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Clarence Edward Hill v. State of Florida

THE LAST CASE ON THIS MORNING'S DOCKET IS THE CASE OF CLARENCE EDWARD HILL VERSUS THE STATE OF FLORIDA. THE CASE IS HEREBECAUSE MR. HILL IS UNDER A DEATH WARRANT, AND THE REASON IS ELEMENTAL BRIEFING. WE HAVE A LOT OF TIME 15 MINUTES A SIDE. MR. DOSS, I UNDERSTAND YOU ARE GOING TO TAKE TEN MINUTES AND THEN FIVE MINUTES FOR REBUTTAL.

THAT'S CORRECT, YOUR HONOR.

CHIEF JUSTICE: ARE THE PARTIES READY? GOT THE RIGHT CASE OUT YOU MAY PROCEED.

MAY IT PLEASE THE COURT. THIS COURT HAS NOT HESITATED IN THE PAST TO HOLD HEARING WHENEVER PROBLEMS WITH THE METHODOLOGY UTILIZED IN EXECUTIONS HAS COME TO THE FLOOR. THAT'S WHAT WE HAVE HERE WITH THE STUDY THAT WAS AUTHORED BY DR. LUBARSKI AND IS FURTHER DEVELOPED IN HIS AFFIDAVIT THAT WE HAD ATTACHED.

CHIEF JUSTICE: SO WE ARE CLEAR, YOU ARE HERE ON THAT YOU ARE ASKING FOR TRIAL COURT FOR AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER A LETHAL INJECTION IS CRUEL AND UNUSUAL PUNISHMENT?

THAT'S CORRECT, BUT NOT LETHAL INJECTION PER SE. IT IS NOT LETTING HAVING INJECTION PER SE THAT IS CRUEL AND UNUSUAL PUNISHMENT BUT THE CURRENT METHODOLOGY THAT IS USED IN THE STATE OF FLORIDA IS CRUEL AND UNUSUAL PUNISHMENT AND WE HAD --.

CHIEF JUSTICE: AND THE PART OF THE STUDY SUGGESTED THAT IN AUTOPSIES THERE WAS SOME CONCERN THAT IN A CERTAIN NUMBER, NOT JUST FROM THIS STATE BUT OTHER STATES, THAT THERE WAS NOT LOSS OF CONSCIOUSNESS?

THAT'S CORRECT. AS MANY AS 43% IT IS THE SODIUM PENOTHAL.

HOW MANY OF THOSE STUDIES WERE FROM FLORIDA?

NONE WERE FROM FLORIDA. WE WERE DENIED ANY RECORDS IN THE LOWER COURT REGARDING THE.

NO, IN THE STUDY. IN THE STUDY, HOW MANY OF THE

NONE. IT WAS ANALYZED TO FLORIDA BASED ON THE FOUR STATES THEY HAD BEEN ABLE TO GET THE DATA FROM WITHIN THE AFFIDAVIT, THE ATTACHMENT I HAVE ON ATTACHMENT A. DR. LUBARSKI LOOKED AT THE PROTOCOLS AND PROCEDURES UTILIZED AS DESCRIBED IN SIMS, AND THOSE WERE SOLID TO THE STATES THAT HE HAD READ THE TOXICOLOGY REPORTS FROM THE STATE OF FLORIDA SO NABE DEGREE OF SCIENTIFIC CERTAINTY THAT THE COURSE XTENDED POLATE THOSE FINDINGS AND ALMOST TO OUR PROCEDURES HERE IN FLORIDA, AND THAT'S THE ONE WHERE 43% WERE AT A POSITION WHERE THEY COULD BE AWARE AND CONSCIOUS OF WHAT WAS GOING ON, AND INDEED 88% WERE NOT EVEN TO THE LEVEL OF WHETHER THE SURGICAL PLAN OF A NEST HESIATR'S REQUIRED

WAS THE REASON EXACT RELATIONSHIP BETWEEN THE LEVELS OF SODIUM PENTOTHAL IN

FLORIDA AS COMPARED TO THE OTHER STATES OR WAS THERE A SIGNIFICANT DIFFERENCE?

I BELIEVE THAT EACH ONE OF THE STATES , WITHIN FLORIDA IT SAYS NOT LESS THAN TWO GRAMS , AND THAT'S , SO THERE IS A --

AND THE OTHER STATES WHERE HOW MUCH?

I BELIEVE IT WAS TWO GRAMS , JUSTICE BELL.

TWO GRAMS ?

AND WHETHER COMPARED TO THE PROBLEM HERE IS THE SECURE CHEMICAL THAT'S USED IS THE PANCRONIUM BROMIDE. THAT'S A PARALYTIC AGENT THAT PARALYZES THE MUSCLES SO IF THE SODIUM PENICILLIN DOES NOT TAKE EFFECT AND DOES NOT PRODUCING THE DEATH EFFECT OF ANESTHESIATING THE PERSON BEING EXECUTED . ESSENTIALLY THEY ARE AWARE AND THEY ARE CONSCIOUS AND THEY ARE ABLE TO FEEL THE PAIN IF THEY CAN'T, THEY CAN'T SAY ANYTHING WHATSOEVER IN REGARD TO WHAT IS GOING ON , AND WHEN YOU LOOK AT THE Likelihood THAT THERE IS CONSCIOUSNESS , THE Likelihood THAT THERE IS AWARENESS, THAT'S WHERE WE GET INTO THE ASPECT OF IT BEING CRUEL AND UNUSUAL THAT IT IS AN UNNECESSARY INFILTRATION OF PAIN.

WHAT'S THE NEW ASPECT OF THIS STUDY THAT WAS NOT AVAILABLE IN SIMS OR OTHER WISE AS TO THOSE RESULTS PREVIOUSLY?

THE DIFFERENCE BETWEEN NEW AND SIMS , AND A SURVEY WAS WHAT DR. LUBARSKI HAS DISCOVERED. WITHIN SIMS, AS IT IS RELATED IN THE OPINION , PROVIDED RATIORITY HAD WENT AND RECENTED INFORMATION HE HAD GATHERED REGARDING BOTCHED EXECUTIONS , BUT HE HAD SAID THAT IT WAS JUST FROM NEWSPAPER ACCOUNTS. IT WASN'T A SCIENTIFIC STUDY . IT WASN'T BASED ON ANY SKIN AT ALL. IT WAS HIM BASICALLY DOING A THOROUGH INVESTIGATION OF THE VARIOUS NEWSPAPERS OUT THERE . AS FAR AS DR. LITMAN , HE HAD PROVIDED A LIST OF POSSIBILITIES ON SPECULATION. NOTHING WITH ANY HARD DATA , NOTHING SPECIFICALLY RELATED TO A SCIENTIFIC STUDY , ONLY WHAT HE KNEW MIGHT BE POSSIBLE. HERE, DR. LUBARSKI AND HIS ASSOCIATES, THEY BASE THEIR INFORMATION ON RIGOROUS SCIENTIFIC STUDY. THEY LOOKED AT THE AUTOPSY RESULTS FROM THE STATES THAT HAD ALLOWED THEM TO HAVE TOXICOLOGY REPORTS , AND THEY CONDUCTED PERSONAL INTERVIEWS OF STATE OFFICIALS THAT HAD ATTENDED THESE EXECUTIONS , PERSONAL INTERVIEWS THEY HAD GAINED FROM THEIR PUBLIC RECORDS REQUEST SPECIFICALLY TO THEIR STUDY AND THEN INDIDICATED THAT IT WAS PUBLISHED IN A PREFERRED WORLD RENOWNED MEDICAL JOURNAL.

WAS THERE AN ALTIMATE CONCLUSION THAT THE PROTOCOL PROVIDED IN SIMS LEADS TO THE PROBLEMS THEY ARE CONCERNED ABOUT?

YES, AND THAT'S WITHIN THE AFFIDAVIT THAT WAS SUBMITTED .

WHAT PART OF THE AFFIDAVIT?

IT WAS PARAGRAPH 23 AND PARAGRAPH 24 IS THE CONCLUSORY ASPECT OF IT. HE HAD LAID OUT HIS BASIS IN THE PREVIOUS PARAGRAPHS , BUT I QUOTE FROM PARAGRAPH 23 , IT SAYS ON THE BASIS OF THE INFORMATION CITED IN THE SIMS OPINION, THE PROCEDURE USED IN EXECUTIONS IN FLORIDA IS SUBSTANTIALLY SIMILAR TO THE PROCEDURE IN THE STATES WHICH KEPT AND PROVIDED TOXICOLOGICAL DATA. THEREFORE, I DRAW THE INFERENCE TO A REASONABLE DEGREE OF SCIENTIFIC CERTAINTY THAT THE LEVELS OF SODIUM PENTOTHAL IN THE BLOOD STREAMS OF PERSONS EXECUTED BY LETHAL INJECTION IN FLORIDA ARE AT BEST SIMILAR TO THOSE LEVELS EXERCISED THERE .

CHIEF JUSTICE: THE ISSUE WASN'T THE PROTOCOL OR THE PROCE-
DURES MAY BE CARRIED OUT? IN OTHER WORDS, THE SUGGESTION ISN'T THAT THE AMOUNT
IN THE PROTOCOL, WHICH IS THE SAME AS IN SIMS, IS MADE QUATE TO RENDER SOMEONE
UNCONSCIOUS, BUT A SUGGESTION IN THE SE AUTOPSIES THAT PERHAPS LESS THAN THE REQUIREMENTS
WERE PROVIDED AS GIVEN? BECAUSE THAT'S AN IMPORTANT DISTINCTION TO UNDERSTAND WHETHER
AND WHETHER YOU ARE ATTACKING THE PROTOCOL OR HOW THE PROTOCOL IS ACTUALLY ALI-
ED.

THEY ARE INTERRELATED IN THE SENSE.

CHIEF JUSTICE: CAN YOU ANSWER THAT?

THE DOSAGES IS DEFINITELY AT ISSUE IN THE TWO GRAMS IS NOT ENOUGH, AND I THINK
THAT THE STUDY ITSELF RELAYED THAT INFORMATION VERY WELL. THE REASON THAT THE
DOSAGE IS IMPORTANT IS BECAUSE THIS IS A SHORT ACTING ANESTHESIA. IF IT IS NOT ADM-
INISTERED AT THE PROPER LEVEL, IT WORKS OFF VERY, VERY QUICKLY.

WOULDN'T THIS HAVE BEEN TRUE BACK IN 2000? WHAT HAS CHANGED? I'M GETTING BACK TO
MY NEW EVIDENCE.

IT WAS MERELY PECULATION BACK IN 2000. NOW WE HAVE SCIENTIFIC DATA, HARD DATA
RATHER THAN JUST SOMEONE SAYING, WELL, THIS POSSIBLY COULD HAVE. NOW WE KNOW
THAT IT IS VERY LIKELY THAT IT IS SAFE, AND THAT

HOW DO WE KNOW THAT FROM THIS STUDY? BECAUSE AGAIN ALL I SEE IS THEY ARE
ARGUING, I MEAN DOES THE STUDY SAY THAT THE TWO GRAMS IS NOT ENOUGH?

IT RELATEDS THAT THE TWO GRAMS, AS ADMINISTERED, AND WHENEVER THEY TAKE THAT
AND THEY GO AND THEY LOOK AT THE LEVELS THAT IS FOUND IN THE BODIES AFTER THE
AUTOPSY WHEN THEY HAVE BEEN EXECUTED, THEY SPECIFICALLY RELATE THE AMOUNTS TO
WHAT WOULD BE REQUIRED TO OBTAIN A SURGICAL PLAN OF ANESTHESIA AND RELATED
IT TO WHETHER SOMEONE IS AWARE AND CONSCIOUS AND THE PEOPLE THAT ARE DOING
THIS ARE IMMINENTLY QUALIFIED. DR. LUBARSKI IS ACTUALLY IF YOU LOOK AT THE CV THAT
WAS ATTACHED IS THE CHAIRMAN OF THE DEPARTMENT OF ANESTHESIOLOGY.

YOU ARE SAYING THERE SHOULD HAVE BEEN AN EVIDENTIARY HEARING BECAUSE NOW THE
AMOUNTS ARE NOT ENOUGH. DO THEY HAVE A RECORD MENTION? SHOULD IT BE 27B.5? IS
THERE SOMEPLACE WE ARE GOING WITH THIS IN TERMS OF WHAT WOULD BE -- WHETHER
IT WOULD OCCUR IF THERE WERE AN EVIDENTIARY HEARING IF YOU ARE NOW ATTACKING THE
PROTOCOL AS RELATED TO WHETHER IT IS BEING CARRIED OUT PROPERLY?

HE MADE NO RECORD MENTION AS TO THE APPROPRIATE DOSAGE, AND I THINK IT IS ETHICAL
CONCERN AS FAR AS TO DO NOT HARM.

CHIEF JUSTICE: SO WHAT WOULD WE GET OUT OF AN EVIDENTIARY HEARING?

THE FACT THAT AS IT IS ADMINISTERED THAT IT IS CRUEL AND UNUSUAL PUNISHMENT.

LET ME ASK YOU ABOUT

THERE MIGHT BE ANOTHER METHOD.

THE THE S TU DY T HAT W AS CONDUCTED IS BASED ON AUTOP SY REPOR TS IN FOUR STATES?

THAT'S CORRECT.

IS THAT CORRECT? HAS THERE BEEN ANY F ED ERAL O R STATE COURT THAT HAS D EC LARE D THE LETHAL I NJ ECTION I N T HO SE STATES UNCONST ITUT IONAL?

NOT THAT I 'M AWARE OF.

HAS THERE BEEN ANY S TATE O R FEDERAL COURT IN THE UNITED STATES THAT HAS DEC LA RE D E ITHER IN PRI NC IP LE O R A S ALIED LETHAL INJEC TI ON UNCONSTIT UTIONAL?

NO , A ND AS FAR AS I KNO W , I HAVEN'T FOUND ANY R EP OR TE D DECISIONS THAT DIRECTLY ADDRESS D R. L UB AR SK I 'S STU DY . SDPLOOCH AND A S I U ND ERSTAND IT, YOU ARE N OT A TTACKI NG T HE LETHAL INJ ECTION AS B EING CRUEL AND UNUSUAL , O NLY WHE THER THERE I S E NO UG H O F T HE SEWED JUM SOD IU M P ENT A THAL T O REN DE R SOM EO NE UNCONSCIOUS IF THE Y DON 'T EXPERIENCE

AS IT A LI ES HER E I N FLORIDA BASED ON WHAT W E DO IN FLORIDA . IT IS NOT A C ONCEPT I N GENERAL.

YOU'RE CLA IMING AS U SE D I N FLORIDA, THE PROCEDURE IS USED , RENDER IT UNCONSTIT UTIO NAL BECAUSE IT IS C RUEL AND UNUSUAL PUNISHMENT?

THAT IS CORRECT.

WHAT ABOUT THE 8TH CIR CUIT'S OPINION IN BROWN VERSUS CRA WF ORD?

THEY NEVER REACHED T HE MERITS OF THE C LAIM IN T HAT. THAT WAS A 1 98 3 ACT IO N B RO UGH T ON M R. B RO WN 'S B EH ALF. THEY FOUND THAT IT W AS PROCEDURALLY BARRED B EC AU SE H E HAD N OT EXHAUSTED HIS REM ED IES BELOW SO THE Y N EV ER REA CH ED THAT.

INTERESTINGLY ENOUGH IN ONE OF THE F OOTNOT ES I N M Y B RIEF I HAD INDIC AT ED T HE RE H AD B EE N FOUR JUSTICES O N THE U.S . SUPREME C OURT THAT V OTED T O ACCEPT CERT O N T HA T , B UT BECAUSE HE WAS UNDER A DEATH WARRANT IT TAKES FIVE AT THA T POINT.

LET ME ASK YOU THI S BEFORE YOU SIT DOWN. I KNOW YOU ARE IN YOUR REBUTTAL BUT TO A NA LOGI ZE I T TO THE P RE VIOU S MET HO D O F E LECTROCUTION, YOU A RE C LAIMING BEC AU SE NOT E NOUG H S ODIUM P ENTO TH AL I S U SE D , THERE WAS PAIN BEF ORE DEA TH OCCURS. IN A LYIN G E LECT RO CUTION WAS THERE ANY K IND OF AGENT INJECTED INTO THE D EF EN DANT BEFORE EXECUTION?

NO , B UT I B ELIE VE T HE T ESTIMONY IN THO SE CAS ES WER E THAT IT WAS A LM OS T INSTANTANEOUS BECAUSE OF THE AMOUNT O F ELECTRICITY THAT WAS PUT INTO THE BOD Y , B UT INTERESTINGLY ENOUGH, WE HAVE A SITUATION H ER E T HA T I S W HA T ANALOGOUS TO WHERE E VIDENT IARY H EARINGS WERE HAD A FTER PROBLEMS HAD O CCURRE D W IT H I BELIEVE IT WAS JESSE TAF AR RO WIT H A LLEN D AVIS A ND T HOSE CASES THAT THIS COURT A LL OW ED EVIDENTIARY HEARINGS A FTER THAT TO GET TO THE BOTTOM OF THE P ROBLEM SO T O S PE AK A ND THAT'S WHERE WE ARE AT HERE. WE'RE NEVER GOING TO HAV E G RU E !!!!!! GRUESOME PHOTOS LIK E W E D ID O F MR. DAVIS BECAUSE OF THE WAY IT IS CARRIED OUT .

IT SEEMS TO M E THA T THE BOTTOM OF THE PROBLEM IN THOSE CASES WAS D EATH W AS N OT INSTANTANEOUS IN E LECT RO CU TI ON , BUT W E NEVERTHEL ESS U PH ELD THAT IT IS C ONSTITUT IO NAL , A ND IT DOESN'T S EEM UNLESS Y OU C AN CITE ME A CAS E THAT A NY COU RT IN THE C OUNTRY HAS S AI D I N ORDER FOR THE DEATH PENALTY T O BE CON STITUT IONAL A S A LI ED T HAT D EATH HAS TO B E INSTANTANEOUS A ND TOTALLY PAINLESS?

NO , BUT I T C AN NO T B E WAN TO N AND UNNECESSA RILY P AI NF UL . BY THE WAY I T I S ADM INIS TE RE D IN FLORIDA, THAT'S WHAT WE HAVE AND I WOULD LIKE TO RESERVE THE REST OF MY T IME. THANK YOU .

FOR THE RECORD, MAY IT PLEASE THE COURT. MY NAME IS C AROL YN SNU RK OWSK I FROM THE ATTORNEY GENERAL'S OFFICE.

CHIEF JUSTICE: COULD Y OU REFRESH MY RECOLLECTION? BEFORE THE NEW MET HO D O F EX- ACCUSE WAS SELECTE D A ND JUST AS JUSTICE CANTE RO I N THOSE DAY S U P HER E , WE WER E CONCERNED ABOUT WHETHER THERE WAS ENOUGH C UR RE NT GOI NG I N.

THERE WAS S TU DI ES A ND T HE RE WAS HEARINGS WIT H R EGARD T O THE ADEQUACY O F T HE S TUDIES BUT THAT WAS B ASED O N A TAK E ON WHETHER OR NOT IT DID NOT REFLECT WHAT KIND OF CUR RE NT THERE WAS.

CHIEF JUSTICE: WERE WE REQUIRING THAT THERE BE UPDATED PROTO COLS S UB MI TTED T O MONITOR T HE S ITUA TION ?

I THINK THERE WAS MONITORING WITH REGARD TO WHAT WAS GOING ON, B UT T HA T W AS - -.

CHIEF JUSTICE: DO W E H AVE ANY CAUSE AND T HIS IS SOMETHING THAT OF COURSE THE DEPARTMENT OF CORRE CTIONS , I MEA N I'M N OT , I DON 'T WAN T T O BE CYNICAL ABO UT T HI S B UT YOU UP THE DOSAG E B Y A NO THER . 5 , I MEAN WHA T' S T HE - - TEL L U S T HE STATE'S POINT OF V IEW.

FIRST OF ALL I D ON'T THI NK ANYTH ING HAS CHA NGED S INCE THEN AND I DON'T THINK T HE L ANCET ARTICLE IS A NY DIF FERENT. I MEAN IF YOU LOOK AT SEE WHA T DR. LITMAN WAS SAYING HE WAS TALKING IN T HE OR ET IC AL B UT H E WAS A N EU RO PSY CH O P HARM AC IS T WHO HAD DEA LT W ITH T HI S , W HO HAD DONE THIS R OUTI NE LY W IT H REGARD TO A DM IN ISTERI NG D RUGS , A ND THE S AM E S TU DI ES Y OU REALLY GET DOWN T O WHAT THE LANCET ARTICLE TALKS ABOUT THE S AME STU DI ES TAL KI NG ABOUT THE SAME THINGS H OW VET VET S W ILL NOT - - V ETER IN ARIA N S W IL L NOT USE T HIS KIND O F P ROCE DURE T O E THANIZE A NI MA LS . THE SAME KIND OF P RESENTATION THAT WAS MADE IN 200 0 WIT H REGARD TO W HETHER L ET HAL INJECTION WAS C ONSTIT UT IONALLY AROPRIATE AND A BLE TO BE CAR RIED OUT. I THINK WHAT I S I NTERESTING WITH REGARD TO THE LANCET ARTICLE AND I'M GOI NG T O M AY BE MISS SPEAK BUT I'M GOING T O THROW IT OUT THERE AND WE C AN CLARIFY IT. I BELIEVE T HAT NOT A LL O F T HE STATES HAD THE SAME D OSAG E LEVELS. THERE WERE STATES THAT HAD DOSAGE LEVELS AT TWO. SOME THAT HAD FIVE AND I N FAC T CALIFORNIA WHERE THEY TRIED TO USE THE L AN CET S TU DY H AD FIV E OR SIMILAR EVIDENCE WAS BROUGHT OUT WHERE THE FIRST DRUG IS A T A 5 M ILLI GR AM DOSAGE.

5 M IL LI GR AM S , N OT G RA MS ?

CHIEF J US TICE: WE H AVE I N FLORIDA WHAT?

WE H AVE TWO , AND I W IL L JUST READ FROM O UR REC OR D I N THE SIMS CASE IT SAY S , THEY WERE HE WAS ASKED A ND T HI S COURT FOUND THAT H E A LS O ADMITTED HIGH DOSAGES OF LETHAL STANCE INTENDED T O BE USED BY D OC D EATH W OU LD CERTAINLY RESULT QUICKLY A ND WITHOUT SENSATION. THAT WAS THE F IN DING S B ASED O N THE SAME PARADE O F P OSSIBILITIES THA T W AS PRESENTED THEM A ND I S NOW BEING PRESENTED. THERE IS NOTHING NEW I N T HIS ARTICLE THAT DOES THAT. WHAT IS NEW IS THAT T HE Y HAVE HAD ACC ESS T O S EV ERAL AUTOPSIES, AND THE RE I S SOM E DISPUTE AS TO WHETHER , I N FAC T , T HE AUT OPSIES OR THE E VIDENCE THAT THEY ARE TAKING B ASED O N THE AUTOPSY EVIDENCE I S R IGH T . THERE IS CHALLENGES. I MEAN, BEHIND ALL OF THIS IS A CHALLENGE WHETHER T HE AUTOPSY

PROTO CO LS ARE C OR RE CT .

THAT C OMES O UT A T THE E VIDENTIARY HEARING. THAT WOULD BE FLESHED OUT A T A H EARING SOMEPLACE.

I'M SAYING THERE IS J UST A WHOLE L OT OF T HING S THE Y A RE T ALKING ABOUT. THE STATE HAS M ADE THE ARGUMENT THAT THERE IS A PROCEDURAL BAR WITH WHAT THE TRIAL C OURT FOUND. THERE IS NOTHI NG H ERE N EW THA T WOU LD RELATE T O A N EW CLA IM WITH REGARD TO POS T-C O NVICTI ON AND HE IS P ROCEDU RALL Y B AR RE D. THERE H AS ALWAYS BEE N T HE OORTUNITY TO MR. HILL T O RAISE THE C ONSTIT UT IO NALITY O F LETHAL INJECTION AND HE HAS NOT DONE THAT IN THE PAST AND HE HAS NOT DONE I T IN A T IM E AND MANNER THAT WOULD HAVE BEEN TIMELY BECAUSE IF Y OU A LL R ECALL, WE JUS T W ENT T HROUGH IT ALL BUT HE HAD A 200 3 P OST-CONVICTION MOTION AND OTHER SUC CESSIVE POST-CONVICTION MOTION AND AT THAT TIME HE RAISED R IN G. HE COULD HAVE C ER TAINLY R AI SE D THE VITALITY AND C OR RE CTNESS OF LETHAL I NJ ECTI ON AND H E DID NOT DO THAT.

BUT HIS A RGUMENT I S T HA T THIS STUDY, W HI CH W AS D ON E , WAS NOT A VA IL ABLE.

NO.

AT THAT TIME , A ND S O T HI S INFORMATION THA T T HE SE L EV EL S MAY N OT BE S UF FICI ENT W AS NOT SOM ETHING THAT R EALLY COULD HAVE BEEN RAISED I N HIS P REVIOUS P OS T-CONVIC TION ?

WELL, I THINK THAT T HA T I S TRUE. THE ARTICLE CAME O UT I N A PR IL 2005 IN THE L AN CET A ND I ASSUME IT IS BEING PREPARED BECAUSE IT WAS PREPARED OVER A PERIOD OF TIME DURING THE T IME WHEN HE C OULD HAVE CHA LLЕНGE D THEM, DONE THE SAME C HA LL ENGE AND DONE THE SAME I NVESTIGATION THAT WAS B EING UNDERTAKEN BY THE SE DOCTORS BUT I MIGHT ADD I F YOU L OO K AT THE A UTHORITIES THAT I HAVE CITED I N M Y PLE AD IN GS Y OU WILL SEE S INCE 2 00 0 T HE RE HAV E B EEN A NUMBER OF PEOPLE LIT IG AT IN G THE VITALITY OR THE CORRECT NESS OF LET HA L INJECTION.

CHIEF JUSTICE: IN THIS STATE?

IN THIS STATE, ABSOL UT ELY IN THIS STATE. THIS COURT JUS T I N S UGGS A C OUPLE O F D AY S A GO D ETER MI NE D WE DID NOT NEE D A N E VIDENT IA RY HEARING WITH REGARD TO LETHAL INJECTION.

CHIEF JUSTICE: UNTIL THE WARRANT IS SIGNED IT IS NOT QUITE THE SAME THI NG , BUT W HA T IS THE A GA IN T WO V ERSU S F IVE. I MEAN, IS T HERE SOMETHING T HE DOC D OE S , D O T HE Y C ON TINU E T O LOOK AT W HETHER THEY ARE D OI NG IT IN THE WAY T HAT IS MOS T LIKELY TO CAU SE , Y OU K NOW , O R NOT TO CAUSE U NNECES SA RY P AIN?

I THINK THE PROTOCO L S T HA T WERE CREATED WERE BASED ON PROTOCOLS THAT HAVE OCCURRED IN MOST OTHER S TATES A ND T HEY ARE THE NUMBERS THAT ARE OCCURRING IN MOST OTHER STA TES AND THEY WERE S UCCE SSFULL Y HAVING E XECUTI ON S THA T DID NOT HAVE ANY PRO BL EM S . I THINK THAT HAS S O F AR B EEN T HE STANDAR D BY W HI CH THE Y HAVE OPERATED. THERE HAS BEEN NO C AUSE, T HERE IS NO BASIS.

CHIEF JUSTICE: IS THERE A DOCTOR THAT IS T HE RE T HA T I S A DMINISTERED AND DO T HEY HAV E DISCRETION IF THERE IS ANY INDICATION OF SOME C ON TI NU ED CONSCIOUSNESS TO INJECT M ORE?

THE Y HAVE A SER IE S O F N EEDLES THAT HAV E T HE REQUISITE AMOUNT OF D RU GS T HA T GO INTO A S EQ UENCE A ND THE PLUNGER I S P LU NG ED A ND I T GOE S THR OUGH THE PROCESS.

THERE IS NO EVIDENCE IN THE EXECUTIONS THAT HAVE OCCURRED AND CERTAINLY NOT THE 16 THAT HE POINTED TO TO HAVE THE WITNESSED RECORDS FROM THAT ANY OF THE EXECUTIONS HAD ANY PROBLEMS AT ALL.

WHAT IS THE DEFENSE ID OF HAVING AN EVIDENTIARY HEARING IN WHICH THE STATE CAN COME FORWARD AND SAY FIRST OF ALL WE DON'T BELIEVE THESE PROBLEMS EXIST, AND HAVE COMPETENT EXPERTS TESTIMONY THAT ESTABLISHES THAT? THAT IF I TALK OVER THE RESULTS OF THE STUDY OR ON THE OTHER HAND SAY WE'VE EXAMINED THE STUDY AND AS A RESULT OF THAT, WE HAVE UPDED THE DOSES AGAINST THIS PARTICULAR DRUG IN ORDER TO AVOID IDENTIFY THE POSSIBILITIES THAT ARE RAISED IN THE STUDY, SO THAT THE BOTTOM LINE IS IT'S POINTING OUT HERE ARE ELIMINATED DOWN THE LINE. WHAT IS THE DOWN SIDE?

WELL, CERTAINLY WEBER, AN OLD CASE TALKS ABOUT IN TERMS OF EXECUTION THERE IS NO GRATUITOUS PAIN. IF THERE IS A MISTAKE, WE DON'T WANT THAT TO HAPPEN, BUT WEBER IS OUT THERE BUT MORE IMPORTANTLY I THINK IT IS WE ALREADY HAD A HEARING ON THIS. WE HAD SIMPLY EVIDENCE, NOW 6 BECAUSE WE ARE IN 2006, SIX YEARS AGO AND THERE HAS NOT, ANYTHING THAT OCCURRED THAT HAS CHANGED THAT.

EVENTS HAVE OCCURRED THAT CHANGED THAT. THAT IS THAT WE'VE HAD THIS SCIENTIFIC INVESTIGATION NOW INTO IT AND FOR INSTANCE WITH THE ELECTRIC CHAIR SITUATION, YOU KNOW, WHAT WE HAD SUBSTANTIALLY WAS THESE EVENTS THAT OCCURRED, YOU KNOW, IN PRECEDING EXECUTIONS.

BUT THAT PRACTICALLY A HEARING TO FIND OUT THE PROBLEMS.

HERE WE DON'T HAVE THE EVENTS BUT THE STUDY SEEKS TO SUGGEST THAT BECAUSE OF THIS MASKING EFFECT OF THE WEARING OFF OF THE DRUG THAT THE PERSON IS NOT GOING TO BE ABLE TO ACT OUT OR IN ANY WAY INDICATE THAT THE PAIN IS THERE, AND SO I'M JUST, I'M TRYING TO -- WHAT IS THE DOWNSIDE OF EXPLORING THAT?

BECAUSE I THINK YOU HAVE TO HAVE SOMETHING MORE THAN SAYING THAT THERE IS A POSSIBILITY THAT SOMETHING COULD -- THEY HAVE NOT ONE -- THERE IS NO EVIDENCE THAT ANYBODY SUFFERED ANY PAIN IN ANY OF THOSE OTHER EXECUTIONS. ALL THEY CAN COME UP WITH IS AN AUTOPSY DIRECTED AT THE POOLING OF THE DRUGS FROM WHERE THE SPOT OF THE LOCAL OF WHERE THE DRUG WAS TAKEN WAS NOT OF THE SAME LEVEL AS WHEN A DMINISTERED, WHICH IS NOT UNKNOWN, BECAUSE, IN FACT, THIS IS A FAST ACTING DRUG. IT IS NOT TOO AND THIS IS YOU ARE TALKING ABOUT WHEN THE AUTOPSY IS TAKEN, BUT EVEN HOURS LATER, TEN DAYS LATER, WHENEVER THE AUTOPSY MY OCCUR. THIS IS NOT THE DRUG THAT KIND OF STAYS IN YOUR SYSTEM AND POOLS AND SITS THERE AND YOU GET A HIGHER DOSE BECAUSE YOUR CHEMICAL OF YOUR BODY LEVELS IT. THIS IS ONE THAT GOES INTO YOUR SYSTEM FOR A SPECIFIC PURPOSE AND THE NEED IS SIMPLY SO YOU CAN BECOME A WAKE AGAIN AT SOME POINT IF IT IS USED IN SURGERY. THERE HAS BEEN NO EVIDENCE IN THIS RECORD, THE LANCET, THE ARTICLE IN THE LANCET DOES NOT SAY AS STRONGLY AS BEING REPORTED THAT, IN FACT THERE IS ANY PROBLEM IN ANY OF THESE CASES. IT IS ALL MAYBE, SHOULD, POSSIBLY, SOME, MAY. THAT'S ALL IT SAYS. AND THAT IS NOT THE BASIS UPON WHICH WE GO FORWARD WITH AN EVIDENTIARY HEARING. THERE HAS TO BE SOMETHING MORE TANGIBLE THAN THAT, BUT MORE IMPORTANTLY, I CAN'T OVEREMPHASIZE THE NEED THAT THERE HAS BEEN THIS CLAIM HAS ALWAYS BEEN A VALIDATION TO MR. HILL. HE COULD HAVE RAISED IT AT THE MOMENT THAT LETHAL INJECTION HE OPTED FOR LETHAL INJECTION AS THE METHOD BY WHICH HE WAS GOING TO BE EXECUTED AT SOME POINT IN THE FUTURE AND HE HAS NEVER CHALLENGED THAT UNTIL NOW ON THE ISSUE OF EXECUTION AND I DON'T BELIEVE WHILE I ADMIT THAT MANY TIMES WE DON'T LOOK AT IT AS SERIOUSLY PERHAPS WHEN THEY RAISE IT, YOU KNOW, ON AEA THAT THAT IS

STILL A VALID MET HODBY WHICH THEY OUGHT TO BE RAISING IT. WE SHOULD NOT DISCOUNT THAT.

YOU SEEM TO BE SAYING MAKE SURE THAT I UNDERSTAND THAT DUE TO THE NATURE OF THIS IS THAT THE SCANS OF ANY AUTOPSIES, SIMPLY CANNOT EVER BE USED AS A - - TO TRANSLATE THE LEVELS AT THE TIME OF THE EXECUTION DUE TO THE NATURE OF THE SUBSTANCE?

THAT'S RIGHT.

IS THAT JUST

THAT'S JUST GENERAL LOGIC ON THIS.

I DON'T KNOW WHETHER IT IS LOGIC OR NOT.

HE IS SAYING IT IS A FAST-ACTING DRUG. HE IS GOING TO BE A WAKE. HOW ARE YOU GOING TO POSSIBLY GET TRACES OR THE LEVEL OF TRACES?

THAT IS ESTABLISHED TO THE POINT THAT EVEN IF WE GOT TO DO AN ANALYSIS, THAT'S NOT THE ROAD YOU CAN GO DOWN?

RIGHT. I AGREE.

IT HAS TO BE SOME OTHER ROAD?

AND I THINK THERE IS NOTHING IN THIS RECORD. IF YOU COMBINE WHAT THE LANCET, THE ARTICLE IN THE LANCET AND WHAT THE IRCONCLUSIONS, AND THAT'S THE BEST, THAT'S A GENEROUS STATEMENT, THEIR CONCLUSIONS DRAW AND YOU READ WHAT WAS PRESENTED AND WHAT THIS COURT FATHOMMED FROM WHAT DR. LITMAN TESTIFIED TO AND WHAT HIS RECORDS SHOW THE REACTIONS NOT A LOT OF DIFFERENCE. THE ONLY DIFFERENCE IS NOW THEY HAVE SOMEBODY COMING IN AND SAYING, WELL, WE THINK THAT THE AUTOPSY REPORT COULD SHOW THIS. COULD SHOW IT. NOT THAT THEY DO. COULD SHOW IT. AND THEY HAVE NOT IDENTIFIED ONE SINGLETAL INJECTION EXECUTION WHERE PROBLEMS HAVE OCCURRED WHERE, IN FACT, AN INDIVIDUAL WOULD HAVE, IN FACT, A WAKENED.

AND ARE THESE AVAILABLE, THE EXAMINATION REPORTS, AVAILABLE FOR INDIVIDUALS TO REVIEW AND HAVE EXPERTS REVIEW OR HAVE THESE BEEN PROVIDED TO ANYONE ANYWHERE?

NOTHING HAS BEEN PRODUCED. ALL THAT WAS PRODUCED WAS THE LANCET ARTICLE AND I ASSUME THAT WE HAVE ACCESSTOWHATEVER THE STUDY WOULD SHOW. BUT THAT WAS NOT ATTACHED TO ANY OF THIS. ALL WE HAVE IS THIS ARTICLE THAT WAS PRODUCED AND AS I THINK THE COURT HAS MENTIONED, IT HAS BEEN PRESENTED IN OTHER COURTS WITH REGARD TO LETHAL INJECTION ON THE EVE OF EXECUTION AND HAVE BEEN REJECTED AS NOT BEING SIGNIFICANT.

BUT IS THE AUTOPSY - - ARE THESE SIMILAR AUTOPSY REPORTS IN FLORIDA AVAILABLE?

THE AUTOPSY

AVAILABLE?

WELL, THE AUTOPSY INFORMATION IS AVAILABLE IN THE SENSE THAT THAT THE MEDICAL EXAMINER RETAINS INFORMATION WITH REGARD TO WHAT TRANSPENDIMENTA AND

UTOPSY BECAUSE AN AUTOPSY WAS REQUIRED IN EVERY CASE.

I GUESS WOMAN LIVED IN TEXAS, VIRGINIA, GEORGIA, A COUPLE OF OTHER STATES?

COULD HAVE BEEN IN FLORIDA.

COULD THAT INFORMATION HAVE BEEN OBTAINED FROM FLORIDA?

SURE.

AND NOT PROHIBITED?

IN FACT, ONE OF THE FOOTNOTES IN THIS CASE IN HIS I THINK REPLY BRIEF IS, IN FACT, IN THE RONALD KNIGHT CASE THE TRIAL COURT HAS ORDERED AN EVIDENTIARY HEARING WITH RAILROAD TO THIS SHOW -- WITH REGARD TO THIS SO WE ARE GOING TO HAVE SOME SORT OF HEARING BUT THAT'S A NINITIAL POST-CONVICTION MOTION.

WHAT IS THE ISSUE HERE? IS IT THE SAME ISSUE OF WHETHER OR NOT WOULD RAMS --

ALL I CAN SAY IS SICK NOW THERE HAS BEEN A HEARING AND THAT WAS REFLECTED IN HIS LEADING -- PLEADINGS. I DON'T THINK THEY HAVE ACCESS, THEY DIDN'T GET ACCESS TO THE MATERIALS BUT THEY ARE GOING TO HAVE A HEARING ON SOMETHING. I DON'T KNOW WHAT THEY ARE GOING TO HAVE A HEARING ON.

YOU'RE SAYING THAT THE PUBLIC CANNOT OR A DEFENDANT CANNOT GET ACCESS TO THE AUTOPSY? THEY CAN OR CANNOT?

THEY CAN, YES, AND, IN FACT, THE INFORMATION HERE WAS A PUBLIC RECORDS REQUEST MADE OF THE MEDICAL EXAMINER FOR THE 8TH JUDICIAL CIRCUIT IN RONALD KNIGHT, AND, IN FACT, THEY PRODUCED THOSE PIECES OF EVIDENCE, AND THE PROBLEM EXISTS WITH HOW THESE FILES IS THAT WHERE ARE THEY? THE MEDICAL EXAMINER SAYS THAT HE SENT THEM TO THE REPOSITORY AND THE REPORTER SAYS THEY DON'T HAVE THEM, BUT WE KNOW THAT THERE IS GOING TO BE AN EVIDENTIARY HEARING IN RONALD KNIGHT.

HOW DOES THAT MAKE SENSE TO HAVE AN EVIDENTIARY HEARING IN THAT CASE ON THIS ISSUE WHERE THERE IS NOT AN EXECUTION PENDING, AND YET DENDING A NEW EVIDENTIARY HEARING IN THIS CASE BEFORE THE EXECUTION IS PENDING?

THAT HAS BEEN SET FOR A NUMBER OF MONTHS AGO. THE STATE HAS OBJECTED TO THAT. THERE IS NO NEED FOR -- I AM NOT GOING TO TALK ABOUT THAT CASE BUT THE STATE IS

IS THAT ANINITIAL MOTION?

YES, IT IS.

I GUESS OUR RULE PROVIDES THAT THERE SHALL BE EVIDENTIARY HEARINGS ON ALL ISSUES?

YES, YOUR HONOR.

AM I TO UNDERSTAND THE ORIGINAL DOCUMENTATION WITH REGARD TO ALL OF THE AUTOPSIIES AND THE TOXICOLOGIES CAN FOR ALL EXAMINATIONS PERFORMED HERE IN FLORIDA, ALL THAT DOCUMENTATION IS NOW LOST OR CAN'T BE FOUND?

NO, NO, NO.

I THO UG HT THAT'S WHAT YOU SAID.

THEY MADE C OP IES. THEY MADE COPIES FOR THAT CASE AND WE WERE TRYING TO LOCATE THEM, AND WE THINK THAT THE DEFENSE LAWYER HAS THEM.

BUT THE SOURCE DOCUMENTS ARE STILL THERE?

THEY ARE THERE AND THEY ARE AVAILABLE.

AND YOU WERE TALKING ABOUT ONE SPECIFIC CIRCUIT AS WELL, NOT THE ENTIRE STATE, CORRECT?

CORRECT. THAT'S IN SOUTH FLORIDA, RIGHT. IF THERE ARE NO FURTHER QUESTIONS THE STATE WOULD ASK THAT YOU AFFIRM THE TRIAL COURT'S DENIAL OF POST-CONVICTION RELIEF BASED ON PROCEDURAL BAR AS TO ALL OF THE CLAIMS PRESENTED. THANK YOU.

CHIEF JUSTICE: REBUTTAL, MR. DOSS?

AS THE DR. LITMAN'S QUOTE IN BRIEFLY THE STATE HAD INDICATED THE QUOTE OUT OF SIMS WHERE IT SAYS DR. LITMAN ADMITTED THAT LETHAL INJECTION IS A SIMPLE PROCEDURE AND THAT IF THE LETHAL SUBSTANCE IS TO BE USED BY DOCTOR IS ADMITTED IN THE PROPER DOSE AND SCHEDULE AT THE APPROPRIATE TIME THEY WILL BRING ABOUT THE DESIRED EFFECT.interestingly enough, DR. LUBARSKI IN THE ARTICLE RELATES THAT THAT THAT'S AN OVERLY SIMPLE STATEMENT THE ASSUMPTION OF TWO GRAMS OF SODIUM PENTHETYL ETYLIC POLYIC, HOWEVER, AND HE PROCEEDS TO CONCLUDE ON PAGE 1413, PAGE 1413, PART ON THE POSTMORTEM REPORTS, MOST INMATES HAD NOT BEEN OVERPERFORMED THEERBY AND 63% HAD SIMPLE CONSTITUTION SYMPTOMS WITH A SHUNESS.

WHY WOULD SOMEONE NOT GET THOSE RECORDS FOR THIS CASE RATHER THAN TALKING ABOUT IT?

WE SPECIFICALLY ASKED FOR THAT. WE WERE DENIED BELOW SAYING WE DIDN'T PRESENT A COLORABLE CLAIM.

TO EVEN GET THE DOCUMENTS?

TO EVEN GET THE DOCUMENTS.

WHEN DID YOU REQUEST IT?

REQUESTED THEM ON DECEMBER 7TH.

DECEMBER 7TH OF 2005?

2005.

THEY WERE NOT BEEN REQUESTED AT ANY PRIOR TIME IN THIS PROCEEDING?

NO, SIR.

HAVE YOU FAMILIARIZED YOURSELF WITH THE KNIGHT CASE IN TERMS OF WHAT THE MOTION IS THERE AND WHAT IS SET FOR AN EVIDENTIARY HEARING AND CAN YOU RELATE THAT TO US?

I HAD SPOKE WITH DEFENSE COUNSEL ON THAT CASE. MY UNDERSTANDING IS THAT THE

Y WERE SET. IT WAS BASED O N D R. L UBAR SK I' S STUDY. THAT IT IS ANA LO GOUS T O W HA T WE HAVE HERE, AND THEY HAV E NOT B EEN GIV EN P UB LI C R ECOR DS , IT IS MY UNDER STAN DING, THE LAST TIME I SPO KE WITH COU NS EL ON THAT C ASE.

WHEN IS THE EVIDE NT IARY HEARING SCHEDULED IN THAT CASE?

I RONICALLY ENO UGH I B EL IEVE IT IS JAN UARY 24TH , T HE D AY O F M R. HILL'S E XECU TION. AND WHAT CIRCU IT I S T HA T IN?

PALM B EA CH C OUNTY. I BELIEVE IT IS JUDGE GARRISON.

LET ME A SK A R EA L QUI CK QUE STION. THIS LANCE T A RTICLE IS T IT LE D A RESEARCH LETTER AND THERE IS A NOTE THAT O NE OF THE AUT HORS IS AN A TTOR NE Y W HO REPRE SE NT S DEATH INM ATES, A ND P ARTICIPATING C OLLECT IN G A LL OF T HIS D AT A. WHAT EVIDENCE O F PEER REVIEW DO WE HAVE O F THI S LET TER?

THAT IS ACT UA LL Y C ONTA INED , I BELIEVE , W ITHIN T HE LAN CET. THERE IS A DR. H EA TH T HA T H AD RESPONDED TO THA T . I H AD NOT S EEN AN YB OD Y ELSE. I K NOW DR. H EATH HAD A CTUA LLY BEEN PRODUCED AS AN E XP ER T W ITNESS I N K EN TU CKY , IN I BELIEVE IT WAS

IS THERE E VI DENCE THA T T HIS RESEARCH LET TE R WAS P EE R REVIEWED?

ABSOLUTELY , AND IT MEN TI ON S THAT IN THE AFFIDAVIT T HAT I T GOES THROUGH PEER REVIEW BEFORE IT I S EVE N P UB LI SHED IT GOES T HR OUGH THE P EE R R EV IE W .

CHIEF JUSTICE: THANK YOU, MR. DOSS. THE COURT WILL TAKE THE CAS E UNDER ADVISEMENT , A ND T HE COURT WILL BE IN REC ES S .

THE MARSHAL: PLEASE RISE.