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Joseph Smith v. State of Florida

SC06-747

>>> PLEASE RISE.

HERE YE, HERE YE, HERE YE,
THE SUPREME COURT OF FLORIDA
IS NOW IN SESSION.

ALL WITH
CAUSE TO PLEA DRAW NEAR, GIVE
ATTENTION, AND YE SHALL BE
HEARD.

GOD SAVE THIS UNITED
STATES, THIS GREAT STATE OF
FLORIDA, THIS HONORABLE COURT.
LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING.

WELCOME TO THE
WEDNESDAY, JANUARY 7 SESSION OF
THE FLORIDA SUPREME COURT.
THE FIRST CASE ON OUR DOCKET,
SMITH VERSUS STATE.

ARE THE PARTIES
READY?

YOU MAY PROCEED.

MRS. BRUECKHEIMER.

>> MY NAME IS DEB BRUECKHEIMER
HERE REPRESENTING MR. SMITH.
A FEW HOUSEKEEPING MATTERS.
THERE ARE 13 ISSUES IN MY BRIEF.
I CANNOT GET TO ALL OF THEM.

THE LAST THREE ARE DONE
STRICTLY FOR PRESERVATION
PURPOSES, BECAUSE THIS COURT
HAS ALREADY RULED ON THEM.
AND MY PLAN IS TO TAKE ONE
THROUGH 10 IN ORDER.

I'M NOT WAIVING ANYTHING, HOWEVER.

AND IF THIS COURT HAS ANY
QUESTIONS, I'M HERE FOR YOU.

SO IF YOU WANT TO JUMP TO A
DIFFERENT QUESTION, OR
DIFFERENT ISSUE, GREAT.

I WILL DEAL WITH IT.

THE FIRST ISSUE IS THE
CRAWFORD DNA ISSUE.

MR. SMITH

WAS CONVICTED, SENTENCED TO DEATH

FOR THE DEATH OF CARLIE BRUCIA,
AND THE CLAIM WAS THAT HE
KIDNAPPED HER, RAPED HER,
STRANGLER HER.

THE EVIDENCE OF
RAPE HAS EXTREMELY SLIM IN
THIS CASE.

>> HE HAS -- MAKES A STATEMENT
ABOUT --

>> THE ONLY STATEMENTS HE
SUPPOSEDLY MADE WERE TO HIS
BROTHER.

THE STATEMENTS WERE NOT
RECORDED, AND THEY WERE NOT
SUBSTANTIATED BY EITHER
EVIDENCE OR ANYBODY ELSE.

>> THAT IS A QUESTION OF
INTERPRETATION ON THE
EVIDENCE, BECAUSE THERE WAS
EVIDENCE OF THAT, THE MEDICAL
EXAMINER RELIED ON --

>> WHY DON'T YOU GET DIRECTLY
TO -- THERE IS A
REAL CLEAR LEGAL POINT WE NEED
TO DISCUSS.

>> DNA, LIKE JOHNSON TESTING
FOR COCAINE OR DRUGS.

>> THERE IS A DIFFERENCE.

IT IS NOT JUST A REPORT.

THE SUPERVISOR CAME IN, SO WE HAVE
TO -- HOW WOULD, HOW DOES THIS
PLAY IN THIS WHOLE CRAWFORD
AREA?

>> WELL, THEY ARE USING A
DIFFERENT HEARSAY EXCEPTION TO
TRY TO GET THIS, AND UNLIKE A
BUSINESS EXCEPTION FOR JOHNSON
THEY ARE USING THE EXPERT AND,
YOU KNOW, RELYING ON ALL THIS
UNDERLYING DATA.

>> WELL, THAT IS NOT -- I MEAN,
THAT IS WHAT HAPPENED.

I MEAN SHE TESTIFIED AS AN EXPERT, TO
SAY THEY ARE USING IT --

JOHNSON, THE REPORT WENT IN,
WITHOUT ANYONE EVEN TESTIFYING
TO IT.

HERE THE PERSON WHO
INTERPRETED THE RESULTS
TESTIFIED TO INTERPRETATION --

>> SHE LIKENED HERSELF TO A
DOCTOR WHO ORDERS TESTS, AND
THEN INTERPRETS RESULTS.

HOWEVER BIG DIFFERENCE, AS

THIS COURT NOTED IN JOHNSON,
THIS ISN'T BEING DONE TO
BENEFIT A PATIENT.
THIS IS BEING DONE TO PROSECUTE
MR. SMITH.

>> THE RULE WITH REGARD TO WHO
YOU WOULD CALL AS A WITNESS
OUGHT NOT CHANGE.

WE NEED TO
HAVE SOME CONSISTENCY WITH OUR
EVIDENTIARY RULES.

>> I'M SAYING THAT --

>> HERE I MEAN IT WOULD SEEM
TO ME IS THAT IT WOULD BE --
THE OPINION, ABSURDITY TO CALL
THE PERSON WHO ACTUALLY -- THE
BIOLOGIST WHO PLACED THE LAB
SAMPLES DID THOSE THINGS MAY
NOT HAVE THE CAPACITY TO EVEN
TESTIFY WITH REGARD TO
RESULTS, AND WHAT IT MEANS,
AND THOSE KINDS OF THINGS.
YET SOMEONE UNDER -- WHO IS A
SUPERVISING PERSON CALLS UPON
HIM TO GIVE ME PIECES THAT GO
INTO THE TOTAL PICTURE.

I MEAN FOR AN ORGANIZED COURT SYSTEM TO
OPERATE, IT SEEMS TO ME THAT
THIS IS THE IDEAL PERSON.

>> WELL, THE -- MISS LUTTMAN,
WHO, YOU KNOW, NOTED THAT THERE
HAVE BEEN PROBLEMS IN
QUANTICO AT THE LAB SHE WORKED
WITH.

>> THAT IS A DIFFERENT ISSUE.

I MEAN THOSE COULD BE --

>> THAT SHOWS WHY SHE IS NOT
THE BEST PERSON TO DECIDE
WHETHER -- TO SAY WHETHER OR NOT
THE TEST WAS DONE PROPERLY.

>> THAT IS NOT AN ISSUE, ABOUT
THE COMPETENCE.

I'M HAVING TROUBLE, I MUST TELL
YOU, SEEING THIS AS A -- YOU -- THE
CROSS-EXAMINATION AS TO
WHETHER -- ONE IN -- I MEAN
SOME LARGE NUMBER, OF UNLIKELY
-- [INAUDIBLE] ANYTHING ELSE,
THE ABILITY TO TEST THAT,
WHETHER IT IS ACCURATE, IS UP
TO CROSS-EXAMINATION.

IF A PERSON IS EXAMINED YOU ARE ATTACKING
IS THE WAY THE DNA SAMPLE WAS DRAWN,
THAT IS A DIFFERENT ISSUE IN TERMS OF

THE RELIABILITY.
BUT AS FAR AS
PROFFERED, THAT ISSUE, YOU WERE
DENIED YOUR OPPORTUNITY TO
CROSS-EXAMINE.
I'M NOT SEEING IT.

>> DEFENSE COUNSEL FOR
MR. SMITH WANTED TO BE ABLE TO
CROSS-EXAMINE THE LAB PEOPLE.
HE WANTED TO BE ABLE TO
CROSS-EXAMINE THE PEOPLE WHO DID
THESE INTRICATE TESTS,
EXTREMELY SENSITIVE, AND COULD
EASILY, YOU KNOW, HAVE ERROR
ALONG THE WAY.

>> -- TAKEN THEIR DEPOSITIONS
AND --

>> IT WASN'T -- SOMEWHERE ALONG
THE WAY CITED IN MY BRIEF THAT
HE WAS NOT EXACTLY GIVEN
ACCESS TO THESE PEOPLE AT
QUANTICO VERY EASILY, HE WAS
GIVEN ACCESS TO LUTTMAN HE
WASN'T GIVEN NAMES OF THE
BIOLOGIST.

THESE BIOLOGISTS ARE
PROTECTED, SO THEY CAN LIVE IN
THEIR LITTLE SECRET -- YOU KNOW --
PLACE IN QUANTICO, AND NEVER
HAVE TO FACE ANY KIND OF
QUESTIONING ABOUT THE RESULTS.
AND HE WANTED TO BE ABLE TO DO
THAT.

IT WASN'T JUST A MATTER, I
MEAN --

>> ISN'T THAT A DIFFERENT
ISSUE THAN -- WELL, THAT IS THE
ISSUE HE RAISED.

>> ISN'T THAT A DIFFERENT
ISSUE THAN CRAWFORD?
THAT ISSUE IS A CONFRONTATION ISSUE.

>> CONFRONTATION UNDER
CRAWFORD, THE IDEA BEING
TESTING WAS DONE BY PEOPLE WHO
HE COULD NOT SPEAK WITH.

>> THE BIOLOGIST WOULD HAVE
TESTIFIED -- DNA, IT AS WE --

>> IT WAS A VERY SMALL, LITTLE
BIT OF A PIECE FOUND --

>> BUT THE -- OPINION WHICH
WAS COMPARING THAT TO THE
SAMPLE WAS DONE BY THE PERSON
WHO TESTIFIED.

>> AND HE WAS ABLE TO

CROSS-EXAMINE ON HOW SHE REACHED HER OPINION, ON HOW MANY PEOPLE IN A BILLION WOULD BE HIM. BUT HE COULDN'T GET TO THE HEART OF THE MATTER, WHICH WAS: WAS THIS HIS TO BEGIN WITH.

>> YOUR THEORY WOULD BE, FOR EXAMPLE, LIKE A URINE SPECIMIN TEST, YOU HAVE TO GO BACK TO THE ORDERLY WHERE THAT WAS OBTAINED, WHOEVER WALKED IT DOWN THE HALL, AND WHOEVER PLACED IT IN THE SPECTROGRAPH, WHATEVER THEY CALL THESE THINGS, AND -- THEN GO ALL THE WAY THROUGH THERE.

IT IS NOT THE DOCTOR AT THE END WHO IS ANALYZING THIS FOR CRAWFORD PURPOSES.

>> RIGHT.

I MEAN -- AND KEEP IN MIND I'M SAYING THAT -- WHEN IT COMES TO CIVIL CASES, AND DOCTORS WHO ARE DOING STUFF

--

>> DO YOU MEAN THIS IN A CRIMINAL CASE?

>> SAME THING.

>> STRICTLY DONE FOR CRIMINAL CASES.

>> BUT AGAIN YOU NEED THE SAME THING, IF THE CRIMINAL CASE TURNED UPON OR INVOLVED RELEVANCY OF A --.

>> YOUR ANALYST.

>> YES.

>> AND IN JOHNSON THIS COURT HAD TWO SETS OF CASES IN FRONT OF IT, AND IT WENT WITH, THE ONE THAT SAID IT WAS TESTIMONIAL.

>> PLEASE HELP ME, JOHNSON WAS WHERE A REPORT WAS PUT IN -- WITHOUT THE PERSON THAT ACTUALLY DID THE REPORT.

>> RIGHT.

>> IN THIS CASE, ARE YOU --

>> THEY WERE USING SUPERVISORS.

>> BUT WHO HAD NO KNOWLEDGE OF THE -- THE REPORT IS THE INCULPATORY PART, HERE, THE

INCULPATORY PART IS NOT IT WAS
DNA THE INCULPATORY PART IS
THAT THAT DNA WAS -- THEN
WHATEVER PROBABILITY BECAUSE
HIS DNA; CORRECT?

>> SKIPPING THE IMHE HE
PROBABILITY THING -- I THINK
THE NUMBERS SUCH THAT MAYBING
SO ONLY SHE COULD HAVE
TESTIFIED TO.

BUT THE ACTUAL.

>> LET ME -- ISN'T THAT THE
INCULPATORY PART YOU ARE
SAYING THAT THIS MIGHT NOT BE
HIS DNA, THAT TO ME IS A CHAIN
OF CUSTODY ISSUE YOU ARE
RAISING A CRAWFORD VIOLATION
THAT IS WHAT I'M HAVING
TROUBLE WITH.

>> HER DESCRIPTION HOW FAR --
HOW THIS TESTING IS DONE AND
HOW -- HUMAN ERROR CAN HAP
ALONG THE WAY HOW THERE WAS
ACTUALLY A BIOLOGIST IN THEIR
LAB FALSIFYING DNA REPORTS
OVER 200 YEARS, I MEAN, 200 --
OVER 100 I CASE OVER A A
TWO-YEAR PERIOD.

>> CONNECTED WITH ANYONE
INVOLVED IF THIS CASE.

>> NO SHE WAS GONE BEFORE THE
BLOOD WAS I MEAN THE SHIRT WAS
SENT TO -- TO QUANTICO,
HOWEVER, NEW PROCEDURES
WEREN'T EVEN THOUGHT OF, UNTIL
AFTER THE TESTING WAS DONE.
BECAUSE THEY BROUGHT IN YOU
KNOW -- THEY -- COME A TO TRY
TO FIX WHAT WAS GOING ON, IN
QUANTICO WITH THIS DNA IF SHE
HAD BEEN FORCED IF THIS
BIOLOGIST HAD BEEN FORCED TO
TESTIFY, UNDER OATH TO HER
PROCEDURES WHAT SHE WAS DOING
MAYBE SHE WOULDN'T HAVE BEEN
ABLE TO GET AWAY WITH IT FOR
OVER TWO YEARS.

.
THE ONLY WAY IT WAS DISCOVERED
WAS BY HAPPENSTANCE, CROSS
EXAMINATION ON HOW THIS THESE
THIS TESTING IS DONE IS
ABSOLUTELY REQUIRED O IN ORDER
TO KEEP THESE PEOPLE HONEST.

>> SEEMS TO ME ISSUE ON APPEAL, I TRIED TO -- FIND BIOLOGIST WHO ORDERED TO -- AN THE STATE WOULDN'T REVEAL IT. >> DEPOSITION WOULD NOT HAVE SATISFIED CRAWFORD. >> HOW YOU DEVELOP IT, BECAUSE YOU SAY I HAVE A CONCERN, THAT THIS DNA SAMPLE WAS TAINTED THAT IS WHAT YOU ARE SAYING. >> CONCERN THEY WANTED TO BE ABLE TO CONFRONT JUST I LIKE ANY WITNESS HOW DNA TESTING WAS DONE, AND THEY -- I MEAN WHEN THE STATE BRINGS IN WIS, IF THE DEFENDANT WHETHER HE CHOOSES TO DEPOSE THEM OR NOT, THEY STILL ARE SUBJECTED TO CROSS EXAMINATION IN THIS CASE LUTTMAN WAS NOT ABLE TO GIVE ANY INFORMATION, ON HOW THE TESTING WAS DONE, SHE DIDN'T DO IT.

AND -- AND --

>> WHAT SPECIFIC QUESTIONS WERE ASKED OF HER THAT SHE WERE NOT ABLE TO ANSWER?

>> WELL -- THAT -- THAT WOULD HAVE BEEN IN THE -- YOU KNOW, I MEAN IT WAS, IT WAS BASED IN THE PROPER ID WERE YOU IN THE ROOM, WERE YOU THERE, AND OF COURSE, NO SHE WASN'T.

AND WHAT ABOUT -- YOU KNOW, HOW -- HOW IMPORTANT IS THIS TESTING HOW DELICATE IS THIS TESTING, CAN THINGS GO WRONG?

AND SHE SAID YEAH, THERE'S A LOT OF VERY -- ESPECIALLY PCP TESTING I BELIEVE IT IS THAT IS SO DELICATE.

AND SHE WOULD NOT BE ABLE TO SAY WHETHER OR NOT IT WAS PROPERLY DONE.

BECAUSE SHE WASN'T THERE.

>> IT IS UNDER HER SUPERVISION, I GOT THE IMPRESSION YOU WERE TRYING TO CROSS-EXAMINE HER BECAUSE SHE WASN'T THE PERSON DOING THE TESTING SHE WAS UNABLE TO ANSWER A SPECIFIC QUESTION WHAT QUESTION WAS SHE UNABLE TO ANSWER.

>> WELL, THE DEFENSES COUNCIL BASICALLY SAID HE COULDN'T ASK OF HER ANY OF THE QUESTIONS BECAUSE SHE DIDN'T DO IT SHE WASN'T THERE.

AND IF YOU GO BACK TO THE WAY THAT BIOLOGIST, WHO WAS FALSIFYING REPORTS -- NOBODY WHO SUPERVISEED THIS BIOLOGIST KNEW SHE WAS FALSIFYING REPORTS.

>> SO UNDER -- CRAWFORD SAY THERE IS NO, THERE IS NO CIRCUMSTANCE IN WHICH AN EXPERT WITNESS COULD RELY ON ANYONE ELSE'S WORK OR WHAT THEY HAVE DONE?

>> WELL, I THINK THAT FOR THE ONE IN A BILLION TYPE ANALYSIS YOU KNOW, PROBABLY, AT LEAST COULD HAVE TESTIFIED TO THAT BUT AS TO WHETHER OR NOT YOU KNOW, THE DNA WAS MR. SMITH'S I BELIEVE THAT IF YOU -- IF DEFENSE COUNSEL WANTED TO CROSS-EXAMINE THE LAB -- THE MORE THAN ACTUALLY DID THE TESTING WHICH HE DID -- WELL HE ACTUALLY JUST SAID SHE WAS NOT QUALIFIED OF TO THE STATE HAD THE DUTY AND THE OBLIGATION TO BRING IN THE LAB PEOPLE, WHICH THEY CHOSE NOT TO.

AND THIS IS STANDARD PROCEDURE.

>> LET ME UNDERSTAND EXACTLY WHAT YOU ARE SAYING WHAT THE LAB PEOPLE DID WAS REALLY JUST TEST THAT.

THEY NEVER SAID THAT THIS WAS MR. SMITH DNA. SHE TOOK WHAT THEY DID, COMPARED IT WITH THE KNOWN SAMPLE AND SAID THIS PROBABLY MR. SMITH'S DNA WITHIN WHATEVER --

>> WELL --

>> MILLION OR BILLION IT WAS. NO, THEY DID -- THIS IS -- THIS IS HIS -- HIS -- THIS IS HIS -- DNA.

>> SAMPLE.

>> THEY SAID THE SAMPLE THAT

WE GOT.

>> RIGHT, AND THIS IS HIS AND THEN THEY WENT ON TO DESCRIBE HOW IT COULDN'T REALLY BE ANYBODY ELSE'S, INCLUDING THE BROTHER'S, SO THAT THE NUMBERS, HOW MUCH, YOU KNOW, THAT THEY WERE CERTAIN ABOUT IT CAME IN KIND OF -- SEPARATELY. BUT THE BOTTOM LINE IS THAT THE STATE HAD THE OBLIGATION WHEN THEY INTRODUCED THIS EVIDENCE TO PRODUCE THE PEOPLE WHO COULD SAY THAT THE TESTING WAS DONE PROPERLY, THEY DIDN'T DO THAT.

THIS WASN'T

MR. SMITH'S DUTY TO BRING IN LAB PEOPLE, OR TO -- INSIST THAT THE STATE BRING THEM, IN. HE IN THE VOIR DIRE, IN THE PROFFER, HE POINTED OUT SHE HAD NO KNOWLEDGE, AND THAT THERE HAD BEEN PROBLEMS AT THIS LAB.

THE --

>> YOU WOULD AGREE, THAT -- THAT THIS IS ONE STEP DOWN THE ROAD --

>> I DO AGREE.

I DO AGREE.

>> AND IS THERE SOME CASE AROUND THE COUNTRY THAT YOU ARE RELYING ON?

>> WELL, THERE ARE CASES THAT I POINTED OUT IN MY REPLY BRIEF FROM MICHIGAN, AND WISCONSIN, THERE ARE GREAT -- CASES THAT THE ATTORNEY GENERAL'S OFFICE CITES, IN WASHINGTON AND -- LET'S SEE -- MINNESOTA.

>> THE CASES OUT OF THE FEDERAL COURTS -- SEVENTH CIRCUIT, FOURTH CIRCUIT ARE GOING THE OTHER WAY.

>> RIGHT, AND -- JUSTICE WELLS, I NOTICE YOU RELIED ON GUIRE IN YOUR DISSENT IN JOHNSON, ONE OF THE OTHER -- SIMILARLY RECEIVED CASES.

>> RIGHT.

>> RIGHT.

THE THING ABOUT GUIRE,

AFTER ALL LOGIC, AFTER ALL THEIR REASONING, THEY SAID BUT EVEN IF WE ARE WRONG THERE WAS HARMLESS ERROR, SO GUIRE HAS A LOT OF REASONING LOGIC TO IT, BUT IT DIDN'T STAND ON IT, I KIND OF BACKED OFF, AND SAID --

>> DOES THIS CASE OUT OF MASSACHUSETTS BEFORE THE UNITED STATES SUPREME COURT HAVE ANYTHING TO DO WITH THIS?

>> I DO KNOW THAT THERE IS A CASE THAT HAD ARGUMENTS A COUPLE MONTHS AGO PENDING. AS FAR AS I KNOW, THEY HAVE NOT REACHED A DECISION YET, AND I DON'T KNOW I PROBABLY SHOULD HAVE KNOWN WHETHER OR NOT IT INVOLVES STRICT LAB TESTING LIKE IN JOHNSON ON A PARTICULAR SUBSTANCE, OR IF IT WENT FURTHER DOWN THE ROAD.

>> LET ME ASK A QUESTION ABOUT WHAT YOUR CONTENTION WOULD BE FOR THE STATE TO DO.

IT IS NOT LIKE JOHNSON WHERE IT IS LIKE THE WRONG PERSON THAT WAS CALLED HERE, YOU DON'T -- OR DO YOU QUESTION THE SUPERVISOR'S ABILITY TO GIVE OPINION TESTIMONY ABOUT THE PERCENTAGE, YOU KNOW, THE LIKELIHOOD OF -- DNA, IS IT -- SAY THEY WOULD HAVE HAD IT, SHOULD HAVE HAVE CALLED NOT ONLY HER, BUT THE PERSON THAT ACTUALLY DREW THE SAMPLE?

>> RIGHT, EXACTLY.

>> A DIFFERENT -- THAT IS WHY I THINK I'M OF COURSE TROUBLED CONCEPTUALLY.

>> YOU NEED THE TWO --

>> WRONG PERSON --

>> YOU NEED BOTH OF THEM --

>> YOU NEED BOTH ACTUAL LAB --

>> THAT THEY -- THEY ARE MISSING SOMEBODY, IN A CHAIN OF CUSTODY.

>> IT IS KIND OF LIKE A CHAIN OF CUSTODY, BUT IT IS ALSO -- THE IDEA BEING NOT SO MUCH I MEAN SHE COULD HAVE TAMPERED

WITH IT, BUT ALSO POSSIBLE SHE DIDN'T DO THE TEST RIGHT, OR SHE SKIPPED A STEP.

>> "SHE" BEING WHO?

>> WELL, SHE OR HE BEING THE ACTUAL LAB BIOLOGIST.

>> PERSON.

>> IF THE BIOLOGIST TESTIFIED THE BIOLOGIST COULDN'T TESTIFY TO THE -- COULD ONLY TESTIFY HOW THEY --

>> IT IS KIND OF LIKE THE, YOU KNOW, THE WAY, YOU KNOW, BEFORE THE ACTUAL EXPERT TO TESTIFY.

>> HOW WOULD YOU EVEN LIST A BIOLOGIST, IF YOUR CLAIM IS IT MIGHT NOT BE HIS DNA -- WHERE -- HOW DO YOU GET TO THAT? DON'T YOU HAVE TO --

>> NO.

>> ULTIMATELY THE CLAIMS FOR DEFENSE THAT IS IT MIGHT NOT HAVE HIS DNA.

I THINK THE CLAIM IS THAT THE STATE HAS TO PROVE IT IS HIS DNA, AND -- SO

--

>> I GUESS, AGAIN, SO WOULD YOU SAY IN ORDER TO ALLOW THE ULTIMATE SUPERVISOR TO TESTIFY ON PROBABILITY BASED ON CRAWFORD THAT THEY WOULD HAVE TO START WITH THE PERSON WHO TOOK THE -- HOWEVER THEY TOOK HIS DNA, OR HOWEVER THEY -- WHOEVER TOOK IT OFF AND THEN GOT IT UP TO QUANTICO, IS THAT -- DOES THAT HAVE TO HAPPEN?

>> YES.

>> THERE MIGHT BE -- WE DON'T KNOW HOW MANY --

>> AND THEY DID INTRODUCE THE PERSON WHO TOOK THE SHIRT, AND SENT IT OFF, AND I MEAN THEY BROUGHT IN ALL THOSE PEOPLE. AND YET THEY DIDN'T BRING IN THE ONE PERSON -- AND WE ARE TALKING DNA, WE ARE TALKING ABOUT THE MOST SIGNIFICANT PIECE OF EVIDENCE THERE WAS OF SEX BATTERY IN THIS CASE, INTERTWINES TO THE FACT THE BROTHER'S STATEMENT, WHICH IS -- YOU KNOW, ISSUE THREE, THE

BROTHER'S STATEMENTS, WERE UNSUPPORTED BY PHYSICAL EVIDENCE, YOU KNOW, HE SAID -- MY BROTHER SAID THAT IT WAS --

>> SO YOUR INTERPRETATION OF EVIDENCE, BECAUSE I MEAN THERE IS A GREAT DEAL OF EVIDENCE HE WOULD SEE CASES, WE HAVE SEEN CASE A, WHERE THE -- THE DESPICABLE RESULTS OF WHAT HAS OCCURRED, SORT OF SPEAK TO WHAT HAS OCCURRED.

>> RIGHT, BUT --

>> THAT IS WHAT IN THIS CASE IF YOU INTERPRET -- THOSE FACTS.

>> WELL THERE WAS A CREDIBILITY PROBLEM WITH THE BROTHER THE JURY HAD TO DEAL WITH THERE WOULD SAY THE FACT THAT HE HAD LIKE -- 21 PHONE CALL CONVERSATIONS WITH HIS BROTHER THAT WERE RECORDED, THAT NEVER EVER MENTIONED A SEXUAL BATTERY. I MEAN THE FACT THAT HIS BROTHER MIGHT HAVE HAVE MADE THIS UP -- BEFORE THE JURY.

>> YOU AND I MAY SIT AND WATCH THIS PERSON TESTIFY, HAVE A DIFFERENT VIEW OF THE CREDIBILITY OF THE WITNESS, BUT THERE IS EVIDENCE AND DIRECT, I MEAN EVIDENCE WITH REGARD -- NOT DIRECT EVIDENCE BUT THE ADMISSION.

>> RIGHT, SUPPOSEDLY HE DID.

>> THERE IS THAT EVIDENCE, THERE WAS A CONFESSION, OF THAT BEING A, IN THIS RECORD, AND THEN THERE IS ALSO PHYSICAL EVIDENCE FROM THE MEDICAL EXAMINER.

>> ACTUALLY, THE MEDICAL EXAMINER DID NOT BACK UP WHAT JOHNSON SAID, THE MEDICAL EXAMINER SAID THAT THERE WASN'T ANY, YOU KNOW ,HEAD TRAUMA, OR YOU KNOW, SPERM IN THE MOUTH OR IN --

>> EXPLAIN WHAT HAPPENED THERE, THEN YOU COMPLAIN ABOUT THE -- FROM HIS -- THEN THE PHOTOGRAPHS, THEY BROUGHT THOSE IN TO DEMONSTRATE TO THE JURY WHY

THERE WAS NOT MORE EVIDENCE AT THE SCENE.

>> THEY HAVE PHOTOGRAPHS, THEY DIDN'T HAVE HAVE 230B, IT DID NOT HAVE HAVE TO BE 35A, THEY DID NOT HAVE TO SHOW THAT SHOT.

AND IT IS INTERESTING THAT THE ENTOMOLOGIST WHO ANALYZED THOSE BUGS DID NOT NEED THAT SHOT.

THEY DID NOT NEED TO SHOW THE SHOT OF THE LEG BEING EATEN AWAY.

THEY DID THE NOT NEED -- YOU KNOW.

>> AGAIN, THAT IS THE WRONG LEGAL TEST?

THE TEST IS NOT NECESSITY.

>> RELEVANCY.

>> THE TEST IS RELEVANCY.

>> THEY WEREN'T RELEVANT.

THEY HAD OTHER LESS INFLAMMATORY PICTURES THEY ALSO USED, HE JUST -- AND WHEN -- WHEN HE SAID HE WANTED TO BECAUSE IT WAS -- FOCUS, BUT YOU KNOW YOU DIDN'T NEED BETTER FOCUS WHEN YOU LOOK AT 32 THE REALITY IS THE STATE USED 35A, AND THEY USED --

>> I AGREE WITH YOU THAT I THINK THE --

>> USED --

>> THAT STATEMENT IS OUT OF PLACE WITH REGARD TO -- WHY IT WAS PLACED INTO EVIDENCE BUT AGAIN WITH REGARD TO OUR TEST IS RELEVANCY.

>> RIGHT.

>> AND I HAVE YET TO SEE PHOTOGRAPHS IN ANY OF THESE CASES THAT I WOULD SAY ARE PLEASANT, AND IT IS THE WORK PRODUCT OF THE INDIVIDUAL THAT -- THAT IS --

>> THEY GOT -- AND THEY WERE USING SOME PHOTOGRAPHS THAT WERE LESS THAN PLEASANT, DEFENSE COUNSEL DID NOT OBJECT TO THEM, AND THEY HAVE THEM THERE.

BUT THEY WENT A STEP

FURTHER, I WOULD SAY THAT BETWEEN 35A AND THE ONE OF THE LEG -- THEY WENT TOO TOO FAR, I MEAN, THEY -- THEY TRY YOU KNOW, KIND OF LIKE BEATING A DEAD HORSE.

THEY JUST WENT TOO FAR.

AND -- THE MEDICAL EXAMINER, HE USED FOUR POINTS TO SAY SHE IN HIS OPINION HAD BEEN SEXUALLY BATTERED, THREE OF THOSE POINTS WERE NOT ANYTHING THAT HE HIMSELF OBSERVED AND KNEW HE HEARD ABOUT THE DNA, HE HEARD ABOUT JOSEPH'S STATEMENTS.

>> CAN I ASK ABOUT THAT.

YOU ARE IN REBUTTAL, THE PART OF THE MEDICAL EXAMINER'S TESTIMONY THAT I THINK CONSIDERED IMPROPER WAS THAT WHEN HE, SHE TESTIFIED, THAT THE LIGATURE STRANGULATION WAS HIGHLY ASSOCIATED WITH SEXUAL BATTERY, DID DEFENSE COUNSEL OBJECT TO THAT PARTICULAR STATEMENT?

>> NO, NO, I WISH HE HAD.

>> AND YOU DID SAY YOU WANTED TO ADDRESS SOME OTHER ISSUES, AND WE ARE INTO YOUR REBUTTAL.

>> I KNOW.

>> IS THERE ANY OTHER PARTICULAR ISSUES TO THE COURT'S ATTENTION?

>> FIRST THREE THE MOST IMPORTANT, OBVIOUSLY THE CRAWFORD ISSUE IS VERY IMPORTANT IN MR. SMITH'S CASE THE IDEA BEING THAT WITHOUT -- CROSS-EXAMINATION -- PROPER CROSS-EXAMINATION THE TESTING OF THIS DNA IS USELESS.

>> ARREST AGGRAVATOR THAT WAS FOUND IN THIS CASE --

>> RIGHT, THAT ONE -- WAS -- LET'S SEE.

OF COURSE IT WAS IMPROPER DOUBLING -- OKAY, IF -- IF YOU ARE NOT DEALING WITH POLICE OFFICER YOU HAVE TO DEMONSTRATE BEYOND REASONABLE DOUBT THE DOMINANT ONLY MOTIVE FOR MURDER, ELIMINATION OF A

WITNESS, I BELIEVE THERE WAS PLENTY OF TESTIMONY, JOHN SMITH'S STATEMENTS THAT WERE RECORDED SHOWING THAT DEFENDANT WAS ACTING OUT OF A DRUG-INDUCED FEAR, ACCIDENT, PANIC POSSIBILITIES ELIMINATING THE WITNESS ALONE WAS NOT PRUDENT BEYOND A REASONABLE DOUBT, I WILL TRY TO SAVE SOME FOR REBUTTAL. THANK YOU.

>> MISS DITMARR.

>> MAY IT PLEASE THE COURT.

I'M CAROL DITMARR FROM THE ATTORNEY GENERAL'S REPRESENTING THE APPELLEE IN THIS STATE, THE STATE OF FLORIDA.

ON THE FIRST ISSUE, WITH REGARD TO JENNIFER LUTTMAN'S TESTIMONY THE DNA EXAMINER, THIS REALLY IS COMPLETELY DIFFERENT FROM THE CRAWFORD ISSUE, IN ONE THING I THINK I THINK MY OPPOSING COUNSEL USED THE TERM WELL THIS IS AN EXPERT EXCEPTION, AND IT IS REALLY NOT LIKE AN EXCEPTION, BECAUSE -- THE UNDERLYING BASIS OF THE EXPERT'S OPINION IS NOT OFFERED FOR TRUTH OF THE MATTER ASSERTED, IT IS OFFERED TO SHOW RELIABILITY OF THE EXPERT'S OPINION.

>> SHE IS ARGUING, SEEMS TO BE, THAT CRAWFORD CANNOT BE SATISFIED THROUGH THE TESTIMONY OF THE ULTIMATE OPINION EXPERT THAT CRAWFORD REQUIRES, THAT THE PERSONS WHO DO SCIENTIFIC TESTING IN THESE KINDS OF CASES WHO ACTUALLY DO IT THEY MAY NOT INTERPRET WHAT THOSE DOTS ON PIECES OF PAPER MEAN, BUT THE ONE THAT PUTS THE CHEMICAL IN WHATEVER THEY DO, THAT IS HER ARGUMENT IT SEEMS TO ME.

>> YES, AND THAT IS YOU KNOW THAT IS BEYOND THAT IS REALLY SOMETHING THAT IS ENCOMPASSED WHEN YOU HAVE AN EXPERT

GIVING THEIR OPINION THEY ARE GOING TO RELY ON LOTS OF INFORMATION, NOT ALL OF WHICH IS ADMISSIBLE.

OUR EVIDENCE

CODE ALREADY RECOGNIZES THAT THAT IS NOT A BASIS TO NOT ALLOW THE EXPERT TO TESTIFY, IT WAS HER OPINION AND HER CONCLUSIONS THAT SHE --

>> I DON'T THINK SHE IS SAYING -- SHE I THINK AGREED SHE CAN TESTIFY THE QUESTION IS IS THIS NECESSARY, ESSENTIAL, IT IS NOT SOMETHING THAT IS NECESSARY IN THESE CASES.

>> THAT IS YOU WHY LOOK AT THE SIXTH AMENDMENT WHAT CONFRONTATION IS WHAT IS TESTIMONIAL FOR THAT PURPOSE WHAT IS TESTIMONIAL IS WHAT IS USED TO INCRIMINATE THE EVIDENCE THE ACCUSATORY EVIDENCE AS JUSTICE PARIENTE WAS SAYING THE THING INCRIMINATING HERE IS NOT THAT THESE PROFILES WERE OBTAINED BUT THAT THEY RELATE TO THE DEFENDANT, THAT THEY MATCHED THE DEFENDANT.

THAT WAS HER OPINION, THAT WAS HER CONCLUSION WHICH SHE DREW THE INCRIMINATING PART, THE TESTIMONIAL PART, THE PART OF THE --

>> -- WITHOUT -- WITHOUT THAT FACTUAL -- [INAUDIBLE] --

>> WELL IT IS -- SHE USES, ALL OF THE ALL OF THE INFORMATION THAT SHE HAS.

JUST LIKE EVERY EXPERT --

>> [INAUDIBLE] ESSENTIALLY OPINIONS WITHOUT --

>> WELL, SHE COULD, I MEAN, YOU KNOW -- THEORETICALLY, I GUESS SHE COULD TAKE THE STAND AND SHE WOULD SAY I REVIEWED THESE PROFILES AND THIS IS WHAT IT WAS, SHE IS EXPLAINING YOU, KNOW WE WANT TO BE ABLE TO TELL JURIES WHAT DNA IS HOW WE GET DNA THEY UNDERSTAND IT IS RELIABLE WE WANT JURIES TO FAITH --

>> FOLLOWING UP ON THAT I DON'T THINK THE ROBERTS PROBLEM COULD HAVE BEEN AVOIDED OFFERING SOMEBODY WHO IS AN EXPERT TO TAKE THIS REPORT, THAT OTHERWISE MIGHT NOT BE ADMISSIBLE AND SAYING I CONCLUDE THE PERSON WAS UNDER THE INFLUENCE OF DRUGS AT THE TIME, THAT WOULD BE THEN AS BROUGHT OUT, YOU ARE REALLY NOT BEING ABLE TO EXAMINE THE INDIVIDUAL RESPONSIBLE FOR THAT TEST RESULT SO I GUESS WE GET BACK TO HERE THAT THE STATE DID FEEL IT WAS NECESSARY TO IN TERMS OF CHAIN OF CUSTODY TO SHOW HOW THIS DNA WAS ON WHAT PIECE OF THE EVIDENCE ON THE SHIRT, THE SHIRT THE VICTIM WAS WEARING.

>> HOW THE SHIRT WAS TAKEN, AND THEN WHAT WAS IT SENT UP TO QUANTICO?

>> IT WAS SENT UP AND THEY GOT THE A BUCKLE SWAB, CHEEK SWAB FROM THE DEFENDANT, BLOOD FROM THE VICTIM -- KNOWN PROFILE THEY WERE ALSO --

>> THEN DO YOU KNOW DO WE KNOW IN THIS RECORD HOW MANY OTHER INDIVIDUALS AT QUANTICO WERE RESPONSIBLE FOR ACTUALLY -- I DON'T KNOW, IF EXTRACTING DNA, IN ORDER TO ALLOW THE SUPERVISOR TO GIVE HER CONCLUSION?

>> THIS RECORD DOES NOT EXPRESSLY SAY HOW MANY PEOPLE -- SHE DISCUSSES THE TEAM CONCEPT, WOULD IT BE -- THERE WAS ONE PERSON IN IT, IT IS NOT CLEAR FROM THE POSITION THE DEFENDANT IS TAKING AT WHAT -- I UNDERSTAND THE BLOOD PERSON, THE PERSON THAT, DREW BLOOD DID BENCH WORK.

WHAT ABOUT THE PERSON EXTENDING TO CHAIN OF CUSTODY THE PERSON THAT SIGNS IT IN, RECEIVED AT QUANTICO?

I'M NOT EVEN SURE IF THE DEFENDANT IS SAYING THAT IS SOMEONE ALSO NEEDS TO COME

AND TEST --

>> WHAT THEY ARE SAYING IS THAT WHO IS TO PERFORM WHOSE TASK TO OBTAIN THE FUNDAMENTAL FACT, THOSE ARE THE ONES, NOT PEOPLE WHO JUST TOUCH IT.

THAT IS HOW I

UNDERSTAND WHAT THEY ARE ARGUING AND THAT IS WHAT JUSTICE CANADY IS ASKING YOU IS WITHOUT THAT, THERE IS NOTHING THERE, THAT IS WHAT THEY ARE SAYING, SO LET'S DON'T -- YOU KNOW -- DON'T CHASE RABBITS.

LET'S GET RIGHT TO --

>> THAT PART IS NOT TESTIMONIAL, COMES BACK AGAIN TO THE CONFRONTATION, AND WHETHER TESTIMONIAL WHAT IS OFFERED IS INCRIMINATING EVIDENCE YOU HAVE TO LOOK AT THE DIFFERENT STEPS AT WHAT POINT IT BECOMES TESTIMONIAL.

>> BUT HOW CAN IT NOT --

>> I'M HAVING A PROBLEM SEEING HOW IT IS NOT TESTIMONIAL, BECAUSE IF YOU ARE GOING TO COMPARE THIS ITEM TO THE SECOND ITEM OVER HERE, IT SEEMS TO ME, IN ORDER TO GET TO THE ULTIMATE STATEMENT BOTH OF THESE ITEMS HAVE TO BE INCRIMINATING ALSO.

I DON'T KNOW SEE HOW IT IS NOT TESTIMONIAL BECAUSE BOTH OF THESE ITEMS PUT TOGETHER IS WHAT IS INCRIMINATING.

>> BUT WHEN AN ITEM IS WHEN IT IS A COMPLETELY NEUTRAL -- YOU KNOW, THE PROFILE OF --

>> HOW COULD IT BE?

WE HAVE THE SWAB THAT SAYS THAT WE GOT FROM MR. SMITH'S MOUTH; CORRECT?

>> YES.

>> OKAY, AND THEN WE HAVE THE DNA THAT WAS TAKEN FROM THE SHIRT.

>> CORRECT.

>> IN ORDER TO COME TO A CONCLUSION THAT THIS ITEM FROM THE SHIRT MATCHES THIS ITEM

FROM MR. SMITH'S MOUTH YOU
HAVE GOT TO HAVE BOTH OF THEM.
THAT IS WHY I'M SAYING -- I
DON'T SEE HOW YOU CAN SEPARATE
THE TWO AND SAY ONE IS
TESTIMONIAL AND ONE IS NOT.
BECAUSE YOU NEED BOTH OF THEM
TO GET TO THE ULTIMATE
CONCLUSION.

>> WELL, I THINK IF YOU LOOK
AT HER PARTICULAR TEST AND YOU
LOOK AT THE OBJECTIONS, WHAT
SHE IS TALKING ABOUT SHE IS
TALKING ABOUT THE PRESUMPTIVE
TEST USING THE ALTERNATIVE
LIGHT SOURCE TO IDENTIFY THE
-- THE STAINS THAT WERE TO BE
TESTED SHE IS THE ONE THAT
MAKES THE CONCLUSION SHE LOOKS
AT THE EVIDENCE, SHE MAKES
THE CONCLUSIONS ABOUT WHAT
TESTS NEED TO BE DONE ON WHAT
PIECES OF EVIDENCE OVERSEES
ALL THAT CAN ANSWER ANY
QUESTIONS ABOUT -- ABOUT THE
TESTING THAT WAS DONE, SHE HAS
ALL OF THE NOTES, SHE HAS ALL
THE -- SHE WOULD KNOW, NOW,
YOU KNOW THERE WAS -- THE
COMMENT WELL SHE COULDN'T BE
CROSS-EXAMINED ON WHETHER
SOMEBODY MISSED A STEP WELL
SHE WOULD HAVE KNOWN IF
SOMEBODY MISSED A STEP BECAUSE
SHE IS APPLYING, SHE IS USING
THEIR WORK, SHE IS USING THEIR
WORK, THEIR NOTES, WHAT THEY
HAVE COME UP WITH WAS BENCH
WORK TO -- TO CREATE HER
ULTIMATE OPINION WHICH IS WHAT
IS BEING OFFERED INTO
EVIDENCE.

AND IF YOU ARE GOING TO LOOK
AT HOW HER OPINION IS -- IS
DEVELOPED, IN EVERY FACT ALONG
THE WAY THAT GOES INTO THAT,
WHO THE PERSON IS, FOR EVERY
EXPERT, THAT IS THAT IS NOT
GOING TO BE A WORKABLE SYSTEM
TO DO ANYTHING, BECAUSE --

>> IN THE RECORD WERE THERE --
WAS THERE ANY SINGLE QUESTION
SHE WAS UNABLE TO ANSWER?

>> NO, THERE WAS NOT.

THERE WAS NOT.

THERE WAS NOT A SINGLE QUESTION AND IT IS REALLY NOT EVEN CLEAR FROM THE APPELLANT ARGUMENT OR FROM THE WAY THAT THIS WAS LITIGATED BELOW, EXACTLY WHICH PARTS THEY ARE COMPLAINING ABOUT, BEING THE HEARSAY THERE IS NO ISSUE WITH REGARD TO PROBABILITIES THE FACT THERE WAS A MATCH IN QUINTILLION.

>> THE SHIRT WAS INTRODUCED INTO EVIDENCE?

>> YES.

>> WERE THE TEST RESULTS --

>> NO.

>> INTRODUCED INTO EVIDENCE?

>> NO, THEY WERE NOT.

>> AND AGAIN LET ME ASK YOU THINK YOU COULD AVOID THE PROBLEM FROM I CAN'T REMEMBER THE CASE.

>> JOHNSON.

>> JOHNSON CASE?

>> YES.

>> BY NOT INTRODUCING THE REPORT, BUT HAVING AN EXPERT TESTIFY ABOUT THE RESULTS OF THE REPORT.

>> I THINK IT DEPENDS ON THE EXPERT'S KNOWLEDGE OF WHAT --

>> IF IT WASN'T IF IT WAS JUST AN -- IF IT WAS JUST AN EXPERT, YOU WOULD AGREE, YOU CANNOT AVOID THE CONFRONTATION PROBLEM BY USING SOMEBODY WHO IS NOT THE ONE THAT DID THE TEST?

>> WELL --

>> FOR JOHNSON?

>> YOU CAN'T AVOID THE PROBLEM JUST SAYING WE ARE GOING TO CALL THIS PERSON AN EXPERT AND LET THEM TESTIFY ABOUT SOMETHING THEY DON'T KNOW ANYTHING ABOUT.

>> SHE HAS TO HAVE THE KNOWLEDGE --

>> YOU KNOW, HAS KNOWN -- TESTS, HOW BLOOD TESTS ARE DRAWN OR SOMETHING, BUT -- YOU ARE SAYING HERE THIS IS THE PERSON THAT WAS THE ACTIVE

SUPERVISOR, OF THE DNA ASPECT OF THIS TESTING IS THAT --

>> YES.

>> SHE IS USING THEIR WORK, RIGHT.

SO SHE WAS FAMILIAR WITH THE ACTUAL TEST THAT HAD BEEN DONE WITH EVERYTHING THAT COULD HAVE HAVE GONE WRONG WITH THOSE TESTS.

>> IS THERE ANYTHING --

>> PROTOCOLS FOR THESE TESTS.

>> YES, THERE ARE.

>> AND -- AND SO --

>> AND SHE -- SHE DISCUSSED THAT, SHE TESTIFIED AT LENGTH ABOUT THE PROTOCOLS AND ABOUT THE -- THE SYSTEM AND THE WAY THINGS ARE DONE, AND SHE STARTED TO GET INTO THE FACT THAT HER WORK WAS PEER REVIEWED THAT WAS EXCLUDED BY DEFENSE OBJECTION, THAT -- THAT -- SOMEONE ELSE REVIEWED HER WORK ALSO.

>> THIS IS SIMILAR TO WHAT THE FOURTH CIRCUIT CASE WAS.

>> THE MOON --

>> WASHINGTON, I KNOW THAT --

>> RIGHT, WHERE YOU GOT PROTOCOLS, AND YOU GOT A SUPERVISOR, AND -- THE SUPERVISOR IS FAMILIAR WITH THE PROCEDURE AND TESTIFIES FROM THE KNOWLEDGE OF HOW THIS WORKS.

>> YES.

>> IN THE LAB, AND WHAT YOU HAVE REALLY GOT -- THE ACTUAL HANDS-ON PEOPLE ARE -- USING INSTRUMENTS TO DO WORK ACCORDING TO A PROTOCOL, AND THAT COMES OUT.

>> RIGHT.

>> AND THAT IS WHAT THE SUPERVISOR USES AS RAW DATA.

>> YES HE IS YES AND YOU HAVE TO YOU KNOW YOU HAVE TO LOOK AT HOW SHE IS COMING UP WITH THE CONCLUSION THAT SHE IS COMING UP WITH WHERE SHE IS GETTING THAT DATA.

AND YOU KNOW, FOR AND EXPERTS ARE ARE DIFFERENT TYPE

WITNESSES IN ABLE TO TO RELY
ON THAT CERTAIN YOU HAVE TO BE
ABLE TO AGAIN EDUCATE THE
JURY LET THE JURY KNOW WHERE
THESE NUMBERS ARE COMING FROM
THEY ARE HEARING ABOUT THESE
QUINTILLIONS, SHE IS THE ONE
THAT PUTS THAT TOGETHER SHE IS
THE PROPER PERSON TO PUT THAT
TOGETHER.

YES, SHE -- ABSOLUTELY --
ABSOLUTELY ENFORCEMENT SHE IS
AN EXPERT THAT KNEW ALL ABOUT
ALL ABOUT THIS TEST AND WHAT
HAD BEEN DONE.

>> GOING BACK TO BECAUSE IN
WASHINGTON, IT SAID AND YOU
KNOW I HAVE THE CASE IN FRONT
OF ME THERE WERE THREE LAB
TECHNICIANS OPERATING UNDER
THE PROTOCOLS, AND THEN
PRESENTED THE RAW DATA FROM
THE TEST I MEAN I THINK WE
KNOW MORE ABOUT BLOOD SAMPLES
I'M NOT AS FAMILIAR ACTUALLY
WHAT DNA --

>> RIGHT.

>> IN THIS CASE, MISS
BRUECKHEIMER HAS SAID THERE
WERE TEMPTS TO TRY TO FIND OUT
WHO ACTUALLY DID THE TEST AND
THEY WERE THWARTED.

IF WE WERE TO WRITE AN OPINION
SAY THIS WAS OKAY BECAUSE --
SHE WAS A SUPERVISOR OF TWO
OTHER PEOPLE DO WE KNOW THE
IDENTITIES OF THE PEOPLE THAT
ACTUALLY WERE DOING THE TEST
DO WE KNOW IF THERE ARE TWO
PEOPLE, OR 100 PEOPLE?
OR ONE PERSON?

>> NO.

>> WHAT THEIR NAMES ARE?

>> WE DON'T KNOW THAT -- ARE
YOU TALKING ABOUT IN THIS
PARTICULAR THAT --

>> IN THIS CASE.

>> IN THIS PARTICULAR CASE
WE DON'T KNOW.

>> SO WE DON'T KNOW WHETHER
THE DEFENDANT TRIED TO GET
THIS INFORMATION WHETHER WAS
THWARTED IN GETTING THIS
INFORMATION?

I MEAN -- AND THERE IS JUST --
IN ANSWER TO JUSTICE POLSTON'S
QUESTION IN TERMS OF
QUESTIONS WHERE SHE ASKED WELL
WHO ELSE WORKED OFTEN THIS, SO
I GUESS FOR ME, THE --

>> SHE WASN'T ASKED SPECIFIC
QUESTION.

>> -- A CASE WHERE THE
DEFENSE SAYS LISTEN I KNOW
THERE HAVE BEEN A LOT OF
PROBLEMS WITH THESE FBI LABS
WE ALL KNOW ABOUT THEM, WHY
WANT TO TAKE THIS PERSON'S WORK
IF A LOT OF PROBLEMS I WANT TO
BE ABLE TO DEPOSE THIS PERSON
I THINK THAT MIGHT BE A
REASONABLE REQUEST AND THERE
MIGHT BE OTHER ISSUES BUT IF
WE DON'T HAVE THAT DEVELOPED
IN THE RECORD --

>> THAT IS A DIFFERENT ISSUE
IT IS REALLY NOT ANYTHING THAT
HAS BEEN DEVELOPED IN THIS
RECORD OR -- OR ARGUED BUT IF
YOU LOOK AT THE EVIDENCE THAT
WAS ADMITTED YOU LOOK HOW IT
WAS ADMITTED FOR EXAMPLE, ONE OF THE
OBJECTIONS ONE OF THE CRAWFORD
HEARSAY OBJECTIONS WHEN
TALKING ABOUT USING THE
ALTERNATIVE LIGHT SOURCE,
WHICH, FLOOR HE USES WHEN YOU
HAVE BLOOD OR SEMEN THERE WERE
NINE POSSIBLE SPOTS AND SEVEN
OF THEM, FLOURESCED, FOR I'M
NOT SURE WHAT ARE THE
TECHNICAL WORD FOR IT, BUT
SHOWED SOME INDICATION AND SO
OF COURSE AT THAT POINT THEY
DO ANOTHER PRESUMPTIVE TEST
SEVERAL PRESUMPTIVE TESTS THE
STATE WASN'T TRYING TO SHOW SEVEN
OF THOSE NINE SPOTS ACTUALLY
WERE SEMEN OR BLOOD OR
SOMETHING THAT NEEDED TO BE
TESTED THAT WAS JUST THAT WAS
SOMETHING A PRELIMINARILY
THING THAT LED TO WHY THE ONE
SPOT THAT WAS TESTED BECAUSE
THERE WERE SEVERAL
PRESUMPTIVE TESTS THAT
ELIMINATED THE NEED TO TEST
THOSE PARTICULAR

STAINS YOU ARE NOT OFFERING THESE FOR THE TRUTH OF MATTER ASSERTED, YOU ARE OFFERING THEM TO SHOW THE FOUNDATION TO HAVE HER OPINION.

>> THAT ONE IS A LITTLE BIT -- I HAVE PROBLEMS WITH THAT, BUT I MEAN I THINK THAT -- THE TRUTH OF THE MATTER IS THAT IT WAS HIS DNA AND IT WAS USED AND I'M NOT SURE --

>> ABSOLUTELY AND THERE IS NO -- AND THAT IS NOT WHAT THEY ARE CONTESTING.

SO THEY ARE NOT CONTESTING THE TRULY INCRIMINATING PART OF HER TESTIMONY, THEY ARE CONTESTING THE BENCH WORK PART SHE SHE DID TALK ABOUT PRESUMPTIVE TEST EXACTLY HOW THEY WERE DONE SHE EXPLAINED WHAT ARE THEY WERE, HOW THEY NEEDED TO BE DONE SHE HAD THE PARTICULAR LAB NOTES THAT HAD BEEN DIVISED AT THE TIME THE BENCH WORK WAS GOING ON, THAT SHE USED AND THAT IS HOW SHE DREW HER CONCLUSION AND THE TRIAL JUDGE -- HAD AN EXTENSIVE COLLOQUY WITH HER BEFORE MAKING THE DETERMINATION HER CONCLUSIONS AND HER RESULTS THAT SHE OBTAINED HER INTERPRETATIONS WERE HER OWN, AND WERE NOT HEARSAY. THAT IS WHY THERE WAS NO PROFFERED VIOLATION.

THIS COURT SHOULD AFFIRM THAT RULING.

>> THE TESTIMONIAL WOULD HAVE TO BE ADMITTED INTO EVIDENCE AGAINST THE DEFENDANT.

>> WELL -- THAT IS -- YOU KNOW, WOULD YOU THINK THAT WOULD BE -- A PART OF BEING TESTIMONIAL BECAUSE IT CERTAINLY HAS TO BE I MEAN IF NOT ADMITTED INTO EVIDENCE I DON'T KNOW HOW IT COULD BE --

>> WERE THOSE BIOLOGISTS, RESULTS, ADMITTED INTO EVIDENCE?

IT WAS ONLY HER TESTIMONY THE RESULTS PHYSICAL REPORTS NOTE

ADMITTED INTO EVIDENCE, SHE TESTIFIED TO THE RESULTS, THAT WERE OBTAINED LIKE WHEN SHE TESTIFIED SEVEN OF THESE NINE POSSIBLE STAINS INDICATES THERE WAS A SOMETHING TO TEST BUT --

>> LET'S BE FAIR -- AGAIN ABOUT THIS, IN OUR CASE, WITH THE TOXICOLOGY, YOU COULD NOT HAVE -- IF THE SAME PERSON WHO OFFERED THE LAB THE TEST RESULTS IN EVIDENCE, JUST TESTIFIED TO WHAT WAS IN THAT REPORT.

>> SURE YOU CAN'T --

>> YOU ARE NOT GOING TO GET AROUND CRAWFORD IN THAT SITUATION.

>> NO.

I AGREE YOU CANNOT JUST PUT AN EXPERT ON THE STAND, HAND THEM A REPORT AND HAVE THEM BE YOU CAN'T DO THAT YOU HAVE TO HAVE SOMEONE WHO UNDERSTANDS WHO KNOWS HOW THINGS WERE DONE, WHO UNDERSTANDS ALL THE FACTS BEHIND IT, SO THEY CAN ANSWERING THOSE QUESTIONS ON CROSS EXAMINATION, AND THERE WASN'T SOMETHING THAT THEY ASKED HER THAT SHE DIDN'T KNOW BECAUSE SHE HADN'T DONE BENCH WORK IF THEY WANTED TO ASK ABOUT PARTICULAR CUTINGS, WHAT WAS YOU KNOW SHE HAD -- SHE HAD THAT INFORMATION AVAILABLE, AND THERE WASN'T ANYTHING, THAT THEY COULDN'T GET FROM HER, RELATED TO THOSE TESTS.

>> -- I ASSUME THAT SHE WAS -- I'M SURE THAT HER NAME WAS DISCLOSED AS A WITNESS.

>> YES.

>> WHO IS GOING TO TESTIFY WEIGH THE PLACINGS SHE WAS RELYING ON? WAS THAT DISCLOSED TO THE DEFENSE?

>> YOU KNOW, I -- I CAN'T SAY, I'M SURE THAT IT WAS, I'M SURE THAT SHE DID A REPORT, THAT WAS FINISHED TO DEFENSE I

CAN'T SAY FOR SURE --

>> I DON'T I MEAN SHE DID A
REPORT BUT -- YOU HAVE SAID.
>> WELL THERE IS CERTAINLY NO

--

>> -- THAT SHE --

>> SHE HAD THE INFORMATION
FROM THE ACTUAL PEOPLE WHO DID
THE TESTING AND THOSE ARE THAT
IS THE INFORMATION I'M ASKING
YOU IF THAT WAS GIVEN TO THE
DEFENSE.

>> THE ONLY WAY I CAN REALLY
ANSWER THAT IS TO SAY THAT THE
DEFENSE CERTAINLY DIDN'T MAKE
ANY INDICATION WHEN SHE IS
REFERRING TO THEM AT THE TIME
OF TRIAL THAT THEY HADN'T SEEN
THEM OR WEREN'T FAMILIAR WITH
THEM.

I DIDN'T LOOK THROUGH
DISCOVERY TO BE ABLE TO SAY,
YES THESE WERE NOT, THESE WERE THERE,
OR NOT THERE.

BUT I CAN TELL YOU THAT
WHEN SHE TALKED ABOUT THEM AND
CERTAINLY INDICATES HER
RELIANCE ON THEM, IF THEY HAD
NOT IF THE DEFENSE DID NOT
KNOW ABOUT THEM, OR HAD NOT
SEEN THEM OR WANT ACCESS TO
THEM I HAVE EXPECTED THE
DEFENSE TO BE SAYING, OH,
WHAT ARE NOTES -- WAIT A MINUTE
YOUR HONOR SHE HAS NOTES I
WANT TO KNOW WHAT NOTES ARE -- THERE
IS NO SUGGESTION LIKE THAT IN
THE RECORD THEY DID NOT HAVE
THE NOTES OR DID NOT HAVE THAT
INFORMATION AVAILABLE, AND YOU
KNOW, FROM THAT I'M -- I'M
CONFIDENT THAT THEY WERE
PROVIDED THE NOTES WHATEVER,
FELT LIKE NEEDED TO BE
PROVIDED WITH THOSE PROVIDED
IN DISCOVERY BUT I DID NOT --
PERSONALLY GO THROUGH THE
DISCOVERY AND IF THE NOTES
WERE THERE OR NOT.

>> I HAVE A COMPLETELY
DIFFERENT QUESTION AND YOU
KNOW, YOU HAVE LIMITED TIME.

>> SURE.

>> THERE ARE SEVERAL FOR CAUSE

CHALLENGE ISSUES RAISED, AND I WAS CONCERNED WITH SOME OF THE JUROR'S ANSWERS I'M NOT -- GOING -- THAT THERE WERE LIKE 10 OF THESE.

I'M NOT -- DID THE JURORS THAT GAVE ANSWER THAT IS WERE QUESTIONABLE DID ANY -- FIRST OF ALL, DID ANY OF THOSE JURORS SERVE, DO YOU KNOW?

>> NONE OF THOSE JURORS SERVED NONE OF THE JURORS THAT THEY CHALLENGED IN THIS ISSUE ACTUALLY SERVED THEY WERE ALL STRICKEN --

>> PEREMPTORILY.

>> AND THE JUDGE GAVE THREE ADDITIONAL PEREMPTORIES; IS THAT CORRECT?

>> YES.

>> IF WE HYPOTHETICALLY FOUND THREE TO BE A -- WOULD BE ON TWO OR TWO UNLESS WE FOUND MORE THAN THREE, THIS WOULD NOT BE A REVERSIBLE SITUATION.

>> YOU WOULD HAVE TO FIND AT LEAST FOUR, BECAUSE THEY IDENTIFIED FOUR -- IN THE JURY THAT ULTIMATE SAT, WAS SWORN, THEY -- IDENTIFIED FOUR NUMBERS THAT THEY SAID WERE OBJECTIONABLE.

>> THOSE FOUR WERE NOT DISCUSSED WE DON'T KNOW WHAT THE OBJECTION WAS.

>> LET'S JUST SAY THAT WE HAVE SOME OF US OR I HAVE PROBLEMS WITH TWO OF THE AGGRAVATORS I'M CONCERNED ABOUT DCP AND AVOID ARREST, IF WE FOUND IF WE FOUND EITHER OF THOSE BOTH OF THOSE AGGRAVATORS, OR EITHERED OF THOSE AGGRAVATORS IMPROPERLY FOUND, WE WOULD THEN -- SUBJECT TO IT A HARMLESS ERROR TEST.

>> YES.

>> CORRECT?

AND THERE ARE FOUR OTHER STRONG I MEAN HOW MANY OTHER AGGRAVATORS?

>> THERE ARE FOUR IN ADDITION TO THOSE, THERE IS ALSO THE PRIOR VIOLENT FELONY CONVICTION,

THE BASIS OF THE STATE APPEAL WAS NOT CONSIDERED, WHICH I THINK WOULD BE VERY APPROPRIATE TO BE CONSIDERED, AS FAR AS THE CTT, AND THE AVOID ARREST I RECOGNIZE THERE ARE A NUMBER OF CASES VERY SIMILAR TO THIS WHERE YOU HAVE CONCEALING A BODY YOU HAVE A PERSON WITH A PRIOR RECORD WHO IS DOING THINGS TO CONCEAL EVIDENCE, YOU HAVE VERY PURPOSEFUL ACTS HERE BEING COMMITTED, AND --

>> YOU I MEAN AFTERWARDS.

>> SEE, MY PROBLEM IS AND IT IS ESPECIALLY THIS ISSUE THAT IT APPEARS FROM THE THAT EVIDENCE WHAT HAPPENED IS THAT AND HE OBVIOUSLY -- OBVIOUSLY IN TERMS OF OF THE EVIDENCE HAD SEXUALLY BATTERED HER, WE TAKE THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO BE STATED, AND THEN EITHER I MEAN THE THING IS WHAT HE -- EITHER PANICKED, AND THEN AND STRANGLED HER, THAT IS NOT A CLASSIC -- HEIGHTENED PREMEDITATION IT CERTAINLY MIGHT BE -- PREMEDITATED MURDER, SO --

>> BUT IT IS I THINK ONE OF THE THINGS THAT REALLY SETS THIS CASE APART FROM -- WHAT YOU MIGHT SEE IN A LOT OF STRANGULATION CASES, IS THE -- THE WAY THAT THE STRANGULATION OCCURRED BECAUSE IT WAS LIGATURE THAT WAS LIKE SHOE LACE THAT WAS CROSSED AND THE PERSON WAS BEHIND THE VICTIM AND SLIGHTLY ABOVE THE VICTIM, NOT LIKE A CASE WHERE SOMEBODY HAS THEIR HANDS AROUND YOUR NECK YOU ARE PANICKING.

>> THAT AGAIN, SHOWS TO ME, A PRE-- YOU COULD SAY PREMEDITATED MURDER, BUT WELL LET'S AGAIN, I JUST WAS ASKING YOU REALLY AND WE CAN

--

>> CERTAINLY BUT THERE ARE FOUR OTHERS YOU ALSO HAVE THE

TRIAL COURT MAKING -- MAKING THE DETERMINATION HE SAYS EXCEPT FOR THE AGGRAVATOR FELONY PROBATION THAT ANY ONE OF THE OTHER AGGRAVATORS WOULD OUTWEIGH THE TOTALITY OF THE MITIGATION SO THAT IS A DETERMINATION THE TRIAL COURTS ALREADY MADE, WITH REGARD TO THOSE REMAINING AGGRAVATING FACTORS BASICALLY SAID YOU KNOW, HE WOULDN'T -- CERTAINLY WOULDN'T DO IT IF FELONY PROBATION WAS THE ONLY AGGRAVATOR HERE, BUT ANY IF ANY OF THE OTHER AGGRAVATORS, WERE UPHeld THAT ANY ONE OF THOSE, INDIVIDUALLY WOULD BE ENOUGH TO OUTWEIGH ALL OF THE MITIGATION PRESENT TO THE TRIAL JUDGE SO YOU HAVE GOT THAT, I THINK VERY STRONG, INDICATION, THAT -- THAT ANY PROBLEM WITH ANY AGGRAVATOR WOULD BE HARMLESS.

>> WHAT IS THE EVIDENCE WHETHER HE WAS UNDER THE INFLUENCE -- OF DRUGS OR --

>> THE ONLY REALLY --

>> LET ME FINISH.

>> OH.

>> AT THE TIME -- AT THE TIME OF THE OFFENSE.

>> HIS STATEMENT HE GIVES A STATEMENT TO THE TRIAL JUDGE AT THE SPENCER HEARING THAT IS REALLY -- HE DOES MAKE STATEMENTS, IN SOME OF THE PHONE CALLS THAT HE MAKES TO HIS MOTHER AND I THINK TO HIS BROTHER WHERE HE SAYS IT WAS AN ACCIDENT BECAUSE I WAS ON DRUGS, BUT THAT IS ABOUT ALL HE SAYS HE REALLY DOESN'T GIVE SPECIFICS, OR TALK ABOUT IT VERY MUCH.

THE -- THE ONLY REAL INDICATION WE HAVE IS WHAT HE TELLS THE JUDGE, AT THE SPENCER HEARING, AND HE TELLS THE JUDGE THAT HE HAD FOUND OUT ON THIS DAY THAT HE HAD TALKING TO HIS WIFE, AND THEY WANTED TO MOVE BACK HOMETOWN

AND SHE SAID NO THAT IS NOT HAPPENING AND SO HE JUST WANTED TO DIE HE JUST WANTED TO KILL HIMSELF, SO HE WENT OUT AND GOT A BUNCH OF DRUGS, AND HE SAYS HEROIN, COCAINE, STARTED INJECTING HIMSELF HOPING THAT HE WOULD JUST KILL HIMSELF, THAT HE DOESN'T REALLY HAVE MUCH OF A MEMORY AFTER 4:00 THAT AFTERNOON, SO THAT IS --

>> -- STATEMENT AT SPENCER HEARING THERE WAS NO EVIDENCE ACTUALLY PRESENTED OTHER THAN AGAIN THE VAGUE PHONE CONVERSATIONS THAT HE HAD WITH SOME OF HIS FAMILY WHERE HE SAID I WAS ON DRUGS AT THE TIME WE DON'T HAVE ANY SPECIFICS AND THERE I GUESS CERTAINLY NO EVIDENCE THAT HE WAS ON DRUGS, EVEN WHEN THIS WAS HAPPENING.

>> I MEAN, THERE IS EVIDENCE THAT HE HAD -- A WITH FAMILY WITH HIS BROTHER, ON THE EVENING OF WHAT OCCURRED, THAT THERE WAS A DISCUSSION THERE; CORRECT?

>> NO, HE DID NOT TALK TO HIS BROTHER THAT NIGHT, HE WENT TO HAVE HIS BROTHER'S HOUSE THE NEXT NIGHT MONDAY.

>> OKAY.

>> YES.

>> ON -- OKAY, I THOUGHT.

>> NOBODY --

>> ATTEMPT TO TALK TO HIS BROTHER -- THAT WAS --

>> TRIED TO CALL HIS BROTHER, DIDN'T ANSWER NEIGHBORS SAW HIM AT 3:15 IN THE AFTERNOON AND SAW HIM AGAIN AT 8:00 THAT NIGHT, WHEN HE WAS PICKING FRUIT, HE WAS TALKING TO THEM HE WAS BEING PERFECTLY NORMAL.

>> THEY DID NOT NOTE ANY UNUSUAL --

>> SPOKE WITH -- TALKED ABOUT A MECHANICAL PROBLEM.

>> THE NIGHT OF -- HE DIDN'T SPEAK WITH ANYBODY, HE TRIED TO,

AND THERE WERE -- IT WAS VERY CONFUSING WHEN THEY TALKED ABOUT THE DATE THAT HE TALKED TO HIS BROTHER, BECAUSE I THINK INITIALLY ONE OR THE OTHER OF THEM THOUGHT THAT IT HAD BEEN THE SAME NIGHT, BUT THEN FIGURED OUT IT WAS ACTUALLY THE NEXT NIGHT SO THERE IS -- THAT DATE FLOATS A LITTLE BIT PRIOR TO TRIAL AS IT GUESTS ACCORDING TO THE BROTHER'S TESTIMONY AT TRIAL IT WASN'T THAT NIGHT, IT WAS THE NEXT NIGHT WENT TO HIS BROTHER'S HOUSE HE TRIED TO CALL THE BROTHER THAT DAY BUT THERE WERE NEIGHBORS OTHER PEOPLE WHO TALKED TO HIM I KNOW THAT THE MECHANIC I DON'T KNOW IF THAT WAS -- THE TIME FRAME OF THAT BUT I KNOW THE NEIGHBOR BEHIND THE HOUSE WHERE HE WAS STAYING, SPOKE WITH HIM, BOTH AT 3:00 IN THE AFTERNOON, AND AFTER 8:00 AT NIGHT, AND HE WAS -- IF YOU'RE THINKING FINE, HE WAS ABLE TO CONVERSE THERE WAS NOTHING UNUSUAL ABOUT HIM.

SO WE HAVE THAT INFORMATION, AND THE TRIAL JUDGE FOUND THAT WAS VERY RELEVANT TO WHAT -- HIS STATE OF MIND AT THE TIME OF THE CRIME BECAUSE IT WAS ON BOTH SIDES OF IT.

NOW, HE RELIED EXTENSIVELY ON HIS HISTORY, OF -- OF DRUG PROBLEMS, AND MEDICAL PROBLEMS AND HE RELIED ON RACK MARKS ON ARMS OBSERVED CLOSE IN TIME TO THIS, AROUND THE TIME OF ARREST THE TRIAL JUDGE SAID THAT STILL DOESN'T TELL US IF BEFORE OR AFTER ALL WE KNOW THERE WERE TRACK MARKS WHEN HE WAS ARRESTED.

>> WELL WE KNOW HE HAD A LONG HISTORY --

>> WE KNOW HE HAD A LONG HISTORY OF DRUG ABUSE ALL SORTS STARTING AT VERY EARLY AGE SO THAT WAS ACTUALLY ON THE PROBATION WAS HE ON WAS

DRUG PROBATION.

>> YES, THAT IS CORRECT.

AND THAT WAS -- GREAT DEAL
MITIGATION HISTORY STRUGGLES
WITH ADDICTIONS, ALSO HIS
PHYSICAL PROBLEMS, BUT AS TO
WHAT WAS HAPPENING THAT NIGHT,
WE HAVE OTHER THAN HIS OWN
STATEMENTS, WE HAVE THE
STATEMENTS OF THE NEIGHBORS
WHO SAW HIM, WHO OBSERVED HIM,
AND WE REALLY DON'T HAVE -- IT
IS NOT ONE OF THOSE CASES
WHERE THE DEFENDANT BROUGHT IN
THE PEOPLE HE WAS DOING DRUGS
WITH TO BE ABLE TO ESTABLISH
WHAT HE HAD TAKEN WHAT HE HAD
TAKEN IT HOW INTOXICATE WAS
HEED WHAT HIS STATE OF MIND
WAS ALL WE HAVE HIM TELLING
PEOPLE I WAS ON DRUGS I DIDN'T
KNOW WHAT I WAS DOING IT IS
VERY -- THAT IS THEIR BIG
ARGUMENT AGAINST CCP, BUT
THERE IS REALLY NO EVIDENCE
THAT HE WAS NOT THE -- IF YOU'RE
THINKING NORMALLY AND THAT IS
-- I THINK WHAT THE TRIAL
COURT LOOKED AT I THINK WAS
EVIDENCE AVAILABLE TO TRIAL
JUDGE ABOUT HIS STATE OF MIND
AND THERE IS NO REASON TO
BELIEVE THAT HE WAS PANICKING,
OR -- OR CLOUDED IN JUDGMENT,
BECAUSE CERTAINLY, HE IS THINKING
HE IS GOING TO THESE FOUR
DIFFERENT DUMPSTERS REMEMBER
LATER TO TELL HIS BROTHER
TAKING THE EVIDENCE TO
DIFFERENT DUMPSTERS SO HE HAS
THE RECALL HE HAS -- HE HAS
THE PURPOSEFUL ACTIONS, AND I
THINK THESE GO BOTH TO CCP AND
AVOID ARREST.

I THINK THIS

FOLLOWS CASES LIKE HASKINS
WHERE THIS COURT LOOKED AT IT
AND SAID, THERE IS NO
EXPLANATION FOR WHY THIS
MURDER OCCURRED --

>> AVOID ARREST --

>> WHEN YOU HAVE MURDERS AND
PEOPLE TRYING TO GET RID OF -- I
MEAN EVERY CASE PRACTICALITY YOU

KNOW THAT -- PEOPLE -- HE
THROWS THE GUN SOMEPLACE, OR
SOMETHING IN A DUMPSTER, AND
SO YOU END UP WITH AVOID
ARREST, REALLY, AND PRACTICALLY
ALL OF THESE CASES, AND I
THOUGHT YOU KNOW, OUR CASE LAW
REALLY HAS TO SHOW SOMETHING
-- THAT THAT REALLY INDICATES
THAT THIS WAS WHY THE MURDER
WAS COMMITTED, A LOT OF THESE
THINGS HAPPEN AFTER THE
FACT -- YOU KNOW, YOU COULD --
I KILLED THIS PERSON I NEED TO
NOW GET RID OF THE GUN, GET
RID OF THE KNIFE DO THOSE --
>> AGAIN I THINK IF YOU GO
BACK TO HOW THIS MURDER
OCCURRED IN THE FACT THAT THIS
STRANGULATION WAS SOMEBODY
BEHIND HER WITH A LIGATURE --
APPLYING CONTINUOUS PRESSURE
EXTENDED PERIODS OF TIME THAT
IS GOING TO TAKE SOME TIME.
THAT IS GOING TO TAKE SOME
REFLECTION.

>> THAT IS PREMEDITATION, OUR
CASE LAW IS VERY CLEAR
STRANGULATION THAT THE
PREMEDITATION CAN BE FORMED.
BUT TO THE C.C. PART OF THE
CCP --

>> I WOULD OFFER --

>> THE THOUGHT IS -- WE DON'T
HAVE EVIDENCE OF HIM TAKING
IMPLEMENTS THAT WERE USED WE
DON'T HAVE HAVE THOSE KINDS OF
THINGS.

>> WELL, I THINK THAT YOU
KNOW, OBVIOUSLY THE CASES THAT
I CITED IN MY BRIEF -- A LOT
OF SIMILAR CASES WHERE YOU
JUST HAVE HAVE -- AN ATROCIOUS
CRIME, AND YOU HAVE A MURDER
THAT REALLY DIDN'T NEED TO BE
COMMITTED UNLESS YOU ARE
TRYING TO COVER UP THE
ATROCIOUS CRIME.

>> I GUESS MIXING TWO --

>> WE ARE YES.

>> -- LEWIS TALKING ABOUT WE
DO SAY WHEN STRANGULATION,
THAT THERE IS PROBABLY HAC.

>> I DON'T KNOW THAT WE HAVE A

CASE THAT -- STRANGULATION.

>> NOT RELYING EXCLUSIVELY ON TRANSLATION.

>> IF SOMEBODY BRINGS A GUN IF HE HAD BROUGHT A GUN THERE, SHOT HER, THAT WOULD HAVE BEEN JUST -- A POSSIBILITY OF SAYING CCP PLANNED IN ADVANCE.

BUT STRANGLING SOMEONE MANUALLY -- DOESN'T TAKE A SECOND OR TWO, STRANGULATION.

>> IT DOES -- IT TAKES MORE THAN AN ASSOCIATION, TWO ESPECIALLY WHEN YOU HAVE TO GET A LIGATURE, GET BEHIND SOMEBODY.

>> THAT IS WHY IT IS NOT AUTOMATICALLY CCP, WHEN YOU STRANGLE -- AUTOMATICALLY WE SAID HAC, NOT NECESSARILY CCP.

>> I DON'T WANT THE COURT TO THINK I'M ONLY RELYING ON STRANGULATION I THINK THE MANNER OF STRANGULATION IN THIS CASE WAS UNUSUAL SETS IT APART FROM OTHER CASES, WHERE THE ARGUMENTS BEEN MADE BUT I THINK WE DO HAVE THE OTHER FACTORS THAT THE COURT NOTED IN THE SENTENCING ORDER, AND THAT I TALKED ABOUT IN MY BRIEF, WITH THE -- THE PLANNING AND THE POSITION, THE FACT THAT SHE WASN'T RESISTING, SHE WASN'T FIGHTING HIM.

SHE WAS ALSO -- HER ARMS WERE ALSO -- HANDS WERE ALSO BOUND WHILE ALIVE, THAT SHE WAS STRANGLED WHEN SHE WAS ALIVE, I THINK --

>> YOU ARE CLOSE TO THE END OF YOUR TOTAL ARGUMENT.

DID YOU WANT TO SAY ANYTHING ABOUT YOUR CROSS APPEAL?

>> WELL, I THINK THIS COURT DOES NEED TO CONSIDER THE CROSS APPEAL.

I KNOW THAT --

>> -- THEN QUICKLY, ARE YOU RELYING ON THE 1993 STATUTORY PROVISION IN 921.0011 THAT TALKED IN TERMS OF THAT A CONVICTIONI WHETHER IT IS A PLEA, OR AFTER A TRIAL, THAT THAT IS TREATED AS CONVICTION WITHOUT

REGARD TO THE WITHHOLDING OF
ADJUDICATION?

IS THAT WHAT YOU ARE RELYING ON?

>> YES.

>> WAS THAT SUBSEQUENTLY
REPEALED IN '97?

>> WELL, IT WAS
RENUMBERED, IT WAS RENUMBERED
AND GIVEN --

>> WAS IT TAKEN OUT OF THE
CONTEXT OF WHERE IT WAS,
THOUGH?

IN SOME WAY MOVED SO THAT
IT DOES MAKE A DIFFERENCE?

>> WELL, I THINK PART OF THE
WHOLE -- PASSING THE -- YOU
KNOW THAT WHOLE CRIMINAL ACT
THAT WAS TOGETHER, COMPLETELY
RENUMBERED AND REORGANIZED THE
WHOLE --

>> DID IT OR DID IT NOT TAKE
IT SOMEWHERE ELSE?

I WANT TO

MAKE SURE I UNDERSTAND THIS
BEFORE WE GO OFF START
ADDRESSING THIS.

IT BECAME VERY
CONFUSING --

I WAS GOING THROUGH
THE BRIEFS ON THIS THING -- TO
ME.

>> WELL, I -- YOU KNOW -- MY
RECOLLECTION IS THAT WE HAD
THE STATUTE THAT IT WAS -- YOU
KNOW, RENUMBER I DON'T KNOW
WHETHER TALKING ABOUT TAKING
OUT, PUTTING IT SOMEWHERE ELSE
I DON'T KNOW THAT IT WAS, THAT
SECTION WAS PARCELED OUT, PUT
SOMEWHERE ELSE, I THINK THE
WHOLE CHAPTER WAS RENUMBERED.
SO EVEN THOUGH MAY HAVE BEEN
GIVEN A NEW NUMBER I DON'T
THINK IT WAS TAKEN OUT AND PUT
IN A DIFFERENT CONTEXT.

>> APPLIED CONSISTENTLY,
WHENEVER WHATEVER HAPPENED IN
97 HAS ABSOLUTELY NOTHING TO
DO WITH THIS, AND THAT THAT
PROVISION STILL APPLIES, AND
DEATH IN CAPITAL CASES.

>> RIGHT, THAT IS REALLY
INCONSISTENT WITH GERARD THE
WAY THIS COURT INTERPRETED IT.

THAT IS MY POSITION ON THAT.
I DO THINK IT IS IMPORTANT.
I KNOW A LOT OF TIMES THOSE ISSUES
ARE TREATED MOOT WHEN THE
STATE RAISES THE ISSUE I
THINK ESPECIALLY IN LIGHT OF
THE COLLATERAL CONSEQUENCES
HOW WE ARE GOING TO HAVE TO GO
BACK WE NEED GUIDANCE FOR
COURTS TO KNOW WHETHER THERE
IS STILL GOOD LAW OR NOT I
THINK IT IS ESPECIALLY
IMPORTANT YOU CONSIDER THE
CROSS APPEAL.
THANK YOU.
I ASK YOU TO AFFIRM THE SENTENCES AND
CONVICTIONS IMPOSED.

>> -- MISS BRUECKHEIMER.

>> I WILL JUST ADDRESS QUICKLY
THE CROSS APPEAL -- THE BIG
CHANGE -- IN 1997, WAS TO PUT
IT UNDER THE CRIMINAL
PUNISHMENT CODE I THINK A BIG
DEAL IT DIDN'T JUST MOVE IT
SOMEPLACE, IT PUT IT INTO THE
SENTENCING GUIDELINES
STRUCTURE, IF YOU ARE GOING TO
ATTACK, IF YOU ARE GOING TO
MUCH A NEW AGGRAVATOR YOU
SHOULD PUT IT WHERE IT BELONGS
IN WITH THE AGGRAVATORS, YOU SHOULD
NOT HAVE THIS -- THIS --
CHANGE THAT WAS DONE, FOR THE
CRIMINAL PUNISHMENT CODE ALL
CASES APPLY IT TO THE --

>> I DIDN'T THINK WE WERE
SAYING THIS WOULD SAY A NEW
AGGRAVATOR I THOUGHT WE WERE
SAYING --

>> WELL, A DEFINITION.

>> -- CHANGED FROM SAYING THAT A
CASE WAS HELD --

>> RIGHT.

>> -- WAS NOT A CONVICTION TO
ADJUDICATION WITH HELP AS A
CONVICTION.

>> DEFINITION OF WHAT IT IS
CHANGED, AND -- IF YOU ARE
GOING TO DO THAT YOU SHOULD
MAKE IT CLEAR YOU SHOULDN'T
PUT IT IN THE MIDDLE OF THE
CRIMINAL PUNISHMENT CODE THAT
IS WHERE IT WENT, AND THAT IS
NOT -- NOT IF YOU ARE GOING TO

CHANGE THE DEFINITION.
FOR AN AGGRAVATOR.

>> THAT IS INCONSISTENT WITH
WHAT WE DID IN CASES HAVING TO
DO WITH WHETHER JUVENILE
CONVICTIONS ARE -- CONVICTIONS
ARE -- CASE OUT OF SOUTH
CAROLINA, THAT --

>> WELL THERE WAS -- YOU
KNOW -- IN FB THERE IS A COURT
SAID DEATH IS DIFFERENT --
>> RIGHT, BUT WE -- BUT WE
SPECIFICALLY LOOKED IN
DETERMINING WHETHER SOMETHING
WAS CONVICTION TO SOMETHING
OTHER THAN WHAT IS IN THE
CAPITAL SENTENCING STATUTE.
WE'VE DONE THAT.

>> YES, WELL -- IT -- IT THIS
COURT HAS YET TO CHANGE IT YOU
KNOW -- THERE IS STILL RELYING
ON THE CASE LAW THAT EXISTED
BEFORE THIS CHANGE, SAYING THAT
IT CAN'T BE CONSIDERED UNLESS
IT IS AN ACTUAL CONVICTION OR
GUILTY PLEA, GOING BACK TO
CRAWFORD, QUICKLY, THE IDEA THAT
LUTTMAN HAD NOTES, THAT THERE
PROTOCOLS THAT SHE WAS -- THAT
SHE COULD RELY ON THESE NOTES,
THAT OTHER PEOPLE HAD PREPARED
BASED ON -- PROTOCOLS ALL
THESE THINGS WERE VIOLATED IN
HER OWN OFFICE, FOR OVER TWO
YEARS, YOU DON'T KNOW IF YOUR
PEOPLE ARE FALSIFYING THINGS,
SKIPPING STEPS, NOT FOLLOWING
PROTOCOLS.

THEY HAD NO CLUE THIS WOMAN
WAS DOING THIS, AND THEY ONLY
FOUND OUT WHEN ANOTHER LAB
PERSON HAPPENED TO WALK BY HER
AREA, AND FOUND THAT SHE WAS
DOING THIS.

THERE WASN'T A SUPERVISOR WHO
DISCOVERED THIS, AND PROTOCOLS
AND REIANCE ON RECORDS
REPORTS ARE ONLY AS GOOD AS
PEOPLE WHO DO THEM.

WE DIDN'T HAVE ACCESS TO THE
PEOPLE WHO DID THEM, DNA IS
EXTREMELY IMPORTANT, NOT JUST
IN MR. SMITH'S CASE BUT IN ALL
THE CASES, IF ANYTHING, NEEDS

THE TEST OF CROSS-EXAMINATION,
IN ORDER TO SHOW
RELIABILITY, DNA SHOULD BE ONE
OF THEM.

>> DO YOU AGREE ABOUT THE -- IN
TERMS OF FOR-CAUSE CHALLENGES
THAT NONE OF THE JURORS THAT
YOU HAVE IDENTIFIED SHOULD
HAVE BEEN STRUCK FOR CAUSE
SERVED -- DO YOU AGREE WITH
THAT?

>> YES.

>> AND THEN DO YOU ALSO AGREE
THERE WERE THREE ADDITIONAL --
PEREMPTORIES GRANTED?

>> YES, I HAVE TO SHOW FOUR AND
I THINK WE -- I HAVE DONE
THAT.

>> WHO DO YOU THINK AS -- WE WILL
GO BACK OVER IT, BUT IF YOU
SAID HERE, YOU KNOW, RAISED
ABOUT 10 OF THEM, YOU HAVE --

>> TOP FOUR, THE
PEOPLE THAT YOU REALLY FEEL I
MEAN I UNDERSTAND YOU FEEL
THEY ALL ARE BUT --

>> I THINK NUMBER NINE WAS
REALLY VERY WEAK, AND I DIDN'T
REALLY GO INTO HER VERY MUCH,
BUT WHEN YOU DEAL --

>> IN WHAT RESPECT?

>> SHE SAID SHE WAS -- SHE WAS
AWARE OF PRETRIAL PUBLICITY.

>> ISN'T SHE ONE SAYS SHE WILL
LISTEN TO THE EVIDENCE?

>> I THINK IT IS WEAK THAT SHE
WOULD BE --

>> I WOULD NOT PUT NUMBER NINE
ON MY TOP 10 LIST.

>> OKAY.

>> THE GUY WOULDN'T EVEN TAKE
ASPIRIN, THE PERSON THAT --

>> THAT IS NUMBER 10.

>> THAT WAS NUMBER 10, NUMBER
27, IT'S BETTER FOR FINANCIAL AND
FOR JAIL CROWDING PURPOSES TO
KILL THEM THAN TO KEEP THEM
FOR LIVE.

NUMBER 29, THE MAN WHO LIVED
NEAR THE AREA WAS KEEPING HIS
OFFICE INFORMED, EVERY DAY,
OF THE DAILY DEVELOPMENTS OR
NOT EVERY DAY BUT AS MUCH
DEVELOPMENTS AS POSSIBLE, HE

LIVED IN THE AREA HE HAD A DAUGHTER THAT DATED, AND HE BELIEVED IN A LIFE FOR A LIFE.
>> -- YOU KNOW, THIS IS OBVIOUSLY A VERY HIGH-PROFILE CRIME SOMEBODY THAT SAYS AFTER I HEAR A MURDER OCCURS OF A YOUNG GIRL, THAT I'M CONCERNED FOR MY CHILDREN, ARE YOU SAYING THAT PERSON CAN'T BE A FAIR JUROR?

>> I THINK THIS MAN WENT WAY BEYOND THAT, KEEPING HIS OFFICE INFORMED ON THE INTERNET, HAVING LIVED IN REAL CLOSE BY, AND KEEPING -- AND HE CURTAILED HIS DAUGHTER'S ACTIVITIES BASED ON THIS.

>> THERE WERE TWO JURORS, ONE SEXUALLY AASSAULTED.

>> NUMBER 62.

>> ONE HAD BEEN A WITNESS OR HAD TESTIFIED HIS DAUGHTER --

>> NUMBER 89.

>> DON'T WE HAVE -- LOOKING AT THAT I THOUGHT WELL THOSE ARE CERTAINLY WITH -- SOME WERE CONCERNED WITH LIFE EXPERIENCES, AS OPPOSED TO SOMEONE -- RESPONSE TO A GENERAL QUESTION, DOESN'T OWEN REALLY -- DEFEAT YOUR ARGUMENT THAT THOSE JURORS, COULD NOT -- WERE NOT --

>> BECAUSE THEY CAN SAY I CAN BE FAIR.

I MEAN.

>> DIDN'T WE CROSS THAT IS -- ANYTHING OWEN IS WHAT I'M ASKING.

>> I'M NOT REALLY FAMILIAR ENOUGH WITH OWEN AT THE MOMENT.

>> THE FACT THAT SOMEBODY HAS HAD A -- SIMILAR LIFE EXPERIENCE.

>> EXPERIENCE --

>> DOES NOT SAY THAT THEY.

>> THEY ARE AUTOMATICALLY EXCLUDED.

>> CORRECT.

>> THE IDEA BEING THAT -- HOW SIMILAR AND WHAT EXPERIENCE ARE WE TALKING ABOUT, I MEAN,

IT MIGHT BE DIFFERENT TO SAY WELL I'VE BEEN ROBBED, TOO, AND YOU KNOW, I SHOULD YOU KNOW THAT SHOULD I BE ABLE TO GET PAST, THAT BUT WHEN YOUR OWN DAUGHTER IS MURDERED YOU ARE HAVING TO TEST IN A MURDER SITUATION I THINK THAT GOES TO EXTREME HOW MANY YEARS WILL IT EVER BE FOR ANYBODY TO GET PAST THAT, NUMBER 29, THE ONE WITH THE DAUGHTER AND THE INTERNET SITUATION, WHEN THEY ASKED IF HE COULD BE FAIR, HE SAID THAT HE BELIEVED THAT HE WAS A PERSON OF INTEGRITY, AND ALL OF THESE PEOPLE SAID THINGS LIKE THAT, THAT THEY COULD BE FAIR, THEY COULD BE -- AND NOBODY WANTS TO BE THOUGHT OF AS NOT HAVING INTEGRITY OR NOT BEING FAIR. THE REALITY IS IS THAT YOU HAVE TO LOOK AT WHAT THEY SAID AS A WHOLE.

AND YOU HAVE TO LOOK AT THE FACT THAT -- THAT -- THESE WERE PEOPLE THAT SHOULD NOT HAVE TO SIT -- IN A CASE, LIKE THIS.

>> THEY DIDN'T SIT.

>> THEY DIDN'T, BUT THEY WERE

--

>> BUT WE HAD TO USE PREEMPTORY TO GET THEM OFF, THEN ON OR ABOUT AND THEN WE ASKED FOR MORE I GAVE THE COURT ANOTHER SEVERAL, THAT THEY ASKED FOR.

>> THIS SEEMS TO ME WHEN A JUROR THAT TO THE PURN PERSON SAT, CORRECT THE CASE -- THE JUROR ACTUALLY SAT I MEAN I THINK TO ME IN LOOKING AT IT, WHEN THE JURORS THAT MIGHT BE UNFAIR, AND THIS QUESTIONABLE ARE STRUCK ABLE TO BE STRUCK THE WHOLE PROCESS IS IN OTHER INTEGRITY IN THE PROCESS THAN IF YOU LET SOMEONE.

>> THAT IS NOT IS IT THOUGH.

>> YOU HAVE TO GET FOUR.

>> WE HAVE TO GET FOUR THEY HAVE TO HAVE TO THERE WERE

OTHERS THAT WERE INVOLVED.
THE SITUATION WITH -- IF YOU
ARE GOING TO STRIKE CCP AND
ADVOIDING ARREST, JUST IN
CASE -- THUN YOU NEED TO SET
IT BACK FOR WHOLE NEW HEARING
YOU CAN'T TAKE THE JURY OUT OF
THE PROCESS, BY SAYING THAT IS
THE JUDGE WOULD HAVE FOUND
THEM GUILTY NO MATTER -- I
MEAN WOULD HAVE -- IMPOSED
DEATH NO MATTER WHAT IF ALL
OTHERS WERE STRUCK ONLY ONE
REMAINED TAKES THE JURY OUT OF
THE EQUATION, SO WE HAVE TO
WOULD IT HAVE TO GO BACK FOR
AN ENTIRE THING.

AND --

>> WELL THAT IS LIKE SAYING
THE HARMLESS ERROR ANALYSIS
DOES NOT PLY THEN, BECAUSE
THAT -- THAT COULD BE SAID.

>> WELL, WHEN YOU START TAKER
OUT MORE THAN ONE YOU CAN'T
ADD IN ONE THAT TO ONE
CONSIDERED, WHICH IS THE NEW
ONE.

SO THE -- I'M TRYING TO COVER
AS MUCH AS I CAN.

>> WELL YOU HAVE USED ALL OF
YOUR TIME, IF YOU WOULD LIKE
TO MAKE A CONCLUDING STATEMENT

--

>> MR. SMITH WAS ENTITLED TO A
FAIR TRIAL, I DON'T BELIEVE HE
GOT ONE.

I WOULD LIKE TO SEE THE
ENTIRE PROCESS START OVER
AGAIN WITH THE CONCEPT THAT
NOW DNA MUST BE SUBJECT TO
CROSS EXAMINATION.

>> THANK YOU.

THANK YOU,
BOTH OF YOU FOR
YOUR ARGUMENTS FOR TODAY.