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**Kayle Barrington Bates v. State of Florida**

**SC07-611 | SC08-66**

PLEASE RISE.

HEAR YE HEAR YE HEAR YE.

THE SUPREME COURT OF FLORIDA IS  
NOW IN SESSION.

ALL WHO HAVE CAUSE TO PLEA, DRAW  
NEAR, GIVE ATTENTION AND YOU  
SHALL BE HEARD. GOD SAVE THESE  
UNITED STATES, THIS GREAT STATE  
OF FLORIDA AND THIS  
HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING AND WELCOME TO  
THE TUESDAY SESSION OF THE  
NOVEMBER ORAL ARGUMENT  
CALENDAR.

OUR FIRST CASE THIS MORNING IS  
BATES VERSUS STATE.

ARE THE PARTIES READY?

>> YES, YOUR HONOR.

>> MAY THE PLEASE THERE COURT,  
TERRI BACKUS. I'LL BE

REPRESENTING THE INTERESTS OF  
KAYLE BARRINGTON BATES TODAY,  
I'LL ADDRESS MY REMARKS TO TWO  
ISSUES, FIRST, THE TRIAL COURT  
SUMMARY DENIAL OF THE DNA  
MOTION.

AND, SECOND, THE TRIAL COURT'S  
DENIAL OF THE POSTCONVICTION  
MOTION REGARDING TRIAL COUNSEL'S  
INEFFECTIVENESS FOR FAILING TO  
PRESENT ORGANIC BRAIN DAMAGE AT  
THE RESENTENCING IN 1995.

I THINK IT IS IRONIC THAT  
MR. BATES' CASE IS BEFORE THE  
COURT TODAY, BECAUSE OF THESE  
HISTORICAL -- THE HISTORICAL  
ELECTION WE ARE LOOK AT ONCE  
AGAIN ARE VIEWING MR. BATES'  
CASE THROUGH THE LENS OF RACE.

>> WHY DON'T YOU START WITH THE  
FACTS HERE?

IT SEEMS TO ME THE BURDEN THAT  
YOU HAVE IS THE DNA MOTION.

IS THAT THE FACTS REALLY HAVE --  
YOU HAVE TO DEMONSTRATE THAT  
THERE WOULD BE A REASONABLE  
PROBABILITY THAT THE DNA WOULD  
REVEAL SOMETHING THAT WOULD  
ESTABLISH MR. BATES' INNOCENCE.  
AND AS I UNDERSTAND IT, THIS  
THING STARTED AT THE FACTS ARE  
IT STARTED -- YOU HAVE A TIGHT  
TIME PERIOD OF SEVEN MINUTES,  
THAT WENT ON HERE.  
AND BATES WAS FOUND RIGHT THERE  
AT THE SCENE.

ISN'T THAT CORRECT?

>> YES, IT WAS A -- THE  
PROXIMITY TO THE SCENE THAT WAS  
THE BIG ISSUE IN THIS CASE, AND  
THIS IS BACK IN 198.

AND -- 1983.

AND THE ISSUE REALLY WAS, AND  
ONE OF THE FIRST THINGS I ARGUED  
IN MY BRIEF WAS THAT THE TRIAL  
COURT ACTUALLY GOT THE  
FACT-FINDING WRONG.

IN THIS CASE --

>> JUST WELLS' QUESTION -- TELL  
US EXACTLY WHAT IT IS YOU WANT  
TESTED.

>> WELL, I SPELLED OUT EXACTLY  
ALL OF THE BIOLOGICAL MATERIALS  
THAT EXISTS IN THE CASE.

BECAUSE, THE STATE --

>> YOU WANT EVERYTHING TESTED.

>> I WANT ALL OF THE BIOLOGICAL  
MATERIALS TESTED, PLUS HAIR AND  
FIBER --

>>... BECAUSE IF YOU SAID,  
SOMEONE SAID TO YOU, LISTEN YOU  
CAN'T HAVE EVERYTHING TESTED  
MAYBE THAT DOESN'T... BUT HERE  
IS, THIS IS WHAT REALLY NEEDS TO  
BE TESTED, THAT COULD ESTABLISH  
HIS INNOCENCE.

WHAT WOULD IT BE, BECAUSE THAT  
WAS -- MY PROBLEM IS LIKE THEIRS  
IS BROAD -- THERE IS A BROAD  
BRUSH, A LOT OF IN CULPATORY  
EVIDENCE, WHICH SEEMS  
OVERWHELMINGLY EXCULPATORY  
EVIDENCE AND IF YOU TOOK THREE  
OR FOUR THINGS,.

>> IF I HAD MY TOP THREE THINGS.

>> THAT WOULD HELP US BECAUSE,  
FRANKLY, IF YOU ESTABLISH JUST

ONE OF THEM, YOU KNOW, THERE IS AT LEAST, TO ME -- INSTEAD OF SAYING I WANT EVERYTHING TESTED. >> THE WAY I LOOKED AT IT, I VIEWED IT AS WHAT WERE THE MOST IMPORTANT THINGS THE STATE EMPHASIZED IN THAT ARE CLOSING ARGUMENT.

FIRST OF ALL, IT WAS THE PANTY, IF I HAD ONLY ONE THING TO CHOOSE I'D HAVE THE PANTIES TESTED BECAUSE IT WAS THE PROSECUTOR'S POSITION THAT THERE WERE -- THERE WAS A PRESENCE OF SEMEN ON THE VICTIM'S PANTIES, AND -- THOSE PANTIES HAD BEEN WIPED OFF, THAT THE DEFENDANT WIPED HIMSELF OFF WITH THE PANTIES AND NUMBER ONE WOULD BE PANTIES.

>> TRIAL WAS IT ESTABLISHED TO BE HIS SEMEN.

>> IT WAS INCONCLUSIVE.

>> YOU SAY THE DNA NOW -- YOU ARE SAYING IT COULD SHOW THAT IT WASN'T HIS SEMEN?

>> EXACTLY.

AND THERE WAS A RAPE KIT TAKEN, NUMBER 2 PRIORITY WOULD BE THE RAPE KIT.

>> IF THERE -- IS THERE EVIDENCE HERE THAT MR. BATES AGREED THAT HE HAD EJACULATED AT LEAST ON THE VICTIM, OR -- EJACULATED ON THE VICTIM OR...

>> THERE WERE ANY STATEMENTS GIVEN BY THE DEFENDANT AND NONE OF WHICH THE PROSECUTION BELIEVED.

AND ARGUED IN THE CLOSING ARGUMENT THEY DIDN'T BELIEVE ANY OF THEM AND SO THERE WERE STATEMENTS GIVEN BY MR. BATES THAT WERE ULTIMATELY RECANTED LATER ON.

THE SHORT ANSWER IS WE DON'T KNOW.

ALL OF THE TESTING AVAILABLE IN 1983 WOULD ONLY BE ABLE TO DO BLOOD TYPING AND THAT WAS ALL THAT WAS AVAILABLE AT THE TIME.

>> PRETTY EXPRESS ON THE FACE OF THE... (Inaudible) DOUBT... THE EVIDENCE IS OVERWHELMING AGAINST

YOUR CLIENT THAT IT WOULDN'T MAKE ANY DIFFERENCE, AND I WOULD APPRECIATE IT IF YOU WOULD RESPOND TO THAT, FROM HERE ON, IN TERMS OF THE ENTITLEMENT TO THE DNA TESSING.

BECAUSE, INCLUDING THE STATEMENTS OF THE DEFENDANT, AND, TALKS ABOUT THERE ONLY BEING A CONVICTION FOR ATTEMPTED SEXUAL BATTERY, BUT, AT LEAST THE MAJOR THRUST THAT I GET FROM THE TRIAL JUDGE'S ORDER IS THAT, WELL, THE EVIDENCE HERE IS SO OVERWHELMING, THAT IT WILL NOT MAKE ANY DIFFERENCE.

SO, WOULD YOU ADDRESS THAT?

>> SURE.

FIRST OF ALL, I THINK IT IS NOT THAT OVERWHELMING, IF YOU REALLY LOOK AT IT, PIECE BY PIECE.

THE MOST DAMNING EVIDENCE OF COURSE WAS HIS PROXIMITY TO THE CRIME SCENE.

OKAY?

BUT, YOU LOOK AT THE OTHER EVIDENCE, AND I -- OUTLINED --

>> WITH ALL DUE RESPECT WE CAN'T LOOK AT A PIECE BY PIECE.

THE EVIDENCE HAS TO BE LOOKED AT IN ITS CONTEXT AND ALL BE CONSIDERED TOGETHER AND LOOKING AT A PIECE BY PIECE THAT IS JUST... NOT WHAT WE'RE CALLED ON TO DO, IS IT?

>> YES, EXACTLY.

I'M ASKING YOU TO ACTUALLY LOOK AT IT IN CONTEXT AND THE CONTEXT WAS THAT THE MAIN THRUST OF THE STATE'S CASE WAS TO SAY THIS BLACK MAN RAPED THIS WHITE WOMAN, AND HE KILLED HER.

THE RAPE WAS THE ABSOLUTE CENTRAL ISSUE AND THAT IS WHAT THE TRIAL COURT MISSED.

THE TRIAL COURT SAID, WELL, THERE WAS NO EVIDENCE THAT A RAPE OCCURRED AND THAT WASN'T ARGUED BY THE STATE.

--

>> WAIT A MINUTE.

WAIT A MINUTE.

HERE YOU HAVE A SITUATION, IN WHICH THIS TOOK PLACE, IN 7

MINUTES, BECAUSE THE VICTIM WAS CALLED AT 1:00.

AND SOMEONE -- THE AGENT OF THE -- STATE FARM AGENT ARRIVED AT 1:07.

>> RIGHT.

>> THAT THEY WERE -- AND THAT THE -- BATES WAS OUT BACK OF THE OFFICE.

THE WOMAN'S BODY WAS FOUND OUT BACK.

OF THE OFFICE.

HE HAD HER -- A PIECE OF JEWELRY IN HIS POCKET.

>> WELL, THAT WAS ONE OF THINGS I WANTED TO POINT OUT TO THE COURT.

ALL OF THESE LITTLE DETAILS, ONE, HE WAS FOUND IN AN AREA OF CATTAILS, WASN'T DIRECTLY BEHIND THE BUILDING, IT WAS OFF TO THE SIDE.

AND THE DETAILS ABOUT THE CRIME, WHICH IS WHAT I WAS TALK ABOUT BEFORE, SUCH AS THE RING SUPPOSEDLY FOUND ON MR. BATES AT THE TIME OF THE CRIME, THE VICTIM IDENTIFIED IT AS A YELLOW-GOLD RING WHEN THE POLICE REPORTS SHOW THE RING TAKEN FROM MR. BATES WAS YELLOW-GOLD, THE TIME --

>> WHAT IS MR. -- DOES MR. BATES SAY ABOUT THE RING.

>> HE SAID HE HAD FOUND THE RING.

THAT HE HAD FOUND IT IN FRONT OF THE OFFICE, AND THAT IT WAS -- AND THE POLICE REPORT SAID THAT IT WAS A, BASICALLY A WHITE GOLD WHICH WOULD BE A SILVER RING --

>> I WANTED TO MAKE SURE, WE ARE GOING AROUND, I DON'T KNOW YOU EVER ANSWERED MY QUESTION, AND IT'S NOT YOUR FAULT.

>> PROBABLY NOT.

>> WE ARE VERY INTENSE IN OUR QUESTIONING.

IT SOUNDS LIKE WHAT YOU ARE FOCUSING ON IS GETTING THE DRIFT HERE IS THAT YOU WOULD TEST THE PIECES OF EVIDENCE, THAT WOULD PROVE HE -- DISPROVE HE ATTEMPTED TO RAPE HER.

IF YOU DO DISPROVE HE ATTEMPTED TO RAPE HER A LOT OF THESE OTHER ISSUES WOULD BE -- MAKE HIM AT THE WRONG PLACE AT THE WRONG TIME BUT IT WOULD BE HIGHLY EXCULPATORY OR IF IT IS OBVIOUSLY HIS WOULD HAVE NAILED IT.

>> CORRECT.

>> SO YOU ARE SAYING, PANTIES AN RAPE KIT AND WHAT WOULD YOU SAY, AGAIN, GIVING THE TOP THREE.

>> THERE WERE OTHER SWABS, SWABS THAT WERE INTERNAL, AS FAR THAT'S RAPE KIT, THERE WERE EXTERNAL SWABS THAT WERE TAKEN.

>> ARE THESE ALL STILL IN EXISTENCE.

>> YES, THEY ARE ALL WITH THE CLERK'S OFFICE IN BAY COUNTY.

>> BUT LET'S GO BACK.

YOU KNOW, YOU STARTED THIS -- DOWN THIS TRAIL ABOUT -- THIS WAS REALLY A CASE ABOUT RACE BECAUSE THE VICTIM WAS WHITE AND THE DEFENDANT WAS BLACK.

BUT, LET'S -- LET'S GET BACK TO THE REAL EVIDENCE THAT CONNECTS MR. BATES TO THIS CRIME.

I MEAN, YOU TALK ABOUT HIM JUST BEING IN PROXIMITY TO THE AREA. AND THERE MIGHT HAVE BEEN DISCREPANCY IN THE RING AND WASN'T HER BLOOD FOUND ON HIS CLOTHES?

>> THERE WAS A BLOOD --ED.

>> A FIBER FROM HIS PANTS, FOUND ON THE VICTIM?

WASN'T THERE SEMEN ON HIS ZIPPER AND THERE WAS A KNIFE CHASE THAT -- A KNIFE THAT WAS SIMILAR TO HIS, AND HIS WATCH, I MEAN, ONE OF THE THINGS THAT REALLY GETS ME IS HIS WATCH IS BROKEN AND MISSING A STEM AND WHERE IS THE STEM?

IN THE OFFICE.

SO, IT SEEMS TO ME WE HAVE A LOT MORE HERE THAN JUST A POSSIBLE RAPE THAT CONNECTED THE MAN TO THE CRIME.

>> WELL, THAT'S WHAT I WANTED TO ADDRESS.

PARTICULARLY WITH THE WATCH,

WATCH PIN, THIS PIN WAS NOT FOUND IMMEDIATELY AFTER THE CRIME.

IT WAS ONLY AFTER FINDING A WATCH IN MR. BATES' POCKET THAT HAD A PIN MISSING THAT THEY BEGAN LOOKING FOR SOMETHING LIKE A WATCH PIN AND THE WATCH PIN WAS NEVER CONCLUSIVELY SHOWN BY THE EXPERTS TO ACTUALLY BELONG TO THIS WATCH.

IT WAS ONLY -- THEY WERE ONLY ABLE TO SAY, WELL, IT COULD HAVE BEEN.

AND, THAT IS THE SAME THING WITH THE KNIFE, THE MURDER WEAPON WAS NEVER FOUND AND THE KNIFE SHEATH THEY FOUND, THEY COULD NEVER SAY CONCLUSIVELY WAS CONNECTED TO THE CRIME.

THE BLUE CORD THAT WAS FOUND IN THE AREA, THEY SAID IT WAS CONSISTENT, COULD NEVER SAY CONCLUSIVELY THAT IT WAS, IT WAS THE SAME THING WITH THE BLOOD ON THE SHIRT.

IT WAS ONLY BLOOD TYPING.

>> THERE ARE VAST NUMBERS OF PEOPLE IN THE POPULATION THAT COULD DO THIS VERY VAGUE BLOOD TYPING.

IT WAS VERY PRIMITIVE AT THE TIME.

>> YOU KNOW WHEN YOU GET ALL OF THESE PIECES OF EVIDENCE.

MOST CASES, LOTS OF CASES ANYWAY, THERE IS NO EYEWITNESS TO THE CRIME.

>> CORRECT.

>> YOU TAKE EVERY LITTLE PIECE OF EVIDENCE, AND PUT IT TOGETHER AND IT SEEMS TO ME IN THIS CASE, ALL OF THESE PIECES OF EVIDENCE, AND MR. BATES BEING RIGHT THERE AT THE SCENE, I DON'T SEE HOW YOU CAN GET AWAY FROM THE FACT THAT MR. BATES WAS INVOLVED IN THIS CRIME.

>> WELL, THERE CERTAINLY -- THERE WERE CERTAINLY A LOT OF OF CIRCUMSTANCE EVIDENCE THAT -- AND THAT THE TRIAL COURT CERTAINLY FOCUSED ON HIS DENIAL OF DNA TESTING ON THE ISSUE OF

EXONERATION.

BUT HE NEVER ADDRESSED WHETHER THE MITIGATION ASPECT OF THE STATUTE -- THE STATUTE ALSO DEALS WITH THAT.

>> WHAT DO YOU FIND WOULD BE THE... TESTING THAT THIS -- THE SEMEN OR BLOOD OR WHATEVER... DOUBT DOES NOT BELONG TO YOUR CLIENT?

WHAT DO YOU CLAIM WOULD BE THE CONSEQUENCE OF THAT AS FAR AS WHAT LIGHT THAT WOULD PUT THE CASE IN IN.

>> WELL, I THINK IT WOULD HAVE TWOFOLD EFFECT.

FIRST OF ALL, I WOULD ARGUE THAT IT IS MITIGATING. IT WOULD GO DIRECTLY AGAINST THE AGGRAVATING CIRCUMSTANCES OF THE SEXUAL BATTERY OR AN ATTEMPTED SEXUAL BATTERY AND REMEMBER, THE 1995 RESENTENCING, THE JURY WAS TOLD THEY HAD TO ACCEPT THAT HE HAD BEEN CONVICTED OF ATTEMPTED SEXUAL BATTERY.

AT THE ORIGINAL TRIAL IN 1983, THE RAPE WAS THE FEATURE OF THE CASE.

IF YOU LOOK AT THE CLOSING ARGUMENTS, OF THE PROSECUTION, THE RAPE WAS THE MAIN FEATURE. AND --

>> WEREN'T THERE OTHER FELONIES COMMITTED, WASN'T HE ALSO CONVICTED OF KIDNAPPING AND ROBBERY AND SO, ONE THOSE ALSO SUPPORT --

>> THEY WOULD, THEY WOULD. BUT I THINK, YOU KNOW, IF WE'RE ALL BEING HONEST HERE, THE DIFFERENCE BETWEEN ARGUING A RAPE, AND A MURDER, VERSUS ROBBERY AND A MURDER, YOU ARE -- COMPLETELY DIFFERENT THINGS WHEN LOOKING AT JURORS, IT IS VERY EGREGIOUS, FACTUALLY TO ARGUE ABOUT A SEXUAL BATTERY IN BAY COUNTY, OF A BLACK MAN RAPING A WHITE WOMAN IN PANAMA CITY IN 1983.

I MEAN, YOU HAVE TO -- AS JUDGE CANADY SAYS YOU HAVE TO LOOK AT IT IN CONTEXT OF WHAT WAS

HAPPENING.

THE TESTING WAS INCONCLUSIVE.  
THE BEST THEY COULD DO WAS BLOOD  
TYPING.

AND NOW, WE HAVE THE ABILITY TO  
GO BACK AND FIND IT OUT.

AND I THINK THAT -- I THINK THIS  
JUDGE NEVER ADDRESSED --

>> BUT WHAT WE'RE DEALING WITH  
IS THAT, WE ARE DEALING WITH A  
SITUATION, IN WHICH OUR RULE AND  
THE RULES FASHIONED UNDER THE  
STATUTE SAYS THERE HAS TO BE A  
REASONABLE PROBABILITY INTO  
CORRECT.

>> OF AN ACQUITTAL.

>> OR A LESSER SENTENCE.

>> OR A LESSER SENTENCE.

>> THAT IS WHAT I'M ARGUING, HAD  
IT BEEN PRESENTED.

>> BUT THE REASONABLE  
PROBABILITY IS WHAT I'M HUNG UP  
ON.

AND HERE YOU'VE GOT A SITUATION  
IN WHICH, THERE WAS EVIDENCE AS  
TO SEMEN THAT SHY AND HER  
HUSBAND HAD HAD -- SHE AND HER  
HUSBAND HAD HAD SEXUAL  
INTERCOURSE, THERE WAS TESTIMONY  
ABOUT THAT, THERE WAS... AND  
THAT THE WHOLE FACT HERE WAS  
THAT WHEN YOU ARE DEALING WITH  
SOMEBODY THAT IS CAUGHT RIGHT  
THERE AT THE SCENE --

>> LIKE I SAID BEFORE THE  
PROXIMITY TO THE CRIME THAT IS  
THE MOST DAMNING EVIDENCE.

>> THAT YOUR DEALING WITH IT.  
THAT IT IS HARD TO, SEEMS TO ME,  
TO CARRY THE BURDEN OF  
REASONABLE PROBABILITY.

>> WHEN YOU LOOK AT IT THROUGH  
THIS LENS OF A REASONABLE  
PROBABILITY OF A LESSER  
SENTENCE, LOOK BACK AT WHAT THE  
JURY SAW, BACK IN 1995.

AT THE RESENTENCING.

THE JURY, AT THAT POINT, I  
THINK, IT WAS A 9-3 DEATH VOTE  
AND LOOK BACK THAT THE JURY'S  
QUESTIONS, THAT THEY SENT OUT TO  
THE JUDGE, DURING DELIBERATIONS.

>> NOT THIS....

>> THE 1995 RESENTENCING THE

JURY QUESTIONED WHETHER THEY  
COULD SENTENCE HIM TO LIFE  
WITHOUT PAROLE.  
BECAUSE AT THE TIME OF THE  
RESENTENCING HE HAD ALREADY DONE  
ALMOST THE FULL 25 YEARS.  
SO, I THINK YOU HAVE TO LOOK AT  
IT, WOULD IT HAVE AFFECTED THE  
JURY IF WE HAD EVIDENCE THAT  
SHOWED NONE OF THE BIOLOGICAL  
MATERIAL MATCHED MR. BATES.  
THAT IS MITIGATING AND HE MAY  
HAVE BEEN GIVEN A LIFE SENTENCE  
ON THAT BASIS.

AND JUDGE -- THE JUDGE NEVER  
ADDRESSES THAT, HIS LENS IS ONLY  
NARROWLY FOCUSED ON EXONERATION  
AND UNDER THE STATUTE YOU HAVE  
TO LOOK AT BOTH.

YOU CANE JUST LOOK AT  
EXONERATION.

>> YOU WILL ARGUE -- INTO YOUR  
REBUTTAL.

IF YOU WILL ARGUE THE SECOND  
ISSUE.

>> I ALWAYS DO THAT!

YES.

JUDGE, WITH REGARD TO THE SECOND  
ISSUE, DEALS WITH THE  
RESENTENCING IN 1995.

AND IN THAT INSTANCE, TRIAL  
COUNSEL FAILED TO PUT ON  
EVIDENCE OF ORGANIC BRAIN DAMAGE  
THOUGH HE HAD THE EXPERT IN THE  
COURTHOUSE --

>> I THINK ON THAT ONE, YOU NO,  
YOU HAD AN EVIDENTIARY HEARING  
ON THAT.

>> YES, WE DID.

>> AND THE LAWYER TESTIFIED AS  
TO WHY HE DIDN'T PUT THE DOCTOR  
ON, SO IT IS A KNOWING DECISION  
AND YOU KNOW, I LOOK AT -- I'M A  
BIG FAN OF, IF THERE IS BRAIN  
DAMAGE, BUT, HERE, REALLY THE  
FOCUS WAS MORE ON THE  
IMPULSIVITY AND THIS WHAT HE DID  
UNDER STRESS AND YOU HAD TWO  
OTHER EXPERTS WHO TESTIFIED TO  
THAT.

SO, SEEMS TO ME THAT YOU DID  
HAVE THE -- TO OVERCOME THE TWO  
HURDLES THERE OF SHOWING THAT  
THE JUDGE'S FACTUAL TIMING, THE

STRATEGY, IS WRONG, AND THAT --  
OR THAT IT WOULD UNDERMINE OUR  
CONFIDENCE IN THE OUTCOME AND  
HAVE THE MRI, THOUGH WE KNOW,  
HAD BRAIN DAMAGE, WITH A NORMAL  
MRI, BUT STILL THAT WAS HIS  
REASON AND SEEMS LIKE IT IS A  
REASONABLE STRATEGY.

>> WELL, I THINK MR. DUNN  
TESTIFIED THAT HE DIDN'T HAVE A  
STRATEGY OR TACTICAL REASON FOR  
DOING THAT AND --

>> STRATEGY, THE WORD STRATEGY,  
BUT HE SAID I DECIDED NOT TO DO  
IT

>> RIGHT.

>> BECAUSE I WAS CONCERNED ABOUT  
--

>> THE NORMAL MRI.

CORRECT, THE STATE HAD DONE OVER  
THE LUNCH HOUR.

AND I THINK THAT THE PROBLEM  
HERE IS THAT WAS IT REASONABLE  
FOR COUNSEL NOT EVEN TO DISCUSS  
WITH DR. CROWN, HE WAS THE ONLY  
ONE WHO DID NEUROPSYCHOLOGICAL  
TESTING IN THE CASE AND WOULD A  
REASONABLE ATTORNEY NOT HAVE  
DISCUSSED IT WITH THE EXPERT  
WHEN THE EXPERT HAD THE ABILITY  
AND THE EXPERTISE TO COMPLETELY  
REBUT THE STATE'S NORMAL MRI AND

I THINK THAT IS THE ISSUE, WHAT  
A REASONABLE ATTORNEY FAILED TO  
EVEN TALK TO THE EXPERT.

BEFORE MAKING HIS DECISION NOT  
TO PUT HIM ON.

THAT THIS IS PROBLEM WITH THIS  
CASE.

AND I SEE I'M WAY INTO MY  
REBUTTAL TIME.

I'LL SIT DOWN.

THANK YOU.

>> GOOD MORNING, MAY IT PLEASE  
THIS COURT, I'M MEREDITH  
CHARBULA, AN ASSISTANT ATTORNEY  
GENERAL AND I REPRESENT THE  
STATE.

IN THE APPEAL.

I THINK THAT THE COURT IS  
ESPECIALLY INTERESTED IN THE DNA  
MOTION, SO IF --

>> I THINK WE ARE INTERESTED

BECAUSE THAT IS WHAT WAS TALKED ABOUT.

GIVE ME -- WE HEAR -- AND I UNDERSTAND ALL OF THE ARGUMENT ABOUT THE OVERWHELMING EVIDENCE OF GUILT.

BUT, WE ALSO CAN'T BE, AS FAR AS -- WHEN I LOOK AT THE DNA TESTING, WE HAVE BEEN PRETTY CONSISTENT ABOUT DENYING IT, IF THERE DOESN'T LOOK LIKE THERE IS GOING TO BE ANYTHING THAT IS --... OVERWHELMING EVIDENCE. MY CONCERN HERE IS THAT IF WE GOT THE EVIDENCE, AND THE DNA TEST COULD SAY, IT WASN'T HIS SEMEN, I, YOU KNOW, I CAN'T SAY THAT IT IS EITHER UNDER THE LIFE SENTENCE ISSUE OR THE DEATH SENTENCE, THAT IT WOULDN'T, YOU KNOW, WOULDN'T MAKE A BIG DIFFERENCE AND MIGHT MAKE A BIG DIFFERENCE TO THE STATED.

I DON'T KNOW.

WHY -- TELL ME, AND HELP ME WITH -- MAYBE I'M LIKE THIS PERSON THAT LIKES TO HAVE ALL THE INFORMATION.

AND THAT IS -- I'M THINKING ABOUT THAT, I'D LIKE TO KNOW IT, IF IT EITHER NAILS THEM OR MIGHT BE, WHOA!

IT'S NOT HIS DNA.

WHAT IS THIS STATE'S POSITION, AS TO THAT ASPECT?

AND WE KNOW THERE IS ALL OF THIS OTHER EVIDENCE BUT I THINK MS. BACKUS DID YOU A PRETTY GOOD JOB SHOWING IN THE END, WHEN YOU GO TO THE GUILT PHASE, HEY, 1983, BAY COUNTY, BLACK MAN RAPING A WHITE WOMAN, AND HE'S EXPECT CONVICTED OF ATTEMPTED SEXUAL BATTERY IS PRETTY POWERFUL STUFF.

>> I THINK YOU WILL SEE OTHER CASES IN THE '80s AN '90s AND ORM, MAN RAYMOND A WHITE WOMAN AND THE DEATH PENALTY WAS SOUGHT IN THAT CASE.

>> OF COURSE IF HE -- IF HE DID ALL THESE THINGS AN EVEN IF HE DIDN'T RAPE MAYBE IT WOULDN'T MAKE A DIFFERENCE, BUT, THE

STATE RELIED ON THE ATTEMPTED RAPE PART AS PART OF THE PHYSICAL EVIDENCE THAT PLACES HIM AS BEING THE PERPETRATOR OF THE RAPE, ATTEMPTED RAPE AND MURDER.

>> YES, MA'AM.

I THINK, YOU KNOW, I THINK THIS THRUST WHEN LOOK AT HER MOTION FOR DNA TESTING, THE THRUST WAS AT THE GUILT PHASE, TOWARD THE FILTER GAZE -- GUILT PHASE AND WHY THE COLLATERAL COURT FOCUSED ON THAT AND IT IS TWO SEPARATE ANALYSES FOR THE GUILT PHASE, FIRST THE EVIDENCE AS JUDGE SIRMONS FOUND WAS OVERWHELMING AND THAT IS WHAT HE BASED IT ON AND PLUS, MR. BATES, MR. WHITE, RANDY WHITE TESTIFIED THAT HE HAD HAD SEXUAL INTERCOURSE WITH HIS WIFE TWO DAYS BEFORE THE MURDER AND THE MEDICAL EXAMINER TESTIFIED THAT SEMEN COULD REMAIN IN THE VAGINAL CAVITY UP TO THREE DAYS AND SO THE JURY HAD AN EXPLANATION FOR THE SEMEN ALTERNATIVELY TO MR. BATES AND YOU SEE IN THE ACQUIT OF SEXUAL BATTERY THAT THEY BELIEVED THAT STORY.

BELIEVED THAT TESTIMONY, THAT MR. BATES TESTIFIED, TOLD THE POLICE THAT HE HAD TAKEN HIS PENIS OUT AND EJACULATED AND HE WAS ASKED IS THAT WHY YOU DIDN'T FINISH HAVING SEX WITH HER, ANSWER, YES.

THE VICTIM WAS FOUND NAKED FROM THE WAIST DOWN.

AND THOSE TWO PIECES OF EVIDENCE COUPLED WITH --

>> I GUESS THIS ONE I WAS LOOKING AT.

THE POSTCONVICTION COURT, ... GREENSPAN HAD THE VICTIM'S BLOOD TYPE ON THEM.

>> YES, MA'AM BUT IT IS SIMPLY -- A COUPLE THINGS I THINK ARE MISREAD OF THE RECORD. IT IS NOT TRUE ABOUT THE BLOOD TYPE.

>> HOLD ON --

>> I'M SORRY, YOUR HONOR.

>> THE POSTCONVICTION COURT.  
WHAT THE POSTCONVICTION COURT  
SAID THE GREENSPAN HAD THE  
VICTIM'S BLOOD ON IT, AN EXPERT  
IN FORENSIC MICRO ROW ANALYSIS  
CONCLUDED A GREEN FIBER FOUND IN  
THE SKIRT WAS SIMILAR TO THE  
FABRIC OF THE GREEN PANTS AND  
THE VICTIM AND BATES BOTH HAD  
SEMEN ON THEIR UNDERWEAR AND I  
GUESS I UNDERSTOOD WHAT WAS  
BEING TESTED WOULD BE THE  
UNDERWEAR OF BOTH BATES AND THE  
VICTIM.

NOW, IF THE ... AND YOU ARE  
SAYING THAT WON'T MATTER,  
WHATEVER IT COMES UP WITH, IT  
MIGHT NOT BE HIS SEMEN?

>> WELL, HIS SEMEN IS ON THE  
UNDERWEAR, OF COURSE THERE WAS  
NO SEAR LOCAL CALL -- THERE WAS  
SEAR LOGICAL TESTING AND THE  
ONLY THING THAT CAME BACK TO HIS  
UNDERWEAR WAS A PGM FACTOR AND  
COUNSEL SAID THE ONLY TYPE OF  
TESTING DONE ON THE BLOOD WAS  
BLOOD TYPING BUT, THEY DID BLOOD  
TYPING BUS FOUR ENZYMES, ALL OF  
WHICH -- PLUS FOUR ENZYMES AND  
ALL OF WHICH WERE FOUND, BATES'  
SHIRTS AND RENE WHITE'S BLOOD  
WAS FOUND AND BLOOD TYPING PLUS  
FOUR ENZYMES EXCLUDED HIM AS A  
CONTRIBUTOR.

MS. WHITE'S BLOOD WAS FOUND ON  
HIS PAN AND BLOOD TYPING PLUS  
FOUR ENZYMES, EXCLUDED BATES AS  
A CONTRIBUTOR, HER BLOOD ON HER  
CLOTHING.

SO, WE HAVE MORE THAN JUST AB --  
A/BO TESTING ON THE BLOOD.

IT IS LOGICAL THE SEMEN BELONGED  
TO BATES FOUND ON THE FLY OF HIS  
UNDERWEAR BELONGED TO ANYBODY  
BUT BATES, AND, IT WAS  
CONSISTENT WITH HIS OWN  
CONFESSION TO THE POLICE, THAT  
HE TOOK HIS PENIS OUT OF HIS PAN  
AND EJACULATED AND WHY HE DIDN'T  
FINISH HAVING SEX WITH HER AND  
INSOFAR AS HER SEMEN IN HER  
VAGINAL CAVITY AND FOUND IN THE  
CROTCH AREA CONSISTENT WITH  
SEEPAGE THE JURY REJECTED THAT

HE RAPED HER, THEY FOUND HIM GUILTY ONLY OF ATTEMPTED SEXUAL BATTERY AND DNA TESTING WILL NOT EXONERATE HIM FROM ATTEMPTED SEXUAL BATTERY BECAUSE THE EVIDENCE SUPPORTING THAT WAS, WE'LL NOT GO WITH DNA TESTING, SHE'S NAKED FROM WAIST DOWN ND HE HAS SEMEN ON THE TROUSERS, UNDERWEAR AND HE CONFESSED HE TOOK HIS PENIS OUT AND EJACULATED AND DNA TESTING WILL NOT CLEAR HIM AND YOU HAVE TO REMEMBER...

>> THAT EXPLANATION FRANKLY IS MUCH -- I THINK YOU HAVE NOW HONED IN ON SOMETHING AND THAT I THINK THAT SOUNDS LIKE A GOOD REBUTTAL TO WHAT MS. BACKUS IS ARGUING.

>> HOPE SO.

>> FOCUSED ON SOMETHING AND -- THAT WOULD CHANGE -- CHANGES MY VIEW ABOUT THAT.

>> AND IF YOU GO TO SENTENCING, HER ISSUE NOW IS, GO TO THE SENTENCING, WELL, AT SENTENCING YOU WILL SEE, ATTEMPTED SEXUAL BATTERY WAS NOT THE FOCUS, WHATSOEVER.

THIS PROSECUTOR MENTIONED IN HIS CLOSING ARGUMENT ONE TIME, WELL, WE HAVE SEMEN AND HIS CONFESSION THAT HE EJACULATED.

THAT IS ALL THEY ARGUED ABOUT THE SEXUAL BATTERY.

THE ATTEMPTED SEXUAL BATTERY WAS NOT THE FOCUS OF THE 1995 RESENTENCING AT ALL.

NO TESTIMONY ABOUT THE SEMEN IN THE VAGINA.

>> WASN'T THAT VIEWED AS THE PRIOR VIOLENT FELONY, A PART OF THE PRIOR --

>> PART BUT WHEN LOOK AT THE ARGUMENT TO -- FOR ANY NOTION THE ATTEMPTED SEXUAL BATTERY WAS ANY MORE OF A FEATURE, AS IT WAS IN THE ORIGINAL TRIAL, IT WASN'T.

THE PRIMARY WAS THE KIDNAPPING AND THE ROBBERY, IN FACT THE PROSECUTOR'S ARGUMENT THROUGH RESENTENCING WAS --

>> COULDN'T BE USED BECAUSE IT WOULD BE USED FOR THE --

>> THAT'S CORRECT.

THAT'S CORRECT, HE DID ARGUE THE -- THE FACT THAT THE RING WAS RIPPED OFF THE FINGER AND THERE IS NO MISIDENTIFICATION OF THE RING.

WHAT MS. BACKUS IS REFERRING TO IS A MISREAD OF THE RECORD, IF YOU LOOK AT THE TRIAL TRANSCRIPT AT VOLUME 1, PAGE 294, RANDY IS DESCRIBING ANOTHER RING THAT HIS WIFE HAD, A SMALL YELLOW-GOLD RING WITH A DIAMOND IN IT.

YOU LOOK AT THE AUTOPSY PHOTOS OR THE CRIME SCENE PHOTOS YOU SEE IT IS STILL ON HER RIGHT RING FINGER.

MR. WHITE POSITIVELY IDENTIFIED THE WEDDING RING THAT MR. BATES HAD IN HIS POCKET AS HIS WIFE'S WEDDING RING AND, ALSO THE PHOTOS, YOU HAVE THE PHOTOS OF THE INJURIES ON HER LEFT HAND, THERE ARE INJURIES TO HER LEFT FINGER AND HER MIDDLE LEFT FINGER, YOU'LL SEE CONSISTENT WITH BATES' RIPPING THE RING OFF HER HAND, WHILE SHE IS STILL ALIVE?

IS THERE ANYTHING, THIS FINGERPRINTS WERE NOT FOUND IN THE STATE FARM OFFICE.

>> HIS FINGERPRINTS WERE NOT FOUND BUT A WATCH PIN WAS FOUND, THAT WAS THE SAME SIZE, THE SAME COLOR, THE SAME CUT, THE SAME MATERIAL.

AS HIS WATCH AND MRS. WHITE HAD A WATCH ON AT THE TIME, AND YOU SEE THAT IN THE PHOTOS, WHICH WAS INTACT.

>> AND MR. BATES' WATCH WAS MISSING.

>> ABSOLUTELY.

IT WAS FOUND IN HIS POCKET, HE INITIALLY TOLD THE POLICE THAT HE HAD NEVER BEEN IN THE STATE FARM OFFICE AND THEN TOLD THE POLICE THAT HE HAD -- WHEN HE WAS CONFRONTED WITH THE WATCH PIN THAT HE HAD SEEN A WHITE MAN STRUGGLING WITH MS. WHITE, RAN

IN TO BE GALLANT TO SAVE HER,  
AND THAT IS WHERE THE WATCH PIN  
AND ALSO WHERE HIS LIP GOT  
BUSTED AND MUST HAVE WATCHED THE  
WATCH -- LOST THE WATCH PIN AND  
AT TRIAL RECANTED TO NEVER BEING  
ACTUALLY INSIDE AND HE JUST  
FOUND HER BODY AND DOESN'T  
EXPLAIN THE PRESENCE OF THE  
WATCH PIN.

>> AND THIS EXPERT PROPERLY  
SAID, I CAN'T TESTIFY THAT WAS  
THE WATCH PIN UNLESS I WATCH IT  
FALL OUT OF THE WATCH BUT I CAN  
TELL YOU IT'S THE SAME SIZE,  
SAME CUT, THE SAME CONSISTENCY,  
THE SAME MATERIAL.  
THE SAME COLOR.

SO, ANY NOTION THAT THAT IS NOT  
BATES' WATCH PIN, WHEN HIS WATCH  
IS FOUND IN HIS POCKET WITH THE  
PIN MISSING IS SIMPLY NOT A  
REASONABLE INFERENCE FROM THE  
EVIDENCE.

>> I'D LIKE TO ASK ON DR. CROWN  
AND I THINK I KNOW THE ANSWER TO  
THIS, BUT, THE BACKGROUND FOR  
MR. ... NOT ULTIMATELY...

(Inaudible) WANTED A BEHAVIORAL  
NEUROLOGIST AND REQUESTED ALL OF  
THESE OTHER TESTS BE DONE ON  
MR. BATES.

(Inaudible)... CONSTANTLY FOR IT  
AND HE SAID HE NEEDED TO HAVE  
THAT BETTER TO BE ABLE TO CROSS  
EXAMINE THE MRI.

>> EXACTLY.

>> IT WAS DENIED AND THAT ISSUE  
WAS RAISED ON APPEAL INTO IT  
WAS.

>> AND REJECTED.

>> AND HE SAID HOW DID THE  
STATE'S PRESENTATION OF THE MRI  
RESULT... (Inaudible) I'M  
TRYING TO FIGURE OUT MY  
REASONING AND I -- HE DIDN'T  
FEEL HE COULD THEN EFFECTIVELY  
CROSS EXAMINE SO, IS THE ISSUE  
THEN OF WHAT HE DID AND THE FACT  
THAT THE COURTS DID NOT ALLOW  
ADDITIONAL TESTING.  
THAT IS ALREADY DECIDED ON  
APPEAL, THAT THAT WAS NOT ERROR.  
>> YES, YOUR HONOR.

>> WE HAVE TO ACCEPT THAT AND REALLY SAY THAT IN LIGHT OF WHAT HE WAS FACED WITH, HE MADE THE BEST DECISION AVAILABLE.

>> YES, YOUR HONOR AND I THINK THERE ARE TWO THINGS.

NUMBER ONE, THE COURT HAND DENY IT BECAUSE IT WAS A REASON -- CAN DENY IT BECAUSE IT WAS A REASONABLE STRATEGIC DECISION AND THE RECORD REFUSED ANY NOTION THAT TRIAL COUNSEL DID NOT -- REFUSED ANY NOTION THAT TRIAL COUNSEL DID NOT TALK TO DR. CROWN AND FIND OUT THAT DR. CROWN WOULD TESTIFY THAT HIS KIND OF BRAIN DAMAGE WAS FUNCTIONAL BRAIN DAMAGE, WOULD NOT SHOW UP ON AN MRI.

WE KNOW IT IS EVEN IN THIS COURT'S OPINION, DOWN ON DIRECT APPEAL FROM THE RESENTENCING, IS MR. DUNN TOLD THE TRIAL COURT WHEN HE WAS OPPOSING THE STATE'S EFFORTS TO GET AN MRI, HE SAID, LOOK, JUDGE, THIS IS NOT GOING TO HELP ANYTHING.

MY -- DR. CROWN -- THE KIND OF BRAIN DAMAGE THAT DR. CROWN TESTIFIES WON'T SHOW UP ON AN MRI BECAUSE IT IS FUNCTIONAL, NOT STRUCTURAL AND HE KNEW THAT.

>> SO WHY DIDN'T HE PUT CROWN ON IF ALL HE HAD TO SAY TO THE MRI GUY IS, YOU ARE DEALING WITH -- FUNCTIONAL BRAIN DAMAGE, AND YOU ARE TALKING ABOUT YOU DON'T EXPECT TO -- HE COULD HAVE HAD CROWN SAY THAT AND CROSS EXAMINED HIM.

>> HE COULD HAVE BUT HERE'S -- OF COURSE HE COULD HAVE, A METICULOUS LITIGATOR DOES NOT CHANCE THE JURY MIGHT PUT MORE WEIGHT ON THAT NORMAL MRI BECAUSE, YOU CAN -- I MEAN, A PSYCHOLOGIST CAN SAY ANYTHING AND THE JURY MIGHT SAY, LOOK, OKAY I HAVE BRAIN DAMAGE THAT DOESN'T SHOW UP BUT AN MRI AND I THINK, TRIAL COUNSEL AND I THINK HIS TESTIMONY, DESPITE HIS EFFORTS TO FOLLOW THE EVIDENTIARY HEARING, HE KNEW

THAT THERE WAS A POSSIBILITY THAT THE JURY WOULD PUT TOO MUCH EMPHASIS ON THIS THAT -- THAT MRI AND IF THEY DID NOT ONLY WOULD IT MAY BE IMPEACH DR. COUNT BUT MIGHT CAUSE THE JURY TO GIVE -- DR. CROWN BUT MIGHT CAUSE THE JURY TO GIVE LESS WEIGHT TO DR. LARSON AND ANY NOTION, HIS TESTIMONY AT THE EVIDENTIARY HEARING, REJECTED AS SELF-SERVING ANY NOTION THAT HE DIDN'T KNOW THAT HE COULD HAVE PUT ON THE BRAIN DAMAGE ANYWAY, BECAUSE DR. CROWN WOULD HAVE, YOU KNOW, SAID IT DOESN'T SHOW UP IS REFUTED BY WHAT HE SAID AT TRIAL.

AND, ALSO, THE EFFECT THAT HE DID NOT QUESTION DR. LARSON ABOUT BRAIN DAMAGE, DR. LARSON TESTIFIED IN THE JANUARY 1995 PENALTY PHASE WHICH WAS RESULTED IN A MISTRIAL BECAUSE THE JUROR WITHHELD INADVERTENTLY INFORMATION ABOUT HIS WIFE BEING THE VICTIM OF A SEXUAL ASSAULT. THEY WENT THROUGH THE ENTIRE PENALTY PHASE IN JANUARY 1995, ONLY TO GET A MISTRIAL AT THE VERY LAST WITNESS.

>> WHAT -- IN THE EVIDENTIARY HEARING, WHAT DID THE BRAIN DAMAGE ADD TO THE MITIGATION.

>> THAT IS NOTHING.

AND THIS IS WHY.

THE BRAIN DAMAGE THAT DR. LARSON TESTIFIED ABOUT IN 1995, HAD TO DO WITH BASICALLY LEARNING DISABILITIES.

INABILITY TO ACADEMIC CHILLY ACHIEVE.

DR. CROWN WAS ESSENTIALLY THE SAME THING, HIS BRAIN DAMAGE, WHAT HE TESTIFIED TO, WAS IMPAIRMENTS AND PROBLEM SOLVING, PARTICULARLY RELATED TO LANGUAGE BASED CRITICAL THINKING.

HE HAS DIFFICULTY WITH MEMORY AND INFORMATION RETRIEVAL AND WE HAVE THAT SORT OF LEARNING DISABILITY-TYPE BRAIN DAMAGE. PLUS, DR. CROWN TESTIFIED THAT HIS KIND OF BRAIN DAMAGE WILL

ALSO MANIFEST ITSELF IN A LOW STRESS THRESHOLD, EXACTLY WHAT DR. LARSON TESTIFIED TO AT THE PEN ENACTMENT PHASE WHICH IS EXACTLY WHAT DR. -- PENALTY PHASE AND DR. LARSON TESTIFIED THAT, YOU KNOW, IN A SITUATION IN WHICH MR. BATES FOUND HIMSELF ON THE DAY OF THIS MURDER HE'D FREAK OUT AND LOSE IT.

DR. McMAHON TESTIFIED THAT, YOU KNOW, IN BATES FOUND HIMSELF IN A SITUATION, THOUGH HE CREATED IT HIMSELF, HE WOULD STRIKE OUT, ACT AGGRESSIVELY AND DO WHATEVER HE COULD TO GET OUT OF THE SITUATION, BECAUSE HE HAS THE LOW STRESS THRESHOLD.

>> DOESN'T THE JURY, I GUESS, IN LOOKING AT THIS, AND I THINK YOU PROBABLY -- THE PREJUDICE PRONG NEEDS TO KICK IN HERE BUT I WANT TO AT LEAST... IF THE JURY IS HEARING THAT IT IS PSYCHOLOGICAL MAKEUP BUT IF THEY HEAR THERE IS FUNCTIONAL BRAIN DAMAGE,

(Inaudible).

>> 24 AT THE TIME OF THE MURDER.

>> THERE IS AN EXPLANATION WITH THE WAY HIS BRAIN IS PUT TOGETHER.

DOESN'T THAT ADD, TALKING ABOUT A 9-4 JURY RECOMMENDATION, AND

--

>> 9-3.

>> 9-3 JURY RECOMMENDATION, THE JUDGE -- DID THE JUDGE FIND STATUTORY MITIGATION.

>> NO, BUT ONE CRITICAL THING ABOUT THAT, YOU HIT ON THE HEAD, BOTH DR. LARSON AND McMAHON SAID BOTH MITIGATORS APPLY AND DR. CROWN OFFERED TO OPINION AS TO THOSE.

>> (Inaudible).

>> YES, MA'AM AND DR. MCLAREN WAS CALLED BY THE STATE TO REBUT SUBSTANTIAL IMPAIRMENT AND EXTREME EMOTIONAL DISTURBANCE AND THIS JUDGE FOUND THAT HE WAS -- DIDN'T RATE STATUTORY MENTAL MITIGATORS BUT FOUND IT NONSTATUTORY BUT GAVE IT SIGNIFICANT WEIGHT AS HE DID THE

STATUTORY MITIGATION OF AGE AND GAVE IT SIGNIFICANT WEIGHT AND FOUND BOTH THAT HE WAS UNDER SOME EMOTIONAL DISTURBANCE AND HIS ABILITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT, TO PERFORM -- CONDUCT FOR THE REQUIREMENTS ALTHOUGH HE WAS IMPAIRED AND GAVE BOTH OF THOSE MITIGATORS SIGNIFICANT WEIGHT. SO, THE SAME AS HE DID, STATUTORY MITIGATOR AND FOUND THAT RELYING ON DR. LARSON AND ON DR. McMAHON AND IF YOU LOOK AT SIDE BY SIDE AT THE TESTIMONY, DR. McMAHON TESTIFIED -- WASN'T JUST HIS PERSONALITY. SHE TESTIFIED THAT HIS COGNITIVE OF TESTING SHOWS THAT HE DOESN'T HAVE A LOT OF INSIGHT INTO HIS OWN DYNAMICS, HE IS BORDERLINE TO AVERAGE INTELLIGENCE, AND HE WAS IQ OF 88, TESTED WHEN HE WAS 12, SHORT OF 13, AND 83, AND IQ TESTING IS CONSISTENT AND HAS NO MAJOR MENTAL ILLNESS AND DR. CROWN SAID HE HAS NO MAJOR MENTAL ILLNESS. HE'S ESSENTIALLY, DR. LARSON DIAGNOSED HIM WITH AN ANXIETY DISORDER AND DOCTOR, McMAHON CONCURRED WITH DR. LARSON'S FINDINGS AND HE COULDN'T FIND FAULT WITH DR. LARSON'S FINDING AT THE HEARING. DR. CROWN'S TESTIMONY WAS VERY VERY, SHORT AT THE EVIDENTIARY HEARING, TOOK 20 PAGES OF THE TRANSCRIPT AND FOCUSED A LOT OF IT ON THE FACT THAT THE BRAIN DAMAGE WOULDN'T SHOW UP ON AN MRI, AND THINGS THAT TRIAL COUNSEL KNEW AT THE TIME. AND AGAIN, YOU SEE HIS TACTICAL -- YOU SEE HIM AVOIDING BRAIN DAMAGE BECAUSE HE DID NOT, AS A METICULOUS LITIGATOR DID NOT WANT TO CHANCE THE JURY MIGHT SEIZE ON THE SCIENTIFIC EVIDENCE OF THE MRI BEING NORMAL, AND GIVING LESS WEIGHT TO DR. CROWN, AND DR. LARSON AND DR. McMAHON BECAUSE OF THE TESTIMONY OF DR. McMAHON AND DR. LARSON WHO

ESSENTIALLY CONCURRED WITH DR. CROWN, IN THAT HE HAS A LOW TOLERANCE FOR STRESS, UNDER STRESSFUL SITUATIONS HE'LL BREAK DOWN, DR. CROWN, THE EVIDENTIARY HEARING SAID HE'D HAVE A BREAK DOWN AND WOULD LOSE IT, EXACTLY WHAT DR. LARSON AND DR. McMAHON TESTIFIED.

HE'D LOSE IT AND BECOME UNWRAPPED AND WOULD RESORT TO PRIM BEHAVIOR, HIS STRIKEOUT, JUST TO GET OUT OF THE SITUATION.

YOU KNOW, WITH NO REAL --

>> WHAT WAS THE STRESSOR IN THIS PARTICULAR SITUATION?

I KNOW HE JUST BOUGHT A HOUSE AND THERE WERE THOSE KINDS OF THINGS, BUT, I'M TRYING TO -- MAYBE I SHOULD ASK YOUR OPPONENT, WHAT WAS ACTUALLY THE -- SUPPOSED TO BE THE STRESSOR THAT THAT WAS --

>> BREAKING INTO THE STATE FARM OFFICE -- WELL, THERE WERE STRESSORS DR. McMAHON OR LARSON TESTIFIED ABOUT, IS BUYING A NEW HOW, HAVING A BABY ON THE WAY, HE DIDN'T GET PROMOTED IN THE NATIONAL GUARD.

BUT I THINK IF YOU LOOK AT THIS TESTIMONY, WHAT THEY ARE REALLY TALKING ABOUT, THE STRESSORS WERE, NUMBER ONE, HE --

PRESUMING THAT HIS INTENT WAS BURGLARY, WHICH I THINK THE JURY FOUND BY THE IN THE GUILTY, OF SEXUAL BATTERY, PRESENTING THE INTENT WAS BURGLARY AND ONE WITNESS SAID HE NEEDED MONEY, HAD NOT GOTTEN PROMOTED.

GOT CAUGHT IN THE ACT AND MS. WHITE ATTEMPTED TO DEFEND HERSELF IN THAT OFFICE, BY SPRAYING HIM WITH MACE, AND HE GOT MACE ACCORDING TO HIS CONFESSION ON HIS ARM, NOT IN HIS FACE, AND, THAT HE ATTACKED HER AND THE PROBLEM I THINK WITH THAT, OF COURSE, TESTIMONY, IT WAS WHEN YOU LOOK AT IT, SHE'S RUNNING INTO ANSWER THE PHONE, BECAUSE YOU KNOW, YOU KNOW THE

PHONE IS RINGING AS SHE GOES INTO THE OFFICE, YOU CAN ALMOST PICTURE IT BECAUSE IT IS TURNED AROUND ON HER DISK LIKE SHE DIDN'T MAKE IT AROUND AND ANSWERING THE PHONE AND THE WITNESS DESCRIBES HER AS BREATHY, STATED FARM AND IMMEDIATELY SHE IS ATTACKED AND SCREAMS, AND CALLS 911 AND HE'S CAUGHT AND THE THING IS THE PROXIMITY OF THE CRIME IS NOT THE KEY TO THIS CASE.

BATES CAME OUT OF THE WOODS, AT 1:20, ABOUT 15 MINUTES AFTER HE KIDNAPPED MS. WHITE.

FROM THE OFFICE, WITH HER BLOOD ON HIS SHIRT.

HER BLOOD ON HIS PANTS.

>> THE IDEA THAT HE PICKED HER UP AND BROUGHT HER --

>> THAT'S WHAT HE SAID, HE PICKED HER UP AND IS LOGICAL AND REASONABLE TO CONCLUDED HE DISABLED HER IN SOME WAY, HIT HER, BECAUSE SHE WAS HIT IN THE MOUTH AND HIT AND STUNNED HER AND PICKED HER UP ACCORDING TO HIS OWN CONFESSION AND CARRIED HER 100 FEET AND IT WAS ONLY 100 FEET BEHIND THE OFFICE AND IT WAS IN A BRUSHY AREA AND IT WAS HARD TO FIND AND THERE, HE STABBED HER AND THE MAL EXAMINER SAID SHE WAS STABBED WHILE LYING DOWN ON THE GROUND LOOKING UP, TRYING TO -- WITH HER ARMS UP DEFENDING HERSELF AND THAT IS WHERE HE -- HERSELF AND THAT IS WHERE HE STABBED HER AND ROBBED HER AND TRIED TO RAPE HER AND WALKED OUT OF THIS WOODS INTO THE ARMS OF THE OFFICER WITH HER BLOOD ON HIS SHIRT AND PANTS AND THE TRIAL COURT DENIED THE POST-CONVICTION MOTION AND THE DNA AND WE'D ASK YOU TO AFFIRM.

>> THANK YOU VERY MUCH.

>> I BELIEVE YOU HAVE A MINUTE

--

>> TWO MINUTES, 53 SECONDS!

>> FIRST OF ALL, I WANTED TO DRAW THE COURT'S ATTENTION TO A COUPLE OF DETAILS AND I'LL JUST

GO THROUGH THEM.

MR. BATES WAS SUPPOSEDLY  
ARRESTED AT 1:20 P.M. IN THE  
AFTERNOON, THE TIME OF DEATH  
LISTED AT 2:10.

AND THIS TIME DISCREPANCY WAS  
SOMETHING THAT MR. DUNN ASKED  
LAW ENFORCEMENT ABOUT AT THE  
RESENTENCING AND THEY COULD NOT  
EXPLAIN IT AND COULDN'T DENY IT,  
SO THE TIME -- THERE ARE TIME  
DISCREPANCIES YOU NEED TO  
CONSIDER WHEN YOU ARE THINKING  
ABOUT THE 7-MINUTE PERIOD.  
BECAUSE THERE IS A PROBLEM WITH  
THE TIME PERIOD.

>> BUT, WHAT IS THE FACT OF THAT  
MEAN?

SHE WAS IN THE WOODS, FROM THAT  
1:00 PERIOD, SO, EVEN IF IT WAS  
2:00, ARE YOU TRYING TO TELL US  
THAT SHE WAS NOT DEAD WHEN  
MR. BATES OR WHOEVER YOU ALLEGE  
ATTACKED HER.

>> I DON'T KNOW WHAT THE ISSUE  
IS AND THAT IS WHY MR. DUNN  
TRIED TO COLOR IT UP WITH LAW  
ENFORCEMENT.

YOU KNOW -- CLEAR IT UP WITH LAW  
ENFORCEMENT, WHAT IS THE ISSUE  
HERE AND WHY DO WE HAVE A TIME  
DISCREPANCY AND NOBODY WANT CANS  
ANSWER THE QUESTION AND HE ASKED  
THE QUESTION SEVERAL TIMES AND  
WE ATTEMPTED TO FIND THE ANSWER  
AND STILL DON'T HAVE IT.

>> WHO ESTABLISHED THE TIME  
PERIOD WAS 2:00?

I MEAN --.

>> THE MEDICAL EXAMINER  
ESTABLISHED IT WHEN -- AND HE  
CAME TO THE CRIME SCENE  
ACTUALLY.

>> AND NO ONE ASKED, DID YOU  
MEAN ONE-SOMETHING --

>> MR. DUNN ASKED THIS QUESTIONS  
AT THE RESENTENCING IN 1995 AND  
IT WAS NOT MADE CLEAR BY ANYONE  
THAT COULD EXPLAIN THE TIME  
DISCREPANCY.

>>... BATES (Inaudible).

>> HE MAKES --

>> HE MADE FOUR OR FIVE  
DIFFERENT STATEMENTS.

AND IF I COULD DRAW YOUR ATTENTION, AT THE PROSECUTOR -- PROSECUTING ATTORNEY SAID THIS, IN CLOSING ARGUMENT, HE'S RIGHT. SPEAK ABOUT THE DEFENSE ATTORNEY, THE ALLEGED CONFESSION DID NOT FIT THE CRIME BUT NEITHER DID THE FOUR OR FIVE OTHER STORIES THE DEFENDANT GAVE THE LAW ENFORCEMENT OFFICERS. SO, EVEN THE STATE DIDN'T BELIEVE MOST OF WHAT CAME OUT OF MR. BATES' MOUTH AND OF COURSE MR. BATES RECALLED IT.

>> WHAT WAS HIS -- RECALLED IT.

>> WHAT WAS HIS EXPLANATION? THERE IS TESTIMONY THERE WAS SEMEN ON HIS UNDERWEAR.

>> AND THAT WAS ONE OF MY OTHER POINTS.

>> THE EXPLANATION OF THE SEMEN ON HIS UNDERWEAR.

>> I DON'T KNOW THAT HE WAS ASKED THAT PARTICULAR QUESTION, BUT I THINK OF COURSE HE WOULD, YOU KNOW, CAN'T REMEMBER EXACTLY WHAT HE SAID, IN HIS FOUR OR FIVE STATEMENTS ABOUT WHY THE SEMEN WAS ON HIS OWN SHORTS. BUT, I'M ASSUMING THAT HE WOULD SAY, THAT OF COURSE, THEY ARE MY OWN SHORTS.

BUT, WITH REGARD TO WHAT THE STATE ARGUED WAS -- WITH REGARD TO WHETHER OR NOT THE DNA WOULD GIVE US DEFINITIVE RESULTS WE COULD USE IS THIS TESTING ON THE DEFENDANT'S SHORTS MAY SHOW SOME FLUID FROM THE VICTIM.

AS WELL AS FROM THE DEFENDANT. THAT THE PRIMITIVE TYPE OF TESTING IN 1983 COULDN'T FIND, ALSO, WITH REGARD TO THE PANTIES.

>> WOULD THAT HAPPY HELP ANYTHING?

IT HURTS --

>> IF HER DNA IS ON HIS SHORTS THAT WILL ANSWER OUR QUESTION ITCH WHICH IS WHAT WE'RE AFTER, WE WANT ANSWERS TO THE QUESTIONS.

>> IT SEEMS, REALLY, YOU SANE ALL HONESTY IN YOUR ARGUMENT, IT REALLY SEEMS AS IF THIS ARGUMENT

IS CIRCLING BACK AROUND TO A PHILOSOPHICAL TYPE OF VIEW, IS THAT WE DO HAVE SOME SCIENTIFICALLY UNANSWERED, WITH PRECISION, ABOUT THINGS. BUT OUR TEST IS NOT THAT WE ARE GOING TO DO DNA TESTING IN EVERY OLD CASE.

>> NO.

>> IN WHICH THERE ARE THESE UNCERTAINTIES.

I MEAN, CERTAINLY THERE IS SCIENTIFIC EVIDENCE IN HUNDREDS AND THOUSANDS OF CASES.

>> SURE.

>> AND SEEMS TO ME WHERE THIS IS GOING AND, TRYING TO PICK THINGS AND TRYING TO THROW THIS, SO -- REALLY DON'T WE HAVE A -- I WOULD LIKE YOU TO ADDRESS THE TEST UNDER THE RULES.

AND WE KEEP GOING BACK TO THAT. THAT THERE IS A REASONABLE PROBABILITY --

>> REASONABLE PROBABILITY AND WHAT I SAID, I WOULD WANT TO PROVE, REASONABLE PROBABILITY THAT THIS WOULD PRODUCE MITIGATING EVIDENCE.

THAT THERE WOULD BE A LESSER SENTENCE IN THE CASE.

>> BUT THOSE ARE WORDS. YOU ARE REPEATING THE STANDARD. WHY?

THIS IS THE -- THE QUESTION THIS MORNING IS THAT --

>> I'M NOT UNDERSTANDING YOUR QUESTION.

>> THAT YOU KEEP REPEATING A REASONABLE PROBABILITY THAT -- BUT YOU HAVEN'T REALLY EXPLAINED TO US WHY.

WHAT IS IT THAT IS GOING TO CHANGE WITH ALL OF THE EVIDENCE THAT IS INVOLVED IN THIS CASE, TO CREATE THAT REASONABLE PROBABILITY?

WHAT CREATES THE REASONABLE PROBABILITY, GIVEN ALL THE OTHER EVIDENCE?

I HEAR YOU JUST SAYING THE STANDARD AGAIN AND AGAIN.

>> RIGHT.

WELL, I THINK IF YOU TAKE THE

SEXUAL BATTERY OUT OF THE PICTURE, LIKE I SAID BEFORE, IF YOU -- IF IN THE BEST OF ALL WORLDS, BY SOME CHANCE IT SHOWS THAT MR. BATES' DNA IS NOT ON THE PANTIES AND NOT IN THE RAPE KIT AND NOT THE HUSBAND'S DNA EITHER, THEN, YOU HAVE SOME REAL QUESTIONS ABOUT ACTUALLY WHO COMMITTED THE SEXUAL BATTERY, AND WHO COMMITTED THE MURDER, BECAUSE, REMEMBER, THE PROSECUTOR ARGUED THIS IS --

>> THERE WAS AN ACQUITTAL ON THE RAPE, RIGHT?

>> WELL, THEY FOUND IT TO BE AN ATTEMPTED SEXUAL BATTERY. I DON'T THINK THAT IS AN ACQUITTAL AND CERTAINLY DOESN'T OBTAIN WHAT THEY ARGUED --.

>> FIND HIM GUILTY OF RAPE.

>> THEY FOUND HIM GUILTY OF ATTEMPTED SEXUAL BATTERY AFTER HAVING WIPED HIMSELF ON HIS PANTIES.

-- ON HER PANTIES AND THAT WAS THE ISSUE.

THAT HE HAD WIPED HIMSELF ON THESE PANTIES, AND THE STATE CAN SPECULATE IT IS THE HUSBAND'S DNA OR SEEPAGE ON THE PANTIES OR WHATEVER THEY WANT TO SPECULATE ABOUT BUT IT DOESN'T MEAN IT IS TRUE.

WE WILL NOT KNOW UNTIL WE TEST THESE THINGS, WE HAVE THE EVIDENCE.

AND IF, AS WE HAD TOLD THE TRIAL COURT, IF IT IS A MATTER OF MONEY, WE'LL GET IT PAID FOR.

BUT, IF WE HAVE THE EVIDENCE, IN THE CASE IN WHICH THE FOCUS WAS, A SEXUAL BATTERY OR AN ATTEMPTED SEXUAL BATTERY, IF E WE HAVE FLUID ON OTHER PIECINGS 0 OF EVIDENCE, HIS SHORTS --

PIECES OF EVIDENCE, HIS SHORTS AND SWABS FROM THE OUTSIDE OF HER BODY, WHY DON'T WE TEST IT.

>> ALL RIGHT.

YOU HAVE GONE WELL BEYOND YOUR TIME.

IF YOU WOULD LIKE TO MIKE ONE CONCLUDING STATEMENT...

>> I WANTED TO POINTED OUT TO THE COURT THAT WITH REGARD TO THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, MR. DUNN TOLD THE JURY THAT HE WAS GOING TO PRESENT DR. CROWN AND PRESENT ORGANIC BRAIN DAMAGE. AND THE DIFFERENCE BETWEEN DR. CROWN'S TESTIMONY WAS HE ACTUALLY DID NEUROPSYCHOLOGICAL TESTING THAT WOULD HAVE SUPPORTED DR. LARSON'S TESTIMONY THAT WENT TOGETHER AND HE HAD ACTUAL NEUROLOGICAL TESTS AND WOULD ASK THE COURT TO REVERSE OR REMAND OR ORDER DNA TESTING ON THAT BASIS, THANK YOU.  
>> THANK YOU VERY MUCH.  
THANK YOU FOR YOUR ARGUMENT.