>> ALL RISE.
>> SUPREME COURT OF FLORIDA IS NOW IN SESSION.
PLEASE BE SEATED.
>> WE NOW GO TO THE THIRD AND FINAL CASE ON TODAY'S DOCKET, BUSH V. THE STATE OF FLORIDA.
>> GOOD MORNING, JUSTICES, COUNSEL.
MAY IT PLEASE THE COURT, I'M NANCY RYAN REPRESENTING THE APPELLANT, SEAN BUSH.
MR. BUSH STANDS CONVICTED OF MURDER AND SENTENCED TO DEATH BEFORE THIS COURT.
MAY I INTRODUCE MY COLLEAGUE, RAYMOND WARREN, WHO WAS TRIAL COUNSEL AT THE GUILT OR INNOCENCE PHASE OF THE TRIAL.
HE DOES NOT HAVE A SPEAKING ROLE TODAY BUT HAS A GREAT INTEREST IN THE MATTER.
AS TO THAT GUILT OR INNOCENCE PHASE, I WOULD ASK THE COURT TO FOCUS ON THE DISCOVERY VIOLATION ISSUE THIS MORNING.
AS TO THAT ISSUE, IT IS MY BURDEN TO SHOW AN ABUSE OF DISCRETION AND, ONCE AN ABUSE OF DISCRETION IS SHOWN, THE QUESTION ARISES WHETHER THERE'S THE REASONABLE POSSIBILITY THE DEFENDANT WAS PROCEDURALLY PREJUDICED.
AND THAT STANDARD IS MET WHEN THE RECORD REFLECTS A REASONABLE PROBABILITY THAT EITHER TRIAL STRATEGY OR PREPARATION WOULD HAVE BEEN MATERIALLY DIFFERENT.
AND A MATERIAL DIFFERENCE FOR THIS PURPOSE IS ONE THAT COULD HAVE BENEFITED THE DEFENDANT.
FOR ALL THOSE PRONOUNCEMENTS, I'M RELYING ON THIS COURT'S OPINIONS IN STATE V. SHAW AND SCIPIO V. STATE.
IT'S THE APPELLANT'S POSITION THAT THE JUDGE DID ABUSE HIS DISCRETION AFTER THE DISCOVERY VIOLATION WAS BROUGHT TO HIS, TO

THE JUDGE'S ATTENTION.
THERE WAS A MATERIAL CHANGE IN
THE TESTIMONY WE EXPECTED.
LET ME, FIRST--
>> COULD YOU, I'M SURE YOU'RE
GOING HERE, BUT COULD YOU
ELABORATE ON HOW THAT WOULD
HAVE-- HOW, IF YOU HAD KNOWN
ABOUT THAT IN ADVANCE, IT WOULD
HAVE CHANGED THE WAY YOU
PREPARED FOR TRIAL AND WHAT YOU
PUT ON FOR TRIAL?
>> HAD THE DEFENSE KNOWN THAT
THE DNA EXPERT WAS GOING TO SAY,
NO, I CAN NO LONGER RELY AND NO
ONE CAN ANY LONGER RELY ON MY
DEPOSITION TESTIMONY, HAD WE
KNOWN THAT, WE WOULD HAVE, WE
CERTAINLY WOULD HAVE HIRED OUR
OWN EXPERT TO SAY, IS THAT TRUE?
IS THE OLD TESTIMONY, IS THE OLD
FDLE PROTOCOLS WHICH WITNESS
MARTIN SAID SHE COULD NO LONGER
RELY ON IS, IN FACT, UNRELIABLE?
JUST BECAUSE FDLE SAYS IT'S SO
DOESN'T MAKE IT SO.
IF OUR EXPERT HAD NOT PANNED OUT
FOR US, I'M CONFIDENT OF WHETHER
THE LIFE OFFER WHICH SAT ON THE
TABLE IN THIS CASE FOR SIX
YEARS, WHETHER THAT SHOULD BE
TAKEN-- THAT CONVERSATION WOULD
HAVE TAKEN ON A RENEWED URGENCY.
IT WAS--
>> I APOLOGIZE.
WASN'T HER TESTIMONY-- AND I
THINK THIS GOES TO WHAT JUSTICE
CANADY WAS ASKING-- WASN'T THE
TESTIMONY, WAS IT MS. MARTIN,
THE DNA EXPERT?
>> YES.
>> ONE OF THE ALLELES WAS NOT OF
THE BUSH FAMILY.
WASN'T THAT THE TESTIMONY THAT
CAME OUT?
>> HER TESTIMONY WAS THAT--
IT'S NOT THAT EASY TO READ.
I'M RELYING ON PAGES 974-983 OF
HER DIRECT EXAMINATION.
IT'S-- I HAD TO READ IT MYSELF

SEVERAL TIMES BEFORE I GOT THE
COMPLETE MEAT OF IT.
WHAT SHE SAID WAS IN 2012, BACK
WHEN I TESTED THIS DNA, I WOULD
HAVE TESTIFIED THAT THE DNA ON
THE TWO ITEMS THAT HAD TO HAVE
BEEN HANDLED AT THE SCENE-- THE
TOWEL OVER THE BLOOD, AND THE--
>> LAPTOP.
>>-- HIDDEN LAPTOP, I WOULD
HAVE TESTIFIED THAT THE DNA HAD
TO HAVE COME FROM A MAN AND NOT
PART OF THE DEFENDANT'S LINE.
>> THERE'S NOTHING THAT UNDERCUT
THAT TESTIMONY.
AS I UNDERSTAND, WHAT SHE SAID
WAS TODAY, NOWADAYS, WE WOULD
HAVE FOUND THIS ALL TO BE
INCONCLUSIVE BECAUSE OF HOW MUCH
DNA WAS ACTUALLY FOUND THERE.
BUT THAT'S NOT INCONSISTENT WITH
WHAT YOUR SIDE HAD ELICITED AT
TRIAL AND WHAT YOU USED IN FRONT
OF THE JURY, THAT THERE WAS
ANOTHER PERSON, NOT MR. BUSH,
RIGHT?
>> BUT IT JUST DID.
IT DIDN'T MAKE A GREAT DEAL OF
DIFFERENCE TO THE STATE'S CASE.
IT MADE A HUGE DIFFERENCE TO THE
DEFENSE CASE.
DEFENSE COUNSEL, MR. WARREN, HAD
STOOD UP FIRST THING IN OPENING
STATEMENT AND SAID YOU WILL HEAR
FROM THE WITNESS STAND TESTIMONY
FROM A DNA EXPERT WHO SAYS THERE
WERE ITEMS AT THE SCENE WHICH
WERE HANDLED BY A MAN WHO IS NOT
MY CLIENT.
ONCE THAT WAS GONE, THE
HYPOTHESIS OF INNOCENCE THAT
SOMEONE ELSE SNUCK IN BETWEEN
5:45 AND 6:15 AND DID THIS
WAS--
>> I GUESS WHAT I'M ASKING IS
THERE'S-- THAT TESTIMONY WAS,
IN FACT, ELICITED, THAT THERE'S
ONE ALLELE THAT WAS FOUND ON THE
LAPTOP AND THE TOWEL THAT DID
NOT COME FROM MR. BUSH OR HIS

FAMILY, CORRECT?
>> THAT WAS THE 2011 CONCLUSION.
BUT IMMEDIATELY AFTER THAT WAS
ELICITED, COUNSEL FOR THE STATE
SAID-- I CAN'T-- LET ME FIND
THE EXACT LANGUAGE.
>> SAYS THAT THE MINOR RESULTS
WOULD HAVE BEEN REPORTED OUT AS
LIMITED DNA RESULTS, NOT
INTERPRETABLE, RIGHT?
MEANING I WOULDN'T HAVE USED
THEM FOR INCLUSION OR EXCLUSION.
>> CORRECT.
SHE COULDN'T EXCLUDE ANYBODY ANY
LONGER, IS WHAT SHE SAID.
SO HER 2017 TRIAL TESTIMONY WAS
THAT, YES, THE VICTIM'S DNA IS
ON BOTH THOSE ITEMS, BUT THAT
OTHER DNA I CAN DRAW NO
CONCLUSIONS FROM.
I CAN'T EXCLUDE ANYBODY, INCLUDE
ANYBODY BECAUSE FDLE HAS CHANGED
WHAT IT LOOKS FOR.
>> WELL, THE POSSIBLE INFERENCE
BEING UNDER THIS NEW STANDARD
THAT IT COULD HAVE BEEN YOUR
CLIENT.
>> CORRECT.
WELL, IT WASN'T SOMEBODY ELSE.
IT WASN'T-- THERE WASN'T AN
AFFIRMATIVE INDICATION ANY
LONGER THAT SOMEONE ELSE WAS
THERE.
JUDGMENT WAS HEAVILY RELIANT
UPON THAT.
MR. BUSH'S DISCUSSION WHETHER TO
GO TO TRIAL NOTWITHSTANDING THE
CONTENTS OF THE HARD DRIVE, DNA
AND ON RELIANCE ON SOME EVIDENCE
WE DIDN'T GET IN, PART OF THE
DYING DECLARATION AND THE--
>> THE FACT THAT SOMEONE ELSE'S
DNA WAS ON THE LAPTOP AND THE
TOWEL AND THAT PERSON MAY OR MAY
NOT HAVE BEEN MR. BUSH OR MAY OR
MAY NOT HAVE BEEN SOMEONE ELSE,
IS THAT CONSISTENT WITH THE
THEORY THAT YOU PRESENTED WHICH
IS THAT SOMEONE ELSE DID IT,
RIGHT?

>> YES.
BUT THAT-- THE THEORY WAS
PRESENTED REALLY IN ARGUMENT
ONLY.
WE DIDN'T HAVE THE EVIDENCE THAT
WE STARTED OUT SAYING--
>> BUT YOU COULD STILL MAKE THAT
ARGUMENT, IN FACT, YOU DID MAKE
THAT ARGUMENT IN CLOSING
ARGUMENTS.
>> YES, YOUR HONOR.
WE SAID IT WAS SUBSTANTIALLY
LESS EFFECTIVE TESTIMONY WE SAID
WE WERE GOING TO ELICIT.
AND--
>> AND YET THE JURY HAD EXACTLY
THAT.
THERE WAS A DNA EXPERT WHO
TESTIFIED THAT IN 2011 THAT
PERSON FOUND DNA THAT COULD NOT
INCLUDE MR. BUSH, THAT
TESTIMONY?
>> CORRECT.
YES, THAT WAS ELICITED.
BUT WHAT SHE IMMEDIATELY SAID
WAS I CAN NO LONGER RELY ON THAT
RESULT-- I'M PARAPHRASING--
>> BUT THAT'S KIND OF IMPORTANT.
SHE DIDN'T QUITE SAY THAT.
TELL ME IF I'M WRONG.
THE QUOTE, IF THIS HAD BEEN
REPORTED TODAY, I WOULD STILL
POINT OUT THE MAJOR CONTRIBUTOR
AS MRS. BUSH, BUT LIMITED DNA
RESULTS NOT INTERPRETABLE.
THERE WAS NO IMPERATIVE THAT WAS
STATED, WAS THERE?
>> NOT EXPRESSLY, PERHAPS, BUT I
THINK THE IMPLICATION IS CLEAR.
IF FDLE HAS CHANGED, IT HAS DONE
THEM TO MAKE THEM MORE RELIABLE.
WHAT OTHER REASON--
>> WHAT'S THERE TO UNDERCUT THE
FINDING OF THE TRIAL COURT WHICH
WE ARE TO DEFER TO, AS I
UNDERSTAND--
>> YES, YOUR HONOR.
>>-- THAT THIS WAS A
NON-INTENTIONAL OR NON-WILLFUL
DISCOVERY VIOLATION?

>> THE STATE HAS ARGUED THAT THE DEFENSE PUT ON NOTHING TO SHOW IT WAS INTENTIONAL, RELYING ON THE QUESTIONS THEMSELVES THAT THE STATE ASKED.
SINCE 2011 HAVE FDLE'S POLICIES CHANGED IN TERMS OF HOW IT REPORTS OUT RESULTS SUCH AS THIS.
AND IF THIS RESULT HAD BEEN REPORTED OUT TODAY, WHAT WOULD YOU HAVE PUT ON THE REPORT?
WELL AWARE THAT THIS--
>> THE TRIAL COURT HEARD THAT AND ALSO HEARD THE ARGUMENT THAT IT WASN'T INTENTIONAL, AND THE COURT MADE A FINDING THERE.
HOW ARE WE TO UNDERCUT THAT FINDING OR TO FIND THAT THAT FINDING IS SO WRONG OR OUTSIDE THE REALM OF REASONABLENESS THAT'S AN ABUSE OF DISCRETION?
>> I SUBMIT IT'S AN ABUSE OF DISCRETION BECAUSE OF THE STAKES IN THIS DEATH CASE AND BECAUSE IT WAS CLEAR ARGUMENT DURING OPENING STATEMENT THAT THE DEFENSE WAS GOING TO HEAVILY RELY ON THIS INDIVIDUAL WHO WAS IN THE ROOM HANDLING THE STUFF.
WE, IT MAY NOT BE A WATERTIGHT DEFENSE, BUT IT WAS OUR DEFENSE, AND WE WERE GOING WITH IT.
>> DIDN'T THE-- THE TRIAL COURT SAID AFTER THE OBJECTION IS MADE.
WELL, I DON'T KNOW IF SHE TESTIFIED TO AN OPINION.
THE OPINION IS THAT IT WOULD BE NO OPINION.
NO OPINION, ESSENTIALLY.
>> CORRECT.
>> AND THEN I HEAR FROM THE STATE, AND THE STATE SAYS THERE'S BEEN NO CHANGE.
THAT ALL SEEMS A LITTLE DETACHED FROM WHAT HAD HAPPENED BECAUSE IT SEEMS LIKE WE'VE GOT, WE'VE GOT THE ORIGINAL, THE TESTIMONY AT THE BEGINNING OF THIS LITTLE

SEQUENCE HERE WHEN SHE SAYS WHAT
THE REPORT WAS EARLIER, AND SHE
TESTIFIES THAT WHAT THE REPORT
SHOWED EARLIER.
BUT THEN WE GO ON TO WHAT THE
REPORT WOULD BE NOW UNDER THE
CURRENT STANDARDS, AND THAT
IS-- IT'S UNQUESTIONABLY
DIFFERENT, ISN'T THAT CORRECT?
>> IT IS UNQUESTIONABLY
DIFFERENT.
CLEARLY, YOUR HONOR.
I SUBMIT TO ALL OF YOU THAT THE
TRIAL JUDGE WHO-- JUDGE MALTS
WAS QUITE NEW TO CRIMINAL
DEFENSE.
I THINK WE CAN ALL AGREE HE'S A
QUICK STUDY AND GOT A GREAT MANY
THINGS RIGHT, AND I DO
CONFIDENTLY--
[INAUDIBLE CONVERSATIONS]
>> BUT WHEN THE STATE SAYS,
WELL, JUDGE, THERE'S BEEN NO
CHANGE, THAT'S NOT, THAT'S NOT
REALLY REFLECTING WHAT HAS GONE
BEFORE.
IS IT?
>> NOT AT ALL.
NOT AT ALL.
THERE WAS CLEARLY A CHANGE.
AND THE DEFENSE WAS MADE TO LOOK
FOOLISH HERE AS IN THE SCIPIO
CASE.
THIS CASE HAS A LOT OF
RESEMBLANCES TO SCIPIO V.
STATE--
>> THE TRIAL JUDGE WAS ACTUALLY
QUITE CAREFUL THOUGH, BECAUSE HE
DID WHAT CAREFUL JUDGES DO.
HE SAID THAT EVEN IF THERE WAS A
DISCOVERY VIOLATION, QUOTE, BUT
EVEN IF THERE WAS DISCOVERY
VIOLATION, IT WOULD BE
INADVERTENT.
IT'S TRIVIAL BECAUSE THE WITNESS
DID NOT TESTIFY TO THAT THERE
WAS SOMEONE ELSE'S PROFILE ON
THERE.
THE JUDGE WENT THROUGH ANALYSIS
AFTER INQUIRY AND MADE AN

ALTERNATIVE FINDING, DID HE NOT?
>> YES, HE DID.
IT'S UNSUPPORTED BY CONFIDENTIAL EVIDENCE IN THE RECORD AFTER ELICITING THE MODEL AND SAYING YOU CAN'T TESTIFY, IN EFFECT, YOU CAN'T TESTIFY TO THAT ANYMORE, CAN YOU?
>> BUT ISN'T THE JUDGE'S REASONING THIS: FIRST OF ALL, I'M GOING TO FIND THAT THERE'S NOT A DISCOVERY VIOLATION BECAUSE ALL SHE SAID IS THAT UNDER TODAY'S STANDARDS SHE WOULD NOT HAVE REPORTED IT, REPORTED IT-- NO REPORT, ESSENTIALLY.
NOT THAT THE OPINION WOULD BE ANY DIFFERENT, BUT OF NO REPORT.
WELL, OR I'M JUST HAVING TROUBLE UNDERSTANDING WHAT THAT MEANS.
>> I AM AS WELL, YOUR HONOR.
I THINK MAYBE WHAT WE SAID EARLIER, WHICH IS THAT IT DIDN'T MAKE A GREAT DEAL OF DIFFERENCE TO THE STATE CASE, PERHAPS, BUT IT MADE AN ENORMOUS DIFFERENCE TO THE DEFENSE CASE.
AND I DO ASK THE COURT TO REVERSE THE CONVICTION ALTOGETHER ON THIS GROUND--
>> MS. RYAN, WHAT WAS THE SUGGESTED PROCEDURAL PREJUDICE TO THE TRIAL COURT AT TRIAL?
>> THE-- MR. WARREN SAID THIS IS MY WHOLE CASE, AND IT'S IN CONJUNCTION WITH OPENING STATEMENT WHICH EVERYBODY HEARD THAT WAS SUFFICIENTLY CLEAR.
>> BUT THE JUDGE-- AND JUST PIGGYBACKING ON WHAT JUSTICE LAWSON SAID-- WHEN THE JUDGE SAID WHAT'S THE PREJUDICE, I WANT TO ANALYZE IT, BECAUSE HE'S GOING THROUGH ALL THE RICHARDSON FACTORS.
THERE'S NOT WHAT YOU SAID NOW WHICH IS WE WOULD HAVE HIRED ANOTHER DNA EXPERT TO BE ABLE TO SHOW THAT WHAT, IN FACT, COULD

BE EXCLUDED, MR. BUSH COULD BE
EXCLUDED.
THIS IS THE TOTALITY, JUDGE,
THIS IS THE HEART OF THE
DEFENSE.
THIS IS WHY IT APPEARS ANY
SUSPICIOUS PERSON WOULD THINK
THE STATE PREPPED THIS WITNESS.
THIS GOES TO THE INADVERTENCE OR
WILLFULNESS.
LEARNED ABOUT IT AND DIDN'T
REVEAL TO US.
NOTHING WAS SAID ABOUT ANY DNA
EXPERT THAT WAS HIRED, WAS
THERE?
>> NOT SPECIFICALLY, YOUR HONOR.
>> HOW'S THE JUDGE SUPPOSED TO
MAKE A FINDING KNOWING THAT ON
APPEAL TO DISCUSS THAT WOULD BE
AN ISSUE BUT NO SUGGESTION IS
MADE IN FRONT OF THE TRIAL
COURT?
>> IN THIS CASE THERE'S NOT ONLY
PROCEDURAL PREJUDICE, THERE WAS
ACTUAL PREJUDICE IN THE
COURTROOM, IN THE JURY'S
PRESENCE.
HERE, AS IN SCIPIO, THE DEFENSE
WAS MADE TO LOOK FOOLISH.
WE HAVE NOT ONLY PROCEDURAL
PREJUDICE, BUT ACTUAL PREJUDICE
IN THAT DEFENSE COUNSEL CAME OUT
GREAT GUNS SAYING THERE'S GOING
TO BE EVIDENCE.
WAIT FOR IT.
AND WHEN IT CAME, IT WAS
COMPLETELY UNDERCUT.
THAT'S OUR POSITION WHY MR. BUSH
IS ENTITLED TO A NEW TRIAL
ALTOGETHER UNDER THE SCIPIO
PRECEDENT.
AND WE SUBMIT, IF THAT ARGUMENT
FAILS, I WOULD ASK THE COURT TO
TAKE A VERY SERIOUS AND CLOSE
LOOK AT THE ENTIRETY OF THE
PENALTY PHASE THAT WAS MORE OF A
DEATH BY A THOUSAND CUTS
SITUATION IN PENALTY PHASE.
THERE WAS--
>> BEFORE YOU GET THERE,

MS. RYAN, COULD I ASK YOU ABOUT
YOUR FIRST ISSUE, SUFFICIENCY OF
THE EVIDENCE?
YOU ARGUE THAT THIS IS A WHOLLY
CIRCUMSTANTIAL EVIDENCE CASE.
I BELIEVE THAT'S CORRECT.
IN RESPONSE, THE STATE ARGUES IN
ITS BRIEF THAT THERE'S DIRECT
EVIDENCE.
YOU DON'T ADDRESS THAT IN YOUR
REPLY, SO I'D ASK YOU TO ADDRESS
TWO THINGS; WHY YOU THINK IT'S
WHOLLY CIRCUMSTANTIAL, BUT IF
IT'S NOT, DO YOU THINK THE
ANALYSIS WOULD CHANGE UNDER THE
NORMAL STANDARD OF REVIEW IN A
NOT WHOLLY CIRCUMSTANTIAL CASE?
GOT THAT?
>> YES, I GOT ALL THAT.
THE DIRECT EVIDENCE INCLUDES THE
PRESENCE OF THE DNA.
THIS COURT SO HELD IN 2012 AND
AGAIN MORE RECENTLY IN THE CASE
WE'VE CITED IN THE BRIEFS, I
BELIEVE IT'S CALLED WILLIAMS.
>> SO YOU NOW ARE TAKING A
POSITION THAT THAT IS DIRECT
EVIDENCE, THE--
>> YES, YOUR HONOR.
I'M SORRY, DID I SAY DIRECT?
I MEANT CIRCUMSTANTIAL.
IN THE MOST RECENT CASE, THIS
COURT HELD THAT PRESENCE OF DNA
IS A CIRCUMSTANCE FROM WHICH
GUILT CAN BE INFERRED.
PRESENCE CAN BE DIRECTLY
INFERRED GUILT OF WHAT WILL
HAPPEN.
THERE CAN ONLY BE INDIRECTLY
INFERRED.
THAT IS OUR POSITION, THAT IT IS
A WHOLLY CIRCUMSTANTIAL CASE.
AND WOULD MY POSITION CHANGE?
THERE'S GOT TO BE REASONABLE
HYPOTHESIS OF INNOCENCE WHERE
DEFENSE WAS HANDICAPPED, WAS
KNEECAPPED AS FAR AS SHOWING A
REASONABLE HYPOTHESIS OF
INNOCENCE.
I HAVE TO ADMIT AS FAR AS THE

SUFFICIENCY OF THE EVIDENCE
GOES.
BUT IN THE PENALTY PHASE, THIS
CASE WENT IN MID 2017 UNDER THE
INTERIM INSTRUCTIONS THIS COURT
HAD APPROVED AT THAT TIME FOR
USE IN PENALTY PHASES AFTER THE
LEGISLATIVE AND CASE LAW CHANGES
OF 2016.
ONE OF THE CHANGES WAS THAT THE
PROHIBITION ON CONSIDERING
SYMPATHY HAS SINCE BEEN REMOVED
AFTER THIS COURT'S CAREFUL
CONSIDERATION IN 2018 IN HOW TO
BEST IMPROVE THE INTERIM
INSTRUCTIONS.
IN 2017 IN THIS CASE THE JURY
WAS TOLD THAT YOU MAY NOT BE
INFLUENCED BY INVIDIOUS BIAS OR
SYMPATHY.
SYMPATHY WAS PUT ON A LEVEL WITH
INVIDIOUS BIAS.
IT'S MY POSITION THAT IN THE
ABSENCE OF A CLEAR AND EXPRESS
MERCY INSTRUCTION, THAT THE
ANTI-SYMPATHY INSTRUCTION IS A
PROBLEM.
THERE'S CASE LAW THAT SAYS IT'S
OKAY TO NOT HAVE A CLEAR MERCY
INSTRUCTION IF YOU GOT THE
SYMPATHY INSTRUCTION.
THIS CASE LAW SAYS THE REVERSE
IS TRUE.
THERE'S CASE LAW FROM THE U.S.
SUPREME COURT TO SAY IT'S OKAY
TO DON'T CONSIDER SYMPATHY.
BUT I'M RELYING ON THE SUPREME
COURTS OF WASHINGTON AND
CALIFORNIA WHICH SAID THEY'VE
GOT TO HAVE ONE OR THE OTHER.
>> WE'VE NEVER SAID THAT THOUGH,
RIGHT?
>> I'M SORRY?
>> WE'VE NEVER SAID THAT--
>> NO, YOUR HONOR.
>> IN FACT, WHAT WE'VE SAID IS
BECAUSE THERE'S NEVER BEEN A
MERCY INSTRUCTION, BUT WHERE THE
STANDARD INSTRUCTIONS DIDN'T
INCLUDE MERCY, WE SAID IT WAS

FINE TO HAVE, QUOTE-UNQUOTE,
ANTI-SYMPATHY INSTRUCTION,
RIGHT?
I THINK IT WAS ZACK, ONE OF THE
CASES THAT SAID THAT?
>> I BELIEVE IT'S FROM BEFORE
2009?
>> IT IS.
>> 2009-2018 IS WHEN THE NO
SYMPATHY INSTRUCTION APPEARED IN
THE PENALTY PHASE INSTRUCTIONS.
IT WAS BROUGHT OVER IN A LUMP OF
RULES OF DELIBERATION WHICH WERE
ADDED IN 2008 OR 2009--
>> IN ZACK, THOUGH, THE COUNSEL
MADE THE SAME EXACT ARGUMENT
THAT COUNSEL MADE HERE WHICH IS
YOU CAN'T CONSIDER SYMPATHY.
IN OTHER WORDS, THE SAME EXACT
THING THE INSTRUCTION SAYS.
AND WHAT WE SAID THERE WAS, A,
YOU DON'T NEED AN INSTRUCTION.
THERE, LIKE HERE, THEY OFFERED
TO PUT AN INSTRUCTION THAT THE
JURY CAN CONSIDER SYMPATHY, AND
WHAT WE SAID WAS THAT WAS AN
ERROR.
AND ALSO THAT COUNSEL'S
ADMONITION TO THE JURY THAT YOU
CANNOT CONSIDER SYMPATHY WAS
PROPER.
RIGHT?
>> YES, YOUR HONOR.
THE ARGUMENT IS PERMITTED ON
BOTH SIDES.
>> RIGHT.
>> YOU SHOULD EXERCISE MERCY,
YOU SHOULDN'T EXERCISE MERCY.
>> RIGHT.
ISN'T THAT EXACTLY WHAT'S
HAPPENING HERE?
>> OH, NO.
THE INSTRUCTIONS FROM THE COURT
ARE DEEMED MORE SERIOUS, AND I
THINK THEY ARE TAKEN MORE
SERIOUSLY BY JURORS.
>> NO, OF COURSE THAT'S THE
CASE.
BUT IF THE STATE IS TELLING THE
JURORS YOU ARE NOT TO CONSIDER

SYMPATHY AND THAT'S FINE AND THE COURT AND THE TRIAL COURT THEY ARE PROPERLY REJECTED, A SYMPATHY INSTRUCTION-- ONE THAT YOU WOULD HAVE HERE-- THOSE ARE NOT THE SAME AS THE SITUATION WE HAVE RIGHT HERE?
>> I WOULD SUBMIT THAT THE DISTINCTION BETWEEN THE JUDGE SAYING IT AND COUNSEL SAYING IT IS GREAT, IS THE DISTINCTION.
I'M AWARE, YOUR HONOR, I'VE ACKNOWLEDGED IN REYNOLDS THIS COURT TERMED THE INSTRUCTION YOU ARE NEVER COMPELLED NOR REQUIRED TO FIND THAT THE DEFENDANT SHOULD BE PUT TO DEATH.
THIS COURT TERMS THAT THE FLORIDA MERCY INSTRUCTION.
AS I POINTED OUT IN THE BRIEF, IT'S THE MISSISSIPPI SUPREME COURT IN THE FLOWERS CASE THAT'S UP BEFORE THE U.S. SUPREME COURT ON OTHER GROUNDS LOOKED AT THE EXACT SAME LANGUAGE AND SAID IT DOESN'T SAY ANYTHING ABOUT MERCY.
IT'S NOT A MERCY INSTRUCTION.
I SUBMIT IT'S THE BEST-- THE MISSISSIPPI SUPREME COURT SAID IT'S JUST A RESTATEMENT OF THE BINARY NATURE OF THE CHOICE BEFORE THE JURY.
AND NOT ONLY DID THIS COURT REMOVE SYMPATHY FROM THE LIST OF IMPROPER CONSIDERATIONS, IT ALSO REMOVED SUGGESTIONS THAT THE JURY'S ROLE IS ONLY ADVISORY, ONLY A RECOMMENDATION.
IN THE PRELIMINARY INTERIM INSTRUCTIONS THAT WERE READ IN THIS CASE, TWICE THE COURT REFERRED TO THE JURY'S UPCOMING RECOMMENDATION.
THOSE REFERENCES WERE NEVER EXPLAINED.
THEY HAVE SINCE BEEN REMOVED BY THIS COURT TO BE READ IN PENALTY PHASES.
THE RECOMMENDATION WAS REFERRED

TO ONCE AGAIN IN THE STATE'S
CLOSING ARGUMENT.
I SUBMIT TO YOU THAT THESE
UNEXPLAINED REFERENCES RESULTED
IN AN UNCLEAR JURY INSTRUCTION.
THAT QUESTION IS FOR THIS COURT
DE NOVO, WHETHER IT'S CLEAR.
THIS COURT HELD IN STATE V.
FLOYD -- IF THIS COURT TERMS THE
INSTRUCTIONS WERE UNCLEAR, IT
SETS OUT THE FEDERAL RULE FOR
DETERMINING WHETHER THERE'S
CONSTITUTIONAL HARM WHICH IS
WHETHER THERE'S A REASONABLE
POSSIBILITY THAT THE JURY
APPLIED THE INSTRUCTION IN A
MANNER THAT DEFEATED A
CONSTITUTIONAL RIGHT.
AND THE CONSTITUTIONAL RIGHT IN
QUESTION IS THE EIGHTH AMENDMENT
RIGHT TO HEIGHTENED RELIABILITY
IN THE JURY'S RESULTS, IN THE
JURY'S VERDICT FINDINGS WHENEVER
WE HAVE NOW.
THE, THERE WAS AN ADDITIONAL
PROBLEM IN THE JURY INSTRUCTIONS
WHICH WAS NOT OBJECTED TO AND IS
STILL IN THE JURY INSTRUCTIONS,
AND THAT'S THE REASONABLENESS
REQUIREMENT FOR MITIGATION.
THAT WAS REFERRED TO IN BOTH THE
INTERIM PRELIMINARY AND THE
INTERIM FINAL INSTRUCTIONS IN
THIS CASE.
THE JURORS WERE TOLD THAT
MITIGATION IS ANYTHING WHICH
REASONABLY INDICATES THAT DEATH
IS NOT THE APPROPRIATE--
>> ISN'T THAT A DIRECT QUOTE
FROM THE LAW, FROM THE STATUTE?
ISN'T THAT QUOTE--
>> YES, YOUR HONOR.
WORDING'S IN THE STATUTE, BUT I
SUBMIT IT'S INAPPROPRIATE FOR
THE JURY INSTRUCTION.
>> BUT HOW CAN THE JURY
INSTRUCTION BE WRONG OR UNCLEAR
IF IT QUOTES EXACTLY THE
LANGUAGE IN SUBSECTION FOUR OF
THE--

>> WHAT THE JURY HEARD WAS SCATTERSHOT RECOMMENDATIONS WHICH MAY HAVE SOWN SEEDS OF PREJUDICE, CONFUSION OR MAY HAVE DETRACTED FROM THEIR INCLINATION TO EXERCISE, TO FOCUS ON EXERCISING MERCY, TO FOCUS THEIR INDIVIDUAL ATTENTION ON HOLDING OUT FOR MERCY.
IN THE CASE FROM 60 YEARS AGO THAT'S CITED IN THIS COURT'S REYNOLDS CASE, WE THINK OF IT NOW AS A CALDWELL/ROMANO CASE BECAUSE OF THE SUBJECT MATTER.
BUT IT WAS AT THE TIME A PROSECUTORIAL COMMENT CASE.
WHAT THE STATE SAID IS THIS COURT DEEMED REVERSIBLE ERROR IN PATE THAT ANOTHER COURT WILL FIX THIS.
IMPLIED.
IT WAS IMPLIED.
IT WAS SUGGESTED THAT ANOTHER COURT WILL FIX ANY MISTAKES WE MAKE.
AND THEN WE FAST FORWARD TO 2017 WHERE A HOLDOUT HAS TO HOLD OUT, HAS TO START TO DISAGREE IN DELIBERATIONS.
IT COULD BE ANYWHERE FROM HARD TO ALMOST IMPOSSIBLE FOR MANY JURORS TO DO SO.
AND I SUGGEST TO YOU THAT THE REASONABLENESS REQUIREMENT IS A STICK TO BEAT A HOLDOUT WITH.
THE OTHER JURORS UNITED IN THEIR PURPOSE TO IMPOSE DEATH COULD SAY YOU'RE NOT BEING REASONABLE.
>> THE REASONABLENESS WAS ONLY TO MITIGATOR, CORRECT?
>> CORRECT.
>> AND HERE WE ACTUALLY KNOW THAT JURORS DID, IN FACT, HOLD OUT ON SOME MITIGATORS.
THERE WAS SOME THAT WERE 10-2 OR 11-1.
DOESN'T THAT INDICATE TO US BEYOND A REASONABLE DOUBT THAT JURORS UNDERSTOOD THEY DIDN'T NEED TO FIND UNANIMOUSLY--

>> I'M SURE THEY KNEW THEY
NEEDED TO MAKE UNANIMOUS
FINDINGS.
>> NOT UNANIMOUS AS TO
MITIGATORS, CORRECT?
>> IT IS MORE CLEAR NOW IN THE
FINAL--
>> ISN'T IT CLEAR HERE, IS WHAT
I'M ASKING.
>> IT MAY NOT HAVE BEEN CLEAR
ENOUGH.
>> DIDN'T AS THE FOUR
SEPARATE-- FIVE SEPARATE, IN
FACT, SOME JURORS DID DISSENT.
AND DESPITE THE INSTRUCTION
YOU'RE SAYING THAT'S CONFUSING,
THAT COMES DIRECTLY FROM THE
STATUTE?
>> I'M NOT SURE OF THE ANSWER TO
YOUR QUESTION, I APOLOGIZE.
>> OKAY.
>> THE STATUTORY LANGUAGE
DOESN'T SUPPORT THE JURY
INSTRUCTION, IS MY POSITION.
THE STATUTORY LANGUAGE HAS TO DO
WITH THE FINDINGS THE JUDGE
MAKES IN HIS OR HER ORDER.
>> RIGHT.
BUT HOW COULD IT BE RELEVANT?
IF THE JUDGE IS ONLY ALLOWED TO
CONSIDER MITIGATORS THAT ARE,
QUOTE, REASONABLY ESTABLISHED BY
THE EVIDENCE, DOESN'T IT STAND
TO REASON THAT WE WOULDN'T WANT
TO TELL THE JURORS TO ONLY FIND
THOSE MITIGATORS REASONABLY
ESTABLISHED BY THE--
>> NO, YOUR HONOR.
I THINK THAT'S ANTITHETICAL TO
THE ENTIRE LOCKETT V. OHIO LINE
OF CASES--
>> THAT JUST MEANS THERE COULD
BE ANY MITIGATOR.
BUT IT HAS TO BE ESTABLISHED BY
THE EVIDENCE, RIGHT?
IT CAN'T BE ANYTHING YOU JUST
MAKE UP OUT OF THIN AIR.
>> IT HAS TO BE SUPPORTED BY THE
EVIDENCE.
>> ISN'T REASONABLY ESTABLISHED

BY THE EVIDENCE STATING EXACTLY
THAT?
>> I SUGGEST, YOUR HONOR, THERE
COULD HAVE BEEN NOT ONLY
EXTERNAL-- A LIKE-MINDED JUROR
WHO WAS ARGUING MITIGATION THAT
WASN'T DEEMED SIGNIFICANT, BY
THE WAY.
SO THE JURY, THEY COULD HAVE
GONE TO HER AND SAID YOU'RE NOT
BEING REASONABLE.
SHE COULD HAVE IN HER OWN MIND
SAID, WELL, I'M NOT SURE I'M
BEING REASONABLE.
AND THERE IS THIS REQUIREMENT
THAT WE'VE GOT TO BE
REASONABLE--
>> COULD I ASK YOU ONE OTHER
THING?
HOW COULD THIS BE HARMFUL OR
EVEN MEET THE FUNDAMENTAL ERROR
STANDARD WHERE THE TRIAL COURT
ACTUALLY REPRESENTED AS PROVEN
ALL OF THE MITIGATORS THAT WERE
PRESENTED AT THE PENALTY PHASE?
IN OTHER WORDS, THE TRIAL COURT
SAID DESPITE WHAT THE JURY
FOUND, I FIND THEY'RE ALL
PROVEN, AND I'M ASSIGNING WEIGHT
TO ALL OF THEM.
>> IT'S HARMFUL BECAUSE EACH
JUROR HAS TO CLEARLY UNDERSTAND
SHE CAN STOP THE TRAIN AT ANY
TIME.
AND I THINK, LIKE I SAID, THIS
IS DEATH BY A THOUSAND CUTS.
THERE WERE SEVERAL SUGGESTIONS
IN THE JURY INSTRUCTION AND THE
ARGUMENT.
ONE OF THE THINGS IN THE JURY
INSTRUCTIONS THAT MIGHT HAVE
HALTED A LIFE-MINDED JUROR FROM
TAKING ON A MAJORITY WOULD BE
THE RECOMMENDATION LANGUAGE.
SHE COULD HAVE SAID TO HERSELF
THIS IS ONLY A RECOMMENDATION.
I HEARD THAT THREE TIMES.
IT MAY NOT REALLY MATTER WHAT WE
DO HERE TODAY, AND THAT'S FATAL
TO THE HEIGHTENED RELIABILITY

REQUIRED BY THE EIGHTH AMENDMENT
IN PENALTY PHASE DELIBERATIONS.
WHICH LEADS ME TO THE, MY
ADDITIONAL ARGUMENTS THAT THE
STATE ATTORNEY'S CLOSING
ARGUMENT WAS INAPPROPRIATE ON
SEVERAL BASES ACROSS THE LINE.
WHAT I MUST SHOW IS THAT THE
ARGUMENT COMPLAINED IT WAS SO
INFLAMMATORY, IT MIGHT HAVE
INFLUENCED THE JURY TO RETURN A
MORE SEVERE VERDICT THAN IT
OTHERWISE WOULD HAVE.
HERE-- AS IN CARDONA, RECENTLY
DECIDED BY THIS COURT-- THE
STATE SOUGHT A VERDICT ON
GROUNDS OTHER THAN THAT.
THE EVIDENCE SUPPORTED IT.
YOU HAD THE STATE ARGUING TO THE
JURY IN THIS CASE THAT WHILE THE
DEFENSE IS BEING VERY UNFAIR TO
YOU BY SUGGESTING THAT THE
EFFECT ON THE REMAINING FAMILY
MEMBERS IS GOING TO BE EVEN
EXACERBATED BY IMPOSITION OF A
DEATH PENALTY, THE STATE IN
EFFECT SAID HOW DARE YOU, HOW
DARE YOU PUT TRANSFER OF THE
RESPONSIBILITY OF THESE
TERRIBLE--
>> COUNSEL, LET'S SAY I AGREE
WITH YOU THAT'S DENIGRATION OF
THE MITIGATION.
WASN'T THAT NOT THE OBJECTION,
THOUGH?
DIDN'T THE OBJECTION STATED HERE
WHEN THE GROUNDS WERE STATE
TREATING THIS AS AN AGGRAVATOR,
NOT A MITIGATOR?
>> THAT WAS ONE OF THE
OBJECTIONS.
I DISTINCTLY RECALL THAT OUR
PENALTY PHASE COUNSEL,
MS. PEEPLES, WAS VERY, VERY
ADAMANT MITIGATION BEING USED AS
AGGRAVATION.
AS FAR AS THE UNFAIRNESS, I KNOW
IT WAS OBJECTED TO.
I CAN'T--
>> SO THIS IS AT PAGE 7589 AND

90 OF THE TRANSCRIPT, AND THE
DEFENSE COUNSEL'S GOING-- I'M
SORRY, COUNSEL'S GOING AND SAYS,
AND WHAT HAPPENS?
IT SHIFTS THE RESPONSIBILITIES
OF THE CONSEQUENCES OF THIS
DECISION, THAT'S THE
RESPONSIBILITY.
AND THE OBJECTION, YOUR HONOR,
HE'S ARGUING A NON-ENUMERATED
AGGRAVATOR.
IT WAS A DENIGRATION OF THE
MITIGATOR, RIGHT?
THAT'S DIFFERENT.
>> IF THAT WAS THE ONLY
OBJECTION, YOU ARE CORRECT,
JUDGE.
>> I'M JUST READING WHAT'S IN
THE TRANSCRIPT.
>> BUT THERE WAS, CLEARLY, A
NON-STATUTORY AGGRAVATOR ARGUED
TO THE JURY WHICH IS THAT THE
DEFENDANT IS A SURVIVOR OF A SEX
BATTERY HIMSELF.
THE ARGUMENT WAS WHO SHOULD HAVE
KNOWN BETTER HOW MUCH PAIN
CRUELTY CAN CAUSE.
CLEARLY, A NONSTATUTORY
AGGRAVATOR.
THE COURT ERRED COMPLETELY BY
FINDING THAT IT WASN'T.
THE STATE SHOULD HAVE BEEN
REBUKED.
INSTEAD, DEFENSE COUNSEL WAS
REBUKED FOR SPEECHIFYING.
>> COUNSEL, YOU HAVE NOW
CONSUMED MOST OF YOUR REBUTTAL
TIME.
I JUST WANT YOU TO KNOW YOU'RE
EATING AWAY AT THE REBUTTAL
TIME.
>> THANK YOU, YOUR HONOR.
I WILL RESERVE MY TIME.
>> GOOD MORNING.
MAY IT PLEASE THE COURT, MY NAME
IS DORIS MEACHAM ON BEHALF OF
THE STATE.
I'D LIKE TO START OFF WITH THE
CLAIM NUMBER TWO, I BELIEVE, THE
DNA THAT WAS FOUND ON THE TOWEL

AND THE COMPUTER.
CONTRARY TO COUNSEL, THE ANALYST NEVER STATED THAT THE RESULTS BACK IN 2011 WERE UNRELIABLE.
IN FACT, DURING CROSS-EXAMINATION SHE WAS ASKED BY DEFENSE COUNSEL, SO ARE YOU SAYING THAT THE TESTS ARE UNRELIABLE.
AND SHE SAID, NO, THAT'S NOT WHAT MY STATEMENT WAS.
SHE TESTIFIED THAT THEY WERE RELIABLE, AND SHE WOULD HAVE SWORN UNDER OATH TO THE RESULTS BACK THEN AS SHE WAS DOING NOW.
SO THERE WAS NOTHING WRONG WITH THE RESULTS.
SHE HADN'T CHANGED HER TESTIMONY.
SHE STILL EXCLUDED THE DEFENDANT AS A CONTRIBUTOR TO THE DNA ON THE TOWEL AND THE COMPUTER.
AND DEFENSE COUNSEL'S TRIAL STRATEGY WAS NOT INFLUENCED AT ALL.
DURING CLOSING ARGUMENT HE MADE THAT ARGUMENT, THAT THE DNA BELONGED TO SOMEONE ELSE ON THE COMPUTER.
DURING THE STATE'S REBUTTAL, THE STATE CONCEDED TO THAT.
THEY SPECIFICALLY SAID THAT THE DNA FOUND ON THE BLUE TOWEL AND ON THE LAPTOP DID NOT BELONG TO THE DEFENDANT.
THE JURY HEARD THAT.
THE STATE CONCEDED THAT.
THE STATE'S THEORY WAS THAT THE QUANTITY AND THE QUALITY WAS SO LOW THAT THAT WAS PERHAPS LEFT A LONG TIME AGO.
THIS BLUE TOWEL WAS LAYING ON THE BATHROOM FLOOR IN BETWEEN THE BATHROOM AND THE BEDROOM.
AND THEIR THEORY WAS THIS COULD HAVE BEEN LEFT BY A MALE THAT WAS INTIMATE WITH HER A WHILE AGO.
WHO KNOWS HOW LONG AGO THAT DNA WAS LEFT ON THAT BLUE TOWEL.

SO, YES, IT EXCLUDED THE
DEFENDANT, BUT IT DIDN'T MEAN
THAT IT WAS ACTUALLY A PART OF
THE MURDER SCENE.
AS FAR AS THE COMPUTER, THEY
ALSO CONCEDED THAT THE DNA
BELONGED TO SOMEONE ELSE.
BUT AGAIN, IT'S A LAPTOP.
PEOPLE TOUCH LAPTOPS.
WE DON'T KNOW WHEN THAT DNA WAS
LEFT THERE, WHETHER OR NOT IT
WAS SOMEBODY WHO LEFT IT THERE
THAT NIGHT OR SOMEBODY THAT LEFT
IT THERE WEEKS AGO, MONTHS AGO.
SO THAT WAS THE STATE'S
POSITION.
BUT THE JURY STILL HEARD THE
SAME EVIDENCE THAT WAS BROUGHT
OUT IN OPENING STATEMENT THAT
THERE WAS DNA BELONGING TO
SOMEONE ELSE.
>> BUT WITH THIS OTHER
TESTIMONY, IT SEEMS TO ME THAT
WAS ALL CAST INTO DOUBT BECAUSE
SHE SAYS IF THIS HAD BEEN
REPORTED TODAY, I WOULD HAVE--
IF THE MINOR RESULTS WOULD HAVE
BEEN REPORTED OUT AS LIMITED DNA
RESULTED NOT INTERPRETABLE,
MEANING I WOULDN'T HAVE USED
THEM FOR INCLUSION OR EXCLUSION.
SHE TESTIFIED TO THAT.
AND THAT'S SOMETHING-- NOW,
WHETHER THERE WAS PREJUDICE AND
ALL THAT, THAT'S A DIFFERENT
QUESTION.
>> CORRECT.
>> BUT THAT DOES SEEM TO BE
SOMETHING THAT IS DIFFERENT THAN
WHAT THE DEFENSE COULD HAVE
EXPECTED TO HEAR BASED ON THE
DEPOSITIONS.
AND THE IDEA THAT SHE CAN KIND
OF COME IN AND SAY, WELL, YEAH,
I SAID THAT, BUT I SAID THIS
OTHER STUFF TOO, THAT SEEMS TO
BE KIND OF PLAYING A LITTLE FAST
AND LOOSE.
>> WHEN YOU TAKE IT INTO THE
CONTEXT-- WHEN THEY WERE ASKING

FOR QUESTIONS ABOUT THE DNA THAT
WAS FOUND ON THIS OBJECT, ON
THAT OBJECT, WHEN THEY
SPECIFICALLY GOT TO THE BLUE
TOWEL AND THEY ASKED HER ABOUT
THE DNA, IT WAS LOW QUALITY, LOW
QUANTITY.
THE PROSECUTOR WENT A STEP
FURTHER.
WHAT ARE THE REASONS FOR THAT?
IS IT BECAUSE MAYBE IT WAS LEFT
THERE A LONG TIME AGO?
AND SHE SAID, YES, THAT'S
POSSIBLE.
WE CAN'T PINPOINT WHEN THAT DNA
A WAS LEFT THERE.
>> WELL, THAT ALL HAPPENS, BUT
THEN THE KEY QUESTION IS IF THIS
RESULT-- AFTER SHE HAD
INITIALLY TESTIFIED ABOUT THE
INCLUSION AND EXCLUSION-- IF
THIS RESULT HAD BEEN REPORTED
OUT TODAY, WHAT WOULD YOU HAVE
PUT ON THAT, ON THE REPORT?
>> CORRECT.
>> THAT'S THE KEY QUESTION,
RIGHT?
>> THAT IS THE QUESTION.
>> IT SEEMS TO ME TO BE
OVERWHELMINGLY LIKELY THAT
COUNSEL KNEW WHAT THE ANSWER TO
THAT WAS GOING TO BE.
THAT'S NOT JUST A SHOT IN THE
DARK.
>> HE JUST ASKED YOU WHETHER OR
NOT STANDARDS HAD CHANGED AS FAR
AS REPORTING, AND SHE SAID IT
HAD.
BUT IT NEVER CHANGED HER OPINION
THAT HE WAS EXCLUDED FROM BACK
THEN.
SHE STILL TESTIFIED TO THAT.
SHE STILL SAID THAT WAS
RELIABLE.
HE STILL GOT TO ARGUE THAT--
THERE WAS NO HARM TO HIS TRIAL
STRATEGY WHATSOEVER, BECAUSE THE
JURY STILL HAD THAT.
IT WAS EXCLUDED FROM THE BLUE
TOWEL AND FROM THE LAPTOP.

AND AGAIN REASON, PERHAPS, WAS
BECAUSE THERE WAS SUCH LOW
QUALITY IN THERE, AND THAT GOES
INTO HER REPORT--
>> IF THE OBJECTION TO THAT
TESTIMONY HAD BEEN THAT IT WAS
COMPLETELY IRRELEVANT, WOULD--
I MEAN, THAT WOULD HAVE BEEN
PROPERLY SUSTAINED, RIGHT?
WHETHER THE STANDARDS HAVE
CHANGED--
>> EXACTLY.
>>-- ARE COMPLETELY IRRELEVANT.
>> WE'RE GOING BY BACK IN 2011
SHE WAS THE ANALYST.
SHE DID THE DNA REPORT--
>> AND SHE CLARIFIED, IT WAS
CLARIFIED ON CROSS-EXAMINATION
THAT HER-- WHATEVER THE, THE
CHANGE IN STANDARDS DID NOT
AFFECT THE LIABILITY AND
ACCURACY OF HER PREVIOUS
DETERMINATION THAT THAT WAS
SOMEONE ELSE'S DNA.
>> CORRECT.
>> THE DEFENDANT WAS EXCLUDED
FROM THE DNA SAMPLE THAT WAS
TAKEN FROM THE LAPTOP AND FROM
THE TOWEL.
>> RIGHT.
NOTHING HAD CHANGED.
SHE WAS JUST ANSWERING THE
QUESTION THAT WAS PRESENTED TO
HER BY THE PROSECUTOR HONESTLY.
IF IT WERE REPORTED TODAY, WOULD
IT HAVE CHANGED.
YES.
>> SO, I MEAN, REALLY ISN'T
THAT, THAT COULD BE TERMED AS
PROSECUTORIAL MISCONDUCT, ASK AN
IRRELEVANT QUESTION TO TRY TO
CONFUSE THE JURY.
>> SHE HAD MENTIONED EARLIER IN
THE TESTIMONY THAT SOME OF THE
PROCESSES HAD CHANGED.
I BELIEVE THAT WAS MAYBE A
FOLLOW UP AS TO WHAT, HAVE
THINGS CHANGED.
>> AT THE TIME IT DID MAKE IT
SOUND LIKE IT WAS NEW

INFORMATION.
IT DID MAKE IT SOUND LIKE YOU COULDN'T RELY ON HER ORIGINAL DETERMINATION, AND THAT WAS CLEARED UP IN CROSS.
BUT THAT WAS CLEARLY THE EFFECT OF THAT QUESTION AND ANSWER.
>> THE EFFECT OF THAT WAS REALLY NOT MUCH ON THE JURY AND THE JUDGE, AS JUSTICE LUKES SPECIFIED.
THEY WENT THROUGH THE RICHARDSON HEARING, AND THEY FOUND THAT THIS WAS NOT, YOU KNOW, WILLFUL.
IT WAS IN ADVERTENT.
THE PROSECUTOR DID NOT HIDE THIS.
THERE WAS NO REPORTING, NO NEW REPORTING DONE.
NO NEW TESTING DONE OF THIS DNA ON THE TOWEL AND COMPUTER.
IT'S NOT LIKE THEY RAN ALL THESE TESTS AND REALIZED, OH, HE WOULD HAVE BEEN EXCLUDED AT THIS POINT, AND THEY KEPT THAT.
THIS WAS NOTHING NEW.
NOTHING HAD CHANGED.
THERE WAS NO DISCOVERY VIOLATION, ACCORDING TO THE JUDGE.
AND EVEN IF THERE HAD BEEN, AS HE STATED, BASICALLY SHE GAVE NO OPINION AT ALL.
IT WAS OF NO OPINION.
THERE WAS NO CHANGE.
>> IF NOBODY ELSE HAS QUESTIONS ABOUT THAT, I WANT TO ASK YOU ABOUT THE SUFFICIENCY OF THE EVIDENCE STANDARD THAT SHOULD BE APPLIED IN THIS CASE.
>> IN THIS CASE IT'S THE DIRECT EVIDENCE CASE--
>> WHAT IS THE DIRECT EVIDENCE?
>> THE DNA ON THE BAT.
>> OKAY.
SO WE HAVE A CASE THAT SAYS DNA IS CIRCUMSTANTIAL EVIDENCE, CORRECT?
>> WE HAVE-- THE CASE THAT HE CITES WITH THE DNA THAT WAS

FOUND ON THE GLOVES IS VERY
DIFFERENT FROM THE CASE THAT WE
HAVE HERE.
ON THAT, IN THAT CASE THE GLOVE,
FIRST OF ALL, WAS NOT EVEN TIED
TO THE MURDER.
THIS WAS A GLOVE THAT WAS LEFT
THERE.
SO IT WAS, YOU KNOW, YOU HAD A
BASE--
>> I MEAN, THE FACT THAT DNA,
THE DEFENDANT'S DNA WAS FOUND ON
THE BAT IS A FACT FROM WHICH THE
JURY COULD INFER THE ULTIMATE
FACT THAT HE WIELDED THAT BAT
DURING THE ATTACK, CORRECT?
>> THAT WAS ONE OF THE MURDER
WEAPONS.
>> BUT THAT'S THE EVIDENCE OF
CIRCUMSTANTIAL EVIDENCE.
DIRECT EVIDENCE WOULD BE A
VIDEOTAPE OR AN EYEWITNESS
TESTIMONY THAT HE WIELDED THE
BAT.
ALL YOU HAVE TO DO IS BELIEVE
WHAT YOU'RE SEEING IN THE VIDEO
OR WHAT THAT WITNESS IS SAYING.
THAT'S THE CLASSIC DEFINITION OF
DIRECT EVIDENCE, ISN'T IT?
>> RIGHT, RIGHT.
BUT THIS WAS, IF THIS WAS DNA
EVIDENCE--
>> LOOK AT THE LAPTOP.
SO IF, ARE YOU SUGGESTING THAT
THE DNA OF SOMEONE ELSE ON THE
LAPTOP IS DIRECT EVIDENCE THAT
SOMEONE ELSE COMMITTED THE
MURDER?
>> THAT HAS NOTHING TO DO WITH
THE MURDER.
I MEAN, AS FAR AS--
>> IT DOES.
I MEAN--
[INAUDIBLE CONVERSATIONS]
WELL, THERE ARE A LOT OF
INFERENCES YOU CAN MAKE FROM
THAT.
ONE IS THE ONE THAT THE
PROSECUTOR ARGUED.
BECAUSE SOMEONE ELSE'S DNA WAS

ON THE LAPTOP, YOU SHOULD INFER
THAT SOMEONE ELSE WAS PRESENT
AND MOVED THAT LAPTOP UNDERNEATH
THE CABINET OR CHEST AT THE TIME
OF THE MURDER.
NOW, YOU HAVE A DIFFERENT
ARGUMENT--
>> WELL, THERE'S MULTIPLE
INFERENCES--
>> AREN'T THERE OTHER INFERENCES
THAT COULD BE DRAWN, PERHAPS NOT
AS STRONG GIVEN THE QUALITY OF
THE DNA, FROM THE FACT THAT THE
DEFENDANT'S--
>> ON A BAT THAT HE SAID HE
NEVER TOUCHED, NEVER EVEN KNEW
WAS THERE--
>> JUST THE FACT OF THE DNA ON
THE BAT, ONE INFERENCE IS THAT
HE TOUCHED IT AT A PRIOR TIME.
NOW,, THAT'S NO LONGER A
REASONABLE INTEREST--
>> HE'S--
>> BUT, YOU SEE, WE'RE TALKING
ABOUT WHAT'S THE CHARACTER OR
NATURE OF THE FACT THAT THERE'S
HIS DNA ON THE BAT.
THAT'S CIRCUMSTANTIAL WITH
RESPECT TO THE ULTIMATE FACT OF
WHETHER HE WIELDED THE BAT
DURING THE MURDER.
>> WELL, IF YOU WERE TO CONSIDER
THIS IS CIRCUMSTANTIAL EVIDENCE,
THERE IS OVERWHELMING
CIRCUMSTANTIAL EVIDENCE THAT--
>> I THINK MS. WRIGHT CONCEALED
THAT.
SHOULD IT BE THE SPECIAL REVIEW
STANDARD FOR WHOLLY
CIRCUMSTANTIAL CASE, OR SHOULD
IT BE AS YOU ARE GETTING YOUR
BRIEF, THE REGULAR STANDARD OF
REVIEW?
>> IT SHOULD BE THE REGULAR
STANDARD WITH THE DNA ON THE
HANDLE OF THE BAT.
>> IS COURAGE AN APPROPRIATE
BASIS FOR WHICH TO TELL THE JURY
THEY'RE TO REACH A VERDICT?
>> THAT IS NOT THE CORRECT--

>> WELL, ANSWER MY QUESTION
FIRST.
>> COURAGE, NO.
>> OKAY.
SO IT WOULD, ON ITS OWN--
>> ON ITS OWN, IT WOULD NOT.
>> IN OTHER WORDS, IF I SAID TO
A JURY HAVE THE COURAGE TO FIND
THE DEFENDANT GUILTY AND TO
EXECUTE HIM OR TO RECOMMEND
EXECUTION, THAT'S IMPROPER,
CORRECT?
>> RIGHT.
>> OKAY.
>> IF YOU TAKE THE CONTEXT OF
WHAT--
>> IS WHAT I SAID IMPROPER.
OKAY.
SO LET'S TURN TO--
>> LET'S TURN TO --
>> WHAT HE SAID, 7606 AND 07 OF
THE TRANSCRIPT.
SAID I'M ASKING EACH OF YOU TO
DO THE HARD THING, BUT THE RIGHT
THING, TO HAVE THE COURAGE TO
RETURN A VERDICT THAT, YES, AND
WHAT HE DOES IS HE GOES THROUGH
EACH OF THE--
>> RIGHT.
>> THAT, YES, THAT THERE'S
AGGRAVATORS, YES THEY'RE
SUFFICIENT, YES, THEY OUTWEIGH
THE MITIGATORS AND, YES, THE
DEATH PENALTY SHOULD BE IMPOSED
IN THIS CASE.
HOW IS WHAT I SAID AND YOU SAID
WAS IMPROPER, DIFFERENT THAN
WHAT I JUST READ TO YOU?
>> BECAUSE WHEN ONE IS MAKING A
DIFFICULT CHOICE AS TO WHETHER
OR NOT THEY'RE GOING TO APPOINT
THE DEATH PENALTY TO SOMEONE, IT
IS A DIFFICULT CHOICE.
I MEAN, HE IS STATING THE
OBVIOUS.
HE IS TELLING THEM, YES, YOU ARE
HERE IN A VERY IMPORTANT ROLE,
AND IT IS A DIFFICULT CHOICE.
>> BUT-- SORRY, GO AHEAD.
>> BUT THE TERM DIFFICULT CHOICE

IS DIFFERENT FROM THE TERM
COURAGE.
I MEAN, YOU COULD ACKNOWLEDGE A
DIFFICULT CHOICE, WHICH I THINK
EVERYONE WOULD ACKNOWLEDGE IN
ALL THESE CASES THEY'RE
DIFFICULT CHOICES.
BUT TO SUGGEST THAT TO SHOW
COURAGE BY MAKING PARTICULAR
FIND, THAT SEEMS TO ME TO BE
DIFFERENT THAN TALKING ABOUT A
DIFFICULT CHOICE.
WHAT AM I MISSING THERE?
>> YOU SAY IT'S THE HARD THING.
IT IS A HARD THING.
IT IS A DIFFICULT THING.
HE DOES GO ON TO SAY THE RIGHT
THING AND TO HAVE THE COURAGE.
AGAIN, ALL-ENCOMPASSING.
ALL OF THESE EMOTIONS THAT YOU
GO THROUGH.
IT IS HARD AND SOMETIMES IT
TAKES COURAGE.
>> BUT AS YOU CONCEDED AT FIRST,
IT'S NOT A PROPER BASIS TO REACH
A VERDICT--
>> AT THIS TIME IT'LL BE VERY
COURAGEOUS OF YOU TO--
>> HOW IS BEING COURAGEOUS AND
HAVE THE COURAGE TO RETURN THIS
VERDICT--
>> AFTER.
AND I KNOW THAT, BUT THEN HE
FOLLOWS THAT UP WITH THE CORRECT
STATEMENT OF THE LAW, AFTER YOU
HAVE HEARD THE EVIDENCE AND
YOU'VE WEIGHED THE AGGRAVATORS
AND YOU'VE FOUND--
>> HE DOESN'T SAY AFTER YOU'VE
CONSIDERED THE EVIDENCE.
HE JUST SAYS-- WHAT HE'S
READING IS THE--
[INAUDIBLE CONVERSATIONS]
>> HOLD ON COUNSEL.
HAVE THE COURAGE TO RETURN A
VERDICT THAT, YES, THERE ARE
AGGRAVATORS IN THIS CASE THAT
HAVE BEEN PROVEN BEYOND A
REASONABLE DOUBT.
YES, THOSE AGGRAVATING FACTORS

ARE SUFFICIENT.
YES, THOSE AGGRAVATING FACTORS
OUTWEIGH THE MITIGATING AND,
YES, THE DEATH PENALTY SHOULD BE
IMPOSED.
>> RIGHT.
>> HOW'S THAT DIFFERENT FROM
WHAT YOU AND I HAVE CONCEDED IS
IMPROPER?
>> BECAUSE HE'S TELLING THEM TO
FOLLOW THE LAW.
HE'S SETTING THEM UP TO WHERE,
YES, THIS IS GOING TO BE AN
EMOTIONAL TIME FOR YOU, IT'S
GOING TO BE DIFFICULT AND, YES,
SOMETIMES IT DOES TAKE COURAGE.
HE'S NOT TELLING THEM WHICH WAY
TO GO, HE'S JUST SETTING THEN UP
AS, YES, THIS IS A HARD THING TO
COME TO, BUT YOU STILL HAVE TO
FOLLOW THE LAW.
>> WHAT'S THE STANDARD OF VIEW
ON THIS PARTICULAR ALLEGED
ERROR?
>> ON THIS WOULD BE AN ABUSE OF
DISCRETION--
>> WOULDN'T IT BE FUNDAMENTAL
BECAUSE IT WASN'T OBJECTED TO?
>> THAT'S CORRECT.
>> THIS WAS NOT OBJECTED TO,
YOU'RE CORRECT.
>> SO GIVEN THAT IT'S
FUNDAMENTAL ERROR, HAVE WE EVER
SAID THAT A SINGLE COMMENT LIKE
THIS IS FUNDAMENTAL ERROR?
>> A SINGLE COMMENT, NOT THIS.
NOT LIKE THIS.
WHAT THE CASES HAVE FOUND IS
WHEN YOU'VE, YOU KNOW, SORT OF
INDICATED THAT THIS IS WHAT THEY
HAVE TO DO, IF THEY'VE
DENIGRATED THE DEFENSE, IF
THEY'VE MADE IT SEEM THAT NOT
LETTING HIM GO OR GIVING HIM A
LIFE SENTENCE WAS THE WRONG
THING TO DO.
THAT'S NOT WHAT WE HAVE HERE.
WE HAVE A PROSECUTOR WHO IS
TELLING THEM TO FOLLOW THE LAW.
>> OKAY.

WHAT ABOUT THE COMMENT IT SHIFTS TO YOU, THE RESPONSIBILITY SHIFTS TO YOU AND IT'S NOT FAIR TO YOU.
SO IT'S NOT FAIR TO SHIFT THIS BURDEN TO YOU IN RELATION TO THE ARGUMENTS THAT THEY'RE SAYING THAT HE HAD CAME FROM A BAD FAMILY SITUATION OR HAD A BAD FAMILY, AND YOU'RE MAKING SYMPATHY ON HIM.
AND THE COMMENT IS THAT SHIFT OF RESPONSIBILITY AND CONSEQUENCES TO YOUR SHOULDERS, THAT'S NOT FAIR TO YOU.
>> RIGHT.
IN THAT HE WAS EXPLAINING WEIGHING THE MITIGATORS AND THE--
>> HOW'S THAT, HOW'S TALKING ABOUT THE FAIRNESS OF THAT PARTICULAR ARGUMENT AND THE SHIFTING OF RESPONSIBILITY HAVE ANYTHING TO DO WITH THE WEIGHT OF THAT RESPONSIBILITY?
>> WHEN HE GOES IN THERE, HE'S TALKING ABOUT WHETHER OR NOT THE DEFENDANT WAS A VICTIM WHEN HE WAS YOUNGER AND THAT THEY SHOULD, YOU KNOW, HE SHOULD KNOW KNOW.
YOU HAVE TO WAIT--
>> AND I'M NOT TALKING ABOUT THAT COMMENT.
I UNDERSTAND THAT COMMENT, AND I TEND TO AGREE WITH YOU ON THAT.
WE'RE TALKING ABOUT FURTHER DOWN.
FURTHER DOWN HE SAYS AND HERE'S WHAT'S GOING ON WITH THAT ARGUMENT, BECAUSE WHAT INVARIABLY HAPPENS WHEN YOU'RE THINKING ABOUT FAMILY THAT'S DAMAGED BY BAD CHOICES, WHAT BEGINS TO HAPPEN IN THE JURY ROOM IS YOU BEGIN TO THINK ABOUT YOUR DECISION ABOUT THAT, HOW THAT'S GOING TO IMPACT OTHER PEOPLE.
AND, AGAIN, SYMPATHY-- AS THE

JUDGE SAYS-- CANNOT BE A PART
OF IT.
FINE.
AND WHAT HAPPENS IS IT SHIFTS
THE RESPONSIBILITY OF THE
CONSEQUENCES OF HIS DECISION
FROM HIS SHOULDERS TO YOU.
THAT'S NOT FAIR TO YOU.
AND IT'S REPEATED TWO OTHER
TIMES.
>> THE SHIFTING--
>> SHIFTING AND THE FAIRNESS
ANGLE.
>> THEY ARE THERE BECAUSE THE
DEFENDANT COMMITTED A CRIME.
THEY ARE THERE BECAUSE OF WHAT
HE DID--
>> RIGHT.
BUT THIS WAS THE MITIGATING
FACTOR THAT WAS THERE.
CERTAINLY, THAT'S THE CASE.
>> RIGHT.
>> YOU'RE SAYING THAT'S NOT
FAIR, THAT MITIGATING FACTOR FOR
HIM TO DO THAT TO YOU?
AREN'T YOU DENIGRATING THAT
MITIGATING FACTOR?
>> THE FACT THAT THEY'RE THERE
AND THEY'RE HAVING TO MAKE THAT
CHOICE, THIS IS A DIFFICULT
CHOICE, AND I KNOW THAT'S NOT
FAIR TO YOU.
WE'RE HERE BECAUSE THE DEFENDANT
MURDERED HIS WIFE.
WE'RE HERE, YOU'RE HAVING TO
MAKE THIS DIFFICULT DECISION
BECAUSE OF WHAT HE DID.
AND THAT MAY NOT BE FAIR TO YOU
THAT YOU'RE IN THIS POSITION,
BUT HE WAS NOT SAYING THAT THAT
MITIGATOR WAS WRONG OR NOT FAIR.
IT WAS THE SITUATION THAT THEY
WERE PLACED IN.
THAT'S WHY WE'RE HERE.
BECAUSE OF WHAT THE DEFENDANT
DID.
AND, AGAIN, HE FOLLOWS THAT UP
WITH, YOU KNOW, THAT IT'S HARD.
IT'S HARD TO COME TO THE
DECISION WHETHER OR NOT YOU WANT

TO IMPOSE THE DEATH PENALTY ON SOMEONE.
AND IT'S NOT FAIR TO YOU.
THAT IS A CORRECT STATEMENT WHY THEY'RE THERE, BECAUSE OF WHAT THE DEFENDANT DID.
BUT HE'S NOT DENIGRATING ANYTHING THAT DEFENSE COUNSEL SAID OR ANY OF THE MITIGATORS IN THIS CASE.
AGAIN, HE SHOULD KNOW BETTER.
AGAIN, THAT'S CONSIDERING MITIGATION IN WEIGHING MITIGATION.
YOU WANT TO SEE HE HAD A HORRIBLE CHILDHOOD AND HE WAS GOOD TO ANIMALS, BUT HOW DID HE TREAT HIS WIFE?
YOU CAN USE THAT TO WEIGH THE MITIGATION.
HE'S ALLOWED TO SAY THAT.
DID YOU HAVE ANY FURTHER QUESTIONS ON THAT, OR CAN I GO TO THE NEXT?
>> I HAVE NO FURTHER QUESTIONS ON THIS ISSUE.
>> ON THIS ISSUE?
LET'S SEE.
AS FAR AS THE RECOMMENDED, RECOMMENDED ON THE STANDARD INSTRUCTIONS, THIS WAS THE INTERIM INSTRUCTIONS AND RECOMMEND WAS STILL IN THAT AT THE TIME THE STANDARD INSTRUCTIONS WERE READ.
THE ONLY TIME WAS TWICE BY THE JUDGE WHEN HE WAS ACTUALLY READING THE JURY INSTRUCTIONS AS WELL AS THE PROSECUTOR.
HE SAID IT TWICE DURING CLOSING ARGUMENT, AGAIN, IN CONTEXT OF WHAT THE JURY INSTRUCTIONS WERE.
THAT WAS THE ONLY TIME IT WAS STATED.
THERE WAS NO HARM IN THAT.
THE ADVISORY, IT'S STILL AN ADVISORY RECOMMENDATION, AND IF AS YOU STATED WITH THE MITIGATORS AND REASONABLE, THEY WERE NOT CONFUSED.

THERE WERE 34 NONSTATUTORY
MITIGATORS, AND THEY FOUND 24 OF
THEM.
THE LANGUAGE WAS NOT CONFUSING
TO THE JURY.
WERE THERE ANY OTHER QUESTIONS?
IF THERE'S NOTHING FURTHER, ON
BEHALF OF THE STATE I WOULD ASK
THAT YOU AFFIRM THE DEFENDANT'S
CONVICTION.
THANK YOU.
>> BRIEFLY, I WOULD AGREE WITH
JUSTICE CANADY THAT THE
DISCOVERY VIOLATION WAS AN
EXAMPLE OF PROSECUTORIAL
MISCONDUCT--
>> I DON'T THINK I ACTUALLY SAID
THAT.
[LAUGHTER]
>> IF THAT'S WHAT YOU MEANT, I
AGREE.
>> [INAUDIBLE]
>> I DO AGREE WITH THAT.
AND THIS COURT IN PATE AND
SCIPIO LOOKED TO WHETHER
PROSECUTORIAL MISCONDUCT WAS
DELIBERATE OR NOT.
>> LET ME ASK YOU THIS, WHAT DID
THE DEFENSE DO TO SHOW TO THE
JUDGE THAT PREJUDICE HAD BEEN
CAUSED TO THE DEFENSE BY THE
DISCOVERY, THE ASSERTIVE
DISCOVERY VIOLATION?
>> HE SAID THAT'S THE TOTALITY
OF OUR CASE IN CONJUNCTION WITH
THE OPENING STATEMENT.
HE SAID I THINK THE WIND WAS
KNOCKED OUT OF HIM BY HEARING
THIS.
IT WAS WHAT THE CLIENT RELIED ON
TO DECIDE TO GO TO TRIAL FOR HIS
LIFE.
>> SO WHAT EXACTLY WAS SAID TO
THE JUDGE?
I JUST WANT TO GET CLEAR IN MY
MIND--
>> HE SAID IT'S THE TOTALITY--
HANG ON A MINUTE.
>> WHAT PAGE IS THAT ON?
>> WE'RE LOOKING AT PAGE--

>> IT'S PAGE 978-81.
I THINK IT'S TOWARDS 80 OR 81.
>> I'M SORRY.
>> I HAVE IT RIGHT HERE.
TELL ME IF I HAVE THIS WRONG.
THIS IS THE TOTALITY, JUDGE.
THIS IS AT THE HEART OF THE
DEFENSE.
THIS IS WHY IT APPEARS ANY
SUSPICIOUS PERSON WOULD THINK
THE STATE PREPPED THIS WITNESS
TO LEARN ABOUT IT DIDN'T REVEAL
IT TO US.
>> YES, YOUR HONOR, THAT'S IT.
AND THAT'S AT PAGE 980.
THAT WAS THE ARGUMENT MADE AT
THAT TIME.
AS I'VE SAID, THIS COURT IN
PATE, THIS COURT IN SCIPIO
LOOKED AT THE NATURE OF THE
MISCONDUCT--
>> DO YOU DISAGREE THAT THE,
THAT THE-- ON
CROSS-EXAMINATION, COUNSEL
EFFECTIVELY GOT THE WITNESS TO
CLARIFY THAT SHE STUCK BY HER
ORIGINAL DETERMINATION THAT WAS
SOMEONE ELSE'S DNA THAT WAS ON
THE TOWEL AND ON THE COMPUTER
AND THAT HE USED THAT IN CLOSING
AS HE WOULD HAVE IF THE SECOND
PART OF THE TESTIMONY HAD NEVER
BEEN THERE?
AND THE STATE DID NOT REFUTE
THAT, THEY CONCEDED THAT?
>> I WOULD NOT AGREE THAT SHE'S,
THAT IT'S OKAY.
WHAT SHE SAID ON CROSS WAS
I'M-- I WOULD HAVE TESTIFIED TO
IT, I WOULD HAVE RAISED MY HAND
AND TESTIFIED TO IT THEN, BUT
IT'S STILL OUT THERE.
SHE CAN'T TESTIFY TO IT ANY
MORE.
[INAUDIBLE CONVERSATIONS]
>> DO YOU AGREE YOUR OPPOSING
COUNSEL SAID THAT THE STATE
REBUTTAL ARGUMENT CONCEDED THAT
SOMEONE ELSE'S DNA WAS ON THE
COMPUTER AND THE TOWEL?

DO YOU CONCEDE--
>> I'M SORRY, COULD YOU REPEAT?
>> I APOLOGIZE, I'M SORRY.
YOUR OPPOSING COUNSEL SAID WHEN
SHE WAS UP HERE THAT IN REBUTTAL
CLOSING DURING THE GUILT PHASE
THE STATE CONCEDED THAT SOMEONE
ELSE'S DNA WAS, IN FACT, ON THE
LAPTOP AND THE TOWEL BUT IT
DIDN'T MATTER BECAUSE.
DO YOU AGREE WITH THAT?
>> NO, YOUR HONOR.
I DON'T THINK-- I THINK THAT'S
A MISUNDERSTANDING ON THE PART
OF OPPOSING COUNSEL.
I DON'T THINK THAT'S WHAT HE
SAID AT ALL.
I DON'T THINK ANYONE EVER SAID
THAT EVEN NOW WE AGREE THAT THE
DEFENDANT COULD BE EXCLUDED.
THAT WAS NOT SAID.
I SUBMIT FACTUAL
MISUNDERSTANDING ON COUNSEL'S
PART.
AS TO THE REMARK, THE
DEFENDANT-- THE COUNSEL NOT
ONLY SAID DO THE COURAGEOUS
THING, HE SAID DO THE RIGHT
THING WHICH WAS PUTTING HIS OWN
PERSONAL OPINION BEFORE THE
JURY, WHICH IS CLEARLY IMPROPER.
AND AS TO THERE BEING A SINGLE
REMARK OF THIS NATURE, I WOULD
POINT TO THE BROOKS CASE CITED
IN THE BRIEFS WHICH SAID THIS
COURT LOOK AT MISCONDUCT
CUMULATIVELY IN DETERMINING
WHETHER THE PROCEEDING WAS FAIR
ENOUGH.
AND IT'S OUR POSITION THAT THE
PROCEEDING WAS NOT FAIR ENOUGH,
THE PENALTY PHASE PROCEEDING WAS
NOT FAIR ENOUGH FOR THE VARIETY
OF REASONS THAT I'VE SET OUT AND
THAT THE GUILT PHASE WAS NOT
FAIR ENOUGH BECAUSE OF THE
SIGNIFICANT SURPRISE.
I ASK THE COURT TO REVERSE BOTH
THE CONVICTION AND THE SENTENCE.
>> ALL RIGHT.

WE THANK YOU BOTH FOR YOUR
ARGUMENTS.
COURT IS NOW ADJOURNED.