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Gerald Delane Murray v. State of Florida

THE NEXT CASE ON THE COURT'S DOCKET IS MURRAY VERSUS STATE. K.D. TRIHN K.D. TRIHN

I REPRESENT MR. MURRAY ON HIS FIRST-DEGREE -- ON HIS FIRST-DEGREE MURDER APPEAL AND CONVICTION. I AM RICHARD KURTZ. I PLAN TO PROCEED TO ISSUES 4, 3 AND 8, THAT INVOLVE THE DNA TESTING AND THE EXPERT'S TESTIMONY SURROUNDING THAT, AS WELL AS THE DEFENSE MOTION TO COMPEL CERTAIN DISCOVERY DOCUMENTS, AS REGARD TO THAT TESTING. THIS ISSUE, THE CASE LAW, IN THE STATE OF FLORIDA, IS THAT, WHEN DEALING WITH THE POSSIBILITY OF TAMPERING, IF THAT, INDEED, ARISES, THE BURDEN SHIFTS TO THE STATE TO EXPLAIN AWAY ANY AND ALL DISCREPANCIES. ON THE DAY OF THE CRIME, EVIDENCE TECHNICIAN CHASE RESPONDED TO THE SCENE N DOING SO, IT IS HIS DUTY TO COLLECT EVIDENCE. IN DOING SO, HE TOOK A PAIR OF TWEEZERS AND TOOK A HAIR OFF OF THE CHEST OF THE VICTIM AND TOOK A HAIR OFF OF THE LEG OF THE VICTIM. HE PLACED THOSE IN A MANILA ENVELOPE. THEY WERE, LATER, SUBMITTED TO THE FBI LAB, IN WASHINGTON, D.C., FOR MICROSCOPIC ANALYSIS. WHEN THAT ANALYSIS ACTUALLY TOOK PLACE, BY MR. DEZINO, IN THE FBI LAB, HE TESTIFIED AT TRIAL THAT HE DOES NOT COUNT HAIRS IN THE FBI LAB, BUT BY REVIEW OF HIS NOTES, IT APPEARS THAT THOSE TWO HAIRS HAD, NOW, BECOME SOMEWHERE BETWEEN FIVE AND 216789 WHEN ASKED HOW HE GOT TO THE NUMBERS 5 AND 21, HE SAYS THAT HIS NOTES INDICATE ONE PUBIC HAIR AND SEVERAL CAUCASIAN HEAD HAIRS AND SEVERAL CAUCASIAN BODY HAIRS. WHAT HE INDICATED WAS SEVERAL PROCEDURES IN POLICY. WHEN HE USES THE WORD RECEIVERAL IT DISTINGUISH -- USED THE WORD RECEIVERAL, IT DISTINGUISHS BETWEEN TWO AND TEN. HE HAD A MAXIMUM OF 21 AND A MINIMUM OF FIVE HAIRS THAT HE USED, BUT WE DO NOT KNOW THE EXACT NUMBER. IT IS CLEAR THERE IS A DISCREPANCY AS TO WHAT EVIDENCE IS BEING USED AND WHAT EVIDENCE IS AT THE CRIME SCENE. AT THAT POINT THE DEFENSE OBJECTED AND POINTED OUT TO THE COURT AND ASKED THEM THEM TO POINT OUT THE CHAIN OF CUSTODY AND EXPLAIN THE DISCREPANCIES.

WAS THERE ANY EVIDENCE THAT THE CONTAINERS THAT THE HAIRS WERE IN HAD, SOMEHOW, BEEN OPENED OR ANYTHING LIKE THAT?

VERY GOOD QUESTION, JUSTICE QUINCE, AND WHAT WE WENT AFTER, THERE WERE TWO CRITICAL KEY WITNESSES IN THE CHAIN OF CUSTODY THAT WERE NOT CALLED TO TESTIFY. THE FIRST ONE, BY THE NAME OF CHET BLITHE, THE INITIAL CB, APPEARED, ON THE BOX THAT WAS OPENED. INTEREST RESTING, THEY WERE -- INTERESTING, THEY WERE STRICKEN OUT BY SOMEBODY. HE OPENED THAT BOX AND IT NOT ONLY CONTAINED THE KNOWN EVIDENTIARY HAIRS BUT THE HAIRS OF DEFENDANT MURRAY, AS WELL AS THE CO-DEFENDANT TAYLOR. THEY WERE ALL IN THE SAME BOX, AS RECEIVED. WE DON'T KNOW WHAT CONDITION IT WAS IN, WHEN IT ARRIVED THERE. THE SECOND KEY WITNESS THAT WAS NOT CALLED, YOUR HONOR, WAS PAULA FRAZIER. PAULA FRAZIER'S DUTY WAS TO TAKE THOSE UNKNOWN HAIRS AND MOUNT THOSE ON SLIDES, FOR MICROSCOPIC ANALYSIS. WE DO NOT KNOW WHAT HAPPENED WHEN SHE DID THAT. WE DO NOT KNOW IF THERE WAS AN ACCIDENT AN INTENTIONAL OR UNINTENTIONAL COMMINGLING OF THE HAIRS THAT CAME, BUT WE KNOW THAT DEFENDANT MURRAY'S SAMPLE, KNOWN HAIRS, WERE IN THAT BOX THAT WERE SUBSEQUENTLY MOUNTED FOR MICROSCOPIC ANALYSIS, AND TWO CRITICAL WITNESSES IN THE CHAIN OF CUSTODY WERE NOT CALLED TO TESTIFY AND TO EXPLAIN AWAY THIS DISCREPANCIES OF GOING FROM TWO HAIRS AT THE CRIME SCENE AND SOMEWHERE BETWEEN FIVE AND 21, SO WE HAVE NO WAY OF KNOWING, YOUR HONOR.

WHAT WAS THE EXPLANATION, IF ANY, BY THE OFFICER THAT PLACED THE HAIRS IN THE ENVELOPE, WITH REFERENCE TO THAT?

THE EXPLANATION IS EVIDENCE TECHNICIAN CHASE TESTIFIED QUITE CLEARLY. EVEN THE STATE, ON REDIRECT, ASKED HIM ARE YOU SURE THAT IT WAS EXACTLY TWO HAIRS, AND HE SAYS -- I BELIEVE THE RESPONSE IN THE TRANSCRIPT WILL BEAR IT OUT. HE SAYS YES. HE SAYS, WELL, ARE YOU SURE IT WASN'T TWO? THIS IS THE STATE ASKING QUESTIONS. ARE YOU SURE IT WASN'T TWO HAIR SAMPLES? HE SAID IT COULD HAVE BEEN, TO WHICH I COME UP, AGAIN, AND SAY, TECHNICIAN CHASE, WAS IT TWO, AND HIS RESPONSE WAS IT WAS TWO HAIRS THAT WERE PLACED IN THE MANILA ENVELOPE FOR TESTING. THAT WAS THE UNDISPUTED TESTIMONY OF MR. CHASE.

YOU ARE SAYING THERE IS NO ROOM FOR MANEUVER THAT THERE WAS ABSOLUTE TESTIMONY, UNCONTRADICTED, THAT ONLY TWO HAIRS WERE PLACED FOR EXAMINATION,, TO BEGIN WITH, BUT THAT, WHEN THE HAIRS WERE UNPACK AGED, THAT THEY, NOW, BECAME FROM FIVE TO 12?

TWENTY ONE.

TO TWENTY ONE.

WHAT I JUST INDICATED A SAMPLE. THAT THERE COULD HAVE BEEN A HAIR SAMPLE. AND OTHER THAN THAT --

BUT THERE IS NO EXPLANATION IN THE RECORD.

IN THE RECORD, YOUR HONOR, AND TECHNICIAN CHASE USED TEASERS TO PICK OUT EACH HAIR THAT WERE PLACED IN THERE, AND HE POINTED OUT WHERE ONE WAS FOUND ON THE CHEST AND ONE WAS FOUND ON THE LEG, WHICH FURTHER REITERATES THE FACT THAT THERE WERE JUST TWO HAIRS, YOUR HONOR, AND WE NOTE THAT.

THE FIRST APPEAL IN THIS CASE TALKS ABOUT A MATCH OF ONE OF THE FIVE HAIRS RECOVERED FROM THE CRIME SCENE. WAS THE TESTIMONY DIFFERENT, AT THE FIRST TRIAL, FROM THE SECOND TRIAL, AS TO HOW MANY HAIRS?

I AM SORRY. YOU LOST ME ON THAT.

IN THE FIRST APPEAL OF THIS CASE --

YES, YOUR HONOR.

-- IN DISCUSSING WHAT HAD HAPPENED, STARTING OUT JUST WITH THE DNA EVIDENCE DISCUSSION, IT SAYS THE STATE OFFERED DNA EVIDENCE, WHICH WAS PREMISED ON THE EVALUATION BY AN EXPERT WITNESS THAT MURRAY'S DNA MATCHED ONE OF THE FIVE HAIRS RECOVERED FROM THE CRIME SCENE.

VERY GOOD QUESTION.

I AM ASKING WAS THE TESTIMONY DIFFERENT AT THE FIRST TRIAL TO THE SECOND OR HAVE WE JUST GOT IT WRONG, OR WAS THAT ISSUE RAISED?

IT IS A VERY GOOD QUESTION, BECAUSE THERE WERE TWO ISSUES RAISED. TWO HAIRS CAME OFF OF THE BODY THAT I JUST DISCUSSED. ALSO THERE WERE TWO HAIRS, OFFICER LOUISIANA FORT, EVIDENCE TECH -- OFFICER LA FORT COMES TO THE SCENE. HE COMES TO THE MASTER BATH AND FINDS A BOTTLE OF LOTION AND A GARMENT IN THE SINK AND HE PLACES THEM IN A BAG FOR CONTINUITY. LATER I WILL GET TO THE SAMPLES, BUT WHEN TAKEN OFF THE GARMENT, ONE OF

THE FIVE HAIRS THAT ARE DISCUSSED ARE PART OF THOSE HAIRS AS WELL, SO IT IS NOT JUST TWO HAIRS OFF THE BODY. THERE ARE ADDITIONAL HAIRS THAT ARE FOUND IN THE BATHROOM SINK.

AND ONE OF THOSE FIVE SUPPOSEDLY MATCHED THE DEFENDANT?

IT ALLEGEDLY IS A MIXTURE OF THE DEFENDANT. NONE OF THEM MATCH. YOU WILL FIND NOTHING IN THE RECORD TO INDICATE THAT ANY HAIR HERE MATCHES MR. MURRAY. WHAT THEY HEAR IS THAT IT THEY CANNOT BE EXCLUDED. THE LAB, THEY HEAR, IS THERE IS A POSSIBILITY OF MIXTURE IN THIS CASE.

THAT IS THE HAIR FROM THE BATHROOM?

THE HAIRS IN THE BODY -- IN THE SINK WERE BROUGHT IN FOR IDENTIFICATION, AND IT IS TESTIMONY THAT STATES THAT ONE OF THE HAIRS MICROSCOPICLY MATCHES THAT OF THE DEFENDANT. WE DON'T KNOW WHICH HAIR, AND THE DEFENSE DID NOT GET AN OPPORTUNITY TO HAVE THE DNA TEST, AND I WANT TO MAKE THE POINT THAT, WHEN IT WAS SENT FOR DNA TESTING, THERE WAS NO HAIR OF JERROLD MURRAY. ONE IS THE VICTIM OF THE CASE AND THE THIRD HAIR HAS NO RESULT, TOTALLY DOWN THE CHART, SO WE DON'T KNOW OR SPECULATE, BUT THE DNA TESTING THAT WAS WITHOUT OBJECTION, SO TO SPEAK, ACTUALLY, ON THE HAIRS OF THE BODY, DON'T SHOW MR. MURRAY. THEY SHOW THE VICTIM AND THE CO-DEFENDANT, AND THIS COURT HAS ALREADY AFFIRMED THE CO-DEFENDANT'S DEATH SENTENCE, YOUR HONOR.

SO THE TWO HAIRS THAT YOU ARE TALKING ABOUT THAT BECAME FIVE TO TEN HAIRS, NONE OF THEM WAS A MATCH?

WITH DNA.

OF YOUR CLIENT.

YES, YOUR HONOR.

SO WHAT IS THE PROBLEM, THEN?

THE HARM, YOUR HONOR, IS THAT MR. DEZINO TESTIFIED THAT ONE OF THOSE HAIRS, AND I BELIEVE HE SAID A PUBIC HAIR THAT WAS FOUND ON THE BODY OF THE VICTIM MATCHED MR. MURRAY MICROSCOPICALLY. CLEARLY THERE IS HARM. WHAT GREATER HARM CAN THERE BE THAN TO SAY THAT A DEFENDANT'S HAIR WAS FOUND ON THE VICTIM'S BODY. WHAT GREATER HARM CAN THERE BE? THAT WAS BEFORE THE DEFENSE HAD AN OPPORTUNITY TO EXAMINE THEM, THEMSELVES. MR. DEZINO TESTIFIES THAT ONE OF THE HAIRS DISCOVERED ON THAT BODY MATCHES THE HAIR OF THE DEFENDANT JERROLD MURRAY. THAT IS AN ISSUE, TOO, YOUR HONOR. LET ME GET TO THE LOTION BOTTLE THAT IS IN THE BATHROOM. WHEN OFFICER LE FORT GOES INTO THAT BATHROOM, HE SEES THE LOTION BOTTLE, AND FOR CONTINUITY HE PLACES THEM IN THE SAME PAPER BAG.

I THOUGHT THAT THERE WERE TWO PAPER BOG BAGS INVOLVED.

THERE ARE, YOUR HONOR -- TWO PAPER BAGS INVOLVED.

THERE ARE, YOUR HONOR. THAT IS A QUESTION THAT, WHEN I DIDN'T SEE THIS COMING, I WAS ASKING ABOUT THIS ISSUE, AND SHE SAID, I AM SORRY. I AM TRYING TO TELL THAT YOU THE LOTION BOTTLE WASN'T TLST.

I THOUGHT THE RECORD INDICATED THAT A ROBE?

A GARMENT.

WAS PUT IN ONE BAG, AND THEN THAT BAG AND THE LOTION WAS PUT IN ANOTHER BAG.

THAT IS TESTIMONY THAT MAY BE ACCURATE. I WOULD AGREE WITH THAT.

SO WHAT BAG WAS SENT TO THE LAB?

THANK YOU. YOUR HONOR, MY UNDERSTANDING FROM THE TESTIMONY IS THAT, FOLLOWING THAT LIVE TESTIMONY, THE GARMENT IS PLACED IN ONE PAPER BAG, AND PAPER IS ESSENTIAL, FOR PURPOSES OF APPEAL, AND THE LOTION BOTTLE IS PLACED IN A BIGGER BAG, AND BOTH OF THEM ARE PLACED IN A BIGGER BAG AND SEALED WITH EVIDENCE TAPE, AND THAT IS WHAT OFFICER LE FORT TESTIFIED TO, THAT THEY WERE, BOTH, PLACED IN THE SAME PAPER BAG AND SENT TO FDLE. WHEN KATHERINE WARNER OPENS THE BAG, THERE WAS NO LOTION IN THERE. I ASKED OFFICER LE FORT IF HE SPECIFICALLY PUT IT INTO PAPER OR PLASTIC, AND HE SAID HE WOULD NEVER PUT IT INTO PLASTIC, BECAUSE PLASTIC PROMOTES THE GROWTH OF MOLD AND MILLION DOLLARS DUE AND HE WOULD NEVER -- MOLD AND MILDEW, AND HE WOULD NEVER PUT IT IN PLASTIC. HOWEVER, NOW THERE IS A DOUBLE ASSEMBLY OF PLASTIC AND PAPER. SO WE KNOW SOMETHING HAPPENED. SOMETHING WAS TAKEN OUT.

WHAT IS THE STATE'S EXPLANATION RELATIVE TO WHAT HAPPENED TO THE LOTION?

ON THIS ISSUE, YOUR HONOR, I THINK THEY DID RECOGNIZE THE NEED TO ESTABLISH A CHAIN OF CUSTODY AND EXPLAIN THE DISCREPANCY, AND THEY, THEN, CALLED DIE AND HANSON, WHO WAS -- DIANE HANSON, WHO WAS, ALSO HE AT THE FDLE, AS A LATENT FINGERPRINT INSPECTION. THEY CALLED DIANE HANSON, AND SHE TESTIFIED WHEN SHE RECEIVED THE ITEMS IN THE BAG, SHE MARKED THE BAG AND SENT IT ON, BECAUSE THEY DON'T DEAL RECOVERY UNTIL THAT IS DONE, SO THAT WAS THE ONLY EXPLANATION AS TO WHAT HAPPENED OR WHERE IT WENT F YOU READ THE TRANSCRIPT, AS I AM SURE YOU HAVE, MY CONVERSATION WAS THERE WASN'T AN ARGUMENT. WE DIDN'T SEE THIS ISSUE COMING, SO WE ABSOLUTELY OBJECTED AT THAT TIME AND CONTINUED OUR OBJECTION THROUGHOUT, BECAUSE WE DIDN'T SEE THAT COMING.

RELATE THIS TO TAMPERING WITH THE EVIDENCE. WHAT IS YOUR HYPOTHESIS?

THANK YOU. WHAT WAS THEIR HYPOTHESIS?

YOURS.

MY THEORY, BASED ON THE LAW AS I UNDERSTAND IT, WE, NOW, HAVE A CLEAR DISCREPANCY, IN THE STATE OF THE EVIDENCE THAT THEY HAVE BEFORE THEM, THAT IS CLEARLY DIFFERENT, IN THE CONDITION IT WAS WHEN IT WAS SEIZED. AT THAT POINT, BASED ON DODD V STATE, MY UNDERSTANDING THE BURDEN SHOULD BE SHIFTED TO THE STATE, FOR THEM TO SHOW A CHAIN OF CUSTODY AND TO EXPLAIN IT AWAY.

THE MISSING LOTION AND THE DISCREPANCY IN THE NUMBER OF HAIRS, YOU HAVE ESTABLISHED TAMPERING.

ON THE NUMBER OF HAIRS, I THINK THAT, IN AND OF ITSELF, SPEAKS FOR ITSELF. IT WENT FROM TWO HAIRS TO 5 AND 21, AND I DON'T LIKE TO USE THE WORD "TAMPERING", BECAUSE IT IMPLIES NEGATIVE CONNOTATION. I AM SAYING IT WASN'T IN THE STATE IT WAS WHEN IT WAS SEIZED.

ARE YOU SAYING IT WAS INTENTIONAL OR UNINTENTIONAL OR WHAT?

I DON'T WANT TO GET INTO FINGER POINTING, SUGGESTING THAT THEY HAVE DONE SOMETHING IMPROPERLY, BUT I THINK CLEARLY AS TO THE HAIRS, FAVORABLE TO THE FBI LAB AT THE TIME -

- WITH REFERENCE TO THE FBI LAB AT THE TIME, IT WAS UNDER INVESTIGATION, BUT I THINK IT WAS UNINTENTIONAL HAIRING, AS TO THE HAIRS.

ARE YOU REPRESENTING TO US THAT THERE WAS TAMPERING OR THAT THERE WAS NOT TAMPERING? THAT IS ALL I AM TRYING TO GET AT.

JUDGE, I THINK THERE WAS TAMPERING, BUT I DON'T FEEL COMFORTABLE SAYING SOMEBODY INTENTIONALLY HAD A MOTIVE OR CONSPIRACY AGAINST MR. MURRAY AND SAID I AM GOING TO TAMPER WITH THIS, SO I THINK AND MY UNDERSTANDING OF THE CASE LAW IS I DON'T HAVE A BURDEN TO PROVE INTENTIONAL OR UNINTENTIONAL TAMPERING, JUST THAT IT IS IN THE SAME CONDITION. JUDGE, I DON'T WANT TO POINT THE FINGER AT ANYBODY, BUT I THINK CLEARLY THEY ARE WITHOUT EXPLANATION, AND IT IS CLEARLY THE STATE'S BURDEN TO EXPLAIN TO US AND TO EXPLAIN TO THIS COURT WHAT HAPPENED. THAT IS WHAT WE ASKED THE COURT TO DO AND TO PROVIDE THE DEFENSE WITH SOMETHING, PROOF POSITIVE, IN DEMONSTRATIVE EVIDENCE. IT IS THE STATE'S BURDEN TO ESTABLISH THAT.

BUT YOU HAVE THE BURDEN, TO BEGIN, WERE TO SHOW THE PROBABILITY OF TAMPERING. I AM HAVING DIFFICULTY WHERE YOU ARE SHOWING ANY EVIDENCE OF TAMPERING AT ALL. AT MOST, AT LEAST WHAT YOU HAVE DESCRIBED HERE, YOU ARE SHOWING THAT THEY MAY HAVE ARRIVED IN A DIFFERENT CONTAINER, PAPER AS OPPOSED TO PLASTIC OR PLASTIC AS OPPOSED TO PAPER, HOWEVER WE WANT TO -- BUT IN TERMS OF DISTURBING THE EVIDENCE, SO THAT IT MIGHT, NOW, SHOW SOMETHING THAT IT DIDN'T SHOW WHEN IT WAS -- I AM ASKING DIFFICULTY SEEING WHERE THERE IS ANYTHING LIKE THAT. THAT WOULD BE LIKE SAYING, MAYBE, FOUR PEOPLE HANDLED THE PACKAGE, AND WE CAN ONLY ACCOUNT FOR TWO OF THEM, BUT THERE IS THE PACKAGE KIND OF THING, AND, YEAH, WE WONDER WHERE -- WHAT HAPPENED WITH THE OTHER TWO PEOPLE OR SOMETHING, BUT THAT DOESN'T GIVE RISE TO A PROBABILITY OF TAMPERING, SO WHERE IS THERE ANY PROBABILITY OF TAMPERING, AND THAT IS THE WORD AND THAT IS THE RULE. SOMETHING HAS BEEN TAMPERED WITH, SO THAT THE IMPLICATION IS IT IS NOT RELIABLE ANYMORE, BECAUSE IT HAS BEEN TAMPERED WITH, SO WHERE, WITH REFERENCE TO THE GARMENT, WHERE IS THERE ANY IMPLICATION THAT SOMETHING HAS BEEN -- THAT THAT HAS BEEN TAMPERED WITH, SO IT NO LONGER WILL BE RELIABLE EVIDENCE?

YOUR HONOR, I CANNOT POINT TO ANYTHING WHERE I FIND SOMEBODY THAT IS GOING TO ADMIT TO IT OR SOMEBODY THAT IS GOING TO SAY --

I DON'T MEAN ADMITTING TO IT.

I CAN'T POINT TO A PAPER BAG THAT APPEARS TO BE RIPPED OR TORN OR TAPE THAT APPEARS TO BE PULLED OFF.

CAN YOU POINT TO ANY CONDITION OF THE GARMENT, ITSELF, THAT APPEARS TO BE CHANGED? IN OTHER WORDS, IF IT SUDDENLY TURNED FROM A YELLOW GARMENT INTO A BLACK GARMENT.

THE EVIDENCE TECHNICIAN WAS NOT ABLE -- HE DID NOT OBSERVE THAT CLOSELY ENOUGH TO BE ABLE TO TELL US WHAT THE CONDITION OF IT WAS THEN.

WITH REFERENCE TO THE HAIRS, IF I UNDERSTAND IT CORRECTLY, YOU ARE SAYING, NOW, YOU DO HAVE TAMPERING THERE, BECAUSE THERE IS ABSOLUTE TESTIMONY THAT THERE WERE ONLY TWO.

YES, YOUR HONOR.

AND NOW, ALL OF A SUDDEN, THERE IS FIVE TO 21, AND THAT THAT SORT OF SPEAKS FOR ITSELF. IS THAT --

YES, YOUR HONOR.

YOU HAVE A NUMBER OF ISSUES AND YOU HAVE A VERY LIMITED TIME. ANOTHER THIRD ISSUE ON MY APPEAL, YOUR HONOR, IS THERE WAS A TELEPHONE CALL PLACED BY THE STATE'S DNA EXPERT TO THE DEFENSE DNA EXPERT, IN THE MIDDLE OF THE FRYE HEARING. THE STATE'S EXPERT HAD TO BIFURCATE HIS TESTIMONY, DUE TO THE TIME CONSTRAINTS, AND THE LAB AND LIST SUPERVISOR IN THIS CASE -- AND THE LAB ANALYST SUPERVISOR IN THE CASE SUPERVISED THE TESTIMONY. THE FIRST THING THE LAB ANALYST ASKED THE DEFENSE ANALYST IS DO YOU KEEP YOUR PHONES LOCKED? THE SECOND THING IS HE ASKED TO MEET OR ARE YOU COMING INTO TOWN.

IS THAT A NECESSARY ELEMENT, IN CONNECTION WITH THE ARGUMENT THAT YOU ARE MAKING?

I WOULD NOT IMPUTE THAT AT ALL TO MR. DELERIONTE. I DO NOT BELIEVE THAT IS A NECESSITY OF MY CASE. I THINK IT IS SIMPLY TAMPERING WITH A WITNESS. I THINK IT GOES TO THE CREDIBILITY OF THE STATE'S DNA EXPERT. I THINK THE STATE EXPLAINED THAT, IF IT HAD GONE FURTHER, THAT THEY WERE GOING TO USE MR. WARNER TO SOMEHOW IMPUTE HIS EVIDENCE.

SO WITH REGARD TO A WITNESS TO WITNESS EXCHANGE, NOT AT THE INSTIGATION OF A PARTY?

YES, YOUR HONOR.

LET ME MOVE YOU TO YOUR ATTACK ON THE DNA EVIDENCE, ITSELF. AS I UNDERSTAND IT, THERE WAS A LENGTHY FRYE HEARING.

YES, YOUR HONOR.

UPON THE REMAND, HERE, AND ARE YOU ATTACKING ANY PART OF THE DNA EVIDENCE NOW, ON THE BASIS THAT IT -- THAT WHAT WAS PUT INTO EVIDENCE WAS NEW AND NOVEL?

SURE. I UNDERSTAND. I AM NOT SAYING THAT PCR TESTING, IN AND OF ITSELF, IS NEW AND NOVEL.

YOU ARE NOT SAYING THAT.

NO, YOUR HONOR. FROM LOOKING AT THE NRC-1, THE NRC-1, THIS COURT HAD GREAT CONCERN ABOUT THE TESTING. THE NRC-2, WHICH THEY HAD, HAS BECOME MORE WIDELY ACCEPTED.

SO THAT PORTION DIDN'T NEED TO BE FRYE TESTED.

CORRECT, YOUR HONOR. HOWEVER, THE METHODOLOGY THAT WAS EMPLOYED IS OF SERIOUS CONCERN N ARGUMENT OF THE REMAND AND IN OUR TRIAL, I THINK THERE WAS A SUBSEQUENT TRIAL IN WHICH THERE WAS A SUBSEQUENT JURY, YOUR HONOR. WHEN I WAS APPOINTED TO TAKE THIS CASE, IS THAT THE PERSON TESTIFYING IN SUPPORT OF THE STATE WAS THE SUPERVISOR OF THE LAB AND NOT THE LAB TECHNICIAN WHO DID THE TESTING, SO I BEGAN MY INVESTIGATION OF THE LAB TECHNICIAN WHO DID THE TESTING AND CONTACTED HIM, TO FIND OUT WHAT HE THOUGHT ABOUT WHEN HE WAS DO IT -- WHEN HE WAS DOING IT, HE ABSOLUTELY, UNEQUIVOCABLY STATED THAT THE TEST WAS UNRELIABLE, AND HE GAVE ME AT LEAST THREE DIFFERENT REASONS.

THAT WAS BECAUSE OF THE METHODOLOGY THAT WAS USED IN THIS PARTICULAR INSTANCE, CORRECT?

YES, YOUR HONOR. I AM NOT TRYING TO ATTACK IT AS A WHOLE, JUST WAY THAT IT HAPPENED IN THIS CASE.

SO AS TO THE SUPERVISOR TESTIFYING AS TO THE METHODOLOGY AND WHAT THE ACTUAL PERSON THAT DID IT TESTIFIED AS TO THE METHODOLOGY, IS THAT CORRECT?

IF I UNDERSTAND YOUR QUESTION, YES, THE METHODOLOGY WAS DONE, UTILIZING THE SAME TOOL, SO TO SPEAK, BUT AS TO ANY OMISSIONS, CORRECTIONS, ERRORS, MANIPULATIONS, THINGS OF THAT NATURE, THERE WAS A WIDE DISCREPANCY AS TO WHAT WAS DONE.

AFTER THE COURT HELD A FRYE HEARING, WAS THE DIFFERENT IN THIS -- THE DIFFERENCE IN THIS METHODOLOGY, BOTH, PRESENTED TO THE JURY?

YES, YOUR HONOR.

SO THE TRIAL COURT CAME TO THE CONCLUSION THAT THAT ASPECT OF IT WENT TO WEIGHT AS OPPOSED TO ADMISSABILITY.

YES, YOUR HONOR.

OKAY.

AND I SUBMIT TO THE COURT THAT, UNDER THE FRYE TEST, AT SOME POINT, THE ERRORS AND DEVIATIONS BECOME SO VAST THAT IT IS UP TO THIS COURT, SITTING IN THE DE NOVO REVIEW, TO DETERMINE WHETHER OR NOT IT DEVIATED SO FAR FROM THE SCIENTIFIC ACCEPTED PROTOCOLS, AND I CAN'T HARP UPON IT ENOUGH. THE MAN WHO DID THE TEST CAME IN AND SAID WE DIDN'T HAVE RELIABLE REVIEW. WE DIDN'T HAVE CONTROLS AGAINST CONTAMINATION.

THAT ISSUE, THE FAILURE TO HAVE APPROPRIATE CONTROLS AGAINST CONTAMINATION.

YES, YOUR HONOR.

YOUR EXPERT SAID THAT THEY SHOULD HAVE USED THE COMPARISON OF THE SHAFT OF THE HAIR ADJACENT TO THE ROOT, AND THAT THAT IS, GENERALLY, ACCEPTED. NOW, DID THE TRIAL COURT MAKE A FINDING AS TO WHETHER, WHEN YOU ARE DOING THIS TYPE OF GIVING AN OPINION ABOUT THE MIXTURE, THAT IT IS ESSENTIAL, AND ESPECIALLY WITH PCR, BECAUSE OF THE SMALL QUANTITIES THAT YOU ARE TALKING ABOUT, THAT THAT IS WITHIN THE GENERALLY-ACCEPTED SCIENTIFIC REQUIREMENT?

IT WAS NOT ADDRESSED BY THE TRIAL COURT, YOUR HONOR. HE DID NOT ISSUE A RULING.

WAS THAT YOUR POINT? DID YOU HAVE TESTIMONY ABOUT -- IS THAT WHAT YOU ARE SAYING IS IT IS NOT GENERALLY AN EXCEPTION, THAT IS IF YOU CAN'T GIVE AN OPINION OF THE MIXTURE, UNLESS YOU HAVE THIS COMPARISON SAMPLE?

THAT IS ABSOLUTELY ONE OF THE POINTS THAT WE CONTEST, YOUR HONOR. AT THE TIME OF THE TESTING, AS WELL AS THE FRYE HEARING AND AS WELL AS THE TRIAL, THE ACCEPTED STANDARD IN THE SCIENTIFIC COMMUNITY WAS THAT THAT WAS DONE, BUT MICRODIAGNOSTICS, THE LABORATORY IN THIS SETTING, DID NOT HAVE THAT AT THAT TIME. IT DID HAVE IT AT THE TIME OF THE FRYE HEARING AND IT DID HAVE IT AT THE TIME OF THE TRIAL. IN OTHER WORDS WHEN THEY WERE UNACCREDITED, IT WASN'T IN THERE YET, AND MR. WARREN, WHO DID THE TEST, TESTIFIED CANDIDLY I DIDN'T KNOW. MR. GUNGLY AND I WAS SUPPOSED -- MR. GUGLIANO WAS SUPPOSED TO STAY UP ON THE LITERATURE AND DO THAT.

IS THAT WHAT THE DEFENSE IS STATING?

THE DEFENSE REQUESTED ADDITIONAL TESTS BUT THEY WERE ALL THERE TO UTILIZE.

ISN'T IT YOUR PROTOCOL THAT IT DIDN'T MAKE A DIFFERENCE IN THE OUTCOME?

THERE WERE A LOT OF MISTAKES AND ERRORS. THE ANALYST SAID THERE WERE THREE DIFFERENT REASONS WHY IT SHOULD BE DEEMED INCONCLUSIVE, AND AS I MENTIONED, MICRODIAGNOSTICS PROTOCOL DIDN'T PROVIDE IT, BUT IT WASN'T THE STANDARD THEN AND IT WAS AT THE FRYE HEARING AND AS TO THIS COURT, AS TO THAT ISSUE, HE DID TESTIFY AS TO THE LACK OF INDEPENDENT REVIEW AND THE AND LIST BIAS THAT GOES WITH -- AND THE ANALYST BIAS THAT GOES WITH THAT. EVERYBODY TALKS ABOUT THE FACT THAT YOU MUST HAVE AN INDEPENDENT REVIEW, BEFORE A TEST RESULT IS REPORTED OUT. IN OTHER WORDS THE LAB ANALYST DOES THE PAPERWORK AND DOES THE TEST. THE SUPERVISOR IS, THEN, SUPPOSED TO COME AND DO THAT. IF THEY DISAGREE, THEY ARE SUPPOSED TO DISCUSS IT.

AREN'T YOU PUTTING THE COURTS, THOUGH, IN THE POSITION WHERE WE ARE ACTUALLY GOING TO END UP LISTING HERE ARE 24 THINGS THAT HAVE TO BE DONE, AND THAT COME OUT AFTER PARTICULAR CASE OR WHATEVER, AND THEN, OF COURSE, THE VERY DAY AFTER WE LIST THOSE 24 THINGS, IT IS GOING TO BE ESTABLISHED OUT THERE IN THE COMMUNITY. WELL, THAT IS ALL OLD STUFF. NOW THERE IS ONLY TWELVE THINGS OR THERE ARE 48 THINGS, AND WOULD YOUR POSITION BE THE SAME, IF IT HAD BEEN -- IF YOUR WITNESS HAD BEEN THE SUPERVISOR, AND THE STATE'S WITNESS HAD BEEN THE ACTUAL TECHNICIAN THAT DID THE EXAMS? BUT JUST REVERSING, WOULD YOUR POSITION BE THE SAME?

YES, YOUR HONOR. I WILL ANSWER THIS QUESTION AND SAVE THE REST OF MY TIME FOR REBUTTAL, BUT, YES, YOUR HONOR, THE STANDARD IN THE COMMUNITY WAS, THEN, AT THE FRYE HEARING AND, ALSO, AT TRIAL, IS THERE IS NOBODY THAT DEVIATES. EVEN THE LABORATORY SUPERVISOR, WHO TESTIFIED FOR THE STATE, INDICATED THAT IT WAS MANDATORY THAT TWO --

YOU ARE WELL INTO YOUR REBUTTAL TIME.

THANK YOU, SIR.

MAY IT PLEASE THE COURT. MY NAME IS CHARMAINE MILSAP, REPRESENTING THE STATE. FIRST I WOULD LIKE TO TALK A LITTLE BIT ABOUT THE GARMENT. THE TESTIMONY WAS THE LOTION BOTTLE --

LET ME PUT IT IN CONTEXT, SO WE CAN GET RIGHT TO IT. IF EVIDENCE PACKAGED, PUT INTO THE EVIDENCE ROOM AND SIGNED AND SEALED AND CAT LOGGED, WHAT IS IN THAT -- AND CAT A LOGGED, WHAT IS IN THAT -- AND CATALOGED, WHAT IS IN THAT PACKAGE, AND THEN IT LIVES AT THE -- AND THEN IT ARRIVES AT THE LAB AND THERE IS A DISCREPANCY, HAS THE DEFENDANT ESTABLISHED TAMPERING, AND IF HE HASN'T, WHAT ELSE CAN HE DO TO ESTABLISH IT?

OKAY. BUT REMEMBER, NOW, IN THIS CASE, WHAT HAPPENS IS IT IS TAGGED, WRAPPED, EVERYTHING. THE LOTION IS PUT IN A PLASTIC BAG, AND THEN THAT LOTION IS PUT IN THE PAPER BAG WITH THE GARMENT. NOW, IT IS AT THE LAB THAT THE DISCREPANCY OCCURS, AND HERE IS WHAT HAPPENED. OUR TESTIMONY WAS THAT PROSECUTORS SAID, LOOK, I -- THEY TOOK THE LOTION BOTTLE DOWN TO THE FINGERPRINT SECTION. WE DIDN'T GET ANY VALUABLE FINGERPRINTS, SO WE DIDN'T BOTHER TO CALL THAT EXPERT. YOUR HONOR, THIS MAY BE A VALID TAMPERING, IF WE WERE TALKING ABOUT THE LOTION BOTTLE, BUT WE WERE --

LET'S GO TO A "HAS". THAT IS MORE CRITICAL. BECAUSE HERE YOU START OUT WITH AN OFFICER TESTIFYING THAT ONLY TWO HAIRS WERE PUT IN, AND THEN, WHEN IT GETS TO THE LAB, SOMEHOW WE HAVE TWENTY-SOME. HASN'T THE DEFENDANT ESTABLISHED THAT THERE HAS BEEN TAMPERING, AND ISN'T THERE A DUTY UPON THE STATE, AT THAT POINT, TO COME FORWARD AND SHOW WHY WE HAVE THIS DISCREPANCY.

THOSE ARE NOT THE FACTS OF THIS CASE. WHAT HAPPENED IS THIS. THIS IS JUST A DISPUTE ABOUT THE MEANING OF THE WORD "SEVERAL". THAT IS ALL THIS IS. YES, OUR EVIDENCE TECHNICIAN SAYS HE PICKS UP TWO HAIRS, BUT THEN HE IS NOT SURE WHETHER THE TWO, THERE COULD BE -- WHEN HE PICKS UP HAIRS, THERE COULD HAVE BEEN MORE THAN TWO. NOBODY COUNTED THE HAIRS. OUR EVIDENCE TECHNICIAN DIDN'T COUNT THE HAIRS, AND THE FBI EXPERT DIDN'T COUNT THE HAIRS. HE WROTE IN HIS NOTES "SEVERAL", AND THEN AT TRIAL, HE SAID HOW MANY DOES SEVERAL MEAN, AND HE TOOK A GUESS. LET ME TELL YOU HOW MANY HAIRS THERE ARE. THERE ARE THREE HAIRS. OKAY. BECAUSE THAT IS HOW MANY HAIRS END UP ON SLIDES. Q-24. OKAY. SO THIS FIVE TO 21, THAT IS JUST EXPERT'S EXPLANATION OF THE NOTE THE WORD "SEVERAL". THERE WEREN'T 21 HAIRS, YOUR HONOR.

WHAT IS THE TESTIMONY WITH REGARD, IN FAVOR OF THE STATE, BY THE OFFICER THAT INITIALLY SECURED THE HAIRS, IN TERMS OF SAYING IT WAS SEVERAL, OR I REALLY DON'T KNOW HOW MANY IT WAS. IT WAS A COUPLE. OR, IN OTHER WORDS, AS OPPOSED TO I ASK YOUR OPPONENT, AND HE SAID ABSOLUTELY THE TESTIMONY WAS THAT THERE WERE ONLY TWO, AND THAT THAT WAS, YOU KNOW -- SO WHAT WAS THE STRONGEST TESTIMONY, YOUR WAY, I.E. THAT, NO, IT WASN'T JUST TWO. IT WAS SEVERAL, OR I DON'T KNOW HOW MANY IT WAS. WHAT WAS SAID?

MOST AIRS THAT WE HAVE, HERE, IS THREE. OKAY.

-- THE MOST HAIRS WE HAVE, HERE, IS THREE.

I AM TALKING ABOUT THE TESTIMONY.

OKAY. OUR EVIDENCE TECHNICIAN SAYS THESE ARE THE HAIRS FOUND ON THE VICTIM'S BODY. HE DESCRIBES WHERE HE GETS THEM FROM. HER LEFT THIGH AND HER CHEST. OKAY. AND THEN HE SAYS I DIDN'T COUNT THEM. THERE COULD HAVE BEEN TWO HAIRS TOGETHER. HE IS TALKING MORE ABOUT THE LOCATIONS. HE DOES NOT COUNT THE HAIRS, YOUR HONOR, AND HE TESTIFIES I DIDN'T COUNT THE HAIRS. I AM TELLING YOU WHERE I GOT THEM. THERE COULD HAVE BEEN TWO HAIRS STUCK TOGETHER.

YOU ARE SAYING A FAIR READING OF HIS TESTIMONY IS IT WAS NOT LIMITED TO JUST, YES, ABSOLUTELY, BOY, I LOOKED HERE AND THERE WAS ONE AND I LOOKED HERE AND THERE IS ONE, AND THAT WHAT I PUT IN THAT ENVELOPE WAS JUST TWO HAIRS.

RIGHT.

THAT A FAIR READING WOULD NOT SUPPORT THAT CONCLUSION.

NOWHERE -- THERE ARE NOT 21 HAIRS HERE. THERE AREN'T FIVE HAIRS HERE. OKAY. THE ONLY DIFFERENCE HERE IS BETWEEN TWO AND THREE. OKAY. THAT IS THE MOST THAT WE HAVE GOT HERE. BECAUSE THAT IS HOW MANY HAIRS END UP ON THE SLIDE. AND HE SAID, LOOK, I DIDN'T COUNT THE HAIR, AND THEY COULD HAVE BEEN STUCK TOGETHER, SO HE IS SAYING I DON'T KNOW. I DIDN'T COUNT THEM.

WITH REFERENCE TO THE GARMENT, WAS THE GARMENT PLACED IN A PAPER BAG?

YES. THE GARMENT --

WAS IT RECEIVED IN A PAPER BAG?

YES. THAT IS HOW I UNDERSTAND IT. WHAT WAS TAKEN OUT WAS THE LOTION BOTTLE.

THE PLASTIC BAG WITH THE LOTION BOTTLE.

WITH THE LOTION BOTTLE, AND SENT DOWN TO THE FINGERPRINT SECTION, AND WE JUST DIDN'T CALL THAT PERSON.

BUT THE TESTIMONY WAS THAT THE GARMENT WAS PLACED IN A PAPER BAG AND IT WAS RECEIVED IN A PAPER BAG. IS THAT RIGHT?

RIGHT. AND ALL OF THIS GOES ON IN THE LAB. IT IS NOT EVEN A MATTER OF IN OUR EVIDENCE ROOM. ALL IT IS, IS IT IS JUST BEING SENT TO DIFFERENT SECTIONS OF FDLE'S LAB. WHAT'S MORE, YOUR HONOR, THIS WHITE NIGHTY THAT IS FOUND IN THE SINK IS WET. WHAT IS GOING TO HAPPEN IS, IF SOMEBODY EVEN MOVED IT FROM ONE PLACE TO THE OTHER, THE MOST LIKELY THING THAT IS GOING TO HAPPEN IS THAT THE HAIRS WERE GOING TO FALL OFF. THIS DOESN'T EQUAL TAMPERING SIMPLY.

THERE APPEARS TO BE A DISCREPANCY, NOW, IN WHAT YOU UNDERSTAND THE EVIDENCE TO BE OR THE TESTIMONY TO BE AND WHAT THE DEFENDANT'S COUNSEL UNDERSTANDS THAT THE TESTIMONY TO BE. WE WOULD HAVE TO READ THE RECORD AND READ THE TESTIMONY, TO RESOLVE THAT DISCREPANCY, AND IF THE DISCREPANCY, IF WE RESOLVE IT, AND THERE IS TESTIMONY THAT I ONLY GOT TWO HAIRS TO START WITH, AND THEN, SOMEHOW, WE END UP WITH THESE OTHERS, DOES THE STATE CONCEDE THAT THERE IS TAMPERING AT THAT POINT?

IF WE WENT TO 1 HAIRS?

YES.

-- IF WE WENT TO 21 HAIRS? MAYBE IF WE WENT TO 21 HAIRS IRK MIGHT BE WILLING TO DO IT.

IF THERE IS --, I MIGHT BE WILLING TO DO IT.

IF THERE IS TESTIMONY FROM THE TWO OFFICERS THAT I ONLY PUT TWO HAIRS IN THERE, AND THEN AT THE LAB WE END UP WITH 21, WOULDN'T THE STATE HAVE TO CONCEDE THAT SOMETHING HAS HAPPENED?

I THINK SO. NOW, REMEMBER ONE HAIR CAN BREAK APART IN TWO, SO I CAN SEE IT GOING ONE HAIR. I CAN SEE -- BECAUSE HE, ALSO, TESTIFIED, OUR FBI ANALYST, AS TO FRAGMENTS. HE GOT FRAGMENTS AS WELL, SO IT IS POSSIBLE, BUT, NO, 21. IF WE WENT UP TO 21, I WOULD AGREE WITH YOU. TWO HAIRS CANNOT GO TO 21, WITHOUT THEIR BEING A PROBLEM, OKAY, BUT WE DON'T GO TO 21. WE GO TO THREE.

HOW DOES THE RECORD REFLECT THAT THIS ISSUE WAS PRESENTED TO THE TRIAL JUDGE?

AS A MOTION TO SUPPRESS THE TESTIMONY OF THE FBI EXPERT, ABOUT THEIR MICROSCOPICALLY MATCHING, THAT THE HAIRS FOUND ON THE VICTIM'S BODY, THEY MADE A MOTION TO EXCLUDE THE FBI MICROSCOPIC MATCH TESTIMONY. NOW, YOUR HONOR, IN THE END, THAT IS THE OTHER THING. THIS IS HARMLESS, EVEN WE DID GO FROM, EVEN IF THESE HAIRS WENT UP. WE, THE PROSECUTOR, IN CLOSING, SPECIFICALLY AS TO THE HAIRS ON THE BODY, SAID, LOOK, THESE ARE NOT MURRAY'S HAIRS. WE, OUR DNA, SHOWED IT WAS THE VICTIM'S HAIR AND TAYLOR'S HAIR, AND THAT THIRD, PROBABLY, FRAING MEANT, WE DIDN'T GET ANYTHING, AND WE DID NOT USE THIS. OUR THEORY WAS NOT THAT THE DNA MATCHED. OUR DNA MATCH IS ON THE NIGHT I IN THE BATHROOM. -- ON THE NIGHTY IN THE BATHROOM. OKAY.

WAS IT A DNA MATCH?

ON FIVE HAIRS IN SLIDE B OF THE WHITE NIGHTY, TWO OF THE HAIRS, HAIRS NUMBER B-3 AND B-4

WERE A MATCH, YES, BUT THEY WERE A MIXTURE. THE DQ AFTER A CAME BACK STRAIGHT THE DEFENDANT'S, BUT THE VICTIM, ALSO, HAS THAT TYPE. OKAY, THE STR'S, THEY WERE, ALSO, MURRAY'S TYPE, WHERE THE PROBLEM IN THE MIXTURE CAME IN WAS IN THE POLLY MARKERS, AND WHAT HAPPENED THERE WAS -- WAS IN THE POLY MARKERS, AND WHAT HAPPENED THERE IS YOU HAD A MAJOR ALIEL THAT MATCHED MURRAY AND WHAT YOU CALL FAINTERS, AND THERE WERE TWO EXPLANATIONS FOR THE FAINTERS, AND THAT IS WHY THE TRIAL COURT LET IT IN, BECAUSE THE MOST LIKELY EXPLANATION IS IT IS A MIXTURE OF THE VICTIM'S SKIN CELLS ON THE WHITE NIGHTY --

BUT THEN DOESN'T THAT MAKE IT VERY IMPORTANT AS TO WHETHER OR NOT THE WHITE NIGHTY WAS IN A CONTAINER OR THE BAG THAT IT WAS ORIGINALLY PUT IN? IF THAT IS THE EVIDENCE THAT YOU ARE SAYING THAT LINKS MR. MURRAY, HELPED TO LINK MR. MURRAY TO THIS CRIME, THEN IT BECOMES VERY IMPORTANT. IF THAT IS WHEN THE LAB GOT THAT NIGHTY, WHETHER IT WAS IN THE ACTUAL BAG THAT THEY WERE TALKING ABOUT. CORRECT?

YES, YOUR HONOR.

AND AS I UNDERSTOOD, OPPOSING COUNSEL'S ARGUMENT, DIDN'T HE SAY THAT THE NIGHTY WAS PUT IN NOT A PLASTIC BAG, OR IN A PLASTIC BAG?

I THINK HE SAID THAT IT ENDED UP IN PLASTIC. YOUR HONOR, TO -- HE SAID IT ENDED UP IN PLASTIC, BUT AS I UNDERSTOOD THE TESTIMONY --

YOU SAID IT WAS IN A PAPER BAG, RIGHT?

AS I UNDERSTOOD THE TESTIMONY, WHAT CAME OUT WAS THE PLASTIC LOTION BOTTLE. THE WHITE NIGHTY WAS STILL IN THE BAG. THERE MAY HAVE BEEN SOME PLASTIC, SOME ADDITIONAL PLASTIC IN THAT BAG, BUT AS I UNDERSTOOD IT, IT WAS, THAT NIGHTY WAS STILL IN THE PAPER BAG, AND, YOUR HONOR, ALL OF THIS HAPPENED AT THE FDLE LAB. OKAY. AND THE ONLY THING THAT IS REALLY MISSING HERE --.

HOW DOES THAT MAKE A DIFFERENCE?

I THINK IT MAKES A DIFFERENCE. YOUR HONOR, IT IS PRETTY HARD THAT YOU ARE GOING TO THINK YOU ARE GOING TO HAVE HARSH TAMPERING, WHEN ALL YOU -- ON HAVE TAMPERING, WHEN -- YOU HAVE TAMPERING, WHEN ALL YOU HAVE IS THE EVIDENCE GOING FROM ONE SECTION TO ANOTHER SECTION. I THINK THE TAMPERING, THE WHOLE ISSUE, ANYTHING THAT HAPPENED TO THIS BAG, HAPPENED AT THE FDLE LAB.

YOU ARE SAYING THE EVIDENCE IS THAT IT ARRIVED AT THE FDLE LAB INTACT.

RIGHT.

AND IT WAS AFTER THAT, IF THERE WAS ANY CHANGE, THE LOTION BOTTLE OR WHATEVER --

I DO THINK THIS IS IMPORTANT THAT IT HAPPENED INSIDE THE LAB, WITH PEOPLE WHO WERE SCIENTIFICALLY TRAINED, AND IT ARRIVED IN THE CORRECT PACKAGING, AND THEN IT WENT FROM SECTION TO SECTION.

COULD YOU MOVE TO THE DNA SITUATION HERE, WHERE WE HAVE THIS, OR AT LEAST I CONSIDER IT TO BE SORT OF AN EXTRAORDINARY SITUATION, WHERE THE ACTUAL SCIENTIST OR TECHNICIAN THAT DID THE TESTING IS HERE, NOW, TESTING ON BEHALF OF THE DEFENDANT, THAT HIS TESTING AND THE OUTCOME IS, REALLY, UNRELIABLE, FOR VARIOUS REASONS. IT SEEMS TO ME THAT IS A FAIRLY UNCOMMON THING TO HAPPEN, AND SO COULD YOU ADDRESS THE DNA ISSUE, COMPREHENSIVELY.

OKAY. FIRST, MIXED SAMPLES ARE NOT UNUSUAL. THEY HAPPEN A GREAT DEAL IN SEXUAL BATTERY CASES, WHERE YOU GET BOTH THE VICTIM'S BODY FLUIDS AND THE PERPETRATORS' SEMEN. OKAY. SO MIXED SAMPLES ARE NOT UNUSUAL, AND THE NATIONAL RESEARCH COUNSEL EVEN TALKS ABOUT MIXED SAMPLES, AND WE HANDLED THE MIXED SAMPLE HERE, EXACTLY THE WAY THEY RECOMMENDED THAT WE HANDLE IT. OKAY. SO WE. THE FAINTER AND ALIELS, WE HANDLED IN THE PROPER WAY AND THE WAY THE BOOK SAID TO HANDLE MIXED SAMPLES.

LET'S ADDRESS THE PROTOCOL.

THE PROTOCOL THEY ARE TALKING ABOUT IS THE SUBSTRAIGHT SHAFT CONTROL. WHAT YOU DO IS, WHEN YOU HAVE A HAIR, THE PERK AND ELMER, THE PRFER MANUFACTURER'S PROTOCOL, RECOMMEND THAT YOU CUT THE BOTTOM HALF, WITH THE ROOT IN IT, WHERE YOU ARE HOPING TO GET THE DNA. THAT IS WHERE THE DNA IS. IT IS IN THE ROOT OF THE HAIR, AND THEN YOU TAKE THE ADJACENT SECTION, AND YOU, ALSO, RUN A TEST ON THAT AS A CONTROL. THAT IS WHAT THE MANUFACTURER RECOMMENDED. HOWEVER, YOUR HONOR, AT THE TIME OF THIS -- THAT THIS TEST WAS RUN, THE TECHNICAL WORKING GROUP DID NOT REQUIRE SUBSTRAIGHT SHAFT CONTROL AS A CONTROL. THE FBI DID NOT HAVE THAT AS PART OF THEIR PROTOCOLS, EITHER. IT WAS ONLY NOW THE FBI HAS CHANGED IT, AND THEY DO RECOMMEND THAT AS PART OF THEIR PROTOCOLS, BUT AT THE TIME OF THIS TEST, YOUR HONOR, WE HAVE EXACTLY WHAT YOU WERE SAYING. OH, NO. WE ARE GOING TO HAVE DIFFERENT PROTOCOLS HERE AND HERE AND DIFFERENT PROTOCOLS AND DIFFERENT PROTOCOLS. THAT IS EXACTLY WHAT HAPPENED HERE. THE MANUFACTURER RECOMMENDED THAT. THE TECHNICAL WORKING GROUP AND THE FBI DID NOT RECOMMEND THAT AT THE TIME THAT IT WAS PERFORMED.

BECAUSE WE ARE DEALING WITH RELIABILITY, WHAT IS THE REASON THAT, NOW, ALL OF THESE AGENCIES REQUIRE IT, BECAUSE YOU SAY MIXTURE IS SOMEWHAT COMMON IN DIFFERENT TYPES OF SEXUAL BATTERY, BUT THE CONCERN IS THAT YOU DON'T, ESPECIALLY WITH PCR, THAT YOU DON'T HAVE CONTAMINATION, SO MY CONCERN IS, IS IT JUST ONE MORE, WE WILL JUST DO THIS, BECAUSE THIS IS ANOTHER GOOD THING TO DO, THAT MIGHT BE ONE ISSUE, BUT IF IT IS REALLY SOMETHING THAT NOW EVERYONE AGREES AFFECTS THE LIABILITY OF THE UNDERLYING CONCLUSION, THEN WE ARE DEALING WITH SOMETHING OF A MUCH GREATER SIGNIFICANCE, SO IS THERE ANY, AS FAR AS WHAT HAS LED TO THIS GENERAL REQUIREMENT, NOW, THAT THERE BE THE COMPARISON TESTING? WHAT LED TO THAT DECISION? DO WE HAVE THAT IN ANY OF THE LITERATURE?

I DIDN'T SEE-ON-WELL, I SAW SOME EX -- I DIDN'T SEE -- WELL, I SAW SOME EXPLANATION IN LAW REVIEWS, BUT I DIDN'T SEE IT IN THE TESTIMONY, BUT WHAT IT IS THEN YOU WOULD BE POSITIVE OF THE VICTIM'S. THAT IS WHAT YOU ARE TRYING TO DO THE. IF YOU HAVE A MIXTURE AND ME ARE THINGS MILKSED OVER HERE BUT THEY ARE NOT MIXED OVER HERE, THEN YOU CAN LITERALLY BE SURE THAT IT WAS -- THAT IT IS THE MIXTURE, OKAY. THAT IS WHY YOU ARE DOING SUBSTRAIGHT SHAFT CONTROL, BUT, YOUR HONOR, THE ONE COURT THAT HAS REACHED THIS HAS SAID THAT THESE TESTS ARE ADMISSIBLE, EVEN IN THE ABSENCE OF SUBSTRAIGHT SHAFT CONTROL. OKAY. SO, NO, I DO NOT THINK IT AFFECTS THE ABSOLUTE RELIABILITY OF THESE. THE OTHER REASON THAT YOU CAN TELL THESE ARE MIXTURES IS THE INTENSITY. OKAY. THAT IS WHY THE TRIAL COURT LET THIS IN IS THE FAINTER TYPES ARE, INDEED FAINTER. THEY ARE ONE-TENTH, ONE-EIGHTH LIGHTER THAN THE MAJOR CONTRIBUTOR, IN OTHER WORDS THAN MURRAY'S TYPE. OKAY. AND WHY YOU LET THAT IN IS THAT IS THE MOST COMMON EXPLANATION IS A VICTIM'S -- IS THAT THAT IS A MIXTURE. THAT IS JUST A TELLTALE SIGN OF BEING A MIXTURE, SO WE HAVE TWO THINGS THAT SAY THAT THIS IS A MIXTURE, AND THEN WE HANDLE MIXTURES IN THE EXACT WAY THE NATIONAL RESEARCH COUNSEL SAID YOU DO. YOU SUBTRACT THE VICTIM'S TYPES OUT, AND YOU DO A NORMAL POPULATION STATISTIC CALCULATION ON THE MAJOR CONTRIBUTOR. THAT IS WHAT WE DID.

NOW, AS PART OF YOUR ARGUMENT, YOU ARE CONTENDING THAT THIS, THAT PART OF THIS ISSUE

IS NOT, REALLY, A FRYE ISSUE, AND WHAT I AM INTERESTED IN IS WHAT HAS TO BE FRYE AND WHAT DOES NOT, IN THIS DNA ARGUMENT? OR IS THAT YOUR POINT, THAT THERE WAS LIMITS, AS TO WHAT WAS ACTUALLY THIS DNA EVIDENCE HAD TO BE CONSIDERED, UNDER FRYE, AND THE REST OF IT WAS A MATTER OF WEIGHT.

YES, YOUR HONOR. VARIATIONS IN PROTOCOL GO TO WEIGHT NOT ADMISSIBLE. THAT IS OUR POSITION -- NOT ADMISSIBILITY. THAT IS OUR POSITION. NOW, I AM NOT SAYING THAT A FRYE HEARING AIRING ALL OF THIS, IT WAS, IN FACT, DONE IN THIS CASE.

AND THIS COURT, IN FACT, SEPTEMBER IT BACK TO DO A FRYE EXAMINATION.

YES, AND THEY DID A MULTI-DAY, IT TAKES UP VOLUMES AFTER VOLUMES OF THE RECORD. THEY DID, IN FACT, DID TWO FRYE HEARINGS. AS A MATTER OF FACT, COURTS ARE DOING FRYE AFTER FRYE AFTER FRYE. THEY DID ONE BEFORE THE RETRIAL, AND THEN THEY DID ONE IN THIS CASE AS WELL. ONE IN FRONT OF JUDGE STEFAN, AND THEN ONE IN FRONT OF JUDGE TAYLOR, HERE, WHICH IT IS THE ONE THAT IS UNDER REVIEW, AND FIRST OF ALL, THEY DID HAVE A WHOLE BUNCH OF TESTIMONY ABOUT WHETHER PCR AND STR, SHORT TANDEM REPEATS, ARE ACCEPTED IN THE SCIENTIFIC COMMUNITY, AND, YES, YOU DO NEED -- NOW, THERE IS SOME POINT AT WHICH WE ARE GOING TO HAVE -- WE SHOULD NOT BE HOLDING FRYE HEARINGS AGAIN AND AGAIN AND AGAIN ON PCR, OKAY, BUT UNTIL THIS COURT SAID THAT PCR, REMEMBER IN MURRAY ONE, YOU HAD SOME SERIOUS DOUBTS ABOUT PCR. NOW THAT THE SECOND --

AS FAR AS THE ISSUE OF POPULATION STATISTICS ARE CONCERNED AND EVERYTHING, I TAKE IT THAT THAT WAS COVERED, DURING THE FRYE HEARING, AND IT IS NOT RAISED AS AN ISSUE.

RIGHT. AND WE WENT THROUGH WHICH DATA BASIS THEY USED.

THE MAJOR CONCERN.

AND WE HAD A POPULATION GENETICIST THE, AN EXPERT, DR. TRACY, WHO IS AN EXPERT AT FLORIDA NATIONAL, AND AS I UNDERSTAND IT, THEY ARE NOT CHALLENGING EITHER THE DQ ALPHA POLLY MARKER OR THE -- POLY MARKER OR THE SHORT TANDEM REPEATS.

WHAT ABOUT THE PART OF THE DIFFICULTY IN ANALYZING THIS, AND AS PART OF THE QUESTION I ASKED, BEFORE, ABOUT THE NUMBERS AND EVERYTHING, IN BRIM, WE DID SAY THAT WE, REALLY, WERE GOING TO LOOK TO THE STATE-OF-THE-ART, AT THE TIME OF THE APPEAL, AS OPPOSED TO WHAT THE SITUATION WAS AT THE TIME OF TRIAL. HOW DOES THAT AFFECT THE SITUATION HERE? YOU UNDERSTAND WHAT I AM SAY SOMETHING.

IN TERMS OF RELIABILITY. I AM ASSUMING THAT YOUR QUESTION MEANS, NOW THAT THE FBI DOES REQUIRE SUBSTRAIGHT SHAFT CONTROL. OKAY. BUT, YOUR HONOR, LET ME -- IT IS PRETTY CLEAR --

WE WERE CORRECT, IN BRIM, TO DO THAT, OR YOU THINK THAT IS A PROBLEM, THAT IS TO SAY THAT, YOU KNOW, WE ARE GOING TO APPLY THE STATE-OF-THE-ART AS IT EXISTS AT THE TIME OF APPEAL.

WELL, JUDGE ALTER BRAND, WHEN YOU REMANDED BACK TO THE SECOND DCA, JUDGE ALTERBRAND WROTE A LONG OPINION, SAYING HE THINKS THERE IS SOME SERIOUS PROBLEMS, DOING IT THAT WAY. IS THAT WHAT YOUR HONOR IS REFERRING TO?

AND HOW DOES IT AFFECT, IN OTHER WORDS, OUR RESOLUTION OF THIS CASE, IN TERMS OF THE STANDARDS, NOW, BEING IMPROVED, REALLY, SAYING, WELL, NOW WE HAVE OTHER CONCERNS ABOUT RELIABILITY AND WE ARE GOING TO PUT THESE SAFEGUARDS IN PLACE.

YOUR HONOR, SEE, ONE OF THE PROBLEMS HERE IS YOU ARE GOING TO BE LEO FROGING. I MEAN, WE HAVE -- TO BE LEO FROGING. WE HAVE ALREADY -- YOU ARE GOING TO BE LEAP-FROGING. WE ARE NOT REQUIRED BY THE MANUFACTURERS -- THE FBI, IN OTHER WORDS, THE REALLY TECHNICAL WORKING GROUP, THE FBI, THE ONE THAT YOU CONSIDERED THE STANDARD, DID NOT REQUIRE T WE ARE GOING TO LEAP FROG. NO DNA TEST, IF THE STATE OF THE LAW KEEPS CHANGING ON US, ABOUT WHAT WE HAVE TO DO, NO DNA TESTS, WE ARE JUST GOING TO HAVE TO KEEP DOING IT AGAIN AND AGAIN AND AGAIN, I THINK THERE ARE SOME PROBLEMS WITH YOUR -- YOUR HONOR, I UNDERSTAND WHY YOU, NOW, WANT TO LOOK TO RELIABILITY, BECAUSE LOOK AT WHAT HAPPENED WITH THE PCR. AT FIRST YOU WERE WORRIED ABOUT THE RELIABILITY, BECAUSE NCR-1 WAS WORRIED ABOUT IT, TOO, AND THEN THEY CAME OUT WITH NCR-2 AND SAID WE ARE NO LONGER WORRIED ABOUT IT, SO I DO UNDERSTAND THAT THIS COURT IS IN SOMEWHAT OF A CATCH-22, WHEN THEY SAY WE REVERSE IT BECAUSE OF THE RELIABILITY AND THEN THEY SAY IT IS RELIABLE, OBVIOUSLY YOU DO WANT TO BE ABLE TO LOOK TO THAT, SO I DO UNDERSTAND YOU ARE IN IN SOMEWHAT OF A CATCH-22, BUT I DO THINK THAT JUDGE ALTERBRAND'S OPINION, ESPECIALLY AFTER PROTOCOL, IN BRIM -- I JUST DON'T THINK YOU CAN ASK PEOPLE TO DO PROTOCOLS DIFFERENTLY THAN WHAT IS REQUIRED AT THE TIME OF TESTING, SIMPLY.

SO WHAT YOU ARE SUGGESTING IS THAT WE HAVE TO, REALLY, ANALYZE THE METHODOLOGY ON A DIFFERENT WAZ BASIS.

YES. YES. -- ON A DIFFERENT BASIS.

YES. YES. YOU COULD DEFINITELY DO, FOR INSTANCE, RELIABILITY ABSTRACTLY, AS TO WHETHER THE METHOD IS RELIABLE AND PCR, THE GENERAL METHOD. THE ACTUAL TEST MUST BE DONE IN CONFORMANCE WITH WHAT THE CURRENT PROTOCOLS ARE AT THE TIME OF THE TEST, SO SUBSTRAIGHT SHAFT CONTROLS WERE NOT REQUIRED, SO THEY SHOULD NOT BE REVERSED AS TO THIS ISSUE.

BUT ASSUMING THAT WE FIND THAT THERE WAS ENOUGH PROBLEMS WITH ALL OF THE TESTING THAT IT'S RELIABILITY IS, REALLY, QUESTIONABLE HERE. WHAT WOULD BE THE STATE OF THIS RECORD? WE HAVE NO MORE HAIR, AS I UNDERSTAND IT, TO BE TESTED, IF WE SEND IT BACK. IS THAT CORRECT?

YOUR HONOR, THAT IS NOT CLEAR, FROM THE RECORD, REALLY. THERE DO SEEM TO BE SOME ADDITIONAL HAIRS, AS I UNDERSTAND IT.

BUT ISN'T THE DEFENDANT ARGUING THAT HE ASKED FOR HAIRS, AND THAT --

BUT HE WANTED THOSE HAIRS ON THAT NIGHTY, AND, NEW YORK CITY THERE ARE NO HAIRS LEFT FROM THE NIGHTY. THERE DO SEEM TO BE ADDITIONAL HAIRS FROM ADDITIONAL SOURCES. WE DON'T KNOW IF THEY ARE THE DEFENDANT'S OR NOT. FOR ALL WE KNOW, THEY ARE JUST VICTIM'S. REMEMBER, WHEN YOU GO INTO A CRIME SCENE, YOU PICK UP ALL THE HAIRS. SO WE PICKED UP ALL KINDS OF HAIRS. WE JUST STOPPED WHEN WE FOUND MURRAY'S HAIR ON THE WHITE NIGHTY, BUT WE DON'T KNOW WHETHER THOSE WOULD BE VALUABLE OR NOT. I COULD NOT TELL THAT YOU WE COULD DO DNA AND FIND IN THOSE ADDITIONAL HAIRS. FOR ALL WE KNOW, THOSE ARE THE VICTIM'S HAIRS OR HAIRS THAT COULD NOT EVEN BE DNA TESTED.

WELL, LET'S TAKE IT A STEP FURTHER. ASSUMING THAT THIS EVIDENCE, THE DNA EVIDENCE IS NOT ADMISSIBLE, WHAT, THEN, WOULD YOU SAY CONCERNING THIS EFFICIENCY OF THE EVIDENCE IN IT CASE? -- IN THIS CASE?

OKAY. EVEN MINUS THE DNA, BECAUSE, REMEMBER, I WOULD SAY THAT EVEN WITH THE ERRORS, BELIEVE IT OR NOT, THE DNA WOULD BE HARMLESS, BECAUSE REMEMBER WHAT WE DID IN THE DNA? WE HAVE TWO DNA TESTS. DQ-AFTER A TESTS, FOUR YEARS APART. IN OTHER WORDS

MURRAY TWO, MURRAY ONE, WHICH YOU ALL WERE REFERRING TO. WE DID A DNA TEST THERE. DR. NITZ DID A DQ-AFTER A, THEN FOUR YEARS LATER, WE DID A DQ-AFTER A HERE, PLUS -- A DQ-AFTER A HERE, PLUS -- A DQ DQ-ALPHA, AND THEN A DQ TEST, AND ANY ERRORS IN ONE WOULD NOT BE THE ERROR IN ANOTHER, BUT EVEN IF YOU EXCLUDE ALL OF THE DNA, YOUR HONOR, WE STILL HAVE THE DEFENDANT SCENE WITH SOMEBODY WE KNOW TO BE THE COPERPETRATOR. THERE IS NOTHING -- TAYLOR'S CASE HAS, ALREADY, BEEN AFFIRMED. OKAY. HE WAS SEEN IN THE NEIGHBORHOOD AT 12:40, ABOUT TWO MILES FROM WHERE THE VICTIM LIVED, FROM WHERE THE VICTIM'S HOUSE IS. HE IS SEEN BY A WOMAN WHO KNOWS HIM. HE IS IN THE BARN, WITH TAYLOR. THEY WERE DROPPED OFF, TOGETHER, EARLIER IN THAT EVENING, BY A FRIEND. SOMEBODY SEES WHO IS GOING TO WORK, SEES A FORD RANCH ARROW THAT IS -- A FORD RANCHERO THAT IS STOLEN, PARKED NEAR THE VICTIM'S HOUSE. THAT FORD RANCHERO HAS BEEN RECOVERED AT THE NORTHSIDE OF TOWN, NEAR STEVEN TAYLOR'S HOUSE. A MEDALLION OF A BRITISH SOVEREIGN NECKLACE MEDALIAN OF THE VICTIM'S WAS RECOVERED IN THE BACKYARD OF STEVEN TAYLOR LIVED AT THE TIME, ANN MURRAY WAS OVER AT THAT HOUSE, WHEN TAYLOR TRIES TO RETRIEVE THAT NECKLACE. OKAY. SO THEY ARE ALL THERE TOGETHER. OKAY. SO THAT --

IT SOUNDS LIKE A PRETTY GOOD CASE AGAINST STEVEN TAYLOR.

OKAY. AND THEN ON OR OUR MEDICAL TESTIMONY, REMEMBER THE WAY THIS VICTIM WAS KILLED, SHE WAS STRANGLER WITH A WEBBED BELT. SHE WAS, THEN, STRANGLER WITH A LEATHER BELT. OUR MEDICAL EXAMINER'S TESTIMONY WAS THAT, GIVEN THE EXTENT AND NATURE OF THE INSTRUMENTS USED TO KILL THIS WOMAN, THAT THE MOST LIKELY THING IS THAT THERE WERE TWO PERPETRATORS. THE LEATHER BELT BROKE. THEN THEY WENT AND GOT AN ELECTRICAL CORD AND STRANGLER HER WITH THAT. THAT ELECTRICAL CORD WAS STILL WRAPPED AROUND HER, WHEN WE FOUND THE VICTIM'S BODY. SHE WAS STABBED 24 TIMES, MAINLY WITH THE KNIFE. FOUR OF THOSE WOUNDS WOULD HAVE BEEN BUT, ALSO, WITH SCISSORS. OKAY. SO IT IS SCISSORS AND A KNIFE. YOU HAVE MULTIPLE BELTS STRANGLER HER. SHE IS HIT WITH A METAL BAR. SHE IS, ALSO, HIT WITH A BRASS CANDLESTICK AND WITH A LIQUOR BOTTLE TO HER CHEEK, THAT BREAKS HER JAW, AND THE GLASS IS FOUND EMBEDDED. AND SO IT IS THE NATURE OF THESE INJURIES.

YOU, ALSO, HAVE A STATEMENT BY THE DEFENDANT, DO YOU NOT?

YES. WE HAVE TWO STATEMENTS, REALLY. HE ESCAPES WITH A COESCAPEE, SMITH, AND HE CONFESSES DETAILS OF THIS CRIME TO THE COME ESCAPEE, SMITH, AND -- TO THE COESCAPEE, SMITH, AND THIS IS EVIDENCE IN THE TRIAL. WE HAVE A CONFESSION IN THIS CASE TO HIS COESCAPEE SMITH, OKAY, AND, ALSO, WHEN CONFRONTED BY DETECTIVE OSTEEN, AS TO THAT THERE IS A MATCH, THIS IS, YOUR HONOR, YOU HAVE TO PUT IT IN CONTEXT IN TIME LINE, BUT WHAT THEY ARE TALKING ABOUT IS THE FIRST DNA, AND HE SAID, LOOK, WE FOUND YOUR HAIR AT THE CRIME SCENE.

THIS IS THE MICROSCOPIC EXAMINATION?

RIGHT. THAT IS WHAT THEY REFERRED TO. DETECTIVE OSTEEN TELLS MURRAY THAT WE FOUND SOME OF YOUR HAIR, AND HIS EXPLANATION IS YOU ARE NOT GOING TO FIND ANYTHING ON ME. TAYLOR TOLD ON HIMSELF BUT I DIDN'T, BASICALLY. IN OTHER WORDS YOU ARE NOT GOING TO GET ME, BECAUSE I WAS TOO CAREFUL. OKAY. NOW, THOSE ARE NOT THE STATEMENTS OF AN INNOCENT MAN, EITHER. OKAY. SO WE HAVE BOTH HIS AMBIGUOUS BUT INCULPATORY STATEMENT TO DETECTIVE OSTEEN, HIS CONFESSION TO COESCAPEE SMITH, AND THEN ALL OF THE EVIDENCE THAT TIES HIM, PUTS HIM IN THE NEIGHBORHOOD AT THE TIME, AND THE MEDICAL TESTIMONY THAT THERE WERE TWO PERPETRATORS.

ONE OTHER QUESTION ON THE DNA. IF THE ISSUE AS TO THE MIXTURE GOES TO WHETHER THE

VICTIM'S DNA WAS, ALSO, ON THIS HAIR, BUT, AND THAT IS WHAT -- THERE IS A LACK OF THE SUBSTRATA, SUBSTRAIGHT SHAFT CONTROL, THOSE TWO, WITHOUT THAT, IS THERE, STILL, DOES THAT AFFECT THE ACTUAL TESTIMONY THAT ONE OF THE HAIRS WAS A MATCH OF MURRAY'S?

NO. BECAUSE WE DID EXACTLY WHAT NCR DOES. YOUR HONOR, THE ONLY FAINTERS WERE IN THE POLY MARKERS.

BUT THAT ONLY GOES TO THE ISSUE OF WHETHER THERE WAS A MIXTURE, NOT AS TO THE FIRST QUESTION OF THE MATCH?

RIGHT. RIGHT. AND WE HANDLED IT THE WAY THEY DID IT. YOU JAY YOU JUST EXCLUDE -- YOU SAY YOU JUST EXCLUDE THE FAINTERS. YOU CAN ACCOUNT FOR THAT. YOU KNOW THE VICTIM IS THERE. THAT IS, REALLY, THE LOGIC HERE. YOU KNOW THE VICTIM IS THERE. SUBEXTRACT THAT - - SUBTRACT THAT AND TYPE IT OUT AND IT IS CLEAR THAT HE IS THE MAJOR CONTRIBUTOR, BECAUSE IT IS SUCH GREATER INTENSITY, HIS ALIELS ARE ON THE STRIP. SO YOU DO IT AND WE DID EXACTLY WHAT THEY DID. WE SUBTRACTED THEM OUT. OH, AND EVEN AT ONE POINT, THEY RECOMMEND THAT, IF YOU ARE NOT TOO SURE WHETHER IT IS THE VICTIM'S OR NOT, DO SOMETHING THEY CALL LEAKAGE CALCULATION, AND WE DID THAT, TOO. OKAY. SO THE JURY KNEW ALL OF THIS. SO WE HANDLED IT EXACTLY THE WAY THE NATIONAL RESEARCH COUNSEL SAYS TO HANDLE IT MIXTURES. THANK, YOUR HONOR.

THANK YOU. MR. KURITZ, REBUTTAL?

QUICKLY A COUPLE OF ISSUES THAT I NEED TO MAKE SURE THAT JUSTICE PARIENTE UNDERSTANDS. THERE ARE NO HAIRS THAT MATCH JERROLD MURRAY. NONE. THE -- THAT MATCH GERALD MURRAY. NONE. THERE ARE TWO HAIRS THAT ARE CONSISTENT WITH, BECAUSE THEY ARE MIXTURES. THERE IS NO HAIR IN THIS ENTIRE CASE THAT MATCHES THAT OF GERALD MURRAY. AS TO PROT-COLORADO THAT IS REQUIRED -- PROTOCOL THAT IS REQUIRED, ONE THING THAT IS CRUCIAL, FROM THE VERY BEGINNING, AS FAR AS PROTOCOLS ARE CONCERNED, IS THAT THERE MUST BE INDEPENDENT REVIEW. THE LAB SUPERVISOR OR SOME INDEPENDENT PERSON HUSDO THE TEST. THEY MUST -- PERSON MUST DO THE TEST. THEY MUST MEET TO DISCUSS IT. IF THEY AGREE, THEY REPORT IT OUT. IF THEY DON'T AGREE, THEY DESCRIBE THEIR DIFFERENCES AND THEY DON'T REPORT IT OUT. FIVE EXPERTS TESTIFIED IN THIS CASE AND ONLY ONE TESTIFIED THAT IT WAS VALID. EVEN THE OTHER EXPERTS, THE GENETICIST TESTIFIED, WHEN GIVEN THE EXAMPLE ABOUT THE POLY MARKERS WITH THE FAINTERS, WHEN HE TESTIFIED, THE A FAINTER AND THE B FAINTER, WHAT HE TESTIFIED IS DR. TRACY PROPOSED THAT THAT IS THE BEST SITUATION WHERE IT SHOULD BE DEEMED INCONCLUSIVE. THEY ALL AGREE WITH THAT. ONLY MR. GUGLIANO DOES THAT WILL. PLEASE DON'T SUBTRACT THE FAINTERS OUT. IN A SITUATION WHERE THEY HAVE AN A FAINTER, B, THE WAY IT IS SET UP, A PERSON CAN BE AN A, A B, OR AN A-B. IF THERE IS A FAINTER B, IT DOES NOT PRECLUDE THE PERSON WITH THE A-B. IT DOES NOT HAVE TO BE A MIXTURE OF SOMEBODY WITH AN A AND A B. IT CAN BE AN A-B, AND THAT CAN BE AN EXACT APPLICATION, AND, AGAIN, THE TWO LAB ANALYSTS MUST AGREE. IF THE COURT LOOSE AT THE NRC, EVERYBODY AT MICRODIAGNOSTICS, EVEN THOUGH THEY WERE NOT ACCREDITED AT THE TIME, THEIR PROTOCOL ABSOLUTELY REQUIRED THAT THE TWO ANALYSTS DISCUSS IT AND AGREE, BEFORE THE REPORT IS ISSUED OUT, AND IT DID NOT OCCUR IN THIS CASE. IT IS CLEAR IN THIS CASE THAT WE HAVE THE TESTIMONY OF THE MAN WHO DID THE TEST THAT IT IS INCONCLUSIVE, NOT JUST BECAUSE OF THE LACK OF THE STRAIGHT SHAFT CONTROL, BUT THERE WAS AN INDEPENDENT ANALYSIS ON IT, AND, THIRD, THESE FAINT ALIELS SHOW ME TAKE THERE MUST HAVE BEEN A CONTAMINATION OR A PROBLEM RUNNING THE TEST, AND THERE IS A PHOTOGRAPH THAT IS MISSINGS, AND IF YOU LOOK AT MR. GUGLIANO AND TAKE THE EXPERT'S TESTIMONY, IT IS THE EVIDENCE AND THE CONTROLS. IF THIS COURT WERE TO COMMISSION THE NRC AUTHORS TO GO VERIFY WHETHER THIS TEST WAS DONE PROPERLY OR NOT, THE FIRST THING THEY ARE GOING TO ASK ABOUT IS THE CONTROLS. THERE ARE NO PHOTOGRAPHS FOR CONTROLS THAT SHOW THIS WAS DONE PROPERLY, AND THE EXPERT DID NOT

EVEN NOTE WHETHER HE EVEN SAW THIS. THERE WAS A POSITIVE AND NEGATIVE CONTROL. THAT WAS NOT THERE. AND REGARDING THE POLY MARKERS, THERE IS A "C" DO THE AND A "S" DO THE, AND THAT IS -- DOT, AND THAT IS -- A "C" DOT, AND A "S" DOT, AND IT IS NOT CLEAR. WE HAVE THREE INFORMATIONS FROM THE MAN THAT DID THE TEST THAT SAYS IT IS INCONCLUSIVE AND SHOULD NOT BE RELIED UPON. HE EVEN STATED THAT THIS IS A SCIENCE AND WE SHOULD HAVE DIRECT NUMBERS, AND WHAT WE ARE DOING IS STRAINING OURSELVES TO FIND ARGUMENTS TO MAKE THE DATA FIT THE CASE, AND THAT GOES BACK TO THE ANALYST'S BIAS. THIS CASE IS ONE --

LET ME ASK YOU THIS. YOU STARTED OUT SAYING THAT THERE IS NO TESTIMONY THAT SAYS THAT THIS IS THIS MAN'S DNA.

ABSOLUTELY. YES, YOUR HONOR.

SO WHERE DOES THAT LEAVE US? I MEAN, IF IT ISN'T, WHERE IS THE TRUE HARM, AND -- IN THIS CASE.

BECAUSE THEY BRING IN AN EXPERT TO TESTIFY THAT IT IS A MATCH. I AGREE WITH THAT. THE EXPERTS AGREE WITH THAT. BUT THEY BRING IN THE LAB AND LIST, EXCUSE ME, THE SUPERVISE -
- LAB ANALYST, EXCUSE ME, THE SUPERVISOR, TO SAY THAT THIS IS.

TO SAY THAT IT IS A MATCH.

IT DOESN'T SAY "MATCH". IT DOES SAY THIS IS CONSISTENT WITH MR. MURRAY'S AND THE VICTIM'S IN THIS CASE. HE DOESN'T SAY IT IS HIS. HE SAYS THESE TWO HAIRS ARE CONSISTENT WITH A MIXTURE OF THESE TWO PEOPLE. THEY DON'T USE THE TERM "MATCH". IT IS CONSISTENT WITH A MIXTURE. THEN HE SHOULD BE EXCLUDED.

AND YOU WERE ALLOWED, EXTENSIVELY, TO CROSS-EXAMINE YOUR OWN EXPERTS, TO SAY WHY THIS IS NOT EVEN CONSISTENT.

EXACTLY.

AND I GUESS, GOING BACK TO WHETHER THIS IS, REALLY, A FRYE ISSUE OR JUST SOMETHING THAT GOES TO THE WEIGHT, WHAT IS IT ABOUT DNA THAT IS GOING TO REQUIRE DNA, IN THE FUTURE, TO HAVE A HIGHER LEVEL THRESHOLD, BEFORE JURIES EVEN HEAR IT, AS OPPOSED TO THE OTHER SCIENCES THAT ALLOWS FOR THIS TYPE OF CROSS-EXAMINATION AND ALLOWS THE JURY TO DECIDE THE WEIGHT THAT THEY ARE GOING TO GIVE TO YOUR -- TO THE EXPERT'S TESTIMONY? THAT IS WHAT I AM HAVING TROUBLE WITH THAT.

SURE. WHAT I UNDERSTAND, FROM ALL OF THE OPINIONS, IS THEY TALK ABOUT THE DNA EVIDENCE IS SO STRONG THAT IT WILL OVER BEAR ANYTHING ELSE THAT COMES OUT IN TRIAL. WE MUST HAVE THE MOST RIGOROUS STANDARDS, AND WHAT I SUGGEST IS QUITE SIMPLY WHAT THIS COURT HAS ALLUDED TO IN THE PAST AND THE OTHER COURTS, IS TO FOLLOW THE DIRECTIONS OF THE NRC ONE AND TWO. THEY ABSOLUTELY TALKED ABOUT THE INDEPENDENT REVIEW NECESSITY. I AM NOT GOING TO ASK YOU TO GO INTO 40 DIFFERENT PROTOCOLS AND I AM NOT ASKING YOU TO WRITE A THESIS ON THE APPROPRIATE METHODS, BUT AT THE MINIMUM, THIS LAB IS NOT EVEN ACCREDITED.

IS IT BECAUSE WE ARE GOING TO BE LOOKING AT PUTING IN POLYGRAPHS, THAT BECAUSE THE JURY ATTACHED SO MUCH WEIGHT TO A DNA, THAT THAT SHOULD REQUIRE A DIFFERENT TYPE OF A STANDARD OF ADMISSABILITY?

ALONG THAT LINE, THAT, WHEN THERE IS SUCH A PIECE OF EVIDENCE THAT IS GOING TO BE SO STRONG THAT IT MIGHT OVER WEIGH EVERYTHING ELSE, LET'S MAKE SURE THAT WE FOLLOW

THE MOST RIGOROUS STANDARDS POSSIBLE, AND THAT IS THE LANGOF THIS COURT AND OTHER COURTS, IS LET'S MAKE SURE THAT IT IS DONE RIGHT. LET'S DON'T LEAVE THE DOOR OPEN FOR MISTAKES OR ERRORS OR MISINTERPRETATION, OR TO HAVE SOMEONE COME IN HERE AND HAVE THE MAN WHO ACTUALLY DID THE TEST IS SAY IT IS INCONCLUSIVE AND UNRELIABLE.

THANK YOU, MR. KURITZ. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE. THE COURT WILL BE IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE SIZE. -- PLEASE RISE.