Oscar Ray Bolin vs State of Florida

MR. CHIEF JUSTICE: AS MR. NORGARD SAID, HIS BETTER HALF.

AT LEAST THE CUTER HALF. MAY IT PLEASE THE COURT. MY NAME IS ANDREA NORGARD, AND I AM REPRESENTING MR. BOLIN TODAY BEFORE YOU. I WILL ADVISE THE COURT, AT THIS POINT IN TIME, THAT I WILL AT LEAST ATTEMPT TO STOP MY ARGUMENT AT 22 MINUTES, SO MR. CONNOR CAN ADDRESS THE FIRST TWO ISSUES, ISSUES ONE AND TWO, AND IF THE COURT'S INDULGENCE WOULD BE, IF YOU HAVE QUESTIONS RELATING TO THOSE ISSUES, TO RESERVE THEM FOR MR. CONNOR, AND I WOULD, ALSO, LIKE TO ACKNOWLEDGE THE PRESENCE OF MR. MILLER HERE, WHO DID PREPARE THE AMICUS BRIEF ON BEHALF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS.

IF YOU WILL BE MINEDFUL OF MURE TIME.

I WILL, YOUR HONOR. -- OF YOUR TIME. EYE WILL, YOUR HONOR. THANK YOU. THIS COURT IS AWARE, BASED ON THE FACTS OF THE APPELLANT BRIEF OF THE ISSUES WHICH WE ARE GOING TO BE DEALING WITH HERE TODAY, MR. BOLIN WAS CON VITHED IN HILLSBOROUGH COUNTY OF THE MURDER OF STEPHANIE COLLINS. THE TESTIMONY FELL INTO CATEGORIES, THE TESTIMONY OF CHERYL COLBY, MR. BOLIN'S EX-WIFE WHO IS NOW DECEASED, AND A SINGLE HAIR THAT WAS REMOVED FROM A TOWEL THAT THE BODY WAS FOUND WRAPPED IN. THAT SINGLE HAIR WAS TESTED AND PRELIMINARY RESULTS WERE INCLUSIVE. AT THE RETRIAL PERIOD, THE STATE AGAIN RETESTED THE -- RESUBMITTED THE HAIR FOR ADDITIONAL TESTING, AND FROM MY IMPRESSION OF THE STATE OF FLORIDA, SUBJECTING THAT HAIR FOR TESTING OF A CONTRAIL OR MTDNA. A FRYE HEARING WAS CONDUCTED ON THE USE OF MTDNA IN THE STATE OF FLORIDA, AND THE TRIAL JUDGE ULTIMATELY RULED THAT THE MTDNA WOULD BE ADMISSIBLE, AND IT IS OUR POSITION, HOWEVER, THAT THE TRIAL JUDGE'S RULING, UNDER FRYE WAS INCORRECT, AND THAT THE TRIAL JUDGE MISS APPLIED THE PRINCIPLES OF FRYE, IN DETERMINING THAT MTDNA ACTUALLY MEETS THE STANDARD FOR ADMISSIBILITY IN THE STATE OF FLORIDA.

LET ME, BEFORE YOU GET INTO THE SCIENCE OF IT, ISN'T THIS A SITUATION IN WHICH IT, ASSUMING THAT DOLBY'S EVIDENCE WAS PROPERLY ADD -- THAT COLBY'S EVIDENCE WAS PROPERLY ADMITTED, THERE WAS NO QUESTION HERE, AND IN FACT THE DEFENSE ARGUED CONCERNING THE FACT THAT THIS MATERIAL CAME FROM THE HOSPITAL WHERE MS. DOLBY HAD BEEN. -- MS. COLBY HAD BEEN. THERE WASN'T AN ISSUE ABOUT THE TOWEL OR THAT THE HAIR CAME FROM THE TOWEL OR THAT, I MEAN, BOLIN'S BASIC DEFENSE, THERE, WAS THAT HE MOVED THE BODY BUT HE DIDN'T KILL IT. ISN'T THAT CORRECT?

YOUR HONOR, I WOULD DISAGREE WITH PART OF THAT. NUMBER ONE, AT THE TIME WHEN THE DEFENSE WENT TO TRIAL, OBVIOUSLY THE COURT HAD ALREADY RULED THAT THE HAIR AND THE SCIENCE BEHIND IT WAS ADMISSIBLE. SECONDLY, COLB'S TESTIMONY, IN MY OPINION, WALKS WAS HIGHLY IMPEACHABLE. EVEN THOUGH SHE HAD MADE CERTAIN STATES, SHE HAD GIVEN CONFLICTING STATEMENTS, AND BOLIN, IN FACT, ACCORDING TO COLBY HAD MADE THREE STATEMENTS. DEFENSE COUNSEL ACKNOWLEDGED THAT THESE WRAP POSITION WERE CONSISTENT WITH ONES THAT MIGHT HAVE COME FROM THE HOSPITAL, BUT I DO NOT BELIEVE THAT DEFENSE COUNSEL WENT SO FAR AS TO ACTUALLY CONCEDE THAT BOLIN HAD A ROLE IN THE HOMICIDE OR A ROLE IN REMOVING THE BODY. I THINK COUNSEL'S ARGUMENT ESSENTIALLY WAS THAT, OF THE THREE STATEMENTS THAT COLBY HAD TESTIFIED TO THAT MR. BOLIN HAD MADE, THE MOST IT WOULD BE WOULD BE RELATING TO WHETHER OR NOT HE HAD MOVED THE

BODY. BUT I DO NOT BELIEVE THAT THERE WAS A CONCESSION THAT MR. BOLIN WAS INVOLVED IN THIS HOMICIDE, AND SECONDLY, THIS COURT HAS RECOGNIZED THAT THE IMPACT OF DNA EVIDENCE ON A JURY IS INCREDIBLE IN THORPE, AND TO TRY TO SAY THAT THE ADMISSION OF THIS HAIR WAS HARMLESS, WHICH IS WHAT I THINK YOUR HONOR IS GOING TOWARDS, I BELIEVE IS INCORRECT. WITHOUT THE HAIR, THERE WAS ABSOLUTELY NO PHYSICAL EVIDENCE, BUT THAT WHICH COLBY TRIED, IN AN ATTEMPT TO LINK MR. BOLIN TO THE CASE. WE HAVE NO FINGERPRINTS. WE HAVE NO BODY FLUIDS. THERE IS SIMPLY NOTHING BUT THIS SINGLE HAIR, BY WAY OF EVIDENCE THAT, CONNECTS OSCAR BOLIN AS OPPOSED TO CHERYL COLBY TO THIS PARTICULAR CRIME.

BUT ISN'T THAT BASED, TO A GREAT EXTENT, UPON THE TYPE OF DNA TESTING? WITH THE MITOCHONDRIAL, THERE IS ONE EXCLUSION, AND ISN'T THAT EXPLAINED DURING THE TESTIMONY, WHERE THE ONE-IN-4 BILLION COMES FROM THE OTHER TYPE OF TESTIMONY. THIS IS ADDITIONAL PIECE, IS IT NOT?

BUT THE FIRST JUMP WE HAVE TO MAKE IS WHETHER THAT ADDITIONAL PIECE SHOULD HAVE BEEN A PART OF THIS TRIAL OR A PART OF THE TESTIMONY.

BUT THE POINT IS YOU MADE THE STATEMENT THAT THE DNA WAS SO OVERWHELMING ON EVERYTHING. WAS IT NOT EXPLAINED DURING THE EVIDENCE?

IT WAS EXPLAINED THAT IT WAS STILL, WITHIN A CHANCE OF 144, THE EXCLUSION RATIO THAT WAS TESTIFIED TO BY THE STATE AT TRIAL, WAS STILL EXTREMELY DAMAGING, AND I DON'T THINK THAT YOU CAN OVERCOME THAT BY SIMPLY SAYING IT WASN'T ONE-IN-4 BILLION. THE JURY WASN'T GIVEN INFORMATION ABOUT THE OTHER TYPES OF DNA TESTING, AND AS I SAID ONE OF THE THINGS TO REMEMBER, WHEN YOU ARE DEALING WITH MTDNA WAS YOU STILL HAD TO GET OVER THAT FIRST HURDLE. DID IT MEET FRYE? AND OUR POSITION IS CLEARLY IT DID NOT MEET FRYE. IT HAD NO BUSINESS COMING INTO THAT COURTROOM.

HOW ABOUT ADDRESSING THAT.

AT ALL. ONE OF THE THINGS I THINK IT IS IMPORTANT FOR THIS COURT TO RECOGNIZE IS THERE ARE INSTANCES WHEN MTDNA IS USED. IT IS NOT USED OUTSIDE OF THE FBI, FOR PURPOSES OF IDENTIFICATION. WHEN IT HAS BEEN USED BY THE SCIENTIFIC COMMUNITY AS A WHOLE, IT IS USED AS A METHOD OF DETERMINING FAMILIAL OR RELATIONSHIPS. IT IS NOT USED BY THE GENERAL SCIENTIFIC COMMUNITY, TO ESTABLISH THE IDENTITY OF AN UNKNOWN, WITH TWO UNKNOWN SAMPLES AND THEN TO COME UP WITH A PERPETRATOR. FOR EXAMPLE, WHEN IT WAS USED TO IDENTIFY THE REMAINS OF THE ROYAL FAMILY, THEY KNEW WHO THEY WERE TRYING TO IDENTIFY. THEY HAD THE DNA FROM THE FAMILY WHERE THEY KNEW THERE WAS A FAMILY CONNECTION. IT WAS COMPARING A KNOWN TO A KNOWN, NOT AN UNKNOWN AND WHO COULD IT POSSIBLY BE.

GIVING US A CONCISE STATEMENT OF THE EVIDENCE THAT WAS PRESENTED, THEN, AT THE FRYE HEARING, IN THIS TRIAL COURT, THEN, USED AS A BASIS FOR ALLOWING THIS EVIDENCE IN, WHAT IS IN THAT BOX, AS EVIDENCE THAT IS PRESENTED?

THIS COURT ALLOWED TO GO BEYOND THAT BOX FOR THE EVIDENCE PRESENTED, BUT ESSENTIALLY WHAT WAS IN THAT BOX WAS THE STATE HAS TO ESTABLISH WHETHER OR NOT DNA WAS GENERALLY ACCEPTED WITHIN THE SCIENTIFIC COMMUNITY, AND THEY PRESENTED THE TESTIMONY OF THE FBI, JOHN STEWART, WHO ESSENTIALLY TESTIFIED TO CERTAIN CHARACTERISTICS OF MTDNA THAT, IN HIS OPINION, MADE IT RELIABLE AND, THUS, WOULD MEET FRYE. HOWEVER, AS HAS BEEN SUBSEQUENTLY SHOWN, NOT ONLY THROUGH DR. SHIELDS'S TESTIMONY BUT THROUGH ADDITIONAL RESEARCH THAT HAS GONE ON SINCE THE FRYE HEARING, EACH OF THOSE UNDERLYING PRINCIPLES OF MTDNA HAVE BEEN COMPLETELY DISPROVED. WE ARE SIMPLY, IT IS SIMPLY NOT READY FOR USE IN THE FLORIDA COURT SYSTEM.

THE WHOLE PURPOSE OF FRYE IS TO HAVE GENERAL ACCEPTANCE IN THE SCIENTIFIC COMMUNITY, PRIOR TO SCIENTIFIC EVIDENCE BEING ADMISSIBLE IN A COURT.

WHAT MAKES IT NOT, AGAIN, GOING BACK TO THE IDEA THAT THIS IS NOT AS HIGH AS REGULAR DNA, AS FAR AS SAYING THESE RATIOS, THAT THE RATIO OF EXCLUSION IS NOT A HIGH ONE, WHAT IS IT ABOUT THE METHOD THAT CAUSES IT NOT TO BE GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY? I KNOW THERE IS DISCUSSION ABOUT CONTAMINATION, BUT THAT IS SOMETHING THAT COULD BE INHERENT IN A PARTICULAR METHOD BUT NOT NECESSARILY MAKE IT SO UNRELIABLE, IF THEY CAN SHOW THAT THERE WAS WASN'T CONTAMINATION IN THIS PARTICULAR CASE, SO WHAT IS IT ABOUT THIS METH ODD THAT MAKES IT NOT RELIABLE -- METHOD THAT MAKES IT NOT RELYABLE?

IT IS THE BASIC UNDERSTANDING OF WHAT THIS COMPONENT IS. FOR EXAMPLE, ONE OF THE POINTS THAT STEWART TRIED TO SAY THAT MAKES MTDNA RELIABLE IS THE FACT THAT, YOU KNOW, IN AN AL GORE I TO NUCLEAR -- IN AN ALLEGORY TO NUCLEAR DNA, YOU ALWAYS HAVE THAT SAME INDIVIDUAL WHO HAS ALWAYS THAT SAME BLUEPRINT WITHIN THEMSELVES. YOUR DNA STAYS CONSTANT. IT STAYS THE SAME. THAT IS NOT TRUE WITH MTDNA.

NOT ALWAYS, BUT THERE IS LIKE --

WELL, AT THE TIME OF THE FRYE HEARING, THE STATE EVEN CONCEDED THAT YOU WOULD HAVE A MUTATIONAL RATE OF ROUGHLY 8-TO-10 PERCENT. SINCE THAT TIME, YOU KNOW, FURTHER SCIENTIFIC RESEARCH HAS INDICATED THAT PROBABLY YOU HAVE A MUTATIONAL RATE OF 100 PERCENT THAT MTDNA WILL MUTATE WITHIN EVERY INDIVIDUAL ALL THE TIME, SO THE FACT THAT THE JURY WAS GIVEN AND WHICH TO DETERMINE WHETHER THIS EVIDENCE WAS RELIABLE OR NOT, ARE NOT EVEN TRUE FACTS. THE BOTTOM LINE IS WE ARE NOT SUPPOSED TO USE THE COURTROOM AS A SUBSTITUTE FOR THE SCIENTIFIC LABORATORIES, AND THE TRIAL COURT, IN THIS CASE, DID EXACTLY WHAT THE FIRST DISTRICT COURT, IN BERRY, CAUTIONED AGAINST. INSTEAD OF LOOKING AT THE ENTIRE SCIENTIFIC COMMUNITY AND WHAT THE GENERAL ACCEPTANCE WAS, WITHIN THAT COMMUNITY, AND AS THIS COURT AFFIRMED IN HAS HAD EN, IT IS THE RELY -- IN HADDEN, IT IS THE RELEVANT MEMBERS WHO ARE INVOLVED IN THE TESTING OR UTILIZATION OF THAT PARTICULAR SCIENTIFIC TECHNIQUE, OF WHICH DR. SHIELDS WAS CLEARLY A MEMBER.

WHAT HAVE OTHER COURTS DID, IN RESPECT?

OTHER JURISDICTIONS THROUGHOUT THE UNITED STATES HAVE ADMITTED MTDNA. HOWEVER, I BELIEVE THAT THEY ARE DISTINGUISHABLE IN SEVERAL AREAS. NUMBER ONE, NONE OF THE OTHER INSTANCES IN WHICH MTDNA HAS BEEN ADMISSIBLE HAVE FOLLOWED OR APPLIED A FRYE STANDARD. THEY HAVE USED THE DOBERT PRINCIPLE OR SOME VARIATION ON IT, WHERE YOU DID NOT HAVE TO ESTABLISH GENERAL ACCEPTANCE WITHIN THE SCIENTIFIC COMMUNITY, PRIOR TO THERE BEING ADMISSION. IN ONE STATE, TENNESSEE, FOR EXAMPLE, THEY SPECIFICALLY ALLOW THAT BY STATUTE, THIS TYPE OF EVIDENCE TO COME IN BY STATUTE. THERE IS NO INITIAL WEIGHING PROCESS. THEY HAVE ABANDONED WHAT, IN ESSENCE, THIS COURT HAS FELT WAS A NECESSARY FUNCTION, WHICH IS THE ROLE OF THE JUDICIARY AS THE GATEKEEPER. AND IT IS OUR POSITION THAT THAT ROLE SHOULD NOT BE DIMINISHED OR UNDER MIND, WHEN A TRIAL JUDGE -- UNDERMINED, WHEN A TRIAL JUDGE SIMPLY MAKES THE DETERMINATION THAT HE BELIEVES ONE EXPERT OVER ANOTHER, WHICH IS EXACTLY WHAT BERRY CAUTIONED AGAINST. THE FOCUS IS NOT WHETHER THERE WAS ENOUGH TO CONVINCE THE JURY BUT WHETHER OR NOT THERE IS GENERAL ACCEPTANCE IN THE SCIENTIFIC COMMUNITY FORM THE TRIAL COURT IGNORED THE FACT, IN REACHING A CONCLUSION THAT THIS EVIDENCE HAD MET FRYE, THAT THERE WAS NOT GENERAL CONSENSUS, AS EVIDENCED BY ONGOING AND CONTINUING RESEARCH, WHICH IS SUBSTANTIAL -- WHICH HAS SUBSTAENKSALLY ALTERED THE SCIENTIFIC THOUGHT AS TO WHAT MTDNA IS AND WHAT ITS USES ARE, AND AS POINTED OUT IN

THE APPENDIX ATTACHED AT THIS POINT IN TIME, CURRENT SCIENTIFIC RESEARCH, THEY STILL DON'T KNOW WHAT THE FORENSIC AND IDENTIFICATION APPLICATIONS OF MTDNA CAN BE, UNTIL THEY HAVE FINALLY FIGURED OUT AND CONCLUSIVELY STATE WHAT DRIVES THIS PARTICULAR PIECE OF INFORMATION. WHAT ARE ITS COMPONENTS, AND HOW DOES IT BEHAVE. AND YOU END UP WITH A SITUATION THAT, IF THIS TRIAL WAS HELD TOMORROW, MOST OF THE FACTORS THAT STEWART USED AND THAT THE STATE PRESENTED WOULD BE ABSOLUTELY FALSE OR INCORRECT, BUT YET YOU HAD A JURY THAT WAS PERMITTED TO HEAR AND ULTIMATELY REACH A DECISION, USING EVIDENCE THAT IS NO LONGER APPLICABLE, THAT IS COMPLETELY FALSE, AND THAT HAS BEEN COMPLETELY DISPROVED. THE WHOLE METHODOLOGY.

THAT IS A PRETTY STRONG STATEMENT. WOULD THERE BE A CONFLICT OR WOULD THERE BE JUST ABSOLUTE AGREEMENT THAT NONE OF THESE, IS THAT WHAT YOU ARE SAY SOMETHING.

I THINK THERE IS ABSOLUTE CONFLICT WITH STEWART'S TESTIMONY THAT MUTATIONAL RATES ARE 8-TO-10 PERCENT. THERE IS ABSOLUTE CONFLICT THERE. THERE IS --

I SEE THE CONFLICT, BUT MY POINT IS WOULD WE HAVE THE FBI DOCTOR TESTIFYING, YES, THIS IS GENERALLY ACCEPTED IN THESE PARAMETERS AND SOMEONE ELSE CONFLICTING WITH THAT, OR IS IT YOUR POSITION THAT THE DOCTOR FROM THE FBI WOULD AGREE? WOULD AGREE ON ALL THOSE POINTS?

YOUR HONOR, I BELIEVE THAT, IF THE DOCTOR FROM THE FBI HAD CON CONFRONTED WITH ONGOING RESEARCH, HE MIGHT CHOOSE OR NOT CHOOSE TO ADAPT THAT, BUT THE PROBLEM IS YOU WOULD STILL, THEN HAVE THIS ONE ISOLATED LAB, SEEKING TO PROMULGATE, FOR THEIR OWN INTENT AND PURPOSES, THEIR RESULTS, INCOMPLETE CONTRAVENTION TO WHAT THE REST OF THE SCIENTIFIC COMMUNITY IS ACKNOWLEDGING OR IS CONTINUING TO WORK ON, AS BEING THE CHARACTERISTICS OF THIS PARTICULAR TYPE OF DNA.

AND WHEN YOU SAY JUST THIS ONE LAB, YOU ARE SUGGESTING, THEN, THAT EVERY OTHER CASE AROUND THE COUNTRY HAS COME OUT OF THIS SAME LAB?

NO, YOUR HONOR, I AM NOT. THE QUESTION THAT I WAS ASKED REGARDING OTHER JURISDICTIONS RELATING TO WHAT EVIDENTIARY STANDARD HAD TO BE MET, IN ORDER FOR THAT PARTICULAR EVIDENCE TO BE ADMITTED.

SO THERE ARE OTHER LABORATORIES USING THIS?

THERE ARE OTHER LABORATORIES, OTHER THAN THE FBI, USING THIS, AND ALTHOUGH THEY ARE NOT USING IT IN A FORENSIC CAPACITY, THEY ARE USING IT TO ESTABLISH THINGS SUCH AS MIGRATORY PATTERNS OF ANCIENT HUMAN NOID ANCESTORS. THEY ARE USING IT TO ESTABLISH RELATIONSHIPS BETWEEN TWO SPECIES. THEY ARE NOT YET USING IT AS A TOOL OF IDENTIFICATION. FROM MY UNDERSTANDING THE ARMED SERVICES LAB AND THE FBI LAB HAVE ATTEMPTED TO USE MTDNA AS A MEANS OF IDENTIFICATION, WHICH I THINK IS A CRITICAL AND CRUCIAL DISTINCTION. NOT ONLY THAT, BUT AS TESTIFIED TO BY DR. SHIELDS, NO OTHER LAB BUT THE FBI LAB IS WILLING TO ACCEPT THE LEVELS OF CONTAMINATION IN ITS TESTING PROCEDURES THAT THE FBI LAB IS WILLING TO ACCEPT, AND THERE IS NOT GENERAL ACCEPTANCE AND, IN FACT, EUROPEAN COUNTRIES DO NOT ACCEPT THE STATISTIC A.M. METHOD THAT THE FBI -- THE STATISTICAL METHOD THAT THE FBI IS CHOOSING TO USE AT THIS POINT.

COULD THIS BE USED AS A TOOL FOR EXCLUSION?

I BELIEVE THAT, AT SOME POINT IT WILL PROBABLY BE USED OR BE MORE APPLICABLE AS A TOOL FOR EXCLUSION, BUT I DON'T BELIEVE WE THERE ARE YET, UNTIL THE SCIENTIFIC COMMUNITY CAN REACH A CONSENSUS ON HOW THIS PARTICULAR DNA OPERATES AND WHAT CREDENCE AND WHAT WEIGHT SHOULD BE GIVEN TO THE MATCHES OR EXCLUSIONS THAT HAPPEN!

I AM GETTING THE IMPRESSION THAT THE WEIGHING PROCESS IS WHERE THE PROBLEM COMES IN WITH THE MTDNA, AND, BUT, THE SCIENTIFIC COMMUNITY AGREES THAT AS A TOOL OF EXCLUSION, THERE IS NO PROBLEM. AM I WRONG THERE?

YOUR HONOR, I WOULD RESPECTFULLY DISAGREE. I DON'T BELIEVE AT THIS POINT, BASED UPON THE CONTINUING RESEARCH THAT THE SCIENTIFIC COMMUNITY HAS REACHED THE POINT WHERE THEY CAN STATE WHAT APPLICATION MTDNA SHOULD HAVE, IN ALL INSTANCES.

OKAY. MR. CHIEF JUSTICE: BE MINEDFUL OF YOUR TIME, IF YOU ARE SPLITTING IT.

THANK YOU, YOUR HONOR. I DO BELIEVE THAT THE PROBLEM THAT WE HAVE HERE IS THAT WE ARE ALLOWING IN SCIENTIFIC EVIDENCE, BEFORE THE SCIENTIFIC COMMUNITY HAS REACHED A CONSENSUS OR REACHED A GENERAL FEELING OR GENERAL LEVEL OF ACCEPTANCE THAT IS SIMPLY NOT THE FUNCTION OF THE JUDICIAL SYSTEM OR OF THE TRIAL COURT, AND WE CAN SEE IN THIS CASE, WHAT ENDS UP BEING THE RESULT, WHERE WE HAVE A RECORD IN WHICH TESTIMONY WAS PRESENTED THAT IS NO LONGER ACCURATE AND NO LONGER RELIABLE, AND YET WE ALLOWED A JURY, BECAUSE OF ALLOWING THIS EVIDENCE IN, TO CONSIDER THAT INACCURATE AND UNTRUE INFORMATION, IN RENDERING A VERDICT.

I AM NOT SURE I UNDERSTOOD YOUR ANSWER TO JUSTICE SHAW, WHETHER THAT WAS A YES OR NO. YOUR ANSWER THAT I DON'T BELIEVE THEY AGREE HOW IT IS TO BE USED UNDER ALL CIRCUMSTANCES. CAN -- IS THERE AGREEMENT THAT YOU CAN USE THIS GENERAL ACCEPTANCE AS A TOOL OF EXCLUSION?

IN MY DIGESTION OF THE ABSTRACTS THAT WERE SUBMITTED AS A DEFENSE EXHIBIT, THE CURRENT NEW FINDINGS OR NEW RESEARCH THAT INDICATES THAT THERE IS PATERNAL INFLUENCE THAT THERE ARE SIGNIFICANTLY HIGHER LEVELS OF MUTATION, AND WHETHER OR NOT MTDNA IS HETERO LAST MICK OR HOME ---HETERO PLASMIC OR HOMO PLASMIC, THE STATEMENT WAS MADE IN THE ABSTRACT, THAT UNTIL THESE PARTICULAR AREAS ARE RESEARCHED MORE FULLY, THEY DO NOT KNOW WHAT IMPACT THAT THESE THINGS WILL HAVE ON MTDNA'S APPLICATION TO THE FORENSIC AND THAT FAMILIAL TYPE, THE PURE RESEARCH END OF WHETHER, OF HOW MTDNA SHOULD BE APPLIED.

AND THAT IS ONLY ONE ABSTRACT. ARE THERE OTHERS?

THERE WERE -- EACH OF THEY THEM, BASICALLY -- EACH OF THEM, BASICALLY, THAT WAS ONE THAT WAS SUBMITTED. I MEAN, PART OF THE PROBLEM IS THIS RESEARCH IS ONGOING TO THIS MOMENT. I MEAN, I WENT ON THE INTERNET, TO CHECK TO SEE IF THERE WAS ADDITIONAL THINGS SINCE THE BRIEFS HAD BEEN FILED, AND THERE ARE NOT. THIS IS SO NEW, THAT WE DON'T EVEN HAVE PUBLISHED PAPERS YET, BECAUSE THIS IS SOMETHING SCIENTISTS ARE STILL WORKING ON.

YOU SAY IT IS SO NEW, BUT, IN FACT, AREN'T THEY BUILDING ON A BASE WHERE THIS HAS BEEN USED IN OTHER AREAS FOR A LONG, LONG TIME, AND HAS BEEN ACCEPTED IN THE SCIENTIFIC COMMUNITY FOR USE IN THESE OTHER AREAS, FOR A LONG LONG TIME? IT IS JUST NOW THE TRANSFER TO USING IT HERE, IN THE FORENSIC AREA THAT WE ARE TALKING ABOUT?

I BELIEVE IN RELATION TO PCRDNA, MTDNA IS STILL A NEW SCIENCE OR A NEW APPLICATION OF OTHER, MORE LONG STANDING SCIENTIFIC PRINCIPLES FORM MTDNA ITSELF HAS ONLY BEEN AROUND, AS FAR AS BEING UTILIZED AS TOOL, SINCE THE EARLY-TO-MID 1990S. WHAT ENDS UP HAPING IS THAT YOU ARE HAVING THE COURT SYSTEM MOVING AHEAD OF WHAT THE SCIENTIFIC COMMUNITY IS ABLE TO KEEP UP WITH AND PUBLISH, IN TERMS OF ACCEPTING THIS. I DO NOT BELIEVE THAT THERE IS GENERAL AGREEMENT, AT THIS POINT BASED UPON NEW AND CONTINUING RESEARCH FINDINGS, ON THE -- ON HOW MTDNA SHOULD BE USED AND HOW USEFUL

IT IS, WHICH IS WHERE I THINK THAT CRITICAL DISTINCTION COMES IN. THERE IS A BIG JUMP, BETWEEN USING MTDNA TO ESTABLISH A FAMILIAL RELATIONSHIP, AS OPPOSED TO USING IT AS A MEANS OF IDENTIFYING THE PERPETRATOR IN A HOMICIDE.

THIS COMES BACK TO THE BASIC PREMISE THAT, IF YOU CAN USE THIS AS A TOOL FOR FAMILIAL RELATIONSHIPS, THEN IS IT NOT A GENERALLY-ACCEPTED SCIENTIFIC PRINCIPLE THAT IT CAN BE USED FOR EXCLUSION?

NO. BECAUSE IT IS GENERALLY ACCEPTED AS A TOOL TO ESTABLISH A FAMILIAL RELATIONSHIP, BUT IT IS NOT GENERALLY ACCEPTED, AT THIS POINT, AS A TOOL IN THE FORENSIC ARENA, FOR IDENTIFICATION. I BELIEVE THAT YOU ARE TALKING TWO SEPARATE STANDARDS, AND YOU ARE TALKING TWO DIFFERENT APPLICATIONS, THE SAME WAY THAT YOU ARE TALKING, WHEN YOU, FOR EXAMPLE, JUST FACT THAT YOU HAVE -- THE FBI LAB PERMITTING A CONTAMINATION RATIO IN, VERY HONESTLY, A MATTER OF LIFE AND DEATH, THAT WOULD NOT BE PERMITTED IN AN INDEPENDENT LAB, RUNNING A MTDNA ANALYSIS OF BONES 300 MILLION YEARS OLD, TO DETERMINE IF THEY ARE THE BONES FROM THE SECOND ARCHAEOLOGICAL SITE. WHY IN THE WORLD WOULD WE WANT A LESSER STANDARD TO APPLY IN THE CRIMINAL JUSTICE SYSTEM, THAN WHAT THE SCIENTIFIC COMMUNITY IS WILLING TO ACCEPT, IN DEALING WITH ISSUES THAT ARE NOT LITERALLY A MAN'S LIFE, AND THAT ARE NOT LIFE AND DEATH ISSUES. AND I BELIEVE THAT THAT IS WHERE YOU COME INTO CRITICAL DISTINCTIONS ON HOW THIS PARTICULAR TYPE OF SCIENTIFIC EVIDENCE SHOULD BE APPLIED IN THIS ARENA, AND AT THIS POINT IN TIME, THERE IS SIMPLY NOT ENOUGH STABBED ABOUT THIS PARTICULAR SCIENCE -- ESTABLISHED ABOUT THIS PARTICULAR SCIENCE, TO MAKE IT BE THE TYPE OF THING THAT WE NEED TO HANG OUR HAT ON, WITHIN THE COURT SYSTEM. I WOULD JUST ASK THE COURT TO MOVE ON TO THE SECOND ISSUE THAT I WILL BE ADDRESSING TODAY, WHICH RELATES TO THE USE OF CHERYL COLBY'S DEPOSITIONAL STATEMENT AND THE DEPOSITION TO PERPETUATE TESTIMONY RELATING TO WHETHER OR NOT THE DEFENSE COUNSEL SHOULD HAVE BEEN PERMITTED TO INTRODUCE CONTRADICTORY OR INCONSISTENT STATEMENTS THAT WERE OBTAINED IN HER DEPOSITION TO PERPETUATE TESTIMONY, WITH THAT VIDEO TESTIMONY THAT THE STATE WAS ABLE TO USE AS THEIR EXHIBIT. I WANT TO MAKE IT CLEAR TO THE COURT THAT WE ARE NOT RAISE AGO CLAIM THAT THIS WAS INEFFECTIVE ASSISTANCE OF COUNSEL ON THE PART OF THE TRIAL ATTORNEY. THE TRIAL COURT CHOSE, SPECIFICALLY, NOT TO RULE ON THIS ISSUE. WHAT WAS AT ISSUE WAS WHETHER OR NOT, UNDER THE SIXTH AMENDMENT, UNDER THE RIGHT TO CONFRONT THE WITNESSES AND THE CONFRONTATION CLAUSE, THE TRIAL ATTORNEYS IN THIS TRIAL SHOULD HAVE BEEN PERMITTED TO POINT OUT OTHER STATES COLBY MADE UNDER OATH, IN A DEPOSITION TO PERPETUATE TESTIMONY, THAT WERE IN CONFLICT WITH HER TESTIMONY THAT SHE GAVE AT THE FIRST TRIAL. AT THIS POINT IN TIME, I AM GOING TO ALLOW MR. CONNOR, UNLESS THE COURT HAS A QUESTION RELATING TO THAT ISSUE THEY WOULD LIKE ME TO ADDRESS, I WOULD ALLOW MR. CONNOR TO ADDRESS YOU, RELATING TO ISSUES ONE AND TWO.

THANK YOU. MR. CONNOR?

THANK YOU. I WANT TO ADDRESS, IN PARTICULAR ISSUE TWO, WHICH IS THE WAY THE TRIAL COURT'S FINDING OF A WAIVER OF SPOUSAL IMMUNITY PRIVILEGE, AND I WANTED TO TICKLARLY ADDRESS THE STANDARD OF REVIEW THAT THIS COURT SHOULD TAKE ON THIS QUESTION. NOW, WHEN 24 COURT SENT THE -- IN THE PREVIOUS OPINION, SAID THAT THE TRIAL JUDGE, ON REMAND, SHOULD EXAMINE THE LETTER WHICH WAS NOT IN THE PREVIOUS RECORD, AND FIND OUT, CONSIDER ALL THE CIRCUMSTANCE AROUND THERE AND DETERMINE WHETHER BOLIN WAIVED HIS SPOUSAL PRIVILEGE AT THAT TIME.

THIS IS THE SAME ISSUE WE HEARD IN FEBRUARY, CORRECT?

THAT'S CORRECT.

AND THESE TRIALS WERE GOING ON SIMULTANEOUSLY? IS THAT -- NO?

THEY WERE ONE AFTER ANOTHER.

ONE AFTER ANOTHER. THEY WERE CONSECUTIVE TRIALS.

RIGHT. ACTUALLY THE SENTENCING WAS HELD AT THE SAME TIME, BUT THE TRIALS WERE, FIRST, THE TRIAL THAT YOU HEARD IN FEBRUARY.

IN FEBRUARY.

CAME FIRST, AND THEN THIS ONE. I DO REMEMBER AT THAT ARGUMENT, THERE WAS, YOU KNOW, A QUESTION ABOUT THE STANDARD OF REVIEW, AND I DIDN'T THINK THAT IT WAS CLARIFIED TOO WELL, AND SO I DID WANT TO CLARIFY THAT AT THIS TIME.

THIS WAS BOTH JUDGE PADGETT WAS THE TRIAL JUDGE IN BOTH OF THESE CASES?

THAT'S CORRECT. AGAIN, THE WAIVER OF IMMUNITY WAS PRETRIAL HEARING, WHICH WAS APPLICABLE TO BOTH CASES. SO IT IS EXACTLY THE SAME FACTS AND CIRCUMSTANCES, IN EACH OF THESE BOLIN CASES, REGARDING THE WAIVER ISSUE. NOW, WHAT WE HAVE HERE IS A MIXED QUESTION OF FACT AND LAW. NOW, WHAT THE TRIAL JUDGE, FIRST HE FINDS THE CIRCUMSTANCES SURROUNDING THE LETTER, OF COURSE, QUESTIONS OF FACT. AS FAR AS WHETHER, WHAT IS IN THE LETTER CONSTITUTES A WAIVER THAT, IS A QUESTION OF LAW. IT IS TO BE REVIEWED BY THIS COURT, ON A DE NOVO BASIS. AS FAR AS WHETHER THIS WAIVER HE FOUND IN THE LETTER, WHETHER THAT SERVES TO OPERATE AS TO SOMEHOW RETROACTIVELY MAKE THE WAIVER RELATE BACK TO THE TIME WHEN CAPTAIN TERRY FIRST INTERVIEWED CHERYL COLBY AND HAD TOOK HER TESTIMONY AT THAT TIME, WHETHER IT CONTINUED DURING THE TIME WHERE THE TRIAL JUDGE FOUND THAT BOLIN HAD WAIVED HIS SPOUSAL IMMUNITY PRIVILEGE, BY TAKING THE DEPOSITION OF CHERYL COLBY, THESE ARE ALL QUESTIONS OF LAW, AND, AGAIN, SHOULD BE GIVEN A DE NOVO REVIEW BY THIS COURT. THE OTHER POINT WAS THE LETTER WHICH WAS EXAMINED, TO DETERMINE WHETHER THERE WAS A WAIVER, IS A WRITTEN DOCUMENT. NOW, THIS COURT HAS PREVIOUSLY HELD THAT, IN CASES WHERE THE TRIAL JUDGE IS REVIEWING A WRITTEN THING RATHER THAN HEARING LIVE TESTIMONY, THAT THERE ARE NO QUESTIONS OF CREDIBILITY, DEMEANOR AND SO FORT, WHICH ARE THE REASONS WHY -- AND SO FORTH, WHICH ARE THE REASONS WHY THE TRIAL JUDGE'S FINDING IS GIVEN A PRESUMPTION OF CORRECTNESS.

IS IT YOUR ARGUMENT THAT THE WAIVER WAS EQUIVOCAL? THAT IT IS A CONDITIONAL WAIVER? IT ONLY WAS TO BE ACTED ON, IF HE COMMITTED SUICIDE? WHAT -- IF YOU TOOK THE LETTER AND SAID ARE THERE TWO INFERENCES THAT CAN BE DRAWN FROM THAT LETTER, HOW DO YOU, WHAT IS YOUR POSITION ON THAT?

WE GAVE, IT WAS ACTUALLY SEVERAL. ONE, OF COURSE, IS THAT THE CONDITIONAL WAS THE CONDITIONAL WAIVER. THE FIRST IS THAT IT IS NOT A WAIVER AT ALL. IT IS JUST SIMPLY A RECOGNITION THAT CAPTAIN TERRY HAS SPOKEN WITH CHERYL COLBY IN THE PAST AND HE HAS TRIED TO SPEAK WITH BOLIN, HIMSELF, AND IT IS JUST A RECOGNITION OF THE FACT, YOU KNOW, THAT THERE IS ONGOING QUESTIONS BY CAPTAIN TERRY, AND THAT, IF BOLIN IS SUGGESTIONFUL IN THE SUICIDE, WHICH, IN HIS -- SUCCESSFUL IN HIS SUICIDE, WHICH IN HIS LETTER HE CERTAINLY INTENDED TO BE, THAT HE WOULD NOT OBAVAILABLE TO ANSWER CAPTAIN TERRY'S QUESTIONS. THE OTHER WAS WHICH WAS RAISED IS, AS YOU SAID, A CONDITIONAL WAIVER THAT, IT WOULD ONLY OPERATE, IF HE WAS SUCCESSFUL, AND THE QUESTION, REALLY, IS THAT WAIVER IS USUALLY SOMETHING YOU DO BY CONDUCT. IF YOU START SAYING, WELL, THESE PRIVILEGED COMMUNICATIONS, I WOULD LIKE TO USE THEM IN A SELF-SERVING WAY, THEN THAT IS USUALLY WHEN YOU LOSE YOUR IMMUNITY. BOLIN NEVER DID THAT. HE NEVER TRIED TO USE, AT LEAST COMMUNICATIONS, IN A SELF-SERVING WAY, AND SO OUR CONTENTION IS THAT HE WAS ALWAYS

USING THE PRIVILEGE AS THE SHIELD. HE NEVER CHANGED FROM THAT POSITION, AND THAT THERE FOR A WAIVER SHOULD NOT BE FOUND. I WILL RESERVE THE BALANCE FOR REBUTTAL.

THANK YOU. MS. HOPKINS.

GOOD MORNING. MAY IT PLEASE THE COURT, MY NAME IS KIMBERLY NOLEN HOPKINS. I WILL GO TO THE RESISTANCE AS TO THE STATE. THE STATEMENT WITH REGARD TO THE GENERAL ACCEPTANCE OF MITOCHONDRIAL DNA IN THE COMMUNITY, AND ACCEPTANCE AS TO THE IDENTIFICATION PROCEDURE, WITH CONCERNS RAISED BY BOTH JUSTICES LEWIS ANSPAUGH. HE AT NO POINT DOES THAT. INSTEAD HE PICKS APART CERTAIN ASPECTS OF THE FBI PROCEDURE, INCLUDING CONTAMINATION, WHETHER OR NOT IT IS HETERO PLASTIC, ET CETERA, AND -- HETERO PLASMIC, ET CETERA, AND --

DOESN'T IT GET RATHER MURKY, ONCE YOU GET PAST USING IT AS A TOOL OF EXCLUSION, ISN'T THAT WHERE YOU WOULD HAVE TO COME IN WITH FRYE, THEN, BECAUSE THE SCIENTIFIC COMMUNITY IS AT ODDS, AS TO WHETHER YOU CAN USE IT AS A FORENSIC TOOL, PAST EXCLUSION. DON'T YOU HAVE TO CONCEDE THAT?

NO. ACTUALLY THE STATE WOULD NOT CONCEDE. THAT I THINK THE TESTIMONY OF DR. STEWART, FROM THE FBI LAB, AS WELL AS THE ARTICLE THAT WE SUBMITTED FROM THE ARMED FORCES LABORATORY, INDICATES THAT IT CAN BE USED IN FORENSIC SETTINGS FOR EXACTLY THE PURPOSE IT WAS USED IN THIS CASE.

THERE IS SCIENTIFIC AGREEMENT ON THAT?

YES, WE WOULD SUBMIT THAT THERE IS, AND ADDITIONALLY THE FACT THAT THE NOTICE IS SUPPLEMENTAL AUTHORITY THAT THE STATE SUBMIT ODD MONDAY, POINTS OUT THAT THEIR OWN EXPERT, DR. SHIELDS, HAS TESTIFIED IN ANOTHER CASE AND SWORN TO AN AFFIDAVIT THAT, BOTH PATERNAL AND FORENSIC LABORATORIES CAN USE MTDNA TESTING ON DEGRADED AND MINUTE SAMPLES OF MTDNA, AND THAT IS THEIR VERY OWN EXPERT, SEEKING IN ANOTHER CASE, TO HAVE A CASE REOPENED AND HAVE THE DNA TESTED OF THE DEFENDANT, ACCORDING TO THAT PROCEDURE. SO --

WHY IS IT NOBODY USES IT EXCEPT THE FBI?

I DON'T BELIEVE THAT THERE WOULD BE A NEED TO USE IT, IN OTHER TYPES OF NONFORENSIC LABORATORIES. OBVIOUSLY THE LABORATORIES THAT ARE CONCERNED WITH THE OTHER TYPES OF USES OF MTDNA DON'T NECESSARILY HAVE TO USE IT IN A FORENSIC SETTING. THAT IS JUST NOT THEIR JOB. BUT DR. STEWART DID TESTIFY, AND THE NAMES ESCAPE ME OF THE OTHER LABORATORIES THAT DO TESTING, MITOCHONDRIAL DNA IS USED, ACROSS THE BOARD, FOR OTHER REASONS, BUT I THINK WHAT IS IMPORTANT TO NOTE THAT, IN THIS CASE WE ARE DEALING WITH WHETHER OR NOT IT IS ACCEPTED IN A FORENSIC SETTING, AND WE HAVE THE FBI OBVIOUSLY BEING A FORENSICS LABORATORY AND THE ARMED FORWARDS LAB USING IT IN THAT VERY SPECIFIC SETTING, AND I WOULD -- AND THE ARMED FORCES LAB USING IT IN THAT VERY SPECIFIC SETTING, AND I WOULD URGE THE COURT THAT SPECIFICALLY THE ARMED FORCES LABORATORY DEALS WITH THIS TYPE OF LABORATORY AND DNA SETTINGS, AND IT GOES ON TO CHALLENGE THE TESTING BY THE DEFENSE IN THIS CASE, AND AS I WOULD POINT OUT PREVIOUSLY, EACH OF THESE FACTORS GOES TO THE CREDIBILITY OF THE UNDER LIKE CONCLUSION THAT IS -- UNDERLYING CONCLUSION THAT IS REACHED BY THE FBI LABORATORY.

I HAVE ONE QUESTION. YOU SAID THE FORENSIC COMMUNITY, RATHER THAN THE GENERAL SCIENTIFIC COMMUNITY. HAS IT BEEN REESTABLISHED IN THE CASE LAW THAT IT IS THE FORENSIC COMMUNITY THAT YOU LOOK TO, VERSUS THE GENERAL SCIENTIFIC COMMUNITY?

I DON'T THINK THE DISTINCTION NECESSARILY NEEDS TO BE MADE. I WOULD ONLY MAKE IT --

THE REASON I THINK IT IS AN IMPORTANT DISTINCTION IS, BECAUSE, SINCE IT IS LAW ENFORCEMENT THAT IS GOING TO BE USING CERTAIN TECHNIQUES, IF LAW ENFORCEMENT GETS TOO FAR AHEAD OF THE SCIENTIFIC COMMUNITY, THERE IS A CONCERN THAT IT BECOMES A SELF-FULFILLING PROPHECY THAT, IF THEY ARE ALL USING IT AND THAT IS WHAT YOU USE TO SAY, WELL, GENERALLY ACCEPTED BY EVERY LAW ENFORCEMENT, DOES THAT, REALLY, SATISFY THE FRYE TEST?

WELL, I THINK THAT IT DOES IN THIS CASE, BECAUSE ALTHOUGH WHAT WE DEAL WITH, IN THE UNDER LYING FACTS OF THIS CASE, IS FORENSICS LABORATORIES. THE OTHER CASES THAT I DID ON SUPPLEMENTAL AUTHORITY, DR. STEWART IS ASKING THE COURT, IN ORDER TO HAVE THIS TYPE OF TESTING DONE FOR A DEFENDANT IN THAT CASE, IN THE CHERRITS CASE, HE SWEARS, IN AN AFFIDAVIT, THAT BOTH FORENSIC AND GENERAL LABORATORIES CAN DO THIS PARTICULAR TYPE OF TESTING, SO WHILE I THINK WE WERE DEALING WITH ONLY A FOREIGN I CAN TYPE OF LABORATORY, DR. STEWART'S TESTIMONY, ITSELF, SHOWS THAT DR. STEWART BELIEVES OTHER LABORATORIES CAN DO THAT TYPE OF TESTING. I DON'T KNOW PERSONALLY, THAT THEY CAN AND HAVE DONE IT IN IDENTIFICATION ISSUES, BUT I KNOW THAT DR. STEWART FROM THE FBI TESTIFIED THAT THIS EXACT KIND OF TESTING CAN BE DONE IN OTHER LABORATORIES. WHETHER OR NOT THEY HAVE DONE THAT AS A PROFIT-SEEKING MOTIVE FOR ANOTHER LABORATORY, I CANNOT ANSWER THAT QUESTION.

IT SEEMS AS THOUGH WE ARE HAVING A LITTLE PLAY ON WORDS HERE. YOU KEEP USING, IS THERE A DIFFERENCE BETWEEN THE USE OF THE SCIENCE THAT WOULD BE UTILIZED TO DETERMINE THE FAMILIAL RELATIONSHIP AND, THUS, A TOOL OF EXCLUSION, AND THAT SCIENTIFIC APPLICATION IN A COURTROOM? ARE WE JUST PLAYING WITH WORDS HERE? IS FORENSIC, ALL THAT MEANS IS THAT YOU ARE USING THE SAME SCIENCE IN A COURTROOM, IS IT NOT?

CORRECT, AND THE ONLY REASON THAT I WERE TO BRING THAT UP AND THAT DISTINCTION IS EVEN MADE IS NOT BECAUSE IT IS RELEVANT TO WHETHER OR NOT IT IS GENERALLY ACCEPTED. IT IS RELEVANT TO THE SPECIFIC CHALLENGES THAT THEY MADE TO THIS TESTING, REGARDING MATRIMONIAL IN HEARTH ANSWER, REGARDING HETERO PLASMIC, ET CETERA. IT IS TRULY RELEVANT ONLY FOR THE PURPOSES OF LOOKING AT THOSE INDIVIDUAL POINTS, BECAUSE THE ARTICLES POINT OUT THAT THESE CONCERNS ARE CONCERNS IN THE FAMILIAL SETTING AND NOT CONCERNS IN A FORENSIC SETTING, AND THE STATE POINTS THAT OUT, BECAUSE THERE REALLY IS NOT A DISAGREEMENT TO THE BASIC SCIENCE OF THE POSSIBILITY OF, FOR INSTANCE, A PATERNAL INFLUENCE IN MTDNA. IF YOU LOOK AT THE ARMED FORCES ARTICLE, THEY ADMIT THAT THAT IS A POSSIBILITY, BUT IT IS SO MINUTE, IT WOULD HAVE NO IMPACT THAT FORENSIC SETTING, IN A FORENSIC USE OF THAT.

BUT YOU WOULD AGREE, WOULDN'T YOU, THAT THE LAW ENFORCEMENT COMMUNITY CAN, FBI AND, WELL, LAW ENFORCEMENT COMMUNITY, CANNOT VALIDATE A SCIENCE, ITSELF, ASIDE FROM THE SCIENTIFIC COMMUNITY VALIDATING THE SCIENCE? THAT IS BECAUSE THEY USE IT AND FIND THAT, OKAY, WE CAN USE IT IN A FORENSIC CAPACITY, BECAUSE OTHER FORENSIC OFFICERS, LAW ENFORCEMENT OFFICERS THROUGHOUT COUNTRY, ARE USING IT, IS A VALID SCIENCE, WHEN ALL OF THE REST OF THE SCIENTIFIC COMMUNITY IS SAYING, NO, THIS IS NOT.

WELL, AND THAT IS TRUE. THAT IS NOT WHAT THE STATE IS TRYING TO ARGWITHDREW. INSTEAD THE QUESTION BECOMES THE USE OF THE SCIENCE. IF WE JUST TALK ABOUT THE UNDERLYING SCIENCE, WHETHER MTDNA CAN BE USED FORITY FIX -- FOR IDENTIFICATION PURPOSES, WHETHER IT BE FAMILIAL OR BE IT WHEN YOU ARE TESTING FOR A KNOWN SAMPLE VERSUS AN UNKNOWN SAMPLE, IT CAN BE USED FOR THAT PURPOSE. WHERE THE DISTINCTION COMES IN IS WHERE YOU ARE TALKING ABOUT THE DIFFERENT AREAS THAT THEY HAVE CHALLENGED, SUPPOSEDLY AN UNDERLYING SCIENCE. THERE WAS, IN ACTUALALITY, CHALLENGES TO THE UNDERLYING

SCIENCE. INSTEAD THEY ARE SAYING THESE ARE THE ISSUES AND OUR RESEARCH, ON THE STATE SIDE, SHOWS THAT THOSE PARTICULAR ISSUES ARE NOT OF CONCERN IN THE FORENSIC APPLICATION OF THE SCIENCE. FOR INSTANCE, THE HETERO PLASTIC MIKO-THE HETERO PLASMIC ISSUE AND AS TO WHETHER HETERO PLASMA OCCURS IN THE MTDNA, ITSELF. IN THE COURT, THEY DID TESTIFY THAT THERE IS A 8-TO-10 PERCENT STATISTIC THAT IT DOES SHOW UP, AND THAT SHOWS A DIFFERENCE IN THE CHAIN OF DNA AND THAT IS HETERO PLASMIC INSTEAD OF HOMO PLASMIC. THE QUESTION IS IS THERE IS A DISAGREEMENT IN THE SCIENTIFIC COMMUNITY ABOUT WHETHER OR NOT THIS EXISTS. THERE IS NO DISAGREEMENT, AND YOU CAN LOOK AT OUR OWN STATEMENTS, FROM OUR EXPERTS AND THE ARTICLES WHICH WE HAVE ATTACHED, THEY TESTED FOR THIS THIS IN THIS PARTICULAR SAMPLE. YOU CAN LOOK FOR IT, AND IT WAS NOT FOUND IN THIS PARTICULAR SAMPLE. ADDITIONALLY WHAT THEY HAVE FOUND IS IT OCCURS AT THE SAME POINT THROUGHOUT THE DNA, AND IF IT DOES EXIST, IT IS GOING TO GIVE YOU AN ADDITIONAL BASIS FOR MAKING A MATCH, BECAUSE IT IS GOING TO SHOW UP IN THE CHAIN OF DNA, SO THEY ARE TRYING TO MAKE AN ARGUMENT THAT SOMEHOW THEY SAY IT IS HETERO PLASMIC AND WE SAY IT IS NOT, AND WHEN YOU LOOK AT THE ARTICLES AND LOOK AT THE TESTIMONY, THAT IS JUST NOT TRUE. THE QUESTION BECOMES, THEN, DOES THAT PARTICULAR FACET OF THE ANALYSIS AFFECT THE ULTIMATE OUTCOME OF THE TESTS, AND THAT IS, FOR THEM TO, IF THEY DISAGREE WITH THAT, THEN THEY ARE MORE THAN WELCOME TO CHALLENGE THE CREDIBILITY OF THE ULTIMATE OPINION THAT IS REACHED BY THE FBI LAB OR DR. STEWART, IN OUR PARTICULAR CASE, AND THAT CERTAINLY DOESN'T GO TO THE LEVEL OF WHETHER OR NOT THIS SCIENCE, IT SELF, IS ACCEPTED IN THE SCIENTIFIC COMMUNITY, AND I THINK THAT, BOTH THE TESTIMONY OF BOTH EXPERTS SHOULD BE LOOKED AT THAT, BECAUSE AT NO POINT DID DR. SHIELDS SAY YOU CANNOT USE THIS FOR THE PURPOSE THAT IT WAS USED IN THIS CASE. INSTEAD HE TAKES ISSUE WITH CERTAIN PROCEDURES OF THE FBI LAB.

LET ME MOVE YOU TO THIS SECOND ISSUE THAT MS. NOR GUARD -- MS. NORGARD TALKED ABOUT. IN READING JUDGE PADGETT IN READING JUDGE PADGETT'S STATEMENTS ON THE FIRST ISSUE, IT SEEMS TO ME THAT HE FIRST SEEMED TO BE GOING ALONG, WHEN IT WAS FIRST ARGUED, TO BE GOING ALONG WITH THE PROPOSITION THAT A DEPOSITION OF A WITNESS TESTIFIES, AND THEN THERE COULD BE SOME TYPE OF REBUTTAL READ OUT OF PRIOR STATEMENTS, THAT THE WITNESS MADE IN DEPOSITIONS, HOWEVER, THEN HE EXCLUDED ALL OF THEM, AND I AM CONCERNED, PARTICULARLY, ABOUT A STATEMENT THAT IS IN THIS MOTION THAT SAYS THAT COLBY TESTIFIED AT TRIAL THAT BOLIN GAVE THREE DIFFERENT VERSIONS ABOUT CIRCUMSTANCES SURROUNDING THE DEATH OF STEPHANIE COLLINS, AND THAT THERE WAS A DEPOSITION STATEMENT BY HER THAT COLBY'S PRIOR TESTIMONY, THAT AFTER THE FIRST VERSION, WHICH DESCRIBED A KILLER OTHER THAN BOLIN AND EXPLAINED WHY THE BODY WAS IN THE TRAILER, AND THERE WAS NO OTHER CONVERSATION STW HER AND BOLIN -- BETWEEN HER AND BOLIN, NOW, WHY WOULDN'T THAT BE PROPER REBUTTAL TESTIMONY, IF I JUST HAD CALLED A WITNESS, MY OPPONENT CERTAINLY COULD EITHER, ON CROSS-EXAMINATION, IMPEACH THAT WITNESS, OR AFTER THE WITNESS LEFT REBUT THE TESTIMONY WITH, BY READING A DEPOSITION, COULDN'T HE?

WELL, I AM NOT SURE I FOLLOWED YOU ALL THE WAY THROUGH THAT TO WHAT YOUR SPECIFIC CONCERN WAS ABOUT THE FACTUAL CONCERN ABOUT THAT PARTICULAR STORY.

MY CONCERN IS THAT THE JUDGE DIDN'T ALLOW THIS OTHER TESTIMONY THAT WAS AVAILABLE, BY WAY OF DEPOSITION, FROM THIS WITNESS, WHO WAS UNAVAILABLE, TO BE READ TO THE JURY.

CERTAINLY, AND I THAUNDZ THAT IS A CONCERN, IN TERMS OF THE JUDGE'S DECISIONS -- AND I UNDERSTAND THAT THAT IS A CONCERN, IN TERMS OF THE JUDGE'S DECISIONS. HE DOESN'T ALLOW IT, IN TERMS OF THE STATE, BECAUSE HE DOESN'T FEEL THAT THE STATE CAN REHABILITATE THE WITNESS. IN TERMS OF THE AREA THAT THEY WISH TO ADDITIONALLY IMPEACH HER WITH, THE STATE SUBMITS THAT THAT WAS CUMULATIVE TO THE IMPEACHMENT

THAT ALREADY DID OCCUR.

I THINK THAT MY BASIC THING THAT I HIM STRUGGLING WITH IS WHERE DOES THIS CONCEPT COME FROM THAT THERE IS SOME REASON NOT TO ALLOW REBUTTAL EVIDENCE, BECAUSE THERE IS NO ABILITY TO REHABILITATE THE WITNESS?

WELL, YOUR HONOR --

IS THERE A CASE THAT SAYS THAT?

THAT COMES FROM THE TRIAL JUDGE IN THIS PARTICULAR CASE. WE DO NOT SUBMIT THAT, IN ALL INSTANCES, THAT WOULD BE COMPLETELY IMPOSSIBLE, TO COME BACK AND REBUT THE TESTIMONY OF A DECEASED OR UNAVAILABLE WITNESS IN THE MANNER THAT THEY ARE ATTEMPTING TO DO IN THIS PARTICULAR CASE. INSTEAD WE ARE ARGUING TO THIS COURT THAT THIS IS HARMLESS ERROR, BECAUSE IF YOU CHALLENGE AND COMPARE EACH OF THE AREAS WHERE SHE WAS IMPEACHED, VERSUS THE ADDITIONAL EVIDENCE THAT THEY SOUGHT TO IMPEACH HER WITH, YOU CAN SEE THAT IT IS QUITE CUMULATIVE INNATE. SHE WAS IMPEACHED THROUGHOUT HER TESTIMONY, ON THE VIDEOTAPE, WITH REGARD TO THE PECUNIARY GAIN OF REWARD MONEY AND HER DIRE FINANCIAL SITUATION, WITH REGARD TO HER FEAR OF BEING CHARGED AS AN ACCESSORY AFTER THE FACT, WITH REGARD TO THE STATEMENTS THAT BOLIN HAD MADE TO HER AND WHETHER OR NOT SHE WAS ACTUALLY THREATENED WITH A GUN IN THE CAR, ON THE WAY TO DISPOSING OF THE BODY AT THAT PARTICULAR POINT. HE ALSO CHALLENGED HER POOR VISION AND POOR LIGHTING AND HER TESTIFYING TO WHAT SHE OBSERVED, BECAUSE SHE TESTIFIED AS TO SEEING BLOOD ON ALL OF THE WALLS OF THE TRAILER, WHEN THEY RETURNED TO DISPOSE OF THE BODY. HE ALSO TRIED TO IMPEACH WITH THE POSSIBILITY THAT SOMEONE ELSE COULD HAVE WORKED WITH BOLIN OR SOMEONE ELSE INVOLVED IN THE MURDER, AND FINALLY WHEN THE POLICE APPROACHED HER SEVERAL YEARS LATER, SHE LIED TO THEM INITIALLY AND DID NOT TELL THE STORY AS IT ULTIMATELY CAME OUT, SO THE STATE SUBMITS THAT, IF YOU LOOK AT THE AREAS THAT THEY ARE TRYING TO IMPEACH WITH HER LATER, THAT IS GLEANED FROM THE BENEFIT OF HINDSIGHT AND BEING ABLE TO GO THROUGH ALL OF THE TESTIMONY, AND ALTHOUGH WE UNDERSTAND THIS IS NOT OFFICIALLY AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, CERTAINLY YOU HAVE TO LOOK AT WHETHER OR NOT THERE WAS ANY HARM IN THEM NOT ALLOWING TO DO, THIS AND SHE WAS SUFFICIENTLY IMPEACHED. NOT ONLY WAS SHE SUFFICIENTLY IMPEACHED, BUT THE DEFENSE ATTORNEY WHO WAS TRYING THE CASE WHO WAS NOT THE DEFENSE ATTORNEY ON THE VIDEOTAPE, IN CLOSING ARGUMENTS, HE WAS ABLE TO COVER, AND HE FOCUSED GREATLY ON HER LACK OF CREDIBILITY, AND HE WAS ABLE TO DO THAT QUITE EFFECTIVELY, WITH THE IMPEACHMENT THAT THEY DID HAVE, SO THAT IS THE STATE'S ARGUMENT, WITH REGARD TO THE IMPEACHMENT ISSUE. BRIEFLY, IF I COULD JUST GO BACK TO THE DNA ISSUE QUICKLY, I UNDERSTAND THE COURT, I HAVE NO IDEA WHAT MY TIME IS, BECAUSE IT DOESN'T SEEM TO BE TICKING. FIVE MINUTES? OKAY. OKAY. THE COURT IS AWARE, OF COURSE, THAT YOU HAVE TO DECIDE WHETHER OR NOT BOTH THE SCIENCE AND THE STATISTICS PASS DNA, AND IN THIS CASE, I WOULD LIKE TO POINT OUT THAT THE APPELLATE, THE APPELLANT'S BRIEF CHALLENGES THE COUNTING METHOD THROUGHOUT, AND ULTIMATELY THAT IS NOT THE METHOD OF STATISTICAL ANALYSIS THAT WAS PRESENTED TO THE JURY. AT THE FRYE HEARING, TWO TYPES OF STATISTICAL ANALYSIS WERE DISCUSSED, ONE BEING THE COUNTING METHOD, WHICH DR. SHIELDS, THEIR EXPERT, TOOK ISSUE WITH, ANOTHER BEING THE LIKELIHOOD RATIO, WHICH ULTIMATELY THAT IS WHAT THE STATE SUBMITTED TO THE JURY, VIA DR. BASS TON'S REPORT, AND YOU READ THE ARMED FORCES ARTICLE THAT, IS THE RATIO THAT THEY ACCEPT AS BEING THE BEST TO DETERMINING, TO BEING ABLE TO INTERPRET THE RESULTS, AND DR. SHIELDS AGREED THAT THAT WAS A REASONABLE PROBABILITY, AND SO THEY, REALLY, HAD NO ISSUE AT TRIAL, WITH THE STATISTICAL METHOD THAT WAS EVENTUALLY ACTUALLY PRESENTED TO THE JURY, AND SO WE THINK THAT, WE WOULD SUBMIT THAT BOTH THE STATISTICS AND THE SCIENCE, ITSELF, PASSED FRYE. BRIEFLY GOING TO THE ISSUES THAT ARE SIMILAR TO THE HOLLY

MURDER CASE, THE FIRST BEING WHETHER OR NOT, THE FIRST TWO ISSUES, THE FIRST BEING WHETHER OR NOT YOU SHOULD REVISIT THE MOTION TO SUPPRESS. THE STATE WOULD POINT OUT THAT THIS COURT HAS HELD, IN NUMEROUS INSTANCES, SUBSEQUENT TO THE PRESTON DECISION, THAT IT IS APPROPRIATE FOR DCA'S TO REVIEW INTERLOCUTORY MATTERS, EVEN IN DEATH CASES, AND SO, AND THAT IS IN FACT, WHAT HAPPENED IN THIS CASE. WHILE PRESTON STILL STANDS, TECHNICALLY AS GOOD LAW, THE STATE SUBMITS THAT, IF YOU ARE TO REOPEN THIS LITIGATION ON THAT POINT, THEN THERE IS REALLY NO POINT IN LETTING THE DCA RULE IN THE FIRST PLACE. THAT WAS A WASTE OF JUDICIAL EFFORT, AND SO WE WOULD SUBMIT THAT YOU WOULD RELY ON THE DCA DECISION, WITH REGARD TO THE MOTION TO SUPPRESS AND THE FACT THAT THIS COURT DENIED CERT, FOLLOWING THAT DECISION.

WELL, THERE IS A HUGE DIFFICULTY WITH THAT, IS THERE NOT, AND THAT IS THAT WE HAVE TRIED TO ENCOURAGE NOT HAVING AN INTERLOCUTORY PRACTICE IN THIS COURT, ON ISSUES THAT COME UP IN THESE DEATH CASES THERE, AND YET BY DOING THAT, YOU KNOW, WE ARE HOPING TO KEEP THOSE ISSUES, EITHER AT THE DISTRICT COURT LEVEL OR WHATEVER, BUT WE DON'T REVIEW THEM, THAT DECISION, AFTER IT IS MADE, UNTIL THE CASE DOES BECOME FINAL AND COMES BACK HERE FOR US, SO THAT ISSUE RETAINS AN INTERLOCUTORY STATUS, DOES IT NOT, AND THAT IS ABOUT THE ONLY WAY THAT THAT CAN WORK, IS THAT IT REMAINS OPEN FOR THAT. I SAY THAT IS ABOUT THE ONLY WAY IT CAN WORK P IN VIEW OF THIS COURT'S POLICY DECISIONS, IT TRIED TO BALANCE THESE THINGS ABOUT WHAT ISSUES IT WILL TAKE UP AS AN INTERLOCUTORY MATTER, SO WE CAN'T HELP BUT EXAMINE THAT AGAIN, CAN WE NOT, AND, OF COURSE, OBVIOUSLY IF WE CONCLUDE THAT THE DISTRICT COURT ANALYZED THIS THING PROPERLY, WHATEVER, BUT WE CAN'T JUST SAY, WELL, THAT IS THE END OF IT. THAT WOULD BE LIKE SAYING BECAUSE THE TRIAL COURT RULED ON IT, THAT THAT WOULD BE THE END OF IT. WHATEVER. NMS WE ARE GOING TO -- UNLESS WE ARE GOING TO CHANGE, FUNDAMENTALLY, THE WAY WE REVIEW THESE THINGS, AND I DON'T THINK WE HAVE IN INCLINATION RIGHT NOW TO TRY TO HAVE ALL OF THOSE ISSUES COME UP TO US ON AN INTERLOCUTORY BASIS, DURING THE PENDENCY OF THE CASE. DO YOU UNDERSTAND THE DILEMMA THAT I HIM POINTING OUT?

YES, YOUR HONOR, AND TO THE EXTENT THAT THAT IS THE PROCEDURE THAT IS GOING TO BE EMPLOYED, I THINK IF YOU LOOK AT THE PRESTON DECISION, ITSELF, THEY HAVE NOT MET THE REQUIREMENTS OF PRESTON, IN ORDER TO ALLOW TO YOU REVISIT THAT, EVEN SHOULD YOU CHOOSE TO FOLLOW THAT PARTICULAR PROCEDURE. THEY WOULD HAVE TO SHOW EXCEPTIONAL CIRCUMSTANCES DEMONSTRATING MANIFEST INJUSTICE AND AT NO POINT DO THEY EVEN ALLEGE SPECIAL CIRCUMSTANCES OR USE THE TERM "MANIFEST INJUSTICE" IN THEIR BRIEF, SO TO THE FACT OF WHETHER YOU ARE GOING TO ALLOW THE DCA TO STAND ON ITS OWN OR TO LOOK AT IT AGAIN, I THINK YOU WILL SIGNED FINED THAT THEY HAVE HAD HAVEN'T ANSWERED THAT ISSUE, WITH REGARD TO THE MOTION TO SUPPRESS, AND SECONDLY ON THE WAIVER, THEY SEEM TO HAVE A DIFFERENT STANDARD THAT APPLIES, AND SPECIFICALLY WHETHER THE STANDARD IS RELYING SOLELY ON A WRITTEN DOCUMENT, BUT WE SUBMIT THAT WASN'T THE CASE HERE. THEY HAVE TESTIMONY OF THE DETECTIVES FINDING A LETTER AND THE CIRCUMSTANCES AS TO HOW THEY CAME INTO POSSESSION OF THAT LETTER, AND SO --

ISN'T THE WAIVER IS BASED ON THE LETTER?

YES.

SO WHAT IS IT ABOUT THE OTHER TESTIMONY THAT WOULD MAKE THIS A CREDIBILITY ISSUE OR SOMETHING THAT THE TRIAL JUDGE WOULD HAVE A DIFFERENT VANTAGE POINT?

IT IS NOT SIMPLY A LEGAL ISSUE, THE STATE SUBMITS, WITH REGARD TO WHETHER OR NOT IT IS A WAIVER. IT IS, I GUESS, WHETHER OR NOT THE WAIVER WAS, IN FACT, A WAIVER. I GUESS IT COULD BE A MIXED QUESTION OF LAW, IN FACT, AND TO THE EXTENT THAT THAT IS TRUE, THEN THEIR PARTICULAR STANDARD OF REVIEW WOULD EXIST, BUT I WOULD SIMPLY POINT OUT THAT

I THINK THAT THE ULTIMATE RULING WAS BASED UPON THIS, WITH REGARD TO THE MOTION TO SUPPRESS, WAS BASED UPON THE LIVE TESTIMONY, AS WELL AS THE WRITTEN DOCUMENTS AND UNLESS THE COURT HAS FURTHER QUESTIONS, I WOULD RELY --

I HAVE ONE QUESTION.

OKAY.

AND THAT IS IN THIS CASE AND THE PREVIOUS CASE WE HEARD, I BELIEVE, IN JANUARY, THERE WAS A QUESTION ABOUT AN AGGRAVATOR.

YES.

OF THE OTHER MURDER THAT WAS DUE TO BE RETRIED. DO WE KNOW THE STATUS OF THAT RIGHT NOW?

YOUR HONOR, I WATCHED THAT ARGUMENT RECENTLY, AND ALL I KNOW IS WHAT THEY TOLD YOU IN FEBRUARY, THAT IT WAS SET FOR MAY, BUT I AM NOT SURE IF IT IS GOING IN MAY. I WOULD POINT OUT THAT MY, THIS PARTICULAR CASE IS DIFFERENT. THE QUESTION IN HOLLY WAS THE FACT THAT THE MATTHEWS, THERE WAS ONE AGGRAVATOR OF PRIOR VIOLENT FELONY, AND IN THE HOLLY DECISION, WHICH WAS ARGUED IN FEBRUARY, THE PRIOR VIOLENT FELONIES WERE AN OHIO RAPE AND KIDNAP AND THE MURDER OF CALEN MATTHEWS, AND THAT HAS BEEN SUBSEQUENTLY SENT BACK.

THE ADDITIONAL FACTOR OF THE PREDICATE FOR IT HERE. A YES. IN MY CASE WE ACTUALLY HAVE, HOLLY DID NOT USE THE COLLINS MURDER, EVEN THOUGH THE JUDGE COULD HAVE, BUT IN MY CASE HE DID USE THE HOLLY MURDER, SO EVEN WITHOUT THE MATTHEWS MURDER YOU HAVE HIS PRIOR VIOLENT FELONIES. IN MY CASE, THE HOLLY MURDER AND THE OHIO RAPE.

IN THIS CASE, WE HAVE, AND MAYBE THIS IS NOT A CHICKEN CHICKEN-IN-THE-EGG ARGUMENT, BUT THE ONLY -- I AM NOT SAYING ONLY ONLY. IN THIS CASE ARE PRIOR VIOLENT FELONIES. CORRECT?

YES.

IN HOLLY, THERE WERE OTHER AGGRAVATORS, ACTUALLY, OTHER THAN THE PRIOR VIOLENT FELONY, OF THE KIDNAPING AND SORT OF FINANCIAL GAIN.

YES.

HERE, THEN, WE HAVE GOT THE MATTHEWS MURDER THAT HAS NOW BEEN SET ASIDE, AND THERE WAS CONSIDERABLE TESTIMONY ABOUT THE MATTHEWS MURDER IN THIS CASE, CORRECT?

THE OFFICERS TALKED ABOUT THE FACTS OF THE CASE.

WE HAVE HOLLY, WHICH IS PENDING, SO IF, FOR WHATEVER OTHER REASON, HOLLY WAS SET ASIDE, THEN YOU ONLY WOULD HAVE THE OHIO KIDNAPING AND RAPE AND, AGAIN, ONLY, I MEAN THAT THE JURY WOULD HAVE HEARD EVIDENCE ABOUT, BOTH, HOLLY AND MATTHEWS IN THIS CASE.

CERTAINLY THAT IS TRUE, IN THE SPECULATIVE SENSE, BUT HOLLY HAS NOT BEEN REMANDED OR OVERTURNED OR SET ASIDE AT THIS POINT, AND SO IT IS VALID, AS YOU SIT BEFORE THIS COURT TODAY, AS YOU SIT BEFORE THIS COURT, IT IS A VALID PRIOR VIOLENT FELONY, AND WHILE I UNDERSTAND THAT THE COURT HAS A PROBLEM WITH HOLDING --

BUT MATTHEWS HAS BEEN RESET, NOW, FOR SEPTEMBER, HASN'T IT, 17th, ISN'T IT?

YOU HAVE A BETTER KNOWLEDGE THAN I DO, JUSTICE SHAW. I KNOW THAT THEY ARE GOING TO RETRY IT THE. I PERSONALLY DON'T KNOW WHEN IT IS SET. BUT HOLLY STANDS BEFORE YOU AT THIS POINT IN TIME, AS A VALID PRIOR VIOLENT FELONY, SO WE STAND IN A DIFFERENT POSITION.

HOLLY IS WAITING FOR ON MATTHEWS, BUT NOW THAT MATTHEWS HAS BEEN SET OFF TO SEPTEMBER, IT POSES A PROBLEM.

I IMAGINE THAT IT MIGHT. HOWEVER, WE WOULD SUBMIT THAT WE HAVE THE SUFFICIENT PRIOR VIOLENT FELONIES AT THIS POINT, AND I WOULD, ALSO, POINT OUT, IN THE WEIGHING PROCESS, THE ONLY MITIGATING EVIDENCE THAT WAS PRESENTED WAS NOT STATUTORY MITIGATION FROM MR. BOLIN'S CURRENT WIFE. THERE WAS NO STATUTORY MITIGATION OR ANYTHING THAT I BELIEVE WOULD OUTWEIGH, IN THE STATE'S POSITION, EVEN IF YOU WERE JUST LEFT WITH THE OHIO CONVICTION, I BELIEVE THAT THAT WOULD BE SUFFICIENT.

JUST SO WE UNDERSTAND, THESE WERE SENTENCED ON THE SAME DAY BY THE SAME JUDGE, AND IN LOOKING AT THE SENTENCING ORDER IN HOLLY, AND IN, WHEN I SAY IN THE HOLLY MURDER, AND THIS MURDER, WE WOULD FIND THAT THE JUDGE ACTUALLY HAD LISTED THE EXACT SAME MITIGATORS AS HE DID IN THE OTHER MURDER. ARE YOU FAMILIAR WITH THAT?

I AM NOT, YOUR HONOR.

I MEAN, ALL OF THIS ABOUT HIS CHILDHOOD AND HIS, WHAT HAPPENED AND WHAT HE WITNESSED, ISN'T THAT, ISN'T IT EXACTLY THE SAME AS THE OTHER MURDER?

I HONESTLY DON'T KNOW, YOUR HONOR. I DON'T KNOW THE RECORD IN THE OTHER CASE A THAT WELL. I KNOW THAT, IN MY CASE, ALL WE HAD WAS ROSA LEE BOLIN'S TESTIMONY AS MITIGATION. IT IS POSSIBLE TO ASSUME THAT, BUT I HONESTLY DON'T KNOW. WE ASK YOU TO AFFIRM THE JUDGMENT AND SENTENCE. THANK YOU.

THANK YOU, MS. HOPKINS.

IF I COULD JUST TOUCH ON THREE THINGS IN ANSWER TO JUSTICE ANSTEAD'S QUESTION. YES, THE TRIAL HAS BEEN DELAYED UNTIL SEPTEMBER. IN RESPONSE TO JUSTICE SHAW'S COMMENTS, I DO NOT THINK IT IS APPROPRIATE FOR THIS COURT TO USE FACTORS AND THINGS OUTSIDE OF THE RECORDS BEFORE THEM, TO DETERMINE WHETHER OR NOT OR HOW THEY RULE. I THINK THIS COURT HAS TO IGNORE WHAT IS GOING ON IN THAT PASCO COUNTY CASE, AND THAT IT IS NOT RELEVANT TO THE DETERMINATION THAT YOU MAKE, IN EITHER THIS CASE OR IN THE CASE THAT YOU HEARD IN FEBRUARY.

IT DEFINITELY WAS THE FACT THAT THE MATTHEWS CASE WAS OVERTURNED.

CORRECT, AND IN THIS RECORD, IT WAS.

CONSIDERED IN THE EARLIER CASE, RIGHT?

AND WITH ALL DUE RESPECT, YOUR HONOR, I THINK THIS COURT IS BOUND BY THE FACT THAT, IN THIS CASE IT WAS OVERTURNED, AND IF THERE IS A SUBSEQUENT RECONVICTION, OF WHICH WE ARE NOT CERTAIN OF AND HAS NOT HAPPENED, THAT IS FOR THE NEXT ROUND OF APPEALS. THAT IS NOT FOR THIS APPEAL. THAT IS NOT SOMETHING THAT I THINK THAT THIS COURT SHOULD CONSIDER, WHEN THEY ARE TRYING TO REACH A DECISION ON THE MERITS IN EITHER THIS CASE OR IN HOLLY, WHAT MIGHT BE GOING ON IN A RETRIAL IN A, AT THIS POINT, UNRELATED TO THIS CASE. REGARDING THE CONFUSION THAT SEEMS TO BE ABOUT THE APPLICATION OF MTDNA IN THE DIFFERENT COMMUNITIES, ABSOLUTELY, JUDGE PARIENTE, THE FORENSIC COMMUNITY IS

ABSOLUTELY A PART OF THAT COMMUNITY, AND IN THIS COURT'S PRIOR RULEINGS IN BOTH HAS HAD ENAND STOKES, STATES THAT IT IS NOT THE SCIENTIFIC COMMUNITY BUT THE RELEVANT MEMBERS WITHIN THE SCIENTIFIC COMMUNITY THAT ADDRESS THOSE ANSWERS, AND THAT WOULD INCLUDE DR. SHIELDS AND THE OTHER LABORATORIES WHICH ENGAGE IN MTDNA RESEARCH AND ANALYSIS. I BELIEVE WHERE THE CONFUSION, IN PART, LIES, REGARDING THE MTDNA EVOLUTION, IS THAT THE CONTINUING EVOLUTION DEVELOPMENT OF THIS PARTICULAR SCIENCE IS CAUSING THE EARLIER APPLICATIONS OF MTDNA USED IN THE NONFORENSIC COMMUNITY, TO BE REEVALUATED AS WELL, AND I WOULD DIRECT THE COURT'S ATTENTION TO THOSE ABSTRACTS THAT WERE SUBMITTED, WHEREIN SPECIFICALLY THE ACTUAL I AND -- ABSTRACT AND THE GIFFORD ABSTRACT, WHERE THEY STATED CONTINUING DEVELOPMENTS IN THE AREA OF HETERO PLASMIC, FOR INSTANCE, TO USE THE EXAMPLE CITED BY THE STATE, CALLED FOR A NEW REEVALUATION OF THE APPLICABILITY IN BOTH THE MEDICAL FORENSIC, AND TOX LOGICAL COMMUNITIES, ON HOW MTDNA WAS GOING TO BE USED. PART OF THE PROBLEM, AS THIS SCIENCE CONTINUES TO EVOLVE AND DEVELOP, THE OLD CONTROLS AND MEASURES OF REALITYIBILITY ARE -- OF REALIBILITY ARE FALLING BY THE WAYSIDE, AND WHETHER MTDNA EXISTS IN 50 PERCENT OR 51 PERCENT OF THE POPULATION IS A SIGNIFICANT DIFFERENCE IN WHETHER OR NOT MTDNA HAS BEEN ACCEPTED AS A TOOL IN EITHER SCIENTIFIC COMMUNITY. IT IS SIMPLY INCORRECT TO ASSUME THAT, AS FUNDAMENTAL PRINCIPLES OF A PARTICULAR SCIENCE CHANGE AND EVOLVE, THAT ITS ACCEPTANCE ALSO DON'T CHANGE AND HE INVOLVE AT THE SAME TIME. -- AND EVOLVE AT THE SAME TIME. I WOULD LIKE TO TAKE A MOMENT TO ADDRESS JUSTICE WELLS'S CONCERN WITH REGARD TO ISSUE TWO, I WOULD SUBMIT THAT THE I AM PEACHMENT -- THAT THE IMPEACHMENT EVIDENCE THAT WAS SOUGHT TO BRING IN, VIA DEPOSITION, THE TESTIMONY WAS TAKEN IN ANTICIPATION THAT COLBY WOULD NOT BE TBL TO MAKE THE PHYSICAL APPEARANCE SHE DID ACTUALLY MAKE AT TRIAL. DURING THAT TESTIMONY, THE STATE DID HAVE THE ABILITY TO CROSS-EXAMINE HER AND TO DIRECT HER AND TO REHABILITATE HER, AND THEY CHOSE NOT TO DO SO IN THAT TESTIMONY. I WOULD SUGGEST THAT THE DEFENSE OUTLINE, BOTH IN THE WRITTEN MOTION AND TO THE ARGUMENT AND IN THE BRIEF, WERE SIMPLY ADDITIONAL IMPEACHMENT. THEY WERE KEY POINTS ON KEY FACTS, WHICH SEVERELY UNDERCUT COLBY'S CREDIBILITY. THEY DEALT WITH HOW MANY VERSIONS BOLIN GAVE.

YOUR TIME IS UP.

THANK YOU, YOUR HONOR.

WE APPRECIATE YOUR ASSISTANCE.