

>> NEXT CASE UP IS TWILEGAR V. STATE.

[BACKGROUND SOUNDS]

>> YOU MAY PROCEED.

>> MORNING.

MAY IT PLEASE THE COURT, SUZANNE KEFFER, ASSISTANT CCRC ON BEHALF OF THE APPELLATE, MR. TWILEGAR. WE'RE HERE APPEALING THE DENIAL OF HIS INITIAL 3.851 FIRST CONVICTION MOTION AFTER AN EVIDENTIARY HEARING ON ONE ISSUE AND AFTER SUMMARY DENIAL OF THE REMAINDER OF HIS CLAIMS.

THE ISSUES THAT WE WERE GRANTED AN EVIDENTIARY HEARING ON IN THE CIRCUIT COURT OR WERE TRIAL COUNSEL'S FAILURE TO EFFECTIVELY CHALLENGE THE STATE'S FORENSIC EVIDENCE AT TRIAL.

SPECIFICALLY, COUNSEL'S FAILURE TO CALL HIS OWN FORENSIC PATHOLOGIST AND HIS FAILURE TO ADEQUATELY CROSS-EXAMINE THE MEDICAL EXAMINER THAT TESTIFIED AT TRIAL.

EACH OF THESE THINGS WAS CRUCIAL IN THIS CASE BECAUSE THIS WAS A CIRCUMSTANTIAL EVIDENCE CASE.

THE STATE'S THEORY REVOLVED AROUND AND THIS COURT RELIED UPON REALLY A SINGLE EVIDENTIARY FACT, AND THAT WAS THAT THE VICTIM WAS KILLED AND BURIED AT THE SAME SITE WHERE MR. TWILEGAR WAS DIGGING A HOLE ON WHAT WAS PROBABLY AUGUST 7TH, THE DAY THAT THE STATE ALLEGED THE VICTIM WENT MISSING.

THE CIRCUIT COURT FOUND THAT TRIAL COUNSEL WAS NOT INEFFECTIVE.

HOWEVER, THE CIRCUIT COURT'S FINDINGS ARE NOT BASED ON COMPETENT, SUBSTANTIAL EVIDENCE.

>> SO LET ME-- SO WHAT WOULD A AND WHAT DID ANOTHER EXPERT SAY THAT WOULD HAVE UNDERMINED THE EVIDENCE THAT WAS PRESENTED AT TRIAL?

>> SURE.

SO A COUPLE DIFFERENT THINGS.  
THERE IS THE EVIDENCE THAT, AND  
THE CONSULTATION THAT TRIAL  
COUNSEL HAD WITH A DR. SPITZ  
PRIOR TO TRIAL.

AND HE HAD DETAILED NOTES FROM  
HIS CONSULTATIONS WITH DR. SPITZ  
CALLING INTO QUESTION THE NUMBER  
OF INJURIES THAT, IN FACT, THE  
VICTIM HAD, CALLING INTO  
QUESTION--

>> THIS WAS A VICTIM WHO HAD  
BEEN BURIED, AND SO THE BODY WAS  
IN A CERTAIN STATE OF  
DECOMPOSITION?

>> IT WAS.

IT WAS QUITE DECOMPOSED.  
IT HAD BEEN, I MEAN, REALLY  
THERE WAS NO TESTIMONY AS TO HOW  
LONG IT HAD BEEN BURIED.

THE MEDICAL EXAMINER COULD NOT  
ANSWER THAT QUESTION.

SCIENTIFICALLY, SHE SAID THERE  
WAS NO WAY TO DETERMINE THAT.  
BUT IT CERTAINLY WAS IN QUITE A  
STATE OF DECOMPOSITION.

SO, HOWEVER, DESPITE THE STATE  
OF DECOMPOSITION-- AND I WILL  
SAY BOTH THE EXPERT THAT TRIAL  
COUNSEL CONSULTED WITH PRIOR TO  
TRIAL AS WELL AS THE THE EXPERTS  
THAT HAVE BEEN PRESENTED NOW IN  
POSTCONVICTION-- WERE ABLE TO  
POINT TO OTHER INJURIES ON THE  
VICTIM'S PERSON.

SPECIFICALLY, THAT THERE WERE  
MULTIPLE SHOTGUN INJURIES, THERE  
WAS SOME QUESTION OVER HOW THE  
STAND IF, IN FACT, IT WAS  
SAND--

>> SO, OKAY.

LET'S TAKE EACH ONE.  
BUT HOW-- WHAT-- ASSUME THERE  
WERE MULTIPLE INJURIES.  
HOW DOES THAT NEGATE OR  
DEMONSTRATE THAT YOUR CLIENT  
DIDN'T INFLICT THOSE?

>> WELL, I THINK IT CALLS INTO  
QUESTION IN A CIRCUMSTANTIAL

EVIDENCE CASE THE STATE'S THEORY.

AND THE STATE'S THEORY WAS THAT THIS WAS A SINGLE GUNSHOT WOUND TO THE BACK AT A DOWNWARD ANGLE--

>> I THOUGHT THE KEY TO THE GUNSHOT WAS THE TYPE OF WEAPON THAT WAS USED RATHER THAN THE NUMBER OF, NUMBER OF SHOTS FIRED.

>> UM--

>> IN THE OVERALL CASE, WHETHER IT WAS ONE SHOTGUN FIRED, SHELL FIRED OR THREE OR FOUR, THAT IT WAS LINKING THE DEFENDANT TO THIS TENT SITE, AND THEN THE BODY BEING FOUND UNDER WHERE HE WAS SEEN DIGGING.

>> WELL, IT'S TWOFOLD, I THINK. SO I THINK THE WEAPON WAS NEVER FOUND IN THIS CASE, AND SO THE ONLY WAY THAT IT HAS BEEN DETERMINED IT WAS A SHOTGUN IS THAT A CUP WAS ACTUALLY EMBEDDED IN THE VICTIM'S RIGHT BACK SHOULDER.

AND WHAT THE TESTIMONY IS NOW IS THAT THERE WERE ADDITIONAL SHOTGUN INJURIES TO THE, I'M SORRY, TO THE RIGHT BACK SHOULDER AND NOW TO THE LEFT FRONT CHEST.

AND SO WHAT IS SENATE ABOUT THAT, ONE, IS IT CALLS INTO QUESTION IF THERE WERE THESE MULTIPLE INJURIES, THERE IS AN ABSENCE OF EVIDENCE AT THE GRAVE SITE OF WHERE THE ADDITIONAL SHOT CUPS ARE.

THERE CERTAINLY WAS NO BLOOD EVIDENCE, AND TRIAL COUNSEL DID ATTEMPT TO POINT THAT OUT.

IT CALLED INTO QUESTION WHETHER OR NOT IT ACTUALLY HAPPENED THERE.

IT CERTAINLY POINTS TO SOMETHING DIFFERENT GOING ON HERE THAN EVEN A SINGLE PERPETRATOR SHOOTING ONE TIME TO KILL THE

VICTIM.

IT CAN BE WITH INDICATIVE OF  
THAT THERE WAS A STRUGGLE  
GOING ON.

LIKE I SAID, MORE PERPETRATORS.  
AND IT CERTAINLY LENT MORE  
REASONABLENESS TO THE ALTERNATE  
THEORIES THAT TRIAL COUNSEL WAS  
ASSERTING AT TRIAL.

>> BUT NOW WE GO BACK TO THIS,  
WHICH IS THAT YOU'RE SAYING IT  
WAS PATENTLY UNREASONABLE, THE  
JUDGE'S FINDINGS THAT IT WAS  
REASONABLE STRATEGY ARE NOT  
SUPPORTED.

BUT WE, WE'RE REALLY IN A  
SITUATION WHERE I FEEL THAT  
THERE'S A LOT OF RETROSPECTIVE  
SECOND GUESSING ON THIS ISSUE.  
SO WHAT DID THE TRIAL COUNSEL  
SAY ABOUT HIS STRATEGY VIS-A-VIS  
CHALLENGING THE MEDICAL EXAMINER  
AND WHETHER HE DECIDED, WHY HE  
DECIDED, WHAT TO DO ABOUT  
EXPERTS?

>> AND I THINK THAT'S EXACTLY  
WHAT THE LOWER COURT HAS  
IGNORED, IS TRIAL COUNSEL'S  
TESTIMONY ON THAT ISSUE WAS VERY  
INCONSISTENT.

HE BEGAN TESTIFYING SAYING  
CERTAINLY CHALLENGING THE  
DEFICIENCIES IN THE AUTOPSY  
INCLUDING MULTIPLE INJURIES, HOW  
THE SAND GOT INTO THE AIRWAYS,  
WHAT THE MEDICAL EXAMINER DID  
NOT DO DURING THE AUTOPSY  
INCLUDING X-RAYS OF THE  
EXTREMITIES DOCUMENTING MUCH OF  
WHAT HE DID WOULD FIT RIGHT INTO  
THEIR THEORY THAT LAW  
ENFORCEMENT-- DUE TO A LACK OF  
INVESTIGATION-- ZEROED IN ON  
MR. TWILEGAR TO THE EXCLUSION OF  
OTHER LEADS.

TRIAL COUNSEL TESTIFIED THE  
DEFICIENCIES IN THE AUTOPSY  
WOULD GO RIGHT TO THAT.  
SPECIFICALLY, WHEN HE QUESTIONED  
THE INFLUENCE THAT LAW

ENFORCEMENT HAD UPON  
DR. HAMILTON AND HIS EXPERIENCE.

>> SO HE DID THAT.

>> HE SAID THAT.

>> CROSS-EXAMINED, BUT HE  
CROSS-EXAMINED THE MEDICAL  
EXAMINER ON THESE POINTS.

>> NO, HE DID NOT.

HE DID NOT CROSS-EXAMINE HER ON  
ALL OF THE DEFICIENCIES IN HER  
AUTOPSY, WHICH WE HAVE DETAILED  
IN LENGTH.

THE CROSS-EXAMINATION WAS FIVE  
PAGES LONG.

HE ASKED HER VERY FEW QUESTIONS  
AND EVEN BEGAN THE  
CROSS-EXAMINATION SAYING "JUST A  
FEW QUICK QUESTIONS," AND THAT'S  
EXACTLY WHAT HE DID.

HE ASKED HER HOW LONG THE VICTIM  
HAD BEEN DEAD, SHE COULDN'T  
ANSWER THAT.

HE ASKED HOW LONG THE VICTIM HAD  
BEEN BURIED, SHE COULDN'T  
ANSWER THAT.

AND THEN HE FOCUSED ON THE SAND  
IN THE CAVITY--

>> WHY DOES ANY DEFICIENCY HERE  
MATTER OR ANY FAILURE TO ASK  
ANYTHING?

WHAT'S THE RELEVANCE AND  
SIGNIFICANCE OF IT FOR YOUR  
CASE?

>> WELL, I THINK THE  
SIGNIFICANCE GOES TO HERE IN THE  
CIRCUMSTANTIAL EVIDENCE CASE  
WHAT THIS COURT RELIED UPON IN  
DISCOUNTING MR. TWILEGAR'S  
REASONABLE HYPOTHESES OF  
INNOCENCE WAS THE SINGLE FACT  
THAT HE WAS KILLED AT THE GRAVE  
SITE, KILLED WHERE HE WAS  
BURIED.

AND IF THAT FALLS APART--

>> WAS THAT HE WAS KILLED WHERE  
HE WAS CAMPING?

HE WAS CAMPED OUT THERE, RIGHT?

>> IT WAS WHERE MR. TWILEGAR--

>> AND HE WAS SEEN DIGGING A  
HOLE OR SOMETHING?

>> WELL, WHAT THE TESTIMONY ACTUALLY WAS AT TRIAL WAS THAT HE, THE PERSON ABOUT TO MOVE INTO THE HOME IN FRONT OF HIS TENT HAD COME THERE AND HEARD DIGGING NOISES.

SO HE DOESN'T ACTUALLY SEE MR. TWILEGAR DUGGING.

HE HEARD DIGGING NOISES, HE RETREATED BACK TO THE HOUSE, AND THAT WAS THE EXTENT OF IT.

IN FACT, DESPITE THE FACT THAT THIS COURT FOUND THAT THE DIGGING HAD OCCURRED ON WHAT WAS PROBABLY-- AND I CONTINUE TO SAY THAT BECAUSE THAT'S A QUOTE FROM THIS COURT-- ON WHAT WAS PROBABLY THE DATE THE STATE HAD ALLEGED THE VICTIM WENT MISSING, THE PERSON THAT PUT HIM THERE DIDN'T GIVE A DATE.

HE GAVE A RANGE OF AT LEAST A MONTH FROM THE END OF JUNE TO JULY TO SEPTEMBER.

HE COULDN'T PUT A SPECIFIC DATE ON IT.

SO THE RELEVANCE OF THESE CHALLENGES TO THE FORENSIC EVIDENCE GOES TO WHETHER OR NOT HE WAS KILLED AT THAT SITE.

IF HE WAS NOT KILLED AT THAT SITE, THEN THE REST OF THE

EVIDENCE INCLUDING THE DIGGING-- AND WHEN YOU TAKE INTO CONSIDERATION WHAT

MR. HARTMAN'S TESTIMONY, THE GENTLEMAN THAT TESTIFIED TO THE DIGGING, ACTUALLY SAID, IT QUINNS TO FALL AWE-- IT BEGINS TO FALL APART.

AND THE STATE'S THEORY BEGINS TO FALL APART.

>> IF YOU LOOK AT ALL OF THE CIRCUMSTANTIAL EVIDENCE THAT WE LISTED, IT SEEMS THAT WHERE YOU'RE IGNORING THE RELATIONSHIP THAT THE DEFENDANT HAD TO THE VICTIMS, THAT HE WAS IN POSSESSION OF A 12-GAUGE SHOTGUN, THAT HE HAD A LARGE

AMOUNT OF CASH, THAT HE MADE  
INCRIMINATING PHONE CALLS.  
IN OTHER WORDS, IT ISN'T AS IF  
ISSUE OF WHETHER HE WAS KILLED  
WHERE THE HOLE WAS OR TAKEN  
THERE WAS THE-- I'M STILL  
TRYING TO FIND OUT HOW THAT  
REALLY HELPS YOU THAT MUCH.  
MAYBE I'M MISSING SOMETHING.  
GIVE ME HOW THAT WOULD HAVE  
POINTED TO REASONABLE DOUBT THAT  
THE DEFENDANT WAS THE SHOOTER  
AND POINTED TO SOMEBODY ELSE AS  
THE SHOOTER?  
HELP ME THAT WAY, BECAUSE I'M  
NOT GETTING IT.

>> OKAY.

I THINK THAT WHEN YOU START TO  
LOOK AT, ONE, IF THIS IS WHAT  
THE STATE'S THEORY IS, THAT IT'S  
A SINGLE GUNSHOT WOUND AND THAT  
IT HAPPENED AT THE GRAVE SITE--

>> BUT LET'S JUST GO BACK.

DO YOU AGREE WAS IT A SHOTGUN  
WOUND?

WAS IT A 12-GAUGE SHOTGUN?

WERE THEY ABLE TO NOT CONNECT IT  
SPECIFICALLY TO HIS GUN, BUT THE  
SAME TYPE OF GUN THAT HE  
POSSESSED?

>> I THINK WHAT THE TESTIMONY--

>> YOU HAVEN'T CHALLENGED THAT.

>> THE TESTIMONY WAS THAT IT WAS  
CONSISTENT.

WHAT THEY FOUND IN THE BACK WAS  
CONSISTENT WITH 12 GAUGE.

>> SO IS THAT NOT-- I MEAN, TO  
ME, AGAIN, THAT DOESN'T MEAN  
HE'S THE SHOOTER, BUT YOU  
HAVEN'T DISPUTED THAT PIECE OF  
EVIDENCE, RIGHT?

>> WELL, I THINK IT DOES-- YOU  
SAID THAT DOESN'T MEAN HE'S THE  
SHOOTER SIMPLY--

>> WELL, BUT IT'S ONE OF  
CIRCUMSTANCES THAT IS A  
REASONABLE, THAT STILL-- WHAT'S  
THE HYPOTHESIS OF INNOCENCE THAT  
NOW COMES IN THAT WOULD, ARE YOU  
SAYING THERE SHOULD BE A

JUDGMENT OF ACQUITTAL, OR ARE YOU SAYING THAT THEY GET A REDO AND NOW THEY USE EXPERTS, THAT YOU USE EXPERTS TO SAY THAT MAYBE HE WASN'T KILLED WHERE THE HOLE WAS BEING DUG?

>> I CERTAINLY THINK THAT THE EVIDENCE WE'VE PRESENTED NOW WOULD HAVE MADE A DIFFERENCE TO A JURY.

>> I GUESS YOU HAVE TO CONVINCING US A LITTLE BIT THAT IT WAS MAKING A DIFFERENCE, BECAUSE I'M STILL NOT SEEING IT.

>> WOULD YOU GO INTO THE EVIDENCE ON THE SAND? BECAUSE, I MEAN, I CAN SEE THAT AS WELL.

IF YOU'RE KILLED SOMEPLACE ELSE AND THEN THE BODY'S PLANTED BACK WHERE HE IS, MAYBE THAT'S A DIFFERENT SCENARIO.

WHAT IS THE EVIDENCE WITH REGARD TO WHAT WAS FOUND-- IS THERE EARTHED-- IS THERE EVIDENCE, DID YOU PRESENT EVIDENCE THAT WHAT WAS FOUND COULD NOT BE IN SAND FROM THE LOCATION?

>> CERTAINLY THERE WAS A QUESTION IN POSTCONVICTION, AND EVEN IN THE NOTES THAT TRIAL COUNSEL, THE EXPERT HE CONSULTED WITH, THERE WAS A QUESTION OF WHETHER OR NOT THIS, IN FACT, WAS SAND.

THERE'S NO DOCUMENTATION OF IT WHATSOEVER.

THE MEDICAL EXAMINER IS WITH TON THAT SAW IT, AND THEN IT'S DISCARDED IT.

>> WELL, I MEAN YOU'RE NOW QUESTIONING CONCERN I'M TRYING TO SEE WHAT YOU PUT ON IN POSTCONVICTION AND WHAT THIS LAWYER SHOULD HAVE PLACED BEFORE THE JURY THAT WOULD TEND TO PROVE HE WAS KILLED IN NORTH CAROLINA, HIS BODY WAS BROUGHT BACK AND PLANTED HERE.

>> AND WHAT OUR EXPERT TESTIFIED



TO IN POSTCONVICTION IS THAT THERE'S OTHER EXPLANATIONS FOR HOW THE SAND GOT INTO THE LARYNGEAL CAVITY.

AT TRIAL IT WAS TESTIFIED TO IT HAD TO BE FROM INHALATION, AND TRIAL COUNSEL DID NOT REFUTE THAT, CONTRARY TO WHAT THE KIM CUT COURT SAID.

HE PROVIDED SOME OTHER EXPLANATION OF LAYING ON UNEVEN GROUND AND INHAILING IT, BUT THE CONCERN INHALING IT, BUT THE GIST OF IT WAS THAT IT WAS INHALED.

SO WHAT'S BEEN PRESENTED NOW IS THAT THERE ARE ALTERNATIVE EXPLANATIONS.

ONE BEING THE FACT THAT THE PHOTOGRAPHS SHOW A LARGE AMOUNT OF WATER IN THE GRAVE SITE THAT WAS POOLED AROUND THE HEAD AND POOLED AROUND THE BODY.

AND SO WHAT DR. HADDOCKS TESTIFIED IN POSTCONVICTION IS THAT IT WAS POSSIBLE, SHE COULDN'T RULE OUT THE RISE AND FALL OF THE WATER TABLES, ACTUALLY WATER GOING IN AND AS IT WENT DOWN COMING OUT, EACH TIME DEPOSITING THE SAND THERE.

>> BUT, AGAIN, THAT DOESN'T MOVE THE SITE, THE LOCATION.

>> IT DOESN'T MOVE THE SITE WHERE HE WAS BURIED, BUT IT DOESN'T MEAN HE WAS KILLED THERE.

THIS COURT AND THE LOWER COURT RELIED ON THE FACT THAT HE DIED WITHIN MINUTES BASED ON THE TESTIMONY OF THE MEDICAL EXAMINER WHICH, IN FACT, NOW DR. HADDOCKS HAS TESTIFIED IF THERE'S MULTIPLE INJURIES, THAT COULD EVEN BE SIGNIFICANTLY SHORTENED.

BUT THE FACT THAT HE DIED WITHIN TWO MINUTES, A COUPLE MINUTES OF BEING SHOT, HE HAD TO HAVE INHALED THAT SAND.

IT HAD TO HAVE OCCURRED AT THE GRAVE SITE.

SO THE LINK BETWEEN THE INJURIES AND THE INHALATION OF THE SAND PUTS IT ALL AT THE GRAVE SITE. BECAUSE IF HE DIED WITHIN A COUPLE OF MINUTES, THAT SAND WOULDN'T BE THERE.

>> I GUESS WHAT I'M HAVING TROUBLE WITH, DISCOUNTING THE OTHER EVIDENCE THAT YOU SAID THAT THAT'S THE ONLY PIECE OF EVIDENCE. RELIED ON ON DIRECT APPEAL WITH A LOT OF OTHER EVIDENCE NOT ANYTHING DEFINITELY SAYING HE'S THE SHOOTER, BUT ENOUGH THAT POINTS TO HIM BEING THE LIKELY-- YOU DON'T HAVE ANOTHER, YOU HAVEN'T COME UP WITH ANOTHER SUSPECT, YOU HAVEN'T, NONE OF THE OTHER EVIDENCE HAVE YOU DISPUTED ON HIS GUILT.

>> AND I THINK, THOUGH, THAT NOW THAT THIS OTHER EVIDENCE HAS BEEN PRESENTED, AND I WILL SAY THAT IT GOES TO THE PREMEDITATION AS WELL IF IT SHOWS SOMETHING DIFFERENT BESIDES STANDING OVER THE BODY, IT CERTAINLY GOES TO PREMEDITATION.

BUT IF YOU LOOK AT WHAT HAS NOW BEEN PRESENTED IN POSTCONVICTION, REFUTING HOW-- THE MANNER IN WHICH THE STATE SAYS THIS HAPPENED, AND YOU CONSIDER IT WITH ALL OF THE OH EVIDENCE THAT WAS PRESENTED AT TRIAL, NOT JUST WHAT THIS COURT CONSIDERED TO BE-- AND I WOULD CALL IT SUSPICIOUS.

REALLY THE OTHER FACTORS DON'T RISE TO MUCH MORE THAN SUSPICIOUS.

IF YOU LOOK AT THE OTHER THINGS THAT WERE PRESENTED, IN FACT, THAT THE MONEY THAT WAS WITHDRAWN WAS IN \$20 BILLS, AND MR. TWILEGAR WAS NOT SPENDING

\$20 BILLS.

THERE WAS TESTIMONY THAT HE WAS SPENDING \$100 BILLS.

AND THAT WAS EVIDENT IN THE RECEIPTS.

THERE WAS TESTIMONY THAT THERE WAS THIS BURNED CAR QUITE SOME DISTANCE FROM THE GRAVE SITE. AND SO, AND THERE WAS TESTIMONY THAT, IN FACT, IT WOULD HAVE HAD TO HAVE BEEN BURNED AFTER MR. TWILEGAR HAD LEFT THE AREA. SO I THINK WHAT NEEDS TO BE DONE IS NOT ONLY ARE WE LOOKING AT MULTIPLE INJURIES AND THE SAND AND THE DEFICIENCIES IN THE AUTOPSY, WHEN YOU LOOK AT ALL THOSE THINGS AND YOU LOOK AT THE CONTRA KICKLY FACTS A-- CONTRADICTORY FACTS AT TRIAL AS TO WHETHER IN FACT THIS WAS MR. TWILEGAR AND YOU TAKE ALL THAT TOGETHER, IT REALLY STARTS TO PICK AWAY AT WHAT THE STATE'S THEORY WAS.

AND IT DOESN'T GIVE THE JURY ENOUGH EVIDENCE TO CONVICT HIM. ALL THAT IT AMOUNTS TO IS SUSPICION HERE.

AND IN A CIRCUMSTANTIAL EVIDENCE CASE, THAT'S NOT SUFFICIENT.

>> YOU'RE DEEP INTO YOUR REBUTTAL.

>> THEN I WILL SAVE THE REMAINING TIME.

THANK YOU.

>> MAY IT PLEASE THE COURT, TIMOTHY FREELAND HERE ON BEHALF OF THE STATE OF FLORIDA.

LET'S START WITH THE FIRST ISSUE.

COUNSEL TESTIFIED ON THIS, AND, WELL, YOU KNOW, LET'S GET THE CIRCUMSTANTIAL EVIDENCE, THE FACTS BEFORE THE COURT.

WE KNOW THAT THE DEFENDANT WAS HIRED BY THE VICTIM, THAT HE WAS INTRODUCED TO THE VICTIM BY SOME OF THE TENANTS, I MEAN, THE VICTIM WAS A LAWYER WHO WAS

NOT--

[INAUDIBLE]

APPARENTLY, AND HE HAD 11 RENTAL PROPERTIES IN THE FORT MYERS AREA THAT HE WAS RENTING OUT. AND THE VICTIM WAS INTRODUCED TODAY TO THE DEFENDANT BY ONE OF THE TENANTS AND ABOUTS IN ONE OF HIS CONCERN TENANTS IN ONE OF HIS RENTAL PROPERTIES, AND HE HIRED THE DEFENDANT TO DO HANDYMAN WORK FOR HIM.

SHORTLY BEFORE THE VICTIM WAS KILLED, HE AND THE DEFENDANT MADE A TRIP UP TO ALABAMA TO DO SOME WORK ON ONE OF HIS PROPERTIES UP IN ALABAMA.

WHILE HE WAS IN ALABAMA, HE WITHDREW \$25,000 IN CASH FROM THE BANK--

>> AND WAS THAT, WAS THAT THE MONEY THAT YOUR OPPONENT SAYS WAS IN \$20 BILLS?

>> CORRECT.

>> AND THE BANK TELLER DID TESTIFY SHE GAVE IT TO HIM IN 20s.

BANK TELLER ALSO TESTIFIED THAT IT'S VERY EASY FOR ANYBODY TO WALK INTO A BANK AND EXCHANGE CASH FOR CASH.

SO AT ANY POINT HE COULD HAVE TRANSFERRED, YOU KNOW, \$20 FOR 100s.

AND HER COMMENT THAT THE RECEIPTS SHOW THAT HE WAS SPENDING EXCLUSIVELY 100s, THAT'S NOT ACTUALLY TRUE. THE RECEIPTS SHOW SOME 100 BILLS, SOME 20s.

BUT, YEAH, THAT WAS THE MONEY. THE \$25,000 THAT HE WITHDREW WAS IN 20s, AND THAT VERY SAME DAY HE RENTED A CAR, AND THEY RETURNED TO THE FORT MYERS AREA.

>> AND WE KNOW THAT BOTH OF THEM RETURNED?

BECAUSE I THOUGHT THE DEFENDANT'S ARGUMENT WAS THAT HE CAME BACK A DAY EARLIER, I

BELIEVE, THAN THE VICTIM.  
>> THAT'S WHAT HE SAID.  
>> AND HE WAS ALONE.  
>> THAT IS WHAT HE SAID.  
BUT THE DEFENDANT AND THE VICTIM  
WERE SEEN TOGETHER HERE IN FORT  
MYERS.  
NOT HERE, IN FORT MYERS, YOU  
KNOW?  
>> AFTER THE DAY HE SAID HE CAME  
BACK.  
>> CORRECT.  
SO ON THE DAY THAT THIS--  
SHORTLY BEFORE THE DEFENDANT  
LEFT, THE VICTIM TOLD VALERIE--  
[INAUDIBLE]  
THAT HE WAS GOING TO GO SEE THE  
DEFENDANT, AND THAT WAS THE LAST  
TIME THAT ANYBODY SAW OR HEARD  
FROM THE VICTIM.  
THIS COURT CONCLUDED THAT IT WAS  
PROBABLY ON AUGUST THE 7TH THAT  
THE MURDER ACTUALLY OCCURRED.  
WE KNOW THAT AROUND THAT TIME  
THE MAN WHO WAS LIVING AT THE  
PROPERTY WHERE THE MURDER  
OCCURRED OBSERVED A DEFENDANT  
DIGGING IN THE BACKYARD.  
>> NOW, YOUR OPPONENT SAYS THAT  
HE GAVE A WHOLE RANGE THAT  
INCLUDED A MONTH--  
>> HE WASN'T SURE.  
>>-- THAT THAT COULD HAVE  
OCCURRED.  
SO--  
>> THAT'S TRUE.  
WE-- I CAN'T REFUTE THAT.  
HE WASN'T SURE EXACTLY WHEN HE  
SAW THE MAN DIGGING IN THE  
BACKYARD.  
BUT STILL--  
>> BUT IF I REMEMBER CORRECTLY,  
I THOUGHT HE WAS MOVING IN IN  
SEPTEMBER AND THAT HE SAW HIM,  
LIKE HE CAME A DAY OR SO EARLIER  
THAN HE WAS MOVING IN, AND  
THAT'S WHEN HE SAW HIM IN THE  
YARD DIGGING WITH A SHOVEL OR  
SOMETHING.  
>> THE SEPTEMBER DATA'S NOT

ACCURATE.

HE WAS IN THE PROCESS OF MOVING  
IN FOR QUITE SOME TIME BEFORE  
THAT.

HE WOULD SHOW UP AND DO SOME  
WORK TO WORK ON THE HOUSE AND  
GET IT READY FOR HIM TO MOVE IN.

SO IF HE SAW THE DEFENDANT  
DIGGING IN SEPTEMBER, THAT'S A  
PROBLEM, YOU KNOW?

AND THE RECORD DOESN'T SAY THAT  
HE SAW HIM IN SEPTEMBER.

HE WASN'T SURE WHEN HE SAW HIM.  
WE KNOW THAT HE SAW THE  
DEFENDANT DIGGING, AND WE KNOW  
THAT THE DEFENDANT LEFT AUGUST  
8TH.

OR SO THAT'S WHEN--

>> THE DEFENDANT LEFT WITH HIS  
MOTHER?

>> CORRECT.

>> ON AUGUST 8TH?

>> RIGHT.

WE KNOW HE LEFT.

>> AND THE DEFENDANT WAS NEVER  
IN THIS AREA IN FORT MYERS, I  
GUESS IT IS, IN SEPTEMBER?

>> NOT THAT-- NO.

WE DON'T HAVE ANY RECORD OF HIM  
BEING HERE.

WE KNOW THAT HIS NIECE TESTIFIED  
THAT SHE SAW HIM AND HIS MOTHER  
THE NIGHT OF AUGUST THE 7TH, AND  
THEN HE LEFT IN THE MIDDLE OF  
THE NIGHT, AND SHE DIDN'T SEE  
HIM ANYMORE AFTER THAT.

SO THE DIGGING HAD TO HAVE  
OCCURRED PRIOR TO HIS DEPARTURE.  
WHEN WE START LOOKING AT THE  
CIRCUMSTANTIAL EVIDENCE LINKING  
THE DEFENDANT WITH THE VICTIM,  
WE KNOW THEN THAT THE DEFENDANT  
KNEW THAT THE VICTIM HAD \$25,000  
IN CASH.

WE KNEW THAT THE-- WE KNOW THAT  
THE DEFENDANT WAS LIVING IN A  
TENT, DID NOT HAVE ANY INCOME.  
HE WORKED AS A HANDYMAN, BUT  
THAT WAS NOT A FULL-TIME JOB.  
HE WAS DOING ODD JOBS NOW AND

THEN.

HE DISAPPEARED, HE VANISHED FROM THE AREA.

THE STATE ARGUED THAT HE FLED THE AREA ON AUGUST 8TH, AND HE MADE LARGE CASH EXPENDITURES ON HIS WAY UP AND IN TENNESSEE TOTALING MORE THAN \$5,000.

THERE'S NO EXPLANATION FOR WHERE THAT KIND OF MONEY WOULD HAVE COME FROM OTHER THAN FROM THE VICTIM.

THE VICTIM WAS SEEN BY VALERIE BI, AND NET WITH A WALLET THAT HAD A SUBSTANTIAL AMOUNT OF CASH IN IT THE DAY BEFORE THE DEFENDANT LEFT.

THAT WALLET WAS NEVER FOUND.

SO THERE'S STRONG CIRCUMSTANTIAL EVIDENCE THERE, YOU KNOW, LINKING THE DEFENDANT WITH-- IN ADDITION, YOU KNOW, THE VICTIM IS FOUND IN A GRAVE THAT THE DEFENDANT DUG RIGHT OUTSIDE OF THE TENT WHERE HE WAS LIVING.

>> WELL, THIS IS WHERE YOUR OPPOSITION SUGGESTS THAT THE EVIDENCE THAT'S AVAILABLE AND PRESENTED DEMONSTRATES-- BECAUSE THE WHOLE THEORY OF STATE, IT SEEMS, IS THAT THE VICTIM WAS KILLED AND BURIED AT THE SITE OF THIS TENT.

>> RIGHT.

>> IS THAT A FAIR STATEMENT?

>> ABSOLUTELY.

>> AND SHE IS SAYING THAT THE EVIDENCE THAT WAS AVAILABLE AND PRESENTED DEMONSTRATES THAT IT WAS NOT FROM THE DURING THE OR DEBRIS IN THE LARYNGEAL CAVITY.

>> THAT'S HER PREFERENCE, TO ARGUE THAT.

>> WELL, NO, I UNDERSTAND.

I'M ASKING.

YOU KNOW, I'M TRYING TO UNDERSTAND WHETHER THERE IS SUCH EVIDENCE THAT WOULD PLACE THIS VICTIM AS BEING CULLED ELSEWHERE.

>> NO, THERE IS NOT.  
THERE'S NO CONTEST, NO DISPUTE  
IN THE EVIDENCE THAT THE VICTIM  
DIED WITHIN A FEW MINUTES AFTER  
HE WAS SHOT.  
HE WAS SHOT AND THAT THE FATAL  
SHOT WAS THE ONE IN THE BACK.  
SO HE HAD, DR. HAMILTON  
TESTIFIED THERE WAS WET, CLOTTED  
SAND IN THE TRACHEA AND THAT THE  
AIRWAY WAS NOT, THERE WAS NO  
DEFECT IN THE AIRWAY.  
SO THAT LEADS US TO CONCLUDE THE  
ONLY WAY THAT WET, CLOTTED SAND  
COULD HAVE GOTTEN INTO THE  
TRACHEA WAS THROUGH INHALATION.  
THAT'S WHY DR. HAMILTON SAID--  
>> NOW, WAIT A MINUTE.  
THE ARGUMENT TODAY IS THAT THERE  
IS AVAILABLE EVIDENCE THAT IT  
COULD HAVE ENTERED IN A  
DIFFERENT MANNER, GOTTEN TO THE  
SAME PLACE, BUT ENTERED IN A  
DIFFERENT MANNER.  
THAT'S-- THERE'S NO EVIDENCE  
OF THAT?  
>> THE ONLY ALTERNATIVE THEORY  
WOULD HAVE BEEN THAT HE INHALED  
IT IN ANOTHER PLACE OTHER THAN  
BEING BURIED IN THE GRAVE SITE.  
AND THIS WAS ESTABLISHED BY  
DEFENSE COUNSEL AT THE TRIAL.  
HE CROSS-EXAMINED DR. HAMILTON  
AND GOT HER TO AGREE THAT IT WAS  
POSSIBLE THAT THE SAND COULD  
HAVE BEEN INHALED IF THE VICTIM  
WERE LAYING FACE DOWN IN UNEVEN  
SANDY AREA, ALL RIGHT?  
BUT THAT STILL DOESN'T TAKE US  
AWAY FROM THE GRAVE SITE.  
>> HOW ABOUT THE WATER THAT  
WE'VE BEEN, WE'VE HEARD  
DISCUSSED AND ARGUED?  
>> IT'S MORE CONSISTENT WITH THE  
VICTIM BEING BURIED IN THE GRAVE  
SITE BECAUSE THERE WAS WATERY  
SAND IN THE GRAVE SITE.  
IT JUST MAKES SENSE THAT WATERY,  
CLOTTED SAND WOULD HAVE BEEN  
INHALED BY THE VICTIM WHILE HE



WAS IN THE GRAVE.

THE OTHER EVIDENCE, WHICH WE REALLY HAVEN'T TALKED ABOUT, THAT SHOWS THAT HE WAS PROBABLY ALIVE AT THE TIME THAT HE WAS BURIED IS THE POSITIONING OF HIS FOOT.

WE KNOW FROM THE RECORD THAT ONE OF HIS FEET WAS ELEVATED AS THEY WERE EXCAVATING THE BODY.

HIS RIGHT FOOT WAS UP SLIGHTLY. AND THE TRIAL JUDGE FOUND THAT IF HE WAS, IN FACT, DEAD BY THAT POINT, HE WOULD HAVE BEEN DEAD WEIGHT, AND THAT FOOT WOULD NOT HAVE BEEN ELEVATED.

THAT SUGGESTED TO THE TRIAL JUDGE THAT THE VICTIM WAS ALIVE, NOT NECESSARILY CONSCIOUS-- WE DON'T HAVE THAT PROOF-- BUT ALIVE AND STRUGGLING WHILE HE WAS BEING BURIED IN THE GRAVE. SO THAT, THAT ALL LINKS US IN TO SHOWING THAT HE WAS KILLED AT THE GRAVE SITE AND PROBABLY BURIED WHILE HE WAS STILL ALIVE.

>> BUT THEY MAKE THE ARGUMENT THAT MULTIPLE CONCERN.

>> MULTIPLE INJURIES.

>> AND WHAT'S THE-- WERE THOSE MADE BY THE SAME WEAPON?

A DIFFERENT WEAPON?

>> POSSIBLY.

POSSIBLY--

>> OKAY.

IS THERE EVIDENCE OF WHAT MADE THOSE--

>> NO.

>> OKAY, ALL RIGHT.

>> DR. HAMILTON PROBABLY WOULD NOT DISAGREE THAT THERE WERE OTHER INJURED AND THAT THOSE OTHER INJURIES COULD HAVE BEEN CAUSED BY MULTIPLE SHOTGUN BLASTS.

SHE TESTIFIED, HOWEVER, SHE COULD NOT TESTIFY WITHIN A REASONABLE DEGREE OF MEDICAL CERTAINTY THAT THERE WERE OTHER SHOTGUN INJURIES.

WHY IN THE WORLD WOULD THE DEFENDANT WANT THAT OTHER EVIDENCE TO COME IN? HE'S TRYING TO AVOID AN HAC AGGRAVATOR HERE.

SO WE KNOW THAT THE VICTIM WAS SHOT ONCE AND DIED.

WHY WOULD THE DEFENDANT WANT TO BRING IN EVIDENCE IF HE WAS SHOT MULTIPLE TIMES AND WE KNOW HE HAD THE BONE FRACTURE ALSO WHICH IS TYPICALLY CAUSED BY STRANGULATION.

DO WE WANT EVIDENCE THAT THE VICTIM WAS TORTURED, STRAPPING LED, SHOT MULTIPLE TIMES AND THEN BURIED ALIVE?

WE KNOW THAT THE STATE WAS SEEKING AN HAC AGGRAVATE NEHR THIS CASE, AND THE TRIAL JUDGE FOUND INSUFFICIENT EVIDENCE TO SUPPORT AN HAC AGGRAVATOR.

SO DEFENSE COUNSEL HAD A GOOD REASON NOT TO WANT THIS ADDITIONAL EVIDENCE TO COME IN.

>> DID HE TESTIFY TO THAT, THE DEFENSE COUNSEL, THAT THAT'S WHY HE DIDN'T PURSUE IT?

>> YEAH.

HE TESTIFIED THAT HE WAS MOSTLY CONCERNED WITH TRYING TO ESTABLISH THAT THE SAND COULD HAVE GOT INTO THE TRACHEA SOME OTHER WAY.

HE DIDN'T WANT THESE OTHER INJURIES, EVIDENCE OF OTHER INJURIES TO COME IN, BECAUSE HE WAS CONCERNED ABOUT THE HAC AGGRAVATOR.

>> AND WERE THE OTHER INJURIES SHOTGUN WOUNDS?

>> POSSIBLY.

POSSIBLY.

>> DID THE PEOPLE TESTIFY AT THE EVIDENTIARY HEARING, THE EXPERT AT THAT--

>> YES.

>>-- SAY THAT IT WAS OR WAS POSSIBLE?

>> THEY TESTIFIED THAT IN THEIR

OPINION IT WAS ADDITIONAL  
SHOTGUN WOUNDS, YES.  
CAUSED BY A SHOTGUN.

>> AND COULD THEY SAY OR DID  
THEY SAY WHETHER OR NOT IT WAS  
THE SAME KIND OF WOUNDS THAT WAS  
THE ONE IN THE BACK?

>> WELL, THEIR TESTIMONY WAS  
BASED UPON THE KIND OF PELLETS  
THAT WERE FOUND IN THE BODY, AND  
IT WAS ALL BIRD SHOT.

SO THERE WAS A CLUSTER OF BIRD  
SHOT FOUND CONSISTENT WITH BEING  
SHOT IN THE BACK, A CLUSTER OF  
BIRD SHOT CONSISTENT WITH BEING  
SHOT IN THE CHEST ALSO.

AND THAT WAS THE BASIS FOR THEIR  
TESTIMONY.

IT WAS PROBABLY THE SAME KIND OF  
WEAPON THAT CAUSED ALL OF THE  
INJURIES THAT WERE BEING CAUSED.

DR. HAMILTON DIDN'T WANT TO  
COMMIT TO MULTIPLE GUNSHOTS,  
SHOTGUN INJURIES BECAUSE SHE'S  
GOT A BURDEN AND TESTIFY TO  
SOMETHING THAT SHE CAN'T  
ESTABLISH--

>> SO THE DEFENDANT'S POSITION  
WAS, WELL, THERE'S MULTIPLE  
SHOTGUN WOUNDS HERE, AND IT MUST  
HAVE BEEN SOMEPLACE ELSE BECAUSE  
THERE WAS ONLY ONE CASING.

ONE SHOTGUN CASING FOUND.  
IS THAT-- AS I UNDERSTAND THE  
ARGUMENT.

>> THAT'S THE ARGUMENT, BUT  
THAT'S NOT WHAT THE RECORD  
SHOWS.

>> WHAT DOES IT SHOW?

>> THERE WAS ADDITIONAL CASING  
FOUND, I BELIEVE, IN THE  
INCINERATOR.

AND THE OTHER SHELLS, THERE WERE  
SHOTGUN SHELLS FOUND IN THE  
AREA.

SO WE DON'T--

>> EXPENDED SHELLS IS WHAT WE'D  
BE TALKING ABOUT, NOT A LIVE  
ROUND.

THERE WERE OTHER CASINGS.

>> CORRECT, FOUND IN THE AREA.  
SO, I MEAN, THAT DOESN'T  
NECESSARILY, THAT DOESN'T LEAD  
US TO THE CONCLUSION THAT THE  
VICTIM MUST HAVE BEEN SHOT  
SOMEWHERE ELSE.

WE STILL HAVE TO COME BACK TO  
THAT ISSUE THAT NOBODY DISPUTE  
THAT IS THE VICTIM WAS SHOT AND  
THEN DIED WITHIN A FEW MINUTES  
OF HIS BEING SHOT.

SO IF WE HAVE SAND IN THE  
TRACHEA AND THE ELEVATED FOOT,  
THE ONLY REASONABLE CONCLUSION  
WE CAN REACH FROM THAT IS THAT  
HE WAS ALIVE WHEN HE WAS BURIED,  
THEREFORE, HE MUST HAVE BEEN  
SHOT AT THE GRAVE SITE.

THE TRIAL JUDGE IN HIS  
SENTENCING ORDER SAID IT WAS  
CONSISTENT WITH HIM EVEN  
KNEELING BY THE GRAVE SITE  
BEFORE HE WAS BEING SHOT, BEFORE  
HE WAS SHOT OR ACTUALLY STANDING  
IN THE GRAVE ITSELF PRIOR TO HIM  
BEING SHOT.

EXTENT OF MY ARGUMENT.

IF YOU HAVE ANY OTHER QUESTIONS,  
I'M HERE.

>> THANK YOU.

>> THANK YOU.

REBUTTAL?

WHICH I WANT TO POINT OUT ONE,  
TRIAL COUNSEL'S INDICATION THAT  
IT WAS HIS STRATEGY TO KEEP OUT  
THIS NEGATIVE INFORMATION IS  
REFUTED BY THE RECORD.

WHAT HIS ANSWER ON  
CROSS-EXAMINATION WAS AS WE  
SPEAK MEANING THINKING ABOUT AS  
THE STATE IS POSING THE QUESTION  
TO HIM, YES, THAT'S REASONABLE.  
HE DIDN'T TESTIFY THAT HE HAD A  
SPECIFIC STRATEGY.

IN FACT, EVERYTHING--

>> WELL, WAS IT HIS STRATEGY  
THAT SOMEBODY ELSE DID IT?

>> THAT WAS HIS STRATEGY FROM  
THE GET GO, THAT MR. TWILEGAR  
DID NOT DO THIS.

AND TO THAT END, HE WAS DEVELOPING ALTERNATIVE THEORIES WHICH HE TESTIFIED NECESSARILY REQUIRED THE KILLING DID NOT TAKE PLACE AT THE GRAVE SITE. SO THE EVIDENCE THAT WE HAVE NOW HERE IN POSTCONVICTION AND, IN FACT, DR. HAMILTON CONCEDED IN POSTCONVICTION AS TO SOME OF THE MULTIPLE INJURIES.

SHE CONCEDED THAT SHE COULDN'T RULE OUT THE SAND MIGRATED THERE THROUGH THE RISING AND FALLING OF THE WATER TABLE.

AND, IN FACT, COMPARED THAT TO VICTIMS THAT ARE FOUND IN WATER AND DEBRIS BEING DEPOSITED THERE.

SO WE HAVE THE CONCESSIONS NOW FROM DR. HAMILTON THAT TRIAL COUNSEL SHOULD HAVE GOTTEN AT THE TIME OF TRIAL.

WE HAVE NO REASONABLE STRATEGY ASSERTED BY TRIAL COUNSEL.

AND THE FACT THAT THIS COURT SAID THAT INHALATION OF THE SAND NECESSARILY MEANT HE WAS KILLED AT THE GRAVE SITE, THAT'S NOW BEEN CONTESTED AS WELL.

>> WHAT ABOUT THE FOOT IN-- THE FOOT?

>> I DON'T THINK THERE'S ANY TESTIMONY THE ELEVATED FOOT IS CONCLUSIVE TO SHOW SOME SORT OF STRUGGLE.

IN FACT, IF YOU'RE GOING TO TALK ABOUT THE ELEVATED FOOT, THEN I THINK WE NEED TO TALK ABOUT THE FACT THAT THE VICTIM'S OTHER SHOE WAS MISSING TOO.

WHERE'S THE OTHER SHOE IF THIS ALL OCCURRED AT THE GRAVE SITE?

I ALSO WANT TO POINT OUT THE UNSIN RATER WAS NOT, YOU KNOW, RIGHT NEXT TO THE GRAVE SITE. I BELIEVE IT WAS SHOWN IN THE BACKYARD OF THE HOUSE WHERE THIS GRAVE SITE WAS.

AND SO WHEN WE'VE ALLEGED THERE WAS NO SPENT CASINGS FOUND ON OR

NEAR THE BODY, THAT IS TRUE.  
THEY WERE NOT FOUND ON OR NEAR  
THE BODY, NOT IN THE GRAVE SITE,  
NOT AROUND THE IMMEDIATE AREA OF  
THE GRAVE SITE.

AND, IN FACT, THIS SPENT SHELL  
WAS FOUND BASED ON THE STATE'S  
ALLEGED TIME OF WHEN THIS  
HAPPENED ALMOST SIX WEEKS LATER  
IN AN OPEN FIELD THAT LED TO A  
BACKYARD OF THIS HOUSE.

AND SO IT'S VERY ATTENUATED  
WHETHER OR NOT THIS, IN FACT,  
WOULD HAVE BEEN ONE OF THE  
SHELLS, JUST LIKE THE LIVE  
SHELLS THAT WERE FOUND ALL  
AROUND THE FIELD.

AND SO I WOULD ASK THIS COURT TO  
FIND THAT BASED ON EVERYTHING  
THAT'S BEEN PRESENTED IN  
POSTCONVICTION AS WELL AS  
CONSIDERING THOSE FACTORS WHICH  
WERE IN DISPUTE AT THE TIME OF  
TRIAL THAT, IN FACT, THERE IS  
NOT SUFFICIENT EVIDENCE FOR A  
JURY TO CONVICT MR. TWILEGAR.

>> THANK YOU FOR YOUR ARGUMENTS.  
COURT WILL BE IN RECESS.  
ALL RISE.