**Pg. 40 Mark Field's shocking admission that there were FBI files in the case that weren't turned over to defense.**

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Judge Brereton:
Can I ask counsel to state appearances? You go first.

Mark Field:
Mark Field for the state of Utah.

Judge Brereton:
Thank you, Mr. Field.

Ann Taliaferro:
Ann Taliaferro and Jensie Anderson for Christopher Wright, who is present, Your Honor.

Judge Brereton:
All right, thank you. So as I indicated, I think what we're scheduled to hear today is a motion for summary judgment. I have read everything that's been submitted, so it is voluminous. So I'm happy to hear your argument. So Mr. Field, I think it's your motion.

Mark Field:
Okay, and do you want me to be-

Judge Brereton:
You can do whatever you feel most comfortable doing. I'm happy to proceed somewhat informally.

Ann Taliaferro:
Can I just ask one question?

Judge Brereton:
Sure.

Ann Taliaferro:
As the court just indicated, it is voluminous. And I guess it just depends on what the court does. We anticipate going through 30 claims and I'm wondering if we're not going to get done in two hours, if the court would consider giving us a second date or if we need to squish as much as we can into two hours.

Judge Brereton:
I mean, I recognize there are 30 claims, but they seem like they could be perhaps maybe grouped in terms of topic-

Ann Taliaferro:
Absolutely. And we'll do our best, absolutely.

Judge Brereton:
I mean, because I will indicate I've got 30 claims, but I mean, several of those claims overlap to the extent that we've got the DNA issue, the voice recognition issue, the date cell data issue. So I don't know that we

need to ... I mean, I'm not going to dictate how you want to do your argument, but I think they could be grouped. It seems to me that-

Ann Taliaferro:

They are. They are, Your Honor.

Judge Brereton:

... two hours is sufficient, but again, I guess we can see where we're at. The issue, as I would guess counsel are aware, is my calendar because it's a criminal calendar primarily, it is full. So were I to have you come back for a second date? It would not be in January or February or March probably. And the other issue is that this calendar is switching to another judge starting February 1st. So I mean, my hope is to, or my intent is to retain it through this motion, but if claims survive the motion for summary judgment, then the calendar's going to transition to a different judge.

Ann Taliaferro:

Okay. Thank you, Your Honor.

Judge Brereton:

I think we need to finish today if we can.

Ann Taliaferro:

Okay.

Judge Brereton:

Okay. All right.

Mark Field:

Your Honor, Chris Wright was convicted back in 2010 of murder and aggravated burglary, and the sole issue that was at trial, the 10-day trial was the identity of the person who killed Ken Dolezsar. Upwards of 45 witnesses testified. There was direct evidence of an eyewitness, Lee Carlson. Judge Hansen at the time determined that Lee Carlson's testimony was reliable and therefore admissible, and so he testified. There was also lots of circumstantial evidence presented on DNA, ballistics, voice identification, and historical cell phone data that the state believed pointed to Mr. Wright as the killer, with the exception of the DNA evidence, which was mostly favorable to Mr. Wright. Trial counsel vigorously challenged all of the other evidence and-

Judge Brereton:

What did I do? I did something, sorry. Did I unmute myself, is that what I did?

Clerk:

I'm not entirely sure what you just did.

Judge Brereton:

I'm not entirely sure either, but I did something to the audio. I think I unmuted my computer. I think it's fixed. I apologize.

Mark Field:

No, no worries.

Judge Brereton:

Go ahead. Go ahead.

Mark Field:

Okay. And so the central defense at trial was that another person, David Novak, actually killed Ken Dolezsar. Well, ultimately the jury determined that Mr. Wright was the killer. They believed the state's evidence and Mr. Wright then appealed. On appeal, he challenged Judge Hansen's determination that the eyewitness identification was reliable, and he also raised ineffective assistance of trial counsel claims related to the ballistics, DNA, voice identification, and historical cell phone data evidence. And as part of that appeal, Mr. Wright moved the appellate court for a remand under rule 23B and that was granted. And so the case was remanded to Judge Hansen and there was approximately a three-day evidentiary hearing on issues of DNA and on issues of the voice recognition testimony and evidence. And experts came in, a DNA expert, the state's DNA experts again came in and testified and were examined and cross examined. Mr. Wright brought in his own DNA expert, Dr. Greg Hampikian, who testified about the DNA, and then there were experts that came in and testified about the voice recognition evidence.

So at the end of the evidentiary hearing, Judge Hansen made approximately 40 pages of factual findings, and then it went back up to the court of appeals. And at the court of appeals, Mr. Wright raised several claims. As I mentioned, he challenged the reliability of Lee Carlson's testimony, or at least Judge Hansen's determination that it was reliable, and then he challenged all the other evidence through the lens of ineffective assistance of counsel.

So the court of appeals, after looking at the claims and hearing argument, determined that Judge Hansen did not rule in error when he determined that Lee Carlson's testimony was reliable and therefore admissible. In fact, one of the things the Court of Appeals said in relation to Lee Carlson's, the reliability of his testimony said that his testimony was reliable, meaning that it was "Likely that the identification was accurate."

And then the court considered all of the ineffective assistance of trial counsel claims, which about trial counsel's approach to investigating and challenging the ballistics evidence, the voice identification evidence, the DNA, and the historical cell phone data evidence. And the court of appeals determined as a matter of law that trial counsel's approach was objectively reasonable.

So now in post-conviction, Mr. Wright again challenges the evidence presented at trial, which the jury has already determined beyond a reasonable doubt showed that he was the one who killed Mr. Dolezsar. All the claims that Mr. Wright raises are by and large variations of the claims that were already raised on appeal before the court of appeals. All the claims rely on evidence that was available to Mr. Wright at the time of the trial and certainly no later than the time of the appeal. And as a result of that, given the history of procedurally what has transpired, all 29 claims that Mr. Wright raises in his post-conviction petition are procedurally barred.

Most of them are barred because they are claims that could have been raised either at trial or on appeal, but were not raised. Some of them are barred because they were in fact already raised in the appellate court. And for the single claim that is not procedurally barred, that's the claim of ineffective assistance of appellate counsel. And the argument there is that appellate counsel was ineffective for not raising all the claims that Mr. Wright faults appellate counsel for not raising below. And he also argues for the claims that were raised below that appellate counsel litigated it ineffectively.

So that's basically where we are with the petition. And so I won't go into all of the details about what is ... I mean, if you want me to, I can go into what claims are procedurally barred because they were already

raised, which claims are procedurally barred because they could have been raised but weren't. But the most important claim I think here is the claim of ineffective assistance of appellate counsel, because that's the lens through which, that's not procedurally barred, and it's the lens through which Mr. Wright is trying to challenge, again, all the evidence that was presented at trial.

So Mr. Wright hasn't carried his burden to show that appellate counsel was ineffective. And I think the first thing to recognize is just how burdensome it is to show that appellate counsel is ineffective. I mean, it's hard enough to show that trial counsel is ineffective because, of course, there's a presumption that trial counsel is doing everything that trial counsel is supposed to do. When it comes to ineffective assistance of appellate counsel, given the nature of how appeals take place and what appellate counsel's role is in the appeal, ordinarily what an appellate attorney is tasked with doing is getting the record, reading through the record, making decisions on what sort of errors, if any, are apparent or even not apparent, looking to see what sort of claims should be raised, making a determination about what claims are better, what claims are worse, and then finally coming to a conclusion about exactly what claims to raise on appeal.

Inevitably, that means that there are some claims raised and there are some claims that aren't raised, but that decision is inherently strategic. In most cases, counsel not raising a claim isn't because they just didn't see it. Usually it's because they see it and they decide that it's not as good as the ones that they want to raise, and that's how they narrow the claims that are raised on appeal.

So in the first instance, just given the nature of what it's like to be an appellate attorney and what appellate counsel's responsibilities are, it's just a very steep uphill battle to prove that counsel's decision making was not strategic.

Second, in relation to the claims that could have been raised, but were not, to show that appellate counsel performed deficiently for not raising them, the United States Supreme Court has explained, and this is in Davila v. Davis, it's 582 U.S. 521, this is back in 2017. The United States Supreme Court explained that, "A petitioner is required to establish that the unraised claim was plainly stronger than those actually presented to the appellate court." And that makes sense because counsel isn't required to raise a claim that is plainly weaker than claims that were already raised on appeal. Those were all in all likelihood properly winnowed out anyway.

So in order to show that appellate counsel was ineffective for not raising a claim, Mr. Wright has to show that the claim that he says counsel should have raised but didn't, was plainly stronger than any of the claims that were already raised on appeal. Mr. Wright hasn't done that. I mean, he says that ... What he mostly does is point out what claims weren't raised, but he doesn't show that somehow those claims were better, stronger than the claims that already were raised. And it doesn't work to say, "Well, the claims that were raised, they lost." That's quintessential hindsight, which Strickland says you can't do. And so the mere fact that the claims that were raised didn't prevail doesn't mean that they were necessarily weaker than the claims that Mr. Wright says counsel should have raised.

And of course, in this case, almost all the claims are ... They're all related to the five pieces of evidence that were presented at trial, the eyewitness identification, the ballistics, the voice identification, the historical cell phone data, the DNA, all of it is just ... There's hardly any ... In fact, I can't think of any specific claim where it's any different than simply a variation of what was already presented.

Mr. Wright also says that not only was appellate counsel ineffective for not raising claims, but he also argues that counsel was ineffective in the way that he litigated the claims on appeal. And I think that that's its ... And so what he says is, "Look, here are other things that counsel should have done, other arguments that could have been made, that kind of thing." But in terms of ineffective assistance of counsel, the mere fact that there are other ways to argue doesn't mean that the way appellate counsel actually argued it was unreasonable.

And one of the things our Supreme Court has said, and this is in State v. Nelson, which is at 215 UT62, at paragraph 14, the court said, "The question of deficient performance is not whether some strategy other than the one that counsel employed looks superior given the actual results of the appeal. It is whether a

reasonable competent attorney could have chosen the strategy that was actually employed." And Mr. Wright has not shown that the strategy that appellate counsel had here was actually unreasonable.

And I think lastly, since it's ineffective assistance of counsel, not only does Mr. Wright have to show that appellate counsel performed deficiently, that counsel's conduct fell outside the wide range of professionally competent assistance, he has to show prejudice. And I think that in this case, in light of the procedural posture of the case and in light of what the Court of Appeals has ruled in particular about the eyewitness identification testimony, it's virtually impossible to show prejudice. Lee Carlson's testimony standing alone ... Well, the sole issue at trial was who killed Ken Dolezsar, so it was one of identity. Lee Carlson identified Chris Wright as the shooter. The case law shows that a testimony from a single eyewitness is sufficient to establish identity. Lee Carlson's testimony has not been undermined.

Judge Brereton:

It's not without its problems though, right? I mean, it's not as clean as perhaps it could have been in some cases. I mean, you have the issues of him photoshopping Mr. Wright, putting wigs on him that I don't think counsel was aware of that at the time of the preliminary hearing. It came to light after that identification, I think, but he'd certainly done things that ideally we wouldn't want an eyewitness to do, which is look up the person who's charged and look at lots of pictures of him and stick wigs on him. And I understand they pointed all those issues out at trial, but it does ... I mean, Mr. Wright is certainly making the argument that if these other corroborating pieces of evidence fall, I mean, that is something we need to look at in terms of prejudice, right? If they're successful ... Because certainly the state in this case did not simply argue, Lee Carlson is it, that's it, convict. I mean, they argue DNA-

Mark Field:

Oh yes. Yes, Your Honor.

Judge Brereton:

... they argue the gun, they argue ... And in, as Mr. Wright points out, somewhat problematic ways. I mean, whether it's enough to get there, I guess is the question. And for today, whether it's enough to survive summary judgment, right?

Mark Field:

Right.

Judge Brereton:

So I understand the argument you're making about eyewitness identification, but I do think that ... I mean, my reading which suggests that I need to look at all the evidence as a whole, and I don't know that the eyewitness ID here is so strong that if everything else fell, there wouldn't be prejudice.

Mark Field:

Okay. So can I push back on that just a little bit?

Judge Brereton:

Yeah, yeah, yeah.

Mark Field:

So that exact ... I mean, the reliability of his identification, you're right that ... I mean, it was vetted pretrial in front of Judge Hansen, and then it was also vetted at trial. There was a stiff cross-examination,

and then it was again vetted on direct appeal in front of the Utah Supreme Court. And pretrial, it was determined that that testimony was reliable.

Judge Brereton:

Well, sufficiently reliable to present it to a jury-

Mark Field:

Right, and then-

Judge Brereton:

... which is kind of a different-

Mark Field:

Right, right. But then it was vetted at ... I mean, I agree at pretrial, there was no cross-examination or anything like that. But once it got to trial, Ed Brass vigorously cross-examined Lee Carlson, and he vigorously cross-examined the state's eyewitness identification expert. And then he had his own expert defense eyewitness identification expert testify. And at the conclusion of that, the jury believed Lee Carlson. And so then it went up on a direct appeal and Mr. Wright said," Hey, there's a problem with this testimony. It wasn't reliable and it shouldn't have been admitted." And the court of appeals said, "No, there was no abuse of discretion, and it was permissibly testified to at trial. And so, I mean, I think that there's that whole backstory of what's going on. I agree that, with the exception of ...

I mean, the DNA evidence wasn't helpful to the state. It was 99% unhelpful to the state. The voice identification or voice recognition evidence, if that went away, then that goes away. I mean, I don't think after reading through the 10 days of transcripts, that wasn't that big of a deal. The ballistics evidence, that was a big deal. And I think if that went away, I agree that there might be a bigger problem. But the ballistics evidence, the court of appeals, they considered the ballistics evidence and because the claim was that Ed Brass and Kim Cordova, they didn't investigate the ballistics evidence and therefore they were ineffective and they didn't sufficiently challenge the evidence, the ballistics evidence, and the Court of Appeals considered all that and they came to the conclusion that Ed Brass' actually did investigate because he did talk to two ballistics experts, and the Court of Appeals said his approach to challenging the ballistics evidence was objectively reasonable.

And I don't know how you get over that. How do you now show that Ed Brass's representation on the ballistics was not objectively reasonable when the Court of Appeals has said that his approach was in fact objectively reasonable? And so, I mean, I think that on the ... And of course, again, they haven't shown that Lee Carlson's testimony was false. I mean, it was, of course, disputed, but it wasn't false, it was believed. And I think in combination with the ballistics evidence, they have to overcome the eyewitness identification and the ballistics evidence in order to show, even come close to showing prejudice because if they don't ever overcome that, then you have the identity and you have Mr. Wright's gun that was used to shoot Ken Dolezsar. So I think that the other evidence, the DNA, and if they can show that there's a problem with that, that's fine. I think that could go away because it really wasn't ... I don't think it was that consequential, but-

Judge Brereton:

I mean, I guess just to push back a little bit on that, I mean, I think juries ... I mean, DNA is, I think, to your average person ... The DNA was argued by the state much stronger than the results suggest ... I mean, I do think the state argued it was a match, and I don't think that's correct. It's not correct. It was not a match.

Mark Field:

It's not a match, but that was brought out at trial. I mean, maybe Josh Player thought it was a match and he shouldn't have said the word match because there was no match.

Judge Brereton:

No.

Mark Field:

There's no evidence that it was a match. And Ed Brass pointed that out. And one of the things that Mr. Brass said was, even if it were a match, how does that show that Mr. Wright was the shooter? Because he was in Ken Dolezsar's car before. You would expect his DNA to be in Mr. Dolezsar's car.

So even if it's a match, that's not remarkable, but of course it wasn't a match and most of the evidence that came in showed that the state repeatedly went to the car and tried to get something, anything, some sort of sample that would show that Chris Wright's DNA was in the car and they didn't do it, especially on the steering wheel that Lee Carlson said he didn't see the guy wearing gloves and he drove away ... Thank you so much. The shooter drove away in Ken Dolezsar's car, put his hands on the steering wheel. You would expect there to be DNA there. They swabbed that whole steering wheel and nothing showed up.

And again, all of this, this is all in front of the jury, and it just ... Maybe they believed it, maybe they didn't believe it, but it doesn't ... I mean, it doesn't show if there's no DNA that really helps the state. I mean, if it goes away, it goes away, and I don't think it affects whether or not there was enough evidence to show that Chris Wright was the shooter.

But I mean, I don't disagree that Lee Carlson's testimony ... I mean, putting wigs online, getting a picture ... I think that that was problematic, and that's part of the reason Mr. Brass filed a motion to suppress. And that whole thing was vetted, and both pretrial and then on direct appeal, and both courts determined that it was reliable. And I suppose ... So I don't know ... I mean, I agree the court has to look at all the evidence and make a determination, but I don't know how ... I mean, I think that is really hard to overcome to now say that Lee Carlson's testimony was unreliable when the Court of Appeals has already said, "Yeah, that it was reliable, and it was okay for him to testify."

And I do think that since at trial, I mean, he was ... The cross-examination, that's how you go about showing that somebody isn't being truthful. Mr. Brass, he really cross-examined Lee Carlson. And at the end of the day ... I mean, I think that the state's expert witness helped a lot, and perhaps the defense expert witness didn't help as much, but I think it would be difficult now looking at what the Court of Appeals has done and what Judge Hansen did than to now say that, "Well, yeah, this is problematic testimony." Do you have any other questions about that?

Judge Brereton:

I don't.

Mark Field:

So, I mean, I think, if it's okay. I think I'll wait to go ... I don't know that it's how helpful it is to go through each individual one to show, "Well, this claim is procedurally barred and here's why," and that kind of thing. I mean, the summary judgment motion explains that.

Judge Brereton:

Yeah, I think it is sent out in the papers.

Mark Field:
Okay. But so if you have any questions, I'm happy to answer them, but if not ...

Judge Brereton:
I don't right now, thank you.

Mark Field:
Okay. Thank you.

Ann Taliaferro:
Thank you, Your Honor. May I stay seated?

Judge Brereton:
You may.

Ann Taliaferro:
Okay. I am going to speak to Mr. Field's arguments about procedural bar, or about the procedural, and then Ms. Anderson will start going through some of the merits in the categories, but let me start where he left off and with prejudice. And I just want to say that what the state is doing is they are making a sufficiency of the evidence argument. We understand that there was sufficient evidence to convict Mr. Wright. We get that. We understand that it was upheld on appeal. We get that, but that's not what post-conviction is. We understand that there is a body of evidence over here that he was convicted on. And on post-conviction, we are saying we have this other body of evidence over here that either some of this evidence should have been excluded or there's additional evidence that should have been given to the jury.

And when you, the real legal term, plop this body of evidence that we found into ... It's a counterfactual analysis, right? So we plop all this evidence that either should have been excluded or should have been heard and we plop it in to the jury's consideration, would that have changed the evidentiary picture of the case? It's not just, well, there was sufficient evidence to convict him because of the eyewitness identification.

And I want to push back a little bit just because it was found legally reliable, we don't know that that's what the jury ... We certainly know that's what the state relied on, but we don't know that's what the jury relied on. We're not back in the jury room. They could have relied on any of these other pillars of evidence that we are going to go through. So it's not a sufficiency of the evidence issue, it is a counterfactual analysis where the court absolutely does take into consideration all of the evidence that was presented before, all of the evidence we are giving the court now, whether it's new evidence or evidence of misconduct or whatever, and how that would affect the evidentiary picture before the jury. And the question is it reasonably probable that one juror might have changed their mind?

And I yes the prejudice analysis is hard, but it's not impossible. And I think that we do meet that when we look at all of that evidence. And we'll go over as we go through the procedural bar stuff, but Mr. Fields also talks about that all of the claims go through ineffective assistance of appellate counsel. And that's not necessarily true, and this is why. And I don't know if the court has questions about the standards and all of that. We probably laid it out ad nauseam to the court.

Judge Brereton:

I think it was laid out in the papers. But I'll be clear with the counsel, this is the first one of these cases I've ever done.

Ann Taliaferro:

Absolutely.

Judge Brereton:

So I have not ... I mean, I think counsel know my background is criminal law, but I've never done post-conviction as a judge. I was never involved in it as a lawyer. So I mean, it is new to me and those standards and how the court applies them on summary judgment, I mean, I think you've laid it out, but again, I mean, just so you understand where ...

Ann Taliaferro:

Well, so let me say one thing and then I'll ask the court a question. So the prosecutor, or Mr. Field just said that most everything goes through appellate counsel IAC. I will indicate that is not true for the new evidence claims because we got new evidence and so it wasn't available to appellate counsel to even raise on appeal. That is not correct with regard to the prosecutorial misconduct claims and probably that could be linked later, but we can talk about that later because as current law stands right now, you cannot raise a substantive claim of prosecutorial misconduct on appeal. I think that applies to other preserved or not preserved issues, but just dealing with prosecutorial misconduct. So because appellate counsel, and we may not have ... I want to clarify our briefing because we may have misargued it a little bit. We said that prosecutorial misconduct claims are not procedurally barred because they could not have been raised on appeal. The more accurate statement is we don't need to allege ineffective assistance of appellate counsel on the prosecutorial misconduct claims because they cannot be raised on appeal. They could have been raised in the trial court, and so we would have to get around the procedural bar in that way. But for prosecutorial misconduct claims or, I would say, unpreserved claims that cannot be raised as substantive claims on appeal, that you have to go through IAC ... They shouldn't be procedurally barred because appellate counsel cannot raise the substantive claims.

And so because we are raising the substantive prosecutorial misconduct claim, the substantive due process claim, they couldn't have been raised on appeal, so we shouldn't have to allege IAC of appellate counsel. Alternatively, though, we have alleged IAC of appellate counsel for either not arguing IAC of trial counsel for not raising them or for misarguing it. And it's not just an alternative strategy. It's that the court of appeals said, "Because you didn't challenge this finding, you didn't meet your burden. That's deficient performance. That's just not an alternative strategy. You just didn't do what you're supposed to do." So that's dealing with the IAC claims. Let me ask the court, does the court want me to go over the standards and burdens of the case or does the court feel comfortable with it?

PART 1 OF 5 ENDS [00:33:04]

Judge Brereton:

I mean, I think I understand, but it may be helpful, all the same.

Ann Taliaferro:

Let's go briefly through some of the standards and burdens, okay? So ...

Jensie Anderson:

He can't give me power over the PowerPoint.

Clerk:
Alright.

Jensie Anderson:
I had power over-

Judge Brereton:
Are you trying to use that...

Jensie Anderson:
the power was working before

Ann Taliaferro:
I have copies of this PowerPoint and ...

Judge Brereton:
I see you've given one of these to Mr. Field

Ann Taliaferro:
I'm giving one right now. And I emailed one to him

Mark Field:
Thank you

Jensie Anderson:
Oh, now I do. Now I do. Thank you.

Clerk:
Just make sure to not unplug it or I have to reset the system.

Jensie Anderson:
Okay. Thank you.

Ann Taliaferro:
Okay. So just with regard to the standards and burdens, and we will go through this quickly, just so the court understands. So with slide number three, the court is basically dealing with usually three standards. We've added in prosecutorial misconduct here. So we have the summary judgment standard, we have the ineffective assistance of counsel standard, we do have the prosecutorial misconduct standard, but forget that for a minute, and then we have the PCR framework and burdens. That little one by the side shows where we laid it out in our briefing. If you go to slide four, basically, and as the court indicated, I get that out of the thousands of cases that the court gets, and especially Your Honor indicated, that you don't get these PCR cases at all. So these standards mesh together. And if they're meshed appropriately, everything should work out. But the problem is when one standard isn't necessarily applied correctly.

So just so you're not, it's not so daunting. With regard to the PCRA, the post-conviction part of it, you're only dealing with a few provisions. You're dealing with Post-Conviction Remedies Act and just a few

provisions of that, and you're dealing with rule 65C, and that's in slide four. Slide five, rule 65C, that's the rule that tells us how we're supposed to do a petition. Okay? And it tells the court what the court's supposed to do. So for example, on slide five, this is the nuts and the bolts of how the procedure. So it's how you file, when you file, what the court does.

So for example, subsection D tells us what we're supposed to put in the petition. E tells us the attachments. F tells us that we're not allowed to have, that we can do an opposite memorandum of authorities, but we're not supposed to put in any argument. On six, it says that the petition is supposed to be in plain and concise terms. We put through all the facts, the form, the basis of the claims for relief. So later, and you may have read when Mr. Field says, "The petition speaks conclusory," or, "We don't put enough argument in and all that," well, we can't do that in the petition.

We're not doing a summary judgment motion. We're putting plain and concise terms in the petition. Slide seven says, it tells us attachments we're supposed to do and F is important. The memorandum of authorities, it says, "The petitioner shall not set forth argument or citations or discuss authorities in the petition, but they may be set out in a separate memorandum." Now I get, and Mr. Field will probably put it out, sometimes we throw in a citation because we're trying to let the court know that Strickland, like this is a Strickland IAC claim. And sometimes they get angry at us for doing that because they point to this and they say, "Look, you put in citations and you're not supposed to." But for the most part, when they're arguing, we didn't make argument or we talked conclusory, this is why we're not allowed to.

Go to slide ... 12. For today, the PCRA, like I said, it sets forth a bunch of relief. Under the PCRA, there's stuff about DNA, there's stuff about factual innocence. You're only dealing with the first chapter. And slide 13 ... That sets forth the grounds for relief. So this 78B-9104 sets forth what we can raise in a PCRA petition. And if the conviction was obtained or the sentence was imposed in violation of the Utah Constitution or United States Constitution, that's due process. That's all that. We can raise those claims. Ineffective assistance of counsel is a standalone way you can raise it. Newly discovered material evidence, that's a standalone claim that you can raise as a ground for relief.

And so then 15 talks about our burdens. 15. Talks about the petitioner's pleadings and burdens. And then importantly, 16, this is the one that you are going to probably live with. These are the procedural bars, okay? And it sets forth the time bars and it sets forth the procedural bars. And it says, "A petitioner is not eligible for relief under this chapter upon any ground." So we're talking about those limited grounds that you can raise in a petition. They're legal grounds that you can raise in a petition that we talked about. You can raise those. You have the ability to raise them, but you cannot get relief. You are barred if, and they may still be raised on direct appeal, I get that because there's still a remedy. B is, was raised or addressed in the trial court, at trial or on appeal and then C could have been, but was not raised in the trial court, at trial or on appeal.

So you think about that, it's like, well, if it was raised, you can't raise it. If it was a legal issue that was raised, and we'll talk about the difference between being raised at trial or being raised on appeal, or it could have been raised, you're barred. So what does that mean? That means we have to engage in this little obscene game of layered IAC. And so for most issues, you can't just say, "I have this constitutional violation." You have to say, and I'll just throw out maybe competence, right? "I was incompetent." This doesn't have anything to do with this case. "I was incompetent." You can't just say, "I was incompetent." You have to say, or post-conviction counsel has to say, "My client was incompetent. Trial counsel was ineffective for not saying my client was incompetent." And then if they had an appeal, you have to say, "Appellate counsel was ineffective for not saying trial counsel was ineffective for not saying my client was incompetent."

And that is all grounded in our showing as well that my client was incompetent. So not only do we have to show the competency issue, we have to show ineffective in that layered way, okay? So that's the obscene game that we play. So when we're talking about ... Well, and so let me just say this as well. Go to 17. It could have been raised, could have been raised bar, so that, it could have been raised before. The

post-conviction statute has an exception for that. So the statute basically says, "These are barred, but for those claims that could have been raised before by either trial counsel or appellate counsel and they were not raised, you, judge can," listen to this, "You can have a cognizable claim for relief if you can show that the failure to raise that claim was due to ineffective assistance of counsel."

So the statute provides an exception to that one. If you go to 18, that bar for, and I call it the relitigation bar, and that may not be a proper thing, but that's the bar upon any ground that was raised in the trial court, at trial or on appeal. The post-conviction, the act does not have an exception for that one. So the state takes the position that because there is no exception to that one, then if it was raised before at any time, you just don't get to raise it in post-conviction.

And the little nuance to that is there may not be an exception for IAC for that relitigation bar, but then you remember that there is a standalone ground of ineffective assistance of counsel that you can always raise under post-conviction. And if, and I don't ... It's too nuanced and the courts never do it, but if the court were to find, no, if something was raised before and we can't raise ineffective assistance of counsel around it, if we're barred from raising those ineffective assistance of counsel claims, then we've said that the statute's unconstitutional. I don't think the court needs to get there. I don't need to throw that out, but just keep in mind that the ineffective assistance is a weird little thing that is not only an exception to the procedural bar, but it's also a standalone claim under the Post-Conviction Remedies Act.

And let me point out, this is 19. This is a little bit of a nuance. So what happens? So the statute says that you are barred if a ground was raised in the trial court, at trial or on appeal. But then the question comes to, so what happens if something was raised at trial, if trial counsel preserved an issue? So technically it was raised at trial. Does that mean that we're barred from ever raising it again? The fact is, though, that it was not raised on appeal. So our position is if trial counsel preserves something or does raise an issue in the trial court, that does not bar claim. It's not the 1B relitigation bar that applies. It's that 1C bar that it could have been raised before on appeal and wasn't. And to that one, the exception for ineffective assistance of counsel applies.

And then 20, just one more little thing about this weird post-conviction. 78B-9106 talks about that exception for ineffective assistance of counsel. And the court looks at the merits of the claim in order to determine ineffective assistance of counsel, okay? So we'll go back to my competency issue. I have to say I'm incompetent, so I have to show I was incompetent, and then it was ineffective assistance for trial counsel not to figure it out or raise it, and then ineffective assistance for appellate counsel not to raise it. So you look at the merits of the claim in that sense. Go to 34, and there's a case called Gregg v. State that applies all of these standards, I think, and I think will be a very good guidepost for the court, because in Gregg v. State, it gives the best example of how you apply the standards in the case, and it provides guidance on a number of the issues present in this case.

And I think it counters some of the standards that the state is saying that the court should apply. As pointed out in our briefing, in Gregg, the petitioner, the petitioner filed a post-conviction claim or a post-conviction case. I think he had like 11 claims. The post-conviction court dismissed them all. On appeal, the state argued just what they are arguing now. All of these claims are procedurally barred because they could have been raised before. And he also alleged ineffective assistance of trial counsel and he also alleged, or ineffective assistance of appellate counsel. So the Utah Supreme Court ultimately held that Gregg ... So the Utah Supreme Court looked at the merits of the case and the Utah Supreme Court ultimately said, "You, state, are arguing procedural bar, but you need to realize that there's an exception to procedural bar." And the court of appeals found that there was ineffective assistance of counsel, of trial counsel, and there was ineffective assistance of appellate counsel.

And the court did so, the Utah Supreme Court did so, in doing the counterfactual analysis, they found two pieces of evidence. I think this was a sex case. There was some text messages and there was some indication of the 45 minutes of consensual sex that trial counsel didn't do what they were supposed to or didn't bring it up or didn't investigate it and bring it up, and then appellate counsel didn't raise it. And

Gregg basically said this evidence would have, because it went to the credibility of the alleged victim, it would have changed the evidentiary picture. It wasn't doing a sufficiency of the evidence analysis. It just said this would have been important for the jury to know because it not only went to the credibility of the alleged victim, but it also corroborated the defense's case.

And I think what's important in Gregg as well is that the court not only found ineffective assistance of trial counsel, the court also found ineffective assistance of appellate counsel for not raising those issues. And the court did so as a matter of law and without an evidentiary hearing. So I think this is just to say that we have 30 claims, right? You can pick one, you can pick two. And I think that if you can find that it's meritorious, and I think that if you can find that trial counsel was ineffective in some way or appellate counsel was ineffective in some way, yes, we deserve to get past summary judgment, but if the court can find ineffective assistance of trial counsel or ineffective assistance of appellate counsel, not only does that get around the procedural bar, but it's also an independent ground for relief under the Post-Conviction Remedies Act. So that's just there as well.

So what we're arguing, yes, is we absolutely, I mean, the court indicated that there's tons of evidence or tons of briefing here, right? That should at least get us passed and get an evidentiary hearing. But I also think that, on some of the claims that we're going to talk about, that the state really hasn't countered, maybe, or that I think that you can find, as a matter of law, that would have changed the evidentiary picture. I think the court, like Gregg did, can take the next step and give us relief as a matter of law. Okay. So that's the procedure. Let's go to the merits of some of the cases, unless the court has any other questions.

Judge Brereton:

No, I don't think I do.

Ann Taliaferro:

Yeah. So we're going to start with 51. Oh, actually, go ahead. So Ms. Anderson's going to go ahead and she's going to talk about the state's case and the evidence at issue.

Jensie Anderson:

So Your Honor, I know we've given you voluminous briefing and I'm not going to spend a ton of time, but I do want to just point out that I think the state's characterization of the facts of this case was pretty simplified and potentially not wholly ... It didn't show the complexity that was involved in this case, and it really has come to light since the trial. And so I just want to point out a couple of things. They didn't, in their briefing to the court, they gave these broad procedural bar arguments without addressing the facts that we've raised in our claim. So I just want to give a little bit of an overview.

I mean, as you know, Ken Dolezsar was killed in the Village Inn parking lot at 7:00 in the morning on November 15th of 2007. It was dark. It happened very quickly. And Mr. Wright was pointed out by another character in the case as potentially being ... As being the person who bought a cell phone for the victim. And once that happened, the police focused on Mr. Wright, to the exclusion of others. And there were things that were illogical that were presented in trial that we've tried to clear up, and I'm not trying to relitigate the trial, but I do want to say Mr. Wright was a land developer. He was developing a number of projects in Utah, in Idaho, in Texas. And as part of that, he had multiple draw accounts from which he could, in moments, put his fingers on hundreds of thousands of dollars.

The state implied, however, that he was poverty ridden and needed the money that, ultimately they implied he was paid as like a murder for hire issue, but he didn't need $25,000 to kill someone at that point. He met the victim through Mr. Novak, who was the one who pointed police to him. And he'd had multiple meetings with the victim, Mr. Dolezsar. He'd actually driven in Mr. Dolezsar's car to Park City to look at the project and they had spent time together. So claiming that Mr. Dolezsar wouldn't recognize

Mr. ... If Mr. Wright tried to disguise his voice on a phone call or show up to a meeting in a wig disguise is a little bit illogical, if not a lot of illogical, since they had a past relationship and had been dealing with each other on a $2 million loan that the victim was supposed to, or an investment that he was supposed to make.

He also didn't mention that Mr. Wright had an alibi on the morning of the murder. He was at home with his wife, Bianca. He told police that in his first interview with police in January of 2008. He told his trial counsel immediately, once he was arrested in February of 2008, and yet the police didn't and prosecutors didn't interview her until almost a year and a half later. And then they claimed, basically implied at trial that it was a Hail Mary alibi, that it had just been created right before trial, which was not true.

I mean, whether the jury believed it or not, it was not a Hail Mary. It was presented to the prosecution. I mean, they knew about it from at least Mr. Wright's arrest forward, if not from his first interview. And that went by without objection. So the victim, and I think this is deeply important, something that didn't come out in trial and that the state has not addressed at all in their pleadings, which is the victim, Mr. Dolezsar and his wife, his wife was incarcerated for tax evasion based on an MLM company that she had owned.

As part of her incarceration, the FBI had approached her, her attorney, and Mr. Dolezsar about cooperating in the FBI investigation, investigating her ex-husband and her two sons. Her ex-husband's name was Thomas, her two sons were named Tommy and Derek, and looking at their connection with the Russian mafia. That is in interview transcripts that were not provided to Mr. Wright or his counsel, and that he actually came by those interviews that were done in 2008. He didn't get those interviews until 2020. So he was never made aware that Mr. Dolezsar was actually acting as an informant for the FBI, looking at connections between these folks and the Russian mafia. So that was something that was never brought forward. In addition, Mr. Dolezsar was funding his own private investigation of those three individuals to show that they were connected with the Russian mafia and to help with that investigation.

And had that panned out, Mrs. Mower, Dee Mower, the wife of the victim, would have been released from prison early. Again, all of that information was information that the prosecutor had, that the police had, that was not turned over to Mr. Wright or his attorney. So although he had had a relationship with Mr. Dolezsar to do a $2 million investment in his property, he certainly wasn't close enough for Mr. Dolezsar to have told him about this cooperation with the FBI involving the Russian mafia. No, I mean, this case sometimes plays like a bad movie. And actually, the truth is sometimes that is stranger than fiction. And we have provided those interview transcripts that we ultimately found post-conviction or during the time of the appeal, showing that indeed these interviews were taken by the lead detective in this case, that the prosecution was present at some of these interviews, and that these were not turned over.

So I think it's deeply important to know that fact that was not brought up. Mr. Dolezsar also had control over an extensive fortune. His wife, Dee Mower, was incredibly wealthy. She had at least $140 million in cash and hundreds of millions of dollars in assets. So there was a real financial issue here in this case, and Mr. Dolezsar, the victim, had full control over that fortune. And because of that, because of the investigation with the FBI, and because of his access to all of this money, Mr. Dolezsar was incredibly paranoid and often used burner phones and asked others to use burner phones to contact him because of his paranoia. So on November 9th, David Novak, who had introduced the victim and Mr. Wright, asked Mr. Wright to purchase a burner phone for the victim. Mr. Wright wasn't particularly comfortable with that, but he was getting a $2 million loan investment from the victim. And so he went to the AT&T store in downtown Salt Lake, bought the phone and turned it over to Mr. Novak.

That phone wasn't turned on until the day before the murder. It was turned on at 9:01 in the morning, when someone called Mr. Dolezsar, the victim, and left a message. And the message said, "This is Robert. Dave asked me to call you." That was the message that was played in court, that the voice recognition argument was based on. 20 minutes later, Mr. Dolezsar spoke with Robert on the phone. His assistant

overheard this call. He clearly was talking to someone he thought was named Robert. He said, "I know 20 Roberts. What Robert is this?" Then he said, "Oh my God, I've been trying to set up a meeting with you for months. Yeah, I'd love to meet you tomorrow morning. I'm really excited about this." He got off the phone, he was thrilled. He had been trying to reach this person. He also was a little nervous.

Again, remembering that he and Mr. Wright had a previous relationship. So unless Mr. Wright somehow disguised his voice, which would then change the voice recognition, it was someone named Robert on the phone that morning who had set up the meeting. So despite that, and then that phone was turned off. It was not turned on again until the morning of the murder. It was turned on at 5:31 in the morning. It was also detected at 6:31 in the morning, near the crime scene. And at that point, there was also a call made to Mr. Dolezsar from that phone, discussing the meeting that was to happen in half an hour. There is no recording of that.

But once the police knew that Mr. Wright had bought that cell phone, which he never denied, they focused on him and to the exclusion of any others and to the exclusion of evidence that would've shown differently. So I think the takeaways have to be that there was this evidence of the connection with the Russian mafia, which also becomes important because the eyewitness said that the shooter had a Slavic accent, which makes sense if indeed this evidence had come forward about the FBI investigation. That Mr. Dolezsar's wife knew that he was meeting with someone about something big in the investigation on the morning he was killed, that is also in transcripts.

And David Novak is the person who, at trial, the defense counsel put forward as an alternative suspect. He had been hired by the victim's wife to help her get out of prison. She had paid him $50,000. He also knew about and was involved in the FBI investigation. And initially, Mrs. Mower believed that he may have been responsible for Dolezsar's death. Again, that was an interview that was never turned over to the defense. So when the police started investigating, they did collect things at the crime scene, they found the car, they collected the car, they swabbed the car, they understood that Novak was a player in this. They went and talked to Novak. Novak pointed them at Mr. Wright. Novak identified Mr. Wright as the person in the video from the cell phone store. He did not admit to police that he had asked Mr. Wright to buy the phone.

He said he was scared of Mr. Wright, which was interesting since he had set up all of the meetings between Wright and the victim. But once again, once they saw, they knew that that was Mr. Wright in that video, they stopped investigating anyone else. And I think it's really important thus to point out claim 19. This was evidence that was not raised at trial. It could not have been raised at trial because the information that set forth the most likely alternative suspects, which were Thomas, Tommy, and Garrett, was not provided to Mr. Wright. He received it by accident in 2020, when he filed a bar complaint against Mr. Player. Mr. Player turned that information over to bar counsel and bar counsel sent it to Mr. Wright. That's how he got it. He didn't even get it straight from the prosecution. So I just want to talk. And this investigation of alternative suspects has not been dealt with in any way by the state in their motion.

Judge Brereton:

So at trial, I think he raised Novak as one of those alternative suspects.

Jensie Anderson:

Oh ...

Judge Brereton:

I'm sorry?

Jensie Anderson:

It was the only alternative suspect that was potentially raised.

Judge Brereton:

Yeah. Because what I'm taking away from the facts that are presented is that was the defense theory of the case, that it was Mr. Novak. Is that ...

Jensie Anderson:

I think that the theory was that it wasn't Mr. Wright.

Judge Brereton:

Mr. Wright.

Jensie Anderson:

Based on what they knew about the case and who was involved in the story at that point, Mr. Novak was the most likely alternative suspect. He was a convicted felon. He'd faked his own death by flying a plane into the ocean. He was involved in both sides of the case, although-

Judge Brereton:

And the police investigated him is what I'm-

Jensie Anderson:

Well, not really-

Judge Brereton:

Was he in one of the lineups that the eyewitness did not ID?

Jensie Anderson:

So, in the very first lineup that, I'm sorry, I keep stepping on you.

Judge Brereton:

You're fine.

Jensie Anderson:

I really apologize. In the very first lineup, they showed Mr. Carlson, which was the day after ... Well, the police said it was the day after. Mr. Carlson claimed it was two weeks later, but that first lineup had a picture of Mr. Novak in it. They had identified, at that point, that Mr. Novak might, the police were interested in Mr. Novak. When they went to speak with Mr. Novak, Mr. Novak pointed them to Chris Wright. And they didn't go any further. They didn't take his DNA to see if he was a contributor. They didn't search his apartment. They didn't check to see if he owned guns. They didn't, I mean, nothing. I mean, there was no further investigation of Mr. Novak done.

Judge Brereton:

They got his cell ... They did get his cell phone information, did they not? I mean they..

Jensie Anderson:

They did.

Judge Brereton:
Okay.

Jensie Anderson:
They did. But other than that, they didn't do anything more. And they didn't do that with any of the alternative suspects that they were aware of either. So Thomas Mower and his sons, Tommy and Derek, were being investigated by the FBI for money laundering with cooperation from the Russian mafia. The prosecution knew that. The prosecution did not turn that information over, even though they knew it because it didn't play in their investigation of Mr ... I mean, I assume because they had such tunnel vision on Mr. Wright that it just didn't play in their investigation of Mr. Wright. And so, they put it aside. Whether that was intentional or negligent in not turning it over to defense, there's no dispute that that was not turned over to defense.

And once you know that, then you can look at things like Mr. Mower was married to a woman who allegedly had connections to the Sunshine Brotherhood, who is one of the largest mafia organizations, and most frightening organizations in Russia. That suddenly the fact that the shooter had a Russian accent, or Eastern European accent, which is what Mr. Carlson said in his initial interview to the police, and also said again before the preliminary hearing. The preliminary hearing information also wasn't provided to Mr. Wright until about two weeks before trial. But at that point, the Slavic accent just was something that wasn't Mr. Wright. It wasn't connected in this way because Mr. Wright didn't have this information about the FBI investigation.

So on top of that investigation, Derek Mower also had other reasons not to umm, to kill the victim. First of all, although they asked him about his alibi, the police absolutely asked him about his alibi, and he said, "I was home. I'm in the middle of a divorce. I was home with my children. My children were asleep at seven o'clock in the morning. At 8:30, I took them to school." And the police said, "Oh, okay. Great." They never investigated to see if he'd left home, if he'd gone there. I mean, his children were young, and so perhaps talking to them would not have been usable, but it may have been. They didn't take his DNA. They didn't search his premises. They didn't look at his car to see if, for example, GPS would have shown that he traveled to Sandy. They just accepted his alibi, and stopped.

But in addition to the FBI investigation, Mr. Mower had threatened Dolezsar's life in the weeks prior or in the months prior to the killing. He was also incredibly angry at Dolezsar because Dolezsar was funding his wife's divorce from him. He was giving her money for an attorney where she was claiming that Derek Mower was abusive. And when Mr. Dolezsar's brother was told that Ken Dolezsar had been killed, the first thing he said was he fell to his knees and said, "It was that blanking Derek."

So the police at that point, even though he claimed to have had an alibi, they did nothing more to investigate that. And so now, we have these alternative suspects. And then there was a gentleman named David Simpson who had worked with Dee and Thomas Mower prior to their convictions. He had bought properties when Dee Mower, never paid her. She ultimately sued him for $12 million, and he didn't pay that either. And that seemed very strange. There's also some allegation, although again, we haven't been able to get all of the information, but he may have also been involved somehow with Tommy, "Tom" Thomas, and Derek Mower in the FBI investigation.

Then we have the Roberts, right? We know that the phone call came in from someone named Robert. Dolezsar said, "I know 20 Roberts. What Robert is this?" We know there were at least, at that point, four Roberts in the case. There was a man named Robert Zemelich who was a Czechoslovakian citizen and had been friends with the Mowers, and potentially had helped them in their money laundering scheme. There was Robert Steed, who was Dee Mower's son from another marriage. He was also aware of the FBI investigation. There is an interview with him that was also provided ... We also discovered post-2020

talking about that. There was Robert Dolezsar, Ken Dolezsar's brother. And then there was an unknown Robert that was mentioned as being part of the investigation of the FBI in a letter from Dee Mower's attorney to Ken Dolezsar. But there's no name except Robert. There's no last name. So we don't know who that Robert is, but we know he was involved in the investigation.

And then honestly, in the last week, we've learned, and this is not in our petition, and we'll certainly amend, but in the last week we've learned that there was a family who saw a Dateline program that was done about this case, in which that voicemail message was played. They called a friend of Mr. Wright's, and said that it was ... The man said, "That's my father in that recording." And his name is Robert.

We have not had time to investigate that. We don't know if he has any connection to the case, but this individual seems certain that that's who was on that voice recording. But again, none of these Roberts were investigated. This new Robert, I don't know was available to them, but all of the other Roberts were. None of them were. No DNA, no searches, no comparison of voice to see if they indeed were the voice on the voicemail message.

Then Dee Mower herself was angry at Dolezsar for spending her money irresponsibly. He had made some secret loans. She actually sued his estate two months after the murder, before Chris Wright was even arrested, and was awarded money from his estate. And we know that she had committed fraud in multiple countries when she was running her MLM, including in Russia and in Colombia. And again, this is part of the case that we didn't know about until after the hearing, but that Dee Mower had actually ... The leading distributor in Colombia was Pablo Escobar's girlfriend, fact is stranger the fiction. She actually writes about the Mowers in her book, and says they had scammed her out of $30 million, and that when she left Colombia, that all she wanted to make sure she took with her was the evidence against the Mowers. So we know that Dee Mower had people angry at her, that there was money issues, and that the only person that was available in the real world that was connected to Dee Mower was her new husband, Ken Dolezsar.

We also found in documents that were turned over after the appeal that the police had a tip line, and that a former attorney for the MLM at Dee Mower ran, who had a contentious relationship with Dee Mower, called the tip line and said, "There is a guy named Christopher Pair who had worked for Dee Mower, was very angry at Dee Mower, and he fits the description that's been put out in the press that was given by the eyewitness to a T." They never investigated that individual. They never spoke with him. They never turned that tip line information over to the defense so they could investigate him. And he actually sued Dee Mower a year after Ken Dolezsar was killed.

And then there's David Novak. And certainly David Novak was ... I wouldn't go so far as saying hinted at being a suspect, but it wasn't flushed out at trial. I mean, it was the only person that seemed reasonable at the time. He had access to Mr. Wright's apartment. He had beefs with the ... I mean, he had been involved in the investigation, but also involved with Dee Mower. He was the one that asked Mr. Wright to buy the cell phone. He had told friends that he knew how to prove the perfect murder, which was to point the finger at someone else, make sure the police had them, and then flee, and that's exactly what he did. He pointed the finger at Mr. Wright, and then he fled town. So even if that suspect, if you were to find that that suspect is procedurally barred on the merits, that information was not fully fleshed out by trial counsel, nor was it fleshed out by appellate counsel.

So on this Claim 19, I think it's deeply important to see that it is undisputed that the prosecution did not turn over evidence about the FBI investigation, although they had it. They did not make the defense aware. They did not investigate any of these alternative suspects except to talk to a couple of them and accept what they said without challenge, and focus on Mr. Wright. And this claim, we've made it again as a prosecutorial misconduct claim-

PART 2 OF 5 ENDS [01:06:04]

Ann Taliaferro:

That's 28. Oh no, I'm sorry. Go ahead.

Jensie Anderson:

... which is 19. And we've also made it as in ... And if you were to find that for some reason that Mr. Brass should have investigated and found this information about the FBI investigation, which was incredibly secretive, but if you were to find that, then that was in effective assistance of counsel for him not to do so and at least present to the jury that this investigation was happening.

So I mean, we would submit, Your Honor, that this is a claim that like one that Annie talked about under Gregg, where there is no dispute, we have provided in the response to summary judgment, the interviews of transcripts that show this investigation indeed is happening. Mrs. Mower actually stopped cooperating with the FBI because she saw that Dolezsar's murder was a warning, and was afraid that there would be further violence. And that is also in the interview that was not turned over.

So, and all of that has gone undisputed. It's simply been argued that this should have been brought up at trial. I don't know how it could have been based on the information that was being turned over. And if it should have been, it was a complete abdication of advocacy for Mr. Brass not to bring this up at trial, and that's ground 28. So ground 19 and ground 28 focus on the alternative suspects. So-

Ann Taliaferro:

Go to 63.

Jensie Anderson:

Okay. Can I just say 62 really fast?

Ann Taliaferro:

Oh yeah, that's fine. I was going to let you continue.

Jensie Anderson:

I mean, do you want to do it?

Ann Taliaferro:

No, you go.

Jensie Anderson:

Okay. So basically there were five pillars of the State's case, the eyewitness, the DNA, the ballistics, the historical cell phone data, and the voice identification. And each of those was dealt with ... I mean, we have made claims on each of those. And we understand that the eyewitness claim was the one claim that may have been ... The substance of that claim may be procedurally barred, but the misconduct of the prosecutors in presenting that evidence, the failure of Mr. Wright's attorney to truly show the inconsistencies in Mr. Carlson's testimony, that he originally said he only got a glimpse of the shooter, and then suddenly after he looked up Mr. Wright online, he put wigs on him, he suddenly became more sure, and he suddenly knew that the shooter had blue eyes, which he had said at the time, he made the identification both to investigators at the scene and in his first interview that day that he had not seen the shooter's eyes.

And suddenly by trial, he was able to say he had Nordic blue eyes, sparkling blue eyes, which Mr. Wright does. But you would only know that if he had looked into his eyes, which Mr. Carlson said he didn't. Mr.

Carlson said that Dolezsar had blue eyes, but he didn't. He had brown eyes. So, I mean, there are multitudinous problems with Mr. Carlson's testimony, and there are things that were not emphasized like the Slavic accent.

And by trial, the prosecution was saying to Mr. Carlson, "Maybe that was just a clearing of the throat. It wasn't actually an accent." And not only had Mr. Carlson said he thought there was an accent, but he had also said he thought they might even be speaking of foreign language. That information wasn't turned over to counsel until two weeks before the trial, and only after the trial counsel had gotten a court order to interview the witness. And at that point, the prosecution said, "Oh, we just learned that he Googled him. We just learned he put wigs on him. We just learned that he said the guy might have been talking in a foreign accent." So I think when you asked Mr. Field whether there were problems with the eyewitness, I think the answer is absolutely. Now the court may have found that he was reliable enough to give a jury.

Judge Brereton:

I mean, I'm having a hard time seeing how those claims survived the motion for summary judgment, the eyewitness ID, just the way that it was raised at trial, the way that it was raised at appeal. I don't know. I mean, it sounds like-

Jensie Anderson:

But it wasn't raised as a prosecutorial misconduct claim.

Judge Brereton:

It was not.

Jensie Anderson:

Which we have claimed it should have been because the prosecution knew a lot of information about the eyewitness that they either didn't turn over or they didn't turn over until very close to the time of trial, including the information about ... Defense didn't know about the Googling until two weeks before trial, that he had Googled Mr. Wright to look at his past, and that he had Googled him, and then Photoshopped Wigs on him. None of that was made. That was not available prior to the preliminary hearing, which was misconduct. And there's a point where prosecution's decisions moved from advocacy to misconduct, and I think that happened in the eyewitness claim. We are conceding that the actual substantive claims that the eyewitness is barred.

Ann Taliaferro:

But the court still looks at it in its prejudice analysis, as what could have been presented in the counterfactual analysis.

Judge Brereton:

All of this information that you're indicating as it relates to the prosecutorial misconduct with the eyewitness ID, which I think is your Claim 13?

Jensie Anderson:

Yeah.

Judge Brereton:

Do you have information to suggest that the state was aware of the Googling prior to preliminary hearing, but didn't turn it over until shortly before trial? Because at least the way I read the papers was that maybe

nobody was aware of it until shortly before trial when the witness indicated that, and that at the point the State became aware of it, it was turned over to defense.

Jensie Anderson:

We believe that there is evidence that needs to be further developed, but couldn't be developed because of the way that certain things were turned over to the defense. And that is that Mr. Carlson said that he told the prosecution about these things before the preliminary hearing in his March 24th, 2008 interview that was recorded, and that ... But we also have shown ... There's experts that have looked at that interview and said that there were three minutes and 21 seconds of that interview that were edited out. Because they don't have the metadata, they didn't get an original recording of that interview, they could not look at the metadata to be 100% certain. But in the 23B remand, the expert found that there were a missing three minutes and 21 seconds, that that interview had been edited.

The information about the Googling, which Mr. Carlson said he had provided in that interview, was not in the recording that Mr. Wright received. An assumption could be made that that was edited out of that. We can't prove that yet because we can't look at metadata. But we can say that once the defense was given permission to interview the eyewitness by the court, because the prosecution wouldn't let them, that that's when the prosecution turned over the information about the Googling and the wig and the foreign accent in a memo they gave to Mr. Brass two weeks before trial. We believe-

Judge Brereton:

Can I ask a follow-up with that? So the interview that you're asserting that you have some ... I mean, you've certainly presented some evidence to suggest that an interview with Mr. Carlson has some missing time. There's a clipped word, I think is what your person says, and the time is ... It was very technical. But in any event, when did that interview take place?

Jensie Anderson:

It was the interview in preparation for the preliminary hearing. We believe it took place on March 24th of 2008.

Judge Brereton:

So shortly before the preliminary hearing. And then in a later interview, the eyewitness told whom that he had disclosed that in that interview?

Jensie Anderson:

He told defense counsel that during the interview with defense counsel.

Judge Brereton:

When Mr. Brass was able to finally interview, he, I'm certain, asked him lots of questions about the Googling.

Jensie Anderson:

He's like, "Why did you tell us this until two weeks before trial?" And he said, "I did. I told them right before the preliminary hearing. I told them all about this."

Judge Brereton:

Okay.

Jensie Anderson:

And Mr. Player denies that, I want to be very clear, that Mr. Player denies that he knew that before he ... That your original posit, which was that nobody knew about it, and that Mr. Player turned it over as soon as he knew about it. That's what Mr. Player claims. I think there is evidence at least, enough disputed material fact, to say that this prosecutorial misconduct claim needs to go forward to hearing, where Mr. Wright has the opportunity to prove that.

Judge Brereton:

Because those facts were certainly not brought up at preliminary hearing, not brought up in the motion to suppress the eyewitness identification in front of Judge Hansen. They were brought up at trial.

Jensie Anderson:

Because Mr. Wright's defense counsel was given a memo by Josh Player that divulged that information two weeks before trial. And when he interviewed the eyewitness, he said, "Oh, he's known that since before the prelim." Now, again, Mr. Player denies that, and we can't ... Because we've never been given originals of those interviews, which we also are alleging is prosecutorial misconduct, that interview and also an interview with Mr. Wright that we believe was edited, because we can't access the metadata unless we have the original interview recording, we have to be able to get that through some discovery.

So I think Ground 7 does not ... We will concede that does not survive, but Ground 13 does. And the reason I talk about it in such detail is that I don't think the State's allegation that without anything else, the eyewitness does it. He doesn't. I mean, you got to have some corroborating evidence for this eyewitness. I mean, if you're going to admit ... I think under Rule 617 that was passed-

Judge Brereton:

After this.

Jensie Anderson:

... after this, that if you really looked at Mr. Carlson's testimony under that rule, it would not have been found reliable or admissible based on the way it was handled, the way he went in, to Google and did this research on his own, the kinds of questions he was asking the prosecution, his inconsistencies, really his ability to view on that morning, all of that, I think ... But we can't supply that, but I think it's important that the state's allegation that if everything else went away, we'd be just fine. It's not accurate based on what we know about the eyewitness. So I'm going to just ... I'd like to move on-

Ann Taliaferro:

Do you want to do new evidence, or do you want to do your ...

Jensie Anderson:

Oh, yeah. So let me-

Ann Taliaferro:

63.

Jensie Anderson:

Okay. So as Annie-

Ann Taliaferro:

We're just going to touch briefly on the sections now. And we'll go through quickly because the Court understands and-

Jensie Anderson:

So there are three newly-discovered evidence claims. There's Ground 2, that says there's newly-discovered evidence based about DNA, there's new scientific evidence about ballistics evidence, and there's new scientific evidence about historical cell phone data. The State has simply said that even though those are based on newly-discovered evidence, that they could have been brought up at the time of trial, and I just want to touch on those really quickly. I just need to ...

Ann Taliaferro:

You don't have to.

Jensie Anderson:

Well, I .. So-

Ann Taliaferro:

Okay.

Jensie Anderson:

I'll let Annie talk about the DNA one, but I'd like to talk about the historical cell phone data and the voice recognition. Oh, and the ballistics. I'm sorry. So the ballistics evidence was that this ... And I'll talk about the entire ballistics claim and then the entire voice recognition claim, and then I'll shut up.

Ann Taliaferro:

No, you won't. You'll continue. You're doing great.

Jensie Anderson:

But the ballistics evidence was this: they collected shells at the scene, then casings at the scene, five of them. Then they searched Mr. Wright's apartment in January. The murder happened in November. During the search of the apartment, they found an empty box that would've contained a Springfield 9mm gun. They opened that box, it was empty. They described it as empty. The gun wasn't there, and it was empty.

Mrs. Wright, Bianca Wright was there when they opened it. She can also attest that it was empty. And it was checked into evidence as empty, an empty box. Mrs. Wright also explained that she had lost that gun during a shooting expedition six months before that. It was pictured in the pictures from that shooting expedition, and she claims that she forgot to put it in the bag. They were at the Great Salt Lake, and that it was lost.

That said, the empty ... So two months after that case, that box went into evidence, the lead detective had a hunch, and he checked that box out of evidence. He opened it with no one else present, and he found a spent shell casing inside.

Judge Brereton:

In an envelope, right?

Jensie Anderson:

He claims it was in an envelope, yes. And that bullet had been shot from Mr. Wright's gun, that that bullet was then compared to the bullets at the scene, and the ballistics expert said, "Yeah, I'm absolutely confident that they match." Now, the problem with that is that was unreliable at the time of trial. There was criticism of tool mark evidence in two scientific studies from the federal government in 2008, 2009, the NRS data, NRC report, and the NAS report, both of which said, "There is not enough foundational studies of this kind of evidence for it to be reliable."

And they didn't go so far as to say it should be inadmissible, but they said, basically, you need to make sure that if it is allowed to be presented in trial, that it is not presented with confidence, because there are not studies that make it unique and reproducible, and that the attorneys understand that, and that did the jury and the Court understand that as well. And nobody talked about that in trial. And substantively, that was information that was available. We will admit it was available, but nonetheless ... And the expert didn't bring it up.

And if indeed this claim is for some reason barred, as Annie said, there are three more claims dealing with this. First, post-trial, new reports were done on ballistics evidence. In 2016, the PCAST report was issued, and in 2017, the PCAST addendum was issued. And in both those reports, they said that firearm analysis does not have the base criteria for foundational validity, and that it cannot be called a science. It has to only be called a discipline. And again, they didn't go so far as to say it was inadmissible, but they said that, again, it had to be ... The experts could not testify with certainty, that defense counsel should be aware of this, and as should prosecutors.

And here, these additional reports that are not super cumulative, but add to the ... I mean, they change it ... And they go so far as to say, "It's not a silence. You can't call this a forensic science." And so this came in ... I mean, this wasn't even available till 2016. This is the first time we could raise it.

Can I get some more water?

Clerk:

Yeah, of course.

Jensie Anderson:

And the State has not responded in any way to that claim of being newly-discovered, that it was not newly-discovered, that it was cumulative, that it was ... They've just said it's procedurally-barred. And I think it's undisputed. And once again, I think this is a claim that you could decide on the merits, and just grant the post-conviction claim. Or at the very least, allow us a hearing on this issue. And that's Ground 4.

Ground 9 is a prosecutorial misconduct claim, again, that the prosecution knew or should have known that these pretrial reports were available, that ballistics evidence did not have the foundation, that their expert could not testify with the plaintiff confidence that he did. And that as a result, they should have either not put on the evidence at all, or at least made it clear to the jury that that was problematic evidence.

And then Ground 15, this chain of custody issue, it was dealt with during trial. The prosecution knew that there were problems with this chain of custody, that that box had been described as empty repeatedly, that Mrs. Wright was able to say, "It was empty, there was nothing in it, zero." And all of a sudden, two months after the crime, a bullet casing showed up in that. Now, the Court was faced with this, and said they saw some problems, but they were going to admit it anyway. Again, there's a point when the prosecution knows that there are great enough problems with its evidence that it shouldn't be presented. Here, I think the prosecution crossed the line from advocacy to misconduct by presenting a ballistics evidence based on that weak, a chain of custody, if that was a chain of custody at all. And so that's a prosecutorial misconduct claim.

And then finally, if this was some ... I mean, the defense counsel did absolutely nothing to challenge this evidence. They didn't present these reports, which would suggest they didn't investigate the reliability and

admissibility of firearm tool mark evidence, knowing that this was one of the pillars of the State's case, to tie the gun to Mr. Wright. They didn't bring their own expert in to talk about the problems with firearm tool mark evidence, they didn't ask for a 702 hearing, and they didn't object in any way to this testimony. And so I think based on what we know, even before trial, that was an effective assistance of counsel.

Judge Brereton:

And I think it was raised on appeal as an effective assistance of counsel.

Jensie Anderson:

Well, on appeal it was, and this was one of the issues that the court of appeals basically found, that the briefing was insufficient for them to look at this. They just had to accept the 23B remand or what was presented at trial because it was not raised sufficiently in the briefing to challenge it on ineffective assistance of counsel. And they also said, interestingly, and I think this was simply because they weren't provided with their correct information, that this evidence was actually gaining favor in the courts. And they cited two pretrial cases that were also pre the NRC and NRS reports that said nice things about ballistics evidence. But those were pre those two reports that were pretrial, and nobody challenged them. The defense didn't. I mean, the appellate counsel didn't.

And so although the court of appeals on its own said these two cases find it favorable, those were cases before the science started to question ballistics evidence. So I think-

Ann Taliaferro:

Go to Pillar 2. Or historical-

Jensie Anderson:

I was going to go to voice recognition and let you do cell phone.

Ann Taliaferro:

I'm not going to do cell phone.

Jensie Anderson:

Okay.

Ann Taliaferro:

Keep going. You're doing great.

Jensie Anderson:

I think we've been very detailed about the cell phone evidence. Their experts were highly unqualified. I mean, one of them used a site called How Things Work, which is basically a child site, where you go and say, "Why does a whale spout water?"

Ann Taliaferro:

It's Slide 109, sorry.

Jensie Anderson:

What slide?

Ann Taliaferro:

109 is his cell phone slide.

Jensie Anderson:

Okay. And his maps that he used as demonstrable exhibits didn't include an antennae, which were deeply important to cell phone evidence. Again, if it was prosecutorial misconduct ... I mean, substantively these claims were problematic. There was evidence that came forward after the trial to challenge cell phone evidence even more. It was prosecutorial misconduct to present this evidence with the experts that it presented it with, and to claim that Mr. Wright's cell phone and the murder phone were close together on the day before the murder, and therefore they must have been close together on the 15th, the day of the murder, which was never shown.

The cell phone was actually closer to Mr. Novak's, and that was actually shown in the expert's materials, and yet it was ignored. So whether that's both prosecutorial misconduct and ineffective assistance of trial counsel, it is unquestionably one of the two. And also we believe if it is substantively barred, there is newly-discovered evidence that we've laid out in our briefing and in this slide show that shows there was new scientific evidence that suggested you had to have highly-qualified experts to testify on cell phone data or it was basically useless.

PART 3 OF 5 ENDS [01:39:04]

Ann Taliaferro:

124 is voice recognition.

Jensie Anderson:

And I just ... I know I'm going beyond our time, but I think-

Judge Brereton:

I don't have anything after this, so-

Jensie Anderson:

Okay. I think the voice recognition evidence is deeply important. This was something that the prosecution relied on heavily to show that Mr. Wright retained the burner phone, saying he left a message the day before the murder, that he was Robert, and then played that voicemail message for the jury.

It was distorted. It was not the original, and it was distorted, and so it was hard to even determine what it sounded like. But neither of the two parties called experts about voice recognition. And the prosecution called two witnesses, one who was a secretary who had not spoken with Mr. Wright for about five years and when she did have a business ... her boss had a relationship with Mr. Wright, it was not daily, or it was sporadic. She initially could not identify the voice on the voice recording. And ultimately, after listening to it a bunch of times, she said she thought it could be his voice.

Mark Field:

[inaudible 01:41:52]

Jensie Anderson:

Oh, I'm sorry. It's not she. That's the FBI agent. I apologize. That's the FBI agent who had worked with Mr. Wright. I apologize. But all of that's true, you just change it to the FBI agent.

Mark Field:

[inaudible 01:42:03

Jensie Anderson:

The second witness was the detective in the case, Detective Carriger. Mr. Carriger had interviewed Chris Wright in January of 2008 and then arrested Mr. Wright in February of 2008 and had never spoken with him since, had never spoken with him before, and certainly had an interest in showing that that cell phone recording was Mr. Wright. That-

Mark Field:

[inaudible 01:42:37]

Ann Taliaferro:

[inaudible 01:42:37]

Jensie Anderson:

No, Carriger ... Okay. I mean, for the prosecution, there was a motion in limine filed in this case by the prosecution to make it so the defense could not present any evidence of alternative suspects. And that was interpreted both by the defense counsel and by the court as hoping to not have the alibi witness testify because she could also identify the voice. That motion was denied. And during the course of that motion, the prosecution admitted that they believed that Mr. Wright's voice had changed since the time of the murder, which is why it was hard to recognize on the voice. They had implied that it might have been because of steroid use before he was arrested and/or weight loss since his arrest. They agreed not to bring that up at trial, but what they didn't consider is it just wasn't his voice on the tape.

If the voice had changed, and they knew that, why were they presenting it as being Mr. Wright's voice with highly questionable witnesses? And unfortunately, the defense counsel followed suit and the defense counsel presented one defense witness and that was the secretary who was not particularly familiar. They didn't present anybody else who would have been available, family members, friends, close business associates, which didn't seem to make any sense, except that in Rule 23B remand hearing, Ed Brass, under oath, testified that during mid-trial that Mr. Wright's father approached him and said, "That's my son's voice on the recording." The court of appeals found that deeply compelling and that made it so that it was completely reasonable for Mr. Brass not to call anyone who might accidentally ... or who might identify that as being Mr. Wright's voice.

The problem with that is that Mr. Wright's father committed suicide when Mr. Wright was 10. He was not at the trial. There was no one that Mr. Wright called father-

Judge Brereton:

I mean, it seems like the supposition is that it's the uncle, right, that raised him.

Jensie Anderson:

The uncle testified at the 23B remand hearing that it wasn't Mr. Wright. He never called Mr. Wright son. Mr. Wright never called him father. Even though he took over guardianship of Mr. Wright at 14, they called each other Jeff and Chris. He never would have identified himself as ... He in his affidavit to this court says he did not have that conversation with Mr. Brass, which, if nothing else, creates a disputed material fact on this issue because it was relied on so heavily by both the 23B remand court and by the court of appeals in upholding this conviction.

I mean, I was the one that discovered that Mr. Wright's father was dead because nobody else looked into it. And I don't know why Mr. Brass said that. And I don't want to accuse Mr. Brass of intentionally lying, but I don't think that conversation ... I don't know who that conversation could have happened with. Mr. Wright's mother, he did not have a relationship with her. She had had a series of boyfriends. She might have been ... I think she was at the trial, but we don't know if she had a boyfriend with her and he certainly would not have identified himself as a father figure. If somebody did have that conversation with Mr. Brass, they were lying, and we have no idea who that might have been.

And so the fact that, if indeed that conversation happened, the defense counsel didn't try to find out from Mr. Wright why his father would have said that. I mean, I wanted to find out why would your dad say such a thing? And it was, "Well, my dad didn't. My dad was dead." And then I spoke with Mr. Wright and the affidavit was presented. So I think at the very least this creates an issue of material fact, but I do think it's also an ineffective assistance of counsel-

Ann Taliaferro:

Hit on 76 DNA.

Jensie Anderson:

Okay.

Ann Taliaferro:

The pillar of DNA

Jensie Anderson:

So I think that that's deeply important to consider in the voice recognition expert issue, whether that's misleading evidence to the jury, whether it's prosecutorial misconduct, or whether it's ineffective assistance of counsel. One of those three claims, if not all of them, survive and could, and at the very least, create disputed facts that need a hearing.

So what page?

Ann Taliaferro:

76.

Jensie Anderson:

Will you take over for a minute? I'm just-

Ann Taliaferro:

You know the DNA evidence. You're doing great.

Jensie Anderson:

Well, Mr-

Ann Taliaferro:

That's okay.

Jensie Anderson:

Excuse me. Mr ... I'm just going to do this quickly. Mr. Field claims that ... I mean, Mr. Field actually in many ways made our arguments for us. He-

Ann Taliaferro:

[inaudible 01:48:14]

Jensie Anderson:

Yes, [inaudible 01:48:16]. We have presented almost a hundred pages of evidence about the mishandling of DNA evidence that it was contaminated evidence from the way it was collected, that it was misrepresented by the analysts that looked at it, that they were using old statistics that had the lab followed its own procedure that not only would Mr. Wright have been excluded from the steering wheel, from the armrest, from the key fob, but also he would have been excluded from this possible inclusion on the door handle.

Now, Mr. Field also argued that, "Oh, maybe he accidentally said it was a match." Oh, it may have been unintentional, but it led the jury to believe that there was a match and there wasn't a match. Even as flawed as the DNA evidence was, and even with what we learned about it afterwards, it was not a match. The best you could say is that Mr. Wright could not have been excluded, which is not a match. And Mr. Field admits that Mr. Player misrepresented that. I mean, he said it nine times in his opening statement. It was important.

Judge Brereton:

Yeah, let's make-

Jensie Anderson:

He put on three experts.

Judge Brereton:

Because I have not reviewed the transcript of the trial. So the ... I mean, what I've got is what is being set out, but at least the way that it's argued in your papers is that ... I mean, it was the underlying theory. It's Wright's DNA, it's Wright's gun, it's Wright's voice, it's Wright's ID, right? And that the DNA was not ...

I mean, because the DNA evidence is very, very weak in this case. And though it sounds like that was brought out in cross, probably, I mean, the state did over and over ... am I correct in that, that is the theory? It's Wright's DNA.

Jensie Anderson:

Yeah. Absolutely.

Judge Brereton:

I mean, it was argued and presented as this is evidence. There is evidence that this is his DNA.

Jensie Anderson:

It's a match. I mean, those words were said repeatedly by the prosecution. And the woman, the co-counsel who handled the DNA evidence only came onto the case about two weeks before trial. She had been with the DA's office that was prosecuting Mr. Wright and had been on the team with the prosecutors who actually handled this trial, so there was a conflict that was not disclosed. She also had never done ... Mr. Brass turned the DNA evidence over to her and she handled it. He said he believed that he knew enough

about DNA not to call an expert, but when you look at how complex the DNA evidence was in this case, it absolutely could not have been done without an expert.

In the 23B remand hearing, there was an expert who testified, a Dr. Hampikian. Dr. Hampikian basically said, if the DNA of the perpetrator were in that car, it would have been the unknown major sample on the steering wheel and that was an unknown individual because that's where the perpetrator grabbed when he drove away. And there was a major profile, but Mr. Wright was excluded from that. I will admit that he did say that the DNA ... he didn't see other problems with the DNA evidence, but he also didn't have-

Judge Brereton:

Yeah, he's-

Jensie Anderson:

He didn't have the full file.

Judge Brereton:

Because he testified that there wasn't a problem with ... I mean, at least the findings ... Judge Hansen's findings-

Jensie Anderson:

He did.

Judge Brereton:

... from the 23B were that there was no issues with collection, storage, the way that it was tested by glove. I mean, he basically said they did it right.

Jensie Anderson:

But he didn't have the whole file.

Judge Brereton:

Okay.

Jensie Anderson:

We know that he only had a portion of the file.

Judge Brereton:

And why is that?

Jensie Anderson:

And once we were able to ... Pardon me?

Judge Brereton:

Why is that that he didn't have the whole file?

Jensie Anderson:

Because I don't think the entire file had been turned over to defense and he had what defense had.

Much of this was discovered later, the fact that they didn't follow their own procedures, that there was contamination, likely contamination, that they were using old statistical documents that had been updated and had they used the proper documents, had they used the proper procedures, and had Mr. ... I mean, we can speculate all day long that had Mr. Hampikian had those files, he would have not said what he said, but based on what he had, he did say, first of all, you can't call that a match on the handles. And second of all, where the DNA of the perpetrator would have been found would have been on the steering wheel, and there was an unknown male major contributor to the steering wheel who was not Dolezsar and was not Mr. Wright.

And so that again, to the extent that that information was presented to the jury in a misleading way, that's a due process violation to the extent that the prosecution put on false evidence knowing and saying ... I mean, it wasn't irrelevant that Mr. Player repeatedly called this a match. That was prosecutorial misconduct. It was not a match and it could not be called a match. And that misled the jury, laypeople who don't know DNA, and DNA is so deeply complicated, especially mixtures and trace DNA evidence, that if you say to someone, "It's a match," they believe it's their DNA. And that's what Mr. Player presented to the jury, and that was misconduct.

And Mr. Brass did ... Ms. Cordova, who took the DNA evidence, talked to the experts for the state, but she didn't ... in the two weeks prior to trial, but she didn't hire her own expert. She didn't have anybody look at it. She didn't really understand the complexity of it. And nobody really ... And appellate counsel really didn't ... I mean, in the appellate decision, again, the court said there was no challenge to the fact-finding of the 23B remand court, and therefore the DNA evidence would stand, but that was an appellate investigation briefing problem. That was not a finding that the DNA was good evidence. That was just that it was not properly briefed for them to find anything else. So-

Judge Brereton:

At what point was the ... So, I mean, it sounds as if you certainly have more now regarding the DNA reports and the testing that was done than they had at the time of appeal. How did that happen?

Jensie Anderson:

Because investigation was done.

Judge Brereton:

But it hadn't-

Jensie Anderson:

By post-conviction counsel.

Judge Brereton:

By post-conviction counsel. Appellate counsel didn't do that.

Jensie Anderson:

He was convicted in 2010. His appeal wasn't decided until August of 2021. Part of that was because it was stayed waiting for the Lujan case. Part of it was the 23B remand. But in those 10 years between the trial and the appeal decision, there was investigation being done by a variety of people and many of these things were discovered during that time. It couldn't have been ... Because the investigation was being done.

Appellate counsel didn't do that and in fact didn't even brief it properly for the court to do anything but accept the 23B remand decision. And so this was not fully briefed at the appellate court. And if nothing

else, it's a failure of appellate counsel, but it's a failure of defense counsel for having a conflict, for not hiring an expert, for not understanding it. It's a failure of the prosecution for calling it a match, for not knowing ... or knowing and not disclosing that procedures were not followed.

Judge Brereton:

And so to the extent that it was raised as a claim of ineffective assistance of trial counsel at appeal, the DNA issue ... I mean, I just want to make sure I'm understanding your argument correctly. You're arguing there's no appellate bar to that as a post-conviction argument because it was not argued in the same way or looked at in the same way as it's being looked at now.

Jensie Anderson:

Yeah.

Judge Brereton:

Or argued now.

Jensie Anderson:

Appellate counsel just challenged the find ... They didn't challenge the factual findings of the 23B remand court based on what we know now.

Judge Brereton:

I'm not having a hard time seeing the arc of your argument. It's an ineffective assistance of appellate counsel. My question really lies is whether there remains an ineffective assistance of trial counsel as it relates to DNA, given that it was the subject of a 23B remand, it was dealt with on appeal. I mean, on appeal-

Ann Taliaferro:

[inaudible 01:57:41]

Judge Brereton:

... the court of appeals ruled on the ineffective assistance of trial counsel as it relates to DNA. I don't think, based on what you're telling me, that it was put before the court that they didn't have the full file, that there were additional issues that weren't raised in the 23B, but I just it's ... It seems very narrow-

Ann Taliaferro:

I think also in answering your question, is that none of the grounds, the specific legal issues that we are raising were raised before.

So there may have been an ineffective assistance of counsel playing-

Judge Brereton:

They were raised at least tangentially, I think, some of them-

Ann Taliaferro:

Well, I mean, for various specific purposes, I mean, it's kind of like a preservation argument. If you're raising an issue A, you're not raising B and C. So whatever was raised before on appeal, other than that I ... And we've conceded the eyewitness reliability issue. That was the same claim that we raised here, but

the claims and the arguments and the issues made on appeal, we have not raised the same things. We've raised different violations, maybe different claims of ineffective regarding the DNA-

Judge Brereton:

That's my argument. You're asserting that trial counsel was ineffective in different ways-

Ann Taliaferro:

Ways. Correct.

Judge Brereton:

... than were argued with the 23B-

Ann Taliaferro:

Correct.

Judge Brereton:

... or on appeal. And you're asserting that because you're pointing out different problems with the representation of trial counsel that the claims should survive the procedural bar-

Ann Taliaferro:

Correct.

Judge Brereton:

... post conviction.

Jensie Anderson:

The appellate court said that based on the unchallenged findings of the 23B remand, that there was no challenge to the factual findings, that they don't challenge the findings of the expert, that they accept those findings because they were unchallenged.

Judge Brereton:

And that seems to me to go to your argument of the ineffective assistance of appellate counsel.

Jensie Anderson:

Correct. Right. Yeah, so that's on [inaudible 01:59:48]-

Judge Brereton:

Because it was appellate counsel-

Jensie Anderson:

Yes, right.

Judge Brereton:

... that needed to challenge the 23B.

Jensie Anderson:

But I also think there are different things that trial counsel should have done, including objecting to this language that it was a match, and they didn't, and that wasn't brought before the appellate counsel.

Judge Brereton:

I think I understand.

Jensie Anderson:

And the conflict was not brought before the trial court or the appellate court. There is-

Ann Taliaferro:

So, so even ...

Jensie Anderson:

I think it's- I'm sorry. It's just a stack. There were problems with the way ... I mean, the evidence, but just as it was presented at trial violated Mr. Wright's due process. There was prosecutorial misconduct in presenting misleading DNA evidence, if only in calling it a match, but there was also other problems. There was ineffective assistance of trial counsel for not understanding the DNA evidence, not presenting expert witness about how complicated it was and about what problems were there and finally of appellate counsel for not bringing up these issues and not challenging that finding.

Ann Taliaferro:

And I just wanted to jump in too. The claims that were raised on appeal regarding ineffective assistance of counsel, even though the court made a finding, I think that it can't necessarily be barred because appellate counsel didn't argue it right. And so the court said something to the effect of, "We have to presume then counsel was effective." So I guess we're saying, because you still ... It isn't appellate counsel ineffective assistance, but you're still looking at the merits of whether trial counsel was ineffective, even for those issues raised on appeal.

Judge Brereton:

Which I think I follow that. Can I ask one factual question too about the DNA file? So you're indicating that post-conviction counsel received it as part of the post-conviction investigation. Is there evidence to suggest that the full DNA file was in possession of the prosecutors and not turned over to defense? Because that I don't think is being argued.

Jensie Anderson:

I still don't think we have the full file, based on what we do have-

Judge Brereton:

Did the state not turn things ... Is there evidence to suggest the state didn't turn over everything they had on DNA?

Jensie Anderson:

I think there is, yes. I think there is evidence to show that either the prosecution or the crime lab did not turn over the full file to the defense because the defense provided their file to Mr. Hampikian and who testified.

Judge Brereton:
And the crime lab didn't do-

Jensie Anderson:
And we know we have ... I mean-

Judge Brereton:
It was Sorenson, wasn't it?

Jensie Anderson:
... quite frankly, the post-conviction investigation was completed by lay-folks who just believed in Mr. Wright. We didn't become involved until later,

Judge Brereton:
Okay

Jensie Anderson:
but during that, they were able to receive additional documents that were not turned over to defense from the Sorenson-

Judge Brereton:
From Sorenson.

Jensie Anderson:
... Lab and from the FBI who had looked at some of this stuff. They didn't get it all. They didn't get it all from ... They tried to get it from Sandy Police. They tried to get it from the prosecutor. So it was coming in piecemeal.

Judge Brereton:
So it sounds like the answer really is you don't know.

Jensie Anderson:
We don't know.

Judge Brereton:
Like, you don't know what the state had, right?

Jensie Anderson:
We do know there's problems with what we've gotten and it wasn't turned over. We don't know if we have the full file at this point, and that would likely be part of discovery as well.

Judge Brereton:
Okay.

Mark Field:

[inaudible 02:03:17]

Ann Taliaferro:
I'm just going to jump ...

Jensie Anderson:
Yep, I'm sorry.

Ann Taliaferro:
I'm going to jump to two things and just guide the court and then we can shut up.

Jensie Anderson:
Yeah.

Ann Taliaferro:
If you go to 137, 137 ...

Jensie Anderson:
Oh, sorry.

Judge Brereton:
Slide people-

Ann Taliaferro:
No, you're good.

Jensie Anderson:
I'm just ...

Ann Taliaferro:
So those were the five pillars. We also alleged some claims of additional state misconduct, and those are grounds 12, grounds 14, grounds 17, and grounds 18. 137, sorry.

Jensie Anderson:
That's 137.

Ann Taliaferro:
Oh, that's weird. You're in the wrong one, but that's okay. And then-

Judge Brereton:
Well, so like the mischaracterization of the alibi witness-

Jensie Anderson:
Oh, I know what you're talking about. This one.

Judge Brereton:

Are you talking about that? The mischaracterization of the alibi witness-

Ann Taliaferro:

Yep, yep.

Judge Brereton:

... the interviews that had issues, not collecting GSR.

Ann Taliaferro:

Yep. And then there's also, I think 145, at least in mine.

Jensie Anderson:

Yeah, I'll get you there.

Ann Taliaferro:

Just additional claims of ineffective assistance of counsel that we have alleged that have not been talked about before. There's ground 24 failing to object to ... just at trial ... to the prosecution's mischaracterization of alibi evidence. Ground 25 deals with the failing to object to state expert witnesses. Seven of them were problematic and we won't go through them. Ground 26, failures to move for a mistrial, ground 27, stipulating the chain of custody issues. Those were just things that ... And I think that we have ... We've talked about them at one point or another. Ground 29, failing to obtain a forensic accountant. Do you want to talk more about that?

Jensie Anderson:

Sure.

Ann Taliaferro:

And then we promise we'll shut up.

Jensie Anderson:

I mean, we know that Mr. Dolezsar had control over an enormous amount of money because Dee Mower was in prison. As I said, it was at least 140 million in cash and hundreds of millions in assets. We know that Dolezsar wrote at least $50 million in checks during the time ... Between the time that Mrs. Mower went into prison in 2006 to his murder in 2007. There was this theory that Novak had paid ... a few days after the murder that Mr. Novak had paid Mr. Wright $25,000 as payment for a murder-for-hire issue, which makes no sense because Mr. Wright was going to get $2 million investment from the victim and that there were draw accounts that he could have covered everything with.

And so the bottom line is to really look ... And we also know that Dolezsar was financing a private investigation of Tommy and Derek. So a forensic accountant would have needed to look at Dolezsar's finances to see who he was paying, what he was paying for, who were those checks, how much were they for? Novak's finances about was he involved in this in any way? How did that 25 ... I mean, was there information that that was money that was a payoff? Wright's finances ... they claimed Mr. Wright was sort of poverty-stricken, but yet no one looked at his finances and the defense didn't look at his ... I mean, the defense in particular did not look at his finances and present evidence that ... $25,000 was a drop in the

bucket, based on what he had in the bank, what he had at his fingertips, and what he was going to get from Mr. Dolezsar.

Also, Thomas Mower's finances and whether ... I mean, Thomas Mower was in prison when this happened, so he could not have been the actual shooter. That said, he could have hired someone. And in fact, in an interview that we've attached, he claims that for $1,000, he could get anybody knocked off by the Russian mafia like that. Now, whether that was bragging or whether that was true, we would have known that by looking at if he had paid anyone off with his finances, and then also Tom and Derek Mower's finances. Detective Carriger did speak with Mrs. Mower's accountant, but that really never went anywhere, but it was defense counsel's job to ... I mean, to understand that this case had a huge financial component to it, and by not investigating those financial components through a number of people, through subpoenas, through discovery, it was, again, an advocation of advocacy.

Ann Taliaferro:

And then just finally, ground 30 is basically our ineffective assistance of appellate counsel. So we thank everybody for your patience. And if the court has any other questions.

Judge Brereton:

I don't have any other questions. Mr. Field?

Mark Field:

So just real quick. So on the DNA evidence, sort of the statement that counsel did not understand the complexities of the DNA, I'm not sure how we know that. The presumption is they did know. We don't have any affidavit from Kim Cordova or Ed Brass on saying, "Yeah, we were over our heads," or anything like that. In fact, Kim Cordova testified at the 23B hearing that she understood the DNA evidence, she understood what ... she had dealt with DNA before and when she was a prosecutor. I mean, unless there is some evidence or affidavit that she had no clue what she was doing, the presumption is that she did know.

On Carlson's testimony, I'm not sure exactly what can be done about that because it was all vetted before trial. I don't know that this court can reassess what happened 20 plus years ... or 10 plus years ago and come to a different conclusion that, oh, that Carlson's testimony was unreliable, especially when that exact issue went up to the court of appeals-

Judge Brereton:

I mean, I don't think I can either, but I mean, it kind of goes back to the question that I asked you initially that ... And I think that Mr. Wright is conceding that the ground of seven, raised in claim seven, regarding that this Court should act because the eyewitness identification was unreliable. I mean, I think the eyewitness testimony is what it is, but it is what it is, right?

Mark Field:

Right.

Judge Brereton:

So I think that in terms of prejudice, I mean, I think if I were to take your argument in your reply brief on its face, I mean, at least the way I'm reading that is like, look, you can't show prejudice because you've got the eyewitness ID and that's enough, right? We don't really need anything else.

Mark Field:

Yeah. And the ballistics, I think. But, yes, you're right.

Judge Brereton:

So the ballistics is clearly being challenged and in multiple ways through the post-conviction, but the other issue is that ... What I'm having a hard time with is that if this eyewitness evidence is the only thing presented at this trial, that's all this jury has, I think I can probably get to prejudice. I mean, I don't know that this testimony on its own ...

Mark Field:

Okay. Let's oppose that that's all that was presented at trial was eyewitness identification testimony and-

Judge Brereton:

Not just eyewitness identification testimony. The eyewitness identification testimony of Mr. Carlson with all its problems because I agree with you. The jury ultimately convicted Mr. Wright, right? But they did that with the state's theory saying, "Look, we've got the eyewitness identification, you've heard about that, but even if there are problems with that, it's his voice on the voice recorder, arranging the meeting where the shooting takes place. It's his gun that's used to shoot. It's his DNA that's inside the car that was driven away by the shooter. That's a very different picture than Carlson. You can convict based just on Carlson. It's a different case.

PART 4 OF 5 ENDS [02:12:04]

Mark Field:

Okay. Let's suppose that Carlson testifies exactly as he testified at this trial, and there's no other evidence, and the jury convicts. What do you do at that point then?

Judge Brereton:

That's not the point. That's not the case that's before me.

Mark Field:

How do you show prejudice at that point? You get rid of everything except for his testimony. It's believed, obviously believed, and you've challenged its reliability pretrial.

Judge Brereton:

It's believed in the context. I don't think that I consider it in ... I don't think it has the same weight without the other evidence, right? I don't think I need to consider it that way. You're suggesting I do.

Mark Field:

No, no. What I'm suggesting is if you got rid of all the other evidence and Lee Carlson's testimony is believed, I don't know how you show prejudice.

Judge Brereton:

Yes, but if you get rid of all the other evidence, would it be believed in light of ...

Mark Field:

I think that ... Well, I'm not sure why not. If you have even more evidence that shows that it's Chris Wright.

Judge Brereton:

Again, I'm not going to undo the finding that Judge Hansen had, but clearly you can tell I have some issues with it. I think there's some issues with your eyewitness evidence. I don't think they can raise it on post-conviction. I don't think they can raise ground seven, but yes.

Mark Field:

Yeah. I guess I'm not sure how much more to say. I think that the ballistics evidence, the fact that it was Chris Wright's gun, and the issue about finding the spent cartridge in the gun case. That was found. It wasn't just Detective Carriger on a whim looking and finding it. He was told that the manufacturer of that kind of gun, they do a test fire, and then they collect the spent casing, and they put it in the gun case when they sell the gun. Carriger didn't know that. He was talking with somebody about this gun that they have, and this person told him, well, did you look for the spent casing that's in an envelope, blah, blah, blah. That's what Detective Carriger did. He went and he found that casing.

Of course, that's all testified to at trial. They explained how all that came about. The jury heard everything. There was cross-examination, of course. That's what the testimony showed, was that it was Chris Wright's gun. Of course, Mr. Brass and Ms. Cordova, they had an explanation, right?

Judge Brereton:

But they chose not to challenge the evidence, at least the way that I'm reading what's been given to me. They chose to suggest his gun could have been accessed by other people, not necessarily to say ... At least the way that it's presented in the papers, it doesn't sound like they really even attacked necessarily the expert's testimony that this is a match. They didn't ...

Mark Field:

That's exactly right. The Court of Appeals said that doing it that way was objectively reasonable. I don't know how you get around that, right? The way to get around it is for Mr. Wright to file a petition for a writ of certiorari with the Utah Supreme Court and ask them to overturn what the court of appeals did. He did that, and the Supreme Court denied certiorari review. I don't know what you do when the Court of Appeals says that the approach that Ed Brass took was objectively reasonable. I don't know that you go back in and say, well, I'm going to disagree with the court of appeals, and I'm going to say it wasn't objectively reasonable. I don't think the court can do that.

I think the prosecutorial misconduct claims, most of them are procedurally barred, and the reason they're barred is because trial counsel could have objected and because counsel didn't object, then you could raise ineffective assistance of trial counsel on appeal. I get that, but the actual standalone prosecutorial misconduct claims, they're barred because they could have been raised before. Now, I do think that-

Judge Brereton:

If I'm understanding their argument correctly, some of the evidence related to that prosecutorial misconduct wasn't in possession of the defendant and was ... At least their suggesting was intentionally withheld by the state so that it couldn't be known to the defense.

Mark Field:

Yes. I think that the evidence of that there was some FBI files that weren't turned over and other things that apparently that the state did not turn over, I think there needs to be an evidentiary hearing on that.

When you bring people in to testify about whether it was or wasn't disclosed ... We don't have an affidavit from Ed Brass saying, I never got it. If we had that, that would certainly show that it wasn't disclosed.

Judge Brereton:

I guess this kind of comes back to ... The way things are being argued, it's very different than I typically think of summary judgment. I understand the burden of pleading is a little bit different as it relates to post-conviction versus a typical civil complaint. I guess what I'm struggling with and what I kind of go back to is that at this juncture, what I'm really determining is are there genuine issues of material fact that suggests that I ought to have that evidentiary hearing and ought to allow discovery because at least there are certainly arguments being made by Mr. Wright throughout the argument today, but I think it weaves in and out of the petition as well, that they don't believe they have everything, that there is discovery that they need to do regarding their post-conviction claims.

This argument is so very different from any summary judgment argument I've ever had because the focus is are there genuine issues of material fact? It seems like there are regarding many of these claims. I know that we also have to get to the hurdle of the procedural bar, which is more of a legal argument, but that's kind of where I'm struggling because it does seem to me that there are issues of material fact.

Mark Field:

Yeah. The vast majority of claims are procedurally barred, some because they were actually raised on appeal and others because they could have been raised. There are also claims that allege newly discovered evidence, and based on what I've heard today, if there's new evidence that the state did not disclose, I agree that there needs to be an ... That claim needs to be vetted at an evidentiary hearing. We don't have all the information. I think there has to be discovery, allow them to investigate more on the evidence that wasn't disclosed. Why wasn't it disclosed? If they have to depose people, if I have to depose people on whether this evidence was disclosed or not. I agree with that for the new evidence, but the vast majority of claims ...

Judge Brereton:

A lot of that though, as I'm looking at it, I'm kind of seeing it as like dominoes stacked up. If one falls, then does another fall too? Because some of that evidence that wasn't disclosed, certainly it sounds as if some of that is DNA that the full ... I don't know how you say that an attorney provided effective assistance of counsel by looking at the discovery that they have and making a concerted choice not to hire an expert, believing that there's some weakness and thinking that it's okay to just talk to their expert and really do all of that within the two weeks prior to trial when now, and again, many years later, we find out that the full DNA file was never turned over to defense. How am I determining they were effective?

It's problematic because I don't know how you as a trial attorney, which is the context I kind of go back to in light of my own experience, how you make the decision about what to do and what strategy to take at trial when you don't have all the evidence. It's kind of an impossibility, right?

Mark Field:

I agree. If there is evidence that wasn't turned over, that deserves an evidentiary hearing, but at least when it comes to the DNA, they knew they had a lot of information.

Judge Brereton:

I don't think they had everything that's before me. I think what's before me casts doubt even on whether the door handle DNA ought to have even been admissible.

Mark Field:

Okay. Let's suppose, let's just suppose for the sake of argument that all the DNA is gone.

Judge Brereton:

Not only that it's gone, I think there's some support in what's presented to me. Again, I think it needs an evidentiary hearing. I can't make a finding today one way or another, but I think there's some support to suggest that a full vetting of this DNA evidence would not only take out the DNA on the door as saying there's any type of match to Mr. Wright, but also saying much more strongly that he's excluded, right? I think there's some support for that, not just inconclusive, but excluded, which is different.

Mark Field:

There was plenty of evidence that he was excluded from much of the DNA samples. Almost all of the rest of them, except for this one on the door handle, it was inconclusive, which meant you couldn't draw any conclusion from it.

Judge Brereton:

It's different than excluded. I think that's a big difference, right? It's different to be inconclusive than excluded.

Mark Field:

Yeah. Okay. Let's suppose that on that door handle, there's DNA evidence that shows he's excluded. There's DNA evidence from which you can't draw any conclusion at all. Then you have this little bit of degraded DNA that they did a test on, and he's not included exactly, but he's not excluded exactly, but there's just this little bit. All the rest of it doesn't point to Chris Wright. In fact, some of it doesn't point to him at all, and the rest of it, you can't make any conclusion on it. Let's suppose that you have another test and this little bit of DNA and it says, yeah, we can now affirmatively exclude Chris Wright. Is there a reasonable likelihood that that's going to affect the outcome of the trial? That just seems ...

Judge Brereton:

Perhaps you and I take a little bit of a different view on the strength of DNA evidence in a trial, but I don't ... Is it enough to survive a summary judgment? That's really my question. I don't know.

Mark Field:

Yeah. If you can't show that ... If excluding that ...

Judge Brereton:

I don't know that excluding that on its own, but I think this is a ... It's a very widespread approach to this petition, the way they've presented it, the five pillars. They're certainly attacking all of them. So if there's genuine issue of material facts as it relates to those, and the one that I certainly can say I will find should not survive summary judgment is item seven, but if there's enough issue with the prosecutorial misconduct and ineffective issues to kind of throw that into the mix, then it just does really seem to me that for purposes of today ... I'm not deciding today whether they're ... I know they're encouraging me to find that some of these issues warrant me saying today that you can have a hearing on the merits. I don't think I'm there. I don't think I'm close to there, but the question that I have is it does seem like there's enough to suggest a genuine issue of material fact that ought to warrant having that hearing.

Mark Field:

On every claim?

Judge Brereton:

Not seven, and maybe not every claim. That's kind of where I fall because I think your approach is, well, even if I find that on some of them, there's enough there that I should deny it outright because you can't really get to prejudice. It's hard for me when I'm ... Where do I draw that line? You seem to be drawing it with eyewitness identification and ballistics. If the eyewitness identification and the ballistics stick, then there's enough or maybe eyewitness identification, but even I think you've walked that back a little bit to say the ballistics and the eyewitness identification together. My question is, where is that line because there's certainly some of these claims that have genuine issues of material fact that should survive summary judgment.

Mark Field:

I don't disagree with the ones where there's newly discovered evidence. I personally don't know if any of that's true. Some of it may be true, and I think it's worth having an evidentiary hearing so we get to the bottom of it. For example, I just don't think that there's been any showing that Lee Carlson lied. I don't think there's been any showing that his testimony was unreliable. It was already been determined to be reliable. Even based on all the evidence that came out at trial, there's been nothing that occurred at trial that would make anybody think, oh yeah, you can't believe what Lee Carlson is saying. That's because all the things that he did that we don't like, that was all put in front of a jury, and they found beyond a reasonable doubt that Chris Wright was guilty, based at least in part on that eyewitness identification.

It's no different for the ballistics. I guess we could get Detective Carriger in here and ask him again, how did you find this spent shell casing? He'd say what he said at trial.

Judge Brereton:

I think on the chain of custody perhaps, but they're certainly making the argument their newly discovered evidence applies to the ballistics because just the ... In an ineffective assistance context, either of trial counsel or appellate counsel, because the choice to not challenge the ballistics in light of the current thinking on ballistics evidence, which I think is a little different than it was at the time of this trial. I don't know. I mean, that's part of their newly discovered evidence, right?

Mark Field:

The argument on appeal was there was a raging debate taking place about the reliability of tool mark evidence. Mr. Brass didn't do any investigation into that, and therefore, he was ineffective. The Court of Appeals rejected that argument and said that Ed Brass's approach was objectively reasonable. I just don't know at that point ... The question of ineffective assistance of counsel isn't is there another approach that would be even better, it's-

Judge Brereton:

It's is his reasonable.

Mark Field:

Is what he did reasonable. Like with the DNA, one of the things that Mr. Brass testified or he testified to at the evidentiary hearing, and there's a factual finding on this, is he knew full well that the DNA evidence was favorable to Chris Wright, and he did not want to get it retested because he was fearful that if there was a retesting, it may not turn out well for Mr. Wright.

He had what he had, he knew it was good for him, and he didn't want that to change. The Court of Appeals said that is a reasonable strategy. Once the Court of Appeals says that ... Again, other attorneys might do something different.

Judge Brereton:

Yeah. the DNA I think of as a little different than the ballistics because I just think if he had the full file and knew ... It's hard for me to say how you make that decision.

Mark Field:

Let's suppose he had the full file, he could have made the same decision. I don't want to get anything else. I don't want it to change.

Judge Brereton:

If he had the full file, would that have been objectively reasonable to take the approach that he did. Isn't that the question I should be asking myself?

Mark Field:

Yes. I think unless there's something in there which I don't know about, and we can vet that in an evidentiary hearing, but unless there's something in there that specifically sort of points away from Mr. Wright, but then again, all of it did, right? What if there's evidence in there that points to him and the state didn't turn it over, and they didn't use it? See, that would be a problem, of course. That's what Mr. Brass was trying to avoid is he knew what he had, he knew all of it was favorable except for this little tiny part, and he knew he could explain that away because Mr. Wright had been in the car and anyway, it was a degraded sample, and it didn't actually point ... It wasn't a match. Mr. Player said that, he got it wrong, but Mr. Brass made a big deal about that in his closing argument about DNA, and he wanted to keep it static. He didn't want any of that to change.

Regardless of whether there's more, something more, I don't know how it could have been better, right? The fear is it could only get worse, so I'm going to leave it the way it is. I'm going to rely on the state's experts to talk about the DNA because then what Mr. Brass did, when I say that this DNA evidence isn't favorable to the state, it's favorable to Mr. Wright, it's the state's own witnesses who are saying that. That's what Mr. Brass wanted to do, that's what he did. The Court of Appeals said that was an eminently reasonable approach. I do agree for evidence that it's alleged that it was not turned over, I think that that needs to be provided, and there needs to be discovery and an evidentiary hearing on that. I think that's it.

Judge Brereton:

Okay. Thank you.

Mark Field:

Thank you, Your Honor.

Judge Brereton:

I don't think I can rule on this today from the bench, so I am going to take it under advisement. I do think that I want to look more closely at some of it. As I indicated, you gave me a lot to read, and I read it all, but maybe not in depth.

Ann Taliaferro:

Some courts have us do proposed findings. Does the court want us to do that or no?

Judge Brereton:
I mean, it would probably be helpful to me to see that. I don't know, Mr. Field, how you'd feel about that?

Mark Field:
Well-

Ann Taliaferro:
He's overworked and doesn't want to.

Judge Brereton:
Just given the number of extensions and the issues that I know your office is having in a wider context.

Mark Field:
Yeah. I guess I'm ... I wouldn't mind the ... Well, if the court gets to a point ... It would be nice to have a ruling on what it ... I think the court should rule at some point.

Judge Brereton:
Well, I'm going to rule at some point. I will promise you that. I will rule. Proposed findings is kind of an odd way to ... I mean, it's a motion for summary judgment. I'm not really going to make findings. The only finding I'll be making is whether there are disputed issues of fact that should preclude summary judgment. I guess it's such a ...

Ann Taliaferro:
It's a bizarre world.

Judge Brereton:
I need to think about it a little bit more because I'll be very honest, as I indicated, I've not done one of these before, and it's ... The issues of procedural bar are muddied up-

Ann Taliaferro:
It's a downfall.

Judge Brereton:
It's muddying up my idea of what a disputed issue that material fact is. I think that's what I frankly just need to look at and think about a little bit more. That's kind of ... I don't know ... When you say proposed findings, I don't know what you envision that even looking like.

Ann Taliaferro:
I don't know.

Judge Brereton:
I don't want more briefing. I have been briefed sufficiently.

Ann Taliaferro:
I know, I know, I know.

Mark Field:
I don't want more briefing.

Judge Brereton:
Yeah.

Ann Taliaferro:
None of us want more briefing.

Judge Brereton:
I think it's been briefed.

Ann Taliaferro:
I don't know if the court has questions about ... I don't know what I'm saying. If the court wants us to lay out the analytical structure or what you have ... I mean, but it's all in briefing. I don't know what the court ...

Judge Brereton:
I think it's briefed. I will tell you this, it's so extensively briefed that the briefing on some level is not helpful because it's like I'm reading a book about what post-conviction is, right? Which is very different than having the arguments in what you would do within page limits, right? It's just a very different kind of context. I think I need to sit and think a little bit more, but I'm not certain ... It's not a situation where I'm making findings. I think that's what I would do at an evidentiary hearing, right?

Mark Field:
Yeah, I think that that's exactly right.

Ann Taliaferro:
I'd also point out, too, that procedural bar, the state can raise procedural bars at any time, and so even if the court said there's findings of facts here, let's just have a hearing, the state can still raise procedural bar even after that hearing and say when there might be more findings about whether there's ineffectiveness. I'm just throwing that out there too.

Judge Brereton:
The one question that I ... It does seem to me that there's some dispute about what even to be procedurally barred means, right? You're not necessarily agreeing on what that means. It almost seems as if I have to take into account the procedural facts and make it ... I don't know. It almost seems like that's mixed in terms of fact and law. I don't know.

Mark Field:
This is just my own view. I think it's smart to spend some time thinking about the procedural bars and what they mean, how they apply. I think in the briefing, we explain our own views of it, and you can look at it. There's also, if you have a law clerk, they can look at ...

Judge Brereton:
I have a law clerk, but shared among many, so it's not ...

Mark Field:

Oh, okay. Fair enough. Fair enough.

Judge Brereton:

I'm not the court of appeals.

Mark Field:

Right

Ann Taliaferro:

I would again point the court to Gregg vs State and see how they went through that.

Judge Brereton:

Okay. Well, as much as I would love to rule today, as I indicated, I'm not going to. I'm going to take it under advisement. I'm not, at this juncture ... I think what I'm inclined to do is an oral ruling, frankly, and I'm wondering if I can just set something right now that will fit in your schedules. It's going to be a little farther out than I would like just because of I'm going out of town and gone for the next little bit. As I'm looking at my schedule, I think I could do it on ... Really what's probably best for me is the morning of January 23rd.

I may in fact contact you and say I need more time or that I've changed my mind and I'm going to write it, but I just tentatively would like to kind of give myself a deadline and see if that works for you for an oral ruling.

Mark Field:

That works for me.

Judge Brereton:

Does that work for counsel?

Ann Taliaferro:

Sure.

Judge Brereton:

Let's set it at 10:00 on January 23rd, and my intent would be to issue an oral ruling at that time, as I indicated. I'll let you know if that changes. It's been very helpful. Thank you. I'm happy to do that by WebEx too. You don't need to come in. You can do it either way. We can do it by WebEx, and I can include Mr. Wright on WebEx ruling as well.

Ann Taliaferro:

That would be great.

Judge Brereton:

Do you want me to plan on doing it that way?

Mark Field:

I'm close enough, I can do either one.

Ann Taliaferro:
We'll still come in person.

Judge Brereton:
Yeah. I'll be here, so I can do it however you'd like. I don't ... Is Mr. Wright housed far away?

Ann Taliaferro:
He's in Gunnison.

Jensie Anderson:
He's in Gunnison, but we could probably have him come in. I mean, they bring people into hearings on WebEx.

Judge Brereton:
It's probably much more convenient for Mr. Wright to appear by WebEx, just given the drive to Gunnison. I will not order his transport. I'll order transport, but WebEx.

Ann Taliaferro:
To the WebEx room.

Judge Brereton:
To the WebEx.

Mark Field:
Okay. We can be here in person.

Judge Brereton:
You may be here. I will be sitting right here, so if you'd like to come in, you can. I have WebEx going. I always have it going, so that's also an option. If you want the link, and you don't want to come, let me know. Thank you so much. Have a nice day.

Ann Taliaferro:
Thank you, Your Honor.

Mark Field:
Thank you, Your Honor.

Bailiff:
All rise.

PART 5 OF 5 ENDS [02:41:23]

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