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J.B. Parker v. State of Florida

CHIEF JUSTICE: GOOD MORNING. IF COUNSEL IS READY ON PARKER VERSUS STATE, YOU MAY PROCEED.

THANK YOU, YOUR HONOR. MY NAME IS DAVID LAMOS FROM FIRST PEERS. SEATED WITH ME -- FROM FT. PIERCE. SEATED WITH ME IS DAVID COSTO WHO HAS COME A LONG WAY FROM NEW YORK. IT HAS BEEN A LONG TIME, AND I WAS THE LEAD TRIAL COUNSEL ON THIS MATTER. YOUR HONORS, THERE ARE THREE REASONS WHY MR. PARKER SHOULD RECEIVE A NEW SENTENCING, WITHOUT AND AND ONING ANY ISSUES IN THE BRIEF. MR. PARKER'S PRESENTATION FOR RESENTENCING AROSE FROM THIS COURT'S OPINION IN 1998, WHEREIN MR. PARKER WAS GRANTED BY THIS COURT A RESENTENCING, BECAUSE THE STATE IN ORIGINAL SENTENCING PROCEEDING, PRESENTED, WAS DENIED PRESENTATION OF EVIDENCE OF INCONSISTENT TESTIMONY AND SO FORTH. THE APPROACH IN RESENTENCING WAS 3-PRONG, FIRST TO ELIMINATE ADMISSIBLE EVIDENCE AND AGGRAVATION, SECOND, TO DEMONSTRATE INCONSISTENT POSITIONS AND INCONSISTENT ARGUMENTS, WHICH WERE PURSE UNION TO BRADY VIOLATION, NOT KNOWN AT THE TIME OF THE ORIGINAL CASE, AND FINALLY, TO THE COMMENTS OF SIXTH AMENDMENT CHARACTER WHICH WERE MADE BY THE PROSECUTOR IN CLOSING ARGUMENT AND INSTRUCTIONS AND WE ASSERT IMPROPERLY MADE. THESE THESE ARE THE -- THESE ARE THE THREE PRONGS ON WHICH WE ASSERT MR. PARKER SHOULD RECEIVE A RESENTENCING. THE FIRST IS A MANIFEST AND A MOTION THAT WE FILED TO REQUEST A NEW TRIAL.

ON THIS, YOU NEED TO HELP ME WITH THE PROCEDURAL POSTURE. THIS IS, REALLY, JUST WAS GOING TO THE MAY 7 STATEMENT, CORRECT?

YES, YOUR HONOR.

THE RECORD IS NOT CLEAR, BUT THE STATE, REQUEST WHY -- WHY DIDN'T THE STATE SEEK TO INTRODUCE THE MAY 5 STATEMENT. THE MAY 5 STATEMENT, YOUR HONOR, WAS SOUGHT TO, OR SOUGHT, WAS ADMISSIONS FROM PARKER.

DID ANYONE TRY TO INTRODUCE THAT IN THIS PROCEEDING?

NO, YOUR HONOR. THAT WAS RULED INADMISSIBLE IN AN EARLIER PROCEEDING.

BUT IT WAS RULED INADMISSIBLE BY THE ELEVENTH CIRCUIT THIS. COURT NEVER RULED IT INADMISSIBLE.

CORRECT.

BUT YOU ARE SAYING, IS THERE SOMETHING IN THE RECORD THAT SAID THE STATE ACKNOWLEDGED THAT, BECAUSE THE LEFT CIRCUIT MADE THAT DECISION, THAT THAT WOULD GOVERN, SOMEHOW, THIS PROCEEDING?

YES, YOUR HONOR, THE STATE TOOK THE POSITION THAT IT WOULD NOT SEEK TO INTRODUCE EVIDENCE AT THE MAY 5 STATEMENT, BASED UPON THE POSITION OF THE ELEVENTH CIRCUIT.

YOU WANTED TO PUT ON EVIDENCE, SO DO WE HAVE TO, FOR THIS APPEAL TO ACCEPT WHAT YOU ARE SAYING, REVISIT, THEN, OUR DIRECT APPEAL OPINION THAT UPHELD THE ADMISSION OF THE

MAY 5 STATEMENT?

I DON'T BELIEVE SO. THE MAY 7 STATEMENT IS A DERIVATIVE OF THE MAY 5.

BUT WE UPHELD THE MAY 5 STATEMENT.

LEFT CIRCUIT --

WE ARE NOT BOUND BY WHAT THE ELEVENTH CIRCUIT HAS TO SAY.

I UNDERSTAND THAT, YOUR HONOR, BUT THE REASON WE ARE SEEKING TO HAVE THE MAY 7 STATEMENT RULED INADMISSIBLE IS BECAUSE OF INTERVENING CASE LAW WHICH OCCURRED BETWEEN THE --

DIDN'T, YOU HAD EDWARDS OUT THERE UNDER THE FIFTH AMENDMENT, BEFORE JACKSON.

WELL, YOUR HONOR, JACKSON IS AN INTERVENING CASE, AND AS IT WAS BRIEFED, WE BELIEVE IT TO BE BECAUSE THIS CASE WAS NOT FINAL IN THE PIPELINE.

BUT WASN'T THE, EVEN MORE BASIC IS WASN'T THE MAY 7 STATEMENT INCLUDED IN THE ORIGINAL MOTION TO SUPPRESS, AND SO WHY IS IT THAT YOU SHOULD NOW HAVE ANOTHER OPPORTUNITY TO ADJUDICATE THE VOLUNTARINESS OF THAT STATEMENT, IF IT WAS, IN FACT, INCLUDED IN THE ORIGINAL MOTION TO SUPPRESS?

YOUR HONOR, THE GROUNDS UPON WHICH THE DEFENDANT RELIES IN THIS PARTICULAR CASE, WERE DIFFERENTLY ASSERTED, IN THE, IN THE NEW MOTION, AND, REALLY, THE BASIS OF OUR CLAIM --

WASN'T THAT IS A GROUND THAT COULD HAVE BEEN RAISED, I MEAN, YOU COULD HAVE RAISED IN THE ORIGINAL MOTION, THAT THE MAY 7 STATEMENT WAS DERIVATIVE OF THE MAY 5 MOTION, COULDN'T YOU HAVE?

YES, YOUR HONOR, BUT IT FLIES, THIS CASE REALLY NEEDS TO FOCUS ON THIS COURT'S OPINION IN PRESTON, WHICH STATES THAT A RESENTSING IS AN ENTIRELY NEW PROCEEDING, AND PROCEEDS IN ALL RESPECTS, AS AN ENTIRELY NEW PROCEEDING, SO THE POSITION OF GOING BACK TO 1983 TO DETERMINE WHETHER SOMETHING COULD HAVE BEEN RAISED OR MIGHT HAVE BEEN RAISED OR WAS LITIGATED OR COULDN'T BE RELITIGATED, IS, IGNORES THIS COURT'S PRESS GENTDENT IN PRESS -- THIS COURT'S PRECEDENT IN PRESTON. IT SAYS THAT RESENTENCING --

TELL ME PRECISELY HOW THE MATTER WAS PRESENTED TO THE TRIAL COURT IN THIS CASE, AND WHAT, DID THE TRIAL COURT HAVE A HEARING?

NO.

OKAY. AND WHAT DID THE TRIAL COURT DO, IN RESPONSE TO THE MOTION?

QUASHED THE MOTION TO SUPPRESS, WITHOUT EVIDENTIARY HEARING.

OKAY. WAS, AND SO WAS THE MATTER JUST NEVER DISCUSSED?

YES, YOUR HONOR. THAT IS PRECISELY THE POINT, AND THAT IS WE ASSERT --

WITH THAT POINT, BECAUSE IT IS CRITICAL AS TO YOUR CLAIM, WHETHER MR. PARKER INITIATED THE MAY 7 VIEW OF THE SCENE BY HIMSELF OR WHETHER THE POLICE INITIATED IT, BUT I AM HAVING PROBLEMS WITH T I AM NOT SURE. WE WILL HAVE TO ASK THE STATE WHETHER THIS GETS INTO WAIVER OR WHATEVER. MR. PARKER HAD THE OPPORTUNITY, AT THE EVIDENTIARY

HEARING ON THE 3.850, BACK IN HOWEVER MANY YEARS AGO, TO PUT ON WHATEVER HE WANTED ABOUT WHAT WAS DEAF HE SHOULD ABOUT THE ORIGINAL TRIAL COUNSEL'S PRESENTATION, AND THERE IS ABSOLUTELY NOTHING IN THERE ABOUT WHAT OCCURRED BETWEEN MAY 5 AND MAY 7, AND WAS THERE A PROFFER IN THIS RECORD THAT YOU WOULD HAVE SHOWN, IF YOU WOULD HAVE BEEN ABLE TO HAVE A HEARING, THAT IN FACT, MR. PARKER WOULD TESTIFY THAT HE DID NOT INITIATE THE MAY 7 STATEMENT, THAT THIS WAS SOLELY POLICE INITIATED?

YES, MA'AM.

THERE IS THAT PROFFER?

YOUR HONOR, THAT PROFFER IS CLEARLY IN THE MOTION TO SUPPRESS WITH ATTACHED TRANSCRIPT, FROM THE ORIGINAL MOTION TO SUPPRESS HEARING, WAS ATTACHED AS AN EXHIBIT TO THE PRESENT SECOND MOTION TO SUPPRESS, WHERE THE HEARING WAS DENIED. THE MOTION WAS WASED, NOT HEARING WAS DENIED, WITHOUT EVIDENTIARY HEARING.

COULD YOU COME BACK TO SQUARE ONE ON THIS ISSUE AND JUST TELL US WHAT DID OCCUR IN THE TRIAL COURT, WHAT YOUR MOTION WAS, WHAT THE STATE'S POSITION WAS ABOUT THE MOTION, AND THEN WHAT ACTION THE TRIAL COURT TOOK, AND THEN GIVE US YOUR POSITION WITH REFERENCE TO WHY YOU BELIEVE THAT WAS AN ERRONEOUS RULING.

YES, YOUR HONOR. I ASSUME THAT YOUR HONOR'S QUESTION GOES TO THE SECOND MOTION TO SUPPRESS.

YES.

THE MOTION TO SUPPRESS, THE SECOND MOTION TO SUPPRESS ALLEGED THAT THE SECOND STATEMENT WAS THE POLICE-INITIATED INTERROGATION AND WAS NOT A SPONTANEOUS VOLUNTEERED STATEMENT AND SIXTH AMENDMENT ARTICLE I SECTION 9 ARTICLE I ISSUES AND SO FORTH. THE STATE TOOK THE POSITION THAT THE MATTER HAD ALREADY BEEN LITIGATED ANIMATERS WERE EXHAUSTED AND BECAUSE IT WAS RELITIGATING, THERE WAS NO NEED TO HEAR A MOTION ON THE ISSUE. THE TRIAL COURT AGREED WITH THAT POSITION. WE ARGUED STRENUOUSLY THAT PRESTON SAYS IN ALL RESPECTS THIS IS AN ENTIRELY NEW PROCEEDING, AND IF THAT HOLDS, WE ARE ENTITLED TO PRESENT NEW ISSUES, BECAUSE THE PENALTY PHASE CLEARLY HAS AN EXCLUSIONARY RULE WHICH SAYS THAT RULES OF EVIDENCE OPEN UP EXCEPT AS IN MATTERS THAT CONTAIN EVIDENCE OR ARE IN VIOLATION OF THE STATE CONSTITUTION, SO THEREFORE A HEARING IS MANDATED, AND ON THE ISSUE OF LITIGATION, WHETHER IT IS RELITIGATION, THE STATE HAS CITED A CASE CALLED FAR I KNOW, A BUT IF YOU -- FARINA, BUT IF YOU READ FARINA CLOSELY, IT SUPPORTS THE POSITION AS IT WAS HELD. IN ORDER TO SUPPRESS THE ISSUE, THE EVIDENTIARY HEARING WAS NEEDED TO BE HAD TO FLASH THE ISSUES IN THE SECOND MOTION AND COMPARE IT TO WHAT HAD BEEN PREVIOUSLY LITIGATED.

HOW FAR DOES THAT GO, AND EVEN WITH PRESTON THAT YOU CITE AS AUTHORITY, HOW FAR DOES IT GO THAT YOU CAN RELITIGATE ISSUES THAT WERE RAISED IN THE GUILT PHASE OF THE PROCEEDINGS?

YOUR HONOR, AS I PERCEIVE PRESTON, IT IS A RULE OF RESENTENCING AND NOT GUILT PHASE, THAT WHEN A COURT GRANTS A RESENTENCING UNDER PRESTON, AND I BELIEVE IT GOES BACK TO TEFFETELLER ABOUT PRIOR TO THAT, THAT TYPICALLY THE STATE COMES FORWARD AND INTRODUCE NEW EVIDENCE AND AGGRAVATION AND SO ON AND SO FORTH AND THAT IS FAIR GAME, BUT WHEN THE SHOE IS ON THE OTHER FOOT, CONSEQUENTLY, WE ARE RELITIGATING, SO WE DON'T UNDERSTAND THE POSITION THAT STATES THAT WE ARE RELITIGATING.

DO YOU IT IT THAT OUR CASE OF OWEN, WHICH HAD TO DO, OF COURSE, WITH A RETRIAL OF THE GUILT, THAT WE ARE, THAT A CONFESSION THAT HAD BEEN REPEATEDLY KEPT OUT, BECAUSE OF

CHANGES THAT OCCURRED BETWEEN THE FIRST CASE AND THE NEXT CASE, WE DID REVERSE OUR POSITION AND LET THAT CONFESSION IN. DOES THAT ASSIST YOU IN THIS, THE OWEN THEORY OF, THAT EVEN IF IT WAS ALREADY LITIGATED, THAT A SUBSEQUENT EVENT CHANGED THE PICTURE FOR THIS TIME?

WELL, I FRANKLY WOULD LOVE TO BE ABLE TO SAY I KNOW HOW TO RESPOND TO THAT QUESTION, BUT THE HONEST ANSWER IS, IN MY DEALING WITH THIS, WHILE THAT OPINION, AND I WOULD YIELD TO YOUR HONOR'S RESOURCES AND SO ON AND SO FORTH, I DON'T KNOW HOW TO ADDRESS THAT ONE, BUT I VIEW, BECAUSE WE ARE IN A RESENTENCING POSTURE, THAT WE ARE DEALING WITH UNIQUELY RESENTENCING ISSUES. I DON'T KNOW WHETHER THE GUILT PHASE SHOULD BE ALLOWED TO BE RELITIGATED OR NOT.

DID THE STATE PUT IT IN ITS RESENTENCING, AS OPPOSE TO RELYING ON WHATEVER THE TESTIMONY WAS IN THE GUILT PHASE? AS I UNDERSTAND IT, IN OTHER WORDS, IS THEY ACTUALLY PUT ON THE POLICE OFFICER OR DETECTIVE TO WHOM MR. PARKER SPOKE ON MAY 7, AND THAT DETECTIVE OR LIEUTENANT SPOKE IN AND TESTIFIED IN THIS RESENTENCING.

YES, YOUR HONOR. THAT IS EXACTLY CORRECT.

AND I KNOW, IN TERMS, BECAUSE THIS IS, YOU HAVE, PROBABLY, LIMITED TIME, BUT IS THE, WAS THERE ANY OTHER TESTIMONY IN THIS RESENTENCING ABOUT THE STATEMENT THAT PARKER MADE THAT THEY WERE GOING TO ALL, HAD CONSIDERED KILLING OFFICER BARGO?

NO, YOUR HONOR.

THAT WAS IT?

THAT WAS IT, AND IT WENT TO THREE AGS. IT WENT TO WITNESS ELIMINATION OF DETECTIVE BARGO. IT WENT TO ISSUES OF WHERE THE KNIFE WENT AND SO ON AND SO FORTH, SO IT CLEARLY IMPLICATED IN AT LEAST THREE AGGRAVATORS, BUT THE QUESTION IS NOTHING OF MAY 5 CAME IN, ONLY MAY 7.

SO YOU WOULD AGREE THAT YOU AT LEAST HAVE HAD AN EVIDENTIARY HEARING, THE REMEDY WOULDN'T BE TO TOTALLY SET ASIDE THE SENTENCE, WOULD IT? IN OTHER WORDS IT STILL COULD BE THAT YOU ARE NOT ABLE TO SHOW THAT THE MAY 7 STATEMENT WAS A PRODUCT OF WHATEVER HAPPENED ON MAY 5, AND THAT IT WAS, OR THAT THE STATE COULD SHOW THAT MR. PARKER VOLUNTARILY INITIATED THAT CONTACT, AND IF THAT WERE THE CASE, THEN THE SENTENCE WOULD STAND, WOULD YOU AGREE WITH THAT?

YOUR HONOR, I WOULD AGREE IT WOULD BE OUR POSITION THAT, IN ORDER TO ASSESS WHETHER THE MAY 7 STATEMENT WAS THE FRUIT OF THE 5th, MAY 5 STATEMENT, THAT AN EVIDENTIARY HEARING WAS MANDATED AND REQUIRED, IN ORDER FOR THAT POINT TO BE ADDRESSED. BECAUSE WE WERE DENIED AN EVIDENTIARY HEARING ON THE FRUIT OF THE MAY 5 STATEMENT, FOR THE REASONS SET FORTH IN THE MOTION AND IN THE BRIEF, THEN WE DON'T HAVE A PREDICATE FOR YOUR HONORS TO EXERCISE DISCRETION IN THE RECORD. I DON'T KNOW IF, I AM HOPING I AM BEING RESPONSIVE, BUT IT CANNOT BE SAID THAT, WITHOUT AN EVIDENTIARY HEARING, THE MAY 7 STATEMENT --

I UNDERSTAND, BUT YOU ARE SEEKING A REVERSAL OF THE WHOLE SENTENCING PROCEEDING, AND WHAT I AM SUGGESTING IS THAT, YOU KNOW, FROM MY POINT OF VIEW, ALTHOUGH I AM SOMEWHAT, I AM, I UNDERSTAND YOUR ARGUMENT ABOUT THIS, BUT I AM SOMEWHAT CONCERNED THAT, EVEN AT THAT, THE EVIDENTIARY HEARING ON THE 3.850, THERE WAS NO TESTIMONY TO SHOW THAT MR. PARKER WASN'T THE ONE THAT INITIATED THAT MAY 7 CONTACT, AND THEREFORE BROKE THE CHAIN THAT EDWARDS AND JACKSON, YOU KNOW, ALLOWED TO BE BROKEN. IT IS NOT LIKE IT IS, YOU DON'T JUST WIN BECAUSE HE HAD, YOU KNOW, HE HAD

ASSERTED HIS RIGHT TO COUNSEL ON MAY 5. YOU HAVE GOT TO SHOW SOMETHING ADDITIONAL.

YES, YOUR HONOR, BUT THERE IS THIS LACK OF CLARITY IN THE OPINIONS, I WOULD SUBMIT. IF THE NEW CASE RULE, UNDER TEFFETELLER, AND UNDER PRESTON, IF THE NEW CASE RULE MEANS WHAT IT SAYS, THEN IT WOULD APPEAR THAT WHAT HAPPENED IN PRIOR 3.850 PROCEEDINGS ON ISSUES OF WAIVER AND SO FORTH WOULD BE WITHOUT --

I THINK THE QUESTION, AS I UNDERSTAND JUSTICE PARIENTE, AND IF NOT THEN IT IS MY QUESTION, IS IF THE TRIAL COURT ERRED, IT WAS DETERMINED, BY NOT HOLDING A HEARING, AND IT WAS REMANDED TO A TRIAL COURT TO HOLD A HEARING, AND THE TRIAL COURT DETERMINED THAT THE MOTION TO SUPPRESS SHOULD BE DENIED ON THE BASIS OF THE EVIDENCE PRESENTED, THEN THAT WOULD NOT, AND THAT WAS AFFIRMED, THEN THAT WOULD NOT BE A BASIS FOR A NEW SENTENCING PROCEEDING.

WE GO TO THE PREJUDICE INHERENT IN THE STATEMENT, AND WE GET A JURY QUESTION EXACTLY WANTING A READ BACK.

UNDER MY SCENARIO AND JUSTICE WELLS'S, YOU LOSE THE MOTION TO SUPPRESS.

YES.

AFTER AN EVIDENTIARY HEARING, AND THAT IS AFFIRMED. THERE IS NOTHING, THEN --

IT IS OVER.

SO THEREFORE THAT IS WHY I GUESS ARTFULLY SAYING, SO AS A DISCREET QUESTION THAT DOESN'T, AT THIS POINT, IF YOU ARE CORRECT THAT YOU SHOULD HAVE HAD AN EVIDENTIARY HEARING ON YOUR MOTION TO SUPPRESS, AND IF YOU ARE-IF YOU DO NOT PREVAIL, THEN -- AND IF YOU DO NOT PREVAIL, THEN THE SENTENCE, I GUESS WE HAVE OTHER POINTS, BUT IF WE DON'T AGREE WITH YOU ON YOUR OTHER POINT, THEN THE SENTENCE REMAINS.

AS I UNDER YOUR QUESTION IF THE HEARING WAS HAD AND THE EVIDENCE TO SUPPRESS WAS DENIED AND IT WAS TAKEN ON APPEAL --

BUT YOU ARE TALKING ABOUT A LIMITED REMAND ON THAT PURPOSE, AS FAR AS REALM DISH EW. IS THAT --

NO, YOUR HONOR.

THAT IS WHAT IS REALLY BEING ASKED YOU.

I UNDERSTAND THAT AND IT IS COMING CLEAR, BUT WHAT I AM REALLY SAYING IS HOW CAN WE SAY, IN LIGHT OF SENTENCING, WHEN WE ARE SAYING THIS IS HARMLESS BEYOND A REASONABLE DOUBT?

WE ARE NOT SAYING THAT. WE ARE SAYING THE SCENARIO, IF THE JUDGE FOUND, THAT IS ANOTHER BRIDGE, IT WOULD BE UP TO, I GUESS, TO CROSS, BUT NOW YOU ARE IN REBUTTAL.

I UNDERSTAND.

CHIEF JUSTICE: WE ARE ALREADY TO YOUR REBUTTAL TIME.

THANK YOU VERY MUCH.

CHIEF JUSTICE: OKAY GOOD MORNING. MELANIE DALE ON BEHALF THE STATE.

THE FARINA OR OWENS OR WHAT CASES GOVERN IT, BUT WOULD YOU START, WITH THE LEFT CIRCUIT'S OPINION IN THIS CASE, IF YOU READ THE LEFT CIRCUIT OPINION AND OUR DIRECT APPEAL OPINION, YOU THINK YOU ARE TALKING ABOUT TWO DIFFERENT CASES, BECAUSE THIS WHOLE ISSUE ABOUT THAT THIS STUDENT INTERN, ON MAY 5, THAT WAS ADVISING MR. PARKER THAT NOT ONLY WAS HE HE A STUDENT INTERN BUT THERE WAS A CONFLICT OF INTEREST ON THAT DATE BY THE PUBLIC DEFENDERS OFFICE EVEN ADVISING MR. PARKER IS NOT MENTIONED IN OUR DIRECT APPEAL. IT WAS NOT, SO THAT IS THE FOCUS ON THE ELEVENTH CIRCUIT OPINION. DOES THE STATE, IN NOT SEEKING TO EVEN ADMIT THAT MAY 7 STATEMENT, DID YOU DO THAT BASED ON THE ELEVENTH CIRCUIT OPINION?

THE MAY 5 STATEMENT, YOU MEAN.

RIGHT.

YES. THAT WAS THE STATE ATTORNEYS'S BELIEF, AS THE LEFT CIRCUIT HAD COME DOWN, EVEN THOUGH WE WON IN THE LEFT CIRCUIT THAT, THE OPINION WAS OUT THERE, AND, REALLY, THE STATE SAID OKAY, WE WILL USE THE STATEMENT THAT IS, WE KNOW IS GOOD.

OKAY. NOW, THE ONLY, WE KNOW IT IS GOOD IS OBVIOUSLY A MAY 5 STATEMENT FAILS, UNDER W.

NG -- UNDER WONG SUN, THERE IS THE POTENTIAL OF ACCLAIMED STATEMENT, AND WHEN SOMEONE INVOKES THEIR RIGHT TO COUNSEL, THIS THERE IS IN EDWARDS AND JACKSON, IN BOTH THE FIFTH AND SIXTH AMENDMENT, AS TO, AS TO THE NEXT QUESTION, INITIATES THE NEXT CONTACT. SEEING AS HOW THIS ALL AROSE WHEN IT WAS IN THE RECORD, AS FAR AS THE MAY 5 APPEAL, FOR THE TWO STATEMENTS OR THE ONE STATEMENT, WHY WOULDN'T THE APPROPRIATE THING WHERE THE STATE IS NOW TRYING TO PUT IN THE EVIDENCE IN THE RESENTENCING, THEY ARE NOT RELYING ON, WELL, DON'T FORGET ABOUT THE LEFT CIRCUIT STATEMENT, YOU JUST GO BACK AND PRETEND THAT DIDN'T HAPPEN. WHY ISN'T THAT APPROPRIATE, UNDER THE CLEAN SLATE RULE, TO ALLOW, AT THE VERY LEAST, IT IS NOT EVEN RELITIGATION. THE LITIGATION OF THE MAY 7 STATEMENT ON THE BASIS THAT THE MAY 5 STATEMENT WAS OBTAINED IN VIOLATION OF HIS RIGHT TO CONFLICT-FREE COUNSEL, AND HE INVOKED HIS RIGHT TO SILENCE, AND THEREFORE WE NEED TO KNOW WHAT HAPPENED BETWEEN MAY 5 AND MAY 7, TO KNOW WHETHER THAT STATEMENT IS GOOD OR NOT, AND WE DON'T KNOW THAT.

WELL, TO GO RIGHT TO THE MERITS IN THE CASE, YES, WE DO. IF YOU LOOK AT THE PRIOR MOTION TO SUPPRESS HEARING, WHICH IS ALL YOU WOULD NEED TO DO, AT VOLUME III, SHERIFF HOLT TESTIFIES ON PAGE 420, HE TESTIFIED THAT ON MAY 5, THE DEFENDANT INITIATED CONTACT WITH HIM. THEN DEPUTY POWERS, WHO IS THE DEPUTY WHO TESTIFIED WITH RESPECT TO THE MAY 7 STATEMENT, TESTIFIES THAT HE WAS TOLD MR. PARKER'S INITIATING CONTACT AND WANTS TO SPEAK TO US.

AGAIN, THAT IS YOU MEAN AFTER MAY 5, BECAUSE THE MAY 5 IS OUT.

THAT IS ON MAY 7, FOR THE MAY 7 CONVERSATION THAT DEPUTY POWER --

WHERE IS THAT IN THE RECORD?

IN VOLUME III AT PAGE 444.

POWERS IS BEING TOLD THAT --

HE IS INITIATING CONTACT.

DOES HE DISPUTE THAT?

THERE IS NO DISPUTE IN THAT MOTION TO SUPPRESS. THE ORIGINAL MOTION TO SUPPRESS HEARING IS WHAT THE CLAIM IS HERE, IS THAT THE ORIGINAL TRIAL JUDGE'S RULING IS ERRONEOUS UNDER MICHIGAN V JACKSON.

I AM MORE LOOKING AT THE FACT THAT THIS COURT DIDN'T HAVE, BEFORE IT, A CLAIM THAT THE COUNSEL THAT WAS ADVISING MR. PARKER ON MAY 5, WAS NOT, WAS A LAW STUDENT WHO, AND THE PUBLIC DEFENDERS OFFICE HAD A CONFLICT, AND THAT IS WHAT, TOPT, THAT THE STATE, BICEPING -- IT SEEMS TO ME THAT THE STATE, BICEPING, THAT THE LEFT CIRCUIT OPINION IS VALID, PUTS US IN A POSITION THAT WE ARE GOING TO GO BACK TO WHAT WE SAID ON DIRECT APPEAL, WHEN WE HAD NO IDEA THERE WAS A CONFLICT OF INTEREST. THAT WAS NEVER RAISED ON THE DIRECT APPEAL.

THE MAY 7 STATEMENT WAS ABANDONED ON DIRECT APPEAL. THE MAY 7 STATEMENT WAS ONLY RAISED PRETRIAL. DIRECT APPEAL ON THIS CASE, THE ONLY ISSUE RAISED WAS MAY 5. THAT WAS AFFIRMED, AND THEN THIS DEFENDANT HAD OPPORTUNITY, 3.850 AND STATE HABEASES TO RAISE AN EFFECTIVE CLAIM AND DID NOT. THIS CLAIM WAS PREVIOUSLY ABANDONED, WHICH HAS BEEN THE STATE'S POSITION ALL ALONG. I ADDRESS THE MERITS, BECAUSE IT CAN BE REFUTED FROM THE RECORD. HOWEVER, THE STATE'S POSITION FROM THE BEGINNING HAS BEEN THAT THIS CLAIM IS PROCEDURALLY BARRED, AND THIS CASE IS EXACTLY LIKE FARINA. FARINA DID HAVE A HEARING ON THE MOTION TO STRIKE BY THE STATE. WE HAD A HEARING ON THE STATE'S MOTION TO QUASH. THERE WAS DISCUSSION IN COURT. VOLUME IV, PAGES 649-TO-683, THERE WAS ARGUMENT BETWEEN COUNSEL REGARDING THE MOTION TO QUASH. THAT IS WHAT HAPPENED IN FARINA. FARINA, THE DEFENDANTS WERE, AGAIN, TRYING TO SUPPRESS A STATEMENT THAT HAD BEEN RAISED AT THE PRIOR TRIAL. ON RESENTENCING, THE TRIAL COURT HELD, AND THIS COURT AFFIRMED, THAT A DEFENDANT CANNOT NOW COME BACK AND RELITIGATE SOMETHING THAT HE COULD HAVE RAISED PREVIOUSLY. THIS CLAIM WAS ABANDONED IN THIS CASE.

IT SEEMS TO ME THAT, IF IT WAS ABANDONED, THEN SOMEBODY WAS PATENTLY INEFFECTIVE, AND WE WERE JUST WRONG WHEN WE SAID NOBODY WAS INEFFECTIVE IN OUR DIRECT APPEAL OF THE 3.850.

WELL, THIS CLAIM HAS NEVER BEEN BEFORE THE COURT. THE ONLY TIME THIS CLAIM HAS BEEN RAISED IS IN FEDERAL COURT, SO IT IS NOT PROPERLY HERE EITHER. IT IS BARRED FROM BEING RAISED IN THIS POSITION. IT HAS TO BE RAISED PROPERLY, AND IT HAS NEVER BEEN DONE IN THIS CASE.

DOES FARINA CONFLICT WITH OTHER CASES FROM THIS COURT CONCERNING THE LAW OF THE CASE DOCTRINE, WHICH SAYS THAT THAT DOCTRINE APPLIES ONLY TO MATTERS THAT WERE ACTUALLY RAISED AND CONSIDERED ON APPEAL?

WELL, THAT IS SOME OF THE QAUNDLY -- QUANDRY WE HAVE HERE. WE HAVE LAW OF THE CASE. HOWEVER, LAW OF THE CASE AND RACE ADJUDICATA AND -- AND RES ADJUDICATA AND DOCTRINES LIKE ESTOPPEL ONLY COME DOWN TO HERE, THE CLAIM COULD HAVE BEEN RAISED, UNDER SOMETHING THAT IS DISCUSSED UNDER THE REST JUDD CAT DOCTRINE. IT COULD -- OF THE RES JUDD CAD A DOCTRINE. THE DEFENDANT HAD THE OPPORTUNITY TO RAISE THE MOTION TO SUPPRESS AND HAD A 3.WILL 50 HABEAS AND THEN AGAIN -- HAD A 3.850 HABEAS AND THEN AGAIN ANOTHER POSITION ON THE 3.850 AND IT HAS NEVER BEEN RAISED AND.

I UNDERSTAND THAT IS YOUR POSITION WITH REGARD TO FARINA, HOWEVER IT RAISED OTHER CASES AND I DON'T THINK THIS IS RACE ADJUDICATA BECAUSE IT IS -- RACE JUDD CAD A BECAUSE IT IS THE -- RES ADD ADJUDICATA. IS THAT SOMETHING WITH OTHER CASES?

IT IS SOMETHING THAT COULD HAVE BEEN RAISED. REALLY. LAW IS SOMETHING THAT COULD

HAVE BEEN RAISED. IT IS MORE SPECIFIC. RES JUDD CAD A COULD HAVE BEEN APPLIED HERE BECAUSE IT IS BROADER. IT IS PART OF THE SAME PROCEEDING FCHT IT WAS DIFFERENT PROCEEDINGS, THEN WE WOULD HAVE COLLATERAL ESTOPPEL.

BUT ISN'T THAT THE KEY TO THE PROBLEM THAT IS PRESENTED HERE, IS THAT WHEN THERE, WHEN THE MATTER IS TO BE PRESENTED TO THE SAME JURY AND YOU HAVE ONE MOTION TO SUPPRESS HEARING, AND THOSEISH ISSUES ARE -- THOSE ISSUES ARE DETERMINED IN THAT MOTION TO SUPPRESS HEARING FOR THE TRIAL, WHICH IS GOING TO BE BOTH THE GUILT AND THE PENALTY PHASE, BUT HERE WE HAVE GOT A NEW JURY. WE HAVE GOT A NEW CONSIDERATION THAT ARE BEING PRESENTED, AND THE STATE PRESENTED THE EVIDENCE FOR, ON THE BASIS OF WHAT WAS SAID TO DETECTIVE POWELL, AS PART OF THE PENALTY PHASE PROCEEDINGS ONLY, TO A NEW JURY! AND SO THE, ISN'T THE SENSE OF OUR PRESTON, THE WHOLE CLEAN SLATE THING IS, WHEN THAT IS GOING TO HAPPEN, THEN THE TRIAL JUDGE HAS GOT TO TREAT THIS DE NOVO. THEY HAVE GOT TO TREAT IT LIKE THEY HAVE GOT TO GO THROUGH AND TEST ALL THAT EVIDENCE THAT IS GOING TO COME IN.

I WOULD DISAGREE WITH THAT, IN THIS CASE, BECAUSE THE CLAIM WAS THAT THE TRIAL COUNSEL, THE TRIAL COURT'S RULING BEFORE WAS ERRONEOUS. IT WASN'T THAT THE MOTION TO SUPPRESS HEARING WAS NO GOOD. IT WAS THE RULING WAS ERRONEOUS BECAUSE OF MICHIGAN V JACKSON, SO I WOULD SUBMIT THAT HERE YOU WOULD TAKE THE CASE LAW OF MICHIGAN V JACKSON APPLY IT TO THE ORIGINAL MOTION TO SUPPRESS HEARING.

BUT HE WANTED TO PUT ON, I THOUGHT HE WANTED AN EVIDENTIARY HEARING ON HIS MOTION TO SUPPRESS, TO DEVELOP THE RECORD AS TO WHAT OCCURRED AFTER MAY 5, TO LEAD TO THIS MAY 7 STATEMENT.

WELL --

IS UNDEVELOPED, YOU SAY IT IS SORT OF DEVELOPED, BUT I AM SAYING THAT IS WHAT THE DEFENDANT WANTED TO DO, AND HE WAS DENIED THAT RIGHT. BECAUSE OF A RULING THAT OCCURRED IN 20, YOU KNOW, 15 YEARS BEFORE.

THAT IS WHAT WAS ARGUED BELOW, BUT I WOULD EVEN GO SO FAR AS TO SUBMIT THAT, ON THE MERITS, THE DEFENDANT LOSES, BECAUSE OF THE CLAIM HE HAS MADE. THERE WAS A FULL HEARING, AND THAT HEARING WAS ATTACHED TO THE DEFENDANT'S MOTION TO SUPPRESS. THIS COURT CAN GO AND READ THAT AND APPLY MICHIGAN V JACKSON.

WHAT ARE THE ACTUAL ALLEGATIONS THAT WERE MADE IN THE ORIGINAL MOTION ABOUT THE MAY 7 STATEMENT?

IT WAS A CURSE OTHER THAT IT WAS, IT ATTACHES BECAUSE THE MAY 5 STATEMENTS ARE INADMISSIBLE. THERE WAS NOT A DEVELOPMENT IN THE INITIAL MOTION TO SUPPRESS.

BUT --

-ORIGINAL TRIAL.

BUT IT WAS AN ATTACHMENT TO THE MAY 5. ARE YOU SAYING THAT THE ARGUMENT WAS THAT THE MAY 7 STATEMENTS FALL, BECAUSE THEY ARE A PRODUCT OF THE MAY 5? I MEAN, THAT IS WHAT THEY ARE ALLEGING NOW. IS THAT WHAT THEY WERE ALLEGING THEN?

SEEMINGLY. IT REALLY WASN'T A CLEAR REPRESENTATION FROM THE ORIGINAL, THE ORIGINAL MOTION TO SUPPRESS HAD ONE STATEMENT WITH RESPECT TO THE MAY 7 STATEMENT.

WHAT ABOUT THE ORIGINAL HEAR? HOW WAS IT DEVELOPED THROUGH THE WITNESSES?

WITH RESPECT TO THE MAY 5 AND THE MAY 7 STATEMENT, BECAUSE WE HAD BOTH SHERIFF HOLT, WHO TESTIFIED THAT HE SPOKE WITH THE DEFENDANT ON MAY 5, AND THEN THE STATE CALLED DEPUTY POWERS TO EXPLAIN THAT THE DEFENDANT HAD INITIATED CONTACT WITH HIM AS WELL. SO IT WAS DEVELOPED AT THE ORIGINAL MOTION TO SUPPRESS. THAT IS ENOUGH TO TAKE IT OUT OF THE REALM OF MICHIGAN V JACKSON. THE ELEVENTH CIRCUIT HAS A CASE, SMITH V DUGGAR. THE CITE IS 800 F-3d 787. IT IS AN APPLICATION OF MICHIGAN V JACKSON IN A CASE WHERE THE PRIOR MOTION TO SUPPRESS RECORD SHOWS THAT THERE WAS, THE DEFENDANT INITIATED THE CONTACT.

YOU ARE REALLY, AND I, BUT FOR THIS LEFT CIRCUIT OPINION IN THIS CASE, AND THE DEVELOPMENT OF THE CONFLICT OF INTEREST ASPECT OF THAT OPINION, WHICH IS NOWHERE, NOWHERE IN THE ORIGINAL RECORD, I WOULD UNDERSTAND, AND MAYBE YOU WOULD HAVE MORE OF A FARINA AND ASSUMING THAT WE CAN TAKE FARINA AND FIGURE OUT HOW THAT GOES ALONG WITH THE CLEAN SLATE AND WITH OUR PRONOUNCEMENTS IN CIVIL CASES, BUT ASSUMING WE GOT PAST THAT, THAT IS, TO ME, A VERY SIGNIFICANT DIFFERENCE AS TO WHAT, BOTH, THIS, BOTH WHAT THE CIRCUIT COURT WAS LOOKING AT AND WHAT OUR OBLIGATION IS, WHICH IS WE ARE ACCEPTING THE FACT NOW, THAT WE KNOW THERE WAS CONFLICT, THERE WAS NOT CONFLICT-FREE COUNSEL, SO NO ONE EVER REALLY WORRIED ABOUT THE MAY 7 STATEMENT, BECAUSE THE MAY 5 STATEMENT WAS GOOD. NOW WE KNOW, BASED ON WHAT WE NOW HAVE IN THE RECORD AND BEING ENLIGHTENED BY THE ELEVENTH CIRCUIT, THAT, NO, THERE IS A REAL PROBLEM WITH THAT MAY 5 STATEMENT. THE STATE IS NOT SAYING TO US, NO, NO, YOU GO BACK TO YOUR ORIGINAL RULING ON THE MAY 5. IGNORE THE ELEVENTH CIRCUIT. THEY SAID, NO, THAT ISN'T GOOD, SO MY CONCERN IS THAT WE DON'T, THE DEFENDANT OUGHT TO HAVE A RIGHT TO DEVELOP WHAT, SOMETHING THAT WAS NEVER DEVELOPED, IS DID HE OR DIDN'T HE INITIATE THE MAY 7. IF HE DID, THEN YOU ARE HOME FREE.

THE PROBLEM IN THIS CASE IS THE LEAPT CIRCUIT AFFIRMED THE DEATH SENTENCE IN THAT CASE, WHILE THEY FOUND SOME PROBLEMS WITH THE MAY 5 STATEMENT, THIS CASE ONLY AROSE BECAUSE OF A BRADY VIOLATION AND THEN NEW ISSUES BEGAN COMING.

WHAT DID THEY SAY IN THE MAY 7 STATEMENT? THEY SAID THAT THEY WEREN'T GOING TO DEAL WITH THAT, BECAUSE IT WASN'T RAISED ON DIRECT APPEAL.

IT WAS BARRED, AND THAT GOES BACK TO OUR ORIGINAL POSITION, THAT THIS CLAIM COULD HAVE BEEN RAISED. THIS CLAIM WAS AVAILABLE AT THE TIME. IT COULD HAVE BEEN RAISED AND HASN'T BEEN PROPERLY RAISED.

TELL ME HOW WE PARS OUT THE CLEAN SLATE DOCTRINE OF ALL OF THE CASES THAT SAY THE STATE CAN COME BACK AND PUT ON AGGRAVATORS OR TRY TO ESTABLISH AGGRAVATORS THAT WERE REJECTED. THEY CAN PUT ON NEW EVIDENCE OF AGGRAVATORS. YET WHEN IT COMES TO A POTENTIAL THAT THERE IS ILLEGALLY-OBTAINED EVIDENCE, THAT THE STATE IS NOW NOT RELYING ON WHAT THEY USED, I MEAN, MAYBE YOU HAVE A DIFFERENT CASE THERE, USING THE PRIOR TESTIMONY, BUT ACTUALLY GOING TO PUT ON NEW TESTIMONY THAT WE SHOULD JUST IGNORE THAT THAT TESTIMONY MAY HAVE BEEN OBTAINED IN VIOLATION OF BOTH HIS FIFTH AND SIXTH AMENDMENT RIGHTS.

TESTIMONY REGARDING THE MAY 7 STATEMENT WAS PRESENTED AT THE ORIGINAL TRIAL AND PROCEEDING. IT JUST WASN'T ATTACKED.

I UNDERSTAND. BUT --

SO IT WAS THERE BEFORE.

DIDN'T PUT ON. YOU CALLED THE WITNESS IN THIS RESENTENCING PROCEEDING.

YES. AND WE, ALSO, CALLED HIM AT THE PRIOR TRIAL. SO, AND IT WAS NOT ATTACKED BEFORE.

I WOULD LIKE TO ASK A QUICK QUESTION ABOUT THE RING AND ISSUE THAT WAS IN THIS CASE. THERE WAS, RING HAS COME ALONG. THE DEFENDANT ACTUALLY RAISED IN SOME DIFFERENT WAYS, THE RIGHT, SOMETHING ABOUT AN UNANIMOUS VERDICT IN THIS CASE, THERE ACTUALLY IS A AGGRAVATOR OF KIDNAPING THAT IS, WAS UNANIMOUS FROM THE PRIOR CASE. ASSUMING THAT RETHINK HAS ANY APPLICATION TO FLORIDA, WHAT IS THE STATE'S POSITION ABOUT WHAT THAT WOULD MEAN IN THIS CASE?

THE PRIOR VIOLENT FELONY AGGRAVATOR? THE STATE'S POSITION IS THAT THAT THAT HAS BEEN FOUND BY AN UNANIMOUS JURY. IT IS AN AGGRAVATOR. THE JURY FOUND IT AND IT EXISTS IN THIS CASE AND RING WOULDN'T APPLY HERE. IN THE MOST SIMPLE FORMAT, I MEAN, THAT HAS BEEN THE ARGUMENT, AND UNLESS THERE IS ANY OTHER QUESTIONS, IT WAS FOUND BY TWELVE JURORS. AND BRIEFLY, I WANTED TO QUICKLY ADDRESS DEFENSE COUNSEL HAD MENTIONED HE WAS GOING TO TOUCH ON TWO OTHER POINTS. BOTH OF THOSE POINTS ARE POINTS WHERE THERE WAS A CURETIVE. THE JUDGE CURED ANY ERROR. THE DEFENSE, ANY ERROR WITH RESPECT TO DEPUTY BARGO'S DEPOSITION AND TESTIMONY THAT WAS MADE AT TRIAL, THE DEPOSITION WAS ENTERED IN CONTEXT. THERE IS NO ERROR, AND DEPUTY BARGO TESTIFIED HE WAS NEVER ABLE TO IDENTIFY ANYBODY BUT CODEFENDANT BUSH. THERE WAS NO HARM IN THAT SITUATION, AND TERRY WAYNE JOHNSON TESTIFIED THAT THIS DEFENDANT, MR. PARKER, WAS SITTING IN THE FRONT PASSENGER SEAT, AND THEN FINALLY, WITH RESPECT TO THE PROSECUTOR'S MISSTATEMENT DURING CLOSING ARGUMENT --

AS FAR AS THAT BEING A MISSTATEMENT, I REALIZE THAT THE PROSECUTOR SAID I DIDN'T MEAN TO SAY THAT, BUT HERE IT IS. WE ARE ON A RESENTENCING, AND THE PROSECUTOR KNEW, FROM, BECAUSE HE SAID IT AT THE TIME, HE SAID HE KNOWS HE IS NOT SUPPOSED TO ASK WILLIAMS ABOUT THE STATEMENT THAT BUSH MADE TO WILLIAMS. HE SAID THAT.

HE DIDN'T ASK HER.

HE DIDN'T ASK HER. RIGHT. SO NOW, HOW CAN THAT BE A MISSTATEMENT?

IT WAS, IN ARGUMENT, EVEN PROSECUTOR, HIMSELF, DIDN'T EVEN THINK THAT IS WHAT HE SAID, SO PROSECUTOR GOT UP AND SAID, THAT IS NOT WHAT GEORGE AND WILLIAMS TESTIFIED -- GEORGE ANN WILLIAMS TESTIFIED TO. SAID THIS IS THE TESTIMONY AND THIS IS THE EVIDENCE BEFORE YOU. THAT IS PROPER. EVEN IF TO STRETCH THERE WAS ANY ERROR, IT IS HARMLESS, BECAUSE THE TESTIMONY WAS BEFORE THE JURY AS TO WHAT GEORGE ANN WILLIAMS TESTIFIED TO, AND WE HAVE TERRY WAYNE JOHNSON'S TESTIMONY SAYING THAT PARKER SAID TO CAREFUL, GIVE ME THE GUN, WHEN -- TO CAVE, GIVE ME THE GUN, WHEN HE GOT OUT OF THE CAR, SO TO STRETCH IT, IT IS HARMLESS.

IS THIS DEATH SENTENCE PREDICATED ON THE FACT, ON PARKER BEING THE SHOOTER OR DOES IT MATTER?

IN THIS CASE IT WOULDN'T MATTER, EVEN THOUGH THIS --

WE HAVE GOT CAVE'S CASE, WHERE IT IS ASSERTED AND IT WAS FOUND THAT HE WAS THE SHOOTER.

NO. 1996 RESENTENCING, WHICH IS THE GOOD RESENTENCING OF ALFONSO CAVE, IT HAS NOT BEEN ASSERTED THAT HE IS THE SHOOTER. THE STATE ADMITTED, ON A MISTAKE IN USING TESTIMONY IN A PRIOR 1993 RESENTENCING, WHICH HAS SINCE BEEN OVERTURNED. IN THIS CASE, THOUGH, THE STATE HAS ALWAYS MAINTAINED THAT THIS DEFENDANT WAS THE TRIGGERMAN. IF THERE ARE NO FURTHER QUESTIONS, I WOULD REST ON MY BRIEF AND ASK --

WHAT, REMIND ME WHAT THE STATE OF CAVE CASE IS.

THE 1996 RESENTENCING HAS BEEN AFFIRMED BY THIS COURT, AND IT IS --
POSTCONVICTION.

IT IS IN POSTCONVICTION. IF THERE ARE NO FURTHER QUESTIONS, I WOULD REST ON MY BRIEF
AND ASK THAT THIS COURT AFFIRM THE DEATH SENTENCE. THANK YOU.

CHIEF JUSTICE: THANK YOU. COUNSEL, ANY REBUTTAL?

YES, YOUR HONOR. CITED IMPORTANTLY TO YOUR HONORS IS THE CASE OF GADSDEN VERSUS
STATE, WHICH CITES ANOTHER CASE, FARAZOLI VERSUS STATE. BOTH OF THESE SPEAK TO THE
SUFFICIENCY OF AN EVIDENTIARY HEARING. COUNSEL IN HER TIME, HAS ALLUDED TO THE FACT
THAT THE COURT HELD A HEARING. WELL, THE GADSDEN CASE AND THE FAZOLLI CASE CLEARLY
CITE THE CASE UNDER THE RULES.

THERE WAS REFERENCE TO 420 AND 444 AT THE PRIOR SUPPRESSION HEARING. IS IT YOUR, AND
THAT IS WHAT I WAS ASKING, DID MR. PARKER EVER TESTIFY AS TO THE EVENTS THAT OCCURRED
BETWEEN MAY 5 AND MAY 7? IN THIS CASE.

NO, YOUR HONOR.

AND IS THAT WHAT YOU SEEKING?

WE ARE SEEKING --

TO HAVE HIM TESTIFY THAT IT WOULD NOT BE HIS --

IT WOULD BE NECESSARY TO HAVE IT BE DEVELOPED IN AN EVIDENCIARY HEARING ON THAT
POINT.

THAT IS WHAT YOU WERE SEEKING BEFORE THIS JUDGE.

YES, YOUR HONOR. ON THE OTHER POINT THERE MAY BE SOME MISUNDERSTANDING. THE
PROSECUTOR, MR. COLTON, IN HIS CLOSING ARGUMENT TO THE JURY, OUR POSITION IS THERE ARE
SEVERAL PROBLEMS WITH WHAT HAPPENED. NUMBER ONE, MR. COLTON MADE STATEMENTS
IMPLICATING THE STATEMENTS OF BUSH, WHO HAD BEEN EXECUTED, I BELIEVE, IN '96. HE THEN
WENT AHEAD AND TOLD THE JURY, WELL, IF I SAID THAT, YOU SHOULDN'T CONSIDER IT. MOST
RESPECTFULLY I AM NOT TRYING TO BE SEMANTIC BUT THE COURT'S INSTRUCTION IS THE
COURT'S DUTY, AND SHOULD IS A LOT DIFFERENT THAN "MUST", SO IT IS A CURETIVE
INSTRUCTION. NUMBER ONE, THE PROSECUTOR DELEGATED THE JURY'S DUTY TIGHT
PROSECUTOR. NUMBER TWO, HE GAVE A BAD INSTRUCTION, AND NUMBER THREE IT HAD BAD
LANGUAGE AND WOULDN'T ALLOW THE JURY TO BE PERMISSIVE, SO ALL OF THESE THINGS
COUPLED TOGETHER SPEAK TO THOSE FEDERAL CASES THAT TALK EXACTLY ABOUT THE TYPE OF
CURETIVE INSTRUCTION.

LET'S ASSUME IT WASN'T A PROPER CURETIVE INSTRUCTION. LET'S ASSUME THAT, THERE FOR IT
WAS AKIN TO HIM HAVING MADE THAT STATEMENT. WHERE, WHY ISN'T IT HARMLESS BEYOND A
REASONABLE DOUBT? IN THE SCENARIO THAT YOU GOT, THEY HAD WILLIAMS ON THE STAND,
WHO SAID, OUT OF YOUR CLIENT'S MOUTH, THAT HE ADMITTED HE WAS A SHOOTER. WHAT
WOULD IT MATTER TO A JURY, THAT HER BOYFRIEND, ALSO, SAID IT? I MEAN, IT SEEMS TO ME
THAT THAT IS PRETTY, I WOULD RATHER HAVE THE, I MEAN, IF YOU HAD IT IN REVERSE, NOW WE
WOULD HAVE ISSUE, THAT IS THAT HE SPITS OUT THAT PARKER TOLD HER WHEN IT REALLY WAS
BUSH. I MEAN, IT DOESN'T SEEM TO ME, TO BE, REALLY, MUCH CONSEQUENCE.

I UNDERSTAND THAT, YOUR HONOR'S CONCERN. HOWEVER, TAKEN INTO CON TEN TEXAS OF THAT -- TAKEN INTO CONTEXT OF THAT, WE KNOW THAT GEORGE ANN WAS BUSH'S GIRLFRIEND HAD WANTED TO MARRY HIM. PUT LETTERS IN THE RECORD THAT SAID I DON'T KNOW WHAT IF ANYTHING WAS TOLD. HER CREDIBILITY SHOULD HAVE REASONABLY BEEN DAMAGED OR WAS DAMAGED ON CROSS. JOHNSON COMES IN AFTER SEVERAL YEARS AND WE GO AHEAD AND AUTHENTICATE AN AFFIDAVIT THAT SAYS MY CLIENT DIDN'T HAVE THE GUN AND WE HAVE TO GO THROUGH FULL-BLOWN, DURING TRIAL, BRINGING IN EXPERTS TO IMPEACH HIM TO SHOW AUTHENTICATION TO BRING IN THE AFFIDAVIT, AND NOW WE ARE COMING IN, SO WHAT HAS HAPPENED. WE ASSERT THAT THE EVIDENCE HAS SHOWN THAT GEORGE ANN WILLIAMS MAY WELL HAVE BEEN FATALLY DAMAGED IN CROSS-EXAMINATION. WHAT MAY HAVE ALSO HAPPENED IS JOHNSON MAY HAVE BEEN FATALLY DAMAGED, SO WHAT DOES THE PROSECUTOR DO? BRING IN THE DEAD MAN'S STATEMENT. HOW CAN YOU CROSS-EXAMINATION THAT? THAT GOES TO THE BRUTE ONE ISSUE. WE -- THAT GOES TO THE BRUTON ISSUE. WE CAN'T CROSS-EXAMINE A DEAD MAN. IT WAS AND POINTED AND NOT CURED IN A CURETIVE WAY BY A TRIAL JUDGE, SO WE CANNOT SAY IT IS HARMLESS. THANK YOU.

YOU WANT TO ADDRESS THE RING ISSUE?

YES, YOUR HONOR. THANK YOU VERY MUCH. ONLY INSOFAR AS WE ARE AWARE OF WATSON. WE BELIEVE THE ISSUE IS PRESERVED. THE MOTION WHICH WE FILED, WHICH SPEAKS TO THE SIXTH AMENDMENT, SIXTH AMENDMENT JURY ARGUMENT AND ADEQUATE GUIDANCE AND SO ON AND SO FORTH WHICH WE FILED, WE HOPE OUTSIDE OF FUNDAMENTAL ERROR AND PRESERVATION, PRESERVES IT.

WHY WOULDN'T, IN THIS CASE, JUST ASSUME THAT RING HAS APPLICATION AND THAT IT REQUIRES NOT JURY SENTENCING BUT IT REQUIRES THAT THE, WHATEVER QUALITYFIES A DEFENDANT FOR THE POTENTIAL OF A DEATH SENTENCE BE FOUND UNANIMOUSLY BY A JURY, AND IN THIS CASE, YOU HAVE TWO PREDICATE FELONIES, ROBBERY AND KIDNAPING IN ADDITION TO THE MURDER, THAT WERE FOUND BY A JURY BEYOND A REASONABLE DOUBT. WHY WOULDN'T THAT MEET THE BARE MINIMUM OF RING AND WHY SHOULD THIS COURT GO ANY FURTHER IN A CASE LIKE THIS, WHERE THAT HAS BEEN FOUND UNANIMOUSLY?

YOUR HONOR, IN ANALYZING RING AND THE CONTEXT OF THE ARGUMENTS IN BOTTOSON, THE JURY MUST BE ALLOWED TO MAKE FINDINGS OF FACT, AND, OF COURSE, YES WE KNOW A JURY MADE A VERDICT ON WHATEVER IT DID BUT WHETHER OR NOT IT MADE FACTUAL FINDINGS SUFFICIENT, WE DON'T KNOW, BECAUSE THE SUPREME CASE, OF COURSE, IS --

IF THE FINDINGS OF FACT ARE GUILT OF KIDNAPING AND ROBBERY AND THAT THOSE ARE AGGRAVATORS AND THERE HAS ACTUALLY BEEN AN UNANIMOUS JURY VERDICT, CLEARLY THAT CONSTITUTES FINDING OF FACT, DID IT NOT HARKS THAT THE FACTS EXIST AND DEMONSTRATE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS GUILTY OF THAT OFFENSE AND THEN, WHEN THAT OFF EPPS IS USED AS AN AGGRAVATOR -- OFFENSE, AND WHEN THAT OFFENSE IS USED AS AN AGGRAVATOR, I AM HAVING DIFFICULTY OF WE DON'T KNOW WHAT THE JURY FOUND, IN TERMS OF FINDING OF FACT. WHEN YOU HAVE THAT CIRCUMSTANCE, THAT IS WHEN YOU HAVE A CIRCUMSTANCE OF A SEPARATE CRIME BEING CHARGED AND THEN THE JURY FINDING BY UNANIMOUS VERDICT, THAT THAT CRIME WAS PROVEN.

YOUR HONOR, I UNDERSTAND THE CONCEPT, THE UNANIMOUS VERDICT, BUT WHETHER IT IS A GENERAL VERDICT THAT PASSES ON THOSE FINDINGS OF FACT, I DON'T KNOW. I AGREE IT IS AN UNANIMOUS VERDICT, BUT HOW THAT PLAYS IN WITH THE SIXTH AMENDMENT AND HOW RING HAS, PRONOUNCEMENTS OF RING ARE DIFFICULT FOR ME TO RECONCILE.

CHIEF JUSTICE: OKAY. ALL RIGHT. THANK YOU. CHANGE -- THANK YOU.