Kevin Puryear v. State of Florida

THE NEXT CASE ON THE COURT'S CALENDAR IS PURYEAR VERSUS STATE.

I AM MARGARET GOOD-EARNEST, HERE ON BEHALF OF KEVIN PURYEAR. THE ROBBERY IN THIS CASE, AMY KEESE, TESTIFIED THAT AT THE TIME OF THE ROBBERY SHE DIDN'T GET A GOOD LOOK AT HIS FACE.

YOU AGREE THAT THERE IS AN IRRECONCILABLE CONFLICT?

I DON'T AGREE THAT THERE WOULD BE AN IRRECONCILABLE CONFLICT. I THINK IT WOULD HAVE TAKEN A LITTLE BIT OF WORK ON THE PART OF THE DISTRICT COURT TO RECONCILE THEM. I THINK THE DISTRICT COURT DID A GOOD JOB, WHEN IT TALKED ABOUT THE TWO CASES. IT FIRST TALKED ABOUT --

LET ME ASK YOU THIS. APPARENTLY, IF YOU FOLLOW POWER'S REASONING, YOU GET INTO EVIDENCE AS AT LEAST THE DENIAL OF A HEARSAY OBJECTION DESCRIPTIONS THAT ARE GIVEN BY WITNESS OR A PERSON, AND THAT -- WHAT IS YOUR POSITION ON HOW BROAD CAN THE DESCRIPTION BE AND STILL MEET THAT?

WELL, MY POSITION IS THAT, AS A MATTER OF STATUTORY INTERPRETATION, SWOFFORD WAS CORRECTLY DECIDED. IT SETS FORTH THE DEFINITIVE INTERPRETATION OF THE STATUTE. IT SAYS A STATEMENT OF IDENTIFICATION OF A PERSON IS NOT A DESCRIPTION.

YOUR POSITION IS THAT IT WOULD HAVE -- THAT SAYING, THEN, THAT THE PERSON HAD RED HAIR AND A KRAING I FACE, WOULD NOT COME WITHIN THE IDENTIFICATION PROVISION OF 801.

CORRECT.

SO YOU WOULD HAVE TO RECEDE FROM POWERS.

YES. I WOULD HAVE YOU RECEDE FROM POWERS, TO THE EXTENT THAT THERE NEEDS TO BE A LITTLE BIT OF HARMONIZING, AND I WOULD, ALSO, REQUEST THE COURT TO EXPLAIN, IF THIS DOCTRINE OF OVERRULING ITSELF SUBSELINTIO EXISTS, I AGREE, BASED ON THIS COURT'S PRECEDENT, BASED ON THE RULE OF LAW WHICH IS VERY IMPORTANT, THAT THIS COURT DOES NOT RECEDE FROM ITS CASES, UNLESS IT SPECIFICALLY SAYS SO, UNLESS THERE ARE COMPELLING REASONS TO DO SO. THE ONLY RESEARCH THAT I HAVE FOUND THAT TALKS ABOUT THE DOCTRINE OF OVERRULEING SUBSELIENTO, TALKING ABOUT THE SUPREME COURT OVERRULING ITS OWN SUBSELIENTO, ON APPEAL THIS COURT HAS NEVER COMMENTED ON THE DOCTRINE OR WHETHER YOU DO THAT OR WHETHER SOMETIMES NEW ADD VERTENTLY SAY SOMETHING IN ONE CASE THAT IS NOT MEANT TO BE OVERRULEING SOMETHING IN ANOTHER CASE.

LET'S ASSUME THAT THERE IS NO SUBSELIENTO. THERE IS NO SUBSELIENTO IN POWERS, TALKING ABOUT THE COURTS MAKING IT AT THE SAME TIME. HOW ABOUT DISCUSSING THE POLICY BEHIND THIS EVIDENTIARY RULING AND TELLING US WHAT THE POLICY REASONS ARE FOR STICKING TO SWOFFORD AS OPPOSED TO THE VIEW OF THE FOURTH DISTRICT EXPRESSED THE POLICY REASON BEHIND THE RULE, THE EVIDENTIARY RULE, AND THEN IN OTHER WORDS SHOULD WE STICK BY SWOFFORD, BOLTY IS?

ABSOLUTELY. YOU SHOULD STICK BY SWOFFORD, BECAUSE THAT IS THE CORRECT NARROW DEFINITIVE STATUTORY INTERPRETATION. WHEN THIS RULE WAS FIRST ADOPTED IN THE FEDERAL EVIDENCE RULES IN 1975, THIS COURT THEN ADOPTED THE ADMISSIBILITY OF EXTRA JUDICIAL IDENTIFICATIONS IN 1978 IN STATE VERSUS FREEBURGH. THE FLORIDA RULES OF EVIDENCE ADOPTED IT IN JULY 1 OF '7. NONE OF THE LEGISLATIVE HISTORY ON THIS, NONE OF THE COMMENTARY. IT WAS NEVER THOUGHT THAT A STATEMENT OF A DESCRIPTION QUALIFIED UNDER THE VERY NARROW LANGUAGE OF THE STATUTE, WHICH IS AN EXCEPTION TO THE HEARSAY RULE. THAT MEANS IT IS SUBSTANTIVE EVIDENCE AS --

WAIT A MINUTE HOW FAR CAN YOU TAKE THAT, THOUGH? IF THE WITNESS TOLD THE -- THE WITNESSES THERE, SUBJECT TO CROSS-EXAMINE, AND HAD MADE A PRIOR STATEMENT, THAT THE PERSON HAD A SIX-INCH SCAR FROM THE EAR TO THE MOUTH, AND THEN FORGOT THAT, WHEN THEY WERE TESTIFYING, WOULDN'T THAT BE A STATEMENT OF DESCRIPTION THAT WOULD NOT BE HEARSAY, UNDER THIS RULE?

NO, SIR. A DESCRIPTION IS NOT AN IDENTIFICATION OF A PERSON. A DESCRIPTION IS ONLY A DESCRIPTION. IT IS ONLY GENERAL, EVEN IF YOU MAKE IT AS SPECIFIC AS YOU SAY.

DOESN'T THAT DESCRIPTION BECOME IDENTIFICATION, BY REASON THAT IT IS SUFFICIENTLY SPECIFIC THAT HOW MANY PEOPLE HAVE SIX-INCH SCARS DOWN FROM THEIR EARS TO THEIR --

THAT ISN'T THE FACT IN THIS PARTICULAR CASE, AND WHAT YOU ARE REFERRING TO IS THAT YOU ARE SAYING THAT, WHEN THE STATE NEEDS IT AND WHEN THE IDENTIFICATION IS DUBIOUS AND QUESTIONABLE, THE STATE SHOULD BE ALLOWED TO HAVE PRIOR CONSISTENT STATEMENTS TO BOLSTER THE CREDIBILITY OF THEIR POOR ID.

I DON'T WANT TO ARGUE WITH YOU, BUT ACTUALLY IN SWOFFORD, THE DEFENSE WAS TRYING TO GET IT IN, CORRECT?

IT IS TRUE. THE DEFENSE WAS TRYING TO GET IT IN IN SWOFFORD.

OFTEN IN THESE CASES THE DEFENSE IS TRYING TO GET IT IN. IS THAT CORRECT?

USUALLY THERE IS NOT TOO MUCH OF TROUBLE WITH THE DEFENSE GETTING IN PRIOR INCONSISTENT STATEMENTS. WE ARE TALKING HERE, WE ARE SPECIFICALLY TALKING ABOUT PRIOR CONSISTENT STATEMENTS, AND IN THIS PARTICULAR CASE, THE STATE TRIED THIS CASE ON THE DESCRIPTION. THEY KNEW HOW WEAK THIS IDENTIFICATION WAS.

COULD YOU GO BACK TO JUST FOLLOWING UP WITH WHAT JUSTICE ANSTEAD ASKED, WHAT THE STATUS, BEFORE THE EVIDENCE CODE WAS ENACTED IN FLORIDA, AND THERE IS A COMMITTEE NOTE THAT SEEM TO SUPPORT YOUR MORE NARROW CONSTRUCTION OF THIS, WHAT WAS THE COMMON LAW ON WHETHER, THAT REFERRED TO STATEMENTS OF IDENTIFICATION? WHAT -- IS THERE ANY CASE LAW THAT SAYS, YES, THIS WASN'T CONSIDERED HEARSAY? YOU KNOW, THERE IS EXCITED OUTRANS THAT IS IN THE COMMON -- THERE IS EXCITED UTTERANCE THAT IS IN THE COMMON LAW. WHAT WAS THE COMMON LAW DESCRIPTION?

IN FREEBURGH, THERE WAS THE STATEMENT BEFORE THAT THIS COURT ADOPTED THAT EXTRA JUDICIAL IDENTIFICATIONS WERE ADMISSIBLE AND COULD BE TESTIFIED TO BY A PARTY. IN MARTIN, A 1930 CASE FROM THIS COURT, A VICTIM COULD TESTIFY, YES, I IDENTIFIED THE DEFENDANT IN A LINE-UP, A SHOW UP OR WHATEVER, BUT THE POLICE OFFICER COULD NOT TESTIFY TO THAT IDENTIFICATION. AT COMMON LAW IT WAS NOT ADMISSIBLE.

EVEN THE MORE NARROW CONCEPT, WHICH WAS IT IS HIM, OR I IDENTIFIED JOE SC HMO E, EVEN THAT WAS NOT ALLOWED IN IN COMMON LAW. IF THE WITNESS SAID THE DEFENDANT HAD RED HAIR, THAT WAS CONSIDERED HEARSAY, JUST LIKE ANY OTHER STATEMENT.

YES. IN FREEBURGH, WHEN THIS COURT SEND THE EXTRA JUDICIAL IDENTIFICATION EXCEPTION TO THE HEARSAY RULE, YOU FOLLOWED A BODY OF LAW THAT HAD BEEN DEVELOPING THROUGHOUT THE STATES OR AT LEAST 12 JURISDICTIONS THAT HAD ACCEPTED SUCH A STATEMENT OF IDENTIFICATION MADE AFTER PER SEE -- AFTER PERCEIVE PERCEIVING THE PERSON. IN THIS CASE, THE FOURTH TIME, SAYING THE BODY SUPPORTS THE IDENTIFICATION DESCRIPTIONS. THERE ARE FIVE CASES THAT THEY CITE. IF YOU LOOK AT THOSE IDENTIFICATIONS, YOU WILL SEE THERE IS NO BODY OF LAW AND NO MODERN, WELL-ESTABLISHED TREND TO ADMIT DESCRIPTIONS AS STATES OF IDENTIFICATION OF A PERSON, MADE AFTER PERCEIVING THE PERSON. THIS IS WHAT THE DIFFERENCE BETWEEN THE DESCRIPTION AND AN IDENTIFICATION IS, EXCEPT IN UNUSUAL CIRCUMSTANCES. DESCRIPTIONS ARE ALMOST ALWAYS TOO GENERAL. THEY DO NOT DESIGNATE A PERSON.

HOW ABOUT IF I SIT WITH -- SOMETHING HAPPENS, AND I SIT WITH AN ARTIST, AND WE RECREATE THE FACE OF A PERSON. IS THAT A DESCRIPTION, OR IS THAT AN IDENTIFICATION, UNDER YOUR ANALYSIS?

WELL --

THAT HAPPENS TO BE A PRECISE LIKENESS.

TWO OF THE CASES THAT THE FOURTH DISTRICT CITED INVOLVED POLICE SKETCHES. ONE OF THEM FINDS THAT IT IS NOT A STATEMENT AND IT IS NOT HEARSAY. IT IS JUST A MATTER OF AUTHENTICITY. DOES THIS RESEMBLE THE PERSON YOU SAW. IT IS AS IF IT WERE A PHOTOGRAPH. THE OTHER CASE, MOTA, THE HAWAII CASE, DOES ACCEPT IT AS A DESCRIPTION.

UNDER YOUR THEORY, THAT WOULD NOT -- THAT WOULD BE A DESCRIPTION BUT NOT AN IDENTIFICATION, THOUGH, IS THAT CORRECT? IS THAT THE ARGUMENT?

I DON'T REALLY HAVE A THEORY ABOUT THAT HERE TODAY, BECAUSE THAT IS NOT THIS CASE.

BUT WE MUST APPLY A RULE OF LAW FOR ALL TO FOLLOW.

I DON'T THINK YOU HAVE TO MAKE A RULE OF LAW TO COVER EVERY SINGLE CASE THAT MIGHT COME BEFORE YOU.

IN FASHIONING THAT RULE OF LAW, NEED WE NOT LOOK AT ALL OF THE VERSES VARZ CIRCUMSTANCES, SO -- OF THE VARIOUS CIRCUMSTANCES, SO WE CAN FASHION WHAT THE RULE OF LAW SHOULD BE SO THAT IT APPLIES EQUALLY TO ALL PERSONS IN THIS STATE.

I THINK THAT A SKETCH MIGHT COME IN UNDER A DIFFERENT THEORY BUT NOT UNDER THE THEORY THAT IT IS A DESCRIPTION, BECAUSE I WANT TO GO BACK --

IDENTIFICATION, YOU MEAN.

RIGHT. 91.02-C, SAYS THE STATEMENT OF IDENTIFICATION OF A PERSON. IT DOESN'T SAY OF SOME PERSON OR ANY PERSON OR MAYBE POSSIBLY, PERHAPS, WOULD BE SOME PERSON THE POLICE FIND IN THE FUTURE. IT HAS TO BE A SPECIFIC PERSON. A DESCRIPTION DOES NOT SPECIFICALLY IDENTIFY ONE PERSON AND ONE PERSON ONLY. THIS WHOLE BODY OF LAW THAT DEALS WITH WHY WE ADMIT IDENTIFICATIONS IN THE FIRST PLACE, BECAUSE OF THEIR PERCEIVED RELIABILITY, BECAUSE OF AN IDENTIFICATION NEAR THE TIME OF THE CRIME, BEING MORE ACCURATE, MORE RELIABLE, THEN ONE MADE MANY MONTHS LATER, AFTER MEMORY HAS FADED. ALL OF THOSE THEORIES OF LAW, ALL OF THOSE RATIONALS AND LOGIC THAT APPEAR IN LEGISLATIVE HISTORY, APPEARED IN THE UNITED STATES SUPREME COURT CASES REGARDING IDENTIFICATIONS, AS LONG AS THEY ARE NOT SUGGESTIVE. THAT IS WHY NONSUGGESTIVENESS IS

VERY IMPORTANT.

IN THIS CASE, ASSUMING THAT WE AGREE WITH YOU ABOUT THE IDENTIFICATION VERSUS DESCRIPTION, WHAT WOULD WE ACTUALLY BE GETTING RID, SUPPRESSING IN THIS CASE?

HER PRIOR STATEMENTS OF DESCRIPTION. THE TWO TIMES THAT THE OBJECTIONS WERE MADE.

FROM SOMEONE ELSE, NOT THE WITNESS HERSELF, CAN GET ON THE STAND AND REPEAT THOSE DESCRIPTIONS. CORRECT?

SHE CAN TESTIFY TO WHAT SHE RECALLS. SHE SHOULDN'T BE TESTIFYING TO WHAT SHE SAID OUT OF COURT, ALTHOUGH MOST TIMES THAT COMES IN WITHOUT OBJECTION, BECAUSE IT IS THE WITNESS HERSELF, BUT WHEN THE TESTIMONY OF THE DETECTIVE CAME IN AND WHEN THE TESTIMONY OF HER BOYFRIEND CAME IN, THOSE --

THOSE ARE WHAT WE ARE REALLY GETTING AT HERE.

THE REASON I REALLY WOULD LIKE TO MAKE MY ARGUMENT HERE FOR JUST A MINUTE AS TO WHY IT WAS SO HARMFUL IN THIS CASE IS THE STATE TRIED THIS CASE ON THE DESCRIPTION. THE VERY FIRST PIECE OF EVIDENCE THEY PUT ON IN THIS CASE WAS DETECTIVE WOOD LOWE'S TESTIMONY. WHAT WAS THE DESCRIPTION MISS DEESE GAVE YOU? EXCEPTION TO HEARSAY EVIDENCE OVERRULED. THE STATE ARGUED AS TO HOW THE DESCRIPTION WAS, NOT THAT YOU SHOULD CONVICT AS TO SOME CREDIBLE IDENTIFICATION AMY DEESE MADE. IT WAS NOT. IT WAS A VERY DUBIOUS IDENTIFICATION. SHE NEVER SAW THE MAN'S FACE. AND WHAT DID THEY SAY? HOW DID THIS DESCRIPTION GET IN THE POLICE REPORT, IF IT IS NOT TRUE? THE PROOF OF HER OPPORTUNITY TO SEE WHAT SHE DID SEE AND HOW SURE SHE IS THE DESCRIPTION THAT IS IN THE POLICE REPORT. AND LASTLY, THEY SAID, THEY TALKED ABOUT THIS DESCRIPTION FOR FIVE PAGES, FROM 329-TO-335 OF THE RECORD, AND FINALLY THE STATE SAID THERE IS NO TAPE. THERE IS NO BLACK MARK ON THE REPORT SHE GAVE THE POLICE. THIS IS THE BEST EVIDENCE IN THIS CASE. SO IT IS VERY HARMFUL IN THIS CASE, BECAUSE IT WAS THE STATE'S CASE. THEY HAD A CONFUSED WITNESS. THEY ADMITTED THE WITNESS WAS CONFUSED, IN CLOSING ARGUMENT. THEY ADMITTED HOW SHAKY SHE WAS, HOW DUBIOUS HER IDENTIFICATION WAS, AND SO THEY WENT ON THE CREDIBILITY OF THE POLICE REPORT. THAT IS WHAT DETECTIVE WARDLOW WROTE IN THE POLICE REPORT, AND THAT IS WHAT THE DEFENDANT WAS CONVICTED ON.

HOW DOES YOUR WHOLE ARGUMENT IMPACT ON THE STATE OF THE LAW CONCERNING BOLOS?

-- I MEAN, WHEN WE GET BOLOS, THEY ARE GENERAL DESCRIPTIONS. IT IS NOT THAT JOE BLOW DID XYZ. IT IS A GUY WEARING RED PANTS AND A WHITE SHIRT AND BLACK HAT AND WHATEVER, SO MANY FEET TALL, WHATEVER. XYZ.

IT IS HEARSAY AND IT IS NOT ADMISSIBLE. BOLOS ARE ALWAYS HEARSAY. BOLOS DO COME IN ON MOTIONS TO SUPPRESS AND INFORMING THE BASIS OF AN OFFICER'S PROBABLE CAUSE AT TIMES. WE HAVE A WHOLE BUNCH OF CASE LAW ABOUT ANONYMOUS TIPS AND WHETHER THERE IS A SUFFICIENT BASIS FOR A PARTICULAR TIP. THE POLICE OFFICER ACTED IN GOOD FAITH ON, BUT WHEN YOU GET TO THE ACTUAL TRIAL, YOU CAN'T SAY I GOT A BOLO THAT DESCRIPTION IS OF THIS PERSON AND THEREFORE I STOPPED THE DEFENDANT BECAUSE HE MATCHED THE DESCRIPTION, BECAUSE THAT, ALSO, IS A CONFRONTATION PROBLEM. MR. CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL.

I SEE THAT. THAT IS ALSO A CONFRONTATION PROBLEM. BUT AS FAR AS THE POLICY GOES, THE POLICY IS THAT IT IS DANGEROUS FOR THE REASONS EXPRESSED BY JUDGE TAYLOR IN HER CONCURRING OPINION AND JUDGE FARMER IN HIS DISSENT, TO EXPAND THE STATEMENT OF IDENTIFICATION OF A PERSON, FROM A VERY SPECIFIC DENOTEATION OF THAT PERSON, THAT IDENTIFICATION, TO SOMETHING MUCH MORE GENERAL, BECAUSE THIS, THE STATE, IN

ADMITTING THIS, THEN GETS SUBSTANTIVE EVIDENCE OF GUILT. THIS IS NONHEARSAY EVIDENCE THEN THEN. AT WHICH POINT IT REALLY DOES INJUSTICE TO THE ENTIRE BODY OF CASE LAW THAT SAYS PRIOR CONSISTENT STATEMENTS USED TO BOLSTER A WITNESSES'S CREDIBILITY PARTICULARLY BY A POLICE OFFICER, IS NOT ADMISSIBLE. IN THIS CASE, THE STATE REALLY NEEDED TO BOLSTER THIS ID. THIS IS A VERY POOR IDENTIFICATION, AND THE EVIDENCE WRONGFULLY ADMITTED WAS HEARSAY, AND IT WAS VERY HARMFUL TO THE DEFENDANT, BECAUSE IT WAS THE CENTERPIECE OF THE STATE'S CASE. THANK YOU.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS MELINDA MAKE LEER, AND I AM -- MY NAME IS MELYNDA MELEAR, AND I REPRESENT THE STATE IN THIS CASE.

WOULD YOU AGREE THAT THIS IS REALLY A MATTER OF LINE DRAWING. SURELY YOU WOULDN'T CONTEND THAT EVERY STATEMENT THAT WOULD BE A DESCRIPTION WOULD MEET THE LANGUAGE HERE, EXCEPT, I MEAN, IF THE WITNESS SAID THE PERSON I SAW HAD BLACK HAIR. NOW, THAT --

CORRECT. THAT SHOULD PROBABLY, THE STANDARD THAT SHOULD BE SET, THE LINE-DRAWING, PROBABLY, SHOULD BE RELEVANCY, BECAUSE EVIDENCE THAT IS RELEVANT IS TYPICALLY ADMISSIBLE, UNLESS IT FALLS INTO A CATEGORY THAT IS UNDULY --

WE HAVE GOT TO DEAL WITH THE HEARSAY PROBLEM FIRST, AND THE ISSUE IS WHAT STATEMENTS THAT ARE MADE OUT OF COURT ARE GOING TO BE SUFFICIENT TO BE THE IDENTIFICATION OF A PERSON. WHY WASN'T THIS RULE -- I NOTICE IN THE THIRD FEDERAL CIRCUIT CASE, THAT JUDGE SHEREKA SAID THAT, WITH THE CONGRULE, IT HAD TO DO WITH LINEUPS AND THE FACT THAT THERE HAD BEEN A PREVIOUS IDENTIFICATION OF A PERSON, AND THAT IS WHAT WE ARE DEALING WITH IS NOT SOME GENERAL DESCRIPTION BUT THE IDENTIFICATION OF A PERSON. NOW, ISN'T THAT WHAT WE ARE REALLY SAYING? ISN'T THAT WHAT THE RULE SAYS?

TO BE PRECISE, YOUR HONOR, IF THE DECLARANT TESTIFIES AT TRIAL AND IS SUBJECT TO CROSS-EXAMINE CONCERNING THE STATEMENT, AND THE STATEMENT IS ONE OF IDENTIFICATION OF A PERSON MADE AFTER PERCEIVING THE PERSON. WHILE THE EMPHASIS THAT IS BEING PLACED ON IT BY PETITIONER IS ON THE IDENTIFICATION, THE STATE IS PLACING EMPHASIS ON THE TERM "PROCEEDING" -- ON THE TERM "PERCEIVING", WHICH PERCEIVING IS MAKING A MENTAL IMAGE, BASED ON PHYSICAL OBSERVATION. EVEN THE SUGGESTION OF IDENTIFICATION, RIGHT FROM BLACK'S LAW DICTIONARY --

BUT THIS IS AN UNUSUAL RULE, IN THAT, AS YOUR OPPONENT SAYS, WE ARE NOT DEALING WITH IMPEACHMENT OF THIS WITNESS.

RIGHT.

WE ARE DEALING WITH BOLSTERING THE WITNESS.

BOLSTERING, NO, I WOULD DISAGREE WITH THE TERM "BOLSTER "BOLSTERING". I WOULD PHRASE IT IN TERMS OF TESTINGABILITY AND COMPETENCY OF A WITNESS TO MAKE A PERCEPTION, TO MAKE A MENTAL IMAGE, TO OBSERVE AND MAKE A MENTAL IMAGE AND BE ABLE TO TRANSFER IT, TO COMPARE PHYSICAL ATTRIBUTES AND SAY THIS IS THE PERSON WHO DID IT, AND THE CASE I WOULD LIKE TO RELY ON MOST HEAVILY IS PEOPLE VHUETEROS, A NEW YORK CASE, AND IN THAT CASEY THOUGHT THAT THE NEW YORK APPELLATE COURT VERY NICELY EXPLAINED WHY WE NEED DESCRIPTIONS IN IT, UNDER THE IDENTIFICATION HEARSAY.

WE ARE NOT HERE TO DECIDE WHAT WE THINK THAT THE COMMON LAW SHOULD BE REGARDING HEARSAY AND IDENTIFICATION.

CORRECT.

WOULD YOU AGREE WITH YOUR OPPONENT THAT, BEFORE THE EVIDENCE CODE, THAT THERE IS NO BASIS IN THE COMMON LAW FOR HAVING SOME FREE STANDING HEARSAY EXCEPTION? THERE IS -- EXCEPT FOR KPIED UTTERANCE, BUT CERTAINLY NOT JUST BECAUSE IT IS IN A POLICE REPORT. IT DOESN'T COME IN, CORRECT?

RIGHT.

HEARSAY.

MY ANSWER TO THAT WOULD BE SIMPLE. NO. I DISAGREE WITH MY OPPONENT, BECAUSE NUMBER ONE, COURTS, AND I WOULD LIKE TO DISCUSS IT A MOMENT, HAVE TERMED HAVE, VIEWED DESCRIPTIONS AS BEING NONHEARSAY INNATE.

FROM FLORIDA?

NO. FROM OUT-OF-STATE.

LET'S JUST STICK WITH FLORIDA. ANY CASE IN FLORIDA?

THE CLOSEST CASE I HAVE IS MARTIN V STATE, WHICH I HAVE CITED IN THE RESPONDENT'S BRIEF. MARTIN V STATE WAS THE CASE THAT WAS DECIDED IN 1930, AND WHILE IT DEALT WITH ADMISSIBILITY OF THE PHOTOGRAPH, ITSELF, THE COURT WAS VERY CLEAR TO SAY THAT THE PHOTOGRAPH WAS CHOSEN, THE LINE-UP WAS CHOSEN, BASED ON THE VICTIM'S DESCRIPTIONS OF THE SUSPECT. IT WAS PUT TOGETHER, AND THE COURT EXPLAINED THAT IDENTIFICATION IS AN OPINION INNATE. IT IS A VICTIM OR WITNESSES'S OPINION, AND THAT CERTAINLY PARTIES SHOULD BE ABLE TO CROSS-EXAMINE OR EVEN TO ALLUDE TO THE BASIS FOR THAT OPINION.

SO THAT CASE DEALT WITH SOMEONE IDENTIFYING A PHOTOGRAPH PICKING OUT --

CORRECT. AND THAT IS THE ONLY PRE-CODE CASE THAT I CAN FIND.

SO WE ARE, NOW, DEALING WITH THE FACT THAT THE EVIDENCE CODE SAYS IDENTIFICATION OF A PERSON. WE HAVE -- YOU AGREE THAT, TO GO THE WAY THAT YOU ARE SUGGESTING WE GO, WE WOULD HAVE TO RECEDE FROM SWOFFORD.

I AGREE, NO, NO, YOUR HONOR, I DON'T, AND I DON'T BELIEVE THAT IT IS NOT -- I THINK IT IS NOT RECONCILABLE, AND THEREFORE POWER DIDN'T NECESSARILY OVERRULE SWOFFORD. THE KEY FACT IN SWOFFORD IS THIS. IN SWOFFORD THERE WAS NO IDENTIFICATION WHATSOEVER. THE WITNESS NEVER MADE AN IDENTIFICATION. THE WITNESS PROVIDED FACTS OF DESCRIPTION, POINTS OF DESCRIPTION, AND THIS COURT WAS VERY CLEAR IN DISCUSSING SWOFFORD, TO SAY THAT ITS OPINION WAS BASED ON THE FACT THAT, NO IDENTIFICATION HAD BEEN MADE AND THERE WAS LANGUAGE IN THERE THAT SAID DESCRIPTIONS ARE NOT IDENTIFICATIONS. THERE WAS NO IDENTIFICATION IN THIS CASE. IN THIS CASE, BEFORE THIS COURT, PURYEAR, THERE WAS ABSOLUTELY AN IDENTIFICATION, AND WHILE PETITIONER HAS CALLED IT DUBIOUS I WOULD POINT OUT THAT, BOTH ON DIRECT AND REDIRECT EXAMINATION, THE VICTIM SAID SHE WAS 100 PERCENT CERTAIN SHE WAS POSITIVE IN THEY ARE I HAD -- IN HER IDENTIFICATION.

BUT SWOFFORD MAKES A VERY SPECIFIC STATEMENT THAT AN IDENTIFICATION OF A PERSON, AFTER PERCEIVEING HIM, SUBSECTION 90.0182-C, A DEFERENCE OR REFERENCE TO A PARTICULAR PERSON AND HIS OR HER PHOTOGRAPH, AND A STATEMENT THAT THE PERSON IDENTIFIED IS THE SAME AS THE PERSON PREVIOUSLY PERCEIVED. NOW, POWERS JUST ALLOWS THESE TWO GENERAL DESCRIPTIONS OF THE PERSON.

POWERS DID ALLOW THE GENERAL DESCRIPTIONS. I CANNOT EXPLAIN TO YOU WHY. I WOULD SAY THAT THIS COURT DOES NOT HAVE ENOUGH INFORMATION OR DID THE FOURTH DCA NOR DO WE, BECAUSE OF THIS FACT. IN POWERS, THERE WAS NO STATEMENT BY THE COURT, AS THERE WAS IN SWOFFORD, BUT NO IDENTIFICATION HAD BEEN MADE. IT IS NOT CLEAR.

DO YOU AGREE WITH YOUR OPPONENT THAT THIS IS, REALLY, AN EXCEPTION TO THE HEARSAY RULE RULE?

I THINK THAT THE DESCRIPTIONS COME IN UNDER THE IDENTIFICATION STATUTE, AND THAT IS THE STATE'S POSITION BEFORE THE COURT.

IS SHOULD THAT BE STRICTLY CONSTRUED? SHOULD THE LANGUAGE OF THE STATUTE BE STRICTLY CONSTRUED?

SHOULD THE LANGUAGE OF THE STATUTE BE STRICTLY CONSTRUED. I WOULD SAY YES, TO THE EXTENT IT TALKS ABOUT PERCEIVEING, AND I WOULD SAY THAT YOU WOULD NEED TO LOOK AT OUTSIDE CASE LAW, AND WHERE PETITIONER HAS SAID THAT THERE WAS NO BODY OF LAW THAT SUGGESTS THAT DESCRIPTIONS COME IN, I WOULD SAY THAT THAT IS ABSOLUTELY INACCURATE. THERE ARE 13 CASES THAT HAVE BEEN CITED TO THIS COURT. OF THOSE CASES, 11 OF THEM SUPPORT THE RESPONDENT'S POSITION THAT THIS TYPE OF EVIDENCE SHOULD COME IN. THE TWO CASES THAT DON'T, I BELIEVE, WERE PEOPLE V JENKINS, A CASE, I THINK, THAT CUTE OF WISCONSIN, AND IN THAT CASE WHAT WAS EXCLUDED WERE THE VICTIM, A CHILD VICTIM OR A CHILD WITNESS'S STATEMENTS EXPLAINING WHAT HAPPENED. THEY WERE NOT DESCRIPTIONS. THEY WERE STATEMENTS EXPLAINING WHAT HE SAW, AND IN THE KIRS, A MICHIGAN CASE, PEOPLE V SKIS, IN THAT CASE, AGAIN -- PEOPLE V SKYS, IN THAT CASE, AGAIN, NO IDENTIFICATION HAD BEEN MADE, AND THE COURT SAID WE WILL NOT STRETCH THE SCOPE OF THE IDENTIFICATION STATUTE WHERE DESCRIPTIONS HAVE NOT BEEN MADE.

SO YOU ARE ADVOCATING TO THIS COURT THAT THE RULE SHOULD BE, IF THERE HAS BEEN IDENTIFICATION THEN THE WHOLE THING IS OPEN. ALL THE DESCRIPTION THAT IS PRECEDED IT ARE, ALSO, ADMISSIBLE. IF THERE HAS NOT BEEN A SPECIFIC IDENTIFICATION, THEN ALL OF THE DESCRIPTIONS ARE NOT.

THAT'S CORRECT. UNDER THE IDENTIFICATION EXCEPTION. NOW, THERE HAVE BEEN SOME -- I HAVE NOT COME ACROSS ANY COURT WHERE THERE HAS NOT BEEN AN IDENTIFICATION THAT HAS ALLOWED THIS IN. LIKE I HAVE SAID, SOME COURTS, AND IF YOU WOULD REFER TO MOTA V STATE, IN THAT CASE THE COURT VERY NICELY SET OUT THE THREE WAY THAT IS THIS TYPE OF EVIDENCE HAS BEEN DONE, ADMITTED. THE FIRST WAY IS TO SAY THAT IT IS NOT HEARSAY, AND THAT WAS DISCUSSED IN JUERTOS. THE DESCRIPTIONS ARE NOT TRUE OR ACCURATE. IT IS JUST BASED ON WHAT THEY PERCEIVED AND REALLY IS JUST A TESTING OF WHAT THEY SAW IT. MAY BE THAT NOW THAT THE DEFENDANT HAS RED HAIR, WHEN THE WITNESS HAS SAID IT IS SANDY BLONDE OR VICE VERSA, BUT IT JUST GOES TO TESTING THE CREDIBILITY OF THE IDENTIFICATION. THE SECOND IS RES GESTAE.

THAT BRINGS ANOTHER QUESTION TO MIND IS HOW, DON'T YOU, THEN, GET INTO THE PROBLEM OF HOW DOES THIS IDENTIFICATION HAVE TO BE? I MEAN, DO YOU HAVE TO BE ABSOLUTELY SURE THAT THIS IS THE SAME PERSON, OR HE LOOKS LIKE THIS PERSON? WHERE DO YOU DRAW THE LINE THERE?

I DON'T KNOW, AND I DON'T KNOW IF THE BODY OF LAW ON SIMPLY PRIOR IDENTIFICATIONS EXPLAIN THAT, EITHER. I KNOW THAT THERE HAS TO BE AN IDENTIFICATION. I AM ASSUMING IDENTIFICATION SHORTLY AFTER THE CRIME, AS OPPOSED TO IN COURT, BECAUSE THE COURTS, WE CAN GET PRIOR IDENTIFICATIONS IN, EVEN THOUGH THE WITNESS IN COURT IS UNABLE TO MAKE AN IDENTIFICATION, UNDER FERBER AND OWNS, AND SO I AM -- AND-. OWENS, SO I AM ASSUMING THAT, AS LONG AS THE PRIOR IDENTIFICATION WAS ABSOLUTE, AND THAT IS, YES, THE

PERSON I SAW IS THE PERSON I SAW COMMITTING THE CRIME, THAT THE DESCRIPTIONS ON WHICH THAT IDENTIFICATION WERE BASED SHOULD BE ABLE TO COME IN. FOR INSTANCE IN THIS CASE, ALTHOUGH THE VICTIM DID NOT SEE AND VERY CANDIDLY SAID I DID NOT SEE THIS PERSON'S FACE, SHE SAID THAT SHE MOMENTARILY SAW HIS PROFILE. SHE KNEW HIS SHAPE, HIS HEIGHT. GUESSED HIS AGE, KNEW HIS MISSING TEETH. WHEN SHE SAW THE DEFENDANT IN THE VICINITY OF WHERE THE CRIME WAS COMMITTED, SHE WAS ABLE TO IDENTIFY THAT PERSON AS THE PERPETRATOR. I AGREE IN COURT ON CROSS-EXAMINATION SHE SAID I CAN'T REALLY SAY I SAW HIS FACE, BUT THAT IS WHY IT IS SO IMPORTANT. WE DON'T WANT CASES FALLING THROUGH THE CRACKS, AND AS JUSTICE WELLS POINTED OUT EARLIER, A LOT OF TIMES THE DEFENDANT TRIES TO GET THAT INFORMATION IN, SUCH AS IN SWOFFORD, WHERE THEY WERE TESTING WHAT THE WITNESS HAD SAID. THEY WANTED TO GET IN THE POLICE REPORT. IT IS NOT, AGAIN, AS FOURTH DCA POINTED OUT, IT IS NOT CLEAR WHETHER THERE WAS A DOUBLE HEARSAY PROBLEM IN SWOFFORD, BUT THERE DOES NEED TO BE SOME KIND OF IDENTIFICATION.

IF WE, THOUGH, ADOPTED THE RULE THAT, IF YOU WERE ADVOCATING, THAT IS THAT DESCRIPTIONS, THEN, COULD NOT COME IN, UNLESS THERE HAD BEEN A SUBSEQUENT IDENTIFICATION, IF I UNDERSTAND IT, YOU ARE SAYING THAT IDENTIFICATION HAD TO BE, ALSO, NEAR THE TIME OF THE OFFENSE?

THE REASON I SAY THAT, YOUR HONOR, IS BECAUSE OF FEHR BETTER AND OWENS -- OF FERBER AND OWENS THAT EVEN IF A WITNESS IS POSITIVELY ABLE TO IDENTIFY A SUSPECT IN COURT, YOU CAN BRING IN THE IDENTIFICATION STATUTE UNDER A PRIOR IDENTIFICATION.

THE WHOLE RATIONALE, IT SEEMS TO ME, IT IS ARTICULATED, ESPECIALLY ARTICULATED BY THE FOURTH DISTRICT IN ITS OPINION, IS THE SAME RATIONALE FOR ALLOWING SHOW-UP IDENTIFICATIONS SHORTLY AFTER THE CRIME OR WHATEVER. THAT IS THAT THE DESCRIPTIONS, BECAUSE THEY ARE GIVEN SHORTLY AFTER THE WITNESS PERCEIVED THE PERSON OR SOMETHING, ARE, THEN, THOUGHT TO BE --

FRESHER.

-- CREDIBLE, AND THE RELIABILITY AND CREDIBILITY, THEN, THAT OUTWEIGHS, PERHAPS, HEARSAY NATURE OF IT, AND SO IF WE ELIMINATE THAT, HAVEN'T WE ELIMINATED THE RATIONALE? IN OTHER WORDS IF WE ELIMINATE JUST ALLOWING DESCRIPTIONS IN, WHICH ARE BASED ON THE FACT THAT THEY ARE CLOSER TO THE TIME OR WHATEVER, AND THAT IS WHY THEY ARE BEING ALLOWED, THEN WE ARE SAYING, NO, THE ONLY TIME WE ARE GOING TO LET THEM IN IS WHEN THERE HAS BEEN A LATER IDENTIFICATION, THAT IS WE ARE CONNECTING THEM, BY NECESSITY, TO THAT, IN THE FORMULA, WE HAVE REALLY, ELIMINATED THE UNDERLYING RATIONALE, TO BEGIN WITH, THAT THEY ARE RELIABLE AND CREDIBLE AND THEREFORE ARE AN EXCEPTION TO THE HEARSAY RULE, BECAUSE OF THAT EXTRA RELIABILITY, BECAUSE THEY WERE MADE AT THE TIME THE WITNESS -- SO WE ARE REALLY --

I SEE WHERE YOU ARE GOING WITH THAT. NO. THE STATE'S POSITION IS, AS LONG AS THERE WAS A PRIOR IDENTIFICATION, THE IDENTIFICATION DOES NOT NEED TO BE MADE AT THE EXACT SAME TIME AS THE DESCRIPTIONS.

BUT THERE DOES HAVE TO BE AN IDENTIFICATION. YOU WOULD SAY POWERS, I TAKE IT YOU WOULD SAY POWERS, THEN, IS WRONGLY DECIDED.

IN POWERS, IT IS NOT CLEAR, YOUR HONOR. THERE IS NOT ENOUGH INFORMATION.

BUT IT ISN'T TIED, AT ALL, TO ANY IDENTIFICATION. IT IS JUST A DESCRIPTION.

I DON'T KNOW. IN POWERS, THE WITNESS, MILLER, DID TESTIFY AND WAS SUBJECT TO CROSS-EXAMINE. THERE WAS NO STATEMENT IN POWERS THAT THERE WAS IN SWOFFORD, THAT THIS

WITNESS DID NOT MAKE AN IDENTIFICATION.

WITHOUT THE ADMISSIBILITY OF THE DESCRIPTIONS, IS NOT CONNECTED IN ANY WAY TO THE REQUIREMENT OF AN IDENTIFICATION IDENTIFICATION.

IN SWOFFORD.

NO. IN POWERS.

IN POWERS. I DON'T UNDERSTAND. I KNOW THAT, IN POWERS, THE WITNESS MILLER GAVE IDENTIFICATION THAT WAS RELAYED BY OFFICER WEALTHY IN THAT CASE -- OFFICER WELTY IN THAT CASE.

ALL WE TALKED ABOUT THERE WAS THE DESCRIPTION AND SAID THAT THE DESCRIPTION WAS ADMISSIBLE.

RIGHT. BUT I DON'T KNOW, HAVING READ THAT, AND I HAVE READ IT A NUMBER OF TIMES, AND, RIGHT, THERE WAS NO STATEMENT IN POWERS THAT MILLER, THE WITNESS, ACTUALLY MADE AN IDENTIFICATION. THERE WAS NO STATEMENT THAT HE DID NOT.

COUNSEL, LET ME ASK THIS QUESTION. IF YOU WERE WRITING A DEFINITION OF THE WORD "IDENTIFICATION", AS USED IN THIS STATUTE, HOW WOULD IT, WHAT WOULD YOU WRITE IT TO BE?

I WOULD WRITE IT TO BE ONE SIMILAR TO THAT IN BLACK'S LAW DICTIONARY. I AM QUOTING FROM THE FIFTH EDITION, 1979. WHERE A WITNESS RECOGNIZES A PERSON, UPON HAVING, UNDER THE OBSERVATION OF THE PERSON. THAT IS WHAT I HAVE HIGHLIGHTED HERE. A WITNESS RECOGNIZES, AS THE SAME, WHICH, HAVING PASSED THE PERSON UNDER OBSERVATION. INHERENT IN THAT PARTICULAR DEFINITION ARE THE WORDS "OBSERVATION" AND "RECOGNIZING", AND I THINK INHERENT IN THOSE WORDS ARE "PERCEIVING". THE STATE, AGAIN, I WANT TO STRESS THE POLICY IN THIS CASE, AND THAT IS IF WE DON'T ALLOW THIS TYPE OF EVIDENCE IN, IF WE JUST DO A BLANKET EXCLUSION OF THIS TYPE OF EVIDENCE, UNDER THE IDENTIFICATION STATUTE OR OTHERWISE, THEN WE ARE NEVER TESTING A WITNESS'S ABILITY TO PERCEIVE OR MAKE AN ACCURATE OBSERVATION.

ARE WE -- SEE, I GUESS I THOUGHT YOU DO THAT BY CROSS-EXAMINATION AND, ALSO, THAT IF IT IS -- IF THEY TESTIFIED INCONSISTENTLY, YOU GET IT IN THROUGH PRIOR INCONSISTENT STATEMENTS, AND THEN IT IS IMPEACHMENT, AND THE JURY HEARS IF THAT WAY,-, OR IF IT IS EXCITED OUTRANS, THEN IT COMES IN THAT WAY, OR IF THEY HAVE CROSS-EXAMINED AND IMPLIED THAT THERE IS MOTIVE TO FABRICATE, IT COMES IN UNDER ANOTHER EXCEPTION, BUT JUST TO SAY BLANKETLY, WE ARE GOING TO TAKE, I GUESS, A STATUTE THAT IS IN DEROGATION OF THE COMMON LAW AND IN DEROGATION OF THE DEFENDANT'S RIGHT OF CROSS-EXAMINATION, AND READ IT IN A BROADER FAX -- A BROADER FASHION, THEN IT APPEARS, AT LEAST ON ITS FACE, THAT IT WAS INTENDED TO COVER, IS WHAT YOU ARE ADVOCATING TODAY, AND THAT IS MY CONCERN.

WE COULD TEST THIS BY WAY OF CROSS-EXAMINATION, BY INCONSISTENT STATEMENTS, BUT WHAT YOU FORGET IS THAT, OFTEN A WITNESS OR VICTIM DOESN'T SAY SOMETHING DIFFERENT, BUT A WITNESS OR VICTIM SIMPLY SAYS I COULD HAVE SAID THAT. I CAN'T REMEMBER. I DON'T QUITE REMEMBER, AND THAT IS WHY IT IS SO IMPORTANT TO GET SOMETHING IN THAT IS PRESSURE.

BUT YOU WOULD LIKE TO HAVE, UNDER THAT RATIONALE, THE ENTIRE STATEMENT THAT THE WITNESS GIVES TO THE POLICE, WITHIN A DAY AFTER, ABOUT THE WHOLE EVENT --

ABSOLUTELY NOT.

BUT WHY IS THE DESCRIPTION OF IT, AS OPPOSED TO THE DESCRIPTION OF THE CRIME, SOMETHING THAT IS WE ARE GOING TO ELEVATE TO A DIFFERENT LEVEL OF CREDIBILITY.

I WOULD LOVE TO READ A PASSAGE FROM JUERTOS, BUT THE COURT SAID IT IS NOT THE ACCURACY OF THE TRUTH OF THE DESCRIPTION BUT IT IS RELEVANT. RATHER IT IS THE PRIOR DESCRIPTIONS OR FEATURES OF THE PERSON THAT IS IDENTIFIED BY THE WITNESS AS TO THE PERPETRATOR THAT IS RELEVANT. THE VICTIM'S ABILITY TO TRANSFER ACCURATELY THE MENTAL IMAGE COMMITTED AT THE TIME OF THE CRIME TO THE POINT AND PLACE OF CORPORAL IDENTIFICATION. IN OTHER WORDS GENERAL STATEMENTS HAVE NOTHING TO DO WITH ONE'S ABILITY TO MAKE AN IDENTIFICATION AND GET A PICTURE AND COMPARE THEM AND MAKE AN IDENTIFICATION, WHETHER IT BE IN COURT OR WHETHER IT BE AT AN EARLIER TIME. THIS IS NOT AN EXTENSION OF THE IDENTIFICATION STATUTE. IT IS THE STATE'S POSITION, AS THE TOURT -- AS THE FOURTH DCA TERMED IT, IT IS A TWIN, PART AND PARCEL OF THE IDENTIFICATION PROCESS, THE ABILITY TO PERCEIVE AND THE ABILITY TO RECOGNIZE AND IT IS THE SAME F WE ALLOW THE WITNESSES TO COME IN AND SAY IT IS THE SAME, WITHOUT TESTING IT, THEN WE ARE NOT CERTAIN THAT WE HAVE LET THE CASE FALL THROUGH THE CRACKS UNNECESSARY EARL, OR WE, PERHAPS, HAVE HAD A BAD IDENTIFICATION MADE.

IF WE TOOK YOUR LINE THAT YOU WOULD DRAW THAT, IF SOMEONE DIDN'T MAKE AN IDENTIFICATION, THEN IT COULDN'T COME IN, WHAT YOU WOULD REALLY HAVE, AND IT IS SORT OF WHAT YOU ENDED UP WITH IN SWOFFORD, YOU WOULD HAVE THAT ONE PERSON IS IDENTIFIED, THE DEFENDANT, AND YOU GET IN ALL THOSE PRIOR DESCRIPTION TO SAY BOLSTER THAT, BUT IF 20 OTHER PEOPLE HAVE SEEN SOMEBODY THAT THEY DIDN'T IDENTIFY AS THE DEFENDANT, BUT DOESN'T FIT THE DEFENDANT'S DESCRIPTION, THEN THE DESCRIPTION THAT ALL THOSE 20 OTHER PEOPLE GAVE TO THE POLICE --

WON'T COME IN.

ISN'T THAT SOMETHING, IF THIS IS A SEVERAL FOR THE TRUTH, WOULDN'T WE WANT ALL THOSE TO GET IN?

I DO AGREE WITH YOU, YOUR HONOR, AND I WOULD SAY THAT THAT WOULD COME UNDER THE NUMBER OF CASE. ROWE, WOODS BURY, JJUERTOS, BUT WITH REGARD TO THE OTHER NUMBER OF CASES THAT WE HAVE CITED THAT SUGGEST THE IDENTIFICATION STATUTE, IDENTIFICATION IS NECESSARY PREDICATE, JUST AS ANY OTHER PREDICATE FOR THE HEARSAY EXCEPTION, ANY OTHER HEARSAY EXCEPTION, A CERTAIN PREDICATE HAS TO BE MADE.

IS THERE ANY LIMITATION ON THIS, ONCE WE DO THIS? THAT IS THAT LET'S SUPPOSE THE WITNESS HERE WENT TO HER MOTHER AND HER FATHER AND HER PRIEST, AND --

YES.

THE MAYOR OF THE TOWN.

ABSOLUTELY.

AND TOLD ALL OF THOSE PEOPLE, YOU KNOW, I WANT TO TELL YOU WHAT THE DESCRIPTION WAS OF THE PERSON, AND I ASSUME, THEN, ALL THOSE PEOPLE, THEN, COULD BE CALLED TO TESTIFY, TO BOLSTER, IN OTHER WORDS, THAT SHE HAS BEGIN A PRIOR CONSISTENT IDENTIFICATION OR DESCRIPTION. IS THAT --

YOUR HONOR, THEN YOU HAVE THAT WEIGHING ANALYSIS THAT IS DONE UNDER 9403, BECAUSE AS YOU KNOW, WE HAVE OTHER, FOR INSTANCE THE CHILD HEARSAY EXCEPTION, IT IS UP TO THE

TRIAL COURT TO THEN LIMIT THE NUMBER OF WITNESSES THAT CAN REPEAT STATEMENTS THAT HAVE BEEN MADE BY THE CHILD VICTIM. THE SAME WOULD BE TRUE HERE, AND I WOULD SAY THAT IT WOULD DEPEND FOR INSTANCE IN THIS CASE, THE PROBLEM WAS --

-- MR. CHIEF JUSTICE: YOU HAVE USED YOUR TIME.

WE WOULD ASK THAT YOU FIND WITH THE IDENTIFICATION STATUTE. MR. CHIEF JUSTICE: REBUTTAL. HOW WOULD YOU DEFINE IDENTIFICATION?

THE WAY THE FOURTH DISTRICT DID IT. THEY TOOK THE IDENTIFICATION OUT OF BLACK'S LAW DICTIONARY, WHICH HAS TO DO WITH IT IS THE VERY SAME PROOF OF IDENTITY, THE PROVING THAT A PERSON, SUBJECT OR ARTICLE BEFORE THE COURT IS THE VERY SAME.

WELL, WOULD YOU BE SO LIMITING IN THAT DEFINITION, THAT YOU WOULD HAVE TO, THE IDENTITY WOULD MEAN THAT YOU WOULD HAVE TO CALL THE PERSON'S NAME?

NO. YOU DON'T HAVE TO CALL THE PERSON'S NAME. YOU CAN SAY THAT IS HIM. IT IS THAT GUY. THAT PICTURE. THAT WOMAN.

WAIT A MINUTE. YOU ARE OUT OF COURT. THIS IS A STATEMENT THAT IS BEING MADE OUT OF COURT. YOU CAN'T -- MAYBE YOU HAVE GOT A GROUP OF PEOPLE STANDING AROUND, AND THEY SAY TO THE POLICE OFFICER THAT IS HIM.

CORRECT. THAT IS ADMISSIBLE.

AND MAYBE THAT WOULD BE ONE SET OF CIRCUMSTANCES. BUT YOU WOULD ONLY LIMIT IT, THEN, TO WHERE THERE IS A GROUP OF PEOPLE OR THEY ARE IN A LINE-UP, NOT ALLOW IT --

THE CIRCUMSTANCES OF A CHANCE MEETING OR YOU SEEING THE PERSON AGAIN, THAT IS ALL COVERED. IT IS THE SAME PERSON. WHEN YOU PERCEIVE HIM TO BE THE SAME, THAT IS A STATEMENT OF IDENTIFICATION OF A PERSON. THAT IS ADMISSIBLE. THIS, AND AS THE STATE SAID HERE IDENTIFICATION IS ALWAYS AN OPINION. IT IS NOT A FACT LIKE A FINGERPRINT. THERE ARE LOTS OF PROBLEMS WITH IDENTIFICATIONS. AND THE STATE IS ASKING YOU TO EXPAND THE STATUTE FROM ITS NORMAL UNDERSTANDING AND MEANING TO MEAN SOMETHING THAT IS GOING TO BE LIMITED TO HELP ONLY THE STATE BOLSTER AN I.D.. THAT IS HOW THEY WANT IT READ. THAT IS EXACTLY THE WAY THEY WANT IT READ. THE DANGER IS WHAT YOU SEE IN THIS CASE. THIS WOMAN, SHE DIDN'T SAY SHE SAW A PROFILE. SHE SAID SHE SAW THE SIDE OF HIS FACE. I GUESS THE SIDE OF ONE BLACK MAN'S FACE LOOSE JUST LIKE THE SIDE OF ANOTHER BLACK MAN'S FACE. SHE DIDN'T SAY ANYTHING BEYOND THAT. BUT SHE DID NOT SEE HIS MOUTH. SHE DID NOT SAY HE HAD MISSING TEETH. SHE DID NOT KNOW HE HAD MISSING TEETH, BUT FROM HER COURT IDENTIFICATION AND WHAT SHE SAW, WHAT SHE HAD THE OPPORTUNITY TO SEE, IT HAD NOTHING TO DO WITH MISSING TEETH, YET IN HEARSAY EVIDENCE THERE IS THE DESCRIPTION THAT THE MAN IS MISSING EVERY OTHER TOOTH. THE DANGER OF THIS KIND OF RULE IS THAT THIRD PERSONS ARE GOING TO BEGIN TO REMEMBER AND DESCRIBE DETAILS AND DESCRIPTIONS THAT THE WITNESS, HERSELF, CAN'T REMEMBER. THEY ARE GOING TO BE LOTS OF HELPFUL WITNESSES OUT THERE, HELPING THE STATE'S WITNESS WITH HER IDENTIFICATION AND WITH HER DESCRIPTION. THERE IS A REAL DANGER OF ALLOW ALLOWING BOLSTERING BY PRIOR CONSISTENT STATEMENTS. TO HOW MANY PEOPLE THERE IS NO LIMIT IN THE WAY IT IS STATED IN THE STATUTE. A STATEMENT OF IDENTIFICATION OF A PERSON, AFTER PERCEIVING THE PERSON. I AM FOCUSING ON "OF A PERSON", BECAUSE A DESCRIPTION EXCEPT IN RARE INSTANCES, DOES NOT DESCRIBE A PERSON AND ONLY ONE PERSON, TO THE EXCLUSION OF EVERY OTHER PERSON IN THE WORLD. THAT IS WHAT THE SEARCH FOR TRUTH IS TRYING TO DO. WE ARE TRYING TO FIND OUTDID THE STATE GET THE RIGHT GUY, OR IS THIS A CASE OF MISTAKEN IDENTIFICATION? YOU CAN BEND OVER BACKWARDS IN TRYING TO HELP THE STATE TOO MUCH, BECAUSE SOME OF THE EVIDENCE IS SIMPLY NOT RELIABLE, AND IT IS NOT WHERE IT SHOULD BE ADMITTED, RIGHT

NOW THIS KIND OF EVIDENCE IS NOT ADMITTED. THEY HAVE NEVER HAD THIS KIND OF EVIDENCE. THEY HAVE NEVER GOTTEN A DESCRIPTION IN BEFORE, UNLESS THERE IS SOME EXCITED OUTRANS OR SOME OTHER EXCEPTION. THE COURT HERE MADE NO FINDING THERE WAS AN EXCITED OUTRANS, AND MS. DEESE SAID THIS ROBBERY HAPPENED BETWEEN THREE AND FOUR IN THE AFTERNOON. SHE GAVE HER STATEMENT TO THE DETECTIVE AT 5:256789 THIS IS NOT AN EXCITED OUTRANS. MY TIME IS UP. I ASK YOU TO REAFFIRM SWOFFORD. THANK YOU. MR. CHIEF JUSTICE: THANK YOU VERY MUCH. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.