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Clotilde Estela Menna v. State of Florida

CHIEF JUSTICE: GOOD MORNING AND WELCOME TO THE THURSDAY ORAL ARGUMENT CALENDAR HERE, AT THE FLORIDA SUPREME COURT. WE WOULD SAY A SPECIAL WELCOME TO THE STUDENTS FROM THE UNIVERSITY OF FLORIDA LAW SCHOOL THE CLASS OF ADVANCED TECHNIQUES AND APPELLATE ADVOCACY. THE CLASS IS ESCORTED BY ITS INSTRUCTOR JUDGE WILLIAM WAGNER. THERE ARE A COUPLE OF US UP HERE AT LEAST, THAT ARE ALWAYS VERY EAGER TO HAVE SUPPORTING GATORS AROUND, IN THIS PART OF FLORIDA, SO PARTICULARLY GLAD TO SEE YOU HERE THIS MORNING.

LOTS OF SUPPORT.

CHIEF JUSTICE: THE FIRST CASE ON THE ORAL ARGUMENT CALENDAR SAVER. GOOD MORNING, --

GOOD MORNING, JUSTICES. MY NAME IS MIKE SNURE. I AM UP HERE FROM ORANGE COUNTY. IT IS MY PRIVILEGE TO REPRESENT ESTELLA MENNA AND MORE OF A PRIVILEGE TO BE INVITED UP HERE BEFORE THE COURT, TO EXPRESS HER POSITION IN THIS MATTER. I KNOW THAT YOU ALL ARE AWARE OF THE FACTS OF THE CASE, BUT I WOULD LIKE TO HIGHLIGHT A FEW MINKS BUT THE ARGUMENT. MRS. MENNA WAS NOTIFIED THAT HER HUSBAND HAD BEEN, WAS IN THE HOSPITAL AND WAS ON THE WAY TO THE HOSPITAL, WHEN SHE WAS STOPPED BY SOME ORANGE COUNTY DEPUTIES, AND A DRIVE-BY SHOW UP FROM THE WITNESS OF THE SHOOTING OCCURRED, AND SHE WAS, FOR LACK OF A BETTER TERM, DISIDENTIFIED. SHE WAS ESCORTED, AS A COURTESY TO THE HOSPITAL IN A PATROL CAR, AND WHEN SHE WAS THERE, SHE MET WITH, INITIALLY, ONE DETECTIVE FROM THE ORANGE COUNTY SHERIFFS OFFICE.

WAS THERE ANY REASON THAT THE OFFICERS HAD TO BELIEVE THAT SHE WAS INVOLVED IN THE SHOOTING?

WAS THERE --

YOU SAID SHE WAS NOT IDENTIFIED BY THE EYEWITNESS, SO WAS THERE ANY REASON THEY SUSPECTED HER?

WELL, I AM NOT SURE HOW MUCH OF THAT IS IN THIS RECORD. THERE HAVE BEEN OTHER HEARINGS IN THE CASE. I DON'T WANT TO REFER TO THINGS THAT ARE NOT IN THE RECORD, BUT TO ANSWER YOUR QUESTION, I BELIEVE THE DETECTIVE INDICATED, BECAUSE THERE WAS A CAR OF A SIMILAR TYPE CAR OWNED BY THE FAMILY SEEN IN THE AREA, AND FAMILY MEMBERS ARE GENERALLY THIS IS ALL IN A ROAD SIDE STOP. SHE CONTACTED -- SHE REQUESTED TO CONTACT TWO OF HER CHILDREN WHO WERE OUT OF THE COUNTRY, TO CONSULT WITH THE CHAPLAIN. SHE WASN'T TOLD OF THE DEATH, APPARENTLY, UNTIL SHE GOT THERE.

YOU AREN'T RAISE AGO CONSTITUTIONAL ISSUE.

WE ARE NOT.

IS THIS A PROBATIVE VERSUS PREJUDICIAL TYPE OF ANALYSIS?

YES, IT IS. AND DURING THAT CONTEXT, SHE ASKED TO TAKE THIS GUNSHOTWABFRD SHE REFUSES. E HEARING, FOLLOWING THE HEARING, IN THE TRIAL COURT, THE L COURT HAD HEARD

A BOND MOTION AND MADEEOTHAT.S IN T, AND EFS AND DECIDED AND ACTUALLY ISSUED A FACTUAL THAT HER REFUSAL COULD NEVER BE ANSWERED. THE FATE AND NATURAL CONSEQUENCE OF THAT IS THAT HER REFUSAL IS NOT PROBATIVE OF ANY CONSCIOUSNESS OF GUILT. THE STATE APPEALED THE FIFTH DISTRICT AND FOUND THAT THE TRIAL COURT APPLIED THE WRONG LAW. WHEN THE TRIAL COURT RELIED ON THE HEARING DECISION, WHICH IS CITEDSES, WSNEARLY FACTUALLY IDENTICAL, BUT AS CLOSE AS YOU CAN GET TO A FACTUALLY-IDENTICAL CASE. THE FIFTH SAID SHE HAD APPLIED AND THE TRIAL COURT RELIED ON HERRING. THE FIFTH SAID SHE HAD RELIED ON THE LAW AND SAID THAT HERRING D EFFECTIY BEEN OVERRULED BY A COMBINATION OF TWO DECISIONS FROM THIS COURT, ONE DISCUSSION FROM THE FIRST DISTRICT COURT OF APPEAL AND ANOTHER DECISION BY THE FIFTH. BY THEIR OWN PRIOR DECISION IN . ANDY WENT INTO ANSF HOW THESE CS CONSTITUTED AN OVERRULEING OF HERRING, SUBSALENCIO, AND ARGUED WITH THE LAW, AND YET THEY ALSO FOUND WITH THE TRIAL COURT'S FINDINGS AND MADE A CONTRARY FINDING THAT THERE WAS NO WAY THAT SHE COULD NOT HAVE KNOWN THATRSAL WOULD NOT BE USED AGAINST HER, AND SO THEY ACTUALLY BOUGHT INTO THE HERRING RATIO, BUT ONE POINT I WANT TO MAKE ABOUT THE FIFTH'S DECISION, IN SAYING THAT THE TRIAL JUDGE HAD RELIED ON A CASE THAT HAD BEEN OVERRULED, THAT DECISION.

THEY REALLY RELY ON THE CONCURING OPINION OF JUSTICE GRIMES, CORRECT? AND IN THAT OPINION, JUSTICE GRIMES ACTUALLY USES THE TERM THAT THERE WAS NO MISLEADING ASSURANCE BY THE POLICE. TAKE THE CONFLICT ISSUE AND RESOLVE IT. WE WOULD LIKE FOR THE COURT TO RESOLVE IT, CONSISTENT WITH YOU HAVE YOUR OWN OPINIONS IN OCHOCONE AND TAYLOR, WHICH DO NOTHING TO WATER DOWN HERRING AND TO AFFIRM HERRING AS THE LAW OF THE STATE OF FLORIDA, SO ONE WAY TOLD WELD ASK THIS COURT TO DEAL WITH -- ONE WAY WE WOULD ASK THIS COURT TO DEAL WITH IT IS TO FIND ON THE FIFTH, OR SECONDLY --

WHAT ABOUT THE LANGUAGE THE COURT USES IN TAYLOR. IN TAYLOR THE COURT SAYS "NOR WAS TAYLOR MISLED CONCERNING THE NCES OF REFUSAL" SO THAT IS STILL A LITTLE DID DIFFERENT FROM THE LANGUAGE THAT SHE USED BY THE THIRD IN THE HERRING CASE, SO IF YOU USE THAT AS THE STANDARD, THAT THE DEFENDANT WAS NOT MISLED CONCERNING THE CONSEQUENCES OF REFUSAL, HOW DOES THAT SQUARE IN THIS PART?

BECAUSE EVEN THOUGH THAT LANGUAGE IS IN THERE, THERE IS A A BIT OF THE OPINION DEVOTED TO MAKING A FINDING THAT TAYLOR WAS AWARE OF THE ADVERSE CONSEQUENCES, THAT HE DID KNOW THINGED TO MAKE AO ARREST HIM THAT HE HAD BEEN ARRESTED TWICE FOR GDUI BEFORE, AND THAT HE HAD BEEN ADVISE -- FOR DUI BEFORE, AND THAT HE HAD BEEN ADVISED BY A LAWYER NOT TO TAKE THE TEST.

DIDN'T THE OFFICER IN THE TAYLOR CASE SAY, WELL, I AM JUST GOING TO USE WHAT I HAVE OBSERVED, TO DETERMINE WHETHER OR NOT YOU ARE --

-- IMPAIRED.

-- SHOULD BE ARRESTED FOR DUI AS OPPOSED TO ACTUALLY SAYING ANYTHING ABOUT THE REFUSAL, PER SE.

WELL, NOW THAT, IS THE ONLY THING REPORTED THAT THE OFFICER SAID, BUT THE COURT, THIS COURT, MAKES A FINDING THAT THOSE OTHER FACTORS WERE PRESENT, AND THEN ULTIMATELY SAYS HE KNEW. OR SHOULD HAVE KNOWN THAT HIS REFUSAL COULD NOT BE MADE FREE. -- FREELY. I AM INTO MY REBUTTAL TIME. I WOULD BE HAPPY TO STAND UP SOME MORE, BUT I WOULD LIKE TO RESERVE SOME OF MR. CHIEF JUSTICE

THANK YOU VERY MUCH, COUNSEL. LET ME ADDRESS THE ISSUE WHICH I WAS ALLUDING TO, FIRST, WITH THE STATE. WHAT, THIS MATTER WAS ON A SUPPRESSION HEARING, CORRECT?

THAT'S CORRECT. DE ISSUE, IS FIRST LINE ISSUE HERE A QUESTION OF RELEVANCE?

WELL, THE TRIAL COURT FOUND THAT IT WAS NOT RELEVANT. THAT IS THE EXACT A 403 ANALYSIS.

SO IS THE PROBLEM THAT THE TRIAL COURT NEVER ENGAGED IN A WEIGHING ANALYSIS, OR IS THE STATE LOOKING FOR A PER SE RULE THAT, IF THERE IS SOME EVIDENCE THAT THEY SHOULD HAVE KNOWN OR BE KNOWN, THAT IT, THEN, COMES IN? I MEAN, BECAUSE EVEN WITH EVIDENCE OF FLIGHT, THERE IS, IT DEPENDS ON THE CIRCUMSTANCES. AND SO, WOULD THIS AT LEAST BE THAT THE TRIAL COURT SHOULD LOOK AT IF IT COULD BE marginally RELEVANT, BUT BECAUSE IT IS AMBIGUOUS IN THIS CIRCUMSTANCE, WHERE HER HUSBAND HAD JUST DIED, AND SHE ISN'T TOLD OF THE CONSEQUENCES, THAT THOSE ARE ALL FACTORS THAT THE TRIAL COURT WEIGHS IN, THEN, DOING A 403 ANALYSIS?

WELL, CERTAINLY SHE IS FREE TO EXPLAIN OTHER POSSIBLE EXPLANATIONS FOR WHY SHE BE LAFD -- BEHAVED AS SHE DID.

SHE ON TRIAL, AND SHE WOULD HAVE TO TAKE THE STAND TO DO THAT.

OR CALL OTHER WITNESSES. YES. SHE CERTAINLY IS FREE TO DO THAT THAT I WAS YOU KNOW, PUT FORTH OTHER EXPLANATIONS FOR HER CONDUCT.

THAT IS IF IT COMES INTO EVIDENCE.

THAT'S RIGHT.

I AM ASKING, IN THE BALANCING TEST, ISN'T IT SOMETHING THAT THE TRIAL COURT, THEN, STILL HAS WITHIN ITS DISCRETION TO LOOK AT ALL THE FACTORS OF THE CASE AND DECIDE WHETHER, IN THIS PARTICULAR CASE, WHERE IT WASN'T COMPULSORY, WHERE THERE IS NO EVIDENCE SHE IS ON NOTICE, WHERE SHE WASN'T TOLD BY THE POLICE THAT ANY MARGINAL RELEVANCE THAT HER REFUSAL IS AMBIGUOUS, AT BEST, AND THAT ANY MARGINAL RELEVANCE WOULD BE OUTWEIGHED BY THE FACTS AT.

WELL, IT IS TRUE THAT THAT BALANCING TEST HAS NOT BEEN PERFORMED TO DATE IN THIS CASE.

IT SOUNDS LIKE THE FIFTH JUST SAID IT COMES IN.

WELL, BECAUSE THAT WAS THE BASIS OF THE DECISION OF THE TRIAL COURT WAS THAT IT WAS NOT RELEVANT, BUT, AND THAT IS WHAT WAS DETERMINED TO BE THE INCORRECT APPLICATION OF LAW UNDER HERRING. THIS COURT HAS NOT FORMALLY ACCEPTED JURISDICTION AT THIS, OF THIS CASE, AND AS MY OPPONENT POINTS OUT, THE FIFTH'S OPINION DID CERTIFY CONFLICT WITH HERRING, BUT THEY ALSO, IN HIS WORDS, BOUGHT INTO THE HERRING RATIONALE. I THINK THAT THERE IS A WAY TO HARMONIZE THE HERRING CASE WITH THE FACTS OF THIS CASE. HERRING ACKNOWLEDGED THAT SOUTH DAKOTA VERSUS NEVILLE STANDS FOR THE PROPOSITION THAT EVIDENCE AFTER DEFENDANT'S BEHAVIOR IS ADMISSIBLE, WHERE THE DEFENDANT HAS SUBSTANTIAL MOTIVATION NOT TO BEHAVE AS HE DID. THE, UNDER THE FACTS OF THIS CASE SHE WAS TOLD, LISTEN, WE CAN ELIMINATE YOU AS A SUSPECT WITH THIS FORENSIC TEST, SO SHE HAD A SUBSTANTIAL MOTIVATION TO NOT BEHAVE AS SHE DID. IT FALLS SQUARELY UNDER HER - - IT FALLS SQUARELY UNDER HERRING. I AM NOT ASKING FOR A PER SE RULE. I AM SUGGESTING THAT THERE WAS EVIDENCE THAT IS UNDISPUTED, THAT SHE WAS TOLD THAT IN THE FUTURE THIS FORENSIC TEST COULD BE USED AS EVIDENCE TO LABEL HER AS A SUSPECT, SO THIS CASE IS DISTINGUISHABLE FROM HERRING ON THAT GROUND.

ARE YOU SAYING THAT THERE WAS NO CASE LAW THAT WOULD SUPPORT THE TRIAL JUDGE'S

DETERMINATION OR HIS DISCRETIONARY CALL THAT HER FAILURE TO TAKE THE TEST WAS NOT RELEVANT? IS THAT WHAT YOU ARE SAY SOMETHING.

I AM SAYING THAT, BASED ON THE FACTS THAT SHE FOUND AND THAT WE ALL ACCEPT, THE INCORRECT RULE OF LAW WAS APPLIED.

BUT WASN'T THAT SES DETERMINATION? THAT IS WHAT I AM ASKING.

WELL, THE DISTINGUISHING FACTOR IS WHETHER SOMEONE HAS SUBSTANTIAL MOTIVATION NOT TO BEHAVE AS THEY DID, WHETHER YOU ARED THAT IT IS, IN THE WORDS OF NEVILLE, A SAFE HARBOR. WHETHER YOU ARE TOLD THAT YOU KNOW, WE ARE NOT GOING TO HOLD THIS AGAINST YOU OR, WHETHER CONVERSELY, YOU ARE TOLD THAT THIS CAN ELIMINATE YOU AS A SUSPECT OR THAT YOU KNOW, YOUR REFUSAL CARRIES WITH IT CERTAIN ADVERSE CONSEQUENCES THERE. IS NO MISLEADING ASSURANCE IN THIS CASE.

WHY ISN'T THAT ANALYSIS INEVITABLY FACTORED? THAT IS THAT, WHETHER OR NOT THOSE FACTORS APPLY.

WELL, IT IS.

IT IS FACT-DRIVEN, THEN, AND THE TRIAL COURT IS THE ONE THAT HAS TO EVALUATE THESE FACTS, IF I UNDERSTAND IT CORRECTLY, ONE OF THE THINGS THAT WAS GOING ON WHILE THEY WERE ATTEMPTING TO GET HER TO DO THIS TEST WAS, IS THAT SHE KEPT ASKING FOR A LAWYER, THAT SHE WANTED TO CONTACT HER LAWYER. IS THAT NOT CORRECT?

THAT'S CORRECT.

WHY WOULDN'T ONE OF THE INFERENCES THAT THE TRIAL COURT COULD CONCLUDE FROM THAT, IS THAT, SINCE SHE WAS BEING, NOT BEING TOLD THAT THIS WAS COMPULSORY, AND IT IS NOT COMPULSORY.

NO.

THAT WHAT SHE WAS DOING WAS SAYING I NEED TO TALK TO MY LAWYER BEFORE I DO ANYTHING, AND THAT THAT WAS PERFECTLY REASONABLE, AND THAT THAT DID NOT GIVE RISE TO AN INFERENCE THAT SHE WAS GUILTY, BECAUSE SHE REFUSED THE TEST. IT GAVE RISE TO AN INFERENCE INFERENCE INFERENCE THAT SHE WAS -- TO AN INFERENCE THAT SHE WAS TRYING TO BE CAUTIOUS UNDER THESE TELY WITH -- TERRIBLY EMOTIONAL CIRCUMSTANCES AND HAVE THE ADVICE AFTER LAWYER, BEFORE SHE DID ANYTHING ELSE.

THIS TOOK PLACE OVER SEVERAL HOURS AND SHE HAD AN OPPORTUNITY TO CALL HER LAWYER AND SHE ALSO WENT IN AND WASHED HER HANDS SEVERAL TIMES BEFORE SHE REFUSED.

IT LOOSE TO ME LIKE SHE WASHED HER HANDS BEFORE SHE EVER

BFTERIS.I DON'T SEE ANYTHING IN THE RECORD, AS FAR AS FROM THE DETECTIVE, THAT INDICATES THAT SHE DID IT AFTERWARDS. DO YOU HAVE A RECORD CITE?

YES.

THAT SAYS AFTERWARDS?

YES. THAT RECORD CITE WAS DURING THE FIRST DETECTIVE'S TESTIMONY AT , 2. E AN EXCERPT HERE.

WHAT DID IT SAY?

HE IS HE THAT IT WAS OVER SEVERAL HOURS OF -- HE SAID THAT IT WAS OVER SEVERAL HOURS OF TIME, AND THAT HE ASKED HERD SHE SAID --

WOULD YOU READ ME THAT PART THAT SAYS HE ASKED HER AND SHE WENT IN.

THE ULTIMATE ANALYSIS WOULD BE THAT THAT WOULD GO TO THE, IN ANY CASE.> YOU SAID THAT AFTER HE ASKED HER, SHE WENT IN AND WASHED HER HANDS. I HAVE TROUBLE FINDING THAT IN THE RECORD.

YOU TOLD HER THAT IT WOULD, IF SHE TOOK THE TEST, IT WOULD PRECLUDE HER FROM HAVING SHOT A WEAPON, RIGHT? RIGHT. HER RESPONSE TO THAT WAS SHE REFUSED AND BEFORE HE ASKED HER TWO OR THREE TIMES SHE WENT INTO THE BATHROOM, YES, AND AFTER HE ASKED HER, SHE CAME OUT? YES. RUBBING HER HANDS? YES.

READ ME THAT AGAIN?

AFTER SHE REFUSED, I ASSUME SHE CAME OUT WASHING HER HANDS. RIGHT. SHE HAD COME OUT AFTER HAVING GONE TO THE BATHROOM. RIGHT. RUBBING HER HANDS. YES. AND THIS WAS SPECIFICALLY AFTER SHE REFUSED. YES.

WHAT PAGE IS THAT?

17.

COUNSEL, AS FAR AS A REMEDY IS CONCERNED, IF IF, -- IF THIS IS SEPTEMBER BACK, IT IS YOUR ESTIMATE THAT THERE WOULD HAVE TO BE A WEIGHING ANALYSIS DONE BY THE TRIAL JUDGE?

THAT CERTAINLY HAS NOT BEEN DONE TO THIS CASE, AND THIS COURT VERY WELL COULD SAY JURISDICTION, NOT ACCEPT JURISDICTION, BECAUSE THIS CASE IS NOT IN CONFLICT WITH HERRING, BECAUSE HERRING ACKNOWLEDGES THE PRINCIPLE THAT, WHERE THERE IS SUBSTANTIAL MOTIVATION NOT TO BEHALF AS THE DEFENDANT DID, THAT THAT EVIDENCE IS RELEVANT. UP TO THIS POINT IN TIME, THAT HAS BEEN THE ONLY MATTER THAT HAS BEEN DISCUSSED. WHETHER IT IS RELEVANT OR NOT. IN FACT, IN ORDER TO ENGAGE IN A 4 ON 3 ANALYSIS, THERE HAS TO BE A FINDING THAT IT IS RELEVANT, BUT WHAT RELEVANCE IT HAS IS OUTWEIGHED BY THE PROBATIVE VALUE.

BUT F WE DETERMINE THAT IT IS RELEVANT.

RIGHT.

THEN THE REMEDY IS TO GO BACK FOR A WEIGHING AS TO THE PREJUDICE.

I SUPPOSE THAT IS TRUE, YES. THAT HAS NOT BEEN DETERMINED AT THIS POINT. THERE ARE DISTINGUISHING FACTS IN THIS CASE, AND HERRING. SHE WAS TOLD THAT THIS TEST COULD EXONERATE HER. SHE WAS NOT MISLED. THERE WAS NO MISLEADING ASSURANCE. SHE WAS, ALSO, TOLD THAT THE TEST WAS PAINLESS, SHORT, AND NONINVASIVE, JUST A SWABBING OF HER HANDS THAT COULD HAVE TAKEN PLACE RIGHT THERE IN THE WAITING ROOM. SHE WAS TOLD THAT IT WAS FORENSIC TEST THAT WOULD ESTABLISH THAT SHE HAD NOT FIRED A WEAPON, SO THERE ARE SUBSTANTIAL DISSIMILARITIES BETWEEN THIS CASE AND HERRING, BUT EVEN IF THIS COURT CHOOSES TO ACCEPT JURISDICTION AND LOOKS AT HERRING, IT IS THE STATE'S POSITION THAT THE CONCURRING OPINION IN CHICONE, THAT HAS SINCE BEEN ACCEPTED AND QUOTED WITH APPROVAL BY THE FIRST AND FIFTH DISTRICTS, IS THE CORRECT LAW. MY OPPONENT HERE DOES NOT ARGUE THAT THERE IS A CONSTITUTIONAL RIGHT. THAT IS WHAT THE CONCURING OPINION SAYS THAT, THERE IS NO CONSTITUTIONAL RIGHT TO REFUSE A HAND SCHWAB TEST.

MOST OF THESE CASES, THE PERSON IS ALREADY UNDER ARREST, UNLIKE THIS CASE.

IS THE CONCURRING OPINION IN OCHOONE REALLY IN CONFLICT WITH THE HERRING DECISION?

YES, BECAUSE HERRING IS DECIDED AS CONSTITUTIONAL ISSUE.

BUT AS A MATTER OF LAW HERE, IT SEEMS TO ME THAT, WHEN YOU LOOK AT WHAT THE COURT SAID IN HERRING AND WHAT THE COURT SAID IN THE OCHOONE DECISION, I MEAN YOU ARGUED TO US THAT THIS SORT OF SUBSALENCIO OVERRULES HERRING CORRECT? THE STATEMENTS THERE ARE NOT REALLY AT ODDS, ARE THEY?

THEY CAN BE HARMONIZEED, AND THAT IS WHAT THE FIFTH DISTRICT DID IN THE CUNNINGHAM CASE.

SO YOU ARE NOT REALLY ARGUING TO US THAT, AS YOUR BRIEF SEEMED TO ARGUE, THAT HERRING IS NO LONGER GOOD LAW.

WELL, CERTAINLY A CONCURRING OPINION CAN'T OVERRULE AN OPINION IN ANY CASE, SUBSALENCIO OR LOUD AS CAN BE. IT IS A CONCURRING OPINION AND I ACKNOWLEDGE. THAT THE SUBSEQUENT TO THAT IS TAYLOR BUT DOES NOT DIRECTLY DISCUSS HERRING AND DOESN'T REALLY CITE TO IT, SO --

LET ME ASK YOU A QUESTION. YOU SAID MANY OF THE OTHER CASES WERE CASES WHERE THE DEFENDANT WAS ALREADY UNDER ARREST.

THAT'S CORRECT.

AND GOING BACK TO THE COLLOQUY THAT JUSTICE ANSTEAD ALLUDED TO, AT THIS POINT, SHE IS NOT UNDER ARREST. SHE WASN'T ELIMINATED AS A SUSPECT, BUT SHE WAS NOT, SHE WAS AFFIRMATIVELY NOT IDENTIFIED BY AN EYEWITNESS.

RIGHT. RIGHT.

SHE IS ASKING FOR, SHE WANTS TO TALK TO A LAWYER. IT JUST SEEMS TO ME THAT THOSE CIRCUMSTANCES, THE CHANCE, IF THEY ARE NOT AFFIRMATIVELY TOLD THAT IF YOU REFUSE, IT IS GOING TO BE USED AGAINST YOU, THAT IT IS INHERENTLY AN AMBIGUOUS SITUATION, BECAUSE YOU ARE BEING QUESTIONED BY THE POLICE. YOU HAVE NOT YET BEEN TOLD FOURSIN SILENT. YOU ARE OR SHE WAS ASKING ABOUT WANTING TO TALK TO A LAWYER, AND IT IS, AND YET THAT IS NOT GOING TO, YOU KNOW, THE ISSUE OF HER WANT AGO LAWYER ISN'T GOING TO GO INTO EVIDENCE, SO THE JURY IS GOING TO HAVE AN INCOMPLETE PICTURE THAT SHE REALLY CAN'T DEFEND AGAINST, UNLESS SHE GETS ON THE STAND. I THINK THOSE FACTORS, OR WOULDN'T YOU THINK THOSE FACTORS ARE FACTORS THAT THE TRIAL COURT CAN PROPERLY TAKE INTO CONSIDERATION, IN DETERMINING THAT THIS TYPE OF CIRCUMSTANCE IS FRAUGHT WITH PREJUDICE OUTWEIGHING ANY PROBATIVE VALUE.

NO. I RESPECTFULLY COULDN'T AGREE WITH THAT, BECAUSE THE DISTINGUISHING FACTOR IN THIS CASE IS SHE WAS TOLD, IF SHE TOOK THIS TEST, IT WOULD ELIMINATE HER AS A SUSPECT, AND THAT ONCE AND FOR ALL, THE QUESTION WOULD BE SETTLED.

BUT, AGAIN, AND OBVIOUSLYT IS NOT TO GO OVER IT AGAIN, BUT SHE WASN'T TOLD THAT, IF SHE DIDN'T CAME TA IT, IT WOULD IMPLICATE HER AS A SUS-- IF SHE DIDN'T TAKE IT, IT WOULD IMPLICATE HER AS A SUSPECT.

I THINK LOGICALLY THAT IS TRUE.

SHE IS A GRIEVING WIDOW. HER HUSBAND HAS JUST BEEN KILLED IN TERMS OF THE EMOTIONAL CIRCUMSTANCE, AGAIN, THAT SHE IS NOT GOING TO BE ABLE TO GET UP AND EXPLAIN, WITHOUT HER HAVING TO WAIVE HER RIGHT TO REMAIN SILENT.

THE STATE HAS ALLEGED, AND THE EVIDENCE, OBVIOUSLY SHE WAS ARRESTED AND INDICTED FOR FIRST-DEGREE MURDER. THERE IS OTHER EVIDENCE THAT IMPLICATES HER, BUT IT WAS NOT KNOWN TO THE OFFICERS AT THAT TIME. THE STATE ALLEGED THAT SHE HAS JUST MURDERED HER HUSBAND AND THEN CAME TO THE HOSPITAL IN A POLICE CAR.

THAT IS NOT WHAT THEY TOLD HER, IS THAT CORRECT?

I BEG YOUR PARDON EN.

THEY DIDN'T TELL HER THAT THEY WERE ACCUSING HER OF A CRIME.

NO. IT IS UNDISPUTED SHE IS NOT IN CUSTODY AT THIS TIME. I JUST POINT OUT->THEN ME OUT. I DIDN'T UNDERSTAND YOUR ANSWER A MINUTE AGO, ABOUT WHEN YOU WERE HAVING AN EXCHANGE ABOUT WHETHER THE CONCURRING OPINION IN OCHOCONE CONCURRED WITH HERRING.

IT DOES.

YOU SAID IT DOES, AND IT DOES BECAUSE HERRING IS CONTUSIONALLY-BASED.

RIGHT. THAT IS MY READING OF IT.

I AM HAVING DIFFICULTY. I THOUGHT HERRING WAS BASED ON THE FACT THAT THEY FOUND UNDER THE FACTS OF THOSE CIRCUMSTANCES THAT THAT EVIDENCE WOULD HAVE NO PROBATIVE VALUE, BECAUSE THE SUSPECT IN THAT CASE WOULDN'T HAVE A REASON TO BELIEVE THIS COULD BE USED AGAINST HIM.

THE CONCURRING OPINION WRITTEN BY JUSTICE GRIMES AND JOINED BY JUSTICE EHRLICH SAID THAT HERRING IS BASED ON A FAULTY PREMISE, BECAUSE THERE IS NO CONSTITUTIONAL RIGHT TO REFUSE A HAND SCHWAB TEST THAT, THEY COULD HAVE BEEN COMPELLED TO TAKE THE TEST AND THE REFUSAL IS THERE FOR ADMISSIBLE. UNLIKE MIRANDA WARNINGS, THE DEFENDANT IS NOT TOLD THAT THEY COULD REFUSE, SO THERE IS NO MISLEADING ASSURANCE.

IT IS YOUR POSITION THAT HERRING IS BASED ON A CONSTITUTIONAL PREMISE?

YES.

WHAT CONSTITUTIONAL PREMISE IS THAT?

WELL, IN CORRECTLY, THAT YOU HAVE, IT IS IMPROPERLY MIXING NONTESTIMONIAL EVIDENCE WITH TESTIMONIAL EVIDENCE. FIFTH AMENDMENT.

WHAT PROVISION? THE FIFTH AMENDMENT?

FIFTH AMENDMENT.

IN OTHER WORDS HERRING SAYS THAT THEY ARE BASING THEIR DECISION ON THE FIFTH AMENDMENT.

RIGHT. THEY INTERPRET THE CASES THAT HAVE TO DO WITH, AND THE LOGICAL PROBLEM IS THAT MIRANDA, BEING WARNED THAT YOU HAVE A RIGHT TO REFUSE AND THEN HOLDING THAT SILENCE AGAINST YOU, IS DETERMINED TO HAVE BEEN UNFAIR, BUT THE PROBLEM WITH THAT IS

THAT HAND SWABBING, THERE IS NO CONSTITUTIONAL RIGHT TO REFUSE TO SUBMIT TO NONTTESTIMONIAL TESTS, LIKE FINGERPRINTS, LIKE LINEUPS, LIKE HANDWRITING EXEMPLARS, LIKE TESTS THAT ARE BEFORE, HERRING DISCUSSES SOUTH DAKOTA VERSUS NEVILLE. IT DISCUSSES UNITED STATES VERSUS. >OE FACT ANALYSIS THAT THEY DO, SO AS TO BE TOTALLY LACKING IN PROBATIVE VALUE, YOU THINK HAD NO RELEVANCE TO THEIR DECISION. YOU THINK IT WAS BASED STRICTLY ON A FIFTH AMENDMENT RIGHT TO REFUSE.

YES, OF COURSE IT HAS RELEVANCE TO THEIR DECISION T HAS RELEVANCE TO THEIR DECISION, BUT --

ISN'T THAT THE WAY THE TRIAL COURT USED IT HERE?

WELL, AGAIN, THE FACTS, THE IMPORTANT FACT IS WHETHER OR NOT YOU ARE MISLED INTO THINKING THAT THAT IS A SAFE COURSE OF CONDUCT. EVEN HERRING ACKNOWLEDGES THAT, WHERE THE DEFENDANT HAS SUBSTANTIAL MOTIVATION, THAT CITES SOUTH DAKOTA VERSUS NEVILLE, FOR THE PRINCIPLE THAT, IF YOU HAVE, IF THE DEFENDANT HAS SUBSTANTIAL MOTIVATION NOT TO BEHAVE AS YOU DID, i.e. YOU ARE TOLD THIS CAN CLEAR YOU.

DO YOU AGREE THAT, IF HERRING IS CORRECTLY DECIDED, THAT HERRING WOULD BAR THE ADMISSION OF REFUSE A.M. HERE? -- OF REFUSAL HERE?

WELL, YOU CAN HARMONIZE HERRING WITH THESE CASES, DESPITE THE CONCURRING OPINION. THE CONCURRING OPINION SAYS, WELL JUSTICE GRIMES SAYS THAT IT IS PROPERLY BASED ON FIFTH AMENDMENT PRINCIPLES. IT MISINTERPRETS, IT IMPROPERLY BLENDS. THE NONTTESTIMONIAL EVIDENCE, PHYSICAL EVIDENCE GATHERING, WHETHER IT IS EXHIBITING YOUR FACE OR YOUR FINGER PRINTS OR SWABBING YOUR HANDS WITH MIRANDA MIRANDA-LIKE REFUSALS AND TESTIMONIAL FIFTH AMENDMENT PRIVILEGE, SO I AM NOT GOING TO DISAGREE WITH JUSTICE GRIMES. JUSTICE GRIMES THINKS THAT IT IS BASED ON THE FIFTH AMENDMENT, AND AN IMPROPER READING OF THOSE OF THAT DECISION, AND SAID THAT IT IS BASED ON A FAULTY PREMISE, AND THAT IS THE FAULTY PREMIES THAT IT IS BASED ON, SO ALTHOUGH IT CAN BE DISTINGUISHED ON ITS FACTS, IT IS ULTIMATELY BASED ON TMENT AND AWE IMR RFSTHENCE BETWEEN TESTIMONIAL AND NONTTESTIMONIAL EVIDENCE, SO IN SUM, THE STATE WOULD ARGUE THAT THIS COURT NEED NOT ACCEPT JURISDICTION FOR THE REASONSIN THE BRIEF. THIS CASE IS DISTINGUISHABLE ON ITS FACTS, BUT IF YOU DO DECIDE TO REACH THE LAW, THE LEGAL ISSUES THAT THE CONCURRING OPINION, THERE IS NO CONSTITUTIONAL RIGHT TO REFUSE TO SUBMIT TO A TEST, THIS PERSON THE DISTINGUISHING FACTOR HERE, WAS THAT SHE WAS TOLD THAT THIS WOULD ELIMINATE HER AS A SUSPECT FROM THE SUBSEQUENT CASE THAT WAS BUILT AGAINST HER. THERE HAS BEEN NO ANALYSIS OF PROBATIVE VALUE, BECAUSE UP TO THIS POINT, THE ONLY ARGUMENT HAS BEEN WHETHER IT IS RELEVANT, SO IF THERE IS NO OTHER QUESTIONS, I WILL RELY ON MY BRIEF. THANK YOU.

CHIEF JUSTICE: THANK YOU. REBUTTAL.

THANK YOU. I WOULD LIKE TO MAKE TWO POINTS. FIRST OF ALL, IN RESPONSE TO JUSTICE PARIENTE, THE TRIAL COURT MADE A FINDING FOLLOWING THE EVIDENTIARY HEARING, THAT, UNDER THE CIRCUMSTANCES, THIS WAS NOT RELEVANT. THROUGHOUT THE STATE'S BRIEFING, BELOW AND HERE, AND EVEN IN THE FIFTH, THEY HAVE STRUGGLED TO REARGUE AND REWEIGH THE FACTS. IF WE ARE GOING TO GIVE DEFERENCE TO THE TRIAL COURT, THAT TRIAL JUDGE WAS IN THE BEST POSITION TO KNOW WHAT RELEVANCE THAT EVIDENCE HAD, IF ANY, AND WHEN SHE FOUND THAT IT HAD, THAT THE DEFENDANT HAD NO INKLING THAT IT COULD BE USED AGAINST HER, HOW CAN WE DISTURB THAT, SO MY FIRST POINT IS THAT WE HAVE GOT TO GIVE DEFERENCE TO THE TRIAL COURT.

GOING BACK TO THE STANDARD, THE POSTURE THAT THE FIFTH DISTRICT HAD IT IN WAS NOT EVEN ABUSE OF DISCRETION. IT WAS THE HIGHER STANDARD THAT WOULD APPLY TO CERTAIN

REVIEW. --EVIEW TD THAT SHE APPLIED INCORRECT LAW. THAT IS THE WAY THEY DOVETAILED THEIR ANALYSIS INTO THE STANDARD WHEN SHE APPLIED HERRING, WHICH IS THE LAW THAT A TRIAL JUDGE SHOULD HAVE APPLIED. I WANT TO MAKE THE POINT THAT WE HAVE GOT TO GIVE DEFERENCE TO THE TRIAL JUDGE IN HER RULING. SHE KNOWS WHAT THE FACTS WERE. AND NOT SUCCUMB TO THE TEMPTATION TO RELY WEIGH THE FACTS TO SOME POINTE THINK -- AND NOT SUCCUMB TO THE TEMPTATION TO REWEIGH THE FACTS, AS WE, TO SOME POINT, WANT TO DO DO. IN STATE VERSUS NEVILLE, THE DEFENDANT COMPLAINED THAT THEY WERE GOING TO USE THE FACT THAT HE REFUSED TO TAKE A BREATH TEST AGAINST HIM, IN THE TRIAL COURT, WHEN THEY NEVER TOLD HIM THAT THEY WERE GOING TO DO THAT, AND THE CASE IS EASILY DECIDED, BECAUSE THE SUPREME COURT SAID, WELL, THERE WAS NO SAFE HARBOR, BECAUSE HE WAS TOLD THAT HE WOULD LOSE HIS LICENSE, IF HE REFUSED TO TAKE THE TEST. THUS HE HAD AMPLE INCENTIVE TO TAKE IT, AND HIS REFUSAL REFLECTED A CONSCIOUSNESS OF GUILT. IT IS EASILY DECIDED. IT IS NOT NEARLY AS COMPLEX AS HAS BEEN MADE OUT TO BE HERE.

YOU DON'T SEE IT CITED FOR CONSTITUTIONAL PRINCIPLES AS OPPOSED TO EVIDENTIARY PRINCIPLES.

I THINK THERE WAS SOME DISCUSSION ABOUT THE FACT THAT THOSE STATEMENTS WERE NOT PROTECTED BY MIRANDA OR THE FIFTH, THE FIFTH AMENDMENT, BUT WHAT THE STATE WOULD ARGUE HERE IS THAT WE WOULD EFFECTIVELY, IF WE WERE TO BUY INTO JUSTICE GRIMES' CONCURRENCE AND WHAT HAS COME FROM THAT, IS THAT THE ONLY TIME SOMEONE'S REFUSAL TO DO SOMETHING COULD NOT BE ADMITTED, IS IF THEY HAD A CONSTITUTIONAL RIGHT TO DO IT, WHETHER IT WAS RELEVANT OR NOT, AND THE PROBLEM WITH THAT IS IT WOULD EFFECTIVELY ELIMINATE CONSENTUAL ENCOUNTERS. IF I WERE WALKING DOWN THE STREET AND A PROIFER POLICE OFFICER CAME UP TO -- AND A POLICE OFFICER CAME UP TO ME AND SAID I WOULD LIKE TO TALK TO YOUNA CONTEXT, I COULD REFUSE AND IT COULD BE USED AGAINST ME. THE HERRING IS CLEARLY AN EVIDENTIARY CASE.

ONCE YOU MOVE AWAY FROM THE CONSTITUTIONAL ISSUE, THEN YOU ARE INTO AN EVIDENTIARY RELEVANCY ISSUE.

YES, SIR.

AND IT IS YOUR POSITION THAT THERE WAS NO RELEVANCY AT ALL. THAT IS WHAT THE COURT RULED.

UNDER THESE CIRCUMSTANCES, THAT IS OUR POSITION. HAD THE COURT SAID I THINK IT MAY BE RELEVANT, BUT I AM GOING TO WEIGH IT, THEN 9403, WEIGHING PROCESS.

YOU DON'T GET TO THE WEIGHING PROCESS.

IT IS NOT RELEVANT.

YOU DIDN'T GET TO THE WEIGHING PROCESS, BECAUSE THEATE F T THE PASS, JU IS NOT RELEVANT, SO IAMG TO LET IT IN.

I AGREE THAT SHE DID NOT ENGAGE IN THAT, BECAUSE SHE FOUND THAT IT WAS NOT RELEVANT, UNDER THE CIRCUMSTANCES, ANDE E BEST POSITION TO KNOW THAT.

BUT BUT YOU START OUT WITH THE RULE THAT IT IST, IF IT HAS ANY RELEVANCY,NU LETN, AND HA SITUATION ONSA WOMAN WASHING HES, AUSING TOTAKE THE TEST AND SO FORTH, AS A PRACTICAL MATTER, CAN YOU SAY THAT THIS WOULD HAVE NO RELEVANCY WHATSOEVER, ON THE FACTS HERE?

I WANT TO ADDRESS THAT. FIRST OF ALL, SHE TOLD THE OFFICER THAT SHE WAS HAVING

INTESTINAL PROBLEMS, AND SHE WENT TO THE BATHROOM AT LEAST TWICE, MAYBE THREE TIMES BEFORE THE GUN SHOT RESIDUE THING EVER CAME UP AND CAME OUT WASHING HER HANDS. THE TRIAL COURT HEARD ALL OF THIS, AND SO THE STIGMA THAT WEO ATTACH TO THAT AFTER THE REQUEST, IS LOST BY THE FACT THAT THAT WAS SOMETHING THAT WAS GOING ON BEFORE THE REQUEST WAS EVER MADE. ALL I CAN SAY ABOUT THE FACT FINDING OF THE COURT IS THAT SHE HEARD THE EVIDENCE AND FOUND IT NOT TO BE RELEVANT, UNDER THESE CIRCUMSTANCES, AND SO I AGREE THAT IT NEVER GET TO -- GOT TO EVEL, BECAUSE THE TRITEE CIRCUMSTANCES, IT IS NOT RELEVANT.

CHIEF J THANK YOU