State of Florida v. Jose Abreu

THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION, AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA, AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. YOU MAY BE SEATED.

CHIEF JUSTICE: GOOD MORNING EVERYONE. GOOD MORNING, GENTLEMEN. IT LOOKS LIKE YOU ARE ALL READY TO GO ON THE FIRST CASE, THE STATE VERSUS ABREU, AND IF THE STATE IS READY, YOU MAY PROCEED.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS JOSEPH TRINGALI. I REPRESENT THE STATE OF FLORIDA IN THIS MATTER. THE STATE APPEALS HERE, FROM THE FOURTH DISTRICT COURT OF APPEAL, WHICH HELD A STATE STATUTE UNCONSTITUTIONAL. THE STATUTE IN QUESTION IS SECTION 90.803 SUBSECTION 22, WHICH DEALS WITH FORMER TESTIMONY. I WON'T READ THE STATUTE TO THE COURT. I KNOW THE COURT DOESN'T PARTICULARLY LIKE TO BE READ TO. BUT IN GENERAL TERMS, IT PROVIDES FOR THE USE OF FORMER TESTIMONY IN A PROCEEDING, WITHOUT REGARD TO WHETHER OR NOT THE WITNESS IS UNAVAILABLE IN THE INSTANT PROCEEDING.

CAN YOU TELL US, AS FAR AS YOUR LEGAL RESEARCH AS REVEALED, WHETHER OR NOT ANY OTHER STATE HAS A SIMILAR RULE?

NOT CURRENTLY, YOUR HONOR. THERE WAS A SIMILAR RULE IN OHIO WHICH DID NOT PASS CONSTITUTIONAL MASTER IN THE FEDERAL COURTS.

SO CURRENTLY, AND WE APPRECIATE YOUR CANDOR, OF COURSE.

YES, SIR.

THERE IS NO OTHER STATE THAT YOU ARE AWARE OF THAT HAS A STATUTE LIKE THIS OR THAT PERMITS, IN ANY WAY, SUCH TESTIMONY. IS THAT CORRECT?

YES, SIR. THAT IS CORRECT. TO THE BEST OF MY KNOWLEDGE, AND I HAVE RESEARCHED THE ISSUE EXTENSIVELY. AS I SAID, THERE WAS AN OHIO STATUTE, AND --

IT WAS INVALIDATED. THANK YOU VERY MUCH.

YES, SIR. THE FACTS OF THIS CASE, JUST TO TAKE A MINUTE TO REVIEW THEM, ARE, IT IS A VERY SIMPLE, ACTUALLY SHOULD HAVE BEEN NO MORE THAN A ONE-DAY TRIAL. A VICTIM CAME HOME TO HIS APARTMENT IN FT. LAUDERDALE, IN BROWARD COUNTY, AND FOUND THE DEFENDANT IN HIS HOUSE, GOING THROUGH HIS PERSONAL POSSESSIONS POSSESSIONS. OBVIOUSLY INTERRUPTED THE DEFENDANT IN THE COURSE OF THIS BURGLARY. THE DEFENDANT TURNED AND RAN OUT OF THE ROOM, LITERALLY, WITHIN TWO FEET OF THE VICTIM, SO IT IS AN EYEWITNESS IDENTIFICATION. SHOULD HAVE BEEN A ONE-WITNESS CASE.

WHY IS IT THE STATE OF FLORIDA FEELS THAT THIS DOES NOT DO DAMAGE TO THE CONFRONTATION CLAUSE? HOW DO YOU REALLY TAKE THAT POSITION?

THE STATE OF FLORIDA TAKES THE POSITION, YOUR HONOR, THAT IN THIS PARTICULAR CASE, THE

FACTS DO NOT SUPPORT THE FOURTH DISTRICT COURT OF APPEALS'S DECISION, AND HERE IS WHY. WHAT HAPPENED IN THIS CASE WAS THAT MR. ABREU, THE DEFENDANT, CHOSE TO REPRESENT HIMSELF. THE TRIAL TURNED INTO, BECAME EXTREMELY LONG. MR. ABREU OBJECTED CONSTANTLY AND VIRTUALLY ON EVERY PAGE OF THE TRANSCRIPT. EVENTUALLY, AFTER ABOUT FOUR DAYS, THE JURY, IN THE FIRST TRIAL, WENT OUT, COULD NOT REACH A VERDICT. CAME BACK. A MISTRIAL WAS DECLARED. WITHIN A MONTH, AND BY THE FOLLOWING MONTH -- THIS HAPPENED IN MAY OF 1999, IN JUNE 1999, A NEW TRIAL BEGAN. THERE IS A DISCUSSION IN THIS RECORD, IN THE RECORD OF THE SECOND TRIAL AS TO THE VICTIM'S AVAILABILITY. I AM NOT GOING TO MISLEAD THE COURT AND SAY THAT ANY PARTICULAR FINDING WAS MADE, BUT CLEARLY THE TRIAL JUDGE, FROM HIS OWN WORDS, WAS CONVINCED THAT THE VICTIM WAS ILL AND UNABLE TO ATTEND.

WELL, DID THE STATE MAKE THE REPRESENTATION THAT THE WITNESS WAS UNAVAILABLE?

THE STATE DID, IN THAT SECOND TRIAL, MAKE THE REPRESENTATION THAT THE VICTIM WAS ILL AND COULD NOT ATTEND. UNFORTUNATELY, FOR OUR POSITION HERE IN THIS COURT, THE STATE DIDN'T CARE THAT DISCUSSION MUCH FURTHER, AND WENT OFF ON A DISCUSSION OF SECTION 90.803 SUB-22 AND BASICALLY SAID BUT WE DON'T EVEN HAVE TO GET INTO THAT. WE HAVE THIS OTHER BRAND NEW STATUTE, SO WE DON'T HAVE TO SHOW AVAILABILITY. OUR POINT, AND BEFORE THIS COURT IS, HOWEVER, THAT THERE IS AN INDICATION IN THE RECORD THAT THIS VICTIM WAS UNAVAILABLE, WOULD HAVE BEEN UNAVAILABLE, LEGALLY UNAVAILABLE UNDER THE OLD STATUTE, AND THEREFORE THE FOURTH DISTRICT SHOULD HAVE HELD THAT THE TRIAL COURT WAS CORRECT UNDER THE PRINCIPLE OF BEING RIGHT FOR ANY REASON.

SO YOU ARE HERE NOT SO MUCH TO DEFEND THE CONSTITUTIONALITY OF THE STATUTE, COMPARED TO THE CONFRONTATION CLAUSE, BUT TO SAY THAT THIS, THE FACTS OF THIS PARTICULAR CASE EXCEPT IT FROM THE PROVISIONS OF THAT STATUTE.

I THINK THAT THAT IS CORRECT, YOUR HONOR, INSOFAR AS THAT ARGUMENT GOES. HOWEVER, I WOULD, ALSO, SAY THAT THERE IS AN ARGKRUMENT THAT CAN BE MADE ON BEHALF OF THE CONSTITUTIONALITY OF THE STATUTE ITSELF, AND I FULLY INTEND TO MAKE THAT.

OKAY. WELL, WHY DON'T YOU PROCEED.

WE WILL LAY ASIDE THE "AS APPLIED", BECAUSE IT IS CLEARLY THE STATE'S POSITION THAT, IN THIS PARTICULAR CASE, THE STATUTE, THERE WAS NO VIOLATION OF THIS DEFENDANT'S RIGHTS, AND THEREFORE THE FOURTH DISTRICT SHOULD NEVER HAVE EVEN REACHED THE CONSTITUTIONALITY.

AND THAT IS BASED ON WHAT YOU SAY IS A SHOWING IN THIS RECORD OF UNAVAILABILITY.

YES, SIR. MOVING TO THE CONSTITUTIONALITY OF THE STATUTE, ITSELF, THE STATE'S POSITION IS THAT THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION, AS IT HAS DEVELOPED, HAS ALWAYS DEVELOPED IN TERMS OF THE RIGHT TO TEST EVIDENCE, THE RIGHT TO CROSS-EXAMINE ONE'S ACCUSERS, THE RIGHT OF THE DEFENDANT IT EXAMINE THE ACCUSERS. AND THE PRINCIPLE HERE THAT WE ARE DEALING WITH HAS, IS THE VERY, VERY HEINOUS PRACTICE, BACK IN ENGLAND, IN MIDIEVAL ENGLAND, OF LITERALLY TRIAL BY AFFIDAVIT, TRIAL BY WRITTEN DOCUMENT, WHERE THE DEFENDANT NEVER GOT TO SEE WHO WAS SPEAKING AGAINST HIM OR WHY AND NEVER GOT TO TEST THAT EVIDENCE. AND THUS DEVELOPED THE PRINCIPLE OF CONFRONTATION OF WITNESSES. BUT CONFRONTATION OF WITNESSES ALWAYS DEVELOPED, HAND-IN-HAND WITH THE THEORY OF TESTING THOSE WITNESSES, BY CROSS-EXAMINATION, AND BY ALLOWING THE DEFENDANT TO CROSS-EXAMINE AND TO DETERMINE THE RELIABILITY OF THAT WITNESS'S STATEMENT. THE STATUTE IN QUESTION HERE --.

BUT DIDN'T THIS COURT, IN ITS APPROVAL OF THE USE OF VIDEO, IN HAVING A WITNESS APPEAR

IN ARGENTINA, SET DOWN AS THREE STEPS, THREE THINGS THAT HAD TO BE MET IN ORDER TO OVERCOME A CONFRONTATION CLAUSE OBJECTION, AND ONE OF THOSE WAS THAT THERE HAD TO BE AN ABILITY OF THE JURY TO SEE AND EVALUATE THE WITNESS. ISN'T THAT WHAT THE HARRELL CASE SAID?

YES, IT DOES. I SUGGEST TO THE COURT THAT, IN THIS CASE, A JURY DID SEE THIS WITNESS. NOW, I AM THE FIRST ONE TO ADMIT IT WAS NOT THE SAME JURY. I AM NOT GOING DOWN THAT ROAD. HOWEVER, I THINK THAT THE GRATUITOUS COMMENT OF THE FOURS DISTRICT COURT OF APPEAL, THE SECOND TO THE LAST PARAGRAPH OF THE OPINION, PUTS AN EMPHASIS ON THAT FACT, BY SAYING, WELL, THE FIRST JURY DIDN'T CONVICT THE DEFENDANT. THEREFORE THERE MUST HAVE BEEN SOME PEOPLE WHO DIDN'T BELIEVE THE WITNESS. I SUGGEST THAT IS A CONCLUSION THAT COURTS, APPELLATE COURTS AT ANY LEVEL, SIMPLY CANNOT REACH. TO DO THAT, WHAT WE ARE DOING IS WE ARE MAKING OURSELVES THE INVISIBLE MAN AND GOING INTO THE JURY ROOM AND SAYING, WELL, I KNOW WHAT THAT JURY WAS THINKING THINKING. WE JUST CAN'T DO THAT. WE HAVE TO TAKE THE FACTS AS THEY ARE GIVEN. MY POINT IS THAT THE JURY DID SEE THE WITNESS. CLEARLY NOT THE SAME JURY. HOWEVER, IT WAS THE SAME JUDGE. IT WAS THE SAME PROSECUTOR. EVERYTHING ELSE WAS THE SAME. SO THAT THE FULL PANOPLY OF RIGHTS IN THIS CASE WAS GIVEN TO THIS DEFENDANT. THE STATUTE CLEARLY LINKS THIS RIGHT, THE USE OF FORMER TESTIMONY, TO THE RIGHT OF CROSS-EXAMINATION, TO THE RIGHT OF TESTING THE CREDIBILITY OF THE EVIDENCE. THAT IS THE POSITION OF THE STATE, WITH REGARD TO THIS STATUTE THAT THE STATUTE DOES MEET THE REQUIREMENTS OF THE CONFRONTATION CLAUSE, IN PRINCIPLE.

WHY DO YOU THINK NO OTHER STATE HAS TAKEN THAT POSITION YOU ARE ADVANCING?

YOUR HONOR, THIS IS OBVIOUSLY WE ARE AT THE EDGE OF THE ENVELOPE. I AM NOT ABOUT TO STAND IN FRONT OF THIS COURT, AFTER THE PRONOUNCEMENTS THAT THIS COURT HAS MADE ON THE SUBJECT, AND I AM NOT ABOUT TO USE THE PHRASE "WELL SETTLED". WE ARE AT THE EDGE OF THE ENVELOPE. HOWEVER, WE TAKE THE POSITION THAT THAT ENVELOPE, ALTHOUGH IT HAS AN EDGE, ALSO HAS AN INSIDE, AND WE THINK THAT ALTHOUGH WE ARE CLOSE TO THE END, WE ARE STILL INSIDE, BECAUSE WE HAVE GUARANTEED THE RIGHT OF THE DEFENDANT TO TEST RELIABILITY OF THE EVIDENCE. ONCE YOU MAKE THE RELIABILITY DECISION, WE SUGGEST TO THE COURT, ONCE YOU SAY THAT A TYPE OF TESTIMONY IS RELIABLE, IS IT REALLY RELEVANT TO DISCUSS WHY OR WHY NOT THE VICTIM IS OR THE WITNESS IS NOT PRESENT.

I THOUGHT, LET'S JUST, IF I AM HEARING YOU CORRECTLY, AND WE ARE TALKING ABOUT THE SIXTH AMENDMENT, AND WE HAVE GOT THE CROSS-EXAMINATION HAVING BEEN FULFILLED, AND THE "UNDER OATH" HAVING BEEN FULFILLED. I AM TRYING TO UNDERSTAND WHETHER YOU ARE SAYING THAT THE ABILITY OF THE JURY THAT IS GOING TO BE DECIDING THE DEFENDANT'S FATE TO OBSERVE THE DEMEANOR OF THE WITNESS, IS NOT PART AND PARCEL OF THE SIXTH AMENDMENT, BY BOTH THIS COURT'S OWN PRECEDENT IN HARRELL, AND THE UNITED STATES SUPREME COURT COURT'S PRECEDENT IN NUMEROUS CASES? IS THAT WHAT, IS THAT POSITION BEING ADVANCED BY THE STATE TODAY?

THAT IS THE POSITION TO THE EXTENT THAT WE WOULD SUBMIT TO THIS COURT THAT, SO LONG AS A JURY HAS SEEN THE WITNESS, SO LONG AS THAT WITNESS HAS BEEN TESTED BEFORE A TRIER OF FACT, THAT IT IS NOT REQUIRED TO BE THE VERY SAME JURY.

HOW DOES THAT ADVANCE ANYTHING? I AM NOT SURE HOW A JURY WHO IS NOT THE JURY, REALLY, ADDS ANYTHING TO THE CONFRONTATION ARGUMENT HERE.

WE WOULD SUBMIT TO THE COURT, YOUR HONOR, THAT THE PURPOSE OF THE CONFRONTATION CLAUSE, AS ORIGINALLY INTENDED BY THE FRAMERS OF THE CONSTITUTION, IS TO TEST WITNESS AND TO REQUIRE THE WITNESS TO BE PRESENT IN THE SETTING --

SO YOU ARE BACK TO THE ARGUMENT, REALLY, THAT THE UNAVAILABILITY ADDS NOTHING TO THE CONFRONTATION CLAUSE.

YES. I AM BACK TO THE ARGUMENT THAT, ONCE YOU DETERMINE THE RELIABILITY OF THE TESTIMONY, THE FACT OF THE REASON FOR THE UNAVAILABILITY SIMPLY BECOMES IRRELEVANT. NOW, THERE IS NO QUESTION, UNDER CURRENT LAW FROM THIS COURT AND FROM THE UNITED STATES SUPREME COURT, THAT UNDER CERTAIN CIRCUMSTANCES, UNVEILABLE WITNESSES, UNLESS IN THE EXTREME CASE A WITNESS WHO IS DEAD, THAT TESTIMONY CAN BE USED, ONCE YOU, ONCE YOU OVERCOME THE RELIABILITY HURDLE. WHAT WE ARE SAYING TO THIS COURT IS, WHAT WE ARE SUGGESTING TO THIS COURT IS THAT, ONCE WE OVERCOME THE RELIABILITY HURDLE, THE REASON FOR THE UNAVAILABILITY SHOULD NOT ANY LONGER BE CONSIDERED, BECAUSE IT IS NO LONGER RELEVANT. IF TESTIMONY IS RELIABLE, IT IS RELIABLE!

BUT YOU, ALSO, TAKE THE POSITION, I MEAN, ASSUMING THAT WE DO NOT AGREE WITH THAT POSITION, YOU TAKE THE POSITION THAT, IN THIS CASE, THERE IS A SHOWING OF UNAVAILABILITY, AND YOU BASE THAT MERELY ON THE FACT THAT THE PROSECUTOR SAID THIS MAN, AS I UNDERSTAND IT THE PROSECUTOR SAYS THIS MAN IS NO LONGER COOPERATIVE.

THE TRIAL JUDGE SAYS SPECIFICALLY --

NOT THE PROSECUTOR. THE PROSECUTOR HAS TO MAKE THE SHOWING OF UNAVAILABILITY, CORRECT?

YES. THE PROSECUTOR --

THE PROSECUTOR SAYS THAT THIS MAN IS NO LONGER COOPERATIVE WITH THE STATE.

HE SAYS, AND I DON'T HAVE THAT PAGE RIGHT AT HAND, BUT HE SAYS THE MAN IS ILL. I CAN'T GET HIM DOWN HERE. HE IS NO LONGER COOPERATING, BUT THE NONCOOPERATION IS BASED ON ILLNESS, UNLIKE, I SUBMIT, THE FOURTH DISTRICT OPINION, WHICH SAYS HE IS NOT COOPERATING BECAUSE HE DIDN'T LIKE HIS HOTEL ROOM.

AND YOU THINK THAT SHOULD BE ENOUGH TO SAY THAT HE IS ILL, WITHOUT ANY FURTHER DEMONSTRATION OF THAT FACT TO THE COURT?

I THINK THAT IS ENOUGH, NO. THAT IS NOT ENOUGH. I THINK THAT, IF THIS WAS A TRIAL IN THE FIRST INSTANCE, AND THE PROSECUTOR WERE ATTEMPTING TO ADMIT A DEPOSITION THAT HAD BEEN TAKEN UP IN PENNSYLVANIA SOMEPLACE, NO. I WOULD ABSOLUTELY AGREE THAT THAT IS NOT ENOUGH. HOWEVER, IN THIS PARTICULAR CASE YOU HAVE THE DIRECT OBSERVATION OF THE TRIAL JUDGE, WITHIN THE PREVIOUS MONTH, WITHIN, ESSENTIALLY 30 OR 45 DAYS, AND HE SAYS THAT MAN WAS CLEARLY ILL AND THEN SAYS I WILL PUT IT ON THE RECORD THAT I OBSERVED THAT, SO THE JUDGE, BASED ON HIS OWN FINDING, WITHOUT REGARD TO AT LEAST I WOULD SUBMIT TO THIS COURT THAT, ON THIS RECORD, THE JUDGE MADE A FINDING, BASED ON HIS OWN DIRECT OBSERVATION.

CHIEF JUSTICE: YOU ARE INTO YOUR REBUTTAL TIME. I JUST WANTED TO REMIND YOU.

THANK AND SIMPLY THE FACT, YOUR HONOR, THAT THAT SHOULD HAVE ENDED THIS CASE, THIS PARTICULAR CASE, AND THAT THERE FOR WE SHOULD NOT BE STANDING HERE, IN THIS CASE AT THIS TIME.

CHIEF JUSTICE: THANK YOU. COUNSEL.

MAY IT PLEASE THE COURT. PAUL PETILLO ON BEHALF OF JOSE ABREU, THE APPELLEE IN THIS CASE. THERE IS NOT MUCH QUESTION, I THINK, THAT THE STATUTE UNDER REVIEW IS

UNCONSTITUTIONAL. THE UNITED STATES SUPREME COURT HAS UNEQUIVOCALLY SPOKEN TO THIS ISSUE AND STATED THAT, BEFORE FORMER TESTIMONY MAY BE ADMITTED AS AN EXCEPTION TO THE HEARSAY RULE THAT, THE CONFRONTATION CLAUSE REQUIRES THAT THE STATE ESTABLISH THAT THE WITNESS IS UNAVAILABLE. IN A LONG LINE OF CASES, THE COURT HAS STATED THAT FORMER TESTIMONY IS MERELY A WEAKER VERSION OF LIVE TESTIMONY, THAT LIVE TESTIMONY IS THE SUPERIOR TESTIMONY, BECAUSE THE JURY IS ABLE TO VIEW THE WITNESS'S DEMEANOR, AND THAT THIS ABILITY TO VIEW THE WITNESS'S DEMEANOR IS ONE OF THE THREE ESSENTIAL ELEMENTS OF THE CONFRONTATION CLAUSE.

WOULD IT MATTER IN THIS CASE, IN THE PRIOR TRIAL, IT WAS VIDEOTAPED, AND THERE, THE STATUTE HAD REQUIREMENT THAT, IF BEFORE IT WOULD BE USED, THAT IT WOULD HAVE TO HAVE BEEN, WE CERTAINLY HAVE THAT ABILITY IN THE 21st CENTURY, TO HAVE THE VIDEOTAPE OF THE, AS OPPOSED TO THE TRANSCRIPT.

YEAH. WHEN THAT TIME COMES, THAT IS GOING TO BE AN INTERESTING CASE, AND I SAY THAT SERIOUSLY, BECAUSE I THOUGHT ABOUT THAT QUESTION. I THINK THE HARRELL CASE FROM THIS COURT WOULD STAND AGAINST THAT, BECAUSE, IN THAT CASE, THE STATE WANTED THIS COURT TO SAY THAT SATELLITE TRANSMISSION TESTIMONY WAS THE EQUIVALENT OF IN-COURT, FACE-TO-FACE TESTIMONY. THIS COURT SAID NO, THAT WE WILL ALLOW THIS UNDER WHEN IT IS ABSOLUTELY NECESSARY FOR OTHER STRONG PUBLIC POLICY REASON, AND ONLY WHEN YOU, ALSO, HAVE SATISFIED THE THREE ESSENTIAL ELEMENTS OF THE CONFRONTATION CLAUSE. OATH, CROSS-EXAMINATION, AND THE ABILITY OF THE JURY TO VIEW THE DEMEANOR OF THE WITNESS. ANOTHER THING THAT WILL RUN COUNTER TO SOMETHING LIKE THAT IS A STATEMENT FROM JUSTICE O'CONNOR IN MARYLAND VERSUS CRAIG, WHERE SHE SAID, MOSTLY YOU WANT THE JURY TO VIEW THE DEMEANOR, BECAUSE IT ENHANCES THE RELIABILITY OF THE FACT FINDER. YOU CAN TELL IF SOMEONE IS LYING OR SHADING THE TRUTH, BY THE WAY THEY TESTIFY, SO I THINK THAT IS VERY IMPORTANT AND THAT IS THE BIGGEST REASON WE WANT LIVE TESTIMONY, BUT JUSTICE O'CONNOR ALSO SAID THERE IS, ALSO, A STRONG SYMBOLIC PURPOSE SERVED, BY REQUIRING ADVERSE WITNESSES AT TRIAL TO TESTIFY IN THE ACCUSED'S PRESENCE. FACE-TO-FACE CONFRONTATION IS ESSENTIAL TO A FAIR TRIAL IN A CRIMINAL PROSECUTION, SO I THINK IF THERE WERE A CASE YOU HAD, WHERE PREVIOUS TESTIMONY WAS TAPE-RECORDED, I DON'T THINK THAT WOULD SATISFY THAT SYMBOLIC VALUE OF ACTUALLY HAVING THE PERSON IN COURT, BECAUSE IT ISN'T THE SAME THING.

BUT YET WE HAVE ALL THE OTHER EXCEPTIONS TO THE HEARSAY RULE THAT ALLOW STATEMENTS TO COME IN WITHOUT THE WITNESS WHO HAS UTTERED THEM BEING PRESENT.

OKAY. SURE.

AND WHY IS IT THAT THIS COURT AND THE U.S. SUPREME COURT HAS SORT OF FICTIONED ON THIS FORMER TESTIMONY, WHICH AS MR. TRINGALI POITS OUT IS UNDER OATH, AND THERE IS CROSS-EXAMINATION. IT SEEMS BETTER THAN A SITUATION WHERE SOMEONE HAS MADE AN EXCITED OUTRANS OR STIPULATIONS SOME OF -- OR SOME OF THOSE OTHER EXCEPTIONS -- EXCITED UTTERANCE OR SOME OF THOSE OTHER EXCEPTIONS.

THE HEARSAY RULE DOES NOT APPLY TO HEARSAY EXCEPTIONS. EXCITED UTTERANCE, COCONSPIRATOR HEARSAY, AND WHAT THE EXPLANATION IS THOSE STATEMENTS, THEIR EFFECT CANNOT BE REPLICATED IN COURT, ANYWAY, AND THE COURT SAYS, THE UNITED STATES SUPREME COURT SAYS "REPEATING IN COURT WHAT WAS STATED OUT OF COURT IS NOT THE BETTER VERSIONS", AND THAT THESE EXCEPTIONS, EXCITED UTTERANCE, COCONSPIRATOR, THESE ARISE FROM THE STATEMENTS FROM WHICH THEY WERE MADE, BUT THEY CONTRAST, UNITED STATES SUPREME COURT IN UNADI AND IN WHITE VERSUS ILLINOIS, THEY CONTRAST FORMER TESTIMONY AND SAY FORMER TESTIMONY, AGAIN, IS THE WEAKER VERSION, AND THAT IT SELDOM HAS INDEPENDENT EVIDENTIARY SIGNIFICANCE OF ITS OWN, BUT IT IS INTENDED TO

REPLACE LIVE TESTIMONY IN CASES OF NECESSITY. SO THAT IS THE UNITED STATES SUPREME COURT EXPLANATION FOR WHY YOU CAN HAVE THE UNAVAILABILITY REQUIREMENT FOR SOME HEARSAY EXCEPTIONS BUT NOT FOR FORMER TESTIMONY.

WAS IDENTIFICATION OF THE DEFENDANT THE KEY ISSUE IN THIS CASE?

YES.

SO YOU REALLY HAD A, WHAT IS JUST WAS PAPER TESTIMONY OF SOMEBODY WHO SAID I AM IDENTIFYING THE DEFENDANT, WITHOUT THE JURY SEEING ANYTHING. I AM JUST TRYING TO SEE WHETHER, HOW, PARTICULARLY IN THIS CASE, DID IT CREATE A PROBLEM FOR THE DEFENDANT?

WELL, HIS FORMER TESTIMONY, WHERE HE IDENTIFIED THE DEFENDANT AS THE CULPRIT, AND WE ARE COMPLAINING THE JURY THAT CONVICTED HIM SENT HIM, THAT EVENTUALLY ENDED UP SENDING HIM TO PRISON, WASN'T ABLE TO VIEW THE DEMEANOR OF THE WITNESS WHIFLS MAKING THAT IDENTIFICATION. THEY COULD HAVE GLEANED FROM THE DEMEANOR WHETHER THEY THOUGHT HE WAS STRONG IN HIS IDENTIFICATION WHETHER HE WAS WEAK IN HIS IDENTIFICATION, WHETHER HE MISSTATED SOMETHING OR WAS EXAGGERATING SOMETHING. THEY BELIEVED HIM AS A WITNESS, AS A PERSON, JUST TO COME IN AND SEE WHAT HE LOOKS LIKE. ALL THOSE THINGS ARE IMPORTANT WITH LIVE TESTIMONY.

WHAT DO YOU SAY ABOUT MR. TRINGALI'S ARGUMENT THAT THE RECORD HERE DOES DEMONSTRATE UNAVAILABILITY AND THAT THE DISTRICT COURT ERRED IN OVERLOOKING THAT AND TREATING THAT ISSUE.

I WOULD DISAGREE, BECAUSE I THINK IT WAS MORE THAT HE WAS UNAVAILABLE BECAUSE HE WASN'T COOPERATING. IT WAS TRULY THAT THERE ARE INDICATIONS HE WAS ILL AT THE FIRST TRIAL, BUT HE DID TESTIFY AT THE FIRST TRIAL. AND THERE WAS NO TESTIMONY, ARGUMENT, STATEMENTS MADE BY ANYONE THAT HIS ILLNESS PROGRESSED TO THE POINT WHERE HE COULDN'T COME DOWN FOR THE SECOND TRIAL. THE TRIAL COURT WASN'T, THE PROSECUTOR DIDN'T ASK THE TRIAL COURT TO MAKE THAT FINDING. THE TRIAL COURT DID NOT MAKE THAT FINDING THAT HE WAS CURRENTLY UNAVAILABLE, DUE TO MEDICAL CONDITION. THE STATE PROCEEDED UNDER THE, THIS NEWLY-ENACTED HEARSAY EXCEPTION THAT DISPENSED WITH THE UNAVAILABILITY REQUIREMENT, I THINK LEADING ONE TO BELIEVE THAT THE WITNESS WAS AVAILABLE, THAT THEY JUST DIDN'T WANT TO INCONVENIENCE THE WITNESS.

HOW WAS THIS ISSUE RAISED, IF IT WAS, AT THE FOURTH DISTRICT COURT OF APPEAL LEVEL?

I AM SORRY. ON WHAT ISSUE WAS THAT?

THE ISSUE THAT THERE WAS A SHOWING OF UNAVAILABILITY. IN OTHER WORDS THE STATE, WAS THAT THE STATE'S FIRST CLAIM?

WELL, I THINK THAT, YEAH, THEY DID ARGUE THAT HE WAS UNAVAILABLE, BUT THEY WERE, AGAIN, AS I RECALL, THE FOCUS OF THE ARGUMENT WAS THAT HE WAS ILL AT THE FIRST TRIAL. AND I AGREE THAT THERE ARE STATEMENTS MADE THAT HE WAS ILL AT THE FIRST TRIAL, BUT THIS DOESN'T MEAN HE WAS ILL AT THE SECOND TRIAL OR THAT HE, THAT HIS HEALTH DIDN'T IMPROVE, AND THAT HE MIGHT HAVE BEEN MORE AVAILABLE AT THE SECOND TRIAL. THERE IS ONE STATEMENT THAT THE JUDGE MAKES. LET ME SEE IF I HAVE IT. THAT IS TYPICAL OF WHAT HAPPENED WHEN THEY ARE DISCUSSING WHETHER IT ADMIT THE TESTIMONY. AT 688, HE SAYS MR. ABREU, YOU KNOW THAT MR. ECKMAN, THEN HE SWITCHES, AND MR. TYLOCK, THAT IS THE PROSECUTOR, HAS INDICATED THAT HE IS NOT GOING TO BE ABLE TO GET HIM BACK. THAT MAN IS NOT COMING BACK HERE FOR ANYBODY. HE WAS NOT COOPERATING AGAIN AND THAT WAS IT. MR. TIE LOCKS MADE THAT -- MR. TYLOX MADE THAT KNOWN DURING THE LAST TRIAL AND IN THE INTERIM PERIOD, I BELIEVE. THAT IS TYPICAL OF THE DISCUSSIONS INVOLVED HERE, AND IT

SEEMED TO BE THAT THE STATE DID NOT MEET THEIR BURDEN, UNDER OATH BOTH THE CONSTITUTION AND -- UNDER BOTH THE CONSTITUTION AND THE STATE LAW, THAT THEY HAVE TO SHOW THE WITNESS UNAVAILABLE. THE EVIDENCE WAS ADMITTED OVER OBJECTION. THERE IS NO QUESTION IT WAS HARMFUL ERROR. I THINK THE DECISION IS, OF THE FOURTH DCA IS CORRECT IN ALL RESPECTS. IF YOU HAVE ANY OTHER QUESTIONS, I WOULD BE HAPPY TO ANSWER THEM.

CHIEF JUSTICE: THANK YOU. MR. TRINGALI, WHO WAS THIS ISSUE RAISED, AS TO THE STATE MAKING A DEMONSTRATION OF UNAVAILABILITY? BECAUSE AS I RECALL THE DISTRICT COURT OF APPEAL DIDN'T TREAT THAT ISSUE, OTHER THAN IN SORT OF THEIR CLOSING SUMMARY OF SAY SAYING --

YES, YOUR HONOR. IN OUR BRIEF, WE RAISED THAT THIS ISSUE, WE CITED, HOLDING OF CASE, AND POINTED OUT THAT THERE IS EVIDENCE IN THE RECORD SHOWING THAT MR. ECKMAN WAS SUFFERING FROM MELANOMA DURING THE FIRST TRIAL, AND THE JUDGE MADE A FACTUAL FINDING THAT MR. ECKMAN WAS SERIOUSLY ILL DURING THAT TRIAL AND CITED TO THE SAME PAGE OF THE TRANSCRIPT THAT MR. PETILLO JUST CITED, PAGE 688, AND THAT, I CAN FRANKLY TELL THE COURT THAT PAGE SUMS UP EVERYTHING.

WELL, THE DISTRICT COURT, THE RELIEF THAT WAS GRANTED HERE WAS A NEW TRIAL?

YES. THAT'S CORRECT.

I ASSUME THAT THE POSTURE OF THIS CASE, ASSUMING THAT WE APPROVE THE DISTRICT COURT DECISION, WILL STILL LEAVE IT WITH AN OPPORTUNITY FOR THE STATE. THIS WITNESS IS NOT AVAILABLE.

THE ODD THING, YOUR HONOR, IS THAT SHOULD THIS COURT DECLARE THE STATUTE UNCONSTITUTIONAL, AND SHOULD, INDEED, MR. ECKMAN BE AS SERIOUSLY ILL AS THE STATE SUGGESTS THAT HE WAS, AT THE TIME OF THE SECOND TRIAL, WE MAY BE BACK TO A SITUATION WHERE WE NEED TO USE THE TESTIMONY FROM THE FIRST TRIAL, UNDER THE OLD, UNAVAILABILITY RULE, IN THAT HE IS ABSOLUTELY UNAVAILABLE.

BUT THERE WILL BE NOTHING TO PROHIBIT YOU FROM DOING THAT. IS THAT CORRECT?

NOTHING. NO. NOTHING AT ALL, YOUR HONOR.

THE STATE STILL, EVEN IF WE APPROVE THE FOURTH DISTRICT DECISION, ACTUALLY THE STATE WILL STILL HAVE RELIEF.

YES, YOUR HONOR. THE STATE WOULD BE ABLE TO RETRY HIM AGAIN, USING THE TESTIMONY FROM THE FIRST TRIAL.

WITH A SHOWING OF UNAVAILABILITY.

WITH THE SHOWING OF ABSOLUTE UNAVAILABILITY, AND WITH REGARD TO THAT, I WOULD JUST LIKE TO SUGGEST TO THE COURT THAT THE STATEMENT BY THE TRIAL JUDGE, "HE IS NOT COMING BACK FOR ANYBODY", CAN BE INTERPRETED TWO-WAYS. ONE WAY IS, AS SUGGESTED BY COUNSEL. THAT IS THAT HE IS JUST NOT COOPERATING, AND HE IS NOT GOING TO COME BACK, NO MATTER WHO ASKS HIM. THE OTHER WAY, HOWEVER, TO INTERPRET THAT STATEMENT, IS HE CAN'T COME BACK, AS IN THE NATURE OF HE HAS CROSSED THE GREAT, TO THE GREAT BEYOND, AND HE IS NOT COMING BACK FOR ANYBODY. THE POINT IS THAT THE JUDGE DID MAKE THAT STATEMENT. THE POINT IS THAT THERE IS SOMETHING THAT LOOSE A LOT LIKE A FINDING, ALTHOUGH CLEARLY THE JUDGE DOESN'T SAY "I AM MAKING THIS ABSOLUTE FINDING," BUT HE DOES SAY, ON THE RECORD, "THIS IS WHAT I HAVE OBSERVED." I RESPECTFULLY REMIND THIS

COURT OF ITS OWN STATEMENT, THAT IT IS THE FUNCTION OF THE COURT, IF AT ALL POSSIBLE, TO RESCUE STATUTES FROM THEDUCE BIN OF UNCONSTITUTION -- FROM THE DUST BIN OF UNCONSTITUTIONALITY. THE STATE OF FLORIDA REMITS THAT IT HAS PASSED THE -- THE STATE OF FLORIDA REPRESENTS THAT IT HAS PASSED THE STATUTE. IT HAS DONE ITS JOB. WE ASK THIS COURT TO APPROVE THE CONSTITUTIONALITY OF THE STATUTE. THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH.