Floyd Thomas Robertson v. State of Florida

THE NEXT CASE ON THE ORAL ARGUMENT CALENDAR IS ROBERTSON VERSUS STATE. MR. ALVAREZ.

MAY IT PLEASE THE COURT. MANUEL ALVAREZ, ASSISTANT PUBLIC DEFENDER ON BEHALF OF THE APPELLANT MR. FLOYD ROBERTSON. MR. ROBERTSON WAS CONVICTED OF THE SECOND-DEGREE MURDER FOR THE SHOOTING DEATH OF HIS GIRLFRIEND. AT TRIAL, MR. ROBERTSON CLAIMS THAT THE SHOOTING WAS ACCIDENTAL. DURING DIRECTION, MR. ROBERTSON SAID NOTHING OR DID NOTHING THAT PUT HIS CHARACTER AT ISSUE. ON CROSS-EXAMINATION, THE PROSECUTOR GOT UP AND ASKED MR. ROBERTSON IF HE HAD EVER THREATENED ANYONE CLOSE TO HIM WITH AN AK 47 ASSAULT RIFLE.

LET ME ASK YOU THIS, WHAT WAS THE WEAPON THAT WAS USED IN THIS PARTICULAR CASE? DOES IT INVOLVE AN AK-47?

NO, MA'AM. IN THIS PARTICULAR INCIDENT, THE SHOOTING OCCURRED WITH A HANDGUN. WHEN MR. ROBERTSON DENIED THAT HE HAD EVER ASSAULTED ANYONE WITH AN AK-47 RIFLE, THE PROSECUTION THEN SUBSEQUENTLY USED THAT AS AN ARGUMENT THAT HIS, TO INTRODUCE EVIDENCE THAT, IN 1992, WHICH WAS FOUR YEARS BEFORE THE INCIDENT, SIX YEARS BEFORE THE TRIAL, HE HAD ALLEGEDLY POINTED AN AK-47 RIFLE AT HIS FORMER SPOUSE.

DOES THE STATE EVER TRY, AT ANY POINT, IN THIS CASE, TO ATTEMPT TO USE THIS AS WILLIAMS RULE EVIDENCE?

NO, JUDGE. THIS IS PART OF THE PROBLEM. THE STATE, IN ITS ANSWER BRIEF, MAKES THE CLAIM THAT THIS IS JUST A GARDEN VARIETY, WILLIAMS RULE CASE, AND THEREFORE THERE IS REALLY NO COMPARABLE. THIS IS NOT A WILLIAMS RULE CASE TO BEGIN WITH, BECAUSE FOR ONE THING, WHAT THE STATE DID IN THIS CASE IS THEY SPECIFICALLY CHOSE TO CIRCUMVENT THE REQUIREMENTS OF RULE 404 AND NOT FILE A NOTICE OF INTENT TO RELY ON THE EVIDENCE. INSTEAD THEY CHOSE TO INTRODUCE THE EVIDENCE UNDER THE GUISE OF IMPEACHMENT, BY ASKING A QUESTION WHICH THIS COURT, FOR OVER A CENTURY, HAS HELD IS AN IMPROPER QUESTION.

SO THE DEPOSITION OF THE WIFE HAD BEEN TAKEN BEFORE TRIAL.

YES.

SO DEFENSE LAWYER KNEW THAT THEY WERE GOING TO PUT THEIR CLIENT ON THE STAND, THEY BETTER MAKE SURE, IN DIRECT, THAT THEY STAY AWAY FROM SOMETHING THAT COULD POSSIBLY CAUSE IMPEACHMENT IMPEACHMENT. YOUR POSITION IS THIS IS NOT AN OPENING THE DOOR. THERE WAS NO OPENING THE DOOR.

I DON'T THINK THAT, BASED ON VERY SUBTLE PRECEDENCE, THERE IS ABSOLUTELY NO, THE DEFENDANT DID NOTHING THAT COULD POSSIBLY HAVE OPENED THE DOOR. WHAT THE MAJORITY OPINION FROM THE THIRD DISTRICT COURT SAYS, THOUGH, WAS THAT MERELY BECAUSE HE TOOK THE STAND AND MERELY BECAUSE HE CLAIMED THAT THE SHOOTING WAS ACCIDENTAL, THAT SOMEHOW THIS AUTOMATICALLY PLACED HIS CHARACTER AT ISSUE. THAT IS CLEARLY ERRONEOUS, BECAUSE CLAIMING THAT THE GUN DISCHARGED ACCIDENTALLY DID NOT

IMPLICATE ANY CHARACTER AT ANY RATE OF THE DEFENDANT. HE MERELY ASSERTED A DEFENSE.

BUT WHEN A WITNESS TAKES THE STAND, THERE IS CERTAIN AMOUNT OF THEIR CHARACTER THAT COMES INTO PLAY, ISN'T THERE?

YOUR HONOR, WHENEVER ANYONE TAKES THE STAND, CERTAINLY HIS QUESTIONABILITY IS AT ISSUE BUT NOT HIS CHARACTER. HIS CHARACTER WILL ONLY COME INTO ISSUE, WHEN THE DEFENDANT VOLUNTEERS INFORMATION ABOUT HIS CHARACTER.

AND YOUR ARGUMENT HERE HAD, IN THIS CASE, IS THAT THE -- AND YOUR ARGUMENT HERE IN THIS CASE, IS THAT THE DEFENDANT SAID NOTHING, IN HIS DIRECTION, TO SAY I AM A GOOD PERSON, THAT I VE HAVE DONE ANYTHING LIKE THIS, ET CETERA. > ABSOLUTELY, YOUR HONOR. HE NEVER MENTIONED ANYTHING BOUT HIS CHARACTER. NEVER EVEN, NEVER CLAIMED THAT THE RELATIONSHIP WAS NONVIOLENT. HE MADE NO CLAIMS. HE SIMPLY LIMITED HIS TESTIMONY PRIMARILY TO THE EVENTS SURROUNDING THE INCIDENTS OF THE EVENTS OF THAT DAY.

COULD THIS QUESTION HAVE BEEN ASKED OF A WITNESS?

ABSOLUTELY NOT, YOUR HONOR. AGAIN, THE LAW HAS BEEN VERY CLEAR. IT IS CODIFIED IN THE COMMENTS TO THE RULE. THE PRECEDENT GOING BACK TO 1891 THAT I FOUND FROM THIS COURT, UNLESS A WITNESS AFFIRMATIVELY SAYS SOMETHING ABOUT THE CHARACTER --

LIMITATION ON HAVE YOU EVER BEEN CONVICTED OF A CRIME. RIGHT. IN WHICH CASE IT IS ONLY A NUMBER, BUT IF THE DEFENDANT HAD CLAIMED, FOR EXAMPLE, I WOULD NEVER HAVE INTENTIONALLY SHOT MY GIRLFRIEND BECAUSE I AM SIMPLY NOT THAT SORT OF A PERSON. I AM NOT A VIOLENT PERSON, IT CLEARLY WOULD HAVE OPENED THE DOOR. THAT DID NOT OCCUR IN THIS CASE. I THINK WHAT THE MAJORITY DID IS IT CONFUSED THE CONCEPT THAT WHEN A WITNESS TAKES THE STAND, HIS CREDIBILITY ISS UR ATTACK. BUT --

IS IT A PROBLEM WITH THE PROSECUTION PROSECUTION'S EXAM -- THE PROSECUTION'S EXAMINATION AFTER WITNESS, AS TO FAMILIARITY WITH A WEAPON, WITH THE AK-47, IF YOU ASKED THE WIFE, THE EX-WIFE, RATHER, DO YOU KNOW THAT YOUR HUSBAND, YOUR EX-HUSBAND IS FAMILIAR WITH AK AK-47. DID YOU HAVE ONE AT THE TIME THAT YOU WERE MARRIED AND SO FORTH. YOU WOULD HAVE NO PROBLEMS WITH THAT TYPE OF QUESTION?

NO, YOUR HONOR. IN FACT, HE WAS ASKED --

SO YOUR CROSS-THE-LINE QUESTION, THEN, I GATHER, AND IN FACT ISN'T IT A FACT THAT YOU HAVE THREATENED PEOPLE WITH ASSAULT RIFLES BEFORE? THAT IS WHERE YOU TAKE THE POSITION THAT THE STATE CROSSED THE LINE. IS THAT CORRECT?

YES, YOUR HONOR, AND I JUST WANT TO ADD THAT MR. ROBERTS HAD NEVER CLAIMED, HE SAID HE WAS FAMILIAR WITH WEAPONS. HE ADMITTED THAT HE HAD PURCHASED AN AK-47 RIFLE. THE PROBLEM IS THAT WHETHER OR NOT YOU ASSAULT SOMEONE WITH A WEAPON DOESN'T MAKE YOU ANYMORE OR LEVELS FAMILIAR WITH WEAPONS. I THINK -- ANY MORE OR LESS FAMILIAR WITH WEAPONS. I THINK WHEN YOU LOOK AT WHAT THE STATE DID IN THIS CASE, IT IS VERY CLEAR THAT WHAT THIS CASE WAS IS IT WAS A TACTIC. THEY WANTED TO CIRCUMVENT THE TACTICS UNDER 404 AND INTERESTINGLY ENOUGH, THE STATE IN ITS ANSWER BRIEF, POINTS OUT THAT THERE WAS NO NOTICE AND THAT THE FAILURE TO PRESENT A TIMELY NOTICE, AND ONE OF THE CASES THEY CITED WAS BARBIE. IF YOU LOOK AT BARBIE, THE NOTICE WAS FILED NINE DAYS AS OPPOSED TO TEN DAYS BEFORE TRIAL AND THE COURT SAID WE WILL APPLY HARMLESS-ERROR ANALYSIS SO WE WILL APPLY A RICHARDSON ANALYSIS. IS WE WILL TREAT AS A DISCOVERY VIOLATION AND, OF COURSE, IN RICHARDSON THE FIRST THING YOU LOOK AT IS WHETHER OR NOT THE DISCOVERY VIOLATION WAS WILLFUL OR INADVERTENT, AND WHETHER

OR NOT THE DEFENSE WAS PREJUDICED BY THAT LACK OF NOTICE. IN THIS PARTICULAR CASE, I DON'T SEE HOW ONE CAN COME TO ANY CONCLUSION OTHER THAN THE FACT THAT CLEARLY THERE WAS A WILLFUL INTENT NOT TO PUT THE DEFENSE ON NOTICE THAT THEY INTENDED TO USE THIS EVIDENCE. CLEARLY --

LET ME ASK YOU THIS, IF THE STATE HAD, IN FACT, FILED A NOTICE OF INTENT TO RELY ON WILLIAMS RULE EVIDENCE, AND THEN THE DEFENSE HAD OPPOSED THAT, WHAT WOULD A TRIAL JUDGE HAVE TO HAVE DETERMINED, IN ORDER TO DETERMINE WHETHER OR NOT THIS WAS, IN FACT, WILLIAMS RULE EVIDENCE AND WHETHER IT SHOULD BE ADMISSIBLE?

WELL, THIS IS A VERY IMPORTANT POINT. THE MAJORITY ONLY ARRIVES AT A WILLIAMS RULE ANALYSIS BY APPLY WAG IS KNOWN AS THE CROCHMAN DOCTRINE.

AND THAT IS DECIDING --

RIGHT. BUT THAT DOCTRINE PRESUPPOSES THAT YOU HAVE A RECORD FROM WHICH AN APPELLATE COURT CAN ARRIVE AT THAT ULTIMATE RATIONALE. IN THIS CASE, HAD A WILLIAMS RULE NOTICE BEEN FILED, THIS ISSUE WOULD HAVE BEEN LITIGATED PRIOR TO THE TRIAL. THE COURT WOULD HAVE HAD TO MAKE A FINISHEDING THAT THE -- A FINDING THAT THE EX-WIFE IS CREDIBLE, THAT THE INCIDENT THAT HAPPENED WAS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE. MOREOVER, THE DEFENSE WOULD HAVE HAD THE OPPORTUNITY TO TRY TO REBUT HER CHRACHLS, BY PRESENTING EVIDENCE -- HER CLAIMS, BY PRESENTING EVIDENCE, AND THESE ARGUMENTS COULD HAVE ALSO BEEN PRESENTED TO THE TRIAL COURT. NONE OF THAT HAPPENED. IT IS -- MOREOVER, I THINK THERE ARE ALSO SOME FACTUAL ISSUES JUST UP FROM THE RECORD THAT WE DO HAVE, REGARDING THE CREDIBILITY OF THIS CLAIM. FOR ONE THING, WHEN THE INCIDENT OCCURRED, IT WAS NEVER REPORTED TO THE POLICE. THE EX-WIFE REMAINED IN THE RELATIONSHIP, EVEN AFTER THE ALLEGED INCIDENT TOOK PLACE AND IN FACT, AS IT CAME OUT DURING HER EXAMINATION, SHE ONLY LEFT THE DEFENDANT WHEN THEY FOUND HIM WITH ANOTHER WOMAN. THE PROBLEM IS THAT THE WAY THAT THE COURT REACHED A WILLIAMS RULE ANALYSIS IN THIS CASE IS THAT IT DID SO WITHIN ITS DEFICIENT RECORD. NONE OF THOSE FINDING ARE IN THE RECORD BECAUSE IT WAS NEVER ES THE URT. SO THE STATE WAS NEVER ALLOWED TO CIRCUMVENT THE REQUIREMENT OF THE WILLIAMS RULE AND IN FACT AMBUSH THE DEFENDANT, BUT THEN IN APPEAL CLAIM THAT IN THE ABSTRACT, THIS EVIDENCE WOULD HAVE BEEN ADMISSIBLE, ANYWAY, HAD THEY DONE WHAT THEY WERE REQUIRED TO DO.

WHY ISN'T IT PERMISSIBLE FOR THE PUT ON REBUTTAL EVIDENCE TO SHOW THAT THE DEFENDANT LIED ON THE STAND? HE SAID, NO, I HAVE NEVER THREATENED ANYBODY. THE STATE SIMPLY BRINGS HIS EX-WIFE IN, AND THE EX-WIFE SAYS YES, HE THREATENED ME WITH AN AK-47.

WELL, THE PROBLEM --

WHY ISN'T THAT PERMISSIBLE?

WELL, IT IS I AM PERMISSIBLE BECAUSE, IN THIS CASE -- IT IS NOT PERMISSIBLE BECAUSE IN THIS CASE THE DENIAL ONLY CAME AFTER IT WAS POSED TOM BY THE PROSECUTOR. THE PROSECUTOR SHOULD HAVE NEVER ASKED THE QUESTION. IF THE PROSECUTOR WANTED TO INTRODUCE THE EVIDENCE OF THE FORMER SPOUSE, IF THE PROSECUTION FELT THAT THIS EVIDENCE WENT TO REBUT THE CLAIM OF ACCIDENTAL SHOOTING, THEY HAD AN OBLIGATION TO FILE A NOTICE OF THEIR INTENT TO RELY ON WILLIAMS RULE EVIDENCE, AND THESE ISSUES SHOULD HAVE BEEN AND COULD HAVE BEEN FLUSHED OUT BELOW AND THEN THE APPELLATE COURT WOULD HAVE MADE A DETERMINATION ON A PROPER RECORD AS TO WHETHER OR NOT THE INCIDENT WAS REMOTE IN TIME, WHETHER THE INCIDENT WAS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, ET CETERA. THEY DID NONE OF THIS. INSTEAD -- IN OTHER WORDS THE STATE CANNOT

OPEN THE DOOR BY ASKING AN IMPROPER QUESTION AND THEN STEP BACK AND SAY BUT WAIT A SECOND, THE DEFENDANT OPENED THE DOOR WHEN HE DENIED THAT HE DID THIS, AND OF COURSE THE DEFENDANT IS IN A TERRIBLE POSITION, BECAUSE OF COURSE IF HE ADMITS THAT HE COMMITTED THE ASSAULT, IF HE ADMITS TO THE IMPROPER QUESTION, THEN THE INCIDENT IS ALREADY IN EVIDENCE, AND IF HE DENIES IT, THEY JUST BRING IN THE WITNESS TO FURTHER EMPHASIZE THE POINT. UNLESS THE COURT HAS ANY FURTHER QUESTIONS AT THIS TIME, I WILL RESERVE THE REMAINDER OF MY TIME FOR REBUTTAL. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. MR. NEIMAN.

MAY IT PLEASE THE COURT. MICHAEL NEIMAN ON BEHALF OF THE STATE.

WHY ISN'T THAT A GOOD ANSWER THAT HE JUST GAVE, AS TO QL THE STATE CANNOT -- AS TO WHY THE STATE CANNOT ASK THAT PARTICULAR QUESTION?

I DON'T THINK THERE IS A GOOD ANSWER.

WHY ISN'T IT? THAT IS WHAT I ASKED YOU.

BECAUSE THE DEFENDANT, BY TESTIFYING, IS BASICALLY FREE GAME. WE DON'T ALLOW THE DEFENDANT, BECAUSE IT IS CROSS-EXAMINATION, TO BE ABLE TO COMMIT A LIE AND NOT TELL THE TRUTH? THE ISSUE IN THIS CASE WAS HIS FAMILIARITY AND USE OF GUNS AND THIS GOES TO THE HEART OF THE MATTER. THIS IS NOT --

THE STATE SORT OF SET HIM UP TO THIS. THE STATE LEADS HIM INTO THIS, AND THEN ASKS HIM THE QUESTION, KNOWING WHEN HE GIVES THIS ANSWER, ABOUT HIS EX-WIFE, THAT THIS IS GOING TO SHOW THAT HE HAS BAD CHARACTER.

BUT IT IS NOT BAD CHARACTER. ONE, IT IS NOT A SET UP BECAUSE EVERYONE KNEW ABOUT THIS. THE DEFENDANT TOOK THE STAND. HE PUT THIS IN ISSUE. IT IS NOT, THE ONLY OBJECTION THAT WAS MADE WAS IT WAS OUTSIDE THE SCOPE. THE SCOPE OF CROSS? THE SCOPE OF DIRECT. THAT IS NOT A GOOD OBJECTION. THIS WAS RELEVANT TESTIMONY. THE DEFENDANT IS DIFFERENT, WHEN HE TAKES THE STAND, THAN ANY OTHER WITNESS.

CAN WE BREAK THIS DOWN INTO SOME SEGMENTS? MAYBE WE CAN KIND OF ISOLATE WHAT THE REAL ISSUE IS THEN. DO YOU, IF THIS IS TOTALLY COLLATERAL, A TOTALLY COLLATERAL MATTER, IS IT YOUR VIEW THAT YOU CAN JUST INQUIRE ABOUT ANYTHING COLLATERAL AND THEN IMPEACH ON THAT? AND LET'S SAY THIS IS NOT AN AK-47. THIS IS JUST A COLLATERAL MATTER. CAN YOU IMPEACH ON THAT?

IF WE, IF IT IS A COLLATERAL MATTER, JUST ASSUME --

JUST ASSUME THAT.

NO, I WAS GOING TO SAY IF IT IS AERAL MATTER, WE HAVE TO ACCEPT THE ANSWER FOR WHAT IT IS.

SO THEN THE REAL ISSUE COMES DOWN TO NOT WHETHER IT IS IMPEACHMENT. IT IS QUESTION OF WHETHER THIS IS A COLLATERAL ISSUE OR NOT. THAT IS WHAT WE ARE TALKING ABOUT.

THAT IS EXACTLY WHERE I AM GOING. IT IS AN IMPORTANT ISSUE IN THIS CASE, BECAUSE THE DEFENSE WAS IT WAS AN ACCIDENT. HE HAD AN AUTOMATIC PISTOL IN HIS HOLSTER, IN A COCKED POSITION. IF ANYONE UNDERSTANDS --

BUT HOW DOES THIS EVIDENCE GO TO WHETHER THAT WAS AN ACCIDENT OR NOT? I MEAN, THE

MERE FACT OF ASSAULTING SOMEONE WITH A WEAPON DOES NOT NEGATE THE FACT THAT, AT SOME OTHER POINT, THERE COULD AND ACCIDENT. I AM HAVING A HARD TIME MAKING THIS CONNECTION --

YOUR HONOR, THE ASSAULT OCCURRED IN BOTH TIMES, THE STATE'S THEORY WAS, WHEN HE POINTED THE GUN.

WHEN WHO POINTED THE GUN?

WHEN THE DEFENDANT POINTED THE GUN TO THE WIFE IN A COCKED POSITION, THAT IS THE ASSAULT. ALL THE EVIDENCE --

HOW DOES THAT NEGATE THAT THIS CRIME THAT HE IS ON TRIAL FOR WASOT ACCIDENTAL?

BECAUSE IT WAS HIS KNOWLEDGE NS AND HIS EVIDENCE OF TESTIMONY THAT HE GAVE AS TO HOW THE GUN WS PLACED AND THE EVIDENCE OF THE BULLET AND THE EVIDENCE THE ME CAME IN, AND THE TESTIMONY WAS THAT IT WAS OVER 45 MINUTES FROM THE TIME THE GUN WAS SHOT UNTIL THE, IT WAS REPORTED. ALL THE EVIDENCE INDICATED THAT IT WAS NOT AN ACCIDENTAL SHOOTING. NOW, I DON'T BELIEVE THAT THE STATE CHARGED PREMEDITATED MURDER AND THAT HE TOOK THE GUN TO SHOOT THE PERSON IMMEDIATELY, BUT THE FACT IS THAT, IN BOTH SITUATIONS, WHEN HE GOT INTO A DOMESTIC DISPUTE, THE WAY HE WAS GOING TO BULLY HIS WAY OUT OF IT WAS TO THREATEN THE INDIVIDUAL WITH A LOADED FIREARM. IN THIS CASE IT JUST WENT OFF. IN THE FIRST CASE IT JUST DIDN'T GO OFF, AND THAT IS THE DIFFERENCE.

SO WHYASN'T A NOTICE OF INTENT TO RELY ON WILLIAMS RULE EVIDENCE FILED BY THE PROSECUTOR?

I WISH I HAD THE ANSWER TO THAT QUESTION, YOUR HONOR. I DON'T HAVE.

AND NOW, TODAY, YOU ARE BEFOREOURT, CLAIMING THAT THIS IS PROPER WILLIAMS RULE-TYPE EVIDENCE. IS THAT THE STATE'S POSITION?

WHAT WE ARE REALLY CLAIMING IS, IF YOU LOOK AT THE COURT'S OPINION, ALL RIGHT, THE OPINION WAS --

IS THE STATE'S POSITION THAT THIS IS PROPER WILLIAMS RULE EVIDENCE?

YES. YES!

DID THE STATE EVER ADVANCE THAT ARGUMENT IN THE TRIAL COURT?

NO, THEY DIDN'T.

DID THE STATE ADVANCE THAT ARGUMENT IN ITS BRIEFS BEFORE THE THIRD DISTRICT?

I AM NOT AWARE OF THAT. IT ESCAPES MY MIND, AND WHATEVER THE BRIEFS SAY, THEY DO. OKAY.

OKAY. IF YOU AGREE THAT, WITH A WILLIAMS RULE-TYPE EVIDENCE, THAT THE TEN-DAY REQUIREMENT IS PART OF THE STATUTE, THEN IT ENVISIONS THAT A TRIAL JUDGE DOES WHAT MR. ALVAREZ SAYS NEEDS TO BE DONE, WHICH IS THE FIRST PRONG IS THE JUDGE HAS TO MAKE A DETERMINATION THAT THE CRIME, IN FACT, OCCURRED, OR THE ACT, IN FACT, OCCURRED. HERE THERE WAS NO POLICE REPORT. WE KNOW THAT. SO -- CORRECT? AND THEN THEY, ALSO, HAVE TO MAKE A DECISION AS TO, WELL, IS THERE, IS THERE SUBSTANTIAL SIMILARITY? YOU CONCEDE, IF

THIS WAS TO BE FOR ABSENCE OF MISTAKE, THERE HAS TO BE SUBSTANTIAL SIMILARITY. CORRECT?

UM-HUM.

AND THEFLD HAVE TO MAKE A DECISION AS -- AND THEY WOULD HAVE TO MAKE A DECISION AS TO WHETHER THE ABSENCE OF ANY ACTS BETWEEN SIX YEARS AND THIS INCIDENT, IF THEY FOUND IT WAS SUBSTANTIAL, WHETHER --

CORRECT.

-- THAT WOULD, THEN, THE REMOTENESS FACTOR WOULD TEND TO MAKE IT LESS RELEVANT, AND THEY WOULD EVALUATE ALL OF THAT AND THEN DETERMINE WHETHER THE PROBATIVE VALUE OUTWEIGHED ITS JUDICIAL EFFECT. CORRECT?

CORRECT.

NONE OF THAT WAS DONE. FIRST OF ALL,ASSUMING IF IT IS NOT WILLIAMS RULE OR IT IS NOT, OR EVEN IF THE STATE IS NOW SAYING IT IS WILLIAMS RULE TO ALLOW THE STATE TO TRY TO GET IN WILLIAMS RULE, BY ASKING A QUESTION, WITHOUT EVEN GOING BEFORE THE TRIAL JUDGE TO, FIRST PROFFER THE QUESTION, WOULDN'T THAT JUST, REALLY, UNDERMINE THE VERY PURPOSE OF THE PROTECTIONS THAT ARE SET FORTH BY THE CODE OF EVIDENCE IN THE WILLIAMS RULE? AND THAT IS A CONCERN OVERRIDING THE SPECIFIC FACTS OF THIS CASE.

THE STATE WOULD NOT DISAGREE WITH THAT OVERALL STATEMENT, AND THAT IS A CONCERN, BUT, AGAIN, WE HAVE TO LOOK AT THE SPECIFIC FACTS OF THIS CASE, AND IT IS NOT LIKE THE HARVEY CASE, WHERE IT JUST COMES NINE DAYS, AND WE DIDN'T KNOW ABOUT THIS EVIDENCE. THIS EVIDENCE WAS KNOWN BY BOTH PARTIES, WELL BEFORE TRIAL.

AND WHAT WAS, WHAT, DO WE KNOW ANYTHING ABOUT WHY THE, WHY THAT, THE WITNESS -- AGAIN, SINCE THE STATE KNEW ABOUT IT, AND THEY OBVIOUSLY MADE A DECISION THEY KNEW IT WASN'T WILLIAMS RULE OR THEY DIDN'T THINK IT WAS, THEY LISTED HER AS A POSSIBLE FOR REBUTTAL, AS A REBUTTAL WITNESS?

SHE CAME OUT ON REBUTTAL, BUT ALSO COULD HAVE BEEN LISTED AS A POSSIBLE WILLIAMS RULE EVIDENCE AND TO PUT THE OTHER PARTY ON NOTICE THAT THIS IS A POSSIBILITY, AND THEREFORE DON'T LIE! AND ONCE YOU GET UP THERE, THE WHOLE ISSUE IN THIS CASE, WHEN YOU THINK ABOUT IT, VERY CLEARLY VERY SIMPLE ISSUE, IS WAS IT AN ACCIDENTAL COCKING OF THE GUN OR WAS THE GUN COCKED AND USED IN A THREATENING MANNER AND THEN WENT OFF? THE GUN THAT IS COCKED, AN AUTOMATIC GUN THAT IS COCKED TAKES A HAIR TRIGGER. A NIECE -- A SNEEZE, YOU COULD SHOOT IT. IF IT IS UNCOCKED, YOU NEED BETWEEN 12-TO-15 POUNDS OF PRESSURE, TO, AND SO THEREFORE WHEN YOU ARE CLEANING THE GUN IN AN UNCOCKED POSITION, IT IS NEVER GOING TO GO OFF, AND THAT IS A BIG DIFFERENCE THERE. THE DEFENDANT IS STATING THAT THIS IS AN ACCIDENT BECAUSE I E GUN COCKED AND I AM CLEANING IT. AN EXPERT, A WELL-KNOWLEDGEABLE PERSON WITH GUNS NEVER CLEANS A GUN IN THE COCKED POSITION.

HOW DID THE PREVIOUS THREAT SHED ANY LIGHT ON THAT ISSUE?

BECAUSE IT WAS AN ASSAULT.

I TAKE IT THAT NO GUN WAS DISCHARGED IN THE PREVIOUS INCIDENT.

YOU DON'T NEED IT TO BE DISCHARGED FOR AN ASSAULT.

W YOU ARE GOING AROUND IN CIRCLES AND TALKING ABOUT ANOTHER ISSUE. WHAT I AM ASKING YOU IS HOW DOES THE PREVIOUS INCIDENT, IN WHICH THE GUN DID NOT GO OFF AND NOBODY IS ASSERTING THAT THERE WAS ANY ACCIDENT OR INTENTIONAL SHOOTING OF THE GUN, SHED LIGHT ON WHETHER THIS SHOOTING WAS AN ACCIDENT OR NOT?

BECAUSE THE ISSUE IS NOT THE ACTUAL OUTCOME, BECAUSE THE ACTUAL OUTCOME WOULD REQUIRE TWO DEATHS, AND ONE DEATH DIDN'T OCCUR, AND THAT MAY BE FORE TUTIES OR IT -- FORE TUT US OR IT MAY BE NOT, BUT THE PROBLEM THAT WE ARE HAVING HERE IS THE ISSUE IS NOT THE DEATH BUT THE ACTION THE DEFENDANT TAKES IN A DOMESTIC DISPUTE, WHEN HE IS BEING CHALLENGED IN THAT DISPUTE AND HOW DOES HE RESOLVE IT? HE RESOLVES IT BY POINTING A GUN A LOADED GUN, AT HIS SPOUSE. I AM THE BOSS. SEE? I HAVE THE GUN. IN ONE CASE, IT DIDN'T GO OFF. IN THE OTHER CASE, IT GOES OFF.

THE CLAIM IN THIS CASE IS --

SO IT IS NOT THE DEATH.

-- THAT IT DID GO OFF. SO THERE IS NO DENIAL THAT IT WENT OFF.

THE GUN IS SHOT. YES, SIR.

BUT THAT IT WENT OFF ACCIDENTALLY.

WELL, IF IT WENT OFF ACCIDENTALLY, THERE ARE TWO DIFFERENT THEORIES OF ACCIDENTS. THE ACCIDENT THAT WE ARE BEING TOLD BY THE DEFENDANT IS HE IS CLEANING THE GUN ON THE BED WITHOUT ANY CLEANING MATERIAL, AN AUTOMATIC GUN AND SINGLE ACTION, THEN IT GOES OFF. THE OTHER TESTIMONY OF DEFENDANT ALSO, WAS THAT HE WAS JUST SHOWING HER THE GUN. HE WASN'T CLEANING IT. SO WE HAVE CONTRARY TESTIMONY FROM THE DEFENDANT. THE STATE'S THEORY WAS THAT IT WAS YOU DO NOT HAVE A LOADED GUN SINGLE-ACTION, AND POINT IT AT SOMEBODY, BECAUSE THAT IS A DEPRAVED MIND, BECAUSE IT DOESN'T TAKE ANYTHING TO MAKE IT GO OFF.

AND SO IT IS, THE RELEVANCY HERE, YOU ARE SAYING, IS BECAUSE I PREVIOUSLY -- IS BECAUSE HE PREVIOUSLY POINTED A GUN AT SOMEBODY?

NOT AT SOMEBODY. AT A SPOUSE IN A DOMESTIC DISPUTE. NOT AT SOMEBODY. IT IS A VERY PARTICULAR SOMEBODY DURING A VERY PARTICULAR TYPE OF SITUATION. A DOMESTIC DISPUTE, WHERE THE WIFE IS CHALLENGING THE HUSBAND, AND THE GIRLFRIEND IS CHALLENGING THE BOYFRIEND.

THE STATE HAD EVIDENCE THAT HE WAS CHARGED WITH 18 AGGRAVATED ASSAULTS OF POINTING THE GUN AT SOMEBODY ELSE, IT WOULD NOT HAVE BEEN RELEVANT.

IT MIGHT HAVE BEEN RELEVANT.

WELL NOW -- WHY WOULD THAT HAVE BEEN RELEVANT? BECAUSE I UNDERSTAND YOU SAYING NOW, THAT, NO, IT IS JUST BECAUSE --

NO. WHAT I AM SAYING, YOUR HONOR, THAT IS NOT WHAT I AM SAYING. I AM SAYING THESE FACTS WERE RELEVANT. I NEED TO KNOW WHAT THE OTHER FACTS WERE, IF THEY WERE RELEVANT.

WELL, IF HE POINTED IT AT A FRIEND.

UNDER THE THEORY THE STATE PRESENTED IN THIS CASE, I DON'T THINK THAT WOULD BE

RELEVANT, BECAUSE THE THEORY, THE SIMILARITIES THAT, IN A DOMESTIC DISPUTE, IN ORDER TO ACHIEVE HIS WAY, HE POINTS LOADED GUNS AT HIS PARTNERS.

SO IT IS BECAUSE --

IT IS VERY MUCH A DISMISS I HAVE ACT.

-- A DISMISS I HAVE ACT.

SO YOU ARE SAYING THE RELEVANCY WAS AT THE TIME IT WAS HIS SPOUSE?

HIS FORMER SPOUSE. AT THE TIME HE WAS MARRIED TO ANOTHER WOMAN AT THE TIME.

BUT NOT THIS CASE. THIS IS ANOTHER PERSON.

THAT'S RIGHT.

SO IT IS NOT RELEVANT HERE. WHAT IF HE HAD THREATENED HIS FORMER SPOUSE THAT WAS HIS SPOUSE, THEN, WITH A KNIFE?

I THINK YOU WOULD HAVE TO LOOK AT DIFFERENT FACTORS IN THAT SITUATION, BECAUSE THE KEY HERE, ANDN, WE HAVE THE KEY FACTOR IS THAT HE USES A GUN TO THREATEN THESE PEOPLE DURING DOMESTIC --

SO IF HE THREATENED HER WITH ANY OTHER WEAPON, IT WOULD NOT BE RELEVANT.

WELL, IT MIGHT BE RELEVANT, BUT WE WOULD NEED A LITTLE MORE TO FLUSH IT OUT. HERE WE HAVE --

WHAT DO YOU NEED TO FLUSH OUT?

THE EXACT SITUATION. ,000 OCCURRED. DID HE ACTUALLY THREATEN HER WITH THE USE OF THE KNIFE IN DID HE JUST -- WITH THE USE OF THE KNIFE? DID HE JUST PULL THE KNIFE OUT?

HE ACTUALLY THREATENED HER WITH THE USE OF THE KNIFE.

I THINK THAT WOULD COME IN UNDER THE FACT THAT, WHEN FACED WITH SAYINGS WHERE HIS MANHOOD WAS BEING CHALLENGED IN A DOMESTIC RELATION, HE USES FORCE.

SO YOU ARE SAYING THAT ANY PREVIOUS THREAT IN A DOMESTIC SITUATION WOULD HAVE BEEN ADMISSIBLE HERE, TO PROVE THAT THIS ACT WAS NOT AN ACCIDENT.

WITH AN ARMED WEAPON. I THINK THAT WOULD BE FAIR --.

THAT HE HAD A PATTERN, IN OTHER WORDS, OF THREATENING --

THIS IS WILLIAMS RULE. THIS IS NOT CHARACTER EVIDENCE. THIS IS TO SHOW ABSENCE OF MISTAKE OR ACCIDENT, BECAUSE IF, IN FACT, HE, THE DEFENDANT, DOES THIS, AND THIS IS HIS PN ANGUNN, GOES OFF, IT WASN'T AN ACCIDENT THAT THE GUN PPO AT IVIDUAL, WAS IT? HE DID IT. HET TOTHREATEN HER AND IT JUST HAPPENED TO GO OFF. THAT IS WHY IT WASN'T AN ACCIDENT. BECAUSE IF IT WAS TRULY AN ACCIDENT, HE WOULD HAVE BEEN CLEANING THE GUN IN AN UNCOCKED POSITION, WITH CLEANING MATERIALS, AND IT WOULD HAVE TAKEN 15-TO-20 POUNDS OF PRESSURE TO PULL THAT TRIGGER, AND THAT WOULD THEN NOT BE AN ACCIDENT.

WHAT DOES THAT HAVE TO DO WITH WHETHER HE POINTED IT AT THE FORMER SPOUSE OR NOT?

IF IT IS -- IF IT, IF HIS KNOWLEDGE OF THE GUN IS TO DISPEL HIS MYTH OF IT BEING AN ACCIDENT? I AM NOT UNDERSTANDING WHY YOU SAY IT WOULD NOT MAKE ANY DIFFERENCE, IF HE DID IT -- IT ONLY IS RELEVANT, IF IT IS TO A FORMER SPOUSE. BUT ISN'T, DIDN'T YOU ARGUE THAT ITAS FOR THE PURPOSE OF DISPELLING HIS THEORY THAT IT WAS AN ACCIDENT?

YES. BECAUSE IN THIS SITUATION, THE ACCIDENT WAS THAT HE WAS CLEANING THE GUN. AND THE STATE'S THEORY IS THAT HE WASN'T CLEANING THE GUN, THAT HE USED THE GUN AS A THREATENING MEASURE, TO GET HIS WAY DURING AN ARGUMENT!

WITH A SPOUSE.

WITH A SPOUSE.

BUT I THOUGHT YOU INDICATED THAT IT MIGHT NOT BE RELEVANT, IF IT WERE POINTED TO A FRIEND.

WELL, AGAIN, BECAUSE WE DON'T KNOW IF IT WAS A THREAT NICK SITUATION OR HOW -- A THREATENING SITUATION OR HOW, IN OTHER WORDS IF THIS WAS A PATTERN WHERE, EVERY TIME HE GETS INTO AN ARGUMENT, AND THE ONLY WAY HE CAN RESOLVE THAT ARGUMENT IS THROUGH A USE OF FORCE BY THREATENING THEM WHAT WEAPON, AND THEN EACH AND EVERY TIME THAT IS REPORTED, EACH AND EVERY TIME SOMETHING HAPPENS, THERE IS NO WAY. I WAS JUST CLEANING IT. THEN WE WOULD HAVE MORE TO GO ON AND THEN THAT WOULD BE ADMISSIBLE.

WHAT IS YOUR BEST CASE TO SUPPORT YOUR POSITION?

WELL, CITED IN THE BRIEF IS THE DUFFY CASE OUT OF THE FOURTH DISTRICT, WHICH BASICALLY HAS A SITUATION WHERE THE DEFENDANT IS HAVING SEX WITH A WOMAN HE HARDLY KNEW AND IT DIDN'T GO THAT WELL AND HIS MANHOOD WAS CHALLENGED AND HE BASICALLY STRANGLED HER, AND HIS CLAIM WAS THAT HE WAS TRYING TO QUIET HER DOWN AND HE PUT HIS HANDS AROUND HER NECK AND IT WAS AN ACCIDENTAL KILLING. FOURTH DISTRICT ALLOWED EVIDENCE OF A PREVIOUS ACTION IN, WHERE HE, AGAIN, MET A WOMAN, SHORT NOTICE, THEY WERE ASKING SEX. THE SEX DIDN'T GO WELL. HIS MANHOOD WAS BEING CHALLENGED CHALLENGED.

A WILLIAMS RULE INVOLVED IN THAT?

YES. THAT WAS WILLIAMS RULE CASE.

AND THAT HAD PREVIOUSLY GONE THROUGH --

THAT WAS WILLIAMS RULE CASE.

IS THE PO -- IS THE FOY CASE -- IS THE --

FOY VERSUS STATE, THAT, AS FAR AS ASKING A QUESTION, THAT IS IMPROPER TO BEGIN WITH, THAT YOU CAN'T, THEN, --

THAT IS THE WHOLE POINT. WE ARE NOT SAYING THIS QUESTION WAS IMPROPER. THE DEFENDANT TAKES THE STAND.

YOU KEEP SAYING THAT, MR. NEIMAN, BUT EXPLAIN TO US CLEARLY WHAT THE DEFENDANT SAID, DURING HIS DIRECTION. YOU HAVE TO -- DURING HIS DIRECT EXAMINATION. YOU HAVE TO AGREE THAT THIS IS A SPECIFIC INCIDENT OF PRIOR MISS CONDUCT, CORRECT?

CORRECT.

WHAT DID THE DEFENDANT SAY, DURING HIS DIRECT EXAMINATION, THAT WOULD ALLOW THE STATE TO THEN EXAMINE HIM ON A SPECIFIC INCIDENT OF MISCONDUCT?

WHAT HE WAS, HE WAS TESTIFYING THAT HE DIDN'T COMMIT ANY ACT OF VIOLENCE AGAINST THE VICTIM HERE, THAT IT WAS AN ACCIDENT, THAT HE KNEW, HE WAS FAMILIAR WITH GUNS, AND HE PUT HIS WHOLE, YOU SEE, THAT IS WHAT I AM TRYING TO BRING OUT. WE ARE TALKING, LET ME GO BACK TO WHAT I WAS TRYING TO SAY BEFORE. WE ARE TALKING ABOUT TWO DIFFERENT THINGS HERE. A WITNESS TESTIFYING AND PUTTING HIS CHARACTER IN ISSUE AND THE DEFENDANT TESTIFYING. THE DEFENDANT DOESN'T PUT THAT CHARACTER AT ISSUE WHEN HE TESTIFIES. HE PUTS EVERYTHING IN ISSUE, THE WHOLE DEFENSE. HE IS GETTING UP THERE, AND HE IS SAYING THAT THIS WAS AN ACCIDENT. I, THIS WAS AN ACCIDENT BECAUSE I PICKED UP THE GUN. I DIDN'T REALIZE IT WAS COCKED, AND IT WENT OFF. AND --

SO YOUR ARGUMENT, REALLY, THEN, IS THIS, THAT WHENEVER A DEFENDANT GETS ON THE STAND, IT IS OPEN SEASON ABOUT ANYTHING THAT HE MAY, HE OR SHE MAY HAVE DONE IN THE PAST?

NOT ANYTHING BUT OPEN SEASON TO ANYTHING THAT IS RELEVANT TO HIS DEFENSE, AND THE DEFENSE HERE IS THAT THIS WAS AN ACCIDENT. IT IS DIFFERENT. NOW, IF HE WOULD HAVE SAID, YES, I HAVE ASSAULTED SOMEBODY, THAT IS IT. WE DON'T HAVE TO GO FORWARD, BECAUSE THAT IS A TRUTHFUL ANSWER, BUT IF HE SAYS NO, AND EVERYONE KNOWS HE IS LYING, THEN THIS, DOESN'T HE, THEN, ALLOW THAT TO GO FORWARD?

SEEMS LIKE WE ARE NOW STARTING TO MIX TWO CONCEPTS, BECAUSE IF THIS IS PROPER WILLIAMS RULE, EVEN WHETHER THE DEFENDANT TAKES THE STAND OR NOT IF THE DEFENSE IS IT WAS A MISTAKE, AND YOU WANT TO PUT IT ON FOR ABSENCE OF MISTAKE, AND YOU GOT TO GO THROUGH THE WILLIAMS RULE.

RIGHT.

NOW, YOU GK TO A DEFENDANT TAKES THE STAND. WE HAVE RULES IN THE STATE FOR HOW YOU IMPEACH THE CREDIBILITY OF A WITNESS. IF IT IS PRIOR, YOU CANNOT, YOU WOULD AGREE, IMPEACH THE CREDIBILITY OF A WITNESS OR A DEFENDANT, BY PRIOR ACTS OF MISCONDUCT. CORRECT?

UNLESS THEY ARE RELEVANT.

UNLESS THEY ARE RELEVANT.

AND HE IS THE DEFENDANT.

NOW WE GET BACK TO WHETHER IT IS RELEVANT, AND IT FALLS INTO THE WILLIAMS RULE ANALYSIS.

IT IS RELEVANT NO MATTER WHICH WAY WE GO, BECAUSE THAT QUESTION IS A RELEVANT QUESTION, WHETHER IT IS FOR WILLIAMS RULE OR FOR IMPEACHMENT. THE QUESTION IS, ONCE THE DEFENDANT TAKES THE STAND, BASICALLY ANYTHING THAT RELATES TO HIS DEFENSE IS FAIR GAME, AND THIS QUESTION DEFINITELY RELATES TO THE DEFENSE, BECAUSE IS HE CLAIMING THAT IT WAS AN ACCIDENTAL SHOOTING, THAT HE DIDN'T POINT A LOADED, COCKED PISTOL AT THE VICTIM.

SO WHEN THE DEFENDANT TAKES THE STAND AND THE 404 WILLIAMS RULE REQUIREMENT PLACED ON THE STATE GOES OUT THE WINDOW?

NO. I DIDN'T SAY THAT, YOUR HONOR. WHAT I AM SAYING -- THIS SHOULD HAVE BEEN A 404 CASE.

I THOUGHT, OKAY, IF IT, SO IT WASN'T A 404 CASE, AND WE DON'T HAVE A RECORD THAT ALLOWED THE TRIAL COURT TO WEIGH WHAT IS SUPPOSED TO BE WEIGHED, INCLUDING WHETHER THE SIX YEARS IN BETWEEN, WHETHER, FIRST OF ALL WHETHER IT HAPPENED, WHETHER IN THE SIX YEARS IN BETWEEN, MR. ROBERTSON WAS A PEACEFUL PERSON, WHETHER THIS WIFE, EX-WIFE, WAS CREDIBLE OR NOT. HOW DO WE KNOW IT HAPPENED? HOW DO WE KNOW, YOU KEEP ON SAYING, WELL, HE DID THIS SIX YEARS AGO. HOW DO WE KNOW?

THE SAME EVIDENCE THAT, SINCE THERE WAS NO POLICE REPORT, THE SAME EVIDENCE THAT THE TRIAL COURT HEARD, THE APPELLATE COURT HAD IN FRONT OF THEM. THERE WAS NOTHING ELSE BUT IT WOULD HAVE BEEN THE TESTIMONY OF EACH PARTY. AND --

HOW DO WE, THE DEFENDANT IN GOOD FAITH SAYS I COULD HAVE PUT ON A RECORD ABOUT WHAT THIS MAN DID IN THOSE SIX YEARS IN BETWEEN, AND HOW DO WE --

BUT HE HAD THE OPTION TO DO THAT.

AT WHAT POINT?

WHEN HE TESTIFIED.

WHEN?

WHEN THEY ASKED HIM THAT QUESTION. COUNSEL KNEW WHAT WAS COMING. EVERYONE KNEW WHAT WAS COMING. MR. CHIEF JUSTICE

THANK YOU, MR. NEIMAN. YOUR TIME IS UP. MR. ALVAREZ.

VERY BRIEFLY, YOUR HONORS. I THINK MR. NEIMAN SAID IT WELL, WHEN HE SAID THAT THIS SHOULD HAVE BEEN A 404 CASE. THIS SHOULD HAVE BEEN. WHAT THE STATE SHOULD HAVE DONE IS THEY SHOULD HAVE FILED NOTICE. THEY HAD THE WITNESS. THEY KNEW THEY WERE GOING TO TRY TO RELY 'THIS EVIDENCE, AND THEY CHOSE NOT TO DO IT. THEY CHOSE NOT TO DO IT, BECAUSE THEY WERE AFRAID IF THEY DECIDED TO DO IT, THE JUDGE WOULD NOT LET THEM DO IT.

THAT IS A WILLIAMS RULE. WOULD YOU AGREE, THOUGH, THAT THERE IS A DIFFERENT ANALYSIS AS TO WHETHER IT IS, QUOTE, OUTSIDE THE SCOPE OF THE DIRECT EXAMATION?

I THINK THAT THAT WAS THE OBJECTION THAT WAS MADE.

THAT IT WAS OUTSIDE THE SCOPE?

THAT WAS THE OBJECTION. OF COURSE, I THINK TO SAY THE LEAST, THE DEFENSE WAS CAUGHT OFF GUARD, WHEN THIS QUESTION WAS ASKED, AND WHEN THE QUESTION WAS ALLOWED. BUT THE PROBLEM, INCONSISTENCY AND THE PROBLEM WITH THE STATE'S RATIONALE, IS THAT, EITHER IT IS PROPER IMPEACHMENT OR IT IS NOT, AND IF IT IS IMPROPER IMPEACHMENT, HOW CAN THEY COME IN AND NOW SAY THAT THIS COURT SHOULD LEGISLATEMIZE WHAT THEY DID, UNDER A -- SHOULD LEGISLATEMIZE WHAT THEY DID UNDER A WILLIAMS RULE ANALYSIS, WHEN THEY SPECIFICALLY ENGAGED IN A TACTIC TO PREVENT THE CREATION OF A RECORD, SO THAT THIS COURT COULD THEN ENGAGE IN A WILLIAMS RULE ANALY? WE DO NOT KNOW WHETHER THE TRIAL JUDGE BELIEVED THIS WITNESS, BECAUSE UNDER AN IMPEACHMENT THEORY, IT IS NOT UP TO THE TRIAL JUDGE TO MAKE A CREDIBILITY DETERMINATION. THE DEFENSE WAS NEVER GIVEN THE OPPORTUNITY TO REBUT THIS EVIDENCE UNDER WILLIAMS RULE.

DO WE GET DOWN TO THE POINT WHERE ANY WILLIAMS RULE EVIDENCE ANYTHING THAT WOULD COME WITHIN 404, IS NOT PROPER IMPEACHMENT?

I AM SORRY, YOUR HONOR.

IT IS NOT PROPER IMPEACHMENT.

NO. THAT IS NOT TRUE. IF THE DEFENSE HAD OPENED THE DOOR TO A PRIOR INCIDENT OF MISCONDUCT, THEN IT WOULD HAVE BEEN PRIOR PROPER IMPEACHMENT, SO I AM NOT SUGGESTING THAT, BECAUSE SOMETHING MAY FALL UNDER 404, IT IS IMPROPER IMPEACHMENT AUTOMATICALLY, BUT THE POINT IS HERE, I THINK THAT CLEARLY, AND --

SO THAT DOES, AS MR. NEIMAN ARGUED, WE ARE KIND OF IN A CIRCULAR POSITION HERE, THAT WE ARE DEALING WITH A QUESTION NOT REALLY OF RELEVANCE, AS MUCH AS WHETHER THE SCOPE OF THE CMINN COULD INCLUDE S PRIOR ITEM?

WELL, ID ARGUE, YOUR HONOR, CLEARLY COULD NOT UNLESS THE DEFENSE HAD PLACED ITS CHARN ISSUE. IN OTHER WORDS, THE ONLY REASON TO ASK THE QUESTION ABOUT THE AK-47, WAS TO INTRODUCE THE PRIOR INCIDENT. IF THE DEFENSE -- IFE HAD BEEN, HE HAD BEEN MARRIED THREE TIMES, AND WITHIN THE PAST YEAR HAD THREATENED, INTENTIONALLY, THE THREE PEOPLE HE HAD BEEN MARRIED TO, WOULD THAT MEET THE TEST?

NOT FOR PURPOSES OF CROSS-EXAMINATION, UNLESS HE, HIMSELF -- IN OTHER WORDS LET'S ASSUME THE DEFENDANT HAD BEEN MARRIED THREE TIMES WITHIN THE LAST YEAR AND HE HAD ASSAULTED EACH ONE OF HIS PRIOR SPOUSES. IF THE STATE WANTED TO USE THAT EVIDENCE, THEY COULD EITHER FILE A WILLIAMS RULENOTICE AND SEEK TO INTRODUCE IT AS WILLIAMS RULE OR, B, THEY COULD SIT BACK TO WAIT TO SEE IF THE DEFENSE SAID SOMETHING IN ITS DIRECTION OR VOLUNTEERED SOMETHING IN ITS CROSS-EXAMINATION WHICH WOULD THEN OP DOOR TO THAT EVIDENCE. BUT WHAT THE STATE CANNOT DO, AND THIS IS VERY, THIS IS BASED ON EXTREMELY WELL-SETTLED LAW, WHAT THE STATE CANNOT DO IS IT CAN'T OPEN THE DOOR, ITSELF. IT CANNOT ASK AN IMPROPER QUESTION, SOLELY TO ELICIT, THEN A DENIAL, AND THEN USE THAT AS A SUBTERFUGE TO BRING IN THE EVIDENCE THROUGH THE BACK DOOR. MR. CHIEF JUSTICE

JUSTICE SHAW HAS A QUESTION.

WHY HASN'T THE STATE, THE DEFENDANT PLACED HIS CHARACTER AT ISSUE, WHEN HIS DEFENSE IS ACCIDENT, AND THEN HE RESPONDS TO A QUESTION, I HAVE NEVER THREATENED ANYBODY CLOSE TO ME WITH A WEAPON, ANYBODY, PERIOD, WITH A WEAPON.

THAT IS AFTER --

COMBINE THE TWO, HIS DEFENSE, AND THAT ANSWER, WHY HASN'T HE PLACED HIS CHARACTER?

BECAUSE THE QUESTIOND NEVER, BECAUSE THE QUESTION HAVE YOU EVER THREATENED ANYONE CLOSE TO YOU WITH AN AK-47, WAS, NEVER SHOULD HAVE BEEN ASKED. IN FACT, THE CROSS-EXAMINATION IN THIS CASE IS ALMOST IDENTICAL TO THE CROSS-EXAMINATION IN THE FOURTH DCA CASE IN DEFREDAS, WHHEDANT WAS IN TRIAL COURT FOR AGGRAVATED ASSAULT AND WAS ASKED ON CROSS-EXAMINATION ABOUT THE FACT THAT HEEDLY HIT HIS SISTER WITH A BASEBALL BAT ACROSS THE HEAD SOME YEARS BEFORE, AND HE GAVE AN ALMOT IDENTICAL TYPE OF RESPONSE, AND THE FOURTH DCA CONCLUDED THAT, I MEAN THE ONLY REASON TO ASK THAT QUESTION WAS TO ELICIT A DENIAL, IN THE HOPES THAT YOU CAN THEN BRING IN THE EVIDENCE.

IS THE PROBLEM HERE THAT IS THE AK-47? WHAT IF THE QUESTION HAD BEEN YOU ARE

MAINTAINING THAT THIS WAS AN ACCIDENT. HAVE YOU EVER THREATENED ANYBODY WITH THIS WEAPON?

I THINK THAT, IF THE WANTED TO BRING IN A PRIOR INCIDENT OF ASSAULT OR WHAT HAVE YOU, AGAIN, THEY HAD TWO OPTIONS. THEY COULD DO ITUGH,EAN THEY CO DO IT TH THE WILLIAMS RULE OR THEY COULD WAIT TO SEE IF THE DEFENDANT, HIMSELF OPENED THE DOOR, BUTT THEY CANNOT DO IS THEY CANNOT ASK THE QUESTION, IN ORDER TO GET HIM TO OPEN THE DOOR, AND THAT IS, SO REGARDLESS OF HOW YOU PHRASETHE QUESTION, ONCE YOU START ASKING ABOUT THAT INCIDENT, THAT IS WHAT THE STATE IS TRYING TO DO. THEY ARE TRYING TO GET HIM TO ADMIT TO THE INCIDENT, IN WHICH CASE OBVIOUSLY IT IS IN EVIDENCE OR IF HE DENIES IT THEY, THEN, CLAIM, WELL, GEE, HE DENIED IT. WE CAN BRING IN THE EVIDENCE UNDER IMPEACHMENT. NOW, THE PROBLEM WITH THE STATE'S LOGIC AND THE PROBLEM WIOPTING THE STATE'S LOGIC IS, IF THAT BECOMES A RULE OF LAW, THEN WHY WOULD THE PROSECUTION EVER FILE A WILLIAMS RULE NOTICE, WHEN ALL YOU HAVE TO DO IS ASK ABOUT THE INCIDENT ON CROSSNATION, AND IF YOU GET A DENIAL, IT ALL COMES IN, AND IF YOU GET AN AFFIRMANCE, IT IS IN. THE PROBLEM IS THAT IT EFFECTIVELY OBLITERATES THE PROTECTIONS OF WILLIAMS RULE 404. THE STATE HAD A CHOICE, AND IT CHOSE TO PURSUE A LINE OF QUESTIONING THAT HAS BEEN CONDEMNED BY THIS COURT FOR OVER A CENTURY. THE STATE CANNOT ASK AN IMPROPER QUESTION ON CROSS-EXAMINATION, IN ORDER TO ELICIT A RESPONSE THAT THEY CAN THEN CLAIM OPENED THE DOOR TO THE EVIDENCE, AND THAT IS WHAT THEY EXACTLY DID HERE, AND NOW WITHOUT AN APPEAL ON THE WILLIAMS RULE RECORD, BECAUSE THERE IS NONE, BECAUSE THERE WAS NO FINDING THAT THE TRIAL COURT WOULD HAVE HAD TO MAKE TO ESTABLISH THAT RECORD, NOW THEY COME IN AND IN THE ABSTRACT SAY THIS COURT SHOULD DETERMINE WHETHER THIS WOMAN WAS CREDIBLE AND THIS COURT SHOULD DETERMINE WHETHER IT WAS PROVED BY CLEAR AND CONVINCING EVIDENCE AND THAT, I SUGGEST, AN APPELLATE COURT CANNOT DO. THANK YOU. MR. CHIEF JUSTICE

THE COURT APPRECIATES YOUR ASSISTANCE. THE COURT WILL TAKE ITS MORNING RECESS FOR 15 MINUTES.