

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

David Famiglietti v. State of Florida

MARSHAL: PLEASE RISE.

CHIEF JUSTICE: GOOD MORNING. PLEASE BE SEATED.

CHIEF JUSTICE: IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. I REPRESENT THE PETITIONER DAVID FAMIGLIETTI. THE RESOLUTION OF WHAT APPEARS TO ME TO BE TWO IN ESCAPEABLE CONCLUSIONS, THE FIRST IS THAT SECTION 90.503 PROVIDES ONLY A LIMITED OR QUALIFIED PRIVILEGE DUE PROCESS REQUIRES AT A MINIMUM AN IN CAMERA REVIEW OF THE WITNESS'S PSYCHOLOGICAL RECORDS, IF A SDEFT CAN MAKE A SUFFICIENT THRESHOLD.

IN THIS CASE, ARE YOU SAYING THAT THE DUE PROCESS INQUIRY CAN ONLY BE MADE, IF THERE IS A DETERMINATION THAT THE LEGISLATURE HAS MADE THE PRIVILEGE QUALIFIED? THAT THAT IS, THAT DUE PROCESS WOULD TURN ON WHAT, WHETHER THE LEGISLATURE INTENDED FOR THE PRIVILEGE TO BE ABSOLUTE OR QUALIFIED?

NO. THAT IS NOT OUR POSITION. OUR POSITION IS, IN THIS CASE, THAT IS, WHAT THE COURT NEEDS TO DECIDE. THIS CASE, IF THE COURT WAS REVIEWING PENDER, ITSELF, THEN THAT WOULD BE AN ISSUE FOR THE COURT TO DECIDE, BUT THIS CASE IS ACTUALLY A REVIEW OF THE PLURALITY DECISIONS OF THE THIRD DISTRICT COURT, WHICH DEALT ONLY WITH 90.503 AND THAT 90 -- AND NOT 90.0535.

WHEEL WHILE YOU ARE TALKING ABOUT THAT -- WHILE YOU ARE TALKING ABOUT THAT, WOULD YOU REFRESH US WITH TWO DIFFERENT STATUTORY SCHEMES. DO WE REALLY HAVE JURISDICTION? IS THERE REALLY A CONFLICT HERE, SINCE WE ARE DEALING WITH TWO DIFFERENT STATUTORY SCHEMES?

PINNEDER ALLOWS FOR A TEST ON AN ABSOLUTE PRIVILEGE.

DAVE RENT STATUTE.

IF PINDER IS CORRECT, THEN THE THIRD DISTRICT'S PLURALITY DECISION IS ABSOLUTELY INCORRECT.

YOU ARE SAYING THAT IS A PLURALITY DECISION. IT DIDN'T COMMAND AN UNANIMOUS DECISION OF THE COURT AND IT DIDN'T CERTIFY A CONFLICT.

AND JUDGE PINDER JOINED IN MAKING A CERTIFICATION.

IF HE DIDN'T, THEN THERE WOULD BE A MINORITY THAT WOULD CERTIFY THE CONFLICT, RIGHT? IT ALL TURNS ON WHETHER HE AGREED WITH CERTIFYING OR NOT?

RIGHT. I BELIEVE, MY READING OF JUDGE RAMIREZ'S CONCURRING OPINION IS, THOUGH HE DISAGREED WITH THE PLURALITY AND SAID THAT THERE MAY BE SOME CIRCSTAPZ IN WHICH THE PRIVILEGE COULD -- CIRCUMSTANCES IN WHICH THE PRIVILEGE COULD BE PIERCED, HE ALSO AGREED WITH CERTIFICATION OF CONFLICT WITH PINDER, BECAUSE HE THOUGHT THE PIND

STANDARD WAS TOO -- THE PINDER STANDARD WAS TOO PERMISSIVE.

HOWEVER, JUDGE JORDAN --.

I CALLED AND ASKED WHERE DOES HE GO, AND THEY DIDN'T GIVE ME A BETTER DECISION THAN I CAN GIVE YOU HERE TODAY, UNFORTUNATELY.

IF YOU TAKE OUT JUDGE JORDAN AND BOTH WAYS YOU ARE STILL LEFT WITH A MINORITY REPORT IN THE CERTIFIED CONFLICT.

WE HAVE THE FOUR REMAINING MEMBERS OF THE PLUROL-- PLURALITY PLUS JUDGE RAMIREZ.

JUDGE JORDAN WAS IN THE PLURALITY, SO YOU HAVE GOT TO TAKE HIM OUT. SO THERE IS THREE REMAINING.

TAKING JUDGE JORS ENSON OUT WOULD -- JUDGE JORING ENSON OUT WOULD LEAVE -- JUDGE JORGENSEON WOULD LEAVE FOUR AND THEN --

YOU WOULD HAVE FOUR REMAIN OINGT CONFLICT.

YES, DEPENDING ON WHAT JUDGE JORGENSEN'S DECISION IS.

IF TOMORROW YOU WANTED TO GET A PATIENT'S PSYCHOTHERAPIST RECORDS, WOULD FAMIGLIETTI, AS THE OPINION IS WRITTEN, BAR THEM FROM GETTING IT, NO MATTER WHAT?

WE BELIEVE THAT IT WOULD. BELIEVE THAT, UNTIL THE THIRD DISTRICT, ANYWAY, OR JUDGE JORGENSEN, AS A MEMBER OF THE THIRD DISTRICT, WOULD INDICATE WHAT HIS POSITION IS, I THINK THAT WE HAVE TO ASSUME AS PRACTITIONERS IN THE THIRD DISTRICT, THAT FAMIGLIETTI IS CONTROLLING LAW.

IN THIS CASE, IN TERMS OF WHETHER WE SHOULD ACCEPT JURISDICTION, IF, EVEN THE ORIGINAL PANEL EVEN THE STATE DID NOT AGREE THAT YOUR MOTION WAS NOT LEGALLY SUFFICIENT TO WARRANT THE IN CAMERA INSPECTION, AND SO THIS CASE, IN TERMS OF REALLY THE THEORY OF IT, IF YOU GO BACK AND PLEAD IT PROPERLY, DO WE REALLY KNOW THAT YOU ARE NOT GOING TO BE ABLE TO GET RELIEF?

WELL, IF WE WERE TO AND PLEAD, THE COURT WOULD REALLY TAKE A POSITION OF THE UMBARD COURT, BECAUSE IT IS A ABSOLUTE BAR, AND NO MATTER WHAT WE PROVE, WE CAN NEVER GET THE RECORDS, AND THEY WE WOULD -- AND THEN WE WOULD HAVE TO GO BACK UP THROUGH THE COURTS AGAIN. THE THIRD DISTRICT WOULD HAVE TO CONSIDER THE SAME ISSUE THAT IS ALREADY DECIDED, AND I DON'T KNOW IF IT WOULD BE MAYBE A MATTER OF NUMBERS IN JUDGE JORGENSEN SAY WAG IT IS, BUT IF JUDGE JORGENSEN SAID, YES, I AGREE WITH JUDGE COPE'S PLURALITY DECISION, THEN WE ARE RIGHT BACK WHERE WE ARE NOW AND MR. FAMIGLIETTI IS IN JAIL ANOTHER YEAR BEFORE HAVING BEEN TRIED, SO THAT IS OUR POSITION NOW, BEFORE IT IS FULLY BRIEFED.

LET ME ASK YOU THIS. WHEN IS THE LEGISLATURE PRECLUDED FROM CREATING A ABSOLUTE PRIVILEGE? WHEN, UNDER WHAT CIRCUMSTANCES?

JUDGE --

EVER?

IT IS OUR POSITION THAT THE LEGISLATURE CAN NEVER IMPOSE AN ABSOLUTE PRIVILEGE THAT WOULD COMPLETELY DO AWAY WITH A DEFENDANT'S CONSTITUTIONAL RIGHTS, PURSUANT TO

THE FEDERAL CONSTITUTION OR THIS STATE COURT, THE STATE OF FLORIDA CONSTITUTION. AND THE REASON --

DUE PROCESS WOULD ALWAYS TRUMP.

YES.

AN ABSOLUTE LEGISLATIVE PRIVILEGE.

AND THE REASON FOR THAT IS SAYING, IN FLORIDA, THIS COURT FINDS, AGREES WITH THE PLURALITY DECISION,, WHICH -- WITH THE PLURALITY DECISION, WHICH WE DON'T SAY THAT IT SHOULD, IS AN ABSOLUTE PRIVILEGE, AND IN GEORGIA, THE GEORGIA SUPREME COURT FINDS THAT THE PSYCHOTHERAPIST PRIVILEGE THERE IS A LIMITED PRIVILEGE. WHY WOULD A DEFENDANT, IN A GEORGIA COURT, BE ALLOWED MORE RIGHTS UNDER THE FEDERAL CONSTITUTION THAN A DEFENDANT CHARGED WITH THE SAME EXACT CRIMES IN A FLORIDA COURT?

DID YOU ADDRESS, AND MAYBE, I DON'T WANT TO GET TOO FACT-SPECIFIC HERE, BUT IT LOOKS LIKE THE WAY THIS CAME UP WITH IT THAT THE VICTIM -- THE WAY THIS CAME UP IS THAT THE VICTIM TESTIFIED KEEPING HER PSYCHIATRIC HISTORY -- CONCERNING HER PSYCHIATRIC HISTORY, WITHOUT OBJECTION. IN OTHER WORDS, I GUESS I AM LOOKING AT JUDGE SHIRANDO'S OBSERVATION THAT THE PRIVILEGE HAD BEEN WAIVED. WAS -- THE PRIVILEGE HAD BEEN WAIVED. WAS THAT AN ARGUMENT THAT YOU MADE?

I WAS NOT THE TRIAL LAWYER, AND ALSO FOR THE COURT'S UNDERSTANDING, I DID NOT ARGUE THIS CASE IN FRONT OF THE PANEL OF THE THIRD DISTRICT I WAS APPOINTED WHEN WE REACHED THE -- IN FRONT OF THE THIRD DISTRICT. I WAS APPOINTED WHEN WE REACHED THE UNBUNK STAGE. I FELT COMPELLED BY THE THIRD DISTRICT'S UNBUNK ORDER, TO ADDRESS THE ISSUES OF WAIVER, SO WE WOULD TAKE THE POSITION THAT THERE WAS A WAIVER, WITH RESPECT TO THE STATEMENTS MADE DURING THE DEPOSITION, IN WHICH THE PURPORTED VICTIM INDICATED THAT SHE HAD MADE A PRIOR MISSTATEMENT TO A DOCTOR, CONCERNING THE IDENTITY OF A PERSON WHO HAD ATTACKED HER PREVIOUSLY. THE PLURALITY DECISION DID NOT ADDRESS THE ISSUE OF THE DISSENT IN THE UNBUNK DECISION INDICATED THAT JUDGE SERRANO AND TWO OTHER MEMBERS OF THE DISSENT WOULD AGREE THAT THERE WAS A WAIVER, AT LEAST TO THAT LIMITED ISSUE.

WITHOUT YOU HAVING MADE THE KIND OF SHOWING THAT WOULD EVEN GO TO THE THRESHOLD, HOW WOULD YOU, I GUESS, ASSUMING WE AGREE WITH YOU THAT DUE PROCESS WOULD, UNDER CERTAIN CIRCUMSTANCES, TRUMP A PRIVILEGE, IF YOU KNOW, UNDER THE SIXTH AMENDMENT THROUGH THE 14th AMENDMENT, HOW WOULD THE RULE OF LAW BE STATED, AND WOULDN'T WE STATE IT IN SOME HYPOTHETICAL MANNER, BECAUSE WHATEVER WE HAVE HERE DOESN'T MEET THAT THRESHOLD?

WE DON'T NECESSARILY AGREE. IN FACT WE DON'T AGREE WITH THE PANEL DECISION THAT WE DID NOT MEET OUR STANDARD. IT IS OUR POSITION THAT FIRST OF ALL, THE PANEL DECISION IMPOSED TWO GREAT A STANDARD ON THE DEFENSE, THAT WE FEEL THAT THE STANDARD IN KAITLIN, FROM THE FOURTH DISTRICT, IS THE APPROPRIATE STANDARD WHEN THE PRIVILEGE IN QUESTION IS A LIMITED PRIVILEGE. UNDER THE KAITLIN STANDARD, AND I BELIEVE OTHER CASES THAT WE CITED IN OUR BRIEFS FROM OTHER JURISDICTIONS AND EVEN THE SUPREME COURT, WHERE RITCHIE HAD INDICATE HAD THAT THE STANDARD IS LIKE TO OR MAY POSSIBLY CONTAIN STANDARD. AND WE FEEL THAT, BY SHOWING THAT THE PURPORTED VICTIM IN THIS CASE HAS GIVEN INCONSISTENT STATEMENTS THAT, WE HAVE SATISFIED OUR BURDEN TO SHOW THAT THE PSYCHOLOGICAL OR THE PSYCHOTHERAPY YOUTH I CAN RECORDS -- PSYCHO THERAPEUTIC RECORDS CONTAIN INFORMATION THAT COULD BE USED TO CHALLENGE HER CREDIBILITY.

THE IN CAMERA INSPECTION, THE JUDGE WOULD THEN BE IN A SITUATION ONLY TO ALLOW THE USE, TO THE EXTENT THAT IT IS JUST WHAT SHE SAID THAT WOULD BE INCONSISTENT WITH WHAT SHE IS NOW TESTIFYING TO, AS OPPOSED TO HER WHOLE, YOU KNOW, HISTORY OF PSYCHIATRIC TREATMENT?

WELL, OBVIOUSLY IF THE COURT HAD A DETERMINATION THAT THERE WAS A PRIOR INCONSISTENT STATEMENT, THAT WOULD BE MATERIAL TO THE DEFENSE, BECAUSE IT WOULD BE TO A NONCOLLATERAL ISSUE. I THINK THAT THE DEFENSE DVS AT A MINIMUM, WOULD BE -- THE DEFENSE, AT AMINIUM -- AT A MINIMUM, WOULD BE ENTITLED TO. THAT I THINK THERE IS A DUTY THAT, IF DURING THE COURSE OF TRIAL THAT THERE WERE OTHER CONTENTS OR ASPECTS OF THE RECORD THAT BECOME MATERIAL TAKES PROGRESSES, THAT IT WOULD THEN BE THE TRIAL COURT'S OBLIGATION TO PRODUCE THE RECORDS AT THAT PERIOD OF TIME. THERE IS A POSSIBILITY THAT EXISTS THAT THE TRIAL COURT WOULD REVIEW THE RECORDS AND SAY THERE IS NOTHING IN HERE OF ANY MATERIAL VALUE AT ALL.

WHAT ABOUT THE BALANCING TEST THAT THE JUDGE WILL ALWAYS HAVE TO DO? IS THAT WHAT YOU ARE SNAING.

YES. THE JUDGE WILL -- -- WHAT YOU ARE SAYING?

YES, THE JUDGE WILL --

AS TO HOW FAR THIS PRIVILEGE EXTENDS, AND THE EXTENT OF THE INFORMATION THAT HAS TO BE DISCLOSED. IS THAT THE WAY IT WORKS?

THE SUPREME COURT IN RITCHIE SAID THAT THIS IS NOT AN ISSUE TO PROVIDE ALL RECORDS TO DEFENSE COUNSEL BUT INSTEAD THIS IS WHY WE HAVE TRIAL JUDGES.

THERE ARE SIGNIFICANT DIFFERENCES BETWEEN RITCHIE AND THIS CASE, AREN'T THERE SOME THERE WERE ELEVEN EXCEPTIONS WRITTEN INTO THE STATUTE IN RITCHIE, ONE OF WHICH WAS, UNLESS A COURT ORDERS OTHERWISE, WHICH SPECIFICALLY GRANTED AUTHORITY TO A COURT TO EVISCERATE THE PRIVILEGE IN A PARTICULAR CASE, AND ALSO IN RITCHIE, IT DIDN'T CONCERN ANY KIND OF TESTIMONIAL PRIVILEGE, LIKE THE ATTORNEY/CLIENT PRIVILEGE OR THE PRIEST PENETANT PRIVILEGE OR THE PSYCHOTHERAPIST PRIVILEGE THAT CONCERNED MEDICAL RECORDS, AND THEY WERE IN THE POSSESSION OF THE STATE. WE DON'T HAVE ANY OF THAT HERE.

ANSWERING THE FIRST QUESTION FIRST. THE DECISION IN RITCHIE WAS NOT BASED ON THE FACT THAT THERE WAS A SPECIFIC EXCEPTION. THE RULING IN RITCHIE WAS BASED ON THE FACT THAT THE PENNSYLVANIA LEGISLATURE HAD DETERMINED THAT, IN SOME JUDICIAL PROCEEDINGS, THIS TYPE OF INFORMATION WAS AVAILABLE. THE COURT SPECIFICALLY USED THE TERM "SOME USE" OF CYS RECORDS IN JUDICIAL PROCEEDINGS, SO I THINK THE COURT'S FINDING THERE, AND I THINK IT IS CLEAR FROM OTHER COURTS THAT HAVE INTERPRETED RITCHIE, IS THAT, WHEN A LEGISLATURE DETERMINES THAT, IN SOME CIRCUMSTANCES, THAT THESE RECORDS ARE PRODUCEABLE OR AVAILABLE, THAT DUE PROCESS SAYS, WELL, THEN, IF THE DEFENDANT REALLY NEEDS THEM TO PRESENT HIS DEFENSE AND MAKE IT AVAILABLE, THAT THEY ARE AVAILABLE.

SO IS THAT HOW YOU START OFF? YOU SEEM TO HAVE STARTED YOUR ARGUMENT OFF WITH THE PREMIES THAT THIS IS A LIMITED PRIVILEGE, AND DO YOU GET TO THAT, BECAUSE THERE ARE EXCEPTIONS IN THE STATUTE?

YES.

YES. THAT THERE ARE THREE EXCEPTIONS IN THE STATUTE. THERE IS THE EXCEPTION PROVIDED

BY ANOTHER STATUTE HAVING TO DO WITH COMMUNICATIONS THAT ARE POTENTIALLY THREATENING TO A VICTIM. THERE IS THE SECTION 510, WHICH DOESN'T SPECIFICALLY DEAL WITH THIS CASE BECAUSE IT DEALS WITH CIVIL MATTERS BUT ALSO ALLOWS FOR PRODUCTION OF THESE RECORDS IN CERTAIN CIRCUMSTANCES.

WELL, I GUESS MY QUESTION, REALLY, MY CONCERN, REALLY, IS THAT IF THIS IS A PRIVILEGE, WHAT SHOULD BE THE TEST FOR GETTING IT, BECAUSE IT SEEMS TO ME THAT WE ARE GOING TO END UP SWALLOWING THE PRIVILEGE, SO THAT, IT NO LONGER EXISTS. IF WE, IF PEOPLE OR PARTIES CAN CONTINUE TO GET THESE RECORDS AND SO, YOU KNOW, A PERSON WOULD SAY WHY GO TO A PSYCHOTHERAPIST, IF EVERYTHING IS GOING TO EVENTUALLY BE OPEN TO OTHERS, SO WHAT TEST DO YOU PROPOSE IS A TEST FOR WHEN DUE PROCESS WOULD REQUIRE THE GRANTING OF THESE RECORDS?

ESSENTIALLY THE TESTS PROVIDED IN BRADY. EXCEPT THIS IS NOT A BRADY ISSUE, BECAUSE WE ARE NOT CLAIMING THAT THE PROSECUTION HAS THESE RECORDS, BUT IN THESE SITUATIONS, THE PROSECUTION WILL VERY SELDOM HAVE THE RECORDS, BECAUSE THE PRIVILEGE WOULD PRESENT IS CLOSER TO THEM, TOO, BUT WE SUBMIT THE TEST IS THE SAME. IF THERE IS MATERIAL INFORMATION CONTAINED IN THESE RECORDS --

I GUESS THE PROBLEM THAT I HAVE IS THIS, SEE, IN THIS PARTICULAR CASE, THIS LADY TALKED ABOUT SOMETHING ABOUT A CASE THAT WAS NOT THE CASE THAT IS BEING TRIED HERE, CORRECT?

CORRECT.

AND SHE DID THAT IN HER DEPOSITION.

YES.

AND SO AT THE TRIAL OF THIS CASE, IT SEEMS TO ME THE DEFENDANT HAS THE INFORMATION THEY NEED THAT, AT SOME POINT SHE ACTUALLY SAID SOMEBODY ELSE HAD DONE OR MISIDENTIFIED SOMEONE IN A PREVIOUS CASE. I MEAN, ISN'T THAT WHAT THE WHOLE POINT OF THE IMPEACHMENT EVIDENCE IS, THAT YOU SAY YOU ARE LOOKING FOR?

WELL, I THINK THAT THERE IS CIRCUMSTANCES THAT MAY HAVE BEEN ATTENDED -- ATTENDANT TO WHAT SHE TOLD THE PSYCHOLOGIST THAT DID NOT COME OUT ON THE DEPOSITION, AND THAT IS WHY WE WANT THE TRIAL COURT TO EXPLORE WHAT SHE SAID, AND WE THINK THAT --

SO, REALLY, IT BOILS DOWN TO A FISHING EXPEDITION, AS TO WHAT ALL WAS SAID IN THE COURSE OF THIS PSYCHIATRIC OR PSYCHOLOGICAL CONSULTATION.

NOT AT ALL. WE COULD NOT MAKE THAT INITIAL ALLEGATION. IF WE COULD NOT GIVE A BASIS FOR A REASON FOR US TO BELIEVE THAT THE RECORDS DO CONTAIN SOME IMPEACHMENT MATERIAL, SOME MATERIAL IMPEACHMENT MATERIAL, WE WOULD NOT GET IN CAMERA REVIEW, AND I THINK THE LAW IS VERY CLEAR ON THAT AND RITCHIE IS VERY CLEAR ON. THAT WE HAVE TO COME IN WITH AN INITIAL BURDEN. OUR INITIAL BURDEN IS TO SHOW THAT THE RECORDS LIKELY CONTAINED SOME RELEVANT MATERIAL, EXCULPATORY INFORMATION.

AND YOU DON'T HAVE TO NARROWLY FOCUS IT ON THE ACTUAL CONSULTATION THAT SHE WAS TALKING ABOUT?

WELL, I WOULD THINK THAT THE FOOTNOTE IN RITCHIE THAT DEALS WITH THIS ISSUE AND QUOTES VALENZUELA BURNELL SAYS THAT IT IS EASIER FOR THE TRIAL COURT TO MAKE THAT DETERMINATION, SO IF WE CAN POINT TO A FACT --

SO THE TRIAL COURT SAYS, LOOK, IF YOU ARE LOOKING FOR ALL OF THIS LADY'S INFORMATION, YOU HAVE TO NARROW WHAT IT IS THAT YOU WANT. YOU WOULD BE SATISFIED WITH THAT?

WELL, I DON'T THINK WE CAN EVER NARROW IT TO EXACTLY WHAT WE WANT BECAUSE WE DON'T HAVE THE RECORDS TO KNOW WHAT IS HERE.

SO YOU ARE SAYING IT WAS DURING THE COURSE OF THIS, A PARTICULAR CONSULTATION.

WELL, I THINK IF THE TRIAL COURT WOULD HAVE SAID TO US, OR IF WE WOULD HAVE SAID TO THE TRIAL COURT, THIS IS THE INFORMATION WE HAVE THAT THERE HAS BEEN INCONSISTENT STATEMENTS, WE WOULD ASK THAT THIS COURT REVIEW THE PSYCHIATRIC RECORDS AND PROVIDE TO US ANY INSTANCES, NOT JUST THIS ONE INSTANCE BUT ANY INSTANCES IN WHICH THE PURPORTED VICTIM MADE AN INCONSISTENT STATEMENT CONCERNING THE IDENTITY OF HER ATTACKERS OR WHO IS ACTUALLY THE PERPETRATOR OF THIS OFFENSE OR ANY PRIOR OFFENSES COMMITTED AGAINST HER. I THINK THAT WOULD HAVE BEEN SATISFACTORY.

WHILE YOU ARE SANSEING JUST -- WHILE YOU ARE ANSWERING JUSTICE QUINCE'S QUESTION, THE LIGHT HAS GONE ON, WARNING YOU ABOUT RESERVING TIME, SO YOU CAN CONTINUE TO ANSWER IF YOU WISH, BUT IT HAS BEEN A COUPLE OF MINUTES SINCE THE LIGHT HAS BEEN ON.

I THINK I RESPOND OUR POSITION IN THAT. THE ONLY PROBLEMS I NEVER RESPOND TO THE SECOND PART OF JUSTICE CANTERO'S QUESTION. IF YOU WOULD LIKE FOR ME TO WAIT --

YOU ARE ASKING FOR A RATHER BROAD RESPONSIBILITY TO BE PLACED ON THE TRIAL COURT JUDGE IN THIS SITUATION, ARE YOU NOT?

YES, WE ARE.

I MEAN, IT IS, AND THAT THE TRIAL COURT, REALLY, IS ALMOST GOING TO BE PUT IN THE POSITION OF COUNSEL. AND THAT IS SEARCHING FOR ANYTHING IN THOSE RECORDS THAT CONCEIVABLY COULD AID THE DEFENSE IN THE CASE. ISN'T THAT REALLY WHAT YOU ARE SAYING?

I THINK THAT WE HAVE MADE IT MORE SPECIFIC THAN THAT, AS TO THE AREAS THAT WE ARE LOOKING FOR. THERE IS SOME QUESTION ABOUT MISS SCOTT'S HOSPITALIZATIONS TEN YEARS BEFORE. WE DON'T NEED THOSE RECORDS. WE ARE NOT REQUESTING THOSE RECORDS. WE DON'T THINK --

LET'S SAY YOU ARE TALKING ABOUT ANOTHER PRIVILEGE, THE ATTORNEY/CLIENT PRIVILEGE, OKAY, NOW, WOULD YOU HAVE THE SAME RULE APPLY?

YES.

SO ANY, SO IN YOUR VIEW, IT DOESN'T MATTER WHAT THE NATURE OF THE PRIVILEGE IS THAT THE DEFENDANT'S DUE PROCESS RIGHTS ALWAYS TRUMP THE PRIVILEGE.

IF THERE CAN BE A SHOWING THAT THE INFORMATION THAT IS BEING REQUESTED IS MATERIAL EXCULPATORY EVIDENCE, AND I THINK THAT THIS IS EXACTLY THE SITUATION THAT JUSTICE O'CONNOR DISCUSSED IN SWINDLER VERSUS GLENN IN HER DISSENT.

I REMINDED YOU OF YOUR TIME, SO YOU HAD BETTER, SO YOU HAVE AT LEAST HAVE SOME TIME. GOOD MORNING.

GOOD MORNING, YOUR HONORS. PAULA TAYLOR, ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE. THIS CASE IS GUIDED BY JAF' VERSUS REDMON AND NOT STATE VERSUS RITCHIE. --

JAFFE AND NOT STATE VERSUS RITCHIE AND THAT IS BECAUSE IT IS NOT A QUALIFIED PRISON LEDGE -- IT IS A QUALIFIED PRIVILEGE. THE PLURALITY OPINION POINTED THAT OUT. LOOKING AT THE WORDS OF THE STATUTE, THEMSELVES --

YOU WOULD DISAGREE THAT THE FACTS OF THIS STATUTE ACTUALLY HAS EXCEPTIONS TO THE PRIVILEGE, MAKES THIS A QUALIFIED --

ABSOLUTELY, YOUR HONOR.

WHAT IS THE EFFECT OF THAT, THOUGH? IN OTHER WORDS, LET'S SAY THAT THE LEGISLATURE CHOOSES TO MAKE AN EXCEPTION THAT, WHEN YOU LOOK AT THE EXCEPTION, AND THEN YOU LOOK AT A DEFENDANT'S DUE PROCESS RIGHTS, YOU SAY, WELL, WAIT A MINUTE. YOU KNOW, THIS IS REALLY OUT OF WHACK, YOU KNOW THAT, THE LEGISLATURE HAS CREATED AN EXCEPTION THAT DOESN'T COME ANYWHERE NEAR THE IMPORTANCE OF A DEFENDANT'S DUE PROCESS RIGHTS TO, YOU KNOW, NOW, IS THAT, AND CAN THE LEGISLATURE DO THAT? THAT IS CAN THEY WATER DOWN THE PRIVILEGE, THEMSELVES, THROUGH EXCEPTIONS, AND YET STILL MAINTAIN THAT IT IS SUCH AN ABSOLUTE PRIVILEGE THAT EVEN A DEFENDANT'S DUE PROCESS RIGHTS CAN'T TRUMP IT SOME.

THE COURT, IN JAFFE VERSUS REDMON, ACKNOWLEDGE THAT THE LEGISLATURE DOES KNOW THE NEED FOR THE INFORMATION. THERE IS RESPECT FROM THE LEGISLATURE FOR THE JUDICIAL PROCESS AND THE TRUTH-SEEKING PROCESS, SO IT IS UNLIKELY THAT THE LEGISLATURE IS GOING TO ENACT AN EXCEPTION THAT BASICALLY SWALLOWS UP THE PRIVILEGE, nr BUT I THINK, YOUR HONOR, THAT, UNDER JAFFE VERSUS REDMON, THE FACT THAT THERE IS A EXCEPTION TO THE PRIVILEGE, THE EXCEPTION DOES NOT MEAN THAT THE COURT CAN GET INTO A BALANCING TEST. THE PRIVILEGE, THE LANGUAGE --

WHAT IF THE EXCEPTION IS THAT THERE IS AN EXCEPTION IF A COURT ORDERS THE RECORDS TO BE DISCLOSEED?

RIGHT. THAT GIVES THE COURT THE AUTHORITY TO MAKE THAT BALANCING, AND THAT IS WHAT JAF' VERSUS, I AM SORRY THAT IS WHAT PENNSYLVANIA VERSUS RICH' DID, AND TO ANSWER JUDGE CANTERO'S QUESTION, THE DIFFERENCE BETWEEN PENNSYLVANIA VERSUS RITCHIE AND JAFFE VERSUS REDMON, IS WE ARE DEALING WITH A STATUTE THAT GAVE THE COURT THE AUTHORITY TO MAKE THAT BALANCING.

WELL, CAN THE LEGISLATURE REALLY, LET'S JUST ASSUME THIS IS AN ABSOLUTE PRIVILEGE AND LET'S ASSUME THAT WHAT WE HAVE IS THE CRITICAL EYEWITNESS, ONE EYEWITNESS TO THE CRIME, IDENTIFYING THE DEFENDANT, AND WHAT THE DEFENDANT LEARNS IN DISCOVER IS THAT THIS, BOTH THE DAY BEFORE AND THE DAY AFTER THE CRIME, THAT THE PERSON WAS SO TRAUMATIZED BY WHAT HAD HAPPENED AND WHAT THEY SAW, THAT THEY TALKED TO THEIR PSYCHIATRIST, PSYCHOTHERAPIST, AND IT COMES OUT THAT THEY TALK ABOUT THE DESCRIPTION OF WHO IT WAS THAT THEY SAW. ARE WE, IS, ARE YOU SAYING IN THOSE, HE HAVE THEN THAT COMPELLING CIRCUMSTANCE, AND THAT SHE, YOU KNOW, THE PERSON HAD A NERVOUS BREAKDOWN OR WHATEVER THAT MIGHT REALLY GO TO THE ENTIRE CREDIBILITY AND REALIBILITY OF THAT IDENTIFICATION, IS THAT, IS THERE, EVEN UNDER THOSE CIRCUMSTANCES THERE WOULD BE NO WAY TO OBTAIN THAT INFORMATION?

UNFORTUNATELY, THAT IS WHAT I THINK THE PRIVILEGE MEANS.

WHEN THE STATE IS PROSECUTING FOR SOMEBODY WHO HAS BEEN A VICTIM OF DOMESTIC VIOLENCE OR SOMETHING, DO THEY EVER, DO THEY ASK THE VICTIM TO SIGN ANY WAIVERS, SO THAT THEY CAN ASSESS THE PSYCHIATRIC OR PSYCHOLOGICAL STATE OF THE PERSON, TO SEE IF THEY ARE A RELIABLE WITNESS? DOES THAT HAPPEN?

I CANNOT ANSWER YOUR QUESTION, JUSTICE PARIENTE, BECAUSE I AM NOT INVOLVED IN THOSE SORTS OF THINGS.

BUT YOU KNOW THAT WOULD, THAT WOULD PUT THE STATE IN A POSITION OF BEING ABLE TO SAY, LISTEN, WE NEED TO MAKE SOME DECISION ABOUT THE CREDIBILITY OF OUR WITNESSES, AND YOU KNOW, WHETHER THEY HAVE HAD A HISTORY OF PSYCHIATRIC OR ESPECIALLY AROUND THE TIME OF THE INCIDENT, AND WE ARE JUST NOT GOING TO BE IN A POSITION TO SEE, TO REALLY DECIDE WHETHER WE CAN FILE THIS, UNLESS WE GET A WAIVER SHOULD THAT BE A ONE-WAY STREET THAT THAT COULD HAPPEN?

IT IS A NOT A ONE-WAY STREET, A WAIVER. IT IS A PRIVILEGE PROVIDED BY THE PATIENT OR BY THE CLIENT.

BUT IF THE STATE DOESN'T WANT TO SHIELD THEIR WITNESSES, THAT IS WHAT I AM SEE SAYING. UNLIKELY THE VICTIM IS GOING TO GIVE A WAIVER TO THE DEFENDANT. THEY ARE GOING TO WANT TO COOPERATE WITH THE STATE. ISN'T, DON'T, DOESN'T THIS GO TO THE VERY ESSENCE OF THE SIXTH AMENDMENT RIGHT OF CONFRONTATION OF CRITICAL WITNESSES, TO SHIELD, YOU KNOW, FOR SOMETHING THAT IS LEGITIMATE, WHICH IS YOU KNOW, SOME PEOPLE OUGHT TO HAVE THE ABILITY TO GO TO SEE A PSYCHIATRIST OR PSYCHOLOGIST AND EXPECT THAT, UNDER MOST CIRCUMSTANCES, THAT THAT WILL BE KEPT CONFIDENTIAL, JUST LIKE ATTORNEY/CLIENT CONFIDENCES, BUT THE LAW LOOKS TO SEE WHETHER THE DUE PROCESS AND FUNDAMENTAL FAIRNESS TRUMPS THAT, UNDER CERTAIN CIRCUMSTANCES.

I THINK THAT JAFFE VERSUS REDMON REALLY ANSWER THAT IS QUESTION, AND BASICALLY, WELL, BETWEEN JAFFE VERSUS REDMON AND SWEET LAND BERLIN VERSUS UNITED STATES, BASICALLY THEY ANSWER THAT QUESTION AND SAY THERE WILL BE SOME IN JUSTICES BY APPLYING THESE ABSOLUTE PRIVILEGES, BUT AS A SOCIETY AS A WHOLE, WE HAVE TO BASICALLY ACCEPT THOSE IN JUSTICES, FOR THE BENEFIT THAT SOCIETY GETS FROM THIS PRIVILEGE. WE LOOK, IN THIS CASE WE ARE LOOKING AT A SPECIFIC INDIVIDUAL. BUT THE BALANCING TEST THAT THE LEGISLATURE ENGAGES, BEFORE IT DETERMINES WHETHER TO MAKE THE PRIVILEGE AN ABSOLUTE PRIVILEGE OR A QUALIFIED PRIVILEGE, THE LEGISLATURE TAKES INTO CONSIDERATION NOT THE INDIVIDUAL THAT IS PROTECTED BY THIS PRIVILEGE BUT THE, TO THE BENEFIT TO THE SOCIETY AS A WHOLE. AS THE COURT IN JAFFE POINTED OUT, WHAT WE HAVE IN THE JAFFE SITUATION, WE HAD A POLICE OFFICER WHO SOUGHT TREATMENT. HAD IT NOT BEEN FOR THIS PRIVILEGE, THIS POLICE OFFICER WOULD NOT BE SEEKING TREATMENT. THEN WHAT IS THE BENEFIT OR LOSS TO SOCIETY, TO HAVE A POLICE OFFICER WITH A GUN AND A BADGE, IN NEED OF PSYCHOLOGICAL OR MENTAL TREATMENT, WHO WILL NOT GO AND GET IT? WHAT IS THE LOSS TO SOCIETY FOR THAT? AND IT IS BASED ON THAT, THAT THE COURT HAS SAID IT IS ALL RIGHT FOR THE LEGISLATURE TO ENACT SUCH A PRIVILEGE STATUTE, SO THAT SOCIETY AS A WHOLE --

SO I STILL WANT TO SEE IF I CAN UNDERSTAND HOW WE GET TO WHEN A PRIVILEGE IS ABSOLUTE AND WHEN IT IS QUALIFIED. NOW, IN THIS CASE, ALL OF THE, THIS PRIVILEGE, ALL OF THE EXCEPTIONS UNDER IT SEEM TO GO TO THE FACT OF, IF THE PERSON WHO HAS THE PRIVILEGE IS HAVING SOME KIND OF MENTAL PROBLEM, IS BEING INVOLUNTARILY COMMITTED OR WHAT IS THE OTHER ONES THAT SHE PUTS HER MENTAL CONDITION INTO, AT ISSUE, AND THOSE KINDS OF THINGS.

CORRECT.

BUT BY NOT ADDING THE PHRASE THAT WE HAD IN THE OTHER CASE, WHICH SAYS "OR IF BY COURT ORDER", BY ADDING THAT LAST PHRASE THAT, IS WHAT WOULD MAKE IT A QUALIFIED PRIVILEGE?

THAT'S CORRECT, YOUR HONOR. THAT IS OUR POSITION. BECAUSE THAT LANGUAGE GIVES THE

COURT SOME AUTHORITY TO ENGAGE THIS BALANCING.

AREN'T THERE, ALSO, OTHER FLORIDA STATUTES THAT SPECIFICALLY CALL IT PRIVILEGE, QUALIFIED PRIVILEGE, AND THEN THEY PROVIDE THE CIRCUMSTANCES UNDER WHICH SOMEBODY MAY SEEK TO OVERCOME THE PRIVILEGE AND WHAT THOSE FACTORS ARE, LIKE THE JOURNALISTS' PRIVILEGE, AND THAT WOULD, ALSO, BE A QUALIFIED PRIVILEGE.

THAT'S CORRECT, YOUR HONOR. IT DOES SAY THAT. IT SAID THIS IS A QUALIFIED PRIVILEGE, AND IT DOES GO ON TO ENUMERATE WHAT A PERSON MUST SHOW, IN ORDER TO PIERCE THAT PRIVILEGE. THE TRADE SECRET IS ANOTHER ONE. IT HAS A CATCHALL SENTENCING, WHEN JUSTICE SO REQUIRES. THERE IS LANGUAGE IN THOSE TWO STATUTES --

THAT KIND OF STATEMENT, ALSO, WOULD MAKE IT A QUALIFIED PRIVILEGE.

THAT'S CORRECT, YOUR HONOR, BUT WHERE YOU HAVE, AS IN THE ATTORNEY/CLIENT PRIVILEGE, THE PSYCHOTHERAPIST THE PATIENT PRIVILEGE, THE SPOUSAL PRIVILEGE, THE CHRERJY PRIVILEGE, THERE IS -- THE CLERGY PRIVILEGE, THERE IS NOTHING IN THE LANGUAGE OF THOSE STATUTES THAT WE COULD INTERPRET AS TO GIVING ANY LEEWAY INTO WHETHER OR NOT THE PRIVILEGE APPLIES.

HOW DO THE TWO TERMS RATIONALLY FIT TOGETHER? THAT IS IF YOU HAVE THE PHRASE ABSOLUTE PRIVILEGE AND THEN YOU PROVIDE TEN EXCEPTIONS TO THAT IN A STATUTORY SCHEME, CLEARLY IT IS NOT AN ABSOLUTE PRIVILEGE, ONCE YOU HAVE PROVIDED ANY EXCEPTION TO IT, AND SO I, HOW DO YOU SQUARE HAVING AN ABSOLUTE PRIVILEGE, WHICH MOST OF US WOULD UNDERSTAND TO BE THAT IS IT. THAT IS A PRIVILEGE THAT THAT CANNOT BE DISCLOSED OR, AND YET THERE ARE EXCEPTIONS, AND SO HOW CAN YOU SQUARE THE WATERING DOWN OF THE PRIVILEGE WITH EXCEPTIONS, WITH IT BEING AN ABSOLUTE PRIVILEGE?

IT IS EITHER THAT THE PRIVILEGE APPLIES OR IT DOES NOT APPLY.

WELL, DON'T YOU HAVE TO, IF YOU ARE GOING TO DO THAT, SHOULDN'T YOU ALWAYS, IT IS LIKE YOU TALKED ABOUT THE POLICE OFFICER, AND YOU SAID THAT THERE ARE IMPORTANT CONSIDERATIONS TO ENCOURAGE THE OFFICER TO SEEK THAT HELP, AND THAT THAT IS VERY IMPORTANT, YOU KNOW, THAT BE DONE, BUT AREN'T YOU LEAVING OUT OF THE EQUATION WHETHER OR NOT THERE MIGHT BE OTHER IMPORTANT CONSIDERATIONS AS TO WHETHER OR NOT THOSE RECORDS SHOULD BE AVAILABLE? DON'T YOU HAVE TO LOOK AND SEE WHAT RIGHT IT IS THAT IS BEING ATTEMPTED TO BE ENFORCED OR IMPACTED, WHEN THERE IS AN ATTEMPT TO GO BEHIND THE PRIVILEGE? DON'T YOU HAVE TO LOOK, OR ARE YOU SAYING, NO, YOU NEVER HAVE TO LOOK, THAT THE, WE MAY HAVE THE COUNTRY UNDER ATTACK, AND THAT WE ARE GOING TO HAVE THAT KIND OF SCENARIO, BUT YOU DON'T EVER, YOU JUST, YOU NEVER LOOK AT THAT, SO DO YOU LOOK AT THAT?

YOU DON'T LOOK AT THAT, BECAUSE THE LEGISLATURE HAS ALREADY LOOKED AT THAT IN MAKING THE DETERMINATION AS TO WHETHER OR NOT THIS IS AN ABSOLUTE PRIVILEGE OR A QUALIFIED PRIVILEGE. THE ABSOLUTE PRIVILEGE IS THE PRIVILEGE APPLIES TO THE SITUATION OR IT DOES NOT APPLY TO THE SITUATION. AND THAT IS EXACTLY WHAT THE STATUTE SAID. IT SAYS THERE IS NO PRIVILEGE UNDER THESE CIRCUMSTANCES.

SO THAT THE LEGISLATURE, FOR INSTANCE, THEN, COULD HAVE A PROSPECTIVE EMPLOYER OF THE PERSON GRANTED ACCESS TO THESE RECORDS, AND PUT THAT IN AS AN EXCEPTION, AND YET NOT CONSIDER A DEFENDANT'S NEED, EITHER ARISEING OUTFIT THE CONFRONTATION OR DUE PROCESS CLAUSE OF THE U.S. OR FLORIDA CONSTITUTIONS. THE LEGISLATURE CAN MAKE THOSE POLICY CHOICES.

I BELIEVE SO, YOUR HONOR, BECAUSE THESE PRIVILEGES ARE CREATED BY THE LEGISLATURE,

AND IT IS UP TO THE LEGISLATURE TO MAKE WHATEVER DETERMINATION AS TO WHEN IT DOES, AND DOES NOT APPLY.

NO CONSTITUTIONAL RIGHTS OF SOMEBODY ELSE CAN TRUMP THAT.

NOT AS FAR AS THE PRIVILEGE GOES. THE JAFFE VERSUS REDMON SAYS THAT. WHEN WE ARE TALKING ABOUT THESE PRIVILEGES, THERE HAS ALREADY BEEN A BALANCE MADE BY THE LEGISLATURE, AS TO WHETHER OR NOT THE NEED FOR THIS PRIVILEGE IS, TRUMPS IF YOU WILL, ANY CONSTITUTIONAL RIGHT THAT THE DEFENDANT HAS. THE DEFENDANT DOES NOT HAVE A RIGHT, THE COURT HAS LONG RECOGNIZED, TO UNLIMITED DISCOVERY. THE DEFENDANT DOES NOT HAVE A RIGHT TO HAVE ANOTHER PERSON INCRIMINATE HIMSELF TO FREE THE DEFENDANT. IN FACT, IN THE SWINDLE AND BERLIN CASE, THE OFFICE THE INDEPENDENT COUNSEL WAS ASKING THE COURT TO CREATE AN EXCEPTION TO THE ATTORNEY/CLIENT PRIVILEGE, FOR CIRCUMSTANCES WHERE THE CLIENT HAS DIED, AND THE INFORMATION IS NECESSARY TO -- THE EXCEPTION TO THE ATTORNEY/CLIENT PRIVILEGE FOR THE CIRCUMSTANCES WHERE THE CLIENT HAS DIED AND THE INFORMATION IS NECESSARY TO THE COURT -- NECESSARY, AND THE COURT HAS SAID NO. IT SEEMS LIKELY THAT THE ONLY REASON THE CLIENT CONSULTED AN ATTORNEY IN THIS CASE IS BECAUSE THE CLIENT CONTEMPLATED HIS OWN DEATH, THE CLIENT, VINCENT FAUCET, COMMITTED SUICIDE SOME NINE DAYS AFTER HE CONSULTED WITH HIS ATTORNEY, AND THE COURT THERE SAID HAD IT NOT BEEN FOR HIS CONTEMPLATION OF DEATH, HE WOULD NOT HAVE SOUGHT CONSULTATION WITH HIS ATTORNEY. SO --

BUT DOESN'T THE SUPPORT VIEW THAT THERE IS REALLY A CONTINUUM OF PRIVILEGES, THAT THAT PRIVILEGE MAY BE WAY UP HERE, BECAUSE IT IS SO FUNDAMENTAL FOR US TO HAVE AN ORGANIZED SOCIETY AND TO RECOGNIZE THOSE RIGHTS, THAT THE LEGISLATURE MAY, ALSO, GRANT PRIVILEGES WAY DOWN HERE, THAT OBVIOUSLY ARE OF A MUCH LESSER VALUE TO SOCIETY THAN THAT PRIVILEGE, AND YOU ARE SAYING YOU TREAT THEM ALL THE SAME WAY.

I AM SAYING SO, YOUR HONOR, I AM SAYING THAT THERE IS NO JUSTIFICATION THAT, ONCE A PRIVILEGE HAS BEEN RECOGNIZED BY THE LEGISLATURE OR BY THE COURT, AS THE UNITED STATES SUPREME COURT DID UNDER FEDERAL LAW, ONCE A PRIVILEGE HAS BEEN RECOGNIZED AND ACCEPTED, THERE IS NO JUSTIFICATION FOR TREATING ONE -- NO JUSTIFICATION FOR TREATING ONE PRIVILEGE GREATER THAN ANOTHER, FOR GIVING ONE PRIVILEGE MORE CERTAINTY THAN ANOTHER PRIVILEGE THERE. IS NO JUSTIFICATION FOR GIVING AN ATTORNEY CLIENT PRIVILEGE MORE SURETY THAN THE SPOUSAL PRIVILEGE OR THE CLERGY PRIVILEGE. THERE REALLY IS SIMPLY NO JUSTIFICATION FOR THAT, AND THE PROBLEM WITH INTRODUCING ANY KIND OF A BALANCING IN IT IS THE UNCERTAINTY THAT IT CREATES IN THE COMMUNICATION, AND IT IS CLEAR THAT THESE KINDS OF RELATIONSHIPS BETWEEN THE LAWYER AND THE CLIENT, THE PSYCHIATRIST AND THE PATIENT, THE SPOUSES, WHATEVER -- AND THE CLIENT, THE PSYCHIATRIST AND THE PATIENT, THE SPOUSES, WHATEVER, THE NEED TO HAVE OPEN AND HONEST COMMUNICATION IS THE BASIS FOR THESE PRIVILEGES. ONCE --

LET ME JUST ASK YOU, IN THE SPECIFIC STATUTE ABOUT HOW ABSOLUTE IT IS, THE PRIVILEGE, DOESN'T IT JUST EXTEND TO IT IS DISCLOSING CONFIDENTIAL COMMUNICATIONS MADE FOR THE PURPOSE OF DIAGNOSIS OR TREATMENT?

CORRECT, YOUR HONOR.

SO IF, SORT OF LIKE, AGAIN, HOSPITAL RECORDS, YOU KNOW, THERE ARE SOMETIMES STATEMENTS THAT THE QUALIFYING QUESTION WAS, TO GET IT INTO EVIDENCE, WAS IT MADE FOR THE PURPOSE OF DIAGNOSIS OR TREATMENT. WOULDN'T THE DEFENDANT BE ENTITLED TO, SINCE, TO SUBPOENA THE PSYCHIATRIST TO ASK QUESTIONS SUCH AS WERE STATEMENTS MADE ABOUT THIS CRIME? YES. WERE THEY, WERE THOSE STATEMENTS MADE, AND IF THEY DON'T ESTABLISH THAT THRESHOLD, IN OTHER WORDS, WHO DETERMINES OR IS THERE A MECHANISM TO

DETERMINING WHETHER THOSE ARE -- THESE ARE EVEN STATEMENTS THAT ARE MATERIAL TO THE TREATMENT THAT THE PERSON WAS SEEKING OR JUST SORT OF BACKGROUND INFORMATION?

I THINK THAT THAT WOULD BE THE SAME AS IN ANY OTHER PRIVILEGE, THAT THE TRIAL COURT WOULD MAKE THAT INITIAL DETERMINATION AS TO WHETHER OR NOT THIS PARTICULAR INFORMATION IS PRIVILEGED.

SO WOULDN'T THAT, HAS THAT BEEN DONE IN THIS CASE ?

IN THIS PARTICULAR CASE? I THINK THAT, NO, THERE WAS NO DISCUSSION ABOUT WHETHER OR NOT THE DEFENDANT, THE INFORMATION WAS ACTUALLY PRIVILEGED. I THINK WHAT HAPPENED WAS THERE WAS A PRESUMPTION. I THINK EVERYBODY KIND OF SORT OF ACCEPTED THAT IT WAS PRIVILEGE, THAT SHE TESTIFIED THAT IT WAS WITH HER THERAPIST AND THAT SHE HAD TOLD HER THERAPIST THAT, ON A PRIOR OCCASION, THAT SOMEBODY ELSE HAD COMMITTED THE BATTERY ON HER, BUT IN FACT IT WAS THE DEFENDANT.

AND THEN SHE WAS ASKED, AND WHAT ABOUT ON THIS OCCASION, WHAT DID YOU TELL, WAS SHE ASKED THAT QUESTION?

I DON'T THINK SHE WAS ASKED. I AM NOT ABSOLUTELY SURE, BUT I DON'T THINK SHE WAS ASKED ABOUT THIS PARTICULAR OCCASION, BECAUSE SHE HAS ALWAYS SAID THAT IT WAS THE DEFENDANT ON THIS PARTICULAR OCCASION, BUT IN THE DEPOSITION SHE SAID ON ANOTHER OCCASION SHE TALKED ABOUT ANOTHER BEATING THAT THE DEFENDANT GAVE HER, AND THAT SHE HAD TOLD, SHE HAD LIED TO HER THERAPIST AND TOLD HER THERAPIST THAT IT WAS TWO UNIDENTIFIED INDIVIDUALS THAT HAD DONE IT.

NOW, WHY, SO WHY WOULDN'T THAT BE, IN THAT CIRCUMSTANCE THEN, A, REALLY A WAIVER OF THE PRIVILEGE?

WE, IN OUR PETITION, WE, YOU KNOW, WE ARGUED THAT THAT IS A WAIVER AS TO THAT PARTICULAR COMMUNICATION, BETWEEN THE VICTIM AND THE PSYCHIATRIST, BUT WHAT THE DEFENDANT WAS ASKING FOR WAS FOR HER ENTIRE PSYCHIATRIC RECORDS.

SO WOULD YOU AGREE, THOUGH, THAT THE JUDGE SHOULD BE ABLE TO LOOK TO SEE IF A SIMILAR STATEMENT WAS MADE AS TO THIS INCIDENT, NOT THAT IS A LIE. SHE HAS ALREADY ADMITTED LYING TO HER PSYCHIATRIST ON A PRIOR OCCASION, THAT A LIE WAS MADE TO THIS PSYCHIATRIST ABOUT WHAT HAPPENED AND WHAT COULD BE MORE MATERIAL, THE VICTIM LYING ABOUT THAT IT WASN'T THE DEFENDANT? I MEAN, WHY WOULDN'T THAT BE THE LIMITED SCOPE OF A PROPER IN CAMERA INSPECTION?

LAW EVEN THE IN CAMERA INSPECTION IS A DISCLOSURE OF CONFIDENTIAL INFORMATION. THE VICTIM, WHEN SHE TESTIFIED ABOUT THE PRIOR INCIDENT THAT ONE COMMUNICATION THAT SHE HAD WITH THE THERAPIST WHEN SHE TALKED ABOUT THAT, IF THERE IS A WAIVER THAT, IS WHAT SHE WAIVED. SHE NEVER WAIVED ANY AND ALL OTHER INFORMATION IN HER RECORD.

ANOTHER WAY TO DO IT WOULD BE TO TAKE THE DEPTIONS OF THE PSYCHIATRIST AND JUST -- THE DEPOSITION OF THE PSYCHIATRIST AND SAY LISTEN, I JUST WANT TO ASK THIS ONE QUESTION, IT WAS ANY STATEMENTS MADE ABOUT THE, WHO PERPETRATED THE, THIS CRIME? AND COULD THAT BE DONE?

I DON'T THINK THAT CAN BE DONE.

WELL, HOW IS THAT IS, AND WHY NOT? I MEAN, I GUESS THE QUESTION, THEN THERE IS NO WAIVER, BECAUSE ALL YOU ARE FINDING, I MEAN, THAT IS NOT PRIVILEGED ABOUT WHO IS A

PERPETRATOR OF A CRIME. IF THE PERSON IS PROSECUTING, HAS COMPLAINED AND CAUSED A DEFENDANT, AS THE COMPLAINING WITNESS, TO BE ARRESTED AND FACING A VERY SIGNIFICANT PENALTY, WHY WOULDN'T THAT LIMIT, I MEAN I AM ALL IN FAVOR OF KEEPING THESE PRIVILEGES AS, YOU KNOW, AS PROTECTIVE OF PEOPLE SEEKING TREATMENT AS POSSIBLE, BUT IT SEEMS THAT THERE IS JUST, THAT THIS, AGAIN, THIS ABSOLUTEIES POSITION, YOU GET -- THIS ABSOLUTIST POSITION, YOU GET --

I SEE MY TIME IS UP. MAY I RESPOND, ANSWER YOUR QUESTION?

CHIEF JUSTICE: YES. YES.

THE PROBLEM WITH THAT, YOUR HONOR, IS THAT THE STATUTE DOES NOT ALLOW T DOES IT DOES NOT, IT ALLOWS WHEN THERE HAS BEEN A WAIVER, BUT IN THIS CASE, SHE DID TESTIFY ABOUT THAT ONE PRIOR INCIDENT, SHE HAD WAIVED IT AS FAR AS THAT IS CONCERNED, BUT SHE IS NOT WAIVED IT FOR ANYTHING ELSE.

CHIEF JUSTICE: THANK YOU VERY MUCH.

THANK YOU, YOUR HONOR.

CHIEF JUSTICE: HOW MUCH TIME ON REBUTTAL?

30 SECONDS.

CHIEF JUSTICE: ALL RIGHT. YOU HAVE A CHALLENGE THERE, COUNSEL.

I WOULD LIKE TO RESPOND TO SOMETHING EUSTIS CANTERO ASKED ME ORANGE -- TO SOMETHING JUSTICE CANTERO ASKED ME ORIGINALLY. THERE IS NO CHAEJ. BOTH OF COVERED BY STATUTES IN ALL 50 STATES, PLUS I DON'T SEE THAT WHY A PATIENT OF A PSYCHOLOGIST WHO VOLUNTARILY MAY GO SEEK THERAPY SHOULD DESERVE MORE PROTECTION THAN A VICTIM OF CHILD SUPPORT, EXCUSE ME, CHILD ABUSE, WHO IS A YOUNGSTER, AND IS OBVIOUSLY NOT VOLUNTEERING TO BE ABUSED, SO IF ANYTHING, I BELIEVE THAT THE STATUTE IN RITCHIE IS DESERVING OF MORE CONSIDERATION THAN THE PRIVILEGE HERE, AND I GUESS MR. CHIEF JUSTICE

WE ARE GOING TO HAVE TO END ON THAT NOTE. OKAY. THANK YOU VERY MUCH, BOTH OF YOU.