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02-286

JUSTICE PARIENTE, WHO WAS RECUSED ON THE FIRST CASE, WILL JOIN US FOR THE SECOND CASE. DESSAURE VERSUS STATE OF FLORIDA.

MAY IT PLEASE THE COURT. MY NAME IS PAUL HELM, AND I REPRESENT THE APPELLANT IN THIS CASE, MR. LOUIS DESSAURE, WHO WAS TRIED AND CONVICTED OF THE MURDER OF CINDY RIEDWEG IN PINELLAS COUNTY. THE FIRST ISSUE CONCERNS THE PROSECUTOR'S OPENING ARGUMENT, OPENING STATEMENT, IN WHICH SHE SAID IN THIS PARTICULAR CASE, AS KENNETH DESSAURE SAID, HIMSELF, THERE IS ONLY TWO PEOPLE THAT KNOW EXACTLY WHAT OCCURRED IN THAT APARTMENT, SO THEREFORE IT IS MY JOB TO TAKE THE PHYSICAL EVIDENCE, THE SCIENTIFIC EVIDENCE, AND THE PHOTOGRAPHS, THE WITNESSES' STATEMENTS, EXPERTS, SCIENTISTS, FORENSIC TECHNICIANS AND RECONSTRUCT WHAT OCCURRED FOR YOU.

WELL, DIDN'T MR. HARDY, ONE OF THE WITNESSES, ACTUALLY TESTIFY THAT DESSAURE SAID CAN'T NOBODY SAY HE KILLED HER. DON'T NOBODY KNOW WHAT HAPPENED BUT HIM AND HER. WASN'T THAT TESTIMONY, AND DOESN'T THAT DISTINGUISH IT FROM JUST ABOUT EVERY OTHER CASE WHERE WE HAVE SAID THERE IS A COMMENT ON THE RIGHT TO REMAIN SILENT?

WELL, YOUR HONOR, THIS COURT, IN RODRIGUEZ, EXAMINED ITS PAST PRECEDENCE, CONCERNING COMMENTS, ON A DEFENDANT'S FAILURE TO TESTIFY, AND NOTED THAT THERE HAD BEEN A SMALL EXCEPTION, THAT A COUPLE OF TIMES, HAD BEEN RELIED UPON, WHERE THE STATE HAD ARGUED THAT THE COMMENT WAS BASED UPON THE EVIDENCE BEFORE THE JURY, AND ESSENTIALLY --

IN OTHER WORDS ISN'T THIS ONE, AND CAN YOU TELL ME, IS THIS, IN THIS CASE, DID HARDY TESTIFY ESSENTIALLY, TO WHAT I JUST STATED?

YES, YOUR HONOR, THAT IS TRUE, AND THE PROSECUTOR'S EXPLANATION FOR HER REMARK WHEN IT WAS OBJECTED TO, WAS THAT IT WAS BASED UPON THE EVIDENCE IN THE CASE.

WASN'T THAT SOMETHING THAT WAS THE SUBJECT OF A PRETRIAL DISCUSSION, BECAUSE IT SOUNDS LIKE, WHEN THE DEFENSE LAWYER GOT UP, HE SAID, WELL, THIS IS JUST WHAT I WAS AFRAID OF, THAT SHE WAS GOING TO BE SAYING.

WE DON'T HAVE A RECORD OF THAT. IT WAS OFF-THE-RECORD AND BETWEEN DEFENSE COUNSEL AND THE PROSECUTOR, AND ESSENTIALLY SHE APPARENTLY HAD TOLD HIM WHAT SHE WAS GOING TO SAY, AND HE TOLD HER IF YOU DO, I WILL OBJECT SECRETARY AND MOVE FOR A MISTRIAL, BECAUSE THAT IS A COMMENT ON MY CLIENT'S FAILURE TO TESTIFY.

WHAT HAPPENED IN THE CLOSE SOMETHING WAS IT, DID HARDY TESTIFY, LIKE I JUST MENTIONED, DID HE TESTIFY DURING TRIAL, AND THEN HOW WAS THAT HANDLED IN CLOSING ARGUMENT?

I DON'T RECALL ANY FURTHER DISCUSSION OF IT. IN CLOSING ARGUMENT. BUT THAT IS NOT THE POINT. SO ONCE THE BELL IS UNRUNG, IT IS HARD TO UNRUNG IT. IN OPENING STATEMENT AT TRIAL, THE PROSECUTOR IN HER COMMENT, EVEN THOUGH IT WAS BASED ON THE EVIDENCE, THE COMMENT STILL QUALIFIES FOR THE SOLE AND ONLY TEST THAT THIS COURT HAS EVER ESTABLISHED TO DETERMINING WHETHER A COMMENT IS A COMMENT ON FAILURE TO TESTIFY,

AND IF THE COMMENT IS FAIRLY SUSCEPTIBLE OF BEING INTERPRETED AS A COMMENT ON SILENCE, BY THE JURY, THEN IT IS A PROHIBITED COMMENT ON THE, ON THAT SILENCE.

WOULD YOU AGREE THAT THERE IS A DIFFERENT SITUATION, THERE ARE MANY CASES WHERE, OBVIOUSLY, THE ONLY WITNESSES WOULD BE THE VICTIM WHO IS NOW DECEASED, AND REPORTEDLY THE DEFENDANT, BECAUSE THAT IS, AND IN THOSE CASES, WE HAVE SAID YOU CAN'T, THOSE ARE THE KINDS OF COMMENTS WHERE THERE IS ONLY TWO PEOPLE AND YOU ARE NOT GOING TO HEAR TWO SIDES, SOMETHING LIKE THAT.

I WOULD POINT OUT THAT THE STATE ARGUED IN THOSE CASES, BASICALLY THE SAME THING THEY ARE ARGUING HERE. IT IS BASED ON THE EVIDENCE BEFORE THE JURY.

I SEE, BUT I DIDN'T THINK THAT THOSE CASES WITH RODRIGUEZ THAT I AM FAMILIAR WITH, WERE BASED ON THE DEFENDANT HIMSELF, MAKING A STATEMENT THAT ESSENTIALLY WAS NOBODY KNEW WHAT HAPPENED BUT HIM AND HER, AND THAT STATEMENT IS A DIRECT QUOTE.

YOUR HONOR, I AGREE.

WHAT IS THE OPENING STATEMENT THAT YOU YOU ARE GOING TO HEAR THE WITNESS SAY THAT DESSAURE SAID NOBODY WOULD HEAR WHAT HAPPENED BUT HIM AND HER. WOULD THAT BE, ALSO, SUSCEPTIBLE TO THE RIGHT TO REMAIN SILENT? IF THE EXACT QUOTE WAS USED THAT HARDY --

HAD SHE USED THE EXACT QUOTE, I WOULD STILL BE MAKING THE EXACT SAME ARGUMENT THAT, IT IS STILL FAIRLY SUSCEPTIBLE ON BEING CONSTRUED BY THE JURY ON THE DEFENDANT'S FAILURE TO TESTIFY. THE WITNESS'S TESTIMONY IS PRESENTED IN ONE CONTEXT. IN THE CONTEXT OF THE WITNESS'S TESTIMONY, THE STATEMENT BY THE DEFENDANT IS RELEVANT AND ADMISSIBLE, BECAUSE ESSENTIALLY, IT IS AN ADMISSION. BUT BY SAYING FOR MR. DESSAURE TO SAY THAT NOBODY KNOWS WHAT HAPPENED IN THAT APARTMENT BUT HER AND ME --

IS THERE A DIFFERENCE BETWEEN OPENING ARGUMENTS AND CLOSING STATEMENTS, WHERE, AND RODRIGUEZ CONCERNED CLOSING STATEMENTS. I AM NOT SURE IN HEATH OR ANY OF THE OTHER CASES, BUT IN CLOSING STATEMENTS, THE ENTIRE TRIAL HAS OCCURRED, AND SO THE JURY IS MORE SUSCEPTIBLE TO AN ARGUMENT OR EVEN AN INFERENCE THAT THE DEFENDANT, THROUGHOUT THE TRIAL, HAS FAILED TO TESTIFY. IS THERE A DISTINCTION, HOWEVER, WITH OPENING STATEMENTS, WHERE NONE OF THE TRIAL HAS OCCURRED YET, SO IT CAN'T BE REASONABLY INFERRED THAT ANY COMMENTS BY PROSECUTOR ARE REFERRING TO THE DEFENDANT'S FAILURE TO TESTIFY.

YOUR HONOR, IN HEATH VERSUS STATE, THIS COURT FOUND EXACTLY THIS KIND OF COMMENT IN OPENING STATEMENT, WAS AN IMPROPER REFERENCE TO THE DEFENDANT'S NOT TESTIFYING, EVEN THOUGH THAT HAS NOT IN FACT, OCCURRED YET. SO YOU HAVE ALREADY ANSWERED THIS COURT HAS ALREADY ANSWERED, THAT QUESTION.

BUT IN HEATH, DIDN'T THE COURT GO A LITTLE FURTHER, EVEN THOUGH THEY SAID IT WAS AN IMPROPER COMMENT. DIDN'T THE COURT INDICATE THAT IT WAS HARMLESS, EVEN THOUGH IT WAS PROPER.

YES, YOUR HONOR, THE COURT DID FIND THE COMMENT IN THAT CASE HARMLESS. THIS COURT HAS FOUND MANY SUCH COMMENTS TO BE HARMLESS.

WELL, WHAT ABOUT UNDER THE FACTS OF THIS CASE? WOULDN'T THE COMMENT, ALSO, BE HARMLESS, IN THIS CONTEXT?

NO, MA'AM. I DON'T BELIEVE SO. IN HEATH, THIS COURT GAVE NO EXPLANATION AS TO WHY THE

COMMENT WAS BEING DEEMED HARMLESS. ONE THING, THAT THIS COURT NEEDS TO BEAR IN MIND, YOU ARE VERY GOOD AT MONITORING THE DISTRICT COURTS OF APPEAL, WHEN THEY MISS APPLY THE CHAPMAN DeJULIO HARMLESS ERROR STANDARD. YOU ARE VERY QUICK TO POINT OUT TO THEM THE STANDARD IS NOT BASED UPON THE SUFFICIENCY OF THE EVIDENCE, EVEN IF THE EVIDENCE IS OVERWHELMING. THIS COURT WOULD NEVER HAVE TO ADDRESS THIS KIND OF COMMENT ISSUE, IN A CASE WHERE THE EVIDENCE WASN'T LEGALLY SUFFICIENT TO CONVICT! IF THE EVIDENCE WEREN'T LEGALLY SUFFICIENT TO CONVICT MR. DESSAURE, THAT IS WHAT WE WOULD BE TALKING B WE WOULDN'T BE TALKING ABOUT THIS COMMENT.

ALL RIGHT. WELL, WE KNOW SINCE WE HAVE DeGUILIO, THAT WHEN WE HAVE THOSE COMMENTS, EVEN THOUGH THEY ARE SUSCEPTIBLE TO BE COMMENTING TO COMMENT ON THE DEFENDANT'S RIGHT TO REMAIN SILENT, THAT NEVERTHELESS WE STOPPED IT IN DeJULIO.

RIGHT. AND DeJULIO WAS FOUND TO BE HARMFUL.

HARMLESS OR HARMFUL?

HARMFUL IN DEGUILLIO.

IN THIS CASE, SEEING THAT IT WAS A PASSING STATEMENT IN OPENING, THAT IT WAS --

YOUR HONOR, THAT PREDISPOSES THE JURY FROM THE VERY BEGINNING OF TRIAL, IT TO FOCUS ON WHETHER THE DEFENDANT PROVIDES AN EXPLANATION THROUGHOUT, WITH EVIDENCE!

LET ME, GO AHEAD.

I JUST WOULD PREFER IF I COULD GET MY QUESTION IN BEFORE YOU --

I AM SORRY.

THEN YOU WOULD BE SAYING, IN ANSWER TO WHAT I SAID, IS THAT EVERY STATEMENT IN OPENING STATEMENT, WILL BE PER SE HARMFUL. I WOULD LIKE TO YOU CONSIDER WHY, IN A SITUATION, NOT BECAUSE OF THE EVIDENCE, BUT BECAUSE IT WAS ONE STATEMENT, BECAUSE HARDY, IN FACT, TESTIFIED ESSENTIALLY TO THAT, AND IT WASN'T REPEATED IN CLOSING, WHY UNDER THOSE CIRCUMSTANCES, IT WOULDN'T BE HARMLESS ERROR BEYOND A REASONABLE DOUBT, AND CONSIDERING THE EVIDENCE, UNLESS YOU ARE GOING TO SAY THAT ANYTHING THAT IS SAID IN OPENING IS GOING TO BE PER SE REVERSIBLE ERROR.

I AM NOT ARGUING THAT IT IS PER SE REVERSIBLE ERROR. I AM ARGUING UNDER THE DEGULLIO STANDARD THAT, THERE IS A REASONABLE POSSIBILITY THAT AT LEAST ONE JUROR CONSIDERED MR. DESSAURE'S FAILURE TO TESTIFY IN RESPONSE TO THE STATE'S EVIDENCE, AS A RESULT OF THE PROSECUTOR'S COMMENT. AND WHERE THAT REASONABLE POSSIBILITY EXISTS, AS A MATTER OF CONSTITUTIONAL LAW. THIS COURT CANNOT SAY THAT THE COMMENT IS HARMLESS AND YOU MUST REVERSE.

LET ME DO THIS, TO DETERMINE THAT REASONABLENESS, LET'S PUT IT IN CONTEXT. GIVE ME THE STATEMENTS IN VOIR DIRE, BECAUSE NORMALLY, AND I HAVEN'T READ THE WHOLE VOIR DIRE COMMENT, BOTH THE STATE AND THE DEFENSE REPEAT TO THE JURORS, OVER AND OVER AGAIN, ABOUT THE BURDEN OF PROOF, THE DEFENDANT'S RIGHT TO REMAIN SILENT, ET CETERA, AND THE TRIAL IN A MURDER CASE GIVES OPENING INSTRUCTION TO SAY THE JURY THAT SAYS THE SAME THING. TYPICALLY THE PROSECUTOR AND THE DEFENSE ATTORNEY, REITERATED IN OPENING STATEMENT, WAS THAT DONE OR NOT DONE IN THIS CASE, SO THAT WE CAN UNDERSTAND THE STATEMENT IN CONTEXT?

FRANKLY, YOUR HONOR, I DON'T RECALL. I DON'T THINK ANY, I DON'T THINK THERE WAS ANY

OTHER DISCUSSION OF IT IN OPENING STATEMENTS. I DON'T RECALL THE VOIR DIRE. EYE NOT THE STATEMENT --

NOT THE STATEMENT. I AM TALKING ABOUT THE STATE BEARS THE BURDEN OF PROOF, THAT SORT OF THING, IN THE OPENING STATEMENT, AND THE JUDGE'S OPENING INSTRUCTION TO SAY THE JURY.

I DON'T RECALL IN THE OPENING STATEMENTS TO THE JURY. PERHAPS IN INSTRUCTION. PERHAPS IN OPENING STATEMENTS.

BY DEFENSE COUNSEL?

I DON'T RECALL, YOUR HONOR.

JUST FOLLOWING UP, IF IT FOCUSED ON IN VOIR DIRE, WE NEED TO LOOK AT THIS, IT IS PART OF THE CLOSING INSTRUCTIONS, AS FAR AS THE STANDARD CLOSING INSTRUCTIONS, OR IS IT NOT?

THE STATE HAS THE BURDEN OF PROOF, IF THE DEFENDANT DOESN'T TESTIFY. THERE IS NORMALLY AN INSTRUCTION THAT THAT IS NOT TO BE HELD AGAINST THE DEFENDANT, AND I AM SURE THAT INSTRUCTION WAS GIVEN IN THIS CASE.

IN THIS CASE, IF, AFTER THE DEFENDANT OBJECTED AND MOVED FOR A MISTRIAL, THE DEFENDANT DID NOT, THEN, ASK FOR AN INSTRUCTION THAT WOULD SAY JUST THIS MAY BE WHAT THE TESTIMONY, BUT YOU, AGAIN, ARE REMINDED THAT THE DEFENDANT'S FAILURE TO TESTIFY IS NOT TO BE USED AGAINST HIM IN ANY WAY. WAS ANYTHING, THAT WAS NOT REQUESTED.

DEFENSE COUNSEL DID NOT REQUEST A CURETIVE INSTRUCTION. THIS COURT HAS RULED, IN THE PAST, THAT THE DEFENDANT HAS NO OBLIGATION TO REQUEST A CURETIVE INSTRUCTION: THE USUALLY RATIONALE FOR NOT ASKING FOR A CURETIVE INSTRUCTION AND NOT GIVING ONE IS IT HIGHLIGHTS THE COMMENTS AND INCREASES THE DAMAGE, BY FURTHER FOCUSING ON THE JURY'S ATTENTION ON THE REMARK THAT INDICATES THAT YOU SHOULD PAY ATTENTION TO THE FACT THAT THE DEFENDANT DOESN'T TESTIFY!

THAT MIGHT BE TRUE FOR MANY OF THOSE YOU CAN'T UNRING THE BELL, BUT WE KNOW THAT A JURY SITTING THERE AND LISTENING, WATCHING THE WHOLE TRIAL, KNOWS THE DEFENDANT HASN'T TESTIFIED, SO --

BUT IT IS -- I AM SORRY.

SO WHEN THE JUDGE, THEN, WE HOPE THAT THE JURY FOLLOWS THE LAW, SO WHEN THE JUDGE TELLS THEM IN OPENING AND THE CLOSING INSTRUCTIONS THAT YOU ARE NOT TO CONSTRUE ANYTHING FROM THE DEFENDANT'S FAILURE TO TESTIFY, AND IN THIS CASE, THIS DEFENDANT SPECIFICALLY IS ATTRIBUTED WITH AN ADMISSION, WHERE HE MAKES THIS PRECISE STATEMENT. I AM JUST HAVING TROUBLE WITH WHY, IN THIS CASE UNDER THOSE CIRCUMSTANCES, THIS IS EITHER NOT ERROR OR IT WOULD BE HARMLESS ERROR BEYOND A REASONABLE DOUBT. NOT BASED ON JUST SUFFICIENCY OF THE EVIDENCE BUT BASED ON THOSE FACTORS THAT I JUST GAVE YOU.

I UNDERSTAND. AND I SIMPLY REITERATE THAT I BELIEVE THAT, DESPITE ALL THE FACTORS YOU ARE TALKING ABOUT FOR THE PROSECUTOR TO HIGHLIGHT THE DEFENDANT'S NOT TESTIFYING, AT THE VERY BEGINNING OF THE CASE, IN OPENING STATEMENT, CREATES AT LEAST A REASONABLE POSSIBILITY THAT JURORS WILL BE PAYING ATTENTION TO THAT, THROUGHOUT THE TRIAL, AND THAT JURORS WILL CONSIDER THAT, IN DELIBERATING ON THEIR VERDICT, AND THAT THEY WILL BECAUSE OF THIS COMMENT, HOLD IT AGAINST MR. DESSAURE, THAT HE FAILED

TO TESTIFY TO REBUT THE STATE'S CASE.

WAS THERE ANY AGGRAVATION OF THIS COMMENT, THAT IS THAT, AT THE TIME THE TESTIMONY CAME OUT ABOUT HIS STATEMENT, OR LATER, DURING THE COURSE OF CLOSING ARGUMENT, WAS THERE REPETITION OF THIS, OR ANY, I AM SAYING AGGRAVATION, WAS IT --

I DON'T RECALL ANY REPETITION, YOUR HONOR. I THINK I WOULD HAVE EMPHASIZED IT IN MY BRIEF, IF I WOULD HAVE SEEN IT.

AS FAR AS YOU KNOW, IT WASN'T, THEN, ALSO USED IN THE FINAL ARGUMENT, TO SAY JUST AS THE DEFENDANT SAID, YOU KNOW, HERE IS WHAT HAPPENED. THANK YOU.

WOULD YOU ADDRESS THE ISSUE OF THE ASHES THAT WERE FOUND IN THE SINK AND THE TRIAL COURT'S FAILURE TO ALLOW THE DEFENDANT TO PRESENT ANY EVIDENCE CONCERNING SOMEONE ELSE POSSIBLY PUTTING THE ASHES IN THE SINK.

YES, YOUR HONOR. THANK YOU. I JUST WANTED TO TRANSITION TO THAT ISSUE. AND I WOULD LIKE TO PREFACE ANY ARGUMENT ON THIS ISSUE WITH AN APOLOGY TO THE COURT AND FROM MR. AKE, BECAUSE IN MY REPLY BRIEF, I POINTED OUT THAT HE HAD MISQUOTED THE STATUTE DEFINING RELEVANT EVIDENCE. WELL, HE MISQUOTED IT BECAUSE I MISQUOTED IT IN THE INITIAL BRIEF, SO THAT WAS MY MISTAKE, AND I AM SORRY. RELEVANT EVIDENCE IS ANY EVIDENCE THAT TENDS TO PROVE OR DISPROVE A FACT IN ISSUE. AND IN THIS CASE, AT THE BEGINNING OF THE TRIAL, THE STATE HAD MOVED IN LIMINE TO EXCLUDE EVIDENCE OF TWO MARIJUANA CIGARETTES THE POLICE HAD FOUND IN THE VICTIM'S APARTMENT, ONE OF WHICH HAD BEEN PARTIALLY SMOKED, AND AT THAT TIME DEFENSE COUNSEL APPARENTLY WASN'T AWARE OF HOW THE STATE INTENDED TO USE THIS EVIDENCE, AND HE WENT ALONG WITH THE STATE'S MOTION, AND THE MOTION WAS GRANTED.

WHAT DID THE STATE PRESENT WITH REGARDS TO THE ASHES IN THE SINK?

YES. TWO OF THE FORENSIC TECHNICIANS WHO HAD BEEN IN THE VICTIM'S APARTMENT, TESTIFIED THAT ASHES IN THE SINK. AND THEY HAD A PHOTOGRAPH SHOWING THE ASHES. ONE OF THE WITNESSNESSES WASN'T SURE, REALLY, THAT WHAT THE PHOTOGRAPH SHOWED WAS ASHES. SHE WAS THE FIRST WITNESS. SHE SAID IT COULD HAVE BEEN A DEFECT IN THE PHOTOGRAPH, BUT SHE THOUGHT IT WAS ASHES. THE OTHER WITNESS WAS VERY CERTAIN THAT THESE WERE LIKE CIGARETTE ASHES. THE STATE, THROUGHOUT THE TRIAL, HAD SEVERAL WITNESSES TESTIFY THAT, ABOUT DESSAURE SMOKING CIGARETTES.

I GUESS I WANT YOU TO KIND OF EXPLAIN TO US, THE DEFENDANT AS I UNDERSTAND IT, ACTUALLY ADMITTED TO HAVING GONE INTO THE APARTMENT AT SOME POINT, CORRECT?

YES, YOUR HONOR.

AND SO WHAT, IS THE REAL SIGNIFICANCE OF, IF HE WAS IN THE APARTMENT, WHETHER HE HAD A CIGARETTE OR NOT, AND WHETHER THERE WAS ASH? I AM TRYING TO UNDERSTAND THE CONNECTION HERE, AND WHY IT WOULD BE IMPORTANT IN THIS CASE.

OKAY. IN THE PROSECUTOR'S CLOSING ARGUMENT, SHE EMPHASIZED THAT THERE WERE, THAT MR. DESSAURE'S IDENTITY AS THE PERPETRATOR OF THE HOMICIDE, WAS ESTABLISHED BY FOUR THINGS THAT HE LEFT BEHIND. THE FIRST WAS A PARTIAL FOOTPRINT ON THE KITCHEN FLOOR, NEAR THE SINK. THE SECOND WERE CIGARETTE ASHES IN THE SINK. THE THIRD AND FOURTH WERE STAINS ON A TOWEL AND A COMFORTER SEMNATURAL FLUID STAINS FOR WHICH -- SEMINAL FLUID STAINS WHICH WERE CONSISTENT WITH MR. DESSAURE'S DNA PROFILE, SO SHE WAS USING THIS ASH TESTIMONY AS ONE OF THE CIRCUMSTANTIAL BUILDING BLOCKS FOR ESTABLISHING MR. DESSAURE'S IDENTITY AS THE PERPETRATOR OF THE CRIME. NOW, ACCORDING

TO MR. DESSAURE'S STATEMENT TO THE POLICE, HE HAD ENTERED THE APARTMENT. HE WAS HOPING TO BORROW SOME ICE FROM HIS NEXT DOOR NEIGHBOR. SHE HAD BEEN OUTSIDE SUN BATHING. SHE WAS NO LONGER OUTSIDE. HE SAID HE KNOCKED ON HER DOOR. SHE DIDN'T RESPOND. HE CLAIMED HE BECAME CONCERNED ABOUT HER. HE OPENED THE DOOR. HE WALKED IN. HE DIDN'T INITIALLY SEE ANYTHING. HE WALKED TO THE KITCHEN. THEN TURNED AROUND AND AS HE TURNED AROUND AND STARTED TO WALK BACK OUT OF THE APARTMENT, HE CLAIMED THAT HE SAW MS. RIEDWEG LAYING IN THE FLOOR OF THE HALLWAY TO THE BATHROOM. HE DIDN'T SAY ANYTHING ABOUT HAVING A CIGARETTE IN HIS HAND AT THE TIME. AND IN POINT OF FACT, HE HAD TOLD THE POLICE THAT THAT WAS THE ONLY TIME HE HAD EVER BEEN IN THE APARTMENT. NOW, WITH THE FOOTPRINT, I SUPPOSE THAT WHAT HE SAID, WHAT HE TOLD THE POLICE DOESN'T REALLY EXPLAIN ANY OF THE FOUR THINGS LEFT BEHIND. IT DOESN'T REALLY EXPLAIN THE FOOTPRINT, EXCEPT IN HIS STATEMENT HE INDICATED HE WENT UP TO THE KITCHEN. IT DOESN'T REALLY SAY THAT HE WAS WALKING ABOUT THE KITCHEN, AND THERE IS NO INDICATION THAT HE WAS BAREFOOT. HE HAD TESTIFIED THAT HE WAS WEARING FLIP FLOPS OR HE HAD TOLD THE POLICE HE WAS WEARING FLIP FLOPS, AND SINCE HE TOLD THE POLICE THAT HE HAD NEVER BEEN IN THE APARTMENT ON ANY OTHER OCCASION, THEN, OF COURSE, ANY OTHER TRACE EVIDENCE LEFT IN THE APARTMENT WHICH CONNECTED TO HIM, WOULD TEND TO PROVE HIS IDENTITY.

SO WHERE WOULD THE CASE BE, IF THE JUDGE HAD ALLOWED TO BE PUT ON THAT MR. DESSAURE, THE BOYFRIEND, HAD SMOKED MARIJUANA, AND THAT COULD BE THE POSSIBLE SOURCE OF ASHES?

THAT WOULD TAKE AWAY ONE OF THE STATE'S FOUR THINGS LEFT BEHIND. THERE WOULD STILL BE THE SEMINAL FLUID STAINS. THERE WOULD STILL BE THE FOOTPRINTS.

WHAT EVIDENCE TO WHAT EVIDENCE DO WE HAVE THAT THE ASHES WERE MARIJUANA AS OPPOSED TO CIGARETTES?

THERE WAS NO EVIDENCE AS TO THE ASHES.

THE ASHES WERE NOT COLLECTED?

NO, SIR. THEY WERE MERELY PHOTOGRAPHED AND THAT IS A PART OF MY ARGUMENT, THAT IT WAS PATENTLY UNFAIR, TO ALLOW THE STATE TO ARGUE INFERENTIALLY THAT, SINCE DESSAURE HAD BEEN SEEN SMOKING THAT DAY AND SINCE CINDY RIEDWEG, THERE WAS TESTIMONY THAT SHE DIDN'T ALLOW CIGARETTE SMOKING IN HER APARTMENT, AND THEREFORE, AND SHE --

WHAT WAS THE TESTIMONY AS TO THE AMOUNT THAT WAS ACTUALLY BURNT OFF THE FIRST CIGARETTE?

THERE WASN'T ANY. THERE WAS NEVER ANY --

I MEAN THE MARIJUANA.

THERE WAS NO TESTIMONY PRESENTED. THIS WAS ORALLY PROFFERED IN THE ORAL PROFFER. THEY SIMPLY SAID THAT IT WAS PARTIALLY BURNT. THERE IS NO REAL INDICATION AS TO HOW MUCH ASHES INVOLVED HERE OR HOW MUCH OF THE MARIJUANA CIGARETTE WAS CONSUMED.

GIVEN THE DISTINCT DIFFERENCE IN SMELL BETWEEN MARIJUANA AND CIGARETTES SMOKE, WAS THERE ANY EVIDENCE OF EITHER?

THERE WAS NO EVIDENCE OF EITHER OF THOSE TWO SMELLS. APPARENTLY, THERE WAS EVIDENCE THAT COULD HAVE BEEN PRESENTED, THAT THERE WAS A STRONG ODOR OF INCENSE

IN THE APARTMENT, AND THAT WAS PART OF THE EVIDENCE THAT THE DEFENSE WANTED TO PRESENT, TO SAY THAT THE ASH IN THE SINK COULD HAVE BEEN MARIJUANA ASH LEFT BEHIND BY THE BOYFRIEND, WHEN HE WAS IN THE APARTMENT THE DAY OF THE MURDER, EARLIER.

THAT EVIDENCE DID COME IN WITH REGARD TO THE BOYFRIEND BEING PRESENT, SOMEONE ELSE IN THE APARTMENT THAT DAY, CORRECT?

YES.

DID COME IN BUT DID NOT TOUCH UPON ANYTHING WITH REGARD TO THE USE OF TOBACCO PRODUCTS OR THE USE OF MARIJUANA, IS WHAT YOU ARE SAYING.

RIGHT. THE ONLY EVIDENCE ABOUT SMOKING INSIDE, THE ONLY DIRECT EVIDENCE ABOUT SMOKING INSIDE THE APARTMENT, WAS TESTIMONY FROM THE VICTIM'S GIRLFRIEND, WHO SAID THAT SHE DIDN'T ALLOW ANYBODY TO SMOKE CIGARETTES IN THE APARTMENT.

AT THAT POINT, WAS THERE AN ATTEMPT, THAT IS A LITTLE BIT DIFFERENT THAN THE IDEA OF USING THIS EVIDENCE TO SAY THAT THOSE ASHES WERE LEFT BY A MARIJUANA CIGARETTE, BUT SEEING THAT THERE WAS INCENSE SMELL AND THERE WAS A MARIJUANA CIGARETTE IN THE APARTMENT, WAS THERE AN ATTEMPT TO IMPEACH THE TESTIMONY OF THAT WITNESS AND USE THE, FOR THAT REASON? IN OTHER WORDS, DID YOU TRY TO PROFFER IT FOR IMPEACHMENT THAT SHE DID, IN FACT --

NO, YOUR HONOR. THE DEFENSE WAS OFFERING IT TO REBUT THE ARGUMENT THAT THE STATE WAS BUILDING TOWARDS THE ASH HAD TO HAVE BEEN LEFT BY KENNETH DESSAURE, THAT NOBODY ELSE COULD HAVE LEFT THE ASH THERE.

NOW, YOU SAY THAT THE ASH WAS ONLY SEEN IN A PHOTOGRAPH, AND THERE WAS, IT WAS IN A CUP.

ONE, THE, THERE WERE TWO WITNESSES WHO TESTIFIED. THEY BOTH, ONE TESTIFIED, WELL, HERE IS A PHOTOGRAPH, AND THERE IS SOMETHING IN THE PHOTOGRAPH SHE DIDN'T REALLY EXPLAIN WHERE THE ASH WAS, EXCEPT THAT IT WAS IN THE SINK. THE SECOND WITNESS, SPECIFICALLY SAID THAT THE ASH WAS IN A CUP THAT WAS IN THE SINK.

WAS THE CUP TAKEN AS EVIDENCE FOR FINGERPRINTS?

THERE IS NO INDICATION IN THE RECORD THAT THAT WAS DONE, NO, YOUR HONOR.

SO DID YOU TRY TO KEEP OUT, I GUESS THE QUESTION I HAVE, IS BECAUSE YOU DIDN'T RAISE THIS AS A SEPARATE ISSUE, IS WHY SHOULD, YOU DON'T RAISE AS A SEPARATE ISSUE, THAT MAYBE THE STATE SHOULDN'T HAVE BEEN ABLE TO USE THAT TESTIMONY ABOUT THE ASH TO BEGIN WITH, BEING --

WHEN YOU RAISE THAT AS PART OF THIS OVERALL ISSUE.

OKAY.

DEFENSE COUNSEL DID MOVE IN LIMINE, TO PRECLUDE, BEFORE CLOSING ARGUMENTS, ASKING THE COURT TO PROHIBIT THE STATE FROM ARGUING THAT THE ASHES WERE EVIDENCE OF DESSAURE'S IDENTITY. THE COURT DENIED THE MOTION, AND ALLOWED, AND THEN ALLOWED THE PROSECUTOR TO DO SO.

SO YOU ARE RAISING, AS PART OF THE ISSUE, THAT THE DEFENSE WAS PROHIBITED FROM PUTTING ON EVIDENCE OF ANOTHER SOURCE OF THE ASH, THAT IT WAS ERROR IN THE FIRST

PLACE, TO PUT ON, TO ALLOW THE STATE TO PUT THAT ON AS PART OF PROOF OF IDENTITY.

WELL, I AM NOT ARGUING THAT IT WAS ERROR TO ADMIT EVIDENCE THAT THERE WERE ASHES IN THE SINK. I AM ARGUING THAT IT WAS UNFAIR TO ALLOW THE STATE TO PRESENT ITS CIRCUMSTANTIAL EVIDENCE ABOUT THE ASHES, PROHIBIT THE DEFENSE FROM PUTTING ON THEIR CIRCUMSTANTIAL EVIDENCE ABOUT THE ASHES, AND THEN PERMIT, AND THEN HAVING DONE THAT, PERMIT THE STATE TO ARGUE THE INFERENCE THAT MR. DESSAURE WAS THE ONE WHO LEFT THE ASHES IN THE SINK. IT WAS UNFAIR, BECAUSE HE WAS PRECLUDED FROM PRESENTING EVIDENCE FROM WHICH HE COULD HAVE ARGUED THAT SOMEBODY ELSE LEFT THE ASHES THERE.

IN TERMS OF THE ASHES AND MAYBE COMING PACK TO WHAT JUSTICE QUINCE SAYS, WHEN YOU HAVE HIS, AND I UNDERSTAND THAT, WHERE HARMLESS ERROR IS AND IN JUST SUFFICIENCY OF THE EVIDENCE, AND JUST BEAR WITH ME, BUT WHEN YOU HAVE A FOOTPRINT THAT IS DEFINITELY HIS, AND YOU HAVE GOT SEMINAL FLUID THAT IS, HOW MUCH OF A MATCH WAS IT WITH HIS DNA?

WELL, THERE WERE, THAT, IT WAS LIKE ONE CHANCE OUT OF SEVERAL QUADRILLION OR SOMETHING, THAT IT COULD HAVE MATCHED SOMEBODY ELSE.

THAT WOULD HAVE BEEN HARD TO EXPLAIN. I MEAN, AN ASH LEFT THERE, EVEN THOUGH HE SAYS HE WAS ONLY IN THERE FOR A MOMENT. IF YOU BELIEVE HIS STORY, HE COULD HAVE GOTTEN FLIPPED OUT AND JUST LEFT HIS CIGARETTE OR LEFT THE ASH AND RAN OUT, BUT IT IS PRETTY HARD TO EXPLAIN AWAY THE SEMINAL FLUID. IT JUST SEEMS LIKE YOU HAVE GOT OVERWHELMING CIRCUMSTANTIAL EVIDENCE, AND TO EXPLAIN THE SEMINAL FLUID, IT SEEMS FAIRLY INSIGNIFICANT THAT THE ASH WAS THERE, BUT YOU OBVIOUSLY DISAGREE WITH THAT, BUT COULD YOU ADDRESS THAT AS HARMLESS-ERROR ANALYSIS, AS TO THE FAILURE TO ALLOW YOU TO PUT ON.

WELL, AGAIN, THE QUESTION IS WHETHER THERE IS A REASONABLE POSSIBILITY THAT THE JURORS CONSIDERED THE ASH EVIDENCE AND THE PROSECUTOR'S ARGUMENT ABOUT THE ASH EVIDENCE, IN FINDING DESSAURE GUILTY, AND IF THE JURORS DID, THEN THE ERROR ISN'T HARMLESS, AND GIVEN THE EMPHASIS THAT THE PROSECUTOR PUT ON THE ASH EVIDENCE IN HER CLOSING ARGUMENT, I DON'T THINK THAT THIS COURT CAN FIND THAT IT IS HARMLESS ERROR.

CHIEF JUSTICE: THE MARSHAL HAS REMINDED YOU THAT YOU ARE IN YOUR REBUTTAL, IF YOU WANT TO PAUSE.

THANK, YOUR HONOR.

CHIEF JUSTICE: THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS STEPHEN AKE AND I REPRESENT THE STATE OF FLORIDA IN THIS CASE. WITH REGARD TO THE FIRST ISSUE, I THINK JUSTICE PARIENTE POINTED OUT IN THE VERY BEGINNING, THAT WHAT DISTINGUISHES THIS CASE FROM THE OTHER CASES CITED IN THE BRIEF AND TALKED ABOUT HERE TODAY, IS THAT THE COMMENT THAT THE STATE ATTORNEY MADE IN OPENING STATEMENT, WAS ALMOST A VERBATIM COMMENT ON THE EVIDENCE THAT WOULD COME OUT IN THIS CASE, THROUGH VALDEZ HARDY.

WAS THERE ANY OBJECTION TO THE PRESENTATION OF THAT EVIDENCE?

NOT WHEN VALDEZ HARDY TESTIFIED, THERE WAS NO OBJECTION TO HIS STATEMENT AT THAT POINT IN TIME, BECAUSE BASICALLY IT WAS THE APPELLANT IN THIS CASE TOLD ME THAT BASICALLY ONLY TWO PEOPLE KNOW WHAT HAPPENED, AND THAT WAS HIM AND HER.

REASON THAT I BRING THAT UP IS BECAUSE THERE ARE CASES OUT THERE, OF COURSE, WHERE

THE POLICE OFFICERS ARRIVE AT THE DEFENDANT'S HOME, OR THE SCENE OF THE CRIME OR WHEREVER, AND THE DEFENDANT MAY SAY SOMETHING, YOU KNOW, LIKE, WELL, YOU KNOW, YOU WILL NEVER KNOW WHAT HAPPENED, BECAUSE I AM NOT GOING TO TESTIFY OR I AM NOT GOING TO TELL YOU NOTHING OR WHATEVER. KIND OF THING. AND BOTH THOSE COMMENTS, IN OTHER WORDS, HIS RESPONSE, AND ANY COMMENT ON THAT, ARE, LATER, RULED TO BE INADMISSIBLE AND IMPROPER AS AN IMPROPER COMMENT ON THE RIGHT TO REMAIN SILENT. IT IS A LITTLE DIFFERENT CONTEXT, BUT WHAT I MEAN CONCERNED ABOUT AND, PERHAPS, ASKING TO YOU DISTINGUISH THOSE CASES, FROM THIS CASE, THAT IS THAT JUST BECAUSE THOSE WORDS COME OUT OF HIS MOUTH, DOESN'T MEAN THAT THEY MAY NOT BE INADMISSIBLE AND IMPROPER, TO BE REFERRED TO LATER, BECAUSE OF THE VALUE WE PLACE IN THIS RIGHT TO REMAIN SILENT, SO COULD YOU HELP ME DISTINGUISH --

I THINK IN THOSE CASES HE EXERCISED HIS RIGHT TO REMAIN SILENT BUT THAT WASN'T DONE IN THIS CASE. THE DEFENDANT MADE STATEMENTS TO DETECTIVES AFTER BEING MIRANDIZED, AND HE ALSO MADE COMMENTS TO TWO JAILHOUSE INMATES. SO IT WAS PROPERLY ADMITTED EVIDENCE AND I WOULD SUBMIT THAT THE STATE HAS A RIGHT TO COMMENT ON PROPERLY- ADMITTED EVIDENCE IN HER OPENING STATEMENT.

IT IS CERTAINLY A QUESTION THE PROSECUTOR, I THINK WHEN YOU HAVE THE ASSISTANT ATTORNEY GENERAL DEFENDING THESE CASES, YOU KIND OF LOOK AND SAY, WELL, WOULDN'T IT HAVE BEEN BETTER, IF THE PRECISE WORDS WERE USED, THAT IS YOU WILL HEAR A WITNESS TESTIFY TO THIS. MY ONLY CONCERN IS THAT, ALTHOUGH IN THIS CASE THERE IS THE ACTUAL STATEMENTS, IN THE WAY THAT THEY USED IT, WITHOUT KNOWING ITS CONTEXT, WITHOUT SAYING THAT YOU WILL HEAR A WITNESS TESTIFY, IT DOES, YOU KNOW, THE BEAR STATEMENT DOES LOOK LIKE IT IS A COMMENT ON HIS RIGHT TO REMAIN SILENT, AND THAT IS WHAT CONCERNS ME, SO COULD YOU ADDRESS THAT IT WASN'T, LIKE, SHE USED IT AS YOU WILL HEAR MR. HARDY TESTIFY TODAY.

CORRECT. SHE DID NOT SAY IT THAT WAY. SHE DID SAY THAT YOU WILL HEAR THAT KENNETH DESSAURE SAID THIS. SHE DIDN'T SAY, SPECIFICALLY STATE, THAT HE TOLD ANOTHER WITNESS, VALDEZ HARDY, THAT THIS WAS COMING OUT, BUT, AGAIN, I THINK JUSTICE CANTERO POINTED OUT THAT THERE WAS -- THAT THIS WAS AN OPENING STATEMENT. THE JURY DOESN'T KNOW WHETHER THE DEFENDANT IS GOING TO TESTIFY AT THIS POINT IN TIME, BUT SUBSEQUENTLY HE DOES, IN FACT, NOT TESTIFY, BUT YOU HAD THE STATEMENT --

WHY ISN'T THAT PUTTING EVEN MORE OF A SPOTLIGHT ON IT? THAT IS OF SETTING THIS UP, THAT WHAT I WANT TO CALL YOUR ATTENTION TO NOW, IS THE FACT THAT, REALLY, ONLY TWO PEOPLE KNOW WHAT WENT ON IN THAT APARTMENT, AND THE TWO PEOPLE ARE THE DEFENDANT AND THE DECEASED VICTIM. AND NOW I WANT YOU TO WATCH, DURING THE COURSE OF THIS TRIAL, YOU KNOW, WHAT HAPPENS, SO IT IS LIKE SHINING A SPOTLIGHT ON THE FACT WE KNOW THE VICTIM, OBVIOUSLY.

I THINK IF IT WAS SAID LIKE YOUR HONOR JUST SAID IT, I THINK THAT WOULD HAVE SHINED MORE AFTER SPOTLIGHT ON IF BUT IT WASN'T, AND A -- ON IT, BUT IT WASN'T, AND A LOT OF THE CASES THAT WE CITE IN RODRIGUEZ AND THOSE REFERRING TO CLOSING ARGUMENTS, WHERE THEY GET UP AND SAY YOU DIDN'T HEAR FROM THE DEFENDANT TODAY. I THINK THAT WILL MAKE IT WORSE IN CLOSING ARGUMENT AND THE DEFENDANT DIDN'T TESTIFY, BUT THIS IS OPENING STATEMENT AND THE JURY DIDN'T KNOW HE WASN'T GOING TO TESTIFY AT THIS POINT, AND THE PROSECUTOR IS MAKING THE STATEMENT THAT THIS IS A STATEMENT THAT THE DEFENDANT MADE TO ANOTHER PERSON. SHE IS NOT HIGHLIGHTING THE FACT THAT HE IS NOT GOING TO GET UP IN COURT AND TELL THE JURY WHAT HAPPENED.

LET'S TAKE AWAY THE STATEMENT THAT HE MADE AND HAVE THE SAME THING SAID BY THE PROSECUTOR IN OPENING STATEMENT THAT, IS THAT --

I THINK IT WOULD BE A PROBLEM, IF VALDEZ HARDY DIDN'T COME THERE AND TESTIFY TO THAT STATEMENT. I THINK IT WOULD BE MORE OF A PROBLEM. IT WOULD STILL BE SUBJECT TO HARMLESS ERROR.

YOU SAID THE FACTS AND IN OTHER WORDS IN REALITY, BUT THERE ARE ONLY TWO PEOPLE AND ONE OF THEM IS DEAD, AND SO LET'S TAKE AWAY THE FACT THAT HE MADE THAT OBSERVATION, WHICH ANYBODY COULD HAVE MADE THAT OBSERVATION, YOU KNOW, AS FAR AS IF IT IS A NO-WITNESS CRIME, SO WHAT WOULD BE THE SITUATION THEN?

I THINK YOU ARE TAKING AWAY THE KEY THING. I THINK IT WOULD BE MORE OF A PROBLEM, BUT YOU WOULD STILL BE SUBJECT TO THE HARMLESS-ERROR ANALYSIS, AND I THINK IN THIS CASE YOU HAVE --

WHAT IS THE HARMLESS ERROR TEST?

WELL, WHETHER THIS COMMENT WOULD HAVE AFFECTED THE JURAT ALL OR THE JURY'S VERDICT.

THAT IS HARMLESS? I THOUGHT THE HARMLESS ERROR TEST IS WHETHER THERE IS ANY REASONABLE POSSIBILITY THAT ANY OF THE JURORS WOULD CONSIDER THIS.

RIGHT, AND I WOULD SUBMIT THAT THERE IS NO REASONABLE POSSIBILITY. HERE YOU HAVE THE TRIAL COURT INSTRUCTING THE JURY THAT THE DEFENDANT DOES NOT HAVE ANY BURDEN OF PROOF AND THAT HE GOOD NOT HAVE TO TESTIFY -- THAT HE DOES NOT HAVE TO TESTIFY, SO THE JURY IS PRESUMABLY FOLLOWING THE LAW AND INSTRUCTED ON THAT.

BUT DOES THE COMMENT, AND HOPEFULLY JURORS LISTEN TO WHAT EVERYBODY SAYS AND THEY LISTEN TO WHAT THE PROSECUTOR SAID, AND THEREFORE THEY WOULD LISTEN TO THAT AND GIVE ATTENTION TO IT.

ALSO THE COURT INSTRUCTION WAS THAT THAT OPENING STATEMENT IS NOT THE EVIDENCE THAT THEY ARE TO CONSIDER. THEY ARE JUST ARGUMENTS OF COUNSEL.

BUT DIDN'T THE PROSECUTOR REALLY SAY, I MEAN, WHEN WE LOOK AT THE STATEMENT, DIDN'T THE PROSECUTOR SAY, AS KENNETH SAID HIMSELF, SHE IS ACTUALLY REPEATING --

RIGHT.

-- WHAT THE DEFENDANT, HIMSELF, SAYS, AND DOESN'T THAT MAKE A DIFFERENCE HERE?

I THINK THAT IS THE KEY DIFFERENCE, AND I THINK YOU KNOW, YOU CAN'T ELIMINATE THAT AND TAKE IT OUT AND ELIMINATE THAT KEY DISTINCTION IN THIS CASE THAT, THAT IS EXACTLY WHAT HAPPENED IN THIS CASE.

THE ONLY PROBLEM IS, AND, AGAIN, THIS IS BECAUSE WE ARE TALKING ABOUT THE RIGHT TO REMAIN SILENT AS TO ANY OTHER COMMENT AND THE QUESTION OF WHAT IS BETTER, IN TRYING TO GIVE GUIDANCE FOR THE FUTURE, SHE SAYS YOU ARE GOING TO HEAR, SHE SAYS IN THIS PARTICULAR CASE THAT KENNETH DESSAURE SAID ONLY TWO PEOPLE KNOW WHAT HAPPENED IN THIS APARTMENT, SHE DOESN'T SAY THERE FOR YOU CAN CONSIDER IT HIS ADMISSION THAT HE WAS THERE, BUT SHE SAYS IT IS MY JOB TO TAKE THE PHYSICAL EVIDENCE AND SCIENTIFIC EVIDENCE AND RECONSTRUCT WHAT OCCURRED TO YOU, SO HIGHLIGHTS, SO SAYING THAT IT IS THE CONTEXT OF WHAT SHE SAYS NEXT, THAT CONCERNS ME AS MUCH AS, INSTEAD OF HER SAYING YOU ARE GOING TO HEAR THIS WITNESS SAY THIS AND THIS WITNESS SAY THAT, SO DOES THAT CAUSE YOU ANY CONCERN, IF SOMEBODY THAT IS KNOWLEDGEABLE, HAVING LOOKED AT ALL OF THE CASES THAT, ALTHOUGH WE HAVE THIS DISTINCTION, THAT IT GETS, BECAUSE OF THE

WAY IT WAS STATED, SHE DIDN'T SAY YOU ARE GOING TO HEAR MR. HARDY SAY IT.

RIGHT. AND THE STATE ACKNOWLEDGED IN THE BRIEF THAT THIS COURT DOES APPLY A VERY LIBERAL RULE TOLL ANY COMMENT THAT IS FAIRLY SUSCEPTIBLE OF BEING INTERPRETED AS THAT, AND I CAN SEE WHERE IT IS GIVING THIS COURT CONCERN, BUT I THINK YOU STILL HAVE TO COME BACK TO THE ROOT OF THE STATEMENT IS THAT THIS IS SOMETHING THAT HE SAID TO ANOTHER WITNESS, AND THAT SUBSEQUENTLY CAME OUT AND IT --

BUT ISN'T THE WAY THAT JUSTICE PARIENTE JUST READ THAT --

RIGHT.

-- REALLY, ALMOST, PUTING IN A PARENTHETICAL AFTER THE PROSECUTE ARE ON SAYS THAT. THE PARENTHETICAL IS, OF COURSE YOU ARE NOT GOING TO HEAR FROM THE DEFENDANT, AND THEREFORE I HAVE GOT TO PROVE THIS, YOU KNOW, AND IN THIS OTHER WAY. AM I LIST THING ANY -- LISTENING TO WHAT WAS JUST READ THERE, ISN'T THERE, REALLY, A PARENTHETICAL THERE OF SOMETHING LIKE I JUST SAID THAT, IS IMPLIED IN THAT STATEMENT?

RIGHT. I COULD SEE WHERE THAT COULD BE CONSIDERED FAIRLY SUSCEPTIBLE TO THAT INTERPRETATION BY SOMEBODY, BUT ACTUALLY I JUST THINK THE PROSECUTOR IS JUST INFORMING THE JURY THAT HER ROLE IS TO RECONSTRUCT THE EVIDENCE.

IT IS ONE THING TO RECONSTRUCT IT THERE, TO STATE IT THERE, BUT IT IS ANOTHER THING TO TIE IT TO, AS THE PROSECUTOR SAYS WE DON'T HAVE ANY EYEWITNESSES, PARENTHETICALLY, AND HE IS NOT GOING TO TESTIFY, AND HERE IS THE WAY THAT WE ARE GOING TO HAVE TO PROVE THIS CASE.

RIGHT, BUT I THINK THE COURT ALSO HAS TO REALIZE THAT THE DEFENDANT'S STATEMENTS WERE INTRODUCED IN THIS CASE, BOTH TO VALDEZ HARDY AND TO ANOTHER INMATE AND TO A LAW ENFORCEMENT OFFICER, SO THE DEFENDANT MAKE STATEMENTS THAT WERE INTRODUCED IN THIS CASE.

DO YOU RECALL IF, EITHER IN VOIR DIRE IN OPENING STATEMENTS, EITHER COUNSEL EMPHASIZED TO THE JURY ABOUT THE DEFENDANT'S RIGHT NOT TO TESTIFY?

I KNOW IT WAS COVERED IN VOIR DIRE, AND I DON'T BELIEVE, I DON'T RECOLLECT WHAT THE JUDGE'S INSTRUCTIONS WERE, PRIOR TO TRIAL. I KNOW IN MY BRIEF, I CITED HIS INSTRUCTIONS AT THE CLOSE OF THE EVIDENCE, REGARDING THAT THE DEFENDANT DOESN'T HAVE TO TESTIFY OR ANY BURDEN OR WHAT HAVE YOU, BUT I CAN'T RECALL WHETHER HE DID IT, ALSO, BEFORE. I AM SURE HE GAVE THE STANDARD INSTRUCTIONS AT THE OUTSET, BUT I DON'T RECALL WHETHER THAT WAS PART OF THE STANDARD INSTRUCTIONS AT THAT POINT IN TIME, BUT EVEN IF THE COURT DOES FIND THIS IS AN ERROR, IT IS CLEARLY A HARMLESS ERROR IN THAT CASE. THE COURT IS CLEARLY AWARE THAT THE DEFENDANT'S DNA WAS FOUND. HIS SEMEN STAINS WERE FOUND ON BOTH THE COMFORT OR AND THE HAND TOWEL THAT WAS FOUND IN THE BATHROOM. COUNSEL ALLUDED TO IT. THE STATISTICS OF IT WAS ONE IN 4 QUADRILLION.

YOU AGREE THAT, WHEN WE ADOPT THE HARMLESS ERROR TEST, EVEN THOUGH THERE IS OVERWHELMING EVIDENCE, THAT WHAT WE LOOK AT IS DOES THIS COMMENT HAVE REASONABLE PROBABILITY OF IMPACTING A JURY, SO NOT THAT WE LOOK AT A PART OF WHAT THE EVIDENCE IS, BUT AS WE POINTED OUT WITH MR. HELM, WE HAVE GOT TO LOOK AT IS THERE A REASONABLE POSSIBILITY, AND THAT IS WHY WE HAVE ASKED YOU THE QUESTIONS ABOUT WHETHER THERE WERE INSTRUCTIONS BEFORE AND AFTER AND THAT IS WASN'T EMPHASIZED IN CLOSING, THAT TESTIMONY FROM MR. HARDY CAME IN UNOBJECTED TO. THOSE ALL HELP US TO FRAME OUR ANALYSIS THAT WE WOULD BE, IF WE ONLY EMPHASIZED THE EVIDENCE, WE WOULD NOT BE APPLYING THE HARMLESS ERROR TEST. DO YOU AGREE WITH THAT?

RIGHT. AND I CITED RODRIGUEZ AND HEATH, BOTH OF WHICH ARE IN THE BRIEFS. I THINK HEATH IS THE CLOSEST CASE IN THIS CASE, AND THEY FOUND IT HARMLESS, TOO. HEATH INVOLVED AN OPENING STATEMENT AND COMMENT AND IN OPENING STATEMENT. ALL THE OTHERS INVOLVED COMMENTS IN CLOSING, AND IN ALL THOSE CASES, THIS COURT APPLIED THE HARMLESS-ERROR ANALYSIS AND FOUND IT HARMLESS. BUT --

DO WE HAVE THE DEFENDANT IN THIS CASE, ADMITTED BEING IN THE APARTMENT. IS THAT CORRECT?

CORRECT. HE ADMITTED ENTERING --

WAS THERE A WITNESS, ALSO, THAT SAW HIM AROUND THAT TIME, SMOKE OR SOMETHING?

HE CAME OUT OF THE APARTMENT. HE EXITED THE APARTMENT AND RAN INTO ANOTHER INDIVIDUAL IN THE PARKING LOT. THERE WAS A QUESTION AS TO WHETHER THE INDIVIDUAL SAW HIM RUNNING AND LEAVING, BUT HE SAW HER AND WENT IMMEDIATELY AFTERWARDS AND SAID THERE IS SOMEBODY IN THIS APARTMENT THAT IS DYING AND THE PERSON SAID, WELL, CALL 911, AND THAT IS WHAT HE DID.

TO DISCUSS THIS SECOND ISSUE.

SURE.

THIS IS WHAT CONCERNS ME ABOUT IT AND YOU CAN HELP ME, IF THE FACTS ARE DIFFERENT. YOU DON'T HAVE ACTUAL ASHES TO BRING IN AND SHOW THAT SOMEONE HAD A LOT OF ASHES OR A LITTLE ASHES. IT WAS IN A CUP WHICH APPARENTLY WAS NOT TESTED, TO SEE WHOSE FINGERPRINTS THERE WERE, AND AT THE TIME THE VICTIM'S MARRIED BOYFRIEND WAS IN THE APARTMENT THAT DAY, AND EVEN THOUGH SHE SAID SHE DIDN'T LIKE THE SMOKE OR WOULDN'T HAVE SMOKE IN HER HOUSE, SHE HAS GOT INCENSE AND A LITTLE MARIJUANA CIGARETTE, WHICH THE JURY DOESN'T HEAR ANY OF THAT, AND IF WE WERE TRYING TO SAY THAT THIS PIECE OF EVIDENCE, THAT IS THE ASHES, ARE NOT IMPORTANT, THERE SURE WAS A LOT OF EMPHASIS BY THE PROSECUTOR, SO CAN YOU HELP ME WITH THE RELEVANCE, FIRST, EVER ALLOWING IN THE EVIDENCE, BUT THEN WHY THE DEFENDANT WOULDN'T HAVE A RIGHT TO SHOW ANOTHER POSSIBILITY OF WHERE THE ASHES WOULD HAVE COME FROM.

LET ME CORRECT SOME OF THE FACTUAL SITUATION THAT IS YOU HAD IN YOUR QUESTION ONE, IS DEFENSE COUNSEL SAID THAT HE COULD INTRODUCE EVIDENCE THAT THERE WAS A STRONG SMELL IN IN SENSE IN THE APARTMENT BUT THAT NEVER CAME OUT, AND IN FACT HE TRIED TO ASK A CRIME SCENE TECH ABOUT THAT AND SHE DENIED THAT THERE WAS A STRONG SMELL OF INCENSE, SO WE DON'T KNOW WHETHER THAT WAS TRUE. THAT WAS BROUGHT OUT, IT WAS DEFENSE COUNSEL'S ORAL PROFFER.

THE JUDGE DID NOT PROHIBIT THE DEFENSE FROM PUTTING IN ANYTHING ABOUT A SMELL OF INCENSE.

NO, AND THE JUDGE NEVER PROTECTED THE DEFENSE COUNSEL FROM SAYING THAT THE ASHES COULD HAVE COME FROM CIGARETTES OR FROM THIS INCENSE AND THE JURY KNEW THAT THE BOYFRIEND SMOKED CIGARETTES AND THAT THE VICTIM WOULDN'T LET HIM SMOKE THEM IN HER HOUSE. HE WAS THERE THAT DAY. DEFENSE COUNSEL COULD HAVE ARGUED THESE WERE CIGARETTE ASHES. THE ONLY THING THE TRIAL COURT BROUGHT OUT WAS THAT YOU ARE NOT ALLOWED TO BRING OUT THAT THERE WERE MARIJUANA CIGARETTES THERE FOUND IN A CIGARETTE PACK, AND APPARENTLY ONE OF THEM WAS PARTIALLY SMOKED.

WERE THOSE TESTED FOR FINGERPRINTS?

NO. THEY WERE NOT EVEN TESTED FOR MARIJUANA. WE DON'T KNOW FOR SURE THAT THEY WERE MARIJUANA.

WHY WOULDN'T THE JUDGE HAVE ALLOWED IN EVIDENCE THAT THERE WERE ACTUALLY A CIGARETTE PACK IN THE APARTMENT, AND THAT THERE WERE OTHER SOURCES FOR THOSE ASHES TO HAVE COME FROM, ESPECIALLY WHEN THEY ALLOWED A WITNESS TO TESTIFY THAT SHE WOULD NEVER ALLOW SMOKING IN HER HOUSE?

WHY WOULD THE JUDGE ALLOW THAT IN?

NOT ALLOW IN THE EVIDENCE. WAS THE CIGARETTE PACK, WAS, THAT WAS NOT ALLOWED IN, THE TESTIMONY?

NO. THAT WAS NEVER A PART OF THIS. THEY NEVER SOUGHT TO ARGUE THE CIGARETTES. THE ONLY THING THAT WAS EXCLUDED WAS THE MARIJUANA. THE CIGARETTES WERE ADMISSIBLE EVIDENCE, AS FAR AS --

WHY WASN'T THE MARIJUANA RELEVANT, AND YOU KNOW, LET'S SAY THAT THE, YOU HAVE GOT THE CUP, IF IT WAS IN A CUP, AND YOU HAVE GOT ASHES, AND IN THE SINK, AND HERE ON THE COUNTER, IMMEDIATELY BY THE SINK, WAS THIS MARIJUANA BUTT, IF THAT IS WHAT, I DON'T KNOW WHERE IT WAS, BUT JUST SAYING --

I DON'T KNOW WHERE IT WAS FOUND, EITHER.

OBVIOUSLY IF ASHES WERE RELEVANT, THEN WHY WASN'T A POTENTIAL SOURCE OF THE ASHES RELEVANT?

IT IS BAD CHARACTER EVIDENCE ON THE VICTIM'S BOYFRIEND'S PART AND THAT IS WHAT THE TRIAL JUDGE FOUND, YOU ARE JUST BRINGING THAT UP TO SHOW THAT. THERE WAS NO LINKAGE OF THIS MARIJUANA, OTHER THAN DEFENSE COUNSEL PROFFERED A GOLFING BUDDY THAT SAID OH, YEAH, WHEN WE GOLFED, HE WOULD SOMETIMES SMOKE MARIJUANA, BUT HE DIDN'T KNOW THAT THE BOYFRIEND SMOKED IT THAT DAY OR THERE WAS NO EVIDENCE OF IT BEING SMOKED.

DID HE ATTEMPT TO SHOW THE SOURCE OF THE ASHES, THEN WHY WOULDN'T THAT CLEARLY BE RELEVANT FOR THE JURY TO KNOW ABOUT THAT AND THEN TO CONSIDER, THEN, THE PROSECUTOR'S ARGUMENT THAT --

I THINK THE DEFENDANT'S ASHES WERE RELEVANT AND ADMISSIBLE. IT IS JUST ONLY ONE THAT WAS HELD OUT WAS THE MARIJUANA, WHICH --

EVIDENCE, IT SEEMS TO ME THAT YOU ARE SAYING THAT YOU T PROBABLY IS RELEVANT.

I AM SAYING EXACTLY THE OPPOSITE, YOUR HONOR. I THINK WHAT WAS RELEVANT IS THAT CIGARETTES WERE FOUND IN THE APARTMENT, AND IF THEY HAD EVIDENCE OF INCENSE IN THE APARTMENT, THEY PROBABLY COULD HAVE ARGUED BOTH OF THOSE.

YOU ARE SHIFTING FROM THE MARIJUANA NOW. LET'S JUST GO TO THE MARIJUANA BUTT. GIVE ME YOUR BEST SHOT AS TO WHY THE MARIJUANA BUTT WAS NOT ADMISSIBLE TO SHED FURTHER LIGHT ON A POSSIBLE SOURCE OF THE ASHES IN THE SINK.

WELL, I THINK JUST FOR WHAT THE TRIAL COURT FOUND IN THIS CASE, IS THAT IT WAS SIMPLY BAD CHARACTER EVIDENCE. THE VICTIM'S BOYFRIEND SMOKED MARIJUANA AND MAY HAVE POSSESSED MARIJUANA. THERE WAS NOTHING TO LINK THIS MARIJUANA TO ANYBODY. THE VICTIM DIDN'T HAVE ANY IN HER SYSTEM. JUST BECAUSE SOME WAS FOUND IN HER HOUSE, I MEAN, THE DEFENDANT COULD HAVE LEFT THEM THERE, FOR ALL WE KNOW. ANOTHER

CONCENTRATION WAS ON THE DRUG, AS OPPOSED TO THE CIGARETTE.

RIGHT. IT WAS JUST ON THE FACT THAT THIS IS MORE EVIDENCE, I MEAN, THEY ALREADY GOT INTO THE FACT THAT THE VICTIM'S BOYFRIEND WAS MARRIED AND HAVING THIS AFFAIR WITH THE VICTIM, BUT THEY JUST WANTED TO BRING THIS IN TO SHOW THAT HE WAS A BAD GUY.

COULD, DID THE VICTIM'S BOYFRIEND SMOKE CIGARETTES AS WELL?

CORRECT. YES.

SO THE DEFENDANT COULD HAVE ARGUED THAT THESE ASHES COULD HAVE COME FROM THE BOYFRIEND, BECAUSE HE SMOKES CIGARETTES AS WELL.

RIGHT. HE WAS THERE THAT DAY AND HE WAS THERE HOURS BEFORE THE MURDER, AND HE HAD LEFT TO GO GOLFING, AND THE JURY HAD HEARD EVIDENCE FROM THE VICTIM'S BEST FRIEND THAT THE BOYFRIEND DID SMOKE AND THAT HER HUSBAND, ALSO, SMOKED, AND HE WAS ANOTHER INDIVIDUAL THAT HAD BEEN IN THE APARTMENT RECENTLY. SHE HAD ONLY LIVED THERE TEN DAYS AND THEY HAD ALL HELPED HER MOVE IN, AND SHE WOULD NOT ALLOW ANY OF THEM TO SMOKE INSIDE HER APARTMENT AT THAT TIME.

ARE YOU SAYING THAT, WHERE WAS THE PACK OF CIGARETTES FOUND?

I DON'T KNOW WHERE THEY WERE FOUND, YOUR HONOR.

THERE WAS NOTHING PRECLUDING THE DEFENDANT, THEN, FROM INTRODUCING EVIDENCE THAT THERE WAS A PACK OF CIGARETTES FOUND THAT TWO OF THE CIGARETTES HAD PARTIALLY BURNED.

YES.

EVEN WITHOUT THE MENTION THAT IT WAS MARIJUANA.

IDENTIFIED AS MARIJUANA. CORRECT. THAT WAS ALL PERMISSIBLE.

THEY NEVER TRIED TO INTRODUCE THAT.

NEVER.

AND YOU ARE SAYING THAT YOU WOULD AGREE THAT, IF THEY HAD TRIED TO GET THAT PART IN, THAT THAT WOULD HAVE BEEN RELEVANT.

RIGHT. THERE IS NO, IT IS NOT UNLAWFUL TO POSSESS CIGARETTES. I MEAN, THERE IS NO STIGMA ATTACHED TO POSSESSING THE CIGARETTES. BAD CHARACTER EVIDENCE.

WAS IT A QUESTION WHETHER TWO OF THE CIGARETTES WERE MARIJUANA, OR WAS IT UNCONTESTED THAT THEY WERE MARIJUANA?

IT WAS BROUGHT UP THAT THEY HAD NEVER BEEN TESTED AND IT WASN'T CONCLUSIVE THAT THEY WERE, IN FACT, MARIJUANA, BUT IT WAS SIMPLY EVIDENCE THAT THEY WERE PROBABLY HAND-ROLLED. I HAVEN'T EVEN SEEN THE PICTURE OF THEM, SO I DON'T KNOW WHAT THEY LOOKED LIKE, BUT APPARENTLY ONE OF THEM WAS PARTIALLY SMOKED.

YOU CERTAINLY WOULD AND AGREE THAT, IF THERE WAS EVIDENCE THAT THE DEFENDANT SMOKED MARIJUANA.

WHICH THEY KEPT OUT. THE DEFENSE ATTORNEY SAID THERE IS EVIDENCE THAT MY CLIENT

USED RECREATIONAL DRUGS AND WE WANT TO KEEP THAT OUT, TOO.

SO THAT IS ANOTHER PROBLEM. IT MAY HAVE OPENED THE DOOR.

IT MAY HAVE OPENED THE DOOR FOR THE STATE TO SAY THAT HE WAS SMOKING MARIJUANA IN THE APARTMENT NOT CIGARETTES. YOU HAVE TO KEEP IN MIND THAT HIS FOOTPRINT WAS FOUND IN THE SINK AND HE DENIED EVER BEING IN THE KITCHEN, SO WHEN THE CRIME SCENE EVIDENCE WAS TAKEN, THE PICTURES WERE TAKEN WITH THE ASHES IN THE SINK, THAT WAS ALLOWED IN THEIR CLOSING ARGUMENT, BECAUSE GIVEN THE FOOTPRINT AND THE PUDDLE OF WATER RIGHT THERE IN THE SINK, THE STATE CAN GIVE REASONABLE EVIDENCE THAT ALL OF THE EVIDENCE IS THAT THE DEFENDANT WAS SMOKING PRIOR TO THE MURDER AND AFTER AND HE WAS CHAIN-SMOKING ALL DAY, AND THAT WAS A REASONABLE ARGUMENT TO MAKE.

THE ASHES ARE FOUND NEATLY IN A CUP.

I DON'T KNOW THAT THEY ARE NEATLY IN A CUP, YOUR HONOR. THERE IS A MEASURING CUP.

THEY ARE NOT ALL OVER THE SINK.

AGAIN, I DIDN'T SEE THE PICTURE, YOUR HONOR, SO I DON'T KNOW.

THE PICTURE WASN'T INTRODUCED INTO EVIDENCE?

NO. I THINK THEY JUST INTRODUCED IT AS A COURT EXHIBIT FOR APPELLATE PURPOSES, BUT I DIDN'T GET TO SEE IT WHEN I WENT TO THE STATE ATTORNEYS OFFICE. THIS COURT MAY INDEED HAVE THE PHOTO. I THINK IT WAS EXHIBIT 63, IF I RECALL.

IT WOULD SEEM TO ME THAT IF WE ARE MAKING A BIG DEAL ABOUT WHAT IT REPRESENTS, IF THE DEFENDANT, IF THERE ARE ASHES AROUND THE SINK AND SHE IS A NEAT FREAK, BUT IF THEY ARE NEATLY IN A CUP, BUT NOBODY SOUGHT TO MAKE THAT DISTINCTION NEATLY IN A CUP?

I GOT THE IMPRESSION THAT THEY WEREN'T NEATLY IN A CUP. THERE WAS APPARENTLY A MEASURING CUP IN THE SINK AND THE FIRST CRIME SCENE TECH DIDN'T REALIZE THEY WERE ASHES. HER TAKE WAS IT LOOKED LIKE A GRAINY PICTURE, AND IT COULD BE ASHES.

IF THEY WERE TRYING TO COLLECT THINGS, YOU ARE TELLING ME AGAIN, THAT THE CUP WAS NEVER PRESERVED AND TESTED FOR FINGERPRINTS?

THERE WERE A NUMBER OF ITEMS TESTED FOR FINGERPRINTS, AND I DON'T RECALL WHETHER THAT CUP WAS ONE OF THEM, AND I DON'T THINK IT WAS, BUT NONE OF THEM CAME BACK TO THE DEFENDANT. THE ONLY PRINT IN THE HOUSE WAS HIS FOOTPRINT. THERE WERE OTHER PRINTS AND OF ALL OF THE OTHER PRINTS TAKEN, ONLY 100, ONLY SEVEN OF THEM CAME BACK AND THEY WERE ALL COMING BACK TO THE TABLE AND THE VICTIM'S FRIENDS THAT HELPED HER MOVE TEN DAYS EARLIER.

THE DEFENSE COUNSEL, IN CLOSING, ARGUE THAT THESE ASHES COULD HAVE COME JUST AS WELL FROM THE VICTIM'S BOYFRIEND?

NO. THE DEFENSE COUNSEL DIDN'T ARGUE ANYTHING WITH REGARD TO ASHES, AND IT WASN'T POINTED OUT IN THE STATE'S ARGUMENTS. THIS IS ONE AND A QUARTER PAGE OF THE CLOSING ARGUMENT, WHERE SHE LINKS IN FOUR THINGS, AND THE CIGARETTE ASHES HAPPENED TO BE IN THAT, THAT SHE IS LINKING THE DNA ON THE COMFORTER AND HAND TOWEL AND HIS FOOTPRINT IN FRONT OF THE KITCHEN SINK AND PUDDLE OF WATER AND A SCUFF MARK AND SHE THROWS IN THE ASHES, TOO, TO KIND OF PUT IT ALL IN THE BIG PICTURE, BUT IT WAS NOT HIGHLIGHTED AT ANY LEVEL THAT THESE ASHES WERE THERE. THE STATE HAD OTHER EVIDENCE TO PROVE THAT

THIS APPELLATE WAS IN THE APARTMENT ON THAT DAY AND LEFT BEHIND ITEMS.

HELP ME OUT WITH THE JUDGE'S FINDING ON THE RECORD WAS THE MARIJUANA CIGARETTE APPEARED THAT JUST VERY END OF IT WAS LIT, AND IT DOES NOT APPEAR THAT WHAT WAS IN THE SINK IN ANY WAY CAN BE TIED TO THE SMALL AMOUNT OF MARIJUANA THAT APPEARS TO HAVE BEEN BURNED OFF THE CIGARETTE. THAT WAS THE BASIC COMMENT. SO WHAT WAS THE JUDGE BASING THOSE FINDINGS ON? BASICALLY WHAT IT APPEARS, THE CIGARETTE WAS SO SMALL --

RIGHT. I REMEMBER THAT THEY HAD A DEBATE, BUT THEY DIDN'T, IT CAME ACROSS TO ME THAT THEY DIDN'T EVEN REALIZE THAT THAT IT HAD BEEN BURNT UNTIL IT WAS POINTED OUT THAT, WELL, IT LOOKS LIKE ONE OF THEM HAD BEEN PARTIALLY BURNED. I GOT THE IMPRESSION THAT IT WAS APPARENTLY A VERY SMALL AMOUNT THAT HAD BEEN BURNED OFF THE END.

IT APPEARED THAT THE JUDGE SAID IT WAS NOT ENOUGH TO GET THE AMOUNT OF ASHES IN THE SINK.

THE JUDGE DIDN'T HAVE A PICTURE OF THE ASHES, SO THERE MUST BE A PICTURE IN THE RECORD THAT WOULD SHOW US --

DEFENSE COUNSEL HAD A PICTURE, AND WHEN I WENT TO THE STATE ATTORNEYS OFFICE TO VIEW THE EVIDENCE, I THINK THAT HAD BEEN PLACED WITH THE COURT AND I DIDN'T HAVE ACCESS TO THAT AT THE TIME, SO I HAVEN'T SEEN THAT PICTURE, BUT IT ALL, REALLY, IS NOT THAT RELEVANT, WHEN YOU GET DOWN TO THE FACT THAT THE DEFENDANT ADMITTED TO GOING INTO THE APARTMENT. HIS FOOTPRINT WAS RIGHT THERE NEXT TO THE SINK WHERE THESE ASHES WERE FOUND, AND --

MR. AKE, I JUST WANT, SOMETHING THAT CONCERNS ME, IF WE ARE HERE TRYING TO DECIDE IF SOMETHING IS RELEVANT OR NOT AND YOU SAY THE ASHES ARE FOUND IN A CUP. NOW THERE IS A INDICATION THAT THEY ARE ACTUALLY FOUND IN THE SINK AND THERE IS A PHOTOGRAPH OF THAT AND THE QUANTITY OF ASHES IS WHAT THE TRIAL JUDGE USED TO FURTHER DECIDE, FURTHER REASON THAT THE MARIJUANA CIGARETTE WOULDN'T COME, IN WHERE, YOU ARE NOT ABLE TO HELP US OUT, IF YOU HAVEN'T SEEN THE SAME EVIDENCE THE JUDGE SAW.

ASHES WERE IN A CUP IN THE SINK, IS WHERE THE CUP WAS AT AND THAT IS WHERE THE ASHES WERE, AND APPARENTLY IT WAS MORE THAN WHAT WAS BURNED OFF THE END OF THIS MARIJUANA CIGARETTE APPARENTLY. THERE IS NO SCIENTIFIC TESTING TO ESTABLISH WHAT KIND OF ASHES THEY WERE AND HOW MUCH QUANTITY WE ARE TALK ABOUT, BUT IT IS REALLY, THE POINT IS IT DOESN'T MATTER. DEFENSE COUNSEL HAD EVERY CHANCE TO REBUT THIS EVIDENCE WITH PERMISSIBLE ADMITTED EVIDENCE THAT HE HAD AVAILABLE. HE COULD HAVE ARGUED THAT THESE WERE CIGARETTE ASHES FROM THE VICTIM'S BOYFRIEND. HE SMOKED CIGARETTES AND HE WAS THERE. THAT WAS A PERMISSIBLE ARGUMENT, AND APPARENTLY HE HAD EVIDENCE OF INCENSE BEING BURNED IN THE APARTMENT AND HE COULD HAVE PRESENTED THAT EVIDENCE, TOO, SO DEFENSE COUNSEL WASN'T PROHIBITED FROM REBUTTING THE STATE'S THEORY IN HER CLOSING ARGUMENT, ALBEIT BRIEF HARKS THAT SHE MENTIONED THESE ASHES, AND SO I DON'T BELIEVE THAT THERE COULD BE ANY KIND OF FINDING THAT THIS WAS HARMFUL TO EXCLUDE THIS EVIDENCE. IF THERE ARE NO FURTHER QUESTIONS, THE STATE WILL RELY ON ITS BRIEF. CAN

CHIEF JUSTICE: THANK YOU VERY MUCH. MR. MARSHAL, HOW MUCH TIME LEFT? COUNSEL.

JUSTICE PARIENTE, I BELIEVE THE STATE'S EXHIBIT 63 IS THE PHOTOGRAPH IN QUESTION, AND THAT IT WAS ADMITTED INTO EVIDENCE. IT SHOULD BE IN THE COURT'S EVIDENCE FILE. IF YOU WANT TO EXAMINE THE PHOTOGRAPH, AND SEE WHETHER THAT AFFECTS YOUR JUDGMENT ON THE CASE.

WHAT ABOUT THE MARIJUANA CIGARETTE? WHAT DO WE HAVE TO KNOW WHAT THE JUDGE HAD TO LOOK AT, WHEN THE JUDGE SAID --

I DON'T THINK THAT WAS EVER INTRODUCED INTO EVIDENCE IN ANY WAY. I, AS FAR AS I KNOW, THERE IS NOT GOING TO BE ANYTHING FOR YOU TO LOOK AT, WITH REGARD TO THAT.

WAS THERE AN EXHIBIT? I MEAN, IS THERE A PHOTOGRAPH?

WELL, APPARENTLY, THE, APPARENTLY THE MARIJUANA CIGARETTES HAD BEEN SEIZED INTO EVIDENCE BY THE POLICE, BUT THEY WERE NEVER ACTUALLY INTRODUCED INTO EVIDENCE.

BUT THE JUDGE MUST HAVE SEEN IT.

YES.

SO I GUESS DON'T WE HAVE A FAILURE OF THE RECORD, UNLESS THE DEFENSE HAD ASKED TO BE IDENTIFIED AS A COURT EXHIBIT, IT SEEMS THAT THE JUDGE MAKES A DETERMINATION THAT THE QUANTITY OF THE ASH COULDN'T POSSIBLY HAVE BEEN LEFT BY THE CIGARETTE, AND WE DON'T HAVE IT, WE ARE NOT ABLE TO REALLY REVIEW THE JUDGE'S FINDING OR AN ABUSE OF DISCRETION, IF WE DON'T HAVE THE COMPARISON. WOULD YOU AGREE WITH THAT? IN OTHER WORDS HOW WOULD YOU COUNTER WHAT WAS SAID THAT JUSTICE BELL READ TO YOU?

YOUR HONOR, I AM SORRY. I MEAN, I WASN'T TRIAL COUNSEL. EYE UNDERSTAND THAT, BUT --

THERE ISN'T AN EXHIBIT, AS FAR AS THE MARIJUANA IS CONCERNED THERE, ISN'T AN EXHIBIT TO LOOK AT, AS FAR AS I KNOW. THAT IS ALL I CAN TELL YOU.

HOW WAS THIS EVIDENCE ATTEMPTED TO BE INTRODUCED? WAS IT THROUGH THE TESTIMONY OF THE POLICE OFFICER WHO HAD PICKED UP THIS EVIDENCE?

YOUR HONOR, WE DON'T REALLY KNOW, BECAUSE DEFENSE COUNSEL MADE AN ORAL PROFFER TO THE EFFECT THAT HE COULD PRESENT EVIDENCE OF A HEAVY SMELL OF INCENSE IN THE APARTMENT. THERE, THE STATE HAD ORIGINALLY MOVED IN LIMINE AT THE BEGINNING OF THE TRIAL BEFORE JURY SELECTION, TO EXCLUDE THE EVIDENCE OF THE MARIJUANA CIGARETTES. THE STATE HAD POSSESSION OF THE MARIJUANA CIGARETTES NOT THE DEFENSE. THE STATE WANTED THEM EXCLUDED, AND THE DEFENSE COUNSEL ORIGINALLY WENT ALONG WITH THAT. I THINK IT WAS ONLY AFTER HE SAW WHERE THE STATE WAS GOING WITH THE ASH EVIDENCE IN THE SINK, THAT HE BECAME CONCERNED AND SAID, WELL, BUT THERE IS CIRCUMSTANTIAL EVIDENCE OF AN ALTERNATIVE SOURCE OF THOSE ASHES, AND HE ASKED THE COURT TO BE ALLOWED TO INTRODUCE THAT EVIDENCE, AND THE COURT SAID HE COULDN'T.

DO YOU DISAGREE WITH THE STATE'S CHARACTERIZATION THAT THERE WAS AVAILABLE EVIDENCE OF CIGARETTES, NOT MARIJUANA BUT CIGARETTE EVIDENCE AVAILABLE AND EVIDENCE THAT THE BOYFRIEND HAD BEEN THERE, SO THAT THIS COULD HAVE BEEN UTILIZED BY THE DEFENSE, OR DO YOU CHARACTERIZE IT THAT THE DEFENSE WAS TOTALLY PRECLUDED FROM ANY EVIDENCE LIKE THAT?

WELL, YOUR HONOR, THE STATE HAD PUT ON VERY CLEAR EVIDENCE THAT THE VICTIM DID NOT ALLOW HER BOYFRIEND TO SMOKE TOBACCO CIGARETTES IN HER APARTMENT.

OKAY. THAT STILL DOESN'T ANSWER THE QUESTION. WAS THERE EVIDENCE THAT A CIGARETTE PACK WAS FOUND?

I WILL TAKE MR. AKE'S WORD FOR IT. I DON'T RECALL.

AND WAS THERE EVIDENCE THAT THE VICTIM'S BOYFRIEND SMOKED CIGARETTES?

YES. AND EVIDENCE THAT CINDY RIEDWEG SPECIFICALLY PROHIBITED HIM FROM SMOKING HIS CIGARETTES IN HER APARTMENT.

BUT GIVEN THAT THERE WAS EVIDENCE THAT THERE WAS A CIGARETTE PACK IN THE APARTMENT AND EVIDENCE THAT HER BOYFRIEND SMOKED CIGARETTES, COULDN'T THE DEFENSE COUNSEL HAVE ARGUED THAT IT WAS THE BOYFRIEND'S CIGARETTE PACK AND THAT THOSE WERE HIS ASHES IN THE SINK?

WELL, THERE WOULD HAVE BEEN, AGAIN, ALL OF THIS IS PURE SPECULATION.

I UNDERSTAND. YOU WEREN'T PRECLUDED FROM MAKING THAT ARGUMENT IS WHAT I AM SAYING OR WERE YOU?

IT WAS NEVER DISCUSSED.

DID THE EVIDENCE OF THE PACK OF CIGARETTES COME OUT, DURING THE TRIAL?

NO, SIR.

SO THAT EVIDENCE WAS NOT THERE, SO YOU COULDN'T MAKE AN ARGUMENT TO THE JURY, BASED ON EVIDENCE THAT WASN'T IN THE RECORD. IS THAT CORRECT?

CORRECT.

CHIEF JUSTICE: THANK YOU VERY MUCH. THANK YOU, BOTH, VERY MUCH. WE ARE GOING TO TAKE OUR REGULAR MORNING RECESS OF 15 MINUTES. BEFORE WE DO, HOWEVER, THE COURT WOULD LIKE TO WELCOME THE PAGES FROM THE FLORIDA SENATE THAT HAVE BEEN PRESENT DURING THE PREVIOUS ORAL ARGUMENT. WE APPRECIATE YOUR PUBLIC SERVICE, AND WE WELCOME YOU TO THE FLORIDA SUPREME COURT. WITH THAT, WE WILL TAKE OUR RECESS. WE WILL BE IN RECESS FOR APPROXIMATELY 15 MINUTES.

MARSHAL: PLEASE RISE.