03-1765

CHIEF JUSTICE: THE NEXT CASE ON THE COURT'S DOCKET IS BEBER VERSUS STATE. ,,

GOOD MORNING , JUDGES, COUNSEL. I AM DEE BALL REPRESENTING RICK BEBER, WHICH IS QUITE A CHANGE FOR THE AUDIENCE. THE DEFENDANT WAS CONVICTEDIN THE TRIAL COURT OF BREVARD COUNTY OF TWO COUNTS OF SEXUAL BATTERY, THAT IS A SENTENCE WHICH CARRIES A LIFE SENTENCE ON EACH COUNT.

WOULD YOU ADDRESS THE JURISDICTION.

YES , JUDGE, I BELIEVETHAT THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THIS CASE IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION INS IN THE STATE VERSUS MOORE AND DECISION INS THE STATEVERSUS MOORE AND STATE V GREEN CASE .

WE DIDN'T HAVE A RECANTATION IN GREEN .

RIGHT.

IN THIS CASE THERE IS NONE.

I SUBMIT THAT THERE IS A RECANTATION , JUDGE. YOU HAVE AT LEAST A RETRENCHMENT, A SUBSTANTIAL RETRENCHMENT FROM THE CHILD'S PRETRIAL STATEMENTS AT TRIAL.

IN MOORE WAS THERE A PRIOR INCONSISTENT STATEMENT IN MOORE?

JUDGE , MOORE WAS A MURDER CASE, WHERE TWO WITNESSES TESTIFIED TO A GRAND JURY , THAT THE DEFENDANT WAS IN FACT , GUILTY , DIRECTLY GUILTY OF THE MURDER , BEFORE TRIAL , AND AT TRIAL, BOTH WITNESSES RECANTED. SAID THAT THEY HAD LIED AT THE GRAND JURY. THE CASE WENT T O A JURY, IN SPITE OF THE FACT THAT THOSE TWO WITNESSES , WHO WERE THE ONLY POSSIBLE POTENTIAL EYEWITNESSES , CAME IN AND SAID, NO, I T NEVER HAPPENED. THE CASE WENT TO THE JURY, ALTHOUGH THE STATE IN MOORE , ADMITTED THAT IT DIDN'T HAVE ANY EVIDENCE OTHER THAN HEARSAY , THE CASE WENT TO THE JURY. MR . MOORE WAS FOUND GUILTY OF THE MURDER. THIS COURT ULTIMATELY HELD , AFTER A SERIES OF APPEALS THAT, THE HEARSAY ALONE , SIMPLY COULD NOT SUPPORT A GUILTY CONVICTION.

THAT WAS NOT UNDER 803.23. MOORE WAS ANOTHER PROVISIONOF THE HEARSAY CODE, RIGHT?

CORRECT, JUDGE , PRIOR INCONSISTENT TESTIMONY. YES, JUDGE .

I KNOW GREEN TALKS ABOUT IT , BUT WOULD YOU ADDRESSTHE IDEA UNDER THE CHILD HEARSAY EXCEPTION , IS THAT A PRIOR STATEMENT OUT OF COURT , IS NOT LIKE A PRIOR INCONSISTENT STATEMENT T COMES IN A S SUBSTANTIVE EVIDENCE. DO YOU AGREE WITH THAT , THATIS WHAT WE HAVE SAID IN THE PAST, THAT THAT EXCEPTION ALLOWS SOMETHING TO COME IN AS DIRECT SUBSTANTIVE EVIDENCE?

YES , JUDGE, THAT IS WHAT THIS COURT HELD I N GREEN , AND I BELIEVE THAT WAS CLEARLY THE LEGISLATURE'S INTENT IN 93.023.

IF WE HAVE GOT HERE THE UNSWORN STATEMENT TO THE CHILD PROTECTION TEAM, WHICHIS THE ONLY EVIDENCE IN THE RECORD OF THE FELL AARON YO , CORRECT?

CORRECT .

AND HE DIDN'T TELL THE MOTHER, TALKED ABOUT THEMOTHER, WHICH MENTIONS THE MOUTH ON THE PENIS, WHICHGETS HIM LIFE.IS THAT CORRECT?

YES, JUDGE.

WHY , IF WE HAVE SAID THAT COMES IN AS SUBSTANTIVE EVIDENCE, AS LONG AS THE PERSON WHO HAS MADE THESTATEMENT , THE CHILD , IS AVAILABLE TO TESTIFY , WHY ISN'T THAT JUST AS MUCH, THEN IT COMES IN AS SUBSTANTIVE EVIDENCE, AS OPPOSED TO A PRIOR INCONSISTENT STATEMENT? I A M HAVING TROUBLE , I MEAN, I REALIZE GREEN , IT SEEMED LIKE GREEN ACKNOWLEDGED THAT , BUT THEN JUST SAID, WELL, IT IS SUBSTANTIVE EVIDENCE BUT IT IS REALLY NOT THE KIND OF SUBSTANTIVE EVIDENCE WE ARE GOING TO, YOU KNOW, WE AREGOING TO LOOK AT THE TOTALITY OF THE CIRCUMSTANCES IN DECIDING IT,WHICH IS A LITTLE DIFFERENT THAN A PRIOR INCONSISTENT STATEMENT IS NOT SUBSTANTIVE EVIDENCE.

CORRECT, JUDGE. GREEN IS THE CASE WE RELY ON IN THIS CASE, BECAUSE WHAT THIS COURT HELD ESSENTIALLY IN MOORE AND IN GREEN IS THAT A SINGLE HEARSAY STATEMENT IS NOT GOOD ENOUGH , UNDER THE DUE PROCESS CLAUSE, TO SUPPORT A CONVICTION, EVEN THOUGH IN GREEN THE OUT OF COURT STATEMENT WAS ADMISSIBLE AS SUBSTANTIVE EVIDENCE, GIVEN THE FACT THAT IT WAS COMPLETELY RECANTED AT TRIAL, THAT WAS SIMPLY NOT GOOD ENOUGH FOR ANY RATIONAL FINDER OF FACT , TO FIND THE DEFENDANT GUILTY.

IT WASN'T A PER SE RULE . AGAIN , I REREAD MB, GREEN, MOORE , CRAWFORD VERSUS WASHINGTON, IN TRYING TO FIGURE OUT WHAT THE CORRECT ANALYTICAL FRAMEWORK IS, AND IT SEEMS LIKE IT IS NOT JUST PER SE STATEMENT THAT, IF IT IS OUT OF COURT BUT IT IS , THAT IT IS , THERE FOR CAN'T SUPPORT, IT THAT SOMEHOW GREEN USED A TOTALITY OF THE CIRCUMSTANCES TO DECIDE THERE WOULD BE A DUE PROCESS VIOLATION IN ALLOWING JUST THAT ONE OUT OF COURTSTATEMENT TO STAND T O CONVICT THE PERSON . WITHOUT ANY CORROBORATING EVIDENCE.

THAT IS THE KEY , JUDGE , THERE WAS NO CORROBORATING EVIDENCE OF THE IDENTITY O F THE PERPETRATOR IN GREEN, AND HERE THERE IS ZERO , ABSOLUTELY ZIP , CORROBORATING EVIDENCE OF THE FELLACIO .

NOW, WE START OUT WITH AT LEAST , FOR MY BENEFIT, WITH A SIMPLE FORMULA, AND THEN I WOULD ASK YOU TO DEMONSTRATE IF WE SHOULD VARY FROM THE SIMPLE FORMULA. OKAY. ORDINARILY , WHEN THIS KIND OF ISSUE ADDRESSED AND A MOTION FOR THE DESCRIBE OF A FOR THE ENTRY OF A JUDGMENT OF ACQUITTAL , AND THE TRIAL COURT HAS TO LOOK, THEN , AND SEE WHETHER OR NOT THERE IS COMPETENT SUBSTANTIAL EVIDENCE , ONEWAY OF PHRASING IT, IN ORDER FOR THIS CASE TO GO TO A JURY , SO THAT IF A JURY DID END UP WITH A VERDICT OF GUILTY, THAT THAT WOULD BE SUSTAINABLE . NOW, HERE , OR IN THAT EXERCISE, THE JUDGE LOOSE , AND IF HE FINDS COMPETENT EVIDENCE , ORDINARILY HE WOULD DENY THAT MOTION , AND THE JURY WOULD BE ENTITLED TO DECIDE WHAT THEY DECIDE. OKAY. AND SO IF THI S EVIDENCE IS ADMISSIBLE AS SUBSTANTIVE EVIDENCE , THEN WHY ISN'T IT ENOUGH, THEN, TO ALLOW THEJURY TO DO WHAT THE JURY DID HERE? THAT IS THERE HAS BEEN THE SUBMISSION IN THE FORM OF THESE OUT OF COURT STATEMENTS , WHICH WE HAVE HELD TO BE ADMISSIBLE AS SUBSTANTIVE EVIDENCE , AND SO WHY ISN'T THAT , WHY SHOULDN'T THAT NORMAL FORMULA , APPLY? THERE IS EVIDENCE IN THE RECORD T O SUPPORT THESE CONVICTIONS AGAINST YOUR CLIENT? NOW , WHY SHOULDN'T WE DEVIATE FROM THAT ORDINARILY NARY THAT ORDINARY EXERCISE?

THE NORMAL FORMULA SHOULDN'T ONLY APPLY IN A CASE LIKE THIS ONE OR IN A CASE LIKE GREEN, WHERE YOUHAVE GOT THE OUT OF COURT STATEMENT COMPLETELY RECANTED OR COMPLETELY RETEFERJD.

WHY DON'T YOU STOP RIGHT THERE AND TELL US WHAT THE RECORD SHOWS, BECAUSE WE HAVE GOT THESE SEVERAL CASES THAT PRESENT SEVERAL DIFFERENT FACTUAL SITUATIONS, OKAY , AND YOU HAVE BEEN CHARACTERIZING THE CHILD'S TESTIMONY AT TRIAL AS A COMPLETE RECANTATION . NOW , OBVIOUSLY ON A SCALE , WE HAVE OVER HERE AT ONE END, SOMEBODY HAVING SAID SOMETHING BEFORE COURT , AND THEN THEY COME INTO COURT AND THEY SAY THAT WAS ABSOLUTELY WRONG. I DIDN'T TELL THE TRUTH. HERE IS WHY I DANTE TELL THE TRUTH. I DIDN'T TELL THE TRUTH I COMPLETELY RECANT AND HERE IS REALLY WHAT HAPPENED , AND IT DOESN'T INVOLVE THIS DEFENDANT AT ALL , WHATEVER,I AM TRYING TO, YOU KNOW, A SCENARIO WHERE EVERYBODY WOULD PROBABLY AGREE, THAT IS A COMPLETE RECANTATION. ALL RIGHT.

YES, JUDGE.

AND THEN WE GO, YOU KNOW , WAY OVER HERE AND, MAYBE , HAD WHEN QUESTIONS ARE BEING ASKED , THEY JUST ANSWER THEM IN A DIFFERENT WAY. OR SOMETHING. YOU KNOW, AND THEN OF COURSE WE HAVE ALL THESE THINGS IN THE MIDDLE . ALL RIGHT . THIS DOESN'T LOOK LIKE THIS THING WAY OVER HERE, DOES IT? IN THIS CASE, IT WASN'T ONE OF THESE THINGS , WHERE THE PERSON SAID, WELL , YEAH, IDID SAY THAT OUT OF COURT , BUT THAT I S COMPLETELY WRONG , SO WE DON'T HAVE THE EXTREMEOF A COMPLETE RECANTATION, DO WE?

NO , JUDGE. YOU DON'T HAVE A FORMAL RECANTATION AS YOU HAD IN THE MOORE CASE. WHAT YOU HAVE HERE , IS A CHILD BEFORE TRIAL , CONFRONTED BY HIS MOTHER ABOUT SOME SEXUALLY EXPLICIT JOTINGS HE HAD MADE AT THE AGE OF SIX. CONFRONTED ABOUT THEM , SHE SAYS WHAT HAPPENED. HOW DID YOU LEARN THIS? HOW DO YOU KNOW THIS? HE SAID THERE WAS, HE SAID THAT HIS GRANDMOTHER 'S BOYFRIEND HAD TOUCHED HIM , HAD FONDLED HIM , DIGITALLY HAD SEXUALLY INTERFERED WITH HIM. THEN WE HAVE GOT ONLY A SECOND OUT OF COURTSTATEMENT.IT IS A VIDEOTAPED CHILD PROTECTION TEAM INTERVIEW , WHERE YOU HAVE GOT THE INTERVIEWER ASKING , AGAIN ABOUT, THESE ALLEGATIONS. THE CHILD REPEATS THEM. THE INTERVIEWER ASKS DID HE TOUCH , DID THE , YOUR GRANDMOTHER'S BOYFRIEND TOUCH YOU WITH ANYTHING ELSE? I DON'T KNOW. DID HE TOUCH YOU WITH HIS PENIS?NO. DID HE TOUCH YOU WITH HIS MOUTH ? OH, YES, HE PUT MY PRIVATE IN HIS MOUTH, THEN ONCE WE GET TO COURT, WE HAVE GOT THE SAME QUESTIONING STARTING AGAIN, WHAT DID HE TOUCH YOU WITH, THE CHILD REPEATS THE LESSER CHARGE, THE DIGITAL CHARGES. ASKED THE CHILD DID HE EVER TOUCH YOUR PRIVATE WITH ANYTHING BESIDES HIS HAND? THE CHILD SAYS I DON'T KNOW. THEN ON CROSS DEFENSE COUNSEL FOLLOWS UP, DETOUCH YOU WITH ANYTHING ELSE? NO.

WAS THERE ALSO A DEPOSITION? DID HE GIVE A DEPOSITION?

YES, JUDGE , AND THEDEPOSITION WAS NOT PUT IN THE RECORD ON APPEAL, BUT THE RECORD INDICATES , AND THE FIFTH DCA CONCLUDED, A THAT IN THE DEPOSITION , THE CHILD, AGAIN, DID NOT COME UP WITH THE DIGITAL ALLEGATION. BUT , AGAIN AT CROSS

THE LEGAL ANALYSIS , NOW , WOULD BE DIFFERENT, IF IN THE DEPOSITION, HE HAD ALSO TESTIFIED ABOUT THE FELLACIO?

PRESUMABLY THAT WOULD HAVE COME IN A T TRIAL AND WE MIGHT HAVE A DIFFERENT SETOF FACTS BEFORE THE COURT , BUT , AGAIN , JUDGES , WE HAVE GOT

BEFORE YOU LEAVE THAT, IF, IN FACT, IT WAS JUST A DEPOSITION, AS OPPOSED TO A STATEMENT WITHOUT CROSS-EXAMINATION , WE HAVE A DIFFERENT QUESTION HERE? BECAUSE AREN'T THESE

THINGS REALLY INVOLVING THE CONFRONTATION CLAUSE? AND IF, IN FACT , IT WAS A DEPOSITION AND THE DEFENSE ATTORNEY WAS THERE TO EXAMINE THE WITNESS DURING THE COURSE OF THE DEPOSITION , ISN'T THAT A DIFFERENT SCENARIO FROM A STATEMENT TAKEN FROM A WITNESS PROTECTION TEAM, WHEN THERE IS NO DEFENSE ATTORNEY THERE TO CROSS-EXAMINE THE WITNESS?

WELL , NOT NECESSARILY , JUDGE , BECAUSE AS THIS COURT HELD IN EITHER MOORE OR GREEN , I BELIEVE GREEN, A DISCOVERY DEPOSITION CAN'T COME IN AS SUBSTANTIVE EVIDENCE, BECAUSE DEFENSE COUNSEL DOESN'T HAVE THE MOTIVATION TO REALLY ATTACK THE WITNESS. A LOT OF TIMES AS A MATTER OF STRATEGY , YOU ARE GOINGTO HAVE JUST A DOZEN JENT H E WILL DISCOVERY JUST A GENTLE DISCOVERY PROCESS , GETTING AS MUCH OUT BEFORE TRIAL AS POSSIBLE.

ON A DEPOSITION WHERE A PERSON I S CHARGED WITH VARIOUS COUNTS OF SEXUAL ASSAULT , INCLUDING CAPITAL SEXUAL BATTERY , THE DEFENSEATTORNEY WOULD NOT HAVE A MOTIVE TO QUESTION THE PROSECUTING WITNESS ABOUT ALLEGATIONS THAT WOULD SUPPORT CAPITAL SEXUAL BATTERY?

JUDGE, AGAIN , AS A MATTER OF DISCOVERY STRATEGY, YOU MIGHT HAVE A VERY SOFT APPROACH IN THE DEPOSITION, TO CONTRAST LATER WITH A RATHER DIFFERENT APPROACH AT TRIAL.

IT SOUNDS LIKE A FRIENDLY QUESTION TO ME , BUT THAT JUSTICE QUINCE IS SAYING WHAT YOU HAVE IN THIS CASE IS AN OUT-OF-COURT CONFRONTATION SITUATION , WHERE THE LAWYER DOES HAVE THIS OPPORTUNITY TO CROSS-EXAMINE. ARE WE CORRECT HERE?

CORRECT, JUDGE , CORRECT. CORRECT , JUDGE. THANK YOU.

I AM TRYING TO GET TO THE BOTTOM OF THIS , WITH A RECENT SUPREME COURT CASE THAT WE ARE TALKING ABOUT , ARE THERE IMPLICATIONS BASED ON THAT DECISION?ARE YOU FAMILIAR WITH THAT CASE?

YES . CRAWFORD VERSUS WASHINGTON , DETERMINED BY THE U.S. SUPREME COURT.

WHAT DO YOU BELIEVE THAT THAT CASE HAS ON OUR PREVIOUS CASE LAW , AND THE ISSUE THAT WE ARE ADDRESSING HERE? THAT IS APPARENTLY I N THIS CASE THERE IS A LACK CONFRONTATION PROTECTION INVOLVED WITH THIS PARTICULAR EVIDENCE , OTHER THAN THE IN -COURT INQUIRY , WHICH WE ARE TALKING ABOUT, WHICH DOES NOT PRODUCE A REPEAT OF THESE STATEMENTS?

CORRECT, JUDGE. CRAWFORD, I DO NOT BELIEVE , DIRECTLY IS GOING TO AFFECT THE OUTCOME OF THIS CASE. IN CRAWFORD, ONE OF THE COURT'S MORE DIRECT HOLDINGS , ALTHOUGH IN A FOOTNOTE, IN FOOTNOTE NINE BUT IT IS A DIRECT HOLDING THAT THE SUPREME COURT SAID , WHERE THE DECLARANT APPEARS FOR CROSS-EXAMINATION BEFORE TRIAL, THE CROSS-EXAMINATION PLACES NO CONSTRAINTS ON HIS PRIOR USE OF PROSECUTORIAL STATEMENTS, SO I CAN'T ARGUE THAT ALL OF HIS CONVICTIONS SHOULD BE THROWN OUT BASED ON CRAWFORD TODAY , SINCE THE CHILD DID APPEAR , BUT

THE CONFRONTATION, THERE IS NO OBJECTION ON THE BASIS OF CONFRONTATION CLAUSE?

NOT IN THIS CASE , JUDGE. WE DID GET OUR CONFRONTATION AT TRIAL.

LET M E GO BACK TO SOMETHING.WE HAVE GOT 803.23, UNLIKE THE OTHER STATUTE THAT DEALSWITH PRIOR INCONSISTENT STATEMENTS , AGAIN , 803.23 , ALLOWS THE DPT, THE STATEMENT TO THE CPT , THE STATEMENT TO THE CPT WORKTORY COME IN AS SUBSTANTIVE

EVIDENCE. HOWEVER , WE ARE NOW SAYING IT COMES IN AS SUBSTANTIVE EVIDENCE, BUT SOMETIMES IT IS NOT REALLY GOOD SUBSTANTIVE EVIDENCE, AND I AM HAVING , I WANT YOU TO HELP ME WITH THE FRAMEWORK , THAT COMES OUT OF MOORE , GREEN , AND M B , THAT WOULD ALLOW US T O APPLY TO OTHER CASES , WHICH , AND SO COULD YOU HELP ME WITH WHAT WOULD YOU SAY THE HOLDINGS SHOULD BE? IS IT A CASE BY CASE SITUATION, OR IS IT THAT DESPITE 803.23 BEING ALLOWED , THAT TESTIMONY OF A CHILD TO A MOTHER OR A FATHER OR A CHILD PROTECTION TEAMWORK ER COMING IN UNDER 803.23 , WE ARE STILL NOT GOING TO ALLOW THAT IN AS SOLE EVIDENCE OF THE CONVICTION, AS A MATTER OF DUE PROCESS. IS THAT , SHOULD THAT BE THE HOLDING OR IS IT A CASE, THAT IS WHERE I WAS GETTING EARLIER , IS IT A CASE-BY-CASE BASIS?

I THINK IT IS GOING TO BE CASE BY CASE DETERMINATION S THAT WILL COME UP IN OTHER CASES.

BUT WHAT FACTORS, THEN , ARE LOOKED AT? WHAT WOULD BE THE FACTORS? WHAT WOULD YOU SAY? GREEN WE WERE LOOKING AT AND SAYING IS I T IS MENTALLY RETARDED CHILD AND SO FORTH . WHAT ARE THE FACTORS THAT YOU SAY WOULD GO INTO THE CASE BY CASE DETERMINATION AS TO WHY SOME SUBSTANTIVEEVIDENCE IS BETTER THAN OTHERS?

JUDGE, I THINK THE RULE. THE GENERAL RULE SHOULD BE, JUST AS IT WAS IN GREEN, WHERE YOU HAVE GOT A FAILURE TO COME UP WITH EVIDENCE ON CROSS, WHERE YOU HAVE GOT CONFRONT EVIDENCE IN FRONT OF THE JURY , WHERE THE ALLEGATION ISN'T REPEATED , WHERE THE ALLEGATIONS WERE RETREFERJD FROM , AND YOUHAVE GOT ZERO CORROBORATION , THEN THE SUBSTANTIVE ISN'T GOOD ENOUGH.

ON THE OTHER HAND, SAY SOMEBODY CONFESSED , THEY CONFESSED OUT OF COURT. IN COURT THEY SAY, NO , I DIDN'T DO IT. WE WOULD SAY THAT CONFESSION IS SUBSTANTIVE EVIDENCE THAT YOU DID THE CRIME. I AM HAVING TROUBLE, FRANKLY , WITH 803.23, BUT WE HAVE ALREADY UPHELD IT AS CONSTITUTION AL , I THINK IT IS , I THINK THERE I S SOME REAL DUE PROCESS CONCERNS, AND I THINK THIS CASE SHOWS IT, BUT IN TERMS OF HOW YOU ACTUALLY APPLY I T O N , YOU KNOW, THIS CASE, TO SAY IT IS SUBTANT I HAVE EVIDENCE BUT IT IS REALLY SUBSTANTIVE EVIDENCE BUT IT IS REALLY NOT, YOU HAVEN'T HELPED ME SOLVE THAT PROBLEM.

THERE IS A SERIES OF DCACASES WHICH SHOW THE CONTINUUM . THERE IS A CASE FROM THE THIRD DISCUSSED IN THE BRIEFS CALLED WILLIAMS. THAT IS A DOMESTIC BATTERY CASE. YOU HAVE GOT THE WIFE AND A SON , SAYING , BEFORE TRIAL , DADDY HIT MOMMY. AT TRIAL, YOU HAVE GOT THEM SAYING, NO , THAT NEVER HAPPENED N ADDITION YOU HAVEGOT THE TRIAL AT TRIAL SAYING , NEW YORK CITY I WASN'T EVEN UPSET AT THE TIME.

THAT IS NOT SEXUAL .

BUT THE CORROBORATION IN THAT CASE WAS EXCELLENT, BECAUSE IT WAS A 911 TAPE WITH THE CHILD CRYING ON I T AND THERE WERE PHOTOGRAPHSOF THE INJURIES , SO IN THAT CASE CLEARLY IT DOESN'T MATTER THAT THERE WAS NO REPETITION OF THE ACCUSATION AT TRIAL. YOU HAVE GOT GOOD CORROBORATING EVIDENCE.

CHIEF JUSTICE: THE MARSHAL HAS REMINDED YOU THAT YOU ARE IN YOUR REBUTTAL TIME, IF YOU WANT TO PAUSE AND SAVE SOME OF THAT TIME ICHLT PAUSE. THANK YOU, JUDGE.

- - TIME.

I WILL PAUSE. THANK YOU, JUDGE.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS KELLIE NIELAN ANDI AM HERE ON BEHALF OF THESTATE OF FLORIDA IN THIS CASE .

CAN'T W E DISTILL FROM MOORE AND GREEN , THE GENERAL PROPOSITION THAT AN UNSWORN OUT OF COURT STATEMENT , NOT SUBJECT TO CROSS-EXAMINE , CANNOT BE ALLOWED A S SUBSTANTIVE EVIDENCE , TO CONVICT THE DEFENDANT OF A CRIME?

NO , YOUR HONOR , I BELIEVE THAT, IN MB , THIS COURT CAME FORWARD AND SAID THAT A PRIOR INCONSISTENT STATEMENT , CHILD HEARSAY , IS

BEFORE WE GET TO MB , LET'S , WE CAN DISCUSS WHAT MB DID, BUT AS TO MOORE AND GREEN , IS MY STATEMENT CORRECT OR INCORRECT?

WELL , IN MOORE, IT WAS SOLELY A PRIOR INCONSISTENT STATEMENT. SO AS TO MOORE, YES, IT IS CORRECT.IN GREEN, THERE WAS CHILD HEARSAY THAT WAS ADMITTED, AND THE COURT SAID THAT CHILD HEARSAY , AND IN THAT CASE, IT WAS A TOTALLY PRIOR INCONSISTENT STATEMENT. WHAT I WOULD LIKE TO SHOW AS BEING ONE , THAT THIS WAS NOT AN INCONSISTENT STATEMENT.

WOULD YOU SAY WHAT THE HOLDING IS OF GREEN.

IT CAN'T STAND ALONE , UNLESS THERE IS CORROBORATING EVIDENCE.

SO IN MB , DIDN'T WE DISTINGUISH MOORE AND GREEN ON, THE BASIS THAT THOSE WERE CRIMINAL CASES, ANDTHEY IMPLICATED THE CONFRONTATION CLAUSE , AND , ALSO, A DEFENDANT'S , A CRIMINAL DEFENDANT'S DUEPROCESS RIGHTS , CIRCUMSTANCES THAT WERE NOTPRESENT IN MB? WEREN'T THOSE THE BASIS THAT MB USED, T O DISTINGUISH GREEN MOORE?

ACTUALLY, WHEN THE COURT DISTINGUISHED GREEN AND MOORE, A RULING IN GREEN AND MOORE WERE PRIMARILY CONCERNED WITH THE MINIMUM STANDARD OF EVIDENCE REQUIRED TO SUSTAIN A CONVICTION AND THE POTENTIAL MISCARRIAGE OF JUSTICE, WHEN THAT EVIDENCE , WHEN THATSTANDARD DOES N OT OCCUR. THEY, ALSO

WE WERE ALSO CONCERNEDABOUT THE CONSTITUTIONAL RIGHTS O F THE ACCUSED IN A CRIMINAL PROCEEDING. THESE CONCERNS ARE NOT PRESENT IN THESE DEPENDENCY PROCEEDINGS. SO DOESN'T THAT CORROBORATEWHAT I JUST ASKED?

RIGHT. I UNDERSTAND THAT. BUT THE FACT OF THE MATTER , THERE IS TWO INTERRELATED ISSUES MERE. FIRST IS THE ISSUES HERE. FIRST IS THE ADMISSIBLE SUBSTANTIVE EVIDENCE.

WE ANSWERED THAT QUESTION IN MOORE AND GREEN , IT SEEMSTO ME.

IT IS CLEARLY ADMISSIBLE OF THE EVEN IN MOORE IT IS ADMISSIBLE. IN GREEN , EXCUSE ME, IN BOTH CASES IT WAS ADMISSIBLE.

IT IS NOT ADMISS IBLE , STANDING ALONE TO CONVICT , IT IS ADMISSIBLE , BUT IT ALONE, UNDER 803.23, IS NOT , WILL NOT SUSTAIN A CONVICTION , UNLESS THERE IS OTHER CORROBORATING EVIDENCE TO SUSTAIN THAT CONVICTION.

THAT WAS THIS COURT'SLANGUAGE IN GREEN. HOWEVER , WHAT THIS COURT'SCONCERN WAS IN GREEN , WAS THAT THERE MUST BE MINIMUM STANDARDS. THE COURT HAS TO HAVE CONFIDENCE THAT AN INNOCENT PERSON WASN'T CONVICTED.

WELL , AND HERE , NOW , WE TALK ABOUT WHAT IS , HE IS NOW GOING TO SPEND THE REST OF HIS LIFE IN PRISON FOR HAVING COMMITTED FELLACIO , CORRECT?

CORRECT.

IF IT WAS, IF HE TOUCHED THE CHILD'S PENIS, THEN WHAT IS THE MAXIMUM SENTENCE?

I BELIEVE HE HAS 60 YEARSIN PRISON FOR THE OTHER OFFENSES FOR WHICH HE WAS CONVICTED .

SPENDING A LONG TIME , BUT IT IS SIGNIFICANT , STILL , I GUESS , 60 VERSUS LIFE , MAYBE , STILL WE ARE TALKING ABOUT CAPITAL SEXUAL BATTERY , CORRECT?

CORRECT.

OKAY . NOW , THE ONLY EVIDENCE OF THE FELLACIO WAS THE TESTIMONY , NOT THE TESTIMONY , THE STATEMENT, IT WASN'T EVEN A SPONTANEOUS STATEMENT, THE CPT, UNSWORN TESTIMONY, CORRECT?

THAT'S CORRECT.

THE MOTHER DOESN'T SAY IT TO THE MOTHER.

CORRECT.

H E DOESN'T SAY IT IN HIS DEPOSITION. AND HE DOESN'T SAY IT AT TRIAL. NOT ABOUT THE SPECIFIC THING THAT CHANGES THIS FROM BEING A CRIME OF LEWD AND LASCIVIOUS T O CAPITAL SEXUAL BATTERY .

WELL , YOUR HONOR, FIRST, IF I COULD, I WOULD LIKE T O CLEAR UP THE DEPOSITION DISPUTE HERE. THE FIFTH DISTRICT COURT OF APPEAL SAID THAT , IN THE DEPOSITION, THE CHILD APPARENTLY, ALSO , SAID THAT BEBER TOUCHED HIS PRIVATE ONLY WITH HIS HANDS. I CANNOT FEIGNED THAT REFLECTED ANYWHERE IN THIS RECORD. THE DEPOSITION IS NOT IN THERECORD. THE DEPOSITION WAS USED IN CROSS-EXAMINATION OF THE CHILD , AND ALL I CAN FIND IS THERE WAS A DISPUTE AS TO HOW MANY TIMES HE TOUCHED THE CHILD'S PRIVATE PART .

ASSUMING THAT THE STATEWOULD HAVE, IF IT WAS FAVORABLE , EVIDENCE TO THE STATE, THE STATE WOULD HAVE INTRODUCED IT AT SOME POINT .

I DON'T BELIEVE THE STATECOULD HAVE INTRODUCED T THE DISCOVERY DEPOSITION CANNOT BE INTRODUCED AS SUBSTANTIVE TESTIMONY.

AS TO REHABILITATE , I MEAN, TO REHABILITATE THE YOUNG BOY?

WELL , THE PROSECUTOR HERE , AT ONE POINT

PRIOR INCONSISTENT STATEMENT?

AT ONE POINT WHERE THE DEFENSE COUNSEL IS TRYING TO USE THE DEPOSITION TO IMPEACH THE CHILD , PROSECUTOR SAYS , YOUR HONOR , I HAVE PUT AN OBJECTION DOWN TO READING PIECEMEAL, THE DEPOSITION TRANSCRIPT. AT SOME POINT

LET'S TAKE IT THAT THESAFETY THE RECORD WE DON'T KNOW WHAT WAS SAID IN THE DEPOSITION. THE ONLY TIME THAT THIS CHILD SAYS IT IS NOT EVEN A SPONTANEOUS STATEMENT, WHICH IS ONE OF THE INDICIA O F RELIABILITY UNDER 803.23 , BUT IN BEING QUESTIONED AND SPECIFICALLY A LEADING QUESTION BY THE CHILD PROTECTION TEAMWORK ER. THAT IS , WELL , WAS I T WITH , YOU KNOW , ANYTHING ELSE? HOW ABOUT THE MOUTH? AND THAT IS THE ONLY EVIDENCE OF THE FELLACIO , CORRECT?

CORRECT. BUT THE CHILD DID GO ON TO DESCRIBE ALL THE CIRCUMSTANCES UNDER WHICH IT OCCURRED, TOO. IT WASN'T SIMPLY DID HE EVER TOUCH YOU WITH HIS MOUTH? YES , AND THEN

THEY MOVED O THE CHILD EXPLAINED THAT IT HAPPENED IN THE BEDROOM AND HE ALSO EXPLAINED HOW IT HAPPENED IN THE LIVING ROOM .

AND DEFENSE COUNSEL AT TRIAL , EVER CHALLENGE THAT SPECIFIC STATEMENT OF THE CHILD?

NO.

DID HE EVER SAY , NOW , IN THAT VIDEO YOU TELL THE CPT WORKER THAT HE TOUCHED YOU WITH HIS MOUTH. DID H E EVER CHALLENGE HIM , I DON'T KNOW FRONT HIM WITH THAT SPECIFIC CONFRONT HIM WITH THAT SPECIFIC STATEMENT?

NO , HE DOES NOT.

BUT WE HAVE GOT STATE V GREEN OUT THERE, THAT SAYS THAT 803.23, STANDING ALONE, CANNOT BE USED TO CONVICTSOMEBODY OF A CRIME.

IF IT IS A PRIOR INCONSISTENT STATEMENT , ANDI DON'T THINK THAT THIS IS A PRIOR INCONSISTENT STATEMENTIN THIS CASE. AND IF YOU WILL ALLOW ME, I WOULD LIKE TO GO THROUGHEACH OF THE STATEMENTS THAT THE CHILD MADE.

LET ME ASK YOU THIS , BECAUSE IT SEEMS TO ME THE ONLY REASON WE ARE HERE, IF WE HAVE JURISDICTION AT ALL, IS BECAUSE OF THE DISTRICT COURT'S STATEMENT IN ITS OPINION, THAT , IN MB , W E RECEDED FROM GREEN ANDMOORE.

CORRECT .

CAN YOU EXPLAIN TO ME WHERE , IN MB , WE REVEEDED FROM GREEN AND MOORE?

I DON'T THINK THE COURT DID RECEDE FROM GREEN AND MOORE IN MB. IT ADDED TO MB. INTERPRETED IN A CRIMINAL CONTEXT , THAT CHILD HEARSAY STATEMENTS ARE ADMISSIBLE IN A CRIMINAL PROCEEDING A S SUBSTANTIVE EVIDENCE, JUST AS THEY ARE IN CIVILPROCEEDINGS , AND THIS COURT HAS NEVER DRAWN A DISTINCTION BETWEEN THE ADMISSIBILITY OF EVIDENCE IN THE TWO SEPARATE PROCEEDINGS, AND I THINK IT JUST RELIED UPON MB, WELL, IT SAID THAT IT DID EXTEND IT. I DON'T THINK IN THEORY THAT MB DID EXTEND GREEN , TO SAY THAT IT COULD

SO THE WHOLE BASIS OF THE DCA OPINION IS WRONG. I MEAN, ISN'T THAT THE HOUSEOF CARDS THAT THE OPINION IS BASED ON , THAT GREEN AND MOORE NO LONGER APPLYTLARNTION FOR THE ENTIRE ANALYSIS IS BASED ON THAT PREMISE , IF THAT PREMISE FALSE, THEN SO DOES THE IF THAT PREMISE FALLS, THEN SO DOES THE DCA EVIDENCE.

THIS IS NOT EVIDENCE ANALYSIS. THIS IS ADMISSIBLE IT Y ANALYSIS.

BUT BEBER SAYS THAT THEDEFENSE ON APPEAL SAYS THE CHILD'S TESTIMONY WAS INCONSISTENT WITH HIS TESTIMONY ON VIDEOTAPE AND TENDED TO REFUTE AND THE TAPE STANDING ALONE PROVIDES A LEGALLY INSUFFICIENT BASISUPON WHICH TO CONVICT BEBER UPON SEXUAL BATTERY . THE STATE CITES GREEN ANDMOORE AS CONTROLLING PRECEDENT AND THEY GO THROUGH WHAT IT IS BUT SAY , HOWEVER , THE DEPARTMENT IN MB , RECEDED FROM GREEN AND MOORE, SO GOING BACK AT THEVERY LEAST , WE HAVE TO ACCEPT THE PREMISE THAT THE FIFTH DISTRICT PRESUMED THIS WAS A PRIOR INCONSISTENT STATEMENT, BUT BECAUSE WE HAD RECEDED FROM GREEN ANDMOORE , THAT THEY DIDN'T NEED TO DEAL WITH THOSE CASES.

WELL , THIS COURT HAS DE NOVO REVIEW OVER THIS CASE , SO I DON'T THINK THIS COURT HAS TO ASSUME THAT IT IS A PRIOR INCONSISTENT STATEMENT.

YOU WOULD BE HAPPY IF WE WROTE A DECISION THAT SAID, NO , GREEN AND MOORE ARE STILL GOOD BUT HERE THAT WASN'T A PRIOR INCONSISTENT STATEMENT.

CORRECT.

NOW I GUESS YOU WANTED TO TELL US WHY IT IS NOT A PRIOR INCONSISTENT STATEMENT.

CORRECT. OKAY. IN THE CHILD'S INTERVIEW WITH THE CHILD PROTECTION PERSON , SHE ASKS HIM , SOMEWHERE AROUND TEN TIMES, HE TOUCHED YOUR PRIVATE WITH HIS HAND. EXCUSE ME. THIS IS ON PAGE 370 OF THE RECORD. CHILD NODS HIS HEAD. DID HE EVER TOUCH HISPRIVATE WITH SOMETHING ELSE? CHILD HUH-UH. BESIDE HIS HAND? NOT HIS MOUTH OR HIS PRIVATE? WAIT. YEAH. HE PUT MY PRIVATE IN HISMOUTH. SO FIRST CHILD, DID HE EVER TOUCH YOU WITH ANYTHING ELSE? THE CHILD SAYS HUH-UH. LATER ON IN THAT INTERVIEW , THE CHILD SAYS HE PUT HIS MOUTH ON M Y PRIVATE. WHEN I FOLD HIM - - WHEN I TOLD HIM NO, HE DID IT ANYWAY.

BEFORE YOU MOVE BEYOND THAT, THE VERY NEXT STATEMENT HE SAYS HE DID, IN FACT, PUT HIS MOUTH ON HISPRIVATE , SO WHAT ARE WE SUPPOSED TO DO WITH THAT , AND , REALLY , YOU ARE SAYING THIS IS NOT IN CONSISTS EN.

CORRECT.

OKAY. SO HE SAID HUH-UH, AND THEN AT TRIAL HE SAYS HUH-UH, BUT THEN IN THE STATEMENT H E SAYS , HE PUT HIS MOUTH ON HIS PENIS . BUT THEN AT TRIAL HE SAYS HE NEVER , H E ONLY TOUCHED HIM WITH HIS HAND.

NO. THE CHILD DID NOT SAY HE ONLY TOUCHED HIM WITH HIS HAND. THE CHILD ASKED

WE ARE TALKING SEMANTICS HERE, BUT WHEN HE IS ASKEDIF HE TOUCHED HIM WITH ANYTHING ELSE , HE SAYS NO , AND ARE YOU SURE, AND HE SAYS NO. ISN'T THAT WHAT HAPPENS AT TRIAL?

AND THAT IS THE EXACT SAME THING THAT HAPPENED WHEN HE WAS BEING INTERVIEWED BY MS. HANSON.

EXCEPT FOR THE FACT HE SAID, NO, WAIT.

NO. DID HE EVER TOUCH HIS PRIVATE WITH SOMETHING ELSE? HUH-UH .

PART OF THE PROBLEM THAT YOU ARE ASKING US TO ADDRESS NOW , HOWEVER , IS, REALLY , NOT OUR PROPER FUNCTION. THAT IS WE ARE NOT HERE A S ANOTHER COURT OF APPEAL , TO REVIEW WHETHER OR NOT THE DISTRICT COURT GOT IT RIGHT IN THEIR CHARACTERIZATION OF THE CHILD'S TESTIMONY AT TRIAL AS BEING I N CONFLICT WITH WHAT THE CHILD MADE IN THE STATEMENT. WE ARE HERE TO ADDRESS THE LEGAL ISSUES THAT THE DISTRICT COURT OF APPEAL ADDRESS ED , AND ORDINARILY WE ACCEPT THEIR EVALUATION OF THE EVIDENCE THAT HAS COME BEFORE , SO HELP US WITH THAT PROPOSITION. LET'S MOVE ON FROM THAT FOR A MOMENT, AT LEAST , AND LET'S ACCEPT THAT THE DISTRICT COURT CHARACTERIZED THE TESTIMONY AT TRIAL , AS NOT CORROBORATING AND NOT BEING THE SAME AS THE STATEMENT , AND THAT IT CONFLICTS WITH THE STATEMENT , BECAUSE THE STATEMENT , IN THE DISTRICT COURT OF APPEAL 'S READING , DOES SAY THAT HE PUT HIS MOUTH ON THE CHILD'S PENIS , AND AT TRIAL , HE SAYS HE TOUCHED ME WITH HIS HANDSOR WHATEVER , AND THAT THE DISTRICT COURT CHARACTERIZES THAT AS CONFLICTING WITH THESTATEMENT. LET'S ACCEPT THAT CHARACTERIZATION . WHY DOESN'T THAT JUST TAKE US TO GREEN , AND IN GREEN WE HELD, THEN , THAT THAT OUT O F COURT STATEMENT STANDING ALONE , WAS NOT ENOUGH TO SUSTAIN THESE CONVICTIONS THAT WILL RESULT IN THIS PERSON 'S SPENDING THE REST OF HIS LIFE IN PRISON. DOESN'T GREEN , YOU HAVE SAID WE HAVE NOT RECEDED FROM GREEN , SO DOESN'T GREEN NOT MANDATE THAT WE SET ASIDE THESE TWO CONVICTIONS?

NO. I DON'T BELIEVE IT DOES.

WHY NOT?

I THINK GREEN I S CONFINED TO ITS FACTS. AND IN THAT CASE , THERE WAS A TOTAL RECANTATION BY THE CHILD WITNESS. THE CHILD TOLD , I BELIEVE IT WAS HER SISTER AND HER SISTER-IN-LAW, THAT THE MOTHER'S BOYFRIEND HAD ABUSED HER AND ALSO TOLD A CHILD PROTECTION PERSON. THE CHILD GETS TO TRIAL AND SAYS, NO , I WAS ABUSED BUT OR I HAVE HAD SEX WITH A LOT OF MEN AND THIS MAN NEVER DID ANYTHING TO ME.

SO THE CHILD IN THIS CASE, WOULD HAVE TO SAY NOT ONLY DID HE NOT TOUCH ME WITH HIS MOUTH BUT HE NEVER TOUCHEDME WITH HIS HANDS , HE NEVER SHOWED ME THE PICTURES, HE NEVER DID ANY OF THE THINGS I SAID IN THE PRIOR STATEMENT, IN ORDER TO MAKE IT A RECANTATION , I MEAN , YOU CAN'T RECANT PART OF THE STATEMENT AND NOT ALL OF THE STATEMENT?

IS THAT WHAT THESTATEMENT? IS THAT WHAT YOU ARE TELLINGUS?

NO. AGAIN, SORRY , JUSTICE ANSTEAD , BUT I REALLY DON'T THINK THE CHILD EVER RECANTED THE FACT THAT , BUT

I A M SAYING LET'S ASSUME THAT HE DID PART OF IT. WHAT WE HAVE DISCUSSEDCONCERNING THE MOUTH , HE RECANTED OR AT LEAST IS IN CONFLICT. ARE YOU TELLING US THAT ALL OF IT HAS TO BE IN CON FLIBLINGT, OR RECANTED ? IN CONFLICT OR RECANTED , ALL OF HIS STATEMENT , IN ORDER FOR GREEN TO APPLY?

INNINGS , YES , BECAUSE THAT ALSO COMES DOWN TO THE SECOND FACTOR IN GREEN , IS THERE CORROBORATION , AND THEFACT THAT THIS CHILD WAS VERY CONSISTENT THAT THIS OTHER SEXUAL ACTIVITY OCCURRED

AND SO WHAT WE END UP WITH UNDER THAT SCENARIO , SEEMS TO ME IS THAT, BECAUSE A DEFENDANT , IN FACT , DID SOMETHING ELSE , W E PRESUMEHE DID THE OTHER THING.

NO. YOU PRESUMED THAT THE CHILD'S STATEMENT WAS RELIABLE , WHEN HE SAID THAT THIS MAN DID SOMETHING TO HIM.

DO WE KNOW IN THIS CASE , WHETHER THE CHILD WAS SHOWN HIS PREVIOUS VIDEOTAPE !!ED INTERVIEW, BEFORE HE TESTIFIED AT TRIAL HERE?

I DON'T KNOW , YOUR HONOR.

SO THAT, I MEAN , THAT WASN'T, WE DON'T KNOW THAT ON THIS RECORD.

NO , WE DON'T.

DON'T WE , REALLY , THOUGH , HAVE A CHILD THAT IS NOW SEVERAL YEARS OLDER AND WHO , PRESUMABLY , WOULD B E A MORE MATURE WITNESS, NOW, AT TRIAL , A S COMPARED T O AT THIS ORIGINAL INTERVIEW ? AND I AM CONCERNED ABOUT THAT. THAT IS THAT NOW WE HAVE A CHILD THAT IS SEVERAL YEARS OLDER , TESTIFYING AT TRIAL. IT SEEMS LIKE IT WOULD BE SURPRISING, IF THE CHILD WASN'T AWARE OF THE EVIDENCE THAT HE HAD PREVIOUSLY GIVEN TO THE STATE , BEFORE GOING TO TESTIFY HERE , BECAUSE THE CHILD , LIKE ANY OTHER WITNESS , IS TOLD THAT HE IS GOING TO BE A WITNESS , YOU KNOW , TO TALK ABOUT THIS, BUT THAT DESPITE ALL THAT , BEING MORE MATURE AND THAT, HE DOES NOT, THEN , ARTICULATE THIS EVIDENCE AGAINST THE DEFENDANT THAT HE DID IN THE OUT O F COURT STATEMENT.

DOESN'T THAT CONCERN YOU AS A REPRESENTATIVE OF THE STATE?

NO , IT DOESN'T , YOURHONOR , BECAUSE THIS CHILD WAS ALL OF EIGHT YEARS OLDAS OPPOSED TO SIX YEARS OLD , AT THE TIME THAT HE TESTIFIED. THE CHILD IS ALSO HAVING TO GET UP AND TESTIFY IN FRONT OF THE DEFENDANT, IN FRONTOF A COURTROOM OF PEOPLE , ABOUT SEXUAL ABUSE, WHICH IS GOING TO MAKE SOMEONE OF ADULT MATURITY UNCOMFORTABLE , AND THIS IS AN EIGHT-YEAR-OLD CHILD WHO IS GETTING UP AND HAVING TO DOTHIS. ALSO I BELIEVE THE TIME FRAME , THE CHILD PROTECTION INTERVIEW WAS GIVEN I N JUNE OF '01 AND THE TRIAL WAS IN JUNE OF '02 , SO IT WAS A YEAR'S DIFFERENCE BETWEENTHE TWO.

NOW, IN THIS CASE YOU HAD THE FULL PRETRIAL NOTICE AND CREDIBILITY , RELIABILITY , TRUSTWORTHINESS TEST AND HEARING UNDER 803.23 , CORRECT?

CORRECT.

DID, THAT WAS NOT PRESENT UNDER MOORE OR GREEN. CORRECT?

IT WAS NOT PRESENT UNDER MOORE.

GREEN WAS 802 , 801.2-A, WHICH IS JUST A PRIOR INCONSISTENT STATEMENT. THERE WAS NO PRETRIAL DETERMINED.

NO. I BELIEVE GREEN WAS 803.23. MOORE WAS THE PRIOR INCONSISTENT STATEMENTS. THAT WAS GRAND JURY TESTIMONY.

GREEN IS THE ONE WE ARE DEALING W ITH.

CORRECT .

CORRECT AND ANOTHER ONE INTRODUCED TO THIS COURT WAS ANDERSON, BUT THAT WAS

GREEN INTRODUCED THE RECANTATION.

CORRECT. I WOULD SAY CORROBORATION, TOO , SINCE IT WAS A TOTAL RECANTATION, WE DO HAVE SOME CORROBORATION HERE WHICH WE DO HAVE IN GREEN .

NOW WE ARE GOING BACK TO HOW DOES THIS COURT FEEL UNDER DUE PROCESS OF LAW , WHICH IS WHAT GREEN WASABOUT AND WHAT WE SAID MB WASN'T ABOUT , WHICH M B WASPROBABLY A STRONGER CASE , BECAUSE YOU SAID, NO , IT NEVER HAPPENED AT ALL. YOU SAID THAT IS A MORE CREDIBLE RECANTATION . FRANKLY I THINK IT IS A LESS CREDIBLE ONE, BECAUSE IT IS LOGICAL SOMETHING HAPPENED, BUT THE QUESTION IS HAPPENED, AND IT IS ALL THE DIFFERENCE BETWEEN WHETHER A CAPITAL SEXUAL BATTERY AND A LEWD AND LASCIVIOUS, IT IS A TOTALLY DIFFERENT CRIME , AND I AM , YOU KNOW, T O ME , WE ARE GOING TO LOOK AT IT, THEFACT THAT THE ONLY TIME THAT THIS, IN THIS RECORD, THAT THIS CHILD AT SIX YEARS OLD, MENTIONED THAT THERE WAS MOUTH-TO-PENIS CONTACT, WAS IN AN INTERVIEW WHEREQUESTIONS WERE ASKED AND ANSWERS WERE GIVEN, THAT THE TIME THAT HE , WHEN HE TOLD HIS PARENTS WHAT HAPPENED , HE SAID HE HAD LEARNED ABOUT IT FROM , WHO HAD TAUGHT HIM THIS STUFF, HE REVEALED HE HAD LEARNED THE SEX , ABOUT SEX FROM BEBER. BEBER HAD TOUCHED HIS PRIVATE, AND THAT IS ALL THAT HE TOLD HIS PARENTS. NOT H E PUT HIS MOUTH ON MY PRIVATE , WHICH IS NOT EXACTLY A VERY DIFFICULT STATEMENT TO MAKE IF YOU ARETALKING ABOUT HE TOUCHED MY PRIVATE , AND THAT, TO ME , YOU ARE TALKING ABOUT TWO DIFFERENT CRIMES, AND HE DOES NOT VERIFY IN ANY WAY , THAT THAT CRIME OCCURRED, UNDER OATH , AT ANY TIME IN THE COURSE OF THESE PROCEEDINGS , AT TRIAL , AND WE DON'T KNOW WHAT HAPPENED AT DEPOSITION. BUT WE CAN ONLY PRESUME WHAT IS IN THE RECORD , THAT HE, ALSO, IN DEPOSITION , DID NOT MENTION THE MOUTH , AND YOU ARE SAYING

THAT, THAT THAT IS NOT A RECANTATION . IT I S THE ESSENTIAL ELEMENT FOR THE CRIME OF CAPITAL SEXUAL BATTERY IS MISSING, AND HE IS TESTIFYING INCONSISTENT LY WITH THAT AT TRIAL , AND I A M NOT SURE I AM UNDERSTANDING HOW YOU CAN SAY THAT THAT IS A , THAT I S JUST , IT IS CORROBORATION, BECAUSE HE SAID OTHER SEXUAL THINGS HAPPENED .

IT CORROBORATES THE RELIABILITY OF THE STATEMENT.

TO ME I GUESS IT IS REALLY A QUESTION OF HOW YOU LOOK AT IT. I MEAN, IF HE HAD SAID , BEBER DIDN'T DO IT , AND EVERYTHING POINTED TO THAT BEBER DID IT, THAT IS NOW ONE THING. I COULD SAY THAT IS NOT VERY RELIABLE, BECAUSE EVERYTHING POINTED TO IT WAS BEENER THAT DID IT , BUT SAYING THA T IT IS WHAT DID BEBER DO I S THE ESSENCE , I MEAN , WHETHER , WAS IT LEWD AND LASCIVIOUS , WAS I T SEXUAL INTERCOURSE? WAS IT FELLACIO ? THAT THAT IS THE ESSENCE OF THE CAPITAL , THAT IS THE CRIME THAT WE ARE LOOKING AT.

RIGHT. AND THIS SIX-YEAR-OLD CHILDSAID HE PUT MY PRIVATE IN HIS MOUTH. THAT IS NOT A STATEMENT THAT MOST SIX-YEAR-OLD CHILDREN ARE GOING T O POP-UP WITH , OUT OF THE BLUE. I MEAN , EVEN , YES , HE TOUCHED MY PRIVATE. A CHILD MIGHT SAY THAT, BUT GOING THE EXTRA EXTENT AND SAYING IT PUT IT IN HIS MOUTH , I DON'T THINK A SIX-YEAR-OLD IS JUST GOING TO COME UP WITH THAT STATEMENT OUT OF THE BLUE. IN ADDITION , BEBER MADE ADMISSIONS

HOW CAN YOU STATEMENTTHAT STATEMENT WAS OUT OF THE BLUE . I THOUGHT THE QUESTION WAS DID HE TOUCH YOU WITH HISMOUTH? IT DIDN'T JUST COME OUT OF THE BLUE, DID IT?

DID HE EVER , HERE , I HAVE IT RIGHT HERE. DID HE EVER TOUCH HISPRIVATE WITH SOMETHING ELSE? HUH-UH . BESIDES HIS HAND , NOT HIS MOUTH OR HIS PRIVATE?

THAT IS WHAT I SAID. THE QUESTIONER IS THE ONE WHO RAISED THE QUESTION OF THE MOUTH , ISN'T IT?

HE DIDN'T SAY DID HE EVER PUT IT IN YOUR MOUTH. THAT IS THE WHOLE, I KNOW THIS COURT IS GOING WITH SEMANTICS.

CHIEF JUSTICE: WE RAN OUT OF TIME , AND YOU ALL , IN ADDITION T O BEING VERY COOPERATIVE WITH US AND RESPONDING TO OUR QUESTIONS, YOU FILED EXTENSIVE BRIEFING , SO WE WILL HAVE TO TAKE IT FROM HERE ON.THAT THANK YOU VERY MUCH .

THANK YOU.

CHIEF JUSTICE: MR . MARSHAL, HOW MUCH TIME ON REBUTTAL. THREE MINUTES. COUNSEL.

JUDGE, IF I MAY I WOULD LIKE TO RESPOND T O YOUR EARLIER FRIENDLY QUESTION ABOUT THE REVERBERATION , RAMIFICATIONS OF THE CRAWFORD CASE.WE JUST POINT OUT THAT CRAWFORD REAFFIRMS RESOUNDINGLY THAT CONFRONTATION IS CENTRAL TO THE RELIABILITY FINDING IN A CRIMINAL CASE.WE HAVE GOT QUOTES LIKE CROSS-EXAMINATION IS THE GREATEST ENGINE EVER DISCOVERED FOR FINDING THE TRUTH, CROSS-EXAMINATION BEATS AND BOLT OUT THE TRUTH.

LET'S NOT GO TOO FAR NOW . KAUFERD CONCERNED A CASE WHERE THE WITNESS WAS UNAVAILABLE AT TRIAL.

CORRECT AND LIKE I CONCEDED EARLIER , IT DOESN'THAVE ANY DIRECT EFFECT , BUT I THINK THE ASSUMPTION IS THAT , WHERE YOU HAVE GOT CONFRONTATION AT TRIAL ANDWHERE THE WITNESS FALLS APART AND SAID, NO , THAT NEVER HAPPENED. YES, I SWEAR, AND NO , I DIDN'T THINK HE WOULD SWEAR, THAT IS BEHIND THE AS UMINGTS.

IN THIS CASE THE ASSUMPTION.

IN THIS CASE THE DEFENSE ATTORNEY KNEW THE VIDEOTAPE WAS COMING IN AND THE VIDEOTAPE CAME IN , CORRECT?

YES .

AND THE CHILD WAS ON THE STAND. CORRECT?

YES.

AND THE DEFENSE ATTORNEY KNEW THAT THE VIDEOTAPE WAS GOING TO BE PRESENTED TO THE JURY, CORRECT? AND THE DEFENSE ATTORNEY NEVER ASKED THE CHILD, INTHAT STATEMENT , H E TOUCHEDYOU , WITH HE PUT YOUR PENIS IN HIS MOUTH. NOW YOU ARE NOT SAYING THAT. THAT CONFRONTATION NEVER REALLY OCCURRED.HE ARTFULLY DANCED AROUND IT. IT COULD BE LOOKED AT THAT WAY , BUT THAT CONFRONTATIONOF THAT WITNESS, THOUGH IT WAS AVAILABLE , NEVER HAPPENED .

NO , JUDGE, THAT QUESTION WAS NOT ASKED.

SO THEY CHOSE NOT TO GET INTO THE CRUCIBLE. IF YOU USE THE LANGUAGE OUT OF CRAWFORD. DEFENSE COUNSEL CHOSE , BY OBJECTING TO THE PRF OR TO THE PROSECUTOR'S STATEMENT AND IN ITS OWN CROSS-EXAMINATION OF THECHILD, CHOSE NOT TO PUT THAT THROUGH THE CRUCIBLE , SO THAT THE JURY COULDDETERMINE THE RELIABILITY OF THE STATEMENTS AND MAKE THEIR FINDING OF FACT AND GIVEN THE HEAVY BURDEN THAT THE STATE BEARS.

AS A MATTER O F STRATEGY , JUDGE , ONCE THE STATE FAILSTO GET THE ACCUSATION OUT , YOU ARE NOT GOING TO HAVE ALL THAT HELPFUL AFTER CROSS.YOU HAVE GOT A RISKY CROSSAS IT IS.

IN DIRECTION , WHETHER , HOWEVER IT HAPOR DIDN'T HAPPEN, WHETHER THEY DIDN'T SHOW UP THE VIDEOTAPE, WHETHER THE VIDEOTAPE WAS JUST ONLY TIME HE SAID IT, ON DIRECTION OF THE STATE'SCASE , HE DID NOT SAY ANYTHING ABOUT THE MOUTH AND THE PENIS .

CORRECT , JUDGE , AND THE STATE ADMITS IN ITS BRIEF THAT THE STATEMENT ABOUT THE MOUTH MADE IN THE CROSS, THE CHILD PROTECTION TEAM INTERVIEW, WAS AFTER PROMPTING.

BECAUSE THE PROMPTING , BECAUSE I THINK THAT THIS IS IMPORTANT , IN TERMS OF WHETHER THIS WAS SPONTANEOUSOR NOT , I T WAS , DID HE EVER TOUCH HIS PRIVATE WITH SOMETHING ELSE? HUH-UH . HE DIDN'T, THEN DIDN'T SAY , WAIT, NO, HE DID. THE QUESTION FROM THE QUESTIONER , WAS BESIDES HIS HAND, NOT HIS MOUTH O R HIS PRIVATE ? THAT WAS THE QUESTION THAT LED TO , WAIT , YEAH , HE PUT MY PRIVATE IN HIS MOUTH, ANDTHAT IS THE ONLY TIME THAT THAT WAS SAID, IN ANY PART OF THE CASE.

YES , JUDGE. CORRECT, JUDGE , THE ONLY TIME, AND AS TO THE SPONTANEITY OR THE CHILD'SKNOWLEDGE , THERE WERE ALSO CHARGE INS THIS CASE THAT DIRTY MAGAZINES WERE SHOWNTO THE CHILD, WHICH COULD EXPLAIN.

LET ME ASK , DID YOU EVER CHALLENGE THE RELIABILITY OR TRUSTWORTHINESS OF THAT STATEMENT?

AT TRIAL , YES.

THAT IS THE QUESTION BEING ASKED HERE. AT THE VIDEOTAPE.

AT TRIAL , YES , THE VIDEOTAPE WAS OBJECTED TO BEFORE AND DURING TRIAL, ON THE GROUNDS OF RELIABILITY , YES , JUDGE.

CHIEF JUSTICE: ALL RIGHT. AGAIN, WE HAVE CONSUME YOUR TIME.

THANK , JUDGE . I WOULD ASK YOU TO QUASH.

CHIEF JUSTICE: THANK YOU VERY MUCH.THE COURT IS GOING TO TAKE ITS MORNING RECESS OF 15 MINUTES, BEFORE HEARING THE LAST CASE ON THE DOCKET. WE STAND IN RECESS FOR 15 MINUTES.

MARSHAL: PLEASE RISE.