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## State of Florida v. Brunel Hosty

THE LAST CASE ON THE COURT'S DOCKET THIS MORNING IS STATE VERSUS WHOSEY -- VERSUS HOSTY. ALL RIGHT. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS RICHARD VALANCE TEST, AND I REPRESENT THE STATE OF FLORIDA IN THIS CASE, THE APPELLANT. IN 1999, THE DEFENDANT IN THIS CASE, A SUBSTITUTE SCHOOL BUS DRIVER, SEXUALLY ATTACKED A 23-YEAR-OLD VICTIM WHO HAS THE MENTALITY OF A TEN-YEAR-OLD CHILD AND IS ALSO MENTALLY DISABLED.

NOW, WE HAVE A PERIOD OF LAW ISSUE HERE -- WE HAVE AN ISSUE OF LAW HERE BEFORE US, IS THAT CORRECT?

YES.

WHAT IS THAT ISSUE OF LAW?

AS I SEE IT OF WHETHER THE CONFRONTATION CLAUSE IS VIOLATED BY THE ADULT HEARSAY EXCEPTION.

COULD YOU DISTINGUISH BETWEEN THE SITUATION IN CONNER, WHERE THE STATE WAS TRYING TO SUBMIT THIS EVIDENCE AND THE VICTIM WAS DECEASED. IS THE STATE SEEKING TO INTRODUCE THE STATEMENT SEPARATE AND APART FROM PUTTING THE VICTIM ON THE STAND?

SEE, UNFORTUNATELY, YOUR HONOR, THAT IS WE DON'T KNOW IN THIS CASE, BECAUSE THE TRIAL COURT WOULD NOT LET US PRESENT ANY EVIDENCE BELOW ON THE ISSUE, SO THE STATE ATTORNEY IS NOT ON THE RECORD OF SAYING, OKAY, YES, WE ARE GOING TO CALL HER OR, NO, WE ARE NOT GOING TO CALL HER.

WOULD YOU AGREE THERE WOULD BE SIGNIFICANTLY DIFFERENT CONFRONTATION CLAUSE ISSUES, WHEN THE VICTIM, THE PERSON WHO IS GIVEN THE STATEMENT IS NOT THERE, VERSUS THE SITUATION WHEN THEY THERE ARE?

ABSOLUTELY, YOUR HONOR.

I THOUGHT THE PURPOSE, THE WHOLE PURPOSE OF THIS STATUTE WAS TO, BECAUSE, TO TAKE, MAKE UNAVAILABILITY VERY BROAD AS A DEFINITION FOR DISABLED OR ADULT, ELDERLY ADULTS, AND THEN ALLOW THE STATEMENTS TO BE PUT IN, EVEN THOUGH THEY ARE NOT UNDER OATH OR ANYTHING ELSE, INDEPENDENT OF THE PERSON TESTIFYING. WOULD YOU AGREE THAT WAS AT LEAST --

THAT SON OF THE ASPECTS OF THE STATUTE, YES, TO HELP PROTECT THE DISABLED AND, AS THIS COURT HAS STRICKEN DOWN, THE ELDERLY HEARSAY EXCEPTION.

SO IF THE 65-YEAR-OLD INDIVIDUAL GOT ON THE STAND AND TESTIFIED AND THEN, WOULD YOU SAY THAT IN THAT SITUATION, THE STATE, THEN, WOULD BE SEEKING TO PUT IN ANOTHER STATEMENT TO BOLSTER THEIR TESTIMONY? IS THAT --

NOT NECESSARILY TO BOLSTER THE TESTIMONY, YOUR HONOR, BUT AS THIS COURT AND IN THE LOWER COURT IN HOSTY DEALT WITH THE CONFRONTATION CLAUSE ISSUE, AND THE STATE CAN,

FOR EXAMPLE IN THIS CASE, WE HAVE AN ATTACK THAT OCCURRED IN 1999. NOW HERE WE ARE IN 2003, AND BY THE BY THE TIME AFTER THIS COURT MAKES ITS DECISION, BY THE TIME IT GOES TO TRIAL, IT IS GOING TO BE MORE THAN FIVE YEARS AFTER THE CRIME, AND AT LEAST THE TEN YEAR OLD THAT I AM FAMILY WITH CAN REMEMBER A LOT OF THINGS THAT HAPPENED FIVE MONTHS AGO IN SPECIFIC DETAIL, AS OPPOSED TO FIVE YEARS LATER, SO WHAT I ENVISION IN THIS CASE AND AS I SAY, YOUR HONOR, IF THE DECLARANT IS AT TRIAL AND SHE TESTIFIES, SHE MAY NOT HAVE ALL THE SPECIFIC INFORMATION AT TRIAL --

ISN'T THERE ANOTHER HEARSAY OBJECTION THAT IS CALLED PAST RECOLLECTION RECORDED, IF SOMEBODY DOESN'T REMEMBER THEIR TESTIMONY? IN OTHER WORDS IT SEEMS THAT THERE ARE WELL-ESTABLISHED OTHER HEARSAY EXCEPTIONS THAT COVER WHAT YOU ARE TALKING ABOUT, AND AGAIN, AS I SAID, I THOUGHT THE PURPOSE OF THE STATUTE WAS THIS BROAD-BASED IDEA WE DON'T WANT TO BRING THE ELDERLY AND THE DISABLED INTO THE COURTROOM, SO WE ARE GOING TO JUST LET THEIR STATEMENTS COME IN, AND THAT, YOU WOULD, IT HAS SOME SNFERCKT CONSTITUTIONAL CONCERNS -- SIGNIFICANT CONSTITUTIONAL CONCERNS.

RIGHT, AND THAT IS WHAT I BELIEVE THAT THIS COURT'S OPINION IN CONNER ADDRESSED WHERE THE DECLARANT IS UNAVAILABLE.

WHAT DOES THE STATUTE SAY? LET'S DEAL HEAD ON, NOW, WITH WHAT THE STATUTE SAYS, AND YOUR CLAIM THAT THEY GOT IT WRONG BELOW.

RIGHT.

ANALYZING WHAT THE STATUTE PROVIDES.

RIGHT. THE STATUTE PROVIDES IN ESSENCE, WHAT THE TRIAL COURT IS SUPPOSED TO DO IS DETERMINE, BEFORE ANY OF THIS EVIDENCE IS ADMITTED UNDER THE HEARSAY EXCEPTION, WHETHER THERE ARE SUFFICIENT SAFEGUARDS OR INDICIA OF OF RELIABILITY, THAT WILL SHOW THAT THIS STATEMENT IS CREDIBLE ENOUGH TO GET N.

CLEARLY WE ARE TALKING ABOUT OUT OF COURT STATEMENTS.

CORRECT.

UNDER THE STATUTE. ALL RIGHT.

YES. AND THE TRIAL COURT IS A GATEKEEPER, IS SUPPOSED TO WEIGH THE TIME, CONTENT AND CIRCUMSTANCES OF THE STATEMENT. IF THE TRIAL COURT FINDS, WHICH IS THE PROBLEM WITH THE TRIAL COURT NOT LETTING ANY EVIDENCE BE PRESENTED IN THIS CASE, IF THE TRIAL COURT IN THIS CASE WOULD HAVE TAKEN EVIDENCE AND FOUND, LOOK, THE STATEMENTS HERE DON'T SATISFY THE STATUTE, THEY DON'T SATISFY THE INDICIA OF REALITY -- OF REALIBILITY, THE WHOLE CASE ENDS THERE.

WHERE IS THERE ANYTHING IN THAT NUMBER OF FACTORS THAT YOU HAVE JUST LISTED IN THE STATUTE, THAT INDICATES THAT THESE STATEMENTS WOULD ONLY BE USED, IF THE WITNESS ACTUALLY TESTIFIES AT TRIAL? IS THERE TELL ME WHAT IT IS.

THE STATUTE, 24.903, 90, 803 SUBSECTION 24, 90, A-1-2, AND THIS IS AFTER THE FACTORS THAT THE TRIAL COURT IS TO , CAN THE ELDERLY PERSON OR IN THIS CASE THE DISABLED ADULT TESTIFIES. SO IF THAT PERSON TESTIFIES, IT IS ADMISSIBLE, BECAUSE THERE IS NO CONFRONTATION CLAUSE PROBLEM, AND THEN THE OTHER HALF IS DEALING WITH UNAVAILABLE WITNESSES, WHICH, AS FAR AS THE RECORD DEVELOPS, WE DON'T HAVE, LIKE IN CONNER, SOMEONE WHO IS CLEARLY DEAD AND WAS NOT GOING TO TESTIFY AT TRIAL. WHAT WE HAVE IN THIS CASE IS SOMEONE WHO CAN TESTIFY AT TRIAL AND WHO THE TRIAL COURT HAS ALREADY

DETERMINED THIS IS SOMEONE WHO IS COMPETENT. SO WE KNOW SHE CAN TESTIFY AT TRIAL. AND THE UNITED STATES SUPREME COURT STATED IN OWNS, IF YOU PUT THE HEARSAY DECLARANT ON THE STAND AND THEY ARE SUBJECT TO CROSS-EXAMINE, THERE IS NO CONFRONTATION CLAUSE PROBLEM WHATSOEVER.

SO THEN WHY DO WE NEED THE STATUTE? IN OTHER WORDS IF SHE IS BEING PUT ON THE STAND AND THERE IS AN EXCEPTION THAT, WHEN SHE GETS ON THE STAND ANYWAY, YOU CAN USE YOUR STATEMENT -- USE HER STATEMENT, AND AS LONG AS SHE IS SUBJECT TO CROSS-EXAMINE, WHAT, WHAT IS THE PROBLEM WITH JUST MAKING, GETTING THE STATEMENT, I MEAN, EXCUSE ME, THE STATUTE, THE REST OF IT DECLARED UNCONSTITUTIONAL FOR THE SAME REASON IT WAS IN CONNOR? I MEAN, HOW IS THE STATE AFFECTED IN THIS CASE?

YOU ARE TALK BTH REST OF THIS STATUTE, MEANING IF A DECLARANT TESTIFIES AT TRIAL? WELL, CLEARLY, IT IS CONSTITUTIONAL, THOUGH, YOUR HONOR, UNDER --

I THOUGHT YOU SAID THAT THERE IS ANOTHER EXCEPTION THAT ALLOWS IT, IF THE DECLARANT, I MEAN THERE IS ANOTHER PROVISION OF THE HEARSAY.

YES, THERE ARE TWO, ONE IF THE DECLARANT TESTIFIES, WHICH IS THE SITUATION THAT WE HAVE IN THIS CASE AND AS THIS COURT WAS PRESENTED WITH IN CONNER. WHEN THE DECLARANT DOES NOT TESTIFY, BUT IN THIS CASE, TO ANSWER YOUR QUESTION, JUSTICE PARIENTE, AS I SAID, THIS IS A SITUATION WHERE WE HAVE SOMEONE WITH THE MENTALITY OF A TEN-YEAR-OLD, WHO WAS SUBJECTED TO A VIOLENT ACT IN 1999.

DO I UNDERSTAND THERE ARE OTHER STATES THAT HAVE ACTUALLY NARROWLY DRAWN HEARSAY STATUTES LIKE THIS, THAT ACTUALLY SORT OF TAKE AND PARALLEL THE CHILD HEARSAY STATUTE AND TAKE WHEN YOU HAVE A DISABLED ADULT LIKE THIS, WHO HAS A, YOU KNOW, MENTAL AGE OF TEN OR YOU KNOW, AN IQ OF THIS OR WHATEVER, THAT THEY WERE GOING TO REALLY PARALLEL, BECAUSE THE SAME INTERESTS, THEN, ARE AT STAKE?

AS YOU POINT OUT AND I BELIEVE ILLINOIS, I THINK, IN A FOOTNOTE IN CONNER, YOU POINT OUT THAT THERE IS PRETTY MUCH A DISABLED ADULT HEARSAY EXCEPTION.

BUT NARROWER.

NARROWER AS TO CONTEXT. AS TO WHAT CASES IT WILL APPLY IN. I BELIEVE THAT IS TRUE, YOUR HONOR.

ISN'T THAT THE PROBLEM HERE, THAT THIS IS SO BROAD, NOT, THAT IT IS SUCH A BROAD STATUTE THAT, IT REALLY ALLOWS VIRTUALLY ALL OF THE STATEMENTS, IF SOMEONE IS EITHER DISABLED OR BEFORE ELDERLY, TO COME INTO EVIDENCE WITH VERY LITTLE IN THE WAY OF SAFEGUARDS?

WELL, NOT AT ALL, YOUR HONOR. AND IN FACT IN THIS CASE, THE INDICIA OF REALLIABILITY -- OF REALIBILITY, PARTICULARLY WITH SOMEONE WITH THE MENTALITY OF A TEN-YEAR-OLD IS EXACTLY THE SAME FOR THAT AS IT WOULD BE FOR SOMEONE WHO IS ACTUALLY TEN YEARS OLD.

THE PROBLEM THAT YOU ARE RUNNING INTO --

JUSTICE LEWIS.

THE PROBLEM THAT YOU ARE RUNNING INTEREST IS THE OVER BREADTH, BECAUSE IT HAS GOT PHYSICAL AS WELL AS OTHERS THAN IS WHAT THROWS IT INTO THE SIMILARITY, ALTHOUGH YOU MAY NOT HAVE ON YOUR PARTICULAR VICTIM, JUST PHYSICAL END, WHAT IS YOUR RESPONSE TO

THAT, BECAUSE THE STATUTE DOES COVER THE PHYSICAL AS WELL.

WELL, MY FIRST RESPONSE WOULD BE THIS ISN'T AN OVER BREADTH TYPE ANALYSIS CASE. ACCORDING TO THIS COURT IN BRAKE, OVER ANALYSIS IS ONLY PROPER WHERE THERE IS FIRST AMENDMENT IMPLICATIONS OR WHERE SOMEONE'S FIRST AMENDMENT RIGHTS COULD BE CHILLED. WE DON'T HAVE THAT HERE, SO IT WOULD BE INAPPROPRIATE TO LOOK TO HYPOTHETICALS, WHEN WE HAVE SOMEONE HERE WHO CLEARLY FALSE WITHIN THE STALLS -- WHO CLEARLY FALLS WITHIN THE STATUTE, AND THE ANALOGOUS IS WHEN THERE IS A CRIME DEFINED. SOMEONE'S CONDUCT CLEARLY FALLS WITHIN THE CRIME THAT IS PRESCRIBED. HOWEVER THAT, PERSON WON'T BE HERE TO HEAR, HEY, YOU CAN INTERPRET THIS STATUTE A CERTAIN WAY THAT NOT MY CONDUCTOR BUT SOMEONE ELSE'S CONDUCT. THAT IS UNCONSTITUTIONAL, SO IT HAS GOT TO BE UNCONSTITUTIONAL IN MY CASE.

WHAT HAPPENS WITH SOMEBODY WITH, SAY, A BROKEN LEG AND THEY ALLOW HEARSAY STATEMENT OF THAT PERSON AND THAT PERSON DOES FOR THE TESTIFY IN COURT. AT THAT POINT, COULD THE DEFENDANT RAISE AN AS-APPLIED CHALLENGE TO THE STATUTE AND SAY AS APPLIED TO THIS PERSON WHAT BROKEN LEG, THE STATUTE IS UNCONSTITUTIONAL?

WELL, YOUR HONOR, FIRST OF ALL IN THE CONTEXT OF A BROKEN LEG, I WOULD THINK THAT THE DISABILITY PART IN OUR STATUTE IS SIMILAR TO FEDERAL. I MEAN, SOMETHING THAT IS TEMPORARY OR FLEETING, LIKE FOR ME MY EYESIGHT, IT CAN BE CORRECTED A BROKEN LEG WILL BE CORRECTED, SO SOMETHING THAT IS CORRECTABLE, I DON'T THINK, IS GOING TO BE, BUT I UNDERSTAND, A PHYSICAL LIMITATION, IN, I MEAN YOU WOULD HAVE TO ADDRESS IT WHEN THAT CAME UP, BUT WE ARE NOT FOCUSING ON WHAT THE IMPORTANT PART IS, IS ARE THERE SUFFICIENT INDICIA OF RELIABILITY THAT THE TRIAL COURT HAS TO FIND?

MY QUESTION IS, CAN A PERSON WHO LATER OBJECTS BASED ON SPECIFIC CIRCUMSTANCES OF THE CASE, THAT THE STATUTE IS OVERBROAD AS TO THAT PARTICULAR CASE, CAN THAT PERSON SAY AS APPLIED TO ME, THE STATUTE IS OVERBROAD?

I DON'T BELIEVE THAT THERE IS AN APPROPRIATE OVER BREADTH ANALYSIS IN THE CONTEXT OF SOMETHING THAT DOES NOT IMPLICATE THE FIRST AMENDMENT, HAS NOT THAT IS WHAT THIS COURT STATED IN BRAKE.

SO NOBODY CAN RAISE AN AS-APPLIED CHALLENGE TO THE STATUTE?

YOU CAN MAKE, HE CAN ARGUE AS APPLIED TO ME BUT HE CAN'T ARGUE AN OVER BREADTH. HE CAN'T USE A HYPOTHETICAL THAT IS NOT HIS CASE. IF HE HAS A BROKEN LEG, HE COULD MAKE THAT CASE, YES.

I GUESS MY PROBLEM IS, BECAUSE THE STATUTE IS SO OVERBROAD, MAYBE THIS IS THE CASE THAT IT WOULD BE, IF IT WAS DRAWN, AND THIS WAS THE SITUATION WHICH IS, AGAIN, YOU KNOW, MENTAL PROBLEM AND, MENTALLY RETARDED, TEN-YEAR-OLD MENTALITY, SEXUAL BATTERY, YOU KNOW, WITH ABOUT 20 CAVEATS, AND SHE TESTIFIES AND THIS AND THAT, BUT THIS STATUTE, YOU KNOW, I GUESS, AND YOU MAY BE RIGHT, TO SAY THAT WE WOULD THEN HAVE TO PIECEMEAL OVER THE NEXT 20 YEARS, TO, FOR EACH SITUATION TO COME UP, AND IN THE MEAN TIME -- IN THE MEANTIME, HAVE, YOU KNOW, CONCERNS ME, SO ARE YOU SAYING THAT IS WHAT WOULD HAVE TO BE DONE, THAT THIS STATUTE IS, EVEN THOUGH WE DID IN CONNER, AND I GUESS, HAS THE STATUTE BEEN REENACTED IN A NARROWER FORM?

NOT THAT I AM AWARE OF, YOUR HONOR. IT IS STILL IN THE SAME FORM, BUT IT IS THE STATE'S POSITION THAT CONNER, AS IT DEALT WITH, WAS ONLY TO UNAVAILABLE DECLARE ANTS,, WHICH HERE WE HAVE -- DECLARANTS, WHICH HERE WE HAVE AN AVAILABLE DECLARANT. AND REGARDING UNAVAILABLE DECLARANT, IT CANNOT RESOLVE A CONSTITUTIONAL INFIRMITY.

YOU ARE SAYING THIS WAS POTENTIALLY CONSTITUTIONAL AS APPLIED TO THIS DEFENDANT, BUT IT CANNOT BE, IT IS, OTHERWISE IT IS OVER BRED. -- OVERBROAD. WE CANNOT MAKE THAT STATEMENT?

I THINK THAT WOULD BE, AS THE TRIAL COURT, I MEAN AS THIS COURT HAS REPEATEDLY STATED, YOU SHOULD NOT ADDRESS ISSUES THAT ARE NOT BEFORE THE COURT OR YOU SHOULDN'T PASS ON CONSTITUTIONAL ISSUES, UNLESS IT IS ABSOLUTELY NECESSARY, OR IF THERE IS ANOTHER WAY TO RESOLVE THIS CASE.

WE HAVE TO SAY IT IS ONLY CONSTITUTIONAL IF THEY ARE AVAILABLE, THEY ARE, THEY HAVE GOT A MENTAL AGE THAT IS EQUIVALENT TO A CHILD UNDER TEN, YOU KNOW, THE STATEMENT WAS MADE CLOSE TO THE TIME. IT IS, AND ALL OF THE OTHER SAFEGUARDS THAT TOWNSEND HAS. WE WOULD HAVE TO PUT ALL OF THOSE CAVEATS ON US, SO WOULDN'T WE BE REWRITING THE STATUTE ESSENTIALLY?

I WOULDN'T THINK SO AT ALL, BECAUSE I MEAN, THE STATUTES ARE VIRTUALLY IDENTICAL, EXCEPT FOR ONE SUBSTITUTES CHILD AND THE OTHER ONE IS DISABLED. I MEAN, THEY ARE IN ESSENCE IDENTICALLY THE STATUTES.

I DIDN'T UNDERSTAND YOUR ARGUMENT TO BE THAT YOU WOULD PUT ALL THESE CAVEATS IN THEM. I UNDERSTOOD THE ARGUMENT OF THE STATE WAS THAT THIS ON THE NOT TO REACH THE CONSTITUTIONALITY OF THIS CASE, BECAUSE IN THIS INSTANCE, THEY SHOULD BE ALLOWED TO PUT ON EVIDENCE, BAN ACE -- AND BASED UPON THE EVIDENCE, THERE SHOULD BE A DETERMINATION THAT RELIABILITY IS NOT AN ISSUE.

YES. THAT IS THE PRIMARY ARGUMENT, AND THAT IS THE REASON WE TOOK A CERT PETITION TO THE FOURTH DCA WAS THE FACT THAT THE TRIAL COURT BELOW WAS UNNECESSARILY PASSING ON A CONSTITUTIONAL ISSUE, WITHOUT LETTING THE STATE HAVE A SHOT AT SHOWING WHETHER THE STATEMENTS ARE RELIABLE OR NOT. NOW, IF THE TRIAL COURT TAKES EVIDENCE AND FINDS THAT THE STATEMENT, OKAY, SATISFIES THE STATUTE, IT IS SUFFICIENTLY RELIABLE, THEN AT THAT POINT, THE TRIAL COURT SHOULD ADDRESS WHATEVER ISSUES COME UP, AND THEN WE CAN HAVE A HEARING AND WE CAN PRESENT EVIDENCE, WHICH WE WEREN'T ALLOWED TO DO BELOW.

NOW, AS FAR AS THE CAVEATS, THOUGH, TOWNSEND, AND I HAVEN'T REREAD IT TODAY, BUT I RECALL THAT IN ORDER TO SAVE THAT STATUTE FROM CONSTITUTIONAL, FROM BEING UNCONSTITUTIONAL, WE DID ADD A CAVEAT EVEN TO A CHILD AS TO WHAT WOULD BE RELIABLE, AND THEY ARE VERY DIFFERENT THAN THE MINIMAL CRITERIA THAT THE STATUTE SETS OUT.

I, FIRST OF ALL, WOULD DISAGREE THAT, I MEAN THE LANGUAGE IN TOWNSEND, IS, IT IS CLEARLY PERMISSIVE. I MEAN, NOTHING IN TOWNSEND STATES THAT, I MEAN, IT IS GREAT AND ION WHY A TRIAL COURT -- AND I DON'T KNOW WHY A TRIAL COURT WOULDN'T USE, BECAUSE THERE ARE CAVEATS THAT IT HAS TO. YOUR OPINIONS SAY IT MAY, SO THAT MEANS THAT THE COURT DOESN'T NECESSARILY HAVE TO ADDRESS THOSE ISSUES, BUT AS JUDGE CORD POINTS OUT IN BROCA, ALL OF THOSE ISSUES ARE APPLICABLE HERE. EVERY SINGLE ONE OF THOSE FACTORS OR CAVEATS WOULD BE USED IN THIS CASE.

CHIEF JUSTICE: THE MARSHAL HAS REMINDED YOU, YOU ARE IN YOUR REBUTTAL TIME, SO IF YOU WANT TO PAUSE NOW, IT IS AN APPROPRIATE TIME.

THANK YOU.

CHIEF JUSTICE: GOOD MORNING.

GOOD AFTERNOON. MAY IT PLEASE THE COURT. DONALD CANNAROZZI, ATTORNEY FOR MR.

HOSTY, FROM THE OFFICE THE PUBLIC DEFENDER. I SAY IT IS HEARSAY WHEN, IN FACT THE DECLARANT IS UNAVAILABLE, BUT AS I HEAR THE ARGUMENTS TODAY, I THINK THERE IS A DISTINCTION THAT IS BEING MADE THAT DOESN'T NEED TO BE MADE. THIS IS SORT OF A UNIQUE CASE IN THAT THIS UNANIMOUS COURT HAS ALREADY DETERMINED IN CONNER, THE STATUTE TO BE UNCONSTITUTIONAL AS TO ELDERLY PEOPLE. THERE IS --

WHAT ABOUT THE, YOUR OPPONENT'S ARGUMENT THAT, IN CONNERS, WE, THE COURT WAS REALLY LOOKING AT THE FACT THAT THE VICTIM IN THAT CASE, THE 84-YEAR-OLD VICTIM WAS DEAD, AND SO WE ARE REALLY LOOKING AT THAT PORTION OF THE STATUTE THAT TALKS ABOUT THE UNAVAILABILITY OF THE DECLARANT.

THAT IS WHERE I WOULD DISAGREE. THE HOLDING IN CONNER SAYS THAT THE STATUTE IS FACIALLY UNCONSTITUTIONAL. CERTAINLY THAT IS DIFFERENT FROM CONSTITUTIONALLY, CONSTITUTIONAL, AS UNCONSTITUTIONAL AS APPLIED.

WHICH ALSO BRINGS US TO HIS ARGUMENT THAT, IF THE TRIAL JUDGE IN THIS CASE, HAD TAKEN EVIDENCE ABOUT THIS VICTIM BEING AVAILABLE FOR TRIAL AND IT COMING IN BECAUSE SHE WAS, IN FACT, AVAILABLE, THAT WE WOULD NOT HAVE TO REACH THE OTHER PART OF THE FACIAL VALIDITY OF THE STATUTE.

AGAIN, GOING BACK TO THE CONNER DECISION, THERE, THAT DISTINCTION SIMPLY IS NOT DRAWN IN CONNER. THIS COURT, I BELIEVE, WHEN IT STRIKES DOWN A STATUTE AS BEING UNCONSTITUTIONAL, IT IS A RARE OCCASION, I THINK, WHEN THIS COURT DOES SO, AND WHEN THIS COURT DOES STRIKE DOWN A STATUTE AS BEING UNCONSTITUTIONAL, THE OPINION IS EXTRAORDINARILY CONCISE.

BUT THE WHOLE EMPHASIS ON THE CONFRONTATION CLAUSE AS BEING NOT SATISFIED, AND WITH THE FACTS OF CONNER BEING THE VICTIM WAS NOT AVAILABLE BECAUSE HE WAS DEAD, SUGGESTS THAT LET'S JUST, LET'S JUST ASSUME THAT, WHETHER, WHATEVER WAS SAID IN CONNER, LET'S TALK ABOUT THIS STATUTE AS IT PERTAINS TO A VICTIM THAT IS AVAILABLE THAT IS GOING TO TESTIFY BUT THAT THE STATEMENT IS THERE AND PUT INTO EVIDENCE AS WELL. WHERE IS THE CONFRONTATION CLAUSE VIOLATION?

WHEN DEALING WITH THIS SORT OF STATUTE, THE TRADITIONAL HEARSAY STATUTES DEAL WITH THE RELIABILITY OF THE STATEMENT AS THE BAR TO ADMISSION. WHEN YOU DEAL WITH CHILD HEARSAY OVER THE STATUTE, WE ARE DEALING WITH TODAY, THE EMPHASIS THEN TURNS NOT ON THE STATEMENT ITSELF, BUT ON THE CLASS. IS THE CLASS OF PEOPLE NARROWLY DEFINED ENOUGH TO PASS CONSTITUTIONAL MUSTER, AND I BELIEVE THAT, AS A CLASS, DISABLED ADULTS SUFFER FROM THE SAME SHORTCOMINGS AS ELDERLY PEOPLE, IN THAT THE CLASS IS ABSOLUTELY TOO HUGE.

BUT YOU ARE SAYING THAT YOU DON'T NEED TO REACH THAT IT IS TOO HUGE, IF, AS TO, THAT THIS IS NOT A, SOMEBODY THAT IS IN A WHEELCHAIR, AND THAT IS WHY SHE IS DISABLED. THIS IS SOMEBODY WHO HAS A MENTAL AGE THAT IS SIMILAR TO A CHILD. WHEN I ASKED YOU, IT IS NOT WHETHER IT IS BROAD OR NARROW. I AM ASKING YOU AS TO DOES THAT IMPLICATE OTHER ISSUES? WHERE IS, WITH THE PERSON TESTIFIES, WHERE IS THE CONFRONTATION CLAUSE VIOLATION, IF THEIR STATEMENT IS AT THE SAME TIME, IS USED WHEN THEY ARE TESTIFYING?

I UNDERSTAND THE QUESTION NOW. UNDER FEDERAL LAW, I WOULD AGREE THAT THE CONFRONTATION CLAW, IDAHO V -- CONFRONT INDICATION CLAUSE, IDAHO V -- CONFRONTATION CLAUSE, IDAHO V WRIGHT, WHEN THE CONFRONTATION CLAUSE IS BREACHED, THAT DOES NOT NECESSARILY --

UNDER FEDERAL LAW, THE STATEMENT IS ADMISSIBLE. IS THAT A CONFRONTATION CLAUSE VIOLATION?

SURE. YOU WOULD HAVE TO, THEN, DEAL WITH THE FACT, THE STATEMENTS, THEMSELVES, AND WHETHER IN FACT, SEE, THEN YOU ARE REMOVING THE ARGUMENT ABOUT THE CLASS OF PEOPLE, AND NOW YOU ARE DEALING JUST WITH THE RELIABILITY OF THE STATEMENTS. AND UNDER FEDERAL LAW, YES, THOSE STATEMENTS WOULD BE ADMISSIBLE AND THEY WOULD NOT BE A CONFRONTATION CLAUSE IMPLICATION, IF, IN FACT, THE VICTIM TESTIFIES. THE PROBLEM GOING BACK, AGAIN, TO WHAT YOU WERE POINTING OUT, IS THAT IS NOT THE PURPOSE OF THE STATUTE, THAT THE WHOLE PURPOSE OF THE STATUTE IS TO PROTECT THOSE WHO WOULD BE TRAUMATIZED BY IN-COURT TESTIMONY, AND IN ORDER TO PICK AND CHOOSE AND TO SAY, WELL, THIS STATUTE IS NOT FACIALLY UNCONSTITUTIONAL, THE COURT WOULD NECESSARILY HAVE TO REWRITE THE STATUTE.

WE ARE SAYING HERE, THAT THE STATE IS REPRESENTED, THAT THEY ARE NOT USING, THEY ARE NOT INTENDING TO USE THIS STATEMENT FREE STANDING, THAT THEY ARE USING IT IN, THEY ARE ATTEMPTING TO USE IT, IF THIS VICTIM, IN CONJUNCTION WITH THE VICTIM'S TESTIMONY, THEN IT IS NOT REWRITING THE STATUTE. THE STATUTE ALLOWS FOR THAT, WE SAY, AND THAT SITUATION IS APPLIED TO THIS SITUATION, AND THE STATE MAY BE ABLE TO CONSTITUTIONALLY PUT THIS STATEMENT INTO EVIDENCE.

FACTUALLY AT THIS POINT,ION IF IT IS DETERMINED THAT, IN FACT -- I DON'T KNOW IF IT IS DETERMINED THAT, IN FACT, THIS VICTIM IS GOING TO TESTIFY.

THAT IS THE PROBLEM.

THEN YOU HAVE GOT CONFRONTATION CLAUSE. THEN YOUR CLIENT IS PROTECTED. IT SEEMS TO ME ANYWAY, IF AT THIS POINT, MAYBE, YOU MAY, THE STATE MAY NOT EVEN NEED THE STATUTE, BECAUSE IT MAY END UP BEING PAST RECOLLECTION RECORDED, IF THE VICTIM CAN'T REMEMBER. YOU WOULD AGREE THAT THERE IS THAT EXCEPTION, THEY ALLOW --

I AGREE AND THEN WE ARE DEALING STRICTLY WITH THE RELIABILITY OF THE STATEMENT.

BUT ISN'T THAT THE VERY PROBLEM THAT WE HAVE WITH TRUNCATED CASE THAT WE ARE DEALING WITH THIS, IS THAT IT WAS, THAT WE DON'T HAVE A RECORD DEVELOPED, AND SO WE ARE JUST, REALLY, CALLED UPON TO GIVE IT, TO MAKE A DECLARATORY JUDGMENT ON THIS STATUTE, AND SO IN THAT KIND OF CONTEXT, DON'T WE HAVE TO GIVE DEFERENCE TO THE LEGISLATURE, IN PASSING THIS AND NOT REACH THE CONSTITUTIONAL ISSUE, AT LEAST UNTIL WE SEE WHETHER IT IS NECESSARY TO BE REACHED?

ONE POINT I WOULD LIKE TO MAKE, THE ONE FACT THAT IS LACKING IN THE RECORD, IN THE STATE -- AND THE STATE POINTED THIS OUT, WAS THAT THE TRIAL COURT NEVER MADE A STATEMENT AS TO THE RELIABILITY OF THE VICTIM'S STATEMENTS. THE SAME THING HAPPENED IN CONNER. IN CONNER, THE TRIAL COURT PUT OFF MAKING A DETERMINATION AS TO RELIABILITY JUST PRIOR TO TRIAL.

BUT WE KNEW IN CONNER, THAT THEY COULDN'T TRY TO PUT THE VICTIM ON THE STAND, BECAUSE THE VICTIM WAS DECEASED, SO THERE WAS, YOU KNOW, THE WHOLE CONNER OPINION DEALS WERE UNAVAILABLEIBILITY AND CONFRONTATION CLAUSE THAT YOU ADMIT IN IDAHO VERSUS WRIGHT, THAT ISN'T IF THE VICTIM TAKES THE STAND.

I AGREE THAT IN CONNER THAT THE VICTIM, IN FACT, WAS UNAVAILABLE.

IN THIS CASE THAT IS NARROW IN TERMS OF WHAT THEY ARE TRYING TO DO, IS A SEXUAL BATTERY, AND THERE IS A REPRESENTATION THAT THE VICTIM HAS A MENTAL AGE OF TEN, ANDION WHAT, THE CHILD HERE, SAY, IT TEN AND UNDER?

ELEVEN.

SO ESSENTIALLY, WE, IF IT IS THAT NARROW, AND IT IS CONSTITUTIONAL UNDER TOWNSEND, IT WOULD BE CONSTITUTIONAL IN THIS CASE.

THEN, YOUR HONOR, I WOULD HAVE TO SAY THAT THIS COURT IS IN A POSITION TO REWRITE CONNER. THERE IS, AGAIN, GOING BACK, THERE IS NOTHING IN CONNER TO SUGGEST IT WAS DECIDED AS APPLIED.

WELL, CERTAINLY YOU WOULD AGREE THAT THE IDEA THAT ANY ELDERLY PERSON OVER 65 IS, THAT THAT CLASS IS DEFINITELY A BROAD CLASS, AND THAT WAS ALL THAT HAD, IN THIS PARTICULAR VICTIM, HAD NO PARTICULAR MENTAL PROBLEMS.

IN CONNER.

HERE YOU HAVE GOT DISABLED. I AGREE THAUFTH THE PHYSICAL DISABLED ASPECT BUT -- I AGREE THAT YOU HAVE GOT THE PHYSICAL DISABLED ASPECT, BUT WE ARE NOT DEALING WITH THAT. YOU HAVE GOT OF THE CLASS OF MENTALLY RETARD INDIVIDUALS. THAT IS A VERY DIFFERENT SITUATION THAN SIMPLY SAYING THAT ANYONE OVER 65 IS GOING TO BE ENOUGH TO COME TO COURT.

AS A CLASS, IF YOU ARE COMPARING IT TO STATUTE, THE STATUTE THAT WE ARE DEALING WITH TODAY DOESN'T DEAL WITH JUST MENTAL RETARDATION. IT DEALS WITH ANY MENTAL INFIRMITY. THAT WOULD INCLUDE A SCHIZOPHRENIC, SOMEONE WITH BIPOLAR DISEASE, OBSESSIVE/COMPULSIVE DISORDER. I MEAN, I COULD SIT HERE FOR AN HOUR ONE GO ON WITH ILLNESSES THAT WOULD FALL UNDER THE STATUTE.

IS IT YOUR POSITION THAT, UNDER NO CIRCUMSTANCES CAN THE STATUTE BE CONSTITUTION WILL A. -- CONSTITUTIONAL.

THE ONLY WAY TO COME TO THAT DECISION WOULD BE TO REWRITE CONNER, SO IT IS MY POSITION THAT THE STATUTE, AS WRITTEN, IS UNCONSTITUTIONAL.

WHAT ABOUT IN THIS PARTICULAR CASE. IS IT UNCONSTITUTIONAL AS APPLIED TO THIS VICTIM?

RELYING ON THIS COURT'S PRECEDENT, IT IS.

WE ALSO HAVE TOWNSEND, SO WE ARE KIND OF IN THE MIDDLE BETWEEN TOWNSEND AND CONNER HERE, AS FAR AS I CAN SEE. SO LET'S FORGET ABOUT CONNER FOR A SECOND.

OKAY.

IT SEEMS TO ME THAT, UNDER CONSTITUTIONAL LAW, WHEN YOU ARE ALLEGING A FACIAL ATTACK ON THE STATUTE, WE HAVE TO DETERMINE THAT THERE ARE VIRTUALLY NO CIRCUMSTANCES IN WHICH THE STATUTE CAN BE CONSTITUTIONALLY APPLIED. WHEN YOU ARE ATTACKING IT FACIALLY, SO WE WOULD HAVE TO SAY THAT, EVEN AS TO THIS PARTICULAR VICTIM, OR ANY OTHER, SAY, MENTALLY DISABLED ADULT WITH A MENTAL AGE OF LESS THAN TWELVE, THAT THE STATUTE STILL COULD NOT BE APPLIED CONSTITUTIONALLY. BUT IF WE HOLD THAT IT CAN BE APPLIED CONSTITUTIONALLY, IN THOSE CIRCUMSTANCES, THEN WE WOULD HAVE TO HOLD, WOULDN'T WE NOT THAT, THE STATUTE IS FACIALLY CONSTITUTIONAL, AND THERE MAY BE OTHER CIRCUMSTANCES NOT PRESENT HERE, WHERE IT MAY BE UNCONSTITUTIONAL AS APPLIED TO A PARTICULAR SITUATION?

I, AGAIN, AS I SAID TO JUSTICE PARIENTE, THAT AS FAR AS IDAHO V WRIGHT ANALYSIS GOES, YES, THAT LAW IS THERE. IT DOES SAY, THAT IF THE VICTIM DOESTIS TESTIFY --

I HIM -- VICTIM DOES TESTIFY -- TIME TALKING BEYOND IDAHO. DO WE HAVE TO MAKE A DETERMINATION THAT THERE ARE NO CIRCUMSTANCES IN WHICH THE STATUTE CAN BE CONSTITUTIONALLY APPLIED?

NO. I THINK THAT, BECAUSE WE ARE DEALING WITH CLASS THAT IS SO BROAD, THAT A FACIAL ATTACK IS GOING TO INCLUDE SOME INDIVIDUALS THAT IN FACT, WOULD BE APPROPRIATE UNDER THE STATUTE, SO I, TO ANSWER YOUR QUESTION, NO, I DON'T THINK THAT YOU WOULD HAVE TO DETERMINE THAT THE STATUTE IS UNCONSTITUTIONAL IN EVERY SINGLE CASE. I THINK THERE ACTUALLY COULD BE SOME CASES WHERE YOU CAN FIND THAT THE STATUTE WAS CONSTITUTIONAL. IT IS JUST THAT THE STATUTE, THE STATUTE AS A WHOLE --

DOESN'T THAT CONTRADICT OUR ANALYSIS IN THE U.S. SUPREME COURT'S CONSTITUTIONAL ADJUDICATION? THEIR JURISPRUDENCE?

I DON'T BELIEVE IT DOES. BECAUSE THE STATUTE, AGAIN, USING WORDS LIKE RESTRICT, WHAT DOES RESTRICT MEAN? NORMAL ACTIVITIES. WHAT IS A NORMAL ACTIVITY? THOSE WORDS ARE SO ENTIRELY BROAD, THAT, YES, THEY MAY BE A PERSON WHO WOULD FALL UNDER THE RUBRIC OF THE STATUTE, BUT THE STATUTE AS WRITTEN, IS SO ENTIRELY BROAD, THAT YOU CAN MAKE AN ATTACK FACIALLY, THAT IT IS UNCONSTITUTIONAL, BECAUSE OF HOW POORLYLY IT IS WRITTEN.

IN CONNER, ONE OF THE THING THAT IS WE WENT THROUGH IS THE FACT THAT SOME OF THE SAME CRITERIA THAT MADE A STATEMENT RELIABLE IN THE CHILD HEARSAY, REALLY WOULDN'T BE TRUE FOR AN ELDERLY PERSON, AND, BUT YET IT DOES SEEM THAT, AGAIN, WHEN YOU ARE DEALING ESPECIALLY ARE WITH A MENTALLY DISABLED ON -- ESPECIALLY WITH A MENTALLY DISABLED ADULT THAT, IT IS CLOSER TO WHAT THE CRITERIA WERE THAT ARE SET FORTH IN THE STATUTE, THAT WOULD MAKE STATEMENTS LIKE THIS MORE RELIABLE. SO COULD YOU COMMENT, AND AGAIN COULD YOU KEEP ON RELYING ON CONNER, AS TO THE REASONING FOR THE ELDERLY EXCEPTION DOES NOT APPLY ACROSS THE BOARD TO A DISABLED, TO A MENTALLY DISABLED ADULT.

> JUST ONE POINT WHEN YOU ARE SAYING MENTALLY DISABLED ADULT. AGAIN, OBVIOUSLY THE STATUTE ENCOMPASS ASSED MORE THAN JUST -- ENCOMPASSED MORE THAN JUST MENTALLY DISABLED ADULTS. IT IS IN INFIRMITY OR ANY DEFECT. THE POINT THAT THIS COURT LOOKED AT IN INVALIDATING THE CLASS TO ELDERLY PEOPLE, OBVIOUSLY APPLIED TO DISABLED ADULTS, FIRST COURT LOOKED AT THE SIZE OF THE CLASS, AND OBVIOUSLY WITH CHILDREN, WE ARE TALKING ABOUT A HOMO GENIUS CLASS. CHILDREN DEVELOP ALONG THE SAME LINES. A FIVE-YEAR-OLD SAL FIVE-YEAR-OLD. THE SAME PROBLEMS THAT ARE INHERENT WITH ONE FIVE-YEAR-OLD WOULD BE INHERENT WITH ANOTHER FIVE-YEAR-OLD, WHEN IT COMES --

BUT ISN'T THE DEFINITION OF A CHILD VICTIM UNDER 803.23, A CHILD VICTIM WITH A PHYSICAL, MENTAL, EMOTIONAL, OR DEVELOPMENTAL AGE OF LESS THAN ELEVEN. IT IS NOT JUST SIMPLY A CHRONOLOGICAL AGE OF LESS THAN ELEVEN.

NO. ACTUALLY I THINK IF YOU READ THE STATUTE, IT TALKS ABOUT A CHILD, AND A CHILD, IT DOES NOT MENTION THAT IT COULD BE A CHILD OR AN ADULT WITH A --

I AM READING THAT IS WHAT IT SAYS T SAYS IS THE CHILD WHO IS THE VICTIM, IS A CHILD VICTIM WITH A PHYSICAL, MENTAL, EMOTIONAL OR DEVELOPMENTAL AGE OF LESS THAN ELEVEN. IT DOESN'T SAY A CHILD OF THE AGE OF LESS THAN ELEVEN CHRONOLOGICALLY.

AND I THINK EVEN THE COURT BELOW WAS INITIALLY THE STATE BELOW WANTED TO ADMIT THESE STATEMENTS UNDER THE CHILD HEARSAY EXCEPTION, AND THE COURT BELOW RECOGNIZED THAT, IN FACT, THAT WAS NOT THE APPROPRIATE EXCEPTION, BECAUSE THE,

OBVIOUSLY THE APPROPRIATE EXCEPTION WAS A DISABLED ADULT, SO TO ANSWER YOUR QUESTION, LOOKING AT THE PLAIN WORDING OF THE STATUTE, THAT THE SECTION 23 APPLIES ONLY TO CHILDREN AND DOES NOT ADDRESS ADULTS WITH A CHRONOLOGICAL AGE, MENTAL CHRONOLOGICAL AGE UNDER ELEVEN.

BUT YOU WOULD AGREE THAT SOME OTHER STATES HAVE MORE NARROWLY DRAWN A SIMILAR HEARSAY EXCEPTION.

YES.

THAT WOULD BE VALID.

I BELIEVE THAT, EVEN IN A SUPPLEMENTAL AUTHORITY AT THE STATE PROVIDE, THERE WAS A CALIFORNIA STATUTE. THE NICE THING ABOUT THE CALIFORNIA STATUTE IS IT REQUIRED THE STATEMENT TO BE VIDEOTAPED, AND SO IT COULD BE MORE NARROWLY DRAWN, BUT THERE WOULD HAVE TO BE MORE SAFEGUARDS.

WHAT, HELP ME OUT ON THAT. YOU KNOW, WE HAVE GOT THE EVIDENCE CODE AND THEN WE HAVE OUR RULES THAT ADOPT AND SOME OF THE EVIDENCE CODE AND WE HAVE REJECTED SOME. ARE YOU, IN TERMS OF THIS STATUTE, IS THIS A STATUTE THAT THE, YOU ARE NOT ATTACKING THE STATUTE AS BEING THAT THE LEGISLATURE COULDN'T PASS THE STATUTE. IS IT SUBSTANTIVE OR IS IT PROCEDURAL?

I DON'T UNDERSTAND THE QUESTION. OBVIOUSLY THE LEGISLATURE HAS THE PREROGATIVE TO COME UP WITH ANOTHER HEARSAY EXCEPTION, AS LONG AS IT PASSES CONSTITUTIONAL MUSTER.

BUT THIS COURT, NOTHING WOULD STOP IF THERE WERE RULES THAT WERE PROMULGATED OF THIS COURT ADOPTING FURTHER PROCEDURES THAT STATEMENTS, YOU KNOW, IF IN THE CHILD CONTEXT SHOULD BE VIDEOTAPED. THAT IS ANOTHER ISSUE AS TO WHETHER THERE IS SOMETHING THAT MIGHT HELP MAKE THEM EVEN MORE RELIABLE, BUT THAT IS NOT BEFORE US NOW.

NO. AGAIN, I THINK THAT WOULD BE THE PREROGATIVE OF THE LEGISLATURE TO DRAW A STATUTE THAT ISN'T SO BROADLY --

I JUST SAID THAT NOTHING WOULD PREVENT THIS COURT FROM SETTING UP PROCEDURES, SUCH AS REQUIREMENT OF A VIDEOTAPE. THAT IS A PROCEDURAL REQUIREMENT. THAT IS NOT A SUBSTANTIVE REQUIREMENT.

THAT'S CORRECT.

HAS THE ENTIRE THRUST OF THIS CASE BEEN BASED ON CONNER FROM THE BEGINNING? IN OTHER WORDS, IS THAT --

YES, JUSTICE ANSTEAD.

IN THE TRIAL COURT, IT WAS THE USEFUL CONER?

THAT WAS THE WHOLE ARGUMENT.

PARALLELS COMPLETELY.

WE ARE LOOKING, THEY WERE FACED WITH A SITUATION WHERE THIS COURT STRUCK DOWN THE STATUTE IN CONNER. OBVIOUSLY IN THE STATUTE, IT GROUPS DISABLED ADULT AND ELDERLY PEOPLE TOGETHER AS ONE GROUP. THE ARGUMENT BELOW WAS THAT, WHAT IS GOOD FOR ONE IS

GOOD FOR ANOTHER. THIS COURT STRUCK IT DOWN IN ONE. THERE WAS NO OPTION BUT TO FIND IT CONSTITUTIONAL.

NO PRATT ARGUMENTS MADE LIKE VOID FOR VAGUENESS.

NO. NO SEPARATE ARGUMENTS WERE MADE BELOW. IT WAS SIMPLY BASED ON CONNER.

BUT THE STATE CONTINUED TO ARGUE THAT ALTHOUGH CONNER STRUCK IT DOWN, IT SPECIFICALLY DIDN'T DEAL WITH DISABLED ADULTS, AND THE WHOLE REASONING OF CONNER IS BASED ON THE CONFRONTATION CLAUSE INFIRMITY.

THAT IS CORRECT.

IF YOU WILL ERASE THE CONFRONTATION CLAUSE INFIRMITY, TELL ME WHAT IS THE CONSTITUTIONAL BASIS? OTHER THAN CONNER. TO SAY THAT THIS IS UNCONSTITUTIONAL. IN OTHER WORDS, AS TO SUBSECTION 2.A. WHAT IS THE CONSTITUTIONAL BASIS? WHY IS IT UNCONSTITUTIONAL. FORGET THAT CONNER IS ON THE BOOKS.

FORGETTING CONNER, YOU ALSO SAID FORGET THE CONFRONTATION CLAUSE ISSUE.

NO. I SAID UNDER 2.A, WHAT IS THE CONSTITUTIONAL INFIRMITY?

IT WOULD BE, IN FACT, THAT IT WOULD AND CONFRONTATION CLAUSE CHALLENGE.

THAT IS WHAT YOU SAID, IDAHO VERSUS WRIGHT SAYS IT IS NOT.

BUT THE STATUTE, AGAIN, THE STATUTE DEALS WITH BOTH AVAILABLE AND UNAVAILABLE. AND I WOULD AGREE, JUSTICE PARIENTE, I WOULD AGREE THAT, IF THE ENTIRE ISSUE TODAY WAS AN AVAILABLE DECLARANT, IF THAT IS WHAT THE STATUTE DEALT WITH, I WOULD HAVE TO CONCEDE THAT UNDER IDAHO V WRIGHT AND UNDER FEDERAL CASE LAW THAT, A NARROWLY DRAWN STATUTE WOULD PASS CONSTITUTIONAL MUSTER.

ALL RIGHT. SO IN OTHER WORDS, AND NOW WE ARE GETTING CLOSER HAD, THAT IF THE STATE CONCEDED THAT THEY ARE GOING TO BE DEALING WITH AN AVAILABLE DECLARANT, THEN AS OPPOSED TO SAYING WE ARE STRIKING DOWN THE PART THAT SAYS, TO SAY THIS IS, YOU KNOW, AS APPLIED TO AN AVAILABLE DECLARANT, AND UNDER THE CIRCUMSTANCES HAS BEEN REPRESENTED HERE -- CIRCUMSTANCES AS HAS BEEN REPRESENTED HERE, WE DECLARE TO FIND THE ENTIRE STATUTE UNCONSTITUTIONAL, BECAUSE IT APPEARS THAT THERE ARE NARROW CIRCUMSTANCES, SUCH AS THIS, WHERE IT WILL BE CONSTITUTIONAL AS APPLIED. WHAT IS WRONG WITH THAT?

IF THAT WERE, AND, AGAIN, AS I JUST STATED, I WOULD CONCEDE THAT POINT, THAT IN FACT, IF THE DECLARANT WERE AVAILABLE, AND IF --

THAT SAME CAVEAT WOULD APPLY TO CONNER, RIGHT?

I AM SORRY?

THAT SAME CAVEAT WOULD APPLY TO CONNER.

ABSOLUTELY, A SEE, AND -- ABSOLUTELY, SEE, AND THAT WAS THE ENTIRE PROBLEM, MY ARGUMENT WITH REGARD TO THAT, WHEN WE READ CONNER, IT DIDN'T SEEM LIKE THIS COURT HAD ANY CAVEATS IN CONNER, AND IF THAT IS A CAVEAT, IT WOULD APPLY TO CONNER, AS IT IT WOULD APPLY TO MR. WHOSETY.

-- TO MR. HOSTY.

ARE YOU TALKING ABOUT AN ADULT WHO IS NOT MENTALLY DISABLED BUT IS PHYSIQUE -- PHYSICALLY DISABLED, YOU ARE SAYING THE STATUTE WOULD BE CONSTITUTIONAL AS TO THAT SNERN.

NO, BECAUSE WHEN WE DO -- TO THAT PERSON?

NEW YORK CITY BECAUSE WHEN WE DO THE FEDERAL CASES, WE DO THE FEDERAL MARRY SAY, AND IT WOULD -- TO FEDERAL HEARSAY, AND IT WOULD HAVE TO GO AFTER THE REGULAR HEARSAY CAME IN. I SEE THAT MY TIME IS UP. THANK YOU.

CHIEF JUSTICE: COUNSEL, AND MR. MARSHAL, HOW MUCH TIME? OKAY.

I WOULD JUST LIKE TO MAKE A FEW POINTS EVIDENT I BELIEVE JUSTICE WELLS HIT THE NAIL ON THE HEAD, WHEN HE SAID THE PROBLEM WITH THIS CASE IS IT IS SO TRUNCATED. WE DON'T HAVE EVERYTHING DEVELOPED, BECAUSE THE TRIAL COURT IMPROPERLY DECIDED THAT IT WANTED TO PASS ON THE CONSTITUTIONALITY, INSTEAD OF FOLLOWING A LONG LINE OF CASES THAT SAY YOU DON'T DO THAT UNLESS YOU HAVE TO.

BUT THE STATE REPRESENTED THAT THIS VICTIM WAS GOING TO BE AVAILABLE TO TESTIFY, BECAUSE IT WOULD BE, IF WE FIND THAT THE FOURTH DISTRICT ERRED IN JUST STRIKING THE WHOLE THING DOWN BUT IT GOES BACK DOWN AND THEN THEY SAY, WELL, YOU KNOW WHAT, SINCE THEY DIDN'T STRIKE IT DOWN, WE DON'T REALLY HAVE TO PUT ON THIS VICTIM IN ORDER FOR YOU KNOW, THIS IS GOING TO PASS MUSTER UNDER A OR B. WE ARE NOT IN THAT SITUATION. THE STATE'S --

NO, HOWEVER, I WOULD LIKE TO POINT OUT THAT, ALTHOUGH THE TRIAL COURT HAS DECLARED THE VICTIM COMPETENT TO TESTIFY, I MEAN, THAT IS THE STATE ATTORNEYS'S DECISION WHETHER OR NOT TO CALL HER AT TRIAL OR NOT, AND I DON'T BELIEVE --

THAT WOULD BE BACK TO WHERE --

IF THAT WERE THE CASE. AS JUSTICE WELLS POINTED OUT, WE DON'T KNOW IF THAT IS THE CASE OR NOT.

WHAT EFFECT WOULD OUR DECISION, IF IT WAS AS JUSTICE PARIENTE POSITS, HAVE, THEN, ON OUR DECISION IN CONNER?

IN CONNER, I THINK, AS THE THIRD DCA HAS POINTED OUT IN FELDER, CONNER WAS DECIDED IN THE CONTEXT OF AN UNAVAILABLE DECLARANT H IN FELDER, WE HAD AN ELDERLY --

IN OTHER WORDS, YOU READ CONNER THAT THERE IS STILL CONSTITUTIONAL ROOM IN CONNER, IF THERE HAD BEEN AN ELDERLY PERSON OFFERED TO TESTIFY THAT, IN ADDITION, THE OUT OF COURT STATEMENT COULD SBREEN OFFERED JUST LIKE WHAT YOU ARE -- COULD HAVE BEEN OFFERED, JUST LIKE WHAT YOU ARE TALKING ABOUT HERE.

ABSOLUTELY, YOUR HONOR.

SO YOU READ THE CONNER HOLDING TO BE, NO, THE STATUTE IS NOT COMPLETELY FACIALLY UNCONSTITUTIONAL. THERE IS STILL A CONSTITUTIONAL AREA FOR IT TO OPERATE IN, EVEN WITH THE ELDERLY.

YES, YOUR HONOR, AND AS JUSTICE CANTERO POINTED OUT, IF THERE THIS IS FACIALLY UNCONSTITUTIONAL, THERE CAN'T BE A SITUATION WHERE IT IS CONSTITUTIONAL.

I UNDERSTAND THAT IS THE RULING, BUT --

THAT IS THE SUPREME COURT CASE LAW THAT, IF A DECLARANT TESTIFIES AT TRIAL, THEN THE HEARSAY OF THE DECLARANT DOESN'T HAVE ANY KIND OF CONFRONTATION CLAUSE PROBLEM.

YOU ARE SAYING A RULING UPHOLDING THE STATUTE IN THIS CASE AGAINST A CHALLENGE OF FACIAL UNCONSTITUTIONALITY, WOULD HAVE NO EFFECT ON THE CONNER DECISION.

IT IS, RIGHT, YOU COULD RULE, IF YOU RULE THAT WAY BASED ON THE FACTS IN THIS CASE, YES, IT WOULD COMPORT WITH CONNER.

OKAY.

AND I WOULD ALSO LIKE TO POINT OUT REGARDING THE QUESTIONS, I THINK JUSTICE QUINCE WAS KIND OF QUESTIONING THE DEFINITION OF DISABLED ADULT. I WOULD JUST ALSO LIKE TO REMIND THE COURT THAT IT HAS PREVIOUSLY FOUND THE DEFINITION OF DISABLED ADULT TO PASS CONSTITUTIONAL MUSTER, WHEN IT WAS USED IN THE CONTEXT OF DEFINING A CRIME. IN THE ENRIQUE CASE, IT WOULD SEEM TO ME THAT IF IT IS FINE FOR DEFINING THE ELEMENT AFTER CRIME, IT WOULD ALSO BE FINE FOR --

WHAT DO YOU CONTEND IS THE PURPOSE OF THIS STATUTE?

WELL, THE PURPOSE OF THE STATUTE, OBVIOUSLY AS JUSTICE PARIENTE POINTED OUT, WHAT ONE, THE PARAMOUNT ONE IS TO PROTECT THE DISABLED, AND AS --

TO PROTECT DISABLED FROM WHAT?

FROM, WELL, MANY THINGS, BECAUSE I BELIEVE THERE WERE PORTIONS IN THE STATUTE THAT ACTUALLY ENACTED CRIMINAL PENALTIES OR LISTED CRIMES.

I GUESS MY QUESTION, REALLY, GOES TO WHAT PURPOSE IS BEING SERVED, IF WE ALLOW HEARSAY STATEMENTS IN OF DISABLED ADULTS WHO ARE PHYSICALLY DISABLED, AS OPPOSED TO MENTALLY DISABLED?

WELL, IF, I MEAN, WE HAVE A FEDERAL HEARSAY EXCEPTION THAT IS SUCH A BROAD CLASS, BUT THIS NARROW CLASS, IF WE ARE ASSUMING, BECAUSE YOUR QUESTION SEEMS TO ASSUME THAT SOMEONE WITH JUST A PHYSICAL DISABILITY IS LIKE ANYONE ELSE, THEN IT IS GOING TO BE, IT WOULD BE MY CONTENTION THAT, WHEN THE JUDGE WAIST INDICIA OF RELIABILITY, THE JUDGE IS GOING TO SAY, WELL, YEAH, YOU ARE DISABLED, BUT THERE IS NOTHING HERE TO INDICATE THAT YOUR STATEMENT IS MORE RELIABLE, SO IT IS NOT COMING IN. AND THAT WOULD BE MY ANSWER TO, I MEAN, IT IS ALL THROUGH THE TRIAL COURT AS THE GATEKEEPER. NOW, IF THERE IS NOTHING TO INDICATE THAT THE STATEMENT MADE BY THE PHYSICALLY SDNLED DISABLE PERSON ARE NOT -- PHYSICALLY DISABLED PERSON ARE NOT RELIABLE, THEN IT IS NOT COMING IN.

ISN'T THAT A PRETTY COMPLICATED LANDSCAPE OUT THERE?

YES, YES, YOUR HONOR.

CHIEF JUSTICE: YOU ALL HAVE BEEN VERY RESPONSIVE TO OUR QUESTIONS. WE APPRECIATE THAT VERY MUCH. WE WILL NOW STAND IN RECESS UNTIL 8:30 TOMORROW MORNING.

MARSHAL: PLEASE RISE.