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Quawn M. Franklin v. State of Florida
Docket Number: SC04-1267

MARSHAL: PLEASE RISE. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING. THE NEXT CASE ON THE COURT'S CALENDAR IS FRANKLIN VERSUS STATE OF FLORIDA.

MAY IT PLEASE THE COURT. GOOD MORNING. I AM CHRIS QUARRELS, AND I REPRESENT -- I AM CHRIS QUARRELS, WHERE I REPRESENT QUAWN FRANKLIN, IN WHICH HE WAS SENTENCED TO DEATH AFTER FINDING NUMEROUS MITIGATING FACTORS AND FOUR NONMITIGATING FACTORS. MR. FRANKLIN DROVE FROM ST. PETERSBURG FROM LEESBURG -- FROM LEESBURG. THEY WERE ALL SHORT OF MONEY AND ULTIMATELY RETURNED TO LEESBURG WITH MR. FRANKLIN DRIVING, AND IT WAS AT THAT POINT IN TIME THAT THEY PULLED INTO THE ALBERTA CRATE AND BOX FRACTURERY OUTSIDE OF LEESBURG, WHERE --

JUSTICE: I THINK YOU CAN ASSUME THAT WE ARE INTIMATELY FAMILIAR WITH THE FACTS OF THE CASE, BECAUSE WE HAVE A LIMITED AMOUNT OF TIME.

I UNDERSTAND, YOUR HONOR.

JUSTICE: LET ME ASK YOU A QUESTION ON ISSUE NUMBER ONE, I AM CONCERNED ABOUT THE INTERPRETATION OF 90.015.2, SAYING WHEN THE RELEVANCE OF EVIDENCE DEPENDS UPON THE EXISTENCE, WHEN -- THE RELEVANCY OF EVIDENCE DEPENDS UPON THE OPINIONS, EXCUSE ME, WHEN THE TRIAL JUDGE MAKES A RULING. WHEN YOU FILE THIS WHOLE STACK OF PRETRIAL MOTIONS IN THIS CASE AND YOU MAKE WHAT IS TYPICALLY, AND YOU WANT TO CLARIFY FOR ME FROM MY EXPERIENCE A TYPICALLY GENERIC MOTION THAT WE OBJECT TO HEAR ON -- TO ANY HEARSAY AND THAT VIOLATES THE CONSTITUTION, BUT THERE IS NO SPECIFICITY AS TO WE OBJECT TO HEARSAY STATEMENTS MADE BY THIS WITNESS, THAT -- SPECIFICITY AS TO WE OBJECT TO ANY HEARSAY STATEMENTS MADE BY THIS WITNESS OR THAT WITNESS, BUT THE GENERAL CHALLENGE OF HEARSAY OF ALL WITNESSES IN THE CASE, THAT WHAT YOU HAVE IN THIS CASE?

HE FILED A GENERAL MOTION AS TO THE HEARSAY ISSUE IN THE CASE.

JUSTICE: WAS THERE EVER AN OBJECTION TO A SPECIFIC WITNESS?

IN THE MOTION.

JUSTICE: OR AT ANY TIME IN THIS TRIAL.

HE POSED A HEARSAY OBJECTION TO THE DETECTIVE'S TESTIMONY THAT HE HEARD THE DOCTOR AT THE HOSPITAL TELL HIM. HE SAID HEARSAY. HE DID NOT SAY CONFRONT INDICATION. -- CONFRONTATION.

JUSTICE: HEARSAY, WOULD YOU BE RELYING ON PRETRIAL MOTIONS OR THE OBJECTIONS MADE AT THE TIME?

BOTH. I THINK THAT THAT STATUTE IS RELATIVELY NEW, AND I THINK THE WAY IT SHAKES OUT

W ILL DEPEND UPON WHAT THIS COURT AND OTHER COURTS IN THE STATE OF FLORIDA , THE WAY THEY INTERPRET IT , BUT EVEN WITHOUT THAT STATUTE , THERE WAS A SPECIFIC HEARSAY OBJECTION THAT WAS CONTEMPORANEOUS WITH THE TESTIMONY, AND EVEN CRAWFORD ASIDE, HEARSAY IS BY STATUTE , ADMISSIBLE IN THE STATE OF FLORIDA AT THE PENALTY PHASE , PROVIDED THERE IS A FAIR OPPORTUNITY FOR THE DEFENDANT TO REBUT. NOW , WE CONTEND THAT EVEN , WITHOUT CRAWFORD ASIDE, THERE WAS NO FAIR OPPORTUNITY TO REBUT, AND THEREFORE THIS HEARSAY OBJECTION THAT WAS POSED WAS SUFFICIENT TO PRESERVE THE ISSUE.

BUT THE HEARSAY IN THIS CASE AS WAS PRESENTED , WAS AS TO THE QUALIFICATION TO TESTIFY , WAS IT?

I AM SORRY. YOU ARE RIGHT. I WAS CONFUSING MY ISSUES. HE DID STATE THAT , WHEN HE TALKED ON THE DOCTOR , THE DOCTOR SAID, AND HE OBJECTED, SAYING THAT THE DETECTIVE WAS NOT A DOCTOR , AND THE PROSECUTORS' RESPONSE WAS THAT, IN THE PENALTY PHASE , HE CAN TESTIFY TO. THAT I THINK IT IS CLEAR THAT THE PROSECUTOR INTERPRETED THE OBJECTION , AT LEAST IN PART AS A HEARSAY OBJECTION. THAT APPRISED THE TRIAL COURT AND THE OPPOSING PARTY, OF WHAT HIS OBJECTION WAS. I WOULD HAVE PREFERRED CANDIDLY, FOR THE DEFENSE COUNSEL TO HAVE USED THE WORD HEARSAY AND CONFRONTATION. BUT IT WAS CLEAR TO EVERYBODY THAT HE OBJECTED TO THE DETECTIVE RELATING WHAT THE DOCTOR TOLD HIM .

JUSTICE: BUT DIDN'T THE VICTIM OF THAT CRIME, ALSO , PROVIDE TESTIMONY?

YES, YOUR HONOR.

JUSTICE: SO WHY WOULD IT NOT BE WITHOUT REGARD TO ANYTHING ELSE, HARMLESS ? IF ERROR.

WELL, I THINK THAT THE, WHAT THE DETECTIVE TESTIFIED TO WAS VERY VERY GRUESOME. THE THE WITNESS, THIS WAS BASED ON ONE OF HIS PRIOR VIOLENT AGGRAVATED SOULS THAT THEY USE. IT WAS AN ELDERLY WOMAN. SHE HAD NOT BEEN AN IN WHEELCHAIR PRIOR TO THIS AT O'CLOCK AC. IT WAS -- TO THIS ATTACK. NO DOUBT.

JUSTICE: THAT IS NOT HEARSAY COMING IN.

NO. BUT THE FACT THAT THE DETECTIVE HEARD THE DOCTOR RELATE TO HIM AT THE HOSPITAL WAS THE MAIN CONCERN THAT PIECES OF HER SKULL HAD BEEN BROKEN UP AND ENDED UP DOWN INSIDE HER BRAIN. I THINK THE GRAPHIC GRUESOME OF THAT SETS IT APART .

CHIEF JUSTICE: SO, A GAIN , NOW I WOULD ASSUME THAT THE DOCTOR COULD HAVE TESTIFIED TO THAT .

YES.

CHIEF JUSTICE: WAS THE DOCTOR, WAS THERE AN ESTABLISH , WAS IT ESTABLISHED WHETHER THE DOCTOR WAS AVAILABLE OR NOT?

NO INDICATION ON THE RECORD WHY THE DOCTOR WAS NOT CALLED BY THE STATE. IF HE HAD AND THE DEFENSE HAD AN OPPORTUNITY TO CONFRONT, I WOULD NOT HAVE THAT ISSUE.

CHIEF JUSTICE: JUSTICE QUINCE.

JUSTICE: IS IT IMPORTANT IN THIS WHOLE ANALYSIS, THIS IS THE PRIOR VIOLENT FELONY , AND HE HAD GONE TO TRIAL ON THAT PRIOR VIOLENT FELONY.

THE TRIAL HAS STARTED AND HE PLED GUILTY IN THE MIDDLE OF THAT TRIAL .

JUSTICE: DID THE DOCTOR TESTIFY IN THAT TRIAL BEFORE HE PLED GUILTY?

I DO NOT KNOW. THAT IS NOT ON THE RECORD .

JUSTICE: SO WHAT IT ALL REALLY BOILS DOWN TO IS, REALLY, THIS ONE STATEMENT ABOUT THAT HE HIT HER AND A PART OF HER SKULL WAS EMBEDDED IN HER BRAIN VERSUS SHE CAME IN THERE AND TESTIFIED, HERSELF , ABOUT HOW THIS , HER LIFE HAD CHANGED AFTER THAT ATTACK , THAT SHE WAS NOW IN A WHEELCHAIR, COULD NOT LIVE ON HER OWN , ALL OF THESE THINGS, SO WE REALLY, DID THE JURY DID HAVE A GRAPHIC PICTURE OF WHAT HAPPENED TO HER FROM HER OWN TESTIMONY . -- TESTIMONY.

YES , WHICH WE ALSO RAISED IN AN OLD CHIEF ARGUMENT THAT THE DEFENSE HAD OFFERED TO STIPULATE TO THAT PRIOR VIOLENT FELONY AGGRAVATOR BUT THE STATE INSISTED ON PROVING IT UP, AND IN ESSENCE IT SORT OF BALLOONED AND BECAME A FEATURE , AND THAT WAS ERROR, ALSO, I RAISED IN ANOTHER PART OF THE BRIEF.

CHIEF JUSTICE: SO WE KNOW HERE, BECAUSE WE ARE , YOU , WE HAVE BEEN DEALING WITH YOUR FIRST POINT ON APPEAL. WAS IT, AND JUSTICE ANSTEAD HAD ASKED WHICH POINT YOU ARE GOING TO TOUCH ON . JUST SO WE MAKE SURE THAT WE HIT THE POINTS THAT YOU , ALSO , AND THE COURT THINGS ARE IMPORTANT .

I CERTAINLY INTEND TO TOUCH ON THE FIRST TWO POINTS, YOUR HONOR.

CHIEF JUSTICE: WE HAVE BEEN DOING THAT ON THE FIRST POINT. JUSTICE QUINCE.

JUSTICE: WELL, I AM KIND OF , SOMETIME THE STATE IS NOW LEFT IN A QUANDRY. WE HAVE THESE - IT SEEMS TO ME THE STATE IS NOW LEFT IN A QUANDRY. WE HAVE THESE CRAWFORD ISSUES AND THEN WHEN YOU EVEN BRING IN THE ACTUAL PERSON AS OPPOSED TO SOMEBODY TALKING ABOUT MRS. JOHNSON'S CONDITION, SHE ACTUALLY COMES IN AND THEN WE GET THESE ISSUES CONCERNING, WELL, HE WANTED TO STIPULATE TO IT, AND SO HOW IS THE JURY SUPPOSED TO EVALUATE THE PRIOR VIOLENT FELONY? JUST MERE FACT THAT A PRIOR VIOLENT FELONY IS ENOUGH? ARE YOU SAYING NOW , THAT WE SHOULDN'T ALLOW ANY TESTIMONY ABOUT THIS PRIOR VIOLENT FELONY, SO THAT THE JUDGE AND THE JURY CAN DETERMINE JUST HOW MUCH WEIGHT TO GIVE THESE?

WELL , THIS COURT HAS HELD THAT THE STATE CAN PROVE UP THE PRIOR VIOLENT FELONIES . HOWEVER , IT DOES REACH A POINT WHERE IT BECOMES TOO MUCH. AND I HAVE ALWAYS -- .

IF WE HAD WANTED THE TESTIMONY ABOUT THE SKULL BEING EMBEDDED INTO THE BRAIN , WE WOULD HAVE TO BRING IN THE DOCTOR , CORRECT?

YES. THAT'S CORRECT .

JUSTICE: AND WE WOULD HAVE HAD EVEN MORE AFTER FEATURE OF THIS PRIOR VIOLENT FELONY , SO I AM TRYING TO FIGURE OUT HERE, WHERE DO WE DRAW THE LINE , VERSUS DARRELL , CONVICTED OF A PRIOR VIOLENT FELONY, VERSUS SOME EVIDENCE OF HOW EGREGIOUS OR NON-EGREGIOUS THAT PRIOR VIOLENT FELONY IS.

WELL , I THINK IN THIS CASE AS I HAVE ARGUED IN OTHER CASES, IT REACHED A POINT OF EGREGIOUS , AND YOU DO HAVE TO DRAW THE LINE SOMEWHERE, BUT IF YOU ARE GOING TO LET THE STATE PROVE THE PRIOR VIOLENT AGGRAVATOR , YOU CERTAINLY CAN'T DO IT , WE CONTEND , BY HAVING A DETECTIVE TESTIFY AS HE DID HERE, ABOUT THE PIECES OF THE BRAIN AND THEN THE PROSECUTOR, THE PROSECUTOR USED THAT IN HIS CLOSING ARGUMENT. HE

REMINDED THE JURY THAT THE DETECTIVE TOLD THEM, TESTIFIED WHAT THE DOCTOR TOLD HIM ABOUT THE PIE CE S OF SKULL GOING INTO HER BRA IN. I THINK THAT CROS SES THE L INE WHEREVER YOU DRAW IT.

JUSTICE: WELL, SPEA K TO THE TESTIMONIAL AS PECT. EXPLAIN TO ME WHY YOU BELIEVE THIS DOCTOR'S STATEMENT WAS TESTIMONIAL.

BECAUSE DETECT IVE S S AID THAT HE WAS AT THE HOS PITAL. HE WAS INVESTIGATING MR . FRANKLIN'S CRIME SPRE E. HE WAS NOT O NLY , HE WAS THE, THE STATE MAKES HAY OF T HEFACT THAT HE WAS THE CHIEF INVESTIGATOR ON THE PIECE DELIVER MURDER, BUT OBVIOUSLY HE WAS CALLED IN TO INVESTIGATE THIS CRIME AGAINST MRS. JOH NSON.

JUSTICE: WAS T HIS DISCUSSION WITH THE DOC TOR AT THE TIME THAT SHE WAS IN THE HOSPITAL, IN THE EMERGENCY ROOM, INVESTIGATING THE INIT IAL COMPLAINT?

SHE WAS DEFINITELY IN THE HOSPITAL. I DON'T KNOW WHETHER SHE WAS IN THE EMERGENCY ROOM.IT IS CLEAR FROM THE RECORD THAT SHE WAS AT THE HOS PITAL AT THE TIME, YES.

JUSTICE: SO IT WAS AN INITIAL INVESTIGATION.

YES, AND HE WAS QUESTIONING THE DOCTOR ABOUT THE EXTENT OF HER INJU RIES, AND I THINK UNDER THE CIRCUMSTANCES, I THINK IT IS CLEAR THAT IT IS REA SONABLE TO AS SUME THAT THE DOCTOR 'S STATEMENTS TO THE POLICE OFFICER , THE DETECTIVE , WOULD BE USED SUBSEQUENTLY IN COURT IF THE DOCTOR DID NOT IN FACT , COM E IN TO TESTIFY.

CHIEF JUSTICE: WE ARE GOING TO EN D UP IN THESE CASES, BECAUSE CLEA RLY CRAWFORD DOES IMPACT ON WHAT,AT LE AST I SEE THAT IT CLEARLY IMPACTS, WITH THE EXTENT OF THE IMPACT IS O PEN TO QUESTI ON. I AM ST IL L HAVING, IN T HIS CASE, I GUESS, IF YOU GET PAST THE PRESER VATION ISSUE , HOW WE MEAS URE WHETHER IT WAS HARMLESS BEYOND AREASONABLE DOUBT OR NOT , AND YOU ARE SAYING THAT HAVING THE V I CTIM COM E IN AND TESTIFY IS NOT THE SAME THING AS HEARING IT FROM THE DETECTIVE.

WELL , SHE WAS , IN HER TESTIMONY , SHE DID NOT REMEMBER A LOT OFF THE OFFENSE. SHE REMEMBER ED THE -- OF THE OFFENSE. SHE REME MBERED THE BEGINNING OF THE OFFENSE.

CHIEF JUSTICE: I GU ESS WHAT I SEE IN THE FUTURE IS DEFENDANTS HAVE NOT REALLY MINDED THE MORE SANMI ZE ED -- SANITIZEED VERSION THAT MAY OCCUR WHEN THE POLICE OFFICER GIVES THE FACTS, A ND IF THE STATE IS GOING TO ACTUALLY BE IN A POSI TION TO BRING IN THE DOCTORS, THE DEFENDANT -- THE DOCTORS , THE VIC TIM, THE DEFE NDANT MAY ACTUALLY END UP SEEING THIS FROM THE ACTUAL WITNESSES , THEY MAY FIND TO BE ACTUALLY MORE HARM FUL TO THEM IN THE PENALTY PHASE , REALLY, THAN NOT , SINCE IDON'T THINK THE FACTS OF THIS CRIME, THE PRIOR CRIME WERE CONTRO VERTED , A S FAR A S WHAT HAPPENED TO HER .

NO, EXCE PT , WELL , WE DON'T HAVE A, L I KE I SAID, THIS CAME FROM THE DETECTIVE NOT THE DOCTOR , SO THE MED ICAL TERMS OF PIECES OF SKULL GOING DOWN INTO YOUR BRAIN, I DON'T KNOW. I MEAN, THAT IS SOMETHING THAT THE DETECTIVE TESTIF IED TO. WE DON'T KNOW WHETHER IT WOULD HAVE WITHST OOD THE COBB FRONT ATION TEST OF -- CONFRONTATION TEST OF THATDOCTOR. MAYBE AND MA YBE NOT. I DON'T KNOW.

CHIEF JUSTICE: IF Y OU ARE SAYING THAT IT WAS , THAT WOULD BE AN ISSUE OF WHE THERHE ACTUALLY HAD THAT KNOWLEDGE, WHETHER IT IS ACCURATE LY EVEN TE LLING OR RELATED WHAT HAPPENED, A ND THERE IS NO , NOTHING I N THIS RECORD, FOR EXAMPLE , THE HOSPITAL RECORDS, TO SHOW THAT THERE IS AN YTHING INACCURATE ABOUT WHAT HE TESTIFIED TO.

NO. NO. THAT'S CORRECT.

JUSTICE: YOU MAKE AN OTHER CONFRONTATION CLAUSE ARGUMENT, ISSUE NUMBER THREE.

YES.

JUSTICE: AS TO THE STATEMENTS OF THE VICTIM TO ONE OF THE WITNESSES AND TO THE POLICE OFFICER. WHY ISN'T THE REASON THAT THAT STATEMENT IS UNAVAILABLE IS BECAUSE YOUR CLIENT MURDERED THE PERSON MAKING THE STATEMENT, SO WHY DOESN'T THE DRAW THE EQUITABLE PRECONCLUSION OF THAT HE SHOULDN'T TAKE ADVANTAGE OF HIS OWN WRONGDOING, PRECLUDES HIM FROM MAKING THAT ARGUMENT AS TO THOSE PARTICULAR STATEMENTS.

I THINK THE FOOTNOTE IN CRAWFORD THAT REFERS TO DYING DECLARATIONS THAT EQUITABLE -- DECLARATIONS IN THAT EQUITABLE ARGUMENT, THAT IS PURE DICTUM, AND IT SEEMS TO ME NOT TO BE LOGICALLY THE SAME CONCLUSION SHOULD BE REACHED LOGICALLY, IN ANALYZING DYING DECLARATIONS, WHICH THIS WAS NOT, BECAUSE THE STATE FAILED TO LAY THE FOUNDATION FOR THAT, BUT THAT IS AN ASIDE, BUT GETTING BACK TO THE EQUITABLE ARGUMENT, IT STILL MAKES NO SENSE TO ME, YOU STILL HAVE A RIGHT TO CONFRONT, I MEAN, YOU ARE SAYING THAT YOU DON'T HAVE A RIGHT TO CONFRONT BECAUSE YOU ARE THE REASON, IT IS SORT OF A CIRCULAR ARGUMENT THAT FLIES IN THE FACE OF THE HOLDING IN CRAWFORD, I THINK.

JUSTICE: THERE IS A DOCTRINE IN THE LAW NOT ONLY IN THIS AREA BUT IN MANY AREAS THAT, UNCLE ANTHONY'S DOCTRINE, BOTH IN CRIMINAL AND CIVIL LAW AREAS THAT YOU CAN'T TAKE ADVANTAGE OF YOUR OWN WRONGDOING.

WELL, THERE AGAIN, I THINK THAT IF YOU CARRY TO THIS EXTREME, I THINK IT BECOMES CIRCULAR, AND BECOMES, YOU AVOID THE ENTIRE CONFRONTATION TEST, BY TAKING OUT THAT CATEGORY, AND THAT IS NOT FAIR. I UNDERSTAND --

CHIEF JUSTICE: WHAT YOU ARE, LET'S MAKE SURE, BECAUSE IF THE DEFENDANT SAID IT WASN'T HIM, THEN IT SORT OF IS PUTTING THE CARD BEFORE THE HORSE TO SAY, WELL, YOU ARE THE ONE THAT DID IT. THEREFORE, BUT IN THIS CASE, DIDN'T THIS DEFENDANT CONFESS? I MEAN, TO THE FACT THAT IT WAS HIM?

WELL, HE DID MAKE THOSE STATEMENTS, YES. BUTS NEVERTHELESS LIE GOING TO -- BUT NEVERTHELESS BY GOING TO TRIAL, I THINK YOU STILL HAVE PUT THE STATE TO ITS BURDEN OF PROOF AND YOU STILL HAVE THE RIGHT TO CONFRONT WITNESSES THAT THE STATE PRESENTS AT THAT TRIAL AGAINST YOU.

JUSTICE: LET ME PROCEED, THEN, TO MY OTHER QUESTION I HAD REGARDING THAT PARTICULAR ISSUE. THE VICTIM'S STATEMENTS TO, I FORGET THE NAME BUT THE TRUCK DRIVER, THAT SEEMED TO BE AN EXCITED UTTERANCE. WHY IS THAT TESTIMONIAL, AND THE SAME THING WITH REGARDING TO THE POLICE OFFICER. THAT MAY BE A CLOSER QUESTION, BUT BOTH, I THINK, WERE INTRODUCED AS EXCITED UTTERANCES, AND CAN YOU EXPLAIN AS TO BOTH, WHY THEY ARE TESTIMONIAL IN NATURE.

WELL, I AGREE WITH YOU. I THINK IT IS A CLOSER QUESTION ON THE FIRST ONE. BUT THE, I DO CITE SOME CASES IN MY BRIEF THAT APPLY CRAWFORD TO EXCITED UTTERANCES, AND THAT WAS THE BASIS, OBVIOUSLY, OF THE TRIAL COURT, ALLOWING IT. HE CITED THE STATUTE SPONTANEOUS STATEMENT, EXCITED UTTERANCE, AND STATEMENT OF, STATE OF MIND OR I FORGET WHAT THE OTHER ONE WAS.

I THINK THAT YOU AGREE ON AND PEEL THAT AT LEAST AS FAR AS -- ON APPEAL THAT AT LEAST AS FAR AS THE HEARSAY IS CONCERNED, IT WOULD BE AN EXCITED UTTERANCE, ABS

CONFRONTATION CLAUSE -- ABSENT CONFRONTATION CLAUSE ISSUE.

YES , BUT AS I SAID I CITED THE MORE RECENT CASES THAT DEAL WITH EXCITED UTTERANCES OTHER THAN CRAWFORD AND THEY ARE STILL NOT ADMISSIBLE UNDER THE CONFRONTATION --

CHIEF JUSTICE: THAT WOULD BE IN THE SUPREME COURT RIGHT NOW ABOUT SOMETHING SAID IN EXCITED UTTE RANCE T O A POLICE OFFICER , THAT THAT IS UNDER CRAWFORD OR NOT.

RIGHT .

CHIEF JUSTICE: SO IN ELLIS , THE ST ATEMENT , THE TRUCK DRI VER, THOUGH , HOW DOES THAT FIT INTO , I DON'T THINK WE ARE AT THAT DISTANCE FROM CRAWFORD.

LI KE I SAID , I THINK I HAVE GOT A M UCH BETTER ARGUMENT ON THE POLICEOFFICER, WHERE HE DID ARRIVE AT THE SCENE AND THEN BLA FK INTERROGATED M R . LAWLEY, ASKING HIM -- BASI CALLY INTERROGATED MR . LAWL EY , ASKING HIM QUESTIONS WH IC H WERE CLEARLY TESTIMONIAL.

CHIEF JUSTICE: AS JUS TICE CANTERO AS KED YOU, IF IT I S ANSWER TO SAY SPEC IFIC QUESTIONS , DO YOU CONCED E ON APPEAL THAT IT WAS PROPERLY , WAS ALSO AN EXCITED UTTERANCE, NOT THAT THAT MEANS THAT IT CAN'T BE TESTIMONIAL BUT THAT IT IS AN EXCITED UTTERANCE , I F IT WAS BEING G IVEN AS FAR AS QUESTION -AN SWER , QUESTION-ANSWER?

ARE YOU SAYING THAT , IF IT IT WERE THE AN SWER SOLICITED BY A QUESTION , DOES THAT TAKE TO UT OF OR MAKE I T --

CHIEF JUSTICE: WHAT IS YOUR ---TAKE IT OUT O F O R MAKE IT - -

CHIEF JUSTICE: WHAT IS YOUR POSITION ON APPEAL?

I THINK THE TRUCK DRIVER DID TESTIFY THAT THE ANSWER WAS IN RES PONSE T O , AND T HAT TAKES IT AWAY FROM EXCITED UTTERANCE.IT IS A CLOSE QUESTION.

JUSTICE: DOES THE CASE LAW SAY THAT IF YOU ANSWER ANY QUESTIONS, IT IS NO LONGER AN EXCITED UTTERA NCE?

WELL , YES , I THINK THERE ARE SOME CASES IN T HERE. I AM NOT SURE I QUITE CITED THEM IN M Y BRI EF -- I CITED THEM IN MY BRIEF , BUT IT I S AKIN TO THE O HIO ROBERTS WHICH WE HAVE ABANDONED , WHICH IS MORE RELI ABLE, BECAUSE IT IS SPO KEN IN THE HAYES THE AND EXCITED - - I N THE HA STE AND EXCITED NATU RE OF THE RECENT EVENT WITH OUT THE TIME FOR THE DECLARANT TO PAUSE AND REFLECT ON WHATEVER --

JUSTICE: SO THOSE FACTORS WOULD STILL BE PRESENT, EVEN IF SOMEONE ASKED YOU A QUESTION WHY ARE YOU SO AGITATED, IT WO ULD STILL BE UNDER THE INFL UENCE OF WHATEVER THAT EXCITING EVENT WAS.

THEY COULD. THEY COULD. YES.

CHIEF JUSTICE: BUT Y OUS AID IT IS A CLOSE QUESTION. AND WE CAN L OOK BAC K AT YOUR BRIEF. ARE YOU CONTESTING THE COURT'S FI NDING THAT THE STATEMENTS WERE EXCITED UTTERANCES ?

DEFINITELY THE POLICE OFFICER.WELL, YES, TO SOME EX TENT BOTH, BUT IT DOESN'T MATTER .

CHIEF JUSTICE: IT DOES MATTER T MATTERS IN TE RMS OF -- IT MATTERS IN TERMS OF FOR E LLIS, BECAUSE THAT DOESN'T SEEM THAT THAT WOULD FIT UNDER CRAWFORD , BEC AUSE IT IS NOT TO

LAW ENFORCEMENT OR SOMEBODY WHERE HE IS CONTEMPLATING THAT HE IS GOING TO BE TRYING TO GET THE , THAT IT FITS INTO THAT, THAT IF IT IS NOT AN EXCITED UTTERANCE, THEN MAYBE IT CAN'T COME, IN BUT IF IS AN EXCITED UTTERANCE , THEN IT IS NONTESTIMONIAL, THEN YOU DO GO BACK TO OHIO V ERSUS ROBBINS. DON'T YOU AGREE WITH THAT?

YES. I CERTAINLY WOULD CONCEDE THAT BEFORE THE POLICE OFFICER. YES.

IS IT YOUR POSITION THAT ANY STATEMENTS MADE BY A VICTIM OR A WITNESS TO A POLICE OFFICER, ARE BY DEFINITION, TESTIMONIAL, OR THAT WE NEED TO CONSIDER THE CIRCUMSTANCES OF THE CASE , TO DETERMINE WHETHER IT IS TESTIMONIAL?

I THINK IF THE POLICE OFFICER IS ASKING QUESTIONS, I THINK IT IS CLEARLY TESTIMONIAL. IF HE IS INVESTIGATING A CRIME, YES . THE OTHER ISSUE I WOULD LIKE TO TOUCH ON BRIEFLY , IS POINT TWO, WHERE HE AND , HE CONFESSED NOT ONLY TO THE POLICE OFFICER BUT WHILE HE WAS AWAITING TRIAL IN THE COUNTY JAIL, HE CALLED A NEWSPAPER REPORTER AND GAVE A TAPED INTERVIEW WITH THE NEWSPAPER REPORTER , CONFESSING TO THE CRIMES AS WELL. HE, AND THERE WAS A HEARING PRETRIAL TO REDACT CERTAIN IRRELEVANT PORTIONS OF THAT STATEMENT. THE JUDGE AGREED THAT IT WOULD REDACT SOME OF THEM BUT OVER DEFENSE OBJECTION, A RELEVANCE OBJECTION, ALLOWED IN PARTS OF THE STATEMENT THAT DEALT WITH MR . FRANKLIN'S STATE OF MIND. HE WAS CLEARLY DEPRESSED . HE SAID --

CHIEF JUSTICE: I GUESS WHAT I WANT TO KNOW ABOUT THAT, LET'S ASSUME THAT IT WASN'T DIRECTLY RELEVANT. HOW IS THAT HARMFUL ? I MEAN , IT SEEMS IF ANYTHING , COULD POSSIBLY HUMANIZE HIM , AS FAR AS SAYING I WAS TIRED OF LIVING , OF BEING TREATED LIKE AN ANIMAL , YOU KNOW , THAT --

WELL , HE ALLEGES THE JURY BY INESSENCE , BLAMING THEM AMONG OTHER PEOPLE. HE SAYS I DID IT BUT SO WHAT. THEY THE CAUSE OF THAT, THE PEOPLE, THE WORLD , LIFE, I HATE LIVING. I HATE LIFE. I AM TIRED OF EVERYTHING. PEOPLE WATCHING ME , HATING ME, TIRED OF PEOPLE. UNDOUBTEDLY IT DEHUMANIZED HIM AND ALLOWED THE JURY MORE READILY , THE OPPORTUNITY AND THE DESIRE TO GO AHEAD AND LEVY THE ULTIMATE SANCTION.

CHIEF JUSTICE: DID THAT COME IN IN THE GUILTY PHASE?

YES, IT DID -- IT DID. AND IF IT HAD ANY RELEVANCE WHATSOEVER, I THINK 403 WOULD APPLY.

CHIEF JUSTICE: YOU DON'T RAISE ANY , EXCEPT FOR THE ISSUE OF VICTIM IMPACT AND , YOU DON'T REALLY RAISE ANY ISSUES ABOUT ANY RULINGS THAT WERE INAPPROPRIATE REGARDING NOT LETTING SOMETHING IN IN THE PENALTY PHASE, AS FAR AS THIS DEFENDANT'S BACKGROUND ? YOU DON'T DIRECTLY RAISE PROPORTIONALITY. IS IT BECAUSE YOU HAVE SO MANY AGGRAVATORS IN THIS CASE?

WELL , I DO HAVE A LOT OF AGGRAVATORS. I MADE AN ARGUMENT , I THINK ESPECIALLY THE EVIDENCE , THE RECORD IS VERY WEAK ON HIDING PREMEDITATION . I THINK THE TRIAL JUDGE 'S INTERPRETATION OF MR. FRANKLIN 'S STATEMENT THAT HE WAS GOING BACK TO GET THE SECURITY GUARD , AS EVIDENCE THAT HE PLANNED TO KILL HIM , IS A STRETCH.

CHIEF JUSTICE: I SEE AGAIN, THAT WE HAVE A SPECIAL VERDICT FORM LIKE WE HAD YESTERDAY IN A CASE.

YES .

CHIEF JUSTICE: AND JUST LIKE WHAT I SUSPECTED WAS GOING TO HAPPEN , THERE WAS ACTUALLY AN UNANIMOUS FINDING ALL OF THE AGGRAVATORS , INCLUDING C CP AND PECUNIARY GAIN. HOW DOES THAT , DOES THAT CHANGE YOUR, THE ISSUE THAT THE JURY FOUND, AL

SO, IN ADDITION TO THE JUDGE , SUBSTANTIAL EVIDENCE TO SUPPORT A HEIGHTENED PREMEDITATION?

NO. I DON'T THINK THE JURY REALLY UNDERSTANDS THAT, THE HEIGHTENED AGGRAVATOR STATUTE. I JUST DON'T THINK THE INSTRUCTIONS SUFFICIENTLY DEFINE IT SUCH THAT THEY CAN MAKE AN EDUCATED DECISION ABOUT THAT .

CHIEF JUSTICE: BEFORE YOU SIT DOWN , DO YOU WANT TO TOUCH ON ANY OTHER POINT? YOU ARE IN YOUR REBUTTAL.

I THINK NOT , YOUR HONOR. THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS STEPHEN AKE AND I WOULD LIKE TO BE GIVEN BY TALKING ABOUT THE PRESERVATION AREA, THAT JUSTICE BELL STARTED HIS ELEMENT, STARTED HIS QUESTIONING WITH COUNSEL ON. COUNSEL PRETRIAL , FILED A PRETTY GENERIC MOTION ATTACKING THE CONSTITUTIONALITY OF THE STATUTE INVOLVING THE ALLOWING HEARSAY IN THE PENALTY PHASE AND , ALSO , SOUGHT TO BAR THE STATE FROM INTRODUCING ANY HEARSAY EVIDENCE IN THE PENALTY PHASE. IT WAS A RATHER GENERAL MOTION, AND IT WAS HEARD THE SAME DAY THAT THE COURT HEARD ALL OF THE OTHER STANDARD DEATH PENALTY MOTIONS, AND THERE WAS NO , NO SPECIAL ARGUMENT OR WHATEVER WHAT HAVE YOU ON THAT MOTION , AND THE COURT DENIED IT IT WASN'T A -- DENIED IT. IT WASN'T A DEFINITIVE RULING AS TO ANY CERTAIN WITNESSES OR ANY TESTIMONY. YOU CAN , FOR COMPARISON PURPOSES, I WOULD LIKE TO LIKE ISSUE NUMBER TWO , WHERE PRIOR TO TRIAL AND WE HAVE A SUPPRESSION HEARING AND HE GOES THROUGH AND SAYS HERE ARE THESE STATEMENTS, TO THE REPORTER, THAT I DON'T WANT INTRODUCED INTO EVIDENCE, AND THE COURT SAID, NO , I AM ALLOWING THOSE INTO EVIDENCE. THAT IS A DEFINITIVE RULING ON SOMETHING THAT , HAD COUNSEL NOT RENewed THAT OBJECTION, I WOULD ARGUE THAT THAT SECTION WOULD ALLOW HIM TO PREPARE PRESERVED IT, BUT THAT IS NOT THE CASE DEALING WITH THE HEARSAY ISSUE IN THE PENALTY PHASE, BECAUSE WE DON'T HAVE A DEFINITIVE RULING FROM THE TRIAL JUDGE AHEAD OF TIME, AND THEN TO MAKE MATTERS WORSE AT THE PENALTY PHASE, THE TRIAL COUNSEL DID NOT OBJECT ON HEARSAY GROUNDS. HIS OBJECTION WAS AS TO THE QUALIFICATIONS OF THE POLICE OFFICER'S ABILITY TO TESTIFY AS TO THE VICTIM'S INJURIES . THE DEFENSE ATTORNEY NEVER PUT THE COURT ON NEARLY THAT HE WAS -- ON NOTICE THAT HE WAS OBJECTING ON HEARSAY OR ON CONFRONTATION CLAUSE GROUNDS, WHICH HAD HE DONE, I SUBMIT THE RECORD WOULD HAVE BEEN BETTER AND WE COULD CLARIFY SOME OF THE ISSUES SURROUNDING THIS , BUT WE DON'T HAVE THAT HERE, SO I DON'T THINK HIS OBJECTION AS TO THE QUALIFICATION AS PRESERVED THE PRESENT ARGUMENT THAT HE IS RAISING NOW AS TO THE VIOLATION OF THE CONFRONTATION CLAUSE , AND THE STATE WOULD SUBMIT THAT .

JUSTICE: I UNDERSTAND YOUR ARGUMENT, BUT ONCE YOU GET BEYOND THAT AND WE MAY VERY WELL DETERMINE THAT , BUT IF WE DON'T , DO YOU CONCEDE THAT THIS TESTIMONY WAS HEARSAY AND THAT IT DID NOT FALL WITHIN ANY HEARSAY EXCEPTION ?

WELL , THE QUESTION WAS NOT DIRECTED TOWARDS THE HEARSAY ANSWER. THE OFFICER DID, IN FACT, GIVE A HEARSAY ANSWER. WHETHER IT IS A VIOLATION OF CRAWFORD IS ANOTHER MATTER.

THAT IS NOT WHAT I AM ASKING.

NO. HE DEFINITELY SAID THIS IS WHAT THE DOCTOR TOLD ME, AND THAT WOULD COME UNDER HEARSAY.

JUSTICE: THAT IS THE HEARSAY AND THERE IS NO EXCEPTION TO IT. THE REASON YOU GOT IT IN WAS BECAUSE IT WAS THE PENALTY PHASE.

RIGHT. CORRECT.

JUSTICE: AND WHAT OPPORTUNITY DID THE DEFENDANT HAVE TO REBUT?

WELL, HE HAD A PRIOR TRIAL INVOLVING ALICE JOHNSON THE VICTIM IN THIS CASE, AND HE OBVIOUSLY COULD HAVE HAD HIS CONFRONTATION RIGHT THERE, TO ADDRESS WHAT THE DOCTOR OR THE TESTIMONY OF THAT CASE, AND THIS COURT IN RODRIGUEZ POINTED THAT OUT

JUSTICE: HE HAD A PRIOR TRIAL. DIDN'T HE ENTER INTO A PLEA?

HE PLED MID WAY THROUGH THE TRIAL, GENTLEMEN, YOUR HONOR. -- YES, YOUR HONOR.

CHIEF JUSTICE: DO WE HAVE IT IN THE RECORD WHETHER THE DOCTOR'S TESTIMONY WAS TAKEN?

WE DO NOT HAVE THAT IN THE RECORD, YOUR HONOR.

CHIEF JUSTICE: BEFORE YOU MAKE THAT STATEMENT TO US, WOULDN'T THAT BE SOMETHING THAT YOU WOULD DO A SUPPLEMENTAL RECORD SO THAT WE WOULD KNOW THAT?

WE CERTAINLY COULD, BUT I DO KNOW THAT HE DEFINITELY TESTIFIED AND WE CAN CERTAINLY SUPPLEMENT ON THE RECORD TO THAT, BUT HE DID COME UP AND TESTIFIED AFTER ALICE JOHNSON TESTIFIED, THE DOCTOR CAME UP AND TESTIFIED, AND THAT WOULD BE MY UNDERSTANDING ON THAT.

JUSTICE: AS TO THE CONFRONTATION CLAUSE ISSUE, THE PRIOR OPPORTUNITY TO CROSS-EXAMINE, BUT AS TO OUR STATUTE, THE OPPORTUNITY TO REBUT.

THAT IS WHAT I THINK IT GIVES THAT, HE HAD THE OPPORTUNITY TO DO IT AT HIS PRIOR TRIAL. WHETHER IT HAPPENED OR NOT --

JUSTICE: I DON'T THINK OUR STATUTE TALKS ABOUT A PRIOR OPPORTUNITY. DID YOU HAVE AN OPPORTUNITY AT THIS TRIAL TO REBUT THE HEARSAY TESTIMONY?

IT MAY HAVE BEEN ABLE TO REBUT IT, MAYBE THROUGH TRYING TO GET A DEPOSITION IN, EVEN THOUGH IT IS HEARSAY, BECAUSE IT IS THE PENALTY PHASE, BUT DID HE HAVE AN OPPORTUNITY IN THIS TRIAL TO REBUT?

I WOULD SUBMIT THAT, HAD THE DEFENSE COUNSEL RAISED THE CONFRONTATION CLAUSE OBJECTION, IT WOULD HAVE ALLOWED THE STATE TO HAVE CURED THE PROBLEM AND THE STATE COULD VERY EASILY HAVE CALLED THE DR.

JUSTICE: MY QUESTION IS NOT ON THE CONFRONTATION CLAUSE ISSUE. THAT IS A SEPARATE PROBLEM. MY QUESTION IS WHETHER THE STATUTE WAS FAITHFULLY APPLIED, AND THAT IS IT ALLOWED THE STATE TO INTRODUCE HEARSAY IN THE PENALTY PHASE, IF THE DEFENDANT HAS THE OPPORTUNITY TO REBUT.

RIGHT.

JUSTICE: AND MY QUESTION IS, DID THE DEFENDANT IN THE PENALTY PHASE HAVE THE OPPORTUNITY TO REBUT THAT HEARSAY TESTIMONY?

HE DIDN'T HAVE THE OPPORTUNITY TO REBUT IT AT THIS ONE BECAUSE HE DIDN'T PROCEED DOWN THAT PATH. HE HAD THE OPPORTUNITY TO REBUT IT IN THE PRIOR TRIAL, WHICH THIS COURT SAID IN RODRIGUEZ IS SUFFICIENT.

JUSTICE: WAS THERE OBJECTION MADE ON THE BASIS THAT HE DID NOT HAVE THE OPPORTUNITY TO REBUT?

NO, YOUR HONOR. THE OBJECTION WAS SIMPLY AS TO THIS DETECTIVE'S QUALIFICATION TO RENDER AN OPINION AS TO HER INJURIES. IT WASN'T, HIS ANSWER WAS ACTUALLY NONRESPONSIVE.

JUSTICE: DOES THE RECORD REFLECT, ONE WAY OR THE OTHER, WHETHER THE DOCTOR WAS AVAILABLE?

NO.

JUSTICE: AT THAT TIME?

NO, YOUR HONOR, AGAIN, DEFENSE COUNSEL NEVER RAISED THE CONFRONTATION AND WE NEVER GOT TO DEVELOP ANYTHING REGARDING THIS. WE COULD HAVE CLEARLY, THE RECORD COULD HAVE BEEN DEVELOPED WITH MUCH GREATER DETAIL, HAD A PROPER OBJECTION BEEN RAISED ON THIS.

JUSTICE: SO ACTUALLY WHAT WE HAVE HERE IS THE OBJECTION WAS TO THE GENERAL QUESTION THAT WAS ASKED, WAS WHAT INJURIES DID SHE SUFFER.

RIGHT.

JUSTICE: THEN THE OBJECTION WAS THAT HE IS NOT A DOCTOR.

RIGHT.

JUSTICE: SO THAT WAS OVERRULED, AND THE PROSECUTOR ASKED, BASICALLY WHAT INJURIES DID SHE SUFFER, AND THEN HE SAYS, WELL, I TALKED TO THE DOCTOR. AFTER THAT POINT, WAS THERE ANY OBJECTION FROM THE DEFENSE COUNSEL, SAYING MOTION TO STRIKE OR NONRESPONSIVE?

NO, YOUR HONOR, AND THAT THEREIN LIES THE PROBLEM ON THIS CASE IS THE QUESTION WAS JUST TELL US ABOUT HER INJURIES AND THEN HE PROCEEDS TO ANSWER AS TO WHAT DOCTOR TOLD HIM, AND WE DON'T KNOW ANYTHING REGARDING THIS. COUNSEL -- ANYTHING REGARDING THIS. COUNSEL TALKED ABOUT HE WAS INVESTIGATING THIS, AND THERE IS NOTHING IN THE RECORD AS TO HE WAS INVESTIGATING THE ALICE JOHNSON CASE. WE HAVE NO TESTIMONY AS TO HE WAS INVESTIGATING WHEN HE TALKED TO THE DR. THIS WAS THE MURDER OF THE PIZZA DELIVERY PERSON AND HE, ALSO, WAS SOMEWHAT INVOLVED IN THE ALICE JOHNSON HOME INVASION ALTHOUGH IT IS NOT REALLY CLEAR TO WHAT LEVEL. HE DIDN'T HAVE MUCH KNOWLEDGE OF THAT CRIME EXCEPT IN A GENERAL SENSE, BUT TAKE ALL OF THIS AWAY AND WE STILL COME BACK TO, EVEN IF THERE IS ANY ERROR IN THIS CASE, IT IS CLEARLY GOING TO BE HARMLESS ERROR, BECAUSE WE HAVE ALICE JOHNSON HAD JUST TESTIFIED. SHE HAD JUST COME IN, APPARENTLY SHE HAD BEEN WHEELED IN, AND HAD TESTIFIED AS TO HOW ACTIVE SHE WAS AND WHAT HAPPENED BEFORE THIS HOME INVASION WHERE SHE WAS STRUCK REPEATEDLY WITH A HAMMER, AND THEN SHE DIDN'T HAVE MUCH RECALL AS TO THE EVENTS AFTER THAT. THE TESTIMONY THAT PIECES OF HER SKULL MAY HAVE BEEN, ENDED UP IN HER BRAIN, IS, COUNSEL IS RIGHT. IT IS SOMEWHAT GRUESOME, BUT IT IS ALSO A RESULT OF WHAT THE DEFENDANT DID, AND THE JURY COULD EASILY INFER THAT SHE SUFFERED SOME SEVERE DAMAGES TO HER HEAD AS A RESULT OF BEING STRUCK WITH A CLAW HAMMER.

CHIEF JUSTICE: JUST TO UNDERSTAND, AND I KNOW THIS CAME UP YESTERDAY ABOUT A PRIOR VIOLENT FELONY, THE STATE TAKES THE POSITION AND WE UPHOLD THIS RIGHT, THAT THE

REASON THAT DETAILS OF A PRIOR VIOLENT FELONY CAN BE OFFERED, BECAUSE NOT ALL BATTERIES ARE THE SAME OR NOT ALL PRIOR CRIMES ARE THE SAME, AND SO IN ORDER TO HAVE SAID, BOTH TO THE TRIAL JUDGE AS TO THE JURY, AS TO WHETHER THE AGGRAVATORS INDEED OUTWEIGH ANY MITIGATORS, UNDERSTANDING THE NATURE OF THE PRIOR CRIME IS APPROPRIATE FOR THEM TO EVALUATE. IS THAT CORRECT?

THAT'S CORRECT. YEAH. THE JURY NEEDS TO KNOW, THEY ARE ENTITLED TO KNOW THE DETAILS OF THESE PRIOR OFFENSES, SO THAT THEY CAN WEIGH THE CHARACTER OF THE DEFENDANT WHEN THEY ULTIMATELY ARE MAKING THEIR RECOMMENDATION.

CHIEF JUSTICE: NOT JUST CHARACTER OF WHETHER THE AGGRAVATOR IS SUFFICIENTLY WEIGHTY.

CORRECT.

CHIEF JUSTICE: IF IT IS BEING REQUESTED.

AND THE COURT DISCUSSED THAT IN RODRIGUEZ AND DISCUSSED HAVING AN OFFICER COME IN AND TESTIFY TO IT, AS OPPOSED TO BRINGING IN ALL OF THE OTHER WITNESSES, SO THAT IT DOESN'T BECOME SUCH A HUGE PART OF --

JUSTICE: WE MIGHT HAVE TO REEXAMINE RODRIGUEZ IN LIGHT OF CRAWFORD?

I DON'T THINK SO, YOUR HONOR, BECAUSE CRAWFORD SAID IF YOU HAD THE PRIOR OPPORTUNITY TO CROSS-EXAMINE THEM AT A PRIOR TRIAL OR PRIOR OFFENSE THAT RESULTED IN YOUR CONVICTION, YOU ARE GOING TO HAVE HAD THE OPPORTUNITY TO CROSS-EXAMINE.

JUSTICE: WOULD THAT REALLY BE APPLICABLE, IF WE ARE TALKING ABOUT THEY MAY HAVE HAD A PRIOR OPPORTUNITY TO CROSS-EXAMINE THE MEDICAL EXAMINER. BUT IF SOMEONE ELSE SAYS WHAT THE MEDICAL EXAMINER SAID, I THINK THE PRIOR OPPORTUNITY WOULD ACTUALLY GO TO THE PERSON WHO IS ACTUALLY DOING THE TESTIFYING NOW, SO WOULD YOU HAVE HAD A PRIOR OPPORTUNITY?

NO, BUT YOU WILL, YOU CAN EASILY REBUT IT BY INTRODUCING THINGS FROM THE PRIOR TRIAL.

CHIEF JUSTICE: WHATEVER WE DECIDE IN THIS CASE, WE ARE GOING TO BE HAVING CRAWFORD ISSUES FROM NOW FOR THE NEXT TEN YEARS. IT WOULD REALLY HELP THE COURT IF THE STATE DIDN'T ASSUME THAT RODRIGUEZ CONTINUES IN ITS SAME FORM, AND MAYBE LOOK AT THAT, SO THAT WE MINIMIZE THE NUMBER OF ISSUES THAT WE HAVE GOT TO LOOK AT CRAWFORD ISSUES.

I DON'T DOUBT THAT THERE WILL BE A LOT OF ISSUES COMING BEFORE THIS COURT.

JUSTICE: BEFORE YOU LEAVE, I WANT TO CLARIFY OUR POSITION. DO YOU CONCEDE THAT THE MEDICAL EXAMINER STATEMENTS TO THE POLICE OFFICER WERE TESTIMONIAL?

NO. NOT AT ALL.

JUSTICE: WHY NOT?

BECAUSE WE DON'T KNOW THE CONTEXT OF THEM. WE DON'T KNOW, AS I SAID, NOTHING WAS DEVELOPED. WE HAVE NO IDEA WHAT THIS OFFICER WAS DOING, WHEN HE LEARNED THIS INFORMATION FROM THE DOCTOR. WE DON'T KNOW THAT HE WAS QUESTIONING THE DOCTOR. WE DON'T KNOW THE CONTEXT OF IT WHATSOEVER.

JUSTICE: HOW ARE WE SUPPOSED TO ANALYZE THE ISSUE THEN?

I WOULD SAY LOGICALLY YES. LOGICALLY IT APPEARS THE POLICE OFFICER WAS THERE CONDUCT AN INVESTIGATION WHICH WOULD PROBABLY FALL UNDER TESTIMONIAL BUT WE JUST DON'T KNOW.

JUSTICE: WE NEED TO ANALYZE IT UNDER THE CIRCUMSTANCES OF THE CASE SO FAR. THE SUPREME COURT HAS, FROM CRAWFORD, WE CAN SURMISE THAT WE NEED TO DETERMINE WHETHER THE MEDICAL EXAMINER'S STATEMENTS TO THE POLICE OFFICER WERE INTENDED TO BE INTRODUCED AT A TRIAL AND THEREFORE WERE TESTIMONIAL, SO HOW ARE WE GOING TO ANALYZE THAT IN A VACUUM?

I DON'T THINK YOU HAVE TO ANALYZE IT IN THIS CASE BECAUSE IT WASN'T PRESERVED, YOUR HONOR, AND HAD IT BEEN PRESERVED, WE WOULD HAVE HAD A BETTER RECORD TO ENABLE YOU TO ANALYZE IT BETTER BUT WE DON'T HAVE THAT HERE AND THAT IS THE PROBLEM. IT MAKES IT DIFFICULT TO ANALYZE -- DIFFICULT TO ANALYZE, BECAUSE WE DIDN'T KNOW WHAT IS GOING ON.

CHIEF JUSTICE: JUSTICE BELL HAD A QUESTION.

JUSTICE: TALKING ABOUT THE MEDICAL EXAMINER, ARE WE TALKING ABOUT THE ER PHYSICIAN?

NOT THE MEDICAL EXAMINER BUT JUST A DOCTOR. HE WAS GOING ALONG WITH THAT.

JUSTICE: I APPRECIATE IT.

CHIEF JUSTICE: NO. WE KNOW WE ARE STILL TALKING ABOUT ISSUE ONE AND WHATEVER THE MEDICAL INDIVIDUAL WAS.

THE DOCTOR AND THAT IS ALL WE KNOW IS HE SAID I SPOKE TO A DOCTOR AND THIS IS WHAT HE TOLD ME. I ASSUME IT WAS HER TREATING PHYSICIAN, BUT, AGAIN, WE DON'T KNOW, SO BRIEFLY GOING ON TO THE NEXT CRAWFORD ISSUE, I GUESS WOULD BE ISSUE THREE. WHICH DEALS WITH TWO OBJECTIONS ON HEARSAY GROUNDS, AGAIN, COUNSEL DIDN'T OBJECT AND RAISE THE CONFRONTATION CLAUSE ISSUE, EVEN THOUGH CRAWFORD HAD COME OUT. AND I CITED CASES IN MY BRIEF THAT SAY THAT HEARSAY OBJECTION ISN'T SUFFICIENT TO PRESERVE A CONFRONTATION CLAUSE ARGUMENT BECAUSE THEY ARE SEPARATE.

JUSTICE: IS OR IS NOT?

IS NOT SUFFICIENT. IT IS JUST A GENERALIZED HEARSAY --

JUSTICE: THERE IS A CONTEST OF HEARSAY IN CRAWFORD. THAT HASN'T CHANGED THE LANDSCAPE? A HEARSAY OBJECTION DOESN'T AUTOMATICALLY --

I THINK YOU STILL HAVE TO MENTION THE CONFRONTATION CLAUSE, BECAUSE THAT TRIGGERS THE COURT'S ANALYSIS INTO WHETHER THE PERSON WAS UNAVAILABLE AND WHETHER THEY HAD THE OPPORTUNITY. I THINK THAT IS A VERY TRIGGERING TERM. IT IS A MATTER OF, YOU KNOW --

JUSTICE: THERE ARE TWO DIFFERENT TYPES OF ANALYSIS. IF YOU ARGUE IT IS HEARSAY, YOU LOOK AT THE EVIDENCE CODE AND DOES IT FALL UNDER THE DEFINITION OF HEARSAY. IF IT DOES, ARE YOU SAYING THAT THERE IS AN EXCEPTION THAT MAY APPLY AND WHEN YOU TALK ABOUT A CONFRONTATION CLAUSE, WAS IT TESTIMONIAL, AVAILABILITY, THE OPPORTUNITY TO CROSS-EXAMINE, THOSE KINDS OF THINGS?

CORRECT, AND IN THIS CASE I THINK IF YOU GET PAST THAT AND WANT TO LOOK INTO IT, THE

STATEMENTS TO EDWARD L , THE TRUCK DRIVER.

JUSTICE: A MINUTE. WHAT WAS THE BASIS OF THE PRETRIAL MOTION ?

THAT HAD TO DO WITH THE PENALTY PHASE. THESE ARE GUILT PHASE ONES. IS THAT WHAT YOU ARE TALKING ABOUT?

JUSTICE: THERE WAS A HEARSAY CONFRONTATION PRETRIAL MOTION , CORRECT?

THAT WENT TO THE PENALTY PHASE , ADMISSIBILITY OF IT IN THE PENALTY PHASE. THEY DIDN'T APPLY ANY OF THAT TO THE GUILT PHASE.

JUSTICE: SO ON THE PENALTY PHASE, ISSUE ONE.

RIGHT. CORRECT .

JUSTICE: YOU STILL MAINTAIN THAT, EVEN THOUGH THAT MOTION WAS FILED --

CORRECT.

JUSTICE: -- THERE STILL NEEDED TO BE A MORE SPECIFIC OBJECTION WHEN THE DETECTIVE GOT ON THE STAND.

CORRECT.

JUSTICE: THEY SHOULD HAVE , AGAIN , MENTIONED HEARSAY.

CORRECT. OUR STATE'S POSITION IS THAT THAT GENERALIZED MOTION PRETRIAL DID NOT PRESERVE IT UNDER SECTION 90.104. THE COURT DID NOT GIVE A DEFINITIVE RULING AS TO THAT , SO --

JUSTICE: WAIT. THERE IS TWO DIFFERENT ISSUES. IF THE COURT WOULD HAVE GIVEN A DEFINITIVE RULING PRETRIAL, DO YOU STILL ARGUE THAT THE DEFENDANT WOULD HAVE HAD TO RENEW IT WHEN THE TESTIMONY WAS INTRODUCED ?

I DON'T THINK HOW THE -- I DON'T KNOW HOW THE COURT COULD HAVE GIVEN A DEFINITIVE RULE ,, NOT KNOWING THAT THAT MAY BE THE CASE.

JUSTICE: RIGHT , BUT ARE YOU STILL ARGUING THAT GIVEN A DEFINITIVE MOTION THAT THEY STILL WOULD HAVE HAD TO RENEW THE OBJECTION DURING THE TESTIMONY?

I THINK THE WORDING OF THE STATUTE WOULD ALLOW A MAN NOT TO RENEW THAT OBJECTION, IF HE GOT A DEFINITIVE RULING.

JUSTICE: THAT IS THE BIG OBSTACLE HERE IS THAT THERE WAS NO DEFINITIVE RULING.

CORRECT. CORRECT, YOUR HONOR. I WAS TALKING TO THE , ABOUT THE STATEMENTS TO EDWARD L AS NOT BEING TESTIMONIAL UNDER CRAWFORD , EXCITED UTTERANCES. I BELIEVE COUNSEL HAS PRETTY MUCH CONCEDED THAT THEY WERE IN THIS CASE , ADMITTED UNDER EXCITED UTTERANCES AND PROPERLY SO.

JUSTICE: WHAT ABOUT THE ONES TO THE POLICE OFFICER?

AS YOU SAID EARLIER , YOUR HONOR, I THINK THAT THAT IS PRESENTED A MURKIER PICTURE AND THE JURISDICTIONS ARE KIND OF SPLIT ON THAT , AND YOU KNOW, THAT IS PENDING IN THE U.S. SUPREME COURT NOW , AND THEY ARE GOING TO HAVE ARGUMENT ON THAT LATER THIS MONTH

. AND I KNOW THAT SOME JURISDICTIONS WANT TO ADOPT THE CASE-BY-CASE BASIS , YOU KNOW, LET'S LOOK AT IT AND SEE WHAT THE FACTS ARE WITH ANY GIVEN CASE. YOU HAVE AN OFFICER RESPONDING TO THE SCENE AND TAKING INITIAL QUESTIONS AND WHETHER THAT IS TESTIMONIAL IN NATURE IS PRETTY SLIT , AND THERE ARE STANDARDS GOING BOTH WAYS.

JUSTICE: I THINK THE CIRCUMSTANCES OF THE OFFICER IS AT THE SCENE WITH MR . LAWLEY, I KNOW HE DIED BUT WHAT WAS , WHAT WERE HIS SKIRK SUBSTANCES AT THE TIME ? -- CIRCUMSTANCES AT THE TIME?

HE HAD BEEN SHOT AND WAS BENDING OVER IN PAIN TALK TOGETHER WITH OFFICER S THAT WHAT YOU ARE REFERRING TO?

JUSTICE: RIGHT.

HAD HE BEEN SHOT. HE MANAGED TO DRIVE HIS CAR TO WHERE HE KNEW HIS FRIEND WAS.

JUSTICE: ACROSS THE PARKING LOT OR SOMETHING.

RIGHT. SHORT DISTANCE AND THEN THE OFFICER ARRIVED, I DON'T THINK THE RECORD SHOWED HOW MANY MINUTES IT WAS BEFORE THE OFFICER ARRIVED, AND HE DID HIS QUESTIONING OF HIM AND WHAT HAPPENED, YOU KNOW.

JUSTICE: BUT THE TRIAL JUDGE IN THIS CASE, DID HE OR SHE WEIGH ALL THE SURROUNDING CIRCUMSTANCES IN MAKING THE DETERMINATION OF WHETHER OR NOT IT WAS AN EXCITED UTTERANCE?

THE COURT RULED THAT IT WAS ADMISSIBLE UNDER THAT SECTION. HE DIDN'T COME OUT AND STATE A WEIGHING. YOU KNOW, I MEAN , HE JUST SAID IT WAS ADMITTED UNDER EXCITED UTTERANCE .

JUSTICE: BUT PRIOR TO MAKING THAT RULING, WERE THERE CIRCUMSTANCES SURROUNDING --

HE KNEW THE CIRCUMSTANCES FROM THE EVIDENCE THAT HAD BEEN PRESENTED AT THAT POINT , BUT HE DIDN'T STATE ON THE RECORD ANY MORE REASONING THAN OVERRULED.

JUSTICE: WITH REGARDS TO THE OFFICER, NOW, THE OFFICER WAS AS KING MR . LAWLEY QUESTIONS , CORRECT?

CORRECT .

JUSTICE: MR . LAWLEY TOLD HIM ABOUT THE ASSAULT , AND THE OFFICER, IMMEDIATELY THEREAFTER, SETS OUT A BOLO, CORRECT?

PRESUMABLY .

JUSTICE: UNDER THOSE KINDS OF CIRCUMSTANCES , CAN WE REALLY SAY THAT THIS WAS JUST AN EXCITED UTTERANCE AND WAS NOT TESTIMONIAL IN NATURE?

I THINK IT IS A CLOSE CALL AS TO WHETHER IT IS TESTIMONIAL. IT IS CLEARLY STILL PROBABLY AN EXCITED UTTERANCE , GIVEN THE CIRCUMSTANCES, BUT AS TO WHETHER IT IS TESTIMONIAL OR NOT IS A CLOSER CALL AND THERE ARE CIRCUMSTANCES THAT SAY GIVEN WHEN AN OFFICER IS AT THE SCENE IN THE FIELD , THE PERSON IS UNDER STRESS AND THE RELIABILITY IS PROBABLY MORE SO THAN OPPOSED TO AN OFFICER QUESTIONING SOMEBODY DOWN AT THE STATION, SO THEY KIND OF GO AND THE CASES EXAMINE NUMEROUS FACTORS AS TO WHETHER THAT IS TESTIMONIAL.

JUSTICE: IN THAT VEIN , I KNOW YOU SAID THE CASES ARE KIND OF ALL OVER THE BOARD .

RIGHT.

JUSTICE: BUT ARE THERE COURTS THAT HAVE SAID THAT AN EXCITED UTTERANCE BY DEFINITION IS NOT TESTIMONIAL, BECAUSE IT IS EXCITED?

I HAVE SEEN THOSE STATEMENTS AS RELATES TO FRIENDS AND RELATIVES . I BELIEVE THOSE ARE CITED IN THE BRIEF, BUT I HAVEN'T SEEN THOSE AS TO AN OFFICER. WELL, ACTUALLY I THINK DAVIS , THE ONE THAT IS IN THE U.S. SUPREME COURT MIGHT BE LIKE THAT.

JUSTICE: A 911 CALL?

YES. THOSE ARE THE ISSUES THAT ARE OUT THERE RIGHT NOW . THE U.S. SUPREME COURT HAS TWO CASES THAT THEY ARE HEARING ARGUMENT ON. ONE INVOLVES A 911 CALL AND I THINK THE OTHER INVOLVES STATEMENTS TO A POLICE OFFICER.

CHIEF JUSTICE: I THOUGHT SOME COURTS HAD RELIED ON THE EXCITED UTTERANCE TO TAKE IT OUT OF CRAWFORD.

RIGHT.

CHIEF JUSTICE: THAT IS MY RECOLLECTION, AND THAT SOUNDS LIKE THAT WILL BE RESOLVED , THAT NARROW ISSUE, BY THE END --

HOPEFULLY THEY WILL GET SOME MORE GUIDANCE AS TO SOME OF THE TERMS THAT THEY USED IN CRAWFORD.

CHIEF JUSTICE: I THINK MAYBE HAMMOND .

I THINK IF YOU FIND THAT THE STATEMENTS TO THE TRUCK DRIVER, TO THE FRIEND , ARE PROPERLY ADMITTED , ANY ERROR IN THE STATEMENTS TO THE DETECTIVE ARE GOING TO BE HARMLESS, BECAUSE IT IS BASICALLY THE SAME TESTIMONY. I MEAN, HE GAVE A DESCRIPTION TO HIS FRIEND , AND NONE OF THIS, ALSO , IT WOULD BE HARMLESS , BECAUSE NONE OF THIS RESULTED IN ANYTHING. IT DIDN'T RESULT IN THE DEFENDANT'S SUBSEQUENT CAPTURE. HE WAS ARRESTED IN ST. PETERSBURG BECAUSE HE WAS ASLEEP BEHIND THE STOLEN CAR.

CHIEF JUSTICE: THE ONLY PART THAT I THOUGHT COULD BE OF CONCERN IS WE ARE UNDER SOME DRAMATIC DETAILS OF HOW HE WAS SHOT OR THAT HE WAS ON --

THOSE WERE THE SAME DETAILS THAT CAME OUT OF HIS MOUTH IN CONFESSIONS . ACTUALLY THE ONLY THING THE VICTIM IN THIS CASE SAID TO THE POLICE OFFICER WAS BASICALLY HE ROBBED ME. I WAS GETTING DOWN ON THE GROUND AND HE SHOT ME IN THE BACK AND THEN HE WENT THROUGH MY CAR. I THINK THE MORE GRAPHIC DETAILS CAME FROM THE DEFENDANT'S OWN CONFESS ION AS TO WHAT HAPPENED. THE STATEMENT TO THE TRUCK DRIVER AND THE POLICE OFFICER WERE VERY GENERIC DESCRIPTIONS, AND MAKE A MODEL -- MAKE AND MODEL OF CAR AND A VERY BASIC SYNOPSIS OF WHAT HAD HAPPENED DURING THE ROBBERY. IT WASN'T VERY PREJUDICIAL TOWARDS THE DEFENDANT . COUNSEL, ALSO , BRIEFLY , TALKED ABOUT ISSUE TWO , WHICH WAS HIS STATEMENTS TO THE NEWS REPORTER . THE STATE SUBMITS THAT THOSE STATEMENTS WERE CLEARLY, THE TRIAL COURT ACTED WITHIN ITS DISCRETION ALLOWING THOSE TO COME INTO EVIDENCE .

JUSTICE: THE RELEVANCE --

THE RELEVANCY , GET WAS WHY ARE YOU CONFESSING TO ME AND HIS ANSWER WAS WHAT

THEY ARE OBJECTING TO , AS TO BASICALLY --

JUSTICE: WHY HE WAS MAKING THOSE STATEMENTS. WHAT AT TRIAL DID THOSE GO --

I THINK IT PUTS IN CONTEXT WHY THIS DEFENDANT WAS CALLED UP IN REPORTER AND GIVING A CONFESSION TO THEM. I THINK THE STATE IS ENTITLED TO INTRODUCE THAT. IT IS RELEVANT AS TO HIS MOTIVATION. I MEAN, IT CERTAINLY WASN'T, THE PREJUDICE WASN'T SUBSTANTIALLY OUTWEIGHING THE PROBATIVE VALUE IN THIS CASE.

JUSTICE: WAS THE JURY IN -- WAS THE JURY IN THIS CASE GIVEN THE STANDARD INSTRUCTIONS ABOUT THE ADMISSIONS AND THE CAUTION AROUND ADMISSIONS?

YOUR HONOR, I MISSED THE FIRST PART OF YOUR QUESTION. COULD YOU REPEAT IT .

JUSTICE: IN MOST CASES , JURIES ARE INSTRUCTED THAT ADMISSION BY THE DEFENDANT HAS BEEN ADMITTED IN THIS CASE AND YOU HAVE TO BE CAREFUL WHEN CONSIDERING THIS AND CONSIDERING THE CIRCUMSTANCES , ET CETERA , I HAVE FORGOTTEN EXACTLY HOW IT IS WORDED. WAS THAT INSTRUCTION GIVEN IN THIS CASE?

THAT WAS GIVEN IN THIS CASE, AND ANOTHER THING I WANT TO POINT OUT WAS THE DEFENDANT TESTIFIED BASICALLY IN THE CASE TO THE SAME THING HE SAID TO THE NEWSPAPER REPORTER AND THAT ALL CAME OUT IN THE PENALTY PHASE, THROUGH HIS OWN TESTIMONY THAT, HE WAS TIRED OF LIVING AND ALL OF THAT KIND OF STUFF , SOUGHT STATE WOULD SUBMIT THAT THE -- SO THE STATE WOULD SUBMIT THAT THE APPELLANT FAILED TO SHOW ANY ABUSE OF DISCRETION IN THAT REGARD .

CHIEF JUSTICE: BEFORE YOU SIT DOWN , YESTERDAY WE HAD A CASE INVOLVING A 64-YEAR-OLD MAN THAT HAD KILLED HIS WIFE. THIS CASE , WE HAVE HERE , SOMEBODY WHO AT 24 , AFTER BEING IN PRISON MOST OF HIS LIFE, HIS ADULT LIFE , COMMITS THESE SERIES OF HORRENDOUS CRIMES AND APPARENTLY ADMITS TO THEM. ALL WE REALLY KNOW ABOUT HIM IS, IF THERE IS ANYTHING MORE IN THE RECORD , I WOULD JUST LIKE TO UNDERSTAND, IS THAT HE HAD, HIS MOTHER HAD ABANDONED HIM AT BIRTH AND THEN AT EIGHT YEARS OLD , APPARENTLY HE HAD BEEN PLACED WITH A FAMILY. HE WAS YANKED OUT OF THE HOME, BUT THEN THE NEXT THING WE KNOW HE JUST STARTS TO COMMIT A SERIES OF ACTS.

RIGHT.

CHIEF JUSTICE: AND AT 16 , HE, PART OF A ROBBERY WHERE HE IS GIVEN A TEN -YEAR SENTENCE, APPARENTLY CLAIMS HE WAS ABUSED IN PRISON. JUST SO THAT , JUST SO THERE IS NOT A PROPORTIONALITY ISSUE RAISED AND CERTAINLY THE AGGRAVATORS ARE THERE , BUT IS THERE ANYTHING MORE IN THE PICTURE OF WHAT LED THIS DEFENDANT --

NO , YOUR HONOR. THE ONLY PENALTY PHASE TESTIMONY PRESENTED WAS FROM THE DEFENDANT, AND YOU PRETTY MUCH ACCURATELY DESCRIBED EVERYTHING. HE WAS RAISED IN A FAIRLY LOVING FAMILY FROM MY UNDERSTANDING, UNTIL ABOUT THE AGE OF EIGHT WHEN HIS BIRTH MOTHER CAME BACK AND LIKE YOU SAID , TOOK HIM BACK TO ST. PETERSBURG AND HE WAS NOT HAPPY ABOUT THAT AND KEPT TRYING TO RUN AWAY, AND I THINK HE STARTED COMMITTING HIS JUVENILE OFFENSES SHORTLY THEREAFTER , AND THEY KIND OF EXLATED UNTIL HE WAS SERVED -- EXLATED UNTIL HE WAS SERVING ADULT PRISON TIME AND 16 MONTHS LATER, HE WENT ON THIS CRIME SPREE THAT LED US TO THIS CASE.

CHIEF JUSTICE: SO WE DON'T HAVE SCHOOL RECORDS IN THE RECORD?

NOT IN THE RECORD. I KNOW THAT DOCTORS EXAMINED HIM. I THINK DEFENSE COUNSEL PROBABLY MADE A STRATEGIC DECISION NOT TO PRESENT THEM. CHIEF WE WILL PROBABLY

FIND OUT ABOUT THEM L ATER.

THANK YOU, YOUR HONOR .

IN ANTICIPATION OF THE PRIOR TRIAL , THE DOCTOR 'S TESTIMONY, IT IS NOT EVEN CLEAR FROM THIS RECORD WH ICH DOCTOR THE DETECTIVE WAS TALKING TO .

CHIEF JUSTICE: NOW BACK TO ISSUE ONE.

YES. HE SAID I WAS TALKING T O A DOCTOR AT THE HOSPITAL , A NDTHAT IS WHERE HE GOT THIS INFORMATION , AND --

JUSTICE: WHAT BURDEN IS IT TO DEMONSTRATOR NOT TESTIMONIAL, FOR PURPOSES OF THE CONFRONTATION CLA USE? YOU MAK E THE OBJECTION. IS IT YOUR BURDEN T O SHOW THAT THIS IS TESTIMONIAL ?

WELL , WE CAN , WE CAN DO THAT, BECAUSE I THINK IT IS CLEAR CL EAR THAT THE DETECTIVE IS AT THE HOSPITAL . WHAT OTHER REASON WOULD HE BE THERE , OTHER THAN INVESTIGATING THIS PARTICULAR CRIME? HE WAS ASKING QUESTI ONS OF THE DOCTOR , AND I THINK UNDER THE DEFINITION OF TESTIMONY --

JUSTICE: BUT IS IT THE POLICE'S INTENT THAT WE L OOK AT IN DETERMINE WLING IT IS TESTIMONIAL -- DETERMINING WHETHER IT IS TESTIMONIAL, OR IS IT THE DOCTOR'S POINT OF VIEW OF DETERM INING WHETHER HE INTENDS TO GIVE TESTIMONY TO THE POLICE OFFICER THAT WOULD THEN BE USED AT TRIAL? COULD IT HAVE JUST BEEN A STATEMENT OF THE VI CTIM 'S MEDICAL STATUS AT THE TI ME? THE DOCTOR HAS NO IDEA THIS IS GOING TO BE AT THE TRIAL. THE POLICE OFFICER IS JUST INQUIRING. HOW IS THE VICTIM DO ING, A NDTHE DOCTOR IS T ELLING HIM. WHY IS THAT NECESSARILY TESTIMONIAL?

BECAUSE WHY E LSE WOULD THE DETE CTIVE BE QUESTIO NING THE DOCTOR , OTHER THAN TO INVESTIGATE THIS PARTICULAR CRIME. THE DOCTOR WOULD OBVI OUSLY ASSUME THAT ANY STATEMENTS , ANY INFORMATION HE GA VE TO THE DETECTIVE , WOULD BE USED IN THE INVESTIGATION OR MADE , PERHAPS , EVEN A T A SUBSEQUENT TRIAL.

DO WE HAVE , DO WE HAVE TO DETERMINE THAT IT MAY BE USED IN THE INVESTIGATION, OR DO WE HAVE TO DETERMINE THAT THE DOCTOR INTE NDED T O BE USED AT TRIAL AND THAT IS WHY IT IS TESTIMONIAL? WHAT DOES CRAWFORD SAY AB OUT THAT?

I THIN K IT SAYS INVESTIGATI ON. I THINK THAT IS PART OF THE DEFINITION OF TESTIMONY , IF MY ME MORY IS CORRECT. I BELIEVE THAT THAT IS A FACTOR .

JUSTICE: WOULD YOU AN SWER MY QUESTION.

YES, SIR.

JUSTICE: O N HIS LIFE CIRCUMSTANCES, THE STATEMENTTHAT YOU OBJECT TO REGA RDING HIS ADMISSION TO THE N EWS REPORTER. DO YOU AG REE THAT THE JURY IN THIS CASE WAS INSTRUCTED THAT THERE WAS AN OUT-OF-COURT STATEMENT MADE PREVIOUS OR AN ADMISSION BY THE DEFENDANT , AND PART O F WHAT THEY ARE TOLD TO DO , THEY HAVE TOLL WEIGH THE CIRCUMSTANCES IN WHICH THE STATEMENT WAS MADE, TO M AKE SURE THAT IT WAS FREE AND VOLUNTARILY MADE. IS THAT CORR ECT?

YES.

JUSTICE: W OULD THAT NOT APPLY , ALSO , TO THE STATEMENT TO THE NEWS REPORTER? I KNOW

IT IS TYPICALLY TO LAW ENFORCEMENT, BUT WOULD THAT INSTRUCTION NOT ALSO APPLY TO THIS ADMISSION TO THE NEWS REPORTER ?

SURE.

JUSTICE: SO WOULDN'T THOSE STATEMENTS BE RELEVANT TO THAT DETERMINATION ?

WELL, THOSE STATEMENTS BE RELEVANT TO THE DETERMINATION BY THE JURY THAT IT WAS VOLUNTARY?

JUSTICE: RIGHT. --

JUSTICE: RIGHT. THAT THE REPORTER DID NOT TRICK HIM INTO IT OR TO MAKE SURE THAT THE STATEMENT, AGAIN, WAS TRIAL AND VOLUNTARILY MADE OR THERE WAS NO COERCION, SINCE NO ONE WAS SUSPECTING THE -- NOT HING TO SUSPECT -- SUSPECT THE CREDIBILITY OF THE STATEMENT.

THAT IS A STRETCH. I THINK THAT, WHERE YOU DON'T HAVE THE DEFENSE CONTENDING THAT HIS STATEMENT TO THE UP IN REPORTER WAS INVOLUNTARY, THAT WAS NOT AN ISSUE AT TRIAL. THEREFORE THESE STATEMENTS REVEALING HIS STATE OF MIND, HAVE NO RELEVANCE TO ANY ISSUE AT THE TRIAL.

BUT THE JUDGE TELLS THE JURY THAT, BEFORE THEY CONSIDER THAT STATEMENT, THEY HAVE TO MAKE THAT BASIC FUNDAMENTAL DETERMINATION OR SHOULD.

WELL, THERE AGAIN, I THINK GOING BACK TO THE ORIGINAL STATEMENT, I THINK THAT THAT IS MORE APPLICABLE TO STATEMENTS GIVEN TO LAW ENFORCEMENT, NOT TO UP IN REPORTERS. AND I CITE TWO FIRST DCA CASES IN THE BRIEF AT PAGES 44 AND 45, ON THE EXCITED UTTERANCE, HOWARD VERSUS STATE AND MANUEL VERSUS STATE, WHERE THEY WERE VERY SIMILAR TO THIS, THE STATEMENTS GIVEN TO THE POLICE OFFICER ARRIVED AT THE SCENE, AND THEY WERE SUBJECT TO QUESTIONING. THE DECLARANT WAS, THE STATEMENTS AT YOU SHALL HEAR WERE ELICITED BY QUESTIONING BY -- AT ISSUE WERE ELICITED BY QUESTIONING BY THE POLICE OFFICER AND THEREFORE PRECLUDE THEM, AND IF THERE IS NO OTHER QUESTIONS, THANK YOU.

CHIEF JUSTICE: THANK YOU.