State of Florida v. Eusebio Hernandez

I C ALL T HE L AS T CASE OF THI S MORNING. STATE OF FLORIDA VER SU S HERNANDEZ, AND I DON'T WANT THE A TTORNEYS TO FEEL B AD LY THAT THE W HOLE AUD IE NCE IS ABOUT TO LEAVE T HE M . WE'LL TRY TO K EE P SOM E PEO PLE HERE FOR Y OU .

JUST A M OM EN T A ND WE'LL BE ABLE T O CLOSE THE D OO R .

MAY IT PLE ASE THE C OURT . WE'RE HERE THIS MORNING ON THE STA TE 'S A EAL A ND THERE ARE TWO I SSUES BEFORE THE COURT . W HETHER THE STATE M AY PROPERLY I NV OK E RUL E 9 .1 401 B T O RECOR D A C ON VE RSATION BETWEEN THE D EFENDANT AND HIS COPER PETR AT OR AND SECONDLY WHETHER THESTATEMENTS BY THE COPERPETRATOR IN THAT STATEMENT ARE ATTRI BU TE I BL TO THE DEFENDANT A S ADO PTIV E ADMISSIONS.

CAN YOU HELP U S , REF RESH US WITH R EFERENCE TO OUR JURISDICTION IN THIS CASE?

YES, YOUR HONOR . T HE THI RD DISTR IC T COURT O F APPEAL, THE CASE W EN T B EF OR E THAT COURT O N THE S TATE 'S NOTICE OF AEAL. THE DISTRICT COURT O F A EA L DECIDED THAT F IRST O FF IT DID NOT HAVE J UR IS DICT IO N A S AN AEAL, BUT U ND ER THE COM MON L AW WRIT OF CERTIORARI AND THEN W EN T AHEAD AND DETERMINED THAT THE STATEMENTS WERE NOT ADOPTIVE ADMISSI ON S AND THA T IT WOULD V IOLA TE , U PHEL D T HE O RESSION OF THE STATE ME NT S T HAT IT W OULD V IO LA TE T HE DEF ENDANT'S CONFRONTATION CLAUSE RIGHTS. IT IS THE STATE'S P OSITION AND C LEARLY T HE DETER MINATION THAT T HE S TATE CANNOT AEAL I S C ONTRARY TO THE COURT'S D EC ISIO NS I N STATE V ER SU S BER RE A A ND PAL MO RE WHERE THERE WAS A NOTIC E O F A EAL FROM THE SUP PR ES SION OF STA TEMENTS .

IF WE DON 'T FIN D A ND T HI S IS SORT OF A CHICKEN AND T HE EGG ISSUE ABOUT W HE TH ER Y OU LOOK AT THE M ER ITS O F T HE CASE TO DECIDE WHE THER I T I S AEALABLE. IN OTHER WORDS, WHETHER WHILE THERE ARE A DO PT IV E ADMISSIONS AND IT IS AEALABLE BUT YOU HAVE TO FIRST DECIDE W HE THER THE Y ARE ADOPTIVE A DM IS SI ONS BUT MY QUESTION TO YOU IS I F THERE IS A MIXTURE IN T HE STATEMENT.THAT IS, THAT CLEARLY HERNA NDEZ MADE S TA TE MENTS.

ABSOLUTELY.

AND THE Y ARE S TA TE ME NT S THAT ARE CERTAINLY NOT HELPFUL TO HIM. THEY MAY B E A MBIG UO US BUT THEY ARE ADMIS SION S , S O D O WE THEN LOOK AND T HEN THE STATE HAS THAT RIGHT A S LO NG AS THERE IS S OM E O F T HE STATEMENTS BY M R. HER NAND EZ THAT ARE I NV OLVE D I N THI S STATEMENT. THAT WOULD BE YOUR --

OUR POSITION , YOUR HONOR , IS THAT THE S TATE MENT CONSISTS OF HALF OF I T I S C LEARLY D EFEN DA NT 'S A ND THAT'S AN ADMISSION AND UNDER RUL E 9 .1 40 , CER TA INLY THE STATE H AS T HE R IG HT T O FILE A N INT ER LOCK T OR AEAL.

I T W OULD R IDIC UL OU S TO SAY HALF OF THIS YOU W ILL D O IT BY A EAL AND THE O TH ER HALF YOU WILL DO IT B Y CER T.

THAT'S C ORRECT AND I F T HE COURT LOOKS AT THE O PI NI ON S IN STATE V ER SU S RGR BREA AND PAL MORE. THE COURT DID NOT D ECID E , THE DISTRICT COURTS DI D N OT DECIDE WHE

THER I N B RE A I T W AS A C OCON SPIR AT OR EXCEPTION. IT WASN'T THE D EF ENDA NT 'S OWN STATEMENTS THEY TRIED TO GET IN. THEY TRIED TO GET I N THE STATEMENTS OF THE C OCONSPIRATOR. THE D CA S AI D T HE A EA L WASN'T PROPER. IT WAS BROUG HT UP T O THI S COURT AND W ITHO UT L OOKING A T WHETHER THOSE WERE COC ONSPIRATOR, T HI S C OU RT REMANDED THE CASE BACK TO THE DCA.

B Y C ONCERN A BO UT H OW T HI S WORKS. WE EITHER HAVE TO DECIDE THAT THIS IS A V ER Y BROAD LY WRITTEN RULE. THAT IS DESIGNED T O R EA LLY GET, AGAIN, TALKING ABO UT ADMISSIONS , CON FE SSIO NS , AND OTHER E VI DE NC E , W HA TE VER , B Y SEA RCH AND S EI ZURE , B EC AUSE IT JUST SEEMS TO ME THAT A RULE THAT SAYS THA T Y OU'V E GOT TO FIGURE OUT THE STATUS OF THE OTH ER PER SO N B EF OR E YOU DECIDE IF IT IS AEALABLE IS NOT A VERY WORKABLE RUL E O R M AY BE I T I S A STATUTE T HA T B ECAME A RULE.

WELL, AND I'M NOT SUR E THAT THE RULE REQ UIRES THAT. I THINK ANY TIME THA T T HE STATE IS ALLEGIN G T HA T T HOSE STATEMENTS ARE A TT RI BU TA BL E TO THE DEFENDANT AND IF YOU LOOK AT T HE PRO CEDU RAL HISTORY IN BRE A AND P AL MO RE THAT'S WHAT THE COURT HAS DONE. IF THE STATE IS ALLEG IN G THAT THOSE STATEMENTS CAN BE ATTRIBUTABLE TO THE DEFENDANT THEN THEY ARE H IS ADMISSIONS AND IF THEY ARE SURESSED THE STATE HAS THE RIGHT TO TAKE A N INTERLOCUTORY AEAL ANDTHEN IT PROVIDES THE STATEWITH THE SAME S TA ND AR D O F REVIEW THAT THE DEFENDANT WOULD OBTAIN IF T HE STATEMENTS HAD BEEN ADMITTED AND T HE N H E CHA LLENGE S O N AEAL THE ADMISSION OF I T.

GO AHEAD.

HOW DOES THI S W OR K T HEN WITH THE M CFPH AD DE R C AS E AND THEN THE LANGUAGE I N BRE A WHICH TALKS ABOUT IF I T IS NOT A STATEMENT BY THE DEFENDANT BUT IT REA LL Y I S A STATEMENT BY THE -- AN INFORMANT THAT YOU ARE TRYING TO GET IN , T HA T Y OU -- T HA T T HE RE IS NOT G OING TO BE A EA LABL E , B UT Y OU HAVE T O P RO CEED I F REVIE W I S S OUGHT B Y WRI T OF CERTIORARI.

AND T HE D ISTINC TI ON WIT H MCPHA DDER AND THAT'S N OT SOMETHING THAT THE DEFENDANTTALKS ABOUT, IS THAT T HERE IT WAS S TRIC TLY A C ONFIDENTIAL I NFORMA NT A ND THAT'S WHAT THE D EFENDANT IS R ELYING UPON BUT WHEN YOU LOOK AT WHAT THE COURT DID WITH B REA AND P AL MO RE , THE STA TEMENTS WERE D IREC TL Y A TRIBLABLE TO THE DEFENDANT WHETHER IT BE THROUGH T HE COC ON SPEAR A T OR E ADM ISSI ON . IN T HE PAL MORE CAS E T HE D EFENDANT A DOPTED S TATEMENTS OF THE VIC TI M A S H IS O WN .

LET ME , I F M CPHA DD ER H AD BEEN A C ONVE RSAT ION BETWEEN THE INFORMANT AND THE DEFENDANT , I S I T T HE S TA TE'S POSITION THAT T HA T WHO LE WHATEVER IT IS WOULD BE AEALED AS O NE ? IN OTHER WORDS, AS A RECORDED CON VERSATION?

THAT'S CORRECT , YOUR HONOR.

I NF ORMANT ? THE ANSWER IS YES ? S O AS FAR AS HERE , W E SHO ULDN'T -- TO A T L EAST FROM MY POINT OF VIEW , HAV E TO DEAL WITH T HE S UB STANTI VE I SSUE FIRST, WHICH IS A RE THEY ADOPTIVE A DMIS SI ON S O R W AS HE AN I NF ORMA NT O R A COCONSPIRATOR IF WITHIN T HE STATEMENT THERE ARE C LEARLY ADMISSIONS B Y HER NA ND EZ ?

THAT'S C ORRECT. THEN THE SECOND LEVEL OF I T IS, AND I D ON 'T THI NK THA T -- I THINK I T I S S UFFI CIEN T IF THE STATE IS ALL EG IN G THAT THOSE STATEMENTS ARE ATTRIBUTABLE TO THE DEFENDANT THEN --

I GUESS T HAT'S - - THE ISSUE HERE WOULD BE THAT YOU DON'T REACH T HAT T O M AK E THE PRELIMINARY DECISION IF THERE ARE T HI S D EF ENDA NT'S OWN S TATEMENTS.

BECAUSE THE DEFENDANT ENGAGED IN THIS CONVERSATION AND THE DISTRICT COURT OF AEAL DID NOT E XPLA IN W HY IT WAS D ETER MI NI NG THA T T HE R ULE DID NOT A LY .

SO THAT THE COURT CERTAINLY COULD J UST SAY THAT THE FACT THAT THE DEFENDANT HAS E NGAGED - - I MEAN, H ALF OF THE CONVERSATION IS HIS. THERE IS NO Q UE STIO N THA T H E MADE A DM ISSION S W IT HI N THA T T ELEPHONE CONVERSATION.

SO W HAT YOU ARE R EALLY ARGUING THEN IS THAT E VEN I F THE TRIAL J UD GE D ECID ED T HA T THE S TATEMENTS MADE B Y T HE COD EFENDANT INFORMANT, WHATEVER YOU WANT T O CALL THIS PERSON , I F THOSE S TATEMENTS ARE NOT ADMISSIBLE , T HE N T HE S TATE COULD A EAL BEC AUSE THE RE WERE -- THERE I S CONVERSATION ON THERE FROM THE DEFENDANT? THAT'S YOUR A RGUMENT?

WELL , T HA T I S M Y A RGUM EN T IN PART. I THINK THE CONCERN I HAV E IN STOING T HE RE I S T HA T THEN YOU ARE CREATING A RULE THAT THE O NL Y TIM E T HE S TATE CAN T AKE A N I NTER LO CUTO RY AEAL IS WHEN THE D EFEN DANT MAKES DIRECTLY OUT OF H IS OWN MOUTH E XP RE SS LY M AKES STATE MENTS AND I THINK UNDER THIS COURT'S CAS E L AW AS LONG AS THE STATEMENTS AND I DON'T THINK IT H AS T O B E DECIDED, THE COURT I N B RE A AND PAL MO RE D ID N' T S AY Y OU H AVE TO PUT T HE CAR T B EF ORE THE HORSE A ND FIRST D EC ID E WHETHER THEY ARE ATTRIBUTABLE TO THE DEFENDANT. WHEN THEY MAKE T HE A RG UMEN T THAT THESE FIT WITHI N T HE COCONSPIRATOR EXCEPTION AND THEN THAT IS EXPRESSED THEN THE STATE HAS A RIGHT TO TAKE AN I NTER LOCU TO RY R EV IE W A ND THEN --

I HAVE A PROBLEM WITH THAT BECAUSE I DON'T REALLY SEE HOW, YOU KNOW , A ND THAT'S AGAIN THE IDEA WHETHER THIS RULE IS MEANT TO BE A V ER Y , YOU KNO W, A NARROW RULE AS FAR AS T HE STATE AEALING . W E USUALLY KNOW A CONFE SSIO N , WE KNOW WHAT T HAT IS , S O THAT'S AN EASY ONE AND W E K NOW EVIDENCE SURESSED , W E KNOW WHAT THAT IS , SO T HE ONLY ONE WE SEEM TO B E HAVING PROBLEMS WITH IS ADMISSIONS, A ND E IT HE R W E SAY THAT , N O , WHE N T HE - - I S THIS A S TA TU TO RY R IG HT O R A RULE R IGHT ? T HE I NT ER PRETING O F S TA TUTE ?

WE'RE INTERPR ETING THE RULE.

A RULE? SO IT IS REALLY A Q UEST ION OF WHETHER T HI S I S T O B E CONSTRUED BY THIS C OURT T HA T ADM ISSIONS WERE M EANT T O REALLY, IF IT I S IN THE CATEGORY, MEANT TO JUST B E THOSE THAT COME OUT O F T HE DEFENDANT'S MOUTH THAT THAT WAS WHAT W AS B EI NG S OUGH T A S OR SHOULD THE P OLIC Y BE A BROADER ONE THAT IT IS J US T, YOU KNOW, REALLY ANYTHING THAT THE STATE SAY S , Y OU KNOW, COU LD B E ATT RIBU TA BL E E VEN IF T HE A EL LA TE C OURT SUBSEQUENTLY FINDS LIKE THE AELLATE COURT DID H ER E THAT THIS GUY WAS NOT A CTIN G AS A C OC ONSP IRAT OR A T THE TIME BUT RATHE R A S A GOVERNMENT INFORMANT. AS LONG AS THE STATE ALL EG ES IT, IT GOE S T HR OU GH A S A REGULAR AEAL .

WELL , I THINK IN T HI S CASE THE COURT CAN S TO P SHORT OF REACHING THE ISSUE BASED UPON AS YOUR HONOR HAS RECOGNIZED THAT THE DEFENDANT HIMSELF HAS MADE STATEMENTS .

THE ANS WE R T O JUSTI CE QUINCE'S QUEST ION , WER E W HA T HERNANDEZ SURESSED A S W EL L AS - - B AS ED O N T HE RE B EING POLICE M IS CO NDUCT AND GETTING THE C ODEFEN DA NT TO --

WELL, THE T RI AL COU RT D ID NOT REALL Y ELA BO RATE A S T O THE BAS IS FOR T HI S SURESSION, OTHER THAN HE WAS C ONCERN ED . THE STATE'S A RGUM EN T H AD BEEN NOT -- WE D ID N'T I NV OKE THE C OCON SP IRAT OR E XCEPTI ON. WE SAID THAT THE STATEMENTS THAT WERE MADE THAT WERE BEING OFFERED FOR THE TRUTH AND THESE STATEME NTS WERE NOT SPECIFICALLY IDENTIFIED AND I W ILL I DENT IFY T HE M WHEN I A DD RE SS T HE S ECOND ISSUE,

BUT T HE S TA TE MENT S THAT WERE O FF ER ED F OR T HE TRUTH, THERE W AS T HE S TA TE'S POSITION THAT THE D EFENDANTHAD ADOPT ED T HOSE S TA TEMENTS BASED UPON HIS RESPONSE IN THIS T ELEP HO NE C ON VERS AT ION , BUT THE T RIAL C OU RT D ID NOT DIFFERENT IATE AND JUST WAS CONCERNED ABOUT L ETTING THE STATEMENTS IN AND THEN THE CASE COMING BACK TO I T I N T WO YEARS U PON A R EV ERSA L .

THE DISTRICT C OURT OF AEAL IN REVIEWING IT F IR ST MADE A DETERMINATION THAT THESE WERE NOT ADOPTIVE ADMISSIONS BECAUSE THE POLICE INVOLVEMENT AND WHEN I ADD RESSED THE SEC ON D ISS UE I DON'T THINK THAT T HAT' S PART OF HOW THE C OU RT ANALYZES WHAT CONST IT UT ES AN ADOPTIVE ADMISSION.

CAN YOU HELP M E OUT IN TRYING TO D ET ER MINE WHY Y OU ARE ABLE TO AEAL D IR EC TL Y SOME AND NOT OTHERS? WHAT'S THE POLICY , T O Y OU R U NDERSTANDING, OF T HE D IFFERENTIATION IN THE RULE?

THA T A LLOW S YOU T O A EA L ONE BUT NOT OTHER S , INTERLOCUTORY?

YOU MEAN IN TERMS O F A DEFENDANT'S STATEMENTS AS OOSED TO SOMEONE ELSE'S?

YES.

I THINK THE CONCE RN I S THE STANDARD , THE POL IC Y BEH IND I T B EI NG THE STANDAR D OF REVIEW WHEN YOU HAVE A STATEMENT OF THE DEF ENDANT THAT C OM ES I N , Y OU KNO W , O N DIRECT AEAL YOU H AV E - - I T IS AN A BUSE O F D IS CR ETIO N AND WHERE THE STATE SHOULDN'T HAVE TO GO THROUGH AN E NTIR E T RIAL W IT HOUT N OT BEING ABLE T O GET THE D EFENDANT'S OWN ADMIS SI ON S AND P OSSIBLY R ISK A N ACQUITTAL .

THE STATE IS NOT GOING TO GET A SECOND BIT E IN A SITUATION LIKE THIS, RIGHT? THAT IS IF IT I S E XC LUDE D AND THERE IS AN A CQ UI TTAL ?

A BSOLUTELY.

THE STATE DOESN'T HAVE A RIGHT TO AEAL AN ACQUITTAL.

AND I THINK T HE P OL IC Y BEHIND WANTING TO U SE T HE INTERLOCUTORY AEAL WITH THE DEFENDANT'S ADMISSIONS AS OOSED WIT H CERTI OR AR I AND DIFFERENT STATEMENTS BY SOMEONE ELSE YOU HAVE A DIFFERENT STA NDARD. IT IS A M UC H H ARDE R STA NDARD.

BUT IF THE I NTEREST I S THAT ANY TIM E T HE S TATE I S GOING TO HAVE S OM ETHI NG S URESSED, IT COULD B E AN INFORMANT THAT HAS SOME V ER Y POWERFUL I NF ORMATI ON , T HERE IS AGAIN GOING B AC K T O W HAT JUSTICE BELL WAS ASKING , WHAT IS THE POLICY I N SAY IN G, LISTEN, YOU'VE GOT T O G O THROUGH CERTIORARI R EVIEW IF YOU ARE G OING T O G ET T HA T INFORMANT 'S S TA TEMENT S OVERTURNED BUT WE'RE GOING TO LET YOU HAV E A N E ASIE R STANDARD FOR THE DEF EN DANT'S ADMISSION?

WELL, AND I THI NK T HE POINT -- T HE DIS TINC TION I S THAT THESE ARE STATEMENTS THAT ARE T HE D EF EN DANT 'S , AND I T IS NOT - - I T I S J US T NOT FAIR FOR THE S TATE T O H EAR O UR S TATE MENTS O F T HE DEFENDANT AND HE IS ABL E TO E SSENTIALLY - -

SO QUALITY OF T HE EVIDENCE, IS THAT WHAT Y OU ARE SUG GE STING?

I THINK I T GOES TO RELIABILITY . WE GIVE G RE ATER W EI GH T T O STATE MENTS FROM THE DEFENDANT HIMSELF .

FOR EXAMPLE, W AS A D ENIA L OF INTRODUCTION O F D NA EVIDENCE, W OULD T HAT BE

AEALABLE? DO YOU HAVE TO DO I T B Y WRI T OF C ER T?

UNDER THE R ULE , I T DOESN'T C ONSTITUTE A CONFESSION, A STATEMENT O R AS THE RULE IS WRI TT EN Y OU C OULDN'T FILE IT.

YOU COULD NOT AEAL IT?

I DON'T BELIEVE SO.

I KNOW YOU HAVE A LIM ITED TIME AND I WANT YOU TO BE ABLE TO ADDRESS ISSUE N UM BE R TWO. I KNOW THAT YOU CLAIM THAT THE D EFENDANT'S STATEMENTS ARE ADM ISSI ONS A S FA R A S T HE COCONSPIRATOR STATEMENTS F OR LACK OF A BETTE R T ER M HER E. ARE YOU CLAIMING T HA T T HE Y ARE ADOPTIVE A DMISSI ONS? I THINK YOU ARE, AND ARE Y OU CLAIMING ALSO THAT THIS WAS A COC ONSP IR ATOR AND I F S O , W HEN DOE S C ON SP IRAC Y HAV E T O HAVE CONTINUED FOR THAT TO BE A C OC ONSP IRAT OR ?

THE STATE IS NOT R EL YI NG ON THE C OCON SPIR AT OR QUESTIO N TO GET I NT O T HE STATEMENTS. I THINK THAT CAN BE M IS RE AD FROM OUR B RI EF A ND OUR POSITION IS THAT THE STATEMENTS THAT ARE OFFERED FOR THE TRUTH THA T THE DEFENDANT DID NOT DIS AV OW ARE ADM IS SI BLE A GA INST H IM AS ADOPTIVE ADM IS SI ON S T O THE EXTENT THE COURT WERE TO HOLD THAT T HEY ARE NOT ADOPTIVE ADMIS SIONS , T HA T --

AND THE REA SON Y OU ARE NOT REL YING ON THE C OCON SPIRATOR IS BECAUSE THE CONSPIRACY THE END ED A T T HA T POINT?

I B EL IE VE U NDER B RO OK S THE CONSP IR ACY E ND S W HE N THE OBJECT OF T HE C ON SP IR AC Y OVER THE MURDER HAS END ED .

SO Y OU ARE NOT S AYING THAT B RE A G OV ER NS T HI S C ASE?

N OT I N R ESPE CT T O T HE COCONSPIRATOR EXCEPTION.

AS FAR AS ADOPTIVE WE HAVE TO TAKE E AC H S TA TEMENT IN ISOLATION T O D ET ERMI NE W HETHER T HESE CIR CUMS TA NCES WOULD REQUIRE A RESPONSE IF THE D EFENDANT DID NOT B ELIEVE IN T HE S TATE ME NT .

I N I SO LA TI ON , BUT N OT COMPLETELY IN ISOLATION , I THINK YOU ALSO HAVE T O L OOK AT THE E NT IRE C ONVE RSATION. I SEE I 'M GO M Y R EB UTTA L TIME. VERY BRIEFLY , T HE RE A RE T HREE SETS OF STATE ME NTS. THE STATEMENTS BY THE DEFENDANT HIMSELF CLEARLYCOME IN. THERE ARE STATEMENTS OFFEREDTHAT THE STATE B EL IE VES WITHIN THE TELEP HO NE CONVERSATION THAT G IV E CONTEXT TO WHAT THE DEFENDANT WAS SAYING THA T EXPLA INS HIS RESPO NSE T O T HE REQUEST F OR M ONEY .

L ET M E MAKE S URE I UNDERSTAND NOW WHAT YOU ARE SAYING IS THA T EVE N I F T HE PER SON WHO WAS ONC E T HE CODEFENDANT, IF H IS STATEMENTS ARE NOT ADMISSIBLE U NDER T HE COCONSPIRA TO. R R UL E O R A NY OTHER RULE BUT PART OF T HEM ARE ADMISSIBL E BEC AU SE THE DEFENDANT RESPONDED TO THEM? IS THAT IN E SSENCE WHAT YOU ARE SAYING?

I AM SAYING THAT THERE ARE STATEMENTS THAT ARE NOT O FFERED FOR THE TRUTH , S UC H AS WHEN M R. QUE ST IONS T A SAID I NEED M ONEY , I'M LEAVING TOWN. THOSE STATEMENTS COM E I N BECAUSE IT E XPLA IN S T HE D EFEN DANT'S RESPONSE T HAT LET ME T AL K T O JAV IE R A ND HAVE HIM GET T HE M ONEY TO YOU. MR. ARE BAS ICALLY O NL Y T HR EE OR FOUR STATEME NTS V ERY BRIEFLY WHERE M R. CUE ST A SAYS I DIDN'T K NOW THAT WOMAN WAS YOUR EX- WI FE O N PAGE 411 O F T HE R EC OR D. THE DEFENDANT'S RESPONSE , DON'T SAY A NYTHING ABOUT THAT. IT INDIC AT ES T HA T, Y OU K NOW , HE KNOWS W HA T M R. C UEST A I S T ALKING ABOUT

AND H E T ALKE D TO MR. CUEST A A BO UT HIS EX-WIFE PREVI OU SLY.

S O A S T O THE SE S TA TE ME NT S WE HAVE TO HAVE A S EPARAT E JURY INSTRUCTION FOR THE TRIAL COURT TO INSTRUCT THE JURY , EIT HE R T HE Y A RE I NTRODUCED FOR THE TRUTH O F THE MATTER OR THEY ARE NOT ?

WELL, THE COU RT W OU LD NEED TO MAKE THE DETERMINATION AS TO W HICH STATEMENTS ARE COMING I N THA T THEY ARE T HE DEFENDANT'S ADOPTIVE ADMISSIONS.

DOESN'T THI S F AL L RIGHT WITHIN C RA WF ORD? I MEAN, THE PROBLEM I N T HI S PAR TICULAR STATEMENT FOO T NO TE 7 O F C RAWF ORD TO T HE EXT EN T THAT THIS DEF EN DANT WAS UNDER POLICE CUS TO DY AT THE TIME AND DIRECTED TO DO T HA T , TO ALLOW T HE STATE ME NT IN WITHOUT THE OORTU NITY T O CROSS-EXAMINE IS EXACTLY WHAT C RAWF OR D S AYS C AN NO T B E DONE?

CRA WFOR D'S CON CERN W ITH TES TIMONIAL T HAT E VI DE NC E THAT OR STA TEMENT S T HAT A RE THE R ESULT O F P OL IC E I NT ERROGATION, IN T HI S SITUATION YOU HAV E MR. CUESTA HAD P RE VIOU SL Y C ONFESSED HE WAS ASK ED IF H E WOULD BE WILLING TO MAKE A PHONE CALL TO HERNANDEZ T O SPEAK WITH HIM AND THE STA TE DOESN'T DISPUTE TO SEE IF HE WOULD A DMIT H IS C OMLI CI TY .

IT WAS A L IE. THE CONVERSATION WAS A LIE BECAUSE HE WAS TAL KING ABOUT GETTING OUT OF TOWN.

AND HE WAS I N C USTODY.

THAT IS CORRECT. BUT WHEN YOU LOOK AT AN ADOPTIVE ADMISSION YOU ARE NOT CONCERNED WITH T HE MR. CUESTA, YOU ARE CONCERNED WITH THE D EFENDA NT HIMSELF AND WHEN HE ADOPTS THOSE STATEMENTS THEY BECOME HIS.

THERE IS NO A BILITY T O CROSS-EXAMINE M R. C UE ST A , I S THERE?

BUT IT IS N OT M R. C UESTA'S STATEMENTS ANY MORE. WE ARE NO LONGE R C ONCERNED WITH OTHER I NC ONSI STEN T STATEMENTS THAT MR. CUESTA HAD MADE. WE ARE CONCERNED WITH THE DEFENDANT AND THE DEFENDANT CERTAINLY HAS T HE OORTUNITY T O T AKE --

ALL OF THE H EA RS AY STATEMENTS COME IN UNDER A N ADOPTIVE - - Y OU S AI D - -

YOU KNOW, I C AN'T TALK T O YOU ABOUT THAT.

HOW COULD WE E VE R , THO UGH , NOT BE -- Y OU S AY THA T I T I S OF NO C ONCE RN W HA T T HE INFORMANT SAID. HOW CAN THAT EVER B E THE CASE IN E VA LU AT ING , Y OU K NO W , WHAT WENT ON HER E AND WHETHER THESE WERE ADO PTIV E A DMISSIONS OR NOT? AREN'T WE ALW AY S C ONCERNED WITH W HA T THE P ER SO N O N T HE OTHER SIDE OF T HE CONVERSATION HAS T O S AY ? IF YOU CALL A L AY WITNE SS FOR INSTANCE T HAT S AI D , GEE , I S AW T HIS ON T HE LAT E N EW S AND THE N T HE P ERSO N DESCRIBES, SOUNDED A LOT LIKE MY FRIEND J OHNN Y AND THEN I SAW M Y F RI EN D JOH NN Y AND I S AID , DID YOU K IL L THAT WOMAN AND T HE N J OH NNY SAID, Y ES. OKAY. THAT'S THE WAY THAT YOU WOULD PRESENT THAT.

AND WE' RE CON CERN ED W IT H W HAT - - W E'RE C ONCE RNED TO THE EXTENT THAT DID THE DEFENDANT HEAR IT, DID H E UNDERSTAND IT A ND WAS IT THE KIND OF STATEMENT THAT HE WOULD HAVE DENIED IF I T W ER E NOT TRUE? THE FAC T THA T --

IS THAT A L EG AL D ECISIO N OR A F AC T D ECIS IO N A S F AC T IN LAW? SO IN OTHER WORDS YOU ARE ASKING THIS COURT TO LOOK A T THIS DEN OV O O R SHO UL DN'T THIS BE SOMETHING

THAT T HE TRIAL COURT MAKES A D EC IS IO N ON?

NO, I MEAN THIS COU RT H AS DECIDED NUMEROU S CAS ES WHETHER SOMETHING CONSTITUTES AN ADO PTIV E ADMISSION. THE COURT DOE S IT - - D ID I T IN THE GLOBE V ER SU S S TATE CASE.

WHERE WE U PH EL D T HE TRI AL COURT'S R ULING.

THAT'S C ORRECT . AND THE TRIAL C OU RT H ER E H AS ASKED FOR GUIDANCE. AGAIN, I THINK THE O NLY TIM E YOU LOOK AT T HE STA TE ME NT S AS TO THE P OL ICE I NVOL VE ME NTAND I THINK THE DCA H AS T HI S CONFUSED IS WHEN Y OU ARE LOOKING T O WHETHER A STATEMENT VIOLATES T HE CONFRONTATION CLAUSE IF I T IS T ES TI MONIAL. HERE WE ARE TALKING ABOUT THE DEFENDANT'S OWN STATEMENTS.

OKAY. THANK YOU VERY MUCH.WITH OUR HELP YOU HAVE USED UP YOUR TIME . M R. BLUMBERG ?

MAY IT PLEASE T HE C OURT , HOWARD BLUMBERG , A SS IS TANT PUBLIC DEFENDER O N B EH AL F O F THE RESPONDENT , E US EBIO H ERNANDEZ.

MAY I ASK YOU FIRST , IN THE BACK OF MY M IN D I'M THINKING EVEN THOUGH THIS I S A RULE THA T A EA LS OF TH E STATE ARE G OV ERNE D B Y STATUTE THAT IS THAT THE LEGISLATURE HAS TO MAKE THE DETERMINATION.

THE DISTINCTION IS BECAUSE THIS IS A NON FINA L ORDER.IT IS A N ON FINA L P RETR IA L O RDER THAT'S GOV ERNED B Y RULE. IT CAN HAVE THE RIGHT TO AEAL. FINAL ORDERS BY STATUTE.

ON THIS , T HO UG H , AGAIN WE TAL K ABOUT ADMISSI ON S , CONFESSIONS O R E VI DENC E OBTAINED THROUGH SEARCH AND SEIZURE. SO THE L AS T P AR T O F T HE R UL E IS VERY BROAD . ANYTH ING T HA T HAS NOT HI NG T O DO WITH WHETHER IT IS THE DEFENDANT'S OR WHATEVER, IT IS EVI DENCE OBT AI NE D B Y SEARCH AND SEI ZU RE . SO IT I S I NT ERESTING , S ORT OF LIKE MIXING T HR EE T HING S TOGETHER. WHAT IS Y OUR I NT ERPR ET ATIO N OF W HAT ADM ISSI ON S M EA NS FOR PURPOSES O F T HI S R UL E , BECAUSE THAT'S WHAT W E H AV E TO FOCUS ON , AND WHA T I S T HE POLICY CONCERNS THAT WE SHOULD BE LOOKING A T I N WHETHER THESE ARE AEALABL E OR GOVER NE D B Y C ERTA IN PROCEEDINGS .

IT IS NOT M Y INTERPRETATION OF THE RULE. IT IS YOUR INT ERPRET AT ION O F THE RULE IN M CP HADD ER A ND GRANT. THIS COURT HAS D ECIDED THI S ISSUE AND A CTUALLY T HE S TA TE UNWITTINGLY SO HAS CON CE DE D THE ISSUE BEFORE YOU TODAY WHEN THEY S AID IF A STATEMENT HAS BOTH STATE MENTS OF THE INFORMANT AND THE DEF EN DA NT , T HE N T HE Y SAID IT SHOULD BE A EALA BL E . MCPHA DDER WAS THAT V ER Y SITUATION.IF YOU LOOK AT THE DISTRICT COURT OF AEAL D EC ISION I N MCPHADDER WHICH M OR E FUL LY FLE SHES OUT W HA T T YP E O F STATEMENT IT WAS IN THAT CASE, M CP HA DDER W AS D EALI NG WITH THE SAME THING YOU ARE DEALING WITH IN THI S COURT TODAY. M CPHADDER WAS DEALING WITH THE ADMISSION OF A STA TEMENT THAT INCLUDED, IT WAS A CONVERSATION BETWEEN THE INFORMANT AND T HE DEF EN DA NT , AND THIS IS IN THE D IS TR ICT COURT OF A EA L D ECISIO N I N MCPHADDER AND THIS IS 4 52 SOUTHERN 2ND AT P AGE 1018 WHERE THEY ARE DES CRIB ING WHAT THE STATEMENT IS IN MCP HADDER AND IT SAYS THE RECORD SHOWED THAT M IS S C AMPBELL 'S STATE MENT S WERE NOT BEING OFFERED T O P ROVE THE TRUTH OF THE MATTER ASSERTED BUT BEING PRESENTED INT O EVIDENCE FOR THE PURPOSE OF SHOWING T HA T THE DEFENDANT ENGAGED I N CONVERSATION WITH M IS S CAMPBELL, THE INFORMANT, A ND TOOK PART IN PLANS TO S UL Y ILLEGAL DRUGS TO HER. THAT'S T HE D IS TRIC T C OURT O F AEA L DECISION IN M CP HADD ER COMES BEFOR E T HI S C OURT A ND THIS COURT SAYS , S TATE , YOU DON'T HAVE THE RIGHT TO AEAL THAT.

SO YOU WOULD SAY T HE N I T IS THE DECISION OF THE T HI RD DISTRICT IS A CTUALLY

COMPATIBLE WITH MCP HA DDER ?

IT IS F OL LO WI NG THIS COURT. IF THE THIRD DIS TRICT H AD HELD THE STATE HAD THE R IG HT TO AEAL THEY WOULD BE IN CONFLICT WITH M CPHA DD ER A ND BREA BECAUSE IN BRE A T HE LANGUAGE IS KIND O F B ROAD . THAT'S EXACTLY WHAT THIS COURT DID I N B RE A , I N EXPLAINING THE DECISION IN M CPHADDER THREE YEARS EARLIER, SAID WHAT WE ARE TALKING ABOUT IN MCP HADD ER WAS A SIT UA TION , I 'M S OR RY , YOU LOOK AT THE R UL E AND I N BREA IT W AS A N A DM ISSION BY A COC ON SPIR ATOR S O T HE C OU RT SAID YES YOU C AN A EAL I N THIS SITUATION BECAUSE THE OUT OF COURT STATEMENT WAS MADE BY S OMEONE ACT IN G I N C ONJUNCTION WITH THE DEFENDANT, A C OC ON SPIR AT OR OR AGENT OF THE DEFENDANT AND T HEN HOW CAN W E S AY T HAT AFTER MCP HA DD ER , YOU S AI D H E W AS AN I NF ORMANT WHO W AS N OT ACTING WITH THE D EFENDANT. NOW, MR. C UE ST A IN THIS CASE WAS NOT A CTING WITH THE DEFENDANT.

BUT WHAT ABOUT T HE IR ARGUMENT THAT IT A LL E NDS U P BEING ADOPTIV E OR M OS T O F IT ENDS UP BEING ADOPTIVE ADMISSIONS? WAS THAT A RG UMENT M ADE IN MCPHADDER?

NO, IT DI D N OT INVOLVE A DOPTIVE A DMIS SI ONS.

SO NOW H OW D O Y OU R ESPO ND IN TERMS OF THE A EALABILITY ISSUE IF YOU LOOK AT IF THE STATE IS I N GOOD FAITH ARGUING T HESE A RE ADOPTIVE ADMISSIONS , THE N WHY WOULDN'T IT BE WITHI N THE RULE, A ND S INCE M CPHADDER DID N' T ADOPT - - DISCUSS ADO PT IV E ADM IS SI ONS , CON SISTENT WITH M CPHA DD ER ?

WELL , M CPHA DD ER D ID N OT E XPRESSLY TALK ABOUT A DOPTIVE A DMISSI ONS BUT A S IT IS INTERPR ETED I N BRE A MAKES THE DIS TI NCTION BETWEEN P EOPLE ACTING IN CONJUNCTION WITH THEDEFENDANT AND PEOPLE WHOAREN'T, A ND MR. C UE ST A WASN'T. NOW, THE RULE HAS TO BE INTERPRETED SOME WAY AND WE'VE HAD SOME QUEST IONS . JUSTICE BELL ASKED US ABOUT POLICY AND YOU JUS T ASKED M E ABOUT POLICY.

SO W HAT IS THE P OL ICY?

I THINK THE POLICY HERE IS THA T W E DON'T WAN T AELLATE COURTS , EIT HE R THE DISTRICT COURTS O F AEAL OR CERTAINLY THIS C OU RT T O B E DEC IDING E VI DE NT IARY I SS UE S PRETRIAL. THIS IS A MOTION I N L IM IN E. NOW , TRIAL J UD GE S , AND I 'M SURE JUSTICE BELL YOU CAN RELATE TO THIS , H AV E P ROBLEMS R ULING O N T HESE EVIDENTIARY ISSUES P RETR IA L AND ON MOTIONS I N L IMIN E BECAUSE THEY DON'T KNOW WHAT THE CASE A RE A LL A BOUT. THAT'S WHAT THIS IS HERE. NOW W E'RE S TA ND ING HERE BEFORE THIS COURT NOT KNOWING WHAT THIS CASE IS ALL ABOUT AND TRYING T O DECIDE, YOU KNOW , WHETH ER THE STATE SHOULD H AVE THE RIGHT TO AEAL T HIS , W HA T EXACTLY ARE THESE STATEMENTS ALL ABOUT AND I THINK THAT'S THE POLICY. IS T HAT , A ND WHETHER IT I S DNA EVIDENCE EXC LU DED , WHETHER I T IS T HE S TATE H AS A DISCOVERY V IO LATI ON AND A CRITICAL PIECE OF THEIR EVIDENCE IS EXCLUDED. THAT'S NOT THE DETERMINING FACTOR AS TO WHE THER THEY HAVE THE RIGHT TO A EA L A S TO WHETHER OR NOT THE EVIDENCE IS CRITICAL TO THE CASE.

SHOULDN'T THERE R EALLY BE AN EASIER WAY T O D ET ER MINE THE STATE'S R IG HT T O A EA L WHEN IT COMES TO T HESE K IN DS OF ADMISSI ON S T HE N B ECAUSE IT SEEMS TO ME WE A RE HER E ON SORT OF A DD H OC - - A D H OC KIND OF THING BEC AU SE THE Y S URESSED THE STATEMENTS AND USUALLY, YOU KNOW , Y OU THINK THAT THA T M IG HT B E AEALABLE , EXC EP T T HE TRI AL COURT SAYS THAT I T I SN 'T AN ADMISSION.IF THE TRIAL COURT HAS SAID IT WAS AN A DM IS SION B UT F OR SOME OTHER REASON IT W AS NOT ALLOWED INTO EVI DENC E , W E W OULD B E HER E O N A N A EA L , COR RECT?

YES.

AND S O , YOU KNO W , Y OU TAKE T HE SAM E S TA TEMENTS , YOU'VE GOT TO M AKE A DETERMINATION AS TO WHET HE R OR NOT IT IS AN ADMIS SION OR NOT AN ADMIS SION BEFORE YOU DECIDE ON WHETHER OR NOT IT IS A EA LA BL E O R REV IEWA BL E BY CER T.

WEL L , I THI NK T HE A NSWE R IS, W HI CH I T F REQUEN TL Y IS , YOU HAVE TO DRAW THE LIN E SOMEWHERE, AND I THINK THE BEST POLICY IS TO J US T S AY WHE N YOU TAL K A BOUT ADMISSIONS YOU ARE CLASSICALLY TALKING ABO UT ADMISSIONS OF A PARTY AND JUST LEAVE IT AT THAT. IN OTHER WORDS, IF THE DEFENDANT IN THIS CAS E HAD MADE A CONFE SSION A ND T HA T CONFESSION WAS SURES SED.

THAT' S NOT - -

THAT' S NOT WHAT Y OU SAID IN B RE A.

WE SAID IT D OESN'T HAVE TO BE JUST A DEF ENDA NT O N THE STAND.

ABSOLUTELY. AND I T HINK THAT H AS L ED T O A LITTLE BIT OF THE CONFUSION HERE, BUT I T HI NK EVEN UNDER THIS C OURT 'S CONSTRUCTION OF THE RULE IN BREA THAT WE STILL D ON'T COME WITHIN IT, B ECAUSE YOU ARE TALKING HERE ABO UT CODEFENDANT STATEMENTS AND LET ME CLEAR UP S OM ET HI NG . ABOUT EXA CTLY WHAT HAENED IN THI S C AS E. THE TRIAL J UDGE D IDN' T EXCLUDE EVERYTHING I N T HA T TAPED STATEMENT. THE TRIAL J UDGE E XCLUDED THE TAPED STA TEMENT BECAUSE IT INCLUDED OUT OF COU RT STATEMENTS MADE B Y CODEFENDANT CUESTA. YOU LOOK AT THE RECORD IN THIS CASE AND THAT' S ALL ANYBODY TALKED ABOUT AT THE HEARI NG BEFOR E T HE T RI AL JUDGE. THE O NLY ISSUE T HE RE I S D O THESE STATEMENTS OF THE CODEFENDANT COME IN OR ARE THEY I NA DM ISSI BL E UNDER THE C ONFRONTATION CLAUSE A ND I N !!!! INADM ISSIBLE HEARSAY. NO ONE EVE R SAI D A NYTH IN G INCRIMINATING THE DEFENDANT SAID WOULDN'T C OME IN AND M A MAYBE SOME THINGS THA T CUESTA SAID C OU LD COM E I N BECAUSE THEY WEREN'T COM IN G IN FOR THE TRUTH. THAT'S NOT THE ISSUE IN THIS CASE.

BUT WAS T HE A RG UMEN T MADE THAT IS NOW BEING MAD E THA T EVEN THOUGH THOSE W ER E STATEMENTS MADE BY SOMEONE OTHER THAN A DEFENDANT , T HE DEFEN DANT'S RES PONS E TO THE M MADE THEM -- T HE D EF ENDANT 'S OWN S TATEMENTS, IN E SS EN CE IS WHAT S HE I S SAY ING THA T THOSE ARE NOW THE DEFENDANT'S STATEMENT BECAUSE THE DEFENDANT ADOPTED THEM?

THAT WAS THE STA TE 'S ARGUMENT IN THE TRI AL COURT AND THAT WAS WHAT WE LITIGATED IN THE DISTRICT COURT OF AEAL.

AND THAT'S REALLY THE ONLY WAY THAT A DO PTIV E ADMISSIONS W OU LD F IT U ND ER THE ADMISSION S P ART O F T HI S RULE, I SN'T T HA T R IGHT ?

YES. IF YOU WERE TO , A GAIN , EXPAND IT BEYOND BRE A A ND SAY NOT ONLY A RE T HEY STATEMENTS OF C OC ONSP IR ATOR S OR PEOPLE ACTING WITH T HE DEFENDANT IT ALSO INCLUDES STATEMENTS MADE BY A C ODEFENDANT NOT ACTING WITH THE DEFENDANT BUT WHI CH THE DEFENDANT SUBSEQUENTLY ADMITS.

SO THE J UD GE REJ EC TE D T HE ARGUMENTS THAT THE STATEMENTS MADE BY CUESTA BY S ILENCE WERE ADO PTIV E ADMISSION?

YES.

SO THAT'S WHAT I W OULD LIKE TO ASK YOU A ND T HA T' S THE D CA A GREE D WIT H THA T, I S T HAT A QUESTION, YOU K NO W , WE ALWAYS S EE S UC H DISCRETION TO THE TRIAL COURTS IN TERMS O F F IN DI NG S OF FACT OR E VI DE NTIA RY RULINGS. IS T HAT A , W HE N YOU A RE

ANALYZING ADO PTIVE ADMISSIONS, I S I T A - - A RE THE RE ANY F ACTU AL DETERMINATIONS? ARE T HEY ALWAYS L EGAL DETERMINATIONS? IS IT A M IX ED Q UEST IO N O F FACT OF LAW? SDP LI THINK THERE ARE A NUMBER OF FACTUAL DETERMINATIONS IN ANY TYP E OF EVIDENTIARY RULING A ND CERTAINLY THIS TYPE OF EVIDENTIARY RULING. YOU HAVE TO ALY THE S IX F ACTORS IN WHA T H AV E C OM E TO BE K NO WN A S T HE P RIVE T TES T. T HOSE SIX FAC TORS HAV E T O BE ALIED TO A SET OF F AC TS T O DETERMINE DID THE D EF ENDA NT UNDERSTAND WHAT WAS BEING SAID. ARE THESE THE TYPE OF STATEMENTS THAT A DEFENDANT WOULD NATURALLY DENY? THERE ARE SIX OF T HEM. AND IT IS A C LA SS IC T HING A TRIAL JUDGE DOES I N M AK IN G AN EVIDENTIARY RULING IS ALYING THE FACTS T O A TEST. IT IS ALI ED AND THA T' S A D ISCRETIONARY CALL BY THE TRIAL JUDGE S O THA T I S CERTAINLY WHAT THE STANDAR D OF REV IEW IS HERE.

LET ME ASK Y OU ABOUT THE RULE ITSELF, WHEN THE RULE TALKS ABOUT ADMISSI ONS SHOULDN'T WE INTER PRET THAT TERM ADMISSIONS A S ADMISSIONSES AS DEFIN ED I N THE RULE OF EVIDENCE W HICH INC LUDES NOT ONLY S TA TE MENTS OF THE DEFENDANT BUT ALSO ADOPTIVE STATEMENTS ?

W EL L , A GAIN , A ND T HI S I S THE CHICKEN AND THE E GG THING.IF YOU DETERMI NE T HA T THI S STATEMENT IS ADMISSIBLE AS AN ADO PTIVE A DM ISSION , Y OU COU LD SAY THA T R UL E 9 .1 40 , THE LANGUAGE I S B ROAD ENOUGH , TO INCLUDE AN ADOPTIVE ADMISSION. OF COURSE, IT IS OUR POSITION HERE THAT IT IS NOT ADMISSIBLE AS AN A DO PT IV E ADMISSION .

BUT THE Q UESTION T HEN IS THIS: S O C OULD THE S TA TE , THEY SAY I A M C LA IMIN G , O R AEALING BECAUSE WE ARE SAYING THAT C UEST A' S STATEMENTS WERE A DO PTIV E ADMIS SIONS. THE TRIAL COURT, THE AELLATE COURT T AKES THAT AS A NONFI NA L A EA L , A ND THEY ARE STI LL T HEN T HEY U SE STANDARD AELLATE PRI NC IP LE S , RATHER THAN C ERT P RINC IP LE S IN DECIDING W HETHER THAT IS CORRECT OR NOT BUT THE DOOR THEY GO I N I S T HE D IR EC T AEAL DOOR AND NOT T HE C ER T DOOR. WHAT IS W RO NG W IT H T HA T , THAT IS , AS LON G A S -- THA T THEY HAVE MADE THE ARG UMENT BELOW, IN GOOD FAITH T HE Y HAVE MADE IT THA T I T I S AN A DOPTIVE A DMISSION THAT THE Y OUGHT TO HAVE THE RIGHT TO AEAL THAT. THAT DOESN'T MEAN THAT THEY A RE GOING TO WIN T HE I SSUE, BUT IT WOULD BE A L ITTL E RIDIC ULOUS IF -- T O S AY , WELL, WE'RE GOING TO - - W E HAVE NOW FOUND IT IS N OT A N A DOPTIVE A DM IS SION AND WE ARE GOING TO DISMISS THE AEAL BECAUSE IT SHOULDN'T HAVE BEEN BROUGHT THAT WAY. THAT WOULD NOT BE AN EFFICIENT WAY TO HANDLE IT. SO WHERE IS T HE HAR M I N T HA T AND DOES IT F UR THER THE P OLICY OF T HI S R ULE O R N OT WHICH IS WHAT I GET B AC K T O WHICH IS THA T I S T HE RE - - I S T HERE A B RO AD CON ST RUCTION OF ANYTHING ATTRIBUTABLE TO THE DEFENDANT IS WHERE WE ARE DRAWING THE L INE , N OT STATEMENTS IN GEN ERAL , AND ADOPT IVE ADMISSI ON S F IT WITHIN THAT. SO THEY SHOULD BE ABLE TO AEAL IT IF THAT'S WHAT THEY H AV E C LAIMED . IN THE TRIAL COURT.

I THINK IT F UR THERS T HE POLICY OF THE RULE AND I KNOW THI S G OE S A GA INST WHAT T HIS C OURT HAS ALREA DY S AID IN B RE A , T O B AS IC AL LY SAY ONLY STA TEMENTS THAT WER E ACTUALLY MADE BY THE DEFENDANT CONST ITUTE ADMISSIONS UNDER THE RULE.

THAT'S THE WAY TO A VO ID THE P ROBLEM THA T YOU ARE SPEAKING ABOUT, B ECAUSE ANY THING E LS E Y OU H AV E T O TALK ABOUT, WELL , F IR ST YOU HAVE TO HAVE A RULING M ADE AS TO NUMBER ONE UND ER B RE A WHETHER THEY ARE ATTRIBUTABLE TO THE C OCONSPIRATOR OR FIRST YOU HAVE TO DETERMINE WHETHERTHEY ARE A DO PT IVE ADM ISSI ON S O R NOT. IF YOU ARE LOOKING FOR A W AY TO DRAW A BRI GH T L IN E I N T HE RULE, Y OU B AS IC AL LY S AY I F THE WHOLE ISSUE C OMES DOWN TO WHETHER IT IS A H EA RS AY ISSUE OR A VIOLA TION O F THE CONFRONTATION CLAUSE AND YOUHAVE TO MAKE THA T CONFRONTATION FIRST TO SEE IF IT IS AN A DM IS SION W E SHOULDN 'T USE THAT ON A AEAL.

WE WOULD BE USING A MOR E N ARROW DEFINITION OF ADMISSIONS THAN IS CONTAIN ED IN THE

RULE OF EVIDENC E .

WEL L , T HI S C OURT I N , W EL L , THAT'S TRUE. THAT IS T RU E , BUT W HA T' S A DMISSIBLE UNDER THE RULES OF EVIDENCE AND W HAT T HE STATE CAN TAK E UP O N A EA L ARE NOT NECESSA RI LY I N ISSUE.

B UT U SUALLY YOU ASS UM E THAT WHEN WE A RE U SI NG A TERM LIKE A DMIS SI ON S I N A RULE AS TO WHETHER SOM EONE IS ALL OWED T O A EA L SOMETHING, THAT W HE N W E USE SUCH A WORD LIK E ADM ISSI ON S OR C ON FE SSIO N , A ND THE RE I S A RULE OF A DM IS SI BILITY O F T HAT TERM THAT W E I NTEN D T O ALY THAT TERM TO THE RULE.

THAT'S TRUE , EXC EP T I WOULD S UBMIT THA T W HE N PEOPLE THINK ABOUT THE T ER M ADMISSION , THIS W HOLE T HING ABOUT ADMISSION BY S IL ENCE IS SOMETHING THAT THEY D ON 'T NORMA LLY THINK ABOUT, B UT , Y ES , L EG ALLY I T DOE S C OME WITHIN THAT CATEG ORY OF CASES . T HE S ECOND I SSUE IN THI S CASE, IN GET TING TO T HE ADMISSIBILITY O F THE SE STATEMENTS , I W OULD L IK E T O SUBMIT TO THE COU RT THA T Y OU R EALLY HAVE BEFORE Y OU A CASE OF F IR ST I MP RE SS IO N. O BVIOUSLY A CASE OF F IRST IMP RESSION , THE RE I S S OM E TENSION THERE. THIS TYPE OF A S TA TE ME NT , WHAT HAENED IN THIS CAS E , THE STATE HAS NOT C IT ED T O YOU A S INGL E C AS E FRO M FLORIDA OR A NY WHERE ELSE IN THE COUNTRY I NV OL VI NG A SITUATION LIKE THIS W HE RE A P OLICE O FFIC ER C REAT ES THE OUT OF C OU RT S TATE MENT THAT THEY LAT ER S EE K T O A DM IT A T TRIAL. NOT A SIN GLE C ASE. I HAVE NOT FOUND A L OT OF CASE LAW ON THIS , E IT HER , BECAUSE IT IS A STRANGE SITUATION.

BUT IT IS NOT A CIRCUMSTANCE THAT DOES N OT OCCUR REPEATEDLY . IT IS A N U NU SU AL CIRCUMSTANCE FOR POLICE OFFICERS TO DO THIS.

NO.

B UT W HA TE VE R THE CASE LAW MAY BE.

IT IS N OT A N UNU SU AL CIRCUMSTANCE FOR A POLICE OFFICER TO D O THI S , T O TRY TO GET TH E DEFENDANT T O SAY SOMETHING INCRIMI NA TING AND THEN INTRODUCE THAT INTO COURT.IT IS V ERY UNUSUAL , AND I HAVE NOT SEEN I T OTHE R T HAN IN THE HOL ME S CAS E IN THE D C AELLATE COURT THAT I CITED YOU , FOR POL IC E OFFIC ER S T O DO THIS AND T HE N W HE N THE DEFENDANT DOESN 'T INCRIMINATE H IMSELF AND SAY WE'LL JUST -- FOR THE STATE TO SAY WE'LL INTRODUCE THE STATEMENTS OF THE CODEFENDANT BECAUSE T HE DEFENDANT DIDN'T FLAT OUT DENY WHAT THE COD EF EN DANT SAID TOM. THAT'S WHAT MAKES THIS C ASE SO DIF FE RENT AND T HA T' S WHY I SUBMIT THE T HIRD DCA W AS DECIDING A CASE OF FIR ST IMPRESSION AND THERE IS NO CONFLICT BETWEEN THAT AND ANYTHING. THERE I S CERTAINLY N O CONFLICT BETWEEN T HA T AND --.

BUT THERE ARE TWO ISS UE S INVOLVED HERE.YOU MAY BE COR RECT T HAT IT IS AN I SSUE OF FIRST IMPRESSION ON THE MERITS , BUT IT MAY NOT B E AN I SSUE OF FIRST IMPRE SS ION O N T HE J URISDICTIONAL ISSUE OF WHETHER YOU REVIEW T HI S BY CERTIOR ARI OR B Y T HE R ULE.

WELL , IT IS N OT I N CONFLICT WITH ANYTHING. T HIS COURT HAS NOT ADD RE SS ED THE I SSUE O F A DMIS SI ON S B Y S ILENCE AND WHETHER T HI S C OME WITHIN A DM IS SI ONS. THIS COURT HAS ONL Y T AL KE D ABOUT IN B RE A , STA TE MENT S THAT COULD BE A TT RI BU TED TO THE DEFENDANT.THIS CASE CLEARLY DOESN'T COME WITHIN THAT, BEC AU SE MR. CUESTA WAS NOT ACTING AS A C OC ONSP IRAT OR A S T HE STA TE C ONCEDED TO YOU R Q UE STION. HE WAS IN G A S A N AGE NT OF THE POLICE, AN I NF ORMANT .

DOESN'T B RE A A T L EA ST I MPLY THAT THE COURT I S USING THE EVIDE NC E R UL E DEFINITION OF ADMISSION BECAUSE IT IS USING A COC ONSPIRATOR STATEMENT AND NOT AS YOU SAY ONLY THE DEF ENDANT'S OWN STATEMENT , SO AT L EAST B RE A SAY S W E AR E NOT GOING TO L IM IT

WHA T WE C ALL ADMIS SI ON U NDER T HE RULE TO ONLY WHAT THE DEFENDANT SAYS, W E'RE GOING TO INCLUDE WHAT THE R UL E O F EVIDENCE ACTUALLY DEF INES WHICH I NCLUDES A COCON SPIRATOR.

THAT MAY BE AN E XT ENSION OF BRE A , B UT B RE A CLE ARLY DID NOT DECIDE THAT.

SO THE THIRD D ISTRICT COURT OF AEALS DEC ISION CANNOT BE IN CONFLICT WITH BREA.

I THINK THE C HI CKEN A ND THE EGG THING I S R EALL Y A S A FORMER AELLATE JUDGE I S REALLY BOTHERING ME B EC AU SE I'M NOT ENSURE W HAT STANDARDS, LET'S SAY T HEY ARE BRINGING THIS AS A COC ONSPIRATOR STATEMENTS, WHICH THEY ARE NOT, SO THEY ALLEGE THEY WERE C OCONSPIRATOR STA TEMENTS WHICH UNDER BREA W OU LD C OM E IN. THEN W HA T S TAND AR D DOE S THE A ELLATE COURT A LY I N DECIDING WHETHER THEY ARE OR ARE NOT F OR D EC ID IN G W HE THER IT I S A DEA L O R A C ER T? E VEN UND ER THA T I THINK I T BECOMES CONFUSING SO I THINK AT SOME POINT YOU HAVE TO SAY, LISTEN , IF I T I S BEI NG ALLEGED THAT THIS IS WHAT IT IS IN GOOD FAITH THE N IT I S GOING TO BE COMING UP THROUGH THE AEAL PRO CE SS , NOT T HROUGH CER T , BEC AUSE OTHERWISE I T HINK YOU P UT THE D ISTR IC T COURT S I N T HIS P OSITION OF TRYING T O DEC ID E THE SUB ST ANTIVE I SS UE AND TRYING TO DECIDE WHICH STANDARD THEY ARE GOING TO USE TO DECIDE WHAT IT IS , WHICH WILL IN THE END D ECID E ADMISSIBILITY. AND AGAIN YOU WOULD L IK E T O GO NARROWER B UT I T SEE MS LIKE WE'VE ALREADY KIND OF CROSSED T HE R IVER THE RE AND SEVERAL YEARS AGO , A ND I N B REA.

BUT I THINK T HI S C AS E POINTS O UT M AYBE SOM E O F THE PRO BLEMS WITH THE WAY THAT THE RIVER W AS CROSSED I N BREA.

THAT SHOULD BE L OO KED A T BY THE RULES C OM MI TT EE AND N OT BY -- B EC AU SE I D ON 'T KNOW THAT IT HAS BEEN GIVEN A LOT OF -- I D ON'T S EE T HAT THERE HAS B EEN A LOT OF PROBLEMS THAT HAVE O CCUR RED OVER THE YEARS . T HIS IS , A S YOU S AY, THIS IS THE FIRST C AS E THA T S EE MS T O HAVE PRESENTED A PROBLEM .

AND I CAN U NDERST AN D I N LIGHT OF HOW WE S TARTED OUT TODAY WHY T HAT MIG HT BE A N OPTION THAT W E WOU LD CONSIDER, BUT, AGAIN, AT THIS POINT WE'RE TRYING T O INTERPRET THE RULE AS W E HAVE IT H ERE , AND I T HI NK SOME OF T HE QUESTIONS THAT HAVE COME U P TOD AY C AN SUORT THE P RO PO SITI ON T HA T THERE S HOULD B E A N ARRO W ER INTERPRETATION OF THE STATE'S RIGHT TO AEAL THESE TYPE OF EVIDE NT IARY RULINGS BECAUSE T HEY ARE DISCRETIONARY TYPE OF RULINGS AND W E SHOULD LEA VE THEM TO THE TRIAL COURTS TO MAKE THE FINAL D ECISION O N THESE TYPE OF THINGS AND THEN IF T HE DEFEN DANT GET S CONVICTED, YOU KNO W , I F T HE EVIDENCE IS EXCLUDED , IF T HE EVIDENCE IS GRANTED , T HE STATE DOES NOT HAVE A RIGHT TO AEAL BUT T HE Y A LW AY S HAVE, WE ARE NOT TELLING THEM THEY CAN'T BRING THIS ISSUE TO THE AELLATE COURT. THAT'S NOT T HING I T HINK I HAVE IGNORED UP TO THI S POINT.THEY STILL HAVE CER TIOR AR I. IF IT HAS B EE N S UC H A TRAVESTY OF JUSTICE OF W HAT THE T RIAL JUDGE DID O N T HE EVIDENTIARY RULING, THEY BRING IT UP BY CERTIOR AR I AND THEY CAN E ST AB LI SH I T , T HEY GET REVIEW , W HICH FURTHER SUORTS MY P OS ITION BECAUSE IF IT IS A DISCRETIONARY CALL BY THE TRIAL JUDGE , THE N T HA T'S N OT A DEPARTURE OF T HE E SSEN TIAL REQUIREMENTS OF LAW AND THEY SHOULDN'T GET REVIEW U NDER THOSE CIRCUMSTANCES. T HAT'S WHAT WE ARE D EALING WITH HERE .

BEFORE YOU SIT D OW N LET ME JUST ASK YOU ON P OI NT S O F AGREEMENT, DO YOU AGREE THA T THE DEF ENDANT'S S TATEMENTS CAN COME IN H ER E A ND T HA T THE - - CUE ST A' S S TA TE ME NTS TO THE EXTENT THAT THEY ARE NOT INTRODUCED FOR THE T RUTH OF THE MAT TE R , N OT THE ADOPTIVE ADMISSIONS B UT THOSE THA T ARE NOT INTRODUCED FOR THE TRUTH OF THE MATTER, THAT THO SE CAN COME IN?

THE DEFENDA NT'S STATEMENTS CAN COME IN. ADMISSIONS BY A PARTY CAN ALWAYS COME IN . CUESTA'S STATEMENTS NOT ADMISSIBLE FOR THE TRUTH. I THINK HAVE T O B E L IT IGAT ED IN THE TRIAL COURT AS TO THEIR RELEVANCE.

HAS THAT B EE N L ITIG AT ED ?

NO , NO , T HA T W AS NOT T HE I SSUE B ELOW.

THANK YOU VERY MUCH. THANKS TO BOTH OF Y OU FOR BEING RES PO NS IV E A ND WIT H THAT, THE C OURT W IL L BE I N RECESS UNTIL 9:0 0 T OM ORRO W MORNING.

PLEASE RIS E .