Jesse L. Blanton v. State of Florida
SC04-1823

MARSHAL: LADIES AND GENTLEMEN, THE FLORIDASUPREME COURT. PLEASE BE SE ATED.

CHIEF JUSTICE: BEFORE YOU GET STARTED , I WANT TO NOTE THAT THE NE XT THREE CASES , BLANTON , LOPEZ AND CONTRARY AS, ARE ALL -- AND CONTRERAS ARE ALL CRAW FORD ISS UES. THE REASON WE DIDN'T CONSOLIDATE THEM IS BECAUSE THEY HAVE DIFFERENT ISSUES ON WHETHER THE STATEMENTS ARE TESTIMONIAL OR NOT, BUT I BELI EVE THEY ALL HAVE THE SAME ISSUE AS TO WHAT I S ADEQUATE , MEANINGFUL CROSS-EXAMINATION, SO HOPEFULLY WE WILL BE ABLE TO , EVEN THOUGH WE DIDN'T CONSOLIDATE THEM , WE WANT TO MAKE SU RE THAT WE TREAT THEM TOGETHER, WHIC H IS WH Y WE SET THEM IN SE RIES. SO YOU WILL START WITH BLANTON , MS. LEVERING.

THAN KS. MAY IT PLEASE THE COURT. MY NAME IS R OSE LEVERING. I REPRESENT THE PETITIONER JESSE BLANTON . A FTER THE SUPREME COURT DECIDED CRAWFORD VWASHINGTON, IT LE FT THE LOWER COURTS SCRAMBLING , TRYING TO DEAL WITH IMPLICATIONS THAT WERE RAISED IN THAT CASE.

CHIEF JUSTICE: SCRAMBLING WOULD BE ONE WAY TO PUT IT.

AS YOU KNOW , THE COURTHELD THAT TESTIMONIAL HEARSAY STATEMENTS ARE IN ADMISSIBLE IN A CRIMINAL TRIAL , UNLESS THE CLAIRE AND THE IS - - THE DECLARANT IS UNAVAILABLE AND UNLESS THE STATEMENT IS , THE PAR TY AGAINST WHOM THE STATEM ENT IS SUB MITTED HAD A PRIOR OPPORTUNITY FORCROSS-EXAMINATION. IN DOING SO, THE COURT ABROGATED THE DECISION IN --

CHIEF JUSTICE: RATHER THAN GOING OVER WHAT CRAWFORD SAYS BECAUSE WE ARE FAMILIAR WITH THAT, IN THIS CASE, I THINK THERE IS A STIPULATION THAT THESTATEMENT IS TESTIMONY QLAL. IS THAT CO RRECT? -- TESTIMONIAL. IS THAT CORRECT?

THE STATEMENT IS TESTIMONIAL.

CHIEF JUSTICE: WHICH GOES TO THE COMMENT ABOUT ALL THREE CASES ABOUT WHETHER THE DISCOVERY DEPOSITION IS EQUIVALENT TO THE PRIOR OPPORTUNITY TO CROSS-EXAMINE, AND THEN ADDRESS THE HAR MLESS ERROR ISSUE AS WELL.

THE ERROR IN THE BLANTON CASE IS THAT THE F I FTH DCA HAS LO OKED, HAS REALLY LOOKED ONLY AT THE WORDS "PRIOR OPPORTUNITY" TO CROSS-EXAMINE, AND HELD THAT OR SAID THAT THE MERE OPPORTUNITY , THE FACT THAT AN OPPORTUNITY EX ISTED TO T AKE AN EX AMINATION, IN THIS CASE A DISCOVERY EXAMINATION WAS TAKEN OR IN A SE NSE COUNSEL ATTEMPTED TO TAKE ONE , AND THE COURT HELD THAT IT MADE NO DIFFERENCE. THE FIFTH DCA HELD THAT IT MADE NO DIFF ERENCE .

JUSTICE: WHEN DID THE DEPOSITION TAKE PL ACE WITH REFERENCE TO THE DECI SION IN

CRAWFORD. IN THIS CASE, DID THE DEPOSITION TAKE PLACE BEFO RETHE ISSU ANCE OF CRAW FORD?

YES, IT DID, AND IN FACT THE TRIAL ITSELF TOOK PLACE D URING THE ISSUANCE OF CRAWFORD. CRAWFORD CAME DOWN AS THE CASE WAS ON AP PEAL AND SUBMITTED SUPPLEMENTAL BRIEFS IN CRAWFORD. THE DEPOSI TION WAS ACTUALLY TAKEN , ABOUT, I THINK , EIGHT OR NINE MONTHS BEFORE THETRIAL , VERY SHORTLY, THEWEEK OR TWO BEFORE THE TRIAL , THE MOTION HEARING WAS HELD ON THE ADMIS SION OF TRIAL V ICTIM HEARSAY STATEMEN TS. THE COURT FO UND THAT UNDER THE CUYLER V ROBERTS RULE , WHICH IS WHAT OUR STATUTE IS BASED ON --

JUSTICE: WHAT WAS THE EXTENT OF THE OBJECTION TO THE DEPOSITION USE HERE?

A T THE PRESENT TRIAL?

JUSTICE: RIGHT.

THE DEFENSE COUNSEL WAS MAK ING A UNIQUE ARGUMENT IN THE FACT THAT THE STATUTE ALLOWS THE ADMISSION OF A STA TEMENT O F A C HILD 11 YEARS OLD. THE CHILD WAS 11 YEARS OLD WHEN SHE MADE THE STATEMENTIN THE CAPITAL SEXUAL BATTERY CASE BUT IN FACT SHE WAS 13 YEARS OLD AT THE TIME OF TRIAL. COUNSEL'S ARGU MENT WAS THAT THE STATUTE SH OULD BE READ TO ALLOW HER TESTIMON Y, NOWTHAT SHE WAS 13.

JUSTICE: CA N I ASK FOR CLARIFICATION WHY YOU DO THIS , WAS THIS A FTER THE DEPOSITION AND THE STATE HAD NOTIFIED THAT IT WAS GOING TO SEEK ADMI SSION UNDER THE HEARSAY RULE?

NO. I WAS ABOUT TO SAY THAT THEDEPOSITION TOOK PLACE EIGHT OR NINE MONTHS BEFORE THE HEARING ON THE MOTION TO ADMIT THE CH ILD VICTIM'S STATES.

JUSTICE: HAD THE MOTION BEEN FILE D? WAS THERE ANY KNOW LEDGE ON BEHALF OF DEFENSE COUNSEL THAT THE STATE WAS GOIN G TO ATTEMPT TO GET THIS STATEMENT ADMITTED AND NOT HAVE THE CHILD ACTUALLY TESTIFY , W HICH IS QUITE COMMON IN THESE CASES.

RIG HT. IN FACT THE MOTION ITSELF IS NOT EVEN FILED IN THE RECORD BELOW, SO I A M NOT CERTAIN AT WHAT POINT THE PART IES ACTUALLY KNEW THAT. I BELIEVE IT IS NOT UNUSUAL THAT THESE MOTIONS ARE FILEDAND HEARD SHOR TLY BEFORE T RIAL.

JUSTICE: YOU EXPLAIN , AT THE DEPOSITION THAT OCCURRED, DID THE DEFENSE COUNSEL ACTUALLY CROSS-EXAMINATION THE WITNESS ABOUT THE STATEMENTS SHE MAD E?

THE ONLY INDI CATION THAT WE HAVE , THE DEPO SITION WAS NOT FILED IN THIS CASE. THE ONLY INDICATION THAT WE HAVE IS THAT THE CHILD WAS RELUCTANT TO COME FORWARD. SHE WAS IN A FRAGILE EMOTIONAL STATE ADMITTEDLY . AND THE PROSECUTOR IN FACT , EVEN, THIS ALL CAME OU T AT THE MOTION HEAR ING, THE PROSECUTOR IN FACT ADMITTED THAT THE CHILD , IT WASN'T A VERY ADEQUATE DEPOSITION. THE CHILD DID NOT WANT TO G O FORWARD AND THAT I S ALL.

CHIEF JUSTICE: YOU HAVE ADMITTED OR I THINK YOU HAVE , THAT THIS IS A CASE WHERE THIS WITN ESS REALLY IS UNAVAILABLE IN T E RMS OF HER VERY FRA GILE EMOTIONALSTATE.IS THAT CORRE CT?

AT LE AST UNDER , AT LEAST UNDER THE OLD ROBERTS TEST SHE WAS UNAVAILABLE .

CHIEF JUSTICE: IF THIS WERE TO BE REVERSED BECAUSE THERE, THIS PARTICULAR DISCOVERY

DEPOSITION WAS NOT AN ADEQUATE OPPORTUNITY FOR CROSS-EXAMINATION, AND IT WENT BACK , AND THE SAME SITUATION EXISTED WITH THIS WITNESS, THAT IS SHE REALLY WAS STILL IN A VERY FRA GILE STATE , WOULD YOU , WHY COULDN'T THIS BE CU RED , IF SHE WERE ANOTHER DEPOSITION TAKEN , WHERE THERE WOULD BE CROSS-EXAMINATION BUT ITJUST WOUL DN'T BE CROSS-EXAMINATION THAT WOULDEXIST AT THE TIME OF TRIAL . IN OTHER WORDS CAN THIS BE C URED , I G UESS IS MY QUESTION.

I THINK THAT THAT SON OF THE BIG ISSUES THAT THIS COURT IS GOING TO HAVE TO ADDRESS , IS WHETHER DEPOSITION TO SAY PERPETUATE DISCOVERY WOULD BE SUFFICIENT TO SATISFY THAT PRIOR OPPORT UNITY FOR CROSS-EXAMINATION. WHE N WE LOOK BA CK HISTORICALLY AT WHAT HAS BEEN CONSIDER ED TO BE MEANINGFUL AND ADEQ UATE PRIOR OPPORTUNITIES FOR CROSS-EXAMINATION, IT HAS GENERALLY BEEN TESTIMONYTHAT HAS BEEN ADMITTED IN A TRIAL CONT EXT , AND WE LOOK AT MARY LAND V CRAIG AND THE CASES THAT FOLLOWED AFTER THAT , AND WE SEE THAT THECOURTS HAVE LOOKED FOR SITUATIONS RESEMBLING CONDITIONS THAT EXIST AT TRIAL. THEY HAVE LOOKED AT THE FACT THAT THE TESTIMONY WAS UNDEROATH, THAT THE TESTIMONYTOOK PLACE IN FRONT OF THE TRIER OF FACT .

CHIEF JUSTICE: BUT IN THIS CASE , BECAUS E YOU SAID IT SHOULD BE CASE SPECIFIC. DO WE DO ANYTHING WITH THEFACT THAT THIS TESTIMONY IN BLANTON WAS NOT, THIS IS NOTA SI TUATION OF UNCORROBORATED SEXUAL ABUSE. THIS IS SOMETHING WHERE THERE IS A GRAPHIC VIDEOTAPE AND PHOTOGRAPH, AND THE M OTHER WAS ABLE TO AUTHENTICATE T MAYBE I AM GETTING TO HARMLESS ERROR , BUT I GUESS THE Q UESTION FOR MEANINGFUL CROSS-EXAMINATION , IS WHAT KIND OF CROSS-EXAMINATION WOULD BEMEANINGFUL, WHEN YOU HAVEGOT A VIDEOTAPE AND WHAT KIND OF IMPEACHMENT COULD BE DONE, OTHER THAN CA USING THIS POOR VI CTIM MORE EMOTIONAL HARM ?

THIS IS KIND OF GETTING ALITTLE BIT INTO THE HARMLESS-ERROR ANALYSIS .

CHIEF JUSTICE: M AYBE IT IS.

BUT I WOULD ASK THE COURT TO REMEMBER FIRST OF ALL , THAT THE DEFENDANT WAS FOUNDGUILTY OF FOUR COUNTS OF S EXUAL BA TTERY AND 13 COUNTS OF PROMOTING SEXUAL PERFORMANCE , BUT THE AS IDE , IF YOU TAKE OUT THE CHILD'S TESTIMONY AND THE AUDIO-TAPED STATEMENT, THE INTERVIEW WITH THE POLICE OFFICER , IN WHICH SHE AUTHENTICATED EACH OF THOSEPHOTOGRAPHS AND THE VIDEO AND SAID , IN MOST CASES THESE ARE ME AND IN SOME CASES THIS IS M E AND J EFF AND JE SSE BL ANTON. WHAT YOU ARE LEFT WITH IS THE MOTHER EYEDFYING THE DAUGHTER IN ONLY -- IDENTIFYING THE DAUGHTER IN ONLY FOUR OF THE PHOTOGRAPHS AND

CHIEF JUSTICE: THAT G OES TO HARMLESS ERROR.

AND MR . BLA NTON 'S V OICE ONLY, IN THE VIDEO, SO IN A NEW DEPOSITION IF IT WERE DONE TO PERPETUATE TESTIMONY, I THINK THAT THE TRIALATTORNEY WOULD HAVE TO FOCUSON THE CREDIBILIT Y OF THE C HILD , HER AB ILITY TO TELL THE TRUTH OR A L IE . HE WOULD HAVE TO FOCUS ON WHETHER THERE MIGHT HAVE BEEN OTHER CHILDREN IN THOSE OTHER PHOTOGRAPHS , OTHER THAN THIS PARTIC ULAR CHILD IN ALL THE PHOTOGRAPHS.

JUSTICE: IN RESPECT, SINCE YOUR TIME IS ABOUT U P, TO HARMLESS ERROR , WHERE WERE THOSE PHOTOGRAPHS OBTAINED?

I AM S O RRY ?

JUSTICE: WHERE WERE THOSEPHOTOGRAPHS OBTAINED?

THEY WERE SEIZED IN EVIDENCE BY THE SHERIFFAFTER THE DAUG HTER CAME FORWARD .

JUSTICE: THEY WERE SEI ZED FROM HIS?

AT MR . BLAN TON 'S RESIDENCE .

JUSTICE: MR. BLANTON'S RESIDENCE .

THAT IS CORRECT.

JUSTICE: IS ANY DETAIL ABOUT WHERE THEY WERE AT MR . BLANTON'S RESIDENCE?

IN ONE OF THE DETAILS OF THE PHOTOGRAPHS, THERE WAS A BACKGROUND WALL WHICH HAD DISTINCTIVE PA INT SPLATTERS ON THE WALL AND THEY MATCHED THE PAINT SPLATTERS IN THE DEFENDANT'S BEDR OOM .

JUSTICE: THANK YOU.

CHIEF JUSTICE: DO YOU WANT TO SAVE THE REST OF YOUR SECONDS?

THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS WESLEY HEIDT AND I REPRESEN T THE STATE IN THIS CASE.

JUSTICE: SINCE YOU DON'T HAVE M UCH TIME , LET ME GETRIGHT TO THE CORE POINT. WHAT DOES THE STATE SAY SHOULD BE THE PRIOR OPP ORTUNITY TO CROSS-EXAMINE? OBVIOUSLY WE NEED TO G IVE S OME ME ANING TO THE WORDS "OPPORTUNITY FO R" BECAUSE THE SUPREME COURT DIDN 'T SAY YOU HAD TO HAVE PRIOR CROSS-EXAMINATION. ONLY PRIOR OPPORTUNITY FOR. ON ONE END OF THE SPECTRUM , YOU CAN SAY WELL , AS LONG AS THE STATE NOTIFIES THE DEFENDANT THAT THEY IN TEND TO USE HEARSAY , INTRODUCE HEARSAY TESTIMONY AT TRIAL, THE RULES GIVE THE DEFEND ANT AN OPPORTUNITY TO TAKE DEPOSITION, IF THE DEFENDANT CHOOSES, AND THAT IS THE ONLY THING THAT THE CONSTITUTION REQU IRES. ON THE OTHER END , IT HAS TO HAVE BEEN A DEPOSITION AT WHICH THE DEFENDANT ACTUALLY CROSS-EXAMINED THE WITNESS , SO WHAT DOES THE STATE SAYSHOULD BE THE MEA NING OF THE OPPORTUNITY FOR?

I THINK THE WORD OPPORTUNITY MEANS WHAT ITS AYS. THE OPPORTUN ITY IS THER E FOR THE DEFENSE TO USE IT AS IT WISHES . THAT IS THE HO LDING IN PLANT ONE. THAT IS THE LANGUAGE USED SPECIFICALLY BY THE U.S. SUPREME COURT.

JUSTICE: BUT DOES THAT CREATE SOME CONFLICT WITH AUTHORITIES FROM THIS COURT,WITH RE GARD TO DEPOSITIONS?

TRADITIONALLY DEPOSITIONS WERE NOT DONE WITH THAT INTENT. THAT CASE LAW PREDATED THE LANGUAGE IN CRAW FORD.

JUSTICE: RIGHT.

AND I THINK THAT, IF YOU LOOK AT THE LANGUAGE FOR EXAMPLE , IT EMPHASIZES THAT THE PURPOSE IS FOR THE OPPORTUNITY TO CROSS-EXAMINE. IT SAYS CROSS-EXAMINATION AND THEY FELT THAT THE DEPOSITIONS WERE NOT BEING U SED AS SUCH , BUT , A GAIN , THE OPPORTUNITY IS THERE AND USING THE LANGUAGE "OPPORTUNITY FOR" . WHEN YOU LOOK AT THE DEPOSITION, THEY ARE A L WAYS PORTRAYED TO AND FRIENDLY T YPE OF ATMOSPHERE AND SOMETIMES THEY NORTH THAT WAY. SOMETIMES THE VI CTIM IS PROVED TO HAVE A WE AK CASE , AND IN THIS CASE --

CHIEF JUSTICE: ARE YOU SAYING THAT WHETHER OR NOT THE STATE HAS NOTI CED THAT THEY ARE NOT GOING TO CALL THE VICTIM AT TRIAL, THAT JUST HAVING THE OPPORTUNITYTO DEPOSE THE VICTIM , EVEN IF THEY HAVEN'T DONE IT OR HAVEN'T DONE I T WITH THE P URPOSE OF USING IT AS SUBSTITUTE FOR CROSS-EXAMINATION , THAT THAT SATISFIES CRAWFORD?

CRAWFORD SAYS OPPORTUNITY .

CHIEF JUSTICE: I KN OW WHAT IT SAYS.

I THINK THE OPPORTUNITY IS MET WHEN THERE IS A OPPORTUNITY TO DEPOSE.

CHIEF JUSTICE: SO THAT NO OBLIGATION ON THE STATE TO FIRST TELL THE DEFENDANTTHAT THEY ARE NOT PLANNING TO USE THE TESTIMONY, THE L IVE TESTIMONY OF THE VICTIM OR THE WITN ESS? DOES IT DEPEND ON THAT?

I DON'T THINK SO , YOUR HONOR.

CHIEF JUSTICE: WHAT ABOUT THE RU LE THAT RIGHT NOW ACTUALLY PREVENTS DEFENDANTS FROM BEING THERE, UNLESS THERE IS COURT PERMISSION? DON'T WE HAVE TO, WOULDN'T WE HAVE TO AM END THE RULE?

THE WA Y THE RULE IS CURRENTLY WRIT TEN, THE RULE SPECIFICALLY PROVIDES FOR THE PHYS ICAL PRESENCE OF THE DEFENDANT AND MA KE ALLOWANCES UPON MOTI ON BY THE DEFENSE .

CHIEF JUSTICE: BUT IF THEY DON'T KNOW THIS IS THE ONLY OPPORTUNITY T THAT ISWHERE IT SEEMS THE PROCEDURERIGHT NOW NEEDS TO BE LOOKED AT, TO REALLY TAKE ACCOUNT FOR THIS NEW , IN THE POST CRAWFORD WORLD.

ADMITTEDLY THIS IS POST CRAWFORD, BUT EVEN PRECRAWFORD, WHEN YOU LOOK AT THE RULING IN CRAWFORD, IT TAKES ABOUT - - IT TALKS ABOUT THE SITUATION WHEN IT IS TESTIMONIAL, WHICH LATER MY ATTORNEY GENERAL WILL GET INTO, AND LATER I T SAYS UNAVAILABLE.IN THIS CASE IDEALLY, THE STATE WANTS THE WITNESSTHERE. THE DECLARANT , AND IN A LOTOF OTHER CASES YOU MIGHT NOT HAVE THE CORROBORATING EVIDENCE THAT YOU HAVE , PICTURES AND VIDEO , ETCETERA, AND WHEN WE AS K THE VICTIM IF THEY WANT TO BE ONTHE STAND , MOST OF THE TIME THEY SAY THEY DO NOT . WE WANT THE VICTIM TO LOOK THE JURY IN THE FACE AND SAYTHIS, THIS AND THIS. WHEN THE GLARE AND THE IS U N -- WHEN THE DECLARANT IS UNAVAILABLE IN A LIMITED NUMBER OF CASES , AND WHEN THIS OPPORTUNITY IS TAKEN ADVANTAGE OF, THAT, LI KE IN THIS CASE , IS ADMISSIBLE.

JUSTICE: THERE IS ALSO LANGUAGE IN CRAWFORD CONCERNING FACE TO FACE CONFRONTATION BETWEEN THE DEFENDANT AND HIS OR HER ACCUSER , SO WHERE DOES THAT FIT INTO IT , WHEN YOU ARE TALKING ABOUT A DISCOVERY DEPOSITION ?

THE LANGUAGE IN CRAWFORD AND A LOT OF THE CONFRONTATION LANGUAGE REST S WITH THE OPPORTUNITY FOR EXAMINATION AND THE OPPORTUNITY FOR FACE TO FACE CONFRONTATION.WHEN YOU LOOK AT CASE LAW LIKE MARY LAND V CRAIG , IT PUTS FACE TO FACE CONFRONTATION IN A BALANCING CHECK , THE BALANCING OF THE COMPETING INTERE STS , AND IT IS THE STATE'S POSITION THAT --

JUSTICE: IN THIS SERIOUS CASE OF WHERE MR . BLANTONWAS CONVI CTED OF SEVERALCOUNTS OF CAPITAL SEXUAL BATTERY, IN A SER IOUS CASE LIKE THAT , YOU BELIEVE THAT IT IS O KAY AND IT IS NOT AVIOLATION OF THE CONFRONTATION CLAUSE , IF MR . BLANTON NEVER GETS TO FACE HIS ACCUSER PERSONALLY. F ACE TO FACE.

I DON'T THINK THAT IS A CONSTITUTIONAL REQUIREMENT. WE CITED CASE LAW IN OUR BRIEF

FROM OTHER JURISDICTIONS WHICH HOLD IT IS NOT A CONSTITUTIONAL REQUIREMENT, AND THE RULE PROVIDES THAT HE CAN BE THEREUPON MOTION, AND THE FIFTH DISTRICT COURT OF APPEALS , IN A CASE SUPPLEMENTED WITH , ROSE TOTHE FACT THAT MO VING TO MEET THE CASE OF CRAWFORD , BY A DEFENSE ATTORNEY, COULD BE DONE.

JUSTICE: I N THIS CASE CRAWFORD IS NOT A DECISION OF THE COURT AT THE TIME THAT AL L OF THIS WE NT ON IN THE TRIAL COURT.

ADMITTEDLY.

JUSTICE: S O H E CERTAINLY DIDN'T HAVE AN OPPORTUNITYTO AS K THE TRIAL COURT TO LET HIM B E PRESEN T AT ANYKIND OF DEPOSITION.

THIS IS A 2001 CASE. CRAWFORD WAS 2004.

CHIEF JUSTICE: JUSTICE CANTERO.

YOU WOULD AGREE THAT , IF THE STATE PROV IDED THEDEFENDANT WITH A NOTICE OF USING HEARSAY TESTIMONY AT TRIAL AND THE DEFENDANT NOTICED THE WITNES S FOR DEPOSITION AND THEN FILED A MOTION FOR THE DEFENDANT TO BE PRESENT AT THE DEPOSITION , THAT UNDER THE RULE , EVEN AS PRESENTLY CONSTITUTED , 3. 220 , THAT, THE FACT THAT CRAWFORD SEEMS TO REQUIRE THE DEFENDANT'S PRESENCE, WOULD FUR NISH GOOD CAUSE IN THAT CIRCUMSTANCE, FOR THE DEFENDANT TO BE PRESENT AT THAT DEPOSITION.

YES, YOUR HONOR. IF THE DEFENSE WANTS THEDEFENDANT TO BE THERE FACE TO FACE , THEN THEY HAVE THAT R IGHT UNDER THE C URRENT WAYIT IS WRITT EN.

JUSTICE: DOES THE DEFENSE MAINTAIN THAT IF THIS WAS ERROR, THIS WAS HARMLESS ERROR.

CLEARLY, YOUR HONOR .

JUSTICE: AND THAT WAS WHAT THE FIFTH DISTRICT DETERMINED, BUT HOW CAN IN THIS INST ANCE, WHERE THI S VICTIM IDENTIFIED AND MADE THESE IDENTIFICATIONS AND HOW CAN IT BE HARMLESS, WHAT THE VICTIM SAID?

WHEN YOU LOOK , THIS WAS ABENCH TRIAL. THE DEFENSE AND THE STATE WAIVED THE RIGHT TO A JURY , AND THE HEARSAY WAS ADMISSIBLE PRE-CRAWFORD , AND WE WA LKED STEP-BY-STEP FROM PHOTOGRAPH TO PHOTOGRAPH , IN FRONT OF JU DGE E ATON WHO HAD ALREADY SEEN THE VIDEOTAPE AND THE PHOTOS JUST A F EW WEEKS BEFORE AT THE UNAVAILABILITY HEARING AND PRESENTED THE VICTIM , WHAT THE VICTIM TOLD YOU AND YES, YES, THIS IS THE DEFENDANTAND THE VICTIM. THE MOTHER WAS PUT ON THE STAND . SHE WAS THERE FOR THE PRESENTATION. WE ONLY HAD TH REE WITNESSES.

CHIEF JUSTICE: GO BACK TO THE STATE'S POSITION, BECAUSE I CAN SEE A SITUATION WHERE WE COULD F RAME THIS PERSPECTIVELY TO SAY THAT , A FTER , AS JUSTICE CANTERO WAS SUGGESTING , THAT AFTER THERE IS A NOTICE OF UNAVAILABILITY , THAT THEN THE DEFENDANT KNOWS THAT THIS IS GOING TO HAPPEN, AND THEN E ITHER HAS A SE COND CHANCE AT A DEPOSITION FOR CROSS-EXAMINATION PURPOSESOR TO PERPETUATE UNDER 3 ., TO LOOK AT HOW THIS WOR KED, B UT ARE YOU SAYING THAT, IN ANY CASE , THE MERE EXISTENCE OF 3 . 220 , WHICH IS WHATEVER , IN THE FLORIDA RULES OF CIVIL PRO CEDURE, JUST EXISTENCE OF THAT , SATISFIES CRAWFORD?

YES. THE WAY THE RULE IS W RITTEN , THE DEFENSE CONCURRENTLY MOVES THE TRIAL COURT TO HAVE THE DEFENDANT THERE. THAT IS THEIR WISH , AND PERSPECTIVELY THERE HAVE BEEN ENCOURAGING DEFENSE ATTORNEYS TO GET MORE AGGRESSIVE IN DEPOSITION.

JUSTICE: WITH THAT HYPOTHESIS, WHAT IF THE DEFENDANT NOTICES WITNESS FOR DEPOSITION AND LET'S SAY THE DEFENDANT IS AWARE OF THESE STATEMENTS AND IS ALREADY AW ARE THAT THESTATEMENTS ARE GOING TO BE USED AT TRIAL , AND AS HAPPENS IN MA NY OF THESECASES , WE , IT IS INVOLVING A CHILD.THE CHILD IS SOMETIMES VERY YOUNG.LET'S SAY IT IT IS A SEVEN-YEAR-OLD CHILD ANDTHEY SET THE DEPOSITION. THE CHILD ATTENDS THE DEPOSITION AND THE CHILD JUST SHUTS DOWN , WILL NOTSPEAK AT ALL, REFUSES TO SPEAK, REFUSES TO ANSWER QUESTIONS FROM THE DEFENSEATTORNEY. HAS THE DEFENDANT THEN BEEN GIVEN AN OPPORTUNITY TO CROSS-EXAMINE IN THAT INSTANCE?

YES. IF YOU PUT THAT CHILD ON THE STAND , CRAWFORD DOES NOT APPLY . DECLARANT IS AVAILABLE AND IF THE CHILD COLLAPSE UP AT TRIAL --

JUSTICE: HOW CAN THE DEFENDANT HAVE AN OPPORTUNITY TO CROSS-EXAMINEIF THE WITNESS IS REFU SING TO ANSWER QUESTIONS? ISN'T CROSS-EXAMINATION THE VERY PURPOSE OF ANSWERINGQUESTIONS FROM COUNSEL?

CH ANGE OF SCENARIO . P UT THAT SAME SEVEN-YEAR-OLD ON THE STAND AND CRAWFORD HAS ABSOLUTELY NO APPLICATION.IF THE DECLARANT WAS AVAILABLE, CRAWFORD DOES NOT APPLY. THE VICTIM CLAMS U P, THAT EVIDENCE COMES IN. UNDER OUR RULES OF EVIDENCE , CRAWFORD SAYS WHEN DECL ARANT IS AVAILABLE , IT TURNS TO RULES OF EVIDENCE.

JUSTICE: BUT CRAWFORD DOESN'T EVEN APPLY IF THE WITNESS TESTIFIES AT TRIAL.

CORRECT.

JUSTICE: SO WE ARETALKING ABOUT WHEN CRAWFORD APPLIES, WHICH IS IN THE PRIOR DEPOSITION, HOW CAN THERE BE AN OPPORTUNITY FOR CROSS-EXAMINATION IF THE WITNESS REFUSES TO ANSWER QUESTIONS?

THEN YOU ASK FOR A SECOND OPPORTUNITY TO DEPOSE ANDUSE THAT OPPORTUNITY AS A MOTION TO PERPETUATE AND THAT OPPORTUNITY IS THEREAND CRAWFORD DID CHANGE THE WAY THAT WE WOULD , HOW DEFENSE ATTORNEYS APPROACH DEPOSITIONS, AND WHEN YOULOOK AT THE S ITUATION AND THE OPPORTUNIT IES , WE DID NOT ANTICIPATE THE CHILD BECOMING UNAVAILABLE IN THIS CASE. THE STATE THEN IDE ALLY --

CHIEF JUSTICE: YOUR TIME IS UP. IT STRIKES ME AND TH ERE ARE SUCH PO LICY ISSUES WHILE WE TRY TO CONFRONT THE CONSTITUTIONAL ISSUES , THE WHOLE PURPOSE OF THE TRIAL HEARSAY RULE IS TO OVERCOME THE HARM FROM THE ADVERSARIAL TRIAL PROCESS AND NO W WE ARE T A LKING ABOUT SOMETHING , WHICH SEE MS TO BE JUST TO GET THIS OPPORTUNITY , T WO OR THREE DEPOSITIONS WHICH COULD BE E QUALLY HARMFUL TO THIS CHILD , SO JUST AS WE THINK ABOUT THIS , WE HAVE GOT SOME TIMES IN THESE CHILD CASES, THE GREATEST NEED FORCROSS-EXAMINATION, TO MAKESURE THAT THE INCIDENT OCCURRED, BUT THEN THE GREATEST HARM TO THE VICTIM FROM THIS PROCESS , AND I THINK THAT IS A VERY , VERY DIFFICULT ISSUE .

IF I CAN MAKE ONE CONCLUDING POINT, THE RULE OF FORFEITURE WHICH WE ALSO REFERENCED IN OUR BRIEF , SAYS THAT YOU CANNOT TAKE ADVANTAGE EQUITYBLY. THE REA SON THE --

CHIEF JUSTICE: YOU DON'T RECALL SOMETHING CA LLED INNOCENT UN TIL PROVING GUILTY. THAT IS ASSUMING THE DEFENDANT DID IT.

YOU HAVE A PRELIMINARY HEARING , IF THE SI TUATION WAS NOT WHAT WE CHARGED THEM WITH AND THERE ARE CASE LA WS THAT CITE THAT THIS IS THE REASON THAT THE CL IENT WAS NOT A V AILABLE -- THAT THE VICTIM WAS NOT AVAILABLE , WE CAN CITE CASES DIRECTLY ON POINT FROM OTHER JURISDICTIONS AND ASK YOU TO FOLLOW THAT RULE AND FIND IT

HARMLESS.

JUSTICE: 804.1.B IN RESPONSE TO YOUR ANSWER TO JUSTICE CAN TERO 'S Q UESTION , DECLARES THAT A WITNESS IS UNAVAILABLE IF THEY PERSIST IN REFUSING TO TESTIFY CONCERNING THE SUBJECT M ATTER OF THE DECLARANT STATEMENT, DE SPITE AN OR DER OF THE COURT TO DO SO. SO UNDER YOUR SCENARIO, IF YOU PU T THE WITNESS ON AND THE WITNESS REFUSES T O TESTIFY , DESPITE A COURT ORDER , THEN THAT WOULD MAKE THE WITNESS UNAVAILABLE. UNDER CRAWFORD , CORRECT?

CORRECT. IF YOU LOOK AT THE SIT UATION , OWNS WHEN WE CITED IN OUR B RIEF SAYS A RECENT CASE A VICTIM WAS HIT ON THE HEAD WITH BARBELLS AND REMEMBERED NOTHING AND YET ST ILL WASTHERE FOR TESTIMONY. CHIEF WE WILL HEAR MO RE OF THIS IN THE OTHER CASES .

WITH REGARD TO THE , JUST RESPONDING TO THE FORFEITURE ARGUMENT, I JUST RELY O N PEOPLE V NE LSON CITED IN MY BRIEF , WHERE THE ILLINOIS COURT EXAMINED A CONSIDERABLE BODY OF CASE LAW ON THIS ISSUE ANDDECIDEDED THIS THAT MOTIVE AND INTENT IN FACT ARE NECESSARY.

JUSTICE: L ET ME REAFFIRM WITH YOU THAT WE REALLY KNOW NOTHING ABOUT THE CIRCUMSTANCES OF THEDEPOSITION IN THIS C ASE. IS THAT CO RRECT?

EXCEPT THAT IT WAS NOT VERY THOROUGH. THE CHILD DID NOT WANT TO DO IT.

JUSTICE: WE TALK ABOUTTHE VARI ETY OF CIRCUMSTANCES THAT COME UP ESPECIALLY PRE-CRAWFORD, INCLUDING THE POTENTIAL FOR THE PROSECUTOR ACTUALLY TO REQUEST OF THE DEFENSE LAWYER NOT T O HAVE THE DEFENDANT PRESENT D URING A CHILD'S DEPOSITION OR THE CONDUCT OF DEFENSE COUNSNECESSARILY MANY INSTANCES, BECAUSE THEY ARE TRYING TO NEGOTIATE A P LEA , TO LIMIT , REALLY , THEIR EXAMINATION, DO WE KNOW WHETHER IN THIS I N STANCE , ANY OF THOSE THING S OCCURRED?

NO , WE DO NOT. NO , WE DO NOT. IT SEEMS AS IF THE DEFENSE COUNSEL DELIBERATELY DID NOT GO FORWARD, BECAUSE THE CHILD DID NOT GO FORW ARD. I WOULD LI KE TO TAKE MY REMAINING 30 SE CONDS AND JUST ADDRESS A COUPLE OF POLICY ISSUES.

CHIEF JUSTICE: YOU ARE ACTUALLY OV ER THE TIME BUT YOU MAY TAKE 30 SECONDS MORE.

POL ICY ISSUES. I WOULD WISH THE COURT IN TERMS OF DISCOVERY DEPOSITIONS, TO THINK ABOUTTHE CHIL LING EFFECT IT WOULD HAVE TO ADMIT TESTIMONY FROM DISCOVERY DEPOSITIONS THAT W OULD HAM PER DISC OVERY FROM DEFENSE COU NSEL . DEFENSE COUNSEL WOULD BEHESTTANT TO ASK INFORMATION-SEEKING QUESTIONS FOR FEAR OF WHATINFORMATION WOULD COME OUT. IT IS THE STATE'S OBLIGATION TO PROVE THEIR CASE NOT THEDEFENSE COUNSEL.

JUSTICE: I DON'T UNDERSTAND, WHERE IF IT IS A MOTION, THE DEPOSITION TO PERPETUATE TESTIMONY , A REYOU SAYING THAT IN THAT CASE THERE WAS AN ADEQUATE OPPORTUNITY TO CROSS-EXAMINEBUT NOT IF IT IS A DISCOVERYDEPOSITION?

I THINK THAT IS A ISSUE THAT REMAINS TO BE DECIDED. I THINK THAT --

JUSTICE: WHAT IS YOUR POSITION, THAT ANYDEPOSITION IS INADEQUATE?

NO. NO. I THINK, A GAIN , YOU WOULD , DEPOSITIONS TO PERPETUATE TESTIMONY IN LI GHT OF CRAWFORD, I THINK , MAY BE ADMISSIBLE UNDER OUR NEWRULES , BUT I THINK THAT YOU WOULD STILL HAVE TO LOOK AT WHETHER THERE WAS MEANINGFUL AND EFFE CTIVE CROSS-

EXAMINATION, AND I --

JUSTICE: HOW ARE WE GOING TO LOOK AT THAT? NOW WE HAVE TO SEE WHETHER THE DEFENDANT , WHAT IF THERE IS A DEPOSITION AND THE DEFENDANT'S COUNSEL DOES N'T WANT TO CROSS-EXAMINE, FOR WHATEVER REA SON? ARE WE NOW GOING T O , THE ADMISSIBILITY OF THE TESTIMONY AT TRIAL NOW GOING TO DEPEND ON THE DEFENDANT HAVING VETO PO WER? BECAUSE IF HE DOESN'T CHOOSE TO CROSS-EXAMINE AT THEDEPOSITION, T HEN IT CAN'T BE USED AT THE TRIAL.

ANTICIPATING THE RULES OF DISCOVERY ARE GOIN G TO BE REWRITTEN IN LIGH T OF THIS CASE , I AM THINKING OF STATE VLASLELIER, WHERE THIS COURT -- THE STATE V LASLELIER, WHERE THIS COURT HELD THAT IT WAS FOR THE CONSIDERED TOBE A WAIVER.

CHIEF JUSTICE: NOW THAT SOME OF THE OTHER LAWY ERS KNOW OUR QUESTIONS ABOUT HOW THIS WOULD WO RK POST CRAWFORD BUT YOU ARE 3 MINUTES OVER YOUR TIME. THANK YOU. WE WILL CA LL THE NEXT CASE, AND I SUGGEST THAT ALL OF THE LAWYERS IN BOTH LO PEZ AND CONTRERAS , COM E AND SIT IN FRONT OF THE BENCH, SO WE CAN GO FROM ONE TO THE OTHER.

GOOD MOR NING. MY NAME IS LISA WIL COX , ANDI WILL REPRESENT THE STATEOF FLORIDA IN THIS CASE. OUR CONFLICT CASE IS CONSISTENT WITH THE STATE'S POSITION IN BLANTON, SO I WOULD LI KE TO ADDRESS , SPENDMY TIME SO FOCUSING ON THE FUNDAMENTAL QUESTION IN THIS CASE , WHICH I BE LIEVE THIS COU RT SHOULD DECIDE THE CASE ON AND IT HAS TO DO WITH WHETHER OR NOT WE HAVE A TESTIMONIAL STATEMENT P IF WE DON'T HAVE A TESTIMONIAL STATEMENT, THEN WE ARE OUTSIDE THE SCOPE OF CRAWFORD AND THIS COURT NEED NOT ADDRESS WHETHER CONSTITUTIONAL --

JUSTICE: IS IT YOUR POSITION THAT EXCITED UTTERANCE NEVER BE TESTIMONIAL?

THAT IS OUR POSITION BECAUSE BY DEFINITION , EXCITED UTTERANCE DOES NOT ALLOW FOR THE TIME FOR REFLECTION OR CONFRONTATION .

JUSTICE: LET ME ASK YOU A CORE LA RRY , THAN I S CAN A REPORT TO A POLICE OFFICER THAT IS NOT THERE WHEN THE E VENT OC CURS , BE OTHER THAN A TESTIMONY THING? IN OTHER WORDS, THE STATEMENT.

ABSOLU TELY , YOUR HONOR. IN OUR POSITION , IN OUR POSITION IS THAT A STATEMENT MADE IN THE Q WEST OF AN OFFICER ASSESSING THESITUATION , AN EMERGENCY , TRYING TO SEC URE THE S ITUATION, A NONTESTIMONIAL THAT IS NOT A STATEMENT OBTAINED FOR PURPOSES OF PROSECUTION.

JUSTICE: WHAT IF , OBVIOUSLY THERE ARE SOME EVENTS THAT PE OPLE WOULD BE EMOTIONAL ABOUT , WEEKS AFTER THE EVENT OR CERTAINLY DAYS AFTER THE EVENT.

IT I S CONCEIVABLE. THAT'S CORREC T.

JUSTICE: DOES THAT MAKE ANY DIFFERENCE ?

YOU HAVE TO LOOK AT THE CONTEXT OF WHEN THESTATEMENT IS MADE. IF THE PURPOSE OF THE STATEMENT , B ASED ON THE OBJECTIVE FA CTS TO OBTAIN HELP , FOR EXAMPLE , A 911 CALL OR A CALL O F A PERSON RUNING TO AN OFFICE SAYING HE HAS GO T A G UN, THAT IS NOT NECESSARILY A TESTIMONIAL STATEMENT. THAT IS A STATEMENT TRYING TO SEEK HELP FROM THE OFFICER , PROTECTION .

CHIEF JUSTICE: ARE YOUSEEKING A PER S E RULE ON EXC ITED UT TERANCE S? THAT IS THAT ANY STATEMENT FOUND TO BE AN EXCITED UTTERANCE BY THE TRIAL JU DGE , IS PER SE NOT

TESTIMONIAL UNDER THE THIRD PRONG OF CRAWFORD?

THAT IS THE STATE'SPOSITION.

CHIEF JUSTICE: AS OPPO SED TO LOOKING AT WHETHER THE , AS JUDGE PADOVANO DID , WHETHER A REASONABLE DECLARERANT WOULD HAVE HAD -- DECLARANT HAVE HAD THE CAPACITY TO UNDERSTAND THE POTENTIAL RAMIFICATIONS OF THE STATEMENT?

THAT IS THE STATE'S POSITION, YOUR HONOR .

JUSTICE: DOESN'T THE VERY HOLDING OF CRAWFORD SAY W E NO L O NGER CAN RELY ON THE DEFINITION OF EXCITED UTTERANCE FOR PURP OSES OF DETERMINING WHETHER THIS THAT IS A EXCEPTION TO THE HEARSAY RULE AND ALL OF THE REAL AB ILITY FACTORS THAT MIGHT GO INTO THAT , THAT NOW IN ADDITION TO THAT HURDLE,THAT THE STATE HAS TO JU MP THE HURDLE OF THE CONFRONTATION CLAUSE AS WE ARE NOW INTERPRETING IT IN CRAWFORD, WHICH ESSENT IALLY IS THIS TESTIMONIAL DISCUSSION, SO WE COULDN'T HAVE A PER SE RULE A FTERCRAWFORD, COULD WE, BECAUSETHE FACTORS TO BE CONSIDERED DID NOT INCLUDE THE CONFRONTATION CLAUSE TESTIMONIAL ANALYSIS, SO HOW COULD WE DO THAT?

YOUR HONOR , I WOULD RESPECTFULLY DISAGREE THATWE CAN HAVE STATEMENTS THAT ARE OU TSIDE OF CRAWFORD. AN EXCITED UTTERANCE , IN THAT CRAWFORD SPECIFICALLY L EFT OPEN THE ADMI SSION OF DYING DECLARATION, WHICH IS A FIR MLY -ROOTED E XCE PTION T O HEARSAY , AND W E WOULD ARGUETHAT THAT IS THE SA ME, THEY ALSO LEFT THAT WITH RE SPECT TO THE EXCITED UTTERANCE.

CHIEF JUSTICE: I GUESS MY PROBLEM IS THAT, IF THESUPREME COURT WANTED TO MAKE IT THAT SI MPLE FOR ALL OF US , WHICH IS TO SAY IF IT IS A FIRMLY R OOTED EXCEPTION , THEN IT IS NONTESTIMONIAL, WE WOULDN'T BE ON HE RE, ANDI GUESS IS THIS ONE OF THE ISSUES THAT THE U.S. SUPREME COURT WILL BE G IVING US SOME DIED ANSWER ON, THAT IS WHETHER SOME THING -- SOME GUIDANCE ON, THAT IS WHETHER SOMETHING BEING AN EXCITED UTTERANCE , TAKES IT OUT OF BEING TESTIMONIAL, SO THAT WE DON'T HAVE , W E CAN DISCUSS THIS HERE BUT W E WILL HAVE AN ANSWER IN A COUPLE OF MONT HS MAYBE?

YES, YOUR HONOR. IT IS OUR POSITION THAT THE SUPREME COURT WILL SPEAK TO THIS MA TTER. HOWEVER , THE SUPREME COURT CASES ON THIS , WHILE THEFACTS ARE VERY SIMILAR TO MY CASE THEY ARE NOT IDENTICAL, SO WE WANT TO MAKE IT CLEARTO THE COURT THAT , WHILE THESUPREME COURT CASES WILL HAVE AN IMPACT ON OUR CASE , IT MAY NOT NECESSARILY BE CONTROLLING .

CHIEF JUSTICE: WHAT IUNDERSTAND YOU SAYING IS THE REASON YOU SAY THERE SHOULD AND PER SE RULE WITH EXCITED UTTERANCE , IS THAT YOU SAY THE VERY DEFI NITION OF EXCITED UTTERANCE WOULD MEAN THAT THEY WOULDN'T HAVE THE CAPACITY TO UNDERSTAND THE RAMIFICATIONS OF THE STATEMENT.WOU LD THAT BE YOUR --

YES , YOUR HONOR.

CHIEF JUSTICE: AND JUDGE PADOVANO SAID, NO , THOSE ARE T WO SEPA RATE INQUIRIES ANDHAVING JUST SAID SOMETHING BEING THE VICTIM OF A CR IME, DOESN'T MEAN THAT YOU COULDN'T APPRECIATE THEPERSON YOU ARE TA LKING TO, RELATING WHAT HAD HAPPENED , IS THE POLICE OFFICER TRYING TO DECIDE WHO TO ARE A ES FOR THIS CRIME, AND I THINK THAT IS WHERE YOUR PER S E RULE FALLS DO WN, BECAUSE I DON'TKNOW THAT THE INQUIRY REALLY IS THE SAME.

WE BELIE VE THAT THE JUDGE PADOVANO ANALYSIS OF THE TESTIMONIAL NATURE OF THESTATEMENT IS INCORRECT, BASED ON THE FACT THAT THE DEFINITION OF AN EXCITED

UTTERANCE, BUT W E ALSO ARGUE THAT JUDGE PA DOVANO 'S DEFINITION O F TESTIMONIAL IS INCORRECT BECAUSE IT IS TOO BROAD.IN FACT , AS INDICATED IN THE CASES THAT ARE SUBMITTED TO THE SUPREME COURT FOR ANALYSIS AND THE TRANSCRIPT THAT I HAVE SUB MITTED TO THIS COURT, THERE IS A EXCEPTION TO TESTIMONIAL STATEMENTS, WHERE THE STATEMENTS ARE MADE IN AN EMERGENCY SITUATION. BASICALLY --

JUSTICE: LE T'S STOP RIGHT THERE. SOMEONE , ANY VICTIM IS , SAY, BEING BE ATEN OR SOMETHINGAND THE POLICE GET THERE, AND THE VICTIM SAYS , LOOK, HE JUST HIT ME. I WANT YOU TO TAKE HIM TO JAIL. CHARGE HIM WITH BATTERY. WHATEVER. AND YOU ARE TE LLING ME THAT J UST BECAUSE THE PERSON IS EXCITED AND IS CONSTITUTIONAL UNDER THE INFLUENCE OF THE BA TTERY , THAT THAT PERSON DOES NOT UNDERSTAND THAT SHE IS ACCUSING SOME ONE AND WANTS THAT PERSON PROSECUTED?

IF IT IS A TRUE EXCITED UTTERANCE.IF IT IS A STATEMENT --

JUSTICE: IT IS THE SAME SORT OF SITUATION AS THIS. WE ARE TA LKING ABOUT THE POLICE HAS COME T O THE S CENE , AND THE PERSON, IT JUST HAPPENED A FEW MINUTES AGO. SAYING I WANT THIS PERSON ARRESTED. THEY DID THIS TO ME .

THERE IS GOING TO HAVE TO BE SOME ANAL YSIS WITHIN THATFEW MINUTES, WHETHER THERE IS TIME FOR CONTEMPLATION , AND WHETHER OR NOT THERE IS TIME FOR FABRICATION OF THESTATEMENT.IF THE COURT CONSIDERED THAT THOSE FEW MINUTES THAT , THERE WAS NO TIME FOR CONTEMPLATION OR FABRICATION --

JUSTICE: DON'T YOU SEE US GETTING INTO A PROBLEM OF WHAT IS ENOU GH? WHAT IS A FEW MINU TES? O NE OF THESE CASES INVOLVES A SITUATION WHERE IT WAS 6-TO-8 MINUTES. IS THAT THAT NOT SUFFICIENT? IS -- IS THAT NOTSUFFICIENT? IS TEN MI NUTES SUFFICIENT?

ADMI TTEDLY THE AREA OF EXCITED UTTERANCE , LAWSUITTO THE CASES WE A P PLY AS EXCITED UTTERANCE MAY HAVE TO BE NARROWLY CONSTRUED IN THE NUT YOUR , BUT IN THIS PARTICULAR CASE WE DO HAVE A TRULY EXCITED UTTERANCE , BUT BEFORE WE MOVE ON I WOULDLIKE TO ALSO GIVE THE COURTAN ALTERNATIVE VI EW OF THAT PARTICULAR SITUATION. AS NOTED IN THE CASES THAT ARE BEFORE THE SUPREME COURT , IF THERE IS A CIRCUMSTANCE OF A CRY FOR HELP , JUST BECAUSE IT IS A ACCUSATION DOESN'T NECESSARILY MAKE IT A TESTIMONIAL STATEMENT. IF THE WITNESS IS MOTIVATED B Y OR MAKES A STATEMENT TO M AKE AN AC CUSATION , ARREST H IM, THAT NECESSARILY IS NOT A SITUATION WHERE SHE I S SEEKING HELP FROM PROTECTION OR SAFETY.THAT MAY AND SITUATION WHERE SHE IS SEEKING --

JUSTICE: IT WASN'T A N EXCITED UTTERANCE. SO IF YOU ARE TALKING ABOUT A PER SE RULE .

ID EALLY WE BELIEVE EXCITED UTTERANCE CA RVES OUT TESTIMONY THAT IS NOT TESTIMONIAL , BUT ALTERNATIVELY, BA SED ON THE ANALYSIS OF THE SUPREME COURT , THE COURT CAN CARVE O UT AN EXCEPTION FOR STATEMENTS THAT ARE PERCEIVED AS A CRY FOR HELP OR AS STATEMENTS THAT WERE DERIVED FROM AN OFFICERTRYING TO ASSESS THE SITUATION OR CARETAKING OR COMMUNITY SA FETY , AND THAT IS SITUATION , THE DECLARANT IS NOT SE EKING TO MAKE AN ACCUSATION.

CHIEF JUSTICE: YOU ARE IN YOUR REBU TTAL BUT JUSTICE CANTERO HAS QUESTION BEFORE Y OU SIT DOWN. JUST JUST IT SEEMS TO ME THAT IF WE ARE --

JUSTICE: IT SEEMS TO ME THAT IF WE ARE GOING TO A PPLY A PER SE RULE FOR EXCITED UTTERANCE THAT WE NEED TO , IN ORDER T O COMPLY WITH CONSTITUTIONAL MANDATES , NARROW THE EXCITED UTTERANCE EXCEPTION.I SEE A LO T OF CASES WHERE , WHETHER THE STATEMENT WAS AN EXCITED UTTERANCE IS REALLY QUESTIONABLE, AND THE TRIALCOURT

WAS AFFIRMED BECAUSE IT WASN'T AB USE OF DISCRETION TO ALLOW THE TESTIMONY , BUT IF WE KBRING TO FULFILL A CON -- IF WE ARE GOING TO FULFILL A CONFRONTATION CLAUSE MANDATE, IT SEEMS THAT WE HAVE TO INTERP THE EXCITED UTTERANCE EXCEPTION PR ETTY NARROWLY , AT LEAST WHERE THE THE IMPLICATION CLAUSE IS -- AT L EAST WHERE THE CLA USE IS IMPLICATED .

THAT MAY BE SO.

JUSTICE: THIS CASE , WHEREI THINK IT WAS 6-TO-8 M INUTES BEFORE THE OFFICER ARR IVED, I SN'T THAT SUFFICIENT TIME FOR REFLECTION, SO THAT SOMEBODY IS NO LO NGER JUST WITNESSING AN EVENT AN NEX CLAIMING AS THE PERSON IS WITNESSING AN E VENT , SOMETHING WHOSE RELIABILITY IS DETERMINED AND MORE PARTICULARLY THAT IT CAN'T BE TESTIMONIAL , BECAUSE YOUR INTENT IS NOT TO PRE SERVE A STATEMENT FOR TRIAL. ISN'T THAT FOR PURPOSES OF THE CONFRONTATION CLAUSE , 6-TO-8 MINUTES ALREADY PRETTY FAR AFIELD?

NO, SIR. I WOULD D I RECT THE COURT TO THE SPECIFIC FACTS. THIS IS AN O N GOING SITUATION. THE OFFICERS, WHEN THEY ARRIVED ON THE SCENE , THEYDID NOT KNOW WHO WAS WHO. THEY DIDN'T KNOW THE PERPETRATOR OR THE VICTIM IN THIS CASE AND THEY SEPARATED THEM BUT THE GUN WAS ST ILL UNSECURED , AND THE CLOSE PROXIMITY OF THE PAR TIES , THE EXCITED EVENT , KIDNAPING WAS STILL GOING ON AND THE DANGER WAS STILL PRES ENT, UNTIL THE OFFICER HADSECURED THAT DEFENDANT AN ARRESTTED HI M AND RE MOVED THE D ANGER AND SECURED THAT GUN , SO IT IS OUR POSI TIONTHAT THAT STATEMENT , WHEN TAKEN IN CONTEXT , WAS MADE DURING THE STARTLING EVENT , BECAUSE THE STARTLING EVENTDID NOT END UNTIL THAT GUN WAS SE CURED AND THAT VICTIM WAS SAFE .

CHIEF JUSTICE: MS. WILCOX , WE HAVE USED UP YOUR EN TIRE ARGUMENT , SO I THINK YOUHAVE MADE YOUR POINT VERY FORCEFULLY, AND WE WILL TAKE THAT UNDER CONSIDERATION AND H EAR FROM MR . SP IVEY. THA NK YOU VERY MUCH.