

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

Earl Wyche v. State of Florida
Docket Number: SC05-1509

THE COURT WILL CALL THE NEXT CASE OF W YCH VERSUS STATE OFFLORIDA. WAIT A MINUTE WHILE , I DON'T BELIEVE YOU TO FEEL BA DLY THE COURTROOM IS CLEARING JUST AS YOU CAME UP. THIS IS ACT UALLY QUITE AN INTERESTING CASE, AND I THINK THE STUDENTS WOULD HAVE ENJO YED HEARING IT.

THIS IS MY F IRST TIME HERE. I AM GET TING FAMILIAR .

CHIEF JUSTICE: 20 MINUTES AND YOUR LIGHT WILL GO AT 15 IN REBUTTAL.

MAY IT PLEA SE THE COURT . COUNSEL. MY NAME IS KAY WITT AND I AM HERE ON BEHA LF OF THE PETITIONER MR . EARL WYC HE. THE ISSUE IN THIS CASE IS VERY STRAIGHTFORWARD. IT INVOLVES A CONFLICT BETWEEN THE DECISION OF THE FIRST DISTRICT COURT AND MR . WYCHE'S CASE , AND THE DECISION OF THE FO URTH DISTRICT IN STATE V McCORD .

CHIEF JUSTICE: TRY TO SPEAK UP A LIT TLE BIT INT O THE MIKE.

ON THE ISSUE OF WHETHER POLICE OFFICERS ARE ALLO WED TO USE DECE PTION AND TRICKLYREY TO OB TAIN A WAIVER OF FOURTH AMENDMENT RIGHTS. McCORD DISTINGUISHED THE U SE OF TRICKERY BY PO LICE AS INTERROGATION TOOL, AFTER A SUSPECT HAS WAIVED HIS RIGHTS FROM THE USE O F TRICKERY AND DECEPTION , TO OBTAIN A WAIVER OF RIGHTS AS IN THIS CASE , CON SENT T O SEARCH. THE COURT, ALSO , DISTINGUISHED THIS UNDER TOTALITY OF THE CIRCUMSTANCES ANAL YSIS . IN THIS C ASE , THAT WOULD BE THAT THE USE OF DEC EPTION WAS PERPETRATED UPON A SUSPEBT WHO WAS IN CUSTODY FOR THE EXPRESS PU RPOSE OF OBTAINING HIS WAIVER , CONSENT .

CHIEF JUSTICE: WHO GOT THEIR FIRST ? JUS TICE ANSTEAD.

JUSTICE: H O W WOULD YOU PHRASE THE LE GAL ISSUE THAT IS BEFORE US? IN OTHER WO RDS, HOW , GIVE US YOUR PHRASEOLOGY. WE ARE TRYING TO DEAL WITH MATTERS OF LAW AT THIS LEVEL.

YES .

JUSTICE: AND SO IS THE QUESTION, HOW MUCH DECE PTION CAN BE TOLERA TED?

THAT WAS THE - -

JUSTICE: OR DOES ANY DECEPTION POISON A SUBSEQUENT CONSENT, OR HOW WOULD YOU PHRASE THE LEGAL ISSUE THAT WE HAVE TO ADDRESS IN THIS CASE?

THE , YES , YOUR HONOR, THE LEGAL ISSUE WOULD B E THAT POLICE ARE ALLOWED TO USE TRICKERY IN CERTAIN CIRCUMSTANCES , AND T HAT WOULD BE GE NERALLY AFTER A WAIVER OF RIGHTS , WHEN THE , IN AN INTERROGATION , WHEN THEY ARE , THEY HAVE WAIVED THE RIGHTS. THAT IS THE ISSUE , AND THE ISSUE, HERE, THEN, IS ARE THEY ALLOWED TO USE SUCH TRICKERY TO OBTAIN A WAIVER OF RIGHTS. DOES THAT ANSWER THE FIRST QUESTION?

JUSTICE: THE A REAL ISSUE, THOUGH, WHEN YOU L OOK AT T HECASES THAT HAVE ALLOWED IT

AND THEN YOUR POSITION HERE.

YES .

JUSTICE: ARE YOU, REALLY, ARGUING THAT THE POLICE CANNOT IN THIS DECEPTION, ACTUALLY TELL A LIE, AS OPPOSED TO NOT TELL THE FULL TRUTH?

THAT IS ONE ASPECT OF IT. IN THIS CASE , WHAT WE HAVE IS A TOTAL FABRICATION .

JUSTICE: A WHAT?

A TOTAL FABRICATION MADE UP OFFENSE , FOR THE PURPOSE OF DELEWDING THE DEFENDANT TO OR THE SUBJECT , I AM SORRY , HE WASN'T A DEFENDANT , TO HIS TRUE POSITION FOR THE PURPOSE OF OBTAINING HIS CONSENT. THE LAW OFFICER TESTIFIED UNDER OATH IN THIS CASE THAT HE DID THAT.

WE LOOK AT THE CASE LAW THAT ALL OF YOU HAVE CITED, IT LOOKS LIKE WE HAVE A CONTINUUM, ALMOST, AND THAT IS THAT THERE HAS BEEN IN THE CASE LAW , AT LEAST ON APPEAL, THAT THERE HAS BEEN A LOT OF DECEPTION THAT HAS BEEN TOLERATED .

YES .

JUSTICE: OR HE LD NOT TO HAVE AFFECTED THE VOLUNTARINESS OF A CONSENT , FOR INSTANCE.

RIGHT.

JUSTICE: OR THE STATEMENT OR WHATEVER MAY HAVE RESULTED , BUT THEN THERE ARE SOME CASES THAT SEEM TO DRAW A LINE AND SAY , WELL , WHEN THE CONSENT IS OF THIS NATURE OR GETS TO THIS POINT , THAT, THEN, IT DOES INVALIDATE THE CONSENT THAT IS GIVEN , SUBSEQUENTLY BASED ON THE DECEPTION, SO WHAT , THAT IS WHY I AM ASKING FOR SOME FRAMEWORK HERE.

YES .

JUSTICE: ARE WE , IS THIS CASE JUST GOING TO BE ANOTHER DO THE ON THE LINE OF --

DO T ON THE LINE OF --

DOT ON THE LINE OF CONTINUUM, WHERE WE ARE DECISION TWO CASES SPECIFICALLY ON THE CONFLICT, OR IS THERE A LARGER LEGAL ISSUE OUT THERE THAT WE NEED TO RESOLVE?

IT IS OUR POSITION THAT THE LARGER LEGAL ISSUE IS THE FACT THAT THIS IS DECEPTION IN THE FORM OF A TOTAL FABRICATION IN DICATION TO -- FABRICATION TO OBTAIN A WAIVER OF CONSTITUTIONAL RIGHTS.

JUSTICE: YOU KNOW WHAT INTERESTS ME ABOUT THIS CASE IS THE CASES THAT WE HAVE HAD , ESCOBAR , AND THAT LINE OF CASES, WHICH HAVE DEALT WITH DECEPTION , AND HAVE BEEN CONFESSION CASES.

YES.

JUSTICE: OR , THIS IS A DNA CASE.

YES .

JUSTICE: NOW , DNA IS SOMETHING THAT YOU HAVE GOT. IT IS GOING TO BE THERE.

RIGHT.

JUSTICE: AND SO I JUST WONDER IF , LIKE ONE O F THESE BRIEFS ALLUDED TO , LIKE FINGERPRINTS .

RIGHT.

JUSTICE: DNA I SN'TSOMETHING THAT EVERYB ODY GIVES UP BECAUSE IT IS JUST THERE!IT IS NOT SOMETHING THAT YOU ARE FORCED OUT OF PE OPLE. LIKE A CONFESSION .

WELL, EXCUSE ME , YOURHONOR , IN THIS CASE IT WAS FORCED , IT WAS BECAUSE MR . WYCHE WAS IN CUST ODY ON A TOTALLY UNRE LATED MA TTER , AND HE HAD NO LEGAL OBLIGATION TO GIVE HIS DNA. THERE WAS NO LAW THAT REQUIRED HIM TO. AND EVERYONE ASSOCIATED WITH THIS CASE KN EW THAT THEY NEEDED HIS --

JUSTICE: DID HE HAVE TO GIVE HIS FINGERPRINTS?

NO. HE WAS IN CUSTODY. THE FA CTS ARE CONF USING T O THAT EXTENT.

JUSTICE: WHEN HE WAS TAKEN INTO CUST ODY, WAS HE FINGERPRINTED?

HE WAS IN CUSTODY ON A VIOLATION OF PROBATION AND HE WAS ALREADY IN THE J AIL.

JUSTICE: HE HAD ALR EADY BEEN FINGERPRINTED.

I AM SURE , WHEN HE WAS APPROACHED BY THIS OFFICER FOR THE PURPOSE OF , I CAN SKIP TO THE FAC TS. THE FACTS, REALLY, ARE - -

CHIEF JUSTICE: WHAT JUSTICE WELLS IS GETTIN G AT IS, UN LIKE A CONFES SION --

RIGHT.

CHIEF JUSTICE: -- WHERE YOU HAVE ISSUES OF THE RELIABILITY OF WHE THERSOMEONE IS BEING C O ERCED , WHY ISN'T THIS M OR E LIKE YOU ARE GETTING AR RESTED FOR SOMETHING AND YOU GIVE YOUR FINGERPRINTS OR YOU HAVE TO DO THIS , THAT IT I S DNA. IT IS NOT SOMETHING THAT CA N BE CHANGED , SO THAT AS A PRODUCT OF THE UNLAWFUL COERCION, THAT SOME HOW THE DNA IS T AINTED . I DON'T KNOW IF THAT --

JUSTICE: THAT'S CORRECT. YOU HAVE TO HAVE YOUR PICTURE TA KEN.

I THINK THE ANSWER WOULD BE AND McCORD WOULD A GREETHAT, IT IS BECAUSE THE FOURTH AM ENDMENT APPLIES. IN OTHER WORDS, THEY HAD NO LAWFUL WA Y TO GET HIS DNA. IT IT IS SO FACT-SPECIFIC, THIS CASE. HE WAS IN CUSTODY ON A TOTALLY UNRELATED MATTER. HE WAS APPROACHED BY A N OFFICER WHO WAS INVESTIGATING A SE XUAL BATTERY , AND THIS OFFICER WANTED MR . W YCHE'S DNA. MR. WYCHE WAS NOT CH ARGED WITH THAT SE XUAL BATT ERY. THERE WAS NO WAY THAT THEY COULD , OTHER THAN GETTING HIS CONSENT , THEY COULD GET HIS DNA. SO WHAT THE OFFICER DID WAS DECIDE TO INCREASE HIS CHANCES OF GETTING CONSENT , BY INDUCING MR . WYCHE T O GIVE HIS CONSENT.

JUSTICE: DO YOU KN OW OF ANY U.S. SUPREME COURT CASES THAT HAVE HELD THAT IT IS A VIOLATION OF THE FOURTH AMENDMENT TO RE QUIRE A PERSON TO GIVE THEIR DNA?

I AM NOT A WARE OF ANY , YOUR HONOR . THIS ISSUE ALWA YS COMES BACK TO THE TOTALITY OF THE CIRCUMSTANCES .

JUSTICE: DOESN'T TAKE REFLECT SOMEWHAT, THE PRACTICAL APPROACH THAT THE FOURTH AMENDMENT HAS BEEN GIVEN IN THIS CONTINUUM? YOU LOOK AT THE FOURTH AMENDMENT, AND YOU HAVE A VERY STERILE VIEW THAT THIS RIGHTEOUS CONCEPT DEALS WITH PRINCIPLED TERMS, SUCH AS UNREASONABLE SEARCHES AND SEIZURES, AND THAT HAS BEEN INTERPRETED. IT SEEMS TO ME, LOOKING AT THESE CASES, THAT IN POLICE INVESTIGATORY WORK AND IN COLLECTING FINGERPRINTS AND DNA, THAT IT IS NOT UNREASONABLE, AND IT SEEMS AS THOUGH MCKINDEOFSTEPS TO THE SIDE, ALTHOUGH IT MAY LEAVE A BAD TASTE IN OUR MOUTH WITH REGARD TO THE DECEPTION OR UNTRUTHFULNESS, BUT ISN'T THAT WHERE THESE CASES GO? I AM HAVING A HARD TIME FINDING LEGAL SUPPORT, OTHER THAN, TO, THAT SUPPORTS THIS, ALTHOUGH IT SOUNDS VERY NICE. I MEAN THERE, IS NO QUESTION THIS RICHESNESS OF THE PROTECTION OF THE -- THE RIGHTEOUSNESS OF THE PROTECTION OF THE FOURTH AMENDMENT, THE CASE LAW, THE U.S. SUPREME COURT DOESN'T SEEM TO GO THERE.

OUR POSITION WOULD BE THAT THE CRUX OF THE ISSUE IS THE FACT THAT A WAIVER OF FOURTH AMENDMENT RIGHTS BY CONSENT, CONSENT TO A SEARCH, IS THE SAME KIND OF WAIVER THAT, TO A FIFTH AMENDMENT RIGHT THAT A MIRANDA WAIVER IS, AND WHEN A PERSON IS DECEIVED, WHEN A PERSON IS COMPLETELY DECEIVED ABOUT THE CRIME FOR WHICH HE IS A SUSPECT, FOR THE EXPRESS PURPOSE OF OBTAINING HIS DNA TO USE IN ANOTHER OFFENSE, IN OTHER WORDS, HE IS TOTALLY NOT, HE IS TOTALLY DECEIVED, THE OFFICER WANTS HIS DNA SO THAT HE CAN USE IT IN THIS ONEROUS CASE, THIS MUCH MORE, IT IS A SEXUAL BATTERY, SO HE TELLS HIM THAT HE IS A SUSPECT IN A BURGLARY THAT NEVER OCCURRED, BECAUSE HE KNOWS MR. WYCHE KNOWS HE DIDN'T COMMIT THIS CRIME, AND WE CAN'T GET INTO MR. WYCHE'S HEAD BUT WE CAN BE 99.9 PERCENT ASSURE THAT WHAT HE WAS THINKING WAS -- PERCENTSURE THAT WHAT HE WAS THINKING WAS I HAVE NOTHING TO LOSE IF I GIVE MY CONSENT.

JUSTICE: IT SEEMS YOU AGREE THAT WE ANALOGIZE CONSENT IN SEARCH AND SEIZURE CASES TO CONSENT TO CONFESSIONS, AND WE HAVE SEVERAL CASES IN OUR COURT DATING BACK TO 1977, WHERE WE HAVE UPHELD DECEPTION IN OBTAINING CONFESSIONS, AND SPECIFICALLY IN A CASE WHERE WE SAID THAT IT IS ALL RIGHT TO TELL A PERSON THAT HIS PARTNER IN CRIME HAD ALREADY CONFESSED TO THE CRIME, AND, I CAN THINK OF FEW MORE EGREGIOUS CIRCUMSTANCES OF CONFESSION THAT IS DESIGNED TO ELICIT A CONFESSION THAN SAYING YOUR PARTNER HAS ALREADY CONFESSED TO A CRIME SO YOU HAVE GOT NOTHING TO LOSE IN CONFESSING, YOURSELF, SO IF THAT IS NOT ENOUGH TO TAINT A CONFESSION, WHY IS SAYING THAT HE IS SUSPECTED OF ANOTHER CRIME AND WE WOULD LIKE TO GET YOUR DNA, WHY IS THAT MORE EGREGIOUS THAN THE OTHER CIRCUMSTANCE?

HE DIDN'T TELL HIM THAT HE WAS A SUSPECT IN THE OTHER CRIME. HE, BUT, I LOST, I WANTED, THE DISTINCTION IS A MATERIAL DISTINCTION, BECAUSE IN ALL THOSE CONFESSION CASES, I AM GOING TO SAY EVERY ONE, THE PERSON HAS ALREADY WAIVED HIS RIGHTS, SO SURELY THE NIN IN AN INTERROGATION TOOL, THE LAW ENFORCEMENT OFFICER CAN SAY, YES, WE HAVE AN EYEWITNESS. WE HAVE YOUR FINGERPRINTS. WE HAVE YOUR DNA, BECAUSE THEY ARE ELICITING SOME INFORMATION, BUT THEY ARE, THE PERSON KNOWS THEY ARE A SUSPECT. THEY WAIVED THEIR RIGHTS.

JUSTICE: IN ALL THOSE CASES IT SEEMS DOUBTFUL THAT THE DEFENDANT WOULD HAVE CONFESSED, IF HE HAD NOT BEEN TOLD YOUR PARTNER HAS ALREADY CONFESSED SO YOU HAVE GOT NOTHING TO LOSE. WE ALREADY KNOW YOU DID IT. YOUR PARTNER SAID IT THE. YOU MIGHT AS WELL CONFESS IT AND THAT WASN'T TRUE.

IT IS TRUE, BUT HE HAD WAIVED HIS RIGHTS. HE WAIVED HIS RIGHTS!

CHIEF JUSTICE: I AM HAVING TROUBLE IN THE DISTINCTION THAT YOU ARE MAKING THAT THE TRICKERY CAN TAKE PLACE ONLY AFTER THE WAIVER OF THE RIGHTS. I MEAN, IF THE POLICE

WENT AND THEY SAID SOMEONE IS A SUSPECT, THEY SAID, YOU KNOW, YOUR CODE FENDANT HAS ALREADY SPILLED THE BEANS AND SPILLED THEM ON YOU AND THAT IS WHY YOU ARE A SUSPECT. YOU HAVE GOT A RIGHT TO REMAIN SILENT AND THEN THEY START TALKING VERSUS WHETHER, AFTER THEY WAIVE IT, THEY MAKE UP THAT STORY, I AM NOT SURE ABOUT. THAT NOW, I THINK, I AM SHOCKED THAT THIS WAS DONE, AND I GUESS WHEN YOU LOOK AT WHAT JUDGE URBAN HAD SAID THAT IN A CIVILIZED SOCIETY THERE, IS SOME LINE AFTER WHICH YOU JUST GO HOW COULD THEY BE FABRICATE AGENTIRE CRIME, TO TRY -- FABRICATING AN ENTIRE CRIME TO TRY TO TRICK THEM INTO SOMETHING SO SEXUAL CHARGES. I GUESS THERE MUST BE A FACT THAT, IF YOU SAY IT IS A SEXUAL CHARGE THAT, PEOPLE WON'T GIVE UP THEIR DNA. ON THE OTHER HAND, ON THE OTHER HAND, IT SEEMS TO ME THAT UNLIKE THE DANGER THAT COMES WITH TRICKERY AFTER, IN PROCURING A CONFESSION, TRICKERY IN GETTING DNA, REALLY, DOESN'T TAINT THE FINAL PRODUCT. THAT IS THE DNA. AND SO I AM STILL TRYING TO GET THE VALUE THAT, WHEN WE ARE, EVEN IF WE ARE ANALOGIZING IT TO CONFESSIONS, I WOULD THINK THAT IT IS TRICKERY TO GET DNA IS LESS OFFENSIVE THAN TRICKERY TO GET A CONFESSION, LESS OFFENSIVE TO THE PROCESS, BECAUSE THE DNA WON'T CHANGE, SO HELP ME WITH THAT. WE ARE, AGAIN, IN THE FOURTH AMENDMENT LAW, AND THE CONSTITUTIONAL VALUE, IT MATTERS THAT IT IS DNA VERSUS A CONFESSION.

I THINK IT MATTERS BECAUSE OF THE WAY IT COMES BACK, IT COMES BACK TO THE WAY IT WAS OBTAINED. IN OTHER WORDS, HE WAS TOLD THAT HE WAS A SUSPECT IN A CRIME THAT NEVER COMMITTED, THAT WAS NEVER COMMITTED, FOR THE PURPOSE OF OBTAINING, LET'S SAY IT THIS WAY. HAD THE OFFICER TOLD HIM THAT HE WAS A SUSPECT IN THE SEXUAL BATTERY, HE DIDN'T WANT TO DO THAT BECAUSE IT WAS NOT GOING TO BE AS LIKELY THAT MR. WYCHE WOULD HAVE, WOULD GIVE HIS CONSENT. HOWEVER, HAD HE DONE SO, THERE WOULD HAVE BEEN NO PROBLEMS. BUT WHAT WE HAVE HERE IS TWO STEPS REMOVED, BECAUSE HE WAS EXONERATED AS TO THE SEXUAL BATTERY.

CHIEF JUSTICE: SOME PEOPLE KNOW THAT, ONCE YOU GOT THE DNA, IT COULD BE USED FOR MANY PURPOSES? EVEN THOUGH, AGAIN, IT SEEMS LIKE ON ITS FACE PRETTY OUTRAGEOUS, ONCE THE LAW ENFORCEMENT HAS YOUR DNA, THEY CAN, THEY ARE NOT RESTRICTED IN WHAT CIRCUIT THEY ARE INVESTIGATING THEY CAN USE IT WITH, ARE THEY?

OUR POSITION IS THEY ARE NOT RESTRICTED, IF IT WAS OBTAINED LEGALLY IN THE FIRST PLACE, BECAUSE THAT IS WHAT HAPPENED HERE. TEN MONTHS AFTER MR. WYCHE WAS TRICKED INTO GIVING HIS DNA AND HE WAS EXONERATED IN THE CRIME THAT WAS ACTUALLY, APPEARS HE WAS A SUSPECT IN, HE WAS IMPLICATED WHEN THE TEST RESULTS CAME BACK, HE WAS IMPLICATED IN A BURGLARY THAT HE WAS CHARGED WITH IN THIS CASE AND CONVICTED OF.

THERE IS NO ATTEMPT AT BURGLARY OTHER THAN HIS DNA?

AT THIS POINT, THEY WAITED TEN MONTHS --

CHIEF JUSTICE: OTHERWISE IT WOULD BE INEVITABLE DISCOVERY, WHICH IS IF THEY HAVE A SUSPICION THAT IS HE CONNECTED, THEN THEY CAN GET A SEARCH WARRANT AND GET HIS DNA FOR THAT CASE ANYWAY.

IT WOULD CERTAINLY APPEAR THAT THEY DID NOT HAVE EVIDENCE WITHIN THE POSSESSION TO CHARGE HIM WITH THE BURGLARY. IT WAS TEN MONTHS LATER. I MEAN THAT, IS KIND OF --

JUSTICE: WAS HE AN EMPLOYEE IN THE STORE?

SORT OF. KIND OF. HE WAS THE OWNER OF THE STORE, NOW WE ARE TALKING ABOUT THE BURGLARY THAT HE WAS CONVICTED OF HERE WHERE HE WAS IMPLICATED WITH THE DNA. HE WAS DOING SOME WORK FOR THE OWNER. YOU KNOW, SOME WORK OUTSIDE, AND AS FAR AS THE EVIDENCE AT TRIAL GOES, THE DNA WAS HANDS DOWN THE MOST DAMAGING EVIDENCE.

WHAT WAS HE ON PROBATION FOR?

I DON'T KNOW, BECAUSE THAT WAS, AGAIN, NOT RELATED TO ANY OF THESE CASES. IT WAS NOT RELATED.

JUSTICE: IT DOESN'T MATTER. IF YOU ARE ON PROBATION FOR ENUMERATED OFFENSES, FOR ANY FELONY AFTER JULY 1 OF '05, IF YOU ARE ON PROBATION, YOU MANDATED TO GIVE SAMPLES OF DNA. JUST LIKE JUSTICE WELLS WAS TALKING MANDATORY FINGERPRINTS. NOW THEY ARE MANDATING DNA SAMPLES FOR ANYBODY THAT IS ON, IT IS STAGGERED IN TIME AS TO OTHER OFFENSES. THAT IS WHY.

THAT WOULD HAVE HAPPENED AT THE TIME THAT HE WAS CONVICTED, IS THAT RIGHT?

JUSTICE: WHEN YOU ARE ON PROBATION.

HE WAS PUT ON PROBATION.

JUSTICE: THAT IS ANOTHER QUESTION BUT IT IS NOT REALLY RAISED IN THE PLEADINGS. I WAS WONDERING WHAT HE WAS ON PROBATION FOR.

IT IS CLEAR EXCEPT THERE IS SOMETHING IN THE RECORD THAT INDICATES, THE SCORE SHEET INDICATES THAT HE MIGHT HAVE BEEN ON PROBATION FOR AN ATTEMPTED ROBBERY, AND I LOOKED AT THE STATUTE. I CAN'T QUOTE THE NUMBER, BUT IT IS NINE SOMETHING, AND ROBBERY WAS NOT ADDED TO THE ENUMERATED LIST, SO --

CHIEF JUSTICE: I AM GOING TO REMIND YOU YOU ARE IN YOUR REBUTTAL. WE CAN CHECK THE STATUTE, AND IF YOU WANT TO DO THAT ON REBUTTAL, BUT YOU MAY WANT TO SAVE THE REST OF YOUR TIME.

THANK YOU.

CHIEF JUSTICE: I HAVE NEVER SEEN THAT TECHNIQUE, WRITING NOTES ON THE YELLOW, OUTSIDE OF YOUR --

SHORT-TERM MEMORY. VERY SHORT, YOUR HONOR. MAY IT PLEASE THE COURT.

CHIEF JUSTICE: WE ARE GOING TO DO SOMETHING HERE BECAUSE OUR MARSHAL FOR SOME REASON IS NOT IN THE ROOM, SO WE WILL HAVE TO, STARTING AT TWO MINUTES AND WE WILL KNOW WHAT TO DO. SO IT IS GOING TO BE A LITTLE CONFUSING. I WILL HELP YOU OUT.

THANK YOU, YOUR HONOR. I AM HERE ON BEHALF OF THE STATE. I THINK I WILL START, YOUR HONORS, BY RESPONDING TO JUDGE ANSTEAD'S QUESTION ABOUT WHAT THE LARGER LEGAL ISSUES, HOW YOU SHOULD FRAME IT I WOULD ASK THIS COURT TO CONSTRUCT THIS ISSUE AS TO WHETHER THE POLICE, A POLICE MISREPRESENTATION AS A MATTER OF FACT ONLY, A FACTUAL MATTER ONLY HERE IN THIS CASE, REALLY RELATING TO WHAT TYPE OF CASE IS BEING INVESTIGATED, REQUIRES CONSENT TO PROVIDING, LET ME USE THE TERM BIOLOGICAL SPECIMENS, WHICH WOULD INCLUDE BLOOD, SALIVA OR WHATEVER, INVOLUNTARY. THAT IS ALL THERE IS TO IT, AND WE ASK THE COURT, OF COURSE, TO DISAPPROVE McCORD AND AFFIRM WHAT THE FIRST DCA DID.

JUSTICE: WELL, DO YOU AGREE THAT IT SHOULD AND TOTALITY OF THE CIRCUMSTANCES?

CERTAINLY, YOUR HONOR.

JUSTICE: AND LET'S SAY YOU HAVE, IN THIS CASE, THIS GENTLEMAN WAS HABITUALLY --

YE S, YOUR HONOR .

JUSTICE: CONVICTION OF THIS OFFENSE , SO HE HAD A PRIOR RECORD. HE IS IN CUSTODY.

YES, YOUR HONOR.

JUSTICE: THE STATE COMES AND COMPLETELY FABRICATES A NONEXISTENT CRIME IN ORDER TO GET THE SAMPLE.

CORRECT.

WHY IS N'T JUSTICE URBAN CORRECT?

WELL , LET ME SAY I AM NOT SHOCKED AT ALL BY THIS. I DON'T CONSIDER IT ANYWHERE EVEN NEAR EGREGIOUS CONDUCT FOR SEVERAL REASONS. FIRST OFF , I THINK IT MOST IMPORTANT, THE TOTALITY OF THE CIRCUMSTANCES OF THIS CASE ALSO FOCUSES ON WHAT WOULD A REASONABLE PERSON PERCEIVE, IF YOU WILL , THE SUSPECT PERCEIVE.

JUSTICE: IF HE IS LOOKING AT SPENDING THE REST OF HIS LIFE IN PRISON IF CONVICTED OF A RAPE AND HE KNOWS HE DID NOT COMMIT THE RAPE. WHAT IF THE OFFICER SAID YOU ARE LOOKING AT DEATH , IT IS AN EGREGIOUS CRIME , AND IF THERE IS NO MURDER , NO BLT OF DEATH SENTENCE AND THIS TYPE OF CONSENT IS GIVEN. WOULD YOU SAY THAT IS APPROPRIATE, TOO?

UNLESS IT ROSE TO SO EXTREME IT ROSE TO PSYCHOLOGICAL COERCION AND THIS IS VERY , VERY FAR SHORT OF THAT, YOUR HONOR. THE POINT I WANTED TO MAKE IS THAT A SUSPECT BEING TOLD BY POLICE THAT THEY ARE INVESTIGATING A CRIME, AS A PRACTICAL MATTER HAVE GOT TO CONSIDER IT IS A REAL CRIME. THE FACT THAT THIS CRIME WAS, QUOTE, FICTITIOUS , I THINK IS VERY SUSPECT .

JUSTICE: WHY WOULD YOU CONSIDER IT INSIGNIFICANT ? IF THE POLICE CAME TO YOU AND SAID YOU ARE A SUSPECT IN A CRIME AND YOU BELIEVE IT IS A REAL CRIME THAT WAS COMMITTED, AND AS JUSTICE BELL SAID , IT WOULD CARRY A SUBSTANTIAL PENALTY, HOW IS THAT INSIGNIFICANT?

AS LONG AS THE POLICE DON'T SAY ANYTHING THAT DEPRIVES YOU OR LESSENS YOUR CHOICE TO SAY NO , THEN IT IS SIMPLY A FACTUAL MISREPRESENTATION OF THE CONSTITUTION - -

JUSTICE: YOU DON'T THINK THAT A REASONABLE PERSON WHO KNOWS THAT THEY DID NOT COMMIT A RAPE , WOULD NOT SAY , SURE, GO AHEAD , CHECK MY DNA?

WELL, THEN , YOUR HONOR , YOU ARE ACTUALLY, I THINK , IRONICALLY ARGUING THE STATE'S SIDE, BECAUSE HERE THE INVESTIGATOR WAS INDEED INVESTIGATING A RAPE, AND IF THE INVESTIGATOR HAD SAID THAT IS WHAT I AM DOING , HE WOULD HAVE FELT MORE PRESSURE TO CONSENT THAN HAD A FICTITIOUS BURGLARY THAT IS THE SAME AS WHAT HE IS ULTIMATELY CONVICTED FOR.

CHIEF JUSTICE: THEY DID THAT TO HELP HIM OUT, SO HE WOULDN'T --

NO, YOUR HONOR. THEY USED THAT AS A TECHNIQUE TO GET CONSENT AND THAT IS EXACTLY THE POINT , AS LONG AS THE POLICE DO NOT MISREPRESENT THE LAW AND THEREBY DETRACT FROM A SUSPECT'S RIGHT TO SAY NO , AND I --

JUSTICE: ISN'T IT A WAY TO EXCLUDE HIM FROM THE CASE , IN OTHER WORDS, TO SAY THERE IS A

RAPE. YOU ARE A SUSPECT IN IT. WOULD YOU BE WILLING TO GIVE A DNA SAMPLE.

THERE ARE REASONS TO DO THAT, YOUR HONOR, BUT ALSO WHY THEY ARE NOT LEGITIMATE, AND LET ME HASTEN TO ADD THERE IS NO WHERE OUT THERE ANYWHERE IN CONTEXT OF CONSENT TO SEARCH OR CONSENT TO ANY TYPE OF BIOLOGICAL SUSPICION OR AS A CONFESSION THAT, SAYS THE POLICE HAVE TO DISCLOSE ANYTHING IN PARTICULAR. THE POLICE COULD BE TOTALLY SILENT.

JUSTICE: I AGREE WITH THAT. IT IS THE INTENTIONAL FABRICATION IS MY CONCERN. I THINK THERE IS MUCH DIFFERENCE BETWEEN A WHITELIE OR NOT REVEALING ALL YOUR CARDS, SO TO SPEAK, THAN COMPLETELY FABRICATING AND LYING IN ORDER TO GET --

YOUR HONOR, POLICE TRICKERY, AS LONG AS IT IS CONSTITUTIONAL, IS A VERY EFFECTIVE MEASURE OF LAW ENFORCEMENT AND IN FACT YOU MIGHT GO SO FAR AS TO SAY IT IS A LAUDABLE TECHNIQUE TO ENFORCE THE LAW. I AM GIVING YOU AN EXAMPLE WITH NO FACTUAL BEARING ON THIS CASE BUT LOTS OF RECENT PUBLICITY. --

JUSTICE: SO IT IS NOT A TOTALITY OF THE CIRCUMSTANCE CASE. YOU ARE ARGUING THAT IS REASONABLE FOR POLICE OFFICERS TO BE ABLE TO LIE, FABRICATE, USE DECEIT, WHATEVER THEY WANT TO, AS LONG AS THERE IS NOTHING ELSE INVOLVED. WHAT I AM SAYING IS YOU ARE BASICALLY DOING WHAT THE FIRST DCA, THE MAJORITY HERE, SAYS ANY DECEPTION, LIE, FABRICATION IS APPROPRIATE. THEY DID NOT COERCE A WAIVER. OR MISREPRESENT AUTHORITY.

THE FOURTH AMENDMENT, IT IS A VOLUNTARINESS QUESTION. AS LONG AS THEY DON'T MISREPRESENT THE LAW TO DETRACT FROM SOMEBODY'S OPPORTUNITY TO SAY NO, IT IS OKAY.

JUSTICE: IS THAT ONLY IN CONNECTION, THEN, WITH THE FABRICATION OF I HAVE A WARRANT WHEN THEY REALLY DON'T. IS THAT THE ONLY EDGE HERE? YOU MAKE A VERY BROAD STATEMENT THAT IS A LAUDABLE AND THAT POLICE, WE SHOULD BE HAPPY THAT THEY ARE LYING AND DECEIVING THE PUBLIC.

THEY ARE LEGAL IF THEY ARE NOT RIGHT IN THE MORAL SENSE, YOUR HONOR.

JUSTICE: I THINK A LOT OF FLORIDIANS WOULD BE SURPRISED WITH THAT, TO BE VERY HONEST WITH YOU, BUT, AGAIN, THE CASE LAW AND YOU BEING EDUCATED IN THE LAW, THAT REALLY THE EDGE, THAT IF THEY FRAUDULENTLY, THEY MAKE A MISREPRESENTATION, THEY DO IT INTENTIONALLY WITH SOMEONE INTENDING THAT THEY REALLY ON IT, THE INDIVIDUAL RELIES ON IT, IS IT ONLY IN CASES OF MISREPRESENTATION OF "I HAVE A WARRANT" OR "I AM A POLICE OFFICER", THAT THIS MISREPRESENTATION WILL OPERATE TO VIOLATE OR TO EVISCERATE CONSENT OR HOW BROAD IS THIS? WHEN DO YOU STEP OVER IT?

THERE IS TWO-WAYS. I CAN GIVE YOU A COUPLE OF EXAMPLES. THE WARRANT IS THE BUMPER NORTH CAROLINA CASE, THE POLICE WANT TO SEARCH A HOUSE AND SAY THEY HAVE A WARRANT AND THEY DON'T REALLY DON'T. THAT MISREPRESENTS THE AUTHORITY TO DO THE SEARCH. IF THE POLICE FEIGN AN EMERGENCY. THEY HAVE -- FEIGNS AN EMERGENCY. IF THEY SAY WE HAVE A 911 CALL AND WE WANT TO COME IN.

JUSTICE: IS THAT HAPPENING?

I AM NOT SAYING THAT THE POLICE SAY THEY HAVE A 911 CALL, BUT AUTHORITY TO ENTER A PLACE WITHOUT CONSENT IS BEYOND AUTHORITY OF A CTUAL CIRCUMSTANCES, SO I WOULD SAY THAT FEIGNING EMERGENCY IS A MISREPRESENTATION TO ENTER.

CHIEF JUSTICE: YOU MUST AGREE THAT THE POLICE DID NOT HAVE AUTHORITY, JUST BECAUSE HE WAS IN CUSTODY, TO OBTAIN HIS DNA, BECAUSE THIS WOULDN'T AND IS SUE OTHERWISE,

BECAUSE IT IS NOT LIKE, AT THIS POINT AT LEAST IT IS NOT LIKE A PHOTOGRAPH, TAKING A MUGSHOT OR THE FINGERPRINT.

I AM GOING TO HAVE TO SAY YES AND NO, YOUR HONOR. THE RECORD HERE REALLY IS NOT REALLY --

CHIEF JUSTICE: THAT WOULD BE A NONISSUE. IN OTHER WORDS, IF THEY COULD HAVE DONE IT, THEY WOULDN'T HAVE NEEDED TO DECEIVE HIM AS TO WHY -- DECEIVE HIM AS TO WHY, TO GET A CONSENT.

HE WAS IN CUSTODY ON PROBATION. IN 1995 HE HAD A BURGLARY FOR WHICH HE RECEIVED FOUR YEARS' PROBATION AND WAS RESENTENCED IN '99 TO TWO YEARS IN PRISON, RELEASED IN JUNE OF '01, ABOUT A MONTH BEFORE --

CHIEF JUSTICE: LET'S CUT TO THE CHASE BECAUSE THE POLICE MUST HAVE THOUGHT THEY NEEDED HIS CONSENT, CORRECT?

I DON'T KNOW WHAT THE POLICE THOUGHT, BUT IF YOU DO HAVE CONSENT -- CHIEF IF THEY COULD HAVE DONE, IT THEY WOULD HAVE DONE IT.

OBVIOUSLY NOT. IT WAS RAISED BELOW.

CHIEF JUSTICE: SO THEY HAD TO USE A SEARCH WARRANT OR GET HIS CONSENT. THAT IS THE PARADIGM WE ARE DEALING WITH AND THE CONFLICT BETWEEN THE TWO CASES.

APPARENTLY THAT IS WHAT THE POLICE THOUGHT AT THE TIME, YES, YOUR HONOR.

CHIEF JUSTICE: THEY COULDN'T GET A SEARCH WARRANT AND GO BEFORE A NEUTRAL MAGISTRATE, A NEUTRAL JUDGE AND SAY WE HAVE GOT THIS MADE-UP CRIME THAT WE WANT, THEY WOULD HAVE TO TELL THE POLICE, I MEAN THE MAGISTRATE, THE JUDGE, THE TRUE POSITION. THAT IS WHAT THEY WERE INVESTIGATING, CORRECT, BEFORE THEY GET A SEARCH WARRANT?

SEARCH, YOUR HONOR, THE POLICE CAN'T --

CHIEF JUSTICE: LIE TO --

-- LIE TO THE MAGISTRATE.

CHIEF JUSTICE: I AM TRYING TO UNDERSTAND IN TERMS OF THE PROCESS, HOW WE CAN HAVE AN OUTRIGHT FABRICATION OF A NONEXISTENT CRIME, TO GET, QUOTE, SOMEONE'S VOLUNTARY CONSENT. SOMETHING ABOUT THAT, THAT JUST DOESN'T SET WELL WITH ME, AND HELP ME, AGAIN, ON HOW THAT IS CONSISTENT WITH THE, OUR TRADITION IN FOURTH AMENDMENT, OF YOU KNOW, SAYING THAT SEARCHES AND SEIZURES NEED TO BE VOLUNTARY AND REASONABLE UNDER THE CIRCUMSTANCES.

THE CONSENT TO A SEARCH IS BASED ON WHETHER THE POLICE SAY -- ON WHETHER OR NOT THE POLICE SAY ANYTHING TO YOU THAT DEPRIVES YOU OF YOUR RIGHT TO SAY NO. THEY SAID NOTHING HERE TO MR. WYCHE THAT WOULD INDICATE THAT HE COULD NOT REFUSE. THAT IS WHAT THE FOURTH AMENDMENT REQUIRES FROM A REASONABLE STANDPOINT. I WOULD POINT YOU TO SEVERAL RECENT CASES BY THIS COURT, FAIRLY RECENT THAT WOULD UPHOLD THAT POSITION, YOUR HONOR, AND THE ESCOBAR CASE FROM '97, THE POLICE FALSELY TOLD THE DEFENDANT THEY HAD PHYSICAL EVIDENCE AND THEN THEY TOLD HIM THAT HE COULD BE SENTENCED TO DEATH. -- SENTENCED TO DEATH THE COURT RULED THAT HIS CONFESSION WASN'T VOLUNTARY. AND ANOTHER CASE THEY SAID THAT THEY WERE INVESTIGATING A MISSING

PERSON AND THE MISSING PERSON WAS DEAD. I THINK THE OFFICER WAS INVESTIGATING A FICTITIOUS BURGLARY AND FROM THE SUSPECT'S PERSPECTIVE HE HAD TO ASSUME WAS TRUE, ANY WAY, BECAUSE HE DOESN'T KNOW. THAT IS DISTINCTION WITHOUT A DIFFERENCE.

JUSTICE: I TAKE IT THAT EFFECTIVE JULY 1, 2005 STATUTE, OBVIATES THIS ISSUE.

YES, YOUR HONOR, ON ITS FACE IT WOULD APPLY TO PEOPLE WHO ARE CONVICTED OF QUALIFYING OFFENSES AT ANY TIME IN THE PAST, WHICH - -

JUSTICE: WHAT I AM SAYING, I AM READING HERE, IS 943.325.

325. YES, YOUR HONOR.

JUSTICE: WHICH SAYS THAT ANY PERSON CONVICTED OR PREVIOUSLY CONVICTED IN THE STATE OF ANY OFFENSE ENUMERATED IN PARAGRAPH B, AND THEN IT HAS IN FIVE, EFFECTIVE JULY 1 AND CONTINGENT ON APPROPRIATION OF ANY FELONY OFFENSE. NOW.

YES, YOUR HONOR, I WOULD ADD TO THAT THAT AS OF JULY 1, 2000, THE LEGISLATURE ADDED BURGLARY TO THE LIST OF CRIMES AND HE DID HAVE A BURGLARY CONVICTION FROM '95, SO AS JULY 1, 2000, THIS DNA STATUTE WOULD HAVE BEEN TRIGGERED UNDER THE FACTS OF THE CASE, AT LEAST ONCE HE WAS BROUGHT BACK INTO CUSTODY ON VIOLATION OF MORE RECENT DRUG-RELATED OFFENSES.

JUSTICE: WHAT IS TO KEEP LAW ENFORCEMENT, EVERY JAIL IN THE STATE OF FLORIDA GOING TO EVERY INMATE AND SAYING YOU ARE SUSPECTED OF THIS FABRICATED CRIME. WOULD YOU SUBMIT A DNA SAMPLE AND JUST GET DNA SAMPLES FROM EVERYBODY INCARCERATED OR EVEN JUST BROUGHT IN FOR INTERROGATION.

WELL, AS FAR AS REQUESTING DNA SAMPLES FROM PEOPLE ALREADY IN CUSTODY, THIS CAUGHT STAUT, PROBATION -- -- THIS STATUTE, PROBATION -- JUST I AM TALKING ABOUT SOMEBODY PICKED UP FOR A FELONY, CHARGED, WITH LET'S SAY, NOT A FELONY BUT CHARGED WITH A DUI. WHAT IS TO KEEP THE CORRECTIONS PEOPLE IN EVERY JAIL IN EVERY COUNTY IN THE STATE FROM GOING TO A DEFENDANT AND SAYING WE SUSPECT YOU OF THIS MAJOR CRIME. WOULD YOU GIVE A DNA SAMPLE?

ASSUMING THEY DON'T MISREPRESENT, TELL THE PERSON IN ANY WAY THAT THEY CANNOT REFUSE, THEN, NO, THE POLICE CAN DO THAT. AND IT IS CONSTITUTIONAL, AND IT IS A FACT OF LAW ENFORCEMENT, AND, AGAIN, YOUR HONOR, IT IS NOT, AND, OF COURSE -- .

THEY TOLD HIM HE COULD REFUSE.

NO. THEY DID NOT. THEY DIDN'T DO ANYTHING TO TELL HIM HE COULDN'T, AND --

JUSTICE: SO IF WE ACCEPT YOUR POSITION, THEN WHAT I AM SAYING IS TRUE. THEY WOULD NOT HAVE TO TELL HIM THEY HAVE THE RIGHT TO REFUSE. THEY COULD GO TO EVERY, EVERYBODY INCARCERATED, EVERY JAIL, EVERYBODY BROUGHT IN FOR INVESTIGATION AND FABRICATE THAT THEY ARE SUSPECTS OF A MAJOR CRIME, AND ASK THEM TO SUBMIT FOR DNA SAMPLE.

I AM HESITANT TO SAY, QUOTE, QUITE THAT FAR. IF SOMEBODY IS VOLUNTARY AT THE POLICE STATION AND THEY ARE JUST THERE, AS IF YOU WILL, PERHAPS A PERIPHERAL WITNESS, AND THE COPS HAVE ABSOLUTELY NO SUSPICION AT ALL, THERE MAY HAVE COME A POINT WHERE THE CONDUCT BECOMES SO IS HE EGREGIOUS THAT ON DUE PROCESS GROUNDS, WHICH OF COURSE HAS NOT EVER BEEN RAISED IN THIS CASE, I THINK IT WAS IN THE LATE '80s THIS COURT CITED A CASE WHERE THE POLICE FABRICATED LAB REPORTS OR SOMETHING LIKE THAT AND YOU ALL SAID THE DIFFERENCE BETWEEN FABRICATING PHYSICAL EVIDENCE AND VERBAL

MISREPRESENTATION WAS SIGNIFICANT AND FOUND THAT CONDUCT SO EGREGIOUS IT VIOLATED THE FLORIDA DUE PROCESS CLAUSE THAT, APPROACH HAS NEVER BEEN RAISED IN THIS CASE, YOUR HONOR.

CHIEF JUSTICE: I ASSUME THAT, GO AHEAD.

I WAS GOING TO SAY GENERALLY, SHORT OF EXTREME CONDUCT THAT WOULD RISE TO EGREGIOUS DUE PROCESS VIOLATION, TO ANSWER YOUR QUESTION, IT WOULD BE YES, AT LEAST LET'S MAYBE LIMIT IT TO SUSPECTED FELONS OR SOMETHING LIKE THAT, BUT - -

JUSTICE: WHAT IF IN THIS CASE THEY HAD GONE TO THE DEFENDANT AND SAID YOU ARE A SUSPECT IN A CRIME, AND THERE IS SOMEBODY THAT HAS PICKED YOU OUT OF A PHOTO ID, AND WHAT I AM SAYING IS MAKE THE OTHER EVIDENCE OF THE FABRICATED CRIME, MAKE IT LIKE IT IS THEY HAVE GOT YOU AS A DEAD RINGER BUT IT IS COMPLETELY FABRICATED.

I DON'T SEE WHERE THAT IS ANY DIFFERENT THAN TELLING SOMEBODY A CODEFENDANT HAS CONFESSED WHEN THEY HAVE NOT, YOUR HONOR.

JUSTICE: SO THE DEGREE OF FABRICATION REALLY DOESN'T MATTER IN YOUR POSITION.

AT LEAST VERBAL MISREPRESENTATIONS, NO, AND CERTAINLY FROM A FOURTH AMENDMENT ANALYSIS, WHICH IS ALL WE ARE TALKING ABOUT HERE, YOUR HONOR, NO. AND I DON'T THINK MENTION AFTER FICTITIOUS CRIME HERE COMES ANYWHERE NEAR EGREGIOUS CONDUCT THAT WOULD RISE TO THE DUE PROCESS VIOLATION. THE CASE, THE FIRST DCA FOLLOWED THE MIAMI-DADE VERSUS MARTINEZ, THE THIRD DCA DECISION FROM 2000 3 RX THE POLICE REPRESENTED THE -- FROM 2000, THE POLICE REPRESENTED THE PURPOSE OF A CONSENSUAL SEARCH. IT IS ANOTHER FACTUAL MISREPRESENTATION. THEY SAID THEY WERE LOOKING FOR WEAPONS INSTEAD OF DRUGS OR VICE VERSA. YOU KNOW, AS LONG AS IT IS A VERBAL MISREPRESENTATION AND THE POLICE DON'T DO ANYTHING THAT DETRACTS FROM THE PERSON'S OPPORTUNITY TO SAY NO, THE FOURTH AMENDMENT IS SATISFIED. AND THAT IS REALLY ALL THERE IS TO IT. NOW, I THINK McCORDE RRED, WHEN ALL THEY DID WAS TOOK OUT ONE CIRCUMSTANCE, THE FACT THAT THE CRIME WAS FICTITIOUS, AND THEY SAID THAT MAKES THIS, THAT CONSENT TO, I THINK IT WAS SALIVA SAMPLES THERE, THE CONSENT WAS NOT VOLUNTARY.

CHIEF JUSTICE: WHAT I WOULD LIKE TO KNOW AND ASK YOU, I ASSUME THAT YOU DIDN'T RAISE BELOW THE DOCTRINE OF INEVITABLE DISCOVERY, THAT IS THAT THEY HAD SOME OTHER, THAT THEY COULD HAVE CONNECTED HIM ENOUGH TO THIS CRIME TO HAVE SUBSEQUENTLY RECEIVED HIS DNA SAMPLE.

I THOUGHT ABOUT IT, YOUR HONOR. THE RECORD IS A LITTLE THIN IN THAT REGARD AND TEN MONTHS DID GO BY BEFORE IT OCCURRED TO THEM TO COMPARE THE SALIVA, THE DNA ANALYSIS OF THE SALIVA SWABS, TO THE DNA ANALYSIS OF THE BLOOD DROPLETS IN THE SHOP, AND UNDER THE CIRCUMSTANCES, IT SEEMED LIKE TOO CLOSE AFTER CALL, AND THE RECORD REALLY WASN'T TOO SO LID, I DIDN'T THINK, SO RAISE IN EVIDENCEABLE DISCOVERY, AND THAT IS WHY THAT WASN'T RAISED. -- INEVITABLE DISCOVERY AND THAT IS WHY THAT WASN'T RAISED. I WOULD ALSO HAVE THIS COURTLOOK TO, I WANT TO MAKE THE DISTINCTION HERE, OPPOSING COUNSEL MADE THE DISTINCTION THAT, IN THE CONFESION CASE THEY HAD ALREADY WAIVED THEIR RIGHT. THAT, I THINK, IS AN IMMATERIAL DISTINCTION, PRESUMABLY ALL OF THESE PEOPLE HAVE BEEN GIVEN THEIR MIRANDA WARNINGS BUT FOR WHATEVER REASON THEY WEREN'T CONFESSING AND THEN THE POLICE MADE FALSE REPRESENTATIONS TO GET THOSE PEOPLE TO, WHO OTHERWISE WEREN'T WILLING TO TALK, TO CONFESS. LOOKING AT ALL OF THE OTHER CIRCUMSTANCES, THERE ARE FACTS MORE ON POINT HERE.

CHIEF JUSTICE: COULD THEY TELL SOMEONE THEY WERE A SUSPECT IN A CRIME THAT DIDN'T EX

IST AND SAY, THEN , GIVE THEIR MI RAN DA RIG HTS FOR THAT, AND BE, ALL THE TIME KNOWING THEY ARE A SUSPECT IN ANOTHER CRIME , AND THAT , A GAIN , THE SAME THING.IT WOULD BE, THAT WOULD BE PERFECTLY OKAY. THAT IS, AGAI N, WE PR ETTY WELL SUSPECT THIS PERSON OF A MUR DER .

RIGHT.

CHIEF JUSTICE: BUT WE WITH THAT WANT TO SORT OF GET TH ROUGH THE BACK DORAN MAKE UP A CRIME THAT WE KN OW HE IS NOT GOING TO BE UNCOMFORTABLE TALKING ABOUT AND HE DIDN'T COMMIT IT BECAUSE THERE IS NO SU CH CRIME AND TELL HIM YOU ARE A SUSPECT IN A WINN-DIXIE BURGLARY, AND WE, YOU HAVE THE RIGHT TO RE MAIN SILENT WITH THAT, AND THEN, BUT ALLTHE TIME , TR YING TO GET HIM TO TALK ABOUT WHERE HE MIGHT HAVE BEEN FOR THAT OTHER CRIME.IS THAT VOLUNTARY? IN OTHER WO RDS, AG AIN , WE KNOW THE OTHER CRIME WAS NOT THE SAME EXACT THIN G AS HERE BUT, AGAIN, A CONFESSION. AGAIN, THE SAME THING , PERFECTLY FINE?

SOUN DS TO ME, YOUR HONOR, IF I UNDERSTAND THE NUA NCES OF YOUR HYPOTHETICAL - -

CHIEF JUSTICE: YOU ARE GIVING THEM MILES AN HOUR AND AND WARNINGS AS IF THEY WERE A SUSPECT IN A CRIME THAT DIDN'T EXI ST.

SO THEY HAVE BEEN G I VEN THEIR MIR ANDA WARNINGS. IT SOUNDS TO ME VERY SIMILAR TO THIS COURT'S DECISION IN THE WASHINGTON CASE FROM ' 94 , WHEN THE POLICE, THE GUY WAS ALREADY IN CUSTO DY, A PR ISON PRISONER WHO COMMITTED A RAPE/MURDER DURING, I THINK , WORK RELE ASE AND THEY ULTIMATELY GOT BL OOD SAMPLES , AND THIS COU RT, THE POLICE TOLD HIM THEY WANTED TO T AL K TO HIM ABOUT WHAT THIS COURT DESCRIBED AS AN UNRE LATED SEXUAL BA TTERY , AND IF YOU READ THE OP INION CLOSELY IT IS NOT CLEAR TO ME THAT HE WAS EVEN A SUSPECT. HE MAY OR MAY NOT HAVE B EEN BUT THEY TOLD HIM THIS WOULD DISPROVE YOUR INNOCENCE OR GUILT, MORE OR LESS CLEAR YOUR NAME .

JUSTICE: WASN'T IN WAS HINGTON , HE REALLY WAS A SUSPECT?

HE WAS A SUSPECT OF THE MURDER.

JUSTICE: OF TWO OFFENSES AND THEY SI MPLY MENTIONED THE ONE CASE WHE RE HE WAS A SUSPECT.

THAT IS WHAT I AM SAYING , YOUR HONOR. THE COURT DESCRIBE S THE OTHER CASE THAT WAS MENTIONED AS AN UNR ELATED SEXUAL BATTERY. I READ THAT CASE A NUMBER O F TIMES, AND I DON'T AG REE THAT WASH INGTON WAS NECESSARILY A SUSPECT IN THAT WAY ONE . NOW, MAYBE WE CAN DISA GREE OVER THE READ ING OF T HAT CASE, BUT IF YOU READ THAT CASE VERY CAREFULLY, THE RAPE/MURDER WAS ONE C RIMEAND THEN THERE WAS AN UNRELATED SE XUAL BATT ERY.

JUSTICE: B EFORE YOU SIT DOWN , CAN I ASK YOU , W E HAVE HAD A LOT OF QU ESTIONS ABOUT THE N EW STATUTORY S CHEME REQUIRING IN MATES HAVING BEEN CONVICTED OF CERTAIN OFFENSES, TO GIVE DNA IN OTHER MATTERS. HAS THE STATE EVER CLAIMED THAT THERE WAS SOME OTHER LEGAL BA SIS TO OB TAIN THE BLOOD HERE , OTHER THAN THE CONSENT THAT WAS GIVEN ? HAS THE STATE EVER CLAI ME D? OTHER LAWFUL BASIS , SO --

NO.NO. NO. NO. NO.

JUSTICE: THE ONLY LAWFUL BASIS HAS BEEN RAISED AS TO CONSENT --

THE WHOLE IDEA, YOUR HONOR, OF THE PROBATIONSTATUTE, IF YOU WILL, WAS A FOOTNOTE IN

THE FIRST D CA'S DECISION.

JUSTICE: IT IS THE CONSENT THAT HAS ALWAYS BEEN THE STATE'S CLAIM AS THE BASIS FOR HAVING LAWFULLY OBTAINED THIS BLOOD, THAT CORRECT?

YES, YOUR HONOR.

JUSTICE: WAS THERE BLOOD TAKEN?

IT WAS SALIVA, YOUR HONOR.

JUSTICE: THAT IS WHAT I THOUGHT.

BUT, YOUR HONOR, THE, STILL, WE ARE GOING TO GO BACK TO THE POINT THAT TRICKERY BY THE POLICE WHEN IT IS NOT A MISREPRESENTATION OF THE LAW AND DETRACTS FROM SOMEONE'S RIGHT TO SAY NO TO CONSENT, WHETHER IT IS A SEARCH OR TO TALK AND CONFESS, IS CONSTITUTIONALLY ACCEPTABLE. POLICE TRICKERY CAN EVEN BE PRACTICALLY THE ONLY EFFECTIVE WAY TO ENFORCE IMPORTANT LAWS. I AM GOING TO THROW OFF THIS EXAMPLE. WHEN THE POLICE PRETEND TO BE CHILDREN ON THE INTERNET SO THEY CAN CAATCH CHILD SEX ABUSERS, THAT TO ME IS A MUCH, IS TRICKERY THAT - -

CHIEF JUSTICE: YOU ARE A REWAY OUT OF YOUR TIME. YOU HAVE TWO MINUTES OF MS. WITT'S TIME.

I APPRECIATE YOUR INDULGENCE. THANK YOU.

CHIEF JUSTICE: MR. MARSHAL, LET'S GIVE HER THREE MINUTES.

THAT IS FINE, YOUR HONOR. I JUST HAVE A COUPLE OF POINTS. THAT IS FINE AT TWO MINUTES OF HE IS GOING TO DO IT. OKAY. THAT IS ALL RIGHT. JUST TO RESPOND TO THE DISCUSSION ABOUT THE LAW THAT MIGHT OR MIGHT NOT HAVE BEEN IN PLACE, THIS HAPPENED IN 2001. AND NO RESEARCH THAT I DID TURNED UP ANYTHING THAT WOULD HAVE REQUIRED HIM TO SUBMIT DNA, AND IT IS CLEAR FROM THE CIRCUMSTANCES THAT THERE WAS NO ONE, THE OFFICER TESTIFIED UNDER OATH AND THIS WAS DISCUSSED AT THE SUPPRESSION HEARING THAT HE DID USE THIS TRICKERY, AND HE TRICKED HIM INTO CONSENTING, BECAUSE IT -- CONSENTING BECAUSE IT HADN'T BEEN OUTLAWED AT THE TIME.

JUSTICE: I AM STILL REALLY TROUBLED WITH THIS, THAT EVEN THOUGH AS DISTASTEFUL AS IT MAY SEEM, THAT THE EXTENT OF THE MISREPRESENTATION SEEMS NOT TO BE THE CRITERIA, BUT IT IS THE NATURE, THE SUBJECT MATTER. WHAT IS THE NATURE? WHAT IS THE SUBJECT OF THE MISREPRESENTATION, AS THE STATE HAS SUGGESTED THAT SEEMS TO BE THE DEFINING POINT, AND THAT IS THOSE CASES. I HAVE A SEARCH WARRANT. WHERE IT ESTABLISHES MISREPRESENTATION AS TO AUTHORITY, AS OPPOSED TO OTHER TYPES OF FACTUAL MISREPRESENTATIONS. ISN'T THE FOURTH DISTRICT CASE HERE THAT WE ARE TALKING ABOUT, THE CONFLICT, REALLY, THE ONLY ONE THAT GOES DOWN THAT PATH? AGAIN, AS DISTASTEFUL AS IT MAY BE, BUT ISN'T THAT THE ONLY ONE?

I THINK IT WOULD BE FAIR TO SAY THAT, IT COULD, IT COULD BE, AND IT GOES BACK TO THE TOTALITY OF THE CIRCUMSTANCES. I MEAN, THEY CITED THE SCHNECKLOTH, AND THOSE CASES, AND I WOULD ALMOST BE WILLING TO SAY THAT IT IS LIMITED TO THE FACTS OF McCORD AND THE FACTS IN MR. WYCHE'S CASE. JUST BUT THIS AREA OF TRICKERY OR DECEPTION OR WHATEVER, DOESN'T SEEM TO GO DOWN THE PATH OF A, WHAT THE DECEPTION IS. OTHER THAN THE BRIGHT LINE, THE AUTHORITY.

RIGHT.

JUSTICE: IT COULD BE DECEPTION AS TO A LOT OF DIFFERENT THINGS , BUT AS LONG AS IT DOESN'T GO TO AUTHORITY, IT SEEMS AS THOUGH THE CASE LAW AND PLEASE CORRECT ME IF I AM MISREADING IT , SEEMS TO FALL UNDER THE AREA THAT IT DOES NOT SAY CONSENT . -- DOES NOT HAVE CONSENT .

McCORD FALLS UNDER THE AREA OF TOTAL TRICKERY.

JUSTICE: BUT ISN'T THAT THE ONLY ONE?

AS FAR AS I KNOW .

JUSTICE: IF I CAN ASK A RELATED QUESTION, I DIDN'T SEE ANY CITED IN YOUR BRIEF BUT DO YOU KNOW OF ANY FEDERAL CASES AROUND THE COUNTRY, I KNOW THE U.S. SUPREME COURT DOESN'T HAVE IT , BUT ANY OTHER CASES WITH A LOWER HOLDING THAT TRICKERY WAS INVOLVED WAS UNCONSTITUTIONAL, VIOLATED THE FOURTH AMENDMENT?

NO, I HAVEN'T , AND WHEN I FIRST STARTED WORKING ON THIS, WORKING ON THE BRIEFS , EVEN, I , AT ONE POINT, I THOUGHT ABOUT EVEN SAYING THAT IT MIGHT HAVE BEEN, IT MIGHT BE CONSIDERED A CASE OF FIRST IMPRESSIONS .

JUSTICE: WELL, IT CERTAINLY SEEMS TO BE A CASE OF FIRST IMPRESSION IF WE RULE IN YOUR FAVOR .

RIGHT, IT MIGHT BE , AND , AGAIN , THE TOTALITY WOULD BE LIMITED , I WOULD SAY , TRUTHFULLY, THAT IT WOULD , IT WOULD ALMOST BE LIMITED TO THE FACTS IN McCORD AND THE FACTS IN MR. WYCHE'S CASE, WHICH ARE VIRTUALLY IDENTICAL.

CHIEF JUSTICE: ON THE FLIP SIDE OF THAT IN LOOKING AT CASES AND MAYBE THERE IS A REASON FOR THE DIVERSITY OF CASES, IS THAT IT SEEMS TO BE STANDARD POLICE PRACTICE THAT IS APPROVED IN THESE CASES, THAT THIS TYPE OF LEVEL OF DECEPTION THAT IS MAKING UP A CRIME , A NONEXISTENT CRIME IN ORDER TO GET A CONSENT , IS CONDONED IN CASES AROUND THE COUNTRY ?

WELL , I WOULD SAY I REALLY HAVEN'T, I HAVEN'T SEEN , I MEAN , I THINK IT IS A CASE OF FIRST IMPRESSION THAT WAY, TOO. I THINK THAT IT IS , BECAUSE IT IS A WAIVER OF RIGHTS , AS OPPOSED TO TRICKERY AS AN INTERROGATION TOOL, TRICKERY IN AN ONGOING INVESTIGATION , MISREPRESENTATION OF FACTS.

CHIEF JUSTICE: MR. McCOY SAID THIS WAS A LAUDABLE LAW ENFORCEMENT TECHNIQUE, SO I WONDERED IF THAT WAS SOMETHING AROUND THE COUNTRY THAT WAS RECOGNIZED AS BEING A LAUDABLE LAW ENFORCEMENT TECHNIQUE. YOUR RESEARCH DIDN'T SHOW ANYTHING.

WE WOULD ARGUE , OF COURSE , THAT IT MIGHT BE LAUDABLE IN THOSE OTHER INSTANCES BUT NOT TO OBTAIN A WAIVER.

CHIEF JUSTICE: THANK YOU VERY MUCH FOR YOUR TIME AND WE WILL TAKE THIS CASE UNDER ADVISEMENT AND WE WILL TAKE OUR MORNING RECESS. THANK YOU.

MARSHAL: PLEASE RISE.