State of Florida v. Rodolfo Contreras
SC05-1767

WE WILL HEAR FROM THE LAST CASE, STATE V ERSUS CONTRERAS, AND I SEE WE GAVE YOU BOTH 15 MINUTES A SIDE, SO I AM NOT SURE WHAT YOU DID TO DESERVE ALL THAT AD DITIONAL T IME .

JUSTICE: USE TEN .

JUSTICE: MOTION FOR RECONSIDERATION.

MAY IT PLEASE THE COURT. MELANIE SURBER ON BEHALF OF THE STATE.WE ARE HERE BECAUSE THE FOURTH DISTRICT COU RT OF APPEAL REVERSED THE CONVICTION FOR SEXUAL BATTERY AND LEWD AND LASCIVIOUS MOLESTATION ON THE DEFENDANT 'S C HILD IN THIS CASE, BASED ON THEDECISION IN CRAWFORD.I THIN K THE THRE SHOLD ISSUE THAT NEEDS TO BE TALKED ABOUT ON THIS CASE UPON A SECOND G LANCE IS THE FO URTH DISTRICT'S REASONING WITH RESPECT TO UNAVAILABILITY OF THIS CHILD. THE FOURTH DCA IS KIND OF A TWOFOLD ANALYSIS. THE FI RST ANALYSIS IS THAT THERE IS SOME REQUIREMENT THAT THE CHILD NEEDED TO BE PHYSICALLY UNAVAILABLE , AND I THINK SIM PLY READING CRAWFORD, THAT IS W RONG . IN CRAWFORD , THE WITNESS IN THAT CASE WAS LE GALLY UNAVAILABLE, AS WAS THECHILD IN THIS CASE, SO AS A PRELIMINARY ISSUE , THAT FINDING NEEDS TO BE OVERTURNED.

CHIEF JUSTICE: ALSO THE I SSUE ABOUT THE ELEVEN , WHEN THEY HAVE TO BE UNDER ELEVEN.

THAT IS THREE FOLD IN A WAY , BECAUSE THERE IS ALSO , THE FOURTH FOUND THAT THE DOCTOR'S OP INION DIDN'T SUPPORT THE UNAVAILA BILITYOF THE CHILD , AND THAT IS ALSO, I THINK , SIMPLY WR ONG. I THINK THE COURT CAN LOOK RIGHT TO THE RECORD AND LOOK AT THE TRIAL COURT'S ORDER FINDING THE CHILD UNAVAILABLE , AND IT IS Q U ITE SPECIFIC IN DETAILING DR . RAHAM'S TESTIMONY ABOUT THE SEVERE ME NTAL AND EMOTIONAL TRAUMA THIS CHILD WASSUFFERING.

CHIEF JUSTICE: ARE YOUGOING TO ADDRESS THE OTHER THRESHOLD ISSU E AS TO WHETHER THE STATEMEN TS TO THE CHILD PROT ECTION TEAM WHICH WERE NOW DONE IN AVERY MUCH OF A QU ESTION /ANSWER FORMAT , ARE TESTIMONIAL UNDER CRAWFORD?

IN THIS CASE WHAT WE HAVE ARGUED IS THAT THEY WERE NOT . HOWEVER , THE STATE'S POSITION IS THAT IT IS WELL TAKEN.THERE ARE VA RYING INTERPRETATIONS OF WHAT IS GOING TO BE TESTIMONIAL, ANDI THINK I HAVE C ITED THOSECASES IN MY BRIEF AS WELL AS SUPPLEMENTED. I THINK WE ARE ACROSS THE BOARD DIVIDED. THERE ARE SOME STATES AND FEDERAL CIRCUITS THAT HOLDTHAT AUTOMATICALLY THESE TYPES OF VIDEO STATEMENTS ARE GOING TO BE TESTIMONIAL , AND THEN YOU HAVE STATES SUCH AS MINNESOTA, A WHICH ARE HOLDING THEY ARE NOT.

CHIEF JUSTICE: IT SEEMSTHIS IS MY PROBLEM WIT H IT , AND LIKE ALL OF US , OUR HEARTS GO OUT IN THE CHILD MOLESTATION CASE S. THIS IS A TREMENDOUS HA RMTHAT IS D ONE ON A LIFELONG BASIS , AND WE HAVE CREATED RULES TO TRY TO MAKE IT MUCH EASIER ON THE

CHILD TO COME FOR WARD . THE CONCERN IS THAT, WHEN THE CHILD PROTECTION TEAM IS G IVING , TAKING THE STATEMENT , I MEAN, THEY ARE DOING IT AS AN AGENT OF THE STATE. THE POLICE OFF SITE , DOING IT IN A WAY -- AT LE AST OFF SITE, DOING IT I N A WAY TO MAKE IT LESS TRAUMATIC FOR THE CHILD. IT IS NOT REALLY MATERIALLY DIFFERENT, IT , THAN SOMEONE , A POLICE DET ECTIVE WHO ALSO HAS A MANNER OF TAK ING THAT STATEMENT.

WE COME TO YOU ON ACASE-BY-CASE BA SIS. THESE VIDEO STATEMENTS NEED TO BE LOOK ED AT BECAUSE THEY ARE DONE WITH AL MOST COMPETING STATUT ES. HERE WE HAVE THE CHILD PROTECTION STATUTE. THE -- HERE WE HAVE THE PROTECTION STATUTE. THE CHILD PROTECTION TEAM, YES , THEY ARRIVE AND THERE ARE CRIMINAL C ASES UNDER SOME OF THE RULES THAT I THINK YOU NEED T O LOOK AT CERTAIN SPECIFIC THING INSORDER TO DETERMINE IF IT IS TESTIMONIAL. ONE THING IS --

JUSTICE: IN THIS CASE , YOU HAVE AG REED THAT THE WORKER CAN BE, IS AN AGENT OF THE STATE. BUT IN THIS CASE DON'T WE EVEN HAVE A LITTLE MORE THAN THAT? WASN'T THE POLICE OFFICER LOOKED UP BY SOME KIND OF TRANSMISSION, TO THE CAS EWORK ER AND COULD ACTUALLY GIVE THE CASEWORK ER QUESTIONS TO ASK THE VICTIM? I MEAN S O WE HAVE A LITTL E MORE HERE THAN JUST THE CASEWORKER.

YES, WE DO IN T HIS CASE. HOWEVER, THE RE CORD REFLECTS THAT THE OFFICER AC TUALLY A SKED THE QUESTION. THIS WAS A PRESCHOOL ATTEND AND THE THAT WAS BROUGHT IN , THAT HAD TO REPORT IT. IT WAS REASON ABLY EX PECTED TO BE USED PROSECUTOR LY . AGAIN WITH RE SPECT TO THE CRIME.

JUSTICE: BUT CAN YOU GET INTO THAT KIND OF ANALYSIS , A GAIN, A FIVE OR SIX-YEAR-OLD, I DON'T KNOW SEE HOW THAT CAN BE DISCUSSED AS A FACTOR OF CONCERN ANYWAY.

I SEE HOW YOU FEEL, BUT WHEN COUPLED WITH WHAT ISTHE PURPOSE OF THAT SPECIFIC INTERVIEW, AND IT MAY VERY WELL BE THAT IN CERTAIN CASES , THESE INTERVIEWS ARE SPECIFICALLY DUB WITH AN EYE -- DONE WITH AN EYE TO WARDS TRIAL, BUT I THINK THAT DEPENDS ON WHAT THE SO CIAL WORKER OR CHILD PROTECTION TEAM, IT DEPENDS ON WHAT YOU ARE GO ING TO SAY .

JUSTICE: OR TO PRESS OR W ITH AN EYE TOWARD CRIMINAL CHARGES , I S THAT WHAT YOUSAY?

I THINK WITH AN EYE TOWARDS CRIM INAL CH ARGES.

JUSTICE: WHY COULDN'T THE POLICE STATEMENT BE WITH AN EYE TOWARD CRIMINAL CHARGES?

WE DON'T HAVE A STATEMENTYET.ALL WE HAVE IS A STATEMENT F ROM SOMEBODY IN THE SC HOOL THAT THE CHILD ATTENDED.

JUSTICE: EVERYTHING THAT IS SAID TO A POLICE OFFICER IS WE HAVEN'T CHARGED HIM Y ET AND WE DON'T KNOW IF WE ARE GOING TO, AND IT SEEMS AS THO UGH THIS BECOMES SO UNWORKABLE IN THE CONSTITUTIONAL SEEM . -- CONSTITUTIONAL SCHEME.

I UNDERSTAND YOUR CONC ERN BUT I THINK IT ILLUSTRATES THAT THIS TYPE OF ANALYSIS ON TESTIMONIAL HAS TO BE CASE BY CASE. IT MAY VERY WELL FI ND THAT THIS STATEMENT IS TESTIMONIAL, BUT IT DO ESN'T CHANGE THE FACT THAT , W HEN YOU ANALYZE WHETHER OR NOTIT IS TESTIMONIAL , YOU CAN'T JUST HAVE AN ACROSS-THE-BOARD RULING THAT EVERY C PT INTERVIEW OR VIDEO INTERVIEW DONE OF A CHILD IS GOING TO BE TESTIMONIAL.

CHIEF JUSTICE: I G UESSTHE PROB LEM IS W E ARE TAKI NGA FO RMAT THAT DIDN'T EX IST A T THE TIME THE CONSTITUTION WAS AD OPTED AND TRYING TO DETERMINE THAT , EXTRAPOLATE WHETHER IT FI TS MORE CLOSELY INTO WHAT WOULD HAVE B E EN A POLICE INTERROGATION. IN

OTHER WORDS THAT YOU HAVEGOT A CRIME INVOLVING A CHILD VICTIM. DECISION HALVES BEEN MADE THAT IT IS BETTER TO HAVE THE CHILD PROTECTION TEAM DOING THE QUESTIONING , PROFESSION QUESTIONERS, SO TO MIN IMIZE THE HARM TO THE CHILD, TO MAKE SURE THE TRUTHFUL TESTIMONY IS ELICITED, BUT FROM THE POINTOF VIEW OF CRAWFORD AND THE STATE'S INTERESTS, IT DOESN'T SEEM TO ME T O BE ANY, I JUST DON'T SEE HOW WE CANINTERPRET THIS AS ANYTHING OTHER THAN TESTIMONIAL.

AS I SAID, I UNDERS TAND THERE ARE VARYING INTERPRETATIONS OF HOW IT IS GOING TO COME D O WN. AGAIN --

CHIEF JUSTICE: SHOULDN'TCOMMON SE NSE PLAY INTO IT, O R DO WE JUST , WHICH IS THAT THIS IS THE FUNCTIONAL EQUIVALENT THAT, IF THIS WAS , THE CHILD HAD BEEN A VICTIM OF A ROBBERY AT A McDONALD'S , THEY WOULD GO IN IN A VERY , YOU KNOW, AGAIN SAME WAY , VERY NICE WAY AND THEREWOULD BE A KIND FE MALE POLICE OFFICER ASKING THE QUESTIONS, AND YOU WOULD AGREE IT WAS A POLICE INTERROGATION, RIGHT?

Y E S. IN THAT SI TUATION. YES. HOW --

CHIEF JUSTICE: HOW IS THIS DIFFER ENT?

I TH INK IT MIGHT. I DON'T KNOW. I THINK IN THIS CASE WHAT ISGOING ON WE DON'T HAVE ENOUGH FACTS TO KNOW EXACTLYHOW THIS CAME ABOUT AND THIS WAS AR GUED BELOW TO THE FOURTH DCA. WE HAVE THE CHILD PROTECTION TEAM AND AGA IN THIS IS A PIPELINE CASE SO EV ERYTHING WENT O N THE RECRAWFORD, SO I THINK WE HAVE A PER SE RULE , BUT I N HIND SIGHT THERE NEEDSTO BE SOME REFLECTION OF HOW ARE WE GOING TO DETERMINE WHEN THESE STATEMENTS ARE TESTIMONIAL , AND AS I SAID THERE MAY BE A DECISION THAT IT IS TESTIMONIAL IN THIS CASE AND THEN I WOULD MOVE ON TO, THEN WE AL SO HAVE IN THIS CASE A DEPOSITION DONE WITH NOTICE, THAT THESE , THIS VIDEO DEPOSITION MAY H AVE BEEN USED AT TRIAL IN LIEU OF LIVE TESTIMONY OR ANY TESTIMONY AT ALL FROM THE CHILD .

CHIEF JUSTICE: WAS THERE A VIDEOTAPED DEPOSITION?

THERE WERE TWO DEPOSITIONS . THE SE COND ONE WAS VIDEOTAPED AND THE RECORD REFLECTS THAT COU NSEL WASTAKING THIS PARTICULAR VIDEODEPOSITION TO PRES ERVE THE R IGHT TO CROSS-EXAM INE.

CHIEF JUSTICE: IT WAS UNDER 3.1 WHATEVER?

I DON'T KNOW , I CAN'T REMEMBER THE RULE AT THIS POINT .

CHIEF JUSTICE: THERE ARE ONLY TWO RULES. DISCOVERY.

IT WAS DISCOVERY.

CHIEF JUSTICE: SO IT WASN'T BEING TAKEN TO PERPETUATE TESTIMONY. IN FACT WASN'T I T THE SECOND DEPOSITION WHERE THE CHILD VICTIM SAYS THAT SHE KNOWSSHE IS GOING TO BE HAVING TO COME TO TRIAL?

YES.

CHIEF JUSTICE: SO IT OBVIOUSLY COULDN'T HAVE BEEN TAKEN BY THE DEFENSE LAWYER , THINKING THAT THIS WAS GOINGTO BE HIS OR HER ONLY OPPORTUNITY TO CROSS-EXAMINE THE WITN ESS .

WELL , I THINK THIS CASE REFLECTS THAT T HEY WERE ACTUALLY LOOKING TO PRESERVE

CONFRONTATION AND CROSS-EXAMINATION. IT IS IN THE RECORD. A DEFENSE ATTORNEY STATED THAT. HOWEVER , IN THIS CASE , THERE WAS WHE THER OR NOT THE CHILD WAS ACTUAL LY GOING TO TESTIFY VIA CL OSED CIRCUIT OR WHETHER OR NOT THE CHILDWAS GOING TO BE AVAILABLE WAS KIND OF FLIP-FLOPPED IN THE CASE. THE NOTI CE WAS DONE ON THEINTENT TO RELY ON THE HEARSAY AT THE BEGINNING AS A MATTER OF COURSE AND THERE WAS FLIP-F LOP ING , B ASED ON THE FACT THAT THE CHILD HAD THOUGH BE EVENTUALLY LOOKED AT BY THE DO CTOR AND FOUND TO BE UNAVAILABLE. SO I THINK IN THIS CASE IT IS SIMPL Y AN EXAMPLE O F HOW DEPOSITIONS CAN SATISFY THE RIGHT TO CROSS-EXAMINE . -- T O CROSS-EXAMINATION. I THINK EVEN IF WE FIND THE TESTIMONY IN THIS CASE --

JUSTICE: I AM HAV ING A HARD TIME FOLLO WING YOU. AND IT DOES IN THIS CASE , EVEN THOUGH THE DETERMINATION ABOUT WHETHEROR NOT SHE WAS GOING TO TESTIFY , WAS MADE A FTER THE S ECOND DEPOSITION , THE RIGHT TO , OF CONFRONTATION WAS SATISFIED BECAUSE ?

BECAUSE WHEN YOU LOOK AT THE DEPOSITION WHICH IS PA RTOF THE RE CORD IN THIS CASE AND WHICH WAS CITED EXTENSIVELY BY THE FOURTH DISTRICT, T HERE WAS MEANINGFUL CROSS-EXAMINATION.

JUSTICE: SO WE HAVE TOLOOK AT ALL OF THESE DEPOSITIONS , ANY DEPOSITIONSTHAT ARE TAKEN, AND MA KE A DETERMINATION AS TO WHETHER OR NOT THERE WAS MEANINGFUL CROSS-EXAMINATION.

NO.YOU DON'T HAVE TO LOOK AT IT IN THOSE CASES. I AM USING THIS CASE AS AN EXAMPLE BECAUSE WE HAVE THE TEN BENE FIT OF H AVING TO SHOW, ESPECIALLY -- THE BENEFIT OF HAVING TO SHOW ESPECIALLY IN THE CHILD VICTIM CASE , WHAT WAS DONE AT DEPOSITION , AND I THINK THAT GIVES AN EXAMPLE OF WHAT THESE DEPOSITIONS CAN BE LIKE AND WHAT THEY CAN SATISFY AND , AGAIN , CRAWFORD PROVIDES AN OPPORTUNITY FOR CROSS-EXAMINATION WHICH IN THIS CASE WAS SATISFIED .

JUSTICE: DID YOU SAY THAT DEF ENSE COUNSEL KNEW THAT THE STATEMENT WAS INTENDED TO BE USED AT TRIA L?

IN THIS CASE THESTATEMENT WAS INTENDED TO BE USED AT TRIAL FROM THE BEGINNING.

JUSTICE: WHAT DID DEFENDANT'S COUNSEL KNOW AND WHEN DID HE KNOW IT?

THE ORIGINAL DISCOVERY, THE NOTICE TO RELY ON THE CHILD'S HEARSAY. HOWEVER , AT THAT POINT THEREWAS NO DETERMINATION OF WHETHER OR NOT THE CHILD WAS GOING TO BE AVAILABLE OR UNAVAILABLE, BECAUSE 9.803 ACTUALLY AL LOWS FOR BOTH , THE AVAILABILITY OF THE STATEMENT TO CO ME IN AND THEN WE HAVE THE SECOND UNAVAILABILITY SECTION, WHICH, THEN, A SEPARATE ANALYSIS. SO THROUGHOUT TRIAL , THERE WAS A KNOWLEDGE THAT THIS VIDEO STATEMENT WAS GOING TO BE USED, AND DEFENSE COUNSE L IN THIS PARTICULAR CASE , ORIGINALLY INTENDED TO UTILIZE THAT DEPOSITION AT TRIAL , AND THEN CHA NGED THEIR MIND AT SOME POINT DURING TRIAL, WHICH IS REFLECTED IN THE RECO RD, ANDI THINK WHAT IS TROUBLING A BOUT THE OPINION IN THIS CAS E, IS THE FOURTH DCA WANTS TO HOLD THE STATE TO A STANDARD OF HAVING TO AD MIT THE DEFENSE DEPOSITION TO SHOW THAT AN OPPORTUNITY FOR CROSS-EXAMINATION WAS EXA CT, ALMOST MORE TROUBLING THAN THE REST OF THE ANALYSIS, BECAUSE THE STATE IS HARD PRESSED TO UNDERSTAND HOWTHEY WOULD HAVE EVEN ADMITTED THAT EVIDENCE ATTRIAL.

JUSTICE: ARE YOU GOING TO TOUCH ON THE HARMLESS ERROR A SPECT ?

I WI LL. IN THIS CASE , THE STATE ALSO CLAIMS THE FOU RTH DC A' S STATEMENT THAT THE VIDEO, IN THIS CASE THE VIDEO AL ONE DIDN'T AFF ECT THE VER DICT IN THIS CASE. IN THIS CASE

WE HAD THEMOTHER WA LK IN ON THE ACT AND TESTIFIED AT TRIAL AND WE HAD ADMISSION AT TRIALTHAT WAS PREVIOUSLY LITIGATED AND FOUND TO BE AVAILABLE AT TRIAL AND WE ALSO HAD THE DEFENDANT CONFESS TO A FRIEND OF HIS , MELVIN ROBINSON , WHO TESTIFIED AT TRIAL , A ND I THINK IN LIGHT OF ALL OF THAT EVIDENCE, THERE IS NO POSSIBILITY THAT IT COULDHAVE AFF ECTED THE VERD ICT IN THIS CASE .

JUSTICE: THE DEFENDANT CONFESSED TO CERTAIN ACTS HAVING TAKEN PLACE, CORRECT?

YES.

JUSTICE: BU T HE DENIED THAT THERE WAS ACTUAL PENETRATION HERE , CORRECT?

YES .

JUSTICE: SO DO WE, DOES YOUR HARMLESS-ERROR ANALYSIS HOLD UP FOR THE CAPITAL SEXUAL BAT TERY PO RTION OF THIS?

I THINK IT CAN, BECAUSE I THINK IT IS CIRCUMSTANTIAL , BASED ON THE MOTHER TESTIFIED TO WALKING IN AND ALTHOUGH SHE DIDN'T SEE PENETRATION, SHE TESTIFIED TO SEEING HIM BE ON THE CHILD.I THINK IT COUL D HAVE BEEN INFERRED, ALTHOUGH THERE IS NO MEDICAL EVIDENCE , I THINK THE IN FERENCE COULD HAVE BEEN PENETRATION IN THIS CASE.

CHIEF JUSTICE: THAT IS A LITTLE DIFFERENCE , SAY ING AN INFERENCE OF PENETRATION , IF THERE IS SI EMEN NOT IN SIDE BUT ON THE -- SEMEN NOT INSIDE BUT ON THE CHILD, THECHILD IS THE ON LY ONE THAT TALKS ABOUT PENETRATION?

YES, SHE WAS IN THIS CASE .

JUSTICE: IS THERE ANY OTHER CASE LAW NONTHIS KIND OF ISS UE THAT TA LK S ABOUT INFERENCES LIKE THAT, BEC AUSE IT IS A SIGNIFICANT DIFFERENCE, IS IT NOT, ON WHAT THE COUNT IS AND THE CONVICTION? ANY OTHER CASE LAW?

YES, IT IS. I WAS UNABLE TO SE ARCH ANY. HOWEVER , OUR POSITI ON IS IF YOU RE VIEW THE TESTIMONY OF THE MOT HER AND THE LOCATION OF WHERE SHE FOUND THIN GS AND ALSO THE CHILD MADE EXCITED UTTERANCES TO THE MOTHER RIGHT AFTER THE CRIME , TO THE MOTHER , WHICH WERE ADMITTED AT TRIAL.

CHIEF JUSTICE: YOU MIGHT WANT TO SAVE YOUR REMAINING MINUTES FOR REBUTTAL.

THANK YOU .

MAY IT PLEASE THE COURT . V ALUE ENCONTINUE RODRIGUEZ ON -- VALENTIN RODRIGUEZ ON BEHALF OF THE DEFENDANT . I HANDLED THIS ON APPEAL. THEY SAID THAT , I N TRY TROOIING TO ANALYZE WHAT I S TEST -- IN TRYING TO ANALYZE WHAT IS TESTIMONIAL, SIM PLY GOING P LACES WHER E AND I YELL-- WHERE AN GEL S F EAR TO TR EAD , IS NOT THAT A REA , BECAUSEWHAT THEY ESTABLISHED IS THE CHILD PROTECTION SYSTEM UNDER CHAPTER 39 I S DESIGNED BY IT S VERY NATURE TO E LICIT TESTIMONIAL IN NA TURE . IF YOU LO OK AT CHAPTER 39 CAREFULLY , YOU WILL EVEN SEE THERE ARE PROVISIONS FOR EXAMPLE IF THIS CASE WERE TO HAPPEN IN PA SCO , MANATEE OR BROWARD COUNTY , YES, THOSE THREE COUNTIES , EXCUSE ME , THEN IT WOULD HAVE BEEN THE SHERIFF WHO WOULD HAVE HAD TO HAVE T A KEN THE IN ITIAL STATEMENT BY STAT UTE. IT IS ACTUALLY SE T IN STATUTE INSERT COUNTIES ANDIF YOU LO OK AT THE STATUTE CAREFULLY , THERE ARE PROVISIONS ON HOW TO TURN IT INTO A CRIM INAL INVESTIGATION AND EXACTLYWHAT THE PROCEDURES ARE TO DO. IN FACT IT IS VERY CLEARTHAT, WHEN YOU COME I N ANDGIVE A STATEMENT UNDER CHAPTER 39, THAT THE TE ACHER L AW REQUIRES NOTIFICATION TO THE POLICE, IT IS CL EARLY TESTIMONIAL UNDER

STATE LAW.

JUSTICE: WHY DIDN'T YOU HAVE AN OPPORTUNITY TO CROSS-EXAMINE?

WELL , W E THINK , TAKE THEPOSITION THAT YOUR OPPORTUNITY FOR CROSS-EXAMINATION IS AT TRIAL .

JUSTICE: THAT IS NOT WHAT CRAWFORD SAYS. CRAWFORD SAYS A P R IOR OPPORTUNITY TO CROSS-EXAMINE. OBVIOUSLY IF YOU HAVE AN OPPORTUNITY TO CROSS- EXAMINE AT TRIAL , CRAWFORD DOESN'T E VEN AP PLY. IT SAYS THIS DOES NOT APPLYWHEN A DECLARANT TESTIFIES AT TRIAL , SO DIDN'T YOU HAVE A PRIOR OPPORTUNITY TO CROSS-EXAMINE?

NO. IT WAS NOT MEANINGFUL UNDER THE TE RMS OF MEA NINGFUL. MEANINGFUL MEAN S THIS , FOR AJURY TO BE ABLE TO SEEEXACTLY HOW THE WITNESS REACTS TO A QUESTION, SEEING W ITH THEIR EYES , SEEING BODY MOVEMENT IN THE COURTROOM.

JUSTICE: NOW YOU ARE REALLY SPEAKING THERE AS TO THE TRIER OF FACT. WHAT DOES THAT CONFRONTATIONCLAUSE AS PECT OF IT FACE TO FACE, HAVE TO DO WITH THE TRIER OF FACT?

I GO BA CK TO 179 4, THE COURT DCA DECIDED A CASE IN -- THE FOU RTH DCA DECI DED A CASE THAT IN THEIR OPINION THAT FRAN KL Y I DIDN'T KNOW ABOUT CA LLED STATE VERSUS WEBB, WHERE IT SAID THAT , AND THIS IS IN 1 994 , THREE Y EARS AFTER THE SI XTH AMENDMENT WAS EN ACTED . THAT DEPOSITIONS COULD ONLY BE READ AGAINST AN AC CUSED IF THEY WERE TAKEN IN HIS PRESENCE. HIS PRESENCE. N OW, THERE WERE LAWYERS BACK THE N, SO THIS WASN'T A SYSTEM WHERE THERE WEREN'T LAWYERS, AND THEY HE LD THAT IT IS A RULE OF COMMON LAW FOUNDED ON NATURAL JUSTICE THAT NO MAN SHALL BE PREJUDICED BY EVIDENCE WHICH HE HAD NOT THE LIBERTY TO CROSS-EXAMINE. THE PROBLEM WITH A DEPOSITION IS THAT THE DEFENDANT , UNDER STATE LAW --

JUSTICE: AT THE TIME IN COMMON LAW WAS THE DEFENDANT ENTITLED TO BE REPRESENTED BY AN ATTORNEY?

HE WAS NOT ENTITLED BUT THE SUPREME COURT CONTEMPLATES, OBVIO USLY , THE ATTORNEY SYST EM, WHERE YOUHAD AN ATTORNEY . 1794 --

JUSTICE: IF WE ACCEPT YOUR ARGU MENT, THEN THE DEPOSITION TAKEN INTENTIONALLY TO PRES ERVE FOR TRIAL , WOULD NOT APPLY , BECAUSE THERE IS NO JU RY THERE TO WATCH THE WITNESS.

WELL , THE FOURTH DCA LOOKS, YOU MEAN THEDEPOSITION TO PERPETUATE TESTIMONY?

JUSTICE: YES .

THE FOURTH DCA SAID FIRSTTHAT WAS THE BURDEN OF THE STATE. THEY DIDN'T SH IFT THE BURDEN. EXCUSE ME. THEY ACTUALLY KEPT THE BURDEN WHERE IT BELONGS. THE BURDEN WAS ON THE STATETHAT IF THEY WEREN'T GOINGTO HAVE THIS PER SON A VAILABLE --

JUSTICE: LET'S GO BACK. I THOUGHT YOUR ARG UMENT WAS THAT THE CROSS-EXAMINATIONFACE TO FACE HAS TO BE IN THE PRESENCE OF THE FACT FINDER.

THAT IS MY PO SITION. THAT IS WHAT I BELIEVE IS PLEENINGFUL FR OM THE PERSPECTIVE OF -- MEAN INGFULFROM THE PERS PECTIVE OF MEANINGFUL --

JUSTICE: BUT NOWHERE IN CRAWFORD DOES IT S AY IT HASTO BE CROSS-EXAMINATIONBEFORE THE FACT FI NDER AND IN FACT , THE FRAMER AT THE TIME OF THE SIXTH A MENDMENT WAS

ADOPTED, YOU HAD DEPOSITIONS , AND AS LONG AS THE DEFENDANT WAS THERE , PRE SENT AT THE DEPOSITION AND RIGHT TO CROSS-EXAMINE, THE FACT FINDER DIDN'T HAVETO BE THERE AND IT DIDN'THAVE TO BE VIDEOTAPED , EITHER , BECAUSE THERE WAS NO VIDEOTAPE BACK THEN.

RIG HT. I THINK WE HAVE MO VED A LONG WAYS I N DUE PROC ESS S I NCE THAT POINT, AND WE ARE NOW AT A POINT WHERE WE HAVE A CAPITAL FELONY, A PERSON ACCUSED BY THEIR DAUGHTER OF A HORR IBLE CRIME, AND I BELIEVE THE MEANINGFUL OPPORTUNITY IS AT TRIAL.

CHIEF JUSTICE: NOW, YOU SEE , I F YOU STA RT TO B RING IN DUE PROCESS A ND YOU HAVE ANOTHER IS SUE ABOUT HOW YOUAPPROACH IT , BUT WE ARE JUST HERE TA LKING SIXTH AMENDMENT.

RIGHT.

CHIEF JUSTICE: AND IT W OULD SEEM TO ME THAT , THAT IF A DEPOSITION WAS TAKEN WHERE THE DEFENDANT HAD THEOPPORTUNITY TO BE PRESENT , A GAIN , BECAUSE THEY TALK ABOUT A PRIOR OPPO RTUNITY TO CROSS-EXAMINE NOT A CONTEMPORANEOUS OPPORTUNITYTO CROSS-EXAMINE, DO YOU AGREE WITH THAT ? CRAWFORD - -

I CAN'T AG REE ON THE PRINCIPLE . THE CRIM INAL CASES AND THE RULE REGA RDING CRAWFORD EXAMINATION AND THE COURTROOM , BUT HAVING THE DEFENDANT AT THE DEPOSITION IS THE NEXT BEST ALTERNATIVE.

CHIEF JUSTICE: WHY CAN'TTHAT, AND THEREFORE, I KNOW YOU ARE ARGUING IN THIS CASE BUT LET' S SAY WE ARE LOOKINGAT THE RULE, WOULDN'T THE RULE BE SATISFIED IF THE STATE GIVES A NOTIC E THAT , PROBABLY WILL NOT BE ABLE TO USE THE TESTIMON Y AT TRIAL , AND THEREFORE ALLOWS THE DEFENDANT T O TAKE THE DEPOSITION, AND THIS DEFENDANT HAS AN OPPORTUNITYTO BE PRESENT , WOULD THAT THEN SATISFY CRAWFORD? I THINK IT WOULD BUT THEN I THINK THE OBLIGATION WOULD BE ON THE STATE TO MOVE THAT DEPOSITION IN. WHICH THEY SH OULD BE ABLE TO DO UNDER THE RULE , AND SO THE BURDEN SHIFTING GOING FROM THERE.

JUSTICE: WELL , CRAWFORD DOESN'T REQUIRE THAT, EITHER, DOES IT? DOESN'T REQUIRE THAT THE PRIOR TESTIMONY B E AD MITTED IN EVIDENCE , ONLY THAT THE DEFENDANT HAD A PRIOR OPPORTUNITY TOCROSS-EXAMINE.

WELL, NO , CRAWFORD IS A RULE OF ADMISSIBILITY , BUT THERE IS , HAS TO BE SOME WAY FOR IT TO GET INTO EVIDENCE,A BE IT IS THE STATE'S BUR DEN. THE STATE HAS TO PRO VE THE CASE .

JUSTICE: THE STATE'S ONLY BURDEN IS TO MAKE SURE THAT, IF IT WAS TESTIMONIAL , THAT THE WITN ESS IS UNAVAILABLEAND THE DEFENDANT HAD A PRIOR OPPORTUNITY TO CROSS-EXAMINE. WHERE DOES IT SAY THAT THE STATE NOW HAS TO INTRODUCE THE PRIOR CROSS-EXAMINATION?

BECAUSE THEN THERE FOR IT ESTABLISHING FOR THE RE CORD THE PRIOR OPPORTUNITY TO CROSS-EXAMINE. BEING DONE IN A VACUUM DOESN'T DO ANYTHING. IT DOESN'T GE T TO THE TRIER OF FACT.

CHIEF JUSTICE: BUT THEDEFENDANT HAS THE ABILITY, THEN, TO OF FER IT IN EVIDENCE AS CROSS-EXAMINATION OF THAT, THE TESTIMONY --

HE SAYS BUT THEN WE LOSE THE IMPORTANT CLOSINGARGUMENT, WE LOSE CERTAIN RIGHTS PROCEDURAL .

JUSTICE: BUT WE ARE HERE TO TRY TO FIGURE OUT IF THERE IS A RULE OF LAW WHICH S HOULD

APPLY IN A POST CRAWFORD ERA , IN WHICH THERE HAVE BEEN DEPOSITIONS TAKEN , AND WHETHER THAT IS GOING TO , UNDER OUR RULE OF LAW AND OUR RULES OF PROCEDURE AND OUR CRIMINAL CASES , MEET THE TEST , IF THE DEFENDANT IS THERE IN DEPOSITION FOR THE CONFRONTATION CLAUSE, AND I AM HAVING AGO HARD TIME UNDERSTANDING WHY -- HAVING A HARD TIME UNDERSTANDING WHY IT DOES NOT.

JUSTICE WE LLS , YOUR POSITION, I BELI EVE THAT W ILL SATI SFY IT ALTHOUGH I WOULD LIKE TO SEE MORE.I BELIEVE IF THE DEFENDANTIS THERE WITH HIS COUNSEL, HE CAN ASK QUESTIONS THAT ARE CONTEMPORANEOUS TO THIS WITNESS AND GIVE --

JUSTICE: I AM HIM AN AWFUL FULLY STRONG FELLOW , BUT MY CONCERN IS HOW WE ARE GOING T O INTERPRET CRAWFORD UNDER OUR , AS APPL IED TO OURRULES OF PROCEDURE .

WELL , I WOULD ASK FOR APER SE RULE THAT OFFERS A CHAPTER 39 INTERVIEWS .

CHIEF JUSTICE: SO WE GET BY THAT AND THEN WHAT ?

AND THEN I WOULD ASK THAT THE PREFER RED ME THOD IS IF THE DEFENDANT IS PRESENT AT A DEPOSITION , AT DEPOSITION PERPETUATE TESTIMONY , ANDTHE STATE MO VES THAT DEPOSITION INTO EVIDENCE , THEN CRAWFORD A SATISFIED A T TRI AL.

JUSTICE: IN THIS CASE DID THE DEFENDANT MOVE TO BE PRESENT AT THE DEPOSITION?

I DON'T BELIEVE THE RECORD ESTABLISHES WHET HER HE DID. I DIDN'T SEE ANY MOTION INTHERE FOR HIM TO BE .

JUSTICE: DOESN'T THE DEFENDANT HAVE TO SHOW THAT THE DEPOSITION WAS DENIED?

IN THIS CASE THAT WOULD HAVE BEEN AN ESTOPPEL WA IVER ISSUE. ALTHOUGH I WILL SAY THIS BEGAN IN 1999 AND THIS WAS A L ONG PROTRACTED PROCESS, AND I DON'T THINK CRAWFORD WAS CONTEMPLATED IN 19 99.

WHY DO YOU NEED ADEPOSITION TO PERPETUATE TESTIMONY? WHY CAN'T YOU YOU HAVE , IF - - WHY CAN'T YOU HAVE, IF THE STATE NOTIFIES THE DEFENDANT THAT IT HAS A HEARSAY STATEMENT THAT IT INTENDS TO PRESENT AT TRIAL AND GIVE THE DEFENDANT AN OPPORTUNITY TO DEPOSE, WHETHER IT IS UNDER 3.190 OR 3 .220 OR -- 3. 220 OR WHATEVER, GIVE N THAT ASIDE , THE OPPORTUNITY TO DEPOSE AND THE DEFENDANT MOVES ANDIS GRANTED THE OPPORTUNITYTO BE PRESENT, WHY DOESN'T THAT FULFILL THE CONFRONTATION CLAUSE REQUIREMENT?

BECAUSE, YOUR HO NOR , IT IS NOT MEANINGFUL. THE DEFENDANT WOULDN 'T BE ABLE TO USE THAT DEPOSITION AT TRIAL.

JUSTICE: WHY NOT?

BECAUSE IT IS NOT ADEPOSITION TO PERPETUATE THE TESTIMONY, YOU CAN'T PRACTICALLY USE T THE RULE DOESN'T ALLOW YOU TO DO THAT.

JUSTICE: BUT THE WHOLEPURPOSE OF ALLOWING CROSS-EXAMINATION IS FOR IMPEACHMENT, AND YOU CAN USE THAT PRIOR CROSS-EXAMINATIONFOR IMPEACHMENT , WHEN THE HEARSAY TESTIMONY IS INTRODUCED AT TRIAL.

YOU COULD BUT WHEN YOU HAVE A DEPOSITION TO PER PETUATE TESTIMONY , YOU CAN ACTU ALLY ENTER THAT AS SUBSTANTIVE EVIDENCE, WHICHMAKES THE OPPORTUNITY TO CROSS-EXAMINE MEANINGFUL. I THINK THAT IS WHAT WE AREGETTING AT IS THE MEANINGFUL .

JUSTICE: IF IT IS THE DEFENDANT'S INTENT TO INTRODUCE THE VICTIM'S TESTIMONY FOR SUBSTANTIVE PURPOSES , THEN WHY CAN'T THE DEFENDANT NOTIFY -- THE DEFENDANT NOTICE THE DEPOSITION TO PERPETUATE TESTIMONY?WHY CAN'T THE STATE DO IT?

WELL , BECAUSE THE BURDEN IS ON THE STATE TO LET THE DEFENDANT KNOW THAT THEYWILL THERE ARE -- THEY ARE NOT GOING TO USE THE PERS ON, AND THEN THE DE FENDANT HASTHE OPPORTUNITY TO COMEFORWARD.

CHIEF JUSTICE: IN THIS CASE WAS IT A REVERSAL FOR A NEW TRIAL?

YES , IT WAS REVERSAL ANDI DON'T KNOW IF YOU WANT ME TO TALK ABOUT HARMLESS ERROR.

CHIEF JUSTICE: BEFORE YOU GET TO HARMLESS ER ROR, IF WE REVERSE , IF WE AFFIRM OR APPROVE THE FOURTH DISTRICT OPINION , THEN WOULD CRAWFORD BE SATISFIED I F YOU HAD AN ADDITIONAL OPPORTUNITY NOW TO TAKE THE DEPOSITION OF THE VICTIM?

IF YOU TELL US I T WILL , IT WOULD BE . I DON'T MEAN THAT , IRONICALLY, BUT I HAD METWITH THE PROSECUTOR IN THIS CASE. WE ARE TR YING TO FIGURE OUT ON RETR IAL HOW DO WE SATISFY CRAWFORD AND WHAT WE DO NEED IS GUIDANCE . FROM THE CO URT ON HOW TO PROCEED.THIS IS THE STRANGE CASE WHERE WE DO NEED SOME KIND OF SPECIALTY WITH A CHILD BEING INVOLVED, NOT A CHI LD , NOW 16 OR 1 7, A WHOLE DIFFERENT ARENA FOR A CHIL D,BUT ON REMAND , I BELIEVE A NEW TRIAL , THE DEFENSE COUNSEL --

CHIEF JUSTICE: YOU WERE HOPING THE FOURTH DISTRICT WOULD GIVE YOU THAT DIRECTION.WE ARE ONLY LOOKING AT THE BIG PICTURE HERE.

RIGHT AND THEY G AVE US V ERY NA RROW DI RECTION THERE.

CHIEF JUSTICE: WHAT ABOUT THE HARMLESS ERROR IS SUE?

I C ITED A CASE PE OPLE VERSUS VI GIL , WHERE THE COLORADO SUPREME COURT SAID E VEN IF A DEFENDANT SA YS HE KNEW HE DID SOMETHING WRONG IN A CAPITAL SEXUAL BATTERY CASE, THAT DOESN'T SATISFY THE HARMLESS ERROR. IN THIS CASE THE DEFENDANT SAID HE KNEW SOME THING WRONG AND NO ONE TESTIFIED THAT THEY ACTUALLY SAW THE CAPITAL SEXUAL BATTERY , NOT EVEN THE CHILD THROUGH THE VIDEOTAPE , SAID THAT THERE W AS . IT WAS WAFFLE ING O N WHETHERTHERE WAS PENETRATION. I WAN T THE COUR T TO ALSO NOTE THAT --

CHIEF JUSTICE: HOW DID THEY SU STAIN THEIR BURDEN IF NOBODY TESTIFIED ON PENETRATION ON CAPITAL SEXUAL BATTERY?

THIS VERDICT CAME BACK AT ONE IN THE M O RNING .

CHIEF JUSTICE: YOU ARE NOT HERE ON INSUFFICIENT EVIDENCE.

I THINK THEY HAD THE BURDEN, THEY HAD THE CHILDON THE STAND TALKING ABOUT THAT AND THE MOM FELT BAD TO STAND OVER HER WITH A CO-WORKER SAYING SHE DID SOMETHING WRONG.

CHIEF JUSTICE: YOU ARE NOT HERE ON EVIDENCE OF CAPITAL SEXUAL BATTERY , SO WHAT EVIDENCE WAS THERE OF CAPITAL SEXUAL BATTERY?

I BELIEVE IN THE FI RS T VIDEO THERE WAS THE QUESTION OF PENETRATION .

CHIEF JUSTICE: AND THE CHILD ANSWERED?

YES.

CHIEF JUSTICE: AND THECHILD IS THE ONLY ONE THAT TESTIFIED AS TO PENETRATION?

ABSOLU TELY AND THAT IS WHY IT IS HARMLESS ERROR, AND I THINK ARGUED TO THE FOURTH DCA , I THINK THAT IS WHY HARMLESS ERROR DID NOT APPLY TO T HIS CASE. AS WELL , THE CHILD WAS THE ONLY ONE THAT TESTIFIED AS TO THE LEWD ACTS , WHICH WAS THE OTHER COUN T. MOM JUST SAW THE FATHER OVER THE CHILD . SAID HE --

CHIEF JUSTICE: WITH S E MEN ON THE CHILD'S LEGS?

YES AND THAT IS NOT PER SE A LE WD ACT .

JUSTICE: LET ME ASK THEQUESTION ON THE FACE TO FACE CONFRONTATION. NOW , WHY DO YOU BELIEVE THE DEFENDANT NEEDS TO BE PRESENT AT THE DEPOSITION?

BECAUSE IN ORDER TO H AVE MEANINGFUL OPPORTUNITY TO CROSS-EXAMINE PEOPLE , FIRSTWHEN YOU ARE ASKING QUESTIONS IN A DEPOT , ABSS COME AND THEN -- IN A DEPO , ANSWERS COME AND THEN THERE MAY BE ADDITIONAL QUESTIONS. YOU DON'T WRITE OUT YOUR Q UESTIONS LIKE A HEAD OF TRIAL. SOMETHING MAY BE SAID THAT TRIGGER S THE ANSWER THE DEFENDANT WANTS.

JUSTICE: S O AS LONG AS YOU ARE ABLE TO OBSERVE WHAT THE VICTIM IS SAYING AND COMMUNICATE WITH HIS OR HER ATTORNEY, THEN THOSE NEEDSARE SATISFIED, CORRECT?

IN SOME CASES BUT I WOULD A LSO ARGUE THE DEFENDANT'S PRESENCE IS IMPORTANTBECAUSE THE PERSON NEEDS TO TELL THE TR UTH O R TE LL A LIE.

CHIEF JUSTICE: THAT IS WHY WE HAVE FACE TO FACE AND WHAT JUSTICE SCALIA SAYS IS THAT THE NE XT TIME , HIS DISSENT IN CRAIG WAS THAT NAMELY THE CONFRONTATION CLAUSE GUARANTEE A FACE TO F ACE CONF RONTATION , MEANS THAT AL WAYS AND EVERYWHERE THE DEFENDANT HAS THE RIGHTTO MEET FACE TO FACE TO LITERALLY, I GUESS SC ALIA I S INTERPRETING IT TO MEAN FACE TO FACE .

THAT WAS , YES , Y OUR HO NOR , IT NEEDS TO BE FACE TO FACE BECAUSE THERE IS A CERTAIN ASPECT OF THE DEFENDANT FACING THE AC YOUTHSER THAT MAY CH ANGE -- AC CUSER THAT MAY CHANGE THE COURSE OF THE OUTCOME .

JUSTICE: YOU ARE RUNNINGOUT OF TIME BUT THE AVAILABILITY IS IMPORTANT IN THIS CASE BECAUSE OF THE PSYCHOLOGICAL EFFECTS. DIDN'T THE EXP ERTS TESTIF Y THAT THE VICTIM COULD NOT TESTIFY?

I BELIEVE THAT THAT WAS A FOURTH DCA THAT HIT IT RIGHTON POINT WHEN THEY ANALYZED THE UNAVAILABILITY , AND BASICALLY SAID THAT NOT HING IN THE PSYCHOLOGIST'S OPINION INDICATED THAT SHE WAS NOT ABLE TO TEST PHI AT TRIAL -- TO TESTIFY AT TRIAL AT AGE 13 , MEANING AT THE T IME OF THE TRIA L. THE PSYCHOLOGIST SAID SHE WAS TRAUMATIZED FROM THE INCIDENT BUT NEVER MA DE AN OPINION AS TO WHETHE R SHE COULD WALK INTO A COURT OF LAW AND TESTIFY, AND THAT IS WHAT THE FOURTH DCA S POKE UPON, AND THAT IS PROVIDED WITH EVIDENCE AS RECORD OF SUPPORT, AND I WAS ASKING NOT TO GET SIDETRACKED ON THE AVAILABILITY. I ASK YOU T O PROMULGATE A PER SE RUL E. THANK YOU.

CHIEF JUSTICE: MS. SURBER .

BRIEFLY I WOULD LIKE TOPOINT OUT THAT THE TRIAL COURT'S ORDE R WITH RESPECTTO THE AVAILABILITY DID STATE THAT DR . HEEM FOUND THAT REQUIRING THE CHILD TO PARTICIPATE

IN THIS CASE FURTHER THAN WHAT SHE HASALREADY DONE , MEANING AT TRIAL, WOULD CREATE THE ULTIMATE EMOTIONAL AND MENTAL TRAUMA , SO UGHT TRIAL COURT AND THE DO CTOR DID SPECIFICALLY TALK ABOUT AND FIND THAT THE CHILD DID SUFFER EXTREME HA RM.

CHIEF JUSTICE: AS FAR AS THIS IDEA OF DEPOSITIONS IN PRE-CRAWFORD, AND I COULDN'T FIND IT BUT SOME HOW THERE IS EITHER A COMMENT TO THERULES OR WAS IT THE COMMISSION ON THE CRIMINAL RULES THAT ACTUALLY SAID , IN CHILD ABUSE SEXUAL BATTERY CASES , THAT THEY COUNSELEDAGAINST THE DEFENDANT BEING PRESENT.DO YOU RECALL THAT?

I HAVE ALSO SE EN, I BELIEVE IT WAS A COMMENT, IT MIGHT BE IN CHAPTER 39. I AM NOT QUITE SURE. HOWEVER, I THINK THAT THE A CTUAL PRESENCE OF THE DEFENDANT AT THE DEPOSITION IS NOT ALW AYS NECESSARY. I T HINK THAT U.S. SUPREME COURT CASE LAW WHICH HAS NOT BEEN CHAN GED SINCE CRAWFORD , I WOULD AG REE THAT THE CONFRONTATION RIGHT IS NOW EVOLVING IN CRAWFORD , WE DO HAVE MARY LAND V CRAI G AND THAT PROGENY WHICH HAS NOT BEEN OVER RULED , WHICH TALKS ABOUT THE FACT THAT THERE ARE IMPORTANT PUBLIC INTERESTS THAT ARE COMPETING WITH THESE RIGH TS, AND IDON'T THINK THAT THAT HAS BEEN UNDERMINED AT THIS POINT.I THINK THAT IS KEY IN THESE CHILD VICTIM CASES , ESPECIALLY IN THIS CASE AS EXAMPLE. THIS WAS A DEFENSE-SET VI DEO DEPOSITION, AND THE RECORD WILL REF LECT THAT THE DEFENSE SET THIS DEPOSITION TO PRESERVE THE RIGHT TO CROSS-EXAMINE, AND WE WOULD ASK THAT THIS COURT WOULD FIND THAT THE DEPOSITION WOULD APPLY AND WE WOULD ALSO ASK THAT THIS COURT NOT COME DOWN WITH A PER SE RULE THAT ALL CHAPTER 39 INTERVIEWS ARE GOING TO BE TESTIMONY. THANK YOU.

JUSTICE: YOUR OPPO NENT WAS TALKING ABOUT WHAT WAS GOING TO HA PPEN IF THE FOURTH DIS TRICT PO SITION WAS APPROVED , AS FAR AS REVERSAL . I TAKE I T , IT WOULD GO UNDER THE FOURTH DISTRICT'S OPINION , IT GOES BACK FOR A NEW TRIAL.

YES .

JUSTICE: AND THERE HAPPENED TO BE A NEW DETERMINATION AS TO PRESENT AVAILABILITY.

YES , THERE WOULD .

CHIEF JUSTICE: THANK YOUVERY MUCH. THE COURT WILL TAKE ALL OF THESE MATTERS UNDER ADVISEMENT AND ALSO ANY , YOUR SUPPLEMENTING AUTHORITY, WE TRY TO KEEP TRACK OF IT, BUT KEEP IT COMING IF YOU W OULD LIKE. THANK YOU .

MARSHAL: PLE ASE RISE .

CHIEF JUSTICE: THE COURT WILL BE IN REC ESS UN TIL 8:30 TOMORROW MORNING.