Mark Anthony Poole v. State of Florida

SC05-1770

GOOD AFTERNOON.
GOOD MORNING.
COURT IS BACK IN SESSION
PLEASE BE SEATED.
THE FINAL CASE ON OUR
DOCKET THIS MORNING, IS
POOLE VERSUS STATE OF
FLORIDA, MR. HELM.
MAY IT PLEASE THE COURT,
MY NAME IS PAUL HELM, AND I
REPRESENT THE APPELLANT,
MARC ANTHONY POOLE,
MR. POOLE WAS CONVICTED
EXTENDSED TO DAET FOR MURDER
OF ONE NOAH SCOTT FOR
ATTEMPTED MURDER AND RAPE
BURGLARY ROBBERY OF LORETTA
WHITE MR. SCOTT'S
GIRLFRIEND.
THE FIRST ISSUE IN THIS
CASE, CONCERNS THE
PROSECUTOR'S CLOSE REGULAR
BUTTAL PHASE IN GUILTY OR
INNOCENCE PHASE OF THE
TRIAL.
THE STATE'S CASE AGAINST
MR. POOLE WAS LARGELY
CIRCUMSTANTIAL.
AND DEFENSE COUNSEL.
WHAT DO YOU MAINTAIN I
MEAN CIRCUMSTANCE YOU MEAN
THAT YOU -- SIESHG
CIRCUMSTANTIAL YOU HAD DNA
EVIDENCE ALL BLOOD EVIDENCE
ON TIRE IRONS, ON CONDOMS
THINGS LIKE THAT, ALL OF
WHICH.
CIRCUMSTANTIAL EVIDENCE.
WELL I MEAN, WE MAY TALK
ABOUT THAT -- IF EVERYTHING
OTHER THAN EYEWITNESS IS
CIRCUMSTANTIAL THEN OKAY I
CAN BUY THAT BUT THIS --
THIS IS ENORMOUS AMOUNT OF
EVIDENCE.

--
YOUR HONOR -- WE'RE
GETTING OFF TRACK HERE.
WELL --
YOU STARTED THIS BY GOING
DOWN THAT PATH -- RIGHT TO
ARGUMENTS ARE WE IN FLORIDA
LAW FOR EXAMPLE TO THE POINT
THAT ONE GETS UP ON THE
STAND, AND THINK PAINTS
PICTURE OF A PERSON THAT YOU
MAY BE RIGHT YOU PROBABLY
ARE RIGHT, THAT THEY PAINT
THE PICTURE OF THE SAINT.
I MEAN, ABSOLUTE SAINT, AND
YOU CAN IMPEACH ABOUT
EVERYTHING EXCEPT YOU CAN'T
IMPEACH WITH PRIOR CRIMINAL
CONDUCT THAT IS PRETTY MUCH
THE LAW; RIGHT?
UH --
UNDER THESE
CIRCUMSTANCES.
PRETTY MUCH.
I MEAN THAT IS REALLY
WHERE WE ARE SO YOU REALLY
GOT -- YOU GOT -- IN THE
VERNACULAR INTO THIS ONE,
BECAUSE AND THAT -- ALSO
WITH REGARD TO WHAT WAS
GOING ON, WITH THE EVIDENCE,
IF TWO PEOPLE ON THE STAND
THEN THEY DEFENSE ATTORNEY
STANDS UP AND SAYS YOU KNOW,
GOES INTO AN ARGUMENT ABOUT
THE GUY BEING IN THERE ALL
THAT YOU DID ALL THESE OTHER
THINGS BUT IT WAS OTHER
FOLKS THAT DID IT IS, I MEAN
-- THAT IS THE POINT.
IN RESPONSE TO THE D
DEFENSE COUNSEL'S EARTH
DEFENSE COUNSEL BEGAN HIS
ARGUMENT SAYING THAT
MR. POOLE ACKNOWLEDGED THAT
HE WAS GUILTY OF EVERYTHING
EXCEPT THE FIRST-DEGREE
MURDER AND TEEMENTD
FIRST-DEGREE MURDER.
LET'S GO TO -- FIRST
ISSUE GUILT PHASE, SECONDED
ISSUE JUSTICE WAS RESERVING
TO HAD TO DO WITH THE
PENALTY FACED, IMPEACHMENT;

CORRECT?
YES.
ALL RIGHT, THE DEFENSE
LAWYER GETS UP SAYS HE
ACKNOWLEDGED HE DID THESE
THINGS, AND BUT HE DIDN'T
MURDER THE -- THE VICTIM.
WHERE DID THAT COME FROM?
AS I TRIED TO EXPLAIN IN
MY BRIEF I BELIEVE THAT IT
WAS SIMPLY RHETORICAL DEVICE
ON THE PART OF THE DEFENSE
COUNSEL HE WAS SAYING --
DIDN'T HE SPEAK TO THE --
AS COUNSEL I'M TELLING
YOU THAT MY CLIENT USED --
IS GUILT OF THREE OF THESE
FIVE CRIMES BUT HE IS NOT
GUILTY OF THE FIRST TWO, AND
THEN HE WENT INTO A LENGTHY
ARGUMENT THAT WAS BASED
EVERY -- HIS ARGUMENT WAS
BASED ON THE FACTS THAT THE
STATE HAD PRESENTLIED.
DIDN'T THE DEFENSE SPEAK
TO THE POLICE?
THERE -- THERE IS NO
RECORD OF ANY STATEMENT BY
MR. POOLE REGARDING THE
CRIME TO THE POLICE.
MR. POOLE WAS
INTERINTROOID THE POLICE, WE
KNOW THAT WE KNOW.
SO HE DID SPEAK TO THE
POLICE HE WAS INTERVIEWED.
IS TALKING TO THE POLICE

ANYTIME HE EVER ACKNOWLEDGED HE
DID ANYTHING.
THAT'S NOT --
THAT IS --
IN REBUTTAL TO WHAT THE
PROSECUTOR -- WHAT THE DEFENSE
LAWYER SAID, WHICH WAS THAT
HE'S ACKNOWLEDGED HE DID THREE
OF THE CRIMES BUT HE DIDN'T DO
THE REST.
I DON'T, YOU KNOW, AND I'M
PRETTY SENSITIVE TO THESE
COMMENTS ON THE RIGHT TO REMAIN
SILENT.
I DON'T SEE THIS ONE.
YOUR HONOR, THAT'S ONLY THE
FIRST COMMENT.

ALL RIGHT.
BUT LET'S -- WELL, BUT YOU --
THERE ARE A TOTAL --
THAT WAS --
THE FIRST COMMENT WAS NOT OBJECTED TO.
SO DO YOU AGREE THAT WAS A FAIR COMMENT?
NO, I DON'T AGREE THAT IT WAS FAIR COMMENT, BUT --
WELL, WHY NOT?
BUT, THAT COMMENT STANDING ALONE, THE INTRODUCTORY COMMENT COULD'VE BEEN CONSIDERED HARMLESS ERROR.
NO, I WANT TO KNOW WHY IT'S ERROR AT ALL.
WE'VE GOT TO BE VERY CLEAR.
ANY COMMENT WHICH IS FAIRLY SUSCEPTIBLE OF BEING INTERPRETED BY THE JURY AS BEING A COMMENT ON THE DEFENDANT'S SILENCE, EITHER AT TRIAL OR AT THE TIME OF HIS ARREST.
BUT HE GIVE A CONFESSION,
AND HE HAD ACKNOWLEDGED THREE THINGS.
THEN YOU -- THAT WOULD BE FAIR TO TALK ABOUT WHAT HE SAID IN THE CONFESSION, CORRECT?
OF COURSE.
BUT NOW OUT OF WHOLE CLOTH, THE DEFENSE LAWYER SAYS WELL, HE HAS ACKNOWLEDGED IT.
HE DOESN'T SAY YOU CAN FIND HIM GUILTY OF THESE THREE CRIMES.
HE SAID HE'S ACKNOWLEDGED IT.
ISN'T THAT WHAT THE DEFENSE LAWYER SAID?
, YES, MA'AM, HE DID, AND THAT WAS A VERY POOR CHOICE OF WORDS.
I WOULDN'T HAVE OPENED MY CLOSING ARGUMENT LIKE THAT.
I DON'T KNOW THE TRIAL ATTORNEY DID IT.
BUT HE DID.
AND IF YOU -- I, IF THE PROSECUTOR HAD LIMITED HIS RESPONSE TO JUST AS THE, THE DEFENSE ATTORNEY MADE ONE STATEMENT THAT HE ACKNOWLEDGES THAT HE'S GUILTY OF THESE THREE

FELONIES BUT NOT THE TWO MOST
SERIOUS ONES, IF THE PROSECUTOR
HAD MADE JUST THE FIRST
STATEMENT TO WHICH DEFENSE
COUNSEL DID NOT OBJECT, THE,
THE, THE DEFENSE ARGUMENT CAME
FROM FANTASY LAND AND THERE WAS
NO EVIDENCE IN THE CASE THAT AT
ANY TIME EITHER IN THIS TRIAL
OR ANYWHERE ELSE MR.^POOLE EVER
ACKNOWLEDGED HE DID ANYTHING.
NOW THAT IS CLEARLY A COMMENT
ON MR.^POOLE'S SILENCE, BOTH
HUSBAND FAILURE TO TESTIFY AT
TRIAL AND HIS SILENCE AT THE
TIME OF HIS --
YOU GO BACK AND FORTH ON
THIS BUT YOU SAID THERE'S
ANOTHER COMMENT THAT YOU'RE
GOING TO SAY IS REALLY --
WELL, THE POINT IS, DEFENSE
COUNSEL DIDN'T OBJECT THEN AND
THE PROSECUTOR DROPPED IT AND
WENT ON FOR SEVERAL PAGES OF
ARGUMENT AND THEN HE RETURNED
TO THE SUBJECT.
STARTING AT TRANSCRIPT PAGE
2840 AND CONTINUING TO 2841.
THE PROSECUTOR MADE
APPROXIMATELY FOUR REPEATED
ASSERTIONS THAT THERE WAS NO
EVIDENCE TO WHAT MR.^POOLE
SAID.
LET ME ASK YOU A QUESTION.
PRIOR TO CAN ANY OF THE
ATTORNEYS GETTING UP AND MAKING
THEIR CLOSING ARGUMENTS, THE
JUDGE INSTRUCTS THE JURIES THAT
WHAT THE ATTORNEYS SAY IS NOT
EVIDENCE.
ABSOLUTELY.
CORRECT?
AND SO, I HAVE A TROUBLE -- I
HAVE PROBLEMS WITH THE LAST
COMMENT.
AND AS FAR AS THE OTHER ONE
IT SEEMS THAT WHAT THE STATE
ATTORNEY IS ARGUING HE SAYS
THAT'S ARGUMENT.
-- INSTRUCTION ON THE LAW AS
THE JUDGE GIVES IT AND WHAT THE
ATTORNEYS SAY IS NOT ARGUMENT.
IT'S JUST -- JUSTICE PARIENTE
WAS SAYING WHAT WE HAVE HERE IS

NOT A FACT CONCEDED IN OPENING STATEMENT.
NOT A FACT CONCEDED DURING THE PRESENTATION OF EVIDENCE IN THE CASE.
BUT AN ARGUMENT PRESENTED AND A FACT SUBMITTED, QUOTE, UNQUOTE.
FROM THERE, HE WENT ON WITH A VERY LENGTHY CLOSING ARGUMENT, UTILIZING THE STATE'S OWN EVIDENCE IN WHICH HE TOLD THE JURY A, A DIFFERENT -- JURY A DIFFERENT VERSION OF HOW THINGS MAY HAVE HAPPENED AND ONE OF THE THINGS HE RELIED UPON WAS TWO STATEMENTS BY THE SURVIVING VICTIM THAT THERE WERE TWO BLACK MEN WHO BROKE INTO HER TRAILER THAT NIGHT AND COMMITTED THESE CRIMES, AND THE PROSECUTOR SAYS, MR.^-- IS ARGUING ALL THESE THINGS BUT THERE IS NO EVIDENCE MR.^POOLE EVER SAID, HEY, EVERYBODY ELSE WAS THERE BEFORE ME AND THERE WAS NO EVIDENCE MR.^POOLE EVER SAID WELL I WENT IN THERE AND RAPED HER AND LEFT HER AND SOMEBODY ELSE CAME IN AND BEAT THEIR HEADS IN.
THERE'S NO EVIDENCE OF THAT EITHER.
THAT'S ARGUMENT BUT WHEN YOU LOOK AT WHAT THE TESTIMONY IS AND WHAT THE PHYSICAL EVIDENCE IS AND WHAT THE PHOTOGRAPHS ARE, THERE IS NO EVIDENCE TO SUPPORT THAT THEORY.
IN THE FIRST PLACE WHAT HE IS SAYING IS UNTRUE BECAUSE THERE'S PLENTY OF EVIDENCE TO SUPPORT MR.^DIVING'S THEORY.
HIS THEORY WAS BASED ON THE STATE'S OWN EVIDENCE.
THEN THE PROSECUTOR CONCLUDES THIS PASSAGE BY SAYING AND IF MR.^POOLE WANTS TO TELL THE STATE DETECTIVE GRISE THAT SOMEBODY ELSE HELPED HIM COMMIT THIS CRIME THEN LET HIM COME FORWARD.
WE KNOW, SO THAT'S IMPROPER.
LET'S -- I WOULD THINK

MR.^BROWNE IS GOING TO GET UP
AND HE WEPT TOO FAR THERE.
I DON'T KNOW BUT USUALLY.
LET'S ASSUME THAT'S IMPROPER
BECAUSE HE CAN'T SAY THAT HE
HAS TO COME FORWARD WITH
EVIDENCE.
BY GOING BACK TO THIS CASE IT
IS NOT HARMLESS BEYOND A
REASONABLE DOUBT?
BECAUSE THE PROSECUTOR WAS
URGING THE JURY TO DISREGARD
MR.^POOLE'S RIGHT TO SILENCE IN
ORDER TO GET THE JURY TO
COMPLETELY DISREGARD HIS ENTIRE
DEFENSE.
HIS ENTIRE DEFENSE WAS BASE
UPON THE THEORY BASED UPON THE
SURVIVING WITNESSES' OWN
STATEMENTS THAT THERE WITH TWO
PEOPLE IN HER TRAILER.
BUT UNDER --
-- HER THEORY WAS THERE
ANOTHER PERSON WHO HAD A MOTIVE
AND OPPORTUNITY TO COMMIT THE
ACTUAL MURDER.
IN DETERMINING WHETHER THERE
WAS HARMLESS IRERROR, DON'T WE
HAVE TO LOOK AT ALL THE
CIRCUMSTANCES AND ALL THE
EVIDENCE PRESENTED, INCLUDING
THE DNA EVIDENCE THAT WAS
PRESENTED AND INCLUDING THE
FOOTPRINTS THAT WERE FOUND?
YOUR HONOR, YES YOU HAVE TO
LOOK AT ALL THE EVIDENCE AND I
MIGHT ADD IN THE STATE v.
HAWKINS, THE STATE RULED THAT
IN PART OF DETERMINING THE
ENTIRE RECORD IN DETERMINING
WHETHER ERROR IS HARMLESS IS TO
CONSIDER OTHER IMPROPER CONDUCT
OR STATEMENTS THAT WERE NOT
OBJECTED TO, WHICH MEANS THAT
EVEN IF YOU FOCUS SOLEY ON THE
FINAL STATEMENT AS BEING THE
ONLY ONE OBJECTED TO, YOU STILL
HAVE TO CONSIDER THE
PROSECUTOR'S OTHER STATEMENTS
ABOUT MR.^POOLE'S SILENCE IN
DETERMINING WHETHER THE ERROR
IN CHALLENGING MR.^POOLE TO GET
UP AND TELL HIM WHO DID IT.
AND DECIDING WHETHER THAT'S

HARMLESS, AND.
LET ME ASK YOU.
-- CREATED A THEME HERE OVER TWO PAGES WHERE HE IS ASKING THE JURY TO DISREGARD MR.^POOLE'S RIGHT TO REMAIN SILENT.
AND THAT, THAT'S SO ABSOLUTELY IMPROPER.
LET ME ASK YOU A QUESTION.
HERE, DEFENSE COUNSEL OBJECTED, MOVED FOR A MISTRIAL.
THE TRIAL JUDGE NEVER REALLY RULED ON THE OBJECTION BUT DENIED THE MOTION FOR MISTRIAL, CORRECT?
YES, YOUR HONOR.
SO WHAT STANDARD DO WE APPLY?
ABUSIVE DISCRETION.
OKAY.
AND THE POINT IS THOUGH THAT COMMENT ON SILENCE ARE REGARDED AS BEING SO SUSPECT THAT THE ORDINARY REACTION TO A COMMENT ON SILENCE, THE ORDINARY REACTION TO THE PROSECUTOR VIOLATING THE CONSTITUTION THAT HE'S SWORN TO UPHOLD IS TO REVERSE.
AND IT'S ONLY IN THOSE FEW CASES WHERE THE STATE CAN CONCLUSIVELY SHOW THAT THE ERROR IS HARMLESS BEYOND ANY DOUBT AND COULD NOT HAVE POSSIBLY AFFECTED THE VERDICT.
WELL, IF WE, MR.^HELMS, IF WE DECIDE THAT THOSE ORIGINAL ARGUMENTS, THE FIRST COUPLE OF ARGUMENTS THAT STATEMENTS THAT WERE MADE BY THE PROSECUTOR ARE NOT ERROR BECAUSE DEFENSE COUNSEL DID IN FACT STAND UP AND SAY HE ACKNOWLEDGES AND IF WE FIND THAT IT WAS A FAIR COMMENT OR RESPONSE TO THAT, LET'S SAY, THERE'S NOTHING IN THIS RECORD THAT SAYS HE EVER ACKNOWLEDGES THAT HE DID THE RAPE, THAT HE DID THE BURGLARY, THAT HE DID THE ROBBERY.
JUST LISTEN TO THE QUESTION.
[LAUGHTER]
I AM.

OKAY.
SO IF WE SAY THOSE COMMENTS WERE FAIR COMMENTS ON, IN RESPONSE IN RESPONSE TO THE DEFENSE ARGUMENT AND THAT ONLY THE LAST COMMENT IS IN FACT AN IMPROPER COMMENT THEN WHERE DOES THAT TAKE YOU WITH THE COMMENT ON THIS ERROR ANALYSIS?
THEN WE WOULD NOT HAVE TO CONSIDER THOSE OTHER COMMENTS BECAUSE WE ARE SAYING THEY ARE FINE, THEY WERE FAIR COMMENTS, SO IF WE LEFT WITH JUST THAT ONE COMMENT AT THE END, THAT SAYS SOMEONE HELPED HIM COMMIT THIS CRIME AND HE SHOULD COME FORWARD BECAUSE, AND THEN THE OBJECTION.
SO IF THAT'S JUST THAT COMMENT, WHERE ARE WE?
IN A BORDERLINE SITUATION WHERE YOU HAVE TO USE YOUR DISCRETION IN EXAMINING THE CASE TO DETERMINE WHETHER THAT COULD'VE BEEN HARMLESS OR NOT.
BUT I WOULD LIKE TO POINT OUT THAT IT WAS THE ONLY VERY FIRST COMMENT HE MADE WHERE THE PROSECUTOR SAID THERE IS NO EVIDENCE THAT MR.^POOLE ACKNOWLEDGED ANYTHING.
IN THE TWO PAGES LEADING UP TO LETTING MR.^POOLE COME FORWARD, THE PROSECUTOR WAS SAYING THERE WAS NO -- THERE WAS NO EVIDENCE THAT ANOTHER MAN WAS INVOLVED.
THAT'S NOT OO THREW STATEMENT.
THERE WAS EVIDENCE.
-- THAT'S NOT TRUE STATEMENT.
THAT'S MISSTATED AS OPPOSED TO MISSTATING FACTS IN THE CASE.
PLEASE YOU HAVE GOT TO LET THIS BE A DIALOGUE HERE, OKAY?
I KNOW YOU FEEL PASSIONATELY.
YOU'RE A EXPERIENCED LAWYER, AN EXCELLENT LAWYER BUT WE HAVE GOT TO GET TO THE BOTTOM OF THIS.
THIS IS MY CONCERN, IF A DEFENSE LAWYER GETS UP AND SAYS MY CLIENT SAYS THAT THIS WAS

SELF-DEFENSE, WHICH IS
SOMETHING THEY HAVE TO
ESTABLISH, WELL THEN AT THAT
TIME POINT, YOU CAN SAY WELL
THERE IS NO EVIDENCE IN THIS
RECORD OF SELF-DEFENSE.
IF IT'S, IF, IF THE DEFENSE
LAWYER GOT UP AND SAID MY
CLIENT ACKNOWLEDGED HE MADE --
COMMITTED THE MURDER BUT HE DID
IT IN SELF-DEFENSE, THE,
PROSECUTOR CAN GET UP AND SAY
THERE IS NO EVIDENCE THAT HE
ACKNOWLEDGED IT.
THAT'S DIFFERENT THAN PUTTING
THE STATE TO ITS BURDEN OF
PROOF, WHICH IS THAT THE
MURDERER, IT MAY HAVE BEEN
SOMEONE ELSE IN THAT PLACE WITH
MR.^POOLE BUT THE MURDERER WAS
MR.^POOLE.
SO I AM GOING BACK TO --
BECAUSE I THINK YOU ARE -- YOU
MAKE A COMPELLING POINT THAT IF
WE DO LOOK AT THIS IN ANOTHER
LIGHT WITH REGARD TO -- WITHOUT
REGARD TO WHAT THE DEFENSE
LAWYER SAID WHICH WAS HIS THEME
WAS TO DISREGARD HIS RIGHT TO
REMAIN SILENT, THEN OF COURSE
WE ARE INTO A HIGH-RISK
CONSTITUTIONAL ERROR BUT I FEEL
LIKE YOU HAVE GOT TO ADDRESS
THE FACT, AND I DON'T KNOW THAT
YOU'VE ADEQUATELY DONE IT, THAT
UP UNTIL THE LAST POINT THAT IS
IF MR.^POOLE WANTS TO TELL THE
STATE SOMEONE ELSE HELPED HIM
COMMIT THE CRIME AND INFORWARD
A LIGHT WENT ON FOR THE DEFENSE
LAWYER WHO OBJECTS BUT LEADING
UP TO IT, I DON'T SEE IT AS A
THEME TO DISREGARD HIS RIGHT TO
REMAIN SILENT.
THE THEME SEEMS TO BE OF THE
DEFENSE ATTORNEY'S MAKING BY
SAYING THAT HE ACKNOWLEDGED
THAT HE COMMITTED CERTAIN
CRIMES BUT NOT OTHERS, WHICH IS
DIFFERENT THAN SAYING THERE IS
NO EVIDENCE THAT THIS CRIME WAS
COMMITTED BY TWO MEN.
MR.^POOLE MAY HAVE BEEN ONE OF
THEM, BUT HE WASN'T THE OTHER.

DO YOU NOT SEEING THAT AS BEING
DIFFERENT IN KIND AND THEREFORE
PROMPTING WHAT IS REALLY A
PROPER RESPONSE TO THAT
ARGUMENT BY THE DEFENSE LAWYER?
YOUR HONOR, I MIGHT AGREE
WITH YOU REGARDING THE
PROSECUTOR'S OPENING STATEMENT
WHERE, WHERE HE FIRST SAID THAT
THERE'S NO EVIDENCE THAT
MR.^POOLE ACKNOWLEDGED.
THAT BUT AS HE PROGRESSED IN
HIS ARGUMENT, HE WAS ATTACKING
THE DEFENSE ARGUMENT ON THE
BASIS THAT THERE WAS NO
EVIDENCE TO SUPPORT A DEFENSE
ARGUMENT THAT WAS BASED ON A
DIRECTLY UPON THE EVIDENCE THAT
HAD BEEN PRESENTED --
NOW LET ME ASK --
AND IN THE PROCESS --
OKAY.
HE KEPT REFERING TO
MR.^POOLE'S FAILURE TO SAY
THINGS.
NOW MAYBE THE KEY IS
THIS:^WHEN HE CONTINUES, HE
SAYS, MR.^POOLE TALKED TO THE
POLICE, WHICH IS WHAT JUSTICE
CANTERO ASKED YOU ABOUT
EARLIER.
DID HE TALK TO THE POLICE?
WELL, WE, WE KNOW THAT HE
WAS TAKEN TO THE POLICE STATION
AND QUESTIONED.
DID HE INVOKE HIS RIGHT TO
REMAIN SILENT.
THE DAY FOLLOWING THE
MURDER.
DID HE INVOKE HIS RIGHT TO
REMAIN SILENT.
WE DON'T KNOW.
BECAUSE THEN THAT WOULD BE,
IF HE'S TALKED TO THE POLICE
AND HE INVOKES HIS RIGHT TO
REMAIN SILENT, NOW YOU START TO
GET INTO SOME SERIOUS QUESTION
ABOUT SAYING WELL HE TALKED TO
THE POLICE.
THE IMPLICATION IS, AND THEN HE
DIDN'T TELL THEM THIS VERSION.
THAT I WOULD AGREE WITH YOU IF
THAT'S WHAT HAPPENED THAT HE
NEVER TALKED TO ANYTHING BUT HE

INVOKED HIS RIGHT -- YOU ARE
SAYING WE DON'T KNOW THAT IN
THIS RECORD.
WE DON'T KNOW THAT IN THE
RECORD, BECAUSE -- THE, I WOULD
PRESUME IF ANYTHING THAT THE AT
THE VERY LEAST, MR.^POOLE DID
NOT TELL THE POLICE THE FIRST
DAY HE WAS INTERVIEWED ANYTHING
THAT WAS DIRECTLY INCRIMINATED
OR THIS PROSECUTOR WOULD'VE HAD
THAT EVIDENCE BEFORE THE JURY.
HE PRESENTED THE ONLY EVIDENCE
--
BUT ARE YOU SAYING --
-- THAT WAS PRESENTED TO THE
JURY ABOUT THAT INITIAL
CONFRONTATION BETWEEN THE
POLICE AND MR.^POOLE WITH
MR.^POOLE CONSENTED TO A SEARCH
OF HIS RESIDENCE.
HE WENT TO THE RESIDENCE WITH
POLICE.
AND HE ALLOWED THEM TO TAKE A
SHIRT AND A PAIR OF SHOES.
MR.^HELM, YOU'RE RAPIDLY
RUNNING OF OUR YOUR TIME AND I
KNOW YOU HAD ANOTHER ISSUE
REGARDING CROSS-EXAMINATION OF
DEFENSE WITNESSES.
I WOULD LIKE TO HEAR YOUR
ARGUMENT ON THAT.
YES, YOUR HONOR.
REGARDING THE
CROSS-EXAMINATION OF DEFENSE
WITNESSES.
THE FIRST INSTANCE -- THERE ARE
THERE WERE THREE INSTANCE --
THE FIRST THREE THINGS THE
PROSECUTOR DID IN CROSS
EXAMINATION OR MAYBE NOT THE
MOST IMPORTANT.
I'M SORRY.
I'M GETTING MYSELF TURNED
AROUND.
WELL, THEN LET ME JUST ASK
YOU QUESTION ABOUT IT.
CAN YOU ADDRESS THE
CROSS-EXAMINATION I THINK IT
WAS AFTER POOLE'S BROTHER
TESTIFIED, AND HE SAID THAT
POOLE WAS A KIND, LOVING PERSON
THAT TO BE HERE TODAY WOULD
NOBODY FROM LOUISIANA AREA

BELIEVE THIS, THAT HE'S HERE IN THIS SITUATION.
AND THE PROSECUTOR ON CROSS-EXAMINATION ASKED HIM IF YOU'RE THAT CLOSE TO YOUR BROTHER, DO YOU KNOW IF THIS WAS THE FIRST TIME HE EVER GOT ARRESTED WHEN HE GOT ARRESTED FOR THIS CRIME.
NO?
YOU DON'T KNOW?
NO IT'S NOT THE FIRST TIME HE GOT ARRESTED.
HE GOT ARRESTED IN GEORGIA, SOUTH CAROLINA, TEXAS, IS WHAT THE PROSECUTOR SAID.
YOU ARE ARGUING THAT THAT IS IMPROPER CROSS-EXAMINATION?
WELL.
AND A VIOLATION OF THEIR PRETRIAL AGREEMENT THAT THEY -- THERE WAS A MOTION IN LIMINY TO EXCLUDE ANY EVIDENCE OF MR.^POOLE'S PRIOR CRIMINAL RECORD.
THE DEFENSE WAIVED NO SIGNIFICANT PRIOR RECORD AS A MITIGATING CIRCUMSTANCE.
THE PROSECUTOR ASKED MR.^POOLE'S BROTHER IF HE HAD BEEN ARRESTED BEFORE.
MR.^POOLE'S BROTHER SAID YES.
THAT HE SAID OR NO THAT IT WASN'T THE FIRST TIME.
RIGHT.
AND THE PROSECUTOR ASSERTS THAT HE WAS ARRESTED IN THREE DIFFERENT STATES.
ALL RIGHT.
SO LET'S TAKE THAT STEP BY STEP.
ARE YOU CONCEDING THEN THAT BECAUSE POOLE'S BROTHER GOT TO TESTIFY THAT POOLE WAS A KIND, LOVING PERSON THAT ESSENTIALLY PEOPLE WERE SURPRISED THAT HE WAS IN THIS SITUATION THET THE FIRST QUESTION DO YOU KNOW IF THIS WAS THE FIRST TIME HE EVER GOT ARRESTED AND THE FIRST ANSWER NO, IT'S NOT THE FIRST TIME.
THAT WOULD'VE BEEN OKAY CROSS-EXAMINATION.

NO, SIR.
VIOLATION OF THE COURT'S --
ALL RIGHT.
GRANTING THE MOTION IN
LIMINY.
WELL THEN I GUESS WE ARE
COMING BACK IN FULL CIRCLE TO
THE CHIEF JUSTICE'S FIRST
QUESTION THAT IF THERE IS
TESTIMONY THAT THE DEFENSE
PRESENTS THAT HE WAS A KIND,
LOVING PERSON, THAT WE ARE WE
WERE ALL SURPRISED THAT HE IS
IN THIS SITUATION, WE ARE ALL
SHOCKED, THAT REGARDLESS OF
WHAT THE DEFENSE PRESENTS
BECAUSE THE STATE AGREED NOT TO
PRESENT EVIDENCE OF THE PRIOR
ARREST, THAT NOW THE PART --
THE DEFENSE CAN SAY ANYTHING
AND THE PROSECUTOR CAN'T SAYING
ON CROSS-EXAMINATION AND
IMPEACH THAT TESTIMONY WITH
THAT EVIDENCE.
THIS WAW NOT VALID
IMPEACHMENT.
IN GERALDS v. STATE, THIS
COURT HAS SAID THAT IN A
CAPITAL CASE PENALTY PHASE
PROCEEDING YOU CAN'T IMPEACH
DEFENSE WITNESSES BY ASKING
QUESTIONS ABOUT NONSTATUTORY
AGGRAVATION IN SPECIFICALLY
NONVIOLENT PRIOR CRIMINAL
OFFENSES.
WELL, PLUS, I DON'T KNOW ANY
THING WHERE YOU CAN IMPEACH
WITH ARRESTS HE DIDN'T JUST SAY
YOU KNOW HE'S CONVICTED.
HE WAS ARRESTED WELL WHAT DOES
THAT SAY -- I DON'T KNOW IF YOU
WERE MAKING A DISTINCTION
BETWEEN THE FACT THAT SOMEONE'S
BEEN ARRESTED.
WELL, AND THAT'S TO ME, I
MEAN, EVEN IN A REGULAR
CRIMINAL CASE YOU CAN'T UNDER
ANY CIRCUMSTANCE IMPEACH WITH
ARREST.
RIGHT.
OF COURSE.
BUT IT WAS IMPROPER IMPEACHMENT
IN ITS ENTIRETY.
BUT IT'S SPECIFIC.

IT'S PARTICULARLY EGREGIOUS HERE BECAUSE THE PROSECUTOR HIMSELF HAD AGREED NOT TO GO INTO THIS.
SO THE PROPER PROCEDURE HERE WOULD'VE BEEN FOR THE STATE ATTORNEY TO SAY, YOUR HONOR, CAN WE TAKE A BREAK AND HAVE A SIDE BAR AND ASK THE JUDGE GIVEN THE FACT OF THE AGREEMENT ON THE MOTION IN LIMINY.
WHAT THE STATE SHOULD'VE DONE IS SAID YOUR HONOR, I THINK THE DEFENSE HAS OPENED THE DOOR, INQUIRED OF THE TRIAL JUDGE I WOULD LIKE TO GO INIT THIS AND HANDLE THAT OUTSIDE THE PRESENCE OF THE JURY?
STEAD OF GET GETTING INTO WHAT JUSTICE PARIENTE SAID IS CLEARLY IMPROPER IMPEACHMENT.
THAT CERTAINLY WOULD'VE BEEN FAR BETTER PROCEDURE ON HIS PART BECAUSE THE WAY IT ACTUALLY HAPPENED, HE WAS IN CLEAR VIOLATION OF THE COURT'S PRETRIAL ORDER.
THAT HE HAD AGREE TO.
AND YES, IF HE FEELS -- IF HE FELT THAT THE CIRCUMSTANCES THEN CHANGED BECAUSE OF THE INFORMATION ELICITED FROM THE WITNESS BY THE DEFENSE THEN HE SHOULD'VE ASKED THE COURT TO REVISIT ITS RULING RATHER THAN TAKING IT UPON HIMSELF TO VIOLATE --
YOU ARE WELL INTO YOUR REBUTTAL IF YOU WANT TO SAVE TIME.
I'M JUST ALERTING YOU TO WHERE YOU ARE IN TIME.
WELL, DOES THE COURT HAVE ANY OTHER QUESTION THEY WOULD LIKE TO ADDRESS RIGHT NOW.
JUSTICE QUINCE PROBABLY DOES.
I WOULD REALLY LIKE YOU TO ADDRESS THE ISSUE OF THE LACK OF REMORSE.
BECAUSE AS I READ THIS RECORD, THERE REALLY WAS NO-NO OBJECTION TO THE STATE'S EXAMINATION OF THE WITNESSES ON

THAT PARTICULAR ISSUE THAT YOU HAVE RAISED AND SO HOW ARE WE TO DEAL WITH THE FACT THAT THERE WAS NO CONTEMPORANEOUS OBJECTION HERE?
YOUR HONOR, THEN AFTER THE THIRD INCIDENT IMMEDIATELY AFTER THE THIRD INCIDENT WHERE THE COURT ASKED ABOUT REMORSE THE COURT TOOK A 20-MINUTE RECESS AND IMMEDIATELY FOLLOWING THE 20-MINUTE RECESS DEFENSE COUNSEL DID OBJECT.
AND SAID WHAT, EXACTLY?
AND SAID THAT, THAT HE TOLD THE COURT THAT HE WAS CONCERNED BECAUSE THE PROSECUTOR KEPT ASKING ABOUT LACK OF REMORSE, AND IT WASN'T PROPER.
BUT, BUT HE --
ISN'T THAT AN OBJECTION?
THE QUESTION IS, WAS IT REALLY AN OBJECTION THAT HE WAS MAKING?
IT SEEMS TO ME THAT HE NEVER REALLY GOT TO THAT POINT.
YOUR HONOR, DOES THE DEFENSE ATTORNEY HAVE TO USE THE EXPRESS LANGUAGE.
WELL, I THINK HE HAS TO SAY SOMETHING.
-- TO OBJECTION?
WHAT DID HE ASK THE COURT TO DO IN RESPONSE TO HIS CONCERN?
I MEAN, DID HE ASK THE COURT TO GIVE AN INSTRUCTION?
DID HE ASK THE COURT FOR A MISTRIAL?
I MEAN, HE EXPRESSES HIS CONCERN AND THEN WHAT DOES HE ASK THE COURT TO DO?
QUITE FRANKL, IT SLIPS MY MIND.
IF YOU COULD TAKE JUST A SECOND, I CAN FIND IT.
MY CONCERN IS HOW DO WE RESPOND IF HE DOESN'T ACTUALLY ASK THE COURT TO CORRECT IT.
I THOUGHT IT WAS SOMETHING MORE TO THE EFFECT OF THE PROSECUTOR SAYS WELL I WON'T GO INTO THAT ANYMORE.
WELL, THE PROSECUTOR DID SAY THAT BUT THE PROSECUTOR WAS

ALSO SAYING THAT HE WAS
ENTITLED TO ANTICIPATORY
REHABILITATION, THAT HE WAS,
THE DEFENSE HAD ASKED NOTHING
WHATSOEVER ABOUT REMORSE FOR
THE CRIMES.
AND THE PROSECUTOR IMPROPER
RAISED THE SUBJECT OF RE MORSE
FOR THE CRIMES WHICH HE'S NEVER
SUPPOSED TO DO UNLESS THE
DEFENSE PUTS ON DEFENSE THAT HE
IS REMORSEMENT SO IT WAS
ALREADY IN VIOLATION OF THE LAW
JUST BY ASKING THE QUESTION.
AND, AND THEN HE HAD TO SAY I
KNOW I CAN'T ARGUE THAT UNLESS
THE DEFENSE GOES INTO IT, BUT I
JUST THOUGHT I WOULD ASK ABOUT
IT IN CASE THEY DECIDE TO GO
INTO IT LATER ON.
AND THEY DIDN'T OBJECT.
AND THE PROSECUTOR WAS GOING TO
GET AWAY WITH WHATEVER HE CAN
GET AWAY WITH.
DEPENDING ON WHETHER DEFENSE
COUNSEL WAS THINKING CLEARLY
ENOUGH TOONG TO WHAT HE WAS
ASKING -- TO OBJECT TO WHAT HE
WAS ASKING.
WHAT ABOUT THE TATTOO?
WELL THE TATTOO, THE, THE
STATEMENT THUG LIFE, THERE WAS
NEVER EVIDENCE IN THE TRIAL, NO
EVIDENCE IN THE TRIAL WHAT THE
TATTOO SAID, THERE HAD BEEN
EVIDENCE THAT MR.^POOLE HAD
TATTOOS, AND THE ARRESTING
OFFICER HAD CHECKED FOUR
TATTOOS TO MAKE SURE THEY HAD
THE RIGHT DYE BUT THERE WAS
NEVER ANY EVIDENCE AS TO WHAT
THE TATTOO SAID.
THE PROSECUTOR ASKED
MR.^POOLE'S BROTHER IF HE KNEW
THAT HE HAD TATTOOS, HE SAID
YES.
AND HE ASKED WHAT THE TATTOO
SAID.
MR.^POOLE'S BROTHER SAID HE HAD
ONE THAT SAID MP.
THEN HE ASKED DOESN'T HE ASK
THUG LIFE ACROSS HIS ABDOMEN HE
WAS CONSTRUING FACTS, HE IS
CONVEYING INFORMATION TO THE

JURY THROUGH THE QUESTIONING OF
DEFENSE WITNESSES BY ASKING
LEADING QUESTIONS.
AND ADMITTED HE HE'S ENTITLED
TO ASK LEADING QUESTIONS BUT
HE'S NOT ENTITLED TO PUT IN
PREJUDICIAL FACTS IN QUESTIONS
WHEN THERE IS NO EVIDENCE OF
THE FACT.
TELL US WHETHER OR NOT THE
PROSECUTOR AFTER THE QUESTIONS
ABOUT REMORSE AND PRIOR RECORD
AND THE TATTOO ALLUDED TO THOSE
THINGS AGAIN AFTER THAT?
IN ARGUMENT OR IN ANY WAY.
I DON'T BELIEVE SO.
OKAY.
HE BROUGHT UP IN CLOSING --.
THANK YOU.
GOOD MORNING.
SCOTT BROWN BROWNE FOR THE
STATE OF FLORIDA.
GOOD MORNING, MR.^BROWNE AND
IF MR.^POOLE WANTS TO TELL THE
STATE AND DETECTIVE GRISE THAT
SOMEBODY HELPED HIM COMMIT THIS
CRIME THEN LET HIM COME
FORWARD.
YOUR HONOR, UNLIKE THE OTHER
COMMENTS MENTIONED BY DEFENSE
COUNSEL TODAY, THAT COMMENT WAS
IN FACT OBJECTED TO AND THE
TRIAL COURT WAS CONFRONTED WITH
IT.
THE PROSECUTOR SAID I WILL
REPHRASE THE ARGUMENT.
HE DID NOT AGAIN --
WELL, WAIT A MINUTE.
WAIT, WAIT.
WAIT.
IS THAT A REMEDY ONCE SOMEONE
HAS, HAS REALLY DIRECTLY
ADACKED AND COMMENTED UPON --
ATTACKED AND COMMENT UPON ONE'S
CONSTITUTIONAL RIGHT TO REPLAIN
SILENT IN SUCH A DIRECT WAY?
I MEAN, THAT'S PROBABLY THE
MOST DIRECT WAY THAT I HAVE
SEEN SINCE I HAVE BEEN ON THE
COURT.
LET HIM COME FORWARD.
COME ON FORWARD AND TESTIFY IF
THAT'S --
YOUR HONOR, THIS IS ARGUMENT

IN DIRECT REBUTTAL TO THE
DEFENSE COUNSEL'S --
OKAY SO YOU ARE NOT GOING TO
AGREE THAT THAT'S IMPROPER
ARGUMENT.
-- ANYTIME YOU SAY THE
DEFENSE HAS TO -- DEFENDANT HAS
TO COME FORWARD, YOU ARE IN
PERIL AND I UNDERSTAND THE
THEME OF THE PROSECUTOR'S
ARGUMENT WAS PROBABLY EVEN IF
THAT -- PROPER EVEN IF THAT
PARTICULAR LANGUAGE WAS ILL
ADVISED BUT WHAT I AM TELLING
THIS COURT IS THAT THAT IS A
SINGLE OBJECTION TO COMMENT --
WELL, THIS IS MY PROBLEM
BECAUSE FIRST OF ALL, I THINK
WE HAVE GOTTEN TO WHERE THE
FIRST STATEMENT, THERE IS NO
EVIDENCE IN THE CASE THAT HE
EVER ACKNOWLEDGED AND DID
ANYTHING, AND I AM ALREADY
THINKING THAT OF THE 3850 WHERE
THEY GO, WELL HE, THE WORDS HE
USED NOW INVITED THESE COMMENTS
AND SCREWED UP THE TRIAL.
SO WE HAVE TO THINK AHEAD HERE.
I THINK THE FIRST COMMENT IS
FAIR REBUTTAL.
THIS IS WHAT -- AND I DIDN'T
PICK IT UP UNTIL I LOOKED AGAIN
IS THAT WHEN HE CONTINUED, HE
SAYS, MR.^POOLE TALKED TO THE
POLICE.
NOW WHAT IS AT LEAST MR.^HELM
IS SAYING IS THERE ISN'T A
CONFESSION IN THIS CASE.
THERE'S A NOTHING.
AND SO WE CAN PRESUME THAT
SINCE HE DIDN'T CONFESS HE MAY
HAVE ACTUALLY AVAILED HIMSELF
OF HIS RIGHT TO REMAIN SILENT
BUT WHAT SO BY SAYING THEY
TALKED TO THE POLICE, HE IS
SAYING NO EVIDENCE EVER SAID,
HEY, SOMEONE ELSE IS INVOLVED
AND MY CONCERN THERE AND IT
LEADS UP TO THAT LAST STATEMENT
IS THAT BY THINKING IT TO THAT
HE TALKED TO THE POLICE, HE IS
DIRECTLY PUTTING IN FRONT OF
HIM THAT HE DIDN'T HAVE A RIGHT
TO REMAIN SILENT AT THAT TIME.

IF HE HAD A THEORY THAT SOMEONE ELSE COMMITTED THE CRIME, HE WOULD HAVE TO COME FORWARD AND THAT'S WHAT EVENTUALLY IS WHAT CAUSES THE OBJECTION.
SO IN, WITH THAT IN MIND, NOT THAT HE OPENED THE DOOR BUT DID HE OPEN THE DOOR TO SAY WELL, I MEAN, COULD THE PROSECUTOR SAID HAVE, -- HAVE SAID, LISTEN, HE TALKED TO POLICE.
HE INVOKED HIS RIGHT TO REMAIN SILENT.
IF THAT POINT HE HAD KNOWN THERE WERE OTHER PEOPLE DOING THE HAD TO TELL THE POLICE AT THAT TIME.
I THINK YOU'D AGREE THAT WAS WRONG BUT ISN'T THIS ESSENTIALLY THE SAME THING THEY ARE SHOWING HE DIDN'T HAVE THE RIGHT TO REMAIN SILENT.
HE HAD TO TELL THAT VERSION AT THAT POINT OR HE WAS, THERE WOULD BE NO CREDIBILITY TO IT.
NO, YOUR HONOR, AND IN FACT WHAT THE PROSECUTOR WAS DOING IN THIS CASE.
THERE WAS TESTIMONY THAT MARK POOLE WAS -- TALKED TO THE POLICE, HE COOPERATED, HE GAVE A BLOOD SAMPLE.
HE GAVE HIM CONSENT TO SEARCH THE TRAILER.
WHAT THE PROSECUTOR WAS SAYING IMPROPERLY IN THIS CASE IS WHEN DEFENSE COUNSEL GETS UP THERE AND SAYS MARK POOLE ADMITS TO COMMITING A BURGLARY.
HE ADMITS TO COMMITING A SEXUAL BATTERY, OR HE SAID IT WAS SEX AGAINST MRS.^WHITE, HER WILL.
WHEN DEFENSE COUNSEL IS SAYING THAT HE IS OBJECTING HIMSELF AS A WITNESS AND THE PROSECUTOR WAS CERTAINLY ENTITLED TO SAY REFUTE THE EVIDENCE THAT WAS ADMITTED AT TRIAL.
DID YOU HEAR ANYONE AT ANY TIME SAY DID MARK POOLE ADMIT THAT HE COMMITTED THESE THREE OFFENSES BUT NOT, NOT --
SO BECAUSE THE LAWYER WAS USED ILL ADVISED WORDS INSTEAD

HE COULD'VE SAID WE CERTAINLY
CAN ACKNOWLEDGE THAT THERE IS
EVIDENCE THAT MR.^POOLE
COMMITTED THE SEXUAL BATTERY
BUT THERE IS NO EVIDENCE HE
COMMITTED THE MURDER, THAT
WOULD NOT HAVE OPENED THE DOOR.
DO YOU AGREE WITH THAT?
PROBABLY NOT, YOUR HONOR.
SO NOW WE'RE IN A SITUATION
TO SAY BECAUSE HE MAY HAVE
MISSPOKE BY SAYING ACKNOWLEDGED
AS OPPOSED TO I NEED TO
ACKNOWLEDGE THAT THIS IS WHAT
THE EVIDENCE SHOWS, WE'RE IN A
SITUATION WHERE THE DOOR IS
OPENED AND IT'S FOCUSING ON
MR.^POOLE NEVER TELLS
ANIVERSION OF THE STORY THAT
EXONERATES -- ANY VERSION OF
THE STORY THAT EXONERATES HIM.
THAT'S CORRECT.
BUT ISN'T THAT BECAUSE THERE
ARE SUCH HIGH-RISK ERRORS ISN'T
THERE JUST A PROBLEM ON ITS
FACE WITH AFFIRMING THIS
CONVICTION AND NOT SAYING THAT
THE COUNSEL SHOULD -- WAS
INEFFECTIVE ON ITS FACE FOR
OPENING THE DOOR BECAUSE ONCE
THE DOOR WAS OPENED, LOOK WHAT
THEY GOT TO TALK ABOUT?
ABSOLUTELY NOT, YOUR HONOR.
AND HERE IS WHY.
IN THIS CASE, YOU HAVE
ABSOLUTELY OVERWHELMING
EVIDENCE OF GUILT.
AND I KNOW SOMETIMES
PROSECUTORS THROW THAT WORD
AROUND OVERWHELMING BUT IN THIS
CASE IT TRULY IS. CHIEF JUSTICE
LEWIS, THERE WASN'T A COURT
EYEWITNESS IN THE DACE.
DAWN BRISEDDINE OBSERVED THE
WINS MOVING IN THE DIRECTION
ALONE TOWARD THE VICTIM'S
TRAILER AT 11:30 P.M., THE TIME
-- WITHIN THE TIME FRAME THAT
THESE CRIMES OCCURRED AND THEN
YOU HAVE OVERWHELMING PHYSICAL
EVIDENCE.
DNA, MATCHING THE APPELLANTS,
AND THAT YIELDS A POPULATION
PERCENTAGE OF ONE IN 80 SOME

TRILLION.
MORE THAN ANY OTHER PERSON ON EARTH.
AND A SHOE RIGHT NEXT TO VICTIM NOAH SCOTT WAS FOUND AND ALSO YOU HAVE GOT VICTIM WHITE'S BLOOD ON A POLO SHIRT RECOVERED FROM MARK POOLE'S TRAILER.
IN ADDITION, HE'S PASSING OFF THESE GAMES IMMEDIATELY AFTER THE MURDER, SELLING THEM TO PEOPLE WHO IDENTIFIED HIM AND AGAIN, GEE, WHAT A SURPRISE.
THOSE GAMES HAVE THE VICTIM'S BLOOD ON THEM.
WHAT WAS THE, YOUR OPPONENT HAS SAID THAT, THAT THERE WAS EVIDENCE THAT THERE WERE TWO PEOPLE INVOLVED IN THE CRIME AS OPPOSED TO ONE?
REFRESH US OR GIVE US A COMPLETE PICTURE OF WHATEVER EVIDENCE, YOU KNOW, THERE WAS OR WASN'T.
IN OTHER WORDS, WHAT IS HE BASING THAT ON?
WELL, I BELIEVE MR.^HELM IS BASING THAT ON THE VICTIM'S 911 CALL.
REMEMBER, SHE WAS NOT UNCONSCIOUS --
THE VICTIM TESTIFIED AT TRIAL, IS THAT CORRECT?
IT DID NOT SAY THAT THERE WERE TWO PEOPLE IN HER TRAILER AT TESTIMONY.
SHE SAID THE PERSON WHO WAS RAPING HER SHE COULD SEE A BLACK ARM AND AN OLDER BLACK GENTLEMAN'S VOICE.
THAT'S IT.
NOW EVERY -- YOU INTRODUCE OF THE 911 CALL WHERE SHE INDICATES THERE WERE TWO ATTACKERS SHE WAS CONCUSIVE AT THAT POINT FALLING IN AND OUT OF CONSCIOUSNESS THERE WAS AN EMERGENCY MEDICAL TECHNICIAN WHO TESTIFIED SHE WAS RAMBLING.
DID SHE EXPLAIN THAT, THAT IN HER TESTIMONY AT TRIAL?
I DON'T BELIEVE SHE DID, YOUR HONOR.
IN OTHER WORDS, SHE, THERE

WAS NO CROSS-EXAMINATION OF HER
THAT SAID WELL WHAT ABOUT THIS
911 CALL AND THEN SHE SAID,
LOOK, I WAS, YOU KNOW, IN SHOCK
AND IN AND OUT OR WAS THERE
ANYTHING LIKE THAT.
I DON'T BELIEVE SO, YOUR
HONOR.
I SEE.
SO SHE WAS NEVER -- THERE
WASN'T ANY TESTIMONY THEN AT
TRIAL THAT SAID, YES, MAYBE I
SAID THAT AND HOW DID THE 911
--
I DON'T BELIEVE SHE --
HOW DID THE 911 EVIDENCE
COME IN, THEN?
THE PROSECUTOR INTRODUCED
THAT, THE 911 CALL.
OKAY FROM THE RECORDER OF
THAT OR --
THAT IS CORRECT, YOUR HONOR.
AND WE HAVE TRANSCRIPT.
THERE WAS ALSO AN EMT
TECHNICIAN WHO INDICATED SHE
MIGHT'VE SEEN SOMEONE ELSE IN
THE APARTMENT, BUT AGAIN THAT
SAME EMT SAID SHE REALLY WASN'T
MAKING SENSE.
THIS WAS A WOMAN LEFT FOR DEAD
STRUCK EIGHT TIMES WITH A TIRE
IRON.
BUT THAT WAS THE EXTENT OF
THE EVIDENCE THAT?
AS I RECALL, YOUR HONOR.
THAT THE DEFENSE COULD'VE
RELIED ON.
OKAY.
RELIED ON, IT'S A VERY
TENUOUS THEORY.
WELL, UNTIL YOU GOT TO THE
ARGUMENT THEY PUT ON THE
EVIDENCE OF THE OTHER TWO
PEOPLE.
RIGHT?
THERE'S MORE EVIDENCE BUT IT
DIDN'T SEEM TO CONNECT TO
ANYTHING.
THERE WAS NO PHYSICAL
EVIDENCE SAYING THAT THERE WAS
ANYONE ELSE THERE.
IN FACT, THE PHYSICAL EVIDENCE
SHOWED THAT THERE WAS ONLY ONE
PERPETRATOR.

BUT THERE WAS EVIDENCE THEY BROUGHT IN ABOUT A WOMAN WHO HAD JUST BEEN RELEASED FROM JAIL OR SOMETHING?
I MEAN, THERE WAS EVIDENCE AND IT DIDN'T SEEM TO CONNECT AND THEN ALL OF A SUDDEN WELL, IT WAS EVIDENCE.
THERE WAS NO CONNECTION.
OH, I UNDERSTAND BUT AGAIN IN ANSWER TO JUSTICE ANSTEAD'S QUESTION WAS THEY PUT THESE PEOPLE ON AND AT THE TIME DIDN'T CONNECT IT TO THIS OTHER TRAILER BUT PIT THOSE PEOPLE ON, MADE YOU WONDER WHY ARE THEY TESTIFYING.
EXACTLY.
IN FACT, THE JUDGE COULD'VE INCLUDED THAT BECAUSE ALL THEY SHOWED IS SOMEBODY MIGHT'VE THOUGHT THAT THE VICTIM -- ALL THESE OTHER PEOPLE BUT THERE WAS NO CONNECTION BETWEEN INDIVIDUALS AND IN FACT, THE VICTIM WHITE KNEW HIS INDIVIDUAL VOICE DID HEAR IT.
WHAT DID DEFENSE COUNSEL SET OUT IN HIS OPENING STATEMENT?
WITH REFERENCE TO ADDRESSING THE JURY AS TO HOW THE APPROACH TO THE CASE WOULD BE?
WAS IT A REASONABLE DOUBT OR MAKING THE, THE STATE PROVE ITS CASE OR WAS IT -- YOU KNOW, DO YOU KNOW?
I DON'T HAVE AN INDEPENDENT RECOLLECTION.
I DON'T BELIEVE HE MENTIONED ANYTHING ABOUT A THIRD -- THE DEFENSE THEORY WAS GOING TO BE -- SOME THIRD PERSON HERE BUT I THINK THE PROSECUTOR WAS CONFRONTED WITH THIS FOR THE FIRST TIME IN REBUTTAL.
REMEMBER, AND ONCE THERE WAS A SINGLE OBJECTION, THE PROSECUTOR, THERE WAS NO OTHER COMMENT THAT THE PROSECUTOR MADE.
SO THE DEFENDANTS HERE IS TO SHOW FUNDAMENTAL ERROR BASED UPON THIS COMMENT WHICH THE STATE ADMITS WERE ENTIRELY FAIR

BASED UPON DEFENSE COUNSEL'S ARGUMENT BUT REMEMBER THE STAND OF REVIEW HERE IS BECAUSE YOU HAD AN OBJECTION AND IT WAS ESSENTIALLY SUSTAINED BY THE TRIAL COURT, AND THE PROSECUTOR AGREED TO REPHRASE HIS ARGUMENT BASED UPON THAT SINGLE COMMENT, THE DEFENDANT'S WORDS SHOW THAT COMMENT WAS SO PREJUDICIAL IT SERVED TO VITIATE THE ENTIRE TRIAL.
WELL THE LAST COMMENT WAS OBJECTED TO.
THAT'S TRUE.
IF THE LAWYER STANDS UP AND SAYS TO THE JURY IF THIS PERSON REALLY -- IF THIS REALLY HAPPENED THIS WAY HE NEEDS TO COME OVER ON THIS WITNESS STAND AND TELL US THAT.
THAT WOULD BE IMPROPER.
WORDS MEAN SOMETHING.
WORDS DO MEAN SOMETHING.
AND SOMETIMES YOU HAVE THOSE WORDS AND I'M NOT EYOU KNOW TO ME IT SAYS THEN LET HIM COME FORWARD IS WHAT THIS SAYS.
I MEAN IT'S REALLY SAYING THAT TO MOO AND WHY AM I WRONG IN SEEING THAT WAY?
WELL, I'M NOT SAYING YOU'RE WRONG AND I'M CERTAINLY NOT --
I ADMITTED THIS BEFORE WHEN YOU SAY ANYTHING ABOUT THE DEFENDANT COMING FORWARD YOU'RE CAREFUL -- REMEMBER, THE PROSECUTOR DOESN'T HAVE A SCRIPT HERE.
HE HEARS THE DEFENSE ARGUMENT AND HE'S ARGUING.
THERE IS DEFENSE OBJECTION WHICH PREVENTED HIM FROM FINISHING THAT THOUGHT.
AND HE AGREES TO REPHRASE IT AND MOVE ON.
BUT WHAT IS COMMONLY DONE IN THE THIS CASE AND CORRECT ME IF I'M WRONG IS WHEN YOU ARE IN THE HEAT OF THE ARGUMENT AND YOU ARE PASSIONATE AND YOU ARE GOING AND YOU ARE MAKING THE ARGUMENT AND YOU SLIP AND GO A LITTLE TOO FAR WHICH THE

PROSECUTOR DEFINITELY DID HERE, IS MADE AWARE OF THAT BY THE JUDGE, THE PROSECUTOR DID NOT GET BACK UP AND REEMPHASIZE WE HAVE THE -- WE HAVE THE BURDEN OF PROVE.
THE DEFENDANTS HAS NO --
DO YOU AGREE?
I ALSO AGREE THERE WAS NO REQUEST FOR CURATIVE YOU HAVE TO UNDERSTAND THE JURY IS INICT CENTERED THE DEFENSE CARRIES NO BURDEN -- THE PROSECUTOR'S ARGUMENT THAT HE HAS, YOU KNOW, THE RIGHT TO REMAIN SILENT.
HE HAS NO BURDEN HE DID NOT TESTIFY IN THIS CASE YOU CAN'T HOLD IT AGAINST HIM SO THE DEFENSE HAS --
I GUESS MY POINT IS ISN'T IT PROPER FOR THE PROSECUTOR WHEN THE PROSECUTOR MAKE AS MISTAKE LIKE THIS TO STAND BEFORE THE JURY AND REEMPHASIZE FOR THE JURY WHERE THE BURDEN LIES AND THE PROSECUTOR MAY HAVE RESTATED IT.
I AM SURE AND I KNOW THE PROSECUTOR IN THIS CASE IS A GOOD PROSECUTOR.
I DON'T KNOW.
I KNOW THAT -- REMEMBER THERE WAS NO OFFENSIVE OR OBJECTIVE COMMENTS BEFORE.
IT WAS NOT LIKE A STRING OF COMMENTS.
THE PROSECUTOR HEARS THE THEORY FOR THE FIRST TIME AND HE MAKE AS ARGUMENT.
WELL, LET'S TALK ABOUT HOW GOOD A PROSECUTOR.
HE MAY BE A VERY GOOD PROSECUTOR.
I MAY BE -- I AM VERY CONCERNED ABOUT WHAT THE PROSECUTOR DID IN THE PENALTY PHASE, AND IF YOU FIRST IF YOU CAN ADDRESS I THINK YOU HAVE ADEQUATELY EXPLAINED WHY YOU THINK IT WAS HARMLESS.
THE COMMENTS AND WE'LL JUST HAVE TO LOOK AT THAT BUT THERE'S A LOT OF THINGS IN THIS PENALTY PHASE THAT I HAVEN'T

SEEN IN A WHILE THAT I'M JUST CONCERNED CUMULATIVELY THAT THIS PROSECUTOR STEPPED OVER THE LINE, AND LET'S JUST START WITH WELL, HE'S A LOVING GREAT GUY.
WELL, DID YOU KNOW HE WAS ARRESTED?
WHERE IS THAT COMING FROM AND WHERE IS THAT NOT A VIOLATION OF OUR CASE LAW ON, AND IN THIS PARTICULAR CASE, A VIOLATION OF THE AGREEMENT THAT THERE WAS BETWEEN THE PROSECUTOR, THE DEFENSE, AND THE, AND THE TRIAL COURT?
YOUR HONOR, IT IS MY RECOLLECTION THAT THE PENALTY PHASE WAS STILL PART OF THE JUSTICE SYSTEM AND WE WANT TO ENCOURAGE THE -- FACT FINDING.
THE PROSECUTOR DOES NOT HAVE TO SIT BACK ON HIS HAND AND LET A WITNESS TESTIFY THAT THIS MAN IS AN ANGEL.
THEN WE WOULD BE SHOT.
BASICALLY WHAT HE SAID WITH THIS REPUTATION NOBODY WOULD BELIEVE HE IS HERE AT ALL.
HE HAS GOT A STELLAR REPUTATION.
HE WAS A CHURCHGOING, KIND AND LOVING MAN.
WE WOULD ALL BE SHOCKED.
WHEN HE CROSSED THAT LINE.
WELL, THEN, LET'S JUST ASSUME HE THOUGHT HE NOW CROSSED THE LINE AS JUSTICE BELL SAID.
ISN'T THEN THE NEXT STEP TO SAY YOUR HONOR I WOULD NOW LIKE TO ASK CERTAIN QUESTIONS, AND WHETHER THE QUESTIONS WOULD BE DID YOU KNOW HE HAD BEEN ARRESTED IN THREE STATES WHERE I DON'T KNOW WHERE THAT COMES FROM, BUT WHERE ARE ARRESTS NO MATTER WHAT YOU SAY UNLESS HE GOES HE'S NEVER BEEN ARRESTED, HEERS ARE -- HE'S SO GOOD, HE'S NEVER BEEN ARRESTED BUT WHERE DO ARREST COMES IN TO IMPEACH SOMEBODY THAT HE'S KIND, LOVING, AND CONSIDER ISN'T.

AND THAT HE HAS A STELLAR
REPUTATION BACK HOME.
YOUR HONOR, I THINK IT GOES
BACK TO THE CASE -- REPUTATION
-- IN MY BRIEF.
BUT I THINK THE DISTINCTION
THAT JUSTICE PARIENTE IS
DRAWING IS THAT WHEN IMPROPER
IMPEACHMENT IF YOU WERE GOING
TO THE CREDIBILITY OF A WITNESS
WOULD BE -- HAVE YOU BEEN
CONVICTED OF A CRIME.
NOT WHETHER YOU'VE BEEN
ARRESTED.
BECAUSE ARRESTED REALLY IS
THOUGH IT, IT IS A VERY STRONG
TERM AS FAR AS A LAYPERSON IS
CONCERNED, WE KNOW AS FAR AS
LAW IS CONCERNED IT ABSOLUTELY
-- IT DOESNT STOP ANYTHING.
-- ESTABLISH ANYTHING.
THIS COURT HAS IN THE PAST
-- IN -- IN THAT CASE THE
DEFENSE WITNESS WAS STATING
HOW, HOW, YOU KNOW, NONVIOLENT
THE DEFENDANT WAS AND HOW
NONVIOLENT HE WAS TOWARD WOMEN
HE WAS.
THIS COURT ALLOWED IMPROPER
IMPEACHMENT AND I DON'T THINK
THERE IS MENTION OF A HIS PRIOR
-- SO I THINK ONCE YOU PUT --
WELL PRIOR VIOLENCE, ACTS OF
MISCONDUCT TO IMPEACH, ACTS OF
MISCONDUCT BUT ARRESTS ON THEIR
OWN MEAN NOTHING.
THEY DON'T IMPEACH ANYTHING,
AND IN FACT, THE WORST ABOUT IT
IS THAT WE DON'T KNOW HERE WHAT
THEY ARE TALKING ABOUT ARRESTS
IN GEORGIA FOR WHATEVER.
YOU KNOW, THE PROSECUTOR JUST
THREW IT OUT LIKE HE THREW OUT
THIS COMMENT WHICH HAS NO BASIS
IN THE EVIDENCE DID YOU KNOW HE
HAD THUG LIFE ON HIS ABDOMEN.
I MEAN, THAT'S, HE'S TESTIFYING
TO A FACT NOT IN EVIDENCE.
IT'S -- YOU KNOW WHAT DOES THAT
HAVE TO DO WITH ANYTHING?
THE.
THE CASES ON REPUTATION ARE
DIFFERENT.
IF YOU HAVE HEARD THIS -- I

SUBMIT THE PROSECUTOR COULD'VE GOTTEN INTO PRIOR CONVICTIONS.
THE PLAUS COURT HAD A GOOD FAITH HAD BASE TO ASK THAT QUESTION WE KNOW THAT THE TRIAL COURTS ORDERED THAT HE APPELLANT'S CRIMINAL RECORD WENT THROUGH THREE FACES BUT FOUR.
THE THERE IS A PSI TO BACK THAT UP.
FURTHERMORE, THERE WAS ABSOLUTELY NO OBJECTION --
WHAT CASE SAYS THAT YOU CAN IMPEACH A WITNESS ON USING PRIOR ARRESTS?
YOUR HONOR, I BELIEVE I CITED GREENFIELD v. STATE WHICH IMPLICATED AND IT WENT THROUGH A LENGTHY DISCUSSION OF REPUTATION AND CHARACTER AND WHAT IS PERMISSIBLE IMPEACHMENT.
I WOULD ADMIT TO YOU IN GERALDS v. STATE THIS COURT SAID IT WAS PROPER TO IMPEACH A CHARACTER WITNESS ON THOSE SPECIFIC FACTS BUT IN GERALDS A NEIGHBOR TESTIFIED HE HAD LIVED NEXT TO HIM ONE YEAR AND HAD NO PROBLEM WITH HIM.
IT IS MUCH DIFFERENT WHERE --
HIS KIND, LOVING AND CHURCHGOING.
OKAY SO YOU ARE.
YOU AGREE THAT HE WOULD NEVER BE ADMITTED AS A REPUTATION WITNESS?
JONES, JR., HE'S THE BROTHER.
OH,.
HE REALLY TESTIFIED TO HIS GENERAL REPUTATION.
HE TESTIFIED.
WELL HE MADE THE STATEMENT AT THE VERY END OF THE LAST STATEMENT THAT WAS ADMITTED AND THERE WAS NO OBJECTION TO THAT OR ANY FOUNDATION FOR THE REPUTATION.
AND, AND THE CROSS-EXAMINATION OF HIM TOWARDS THIS DIDN'T GO TO -- AND THEY SAID FOLKS IN LOUISIANA.
AND I MEAN THERE WAS NO

EVIDENCE PRESENTED TO THE FOLKS
IN LOUISIANA HAD A DIFFERENT
IMPRESSION OR KNEW ABOUT
ARRESTS IN NON-LOUISIANA
STATES, NON-LOUISIANA ARRESTS.
THE POINT WAS MADE.
-- YOU DON'T REALLY KNOW
THIS MAN AND HIS REPUTATION --
WHY DIDN'T THEY USE THAT
QUESTION?
AGAIN WORDS MEAN SOMETHING AND
THAT'S WHAT WE'RE --
BEFORE WE VILIFY THE
PROSECUTOR HERE.
WE'RE NOT VILIFICATION, THIS
IS TRYING TO GET TO
CONSTITUTIONAL PARAMETERS,
PROPER QUESTIONING AND WE ARE
NOT COMMENTING UPON A BAD
PERSON OR ANYTHING LIKE THAT.
WE'RE TALKING UTLAW AND THE
PROSECUTOR ON ANY PROSECUTORS
HE ONLY QUESTIONED THE BROTHER
ON THAT AND THE REASON HE DID
BECAUSE THE BROTHER STEPPED
OVER THAT LINE AND SAID HIS
REPUTATION EVERYONE BE SHOCKED.
HE DIDN'T --
ISN'T THERE A DIFFERENCE IN
BEING SHOCKED THAT SOMEONE IS
ACCUSED OF FIRST-DEGREE MURDER
AND SOMEONE HAVING BEEN
ARRESTED FOR WE DON'T KNOW.
SHOPLIFTING, PETTY THEFT, IT
COULD'VE BEEN ANYTHING THAT HE
WAS POSSIBLY ARRESTED ON.
TO TAKE IT FURTHER WHICH REALLY
DISTURBS ME WE HAVE A
STIPULATION THAT WE ARE NOT
CONSIDERING NO PRIOR HISTORY,
CORRECT?
AND WHAT DOES THE JUDGE DO AND
THE JUDGE'S ORDER BUT UNDER THE
PRIOR HISTORY, TALKED ABOUT
THESE POSSIBLE ARRESTS AND
THESE OTHER STATES THAT WE HAVE
NO EVIDENCE ON AND HE TALKS
ABOUT IT IN HIS ORDER SAYING
THAT THE NO PRIOR HISTORY
DOESN'T REALLY -- IS NOT REALLY
APPLICABLE HERE AND SO NOT ONLY
DO WE HAVE A JURY NOW LISTENING
AND HEARING THAT THERE'S
PROBABLYY SOME OTHER CRIMINAL

STUFF IN THIS MAN'S BACKGROUND
BUT WE HAVE THE JUDGE USING IT
AS I SEE ADVERSELY AGAINST THE
DEFENDANT AND ALTHOUGH HE, IT'S
WRITTEN UNDER A MITIGATING
MACTER DASH FACTOR, IT REALLY
SOUNDS LIKE A NONSTATUTORY
AGGRAVATING FACTOR.
WELL, LET ME MOVE ON NOW TO
HARMLESS ERROR.
NO.
NO
[LAUGHTER]
ANSWER THAT QUESTION.
SHE WOULD LIKE AN ANSWER TO
THAT QUESTION.
YEAH, PLEASE DO.
I THINK IT'S CLEAR THAT THE
DEFENDANT HAD A CRIMINAL
RECORD.
HE WAS NOT ENTITLED TO THE
MITIGATOR OF NO SIGNIFICANT
CRIMINAL HISTORY.
BUT HE SAID -- HE WAS NOT
OFFERING THAT AS A MITIGATING
FACTOR.
AND I THINK WHAT THE TRIAL
JUDGE, LOOK AT HIS ORDER HE WAS
CAREFUL TO LIST THROUGH EVERY
MITIGATOR WHETHER IT WAS PROVEN
OR NOT IN, AND GIVE A BRIEF
DISCUSSION.
AND THERE WAS NO ERROR ALLEGED
BAITS BASED ON THE TRIAL
COURT'S ORDER.
HAVE WE EVER HELD THAT --
DO WE HAVE TO LOOK AT THAT
WHEN WE ARE TALKING ABOUT
DOLLAR WAS REAL -- THERE WAS
REAL, SOME REAL HARM IN THE
PROSECUTOR BRINGING OUT THIS
INFORMATION.
HERE'S WHY IT'S CLEARLY
HARMLESS IN THIS CASE.
THE DEFENSE COUNSEL'S OWN WINS
ON DIRECT EXAMINATION --
WITNESS ON DIRECT EXAMINATION
ADMITTED THE APPELLANT WAS A --
HE WAS COMMITTING A LOT OF
BURGLARIES.
AND JURY WAS NOT UNDER THE
IMPRESSION.
INATE CONTEXT OF HIM HAVING A
-- IN THE CONTEXT OF HIM HAVING

A DRUG HABIT AND HE WAS DOING
THIS -- WASN'T THERE -- WASN'T
THIS IN THE CONTEXT OF WHETHER
OR NOT HE HAD A SUBSTANCE ABUSE
PROBLEM, ALCOHOL ABUSE PROBLEM?
IN, IN, --
AND THE DOCTOR'S TESTIMONY?
-- YOUR HONOR YOUR HONOR,
CERTAINLY.
HIS OWN WITNESS IS SAYING HE IS
CERTAINLY NOT ADVERSE TO
VIOLATING THE RIGHTS OF OTHERS
SO WHEN YOU ARE TALKING ABOUT
HARMFUL ERROR LOOK AT THE
DEDEFENSE.
THE JURY DIDN'T VOTE 12-0 FOR
DEATH IN THIS CASE.
BECAUSE THE PROSECUTOR
MENTIONED THAT HE HAD SOME
PRIOR ARRESTS THAT THEY WEREN'T
INFORMED OF.
WITH WE REALLY SAY THAT?
WHAT'S THE STANDARD IN ORDER
FOR -- WE HAVE TO SAY THAT
BEYOND A REASONABLE DOUBT THIS
DOES NOT CONTRIBUTE TO --
THAT IS CORRECT, YOUR HONOR
BUT LOOK AT THE AGGRAVATION IN
THIS CASE.
HERE WAS A YOUNG COUPLE
ATTACKED WITH A TIRE IRON.
WE HAVE TWO AGVUIVATING
FACTORS, A PRIOR FELONY AND THE
HAC AND THE PRIOR VIOLENT
FELONY OR THE CONTEMPORANEOUS
FELONIES WE DON'T HAVE ANY
PRIOR VIOLENT FELONIES THAT GO
BACK BEYOND THIS ACTUAL
CRIMINAL INCIDENT, CORRECT.
NO PRIOR VIOLENT FELONIES
OTHER THAN WHAT WE KNEW FROM
THE PSI.
WE ALSO KNOW WHAT THE JURY
KNEW, THAT MR.^POOLE WAS IN
TROUBLE IN JAIL FOR HITTING
PEOPLE.
THAT CAME OUT THROUGH THE
DEFENSE EXPERTS.
WELL, LET ME ASK AS FAR AS
THE TRIAL JUDGE IN THE TRIAL
JUDGE'S ORDER, THE TYPICAL CASE
WHERE THE TRIAL JUDGE HAD THE
INVESTIGATION WHICH WOULD'VE
LISTED THE PRIOR ARRESTS AND

OTHERWISE.
YES, YOUR HONOR.
SO THAT WOULD'VE BEEN -- SO THE JUDGE WOULD'VE HAD THAT PERFORMED AT THE SPENCER HEARING OR PRIOR TO SENTENCING ANYWAY.
YEAH, AND HE DID BUT IN THIS CASE, AGAIN, GOING BACK TO THE FACT, AGAIN, NOT BECAUSE HE HAD A THUG LIFE TATTOO ON HIS CHEST OR HE MAY HAVE BEEN ARRESTED A FEW TIMES.
HE HAS BEEN IN TROUBLE WITH THE LAW.
THE JURY KNEW THAT.
THE DEFENSE EXPERT'S TESTIMONY.
IT'S DISCONCERTING THAT THE TRIAL JUDGE DOESN'T DISCUSS WHAT MAY HAVE BEEN IN A PRE-- PRETRIAL.
WHAT IS IT CALLED?
PRECENTANCE INVESTIGATION REPORT.
HE DISCUSSES WHAT WAS BROUGHT OUT -- PRECENTANCE INVESTIGATION REPORT.
HE DISCUSSES WHAT WAS BROUGHT OUT BY THE --
LET ME ASK YOU A QUESTION ABOUT THAT PARTICULAR FINDING OF THE JUDGE IN THE SENTENCING ORDER.
ARE THERE CASES THAT HOLD THAT A JUDGE CAN FIND A LACK OF THE MITIGATOR OR NO PRIOR SIGNIFICANT CRIMINAL HISTORY BY THE MERE FACT OF ARRESTS AS OPPOSED TO CONVICTIONS?
WELL, YOUR HONOR, THERE WERE CONVICTIONS, AND THERE WERE ARRESTS IN MORE THAN THREE STATES, FOUR STATES.
THERE COULD'VE BEEN 100 ARRESTS.
MY QUESTION IS CAN A JUDGE VIEW ARRESTS AS OPPOSED TO CONVICTIONS FOR A FINDING THAT THERE WAS A PRIOR CRIMINAL HISTORY?
YOUR HONOR, SINCE THAT WAS NOT RAISED I'M NOT SURE.
HOWEVER I DO KNOW THE DEFENSE DID NOT WANT THAT MITIGATOR AT

ALL AND THEY ADMITTED --
EXPERTS ADMITTED HE COMMITS A
LOT OF BURGLARIES.
HE VIOLATES THE RIGHTS.
MR.^BROWNE I DO WANT TO MAKE
SURE IN DIRECT BECAUSE WE ARE
HERE ON THE LAW DO WE HAVE A
CASE THAT SAYS IT IS PROPER TO
IMPEACH A WITNESS IN A WINS
WITH A PRIOR ARREST?
I COULD FIND A CASE -- I
CITED IT WHERE I THINK IF YOU
TALK ABOUT GENERAL CHARACTER
REPUTATION AND AIRHART, THEY
DISCUSS IT, WHEN YOU TALK ABOUT
GENERAL REPUTATION YOU CAN TALK
ABOUT THINGS -- SUCH AS
CONVICTIONS.
ABOUT ACTS OF MISCONDUCT.
NOW THE THING, THE REASON THIS
CONCERNS ME IS THAT IN EVERY
PENALTY PHASE, MOTHERS GET ON THE
STAND, FATHERS GET ON THE
STAND, BROTHERS AND THEY SAY,
HEY, THIS WAS A GOOD GUY
BECAUSE THAT'S WHAT THEY GET TO
DO WITH MITIGATION.
WE HAVE NEVER SAID THAT KIND OF
TESTIMONY OPENS THE DO TO --
DOOR TO SAY YOU KNOW THIS GUY
HAD A TATTOO ON HIS CHEST, HE
HAD ARRESTS AND BRING OUT
EVERYTHING ABOUT THE PERSON
THAT COULD NOT COME IN BECAUSE
IT'S IMPERMISSIBLE STATUTORY --
NONSTATUTORY AGGRAVATION, AND
THAT'S WHY I THINK THE
PRINCIPLE OF LAW HERE IS SO
IMPORTANT.
AND WHETHER WE REALIZE THIS IS
HARMLESS ERROR.
THIS WASN'T A SLIP-UP.
THIS WAS AN EXPERIENCED
PROSECUTOR SAYING HE'S GOT
ARRESTED IN GEORGIA, SOUTH
CAROLINA, AND TEXAS.
WHICH WAS NOT LOUISIANA.
SO CAN WE AGREE THAT WE MIGHT
LOOK AT THIS AS HARMLESS ERROR
BUT WE WOULD SAY THAT THIS TYPE
OF IMPEACHMENT OF A PENALTY
PHASE MITIGATION WITNESS IS
IMPROPER.
YOU CAN'T IMPEACH WITH JUST

PRIOR ARRESTS.
I WOULD INDICATE THIS COURT
DID SAY BUT AGAIN I WOULD LIMIT
-- I AM NOT, I AM NOT SURE THE
ANSWER TO THAT SHOULD BE THE
PROSECUTOR HAS TO JUST SIT BACK
AND I THINK IF YOU MAKE THE
PROSECUTOR GO FAR ENOUGH HE
SHOULD'VE ASKED ABOUT
CONVICTIONS AND BUT I DO KNOW
THIS, THE 12-0 JURY
RECOMMENDATION THE JURY DIDN'T
VOTE FOR DEATH BECAUSE THEY
KNEW THAT HE HAD A FEW ARRESTS?
ARE YOU KIDDING ME IN A CASE
WHERE HE BROKE IN AND BEAT TWO
PEOPLE MERCILESSLY RAPED.
IF THIS WAS SUCH AN AIRTIGHT
CASE WHY WOULD THEY ASK ABOUT,
ABOUT REMORSE IF THAT'S NOT
STATUTORY IN THIS CASE BECAUSE
HE DID NOT ALLEGE HE WAS
REMORSEFUL.
WHY WOULD HE ASK ABOUT THAT?
WHY WOULD HE RISK THAT IF THIS
IS OFF AN AIRTIGHT CASE.
YOUR HONOR, HERE'S WHAT
HAPPENED WITH HE-ALL REMORSE.
I CAN'T ANSWER
PERSONALLY FOR THE PROSCOURT.
I KNOW ABOUT REMORSE.
THE VERY FIRST DEFENSE WITNESS
WAS MR.^POOLE'S MOTHER WHO
INDICATED IN RESPONSE TO
DEFENSE COUNSEL'S QUESTION DID
HE EVER INDICATE HE WAS SORRY
FOR WHAT HE'D DONE OR SORRY?
I THOUGHT WAS AMBIGUOUS ENOUGH
FOR THE PROSECUTOR TO COME IN
AND ASK ABOUT REMORSE DID SHE
SPECIFICALLY EXPRESS REMORSE IN
THIS CASE AND AGAIN THREE
WITNESSES TESTIFIED IN THIS
CASE AND THE PROSECUTOR ASKED
ABOUT REMORSEURT THE -- BEFORE
THE DEFENSE COUNSEL.
THERE WAS NEVER AN OBJECTION ON
REMORSE.
THIS IS THE PENALTY PHASE
FOR THIS DEFENSE LAWYER TO HAVE
TO KEEP ON GETTING UP IN FRONT
OF THE JURY IN RESPONSE TO
IMPERMISSIBLE THINGS AND SAY
HE'S NOT SUPPOSED TO GO INTO

REMORSE AT SOME POINT YOU GO I
HAVE GOT TO WAIT TILL IT GETS
REALLY BAD HERE SO I AGREE WITH
YOU WE ALL WENT OVER THAT THERE
IS WARRANT OBJECTS BUT WE ARE
ALSO TRYING TO MAKE SURE THAT
WE DON'T HAVE TO TRY PENALTY
PHASE CASES AND EVERY TIME
CLOSING ARGUMENTS OR LIKE WE
HAVE HERE WITH THE RIGHT TO
REMAIN SILENT THE ARGUMENT IS
IF IT WAS IMPROPER IT WAS
HARMLESS IN THIS CASE IT SEEMS
TO ME PROSECUTOR HAVE BEEN
LISNING AND HAVE NOT STEPPED
OVER THE LINE AND THIS ONE
CONCERNS ME BECAUSE OF WHAT WE
HAVE BEEN TALKING THIS MORNING.
YOUR HONOR, THE PROSECUTOR
-- HAD ARGUED REMORSE AND WOULD
FINALLY THE DEFENSE BROUGHT UP
THE ISSUE THEY -- THE TRIAL
COURT INDICATED THAT WELL, IT
SOUNDS LIKE YOU HAVE
STIPULATIONS, AND WHEN THEY
DISCUSSED THAT.
BUT WHAT ABOUT THE FACT IT
SEEMS HERE AGAIN IN THE
SENTENCING ORDER WE HAVE A
TRIAL JUDGE AGAIN PICKING UP ON
THIS INFORMATION ABOUT LACK OF
REMORSE AND HE ACTUALLY PUTS
THAT IN HIS SENTENCING ORDER
ALSO.
YOUR HONOR, WHAT HE DID, IT
IS PERFECTLY APPROPRIATE.
TO TALK ABOUT REMORSE WHEN
THE DEFENSE DOES NOT SAY THAT
HE WAS REMORSEFUL?
THE DEFENSE INDICATED THAT
HE WAS A RELIGIOUS PERSON.
THE JUDGE IN RESPONDING TO
THAT SAID THE DEFENSE -- I
SUGGEST I PUT IT IN MY BRIEF.
YOU READ THE DEFENSE SPENCER
HEARING TESTIMONY HE DIDN'T
SHOW ANY REMORSE.
IN FACT HE SAID SYMPATHY WAS
SHOWN TO THE VICTIM.
WE HAVE A CASE HERE WHERE
THE VICTIM IS SAYING LOOK
WHETHER HE ACKNOWLEDGED IT OR
NOT HE COMMITTED THE RAPE HE
COMMITTED THE BURGLARY HE

COMMITTED THE ROBBERY BUT HE
DID NOT MURDER ANYONE SO EVEN
IF HE GETS ON THE STAND AT THE
SPENCER HEARING AND DOES NOT
SAY I'M SORRY, FOR KILLING
THESE PEOPLE, WHEN HE'S
MAINTAINING THAT HE DID NOT
KILL THESE PEOPLE DON'T WE HAVE
CASE LAW ABOUT THAT?
HE'S MAINING HIS INNOCENCE AS
TO THOSE TWO --
HE'S MAINTAINING HIS
INNOCENCE TO THE MURDER.
WHY SHOULD HE HAVE TO GET UP ON
THE STAND AND SAY I'M SORRY FOR
SOMETHING I DIDN'T DO.
HE DIDN'T HAVE TO BUT NOT ONLY
DIDN'T SHOW REMORSE BUT THE
DEFENSE -- GAVE HER TISSUE.
[INAUDIBLE]
THE DEFENSE IS OFFERING HIM
SOME RELIGIOUS GUY ARE YOU
KIDDING ME?
YOU CAN'T USE THAT?
HAVE WE GONE SO FAR OVERBOARD.
I AM NOT TRYING TO KID YOU.
WHAT I AM ASKING YOU IS IF THE
DEFENDANT IS MAINTAINING HIS
INNOCENCE ARE YOU SAYING THAT
DESPITE THAT FACT HE SHOULD GET
UP ON THE STAND, IF HE GETS ON
THE STAND, HE SHOULD SAY I'M
SORRY, FOR HAVING KILLED PEOPLE
THAT HE'S SAYING HE DIDN'T
KILL.
HE SHOULDN'T HAVE TO BUT IF
YOU GO AND COMPLAIN THAT THE
VICTIMS WERE SHOWN SOME
SYMPATHY THEN I THINK YOU
COULD, THE TRIAL COURT WOULD BE
REMISIN NOT MENTIONING -- IN
REBUTTING THE DEFENDANT
PROFFERING HIMSELF AS A
RELIGIOUS MAN AT THE VERY
LEAST.
THE DEFENDANT ADMITTED THAT HE
RAPED THE PREGNANT MRS.^WHITE
WHILE SHE WAS BEGGING FOR MERCY
FOR HERSELF AND HER UNBORN
CHILD.
GEE, UM, YOU KNOW, I DON'T KNOW
WHY ANYONE WOULD FEEL SYMPATHY
FOR HER.
AND AGAIN, THE JURY -- THE FACT

OF THIS CASE ARE SO
OVERWHELMING AND OUTRAGEOUS
THAT IT -- THE FACT THAT WE
COULD BE TALKING ABOUT ANOTHER
PENALTY PHASE BECAUSE THE JURY
WORKED THIS OUT WELL HE MAY
HAVE BEEN ARRESTED.
LOOK AT THE DEFENSE EXPERT'S
OWN TESTIMONY.
THE JURY KNEW HE WAS A B&E GUY.
HE COMMITTED BURGLARY.
WITH OUR HELP YOU HAVE
EXHAUSTED ALL OF YOUR TIME AND
PLUS -- AND I KNOW YOU ARE VERY
PASSIONATE THAT'S NOT A PROBLEM
BUT MR.^HELM WE WILL GIVE YOU A
COUPLE QUESTIONS SO IF YOU WILL
GO AHEAD AND --
I WOULD JUST LIKE TO MAKE
ONE POINT.
EVER SINCE THE DIGUILIO WAS
DECIDED THIS COURT HAS
REPEATEDLY SAID THE TEST FOR
HARMLESS ERROR IS SUFFICIENCY
OF THE EVIDENCE.
IT IS NOT THE WEIGHT OF THE
EVIDENCE AND IT IS NOT EVEN
OVERWHELMING EVIDENCE.
IT'S WHETHER THERE IS A, YOU
CAN SAY BEYOND A REASONABLE
DOUBT THAT THE INCIDENT {CHRAN}
COMPLAINED OF DID NOT AFFECT
THE JURY'S VERDICT.
THANK YOU.
THANK YOU VERY MUCH.
WE WILL TAKE THE CASE UNDER
ADVISEMENT AND THE COURT WILL
STAND IN RECESS.
ALL RISE.
COURT IS IN RECESS.

ALL RISE.
HEAR YE HEAR YE HEAR YE.
THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
ALL THOSE HAVING BUSINESS BEFORE
THIS COURT DRAW NIGH, GIVE
ATTENTION AND YE SHALL BE HEARD,
GOD SAVE THE UNITED STATES, THE
GREAT STATE OF FLORIDA AND THIS
HONORABLE COURT.
GOOD MORNING.
GOOD MORNING.
LADIES AND GENTLEMEN, THE

FLORIDA SUPREME COURT, PLEASE BE SEATED.
GOOD MORNING, FRIENDS,
WELCOME TO THE FLORIDA SUPREME COURT ON THE ORAL ARGUMENT CALENDAR FOR TUESDAY, APRIL 8th.
THE FIRST CASE UP THIS MORNING IS WILLIAMSON VERSUS STATE OF FLORIDA.
READY TO PROCEED?
OKAY.
KEVIN KULIK ON BEHALF OF MR. WILLIAMSON.
BASICALLY, IN THIS CASE, THIS WAS A CASE THAT OCCURRED -- ACTUALLY OCCURRED IN 1988, AND SORT OF A CASE, TYPICAL OF THAT ERA AND THERE'S NOT A LOT OF FORENSIC EVIDENCE OR ANYTHING LIKE THAT AND, IN 1988, THE CASE WAS TRIED IN BROWARD COUNTY, FLORIDA, IT WAS KIND OF A SENSATIONAL CASE AT THE TIME, THE WAY THE HOMICIDES OCCUR WAS, VERY BRUTAL.
AND ESSENTIALLY THAT SORT OF FLAVORED THE ENTIRE PROCEEDINGS AND CASE.
WHAT POINTS ARE YOU GOING TO ARGUE HERE?
WE ARE FAMILIAR WITH THE PROCEDURAL POINTS OF THIS.
I'M PREFACING MY OVERALL ARGUMENT HOW THE TRIAL OCCURRED AND HAD A PROBLEMS ABOUT HOW THE TRIAL OCCURRED AND THE MAIN ISSUE I GUESS UNDER THE COURT'S CONSIDERATION THIS IS GRAY ISSUE.
AND I GUESS I'LL SWITCH NOW AND START WITH THAT.
ESSENTIALLY THIS IS A CASE IN THE STATE VERSUS GRAY CASE, THE FLORIDA SUPREME COURT BASICALLY HELD THAT --
WELL --
CERTAINLY, CERTAINLY, HERE, YOU HAVE OTHER AGGRAVATION, OTHER THAN JUST THE ATTEMPTED FELONY MURDER.
I MEAN, YOU HAVE SIGNIFICANT AGGRAVATION ON THE PRIOR VIOLENT FELONY THAT WE IN OUR DIRECT APPEAL HELD WAS PROPERLY

PRESENTED IN THE GUILT PHASE.
AS TO THE BEATING TO DEATH OF A CHILD, AND -- EARLIER, AND BEATING OF ANOTHER CHILD.
WITH A BASEBALL BAT.
NOW, SO YOU HAVE THREE OTHER AGGRAVATED ASSAULTS, A KIDNAPPING, BURGLARY.
SO I DON'T SEE HOW GRAY REALLY GETS YOU VERY FAR.
OTHER THAN YOU GET REVERSAL.
ON --
I WOULD FIRST ARGUE THAT MR. RODNEY WILLIAMSON, THE DEFENDANTS'S BROTHER, HAD FOR THE EXACT SAME REASON --
WELL, THERE WAS -- THERE WAS NOT A -- IN THAT REVERSAL, IT WAS REVERSED ON THE JURY VERDICT.
COMBINED ATTEMPTED FELONY MURDER AND PREMEDITATED MURDER.
THAT'S NOT RAISED HERE.
THAT WAS THE REASON THE 4th DISTRICT REVERSED THAT CASE.
WELL, MY ARGUMENT BASICALLY IS THAT THIS COURT HAS ACTUALLY SEVERAL TIMES RULED THE OPPOSITE OF THE WAY JUSTICE WELLS HAS SUGGESTED, ESSENTIALLY, IF THERE ARE MULTIPLE GROUNDS FOR A -- AN AGGRAVATION AND SOME OF THE GROUNDS FOR AGGRAVATION ARE LATER DETERMINED TO BE NONEXISTENT CRIMES, I WOULD SUBMIT IN THIS CASE THAT THREE ATTEMPTED FIRST DEGREE MURDERS WHICH ARE NOT -- NONCONSISTENT CRIMES FOR THE PURPOSES OF THE CASE IS A SIGNIFICANT FACTOR FOR THE JURY AND THE JURY INSTRUCTIONS IN THIS CASE ACTUALLY READ THAT IF YOU FIND THAT HOMICIDES OCCURRED AS A RESULT OF -- IN THE COURSE OF THESE OTHER UNDERLYING FELONIES, ATTEMPTED MURDER AND THE OTHER ATTEMPTED FIRST DEGREE MURDERS IN THIS CASE WERE SEVERE FACTUALLY TO THE JURY, A ONE-AND-A-HALF-YEAR-OLD CHILD SHOT IN THE BACK OF THE HEAD AND SEEMED TO BE AN ATTEMPT TO ELIMINATE THE WITNESSES IN THE

CASE, PEOPLE WHO BASICALLY
DIDN'T DO ANYTHING WRONG WERE
SHOT IN THE BACK OF THE HEAD BUT
SURVIVED, BECAUSE IT WAS A .22,
NOT A FIREARM TO CAUSE --
LET ME, IF I COULD, STEER YOU
SINCE YOU HAVE A LIMITED AMOUNT
OF TIME TO AN ISSUE THAT IS OF
CONCERN TO ME AND THIS IS THE
ISSUE OF THE FAILURE TO OBJECT
TO THE DOCTOR'S TESTIMONY.
AND WHAT I AM CONCERNED ABOUT
THERE FROM YOUR STANDPOINT IS
WITH IT THE EVIDENCE THAT WAS IN
THE RECORD FROM O'BRIEN, THIS
PRIOR VIOLENT FELONY, THE
BEATING TO DEATH OF THE CHILD
AND THEN, THE -- SEVERELY
INJURING ANOTHER CHILD, HOW IS
THAT EVIDENCE PREJUDICIAL?
IT WASN'T VERY -- THEY
EMPHASIZED IN THE CLOSING
ARGUMENT IN THIS CASE -- WE
DIDN'T EVEN MENTION IN OUR
DIRECT APPEAL.
I UNDERSTAND.
I THINK THE MAIN THING ABOUT
THIS CASE AND YES, THEY
CONSIDERED THE DOCTOR'S
TESTIMONY IN CONTEXT.
IS THAT THE STATE KNEW GOING IN
THAT BASICALLY IT WAS A ONE
WITNESS CASE AND HAD MR. PANOYAN
WHO HAD -- A FLIPPED
CO-DEFENDANT --
WELL, COULD ANYONE ELSE
IDENTIFY WILLIAMSON?
IN OTHER WORDS, OBVIOUSLY THE
SURVIVING HUSBAND WAS ABLE TO
TESTIFY TO WHAT HAPPENED.
BUT WAS THE -- YOUR CLIENT OR
THE DEFENDANT IN THIS CASE,
WHOEVER WAS THE PERPETRATOR, WAS
MASTERING THE WHOLE INCIDENT?
SO ARE YOU SAYING THAT --
NO ONE.
NO ONE OTHER THAN --
NO ONE OTHER THAN MR. PANOYAN
WHORES ACTUALLY CHARGED WITH THE
CRIME AND IM PRISONED, IN JAIL
18 MONTHS.
NO ONE ELSE COULD HAVE
IDENTIFIED MR. WILLIAMSON.
THAT'S CASE PROGRESSED,

MR. PANOYAN ESSENTIALLY MADE THE CASE, ONCE HE AGREED TO BE AND IN FORM MANTLE TO THE GOVERNMENT.
THE ONLY OTHER THING THE GOVERNMENT COULD DO WAS FIND THREE OTHER PEOPLE IN JAIL WITH MR. WILLIAMSON, AND THEY ALSO TESTIFIED THAT WHILE HE WAS IN MY CELL HE TOLD ME THIS AND THAT.
ONE OF THOSE -- ONE OF THOSE WITNESSES, O'BRIEN, SAID THAT RODNEY WILLIAMSON, THAT HIS BROTHER HAD IMPLICATED RODNEY WILLIAMSON, AND RODNEY WILLIAMSON DID NOT TESTIFY IN THIS CASE, CORRECT?
THAT'S CORRECT.
BUT THERE WAS IN THE RECORD THAT HE WAS THERE BY REASON OF WHAT WILLIAMSON TOLD O'BRIEN.
WELL, THERE IS ALSO ANOTHER BROTHER, VERNON WILLIAMSON WHO WAS A SUSPECT IN THE CASE AND MR. WILLIAMSON HIMSELF, DANA WILLIAMSON, MY CLIENT, MADE COMMENTS INDICATING THAT HE THOUGHT THAT MAYBE RODNEY AND HIS BROTHER, VERNON, HAD BEEN INVOLVED IN THIS BUT NOT HIM
BUT, ESSENTIALLY, THE NATURE OF THE CASE IS THAT THEY HAD THE ONE WITNESS, MR. PANOYAN WHO WAS IN ON THE CRIME AND MADE A STATEMENT SAYING HE DIDN'T KNOW WHO COMMITTED THE CRIME AND HE WAS INNOCENT AND HOGTIED DURING IT AND THEY FLIPPED HIM AND SAID DANA WILLIAMSON COMMITTED THE CRIME AND THAT IS BASICALLY THE ENTIRE CASE, NO FORENSIC EVIDENCE TO SUPPORT THE STATEMENT AND HAD THE OTHER THREE JAIL INMATES TESTIFYING
BUT IT IS THE KIND OF CASE THAT IS WEAK --
I WANT TO ASK YOU --
AND THE DOCTOR WAS --
YOU DO HAVE THAT, YOU DO HAVE THE HAT.
THE GOVERNMENT'S WHOLE CASE IS BASICALLY DESIGNED TO BOLSTER THE TESTIMONY OF CHARLES

PANOYAN.
AND IT IS A WEAK --
YOU ARE ARGUING FOR AN EVIDENTIARY HEARING, YOU AREN'T SAYING AT THIS POINT WE SHOULD GRANT A NEW TRIAL.
ON THE -- THE GRAY ISSUE I WOULD SUBMIT THE WHOLE CASE IS SUBJECT TO REVERSAL.
ON THE PENALTY -- YOU ARE ARGUING FOR REVERSAL ON THE PENALTY PHASE.
ON THE GRAY ISSUE, I WOULD ALSO ARGUE THE GUILT PHASE.
THE COMMISSION WAS FOR FIRST DEGREE MURDER, PREMEDITATED OR FELONY MURDER, ONE OF THE UNDERLYING FELONY WAS ATTEMPTED FIRST DEGREE MURDER WHICH IS DETERMINED TO BE A NONEXISTENT OFFENSE FOR PURPOSES OF THIS CASE SO IF THE JURY IN THEORY FOUND MR. WILLIAMSON GUILTY OF FIRST DEGREE MURDER AS A FELONY MURDER WITH ATTEMPTED FIRST DEGREE FELONY MURDER WHICH DOES NOT EXIST THE -- AS THE UNDERLYING FELONY OF COURSE THE ENTIRE WAYS WOOF TO BE REVERSED.
WHAT ABOUT THE OTHER FELONIES THAT WERE FOUND.
KIDNAPPINGS, EXTORTIONS AND...
THE COURT HAS MULTIPLE TIMES DECIDED IF YOU HAVE OTHER FELONY CONVICTIONS, BUT ALSO NONEXISTENT OFFENSES ESSENTIALLY THE COURT HAS TO SUBSTITUTE ITSELF FOR THE FACT-FINDING FUNCTION OF THE JURY TO DECIDE WHICH ONE THE JURY ACTUALLY RELIED UPON, IN THE CASE, THE WILLIAMSON CASE, THE ATTEMPTED FIRST DEGREE MURDER CONVICTIONS EVEN THOUGH THEY HAVE BEEN DETERMINED TO BE NONEXISTENT WERE VERY SEVERE CASES, AND IF THE JURY DETERMINED THAT, YOU KNOW, THE SHOOTING THE CHILD IN THE BACK OF THE HEAD WAS SO HEINOUS, THAT THAT IS THE UNDERLYING FELONY WE'LL FIND HIM GUILTY OF FIRST DEGREE MURDER FOR, FIRST DEGREE FELONY MURDER.

YOU ARE SAYING THE JURY WAS INSTRUCTED ON FIRST DEGREE MEL FUNNY MURDER AND THE BASIS OF IT WAS -- FIRST DEGREE FELONY MURDER AND THE BASIS WAS FIRST DEGREE MURDER AND KIDNAPPING AND THE OTHER FELONIES, THAT WERE --
YES.
THERE WERE ALTERNATE THEORIES FOR EVERY COUNT.
FOR THE 1st DEGREE.
IT COULD BE EITHER PREMEDITATION OR FELONY MURDER AND FOR ALL OF THE ATTEMPTED 1st DEGREE MURDERS, IT WAS PREMEDITATED, ATTEMPTED OR --
BUT I'M TALKING ABOUT THE 1st DEGREE MURDER CONVICTION ITSELF.
THE JURY WAS INSTRUCTED ON PREMEDITATED MURDER, CORRECT.
THAT'S CORRECT.
THE JURY WAS INSTRUCTED ON FELONY MURDER.
CORRECT.
AND THE FELONIES THAT THEY WERE INSTRUCTED ON WERE WHAT?
BASICALLY ALL OF THE OTHER FELONIES IN THE CASE.
I'M LOOKING AT TWO -- LOOKING AT -- IT SAYS THE CAPITAL -- NONEXISTENCE ONES.
THE SENTENCING ORDER SAYS THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN AND LISTS THE CRIMES BUT IT STARTS WITH ROBBERY.
SEXUAL BATTERY, ARSON, BURGLARY, KIDNAPPING, AND DOES NOT TALK ABOUT ATTEMPTED 1st DEGREE MURDER.
NEVERTHELESS, THE JURY INSTRUCTION ACTUALLY EXPLAINED FELONY MURDER AND THE OTHER UNDERLYING FELONIES --
AND THE QUESTION WAS, AND THAT INSTRUCTION INCLUDED ATTEMPTED MURDER?
ON THE OTHER?
I'M NOT SURE SPECIFICALLY INCLUDED IT BUT GAVE THE DEFINITIONS OF THE OTHER -- OF THE OTHER UNDERLYING --
THAT WOULD BE PRETTY IMPORTANT.

I MEAN, WE ARE RIGHT HERE AND
YOU MIGHT HAVE A POINT, IT WOULD
SEEM TO ME ON THE CRITICAL
POINT.
WHICH IS WHAT WAS THE JURY
INSTRUCTED ON.
YOU WOULD BE ABLE TO TELL US,
WHETHER THE -- BECAUSE THERE WAS
NO SEXUAL BATTERY IN THE CASE,
WAS THERE?
NO.
ALL RIGHT, SO IT WASN'T SOME
-- LET'S ASSUME IT WAS A
CUSTOMIZED JERRY INSTRUCTION.
DID THE JURY INSTRUCTION INCLUDE
#NAME?
INCLUDE ATTEMPTED 1st DEGREE
MURDER?
FELONY MURDER?
ATTEMPTED FELONY MURDER.
YOU MEAN FOR THE GUILT PHASE?
THAT IS WHAT -- I GUESS THAT
IS WHAT WE ARE TALK ABOUT WHEN I
SAID IT WOULD REQUIRE A NEW
PENALTY PHASE AND YOU SAID, NO,
IT WOULD REQUIRE A NEW GUILT
PHASE ON THE GRAY ISSUE BECAUSE
THE JURY WAS INSTRUCTED IN A
GENERAL AND RETURNED A GENERAL
VERDICT ON 1st DEGREE MURDER AND
THAT IS PRETTY IMPORTANT RIGHT
NOW.
I THINK IT IS IMPORTANT.
WE CAN FIND THIS IN THE
RECORD, YOU WOULD AGREE IF THEY
WERE INSTRUCT ON KIDNAPPING OR
ROBBERY, THEN AS THE UNDERLYING
FELONIES, THAT --
IT WOULD NOT -- I AGREE WITH
THAT.
IT WOULD NOT APPLY TO THE GUILT
PHASE OF THE TRIAL.
OKAY.
I WANT TO -- THIS IS JUST AS A
GENERAL OBSERVATION OR QUESTION,
DID YOU RAISE IN YOUR -- LOOKS
LIKE LOOKING OVER ALL OF THE
GUILT PHASE ISSUES THAT YOU
RAISED, THEY ARE ALL ISSUES THAT
YOU COULD LOOK AT THE TRANSCRIPT
OF THE TRIAL AND SAY, THE LAWYER
SHOULDN'T HAVE DONE THIS,
SHOULDN'T HAVE DONE THAT.
I DON'T SEE ANYTHING IN A CASE

WHERE YOU ARE SAYING, 20, NOW 20
YEARS OLD AND IT IS KIND OF A --
YOU SAY A WEAK CASE, ANYTHING
THAT SHOWS THAT THE GOVERNMENT,
THE STATE DIDN'T -- FAILED TO
PRODUCE FAVORABLE EVIDENCE.
THERE ARE OTHER WITNESSES NOW
THAT COULD HAVE PLACED YOUR
CLIENT SOMEPLACE ELSE, AT ALL.
WERE ANY CLAIMS LIKE THAT RAISED
AND DENIED WITHOUT AN
EVIDENTIARY HEARING OR ARE THESE
ALL CLAIMS SOMEONE COULD READ
THE RECORD AND SAY WELL, THE
LAWYER SHOULD HAVE OBJECTED TO
THIS OR SHOULD HAVE DONE THAT?
THE ONLY POSSIBLE PIECE OF
FORENSIC EVIDENCE IN THIS CASE
WAS A STRAW HAT FOUND UNDERNEATH
ONE OF THE BODIES THAT DANA
WILLIAMSON AT ONE POINT MADE A
STATEMENT SAYING THAT HE HAD
ONCE HAD A SIMILAR HAT AND WE IN
ANOTHER PROCEEDING ACTUALLY
DEMANDED DNA TESTING OF THE
INSIDE RIM OF THE HAT SINCE
NOWADAYS WE HAVE THE ABILITY TO
TEST SUCH A THING AND THEY FOUND
NO USABLE EVIDENCE.
THAT WAS THE ONLY THING WE COULD
TRY AND DO IN THIS CASE, THE
ONLY PIECE OF EVIDENCE THAT
WOULD HAVE RE--
BUT THERE IS NO INDICATION
THAT THERE ARE OTHER SUSPECTS
THAT REALLY WERE THE REAL
PERPETRATORS HERE?
CLEARLY IT WASN'T A CRIME THAT
WAS DONE BY ONE PERSON.
AS I STATED, MY CLIENT HAD
ORIGINALLY MADE STATEMENTS
IMPLICATING HIS OWN BROTHERS.
MR. PANOYAN HAD HIS OWN REASONS
FOR INCULPATING DANA WILLIAMSON
AS OPPOSED TO VERNON OR RODNEY.
WHAT IS THE STATUS OF THEIR
BROTHERS, THEIR CONVICTIONS.
RODNEY WILLIAMSON WAS REVERSE
AND WHAT HAPPENED AFTER THAT I'M
NOT SURE.
YOU KNOW, I ASSUME HE HAD
ANOTHER PENALTY PHASE AND I
THINK GOT LIFE.
AND VERNON?

VERNON NEVER CHARGED.
JUST THE TWO, JUST RODNEY.
RIGHT.
AND THE TESTIMONY FROM O'BRIEN WAS -- THAT'S WHAT THE TESTIMONY FROM O'BRIEN WAS ABOUT.
MY PROBLEM WITH THE WAY THE TRIAL WAS CONDUCTED WAS BASICALLY IT WAS THE STATE'S ENTIRE INTENT EVEN DURING THE JURY SELECTION WAS TO BOLSTER THE TESTIMONY OF THEIR WITNESS, THEY ACTUALLY ASKED A QUESTION OF THE WHOLE JURY PANEL, HAVE YOU EVER BEEN BETWEEN A ROCK AND A HARD PLACE?
YOU KNOW, THE DEFENSE DIDN'T SAY ANYTHING, I GUESS THEY WONDERED WHY IS HE ASKING THAT AND HE SORT OF WENT DOWN THE WHOLE GROUP OF JURORS AND SAID, HAVE YOU EVER BEEN BETWEEN A ROCK AND A HARD PLACE AND YOU KNOW THAT PHRASE MEANS, YOU KNOW WHAT IT MEANS IN RELATION TO YOUR OWN CHILDREN, YOU KNOW, WHAT IF YOU GOT INTO A SITUATION WHERE YOU HAD TO MAKE A CHOICE BETWEEN DOING SOMETHING HORRIBLE AND SAVING ONE OF YOUR CHILDREN, THAT KIND OF THING AND SEEMED OUT OF CONTEXT AT THE TIME THE PROSECUTOR DID IT BUT, THEN, QUICKLY, IN HIS OPENING STATEMENT, HE SAID THE PERSON THAT I WAS REFERRING TO IS -- INJURY SELECTION WHEN I SAID HAVE YOU EVER BEEN BETWEEN A ROCK AND A HARD PLACE WAS CHARLES PANOYAN AND HE WAS, ATTEMPTED TO PLACE THE JURY IN A #NAME?
THROUGHOUT THE TRIAL AND THAT IS WHY HE CALLED THE DOCTOR AND THE DOCTOR TESTIFIED WITHOUT ANY SCIENTIFIC BASIS --
YOU ARE ARGUING THIS IS A VIOLATION OF THE GOLDEN RULE BUT SEEMS LIKE THE CASES I'VE READ AT LEAST AS FAR AS THE GOLDEN RUMOR IS TO PUT YOURSELF IN THE VICTIM'S SHOES.
AND PANOYAN WAS NOT THE VICTIM

HERE, ARE THERE ANY CASES THAT SAY IT CAN RELATE TO OTHER WITNESSES AS WELL?
WELL, THE PROSECUTOR'S CASE WAS TO MAKE MR. --
I UNDERSTAND THAT.
IS THERE ANY OTHER CASE WHERE WE HAVE SAID IT CAN RELATE TO A WITNESS, WHERE THE PROSECUTOR MAKES THE WITNESS LIKE THE VICTIM?
THE CASES ARE, I WOULD SAY, NOT THAT SPECIFIC.
THEY ARE VERY SPECIFIC.
USUALLY THE VICTIM THAT YOU ARE PUTTING -- LOOKING AT.
THEY ARE SAYING, PUT YOURSELF IN THE SHOES OF VICTIM.
SO IS THERE ANY CASE WHERE WE'VE SAID THERE IS A VIOLATION OF THE E GOLDEN RULE WHERE THEY DON'T SAY, PUT YOURSELF IN THE VICTIM'S SHOES.
NOT THAT I'M AWARE OF BUT MR. PANOYAN TESTIFIED HE WAS THREATEN WITH HIS LIFE AND THAT HIS FAMILY WOULD BE ATTACKED AND HIS SON WOULD BE CASTRATED AND DAUGHTER WOULD BE RAPED IF HE EVER TOLD ANYBODY ABOUT THIS AND HE SAID HE WAS HOGTIED DURING THE COURSE OF THE ROBBERIES.
AND, YOU KNOW, AND THIS STATE ASSERTED THROUGHOUT THE CASE THAT THAT WAS TRUE.
SO IF HE IS A -- IF THAT DOESN'T MAKE HIM A VICTIM.
HE'S A WITNESS.
I MEAN, THAT IS WHERE HE SAID IT.
IS THERE CASE LAW IN FLORIDA THAT ADDRESSES WITNESS --
VICTIM AND --
ALL OF THE OTHER FELONIES AND ROBBERIES --
NOT THE SUBJECT OF THIS TRIAL.
ACTUALLY, NO.
I MEAN, THE DEFENSES WERE THE ROBBERY -- HE WAS THE VICTIM IN THE CASE.
YOU ARE WELL INTO YOUR REBUTTAL TIME, YOU WANT TO SAVE A LITTLE TIME FOR THAT, SO...

OKAY.
MAY IT PLEASE THE COURT, LISA MARIE LERNER. I BELIEVE THE JURY WAS INSTRUCTED ON THE FELONY MURDER ON THE ROBBERY AND ARMED BURGLARY THAT'S UNDERLYING FELONIES.
AND THE STATE ATTORNEY'S CLOSING ARGUMENT HE USED THE ROBBERY CHARGES AND THE ARMED BURGLARY FOR THE FELONY MURDER FOR BOTH DONNA DECKER'S DEATH AS WELL AS THE THREE ATTEMPTED --
YOU SAY I BELIEVE BUT THE RECORD WILL SUPPORT THAT THOSE WERE THE ONLY TWO UNDERLYING FELONIES THAT THE JURY WAS INSTRUCTED ON?
I THINK SO, YES.
HOWEVER, IF THE JURY WAS INSTRUCTED ON FELONY MURDER, AND ATTEMPTED FELONY MURDER WAS USED AS A POSSIBLE UNDERLYING FELONY, FOR THE FELONY MURDER, THAT THAT WOULD BE REVERSIBLE ERROR.
FOR THE ENTIRE TRIAL?
OR JUST FOR --
1st DEGREE MURDER.
NO.
I DON'T BELIEVE IT WOULD.
BECAUSE THERE WERE ADDITIONAL UNDERLYING FELONIES.
YOU HAD NUMEROUS COUNTS OF ROBBERY, ARMED BURGLARY, YOU ALSO HAD THE EXTORTION --
BUT THAT'S DEFENSE POINTS OUT THERE IS CASE LAW THAT INDICATES THAT IF ONE OF THOSE POSSIBLE THEORIES AND WE DON'T HAVE A SPECIAL VERDICT FORM HERE, TO KNOW WHAT FELONY MURDER -- IF FELONY MURDER WAS FOUND AND UNDER WHAT CIRCUMSTANCES, IF ONE OF THE UNDERLYING FELONIES THAT WAS USED WAS NONEXISTENT CRIME, THEN DON'T YOU HAVE TO REVERSE BECAUSE WE HAVE NO IDEA OF WHETHER OR NOT THE JURY ACTUALLY USED THAT AS THE BASIS FOR THE FELONY MURDER.
FELONY MURDER.
WELL, NO, I DON'T THINK YOU DO.
BECAUSE AS I SAID YOU HAVE THE

OTHER FELONIES.
AND THE WAY THAT THE STATE PRESENTED ITS CASE IN CLOSING, THEY FOCUSED SOLELY ON THE ROBBERY AND ARMED BURGLARY.
WE -- YOU KNOW, IF THE RECORD SUPPORTS YOU WE DON'T HAVE TO GO FURTHER BUT THERE ARE CASES THAT WE ARE -- WE HAVE, AFTER WE CHANGED THE DEFINITION OF BURGLARY IF THERE IS A LEGALLY INSUFFICIENT THEORY, THAT THE JURY COULD HAVE CONVICTED ON, AND THE GENERAL VERDICT FORM, I BELIEVE, THAT THE CASE LAW SAYS YOU HAVE TO REVERSE BUT IF YOU ARE RIGHT, YOU HAVE TO GET TO THAT AS TO THE GUILT PHASE, SO, LET'S -- I MEAN, WE'LL -- THE RECORD WILL SHOW IT OR NOT.
AND I'M ASSUMING IF IT WASN'T BROUGHT TO OUR ATTENTION THAT YOU ARE PROBABLY RIGHT ON THIS PARTICULAR POINT.
I'M CONCERNED ABOUT -- THIS IS A SUMMARY DENIAL OF ALL CLAIMS AND I THINK AS TO MOST OF THEM, THEY ARE EITHER NOT ERROR OR YOU CAN #NAME?
AM CONCERNED ABOUT THIS DOCTOR'S TESTIMONY.
AND WHY THERE SHOULDN'T BE AN EVIDENTIARY HEARING AND JUST AT LEAST TELL YOU FROM MY POINT OF VIEW, MR. PANOYAN, OBVIOUSLY IS A CRITICAL WITNESS.
THE STATE THOUGHT HE WAS A CRITICAL WITNESS.
AND WE'VE BEEN SUPPLIED AND READ THE DOCTOR'S TESTIMONY IN FULL, AND IT APPEARS THAT ESSENTIALLY WHAT WE DID WAS BOLSTER THE TESTIMONY OF THE WITNESS BY COMING UP WITH THE THEORY OF -- HE ACTED AS SOMEBODY THAT HAD A CREDIBLE THREAT AND THAT IS WHAT SOMEBODY WOULD DO.
I AM -- IN THE REPLY BRIEF THEY POINTED OUT MANY CASES WHERE THE DOCTOR IN OTHER STATES HAS NOT BEEN ABLE TO TESTIFY TO THIS KIND OF PATTERN EVIDENCE.
AT THE VERY LEAST, IT WOULD SEEM THAT AN EVIDENTIARY HEARING

WOULD BE WARRANTED TO FIND OUT WHY THE LAWYER DIDN'T EVEN VOIR DIRE THE WITNESS.
MADE NO ATTEMPT TO EXCLUDE HIS TESTIMONY, AND, YOU KNOW, REALLY UNDERSTAND THE WHOLE CONCEPT IN WHICH THIS AROSE.
AND CAN YOU EXPLAIN TO ME WHY WE SHOULDN'T REVERSE FOR AN EVIDENTIARY HEARING ON THAT POINT, BECAUSE I'M SOMEWHAT CONCERNED THAT ALTHOUGH IT WASN'T MENTIONED IN DIRECT APPEAL, IT IS PRETTY POWERFUL TESTIMONY, THE DOCTOR HAD, ABOUT THE EFFECT OF YOU KNOW WHY SOMEBODY ONE COME FORWARD IF THEY HAD THIS KIND OF THREAT AND PLUS HE EVEN INTERVIEWED THE WITNESS, SO HE DIDN'T -- YOU KNOW, SO, AGAIN HE WAS SORT OF BOLSTERING THE WITNESS BY SAYING THIS WAS A CREDIBLE THREAT.
SO IF YOU COULD AT LEAST EXPLAIN WHY SUMMARY DENIAL IS WARRANTED, OR WHY WE SHOULDN'T BASED ON OUR CASE LAW AT LEAST ALLOW AN EVIDENTIARY HEARING ON THIS POINT.
WELL, INITIALLY, THE MOVING PAPERS ARE 3850 SAID THAT THE ATTORNEY WAS DECISIONED FOR NOT VOIR DIRING HOWEVER THEY DID NOT BRING OUT IN THE PAPERS ANY ASPECTS THAT HE COULD HAVE BROUGHT UP DURING VOIR DIRE.
THE INFORMATION THAT WAS IN THE REPLY BRIEF WAS NOT BEFORE THE TRIAL COURT.
IT WAS NOT IN THE ORIGINAL 3850.
MORE AS THE COURT IS AWARE WAS IT IN THE ORIGINAL APPELLATE BRIEF HERE.
THE FIRST TIME THAT INFORMATION APPEARED IN THIS CASE, IS IN THAT REPLY REEF BRIEF.
THE TRIAL COURT HAD NONE OF THAT INFORMATION.
AT THE TRIAL, THE DEFENSE ATTORNEY HAD THE DOCTOR'S CD, HE HAD HIS REPORT ON HIS INTERVIEW WITH PANOYAN AND HAD SPOKEN WITH THE EXPERTS --
BUT HE TALKED TO HIM

APPARENTLY FOR ABOUT 10 MINUTES,
BEFORE HE WENT ON THE STAND.
DEFENSE COUNSEL DID.
AND THIS DOCTOR HAD A BACHELOR'S
DEGREE IN PSYCHOLOGY.
A Ph.D. IN SOCIOLOGY.
HE HAD NEVER BEEN A TREATING
PSYCHOLOGIST.
HE HAD DONE MERELY STUDIES OF
VARIOUS TYPES OF CONFESSIONS AND
#NAME?
THAT, HOWEVER, CERTAINLY, AN
OBJECTION SHOULD HAVE BEEN MADE
AS TO WHAT IS A SOCIOLOGIST
DOING TESTIFYING AS TO THE FEAR
BY AN INDIVIDUAL UNDER THREAT?
WELL, I PRECISELY DISAGREE.
I DON'T THINK THE DOCTOR
TESTIFIED ABOUT THE FEAR.
THE CORE OF HIS TESTIMONY WAS
BASED ON HIS EXPERIENCE AS A
PSYCHOLOGIST, BE IT AN
UNDERGRADUATE DEGREE IN
SOCIOLOGY DEGREE.
HE WAS A PROFESSOR OF PSYCHOLOGY
AT THE UNIVERSITY OF CALIFORNIA
--
HE WAS A PROFESSOR OF
SOCIOLOGY.
AT BERKELEY AND HE ALSO HAD
BEEN QUALIFIED AS AN EXPERT IN
OVER 25 TRIALS AS AN EXPERT IN
THE AREA OF INFLUENCING CONTROL.
AND IT WAS THAT AREA THE DOCTOR
WAS TESTIFYING AND HIS TESTIMONY
WAS --
DID THE RECORD INDICATE
WHETHER THE DOCTOR'S TESTIMONY
HAD EVER BEEN FRYE TESTED IN
FLORIDA.
THE TRIAL RECORD, NO.
AND AND CLEARLY AT THAT POINT
IN TIME FLANNAGAN WAS OUT THERE.
AND FLANNAGAN SAID THAT IF THERE
IS A MIXTURE EVEN OF PURE
OPINION TESTIMONY WHICH HAD TO
BE A CLINICAL STUDY, AND PROFILE
TESTIMONY YOU NEEDED IT FRYE
TESTED AND PROBABLY WASN'T
ADMISSIBLE.
WELL, I DON'T BELIEVE THAT
THE DOCTOR TESTIFIED HE SAID A
PROFILE OR A SYNDROME.
IT WAS NOT LIKE A CHILD SEXUAL

ABUSE CASE WHERE THEY SAID THE CHILD IS DOING X, Y AND Z AND PROVED THAT HE WAS MOLESTED.
WHAT YOU ARE SAYING, THOUGH, WITH OUR QUESTIONS, IS SOMETHING THAT JUST LEAPS OUT FROM THE RECORD HERE.
THAT IS, IN TERMS OF, WE GO BACK TO THE CASES WHERE WE HAVE HELD THAT ONE WITNESS REALLY CANNOT COMMENT ON THE TRUTHFULNESS OR THE CREDIBILITY OF ANOTHER WITNESS, YOU KNOW, DIRECTLY.
THERE MAY BE SOME CHARACTER EVIDENCE OR SOMETHING LIKE THAT.
AND SO, THIS IS REALLY JUMPING OUT TO ALL OF US THAT YOU KNOW, WHAT IS GOING ON HERE?
ARE WE GOING TO END UP IN OUR CRIMINAL COURTS WITH EXPERT WITNESSES NOW LIKE THIS PERSON THAT COME IN AND SAY, WELL, I HAVE LOOKED AT THE TESTIMONY OF THE POLICE INFORMANT OR OF THE PRISONER THAT WAS IN THE OTHER CELL, OR OF THE WITNESS TO THESE EVENTS, AND EVERYTHING, AND IN ESSENCE, TELL A JURY THAT I THINK THAT PERSON IS TELLING THE TRUTH.
THAT UNDER THOSE CIRCUMSTANCES #NAME?
REALLY JUMPING OUT AT US IN TERMS OF THE DEFENSE LAWYER REALLY NOT DOING ANYTHING THAT #NAME?
THEN, WHAT WE HAVE IS THERE IS NO HEARING HERE, YOU KNOW, THE TWO -- TO EXPLORE ALL OF THIS AND WHAT WAS GOING ON WITH THE DEFENSE LAWYER OR WHATEVER.
SO, YOU KNOW, ESSENTIALLY WHAT WE HAVE IS A DENIAL WITHOUT ANY EXPLORATION IN AN AREA THAT IS A VERY QUESTIONABLE -- VERY QUESTIONABLE IN TERMS OF THE ADMISSIBILITY OF THIS KIND OF EVIDENCE.
THAT IT IS A VERY DANGEROUS ROAD THAT WE APPEAR TO BE TRAVELING AND RECOGNIZING, YOU KNOW, NOTHING ON DIRECT APPEAL AND ALL OF THAT, AND WHICH MAY WELL LEAD TO A DENIAL OF THE CLAIM ON THE

MERIT, YOU KNOW, IF IT IS
EXPLORED PROPERLY.
YOU KNOW, THAT THE -- WHATEVER
IS GOING ON HERE... BUT I THINK
YOU CAN HEAR OUR CONCERN THAT
WITHOUT ANY -- AS OPPOSED TO --
WE'RE NOT SUPPOSED TO HAVE THESE
CASES WHERE WE HAVE GOT TO DO
ALL THE WORK IN ORDER TO SUSTAIN
A JUDGE'S SUMMARY DENIAL.
SO WHERE ARE WE GOING WITH
TESTIMONY LIKE THIS?
IS THIS FELLOW GOING TO TESTIFY
IN THE NEXT CRIMINAL TRIAL AND
SAY THE WITNESSES ARE ALL
TELLING THE TRUTH THAT TESTIFY
FOR THE STATE?
WELL, FIRST OF ALL, I DON'T
THINK HE DID TESTIFY THAT
PANOYAN WAS CREDIBLE.
I THINK THIS IS CLOSER TO --
CREDIBLE.
I THINK IT IS CLOSER TO RAMIREZ
WHERE THE COURT DISCUSSED
WHETHER OR NOT EVIDENCE COULD
COME IN, THE DEFENSE USES --
WHETHER OR NOT KNIFE EVIDENCE
COME IN AND SAY, THIS PARTICULAR
KNIFE MADE THIS PARTICULAR
WOUND.
AND THE CORE SAID YOU CAN'T DO
THAT.
YOU NEED A FRYE HEARING.
I DON'T SEE HOW THAT COULD
POSSIBLY BE -- WE'RE TALKING
ABOUT APPLES AND ORANGES HERE.
YOU KNOW, OBJECTIVE OR WHAT IS
PERCEIVED TO BE OBJECTIVE
PHYSICAL EVIDENCE OF SOMETHING
THAT PEOPLE CAN -- AS OPPOSED TO
THE CIRCUMSTANCES SURROUNDING A
WITNESS WHO OBVIOUSLY, YOU KNOW,
PERHAPS -- OBVIOUSLY FOR VERY
GOOD, LEGITIMATE REASONS, YOU
KNOW, HAS NOT COME FORTH BEFORE,
AND NOW IS THE -- YOU KNOW, THE
KEY WITNESS IN THE CASE.
HAVING AN EXPERT WITNESS,
REALLY, TAKE ALL THESE
CIRCUMSTANCES AND SORT OF SAY,
WELL, THAT IS ALL RIGHT.
IT IS UNDERSTANDABLE.
YES, THEY DO ALL THE TIME AND
IN RAMIREZ SAID IN THAT CASE, IF

THE EXPERT IN THE CASE SAID THE WOUND IS CONSISTENT WITH BEING MADE BY THE KNIFE IT IS OKAY.
AND THAT HAPPENS ALL THE TIME BUT IT HAPPENS WITH THE DEFENSE.
WE HAVE DEFENDANTS GETTING UP THERE, SAYING, YOU KNOW, THE DEMONS WERE CHASING ME AND, THEREFORE, I DID X, Y AND Z.
LET ME ASK THE QUESTION FROM A SLIGHTLY DIFFERENT ANGLE.
WHY DO WE NEED AN EXPERT TO TELL US THAT IF YOU THREATEN TO KILL SOMEBODY'S FAMILY HE IS MORE LIKELY TO DO WHAT YOU WANT?
EVEN IF IT IS ILLEGAL?
BECAUSE IT GOES TO PANOYAN'S ENTIRE SERIES OF ACTIONS OVER A TWO TO THREE-YEAR PERIOD AND IT WASN'T A SITUATION WHERE THE STATE DIDN'T HAVE A WITNESS THAT DIDN'T COME FORWARD FOR A MONTH OR TWO.
HE DIDN'T COME FORWARD FOR TWO-AND-A-HALF YEARS.
AND THE REASON HE DIDN'T COME FORWARD WAS BECAUSE THE DEFENDANT THREATENED TO MUTILATE, TO KILL HIS FAMILY AND SO WHY DO WE NEED AN EXPERT TO TELL US THAT IF YOU HAVE THREATS AGAINST SOMEBODY'S FAMILY, HE IS MORE LIKELY NOT TO TESTIFY AGAINST YOU IN ORDER TO PROTECT HIS FAMILY?
WELL, THAT'S TRUE OF MANY EXPERT WITNESSES.
WHETHER OR NOT THE WITNESS IS TESTIFYING TO AN ISSUE THAT THE JURY ULTIMATELY HAS TO DECIDE, DOESN'T MEAN THAT THE EXPERT CAN'T ASSIST THE JURY IN ANALYZING THE EVIDENCE.
BUT APPARENTLY THE PROSECUTOR IN THIS CASE DIDN'T THINK THIS DOCTOR'S TESTIMONY WAS ALL THAT IMPORTANT IN THAT HE MENTIONED IT IN THREE LINES THAT I HAVE FOUND AND -- IN HIS CLOSING ARGUMENT.
THAT'S TRUE.
AND FOCUS ON THE EXPERT.
THE EXPERT TESTIFIED, AND IT WAS A SINGLE PART OF THE TRIAL, THE

TRIAL LEFT -- HAD 45 WITNESSES
AND --
THAT IS WHAT IS DISTURBING TO
ME IS WHY THE STATE WOULD TAKE
THAT TYPE OF RISK IN A CASE LIKE
THIS.
BUT LET ME ASK YOU TO ADDRESS
THE PREJUDICE PRONG.
WE ASSUMED SOUP THAT THIS WAS AT
LEAST THERE AT LEAST SHOULD BE
AN EXPLANATION BY THE LAWYER AS
TO WHY THERE WAS NO OBJECTION
BUT WE HAVE EXAMINED THE
PREJUDICE.
YES.
AND I DO NOT BELIEVE THAT THE
DEFENSE HAS MET THE PREJUDICE
PRONG.
AS YOU POINTED OUT, THIS
TESTIMONY WAS NOT RELIED ON
SUBSTANTIALLY IN CLOSING
ARGUMENTS.
ADDITION, THE STATE PUT ON A
NUMBER OF OTHER WITNESSES THAT I
WON'T SAY BOLSTER BUT
SUBSTANTIATE PANOYAN'S FEAR.
THEY PUT ON THE SECURITY GUARD
WHO TESTIFIED THAT PANOYAN WENT
TO THE SHOPPING CENTER
IMMEDIATELY SAID, WHAT HAPPENED,
WAS SHAKING, WAS SCARED, ASKED
THE MAN TO CALL THE POLICE.
CALLED HIS WIFE, TWO EMPLOYEES
OFFICERS WHO TALKED TO PANOYAN
THAT NIGHT SAYING HE WAS AFRAID
FOR HIS CHILDREN.
SENT POLICE OVER TO HIS HOUSE.
AND A NUMBER OF OTHER WITNESSES
WHO FOLLOWED PANOYAN'S ACTIONS.
LET ME --
THIS IS MY CONCERN AGAIN, WE
ARE TALKING ABOUT WHETHER AN
EVIDENTIARY HEARING SHOULD BE
HAD ON THIS, NOT WHETHER
ULTIMATELY PREJUDICE WOULD BE
FOUND.
THERE IS ALSO A LOT THAT WOULD
BE CONSISTENT WITH SOMEBODY WHO
PARTICIPATED IN THE CRIME AND
THEN FOR WHATEVER HIS OWN
REASONS WERE, SET UP THE STRAW
MAN TO BLAME THIS ON, EVEN
THOUGH OTHER PEOPLE WERE
INVOLVED.

THAT WOULD BE THE DEFENDANT'S THEORY.
AND AS I READ THE DOCTOR'S TESTIMONY, TO ME IT IS VERY CHILLING TESTIMONY IN TWO WAYS, FIRST OF ALL, HE INTERVIEWED PANOYAN.
SO, HE'S KIND OF ANOTHER PERSON THERE, THAT IS ADDING TO LIKE ANOTHER WITNESS FOR PANOYAN AND ALTHOUGH YOU SAY THAT HE DIDN'T COMMENT ON THE CREDIBILITY OF PANOYAN, IF YOU GO TO THE RECORD AT 2233, HE GOES THROUGH IN REVIEWING THE HISTORY OF THE EXPERIENCE IN CONNECTION WITH THE INVASION, THE DEATH, HE IS ONE WHO WAS FOR BETTER WORD THAN TERRORIZED, SOMEONE ACTING IN RESPONSE TO A CREDIBLE THREAT.
NOT ONLY TO HIMSELF, BUT FAMILY AND HE GOES THROUGH THAT AND THEN, HE SPENDS THE REST OF HIS TESTIMONY GIVING THESE HORRIBLE EXAMPLES OF PEOPLE WHO HAVE BEEN KIDNAPPED, TORTURED, FOR YEARS ON END, WHICH I CERTAINLY NOBODY IN THE CLOSING ARGUMENT COULD USE THAT.
SO, EVEN THOUGH THE DEFENSE -- I MEAN, I'M SORRY.
THE STATE DOESN'T REFER TO HIM EXTENSIVELY, I DON'T KNOW HOW YOU WIPE THAT OUT OF THE JURY'S MINE, AND CERTAINLY IT WAS CHILLING TESTIMONY TO ME, AND SO THAT IS WHY I THINK -- I'M ASKING WHY WE SHOULDN'T HAVE AN EVIDENTIARY HEARING TO KIND OF SEE, WELL, IN THE REAL WORLD OF THIS TRIAL, WAS THIS A BLIP OR WAS IT SOMETHING, ONCE YOU HEAR IT, AS A JUROR, YOU KNOW, IT IS GOING TO HAVE AN IMPACT?
WELL, I UNDERSTAND YOUR CONCERN BUT I DO SAY THAT IF WE LOOK AT THE RECORD THAT WE HAVE FROM THE TRIAL, IT IS A BLIP.
WE HAD PANOYAN HIMSELF TESTIFYING TO THESE HORRIBLE THREATS AND HE DETAILED THEM AND THIS WAS PANOYAN TESTIFYING ABOUT THREATS THAT HE SAID

WILLIAMSON MADE.
AND WE HAVE THE FACTS OF THE CASE ITSELF.
SO ANYTHING --
BUT, IF YOU DON'T BELIEVE --
IT IS GOING TO RISE AND FALL, THIS CASE, ESSENTIALLY RISES AND FALLS ON PANOYAN.
SO, AGAIN, WHAT WE HAVE HERE IS AN EXPERT WITNESS WITH QUALIFICATIONS THAT HAVE NOT BEEN FRYE TESTED AS FAR AS WHETHER HIS HERE TO IS HAVE BEEN GENERALLY ACCEPTED, BOLSTERING THE ONLY WITNESS THAT CAN PUT THE, YOU KNOW, NOOSE ON THE DEFENDANT.
AND THERE IS NO WAY TO GET AROUND THAT.
NOT LIKE THERE ARE THREE OTHER EYE WITNESSES THAT SAY THAT WHAT PANOYAN SAID HAPPENED HAPPENED.
THAT IS WHY CONCERN.
I UNDERSTAND, BUT THE DOCTOR'S TESTIMONY WAS NOT THAT PANOYAN FIT INTO A PROFILE OR A #NAME?
HE SAID BASED ON HIS ACTIONS, AND MY EXPERIENCE DEALING WITH PEOPLE, IN DIFFICULT SITUATIONS, HIS ACTIONS WERE CONSISTENT WITH SOMEONE WHO WAS THREATENED.
THAT IS PURE EXPERT OPINION TESTIMONY.
THAT DOES NOT NEED A FRYE HEARING.
AND SECONDARILY, AGAIN, I GO BACK TO THE ENTIRE RECORD.
THERE WERE AT LEAST FIVE OTHER WITNESSES WHO TESTIFIED ABOUT PANOYAN BEING THREATENED.
BECAUSE PANOYAN TOLD HIM AT THE TIME HE WAS BEING THREATENED.
HIS CHILDREN WERE THREATENED.
AND SO, TAKEN AS A WHOLE, I DON'T BELIEVE THE DEFENSE CAN SHOW PREJUDICE IN THIS, EVEN TO HAVE AN EVIDENTIARY HEARING.
AND FINALLY I WANTED TO POINT OUT TO THE COURT THAT THERE WERE TWO ADDITIONAL ITEMS OF EVIDENCE THAT DID LINK DANA WILLIAMSON TO THE CRIME.
THERE WAS THE HAT, WHICH

MR. WILLIAMSON SAID WAS -- THE
DETECTIVE SHOWED IT TO HIM, YES,
THAT IS MY HAT AND THEN BACKED
OFF A LITTLE BIT AND SAID, WELL,
IT LOOKS JUST LIKE MY HAT AND HE
SAID AND HE SAID HIS BROTHER,
VERNON, MUST HAVE PLACED IT WITH
THE DEAD BODY TO SET HIM UP AND
WE HAVE WILLIAMSON ACKNOWLEDGING
THE HAT THAT WAS FOUND UNDER
MRS. DECKER'S BODY, IN THE
LOCKED CLOSET AS HIS HAT.
ADDITION, THERE WAS A NINJA
BELTED WHICH THE STATE PROVED
THAT HIS BROTHER, RODNEY,
PARTICIPATED IN THIS CRIME,
ORDERED A COUPLE MONTHS BEFORE
FROM THE VERY DISTINCT
MANUFACTURER.
THE MANUFACTURER'S LABEL WAS ON
THE BELT.
CENTS THEY HAD THE PROOF THEY
BOUGHT IT A COUPLE MONTHS BEFORE
AND IT WAS FOUND IN PANOYAN'S
TRUCK AND SO THERE IS SOME --
MAY NOT BE OVERWHELMING BUT
THERE IS ADDITIONAL EVIDENCE
LINKING MR. WILLIAMSON AS BEING
THE PERPETRATOR OF THE CRIME
BESIDES O'BRIEN AND PANOYAN.
AND ON THE GRAY ISSUE, ON THE --
I ASK THE COURT ON THE 3850, THE
GRAY DOES NOT APPLY, YOU HAVE
FOUND IT IS NOT RETROACTIVE AND
ON THE HABEAS IT WAS A PIPELINE
CASE, BUT THE COURT SHOULD JUST,
IF YOU ARE GOING DO IT, OVERTURN
ONLY THE THREE ATTEMPTED MURDER
CONVICTIONS.
AND SEND THEM BACK FOR RETRIAL.
BUT, LEAVE THE ADDITIONAL
FELONIES AND THE 1st DEGREE
MURDER AS IT IS.
THANK YOU VERY MUCH.
REBUTTAL?
THE REASON THE DOCTOR'S
TESTIMONY IS CRITICAL IS BECAUSE
THE CASE RISES AND FALLS ON THE
TESTIMONY OF WITNESS PANOYAN.
AND ESSENTIALLY THE GOVERNMENT
HAS TO PROVE THE CASE BASED UPON
A FLIPPED CO-DEFENDANT AN
EVERYTHING IN THEIR CASE WAS
DESIGNED TO BOLSTER THE WITNESS.

TO THE -- CAN I ASK YOU A QUESTION?
TO THE EXTENT AS I ASKED THE QUESTION OF THE STATE THAT THIS IS SOMETHING WITHIN THE COMMON KNOWLEDGE, REALLY OF JURORS OF EVERYBODY THAT IF YOU ARE -- THEY THREATEN YOUR FAMILY YOU WILL FOLLOW DIRECTIONS.
WHY DOES THAT NOT MAKE IT THEN, NOT PREJUDICIAL BECAUSE HE'S NOT OFFERING ANY MORE EVIDENCE THAN THE JURY CAN ALREADY INFER BY COMMON SENSE?
I'M SAYING IN A CASE LIKE THIS ALMOST EVERYTHING IS PREJUDICIAL BECAUSE WHAT THE GOVERNMENT IS TRYING TO DO WITH ALL OF THESE ARGUMENTS, ARGUING CREDIBILITY AND WHY THE WITNESS IS CREDIBLE AND HAVING A WITNESS TESTIFY ABOUT WHY THE WITNESS IS CREDIBLE IS THEY WANT TO CHANGE THE BURDEN OF PROOF FROM -- BUT YOU HAVE TO -- YOU HAVE TO AGREE THAT THE GOVERNMENT DID NOT ARGUE THE DOCTOR IN CLOSING ARGUMENT.
I MEAN, HE WAS OR THE OF A FLASH.
FOUR WEEK TRIAL HERE AND AS I SAY, I THINK THERE ARE THREE LINES IN THE CLOSING ARGUMENT THAT MENTION THE DOCTOR, AND HE WAS NOT MENTIONED AT ALL IN THE OPENING STATEMENT.
INSTEAD THE PROSECUTOR LINKED IS A ARGUMENT AND TRIED TO PLACE THE JURY IN THE SHOES OF THE VICTIM, MR. PANOYAN IN HIS OPINION AND THE DOCTOR -- AND THEY FOUND THE WITNESS WAS UNDER CREDIBLE THREAT AND USED -- THAT WAS USED TO DESCRIBE THE TYPE OF THREAT FOR AN OPINION.
IN THAT HE WAS SAYING IF CREDIBLE, I UNDERSTAND -- ISN'T THAT A FAIR COMMENT --
THE PROSECUTOR LINKS THAT WORD WITH HIS OWN ARGUMENT, ABOUT BELIEVABLE THREATS.
YOU KNOW, I MEAN, HE WE WAS IT THROUGHOUT AND -- WEAVES IT THROUGHOUT AND FILES CHARGES

BECAUSE IT IS WARRANTED AND
MAKES AN ARGUMENT TO THE JURY
ABOUT HOW A BABY --
THAT REALLY WAS FOR -- WAIT A
MINUTE.
IN THE CASE --
LET HIM ANSWER THE QUESTION.
IN FAIRNESS, WHERE HE MADE
THE -- WE FILED IT BECAUSE THEY
ARE WARRANTED, WERE LISTING
THESE OTHER FELONIES.
THAT WERE FILED.
ISN'T THAT A FAIR READING OF THE
ORAL ARGUMENT.
I IT WOULD HAVE SAY THAT, YOU
KNOW, I'VE TRIED SEVERAL CASES
AGAINST THIS PARTICULAR
PROSECUTOR MYSELF PERSONALLY
AND, YOU KNOW, HE'S VERY ABLE --
A VERY ABLE PERSON.
BUT I MEAN --.
I'M BUILDING HIM UP TOO MUCH,
MAYBE --
AND I'M READING IT.
READING IT.
I ALSO NOTE IN RESPONSE --
RESPECT TO THE GRAY ISSUE THAT
IN OUR DIRECT APPEAL, OPINION,
THAT WE SAY THAT THE CAPITAL
FELONY WAS COMMITTED WHILE
WILLIAMSON WAS ENGAGED OR
ACCOMPLISHING THE COMMISSION OR
ATTEMPT TO COMMIT BURGLARY,
ROBBERY, AND KIDNAPPING, WE DID
NOT REFER TO ATTEMPTED FELONY
MURDER MORE DOES THE SENTENCING
ORDER.
SO DOESN'T THAT -- ISN'T THAT
PRETTY MUCH ON POINT.
ON THAT ISSUE.
YES.
CHIEF, MAY I ASK ONE
QUESTION?
AND PLEASE BE DIRECT WITH
YOUR OUT -- WE ARE OUT OF TIME,
SO....
I'M SORRY, I HAD TROUBLE
GETTING TO YOU.
LET ME ASK ONE QUESTION.
HYPOTHETICALLY, PUT YOURSELF IN
THE OTHER FOOT, IF PANOYAN HAD
BEEN CHARGED BY THE STATE IN THE
CASE AND HAD ATTEMPTED PRESENT
THE TESTIMONY OF THE DOCTOR, TO

MAKE THE ARGUMENT THAT HE WAS
UNDER THIS THREAT, WOULD THE
SAME ARGUMENT APPLY, THE
TESTIMONY WOULD NOT BE
ADMISSIBLE?
I WOULD SAY YES.
I MEAN, ESSENTIALLY, THE
DOCTOR'S TESTIMONY DOESN'T MEET
ANY SCIENTIFIC STANDARDS OR
EVIDENCE CODE STANDARDS AND
FAILS UNDER, BASICALLY, EVERY
POSSIBLE TEST.
HE NEVER TESTIFIED ABOUT THE
SPECIFIC EXPERTISE THAT HE HAD.
DO YOU AGREE HE WASN'T
TESTIFYING TO -- SUFFERING FROM
A PARTICULAR SYNDROME?
I AGREE TO THAT.
HE JUST SAID, YOU KNOW, THE
LANGUAGE IS IN MY BRIEF, THERE
IS A PATTERN, THE PATTERN, THE
WITNESS SHOWS IS THAT HE WAS
UNDER A CREDIBLE THREAT.
I MEAN,, YOU KNOW, I THINK THE
ENTIRE PURPOSE OF THE TESTIMONY
WAS FOR THE WITNESS TO
ESSENTIALLY VOUCH FOR IT.
THIS WOULD BE SOMEWHAT
SIMILAR TO THE EARLIER CASES --
SOMEWHAT SIMILAR TO THE CASES ON
DOMESTIC VIOLENCE, PEOPLE
CLAIMING THEY WERE VICTIMS OF
DOMESTIC VIOLENCE AN EXPLAINED
THEIR CRIMINAL BEHAVIOR AS A
RESPONSE TO BEING A VICTIM OF
DOMESTIC VIOLENCE.
CRIMINAL CASES AN DOMESTIC
VIOLENCE I AGREE, THAT TYPE OF
TESTIMONY SHOULD NOT BE
ADMISSIBLE.
THE JURY SHOULD BE THE ONES TO
LOOK AT THE WITNESS AND DECIDE
WHETHER OR NOT THEY ARE
CREDIBLE.
AND AT WHAT LEVEL.
THE PROSECUTOR THROUGHOUT ALL OF
THIS CHANGED THE BURDEN OF PROOF
FROM BEYOND A REASONABLE DOUBT
TO WHETHER YOU HAVE A GUT
FEELING ABOUT WHETHER YOU
BELIEVE THE WITNESSES WHICH IS
NOT E THIS BURDEN OF PROOF IN
THE CASE AND THAT THIS IS KIND
OF CASE HE HAS AND I UNDERSTAND

WHY HE -- HE'S DOING IT AND I
WAS A PROSECUTOR BEFORE MYSELF
AND THIS CASE IS, YOU KNOW, A
VERY WEAK CASE BASED UPON THE
PANOYAN TESTIMONY AND I WOULD
SUBMIT THAT EVERY PIECE OF
TESTIMONY, ESPECIALLY TESTIMONY
IN THE NATURE OF THE DOCTOR --
WITH THAT, YOU BOTH HAVE USED
YOUR TIME, PLUS ADDITIONAL TIME.
THANK YOU.
THANK YOU VERY MUCH, TAKE THE
CASE UNDER ADVISEMENT.
NEXT CASE ON THE CALENDAR IS
STATE OF FLORIDA VERSUS
MONINGER.
IF -- MONINGER IF I'M
PRONOUNCING THAT CORRECTLY.
MAY IT PLEASE THE COURT, I
REPRESENT THE STATE ON THIS
APPEAL, THE SECOND DISTRICT
COURT IN THE CASE, ERRED IN
FINDING THE VICTIM CAN NEVER
BEHAVE DUAL INTEREST IN
OBTAINING EVIDENCE TO
SUBSTANTIATE THEIR CLAIM.
WOULD YOU --
I THINK WE'RE BOTH GOING IN
THE SAME DIRECTION.
THOUGH MORE I LOOK AT THIS CASE,
I THINK YOU REALLY NEED TO GO
TOWARD, IS THERE REALLY CONFLICT
HERE AND EXPLAIN IT IN SOME
DETAIL AND THE MORE I LOOK AND
ANALYZE IT.
IT REALLY SEEMS WE HAVE
DIVERGENT FACTUAL PREDICATES AND
DO WE REALLY HAVE JURISDICTION
HERE.
JUSTICE I THINK IN THIS CASE
THE FACTS ARE MORE SIMILAR THAN
THEY WOULD APPEAR ON IMMEDIATE
GLANCE.
UNDER TREADWAY, LOOKING FOR
CONFLICT, WHAT WE HAD IN
TREADWAY WAS THE OWNER OF AND
INSURANCE AGENCY SETS UP AN
ANNUITY PROGRAM, ONE OF HIS
AGENTS INVESTS HIS OWN MONEY IN
IT AND ALSO INVESTS MONEY FROM
SOME OF HIS CLIENTS.
AND HE GOES INTO TRIAL, HE DID
NOT HAVE THE AUTHORITY TO LOOK
AT -- FILES HE DIDN'T HAVE THE

AUTHORITY TO LOOK AT, TO CHECK ON HIS CLIENT'S FILES AND -- BEFORE YOU GO FURTHER ON THOSE FACTS.
DID ANY STATE AGENT ASK THAT PERSON TO GO INTO THE FILES?
NO.
NOT AT THAT POINT, YOUR HONOR.
WHAT HAPPENED IS HE GOES INTO THE FILES AND HE THEN COPIES FILES, GOES TO AN ATTORNEY, AND HIS ATTORNEY GOES TO THE STATE.
AND OFFERS THIS EVIDENCE.
ISN'T THAT SIGNIFICANTLY DIFFERENT WHEN SOMEONE IS ACTING IN RESPONSE TO ENCOURAGEMENT, IF NOT DIRECTION, ENCOURAGEMENT FROM THE STATE.
IF IT HAD STOPPED THERE, YOUR HONOR I BELIEVE YOU ARE RIGHT.
BUT IT DIDN'T.
THIS PERSON ENGAGED IN A MONTH-LONG INVESTIGATION, CONTINUING TO PROVIDE EVIDENCE TO THE STATE AGAINST HIS EMPLOYER.
WHO INITIATED THE CONTACT?
WAS IT THE AGENT INITIATING THE CONTACT WITH THE STATE.
EXACTLY THE SAME AS WE HAD IN MONINGER, WE HAVE THE VICTIMS OF THE CRIME WHO INITIATES THE CONTACT --
DID THE AGENT SAY I HAVE THE DOCUMENTS AND GIVE THEM TO THE STATE.
YES.
OKAY, DOESN'T THAT -- AND WHETHER THIS CASE IS RIGHT OR WRONG, IS REALLY A DIFFERENT ISSUE.
DOESN'T THAT MAKE THAT A DIFFERENT FACTUAL CASE THAN THIS ONE.
NO.
BECAUSE IN THIS CASE, IT DIDN'T STOP THERE.
HE CONTINUED TO PROVIDE MORE EVIDENCE AND THIS IS AN ONGOING EXCHANGE, OVER A SERIES, WHERE THE AGENT AS YOU PROVIDED -- ACTUALLY PROVIDED MORE EVIDENCE.
BUT I GUESS, WE'RE TALKING ABOUT THE 4th AMENDMENT AND IF,

IN THIS CASE, IN MONINGER, THE YOUNG GIRL VICTIM HAD, HERSELF, GONE AND WITHOUT DISCUSSION OR URGING OR ACQUEISCENCE OF THE POLICE -- ACQUIESCENCE OF THE POLICE AND SEARCHED THE HOUSE AND BROUGHT IT TO THE POLICE, WE WOULDN'T BE HERE BECAUSE HE IS #NAME?
WE ARE TALKING ABOUT A APPLICATION FOR PRINCIPLE OF LAW WHICH IS [INAUDIBLE] THAT IF A PARTICULAR PRIVATE INDIVIDUAL BECOMES IN ESSENCE A STATE AGENT, THEN THE 4th AMENDMENT APPLIES, THAT IS THE PRINCIPLE.
NOW, I THINK THAT WE'RE TALKING THEN ABOUT AN APPLICATION FOR PRINCIPLE TO A VERY DISCRETE SET OF FACTS AND I'M STRUGGLING TO SEE HOW YOU FIND CONFLICT BETWEEN THE SECOND DISTRICT CASE AND THE -- 2nd AND THE 4th DISTRICT CASE.
BECAUSE THE PRINCIPLE IS WHAT THEY ARE BOTH APPLYING.
NOW, THEY -- AND THE FACTS TO ME, ALTHOUGH YOU SAY, WELL, IT IS THE SAME BECAUSE -- I THOUGHT YOU WERE SAYING IS BECAUSE THE AGENT KEPT ON TURNING OVER INFORMATION, BUT IT'S NOTE THIS TURNING OVER THE INFORMATION THAT IS THE 4th AMENDMENT VIOLATION.
IT IS THE INSTIGATION AND ENCOURAGEMENT OF THE POLICE EXPRESSLY IN THE CASE THAT MADE THE 2nd DISTRICT SAY THIS APPLYING TREADWAY AND IN OUR VIEW, BASED ON THE TIP LATE FACTS AND OF COURSE YOU ARE SMILING BECAUSE THAT REALLY GETS THE STATE HERE, THE STIPULATED FACTS, THESE FACTS DO NOT SHOW THAT THEY WERE -- SHE WAS ACTING SOLELY FOR OR PRIMARILY OR A PRIVATE PURPOSE.
IT WAS -- AND THEY MAKE THE CONCLUSION SO I DON'T SEE WHERE THE CONFLICT IS.
I'LL START OFF, YOUR HONOR, QUITE CANDIDLY, THE STATE DIDN'T STIPULATE TO THESE -- THESE ARE

NOT WRITTEN STIPULATIONS, THE STATE WANTED TO PRODUCE THE VICTIM AND THEIR -- ALL THE WITNESSES BUT THE TRIAL COURT DECIDED.
IT APPEARS THE TRIAL COURT WANTED TO APPLY A C4 PROCEDURE TO --
WHATEVER I WASN'T QUOTING THE STATE.
I'M SAYING WE HAVE -- THE FACTS ARE RIGHT NOW AS WE HAVE TO ACCEPT THEM IN THE 2nd DISTRICT.
UNDER THESE FACTS, THE TRIAL -- 2nd DISTRICT STILL HEARD -- A FINDING THAT SHE DID NOT HAVE A DUAL PURPOSE, THAT SHE -- FIRST OFF.
NOW YOU ARE GETTING INTO THE MERITS.
FINISH WITH THE -- TREADWAY IS NOT SUSTAINABLE BECAUSE IN TREADWAY I GUESS WHAT YOU ARE SAYING IS THAT IT WAS ACCESSED AND THE CONTINUATION OF TURNING OVER DOCUMENTS, ESSENTIALLY THAT THAT IS THE SAME AS THIS CASE.
THIS CASE IS WHAT THE 4th DISTRICT IN TREADWAY FOUND THAT IS A VICTIM OF AN OFFENSE HAS A DUAL PURPOSE, IN PROVIDING INFORMATION TO THE POLICE TO SUBSTANTIATE THEIR CLAIMS AND IN OUR CASE, THERE ARE OBJECTIVE PRIVATE INTERESTS FROM THE 15-YEAR-OLD VICTIM TO SHOW THAT THE -- WE COULD ACCOMPLISH THE OBJECTIVE IF THE TRIAL COURT ALLOWED US TO BRINGING THE VICTIM FORWARD AND ALLOWED HER TO TESTIFY.
YOU HAVE SAID THAT A COUPLE OF TIMES, IF THE TRIAL COURT HAD ALLOWED IT.
WAS THERE AN OBJECTION MADE BY THE ATTORNEYS TO THE TRIAL COURT, WHETHER YOU CALL IT A STIPULATED FACT, THE PROPER FACTS, WHATEVER IT IS, DID THE STATE OBJECT TO THAT PROCEDURE.
THE STATE -- IF YOU READ THE TRANSCRIPT OF THAT HEARING, THE TRIAL COURT MADE IT PERFECTLY CLEAR THAT THIS IS A CASE BASED

ON THE FACTS AND HE WAS GOING TO GO WITH THESE FACTS AND THE STATE SAID, WELL, I HAVE MY WITNESSES HERE, CAN WE PUT THEM ON AND THEY ARE READY TO TESTIFY AND HE SAID, NO, AND HE SAID CAN I PROFFER WHAT THEY WOULD HAVE SAID AND SO, WHAT WE HAVE IS ONLY A PROFFER.
WE WERE NOT PERMITTED TO BRING FORWARD TO DEVELOPMENT --
THE PROBLEM I HAVE WITH THE PROFFER, EVEN, IS THAT ONE OF THE STATEMENTS I BELIEVE YOU WERE ABOUT TO MAKE IS THAT THIS WITNESS WAS SIMILAR, THIS VICTIM, SIMILAR TO THE TREADWELL CASE AND SHE WAS THE ONE WHO BROUGHT THE CASE BEFORE THE POLICE -- WE DON'T HAVE THAT.
AND THESE PROFFERED OR STIPULATED FACTS, THERE REALLY ISN'T ANY INDICATION AS TO WHO ACTUALLY WAS THE ONE WHO CONTACTED THE POLICE.
I KNOW IN THE BRIEF, THERE IS SOME DISCUSSION THAT A FRIEND OF THE VICTIM, YOU KNOW, WENT TO THE POLICE, AND THAT IS HOW THE POLICE GOT INVOLVED.
BUT THE FACTS DON'T SUPPORT THAT.
WELL, THE FACTS THAT --
HAPPENED AND THE FACTS IN OUR CASE, DO SHOW THE POLICE WERE NOTIFIED OF THIS ABUSE AND CAME TO THE HOME OF THE VICTIM, TO SPEAK TO HER TO SHE IF SHE'D VERIFY WHAT HAD BEEN REPORTED TO THEM BECAUSE THE THIRD-PARTY DID REPORT THE OFFENSE.
DIS THAT DIFFERENCE FROM TREADWAY WHERE THE -- IS THAT DIFFERENT FROM TREADWAY WHERE THE ACTUAL PERSON WENT TO THE POLICE?
THAT GUY WENT TO THE POLICE BECAUSE HE WAS CONCERNED ABOUT HIS INVESTMENT.
ACTUALLY, IN THE CASE --
TREADWAY, THE THIRD PARTY DID GO, HE WENT TO AN ATTORNEY AND THE ATTORNEY THEN WENT TO THE POLICE, THE VICTIM DID NOT GO TO

THE POLICE.
INITIALLY, WITHIN THROUGH HIS ATTORNEY, SO, WE HAVE A 15-YEAR-OLD GIRL WHO WENT THROUGH THE MOTHER OF HER BEST FRIEND TO GET TO THE POLICE TO GET TO --
AND THAT IS FACT -- THAT FACT IS IN THE RECORD.
IT WAS THAT THE POLICE WERE NOTIFIED.
I GUESS WE ARE DISCUSSING THE MERITS.
I MEAN, WE CAN READ TREADWAY AND DECIDE WHETHER THE FACTS ARE DISTINGUISHABLE OR NOT.
I HAVE A QUESTION ABOUT THIS EXCEPTION.
THIS WAS A WARRANTLESS SEARCH INTO YES.
NORMALLY IT IS THE STATE THAT HAS THE BURDEN OF PROVING THAT IT WAS STILL LEGITIMATE UNDER THE 4th AMENDMENT.
AND DO YOU AGREE THAT THE STATE HAS TO PROVE THAT THERE WAS A DUAL PURPOSE IN THIS CASE.
NO, YOUR HONOR, THE BURDEN AT THIS POINT IS ON THE PARTY THAT BROUGHT THE MOTION TO SUPPRESS.
I DON'T UNDERSTAND THAT.
BECAUSE IN EVERY OTHER CASE WHEN WHEN WE LOOK AT WARRANTLESS SEARCHES, THAT THE BURDEN OF SHOWING THAT IT WAS PROPER NOT WITHSTANDING THE ABSENCE OF A WARRANT IS ON THE STATE.
BECAUSE THE BURDEN IN THIS CASE IS NOT SHOWING THAT THE STATE COMMITTED A WARRANTLESS SEARCH, IS WHETHER THE DAUGHTER WAS A -- AN AGENT OF THE STATE.
DID SHE TRANSFORM FROM A PRIVATE -- YOU KNOW, PRIVATE SEARCH, BECAUSE -- PRIVATE SEIZURE, THERE WAS NO SEARCH AND THE POLICE ARRIVED AT THE TRAILER OF THE VICTIM.
WITH -- AND SHE --
THE DEFENDANT DURING THIS TIME, IS UNDER ARREST, RIGHT?
NO.
THE DEFENDANT ISN'T THERE?
HE IS THERE.

OUTSIDE THE HOME, AND THEY WERE TALKING TO HIM BUT HE WAS NOT UNDER ARREST.
AND WE WOULD BE, ALL THAT THE STATE HAD TO DO WAS ASK THE DEFENDANT, MAY I SEARCH YOUR HOME, AND IF HE SAID YES, THAT WOULD HAVE ENDED THE CASE.
YES.
WELL, --
OR --
THE DAUGHTER.
OR IF HE HAD SAID NO, WE --
THE POLICE ARRIVE AT THE TRAILER NOT HAVING ANY IDEA THAT THERE IS EVIDENCE TO SUBSTANTIATE A SEXUAL BATTERY.
AND WHEN THEY SAID NO, WHAT THEN --
ONCE THE VICTIM SAYS, I BELIEVE THERE MAY BE CONDOMS, WE USED CONDOMS WHEN WE HAVE SEX AND I BELIEVE THERE MAY BE SOME IN THE TRAILER AND AT THAT TIME THEY HAVE PROBABLE CAUSE TO GET A SEARCH WARRANT, IF THEY HAD TO AND IF -- WHAT HAPPENS IS AND EVEN THE TRIAL COURT FOUND, THEY ENGAGED IN PROPER POLICE INVESTIGATION AND ASKED THE VICTIM IS THERE ANYTHING TO SUBSTANTIATE YOUR CLAIM AND SHE'S THIS ONE WHO VOLUNTEERS, YES, AND I BELIEVE THERE MAY BE SOME INSIDE.
AND SHE THEN GOES IN, YOU KNOW, TO PACK HER BAGS BECAUSE SHE WAS TOLD CHILD PROTECTIVE INVESTIGATOR WILL TAKE HER TO A SHELTER.
AND WHAT DID THEY HAVE --
GIVE HER A BAG TO GET THE CONDOMS?
WELL, SHE WAS TOLD THAT IF SHE WANTED TO, SHE COULD BRING THOSE OUT.
THE NATURE OF THE ITEM THAT SHE WAS GOING TO BRING OUT THE POLICE GAVE HER A BAG TO PUT THEM IN, YES.
WELL, ACTUALLY, I THINK UNDER THIS COURT'S CASE LAW, THAT IF THIS CHILD HAD BEEN ASKED FOR CONSENT TO SEARCH THAT THE CHILD

COULD HAVE GIVEN THE CONSENT.
AND -- BUT THAT WANT DONE,
CORRECT.
WE DIDN'T ASK FOR CONSENT
BECAUSE WE DID NOT KNOW SHE WAS
GOING TO BRING OUT THE CONDOMS,
WE DIDN'T COMPEL HER, DIDN'T
COERCE HER, THE POLICE ASKED --
SUGGESTED TO HER, IF SHE WANTED
TO SHE COULD BRING THEM OUT --
BUT THE QUESTION IS, THE
STATE DIDN'T BRING THIS AS A
CONSENT CASE.
WE DON'T KNOW WHAT PART -- BASED
ON THIS RECORD, BECAUSE --
WHETHER SHE HAD JOIN CONTROL
OVER THE -- HOW MANY BEDROOMS
AND WE DON'T KNOW AND THAT IS
ANOTHER REASON, BECAUSE THE
RECORD DOESN'T GIVE AN
ALTERNATIVE BASIS TO SHOW THAT
CONSENT WOULD HAVE BEEN
APPROPRIATE.
UNDER THE STIPULATED FACTS
THEY DID CONCEDE SHE HAD JOINT
ACCESS TO THE BEDROOM, THE
BEDROOM.
THERE IS ONE BEDROOM, YOUR
HONOR, THAT SHE HAD JOINT ACCESS
AND NEVER HAD BEEN DENIED
ACCESS.
THAT WAS PART OF THE DEFENDANT'S
STIPULATION, OF THE FACTS THEY
BROUGHT FORWARD.
YOU KNOW, THE OFFICIAL
CONSENT, IN THE SECOND DCA --
WE DIDN'T HAVE TO.
SHE BROUGHT THEM OUT FIRST.
IF SHE HAD NOT BROUGHT THEM OUT,
BEFORE SHE WAS YOU KNOW -- LED
TO THE SHELTER SHE COULD HAVE
GIVEN US -- AT LEAST CONSENT TO
GO IN BUT BROUGHT THEM OUT AND
IT IS A CONUNDRUM AT THIS POINT.
WE HAVE TO SHOW SHE ACTED
WITHOUT A DUAL PURPOSE IN GOING
AND GETTING THOSE.
YOU KNOW, REDUCED EXPECTATION OF
PRIVACY BECAUSE SHE LIVED IN
THAT HOUSE.
SHE HAD FULL ACCESS.
I UNDERSTAND YOUR ARGUMENT.
MY QUESTION IS WHETHER YOU MADE
IT IN THE SECOND DCA.

WE TRIED, YOUR HONOR.
THE PROBLEM I'M HAVING, YOU ARE TRYING TO PEEL THE ONION AND YOU NEED TO ADDRESS THIS HEAD ON AS TO -- DANCING AROUND WITH THE LAW ENFORCEMENT ENCOURAGED OR THE DO THIS IS DISINGENUOUS

MONINGER MONINGER.

THEIR CRIMINAL BEHAVIOR AS A RESPONSE.
IF THERE ARE CRIMINAL CASES ON DOMESTIC -- I AGREE.
THE JURY SHOULD BE THE ONES TO LOOK AT THE WITNESS AND DECIDE WHETHER OR NOT THEY'RE CREDIBILITY AND AT WHAT LEVEL.
THE PROSECUTOR, THROUGHOUT ALL OF THIS, IS TRYING TO CHANGE A BURDEN OF PROOF TO BEYOND A REASONABLE DOUBT TO WHETHER OR NOT YOU HAVE A GUT FEELING WHETHER YOU BELIEVE THE WITNESSES, WHICH IS NOT THE BURDEN OF PROOF.
BECAUSE THAT'S THE KIND OF CASE HE HAS.
I WAS A CREATE -- THIS CASE IS A WEAK CASE.
IT'S BASED UPON THIS TESTIMONY.

TEST TEST TEST TEST TEST TEST TEST TEST TEST TEST TEST TEST TEST.
I WOULD SUBMIT THAT EVERY PETE OF TESTIMONY, ESPECIALLY -- AND WITH THAT, YOU'VE BOTH USED YOUR TIME PLUS ADDITIONAL TIME.
THANK YOU VERY MUCH.
WE'LL TAKE THE CASE UNDER ADVISEMENT.
THE NEXT CASE ON THE CALENDAR IS THE STATE OF FLORIDA VERSUS MONINGER.
CHANDRA DASRAT.

GURALNICK LEWD AND LASCIVIOUS DE NOVO EFFECTUATED EWALD INEVITABLE DISCOVERY DISKEY ASHLEY LOOMIS STATE VERYIACCARINO IACCARINO
THE NEXT CASE ON THE CALENDAR

THIS MORNING IS THE STATE OF FLORIDA VERSUS MONINGER, IF I'M PRONOUNCING THAT CORRECTLY.
TEST TEST.
TEST TEST.

MAY IT PLEASE THE COURT, I REPRESENT THE STATE IN THIS APPEAL.
THE SECOND DISTRICT COURT IN THE CASE ERRED IN FINDING THE VICTIM CAN NEVER HAVE A DUAL --
BEFORE YOU --
WOULD YOU --
[LAUGHTER]
I THINK WE'RE BOTH PROBABLY GOING IN THE SAME DIRECTION.
THE MORE I LOOK AT THE THIS CASE, I THINK YOU REALLY NEED TO GO FORWARD IS THERE REALLY CONFLICT HERE AND EXPLAIN IN SOME DETAIL, THE MORE I LOOK AT IT AND ANALYZE IT, IT SEEMS WE HAVE SOME DIVERGENT FACTUAL PREDICATES WE'RE DEALING WITH, AND DO WE REALLY HAVE JURISDICTION HERE.
JUSTICE, I THINK IN THIS CASE THE FACTS ARE MORE SIMILAR THAN THEY WOULD APPEAR ON IMMEDIATE GLANCE.
UNDER TREADWAY, WHICH IS WHERE WE'RE LOOKING FOR CONFLICT, THE OWNER OF AN INSURANCE AGENCY SETS UP AN ANNUITY PROGRAM.
ONE OF HIS AGENTS INVESTS HIS OWN MONEY IN IT, BUT ALSO MONEY FROM SOME OF HIS CLIENTS.
HE GOES INTO FILES HE DID NOT HAVE THE AUTHORITY TO LOOK AT TO CHECK ON THROUGH HIS CLIENT'S FILES AND --
BEFORE YOU GO FURTHER, DID ANY STATE AGENT ASK THAT PERSON TO GO INTO THE FILES?
NO, NOT AT THAT APPOINTMENT, YOUR HONOR.
BUT WHAT HAPPENS IS HE DOES GO INTO THOSE FILE, HE THEN COPIES FILES, GOES TO AN ATTORNEY, AND HIS ATTORNEY GOES TO THE STATE AND OFFERS THIS EVIDENCE.
ISN'T THAT SIGNIFICANTLY --
SIGNIFICANTLY DIFFERENT WHEN

SOMEONE'S ACTING FROM
ENCOURAGEMENT FROM THE STATE?
IF IT HAD HAPPENED RIGHT
THERE, I BELIEVE YOU'RE RIGHT,
BUT IT DIDN'T.
THIS PERSON ENGAGED IN A MONTH
LONG INVESTIGATION CONTINUING TO
PROVIDE EVIDENCE TO THE STATE
AGAINST HIS EMPLOYER.
WHO INITIATED THE CONTACT?
WAS IT THE AGENT INITIATING
CONTACT WITH THE STATE?
EXACTLY AS IN MONINGER.
WE HAVE A VICTIM INITIATING
CONTACT WITH THE STATE.
DID THE VICTIM SAY I'VE GOT
THESE DOCUMENTS?
YES.
AND WHETHER THIS CASE IS
RIGHT OR WRONG, DOESN'T THAT
MAKE THAT A DIFFERENT FACTUAL
CASE THAN THIS ONE?

NO BECAUSE IN THIS CASE IT
DIDN'T STOP THERE.
HE CONTINUED TO PROVIDE MORE
EVIDENCE, HE CONTINUED.
THIS WAS AN ONGOING EXCHANGE
OVER A SERIES WHERE THE AGENT
ACTUALLY PROVIDED MORE EVIDENCE.
THEN I GUESS, AND WE'RE
TALKING ABOUT THE FOURTH
AMENDMENT.
IF, IN THIS CASE, IN MONINGER,
IF THE YOUNG GIRL VICTIM HAD
HERSELF GONE AND WITHOUT
DISCUSSION OR URGING OR
ACTUAL -- OF THE POLICE AND
SEARCHED THE HOUSE AND BROUGHT
THIS TO THE POLICE, WE WOULDN'T
BE HERE BECAUSE SHE'S NOT A
STATE ACTOR.
WE'RE REALLY TALKING ABOUT AN
APPLICATION FOR PRINCIPLE OF LAW
WHICH IS -- [INAUDIBLE] THE
COUNTRY WHICH IS THAT IF A
PARTICULAR PRIVATE INDIVIDUAL
BECOMES, IN ESSENCE, AN AGENT,
THEN THE FOURTH AMENDMENT
APPLIES.
THAT'S THE PRINCIPLE.
NOW, I THINK WE'RE TALKING,
THEN, ABOUT AN APPLICATION OF
PRINCIPLES TO A VERY DISCREET

SET OF FACTS, AND THAT'S WHY I'M STILL STRUGGLING TO SEE WHY YOU FIND CONFLICT BETWEEN THE SECOND AND THE --
FOURTH.
FOURTH DISTRICT.
THAT'S RIGHT.
BECAUSE THE PRINCIPLE IS WHAT THEY'RE BOTH APPLYING.
NOW, THEY -- AND THE FACTS TO ME, ALTHOUGH YOU SAY, WELL, IT'S THE SAME BECAUSE WHAT I THOUGHT YOU WERE SAYING WAS BECAUSE THE AGENT KEPT ON TURNING OVER INFORMATION.
IT'S NOT THE TURNING OVER OF INFORMATION THAT IS THE FOURTH AMENDMENT VIOLATION, IT'S THE INSTIGATION AND ENCOURAGEMENT OF THE POLICE EXPRESSLY IN THIS CASE THAT MADE THE SECOND DISTRICT SAY THIS, APPLYING TREADWAY AND IN OUR VIEW BASED ON THE STIPULATED FACTS, AND THAT, OF COURSE -- YOU'RE SMILING BECAUSE THAT REALLY GETS THE STATE, YOU KNOW, HERE, THE STIPULATED FACTS, THESE FACTS DO NOT SHOW THAT THEY WERE, THAT SHE WAS ACTING SOLELY OR PRIMARILY FOR A PRIVATE PURPOSE.
AND THEY MAKE THAT CONCLUSION.
SO I DON'T SEE WHERE THE CONFLICT IS.
MAY I START OFF, YOUR HONOR, QUITE CANDIDLY, THE STATE DIDN'T STIPULATE TO -- THIS IS NOT A WRITTEN STIPULATION.
THIS WAS -- THE STATE WANTED TO PRODUCE THE VICTIM AND ALL THE WITNESSES, BUT THE TRIAL COURT DECIDED, WANTED TO APPLY C4 PROCEDURE TO MOTION --
AND I WASN'T FAULTING THE STATE.
WHAT I'M SAYING, THOUGH, IS THE FACTS ARE RIGHT NOW AS WE HAVE TO ACCEPT THEM IN THE SECOND DISTRICT OPINION.
UNDER THESE FACTS THE TRIAL, THE SECOND DISTRICT STILL ERRED IN FINDING THAT SHE DID NOT HAVE A DUAL PURPOSE, THAT SHE --
FIRST OF ALL --

NOW YOU'RE GETTING INTO THE MERITS, AND I GUESS FINISH WITH SAYING THAT TREADWAY ISN'T ADMISSIBLE BECAUSE IN TREADWAY, I GUESS WHAT YOU'RE SAYING IS IT WAS THE CONTINUATION OF TURNING OVER DOCUMENTS.
ESSENTIALLY WITH -- THAT THAT'S THE SAME AS THIS CASE.
THIS CASE IS, WHAT THE FOURTH DISTRICT IN TREADWAY FOUND IS THAT A VICTIM OF AN OFFENSE HAS A DUAL PURPOSE IN IN PROVIDING INFORMATION TO THE POLICE TO SUBSTANTIATE THEIR CLAIMS.
AND IN OUR CASE THERE ARE OBJECTIVE, PRIVATE INTERESTS FROM THE 15-YEAR-OLD VICTIM TO SHOW THAT WE COULD HAVE FOUND MORE SUBJECTIVE IF THE TRIAL COURT HAD ALLOWED US TO BRING THE VICTIM FORWARD.
YOU HAVE SAID THAT A COUPLE OF TIMES.
WAS THERE SOME OBJECTION MADE BY THE STATE TO THE TRIAL FOR WHETHER YOU CALL IT STIPULATED FACTS OR PROPER FACTS, WHATEVER IT IS, DID THE STATE OBJECT TO THAT PROCEDURE?
THE STATE, IF YOU READ THE TRANSCRIPT OF THAT HEARING, THE TRIAL COURT MADE IT PERFECTLY CLEAR THAT THIS WAS BASED ON THE FACTS, AND HE WAS GOING TO GO WITH THESE FACTS.
AND THE STATE SAID, WELL, I HAVE MY WITNESSES HERE, CAN WE PUT THEM ON?
AND HE SAID, NO, AND HE SAID, WELL, CAN I AT LEAST HAVE A PROFFER OF WHAT THEY WOULD HAVE SAID?
THE PROBLEM I HAVE WITH THE PROFFER, EVEN, IS THAT ONE OF THE STATEMENTS I BELIEVE YOU WERE ABOUT TO MAKE IS THAT THIS WITNESS WAS SIMILAR TO, THIS VICTIM WAS SIMILAR TO THE TREADWELL CASE IN THAT SHE WAS THE ONE THAT BROUGHT THIS CASE BEFORE THE POLICE?
WELL, WE DON'T HAVE THAT.
IN THESE PROFFERED FACTS OR

STIPULATED FACTS, THERE ISN'T
ANY INDICATION AS TO WHO
ACTUALLY WAS THE ONE THAT
CONTACTED THE POLICE.
I KNOW IN THE BRIEFS THERE'S
SOME DISCUSSION THAT A FRIEND OF
THE VICTIM, YOU KNOW, WENT TO
THE POLICE AND THAT'S HOW THE
POLICE GOT INVOLVED, BUT THE
FACTS DON'T SUPPORT THAT.
WELL, THE FACT THAT, WHAT
HAPPENED AND THE FACTS IN OUR
CASE [INAUDIBLE] DO SHOW THE
POLICE WERE NOTIFIED OF THIS
ABUSE AND CAME TO THE HOME OF
THE VICTIM TO SPEAK TO HER TO
SEE IF SHE WOULD VERIFY WHAT HAD
BEEN REPORTED TO THEM BECAUSE A
THIRD PARTY DID REPORT THE
OFFENSE.

SO IS THAT DIFFERENT FROM
TREADWAY WHERE THE ACTUAL PERSON
WENT TO THE POLICE?
THAT GUY WENT TO THE POLICE
BECAUSE HE WAS CONCERNED ABOUT
HIS INVESTMENT DEAL.
ACTUALLY IN THIS CASE, IN
TREADWAY, YEAH, A THIRD PARTY
DID GO.
HE WENT TO AN ATTORNEY, AND THE
ATTORNEY THEN WENT TO THE
POLICE.
THE VICTIM DID NOT GO TO POLICE
INITIALLY.
WENT THROUGH HIS ATTORNEY.
SO WE HAVE A 15-YEAR-OLD GIRL
WHO WENT THROUGH THE MOTHER OF
HER BEST FRIEND TO GET TO --
AND THAT FACT IS IN THE
RECORD?
IT WAS JUST THAT THIS POLICE
THE POLICE WERE NOTIFIED.
IS IT YOUR -- I GUESS WE'RE
JUST DISCUSSING THE MERITS.
I HAVE A QUESTION ABOUT THIS
EXCEPTION.
THIS WAS A WARRANTLESS SEARCH.
YES.
NORMALLY, IT IS THE STATE
THAT HAS THE BURDEN OF PROVING
THAT IT WAS STILL LEGITIMATE
UNDER THE FOURTH AMENDMENT.
DO YOU AGREE THAT THE STATE HAD

TO PROVE THERE WAS A DUAL
PURPOSE IN THIS CASE?
NO, YOUR HONOR.
THE BURDEN AT THIS POINT IS ON
THE PARTY THAT BROUGHT THE
MOTION TO SUPPRESS.
SEE, I DON'T UNDERSTAND THAT
BECAUSE IN EVERY OTHER CASE WHEN
WE LOOK AT WARRANTLESS SEARCHES
THAT THE BURDEN OF SHOWING THAT
IT WAS PROFFERED,
NOTWITHSTANDING THE ABSENCE OF A
WARRANT, IS ON THE STATE.
BECAUSE THE BURDEN IN THIS
CASE IS NOT SHOWING THAT THE
STATE COMMITTED A WARRANTLESS
SEARCH, IT'S WHETHER THE
DAUGHTER WAS A AGENT OF THE
STATE.
DID SHE TRANSFORM FROM A
PRIVATE, YOU KNOW, AS A PRIVATE
SEARCH BECAUSE -- I MEAN, A
PRIVATE SEIZURE.
THERE WAS NO SEARCH.
THE POLICE ARRIVED AT THE
TRAILER OF THE VICTIM WITH THE
IDEA -- AND SHE CONFIRMED --
THE DEFENDANT DURING THIS
TIME IS UNDER ARREST, RIGHT?
NO.
THE DEFENDANT ISN'T THERE?
HE IS THERE.
HE'S OUTSIDE THE HOME.
THEY WERE TALKING TO HIM, BUT HE
WAS NOT UNDER ARREST.
AND HE WOULD BE IF ALL THE,
ALL THAT THE STATE HAD TO DO WAS
ASK THE DEFENDANT, MAY I SEARCH
YOUR HOME?
AND IF HE SAID, YES, THAT WOULD
THEN HAVE ENDED THIS CASE?
YES.
WELL, OR IF THEY --
OR --
OR ASK THE DAUGHTER.
OR IF HE HAD SAID NO -- THE
POLICE ARRIVED AT THE TRAILER
NOT HAVING ANY IDEA THERE'S
EVIDENCE TO SUBSTANTIATE A
SEXUAL BATTERY.
WHEN THEY SAID NO, THEN --
WE KNOW, ONCE THE VICTIM SAYS
I BELIEVE THERE MAY BE CONDOMS,
WE HAD CONDOMS WHEN WE HAVE SEX,

AT THAT TIME THEY HAVE PROBABLE CAUSE TO GET A SEARCH WARRANT.
WHAT HAPPENS IS, AND EVEN THE TRIAL COURT FOUND THEY ENGAGE IN IMPROPER POLICE INVESTIGATION, AND SHE'S THE ONE WHO VOLUNTEERS, YES, WE USE CONDOMS.
I BELIEVE THERE MAY BE SOME INSIDE.
SHE THEN GOES IN TO PACK HER BAGS BECAUSE SHE'S TOLD HE'S GOING TO A SHELTER.
AND WHAT DID THEY HAVE, DID THEY GIVE HER A BAG TO GET THE CONDOMS?
SHE WAS TOLD THAT IF SHE WANTED TO, SHE COULD BRING THOSE OUT, BUT THE NATURE OF THE ITEMS SHE WAS GOING TO BRING OUT, THE POLICE DID GIVE HER A BAG TO PUT THEM IN, YES.
WELL, ACTUALLY I THINK UNDER THIS COURT'S CASE LAW THAT IF THIS CHILD HAD BEEN ASKED FOR CONSENT TO SEARCH, THAT THE CHILD COULD HAVE GIVEN THE CONSENT.
YES, YOUR HONOR.
BUT THAT WASN'T DONE, CORRECT?
WE DIDN'T ASK FOR CONSENT BECAUSE WE DID NOT KNOW IF SHE WAS GOING TO BRING OUT THE CONDOMS.
WE DIDN'T COMPEL HER, WE DIDN'T COERCE HER, THE POLICE SUGGESTED TO HER IF SHE WANTED TO, SHE COULD BRING THEM OUT.
BUT THE STATE DIDN'T BRING THIS AS A CONSENT CASE.
WE DON'T KNOW WHAT PART OF -- BASED ON THIS RECORD.
RIGHT, BECAUSE --
WHETHER SHE HAD JOINT CONTROL OVER THIS HOUSE, HOW MANY BEDROOMS, WE DON'T KNOW IT.
AND THAT'S ANOTHER REASON THIS CASE -- BECAUSE THE RECORD DOESN'T GIVE AN ALTERNATIVE BASIS TO SHOW CONSENT --
UNDER THE STIPULATED FACT THEY DID CONCEDE SHE HAD JOINT ACCESS TO THE BEDROOM, THE BEDROOM.

THERE'S ONE BEDROOM, YOUR HONOR.
SHE HAD JOINT ACCESS, AND SHE'D NEVER BEEN DENIED ACCESS.
THAT WAS PART OF THE DEFENDANT'S STIPULATION OF FACTS THEY BROUGHT FORWARD.
YOU KNOW OUR ISSUE OF CONSENT IN --
SHE BROUGHT THEM OUT FIRST.
IF SHE HAD NOT BROUGHT THEM OUT BEFORE SHE WAS, LEFT FOR THE SHELTER, SHE COULD HAVE GIVEN THE POLICE CONSENT TO GO IN, BUT SHE BROUGHT THEM OUT SO IT'S SORT OF A CONUNDRUM AT THAT POINT.
WE HAVE TO SHOW SHE ACTED WITHOUT A DUAL NUMBER GOING AND GETTING THOSE.
IT'S A REDUCED EXPECTATION OF PRIVACY BECAUSE SHE LIVE INSIDE THAT HOUSE, SHE HAD FULL ACCESS.
I UNDERSTAND YOUR ARGUMENT, MY QUESTION IS WHETHER YOU MADE IT IN THE SECOND DCA.
WE TRIED, YOUR HONOR.
THE PROBLEM I'M HAVING WITH TRYING TO, YOU'RE TRYING TO PEEL THE ONION.
DANCING AROUND WITH THE LAW ENFORCEMENT ENCOURAGED HER TO DO THIS, I THINK, IS REALLY VERY DISINGENUOUS.
OF COURSE THEY DID.
THEN THEY GAVE HER A BAG.
ASSUMING THOSE FACTS, THAT'S HOW THIS ARGUMENT NEEDS TO FLOW RATHER THAN TRYING TO PEEL THE ONION DIFFERENT WAYS.
THEY REALLY DIDN'T, I MEAN, REALLY AS ANY THINKING ADULT THERE'S A YOUNG PERSON THERE, AND THERE'S SOMETHING HAS OCCURRED, AND THERE'S EVIDENCE INSIDE, AND THE POLICE, WELL, YOU CAN GET THOSE ON YOUR WAY OUT, AND HERE'S A BAG TO PUT THEM IN.
TO STAND HERE AND ARGUE TO THIS COURT THAT THAT'S REALLY NOT, I MEAN, THAT'S JUST NOTHING, THAT'S WHY WE NEED TO UNDERSTAND THIS CASE, AND WE REALLY NEED TO GET TO WHAT THIS CASE IS ABOUT

RATHER THAN ALL THESE TANGENTS.
YOUR HONOR, YOU'RE RIGHT.
WHAT WE HAVE, THIS HAS TO BE ABOUT SPECIFIC FINDING.
WHAT WE HAVE IS A 15-YEAR-OLD CHILD WHO HAS BEEN SEXUALLY ABUSED BY HER FATHER FOR EIGHT YEARS.
IT'S NOT -- WE NEED TO HAVE A LITTLE, A LITTLE FOUNDATION HERE.
THAT'S NOT THIS COURT LOOKING AT THE FOURTH AMENDMENT IS NOT CONDONING WHAT MAY OR MAY NOT HAVE HAPPENED, AND THAT'S AN INAPPROPRIATE ARGUMENT TO TRY TO SET THIS TONE.
THE QUESTION IS WE HAVE LAW ENFORCEMENT THAT COME TO A SCENE, THAT SOMETHING HAS OCCURRED AND GO FROM THERE.
BUT DON'T WE HAVE TO ALSO LOOK AT THE VICTIM THEMSELVES?
I MEAN, IT'S NOT LIKE THE POLICE CAME TO YOUR HOUSE, YOUR HONOR, OR TO THE HOUSE OF AN ADULT AND SAID, YOU KNOW, IS THERE ANY EVIDENCE --
YOU CAN CONTINUE ON ANY WAY YOU WANT.
I'M TRYING TO GET -- IT'S NOT GOING TO SERVE YOUR PURPOSE.
THAT'S MY ONLY CONCERN.
I DON'T THINK THIS IS AN EMOTIONAL ARGUMENT, I THINK THIS IS AN OBJECTIVE ARGUMENT.
YOU LOOK AT THE COMMON KNOWLEDGE OF A MINOR CHILD THAT THE POLICE TALKED TO.
SHE WASN'T TOLD SHE HAD TO.
THERE WAS NO COMPELLING, THERE WAS NO COERCING.
I DON'T KNOW --
DOES THE, DO THE CASES REQUIRE THAT TYPE OF COERCION, DIRECTION, COMPULSION?
OR DOES IT SAY WHERE THE STATE HAS ENCOURAGED, INITIATED THE ACTION THEN IT'S STATE CONDONED AND IT'S AN ILLEGAL SEARCH?
THE COOLIDGE CASE GIVES YOU THE COMPELLING, COERCE LANGUAGE.
IN THE TREADWAY THEY FOUND THAT EVEN WHERE THERE IS A MODICUM OR

A PORTION WHETHER GOVERNMENT ENCOURAGES THAT IF THE VICTIM HAS A DUAL INTEREST, IT STILL CAN COME IN AS A PRIVATE SEARCH, YOUR HONOR.
EVEN WHERE THE GOVERNMENT HAS ENCOURAGED --
UNDER YOUR ARGUMENT ANY TIME IT'S THE VICTIM OF A CRIME, THEN WE WOULD HAVE TO FIND THAT THERE IS A DUAL PURPOSE.
NO, YOUR HONOR.

[INAUDIBLE]
EXPLAIN THE DIFFERENCE IN THIS CASE THEN.
SHE WAS THE VICTIM OF THE CRIME, AND YOU'RE SAYING BECAUSE OF THAT OR WHAT OTHER REASON DOES SHE HAVE OTHER THAN BEING THE VICTIM TO HAVE CRIME DO YOU SAY SHE HAD A DUAL PURPOSE?
ON THE CASE OF THIS RECORD WE HAVE A 15-YEAR-OLD MINOR CHILD.
FATHER IS THE ALLEGED PERPETRATOR OF THE OFFENSE, AND IF HER CASE IS NOT PROVEN AND EVEN IF SHE'S SHELTERED AT THAT POINT, SHE COULD FACE THE REAL-LIFE PROBABILITY OF BEING PUT BACK IN THE CUSTODY OF HER FATHER.
SHE'S ONLY 15.
I MEAN, THERE'S AN OBJECTIVE INTEREST RIGHT THERE.
IS THAT ARTICULATED AT SOME POINT BY HER?
I MEAN, BECAUSE MOST OF THE TIME WHEN WE SEE THESE DUAL PURPOSE CASES, THERE'S BEEN AN ARTICULATION OF WHAT THE VICTIM OR -- [INAUDIBLE] MAY HAVE BEEN.
DO WE HAVE ANY ARTICULATION IN THIS RECORD OF THIS VICTIM'S PURPOSE?

NO, WE DON'T BECAUSE WE DIDN'T HAVE, WE DID NOT ALLOW HER TO TESTIFY.
WE WERE NOT GIVEN THE OPPORTUNITY FOR HER TO TESTIFY AT THE TRIAL COURT.
WELL, BUT THE JUDGE GIVE YOU AN OPPORTUNITY TO PROFFER THE

TESTIMONY WHICH IS PROBABLY
BETTER THAN THE ACTUAL TESTIMONY
BECAUSE IT'S NOT BEING
CROSS-EXAMINED, AND THE DEFENSE
AGREED TO IT.
YOU CAN SAY WHATEVER YOU WANT IN
THE PROFFER, THIS IS WHAT SHE'S
GOING TO TESTIFY, TO YOU COULD
HAVE PUT ANYTHING YOU WANTED TO
TO JUSTIFY YOUR POSITION.
TO SAY THERE'S NO TESTIMONY, I
THINK IT WOULD HAVE BEEN MORE
DETRIMENTAL TO HAVE HER SUBJECT
TO CROSS-EXAMINATION.
WE DON'T KNOW THAT, YOUR
HONOR.
YOU DIDN'T SAY, JUDGE, WE
WANT HER TO TESTIFY, LET HER BE
SUBJECT TO CROSS-EXAMINATION, WE
THINK THAT WILL BE MORE POWERFUL
THAN TO PROFFER.
THE TRIAL COURT MADE IT CLEAR
THEY DIDN'T NEED TO HEAR
TESTIMONY.
AND AT THAT POINT, YOU DIDN'T
NEED TO HEAR TESTIMONY, THE
STATE WANTED TO PUT THEM ON,
INFORMED THE COURT THAT THEY
WERE THERE, AND THE --
AND SO DID YOU SAY, WELL, WE
WOULD PROFFER, THEN, THAT THE
VICTIM WOULD TESTIFY, THAT SHE
WAS ACTING IN HER PRIVATE
INTERESTS BECAUSE SHE DIDN'T
WANT TO BE LIVING IN THE SAME
HOUSE WITH THIS FATHER.
AND FINDING THESE CONDOMS AND
GIVING THEM TO POLICE WOULD
PROVE HER CASE, AND THEN SHE
WOULD BE ABLE TO HAVE, TO GO TO
SHELTER SOMEWHERE ELSE AND NOT
HAVE TO LIVE WITH THAT FATHER.
DID YOU PROFFER THAT?
NO, YOUR HONOR.
BUT YOU COULD HAVE.
IF WE KNEW WHAT HER
SUBJECTIVE REASONS WERE --
I ASSUME YOU --
THE POLICE DIDN'T SHOW UP,
SHE INITIATED THE CONTACT WITH
THE POLICE.
I ASSUME YOU INTERVIEWED THE
VICTIM BEFORE?
THE OFFICER DID.

NO, I'M SAYING BEFORE THE SUPPRESSION HEARING.
I ASSUME THAT A PROSECUTOR, AS NORMALLY WOULD DO BEFORE A HEARING, WOULD INTERVIEW THE WITNESS.
YES, YOUR HONOR.
AND SO IF YOU COULD HAVE GOTTEN HER SUBJECTIVE FEELINGS FROM THAT SITUATION, AT THAT POINT YOU COULD HAVE PROFFERED IT TO THE JUDGE.
IF THEY KNEW THAT WAS AN IMPORTANT THING TO, YOU KNOW, DEVELOP.
AS A SUBJECTIVE REASON, WHY WOULD --
WELL, YOU'RE THE ONE THAT'S SAYING THAT PART OF THE LAW IS WHETHER YOU'RE ACTING IN YOUR OWN PRIVATE INTEREST.
SO THAT SEEMS TO ME WOULD SUPPORT YOUR POSITION.
WELL, YES, IT WOULD HAVE.
AND IF THE TRIAL -- AND THE TRIAL COURT, THE ONUS WAS ON THE DEVELOP, I MEAN, THE DEFENDANT WAS SAYING THAT SHE WASN'T, SHE WAS ACTING SOLELY AS A GOVERNMENT AGENT.
AND AT THAT POINT WE NEEDED TO HEAR TESTIMONY FROM THE VICTIM.
AND IT HAS TO BE A SUBJECTIVE CASE BY CASE IF YOU'RE GOING TO ASK, WHAT WAS YOUR SUBJECTIVE REASON FOR GIVING THAT?
DID YOU EVER SAY DURING THE HEARING, JUDGE, AT THIS POINT THE DEFENSE IS ARGUING THAT SHE WAS ACTING IN THE GOVERNMENT'S INTEREST, AT THIS POINT WE REALLY NEED TO PUT ON THE TESTIMONY OF THE VICTIM?
NO, YOUR HONOR.
IF YOU LOOK AT THE RECORD, THERE WAS, THE STATE STATED BASED ON THEIR READING OF THE MOTION TO SUPPRESS THERE WAS AN ERRONEOUS ALLEGATION THAT SHE HAD ALREADY BEEN REMOVED FROM MR. MONINGER'S HOME PRIOR TO HER GETTING CLOTHING, THAT SHE HAD ALREADY BEEN AT SHELTER.
SO THE STATE WAS GOING FORWARD

UNDER THE BELIEF THEY THOUGHT
SHE DIDN'T HAVE THE AUTHORITY TO
ENTER INTO THE HOME AT ALL
BECAUSE SHE'D ALREADY BEEN
REMOVED, AND THE STATE SAID THAT
ON THE RECORD.
MY READING OF THIS MOTION, YOUR
HONOR, IS THAT THEY'RE ALLEGING
SHE DIDN'T HAVE ACCESS ANYMORE
TO THAT HOUSE BECAUSE PRIOR TO
HER MEETING WITH THE POLICE, SHE
WAS NO LONGER LIVING IN THE
RESIDENCE.
AND THE STATE SAID TO THE TRIAL
COURT, THAT'S HOW I READ THIS
MOTION, AND THIS IS WHAT I
UNDERSTAND THE MOTION TO BE.
AND THE TRIAL COURT SAID, WELL,
THIS IS A FACTUAL MATTER BASED
ON WHAT'S STIPULATED IN THE
MOTION TO SUPPRESS, I'M GOING TO
GO ON THOSE FACTS, AND IT'S
GOING TO BE AN EASY ISSUE FOR
ME.
AND YOU'LL SEE THEY DEVELOP
INSIDE A DIFFERENT WAY.
THE STATE THOUGHT THAT THE WHOLE
MOTION WAS THAT SHE HAD NO
AUTHORITY TO BE IN THE HOME.
WITH OUR ASSISTANCE, YOU'VE
USED ALL YOUR TIME, PLUS
ADDITIONAL TIME.
SO GO AHEAD AND BRING YOUR
ARGUMENT TO A CONCLUSION FOR
YOUR LAST STATEMENTS.
WELL --
I'LL GIVE YOU A MINUTE.
THANK YOU.
I WOULD ASK THAT THIS COURT FIND
THAT THE SECOND DISTRICT ERRED
IN FINDING THAT THE VICTIM DID
NEVER HAVE A DUAL PURPOSE.

MAY IT PLEASE THE COURT, MY
NAME IS RON GURALNICK, AND I
REPRESENT MR. MONINGER IN THIS
CASE.
I THINK THE KEY HERE IS THE --
AS YOUR HONOR INDICATED, IT GAVE
THE STATE AN ADVANTAGE BECAUSE
WE HAVE TO ASSUME THEY KNEW WHAT
THE INFORMATION WAS ANT, THEY
PREPARED FOR THE MOTION, THEY
KNEW THE FACTS OF THE CASE, THEY

DID NOT PROFFER ANYTHING TO THE COURT, AND THAT WAS INDICATED IN THE TRIAL JUDGE'S MOTION TO SUPPRESS.
THEY DID NOT PROFFER ANYTHING THAT WOULD LEAD ANYONE TO BELIEVE THERE WAS A DUAL INTEREST IN THIS CASE.
THEY HAVE AN ADVANTAGE BECAUSE, AS YOUR HONOR INDICATED, THERE WAS NO CROSS-EXAMINATION OF THE STATE'S WITNESSES.
THE STATE COULD HAVE SAID ANYTHING THAT THEY WANTED TO, THEY ARE THE REPRESENTATIVE OF THE STATE OF FLORIDA REPRESENTING THIS YOUNG LADY AND THE STATE, AND I WOULD ASSUME THAT THEY WOULD HAVE TO KNOW THE INFORMATION, AND IF THEY HAD THE INFORMATION, THEY SHOULD HAVE PROFFERED IT, AND THEY DIDN'T.
SO THERE WAS NOTHING IN THE PROFFER WHICH COULD LEAD ANYONE TO BELIEVE THERE WAS A DUAL INTEREST, THAT'S WHAT THE TRIAL JUDGE SAID, THAT'S WHAT THE SECOND DISTRICT COURT OF APPEALS SAID.

I ASSUME FROM YOUR COMMENTS THAT YOU AGREE THE TEST THAT SHOULD APPLY.
THAT I WHAT?
THAT YOU AGREE WITH WHAT TESTS SHOULD BE APPLIED IN THESE CASES.
YES, I DO, ABSOLUTELY.
THAT'S THE STATE V. TREADWAY, AND THAT IS THAT THE STATE CANNOT SECURE EVIDENCE THAT THEY HAVE FROM THE INTERIOR OF A HOME WHERE THEY HAVE NOT SORT A SEARCH WARRANT, NEVER EVEN ATTEMPTED TO GET A SEARCH WARRANT.
BOTH THE FATHER AND THE DAUGHTER WERE PRESENT, AND NEITHER ONE OF THEM WAS ASKED FOR CONSENT TO ENTER THE HOME OR SEARCH THE HOME.
WAS THERE PROBABLE CAUSE AT THAT POINT TO ARREST THE FATHER?
AT THE TIME THAT THE POLICE CAME

AND THE DAUGHTER ACKNOWLEDGED
THAT THERE HAD BEEN SEXUAL
ACTIVITY, WAS THERE, THEN,
PROBABLE CAUSE TO ARREST
MR. MONINGER?
I WOULD HAVE TO SAY, YOUR
HONOR, THAT WHEN THE DAUGHTER
SAID THERE WAS SEXUAL ACTIVITY
AND SHE'S A 15-YEAR-OLD MINOR
AND THAT'S HER FATHER, THAT THEY
HAD PROBABLE CAUSE.
I WOULD SAY THAT.
IF THEY HAD PROBABLE CAUSE TO
ARREST HIM AT THAT POINT, COULD
THEY HAVE SEARCHED THE RESIDENT
PURSUANT TO THE ARREST?
NO.
THEY HAVE TO GET A SEARCH
WARRANT.
OR THEY WOULD ALSO THEN HAVE
PROBABLE CAUSE TO GET THE SEARCH
WARRANT.
THEY WOULD HAVE HAD PROBABLE
CAUSE TO GET THE SEARCH WARRANT
IF THEY ATTEMPTED TO DO SO, BUT
THEY NEVER DID.
WHAT THEY DID WAS, THEY SAID GO
INTO THE HOUSE, YOUNG LADY,
GATHER YOUR CLOTHING, AND, OH,
AND BY THE WAY, IS THERE
ANYTHING IN THE PREMISES THAT
COULD SUBSTANTIATE YOUR
ALLEGATION?
SHE SAID, THERE'S TWO CONDOMS IN
A TRASH CAN IN MY FATHER'S
BEDROOM IN HIS HOUSE.
WHAT I WAS GETTING AT --
YES.
WAS PROBABLE CAUSE TO ARREST
THE FATHER AND THEN PROBABLE
CAUSE TO HAVE GOTTEN A SEARCH
WARRANT FOR THE HOUSE.
IF THE POLICE COULD, IN FACT,
HAVE AT THAT POINT GOTTEN A
SEARCH WARRANT, DOES THIS THEN
FALL UNDER THE INEVITABLE
DISCOVERY?
THEY WERE TAKING THE CHILD OUT
OF HOME, THE FATHER'S GOING TO
BE ARRESTED, A SEARCH WARRANT
COULD HAVE ISSUED, AND THEY
COULD HAVE HAD, IN FACT, FOUND
THIS EVIDENCE PURSUANT TO THE
SEARCH WARRANT?

LET ME TRY AND ANSWER THAT QUESTION.
UNDER THE INEVITABLE DISCOVERY DOCTRINE, THE STATE WOULD HAVE TO SHOW TWO THINGS.
ONE, THAT THEY MADE SOME ATTEMPT TO GET A SEARCH WARRANT SO THAT THEY COULD LEGALLY ENTER THE PREMISES, AND THEY NEVER DID.
NOT ONLY THAT, BUT --
WHAT CASE ACTUALLY SAYS THAT?
I'M SORRY?
WHAT CASE SAYS THAT YOU HAVE TO BE IN THE PROCESS OF GOING TO GET THE WARRANT BEFORE THE INEVITABLE DISCOVERY DOCTRINE APPLIES?
YOUR HONOR, PLEASE FORGIVE ME FOR NOT REMEMBERING THE EXACT CASE.
IT IS MENTIONED IN MY BRIEFS, IN THE BRIEFS.
BUT THERE'S ANOTHER THING THAT THEY WOULD HAVE TO DO.
THE STATE WOULD HAVE TO AT THE HEARING ON THE MOTION TO SUPPRESS SHOW THAT BY A PREPONDERANCE OF THE EVIDENCE, IN THE CASE -- I'M SORRY, I CAN'T REMEMBER THE NAME OF THE CASE, BUT THEY WOULD HAVE TO SHOW BY THE PREPONDERANCE OF THE EVIDENCE THAT THEY COULD HAVE FOUND THIS EVIDENCE IN THE HOUSE, AND THAT WAS NEVER ATTEMPTED AT THE MOTION TO SUPPRESS HEARING.
SO WHAT HAVE WE GOT?
WE'VE GOT NO SEARCH WARRANT, NO ATTEMPT TO GET ONE, WE HAVE NO CONSENT FROM EITHER THE YOUNG LADY OR HER FATHER TO ENTER THE PREMISES AND SEARCH THE PREMISES.
COULD SHE ACTUALLY, WITH THE PARENT ACTUALLY PRESENT, IS THE MINOR STILL -- IF THE PARENT IS THERE, DOES THE POLICE HAVE TO ASK THE PARENT, OR CAN THE POLICE CIRCUMVENT THE PARENT GO DIRECTLY TO THE MINOR?
I BELIEVE THAT THE POLICE, IT WOULD BE THE PARENT OR THE

PERSON THAT ACTUALLY OWNS THE HOUSE THAT THEY WOULD HAVE TO ASK.
AND, REMEMBER, SHE WASN'T EVEN IN THE HOUSE AT THAT TIME BECAUSE SHE WAS STAYING WITH A FRIEND'S MOTHER WHO ORIGINALLY NOTIFIED THE POLICE THAT THAT COMPLAINT HAD BEEN MADE TO HER.
SO I BELIEVE THEY WOULD HAVE HAD TO ASK THE FATHER, BUT REALLY, RESPECTFULLY, IT'S NEITHER HERE NOR THERE BECAUSE THEY NEVER ASKED THE FATHER, THEY NEVER ASKED THE DAUGHTER, AND SO THAT ISSUE IS NOT PRESENT IN THIS CASE.
THEY DIDN'T DO IT, IT'S AS SIMPLE AS THAT.
AND FOR SURE WHAT THEY DID DO WAS THEY SAID, GO INTO THE HOUSE AND BRING OUT YOUR BELONGINGS, AND, BY THE WAY, IS THERE ANYTHING THAT COULD SUBSTANTIATE THE FACT OF THIS ALLEGATION?
THIS CASE HAS BEEN --
I'M SORRY, YOUR HONOR?
THIS CASE HAS ESSENTIALLY BEEN IN LIMBO SINCE, WHILE THIS MOTION TO SUPPRESS IS GOING ON?
THAT'S CORRECT.
IT WENT TO THE SECOND DISTRICT COURT OF APPEAL, THEY AFFIRMED BASED UPON --
WAS THE, WERE THE CONDOMS EVER TESTED?
I'M SORRY?
WAS DNA EVER DONE?
LET'S PUT IT THIS WAY, I WASN'T THE TRIAL LAWYER AT THE TIME, JUDGE.
I'M HANDLING THE CASE BEFORE THE SUPREME COURT.
I DON'T KNOW WHETHER THEY ACTUALLY -- BECAUSE THE CASE STOPPED ONCE THE MOTION WAS GRANTED.
I DON'T KNOW WHETHER THEY TESTED IT OR NOT, BUT CERTAINLY IF THE CONDOMS ARE SUPPRESSIBLE FOR THE REASONS SET FORTH BEFORE THIS COURT, SO WOULD THE DNA.
BUT IN OTHER WORDS, THIS IS AN EVENT THAT OCCURRED IN

DECEMBER OF 2004, AND HERE WE
ARE IN 2008.
YES.
AND THE MATTER HAS JUST BEEN
IN LIMBO.
YES, IT HAS BECAUSE WE
HAVEN'T GOTTEN PAST THE MOTION
TO SUPPRESS ISSUE.
WELL, THE STATE, CERTAINLY
THIS WOULD BE A QUESTION FOR THE
STATE.
IF THE CONDOMS WITH TESTED AND
NO DNA WAS FOUND, THE VALUE OF
THIS EVIDENCE WOULD HAVE BEEN
MARGINALIZED ANYWAY.
WE DON'T KNOW THAT.
THAT'S CORRECT, JUDGE.
THAT IS CORRECT.
WELL, THE STATE STILL HAS,
OBVIOUSLY, THE TESTIMONY OF THE
VICTIM.
YES, THEY DO.
WHICH IS --
YES, THEY DO.
IT'S JUST A MATTER THAT THE
STATE HAS NOT CHOSEN TO BRING IT
TO TRIAL, I ASSUME.
UNTIL THIS IS RESOLVED.
THAT'S CORRECT.
THAT IS CORRECT.

ALL RIGHT.
BUT THEY HAVE AT LEAST
TESTIMONY --
WELL, LET'S SAY THAT THE
YOUNG LADY SAID, WELL, WE
RECENTLY HAD SEX, AND THESE ARE
THE CONDOMS THAT MY FATHER USED,
AND NO DNA WAS TAKEN OF THE
FATHER FROM THOSE EXHIBITS, I
WOULD HAVE TO SAY THAT HER
CREDIBILITY WOULD BE LESSENED
EXTREMELY.
WELL, IT'D BE PRETTY IRONIC
IF THESE GET TESTED AND SOMEBODY
ELSE'S DNA IS ON THEM.
IT WOULD BE HELPFUL, THEN, TO
THE DEFENSE, NOT TO THE STATE.
AGAIN, THIS IS ALL VERY
SPECULATIVE, WE'RE DEALING WITH
A DISCREET LEGAL ISSUE, BUT IT
ACTUALLY, AS I THINK ABOUT IT,
COULD HELP THE DEFENSE THE IT
DIDN'T -- IF IT DIDN'T REVEAL

YOUR CLIENT'S DNA OR IT SHOWS
SOMEBODY ELSE'S DNA INTERMIXED.
I COULDN'T POSSIBLY DENY.
THAT WE DON'T KNOW WHAT THE DNA
WOULD SHOW.
WE'RE STARTING TO GET FAR
AFIELD.
YOU SAID A MOMENT AGO PART OF
THE FACTS WERE, AND AGAIN THIS
IS PART OF THE DIFFICULTY I'M
HAVING WITH COMPARING THIS TO
THE TREADWAY CASE.
THE OTHER CASE IS THAT WE,
APPARENTLY, DON'T HAVE A CASE
HERE WHERE THERE WAS TESTIMONY
AND EVIDENCE OFFERED, AND THE
JUDGE HAS TO MAKE EVALUATIONS
ABOUT INFERENCES AND CREDIBILITY
AND, YOU KNOW, AND THEN FINDINGS
OF FACT, YOU KNOW, BASED ON --
DISPUTED IN THE EVIDENCE.
BUT YOU SAID THE VICTIM WAS NOT
LIVING --
WHAT?
WAS NOT LIVING IN THE MOBILE
HOME RESIDENCE AT THE TIME?
NO, AS I UNDERSTAND IT --
WELL, AS YOU UNDERSTAND IT.
WHAT I'M LOOKING FOR IS IN
THE -- WAS THIS A STIPULATION OR
A PROFFER OR JUST EXACTLY WHAT
WAS THIS?
IN TERMS OF GETTING INFORMATION
TO THE TRIAL JUDGE FOR THE TRIAL
JUDGE TO MAKE A RULING?
WAS THERE A STIPULATION BETWEEN
THE TWO SIDES THAT, JUDGE, WE
STIPULATE TO THESE FACTS THIS IS
WHAT WOULD HAVE BEEN ESTABLISHED
IF WE DID HAVE A HEARING IN
WHICH THE OFFICERS AND THE
VICTIM AND WHOEVER ELSE
TESTIFIED?
OR WAS THERE A PROFFER BY EACH
SIDE?
HOW DO WE GET TO THIS, THESE
FACTS THAT THE TRIAL COURT FACED
A RULING ON?
YOUR HONOR, TO ANSWER THAT
QUESTION I DON'T WANT TO MAKE A
MISSTATEMENT, OKAY?
AND IT COULD HAVE BEEN THE
PROFFER FROM EITHER THE STATE OR
THE DEFENSE, I REALLY DON'T

RECALL.
I MUST SAY MOST RESPECTFULLY I DON'T THINK THAT THAT HAS BEARING ON THE ISSUE BEFORE THIS COURT, RESPECTFULLY.
AND THAT IS THAT THIS GIRL WAS USED AS A POLICE AGENT TO ACQUIRE THAT WHICH THEY COULDN'T LEGALLY ACQUIRE --
WELL, CLARIFY FOR ME, THOUGH, WHAT THE STATUS OF HER RESIDENCE WAS IF THERE IS ANY INFORMATION IN THE PROFFER, STIPULATION, WHATEVER THERE WAS.
WHAT IS SET OUT IN THE PROFFER ABOUT WHETHER SHE WAS RESIDING AT THE TIME?
HE TOLD HER GIRLFRIEND, HER BEST GIRLFRIEND, ABOUT WHAT HAPPENED.
THAT GIRLFRIEND TOLD HER MOTHER.
THE GIRLFRIEND'S MOTHER.
BUT THAT ACTUALLY WAS INCLUDED IN THE PROFFER?
IS THAT IN THE PROFFER?
I'M NOT SURE, JUDGE.
I DON'T WANT TO MISSTATE.
ACCORDING TO THE SECOND DCA, THE DEPARTMENT RESPONDED TO MONINGER'S RESIDENCE WHERE HIS DAUGHTER ALSO LIVED.
CPI MORGAN WAS PRESENT AND WAS GOING TO REMOVE THE DAUGHTER TO SHELTER CARE.
OKAY.
I HAD TAKEN THAT SHE HAD LIVED THERE PRIOR, SO I MAY HAVE MISSTATED, AND IF I DID, I APOLOGIZE.
THEY ALSO REFER TO THE PARTIES STIPULATED TO THE FACT.
THAT'S WHAT THE SECOND DCA SAYS.
I WOULD HAVE TO AGREE THAT PORTION IS CORRECT.
BUT I STILL DON'T FEEL THAT HAS BEARING ON THE ISSUE BEFORE THE COURT.
THEY USED HER AS A STATE AGENT NOT ONLY DID THEY SUGGEST THAT SHE BRING THE CONDOMS OUT, BUT THEY SAID, AND HERE IS A BAG TO BRING THEM OUT IN WHICH, NATURALLY --
LET ME ASK A QUESTION.

YES.
THE TRIAL JUDGE HERE SAID IT DOES NOT SEEM LOGICAL TO FIND THE PRIVATE INTERESTS OF THE VICTIM IS ANY DIFFERENT FROM THE STATES.
DO YOU NOT SEE THAT THERE'S AN INDEPENDENT INTEREST OF SOMEBODY WHO WANTS TO LIVE IN A HOME SAFELY WITHOUT BEING SUBJECT TO SEVERE ABUSE, THAT THAT IS NOT SOME INDEPENDENT INTEREST, THAT'S DIFFERENT FROM THE STATE'S?

I WOULD SAY, AS JUSTICE QUINCE DID, THAT WOULD MEAN THAT THERE WOULD ALWAYS BE AN INDEPENDENT INTEREST ON THE PART OF THE VICTIM IN EVERY SINGLE CASE, AND THAT IS NOT THE CASE.
WE HAVE A --
BUT, OF COURSE, IT'S NOT ALWAYS THE VICTIM THAT'S ASKED TO PERFORM THESE TASKS FOR THE STATE TO GET EVIDENCE AND THINGS LIKE THAT.
FOR EXAMPLE, IN THE COOLIDGE CASE FROM THE U.S. SUPREME COURT IT WAS NOT THE VICTIM WHO DID IT, IT WAS THE, IT WAS THE SUSPECT'S WIFE.
SO THERE ARE A WIDE VARIETY OF FACT PATTERNS.
SO, YES, SURE THE VICTIM MAY ALWAYS HAVE AN INTEREST, BUT IT'S NOT ALWAYS THE VICTIM INVOLVED IN OBTAINING THE EVIDENCE.
WELL, I WOULD SAY THIS, THAT I THINK THE STATE HAS ALREADY INDICATED THERE WAS NO PROFFER MADE, IT WAS NOT PART OF THE PROFFER THAT THERE WAS A DUAL INTEREST HERE.
THE COURT COULD ONLY GO BY WHAT IS IN THE RECORD, THE APPELLATE COURTS CAN ONLY GO BY WHAT'S IN THE RECORD, AND WHAT IS IN THE RECORD IS THE ABSENCE OF ANY DUAL PURPOSE IN THE PROFFER MADE BY THE STATE.
THEY FAILED TO MAKE THAT PART OF

THE PROFFER, AND THEY SHOULD HAVE DONE IT IF THERE WAS A DUAL PURPOSE.
WE CAN ONLY GO BY THE RECORD, THE APPELLATE COURTS, AND THE TRIAL COURT AS WELL.
THERE IS NO DUAL PURPOSE IN THE RECORD.
IS IT PERMISSIBLE TO DRAW AN INFERENCE THE STIPULATED FACT THAT SOMEBODY WHO'S BEEN A MINOR WHO'S BEEN A VICTIM OF SEXUAL BATTERY BY HER FATHER WOULD HAVE AN INTEREST IN REMOVING HERSELF FROM THAT RESIDENCE AND THAT ANY EVIDENCE SHE COULD OBTAIN TO HELP HER GET REMOVED WOULD ASSIST HER, WOULD FURTHER THOSE INTERESTS?
THE STATE COULD HAVE MADE THAT PART OF THE PROFFER, JUDGE, AND THEY DIDN'T.
AND HOW CAN WE SPECULATE AS TO WHAT THAT WITNESS WOULD HAVE SAID?
DID YOU ADDRESS THE ISSUE OF THE BURDEN OF PROOF, AND THAT MAY BE IMPORTANT IN TERMS OF -- IF WE CONTINUE TO TAKE THIS CASE -- WHERE WE'D COME OUT.
DO YOU AGREE THAT SINCE SHE WAS AT LEAST ON THE FACE SHE OBTAINED THE CONDOMS PRIVATE INDIVIDUAL SO THEN IT'S YOUR, THE DEFENDANT'S, BURDEN TO PROVE SHE WAS ACTING AS A STATE AGENT?
IS THAT CORRECT?
THAT'S CORRECT.
ALL RIGHT.
AND I WOULD SAY THAT IT'S CLEAR.
SO YOU THEN PRODUCE AND SHOW THAT SHE WAS ACTING AS A STATE AGENT.
WHOSE BURDEN IS IT TO SHOW, THEN, THAT THERE WAS ALSO A DUAL PURPOSE?
WOULD THAT GO BACK TO THE STATE TO HAVE TO ESTABLISH THERE WAS A DUAL PURPOSE?
WHAT I WOULD HAVE TO SAY IS IF THERE'S A PROFFER MADE TO THE COURT --
NOT TALKING ABOUT LEGALLY SO

IF WE TAKE THIS CASE AND WE TALK ABOUT IT WHERE BURDENS ARE, BURDEN ON THE DEFENDANT TO SHOW THAT THE PERSON WAS ACTING AS A STATE AGENT.
IS IT THEN BECAUSE THEY WERE DOING IT AT THE DIRECTION OF THE STATE, IS IT THEN THE STATE COME FORWARD AND SHOW THERE WAS ALSO A LEGITIMATE PRIVATE INTEREST?
I WOULD SAY IF THAT'S, IF THAT IS -- IT'S GOING TO SUPPORT THE DECISION, THEY WOULD HAVE -- I MEAN, IN OTHER WORDS -- OBLIGATION TO DO SO.
THE DEFENDANT WOULDN'T HAVE TO ESTABLISH THE LACK OF A DUAL PURPOSE.
OR WOULD THEY?
IF THE STATE DOESN'T PROFFER IT, I DON'T SEE HOW -- IF THE STATE DOESN'T PROFFER IT -- LET'S LOOK AT THE PROFFER.
THE DETECTIVE TOLD THE VICTIM THAT WHILE INSIDE SHE COULD GET THE CONDOM IF SHE CHOSE TO.
RIGHT.
DO YOU AGREE THAT IF THE DETECTIVE HAD NOT MADE THAT STATEMENT, THAT IF INDEPENDENTLY SHE HAD, WHILE SHE WENT IN TO GET HER STUFF, SHE HAD CHOSEN TO GET THE CONDOMS, COULD SHE HAVE DONE THAT IF THE OFFICER HAD SAID NOTHING?
THIS IS PURELY CONCLUSIONARY, YOUR HONOR.
THERE'S NO WAY WE CAN KNOW THAT.
I'M SAYING THAT IF SHE HAD ON HER OWN DECIDED TO GO AND GET THE CONDOMS AND GO AND HAND THEM TO THE OFFICERS, SHE WOULD HAVE HAD THE FREEDOM AND ABILITY TO DO SO?
ABSOLUTELY, I AGREE WITH THAT.
AND SO THE KEY HERE IS YOU'RE SAYING THAT THE OFFICER SAID TO THIS YOUNG LADY, WHEN YOU GO GET YOUR STUFF, IF YOU CHOOSE, YOU CAN GET THE CONDOMS, THAT THAT TURNS HER INTO A STATE AGENT?
WE DON'T KNOW --
DIRECTED.

YES.
BY THE STATE.
NOT ONLY THAT, THAT WAS A MERE SUGGESTION.
BUT WHEN HE HANDED HER THE BAG TO BRING THEM BACK IN, THAT WAS DIRECT PARTICIPATION BY THE POLICE.
WHICH IS EVEN MORE THAN --
BUT YOU AGREE THE STIPULATED FACT, SHE HAD THE CHOICE WHETHER TO GET THE CONDOMS OR NOT GET THE CONDOMS?

YES, I WOULD HAVE TO SAY THAT TRUTHFULLY.
AT ANY RATE, WE MUST GO BY THE RECORD.
THERE IS NOTHING IN THE RECORD BECAUSE OF THE PROFFER THAT WAS MADE BY THE STATE TO SHOW THAT THERE WAS ANY DUAL PURPOSE HERE.
WHAT IS IN THE RECORD IS THE IMPROPRIETOUS, ILLEGAL SEARCH AND SEIZURE BY THE POLICE IN A SEARCH THAT THEY COULDN'T HAVE MADE THEMSELVES.
BUT THEY DID SECURE THE CONDOMS BECAUSE THEY USED THE MINOR AS A STATE AGENT.
WOULD YOU GO BACK TO THE BURDEN OF PROOF?
I THINK YOU WERE INTERPRETED WHEN THE JUSTICE WAS TRYING TO ADDRESS THE THE BURDEN.
YOU FILED A MOTION TO SUPPRESS, AND YOU'D HAVE A BURDEN TO SHOW SOMETHING WHICH IS THAT ENTRY OCCURRED, RIGHT?
THAD BE NUMBER ONE, THAT THERE WAS NO CONSENT OR WARRANT, NUMBER TWO, AND THEN YOU'D HAVE TO SHOW THAT IT WAS THE STATE DOING IT --
YES.
OKAY.
THEN THEN AT THAT POINT THE BURDEN WOULD SHIFT, WE HAVE A SHIFTING BURDEN, THEN THE STATE WOULD BE REQUIRED TO GO FORWARD TO SHOW THE VALIDITY, SO THERE'S A SHIFTING BURDEN, IS THAT A CORRECT APPROACH?
I BELIEVE THAT'S CORRECT.

HOW THE ANALYSIS SHOULD FLOW?
YES.
THEN THEY WOULD HAVE THE BURDEN OF DEMONSTRATING THIS WAS A PRIVATE INTEREST OR SOME OTHER KIND OF INTEREST THAT IT DOES NOT VIOLATE.
SO THEY DO HAVE A BURDEN --
YES.
THAT'S THE ANALYSIS FLOW.
AND BY THE WAY, AS FAR AS THE TREADWAY CASE IS CONCERNED, IT'S ON ALL FLOORS OF THE TRIAL COURT AND THE SECOND DISTRICT COURT OF APPEAL.
THE FACTS IN THAT CASE WERE MUCH DIFFERENT THAN THIS CASE BECAUSE THERE THE INSURANCE AGENT HAD HIS OWN MONETARY INTEREST AT STAKE, AND SO HE DID MAKE AN ACT OF HIS OWN VOLITION TO GIVE THIS INFORMATION TO THE STATE.
THAT IS NOT THE CASE HERE.
IT IS JUST THE OPPOSITE.
SO IT'S THE PROMPTING, IS WHAT YOU'RE SAYING.
THIS CASE RISES AND FALLS ON THE LEGAL SIGNIFICANCE OF THE ENCOURAGEMENT AND THE BAG.
YES.
THAT PRETTY MUCH BOILS IT DOWN TO THAT.
I WOULD SAY THAT'S CORRECT, YOUR HONOR.
SO IN THE INSURANCE CASE, TREADWAY BELOW, IF THIS PERSON HAD GONE TO LAW ENFORCEMENT AND SAID, YOU KNOW, I'M CONCERNED ABOUT THIS, THE EVENTS HAPPENING, AND THE OFFICER SAID, WELL, YOU DON'T HAVE ANY EVIDENCE.
IF YOU HAD SOME PROOF, MAYBE WE COULD GO FORWARD, AND THE INSURANCE AGENT DEVELOPS THAT PROOF AND GETS IT AND HANDS IT OVER.
UNDER YOUR SCENARIO THAT WOULD BE ACTING AS AN AGENT OF THE STATE.
THAT'S RIGHT.
THAT'S RIGHT.
IF THEY DON'T HAVE THE RIGHT TO GET IT, SO THEY SEND SOMEBODY

ELSE IN TO GET THAT WHICH THEY DON'T HAVE THE RIGHT TO GET THEMSELVES --
BEFORE THERE'S EVEN ANY [INAUDIBLE] UNDER ARREST?
RIGHT.
CORRECT?
CORRECT.

WITH THAT, YOU HAVE EXHAUSTED ALL OF YOUR TIME WITH OUR QUESTIONING.
THANK YOU VERY MUCH FOR YOUR INDULGENCE.
I APPRECIATE IT VERY MUCH.
NICE APPEARING BEFORE YOU AGAIN.
EVEN THOUGH YOU'VE USED YOUR TIME UP, GIVE A COUPLE OF MINUTES, PLEASE, MR. MARSHALL.

THANK YOU, YOUR HONOR.
I WOULD LIKE TO JUST STRESS SOMETHING VERY QUICKLY, AND THE BURDEN WOULD BE ON THE PARTY BRINGING THE MOTION TO SUPPRESS THAT THE PRIVATE ACTION OF THE VICTIM IN GOING INTO THE HOUSE AND RETRIEVING THE CONDOMS WAS DONE FOR THE SOLE PURPOSE AND THE SAME INTEREST AS THE POLICE, AND THAT'S WHAT THE TRIAL COURT FOUND.
BECAUSE THERE WAS NO HEARING ON THE MATTER, THIS COURT IS ACTUALLY IN THE SAME POSITION AS THE TRIAL COURT TO DETERMINE WHETHER OR NOT THE FACTS ESTABLISH THAT THERE WAS UNCONSTITUTIONAL POLICE ACTION THAT WARRANTED THE APPLICATION OF THE FOURTH AMENDMENT SUPPRESSION.
THE EXCLUSIONARY RULE.
WHAT WE HAVE HERE IS --
SO YOU'RE ARGUING THAT IT'S THE DEFENDANT'S BURDEN TO SHOW THAT THE VICTIM WAS NOT ACTING IN HER PRIVATE INTERESTS?
WAS THAT HER SOLE INTEREST IN DOING SO.
THE PROBLEM IS EVEN UNDER TREADWAY, THE FOURTH DISTRICT FOUND THERE WAS POLICE, THEY SUGGESTED IT WAS AN ONGOING

EXCHANGE, AND EVEN WHERE THEY FOUND THERE WAS POLICE INTERVENTION OR ENCOURAGEMENT, THEY LOOKED ALSO TO WHETHER THERE WAS A SOLE PURPOSE.
AND THEY SAID BECAUSE THE AGENT WAS A VICTIM OF THE CRIME, BECAUSE HIS MONEY WAS IN THAT --
I UNDERSTAND.
I ACTUALLY HAD A FOLLOW-UP QUESTION.
HOW IS THE DEFENDANT SUPPOSED TO PROVE THAT IF YOU SAY THAT WHETHER THERE WAS A PRIVATE INTEREST YOU SAID EARLIER WAS A MATTER OF SUBJECTIVE INTENT OF THE VICTIM, HOW IS THE DEFENSE SUPPOSED TO SHOW THE VICTIM'S SUBJECTIVE INTENT?
IN THIS CASE THERE'S ALSO AN OBJECTIVE.
HERE WE HAVE A VICTIM WHO'S REACHED OUT TO THE POLICE.
THIS IS HER OBJECTIVE INTENT TO GET, TO GET THE POLICE INVOLVED IN HER SITUATION.
THERE IS AN OBJECTIVE INTEREST THAT WE CAN DISCERN ON THE FACT THAT SHE REACHED OUT TO THE POLICE, SHE REPORTED HER FATHER AND THE OFFENSE, AND WHEN THE POLICE CAME --
WE DON'T KNOW THAT FROM THE STIPULATED FACTS.
WHEN THE POLICE ARRIVED, SHE TOLD THEM ALL THAT WAS GOING ON --
THAT'S NOT IN THE STIPULATION EITHER.
THAT'S HOW --
ALL THAT WAS GOING ON.
WELL, IN THE STIPULATED FACTS --
IT SAID THEY HAD AN INTERVIEW, IS ALL IT SAYS.
THEN IT SAYS AT THAT POINT THAT THERE WAS THE OTHER INDIVIDUAL, THE CPI MORGAN THERE, AND IT WAS DECIDED TO REMOVE THE CHILD FROM THE RESIDENCE AT THE CONCLUSION, WHEN THE INTERVIEW WITH THE CHILD WAS DONE.
AT THAT POINT THEY'D ALREADY MADE THAT DECISION.

RIGHT.
THE STIPULATION WAS THAT IT WAS UPON HER THAT THE OFFICER ASKED HER DID SHE HAVE ANY EVIDENCE TO SUPPORT HER ALLEGATIONS.
SO THERE IS SOME TO SUPPORT THAT SHE MADE ALLEGATIONS AGAINST HER FATHER TO THE OFFICER, AND THAT WAS HER, I MEAN, SHE REACHED OUT TO THE POLICE AT THAT POINT.
AND WE HAVE TO FIND AT THE VERY LEAST THAT IF WE CAN'T REVERSE ON THE FACE OF THIS RECORD, THAT AT THE VERY LEAST THE OPINION OF THE SECOND DISTRICT SHOULD BE QUASHED AND THIS MATTER SHOULD BE REMANDED TO THE TRIAL COURT TO HOLD A PROPER HEARING TO ESTABLISH THAT.
DID THE STATE RAISE AS AN ISSUE AT THE SECOND DISTRICT THAT THE TRIAL COURT IMPROPERLY DENIED THE STATE THE OPPORTUNITY TO PRESENT LIVE TESTIMONY AND OTHER EVIDENCE?
IT WAS NOT SET FORWARD EXACTLY IN ASKING FOR A QUASH.
WELL EXACTLY OR INEXACTLY.
WELL, INDIRECTLY, YES, YOUR HONOR, THEY DID SAY --
BUT THAT WASN'T RAISED AS AN ISSUE?
WITH THAT, WE'VE USED ADDITIONAL TIME, SO WE THANK YOU BOTH FOR VERY GOOD ARGUMENTS, AND WE'LL TAKE THIS CASE UNDER ADVISEMENT.
THANK YOU.
COURT WILL STAND IN RECESS.
ALL RISE.