Shana Barnes v. State of Florida

SC06-662

ALL RISE. SUPREME COURT OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION. AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA, AND THIS HONORABLE COURT.
GOOD MORNING.
LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. POLICE BE SEATED. -- PLEASE BE SEATED.
GOOD MORNING, FRIENDS. WELCOME TO THE FLORIDA SUPREME COURT AND THE ORAL ARGUMENT CALENDAR FOR WEDNESDAY, SEPTEMBER 19th. THE FIRST CASE ON OUR CALENDAR THIS MORNING IS BARNES v. THE STATE OF FLORIDA. MR. ROSENBLOUM.
GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS LEWIS WHO SEEKS ERVERSAL OF HER QIXS AND SENTENCE.
MR. ROSENBLOUM LET ME ASK THIS QUESTION IF WE HAD NO RULE OF CRIMINAL PROCEDURES JUST ASSUME, THERE'S NO RULE AT L. WOULD YOU BELIEVE THE COMMON LAW RULE OF EVIDENCE WOULD BE WITH REGARD TO, TO THIS, I GUESS IT'S NOW A DOCUMENT BUT TO THIS SITUATION?
WELL, THE COMMON LAW RULE APPEARS TO BE, AND OF COURSE WHEN YOU SAY COMMON LAW, I DON'T THINK IN EARLY ENGLAND THEY WERE WORRY ABOUT DEPOSITION TRANSCRIPT.
RIGHT.
BUT THE EARLIOUS CASE IN FLORIDA.
WELL, JUST DEVELOPED.
WELL THE EARLIEST CASE IN FLORIDA WAS A CIVIL CAY AND THERE THEY STATED THE RULE OF DEPOSITION TRANSCRIPT THAT THEY ARE NOT TO BE GIVEN TO THE JURY FOR THE OBVIOUS REASON THAT THE JURY PLACES GREATER EMPHASIS ON THAT, ON THAT DEPOSITION TRANSCRIPT THAN ON THE WITNESS'S LIVE TESTIMONY OR ANY OTHER EVIDENCE IN THE CASE.
SO --
WELL, I THINK THAT'S CRITICAL HERE. DOES IT MAKE ANY DIFFERENCE WHETHER THAT WITNESS TESTIFIES OR NOT?
WELL, IF YOU MEAN TESTIFY LIVE --
LIKE IN THIS CASE, THE DEFENDANT DID NOT -- WE ARE NOT DEALING WITH THE CASE HERE WHERE THE DEFENDANT TESTIFIED AT THE RETRIAL AND ONLY THE PRIOR TESTIMONY WENT BACK TO THE JURY.
NO, WHEN YOU HAVE A DEPOSITION READ TO THE JURY, THAT WITNESS IS NOT TESTIFYING LIVE EITHER. AND SO I DON'T THINK THERE'S ANY DIFFERENCE HERE. AND THE OTHER THING THAT I THINK IS VERY IMPORTANT IS THE STATE DID NOT REALLY TREAT THIS AS A PIECE OF PHYSICAL EVIDENCE LIKE THE HAND WRITTEN STATEMENT. THEY READ THE, THE TRIAL TESTIMONY FROM THE FIRST TRIAL TO THE JURY IN QUESTION AND ANSWER FORM JUST LIKE A DEPOSITION AND THE JUDGE EXPLAINED TO THE JURY THAT ONE PROSECUTOR WOULD PLAY THE ROLE, AND I BELIEVE HE USED THE ROLE OF THE WITNESS AND THE OTHER PROSECUTOR WOULD PLAY THE ROLE ASS THE -- AS THE QUESTIONING ATTORNEY SO THEY PRESENTED THE, THE FORMER TESTIMONY IF YOU WANT TO CALL IT THAT --
DID THE JUDGE INSTRUCT THE JURY THAT THEY WERE TREATED JUST AS IF THAT WAS THE WITNESS THERE TESTIFYING IN COURT?
YOU KNOW I DON'T THINK HE USED THOSE -- HE DID NOT GIVE WHAT I WOULD CALL THE STANDARD INTRODUCTORY!!ISTRUCTION YOU GIVE TO A, A JURY WHEN YOU ARE READING THE DEPOSITION. HE SAID WE'RE GOING TO PLACE IN EVIDENCE SWORN TESTIMONY OF MRS. SHANA

BARNES, THE DEFENDANT IN THIS CASE, WHICH IN THIS INSTANCE, THIS IS MS. LONDONHAUERSTEIN, WHO IS ALSO AN ASSISTANT STATE ATTORNEY WHO IS GOING TO ACT THE ROLE OF MS. BARNES WHEN SHE GAVE THIS TESTIMONY AND READ HER PART, AND MTS ZEMEA WILL READ THE QUESTIONS AND MS. HARSON WILL READ THE ANSWERS SO HE DIDN'T SAY YOU SHOULD READ THIS AS THOUGH THE WITNESS IS ACTUALLY HERE BUT THEY GAVE, THE COURT GAVE A SIMILAR INTRODUCTION.

BUT WAS THE FUNCTIONAL EQUIVALENT OF THE DEFENDANT BEING ON THE STAND.

OH, I DEFINITELY THING IT WAS. IN FACT, YOU KNOW, THEY DID TAKE SOME, SOME CARE IN MAKING SURE THE JURY DID NOT KNOW THIS WAS TESTIMONY FROM A PREVIOUS TRIAL. HE CALLED IT A STATEMENT AND SO FORTH BUT EVEN IN CLOSING ARGUMENT, THE LAWYERS TRIPPED UP AND CALLED IT TESTIMONY.

WELL, LET'S, LETS ARE NOW MOVE THIS BACK INTO IF THIS WERE OCCURRING IN THE POLICE STATION. AND THE SAME INTERROGATION AFTER THE WAIVER, YOU DON'T HAVE AN ISSUE OF ANY OF THE OTHER CONSTITUTIONAL RIGHTS AND THE SAME THING TRANSPIRED, QUESTION AND ANSWER AND THEN SIGNED OFF AND THEN THAT'S PRESENTED AT TRIAL. IT IS READ INTO EVIDENCE. CAN THAT DOCUMENT THEN GO BACK TO A JURY?

GENERALLY, YES.

NOW, WOULD YOU REALLY TELL US THEN HOW, WHAT IS THE KEY DIFFERENCE OR IS THERE A KEY DIFFERENCE IF THAT CAN GO IN WHY, WHY SHOULD NOT A STATEMENT THAT'S GIVEN SOMEWHERE ELSE, IN A HOME, OUT ON THE STREET, IN A COURTROOM?

I THINK THE CHI DIFFERENCE IS THE DISTINCTION BETWEEN PHYSICAL EVIDENCE AND TESTIMONY. PHYSICAL EVIDENCE BEING LIKE THE MURDER WEAPON OR, OR A PHOTOGRAPH OR A HAND WRITTEN STATEMENT.

WELL, HOW ABOUT NOT HAND WRITTEN. THIS IS A QUESTION AND ANSWER. IT'S TRANSCRIBED WE SEE IT ALL THE TIME WITH THOSE WITNESS STATEMENTS AND IF WE WERE TO WRITE AN OPINION DRAWING THE DISTINCTION BETWEEN THOSE TWO THINGS, WHAT WOULD IT BE BECAUSE IT'S THE SAME AS A STENOGRAPHER. WE OFTEN SEE STENOGRAPHERS ARE CALLED?

I THINK THE OTHER DISTINCTION WOULD BE AN OUT-OF-COURT CREATED STATEMENT AND ONE CREATED IN COURT.

WELL, DEPOSITIONERIZE CREATED OUT OF COURT.

WELL, THAT'S STREW TRUE, BUT THEY'RE READ TO THE JURY. I, I SUPPOSE IN A JURY TRIAL YOU COULD JUST BRING THE DEPOSITION TRANSCRIPT INTO TRIAL AND NOT READ IT. I'VE NEVER SEEN IT DONE BUT YOU READ IT IN QUESTION AND ANSWER FORM AS THOUGH THE WITNESS WAS READING IT LIVE. AND I THINK THAT'S THE WAY THE STATE TREATED IT HERE AND I THINK THAT'S A DIFFERENCE.

DO YOU THINK THIS IS REALLY AN ISSUE OF THE FIRST TIME THAT WE HAVE ADDRESSED THIS ISSUE? IS THERE ANY CASE THAT YOU THINK SUPPORTS YOUR POSITION? WHAT'S THE LEGAL BASIS.

WELL, THE ONLY CASE FROM THIS COURT THAT I'M AWARE OF FROM THIS COURT WOULD BE THE YOUNG CASE, AND THAT'S THE CASE INVOLVED THE VIDEOTAPED INTERVIEW AND THE VIDEOTAPED TESTIMONY WITH THE CHILDREN. AND THE COURT HELD THAT THE VIDEOTAPES DON'T GO BACK TO THE JURY, AND THIS COURT DECIDED THE -- CITED THE RULES FROM THE RULES OF CRIMINAL PROCEDURE.

RIGHT, BUT THAT'S REALLY DIFFERENCE.

THAT, THAT'S THE ONLY CASE FROM THIS COURT. AND THERE ARE FOUR DISTRICT COURT OF APPEAL CASES THAT WE'VE CITED IN OUR BRIEF. THE SHEPPAL CASE INVOLVES DEPOSITIONS, AS DOES THE GILLS CASE, AND THE ZEAL CASE AND THEN THERE'S THE JAN SEN CASE, I THINK IT'S FROM THE 5th DCA WHERE IT INVOLVES A TRANSCRIPT OF LIVE TESTIMONY. I DON'T THINK THERE'S ANY DISPUTE, I DON'T THINK THE STATE WOULD DISPUTE THE GENERAL RULE, THAT YOU DON'T SEND TESTIMONY!!IAL TRANSCRIPTS BACK TO THE JURY. THEY SAY THAT THE BIG DIFFERENCE HERE IS THAT THESE WERE ADMISSIONS, SO THEREFORE WE SHOULD TREAT THEM JUST LIKE A CONFESSION AT THE POLICE STATION.

RIGHT, DID THE JANSON CASE INVOLVE ADMISSIONS?

I THINK THEY DID. IT WAS A TESTIMONY OF TWO WITNESSES.

OH,.
BUT IF, BUT WE HAVE TO TAKE THE STATE'S ARGUMENT TO THE LOGICAL EXTREME. IF, IF, IF THE FACT THAT THERE WERE ADMISSIONS MADE THE TRANSCRIPT ADMISSIBLE AND AVAILABLE TO THE JURY, THEN ANY TIME THE DEFENDANT TESTIFIES AT TRIAL AND MAKES AN ADMISSION, WELL, THE STATE, IF YOU FOLLOW THEIR LOGIC, SHOULD BE ABLE TO GET A TRANSCRIPT AND SEND IT BACK TO THE JURY AND --
BUT DON'T WE HAVE TO BEGIN WITH THE PLAIN LANGUAGE OF THE RULE BECAUSE THE RULE IS WHAT TELLS THE JUDGES WHAT THEY HAVE DISCRETION TO DO AS FAR AS ALLOWING THE MATERIALS IN THE JURY ROOM? DOESN'T IT SAY THAT THEY HAVE THE DISCRETION TO TAKE IN A JURY ROOM ALL THINGS RECEIVED INTO EVIDENCE OTHER THAN DEPOSITIONS?
CORRECT. BUT THE KEY LANGUAGE THERE IS RECEIVED INTO EVIDENCE. THE TRIAL JUDGE SHOULD NEVER HAVE RECEIVED THE TRANSCRIPT AS A PHYSICAL DOCUMENT INTO THE EVIDENCE. AND THERE, AND THERE WAS STRENUOUSLY OBJECTED TO, BY, BY TRIAL COUNCIL SO, SO THAT, THAT, THAT'S THE FIRST REASON WHY THE RULE DOESN'T ABY. SECONDLY, -- APPLY. SECONDLY, THIS S WE SUBMIT, THE EQUIVALENT OF A DEPOSITION, EVE -- EVEN THOUGH IT MAY NOT LITERALLY --
LOOKING A EQUIVALENTS WOULDN'T THE RULE BE MORE SPECIFIC AND SAY PRIOR TESTIMONY RATHER THAN SAYING IT WAS LIMITED TO DEPOSITIONS. YOU ARE ASKING FOR A BROADER INTERPRETATION BUT THE RULE ISN'T BROADLY CONCEIVED TO PROHIBIT ALL PRIOR TESTIMONY. OR ALL TRANSCRIPTS. IT JUST SAYS DEPOSITIONS.
WELL, THE COURT IN YOUNG DID NOT -- THIS COURT IN YOUNG DID NOT READ IT LITERALLY. IN THAT CASE, IT WAS A VIDEOTAPED INTERVIEW, AS I RECALL, OF CHILDREN, AND A VIDEOTAPED TESTIMONY OF, YOU KNOW, TAKEN UNDER THAT STATUTE OF RULE AND I DON'T RECALL THE NUMBER. AND THIS COURT HELD THAT THEY WERE THE EQUIVALENT OF A, THEY ARE MORE AKIN TO DEPOSITIONS IN WHICH TESTIMONY IS PRESERVED FOR LATENER TRODUCTION AT THE TRIAL. SO THIS COURT HAS CONTRUED SOMETHING OTHER THAN A REAL DEPOSITION AS THE EQUIVALENT OF --
BUT YOUR REAL ATTACK AS I HEARD YOU JUST SAY WAS ON THE ADMISSIBILITY. AS OPPOSED TO ON WHATEVER COMES IN.
WELL, YOU HAVE TO START WITH THE -- YOU HAVE TO START WITH THE PROPOSITION THAT ANY EVIDENCE THAT IS ADMITICIDE, IS A AVAILABLE TO THE JURY. -- ADMITTED IS AVAILABLE TO THE JURY SO, ONCE THE JUDGE -- ALLOWING THE ADMISSIONS READ TO THE JURY IS ONE THING. BUT, BUT THE PHYSICAL DOCUMENT AVAILABLE TO THE JURY IS ANOTHER THING. SO THE, MRS. BARNES' TRIAL COUNCIL RELUCTANTLY AGRAEED FROM THE CASE LAW -- AGREED FROM THE CASE LAW THAT THE STATE COULD READ THE TESTIMONY FROM THE FIRST TRIAL AS ADMISSION. THERE WAS A CASE CALLED BILLY v. STATE THAT WAS CITED. BUT COUNSEL STRENUOUSLY OBJECTED TO ADMITTING THE TRANSCRIPT IN EVIDENCE AND MAKING IT AVAILABLE TO THE JURY. SO IF YOU GO BACK TO THE TEXT OF RULE 3.400 WHEN IT SAYS ALL THINGS RECEIVED IN EVIDENCE, IT SHOULD'VE NEVER BEEN RECEIVED IN EVIDENCE.
BUT ISN'T THE FACT THAT YOU ARE REALLY DEALING WITH AN ISSUE THEN OF ADMISSIBILITY? THE LOGIC BREAKS DOWN BECAUSE IF IT WAS A WRITTEN STATEMENT THAT WAS -- THEN YOU HAVE TO AGREE THAT THAT ADMISSION WOULD COME INTO EVIDENCE.
AND IT'S TRUE.
SO THEN, WELL, HE COMES DOWN TO THE DIFFERENCE BETWEEN THE SPOKEN ADMISSION BEING TAKEN DOWN AND A WRITTEN ADMISSION.
WELL, HERE AGAIN, THE DISTINCTION I DREW EARLIER I THINK IS IMPORTANT, AND THAT IS, ONE IS AN OUT-OF-COURT STATEMENT, A CONFESSION OR A STATEMENT TREATED LIKE, YOU KNOW, THE MOST POWERFUL PIECE OF EVIDENCE IS THE CONFESSION. IT'S A PIECE OF PHYSICAL EVIDENCE LIKE THE MURDER WEAPON THAT WAS OBTAINED OUT OF COURT. THAT'S CONTRASTED WITH THE SITUATION HERE OR THE SITUATIONS WITH DEPOSITIONS WHERE THEY'RE BEING READ TO THE JURY AS THOUGH THE WITNESS WERE PRESENT IN THE COURTROOM.
LET ME ASK YOU A QUESTION.
WHAT ABOUT THE SITUATION FOLLOWING UP ON THAT, IF IT'S READ TO THE JURY, THE SAME STATEMENT JUSTICE WELLS IS TALKING ABOUT, IT IS READ TO THE JURY. THAT'S TAKEN

SOMEWHERE ELSE. DOES THAT ONCE IT'S READ TO THE JURY THEN ELIMINATE THAT FROM GOING INTO EVIDENCE OR DOES THAT STILL GO INTO EVIDENCE?
I THINK -- WELL, ACCORDING TO CASE LAW --
IT IS STILL IN EVIDENCE SO THAT DISTINCTION IS NOT REALLY -- YOU SEE --
WELL, I SEE YOUR POINT, AND, AND I, I THINK, I THINK IF WE CARRIED, CARRIED THIS, THIS RULE BACK TO ITS ROOT, I THINK YOU WOULD PROBABLY FIND THAT THE CONCEPT OF DEPOSITIONS DIDN'T EXIST. IT PROBABLY STARTED WITH LIVE TESTIMONY, AND, YOU KNOW, THERE'S A RULE OF PROCEDURE WHERE THE JURY CAN HAVE PORTIONS READ BACK. BUT, BUT YOU KNOW, I JUST THINK ITS, IT'S A RULE YOU LEARN EARLY IN TRIAL PRACTICE THAT YOU JUST CAN'T GIVE A JURY A TRANSCRIPT OF A WITNESS'S TESTIMONY AND THEN I THINK IT WAS EXTENDED TO DEPOSITIONS AND THEN SUDDENLY I THINK WE DO HAVE THE CASES, ARE, ARE DRAWING A LINE BETWEEN OUT-OF-COURT STATEMENTS AND IN-COURT TESTIMONY.
JUSTICE PARIENTE.
YEAH, I HAVE A COUPLE OF QUESTIONS. THE WAY THIS PARTICULAR TRANSCRIPT, I KNOW THERE WERE PARTS REDACTED AND THAT THE, THE DEFENDANT HAD OBJECTED TO, THAT, THAT IS IN THE ACTUAL PRIOR TESTIMONY. IS THERE ANYTHING THAT YOU'RE CLAIMING IN, IN THE FORM IN WHICH IT WENT BACK THAT WAS IMPROPER WHERE THEY COULD SEE THE REDACTIONS, ANYTHING OF THAT NATURE IN THIS CASE?
NO, YOUR HONOR. I THINK ALL THE REDACTION ISSUES WERE SETTLED, AND THERE WERE NUMEROUS -- AND TO THE TRIAL COURT'S CREDIT. HE WAS, HE WAS VERY CAREFUL TO REDACT ANYTHING IN THERE THAT WAS PREJUDICIAL AND ADMISSIBLE AND WOULD INDICATE TO THE JURY THAT IT WAS PRIOR TESTIMONY. THAT'S NOT THE PROBLEM.
WHAT SHE'S ASKING IS COULD YOU TELL, COULD THE JURY TELL THAT SOMETHING HAD BEEN REDACTED?
I DON'T KNOW. AND THE COURT HAS ADVANTAGE OVER ME HERE BECAUSE THE EXHIBIT WAS NOT RECEIVED IN THE COURT UNTIL YESTERDAY.
SO THEY HAVE -- WHO DID THE JURY THINK WAS ASKING THE QUESTIONS? WAS IT THE DEFENSE LAWYER IN THE PRIOR TRIAL OR THE PROSECUTOR?
THEY WERE NOT TOLD. THEY WERE TOLD IT WAS A,, THEY WERE TOLD IT WAS, IT WAS, THE COURT SAID WE ARE NOW GOING TO PLACE IN EVIDENCE SWORN TESTIMONY OF MRS. SHANA -- BUT WAS THERE BOTH DIRECT AND CROSS OF HEIFER, -- HER?
YES, BUT THERE IS NO DEMARCATION.
SO THERE'S NOTHING OF THAT.
WE AS TRAINED, YOU KNOW, LAWYERS CAN TELL WHERE THE TONE CHANGED FROM DIRECT TO CROSS, BUT, BUT THE JURY WAS NOT MADE AWARE OF THAT.
WHAT I AM THINKING ABOUT IT THIS WAY: WHEN IT WAS PRESENTED AT THE PRIOR TRIAL, YOU REALLY WOULD'VE HAD THE DEFENSE LAWYERS PRESENTING THE WITNESS AND IT CAN'T BE ALL DAMNING OR SOMEBODY WOULDN'T HAVE PUT HER ON AND THEN THERE'S CROSS EXAMINES CPPTION. SOMETHING ABOUT THE TENOR OF IT NOW BEING OFFERED AND THEN GOING BACK TO ME AND I'M GOING DO ASK THE QUESTION, ESPECIALLY WITH HER NOT TESTIFYING, WOULD CONCERN ME AS BEING REALLY GIVING HEIGHTENED 'EM EMPHASIS TO THIS TESTIMONY NOW THAT'S SORT OF BEING, BEING TRANSFORMED INTO ALMOST A DIFFERENT TYPE OF DOCUMENT. THAT'S SORT OF A FRIENDLY QUESTION BECAUSE THAT'S HOW I SEE IT AS PERHAPS DIFFERENT THAN A POLICE INQUIRY OF A, YOU KNOW, IN A, OF A CONFESSION AND, YOU KNOW, AFTER A MIRANDA WARNINGS HAVE BEEN GIVEN.
WELL, YOU KNOW, CERTAINLY THE WAY THE COURT HANDLED IT BY TIME THE JURY HEARD IT, IT WAS PROBABLY NOT AS POWERFUL AS IT WAS DURING THE FIRST TRIAL. BUT, BUT I DO WANT TO EPHASIZE THAT THE STATE THOUGHT THIS WAS VERY, VERY IMPORTANT. THAT, YOU KNOW, DESPITE THEIR CLAIM OF HARMLESS ERROR IN THEIR BRIEF, YOU KNOW, THEY CHOSE, TOLD THAT THE JUDGE IT WAS VERY IMPORTANT FOR THE JURY TO HAVE THIS TESTIMONY. THIS TRANSCRIPT, AND TO COMPARE IT WITH THE WRITTEN STATEMENT. THEY, THEY, THEY DREW OUT MANY OF THE DISCREPANCIES BETWEEN THE TWO IN CLOSING, SO --
YOU HAVE TO SHOW THAT THE TESTIMONY, I DON'T THINK YOU'RE ARGUES WAS INADMISSIBLE AS FAR AS READING IT TO THE JURY.

THAT'S CORRECT --
YOU'RE ONLY CLAIMING IT SHOULDN'T HAVE BEEN ALLOWED IN THE JURY ROOM, SO THE PREJUDICE YOU HAVE TO SHOW, THE HARMFUL ERROR WAS THAT TIT MADE A BIG DIFFERENCE IN THE TRIAL THAT THE URY -- JURY HAD IT IN THE JURY ROOM AND DIDN'T JUST HEAR IT IN THE COURTROOM.
WELL, I THINK THE STATE MAY HAVE THE BURDEN OF SHOWING THAT IT WAS --
WELL, HOW IS IT NOT HARMLESS THE FACT THAT IT WAS --
WELL, IT WAS DEFINITELY NOT HARMLESS BECAUSE -- WELL, LET ME JUST SAY THAT IN THIS COURT, AND I AM WELL AWARE THAT TIPSY COACHMAN RULE BUT THE STATE HAS NEVER ARGUED HARMLESS ERROR UNTIL THEY GOT TO THIS COURT, BUT HERE IS WHAT THEY TOLD THE TRIAL JUDGE WHICH IS DIFFERENT FROM THEIR POSITION IN THIS COURT THEY SAID IT IS IMPORTANT FOR THE JURY TO BE ABLE TO HAVE THAT AND COMPARE IT, REFERRING TO THE TRANSCRIPT, TO HER WRITTEN STATEMENTS TO THE POLICE SO THEY OBVIOUSLY THOUGHT IT WAS A VERY CRUCIAL DOCUMENT.
BUT YOU POINTED OUT IN CLOSING THE STATE POINTED OUT THE DISCREPANCIES BETWEEN THE TESTIMONY AND THE STATEMENTS TO THE POLICE?
THAT'S RIGHT. THE BIGGEST DISCREPANCY WAS THE LOCATION OF THE GUN. IN HER STATEMENT SHE SAID IT WAS ON THE SEAT. AND IN HER TESTIMONY, IN THE FIRST TRIAL, SHE SAID IT WAS IN HER PURSE, AND IF SHE'S CLAIMING SELF-DEFENSE WITH SOME REFLEXIVE ACTION WHERE SHE JUST GRABBED THE GUN --
WHAT WOULD BE THE DIFFERENCE IF THE STATE HAD ORDERED A TRANSCRIPT OF THE TESTIMONY GIVEN LIVE? AND THEN HAD PUT THAT UP, YOU KNOW, BEFORE THE JURY IN THEIR CLOSING ARGUMENT AND POINTED OUT THE SAME INCONSISTENCIES? THAT THEY'RE TALKING ABOUT WITH THE JURY COULD DO, YOU KNOW, BACK IN THE JURY ROOM? IN OTHER WORDS, TO, TO HAVE THE COURT REPORTER GIVE THEM A TRANSCRIPT OF THOSE PARTS THAT CAN THEN HOLD THAT UP AND, AND POINT OUT HERE'S WHAT SHE SAID IN HER STATEMENT. HERE'S WHAT SHE SAID, YOU KNOW,.
I'VE NOT UNDERSTOOD THAT TO BE PROPER ARGUMENT FOR COUNSEL TO ASK THE COURT REPORTER TO TRANSCRIBE CERTAIN PORTIONS OF TESTIMONY AND PUT IT UP ON A BOARD DURING CLOSING ARGUMENT.
YOU THINK THAT'S A VIOLATION?
I, YOU KNOW, I HAVEN'T RESEARCHED THAT. SOMEWHERE IN MY, MY CIVIL BACKGROUND I, I FIND TROUBLE WITH THAT. SO I DON'T THINK THERE THEY WOULD BE PERMITTED TO DO THAT.
WELL, LET ME ASK A QUESTION. IF THIS DEFENDANT HAD GIVEN TWO SEPARATE STATEMENTS OUTSIDE THE COURT, YOU WOULD AGREE THAT THOSE TWO STATEMENTS COULD GO BACK TO THE JURY ROOM?
YES, ASSUMING THE EYES -- I-s WERE DOTTED AND THE Ts CROSS.
AND DETERMINED IT WAS FREE AND VOLUNTARY AND MURANDA WAIVERS AND ALL THAT STUFF SO THE RELIABILITY OF IT AND LACK OF COERCION, AS LONG AS THAT'S ALL TAKEN CARE OF THOSE TWO PRIOR OUT!!!!!! OUT-OF-COURT STATEMENTS COULD GO IN WITH THE JURY, YOU AGREE WITH THAT?
YES, SIR.
BUT HERE YOUR ARGUMENT IS THAT THE ONE GIVEN IN COURT COULD NOT GO BACK BUT THE ONE GIVEN OUTSIDE OF COURT COULD GO BACK TO THE JURY.
THAT'S CORRECT, THE SAME RULE THAT APPLIES TO LIVE TESTIMONY SHOULD APPLY TO THIS CASE AS THOUGH PLS BRARNS HAD ACTUALLY TESTIFIED DURING THE SECOND -- PLS BARNES AND AS I HAD ASKED HER YOU DON'T SEE ANY DISTINCTION, SOME OF THE TALK IS CONCERNED ABOUT GIVING IT UNDUE INFLUENCE AS OPPOSED TO IF SHE HAD TESTIFIED LIVE AND THEN I SEE THE REAL PROBLEM IF SHE HAD TESTIFIED AND THEN ONLY HER PRIOR TESTIMONY WENT BACK. THAT THERE WOULD BE UNDUE INFLUENCE ON THAT PRIOR TRIAL TESTIMONY BUT IN THE CASE WHERE THE DEFENDANT DOESN'T TESTIFY I CAN'T DISTINGUISH THE DIFFERENCE BETWEEN ONE IN COURT AND ONE NOT COURT.
YOU COULD CERTAINLY FIND A STATEMENT IN QUESTION AND ANSWER FORM WHERE IT WOULD BE FRANKLY DIFFICULT TO DRAW A PRACTICAL DISTINCTION, BUT THE CASE LAW DRAWS THAT

DISTINCTION, AND, AND THE RULE OF CRIMINAL PROCEDURE SAYS THE DEPOSITIONS DON'T GO BACK, AND WE BELIEVE THAT THIS WAS THE, THE JUST AS YOUNG FOUND THE VIDEOTAPES, THE EQUIVALENT OF A DEPOSITION, WE CERTAINLY BELIEVE THAT THIS WAS THE EQUIV LNT OF A DEPOSITION.
I WANT TO MAKE SURE THAT WE ARE, THAT WE ARE ON ONE ACCORD HERE, AND THIS IS ONLY BECAUSE THIS IS THE DEFENDANT AND THEIR ADMISSIONS ALLEGEDLY IN HER TESTIMONY BECAUSE YOU KNOW IN THIS DAY OF REALTIME REPORTING AND THAT KIND OF THING I DON'T WANT US TO MAKE SOME KIND OF RULE AND, YOU KNOW, YOU CAN GO GET YOUR ANY WITNESS'S TESTIMONY TRANSCRIBED RIGHT AWAY AND END UP IN THE JURY ROOM. SO THIS IS ONLY BECAUSE THERE IS ADMISSION ALLEGEDLY BY THE DEFENDANT IN THIS TESTIMONY?
THAT'S WHAT MADE THE TESTIMONY ITSELF ADMISSIBLE THAT'S A SEPARATE ISSUE FROM THE TRANSCRIPT AS A PHYSICAL DOCUMENT. THE RULE --
SO IF THIS DEFENDANT HAD NOT MADE ANY ADMISSIONS IN THIS TESTIMONY, WE WOULDN'T BE HERE WITH THIS QUESTION?
I DON'T THINK SO. I, I, I, I'M NOT FULLY PREPARED TO ANSWER THAT QUESTION WHETHER IT CAN BE READ IN THE ABSENCE OF ADMISSIONS BUT I DON'T BELIEVE IT CAN. AND, BUT THE RULE THAT PROHIBITS THE TRANSCRIPT OF TESTIMONY OR DEPOSITIONS FROM GOING BACK TO THE JURY APPLIES ACROSS THE BOARD TO ANY WINS, NOT JUST THE DEFENDANT. BUT IT WAS THE ADMISSIONS THAT MADE MS. BARNES' TESTIMONY FROM THE FIRST TRIAL ADMISSIBLE.
WITH OUR HELP YOU HAVE ALREADY USED YOUR TIME AND YOUR REBUTTAL TIME SO I AM GOING TO GIVE YOU A COUPLE MINUTES ON THAT. COUNSEL?
THANK YOU.
THANK YOU. MAY IT PLEASE THE COURT THOMAS WINOKUR FOR THE RESPONDENT, THE STATE OF FLORIDA IN THIS CASE. I WANT TO START OUT WITH JUST AN OBSERVATION ABOUT TRANSCRIPTS. THERE IS NOTHING INHERENTLY WRONG WITH A TRANSCRIPT THAT MAKES IT INAPPROPRIATE AS USED AS AN EXHIBIT TO BE SENT BACK TO THE JURY.
WELL, LET'S, LET'S EXPLORE THAT A LITTLE BIT THEN. ARE YOU URGING A RULE OF LAW THAT WITH, WE CAN GET OVER NIGHT TRANSCRIPTS TRANSCRIPTIONS, THAT YOU HAVE A, A A DEFENDANT THAT TESTIFIES AT TRIAL AND THAT IS THEN TRIBED OVERNIGHT AND THEN YOU CAN COME BACK THE NEXT MORNING, THAT GOES BACK TO THE JURY ROOM WHEN THEY GO BACK TO DELIBERATE.
NO, WE ARE NOT ADVOCATING ANY SUCH RULE.
WELL YOU SAID A TRANSCRIPT. I AM SAYING THAT IS A TRANSCRIPT OF WHAT OCCURRED.
I AGREE. WHAT I MEAN TO SAY BY THAT IS THAT THERE IS NOTHING INHERENTLY ABOUT A TRANSCRIPT THAT MAKES IT INAPPROPRIATE FOR USE AS AN EXHIBIT. WHAT IS INAPPROPRIATE IS WHEN YOU HAVE A TRIAL AND YOU HAVE A CERTAIN NUMBER OF WITNESSES, AND YOU TRANSCRIBE SOME OF THOSE WITNESSESS' TESTIMONY. YOU SEND THAT BACK TO THE JURY. THE JURY IS REQUIRED TO RELY ON THEIR MEMORY FOR WITNESSES AND THEY MAY HAVE A TRANSCRIPT AVAILABLE TO THEM FOR OTHER WITNESSES, IT'S UNFAIR AND IT IS GOING TO CARRY THE DANGER OF UNDUE EMPHASIS ON IT. SO ABSOLUTELY NOT. THE STATE ISN'T ADVOCATING A RULE SAYING THAT ALL TRANSCRIPTS, INCLUDING TRIAL TRANSCRIPTS OF THE EXISTING TRIAL SHOULD COME INTO EVIDENCE.
WELL, WHY SHOULDN'T THOUGH, IF THIS IS WHAT'S USED. THIS IS THE SAME THING, IF THESE QUESTIONS HAVE BEEN ASKED AND ANSWERED IN THE MAIN TRIAL, AND THEN TRANSCRIBED THIS IS IDENTICALLY, I MEAN, EXACTLY WHAT, WHAT WE'RE TALKING ABOUT. WHAT WAS SAID PORTRAYED IN THE COURTROOM AS THE TESTIMONY OF THIS WITNESS HAPPENED TO ALREADY BE RECORDED BUT IT WAS READ TO THE JURY AS THOUGH THE TESTIMONY WERE THERE. THEN IT WENT BACK AND HOW IS THAT DIFFERENT?
WELL, FIRST OF ALL, I DON'T AGREE THAT THIS WAS ACTUAL TRIAL TESTIMONY. SHANA BARNES DID NOT TESTIFY IN THIS CASE. IT WAS NOT PRESENTED AS A SUBSTITUTE FOR HER TESTIMONY. IT WASN'T LIKE A DEPOSITION WAS TAKEN TO PERPETUATE HER TESTIMONY FOR THE TRIAL?
WHAT'S THE DIFFERENCE. IT'S QUESTION AND ANSWER S. THIS WORD DEPOSITION SOME MAGIC WORD. AREN'T WE TALKING ABOUT THE SUBINSTANCE.
NOTTATS L. WHAT WE ARE TALKING ABOUT IS THE REASON WHY THIS WAS ADMIT UNDER TO

EVIDENCE. THUSS WAS NOT A SUBSTITUTE FOR TESTIMONY. SHANA BARNES DID NOT TESTIFY IN THIS CASE. I AM PRETTY SURE THE STATE WOULD NOT BE PERMANENTED TO EXAMINE A -- PERMITTED TO EXAMINE A DEFENDANT IN THIS CASE. IT WAS OBVIOUSLY ADMITTED FOR ANOTHER REASON AND IT WAS NOT AS A SUBSITUTE FOR HER TESTIMONY.
SO DO YOU AGREE THAT IF SHE HAD TESTIFIED, THERE'S ABSOLUTELY NO WAY THIS DOCUMENT COULD GO BACK TO THE JURY?
NONE THAT I THINK THINK OF, JUSTICE BELL. CERTAINLY NOT OF HER CURRENT TRIAL TESTIMONY.
, BUT MY QUESTION, AND MAYBE IT'S A FOLLOW-UP, ASSUME SHE'S TESTIFIED IN THIS CASE, AND YOU WOULD HAVE STILL THE RIGHT TO USE HER, UNDER YOUR THEORY, TO TAKE HER PRIOR TESTIMONY, TRANSCRIBE IT, HAVE A QUESTION AND ANSWER READ TO THE JURY, HAVE THAT TRANSCRIPT PUT INTO EVIDENCE AND HAVE THAT SENT BACK, IS THAT WHAT, I MEAN, UNDER YOUR THEORY?
THAT'S CORRECT. I MIGHT MFB MISUNDERSTOOD JUSTICE BELL'S QUESTION I STILL THINK THAT THE PRIOR TRANSCRIPT WOULD STILL BE ADMISSIBLE BECAUSE OF THE NACH ORPHWHY IT WAS ADMITTED.
AND YOU DON'T SEE THAT AS THEN UNDUALLY EMPHASIZING HER PRIOR TESTIMONY OVER WHAT SHE HAS NOW GIVEN IN COURT?
NO MORE THAN ANY OTHER TRANSCRIPT OF A PRIOR STATEMENT MADE BY A DEFENDANT THAT IS GOING TO BE ADMISSIBLE. THE FACT THAT IT IS DONE IN A QUESTION AND ANSWER FORM DOESN'T MAKE ANY DIFFERENCE. POLICE INTERVIEWS CAN BE DONE --
SO IS EVERYTHING IN THIS STATEMENT OR MAYBE THIS ISN'T THE ISSUE, AN ADMISSION OR IS IT JUST BECAUSE SHE'S THE DEFENDANT THAT EVERYTHING SHE'S NOW SAID IN A PRIOR TRIAL IS AN ADMISSION?
I THINK IT'S PROBABLY CLOSER TO THE LATTER. I DON'T THINK THAT YOU'RE REQUIRED TO HAVE IN-- INCULPATORY STATEMENTS IN ADMISSION --.
THE OTHER QUESTION I HAD IS SHE DIDN'T TESTIFY. JUSTICE WELLS IS TALKING ABOUT A DANGER IF SHE DID TESTIFY. MY CONCERN IN SOME OF THE COURTS EXPRESS ADCONCERN THAT THERE IS A RIGHT TO REMAIN SILENT. WAS AN INSTRUCTION READ THAT SHE HAD A RIGHT TO REMAIN SILENT AND NOT TO INTERPRET HER SILENCE AS IN ANY WAY --
I BELIEVE. EXCUSE ME, JUSTICE. I'M SORRY. I BELIEVE ALL THE STANDARD INSTRUCTIONS REGARDING HER SILENCE WERE READ.
AND DOESN'T THIS UNDERMINE EVERYTHING ABOUT IS NOT ONLY SHE IS THERE JURY IS WONDERING WHY SHE IS NOT SAYING ANYTHING TODAY BUT HER TESTIMONY IS BEING READ AS IF SHE WERE THERE, AND SHE IS THERE AND THEN SENT BACK TO THE JURY ROOM. YOU DON'T SEE ANYTHING ABOUT A, A POSSIBLE CONSTITUTIONAL CONCERN ON THIS REALLY BEING A INFRINGEMENT ON HER RIGHT TO REMAIN SILENT?
I DON'T THINK IT DOES, JUSTICE BECAUSE THE CONSTITUTIONAL RIGHT TO REMAIN SILENT I THINK WHAT WE'RE CONCERNED WITH IS COERCED TESTIMONY, THE STATE CAN'T FORCE HER TO TESTIFY, THE STATE CAN'T COERCE HER INTO GIVING A STATEMENT. OBVIOUSLY, THIS WAS NOT COERCED TESTIMONY. IT WAS VOLUNTARY TESTIMONY THAT SHE GAVE AT A TRIAL WITH PROBABLY MORE RIGHTS GIVEN TO HER ON HER RIGHT NOT TO TESTIFY --
WELL, AT THE TIME THAT IT WAS ADMITTED INTO EVIDENCE, WHAT WAS THE OBJECTION IF ANY TO THE ADMISSIBILITY OF THE STATEMENT?
WELL, I DON'T THINK THERE WAS ANY OBJECTION TO THE ADMISSIBILITY OF THE STATEMENT. I THINK THAT IT IS IN FACT SETTLED. STATE v. BILLY BEING A STATE CASE. HARRISON v. UNITED STATES BEING --
SO IN THIS RECORD THERE WAS NO OBJECTION.
THERE WAS NO OBJECTION ON THAT BASIS.
HE IS ASKING NOT ABOUT THE EXHIBIT. AS AN EXHIBIT WAS THERE AN OBJECTION TO THIS BEING INTRODUCED AND ADMITTED AS AN EXHIBIT IS WHAT HE IS SAYING NOT THE SUBSTANCE.
THEY, THEY DID OBJECT TO IT BEING MADE INTO AN EXHIBIT FOR PURPOSE, FOR THE USE OF THE JURY.
OKAY WELL WHAT WAS THE BASIS OF THE OBJECTION?

THAT IT WOULD GIVE UNDUE EMPHASIS OVER OTHER TRIAL TESTIMONY.
WAS THERE ANY OBJECTION MADE ON THE BASIS THAT IT WAS IN VIOLATION OF HER RIGHT TO REMAIN SILENT?
IT WASN'T, AND THAT'S WHAT I MEANT WHEN I SAID, YOU KNOW, THE SUBSTANCE OF IT WAS NOT OBJECTED TO. AND I THINK IF YOU TOOK THAT REASONING TO ITS LOGICAL CONCLUSION, I DON'T SEE WHY ANY OTHER STATEMENT MADE BY A DEFENDANT, IF IF IT'S IN QUESTION AND ANSWER FORM, IF IT IS SWORN, COULDN'T BE PROHIBITED THE STATE WOULD BE PROHIBITED FROM USING IT AGAINST THEM.
WAS HER ENTIRE TRIAL TRANSCRIPT, THE HER TESTIMONY, DIRECT AND CROSS EXAMINATION AND ANY REDIRECT READ TO THE JURY?
YES, MA'AM, OTHER THAN THE --
SO WHY ARE, OR DID THE DEFENSE EVEN ASK THAT ONLY THAT PORTION THAT THE STATE DEEMS TO BE AN ADMISSION BE READ TO THE JURY? BECAUSE WHEN YOU READ THE WHOLE THING TO ME IT BECOMES THE WITNESS ON THE WITNESS STAND AS OPPOSED TO YOU ARE GETTING IN SOME KIND OF ADMISSION THAT THE DEFENDANT HAS MADE.
WELL, I THINK THAT THE PROSECUTION IN THIS CASE WANTED HER STORY TO BE COMPLETE. I BELIEVE THAT IF THEY HAD ATTEMPTED ONLY TO SAY FOCUS ON THE TWO INCONSISTENCIES THAT THEY NOTED IN CLOSING THAT PROBABLY THE DEFENSE WOULDIVE OBJECTED ON THE BASIS OF THE RULES OF COMPLETENESS AND WOULD'VE WANTED HER FULL STATEMENT IN. CERTAINLY HER STATEMENT WAS EXCULPATORY. I DON'T THINK SHE REALLY MADE ANY INCULPATORY STATEMENTS OTHER THAN STATEMENTS THAT MAY HAVE BEEN INCONSISTENT WITH HER PRIOR STATEMENT.
WELL, LET ME --
IS THERE ANY --
GO AHEAD.
WAS THERE ANY ARGUMENT MADE BOOIFT DEFENSE THAT THE SECTION THAT -- BY THE DEFENSE THAT THE SECTION YOU WERE TALKING ABOUT REALLY ISN'T INCONSISTENT BECAUSE, YOU KNOW, YOU COULD HAVE, YOU KNOW, THE GUN WAS ON THE SEAT. THE PURSE WAS ON THE SEAT SO THE GUN WAS IN THE PURSE ON THE SEAT.
I THINK THEY DID MAKE THATTUREMENT ARGUMENT.
I THINK THEY DID.
AND THE TRIAL JUDGE OVERRULED IT?
WELL, I THINK THEY MADE THAT ARGUMENT THAT WASN'T PARTICULARLY INCONSISTENT BUT I DON'T THINK THAT WAS MADE IN TERMS OF WHETHER THE STATEMENT, WHETHER THE PRIOR TESTIMONY OR THE TRANSCRIPT SHOULD BE ADMISSIBLE, NO.
I'M, I WANT TO ASK A QUESTION. YOU, YOU AGREE THAT IF IT WAS FORMERLY RECORDED TESTIMONY OF A WITNESS WHO WAS NOW UNAVAILABLE, THAT WOULD THEN BE READ IN THE COURTROOM. COULD THAT BE ADMISSIBLE AS AN EXHIBIT AND SENT BACK TO THE JURY ROOM?
I DON'T THINK SO, JUSTICE. I THINK --
AND WHY IS THAT? I MEAN, IN OTHER WORDS, AGAIN, IT'S BEING READ IN OPEN COURT. AND IT WAS PRIOR TESTIMONY. I'M NOT SURE I UNDERSTAND WHY THE FACT THAT IT'S THE DEFENDANT, WHICH IS THE REASON THAT, EVEN THOUGH THE DEFENDANT'S AVAILABLE, YOU KNOW, OR MAYBE IS NOT AVAILABLE BECAUSE HE HASN'T -- THAT IT CAN BE READ. BUT WHY THE DISTINCTION BETWEEN THE DEFENDANT'S TESTIMONY BEING ALLOWED TO BE SENT BACK AND A WITNESS WHO'S NOT AVAILABLE AND IS, AGAIN, THROUGH THE QUESTION AND ANSWER FORMAT, THAT TRANSCRIPT NOT BEING ABLE TO BE SENT BACK?
IT HAS TO DO WITH WHY IT IS BEING ADMITTED IN THE TRIAL. WHEN AIOTAKE A DEPOSITION TO PERPETUATE TESTIMONY FOR USE AT THE TRIAL, IT SHOULD BE TREATED THE SAME AS TRIAL TESTIMONY. THAT WAS THE PURPOSE FOR ITS TAKING. IT IS BEING USED AS A SUBSTITUTE FOR TESTIMONY AT TRIAL. IT IS VIRTUALLY THE SAME AS A LIVE WITNESS.
WHEN YOU TAKE A DEFENDANT'S STATEMENT, BE IT AT A POLICE STATION, BE IT ADMISSIONS THAT COME IN BY OTHER WITNESSES, BE IT PRIOR TRIAL TESTIMONY, IT IS NOT CPLG IN AS -- COMING IN AS WITNESS TESTIMONY.
SO AGAIN --

SO THE STATE CAN'T --
OKAY, I DO APPRECIATE THAT.
IT IS BROUGHT IN FOR ANOTHER REASON.
SO AGAIN IF THIS DEFENDANT HAD TESTIFIED AT THIS LIVE, COULD THE SAME EXACT, AND I THINK YOU HAVE ANSWERED I JUST WANT TO MAKE SURE, THE SAME THING COULD'VE HAPPENED, WHICH IS IT COULD, ACCORDING TO THE STATE?
ACCORDING TO THE STATE, YES, MA'AM. IT STILL COULD'VE COME IN. THE SAME WAY THAT ANY OTHER CONFESSION OR POLICE INTERVIEW TRANSCRIBED CONFESSION OR POLICE INTERVIEW --
BUT DOESN'T THAT PUT THE DEFENDANT AS A SEVERE DISADVANTAGE. LET'S PUT THE SHOE ON THE OTHER FOOT. LET'S SAY IT IS RETRIAL AND THE VICTIM IN A SEXUAL BATTERY TYPE CASE TESTIFIED AND FELL APART ON THE STAND. AND THEN THERE'S A RETRIAL. WHAT YOU'RE SAYING IS THE DEFENDANT'S TESTIMONY PRETRIAL COULD GO BACK TO THE JURY BUT THE DEFENDANT COULD NOT SEND THE VICTIM'S PRIOR TESTIMONY BACK INTO THE JURY ROOM? THAT'S THE RULE OF LAW YOU ARE BASICALLY ASKING FOR? CORRECT?
I THINK THAT, THAT ANY CONFESSION OR ADMISSION CAN IN FACT BE ADMITTED AND TRANSCRIBED.
BUT YOU HAVE THE VICTIM'S PRIOR COURT TESTIMONY IN THE SAME CRIMINAL OFFENSE AND WHAT YOU ARE SAYING IS THE DEFENDANT'S PRIOR TESTIMONY CAN GO BACK AND BE READ BY THE JURY BUT THE VICTIM'S CANNOT?
IF, IT DEPENDS ON THE REASON FOR THE ADMISSION OF THE VICTIM'S TESTIMONY. IF IT'S BEING ADMITTED FOR IMPEACHMENT, I DON'T THINK IT TYPICALLY CAN. IF IT'S BEING ADMITTED AS CONFESSIONS OR ADMISSIONS, I DON'T SEE WHY, WHAT THE DIFFERENCE WOULD BE. I DON'T THINK THAT --
SO YOU THINK THAT IF THE DEFENDANT WANTED TO PRESENT AS THE STATE DID IN THIS CASE BUT THE DEFENDANT IN ITS CASE AT RETRIAL WANTS TO PREVENT THAT PRIOR TESTIMONY OF THE VICTIM, THAT THAT VICTIM'S TRANSCRIPT COULD GO BACK WITH THE JURY JUST AS YOU ARE ARGUING THE DEFENDANT'S IN THIS CASE?
I THINK THAT IT COULD. THERE MAY BE A DISTINCTION THAT I AM NOT THINKING OF BECAUSE THERE ARE CERTAIN REASONS WHY CONFESSIONS IN PARTICULAR ARE TREATED DIFFERENTLY FOR THIS PURPOSE.
BUT RELATED TO THAT, YOU KNOW, THERE IS TESTIMONY GIVEN IN A PRIOR TRIAL, THE EXPECTATIONS REALLY ARE NOT THAT THIS MAY BE USED AS A SUBSEQUENT TRIAL OR SUCH AT THAT. THE EXPECTATION IS, IS THAT GIVING TESTIMONY THAT A JURY'S GOING TO RESOLVE THIS DISPUTE, AND, AND HAVE A RESULT, AND THE STATE AT THAT FIRST TRIAL TRIAL AS BASED ON THE STATEMENTS YOU HAVE MADE ALREADY I ASSUME YOU AGREE THAT THE STATE COULD NOT HAVE HAD A TRANSCRIPTION OF THE DEFENDANT'S TESTIMONY MADE AND SENT THAT BACK TO THE JURY.
THAT'S CORRECT.
SO WHY SHOULD THE STATE GET THIS EXTRA ADVANTAGE, SORT OF OF A DOUBLE WHAMMY JUST BECAUSE THERE WAS A MISTRIAL IN THE FIRST TRIAL? OR WHATEVER, WHATEVER OCCURRED? WHY SHOULD THE STATE NOW ACTUALLY AS OPPOSED TO THE JURY JUST CONSIDERING THE TESTIMONY IN THE FIRST TRIAL, WITHOUT A TRANSCRIPT OF THE DEFENDANT'S TESTIMONY, NOW BECAUSE THERE'S BEEN A MISTRIAL OR, OR WHATEVER SOMETIMES MISTRIALS BECAUSE OF THE STATE'S MISCONDUCT, FOR INSTANCE, WHY, WHY SHOULD THE STATE GET THIS NOW EXTRA ADVANTAGE OF, OF WHAT THEY DIDN'T HAVE AT THE FIRST TRIAL OF BEING ABLE TO ACTUALLY HAVE A TRANSCRIPT OF THE DEFENDANT'S TESTIMONY BACK BEFORE THE JURY?
WELL, THE, I THINK THAT THERE PROBABLY IS SOMEWHAT OF AN ADVANTAGE TO THE STATE IN THIS REGARD, BUT I DON'T THINK THAT WE CAN IGNORE PRIOR STATEMENTS MADE UNDER OATH BY A CRIMINAL DEFENDANT, PRETEND THAT THEY DIDN'T HAPPEN. AND I THINK --
BUT THE REALITY IS IS THAT THIS WAS TRIAL TESTIMONY.
WELL, IT WAS TRIAL TESTIMONY WHEN IT WAS GIVEN BUT THAT WASN'T THE BASIS FOR IT'S ADMISSION AT THE SECOND TRIAL.
AREN'T WE ALSO SORT OF FOLLOWING A SLIPPERY SLOPE HERE, THAT IS THAT IF, IF, IF WE HAVE THIS TRANSCRIPT GO BACK, AREN'T WE NOW GOING TO LEAK OVER, YOU KNOW, INTO

DEPOSITIONS WHERE THE SAME ARGUMENTS CAN BE MADE THAT IF, YOU KNOW, THAT WE, WE HAVE THE, THE PRIOR TESTIMONY WHETHER IT'S IN A CRIMINAL OR CIVIL MATTER AND JUDGE, LET'S LET THE, LET'S LET THE JURY HAVE THAT TRANSCRIPT SO THEY'LL HAVE REALLY THE MOST ACCURATE, YOU KNOW, VERSION OF THAT.
WELL, I THINK YOU COULD MAKE A SHARP DISTINCTION BETWEEN TESTIMONY AT TRIAL OR IN THE CASE OF A DEPOSITION, SUBSTITUTED TESTIMONY AT TRIAL, AND A PRIOR CONFESSION OR ADMISSION BY A CRIMINAL DEFENDANT. I DON'T THINK THAT ONE NECESSARILY LEADS TO THE OTHER.
WHAT'S THE DISTINCTION? YOU KNOW, YOU ARE CONCLUDING ONE DOESN'T LEAD TO THE OTHER. WHAT IS THE DISTINCTION?
WELL, THE DISTINCTION IS THAT CONFESSIONS ARE IN FACT TREATED DIFFERENTLY BECAUSE OF THE NATUREOME THE -- OF THEM. THEY ARE GIVEN IN A CIRCUMSTANCE WHERE THEY HAVE AN OPPORTUNITY TO -- THEY ARE, THEY ARE FREELY AND VOLUNTARILY GIVEN. THERE'S A DETERMINATION MADE.
WELL, LET'S ASSUME THAT I'M A DEFENSE ATTORNEY AND I SAY I AM GOING TO LET MY CLIENT BE DEPOSED BY THE STATE BECAUSE MY CLIENT IS, IS INNOCENT AND THIS DEPOSITION WILL SHOW IT AND CAUSE THE STATE TO DROP THIS CASE. SO I, I LET YOU DEPOSE MY, MY CLIENT.
HMM, I THINK THAT HMM I THINK THAT PROBABLY SHOULD BE TREATED THE SAME WAY AS ANY OTHER CONFESSION.
IT IS BECAUSE IT IS A DEFENDANT S. THAT WHAT IT IS?
WELL, AGAIN, I AM GOING TO GO BACK TO IT'S BECAUSE OF THE NATURE OF WHITE THE EVIDENCE IS ADMITTED.
BUT ISN'T IT ADMITTED FOR A DEFENDANT BECAUSE THE DEFENDANT HAS A RIGHT THAT NO OTHER PARTY HAS IS TO SIT THERE AND SAY NOTHING? THAT'S CORRECT.
THAT'S THE WHOLE REASON WE LET IN CONFESSIONS WE LET IN OTHER WITNESSES FOR IMPEACHMENT AND OTHER REASONS BUT ISN'T THE IF THE GIRDING REASON FOR ALLOWING THE ADMISSION OF THE CONFESSION IS BECAUSE IN A LAW OF CASES THE DEFENDANT WILL SAY NOTHING.
RAB ABSOLUTELY.
AND THE STATE IS AT A DISADVANTAGE BECAUSE THEY CAN'T FORCE THE DEFENDANT ON THE STAND SO WE ALLOW THE ADMISSION IN AS LONG AS IT FITS CERTAIN THRESHOLDS.
THAT'S BETTER PUT THAN I COULD'VE JUSTICE BELL.
BUT FOLLOWING UP ON THAT --
BUT WHAT IF YOU HAVE THE STATE HAS CAUSE ADMISTRIAL AS JUSTICE ANSTEAD?
WELL, I THINK THERE MAY BE SOME CIRCUMSTANCES WHERE A COURT COULD DETERMINE THAT BASED ON THE NATURE OF WHAT HAS HAPPENED THAT IT WOULD NOT BE FAIR TO GIVE UNDUE EMPHASIS TO SOMETHING LIKE THAT BUT I DON'T THINK THAT THE MERE FACT THAT THERE WAS A PRIOR TRIAL IN THIS CASE, THERE WAS A REVERSAL, SHOULD FORECLOSE THE STATE FROM USING IT AS AN ADMISSION.
AND LET'S -- SO THERE IS A FAIRNESS THING, AND I REALLY APPRECIATE YOUR, YOUR WHOLE ARGUMENT IT SEEMS YOU ARE TRYING TO STRIKE A BALANCE AND THAT'S WHAT WE ARE TRYING TO GET AT HERE AND YOU SAID AT THE BEGINNING, THE FIRST CONCERN WHY YOU DON'T SEND TRANSCRIPTS BACK IS THAT THE JURY MAY GIVE UNDUE WEIGHT TO THE TESTIMONY BECAUSE IT IS AVAILABLE IN TRANSCRIPT FORM OVER WHAT'S ACTUALLY OFFERED LIVE, CORRECT?
YES, MA'AM, THAT'S CORRECT.
AND I, SINCE I DIDN'T SAY IT AS WELL, THE, THE DISTRICT COURT OF COLUMBIA, THE APPELLATE COURT IN SAYING WHY A DEFENDANT'S PRIOR TESTIMONY SHOULDN'T BE ADMISSIBLE SAYS, OF COURSE, WITH THE DEFENDANT, THE ADMISSION IS GOING TO EVEN QUERY MORE WEIGHT, THAT IS, THAT THE DEFENDANT SAID IT. SO NOW YOU HAVE GOT THE STATE HAVING THE UNDUE RISK OF THEM CARRYING MORE WEIGHT BECAUSE IT'S GOING BACK, PLUS IT'S THE DEFENDANT COMING FROM THE MOUTH SO YOU HAVE GOT TWO THINGS FOR THE STATE BUT THE OTHER PART, I UNDERSTAND NO ONE MADE A 5th AMENDMENT OBJECTION. I AM NOT SAYING IT VIOLATES THE 5th AMENDMENT BUT WHAT THE DISTRICT COURT OF COLUMBIA SAID IS THAT MOREOVER, THERE'S A 5th AMENDMENT CONCERN FOR EVEN IF A DEFENDANT'S TESTIMONY FROM A PRIOR

TRIAL HAS BEEN OFFERED. A TRANSCRIPT OF THAT TESTIMONY MIGHT RECEIVE EVEN GREATER SCRUTINY AND INVITE IMPERMISSIBLE INFERENCES WHERE THE DEFENDANT HAS EXERCISED HIS CONSTITUTIONAL RIGHT NOT TO TAKE THE STAND AT A SECOND TRIAL. SO WHAT I'M ASKING YOU IF YOU, IF EVERYTHING IS EQUAL, WHERE, YES, MR. ROSENBLOUM HAS CONCEDED THAT YOU COULD READ THIS TESTIMONY IN OPEN COURT, WHY GIVEN THE DEFENDANT'S SACRED 5th AMENDMENT RIGHT TO REMAIN SILENT SHOULDN'T AT THAT POINT WE DRAW THE LINE AT LIVE TESTIMONY THAT'S BEEN RECORDED AND ALLOW IT TO BE READ AT THE TRIAL BUT NOT HAVE IT GO BACK TO THE JURY ROOM?

WELL, I, I REMEMBER READING THAT PART OF THE FULLER DECISION, AND I THINK THAT IT IS A REASONABLE CONCERN, BUT IT IS AT ODDS WITH THE MAJORITY OF JURISDICTIONS AND THE WAY THAT THEY VIEW PRIOR STATEMENTS BY A DEFENDANT. I, I THINK THAT THE SUP POSITION THAT THE COURT IS GOING TO GIVE MORE WEIGHT 22 IT BECAUSE IT'S A DEFENDANT IS NOT ANYMORE TRUE THAN IF IT IS A TRANSCRIPT OF A POLICE INTERVIEW. AND I DON'T THINK THAT THAT IS A COMPELLING REASON TO DO T. I DON'T AGREE WITH HER 5th AMENDMENT ANALYSIS FOR THE REASONS I TOLD YOU BEFORE --

I HAVE DIFFICULTY WITH THAT PROPOSITION THAT YOU ARE ADVANCING NOW ABOUT IT NOT BEING DIFFERENT. YOU KNOW, OBVIOUSLY, THE DECISION OF A DEFENDANT TO WAIVE ALL THE RIGHTS NOT TO TESTIFY AND DO ALL THAT, IS A VERY, VERY SERIOUS ONE. AND I THINK WE ALL KNOW AS A MATTER OF PRACTICE THAT IN MOST INSTANCES, THE ADVICE OF COUNCIL IS NOT TO, TO HAVE THE DEFENDANT TESTIFY. BUT IF WE HAVE A SITUATION WHERE AFTER MAKING THAT WEIGHTY DECISION AND THEN TO HAVE THERE BE SOME ERROR IN THE PROCEEDINGS WHERE AS OPPOSED TO IF MAKING THAT DECISION AND THE CASE DECIDED, YOU KNOW, WITH THAT AT THAT POINT BASED ON DOING THAT, NOW WE HAVE THAT BECAUSE OF SOME SERIOUS ERROR THAT THERE'S GOING TO BE A RETRIAL OF THE CASE. IT SEEMS TO ME THAT ALL THE EXPECTATIONS THAT WENT INTO WAIVING THEIR RIGHT NOT TO TESTIFY AND GOING FORWARD AND TESTIFYING, MAKES THIS DIFFERENT. THAN, YOU KNOW, JUST THE, THE, THE GIVEN THE MIRANDA RIGHTS AND, AND GOING THROUGH THAT AND THE STATEMENT. YOU DON'T, YOU DON'T THINK THERE ARE THOSE DIFFERENCES?

I THINK THAT IT IS TRUE THAT A DEFENDANT WHO CHOOSES TO TESTIFY -AND THEN CHOOSE NOT TO TESTIFY IS AT SOMEWHAT OF A DISADVANTAGE IN THAT THAT PRIOR TESTIMONY IS GOING TO BE USED AGAINST THEM. I THINK THAT THE UNITED STATES SUPREME COURT IN HARRISON SAID THAT WHATEVER 5th AMENDMENT CONCERNS ATTEND TO THAT ARE NOT SERIOUS ENOUGH TO PREVENT THEM FROM BEING USED AT ANOTHER TRIAL AND I STILL THINK THAT THE, THE PRIMARY BASIS OF THE 5th AMENDMENT IS THAT IS COMPULSION. A DEFENDANT SHOULD NOT BE COMPELLED TO GIVE A STATEMENT.

WE ARE NOT TALKING HERE ABOUT THE USE OF IT. THAT IS CONCEDED NO ARGUMENT PG BEING MADE ABOUT THE USE. WHAT WE ARE REALLY TALKING ABOUT NOW IS THAT WHEREAS THE FIRST TIME IT'S OFFERED IT WOULD'VE BEEN USED ONCE IBWHAURVE WAY BUT NOW -- IN WHATEVER WAY BUT NOW BECAUSE THAT THERE WAS SOME SERIOUS ERROR IN THE CASE THAT, THAT THE DEFENDANT IS REALLY BEING PUT NOW AT A DISADVANTAGE, AND IT'S BEING USED AS A DOUBLE WHAMMY BECAUSE IT'S ALSO BEING GIVEN IN PHYSICAL FORM TO OO JURY. SO IT'S, IT'S THE EXTRA THAT I AM TALKING ABOUT. NOT THE, NOT THE PRINCIPLES OF USING IT TO BEGIN WITH.

WELL, I UNDERSTAND THAT CONCERN AND I THINK THAT IT'S A LEGITIMATE CONCERN, BUT I DON'T THINK THAT IT OUTLAYS THE LEGITIMATE REASONS THAT THAT STATE HAS TO BE ABLE TO USE THAT PRIOR TESTIMONY IN THE SAME WAY THAT IT WOULD'VE BEEN ABLE TO USE ANY OTHER SWORN STATEMENT BY A DEFENDANT WHICH INCLUDES BEING ABLE TO GIVE A TRANSCRIPT.

YOU ARE WELL OVER YOUR TIME. WE THANK YOU FOR THE ARGUMENTS AND.

THANK YOU VERY MUCH.

YOU HAVE EXHAUSTED YOUR TIME. MR. ROSENBAUM WE WILL GIVE YOU EQUAL TIME TO THE STATE. TWO MINUTES.

I DON'T THINK I'LL NEED MORE THAN A MINUTE OR TWO. WITH THE COURT'S INDULGENCE.

THAT'S WHAT THEY ALL SAY. [LAUGHTER]

YOU BETTER USE THEM. IT'S RUNNING.
THE, THE, ONE POINT I WANT TO MAKE IS, IS THAT THE, THE DISTINCTION THE STATE HAS DRAWN BETWEEN LIVE TESTIMONY AND, AND STATEMENTS IS MORE OF AN ARTIFICIAL DISTINCTION THAT THE APPELLATE LAWYERS ARE MAKING, BUT THAT'S NOT THE WAY THE STATE TREATED IT AT TRIAL, AND I WANT, WITH THE COURT'S INDULGENCE I JUST WANT TO READ ONE BRIEF PART OF THE STATE'S CLOSING ARGUMENT AT PAGE 952 AND THE PROSECUTOR, AND LADIES AND GENTLEMEN, THE CRITICAL DISTINCTION OF THE GUN IN THE SEAT AS SHE TOLD THE POLICE, IT WAS REFLECTED IN THEIR NOTES AS READ FROM THE STAND, IT IS REFLECTED IN HER WRITTEN STAJT AND THEN IN HER TESTIMONY -- STATEMENT AND THEN IN HER TESTIMONY FROM THE YEAR 2002, WHICH IS REFERRING TO THE TESTIMONY FROM THE FIRST TRIAL. SO THE STATE TREATED IT LIKE TESTIMONY, AND, I WOULD --
THERE AGAIN, WE ARE NOT HERE TO, CONSIDER WHETHER THE TESTIMONY SHOULD'VE BEEN ALLOWED IN THE FIRST PLACE. THAT, THAT STATEMENT --
OH, I UNDERSTAND.
WILL BE MADE EVEN IF THE STATEMENT DIDN'T GO BACK WITH THE JURY.
BUT IF IT WAS TESTIMONY, THEN YOU'RE NOT ALLOWED TO GIVE A TRANSCRIPT TO THE JURY.
THE FINAL POINT I WANT TO MAKE IS SOMETHING I'VE, YOU KNOW, I WAS REREADING RULE 3.400, WHICH SAYS THE COURT MAY PERMIT THE ZWRURY UPON RETIRING FOR DELIBERATIONS TO TAKE TO THE JURY ROOM ALL THINGS RECEIVED IN EVIDENCE OTHER THAN DEPOSITIONS. WELL ADEPOSITION YOU'VE GOT A FRIPT YOU'VE BEEN CARRYING IT AROUND IN YOUR FILE FOR MONTHS. IT'S A THING. I DON'T CONSIDER A TESTIMONY READ FROM THE STAND A THING. IT'S NOT A THING UNTIL SOMEBODY DECIDES I'M GOING TO GIVE A TRANSCRIPT AND ASK THE JUDGE IF I CAN SEND IT BACK TO THE JURY. SO THAT'S WHY WE DON'T THINK THAT THE RULE 3.T400 APPLIES, AND WE RESPECTFULLY URGE THE COURT TO QUASH THE DISTRICT COURT DECISION IN THIS CASE.
THANK YOU VERY MUCH. WE THANK YOU FOR YOUR CANDOR IN YOUR ARGUMENTS AND THE COURT WILL TAKE THIS UNDER ADVISEMENT.