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**Thomas Elwell v. State of Florida**

**SC07-1003**

THE NEXT CASE IS ELWELL VERSUS  
THE STATE OF FLORIDA.

>> MEMBERS OF THE COURT, GOOD  
MORNING.

I WORK FOR A LOCAL FIRM HERE.  
WE ARE A SPECIALLY APPOINTED  
PUBLIC DEFENDER SERVING FOR  
FLORIDA.

I REPRESENT THE PETITIONER, MR.  
THOMAS ELWELL IN THIS CASE.  
WE ARE HERE BECAUSE THE SECOND  
DISTRICT COURT OF APPEAL HAS  
WOUND UP AFFIRMING MR. ELWELL'S  
CONVICTION INDICATING THAT HIS  
COUNSEL DID NOT PROPERLY  
PRESERVE A HEARSAY OBJECTION  
UNDER 90.803.

IT IS THE ABUSE EXCEPTION TO THE  
HEARSAY RULE.

>> LET'S GET RIGHT DOWN TO WHAT  
SEEMS TO BE A DISPUTE HERE.  
AND IF WE LOOK AT THE CASE FROM  
THIS COURT, IT APPEARS TO SAY  
THAT JUST THE OBJECTION ON  
RELIABILITY.

THIS IS A CASE THAT DIRECTLY  
SAYS THAT, BUT FOLLOWING THAT  
DECISION THERE WERE STATUTORY  
CHANGES AND TO THOSE STATUTORY  
CHANGES IMPACT THAT DECISION, SO  
THAT THAT REALLY IS NO LONGER A  
SUFFICIENT OBJECTION, JUST THE  
MERE RELIABILITY?

DO YOU UNDERSTAND MY QUESTION?

>> I DO VERY CLEARLY.

I DON'T BELIEVE THE STATUTE THAT  
WINDS UP DESCRIBING THE  
MECHANISM OF THE WAY THE COUNCIL  
MUST PRESERVE, I NOW BELIEVE  
THAT IS A DIRECT TO THIS COURT  
THAT INVALIDATES THE COURT'S  
PRIOR DECISIONS AND THE PRIOR  
HOLDINGS THAT ARE FOUND IN  
HOPKINS AS WELL AS TOWNSEND SO

AS YOU LOOK AT THIS AS A  
COMPLICATION OF THE PRESERVATION  
OF ERROR.

THAT HAS ALWAYS BEEN THE FLORIDA  
LAW OR DO YOU THINK IT WENT ONE  
STEP FURTHER?

>> I THINK CLEARLY THE  
LEGISLATURE'S CONCERN WOULD HAVE  
BEEN TO PROVIDE OR ATTEMPT TO  
PROVIDE A BRIGHT LINE ROLE AS TO  
WHEN COUNSEL OR DEFENDANT WANTS  
THE PRESERVING ERROR IN THE  
RECORD, THAT THERE NEEDS TO BE  
ENOUGH SPECIFICITY TO PLACE THE  
TRIAL BOARD ON NOTICE BEFOREHAND  
AND THE JUDGE, THE TRIAL JUDGE  
NEEDS TO BE ABLE TO MAKE A  
DECISION OR DETERMINATION BASED  
ON THAT NOTICE.

I THINK ESSENTIALLY IT IS A  
CODIFICATION.

>> WE HAVE HELD THAT IN SIMILAR  
CIRCUMSTANCES THAT RAISING A  
HEARSAY OBJECTION DOES NOT  
PRESERVE A CONFRONTATION CLAUSE  
OBJECTION.

SO HOW IS THIS DIFFERENT FROM  
THAT?

WE SEEM TO, AFTER HOPKINS AND  
AFTER THE STATUTE WAS ENACTED  
REQUIRE A VERY SPECIFIC

OBJECTION TO ALLOW THE COURT,  
THE TRIAL COURT TO CORRECT  
ITSELF IF POSSIBLE BEFORE IT IS  
TOO LATE, BUT FORGETS TO AN  
APPEAL SO WE FELT OBJECTING ON  
HEARSAY GROUNDS DOES NOT ALLOW  
THE COURT TO CORRECT THE  
CONFRONTATION CLAUSE.

YOU HAVE TO REALLY BE SPECIFIC  
ABOUT WHAT YOU ARE OBJECTING TO  
SO POWELL IS AN OBJECTION ON  
RELIABILITY SPECIFIC ENOUGH TO  
ALLOW THE TRIAL COURT TO CORRECT  
AN ERROR AS TO THE SPECIFICITY  
OF FINDINGS?

>> I AGREE WITH YOU AND THE  
REASON IS IS THAT IT IS  
FACTUALLY DRIVEN.  
THAT IS THE REASON I DISAGREE  
WITH THE SECOND DISTRICT OF  
COURT OF APPEALS OPINION.  
THE SECOND DISTRICT COURT OF

APPEAL TRUSTED INTO THE CONFIRMATION CLAUSE DEBATE. FACTUALLY AND WE WIND UP WITH THE CIRCUMSTANCE WHERE THERE IS A NOTICE FILED BY THE STATE THAT THEY ARE GOING TO SEEK TO INTRODUCE THE HEARSAY FOR GOOD DEFENSE COUNSEL RESPONSE IN WRITING WITH THE MOTION TO STRIKE, DELINEATE ON THE REASONS WHY IT IS UNACCEPTABLE FOR THE ADMISSIBILITY OF THE EVIDENCE. THE HEARING WINDS UP BEING HELD WHERE DEFENSE COUNSEL WAS ABLE TO CHALLENGE THE EVIDENCE FOR THE REASONS THAT ARE DELINEATED IN THE MOTION TO STRIKE AND ALSO FOR THE REASONS ARTICULATED VERBALLY DURING THE PROCESS OF THE MOTION.

THEN DEFENSE COUNCIL RENEWS THE MOTION IN OBJECTION TO THE ADMISSIBILITY OF THE HEARSAY AT A SECONDARY HEARING WHERE IT WINDS UP BEING PROLONGED TO ANOTHER DAY.

THE TRIAL COURT SPECIFICALLY WINDS UP SAYING, I'M GOING TO

EXCLUDE THE POLICE OFFICER'S TESTIMONY AND MY WIFE'S GRANDFATHER'S TESTIMONY AND THERE'S NO ARTICULATION FOR THE REASONS.

>> YOU CERTAINLY HAVE THE ABILITY AND YOU PRESERVE THE ISSUE AS TO THE ADMISSIBILITY OF THE GRANDFATHER'S STATEMENTS ON RELIABILITY GROUNDS BUT WHEN THE JUDGE DID NOT MAKE SPECIFIC FINDINGS, HE DID NOT OBJECT, JUDGE, YOU HAVE TO MAKE SPECIFIC FINDINGS ON THE RECORD, YOU DID NOT OBJECT TO THAT.

>> I DISAGREE.

AS JUSTICE OVERTON WOUND UP ARTICULATING IN THE TOWNSEND HEARING FOR THIS COURT, THE THING THAT IS INCUMBENT ON THE TRIAL COURT IS TO MAKE A DETERMINATION AS TO THE ADMISSIBILITY RELIABILITY THROUGH THE LENS OF TIME, CONTENT AND CIRCUMSTANCE AND

THAT ALSO IMPACTS THE  
CONSTITUTIONAL RIGHT THAT IS  
INDICATED.

>> IF YOUR ARGUMENT ULTIMATELY  
IS THAT THERE IS REVERSIBLE  
ERROR THAT WOULD REQUIRE  
INCLUSION OF THE STATEMENT,  
BECAUSE THE JUDGE DID NOT MAKE  
THE FINDINGS, IS THAT YOUR  
ARGUMENT HERE?

>> THE ARGUMENT IS THAT THE  
TRIAL COURT COMMITTED REVERSIBLE  
ERROR IN THAT IT DID NOT FOLLOW  
THE DIRECTIVE OF THE STATUTE, IT  
DID NOT MAKE THE SPECIFIC  
FINDINGS AS REQUIRED BY LAW AND  
THAT COUNSEL PROPERLY PRESERVED  
THE ISSUE.

>> IF WE AGREE WITH YOU THAT THE  
FINDINGS WERE NOT MADE AND IT  
WAS PRESERVED, AND WE WERE  
FIRST, IT WOULD GO BACK AND THEN  
THE JUDGE COULD MAKE THE  
FINDINGS.

WE ARE NOT TALKING ABOUT MIRANDA

HERE, IT IS NOT AS IF THE  
STATEMENT WOULD THEN BE EXCLUDED  
WOULD IT?

IT WOULD JUST THIS TIME AROUND  
MAKE THESE FINDINGS?

>> THAT IS EXACTLY CORRECT.

>> THEN MY QUESTION TO YOU IN  
THIS CASE, I AM NOT AS CONCERNED  
ABOUT THE PRESERVATION BECAUSE I  
THINK, TO ME IT IS ENOUGH.  
I AM SYMPATHETIC, OR I AM ON THE  
SIDE OF JUDGE FULMORE WHO SAID  
THAT IT IS HARMLESS BECAUSE WE  
CAN LOOK AT THE RECORD, AND  
ALTHOUGH THESE FINDINGS ARE  
CERTAINLY HELPFUL FOR, IF THERE  
WERE NO HEARING, HERE THERE WAS  
AMPLE EVIDENCE TO SHOW HOW THESE  
WERE -- THE STATEMENTS WERE  
RELIABLE, THAT ALTHOUGH HE CAN'T  
MAKE SPECIFIC FINDINGS OF FACT  
AND THE RECORD IS CLEAR THAT WE  
CAN LOOK AND SAY THAT IT WAS  
RELIABLE BECAUSE -- TO HIS  
GRANDFATHER BECAUSE OF HIS AGE,  
BECAUSE HE WAS THERE TO TESTIFY  
IN PERSON, ETC., ETC, THEREFORE  
IN THIS CASE THE FAILURE TO MAKE

THE FINDING WAS AN ERROR BUT IT WAS A HARMLESS ERROR BEYOND A REASONABLE DOUBT.

CAN YOU ADDRESS THAT ISSUE, THAT WHICH IS BEYOND -- YES IT WAS PRESERVED AND IT WAS ERROR FOR THE JUDGE NOT TO MAKE THE FINDINGS BUT IT IS HARMLESS BEYOND A REASONABLE DOUBT?

>> TWO ANSWERS TO THE QUESTION. THE FIRST RESPONSE IS IN THE FIRST DISTRICT COURT OF APPEALS CASE, THE COURT ARTICULATED WHERE A TRIAL COURT FAILS TO MAKE THE REQUISITE FINDINGS AS DIRECTED BY THE STATUTE, IT IS NOT FOR THE APPELLATE COURT TO THEN LOOK BEHIND AND MAKE THOSE DETERMINATIONS OF RELIABILITY AT A LATER POINT.

THE SECOND ANSWER TO YOUR QUESTION, MY PERSONAL OPINION IN

DEALING WITH TRIAL WORK AND APPELLATE WORK IS I BELIEVE IT IS ONE OF THE MOST ABUSED OPINIONS THAT IS RELIED UPON. I DON'T BELIEVE IT IS HARMFUL. >> I DON'T MEAN HARMLESS THAT THE GRANDFATHER'S STATEMENT CAME IN.

THAT IS NOT A HARMLESS ERROR I AM TALKING ABOUT.

I AM TALKING ABOUT HARMLESS THAT TO THIS COURT, I HAVE TO LOOK AT WOLMACK, THIS COURT AND LOOKING AT, THERE WAS A HEARING, THERE WAS THE ARGUMENT MADE, THERE WAS A PRE-TRIAL HEARING ON IT AND THEN AT THE END OF THAT HEARING, AS YOU SAID THE JUDGE MADE A DETERMINATION THAT THE POLICE OFFICERS' STATEMENTS OF THE POLICE OFFICER WERE NOT RELIABLE.

YOU MAKE THE FINDINGS, YOU ARE NOT TAKING ISSUE WITH -- THAT WAS NOT FOUND TO BE RELIABLE SO THAT WENT OUT.

TO FIND THE STATEMENTS OF THE GRANDFATHER WERE RELIABLE. DON'T WE HAVE A SUFFICIENT RECORD IN THIS CASE, AND I WILL LOOK AT WOLMACK, TO TELL US THAT

EVEN THOUGH HE DID NOT CROSS HIS T'S, THE FINDINGS WOULD BE UNREASONABLE DOUBT, NOT THAT THE GRANDFATHER'S STATEMENT COMING IN WAS -- AS OPPOSED TO FUNDAMENTAL ERROR, WE UNDERSTAND THAT.

IT WAS PRESERVED.

AND YOU ARE SAYING NO, IT CAN NEVER BE HARMLESS BECAUSE WE CAN'T LOOK AT RECORD.

>> I DON'T THINK A HARMLESS ERROR ANALYSIS WOULD APPLY IN THAT MANNER.

>> WHY CAN'T IT?

>> BASED ON THE JUSTICE OPINION IN HOPKINS AND THEIR PROGENY OF THAT, IT IS NOT SUFFICIENT TO JUST ARTICULATE THE BOILERPLATE

TERMS.

YOU CAN'T JUST SAY, THE STATUTE 90.803 REQUIRES ME TO DO THIS, THIS AND THIS, AND I THINK I'VE HEARD IT.

THAT IS NOT SUFFICIENT, THAT IS NOT GOOD ENOUGH.

>> I UNDERSTAND.

I AM NOT TALKING ABOUT THAT. I AM TALKING ABOUT THIS RECORD THAT JUDGE HOMAN SAID HIS AUNT HAS FACTUAL SUPPORT FOR THE LIABILITY.

>> ARE YOU REFERRING TO THE DISSENTING OPINION FROM THE SECOND DISTRICT, THE CONCURRING OPINION?

>> YES, JUDGE FULMORE.

>> I'M NOT CERTAIN JUDGE FULMORE'S CONCURRING OPINION WINDS OF SPEAKING THERE IS AMPLE EVIDENCE TO SUPPORT THE RELIABILITY AND I THINK WHAT JUDGE FULMORE IS SPEAKING TO IS THAT AS YOUR HONOR SUGGESTS, IF WE WOUND UP REVERSING THIS AND REMANDING IT TO THE TRIAL COURT FOR A HEARING, THEN THE QUESTION WINDS UP BEING, IF WE EXCLUDE THE TESTIMONY OF THE GRANDFATHER.

>> YOU KNOW WHAT?

THE MORE I LOOK, WE ARE NOT SURE WHAT THAT MEANS.

WE CAN LOOK TO THE RECORD AND ANY ERROR IN ADMITTING WITHOUT FIRST MAKING A FINDING IS HARMLESS.

SHOULD SAY ANY ERROR AND ADMITTING IT BUT IT DOES NOT REALLY MATTER.

I AM ASKING USED, AND WHEN THERE IS A FULLY DEVELOPED RECORD, THAT MAKES FINDINGS HARMLESS. YOU SAID HOPKINS, THE WORDS -- I'M NOT SAYING THAT EITHER.

I AM SAYING THIS RECORD GIVE SUPPORT TO THE JUDGE'S RULING THAT THIS WAS RELIABLE BECAUSE THE CHILD TESTIFY, BECAUSE HE

WAS CLOSE TO 12 YEARS OLD, BECAUSE IT WAS HIS GRANDFATHER, BECAUSE OF THE CIRCUMSTANCES THAT WERE IN HIS RECORD TO SHOW THAT ALL OF THOSE THINGS THAT IS PHYSICAL AGE, MATURITY, ETC. AND THE RELATIONSHIP ALL INDICATE A LIABILITY.

>> TWO ANSWERS, THE FIRST ANSWER IS THAT THE STATUTE PROVIDES THE DIRECTIVES IN THE SUBSECTIONS AND IT SAYS WAS BEST AT THE DIG, THE TRIAL COURT MUST MAKE THESE FINDINGS.

IT DOESN'T SAY CAN OR MAYBE SHOULD, IT SAYS MUST SO TO ADOPT YOUR HONOUR'S INTERPRETATION OF IT, THAT WE CONFINE IT IS HARMLESS ERROR BASED ON THE RECORD IS ESSENTIALLY ARGUES THAT THE STATUTE DOES NOT BEAR THE MEANING THAT REALLY HOLDS. THE SECOND IS THAT THE REASON THE STATUE REQUIRES THOSE FINDINGS IS BECAUSE THERE MUST BE A SUFFICIENT RELIABILITY FOUND AND I WOULD SUGGEST TO THE COURT THAT UNDER THE U.S. CONSTITUTION, AS I BELIEVE IT WAS JUST AS OVERTON INDICATED, AND HE WAS REFERRING TO IDAHO VERSUS WRIGHT THAT IT IS INCUMBENT UPON THE TRIAL COURT WHEN WE ARE DEALING WITH HEARSAY STATEMENTS OF THIS NATURE TO MAKE THOSE FINDINGS. YOU HAVE TO APPEAL THE JUDGE'S

FINDING FOR DETERMINATION.  
THE GRANDFATHER STATEMENTS WERE  
RELIABLE.

>> I DID NOT UNDERSTAND YOUR  
HONOR.

>> YOU HAVE NOT APPEALED HERE  
THE COURT'S DETERMINATION THAT  
THE GRANDFATHER STATEMENTS WERE  
RELIABLE.

>> YOU ARE CORRECT.

>> YOU ONLY APPEALED THE TRIAL  
COURT'S FAILURE TO STATE  
FINDINGS ON THE RECORD BECAUSE

THE THAT IS CORRECT.

>> SO WHAT RELIEF TO ACHIEVE IF  
WE AGREE WITH YOUR POSITION?

>> THE RELIEF IS THAT THE CASE  
IS REMANDED TO THE TRIAL COURT  
AND PROFFERED EVIDENCE ARGUABLY  
WAS CONDUCTED.

THE TRIAL COURT WOULD BE  
INSTRUCTED TO MAKE THE CORPORATE  
FINDINGS AND THAT WAY THIS COURT  
COULD MAKE A DETERMINATION  
WHETHER OR NOT THERE WAS A  
PROPER INITIATIVE OF  
RELIABILITY.

>> WHY ISN'T THAT THOUGH THE  
VERY THING THAT THIS STATUTE,  
AND I THINK YOU'LL PROBABLY  
AGREE, MANY OF OUR CASES ALSO  
SAT OUT THE REQUIREMENT FOR THE  
SPECIFICITY OF AN OBJECTION, AND  
SO HERE REALLY WHAT YOU ARE  
SAYING IS THAT COUNSEL COULD  
HAVE SAID, JUDGE, ALTHOUGH I  
DISAGREE WITH YOU ABOUT YOUR  
RULING, I AGREE WITH YOU ABOUT  
THE POLICE OFFICER BUT I  
DISAGREE ABOUT YOUR RULING ABOUT  
THE GRANDFATHER, BUT THE STATUTE  
REQUIRES THE JUDGE, EVEN THOUGH  
I DISAGREE WITH YOU, TO SET OUT  
SPECIFIC FINDINGS, AND SO YOU  
HAVE NOT DONE THAT.

I AM OBJECTING NOT ONLY  
DISAGREEING WITH YOUR  
SUBSTANTIVE RULING, BUT I AM  
ALSO TELLING YOU I OBJECT  
BECAUSE YOU ARE NOT MAKING THE  
FINDINGS REQUIRED BY THE  
STATUTE.

HERE WE ARE, HOWEVER MUCH TIME

LATER.

THERE WAS NO OBJECTION LIKE THAT IN THE TRIAL COURT, AND WE ARE ENDING UP YOU KNOW CONSUMING A COUPLE OF YEARS IN THE INTERIM TIME, WHEN THIS IS THE VERY REASON THAT WE SAY TRIAL JUDGES ARE ENTITLED TO KNOW JUST EXACTLY WHAT IT WAS THAT DEFENSE COUNSEL FOUND OBJECTIONABLE

ABOUT THE RULING FOR THE LACK OF FINDINGS OR WHATEVER SO I'M HAVING SOME DIFFICULTY TO BECAUSE WE REALLY HAVE GOT A COUPLE OF ISSUES HERE.

ONE WOULD BE, WHETHER OR NOT THERE REALLY IS A DISTINCTION BETWEEN THE POLICE OFFICER AND THE GRANDFATHER.

THAT IS THE THING ON THE MERITS, THAT IS IS THERE ENOUGH RELIABILITY WITH THESE STATEMENTS TO THE GRANDFATHER, OR THE GRANDFATHERS' TESTIMONY AS COMPARED TO A POLICE OFFICER. MAYBE THERE ARE, MAYBE THERE AREN'T.

THERE REALLY IS SORT OF THE ISSUE THAT IT WAS BEING LITIGATED BELOW BUT NOW WE COME UP HERE AND WE HAVE WHAT WE HEAR SO MANY TIMES ABOUT A TECHNICALITY.

OF COURSE IT IS NOT A TECHNICALITY.

THESE ARE IMPORTANT REQUIREMENTS, BUT THERE'S NO CONVERSATION ABOUT THIS WHATSOEVER IN THIS TRIAL RECORD, SO HELP ME WITH WHITE IS THIS VERY THING, WHEN WE TALK ABOUT THE OBJECTION BEING SPECIFIC, ISN'T THIS THE VERY THING WE WERE TALKING ABOUT?

>> I DON'T THINK SO AND THE REASON BEING IS IF YOU GO BACK AND WIND UP LOOKING IN THAT TRANSCRIPT IN THE HEARING OR HEARINGS FOR ALL, THERE IS NO WAY THAT ANYONE CAN CONCLUDE THAT THAT TRIAL JUDGE DID NOT KNOW EXACTLY WHAT THE OBJECTION WAS.

THAT JUDGE NEW SPOT ON WHAT THE OBJECTION WAS.

>> IS YOUR POSITION THAT THERE WAS AN OBJECTION, THE FINDINGS WERE NOT MADE?

>> I CANNOT TELL YOU JUSTICE WELLS THAT THAT SPECIFIC OBJECTION WAS MADE BUT IT IS PRETTY DARNED CLEAR FROM ANALYZING THE RECORD THAT DEFENSE COUNSEL BROUGHT TO THE COURT'S ATTENTION THE STATEMENTS WERE NOT MADE IN A CONTEMPORARY AND CONTEMPORANEOUS MEASURE.

10:00 A.M. 3/5/2008

Florida Supreme Court

(part two of Elwell)

VERY DEFINITIVE

REQUIREMENT IN THIS IS PARTICULAR SITUATION, THERE HAS TO BE SPECIFIC FINDINGS SO IF THAT'S CORRECT.

>> AND SO -- A SPECIFIC REQUIREMENT IT WOULD SEEM TO ME WOULD REQUIRE A SPECIFIC OBJECTION IF IT IS GOING TO BE FOLLOWING ALL OF THESE STATUTES.

>> I ASSUME THAT THE COURT COULD MAKE THAT INTERPRETATION.

I THINK THAT IT FLIES IN THE FACE OF -- I MEAN, IT -- IF -- IF THERE IS A DIRECTIVE IN THE STATUTE SAYS COURT MUST MAKE THIS DETERMINATION WE ARE GOING TO IGNORE THAT SAY THAT IT IS NOT PRESERVED, WHEN IN ACTUALITY THERE IS AN OBJECTION THAT IS LODGED, IT PUTS THE COURT ON NOTICE BY WRITTEN MOTION TO STRIKE WHAT THE ISSUE IS.

>> I HAVE A QUESTION.

>> -- IN YOUR ANSWER --

>> -- CONCEDING THAT HOPKINS HAS NOT ALREADY TOUCHED ON THIS?

>> IT WAS MY IMPRESSION HOPKINS ALREADY PASSED ON THIS ISSUE.

I THINK HOPKINS PASSED ON THIS ISSUE.

>> YOU HAVE NOT USED IT IN YOUR ARGUMENT RESPONSE IT SEEMS TO ME WE HAVE TO RECEDE FROM HOPKINS IT ALREADY HELD THAT THE OBJECTION MADE HERE IS SUFFICIENT.

ISN'T THAT WHAT HOPKINS SAYS?

>> I THINK HOCPKINS COVERS IT VERY CLEARLY.

>> WE HAVE TO RECEDE FROM THAT, OR DRAW SOME KIND OF DISTINCTION THAT THERE IS A STATUTE LATER THAT REQUIRES MORE THAN THAT, THAT IS WHAT I'M TRYING TO UNDERSTAND, IF HOPKINS AS I READ IT, SAYS WE HAVE ALREADY CROSSED THAT BRIDGE.

>> I THINK HOPKINS VERY SPECIFICALLY DEALS WITH THIS, DICTATES TO THE COURT THAT HOPKINS STAYS IN PLACE. BECAUSE OF THAT, THIS COURT IS REQUIRED BY PRECEDENT TO REVERSE THE REMAND THE CASE, I DON'T BELIEVE THAT THE STATUTE WINDS UP CREATING A CIRCUMSTANCE THAT ADDS ADDITIONAL REQUIREMENTS FOR OBJECTIONS -- YOU KNOW, I THOUGHT ABOUT IT -- I'M NOT BEING SMART BUT YOU KNOW I THOUGHT ABOUT THE MOVIE "FEW GOOD MEN."

"OBJECTION, YOUR HONOR.

"OVERRULED.

"I STRENUOUSLY OBJECT."

WE ARE GOING DOWN A PATH OF YOU KNOW, AND THERE ARE OPINIONS IN THE CASE LAW THAT CITED BOTH BY STATE --

>> LET ME FOLLOW UP, TRYING TO UNDERSTAND.

WHAT IS YOUR THOUGHT WITH REGARD TO THIS HOPKINS GOING TO THE QUESTION OF JUSTICE?

-- PARIENTE RAISED IF WE LOOK AT THIS TRANSCRIPT DOES HOPKINS SPEAK TO THAT ISSUE? IS THERE SOMETHING IN HOPKINS THAT WOULD PRECLUDE

AN APPELLATE COURT FROM  
LOOKING OR IS THERE NOT?  
I DON'T KNOW THE ANSWER TO  
THAT.

>> I DO NOT HAVE A  
RECOLLECTION THE HOPKINS  
OPINION SPOKE TO --

>> CORRECT, THE ONLY CASE  
THAT I WOUND UP FINDING WAS THE  
WILLMOTT CASE I CITED FOR THE  
COURT, CERTAINLY THE HOLDING  
IN WILLMOTT, AN APPELLATE COURT  
SHOULD NOT LOOK BEHIND THE  
FACTS OF THE RECORD AND THEN  
MAKE A DETERMINATION OF  
INDICIA RELIABILITY IT IS  
INCUMBENT UPON THE TRIAL COURT TO  
DO THAT.

>> IT SEEMS TO ME WHAT YOU ARE  
ASKING US TO DO IS SEND IT BACK  
TO TRIAL COURT TO MAKE  
FINDINGS, REALLY  
BECOMES, MAYBE A WASTE OF OUR  
JUDICIAL EFFORT IF -- WHY ISN'T  
IT APPROPRIATE TO LOOK AT  
THIS CASE IN HARMLESS ERROR  
ACT?

IT SEEMS TO ME WHAT  
JUDGE FULLMER WAS SAYING IN  
SECOND DISTRICT IT MAY HAVE  
BEEN ERROR FOR THE TRIAL  
COURT TO HAVE ADMITTED EVEN  
IF WE GO DOWN THE LINE IT  
WAS ERROR TO HAVE EVEN  
ADMITTED THIS GRANDFATHER'S  
TESTIMONY.

WHERE ARE WE IF WE  
LOOK AT THIS IN A HARMLESS  
ERROR.

>> I SEE MY TIME IS ABOUT TO  
EXPIRE --

>> AND I THINK THAT  
THIS ANSWERS JUSTICE PARIENTE'S  
QUESTION.

>> TALKING ABOUT HARMLESS  
ERROR IN THE SENSE OF  
WHETHER OR NOT IT WAS  
RELIABLE, I'M SAYING  
HARMLESS ERROR IN THE SENSE  
OF LET'S THROW IT OUT.

>> AND IF I UNDERSTAND YOUR  
HONOR'S QUESTION, CORRECTLY,  
FINE, WE DISCOUNT OR  
DISREGARD THE GRANDFATHER'S

TESTIMONY IN ITS ENTIRETY ON THE MERITS OF THE REST OF THE THE TESTIMONY ALONE, THERE WAS AMPLE EVIDENCE BEYOND A REASONABLE DOUBT THAT A CONVICTION WOULD BE RETURNED.

AND THE ADMISSIBILITY OF THE GRANDFATHER'S TESTIMONY WAS HARMLESS, AS A RESULT OF THAT.

IT WAS NOT.

THE REASON WAS IS IT WOUND UP SERVING TO BOLSTER THE CREDIBILITY AND THE VERACITY OF AN 11-YEAR-OLD AT THE TIME AND 12-YEAR-OLD WHEN THAT 12-YEAR-OLD WAS ON THE WITNESS STAND IT WINDS UP AVOIDING CUMULATIVE EVIDENCE THAT WINDS UP SERVING -- ESSENTIALLY WINDS UP BEING SELF-SERVING TO THE STATE, WHERE IT CAN'T BE HARMLESS, IT HAS GOT TO BE CONSIDERED TO PROP UP THE TESTIMONY OF A 12-YEAR-OLD, WHEN THAT IS THE VERY THING THAT IS IN QUESTION.

>> OKAY, YOU HAVE GONE BEYOND THE TIME -- A MINUTE REBUTTAL SINCE WE ASKED SO MANY QUESTIONS.

>> THANK YOU YOUR HONOR.

>> GOOD MORNING YOUR HONOR DIANA BOCK WITH THE ATTORNEY GENERAL'S OFFICE.

>> WE ESTABLISHED AT LEAST STARTING POINT, IN LOOKING THROUGH HOPKINS IT APPEARS THIS COURT HAS ALREADY SAID THAT THAT OBJECTION THAT WAS MADE IN THIS CASE IS SUFFICIENT TO PRESERVE A CHALLENGE TO THE LACK OF SPECIFIC FINDINGS.

DO YOU SEE HOPKINS THE SAME.

>> NO I DO NOT.

>> OKAY WHAT DO YOU SEE HOPKINS AS SAYING.

>> I BELIEVE THAT YOU MUST LOOK AT HOPKINS ON THE FACTS WITHIN HOPKINS, WHICH WAS A DOUBLE OBJECTION, ACTUALLY

ONE OBJECTION.

THE OBJECTION WAS TO THE CHILD OKAY TESTIFY OFFSITE BY VIDEO, DID THAT INVOKE THE CONFRONTATION CLAUSE PROBLEM THAT HOPKINS WAS DEALING WITH.

IT IS INTEGRAL TO THE DECISION IN HOPKINS TO SEE THAT THE COURT DECIDED FIRST THAT THIS WAS IN FACT A CONFRONTATION PROBLEM, THAT THAT CREATED UNDER 92.51 I BELIEVE, A PROBLEM WITH CONFRONTATION, FOR THAT DEFENDANT, HAVING DECIDED THAT, THERE IS A CONFRONTATION ERROR HERE, IF WE DON'T LOOK NOW TO WHAT DID THE TRIAL COURT DO WHEN THEY WERE LOOKING AT

90.803 --

>> EVEN THOUGH THE COURT SAID SEPARATE AND APART FROM CONFRONTATION ISSUE COUCHED ITS HOLDING WITH THAT PHRASE, SEPARATE AND APART FROM --

>> BUT IF YOU LOOK FURTHER INTO THE OPINION YOU WILL SEE WHERE IT SAYS, THAT THESE EVIDENTIARY ISSUES TOGETHER IT TALKING ABOUT THAT I THINK HE HAD NOTE TEN IF YOU GO TO THAT SECTION OF THE OPINION WILL SEE THAT THE COURT IS INTERTWINING THEM THE COURT WAS SAYING, IN HOPKINS WAS YOU NOW HAVE A CONFRONTATION ISSUE, YOU MUST GO FROM THE CONFRONTATION ISSUE NOW, WE SEE THERE IS A PROBLEM, HAVING SAID THAT, WE ARE GOING TO NOW LOOK AT WHAT THE TRIAL COURT DID, WHEN IT REVIEWEDED THE RELIABILITY UNDER 90.803 AND WE HAVE TO GO TO THE FINDINGS, WE NOW HAVE TO LOOK AT THE SUFFICIENCY OF THE FINDINGS, BECAUSE WE HAVE A CONFRONTATION PROBLEM. THAT --

>> DO YOU -- AGREE WITH THE INTERPRETATION DOES THE NEW STATUTE OFFER NECESSARY OBJECTION THAT NEEDS TO BE MADE THAT WITH -- WOULD ALTER IF YOU SEPTUPLETS ASSUME THAT HYPOTHETICALLY, THAT IT IS NOT BASED ON CONFRONTATION BASED ON ANALYSIS OF THE STATUTE, DOES THE NEW STATUTE REQUIRE A MORE FULLY EXPLAINED OBJECTION?

>> I THINK THE ANSWER IS YES, I DON'T THINK THAT IT NECESSARILY CHANGES LAW THAT EXISTED PRIOR TO STAY ON HURST AND PROGENY BUT I DO BELIEVE THAT THE COMPLICATION THAT WAS STATUTE -- THE FOREFRONT AT THAT TIME A NECESSITY THAT THE COURT SYSTEMS WERE SEEING, WITH ITS TYPE OF ABILITY TO NOT ARTICULATE THE OBJECTIONS SUFFICIENTLY FOR THE TRIAL COURT TO RESPOND IN A TIMELY MANNER, AND, THEREFORE, THAT IS WHY PUTTING THE ACE IN THE POCKET WAITING TELL EVERYTHING IS GOING ON IT CAN'T BE CORRECTED, AND THEN PULLING OUT THE ACE AND SAYING OH, BY THE WAY --

>> IT STRIKES ME I'M LOOKING AT HOPKINS, IN THAT CASE WE REMANDED FOR A NEW TRIAL, MR. MORRIS IS SUGGESTING A MUCH MORE NARROW REMAND WHICH WOULD BE A REMAND TO ALLOW THE JUDGE TO MAKE THE FINDINGS.

IF MAKING THE -- I MEAN BECAUSE YOU KNOW, I'M LESS CONCERNED IN THIS CASE BECAUSE THERE ISN'T A CONFRONTATION RIGHT PROBLEM. BUT WE ARE TRYING TO LOOK AT THIS FOR ALL YOU KNOW FOR ALL CASES.

WHY ISN'T GOOD RULE AND MAY BE A A MODIFICATION OF HOP CONGRESS IS TO BE FIRST OF ALL THEY STATED COULD HAVE

BROUGHT IN THE JUDGE'S --  
JUDGE YOU HAVE TO MAKE THESE  
FINDINGS, AND THEY'RE STANDING  
THERE THEY KNOW THE LAW.  
THEY DIDN'T.

TO ALLOW THE -- THIS TO BE  
DONE AND THEN BROUGHT BACK  
ON APPEAL IF AT THAT POINT  
THE DEFENDANT THINKS THAT  
THEY ACTUALLY HAVE A BASIS  
TO CHALLENGE THE RELIABILITY  
BECAUSE I THINK IT IS  
NOTEWORTHY THAT THEY ARE NOT  
SEPARATELY CHALLENGING  
RELIABILITY JUST FAILURE TO  
MAKE FINDINGS.

>> CORRECT.

>> WHICH IS DIFFERENT THAN A  
CONFRONTATION CLAUSE ISSUE.  
WHY WENT THAT BE A BETTER  
RULE THAT SOMEONE HAS  
PRESERVED IT, BY RAISING  
THAT THESE ARE NOT  
STATEMENTS ARE NOT RELIABLE  
WE WANT THEM OUT, THAT THE  
JUDGE THEN UNDER THOSE  
CIRCUMSTANCES HAS TO CONDUCT  
A HEARING, HAS TO MAKE  
MEANINGFUL FINDINGS, ON THE  
RECORD, THAT WASN'T DONE IN  
THIS IS INDICATION, IT WAS  
PRESERVED BECAUSE THE LAWYER  
WAS ASKING THAT THEY BE KEPT  
OUT, BECAUSE OF LACK OF  
RELIABILITY, AND LET IT GO  
BACK LET THE JUDGE HAVE THE  
HEARING, MAKE THE FINDINGS,  
AND THEN HAVE THAT REVIEWED  
BY THE SECOND DISTRICT  
WOULDN'T THAT MAKE THE  
SYSTEM SORT OF MORE -- MORE  
RELIABLE, TO DO IT THAT WAY.

>> -- I THINK THE ANSWER HAS  
TO BE A CONSERVATIVE KNOW IF  
YOU LOOK HOW THIS IS WAS  
PRESENTED IN THIS IS CASE  
UNDER OUR FACTS THAT IS WHAT  
I'M TALKING TO NOW, OUR  
FACTS, AT THE HEARING, WHEN  
THERE WERE TWO, SEQUENTIAL,  
PRIOR TO THE TRIAL WHEN THIS  
IS INFORMATION CAME IN, THE  
ONLY CHALLENGES BY THIS  
PARTICULAR DEFENSE COUNSEL

WAS THAT FIRST OF ALL THAT  
THEY CHALLENGED THE  
ADMISSIBILITY OF THE CHILD  
HEARSAY THROUGH MOTION TO  
STRIKE NOT MOTION IN LIMINE,  
NOTHING PROPOSE THERE WAS  
RELIABILITY IN ISSUE AND ITS  
OF THE TESTIMONY BUT RATHER  
THE NOTICE WASN'T TIMELY  
FILED BY THE STATE, THAT WAS  
A DIRECT -- ADDRESSED AT  
HEARING NOTICE DID NOT  
SPECIFY THE REASON THE STATE  
BELIEVES IT WAS RELIABLE,  
THEY DIDN'T SUFFICIENTLY  
STATE WHAT STATEMENTS WITH  
PARTICULARITY WERE GOING TO  
COME IN AND THAT THE CHILD  
WAS 12 YEARS OLD, AT THE  
TIME THAT THE TRIAL WAS TO  
OCCUR --

>> OKAY, NOW, THEN THIS IS A  
WHOLE OTHER ISSUE YOU ARE  
SAYING IT WASN'T A  
RELIABILITY OBJECTION THAT  
WAS RAISED BY THE DEFENDANT.

>> NOT INITIALLY.

>> OKAY.

>> INITIALLY --

>> -- HEARING HE DOES SAY  
WHOLE POINT WOULD BE POINT  
REALLY AND THAT IS THAT THE  
DISCLOSURE WAS UNTIMELY.  
THAT HE DIDN'T -- AT  
FIRST --

>> THEN HE THEN COMES BACK  
THEN WHAT HAPPENS.

>> AT THAT POINT, THAT IS  
WHAT HE IS ARGUING, JUDGE,  
THIS IS NOT RELIABLE,  
BECAUSE OF THAT.

AND THAT IS ALL SAYS THE  
BECAUSE UNTIMELY.

>> BECAUSE UNTIMELY.

>> YOU ARE TALKING ABOUT THE  
SAID THAT BECAUSE THE CHILD  
DIDN'T REPORT IT.

>> RIGHT.

>> THAT IS WHAT SHE IS  
SAYING.

>> -- OH --

>> APOLOGIZE APOLOGIZE.

--

>> ALL RIGHT.

>> THE CHILD -- UNTIMELY --  
>> CHALLENGING THE LIABILITY  
OF THE CHILD'S STATEMENT  
BECAUSE HE DIDN'T REPORT IT  
HEIGHT AWAY INTO ON ONE  
FACTOR, CORRECT, NOW THERE  
ARE MULTIPLE FACTORS TO BE  
REVIEWED LOOKING AT  
RELIABILITY OF HEARSAY  
STATEMENT IN THIS CONTEXT  
ALL THE OTHER FINDINGS THAT  
WERE ABLE TO BE GLEANED FROM  
THIS, AND CLEARLY, THE  
TRIAL JUDGE OR EXCUSE ME --  
DID NOT MAKE THE REQUISITE  
FINDINGS ON RECORD AS  
REQUIRED WE ARE NOT ARGUING  
THAT THEY ARE THERE, BUT  
THEY DID GO THROUGH, AS THE  
TESTIMONY IS GOING THROUGH,  
ALL THEORY ISSUES WHERE WE  
CAN LOOK AT WHAT THE COURT  
HAS SAID ARE PARTICULAR  
FACTORS, AND I CAN ASK THESE  
ARE PRESENT AT TESTIMONY, HE  
DIDN'T ARTICULATE IT, ON THE  
RECORD HE DIDN'T WRITE IT  
DOWN, BUT --

>> MY PROBLEM IS THIS.  
I'M -- I'M CONFLICTED ABOUT IT  
IF IT GOES BACK THE JUDGE  
WILL MAKE FINDINGS SECOND  
DISTRICT WILL AFFIRM IT AND  
WE'LL HAVE A -- A YOU KNOW,  
JUDICIAL LABOR, THAT WILL BE  
-- THE OTHER HAND IT SEEMS  
THAT AS THAT THE JUDGE  
CHARGE KNOWING WHICH TIMES  
OTHER THE ESTIMATE -- HAS TO  
MAKE FINDINGS STATE  
CERTAINLY KNOWS IT, THAT  
THESE ARE YOU KNOW THESE ARE  
YOUR HIGH RISKY CASES,  
WHEN YOU ARE TRYING TO GET  
CHILD CARE WE HE HAVE A  
CRAWFORD QUESTION THAT COMES  
UP, SO I DON'T KNOW THAT --  
THAT IT IS A BAD THING THAT  
WHEN THE OBJECTION IS IF IT  
WAS A MAN PRESERVED PURSUANT  
TO HOPKINS, IF WE TAKE, THAT  
THAT THE APPROPRIATE REMEDY  
HERE IS JUST TO ALLOW THAT  
HEARING TO TAKE PLACE, THEN

IF THIS WAS COMING UP TO  
UPSET INITIALLY WE WOULD SAY  
LET'S RELINQUISH IT FOR A  
HEARING, AND THEN WE WILL  
LOOK, AND MAYBE -- THEY ARE  
NOT GOING TO EVEN RAISE IT  
AGAIN, BECAUSE -- THEY SAY  
WELL MADE THE FINDINGS, AND  
THERE IS NOTHING MORE WE CAN  
DO WITH IT BECAUSE -- WE  
THINK THOSE WILL BE UPHELD.  
AS A GENERAL RULE, FOR WHAT  
WE WANT TO ENCOURAGE JUDGES  
TO DO, WHICH IS THAT THEY  
KNOW THESE ARE SOMETHING  
THEY HAVE TO DO, JUST LIKE  
ANY DEATH SENTENCING, THINGS  
THAT THIS IS A HIGH-RISK  
SITUATION CHILD HEARSAY  
STATEMENT WE OUGHT TO BE  
ENCOURAGING JUDGES TO BE  
MAKING THESE FINDINGS NOT  
TRY TO FIGURE OUT A WAY TO  
-- YOU KNOW, AFFIRM EVEN IF  
THEY DON'T MAKE THEM, WHY  
ISN'T THAT A POLICY OF OF  
THIS COURT, THAT ARE ARE --  
IN THIS I WAS --

>> WELL, I THINK TO ANSWER  
THAT LOOK TO TOWNSEND  
TOWNSEND SAYS IT IS NOT A  
FUNDAMENTAL ERROR THIS  
PARTICULAR FAULT OF THE  
TRIAL JUDGE IN NOT FINDING  
THOSE PARTICULAR SETTING OUT  
THOSE PARTICULAR FACTORS HE  
RELIED UPON TO FIND  
RELIABILITY IS NOT  
FUNDAMENTAL, I THINK TO DO  
WHAT YOU MIGHT BE  
SUGGESTING, YOUR HONOR.

>> WHERE --

>> WE'VE GOT TO ASSUME, WHAT  
I SAID IS RELIABILITY WHEN  
HE HAS CHALLENGED IT, HE  
CHALLENGED THAT THIS CAN'T  
COME IN.

NOW, YOU ARE INVOKING THE  
STATUTE THAT ALLOWS TO COME IN  
IF SUFFICIENTLY PRESERVED.

>> CORRECT IF SUFFICIENTLY  
PRESERVED.

>> THEN YOU AGREE THEN IT  
HAS TO GO BACK FOR A

FINDING.

>> NO I DO NOT.

I BELIEVE THE RECORD IS SUFFICIENT FOR REVIEW, I DO NOT BELIEVE IT WOULD BE A JUDICIAL RESOURCE OR THAT IT WOULD -- WOULD BE ENHANCEMENT OF JUDICIAL RESOURCES TO HAVE THIS GO THROUGH WHOLE ANOTHER CYCLE TO GO DOWN WHAT IS GOING TO DO HAPPEN --

>> DOES WILLMOTT SAY DIFFERENTLY?

>> I HAVEN'T READ THAT CASE.  
>> AS I RECALL WAIT SAYINGS YOU CAN'T GO BEHIND JUDGE'S FINDINGS REASSERT FINDINGS TO -- PROP HIM UP, IN OTHER WORDS, IF HE DIDN'T MAKE SUFFICIENT FINDINGS ON THE RECORD THEY ARE CHALLENGING THE SUFFICIENCY OF HIS FINDINGS, YOU CAN'T GO BEHIND THAT JUDGE AND NOW FIND OKAY, HE MAY NOT HAVE SAID IT BUT IT IS HERE.

>> I'D LIKE TO ASK A QUESTION AT THIS POINT INTO CERTAINLY YOUR HONOR.

>> COMPLETE DIFFERENTLY TACT.

>> OKAY.

>> THE AND I LIKE I WANTED TO ASK PETITIONER THIS IS I DIDN'T GET A CHANCE, PETITIONER CLAIMS THAT HOPKINS APPLIES AND THIS CASE IS HERE ON EXPRESS DIRECT CONFLICT WITH A COUPLE OF OTHER CASES. I BELIEVE THAT HUGHES VERSUS STATE IS ONE OF THEM, HOPKINS WAS DECIDED I BELIEVE IN 1994.

TO THAT THAT'S CORRECT.

>> HUGHES VERSUS STATE AND THE OTHER CONFLICT CASE WERE DECIDED IN 1994, AND 1995.

>> CORRECT.

>> THE STATUTE -- 924.051 ENACTED IN 1996.

THIS CASE THE SECOND

DISTRICT RELIED ON IN PART  
ON THAT STATUTE IN DECIDING  
THAT THIS ISSUE HAD NOT BEE  
PRESERVED.

>> THAT IS CORRECT.

>> SO IS IT REALLY NECESASRY FOR  
US TO

RESOLVE THE APPARENT  
CONFLICT HERE WHEN IT SEEMS  
LIKE ONE INTERPRETATION HERE  
IS THAT REALLY THAT THE  
DIFFERENCE IN THE CASES IS  
THE SUBSEQUENT ENACTMENT OF  
THE STATUTE?

>> I THINK THAT IS CERTAINLY  
A POSSIBILITY, AND SHOULD BE  
REVIEWED BY THIS IS COURT, I  
DO BELIEVE THAT THERE THAT  
THAT IS A DISTINCTION.

AND THERE IS A CHANGE IN THE  
LEGAL LANDSCAPE FROM POINT  
IN TIME HOPKINS WAS DECIDED  
BY THIS IS COURT 94 WHERE WE  
STAND TODAY WITH DECISION OF  
THE SECOND DISTRICT COURT OF  
APPEAL IN -- I THINK THAT  
YOU ALSO HAVE TO LOOK AT THE  
SPECIFICITY OF HOPKINS, AND  
WHAT IT WAS DOING THAT IS A  
NARROW OPINION, WHEN YOU  
REALLY LOOK AT IT.

YOU HAVE TO INTERPRET IT IN  
LIGHT OF THE CONFRONTATION  
CLAUSE, THE COURT DOES THAT  
THE COURT PUTS IT TOGETHER,  
TO MAKE IT AN INTERTWINED  
DECISION

PROCESS EQUATES HAS TO BE  
CARRIED DOWN TO 90.03 THIS  
IS WHY HOPKINS DOESN'T WORK  
IT IS NEAT SAME, THIS CASE  
WE HAVE TWO LINES OF  
QUESTIONING, THAT SHOULD  
GONE.

>> THIS IS A HOPKINS COURT  
REALLY DISCUSSION TWO  
DIFFERENT THINGS, THERE IS  
THE CONFRONTATION ISSUE, AND  
THAT IS THE -- CLOSED  
CIRCUIT TV CORRECT?

BUT THEY GO ON AND TALK  
ABOUT ADMISSION OF THE OUT  
OF THE COURT STATEMENT SO --  
HOPKINS REALLY IS TALKING

ABOUT TWO DIFFERENT THINGS,  
ONE UNDER CHAPTER 94 THE  
OTHER UNDER 90.803.

>> I DON'T AGREE YOUR HONOR  
RESPECTFULLY I BELIEVE IF  
YOU LOOK AT IT CAREFULLY  
LOOK AT THE LANGUAGE OF  
HOPKINS, YOU WILL --

>> THEY SAY.

>> IN THE INSTANT CASE,  
NEITHER VICTIM'S TESTIMONY  
BY CLOSED CIRCUIT  
TELEVISION NOR ARE  
OUT STATEMENTS WERE NOR WERE  
OUT OF COURT STATEMENTS WERE  
PROPERLY ADMITTED DUE TO THE  
COURT'S FAILURE TO MAKE  
SPECIFIC FINDING REQUIRED BY  
SECTION 92.54, AND 90.8032.

>> CORRECT YOUR HONOR THEY  
DIDN'T GET TO LOOKING AT TH  
FINDINGS, IN OTHER WORDS,  
GERT TO GO THE ISSUE OF  
WHETHER THE TRIAL COURT  
MAKES SPECIFIC FINDINGS TO  
SUPPORT THEIR RULING, UNTIL  
THEY WERE FACED WITH THE  
CONFRONTATION CLAUSE THEY  
DIDN'T IN ALL IN NOT IN AND  
OF ITSELF ENOUGH, HAD IT ONLY  
BEEN 9803 THEY WERE LOOKING  
AT NO CONFRONTATION ISSUE,  
WHICH IS THE FACTS WE HAVE  
IN OUR CASE TODAY, THAT  
WOULD NOT HAVE BEEN THIS IS  
COURT'S FINDING.

BECAUSE I DON'T BELIEVE THAT  
THE --

>> THE COURT SEEMS TO ME TO  
HAVE SEPARATED THE TWO.  
THE COURT TO ME SEEMS IS TO  
HAVE SEPARATED THE TWO, AND  
DEALT WITH THE ONE UNDER 92  
AND THE ONE UNDER 90.  
AND EVEN MADE DIFFERENT  
DISPOSITIONS ABOUT THE  
VARIOUS COUNTS THAT WERE  
INVOLVED IN THE CASE.  
THEY BASED ON THAT.

>> I THINK THEY REVIEWED  
THEM SEPARATELY YOU HAVE TO  
AS TO WHAT IS REQUIRED UNDER  
EACH I THINK WHAT THE COURT  
DID THEY GOT THERE ONLY

BECAUSE THEY HAD TO TAKE THAT NEXT STEP AFTER DETERMINING THAT THE VIDEO USING THE VIDEO, WAS IN FACT THE CONFRONTATION TRIGGER, NOW, THEY WILL REQUIRE BECAUSE THEY HAVE THE IMPETUS TO LOOK BEHIND THOSE FINDINGS, BECAUSE NOW THOSE FINDINGS BECAME HEIGHTENED, NOW WE KNOW WE ARE FACING THE CONFRONTATION ISSUE, IF YOU LOOK CLOSELY AT THE LANGUAGE, OF HOPKINS, YOU WILL SEE WHEN THEY TALK ABOUT -- SAYING BOTH EVIDENCE RULINGS, AND GOING BACK TO THIS IS, AND WHAT THEY ARE GOING BACK TO IN THE CASE IS BACK TO THE DETERMINATION OF CONFRONTATION, I THINK IT IS INTERTWINED, YOUR HONOR I DON'T THINK YOU CAN SEPARATE THAT OUT FROM HOPKINS, HERE, WE ARE CLEARLY SEPARATE, WE HAVE NO CONFRONTATION ISSUE TRIGGERED HERE.

>> MR. CANTERO HAD ANOTHER QUESTION INTO YES, YOUR HONOR.

>> FOLLOW-UP.

>> I WAS GOING TO ASK IF THERE I ANY CASE EP AFTER THE STATUTE WAS ENACTED, FROM THIS IS COURT, THAT SAYS THAT REGARDLESS OF THE STATUTE YOUR PRESERVATION ON ISSUE ONE IS SUF TO PRESERVE ISSUE TWO.

>> I AM NOT AWARE OF ANY THAT SAY THAT THAT ACTUALLY SAY THAT THAT NOW THE SPECIFICITY IS NOT NEEDED EVEN STATUE SAYS IT IS I DO DO NOT KNOW THERE IS A CASE THAT A SAYS THAT OUT OF THIS IS COURT.

>> IT SEEMS TO ME THE STATUE IS RIGHT ON POINT.

IT SAYS THE LEGAL ARGUMENT OBJECTION TO EVIDENCE TO BE PRESERVED MEANS IT WAS SUFFICIENTLY PRECISE THAT IT

FAIRLY APPRISED THE TRIAL COURT OF THE RELEASE SOUGHT AND ON GROUNDS THEREFORE SO THAT AN OBJECTION ON RELIABILITY GROUNDS IS NOT THE SAME AS OBJECTION ON FAILURE TO MAKE THE REQUISITE FINDINGS.

>> I THINK THAT IS ABSOLUTELY CORRECT, AND I THINK THAT EVEN IF THE -- COUNCIL BELOW SAYS TO THE JUDGE I DON'T AGREE WITH YOUR FINDINGS, I DON'T AGREE WITH THE ULTIMATELY ADMISSION OF THIS EVIDENCE, I HE COUNTRY SAY I DISAGREE BECAUSE DOESN'T MAKE THE REQUISITES FINDINGS, WHICH HE DIDN'T SAY, BUT NEVER SAID.

UNTIL WE GOT ON APPEAL, HE WAS SAYING I DISAGREE WITH YOUR FINDINGS, AND IF YOU LOOK AT WHAT HE DID THE THE COURT IN THE TELL YOU TRIAL PROCEEDING WHEN THE GRANDFATHER GETS UP TO TESTIMONY HIS OBJECTION IS OBJECTION, HEARSAY, WHICH WOULD STILL SAY I DON'T AGREE WITH YOUR FINDING BUT I'M NOT CHALLENGING THE FACT THAT YOU DIDN'T MAKE THE STATUTORILY MANDATED FINDINGS NO NOTICE TO THAT TRIAL JUDGE IF AT THE TRIAL POINT IN TIME GRANDFATHER GETTING READY TO TESTIFY HE SAYS OBJECTION -- I DON'T BELIEVE THIS COURT HAS MADE SPECIFIC FINDINGS NECESSARY TO SHOW THAT THIS TESTIMONY IS RELIABLE, THE TRIAL JUDGE EVEN THEN COULD HAVE STOPPED, THE TRIAL PUT IN HIS WRITTEN FINDING, HE HAD ALREADY DONE EVIDENTIARY HEARING WE WOULD HAVE MOVED ON WE WOULDN'T BE HERE TODAY.  
SO IF SO IF -- IF WE DISAGREE AND BELIEVE UNDER

HOPKINS THIS WAS A SUFFICIENT OBJECTION WHAT IS THE REAL REMEDY HERE, IT SEEMS TO ME SENDING THIS IS BACK JUST FOR THE TRIAL JUDGE TO MAKE THESE FINDINGS DOES NO ONE ANY REAL SERVICE HERE.

>> AGREED.

>> THE TRIAL JUDGE WILL MAKE FINDINGS THEN WE WILL MOVE ON, WHAT IS -- THE REMEDY IF WE DECIDE THAT THIS WAS A SUFFICIENT WAS SUFFICIENTLY PRESERVED?

>> I THINK IF THE COURT WERE TO FIND IT WAS SUFFICIENTLY PRESERVED THEY WOULD HAVE THE RIGHT TO LOOK AT THE RECORD, THE RECORD HERE IS SUFFICIENT I THINK JUDGE FULLMER SAYS THAT IN CONCURRING OPINION --

>> SHE IS LOOKING AT THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT RELIABILITY, OR IS SHE TALKING ABOUT THE SUFFICIENCY OF THE EVIDENCE IF WE ELIMINATE THE GRANDFATHER'S TESTIMONY.

>> I THINK SHE WAS ACTUALLY LOOKING IF YOU ELIMINATE BECAUSE IN HER MIND, IN HER CONCURRENCE SHE SAYS I AGREE THEY PRESERVED.

SO I THINK WHAT SHE IS SAYING EVEN WITHOUT THE GRANDFATHER'S TESTIMONY, THAT THERE IS ENOUGH EVIDENCE ON THE RECORD TO SHOW THIS HAS NOT AFFECTED THE FINAL OUTCOME.

>> IS THERE A THE CORRECT HARMLESS ERROR IF THAT IS WHAT IT IS SAYING IS THAT WHAT THE JULIO OR -- REALLY SAYS, IS THAT THE DEFINITION OF HARMLESS ERROR.

>> WHETHER OR NOT IRRELEVANT HAS AFFECTS ON THE FINAL OUTCOME I BELIEVE IT IS YOUR HONOR.

>> NOT THE SAME AS SAYING THERE IS SUFFICIENT EVIDENCE

THAT IS DIFFERENT -- THE  
STANDARD IS THAT THAT  
IS A DIFFERENT STANDARD I SAY  
THE RECORD AMPLY SUFFICIENT  
FOR THIS IS COURT TO REVIEW  
THE FINDING OF THIS COURT IS  
GOING TO BE BASED  
WITHIN --

>> YOU DIDN'T RAISE THAT IN  
YOUR BRIEF YOU RAISE A  
TRADITIONAL HARMLESS ERROR.

>> I DID YOUR HONOR.  
YOU DIDN'T RAISE WHAT I  
THOUGHT JUDGE FULLMER MEANT,  
AND WHAT I WAS ASKING SO --  
DID YOU RAISE THAT ISSUE IN  
THE SECOND DISTRICT?  
THAT IS, NOT HARMLESS ERROR  
IN THE ADMISSION OF THE  
TESTIMONY BUT HARMLESS ERROR  
IN FAILING TO MAKE THE  
FINDINGS

>> ACTUALLY I AM UNSURE I  
APOLOGIZE, DID NOT.

>> YOU DIDN'T MAKE THAT  
ARGUMENT YOU HAVEN'T MADE  
THAT ARGUMENT IN THIS  
COURT.

>> I DID NOT RAISE THAT  
ARGUMENT SPECIFICALLY  
ALTHOUGH I DON'T THINK THAT  
CURTAILS THE COURT FROM  
REVIEWING IT.

I HOPE THAT THAT WOULD BE A  
DOOR THAT IS OPEN, WHAT I  
WILL LIKE -- I KNOW MY TIME  
IS RUNNING OUT I THINK THAT  
IS IMPORTANT HERE IS TO SHOW  
THAT IF YOU LOOK AT THE  
TESTIMONY OF THE CHILD, AND  
THE TESTIMONY OF THE  
GRANDFATHER ISSUE ABOUT  
ABOUT BOLSTERING, IS REALLY  
NOT THERE.

IF YOU LOOK THE ONLY  
STATEMENTS COMING TO  
GRANDFATHER ARE THOSE MADE  
BY THE CHILD, SO ANY  
CONFLICT IN THE CHILD'S  
TESTIMONY IS INHERENTLY A  
CONFLICT WITHIN  
GRANDFATHER'S TESTIMONY.

>> WHAT DO WE HAVE OTHER  
THAN THE CHILD'S TESTIMONY

THAT REALLY SUPPORTS THIS  
CONVICTION?

>> IT IS THE CHILD'S  
TESTIMONY, YOUR HONOR.  
THERE WAS NO ACTUAL SEXUAL  
MOLESTATION IN SENSE OF  
PHYSICAL EVIDENCE, THERE  
WERE NO WITNESSES, NO  
EYEWITNESSES OTHER THAN  
DEFENDANT HIMSELF AND CHILD  
VICTIM.

>> SO YOU DO NOT HAVE ANY  
OTHER EVIDENCE -- OTHER THAN  
WHAT THE CHILD HAS SAID.  
NOW TO SHOW IN CONTEXT OF  
THAT OCCURRENCE HE TELLS THE  
GRANDFATHER IN NORMAL COURSE  
OF EVENTS WHEN THE CHILD  
REFUSES NEXT MORNING TO GO  
FISHING WITH THIS  
DEFENDANT, BECAUSE HE IS  
AFRAID OF BEING ALONE WITH  
HIM, THAT HE SAYS  
GRANDFATHER I DON'T WANT TO  
GO FISHING.

>> WE ARE ASSUMING THAT IS  
WHY HE DIDN'T WANT TO GO.

>> HE TOLD THE GRANDFATHER  
THAT IS WHY HE DIDN'T  
WANT TO GO GRANDFATHER SAYS  
I DON'T GET IT WHY DON'T YOU  
WANT TO GO FISHING RESPONSE  
WAS, LET ME TELL WHAT  
HAPPENED YESTERDAY.

>> TO ME IT JUST BRINGS OUT  
THE REAL IMPORTANCE OF  
WHETHER OR NOT THIS  
GRANDFATHER'S TESTIMONY  
REALLY SHOULD HAVE BEEN  
ALLOWED INTO EVIDENCE  
WHETHER IT WAS IN FACT  
RELIABLE.

BECAUSE WE JUST HAVE THE  
CHILD'S TESTIMONY OTHER THAN  
THE GRANDFATHER'S REPEATING  
OF WHAT THE CHILD TOLD HIM.

>> I AGREE THAT EVERYTHING  
THAT CAME IN IS WHAT THE  
CHILD SAID AND I THINK THAT  
I THAT I THE ISSUE HERE IS  
WAS THAT DONE IN MANNER  
WHERE THE GRANDFATHER'S  
TESTIMONY WAS NOT IN  
ADDITION TO.

>> WELL THAT ISSUE IS AN  
ISSUE OF TRUSTWORTHINESS  
WAS NOT OBJECTED  
TO, THE ONLY, OBJECTS TO  
RELIABILITY NEVER OBJECTED  
TO TRUSTWORTHINESS OF THE  
GRANDFATHER.

>> CORRECT.

>> BOTH CONSIDERATION OF THE  
TRIAL COURT.

>> ABSOLUTELY I AGREE SO  
WOULD I VERY MUCH ENCOURAGE  
THE COURT TO AFFIRM SECOND  
DISTRICT COURT OF APPEAL'S  
OPINION, AND IT IS NECESSARY  
-- PERHAPS REVISIT HOPKINS  
REVIEW IN LIGHT OF THE  
CHANGED LANDSCAPE AND THE  
STATUTORY CHANGES THAT HAVE  
OCCURRED, AND HOPE THAT THIS  
COURT WOULD FIND IN FAVOR OF  
THE OPINION OF THE SECOND  
DISTRICT COURT OF APPEAL AND  
AFFIRM, THANK YOU.

>> LET ME GIVE YOU A MINUTE.

>> FOUR QUICK POINTS THE  
FIRST OF WHICH IS I THINK,  
THAT IS THE COURT IS  
CONCLUDED HOPKINS IS NOT  
PIGEONHOLED TO THE  
CONFRONTATION ISSUE, THE  
MUTUALLY SEPARATE AS WE HAVE  
DISCUSSED, THE SECOND ISSUE,  
JUSTICE CANTERO I RESPECTFULLY  
DISAGREE I DON'T THINK  
STATUTE OF SERVES TO TRUMP  
THE HOLDING THAT IS IN  
HOPKINS, IN THE SENSE THAT  
IT REQUIRES MORE SPECIFICITY  
AS IT RELATES TO THE  
OBJECTION.

>> REGARDLESS WHETHER IT  
TRUMPS HOPKINS OR NOT DO YOU  
AGREE THE STATUTE APPLIES  
HERE?

>> I AGREE THE  
STATUTE APPLIES IF WE  
APPLY THE STATUTE IT HAS IT  
HAS TO BE THE SPECIFIC  
OBJECTION YOU ARE APPEALING  
FROM.

>> I SAY -- TO LOOK AT THE  
RECORD, THEN IT WINDS UP  
IGNORING ALL THE FACTS THAT

ARE KAIND IN THE RECORD I  
THINK THAT IT IS A FACTUALLY  
DRIVEN A QUESTION COURT HAS  
TO ANALYZE IS THIS ISSUE  
HAS IT BEEN SPECIFICALLY  
PRESERVED ENOUGH, AND I  
THINK THAT THE FACTS IN THIS  
CASE DICTATE THAT THE  
ANSWER IS YES.

THE THIRD ISSUE, THAT I  
WANTED TO HIGHLIGHT IS THE  
QUESTION OF WHETHER IT IS A  
WASTE OF TIME.

JUDICIAL RESOURCES.

I DON'T THINK THAT IT IS.

IT GETS REMANDED TO TRIAL  
COURT MAKES THE APPROPRIATE  
FINDING, THE SECOND DISTRICT  
COURT OF APPEAL CAN REVIEW  
THE PROPRIETY OF THAT  
FINDING IF THEY DON'T FIND  
THAT THE JUDGE -- WOUND UP  
PICK THE APPROPRIATE  
DETERMINATION.

>> WHILE YOU ARE ON THAT,  
I'M A LITTLE SURPRISED THAT  
YOUR ASKING FOR THAT RELIEF AS  
OPPOSED TO A NEW TRIAL.

WHEN IN HOPKINS WHEN WE SAID  
THAT THE BOILERPLATE  
RECITATION OF FINDINGS WAS  
NOT SUFFICIENT AND AT LEAST  
ON THE ONE COUNT, REMANDED  
FOR A NEW TRIAL, THESE POST  
HOC REMANDS I KNOW DO  
SOMETHING LIKE THIS IS IT  
SEEMS LIKE THIS IS IT  
SEEMS THEY ARE INHERENTLY  
FLAWED IN TERMS OF MAKING AN  
AFTER THE FACT DECISION, AS  
TO WHETHER IT WOULD HAVE  
BEEN THE SAME THING THAT THE  
JUDGE DID IN TERMS OF THE  
FINDINGS, THE JUDGE WOULD  
HAVE MADE AT THE TIME OF THE  
HEARING BELOW.

NOW WE ARE TALKING ABOUT  
FINDINGS THAT A COURT MAKES  
SEVERAL YEARS LATER YOU KNOW  
IN SOMETHING LIKE THIS.

BUT IT -- YOU ARE NOT ASKING  
FOR A NEW TRIAL.

>> I'M CERTAIN THAT MR. ELWELL  
WOULD BE APPRECIATIVE IF THE

COURT WOULD GRANT IT BUT THE REASON I REQUESTED THE REMEDY AND THE RELIEF IS EXACTLY THE CONCERN OF JUSTICE QUINCE, THAT IT SEEMS TO ME THE MOST CORRECT AND APPROPRIATE REMEDY OF JUDICIAL RESOURCES.

THAT IS THE REASON THAT I REQUESTED THAT REMEDY.

>> YOU REALLY THAT I JUDGE CAN DO THAT?

>> I DO.

>> WITHOUT A FRESH HEARING?

>> THERE MAYBE THE ABILITY OF HAVING A FRESH HEARING THERE MAYBE THE ABILITY OF RELYING ON WHAT THE COURT'S CONCERN IS A COLD RECORD, I BELIEVE THAT THERE IS A SUFFICIENT RECORD TO BE ABLE TO MAKE OR DRAW THOSE CONCLUSIONS THAT THE STATUTE REQUIRES, AND IF THEY ARE NOT SUFFICIENT THEN THE SECOND DISTRICT COURT OF APPEAL COULD SAY SO.

AND THAT THE OPPORTUNITY WASN'T THERE.

>> WHAT WAS YOUR FOURTH YOU HAD.

>> FOURTH POINT, JUSTICES I DON'T WANT THE COURT TO STEP OUT ON LIMB ON HOPKINS I'M NOT ENCOURAING THE COURT TO MAKE ANALYSIS AS IT RELATES TO THE STATUTE.

THE ONLY THING I'M ASKING THE COURT TO DO IS TO INSTRUCT TRIAL COURT BELOW THAT THEY DIDN'T FOLLOW THE LAW, AND THAT THEY NEEDED TO.

AND BECAUSE OF THAT I'M GOING TO ASK THIS COURT TO REVERSE THE SECOND DISTRICT COURT OF APPEALS' DECISION AND REMAND IT FOR FURTHER PROCEEDINGS, THANK YOU.

>> THANK YOU, WE'LL TAKE THE CASE UNDER ADVISEMENT.