

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

Steven Douglas Hayward v. State of Florida

SC07-1234

>> THE NEXT CASE ON THE COURT'S AGENDA IS HEYWARD VERSUS STATE.

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

GARY CALDWELL ON BEHALF OF MR.^HAYWARD.

I WOULD LIKE TO ARGUE THE FIRST THREE ISSUES IN MY BRIEF THIS MORNING, SEQUENTIALLY.

THE FIRST ISSUE PERTAINS TO A STATEMENT BY THE VICTIM IN CASE, MR.^DESTEFANO, AND IN RESPONSE TO QUESTIONING BY A POLICE OFFICER SOMETIME AFTER THE TIME OF THE FATALLING.

>> LET ME ASK YOU THIS.

THE QUESTIONING POSED BY THE POLICE OFFICER, HOW DO YOU REGARD IT?

WHAT WAS THE OBJECTIVE OF THE OFFICER?

MY UNDERSTANDING IS THAT HE WAS ALREADY BEING TREATED BY PARAMEDICS.

HE WAS ALREADY PRACTICALLY BEING TAKEN AWAY AND OFFICER GRECCO ARRIVES AT THE SCENE AND THE QUESTION WAS, WHAT HAPPENED?

>> UH-HUH.

>> NOW, THAT CAN BE INTERPRETED TWO WAYS.

I'M NOT SURE WHETHER TO, IS THERE ANYTHING IN DIRECT OR THAT INDICATES THAT THE OFFICER KNEW WHETHER THIS WAS A SHOOTING, STABBING, GOT HIT BY A CAR OR WHETHER OFFICER WAS ASKING, HOW DID THIS HAPPEN? SO BECAUSE IN THE DIFFERENCE THAT I'M LOOKING AT IS, BECAUSE IF THE OFFICER IS TRYING TO FIND OUT SOMETHING FOR ASSISTANCE, THEN NOT REALLY TESTIMONIAL IN THE SENSE THAT

CRAWFORD REGARDS IT.

HOW DO YOU, WHAT IS THE OBJECTIVE OF THE OFFICER THAT YOU THINK?

>> WELL, CLEARLY THE OBJECTIVE OF THE OFFICER IS INVESTIGATIVE.

AS YOU SAID, THE PARAMEDICS ARE THERE TREATING HIM SO THE OFFICER ISN'T TRYING TO FIND OUT ANY SORT OF MEDICAL INFORMATION OR ANYTHING LIKE THAT.

HE IS TRYING TO FIND OUT HISTORICALLY WHAT HAS HAPPENED SO HE CAN INITIATE HIS INVESTIGATION.

APPARENTLY THE 911 CALL IN WAS THAT THE MAN HAD BEEN SHOT BECAUSE THE PERSON WHO MADE THE CALL WAS THIS FELLOW CALVIN WILLIAMS, AND, THE MR. DESTEFANO HAD TOLD HIM, I HAVE BEEN SHOT.

SO AT THAT POINT THE OFFICER IS INVESTIGATING A SHOOTING.

>> SO YOUR POSITION THEN IS THAT A STATEMENT IS TESTIMONY?

>> UH-HUH.

>> BECAUSE, IT WAS IN RESPONSE TO, TO A POLICE OFFICER'S QUESTION AS TO WHAT HAPPENED AT THE SCENE?

>> WELL, IN LARGE PART, YES. I MEAN, IT WHAT HAPPENS IS ALSO TESTIMONIAL BECAUSE IT IS HISTORICAL NARRATIVE OF WHAT HAPPENED AT SOME PREVIOUS TIME.

IN THAT SENSE IT IS LIKE THE STATEMENT I BELIEVE IN THE INDIANA CASE, HAMMOND VERSUS INDIANA, WHICH IS THE COMPANION, THAT WAS DECIDED WITH THE DAVE DAVIS VERSUS WASHINGTON CASE.

>> LET'S GO BACK TO THE ISSUE, WELL, FIRST OF ALL, AND I STILL HAVE A HARD TIME WITH THIS ISSUE BUT, YOU KNOW, IT APPEARS TO ME THAT, ALTHOUGH THE WHAT HAPPENS STARTS, COULD BE, STARTS TO BE CONSTRUED THE POLICE ASKING SOMETHING FOR INVESTIGATIVE PURPOSES, WHAT

FOLLOWS, IN ALL OF THE CIRCUMSTANCES, HE IS IN EXTREME DISTRESS, QUALIFIES AS EITHER AN EXCITED UTTERANCE OR A DYING DECLARATION.

JUST ACCEPT THAT THE JUDGE, AND THE JUDGE MADE THOSE FINDINGS, CORRECT?

>> THE JUDGE MADE THOSE FINDS THAT'S RIGHT.

>> AT LEAST AS TO THE EXCITED UTTERANCE MIGHT NOT PREVENT THE APPLICATION OF CRAWFORD ANALYSIS UNDER THE U.S. SUPREME COURT PRECEDENT, EVEN THOUGH IT WAS UNDER OHIO VERSUS ROBERTS IT WOULD HAVE ENDED THE INQUIRY BECAUSE IT HAS ALL THE INDICIA OF RELIABILITY.

BUT BACK TO THE QUESTION OF WHETHER IT'S TESTIMONIAL OR NOT, DAVIS VERSUS WASHINGTON APPEARS TO, MAKES THE DISTINCTION BETWEEN WHETHER THE INTERROGATION IS UNDER CIRCUMSTANCES WHICH OBJECTIVELY INDICATE WHAT THE PRIMARY PURPOSE OF THE INTERROGATION WAS.

SO, IF IT IS TO ESTABLISH OR PROVE PAST EVENTS, THEN IT WOULD BE TESTIMONIAL.

BUT IF IT IS TO AID IN A ONGOING EMERGENCY IT IS NON-TESTIMONIAL.

BACK TO WHAT JUSTICE LABARGA IS ASKING YOU, WHY ARE WE SO SURE IN THIS CIRCUMSTANCE, THE QUESTION OF, WHAT HAPPENED, WHICH IS A PRETTY OPEN-ENDED QUESTION, ISN'T, SAY MIXED TO, THAT BOTH ASSIST IN THE ONGOING EMERGENCY AND START TO INCLUDE HIS, START TO INCLUDE HIS INVESTIGATION?

I MEAN WHAT IS THE STANDARD BY WHICH WE LOOK AT THOSE OBJECTIVE CIRCUMSTANCES IS IT A MIXED QUESTION OF LAW OR FACT? DO WE DEFER TO THE TRIAL JUDGE? DID THE TRIAL JUDGE MAKE RULINGS?

GO BACK TO JUST BEFORE WE DECIDED IT IS TESTIMONIAL, WHAT

IS YOUR, WHAT'S YOUR RESPONSE
TO THAT?

>> RIGHT.

I BELIEVE THAT WHAT THE U.S.
SUPREME COURT WAS TALKING ABOUT
WHEN THEY TALKED ABOUT THE
PURPOSES OF THE QUESTIONING WAS
THEY MEANT OBJECTIVELY IS THIS
QUESTIONING AS
TO WHETHER YOU'RE TALKING ABOUT
SOMETHING THAT IS GOING ON AT
THIS TIME, SOMETHING THAT IS
HAPPENED IN THE PAST.

AND THAT WAS, THAT WAS THE
DISTINCTION THAT THEY DREW IN
THE DAVIS AND HAMMOND CASE --
I BELIEVE IT WAS THE DAVIS CASE.
MIGHT BE MIXING THEM UP IN MY
HEAD A LITTLE BIT.

THE DAVIS CASE WAS ONGOING.
THE DEFENDANT IS RIGHT THERE
BEATING ON HER.

>> WHAT HAPPENED IN DAVIS, SHE
WAS MAKING, DURING THE ATTACK
SHE WAS ABLE TO DIAL 911
TELLING THEM WHAT HAPPENED.

>> RIGHT.

>> THE SUPREME COURT SAID THAT
IS NOT TESTIMONIAL BECAUSE WE
HAVE AN ONGOING EMERGENCY.

>> EXACTLY.

>> WHAT HAPPENED IN THE HAMMOND
CASE WAS THAT THE VICTIM WAS
ESCORTED BY THE POLICE IN A
DIFFERENT ROOM, QUESTIONED
ABOUT WHAT HAPPENED.

NOW THAT BEGINS INVESTIGATORY.
SO THAT IS A MAJOR DIFFERENCE
BETWEEN THE TWO CASES.

WHAT JUSTICE PARIENTE AND I
ARE GETTING AT I THINK IS, IN
THIS CASE SEEMS TO FALL
SOMEWHERE IN THE MIDDLE.

THE COPS GET THERE.

EVERYTHING IS GOING FAST, HE IS
BEING TAKEN AWAY AND GRECCO GET
THERE IS IN A HURRY.

WHAT HAPPENED, WHAT HAPPENED
HERE?

AND THIS YOUNG MAN WAS ABLE TO
GET OUT, I WAS SHOT BY A GUY,
WHATEVER.

THAT'S WHAT I'M TROUBLED BY AS
ON THE ISSUE OF TESTIMONY.

I THINK SHE THIS ISSUE FALLS SOMEWHERE IN THE MIDDLE, RIGHT SMACK IN THE MIDDLE OF ONGOING EMERGENCY I THINK.

>> WELL, I DISAGRE, I'M AFRAID I HAVE TO DISAGREE WITH YOU, JUSTICE LABARGA, WHAT YOU SAID ABOUT THE ONGOING EMERGENCY.

THE ONGOING EMERGENCY THEY WERE TALKING ABOUT IN THE DAVIS AND HAMMOND CASES IS, WHAT'S HAPPENING RIGHT THEN, NOT WHAT HAPPENED IN THE PAST.

BECAUSE IN THE, DAVIS CASE, THE WOMAN IS DESCRIBING THE ATTACK AND THEN THE MAN, DAVIS, RUNS AWAY AND THE U.S. SUPREME COURT SAYS, THEY DIDN'T DECIDE THE SPECIFICALLY WHETHER THAT WAS TESTIMONIAL BUT THEY INDICATED THAT IT WAS LIKELY THAT THEY WOULD FIND THAT TESTIMONIAL. AND IN FACT IN THE HAMMOND CASE, IT WAS DESCRIBING HISTORICAL FACTS.

IN THIS COURT'S OPINION IN LOPEZ, IS VERY SIMILAR BECAUSE, IN LOPEZ, WHAT HAPPENS IS, THE POLICE OFFICER ARRIVES WITHIN A, I DON'T KNOW, MAYBE A MINUTE OF THE THING AND THE DEFENDANT LOPEZ IS RIGHT THERE. HE WAS JUST ATTACKED SOMEBODY IN HIS HOUSE.

SO THAT IS ALMOST AN ONGOING SITUATION.

>> I'M NOT SURE YOU ANSWERED THOUGH MY QUESTION AS TO WHAT OUR STANDARD REVIEW IS. THE JUDGE OVERRULED THE OBJECTION THAT IT WAS IN VIOLATION OF CRAWFORD.

WHAT DID, DID THEY ENGAGE IN A DISCUSSION WHETHER THE CIRCUMSTANCES WERE TESTIMONIAL OR NOT?

WAS THERE A FINDING?

>> THERE WAS A DISCUSSION OF THAT AND THE JUDGE, THE JUDGE, YOU KNOW, I CAN'T QUOTE EXACTLY WHAT THE JUDGE SAID ABOUT THAT BUT HE, HE FOUND THAT IT WAS TESTIMONIAL I BELIEVE.

>> HE FOUND IT WAS TESTIMONIAL?
HE OVERRULED THE OBJECTION.

>> RIGHT, RIGHT.

>> SO THE QUESTION THEN,
WHATEVER THE JUDGE DID, THE
JUDGE WAS RAISED, IT WAS RULED
ON, IS IT A MIXED QUESTION OF
LAW AND FACT?

ARE THERE, EVEN THOUGH THE
SUPREME COURT TALKS ABOUT
OBJECTIVE CIRCUMSTANCES, EACH
CASE IS JUDGED ON ITS OWN
MERITS.

>> SURE.

>> WHY ISN'T THIS ONE WHERE
THERE IS AT LEAST, IN TERMS OF
SOME OF THE FINDINGS OF WHAT
THIS IS, DEFERENCE TO THE TRIAL
JUDGE MAKING THAT,
DETERMINATION?

>> RIGHT. JUSTICE PARIENTE
THIS IS MIXED QUESTION OF LAW AND FACT.
THIS IS NOT A SITUATION
SOMEWHERE YOU HAVE TWO VERSIONS
OF THE FACTS FROM DIFFERENT
WITNESSES WHICH OBVIOUSLY WHERE
THE JUDGE HAS THE GREATEST
DISCRETION.

THIS IS SITUATION WHERE THE
STATE, SHOWED THAT THIS WAS A,
WAS AN EXCEPTION TO THE HEARSAY
RULE. WHETHER THE STATE PUT FORWARD
SUFFICIENT EVIDENCE TO
ESTABLISH THAT AND TO ESTABLISH
THAT THIS WAS, NOT TESTIMONIAL
SO THAT IT HAD NOT FIT UNDER
THE CONFRONTATION CLAUSE.

THE QUESTION IS, DID THE STATE
SHOW THAT, AND I AM SUBMITTING
TO YOU, THAT IT DID NOT BECAUSE
THE, AS SOON AS THE OFFICER IS
ARRIVING TO A REPORT OF A
GUNSHOT, SOMEBODY HAS BEEN
SHOT, IS ASKING THE PERSON WHAT
HAPPENED IN THE PAST, IS
GETTING A NARRATIVE OF WHAT
HAPPENED IN THE PAST AND THAT
IS, THE SORT OF SITUATION WHICH
THE SUPREME COURT --

>> HE OWNS UP -- WHAT'S THE
STATEMENT WE'RE TALKING ABOUT?
HE SAYS, HE HAD BEEN SHOT BY A
BLACK MALE WITH A STOCKING CAP
OVER HIS FACE?

>> YES. BLACK STOCKING CAP OVER HIS FACE.

>> I'M JUST GOING TO ASK AN OBVIOUS QUESTION WHICH I'M SURE THE STATE WILL BRING UP. I DON'T WANT TO EVER OVERUSE HARMLESS ERROR BEYOND A REASONABLE BUT UNDER THE CIRCUMSTANCE OF THIS CASE WE KNOW HE HAS BEEN SHOT SO THERE IS NOTHING ABOUT THAT.

>> RIGHT.

>> THERE IS AN EYEWITNESS THAT ACTUALLY WATCHES THE SHOOTING THAT VERIFIES THIS PERSON, HE IS NOT ABLE TO IDENTIFY THE DEFENDANT BECAUSE SAYS HE HAS BEEN SHOT BY A BLACK MALE WITH A STOCKING CAP.

WHAT, IN THE SCHEME OF ALL THE OTHER TESTIMONY, ESPECIALLY GIVEN WHAT THE DEFENDANT HIMSELF SAYS ABOUT THAT HE WAS THERE AND SO FORTH AND SO ON, HOW IS THAT EVEN REALLY INCULPATORY OF THE DEFENDANT AND THE, WHAT WOULD BE YOUR RESPONSE TO THE HARMLESS ERROR QUESTION?

>> THE STATE HAD OVERWHELMING EVIDENCE THAT THE DEFENDANT WAS AT THE SCENE AT THE TIME OF THE ROBBERY AND THE MURDER. OVERWHELMING EVIDENCE OF THAT, AND IN SOME WAY THAT THE DEFENDANT WAS SHOT DURING THIS INCIDENT, WHETHER AS HE SAID WHEN HE PICKED UP A GUN THAT HE WAS STEALING OR WHETHER AS THE STATE CONTENDS, THE VICTIM SHOT HIM.

HOWEVER THE JURY HEARING THAT STILL HAS THE PROBLEM OF OKAY, STATE, WHAT IS YOUR EVIDENCE THAT THIS WAS THE MAN WHO ACTUALLY SHOT THE VICTIM, COMMITTED THE ROBBERY?

>> HOW ABOUT THE BLOOD ON THE, THE BLOOD ON THE BACK POCKETS RIFLING THROUGH THE VICTIM'S POCKETS?

>> WELL THERE WAS EVIDENCE THAT THE PANTS COULD HAVE BEEN TAMPERED WITH.

ALSO THERE WAS EVIDENCE THAT THE DEFENDANT WAS BLEEDING PROFUSELY AS HE IS WALKING AROUND THE SCENE.

JUSTICE --

>> BUT THESE WERE THE CONTACT TRANSFERS AS I UNDERSTOOD IT, NOT SPLATTERS OR ANYTHING OF THAT NATURE.

>> THE VICTIM COULD HAVE FALLEN BACK DOWN AT SOME POINT AFTER GETTING UP.

JUSTICE PAPIRIENTE SAID THERE WAS AN EYEWITNESS.

HE WASN'T AN EYEWITNESS TO THE SHOOTING.

HE DOESN'T KNOW WHAT HAPPENED DURING THIS PERIOD BEFORE HE LOOKED OUT.

THE VICTIM COULD HAVE STARTED TO GET UP, GOTTEN BACK DOWN. THERE WAS BLOOD ALL OVER THE PLACE.

>> HOW ABOUT THE BLOOD AND THE, AND THE MURDER WEAPON?

>> DEFENDANT SAID HE PICKED IT UP AND THAT WAS HOW THE BLOOD GOT ON IT.

SO THE POINT I'M TRYING MAKE IS, THE STATE HAD TO PROVE THIS IS THE MAN WHO SHOT THE GUN, NOT JUST THE MAN WHO CARRIED THE GUN AWAY.

NOT JUST THE MAN WHO WAS BLEEDING ALL OVER THE SCENE. HE HAD TO SHOW THAT HE WAS, HE WAS THE SHOOTER.

AND THE BEST EVIDENCE THAT THEY HAD OF THAT WAS THE STATEMENT OF THE VICTIM THAT THE MAN HAD THIS BLACK, BLACK WATCH, BLACK STOCKING CAP OVER HIS FACE.

>> McDOWELL SAID THAT TOO, DIDN'T HE?

>> EXCUSE ME.

>> THE, MR. ^McDOWELL?

>> NO. McDOWELL SAID HE DIDN'T SEE THE MAN'S FACE BUT HE DIDN'T SAY HE HAD ANYTHING COVERING HIS FACE. HE SAID HE WAS WEARING A HAT.

>> WAS THIS MAN WEARING SOME KIND OF A STOCKING OR SOMETHING?

>> NO, HE SAID HE DID NOT SEE A STOCKING CAP. HE SAW A HAT. HE WAS ABLE TO SEE THE MAN'S HAIR WHICH IS INCONSISTENT OBVIOUSLY WITH A HOOD OVER THE BECAUSE HE WAS ABLE TO DESCRIBE THE MAN'S HAIR VERY WELL. SO, THE ISSUE WAS, THE STATE HAD TO PROVE THIS WAS THE SHOOTER, AND THEIR BEST EVIDENCE TO THAT WAS, THAT THE SHOOTER WAS THE PERSON, NOT WITH THE HAT SEEN BY MR. ^McDOWELL, BUT BY THE, SOMEBODY WEARING THIS BLACK STOCKING THING OVER THE FACE, AND THE STATE'S CONTENTION WAS, THAT THIS WAS THE HOODIE THAT WAS WORN BY THE DEFENDANT. AND THAT WAS THE SPECIFIC ARGUMENT THAT THE STATE MADE TO THE JURY WAS THAT THERE WAS BLOOD ON THIS DRAWSTRING OF THE HOODIE, SIGNIFICANT QUANTITIES OF BLOOD ON THE TOP OF THE HAT OR, CAP OR THE HOOD. IF THAT HOOD IS OVER YOUR HEAD, PULLED TIGHTLY WOULD OBSTRUCT AND CONCEAL YOUR FACE TO A LARGE EXTENT, IF HE SUFFERED AN INJURY ON HIS HAND IT WOULD BE COMPLETELY CONSISTENT WITH REACHING UP TO HIS HEAD AT SOME POINT IN TIME AND PULLING THAT HOOD BACK. SO THE STATE IS SAYING THIS IS WHAT THE THING IS, THAT THE VICTIM SAW THAT WAS COVERING HIS FACE. AND THAT'S THEIR BEST EVIDENCE THAT THEY HAVE THIS IS THE SHOOTER. I AGREE THEY HAD THE DEFENDANT'S BLOOD ON THE MAN'S PANTS, AND THERE WAS EVIDENCE THAT SOME OFFICER, FOR WHATEVER REASON, MUCH TO THE DISGUST OF THE CRIME SCENE OFFICER, BROUGHT THE VICTIM'S PANTS BACK. WE DON'T KNOW WHAT THAT OFFICER DID WITH THOSE PANTS BEFORE THE CRIME SCENE OFFICER GOT THEM

FROM HIM.

HE ADMITTED HE DIDN'T SEE WHAT THE MAN, DID WITH THE PANTS, THAT WERE AT THE SCENE.

AND THIS MR. McDOWELL WHO LOOKS OUT AND SEES THESE PEOPLE, OBVIOUSLY DOESN'T KNOW IF THE VICTIM MIGHT HAVE FALLEN DOWN AND ONE -- THERE ARE JUST POOLS OF BLOOD ALL OVER THE PLACE APPARENTLY.

>> LET ME GET BACK TO THE STATEMENT FOR A SECOND.

>> SURE.

>> LET'S GET OVER THE, THE CRAWFORD HURDLE FOR A SECOND.

LET'S ASSUME THAT IT COMES IN. HOW IS IT NOT A DYING DECLARATION?

THE MEDICAL EXAMINER SAYS THAT THIS YOUNG MAN WAS SHOT ONCE IN THE LEG, AND HE WAS SHOT AGAIN IN THE CHEST AREA AND IT WAS A SMALL .22 CALIBER WHICH PRETTY MUCH RICOCHETED ALL OVER INSIDE HIS BODY AND HE WAS ABLE TO STRUGGLE AND WALK ABOUT 100 YARDS,

HE HAD TO HAVE BEEN IN PAIN. OFFICER GRECCO SAID HE WAS SCARED AT THE TIME OF THE STATEMENT.

IT WOULD SEEM TO ME THIS YOUNG MAN KNEW HE WAS DYING.

IS THIS NOT A DYING DECLARATION?

AND IF SO, AREN'T DYING DECLARATIONS REALLY NOT COVERED BY CRAWFORD?

>> OKAY.

OBVIOUSLY --

>> PLEASE.

>> TWO ISSUES HERE.

THE ESSENCE OF THE DYING DECLARATION THIS COURT HAS HELD FOR OVER 100 YEARS, THERE HAS TO BE STRICT PROOF THAT THE DECLARANT WAS AWARE THAT DEATH WAS IMMINENT AND INEVITABLE AND HAD NO HOPE OF RECOVERY.

GO BACK IN THE CASES YOU WILL SEE, HAD LOST ALL HOPE FOR THIS WORLD.

DIFFERENT FORMULATIONS ALONG
THOSE LINES.
FULLY IMPRESSED WITH THE BELIEF
HIS DEATH WAS IMMINENT.
THERE IS A CASE DISCUSSED IN
THE BRIEFS CALLED GARDNER,
WHERE THE MAN HAS BEEN SHOT IN
THE STOMACH AT A TIME WHEN THAT
WAS PRETTY MUCH AUTOMATICALLY A
FATAL WOUND.
HE IS SAYING I CAN'T LIVE.
HE SAYING ALL SORTS OF THINGS
LIKE THAT.
AND THE COURT INDICATED THAT
THAT WAS AN INSUFFICIENT
PREDICATE.
>> ALSO INDICATED THERE ARE NO
MAGIC WORDS THAT A PERSON HAS
TO SAY.
>> CERTAINLY.
>> SO HOW DO WE KNOW -- CLEARLY
WE HAVE TO RELY ON THE EVIDENCE
BEFORE NEWS RIGHT.
THE EVIDENCE DOES NOT, --
EVIDENCE BEFORE US.
THE ASKED THE MEDICAL EXAMINER
DID KNOW THAT DEATH WAS PENDING
NOT IMPLEMENT.
THE MEDICAL EXAMINER SAID YES
BECAUSE HE WOULD KNOW SOMETHING
WAS SERIOUSLY WRONG BECAUSE HE
WOULD BE HAVING TROUBLE
BREATHING.
THE STATE DID NOT GO BEYOND
THAT DID NOT ESTABLISH THIS
VERY HIGH, VERY STRICT
PREDICATE INVOLVING FAIRLY
FORMAL CIRCUMSTANCES.
IF WE'RE GOING BACK TO THIS
COMMON LAW ERA, TALKING ABOUT
VERY FORMAL STANDARDS OF PROOF
FOR THIS, SOLEMN OCCASION, THAT
SORT OF THING.
AND I SUBMIT TO YOU THAT, THE
FACT THAT SOMEONE HAS BEEN SHOT
AND HAS NOT BEEN BLEEDING
PROFUSELY, IS BLEEDING, CAN'T
PRONOUNCE, IS NOT BLEEDING
PROFUSELY, AND IS, SUFFERING,
SOME DELIRIUM, BECAUSE OF
LACK OF OXYGEN YOU CAN NOT
EQUATE THAT WITH SUBTLE BELIEF
THAT THERE IS NO HOPE IN THIS
WORLD AND THAT THE PERSON IS

DYING.
THAT IS THE TRICT
LEVEL OF PROOF THAT IS
REQUIRED.

--

>> SO
WHEN DID THE INVOLUNTARINESS
START?

>> I THOUGHT IT STARTED WHEN HE
WALKED OUT OF THE BATHROOM.
HE WALKED OUT OF THE BATHROOM
AND, OF COURSE, THIS HAS TO BE
DETERMINED FROM THE VIEWPOINT OF
THE DEFENDANT, AND -- AS SOON
AS HE WALKED OUT OF THE
BATHROOM AND IN -- HALLWAY
WITH THE SEVERAL POLICE
OFFICERS, ONE OF WHOM HAS A
GUN, DISPUTED WHETHER IT WAS A
SHOTGUN.

IN ANY EVENT, AN OFFICER HAS A
GUN.

>> WAS THE GUN DRAWN POINTING
AT THE DEFENDANT?

>> NOT POINTING AT HIM, NO
EVIDENCE OF THAT.

THE EVIDENCE --

>> WAS IT IN -- NO EVIDENCE IT
WAS EVEN DRAWN?

>> WELL ,IT WAS --

>> AGAIN, ALL THE DETECTIVE
SAID MY GUN WASN'T DRAWN, AND
THE QUESTION WAS THE SHOTGUN.
OBVIOUSLY, CAN'T -- WHO WILL
STARE AT A SHOTGUN -- LIKE -- THE
TESTIMONY.

>> YOU CAN'T HOLSTER IT, BUT YOU CAN
POINT IT AT SOMEONE OR YOU CAN
HAVE IT SORT OF DOWN, POINTING
DOWN TO THE GROUND, THAT KIND
OF THING.

SO I'M JUST -- THEY
ASKED HIM, THEY SEE THAT HE HAS
SOME KIND OF WOUND ON HIS HAND.

>> BANDAGE.

>> DID WE LOOK AT
THAT?

>> SO IF YOU'RE WOUNDED -- WHAT
HAPPENED?

>> OKAY.

THEY SEE HE HAS
A BANDAGE.

THEY ASK WHAT HAPPENED TO HIS
HAND, HE SAID HE WAS STABBED
BY HIS GIRLFRIEND.

THEY ASK TO SEE THE
HAND, THEY SEE IT PICTURES --

>> THAT IS WHAT YOU'RE
MAINTAINING.

NOW WAS IT IMPROPER, ASKING TO SEE THE
HAND?

>> UNDER THESE CIRCUMSTANCES,
IT IS A DETENTION BECAUSE YOU
HAVE SEVERAL POLICE OFFICERS
CONFRONTING THE DEFENDANT IN A
SMALL AREA, THEY HAVE A GUN,
AND VERY HARD FOR HIM TO --

>> AGAIN, I JUST WANT TO MAKE
SURE I -- THE QUESTION IS THEY
SAID CAN WE SEE THE
WOUND, AND HE SHOWS
THEM THE WOUND.

>> UM-HMM.

>> IS THAT THE -- THAT IS
GOING -- THEY ARE GOING TO --
ABLE TO SEE THE WOUND
EVENTUALLY.

WHAT IS THE
INCRIMINATING PART AT THAT
PARTICULAR TIME, WHAT HE SAID
YOU ARE CONTENDING SHOULD HAVE
BEEN SUPPRESSED?

>> I'M SAYING THAT HIS
STATEMENT THAT HE WAS STABBED,
HIS STATEMENT THAT LATER ON
THAT HE WAS ROBBED AND SHOT BY
THE ROBBER, HIS LATER STATEMENT
TO THE POLICE STATION ARE ALL

--

>> WHEN DOES HE GET THE MIRANDA
WARNING?

>> STATION.

>> HE MADE PLENTY OF
INCULPATORY COMMENTS AFTER HE WAS
ADMINISTERED THE MIRANDA
WARNING.

IN OTHER WORDS,
WHAT IS IT THAT HAPPENED?

I KIND OF THINK WHAT HE SAID IN
THE -- IF HE IS HANDCUFFED IN THE
POLICE CAR, IT SEEMS TO ME HE
IS PRETTY NOT FREE TO GO, BUT
I'M JUST NOT SEEING THAT HE
SAID A WHOLE LOT UNTIL AFTER
THE MIRANDA WARNING, THEN KEPT
ON INCRIMINATING HIMSELF OVER

AND OVER.

>> MIRANDA WARNINGS ARE NOT VALID TO BREAK THE CHAIN OF THE ILLEGAL DETENTION. THAT IS WHAT WE HAVE TO START WITH, IS --

>> SO YOUR ARGUMENT REALLY IS THAT HE WAS DETAINED FROM THE MOMENT HE CAME OUT OF THE BATHROOM.

>> YES, MA'AM.

>> THAT THERE WAS NO PROBABLE CAUSE FOR THAT DETENTION.

>> YES, MA'AM, THAT THE JUDGE FOUND -- I'M SORRY.

>> GO ON.

>> AS TO PROBABLE CAUSE, THE -- WHAT THE STATE HAD WAS THEY HAD A ROBBERY-MURDER, OBVIOUSLY.

THEY HAD A -- A STATEMENT THAT A PERSON, BLACK MAN AT THE SCENE, WAS BLEEDING PROFUSELY FROM THE LEFT HAND.

>> TRYING TO GET -- THEY HAD A STATEMENT FROM SOMEONE THAT THERE WAS THIS MAN WITH A GUNSHOT WOUND, TRYING TO GET SOMEONE TO SEW IT UP, THAT IS WHY THEY CAME TO THIS PARTICULAR PLACE.

>> NO, NO -- THE TESTIMONY WAS, AND THIS IS PAGE 23, WAS THAT AN INFORMANT CALLED UP, SAID THERE WAS SOMEONE WITH A POSSIBLE GUNSHOT WOUND.

>> OKAY, POSSIBLE GUNSHOT WOUND.

>> THAT'S A LOT DIFFERENT.

>> TRYING TO GET SOMEONE TO SEW IT UP.

>> I DON'T BELIEVE SO.

>> LOOK AT THE BIG PICTURE.

I THINK WE ARE TRYING TO MICROMANAGE THIS, IF YOU -- YOUR MAN GETS SHOT, THERE IS EVIDENCE THAT WHOEVER SHOT HIM ALSO WAS -- BLOOD ALL OVER THE PLACE, THEY GET A CALL FROM SOMEONE THAT SAYS "I LIVE IN A ROOMING HOUSE WITHIN A BLOCK," A COUPLE BLOCKS, WHATEVER HE SAYS -- THIS GUY LIVES HERE, CAME OVER, AND HE HAS A BULLET

WOUND, GUNSHOT WOUND IN HIS HAND.
HE IS TRYING TO GET PEOPLE TO
SEW IT UP FOR HIM.

>> LOOKING AT THIS TOTALITY OF
CIRCUMSTANCES, TOTALITY OF
CIRCUMSTANCES, WHICH IS WHAT WE
HAVE TO LOOK AT, HOW IS THAT
NOT -- THAT -- WHAT HAPPENS TO
YOUR HAND?

>> I APOLOGIZE IF I'M
MICROMANAGING.

I HAVE TO GO
BACK TO --

>> YOU ARE CORRECT.

>> WE HAVE TO LOOK AT THE TOTALITY OF
THE CIRCUMSTANCES.

>> AS I SAID, BLEEDING FROM HIS
HAND.

TWO DAYS LATER THEY GET A
PHONE CALL THAT THERE IS
SOMEONE AT THIS ROOMING HOUSE,
POSSIBLE GUNSHOT WOUND --

MADISON -- MAN SEEN WALKING
WEST, COULD HAVE BEEN --

>> GOT IN A CAR, STREET --

>> COULD HAVE BEEN GOING
ANYWHERE.

SO FIVE BLOCKS TO THE
NORTHWEST, THE PHONE MESSAGE,
ACCORDING TO THE TESTIMONY AT
PAGE 23, HAS A POSSIBLE GUNSHOT
WOUND, DOESN'T SAY -- POSSIBLE
GUNSHOT WOUND TO THE HAND,
DOESN'T SAY HOW RECENTLY THE
GUNSHOT WOUND WAS SUPPOSED TO
BE.

ALL IT IS, POSSIBLE GUNSHOT
WOUND TO THE HAND.

OKAY.

SO PAGE 1818 -- INTERROGATION
DETECTIVES CLEARLY SAYS TO THE
DEFENDANT THIS IS WHAT
HAPPENED.

20 POLICE OFFICER
CARS CONVERGED ON THIS PLACE,
SO -- SIGNIFICANT POLICE
PRESENCE ARRIVING.

>> DID YOU SAY "20"?

>> "20."

THAT WAS PAGE 1818, THE
DEFENDANT AND DETECTIVE --

>> WHAT DOES THAT HAVE TO DO
WITH ANYTHING?

HE DIDN'T SEE

THOSE CARS.

>> CERTAINLY WHEN
HE WENT OUTSIDE HE --

>> BUT HE IS INSIDE WHEN THIS
ENCOUNTER STARTS, HE AGREES TO
GO, HE HAS NOT SEEN 20 CARS.
THE ANALYSIS HAS TO BE VIEWED
FROM THE DEFENDANT'S
PERSPECTIVE RATHER THAN AN
OBJECTIVE PERSON, REASONABLE
OBJECTIVE PERSON.

>> YES, JUSTICE, I AGREE WITH
THAT.

IT WAS -- THE 20 POLICE
OFFICERS, IS THREE OF THEM THAT
GO TO HIS ROOM, HE COMES OUT,
THERE'S ALSO SOME OFFICERS
WHO HAVE STAYED BEHIND, BACK
IN THIS LOBBY AREA WHICH IS
APPARENTLY RIGHT DOWN THE HALL
PRESUMABLY HE WOULD HAVE BEEN
ABLE TO SEE THEM, THERE WAS NO
TESTIMONY WHAT HE WAS ABLE TO
SEE OUT THE BACK BECAUSE THERE
WERE OTHER OFFICERS OUT IN THE
BACK, WHETHER -- THERE WAS --
THAT IS JUST NOT CLEAR.

I THINK I LOST MY TRAIN OF
THOUGHT.

OKAY.

SO THE OFFICERS ARRIVED, THEY TALKED
TO THESE PEOPLE IN THE LOBBY,
AND THEY ASKED THEM IF THERE
IS SOMEONE HERE WITH A GUNSHOT
WOUND, OR SOMETHING LIKE THAT.
SO WHAT THEY HAVE IS A WOUND
TO THE HAND.

OR SOMETHING LIKE THAT.

THAT IS HOW THEY GET IN, THAT
IS HOW THEIR INFORMATION IS
WHEN THEY ENCOUNTER THE
DEFENDANT.

>> DOESN'T THAT ARGUE IT
WAS A CONSENSUAL ENCOUNTER,
THEY ARE COMING
IN TO ARREST HIM OR COMING IN
TO FIND OUT WHAT IS GOING ON
WITH SOMEBODY THAT HAS A WOUND
TO HIS HAND?

AND SO THAT IS WHY -- AGAIN, I
DON'T -- I'M NOT PARTICULARLY
IMPRESSED WITH YOUR ARGUMENT
THAT HE -- THE INITIAL
ENCOUNTER WAS AN ENCOUNTER

THAT WOULD HAVE REQUIRED THEM TO HAVE -- I ASSUME YOU WOULD ARGUE AT THAT POINT PUT HIM UNDER ARREST BEFORE THEY SAY WORD ONE, ADMINISTERED HIS MIRANDA WARNING.

IS THAT YOUR ARGUMENT? MAYBE YOU -- WHAT IS THE ARGUMENT?

>> WELL, MY ARGUMENT IS JUST AS I SAID, THE ISSUE OF WHETHER IT WAS A CONSENSUAL ENCOUNTER OR DETENTION.

>> YOU ARE SAYING IN THE FIRST PART IT WAS AN -- IT WAS NOT CONSENSUAL FROM THE GET-GO.

>> RIGHT.

IF IT WAS CONSENSEYAL AT THE GET-GO, I GUESS WHAT I'M TRYING TO UNDERSTAND, SAY HE GETS IN THE CAR, POLICE CAR, THEY HAVE DETAINED HIM, YOU SAID SOMETHING EARLIER, THAT IS WHETHER THEY BRING HIM TO THE STATION AND THEY ARREST HIM AND ADMINISTER MIRANDA, THAT THOSE COMMENTS, AFTER THEY ADMINISTER MIRANDA, COULD NOT COME INTO EVIDENCE?

>> NO.

THE MIRANDA IS NOT SUFFICIENT TO BREAK THE CHAIN OF THE ORIGINAL --

>> BUT THEY DIDN'T -- OKAY, YOU ARE IN REBUTTAL SO I BETTER NOT --

>> WELL, I WANT TO TALK ABOUT POINT THREE BUT -- OUT OF TIME.

>> YOU HAVE VERY LITTLE TIME OF REBUTTAL LEFT, IF YOU WANT REBUTTAL.

>> THANK YOU.

>> MAY IT PLEASE THE COURT. GOOD MORNING.

LESLIE CAMPBELL WITH ATTORNEY GENERAL'S OFFICE ON BEHALF OF THE STATE.

LET ME JUST MAKE TWO QUICK CORRECTIONS ON THE FACTS.

WITH REGARD TO THE FIRST POINT WERE, THERE ARE -- TWO THINGS THAT NEED TO BE CORRECTED, AND I BELIEVE YOU

CAN FIND THOSE LINE 24, AND
FIRST ONE IS PAGE 1487.
THAT IS WITH REGARD TO
WHEN THE AMBULANCE ARRIVES, I
BELIEVE OFFER GRECO, THE FIRST FEW
MINUTES LATER, TWO, THREE,
FOUR MINUTES LATER THE
AMBULANCE ARRIVED.

>> BUT IT IS TRUE, HOWEVER,
THAT THE -- AMBULANCE PEOPLE
STABILIZED OR DID WHAT
THEY COULD FOR HIM, PRIOR TO
OFFICER GRECO ASKING WHAT
HAPPENED.

>> THAT IS NOT MY
UNDERSTANDING OF THE RECORD,
YOUR HONOR.

THERE WAS CONVERSATION WAS HE WAS
LOSING CONSCIOUSNESS AS HE IS
TALKING TO THE OFFICER, AND
THEN WHISKED AWAY, BY THE TIME THE
AMBULANCE LEAVES THE
SCENE, THEN -- HE IS --

>> AMBULANCE PEOPLE HAD NOT
DONE ANYTHING TO HIM PRIOR TO
OFFICER GRECO SAYING WHAT
HAPPENED.

>> THAT IS MY UNDERSTANDING.

>> WERE THEY PRESENT WHEN --

>> -- GRECO ASKED --

>> I'M SURE THEY WERE PRESENT
AT SOME POINT, BUT OFFICER
GRECO GOT THERE FIRST.

>> IF I'M PICTURING THIS
CORRECTLY, GRECO GETS THERE,
AND THE YOUNG MAN I GUESS IS ON
THE GROUND,
BLEEDING, WHATEVER -- BUT I
TAKE IT THAT --

>> MCDOWELL IS AN EYEWITNESS.

>> CALLED 911.

>> NO.

MR. WILLIAMS

CALLED 911.

THE PERSON DRIVING THE
VEHICLE MET HIM, MET THE DEFENDANT
AND THE VICTIM IN THE MIDDLE OF THE ROAD.

>> I GUESS HE WAS PRESENT --

>> HE WAS PRESENT,

MR. WILLIAMS TOLD THE VICTIM HE HAS
BEEN SHOT, AND MR. WILLIAMS
CALLS 911.

>> RIGHT.

>> SO GRECO GETS THERE.

>> TWO MINUTES.

>> YOUNG MAN -- SOME POINT IN TIME RIGHT THERE, PARAMEDICS ARRIVE.

>> CORRECT.

>> WHEN DID THE QUESTION COME ABOUT THAT QUESTION?

>> IN THAT TIME, AND I BELIEVE IT WAS BEFORE THE AMBULANCE ACTUALLY ARRIVED.

>> YOUR BELIEF, AND THIS IS -- THE QUESTION IS DID THE JUDGE MAKE A DETERMINATION AS TO WHETHER -- I MEAN THIS IS WHERE WE GET -- NOT SPLITTING HAIRS, BECAUSE THIS BECOMES VERY IMPORTANT IN THE UNITED STATES SUPREME COURT ANALYSIS UNDER CRAWFORD, WOULDN'T HAVE HAD A PROBLEM -- UNDER OHIO VERSUS ROBERTS, WHO MAKES THE DETERMINATION AS TO WHEN IN THE SEQUENCE THIS OCCURRED? DOES THE JUDGE MAKE FINDINGS? DO WE ASSUME THAT THE JUDGE FOUND THESE WERE NOT TESTIMONIAL, THAT THEY WERE -- THE QUESTION WAS ASKED TO AID IN AN ONGOING EMERGENCY?

>> YES, THE JUDGE -- FIRST OF ALL, THAT WAS THE SECOND THING THAT NEEDED TO BE DISCUSSED. I BELIEVE IT IS PAGE 1505 TO 1507 THE JUDGE MADE A FINDING THAT IT WAS NOT TESTIMONIAL, THE STATE ATTORNEY SAYING, ASSUMING IT IS THE JUDGE QUESTIONS HIM ON THAT, THE JUDGE DID SAY IT WAS NOT TESTIMONIAL.

>> WHAT REASONING -- THEY CAN SAY THAT, THE JUDGE CAN SAY IT BUT BECAUSE HE FOUND THAT OFFICER GRECO WAS COMING TO THE AID OF THE VICTIM? BY -- YOU KNOW, AGAIN, USUALLY WHAT HAPPENED -- I MEAN FROM THE STATE'S PERSPECTIVE DOES SOUND LIKE YOU ARE ASKING ABOUT A PAST EVENT, I MEAN IT SOUNDS IN A VACUUM A TESTIMONIAL TYPE QUESTION.

>> TESTIMONIAL IN THE SENSE

THAT A QUESTION WAS ASKED.
BUT NOT TESTIMONIAL IN THE SENSE
OF CRAWFORD OR DAVIS, OR ANY
OF THE CASES THAT ARE TALKING
ABOUT THE CONFRONTATION CLAUSE
AFTER CRAWFORD.
IT SHOULD BE LEFT UP TO
THE TRIAL JUDGE WHO WAS
ACTUALLY HEARING THE TESTIMONY
AS TO WHAT THE FACTS ARE THAT
ARE COMING OUT FROM THOSE
WITNESSES, IT WOULD BE -- THIS
COURT'S COULD LOOK AT IT DE
NOVO, AS YOU DO WITH ANY
SUPPRESSION ISSUE OR ANY
EVIDENTIARY ISSUE WHERE --
>> DID THE TRIAL JUDGE ACTUALLY
MAKE ANY FACTUAL FINDING?
>> HE MADE FACTUAL FINDING ONE
THIS PARTICULAR STATEMENT WAS
A DYING DECLARATION.
>> A FACTUAL FINDING, THERE IS
A FINE LINE HERE, IT SEEMS TO
ME, WHETHER OR NOT WHAT THE TRIAL
JUDGE SAID WAS A FACTUAL FINDING
OR WAS HE MAKING A CONCLUSION
THAT BASED ON WHATEVER FACTS
THERE ARE, THAT THIS WAS A DYING
DECLARATION, EXCITED UTTERANCE,
NOT TESTIMONIAL, IT IS FACTUAL
IN THAT AS THEY DISCUSS THE
FACTS THAT CAME OUT AT
TRIAL, IF THIS COURT
WISHES TO GO TO THE MIXED
QUESTION OF LAW AND FACTS --
>> YOU SAY HE HAS TO EXAMINE
FACTS THAT CAME OUT.
WHAT WERE THOSE FACTS THAT CAME OUT?
>> THE FACTS THAT CAME OUT
WOULD BE THAT THIS VICTIM HAD
BEEN SHOT TWICE, FIRST TIME
WOULD HAVE BEEN IN THE LEG,
BASED ON WHAT THE MEDICAL
EXAMINER IS TESTIFYING, SHOT IN
the CHEST, BLEEDING FROM THE CHEST
INTERNALLY, FROM THE LUNGS,
DIAPHRAGM, LIVER, BOTH LARGE --
INTESTINE BLEEDING FROM
SEVERAL LOCATIONS, MEDICAL
EXAMINER DRESSES THIS WOUND, HE
COULD BE AMBULATORY FOR A
WHILE, CERTAINLY IS SOMETHING
THAT HE IS LOSING BLOOD
RAPIDLY AND GOING TO

DETERIORATE, GOING TO KNOW THAT THIS IS A PROBLEM.

>> NOW, WE HAVE EYEWITNESS TESTIMONY, TALKING ABOUT HOW THE DEFENDANT WAS ACTING, WE HAVE THE EYEWITNESS TESTIMONY FROM MR. WILLIAMS, YOUR HONOR

--

>> I JUST -- I'M -- I'M VERY CONCERNED THAT WE ARE, YOU KNOW, WE WANT A RESULT SOMEHOW TO GO WITH A STATEMENT SHOULD COME IN NOW, WE ARE GOING TO TAKE WHAT IS CLASSICALLY A DYING DECLARATION, IF YOU COULD DO ME THE -- WE DON'T KNOW WHETHER U.S. SUPREME COURT IS GOING TO SAY DYING DECLARATIONS ARE OUTSIDE OF CRAWFORD, THE WAY THAT COURT LOOKS AT THE 6TH AMENDMENT AND CRAWFORD, I WOULDN'T BET ON ANYTHING IN THAT REGARD. LET'S -- JUST ONE MORE MOMENT, HOW IS IT NONTESTIMONIAL?

WHAT WAS THE POLICE OFFICER -- HOW DO WE FIND THAT THE PRIMARY PURPOSE OF THE INTERROGATION IS TO HELP WITH AN ONGOING MEDICAL EMERGENCY? WHEN THE POLICE OFFICER ASKED WHAT HAPPENED.

>> WELL, HE IS COMING UP ON TO A SCENE, AND HE SEES SOMEONE, DEFENDANT WAS -- NOT BLEEDING PROFUSELY, THERE WERE DROPS OF BLOOD ON THE GROUND AND BLOOD ON CLOTHING, HE WAS SHOT IN TWO LOCATIONS, SO THAT IS A MEDICAL EMERGENCY.

THE OFFICER HAS EVERY RIGHT TO ASK WHAT HAPPENED, AND THIS IS THE FIRST THING THAT THE DEFENDANT SAYS.

>> -- EARLIER -- OFFICER ALREADY KNEW THAT SOMEONE HAD BEEN SHOT -- I TAKE IT THIS -- SO ONCE WE GET THERE, WHAT HAPPENS, I GUESS HE WANTS TO KNOW WHO SHOT HIM.

ISN'T THAT WHAT IS GOING ON?

>> THERE MAY HAVE BEEN A

REPORT OF A SHOOTING.

HE MAY HAVE EXPECTED THAT THE ANSWER WAS THAT "I WAS SHOT." BUT UNTIL HE ACTUALLY ASKS THE QUESTION OF THE VICTIM HAS HE CONFIRMED THAT THE 911 CALL WHICH WAS NOT PLACED BY THE VICTIM BUT WAS PLACED BY MR. WILLIAMS, IS -- IS IN FACT THE SITUATION THAT HE IS FACING?

HE NEEDS TO ASCERTAIN WHAT HAPPENED.

HAS A STATEMENT FROM THE OPERATOR, YES, SOMEONE HAS BEEN SHOT, BUT HOW DOES HE KNOW UNTIL HE ACTUALLY CONFIRMS, SEES WITH HIS OWN EYES, HEARS WITH HIS OWN EARS, THERE IS THAT INITIAL REQUIREMENT THAT HE IS ANSWERING AN ONGOING EMERGENCY.

>> NOW WITH RESPECT TO JUSTICE PARIENTE'S COMMENT, YES, WE WOULD RELY ON THE FACT THAT THIS IS NOT ONLY A DYING DECLARATION BUT HAS --

>> GO TO DYING DECLARATION, EXCITED UTTERANCE, WOULD YOU AGREE IF IT IS EXCITED UTTERANCE IT IS NOT A DYING DECLARATION, THERE IS NOTHING THE UNITED STATES SUPREME COURT HAS SAID THAT WOULD MAKE US THINK IT STILL COULDN'T BE TESTIMONIAL SUBJECT TO CRAWFORD; CORRECT?

>> THERE IS STILL WORKING, SO HE --

>> THE FACT IS BECAUSE THOSE HEARSAY EXCEPTIONS ARE NOT ENOUGH TO GET PAST CRAWFORD'S 6TH AMENDMENT SITUATION.

>> BUT THE DYING DECLARATION ONE IS.

>> WE SAY -- SOMEONE MIGHT SAY IT IS, BUT I, YOU AND SUPREME COURT -- WE -- PEOPLE PREDICTED THAT THEY WOULD EMBRACE THE FORFEITURE EXCEPTION IN GILES VERSUS CALIFORNIA, THEY SAID NO, NO SUCH THING AS FORFEITURE EXCEPTION, IN TERMS OF CRAWFORD.

WHAT MY CONCERN IS I WOULD

HAVE A HARD TIME THINKING SOMEONE IS IN A HOSPITAL IS DYING, THEY GET THE CALL, THE POLICE COME AND GO NOW YOU TELL US WHAT HAPPENED, AND THEY GO THROUGH AN INTERROGATION AND UNITED STATES SUPREME COURT IS GOING TO GO WELL THAT IS A DYING DECLARATION, IT IS NOT SUBJECT TO CRAWFORD.

SO TELL ME HOW WE -- FIRST OF ALL, I THINK THAT IT HAPPENS TO STRICTLY CONSTRUE WHAT A DYING DECLARATION IS, AND I'M JUST NOT SURE HOW THIS WOULD QUALIFY AS A -- AS WE CLASSICLY THINK OF A DYING DECLARATION BECAUSE HE IS IN EXTREME PAIN AT THIS POINT, GETTING -- MEDICAL EMERGENCY, HOPING HE IS GOING TO LIVE, NOT DIE.

>> I ASSUME EVERY ONE IS HOPING THEY ARE GOING TO LIVE.

>> HOW DOES -- KNOW DEATH IMMINENT -- WERE SURVIVAL.

>> THE FACT OF THE MATTER THIS GENTLEMAN IS IN EXTREME FEAR. HE IS PANTING AND HAVING DIFFICULTY BREATHING, LOSING CONSCIOUSNESS RAPIDLY, ALL SIGNS AS YOU COME TO WOUNDS -- HE STATED HE THOUGHT HE WAS DYING, HAD GIVEN UP HOPE, ALL OF THOSE THINGS.

NONE OF THOSE THINGS WERE SAID.

BUT ALL OF THE OUTWARD MANIFESTATIONS ALL SIGNS THAT PEOPLE COULD READ AS HIS EYES WIDE, FEAR ON HIS FACE, ALL OF THOSE THINGS INDICATED THAT HE FEARED HIS IMMINENT DEMISE.

>> DO YOU THINK THE UNITED STATES SUPREME COURT IS GOING TO SAY THE POLICE OFFICERS INTERROGATE PEOPLE LOOKING LIKE THEY ARE IN EXTREME DISTRESS MAYBE GOING TO DIE THEY ARE GOING TO SAY CRAWFORD DOESN'T APPLY IN THOSE SITUATIONS.

>> CRAWFORD SAYS ONE OF THE DEVIATIONS WE HAVE FOUND

INVOLVED DYING DECLARATIONS,
EXISTENCE OF THAT, EXCEPTIONS
AS A GENERAL RULE CRIMINAL
HEARSAY LAW MAY NOT BE
DISPUTED MANY DYING DECLARATIONS
MAY NOT BE
TESTIMONIAL.

THERE IS AUTHORITY
FOR ADMITTING THOSE THAT CLEARLY
ARE.

WE NEED NOT DECIDE IN THIS
CASE --

>> WHETHER THE 6TH AMENDMENT
INCORPORATES EXCEPTION FOR
TESTIMONIAL DYING
DECLARATIONS FOR THIS
EXCEPTION MUST BE ACCEPTED ON
HISTORICAL REALM SUI GENERIS,
SOUNDS LIKE DYING DECLARATIONS
ARE EXEMPT FROM CRAWFORD.

>> YOUR OPPOSING COUNSEL URGES
US THAT WHEN EVALUATING A DYING
DECLARATION THE FACTORS MUST
BE FAR MORE EXTREME THAN WHAT
WE ARE DEALING WITH IN THIS
CASE, SOMEONE ATTACHED TO
MACHINES IN A HOSPITAL,
PEOPLE SHAKING THEIR HEADS,
WOULD YOU ADDRESS THAT BECAUSE
I THINK WE ARE REALLY WALKING
A VERY THIN LINE IF TALKING
ABOUT SOMEONE OUT OF BREATH,
SOMEONE IN PAIN, EYES OPEN.
THAT IS VERY, VERY GENERIC.
WE THINK OF THIS, YOUR OWN
SITUATION SAYS CASE LAW, NOT
OUR VIEW, THE CASE LAW REQUIRES
FAR MORE DETAILED
INFORMATION THAN WE HAVE IN
THIS CASE, AND THAT THIS CASE LAW
SUPPORTS IT.

>> I BELIEVE THE POSITION OF
MY OPPONENT IS THAT THE DETAIL
HAS TO BE MORE IN WHAT THE
PERSON IS THINKING OR FEELING
AT THE TIME.

NOT SO MUCH THAT HE IS HOOKED
UP TO MACHINES AND TOLD BY A
DOCTOR HE HAS 15 MINUTES TO LIVE.

>> WE HAVE CASES LIKE THAT, I
I MEAN, I'M GOING BACK TO
CASES FOR OUR COURT BUT --
GENERAL CASES ACROSS THE
COUNTRY.

>> OF COURSE WE DO, EACH SITUATION HAS TO BE LOOKED AT INDIVIDUALLY, AND FROM THE STANDPOINT OF THE VICTIM. I'M SURE WE WOULD BE STANDING HERE ARGUING THAT SOMEONE WAS HOOKED UP TO A MACHINE, MIGHT HAVE A GREATER EXPECTATION OF LIFE BECAUSE HE IS ALREADY AT THE HOSPITAL, ALREADY RECEIVED SOME SORT OF MEDICAL CARE THAN SOMEONE ON THE STREET AT 4:00 IN THE MORNING, AND HAS JUST BEEN ACCOSTED, SHOT TWICE.

>> I'M -- I DON'T KNOW THAT 4:00 IN THE MORNING OR BEING ON THE STREET REALLY ADDRESSES THE NATURE OF THE INJURY IN LIGHT OF THE THREATENING NATURE OF THE INJURY, IF YOU ADDRESS THOSE MOST IMPORTANT FEARFUL OF BEING ON THE STREET 4:00 IN THE MORNING.

>> HE HAS ALSO BEEN SHOT TWICE, AND DON'T FORGET ONE HAS GONE THROUGH -- THINKING VERY, VERY DIFFICULT TO BREATHE, ALSO THROUGH DIAPHRAGM MAKES IT WORSE.

>> THOSE ARE THINGS THAT HE IS NOT AWARE OF HE KNOWS HE IS SHOT, BUT NOT AWARE WHAT WENT THROUGH THIS ORGAN OR THAT ORGAN, WHATEVER ORGAN.

>> HE CERTAINLY KNOWS HE CAN'T BREATHE, AND HE CERTAINLY KNOWS THAT HE HAD A -- THE WHOLE RIGHT SIDE OF HIS BODY HAS BEEN DAMAGED. HE IS LOSING BLOOD INTERNALLY.

>> HE IS NOT AWARE OF THAT, I'M TRYING TO GET TO WHAT HE IS AWARE OF.

>> I WOULD DISAGREE, YOUR HONOR. I THINK SOMEBODY LOSING THAT AMOUNT OF BLOOD, HAS BEEN SHOT AND HIT IN THAT MANY VITAL ORGANS IS CERTAINLY GOING TO KNOW THAT HE IS LOSING CONSCIOUSNESS AND CAN NO LONGER CONTINUE BREATHING, SURVIVING.

YOU ARE TALKING ABOUT A MASSIVE LOSS OF BLOOD, AND YOU ARE TALKING ABOUT SOMEONE WHO

JUST SAID FOUND SOMEONE ON THE STREET, FAMILY FOUND SOMEONE ON THE STREET TO AT LEAST REPORT THIS TO, AND A POLICE OFFICER AMBULANCE, ALIVE SHORTLY THEREAFTER, BUT HE IS SLOWLY IN THE BEGINNING AND RAPIDLY TOWARDS THE END, LOSING CONSCIOUSNESS, ABILITY TO COMMUNICATE AND BREATHE. SO I WOULD SAY THAT THIS IS A DYING DECLARATION.

WHETHER HE VOICED IT OR NOT HE CERTAINLY HAD ALL OF THE OUTWARD MANIFESTATIONS OF A DYING DECLARATION.

>> UNLESS ANY OTHER QUESTIONS, I'LL MOVE TO THE SECOND.

>> YOU WANT TO ADDRESS HARM --

>> -- ARTICLES OF ERROR, WITH MR. MCDOWELL'S TESTIMONY, THAT THERE WAS A BLACK MAN WHO HAD ACCOSTED THE VICTIM, THE VICTIM TOLD HIM THAT HE HAD NOTHING MORE THAN TWO SHOTS THAT ARE FIRED, AND THEN THERE IS A THIRD SHOT, WHICH IS A LOUDER SHOT, WHICH IS CLEARLY THE .357, THAT THE VICTIM, THE SHOT THAT VICTIM GOT OFF, AND WE'VE ONLY THOSE THREE SHOTS.

THEREFORE, WE KNOW TWO ARE IN THE VICTIM, AND ONE WENT THROUGH THE DEFENDANT'S HAND, AND THEN THE DEFENDANT THEN WENT THROUGH THE VICTIM'S POCKETS, WENT THROUGH HIS CAR, WE HAVE MR. MCDOWELL TESTIFYING AS TO THE ROUTE THAT THE VICTIM -- THE DEFENDANT TOOK.

ACTUALLY, SAW THE DEFENDANT STAND UNDER A LIGHT POST, BLEEDING FOR A WHILE, EXAMINING HIS HAND, TAKE A ROUTE AWAY FROM THE SCENE.

GIVEN THE BLOOD EVIDENCE, MR. MCDOWELL HAS IDENTIFIED THE DEFENDANT. HE HAS IDENTIFIED NO ONE ELSE, AND -- NO ONE ELSE BECAUSE WE HAVE THE THREE GUNSHOTS AND WE HAVE THE BLOOD EVIDENCE, IT

TIES THE DEFENDANT TO THE SCENE, TIES THE DEFENDANT TO THIS CRIME.

FURTHER, WE HAVE THE .22 WHICH IS THE MURDER WEAPON, IDENTIFIED AS MURDER WEAPON, HAS THE DEFENDANT'S BLOOD ON IT, AND THE BULLETS MATCH THOSE TAKEN FROM THE VICTIM.

SO THIS IS -- ARTICLES BEYOND A REASONABLE DOUBT AS FAR AS THE IDENTITY OF THE SHOOTER.

>> AS FAR AS THE SECOND ISSUE, THAT IS THE DEFENDANT'S STATEMENT AT THE LOCATION WHERE HE WAS STAYING WITH HIS GIRLFRIEND.

>> LET'S PAINT THE PICTURE. THERE HE IS IN THE BATHROOM, HALLWAY, COMING DOWN THE HALLWAY.

HOW MANY POLICE OFFICERS?

>> IN UNIFORM.

>> ONE IN UNIFORM, YES.

>> HAS -- HE IS RELEASED.

>> DECIDED TO WALK BY, I DON'T KNOW IF -- I'M SURE OFFICERS WOULD HAVE ASKED HIM THE SAME QUESTIONS THAT THEY ASKED HIM WHEN HE CAME OUT OF THE -- BATHROOM AND STOPPED, BUT THE FACT IS HE DIDN'T HAVE TO EXIT THE BATHROOM.

THE OFFICERS

WERE IN THE GIRLFRIEND'S ROOM.

THEY WERE ASKING THE GIRLFRIEND QUESTIONS, THEY HAD NO IDEA SOMEONE WAS IN THE BATHROOM, AND HE CAME OUT. SEEING HIS HAND, THEY ASKED HIM THE OBVIOUS

QUESTION, "WHAT HAPPENED?"

DEFENDANT BLURTED OUT HE HAD A FIGHT WITH HIS GIRLFRIEND, SHE STABBED HIM OR CUT HIS HAND, SO THEY ASKED THE OBVIOUS QUESTION,

WHICH WAS "MAY WE SEE IT."

AND HE UNDOED HIS BANDAGE AND IT CLEARLY LOOKED TO THE OFFICERS THAT THIS WAS A GUNSHOT AND NOT A STAB WOUND.

AT WHICH POINT ONE OF THE OFFICERS SAID THAT HE WOULD LIKE TO TALK TO THE GIRLFRIEND, BY -- BY HERSELF, THAT SHE SEEMED NERVOUS.

>> WHEN THEY CAME, TO THE ROOM WERE THEY INVESTIGATING THE MURDER OR WERE THEY SOLELY COMING IN RESPONSE TO A -- QUESTION ABOUT SOMEBODY HAVING A GUNSHOT WOUND?

I MEAN, THEY PRETTY WELL WERE THINKING THIS COULD BE THE SUSPECT; CORRECT?

>> YES, YOUR HONOR.

THEY NEW FROM BLOOD EVIDENCE AT THE SCENE THAT THERE WERE TWO BLEEDERS, THAT VICTIM WHO WASN'T BLEEDING THAT MUCH AT THE SCENE, AND THE PERPETRATOR.

>> WHEN THEY CAME TO THE ROOMING HOUSE, WERE COMING TO CONFRONT THE SUSPECT IN THIS MURDER?

>> RIGHT.

THEY HAD THE STATEMENT FROM I THINK LINDA ROBERTS, WHO SAID THAT THERE WAS SOMEONE THERE THAT HAD A GUNSHOT WOUND TO THE -- HAND, TO THE HAND.

>> DID THEY HAVE ANYTHING AT THAT POINT ON HAYWARD, ANYTHING TO BASE AN ARREST ON?

>> THAT SEEMS LIKE PROBABLE CAUSE TO ARREST, AT THAT POINT, ONCE THEY SEE THAT MR. HAYWARD HAS THIS GUNSHOT WOUND, BUT BEFORE HE IS ARRESTED, THEY ALSO HAVE INFORMATION FROM THE GIRLFRIEND THAT HE HAD COME BACK TO THE APARTMENT THAT NIGHT AROUND THE TIME OF THE MURDERS, THAT HE HAD THIS GUNSHOT WOUND TO HIS HAND, AND THEY ALSO -- WHEN I SAY BEFORE HE WAS FORMALLY ARRESTED AT THE POLICE STATION THEY LEARNED THAT HE HAD SOLD A --

>> AT THE TIME THEY ACTUALLY

CAME TO THE ROOMING HOUSE
AND ENCOUNTERED HIM, AS HE
CAME OUT OF THE BATHROOM, ALL
THEY KNEW WAS THAT HE HAD A
WOUND TO HIS HAND.

AND ONCE THEY ACTUALLY SAW THE
WOUND, ARE YOU SAYING THAT AT
THAT POINT THEY ACTUALLY HAD
SOME KIND OF PROBABLE CAUSE --
FOUND SUUSPICION?

WHAT WOULD

THEY NEED TO HAVE IN ORDER TO
HAVE DETAINED HIM AT THAT
POINT?

>> I THINK THEY COULD HAVE
ARRESTED HIM AT THAT POINT.

>> GIVEN THE BLOOD EVIDENCE
SCENE DEFENDANT OR PERSON --
DID THEY KNOW WHOSE
BLOOD THAT WAS AT THAT POINT?

>> NO.

THEY KNEW THAT IT WAS
THE -- DEFENDANT'S, THEY DIDN'T
KNOW THAT IT WAS DEFENDANT'S
BLOOD BUT KNEW IT WAS THE
PERPETRATOR'S BLOOD.

>> THEY SAW THAT SOMEONE OTHER
THAN THE VICTIM HAD BLED AT THE
SCENE.

>> YES.

>> THEY KNEW THAT THIS MR. HAYWARD
HAD A WOUND TO HIS HAND,
AND THAT WAS SUFFICIENT TO
GIVE THEM PROBABLE CAUSE.

>> HE HAD A GUNSHOT WOUND TO
THE HAND BY LOOKING AT --

>> HE HAD A GUNSHOT WOUND TO HIS
HAND, AND THAT THERE WAS A
PERSON ALSO AT THE SCENE WHO
WAS BLEEDING OTHER THAN THE
VICTIM.

AND YOU ARE SAYING THAT WAS
PROBABLE CAUSE TO ARREST HIM
THEN.

>> YES, BECAUSE THERE IS ALSO
THE BLOOD, THE BLOOD TRAIL
FROM THE SCENE TOWARDS HIS
ROOMING HOUSE, SO WE KNOW THAT
THE PERSON WHO HAS COMMITTED
THIS CRIME HAS GONE THROUGH
THE BACK WAY, BACK TOWARDS THAT
ROOMING HOUSE, THE BLOOD
TRAIL WENT WEST AS I
UNDERSTOOD, DEFENDANT TO SAY

YOU HAD TO TURN IN ANOTHER DIRECTION, SO YOU HAD BLOOD ALL THE WAY TO THE ROOMING HOUSE.

>> NOT ALL THE WAY TO THE ROOMING HOUSE BUT WERE YOU HAD BLOOD IN THE DIRECTION OF THE ROOMING HOUSE IT IS MORE THAN JUST HEADING WEST, THERE ARE -- SPOTS ON -- A FENCE, ON A BUILDING, THAT ARE IN THAT DIRECTION.

SO --

>> THEY HAD ALREADY FOUND THAT BLOOD AT THE TIME THEY CAME TO THE ROOMING HOUSE.

>> I BELIEVE THEY HAD, YOUR HONOR, BECAUSE THIS IS THREE DAYS LATER, TWO DAYS LATER.

>> WOULDN'T IT ALSO BE RELEVANT TO THIS QUESTION WHETHER THEY HAD PROBABLE CAUSE AS HE HAD LIED TO THEM ABOUT THE NATURE OF THE WOUND?

>> YES, YOUR HONOR, WOULD ALSO GO INTO IT, THEY HAVE THE STATEMENT AS HE IS BEING PUT INTO THE CAR THAT HE DID LIE. SO YOU HAVE THE GIRLFRIEND INITIALLY SAYING, CONFIRMING IT WAS A STAB WOUND, BUT THE EVIDENCE IS THAT IT WAS A GUNSHOT WOUND.

>> WELL, IF WE FIND THAT THE AT THE POINT THAT HE SHOWS THEM THE WOUND, AND THEY REALIZE THAT IS WHAT IT IS, THEY ASK HIM TO COME DOWN TO THE POLICE STATION, THEY HANDCUFF HIM, IT BECOMES A CUSTODIAL, HE IS IN CUSTODY, YOUR ARGUMENT WOULD BE THAT THE STATEMENTS THAT HE MADE AS HE WAS GETTING TO THE VEHICLE ARE ACTUALLY SPONTANEOUS STATEMENTS, THEY WERE NOT MADE IN RESPONSE TO HIS QUESTIONING TO -- THAT THERE WAS NO QUESTIONING, YOUR HONOR, HE WAS SPECIFICALLY TOLD AT THE SITE OF THE CARE WAS NOT RELEVANT.

>> I UNDERSTAND THEY SAY THAT, BUT THEY HANDCUFF HIM, ONLY

PERSON --

>> HANDCUFF IN FRONT VERSUS
HANDCUFF IN BACK.

RESPECTFULLY,

I CANNOT IMAGINE A REASONABLE
PERSON -- THEY

ARE FREE TO LEAVE WHEN
HANDCUFFED.

LET'S ASSUME IT IS

CUSTODIAL AT THAT TIME, THERE
IS NO -- THERE IS A SPONTANEOUS
STATEMENT THEY GET HIM -- TO THE

POLICE OFFICER SAYING AT
THAT POINT THEY ADMINISTER THE --

THEY TELL HIM HE IS UNDER
ARREST?

>> NO, YOUR HONOR.

HE IS AT --

ONCE THEY GET HIM TO THE
POLICE OFFICER IS SAYING THEY
UNCUFF HIM.

>> SHACKLED.

>> SHACKLED TO THE FLOOR.

>> STANDARD POLICE PROCEDURE.

>> TOLD STANDARD POLICE
PROCEDURE, NOT QUESTIONED FOR
ABOUT AN HOUR.

THEY DO

ADDITIONAL INTERVIEWS WITH THE
GIRLFRIEND, AND WITH ANOTHER
PERSON THAT WAS ARRESTED.

>> SO ANY TIME -- AT -- A
PERSON IS -- GOES DOWN TO THE
POLICE STATION, AND YOU SAY
IN THIS CASE IT WAS VOLUNTARY,
YOU GO DOWN TO THE POLICE STATION,
THEY ARE GOING TO
QUESTION YOU, YOU ARE
SHACKLED?

>> THAT IS WHAT THE TESTIMONY
WAS.

>> BUT AT THAT

POINT OBJECTIVELY SOMEONE IS
NOT FEELING FREE TO LEAVE.

ALL I WANT TO KNOW IS ONCE -- THE
MIRANDA WARNING IS GIVEN,
BEFORE HE STARTS TO TELL ALL
THESE DIFFERENT STORIES.

>> THAT IS CORRECT.

>> SO I WOULD LIKE YOU TO
RESPOND TO MR. CALWELL'S
RESPONSE, AND TO ME -- IT IS --
THEY ARE GOING TO SEE THE WOUND
EVENTUALLY, WHETHER INEVITABLE

DISCOVERY, SHOWING THE WOUND DOESN'T SAY MUCH OF ANYTHING, SHE LIED ABOUT A CUT, THEN CHANGES THE STORY, ISN'T THE LAW ABOUT WHAT THE FACT THAT REALLY, WHAT HAPPENED WHEN THE MIRANDA WARNINGS ARE GIVEN, WHAT HE SAYS THERE, ARE THE INCULPATORY STATEMENTS THE STATEMENT BEFORE HE GETS INTO THE VEHICLE, IS A SPONTANEOUS STATEMENT, NO POLICE QUESTIONING, WHY ISN'T THAT BETTER ANALYSIS THAN TRYING TO TAKE SOMETHING -- ANY PERSON WOULD REALIZE THEY ARE NOT FREE TO LEAVE, IF THEY ARE IN HANDCUFFS AND TRY TO PRETEND THAT IS A CONSENSUAL ENCOUNTER.

>> THE ENCOUNTER WAS IN THE -- HALLWAY --

>> ROOMING HOUSE.

>> ROOMING HOUSE.

I'M NOT SURE

I'M SAYING THAT IT WAS COMPLETELY CONSENSUAL ONCE HE WAS HANDCUFFED, ALTHOUGH I WOULD SAY HE WAS BEING TOLD THAT HE WAS NOT UNDER ARREST, THERE WAS NO POLICE QUESTIONING, SO THAT WAS A SPONTANEOUS STATEMENT.

ONCE YOU GET TO THE POLICE STATION HE IS MIRANDIZED, NOW HE KNOWS HE IS UNDER ARREST, GIVES

--

>> SO THEY ARE NOT -- SO WHERE IS THE CASE LAW WHICH SAYS THAT THEY CAN'T THEN USE THE EARLIER STATEMENT, THAT WE'RE ASSUMING SOME SHOULD HAVE NOT COME IN, HE GIVES A FRESH SET OF LIES OVER AND OVER AGAIN, WHILE HE IS BEING QUESTIONED, WHAT I'M SEEING IN THIS CASE.

>> RIGHT, AND HE DOES, AND THE MIRANDA CLEARS ANY -- YOU KNOW, ANY MISUNDERSTANDING HE MIGHT HAVE HAD AS TO WHAT THEY WERE GOING TO QUESTION ABOUT, WHAT THE TRIAL COURT FOUND WAS THAT THERE WAS PROBABLE CAUSE, AT

LEAST AT THAT POINT TO ARREST HIM AT THE ROOMING HOUSE BASED ON WHAT THEY SAW, WHAT THEY KNEW, IT WAS AS SPONTANEOUS A STATEMENT TO THE POLICE OFFICER BECAUSE THERE WAS NO QUESTION.

AND THEN THOSE LATER STATEMENTS I DON'T BELIEVE WERE ACTUALLY CHALLENGED, BECAUSE THE MIRANDA WARNINGS WERE GIVEN.

AND MIRANDA WARNINGS WERE FINE.

THERE IS NO QUESTION THAT THOSE -- THE REQUIREMENTS OF MIRANDA.

SO UNLESS THERE ARE ANY OTHER QUESTIONS --

>> I HAVE ONE ON THE PROSECUTOR'S ARGUMENT. WITH REGARD TO COMPARING CHOICES THE DEFENDANT AND VICTIM HAD MADE, DO YOU READ OUR CASE LAW AS BEING VERY, VERY CLEAR THAT THIS IS PROHIBITED ARGUMENT?

>> I DON'T BELIEVE THIS IS PROHIBITED ARGUMENT. WHAT THE PROSECUTOR WAS DOING, HE WAS SETTING UP HOW THESE TWO INDIVIDUALS CAME TO MEET AT THAT LOCATION, AT 4:00 IN THE MORNING.

THE VICTIM WAS A HARDWORKING PERSON, WHO WANTED TO BETTER HIMSELF.

HE WORKED SEVERAL JOBS.

AND HE WAS WILLING TO BE OUT THERE AT 4:00 IN THE MORNING IN A DANGEROUS NEIGHBORHOOD, PUTTING IN NEWSPAPERS, HE CAME BACK LATER IN THE DAY, TO TAKE OUT THE COINS.

HE DID TRY AND PROTECT HIMSELF IN THAT RESPECT, VERSUS THE DEFENDANT, WHO HAD JUST GOTTEN PAID \$200, WASTED IT SOMEHOW THAT NIGHT, DECIDED HE NEEDED TO GET MORE CASH AND

--

>> LET ME APPROACH IT THIS WAY.

WILL YOU DESCRIBE FOR ME
WHAT YOU UNDERSTAND OUR CASE
LAW WITH REGARD TO
PROHIBITED ARGUMENTS ON
CHOICES THAT THE VICTIM AND
THE DEFENDANT MADE.
TELL ME WHAT YOU THINK OUR CASE LAW
SAYS ON THAT.

>> I THINK WITH REGARD TO
VICTIM IMPACT, YOU ARE ALLOWED
TO DISCUSS THE UNIQUENESS OF THE
PARTICULAR --

>> NOT VICTIM IMPACT.
I'M TALKING
ABOUT CHOICES, NOT VICTIM IMPACT.

>> THIS --

>> OUR CASE LAW.

>> I UNDERSTAND, YOUR HONOR, BUT
THIS IS NOT CHOICES MADE, THIS
WAS NOT THE ARGUMENT THAT
CHOICES WERE MADE TO FOLLOW A
CRIMINAL PATH VERSUS A
NONCRIMINAL PATH.

>> AGAIN, I WILL CHARACTERIZE, I
WANT TO KNOW WHAT YOU
THINK OUR CASE LAW SAYS, WHAT
IS PROHIBITED, WHAT IS NOT
ON THE --

>> AS I SAID, YOU ARE NOT
SUPPOSED TO DISCUSS OUTSIDE
THE FACT, NOT SUPPOSED TO BRING
EVIDENCE THAT -- PRESENT AT
THE TIME HE PRESENTED AT THE
TIME OF THE TRIAL, YOU ARE NOT
SUPPOSED TO PUT ONE VICTIM
OVER THE DEFENDANT
TO DISCUSS ONE HAS A HIGHER
POSITION THAN THE OTHER.

BUT, AS I SAID, THAT IS NOT WHAT
HAPPENED IN THIS CASE.

THE VICTIM IMPACT STATEMENT WAS
MADE, THE PROSECUTOR THEN
CHARACTERIZED HOW BOTH CAME TO
BE AT A PARTICULAR LOCATION IN
TIME, PUTTING THIS WHOLE
CASE IN CONTEXT, AND HE DID
NOT GO OUTSIDE THE RECORD.

AND, ON TOP OF THAT, THE PROPER
STATEMENT OR PROPER
INSTRUCTION WAS GIVEN ON
VICTIM IMPACT EVIDENCE, SO THE
JURY DID NOT USE IT IMPROPERLY.

I ASK THIS COURT CONFIRM
CONVICTION AND SENTENCE OF

MR. HAYWARD.

THANK YOU.

>> LET ME MAKE THREE QUICK
LITTLE POINTS, ONE WITH
RESPECT TO WHAT JUSTICE
PARIENTE WAS ASKING, THE ISSUE
WHETHER A SPONTANEOUS
STATEMENT MADE NOT IN RESPONSE
TO QUESTIONING IS -- IN ISSUE
HERE.

THE FOURTH AMENDMENT ISSUE, THE
QUESTION WHETHER SOMETHING WAS
ILLEGAL DETENTION, DOESN'T
MATTER WHETHER THE DEFENDANT MAKES
A SPONTANEOUS STATEMENT FOR
PURPOSES OF THE
FOURTH AMENDMENT, WHETHER IT
IS CONTAINED BY EXPLOITATION
OF THE ILLEGAL DETENTION.

>> WHY DIDN'T THEY HAVE
PROBABLE CAUSE TO DETAIN HIM?
THEY OBVIOUSLY KNEW THAT
SOMEONE OTHER THAN THE VICTIM
HAD BEEN SHOT AT THE SCENE.
EVIDENTLY, THERE WAS SOME
KIND OF BLOOD TRAIL
LEADING AWAY
FROM THE SCENE.

THEY KNEW

MR. HAYWARD HAD BEEN SHOT
ONCE, THEY SAW HIS HAND.
WHY WASN'T THAT SUFFICIENT TO
DETAIN HIM AND -- EVEN ARREST
HIM AT THAT POINT?

>> WELL, ALL THEY HAVE IS A
GUNSHOT WOUND TO THE HAND, OR
APPARENT GUNSHOT WOUND.
OBVIOUSLY THEY ARE NOT
DOCTORS, IT JUST SEEMS THAT WAY
TO THEM, THEY DON'T KNOW HOW
RECENT IT IS, THEY -- THEY
HAVE NO --

>> LIE ABOUT IT?

>> EXCUSE ME?

>> BASED ON THEIR PERCEPTION,
THEIR UNDERSTANDING, DIDN'T HE
LIE TO THEM ABOUT IT?
WOULD NOT THAT GIVE THEM
GREAT REASON TO BE SUSPICIOUS
THAT HE MIGHT HAVE BEEN THE
PERSON WHO HAD JUST SHOT OR
WHILE BEFORE BEEN SHOT IN THE HAND
IN COMMISSION OF A MURDER?

>> WELL, HE WAS ALSO CUT IN

THE HAND.

THE WOMAN SAID HE WAS
ALSO -- THE WOMAN SAID SHE HAD
CUT HIM IN THE HAND PREVIOUSLY,
AND THAT SUBSEQUENTLY HE WAS
SHOT IN THE HAND.

THAT WAS HER ULTIMATE STATEMENT OF WHAT
HAPPENED.

SO IT WASN'T THAT
CLEAR THAT IT WAS -- YOU LOOK
AT PICTURES -- LIKE THAT.

>> WE ARE TALKING ABOUT
PROBABLE CAUSE.

>> RIGHT.

>> IT WAS A DIFFERENT MATTER.

>> UM-HMM, RIGHT.

I'M SUBMITTING TO YOU THAT
IS NOT PROBABLE CAUSE BECAUSE
THEY DID NOT HAVE ANYTHING
TYING -- THEY DIDN'T HAVE HIS
PRESENCE AT THE SCENE.

THE ONLY

THING THEY HAD LINKING HIM WAS
AN APPARENT GUNSHOT WOUND.

THAT IS THE ONLY THING LINKING SUPPOSEDLY
HIM TO THIS CRIME AT ALL, THAT
IS -- THAT IS JUST NOT
PROBABLE CAUSE.

PROBABLE CAUSE

IS -- GRAND JURORS ARE
INSTRUCTED PROBABLE CAUSE IS
EVIDENCE THAT THE DEFENDANT
PROBABLY COMMITTED THE CRIME.
THIS ISN'T PROBABLE CAUSE.

>> DIDN'T THEY KNOW THAT HE
WAS SEEKING ASSISTANCE TO HAVE
THIS SEWN UP FROM PEOPLE IN
THE APARTMENT HOUSE, RATHER
THAN GOING TO GET MEDICAL
ASSISTANCE, AGAIN, WHICH
CREATES GREAT SUSPICION, A
PERSON HAS SOMETHING TO HIDE
RELATED TO THIS MURDER.

>> THEY DIDN'T HAVE THAT TILL
AFTER THEY HAD HIM IN THE CAR,
AND HE HAD SAID THAT HE HAD
BEEN SHOT BY A ROBBER.

THEY DIDN'T HAVE THAT AS
PROBABLE CAUSE BEFORE THAT.

THAT CAME OUT --

>> WHAT ABOUT THE CALL THAT
CAME THAT CAUSED THEM TO GO TO
THE PLACE --

>> THE CALL WAS -- TRANSCRIPT,

A POSSIBLE -- PERSON WITH A
POSSIBLE GUNSHOT WOUND, DIDN'T
SAY TO THE HAND, DIDN'T SAY
HOW RECENT THE WOUND WAS, ANYTHING
ALONG THOSE LINES.

AS TO WHEN

THE STATEMENT WAS MADE, THE
VICTIM, THE TESTIMONY IS VERY
CLEAR PAGES 1487, AND 1488 AS
THEY ARE BEGINNING TO
TRANSPORT HIM PRIOR TO
REMOVING HIM FROM THE SCENE
"DID HE MAKE ANY STATEMENTS?"
AND THEN THE ANSWER IS "YES, HE
MADE THE STATEMENT."

SO AFTER THE PARAMEDICS ARRIVED,
WERE TAKEN, TAKE THE MAN AWAY
OFFICER ARRIVING BEFORE
PARAMEDICS, JUST TRYING TO FIND
OUT WHAT HAPPENED, THE JUDGE
GAVE HIS REASON WHY THE
STATEMENT WAS TESTIMONIAL, AT
PAGE 1507, RATHER NOT
TESTIMONIAL, WAS FOCUSED
ENTIRELY ON THE VICTIM, HE
SAID THAT -- DECLARANT DID NOT
ANTICIPATE MAKING THESE
STATEMENTS FOR PURPOSES OF
LATER PROSECUTION, SIMPLY UNDER
AN EXCITED CONDITION, INDICATING
TO A RESPONDING OFFICER WHAT
HAD JUST HAPPENED, SO HIS
TESTIMONIAL, BECAUSE THE
OFFICERS QUESTIONING HIM,
TESTIMONIAL BECAUSE THE
VICTIM IS EXPLAINING WHAT HAD
HAPPENED BEFORE.

SO I'M -- I KNOW I HAVE USED MY
TIME, VERY APPRECIATIVE OF THE TIME.
THANK YOU VERY MUCH.

>> THANK YOU FOR YOUR
ARGUMENTS.

THE COURT WILL TAKE ITS
MORNING RECESS FOR 10 MINUTES.
PLEASE RISE.