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State of Florida v. Donald Moninger

SC07-510

NEXT CASE ON THE CALENDAR IS
STATE OF FLORIDA VERSUS
MONINGER.

IF -- MONINGER IF I'M
PRONOUNCING THAT CORRECTLY.

MAY IT PLEASE THE COURT, I
REPRESENT THE STATE ON THIS
APPEAL, THE SECOND DISTRICT
COURT IN THE CASE, ERRED IN
FINDING THE VICTIM CAN NEVER
BEHAVE DUAL INTEREST IN
OBTAINING EVIDENCE TO
SUBSTANTIATE THEIR CLAIM.

WOULD YOU --

I THINK WE'RE BOTH GOING IN
THE SAME DIRECTION.

THOUGH MORE I LOOK AT THIS CASE,
I THINK YOU REALLY NEED TO GO
TOWARD, IS THERE REALLY CONFLICT
HERE AND EXPLAIN IT IN SOME
DETAIL AND THE MORE I LOOK AND
ANALYZE IT.

IT REALLY SEEMS WE HAVE
DIVERGENT FACTUAL PREDICATES AND
DO WE REALLY HAVE JURISDICTION
HERE.

JUSTICE I THINK IN THIS CASE
THE FACTS ARE MORE SIMILAR THAN
THEY WOULD APPEAR ON IMMEDIATE
GLANCE.

UNDER TREADWAY, LOOKING FOR
CONFLICT, WHAT WE HAD IN
TREADWAY WAS THE OWNER OF AND
INSURANCE AGENCY SETS UP AN
ANNUITY PROGRAM, ONE OF HIS
AGENTS INVESTS HIS OWN MONEY IN
IT AND ALSO INVESTS MONEY FROM
SOME OF HIS CLIENTS.

AND HE GOES INTO TRIAL, HE DID
NOT HAVE THE AUTHORITY TO LOOK
AT -- FILES HE DIDN'T HAVE THE
AUTHORITY TO LOOK AT, TO CHECK
ON HIS CLIENT'S FILES AND --
BEFORE YOU GO FURTHER ON
THOSE FACTS.

DID ANY STATE AGENT ASK THAT PERSON TO GO INTO THE FILES?

NO.

NOT AT THAT POINT, YOUR HONOR. WHAT HAPPENED IS HE GOES INTO THE FILES AND HE THEN COPIES FILES, GOES TO AN ATTORNEY, AND HIS ATTORNEY GOES TO THE STATE. AND OFFERS THIS EVIDENCE.

ISN'T THAT SIGNIFICANTLY DIFFERENT WHEN SOMEONE IS ACTING IN RESPONSE TO ENCOURAGEMENT, IF NOT DIRECTION, ENCOURAGEMENT FROM THE STATE.

IF IT HAD STOPPED THERE, YOUR HONOR I BELIEVE YOU ARE RIGHT.

BUT IT DIDN'T.

THIS PERSON ENGAGED IN A MONTH-LONG INVESTIGATION, CONTINUING TO PROVIDE EVIDENCE TO THE STATE AGAINST HIS EMPLOYER.

WHO INITIATED THE CONTACT?

WAS IT THE AGENT INITIATING THE CONTACT WITH THE STATE.

EXACTLY THE SAME AS WE HAD IN MONINGER, WE HAVE THE VICTIMS OF THE CRIME WHO INITIATES THE CONTACT --

DID THE AGENT SAY I HAVE THE DOCUMENTS AND GIVE THEM TO THE STATE.

YES.

OKAY, DOESN'T THAT -- AND WHETHER THIS CASE IS RIGHT OR WRONG, IS REALLY A DIFFERENT ISSUE.

DOESN'T THAT MAKE THAT A DIFFERENT FACTUAL CASE THAN THIS ONE.

NO.

BECAUSE IN THIS CASE, IT DIDN'T STOP THERE.

HE CONTINUED TO PROVIDE MORE EVIDENCE AND THIS IS AN ONGOING EXCHANGE, OVER A SERIES, WHERE THE AGENT AS YOU PROVIDED -- ACTUALLY PROVIDED MORE EVIDENCE.

BUT I GUESS, WE'RE TALKING ABOUT THE 4th AMENDMENT AND IF, IN THIS CASE, IN MONINGER, THE YOUNG GIRL VICTIM HAD, HERSELF, GONE AND WITHOUT DISCUSSION OR URGING OR ACQUEISCENCE OF THE

POLICE -- ACQUIESCENCE OF THE POLICE AND SEARCHED THE HOUSE AND BROUGHT IT TO THE POLICE, WE WOULDN'T BE HERE BECAUSE HE IS #NAME?

WE ARE TALKING ABOUT A APPLICATION FOR PRINCIPLE OF LAW WHICH IS [INAUDIBLE] THAT IF A PARTICULAR PRIVATE INDIVIDUAL BECOMES IN ESSENCE A STATE AGENT, THEN THE 4th AMENDMENT APPLIES, THAT IS THE PRINCIPLE. NOW, I THINK THAT WE'RE TALKING THEN ABOUT AN APPLICATION FOR PRINCIPLE TO A VERY DISCRETE SET OF FACTS AND I'M STRUGGLING TO SEE HOW YOU FIND CONFLICT BETWEEN THE SECOND DISTRICT CASE AND THE -- 2nd AND THE 4th DISTRICT CASE.

BECAUSE THE PRINCIPLE IS WHAT THEY ARE BOTH APPLYING. NOW, THEY -- AND THE FACTS TO ME, ALTHOUGH YOU SAY, WELL, IT IS THE SAME BECAUSE -- I THOUGHT YOU WERE SAYING IS BECAUSE THE AGENT KEPT ON TURNING OVER INFORMATION, BUT IT'S NOTE THIS TURNING OVER THE INFORMATION THAT IS THE 4th AMENDMENT VIOLATION.

IT IS THE INSTIGATION AND ENCOURAGEMENT OF THE POLICE EXPRESSLY IN THE CASE THAT MADE THE 2nd DISTRICT SAY THIS APPLYING TREADWAY AND IN OUR VIEW, BASED ON THE TIP LATE FACTS AND OF COURSE YOU ARE SMILING BECAUSE THAT REALLY GETS THE STATE HERE, THE STIPULATED FACTS, THESE FACTS DO NOT SHOW THAT THEY WERE -- SHE WAS ACTING SOLELY FOR OR PRIMARILY OR A PRIVATE PURPOSE.

IT WAS -- AND THEY MAKE THE CONCLUSION SO I DON'T SEE WHERE THE CONFLICT IS.

I'LL START OFF, YOUR HONOR, QUITE CANDIDLY, THE STATE DIDN'T STIPULATE TO THESE -- THESE ARE NOT WRITTEN STIPULATIONS, THE STATE WANTED TO PRODUCE THE VICTIM AND THEIR -- ALL THE WITNESSES BUT THE TRIAL COURT

DECIDED.

IT APPEARS THE TRIAL COURT
WANTED TO APPLY A C4 PROCEDURE
TO --

WHATEVER I WASN'T QUOTING THE
STATE.

I'M SAYING WE HAVE -- THE FACTS
ARE RIGHT NOW AS WE HAVE TO
ACCEPT THEM IN THE 2nd DISTRICT.
UNDER THESE FACTS, THE TRIAL
-- 2nd DISTRICT STILL HEARD -- A
FINDING THAT SHE DID NOT HAVE A
DUAL PURPOSE, THAT SHE -- FIRST
OFF.

NOW YOU ARE GETTING INTO THE
MERITS.

FINISH WITH THE -- TREADWAY IS
NOT SUSTAINABLE BECAUSE IN
TREADWAY I GUESS WHAT YOU ARE
SAYING IS THAT IT WAS ACCESSED
AND THE CONTINUATION OF TURNING
OVER DOCUMENTS, ESSENTIALLY THAT
THAT IS THE SAME AS THIS CASE.

THIS CASE IS WHAT THE 4th
DISTRICT IN TREADWAY FOUND THAT
IS A VICTIM OF AN OFFENSE HAS A
DUAL PURPOSE, IN PROVIDING
INFORMATION TO THE POLICE TO
SUBSTANTIATE THEIR CLAIMS AND IN
OUR CASE, THERE ARE OBJECTIVE
PRIVATE INTERESTS FROM THE
15-YEAR-OLD VICTIM TO SHOW THAT
THE -- WE COULD ACCOMPLISH THE
OBJECTIVE IF THE TRIAL COURT
ALLOWED US TO BRINGING THE
VICTIM FORWARD AND ALLOWED HER
TO TESTIFY.

YOU HAVE SAID THAT A COUPLE
OF TIMES, IF THE TRIAL COURT HAD
ALLOWED IT.

WAS THERE AN OBJECTION MADE BY
THE ATTORNEYS TO THE TRIAL
COURT, WHETHER YOU CALL IT A
STIPULATED FACT, THE PROPER
FACTS, WHATEVER IT IS, DID THE
STATE OBJECT TO THAT PROCEDURE.
THE STATE -- IF YOU READ THE
TRANSCRIPT OF THAT HEARING, THE
TRIAL COURT MADE IT PERFECTLY
CLEAR THAT THIS IS A CASE BASED
ON THE FACTS AND HE WAS GOING TO
GO WITH THESE FACTS AND THE
STATE SAID, WELL, I HAVE MY
WITNESSES HERE, CAN WE PUT THEM

ON AND THEY ARE READY TO TESTIFY
AND HE SAID, NO, AND HE SAID CAN
I PROFFER WHAT THEY WOULD HAVE
SAID AND SO, WHAT WE HAVE IS
ONLY A PROFFER.

WE WERE NOT PERMITTED TO BRING
FORWARD TO DEVELOPMENT --
THE PROBLEM I HAVE WITH THE
PROFFER, EVEN, IS THAT ONE OF
THE STATEMENTS I BELIEVE YOU
WERE ABOUT TO MAKE IS THAT THIS
WITNESS WAS SIMILAR, THIS
VICTIM, SIMILAR TO THE TREADWELL
CASE AND SHE WAS THE ONE WHO
BROUGHT THE CASE BEFORE THE
POLICE -- WE DON'T HAVE THAT.
AND THESE PROFFERED OR
STIPULATED FACTS, THERE REALLY
ISN'T ANY INDICATION AS TO WHO
ACTUALLY WAS THE ONE WHO
CONTACTED THE POLICE.

I KNOW IN THE BRIEF, THERE IS
SOME DISCUSSION THAT A FRIEND OF
THE VICTIM, YOU KNOW, WENT TO
THE POLICE, AND THAT IS HOW THE
POLICE GOT INVOLVED.

BUT THE FACTS DON'T SUPPORT
THAT.

WELL, THE FACTS THAT --
HAPPENED AND THE FACTS IN OUR
CASE, DO SHOW THE POLICE WERE
NOTIFIED OF THIS ABUSE AND CAME
TO THE HOME OF THE VICTIM, TO
SPEAK TO HER TO SHE IF SHE'D
VERIFY WHAT HAD BEEN REPORTED TO
THEM BECAUSE THE THIRD-PARTY DID
REPORT THE OFFENSE.

DIS THAT DIFFERENCE FROM
TREADWAY WHERE THE -- IS THAT
DIFFERENT FROM TREADWAY WHERE
THE ACTUAL PERSON WENT TO THE
POLICE?

THAT GUY WENT TO THE POLICE
BECAUSE HE WAS CONCERNED ABOUT
HIS INVESTMENT.

ACTUALLY, IN THE CASE --
TREADWAY, THE THIRD PARTY DID
GO, HE WENT TO AN ATTORNEY AND
THE ATTORNEY THEN WENT TO THE
POLICE, THE VICTIM DID NOT GO TO
THE POLICE.

INITIALLY, WITHIN THROUGH HIS
ATTORNEY, SO, WE HAVE A
15-YEAR-OLD GIRL WHO WENT

THROUGH THE MOTHER OF HER BEST FRIEND TO GET TO THE POLICE TO GET TO --

AND THAT IS FACT -- THAT FACT IS IN THE RECORD.

IT WAS THAT THE POLICE WERE NOTIFIED.

I GUESS WE ARE DISCUSSING THE MERITS.

I MEAN, WE CAN READ TREADWAY AND DECIDE WHETHER THE FACTS ARE DISTINGUISHABLE OR NOT.

I HAVE A QUESTION ABOUT THIS EXCEPTION.

THIS WAS A WARRANTLESS SEARCH INTO YES.

NORMALLY IT IS THE STATE THAT HAS THE BURDEN OF PROVING THAT IT WAS STILL LEGITIMATE UNDER THE 4th AMENDMENT.

AND DO YOU AGREE THAT THE STATE HAS TO PROVE THAT THERE WAS A DUAL PURPOSE IN THIS CASE.

NO, YOUR HONOR, THE BURDEN AT THIS POINT IS ON THE PARTY THAT BROUGHT THE MOTION TO SUPPRESS.

I DON'T UNDERSTAND THAT.

BECAUSE IN EVERY OTHER CASE WHEN WHEN WE LOOK AT WARRANTLESS SEARCHES, THAT THE BURDEN OF SHOWING THAT IT WAS PROPER NOT WITHSTANDING THE ABSENCE OF A WARRANT IS ON THE STATE.

BECAUSE THE BURDEN IN THIS CASE IS NOT SHOWING THAT THE STATE COMMITTED A WARRANTLESS SEARCH, IS WHETHER THE DAUGHTER WAS A -- AN AGENT OF THE STATE.

DID SHE TRANSFORM FROM A PRIVATE -- YOU KNOW, PRIVATE SEARCH, BECAUSE -- PRIVATE SEIZURE, THERE WAS NO SEARCH AND THE POLICE ARRIVED AT THE TRAILER OF THE VICTIM.

WITH -- AND SHE --

THE DEFENDANT DURING THIS TIME, IS UNDER ARREST, RIGHT?

NO.

THE DEFENDANT ISN'T THERE?

HE IS THERE.

OUTSIDE THE HOME, AND THEY WERE TALKING TO HIM BUT HE WAS NOT UNDER ARREST.

AND WE WOULD BE, ALL THAT THE

STATE HAD TO DO WAS ASK THE DEFENDANT, MAY I SEARCH YOUR HOME, AND IF HE SAID YES, THAT WOULD HAVE ENDED THE CASE.

YES.

WELL, --

OR --

THE DAUGHTER.

OR IF HE HAD SAID NO, WE --

THE POLICE ARRIVE AT THE TRAILER NOT HAVING ANY IDEA THAT THERE IS EVIDENCE TO SUBSTANTIATE A SEXUAL BATTERY.

AND WHEN THEY SAID NO, WHAT THEN

--

ONCE THE VICTIM SAYS, I BELIEVE THERE MAY BE CONDOMS, WE USED CONDOMS WHEN WE HAVE SEX AND I BELIEVE THERE MAY BE SOME IN THE TRAILER AND AT THAT TIME THEY HAVE PROBABLE CAUSE TO GET A SEARCH WARRANT, IF THEY HAD TO AND IF -- WHAT HAPPENS IS AND EVEN THE TRIAL COURT FOUND, THEY ENGAGED IN PROPER POLICE INVESTIGATION AND ASKED THE VICTIM IS THERE ANYTHING TO SUBSTANTIATE YOUR CLAIM AND SHE'S THIS ONE WHO VOLUNTEERS, YES, AND I BELIEVE THERE MAY BE SOME INSIDE.

AND SHE THEN GOES IN, YOU KNOW, TO PACK HER BAGS BECAUSE SHE WAS TOLD CHILD PROTECTIVE INVESTIGATOR WILL TAKE HER TO A SHELTER.

AND WHAT DID THEY HAVE -- GIVE HER A BAG TO GET THE CONDOMS?

WELL, SHE WAS TOLD THAT IF SHE WANTED TO, SHE COULD BRING THOSE OUT.

THE NATURE OF THE ITEM THAT SHE WAS GOING TO BRING OUT THE POLICE GAVE HER A BAG TO PUT THEM IN, YES.

WELL, ACTUALLY, I THINK UNDER THIS COURT'S CASE LAW, THAT IF THIS CHILD HAD BEEN ASKED FOR CONSENT TO SEARCH THAT THE CHILD COULD HAVE GIVEN THE CONSENT.

AND -- BUT THAT WANT DONE, CORRECT.

WE DIDN'T ASK FOR CONSENT

BECAUSE WE DID NOT KNOW SHE WAS GOING TO BRING OUT THE CONDOMS, WE DIDN'T COMPEL HER, DIDN'T COERCE HER, THE POLICE ASKED -- SUGGESTED TO HER, IF SHE WANTED TO SHE COULD BRING THEM OUT -- BUT THE QUESTION IS, THE STATE DIDN'T BRING THIS AS A CONSENT CASE.

WE DON'T KNOW WHAT PART -- BASED ON THIS RECORD, BECAUSE -- WHETHER SHE HAD JOINT CONTROL OVER THE -- HOW MANY BEDROOMS AND WE DON'T KNOW AND THAT IS ANOTHER REASON, BECAUSE THE RECORD DOESN'T GIVE AN ALTERNATIVE BASIS TO SHOW THAT CONSENT WOULD HAVE BEEN APPROPRIATE.

UNDER THE STIPULATED FACTS THEY DID CONCEDE SHE HAD JOINT ACCESS TO THE BEDROOM, THE BEDROOM.

THERE IS ONE BEDROOM, YOUR HONOR, THAT SHE HAD JOINT ACCESS AND NEVER HAD BEEN DENIED ACCESS.

THAT WAS PART OF THE DEFENDANT'S STIPULATION, OF THE FACTS THEY BROUGHT FORWARD.

YOU KNOW, THE OFFICIAL CONSENT, IN THE SECOND DCA -- WE DIDN'T HAVE TO.

SHE BROUGHT THEM OUT FIRST. IF SHE HAD NOT BROUGHT THEM OUT, BEFORE SHE WAS YOU KNOW -- LED TO THE SHELTER SHE COULD HAVE GIVEN US -- AT LEAST CONSENT TO GO IN BUT BROUGHT THEM OUT AND IT IS A CONUNDRUM AT THIS POINT.

WE HAVE TO SHOW SHE ACTED WITHOUT A DUAL PURPOSE IN GOING AND GETTING THOSE.

YOU KNOW, REDUCED EXPECTATION OF PRIVACY BECAUSE SHE LIVED IN THAT HOUSE.

SHE HAD FULL ACCESS.

I UNDERSTAND YOUR ARGUMENT.

MY QUESTION IS WHETHER YOU MADE IT IN THE SECOND DCA.

WE TRIED, YOUR HONOR.

THE PROBLEM I'M HAVING, YOU ARE TRYING TO PEEL THE ONION AND YOU NEED TO ADDRESS THIS HEAD ON

AS TO -- DANCING AROUND WITH THE
LAW ENFORCEMENT ENCOURAGED OR
THE DO THIS IS DISINGENUOUS

MONINGER MONINGER.

THEIR CRIMINAL BEHAVIOR AS A
RESPONSE.

IF THERE ARE CRIMINAL CASES
ON DOMESTIC -- I AGREE.

THE JURY SHOULD BE THE ONES TO
LOOK AT THE WITNESS AND DECIDE
WHETHER OR NOT THEY'RE
CREDIBILITY AND AT WHAT LEVEL.
THE PROSECUTOR, THROUGHOUT ALL
OF THIS, IS TRYING TO CHANGE A
BURDEN OF PROOF TO BEYOND A
REASONABLE DOUBT TO WHETHER OR
NOT YOU HAVE A GUT FEELING
WHETHER YOU BELIEVE THE
WITNESSES, WHICH IS NOT THE
BURDEN OF PROOF.

BECAUSE THAT'S THE KIND OF CASE
HE HAS.

I WAS A CREATE -- THIS CASE IS A
WEAK CASE.

IT'S BASED UPON THIS TESTIMONY.

TEST TEST TEST TEST TEST TEST
TEST TEST TEST TEST TEST TEST
TEST.

I WOULD SUBMIT THAT EVERY
PETE OF TESTIMONY, ESPECIALLY --
AND WITH THAT, YOU'VE BOTH
USED YOUR TIME PLUS ADDITIONAL
TIME.

THANK YOU VERY MUCH.

WE'LL TAKE THE CASE UNDER
ADVISEMENT.

THE NEXT CASE ON THE CALENDAR IS
THE STATE OF FLORIDA VERSUS
MONINGER.

CHANDRA DASRAT.

GURALNICK LEWD AND LASCIVIOUS DE
NOVO EFFECTUATED EWALD
INEVITABLE DISCOVERY DISKEY
ASHLEY LOOMIS STATE
VERYIACCARINO IACCARINO
THE NEXT CASE ON THE CALENDAR
THIS MORNING IS THE STATE OF
FLORIDA VERSUS MONINGER, IF I'M
PRONOUNCING THAT CORRECTLY.
TEST TEST.

TEST TEST.

MAY IT PLEASE THE COURT, I REPRESENT THE STATE IN THIS APPEAL.

THE SECOND DISTRICT COURT IN THE CASE ERRED IN FINDING THE VICTIM CAN NEVER HAVE A DUAL --

BEFORE YOU --

WOULD YOU --

[LAUGHTER]

I THINK WE'RE BOTH PROBABLY GOING IN THE SAME DIRECTION. THE MORE I LOOK AT THE THIS CASE, I THINK YOU REALLY NEED TO GO FORWARD IS THERE REALLY CONFLICT HERE AND EXPLAIN IN SOME DETAIL, THE MORE I LOOK AT IT AND ANALYZE IT, IT SEEMS WE HAVE SOME DIVERGENT FACTUAL PREDICATES WE'RE DEALING WITH, AND DO WE REALLY HAVE JURISDICTION HERE.

JUSTICE, I THINK IN THIS CASE THE FACTS ARE MORE SIMILAR THAN THEY WOULD APPEAR ON IMMEDIATE GLANCE.

UNDER TREADWAY, WHICH IS WHERE WE'RE LOOKING FOR CONFLICT, THE OWNER OF AN INSURANCE AGENCY SETS UP AN ANNUITY PROGRAM.

ONE OF HIS AGENTS INVESTS HIS OWN MONEY IN IT, BUT ALSO MONEY FROM SOME OF HIS CLIENTS.

HE GOES INTO FILES HE DID NOT HAVE THE AUTHORITY TO LOOK AT TO CHECK ON THROUGH HIS CLIENT'S FILES AND --

BEFORE YOU GO FURTHER, DID ANY STATE AGENT ASK THAT PERSON TO GO INTO THE FILES?

NO, NOT AT THAT APPOINTMENT, YOUR HONOR.

BUT WHAT HAPPENS IS HE DOES GO INTO THOSE FILE, HE THEN COPIES FILES, GOES TO AN ATTORNEY, AND HIS ATTORNEY GOES TO THE STATE AND OFFERS THIS EVIDENCE.

ISN'T THAT SIGNIFICANTLY -- SIGNIFICANTLY DIFFERENT WHEN SOMEONE'S ACTING FROM ENCOURAGEMENT FROM THE STATE? IF IT HAD HAPPENED RIGHT THERE, I BELIEVE YOU'RE RIGHT,

BUT IT DIDN'T.

THIS PERSON ENGAGED IN A MONTH
LONG INVESTIGATION CONTINUING TO
PROVIDE EVIDENCE TO THE STATE
AGAINST HIS EMPLOYER.

WHO INITIATED THE CONTACT?

WAS IT THE AGENT INITIATING
CONTACT WITH THE STATE?
EXACTLY AS IN MONINGER.

WE HAVE A VICTIM INITIATING
CONTACT WITH THE STATE.

DID THE VICTIM SAY I'VE GOT
THESE DOCUMENTS?

YES.

AND WHETHER THIS CASE IS
RIGHT OR WRONG, DOESN'T THAT
MAKE THAT A DIFFERENT FACTUAL
CASE THAN THIS ONE?

NO BECAUSE IN THIS CASE IT
DIDN'T STOP THERE.

HE CONTINUED TO PROVIDE MORE
EVIDENCE, HE CONTINUED.

THIS WAS AN ONGOING EXCHANGE
OVER A SERIES WHERE THE AGENT
ACTUALLY PROVIDED MORE EVIDENCE.

THEN I GUESS, AND WE'RE
TALKING ABOUT THE FOURTH
AMENDMENT.

IF, IN THIS CASE, IN MONINGER,
IF THE YOUNG GIRL VICTIM HAD
HERSELF GONE AND WITHOUT
DISCUSSION OR URGING OR
ACTUAL -- OF THE POLICE AND
SEARCHED THE HOUSE AND BROUGHT
THIS TO THE POLICE, WE WOULDN'T
BE HERE BECAUSE SHE'S NOT A
STATE ACTOR.

WE'RE REALLY TALKING ABOUT AN
APPLICATION FOR PRINCIPLE OF LAW
WHICH IS -- [INAUDIBLE] THE
COUNTRY WHICH IS THAT IF A
PARTICULAR PRIVATE INDIVIDUAL
BECOMES, IN ESSENCE, AN AGENT,
THEN THE FOURTH AMENDMENT
APPLIES.

THAT'S THE PRINCIPLE.

NOW, I THINK WE'RE TALKING,
THEN, ABOUT AN APPLICATION OF
PRINCIPLES TO A VERY DISCREET
SET OF FACTS, AND THAT'S WHY I'M
STILL STRUGGLING TO SEE WHY YOU
FIND CONFLICT BETWEEN THE SECOND
AND THE --

FOURTH.

FOURTH DISTRICT.

THAT'S RIGHT.

BECAUSE THE PRINCIPLE IS WHAT
THEY'RE BOTH APPLYING.

NOW, THEY -- AND THE FACTS TO
ME, ALTHOUGH YOU SAY, WELL, IT'S
THE SAME BECAUSE WHAT I THOUGHT
YOU WERE SAYING WAS BECAUSE THE
AGENT KEPT ON TURNING OVER
INFORMATION.

IT'S NOT THE TURNING OVER OF
INFORMATION THAT IS THE FOURTH
AMENDMENT VIOLATION, IT'S THE
INSTIGATION AND ENCOURAGEMENT OF
THE POLICE EXPRESSLY IN THIS
CASE THAT MADE THE SECOND
DISTRICT SAY THIS, APPLYING
TREADWAY AND IN OUR VIEW BASED
ON THE STIPULATED FACTS, AND
THAT, OF COURSE -- YOU'RE
SMILING BECAUSE THAT REALLY GETS
THE STATE, YOU KNOW, HERE, THE
STIPULATED FACTS, THESE FACTS DO
NOT SHOW THAT THEY WERE, THAT
SHE WAS ACTING SOLELY OR
PRIMARILY FOR A PRIVATE PURPOSE.
AND THEY MAKE THAT CONCLUSION.
SO I DON'T SEE WHERE THE
CONFLICT IS.

MAY I START OFF, YOUR HONOR,
QUITE CANDIDLY, THE STATE DIDN'T
STIPULATE TO -- THIS IS NOT A
WRITTEN STIPULATION.

THIS WAS -- THE STATE WANTED TO
PRODUCE THE VICTIM AND ALL THE
WITNESSES, BUT THE TRIAL COURT
DECIDED, WANTED TO APPLY C4
PROCEDURE TO MOTION --
AND I WASN'T FAULTING THE
STATE.

WHAT I'M SAYING, THOUGH, IS THE
FACTS ARE RIGHT NOW AS WE HAVE
TO ACCEPT THEM IN THE SECOND
DISTRICT OPINION.

UNDER THESE FACTS THE TRIAL,
THE SECOND DISTRICT STILL ERRED
IN FINDING THAT SHE DID NOT HAVE
A DUAL PURPOSE, THAT SHE --
FIRST OF ALL --

NOW YOU'RE GETTING INTO THE
MERITS, AND I GUESS FINISH WITH
SAYING THAT TREADWAY ISN'T
ADMISSIBLE BECAUSE IN TREADWAY,

I GUESS WHAT YOU'RE SAYING IS IT WAS THE CONTINUATION OF TURNING OVER DOCUMENTS.

ESSENTIALLY WITH -- THAT THAT'S THE SAME AS THIS CASE.

THIS CASE IS, WHAT THE FOURTH DISTRICT IN TREADWAY FOUND IS THAT A VICTIM OF AN OFFENSE HAS A DUAL PURPOSE IN PROVIDING INFORMATION TO THE POLICE TO SUBSTANTIATE THEIR CLAIMS.

AND IN OUR CASE THERE ARE OBJECTIVE, PRIVATE INTERESTS FROM THE 15-YEAR-OLD VICTIM TO SHOW THAT WE COULD HAVE FOUND MORE SUBJECTIVE IF THE TRIAL COURT HAD ALLOWED US TO BRING THE VICTIM FORWARD.

YOU HAVE SAID THAT A COUPLE OF TIMES.

WAS THERE SOME OBJECTION MADE BY THE STATE TO THE TRIAL FOR WHETHER YOU CALL IT STIPULATED FACTS OR PROPER FACTS, WHATEVER IT IS, DID THE STATE OBJECT TO THAT PROCEDURE?

THE STATE, IF YOU READ THE TRANSCRIPT OF THAT HEARING, THE TRIAL COURT MADE IT PERFECTLY CLEAR THAT THIS WAS BASED ON THE FACTS, AND HE WAS GOING TO GO WITH THESE FACTS.

AND THE STATE SAID, WELL, I HAVE MY WITNESSES HERE, CAN WE PUT THEM ON?

AND HE SAID, NO, AND HE SAID, WELL, CAN I AT LEAST HAVE A PROFFER OF WHAT THEY WOULD HAVE SAID?

THE PROBLEM I HAVE WITH THE PROFFER, EVEN, IS THAT ONE OF THE STATEMENTS I BELIEVE YOU WERE ABOUT TO MAKE IS THAT THIS WITNESS WAS SIMILAR TO, THIS VICTIM WAS SIMILAR TO THE TREADWELL CASE IN THAT SHE WAS THE ONE THAT BROUGHT THIS CASE BEFORE THE POLICE?

WELL, WE DON'T HAVE THAT. IN THESE PROFFERED FACTS OR STIPULATED FACTS, THERE ISN'T ANY INDICATION AS TO WHO ACTUALLY WAS THE ONE THAT CONTACTED THE POLICE.

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

SO IS THAT DIFFERENT FROM TREADWAY WHERE THE ACTUAL PERSON WENT TO THE POLICE? THAT GUY WENT TO THE POLICE BECAUSE HE WAS CONCERNED ABOUT HIS INVESTMENT DEAL. ACTUALLY IN THIS CASE, IN TREADWAY, YEAH, A THIRD PARTY DID GO. HE WENT TO AN ATTORNEY, AND THE ATTORNEY THEN WENT TO THE POLICE. THE VICTIM DID NOT GO TO POLICE INITIALLY. WENT THROUGH HIS ATTORNEY. SO WE HAVE A 15-YEAR-OLD GIRL WHO WENT THROUGH THE MOTHER OF HER BEST FRIEND TO GET TO -- AND THAT FACT IS IN THE RECORD? IT WAS JUST THAT THIS POLICE THE POLICE WERE NOTIFIED. IS IT YOUR -- I GUESS WE'RE JUST DISCUSSING THE MERITS. I HAVE A QUESTION ABOUT THIS EXCEPTION. THIS WAS A WARRANTLESS SEARCH. YES. NORMALLY, IT IS THE STATE THAT HAS THE BURDEN OF PROVING THAT IT WAS STILL LEGITIMATE UNDER THE FOURTH AMENDMENT. DO YOU AGREE THAT THE STATE HAD TO PROVE THERE WAS A DUAL PURPOSE IN THIS CASE? NO, YOUR HONOR. THE BURDEN AT THIS POINT IS ON

THE PARTY THAT BROUGHT THE MOTION TO SUPPRESS.

SEE, I DON'T UNDERSTAND THAT BECAUSE IN EVERY OTHER CASE WHEN WE LOOK AT WARRANTLESS SEARCHES THAT THE BURDEN OF SHOWING THAT IT WAS PROFFERED, NOTWITHSTANDING THE ABSENCE OF A WARRANT, IS ON THE STATE. BECAUSE THE BURDEN IN THIS CASE IS NOT SHOWING THAT THE STATE COMMITTED A WARRANTLESS SEARCH, IT'S WHETHER THE DAUGHTER WAS A AGENT OF THE STATE.

DID SHE TRANSFORM FROM A PRIVATE, YOU KNOW, AS A PRIVATE SEARCH BECAUSE -- I MEAN, A PRIVATE SEIZURE.

THERE WAS NO SEARCH.

THE POLICE ARRIVED AT THE TRAILER OF THE VICTIM WITH THE IDEA -- AND SHE CONFIRMED -- THE DEFENDANT DURING THIS TIME IS UNDER ARREST, RIGHT? NO.

THE DEFENDANT ISN'T THERE?

HE IS THERE.

HE'S OUTSIDE THE HOME.

THEY WERE TALKING TO HIM, BUT HE WAS NOT UNDER ARREST.

AND HE WOULD BE IF ALL THE, ALL THAT THE STATE HAD TO DO WAS ASK THE DEFENDANT, MAY I SEARCH YOUR HOME?

AND IF HE SAID, YES, THAT WOULD THEN HAVE ENDED THIS CASE?

YES.

WELL, OR IF THEY --

OR --

OR ASK THE DAUGHTER.

OR IF HE HAD SAID NO -- THE POLICE ARRIVED AT THE TRAILER NOT HAVING ANY IDEA THERE'S EVIDENCE TO SUBSTANTIATE A SEXUAL BATTERY.

WHEN THEY SAID NO, THEN --

WE KNOW, ONCE THE VICTIM SAYS I BELIEVE THERE MAY BE CONDOMS, WE HAD CONDOMS WHEN WE HAVE SEX, AT THAT TIME THEY HAVE PROBABLE CAUSE TO GET A SEARCH WARRANT.

WHAT HAPPENS IS, AND EVEN THE TRIAL COURT FOUND THEY ENGAGE IN

IMPROPER POLICE INVESTIGATION,
AND SHE'S THE ONE WHO
VOLUNTEERS, YES, WE USE CONDOMS.
I BELIEVE THERE MAY BE SOME
INSIDE.

SHE THEN GOES IN TO PACK HER
BAGS BECAUSE SHE'S TOLD HE'S
GOING TO A SHELTER.

AND WHAT DID THEY HAVE, DID
THEY GIVE HER A BAG TO GET THE
CONDOMS?

SHE WAS TOLD THAT IF SHE
WANTED TO, SHE COULD BRING THOSE
OUT, BUT THE NATURE OF THE ITEMS
SHE WAS GOING TO BRING OUT, THE
POLICE DID GIVE HER A BAG TO PUT
THEM IN, YES.

WELL, ACTUALLY I THINK UNDER
THIS COURT'S CASE LAW THAT IF
THIS CHILD HAD BEEN ASKED FOR
CONSENT TO SEARCH, THAT THE
CHILD COULD HAVE GIVEN THE
CONSENT.

YES, YOUR HONOR.

BUT THAT WASN'T DONE,
CORRECT?

WE DIDN'T ASK FOR CONSENT
BECAUSE WE DID NOT KNOW IF SHE
WAS GOING TO BRING OUT THE
CONDOMS.

WE DIDN'T COMPEL HER, WE DIDN'T
COERCE HER, THE POLICE SUGGESTED
TO HER IF SHE WANTED TO, SHE
COULD BRING THEM OUT.

BUT THE STATE DIDN'T BRING
THIS AS A CONSENT CASE.

WE DON'T KNOW WHAT PART OF --
BASED ON THIS RECORD.

RIGHT, BECAUSE --

WHETHER SHE HAD JOINT CONTROL
OVER THIS HOUSE, HOW MANY
BEDROOMS, WE DON'T KNOW IT.

AND THAT'S ANOTHER REASON THIS
CASE -- BECAUSE THE RECORD
DOESN'T GIVE AN ALTERNATIVE
BASIS TO SHOW CONSENT --

UNDER THE STIPULATED FACT
THEY DID CONCEDE SHE HAD JOINT
ACCESS TO THE BEDROOM, THE
BEDROOM.

THERE'S ONE BEDROOM, YOUR HONOR.
SHE HAD JOINT ACCESS, AND SHE'D
NEVER BEEN DENIED ACCESS.

THAT WAS PART OF THE DEFENDANT'S

STIPULATION OF FACTS THEY
BROUGHT FORWARD.

YOU KNOW OUR ISSUE OF CONSENT
IN --

SHE BROUGHT THEM OUT FIRST.
IF SHE HAD NOT BROUGHT THEM OUT
BEFORE SHE WAS, LEFT FOR THE
SHELTER, SHE COULD HAVE GIVEN
THE POLICE CONSENT TO GO IN, BUT
SHE BROUGHT THEM OUT SO IT'S
SORT OF A CONUNDRUM AT THAT
POINT.

WE HAVE TO SHOW SHE ACTED
WITHOUT A DUAL NUMBER GOING AND
GETTING THOSE.

IT'S A REDUCED EXPECTATION OF
PRIVACY BECAUSE SHE LIVE INSIDE
THAT HOUSE, SHE HAD FULL ACCESS.

I UNDERSTAND YOUR ARGUMENT,
MY QUESTION IS WHETHER YOU MADE
IT IN THE SECOND DCA.

WE TRIED, YOUR HONOR.

THE PROBLEM I'M HAVING WITH
TRYING TO, YOU'RE TRYING TO PEEL
THE ONION.

DANCING AROUND WITH THE LAW
ENFORCEMENT ENCOURAGED HER TO DO
THIS, I THINK, IS REALLY VERY
DISINGENUOUS.

OF COURSE THEY DID.

THEN THEY GAVE HER A BAG.

ASSUMING THOSE FACTS, THAT'S HOW
THIS ARGUMENT NEEDS TO FLOW
RATHER THAN TRYING TO PEEL THE
ONION DIFFERENT WAYS.

THEY REALLY DIDN'T, I MEAN,
REALLY AS ANY THINKING ADULT
THERE'S A YOUNG PERSON THERE,
AND THERE'S SOMETHING HAS
OCCURRED, AND THERE'S EVIDENCE
INSIDE, AND THE POLICE, WELL,
YOU CAN GET THOSE ON YOUR WAY
OUT, AND HERE'S A BAG TO PUT
THEM IN.

TO STAND HERE AND ARGUE TO THIS
COURT THAT THAT'S REALLY NOT, I
MEAN, THAT'S JUST NOTHING,
THAT'S WHY WE NEED TO UNDERSTAND
THIS CASE, AND WE REALLY NEED TO
GET TO WHAT THIS CASE IS ABOUT
RATHER THAN ALL THESE TANGENTS.
YOUR HONOR, YOU'RE RIGHT.

WHAT WE HAVE, THIS HAS TO BE
ABOUT SPECIFIC FINDING.

WHAT WE HAVE IS A 15-YEAR-OLD CHILD WHO HAS BEEN SEXUALLY ABUSED BY HER FATHER FOR EIGHT YEARS.

IT'S NOT -- WE NEED TO HAVE A LITTLE, A LITTLE FOUNDATION HERE.

THAT'S NOT THIS COURT LOOKING AT THE FOURTH AMENDMENT IS NOT CONDONING WHAT MAY OR MAY NOT HAVE HAPPENED, AND THAT'S AN INAPPROPRIATE ARGUMENT TO TRY TO SET THIS TONE.

THE QUESTION IS WE HAVE LAW ENFORCEMENT THAT COME TO A SCENE, THAT SOMETHING HAS OCCURRED AND GO FROM THERE.

BUT DON'T WE HAVE TO ALSO LOOK AT THE VICTIM THEMSELVES? I MEAN, IT'S NOT LIKE THE POLICE CAME TO YOUR HOUSE, YOUR HONOR, OR TO THE HOUSE OF AN ADULT AND SAID, YOU KNOW, IS THERE ANY EVIDENCE --

YOU CAN CONTINUE ON ANY WAY YOU WANT.

I'M TRYING TO GET -- IT'S NOT GOING TO SERVE YOUR PURPOSE.

THAT'S MY ONLY CONCERN.

I DON'T THINK THIS IS AN EMOTIONAL ARGUMENT, I THINK THIS IS AN OBJECTIVE ARGUMENT.

YOU LOOK AT THE COMMON KNOWLEDGE OF A MINOR CHILD THAT THE POLICE TALKED TO.

SHE WASN'T TOLD SHE HAD TO.

THERE WAS NO COMPELLING, THERE WAS NO COERCING.

I DON'T KNOW --

DOES THE, DO THE CASES REQUIRE THAT TYPE OF COERCION, DIRECTION, COMPULSION?

OR DOES IT SAY WHERE THE STATE HAS ENCOURAGED, INITIATED THE ACTION THEN IT'S STATE CONDONED AND IT'S AN ILLEGAL SEARCH?

THE COOLIDGE CASE GIVES YOU THE COMPELLING, COERCE LANGUAGE.

IN THE TREADWAY THEY FOUND THAT EVEN WHERE THERE IS A MODICUM OR A PORTION WHETHER GOVERNMENT ENCOURAGES THAT IF THE VICTIM HAS A DUAL INTEREST, IT STILL CAN COME IN AS A PRIVATE SEARCH,

YOUR HONOR.
EVEN WHERE THE GOVERNMENT HAS
ENCOURAGED --
UNDER YOUR ARGUMENT ANY TIME
IT'S THE VICTIM OF A CRIME, THEN
WE WOULD HAVE TO FIND THAT THERE
IS A DUAL PURPOSE.
NO, YOUR HONOR.

[INAUDIBLE]
EXPLAIN THE DIFFERENCE IN
THIS CASE THEN.
SHE WAS THE VICTIM OF THE CRIME,
AND YOU'RE SAYING BECAUSE OF
THAT OR WHAT OTHER REASON DOES
SHE HAVE OTHER THAN BEING THE
VICTIM TO HAVE CRIME DO YOU SAY
SHE HAD A DUAL PURPOSE?
ON THE CASE OF THIS RECORD WE
HAVE A 15-YEAR-OLD MINOR CHILD.
FATHER IS THE ALLEGED
PERPETRATOR OF THE OFFENSE, AND
IF HER CASE IS NOT PROVEN AND
EVEN IF SHE'S SHELTERED AT THAT
POINT, SHE COULD FACE THE
REAL-LIFE PROBABILITY OF BEING
PUT BACK IN THE CUSTODY OF HER
FATHER.
SHE'S ONLY 15.

I MEAN, THERE'S AN OBJECTIVE
INTEREST RIGHT THERE.
IS THAT ARTICULATED AT SOME
POINT BY HER?
I MEAN, BECAUSE MOST OF THE TIME
WHEN WE SEE THESE DUAL PURPOSE
CASES, THERE'S BEEN AN
ARTICULATION OF WHAT THE VICTIM
OR -- [INAUDIBLE] MAY HAVE BEEN.
DO WE HAVE ANY ARTICULATION IN
THIS RECORD OF THIS VICTIM'S
PURPOSE?

NO, WE DON'T BECAUSE WE
DIDN'T HAVE, WE DID NOT ALLOW
HER TO TESTIFY.
WE WERE NOT GIVEN THE
OPPORTUNITY FOR HER TO TESTIFY
AT THE TRIAL COURT.
WELL, BUT THE JUDGE GIVE YOU
AN OPPORTUNITY TO PROFFER THE
TESTIMONY WHICH IS PROBABLY
BETTER THAN THE ACTUAL TESTIMONY
BECAUSE IT'S NOT BEING
CROSS-EXAMINED, AND THE DEFENSE

AGREED TO IT.

YOU CAN SAY WHATEVER YOU WANT IN THE PROFFER, THIS IS WHAT SHE'S GOING TO TESTIFY, TO YOU COULD HAVE PUT ANYTHING YOU WANTED TO TO JUSTIFY YOUR POSITION.

TO SAY THERE'S NO TESTIMONY, I THINK IT WOULD HAVE BEEN MORE DETRIMENTAL TO HAVE HER SUBJECT TO CROSS-EXAMINATION.

WE DON'T KNOW THAT, YOUR HONOR.

YOU DIDN'T SAY, JUDGE, WE WANT HER TO TESTIFY, LET HER BE SUBJECT TO CROSS-EXAMINATION, WE THINK THAT WILL BE MORE POWERFUL THAN TO PROFFER.

THE TRIAL COURT MADE IT CLEAR THEY DIDN'T NEED TO HEAR TESTIMONY.

AND AT THAT POINT, YOU DIDN'T NEED TO HEAR TESTIMONY, THE STATE WANTED TO PUT THEM ON, INFORMED THE COURT THAT THEY WERE THERE, AND THE --

AND SO DID YOU SAY, WELL, WE WOULD PROFFER, THEN, THAT THE VICTIM WOULD TESTIFY, THAT SHE WAS ACTING IN HER PRIVATE INTERESTS BECAUSE SHE DIDN'T WANT TO BE LIVING IN THE SAME HOUSE WITH THIS FATHER.

AND FINDING THESE CONDOMS AND GIVING THEM TO POLICE WOULD PROVE HER CASE, AND THEN SHE WOULD BE ABLE TO HAVE, TO GO TO SHELTER SOMEWHERE ELSE AND NOT HAVE TO LIVE WITH THAT FATHER.

DID YOU PROFFER THAT?

NO, YOUR HONOR.

BUT YOU COULD HAVE.

IF WE KNEW WHAT HER SUBJECTIVE REASONS WERE --

I ASSUME YOU --

THE POLICE DIDN'T SHOW UP, SHE INITIATED THE CONTACT WITH THE POLICE.

I ASSUME YOU INTERVIEWED THE VICTIM BEFORE?

THE OFFICER DID.

NO, I'M SAYING BEFORE THE SUPPRESSION HEARING.

I ASSUME THAT A PROSECUTOR, AS NORMALLY WOULD DO BEFORE A

HEARING, WOULD INTERVIEW THE WITNESS.

YES, YOUR HONOR.

AND SO IF YOU COULD HAVE GOTTEN HER SUBJECTIVE FEELINGS FROM THAT SITUATION, AT THAT POINT YOU COULD HAVE PROFFERED IT TO THE JUDGE.

IF THEY KNEW THAT WAS AN IMPORTANT THING TO, YOU KNOW, DEVELOP.

AS A SUBJECTIVE REASON, WHY WOULD --

WELL, YOU'RE THE ONE THAT'S SAYING THAT PART OF THE LAW IS WHETHER YOU'RE ACTING IN YOUR OWN PRIVATE INTEREST.

SO THAT SEEMS TO ME WOULD SUPPORT YOUR POSITION.

WELL, YES, IT WOULD HAVE.

AND IF THE TRIAL -- AND THE TRIAL COURT, THE ONUS WAS ON THE DEVELOP, I MEAN, THE DEFENDANT WAS SAYING THAT SHE WASN'T, SHE WAS ACTING SOLELY AS A GOVERNMENT AGENT.

AND AT THAT POINT WE NEEDED TO HEAR TESTIMONY FROM THE VICTIM.

AND IT HAS TO BE A SUBJECTIVE CASE BY CASE IF YOU'RE GOING TO ASK, WHAT WAS YOUR SUBJECTIVE REASON FOR GIVING THAT?

DID YOU EVER SAY DURING THE HEARING, JUDGE, AT THIS POINT THE DEFENSE IS ARGUING THAT SHE WAS ACTING IN THE GOVERNMENT'S INTEREST, AT THIS POINT WE REALLY NEED TO PUT ON THE TESTIMONY OF THE VICTIM?

NO, YOUR HONOR.

IF YOU LOOK AT THE RECORD, THERE WAS, THE STATE STATED BASED ON THEIR READING OF THE MOTION TO SUPPRESS THERE WAS AN ERRONEOUS ALLEGATION THAT SHE HAD ALREADY BEEN REMOVED FROM MR. MONINGER'S HOME PRIOR TO HER GETTING CLOTHING, THAT SHE HAD ALREADY BEEN AT SHELTER.

SO THE STATE WAS GOING FORWARD UNDER THE BELIEF THEY THOUGHT SHE DIDN'T HAVE THE AUTHORITY TO ENTER INTO THE HOME AT ALL BECAUSE SHE'D ALREADY BEEN

REMOVED, AND THE STATE SAID THAT ON THE RECORD.

MY READING OF THIS MOTION, YOUR HONOR, IS THAT THEY'RE ALLEGING SHE DIDN'T HAVE ACCESS ANYMORE TO THAT HOUSE BECAUSE PRIOR TO HER MEETING WITH THE POLICE, SHE WAS NO LONGER LIVING IN THE RESIDENCE.

AND THE STATE SAID TO THE TRIAL COURT, THAT'S HOW I READ THIS MOTION, AND THIS IS WHAT I UNDERSTAND THE MOTION TO BE.

AND THE TRIAL COURT SAID, WELL, THIS IS A FACTUAL MATTER BASED ON WHAT'S STIPULATED IN THE MOTION TO SUPPRESS, I'M GOING TO GO ON THOSE FACTS, AND IT'S GOING TO BE AN EASY ISSUE FOR ME.

AND YOU'LL SEE THEY DEVELOP INSIDE A DIFFERENT WAY.

THE STATE THOUGHT THAT THE WHOLE MOTION WAS THAT SHE HAD NO AUTHORITY TO BE IN THE HOME.

WITH OUR ASSISTANCE, YOU'VE USED ALL YOUR TIME, PLUS ADDITIONAL TIME.

SO GO AHEAD AND BRING YOUR ARGUMENT TO A CONCLUSION FOR YOUR LAST STATEMENTS.

WELL --

I'LL GIVE YOU A MINUTE.

THANK YOU.

I WOULD ASK THAT THIS COURT FIND THAT THE SECOND DISTRICT ERRED IN FINDING THAT THE VICTIM DID NEVER HAVE A DUAL PURPOSE.

MAY IT PLEASE THE COURT, MY NAME IS RON GURALNICK, AND I REPRESENT MR. MONINGER IN THIS CASE.

I THINK THE KEY HERE IS THE -- AS YOUR HONOR INDICATED, IT GAVE THE STATE AN ADVANTAGE BECAUSE WE HAVE TO ASSUME THEY KNEW WHAT THE INFORMATION WAS ANT, THEY PREPARED FOR THE MOTION, THEY KNEW THE FACTS OF THE CASE, THEY DID NOT PROFFER ANYTHING TO THE COURT, AND THAT WAS INDICATED IN THE TRIAL JUDGE'S MOTION TO SUPPRESS.

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

I ASSUME FROM YOUR COMMENTS THAT YOU AGREE THE TEST THAT SHOULD APPLY. THAT I WHAT? THAT YOU AGREE WITH WHAT TESTS SHOULD BE APPLIED IN THESE CASES.

YES, I DO, ABSOLUTELY. THAT'S THE STATE V. TREADWAY, AND THAT IS THAT THE STATE CANNOT SECURE EVIDENCE THAT THEY HAVE FROM THE INTERIOR OF A HOME WHERE THEY HAVE NOT SORT A SEARCH WARRANT, NEVER EVEN ATTEMPTED TO GET A SEARCH WARRANT. BOTH THE FATHER AND THE DAUGHTER WERE PRESENT, AND NEITHER ONE OF THEM WAS ASKED FOR CONSENT TO ENTER THE HOME OR SEARCH THE HOME.

WAS THERE PROBABLE CAUSE AT THAT POINT TO ARREST THE FATHER? AT THE TIME THAT THE POLICE CAME AND THE DAUGHTER ACKNOWLEDGED THAT THERE HAD BEEN SEXUAL ACTIVITY, WAS THERE, THEN, PROBABLE CAUSE TO ARREST

MR. MONINGER?

I WOULD HAVE TO SAY, YOUR HONOR, THAT WHEN THE DAUGHTER SAID THERE WAS SEXUAL ACTIVITY AND SHE'S A 15-YEAR-OLD MINOR AND THAT'S HER FATHER, THAT THEY HAD PROBABLE CAUSE.

I WOULD SAY THAT.

IF THEY HAD PROBABLE CAUSE TO ARREST HIM AT THAT POINT, COULD THEY HAVE SEARCHED THE RESIDENT PURSUANT TO THE ARREST?

NO.

THEY HAVE TO GET A SEARCH WARRANT.

OR THEY WOULD ALSO THEN HAVE PROBABLE CAUSE TO GET THE SEARCH WARRANT.

THEY WOULD HAVE HAD PROBABLE CAUSE TO GET THE SEARCH WARRANT IF THEY ATTEMPTED TO DO SO, BUT THEY NEVER DID.

WHAT THEY DID WAS, THEY SAID GO INTO THE HOUSE, YOUNG LADY, GATHER YOUR CLOTHING, AND, OH, AND BY THE WAY, IS THERE ANYTHING IN THE PREMISES THAT COULD SUBSTANTIATE YOUR ALLEGATION?

SHE SAID, THERE'S TWO CONDOMS IN A TRASH CAN IN MY FATHER'S BEDROOM IN HIS HOUSE.

WHAT I WAS GETTING AT --

YES.

WAS PROBABLE CAUSE TO ARREST THE FATHER AND THEN PROBABLE CAUSE TO HAVE GOTTEN A SEARCH WARRANT FOR THE HOUSE.

IF THE POLICE COULD, IN FACT, HAVE AT THAT POINT GOTTEN A SEARCH WARRANT, DOES THIS THEN FALL UNDER THE INEVITABLE DISCOVERY?

THEY WERE TAKING THE CHILD OUT OF HOME, THE FATHER'S GOING TO BE ARRESTED, A SEARCH WARRANT COULD HAVE ISSUED, AND THEY COULD HAVE HAD, IN FACT, FOUND THIS EVIDENCE PURSUANT TO THE SEARCH WARRANT?

LET ME TRY AND ANSWER THAT QUESTION.

UNDER THE INEVITABLE DISCOVERY

DOCTRINE, THE STATE WOULD HAVE TO SHOW TWO THINGS.

ONE, THAT THEY MADE SOME ATTEMPT TO GET A SEARCH WARRANT SO THAT THEY COULD LEGALLY ENTER THE PREMISES, AND THEY NEVER DID.

NOT ONLY THAT, BUT --

WHAT CASE ACTUALLY SAYS THAT? I'M SORRY?

WHAT CASE SAYS THAT YOU HAVE TO BE IN THE PROCESS OF GOING TO GET THE WARRANT BEFORE THE INEVITABLE DISCOVERY DOCTRINE APPLIES?

YOUR HONOR, PLEASE FORGIVE ME FOR NOT REMEMBERING THE EXACT CASE.

IT IS MENTIONED IN MY BRIEFS, IN THE BRIEFS.

BUT THERE'S ANOTHER THING THAT THEY WOULD HAVE TO DO.

THE STATE WOULD HAVE TO AT THE HEARING ON THE MOTION TO SUPPRESS SHOW THAT BY A PREPONDERANCE OF THE EVIDENCE, IN THE CASE -- I'M SORRY, I CAN'T REMEMBER THE NAME OF THE CASE, BUT THEY WOULD HAVE TO SHOW BY THE PREPONDERANCE OF THE EVIDENCE THAT THEY COULD HAVE FOUND THIS EVIDENCE IN THE HOUSE, AND THAT WAS NEVER ATTEMPTED AT THE MOTION TO SUPPRESS HEARING.

SO WHAT HAVE WE GOT?

WE'VE GOT NO SEARCH WARRANT, NO ATTEMPT TO GET ONE, WE HAVE NO CONSENT FROM EITHER THE YOUNG LADY OR HER FATHER TO ENTER THE PREMISES AND SEARCH THE PREMISES.

COULD SHE ACTUALLY, WITH THE PARENT ACTUALLY PRESENT, IS THE MINOR STILL -- IF THE PARENT IS THERE, DOES THE POLICE HAVE TO ASK THE PARENT, OR CAN THE POLICE CIRCUMVENT THE PARENT GO DIRECTLY TO THE MINOR?

I BELIEVE THAT THE POLICE, IT WOULD BE THE PARENT OR THE PERSON THAT ACTUALLY OWNS THE HOUSE THAT THEY WOULD HAVE TO ASK.

AND, REMEMBER, SHE WASN'T EVEN

IN THE HOUSE AT THAT TIME
BECAUSE SHE WAS STAYING WITH A
FRIEND'S MOTHER WHO ORIGINALLY
NOTIFIED THE POLICE THAT THAT
COMPLAINT HAD BEEN MADE TO HER.
SO I BELIEVE THEY WOULD HAVE HAD
TO ASK THE FATHER, BUT REALLY,
RESPECTFULLY, IT'S NEITHER HERE
NOR THERE BECAUSE THEY NEVER
ASKED THE FATHER, THEY NEVER
ASKED THE DAUGHTER, AND SO THAT
ISSUE IS NOT PRESENT IN THIS
CASE.

THEY DIDN'T DO IT, IT'S AS
SIMPLE AS THAT.

AND FOR SURE WHAT THEY DID DO
WAS THEY SAID, GO INTO THE HOUSE
AND BRING OUT YOUR BELONGINGS,
AND, BY THE WAY, IS THERE
ANYTHING THAT COULD SUBSTANTIATE
THE FACT OF THIS ALLEGATION?

THIS CASE HAS BEEN --

I'M SORRY, YOUR HONOR?

THIS CASE HAS ESSENTIALLY
BEEN IN LIMBO SINCE, WHILE THIS
MOTION TO SUPPRESS IS GOING ON?
THAT'S CORRECT.

IT WENT TO THE SECOND DISTRICT
COURT OF APPEAL, THEY AFFIRMED
BASED UPON --

WAS THE, WERE THE CONDOMS
EVER TESTED?

I'M SORRY?

WAS DNA EVER DONE?

LET'S PUT IT THIS WAY, I

WASN'T THE TRIAL LAWYER AT THE
TIME, JUDGE.

I'M HANDLING THE CASE BEFORE THE
SUPREME COURT.

I DON'T KNOW WHETHER THEY
ACTUALLY -- BECAUSE THE CASE
STOPPED ONCE THE MOTION WAS
GRANTED.

I DON'T KNOW WHETHER THEY TESTED
IT OR NOT, BUT CERTAINLY IF THE
CONDOMS ARE SUPPRESSIBLE FOR THE
REASONS SET FORTH BEFORE THIS
COURT, SO WOULD THE DNA.

BUT IN OTHER WORDS, THIS IS
AN EVENT THAT OCCURRED IN
DECEMBER OF 2004, AND HERE WE
ARE IN 2008.

YES.

AND THE MATTER HAS JUST BEEN

IN LIMBO.

YES, IT HAS BECAUSE WE
HAVEN'T GOTTEN PAST THE MOTION
TO SUPPRESS ISSUE.

WELL, THE STATE, CERTAINLY
THIS WOULD BE A QUESTION FOR THE
STATE.

IF THE CONDOMS WITH TESTED AND
NO DNA WAS FOUND, THE VALUE OF
THIS EVIDENCE WOULD HAVE BEEN
MARGINALIZED ANYWAY.

WE DON'T KNOW THAT.

THAT'S CORRECT, JUDGE.

THAT IS CORRECT.

WELL, THE STATE STILL HAS,
OBVIOUSLY, THE TESTIMONY OF THE
VICTIM.

YES, THEY DO.

WHICH IS --

YES, THEY DO.

IT'S JUST A MATTER THAT THE
STATE HAS NOT CHOSEN TO BRING IT
TO TRIAL, I ASSUME.

UNTIL THIS IS RESOLVED.

THAT'S CORRECT.

THAT IS CORRECT.

ALL RIGHT.

BUT THEY HAVE AT LEAST

TESTIMONY --

WELL, LET'S SAY THAT THE
YOUNG LADY SAID, WELL, WE
RECENTLY HAD SEX, AND THESE ARE
THE CONDOMS THAT MY FATHER USED,
AND NO DNA WAS TAKEN OF THE
FATHER FROM THOSE EXHIBITS, I
WOULD HAVE TO SAY THAT HER
CREDIBILITY WOULD BE LESSENERED
EXTREMELY.

WELL, IT'D BE PRETTY IRONIC
IF THESE GET TESTED AND SOMEBODY
ELSE'S DNA IS ON THEM.

IT WOULD BE HELPFUL, THEN, TO
THE DEFENSE, NOT TO THE STATE.

AGAIN, THIS IS ALL VERY
SPECULATIVE, WE'RE DEALING WITH
A DISCREET LEGAL ISSUE, BUT IT
ACTUALLY, AS I THINK ABOUT IT,
COULD HELP THE DEFENSE THE IT
DIDN'T -- IF IT DIDN'T REVEAL
YOUR CLIENT'S DNA OR IT SHOWS
SOMEBODY ELSE'S DNA INTERMIXED.

I COULDN'T POSSIBLY DENY.

THAT WE DON'T KNOW WHAT THE DNA

WOULD SHOW.

WE'RE STARTING TO GET FAR
AFIELD.

YOU SAID A MOMENT AGO PART OF
THE FACTS WERE, AND AGAIN THIS
IS PART OF THE DIFFICULTY I'M
HAVING WITH COMPARING THIS TO
THE TREADWAY CASE.

THE OTHER CASE IS THAT WE,
APPARENTLY, DON'T HAVE A CASE
HERE WHERE THERE WAS TESTIMONY
AND EVIDENCE OFFERED, AND THE
JUDGE HAS TO MAKE EVALUATIONS
ABOUT INFERENCES AND CREDIBILITY
AND, YOU KNOW, AND THEN FINDINGS
OF FACT, YOU KNOW, BASED ON --
DISPUTED IN THE EVIDENCE.

BUT YOU SAID THE VICTIM WAS NOT
LIVING --

WHAT?

WAS NOT LIVING IN THE MOBILE
HOME RESIDENCE AT THE TIME?

NO, AS I UNDERSTAND IT --

WELL, AS YOU UNDERSTAND IT.

WHAT I'M LOOKING FOR IS IN
THE -- WAS THIS A STIPULATION OR
A PROFFER OR JUST EXACTLY WHAT
WAS THIS?

IN TERMS OF GETTING INFORMATION
TO THE TRIAL JUDGE FOR THE TRIAL
JUDGE TO MAKE A RULING?

WAS THERE A STIPULATION BETWEEN
THE TWO SIDES THAT, JUDGE, WE
STIPULATE TO THESE FACTS THIS IS
WHAT WOULD HAVE BEEN ESTABLISHED
IF WE DID HAVE A HEARING IN
WHICH THE OFFICERS AND THE
VICTIM AND WHOEVER ELSE
TESTIFIED?

OR WAS THERE A PROFFER BY EACH
SIDE?

HOW DO WE GET TO THIS, THESE
FACTS THAT THE TRIAL COURT FACED
A RULING ON?

YOUR HONOR, TO ANSWER THAT
QUESTION I DON'T WANT TO MAKE A
MISSTATEMENT, OKAY?

AND IT COULD HAVE BEEN THE
PROFFER FROM EITHER THE STATE OR
THE DEFENSE, I REALLY DON'T
RECALL.

I MUST SAY MOST RESPECTFULLY I
DON'T THINK THAT THAT HAS
BEARING ON THE ISSUE BEFORE THIS

COURT, RESPECTFULLY.

AND THAT IS THAT THIS GIRL WAS
USED AS A POLICE AGENT TO
ACQUIRE THAT WHICH THEY COULDN'T
LEGALLY ACQUIRE --

WELL, CLARIFY FOR ME, THOUGH,
WHAT THE STATUS OF HER RESIDENCE
WAS IF THERE IS ANY INFORMATION
IN THE PROFFER, STIPULATION,
WHATEVER THERE WAS.

WHAT IS SET OUT IN THE PROFFER
ABOUT WHETHER SHE WAS RESIDING
AT THE TIME?

HE TOLD HER GIRLFRIEND, HER
BEST GIRLFRIEND, ABOUT WHAT
HAPPENED.

THAT GIRLFRIEND TOLD HER MOTHER.
THE GIRLFRIEND'S MOTHER.

BUT THAT ACTUALLY WAS
INCLUDED IN THE PROFFER?
IS THAT IN THE PROFFER?

I'M NOT SURE, JUDGE.

I DON'T WANT TO MISSTATE.

ACCORDING TO THE SECOND DCA,
THE DEPARTMENT RESPONDED TO
MONINGER'S RESIDENCE WHERE HIS
DAUGHTER ALSO LIVED.

CPI MORGAN WAS PRESENT AND WAS
GOING TO REMOVE THE DAUGHTER TO
SHELTER CARE.

OKAY.

I HAD TAKEN THAT SHE HAD LIVED
THERE PRIOR, SO I MAY HAVE
MISSTATED, AND IF I DID, I
APOLOGIZE.

THEY ALSO REFER TO THE
PARTIES STIPULATED TO THE FACT.
THAT'S WHAT THE SECOND DCA SAYS.
I WOULD HAVE TO AGREE THAT
PORTION IS CORRECT.

BUT I STILL DON'T FEEL THAT HAS
BEARING ON THE ISSUE BEFORE THE
COURT.

THEY USED HER AS A STATE AGENT
NOT ONLY DID THEY SUGGEST THAT
SHE BRING THE CONDOMS OUT, BUT
THEY SAID, AND HERE IS A BAG TO
BRING THEM OUT IN WHICH,
NATURALLY --
LET ME ASK A QUESTION.

YES.

THE TRIAL JUDGE HERE SAID IT
DOES NOT SEEM LOGICAL TO FIND

THE PRIVATE INTERESTS OF THE VICTIM IS ANY DIFFERENT FROM THE STATES.

DO YOU NOT SEE THAT THERE'S AN INDEPENDENT INTEREST OF SOMEBODY WHO WANTS TO LIVE IN A HOME SAFELY WITHOUT BEING SUBJECT TO SEVERE ABUSE, THAT THAT IS NOT SOME INDEPENDENT INTEREST, THAT'S DIFFERENT FROM THE STATE'S?

I WOULD SAY, AS JUSTICE QUINCE DID, THAT WOULD MEAN THAT THERE WOULD ALWAYS BE AN INDEPENDENT INTEREST ON THE PART OF THE VICTIM IN EVERY SINGLE CASE, AND THAT IS NOT THE CASE.

WE HAVE A --

BUT, OF COURSE, IT'S NOT ALWAYS THE VICTIM THAT'S ASKED TO PERFORM THESE TASKS FOR THE STATE TO GET EVIDENCE AND THINGS LIKE THAT.

FOR EXAMPLE, IN THE COOLIDGE CASE FROM THE U.S. SUPREME COURT IT WAS NOT THE VICTIM WHO DID IT, IT WAS THE, IT WAS THE SUSPECT'S WIFE.

SO THERE ARE A WIDE VARIETY OF FACT PATTERNS.

SO, YES, SURE THE VICTIM MAY ALWAYS HAVE AN INTEREST, BUT IT'S NOT ALWAYS THE VICTIM INVOLVED IN OBTAINING THE EVIDENCE.

WELL, I WOULD SAY THIS, THAT I THINK THE STATE HAS ALREADY INDICATED THERE WAS NO PROFFER MADE, IT WAS NOT PART OF THE PROFFER THAT THERE WAS A DUAL INTEREST HERE.

THE COURT COULD ONLY GO BY WHAT IS IN THE RECORD, THE APPELLATE COURTS CAN ONLY GO BY WHAT'S IN THE RECORD, AND WHAT IS IN THE RECORD IS THE ABSENCE OF ANY DUAL PURPOSE IN THE PROFFER MADE BY THE STATE.

THEY FAILED TO MAKE THAT PART OF THE PROFFER, AND THEY SHOULD HAVE DONE IT IF THERE WAS A DUAL PURPOSE.

WE CAN ONLY GO BY THE RECORD,

THE APPELLATE COURTS, AND THE TRIAL COURT AS WELL.

THERE IS NO DUAL PURPOSE IN THE RECORD.

IS IT PERMISSIBLE TO DRAW AN INFERENCE THE STIPULATED FACT THAT SOMEBODY WHO'S BEEN A MINOR WHO'S BEEN A VICTIM OF SEXUAL BATTERY BY HER FATHER WOULD HAVE AN INTEREST IN REMOVING HERSELF FROM THAT RESIDENCE AND THAT ANY EVIDENCE SHE COULD OBTAIN TO HELP HER GET REMOVED WOULD ASSIST HER, WOULD FURTHER THOSE INTERESTS?

THE STATE COULD HAVE MADE THAT PART OF THE PROFFER, JUDGE, AND THEY DIDN'T.

AND HOW CAN WE SPECULATE AS TO WHAT THAT WITNESS WOULD HAVE SAID?

DID YOU ADDRESS THE ISSUE OF THE BURDEN OF PROOF, AND THAT MAY BE IMPORTANT IN TERMS OF -- IF WE CONTINUE TO TAKE THIS CASE -- WHERE WE'D COME OUT.

DO YOU AGREE THAT SINCE SHE WAS AT LEAST ON THE FACE SHE OBTAINED THE CONDOMS PRIVATE INDIVIDUAL SO THEN IT'S YOUR, THE DEFENDANT'S, BURDEN TO PROVE SHE WAS ACTING AS A STATE AGENT? IS THAT CORRECT?

THAT'S CORRECT.

ALL RIGHT.

AND I WOULD SAY THAT IT'S CLEAR.

SO YOU THEN PRODUCE AND SHOW THAT SHE WAS ACTING AS A STATE AGENT.

WHOSE BURDEN IS IT TO SHOW, THEN, THAT THERE WAS ALSO A DUAL PURPOSE?

WOULD THAT GO BACK TO THE STATE TO HAVE TO ESTABLISH THERE WAS A DUAL PURPOSE?

WHAT I WOULD HAVE TO SAY IS IF THERE'S A PROFFER MADE TO THE COURT --

NOT TALKING ABOUT LEGALLY SO IF WE TAKE THIS CASE AND WE TALK ABOUT IT WHERE BURDENS ARE, BURDEN ON THE DEFENDANT TO SHOW THAT THE PERSON WAS ACTING AS A

STATE AGENT.

IS IT THEN BECAUSE THEY WERE DOING IT AT THE DIRECTION OF THE STATE, IS IT THEN THE STATE COME FORWARD AND SHOW THERE WAS ALSO A LEGITIMATE PRIVATE INTEREST?

I WOULD SAY IF THAT'S, IF THAT IS -- IT'S GOING TO SUPPORT THE DECISION, THEY WOULD HAVE -- I MEAN, IN OTHER WORDS -- OBLIGATION TO DO SO.

THE DEFENDANT WOULDN'T HAVE TO ESTABLISH THE LACK OF A DUAL PURPOSE.

OR WOULD THEY?

IF THE STATE DOESN'T PROFFER IT, I DON'T SEE HOW -- IF THE STATE DOESN'T PROFFER IT -- LET'S LOOK AT THE PROFFER.

THE DETECTIVE TOLD THE VICTIM THAT WHILE INSIDE SHE COULD GET THE CONDOM IF SHE CHOSE TO. RIGHT.

DO YOU AGREE THAT IF THE DETECTIVE HAD NOT MADE THAT STATEMENT, THAT IF INDEPENDENTLY SHE HAD, WHILE SHE WENT IN TO GET HER STUFF, SHE HAD CHOSEN TO GET THE CONDOMS, COULD SHE HAVE DONE THAT IF THE OFFICER HAD SAID NOTHING?

THIS IS PURELY CONCLUSIONARY, YOUR HONOR.

THERE'S NO WAY WE CAN KNOW THAT. I'M SAYING THAT IF SHE HAD ON HER OWN DECIDED TO GO AND GET THE CONDOMS AND GO AND HAND THEM TO THE OFFICERS, SHE WOULD HAVE HAD THE FREEDOM AND ABILITY TO DO SO?

ABSOLUTELY, I AGREE WITH THAT.

AND SO THE KEY HERE IS YOU'RE SAYING THAT THE OFFICER SAID TO THIS YOUNG LADY, WHEN YOU GO GET YOUR STUFF, IF YOU CHOOSE, YOU CAN GET THE CONDOMS, THAT THAT TURNS HER INTO A STATE AGENT?

WE DON'T KNOW -- DIRECTED.

YES.

BY THE STATE.

NOT ONLY THAT, THAT WAS A MERE SUGGESTION.

BUT WHEN HE HANDED HER THE BAG TO BRING THEM BACK IN, THAT WAS DIRECT PARTICIPATION BY THE POLICE.

WHICH IS EVEN MORE THAN -- BUT YOU AGREE THE STIPULATED FACT, SHE HAD THE CHOICE WHETHER TO GET THE CONDOMS OR NOT GET THE CONDOMS?

YES, I WOULD HAVE TO SAY THAT TRUTHFULLY. AT ANY RATE, WE MUST GO BY THE RECORD.

THERE IS NOTHING IN THE RECORD BECAUSE OF THE PROFFER THAT WAS MADE BY THE STATE TO SHOW THAT THERE WAS ANY DUAL PURPOSE HERE. WHAT IS IN THE RECORD IS THE IMPROPRIETOUS, ILLEGAL SEARCH AND SEIZURE BY THE POLICE IN A SEARCH THAT THEY COULDN'T HAVE MADE THEMSELVES.

BUT THEY DID SECURE THE CONDOMS BECAUSE THEY USED THE MINOR AS A STATE AGENT.

WOULD YOU GO BACK TO THE BURDEN OF PROOF?

I THINK YOU WERE INTERPRETED WHEN THE JUSTICE WAS TRYING TO ADDRESS THE THE BURDEN. YOU FILED A MOTION TO SUPPRESS, AND YOU'D HAVE A BURDEN TO SHOW SOMETHING WHICH IS THAT ENTRY OCCURRED, RIGHT?

THAD BE NUMBER ONE, THAT THERE WAS NO CONSENT OR WARRANT, NUMBER TWO, AND THEN YOU'D HAVE TO SHOW THAT IT WAS THE STATE DOING IT --

YES.

OKAY.

THEN THEN AT THAT POINT THE BURDEN WOULD SHIFT, WE HAVE A SHIFTING BURDEN, THEN THE STATE WOULD BE REQUIRED TO GO FORWARD TO SHOW THE VALIDITY, SO THERE'S A SHIFTING BURDEN, IS THAT A CORRECT APPROACH?

I BELIEVE THAT'S CORRECT.

HOW THE ANALYSIS SHOULD FLOW?

YES.

THEN THEY WOULD HAVE THE BURDEN OF DEMONSTRATING THIS WAS

A PRIVATE INTEREST OR SOME OTHER KIND OF INTEREST THAT IT DOES NOT VIOLATE.

SO THEY DO HAVE A BURDEN -- YES.

THAT'S THE ANALYSIS FLOW. AND BY THE WAY, AS FAR AS THE TREADWAY CASE IS CONCERNED, IT'S ON ALL FLOORS OF THE TRIAL COURT AND THE SECOND DISTRICT COURT OF APPEAL.

THE FACTS IN THAT CASE WERE MUCH DIFFERENT THAN THIS CASE BECAUSE THERE THE INSURANCE AGENT HAD HIS OWN MONETARY INTEREST AT STAKE, AND SO HE DID MAKE AN ACT OF HIS OWN VOLITION TO GIVE THIS INFORMATION TO THE STATE.

THAT IS NOT THE CASE HERE.

IT IS JUST THE OPPOSITE.

SO IT'S THE PROMPTING, IS WHAT YOU'RE SAYING.

THIS CASE RISES AND FALLS ON THE LEGAL SIGNIFICANCE OF THE ENCOURAGEMENT AND THE BAG.

YES.

THAT PRETTY MUCH BOILS IT DOWN TO THAT.

I WOULD SAY THAT'S CORRECT, YOUR HONOR.

SO IN THE INSURANCE CASE, TREADWAY BELOW, IF THIS PERSON HAD GONE TO LAW ENFORCEMENT AND SAID, YOU KNOW, I'M CONCERNED ABOUT THIS, THE EVENTS HAPPENING, AND THE OFFICER SAID, WELL, YOU DON'T HAVE ANY EVIDENCE.

IF YOU HAD SOME PROOF, MAYBE WE COULD GO FORWARD, AND THE INSURANCE AGENT DEVELOPS THAT PROOF AND GETS IT AND HANDS IT OVER.

UNDER YOUR SCENARIO THAT WOULD BE ACTING AS AN AGENT OF THE STATE.

THAT'S RIGHT.

THAT'S RIGHT.

IF THEY DON'T HAVE THE RIGHT TO GET IT, SO THEY SEND SOMEBODY ELSE IN TO GET THAT WHICH THEY DON'T HAVE THE RIGHT TO GET THEMSELVES --

BEFORE THERE'S EVEN ANY

[INAUDIBLE] UNDER ARREST?
RIGHT.
CORRECT?
CORRECT.

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

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

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

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