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**Dale Johnson v. State of Florida**

**SC07-368**

ALL RISE.

O YE, O YE, O YE.

THE SUPREME COURT OF FLORIDA  
IS NOW IN SESSION.

ALL THOSE HAVING BUSINESS  
BEFORE THIS COURT, DRAW NIGH,  
GIVE ATTENTION, AND YE SHALL  
BE HEARD.

GOD SAVE THE UNITED STATES,  
THE GREAT STATE OF FLORIDA,  
AND THIS HONORABLE COURT.

>> GOOD MORNING.

GOOD MORNING.

>>.

>> LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.  
PLEASE BE SEATED.

>> GOOD MORNING, FRIENDS,  
AND WELCOME TO THE FLORIDA  
SUPREME COURT AND THE ORAL  
ARGUMENT CALENDAR FOR  
THURSDAY, DECEMBER 6th.

JUSTICE QUINCE WILL NOT BE  
SITTING ON THE PANEL THIS  
MORNING BUT WILL PARTICIPATE  
IN THE CASE, AND WILL REVIEW  
THE TAPE OF THE ORAL  
ARGUMENTS, THE FULL TAPE  
THAT ON OUR GAVEL TO GAVEL.  
SHE HAD SOME REACTION TO  
MEDICATION.

SHE'S FINE BUT SHE'S RESTING  
TODAY SO SHE SENDS HER  
REGARDS TO ALL THE  
PARTICIPANTS.

SO OUR FIRST CASE IS ROEBUCK  
v. STATE OF FLORIDA.

>> MAY IT PLEASE THE COURT.  
MY NAME IS MICHAEL LUFMAN  
AND I REPRESENT THE PETITIONER  
VINCENT ROEBUCK I WOULD LIKE  
TO RESERVE FIVE MINUTES OF  
MY TIME FOR REBUTTAL.  
THE ISSUE IS WHETHER THE

TRIAL COURT PREVENTED  
MR. ROEBUCK FOR IMPEACHING  
THE FOR PRIOR FALSE  
CRIMINAL ACCUSATION.

THE SECOND ZRIKT HAS HELD A  
CRIMINAL DEFENDANT HAS A  
RIGHT TO IMPEACH A WITNESS  
IF A WITNESS HAS MADE A  
PRIOR FALSE ACCUSATION.

>> DOES IT SEEM THE SECOND  
DISTRICT IN THEIR READ SNG  
CONTRARY TO THE FLOW OF THE  
RULES OF EVIDENCE AND THE  
COMMENTATORS ON THE RULES OF  
EVIDENCE REALLY PRETTY MUCH  
THE THEORY OF EVIDENCE THAT  
YOU DON'T USE JUST THIS ONE  
EVENT TO IMPEACH FOLKS?

I MEAN, IT'S SORT OF A  
STANDARD UNDERLYING  
PRINCIPLE THAT WE DEAL WITH.

>> A COUPLE ANSWERS TO THAT,  
YOUR HONOR, FIRST, I THINK  
IF YOU LOOK AT THE STATES  
NATIONWIDE, MOST STATES  
RECOGNIZE A PRIOR FALSE  
CRIMINAL ACCUSATION.

I THINK THAT'S OUTLINED IN  
THE NEW JERSEY SUPREME COURT  
BUT IN PARTICULAR REGARDING  
THE FLORIDA EVIDENCE CODE  
THE SECOND DISTRICT COURT  
RULED IN JAGERS, INVOLVE  
ADWILLIAMS RULE WITNESS ALSO  
A CHILD WHO HAD MADE A PRIOR  
FALSE ACCUSATION OF SEXUAL  
ABUSE AND THE BROAD GENERAL  
THAT THE CREDIBILITY OF A  
WITNESS MAY NOT BE ITCH  
PEACHED BY PROOF.

>> WAS THIS, WAS THIS  
INTRODUCED AS WILLIAMS RULE?

>> IN, THE JAGGERS CASE OR  
MR. ROEBUCK'S CASE?

>> IN ROEBUCK SFLOOS NO.  
NO.

NO.

IN THE JAGGER CASE, THE  
STATE WAS ATTEMPT TO OFFER  
WILLIAMS AS A WITNESS ABOUT  
PRIOR SEXUAL MISCONDUCT IN  
MR. ROEBUCK IT WAS CASE IT  
WAS MR. ROEBUCK ATTEMPTING  
TO IMPEACH WITH A PRIOR

FALSE.

>> TAKE THE NEW JERSEY  
GOOUNGER CASE THAT'S IN  
ESSENCE WILLIAM'S RULE TYPE  
CASE.

IT HAS TO BE SUFFICIENTLY  
SIMILAR, DO YOUGRY.

>> YES.

>> IS THAT EVEN PRESENT  
HERE.

>> WELL, I MEAN, BACK UP.

I SAID YES.

I THINK THE NEW JERSEY  
SUPREME COURT CASE LISTED A  
NUMBER OF FACTARDS THAT  
COULD BE CONSIDERED.

ONE OF THEM IS WHETHER THE  
SIMILARITY OF THE PRIOR  
FALSE CRIMINAL ACCUSATION TO  
HAVE CRIME CHARGED.

THERE WAS FOUR OTHER FACTORS  
THAT THE NEW JERSEY SUPREME  
COURT IN GUENTHER RELIED  
UPON WHETHER WILLIAMS IS THE  
CENTRAL ISSUE.

FIRST IT IS HERE.

PROXIMITY OF THE PRIOR FALSE  
ACCUSATION THAT IS THE BASIS  
OF THE CRIME CHARGE I THINK  
WE HAVE THAT HERE.

PROBABLY FIVE  
YEARS-DIFFERENCE BETWEEN THE  
CRIME CHARGED AND THE  
PREVIOUS PRIOR FALSE  
ACCUSATION.

>> HERE YOU HAVE THE PRIOR  
EVENT BEING A FOURTH GRADE  
-- WHEN SHE WAS IN THE  
FOURTH GRADE.

>> YES.

>> SHE GOT BURNED IN THE  
FACE.

GOT GRILLED BY SOME TEACHERS  
AND WHATEVER AND EVENTUALLY  
ENDED UP SAYING IT WAS HER  
BROTHER WHO DID IT.

>> YES.

>> IT WASN'T SEXUALLY  
RELATED.

>> BUT IT WAS A BATTERY.

IT WAS, IT WAS, SHE  
ACCIDENTALLY BURNED HERSELF  
WITH AN IRON.

SHE WENT TO SCHOOL, AND

NURSE AND HER MOTHER ASKED HER ABOUT THE BURN AND SHE SAID THAT IT WAS HER BROTHER WHO DID IT. SHE ACKNOWLEDGED IT AT THE TIME SHE WAS UPSET AT HER BROTHER.

HER BROTHER WAS MAD AT HER AND THEREFORE SHE BLAMED IT ON HER BROTHER.

AS A RESULT OF THE ACCUSATION.

>> SO LET'S SAY SHE WAS IN SCHOOL IN THE FIFTH GRADE AND GOT IN A FIGHT AND FALSELY ACCUSED SOMEBODY ELSE FOR CAUSING THE FIGHT WHERE SHE CAUSED IT AND SOMEBODY ELSE.

UNDER YOUR THEORY, THAT ALSO WOULD BE ADMISSIBLE AS PRIOR FALSE ACCUSATION?

>> I THINK, AGAIN, UNDER THE APPROACH FROM THE NEW JERSEY SUPREME COURT YOU HAVE TO LOOK AT EACH CASE AND LOOK AT WHETHER OR NOT THE TWO DIFFERENT ACCUSATIONS ARE SIMILAR, AND THAT'S ONE FACTOR TO BE CONSIDERED.

I WOULD SUBMIT, IN THE SITUATION LIKE THIS WHEN AGAIN IT SEEMS SHE WAS 14 AT THE ALLEGELES TIME IN FOURTH GRADE AT THE PREVIOUS.

THAT'S A FIVE-YEAR DIFFERENCE.

THAT'S PRETTY CLOSE IN TIME

--

>> BUT I GUESS THIS IS THE QUESTION.

YOU'RE ASKING US TO ADOPT UNDER 610, WHICH IS PART OF THE EVIDENCE CODE, WHICH IS A STATUTE, AN EXCEPTION THAT DOESN'T APPEAR THERE, AND I GUESS I'M CONCERNED ABOUT WHETHER THIS IS A 610 ARE WE TALKING ABOUT?

MAYBE IT WAS 610.

WHETHER IN JAGGERS AND THE CLIBURN, WHETHER THEY REALLY WERE LOOKING TO OTHER SECTIONS OF THE EVIDENCE CODE.

SO LET'S FIRST TALK ABOUT WHETHER UNDER 610, THAT DEALS WITH PRIOR CONVICTIONS.

>> YES, YOUR HONOR.

>> SO THE IDEA THAT THIS COURT COULD TAKE SOMETHING THAT DOESN'T EXIST IN THE EVIDENCE CODE AND CARVE OUT AN EXCEPTION ISN'T THIS AN ISSUE OF STATUTORY CONSTRUCTION AND THIS WOULD NOT BE THE SECTION WE SHOULD BE GOING UNDER.

>> COUPLE DIFFERENT ANSWERS TO THAT.

FIRST LET ME POINT OUT IN JAGGERS THE SECOND DISTRICT DEFEND DEPENDED ON. WHEN A CHARACTER OR TRAIT OF CHARACTER OF A PERSON IS AN ESSENTIAL OF A CHARGE, CLAIM, OR DEFENSE, PROOF MAY BE MADE OF SPECIFIC INSTANCES OF THAT CONDUCT.

>> IN JAGGERS --

>> THEY COULD USE THAT, DO YOU REALLY THINK THAT THAT'S, THAT A WITNESS'S CREDIBILITY IS AN ESSENTIAL ELEMENT OF A, OF, OF A CRIME OR A DEFENSE?

>> OR A DEFENSE.

NOW, IN THIS CAR., AGAIN, IT'S A HE-SAID, SHE-SAID CASE.

NO PHYSICAL WHATSOEVER.

MR. ROEBUCK'S ENTIRE DEFENSE WAS THE ALLEGED VICTIM WAS NOT CREDIBLE.

IN ORDER FOR THE STATE TO PROVE THEIR CASE THEY HAD TO CONVINCED THE JURY THAT THE ALLEGED VICTIM WAS CREDIBLE IN ORDER FOR MR. ROEBUCK TO COME BACK AND CONVINCED THE JURY, HAD TO CONVINCED THE JURY --

>> SO YOU WOULD INSTEAD OF SAYING THERE IS A FALSE CONFESSION ACCUSATION EXCEPTION TO 610, YOU WOULD TRAVEL UNDER 4052?

>> I THINK THAT'S CERTAINLY ONE WAY TO LOOK AT T.

ANOTHER WAY --

>> AND I'M GOING TO ASK THE STATE THIS.

MY CONCERN -- MY INTEREST IS THIS, IS THAT WE ALLOW UNDER CERTAIN SECTIONS OF THE EVIDENCE CODE REPUTATION FOR BEING UNDER UN TRUTHFUL. AND IT SEEMS A LITTLE WEIRD THAT YOU SORT OF SAY YOU COULD BRING IN GENERAL CHARACTER EVIDENCE BUT YOU COULDN'T BRING IN IF THE PERSON HAD CONTINUALLY FALSELY ACCUSED PEOPLE OF CRIMES.

SO WHAT SECTION DOES THAT, WHAT SECTION OF THE EVIDENCE CODE WOULD, IS THE, WHERE YOU CAN PUT IT, BRING IN CHARACTER --

>> 609.

609 WOULD BE REPUTATION FOR UNTRUTHFULNESS.

>> AND DID THEY TRUE TO -- TRY TO GET IT --

>> WHAT SECTION DID THEY TRY TO GET IT IN UNDER?

>> I, I THINK GENERALLY SPEAKING THE THE DEFENSE COUNSEL BELOW ARGUED THIS WAS REL VOONT TO IMPEACH THE ALLEGED VICTIM'S CREDIBILITY.

I DON'T KNOW IF THEY WENT TO THE SPECIFIC SECTION OF THE EVIDENCE CODE THEY WERE RELYING ON.

>> WHICH SECTION DID YOU RELY ON IN THE DCA.

>> AGAIN, MANY WAY AS COURT CAN REACH THE CONCLUSION THAT A PRIOR FALSE CRIMINAL ACCUSATION IS ADMISSIBLE. THE VERY GOOD POINT THAT I THINK THE NEW JERSEY SUPREME COURT MADE IN THE OPINION IS THAT IF YOU LOOK AT 609, YES, IT ALLOWS A WITNESS TO BE IMPEACHED WITH THE EVIDENCE THAT THE WITNESS HAS A REPUTATION FOR LYING. IF YOU LOOK AT 610 IT ALLOWS A WITNESS TO BE IMPEACHED

WITH CRIMINAL CONVICTION.  
>> WHY DIDN'T THE FIRST DCA  
TALK ABOUT THE OTHER  
PROVISIONS.

THEY TALKED ABOUT 610.  
THAT SEEMS LIKE IT WAS THE  
ONLY ONE ARGUED TO THEM.

>> THAT'S NOT TRUE.  
THE SAME ARGUMENT I AM  
MAKING TO YOU IS THE SAME I  
MADE TO FIRST DCA.

>> WHY DID THEY RESTRICT  
THEIR ANALYSIS ON 610.

>> I CAN'T TELL.

I CERTAINLY KIDDANT ARGUE  
THIS WAS AN EXCEPTION JUST  
TO 610.

I ARGUED THIS IS SOMETHING  
THAD SHOULD COME IN FOR MANY  
OTHER REASONS AND ANOTHER  
ISSUE IS WHETHER OR NOT HE  
HAS A CONSTITUTIONAL RIGHT  
TO BRING THIS IN.

>> FOR PURPOSES OF  
IDENTIFICATION DOESN'T THE  
COUNSEL HAVE TO IDENTIFY A  
SPECIFIC PROVISION UNDER  
WHICH THIS EVIDENCE WOULD BE  
ADMISSIBLE.

>> I THINK, AGAIN, AS FAR AS  
PRESERVATION IS CONCERNED,  
DEFENSE COUNSEL REPEATEDLY  
SAID HE WANTED TO INTRODUCE  
THIS EVIDENCE TO IMPEACH THE  
ALLEGED VICTIM'S CREDIBILITY  
AND THE COURT ON PAGE 164 OF  
THE RECORD SPECIFICALLY  
STATES, I JUST WANT TO STATE  
FOR THE RECORD THAT YOU HAVE  
PRESERVED THAT ISSUE FOR  
APPEAL, AND I'M DIRECTING  
YOU NOT TO ASK ANY QUESTIONS  
ABOUT T. SO AGAIN I SUBMIT  
THAT THE QLOUSH IS  
PRESERVED.

IT'S CLEAR THAT THE CLAIM  
THAT WAS BEING PRESENTED WAS  
THIS, THIS ALLEGED VICTIM  
SHOULD BE ABLE TO BE  
IMPEACHED WITH THE PRIOR  
FALSE CRIMINAL ACCUSATION.

>> -- RELEVANT.

IF WE JUST TAKE -- WHETHER  
IT'S RELEVANT I SEE A PRETTY

BIG DIFFERENCE IN JAGGERS,  
WHERE YOU'VE GOT, WHERE  
JUSTICE BELL WAS GOING ON I  
THINK, TOO, YOU'VE GOT  
EVIDENCE THAT THIS VICTIM  
ACCUSED THE SAME DEFENDANT  
FALSELY BEFORE.  
TO ME THAT IS -- FAR AWAY  
THAT, AS YOU CAN GET FROM  
SAYING WHEN SOMEBODY WAS IN  
FOURTH GRADE FOR A WHOLE  
DIFFERENT REASON AFTER, THEY  
FALSELY ACCUSED THEIR  
BROTHER OF SOMETHING.  
SO CAN'T, EVEN IF IT'S  
BEGINS TO LOOK LIKE IT COULD  
BE RELEVANT UNDER SOME  
SECTIONS, WOULDN'T THE ISSUE  
OF 404, YOU KNOW, WHERE  
PREJUDICE IS -- LIKELIHOOD  
OF CONFUSING THE ISSUE.  
COME INTO PLAY TO SAY THIS  
REALLY IS COLLATERAL, THIS  
IS NOT DIRECT.  
THIS IS NOT THE, YOU KNOW,  
THE SAME DEFENDANT, AND IT  
IS REMOTE IN TIME.  
>> I THINK IT'S RARE THAT  
YOU'RE EVER GOING TO HAVE  
THE ALLEGATION REGARDING THE  
SAME DEFENDANT.  
I THINK MOST OF THE CASES,  
CERTAINLY THE CLIBURN CASE  
AND, AND MOST OF THE OTHER  
CASES AROUND THE COUNTRY ARE  
GOING TO INVOLVE PRIOR FALSE  
CRIMINAL ACCUSATIONS AGAINST  
SOMEONE ELSE.  
NOW, WHETHER OR NOT THE  
CRIMP IS SIMILAR, I AGREE  
THE FACT THAT NEEDS TO BE  
CONSIDERED BUT IT'S ONLY ONE  
FACTOR TO BE CONSIDERED AND  
AGAIN I SUBMIT THE CRIMES  
ARE SIMILAR IN NATURE IN  
THIS CASE.  
WE HAVE A BATTERY FROM  
BEFORE AND WE HAVE A TYPE OF  
BATTERY IN THIS CASE.  
IT'S, IT'S A SEXUAL BATTERY  
BUT AGAINATES BAT RAE.  
>> DOES IT MAKE ANY  
DIFFERENCE WHETHER THE  
ACCUSATION IS DIRECTLY TO

LAW ENFORCEMENT OFFICERS OR,  
OR NOT?

>> MY ARGUMENT, IN A CASE  
INVOLVING A CHILD, I WOULD  
SUBMIT THAT A TEST SHOULD BE  
WHETHER OR NOT THE  
ACCUSATION IS MADE TO A  
POSITION IN A, A PERSON IN  
POSITION OF AUTHORITY.  
A LOT OF TIMES IN CHILD  
CASES, YOU'RE NOT GOING TO  
HAVE ALLEGATIONS MADE BY THE  
CHILD TO A POLICE OFFICER.  
BUT THEY MADE BE MADE TO A  
CHILD PROTECTION TEAM MADE  
OR A SCHOOL NURSE LIKE IN  
THIS CASE.

>> WOULD YOU COME BACK TO  
JUSTICE PARIENTE'S QUESTION,  
WITH REFERENCE TO THE  
EVIDENCE CODE AND IT APPEARS  
TO ME THAT IN DEVELOPING THE  
EVIDENCE CODE THAT THE  
AUTHORS OF THAT, AND OF  
COURSE, THIS COURT AND THE  
LEGISLATURE IN ADOPTING, YOU  
KNOW, THAT CODE, HAVE REALLY  
EMBRACED, YOU KNOW, THE, THE,  
THE PURPOSE OF THE AUTHORS.  
HAVE ALREADY MADE A  
JUDGMENT.  
IN THIS AREA.

AND THE JUDGMENT DOES NOT  
INCLUDE THE IMPEACHMENT THAT  
YOU ARE TRYING TO GET IN  
HERE.

AND THAT'S WHAT I'M  
CONCERNED ABOUT BECAUSE IN  
FOR INSTANCE THE REPUTATION  
FOR UNTRUTHFULNESS, WHATEVER,  
THEY'VE MADE A JUDGMENT  
THERE THAT WHEN THE CONDUCT  
OF THE WITNESS RISES TO THIS  
LEVEL WHERE ACTUALLY PEOPLE  
AROUND THEM DON'T TRUST THEM,  
AND THEY WOULD TESTIFY, NOW  
THIS PERSON, IS NOT  
TRUSTWORTHY AND SHE HAS A  
REPUTATION FOR THAT.  
SHE'S, SHE'S, SHE'S LIED  
ENOUGH IN, YOU KNOW, THAT  
NOW AMONGST THE PEOPLE THAT  
KNOW HER THAT SHE HAS THAT  
REPUTATION, THEY'VE MADE

THAT JUDGMENT ABOUT THAT.  
WITH REFERENCE TO ACTS OF  
MISCONDUCT, THEY'VE MADE A  
JUDGMENT, WELL, WHEN THAT'S  
CREDIBLE ENOUGH THAT  
SOMEBODY'S ACTUALLY BEEN  
CONVICT OIFD MISCONDUCT,  
THEN -- CONVICTED OF  
MISCONDUCT THEN YOU CAN  
BRING THAT IN IN THIS WAY.  
SO SO, BUT THEIR JUDGMENT  
HAS NOT INCLUDED THE, THESE  
SPECIFIC ACTS THAT YOU'RE --  
SO I AM CONCERNED THAT THAT  
THAT JUDGMENT HAVING BEEN  
MADE AND THIS COURT AND THE  
LEGISLATURE HAVING EMBRACED  
THAT, THAT WE BE VERY  
CAREFUL, YOU KNOW, NOT TO GO  
OUTSIDE THAT.

SO HELP, HELP ME WITH, THAT  
THIS WOULD BE, THIS WOULD  
REALLY BE A HUGE ADDITION OR  
EXCEPTION TO THOSE ORDINARY  
RULES.

HELP ME -- I DIDN'T REALLY,  
I DIDN'T FEEL LIKE YOU  
PROPERLY RESPONDED TO THAT  
QUESTION.

>> THANK YOU, YOUR HONOR.

>> MAYBE IT WAS A DIFFERENT  
QUESTION.

>> THANK YOU, YOUR HONOR.

IT'S TRUE THAT, THAT FEDERAL  
RULE OF EVIDENCE 608 B DOES  
-- WOULD ALLOW THIS TYPE OF  
EVIDENCE AND WHEN THE CODE  
WAS ADOPTED BY THE  
LEGISLATURE, THE FLORIDA  
LEGISLATURE DID NOT ADOPT  
THAT PROVISION OF THE  
FEDERAL EVIDENCE CODE.

PROFESSOR ERHEART HEART  
STATES THEY DIDN'T DO SO --  
EHRHARDT STATES THEY DIDN'T  
DO THAT BECAUSE THEY THOUGHT  
THERE WAS A POSSIBILITY FOR  
ABUSE OF THIS TYPE OF  
EVIDENCE.

BUT AGAIN THAT'S GENERAL  
EVIDENCE OF MISCONDUCT NOT  
SPECIFICALLY THEY DIDN'T  
CONSIDER THE SPECIFIC  
INCIDENT OF A PRIOR

ACCUSATION.

I SUBMIT WE ARE TALKING ABOUT VERY FEW CASES WHERE YOU ARE GOING TO HAVE SOMEONE WHO'S ABLE TO ESTABLISH THAT A WITNESS HAS FALSELY ACCUSED SOMEONE OF A CRIME.

IN THIS CASE, THERE'S NO QUESTION.

SHE ACKNOWLEDGED DURING THE PROFFER THAT SHE DID IN FACT FALSELY ACCUSE HER BROTHER. IT'S GOING TO BE RARE WHERE YOU ARE GOING TO BE ABLE TO ESTABLISH THAT SO THIS IS A VERY NARROW EXCEPTION TO THE GENERAL RULE THAT ACTS OF MISCONDUCTINATE BE USED TO IMPEACH A WINS.

>> BUT ASSUMING THAT IT'S TRUE, SHOULDN'T THERE BE SOME KIND OF 404 B TYPE URNALSIS THAT'S GOT TO BE SUFFICIENTLY SIMILAR -- ANALYSIS THAT'S GOT TO BE SUFFICIENTLY SIMILAR SO THAT THE RELEVANCY OF THAT ACT THAT OTHER LIE IS NOT OUTWEIGHED BY THE PREJUDICE OF INTRODUCING THAT KIND OF EVIDENCE?

>> CERTAINLYIAL RR -- CERTAINLY I'LL ACKNOWLEDGE THE OTHER STATES THAT HAVE ADOPTED THIS TYPE OF EXCEPTION SAY THERE MUST BE ANALOGOUSSIS AT LEAST ONE OF THE FACTORS TO DETERMINE WHETHER OR NOT THE PREVIOUS FALSE ACCUSATION IS SIMILAR TO THE CURRENT FALSE ACCUSATION.

I WOULD SUBMIT THAT BURNING SOMEONE WITH AN IRON IS VERY SIMILAR TO THIS SIMILAR ALLEGATION OF SEXUAL BATTERY OR LEWD AND LUSIEVIOUS BATTERY IN THIS CASE.

I SUBMIT THAT FORLET REASONS.

>> THAT'S NOT A SEXUAL BATTERY.

>> BUT IT'S A BATTERY.

>> AGAINST THE SAME PERSON.  
>> IT'S CERTAINLY A CRIME OF  
VIOLENCE AGAINST A PERSON.  
AND IF AN ALLEGED VICTIM HAS  
THE TENDENCY TO FALSELY  
ACCUSE OTHERS IN THE PAST OF  
THIS TYPE OF INCIDENT --  
>> LET'S ANALYZE IT THIS  
WAY.

LET'S SAY THAT THE DEFENDANT  
WAS ACCUSED OF SEXING WITH  
BATTERY, COULD THE -- SEXUAL  
BATTERY, COULD THE STATE  
INTRODUCE EVIDENCE THAT THE  
DEFENDANT HAD PREVIOUSLY  
BURNED SOMEBODY WITH AN IRON  
AS PRIOR BAD ACT EVIDENCE,  
404 B EVIDENCE.

>> CONSTITUTION IS GOING TO  
COME INTO PLAY.

AND MY RIGHT HAS THE RIGHT  
TO DO ANYTHING TO DEFEND  
THIS ACCUSATION.

>> BUT WE ALLOW 404,  
WILLIAMS RULE SNEFDS BUT  
AGAIN A VERY STRICT STANDARD  
IS GOING TO APPLY WHEN YOU  
USE THAT TYPE OF EVIDENCE  
AGAINST A CRIMINAL  
DEFENDANT.

I DON'T THINK THE SAME  
STRICT STANDARD WOULD APPLY  
WHEN A CRIMINAL DEFENDANT IS  
EXERCISING HIS RIGHT TO  
CONFRONT A WITNESS OR  
CROSS-EXAMINE A WITNESS HE  
HAS A DREW PROCESS RIGHT TO  
PRESENT TO THE JURY WHETHER  
OR NOT THIS DEFENDANT WAS  
CREDIBLE.

THAT'S HIS ENTIRE DEFENSE.  
THERE IS NO PHYSICAL  
EVIDENCE.

THERE IS NO OTHER WAY OTHER  
THAN TO ATTACK HER  
CREDIBILITY.

IT IS DEE TO HER  
CREDIBILITY.

AGAIN, LET ME QUICKLY  
ADDRESS WHAT THE NEW JERSEY  
SUPREME COURT SAID.  
THEY RECOGNIZED THAT YOU CAN  
IMPEACH SOMEONE WITH  
REPUTATION FOR LYING.

THEY RECOGNIZED THAT YOU CAN IMPEACH SOMEONE WITH A PRIOR CONVICTION AND THEY WENT ON TO SAY THAT THE FACT THAT A WITNESS UTTERED A PRIOR FALSE ACCUSATION MAY BE NO LESS RELEVANT OR POWERFUL AS IMPEACHMENT TOOL THAN TESTIMONY THAT THE WITNESS HAS A REPUTATION FOR LYING. CERTAINLY --

>> IT DOES SEEM TO ME, I JUST LOOKED AT ALL THE DIFFERENT SECTIONS THAT WE'VE GOT THIS COMPREHENSIVE CODE AND IT, YOU CAN'T GET UNDER A PARTICULAR SECTION UNLESS WE REWRITE THE CODE.

>> BUT, AGAIN, I THINK WHAT THE, THERE'S A COUPLE DIFFERENT WAYS TO DO THAT. YOU COULD RECOGNIZE THAT UNDER 4052 CHBLTH.

YOU COULD RECOGNIZE IT AS, WHAT THE NEW JERSEY SUPREME COURT DID.

AND THEY SAID THAT THEY WERE NOT CREATING THE NEW RULE. THEY WERE MERELY CARVING OUT AN EXCEPTION TO THE RULES OF EVIDENCE FOR THE PURPOSES OF PERMITTING THE JURY TO CONSIDER RELEVANT EVIDENCE AND CLEARLY DEFINED CIRCUMSTANCES THAT MAYIC AFFECT THE JURY'S ESTIMATION OF THE CREDIBILITY OF THE STATE'S KEY WITNESS.

AND THEN I THINK YOU ALSO HAVE TO CONSIDER THE, THANK YOU, YOUR HONOR, YOU HAVE TO CONSIDER MY CLIENT'S CONSTITUTIONAL RIGHTS.

OF COURSE, STATE RULES OF EVIDENCE MUST YIELD TO MY CLIENT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND TO BE ABLE TO EFFECTIVELY CROSS-EXAMINE AND CONFRONT THULEDGED VICTIM.

>> SO ARE YOU SAYING RULE 403 IS THEN UNCONSTITUTIONAL AS APPLIED TO A DEFENDANT

TRYING TO ADMIT EVIDENCE?

>> I SUBMIT THAT IN A SITUATION WHERE YOU CAN ESTABLISH THAT THE ALLEGED VICTIM HAS MADE A PRIOR FALSE CRIMINAL ACCUSATION, AND THAT'S, THAT'S NOT IN DISPUTE THEN THE DEFENDANT DOES HAVE A RIGHT TO IMPEACH THE ALLEGED VICTIM WITH THAT PRIOR FALSE ACCUSATION.

>> YOU MADE THE MORE GENERAL STATEMENT THAT A DEFENDANT IS ENTITLED TO PRESENT ALL THIS EVIDENCE IN, IN HIS DEFENSE, IT'S A CONSTITUTIONAL RIGHT AND SO WOULD THAT RENDER RULE 403 UNCONSTITUTIONAL TO THE EXTENT THAT IT WOULD EVER PREVENT A DEFENDANT FROM INTRODUCING RELEVANT EVIDENCE?

>> NO, I AGREE THAT THERE IS A WEIGHING TEST THAT MUST BE CONDUCTING, A BALANCING TEST.

BUT IF, AND THERE MUST BE SOME CONSIDERATION AS TO THIS PARTICULAR PRIOR FALSE ACCUSATION.

BUT WHEN YOU HAVE A PRIOR FALSE ACCUSATION AND THE FACTORS THAT THE NEW JERSEY SUPREME COURT RESIDE -- RELIED UPON, NUMBER ONE, THE ALLEGED VICTIM'S TESTIMONY IS THE ONLY TESTIMONY THE STATE IS RELYING UPON.

THE PRIOR FALSE ACCUSATION IS NEAR IN TIME TO THE ACCUSATION IN THIS CASE.

IF IT'S A SIMILAR TYPE OFFENSE, I, I ACKNOWLEDGE THAT THERE COULD BE A SCENARIO WHERE PERHAPS THE PRIOR FALSE ACCUSATION INVOLVE ADWORTHLESS CHECK AND THIS PARTICULAR CRIME INVOLVES A CRIME OF VIOLENCE OR A BATTERY THEN MAYBE THE COURT WOULD SAY THAT IS NOT RELEVANT UNDER 403 AND WE ARE NOT GOING TO ALLOW YOU

TO INTRODUCE THAT BUT WE DON'T HAVE THAT WE HAVE SIMILAR CRIMES AND IN THE CLIBURN CASE THE SECOND DISTRICT DEALT WITH CRIMES THAT WERE SIMILAR.

THE CRIME AT ISSUE WAS BURGLARY AND THE COURT SAID THAT'S SIMILAR ENOUGH TO ALLOW THE, THE DEFENDANT TO BE ABLE TO CROSS-EXAMINE THE ALLEGED VICTIM REGARDING THAT PRIOR FALSE ACCUSATION.

>> I RESERVE THE REST OF MY TIME FOR REBUTTAL.

THANK YOU.

>> GOOD MORNING.

MAY IT PLEASE THE COURT. JISELL LYLEN RIVERA FOR THE STATE OF FLORIDA.

>> WOULD YOU DO US A FAVOR, OR AT LEAST ME, THE PRIOR OF THE PRIOR ACT, WAS IT UNCONTESTED THAT IT WAS FALSE?

>> YES.

>> IN OTHER WORDS, SHE ENDS UP ACCUSING HER BROTHER FALSELY AND HE ENDS UP IN A JUVENILE FACILITY FOR SIX MONTHS AND THERE WAS NO OTHER EVIDENCE THAT IT REALLY WAS HIM THAT DID IT OTHER THAN HER FALSE ACCUSATION?

>> IF I MAY, I'D LIKE TO CORRECT YOUR ASSESSMENT OF THE FACTS JUST SLIGHTLY. FIRST OF ALL, SHE WAS PRETTY MUCH BROWBEATEN INTO MAKING THIS ACCUSATION AGAINST HER BROTHER.

>> HOW DO WE KNOW THAT?

>> BECAUSE THE, BECAUSE OF THE PROFFER UNDER OATH. SHE TESTIFIED THAT SHE WENT TO SCHOOL WITH A SCAR MARK ON HER FACE, THAT SHE WAS CALLED DOWN BY THE SCHOOL NURSE WHO CALLED HER BROTHER, AND THE -- MOTHER, AND THE TWO OF THEM PROCEEDED TO QUESTION HER FOR THREE HOURS.

DURING THE COURSE OF THAT TIME SHE TOLD THEM EXACTLY WHAT HAPPENED, SHE TOLD THEM THE TRUTH AND THEY REPEATEDLY TOLD HER OVER THE COURSE OF THE THREE-HOUR PERIOD THAT THEY DID NOT BELIEVE WHAT SHE WAS SAYING AND THAT AFTER THE END OF THIS, SHE BASICALLY, QUOTE UNQUOTE, LET HER BROTHER TAKE THE FALL FOR IT.

AS FOR WHETHER OR NOT HE WENT TO A JUVENILE FACILITY, NOW READ THE PROFFER CAREFULLY, IT SHOWS SHY, THREE DAYS LATER HER BROTHER JUST DISAPPEARED AND SHE ASKED HER MOTHER WHAT HAPPENED AND SHE THOUGHT THAT HER MOTHER TOLD HER THAT SHE -- HE WENT TO A JUVENILE FACILITY BUT THE CHILD NEVER TESTIFIED AGAINST THE BROTHER.

THERE WAS NEVER ANY KIND OF LEGAL PROCEEDING --

>> WITNESS AGAINST THIS DEFENDANT?

>> EXCUSE ME?

>> WAS SHE THE SOLE WINCE AGAINST THIS DEFENDANT.

>> YES, SHE WAS, IT WAS A SEXUAL BATTERY.

>> AND HER DEFENSE WAS SHE HAD A MOTE TO HAVE LIE.

SHE WANTED TO REMAIN IN THE COUNTRY.

-- MOTIVE TO LIE.

>> THAT WAS THE MOTIVE THAT WAS ASSERTED, YES.

>> NOW LET'S GO TO, I DON'T THINK YOU CAN GET TO AN EXCEPTION UNDER 610 BECAUSE IT'S PRETTY CLEAR.

BUT WHY DOESN'T IT COME IN UNDER GENERAL CHARACTER EVIDENCE OR AT LEAST BE CONSIDERED UNDER THAT?

THIS CASE MAY NOT BE WHERE IT GOES, BUT IT SEEMS TO ME THAT THE STATE WAS CONCEDED THAT IN THE OTHER CASES, JAEGERS AND -- JAGGERS AND

CLIBURN OR AT LEAST ONE OF THEM IT SHOULD COME IN OR IS THE STATE'S POSITION THAT ALL THOSE OTHER CASES FROM THE SECOND DISTRICT ARE WRONG?

>> THE STATE'S POSITION IS THAT YOU WERE WRONGLY DECIDED AND THEY ARE DISTINGUISHABLE ON THEIR FACTS.

>> WELL IT'S MORE IMPORTANT -- LET'S TAKE ONE THAT WOULD BE A REAL MISCHARACTER OF -- MISCARRIAGE OF JUST ASPRIOR MISACCUSATION AGAINST THE SAME DEFENDANT FOR SEXUAL ASSAULT.

IT'S THE STATE'S POSITION THAT THERE'S NO, AND, THERE IS NO PROVISION OF THE EVIDENCE CODE THAT WOULD ALLOW THAT EVIDENCE TO, AS IMPEACH SNMENT.

>> REVERSE WILLIAMS RULE EVIDENCE, JUSTICE.

>> NOW HOW IS IT, OKAY, SO REVERSE THAT'S UNDER 404 TO A&IT WOULD BE, TELL ME WHAT IS, IT GOES TO?

>> COLLATERAL BAD ACT, AND

--

>> TO PROVE BUT WHAT'S THE -- TO PROVE WHAT? THAT THE PERSON IS LIEING?

>> WELL, I THINK IT'S ACTUALLY MORE TO PROVE THAT IDENTITY.

CONSISTENT PATTERN, THINGS LIKE THAT.

AND WHEN YOU LOOK AT WHAT --

>> CONSISTENT PATTERN OF LIEING?

>> RIGHT.

IT'S REPUTATION ESSENTIALLY.

>> WELL THEN --

>> BUT THAT'S WHAT MR. LUFERMAN IS ARGUING HERE IS THAT --

>> IT CAN'T BE A CHARACTER TRAIT OR PATTERN WHEN IT'S ONE INSTANCE.

THROUGHOUT THE CODE -OF THEM ARE SAYING YOU CAN'T HAVE A CONSISTENT ACT TO PROVE

CONFORMITY ON A SUBSEQUENT OCCASION.

WHEN WE LOOK AT 405 WHICH IS WHAT I BELIEVE HE'S ARGUING UNDER TODAY, EVEN THOUGH THROUGHOUT I THINK WHEN WE LOOK AT THE HISTORY OF THIS CASE, IT'S ALWAYS BEEN 610 AND WHICH IS WHY THE FIRST DISTRICT RELIED ON 610, FIRST DISTRICT DID NOT RELY ON ANYTHING ELSE BECAUSE THE ARGUMENT HAS CHANGED THROUGHOUT --

>> ARE YOU SAYING THAT, THAT THE, WHAT THE OTHER SECTIONS WERE NOT RAISED IN HIS BRIEF TO THE FIRST DISTRICT?

>> I THINK THEY MIGHT'VE BEEN COLLATERALLY BUT IN THE TRIAL COURT --

>> LET ME --

>> IN THE TRIAL COURT LEVEL TRUALLY WAS 610. THEY WERE, THAT EVERYONE WAS RELYING ON.

>> LET ME ASK, IS, THE, WHAT'S THE STATE'S POSITION ON WHETHER THIS STATEMENT, FOR GETTING 610 AND FOR THE TIME BEING AND 608, 609, IS THIS STATEMENT RELEVANT?

>> NO, IT'S NOT.

>> OKAY.

WHY IS IT NOT RELEVANT.

>> BECAUSE IT FAILS IN TWO SPECIFIC AREAS.

OKAY?

FIRST OF ALL, RELEVANT EVIDENCE WE KNOW CAN BE ADMITTED.

HOWEVER, IT HAS TO BE SIMILAR ENOUGH.

IT HAS TO SHOW SIMILARITY OF ACTION.

IT HAS TO BE RELIABLE.

HERE WE HAVE A STATEMENT THAT IS NOT RELIABLE BECAUSE IT WAS ESSENTIALLY COERCED.

>> DON'T WE HAVE A UNIQUE SITUATION IN THIS TYPE OF CASE?

IN WHICH REALLY IT DOES BOIL DOWN TO THE CREDIBILITY OF

THE VICTIM AND THE DEFENDANT  
AND THAT TLR THEREFORE WHAT  
THE VICTIM HAS DONE IN, IN  
RESPECT TO MAKING ACCUSATIONS  
IS, BEARS ON THE CREDIBILITY,  
OF THE WITNESS, OF THE  
VICTIM?

DOESN'T IT?

>> I DON'T THINK YOU CAN --  
I MEAN, THE EVIDENCE CODE IN  
EVERY SINGLE PROVISION, 405,  
ALL OF THEM SAY YOU CAN'T  
USE ONE SPECIFIC ACT.  
YOU CAN PROVE BY CHARACTER  
IF YOU CHOOSE TO.

HOW THE DEFENDANT, HOW THIS  
LITTLE GIRL GOT AROUND AND  
MADE SEXUAL ALLEGATIONS  
AGAINST ALL KINDS OF PEOPLE.

>> BUT DOESN'T, THE  
EVIDENTIARY ANALYSIS HAVE TO  
BEGIN WITH THE FUNDAMENTAL  
PROPOSITION THAT ALL  
RELEVANT EVIDENCE IS  
ADMISSIBLE UNLESS THERE IS  
AN EXCEPTION?

>> THAT IS, THAT'S WHAT IT  
SAYS.

>> RIGHT.

AND SO WE START FROM THE  
PROPOSITION OF HAVING TO  
DEAL WITH WHETHER THIS IS  
RELEVANT OR NOT RELEVANT IF  
WE ACCEPT THAT IT'S RELEVANT  
THEN THE QUESTION SHIFTS TO  
WHETHER THERE IS AN  
EXCEPTION WHICH WOULD KEEP  
IT OUT, WHETHER IT WAS TOO  
REMOTE IN TIME, WHETHER IT,  
THERE IS A SPECIFIC  
EXCEPTION IN THE CODE AND IS  
THERE A SPECIFIC EXCEPTION?

>> WELL, THE RELEVANCE  
BASICALLY REQUIRES THAT IT  
BE PROBATIVE OF A FACT.  
IN THIS CASE, IT'S NOT THE  
SAME PERSON.  
IT'S NOT THE SAME TYPE OF  
SITUATION.

YOU'RE ASKING TO ALLOW A  
CHILD WHO AT A POINT IN TIME  
CLEARLY DOESN'T HAVE THE  
MENTAL CAPACITY TO  
UNDERSTAND THE CONSEQUENCES

OF HER ACTIONS.

TO ADMIT -- YOU KNOW, YOU  
HAVE TO LOOK AT ALL THOSE  
FACTORS.

FOR RELEVANCE TREALLY HAS TO  
BE SOMETHING THAT GOES TO  
PROVE OR DISPROVE AN ELEMENT  
OF THE CRIME.

HERE UNDER 404 WE ARE  
TALKING ABOUT WHETHER IT WAS  
AS ESSENTIAL ELEMENT.

>> I THINK JUSTICE WELLS IS  
ASKING GO BACK TO THIS WHICH  
IS THE FIRST ANALYSIS STARTS  
WITH RELEVANCY, AND THAT'S  
SPECIFIC TO THIS CASE OR  
FACT SPECIFIC SO EACH CASE  
IS ANALYZED FIRST ON  
RELEVANCY.

BUT IT GOES TO, I THINK WHAT  
YOU'RE -- LET'S ASSUME IT'S  
RELEVANT AT LEAST THAT SHE  
MAY NOT BE A TRUTHFUL PERSON  
AND AGAIN YOU HAVE GOT THE  
SOLE ACT OF, THAT IS THE  
SOLE WITNESS IS THIS VICTIM.  
SO I GUESS -- I WANT TO JUST  
RETURN TO THAT.

ARE YOU SAYING THAT THERE,  
THAT IT'S BECAUSE ALL THE  
OTHER SECTIONS EXPLAIN HOW  
TO IMPEACH THAT THE COURT IS  
NOT, IS HAMSTRUNG FROM  
SAYING EVEN IF IT'S RELEVANT  
IT'S EXCLUDED BECAUSE OF  
THIS PROVISION?

CAN YOU POINT TO A PROVISION  
THAT WOULD THEN REQUIRE  
AFTER THE JUDGE FINDS IT'S  
RELEVANT LIKE IN JAGGERS,  
THAT IT HAS TO BE EXCLUDED  
BY A PROVISION OF THE  
EVIDENCE CODE?

>> WELL, I THINK IT'S  
EXCLUDED UNDER THE MANNER IN  
WHICH IT WAS SOUGHT TO BE  
INTRODUCED.

>> I DON'T UNDERSTAND.  
EXPLAIN THAT.

>> OKAY.

I'M NOT SURE I'M REALLY  
ANSWERING YOUR QUESTION.

>> NO --, WE'RE REALLY  
GETTING -- JUST NOT THINK

ABOUT THIS CASE.

TOMORROW, ANOTHER JUDGE  
STARTS A CASE, IT'S A SOLE  
WITNESS CASE.

AND THERE'S SOMETHING A YEAR  
AGO THAT INVOLVED THIS  
PERSON LYING ABOUT ABOUT  
SOMETHING PRETTY MATERIAL  
AND FILLING OUT A FALSE  
POLICE REPORT BUT SHE'S NOT  
PROSECUTED.

NOW A LAWYER TRIES TO PUT  
INTO EVIDENCE THE JUDGE IS  
SUPPOSED TO DO WHAT?

THEY ARE GOING TO LOOK AT  
THIS CASE AS A BLUEPRINT.

WHAT WILL THE JUDGE DO?

HOW WILL THE JUDGE ANALYZE  
IT AND HOW WILL THE PARTIES  
ARGUE?

>> OKAY EVEN IF WE ARE  
ASSUMING IT'S RELEVANT --

>> WE'LL START WITH IT.

>> YOU START WITH RELEVANCY.

>> IT CAN BE EXCLUDED ON THE  
BASIS OF PREJUDICE.

>> IT CAN'T BE RELEVANT TO  
THE CRIME ITSELF TO PROVE  
THE ELEMENTS OF THE CRIME IF  
IT'S RELEVANT AT ALL IT'S  
ONLY RELEVANT TO THE  
WITNESS'S CREDIBILITY.

IS THAT RIGHT?

>> RIGHT.

>> OKAY AND SO ISN'T THE,  
THE, THE DETERMINATION OF  
WHAT EVIDENCE CAN IMPEACH  
THE WITNESS'S CREDIBILITY  
DETERMINED UNDER 404, 405,  
610.

>> EXACTLY AND THE STATE  
WOULD SUBMIT THAT IN THIS  
CASE WHERE WE'RE START WITH  
THE ASSERTION IT'S  
ADMISSIBLE UNDER 610 THERE'S  
NO CONVICTION IT'S NOT A  
CHARGE MADE --

>> THAT'S WHY YOU DON'T SEE  
ALL THESE CASES DISCUSSED.

401 BECAUSE IT'S NOT  
RELEVANT EVIDENCE TO WHETHER  
THE CRIME WAS COMMITTED OR  
NOT.

YOU'RE TRYING TO IMPEACH A

WITNESS.

>> BASED ON CREDIBILITY AND YOU CAN ONLY DO THAT VIA REPUTATION.

>> AND THE COURT ONLY PROVIDES CERTAIN METHODS OF IMPEACH AGWITNESS'S CREDIBILITY.

>> THAT'S CREDIBLE.

HAD APPELLANT TRY!!IED TO DO THIS SOME OTHER WAY THEY COULD'VE TRIED TO GO TO REPUTATION EVIDENCE.

THEY COULD'VE TRY!!IED TO DO IT VERSUS REVERSE WILLIAMS.

>> THAT'S WHERE YOU WERE GOING UNDER 404 SO YOU'RE NOW EVEN THOUGH JUSTICE CANTERO GAVE YOU THE ANSWER TO HOW YOU WOULD ANSWER THIS, AND I'M NOT DOESH, THE QUESTION IS IS YOURS GOING BACK TO SAYING MAYBE IT COULD COME IN UNDER 404?

>> POTENTIALLY HAD -- IF IT WAS RELEVANT, AND IF IF HE COULD MOVE IT WAS AND SOUGHT TO SUBMIT THAT WAY.

>> YOU COULD EXPLAIN THE RELATIONSHIP BETWEEN 4042 IN OUR CODE AND 4052?

IT SEEMS LIKE THEY ADDRESS SIMILAR IF THOUGHT INSAME THINGS BUT 4042 IS MORE RESTRICTIVE THAN 4052.

PROFESSOR EHRHARDT SEEMS TO THINK 4052 IS LIMITED TO A VERY NARROW SET OF CIRCUMSTANCES.

>> THAT'S CORRECT.

WHEN WE READ THE COMMENTARY TO 4052, WE READ WHAT PROFESSOR EHRHARDT SAYS. WE READ ABOUT WHAT THE CASES SAY.

IT IS LINKED TO CASES WHERE IT IS A SPECIFIC AND ESSENTIAL ELEMENT OF THE CLAIM OR THE DEFENSE.

AND THE TYPES OF CASES IN WHICH THIS HAS BEEN FOUND TO HAVE APPLIED, ARE CASES LIKE SELF-DEFENSE WHERE YOU ARE TRYING TO PROVE THAT THE

VICTIM HAS A HISTORY OF, CAN  
A REPEATED PATTERN OF  
CONDUCT THAT THEY ATTACK.  
OR IN CASES WHERE WE'VE GOT  
AN INCOMPETENT DRIVER AND  
THE PERSON HAS A, A RECORD  
OF ADMINISTRATION ACCIDENTS.  
THOSE KINDS OF CASES.

BUT ALL OF THE COMMENTARIES  
AND ALL OF THE CASES  
SPECIFICALLY SAY THAT YOU  
CANNOT OFFER THAT TYPE OF  
EVIDENCE, A SPECIFIC ACT AS  
A BASIS OF AN INFERENCE THAT  
BECAUSE THE PERSON ACTED  
THAT WAY IN THE PAST THAT  
THEY'RE ACTED IN CONFORMITY  
IN THE --

>> WE KNOW THAT AS TO, YOU  
KNOW, IF YOU'RE, IF THIS IS  
THE DEFENDANT, I DON'T THINK  
ANYBODY IS SUGGESTING THE  
DEFENDANT YOU COULD GET TO  
THIS EVIDENCE IN AGAINST THE  
DEFENDANT TO SAY THAT THEY  
ACTED THIS WAY, YOU KNOW,  
FIVE YEARS AGO.

BUT WE ARE TALKING ABOUT,  
WE'VE GOT THE CONSTITUTIONAL  
OVERTONES HERE AND CLEARLY  
WE CAN'T VIOLATE -- YOU KNOW,  
THE EVIDENCE CODE IS EITHER  
EXCLUSIVE OR THERE ARE --  
WITHIN THE EVIDENCE CODE  
WHERE THIS COMES IN OR ALL  
THE OTHER STATES THAT HAVE  
FOLLOWED THIS FALSE  
ACCUSATION EXCEPTION ARE  
JUST, YOU KNOW, EITHER THEIR  
STATES HAVE THIS ALREADY IN  
THERE, YOU WOULD HAVE TO  
LOOK AT EACH STATE BUT SO  
GOING BACK TO HOW IT WOULD  
COME IN IN WILLIAMS RULE,  
EXPLAIN THAT AGAIN TO ME?  
THAT'S, YOU WOULD SAY IT WAS,  
IT'S, WOULD BE, BECAUSE IT  
SAYS IT'S RELEVANT -- IT'S  
INADMISSIBLE WHEN THE  
EVIDENCE IS SOLEY TO PROVE  
BAD CHARACTER OR PROPENSITY  
SO IT SEEMS TO ME PROPENSITY,  
PROPENSITY FOR  
UNTRUTHFULNESS YOU CAN'T

IMPEACH BY A PRIOR ACT.

>> THAT'S, THAT'S CORRECT.

>> BUT THAT WOULD BE TRUE  
EVEN IF IT LOOKED SO  
RELEVANT LIKE IT, IT'S THE  
SAME DEFENDANT AND THE SAME  
VICTIM ACCUSING THAT  
DEFENDANT.

THAT'S WRMIER, I'M NOT AS --  
THIS ONE IS, IS I THINK MORE  
DIFFICULT FOR THE DEFENDANT.  
BUT, BUT WE'VE GOT TO LOOK  
AT ALL THE CASES, AND I'M  
CONCERNED THAT IT WAS NOT  
COME IN AND IN THE SCENARIO  
WHERE TWO WEEKS AGO THE  
PERSON FALSELY ACCUSED THAT  
SAME DEFENDANT AND WOULDN'T  
COME IN UNDER 404 BECAUSE IT  
SAYS IT'S NOT RELEVANT, WHEN  
THE EVIDENCE IS RELEVANT  
SOLEY TO PROVE BAD CHARACTER  
OR PROPENSITY, IT'S GOD TO  
COME IN UNDER 609 AND 610 OR  
405.

SO EXPLAIN THAT AGAIN TO ME.  
YOU THINK THAT CAN AT  
CERTAIN TIMES COME IN UNDER  
4042?

>> NOT IN THIS CASE, I DON'T  
BELIEVE BUT I BELIEVE IN  
OTHER CASES IT, IT CERTAINLY  
COULD.

THE BEAUTY OF THOSE  
PROVISIONS THOUGH ARE THERE  
ARE CERTAIN THINGS BUILT  
INTO IT TO MAKE SURE THAT  
THE EVIDENCE IS RELIABLE.  
THAT WOULDN'T HAPPEN IN THIS  
CASE BECAUSE IT'S TOO  
REMOTE.

IT'S DIFFERENT TYPES OF  
EVIDENCE.

IT'S DIFFERENT DEFENDANTS.  
SO THERE, THERE WOULD BE  
PROBLEMS IN THIS CASE BUT IN  
OTHER CASES, IT MIGHT.

>> BUT, THAT'S, BUT THOSE  
ISSUES OF REMOTENESS, THE  
RELIABILITY, THAT'S NOT IN  
THE EVIDENCE CODE.

THAT'S CASE LAW.

CORRECT?

>> CORRECT.

>> SO IT'S NOT LIKE EVERYTHING THAT IS, THAT'S THE COURT HAS NOT EXPANDED ON, WHAT IS IN THE EVIDENCE CODE TO MAKE SURE THAT A TRIAL IS CONDUCTED FAIRLY. CORRECT?

>> CORRECT.

THE STATE SUGGESTS THAT IN THIS CASE WHAT THE SECOND DISTRICT HAS SOUGHT TO DO IS CREATE A STATUTORY EXCEPTION THAT WAS NOT CONTEMPLATED BY THE FRAMERS OF THE CODE.

IN THIS, IN THIS CASE, IT'S CLEAR THAT THEY CONSIDERED FEDERAL RULE OF EVIDENCE 608, WHICH ALLOWS A BROAD ADMISSION OF IMPEACHMENT EVIDENCE AS TO TRUTH OR UNTRUTHFULNESS.

THEY CONSIDERED THAT AND THEY REJECTED IT FOR TWO REASONS.

ONE, BECAUSE IT DID NOT ACCURATELY REFLECT THE STATE OF THE LAW IN FLORIDA, BUT ALSO BECAUSE OF THE POTENTIAL FOR ABUSE.

AS IN THIS CASE.

FOR EXAMPLE, I HAD A FIGHT WITH MY SISTER AS A SMALL CHILD.

WE WERE ROUGH HOUSING.

I BROKE A VASE OF MY BROTHERS AND I BLAMED HER.

SO THAT MEANS -- MOTHERS MOTHER'S SO THAT MEANS TODAY THAT BECAUSE I AM A VICTIM IN A SEXUAL BATTERY CASE THAT THAT CAN BE BROUGHT IN TO PROVE THAT I'M AN UNTRUTHFUL PERSON.

IT'S TOO REMOTE.

IT'S TOO DIFFERENT AND THE MINDSETS INVOLVED AT DIFFERENT TIMES CAN BE DIFFERENT.

>> BUT ISN'T THAT WHY, EVEN IF YOU HAVE GENERAL PRINCIPLE, WHICH IS UNDER CERTAIN CIRCUMSTANCES, PRIOR ACTS OF LYING, COULD COME IN, YOU HAVE THE JUDGE FRAMING

IT AND YOU HAVE THIS COURT  
AND THROUGH CASE LAW  
EXPLAINING THE PARAMETERS,  
YOU KNOW, UNDER 403 WHEN  
IT'S SECLUDED.

I MEAN THE CATCH-ALL IS EVEN  
WHEN SOMETHING'S RELEVANT,  
IT STILL CAN BE EXCLUDED IF  
DANGER OF CUB FUSION OR  
PREJUDICE, REMOTENESS, COMES,  
SO NOTHING PRECLUDES THE  
JUDGE FROM THEN PERFORM  
AG403 ANALYSIS.

>> THAT'S CORRECT.

THE STATE WOULD ALSO SAY  
THAT WHAT HAPPENED WITH THE  
SECOND DISTRIBUTION IS THEY  
ARE ESSENTIALLY IMPOSING ON  
THE LEGISLATIVE PERVIEW BY  
LEGISLATIVE!!ING THEY CAN  
NARROWLY CONSTRUE A STATUTE  
TO SAY THAT IT'S  
CONSTITUTIONAL BUT THEY  
CAN'T EXPAND IT.

>> WE ALL AGREE THAT 610,  
YOU CAN'T NOT CARVE AN  
EXCEPTION INTO 610.  
SO I, THIS GOES BEYOND THAT.

IT'S JUST REALLY THE  
QUESTION OF WHETHER THE  
OTHER PROVISIONS AS JUSTICE  
WELLS WAS SAYING BECAUSE  
IT'S RELEVANT IS IT  
SPECIFICALLY EXCLUDED AND IS  
IT EXCLUDE SAID BECAUSE  
JUSTICE CANTERO SAID BECAUSE  
THERE ARE ALL THESE OTHER  
PROVISIONS ABOUT HOW YOU  
IMPEACH AND THEREFORE THOSE  
PROVIDE THE ONLY METHODS OF  
IMPEACHMENT AND THAT WOULD  
BE YOUR POSITION.

>> THAT'S CORRECT.

>> LET ME ASK YOU A  
QUESTION.

IN, WHAT ABOUT 4041 B?  
SPECIFICALLY CHARACTERS AND  
VICTIMS, THE OTHERS SPEAK TO  
VICTIM.

WHY WOULDN'T 4041 B NOT BE  
AVAILABLE.

>> 4041 B DISCUSSES  
CHARACTER AS A ESSENTIAL  
ELEMENT OF THE CRIME OR

DEFENSE, AND AGAIN, THOSE TYPES OF CASES GO.

>> -- ONE B THAT SAYS EVIDENCE OF A PERTINENT TRAIT OF THE CHARACTER OF THE VICTIM OF THE CRIME OFFERED BY AN ACCUSED.

>> WELL, AGAIN, IT CAN'T BE ONE INSTANCE.

IT HAS -- WHEN YOU ARE TALKING ABOUT A CHARACTER TRAIT, IT'S SOMETHING THAT'S CONSISTENT IN BEHAVIOR.

SO IT EQUATES ESSENTIALLY TO REPUTATION-TYPE EVIDENCE, IT'S SOMETHING THAT IS A QUOTE, UNQUOTE, HISTORIC RESPONSE OF SOMEBODY.

ONE INSTANCE WOULD NOT MAKE A TRAIT OR A CHARACTER TYPE TRAIT.

SO THE STATE'S POSITION IS THAT WOULD NOT APPLY.

I JUST WOULD LIKE TO CONCLUDE BY SAYING, YOU KNOW, PETITIONERS RAISE AGDUE PROCESS ARGUMENT.

THAT WAS ARTICULATED BELOW.

-- WAS NOT ARTICULATED ABELOW.

IT DOES NOT APPLY BECAUSE THERE ARE OTHER MEANS THAT THIS TYPE OF EVIDENCE COULD BE ADMITTED PROVIDED OF COURSE THE STATUTORY ELEMENTS FOR ADMISSION WERE MET.

AND THE MOST IMPORTANT THING ABOUT DUE PROCESS IS IT DOESN'T ALLOW A DEFENDANT TO PRESENT ANY DEFENSE ANY WAY. HE STILL HAS TO DO SO WITHIN THE BOUNDS OF WHAT THE LAW PROVIDES.

AND THE LAW REQUIRES THAT EVIDENCE MUST BE RELIABLE AND IT MUST BE RELEVANT. FOR ALL OF THOSE REASONS, THE THE STATE WOULD ASK THIS COURT TO AFFIRM.

>> THANK YOU.

>> REBUTTAL?

>> MAY IT PLEASE THE COURT.

MR. --

>> LUFFERMAN, ISN'T THE, THE FALLACY HERE OF BEGINNING WITH THE ISSUE OF RELEVANCE AS JUSTICE CANTERO WAS ALLUDING TO THAT THE CREDIBILITY OF THE VICTIM IS NOT A MATERIAL FACT?

>> IN THIS CASE, IT IS. IT WAS A DEFENSE THAT --

>> WELL, HOW IS IT A MATERIAL FACT?

I MEAN, THE MATERIAL FACT INVOLVES THE CRIME, DO THEY NOT?

>> BUT IT WAS A MATERIAL FACT AS FAR AS THE MR. ROEBUCK'S DEFENSE. HIS DEFENSE WAS THERE'S NO PHYSICAL EVIDENCE.

IT'S HE-SAID SHE-SAID AND HER THEBLT IS THE KEY. IF YOU DON'T BELIEVE HER, THEN YOU DON'T HAVE A CRIME. IF YOU BELIEVE HER, YOU DO.

>> YOU HAVE A CASE THAT SAYS CREDIBILITY IS A MATERIAL FACT?

>> JAGGERS AND CLIBURN I THINK BOTH SAY THAT.

>> THAT IT'S A MATERIAL FACT?

>> THAT THE VICTIM'S CORRUPTNESS IS AN ESSENTIAL ELEMENT THAT ALLOWS THE DEFENSE TO BE ABLE TO CROSS-EXAMINE THE ALLEGED VICTIM REGARDLESS OF THAT CORRUPTNESS.

>> WHAT I AM TRYING TO TAILOR IS TO IS WHAT IS IN THE EVIDENCE CODE.

>> JAGGERS PROVIDE RELIED UPON --

>> WHAT HAVE OTHER COURTS SAID AS FAR AS WHETHER YOU CAN IMPEACH THE CREDIBILITY OF A WITNESS THROUGH 405? IT SEEMS TO ME THAT 608 PROVIDES THE METHODS FOR IMPEACHING THE CREDIBILITY OF A WITNESS AND IT'S VERY SPECIFIC AND HAS CERTAIN PROVISIONS AND IT ALSO REFERS TO 609 AND 610.

IT DOESN'T SAY ANYTHING  
ABOUT 404 OR 405.

>> I UNDERSTAND THAT.

AGAIN, I THINK JAGGERS CASE  
AGAIN IS THE MAIN CASE THAT  
RELIED UPON 405.

I NEED TO CHRROR FIMPT  
JAGGERS DID INVOLVE A  
DIFFERENT PERSON WHERE THE  
ALLEGED CRIMINAL TACT WAS  
COMMITTED UPON.

THE WILLIAMS RULE CASE SAID  
IN THE INSTANCE THE  
DEFENDANT HAD MOLESTED THE  
WILLIAMS RULE WITNESS AND  
SHE HAD SAID PREVIOUSLY HER  
FATHER MOLESTED HER SO THERE  
WERE DIFFERENT PEOPLES IN  
JAGGERS AS WELL.

I WOULD ASK YOU TO ADOPT THE  
SECOND DISTRICT'S POSITION.

>> THANK YOU VERY MUCH.

I DOUBT THAT WE HAVE HAD  
THIS INTERESTING DISCUSSION  
ABOUT THE EVIDENCE CODE  
SINCE LAW SCHOOL  
EXAMINATION.

>> I WAS SAYING TO JUSTICE  
CANTERO THIS WOULD BE A  
GREAT LAW SCHOOL QUESTION.

>> YOU BOTH DID A WONDERFUL  
JOB.

>> THANK YOU.

>> GIVE IT TO PROFESSOR  
EHRHARDT.