>> PLEASE RISE.
LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.
PLEASE BE SEATED.
>> THE NEXT CASE ON THE COURT'S
AGENDA IS PETION V. STATE.
>> GOOD MORNING.
MAY I PLEASE THE PANEL.
I AM ON BEHALF OF GERALD PETION.
JUST RECENTLY HE WAS DRIVING
AN AUTOMOBILE IN THE POLICE
OFFICERS GAVE HIM A DRIVERS
LICENSE.
THEY PATTED HIM DOWN, FOUND ON
HIS PERSON COCAINE.
THEN SEARCHED THE AUTOMOBILE AND
UNDERNEATH THE JACKET ON THE
DRIVER SEAT FOUND MARIJUANA.
HE WAS CHARGED WITH TRAFFICKING
IF COCAINE AND POSSESSION OF
MARIJUANA WITH INTENT TO
DELIVER.
SEE MY GOOD JUDGMENT IS TO LOOK
AT, DO YOU AGREE THAT THAT IS
CONTRARY TO THE MAJORITY REVIEW
AROUND THE COUNTRY?
>> I'M NOT DISPUTING THAT.
>> OKAY.
>> ARE THERE ANY CASES, AND
OTHERS A GENERAL RULE STATED,
BUT WHEN A COURT EXPRESSLY MAKES
FINDING OF A DISABILITY, THE
TRIAL COURT CAN BE DEEMED TO
DISREGARD EVIDENCE THAT IS FOUND
TO BE ADMISSIBLE.
RATHER THE COURT WOULD BE

PRESUMED TO HAVE CONSIDERED IT,
BECAUSE THEY HELD US BECAUSE
THEY HELD US TO BE ADMISSIBLE.
SO MY QUESTION, THERE SPARKS
OUT OF THE SECOND DISTRICT
UPHELD THAT WAY.
AND THEY ACTUALLY ARE CONFRONTED
WITH A JUDGE WHO HAS HELD
EVIDENCE TO BE ADMISSIBLE,
EITHER CASES IN THE STATE THAT
SAID THE JUDGE WAS PRESUMED TO
DISREGARD WHAT THE JUDGE HAS
EXPRESSLY STATED WAS
ADMISSIBLE?
I UNDERSTAND THIS IS GENERAL
PRINCIPLE, WHICH WOULD BE TRUE
IF THEY HEARD A MOTION TO
ELIMINATE, MOTION TO
SUPPRESS, IF THEY HEARD ANOTHER
CASE INVOLVING THE SAME
DEFENDANT.
WE PRESUME THEY'RE NOT GOING TO
HEAR TO INADMISSIBLE EVIDENCE.
COMING TO CASES THAT SAY, ANY OTHER
THAN THIS CASE THAT IF THE JUDGE
EXPRESSED THE RULES THE
ADMISSIBILITY, THAT WE CAN PAY
AN APPEAL THAT THEY'RE PRESUMED TO
HAVE DISREGARDED WHAT THEY
ALREADY SAID THEY WOULD ADMIT.
[INAUDIBLE]
I WOULD JUST DISCLOSE THAT THE
MAJORITY RULE, THAT'S WHAT I'M
TRYING TO FIND OUT.
WHAT ARE THE CASES THAT
RATIONALIZE OR EXPLAIN THE ISSUE

WHEN THE EVIDENCE IS HELD TO BE
ADMISSIBLE?
>> I'M NOT SURE I QUITE --
>> WHEREAS THE REASONING OF THE
MAJORITY OF THE CASES THAT THE
MAJORITY RULED THAT SAY WHEN THE
JUDGE HAS HELD IT TO BE
ADMISSIBLE, THAT THE JUDGE IS
PRESUMED TO DISREGARD IT?
[INAUDIBLE]
>> MOST OF THOSE WERE CASES
WHERE THE JUDGE FOUND IT WAS
INADMISSIBLE AND IT WAS PRESUMED
THEY DISREGARDED IT.
[INAUDIBLE]
IT SEEMS TO ME THAT THERE IS A
SIGNIFICANT DIFFERENCE BETWEEN
CIRCUMSTANCES WHERE A COURT,
SITTING AT THE TRIAL OF FIVE
CONSIDERS EVIDENCE AND THEY
PROPPER FOR INSTANCE AND THEN
DECIDES THAT EVIDENCE IS NOT
ADMISSIBLE.
IN A SITUATION WHERE A COURT, IN
THE SAME CAPACITY, CONSIDERS
EVIDENCE AND DECIDE THAT IT IS
ADMISSIBLE.
YOU CAN ARGUE THAT WHEN THERE'S
A JURY INVOLVED, THAT THE MERE
PRESENTATION OF THE EVIDENCE,
LETTING THE JURY BECOME AWARE
OF IT, SOMEHOW IN SOME
CIRCUMSTANCES CAN TAINT THE JURY
BECAUSE ONCE THEY ARE AWARE OF
IT, THEY CANNOT TAKE IT OUT OF
THEIR MINDS.

NOW THAT'S NOT OBVIOUSLY ALWAYS
THE CASE, BUT THERE'S SOME
CIRCUMSTANCES WHERE THAT COMES
INTO PLAY.
BUT I THINK SOME OF THESE CASES
AND WHAT THEY SAY ABOUT JUDGES
DEAL WITH THE CIRCUMSTANCES
WHERE IT'S BEFORE THE JUDGE,
BUT THE JUDGE KNOWS IT'S NOT
ADMISSIBLE AND THEN THE COURTS
RECOGNIZE COMING OUT THAT'S NOT
A PROBLEM FOR A COURT.
A COURT CANNOT BE DISCIPLINED TO
SAY I'VE HEARD THAT.
BUT I'VE DECIDED IT'S NOT
ADMISSIBLE.
IT'S HISTORY, IT'S GONE.
IT'S NOT GOING TO TAINT THE
JUDGES CONSIDERATION OF THE
CASE.
AND IT SEEMS TO ME THAT A LOT OF
THESE CASES ARE REALLY TALKING
ABOUT THAT KIND OF CIRCUMSTANCE
AND THAT EXPLAINS A LOT OF THE
SLAINT LANGUAGE.
ISN'T THAT RIGHT?
>> YES, I POINTED THAT OUT IN MY
BRIEF.
THEY GIVE LIP SERVICE TO A JUDGE
IS PRESUMED TO KNOWING THE LAW
[INAUDIBLE]
[INAUDIBLE]
I AM NOT CONSIDERING THAT
EVIDENCE.
THAT'S WHAT YOU'RE TALKING ABOUT
IN ALL THOSE CASES.

>> THE CATEGORY THOUGH IS THAT
THE JUDGE WILL SENTENCE INADMISSIBLE,
PRESUMED THEY DISREGARDED THE
INADMISSIBLE EVIDENCE.
IF THEY HEARD IT AT A SEPARATE
HEARING, IT IS PRESUMED THAT THEY
CAN SEPARATE WHAT THEY HEARD
FOR PURPOSES OF VOLUNTARINESS OR
MOTION TO SUPPRESS.
BUT THAT'S WHY ASK YOU, ARE
THERE CASES IN THE STATE, OTHER
THAN THIS PARTICULAR CASE THAT'S
BEFORE US, WHERE THE JUDGES
EXPRESSLY RULED IT'S ADMISSIBLE.
>> THAT'S THE CASE WE HAVE
BEFORE US.
HE SAID ITS ADMISSIBLE.
>> SO I'M ASKING YOU, OTHER THAN
THIS CASE, WHAT OTHER CASES IN
THE STATE THAT HAVE HELD SIMILAR
TO THE PETITION CASE?
>> WELL,
[INAUDIBLE]
[INAUDIBLE]
THE THIRD DISTRICT THAT HE
SHOULD HAVE ADMITTED IT AND IT
ODDLY AFFECTED THE STATE OF
APPEAL CAME OUT OF ODD THAT HE
RELIED UPON IT AND THEREFORE HE
REVERSED IT.
[INAUDIBLE]
>> THAT'S NOT THIS CASE.
>> THIS IS THE CASE WITH THE
JUDGES NOW EXPRESSLY RULED THAT
THE EVIDENCE IS ADMISSIBLE.
THE DCA SAYS HE SHOULD NOT HAVE

ADMITS THAT.
IT'S BEEN AROUND FOR QUITE A
NUMBER OF YEARS.
BUT BECAUSE THE JUDGE IS
PRESUMED TO KNOW THE LAW, WE'RE
NOT GOING TO --
[INAUDIBLE]
>> IT IS NONSENSICAL TO PRESUME
THAT A JUDGE, WHO HAS RULED THAT
EVIDENCE IS ADMISSIBLE IS
PRESUMED TO KNOW THAT IT'S NOT
ADMISSIBLE.
>> I DON'T KNOW.
>> IT SEEMS LIKE A PRESUMPTION
THAT IS VERY MUCH CONTRARY TO
FACT.
>> I DON'T KNOW HOW THAT
HAPPENED.
>> UNLESS THERE'S SOMETHING ELSE
IN THE RECORD THAT SHOWS WHY I
ADMITTED THAT, BUT I'M NOT GOING
TO CONSIDER IT.
>> A LOT OF THE CASES ARE LIKE
THAT.
THEY SORT OF STICK TO THAT
PROPOSITION , BUT THEN ARE QUICK
TO POINT OUT WHILE THE JUDGE
REALLY DIDN'T CONSIDER THAT
EVIDENCE BECAUSE SOMEWHERE IN
THE RECORD
[INAUDIBLE]
>> I THINK THE PROBLEM IS IF YOU
GO BACK TO THE C.W., WHICH IS
CITED IN THIS CASE, C.W., WHERE
SOMETIMES COURTS GET BOUND UP IN
THIS, WHEN A JUDGE SITTING AS

THEY TRY OR AFFECT ERRONEOUSLY
ADMITS EVIDENCE, THE JUDGE IS
PRESUMED TO DISREGARDED THE
EVIDENCE.
BUT THAT'S FROM ARROYO, WOULD END
UP SAYING THEY ACTUALLY DID RELY
ON IT BECAUSE YOU CAN SEE THEY
RELIED ON IT.
AND THEN IT SAYS IF IT'S A ROSE
THEY WERE RELIED ON IT IN ANY
EVENT THERE RECORD AFFIRMATIVELY
REFLECTS THE JUDGE DID NOT
CONSIDER AND DISREGARDED THE
ADMISSIBLE EVIDENCE.
WHAT WE'RE REALLY TALKING ABOUT
HERE IS THAT IF THE JUDGE ADMITS
THE EVIDENCE AND DOESN'T THINK
THE JUDGE IS DISREGARDING THAT,
THEN YOU WOULD SAY THE
PRESUMPTION IS OVERCOME THAT THE
JUDGE DIDN'T RELY ON IT.
I MEAN, SO YOU CAN STILL KEEP
THE PRESUMPTION, BUT JUST WHEN
THEY'VE ADMITTED IT AND HAVEN'T
INDICATED THEY'RE NOT RELYING ON
IT, THEN IT'S PRESUMED THEY
RELIED ON IT.
WE HOPED THEY WOULD'VE AS THEY
DEEMED ITS ADMISSIBLE.
>> THE LAW HAS BEEN TRIED OF
THAT IN IT'S PRESENT BECAUSE THE
JUDGE KNOWS THE LOCK SOMEHOW
SOMEBODY HAS TOTALLY JUDGED AS
ERRONEOUS, YOU DON'T CONSIDER
IT --
>> WHAT IS REALLY BEING TESTED OR

IS THERE REALLY AREN'T ANY CASES
WHERE THE JUDGE, OTHER THAN THIS
ONE, WHERE THE JUDGE SAYS THIS
IS ADMISSIBLE EFFORT IN,
OVERRULED OBJECTION TO SOMEONE
WHO SAYS IT'S NOT ADMISSIBLE,
SAYS YES IT IS AND THEN MAKES
A RULING.
THERE ARE NO OTHER CASES.
>> THE JUDGE DID ADMIT THE
EXPERIMENT OF THAT CASE IN THE
DCA SAID THAT HAVE ADMITTED
THAT.
>> SAID THAT CASE ISN'T IN
HOLDING OF ANYTHING THEY
WOULD'VE SAID BECAUSE THEY FOUND
THAT THE JUDGE ERRONEOUSLY
RELIED ON IT.
>> SO THERE WAS A FINDING THAT
THE JUDGE RELIED UPON THAT.
[INAUDIBLE]
>> AND THIS IS ON EXPRESSIVE
DIRECT CONFLICT.
AND WHAT IS THAT THE JDK'S?
>> THAT'S THE THIRD DISTRICT
WHERE THE COMMENT DEFENSE
CONFLICT RULES FOR MS. CHILD WAS
DENIED.
NO RULING ON THE OBJECTION.
AND THERE WAS AN APPEAL OF
ADJUDICATION AND THE STATE HAD
URGED A CERTAIN DISTRICT SAID
WELL LISTEN, THE NON-JURY TRIAL
JUDGE IS PRESUMED NOT TO HAVE
CONSIDERED THIS COMMENT ON THE
RIGHT TO REMAIN SILENT.

THEY REJECT TO THAT.
AND THEY SAID NO, WE'RE GOING TO
DO THAT FOR NON-LIST ERROR
CONFLICT.
[INAUDIBLE]
WE ARE GOING TO DO AN OBJECT OF
ANALYSIS.
AND THEREFORE THEY SAID YES, THE
COMMENT WAS MADE.
THE FACT THAT THE JUDGE DENIED
THE MISTRIAL DIDN'T GIVE HIM THE
OBJECTION THAT WHICH OVERRULING
THE OBJECTION AND THEN THEY DID
AN ANALYSIS AND SAID WE FIND
THAT WE CAN'T SAY THAT IT DIDN'T
AFFECT ADJUDICATION BILLING
QUICKLY.
>> IT ALSO CONFLICTS WITH PARKS
V. THIS NECK.
AND THAT'S REALLY THE WAY TO PUT
THESE TOGETHER LOGICALLY, WHICH
IS IS PRESUMED TO REST JUDGMENT
ON ADMISSIBLE EVIDENCE.
DISREGARD INADMISSIBLE
EVIDENCE.
THEN IT GOES ON AND SAYS THAT IN
VIEW OF THE SPECIFIC FINDINGS OF
ADMISSIBILITY, WE CANNOT HOLD
THE TRIAL COURT DISREGARDED IN
ADMISSIBLE EVIDENCE.
THAT'S THE LOGICAL -- THAT
BECOMES LOGICAL.
[INAUDIBLE]
LET'S ASSUME WE TAKE THIS CASE,
WE AGREE THAT WAS A
MISSTATEMENT, WOULD WE SEND IT

BACK TO THE DISTRICT COURT TO
GET INTO A HARMLESS ERROR
ANALYSIS?
[INAUDIBLE]
THERE SAID THIS WAS ERRONEOUS.
THIS IS MY TESTIMONY TO MOTION
THAT HAS NOT BEEN INTRODUCED
INTO EVIDENCE.
THAT'S WHAT WE'RE ASKING THAT
YOU SEND IT BACK AND HAVE THEM
NOW DO A HARMLESS ERROR
ANALYSIS, RATHER THAN JUST SAY
THE JUDGE IS PRESUMED TO
DISREGARD IT AND THERE ISN'T
ANYTHING IN THE RECORD THAT
SHOWS A JUDGE THAT HAS AFFECTED
OR INFLUENCED THE JUDGE'S
DECISION.
>> SO WITHOUT ANY OTHER
STATEMENTS, IF WE PRESUME THAT
THE JUDGE DID IN FACT USE THE
EVIDENCE IN HIS DETERMINATION,
DO YOU STILL THINK THERE SHOULD
BE A HARMLESS ERROR ANALYSIS?
>> YES.
>> BECAUSE IT CAN BE THAT ONLY
ONE MENTIONED.
THERE WAS NO MENTION IN CLOSING
ARGUMENTS.
THIS WASN'T REALLY THE ISSUE IN
THE CASE.
>> WE BELIEVE IT WAS NOT
HARMLESS ERROR, BUT HAD THE
COURT NEVER GOT TO THAT PORT.
UNLESS THIS COURT WANTS TO GO A
STEP FURTHER AND SAY IT MUST

ERROR ANALYSIS SHOULD HAVE BEEN
APPLIED.
>> OR THE OPPOSITE.
EITHER WAY.
BUT THAT'S WHAT WE NEED TO DO
AND I JUST THOUGHT THIS WOULD BE
A GOOD CASE AND JUSTICE PARIENTE
WAS A GOOD EXAMPLE BECAUSE
WHAT'S HAPPENING IS YOU'RE
SHIFTING THE BURDEN AND MAKE AN
INDEFINITE COME FORWARD AND SHOW
THAT SOMEHOW OR OTHER OF THIS
INADMISSIBLE EVIDENCE WHICH
HAS BEEN BROUGHT BEFORE THE
COURT IS NOW INFLUENCING THE
COURT.
THE THIRD TO YOUR CASE ON THE
DANIELS CASE IN THE ARROYO CASE
SET OUT TO DO THAT.
HE DOESN'T.
ONLY THE JUDGE STATES FOR THE
RECORD SOMEHOW, THAT HE RELIED
UPON THIS INADMISSIBLE EVIDENCE
OF REACHING THE JUDGMENT AND
THAT'S ALMOST A VIRTUALLY
IMPOSSIBLE TASK.
AND IN THE GOODWIN CASE, THAT'S
THE WHOLE FUNCTION OF THE
APPELLATE COURT.
THEREFORE, APPELLATE COURT, THE
PRESERVED ERROR, THE COURT HAS
TO LOOK AT THE ERROR OR ENTITY
CONCLUDES THAT IT IS IN FACT
ERROR, THEY HAVE TO DO HARMLESS
ERROR ANALYSIS AND MAKE THE
STATE SHOW THAT BEYOND A

REASONABLE DOUBT IT DIDN'T
AFFECT --
>> WOULD YOU AGREE THOUGH AND
LOOKING AT IT AS FAR AS THE
TRIAL JUDGES CONCERNED, THAT
WHEREAS SOMETHING LIKE THIS,
WHICH IS WELL, THIS IS WHAT WE
KNOW, DEFENDANTS DO WHEN THEY'RE
DOING DRUG DEALS, THAT IT IS THE
POSSIBILITY OF LOOKING AT IT
DIFFERENTLY BECAUSE OF THE TRIAL
JUDGE AS FAR AS WHAT THE REMARK
IS, YOU KNOW, LIKE WE HAVE THE
LAST CASE INVOLVING A STABBING
OF COLLATERAL CRIME.
WELL, WE KNOW THAT'S GOING TO BE
VERY POTENTIALLY DAMAGING FOR A
JURY, BEFORE A JUDGE, THAT'S
WHERE THE IDEA THAT THEY
UNDERSTAND THAT IT DOESN'T MAKE
THEM GUILTY OF THIS CRIME JUST
BECAUSE COLLATERAL CRIMES COME
IN.
CAN YOU TAKE THAT INTO
CONSIDERATION AND USE YOUR
HARMLESS ERROR ANALYSIS?
>> I WOULD SAY NO.
I THINK YOU SHOULD SAY IT HAS TO
BE SHOWN THAT THERE IS NO BEYOND
A REASONABLE DOUBT THAT IT
DIDN'T AFFECT THE VERDICT.
I DON'T SEE ANY DIFFERENCE
BETWEEN THE JURY AND THE
EVIDENCE ERRONEOUSLY ADMITTED
THAT HE JUST CONTINUED TO YOUR
HARMLESS ERROR ANALYSIS.

IF HE'S ADMITTED THAT EVIDENCE,
THAT'S MORE LOGICAL THAT IS
GOING TO CONSIDER THAT EVIDENCE
IN REACHING HIS JUDGMENT THAN
NOT.
IT JUST DOESN'T MAKE ANY SENSE
TO ME WHY HE WOULDN'T ENTER THAT
EVIDENCE.
UNLESS YOU DO THE ANALYSIS JUST
BECAUSE IT'S ADMITTED DOESN'T
PER SE MEAN IT'S REVERSIBLE OR YOU
HAVE TO GO INTO YOUR HARMLESS
ERROR ANALYSIS.
BUT THE GUILT OVERWHELMING WAS
THERE OTHER EVIDENCE WHICH
COLLABORATED THE INADMISSIBLE
EVIDENCE IN THAT KIND OF 1
ANALYSIS?
[INAUDIBLE]
[INAUDIBLE]
IT WAS AN EXTENSIVE TESTIMONY.
>> RIGHT, THERE WAS A REJECTION
OF TESTIMONY ABOUT THAT.
EVEN THOUGH THE INITIAL WERE
MASS DEFENDANTS, THEY WERE NEVER
INTRODUCED INTO EVIDENCE.
THE TELEPHONE NUMBER LISTED HAS
NO TESTIMONY THAT THE TELEPHONE
NUMBER MATCHED THE DEFENDANT
WHETHER WITH HIS CELL PHONE.
SO THAT'S SOMETHING THE COURT,
THE APPELLATE COURT HAS TO TAKE
A LOOK AT IN THE HARMLESS ERROR
ANALYSIS.
[INAUDIBLE]
[INAUDIBLE]

>> THERE IS NOTHING IN THE
RECORD HERE THE TRAFFICKING IN
COCAINE WAS REDUCED TO POSSESSION
BECAUSE THERE WAS AN ARGUMENT
ABOUT THE 28 GRAMS.
THERE WAS AN ARGUMENT THAT THE
STATE DIDN'T PROVE THE 28 GRAMS.
AND SO I CAN ASSUME THAT THE
JUDGE WOULD LEAD WITH THE
DEFENSE COUNSEL ON THAT BECAUSE
OF THE WEIGHT OF THE COCAINE.
BUT THE JUDGE DID FIND
POSSESSION OF INTENT TO SELL
BOTH THE MARIJUANA AND COCAINE.
>> YOU ARE NOW -- IF YOU WANT TO
SAVE SOME TIME.
>> OKAY, THANK YOU.
>> GOOD MORNING, MAY I PLEASE
THE COURT.
MY NAME IS HEIDI
BETTENDORF AND I'M ASSISTANT
ATTORNEY GENERAL REPRESENTING
THE STATE OF FLORIDA IN THIS
CASE.
FIRST I'D LIKE TO ADDRESS THAT
JUSTICE LABARGA JUST POINTED OUT
FOR THE RECORD.
I MUST RESPECTFULLY
DISAGREE WITH YOU, YOUR HONOR,
ON PAGE 91 OF THE
TRANSCRIPT IS WHERE THE, CAME IN
REGARDING OFFICER'S TESTIMONY.
IT'S ONLY REALIGNED OUT OF 100
SOMETHING PAGE TRANSCRIPT AND
IT'S THE ONLY TESTIMONY ABOUT
THE OFFICER'S OPINION.

IMMEDIATELY AFTER THE OBJECTION,
THE SERGEANT MORSE TESTIFIED
HIS POTENTIAL FOR BUYERS TO
CONTACT THEM AND THAT'S
CONSISTENT WITH THAT.
BUT THE ONLY STATEMENT IS IN THE
RECORD REGARDING THAT.
>> THE OBJECTION WAS MADE.
>> THE OBJECTION WAS MADE THAT
IT WAS SPECULATIVE.
IT WAS AN OBJECTION THAT WAS
IMPROPER OPINION.
>> YOU'RE NOT ASKING US TO
RE-REVIEW WHETHER THE FOURTH
DISTRICT WAS CORRECT IN ITS
RULING THAT IT WAS INADMISSIBLE.
WE START HERE WITH THE IDEA THAT
THE FOURTH DISTRICT FOUND THE
SENATE WAS PRESERVED AND WAS
INADMISSIBLE.
THE JUDGE MADE A RULING THAT IT
WAS ADMISSIBLE.
>> YES, THE JUDGE MADE IT.
>> WOULD YOU DISTINGUISH A CASE
WHERE THERE HAD BEEN AN OFFER
MADE AT EXACTLY THIS TESTIMONY.
THE JUDGE SAID THIS IS A COMMON
PRACTICE EVIDENCE AND
SPECULATIVE.
I'M NOT GOING TO ALLOW IT.
AND THEN THEY GO ON.
WOULD YOU AGREE THERE WE WOULD
SAY IS PRESUMED THAT BECAUSE
THEY HAD TO REVIEW THE EVIDENCE
THAT THEY PRESUMED DISREGARDED
BECAUSE THEY'D BEEN FOUND INNOCENT?

>> YES, I WOULD AGREE WITH THAT.
>> EXPLAIN THE LOGIC WHEN A
JUDGE IS PRESUMED TO BE LEARNED
AND UNDERSTANDING THE LAW,
HERE THE ARGUMENT AND SAYS I
THE OBJECTION OF THE DEFENDANT.
I AM RULING IT IS ADMISSIBLE
INTO EVIDENCE.
DO WE PRESUME THAT JUDGES LIKE
JURIES, DID YOU CONSIDER ALL
ADMISSIBLE EVIDENCE IN THE CASE
AND GIVE A DIFFERENT WAY.
THEY MAY EVALUATE IT, THAT ISN'T
THE PRESUMPTION THAT WHEN THEY
ESPECIALLY RULED ITS ADMISSIBLE,
THEY CAN'T SAY THAT WE'RE
PRESUMED TO DISREGARD IT BECAUSE
THAT WOULD BE, TO ME, AN INSULT
TO THE JUDGE AND A JUDGE WHO HAS
MADE A CONSCIENTIOUS RULING, I
HAVE NO REASON TO THINK THAT THE
JUDGE WAS, YOU KNOW, JUDGE
CONSCIENTIOUSLY FELT THE LAW WAS
ADMISSIBLE AND ADMITTED IT.
HOW CAN THERE BE THAT HE IS
PRESUMED TO HAVE DISREGARDED IT?
>> WELL, YOUR HONOR, FIRST OFF I
TO TALK ABOUT THE PRESUMPTION
INTO SETS.
FIRST THERE'S A BROAD RESUMPTION
THAT'S NEVER BEEN STRUTTED JUDGE
IS PRESUMED TO IGNORE ADMISSIBLE
EVIDENCE.
THE SECOND PART OF THE
PRESUMPTION THOUGH IS THAT TO
OVERCOME THE PRESUMPTION IS

THAT THERE'S ANYTHING IN THE
RECORD TO SHOW THAT THE TRIAL
JUDGE HAS CONSIDERED THE
IMPROPERLY ADMITTED EVIDENCE,
THAT THE PRESUMPTION IS
OVERCOME.
>> ASSUMING YOU WANT TO USE THAT
FRAMEWORK IN A POSE THAT ON THE
CIRCUMSTANCES, WOULDN'T THE VERY
RULING BY THE TRIAL JUDGE, TO
THE EFFECT THAT THE EVIDENCE WAS
ADMISSIBLE OVERCOME THE
PRESUMPTION?
>> I WOULD SAY IN CERTAIN
CIRCUMSTANCES, YES.
>> LET'S TALK ABOUT THIS CASE
BECAUSE THAT'S ONE BEFORE US.
UNDER THE UNIQUE FACTOR THIS
CASE I DON'T BELIEVE THE TRIAL
HAS A MISSION OF THE TESTIMONY
IN THIS CASE NECESSARILY
OVERCOMES THE PRESUMPTION.
AND ON THE FACT THERE'S A FOURTH
CHARGE THAT WAS NOT REFERRED TO
IN THE FOURTH DCA'S OPINION
WHICH WAS POSSESSION OF DRUG
PARAPHERNALIA, THE DRUG
PARAPHERNALIA WAS FOUND IN THE
CONSOLE AND THE JUDGE
COMFORTABLY ACQUITTED THE
DEFENDANT ON THAT CHARGE.
>> WE ARE FACED WITH A HOLDING.
THE FOURTH DISTRICT HELD THAT
THE JUDGE WAS PRESUMED TO HAVE
DISREGARDED IT, NOT BASED ON
SOMETHING IN THE RECORD.

AM I INCORRECT?
THE FOURTH DISTRICT DECISION, IS
SAID WHEN THE TRIAL JUDGE SITTING
ERRONEOUSLY ADMITS THE EVIDENCE.
THE JUDGE IS PRESUMED TO HAVE
DISREGARDED THAT EVIDENCE.
ALTHOUGH THIS PRESUMPTION IS
REBUTTABLE, NOTHING IN THE
RECORDS SUGGEST THE TRIAL JUDGE
REGARD ON THE INADMISSIBLE
EVIDENCE.
>> IT DOESN'T MEAN THEY
AUTOMATICALLY GET THE
PRESUMPTION TO THE JUDGE.
WHEN IT SAYS NOTHING IN THE
RECORD, I TAKE THAT TO MEAN IT'S
TAKEN OUT OF THE RECORD.
IT CAN BE CONCLUDED SINCE THE
TRIAL COURT ACQUITTED THE
APPELLANT IN THIS CASE OF THE
FOURTH CHARGE WHICH HAD TO DO
THE DRUG PARAPHERNALIA, WHICH WAS
IN THE CONSOLE.
>> I MEAN, WOULDN'T YOU HAVE TO
HAVE SOMETHING IN THE RECORD
WHERE THE TRIAL JUDGE EITHER
ACTUALLY SAYS THAT I HEARD THIS,
THAT WAS NOT USED IN MY
CONSIDERATION OF THE DEFENDANTS
GUILTY OR INNOCENT OR THE TRIAL
JUDGE HAS SAID THIS EVIDENCE WAS
NOT ADMISSIBLE.
BUT WHEN YOU HAVE A TRIAL JUDGE
WHO SAYS THAT THIS EVIDENCE IS
ADMISSIBLE, HOW IN THE WORLD
CAN YOU SAY THAT THE TRIAL JUDGE

DISREGARDED IT?
>> IN THIS CASE OR IN ALL CASES?
>> THIS CASE IN PARTICULAR AND
IN MOST CASES IN GENERAL.
IF THE TRIAL JUDGE THAT I
BELIEVE THERE IS ARGUMENT OF THE
DEFENSE ATTORNEY SAYS JUDGE,
THIS EVIDENCE SHOULD NOT
COMMAND.
THEY SAID JUDGE, THIS EVIDENCE
IS ADMISSIBLE.
THE JUDGE SAID I AGREE.
THIS EVIDENCE IS ADMISSIBLE,
RELEVANT, PROBATIVE, ALL THOSE
KINDS OF THINGS.
HOW IN THE WORLD, IF THE
DISTRICT COURT SAYS THAT WAS
EVER CAN WE SAVE THE TRIAL JUDGE
DIDN'T CONSIDER IT?
BECAUSE THAT'S WHAT THAT RULE
SAYS.
THAT'S WHAT THAT STATEMENT
MEANS.
>> BECAUSE IN THE CASE WITH THE
EVIDENCE GOES TO ONE PARTICULAR
CHARGE AND THE DEFENDANT IS ON A
BENCH TRIAL AND THE SENATE IS
ACQUITTED OF THAT ONE PARTICULAR
CHARGE, YOU CAN SAY THAT
ALTHOUGH THE TRIAL COURT
ADMITTED THE EVIDENCE HE
SUBSEQUENTLY DID NOT CONSIDER --
>> HOW DOES THE EVIDENCE GO TO
THAT CHARGE AND NOT THE OTHERS.
BUT THE EVIDENCE WE ARE TALKING
ABOUT IS THE EVIDENCE OF HOW YOU

GIVE OUT THESE SLIPS OF PAPER
THAT HAVE YOUR PHONE NUMBER OR
SOMETHING ON IT SO THEY CAN COME
AND BUY DRUGS FROM YOU, NOT
COME AND BUY PARAPHERNALIA FROM
YOU.
>> THIS EVIDENCE WOULD GO TO
SHOW THAT SIMPLE PLASTIC BAGS
THAT WERE IN THE CONSOLE WERE
BEING USED AS DRUG
PARAPHERNALIA.
>> I WAS UNDER THE IMPRESSION
THAT THERE WAS A CONVICTION FOR
POSSESSION OF COCAINE WITH THE
INTENT TO SELL.
>> YES, A LESSER INCLUDED OF
COUNT ONE.
>> AND POSSESSION OF CANNABIS
WITH INTENT TO SELL.
HOW WILL THE PEOPLE THAT SELL
COCAINE AND SELL CANNABIS USE
THIS PIECE OF PAPER METHOD TO
ALERT FOLKS THAT I'M AVAILABLE.
HOW CAN YOU SAY THAT IT DOESN'T
COME INTO PLAY IN THOSE TWO?
>> I BELIEVE THE QUESTION WAS
FROM THE FOURTH DCA'S OPINION
AND WHERE TRIAL COURT IS SILENT,
HOW THE STATE COULD SUPPORT THE
COURT DCA'S OPINION AND SAY FROM
THIS RECORD, HOW COULD IT BE SET
AS THE TRIAL COURT REJECTED THE
EVIDENCE ULTIMATELY WHEN
REACHING ITS VERDICT.
>> THAT'S SPECULATION.
IF YOU'RE CONVICTED OF

POSSESSION OF COCAINE WITH
INTENT TO SELL, NOT JUST
POSSESSION OR SOMETHING LIKE
THAT, HOW CAN ONE LOGICALLY SAY
THAT SOMETHING THAT GOES TO
ESTABLISH THAT YOUR DEALER
DOESN'T IMPACT THIS OUTCOME OF A
CONVICTION FOR THEM.
>> YOUR HONOR, IF I AGREE WITH
YOUR STATEMENT WOULD MOVE ONTO
THE NEXT PART OF THE ANALYSIS
WHICH IS THE SHOWING --
>> LET'S STAY WITH THE PRINCIPLE
OF LAW BECAUSE REALLY THIS ISSUE
THAT THEY'VE GOT ACQUITTED ON
ONE OR NOT, MAYBE THAT GOES TO
THE HARM OF ERROR.
WE'RE JUST REALLY HERE BECAUSE
IN TERMS OF LOOKING AT WHAT
THE FOURTH DISTRICT HAS SAID ON
ITS FACE, IT IS NOT COMPLETE,
WHICH IS A JUDGE IS PRESUMED AND
USE OF THE FIRST STEP IS PRESENT
TO DISREGARD INADMISSIBLE
EVIDENCE.
SO AGAIN, THAT IS WHAT HAPPENS
MANY TIMES.
JUDGES ARE CONSIDERED EVIDENCE
IN NON-JURY TRIALS THEY SAY THIS
EVIDENCE IS INADMISSIBLE AND
THERE ARE 20 GRUESOME
PHOTOGRAPHS.
THEY'RE ONLY GOING TO ADMIT THREE.
AND IF THE DEFENDANT ARGUES,
WELL, WE DON'T KNOW THAT THE
JUDGE PROBABLY LOOKED AT ALL 17,

OTHER 17, SO THEY MUST HAVE
INFLUENCED THE JUDGE.
NO, THEY'RE PRESUMED TO HAVE
DISREGARDED THE EVIDENCE HE DID
ADMIT.
SO THAT'S A FIRST STEP AND
THAT'S WHY THAT'S LOGICAL.
THE JUDGES ARE HEARING THINGS
FOR DUAL PURPOSES ALL THE TIME.
CORRECT?
>> YES, MA'AM.
>> NOW WE GO TO THE NEXT ONE
WHICH IS THEY HAVE RULED IT TO
BE ADMISSIBLE.
WHY ISN'T THE BETTER RULE OF LAW
WITH BOTH OF THEIR DISTRICT SAID
AND DONE WITH THE SECOND
DISTRICT SAID MENKS AND INSKO
THAT IN VIEW OF SPECIFIC
FINDINGS OF ADMISSIBILITY CANNOT
HOLD THE TRIAL COURT IN THE
ADMISSIBLE EVIDENCE.
ISN'T THAT REALLY WHAT THE NEXT
STATEMENT NEEDS TO BE, THAT WHEN
THEY HAVE MADE A SPECIFIC RULING
ON ADMISSIBILITY, WE DON'T
PRESUMED THEY DISREGARDED IT.
WE PRESUME THEY HAVE CONSIDERED
IT BECAUSE THEY ARE GOOD JUDGES,
THEY MADE A RULING AND WERE NOT
GOING TO PRETEND THEY DISREGARDED
IT UNLESS THEY SAY LATER ON, YOU
KNOW, I'VE BEEN THINKING ABOUT
THE SYNDICATE AND MADE THAT
RULING BUT I'M NOT GOING TO
CONSIDER IT IN MY ULTIMATE

DECISION IN THIS CASE.
WE SEE THAT IN PENALTY CASES A
LOT.
THE JUDGE SAYS I HAVE THIS
AUTOMATIC EARTHLY CONSIDERING
IT.
ISN'T THAT A MORE LOGICAL
CONSTRUCT FOR THESE PRESUMPTIONS
AND THEN WHAT WOULD GUIDE THE
APPELLATE COURTS AND TRIAL
JUDGES, YOU KNOW, WHO MIGHT BE
QUESTIONING WHETHER THEY
SHOULD'VE ADMITTED EVIDENCE THAT
THEY CAN SAY I'VE DECIDED AFTER
LISTENING TO EVERYTHING, I'VE
ADMITTED THIS, BUT I'M NOT GOING
TO CONSIDER THIS IN MY VERDICT.
>> YOUR HONOR, I AGREE THAT
WOULD BE BETTER CONSTRUCT IN
PROBABLY 90% OF CASES.
BUT IT'S IMPORTANT TO REMEMBER
WHEN JUDGES ARE SITTING AS
TRIERS IN THE TRIALS, MANY
THINGS ARE DONE.
FOR EXAMPLE, I WOULD HIGHLIGHT
THE PHASE WHERE A DEFENDANT IS
UNDERLYING CRIMINAL CHARGE AND
ALSO CHARGED WITH VIOLATION OF
PROBATION.
HE'S TRIED ON BOTH CHARGES AT
THE SAME TIME.
EVIDENCE IS ADMISSIBLE IN THE
VIOLATION OF PROBATION FOR
DETERMINING PURPOSES OF GUILT IS
HEARSAY EVIDENCE.
IF YOU WERE TO APPLY STRICTLY

THAT YOU SUGGEST, EVERY TIME THE
JUDGE ADMITS HEARSAY EVIDENCE
FOR THE PURPOSES OF THE VOP, BUT
NOT ADMITTING IT'S A CRIMINAL
CHARGE.
>> WHAT WOULD BE WRONG WITH
THAT?
IT WOULD MAKE IT CLEAR TO
EVERYONE THAT YES I'M LISTENING
TO A VOP.
I'M ALSO LISTENING TO A
SUBSTANTIVE CASE.
IN THE VOP EVIDENCE THAT IS
ADMISSIBLE IN THE TRIAL OF
WHAT'S WRONG WITH THE PROJECT
HAVING TO DO WITH THAT.
>> I WOULD PRESUME THAT IT'S A
LIMITATION THAT THE COURT WANTS TO
PLACE ON TRIAL JUDGES.
>> DO WE NEED TO HAVE --
>> WE DON'T NEED TO GET THAT
FROM THIS CASE, DO WE?
THAT SHE ASKED A VERY BROAD
QUESTION I WAS TRYING TO RESPOND
TO THE JUSTICE'S QUESTION.
IN THIS CASE, THE FOURTH DCA
USES LANGUAGE THAT I DON'T
NECESSARILY AGREE WITH WHAT THE
PROPOSITION IS FOR THE
PRESUMPTION OF HOW TO REBUT THE
PRESUMPTION.
SO IN THIS CASE THOUGH, EVEN IF
YOU WERE TO REVERT AND SEND IT
BACK TO FOURTH DCA HARMLESS
ERROR ANALYSIS, THE ERROR IN
THIS CASE WHICH WOULD STILL

CONSIDER TO BE HARMLESS.
>> IS THAT BECAUSE HE WAS
ACQUITTED ON THE OTHER CASE?
ARE WE GETTING BACK TO THAT?
>> NO, I WAS GOING TO SAY IT WAS
BECAUSE HE FOUND THE ACTUAL DRUG
IN HIS POSSESSION ON THE
POSSESSION OF COCAINE ACCOUNT IN
THE MANNER IN WHICH COCAINE WAS
PACKAGED TO SHOW HIS INTENT TO
SELL.
SO EVEN IF YOU WERE TO GO BACK
TO THE TRIAL COURT THE STATE CAN
SHOW BEYOND A REASONABLE DOUBT
THE ADMISSION OF THIS EVIDENCE
DID NOT AFFECT THE TRIAL COURTS
VERDICT.
>> I WANTED TO FOLLOW-UP ON WHAT
WHAT YOU SAID ABOUT THE
SITUATION WHERE TWO CASES ARE
BEING TRIED TOGETHER.
THE JUDGE SAID THAT THE OUTSET
I'M GOING TO BE CONSIDERED
EVIDENCE ON THE VIOLATION OF
PROBATION AND I'M ALSO GOING TO
BE CONSIDERED EVIDENCE OF THE
SENSITIVE CHARGED.
THE JUDGE HAS TO HAVE SOME POINT
EXPLAINED WHAT THEY'VE
CONSIDERED FOR EITHER BECAUSE
HOW WAS THE REVIEWING COURT
GOING TO KNOW WHICH WAS
COMPETENT SUBSTANTIAL EVIDENCE?
I THINK THAT YOUR IDEA THAT THEY
COULD BE TRIED TOGETHER IS
CERTAINLY TRUE, BUT I WOULD

IMAGINE THAT AT SOME POINT THE
JUDGE HAS MADE CLEAR THAT WHAT
THE JUDGE IS CONSIDERING FOR
PURPOSES OF THE VIOLATION OF
PROBATION.
ARE YOU SUGGESTING THAT IF THEY
JUST SAY IT'S ALL ADMISSIBLE
BECAUSE I'M TRYING BOTH TOGETHER
THAT THEY WOULD RESUME CORRECTLY
SEGMENTED THE EVIDENCE?
>> I'M SUGGESTING THAT WHEN THE
JUDGE MAKES ITS FINDINGS FOR
THAT VOP HE MAKES EXPLICIT
FINDINGS PROVE THE JUDGE RENDERS
A VERDICT ON A CRIMINAL CASE HE
DOESN'T ALWAYS MAKE --
>> IS THIS HYPOTHETICAL WHERE
THE JUDGE DOESN'T SAY I'M A
MEETING THIS EVIDENCE ONLY FOR
THE PURPOSES OF THE VIOLATION OF
PROBATION?
>> WE'LL SAY THAT EVERY TIME HE
ADMITS EVIDENCE IN THE VOP.
>> WELL, YOU HAVE TAKEN US.
IN THAT SITUATION IS ADJUDGED AS
AN CONSIDERING HEARSAY EVIDENCE
FOR THE PURPOSE OF THE VIOLATION
OF PROBATION ONLY.
I THINK THE ISSUE WHETHER IT HAS
TO BE RENEWED EVERY TIME IS A
WHOLE DIFFERENT QUESTION.
THE JUDGES ARE DETERMINED TO
KNOW I SAID IT WILL THE HEARSAY
FOR ANYTHING BUT THE VIOLATION
OF PROBATION.
THAT'S NOT WHAT WE'RE TALKING

ABOUT IN THIS TYPE OF CASE.
[INAUDIBLE]
[INAUDIBLE]
[INAUDIBLE]
THE POINT WAS YOU HAVE TO LOOK
AT WHAT WAS ADMISSIBLE, AS TO
WHETHER IT WAS ONE OF THOSE
THINGS --
[INAUDIBLE]
MY POINT WAS IT SEEMS TO BE --
[INAUDIBLE]
IT'S NOT ONE OF THOSE THINGS
THAT THE COURT WILL JUST SWEEP
ASIDE.
YOU ACTUALLY CONSIDER THAT.
>> OKAY.
>> NO, I THINK THAT JUST ONE OR
TWO ANSWERS.
YOU DIDN'T GET TO ANSWER WHAT I
HAD SAID.
I JUST WANTED TO FINISH WHAT
JUSTICE LABARGA --
[INAUDIBLE]
IS SOMETHING THE JUDGE WOULD
HAVE CONSIDERED IN DECIDING
GUILTY OR NOT GUILTY.
>> NO, I DON'T THINK IT WAS
ESSENTIAL TO THE JUDGE.
NOT ONLY DO NOT BELIEVE IT WAS
ESSENTIAL TO THE JUDGE AND
FINDING NOT GUILTY WITH INTENT
TO SELL COCAINE, I BELIEVE THE
STATE CAN SHOW BASED ON THE
RECORD THAT THE ADMISSION WAS
HARMLESS BEYOND A REASONABLE
DOUBT.

AND WITH ALL DUE RESPECT TO MY
OPPONENT, I DON'T REMEMBER IF HE
ARGUED THAT, BUT I BELIEVE HE
ARGUED THAT, WE SHOULD
COMPLETELY OBLIGATE THE
PRESUMPTION REGARDING GIVING
DEFERENCE TO A TRIAL JUDGES
RULING IN BENCH TRIAL IN IOWA
JUDGE RESPOND TO THAT.
THERE IS NO CASE.
>> YOU WOULD START THAT THERE'S
A PRESUMPTION THE JUDGE HAS
DISREGARDED INADMISSIBLE
EVIDENCE.
ADMIT THAT IT IS A REBUTTABLE
PRESUMPTION.
>> BUT WITH SLIGHT VARIATION
THAT IS A JUDGMENT AS FRESH
RULING THAT ITS ADMISSIBLE.
THAT'S WHERE WE'RE REALLY BACK
TO THE CONFLICT CASE.
IN THAT POINT IT HAS REBUTTED
THE PRESUMPTION.
AND THEN YOU WOULD MOVE TO
HARMLESS ERROR.
>> IN A CRIMINAL CASE, YES.
I WANT TO HIGHLIGHT THIS
PRESUMPTION IS IN CRIMINAL
CASES AND CIVIL CASES.
WHATEVER ISSUES THEY WILL BOTH
AFFECT BOTH CIVIL AND CRIMINAL
CASES BECAUSE THE PRESUMPTION IS
APPLIED ACROSS THE BOARD.
AND WITH THAT CAUTION, I WOULD
REQUEST THAT YOU AFFIRM THE
FOURTH DCA'S RULING OR IF YOU

DETERMINE THAT THE FOURTH DCA'S
OPINION WAS ERRONEOUSLY ISSUED
WITH REGARD TO THE REBUTTAL OF
PRESUMPTION AND THE HARMLESS
ERROR ANALYSIS.
OR YOU COULD MAKE A HARMLESS
ERROR ANALYSIS YOURSELF AND
UPHOLD THE CONVICTION.
THANK YOU.
>> FOR A BRIEF REBUTTAL I WANT
TO MAKE IT CLEAR THAT ARGUED
THAT THE PROPOSITION OF LAW
WITH AN OBJECTION.
IS OBJECTION IS SUSTAINED IN A
NON-JURY TRIAL AT THE BENCH.
I AGREE THE JUDGE SUSTAINED THE
OBJECTION.
NOT TO CONSIDER THAT, I AM
CONCERNED WITH THE ISSUE THAT WE
HAVE HERE THAT THE OBJECTION
MADE, THE JUDGE OVERRULED THE
OBJECTION, THE EVIDENCE AND THAT
HIS TESTIMONY IS NOT ADMITTED
INTO EVIDENCE.
AND NOW WE HAVE TO WORK WITH THE
FOURTH DISTRICT AS THEY APPLY
THIS PRESUMPTION WELL EVEN
THOUGH WE'VE BEEN AT THE
EVIDENCE IT HAS REACHED ITS
VERDICT.
>> IT SOUNDS TO ME LIKE THE TWO
OF YOU ARE REALLY COMING CLOSE
ON THIS THAT THIS IS A KIND OF
SITUATION BECAUSE THE EVIDENCE
WAS ADMITTED.
WE CAN'T PRESUME THAT A TRIAL

JUDGE ACTUALLY DID NOT CONSIDER
IT.
AND SO, THE BOTH OF YOU SAY SEND
IT BACK WITH A HARMLESS ERROR
ANALYSIS FOR THE STATE SAYS WE
CAN MAKE THE HARMLESS ERROR
ANALYSIS.
I'M NOT SURE THE TWO
OF YOU ARE THAT FAR.
>> THAT CRUCIAL DIFFERENCE IS
THE JUDGE ADMITTED TO EVIDENCE.
DCA SAID THAT WAS INCORRECT.
BUT THEN INSTEAD OF GOING TO
HARMLESS ERROR ANALYSIS.
HE WAS PRESUMED TO HAVE NOT
CONSIDER ANY WAY AND THE
ANALYSIS AND NOT BY SAYING THERE'S
NOTHING IN THE RECORD TO
INDICATE THAT THEY RELIED UPON
THAT IS ALMOST IMPOSSIBLE BURDEN
SWORD UPON THE APPELLANT TO SHOW
SOMEHOW THAT HE DID CONSIDER
IMPACT ARE GOING DO THAT IS THE
ONLY WAY AN APPELLANT CAN DO
THAT IS IT THE JUDGE ACTUALLY
SOMEHOW STATES FOR THE RECORD
LIKE THEY DID RELY UPON THIS
EVIDENCE THAT WAS OBJECTED TO
AND NEVERTHELESS OVERRULED AND
WAS ADMITTED INTO EVIDENCE.
WHAT THE JUDGE DID, VERY CLEAR
FOR THE RECORD, DID RELY UPON
THAT EVIDENCE.
THE CONDITIONS WERE SIMILAR
ENOUGH.
THANK YOU.

>> THANK YOU BOTH FOR YOUR
ARGUMENTS.