

We now move to the final case on today's docket and this week's docket, Hasan versus Garvar.

>> May it please the court.

Normally at this stage I would be introducing myself as Jim Blecke appearing on behalf of Mr. Hasan but as this court knows, Mr. Hasan and Dr. Garvar have resolved their differences below, so let me instead thank the court for the opportunity to assist the court in resolving the conflicts that this case presents.

What the 4th District has allowed in this case is, in my judgment, ten times worse than the conduct that this court prohibited in Acosta and the reason I say that is, in Acosta, this court precluded Mr. McIntosh from meeting with Dr. Schaumberg in a pre-deposition conference.

>> But let me ask you this.

In Acosta, the treating physician in the meeting that couldn't take place was between the treating physician and the actual attorney who is representing the defendant.

Is that correct?

>> Yes, Your Honor and that would be Mr. McIntosh.

>> No matter who the attorney was, he was representing the defendant.

>> That's correct.

>> And in this case, the attorney that could not meet with the treating physician was the treating physician's own attorney, not the same person representing the defendant?

Is that true?

>> I don't know whether Mr. Reagan ever established an attorney-client relationship with Dr. Schaumberg.

I do know that the insurance
company retained --

>> Do you know -- he was not
representing the defendant
doctor, correct?

>> That's correct.

He was detained by OMS, the
insurance company that insured
Dr. Garvar.

>> Just so we are understanding
how close this is to Acosta or
whatever it is, that when I read
the 4th District case, I said
wait a second, the doctor hired
her own attorney and wanted to
make sure she was protected but
this is a malpractice case.

The insurance company that
happens to also insure her, also
insures the defendant doctor and
the insurance company decides
that -- I mean, I assume based
on somebody suggesting that
would be a good idea, that they
are going to hire a lawyer for

her, not to discuss the case but to tell her about her potential for legal exposure as a Fabre defendant which in true talk is, if you say anything that this is what this malpractice case is about, and if you say anything that is going to hurt the other person, that other person may want to bring you in or something like that.

Because I mean that's the part that sort of gets to me.

If we are stuck with number one, they just want to tell her about a deposition and I would assume they would have the doctor ring an attorney to the deposition to say you don't have to answer that but anyway so maybe this is a very friendly question but I want to make sure we are clear that it wasn't like this doctor/dentist went out and said I am going to have a lawyer at

my deposition.

Do you agree with that?

>> Yes, and let me use

Mr. McIntosh and Mr. Reagan as

my examples in this case along

with Dr. Schaumberg.

>> Before you go further,

Acosta, which was rendered

before any of us came to this

court, is very clear and it

prohibits discussion with

anyone, even the doctor's own

lawyer and less there are three

elements.

That is what this case says,

does it not?

Acosta says, this is a

broad-sweeping doctor/patient

agreement.

They can't discuss it with a

doctor's own lawyer unless you

have one of these three

exceptions.

You can't even discuss it with

plaintiffs, with the patient's

lawyer without an exception,
correct?

>> That's correct and with HIPAA
which requires equally if not
more severe constraints on
that --

>> The distinguishing factor
here is, it was understood
always that they were not going
to talk about the patient.

>> Can I finish my question?
That is, they were not going to
talk about the patient or any
information related to the
patient.

It was just going to be
information that a lawyer would
provide to somebody he is going
into deposition and the doctor
would not be providing any
information to the lawyer that
would violate the statute which
is what we are trying to deal
with.

Isn't that correct?

>> That is correct.

>> This is the point and isn't it also correct that in Acosta that is exactly what was provided?

The trial court in Acosta said you cannot discuss the medical condition and that was why.

>> Yes it was and that's because this court held to suggest the sort of conversation could go on.

>> Isn't it a distinguishing fact in Acosta that the lawyer involved there was the lawyer for the defendant's doctor?

>> Yes and that is why -- the distinguishing factor?

Doesn't that mean there is conflict with the constants?

>> No, Your Honor.

>> IT PROVED THAT HE COULD WORK AND HOLD DOWN A JOB, SO HE GOT A SPECIAL HIGH SCHOOL GRADUATION. THAT'S WHAT WE KNOW ABOUT --

>> WAS IT WHERE HE WAS DOING ODD
JOBS AT THE TIME?

>> HE ACTUALLY HAD A PRETTY GOOD
HISTORY OF EMPLOYMENT.

HE WORKED FOR HIS FATHER WHEN HE
WAS, LIKE, 10 YEARS OLD.

I DON'T RECALL EXACTLY WHAT HIS
EMPLOYMENT WAS.

>> WELL, APPARENTLY IT'S THROUGH
HIS INFORMATION HE WAS COMING
OVER AND DOING SOME YARD WORK
FOR THE VICTIM AND COME --

>> WELL, HE CUT HER GRASS.

>> THAT'S WHAT I MEAN.

>> HE HAD OTHER EMPLOYMENT
BESIDES THAT.

THE JUDGE DID DECIDE HE HAD A
HISTORY OF CONTINUOUS
EMPLOYMENT.

>> I JUST WONDER WHAT THAT IS.
IT'S ONE THING TO BE MOPPING AND
GARBAGE CANS AND IT'S ANOTHER --
THE INTELLECTUAL IS WHAT I'M
TRYING TO UNDERSTAND.

>> I WISH I COULD TELL THAT,

YOUR HONOR.

>> OKAY.

>> TRYING TO RECALL.

ANYWAY, WE SORT OF SWITCHED

GEARS HERE, BUT I'LL GO AHEAD

AND CONTINUE WITH THAT FIRST

ISSUE.

HE WAS PICKED UP, BROUGHT DOWN

TO THE STATION WHERE HE WAS TOLD

THAT HE WASN'T UNDER ARREST AND

THAT HE COULD LEAVE WHENEVER HE

WANTED TO.

HE WAS GIVEN HIS MIRANDA RIGHTS

INCLUDING THE OBVIOUS RIGHT THAT

YOU CAN, UM, CUT OFF QUESTIONING

WHENEVER --

>> LET ME ASK YOU THAT.

IT SEEMED LIKE -- AND I HAVE NOT

WATCHED THE DVD.

>> YEAH.

>> IT SEEMED LIKE THEY HAD HIM

READ IT OUT LOUD.

IS THAT WHAT HAPPENED?

>> THE STATEMENT OF RIGHTS?

MY RECOLLECTION IS HE STARTED TO

READ IT, AND HE HAD A DIFFICULT
TIME READING IT.

HE READ IT HALTINGLY, I THINK.

>> THE RECORD WILL SHOW -- BUT
THEN --

>> YEAH.

>> BUT HE -- THEY KIND OF, WHAT
THEY SAY TO HIM IS WE'RE
BRINGING YOU IN, WE'RE JUST
GOING TO BE LOOKING AT THE WHOLE
NEIGHBORHOOD, AND WE'RE JUST
BRINGING YOU IN.

THEY DON'T HAVE THE DNA AT THAT
POINT.

>> RIGHT.

>> AND THEY SAY AND WE GIVE
EVERYBODY THAT COMES IN MIRANDA
WARNINGS.

THAT'S WHAT THEY TELL HIM?

>> YEAH.

THEY SAID THIS IS WHAT WE HAVE
TO DO FOR EVERY WITNESS.

I EVEN THINK HE SAID SOMETHING
LIKE, YEAH, IF YOU CONFESS TO
KILLING JFK, THEN WE'D BE IN

TROUBLE IF WE HADN'T DONE THIS.

THEY MINIMIZED IT.

>> YOU DON'T REALLY MAKE AN
ARGUMENT ABOUT DOWNPLAYING THE
MIRANDA WARNINGS AT THIS POINT,
BUT THIS SEEMS TO ME, AND I
WOULD ASK YOU TO ADDRESS THIS,
AT THAT POINT THEY TELL HIM HE'S
FREE TO GO, HE'S NOT UNDER
ARREST, AND THEY SORT OF GIVE
HIM THESE WARNINGS.

BUT, LIKE IN -- THIS IS SORT OF
STANDARD PROCEDURE, OKAY?

AND THEN WHY DON'T YOU CONTINUE
FROM THERE.

>> WELL, THEN --

>> LET ME JUST ASK YOU ONE
QUESTION.

YOUR NOT SAYING THAT SOME MENTAL
CAPACITY HAS ANYTHING TO DO WITH
AND WE SHOULD JUST NOT CONSIDER
THAT AS A CIRCUMSTANCE AS PART
OF THE INTERROGATION.

THAT'S WHERE I WAS GOING WITH
THIS.

SO YOU'RE CONCEDING LIKE THIS IS
JUST TREATING NORMAL ADULTS.

>> IN TERMS OF THE --

>> YES, MA'AM.

WHAT HAPPENS WITH THIS
INTERROGATION?

THAT'S ALL I'M ASKING.

SO THERE'S NOTHING ABOUT THE
INTERROGATION -- RAMIREZ AND
SOME OF THE OTHERS MAKE
ALLOWANCES FOR WHO IT IS THAT'S
BEING INTERROGATED.

THAT'S ALL I'M ASKING.

JUST A FRIENDLY QUESTION.

>> SURE, SURE, I UNDERSTAND.

IT'S THE RELEVANT FACTOR, BUT WE
HAVEN'T RAISED IT IN SEPARATE
ISSUE.

>> WELL, I DON'T MEAN SEPARATE
ISSUE.

>> INVOLUNTARY.

>> RIGHT.

SO THERE'S NOTHING ABOUT HIM WE
SHOULD DEEM INSUFFICIENT IN
ANALYZING THESE CIRCUMSTANCES.

>> OF COURSE, I THINK YOU HAVE
TO CONSIDER ALL THESE
CIRCUMSTANCES.

>> THAT'S WHAT I'M ASKING.
IS THERE ANY MENTAL STATUS
ELEMENT THAT SHOULD BE PART OF
THIS ANALYSIS IN THIS CASE?
IS THERE ANYTHING PRESENT?

>> I MEAN, AGAIN, THE FACT THAT
HE'S 18 AND HE'S LEARNING
DISABLED, AND IS THAT -- IN
TERMS OF LOOKING AT WHAT HE'S
TOLD THE POLICE AT WHAT POINT IN
TIME WHEN HE SAYS I WANT TO
LEAVE, DOES IT MATTER THAT HE'S
18 VERSUS 38?

>> WELL, HE IS 18.

UM --

>> WELL, WAS HE EIGHT DAYS FROM
BEING 19?

THAT'S CLOSER TO 19 THAN 18,
ISN'T IT?

>> I DON'T THINK THAT'S
RELEVANT, YOUR HONOR.

>> OKAY.

>> YOU KNOW, I THINK I HEAR YOUR QUESTION.

IF MR. DEVINEY WAS A 40-YEAR-OLD ATTORNEY, I THINK IT WOULD MAKE A DIFFERENCE IN ANALYZING IT.

I THINK WE HAVE TO LOOK AT THE FACT THAT HE'S JUST AN ORDINARY 18, UNEDUCATED, NOT PARTICULARLY INTELLIGENT GUY.

>> BUT NOT PARTICULARLY CHALLENGED.

>> SO WHEN HE SAYS --

>> BUT NOT PARTICULARLY CHALLENGED EITHER, IS WHAT I HEAR YOU SAYING THEN.

>> WELL, HE'S IN THE MIDDLE AS FAR AS WE KNOW.

>> ALL RIGHT, OKAY.

>> HE'S 18.

HE STILL RESPECTS AUTHORITY.

HE'S VERY POLITE TO THESE OFFICERS.

REGARDLESS OF THAT, I THINK HIS STATEMENT, "I'M DONE, I'M GOING, I'M READY TO GO NOW," REPEATED

FIVE TIMES INCLUDING HIS CONDUCT
OF GETTING UP AND SAYING HE'S
READY TO GO AND TRYING TO WALK
OUT THE DOOR CAN'T BE
INTERPRETED AS ANYTHING OTHER
THAN A DESIRE TO END THE
INTERROGATION.

>> AND THAT'S WHAT I'M TRYING TO
FIND OUT, IS -- OR FROM EARLIER.
WHAT IS IT THAT HAPPENED WHEN
THE POLICE -- WHAT IS THE TIME
PERIOD FROM WHEN THE POLICE
FIRST SAID YOU'RE JUST HERE AS A
VOLUNTEER, WE'RE JUST CALLING
ALL WITNESSES, YOU KNOW, WE DO
THIS TO ALL WITNESSES, AND
YOU'RE FREE TO GO, WE DON'T LOCK
THE DOOR, ANYTIME YOU WANT TO
GET UP AND WALK OUT -- AND WHEN
THEY, HE SAYS I WANT --

[INAUDIBLE]

[LAUGHTER]

THEY GO, YOU CAN'T.

I'M DONE.

NO, YOU CAN'T GO.

HOW MANY MINUTES ELAPSE

BETWEEN --

>> OKAY.

>> -- THE FIRST, STARTING IT AND

WHEN HE SAID, I WANT TO GO.

>> OKAY.

THEY GIVE HIM HIS MIRANDA

WARNINGS.

THE FIRST QUESTION IS, "DID YOU

HAVE ANYTHING TO DO WITH THIS OR

DO YOU KNOW ANYONE WHO DID?"

HE SAYS, "NO."

THEN THEY QUESTION HIM FOR ABOUT

AN HOUR.

I THINK IT'S APPROXIMATELY AN

HOUR.

HOW DO YOU KNOW HER, DID YOU SEE

ANYONE, WHEN DID YOU LAST SEE

HER, THAT SORT OF THING.

UM, AT THAT POINT THEY SAY TO

HIM WHY WOULD ANYONE SAY YOU DID

IT.

I THINK, AND, YOU KNOW, I'LL

HAVE TO CHECK, BUT I THINK THIS

IS THE SEQUENCE.

AND HE SAYS, I DON'T KNOW.

AND THEN THEY ASK HIM IF HE
MINDS GIVING A DNA SAMPLE.

HE AGREES, IT'S CONSENSUAL, THEY
GIVE HIM A FORM THAT HE SIGNS,
HE GIVES THE DNA SAMPLE.

THEN THEY LEAVE THE ROOM.

THEY COME BACK A COUPLE MINUTES
LATER AND SAY WE GOT YOUR DNA ON
HER, YOU DID IT, WE KNOW YOU
KILLED HER.

>> AND THAT'S WHAT I'M ASKING.

SO REALLY, AND YOU DON'T -- I
UNDERSTAND YOU DON'T USE THIS
AND THEY CAN BE DECEPTIVE, BUT
IT'S SOMEWHAT DECEPTIVE IN THAT
THEY'RE LEADING HIM TO BELIEVE
THAT BASED ON WHAT THEY'VE JUST,
IT SEEMS TO ME, BASED ON THESE
SWABS AND WHAT THEY JUST DID,
THEY NOW HAVE THE RESULTS OF THE
INVESTIGATION, AND IT CLEARLY
SHOWS YOU'RE THE PERSON WHO
KILLED HIM.

>> YES.

>> WHATEVER THEY HAD AN HOUR
INTO THE INTERROGATION, THEY HAD
WHEN THEY BROUGHT HIM IN.

>> EXACTLY.

>> BUT I -- OKAY.

SO NOW HE GOES I DON'T SEE -- SO
NOW HE STARTS TO GET, NOW HE
REALIZES HE'S NOT JUST THERE TO
HELP THEM SOLVE THIS MURDER.

HE'S NOW -- THEY'RE SAYING
YOU'RE THE ONE THAT KILLED HIM.

>> THAT'S RIGHT.

>> AND HOW QUICKLY AFTER THAT
DOES HE SAY I'M READY TO GO?

>> UM, I THINK IT'S --

>> WELL, I SEE IT IN THE
TRANSCRIPT.

>> YEAH.

>> HE'S BASICALLY, AFTER THEY
SAY, NO, I DIDN'T DO IT, I DON'T
SEE HOW YOU COULD DO IT, AND HE
SAYS, "YOU ALL, I'M READY TO
GO."

>> RIGHT.

>> IT'S REASONABLE FOR HIM TO

THINK THAT HE NOW CAN GO, I
MEAN, THAT HE CAN GO BECAUSE
THEY TOLD HIM AN HOUR AGO HE
COULD GO.

>> EXACTLY.

THEY TOLD HIM HE WASN'T UNDER
ARREST, HE COULD STOP WHENEVER
HE WANTED --

>> BUT IT SEEMS TO ME THE FIRST
TIME HE SAYS THAT, "I'M DONE,"
AND THEY ASK HIM, WHAT DOES THAT
MEAN, WHAT DOES "I'M DONE" MEAN?

IT MEANS "I'M DONE, I'M READY TO
GO HOME, AND I DID NOT DO THIS."

AND IF I DID DO IT, I WANT YOU
ALL TO SHOW ME WHAT I DID.

AT THAT POINT HE'S SAYING I'M
READY TO GO, BUT IF YOU THINK I
DID THIS, SHOW ME WHAT IT IS
THAT YOU HAVE.

AND SO THEN THEY START TALKING
ABOUT THE DNA.

AT THAT POINT WHEN HE SAYS, I'M
DONE BUT SHOW ME WHAT YOU HAVE,
WHAT SHOULD HAVE HAPPENED?

WHAT IS YOUR ARGUMENT THAT WHAT
SHOULD HAVE HAPPENED AT THAT
POINT?

>> YEAH.

OUR -- IN THE BRIEF WE LOOKED AT
EVERY SINGLE ONE OF HIS
STATEMENTS INDIVIDUALLY.

HIS FIRST STATEMENT WAS, "I'M
DONE, I'M GOING."

OKAY, TO ME THAT'S A CLEAR
STATEMENT, INDICATION OF HIS
RIGHT TO LEAVE, HIS RIGHT TO CUT
OFF QUESTIONING.

>> BUT THEN WHEN HE SAYS --

>> OKAY, I'M GETTING THERE.

>> OKAY.

COME ON.

>> AT THAT POINT, THEY SHOULD
HAVE CEASED THE INTERROGATION.

THAT'S THE ARGUMENT WE MAKE.

BUT THEY DIDN'T.

THEY KEPT TALKING TO HIM.

>> BUT WAIT A MINUTE --

>> IN THE SECOND STATEMENT, THE
ONE YOU MENTIONED --

>> WAIT A MINUTE, IT DOESN'T
JUST END WITH "I'M DONE, I'M
READY TO GO," IT'S ALL ONE
STATEMENT.

HE SAYS I DID NOT DO THIS, AND
IF I DID DO IT, I WANT YOU ALL
TO SHOW ME WHAT DID, WHAT I DID
DO.

>> YOUR HONOR, THAT WAS HIS
SECOND STATEMENT.

THAT WAS NOT HIS FIRST.

HIS FIRST WAS, "I'M DONE, I'M
GOING."

>> HIS FIRST ONE WAS, "I'M DONE,
I'M DONE."

>> WELL --

>> AND THEN THEY ASK HIM WHAT
DOES THAT MEAN, AND HE SAYS,
"I'M DONE," AND THEY SAY WHAT
DOES IT MEAN, "I'M DONE"?

>> WELL, THERE'S TWO DIFFERENT
TRANSCRIPTIONS OF THAT.

SO HE EITHER SAID "I'M DONE, I'M
GOING," OR "I'M DONE, I'M DONE."

>> THE ONE WE HAVE SAYS, "I'M

DONE, I'M DONE."

>> OKAY.

WELL, THAT'S THE STATE --

[LAUGHTER]

>> YOU CAN WATCH THE TAPE.

EVERYBODY CAN LISTEN TO IT.

>> THE FINAL THING IS BECAUSE HE
STILL DOESN'T CONFESS AT THAT
POINT.

HE SAYS AT THE POINT WHERE THE
DEFENDANT SAYS, I'M DONE, I'M
READY TO GO HOME, CAN I LEAVE,
AND IT SEEMS TO ME THAT THAT IS
BASED ON WHAT HE'S BEEN SAYING,
THERE'S NO EQUIVOCATIONS TO SHOW
ME WHAT I DID, AND THE DETECTIVE
SAYS, NO.

>> THAT'S RIGHT.

AND I'M TRYING TO GET THERE,
YOUR HONOR.

THERE WAS, THERE WAS ONE
EQUIVOCAL STATEMENT, THE ONE --

>> OKAY.

>> AND WE'VE CONCEDED THAT THAT
STATEMENT IS EQUIVOCAL BECAUSE

HE SAYS, "I'M DONE, I'M GOING."

BUT THEN HE SAYS, "YOU'VE GOT TO
SHOW ME."

SO THAT SHOWS SOME UNCERTAINTY.

BUT AFTER THAT STATEMENT THEY

KEEP GOING AFTER THAT ONE, I

THINK THERE'S THREE OTHERS.

THE ONE JUSTICE PARIENTE

MENTIONS, "I'M DONE, I'M READY

TO GO HOME, CAN I LEAVE," AND

THEN THERE'S, "WHY CAN'T I GO?"

"I'M READY TO GO."

"Y'ALL SAID I COULD LEAVE."

"CAN I GO?"

AND, "WHY CAN'T I LEAVE?"

AND DURING SEVERAL OF THOSE, HE

GETS UP AND TRIES TO LEAVE, AND

THEY SAY, NO, YOU CAN'T GO, AND

THEY SIT HIM DOWN.

>> NOW ALL -- IF HE HAD SAID I'M

DONE, I'M READY TO GO HOME, CAN

I LEAVE, IF HE HAD SAID, I'M

DONE TALKING --

>> UH-HUH.

>> THERE WOULD BE NO, WE

WOULDN'T BE HERE ON THIS ISSUE.

BECAUSE THAT WOULD BE, "I'M

DONE," AND, I MEAN, I GUESS

THAT'S WHAT I WOULD ASK YOU.

WHY ISN'T THAT -- I MEAN, I GET

THAT'S YOUR ARGUMENT.

WHY ISN'T THAT WHAT HE SAID, I'M

DONE TALKING?

>> BECAUSE HE'S 18 YEARS OLD --

>> WELL, I'M -- THIS IS, AGAIN,

A FRIENDLY QUESTION.

I KNOW IT'S HARD TO BELIEVE

YOU'RE GETTING FRIENDLY

QUESTIONS ALL THE TIME HERE --

[LAUGHTER]

BUT WHAT ELSE DOES "I'M DONE"

MEAN?

>> THAT'S EXACTLY OUR POINT.

THAT'S ALL IT COULD POSSIBLY

MEAN.

>> WELL --

[INAUDIBLE CONVERSATIONS]

>> DID HE --

>> I'M READY TO GO.

I'M DONE, I'M READY TO GO.

>> THAT HE'S DONE WITH THE
INTERROGATION.

HE'S BROUGHT IN TO BE
QUESTIONED.

ALL THAT'S HAPPENING IS HE'S
BEING QUESTIONED.

WHEN HE SAYS, "I'M DONE," I'M
LEAVING, WHAT ELSE COULD IT
POSSIBLY MEAN?

>> WELL, THE PROBLEM I HAVE IN
HERE, HE SAID, "I'M DONE," AND
THEN THEY ASKED HIM A
CLARIFICATION, "WHAT DOES THAT
MEAN?"

AND HE DIDN'T --

>> HE SAYS, "I DIDN'T DO IT."

>> AND NORMALLY, THEY DON'T ASK
THOSE KIND OF CLARIFYING
QUESTIONS EVEN THOUGH WE WANT
THEM TO.

BUT IN THIS CASE THEY DID.

>> HE SAID WHEN THEY SAID HIS
RESPONSE TO WHAT DOES THAT MEAN
IS, "I'M DONE."

THAT WAS HIS RESPONSE, CORRECT?

>> I'M READY TO GO HOME.

>> IT WASN'T SOME AMBIGUOUS
STATEMENT, IT WAS, "I'M DONE."

>> EXACTLY.

IT'S A CLEAR, UNEQUIVOCAL
STATEMENT.

THE POLICE HAVE TO STOP
QUESTIONING WHICH THEY DID NOT
DO HERE.

>> HE SAID, "I'M DONE, I'M READY
TO GO HOME."

I DID NOT DO THIS.

IF I DID, I WANT YOU TO SHOW ME
THAT I DID DO IT.

THAT'S WHAT HE SAID.

>> THAT WAS HIS SECOND
STATEMENT, YOUR HONOR.

HE MADE CLEAR, UNEQUIVOCAL
STATEMENTS --

>> WHAT SHOULD HAVE HAPPENED AS
A MATTER OF LAW WHEN HE SAID,
I'M DONE, I'M READY TO GO HOME,
I'M GOING TO LEAVE, AND THE
OFFICER SAYS NO?

WHAT SHOULD HAVE HAPPENED AT

THAT TIME AS A MATTER OF LAW?

>> AT THAT TIME THE
INTERROGATION SHOULD HAVE
CEASED, AND THEY SHOULD HAVE
SCRUPULOUSLY HONORED HIS RIGHT
TO END THE INTERROGATION.

THAT'S REQUIRED UNDER MIRANDA
AND MOSLEY.

>> HE WAS IN CUSTODY AT THAT
POINT IN TIME.

>> YES.

>> SO THEY SHOULD HAVE JUST
ENDED IT RIGHT THERE?

>> THEY SHOULD HAVE ENDED IT,
AND THEY COULD NOT HAVE RESUMED
IT UNTIL AT THE VERY LEAST --

>> OR GOTTEN ANOTHER WAIVER OF
SOME KIND.

>> RENEWED WARNINGS WERE GIVEN,
YES.

>> AT THAT POINT WHEN THEY SAID,
NO, RANDALL, NOW --

>> YOU'RE UNDER ARREST.

>> -- YOU'RE UNDER ARREST FOR
THE MURDER, YOU'RE NOT FREE TO

GO, AND WE ARE NOW GOING TO, YOU
KNOW, HEAR YOUR WARNING.
YOU KNOW, SO THAT'S, TO ME, WHAT
WAS CALLED FOR IN THIS
SITUATION.

>> RIGHT.

THAT'S CORRECT.

>> WELL, LET ME ASK YOU THIS.

ISN'T IT POSSIBLE THAT SOMEONE
IN THE SITUATION SUCH AS THE
DEFENDANT WHO DISCOVERS THAT HIS
DESIRE TO GO IS NOT GOING TO BE
HONORED BECAUSE THEY'VE DECIDED
HE IS GOING TO BE IN CUSTODY
MIGHT WANT TO TALK?

AND SO THE FACT THAT YOU WANT TO
GO DOES NOT NECESSARILY MEAN YOU
DON'T WANT TO TALK IF YOU'RE NOT
ALLOWED TO GO, SEE WHAT I'M
SAYING?

>> I DON'T --

>> BECAUSE HE, YOU KNOW, HE
NEVER SAYS HE DOESN'T WANT TO
TALK.

AND SO WE'RE INFERRING THAT HE

DID NOT WANT TO TALK.

I MEAN, WHAT YOU'RE ASKING US TO
DO IS TO INFER THAT HE WANTED,
HE WAS INVOKING HIS RIGHT OF
SILENCE BECAUSE HE WAS INVOKING
HIS RIGHT TO LEAVE.

CORRECT?

>> THAT'S CORRECT.

>> OKAY.

BUT ISN'T IT, ISN'T IT THE CASE
THAT SOMEONE WHO INVOKES THE
RIGHT TO LEAVE AND THEN FINDS
OUT THERE IS NO SUCH RIGHT IN
THESE CIRCUMSTANCES BECAUSE HE'S
BEEN TAKEN INTO CUSTODY MAY WISH
TO CONTINUE TALKING GIVEN THE
CIRCUMSTANCE THAT HE'S NOT GOING
TO BE ALLOWED TO GO?

>> YOUR HONOR, THERE'S NO FIFTH
AMENDMENT OR MIRANDA RIGHT TO
LEAVE.

THE FIFTH AMENDMENT RIGHT IS THE
RIGHT TO BE SILENT, NOT TO
INCRIMINATE YOURSELF OR TO CUT
OFF QUESTIONING ONCE AN

INTERROGATION HAS BEGUN.

SO THE RIGHT WE'RE TALKING ABOUT

IS THE RIGHT TO CUT OFF

QUESTIONING.

HE --

>> I UNDERSTAND THAT.

>> HE INVOKES THAT RIGHT WHEN HE

SAID, "I'M DONE" --

>> WELL, HE DID HAVE, IT MAY NOT

BE A MIRANDA RIGHT --

>> THAT'S HIS RIGHT.

>> PEOPLE HAVE A RIGHT NOT TO BE

HELD IN CUSTODY UNLESS THE

POLICE HAVE A JUSTIFICATION FOR

THAT.

AND, YOU KNOW, WE TALK ABOUT THE

DIFFERENT CIRCUMSTANCES WHERE

THAT'S JUSTIFIED, BUT CERTAINLY

THERE ARE TIMES WHEN PEOPLE DO

HAVE A RIGHT TO SAY, THIS IS

OVER, AND I'M LEAVING, AND YOU

DON'T HAVE A RIGHT TO MAKE ME

STAY.

AND HE WASN'T IN THAT SITUATION

AS IT TURNED OUT BECAUSE THEY

HAD PROBABLE CAUSE TO HOLD HIM.

BUT IT JUST SEEMS TO ME THAT
THERE IS A DISTINCTION BETWEEN
SAYING I WANT TO LEAVE AND A
DISTINCTION IN SAYING I DON'T
WANT TO TALK ANYMORE.

>> WELL, I THINK LEGALLY THERE
IS NO DISTINCTION.

THE ASSERTION TO LEAVE MEANS IN
THIS CASE, I DON'T WANT TO BE
INTERROGATED ANYMORE.

>> WELL, IT COULD -- THIS IS A
MIXED QUESTION OF FACT AND LAW,
AND WE HAVE THE VIDEOTAPE.
THERE COULD BE, AGAIN, IF YOU'VE
GOT THE 40-YEAR-OLD ATTORNEY
SAYING, I'M READY TO LEAVE, IS
NOT, I'M STOPPING, YOU KNOW?
OBVIOUSLY, WHEN YOU LEAVE YOU'RE
NOT GOING TO TALK ANYMORE.
SO, BUT ISN'T IT REALLY THE
CIRCUMSTANCES OF THIS CASE AND
THE AGE OF THIS DEFENDANT AND
THE FACT THAT IT WAS REPEATED
SEVERAL TIMES AND WASN'T HONORED

WHEN HE'S SAYING, "I'M DONE,"
AND THEY'RE TRYING TO SAY WHAT
DO YOU MEAN BY THAT, I MEAN, YOU
KNOW, ARE YOU, YOU HAVE A RIGHT
TO REMAIN SILENT.

ARE YOU SAYING THAT YOU DON'T
WANT TO TALK ANYMORE?

YOU'D EITHER SAY AT THAT POINT,
NO, I'M GOING TO TALK IF YOU'RE
NOT GOING TO LET ME LEAVE, BUT I

THINK THE OBVIOUS ISSUE WAS

THERE AN OBLIGATION ON THE

OFFICERS WHO ONCE HAVING HIM

ENSNARED INTO THIS BY PRETENDING

THAT HE WAS FREE TO LEAVE AND

THEN CONFRONTING HIM WITH

EVIDENCE THAT THEY HAD AT THE

POINT THEY TOLD HIM HE WAS FREE

TO LEAVE SAY NOW YOU'RE NOT FREE

TO LEAVE.

SO IT'S REALLY THEIR, THE

QUESTION IS WHETHER THEY HAD AN

OBLIGATION EITHER TO STOP THIS

INTERROGATION OR TO CLARIFY

THERE WHAT IS PROBABLY NOT

UNEQUIVOCAL BUT AT LEAST MAKE
SURE INSTEAD OF "I'M DONE" MEANS
YOU CAN'T LEAVE, YOU DON'T WANT
TO TALK ANYMORE.

>> YEAH.

IT IS THE OBLIGATION OF THE
POLICE.

AGAIN, TO ME THIS IS A CLEAR,
UNEQUIVOCAL ASSERTION THAT HE
DOESN'T WANT TO BE INTERROGATED
ANYMORE.

I DON'T SEE HOW YOU COULD LOOK
AT IT --

>> IS THERE LEGAL AUTHORITY?

ARE THERE CASES OUT THERE FROM
THE U.S. SUPREME COURT OR THIS
COURT THAT REQUIRES SOME KIND OF
RE-MIRANDIZING OF SOMEONE WHO
WAS GIVEN A MIRANDA WARNING, GOT
A WAIVER WHILE NOT IN CUSTODY
BUT NOW ONCE IN CUSTODY THEY'RE
REQUIRED TO RE-MIRANDIZE IN SOME
WAY?

>> I THINK THAT'S BASIC FIFTH
AMENDMENT LAW.

ONCE YOU'VE BEEN ARRESTED, YOU
HAVE TO BE GIVEN THE MIRANDA
WARNINGS.

IN THIS CASE I CITED IN MY
BRIEF --

>> ARE THERE ANY CASES IN THESE
FACTUAL CIRCUMSTANCES?

>> COSELL IS VERY SIMILAR.

THEY BROUGHT SOMEONE IN ON
EXECUTIVE ABUSE, TOLD THE PERSON
THEY WEREN'T UNDER ARREST, FREE
TO LEAVE.

WHEN THE QUESTIONING GOT HEATED,
THE PERSON IN THIS CASE MANAGED
TO STORM OUT OF THE ROOM.

THEY WENT AND GRABBED HER,
BROUGHT HER BACK INTO THE ROOM.

I THINK AT THAT POINT TOLD HER
SHE WAS UNDER ARREST AND
PROCEEDED TO INTERROGATE HER
WITHOUT RENEWING THE MIRANDA
WARNINGS.

THAT'S AN IOWA SUPREME COURT
CASE WHICH, I THINK, IS RIGHT ON
POINT.

AND THAT CASE HAS -- OBVIOUSLY,
TRYING TO LEAVE OR LEAVING THE
ROOM WAS AN INDICATION OF THE
RIGHT TO END THE QUESTIONING.
I THINK THE SAME THING APPLIES
HERE.

>> THIS IS EVEN STRONGER BECAUSE
THEY SAID, "I'M DONE."

IT'S NOT ONLY THE PHYSICAL ACT
OF TRYING TO LEAVE, THIS PERSON
SAID, "I'M DONE."

>> "I'M DONE."

>> ABOUT FIVE TIMES.

>> I DON'T KNOW WHAT ELSE HE
COULD BE DONE WITH.

UM, I SUPPOSE IF HE SAID, UM,
JUST GOING BACK TO YOUR
QUESTION, JUSTICE CANADY, I'M
NOT REALLY SURE WHERE YOU'RE
GOING, I SUPPOSE IF HE SAID, YOU
KNOW, I'M READY TO LEAVE, BUT IF
YOU GUYS WANT TO COME WITH ME
I'LL CONTINUE TALKING, THAT
WOULD BE A DIFFERENT SCENARIO.

THAT WASN'T ANYTHING AT ALL WHAT

HAPPENED HERE.

>> WELL, IF WE SAY THE LEGAL
STANDARD IS, AGAIN, IT'S NOT
THAT YOU HAVE TO SAY MAGIC
WORDS, SO IF WE LOOK AT MIRANDA
CASES LIKE IN CUERVO WHICH
EVERYONE SEEMS TO CITE, WHAT DID
HE -- HE SAID -- WHAT DID HE SAY
THERE?

I DON'T WANT TO -- HE SAID
SOMETHING, I DON'T WANT TO
DECLARE ANYTHING.

>> RIGHT.

>> IS THAT WHEN YOU SAY, WHEN HE
SAID, "I'M DONE," WHAT IT
CONVEYED, IS IT AN OBJECTIVE
STANDARD TO A REASONABLE OFFER
THAT HE DID NOT WANT TO SPEAK
ANYMORE?

>> YES.

>> THAT'S REALLY WHAT, AND
THAT'S A QUESTION OF FACTS IN
LAW AS TO WHETHER UNDER THE
CIRCUMSTANCES THAT'S WHAT IT
CONVEYED.

>> YES.

IT'S AN OBJECTIVE STANDARD.

AND, YOU KNOW, THIS CASE IS

TROUBLING TO ME NOT ONLY BECAUSE

THE POLICE CONTINUED

INTERROGATION, BUT AFTER THEY

ARRESTED HIM THEY WENT BACK

OUTSIDE, AND THE PROSECUTOR

APPARENTLY WAS STANDING THERE.

AND I GUESS THEY WENT TO ASK HIM

WHERE'D HE GO, THEY WENT RIGHT

BACK IN AND CONTINUED THE

INTERROGATION.

SO EVEN THE PROSECUTORS IN SOME

OF THESE CASES, NOT JUST THE

POLICE, DON'T SEEM TO UNDERSTAND

THAT A DEFENDANT HAS THE RIGHT

TO CUT OFF QUESTIONING.

AND THE ARGUMENT BELOW THE

PROSECUTOR ARGUED, HE DIDN'T ASK

FOR A LAWYER.

WE ALL KNOW THAT'S A DIFFERENT

RIGHT INVOLVED.

SO THIS IS THE SECOND CASE THIS

MONTH I'VE COME UP HERE ON THIS

ISSUE FROM THE SAME COUNTY, AND
I HAVE THE CASE RIGHT NOW WHEN
THE SUSPECT SAID 42 TIMES I WANT
TO GO BACK TO, "I WANT TO GO
BACK TO MY CELL, TAKE ME BACK TO
MY CELL," 42 TIMES.

>> I GUESS ONE OF THE THINGS
THAT'S TROUBLING HERE IS THE
POLICE ACTUALLY SAID SOMETHING
TO THE EFFECT OF YOU DON'T, YOU
CAN'T LEAVE, AND IF I HAVE TO
SIT ON YOU OR SOMETHING TO THAT
EFFECT.

WHAT IS IT?

IF I HAVE TO FORCE YOU TO SIT
DOWN, WE'LL DO THAT.

OR SOMETHING TO THAT EFFECT.

>> THEY ALSO SAID, AND "I CAN'T
TALK TO YOU ANYMORE."

WHICH TO ME SUGGESTS THEY KNEW
THEY COULDN'T TALK TO HIM
ANYMORE.

SO I JUST, I FIND THIS -- I

THINK IT MEANS I HAVE THREE

MINUTES LEFT, IS THAT CORRECT?

>> AND 17 SECONDS.

>> OKAY.

I THINK I BETTER SAVE THOSE

THREE FOR REBUTTAL THEN.

THANK YOU VERY MUCH.

>> PLEASE THE COURT, STEVE WHITE

REPRESENTING APPELLEE.

THERE ARE A NUMBER OF

PRELIMINARY FACTS THAT OPPOSING

COUNSEL MENTIONED THAT JUST FOR

THE RECORD I'D LIKE TO INDICATE

THE STATE --

[INAUDIBLE]

VIEW OF THOSE PARTICULAR FACTS

IN TERMS OF HIS AGE, JUSTICE

PARIENTE ALREADY CLARIFIED THAT.

OPPOSING COUNSEL INDICATES THAT

SHE DIED, AND THESE ARE RELEVANT

TO OTHER ISSUES THAT WE HAVEN'T

TALKED ABOUT, THAT THE VICTIM

DIED WITHIN SECONDS.

I BELIEVE THE EVIDENCE IS THAT

SHE CALLED 911, PROTRACTED

STRUGGLE, NUMEROUS, NUMEROUS

INJURIES TO THE VICTIM OVER A

PERIOD OF TIME.

THE MEDICAL EXAMINER SAID IT
COULD BE SECONDS TO MINUTES IN
TERMS OF LOOKING AT THE AUTOPSY.

>> THERE WERE DEFENSIVE WOUNDS,
RIGHT?

>> YES, SIR, YOUR HONOR.

>> AND ASPIRATED BLOOD.

>> I'M SORRY, YOUR HONOR?

>> ASPIRATED BLOOD.

>> ASPIRATED BLOOD.

THE 911 CALL, THE POLICE
ARRIVING AND FINDING HER BODY.
SO SHE CALLED THE POLICE AT SOME
POINT WHEN SHE WAS ABLE TO, AND
IN THE MEANTIME, HE HAD CUT OUT
THE CROTCH AREA OF HER PANTIES
AND CUT HER BRA AND EXPOSED HER
BREASTS IN THAT HALF HOUR OR SO.

>> THERE DID APPEAR THAT THE
VICTIM HAD BEEN PLACED IN A
POSED POSITION, CORRECT?

>> THEY HAD, THERE WAS A
TESTIMONY FROM ONE OF THE
OFFICERS THAT IT LOOKED POSED,

MEANING UNNATURAL.

>> UNNATURAL.

>> AND, CERTAINLY, THE VIOLENT
RAPE, THEY TOOK TIME TO USE
SCISSORS AND CUT A NICE LITTLE
SWATH --

>> I DON'T THINK THERE'S, I
DON'T BELIEVE THERE'S ANY
EVIDENCE OF THAT IN TERMS OF
PATTERNS OF BEHAVIOR, YOUR
HONOR.

BUT IN THIS PARTICULAR CASE --

>> IT IS THE POSITION ONLY FROM
WHICH THE SEXUAL INNUENDO COMES
IN, CORRECT?

>> THE CUT BRA, THE EXPOSED
BREASTS, THE CUT CROTCH AREA,
HIM TELLING A NEIGHBOR THAT HIS
UNDERSTANDING THAT SHE WAS
VIOLATED, HIS --

>> IN HIS CONFESSION HE SAID HE
DID THAT TO SORT OF THROW OFF
WHAT HAD HAPPENED.

>> THAT DOESN'T MAKE ANY SENSE
TO ME.

HOW WOULD POSING A SEXUAL
ASSAULT OR AN ATTEMPTED SEXUAL
ASSAULT THROW SUSPICION OFF OF
HIM?

IT JUST INTERNALLY DOESN'T MAKE
ANY SENSE.

PLUS, HE SAYS IN ANOTHER PART OF
HIS STORY THAT HE WAS IN A RAGE.

THAT DOES -- WITHIN THIS HALF
HOUR HE WAS SUPPOSEDLY IN THIS
RAGE, AND HE'S METHODICALLY
STAGING EVERYTHING.

THAT DOESN'T WASH.

>> HOW ABOUT GOING INTO THE
CIRCUMSTANCES OF THE
INTERROGATION.

I THINK THAT'S REALLY THE --

>> YES, YES, YOUR HONOR.

>> -- THAT'S REALLY THE GUTS OF
THIS CASE.

>> YEAH.

>> YOU'RE A FINE LAWYER.

>> THANK YOU, JUDGE.

>> YOU COME HERE TO US, AND WE
TALK ABOUT CASES, AND HAVE YOU

EVER SEEN WHERE IT'S JUST

REPLETE LIKE THIS, "I'M DONE,

I'M DONE," I WANT TO LEAVE, I'M

DONE?

IS THERE ANOTHER CASE SOMEPLACE?

I MEAN, THE CLOSEST, TO ME,

SEEMS TO BE, YOU KNOW, I DON'T

WANT TO DECLARE.

THAT, TO ME, IS MORE AMBIGUOUS

THAN HERE.

>> I DON'T WANT TO DECLARE

ANYTHING, CUERVO, AND THAT WAS

RIGHT AT THE BEGINNING OF THE

INTERROGATION AS, I BELIEVE --

>> WELL, THAT'S NOT THE CRITICAL

FACTOR.

YOU CAN STOP INTERROGATION

ANYTIME, CORRECT?

CAN'T YOU?

>> YES, YOUR HONOR.

IF YOU'RE CLEAR.

IF YOU'RE UNEQUIVOCAL AND

UNAMBIGUOUS.

>> I UNDERSTAND.

I WANT YOU TO TELL US AND TELL

THE PEOPLE HOW IS IT THAT THE
ENGLISH LANGUAGE WHEN SOMEBODY'S
BEING INTERROGATED, NOT A LAWYER
SAYS I'M DONE, I'M DONE, I WANT
TO GO, I'M DONE, WHAT DO YOU
MEAN BY THAT?

"I'M DONE"?

>> YOUR HONOR, CAN I DROP BACK

JUST A SECOND REGARDING MR.--

>> SURE, IT'S YOUR ARGUMENT.

YOU CAN TAKE IT ANYWHERE YOU

WANT.

[LAUGHTER]

>> OF COURSE, I DO WANT TO TALK

ABOUT EXACTLY WHAT HAPPENED AND

THE SEQUENCE OF EVENTS, AND I

HAVE THE FULL TRANSCRIPT OF --

>> WE DO TOO.

WE DO AS WELL.

>> YES, YOUR HONOR.

FOR THE RECORD I'D LIKE TO TAKE

IT BLOW BY BLOW, BUT AS A

PRELIMINARY MATTER IN TERMS OF

MR. DEVINEY'S MENTAL STATE, HE

TOLD THE POLICE, LOOK, I DON'T

HAVE ANY MENTAL PROBLEMS, ANY
PHYSICAL PROBLEMS.

HE DID READ THE MIRANDA RIGHTS
FORM.

HE BRAGGED ABOUT -- LOOK, THIS
ISN'T MY FIRST RODEO, I THINK
ARE THE WORDS HE USED.

HE BRAGGED ABOUT KNOWING HIS
MIRANDA RIGHTS AND THEN
INITIALED EACH RIGHT AFTER HE
READ IT AND SIGNED THE FORM.

SO FROM THE REASONABLE OFFICER'S
PERSPECTIVE, WHICH IS WHAT WE'RE
TALKING ABOUT HERE, MR. DEVINEY
FULLY UNDERSTOOD HIS RIGHTS, AND
MR. DEVINEY SAID I WILL MAKE
SURE I'M CLEAR AS TO WHAT I'M
SAYING.

AND THE OFFICER AT WHAT POINT IS
WRITING THINGS DOWN, AND DEVINEY
SAYS, WHY ARE YOU WRITING THINGS
DOWN?

I WANT TO MAKE SURE I CLARIFY
EVERYTHING THAT YOU SAY.

>> AND HE DOESN'T -- I MEAN,

THAT THIS IS GOING TO BE THE
CRITICAL FACTOR.

HE DOESN'T KNOW HE'S BEING
VIDEOTAPED.

>> THAT'S CORRECT.

>> THERE'S NO REQUIREMENT THAT
HE HAD TO BE, AND WE'RE VERY
PLEASED -- YOU KNOW, IT'S VERY
HELPFUL --

>> DOOR TO DOOR.

>> BUT WHAT, AS YOU GO -- WE
HAVE THE TRANSCRIPTS SO, YOU
KNOW, WE HAVE THE INTIMATIONS
AND WHATEVER.

SO WE CAN GO AS TO WHAT HAPPENED
FIRST OR SECOND, BUT IN THE END
WE'LL BE ABLE TO LOOK AT THAT.

WHAT CONCERNS ME AND EACH TIME
WHETHER IT'S A BLAME/LOSS, YOU
KNOW, IF THE QUESTION IS WHAT'S
THE POLICE DOING, IT'S FINE THAT
THEY CAN DO WHAT THEY NEED TO DO
TO ELICIT A CONFESSION BECAUSE
THAT'S WHAT WE EXPECT THE POLICE
TO DO.

WHAT CONCERNS ME HERE IS THAT
THEY BRING HIM IN KNOWING
WHETHER IT'S AN UNCONFIRMED
MATCH --

>> IT'S --

[INAUDIBLE]

MATCH.

>> THEY HAD THE PROSECUTOR
THERE.

>> I'M NOT SURE ABOUT THAT.

>> AND THEY CALL THIS DEFENDANT,
THIS 18 OR ALMOST 19-YEAR-OLD
DEFENDANT, A YOUNG DEFENDANT --

>> VERY EXPERIENCED IN THE
SYSTEM.

>> -- THAT THEY ARE GOING TO,
THEY'RE JUST QUESTIONING HIM
LIKE THEY'RE QUESTIONING ALL THE
PEOPLE, THE WITNESS TO TRY TO
FIND OUT WHAT HAPPENED.

THAT'S WHAT THEY'RE SAYING.

YOU'RE NOT -- YOU CAN --

>> IN FACT, HE'S IN THE FRONT
SEAT OF THE PATROL CAR.

>> RIGHT.

SO HE'S VERY COMFORTABLE THAT

THEY HAVE NOTHING ON HIM.

AND SO HE'S GOING ALONG, YEAH,

I'LL SIGN MY RIGHTS, YEAH,

EVERYTHING'S FINE AND, YEAH, I

WANT TO HELP YOU OUT.

AND AN HOUR INTO IT THEY SAY,

WELL, AND CAN WE TAKE THIS DNA

SWAB?

SO THEY TAKE -- SURE, SURE, YOU

CAN TAKE IT.

THEY WALK OUT, TALK TO THE

PROSECUTOR --

>> WELL, I'M NOT SURE ABOUT

THAT.

>> TALK TO SOMEBODY AND TWO

SECONDS LATER THEY COME BACK AND

SAY THIS IS NOT AN

INVESTIGATION, WE'VE CONFIRMED

YOU KILLED HER.

SO ALL OF A SUDDEN NOW WE'VE GOT

A DIFFERENT CIRCUMSTANCE, AND

IT'S THAT THAT PARTICULARLY

CONCERNS ME ABOUT HOW THEN HE

STARTS TO SAY, I WANT TO LEAVE,

I WANT TO LEAVE, I'M DONE.

>> WELL, INITIALLY, HE JUST

DENIES IT.

HE SAYS THERE'S NO WAY, "HELL,

NO," QUOTE-UNQUOTE.

>> I UNDERSTAND.

WHERE IS THAT TACTIC WHICH IS

THAT WHEN YOU GIVE MIRANDA AND

TELLING SOMEBODY THEY'RE NOT

UNDER ARREST THEY'RE FREE TO

LEAVE WHICH, YOU KNOW, WE

USUALLY SAY MIRANDA SHOULD BE

GIVEN WHEN YOU'RE IN CUSTODY,

BUT THEY'RE TELLING THEM, NOPE,

YOU'RE NOT, BUT WE'RE GOING TO

GIVE YOU THESE RIGHTS.

THEN WHEN THEY ARE ACTUALLY

READY TO ARREST HIM, THEY DON'T,

THEY COME BACK AND, AND THEN

THAT'S WHEN THEY START THIS, AND

THAT'S WHEN HE SAYS, "I'M DONE."

AND I JUST, I GUESS THE QUESTION

THERE IS WHY WOULDN'T A

REASONABLE POLICE OFFICER UNDER

THAT CIRCUMSTANCE WHERE THEY'RE

NOW CONFRONTING HIM WITH
EVIDENCE THAT HE DID IT, WHY HE
FELT HE WAS LULLED INTO THIS
FALSE SENSE OF SECURITY, THEY
HAD NO FURTHER EVIDENCE, SO THAT
WAS NOT TRUE.

>> I DON'T THINK THE RECORD'S
DEVELOPED ON THAT, JUDGE.

>> WELL, IT WOULD BE PRETTY HARD
TO THINK IN -- HOW MANY MINUTES
BETWEEN WHEN THEY SWABBED HIM
AND THEY CAME BACK IN?

>> IT WASN'T HOURS, BUT IT WAS
MINUTES.

>> AND ARE YOU SAYING THERE'S
SOME DNA THING THAT COULD HAVE
CONFIRMED --

>> I DON'T KNOW.

I MEAN, THE RECORD'S NOT
DEVELOPED BECAUSE THAT WASN'T
BROUGHT UP.

>> OKAY.

>> THAT I CAN RECALL IN THE
TRIAL.

>> OKAY.

SO THAT CIRCUMSTANCE THAT IS YOU
GIVE -- INSTEAD OF GIVING THE
MIRANDA WARNING TO THE POINT
THEY COME BACK IN, THEY GIVE THE
MIRANDA WARNING AT THE POINT
HE'S TOLD HE'S NOT UNDER ARREST,
THEN WHEN HE ACTUALLY SHOULD BE
UNDER ARREST, THEY DON'T GIVE
THE MIRANDA WARNING?

>> IT'S 24 MINUTES LATER,
ACCORDING TO MY NOTES, JUDGE.
THE DNA GETS STARTED AT ONE HOUR
AND 50 SECONDS, AND THE
CONFRONTATION STARTED AT ONE
HOUR AND 24 MINUTES.

>> BUT EVEN IF THEY DID
SOMETHING WITH THAT SWAB THAT
CONFIRMED WHAT HAD GONE, WHAT
THEY HAD GOTTEN FROM THE --

[INAUDIBLE]

AT THAT POINT AND WHEN THEY TELL
HIM HE CAN'T LEAVE, HE IS NOW
UNDER ARREST, ISN'T HE?

>> WHEN THEY TELL HIM HE CANNOT
LEAVE, HE IS DETAINED AND IN

CUSTODY.

HE DOESN'T WANT TO BE.

>> WAIT A MINUTE.

>> THAT'S WHAT HE SAID.

>> BUT THE POLICE HAVE NOW TOLD

HIM, IN ESSENCE, THAT HE'S UNDER

ARREST.

IF YOU'RE UNDER ARREST, WHAT

IS -- AND THE POLICE WANT TO

INTERROGATE YOU, WHAT IS THE

POLICE SUPPOSED TO DO?

>> THEY HAD ABOUT AN HOUR BEFORE

THAT --

>> WAIT A MINUTE.

BUT AN HOUR BEFORE THAT HE

WASN'T UNDER ARREST.

WHEN YOU'RE UNDER ARREST, WHAT

IS THE POLICE SUPPOSED TO DO IF

THEY WANT TO INTERROGATE YOU?

>> WELL, THEY HAD BEEN

INTERROGATING THAT WHOLE TIME.

THIS IS ONE SEQUENCE.

ARE YOU SAYING THAT THE POLICE

HAVE A --

>> I'M JUST SAYING IF SOMEONE IS

UNDER ARREST, ANYONE IS UNDER
ARREST AND THE POLICE WANT TO
INTERROGATE THEM, WHAT DOES THE
POLICE HAVE TO DO?

>> INITIALLY, TO GIVE HIM HIS
MIRANDA RIGHTS.

HE WAS GIVEN HIS MIRANDA RIGHTS
WITHIN AN HOUR BEFORE THIS.

THERE'S NO QUESTION --

>> IS THERE ANY LAW, IS THERE
ANY LAW ONE WAY OR THE OTHER ON
A REQUIREMENT TO RE-MIRANDIZE?

>> NO, YOUR HONOR.

I MEAN, THE QUESTION IS WHETHER
HE WAS GIVEN HIS MIRANDA RIGHTS
AND KNEW THEM AT THE TIME THAT
THE POLICE WERE INTERROGATING
HIM, WHETHER IT WAS BEFORE OR
AFTER THE ARREST.

AND THEY HAD JUST GIVEN HIM HIS
MIRANDA RIGHTS ABOUT AN HOUR
BEFORE.

AND HE READ THEM TO HIM, HE TOLD
THE POLICE THAT HE FULLY
UNDERSTOOD HIS MIRANDA RIGHTS.

>> SO YOU CAN GIVE -- SO YOUR
ARGUMENT THAT YOU CAN GIVE
SOMEONE THEIR MIRANDA RIGHTS
WHEN YOU TELL THEM THEY ARE NOT
UNDER ARREST, AND THAT TAKES
CARE OF THEIR MIRANDA RIGHTS
WHEN THEY ARE UNDER ARREST?

>> IF IT'S ONE EVENT, YOUR
HONOR, AND IT'S CLEAR HE
UNDERSTOOD HIS RIGHTS -- THE KEY
ISN'T WHETHER WE HAVE A
TECHNICALITY OF, BAM, YOU'RE
UNDER ARREST, AND WE HAVE TO
REREAD THE MIRANDA RIGHTS, THE
KEY IS WERE YOU GIVEN YOUR
MIRANDA RIGHTS, AND DID YOU
UNDERSTAND THEM IN THE SEQUENCE
OF EVENTS IN THE INTERVIEW?

IT'S TO TAKE THE EDGE OFF OF THE
INTERROGATION.

THE SUSPECT KNOWING THAT HE HAS
NOT TALKED AND THAT HE HAD, HE
KNEW THAT RIGHT.

I'M SORRY, JUSTICE.

>> WHAT HAPPENS WITH THESE

CASES, THE UNDERLYING CURRENT IS
PERHAPS OUR EXPECTATION OR
PERHAPS THE STATE'S EXPECTATIONS
THAT THE PEOPLE RESPOND
APPROPRIATELY TO THE QUESTION OF
MIRANDA.

I MEAN, IDEALLY, IDEALLY THIS
18-YEAR-OLD SAID, ALL RIGHT,
OFFICER, I AM HEREBY EXERCISING
MY RIGHT TO REMAIN SILENT --
>> I DO NOT WANT TO TALK TO YOU.
>> I DO NOT WANT TO TALK TO YOU.
THAT WOULD HAVE BEEN THE IDEAL
SITUATION.

CAN WE POSSIBLY EXPECT THAT FROM
AN 18, 19-YEAR-OLD?

IF YOU HAVE CHILDREN THAT AGE,
AND I'VE BEEN THERE, THEY
COMMUNICATE IN A COMPLETELY
DIFFERENT LANGUAGE THAN I DO.
AND HERE THIS YOUNG GUY HERE'S
SAYING, "I'M DONE, I'M DONE, I'M
DONE."

THAT MAY BE HIS WAY OF
COMMUNICATING, I DON'T WANT TO

TALK TO YOU ANYMORE.

>> THAT'S THE OPERATIVE WORD,
YOUR HONOR.

>> BUT WE EXPECT THEM TO SAY, "I
DON'T WANT TO TALK TO YOU
ANYMORE."

>> THE OPERATIVE WORD THAT YOUR
HONOR JUST SAID, IT "MAY BE."
IF HE MIGHT HAVE BEEN EXERCISING
HIS RIGHT TO REMAIN SILENT, THEN
THAT'S AMBIGUOUS, AND THE POLICE
ARE NOT REQUIRED TO STOP
QUESTIONING.

THE FACT -- LET'S LOOK AT THE
TOTAL CONTEXT JUST TO GET BACK
TO THE TRANSCRIPT AND LOOK AT
THE TOTAL CONTEXT AS YOUR HONORS
HAVE ARE POINTED OUT.

WHEN HE SAID, "I'M DONE," THE
OFFICER -- NO MORE
INTERROGATION.

THE OFFICER JUST ASKED, "WHAT DO
YOU MEAN?"

>> NO, I'M SORRY, LET'S WORK
WITH THE ACTUAL RECORD.

>> YES, SIR.

>> HE WANTS TO KNOW WHY YOU DID
IT BECAUSE IT'S A QUESTION, NOT
A STATEMENT.

AFTER HE TELLS HIM HE'S READY TO
GO HOME, HE SAYS, "I HAVEN'T
DONE ANY OF THESE THINGS," AND
THE NEXT QUESTION WAS BEFORE THE
DETECTIVE STARTS, "SHE TOUCHED
YOU, SHE --

[INAUDIBLE]

BEFORE HE GOES THROUGH THAT
MONOLOGUE WITH ALL THE
ALLEGATIONS HE SAYS WHY WOULD
YOUR DNA BE ON HER, PROMPTED BY
A QUESTION.

HE SAYS, "I'M DONE, I'M DONE."

WHAT DOES THAT MEAN?

THE DEFENDANT SAYS, "I'M DONE."

THE DETECTIVE SAYS, WHAT DOES IT
MEAN, "I'M DONE"?

HE SAYS, I'M DONE, I DIDN'T DO
THIS, I WANT YOU ALL TO SHOW ME
THAT I DID NOT -- AND HE SAYS,
"WE TOLD YOU, RANDALL," AND HE

SAYS, "I DIDN'T DO IT."

BUT THEN THE NEXT ONE IS A
QUESTION, "WHY WOULD YOUR DNA BE
ON HER?"

SO IT WAS A QUESTION, NOT A
STATEMENT.

>> BUT IN BETWEEN, YOUR HONOR,
WHEN HE SAID, "I'M DONE, I'M
GOING" -- I'M LOOKING AT THE
UNREDACTED TRANSCRIPT IN VOLUME
FOUR -- HE SAYS THAT, THE POLICE
CLARIFY IT, THEN THE DEFENDANT
SAYS -- AFTER HE SAYS, "SHOW ME
THAT I DID IT IF I DID IT --

>> RIGHT.

>> AND THEN THE DETECTIVE SAYS,
"WE TOLD YOU" --

[INAUDIBLE]

THAT'S AN AFFIRMATIVE STATEMENT.

THAT'S NOT A QUESTION.

AND THEN THE DEFENDANT SAID, "I
DIDN'T DO IT."

BASICALLY, THE THREE THEMES TO
WHAT THE DEFENDANT SAYS IN THIS
SERIES OF EVENTS HERE, ONE IS

HE'S ASSERTING THAT I DIDN'T DO
IT.

OVER AND OVER AND OVER AGAIN, I
DID NOT DO IT.

THAT'S NOT INVOKING THE RIGHT TO
REMAIN SILENT.

HE'S ALSO SAYING, I WANT TO KNOW
WHAT YOU HAVE AGAINST ME.

HE REPEATEDLY SAYS THAT, "SHOW
ME."

IN FACT, THEY READ THE DNA
E-MAIL TO HIM AT ONE POINT
BEFORE --

>> THE PROBLEM, THOUGH, THAT AT
THE POINT IF THERE'S ONE
UNEQUIVOCAL INDICATION AND THEY
CONTINUE TO INTERROGATE HIM,
THAT'S NOT CORRECT.

AND WHAT I WANT TO ASK YOU IS
THIS -- I MEAN, THAT'S NOT
CORRECT BECAUSE HE SAYS
SOMETHING ELSE AFTERWARDS, IT'S
OKAY.

WHAT ABOUT THE COMMENT THAT
AFTER WHEN HE KEPT ON SAYING

SEVERAL TIMES, "I'M DONE," WHICH THOSE OF US THAT HAD CHILDREN IN THE PAST THAT WERE YOUNGER, "I'M DONE" USUALLY MEANS YOU'RE IN A CONVERSATION WITH YOUR CHILD, THEY GO, "I'M DONE," AND OUT THE DOOR THEY GO.

>> BUT THEY ASK YOU TO --

[INAUDIBLE]

>> WHY DIDN'T THEY SAY, LISTEN, WE CAN'T TALK TO YOU, OKAY?

WE CAN'T TALK TO YOU.

THEY SAID THAT IN THE

TRANSCRIPTS.

WHAT WERE THEY SAYING IF THEY DIDN'T KNOW HE HAD ALREADY INVOKED HIS RIGHT TO SILENCE?

WHY WOULD THEY SAY, WE CAN'T TALK TO YOU?

IS THAT AN ACCURATE STATEMENT THAT THE DETECTIVE MADE?

>> THAT'S --

>> [INAUDIBLE]

>> THE CONTEXT FOR THAT, YOUR HONOR, IS, I BELIEVE, OPPOSING

COUNSEL DISCUSSED THAT IN HER
REPLY BRIEF.

THE CONTEXT FOR THAT IS YOU LOOK
AT THE PAGE OR TWO BEFORE THAT,
AND BY THE WAY, THE THIRD -- TO
GET BACK TO THE POINT THAT I WAS
GOING TO FINISH -- THE THIRD
THEME IS THE DEFENDANT DIDN'T
WANT TO BE ARRESTED, AND THAT'S
NOT AN INDICATION OF A RIGHT TO
REMAIN SILENT.

SO HE HAD THREE THEMES TO WHAT
HE WAS DISCUSSING WITH THE
DETECTIVES AROUND THESE EVENTS.

THE DETECTIVE DID SAY WE CAN'T
TALK TO YOU AT ONE POINT.

RIGHT BEFORE THAT IF YOU READ
THE FEW PAGES BEFORE THAT,
THEY'RE TRYING TO LEAVE THE
ROOM.

AND YOU WATCH THE VIDEO.

IN FACT, THE DOOR OPENS AT ONE
TIME, I THINK THE TRANSCRIPT
SHOWS -- SO THE DETECTIVES ARE
TRYING TO LEAVE, IN FACT, ONE

DETECTIVE GOES OUT OF THE
PICTURE IN THE VIDEO.
AND THERE'S CONTINUOUS
INTERACTION AND FINALLY
DETECTIVE SAYS, LOOK, WE CAN'T
TALK TO YOU, AND THEY LEAVE THE
ROOM.

IT WASN'T THE DETECTIVE'S
OPINION WHICH, BY THE WAY, THIS
IS A REASONABLE OFFICER TEST, AN
OBJECTIVE TEST AND NOT A
SUBJECTIVE TEST ANYWAY.

>> WELL, IT COULD JUST MEAN THEY
HAD SOMETHING ELSE TO DO.

>> YES, SIR.

I MEAN, BASICALLY, THEY WERE
JUST LEAVING THE ROOM.
AND THE INTERACTION WAS
CONTINUOUS.

WE CAN'T TALK TO YOU, AND THEY
LEFT.

IT DOESN'T MEAN THE DETECTIVE
CONCLUDED HE HAD -- IN FACT,
RIGHT AROUND THAT SAME TIME ONE
OF THE DETECTIVES SAID, HEY,

WE'LL BE BACK IN A FEW MINUTES
TO TALK TO YOU SOME MORE.
>> JUST AS YOU THINK "I'M DONE"
COULD MEAN "I'M THROUGH TALKING
WITH YOU," A REASONABLE
INTERPRETATION OF WHAT THEY'RE
SAYING IS THAT I CAN'T TALK TO
YOU BECAUSE YOU'VE SAID YOU WANT
TO STOP TALKING.

>> THEY DIDN'T SAY THAT.

>> I KNOW THEY DIDN'T SAY THAT
JUST AS HE DIDN'T SAY I'M DONE
AND I DON'T WANT TO TALK TO YOU,
BUT AN INTERPRETATION OF IT.

>> HE MIGHT HAVE BEEN INVOKING
HIS RIGHT TO --

>> THE INTERPRETATION OF WHAT
THEY ARE SAYING WHEN THEY SAID,
"I CAN'T TALK TO YOU."

I MEAN, THERE ARE A COUPLE OF
INTERPRETATIONS I BELIEVE THAT
YOU CAN MAKE OF THAT STATEMENT.

>> AND THAT'S CRUCIAL, YOUR
HONOR.

>> YOU ARE MAKING AN

INTERPRETATION OF WHAT --

>> THINK THAT FALLS IN THE
CATEGORY OF CAN'T HAVE THE CAKE
AND EAT IT TOO.

>> THAT MAKES IT AMBIGUOUS, YOUR
HONOR, AND IT'S NOT AN
IMPLICATION OF INVOKING SILENCE.
AS SOON AS YOU SAY IT MIGHT HAVE
BEEN SOMETHING ELSE TO A
REASONABLE OFFICER --

>> I'M SAYING THAT THAT
OFFICER'S STATEMENT MIGHT HAVE
BEEN SOMETHING ELSE.

I WASN'T REFERRING TO THE "I'M
DONE."

>> OH, I'M SORRY.

I MISINTERPRETED YOU.

I'M SORRY.

>> UNEQUIVOCAL TO ME.

>> BUT THE OFFICER DID CLARIFY
IT.

I MEAN, LET'S GO BACK TO THE
INITIAL EXCHANGE WHICH I KNOW
WE'RE BEATING THE DEAD HORSE
HERE, BUT THE OFFICER, THE

OFFICER DID CLARIFY IT.

THE OFFICER WAS REASONABLE.

HE SAID WHAT DO YOU MEAN BY --

AND THE DEFENDANT ASSERTS HIS

INNOCENCE AND WANTS TO SEE WHAT

THE POLICE HAVE.

AND THAT'S EXACTLY WHAT THEY DO

DOWN THE ROAD.

I MEAN, THE WHOLE CONTEXT OF

THIS, AGAIN, IS THE DEFENDANT IS

ASSERTING HIS INNOCENCE, HE

WANTS TO KNOW WHAT THE POLICE

HAVE, AND HE DOESN'T WANT TO BE

ARRESTED.

THAT'S THE THEME RUNNING THROUGH

THIS WHOLE TRANSCRIPT.

HE'S, HE DOES NOT EVER SAY EVEN

THOUGH HE'S EXPERIENCED IN THE

SYSTEM TO THIS REASONABLE

OFFICER, HE NEVER SAYS I DO NOT

WANT TO TALK TO YOU.

>> YOU'VE SAID THAT A COUPLE OF

TIMES.

WHAT WAS HIS EXPERIENCE WITH THE

SYSTEM?

>> WELL, HE BRAGGED ABOUT HAVING
A FELONY WITH A 25-YEAR MAXIMUM
ON IT.

IN FACT, HE ALSO MADE THE --

>> WAS THAT ONE OF THE
AGGRAVATING FACTORS, A PRIOR
VIOLENT FELONY?

>> NO, YOUR HONOR.

BUT THAT WAS PENDING.

>> EXCUSE ME?

>> I'M SORRY.

HE SAID THAT THAT WAS PENDING,
STILL PENDING, THE DEFENDANT
DID.

>> WELL, DO YOU KNOW -- I MEAN,
IS THERE, I MEAN, EXCEPT FOR
SAYING HE WAS BRAGGING, YOU
KNOW, THAT HE'S EXPERIENCED,
HE'S, AGAIN, YOU KNOW, 18,
ALMOST 19-YEAR-OLD THAT GOT A
SPECIAL DIPLOMA THAT HAS
LEARNING DISABILITIES AND,
APPARENTLY, HAD A PRETTY
HORRIBLE CHILDHOOD.

>> YEAH.

THAT'S IN THE PENALTY PHASE

SUBSTANCE.

>> I -- BUT I DON'T KNOW -- BUT

IN TERMS OF WHAT WE'RE LOOKING

AT, LET ME ASK YOU THIS.

DOES IT MATTER AT ALL IN LOOKING

AT WHAT WAS GOING ON HERE THAT

HE IS -- I WAS GOING TO SAY 19.

>> HE WAS 19 FOR ALL PRACTICAL

PURPOSES.

>> WELL, HE'S 18.

I MEAN, IF HE WAS 17 AND 11

MONTHS AND A FEW DAYS, HE WOULD

NOT BE HAVING THE DEATH PENALTY.

SO THE DAYS MATTER.

>> BY THE WAY, HIS DNA WAS IN

THE SYSTEM BECAUSE OF A PRIOR

SCRAPE WITH THE LAW.

I'M SORRY.

>> DOES IT MATTER THAT HE'S 18

VERSUS 28 AT ALL?

>> IN TERMS OF THIS STATEMENT?

NO, YOUR HONOR.

I MEAN, TO THE OFFICER SAYING --

WE GET BACK TO, "I'M DONE," WHAT

DOES IT MEAN.

IF IT MIGHT MEAN THAT HE WAS
INVOKING THE RIGHT TO COUNSEL,
THAT'S NOT UNAMBIGUOUS AND NOT
UNEQUIVOCAL.

IF IT COULD MEAN TO A REASONABLE
OFFICER THAT HE JUST DIDN'T WANT
TO BE ARRESTED AND HE WANTS TO
KNOW WHAT THE POLICE HAVE --

>> WELL, HE SAID SEPARATELY,
"I'M LEAVING."

THE "I'M DONE," IS I'M DONE WITH
THIS INTERROGATION.

I'M DONE TALKING.

>> HE DIDN'T SAY THAT.

>> WHAT ELSE WOULD "DONE" BE?

>> EXACTLY WHAT HE SAID WHEN HE
EXPLAINED IT.

HE SAID, I'M GOING, I WANT TO
LEAVE, I WANT TO GO HOME AND I
DIDN'T DO IT, AND IF I DID DO
IT, SHOW ME WHAT YOU'VE GOT
WHICH IS EXACTLY WHAT THEY
FOLLOWED UP WITH.

THEY DID EXACTLY WHAT HE

EXPLAINED HE MEANT.

THE POLICE FOLLOWED UP ON --

THEY BROUGHT THE --

>> THE PROBLEM WITH THAT

ARGUMENT IS THAT EVEN AFTER THAT

WHEN THEY FOLLOWED UP WITH HIS

"SHOW ME WHAT YOU'VE GOT," HE

THEN LATER SAYS, "I'M DONE, I'M

READY TO GO, WHY CAN'T I LEAVE?"

I MEAN, I CAN UNDERSTAND --

>> WELL.

>> I CAN UNDERSTAND YOUR

ARGUMENT ABOUT THE "I'M DONE"

AND "SHOW ME WHAT YOU'VE GOT."

BUT AFTER THAT IT'S NOT A "SHOW

ME WHAT YOU'VE GOT," IT'S AN

"I'M DONE, I WANT TO LEAVE, WHY

CAN'T I LEAVE?"

>> THAT'S ON PAGE 568.

AND LET'S LOOK WHAT HAPPENED

RIGHT AFTER THAT.

HE SAYS, "I'M DONE, CAN I GO

HOME, CAN I LEAVE?"

AND ACTUALLY GRABS HIS KEYS IF

YOU LOOK AT THE VIDEO.

HE WANTS TO GO.

AND THEN THE OFFICER SAYS, "NO."

THAT'S IT.

AND THEN THE DETECTIVE SAYS,

"NO."

IN ANY EVENT, DEVINEY SAYS,

"WHY?"

"I DIDN'T DO THIS S-H-I-T,

Y'ALL," AND THEN THE DETECTIVE

CONFRONTS HIM AGAIN, THEY

CONTINUE THE INTERVIEW.

THE BEST EVIDENCE OF WHAT HE

MEANT IS, AGAIN, THESE THREE

THEMES KEEP REPEATING

THEMSELVES.

THE DEFENDANT SAYS, I DIDN'T DO

IT.

HE WANTS TO KNOW WHAT THE POLICE

HAVE ON HIM, AND HE DOESN'T WANT

TO BE ARRESTED.

THOSE ARE THE THREE THEMES.

NONE OF THOSE THEMES ARE AN

UNEQUIVOCAL, UNAMBIGUOUS RIGHT

TO SILENCE.

>> DO YOU THINK BY LOOKING AT

THE VIDEOTAPE YOU GET THAT
FLAVOR BETTER, OR HAVING LOOKED
AT THE TRANSCRIPTS AND SEEN THE
VIDEOTAPE, MR. WHITE, WILL THAT
COME --

>> I'VE LOOKED AT THE VIDEO SO
MUCH.

[LAUGHTER]

>> DOES THAT COME ACROSS THAT HE
WAS NEVER REALLY STOPPED
TALKING, HE WAS, YOU KNOW, WHAT
YOU JUST SAID, THAT "I'M DONE,"
I'M DONE TALKING, THAT IT WAS
PRETTY CLEAR --

>> FROM MY PERSPECTIVE, I NEVER
SAW ANYTHING THAT INDICATED TO
ME THAT HE WAS EVOKING
UNEQUIVOCALLY AND UNAMBIGUOUSLY
HIS RIGHT -- HE WANTED TO GO.
SO YOU THINK THE VIDEOTAPE WOULD
HELP --

>> I WOULD HIGHLY RECOMMEND
VIEWING THE VIDEOTAPE AS WELL
AS, OF COURSE, COMPARING IT WITH
THE TRANSCRIPT IN VOLUME FOUR.

AND BY THE WAY, THE BOLD AND THE PARENTHESES IN THAT TRANSCRIPT ARE DISAGREEMENTS BETWEEN COUNSEL AT THE TRIAL LEVEL AS TO WHAT THE TRANSCRIPT IS SHOWING THAT THE UNBOLDED AND UNPARENTHESES, I GUESS YOU'D SAY, THINGS IN THAT TRANSCRIPT ARE THINGS THAT THE TRIAL COUNSEL AGREED ON.

>> BUT AS TO THE CRITICAL, "I'M DONE," THERE ISN'T ANY DISPUTED WORDS --

>> IT'S -- NOTHING JUMPED OUT AT ME, JUSTICE PARIENTE.

I MEAN, THE BOTTOM LINE IS WHETHER I'M DONE IS CLEAR, UNEQUIVOCAL, UNAMBIGUOUS RIGHT TO REMAIN SILENT.

AND WHEN HE REPEATS, "I'M DONE," THE POLICE DON'T FOLLOW UP ON ANYTHING UNTIL THE DEFENDANT SAYS WHY AND REINITIATES THE CONVERSATION AGAIN.

SO THE DEFENDANT, AGAIN, KEEPS

PERSISTING.

HE'S TRYING TO GET INFORMATION
FROM THE POLICE JUST AS MUCH AS
THE POLICE ARE TRYING TO GET
INFORMATION FROM HIM.

THAT'S A COMMON THEME, TRYING TO
FIND OUT WHAT THE POLICE HAVE.

HE ASKS THE POLICE TO READ THE
FDLE E-MAIL TO HIM.

AND IT'S AFTER THAT THE POLICE
READ THE E-MAIL THAT THE
DEFENDANT FINALLY CONFESSES.

YOU MADE A MISTAKE, THE POLICE
SAY, YOU MADE A MISTAKE,
RANDALL, AND WE CAUGHT IT.

YOU LEFT YOUR DNA ON HER.

THEN HE FINALLY CONFESSES, WHAT
ARE WE GOING TO TELL H, THE
LONGTIME FRIEND OF THE VICTIM?

>> WHAT WAS IT --

>> I'M SORRY.

>> HE ENDS UP WHEN HE CONFESSES,
HE SAYS SHE STARTED ASKING ABOUT
MY CHILDHOOD AND THAT, YOU KNOW,
I WENT OFF.

WHAT IS IT -- AND REALIZE THIS

WOULD BE IN THE PENALTY PHASE --

>> YES, MA'AM.

>> -- ABOUT HIS CHILDHOOD THAT

WAS INVOLVED IN THIS CASE?

>> I DON'T, I DON'T -- I MEAN --

HE SAID IT WAS SOMETHING --

>> IT DOESN'T COME OUT IN THE

PENALTY PHASE AS TO WHAT --

>> I THINK HE HAD A DISTRESSED

CHILDHOOD, YOUR HONOR, BUT I

DON'T --

>> HE DIDN'T FOCUS ON THAT?

AND THAT'S ALL RIGHT.

>> BUT, I MEAN, THE JUDGE DID

FIND THAT HE HAD A DEPRIVED

CHILDHOOD OR SOMETHING LIKE THAT

AS A MITIGATOR.

>> I THOUGHT IT WAS PRETTY -- I

MEAN, SOMETHING WITH HIS PARENTS

HAD ACTUALLY BEEN CONVICTED OF

KILLING THE FIRST CHILD AND THEN

AFTER THEY GOT OUT OF PRISON

THEY HAD HIM AND HIS BROTHER,

AND IT LOOKED LIKE HIS BROTHER

WAS CONSTANTLY --

>> I HONESTLY DON'T RECALL.

RIGHT OFF THE TOP OF MY HEAD.

I'M DRAWING A BLANK.

BUT IN ANY EVENT, AGAIN, I WOULD

ENCOURAGE THE COURT TO REVIEW

THE VIDEO FOR ITSELF, THE

UNREDACTED VERSION.

>> WHY SHOULDN'T THEY HAVE

GOTTEN CONSTRUCTION ON EXTREME

EMOTIONAL DISTURBANCE MITIGATOR?

>> YOUR HONOR, THAT'S ISSUE

THREE.

AND I THINK IT'S IMPORTANT TO

LOOK AT THE SEQUENCE OF EVENTS

IN THE TERMS OF WHAT HAPPENED.

THE DEFENSE DID INITIALLY

REQUEST THAT JURY INSTRUCTION.

NOW, THIS WAS BEFORE THE PENALTY

PHASE EVIDENCE HAD BEEN

INTRODUCED THOUGH.

THE ONLY EVIDENCE THAT THE

DEFENSE SPECIFICALLY TENDERED TO

JUSTIFY THAT JURY INSTRUCTION

WAS THE DEFENDANT'S STATEMENT TO

THE POLICE.

THE PROSECUTOR CITED DUNCAN
WHICH THE STATE ALSO DISCUSSES
IN ITS BRIEF, THAT THE
DEFENDANT'S SELF-SERVING
STATEMENT OUT OF COURT ALONE
ISN'T SUFFICIENT TO JUSTIFY THE
INSTRUCTION.

THE JUDGE RULED --

>> WELL, DOESN'T THE JUDGE
ACTUALLY FIND SOME KIND OF
MENTAL OR EMOTIONAL DISTURBANCE?

>> I'M GOING TO GET TO -- YES,
YOUR HONOR.

BUT IT'S IMPORTANT TO SEE HOW WE
GOT THERE.

OPPOSING COUNSEL ARGUES, THE
REPLY BRIEF ARGUES IT WAS
INCONSISTENT.

HER FINDING OF SLIGHT WEIGHT
EMOTIONAL DISTURBANCE, SHE
ARGUES IT'S INCONSISTENT WITH
HER REFUSAL TO GIVE THE JURY
INSTRUCTION.

IT'S NOT.

BECAUSE THIS IS HOW WE GOT
THERE.

OKAY, THE DEFENSE PRESENTS THE
DEFENSE SELF-SERVING STATEMENT
TO ATTEMPT TO JUSTIFY -- AND WE
GOT SOME OTHER, BUT IT DOESN'T
SPECIFY ANYTHING.

JUDGE SAYS, BASICALLY, THAT'S
NOT ENOUGH.

I'M NOT GOING TO GIVE THE JURY
INSTRUCTION.

THEN THE DEFENSE PRESENTS ITS
MITIGATION EVIDENCE.

INCLUDED IN THAT WAS NOT ONLY
THE GUILT PHASE DEFENDANT
STATEMENT, BUT ALSO EVIDENCE
THAT DEFENDANT HAD BEEN TAKING
ZOLOFT, THAT HE WAS UPSET ABOUT
SOMETHING THE VICTIM SAID ABOUT
HIS DAD.

YOU HAD EVIDENCE PRESENTED THAT
WASN'T PRESENTED AT THE RULING.

THE DEFENSE WAS ABLE TO ARGUE
THAT.

THE JURY WAS ENTITLED, YOU KNOW,

DID CONSIDER THAT EVIDENCE AS
MITIGATION.

AS ARGUED BY THE DEFENSE.

WELL, NOW, AFTER THIS ADDITIONAL

EVIDENCE WE HAD THE SPENCER

HEARING, AND WE HAD THE

SENTENCING --

[INAUDIBLE]

THE DEFENSE AGAIN ARGUES THIS

OTHER EVIDENCE, AND YOU LOOK AT

THE TRIAL CODE SENTENCING

ORDER --

>> YOU MEAN THERE WAS OTHER --

WHEN YOU SAY "OTHER EVIDENCE,"

ARE YOU SAYING THERE'S OTHER

EVIDENCE OF THE MENTAL AND

EMOTIONAL DISTURBANCE AT THE

SPENCER HEARING?

>> YES, YOUR HONOR.

>> AT THE, IN THE PENALTY PHASE

EVIDENCE AFTER THE RULING.

>> RIGHT.

I UNDERSTAND THAT.

BUT OTHER EVIDENCE, WAS THAT

OTHER EVIDENCE FROM ITS SISTER

HEARING TOO?

>> YES, YOUR HONOR.

THE FATHER TESTIFIED MORE ABOUT
THE ZOLOFT AT THE SPENCER
HEARING, SO THERE WAS ADDITIONAL
EVIDENCE ABOUT THE ZOLOFT AT THE
SPENCER HEARING AFTER THE
RULING.

AND SO THE JUDGE WHEN SHE DOES
THE ORDER, SHE CONSIDERS NOT
JUST WHAT WAS PRESENTED BEFORE
THE PENALTY PHASE AT THE TIME
SHE MADE THE RULING, BUT ALSO
THIS OTHER EVIDENCE.

AND, HENCE, SHE CONSIDERED IT
AND GAVE IT SLIGHT WEIGHT.

SO THE TWO ARE NOT INCONSISTENT.
WHAT SHE WAS PRESENTED AT THE
TIME OF THE RULING WAS DIFFERENT
FROM WHAT SHE HAD BEEN PRESENTED
AT THE TIME SHE DID THE ORDER.

>> WAS THERE ANY ADDITIONAL
REQUEST AFTER THE ACTUAL PENALTY
PHASE THAT THE TRIAL JUDGE GIVES
THE INSTRUCTION?

>> THE SENTENCING MEMO BY THE
DEFENSE, YES, YOUR HONOR, THE
SENTENCING MEMO AS WELL AS THE
SPENCER HEARING, THEY ARGUED NOT
JUST THE DEFENDANT'S
SELF-SERVING STATEMENT, BUT THIS
OTHER EVIDENCE AS WELL.

WHICH THEY DID NOT PRESENT TO
THE JUDGE IN GETTING THE RULING
INSTRUCTIONS.

AND ALSO, BY THE WAY, AT THE END
OF THE JURY INSTRUCTIONS THE
DEFENSE EXPRESSLY SAID THAT, FOR
THE RECORD, WE HAVE NO
OBJECTIONS TO THE INSTRUCTIONS
AS GIVEN.

I MEAN, EXPRESSLY NOT PRESERVING
THAT PARTICULAR ISSUE.

AND I SEE I'M DOWN TO 19
SECONDS.

THANK YOU, YOUR HONORS.

THE STATE WOULD REQUEST THAT YOU
AFFIRM THE CONVICTION AND
SENTENCE.

THANK YOU.

>> UM, I WOULD JUST URGE THE
COURT TO WATCH THE VIDEOTAPE.
UM, I THINK IT SUPPORTS OUR
POSITION.
UM, I'D ALSO LIKE TO ASK THE
COURT TO READ THE MEDICAL
EXAMINER'S TESTIMONY IN FULL.
UM, THE MEDICAL EXAMINER SAID
SOME OF THOSE BRUISES COULD BE
DEFENSIVE WOUNDS, THAT THEY
COULD BE LOTS OF OTHER THINGS.
WE HAD A DISAGREEMENT ABOUT SOME
OF THAT TESTIMONY, AND I WOULD
JUST ASK THE COURT TO READ IT.
AND ALSO TO, WHEN LOOKING AT THE
ESPECIALLY HEINOUS AND CRUEL
AGGRAVATING FACTOR, TO TAKE NOTE
OF THE FACT THAT THIS HAS TO BE
PROVED BEYOND A REASONABLE
DOUBT, AND MOST OF THE
SCENARIOS -- OF WHICH THERE WERE
MANY HYPOTHESIZED BY THE
STATE -- WERE PURE SPECULATION
AND WEREN'T SUPPORTED BY THE
EVIDENCE.

UM, I THINK IT MAKES PERFECT
SENSE THE DEFENDANT AFTER
KILLING THIS INDIVIDUAL WHO HE,
OBVIOUSLY, CARED ABOUT, UM, IN A
RAGE WOULD TRY TO DO SOMETHING
TO MAKE IT LOOK LIKE A STRANGER
MURDER.

AND I THINK THAT'S EXACTLY WHAT
HE DID.

UM, AND --

>> JUST ON THAT.

>> -- THE EVIDENCE SUPPORTS
THAT --

>> I CAN, IF YOU KILL SOMEONE IN
A RAGE, YOU MIGHT SAY, WELL, I'M
GOING TO MAKE IT LOOK LIKE IT
WAS A ROBBERY.

BUT WHY WOULD WE HAVE TO ACCEPT
THE DEFENDANT'S STATEMENT THAT
HE DID IT TO THROW THE POLICE
OFF WHEN IT'S AN OBVIOUSLY
SEXUAL POSITION SHE WAS FOUND
IN?

IN OTHER WORDS, ISN'T THAT
ENOUGH FOR THE JURY --

>> WELL, I DISAGREE BECAUSE THAT

HAPPENED AFTER HER DEATH.

WHATEVER HE DID AFTER HER DEATH

IS NOT RELEVANT.

SHE WAS DEAD ALREADY.

>> WELL, DID THEY --

>> THE MEDICAL EXAMINER AND BOTH

OF THE CRIME TECHNICIANS, THE

POLICE SAID SHE WAS KILLED

OUTSIDE --

>> WAS HE CONVICTED OF ATTEMPTED

SEXUAL BATTERY?

>> WE DON'T KNOW WHAT THE JURY

FOUND BECAUSE THE INSTRUCTION

WAS AS TO FELONY MURDER, AND IT

WAS GIVEN EITHER HE COMMITTED A

BURGLARY OR ATTEMPTED SEXUAL

BATTERY.

>> SO WHAT WAS THE STATE'S

EVIDENCE THAT THE ATTEMPTED

SEXUAL BATTERY OCCURRED BEFORE

THE DEATH?

>> THERE WAS NO EVIDENCE.

THE PROSECUTOR DIDN'T EVEN ARGUE

THERE WAS AN ATTEMPT BEFORE

DEATH.

THE ONLY THING THE PROSECUTOR
ARGUED WAS HE MAY HAVE GONE OVER
TO DO SOMETHING SEXUALLY TO HER.

HE MAY HAVE WANTED TO DO
SOMETHING SEXUALLY TO HER.

THE REAL -- THERE WAS NO
EVIDENCE.

THE CLOTHES WERE REMOVED AFTER
SHE WAS BROUGHT INSIDE AND AFTER
SHE WAS DEAD.

THERE'S NO EVIDENCE OF IT AT
ALL.

>> I FIND IT REALLY, I'M HAVING
A HARD TIME TRYING TO PICTURE.
NOW, THE VICTIM HERSELF WAS THE
ONE THAT CALLED 911?

>> THAT'S NOT CLEAR EITHER, YOUR
HONOR.

THE 911 CALL CAME IN AROUND
10:00 --

>> AND THE POLICE GOT THERE
AT --

>> 10:30 OR 10:35.

>> OKAY.

SO IS THE SCENARIO SUPPOSEDLY
FROM THE TIME OF THE CALL TO THE
TIME THE POLICE GOT THERE IS
WHEN THIS STAGING ALL WENT ON?

>> WELL --

>> I FIND THIS A LITTLE BIT
DIFFICULT --

>> WELL, IT'S NOT CLEAR ABOUT
THE 911 CALL.

THE ONLY THING I CAN -- IT
DOESN'T MAKE SENSE THAT SHE
CALLED AND THEN HE KILLED HER
BECAUSE THE PHONE WAS IN THE
HOUSE.

HE KILLED HER OUTSIDE.
WHY WOULD HE TAKE HER OUTSIDE
AND KILL HER, THEN BRING HER
BACK INSIDE?

THAT MAKES NO SENSE AT ALL.

UM, THE ONLY THING I CAN SUGGEST
IS THAT MAYBE SHE HEARD A NOISE.
THE LIGHTS WERE ON, THE TV WAS
ON, SHE MAY HAVE BEEN IRONING.
THE IRONING BOARD WAS SET UP.
SHE HEARD A NOISE, SHE MADE A

CALL, AND THEN SHE REALIZED IT
WAS HER NEIGHBOR AT THE DOOR, SO
SHE HUNG UP.

HE CAME IN, THEY WALKED OUTSIDE.

HE WAS ALREADY UPSET.

HIS MOTHER SAID HE WAS UPSET

THAT EVENING FROM A

CONFRONTATION WITH HIS FATHER.

SHE WAS A FRIEND, SHE COUNSELED
PEOPLE.

HE WAS TALKING TO HER, SAID SHE

STARTED TALKING ABOUT HIS

CHILDHOOD, AND HE GOT VERY UPSET

WHEN PEOPLE SAY, "I KNOW HOW YOU
FEEL."

HE GOT UPSET SEVERAL TIMES

DURING THE INTERROGATION WHEN

THAT CAME UP.

THAT TRIGGERED THINGS FOR HIM,

AND APPARENTLY SHE SAID

SOMETHING LIKE THAT TO HIM, AND

HE LOST IT.

BUT SHE WAS KILLED OUTSIDE.

AND THE EVIDENCE SUGGESTS IT

HAPPENED VERY QUICKLY.

AND, AGAIN, I ASK YOU TO READ
THE MEDICAL EXAMINER'S
TESTIMONY.

THE JUGULAR VEIN WAS SLICED.
THERE WAS A RAPID BLOOD LOSS.
THERE WERE MAYBE A COUPLE OF
BREATHS SHE TOOK, AND SHE WAS
GONE.

>> BUT THERE WAS ALSO THE
FRACTURE OF THE --

[INAUDIBLE]

BONE INDICATING STRANGULATION.
AND WAS THAT NOT --

>> THAT HAPPENED AFTER DEATH.

>> AFTER DEATH, TOO, YOU SAY?

>> AFTER SHE WAS CUT, YES.

>> BUT, WAIT A MINUTE, AFTER SHE
WAS CUT OR AFTER HER DEATH?

THERE'S TWO DIFFERENT ISSUES.

>> HE SAID AFTER CUT AND

PROBABLY AFTER DEATH BECAUSE

AFTER SHE WAS CUT, SHE ONLY TOOK
TWO BREATHS.

>> OKAY.

I THOUGHT THERE WAS SOME, SOME

QUESTION AS TO WHETHER THERE WAS
MANUAL STRANGULATION AFTER THE
CUT.

>> IT WAS --

>> AFTER THE CUT.

>> IT WAS UNCLEAR HOW IT
HAPPENED, SOME COMPRESSION
THERE.

UM --

>> IF YOU COULD SUM UP IN ABOUT
30 SECONDS.

>> OKAY.

THANK YOU, YOUR HONOR, I'M DONE.

[LAUGHTER]

>> DOES THAT MEAN YOU DON'T WANT
TO TALK TO US ANYMORE?

[LAUGHTER]

>> UH-OH.

>> OR YOU'RE LEAVING?

>> YOU THINK YOU CAN LEAVE?

[LAUGHTER]

>> THE COURT WILL NOW TAKE A TEN
MINUTE RECESS.

>> ALL RISE.