

>> ALL RISE.

>> SUPREME COURT OF FLORIDA IS NOW IN SESSION, PLEASE BE SEATED.

>> LAST CASE ON THE DOCKET IS RANDY W. TUNDIOR V. STATE OF FLORIDA.

>> MAY IT PLEASE THE COURT, GARY CALDWELL FOR THE APPELLATE.

THERE ARE A LOT OF THINGS THAT ARE NOT DISPUTED IN THIS CASE WAS THERE IS NO DISPUTE ABOUT THE FACT THAT THESE CRIMES OCCURRED, NO DISPUTE ABOUT THE FACT THAT THE DEFENDANT'S SON, RANDY TUNDIOR, WAS INVOLVED IN A CRIME TO A TREMENDOUS DEGREE AS THE VICTIM'S BLOOD WAS ON HIS SHIRT, RANDY, THE SON, RANDY TUNDIOR'S DNA WAS ON THE GAS CAN USED IN THE ARSON.

RANDY WAS ARRESTED TWO DAYS AFTER THE CRIME.

HE MADE A POLICE STATEMENT THAT NOBODY BELIEVED, INVOLVING VARIOUS DRUG FRIENDS OF HIS. THEN, THE STATE DEVELOPED A CASE IMPLICATING BOTH RANDY AND THE APPELLATE.

THIS BRINGS US TO ISSUE ONE ON APPEAL WHICH HAS TO DO WITH THE STATEMENT OF RANDY TO THE POLICE ON APRIL 29TH WHICH WAS 25 DAYS AFTER, 24 DAYS AFTER THE CRIME.

THERE WAS AGAIN NO DISPUTE ABOUT THE FACT THAT THIS STATEMENT WAS CONSISTENT WITH THE STATEMENT OF THE STATEMENT AT THE TIME OF HIS PLEA DEAL, NO DISPUTE HE MADE THIS APRIL 29TH STATEMENT IN ORDER TO GET THAT PLEA DEAL AND BOTH OF THESE STATEMENTS WERE CONSISTENT WITH TRIAL TESTIMONY, AND THIS CAME OUT ON DIRECT EXAMINATION BY THE STATE.

THE DEFENSE HAD NO CLAIM THAT THE PLEA DEAL, AND THE TRIAL TESTIMONY WAS A RESULT OF SOME NEW INCENTIVE TO TESTIFY AFTER

THE APRIL 29TH STATEMENT.
THERE WAS NO DISPUTE ABOUT THE
FACT THAT THE APRIL 29TH
STATEMENT WAS CONSISTENT.
NONETHELESS, DESPITE THE FACT
THAT THERE WAS NO CLAIM OF
RECENT FABRICATION OR HOWEVER
YOU WANT TO TERM IT, THE STATE
CALLED AS ITS FINAL WITNESS A
POLICE DETECTIVE TO TESTIFY AT
LENGTH ABOUT THE APRIL 29TH
STATEMENT.

THE DEFENSE OBJECTED THAT IT WAS
HEARSAY AND I'M HERE TO SUBMIT
TO YOU THAT IT WAS HEARSAY, NO
DISPUTE ABOUT THE FACT THAT IT
IS NOT A COURT STATEMENT, AND
WAS INADMISSIBLE.

>> I THOUGHT IT WAS ADMITTED AS
A PRIOR CONSISTENT STATEMENT.

>> THE STATE ARGUES THAT FOR THE
FIRST TIME IN ITS BRIEF.

>> WHAT WAS THE REASON THE STATE
GAVE FOR PUTTING THE INCENTIVE
AT TRIAL?

>> NONE, IT GAVE NO REASON.
THE DEFENSE INJECTED HEARSAY AND
THE JUDGE OVERRULED THE
OBJECTION.

IF THIS HAD BEEN BROUGHT ON IN
THE TRIAL THE STATE HAD MADE
THIS CLAIM IN THE TRIAL COURT
THEN THE DEFENSE COULD HAVE
POINTED OUT ALL THIS, THE
APRIL 29TH, NEVER ANY CLAIM THE
APRIL -- THE FIRST TIME HE CAME
UP WITH THIS WAS AT THE TIME OF
THE PLEA DEAL.

THE CLAIM ALL ALONG, CLEAR FROM
HIS TESTIMONY, THE CLAIM ALL
ALONG WAS THERE WAS NO NEW
MOTIVE BECAUSE AT THE START OF
THE APRIL 29TH STATEMENT, TALK
TO THE DETECTIVE AND SAID HE WAS
DOING THIS TO GET A DEAL.
THE ATTORNEY TALKED TO THE STATE
AND THE PROSECUTOR ON DIRECT
EXAMINATION SAID WHEN YOU CAME
IN FOR YOUR PLEA DEAL YOUR
STATEMENT WAS VERY SIMILAR AND

HE SAID YES AND IN THIS CIRCUMSTANCE THERE IS NO CLAIM THAT WOULD JUSTIFY THE STATE USING THIS TO REBUT A CLAIM ABOUT RECENT FABRICATION, A NEW MOTIVE THAT AROSE AFTER THE APRIL 29TH STATEMENT.

THAT TESTIMONY WAS INADMISSIBLE AND UNDER THE DECISIONS OF THE COURT.

>> WAS THIS ON CROSS-EXAMINATION?

THE STATEMENT, PRIOR CONSISTENT STATEMENTS ON CROSS-EXAMINATION?

>> NO.

THE STATE'S DIRECT EXAMINATION BROUGHT OUT THAT HE HAD MADE THE ORIGINAL STATEMENT AT THE TIME OF HIS ARREST WAS THE DIRECT EXAMINATION, THIS IS A -- THE DIRECT EXAMINATION OF RANDY TUNDIOR'S BROUGHT OUT THAT HE MADE A STATEMENT ON APRIL 29TH, INCULCATED HIMSELF AND THE DEFENDANT, AND THE DIRECT EXAMINATION SAID AFTER THAT, YOU CAME IN WITH A PLEA AND MADE THE STATEMENT AT THAT TIME VERY SIMILAR TO THE APRIL 29TH STATEMENT AND HE SAID YES.

SO THE STATE WENT INTO DIRECT EXAMINATION.

THE DEFENSE SIMPLY CROSS-EXAMINED HIM.

>> EACH OF THOSE WERE OBJECTED TO BY THE DEFENSE?

>> THERE WAS NO OBJECTION TO THAT, BUT BECAUSE THERE WAS NO CLAIM OF PRIOR FABRICATION, DIDN'T GO INTO DETAILS OF APRIL 29TH STATEMENT BUT SAID IT WAS VERY SIMILAR TO THE PLEA TESTIMONY AND THE TESTIMONY AT TRIAL.

UNDER THOSE CIRCUMSTANCES, THAT THE TESTIMONY ABOUT THE APRIL 29TH STATEMENT IS HEARSAY, DOESN'T FIT UNDER THE HEARSAY EXCEPTION.

>> A SPECIFIC HEARSAY EXCEPTION

DOESN'T JUST REFER TO RECENT FABRICATION.

IN THE STATUTE OF 90.8012 B IT REFERS TO REBUTTING AN EXPRESS OR IMPLIED CHARGE AGAINST IMPROPER INFLUENCE MOTIVE, OR RECENT FABRICATION.

THAT IS DISJUNCTIVE.

>> ABSOLUTELY.

REALLY COUCHED THIS WHOLE EXAMINATION, YOU ARE LYING AND WHICH LIE IS THE CORRECT LIE, YOU WANT US TO CONVICT ON LIES, DOESN'T THAT INDICATE A CHALLENGE TO THE VERACITY AND FABRICATION THAT YOU COULD REBUT LATER ON?

>> THE RULE IS THE PRIOR CONSISTENT STATEMENT WITH A CLAIM, BEFORE THE TRIAL TESTIMONY.

THERE WAS SOME CHANGE IN CIRCUMSTANCES BETWEEN APRIL 29TH AND THE PLEA THE DEFENSE WAS MAKING SOME CLAIM, IMPROPER MOTIVE AROSE IN THAT PERIOD BETWEEN APRIL 29TH AND THE PLEA. AND THE DIRECT EXAMINATION MADE CLEAR THAT IT WAS THE SAME ALL ALONG.

>> THE LAWYER WAS NOT IN QUESTIONING.

WAS THAT SUFFICIENT?

>> BECAUSE IT WAS ALWAYS THE SAME MOTIVE.

THAT WAS THE DECK OF THE DEFENSE ATTORNEY MADE, THIS APRIL 29TH STATEMENT --

>> YOU HAVE TO GO IN AND SEE IF THEY WERE DIFFERENT, THAT YOU CANNOT USE THIS REBUTTAL TESTIMONY WHEN A PARTY CHALLENGES THE TRUTHFULNESS AND RECENT FABRICATION TO GO INTO IT.

IS THAT THE STANDARD?

YOU AGREE THE LAWYER MADE THOSE STATEMENTS THAT THE WITNESS HAD GIVEN.

>> THE DEFENSE ATTORNEY, HERE IS

WHAT HAPPENED.

THE PROSECUTOR BRINGS OUT A
PRIOR CONSISTENT STATEMENT SO
THERE WAS NO DISPUTE THAT THERE
WAS A PRIOR --

>> IT IS THE DEFENSE COUNSEL.
WHAT THE DEFENSE COUNSEL DID?
DID HE CHARGE THE WITNESS IN THE
PRESENCE OF THE JURY WITH LYING
NOW OR LYING LATER OR LYING TO
SAVE YOUR LIFE?

THAT IS NOT SUFFICIENT.

>> HE HAD THAT MOTIVE, IMPROPER
MOTIVE OR RECENT FABRICATION,
THERE WAS NO CLAIM -- IT WAS
NEVER DISPUTED THAT THERE WAS
THIS PRIOR CONSISTENT STATEMENT
WAS THE ONLY REASON TO BRING OUT
THE PRIOR CONSISTENT STATEMENT
IS TO SHOW THAT EVEN BEFORE THE
PLEA HE WAS SAYING THE SAME AND
HE SAID AT THE TIME OF THE PLEA.
THAT WAS THE PURPOSE, WHY A
PRIOR CONSISTENT STATEMENT IS
ADMISSIBLE, TO SHOW HE HAD THE
SAME PURPOSE AT THE TIME OF THE
APRIL 29TH STATEMENT AS HE DID
IN THE TRIAL AND THE CLAIM WAS A
PRIOR CONSISTENT STATEMENT AND
THE SAME MOTIVE, HE DEVELOPED
THE MOTIVE SHORTLY AFTER THE
ARREST AND BEFORE THE APRIL 29TH
STATEMENT AND IT IS PREJUDICIAL.
AND THE STATE IS MUCH HAPPIER
PRESENTING THIS TO A POLICE
OFFICER THEN THREW RANDY
TUNDIOR'S WHO WOULD MAKE ANY
STATEMENT TO ANYBODY THROUGH THE
COURSE OF THE CASE SO THAT IS MY
FIRST ISSUE ON APPEAL.

MY THIRD ISSUE ON APPEAL IS THE
SECRET RECORDING OF THE
CONVERSATION THE DEFENDANT'S
HOUSE, THE OTHER SON OF THE
DEFENDANT, SEAN CAME TO THE
POLICE ON APRIL 9TH OR APRIL 8TH
AND THEY SET HIM UP WITH A WIRE,
HE COULD GET A CONFESSION FROM
THE DEFENDANT.

>> YOU ARE NOT RAISING A HENRY

CLAIM, THAT IT WAS A STATE AGENT.

>> NO.

HE IS NOT A STATE AGENT, THAT IS MY CLAIM.

HE IS NOT ACTING UNDER -- UNDER THE STATUTE THE STATUTE SAYS THAT THE RECORDING IS ALL RIGHT IF SEAN ACTED UNDER THE DIRECTION OF LAW ENFORCEMENT OFFICERS, A SPECIFIC STATUTE, THE CASE LAW AND ATTORNEY GENERAL OPINION, THE EXCEPTION TO THE STATUTE MUST BE STRICTLY CONSTRUED IN FAVOR OF THE RIGHT TO PRIVACY.

WE HAVE HERE THE EXCEPTION THE STATE WAS TRAVELING UNDER WAS THAT THE SUN WASN'T GOING -- ACTING UNDER THE DIRECTION OF A LAW ENFORCEMENT OFFICER BUT THERE WAS NO EVIDENCE.

>> MAYBE MISS CAMPBELL CAN HELP ME.

WE HAVE HAD CASE LAW AT OTHER TIMES WHERE WHEN SOMEONE ACTS ON BEHALF OF THE STATE, THEY HAVE TO DIVULGE THEY ARE ACTING AS A STATE AGENT UNDER HENRY SO WHERE DID THE TWO INTERSECT UNDER THE DIRECTION THEY ARE TRAVELING UNDER AND THEREFORE IT WOULD BE PROPER WHERE IT BECOMES IMPERMISSIBLE?

>> IT WAS A STATUTE THAT HE DID NOT ACT UNDER THE DIRECTION OF A LAW ENFORCEMENT OFFICER AND THERE WAS NO EVIDENCE HE ACTED. THE STATE HAS THE BURDEN UNDER THE CASE LAW --

>> HE CAME TO THE POLICE AND OFFERED TO TRY TO GET A CONFESSION FROM HIS FATHER SO THE POLICE SET HIM UP WITH THE WIRE, DID ALL THAT WAS NECESSARY SO THAT HE COULD ACTUALLY RECORD THE STATEMENT, STATEMENTS AND IT IS NOT AT THE DIRECTION -- WHAT WOULD BE REQUIRED TO SAY THAT THIS WAS DONE AT THE DIRECTION?

>> DIRECTION MEANS GIVING
ORDERS, SUPERVISING MANAGEMENT.
>> GAVE HIM THE WIRE.
>> THAT IS NOT -- IF I ASK YOU

--

>> THE PRINCIPAL YOU ARE ARGUING
IS ANY TIME A PERSON INITIATES,
OR MAKES THE FIRST SUGGESTION OF
WEARING A WIRE AND THE POLICE
SAY THAT IS A GOOD IDEA, WE WILL
DO THAT AND SET THIS UP,
WHENEVER IT IS INITIATED, THEY
GET THE BENEFIT OF THIS
EXCEPTION.

>> NO.

>> IS IN THE PURPOSE -- THIS IS
A FEDERAL STATUTE.

>> THIS IS --

>> WE ARE LOOKING AT THE
DIFFERENCE BETWEEN PEOPLE USING
THEIR OWN ON THEIR OWN VOLITION
RECORDING STATEMENT AND THE
OTHER PERSON DOESN'T KNOW VERSUS
THOSE THAT HAVE SOME LAW
ENFORCEMENT PURPOSE, UNDENIABLY
THIS HAD A LEGITIMATE LAW
ENFORCEMENT PURPOSE, WANTED HIM
TO HAVE THIS REPORTING SO THEY
COULD GET THESE ADMISSIONS.
I DON'T SEE HOW THE STATUTE
WHICH IS SAYING WE WANT TO
PREVENT INTRUSIONS INTO PRIVACY
THAT ARE NOT CONNECTED WITH LAW
ENFORCEMENT PURPOSE, CAN YOU
EXPLAIN THAT IN TERMS OF
LEGISLATIVE INTENT AND THE USE
OF THE WORD UNDER DIRECTION OF,
GIVING IT A VERY STRICT
INSTRUCTION WHICH IS THEY HAVE
TO HAVE ON TO HIM AND REQUESTED
THAT HE WHERE THE WIRE AS
OPPOSED TO HIM TELLING ABOUT IT.

>> HE CAN COME TO THEM.

>> YOU NEVER HAD AN OPPORTUNITY
TO ANSWER EXCEPT BRIEFLY.
IF YOU ARE NOT SUGGESTING THAT,
WHAT ARE YOU SUGGESTING?
THAT SEEMS TO BE THE DIRECT
IMPLICATION OF YOUR ARGUMENT
HERE.

WHAT CIRCUMSTANCES HERE SET THIS CASE APART FROM WHAT I DESCRIBED?

>> IF I ASK MY FRIEND CAN I USE YOUR PEN, CAN I WRITE SOMETHING? I'M NOT ACTING UNDER HER DIRECTION, THE STATUTORY LANGUAGE HAS MEANING.

>> YOU ARE SAYING IF IT IS EVER INITIATED BY A PERSON, I DON'T UNDERSTAND.

>> IF I COME TO SOMEBODY --

>> LET'S TALK ABOUT LAW ENFORCEMENT, TO THIS CONTEXT HERE.

>> I COME TO LAW ENFORCEMENT AND SAY I CAN GET THIS EVIDENCE FOR YOU, WIRE ME UP AND KNOCK YOURSELF OUT.

THAT -- EVEN IF -- LAW ENFORCEMENT OFFICER, AND SAY I KNOW ABOUT THIS AND THEY SUGGEST WHY DON'T YOU WEAR A WIRE, EITHER WAY I AM NOT ACTING UNDER THE DIRECTION OF THE OFFICER. DIRECTION MEANS MANAGEMENT, IT MEANS GIVING AND ORDER.

>> DO THEY HAVE TO GO WITH THEM.

>> WHAT USUALLY HAPPENS WITH CONFIDENTIAL INFORMANTS, DO GIVE THEM VERY STRICT INSTRUCTIONS, CAN'T DO THIS OR THAT.

I SUBMIT THAT.

IT HAS TO BE STRICTLY, THE CASE LAW.

THE ATTORNEY GENERAL OPINION CITING THE CASE LAW, HAS TO BE STRICTLY CONSTRUED, GREATER PRIVACY RIGHT UNDER THE FEDERAL CONSTITUTION.

>> TO JUSTICE. DATE -- TO JUSTICE PARIENTE'S QUESTION THAT IS WHAT LAW ENFORCEMENT HAS TO DO AND YOU HAVE A HENRY ISSUE.

>> THAT COULD BE BUT WE ARE GOING UNDER THE STATUTE.

THE STATUTE IS CLEAR, UNDER THE DIRECTION AND HAS TO HAVE SOME MEANING OTHER THAN HERE.

>> HERE IS THE WIRE.

WITH THIS WIRE, IN YOUR FATHER'S PRESENCE YOU SHOULD DIRECT THE CONVERSATION SO THAT IT TOUCHES ON SOME PART OF WHAT HAPPENED THAT NIGHT.

IS THAT POLICE DIRECTION?

>> THAT WOULD GO IN THAT DIRECTION.

TO ME IT WOULD DEPEND ON THE CIRCUMSTANCES.

IT WOULD INVOLVE SOMETHING LIKE DON'T TRAP SOMEONE, DON'T BE RECORDING THIRD PERSONS BECAUSE THAT IS NOT ALLOWED.

IT WOULD INVOLVE SOMETHING MORE THAN HERE YOU GO.

>> DO WE KNOW IF THE POLICE GAVE ANY SUCH DIRECTIONS?

IT IS NOT IN THE RECORD.

>> ALL OF THE EVIDENCE IS THEY DID NOT.

WE HAVE A TRANSCRIPT OF SEAN'S 100 PAGE STATEMENT TO THE POLICE AND NOTHING LIKE THAT IN THEIR. THE STATE PRESENTED NO EVIDENCE. THE CASE LAW IS CLEAR.

THE STATE HAS THE BURDEN TO PROVE THEY NEED THE STATUTORY EXCEPTION.

THE STATUTORY EXCEPTION MUST BE STRICTLY CONSTRUED.

THE STATE PRESENTED NO EVIDENCE ON THIS AT THE HEARING.

RIGHT THERE, THAT SHOULD END THE COURT'S ANALYSIS.

>> WE HAVE TO CONSTRUE THAT STATUTE IN ACCORDANCE WITH THE RIGHT TO PRIVACY AND CONSTRUE IT TO MEAN LAW ENFORCEMENT HAS TO BE ACTIVELY INVOLVED BEFORE THE RECORDING CAN TAKE PLACE.

>> THE STATUTE HAS TO BE STRICTLY CONSTRUED.

UNDER THE PRIOR CASE LAW BECAUSE IT ENFORCES OUR FLORIDA RIGHT OF PRIVACY, THE STATE HAS THE BURDEN OF GOING FORWARD WITH EVIDENCE TO ESTABLISH THIS.

THE STATE PRESENTED NO EVIDENCE. THAT SHOULD END IT RIGHT THERE.

THE THIRD RECORD WE HAVE FROM THE TRIAL SHOWS THAT THERE WAS NO DIRECTION BY THE POLICE AT ALL.

DIRECTION CAN MEAN, IF YOU GIVE ME DIRECTIONS TO THE AIRPORT, THAT IS ONE THING WHICH I'M NOT ACTING UNDER YOUR DIRECTIONS. IF I AM DIRECTED TO SIT DOWN, MY TIME IS UP, THAT IS QUITE DIFFERENT.

UNDER THE DIRECTION MEANS SOMEBODY ABOVE GIVING ORDERS, TELLING SOMEONE WHAT TO DO. THIS IS CONFIDENTIAL INFORMANT, DON'T ENTRAP THE PERSON, THAT KIND OF THING, THERE IS NO EVIDENCE OF COMPLIANCE WITH THE STATUTE WHICH MUST BE STRICTLY CONSTRUED.

I'M IN MY REBUTTAL TIME.

>> MAY IT PLEASE THE COURT, LESLIE CAMPBELL WITH THE ATTORNEY GENERAL'S OFFICE ON BEHALF OF THE STATE.

WITH REGARD TO THE LAST QUESTION FIRST.

THE POLICE, EXCUSE ME, SEAN WENT TO THE POLICE, REPORTED WHAT HIS FATHER HAD SAID TO HIM AND DURING THE COURSE OF THAT DISCUSSION, HE GOT THE IDEA THAT THE POLICE WERE NOT NECESSARILY BUYING EVERYTHING HE SAID. HE OFFERED TO WEAR A WIRE. THE POLICE AGREED AND THE POLICE GAVE HIM A WIRE IN THE SHAPE OF THE KEY.

THE POLICE TOLD HIM HOW TO WORK THE WIRE, THE POLICE AGREED THIS WAS THE PROPER ACTION TO TAKE.

>> WHAT IS THE PURPOSE OF THE STATUTE?

LET'S TAKE ONE EXAMPLE.

THE POLICE WILL NEVER BELIEVE ME, I WILL TAKE MY PHONE AND RECORD THE CONVERSATION.

>> THAT WILL NOT FALL UNDER THE STATUTE.

>> THERE IS NO POLICE

INVOLVEMENT.

>> THE OTHER EXTREME, THEY SUSPECT HIS FATHER HAVE A LOT OF EVIDENCE AND THEY HAVE ENOUGH EVIDENCE TO ARREST THE FATHER. THEY GO TO THE SUN, THIS SON THAT WAS NEVER CHARGED.

>> THAT IS CORRECT.

>> THEY GO WE ARE GOING TO BRING HIM IN, WENT TO INSTEAD WEAR A WIRE, AND RECORD THE CONVERSATION.

WHAT WOULD HAPPEN IN THAT CIRCLE?

AND AS AN AGENT, WHAT THEY COULD OR COULDN'T DO DIRECTLY, WOULD HAVE BEEN ARRESTED.

HENRY VIOLATION.

>> IF HE WOULD HAVE BEEN ARRESTED, IF THE FATHER COULD HAVE BEEN ARRESTED AND WOULD BE IN CUSTODY AND THEY WANTED MORE EVIDENCE.

>> HOW DOES HENRY APPLY?

WE HAVE THE WHOLE RANGE OF WHAT COULD HAVE HAPPENED, RECORDING POLICE INVOLVEMENT OR COMPLETE POLICE INVOLVEMENT IN GETTING SOMEONE TO RECORD A CONVERSATION.

>> WE DID NOT BRIEF HENRY BECAUSE IT WAS UNDER THE STATUTE.

I DON'T BELIEVE I COULD ANSWER YOUR QUESTIONS.

>> THE HENRY ISSUE COMES UP IF SOMEONE IS INCARCERATED AND A CELL MATE GOES TO A GUARD AND SAYS IF YOU CAN GIVE ME SOME LENIENCY I CAN GET THE WHOLE STORY KIND OF THING AND THEN THEY CLOAK HIM AND THE DEFENDANT SAYS THAT IS A HENRY VIOLATION, YOU VIOLATED MY RIGHT TO COUNSEL.

SOUNDS LIKE IT IS A MYSTERIOUS THEORY.

>> HE IS IN CUSTODY.

>> IN ANY EVENT, SOMEWHERE MIDDLE GROUND, IF THE POLICE ARE

INVOLVED AND THE PERSONS DOING IT WITH POLICE APPROVAL BECAUSE THAT IS WHAT WE ARE TRYING TO PREVENT, THESE UNINTENTIONAL, THIS IS FRIENDLY QUESTION.

>> WE ARE NOT VIOLATING ONE RIGHT TO GET TO ANOTHER.

IN THIS PARTICULAR CASE WE ARE NOT VIOLATING THE RIGHT TO COUNSEL, AND --

>> VIOLATING HIS RIGHT TO PRIVACY BECAUSE HIS SON COULDN'T HAVE DONE THIS ON HIS OWN.

>> COULDN'T HAVE DONE IT ON HIS OWN.

>> COULDN'T HAVE RECORDED IT ON HIS PHONE.

IT WOULD HAVE BEEN A VIOLATION OF THE STATUTE.

THERE IS NO CRIME EXCEPTION LIKE IF YOU THINK YOUR KID OR SOMEONE IS DOING A CRIME, YOU GET TO DO THAT WITHOUT TALKING TO THE POLICE.

WE WANT POLICE TO BE INVOLVED IN DONE APPROPRIATELY.

>> THAT IS CORRECT AND THAT WAS DONE IN THIS CASE.

POLICE WERE INVOLVED FROM THE START, POLICE GAVE THEM THE EQUIPMENT, SEND HIM HOME, TOLD HIM TO CALL THE POLICE BACK WHEN HE HAD INFORMATION AND THEY PICKED HIM UP AND COLLECTED THE WIRE.

POLICE WERE INVOLVED FROM START TO FINISH.

>> THEY NEVER SUSPECTED HE ALSO, THE DEFENSE IS THE TWO BOYS GOT TOGETHER TO FRAME THE FATHER.

WAS THIS SEAN, WAS IT EVER --

>> INVESTIGATED?

>> CONSIDERED AS A SUSPECT?

>> HE WAS NOT CONSIDERED AS A SUSPECT ALTHOUGH THEY INVESTIGATED HIM, THEY LOOKED AT HIS PHONE RECORD AND TALKED TO SEAN'S GIRLFRIEND AND HE WAS ON THE PHONE DURING IMPORTANT PERIODS OF TIME THAT HE COULD

NOT BE INVOLVED WITH THIS PARTICULAR CRIME.
THEY HAVE A TEXT MESSAGE FROM THE FATHER TO THE SUN, SEAN SAID WHAT IS GOING ON?
I WANT TO RIDE WITH YOU AND THE FATHER SPECIFICALLY TOLD HIM I DON'T WANT YOU INVOLVED IN THIS CRIME, NOT CRIME BUT I DO NOT WANT TO INVOLVED.
>> HE SAID I WANT TO RIDE WITH YOU MEANING I WANTED TO GO SCARE THE LANDLORD?
>> I WANT TO RIDE WITH YOU. THERE ISN'T ANY CONTEXT TO THAT THAT HE KNEW WHAT WAS GOING TO HAPPEN.
>> WHAT ABOUT THE TWO SONS?
>> 22 WAS RANDY H AND I BELIEVE SEAN WAS THE YOUNGER SON AND THE FATHER WAS 44 AT THE TIME.
>> IN THE FIRST ISSUE, AND JUNIOR COMES TO TESTIFY AND SAYS MY FATHER MADE ME DO IT. THE STATE IN DIRECT EXAMINATION BRINGS OUT THESE OTHER STATEMENTS?
>> THEY MENTION STATEMENTS --
>> NOT -- WHAT WAS THEIR PURPOSE IN BRINGING OTHER STATEMENTS?
>> TO SHOW THAT IT WAS AN INITIATION OF THE CASE, AND HOW IT PROGRESSED AND HE DID SEEK A PLEA DEAL.
>> THE CONTENT OF THE CONVERSATION DID NOT COME OUT IN DIRECT EXAMINATION.
>> THE CONTENT OF WHICH CONVERSATION?
>> THE CONTENT OF WHAT JUNIOR SAID OUT OF COURT TO THE POLICE COME OUT ON DIRECT CONVERSATION.
>> I DON'T BELIEVE SO.
>> IF THAT CAME OUT ON DIRECT, WOULDN'T THAT BE HEARSAY? OUTSIDE THE COURTROOM ON DIRECT EXAMINATION.
>> IT WENT TO THE TRUTH OF THE MATTER, YES.
HERE, HOWEVER, THE RECOLLECTION

IS THERE IS DISCUSSION THESE THINGS TRANSPIRE, THAT HE EVENTUALLY GOT A DEAL.

>> THAT IS GOING TO BE CROSS-EXAMINATION.

ON CROSS-EXAMINATION THEY BASICALLY START ON YOU ARE A LIAR, YOU DID THIS AND DID THEY BRING OUT AT OTHER TIMES, IMPLICATED HIMSELF?

>> THAT WAS BROUGHT OUT THAT HE IMPLICATED HIMSELF, IMPLICATED TWO OR THREE PEOPLE, THAT HE HAD GIVEN DIFFERENT STATEMENTS AND THERE WAS EVEN STUFF WHERE HE HAD WRITTEN TO HIS FATHER.

>> THE JUDGE ON REDIRECT IS WHEN ALL THE PRIOR CONSISTENT STATEMENTS CAME?

>> ON REDIRECT, THEY REHABILITATED BUT THE PROBLEM RAISED HERE, THE DETECTIVE TESTIFYING AS TO THE CONTENT.

>> WHEN DID THE DETECTIVE TESTIFY?

>>.

>> AT THAT POINT THEY WERE PUTTING OUT IN ORDER TO REBUT THE CROSS-EXAMINATION OF IMPLIED THAT HE WAS LYING.

>> IF THERE ARE NO OTHER QUESTIONS ON THOSE TWO ISSUES, I WILL REST ON MY BRIEF, ASK THE COURT TO AFFIRM THE CONVICTION AND SENTENCE AND --

>> AND WAVE MITIGATION.

>> YES HE DID.

THANK YOU, YOUR HONOR.

>> WITH RESPECT TO --

>> WAS THAT DIRECTION?

>> WAS THAT DIRECTION?

THAT WAS MISDIRECTION.

WITH RESPECT TO THE SECRET RECORDING THIS COURT HELD BACK IN THE SHELIVING CASE THAT THE STATUTE FOR BIDS SECRET RECORDING EVEN IF THE PERSON SUBJECT TO THE INTRUSION HAS REASONABLY SUSPECTED THE CRIME. THIS COURT HELD IN THAT CASE.

>> DID THAT HAVE TO DO -- THAT IS BASICALLY SAYING YOU ARE A GOOD CITIZEN, YOU THINK SOMEONE HAS COMMITTED A CRIME, YOU GO AHEAD AND RECORD SOMETHING.

>> THAT IS A DIFFERENT SITUATION, ISN'T IT?

>> APPROVAL OF THE POLICE AND THE STATUTE SAYS, THE STATE'S POSITION IS WITH AUTHORIZATION OF THE POLICE BUT THAT IS NOT WHAT THE STATUTE SAYS.

WAS IT SAID IN 1978 WAS THE COURT CANNOT SUBSTITUTE ITS JUDGMENT FOR THE LEGISLATURE AND CREATE AN EXCEPTION TO THE STATUTE TO SUIT A PARTICULAR CASE AND THAT IS WHAT THE STATE IS ASKING YOU TO DO.

>> WE ARE ALL SEARCHING FOR WHAT THAT MEANS UNDER THE DIRECTION. IS THIS ENOUGH, IS THAT ENOUGH? THAT IS WHAT WE ARE TALKING ABOUT.

WE DO THIS EVERY DAY ON STRICT CONSTRUCTION OF STATUTES, DOES THAT WORD OR GROUP OF WORDS MEAN AN APPLICATION?

THAT IS WHAT THESE QUESTIONS ARE DESIGNED.

>> I UNDERSTAND THAT.

I AM TRYING TO MAKE THE POINT IT IS EASY TO SLIP INTO SAYING SOMETHING LIKE THE APPROVAL OF THE AUTHORIZATION, THE LANGUAGE IS UNDER THE DIRECTION, AND --

>> THAT IS WHAT THE QUESTION MEANT TO YOU.

PLEASE DESCRIBE FOR ALL OF US, WHAT ARE THE ELEMENTS, WHAT IS REQUIRED UNDER THE DIRECTION?

IT IS NOT INVOLVEMENT, NOT ACKNOWLEDGMENT, NOT KNOWLEDGE, AND -- IN THE REAL WORLD.

>> DIRECTION MEANS GIVING ORDERS, GIVING COMMANDS, BEING UNDER THE DIRECTION OF SOMEBODY, BASICALLY AN EMPLOYEE KIND OF RELATIONSHIP.

AT A MINIMUM IT WOULD INVOLVE

GIVING DETAILED INSTRUCTIONS ABOUT WHAT SORTS OF RECORDINGS ARE ALLOWED AND WHAT SORTS ARE NOT.

ONE IMPORTANT POINT I WANT TO MAKE IS UNDER THE COURTS CASE LAW, THE STATE'S BURDEN TO COME FORWARD WITH EVIDENCE THAT THE HEARING AND DIDN'T COME FORWARD WITH EVIDENCE AT THE HEARING AT ALL.

ALL THAT HAPPENED WAS THE PROSECUTOR SAID HE WAS ACTING UNDERCOVER OF THE LAW.

THIS IS UNDERCOVER OF LAW, I DON'T KNOW WHAT IS.

THE POLICE GAVE IT TO HIM, SHOWED HIM HOW TO DO IT.

>> THAT IS WHAT TRIAL SAY DIRECTION MEANT.

>> THEY DID NOT SHOW.

>> THEY GAVE THE TRIAL COURT NO ARGUMENT AS TO WHAT IT MEANT.

>> THAT IS WHAT THE PARTY DID. THE COURT DIDN'T INQUIRE INTO IT.

>> THE COURT APPLIED COMMON SENSE.

>> IT HAS TO HAVE FACTS BUT NO EVIDENCE PRESENTED BY THE STATE.

>> DON'T THE FACTS SHOW THAT THE STATE, THE POLICE GAVE A RECORDING DEVICE, THE DEVICE DESIGNED FOR SURREPTITIOUSLY RECORDING A CONVERSATION.

>> ABSOLUTELY.

>> THAT IS A VERY IMPORTANT FACT, WOULDN'T YOU THINK?

>> OTHERWISE IT WOULDN'T HAVE BEEN A SECRET RECORDING AT ALL BECAUSE THE POLICE GAVE IT TO THEM.

THE STATUTE DOESN'T SAY IT IS OKAY AS LONG AS YOU USE EQUIPMENT THE POLICE GIVE YOU. IN MY BRIEF, THERE WERE STATUTES SAYING SOMEONE COULD SERVE A SEARCH WARRANT UNDER THE DIRECTION OF LAW ENFORCEMENT OFFICER.

>> THE PROBLEM IS YOU ARE QUESTIONING WHETHER SOMEONE IS A STATE AGENT AND I AM NOW LOOKING AT THE HENRY KIND OF CASES BECAUSE WHEN SOMEONE BECOMES A STATE AGENT ALL SORTS OF IMPLICATIONS, WHETHER YOU ARE VIOLATING HIS RIGHT TO COUNSEL EVEN OUTSIDE OF JAIL.

THE LINE BETWEEN WHAT IS FOR THE STATE TO GO, OKAY, PLEASE RECORD THIS, OR YOU MAY RECORD THIS, AND WE'RE GIVING YOU THE RECORDING.

AND WHEN THEY DIRECT IT TO SUCH AN EXTENT THAT THEY BECOME AN AGENT ACTING ON BEHALF OF THE STATE.

THAT'S, THAT LINE, WE WANT TO MAKE SURE WE KEEP THAT LINE SEPARATE, RIGHT?

BECAUSE OTHERWISE--

>> NO--

>> YOU WANT TO BLUR THE LINES?

[LAUGHTER]

>> I'M JUST SAYING THE STATUTE HAS SPECIFIC LANGUAGE.

IT'S THE LEGISLATURE THAT WROTE THIS LANGUAGE.

THE CASE LAW IS CLEAR THAT'S SUPPOSED TO BE STRICTLY CONSTRUED BECAUSE IT VINDICATES THE CONSTITUTIONAL RIGHT.

SO, I MEAN, THEY-- HENRY JUST DOESN'T COME INTO THIS, BECAUSE THE STATUTE DOESN'T WANT THE POLICE TO JUST BE HANDING THINGS OUT SAYING GO OUT AND KNOCK YOURSELF OUT, HAVE FUN WITH THIS PIECE OF POLICE EQUIPMENT.

JUST BRIEFLY ON POINT ONE, I WANT TO MAKE CLEAR AGAIN THE STATE'S DIRECT EXAMINATION WAS THAT IN ADDITION TO THE CONVERSATION WITH DETECTIVE KIMBALL WHICH WAS THE APRIL 29 STATEMENT, "YOU ALSO DID SOMETHING VERY SIMILAR WITH ME, ISN'T THAT CORRECT?"

AND THERE HE'S TALKING ABOUT THE

PLEA AGREEMENT.

SO HE WAS SAYING THAT THE PLEA
TESTIMONY, THE PLEA AGREEMENT
WAS THE SAME STATEMENT AS HIS
APRIL 29 STATEMENT WHICH WAS THE
SAME STATEMENT AS THIS TRIAL
TESTIMONY.

SO IN THAT SENSE, THE STATE DID
GO INTO THE DETAILS OF THOSE
PRIOR STATEMENTS.

SO FOR THESE REASONS, I SUBMIT
THAT THE EVIDENCE WAS
INADMISSIBLE.

THANK YOU FOR YOUR TIME TODAY.

>> THANK YOU FOR YOUR ARGUMENTS.
COURT'S IN RECESS.