

>> ALL RISE.  
>> SUPREME COURT OF FLORIDA IS  
NOW IN SESSION.  
PLEASE BE SEATED.  
>> LAST CASE.  
MONROE V. STATE.  
>> MAY IT PLEASE THE COURT,  
MICHAEL UFFERMAN ON BEHALF OF  
THE PETITIONER, RALPH MONROE.  
I'D LIKE TO RESERVE FIVE MINUTES  
OF MY TIME FOR REBUTTAL.  
THE ISSUE IN THIS CASE IS  
WHETHER AN UNPRESERVED  
SUFFICIENCY OF THE EVIDENCE IN  
THIS CASE CAN BE REVIEWED FOR  
FUNDAMENTAL ERROR ON DIRECT  
APPEAL WHEN THERE IS NO  
COMPETENT EVIDENCE FOR THE  
DEFENSE, ESPECIALLY IN THIS CASE  
WHERE AFFIRMANCE WOULD RESULT IN  
AN UNCONSTITUTIONAL SENTENCE.  
THE FACTS OF THIS CASE ARE  
PRETTY STRAIGHTFORWARD.  
>> WELL, I MEAN, IS THAT LAST  
PART REALLY NECESSARY AS PART OF  
THIS QUESTION?  
BECAUSE IF THERE'S NO EVIDENCE,  
NO LEGALLY-ACCEPTABLE EVIDENCE  
TO SUPPORT A CONVICTION, ISN'T  
THAT AN UNCONSTITUTIONAL  
SENTENCE THAT WOULD FLOW FROM  
THAT AS WELL?  
>> I BELIEVE SO, YOUR HONOR.  
I THINK--  
>> SO, I MEAN, THAT, THE SECOND  
PART'S KIND OF A THROW-ON.  
I'M TRYING TO UNDERSTAND BECAUSE  
WE'RE DEALING WITH A MINOR THAT  
IT JUST TOTALLY CHANGES  
EVERYTHING.  
BUT IT SEEMS TO ME THAT BOTH  
WOULD BE UNCONSTITUTIONAL,  
THEREFORE, THAT DOESN'T CHANGE  
THE DYNAMICS.  
>> I DON'T DISAGREE WITH THAT.  
>> OKAY.  
>> I THINK THE COURT CAN GO AS  
BROAD OR AS NARROW AS THEY WANT  
TO.  
IF THE COURT WANTED A BROAD

EXCEPTION TO THE CURRENT RULE  
AND THEY WERE LOOKING FOR A  
REASON TO NOT OPEN THE  
FLOODGATES, THE REASON IN THIS  
CASE WOULD BE BECAUSE WE ARE  
DEALING WITH SOMETHING THAT IF  
THIS IS AFFIRMED AND THE  
EVIDENCE DOESN'T SUPPORT THAT MY  
CLIENT WAS AN ADULT, IT MEANS  
HE'S NOW SERVING AN  
UNCONSTITUTIONAL SENTENCE.

>> YEAH, I UNDERSTAND.

>> THE FACTS ARE PRETTY  
STRAIGHTFORWARD.

THE STATE CHARGED MY CLIENT WHEN  
HE WAS IN HIGH SCHOOL, A SENIOR,  
AND THEY ALLEGED HE COMMITTED A  
SEXUAL ACT AGAINST ANOTHER  
STUDENT, A SECOND GRADER.  
THEY ALLEGED THIS ACT HAPPENED  
ON A PARTICULAR DAY, A BATHROOM.

>> [INAUDIBLE]

>> YES.

AN ESSENTIAL ELEMENT OF BOTH  
COUNTS ONE AND TWO WERE THAT MY  
CLIENT BE 18 OR OLDER THAT THE  
THE TIME OF THE OFFENSE.

>> LET ME ASK YOU THIS, WHAT  
EVIDENCE WAS PRESENTED BY THE  
STATE TO PROVE THAT YOUR CLIENT  
WAS 18?

>> THE TWO PIECES OF EVIDENCE  
THAT ARE ARGUABLY OUT THERE,  
NUMBER ONE, THEY SAID THIS WAS  
REPORTED IN MAY.

MY CLIENT'S BIRTHDAY WAS ON  
FEBRUARY 27TH.

SO THERE WAS THIS INSINUATION  
THAT PERHAPS IT MIGHT HAVE  
OCCURRED CLOSE IN TIME TO WHEN  
IT WAS REPORTED, BUT IT WASN'T  
REPORTED ON THE DATE OF THE  
INCIDENT.

THE WAY IT WAS REPORTED IS I  
CAN'T USE THAT BATHROOM, I SEE  
THAT PERSON.

AND THAT PERSON HAS MESSED WITH  
ME BEFORE.

>> SO REALLY YOU HAD THE  
BIRTHDAY OF THE DEFENDANT IS THE

ONLY DEFINITIVE, BECAUSE EACH TIME THE VICTIM WAS ASKED, IT CAME BACK WITH AN I DON'T KNOW OR A MAYBE.

>> MAYBE, THAT'S-- AND ONE TIME EVEN NO.

THE THREE QUESTIONS, AND THIS IS ON PAGES 40 AND 41, WAS THIS AFTER CHRISTMAS TIME, MAYBE, I DON'T KNOW.

DID IT HAPPEN AFTER SPRING BREAK?

MAYBE.

WAS IT AFTER CHRISTMAS?

NO.

>> WE TALKING ABOUT ONE TIME?

>> WE ARE TALKING ABOUT ONE TIME.

>> SO THIS COULD BE DIFFERENT IF IT WAS A CONTINUING ACT SITUATION WHERE IT WAS OVER A PERIOD OF MONTHS, SOMEONE DOESN'T KNOW--

>> CORRECT.

TO BE CLEAR ON THAT, THERE IS-- THE STATE SENT OUT AN INVESTIGATOR TO INTERVIEW THE VICTIM, AND DURING THAT INTERVIEW HE INDICATED THAT IT COULD HAVE HAPPENED TWICE.

BUT AT TRIAL HE SPECIFICALLY SAID IT HAPPENED ONCE, AND THIS COURT'S PRECEDENT EVEN THOUGH CHILD HEARSAY IS ADMISSIBLE, IF THERE'S A CONFLICT BETWEEN THE THIS-COURT TESTIMONY, THE OUT OF COURT TESTIMONY CONTROLS.

SO, YES, THE ANSWER IS WE'RE TALKING ABOUT ONE TIME.

>> WHAT'S THE-- DID THE JURY HAVE THE OPTION OF FINDING HIM GUILTY OF UNDER 18--

>> YES.

>>-- UNDER 18 AND THEY DID NOT?

>> THEY DID NOT.

>> THE, SO I GUESS IT GETS PACK TO THE QUESTION-- GETS BACK TO THE QUESTION OF THE REQUIREMENT THAT THE DEFENSE ATTORNEY MOVE FOR A JUDGMENT OF ACQUITTAL.

>> THAT'S THE ISSUE.  
>> AND HERE THE DEFENSE ATTORNEY IS AFFIRMATIVELY ASKED ARE YOU GOING TO BE MOVING FOR A JUDGMENT OF ESSENTIAL--  
>> CORRECT.  
>> SHE SAYS NO.  
>> CORRECT.  
>> SO HOW DO WE GET AROUND THAT?  
>> IT'S FUNDAMENTAL ERROR. AND THERE COULD BE NO ERROR MORE FUNDAMENTAL THAN THE STATE FAILING TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME. THIS COURT RECOGNIZES FUNDAMENTAL ERROR IN THE CONTEXT OF JURY INSTRUCTIONS. WE'VE HEARD A CASE ALL MORNING LONG ABOUT IT. COURTS RECOGNIZE FUNDAMENTAL ERROR IN THE CONTEXT OF PROSECUTORS--  
>> WELL, YEAH. WE'VE BEEN HEARING ALL MORNING, BUT NOT WHEN SOMEONE AFFIRMATIVELY AGREES TO SOMETHING. IS THERE-- WELL, THE FIRST DISTRICT'S CASE ASSUMES THERE'S INSUFFICIENT EVIDENCE.  
>> CORRECT.  
>> IS THERE AN ARGUMENT TO BE MADE THAT THERE ACTUALLY WAS SUFFICIENT EVIDENCE TO GO TO THE JURY?  
>> THE ANSWER THAT I WOULD GIVE YOU IS THE SAME ANSWER I JUST GAVE. ALL YOU HAVE TO LOOK AT IS HIS TESTIMONY ON PAGES 40 AND 41. MAYBE IS NOT SUFFICIENT.  
>> OKAY. SO JUST SO WE UNDERSTAND WHAT WE'RE DEALING WITH HERE, WE'RE DEALING WITH A MANDATORY LIFE--  
>> YES.  
>>-- IN PRISON.  
>> WITHOUT PAROLE.  
>> WITHOUT PAROLE. SO IF HE'S, AND IF HE'S 17-- WE

DON'T HAVE A GRAHAM ISSUE,  
BECAUSE THEN THE CRIME IS, WHAT  
IS THE PUNISHMENT THEN?

>> IF HE WAS UNDER, THE  
PUNISHMENT-- IF THE DCA COULD  
DO WHAT IT WANTED TO DO, WHICH  
WAS SEND THIS BACK FOR  
SENTENCING AS IF HE WAS ONLY 17,  
IT'S STILL A LIGHT FELONY, BUT  
THE JUDGE HAS THE DISCRETION TO  
SENTENCE HIM UNDER GUIDELINES,  
AND WE KNOW UNDER GRAHAM THE  
JUDGE COULD NOT GIVE LIFE, BUT  
UNDER HENRY, THAT COULD BE  
SOMETHING LESS THAN A DE FACTO  
LIFE SENTENCE.

>> SO IT WOULD STILL BE--

>> YES.

>>-- A SUBSTANTIAL TERM.

>> YES.

>> IT'S NOT LIKE HE COULD GET A  
YOUTHFUL-- COULD HE GET A  
YOUTHFUL OFFENDER--

>> LIFE FELONIES EXCLUDES  
SOMEONE FROM CONSIDERATION FOR  
YOUTHFUL OFFENDER.

>> SO THERE'S, I MEAN REALLY  
JUST-- I MEAN, NOT JUST, BUT  
HE'S GOING TO END UP WITH A  
SUBSTANTIAL SENTENCE.

>> HE'S GOING TO HAVE A  
SUBSTANTIAL SENTENCE, BUT RIGHT  
NOW HE'S SENTENCED TO LIFE  
WITHOUT THE POSSIBILITY OF  
PAROLE.

NEVER GETTING OUT.

>> AND THE PROBLEM WE'RE DEALING  
WITH IS THAT THE ESTABLISHED  
CASE LAW ON, IN THIS AREA IS  
THAT IF THE EVIDENCE  
DEMONSTRATES THAT A CRIME WAS  
COMMITTED WHICH THIS EVIDENCE  
WOULD DEMONSTRATE THAT--

>> CORRECT.

>>-- BUT NOT WHICH CRIME.

>> CORRECT.

AND THAT'S, AND THAT'S, I THINK  
IF YOU LOOK AT FB, WE ARE  
LOOKING AT A VERY DIFFERENT TYPE  
OF CASE THAN WHAT WE'RE LOOKING

AT HERE.

IF FB AND ALL THE CASES BEING  
CONSIDER INSIDE FB WERE THEFT  
CASES.

AND THE ISSUE WAS VALUE.

AND THE DIFFERENCE WAS  
MISDEMEANOR OR THIRD-DEGREE  
FELONY BASED ON VALUE.

AND A BIG, SIGNIFICANT  
DIFFERENCE IS THIS COURT SAID  
THAT IN THOSE CASES IT VERY WELL  
MAY HAVE BEEN A TECHNICAL  
DEFICIENCY IN THE EVIDENCE.  
AND THAT'S A TERM THE FIRST DCA  
USES.

IF THIS ISSUE HAD BEEN BROUGHT  
TO THE ATTENTION OF THE STATE,  
THE STATE MERELY COULD HAVE  
RECALLED THE WITNESS AND SAID WE  
FORGOT TO ASK YOU WHAT'S THE  
VALUE OF--

>> AND THAT'S A HUGE DIFFERENCE.

>> HUGE DIFFERENCE.

>> WHETHER THERE'S A GOTCHA  
GOING ON--

>> YES.

>> OR HERE NO MATTER WHAT THE  
STATE COULD DO, THIS IS ALL THE  
EVIDENCE THEY COULD PUT ON.

>> AND THE FIRST DCA SO FOUND.

>> I'M JUST CURIOUS FROM WHAT  
LAWYERS DO, IN THE FIRST CASE  
YOU WERE HERE--

>> YES.

>> HEARD THE ARGUMENTS.

AT LEAST THERE WAS SOME TYPE OF  
ARGUMENT TO BE MADE THAT THE  
LAWYER IN THE PARTICULAR CASE  
WANTED THAT INCORRECT  
INSTRUCTION FOR WHATEVER  
STRATEGIC REASON HE OR SHE MAY  
HAVE HAD.

I CAN UNDERSTAND THAT.

BUT WHAT IS THE DOWNSIDE IN THIS  
CASE IN MOVING TO A MISTRIAL, IN  
MOVING FOR A DIRECT JUDGMENT OF  
ACQUITTAL?

>> NONE, YOUR HONOR.

>> WHY NOT MOVE FOR IT?

>> AND IT MAY BE DIFFERENT.

YOU MAY HAVE TO DRAW THE LINE BETWEEN THE CASE WHERE THERE IS A TECHNICAL DEFICIENCY IN THE EVIDENCE, BUT I STILL DON'T KNOW HOW YOU DEAL WITH STEPHENS AND 3.80C WHERE YOU COULD RAISE IT TEN DAYS AFTER TRIAL.

THAT'S NOT WHAT WE HAVE HERE. IF THIS WOULD HAVE SIMPLY BEEN THE CASE WHERE THEY, OH, FORGOT TO ASK VALUE, THAT'S GOING TO CAUSE THEM TO REOPEN THEIR CASE. THEY'LL PUT IT BACK ON.

PERHAPS.

AND THAT'S A DIFFERENT CASE THAN THIS.

BUT HERE WHEN THERE'S NO WAY, THIS PROSECUTOR ATTEMPTED TO DO EVERYTHING HE COULD TO GET THIS VICTIM TO SAY WHEN IT OCCURRED. THE VICTIM WASN'T GOING TO SAY IT.

>> BUT DOESN'T THAT VERY POINT INDICATE THAT A VERY VIABLE WAY TO SOLVE THE PROBLEM THAT YOUR CLIENT HAS HERE IS THROUGH A PROCEEDING UNDER RULE 3.850?

>> AND MY ANSWER TO THAT IS TWOFOLD, YOUR HONOR.

ONE, AND I'VE EXPLAINED IT, AND I REALIZE I DIDN'T EXPLAIN IT GREAT IN MY REPLY BRIEF.

THERE'S A TYPO IN THERE.

THERE'S A SIGNIFICANT DIFFERENCE BETWEEN RAISING IT ON DIRECT APPEAL AND ON POSTCONVICTION MOTION.

RIGHT NOW ON DIRECT APPEAL THE CLIENT HAS A RIGHT, CONSTITUTIONAL RIGHT TO COUNSEL. IN POSTCONVICTION THERE IS NO STATUTORY OR CONSTITUTIONAL RIGHT TO COUNSEL.

WE KNOW THE VAST MAJORITY OF ALL 3.850s ARE RAISED PRO SE.

SO YOU WOULD ALLOW WHAT THE APPELLATE COURT WOULD SEE FOR FIRST TIME ON DIRECT APPEAL IS A GLARING DEFICIENCY IN THE EVIDENCE SUCH AS IN THIS CASE

COULDN'T BE MORE EXTREME.  
CAUSING THEM TO SERVE LIFE  
WITHOUT PAROLE, NEVER TO GET  
OUT,  
HOPING THAT HE ON HIS OWN, MAYBE  
HE CAN AFFORD COUNSEL, HE'S  
GOING TO TRY TO RAISE THIS FOR  
THE FIRST TIME IN 3.850.  
THE WHOLE POINT OF THIS COURT'S  
RULING IN STEENS WHERE IT SAID  
THIS TYPE OF ISSUE CAN BE RAISED  
TEN DAYS AFTER TRIAL FOR THE  
FIRST TIME IS THE JUDICIAL  
AUTONOMY FAVORS BRINGING IT UP  
NOW SO JUDGES CAN DEAL WITH THE  
ISSUE IMMEDIATELY.  
I'VE ARGUED THIS IN MY BRIEFS,  
EVERY FEDERAL APPELLATE COURT IN  
THIS COUNTRY SAYS THE ANSWER IS  
NOT SEND IT BACK FOR  
POSTCONVICTION.  
THE ANSWER IS ADDRESS IT FOR THE  
FIRST TIME ON DIRECT APPEAL.  
IT'S A TOUGH STANDARD, AND I'M  
ASKING THIS COURT TO ADOPT THAT  
STANDARD.  
BUT THE STANDARD IS THIS, THE  
11TH CIRCUIT SAYS THIS IN THE  
FRY'S CASE, WE WILL REVERSE A  
CONVICTION WHERE THE SUFFICIENT  
OF EVIDENCE-- SUFFICIENCY OF  
EVIDENCE IS CONCERNED.  
ONLY TO PREVENT A MISCARRIAGE OF  
JUSTICE.  
EITHER FIND THE RECORD IS DEVOID  
OF EVIDENCE OF AN ESSENTIAL  
ELEMENT OF THE CRIME OR THAT THE  
EVIDENCE ON A KEY ELEMENT IS SO  
TENUOUS THAT A CONVICTION WOULD  
BE SHOCKING.  
THAT'S EXACTLY WHAT WE HAVE  
HERE.  
THERE'S NO EVIDENCE OF AGE.  
NONE.  
IT DOESN'T MEAN MY CLIENT WALKS  
AWAY.  
MY CLIENT STILL GETS SENTENCED  
FOR A VERY SERIOUS OFFENSE.  
HE'S STILL LOOKING AT A LOT OF  
TIME.

BUT HE'S GOING TO BE SENTENCED FOR THE OFFENSE HE COMMITTED WHICH WAS AN OFFENSE WHEN HE WAS A JEWELL.

HE'S NOT GOING TO BE SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE.

>> IS THERE ANY WAY, CAN YOU FORMULATE FOR THIS COURT THE RULE OF LAW OR PRINCIPLE TO CARVE OUT THE CIRCUMSTANCE FOR A JUVENILE SO THAT IT WOULD NOT REQUIRE A TOTAL REVERSAL OF THE JURISPRUDENCE FROM THIS COURT IN ADOPTING A TOTALLY DIFFERENT STANDARD THAN WE CURRENTLY USE?

>> I THINK, I THINK YOU COULD. I THINK THE ANSWER WOULD BE FUNDAMENTAL ERROR CAN BE ADDRESSED WHEN THERE'S A MANIFEST MISCARRIAGE OF JUSTICE. AND THAT'S WHAT THE FEDERAL COURTS HAVE SAID.

AND THAT'S A TERM THAT COURTS BASICALLY HAVE SAID WE KNOW IT WHEN WE SEE IT.

THIS COURT--

>> AGAIN, THAT GIVES YOU A NEBULOUS WORLD OF IT'S IN THE EYE OF THE BEHOLDER.

>> BUT IT'S VERY RARE.

THIS COURT RARELY EVER FINDS THERE'S A MANIFEST INJUSTICE. WE HAVE THE MANIFEST INJUSTICE EXCEPTION IN THIS STATE FOR WHEN YOU ARE UNTIMELY IN A 3.850 OR WHEN YOU PREVIOUSLY RAISE AN ISSUE AND NOW YOU'RE TRYING TO RAISE IT AGAIN.

COURTS HAVE THAT FALLBACK THAT IF THIS IS THE RIGHT CASE AND IT'S AN EXTREME CIRCUMSTANCE, YOU CAN JUMP IN AND STILL REVIEW THE CASE.

>> BUT YOU DO AGREE THAT'S IN THE REALM OF TALKY-TALK, AND I CAN DESCRIBE IT RATHER THAN GUIDANCE FROM PRINCIPLES OF LAW? THAT COULD BETTER GUIDE US IN OUR DAY-TO-DAY ACTIVITIES AND

ACROSS THE STATE.

>> THE OTHER THING, I GUESS--

>> DO YOU--

>> IT'S NOT AN EASY STANDARD TO APPLY.

IT CERTAINLY IS A STANDARD THAT THE COURT KNOWS IT WHEN THEY SEE IT.

BUT I DO THINK THIS IDEA THE TWO PRONGS OF FB, BE THERE'S NO CRIME-- IF THERE'S NO CRIME COMMITTED AT ALL, IF YOU LOOK AT THE WAY FB-- AND JUSTICE CANTERO ARE, I BELIEVE, WROTE IT.

RELIED ON ADVANCE AND DRAW DELL.

BOTH OF THOSE INVOLVES SITUATIONS WHERE THERE WAS ONE OFFENSE, BUT THE STATE CHARGED TWO OFFENSES.

ONE OF THE CASES THERE WAS TWO BURGLARIES THAT WERE CHARGED. ONE BURGLARY WAS CHARGED WITH AN ASSAULT, AND ONE WAS CHARGED AS SIMPLE BURGLARY.

AND THE DEFENDANT WAS CONVICTED OF BOTH BY THE JURY, AND THE COURT SAID THAT'S NOT TWO SEPARATE INSTANCES OF BURGLARY, IT'S ONLY ONE, AND, THEREFORE, WE'RE GOING TO THROW OUT THE OTHER ONE.

THAT'S NOT REALLY-- I'M NOT SURE THAT'S LOGICALLY ACCURATE. WHAT HAPPENED IT'S MORE OF A DOUBLE JEOPARDY ANALYSIS THAT ONLY ONE CRIME WAS COMMITTED. BUT IN THAT CASE THE CRIME WAS COMMITTED.

THE OTHER CASE WAS AGGRAVATED ASSAULT.

AND WE KNOW IT'S VICTIM-SPECIFIC.

THE LESSON IS IMPROPER EXHIBITION OF A FIREARM. SAME THING, JURY CAME BACK WITH THE TWO LESSERS OF IMPROPER EXHIBITION, AND THE COURT SAID THAT'S STILL ONLY ONE OFFENSE.

IT WASN'T A SITUATION WHERE NO  
CRIME WAS COMMITTED.

I'M NOT SURE THAT'S THE PROPER  
STANDARD THAT FUNDAMENTAL ERROR  
HAS TO BE APPLIED THAT ONLY  
APPLIES WHEN NO CRIME WAS  
COMMITTED AT ALL, AND THIS COURT  
HAS FOUND FUNDAMENTAL ERROR  
BASED ON FB CITING OF THOSE  
CASES EVEN THOUGH A CRIME WAS  
COMMITTED, JUST NOT THAT  
PARTICULAR CRIME.

I THINK THE BETTER STANDARD IS  
THE ONE THAT EVERY SINGLE  
FEDERAL APPELLATE COURT USES  
WHICH IS IF YOU CAN SHOW THAT  
THE RECORD IS DEVOID OF EVIDENCE  
OF AN ESSENTIAL ELEMENT OF THE  
CRIME-- NOT NO CRIME AT ALL,  
BUT AN ESSENTIAL ELEMENT OF THE  
CRIME-- OR THAT THE EVIDENCE ON  
A KEY ELEMENT IS SO TENUOUS THAT  
A CONVICTION WOULD BE SHOCKING,  
THEN YOU CAN STILL ADDRESS THAT  
ISSUE ON FUNDAMENTAL BE ERROR.

>> SO HOW DO YOU THEN ESTABLISH  
FB, THE SITUATION WHERE THE  
STATE COULD CORRECT IT IF IT  
WERE BROUGHT TO THE STATE'S  
ATTENTION?

DON'T YOU-- I MEAN, THAT SEEMS,  
YOU KNOW, LIGHT YEARS DIFFERENT  
FROM THIS SITUATION.

>> YES.

>> SO WHAT'S THE RULE OF LAW  
THAT DISTINGUISHES IT?

I SORT OF TEND TO AGREE ABOUT  
THIS, ALTHOUGH MANIFEST OF  
JUSTICE, YOU HAVE IT THERE, KNOW  
IT WHEN YOU SEE IT.

THIS SEEMS LIKE THIS SHOULD FIT  
INTO SOME OTHER WHEN THERE IS, I  
MEAN, NO CRIME OF A, I MEAN, THE  
DIFFERENCE IN THE PENALTY, I  
GUESS I THOUGHT IT WAS EVEN A  
GREATER DIFFERENCE.

IT STILL MAY BE DIFFERENT, BUT  
YOU SAY IT'S GOING TO GET A  
SUBSTANTIAL SENTENCE.

SO WHAT'S THE-- HOW WOULD YOU

ARTICULATE THE RULE OF LAW  
COMING OUT OF THIS CASE?

>> I'D STILL SAY IT'S A  
SUBSTANTIAL DIFFERENCE JUST  
BECAUSE WE KNOW WHEN WE ARE  
DEALING WITH A JUVENILE THAT THE  
U.S. SUPREME COURT AND NOW THIS  
COURT HAS RECOGNIZED THAT  
JUVENILES MUST BE TREATED  
DIFFERENTLY AND MUST BE GIVEN AN  
OPPORTUNITY TO SHOW  
REHABILITATION.

SO IT IS A SUBSTANTIAL  
DIFFERENCE IN PENALTY, BECAUSE  
WITH THE CURRENT SENTENCE HE'S  
NOT GIVEN THAT OPPORTUNITY AT  
ALL.

I THINK THE STANDARD IS THE 11TH  
CIRCUIT STANDARD.

IT'S GOT TO BE A MANIFEST  
MISCARRIAGE OF JUSTICE.

I DON'T KNOW IF ANY THEFT CASE  
WOULD EVER MEET THAT.

AGAIN, IF I WAS STANDING IN  
FRONT OF YOU AND MY CLIENT WAS  
LOOKING AT A FIVE-YEAR SENTENCE  
VERSUS A ONE-YEAR SENTENCE,  
PERHAPS I COULD MAKE THAT  
ARGUMENT.

THAT STILL IS DIFFERENT.  
AND YOU STILL WOULD HAVE TO MEET  
THIS IDEA THAT THE RECORD IS  
DEVOID OF ANY EVIDENCE OF AN  
ESSENTIAL ELEMENT ARE OR THE  
CONVICTION WOULD BE SHOCKING.

I DON'T THINK YOU HAVE THAT IN A  
THEFT CASE.

YOU HAVE THAT HERE--

>> I WOULD LIKE TO ASK YOU  
ANOTHER QUESTION ABOUT  
INEFFECTIVE ASSISTANCE OF  
COUNSEL.

IN THE CIRCUMSTANCES OF THIS  
CASE, I REALIZE THIS WAS NOT  
ARGUED IN THE DISTRICT COURT,  
AND IT'S NOT BEEN ARGUED HERE.  
BUT WHY WOULD NOT THIS BE AN  
INSTANCE OF INEFFECTIVE  
ASSISTANCE OF COUNSEL ON THE  
FACE OF THE RECORD?

THAT COULD BE COGNIZABLE IN THE DIRECT APPEAL.

>> I THINK THE FIRST DISTRICT ANSWERED THAT, NUMBER ONE, BUT SAYING THAT WAS JUST BE AN END AROUND FB.

>> I DID NOT UNDERSTAND THAT FOOTNOTE IN THE OPINION.

[LAUGHTER]

>> OKAY.

>> COULD YOU ELUCIDATE THAT FOR ME.

>> BECAUSE IF THE IDEA IS, YES, YOU CAN PRESERVE IT, BUT YOU CAN STILL GET AROUND IT BY--

>> WELL, THAT'S TRUE ABOUT ANY INEFFECTIVE ASSISTANCE OF COUNSEL ARGUMENT THAT INVOLVES A FAILURE OF COUNSEL TO RAISE AN OBJECTION OR TO DO ANYTHING ELSE.

I'M SORRY, I'M MISSING SOMETHING HERE.

>> OKAY.

I THINK THE TWO OTHER ANSWERS TO THAT ARE THIS DOESN'T NEED TO BE CONSIDERED IN THE CONTEXT OF INEFFECTIVE ASSISTANCE OF COUNSEL.

BY OPENING UP--

>> BUT YOU WOULD, YOU WOULD CONCEDE OR YOU WOULD ARGUE THAT THIS CLEARLY WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

>> OTHER THAN THE FIRST DISTRICT SEEMED TO SAY THEY WOULDN'T SO EASILY-- WHETHER ALL RIGHT, LET'S PUT THAT ASIDE.

>> OKAY.

>> I'M ASKING FOR YOUR POSITION ON THAT.

>> I THINK THE ANSWER-- YES, I THINK IT'S INEFFECTIVENESS, BUT I DON'T THINK THAT'S THE ISSUE THIS ISSUE NEEDS TO BE VIEWED THROUGH.

THE LENS IS, IS THERE SUFFICIENT EVIDENCE.

THE MOMENT YOU PUT IT INTO THE CONTEXT OF WAS COUNSEL

INEFFECTIVE, SOME APPELLATE JUDGES WILL SAY ANYTIME I'M HEARING ANY TYPE OF INEFFECTIVE ON THE FACE OF THE RECORD, I'M MORE INCLINED--

>> WHAT'S THE POSSIBLE, WHAT'S A CONCEIVABLE ARGUMENT THAT WOULD JUSTIFY COUNSEL--

>> NONE.

>>-- NOT FILING AT LEAST A 3.380C?

>> NONE.

>> MOTION?

>> THERE IS NO STRATEGY HERE.

>> I MEAN, TO ENTERTAIN THAT POSSIBILITY THAT EFFECTIVE COUNSEL WOULD FAIL TO DO THAT IN THE CIRCUMSTANCES OF THIS CASE, SEEMS TO ME, TO BE ENTIRELY FANCIFUL.

>> IF THIS COURT WANTS TO FIND THAT THAT'S THE ANSWER AND THE COUNSEL WAS INEFFECTIVE, OF COURSE, I WELCOME THAT FINDING. I THINK YOU COULD GO THAT ROUTE. I THINK THE BETTER ROUTE IS NOT TO EVEN INJECT THIS IDEA OF COUNSEL BEING INFECTED-- OR INEFFECTIVE IN THIS BECAUSE IT RAISES THE POTENTIAL THAT THIS IS GOING TO BE SENT BACK FOR A 1.850-- 3.850.

THE BETTER WAY TO LOOK AT THIS AS EVERY FEDERAL APPELLATE COURT DOES IS NOT THAT WE LOOK AT THIS EVEN THOUGH IT WASN'T PRESERVED BECAUSE COUNSEL WAS INEFFECTIVE, WE LOOK AT THIS, IS THERE SUFFICIENT EVIDENCE?

IT'S OUR RESPONSIBILITY TO LOOK AT EVERY CONVICTION THAT COMES IN FRONT OF US TO MAKE SURE THERE'S SUFFICIENT EVIDENCE. AND IF THE ANSWER IS THERE'S NOT, WE HAVE TO OVERTURN THAT. THAT'S WHAT THE APPELLATE COURTS SHOULD BE ABLE TO DO IN THIS FOR INSTANCE ONLY WHEN A MANIFEST INJUSTICE OCCURS. IT'S NOT GOING TO HAPPEN VERY

OFTEN IT CERTAINLY HAPPENED IN THIS CASE.

I'LL RESERVE MY REMAINING TIME FOR REBUTTAL.

>> MAY IT PLEASE THE COURT, ANGELA HEN EL ALONG WITH PATRICIA FAITH FOR THE STATE.

>> IF YOU WOULD MOVE YOUR MICROPHONE.

>> OKAY.

THE STATE WOULD REQUEST THIS COURT REJECT THE FIRST DISTRICT'S LOADED INVITATION TO MODIFY AND EXPAND PRESERVATION UNDER FB AND YOUNG BECAUSE--

>> I'M SORRY, YOU STILL--

>> CAN YOU HEAR ME NOW?

>> WE'RE KIND OF HARD OF HEARING UP HERE.

[LAUGHTER]

>> WHAT'S THIS WE?

[LAUGHTER]

>> THIS IS THE SENIOR COURT.

[LAUGHTER]

>> IN FLORIDA WE ALREADY HAVE REMEDY IN PLACE TO PREVENT A MANIFEST MISCARRIAGE OF JUSTICE, AND THAT'S POSTCONVICTION REVIEW.

IN THIS CASE IT'S NOT CLEAR FROM THE RECORD WHETHER COUNSEL WAS WORKING OR ACTING STRATEGICALLY OR NOT, BUT IT'S PLAUSIBLE.

>> WELL, WAIT.

CAN I-- LET ME

JUST GO TO TWO THINGS.

FIRST OF ALL, IN DEATH PENALTY CASES WE REVIEW SUFFICIENTLY OF EVIDENCE WHETHER IT'S RACED AROUND.

WHY DO WE DO THAT?

>> BECAUSE DEATH IS DIFFERENT.

>> WELL, IS LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR SOMEBODY WHO'S A JUVENILE NOT DIFFERENT?

>> IT'S-- THERE'S A--

>> NOT SYMPATHY.

A SINGLE ACT WHEN HE WAS UNDER 18 PUTTING HIM IN PRISON FOR THE

REST OF HIS LIFE WITHOUT THE  
POSSIBILITY OF PAROLE.

>> AND I THINK THE SENTENCE  
WOULD GO TO THE REASONABLENESS  
THAT NEEDS TO BE DETERMINED ON  
POSTCONVICTION.

>> BUT YOU'RE NOW SAYING THAT  
THERE WOULD BE SOMETHING THAT IN  
POSTCONVICTION, MAYBE THERE'LL  
BE DISCRETION.

NOW, YOU SAY THERE'S A  
CONCEIVABLE REASON THAT THE  
DEFENSE ATTORNEY DIDN'T MOVE FOR  
A JUDGMENT OF ACQUITTAL EVEN  
THOUGH IF THEY DIDN'T, IF THE  
STATE DIDN'T PROVE HE WAS 18, IT  
MEANT THAT HER CLIENT DID NOT  
GET LIFE IN PRISON WITH THE  
POSSIBILITY OF PAROLE.

JUST INDULGE ME AND TELL ME THE  
CONCEIVABLE REASON THAT COULD  
HAPPEN FROM A REASONABLE  
STRATEGIC POINT OF VIEW.

>> WELL, THE STATE'S POSITION IS  
THAT WE'RE NOT THERE IN THE  
COURTROOM.

THIS IS A COLD RECORD--

>> I UNDERSTAND THAT AND, YOU  
KNOW, AGAIN, YOU HEARD-- WELL,  
MAYBE YOU DID.

YOU KNOW, THERE ARE JURY  
INSTRUCTIONS THAT MAYBE THERE  
ARE STRATEGIC REASONS FOR, YOU  
KNOW, YOU WANT TO INVITE ERROR  
BECAUSE YOU WANT ANOTHER TRIAL.  
I'M ASKING YOU WHEN THERE IS THE  
CRIME THAT IS CHARGED DID NOT  
OCCUR BECAUSE THE STATE CAN'T  
PROVE THAT THE PERPETRATOR WAS  
18 AND OVER, WHAT'S THE  
CONCEIVABLE REASON.

NOT-- WHAT?

>> WELL, THE STATE COULD REOPEN  
ITS CASE.

BUT IF YOU LOOK AT THIS CASE IN  
PARTICULAR, THE KID WAS  
TESTIFYING TO MAYBES.

IT COULDN'T HAVE GOTTEN ANY  
BETTER FOR THE DEFENSE.

SHE SAW THE AMBIGUITY, AND SHE

TOOK ADVANTAGE OF IT IN HER  
CLOSING ARGUMENT BY ARGUING--  
>> BUT WHAT ABOUT RULE 3.380C?  
HOW DOES THAT WORK?  
THAT'S AFTER THE TRIAL AND AFTER  
THE JURY'S GONE.  
CAN THE STATE REOPEN THE CASE  
THEN?

>> NO.  
THEY COULD RESPOND AND THE STATE  
COULD APPEAL IF GRANTED.  
WHY SHE DID NOT DO THAT--  
>> WELL, WHAT DO YOU MEAN?  
THEY COULD APPEAL IF GRANTED,  
BUT IF THE EVIDENCE IS NOT THERE  
IN THE RECORD--

>> RIGHT.  
>>-- THAT IS SUFFICIENT TO  
SUPPORT A RATIONAL JURY IN  
FINDING BEYOND A REASONABLE  
DOUBT THAT THE AGE OF THE  
DEFENDANT WAS 18, THEN THE  
DEFENDANT IS GOING TO WIN ON  
THAT ISSUE, ON THAT 3.380C  
MOTION.  
ISN'T THAT CORRECT?

>> YES.  
BUT IN THIS CASE SHE-- WHEN HE  
EXPRESSLY ASKED HER DO YOU WANT  
TO MOVE FOR JUDGMENT OF  
ACQUITTAL, SHE SAID NO.  
THE TRIAL JUDGE IMMEDIATELY  
FOLLOWED IT WOULD HAVE BEEN  
FRUITLESS ANYWAY.

THE NEW TRIAL, THE TRIAL JUDGE  
WOULD ACTUALLY BE ACTING AS AN  
ADDITIONAL JUROR.  
IF HE SAW THE EVIDENCE TO GO TO  
THE JURY SUFFICIENT AS IS--

>> SO WHAT IS THE ARGUMENT?  
ARE YOU MAKING AN ALTERNATIVE  
ARGUMENT THERE WAS SUFFICIENT  
EVIDENCE TO ESTABLISH THAT THE  
DEFENDANT WAS 18?

>> THE STATE BELIEVE THAT IS THE  
EVIDENCE WAS SUFFICIENT TO GO TO  
THE JURY.

THERE WAS, I APOLOGIZE, IT'S NOT  
IN MY BRIEF.  
DURING THE INTERVIEW WITH THE

CHILD, THE OFFICER INDICATED THAT THEY WERE ACTUALLY-- GOT OUT OF THE CHILD THERE WERE ACTUALLY TWO INSTANCES, AND BOTH INSTANCES HAPPENED WHEN HE WAS 8 YEARS OLD AND THAT THE INSTANCE THAT WAS DISCLOSED TO THE TEACHER IN MAY HAPPENED A LONG TIME--

>> NOW, WAIT.

YOU'RE TELLING-- AND, AGAIN, THIS IS IN THE RECORD.

BUT YOU'RE TELLING ME THAT THE STATE WHO HAS, I GUESS, A STAKE TO KEEP HIS SENTENCES LIFE WITHOUT THE POSSIBILITY OF PAROLE BECAUSE HE'S 18, THAT THERE IS SOMETHING ELSE THAT BUDGET POINTED OUT IN THE BRIEF THAT WOULD SHOW THAT THERE WAS A BASIS IN THE RECORD FOR FINDING THAT THE DEFENDANT WAS 18?

>> THERE'S NOTHING-- WE JUST ARGUE IT'S SUFFICIENT.

>> WELL, YOU CAN'T JUST ARGUE-- [LAUGHTER]

YOU CAN SAY IT'S SUFFICIENT, BUT--

>> BASED ON THOSE FACTS.

>>-- THE FIRST DISTRICT FOUND OUT, SAID, YOU KNOW, THEY, THAT THERE WAS NO SUFFICIENT EVIDENCE.

>> BUT THE, IF YOU READ THE FIRST DISTRICT'S OPINION AND THE QUESTION AS WORDED, IT APPEARS THEY REWEIGHED THE EVIDENCE WHICH THE APPELLATE COURT IS NOT SUPPOSED TO DO.

>> BUT THE QUESTION HERE IS, IS THE EVIDENCE THAT WAS PRESENTED TO THIS JURY, COULD A RATIONAL JURY-- AND I MEAN NO RESPECT TO THIS HONORABLE CITIZENS WHO SERVED ON THIS JURY. BUT COULD A RATIONAL JURY DECIDE THAT HE WAS 18 YEARS OLD? AND I'VE READ THROUGH THIS, AND I JUST HAVE A HARD TIME SEEING IT.

AND THAT QUESTION IS A PURELY  
LEGAL QUESTION.  
ISN'T THAT CORRECT?

>> YES.

>> AND SO WHETHER THE TRIAL  
JUDGE, WHATEVER THE TRIAL JUDGE  
WOULD HAVE, MIGHT HAVE DONE OR  
MIGHT NOT HAVE DONE, THAT'S NOT  
THE QUESTION.

THE QUESTION IS THE LEGAL  
QUESTION OF WHETHER THIS  
EVIDENCE WAS LEGALLY SUFFICIENT  
FOR A JURY TO FIND THAT IT'S  
BEYOND A REASONABLE DOUBT.  
AND I'M HAVING TROUBLE WHEN I'VE  
GONE OVER THE RECORD AND LOOKING  
AT THE THINGS YOU TALK ABOUT IN  
YOUR BRIEF, I JUST HAVE TROUBLE  
SEEING HOW-- IT JUST SEEMS LIKE  
THE WITNESS WAS UNCERTAIN.  
JUST-- AND, AGAIN, NO  
REFLECTION ON THE WITNESS.  
THIS IS A YOUNG CHILD.

>> RIGHT.

AND A COLD RECORD.

>> WELL, IT'S-- YEAH, I  
UNDERSTAND--

>> THAT'S ALL WE HAVE.

[LAUGHTER]

>> BUT THERE ARE WORDS ON THE  
COLD RECORD THAT HAVE TO HAVE  
SOME MEANING.

AND THIS CANNOT, YOU CANNOT FIND  
THAT SOMETHING IS LEGALLY  
SUFFICIENT BY SOME SORT OF  
OSMOSIS FROM SOMETHING ELSE IF  
THE WORDS IN CONTEXT, UNDERSTOOD  
IN CONTEXT, CANNOT RATIONALLY  
SUPPORT THAT.

ISN'T THAT CORRECT?

>> THAT'S CORRECT.

BUT THE CONTEXT IN THE TRIAL  
ROOM MAY HAVE BEEN DIFFERENT TWO  
THE TONE AND INFLECTION OF THE  
CHILD.

HE SAID MAYBE AFTER, BUT YOU  
DON'T KNOW IF HIS BODY LANGUAGE  
OR-- AND THAT'S WHY THIS IS  
BETTER SETTLED FOR  
POSTCONVICTION.

>> HOW DO YOU GET THE BODY LANGUAGE ON THE RECORD?  
>> YOU CAN'T.  
IT'S A COLD RECORD.  
>>  
[INAUDIBLE]  
>> HOW DO YOU GET WHAT?  
>> AGE.  
AGE, AGE.  
>> WE CAN'T GET AGE, I WAS JUST TALKING ABOUT TESTIMONY.  
>> LET'S JUST SAY DID SO AND SO COMMIT AN ACT OF, YOU KNOW, DID THEY TOUCH YOU.  
NO, BUT THEY ACTUALLY GO AND THEY ROLL THEIR EYES.  
YOU'RE ASKING NOW AN APPELLATE TO SAY, WELL-- AND NOBODY, AND NOBODY REFERENCES IT IN THE RECORD TO SAY, WELL, I WANT THE COURT TO NOTE THAT ALTHOUGH HE SAID NO, HE ROLLED HIS EYES INDICATING HE WAS EQUIVOCAL.  
>> RIGHT.  
>> DOESN'T-- I MEAN, IT'S, WE UNDERSTAND YOU HAD TO JUDGE CREDIBILITY--  
>> CORRECT.  
>>-- BUT USUALLY IT'S THE DIFFERENT WAY.  
DO YOU SEE THIS AS A DIFFERENT CASE OF THE ISSUE IS WAS HE 18 AND ALL THEY HAD TO DO WAS INTRODUCE HIS BIRTH CERTIFICATE AND, YOU KNOW, THE STATE FORGOT TO DO THAT, AND YOU KIND OF-- AND THE DEFENSE DOESN'T SAY ANYTHING, RIGHT?  
THAT'S DIFFERENT, BECAUSE YOU CAN CORRECT THAT.  
>> RIGHT.  
>> HOW ARE YOU GOING TO CORRECT, HOW WOULD YOU HAVE IT MOVE FOR A JUDGMENT OF ACQUITTAL ON THIS? DOES THE STATE HAVE ANY CREDIBLE BASIS?  
YOU KNOW, WE'VE GOT TO MAINTAIN CREDIBILITY HERE ALL AROUND FOR SAYING-- OR WE WOULD HAVE THEN PUT ON THIS ADDITIONAL EVIDENCE

BECAUSE THIS WOULD HAVE SHOWN HE WAS 18.

>> WE COULD HAD THE CHILD BACK ON THE STAND, CLEARED UP THE EVIDENCE, COULD HAVE TESTIFIED TO WHEN SPRING BREAK WAS, MAYBE DRAW IT CLOSER.

AGAIN, WE'RE DEALING WITH AN 8-YEAR-OLD CHILD.

AND THE STATE'S NOT SAYING HE'S NOT ENTITLED TO RELIEF.

IF MR. MONROE WAS, IN FACT, REPRESENTED BY DEFICIENT COUNSEL OR IF STRATEGIES WERE UNREASONABLE, THEN HE'S CERTAINLY ENTITLED TO RELIEF.

>> BUT WHY-- I GUESS MY QUESTION HERE IS THESE, THIS IS, THESE ARE VERY UNUSUAL CIRCUMSTANCES.

>> CORRECT.

>> I MEAN, I WAS LIKE WHEN I'M LOOKING AT THIS, AND I THOUGHT, AGAIN, IF HE GETS RESENTENCED AS A 17-YEAR-OLD, IT'S STILL A SUBSTANTIAL SENTENCE.

>> YES.

>> WE'RE NOT TALKING-- WE'RE TALKING ABOUT, I THINK, PEOPLE WOULD BE SOMEWHAT SHOCKED ABOUT THE MANDATORY LIFE WITHOUT THE POSSIBILITY OF PAROLE.

AGAIN, NOT DEMEANING, I MEAN, IT'S A HORRIBLE CRIME.

>> RIGHT.

>> BUT STILL THE KID IS 17, YOU KNOW, MAYBE HE WAS SEXUALLY ABUSED AS A CHILD.

SO WHAT IS THE STATE'S INTEREST IN NOT, YOU KNOW, KEEPING FB WHERE IT IS, WHERE THE STATE CAN, YOU KNOW, IT'S A FAILURE, BUT THEY COULD FIX IT TO A CASE, THIS CASE WHERE IT'S REALLY NOT QUITE LIFE OR DEATH, BUT IT'S SORT OF DEATH FOR THIS JUVENILE?

>> WELL, THE STATE'S INTEREST IS, OF COURSE, TO KEEP FB AND YOUNG.

AND IN DOING SO, THERE IS NO

MANIFEST MISCARRIAGE OF JUSTICE  
BECAUSE THE STATE OF FLORIDA  
PROVIDES A REMEDY WHICH IS  
POSTCONVICTION RELIEF.

THIS CASE IS INDISTINGUISHABLE  
FROM YOUNG WHICH WAS JUST HANDED  
DOWN TWO YEARS AGO.

THE BURGLARY OF A STRUCTURE  
VERSUS THE BURGLARY OF A  
DWELLING.

JUST LIKE THE CASE HERE, THE  
ONLY DIFFERENCE IS AN  
UNCONSTITUTIONAL SENTENCE UNDER  
GRAHAM IF HE WAS, IN FACT, 17.  
AND THAT, IF TRIAL COUNSEL'S  
ACTIONS WERE UNREASONABLE, THAT  
WOULD BE DETERMINED ON  
POSTCONVICTION RELIEF, AND HE  
WILL BE--

>> BUT THAT DOESN'T REALLY  
MATTER IF HE WAS UNDER 17.  
THE QUESTION HERE IS THAT THE  
STATE NEVER PROVED THAT HE WAS  
18 WHICH IS THE CUTOFF LINE FOR  
THE OFFENSE THAT HE WAS  
SENTENCED FOR.

AND SO SHOULDN'T IT BE A  
DIFFERENT STANDARD WHEN THE  
STATE HAS WHOLLY FAILED TO PROVE  
AN ESSENTIAL-- AND THIS IS AN  
ESSENTIAL ELEMENT OF THIS  
CRIME-- THAT THE DEFENDANT HAS  
TO BE 18 OR OLDER?

>> YES.

BUT WE, I MEAN, THAT'S WHY WE  
HAVE THIS SAFETY VALVE IN PLACE  
FOR POSTCONVICTION IF THAT DID,  
IN FACT, HAPPEN.

I MEAN, IF THE STATE'S EVIDENCE  
WAS SO LACKING, THEN IT WAS  
TRIAL COUNSEL'S DUTY TO MOVE FOR  
A JUDGMENT OF ACQUITTAL AND MAKE  
SURE--

>> IT WASN'T LIKE IT, IT WAS  
NONEXISTENT.

>> OUR POSITION IS IT WAS WEAK  
EVIDENCE.

>> WEAK?

THIS IS SOMETHING VERY  
DEFINITIVE, HOW OLD YOU ARE.

>> CORRECT.  
>> THAT'S NOT IF YOU'RE A LITTLE PREGNANT.  
YOU'RE EITHER THAT ANAL OR YOU'RE NOT-- THAT AGE OR YOU'RE NOT.  
>> BUT THERE WAS SUFFICIENT EVIDENCE PRESENTED FOR A REASONABLE JURY TO MAKE THE FINDING THAT HE WAS, IN FACT, 18?  
>> A RANGE?  
[LAUGHTER]  
>> THE REST OF US HAVE LOOKED AT THIS.  
WHAT WAS THE EVIDENCE THAT THE JURY COULD REASONABLY BELIEVE THAT THIS PERSON WAS 18 AT THE TIME OF THAT OFFENSE?  
>> WELL, WE HAVE FROM THE VIDEO THAT BOTH INCIDENTS HAPPENED WHEN HE WAS 8.  
SO IT REALLY BOILS DOWN TO A 23-DAY PERIOD.  
SO WHETHER THE PENETRATION FOR THE CAPITAL CRIME HAPPENED AFTER THAT 23-DAY PERIOD IS REALLY THE QUESTION BEING RAISED.  
THE CHILD SAID IT HAPPENED--  
>> WHAT DO WE HAVE THAT SAYS IT DID?  
WHAT IN THIS RECORD SAYS IT HAPPENED AFTER THAT 20-DAY, 23-DAY PERIOD?  
>> THE CHILD INDICATED THAT THE DISCLOSURE IN MAY WAS THE PENETRATION AND THAT THIS, THE INCIDENT THAT WAS DISCLOSED IN MAY, THE PENETRATION, HAPPENED A LONG TIME AFTER THE OTHER INCIDENT HE TALKED ABOUT IN THE VIDEO.  
AND I KNOW THAT HE ONLY TESTIFIED TO ONE INCIDENT DURING HIS TESTIMONY.  
BUT, YOU KNOW, THAT WAS A RISK THE DEFENSE COUNSEL MAY NOT HAVE WANTED TO TAKE HAD SHE GOTTEN THE CHILD BACK UP THERE, OTHER INSTANCES MAY HAVE BEEN EVEN

MORE PREJUDICIAL TO HER CLIENT.

>> WHAT WOULD HAVE BEEN THE IDEAL WAY TO PROVE AGE?

YOU'RE ASKING THE JURY TO DO A LOT OF MATH AND GO HERE AND GO THERE, THAT TYPE OF THING.

>> RIGHT.

>> WHAT WOULD HAVE BEEN THE IDEAL WAY TO PROVE HE WAS 18 AT THE TIME OF THE CRIME?

>> WELL, THE IDEAL WAY WOULD BE TO GET THE CHILD TO TESTIFY TO THE DATE, BUT THEN AGAIN, WE'RE DEALING WITH AN 8-YEAR-OLD, AND IT APPEARS--

>> WHAT ABOUT A BIRTH CERTIFICATE OR SOMETHING, IS THERE SOMETHING THAT, A FORM BE, A DOCUMENT THAT YOU COULD INTRODUCE INTO EVIDENCE TO SHOW HOW OLD HE IS AT A PARTICULAR TIME FROM WHICH THE JURY CAN EXTRAPOLATE AND FIND OUT HOW OLD HE WAS AT TIME OF THE CRIME?

>> THERE WAS NO DISPUTE HIS BIRTHDAY WAS FEBRUARY 27TH. I DON'T KNOW THAT INTRODUCING A BIRTH CERTIFICATE WOULD HAVE MADE--

>> SO YOU'RE SAYING ONCE IT WAS INTRODUCED INTO EVIDENCE, THE DATE OF BIRTH, THAT WAS SUFFICIENT FROM WHICH A JURY CAN EXTRAPOLATE WHEN THE CRIME OCCURRED, HOW OLD HE WAS WHEN IT OCCURRED?

>> NOT THAT IN AND OF ITSELF, OF COURSE--

>> THE OTHER FACTORS ARE PUT IN THERE.

>> RIGHT.

>> THE JURY HAD TO DO SOME MATH.

>> THE PROBLEM WAS REALLY THAT THE CHILD DID NOT KNOW WHEN IT HAD OCCURRED.

>> RIGHT.

HE WAS WAFLING.

>> AND SO THERE WAS A PERIOD WHEN THE YOUNG MAN WAS 17 YEARS OLD, AND WE KNOW BY THE TIME HE

GOT TO TRIAL HE WAS OVER 17.  
BUT THE PROBLEM IS THE STATE  
COULD NOT PROVE REALLY WHEN THE  
CRIME OCCURRED IN RELATIONSHIP  
TO WHEN THE DEFENDANT WAS 18.  
ISN'T THAT THE REAL PROBLEM WITH  
THE CASE?

>> THAT IS A PROBLEM WITH THE  
CASE, BUT WE DON'T KNOW IF THE  
STATE COULD HAVE PROVEN IT,  
BECAUSE THEY WERE NOT GIVEN THE  
OPPORTUNITY TO REOPEN THEIR CASE  
WHEN DEFENSE COUNSEL DIDN'T MOVE  
FOR JOA.

I MEAN, THIS IS A COLD RECORD--  
>> WELL, NOW, IN FAIRNESS THE  
STATE IN THE TRANSCRIPT THERE,  
IT'S APPARENT THAT THE STATE IS  
STRUGGLING WITH  
THE WITNESS, TRYING TO GET THE  
WITNESS TO NARROW IT DOWN AND IS  
MAKING A VALIANT ATTEMPT TO DO  
THAT AND, ULTIMATELY, FAILS.  
I MEAN, THE WITNESS CAN ONLY  
REMEMBER WHAT THE WITNESS  
REMEMBERS AND CAN ONLY  
ARTICULATE WHAT IS POSSIBLE FOR  
HIM TO ARTICULATE.  
AND THAT NOTION THAT SOMEHOW  
THAT THE STATE COULD COME  
BACK-- AND, AGAIN, IT COULDN'T  
COME BACK AFTER THE TRIAL WITH A  
POST-TRIAL MOTION HAVING BEEN  
FILED.

SO I JUST, I'M STRUGGLING WITH  
THAT CONCEPT.

>> BUT THAT-- I UNDERSTAND  
THAT, BUT THIS COURT HAS HELD IN  
FB AND YOUNG THAT THERE HAS TO  
BE ABSOLUTELY NO EVIDENCE OF ANY  
TO OFFENSE AT ALL.

SHE FULLY ADMITS HE'S GUILTY OF  
THE LESSER LEWD AND LASCIVIOUS,  
SO THERE WAS A CRIME, IN FACT.  
AND UNDER FB AND YOUNG, WE HAVE  
TO FIND THAT FUNDAMENTAL ERROR  
DID NOT OCCUR.

AND TO GO A STEP FURTHER, A  
MANIFEST INJUSTICE WOULD TO NOT  
OCCUR BECAUSE THERE'S A SAFETY

VALVE.

AND WHETHER OR NOT HE GETS--  
THEY CAN TAKE IN FOUR FACTORS TO  
DETERMINE WHETHER HE NEEDS IT  
WHICH INCLUDES THE COMPLEXITY OF  
THE ISSUE.

>> YOU'VE HEARD SOME OF MY  
COLLEAGUES VOICE THE QUESTION  
WHY SHOULD THIS COURT NOT VIEW  
THIS ON THE FACE OF THE RECORD  
AS A FAILURE OF COUNSEL THAT  
REQUIRES RELIEF AND GRANTS  
RELIEF AT THIS POINT THROUGH  
THAT MECHANISM, INEFFECTIVE  
ASSISTANCE OF COUNSEL ON THE  
FACE OF THE RECORD, AND BE DONE  
WITH IT?

>> AND YOU COULD.

AND, I MEAN, I THINK THE STATE  
WOULD BE IN FAVOR OF THAT  
LEAVING FB AND YOUNG INTACT IN  
DOING SO TO FIND INEFFECTIVE  
ASSISTANCE OF COUNSEL ON THE  
FACE OF THE RECORD.

BUT THE STATE SAYS THAT'S NOT  
NECESSARY HERE BECAUSE THERE IS  
A PLAUSIBLE REASON ON THE FACE  
OF THE RECORD WHICH WOULD TAKE  
IT OUT OF THE--

>> WHAT WAS THAT PLAUSIBLE  
REASON?

>> SHE DIDN'T WANT THE STATE TO  
REOPEN ITS CASE.

SHE DIDN'T-- SHE'S THERE IN  
FRONT OF THE JURY.

>> BUT THE STATE KNOWS THEY GOT  
THE BEST THEY COULD GET OUT OF  
THIS YOUNG CHILD.

I MEAN, IT'S JUST NOT, YOU KNOW,  
AGAIN, IT IS NOT CLEAR WHEN THE  
ACT OCCURRED.

AND IT IS AS REASONABLE THAT IT  
OCCURRED BEFORE THE DEFENDANT  
WAS 18, THEN MAYBE RIGHT AFTER  
HIS 18TH BIRTHDAY.

SO THIS THAT SITUATION WE'RE NOT  
GOING TO TOLERATE THE CONVICTION  
FOR AN OFFENSE WHERE THERE IS  
COMPLETE AMBIGUITY.

SO, I MEAN, IF THE STATE

THOUGHT-- I MEAN, I'M ASSUMING THE STATE THOUGHT THEY DID THE BEST JOB WITH THIS POOR YOUNG VICTIM.

>> AND HE COULD HAVE, BUT WE DON'T KNOW FROM THE RECORD. HE MAY HAVE THOUGHT HE COULD DO BETTER IF HE GOT HIM BACK ON THE STAND.

>> WITH COACHING?

SAYING NOW WE-- I MEAN, YOU KNOW, THAT'S NOT, I MEAN, EVEN IN THAT SITUATION, LISTEN, NOW SAY IT'S A NEW TRIAL FOR SOME REASON.

NOW THE CHILD IS, HOW OLD WOULD HE BE?

BE HOW MANY YEARS AGO THIS OCCURRED.

>> HE'D BE 11, I THINK.

>> AND HE'LL SAY, YOU KNOW, NOW LISTEN, IT'S REALLY CRITICAL THAT THIS HAPPENED BEFORE FEBRUARY, SO CAN YOU HELP ME OUT?

I'M NOT SAYING SOMEBODY WOULD SAY IT JUST LIKE THAT.

CAN YOU HELP ME OUT TO PLACE IT AFTER FEBRUARY.

AND SO WE START TO HAVE A SYSTEM THAT JUST SEEMS WITH SOMETHING LIKE THIS--

>> RIGHT.

>> AND THAT'S

WHAT THE FIRST DISTRICT WHICH IS LOOKING SAYING, NO, YOU CANNOT HAVE-- YOU HAVE GRAHAM, LIFE WITHOUT THE POSSIBILITY OF PAROLE, THERE'S A REASONABLE CHANCE HE WAS 17.

WE CAN'T LET THIS STABLED. STAND.

>> AND THAT'S WHY YOU GET DEFENSE COUNSEL IN POSTCONVICTION AND ASK HER WHY SHE DIDN'T MOVE FOR JOA. MAYBE SHE THOUGHT SOMETHING WE DEPARTMENT.

SHE MAY HAVE THOUGHT THE CASE COULD BETTER PROVE ITS CASE, AND

THE STATE WOULD ASSERT--  
>> BUT, AGAIN, HOW WOULD THAT ADDRESS THE 3.380C MOTION?  
>> THE FACT THAT I CAN'T ANSWER WHY SHE DID NOT MOVE OR DID NOT FILE FOR A NEW TRIAL IS A CLEAR INDICATION THAT THAT POSTCONVICTION, A POSTCONVICTION HEARING WOULD BE WARRANTED.  
>> BUT HOW WOULD THAT PROVE OF THE ELEMENT?  
>> IT WOULDN'T PROVE-- WELL, THE STATE WOULD HAVE BEEN ABLE TO RESPOND.  
I DON'T KNOW WHAT THE RESPONSE WOULD HAVE BEEN.  
>> WOULD A RESPONSE PROVE THE ELEMENT WAS NOT PROVEN.  
>> WELL, THIS TRIAL JUDGE ALREADY INDICATED HE THOUGHT THE EVIDENCE WAS SUFFICIENT, SO MAYBE--  
>> BUT YOU LOOK AT THE ANSWERS, I MOON, RIGHT HERE. -- I MEAN, RIGHT HERE-- DO YOU REMEMBER SPRING BREAK?  
YES, DID IT HAPPEN BEFORE SPRING BREAK?  
MAYBE.  
AFTER THE EASTER BUNNY CAME?  
NO.  
OKAY, THAT WAS CHRISTMAS.  
NO, I DON'T.  
DO YOU REMEMBER EXACTLY WHEN IT HAPPENED?  
YES, SIR.  
>> THE KID WAS CLEARLY WAFFLING. AND THE DEFENSE COULDN'T HAVE GOTTEN ANY BETTER ANSWERS FOR HIM, AND SHE DIDN'T WANT TO RUN THE RISK OF OPENING THE STATE'S CASE AND NARROWING IT DOWN. THEREFORE, THE STATE WOULD ASK THAT YOU NOT RECEIVE FROM FB AND YOUNG BECAUSE THERE'S A SAFETY VALVE IN PLACE WHERE WE'LL BE ABLE TO HEAR HER STRATEGIC REASONS.  
IF HE'S ENTITLED TODAY RELIEF, THEN HE NEEDS RELIEF.

THANK YOU.

>> THANK YOU.

>> MAY IT PLEASE THE COURT,  
JUSTICE LEWIS, I DIDN'T THINK OF  
IT WHEN YOU ASKED, BUT I DO HAVE  
AN ANSWER AS TO ANOTHER  
POTENTIAL WAY YOU COULD ANSWER  
THIS.

FB ACKNOWLEDGES THE TWO CASES  
ARE DEATH CASES, AND WHEN  
THERE'S NO CRIME AT ALL, I THINK  
YOU COULD EXPAND FB TO  
JUVENILES.

AND I THINK WE'VE SEEN OVER THE  
LAST SEVERAL YEARS THAT  
JUVENILES ARE ALSO DIFFERENT,  
AND ANOTHER WAY TO LOOK AT THIS  
IS IN A CASE DEALING WITH  
JUVENILE JUSTICE, A JUVENILE IS  
DIFFERENT, AND THE COURT HAS TO  
HAVE THE A ABILITY TO DETERMINE  
WHETHER OR NOT THE OFFENSE WAS  
COMMITTED AT THE TIME WHEN THE  
DEFENDANT WAS EITHER A JUVENILE  
OR NOT.

SO THAT'S ONE OPTION.

OF COURSE, I STAND BEFORE YOU, I  
WANT RELIEF FOR MY CLIENT.

>> THAT SEEMS LIKE A VERY NARROW  
EXCEPTION YES.

>> THAT REALLY DOES FIT IN WITH  
WHY JUVENILES ARE TREATED  
DIFFERENTLY.

>> YES.

BUT I WANT RELIEF FOR MY CLIENT.  
IF THAT COMES IN THE FORM OF  
FINDING INEFFECTIVENESS ON THE  
FACE OF THE RECORD, MY CLIENT  
GETS RELIEF, AND THAT'S WHAT I  
WANT.

>> WHAT DO YOU SAY TO THE  
ARGUMENT OF THE STATE WHILE  
THERE COULD HAVE BEEN A  
STRATEGIC REASON BECAUSE THE  
STATE COULD HAVE RECALLED THIS  
WITNESS AND GOTTEN MORE  
DEFINITE--

>> JUSTICE CANADY'S SAID IT  
SEVERAL TIMES, THERE'S NO  
STRATEGY FOR NOT FILING 3.380C,

NONE.

I DON'T THINK THERE'S ANY REASON-- THE STATE WAS WELL AWARE THAT THIS WAS AN ISSUE. THE STATE FILED THIS, AS YOU KNOW, IN THE INFORMATION AS TWO CHARGES FOR COUNT ONE, ONE WHEN HE'S 18, ONE WHEN HE'S 17, TWO CHARGES FOR COUNT TWO.

SO THEY KNEW GOING IN.

IN CLOSING ARGUMENT THE STATE SAID SO THE JURY THE ISSUE ISN'T WHETHER HE DID IT, IT'S WHEN.

SO THEY DID EVERYTHING THEY COULD, THEY KNEW, THEY PUT ON THEIR BEST CASE.

>> DIDN'T THE DEFENSE ATTORNEY EVEN ARGUE THAT AGE THING?

>> YES.

>> I'M AT A LOSS, IT JUST REALLY SEEMS SHE UNDERSTOOD THAT THERE WAS A GAP HERE.

>> JUST, APPARENTLY, MISSED THE IDEA THAT SHE COULD HAVE SAID MAYBE THEY DIDN'T NOT PROVE A CRIME AT ALL, BUT THEY DIDN'T PROVE THE ESSENTIAL ELEMENT OF 18, SO THIS SHOULD BE-- THE ONLY THING GOING TO THE JURY ARE THE TWO LESSER OFFENSES.

SHE DIDN'T SAY THAT, CLEARLY SHE JUST MISSED IT.

AND IF THERE WAS ANY POSSIBLE STRATEGY, THEN CERTAINLY YOU WOULD HAVE FILED A 3.380C MOTION, THAT WASN'T DONE.

SO I'D ASK THIS COURT TO REVERSE AND GIVE MY CLIENT RELIEF.

>> WHAT IS YOUR RESPONSE TO THE STATE'S POSITION THAT THIS COULD NOT BE CONSIDERED A MISCARRIAGE OF JUSTICE BECAUSE THERE IS AVAILABLE A SECONDARY PROCESS TO EVALUATE WHAT OCCURRED AND WHY.

>> TWOFOLD.

WELL, THREEFOLD.

>> I UNDERSTAND THE NO COUNSEL GUARANTEE--

>> THAT'S ONE OF THEM.

MY ARGUMENT IS DON'T LET THIS GO

TO A 3.850 BECAUSE SOME OF THESE  
CASES WILL FALL THROUGH THE  
CRACKS.

WE NEED TO LET THESE ISSUES COME  
UP TO THE COURT SYSTEM WHILE THE  
DEFENDANT IS REPRESENTED BY  
COUNSEL, NUMBER ONE.

NUMBER TWO, THERE'S-- THE  
FEDERAL COURTS ALSO HAVE THE  
ABILITY FOR POSTCONVICTION  
MOTIONS, 2255 MOTIONS ARE FILED  
ALL THE TIME.

NO FEDERAL COURT HAS SAID, OH,  
THE BETTER WAY TO DO THIS IS  
THROUGH A 2255.

AND FINALLY, THE 11TH CIRCUIT  
SAID WHEN THIS ISSUE IS  
PRESENTED TO A COURT IN THE  
FIRST INSTANCE, WHENEVER THAT  
IS, THE COURT HAS A DUTY TO STEP  
IN AND CORRECT THE ERROR IF THE  
COURT CAN SAY THAT THERE'S  
LACKING EVIDENCE ON AN ESSENTIAL  
ELEMENT.

THAT'S EXACTLY WHAT WE HAVE  
HERE.

THIS COURT SHOULD STEP IN AND DO  
THE RIGHT THING.

THE FIRST DISTRICT WOULD HAVE,  
THEY JUST FELT THEIR HANDS WERE  
TIED.

THANK YOU.

>> OKAY.

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