

>> ALL RISE.
>> SUPREME COURT IS NOW IN
SESSION.
PLEASE BE SEATED.
>> NEXT CASE ON THE DOCKET IS
DAVIS v. STATE.
JUSTICE LEWIS IS IN THE
CONFERENCE ROOM.
HE IS PARTICIPATING.
HE WILL PARTICIPATE IN THIS
CASE.
HE JUST ASKED, HAS A COUGH HARD
TO CONTROL.
HE DOESN'T WANT TO INTERRUPT THE
COURT IN THE PROCEEDINGS.
OKAY?
>> MAY IT PLEASE THE COURT.
MOSES BRACEY ON BEHALF OF
MR. DAVIS.
I WOULD LIKE TO ADDRESS THE
FOURTH MOMENT ISSUE.
GENERAL SEARCHES OF HOMES
VIOLATE THE FOURTH AMENDMENT.
SEARCHES CAN BE LIMITED IN TIME,
SPACE AND MANNER.
HERE, DURING THE SEARCH FOR
MR. HUGHES' DEBIT CARD, OFFICERS
TOOK NUMEROUS INTENSELY-FOCUSED
PHOTOGRAPHS OF UNRELATED
PROPERTY THROUGHOUT MR. DAVIS'
HOME.
THOSE ACTIONS GAVE RISE TO A
SECOND DISTINCT SEARCH, A
GENERAL SEARCH OF MR. DAVIS
HOME, THAT SECOND SEARCH AROSE
ADDITIONAL INVASION OF MR.
DAVIS' EXPECTATION OF PRIVACY
OCCURRED BEYOND THE AUTHORIZED
SEARCH.
>> YOU'RE SAYING THOSE PHOTOS
WERE THE BASES FOR THE
ADDITIONAL SEARCH OF HIS HOME?
AND IN THE ORIGINAL SEARCH WAS
FOR CREDIT CARDS, CORRECT?
>> YES.
A SINGLE DEBIT CARD.
>> A SINGLE DEBIT CARD.
>> SO FIND THE SINGLE DEBIT CARD
THE SCOPE OF THE SEARCH COULD BE
ANYTHING.

>> IN AREA OF SPACE, YES, MA'AM.
>> YOU SAY THEY WENT BEYOND THAT
WHEN THEY TOOK PHOTOGRAPHS OF
THE AREA?

>> YES, MA'AM.
I BELIEVE THEY EXCEEDED THE
MANNER IN WHICH THEY WERE
AUTHORIZED TO SEARCH FOR THE
DEBIT CARD.

>> HERE'S THE THING THAT I'M
HAVING-- THERE IS SOME
INTERESTING ASPECTS TO YOUR
ARGUMENT I MUST SAY BECAUSE THE
WOMAN THAT TESTIFIED, YESTERDAY
SEA HAD BEEN INSTRUCTED TO LOOK
FOR CERTAIN THINGS AND TO
PHOTOGRAPH THE TVs AND SO YOU
HAVE THAT.

ON THE OTHER HAND THIS WAS A
SEARCH FOR A CREDIT CARD WHICH
YOU WOULD AGREE WOULD ALLOW THEM
TO LOOK INTO THE DEFENDANT'S
DRAWERS, THE DEFENDANT'S, UNDER
THE BED, UNDER JUST ABOUT ANY
PLACE IN THE HOUSE?

AND THAT WOULD BE A PRETTY GREAT
INVASION OF PRIVACY, WOULDN'T
IT?

I MEAN THE IDEA, YOU'RE LOOKING
FOR A CREDIT CARD, YOU LOOK AT
EVERYTHING.

THEY DIDN'T MOVE THE TVs OR
THE MOPED.

THEY THEN PHOTOGRAPHED THESE.
THEY DIDN'T TAKE ANYTHING OTHER
THAN I GUESS IT WAS A MARIJUANA,
SOMETHING WITH MARIJUANA THAT
THEY SAW.

AND YOU'RE NOT SAYING THEY
COULDN'T HAVE TAKEN THAT.

SO WHERE IS THE ADDITIONAL
INVASION OF PRIVACY THAT THE
FOURTH AMENDMENT IS TRYING TO
PREVENT?

IN OTHER WORDS, IF THEY COULD
SEARCH EVERYTHING AND ANYTHING
BUT WE WOULD SAY, AND YOU CAN
SEE ALL THESE THINGS AND THEY
COULD HAVE SEEN A MOPED AND FIVE
TVs, WHATEVER THEY HAD, WHERE

IS THE ADDITIONAL INVASION FROM THE PHOTOGRAPHING OF THE ITEMS?

>> YES, MA'AM.

WELL, JUSTICE PARIENTE, I WOULDN'T QUITE SAY THEY COULD SEARCH ANYTHING AND EVERYTHING BUT THEY WERE ENTITLED TO GO THROUGHOUT MORE OR LESS ANY AREA WITHIN THE HOME BUT EVEN IF THESE ACTIONS AND CLOSELY INSPECTING AND PHOTOGRAPHING UNRELATED ITEMS, EVEN IF THEY WERE WITHIN THE TIME AND SPACE AUTHORIZED BY THE WARRANT THE MANNER IN WHICH THEY WENT BIT EXCEEDED THE SCOPE OF THE WARRANT.

>> I GUESS, CAN THEY LOOK AT IT? COULD THEY HAVE LOOKED AT IT?

>> I BELIEVE THEY COULD CURSORY NOTICE IT AND MERELY INSPECT IT.

>> BECAUSE SHE PHOTOGRAPHED THE VINS OF THESE, THAT IS A PROHIBITED INVASION OF PRIVACY UNDER THE FOURTH AMENDMENT?

>> IT LEAST ON THE SCOPE THAT THEY DID IT HERE.

>> I JUST, AGAIN, AND, THERE IS SOMETHING ABOUT THAT THAT DOESN'T SEEM QUITE RIGHT BUT ON THE OTHER HAND AS I LOOK AT WHAT THE FOURTH AMENDMENT IS TRYING TO PROTECT, THEY CERTAINLY DIDN'T APPARENTLY HAVE PROBABLE CAUSE TO BELIEVE STOLEN WERE THERE OR THEY WOULD HAVE INCLUDED THAT WITHIN THE WARRANT.

>> RIGHT.

>> BUT ONCE THEY'RE IN THERE, LAWFULLY--

>> YES, MA'AM.

>> AND ABLE TO SEARCH, I WOULD SAY THE ENTIRE PREMISES IN VERY INVASIVE WAY.

BECAUSE YOU'RE LOOKING FOR A CREDIT CARD.

AGAIN THEY CAN GO INTO HIS UNDERWEAR DRAWERS OR INTO THE BATHROOM AND GO INTO THE

MEDICINE CABINET, RIGHT?
THEY COULD DO ALL OF THAT?
>> THEY COULD DO, BUT THERE IS
NO RELATIONSHIP IN TERMS OF THE
OBJECTIVE OF LOCATING THE CARD
AND GETTING AN INCH OR TWO AWAY
FROM BRAND NAMES FROM SERIAL
NUMBERS AND-- SERIAL NUMBERS
AND SO FORTH.

A LITTLE MORE BROADLY THE WAY I
WOULD EXPLAIN IT, EVEN THOUGH
THE OFFICERS ACTIONS HERE WERE
WITHIN THE TEMPORAL AND SPATIAL
LIMITS OF THE WARRANT, WITHIN
THOSE LIMITS THEY ARE ALLOWED TO
FOCUS CLOSELY ON ITEMS DIRECTLY
REVIEWED TO RELATED TO THE
LOCATE THE CARD.

IF THEY ARE PULLING OPEN DRAWERS
THEY CAN OBVIOUSLY LOOK CLOSELY
THERE, BUT I WOULD ARGUE THE
FOCUS THEY CAN PLACE ON OTHER
ITEMS NOT DIRECTLY RELATED TO
LOCATING THE CARD, THERE ARE
SOME LIMITS.

I THINK THE FOCUS THERE HAS TO
BE DULL TO SOME EXTENT.

>> IF THEY HAD PHOTOGRAPHED--
>> MA'AM?

>> IF THEY HAD NOT PHOTOGRAPHED
THE ITEMS WHICH AGAIN,
APPARENTLY IS PART OF DEPARTMENT
POLICY, AND I'M ASSUMING THE
POLICY IS BECAUSE PEOPLE SAY
AFTERWARDS YOU'VE, YOU TOOK
SOMETHING THAT DIDN'T BELONG TO
YOU, OR YOU RANSACKED MY HOUSE
WHEN YOU WERE LOOKING FOR
SOMETHING BIG.

SO IT IS MORE OF A PROTECTION--
THE POLICY, WOULD YOU AGREE WAS
PROBABLY PROTECTION OF THE, THAT
THEY DON'T, THEY DON'T DO
SOMETHING UNAUTHORIZED, WOULD
YOU AGREE WITH THAT?

>> I THINK THAT WAS PROBABLY THE
INTENT BEHIND THE POLICY.
I DON'T THINK THAT IS WHAT
HAPPENED HERE THOUGH.

>> LET ME ASK YOU, THESE ITEMS

ARE IN PLAIN VIEW.
WE'RE TALKING ABOUT-- WE HAVE A
LITTLE CREDIT CARD AND MOPED AND
WE HAVE TVs.
COULD THE-- THEY WERE OPEN.
THEY WEREN'T HIDDEN SOMEPLACE,
RIGHT?
THEY WERE WITHIN THE PREMISES?
>> YES, MA'AM.
>> COULD THE POLICE THAT WERE
SEARCHING HAVE THEN SAID,
LOOKING AT THIS-- HOW MANY
TVs WERE THERE BY THE WAY?
>> I BELIEVE BETWEEN THREE OR
FOUR.
>> WITHIN THE SAME AREA?
>> WELL, THERE WAS ONE OUT
BUILDING THAT HAD I BELIEVE TWO
TVs AND SOME DESKS AND THAT
SORT OF THING.
>> LOOKED LIKE THEY WERE-- DID
THEY LOOK, TO THOSE OFFICERS, I
GUESS MY QUESTION IS, WAS THERE,
AT THAT POINT PROBABLE CAUSE TO
BELIEVE SINCE THEY KNEW THAT ALL
OF HUGHES' FURNITURE WAS GONE
AND THEY HAD ALREADY FOUND THAT
THE FOUR BAR STOOLS WERE IN THIS
STORAGE, DID THEY HAVE AT THAT
POINT, ONCE THEY'RE IN THERE,
PROBABLE CAUSE TO BELIEVE THAT
STOLEN FURNITURE AND GOODS FROM
HUGHES' HOUSE WERE WITHIN HIS,
WITHIN HIS HOME WITHOUT WORRY
ABOUT THE VIN NUMBERS?
>> NO, MA'AM.
>> WHY NOT?
>> THE LEAD DETECTIVE TESTIFIED
THEY DID NOT DEVELOP PROBABLE
CAUSE TO BELIEVE THESE UNRELATED
ITEMS THAT WERE INSPECTED WERE
MR. HUGHES' STOLEN PROPERTY.
UNTIL WEEKS LATER THEY SHOWED
PHOTOGRAPHS TO ACQUAINTANCES
OF MR. HUGHES'.
YES THAT WAS JOHN HUGHES'
PROPERTY.
THAT PROBABLE CAUSE DID NOT
ARRIVE UNTIL WEEKS LATER.
>> HOW IS THIS DIFFERENT FROM

ARIZONA VERSUS HICKS WHERE THE U.S. SUPREME COURT SAID IT DIDN'T VIOLATE FOURTH AMENDMENT RIGHTS TO RECORD A SERIAL NUMBER?

>> YES, SIR.

JUSTICE LAWSON, I BELIEVE THE ACTIONS ARE NOT ANALOGOUS IN HICKS' ACTIONS AND PICKING UP ROTATING THE STEREO EQUIPMENT AND SIMPLY BENDING DOWN AND OBSERVING THE SERIAL NUMBER IN OPEN VIEW.

I'M NOT SAYING DIRECTLY ANALOGOUS BUT I THINK IT IS MORE ANALOGOUS.

>> IF YOU'RE LOOKING FOR A CREDIT CARD YOU CAN-- YOU'RE GOING TO HAVE TO MOVE THINGS, PICK UP THINGS.

I DON'T SEE WHY THAT WOULD BE ANALOGOUS TO THAT PART THE DECISION IN HICKS, GIVEN THE SCOPE OF THE WARRANT, SORRY.

>> YES, SIR.

I'M NOT SUGGESTING THAT, THAT IT IS ANALOGOUS BECAUSE OF THE PHYSICAL MANIPULATION BUT I WOULD SUGGEST THAT IF IN HICKS IF THE OFFICER HAD, LET'S SET ASIDE MOVING AN ITEM OF SUSPECTED STOLEN STEREO EQUIPMENT TO LOOK AT THE NUMBER, LET'S SAY THEY WENT THROUGHOUT THE APARTMENT AND TOOK CLOSE PHOTOGRAPHS OF THE SERIAL NUMBERS, ON 10 OR 12 OR 15 ITEMS, CLOSELY INSPECTED NUMEROUS ITEMS OF ELECTRONICS OR SO FORTH THERE, I WOULD THINK IT WOULD BE ANALOGOUS WHAT HAPPENED HERE, ALTHOUGH IN THAT CASE HE WOULD NOT HAVE PHYSICALLY MANIPULATED ANY ITEMS.

I THINK THAT IN GENERAL TERMS THE COURT'S TASK HERE IS A MATTER OF DETERMINING WHERE A LINE FALLS AND WHERE THESE ACTIONS FALL ON, EITHER SIDE OF THE LINE RATHER THAN APPLYING A COTGOER

RULE.

OF COURSE IT IS BASED ON THE TOTALITY OF THE CIRCUMSTANCE SO I'M NOT SUGGESTING ANY ONE FACT HERE DECIDES THE CASE ONE WAY OR THE OTHER.

>> IF WE WERE, IF WE AGREED WITH YOU, WHAT WOULD HAVE, WHAT WOULD BE SUPPRESSED?

>> IN A NUTSHELL IT WOULD BE 100 PHOTOS AND TESTIMONY, DERIVATIVE TESTIMONY FROM THOSE PHOTOS.

>> SO THERE WAS NOTHING THEY DEVELOPED AFTERWARDS OTHER THAN BECAUSE THEY TOOK THE PHOTOGRAPHS?

IN OTHER WORDS, THERE WAS NO OTHER EVIDENCE THAT THEY HAD HIS STOLEN GOODS WERE WITHIN THE HOME OF MR. DAVIS?

>> I'M NOT SUGGESTING THAT THERE, THEY HAD NO OTHER EVIDENCE ABOUT PROPERTY BEING WITHIN MR. DAVIS' HOME BUT IT WOULD HAVE BEEN CERTAINLY MUCH LESS PERSUASIVE.

I THINK THAT IMPERMISSIBLE EVIDENCE THAT IS RELATED TO THIS SEARCH, THERE'S A REASONABLE POSSIBILITY THAT IT AFFECTED THE JURY'S VERDICTS.

AND I THINK IT IS IMPORTANT TO NOTE THAT AFTER THIS UNLAWFUL SEARCH BASED ON INFORMATION THEY OBTAINED THERE, THEY OBTAIN AD SECOND WARRANT AND THEN WENT BACK IN, TOOK ADDITIONAL PHOTOS AND SO--

>> HOW LONG WAS THE TIME, I'M SORRY BETWEEN WHEN THE FIRST WARRANT AND WHEN THEY DEVELOPED PROBABLE CAUSE FOR THE SECOND SEARCH OF THE HOUSE?

>> YES, MA'AM.

THIS SEARCH WAS ON JULY THE 10th.

THE DETECTIVE INDICATED THAT IN THE SUBSEQUENT WEEKS AND THEN THE SECOND SEARCH ON SEPTEMBER 7th.

APPROXIMATELY TWO MONTHS.

>> IN LINE WITH THAT,
SPECIFICALLY WHAT WOULD BE
SUPPRESSED?

BECAUSE IT SEEMS TO ME THAT EVEN
WITHOUT THE EVIDENCE OF THOSE
STOLEN ITEMS THAT WE HAVE
SUFFICIENT EVIDENCE HERE THAT
WOULD STILL PLACE MR. DAVIS,
HAVING, YOU KNOW, KILLED THESE
PEOPLE.

HE HAD CHECKS THAT HE HAD FORGED
OF MR. HUGHES'.

AND OTHER EVIDENCE SO I'M TRYING
TO SEE WHERE THIS WOULD TAKE US
EVEN IF WE SUPPRESSED THE
EVIDENCE OF THIS, OF THE TAKING
OF THE PHOTOS?

>> YES, MA'AM.

YOUR HONOR, I CERTAINLY CONCEDE
THERE WAS SUFFICIENT EVIDENCE
FOR SAKE OF THIS ARGUMENT, I
WOULD ASSERT THAT.

NONETHELESS, THIS EVIDENCE IS A
REASONABLE POSSIBILITY THAT IT
AFFECTED THE VERDICTS AND HERE'S
WHY.

>> THAT IS WHERE I'M GETTING.
WHAT IS THE REASONABLE
POSSIBILITY?

>> OKAY.

>> IF YOU SUPPRESS ALL OF THAT
AND YOU STILL HAVE ALL OF THIS
OTHER EVIDENCE THAT DIRECTLY
POINTS TO MR. DAVIS, I DON'T
BELIEVE YOU'RE ENTITLED TO
RELIEF ON THIS ISSUE?

>> YES, MA'AM.

WELL, THE EVIDENCE HERE HAD AN
IMPACT.

IT WAS A FIXTURE OF THE STATE'S
CASE FROM OPENING THROUGH
CLOSING.

WOULD ANALOGIZE IT TO THE SAME
THAT STITCHED AND HELD THE
STATE'S CASE TOGETHER.

FIRST OF ALL DURING OPENING THE
STATE DISPLAYED SOME OF THESE
PHOTOS.

DURING ITS CASE IN CHIEF IT

INTRODUCED 100 PHOTOS.
A DOZEN STATE WITNESSES HANDLED
AND REFERRED TO THESE PHOTOS
DURING TESTIMONY.
THE DERIVATIVE--
>> ACTUALLY HANDLED PHOTOS OF
THE TV AND THOSE KINDS OF ITEMS?
>> YES, MA'AM.
>> OKAY.
>> DERIVATIVE TESTIMONY WAS
INTRODUCE SUCH AS MR. DAVIS WAS
LITERALLY LIVING ON AND OFF OF
THESE ITEMS OF MR. HUGHES'
PROPERTY THAT WAS SEEN IN
PHOTOGRAPHS WITHIN THE HOUSE.
EVIDENCE WAS ALSO INTRODUCED
THAT--
>> WHAT DO YOU MEAN, EXPLAIN
THAT.
HE WAS LIVING--
>> HE WAS LIVING ON, LITERALLY
ON THIS, THE FURNISHINGS AND SO
FORTH, TO SOME EXTENT LIVING OFF
IN TERMS OF PAWNING SOME OF THIS
PROPERTY.
>> LET ME GO WITH PAWNING THEN.
IF THERE WAS THE PAWNING, HE
PAWNEED PROPERTY THAT WAS
MR. HUGHES', WOULDNT'T THAT BE
INDEPENDENTLY ADMISSIBLE?
>> THERE WOULD BE SOME
INDEPENDENTLY ADMISSIBLE
EVIDENCE OF HIM POSSESSING SOME
OF THIS PROPERTY.
>> WHAT HE SOLD, THAT BECOMES
MORE IMPORTANT.
NOT THAT HE MAY HAVE HAD IT IN
HIS HOUSE BUT HE THEN PAWNEED IT.
IF HE IS LIVING OFF OF IT THAT
WOULD BE INDEPENDENT EVIDENCE OF
BEING MR. HUGHES', RIGHT?
>> YES, MA'AM.
I THINK WHAT'S ALSO IMPORTANT TO
NOTE IS--
>> BUT THAT SEEMS LIKE THAT'S
SORT OF CUTS AGAINST YOUR
ARGUMENT THAT NONE OF THIS WOULD
COME IN?
>> WELL, JUSTICE PARIENTE, I'M
NOT SUGGESTING THERE WOULD NOT

BE SOME OTHER EVIDENCE THAT HE POSSESSED MR. HUGHES' PROPERTY FOLLOWING THE MURDER.

>> LET'S TALK ABOUT WHAT PROPERTY DID HE PAWN WAS ABLE TO SHOW WAS MR. HUGHES'?

>> I KNOW FISHING GEAR AND--
>> TVs?

>> NO, MA'AM, I DON'T BELIEVE IT WAS THE TVs.

I THINK THEY WERE ACTUALLY SEIZED DURING THE SECOND SEARCH.

>> WHAT ABOUT THE CAR?

DIDN'T HE SELL HIS CAR AND GET 15,000-DOLLARS FOR IT.

>> YES, MA'AM.

>> I'M SILL HAVING A HARD TIME GRASPING HOW THIS WOULD AFFECT THE VERDICT EVEN IF WE SUPPRESSED THE EVIDENCE THAT CAME IN WITH THE PHOTOS?

>> WELL, JUSTICE QUINCE, I THINK THE BEST EVIDENCE OF THAT HOW THE STATE UTILIZED THIS EVIDENCE RELATED TO UNLAW IF YOU RECALL SEARCH DURING ITS CLOSING. DURING ITS CLOSING IT WAS DISPLAYING THESE PHOTOS AND SOME OF THESE NOTE FEES ON A POWER POINT.

IT MADE THE TYPE OF ARGUMENTS. THEY SHOULD BELIEVE MR. HUGHES' WAS DEAD BECAUSE BARRY DAVIS ENDED UP WITH HIS PROPERTY DOWN TO THE LAST SALT SHAKER AND LAST SPOON ON THE RACKS.

THEY ALSO ARGUED THEY SHOULD BELIEVE MR. DAVIS BECAUSE HE ENDED UP WITH THE BOAT MOTOR YOU SEE, WITH THAT PAINTING, WITH THAT FINE LEATHER FURNITURE.

FINALLY IT ARGUED THAT THE MOTIVATION, MR. DAVIS' MOTIVE FOR COMMITTING THE MURDERS TO OBTAIN FINANCIAL MEANS TO SET UP A MARIJUANA-GROWING OPERATION TO SUPPORT HIS FAMILY.

THEY HAD INTRODUCED PHOTOS TAKEN OF THAT HYDROPONIC GROWING EQUIPMENT AND MATERIALS DURING

THESE SEARCHES AND DISPLAYED
THOSE TOO.

>> NOW THAT'S-- I COULD SEE THE
POINT MAYBE GOING IN LOOKING AT
THE VIN OF THE TVs BUT WHERE
WAS-- HE WAS GROWING MARIJUANA
IN, AT THE TIME?

>> NO, MA'AM.

NO MARIJUANA.

>> WHAT WAS IT?

>> TABLES AND DUCTWORK AND SO
FORTH HAD BEEN SET UP BUT THERE
WAS NO MARIJUANA BEING GROWN.

>> NOW, THERE YOU HAVE A
SEPARATE ISSUE WHICH IS THAT
COULD THEY, WERE THEY LAWFULLY
IN THE PLACE WHERE THE TABLES
AND ALL THE EQUIPMENT WAS SET
UP?

>> I THINK THEY WERE ENTITLED TO
GO INTO THAT AREA FOR THE CARS.

>> AND COULD THEY-- AND THEY
CAN'T, OR CAN UNDER YOUR
INTERPRETATION OF FORTH
AMENDMENT LAW PHOTOGRAPH THEN
WHAT WAS GOING ON IN THAT OTHER
SPACE?

IS THAT PROHIBITED?

IF WE SET A RULE, YOU CAN NOT,
UNLESS YOU NAME EVERYTHING IN
THE HOUSE, YOU CAN'T PHOTOGRAPH
WHAT'S IN THE HOUSE WHEN YOU'RE
GOING AND DOING A SEARCH FOR
SPECIFIC THINGS?

>> WELL, JUSTICE PARIENTE, I
THINK IN DECIDING THIS CASE THE
COURT COULD CERTAINLY TAILOR THE
RULING TO THE FACTS OF THIS CASE
AND OBVIOUSLY IN THE FOURTH
AMENDMENT THEY WILL DEPEND ON
THE TOTALITY OF THE
CIRCUMSTANCES.

I THINK JUST LIKE THE SUPREME
COURT OF MASSACHUSETTS DID IN
COMMONWEALTH VERSUS BILEKY, THAT
COURT BASICALLY SAID THAT LOTS
OF ITEMS OF EVIDENCE HAD TO BE
SUPPRESSED BECAUSE IT WAS
OBSERVED AND PHOTOGRAPHED DURING
THE SEARCH OF MISS BILECKY'S

HOME.

>> YOU AGREE WE'RE NOT BOUND BY OUR OWN INTERPRETATION FOURTH AMENDMENT RIGHT BUT BY THE USE SUPREME COURT?

>> RIGHT.

>> COMMONWEALTH VERSUS BILECKY, COULD BE MORE ON POINT, COULD IN IS NOT AN INADVERTENCE REQUIREMENT THEY'RE LOOKING AT THEIR OWN STATE CONSTITUTION?

>> NO, MA'AM, I DON'T THINK THAT IS THE CASE.

>> YOU THINK THAT IS RIGHT ON POINT.

>> BASED ON THE FOURTH AMENDMENT.

WHERE THE INADVERTENCE REQUIREMENT IS CONCERNED THAT IS DISTINCTION BETWEEN MASSACHUSETTS AND FLORIDA LOU, THAT DISTINCTION DID NOT COME INTO PLAY.

THE BILECK APPLIED THE PLAIN VIEW EXCEPTION AS THIS COURT SHOULD.

IF THERE IS PROBABLE CAUSE THAT ITEMS IN PLAIN VIEW ARE EVIDENCE OF A CRIME THEY CAN BE SEARCHED BUT IF NOT THEY CAN NOT BE.

>> I'M STILL STRUGGLING TO SEE, I THINK THE TEST IS WHETHER THERE WAS AN ADDITIONAL INVASION OF DAVIS' PRIVACY THAT WASN'T AUTHORIZED BY THE WARRANT.

>> YES, SIR.

>> WHEN YOU HAVE A WARRANT THAT ALLOWS YOU TO SEARCH A HOME FOR A CREDIT CARD THAT, AND IT TURNS OUT THE CREDIT CARD'S NOT THERE PARTICULARLY, THAT MEANS THAT THERE IS HARDLY ANY NOOK OR CRANNY OF THAT RESIDENCE THAT COULD NOT LAWFULLY BE ENTERED, LEAVED, EVERY PIECE OF PAPER. IT COULD BETWEEN PIECES OF PAPER ON A DESK.

THE SEARCH IS ABOUT AS INVASIVE AS IT COULD GET WHEN YOU'RE TALKING ABOUT AN ITEM OF THAT

SIZE AND, THAT'S NOT THERE,
RIGHT?

>> I DO THINK THAT'S CORRECT,
JUSTICE LAWSON.

>> HOW IS THIS AN ADDITIONAL
INVASION OF PRIVACY THAT WASN'T
AUTHORIZED UNDER THESE
CIRCUMSTANCES?

>> I THINK IT IS--

>> WHEN YOU CAN TOUCH
EVERYTHING, LOOK UNDER
EVERYTHING, MOVE EVERYTHING?

>> I THINK IT IS SUCH AN
INVASION THE SAME WAY THE
OFFICER'S ACTIONS IN BILECKI
WERE INVASION.

>> IT IS PHOTOGRAPH?

>> SIR.

>> IT IS THE PHOTOGRAPH?

>> THAT IS HUGE PART OF IT, YES,
SIR.

>> ERROR OF BODY CAMERAS, FOURTH
AMENDMENT VIOLATION EVERY TIME A
POLICE OFFICER LAWFULLY IN THE
PERSON'S HOME IN A PERSON'S HOME
DO NOT TURN OFF THEIR BODY
CAMERA?

>> I WOULD NOT SAY ANYTIME.
JUST AS THERE NO MURDER SCENE
EXCEPTION TO THE WARRANT
REQUIREMENT, THERE IS NO SEARCH
VANE EXCEPTION, SEARCH WARRANT
SCENE EXCEPTION TO THE WARRANT
REQUIREMENT.

I THINK THE FACT THE MATTER THE
SHERIFF'S ORDER WAS NOT
FOLLOWED.

EVEN IF ACTIONS IN CONFORMITY TO
THAT ORDER WERE CARRIED OUT--
LET ME BACK UP.

THOSE ACTIONS WERE NOT CARRIED
OUT HERE.

THE OFFICERS DID NOT ACT IN
ACCORDANCE WITH THAT ORDER.
INSTEAD OF JUST PHOTOGRAPHING
THE PREMISES GENERALLY THEY
EXERCISED THEIR DISCRETION TO
FOCUS ON INDIVIDUAL ITEMS THAT
THEY THOUGHT HAD POTENTIAL
EVIDENTIARY VALUE BUT IF THEY --

>> YOU COULD HAVE A GENERAL CAMERA ROLLING, IT IS NOT A FOURTH AMENDMENT VIOLATION TO PHOTOGRAPH WHAT YOU'RE SEEING I DON'T SEE WHY IT WOULD BE ANY DIFFERENT THAN YOU'RE TAKING A STILL PHOTOGRAPH RATHER THAN HAVING A--

>> JUSTICE LAWSON, I'M NOT SUGGESTING I DO NOT THINK IT WOULD BE REASONABLE UNDER THE FOURTH AMENDMENT TO HAVE BODY CAMERAS GOING ON ANYTIME A SEARCH WARRANT.

IF THERE IS EXIGENT CIRCUMSTANCES THAT COULD LIKELY ALLOW THAT BUT TO HAVE A GENERAL CAMERA ROLLING DURING A SEARCH WARRANT--

>> MORE INVASIVE TO PHOTOGRAPH A SERVE THAN TO A HAVE SEARCH?

>> YES, SIR.

>> YOU SHOULD SAY WE SHOULD RULE UNLESS THERE ARE EXIGENT CIRCUMSTANCES YOU COULD NEVER HAVE VIDEO OR PHOTOGRAPH OF A SEARCH BEING EXECUTED INSIDE OF A HOME PURSUANT TO A WARRANT.

>> I'M HESITANT TO SAY NEVER. CERTAINLY IF THERE WAS CONSENT.

>> IF IT IS NOT NEVER I DON'T KNOW HOW YOU DISTINGUISH THIS CASE FROM ANY OTHER CASE?

>> I THINK YOU'RE NOT ALLOWED TO HAVE VIDEO ROLLING OR AUTOMATICALLY TAKE PHOTOGRAPHS ANYTIME THEY'RE SIMPLY PLENTY EXECUTING A SEARCH WARRANT.

>> AGAIN, I'M NOT REAL SYMPATHETIC TO YOUR ARGUMENT I GUESS THE DISTINCTION WOULD BE, IF YOU'RE JUST PHOTOGRAPHING THE SEARCH AS YOU'RE EXECUTING IT IS ONE THING BUT HERE THERE WAS EVIDENCE THAT THESE PHOTOGRAPHS WERE BEING TAKEN BECAUSE SHE WAS INSTRUCTED TO TAKE PHOTOGRAPHS OF ANYTHING OF EVIDENTIARY VALUE.

>> RIGHT.

>> THAT MAY BE A DISTINCTION BUT I DON'T THINK IT WOULD REALLY APPLY TO AGAIN MANY OF THE OTHER, THERE WERE JUST RIGHT IN FRONT OF THEM, LIKE AGAIN THE MARIJUANA-GROWING EQUIPMENT OR THE FACT THAT THEY PAWNED THESE OTHER ITEMS OR THE FACT, AS JUSTICE QUINCE SAID, HE, YOU KNOW, THINGS THAT WERE OUTSIDE OF THE SEARCH WARRANT.

I KNOW YOU SAID YOU WANT TO CONCENTRATE ON THE FOURTH AMENDMENT ISSUE BUT DO YOU WANT TO TALK ABOUT THE GUN ISSUE? COULD YOU ANSWER MY QUESTION AS, IF, ON THE GUN, WHY THE, THE STATE DIDN'T BRING UP ANYTHING ON DIRECT.

IT WAS THE DEFENDANT ON CROSS THAT ASKED TO EXPLAIN HER NOVEMBER 13th STATEMENT THAT HE DIDN'T HAVE A GUN BUT THEN REMEMBERED LATER ON.

SO IT'S THE DEFENDANT THAT ASKED ON CROSS ALL ABOUT THE GUN.

I MEAN, I DON'T SEE HOW THAT'S, THERE IS NOTHING, I DON'T SEE THE OTHER CASES BEING SIMILAR TO THIS.

HOW IS THAT NOT A CLASSIC OPENING THE DOOR?

>> WELL, BECAUSE EVEN THOUGH THE DEFENSE ASKED THAT ON CROSBY THE TIME CROSS ENDED, MISS STEWART'S TESTIMONY WAS COMPLETE AND NOT MISLEADING IN TERMS OF HER TESTIMONY THAT MR. DAVIS HAD TAKEN A GUN WITH HIM.

>> BUT HE WAS-- HE, THE DEFENSE LAWYER, WAS TRYING TO IMPEACH HER AND HER RECOLLECTION AND WAS DOING IT.

THE QUESTION AS TO WHETHER, WHY DOESN'T HE HAVE A RIGHT TO REHABILITATE WITH SAYING, WELL, YOU ALSO, HE TOLD YOU HE HAD A GUN THAT EVENING AND, YOU HAD SEEN HIM WITH A GUN IN THE PAST? HOW IS THAT NOT HELPING TO

REHABILITATE HER ON DIRECT,
REDIRECT EXAMINATION?

>> WELL THE FIRST STATEMENT WAS,
THE SECOND STATEMENT WAS NOT.
IN OTHER WORDS HER SAYING THAT
HE TOLD ME TOOK A GUN WITH HER
DID EXPLAIN AND DID CORROBORATE.
THE SECOND FACT THAT HE
POSSESSED GUN IN THE PAST
CORROBORATED ONLY AS FAR AS IT
WAS PROPENSITY EVIDENCE.

>> DID THEY BREAK IT DOWN?
I KNOW THESE TRIALS, VERY FAST
HERE BUT, DID THEY BREAK IT
DOWN?

WE OBJECT TO THIS PART, NOT THAT
PART OR THEY JUST SAID, YOUR
HONOR THIS IS GOING BEYOND THE
SCOPE OF DIRECT?

>> THE VERY LAST QUESTION WAS
HER SAYING THAT I'VE SEEN A GUN,
OR REVOLVER IN HIS POSSESSION IN
THE PAST.

>> THAT IS WHAT--

>> THAT IS WHAT THEY OBJECTED
TO.

>> THE PART THAT WASN'T OBJECTED
TO IN CLOSING ARGUMENT, SEEMS
THE STATE WENT A LITTLE FARTHER
EVEN WITH THIS LEGITIMATE
EVIDENCE, WELL THIS IS WHAT DRUG
DEALERS DO.

THEY CARRY GUNS BUT THAT WASN'T
OBJECTED TO?

>> NO, MA'AM.

>> SO THAT IS, THAT WOULD BE A
DIFFERENT ARGUMENT THAN JUST,
YEAH, YOU KNOW, SHE HAD SEEN HIM
WITH A GUN.

HEY, THIS IS WHAT DRUG DEALERS
DO.

THAT WAS NOT OBJECTED TO?

>> I THINK THERE WERE DISTINCT
GROUNDS TO OBJECT AT THAT,
NONETHELESS NOT OBJECTING DID
NOT WAIVER THE UNFAIR PREJUDICE
FROM THIS EVIDENCE.

>> I'M ASSUMING DIRECTED APPEAL,
YOU'RE HAVING TWO NON-UNANIMOUS
VERDICTS BUT I BELIEVE YOU WILL

RELY IN OUR CASE LAW ON THE
HURST ISSUE.

I DO HAVE A QUESTION.

THIS IS ALSO THE STATE.

WE'VE SEEN THIS RECENTLY IN
ANOTHER CASE, I THINK IT WAS
TRUEHILL WHERE THE CASE IS
TAKING, PUTTING TOGETHER
EVIDENCE TO DO A PHOTO SLIDE
SHOW IN THEIR CLOSING ARGUMENT,
AND IN THIS, WHEN THEY DO THAT,
DOES THE DEFENSE HAVE AN ADVANCE
NOTICE OF WHAT'S GOING TO BE IN
THE SLIDE SHOW FOR CLOSING
ARGUMENT?

WHAT I'M REFERRING TO HERE IS
THIS, THE PICTURE, THIS, OF HER
CRYING, GOING INTO-- WAS THAT
IN CLOSING ARGUMENT OF THE
PENALTY PHASE OR THE GUILT
PHASE.

>> GUILT PHASE.

>> OKAY.

SO THE ISSUE THERE IS, WAS IS
THERE ANYTHING IN THE RECORD TO
SHOW THAT THE STATE SHOWED THE
SLIDE SHOW TO THE DEFENSE BEFORE
USING IT?

>> THERE IS NO EVIDENCE THAT,
THERE IS NO AFFIRMATIVE EVIDENCE
THAT THAT HAPPENED.

MY IMPRESSION IS THAT IT WAS NOT
SHOWN BUT, AGAIN THAT IS JUST
IMPLICIT?

>> IT IS SOMETHING, BECAUSE HE
JUMPS UP AFTERWARDS AND SAY I
WOULD HAVE OBJECTED TO IT.

>> RIGHT.

>> I HAVE NEVER SEEN THIS
PARTICULAR THING.

SOMEONE CRIES ON THE STAND.
APPARENTLY PHOTO TAKEN OFF THE
VIDEO OF THE COURTROOM.

>> IT IS UNCLEAR OFF A VIDEO OR
IF SOMEONE SNAPPED A PICTURE
DURING THE TRIAL.

>> OKAY.

BUT IT IS WHAT THE JURY OBSERVED
SO HOW IS, HAVING THAT
PHOTOGRAPH, THAT SHE WAS CRYING

ON THE STAND, HOW IS THAT NOT EVIDENCE IN THE CASE, HOW IS THAT NOT PERMISSIBLE SCOPE OF THE CLOSING ARGUMENT?

>> I THINK THERE IS SOMETHING QUALITATIVELY DIFFERENT SEEING THE LIFE LIKE REPRODUCTION OF HER ON THE STAND AS OPPOSED TO THE PROSECUTOR JUST REMINDING THEM OF HER DEMEANOR.

>> I MUST SAY LOOKING AT THE PHOTOGRAPH, IT IS REALLY NOT-- SHE HAS HER HAND DOWN.

IT IS NOT EXACTLY WHAT I WOULD CALL, LIKE ANY KIND OF GRAPHIC PHOTO OR ANYTHING ELSE.

I MEAN IT JUST SHOWS SOMEBODY THAT COULD HAVE BEEN JUST LOOKED DISTRESSED BEING, HAVING TO GO THROUGH WHAT SHE WENT THROUGH.

>> YES, MA'AM.

I THINK IT WAS THE CRUCIAL STATE WITNESS AND IT WAS AN APPEAL TO SYMPATHY AND I DO THINK IT IS SUGGESTING--

>> SHE WAS CRYING ON THE STAND?

>> YES, YES.

IF THERE ARE NO--

>> I HAVE A QUESTION FOR YOU ABOUT BILEKY.

>> YES, SIR.

>> IF I UNDERSTOOD YOU CORRECTLY, BILEKY IS SIMPLY A CASE INTERPRETING THE FOURTH AMENDMENT.

>> YES, SIR.

I SUGGEST YOU GO BACK AND READ IT BECAUSE THE WAY I READ IT THE COURT SPECIFICALLY SAID THAT IT WAS NOT GOING TO FOLLOW HORTON'S ABANDONMENT OF THE INADVERTENT DISCOVERY REQUIREMENT AND THEY WERE GOING TO TRAVEL UNDER THEIR OWN CONSTITUTIONAL PROVISION ON THAT.

ISN'T THAT CORRECT?

>> THAT IS CORRECT, JUSTICE CANADY.

I APOLOGIZE, I SHOULD HAVE SAID IN RELEVANT PART.

IN BILEKY THE COURT NEVER SAID THE PLAIN VIEW EXCEPTION WOULD NOT APPLY EXCEPT FOR THE ITEMS WERE DISCOVERED INADVERTENTLY THERE.

IS A DISTINCTION, BUT THE DISTINCTION DID NOT AFFECT THE OUTCOME IN BILEKY.

THAT IS CORRECT.

>> YOU'RE DOWN TO 2:45.

>> YES, SIR, IF THERE THERE ARE NO OTHER QUESTIONS I WILL RESERVE MY TIME.

>> MAY IT PLEASE THE COURT. MY NAME IS JENNIFER KEEGAN, ASSISTANT ATTORNEY GENERAL REPRESENTING THE STATE IN THIS MATTER.

I WOULD LIKE TO BEGIN BY ADDRESSING ISSUE 3 RELATED TO THE PHOTO THAT WAS DISPLAYED OF MISS STEWART CRYING ON THE STAND.

FIRST OF ALL, JURORS ARE ALLOWED TO CONSIDER THE Demeanor OF A WITNESS.

WE ALL KNOW THAT IS PART OF THE STANDARD JURY INSTRUCTIONS 3.9, I BELIEVE, THAT SAYS JURORS ARE ALLOWED TO CONSIDER THE Demeanor OF A WITNESS.

NOW DURING THE TIME THAT MISS STEWART WAS CRYING THE RECORD IS PARTICULARLY SILENT WHETHER OR NOT THERE WAS ANY SORT OF OUTBURST OR ANYTHING OF THAT NATURE.

THERE WAS NO OBJECTION MADE. NO COMMENT BY ANY COUNSEL OR BY THE WITNESS THAT THERE WAS ANY SORT OF EXTREME EMOTIONAL DISTRESS OR ANYTHING THAT WOULD CAUSE SOME SORT OF UNDUE INFLUENCE OR SOME SORT OF INAPPROPRIATE PREJUDICE AGAINST THE DEFENSE.

>> SO WHAT WAS THE POINT OF THIS PHOTOGRAPH THEN?

>> THE POINT OF THIS PHOTOGRAPH WAS TO DEMONSTRATE HER Demeanor

AT THE TIME OF HER TESTIMONY.
THE STATE ATTORNEY WAS--
>> THEY HAD ALREADY SEEN THAT.
>> YES.

>> SHE WAS ACTUALLY ON THE
STAND.

ALL THE JURORS SAW HER AND HEARD
HER TESTIMONY.

SO, I GUESS I'M NOT SURE WHAT
THE STATE WAS, HOW WAS THIS
RELEVANT TO THE STATE'S ARGUMENT
IN CLOSING?

>> IT WAS SIMPLY A DESCRIPTION
OF WHAT HAD OCCURRED AT TRIAL.
JUST LIKE THE STATE ATTORNEY
COULD HAVE DESCRIBED HER
TESTIMONY AND SAID, WHILE SHE
WAS CRYING SHE TOLD YOU THIS,
THIS PHOTOGRAPH IS SIMILARLY
APPROPRIATE.

>> WELL, IT IS INTERESTING YOU
BRING OUT, THERE WASN'T ANY
INDICATION IN THE RECORD THAT
SHE WAS CRYING AT THAT TIME.
THEY CERTAINLY COULD HAVE SAID,
AS YOU RECALL SHE WAS CRYING AND
THEN IF ON, THEIR EXAGGERATING,
ON REBUTTAL OR ON, COME UP WITH
IT.

I THINK MY CONCERN IS MORE, I
DON'T REALLY SEE THAT THERE IS,
IF IT IS ERROR, I WOULD, IN THIS
CASE I THINK IT IS HARMLESS.
WHAT I'M CONCERNED ABOUT IS,
SHOULD THERE BE A REQUIREMENT
THAT WHEN A, YOU CERTAINLY DON'T
HAVE TO SHOW YOUR CLOSING
ARGUMENT TO THE DEFENSE IN
ADVANCE.

>> RIGHT.

>> BUT IF YOU'RE GOING TO BE
STARTING TO USE, I GUESS THEY'RE
USED, THIS WAS 100 PHOTO SLIDE
SHOW.

>> YES.

>> IN CLOSING IN THE GUILT
PHASE.

>> YES.

>> WHERE YOU KNOW, THE JUDGE
DOESN'T KNOW IT'S COMING.

THE DEFENSE DOESN'T KNOW IT'S COMING.

WE'RE TRYING TO MAKE SURE THESE CASES AS THEY COME UP HERE AS ERROR-FREE AS POSSIBLE.

I'M SURE NO ONE WANTS THESE RETRIED.

SHOULDN'T THERE BE SOME REQUIREMENT BEFORE A PHOTO SLIDE SHOW IS USED THAT IT IS, PERMISSION IS ASKED OF THE COURT SO THAT THERE IS AN OPPORTUNITY TO LOOK AT SOMETHING?

YOU KNOW MAYBE IT WAS TAKEN OUT OF CONTEXT.

MAYBE, YOU KNOW, LET'S JUST SAY A DEFENSE WITNESS WAS, THE STATE WAS TRYING TO ARGUE HE WAS SNICKERING ON THE STAND AND THEY FIND SOME PHOTO THAT LOOKS LIKE MAYBE HE WAS, THERE WAS A SMIRK AND USE THAT ONE, AND IT IS REALLY NOT.

IT IS TAKEN OUT OF CONTEXT.

IS THERE ANY-- SO WOULDN'T THAT BE, NOT THROUGH THIS CASE BECAUSE THESE SLIDE SHOWS ARE APPARENTLY BEING USED SOME REQUIREMENT THEY BE SHOWN JUST LIKE EVIDENCE WOULD BE SHOWN IN ADVANCE TO THE COURT AND THE DEFENSE?

>> NO, I DON'T THINK SO.

THERE ARE ALREADY RULES IN PLACE THAT INSURE A CLOSING ARGUMENT IS APPROPRIATE AND NOT UNFAIR OR UNREASONABLY PREJUDICIAL TO EITHER SIDE.

>> HOW, LET'S SAY, HOW DID HE KNOW, THIS PHOTO WAS COMING UP TO BE ABLE-- WE DO HAVE A REQUIREMENT, YOU KNOW, YOU OBJECT, BUT IF YOU'RE ORB PROJECTING AFTER THE FACT THAT DOESN'T HELP THE JURY ALREADY SEES IT?

>> WELL, YOU KNOW, IT HAS BEEN RECOGNIZED REPEATEDLY THAT CURATIVE INSTRUCTIONS CAN BE USED IF FOR INSTANCE, SOME

ERRANT PREJUDICE DOES ARISE AND THAT IS THE APPROPRIATE PROCEEDING IF YOU HAVE SOME SORT OF OBJECTIONABLE MATERIAL THAT COMES UP IN CLOSING ARGUMENT.

>> IS THERE ANY CASE WHERE IT HAS BEEN ALLOWED?

THAT IS THIS TYPE OF TAKING A PHOTO OF A WITNESS AND USING IT IN THE PHOTO ITSELF WHICH WAS NOT IN EVIDENCE IN THE CASE IN CLOSING ARGUMENT?

DO WE HAVE A CASE ON THIS?

>> I'M NOT AWARE OF ONE.

OBVIOUSLY THIS IS RATHER UNIQUE SCENARIO AND I HAVEN'T FOUND ANY CASES SPECIFICALLY--

>> WE WOULD BE ESTABLISHING THOUGH IT IS PERFECTLY PERMISSIBLE TO TAKE PHOTOS OF WITNESSES, USE THEM IN THE SLIDE SHOW AND NOT HAVE TO GIVE THE COURT OR THE DEFENSE NOTICE OF WHAT YOU'RE GOING TO BE USING IN CLOSING ARGUMENT?

>> RIGHT.

BECAUSE THIS IS A SITUATION WHERE EVERYTHING IN THAT SLIDE SHOW, AND EVERYTHING IN THESE TYPES OF SLIDE SHOWS ARE THE SORTS OF MATERIAL WOULD BE USED IN SPOKEN WORD, IN CLOSING ARGUMENT ANYWAY.

>> WHAT ELSE WAS THERE WASN'T EVIDENCE IN THE CASE THAT WAS IN A SLIDE SHOW?

>> I'M NOT AWARE OF ANYTHING ELSE THAT WAS IN THERE THAT WAS NOT EVIDENCE.

HOWEVER, THERE WAS, YOU KNOW, IN THE SLIDE SHOW THERE WAS A LOT OF ARGUMENT AND ARGUMENT OBVIOUSLY IS NOT EVIDENCE.

THAT WAS PERFECTLY PERMISSIBLE, JUST LIKE A DEFENSE COUNSEL OR STATE COUNSEL IS NOT OBLIGATED TO DEMONSTRATE THEIR CLOSING AHEAD OF TIME TO THE OTHER SIDE, IT WOULD BE ESSENTIALLY, WE WOULD BE APPLYING THAT SORT OF

REQUIREMENT TO THIS IF WE WERE TO EXTEND THAT RULE HERE OR IN A SIMILAR CASE.

>> IN TODAY'S TECHNOLOGY, IN MY EXPERIENCE HAS BEEN, AND IT HAPPENS OFTEN IN CIVIL CASES, NOT CRIMINAL CASES BECAUSE IT IS EXPENSIVE BUT DEPOSITIONS ARE NOW VIDEOTAPED.

>> YES.

>> AND THEY'RE, NOW YOU HAVE THE CAPABILITY WHEN LAWYERS IMPEACH A WITNESS WITH A DEPOSITION TESTIMONY, THEY CAN ACTUALLY PLAY THE WITNESS'S VIDEOTAPE TO THE JURY AS TO WHAT THE WITNESS ACTUALLY SAID, INSTEAD OF JUST READING FROM A TRANSCRIPT.

>> YES.

>> THIS IS A LITTLE DIFFERENT. NOW YOU'RE TAKING THE TESTIMONY OF A WITNESS ON THE STAND AND SHOWING THAT.

I GUESS MY QUESTION IS, SINCE THE TESTIMONY OF THE WITNESS IS IN EVIDENCE, IT WAS PRESENTED BEFORE THE JURY AND THAT LAWYERS ARE PERMITTED TO ARGUE DURING CLOSING ARGUMENT ABOUT ANYTHING THAT WAS PRESENTED IN EVIDENCE, WHAT IS THE PROBLEM WITH, WITH, IF THE TECHNOLOGY WAS AVAILABLE OF PLAYING THE WITNESS'S TESTIMONY TO THE JURY DURING CLOSING ARGUMENT TO SHOW PARTICULAR PORTIONS OF IT AS TO A PARTICULARLY POINT IN THE CASE?

>> I DON'T THINK THERE IS A PROBLEM USING MODERN TECHNOLOGY TO--

>> LET ME ASK YOU THIS. THIS RULE 2.450 SUB-H, RULES OF JUDICIAL ADMINISTRATION, NO FILM, VIDEOTAPE, STILL PHOTOGRAPHS OR AUDIO REPRODUCTIONS DEVELOPED DURING OR BY VIRTUE OF COVERAGE OF A JUDICIAL PROCEEDING SHALL BE ADMISSIBLE AS EVIDENCE IN A

PROCEEDING OUT OF WHICH IT
AROSE?

>> YES.

>> I DOESN'T THAT SAY YOU CAN'T
USE ANY VIDEO TAKEN DURING THE
TRIAL TO SHOW TO THE JURY?
IS THAT WHAT THE RULE IS SAYING?

>> THAT DOES APPEAR WHAT THE
RULE IS SAYING BUT THAT
OBJECTION WASN'T MADE AT TRIAL.
SUCH A BASIS IS FOR A CLIMB HERE
WASN'T PRESERVED.

FURTHERMORE, THAT RULE DOESN'T
GO TO SUBSTANTIVE PREJUDICE LIKE
THE DEFENSE IS ALLEGING OCCURRED
HERE.

THAT'S MORE OF A RULE OF
PROCEDURE THAT DECAN FINES THE
BOUNDS OF PROCEEDINGS AND HOW
THEY SHOULD GO FORWARD.

>> DOESN'T THAT RULE SAY SHALL
NOT BE ADMITTED INTO EVIDENCE?

>> YES.

>> WELL, SO WHAT WE'RE TALKING
ABOUT HERE, THIS PHOTOGRAPH THAT
IS PART OF THE POWER POINT
PRESENTATION, THAT WASN'T
ADMITTED INTO EVIDENCE, WASN'T
IT?

>> THANK YOU FOR CLARIFYING.
THIS WAS MARKED FOR REFERENCE
AND PUT INTO THE RECORD BUT IT
WAS NOT INCLUDED AS EVIDENCE OR
ADMITTED AS EVIDENCE IN THE
CASE.

>> LET ME ASK YOU THIS ABOUT
DEPOSITIONS.

DEPOSITIONS DO GO INTO EVIDENCE
SO WHEN THEY'RE CROSS-EXAMINED
ON THE DEPOSITION, EITHER THE
WORDS OR THERE IT IS IN
EVIDENCE.

COULD THE STATE OR THE DEFENSE
TAKE, SINCE THE YOU KNOW, THEY
HAVE GOT, SOMETIMES, MAYBE
ELIMINATE READBACKS, BECAUSE
WHAT THEY HAVE, THEY HAVE, WHOLE
TRIAL IS BEING VIDEOTAPED BY
VIRTUE OF IT BEING IN A
COURTROOM.

COULD THEY TAKE ANY OF THE TESTIMONY AND SHOW IT TO THE JURY, YOU KNOW, JUST, MAYBE CUT LIKE ACTUALLY DO A LITTLE HIGHLIGHTING OF TESTIMONY HERE, TESTIMONY THERE, SORT OF A UPSIDE OF THE TESTIMONY AND THE WITNESSES?

COULD THEY DO LIKE A VIDEO MONTAGE IN CLOSING ARGUMENT?

>> ARE YOU REFERRING TO IN CLOSING?

>> YES.

>> I THINK THAT DEPENDS.

IF YOU HAVE EVIDENCE THAT IS ADMITTED AT TRIAL--

>> WELL THE TESTIMONY OF EVERYBODY IS THE TESTIMONY?

>> YES.

>> I'M TALKING ABOUT GOING BACK TO WHAT IS, MAYBE IT'S NOT BEING CONTEMPLATED.

CAN THE STATE OR THE DEFENSE IN CLOSING ARGUMENT CUT AND PUT TOGETHER A VIDEO MONTAGE OF THE WITNESSES AND THE TESTIMONY SINCE IT IS ALL THINGS THAT THE JURY HEARD AND SAW?

>> I THINK IT DEPENDS ON THE CIRCUMSTANCES.

SO OBVIOUSLY THE TRIAL COURT IS GOING TO BE IN THE BEST POSITION TO DETERMINE WHETHER OR NOT EVIDENCE IS APPROPRIATE.

>> I GUESS THAT'S WHY AT THE VERY LEAST IT WOULD SEEM IT SHOULD BE SHOWN FIRST TO THE JUDGE SO WE DON'T HAVE AN ISSUE AFTERWARDS.

NOT, IF IT IS WORDS, YOU'RE SAYING THAT THERE WAS, IN THE VIDEO SLIDE SHOW THERE WAS-- I MEAN THAT THERE WERE THE ARGUMENTS, ACTUAL WRITTEN WORD WHAT THE STATE WAS ARGUING?

>> AS I RECALL, YES.

>> AS A PRACTICAL MATTER ISN'T THE LAW THE JUDGE HAS DISCRETION WHETHER TO ALLOW A PARTICULAR DEMONSTRATIVE AID OR NOT?

>> YES.
>> IF THERE HAD BEEN OBJECTION TO USE OF THIS VIDEO OR POWER POINT THAT THE DEFENSE ATTORNEY HAD NOT SEEN, WAS THERE AN OBJECTION IN ADVANCE?
HE IS ABOUT TO USE A DEMON--
DEMONSTRATIVE AID.
>> THERE WAS NOT OBJECTION TO THAT RAISED.
>> IF THE HAD BEEN THE JUDGE WOULD HAVE SAID IF THERE IS OBJECTIONABLE PART SHOW IT TO ME.
THERE IS MECHANISM TO DEAL WITH THAT.
>> THE JUDGE HA DISCRETION TO DETERMINE WHAT CIRCUMSTANCES IN CASE.
WHAT DEMONSTRATIVES COME IN IF THERE IS ISSUE RAISED.
WITH RESPECT TO THIS CASE.
>> JUDGE MADE A FINDING THAT THE PHOTOGRAPH ACCURATELY DEPICTED THE'S DEMEANOR AT THE RELEVANT TIME, CORRECT.
>> CORRECT.
>> THERE IS NO ISSUE.
EVERYBODY AGREED IT DID?
>> RIGHT.
>> EVERYBODY AGREED AT CLOSING IT WOULD BE APPROPRIATE TO ASK THE JURY TO RECALL THE DEMEANOR ON THE STAND AND ASK YOURSELF IF THAT IS THE DEMEANOR OF SOMETHING-- DEMEANOR OF SOMEONE TELLING TRUTH?
THAT ARGUMENT IS COMPLETELY FAIR GAME?
>> I DON'T THINK THERE IS ANY QUESTION OF THE FACT THAT STATE COUNSEL IS ALLOWED TO USE DESCRIPTIVE TERMS WHEN REFERENCING A WITNESS'S TESTIMONY.
NOTHING IN THIS CASE, NOTHING IN THIS CLOSING WENT BEYOND THE BOUNDS OF USING A DEMONSTRATIVE AID IN HIS CLOSING ARGUMENT.
>> THIS IS NOT REALLY A

DEMONSTRATIVE AID.
HE IS PUTTING A PHOTOGRAPH WHAT
HE COULD HAVE, YOU RECALL SHE
WAS CRYING WHEN SHE TESTIFIED.
IT IS NOT, I MEAN IT IS
DEMONSTRATIVE AID IS TO ME MORE
SOME OF THOSE ISSUES OF HOW THE
KNIFE WENT INTO THE FLESH OF THE
PERSON OR SOMETHING OF THAT
NATURE.

>> WELL A DEMONSTRATIVE AID CAN
BE ANYTHING THAT CAN ASSIST THE
JURY IN ITS UNDERSTANDING OF THE
EVIDENCE.

>> THERE IS NO CASE LAW IN IT
STATE, OR I COULDN'T FIND CASE
LAW ANYWHERE ELSE-- LISTEN,
WHEREVER WE GO ON THIS PROBABLY
JUST IS A SMALL, IT'S, CERTAINLY
NOT GOING TO BE ANYTHING OTHER
THAN HARMLESS ERROR.

SO LET'S, WE'VE SPENT A LOT OF
TIME ON THIS I WOULD LIKE TO
JUST ASK YOU BRIEFLY ABOUT THE
SEARCH AND TRYING TO UNDERSTAND
THE SCOPE.

I APPRECIATE THAT YOU, THAT THEY
HAD A POLICY THAT THEY TAKE
PHOTOGRAPHS WHEN THEY'RE IN THE
COURSE OF THEIR SEARCH.

THE PART THAT I WAS CONCERNED
ABOUT IS THAT SHE WAS TOLD THAT
SHE PHOTOGRAPHED OR SHE DID
PHOTOGRAPH EVERYTHING THAT HAS
EVIDENTIARY VALUE AND THAT SHE
WAS SPECIFICALLY TOLD TO
VIDEOTAPE THE MOPED AND VIN
NUMBERS.

SO THEY MUST HAVE KNOWN THERE
WAS A MOPED THERE BUT NOT
ENOUGH, I GUESS, AND THAT
SEVERAL TVS WITH SERIAL NUMBERS
AND THE-- SERIAL NUMBERS AND
THE SERGEANT STOPPED HER.

COULD THEY HAVE, AS TO ALL THE
ITEMS THEY SEARCHED BY
PHOTOGRAPH, COULD THEY HAVE
SEIZED EVERYTHING THAT THEY
SEARCHED?

IN OTHER WORDS, COULD THEY HAVE

THEN TAKEN THE MOPED, THE TVs,
EVERYTHING THAT THEY SAW IF THEY
SEARCH IT, COULD THEY HAVE
SEIZED IT.

>> NO.

AND THAT'S THE REASON THEY
DIDN'T.

THEY WAITED UNTIL THEY HAD THE
APPROPRIATE AMOUNT OF PROBABLE
CAUSE.

>> THE IDEA THERE IS A
DIFFERENCE, YOU'RE SAYING THE
NON-INVASIVE PHOTOGRAPHING
VERSUS SEIZING, DOES THE FOURTH
AMENDMENT MAKE THAT DISTINCTION.

>> WELL THE FOURTH AMENDMENT I
THINK IN ARIZONA v. HICKS
ESPECIALLY MAKES IT PARTICULARLY
CLEAR YOU DON'T HAVE AN
ADDITIONAL SEARCH OUTSIDE THE
FOUR CORNERS OF THAT WARRANT
UNLESS YOU INVADE NEW OR
ADDITIONAL PRIVACY.

AND IN THIS CASE THE OFFICERS
WERE ABSOLUTELY WITHOUT QUESTION
IN A PLACE THAT THEY WERE
AUTHORIZED TO BE.

THIS WARRANT COVERED VERY SMALL
ITEM, DEBIT CARD, WHICH CAN BE
CONCEALED IN MOST AREAS.
ABSOLUTELY COULD HAVE BEEN
CONCEALED IN EVERY VANTAGE POINT
AND PERSPECTIVE AND AREA THAT
THEY TOOK PHOTOS OF IN THIS
CASE.

SO THE OFFICERS WERE WITHOUT
QUESTION IN AREAS THEY WERE
ALLOWED TO BE IN.

AND, THEY TOOK PHOTOS OF WHAT
THEY SAW AS THEY PROCEEDED.

NOW, YOU KNOW, THERE WERE ITEMS
OF SPECIFIC INFORMATION THAT WAS
AVAILABLE TO THEM DURING THE
LAWFUL PROCESS OF THEM GOING
THROUGH SEARCHING FOR THIS DEBIT
CARD.

ARIZONA v. HICKS MAKES IT VERY
CLEAR WHEN YOU'RE IN A PLACE
YOU'RE ALLOWED TO BE, IF THAT
SERIAL NUMBER ON THE TURNTABLE

WAS READILY VISIBLE TO THE OFFICER HICKS MAKES IT VERY CLEAR THEY WOULD HAVE THE ABSOLUTE RIGHT AND TO INSPECT AND RECORD THAT SERIAL NUMBER.

>> LET ME ASK YOU.

WE KNOW THEY CAN GO JUST ABOUT ANYWHERE TO LOOK FOR THE CREDIT CARD.

>> YES.

>> SAY THERE IS FILING CABINET FULL OF FINANCIAL RECORDS, OTHER DOCUMENTS AND THEY'RE GOING TO GO THROUGH THE FILING CABINET, EVERY FILE IN IT AND LOOK AT EVERY PAPER IN IT, BETWEEN EVERY PAPER.

COULD THEY, MAKE A PHOTOGRAPHIC COPY OF EVERY PAPER IN THE FILING CABINET?

>> I THINK UNDER THE FOURTH AMENDMENT THAT--

>> THAT IS PUSHING YOUR POSITION TO THE LIMIT.

>> RIGHT.

THAT WOULD BE A BIT OF AN EXTREME EXAMPLE I THINK, AND I DON'T THINK THAT'S NECESSARILY WHAT-- CERTAINLY NOT WHAT HAPPENED HERE.

NOTHING OF THAT THAT NATURE HAPPENED HERE.

HICKS SAYS YOU'RE ALLOWED TO SEARCH AND DOCUMENT ANYTHING OF POTENTIAL EVIDENTIARY VALUE YOU COME ACROSS IN A SEARCH.

IF THE LAW ENFORCEMENT OFFICERS, IF THERE WAS A WHITE-COLLAR CRIME INVESTIGATION GOING ON, FOR INSTANCE, THEY COME ACROSS THOSE PHOTOS OR PAPERS OR OTHER DOCUMENTS OF VALUE THAT THEY THINK MAY NEED TO BE DOCUMENTED THEY ARE ABSOLUTELY ALLOWED TO INSPECT AND DOCUMENT THINGS COME INTO VIEW DURING THE LAWFUL PROCEEDING OF THAT WARRANT.

THAT IS THE NATURE OF A WARRANT. THAT IS WHY WE REQUIRE MAGISTRATES TO SIGN OFF ON THEM.

>> THEY COULDN'T SEIZE IT?
>> WITHOUT PROBABLE CAUSE, NO.
>> I THINK IN THIS BILEKY CASE,
I THINK THERE ARE DIFFERENCES
THEY SEIZED SPECIFIC INVOICES
PART OF WHAT OCCURRED.
I DON'T KNOW IF THERE IS OTHER
DISTINCTIONS.
BUT I THINK, TO ME, WE'VE GOT TO
BE CAREFUL IF WE'RE ENUNCIATING
A RULE ABOUT THE LOOKING FOR A
CREDIT CARD.
THEREFORE HAVING BASICALLY FREE
REIN OF THE HOUSE TO SEARCH FOR
IT, NOT MOVING THINGS AND
THEREFORE, AND PHOTOGRAPHS
BEING, THE LEAST INTRUSIVE MEANS
OF DOCUMENTING WHAT THEY SAW.
I MEAN, RATHER THAN SAYING I
THINK YOU SAID RANSACK THE
HOUSE.
>> RIGHT.
AND THE PHOTOS CERTAINLY
DEMONSTRATE THAT'S NOT WHAT
HAPPENED.
>> NOW IS THERE ANY, AS JUST THE
ALTERNATIVE ARGUMENT, YOUR
CO-COUNSEL, YOUR OPPOSING
COUNSEL IS SELL SAID THEY COULD
NOT HAVE GOTTEN, THEY BELIEVED
THAT HE MIGHT HAVE STOLEN GOODS
BUT THEY DIDN'T HAVE ENOUGH
PROBABLE CAUSE AT THE TIME TO
GET A WARRANT TO ASK FOR, YOU
KNOW, FOR FURNITURE AND TVs
AND THE MOPED, CORRECT?
>> THEY DIDN'T HAVE IT AT THAT
TIME?
>> THEY DID NOT HAVE IT AT THAT
TIME.
>> WAS THERE ANY TESTIMONY
REGARDLESS OF THE SHOWING OF THE
PHOTOGRAPHS, THAT THEY, ONCE
THEY SAW THOSE ITEMS, THAT THEY
DID DEVELOP PROBABLE CAUSE OR
DID THAT DEPEND ON THE LINK OF
SHOWING THE PHOTOS TO THE
VARIOUS WITNESSES?
>> WELL THE PROBABLE CAUSE,
YOU'RE REFERRING TO THE

SEPTEMBER WARRANT, IS THAT CORRECT?

>> YES.

>> OKAY.

SO THE PROBABLE CAUSE UNDERLYING THE SEPTEMBER WARRANT WAS NOT JUST THOSE PHOTOS.

THEY ALSO SPOKE TO ASSOCIATES AND FRIENDS OF MR. HUGHES', FOR INSTANCE, WHO DESCRIBED ITEMS, ESSENTIALLY UNSOLICITED TO THE LAW ENFORCEMENT OFFICER, HEY, YOU KNOW HE RECENTLY BOUGHT SEVERAL REALLY NICE TVs FROM BEST BUY AND THIS IS WHAT THEY LOOK LIKE.

>> DID THEY THEN SHOW THE PHOTOGRAPHS TO THEM?

>> TO SOME OF THESE INDIVIDUALS, YES.

>> SO IT IS HARD, HARD THEN TO SEPARATE WHAT THEY PHOTOGRAPHED, IF THERE'S ANYTHING IMPROPER ABOUT THAT, FROM THE WHAT LED TO THE SECOND WARRANT.

>> WELL, I DON'T NECESSARILY KNOW THAT'S THE CASE.

OBVIOUSLY--

>> WHAT YOU JUST SAID THOUGH IS THE WAY THEY WERE ABLE TO VERIFY THAT THOSE WERE, I MEAN, THEY SHOWED THE PHOTOGRAPHS TO THEM.

>> YES.

>> AND THEY SAID YES, THOSE ARE THEM YOU BUT YOU'RE SAYING THAT THEY MIGHT HAVE BEEN ABLE TO, EVEN IF THEY HADN'T SHOWN THE PHOTOGRAPH, IF THEY SAID HE JUST BOUGHT SOME TVs RECENTLY AND THEY HAVE THINKING WE JUST SAW FOUR TVs, THEY LOOK, NEW, WHATEVER, GET THE SECOND WARRANT?

>> YES.

IT IS NOT JUST THE TVs. THERE WERE NUMBER OF EXTREMELY DISTINCT-LOOKING ITEMS. NUMBER OF ORIGINAL PAINTINGS STOLEN FOUND IN MR. DAVIS' HOUSE.

SCULPTURES, ARTISTIC STRUCTURES,
LARGE PIECES FURNITURE.
VERY UNIQUE THINGS.

>> IT DIDN'T LOOK LIKE IT WAS
QUOTE, NORMAL HOUSE?

IT LOOKED LIKE, SOMEBODY, A
FENCE IS TAKING STOLEN GOODS IN
THE HOUSE?

>> THE HOUSE WAS EXTREMELY FULL
OF VERY NICE PROPERTY, RIGHT.
AND SO,.

>> I GUESS THAT IS A BETTER WAY
TO SAY IT.

>> SO, YOU KNOW, THEY WALK INTO
THIS SITUATION.

AND IT WOULD BE COMPLETELY
UNREASONABLE TO EXPECT THESE LAW
ENFORCEMENT OFFICERS TO TOTALLY
AVERT THEIR EYES FROM VERY LARGE
PIECES OBVIOUSLY SUSPICIOUS
FURNITURE, PAINTINGS AND THE
LIKE JUST BECAUSE, THE WARRANT
THAT THEY HAVE AND THEY'RE
PRESENT ON AT THE TIME DOES NOT
SPECIFY THOSE INDIVIDUAL ITEMS.
WE WOULD END UP IN INCREDIBLY
UNREASONABLE CIRCUMSTANCE IF WE
WERE LIMITING LAW ENFORCEMENT
OFFICERS FROM BEING ABLE TO TAKE
REASONABLE, NON-INVASIVE STEPS
TO DOCUMENT THINGS THEY SEE
WHILE THEY'RE IN A PLACE
LAWFULLY ALLOWED TO BE.
IMAGINE WHAT THAT WOULD PLAY
OUT?

WE WOULD END UP WITH A SITUATION
WHERE WARRANTS HAVE TO SPECIFY
IN GROSS DETAIL EVERYTHING THEY
COULD SEIZE.

THEY WOULD HAVE TO AVERT THEIR
EYES FROM WHAT THEY COULD SEIZE
IN A LAWFUL MANNER.

>> IT MIGHT BEEN DIFFERENT IF
THEY HAD GONE AHEAD TO SEIZE ALL
THOSE ITEMS.

IS THAT A DISTINCTION WE AGREE
WE HAVE TO MAKE.

>> I'M NOT ENTIRELY CLEAR ON
YOUR QUESTION.

>> YOU SAID IT WAS OKAY TO

PHOTOGRAPH IT.

>> YES.

>> THEY DIDN'T HAVE AUTHORITY,
EVEN THOUGH THEY'RE IN PLAIN
VIEW TO TAKE WHAT THEY THOUGHT
AT THAT TIME WAS STOLEN
PROPERTY.

>> RIGHT.

>> SO YOU'RE MAKING A
DISTINCTION BETWEEN THE
REASONABLENESS OF THE INTRUSION
HERE.

>> THIS, TAKING PHOTOS IS A
SEARCH.

AND IT'S A SEARCH THAT IS
ENCOMPASSED IN THE FOUR CORNERS
OF THIS WARRANT.

IT IS NOT A SEIZURE.

BECAUSE IT IS NOT A SEIZURE WHAT
THEY DID WAS ABSOLUTELY
UNQUESTIONABLY APPROPRIATE.

IF THERE ARE NO FURTHER
QUESTIONS ON THAT ISSUE I'M
GOING TO TURN TO, VERY QUICKLY
TO ISSUE TWO.

ADDRESSING THE REVOLVER THAT WAS
MENTIONED IN THIS CASE AS, WAS
ALREADY DISCUSSED A BIT.

THIS EVIDENCE DID COME OUT IN
RESPONSE TO CROSS-EXAMINATION
FROM DEFENSE COUNSEL OF THE
STATE'S WITNESS.

THIS WAS NOT EVIDENCE THAT WAS
ELICITED ON DIRECT TESTIMONY.

AND IT WAS ARE ABSOLUTELY
BROUGHT OUT TO-- THE EVIDENCE
THAT THE DEFENSE NOW OBJECTS TO
WAS BROUGHT OUT ON REDIRECT TO
REHABILITATE IT THE WITNESS AND
DEP STRAIGHT THAT HER
EXPLANATION FOR THE

INCONSISTENCY IN HER PRIOR
STATEMENTS WAS REASONABLE.

THAT IS JUST THAT SIMPLE.

THAT BEING SAID THE EVIDENCE
HERE WASN'T PREJUDICIAL ANYWAY.
THERE IS NOTHING AGAINST OWNING
A FIREARM.

IT IS PROTECTED BY THE SECOND
AMENDMENT.

THERE WAS NO EVIDENCE IN THIS CASE THAT THIS DEFENDANT USE A FIREARM IN THE COMMISSION OF A FELONY.

THAT HE WAS NOT ALLOWED TO--
>> I GUESS ONLY PART COMES IN CLOSING WHEN THE STATE ENDS UP SAYING, AND JUST LIKE DRUG DEALERS CARRY FIREARMS.

I MEAN THAT IS SORT OF, MIGHT HAVE GONE A LITTLE BIT BEYOND WHAT THE RELEVANCY OF THAT TESTIMONY WAS.

>> WELL THE DEFENSE AT THE TIME DIDN'T THINK IT WAS OBJECTIONABLE AND CHOSE NOT TO OBJECT.

>> WE DON'T KNOW WHAT THEY THOUGHT BUT THEY DID NOT OBJECT.

>> THEY MADE THE DETERMINATION NOT TO OBJECT.

MY POSITION, THE STATE'S POSITION THAT IS NOT AN ISSUE THAT WE NEED TO EVEN ADDRESS HERE BECAUSE, IT IS NOT SPECIAL ISSUE IN THIS CASE.

QUESTIONING AND EVIDENCE RELATED TO THAT REVOLVER WAS ABSOLUTELY PERMISSIBLE AND APPROPRIATE GIVEN THE CIRCUMSTANCES.

NOW I WOULD LIKE TO FINALLY IN THE TIME I HAVE REMAINING QUICKLY ADDRESS THE MATTER OF HURST.

NOW THE STATE'S POSITION IS ANY ERROR IN THIS CASE RELATED TO HURST IS HARMLESS BEYOND A REASONABLE DOUBT.

AS WE ALL KNOW GOING BACK THROUGH CHAPMAN TO NADIR, GALINDEZ ISSUE BY THE COURT, TEST FOR HARMLESSNESS IS OBJECTIVE TEST.

WHETHER OR NOT A REASONABLE JURY WOULD FIND THAT THE EVIDENCE IN THE CASE WOULD END UP WITH THE SAME RESULT.

SO, OBVIOUSLY WHERE WE HAVE EVIDENCE INVOLVING A MISSING ELEMENT, FOR INSTANCE, WE CAN

NOT ASK OURSELVES SPECIFICALLY,
WELL, WHAT DID THIS JURY DO
BECAUSE THEY'RE MISSING, FOR
INSTANCE AN INSTRUCTION.
NADER IS PERFECT EXAMPLE OF
THAT.

IN THAT CASE THERE WAS A
FINANCIAL CRIMES PROSECUTION AND
JURY WAS NOT INSTRUCTED ON
MATERIALITY.

MATERIALITY IS NOT AN ELEMENT A
REGULAR LAYPERSON WOULD KNOW
ABOUT THAT IS SOMETHING THAT
LAWYERS AND JUDGES KNOW ABOUT.
BECAUSE THAT JURY WAS NOT
INSTRUCTED ON MATERIALITY, THEY
COULDN'T HAVE POSSIBLY FOUND IT.
FOR NADER TO HAVE BASED THEIR
HARMLESSNESS ANALYSIS ON WHETHER
OR NOT THE JURY HAD FOUND
MATERIALITY, FOR INSTANCE, WOULD
LEAD TO AN UNRELIABLE
HARMLESSNESS RESULT.

THE STATE'S POSITION IS THAT IF
WE ARE APPLYING AN OBJECTIVE
TEST LOOKING AT THE EVIDENCE IN
MR. BERRY'S CASE, OR MR. DAVIS'
CASE, I'M SORRY, IT DEMONSTRATES
THAT THE EVIDENCE IS BEYOND A
REASONABLE DOUBT THAT THE JURY
WOULD HAVE RENDERED THE EXACT
SAME RULING.

THEY WOULD HAVE MADE A UNANIMOUS
FINDING FOR DEATH IN THIS CASE.
HEAVILY AGGRAVATED CASE.

WE HAVE 10 AGGRAVATORS IN THIS
CASE.

RELATIVELY MINIMAL MITIGATION.
THE MOST COMPELLING OF WHICH
MR. DAVIS HAD A RATHER DEPRIVED
CHILDHOOD.

LIVED IN POVERTY UNTIL ABOUT THE
AGE OF 10 OR 11 THIS IS NOT A
VERY HEAVILY-MITIGATED CASE BUT
THERE IS ENORMOUS AMOUNT OF
AGGRAVATION WHICH IS SUPPORTED
BY IRREFUTABLE, IRREFUTABLE
EVIDENCE.

THERE WERE ALMOST 90 WITNESSES
IN THIS CASE THAT WERE CALLED TO

TESTIFIED VARIOUS PARTS OF EVIDENCE.

THIS IS A VERY SOUND, WELL-SUPPORTED CASE.

SO THE STATE'S POSITION IS THEY WOULD HAVE REACHED THE SAIL RULING AND IF THERE IS ANY ERROR IN HURST THIS IS HARMLESS BEYOND A REASONABLE DOUBT.

IF THERE ARE NO FURTHER QUESTIONS, THANK YOU VERY MUCH FOR YOUR TIME.

>> IN TERMS OF THE HURST ERROR, THE JURY'S FAILURE TO FIND THE CRITICAL ELEMENTS NECESSARY TO IMPOSE DEATH, THAT WAS NOT HARMLESS.

THE DEATH RECOMMENDATIONS WERE 9-3 AND 10-2.

THAT FACT ALONE THE STATE CAN'T PROVE THAT REASONABLE POSSIBILITY EXISTS THAT THE VERY REASON THE JURORS WHO DID NOT RECOMMEND DEATH DID SO BECAUSE THEY HAD FAILED TO FIND THAT THE AGGRAVATION WAS SUFFICIENT AND OR, THAT THE AGGRAVATION OUTWEIGHED THE MITIGATION.

TO BRIEFLY TOUCH BACK ON THE SEARCH, IT'S ONE THING TO TAKE A FEW PHOTOGRAPHS.

IT'S ONE THING TO INSPECT A FEW THINGS CLOSELY.

IT'S ONE THING TO JOT DOWN A HANDFUL OF SERIAL NUMBERS IN OPEN-- SERIAL NUMBERS IN OPEN VIEW.

THAT MAY NOT AMOUNT TO REASONABLE EXPECTATION OF PRIVACY BUT IT'S

A DIFFERENT THING QUALITATIVELY TO FOCUS ON, CLOSELY INSPECT, PERMANENTLY DOCUMENT THROUGH PHOTOS DOZENS IF NOT HUNDREDS OF ITEMS OF PERSONAL PROPERTY UNRELATED TO THE OBJECT OF THE SEARCH AND TO DO IT THROUGHOUT THE HOME AND FUNDAMENTALLY THERE IS SOMETHING DIFFERENT BETWEEN THE AUTHORIZED SEARCH FOR THE

CARD WHICH IS SPECIFICALLY
TARGETED AND BASED ON A
CONCRETE, OBJECTIVE, WHEREAS,
THE GENERAL INSPECTION OF OTHER
ITEMS IS MORE GENERAL.
IT IS EXPLORATORY.
IT IS EQUIVALENT TO RUMMAGING.
SO IN THIS CASE THERE WAS AN
UNLAWFUL SEARCH.
EVIDENCE DERIVED FROM THAT
LAWFUL SEARCH WAS ADMITTED.
RATHER THAN EXCLUDED.
AND IT IS ADMISSION WAS NOT
HARMLESS.
I'D ASK YOU TO REVERSE THE
DENIAL OF MR. DAVIS' MOTION FOR
SUPPRESS AND REMAND FOR A NEW
TRIAL.
THANK YOU.
>> THANK YOU FOR YOUR ARGUMENTS.
WE'RE IN RECESS UNTIL TOMORROW
AT 9:00.
WEDNESDAY AT 9:00.