

>> ALL RISE.  
>> PLEASE BE SEATED.  
>> JOHNSON VERSUS STATE.  
>> MY NAME IS B. RICHARD YOUNG  
ON BEHALF OF THE PETITIONER,  
MISTER RICO JOHNSON AND WE ARE  
HERE, TO DISCUSS THE DECISION OF  
THE FIFTH DISTRICT COURT OF  
APPEAL, WAS PROPER AND BASED ON  
THE OFFICER, AND START BY  
DISCUSSING THE SPECIAL  
FAMILIARITY AT TRIAL TO GIVE YOU  
A REFERENCE, THE AGENT, THE LEAD  
AGENT, AGENT SCOVEL WAS ASKED  
HAVE YOU BECOME WITH MISTER  
JOHNSON'S VOICE, TONE, MANNER,  
SOUNDS, INFLECTION OF HIS VOICE,  
YES I HAVE.  
AFTER REVIEWING THE DVD AND MY  
INTERVIEW WITH MISTER JOHNSON  
COME WITH THE WAY -- TWO THINGS  
--

>> IN ADDITION TO THE LISTEN TO  
HIS VOICE OVER WIRE INTERCEPT?  
>> HE DID, I DON'T THINK HE  
CONFIRMED THE IDENTIFICATION,  
THERE'S NOTHING ELSE THAT  
POINTED TO THE FACT THAT MISTER  
JOHNSON, THIS WAS NOT A TYPICAL  
CONSPIRACY CASE, NO CONFIDENTIAL  
INFORMANT, NO EXCHANGE OF  
PACKAGES, NO TALKING ON THE  
PHONE, SUBSCRIBER OF INDIAN  
PHONE NUMBERS THAT WERE LISTENED  
TO.

>> THE WAY HE IDENTIFIES HIS  
VOICE, THE PERSONAL INTERACTION  
IN THE DVD.  
IN EVIDENCE THE OFFICER RELIED,  
LISTENING TO TWO RECORDINGS THAT  
OCCUR AFTER THE CRIME, AND THAT  
WAS NOT SUFFICIENT.  
THE ONLY FACTOR HERE, THE  
OFFICER TESTIFIED HE SPENT SOME  
TIME SPEAKING FACE-TO-FACE WITH  
THE DEFENDANT DURING EXECUTION  
OF THE SEARCH WARRANT, THAT IS  
THE ONLY FACTOR.  
IS THERE ANYTHING IN THE RECORD  
THAT INDICATES JUST A PASSING

HOW ARE YOU DOING?  
GOING TO SEARCH THE HOUSE FOR A  
LENGTHY CONVERSATION.  
>> THE OFFICER TESTIFIED THE  
ENTIRE CONVERSATION WAS FIVE  
MINUTES, HE DID A MAJORITY OF  
THE TALKING AND THE TONE --  
>> WHO DID THE MAJORITY TALKING?  
>> THE OFFICER DID A MAJORITY OF  
THE TALKING, THAT WAS HIS  
TESTIMONY AND SEEMED LIKE MORE  
OF A YES AND NO RESPONSE, DO YOU  
KNOW WHAT WE ARE SEARCHING FOR,  
YES, NO, AND EVENTUALLY MISTER  
JOHNSON SAYS I AM UNCOMFORTABLE  
SPEAKING WITH YOU AND AFTER  
THAT SO THE BREVITY OF THE  
INTERACTION IS PROBLEMATIC.  
>> ANYTHING ON RECORD THAT WOULD  
INDICATE THE DEFENDANT HAS A  
DISTINCTIVE VOICE THAT WOULD BE  
IDENTIFIED, SOME PEOPLE THAT WE  
KNOW WHO THEY ARE.  
>> ASSUMING YOU ARE REFERRING TO  
THE CASE THAT IS A CASE WHERE  
THERE WAS A PRIOR INTERACTION  
FOUR YEARS PRIOR BUT THE  
DEFENDANT HAD A DISTINCT DEEP  
RASPY VOICE WITH THE TESTIMONY  
AND WE DON'T HAVE ANYTHING LIKE  
THAT HERE, NO CHARACTERISTICS OF  
THE VOICE THAT WOULD ALLOW FEW  
WORDS TO BE ABLE TO IDENTIFY IT.  
THAT IS A PROBLEM.  
>> OVER WHAT TIME WAS LAW  
ENFORCEMENT INCLUDING THIS  
DETECTIVE LISTENING IN ON THE  
PHONE CALLS?  
>> THE INVESTIGATION ITSELF  
LASTED THREE MONTHS OR SO,  
MISTER JOHNSON LISTENED TO THEM  
AFTER THE FACT, WASN'T THERE  
ALIVE WHEN THEY WERE HAPPENING,  
THAT DISPENSES WITH THE  
ARGUMENT.  
>> DID HE LISTEN TO THEM BEFORE  
THE SEARCH WARRANT WAS EXECUTED?  
>> HE DID.  
>> THE TESTIMONY, HE MAY LISTEN  
TO SOME OF THEM LIVE BUT MOST HE

LISTEN TO AFTER THEY WERE RECORDED BUT CONTEMPORANEOUSLY WITH THE RECORDING BUT BEFORE THE INVESTIGATION.

AND HOW MANY HOURS OF THOSE VOICE RECORDINGS DID HE LISTEN TO PRIOR --

>> THE TESTIMONY WAS IT WAS THOUSANDS OF PHONE CALLS INVOLVING HUNDREDS OF SUSPECTS, HE LISTENED TO A LOT OF PHONE CALLS INVOLVING A LOT --

>> YOU CHARACTERIZED IT DIFFERENTLY BUT -- WITH THE VOICE.

SO I DON'T KNOW, SEEMS LOGICAL TO ME THAT IF YOU HAVE LISTENED TO THOUSANDS OF PHONE CALLS OVER MONTHS OF TIME THAT YOU WOULD HAVE A SPECIAL FAMILIARITY WITH THAT VOICE, SUCH THAT WHEN YOU WALKED IN AND MET THE PERSON YOU MIGHT BE ABLE TO SAY THAT IS IT NO MATTER HOW LONG THE ENCOUNTER WITH THE PRESIDENT IS THE FAMILIARITY WITH THE VOICE GAINED OVER MONTHS AND THOUSANDS OF PHONE CALLS THAT ALLOW YOU TO MAKE THAT IDENTIFICATION.

>> IT GOES AGAINST THAT. THE FACT THAT HE IS LISTENING TO SO MANY PEOPLE OVER SO MANY MONTHS AND NOT BEING ABLE TO IDENTIFY MISTER JOHNSON ANY OTHER WAY.

>> ANYWAY A JUROR COULD DUPLICATE SOMEONE LISTENING TO THOUSANDS OF PHONE CALLS OVER THE EXTENT OF INVESTIGATION AND HEARING THEIR VOICE, IT INVADES THE PROVINCE OF THE JURY TO HAVE THIS TESTIMONY BUT I DON'T SEE ANY WAY THAT A JUROR WOULD HAVE THE FAMILIARITY YOU WOULD GAIN WITH A VOICE IN LISTENING TO IT OVER MONTHS OF AN INVESTIGATION.

>> THE BASIS THE OFFICER TESTIFIED TO, I AM FAMILIAR WITH THIS VOICE BECAUSE I LISTENED TO THIS RECORDING OF HIS PRETRIAL

HEARING.

>> HE IDENTIFIED IT WITH HIM BUT FAMILIARITY.

>> TO THAT, I WOULD RESPOND THIS COURT COULD HAVE SAID FAMILIARITY WITH THE VOICE AND NO DOUBT THERE WAS SOME FAMILIARITY BUT WAS A PRIOR SPECIAL FAMILIARITY AND I THINK EVANS HAS INTERPRETED THAT CANNOT BE GAINED A PRIOR SPECIAL FOR MARY CANNOT BE GAINED DURING AN INVESTIGATION SO --

>> WHAT IS THE RATIONALE FOR THAT?

IS THERE A RATIONALE FOR IT?

>> THE RATIONALE IS IN CASES LIKE THIS WHERE THERE IS INSUFFICIENT FAMILIARITY, WHAT WE ARE ARGUING, YOU CREATE A DVD WHERE OF COURSE YOU ARE FAMILIAR WITH THE DEFENDANT'S VOICE AFTER LISTENING TO 20 MINUTES OF HIM TESTIFYING AND TO BOLSTER THE CREDIBILITY THE YOU DON'T HAVE PRIOR FAMILIARITY, NO ONE IS DISPUTING THAT HE DID NOT OCCUR PRIOR TO THE INVESTIGATION ALL OF THIS OCCURRED DURING THE INVESTIGATION AND IF YOU ARE GOING TO JUST COMPARE A RECORDING TO ANOTHER RECORDING --

>> WHY THE FACT THAT THE FAMILIARITY IS GAINED IN THE COURSE OF THE INVESTIGATION CATEGORICALLY, DISQUALIFIES IT. WHAT IS THE RATIONALE FOR THAT?

>> SO THE STATE ISN'T ABLE TO CREATE THIS EXEMPLAR THAT BY ITSELF WOULD NOT BE A PROPER WAY TO FAMILIARIZE YOURSELF WITH SOMEBODY'S VOICE BUT THESE OTHER THINGS, THE DISTINCTION IS THAT IT SHOULD OCCUR PRIOR BECAUSE EVAN SAYS SO.

>> THE QUESTION IS THE LOGIC BEHIND IT, THE RATIONALE. I HEARD WHAT YOU SAID. I DIDN'T AGREE WITH EVAN.

I AM STRUGGLING TO UNDERSTAND  
THE RATIONALE.

>> IF YOU USE THE STATEMENT OF  
LAW, STRUGGLING TO UNDERSTAND --  
AND UNDERCOVER OFFICER FROM  
TESTIFYING TO FAMILIARITY WITH  
THE VOICE.

THE SAME OFFICER HAD BEEN  
UNDERCOVER, MONTH OF  
CONVERSATION, AND ACQUIRED THAT  
KNOWLEDGE.

>> HE IS NOW AN EYEWITNESS TO  
THE CRIME.

AND

>> I'M TRYING TO UNDERSTAND.  
AND A DIFFERENT BASIS PURSUANT  
AND THE PERSON WOULD BE AN  
EYEWITNESS.

WHY WOULD FAMILIARITY GAIN IS AN  
UNDERCOVER OFFICER BE DIFFERENT  
THAN SPECIAL FAMILIARITY  
DIFFERENT FROM WHAT THE JURY  
COULD GET IF THEY DIDN'T HAVE  
THE BENEFIT OF THIS TESTIMONY,  
IT WAS GAINED DURING THE  
INVESTIGATION AND MAKE ANY  
DIFFERENCE WHETHER IT WAS  
UNDERCOVER OR LISTENING TO PHONE  
CALLS.

>> THE OFFICES DEFINITELY KNEW  
WHO WAS ON THESE PHONE CALLS  
UNTIL THIS FACE-TO-FACE  
INTERACTION.

AND -- UNTIL MISTER  
JOHNSON'S UNTIL THEY GET TO THE  
SEARCH WARRANT.

AND THE STATE DIDN'T THINK THAT  
INTERACTION.

>> IT WAS NOT ACQUIRED BY THE  
COURSE OF THE INVESTIGATION, IF  
YOU JUST LOOK AT THE RULE AS IT  
TURNED.

I DON'T SEE A RATIONALE.

>> I THINK THE PRIOR FAMILIARITY  
CASES, SPECIAL FOR MARY CASES.  
SEEMS TO INDICATE EXTENSIVE  
CONTACT AND EXTENSIVE KNOWLEDGE  
OF THE VOICE, THE INVESTIGATION  
WAS 3 MONTHS LONG, THOUSANDS OF  
PHONE CALLS, HUNDREDS OF

DIFFERENT INDIVIDUALS, MISTER JOHNSON, UNTIL WE GET TO --

>> HE WAS A SPECIFIC VOICE AND HIS FAMILIARITY WITH THE VOICE.

>> THAT MOMENT, AND THEY SEE HIM ON THE DVD AND TALKING TO HIM, THAT IS THE GUY.

WE HAVE BEEN HEARING HIM.

>> IT IS A EUREKA MOMENT. AND CIRCUMSTANCES.

>> THE PROBLEM, IF THAT WAS A DEFINITE EUREKA MOMENT, WHY CREATE THIS DVD RECORDING TO BOLSTER THE OFFICER'S CREDIBILITY WHEN THAT CAN BE GIVEN TO THE JURY TO MAKE A DETERMINATION, THEY GOT TO TRIAL, THIS IS A PROBLEM AND THAT IS WHY THEY CREATED IT.

>> THE JURY DIDN'T HAVE MONTHS OF EXPERIENCE LISTENING TO THE VOICE.

THE DVD DOESN'T HAVE THE SAME IMPACT ON THE JURY, NO WAY TO REPLICATE FOR THE JURY A EUREKA MOMENT THAT OCCURS BECAUSE OF A SPECIAL FAMILIARITY, THOUSANDS OF CALLS OF LISTENING TO THE VOICE.

>> DISAGREEING WITH THE EUREKA MOMENTS.

IF IT WAS SO CLEAR, BETTER THAN A JUROR LANGUAGE, THE BETTER POSITION OF ALVAREZ, NON-EYEWITNESS MAY TESTIFY TO PERSONS DEPICTED ARE HEARD ON A RECORDING AS LONG AS IT IS CLEAR.

>> AND 20 MINUTES, THE VOICE THEY LISTEN TO FOR MONTHS OR THOUSANDS OF CALLS.

>> THE FAMILIARITY ITSELF AT THIS POINT GAINED DURING THE INVESTIGATION, AND NOT SUFFICIENT BECAUSE SO FEW WORDS ARE SPOKEN AND TESTIFY YOU ARE FAMILIAR WITH THE SOUND.

>> JUSTICE QUINCE, AND 100 DAYS OF INVESTIGATION, THE OFFICER HAD THE OPPORTUNITY TO THE

DEFENDANT.

>> I DON'T THINK THERE'S ANY DIRECT TESTIMONY GIVEN HOW MANY DIFFERENT INDIVIDUALS THERE WERE.

>> AND LOOKING AT THIS EXCEPTION IT SEEMS TO ME, EVANS -- TRYING TO DIFFERENTIATE BETWEEN THE OFFICER WHO TRANSPORTED AN ARRESTEE TO THE JAIL AND HAD A CONVERSATION IN THE POLICE CAR ON THE WAY OVER.

HAVING THEM LISTEN TO TAPES AND SAY THIS IS THE SAME GUY, AND MUSTER.

FACTUALLY INTENSIVE AND ANY CASE IS DIFFERENT AND THE STANDARD IS OUT THERE.

THE QUESTION IS WE HAVE A SITUATION WHO TESTIFIED TO THE DEFENDANT -- HOW MANY HOURS OR 100 DAYS AND INVESTIGATION AND AN OFFICER WHO TESTIFIED HE WENT TO THE EXECUTION OF THE SEARCH WARRANTS, HE WAS PRESENT AND SPOKE WITH THE DEFENDANT FOR FIVE MINUTES BACK AND FORTH, AND THOUGHTS AND DOTS UNTIL YOU GET TO THE POINT IT HAS TO BE UP AND WE WON'T HAVE THIS ROLE.

WE SEEM TO HAVE A LOT MORE THAN WE DID.

>> IT SEEMS IF WE ARE JUST VIEWING THE INTERACTION AS BEING SUFFICIENT TO YOUR PRIOR FAMILIARITY IT FALLS SHORT OF THAT THE INTERACTION IS THE DISSENT NOTED, ON AMOUNT OF COMMON SENSE THE ABILITY TO IDENTIFY SOMEBODY'S VOICE SHOULD DEPEND ON THE NUMBER OF EXPOSURES AND QUALITY OF EXPOSURES.

>> GOING BACK TO A DISTINCTIVE VOICE.

IF I AM A POLICE OFFICER AND TRANSPORTING JACK NICHOLSON TO JAIL, THAT IS WHAT I WOULD NEED WHEN HIS DISTINCTIVE SPEAKING PATTERNS IN HIS VOICE IS ALL I

WOULD NEED TO IDENTIFY HIS VOICE.

THIS IS FACTUALLY BASED, WHERE IS THERE?

THERE IS A LOT HERE.

>> THE CLARITY OF IT IS THE PROBLEM FOR ME, THAT WHEN THE SEARCH WARRANT, WOULD NOT HAVE CREATED THIS DVD RECORDING WHICH THEY WANTED TO KEEP FROM THE JURY AND ENTER IT INTO EVIDENCE AND KEEP IT FROM THE JURY, TRYING TO BOLSTER CREDIBILITY AND THE ABILITY TO IDENTIFY THIS VOICE BUT NOT HAVE THE JURY HEAR IT.

THE RATIONALE WOULD BE WE DON'T WANT THEM TO MAKE THE COMPARISON OR WANT THEM TO SECOND-GUESS THIS OFFICER'S DETERMINATION AND THE ONLY THING THAT IS THE DIFFERENCE BETWEEN GUILTY AND NOT GUILTY IS THE OFFICER TESTIFYING AND NO OTHER EVIDENCE MISTER JOHNSON IS GUILTY OF ANY CRIMES.

>> WHAT HAPPENED WITH THE DVD?

>> IT WAS --

>> THAT IS WHAT HAPPENS.

>> THE TRIAL COURT KEPT IT OUT BECAUSE THEY SAID I DON'T KNOW OF ANY STATE YOU ARE ALLOWED TO ENTER SOMETHING INTO EVIDENCE AND KEEP IT FROM THE JURY. IF YOU SHOW ME AGAIN IF I CAN RECONSIDER IT BUT YOU WON'T FIND ONE.

THE ADMISSION OF THAT ON HEARSAY GROUNDS, THAT IS NOT THE REASON IT WAS KEPT OUT.

AND THE STATE MOVED ON.

I THINK THAT IS IMPORTANT TO NOTE, THAT WAS THEIR INTENT, NOT TO GIVE THIS TO THE JURY AT ALL AND HAVE THE JURY RELY ON THIS NOT JUST OFFICER BUT THE LEAD AGENT IN THE INVESTIGATION SAY IT IS MISTER JOHNSON'S VOICE ON THOSE TAPES AND INTERPRET WHAT THEY ARE TALKING ABOUT.

THAT IS AN INVASION OF THE PROVINCE OF THE JURY GIVEN THEY DIDN'T KNOW MISTER JOHNSON REALLY WAS DURING THE CONSPIRACY, THEY ONLY CONFIRMED THAT DURING THE INVESTIGATION, IT WAS TOO BRIEF TO GIVE THIS OFFICER -- IT WASN'T PRIOR ACCORDING TO EVIDENCE.

>> LEAVING ASIDE HIS CATEGORICAL RULE THAT IS IN EVIDENCE, ISN'T THAT IS DISCRETIONARY CALL BY A TRIAL COURT JUDGE SUBJECT TO ABUSE OF DISCRETION STANDARD?

>> WHETHER THERE IS FAMILIARITY.

>> I BELIEVE SO.

>> I THINK IT WOULD BE.

>> YOUR REAL REFUGE IS A CATEGORICAL ROLE.

>> THE TRIAL COURT FOUGHT THE STATE PRETTY HARD ON THIS.

THIS WAS NOT AN EASY CASE.

AT ONE POINT THEY EVEN SAID WE DON'T KNOW HOW WE WILL GET THESE TAPES IN BECAUSE THIS IS AN OBJECTION YOU ARE NOT LETTING US GETTING WHAT YOU WANT TO GET IN AND THE STATES THAT I WON'T TELL YOU HOW TO PRESENT HIS EVIDENCE BUT IT FINALLY CAME DOWN TO THE STATE SAID WE HAVE TO GET THIS IN AND IF YOU WANT TO ALLOW US TO ENTER IT INTO EVIDENCE SUBJECT TO A MISTRIAL THAT IS WHERE WE ARE BUT THIS WAS NOT AN EASY CASE FOR THEM AND HAD THE TRIAL OCCURRED PRIOR TO EVIDENCE I THINK THE TRIAL COURT WOULD HAVE GOTTEN IT RIGHT IF EVANS HAD BEEN AROUND BECAUSE THIS --

>> THERE SEEMS TO BE A CATEGORICAL RULE IN EVANS THAT WOULD COVER THE CIRCUMSTANCE. BUT THAT IS NO GOOD.

>> HAS THAT EVER BEEN APPLIED BY ANY OTHER COURTS?

>> THE FIFTH DISTRICT WAS FIRST TO INTERPRET IT.

>> THE SPECIAL EXCEPTION YOU CAN'T OBTAIN ANY INFORMATION,

CAN'T USE INFORMATION OBTAINED  
DURING AN INVESTIGATION TO  
SATISFY THE BURDEN.

>> TO USE IT UP, TWO MINUTES FOR  
REBUTTAL.

>> MY NAME IS CHRIS DAVENPORT  
AND I REPRESENT THE STATE OF  
FLORIDA.

THIS COURT IS CORRECT, THIS IS A  
FACTUAL FINDING SUBJECT TO THE  
ABUSE OF DISCUSSION.

THE PROBLEM ARISES, DISSENT ON  
THE OPINION BELOW, THERE SEEMS  
TO BE A CATEGORICAL EXCLUSION,  
WHEN YOU LOOK AT THE LANGUAGE,  
WE ARE APPLYING SPECIAL  
FAMILIARITY, BUT ANYTHING DURING  
THE INVESTIGATION DOESN'T COUNT.  
THERE IS NO RATIONALE FOR THAT.  
IN MY OPINION NO RATIONALE  
EXPRESSED BY THE DEFENSE  
ATTORNEY THAT SUPPORTS THAT  
CATEGORICAL EXCLUSION AND WE  
SUBMIT THE COURT NEEDS TO GET IN  
AND FIX THE PROBLEM THAT CAUSED  
THE CONFUSION.

NO COURT HAS EVER DONE THAT.  
WHEN YOU LOOK AT THE VIDEO WHERE  
OFFICERS LOOK AT VIDEO  
SURVEILLANCE AND WHETHER THEY  
CAN TESTIFY, LOOK AT THE JOHNSON  
CASE CITED BY THE OPINION BELOW,  
THE GUY CHANGED HIS APPEARANCE  
POST ARREST.

A PICTURE OF HIM ON THE VIDEO  
COMMITTING THE CRIME.

AFTER HIS ARREST HE CHANGED HIS  
SKIN COLOR, BLEACHED HIS SKIN  
AND CHANGED HIS APPEARANCE AND  
THE OFFICER WAS ALLOWED TO  
TESTIFY AND HE LOOKED DIFFERENT  
AT TRIAL SO THERE WAS POST  
ARREST WHICH WAS POST  
INVESTIGATION BUT THE COURT  
ALLOWED IT BECAUSE WHEN YOU LOOK  
AT THE RATIONALE WHY THESE  
OFFICERS IDENTIFY THE VOICE OR  
THE VIDEO THEY HAVE UNIQUE  
PERSPECTIVE THE JURY DOES NOT  
AND IN THAT CASE THE OFFICER

KNEW WHAT THE GUY LOOKED LIKE BEFORE SO NOT THE SAME AS OTHER CASES WHERE THE JURY COULD LOOK AT THE GUY SITTING THERE AND THEN LOOK AT THE VIDEO AND MAKE THEIR OWN COMPARISON.

IF THAT IS THE CASE THE OFFICER CAN TESTIFY, HE IS USURPING THE ROLE OF THE JURY BUT IN THAT CASE THEY HAD TO HAVE SOMEONE COME IN BECAUSE HE DIDN'T LOOK THE SAME ANYMORE.

POST INVESTIGATION, POST ARREST THE OFFICER WAS ALLOWED TO TESTIFY AND COMMON SENSE SAYS HE SHOULD BE ALLOWED TO TESTIFY, YOU CAN'T GET AWAY FROM HAVING YOUR PICTURE ON SURVEILLANCE VIDEO BY CHANGING YOUR APPEARANCE, YOU HAVE TO ALLOW THE STATE TO REBUT THE CHANGE IN APPEARANCE.

>> THE MAJORITY IN EVANS, SPENT A LOT OF TIME TALKING ABOUT PREJUDICE AND ALLOWING POLICE OFFICERS WHOSE CREDIBILITY IS SOMEWHAT ELEVATED BY VIRTUE OF THEIR STATUS TO PREVENT THEM COMING IN, IN EVERY CASE USING THAT AS PROOF OR EVIDENCE OF A CRIME.

WHAT IS YOUR RESPONSE TO THE EVIDENCE, DISCUSSION OF THOSE FACTORS, OPENING PANDORA'S BOX AND THIS IS UNFAIR AND THAT KIND OF THING.

>> IF YOU'RE BRINGING AN OFFICER INTO VOUCH FOR WHAT THE JURY CAN SEE FOR THEMSELVES, THAT MAKES SENSE BUT YOU CAN'T HAVE THEM SAY THAT IS THE GUY, THE JURY MAKES THE DETERMINATION, YOU CAN'T USE THE OFFICE OF POLICE OFFICER TO BOLSTER YOUR CASE. OF THAT IS ALL THERE IS I AM BRINGING THEM IN BECAUSE HE IS WEARING THE UNIFORM, THAT WOULD NOT BE ADMISSIBLE BUT IN A SITUATION LIKE THIS WHERE THE OFFICER HAS LISTENED TO HIS

VOICE FOR THREE MONTHS,  
THOUSANDS OF PHONE CALLS, PLUS  
TALKED TO HIM IN PERSON AND WENT  
BACK AND VERIFIED BY LISTENING  
TO HIS TESTIMONY AT THE PRETRIAL  
HEARING.

NOT JUST BECAUSE HE IS WEARING  
THE UNIFORM BUT HAS THAT  
REQUISITE FAMILIARITY THAT GOES  
BEYOND WHAT THE JURY CAN HAVE.  
HE IS IN A BETTER POSITION THAN  
THE JURY.

>> THE POINT BEING IT SEEMS TO  
ME YOU CAN OBTAIN SPECIAL  
KNOWLEDGE NOT WITH REGARD TO THE  
TIME WHETHER IT WAS BEFORE OR  
AFTER THE ARREST OR WHATEVER BUT  
THAT IS WHAT THE MAJORITY IN  
EVANS SEEMED TO HOLD BECAUSE  
THEY WERE LISTENING TO THE  
TELEPHONE CONVERSATIONS FROM THE  
JAIL, THEY KNEW FROM THAT, THERE  
SEEMS TO BE SOMETHING MORE GOING  
ON WITH REGARD TO USING THE  
INVESTIGATORY PERIOD AS A CUT  
OFF.

>> I BELIEVE THE LANGUAGE IS NOT  
NECESSARY TO EVANS.

EVANS, THE POLICE OFFICER CAME  
IN AFTER THE FACT AND  
INVESTIGATED THE VOICE.

THEY BROUGHT IN THE POLICE  
OFFICER TO SAY LISTEN TO THIS,  
IS THIS THE GUY?

THEY COULD HAVE PICKED A PERSON  
OFF THE STREET TO DO THE SAME SO  
HE ACQUIRED THAT FAMILIARITY  
WITH THE DEFENDANT'S VOICE  
AFTERWARDS, NOT BECAUSE IT WAS  
DURING THE INVESTIGATION OF THE  
CASE THAT MADE IT BAD BUT HE WAS  
INVESTIGATING THE VOICE IN A  
MANNER THAT ANYBODY COULD HAVE  
DONE AND USURPED THE ROLE OF THE  
JURY BECAUSE THE JURY COULD DO A  
TOO.

I THINK EVANS WAS A CLOSER CASE  
BECAUSE THE OFFICER LISTENED TO  
THE RECORDING 50 TIMES.

IS THAT ENOUGH TO GIVE SPECIAL

FAMILIARITY?

THIS COURT FOUND IT WASN'T, IT IS AN ABUSE OF DISCRETION STANDARD.

>> WHEN IT IS ACQUIRED IN THE LANGUAGE YOU MENTIONED --

>> SEEMS TO BE IN THE LANGUAGE, WE SUBMIT THAT MAKES NO SENSE. THE REAL PROBLEM IS THERE WAS NO SPECIAL FAMILIARITY, HE WAS IN NO BETTER POSITION IN THE JURY BECAUSE HE LISTENED TO IT A BUNCH OF TIMES, A SHORT PHONE CALL PLAYED A BUNCH OF TIMES AT TRIAL.

EVANS IS A CLOSE CASE.

THE COURT FOUND THAT WAS NOT ADMISSIBLE.

WHEN HE ACQUIRED THAT FAMILIARITY HAS NOTHING TO DO WITH AND WE SUBMIT THE COURT NEEDS TO CLARIFY THAT LANGUAGE.

>> NO SUPPORT IN THE LAW IS YOUR POSITION.

>> IT CAME OUT OF THE BLUE. IT CAUSED CONFUSION WITH THE DISSENTING OPINION AND THE COURT NEEDS TO CLARIFY AND TAKE THAT OUT.

ONCE YOU TAKE THAT OUT SPECIAL FAMILIARITY HAS BEEN AROUND FOREVER APPLIED IN VIDEO CASES AND VOICE CASES AND MAKES SENSE AND UP TO THE TRIAL JUDGE AND IT WILL BE A FACTUAL DETERMINATION. IN THIS CASE HE DEMONSTRATED AN ABUSIVE DISCRETION NO REASONABLE PERSON WOULD FIND THIS OFFICER DIDN'T HAVE SPECIAL FAMILIARITY WITH THIS, THOUSANDS OF HOURS AND SAW HIM IN PERSON AND SAID THAT THE GUY.

THERE IS AMPLE EVIDENCE TO SUPPORT THE TRIAL COURT'S RULING, NO ABUSE OF DISCRETION AND WE ASK THE COURT TO CLARIFY THE OPINION IN EVANS TO TAKE OUT THAT CONFUSING LANGUAGE AND CLARIFY AS LONG AS THEY HAVE SPECIAL FAMILIARITY DOESN'T

MATTER WHEN THEY GOT IT.  
ACQUIRING IT DURING THE  
INVESTIGATION IS THE BEST TIME  
TO GET IT SO WE WOULD SUBMIT  
THERE IS NO REASON FOR THAT  
LANGUAGE AND THE COURT SHOULD  
RECEDE FROM IT.  
IF THERE ARE NO OTHER QUESTIONS  
WE ASK YOU TO AFFIRM THE -  
>> THANK YOU.  
>> REBUTTAL?  
>> AS TO EVANS BEING CONFUSING,  
I DISAGREE WITH THAT I THINK  
EVANS IS PRETTY CLEAR AND, I  
DON'T, I DON'T THINK THAT THIS  
COURT SHOULD RECEDE FROM THAT OR  
CHANGE EVANS PRECEDENT.  
I DON'T THINK IT IS CONFUSING.  
I THINK IT IS ABUNDANTLY CLEAR  
WHAT EVANS REQUIRES.  
>> IT COULD BE, IT COULD BE  
SERIOUSLY WRONG WITHOUT BEING  
CONFUSING.  
COULDN'T IT?  
>> POSSIBLE.  
BUT I THINK--  
>> ANY OTHER LAW, ANY OTHER  
CASES, THAT HAVE GENERATED,  
BEFORE EVANS, GENERATED THAT  
THOUGHT, THAT REQUIREMENT.  
THAT ONE REQUIREMENT.  
THAT IT COULD NOT BE AT THAT  
PARTICULAR TIME?  
>> WELL I THINK STATE V CORDIA  
AND HARDY, AND BARIONTOS WOULD  
FIT WITHIN INTERACTION OCCURS  
PRIOR, THAT, ASSUMING YOU'RE  
TALKING ABOUT THE PRIOR--  
>> WHETHER IT CAN NOT BE  
OBTAINED DURING AN INVESTIGATION  
BEFORE AN ARREST.  
>> THAT SPECIFIC QUESTION HAS  
NOT.  
BUT PRIOR CASES HAVE BEEN  
INTERPRETED AS SOMETHING PRIOR  
TO THE CRIME AT ISSUE.  
IN OTHER WORDS--  
>> NO.  
I THOUGHT JUSTICE TORPY DID A  
GOOD JOB INTERVIEWING THIS RULE.

>> YOU ELEVATED HIM.  
>> JUDGE, TORPY, I'M SORRY,  
PRIOR ALWAYS MEANT PRIOR TO  
TRIAL.  
>> THAT IS HOW THE FIFTH  
DISTRIBUTE COURT OF APPEAL  
TERMED THAT.  
>> THAT IS EXHAUSTIVE RULE OF  
FEDERAL RULE OF PROCEDURE.  
EVANS, MEANT PRIOR TO TRIAL.  
IN EVANS, WE SAID PRIOR TO TRIAL  
EXCEPT FOR A POLICE OFFICER, AND  
THEN PRIOR TO INVESTIGATION.  
>> RIGHT.  
AND THAT'S FROM THE FEDERAL  
RULES OF EVIDENCE, WHICH, WE  
WOULD ARGUE IS NOT NECESSARY TO  
SEEK ANY GUIDANCE FROM THERE  
BEING EVANS--  
>> ISN'T THERE FLORIDA SUPREME  
COURT PRECEDENT WE LOOK TO THE  
FEDERAL RULES OF EVIDENCE AFTER  
WHICH FLORIDA RULES ARE MODELED  
TO INTERPRET OUR RULES?  
>> CORRECT.  
IF THERE IS NO PRECEDENT THAT--  
>> ONLY DIFFERENT PRECEDENT WILL  
BE EVANS?  
OKAY.  
>> WE WOULD JUST ASK THAT  
HONORABLE COURT QUASH THE  
DISTRICT OF FIFTH DISTRICT COURT  
OF APPEAL, REVERSE AND REMAND.