Duane Owen v. State of Florida

CHIEF JUSTICE: GOOD MORNING. NEXT CASE ON THE DOCKET IS OWEN VERSUS STATE. IF COUNSEL IS READY, YOU MAY PROCEED.

YES, SIR. THANK YOU.

CHIEF JUSTICE: GOOD MORNING AGAIN.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS GLENN MITCHET FORM -- GLENN MITCHELL. I AM FROM WEST PALM BEACH. I AM COURT APPOINTED TO REPRESENT THE APPELLANT DUANE OWEN BEFORE YOU HERE TODAY. THERE ARE FOUR POINTS THAT HAVE BEEN ENUMERATED IN THE BRIEF. WITH THE COURT'S PERMISSION, I WOULD LIKE TO CONCENTRATE ON POINT ONE OF THE BRIEF AND RELY ON THE BRIEFS AS TO COUNT 2, 3 AND 4, INCLUDING BUT NOT LIMITED TO THE RING/APPRENDI ISSUE, WHICH THIS COURT HAS RULED UPON NUMEROUS TIMES IN THE PAST.

WHY DOESN'T THE LAW CONTROL ON POINT ONE?

THAT IS PRESIZELY THE ISSUE THAT I AM PREPARED TO ADDRESS WITH YOU. WOULD IT BE HELPFUL IF I REVIEWED THE LONG, COMPLICATE INDICATED HISTORY OF THIS -- COMPLICATED HISTORY OF THIS CASE OR WOULD YOU LIKE ME TO GET RIGHT TO IT? BECAUSE THE HISTORY DOES HAVE A ROLE IN THE QUESTION.

MAYBE IF YOU COULD HELP WITH A REVIEW.

YES, SIR. AS YOU KNOW, IT IS A 1984 CASE. HOWEVER, THIS MATTER CAME BEFORE THE SUPREME COURT BACK IN 1997, BASED ON A CASE THAT HAD COME OUT BETWEEN THE ORIGINAL TRIAL AND THE RETRIAL. OBVIOUSLY DAVIS VERSUS UNITED STATES. IN THAT PARTICULAR DECISION, IT WAS ADDRESSED THAT THE LAW, IT HAD BEEN ARGUED THAT THE LAW HAD CHANGED, AND THAT BASED ON THE CHANGE IN THE LAW, THE MATTER SHOULD BE, THE MOTION TO SUPPRESS A CONFESSION, WHICH WAS AN IMPORTANT CRITICAL ISSUE IN THIS CASE, SHOULD HAVE BEEN CONSIDERED IN LIGHT OF DAVIS. WELL, BEFORE THE RETRIAL DAVIS CAME OUT, AND EVENTUALLY THIS CASE CAME BEFORE THE COURT, IN TERMS OF HOW DAVIS ACTUALLY AFFECTS A MOTION TO SUPPRESS THE STATEMENT. TO TRY TO GET TO YOUR POINT, IF WE LOOK AT THE 1997 DECISION, THE 1997 DECISION, ESPECIALLY WHEN WE GET TO THE LAST HEAD NOTE, THE LAST PORTION OF THAT PARTICULAR OPINION, THE COURT INDICATED THAT THE MATTER SHOULD BE REMANDED BACK TO THE TRIAL COURT, TO CONSIDER THE MOTION TO SUPPRESS, WHICH HAD PREVIOUSLY BEEN GRANTED, BUT TO RECONSIDER THE MOTION TO SUPPRESS, IN LIGHT OF THE DAVIS OPINION. NOW, WHAT --

WHAT I AM READING IS THEY REQUEST THE DECISION REMANDED WITH DIRECTION TO SAY GRANT THE PETITION FOR CERT.

CORRECT.

WHICH IS DIRECTION TO SAY THE COURT OF APPEAL TO GRANT THE PETITION FOR CERT, AND IT WAS THE STATE, I BELIEVE, THAT WAS APPEALING.

THE STATE WAS APPEALING AT THAT POINT, AND THE CERTIFIED QUESTION CAME TO THIS COURT, WHICH WAS ANSWERED BY THE COURT, AT THE VERY END, AND THE MATTER DID COME BACK IN 1999, FOR RETRIAL. NOW, THE REASON THE CASE DOES NOT APPLY IN THIS CASE, WOULD BE IN THE 1997 OPINION, THE, THIS COURT HAD INDICATED THAT THE TRIAL COURT NEEDS TO RECONSIDER THE MOTION TO SUPPRESS, WHETHER IT SHOULD BE GRANTED OR DENIED, IN LIGHT OF THE DAVIS DECISION. AND THAT IS ESSENTIALLY WHAT THIS POINT OF APPEAL IS ALL ABOUT, THE CASE CAME BACK FOR RETRIAL. PRIOR TO TRIAL, A BRAND NEW EMOTIONAL EDGING DIFFERENT GROUNDS, ADDITIONAL GROUNDS THAT HAD BEEN RAISED PRIOR TO THE 1997 DECISION, MORE IMPORTANTLY, A MOTION TO SUPPRESS HAD BEEN FILED WHEN THE CASE ORIGINALLY CAME TO COURT BACK IN THE 1980s.

WHICH ISSUE, LET'S JUST GO BACK ON THE ISSUE OF THE STATEMENT, YOU HAVE GOT THE DAVIS ISSUE ABOUT THE EQUIVOCAL RESPONSES, AND YOU KNOW, AGAIN, IT SEEMS TO ME THAT WE HAVE MADE THE DETERMINATION THAT, IN THE 1997 DECISION, THAT THE RESPONSES WERE EQUIVOCAL AND NOT UNEQUIVOCAL, AND, BUT, IS THAT, ARE YOU ARGUING THAT WE DIDN'T SAY THAT, AND THEN I GUESS THERE ARE OTHER ASPECTS AS TO THE VOLUNTARINESS, WHICH APPEARS TO HAVE BEEN RESOLVED IN THE 1990 OPINION, THAT THE STATEMENT WOULD HAVE OTHERWISE BEEN VOLUNTARY.

WELL THAT, IS --

ARE YOU GOING TO BE ARGUING BOTH OF THOSE THINGS?

THAT IS THE INTERESTING POINT. THIS COURT DID SAY, IN ITS OPINION, THAT THE RESPONSE BY OWENS WAS EQUIVOCAL, AND THAT CAUSED THE CONFUSION, BECAUSE WHEN THIS MATTER WENT BACK TO JUDGE COHEN, WHEN THE NEW MOTION WAS FILED, JUDGE COHEN, AND I WOULD LIKE TO POINT TO PAGE 1331-TO-1333 OF THE RECORD, IF WE LOOK AT JUDGE COHEN'S ORDER, HE LOOKED AT YOUR LANGUAGE AND INDICATED I CAN'T TAKE ISSUE WITH THE FLORIDA SUPREME COURT. THE FLORIDA SUPREME COURT HAS ALREADY RULED THAT THIS MATTER EQUIVOCAL, ALTHOUGH THAT PRECISE ISSUE WAS NEVER BEFORE THE COURT. NO TRIAL JUDGE HAD EVER LOOKED AT ALL OF THE FACTS AND CIRCUMSTANCES, AND MADE A RULING THAT THE ANSWERS BY MR. OWEN WERE EITHER EQUIVOCAL OR UNEQUIVOCAL. THE POSITION THAT THE APPELLANT IS TAKING WITH THIS COURT IS THAT ISSUE HAS NEVER BEEN ADDRESSED IN THE TRIAL COURT.

THE EQUIVOCAL, YOU ARE SAYING, WHETHER IT WAS EQUIVOCAL OR UNEQUIVOCAL.

CORRECT.

CORRECT.

NOT THE OTHER QUESTIONS ABOUT VOLUNTARINESS.

THAT WOULD BE PART TWO OF THE ARGUMENT, IN THAT IF WE TAKE A LOOK AT THE OPINION, WITH RESPECT TO THIS ISSUE, OWEN STANDS IN THE SAME POSITION AS ANY OTHER DEFENDANT WHO HAS BEEN CHARGED WITH MURDER BUT WHO HAS NOT YET BEEN TRIED. BASED ON THAT LANGUAGE, THE PUBLIC DEFENDER FILED A NEW MOTION TO SUPPRESS, ADDING ADDITIONAL GROUNDS, WHICH WENT TO THE VOLUNTARINESS, AND IF WE LOOK AT THE --

WHAT -- ARE YOU SAYING ADDITIONAL GROUNDS THAT WEREN'T ARGUED, EVEN BACK IN 1990?

YES, MA'AM.

AND WHAT ARE THOSE ADDITIONAL GROUNDS?

OKAY. LOOKING AT THE 1990 OPINION, IT WOULD BE VERY HELPFUL, IN TERMS OF WHAT WAS

RULED UPON BY THIS COURT. BUT LOOK ING AT THE RECORD, PAGE 570-TO-577, THE ISSUE OF WHETHER OR NOT THE STATEMENT WAS FREE AND VOLUNTARILY GIVEN, THE NEW MOTION WAS BASED ON WHETHER OR NOT PROMISES WERE MADE, WHETHER OR NOT THREATS WERE MADE, AND THAT WAS NOT SPECIFICALLY ADDRESSED IN THE 1990 CASE.

WHAT WAS IT?

IN 1990, ACCORDING TO THE OPINION, THE OLD MOTION WAS BASED ON PSYCHOLOGICAL COERCION. IT WAS BASED ON A MIRANDA VIOLATION, WHICH GETS INTO THAT EQUIVOCAL/UNEQUIVOCAL. IT, ALSO THE BASIS FOR THE STOP, THERE WAS AN ALLEGATION THAT THERE WAS NO WELL-FUNDED SUSPICION OF CRIMINAL ACTIVITY, WHICH LED TO THE STATEMENT BEING BEGIN, SO IN OTHER WORDS BASED ON ON THE BAD STOP, THE CONFESSION SHOULDN'T HAVE BEEN ADMITED, AND ALSO THERE WAS AN ISSUE RAISED IN THE TRANSCRIPT THAT THERE WAS SOME ISSUE REGARDING SELECTIVE RECORDING, WHETHER OR NOT LAW ENFORCEMENT CAN CHOOSE TO TURN ON THE TAPE, TURN OFF THE TAPE. THOSE WERE I SHOULD ENUNCIATEED IN THE -- THOSE WERE ISSUES ENUNCIATED IN THE 1990 OPINION. HOWEVER, WE GET INTO AREAS BASED ON PROMISES AND THREATS.

THE TAPES SHOW IN THE 1990 OPINION, AS FAR AS WHO NEEDS TO LOOK AT THIS, WE HAVE GOT TAPES, RIGHT, VIDEOTAPES IN THIS CASE? THIS COURT IN 1990, DID AN INDEPENDENT REVIEW, AS THEY ARE ABLE TO DO IN A MOTION TO SUPPRESS, BECAUSE THEY HAVE GOT THE SAME TAPE AS THE TRIAL COURT DOES, WHICH SHOWS THAT THE CONFESSION WAS ENTIRELY VOLUNTARY UNDER THE FIFTH AMENDMENT AND NO IMPROPER COERCION WAS EMPLOYED. HOW DO YOU INTERPRET THAT?

BASED ON WHAT THE COURT HAD INDICATED IN THE 1990 OPINION, YES, IT MAY BE INVOLUNTARY, BECAUSE PSYCHOLOGICAL COERCION WAS ALLEGEDLY UTILIZED. HOWEVER, IN THE MOTION THAT WAS FILED IN 1999, THE NEW MOTION, BECAUSE THE DEFENDANT IS STANDING IN A POSITION AS A PERSON WHO IS YET TO BE TRIED, A NEW EMOTIONAL EDGING PROMISES BEING MADE, MORE SPECIFICALLY PROMISES REGARDING, PROMISES REGARDING MENTAL HEALTH HELP WAS PROMISED.

HOW WAS THAT PROMISE MADE? HOW DO YOU ALLEGE THAT, IN THIS RECORD, IT DEMONSTRATES THAT SUCH A PROMISE WAS MADE?

WELL, THAT HAS TO BE ANALYZED BY THE TRIAL JUDGE A MOTION TO SUPPRESS IN AN EVIDENTIARY HEARING WAS HELD. THESE ISSUES WERE PRESENTED TO JUDGE COHEN. HOWEVER, IF WE LOOK AT HIS RULING, HE DID NOT RULE ON THE MERITS. THAT HAS NEVER BEEN --

WHAT WAS THE EVIDENCE THAT WAS ACTUALLY PRODUCEED?

THE EVIDENCE ACTUALLY PRODUCED WOULD BE, AND IT IS CONFLICTING EVIDENCE, AND I SUBMIT THAT THIS IS ONLY SOMETHING THAT A TRIAL COURT, NOT AN APPELLATE COURT, WOULD NEED TO CONSIDER, BUT IT WAS PRODUCED BY WAY OF THREE POLICE OFFICERS WHO TESTIFIED, AND THIS WOULD BE LINCOLN, WOODS AND McCOY, AND BASED ON THEIR TESTIMONY, AND IT IS IN THE RECORD. IT WENT ON IN ITS MOTION TO SUPPRESS FOR QUITE A PERIOD OF TIME, BUT THERE IS DISCUSSIONS ABOUT PROMISES OF MENTAL HEALTH BEING PROMISED IN EXCHANGE FOR A CONFESSION. IT WAS ALSO, THERE WAS INDICATION THAT IS HE COULDN'T BE PUNISHED TWICE. THERE WAS INDICATIONS ABOUT SOME DEAL, IF YOU COULD TALK TO HIS BROTHER. AGAIN, ALL QUESTIONS OF FACT THAT THIS COURT SHOULDN'T BE CONSIDERING, BUT THE TRIAL JUDGE, WHO THIS ISSUE WAS BEFORE, SHOULD HAVE CONSIDERED.

BUT AREN'T THESE ALMOST ON THE ABSTRACT, BECAUSE LIKE WITH REGARD TO THE BROTHER, THERE IS SOME MENTION ABOUT KEEPING YOUR PART OF THE DEAL OR WHATEVER, AND THEN THE BROTHER VISITS, BUT THE QUESTIONING IS SOME GREATER TIME LATER. IT IS NOT ALL PART

OF THIS. THIS IS JUST, THESE ARE LIKE ABSTRACTS AND PULLED OUT OF CONTEXT, TO EVEN GET TO THESE ARGUMENTS, SO DO YOU DISAGREE WITH THAT?

THIS, IT IS NOT AN AGREEMENT OR DISAGREEMENT. THE QUESTION IS, BASED ON THE, THIS TESTIMONY THAT HAS BEEN PRESENTED AT THE HEARING, IT NEEDS TO BE WEIGHED. IT NEEDS TO BE CONSIDERED. MR. OWEN --

MY QUESTION WAS, AND IT IS NOT, IT IS A DISAGREEMENT OR AN AGREEMENT WITH A FACT, DID THESE NOT OCCUR AT A SUBSTANTIAL PERIOD LATER, WHEN THIS INTERROGATION WENT ON, THAT YOU HAVE TO, IT IS NOT "I WILL LET YOUR BROTHER COME SEE YOU IF YOU TELL ME SO-AND-SO", AND THEN THE BROTHER COMES IN AND HE TELLS HIM SO. THIS IS WEEKS LATER. IS THIS NOT CORRECT FACT?

THE INTERROGATION DID TAKE PLACE OVER AN EXTENDED PERIOD OF TIME, ABOUT THREE WEEKS, BASED ON THE TRANSCRIPT AS I HAVE READ IT. THERE ARE OVER 20 HOURS OF TAPED TAPES, THAT APPARENTLY ARE IN THE RECORD THAT CAN BE CONSIDERED. BUT HOW ONE WOULD ACTUALLY VIEW THIS, YES, WE ARE JUST LOOKING AT THIS PARTICULAR ONE FACT AT THIS JUNCTURE, BUT VIEWING THE TOTALITY OF THE CIRCUMSTANCES, WE SUBMIT, AND OUR POINT WOULD BE JUDGE COHEN WAS OBLIGATED TO AT LEAST CONSIDER THIS, AT LEAST WEIGH THIS, NOT ONLY THAT, BUT IT WAS ALSO OBLIGATED BY THIS 1997 OPINION, TO LOOK AT THE CASE, IN LIGHT OF DAVIS, REGARDING WHETHER OR NOT, BASED ON ALL THIS EVIDENCE, THE STATEMENT OF MR. OWEN, WHETHER OR NOT IT WAS EQUIVOCAL OR UNEQUIVOCAL.

AS FAR AS WHETHER HIS STATEMENT WAS EQUIVOCAL OR UNEQUIVOCAL, YOUR ARGUMENT SEEMS TO BE THAT THIS COURT NEVER ACTUALLY MADE A RULING ON THAT. IS THAT WHAT YOU ARE SAYING, IN ITS EARLIER OPINION, THE STATE APPEAL THAT WAS FILED HERE, THAT THIS COURT NEVER ACTUALLY MADE A SPECIFIC FINDING THAT IT WAS UNEQUIVOCAL OR THAT IT WAS EQUIVOCAL?

THAT IS VERY INTARE EGG, AND -- THAT IS VERY INTERESTING, AND I DON'T KNOW REALLY HOW TO ANSWER THAT. THE STATEMENT WAS MADE IN THE OPINION, BECAUSE OWEN'S STATEMENTS WERE UNEQUIVOCAL. THIS COURT SAID THAT. HOWEVER, NO FINDER OF FACT HAD EVER MADE THAT DETERMINATION, BECAUSE DAVIS HADN'T COME OUT AT THAT POINT IN TIME.

WELL, IF THE COURT ISN'T, IF THE COURT ISN'T ACTUALLY MAKING A FINDING THAT THE STATEMENT WAS EQUIVOCAL, HOW DO YOU EVEN GET TO THE FACT THAT IT WAS THEN REMANDED? WOULDN'T, IF IT WAS NOT AN EQUIVOCAL STATEMENT, WOULDN'T THIS COURT HAVE A NECESSITY SAID THAT THE LAW OF THE CASE TOOK CARE OF THIS ISSUE FROM THE PRIOR OPINION?

I WOULD ABSOLUTELY AGREE, IF THERE WAS A FINDER OF FACT WHO CONSIDERED THIS ISSUE AND BASED ON THIS ISSUE BEING BEFORE THIS COURT, THIS COURT WOULD HAVE RULED, AND THIS COURT FOUND IT EQUIVOCAL, THEN, YES, WE WOULD HAVE LAW IN THE CASE.

BUT THIS COURT SAID THAT WITHOUT HAVING THE DETERMINATION OF WHETHER IT WAS EQUIVOCAL OR UNEQUIVOCAL.

YOU HAVE SAID THAT.

WE CANNOT MAKE THAT FINDING IS WHAT YOU ARE SAYING.

CORRECT.

AT THE TIME IN 1997, IT CAME UP ON PETITION FOR CERT FOR A TRIAL COURT'S GRANTING OF A MOTION TO SUPPRESS, CORRECT?

IT CAME, THIS COURT GRANTED OR BASICALLY REVERSED THE ORIGINAL FINDING.

I AM TALKING ABOUT, IN 1997.

YES.

THAT CAME UP FROM A TRIAL COURT'S ORDER, GRANTING A MOTION TO SUPPRESS, CORRECT?

TECHNICALLY YES.

PETITION FOR CERT.

NOT TECHNICALLY. EITHER THE COURT GRANTED OR DIDN'T GRANT IT.

WOULD NOT ALLOW, YES, BASED ON WHAT THE SUPREME COURT HAD FOUND BACK IN 1990, ONCE AGAIN, SUPPRESSED THE STATEMENT AGAIN.

SO IT SUPPRESSED THE STATEMENT. THE STATE APPEALED.

THE DCA.

THE DCA AND THEN FROM THERE CAME UP TO US.

CERTIFIED QUESTION. YES, SIR.

AND WE SAID, IN THAT CASE, OWEN'S RESPONSES WERE EQUIVOCAL, AND THEN WE REMANDED TO THE DCA, NOT TO REMAND FOR A HEARING. WE REMANDED TO THE DCA TO GRANT THE PETITION FOR CERT, WHICH ESSENTIALLY DENIES THE MOTION TO SUPPRESS AND SENDS IT BACK FOR A TRIAL. SO WE DETERMINED, IN 1997, THAT BECAUSE THE STATEMENTS WERE EQUIVOCAL, THOSE STATEMENTS SHOULD NOT BE SUPPRESSED IN HIS -- AND HIS CONFESSION SHOULD NOT BE SUPPRESSED, SO THAT SEEMS TO ME TO BE THE LAW OF THE CASE, AND IN HOW TO HOLD IN YOUR -- AND NOW TO NOLED YOUR FAVOR, WE WOULD HAVE TO DETERMINE THAT LAW OF THE CASE PRINCIPLES DO NOT APPLY OR THERE IS SOME EXCEPTION THAT WOULD APPLY IN THIS CASE.

BASICALLY, LOOKING AT WHAT YOU ARE SAYING IN ISOLATION, IT IS MAKING SENSE. HOWEVER, IF YOU READ THE LATTER PART OF THE PARAGRAPH, TALKING ABOUT TREATING MR. OWEN A AS A PERSON WHO HAS YET TO BE TRIED, JUST AS IT WOULD BE THE CASE IN ANY OTHER DEFENDANT, THE ADMISSIBILITY OF OWN'S -- OF OWEN'S CONFESSION IN HIS NEW TRIAL WILL BE SUBJECT TO THE DAVIS RATIONALE THAT WE ADOPTED IN THIS OPINION.

BUT THAT IS IN RESPONSE TO THE STATE'S ARGUMENT THAT ALL WE SHOULD DO IS REINSTATE HIS PRIOR CONVICTION, BECAUSE OUR 1990 DECISION HAS NOW BEEN RENDERED INCORRECT BY DAVIS VERSUS UNITED STATES, AND IN RESPONSE TO THAT ARGUMENT, WE SAID, NO, WE ARE NOT GOING TO REINSTATE HIS CONVICTION. WE JUST GOING TO SEND IT BACK -- WE ARE JUST GOING TO SEND IT BACK FOR A NEW TRIAL.

OBVIOUSLY IT NEEDS TO BE SOME MEANING TO THE CASE BEING SENT BACK, SUBJECT TO THE DAVIS RATIONALE.

YOU ARE SAYING THAT THE COURT IN ITS DECISION DIDN'T ADOPT THE DAVIS RATIONALE BUT SAID THAT A TRIAL JUDGE WOULD HAVE TO CONSIDER THE ADMISSIBILITY OF THE CONFESSION NOW, UNDER THE COURT'S NEWLY-ADOPTED DAVIS RATIONALE, BEFORE IT COULD BE ADMITTED AT TRIAL.

ABSOLUTELY.

AND THAT IS YOUR POSITION.

THAT IS THE APPELLANT'S POSITION, YES, SIR.

LET ME COME BACK. I AM NOT SURE I UNDERSTAND YOUR POSITION, THOUGH, ABOUT THE TRIAL COURT NOT RULING ON THE VOLUNTARINESS OF THE CONFESSION, UNDER THESE NEW GROUNDS OR WHATEVER. IS THAT, IS IT YOUR POSITION THAT THE TRIAL JUDGE HERE, IN DENYING THE MOTION TO SUPPRESS, JUST SAID, WELL, SINCE THE SUPREME COURT, YOU KNOW, RULED IN 1990, THAT IT WAS VOLUNTARY, AND SINCE THE SUPREME COURT ADOPTED THE DAVIS RATIONALE IN '97, THAT I DON'T HAVE ANYTHING TO DO HERE, AND I AM JUST DENYING THE MOTION TO SUPPRESS, BASED ON THOSE TWO FACTORS? IS THAT BECAUSE ARE SAY SOMETHING.

WELL, NOT IN THOSE WORDS BUT PRETTY CLOSE TO IT.

I HAVE DIFFICULTY WITH THAT, BECAUSE I HAVE READ THE EXERTS OF THE TRANSCRIPT WHERE THE JUDGE, AT THE END OF THE MOTION TO SUPPRESS, GOES INTO THE VOLUNTARINESS AND TALKS ABOUT IT BEING MILES AN HOUR ANDIZED 8,000 TIMES AND THAT HE HAS CONSIDERED THE OTHER ASPECTS OF IT, AND THAT HE FINDS THE, IT TO BE VOLUNTARY. NOW, I AM OBVIOUSLY THINK EXAGGERATING, TOO, AND I DON'T MEAN TO DO THAT AND I APOLOGIZE FOR THAT, BUT I DON'T READ THE TRIAL JUDGE AS JUST SORT OF RUBBER STAMPING THIS, BASED ON THE 1990, I REALIZE THAT EVERYBODY HAS HAD EXTENSIVE DISCUSSIONS AS WE ARE HAVING EXTENSIVE DISCUSSIONS NOW, BUT I READ THE TRIAL JUDGE AS CONSIDERING ALL OF THE EVIDENCE THAT WAS THERE AND RULING AND NEW, THAT HE FINDS THIS TO BE VOLUNTARY. AM I WRONG ABOUT WHAT HE SAID?

WELL, I WOULD ASK THE COURT AGAIN, TO LOOK AT PAGE 1331-TO-1333 OF THE RECORD.

I AM LOOKING FROM 1329-TO-1330, AND THERE IS TWO SHORT PARAGRAPHS THAT I AM READING FROM THAT I BELIEVE SAY THIS. I DON'T WANT TO READ THEM ALL OUT AGAIN, BUT YOU KNOW, THE VIDEOS THAT I VIEWED, THE 22 HOURS AND THE TESTIMONY IN SUPPORT OF THAT SHOWS EXTENSIVE MIRANDAIZATION OF THE DEFENDANT. THE COURT HAS LISTENED TO AND I THINK THE RECORD IS CLEAR, TO ALL OF THE VIDEOTAPED STATEMENTS, WHICH RAN 21 OR 22 HOURS. THE COURT HAS ALSO TAKEN INTO CONSIDERATION NOW, THOSE MATTERS THAT ARE NOT SPECIFICALLY ON THE TAPES, THEMSELVES, THAT WERE TESTIFIED AND ARGUED ABOUT, AND LOOKING AT THE CASE LAW AND POLICE TECHNIQUES AND OBTAINING CONFESSIONS OR STATEMENTS. THIS COURT WILL FIND THAT THE STATEMENTS, BY THE DEFENDANT, WERE, IN FACT, VOLUNTARILY GIVEN, AND PROPER PROCEDURALLY, MIRANDA RIGHTS WERE BEGIN, AND I THINK THE TOTALITY OF THE CIRCUMSTANCES ALSO SUPPORTS THAT. IT SOUNDS AWFUL MUCH LIKE WHAT TRIAL JUDGES DO ROUTINELY.

YES, SIR.

WHEN THEY ARE CONSIDERING MOTIONS TO SUPPRESS, AND HE HAS BEEN PRETTY SPECIFIC.

JUDGE COHEN SEEMED TO GO BACK AND FORTH ON THIS ISSUE, AS TO IS IT LAW OF THE CASE, IT NOT LAW OF THE CASE, BUT IF WE GO ON TO 1331 AND 1332, THERE IS, ESPECIALLY IF WE REALLY WANT TO FOCUS INTO THE EQUIVOCAL/UNEQUIVOCAL ISSUE, THERE IS A NOTEITION THAT HE INDICATED THE SUPREME COURT RULED. I CAN'T TAKE ISSUE WITH THE SUPREME COURT. I THINK THEY RULED. AND THAT GETS RIGHT INTO THE EQUIVOCAL/UNEQUIVOCAL ISSUE, WHERE, BASED ON THIS STATEMENT, WHERE, BECAUSE OWEN'S REQUESTS WERE EQUIVOCAL, THAT GETS THE 1990 --

NOW YOU ARE SHIFTING, LET'S JUST STAY ON THE VOLUNTARINESS. YOU REPRESENTED, YOU SAID THAT THE JUDGE WOULDN'T LET YOU PRESENT ANY EVIDENCE OR THE TRIAL COUNSEL, AND

DIDN'T FEEL LIKE IT WAS TO RULE ON THE VOLUNTARINESS. THERE WAS A HEARING, WASN'T THERE, WAS THERE NOT A HEARING ON AND TESTIMONY PRESENTED?

LONG HEARING AND EVIDENCE WAS PRESENTED. THE QUESTION IS GOING TO BE WHETHER THIS WHOLE MOTION WOULD BE BARRED BY LAW OF THE CASE.

THE TRIAL JUDGE, I DON'T SEE ANYWHERE, WHERE THE TRIAL JUDGE ENTERED AN ORDER SAYING THIS IS CONTROLLED BY THE 1990 DECISION OF THE FLORIDA SUPREME COURT AS LAWFUL THE CASE, AND IT IS CONTROLLED BY THE 1997, AND I AM NOT CONSIDERING ANYTHING ELSE THAT THAT IS IT. IS THAT WHAT YOU ARE SAYING IS IN HIS WRITTEN ORDER?

THOSE EXACT WORDS WERE NOT, BUT ON 1331-TO-1333 --

I REALIZE THAT YOU AGREE THAT, ON THE RECORD HERE, ON RULING ON THIS, HE APPEARS TO HAVE CONSIDERED ALL OF THE EVIDENCE THAT WAS PRESENTED TO HIM ON BOTH OF THESE PRONGS.

APPEARS, TO YES. HOWEVER, WHEN WE GET TO THE BOTTOM LIKE RIGHT BEFORE HE RULES -- THE BOTTOM LINE RIGHT BEFORE HE RULES, HE INDICATES I CANNOT TAKE EXCEPTION WITH THE SUPREME COURT. THE SUPREME COURT CLEARLY SAID IT IS EQUIVOCAL. OUR POSITION --

NO TRIAL JUDGE IN HIS RIGHT MIND IS JUST GOING TO IGNORE AN ANALYSIS BY THE STATE'S HIGHEST COURT. AND THAT CERTAINLY, HOPEFULLY, SHOULD SHED IN SIGHT, YOU KNOW, VIRTUALLY ALL OF OUR DECISIONS, YOU KNOW, ARE BASED ON FACTUAL CIRCUMSTANCES THAT WE CONSIDER. BUT DID, THAT IS THE ISSUE THAT YOU WOULD HAVE US LOOK AT FIRST, THOUGH, IS WHETHER THE TRIAL COURT, INSTEAD OF GIVING THIS A FRESH LOOK, JUST SEND THE RULINGS OF THIS COURT BEFOREHAND AND MECHANICALLY, WITHOUT DOING A FRESH CONSIDERATION OF CIRCUMSTANCES, THAT IS WHAT YOU WOULD HAVE US CONSIDER FIRST.

YES, SIR.

WE ARE INTO YOUR REBUTTAL TIME, AND OF COURSE, I WANT YOU TO USE IT AS YOU WANT TO, BUT IT MIGHT BE A GOOD TIME TO LISTEN.

YES, SIR.

THANK YOU VERY MUCH. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. CELIA TOREENS YO, ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE OF FLORIDA.

WAS I READING THAT CORRECTLY?

IN TERMS OF THE VOLUNTARINESS, ABSOLUTELY, ON PAGES 1329-TO-1330, THE TRIAL COURT DID ALLOW THE DEFENSE TO TRY AND OVERCOME THE LAW OF THE CASE DOCTRINE, AND BECAUSE THE STATE'S ARGUMENT IS JUDGE, WE DON'T NEED ANOTHER SUPPRESSION HEARING THIS. IS LAWFUL THE CASE, AND THE COURT SAID, WELL, I WILL GIVE YOU AN OPPORTUNITY TO DO THAT, IF YOU ARE GOING TO PRESENT DIFFERENT FACTS, DIFFERENT ARGUMENTS.

AND THE TRIAL JUDGE CONSIDERED THOSE?

CONSIDERED THE ARGUMENTS, YES, SIR, HE DID. I MEAN, THERE WAS A FULL-BLOWN MOTION TO SUPPRESS HEARING, AND WHAT THE EXCERPTS THAT YOU READ WENT TO THE VOLUNTARINESS OF THE CONFESSION, AND, BUT ACTUALLY, IN FOOTNOTE 3 OF MY BRIEF, I TRIED TO LAY OUT FOR THE COURT THAT ACTUALLY, THE ARGUMENTS AT THE SECOND MOTION TO SUPPRESS HEARING,

WERE ALMOST IDENTICAL TO WHAT WAS RAISED AT THE FIRST MOTION TO SUPPRESS HEARING.

BUT YOU REALLY HAVE, AGAIN, IF YOU HAVE GOT A SITUATION WHERE THE DEFENDANT WAS ALLOWED TO PUT ON TESTIMONY, BECAUSE WE HAVE HAD SOME CASES RECENTLY WHERE IT COMES BACK AND THE ISSUE IS SHOULD THE MOTION TO SUPPRESS BE REVISITED, I THINK IT WAS THE PARKER CASE.

YES.

IS ONE, AND SO IT IS, AND SO JUDGE COHEN DID A GOOD THING FOR THE STATE AND FOR THIS COURT, NOT THAT IT IS GOOD FOR THE DEVELOPED, IN LETTING THIS BE PUT ON, AND WE HAVE GOT THE RECORD HERE AND A RULING ON VOLUNTARINESS, EVEN THOUGH IT DOES APPEAR, I AGREE WITH YOU, WE HAVE ALREADY RULED ON VOLUNTARINESS.

CORRECT, AND AGAIN IT MAY BE SHORT SIGHTED ON THE PART OF THE STATE BUT WE HAD ASKED THE COURT AND SAID, NO, THIS IS LAW OF THE CASE, BUT JUDGE COHEN SAID, WELL, NO, I AM GOING TO LET YOU IF YOU CAN PRESENT SOMETHING NEW AND DIFFERENT, GO AHEAD, SO HE HAD HIS HEARING, AND THE COURT ACTUALLY RULED ON IT RATHER THAN SAYING YOU KNOW WHAT? THIS ISN'T ANY DIFFERENT. THE COURT STILL, AGAIN, MADE THE ASSESSMENT THAT THE CONFESSION WAS VOLUNTARY.

WHAT ABOUT THE EQUIVOCINDICATION ISSUE? IT APPEARS TO ME THE COURT WAS MAKING A DECISION THAT IT WAS EQUIVOCAL, AND THEREFORE IT COULD, CONFESSION ON THAT BASIS COULD COME IN. AND HOW DID THAT COME DOWN AT THE JUDGE COHEN, AT THE TRIAL COURT LEVEL, AS FAR AS WHETHER HE FELT BOUND BY OUR DETERMINE NATION THAT IT WAS ONLY EQUIVOCAL OR AT LEAST EQUIVOCAL, DEPENDING ON OPINION.

OKAY. WELL, ACTUALLY THE HISTORY OF THAT ISSUE, YOU START WITH THE FIRST DIRECT APPEAL OPINION.

WELL, WITHOUT GOING INTO THE HISTORY FOR A MINUTE, DID JUDGE COHEN CONSIDER WHAT WAS RECITED IN A RECORD THERE OR THE VIDEOTAPE STATEMENTS, AND THEN DID HE CONCLUDE THAT THEY WERE EQUIVOCAL, YOU KNOW, BASED ON HIS EXAMINATION OF THOSE?

YES, HE DID, AND I UNDERSTAND WHAT COUNSEL IS SAYING THOUGH, BECAUSE WHAT THE COURT DID WAS HE SAID, OKAY, I HAVE CONSIDERED IT. HOWEVER, WHAT HE DID WAS HE READ FROM THIS COURT'S 1997 OPINION. THIS COURT FOUND IT TO BE EQUIVOCAL. BUT IF YOU GO BACK TO THE INITIAL MOTION TO SUPPRESS, THE DEFENSE ARGUED THAT "I DON'T WANT TO TALK ABOUT IT" WAS UNEQUIVOCAL REQUEST FOR REMAIN SILENT, AND THE DIRECT APPEAL OPINION FROM 1990, ADD DREZ DRESSED THAT, AND THIS -- ADDRESSED THAT, AND THIS COURT THERE SAID, HOWEVER, WHEN THE POLICE INQUIRED ABOUT A RELATIVELY INSIGNIFICANT DETAIL, THE RESPONSE WAS, I WOULD RATHER NOT TALK ABOUT IT. INSTEAD OF EXPLORING WHETHER THIS WAS THE INVOCATION OF THE RIGHT TO REMAIN SILENT OR MERELY A DESIRE NOT TO TALK ABOUT THAT PARTICULAR DETAIL, THE POLICE URGED HIM TO CLEAR UP MATTERS, AND THE COURT AGAIN SAYS THAT A LITTLE LATER ON, WHEN HE AGAIN SAID I DON'T WANT TO TALK ABOUT IT, SO THIS COURT'S ORIGINAL OPINION BACK IN 190, FOUND THAT THOSE -- IN 1990, FOUND THAT THOSE STATEMENTS WERE EQUIVOCAL.

IN 1997, IF WE HAD FOUND THAT CLEARLY, HAD HE INVOKED THE RIGHTS ON HIS OWN --

THE STATE WOULD HAVE LOST. EXACTLY. AS A MATTER OF FACT, IN FOOTNOTE --

I HATE TO THINK WE WOULD HAVE SENT IT BACK FOR A NEW TRIAL, I MEAN A TRIAL WHERE THE CONFESSION COULD COME IN, IF WE THOUGHT THAT THAT RESPONSE WAS EQUIVOCAL.

WAS THERE ANY ATTEMPT TO OFFER ANYTHING NEW ABOUT THE EQUIVOCAL/UNEQUIVOCAL DEBATE?

YES. THIS TIME AROUND? YES. THE DEFENDANT TESTIFIED AT THE MOTION TO SUPPRESS HEARING THIS TIME AROUND.

DID THE TRIAL JUDGE CONSIDER THAT?

YES, SIR, AND HE SAID, WELL, WHAT I MEANT WAS I DIDN'T WANT TO TALK ABOUT THE HOMICIDE ANYMORE. HE DID SAY THAT, AND THE TRIAL JUDGE CONSIDERED THAT, ALONG WITH THE TESTIMONY OF THE OTHER TWO OFFICERS, AND THEIR INTERPRETATION WAS, WELL, HE DIDN'T WANT TO TALK TO US ABOUT WHERE HE PUT THE BIKE OR WHY HE CHOSE THIS HOUSE, BECAUSE THOSE RESPONSES WERE TO THOSE PARTICULAR QUESTIONS.

THE TRIAL COURT DIDN'T SAY I AM NOT GOING TO CONSIDER ANY OF THAT --

NO, SIR.

-- BECAUSE THE SUPREME COURT HAS ALREADY RULED OR SOMETHING.

NO, SIR. AS A MATTER OF FACT, WHAT HE SAID WAS I AM GOING TO RELY 'WHAT THE SUPREME COURT DID, BECAUSE YOU HAVEN'T GIVEN ME ANYTHING DIFFERENT OR WHY I SHOULDN'T, AND THEN ACTUALLY IN FOOTNOTE EIGHT OF THIS COURT'S 1997 OPINION, IT SAYS WE REJECT OWEN'S ARGUMENT THAT, BECAUSE WE TERMED HIS COMMENTS TO BE AT LEAST EQUIVOCAL, AND REFERRING TO THE 1990 OPINION, IN OUR EARLIER OPINION, WE SHOULD NOW CONSTRUE HIS COMMENTS AS UNEQUIVOCAL. SO NOW, IN TWO PRIOR OPINIONS, THIS COURT HAS ALREADY SAID THOSE COMMENTS, THAT IS WHAT, THAT WAS THE WHOLE CONFUSION ABOUT, WHY DAVIS ENDED UP APPLYING, BECAUSE THE COMMENTS WERE EQUIVOCAL F THEY WEREN'T, WE NEVER WOULD HAVE GOTTEN TO THIS COURT BACK IN 1997.

OKAY. BUT NEVERTHELESS THE TRIAL COURT DID CONSIDER WHATEVER NEW WAS OFFERED BEFORE RULING ON IT.

YES, HE DID. HE APPRECIATED THE LAW OF THE CASE BUT HE ALLOWED HIM THE OPPORTUNITY TO OVERCOME IT WITH A NEW HEARING, AND HE CONSIDERED IT.

HE CONSIDERED ALL OF IT.

YES, SIR, HE DID.

I JUST WANT TO GO BACK ABOUT WHETHER EQUIVOCAL OR UNEQUIVOCAL. YOU KNOW, IF YOU READ JUDGE KOGAN'S DISSENT IN 1997, PART OF THE CONCERN WAS YOU ARE GOING TO BE INTERPRETING WORDS THAT MAYBE, YOU KNOW, WE WEREN'T THERE, AND I GUESS MY QUESTION IS, I HAVE ALMEIDA IN MIND, TOO, DON'T WE HAVE TO HAVE A FAIRLY OBJECTIVE STANDARD TO DETERMINING WHETHER A PARTICULAR COMMENT IS EQUIVOCAL OR UNEQUIVOCAL, BECAUSE OTHERWISE IF WE GET TO SAY, WELL, THE DEFENDANT SAYS THIS BUT HE WILL TESTIFY, WELL ACTION I MEANT THIS, OR THE POLICE SAY, WELL, HE SAID THAT BUT I THOUGHT HE MEANT THAT, WE ARE GOING TO REALLY HAVE SOMETHING THAT IS PRETTY DIFFICULT TO REVIEW, SO --

RIGHT.

AREN'T WE REALLY SUPPOSED TO BE LOOKING AT WHAT THE WORDS WERE, AS REFLECTED IN THE TRANSCRIPT, AS WELL AS THE VIDEO, TO SEE THAT HE DID NOT INVOKE, CLEARLY INVOKE HIS RIGHT TO COUNSEL, AND THAT IS HOW WE HAVE TO, THAT IS THE POST-DAVIS --

CORRECT.

-- TEACHING.

CORRECT. AND I THINK, FROM THE VERY FIRST OPINION YEARS BEFORE DAVIS EVEN CAME OUT, THIS COURT GRAPPLED WITH WHETHER IT WAS EQUIVOCAL OR UNEQUIVOCAL AND FOUND THAT IT WAS EQUIVOCAL. YES, SIR.

WE HAVE GOT A FULL RECORD HERE. THERE ISN'T ANYTHING ELSE OUT THERE THAT WASN'T ALLOWED TO BE BROUGHT IN BY THE TRIAL COURT OR, IS THAT CORRECT?

THAT'S CORRECT.

SO WE HAVE GOT EVERYTHING THAT WE NEED TO LOOK AT IT AGAIN, IS THAT CORRECT?

YES. THAT IS THE STATE'S POSITION. WE WOULD ASK THE COURT TO AFFIRM BOTH THE CONVICTION AND THE SENTENCE THEN. THANK YOU.

ALL RIGHT. ALL RIGHT. MR. MITCHELL.

JUST BRIEFLY.

WOULD YOU AGREE THAT, AS SORT OF A PRELIMINARY MATTER, THAT WE DO HAVE EVERYTHING IN THIS RECORD, THAT IS THAT THERE WASN'T ANYTHING THAT THE TRIAL JUDGE DIDN'T ALLOW TO BE PRESENTED, OR WOULD YOU NOT AGREE? TELL ME ABOUT THAT.

TO THE BEST OF MY KNOWLEDGE, YOU WOULD HAVE EVERYTHING. AGAIN, I HAVE BEEN APPOINTED SEVERAL MONTHS AGO. I DID NOT DO THE INITIAL BRIEF. IF SOMETHING IS MISSING, I WOULD DEFER --

BUT ON YOUR, AT LEAST EXAMINATION, IT APPEARS THE TRIAL JUDGE DID ALLOW ANYTHING THAT THE DEFENSE WANTED TO PRESENT, TO BE PRESENTED.

YES, SIR.

YOU HAVE, YOU HAVE SOME CONCERN AND ASK US TO LOOK TO SEE WHETHER THE TRIAL JUDGE JUST RULED NARROWLY ON THE BASIS OF BEING CONTROLLED YOU KNOW, BY THE OUTCOME OF THE TWO PRIOR CASES IN THIS COURT, IN TERMS OF CONSIDERING THAT, BUT YOU WOULD GENERALLY AGREE THAT IT LOOKS LIKE EVERYTHING THE DEFENSE ASKS FOR TO BE CONSIDERED IS IN THE RECORD.

IT WAS A FULL, NEW EVIDENTIARY HEARING, WHICH WAS DIFFERENT THAN THE FIRST TIME, AS COUNSHE WILL POINTED OUT. -- AS COUNSEL POINTED OUT. MR. OWEN DID TESTIFY AS TO HIS INTERPRETATION, HIS VERSION OF WHAT OCCURRED, A AND THAT IS OUR WHOLE POSITION. THAT NEED BE CONSIDERED BY JUDGE COHEN. THAT IS THE FIRST TIME THIS ISSUE WOULD HAVE BEEN CONSIDERED. NOW, DID HE CONSIDER THIS AND WEIGH THAT, OR DID HE FEEL BOUND BY THIS COURT'S NOTATION?

THAT IS WHAT YOU WANT US TO FOCUS ON.

CORRECT, AND I SUBMIT THAT THERE IS NO CLEAR EVIDENCE THAT THE JUDGE, NOT EVIDENCE BUT IF WE READ THE RULING, IT DOESN'T APPEAR CLEAR THAT HE MADE THAT FINDING. THE CASE IS TOO IMPORTANT. IT IS A DEATH CASE, AND I WOULD ASK THE CASE TO BE REMANDED BACK TO JUDGE COHEN TO MAKE THIS FINDING. THANK YOU VERY MUCH.

CHIEF JUSTICE: OKAY. THANK YOU. THANK YOU BOTH, VERY MUCH.