Oscar Ray Bolin v. State of Florida

NEXT CASE ON THE COURT'S CALENDAR IS BOLIN VERSUS STATE. MR. CONNOR.

MAY IT PLEASE THE COURT. I AM DOUG CONNOR, APPEARING ON BEHALF THE APPELLANT IN THIS CASE, OSCAR RAY BOLIN. THIS IS APPEAL FROM A RETRIAL AND CONVICTION OF FIRST-DEGREE MURDER AND A SENTENCE OF DEATH. BASIC FACTS, HERE, IS THE ASSISTANT MANAGER OF A CHURCH CHICKEN OUTLET WAS APPARENTLY FOLLOWED FROM HER WORKPLACE, WHEN SHE GOT OFF IN THE EARLY MORNING HOURS. HER CAR WAS FOUND ABANDONED AND HER BODY WAS FOUND STABBED TO DEATH, SEVERAL MILES FROM THAT POINT, IN A WOODED AREA. THIS TOOK PLACE BACK IN JANUARY 1986. A POLICE INVESTIGATION WAS STALLED FOR MANY YEARS. IT WAS NOT UNTIL JULY 1990, WHEN BOLIN'S EX-WIFE, CHERYL JO COLBY, TALKED TO DETECTIVES, AND SHE BASICALLY TOLD THEM THINGS, BASICALLY WHAT SHE SAID, ACCORDING TO HER, BOLIN HAD TOLD HER ABOUT THIS INCIDENT, AND THINGS THAT SHE OBSERVED, HERSELF, WHICH WERE PART OF THE INCIDENT. BASED ON THAT EVIDENCE, BOLIN WAS TRIED AND CONVICTED. NOW, THE IMPORTANT THING IN THAT TRIAL WAS PRETRIAL, DEFENSE TOOK THE DEPOSITION OF CHERYL JO COLBY, AND THE TRIAL JUDGE RULED THAT TAKING THE DEPOSITION MEANT THAT BOLIN HAD WAIVED HIS MARITAL COMMUNICATIONS PRIVILEGE. ON APPEAL, THIS COURT REVERSED THAT, BECAUSE OF THAT REASON, AND WAS REMANDED TO THE TRIAL COURT FOR A NEW TRIAL. NOW, SUBSEQUENTLYLY, IN ANOTHER HILLSBOROUGH COUNTY CASE, THIS COURT ORIGINALLY MADE THE SAME DISPOSITION. JUST SAID, YOU KNOW, RETRIAL. THE STATE ARGUED, ON REHEARING, THAT THERE MIGHT HAVE BEEN A WAIVER OF THE SPOUSAL COMMUNICATIONS PRIVILEGE, CONTAINED IN A LETTER THAT WAS ADDRESSED TO CAPTAIN TERRY AND WAS CREASED AT THE TIME OF -- SEIZED AT THE TIME OF BOLIN'S ATTEMPTED SUICIDE, JUST BEFORE TIME TRIAL WAS TO BEGIN. THIS COURT DID NOT HAVE THAT LETTER IN THE RECORD OR ANYTHING LIKE THAT, BUT IT SAID THIS COULD HAVE -- BE A WAIVER. IT WOULD BE DETERMINED BY THE TRIAL COURT BELOW, AND THE STATE COULD OPERATE, COULD BRING THAT UP TO THE TRIAL COURT, ON RETRIAL. NOW, I WANT TO CUT BACK TO THE TRIAL COURT. THE FIRST THING THAT HAPPENED IS THAT THE DEFENDANT MOVED TO SUPPRESS THE LETTER IN ITS ENTIRETY, AS ILLEGALLY SEIZED. THE TRIAL JUDGE AGREED WITH THAT CONTENTION AND SAID THAT IT WAS SEIZED WITHOUT PROBABLE CAUSE, FROM HIS JAIL CELL, AND IT WAS, ALSO, IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL. THEN THE STATE APPEALED THAT TO THE SECOND DISTRICT. THE SECOND DISTRICT REVERSED AND THEY SAID THAT THE LETTER WAS IN PLAIN VIEW AND IT WAS EVIDENCE OF THE ATTEMPTED SUICIDE, AND FOR THAT REASON THEY THOUGHT THAT IT WAS LEGITIMATE. FINALLY, THE TRIAL COURT EXAMINED THE LETTER AND DECIDED THAT THERE WAS A WAIVER OF THE MARITAL COMMUNICATIONS PRIVILEGE. SO IN ESSENCE WHAT HAPPENED AT THE RETRIAL WAS CHERYL JO COLBY'S TESTIMONY WAS REREAD TO THE JURY IN ITS ENTIRETY, INCLUDING ALL OF THE STATEMENTS WHICH BOLIN ALLEGEDLY MADE TO HER DURING THE MARRIAGE, ABOUT THIS CRIME. FIRST I WOULD LIKE TO GO ON THE MOTION TO SUPPRESS ISSUE, WHICH WAS WHERE THE TRIAL COURT AGREED TO SUPPRESS THE LETTER BUT IT WAS REVERSED BY THE SECOND DISTRICT. NOW, THE IMPORTANT THING, HERE, IS THAT THE TRIAL JUDGE'S RULING IS THE RULING THAT IS ENTITLED TO PRESUMPTION OF CORRECTNESS, NOT THE SECOND DISTRICT'S OPINION. THAT IS BECAUSE THE TRIAL JUDGE ACTUALLY HEARD THE WITNESSES RESOLVE TO THE CONTRADICTORY TESTIMONY, AND SO ITS DETERMINATION THAT THE LETTER WAS SEIZED, WITHOUT PROBABLE CAUSE, THAT IT WAS EVIDENCE OF THE CRIME, SHOULD BE UPHELD, BASED ON THOSE FACTS THAT HE WAS THE FINDER OF FACT.

WELL, WERE THERE ANY SERIOUS FACTUAL DISPUTES ABOUT THE CIRCUMSTANCES OF SEIZING THE LETTER? I THOUGHT THIS WAS DURING AN AMENDMENTED SUICIDE OR WHATEVER, AND THEN THEY WENT IN HIS CELL? IN OTHER WORDS WHAT PARTICULAR DISPUTES, IN THE FACTS, DO YOU CLAIM THE TRIAL COURT RESOLVED, AND THAT WE SHOULD, THEREFORE, INDULGE THAT RESOLUTION?

WELL, SIMPLY THE LETTER WAS INSIDE AN ENVELOPE THAT WAS STAMPED, AND, YOU KNOW, IT WAS CONTRADICTORY AS TO WHETHER IT WAS SEALED OR WHETHER IT WAS NOT SEALED.

IN OTHER WORDS, THERE WAS SOME TESTIMONY WAS THAT IT WAS SEALED AND CLOSED, AND THERE WAS OTHER TESTIMONY --

THAT IT WASN'T.

THAT IT WAS OPEN. WHAT OTHER CONFLICTS?

WELL, THE MAIN THING IS THAT, WHATEVER FACTUAL DETERMINATIONS WERE MADE BY THE TRIAL JUDGE SHOULD BE THE DETERMINATIONS, RATHER THAN ANY DETERMINATIONS THAT WERE IN THE SECOND DISTRICT OPINION.

WELL, THAT IS AN IMPORTANT THING, WHEN THE FACTS ARE HOTLY IN DISPUTE ABOUT THE -- BUT IT SNOT USUALLY AN IMPORTANT THING, WHEN THE -- IT IS NOT USUALLY AN IMPORTANT THING, WHEN THE BASIC FACTS, THE CIRCUMSTANCES OR SOMETHING, ARE NOT REALLY -- JUST LEGAL CONCLUSION THAT IS FLOW FROM THEM THAT MAY BE DISPUTED, AND I THOUGHT, REALLY, IT WAS THE LEGAL CONCLUSIONS THAT YOU WERE FOCUSING ON, MORE THAN IT WAS THE DISPUTES AND THE FACTS, THAT ONE WITNESS SAID THE LETTER WAS THERE AND ANOTHER WITNESS SAID, NO, IT WAS IN THE MAILBOX OUTSIDE OR SOMETHING.

WELL, YOU KNOW --

THERE WEREN'T ANY REAL -- I MEAN WERE THE UNDERLYING FACTS IN HOT DISPUTE HERE?

I WILL SAY THAT, MY ARGUMENT IS BASICALLY MADE ON THE LEGAL CONCLUSIONS. BUT I WANT THE BENEFIT OF THE FACTS.

WHEN WE DECLINED JURISDICTION, DIDN'T THAT BECOME THE LAW OF THE CASE, THEN, AND THAT IS THE END OF IT? HOW IS THAT BACK UP HERE, NOW, BEFORE US?

BASICALLY THE ONLY WAY THAT I WAS ABLE TO TRY TO GET JURISDICTION AT THAT TIME WAS IT WAS ON CONFLICT, CONFLICT WITH OTHER SEARCH AND SEIZURE CASES, DECIDED BY THIS COURT AND OTHER FLORIDA COURTS, AND --

BUT THE DISTRICT COURT RULED ON IT AND RULED AGAINST YOU.

CORRECT.

AND YOU ATTEMPTED TO BRING IT UP HERE. WE DECLINED TO TAKE JURISDICTION. SO IT SEEMS TO ME THAT WAS THE END OF THAT.

WELL, MY FEELING WAS THE REASON THAT THE COURT DECLINED TO TAKE THE EXERCISED JURISDICTION IS BECAUSE IT DIDN'T FIND ANY CONFLICT. IT DIDN'T FIND JURISDICTION IN THE CONFLICT, AND IT WOULD NOT HAVE JURISDICTION TO HEAR THE CASE AT THAT TIME. YOU KNOW, ABSENT A CONFLICT BETWEEN CASES.

WHAT KEPT IT FROM BECOMING THE LAW OF THE CASE THEN?

WELL, BASICALLY WHAT I AM RELYING UPON IS THIS COURT'S DECISION AND PRECEDENT, WHICH IS, REALLY, SIMILAR CIRCUMSTANCES, WHERE THE CASE FIRST WENT TO THE FOURTH DISTRICT COURT OF APPEAL, AND ON A SUPPRESSION ISSUE, AND THEN QUESTIONED, AGAIN, WHEN HE WAS RECONVICTED OR, I GUESS, WAS AN ORIGINAL CONVICTION, THEN, AND SENTENCE OF DEATH. HE RERAISED THE SUPPRESSION ISSUE, ON HIS APPEAL TO THIS COURT, FROM THE DEATH SENTENCE, AND THIS COURT SAID, IN A CAPITAL CASE, WE REVIEW EVERYTHING, AND THAT IS THE MANDATE OF THE STATUTE, AND THAT MEANS THAT WE REVIEW THE SUPPRESSION ISSUE, AS WELL. SO IT IS ALL PART OF THE RECORD, AND ALL OF THE RECORD IS REVIEWED. AND THAT IS WHY WE BRING THE SUPPRESSION ISSUE FOR THIS COURT TO DECIDE, HEAR AND DECIDE FOR THE FIRST TIME.

YOU HAVE GOT A VERY LITTLE AMOUNT OF TIME, AND YOU HAVE GOT A NUMBER OF ISSUES AND REALLY HAVEN'T GOT TO THEM.

I REALIZE. OKAY. FIRST I JUST WANT TO ATTACK THE SECOND DISTRICT'S CONCLUSIONS, ONE, THAT THE LETTER WAS IN PLAIN VIEW. IT -- IN ORDER FOR THE PLAIN VIEW EXCEPTION TO THE FOURTH AMENDMENT TO BE APPLICABLE, IT HAS TO BE EVIDENCE OF THE CRIME. AND THERE WAS NO EVIDENCE THAT IT WAS EVIDENCE OF THE CRIME. NOW, IF -- I CONCEDE THAT, IF THE LETTER WAS OPEN THERE, IF IT WAS JUST LYING, NOT IN AN ENVELOPE, THAT CAPTAIN TERRY WAS LEGITIMATELY IN THE JAIL CELL, HE COULD HAVE LOOKED AT IT AND COULD HAVE READ IT, BUT IT WAS INSIDE AN ENVELOPE. IT WAS ADDRESSED TO HIM. THERE WAS A STAMP ON IT. CLEARLY BOLIN WAS WORKING ON THE LETTER THAT WOULD HAVE, MAYBE, EVENTUALLY BEEN MAILED TO HIM, BUT IT WASN'T AT THAT TIME, SO IT WAS INAPPROPRIATE TO USE PLAIN-VIEW EXCEPTION.

LET'S ASSUME THAT IT WAS PROPERLY BEFORE THE TRIAL COURT AND SHOULDN'T HAVE BEEN SUPPRESSED. WHAT IS OUR STANDARD OF REVIEW ON WHETHER -- ON THE TRIAL COURT'S FINDING THAT THE ACTUAL LETTER CONSTITUTED THE WAIVER OF THE SPOUSAL PRIVILEGE. IT IS A FACTUAL FINDING, BASED JUST ON THIS LETTER. HOW DO WE, FIRST OF ALL, WHAT IS THE STANDARD FOR WHETHER THERE IS A WAIVER, AND WHAT IS OUR STANDARD OF REVIEW IN LOOKING AT THAT DETERMINATION BY THE TRIAL COURT?

WELL, IF I WOULD -- COULD ADDRESS THE STANDARD OF REVIEW FIRST, THE STANDARD OF REVIEW WAS DE NOVO, BECAUSE IT IS A WRITTEN DOCUMENT. IT IS WHEN A TRIAL -- THIS CASE LAW WHICH I CITED, PARTICULARLY IN MY REPLY BRIEF, THAT WHEN A WRITTEN DOCUMENT SUCH AS A CONTRACTOR WHATEVER, IS REVIEWED BY A TRIAL COURT, IT GOES TO THE APPELLATE COURT WITH VERY LITTLE, IF ANY, PRESUMPTION OF CORRECTNESS, ITS DECISION, BECAUSE IT IS NOT THE TESTIMONY, THE DEMEANOR OF WITNESSES AND WHATNOT THAT THE JUDGE LOOSE AT. IT IS SIMPLY A DOCUMENT WHICH CAN BE REVIEWED BY AN APPELLATE COURT, JUST AS WELL AS A TRIAL COURT.

BUT IN THIS INSTANCE, IT WAS NOT -- YOU WERE LOOKING AT MORE THAN JUST A DOCUMENT, ITSELF. YOU WERE LOOKING AT WHERE THE DOCUMENT WAS FOUND, ON TOP OF THE BOX, WHETHER IT WAS IN THE LOCKED BOX. THE A COMPANYING CIRCUMSTANCES, SPOKEN -- THE ACCOMPANYING CIRCUMSTANCES SPOKE AS LOUD AS THE ACTUAL DOCUMENT, DIDN'T IT IT?

WELL, I AM TALKING IN DETERMINES OF WHETHER IT IS A-THEY TERMS OF WHETHER IT IS A -- I AM TALKING IN TERMS OF WHETHER IT WAS A WAIVER OF THE MARITAL PRIVILEGE OR NOT, AND WHETHER IT WAS FOUND GOES TO WHETHER HE INTENDED TO WAIVE HIS MARITAL COMMUNICATIONS PRIVILEGE OR WHETHER THERE SHOULD BE A WAIVER OF THE PRIVILEGE, BASED ON. THAT.

WELL, UNLIKE A CONSTITUTIONAL RIGHT, WHICH HAS TO BE KNOWING AND VOLUNTARY AND CLEAR AND UNEQUIVOCAL, WHAT IS IT THAT HAS -- THIS WAIVER, YOU COULD SAY, WELL, IT WAS ONLY A WAIVER IF HE WAS DEAD FELT -- DEAD AT THE TIME, OR MAYBE TWO PEOPLE COULD

READ IT AND DRAW TWO DIFFERENT CONCLUSIONS FOR WHAT WAS MEANT A WHAT IS THE STANDARD FOR, DOES THE WAIVER HAVE TO BE CLEAR AND UNEQUIVOCAL, THIS IN ORDER TO WAIVE THE SPOUSAL PRIVILEGE, OR IS IT LESSER THAN IT WOULD BE, IF IT WERE A CONSTITUTIONAL RIGHT?

WELL, FIRST, IT DOESN'T HAVE TO BE KNOWING, AND THAT IS, AS PROFESSOR WIG MORE SAID, IS BECAUSE PEOPLE SELDOM INTENTIONALLY WAIVE PRIVILEGE. WHAT YOU LOOK AT IS CONDUCT. DOES THE PERSON CONDUCT THEMSELVES IN SUCH AWAY THAT IT WOULD BE NO LONGER FAIR FOR THEM TO MAINTAIN THE PRIVILEGE? NOW, WE -- THIS COURT HAS, ALREADY, SAID THAT BOLIN ATTEMPTED TO MAINTAIN THE SPOUSAL COMMUNICATIONS PRIVILEGE, ALL THROUGH THE PROCEEDINGS. THIS WAS IN THE PREVIOUS OPINION.

ISN'T THE ISSUE WHEN HE WROTE THE LETTER, DIDN'T HE INTEND TO ALLOW THE CONVERSATION OR HIS WIFE'S STATES TO BE MADE PUBLIC? ISN'T IT HIS INTENT, NOW, WHETHER IT IS FAIR OR NOT FOR IT TO HAPPEN?

WELL.

BUT HIS INTENT TO WAIVE IT, BY WRITING THAT LETTER, ISN'T THAT THE ISSUE?

WELL, I DON'T SEE WHERE, YOU KNOW, HIS WIFE HAD, ALREADY, TALKED TO THE POLICE, HAD GIVEN THEM ALL THESE STATEMENTS AT THAT TIME. THE TRIAL COURT HAD RULED THAT, BY TAKING THIS -- BY DEFENSE TAKING THE WIFE'S DEPOSITION, THAT HE HAD WAIVED HIS SPOUSAL COMMUNICATIONS PRIVILEGE. THIS WASN'T SOMETHING THAT THE INVESTIGATING DETECTIVES WERE LEARNING FOR THE FIRST TIME OR ANYTHING LIKE THAT. AND, AGAIN, IT WASN'T SAYING -- IT WASN'T LIKE THE CASE WHERE THE DEFENDANT WOULD SAY, TO THE DETECTIVE, WELL, ASK MY WIFE. SHE WILL EXONERATE ME. HE WAS SAYING TO THE DETECTIVE, LOOK, SORRY TO CHECK OUT LIKE THIS. IT WAS SUICIDE NOTE. CAPTAIN TERRY HAD, ALL THE TIME, BEEN SAYING TO HIM, WELL, YOU KNOW, ANY TIME YOU WANT TO TALK ABOUT THIS CASE, JUST LET ME KNOW, AND HE HAD, IN FACT, SEVERAL WEEKS BEFORE, HE HAD SENT A NOTE TO CAPITAL I AM TERRY, SAYING, YOU KNOW, OKAY, I AM READY TO DISCUSS THIS WITH YOU. AT THAT POINT, THE JAIL HAD NOTIFIED THE PUBLIC DEFENDER'S OFFICE, AND THE PUBLIC DEFENDER WENT OVER, BECAUSE HE WAS REPRESENTED BY THE PUBLIC DEFENDER AT THAT TIME, AND PERSUADED HIM THAT IT WASN'T IN HIS INTERESTS TO TALK TO 9 THE POLICE ABOUT THIS, SO THIS IS AN ONGOING THING, IF, WHERE CAPTAIN TERRY HAS BASICALLY ENCOURAGED HIM TO TALK ABOUT THIS THING, AND HE IS SAYING, WELL, I CAN'T TALK TO YOU ANYMORE, BECAUSE I AM DEAD, YOU ARE GOING TO HAVE TO ASK THOSE QUESTIONS TO CHERYL JO, BECAUSE I WON'T BE HERE, AND THAT IS ALL IT IS. IT IS NOT SAYING, YOU KNOW, CHERYL JO IS GOING TO SAY SOMETHING GOOD FOR ME OR BAD OR EVEN THAT THERE WOULD BE ANYTHING FOR HER TO SAY, EXCEPT THAT, IF TERRY HAD A QUESTION, HE CAN ADDRESS IT TO -- HE CAN'T ADDRESS IT TO BOLIN. BOLIN ISN'T THERE TO ANSWER IT, SO THE IMPORTANT QUESTION, ON WHETHER THE SPOUSAL COMMUNICATIONS PRIVILEGE IS WAIVED, IS, REALLY, WHETHER THE DEFENDANT WAIVED -- ABUSED THAT PRIVILEGE, IF HE DID SOMETHING THAT COULD BE CONSIDERED CONTRADICTORY TO MAINTAINING THE PRIVILEGE, AND HE DID NOT DO ANY OF THE THINGS. HE DID NOT REVEAL ANY OF THE PRIVILEGED CONVERSATIONS. HE DID NOT, AS IN SOME CASES, TRY TO SAY, WELL, I WANT THIS TO COME IN, BECAUSE IT IS SELF-SERVING, THIS PART OF THE TESTIMONY TO COME IN. IT IS SELF-SERVING, BUT I WANT TO KEEP OUT THE OTHER PART. CLEARLY YOU CAN'T DO THAT. HE NEVER TRIED TO DO. THAT HE NEVER OFFERED TO TESTIFY TO COMMUNICATIONS. YOU KNOW, MAINLY HE WAS NEVER SAYING THAT HIS WIFE WOULD SOMEHOW EXONERATE HIM IN THIS MATTER. NOW, RELY, PARTICULARLY, ON SOME CASES WHICH HAVE USED A SWORD AND SHIELD ANALOGY TO THE PRIVILEGES. THERE ARE CASES CALLED SIKES V SAINT ANDREWS SCHOOL, FROM THE FOURTH DISTRICT. IN THAT CASE, IT WAS A PLAINTIFF ORIGINALLY BROUGHT CHARGES. THIS WAS A CIVIL CASE, AND ORIGINALLY BROUGHT A SUIT, ASKING DAMAGES FOR BOTH EMOTIONAL DISTRESS, AS WELL AS ON OTHER INJURIES. -- AS WELL AS OTHER INJURIES.

BUT THAT WAS, THEN, OF COURSE, THE DEFENSE, IN THAT, WANTED TO -- SAID THAT THAT WOULD ACT AS A WAIVER OF THE PSYCHOTHERAPIST/PATIENT PRIVILEGE. THEY WANTED TO EXAMINE HER DEALINGS WITH THE PSYCHIATRIST. SO --

BUT WE DON'T HAVE A SWORD OR SHIELD. WE DON'T HAVE INCONSISTENT BEHAVIOR. WE HAVE, REALLY, THE STATE IS RELYING ON THIS LETTER. CORRECT? THAT IS THEIR BASIS, IN THIS CASE, FOR ARGUING TO THE TRIAL COURT THAT THERE WAS A WAIVER. SO YOU, REALLY, HAVE TO --

RIGHT.

THE OTHER CASES MAY BE WHERE THERE WASN'T SOMETHING AS DIRECT AS THIS LETTER. YOU HAVE TO BE ABLE TO SAY THAT THIS LETTER DID NOT AMOUNT TO A WAIVER, AND I GUESS WHAT I AM STRUGGLING WITH AND TRYING TO GET YOUR ASSISTANCE ON IS YOU HAVE THE TRIAL COURT LOOKING AT IT. WHAT IS THE LEGAL PRINCIPLE? IT DOESN'T HAVE TO BE KNOWING. SO WHAT DOES IT HAVE TO BE, IN ORDER TO CONSTITUTE A WAIVER?

IT HAS TO BE INCONSISTENT WITH BEHAVIOR WHICH IS INCONSISTENT WITH MAINTAINING THE SPOUSAL COMMUNICATIONS.

BUT IF I SAID, IF THE SPOUSE SAYS TALK TO MY WIFE, THAT IS -- YOU DON'T NEED TO WORRY ABOUT INCONSISTENCY FORM THAT IS A DIRECT STATEMENT THAT I AM WAIVING MY PRIVILEGE. RIGHT?

HE DIDN'T ASK CAPTAINTER TOY TALK TO HIS WIFE. CAPTAIN TERRY HAD, ALREADY, TALKED TO HIS WIFE, MANY, MANY TIMES. HE SAID IF YOU CAN'T ASK MILE ME ANY QUESTIONS AND I AM COMMITTING SUICIDE, SO YOU HAVE TO ASK HER.

WOULD YOU MOVE TO PENALTY PHASE ISSUE, CONCERNING THE FINDING OF THE PRIOR VIOLENT FELONY, WHICH I UNDERSTAND THAT YOU -- YOUR POINT IS THAT MATTHEWS CASE WAS REVERSED AND SENT BACK FOR A NEW TRIAL. THAT IS THE ONE IN PASCO COUNTY?

THAT'S CORRECT.

AND THE STATE ANSWERS BY SAYING THAT THERE WAS A SITUATION IN HILLSBOROUGH COUNTY -- A SECOND FELONY IN HILLSBOROUGH, WHICH, IF THERE IS GOING TO BE A NEW TRIAL THAT, HE IS CONVICTED OF THAT SECOND VIOLENT FELONY. IS THAT NOT THE STATUS OF THIS SITUATION?

TWO HILLSBOROUGH CASES WERE SENTENCED CONTEMPORANEOUSLY, AND, ONE, THE TRIAL JUDGE DID NOT TRY TO USE THOSE CONTEMPORANEOUS CONVICTIONS, IF YOU WILL, ON NEW TRIAL, AS THE AGGRAVATING CIRCUMSTANCE. WHAT HE USED WAS THE PASCO CONVICTION OF FIRST-DEGREE MURDER, WHICH WAS REVERSED, AND, YOU KNOW, IS NO LONGER A CONVICTION, AT THIS POINT. AFTERNOON SO THIS -- PREVIOUSLY THIS COURT HAS SAID THAT THERE CAN BE HARMLESS ERROR, WHEN AND IF THERE IS, STILL, ANOTHER PRIOR VIOLENT FELONY TO SUPPORT THE AGGRAVATING CIRCUMSTANCE. HOWEVER, THROUGH THE DISTINCTION IN LONG THAT, EVEN IF THERE ARE PRIOR PRIOR VIOLENT FELONIES WHICH WOULD SUPPORT THE AGGRAVATING CIRCUMSTANCE, WHEN IT IS A MURDER CASE THAT HAS BEEN THROWN OUT, IT IS AN ENTIRELY DIFFERENT STANDARD, BECAUSE THAT WEIGHS SO HEAVILY ON THE INJURY -- ON THE JURY, AND THE JURY, OBVIOUSLY, CONSIDERED THE PRIOR PASCO MURDER VERY HEAVILY, AND IN DETERMINING THAT A SENTENCE OF DEATH WAS APPROPRIATE.

WHAT IS THE STATUS OF THAT PASCO COUNTY CASE? HAS THAT BEEN RETRIED?

IT HASN'T BEEN RETRIED.

THAT IS SET NEXT MONTH, AS I UNDERSTAND IT.

MAY, I BELIEVE. WHAT I HEARD WAS MAY. BUT I AM NOT POSITIVE.

OKAY. THAT IS THE PASCO COUNTY CASE FORM THE HILLSBOROUGH COUNTY CASE, THERE WAS -- PASCO COUNTY CASE. THE HILLSBOROUGH COUNTY CASE, THERE WAS A CONVICTION AND SENTENCE OF DEATH, THE HILLSBOROUGH COUNTY CASE, AND THAT CASE IS HERE.

THAT WILL BE HERE, YES, ON ARGUMENT.

LET ME ASK YOU, JUST BECAUSE THIS COULD, ALMOST, BE A CHICKEN IN THE EGG ARGUMENT, IN THAT HILLSBOROUGH, IF YOU KNOW, IN THE HILLSBOROUGH CASE, DID THEY USE THIS CONVICTION, RELY ON THIS CONVICTION?

NO. BOTH HILLSBOROUGH CONVICTIONS USE THE PASCO CONVICTION, WHICH HAS SINCE BEEN REVERSED AS THE AGGRAVATING CIRCUMSTANCE.

SO YOUR ARGUMENT IN THAT CASE IS GOING TO BE THE SAME AS THIS. THAT IS IF PASCO WAS SET ASIDE, THEN THAT SENTENCE SHOULD BE SET ASIDE.

BASICALLY YES. I -- ACTUALLY I WILL NOT BE DOING THE ARGUMENT, SO I SHOULDN'T REPRESENT FOR OTHER COUNSEL. I WILL RESERVE THE BALANCE OF MY TIME. THANK YOU.

THANK, SIR.

MAY IT PLEASE THE COURT. I AM CANDACE SABELLA, REPRESENTING THE STATE OF FLORIDA. LET ME START AT THE END AND WORK OUR WAY BACK WARDS. AS TO THESE PRIOR VIOLENT FELONIES, PASCO WAS, INDEED, REVERSED AFTER THE TRIAL COURT RELIED ON IT, BUT THE HOLLY CASE, DONE AT THE SAME TIME, AND FOR REASONS I HAVE BEEN UNABLE TO DETERMINE, THE JUDGE IN THIS CASE DID NOT CONSIDER STEPHANIE COLLINS AS A PRIOR VIOLENT NECESSARILY FEL ANY, HOWEVER HE CONSIDERED STEPHANIE COLLINS, IN THE SENSE THAT THIS WAS PREDATED THIS TRIAL AND HE COULD NOT USE IT, ALTHOUGH THE SENTENCING WAS AT THE SAME TIME, AND CLEARLY THIS COURT HAS HELD THAT, WHEN SENTENCING IS AT THE SAME TIME, CONTEMPORANEOUS MURDERS CAN BE CONSIDERED, SO IN THE EVENT THIS COURT WERE TO SEND THIS BACK, THE STEPHANIE COLLINS MURDER AND CONVICTION DEFINITELY COULD BE CONSIDERED, IN RESENTENCING HIM TO DEATH, NOT ONLY THAT, THOUGH, THERE IS, ALSO, ANOTHER KIDNAPPING RAPE OF JENNIFER LE FEVER, WHICH CLEARLY STANDS AND IS NOT BEING CHALLENGED, WHICH, ALSO, SUPPORTS THIS PRIOR VIOLENT FELONY.

AM I CORRECT THAT THERE WAS NO EVIDENCE PRESENTED IN THE TRIAL OF EITHER HILLSBOROUGH CASE, CONCERNING THE OTHER HILLSBOROUGH MURDER? IS THAT RIGHT?

THERE WAS NO EVIDENCE PRESENTED IN THE NATALIE HOLLY CONVICTION, ABOUT THE OTHER HILLSBOROUGH MURDER. I DO NOT -- AGAIN, I DON'T HAVE THE OTHER CASE, EITHER.

YOU DON'T KNOW COLLINS.

BUT I DO KNOW THAT THE SENTENCING ORDER CONSIDERS THE NATALIE HOLLEY CONVICTION, AND THAT CASE IS PENDING BEFORE THIS COURT, AND BRIEFS HAVE ALREADY BEEN FILED.

WHAT WAS OF THE EXTENT OF THE EVIDENCE PRESENTED IN THIS CASE, CONCERNING THE MATTHEWS MURDER IN PASCO COUNTY?

THEY PRESENTED THE OFFICERS, WHO INVESTIGATED IT. THERE WERE PHOTOGRAPHS THAT WERE PRESENTED, ALSO, SHOWING THAT SHE HAD, INDEED, BEEN STABBED, AS THE VICTIM IN THIS CASE WAS, BUT THE MAJOR EVIDENCE THAT THEY WERE FOCUSING ON WAS THE JENNIFER LE FEVER EVIDENCE, BECAUSE SHE ACTUALLY SURVIVED THIS KIDNAP AND RAPE THAT THE VICTIMS WHO

DIED IN THESE CASES WENT THROUGH, SO SHE WAS ABLE TO GIVE A CLEARER PICTURE OF EXACTLY WHAT THESE VICTIMS WOULD HAVE SUFFERED.

SHE TESTIFIED IN PERSON.

SHE TESTIFIED IN PERSON, YES, SHE DID. YES, SHE DID. SO TO SUGGEST THAT THIS COURT SHOULD SEND IT BACK FOR RESENTENCING, WHEN CLEARLY THERE IS THIS OTHER CONVICTION FOR MURDER THAT IS STILL STANDING. THERE IS NO CHALLENGE TO IT. IT IS LEGAL TURNING, BECAUSE IF YOU GO BACK, CLEARLY THIS COULD BE CONSIDERED AND WE ARE BACK AT SQUARE ONE, SO FROM IS NO POINT IN DOING THAT, AND -- SO THERE IS NO POINT IN DOING THAT, AND IT IS, ALSO, MY UNDERSTANDING THAT THE PASCO CASE IS TO BE TRIED NEXT MONTH, ALTHOUGH THAT MAY HAVE BEEN CHANGED.

THE JURY, ALSO, CONSIDERED THE OTHER AGGRAVATOR THAT, IN FACT, THEY SHOULD NOT HAVE CONSIDERED. AND THAT IS THE PROBLEM, ISN'T IT?

BUT THE JURY DID CONSIDER. YOU ARE ABSOLUTELY RIGHT. AND IF WE HAD FLIPPED THOSE TWO CASES AND THE NATALIE HOLLEY TRIAL WAS ALF STEPHANIE COLLINS, THE JURY WOULD HAVE BEEN ABLE TO CONSIDER THE STEPHANIE COLLINS, BUT BECAUSE IT CAME AFTERWARDS, IT WAS LEFT TO THE TRIAL JUDGE TO CONSIDER THAT, AND THE TRIAL JUDGE COULD HAVE CONSIDERED BOTH, HE EVEN IF THE INJURY HAD -- EVEN IF THE JURY HAD NOT HEARD T HE DIDN'T. SO WHAT I AM SAYING TO YOU IS YOU NEED TO FIND THIS AS HARMLESS, BECAUSE IF YOU SEND IT BACK, THAT IS EXACTLY WHAT IS GOING TO HAPPEN, AND YOU ARE BALANCING TWO IDENTICAL MURDERS TO EACH OTHER. YOU CANNOT CONSIDER ERROR FOR ONE WHICH YOU CAN NOW CONSIDER THE OTHER, WHICH IS IDENTICAL. FURTHERMORE, IF YOU, INDEED, SENT IT BARKS THE PASCO CONVICTION COULD HAVE ALREADY BEEN THROUGH AND WE ARE BACK TO SQUARE ONE AND, AGAIN, THE CHICKEN OR EGG THING, IT IS HARMLESS.

YOUR ARGUMENT IS THAT IT IS HARMLESS?

ABSOLUTELY THAT IS MY ARGUMENT IS THAT IT IS HARMLESS. BECAUSE WE HAVE THE KIDNAP AND RAPE OF JENNIFER LE FEVER AND THE STEPHANIE COLLINS MURDER AND CONVICTION FOR HIM TO CONSIDER.

THE PRIOR MURDERS THAT THE JURY SHOULD NOT HAVE CONSIDERED WAS HARMLESS ERROR?

YES, YOUR HONOR, BECAUSE THERE WAS ANOTHER MURDER THAT WAS NOT PRESENTED THAT WAS VIRTUALLY IDENTICAL.

WAS THERE NOT A RAPE?

THERE WAS A RAPE AND A KIDNAPPING OF JENNIFER LE FEVER. THE -- TERRY LIEN MATTHEWS CONVICTION, THE MASS COCOUNTY -- THE PASCO COUNTY CASE THAT YOU HAVE SENT BACK WAS SIMPLY A KIDNAP AND A MURDER.

I THINK THE REASON IT WAS THE OTHER HILLSBOROUGH CASE WAS NOT -- JUST SO I MAKE SURE THE CHRONOLOGY BY THE STATE, IN FRONT OF THE JURY, BECAUSE WAS BECAUSE AT THAT POINT THERE WAS NOT A --, WAS BECAUSE AT THAT POINT THERE WAS NO A CONVICTION. THAT TRIAL WAS AFTER THIS TRIAL?

THE STEPHANIE COLLINS TRIAL WAS AFTER THIS TRIAL.

BUT THE STATE COULDN'T HAVE PRESENTED TO THE JURY.

ABSOLUTELY.

SO WHAT I GUESS WE ARE CONCERNED, YOU ARE SAYING IT WAS HARMLESS ERROR, AS FAR AS THE JUDGE, BECAUSE THE JUDGE COULD HAVE CONSIDERED THIS, BUT IN UNDERSTANDING THIS FRUSTRATION ABOUT THESE CONVICTIONS THAT MAY BE REINSTATED, HOW CAN YOU SAY IT IS HARMLESS, FOR THE -- FROM THE JURY'S POINT OF VIEW, THAT THE JURY CONSIDERED THIS EVIDENCE THAT HE HAD MURDERED SOMEBODY THAT THEY HEARD THAT EVIDENCE AND IT WAS SUBJECT TO THE --

I AM SAYING, IF YOU TAKE THE PASCO COUNTY CONVICTION OUT OF THE EQUATION, THAT IF YOU SEND THIS BACK, HE WILL, AGAIN, GET DEATH, BECAUSE HE HAS TWO PRIOR VIOLENT FELONIES THAT THE JURY OR THE SENTENCING JUDGE CAN CONSIDER. THAT BEING THE KIDNAPPING AND RAPING OF JENNIFER LE FEVER AND, ALSO, THE MURDER OF STEPHANIE COLLINS, SO YOU ARE BASICALLY TAKING ONE OUT OF THE EQUATION AND PUTTING THE SAME THING BACK IN, AGAIN, SO NOTHING COULD CLEARLY BE MORE HARMLESS THAN THIS, BECAUSE YOU ARE PUTTING THEM EXACTLY BACK IN THE SAME PLACE THEY WERE.

HAVE WE HAVE HELD THAT BEFORE? I MEAN, IS THERE ANY CASE THAT ACTUALLY STANDS FOR THAT PROPOSITION? I KNOW IT WAS ARGUED IN ANOTHER CASE, ROGERS, WHERE THERE WAS A SUBSEQUENT CALIFORNIA CONVICTION. HAS THAT EVER BEEN HELD --

YOU HAVE -- HAS THAT EVER BEEN HELD -- UF A SERIES OF CASES WHERE IT WAS HELD THAT THE PRIOR VIOLENT FELONY AGGRAVATOR WAS UPHELD BY A PRIOR VIOLENT FELONY CONVICTION, THAT IF ONE IS TAKEN OUT IN A SUBSEQUENT CONVICTION, THAT THAT CAN BE HARMLESS. YOU HAVE SAID IT IN DARDER AND A NUMBER OF CASES. I AM SAYING THAT, IF YOU TAKE THIS OUT, THEN WE ARE PUTTING ONE BACK IN AGAIN, SO IT IS HARMLESS, AS IN --

LET'S ASSUME WE DON'T AGREE IT IS HARMLESS BUT FOR THESE OTHER THINGS THAT CAN COME IN. IS THERE ANY CASE, YET, THAT SAID THAT WE CAN CONSIDER THE SUBSEQUENT EVENTS OF WHAT WILL PROBABLY OCCUR AT THE NEXT SENTENCING TO CONDUCT A HARMLESS ERROR ANALYSIS OF THIS SENTENCING?

IF THERE IS, I AM NOT AWARE OF IT. AS FAR AS GOING BACK TO THE FIRST ISSUES RAISED BY COUNSEL, THE SUPPRESSION OF THE LETTER AND THE WAIVER, THIS COURT SENT IT BACK FOR THE SPECIFIC DETERMINATION OF WHETHER THE CIRCUMSTANCES SURROUNDING THAT WAIVER MADE IT CONSTITUTE A WAIVER, SO TO ARGUE NOW THAT IT WAS SIMPLY A DE NOVO AND THERE IS NO REASON FOR YOU TO RIL I ON THE FINDINGS OF THE -- FOR YOU TO RELY ON THE FINDINGS OF THE TRIAL COURT, THAT IS DISINGENIOUS. YOU COULD HAVE SAID, LET'S SEE THE LETTER. LET'S LOOK AT IT. CLEARLY THE CIRCUMSTANCES SURROUNDING THE LETTER AND ITS CONTENTS, AS WELL AS THE WAY IT WAS FOUND AND WHAT IT WAS, ALSO, FOUND, WITH THAT THE TRIAL COURT NEEDED TO CONSIDER AND THE TRIAL COURT DID CONSIDER, AND WHEN PUTTING THESE ALL TOGETHER, THE TRIAL COURT MADE THE CONCLUSION THAT IT WAS A WAIVER, AND AS FAR AS YOUR QUESTION IS, CONCERNING THE STANDARD OF REVIEW, THE SPOUSAL PRIVILEGE IS DEEMED WAIVED, WHEN THE PERSON HOLDING THE PRIVILEGE CREASES TO TREAT THE MATTER -- CEASS TO TREAT THE MATTER AS PRIVILEGED. HE NOT ONLY WROTE THIS LETTER BUT OTHER LETTERS, FIVE PAGES LONG, AND IN IT HE TELLS THEM ABOUT THINGS THAT HE HAS DONE, AND IN THE END HE SAID YOU ARE GOING TO HAVE TO ASK CHERYL ABOUT ALL OF THIS, BECAUSE SHE KNOWS EVERYTHING ABOUT ALL THAT I HAVE DONE.

IS IT IMPORTANT THAT, AT THE TIME THAT HE WROTE THIS LETTER, THAT HE WAS CONTEMPLATING THAT, WHEN IT GOT READ HE WAS CHECKING OUT OF THIS WORLD, INTENDING TO KILL HIMSELF, BUT MORE IMPORTANTLY, THAT THE TRIAL COURT HAD, ALREADY, RULED THE SPOUSAL PRIVILEGE WAIVED, BECAUSE OF THE DEPOSITION TESTIMONY? IN OTHER WORDS THERE WAS -- HE WAS UNDER A MISS PREVENTION THAT IT WAS, ALREADY -- A MISS APPREHENSION THAT IT WAS -- A MI S.A.P. PREH -- A MISS AND PENSION THAT IT WAS ALREADY -- A MISS APPREHENSION? IS THAT IT WAS ALREADY WAIVED?

NO. THIS COURT HAS HELD, IN A NUMBER OF CASES, THAT WHEN SOMEBODY IS ALREADY CONVICTED AND SITTING IN PRISON AND CLEARLY THEY ARE CONVICTED, THAT THEY MAKE STATEMENTS INCULPATEING THEMSELVES, THAT IT IS SUBJECT TO A HEARING AT A LATER RETRIAL. AND CLEARLY WE HAVE THAT. IF THE STATE HAS WHAT HE ALREADY HAD, HE CLEARLY ASKS FOR SILENCE AND HAS THAT ABILITY. HE DID NOT DO. THAT HE SEPTEMBER A NOTE TO MAJOR TERRY AND SAID I WANT TO TALK TO YOU. HIS LAWYERS JUMP IN AND SAY, NO, NO, NO, YOU ARE NOT TO TALK TO HIM, AND IN THESE BOXES THAT HE PUT THE LETTERS ON THE COMB OWED, WHERE HE NORMALLY KEPT SOMEWHERE ELSE BUT IT IS CLEARLY OUT IN THE OPEN, THERE ARE LETTERS TO HIS SISTER SAYING, LOOK, I HAVE INSTRUCTED MAJOR TERRY TO SEND MY EFFECTS TO YOU AND IN THE LETTER TO MAJOR TERRY, HE SENDS HIS EFFECTS, SO PUTTING IT ALL INTO EFFECT, IT IS CLEAR THAT BLOL I KNOW -- BOLIN THOUGHT ABOUT THIS FOR A LONG PERIOD OF TIME AND HE MADE THE INFORMATION AVAILABLE THAT YOU CAN GO TO TALK TO CHERYL AND TALK TO HER ABOUT NOT ONLY THESE CRIMES BUT EVERYTHING. AND CLEARLY PRIVILEGE, WHETHER IT WAS WAIVED AS TO THESE ITEMS OR NOT, HE GAVE A MUCH MORE EXPANSIVE WAIVER, AND THAT WAIVER WAS IN EFFECT AT THE TIME OF THE TRIAL.

HAS ANY COURT, THAT YOU KNOW OF, EVER RULED ON THE RETRO ACTIVITY OF SUCH A WAIVER? YOU GENERALLY DON'T HAVE IT, BECAUSE THE PERSON IS TESTIFYING, BUT HERE YOU HAVE GOT THE DEPOSITION, WHICH GIVES IT A DIFFERENT SLANT, SO YOU GET INTO THIS RETRO ACTIVITY. IS THERE ANY LAW YOU FOUND ON THAT THAT YOU KNOW OF?

IF THERE WAS, YOUR HONOR, I CLEARLY DID NOT FIND IT, BUT WHEN YOU PUT THIS IN THE CONTEXT OF THIS CASE, AND I ANALOGIZEED IT TO A LEVEL OF DISCOVERY CASES, WHERE THE POLICE HAVE OBTAINED EVIDENCE, WHILE THEY THOUGHT THROUGH A LEGAL MANNER WHICH IS SUBSEQUENTLY FOUND NOT TO BE BUT IT WAS ABLE TO HAVE BEEN FOUND THROUGH A LEGAL MANNER, THEY ARE ALLOWED TO USE T THEY DON'T HAVE TO GO BACK OUT AND REFINED IT. THEY OBTAINED THIS INFORMATION THROUGH WHAT THEY THOUGHT WAS A LEGAL MANNER, BY DISCOVERY DEPOSITION AND A WAIVER. THEY HAD THIS INFORMATION. THEY THOUGHT THEY COULD USE IT. ONCE HE WAIVES IT AGAIN, THERE WAS NO REASON FOR THEM TO GO BACK OUT AND GET IT, BECAUSE THEY, ALREADY, HAD DONE THEIR MOTION TO PERPETUATE TESTIMONY, BECAUSE MS. COLBY WAS VERY ILL, AND THEY TOOK IT JUST IN CASE SHE WAS NOT ABLE TO TESTIFY. THEY CLEARLY HAD, WITHIN THIS WINDOW, TIME TO GO OUT AND GET EVERYTHING THEY HAD, SIMPLY DOESN'T MAKE SENSE. I ASK THIS COURT TO AFFIRM THE JUDGMENT AND SENTENCE. THANK YOU.

I WOULD LIKE TO JUST BRIEFLY ADDRESS THE WAIVER ISSUE AGAIN. AND THE QUESTION, HERE, IS NOT A HYPERTECHNICAL THING OF WHAT PARTICULAR LANGUAGE SHOULD BE AND WHAT ISN'T. THE QUESTION IS FAIRNESS. THE QUESTION IS WHETHER A STATEMENT, SAYING TO TERRY, I CAN'T ANSWER YOUR QUESTIONS. YOU WILL HAVE TO ASK MY WIFE, BECAUSE I AM COMMITTING SUICIDE, WHETHER THAT, IN FAIRNESS, ACTS AS AWARENESS OF THE SPOUSAL COMMUNICATION PRIVILEGE, WHEN HE SOUGHT TO MAINTAIN IT ALL ALONG. NOW, THE OTHER THING IS THAT, YOU KNOW, IT WAS REASSERTED BEFORE TRIAL, SO IT IS -- IF THERE WAS A WAIVER, THERE WAS ONLY A WINDOW PERIOD, WHERE THERE WAS A WAIVER IN EFFECT, AND, OF COURSE, WE SAY THAT THERE WASN'T A WAIVER, BUT EVEN IF THERE WAS, THE STATE TOOK NO ACTION, BASED ON THAT. AND THAT IS ONE OF THE REASONS I WAS CITING, BEFORE, THE CASE OF SIKES V SAINT ANDREWS SCHOOL, BECAUSE IN THAT CASE, THE FOURTH DISTRICT HELD THAT THERE HAD BEEN A WAIVER, BUT SINCE THE PERSON, THE PLAINTIFF DROPPED THEIR SUIT, BASED ON EMOTIONAL DISTRESS, THAT THEY COULD, AGAIN, CLAIM THE PSYCHOTHERAPIST/PATIENT PRIVILEGE. IN OTHER WORDS EVEN IF YOU DO WAIVE A PRIVILEGE, IT ISN'T GONE FOREVER, AS LONG AS YOU DON'T DO ANYTHING, BY CONDUCT, THAT WOULD INDICATE THAT IT WOULD BE UNFAIR FOR THE PERSON TO MAINTAIN THE PRIVILEGE. NOW, OUR POSITION IS THAT BOLIN NEVER DID ANYTHING WHATSOEVER TO ABUSE THE SPOUSAL COMMUNICATIONS PRIVILEGE. IT WOULD BE UNFAIR NOT TO LET HIM MAINTAIN T THANK YOU. -- LET HIM MAINTAIN IT. THANK YOU.

THANK YOU, COUNSEL. THE COURT WILL BE IN RECESS. THE MARSHAL: PLEASE RISE.