>>> CALL THE NEXT CASE, BOLIN V. STATE OF FLORIDA.
[BACKGROUND SOUNDS]
>> WE NOTE THAT JUSTICE QUINCE IS RECUSED IN THIS MATTER.
IS COUNSEL READY TO PROCEED?
>> YES, YOUR HONOR.
MAY IT PLEASE THE COURT, I'M DEBORAH BRUECKHEIMER, I'M HERE REPRESENTING MR. BOLIN.
THERE ARE THREE ISSUES OR SUBISSUES.
I'LL FOCUS FIRST ON THE MAIN ISSUE WHICH IS CHERYL KOBE'S TRIAL TESTIMONY THAT HAS BEEN USED OVER AND OVER AGAIN AND HAS BEEN THE SUBJECT OF THE PRIOR REVERSAL.
SHE DIED A YEAR AFTER THAT TRIAL WAS --
[INAUDIBLE]
SO THERE HASN'T BEEN ANY ABILITY TO RE CROSS-EXAMINE HER IN SUBSEQUENT TRIALS.
THE FACT THAT THERE HAVE BEEN SUBSEQUENT TRIALS, WHICH IS NO FAULT OF MR. BOLIN, THE STATE WAS USING IMPERMISSIBLE HUSBAND/WIFE PRIVILEGED COMMUNICATIONS, AND IT RESULTED IN THE MISTRIAL.
SO IT WAS 15 YEARS LATER WHEN WE HAVE THIS PARTICULAR TRIAL, AND WE HAVE PROBABLY THE ONLY MAIN WITNESS AGAINST MR. BOLIN TESTIFYING FROM HER 1991 DEPO THAT HAS NOW BEEN SEVERELY REDACTED BASED ON THIS COURT'S PRIOR ORDERS, AND THE PROBLEM IS THAT THERE'S -- THE CROSS-EXAMINATION WAS ALSO SEVERELY REDACTED BECAUSE THE FOCUS BACK IN 1991 WAS ON ALL OF THAT PRIVILEGED COMMUNICATION.
SHE WAS TESTIFYING TO WHAT MR. BOLIN SUPPOSEDLY SAID TO HER --
>> I'M TRYING TO GATHER IN THIS ARGUMENT, BECAUSE IT SEEMS TO ME IS THAT WE'D HAVE TO HAVE THE RULE WITH ABOUT 15 SUBPARTS TO TRY TO UNDERSTAND HOW YOU'D HAVE THIS APPLIED.
BECAUSE, FIRST, TO HELP ME UNDERSTAND, SEEMS TO ME THAT ONE DAY LATER SOMETHING COULD HAVE HAPPENED IN THE INTERIM ONE DAY

LATER, AND THAT SAME ARGUMENT
WOULD APPLY.
SO IS THIS A BRIGHT LINE RULE
THAT AFTER TEN YEARS THIS
TESTIMONY'S NOT ADMISSIBLE?
BECAUSE, CLEARLY, THE RULE
ITSELF AS WRITTEN DOES NOT
CONTAIN A TIMELINE.
>> NO.
>> DO YOU AGREE WITH THAT?
>> I AGREE.
AND I ALSO --
>> I'VE BEEN TRYING TO FIND CASE
AUTHORITY THAT WOULD HELP ME
UNDERSTAND THIS THEORY, THIS
TIMELINE THEORY WHICH I CANNOT
FIND.
CAN YOU HELP ME WITH WHAT YOU
THINK IS THE BEST CASE THAT SAYS
YOU CANNOT USE THIS AFTER X
NUMBER, PERIOD OF TIME?
>> WELL, I THOUGHT THAT THE
STATE CITATION TO THE CASE OF
MANCUSI WHICH WAS, I BELIEVE, A
U.S. SUPREME COURT CASE IN 1972,
WAS VERY GOOD BECAUSE THERE
ISN'T REALLY A BRIGHT LINE.
IT'S A QUESTION OF WHETHER THE
RIGHT TO CONFRONT HAS BEEN
INFRINGED UPON WHICH DEPENDS ON
THE ADEQUACY OF THE
CROSS-EXAMINATION AT THE FIRST
TRIAL AND WHETHER OR NOT IT WAS
EFFECTIVE CROSS AND WHETHER OR
NOT IT STILL HAS THAT INDICIA
OF RELIABILITY.
WE'RE NOT ATTACKING, FOR
EXAMPLE, THE MEDICAL EXAMINER'S
TESTIMONY WHICH HAD TO BE USED
BECAUSE HE HAD PASSED AWAY.
SO THEY USED PRIOR TRIAL
TESTIMONY FOR HIM.
THERE REALLY WASN'T ANYTHING
CONTESTED THERE, THAT, YOU KNOW,
THE FACTS WERE THE FACTS AS TO
HOW SHE DIED, HOW THE YOUNG GIRL
DIED.
BUT WHAT WE ARE HAVING PROBLEMS
WITH IS THE MAIN WITNESS, THE
INDICIA OF HER RELIABILITY WHEN
YOU'VE GOT SOMEONE WHO DID THE
CROSS-EXAMINATION 15 YEARS AGO
FOCUSING ON THE STATEMENTS THAT
HER HUSBAND HAD SUPPOSEDLY MADE
TO HER.
AND NOW THAT FOCUS IS GONE, AND
I KNOW THE STATE CLAIMS THAT MR.

FOMANI, WHO WAS THE TRIAL
ATTORNEY AT THAT TIME, DID A
GREAT JOB IN ATTACKING HER
CREDIBILITY IN ANOTHER WAY, BUT
IF HE HADN'T HAD TO SPEND ALL OF
HIS TIME ON THAT, THERE MIGHT
HAVE BEEN ADDITIONAL
CROSS-EXAMINATION HE COULD HAVE
FOCUSED ON.
>> SO LET ME ASK YOU A QUESTION.
TWO DIFFERENT QUESTIONS ABOUT
THE NATURE OF THE
CROSS-EXAMINATION.
THE REDACTED OR SOME OF HER
VIDEOTAPED DEPOSITION CAME IN ON
THE SECOND TRIAL.
>> I BELIEVE IT WAS A VIDEOTAPE.
>> IN OTHER WORDS, ISN'T -- SHE
DIED, YOU SAID, AFTER THE FIRST
TRIAL.
>> RIGHT.
>> SO IN THE SECOND TRIAL, WAS
THIS, HER TESTIMONY INTRODUCED
THROUGH THE SAME IDEA OF A
DEPOSITION?
>> WELL, YEAH.
I MEAN, I --
>> YEAH.
>> YES, IT WAS.
I WAS TRYING TO THINK.
I THINK IT WAS THE 1991 TRIAL AS
OPPOSED TO THE DEPOSITION, BUT
IT WAS PARTIALLY VIDEOTAPED,
YEAH.
>> OKAY.
SO, BUT THAT WAS -- SO WASN'T,
ISN'T THIS ALREADY LAW OF THE
CASE?
IN OTHER WORDS, WE'VE ALREADY
SAID IT WAS PERMISSIBLE TO HAVE
ALLOWED IN HER VIDEOTAPED
TESTIMONY?
OR TESTIMONY VERSUS DEPOSITION.
SO HOW DO WE -- IS IT BECAUSE
NOW IT'S 15 YEARS VERSUS BEFORE
IT WAS 10 YEARS OR, AGAIN,
TRYING IN A SLIDING SCALE IF IT
WAS 30 YEARS FROM NOW, WOULD IT
BE -- COULD WE USE IT?
>> WELL, NOW WE SEE WHAT THE
TESTIMONY LOOKS LIKE NOW THAT
IT'S BEEN REDACTED.
THIS COURT HAS NEVER HAD THAT
BEFORE.
NOW THAT THEY SEE WHAT IT LOOKS
LIKE, YOU ALSO HAVE THE PROBLEM
WHICH GETS INTO THE OTHER ISSUE

OF BEING INTERTWINED WHERE SHE'S
TALKING ABOUT THE BODY, A BODY
SHE NEVER SAW.
A BODY --
>> SHE SAW SOMETHING BEING
LIFTED, DID SHE NOT?
>> SHE SAID -- AT FIRST SHE SAID
AN ITEM BEING LIFTED THAT WAS
WRAPPED UP IN BED CLOTHES, BUT
THEN SHE STARTED REFERRING TO IT
AS, YOU KNOW, AS "THE BODY," AND
SHE REFERRED TO IT, LIKE, FIVE
TIMES IN THAT --
>> WELL, IT CERTAINLY WASN'T A
BUSHEL OF APPLES.
HE HAD SOMETHING IN THE BACK OF
THE TRUCK, AND THEY TOOK IT OUT
AND BURIED IT.
>> WELL, THEY DIDN'T BURY IT.
>> THEY TOOK IT TO AN ISOLATED
AREA.
IT WASN'T TRASH AND GARBAGE.
AND HE MADE SURE THAT NOBODY --
ACCORDING TO THE TESTIMONY,
NOBODY ELSE COULD SEE IT FROM
THE ROAD.
>> RIGHT.
>> BUT IT WAS SOMETHING --
>> BUT HOW DID SHE KNOW IT WAS A
BODY?
SHE NEVER SAW IT.
SHE'S ASSUMING --
>> WELL, COMMON SENSE.
I MEAN, WHAT ELSE DO YOU DUMP,
DO YOU WRAP IN ALL THESE
BLANKETS AND SHEETS, AND YOU'RE
TAKING IT OUT AT NIGHT, MAKE
SURE IT'S FAR AWAY INTO THE
WOODS SO THAT, I MEAN --
>> I DON'T KNOW.
I ONLY KNOW THAT SHE KNEW THAT
INFORMATION BECAUSE SHE KNEW HE
HAD TOLD HER WHAT WAS IN THERE.
>> SO YOU'RE SAYING -- SO GOING
BACK TO THE ARGUMENT, THOUGH,
NOW THAT'S, SEEMS LIKE A
SOMEWHAT DIFFERENT ARGUMENT.
>> THERE'S TWO ARGUMENTS.
>> OKAY.
SO LET'S STAY WITH THE ARGUMENT
THAT THE CROSS-EXAMINATION
VIOLATED YOUR CLIENT'S RIGHT
UNDER CROSS BECAUSE IT REALLY
WASN'T EXTENSIVE.
>> RIGHT.
>> OKAY.
AND SO BACK TO THIS ISSUE OF

WHAT JUSTICE LEWIS IS ASKING.
IT SEEMS TO ME THAT SINCE THIS WASN'T ACTUALLY, SINCE IT WASN'T A DEPOSITION, IT WAS A TRIAL, AND THE DEFENSE ATTORNEY DID SOMEWHAT EXTENSIVELY CROSS-EXAMINE HER ON HER MOTIVE, HER STRAINED RELATIONSHIP WITH HER EX-HUSBAND, HER PROBLEMS WITH SEEING, HER INABILITY TO SEE THAT WELL, HER FINANCIAL PROBLEMS AND ALL OF THIS OTHER BIAS, WHAT WOULD YOU -- IT SEEMS TO ME YOU WOULD WANT TO POINT TO SOMETHING ELSE THAT SHE SHOULD HAVE BEEN CROSS-EXAMINED ON THAT WOULD HAVE COMPLETELY DESTROYED HER CREDIBILITY.
IN OTHER WORDS, IF YOU HAD KNOWN THEN THAT SHE WASN'T, THAT SHE WAS GOING TO DIE AND THAT THIS PART WASN'T GOING TO COME IN, WHAT WE WOULD HAVE BEEN ABLE TO CROSS-EXAMINE HER ON WAS WHAT?
>> WELL --
>> SHOULDN'T THERE BE SOMETHING THAT WASN'T, THAT THE JURY NEVER HEARD BECAUSE BACK IN 1991 THEY DIDN'T KNOW THAT THERE WAS GOING TO BE MEANS IN A SUBSEQUENT TRIAL, SOMETHING LIKE THAT?
>> WELL, THE DEFENSE COUNSEL FOR THIS TRIAL POINTS OUT SOMETHING THAT HAD TO DO WITH THE OTHER HILLSBOROUGH CASE, BUT AS FAR AS THIS CASE GOES, THERE WAS THE ITEM OF HOW DID SHE KNOW IT WAS EXACTLY NOVEMBER 5TH WHEN ALL OF THIS OCCURRED, AND SHE WAS BASING IT ON A DATE SHE WENT TO THE CLINIC AND FOUND OUT SHE WAS PREGNANT FOR THE SECOND TIME.
BUT THERE WERE NO CLINIC RECORDS TO BE LOCATED.
>> AND YOU WEREN'T ABLE TO -- THE JURY DIDN'T HEAR THAT?
>> NO.
>> SO THAT'S SOMETHING.
>> THAT IS SOMETHING THAT --
>> NOW, WAS THAT SOMETHING THAT HE WOULD HAVE, THAT HE JUST DIDN'T KNOW IN 1991?
WOULD THAT BE BASED ON AN INEFFECTIVE ASSISTANCE OF COUNSEL, THAT HE SHOULD HAVE FOUND THAT OUT?
>> WELL, THAT'S WHY I'M, YOU

KNOW, IN HERE I'M NOT DOING AN INEFFECTIVENESS PER SE, BUT I AM SAYING THAT, YOU KNOW, THAT THE CROSS-EXAMINATION WAS LESS THAN PERFECT.
>> WELL, IF THAT WERE THE STANDARD OF VIOLATING CRAWFORD, WE WOULD BE, THAT WOULD BE A NEW STANDARD THAT I THINK A LOT OF PROSECUTORS WOULD BE QUITE CONCERNED ABOUT AS WOULD TRIAL JUDGES IN THIS COURT.
>> WELL, AND THE QUESTION IS WAS THERE AN ADVERSARIAL TESTING OF MS. KOBE'S CREDIBILITY --
>> BECAUSE THAT IS THE STANDARD.
>> YEAH.
>> AND IF WE FIND, THEREFORE, WHAT OCCURRED IN 1991 WAS A MEANINGFUL TESTING EVEN THOUGH IT MIGHT HAVE BEEN BETTER OR IT COULD HAVE INCLUDED SOMETHING ELSE, THAT MEETS THE SIXTH AMENDMENT STANDARD ON A CROSS.
>> UH-HUH.
>> IS THAT RIGHT?
>> YEAH.
THE IDEA BEING THE RIGHT TO CONFRONT HAD MR. FOMANI'S FOCUS NOT BEEN DISTRACTED WITH IMPERMISSIBLE THINGS THAT SHOULD NOT HAVE BEEN ADMITTED -- WHICH WAS PRETTY SEVERE.
I MEAN, THE FOCUS ON MR. BOLIN'S STATEMENT WERE, YOU KNOW, WERE HIGHLY EMPHASIZED.
AND THEN WHEN YOU GET TO THE CLOSING ARGUMENT IN THIS CASE, THE PROSECUTOR'S GOING ON AND ON ABOUT HOW YOU SAW CHERYL KOBE'S TESTIMONY, SHE WAS NOT IMPEACHED, THERE WAS NOTHING THERE TO IMPEACH.
HE EMPHASIZES THE FACT THAT THE DEFENSE COUNSEL DID NOT DO ANY, YOU KNOW, REALLY SUBSTANTIVE IMPEACHMENT IN THIS CASE.
WHY?
BECAUSE ONE-THIRD OF THE CROSS-EXAMINATION WAS NOW GONE, AND THAT'S WHERE MOST OF THE IMPEACHMENT WAS.
SO THE STATE WAS ALLOWED TO TAKE ADVANTAGE --
>> WELL, THAT'S BECAUSE HE WASN'T ALLOWED TO TESTIFY BECAUSE OF THE RULES OF

EVIDENCE.
I MEAN, THAT HAPPENS ALL THE TIME.
IF THERE'S A RULE OF EVIDENCE THAT PRECLUDES THE ADMISSION OF CERTAIN EVIDENTIARY MATTERS --
>> UH-HUH.
>> -- I MEAN, THAT'S AN ARGUMENT COULD BE MADE EVERY TIME, BUT THAT DOESN'T TRUMP THE RULES OF EVIDENCE.
>> NO, BUT IN THIS PARTICULAR --
>> I'M STILL TRYING TO UNDERSTAND THE ONE THING THAT YOU'VE ANSWERED JUDGE PARIENTE BUT STILL TALKING AROUND IT, WHAT IS THE IMPEACHMENT THAT EXISTED THAT COULD ONLY COME FROM HER LIPS?
>> WELL, OTHER THAN THE INCIDENT OF BEING FOCUSED ON 11/5 WHICH IS THE DATE THAT MS. COLLINS DISAPPEARED --
>> BUT WHY WERE YOU PRECLUDED FROM GOING TO WHATEVER CLINIC OR FINDING WHATEVER RECORDS?
>> IT WAS A LACK OF RECORDS. THEY COULD NOT FIND ANY RECORDS.
>> WELL, I MEAN, IS THAT -- SO, I MEAN, THAT DOESN'T --
>> UNLESS, I SUPPOSE UNLESS THEY PUT ON EVERY CLINIC RECORDS' CUSTODIAN IN THE AREA TO SAY DO YOU HAVE ANY --
>> SO THERE IS NO IMPEACHMENT THEN.
YOU DON'T KNOW WHETHER THERE'S IMPEACHMENT OR NOT.
>> WELL, IF THEY WERE TO ASK MS. KOBE WHERE WAS PROOF THAT SHE VISITED THE CLINIC ON THAT DAY AND WHY SHE WAS ABLE TO FOCUS ON THAT DAY AS BEING SO SPECIAL, SHE COULD HAVE -- I MEAN, HER FRIEND COULDN'T REALLY FOCUS ON THAT DAY.
SHE DIDN'T KNOW WHICH DAY IN NOVEMBER IT WAS, BUT SHE KNEW IT WAS THE DAY THAT HER FRIEND WAS FOUND TO BE PREGNANT, THAT THEY MET AT THIS COFFEE SHOP OR WHATEVER.
SO THE DATE BECOMES IMPORTANT, AND THAT WAS THE FOCUS OF WHAT COULD NOT BE IMPEACHED, AT LEAST AT WHAT WAS PRESENTED AT THIS TRIAL.

THERE COULD BE OTHER THINGS.
I THINK WHAT --
>> HOW DO YOU REVERSE A TRIAL
BECAUSE THERE COULD BE OTHER
THINGS?
>> WELL --
>> WHAT'S THAT?
>> WELL, I HAVE NO IDEA --
>> YOU'RE A WONDERFUL LAWYER
BUT, PLEASE, TELL ME HOW THAT
CAN HAPPEN.
>> WELL, IF -- THE IDEA BEING
THAT NO ONE ELSE COULD EVER GET
TO, YOU KNOW, TALK TO THIS WOMAN
AND CROSS-EXAMINE HER AGAIN.
>> WELL, THAT'S IN EVERY CASE
THAT THERE'S A DEATH.
>> THERE'S A DEATH.
BUT IN THIS PARTICULAR CASE HER
TESTIMONY WAS CRUCIAL, AND --
>> THAT'S IN EVERY CASE ALSO.
>> NO, NOT -- I MEAN --
>> SURE IT IS.
CIVIL OR CRIMINAL.
IF YOU HAVE A WITNESS WHOSE
TESTIMONY IS GOING TO BE
ADMITTED AND IT IS RELEVANT
EVIDENCE, THEN THAT'S PART OF
THAT TRIAL.
>> YEAH.
BUT THERE'S RELEVANT AND THERE'S
CRUCIAL.
HER EVIDENCE THAT CAME IN BEFORE
CAUSED TWO MISTRIALS, I MEAN,
TWO NEW TRIALS.
>> DIDN'T SHE BECOME LESS
CRUCIAL WITH ALL OF THE
TESTIMONY THAT THE STATE
CONSIDERED TO BE CRUCIAL
REDACTED?
I MEAN, IT SEEMS TO ME THAT IN
TERMS OF HIS GUILT, SHE BECAME A
LESS IMPORTANT WITNESS, BUT, YOU
KNOW, AGAIN, I THINK WE'RE --
THE PROBLEM YOU HAVE, AND YOU
ARE AN EXCELLENT APPELLATE
ADVOCATE, IS THAT THE SIXTH
AMENDMENT ARGUMENT THAT YOU'RE
MAKING JUST SEEMS THAT IT IS
WHEN YOU HAVE A WITNESS WHO WAS
CROSS-EXAMINED -- WHICH IS SORT
OF THAT IS THE IMPORTANT
THING -- AND CROSS-EXAMINED IN
WHAT APPEARS TO BE A COMPETENT
WAY, I JUST DON'T SEE HOW YOU
GET TO EITHER A DUE PROCESS OR A
CRAWFORD VIOLATION OF A

CONSTITUTIONAL VIOLATION.
AND YOU REALLY CAN'T POINT TO AN ERROR THAT THE TRIAL COURT MADE.
AND WE SAID IN THE LAST APPEAL THIS EVIDENCE IS GOING TO COME IN.
SO IF YOU HAD, IF THE JUDGE HAD SAID IT COULDN'T COME IN, I THINK IT WOULD HAVE BEEN, YOU KNOW, A CERT BY THE STATE TO SAY, OF COURSE IT'S COMING IN, YOU SAID IT'S COMING IN.
>> WELL, I'M SORRY I COULDN'T PERSUADE YOU ON THAT.
BUT THEN WE GET TO THE SECOND ASPECT WHICH IS WHAT YOU SAW WITH WHAT SHE HEARD BEING SO INTERTWINED THAT THERE'S NO WAY TO SEPARATE IT OUT AND THAT THE MARITAL PRIVILEGE SHOULD INCLUDE ACTS AS WELL AS, UM, WHAT YOU HEAR, YOU KNOW, GESTURES, WHAT WAS WRITTEN.
>> BUT, NOW, IS THAT TWO DIFFERENT THINGS?
BECAUSE ON THE SECOND PART, WHICH IS OBSERVATIONS ARE NOT COVERED BY THE MARITAL PRIVILEGE, WE CLEARLY HELD IN THE SECOND APPEAL THAT THOSE OBSERVATIONS WERE ADMISSIBLE.
DO YOU AGREE WITH THAT?
>> OH, YEAH.
>> NOW, THE ISSUE OF IT BEING SO INTERTWINED, THERE WAS NOTHING MEANINGFUL, IN OTHER WORDS, SHE COULDN'T HAVE MADE OBSERVATIONS WITHOUT HAVING HEARD FROM HIM, THAT SEEMS TO BE SOMETHING -- WAS THAT RAISED IN THE SECOND APPEAL?
>> THAT I DON'T KNOW.
I DO KNOW THAT MR. TERRY FOR THE FIRST TIME WAS ABLE TO LOOK AT A TRANSCRIPT AND SEE WHAT WAS THERE AFTER THE REDACTIONS AND SAY, WELL, YOU KNOW, SHE'S TALKING ABOUT A BODY, SHE'S TALKING ABOUT SEEING BLOOD, SEEING HER SHEETS.
THIS IS A WOMAN WHO'S LEGALLY BLIND, CAN'T SEE AT NIGHT, CAN'T DRIVE, AND YET SHE'S DESCRIBING THE COLOR OF HER SHEETS IN PITCH BLACK --
>> AND THAT WAS CROSS-EXAMINED EVEN FROM THE FIRST TIME.

THAT'S WHAT --
>> WELL, IT WAS --
>> -- SHE WAS LEGALLY BLIND,
THAT IT WAS DARK.
THAT ALL CAME OUT IN
CROSS-EXAMINATION.
>> WELL, THE FACT -- FROM THAT
OUTSIDE PART.
>> AND DOESN'T THAT ACTUALLY
MAKE THE STATE HAVE A MORE
DIFFICULT TIME?
BECAUSE NOW THE STATE DOESN'T
HAVE, WELL, SHE ALSO HEARD IT
THAT BUTTRESSED IT.
NOW IT LOOKS LIKE SHE HAD A
MOTIVE MAYBE TO TESTIFY AGAINST
HER EX-HUSBAND.
SHE REALLY CAN'T SEE AT NIGHT,
SHE'S TELLING US -- AND SO SHE
BECOMES A MUCH MORE IMPEACHED
WITNESS WHICH IS HELPFUL FOR THE
DEFENSE.
>> WELL, EXCEPT THAT SHE'S
TALKING ABOUT ALL THE BLOOD THAT
SHE SAW IN THE HOUSE, LIKE A
SPOT OF BLOOD ON THE CARPET IN
THE BEDROOM, SOME BLOOD SPECKLES
ON THE --
>> WELL, THAT WAS BASED -- IF
SHE SAW BLOOD, WAS THAT BASED ON
WHAT HER HUSBAND TOLD HER OR
THAT SHE ACTUALLY OBSERVED IT?
>> WELL, CONSIDERING HER
CONDITION, I BELIEVE -- I THINK
IT'S A GOOD ARGUMENT THAT SHE
WOULD NOT OBSERVE THESE THINGS
IF SHE HADN'T BEEN LOOKING FOR
THEM BECAUSE OF WHAT HER HUSBAND
TOLD HER.
I MEAN, A SPOT OF BLOOD IS NOT A
POOL OF BLOOD.
IT'S, YOU KNOW, WE'RE LOOKING
FOR SMALL THINGS THAT SHE
NORMALLY WOULDN'T HAVE BEEN
LOOKING FOR.
>> SO YOU'RE SORT OF MAKING A
FRUIT OF THE POISONOUS TREE
ARGUMENT THAT IF BUT FOR THE
STATEMENT, SHE WOULDN'T HAVE
BEEN LOOKING AT IT.
BUT I THINK WE, AGAIN, SEEM TO
HAVE COVERED THAT WHEN WE SAID
THE OBSERVATION THAT SHE MADE
WOULD BE ADMISSIBLE.
>> WELL, THE COURT SAID THAT,
BUT THEY DIDN'T KNOW WHAT THE
FINAL PRODUCT WOULD LOOK LIKE

UNTIL THIS TRIAL.
SO WHAT I'M SAYING IS, IS THAT THIS ISSUE IS NOW RIGHT, IT IS NOW HERE BEFORE THE COURT, AND THAT THIS COURT'S DECISION IN KERRWOOD IN 1977 SHOULD BE REVISITED AND CHANGED.
[LAUGHTER]
>> DOES THAT MEAN WE -- YOU'RE SAYING IN PLAIN ENGLISH WE COULD RECEDE FROM PRECEDENT?
>> YES.
IT HAPPENED IN CRAWFORD WITH OHIO V. ROBERTS.
>> I KNOW THEY DID THAT, BUT -- ANYWAY, I APPRECIATE THAT THAT'S --
>> THAT'S MY ARGUMENT.
OKAY.
WELL, I DEFINITELY WANT TO GET TO THE LAST ISSUE, TOO, SO I'M GOING TO JUST MAKE A FEW COMMENTS ON THE SUICIDE LETTER.
I KNOW THIS COURT HAS ALSO SAID THAT THERE WAS NO PROBLEM WITH THE TRIAL COURT ALLOWING THE SUICIDE LETTER, AND THE SECOND DCA SAID IT WASN'T -- IT WAS ERROR FOR THEM NOT TO LET IT IN.
HOWEVER, UNDER PRESTON, YOU KNOW, THIS COURT SHOULD REVISIT THAT IN LIGHT OF WHAT ALL THIS EVIDENCE IS.
>> I HAVE A LITTLE TROUBLE UNDERSTANDING THE SUICIDE LETTER GIVEN THE FACT THAT IT WAS ADDRESSED TO THE DETECTIVE WITH A STAMP ON IT.
I MEAN, HE WOULD REASONABLY THINK THAT'S FOR ME AND LOOK AT IT.
PEOPLE LOOK AT MAIL THAT'S ADDRESSED TO THEM, DON'T THEY?
>> THIS COURT HAS SAID IN A PRIOR OPINION BECAUSE HE HADN'T TURNED IT OVER -- IT'S LIKE IF IT HADN'T BEEN POSTED YET SO, THEREFORE, HE HAD NOT VOLUNTARILY RELINQUISHED IT TO CAPTAIN, CORPORAL -- HIS TITLE KEEPS CHANGING, SO I JUST REFER TO HIM AS "TERRY."
YOU KNOW, BECAUSE IT HADN'T BEEN DELIVERED, IT WASN'T OUT OF MR. BOLIN'S CUSTODY AT THAT POINT.
IT WASN'T VOLUNTARILY BEING

GIVEN TO MR. TERRY.
SO, THE FIRST THING IS --
>> WHEN THEY CAME INTO THE JAIL, THE CELL, IT WAS -- WHAT WAS THE REASON THEY WERE COMING INTO THE JAIL CELL?
>> WELL, THEY HAD TAKEN HIM TO THE HOSPITAL BECAUSE HE HAD TRIED TO COMMIT SUICIDE BY TAKING AN OVERDOSE OF --
>> SO A REASONABLE EXPECTATION OF PRIVACY --
>> BACK IN THOSE DAYS THERE WAS A QUESTION AS TO WHETHER OR NOT THERE WAS REASONABLE, ANY REASONABLE EXPECTATION OF ANY KIND OF PRIVACY FOR SOMEBODY AS A PRETRIAL DETAINEE.
KEEP IN THE MIND, THIS WAS BEFORE HE WAS CONVICTED.
HE WAS IN THE COUNTY JAIL.
>> MAYBE IF IT WAS A LETTER TO HIS LAWYER, JUST FOLLOWING UP ON WHAT JUSTICE CANADY SAYS, IT'S A LETTER TO THE PERSON THAT OPENED IT.
>> WELL, THE ONLY LETTER THEY INTRODUCED AT COURT.
THEY WENT THROUGH ALL OF HIS LETTERS IN THE BOX.
I'VE GOT -- IN THE RECORD THERE ARE SEVERAL LETTERS TO FAMILY MEMBERS, TO OTHER PEOPLE.
SO THAT DIDN'T STOP THEM.
AND WHAT THE EVIDENCE, AND I SAY "EVIDENCE," THERE WAS A SUMMATION OF FACTS PRESENTED BY TRIAL COUNSEL.
THIS HAD BEEN REHASHED BEFORE, AND THE TRIAL COURT WAS NOW IN THE SECOND DCA --
[INAUDIBLE]
AND SO THEY WERE JUST KIND OF QUICKLY RUNNING THROUGH THE EVIDENCE.
BUT THERE WERE THREE POLICE DETECTIVES WHO WENT IN OR OFFICERS WHO WENT INTO THAT JAIL CELL, AND CLEARLY THEY WERE NOT THERE TO INVESTIGATE AN ATTEMPTED SUICIDE.
THEY WERE LOOKING FOR EVIDENCE IN THE COLLINS CASE.
AND THAT'S WHAT THE SUMMATION BY MR. TERRY WAS AS FAR AS WITH BAKER.
I MEAN, THE FACT THAT THERE WAS

AN ATTEMPTED SUICIDE WAS NOT
DISPUTED AND WAS STIPULATED TO
BY COUNSEL.
THE LETTER, HOWEVER, WAS WHAT
THEY WERE TRYING TO KEEP OUT.
AND IN ROGERS THIS COURT SAID
THAT YOU CAN'T JUST SEND IN THE
INVESTIGATORS TO GO LOOKING FOR,
UM, EVIDENCE OF THE CRIME THAT
YOU'RE ABOUT TO GO TO TRIAL
ON -- WHICH HAPPENED IN
ROGERS -- UNDER THE IDEA THAT
THIS PERSON IS A HIGH RISK.
MR. BOLIN WAS HIGH RISK.
HIS CELL WAS SEARCHED SEVERAL
TIMES A DAY LOOKING FOR
CONTRABAND.
BUT THEY WEREN'T ALLOWED TO READ
HIS MAIL, THEY WEREN'T ALLOWED
TO READ HIS PAPERS.
THIS TIME THEY WENT THROUGH
EVERYTHING.
UM --
>> [INAUDIBLE]
>> OKAY.
I'M GOING TO GO QUICKLY INTO THE
LAST ISSUE WHICH A SUBSTANTIAL
TERM MITIGATION WAS REJECTED,
THE ABILITY TO PERFORM CONDUCT.
THE TRIAL -- DR. BERLIN'S
TESTIMONY WAS UNCONTROVERTED,
AND UNLIKE SOME OF THE OTHER
CASES THE STATE CITES LIKE
NELSON, IT WASN'T BASED ON
SOLELY HIS SELF-SERVING
STATEMENT, IT WAS BASED ON
RELIABLE FAMILY MEMBERS, PEOPLE
WHO KNEW HIM, HIS HISTORY OF
BRAIN INJURIES WHICH WERE
EXTREMELY SEVERE, HIS
INABILITY -- THE DOCTOR ADMITTED
HE KNEW RIGHT FROM WRONG, HE
JUST COULDN'T CONFORM TO CONDUCT
OF THE LAW.
THIS COURT SHOULD FIND WHAT THE
STATE, WHAT THE JUDGE REJECTED.
>> I THINK THAT DIDN'T
DR. BERLIN, AND, I MEAN, TO ME
IT'S CERTAINLY A STRONG
STATEMENT, BUT IT DOESN'T QUITE
GET YOU THERE.
THE EVIDENCE THAT I HAVE
SUGGESTS THAT THIS WAS A
SUBSTANTIAL IMPAIRMENT.
HE DID RECOGNIZE THE CRIMINALITY
OF WHAT HE WAS DOING BUT THE
EFFECTS, THE SUBSTANTIAL PART OF

THIS MENTAL ILLNESS,
PARTICULARLY THE MANIC PART,
WOULD MAKE IT DIFFICULT FOR HIM
TO --
[INAUDIBLE]
THAT WOULD AFFECT HIS ABILITY TO
CONFORM TO BEHAVIOR --
[INAUDIBLE]
SEEING THAT THAT'S CERTAINLY
STRONGER THAN WHAT WE JUST
HEARD, BUT I DON'T KNOW THAT
THAT QUITE GETS YOU THERE AS FAR
AS THE FINDINGS FOR THE
STATUTORY MITIGATOR.
IS THAT THE GIST OF WHAT
DR. BERLIN HAS TO SAY?
>> I'LL LOOK AT IT DURING MY
TIME --
[INAUDIBLE]
BUT I BELIEVE THAT IT WASN'T
THAT REASON THAT THE TRIAL JUDGE
REJECTED IT.
IT WAS BECAUSE HE WAS COVERING
UP AND HAD THIS PLANNED-OUT
THING WHICH GOES TO HIS ABILITY
TO KNOW WHAT HE WAS DOING BUT
NOT HIS INABILITY TO STOP
HIMSELF.
UM, THE PROPORTIONALITY
ARGUMENT, THIS WAS NOT THE MOST
AGGRAVATING AND LEAST MITIGATING
OF CIRCUMSTANCES.
ONE AGGRAVATOR, ALBEIT A
HEAVY-DUTY ONE, THERE WAS A LOT
OF MITIGATION.
TERRIBLE CHILDHOOD, LOTS OF
SEVERE HEAD INJURIES, SERIOUS
HEALTH ISSUES WITH HIS WIFE, A
DEAD CHILD, UM, HIS YOUTH --
[INAUDIBLE]
HIS DRUG ABUSE, SUICIDE ATTEMPTS
ALL OF WHICH HAPPENED, YOU KNOW,
BEFORE THIS.
THIS VERY POOR, MINIMAL
EDUCATION.
IT WAS VERY POOR, AND HE HAD A
MINIMAL EDUCATION.
ALL OF THESE THINGS WERE PART OF
THE MITIGATION.
FOURTEEN ITEMS, I KNOW WE DON'T
COUNT THE 14 ITEM INDICATION,
AND ONE AGGRAVATOR
ALL OF THIS, THE CLOSEST I COULD
FIND IS --
[INAUDIBLE]
DOESN'T MATTER THAT MAYBE SOME
WITH LITTLE WEIGHT OR NO WEIGHT,

THERE WAS ONLY ONE AGGRAVATOR,
AND THERE WAS SUBSTANTIAL
MITIGATION.
WE REST.
>> GOOD MORNING, YOUR HONORS.
MAY IT PLEASE THE COURT, CAROL
DITTMAR REPRESENTING THE
APPELLEE IN THIS CASE, THE STATE
OF FLORIDA.
ON THE FIRST ISSUE, AND IT IS
IMPORTANT TO SEPARATE OUT SOME
OF THE SUBISSUES HERE BECAUSE
THE SUBISSUE, THE WHOLE CLAIM
ABOUT THIS COURT SHOULD CHANGE
THE EVIDENCE CODE TO HAVE THE
PRIVILEGE ENCOMPASS OBSERVATIONS
AS WELL AS PRIVILEGES, THAT
ARGUMENT WAS NEVER MADE IN THE
TRIAL COURT.
THAT ARGUMENT IS NOT BEFORE THE
COURT AND SHOULDN'T BE
CONSIDERED.
IT HASN'T BEEN PRESERVED HERE.
THE ARGUMENT WHICH HAS BEEN
PRESERVED IS THE CRAWFORD
ARGUMENT, THE SIXTH AMENDMENT
CONFRONTATION ARGUMENT BASED ON
ON THE CROSS-EXAMINATION.
A COUPLE OF POINTS ON THAT.
THERE WAS -- CRAWFORD SAYS AS
YOU LOOK AT THE OPPORTUNITY TO
CROSS-EXAMINE IN THIS CASE,
OBVIOUSLY, SQUARELY WITHIN THE
HEARSAY FOR PRIOR EXCEPTION WITH
PRIOR TESTIMONY, BUT IT ALSO
MEETS CRAWFORD'S DEMANDS FOR
CONFRONTATION BECAUSE THERE WAS
THAT OPPORTUNITY FOR
CROSS-EXAMINATION, AN
OPPORTUNITY WHICH WAS NOT ONLY
TAKEN, BUT WAS WELL TAKEN, AND
AS HAS BEEN NOTED THERE WAS A
THOROUGH CROSS-EXAMINATION OF
CHERYL KOBE.
THAT WAS ADMITTED AS PART OF
THIS TILE WITH PART OF HER
RECORDED TESTIMONY.
AS FAR AS HER RECORDED
TESTIMONY, JUSTICE PARIENTE, MY
UNDERSTANDING FROM THE RECORD
THAT THERE WAS A DEPOSITION
TAKEN TO PERPETUATE HER
TESTIMONY PRIOR TO THE FIRST
TRIAL BECAUSE THEY DID NOT THINK
SHE WOULD LIVE THROUGH THE FIRST
TRIAL.
THEY DIDN'T USE IT IN THE FIRST

TRIAL BECAUSE SHE DID LIVE
THROUGH THE FIRST TRIAL.
I BELIEVE THEY ACTUALLY
VIDEOTAPED HER IN-COURT TRIAL
TESTIMONY AT THAT FIRST TRIAL,
AND THAT'S ACTUALLY WHAT CAME IN
IN THE SECOND TRIAL, AND THEN
WHAT WAS REDACTED, EVEN THE
VIDEOTAPE IN THIS THIRD TRIAL.
NOW, THE INITIAL PART OF THE
QUESTIONING APPARENTLY THERE WAS
SOME PROBLEM WITH THE VIDEOTAPE
BECAUSE IT STARTS OFF THE
INITIAL PART OF HER QUESTIONING
IS READ FROM THE PRIOR
TRANSCRIPT BY THE PROSECUTOR,
BY --
[INAUDIBLE]
AND THEN HE GETS TO A POINT
WHERE HE SAYS NOW WE CAN TURN TO
VIDEO, AND THE JURY CAN ACTUALLY
OBSERVE HER TESTIFY THROUGH THE
END OF IT.
THE REASON THAT I DON'T THINK IT
WAS THAT DEPOSITION IS IF YOU
LOOK AT -- AND I KNOW THIS
RECORD IS VERY SCREWY ABOUT THE
WAY THE MOTIONS WERE FILED AND
THE WAY ISSUES CAME UP TO BE
LITIGATED BECAUSE THIS CASE, THE
HOLLY CASE WAS BEING REHEARD AT
THIS SAME TIME.
SO IN OUR CASE PRIMARILY IT'S ON
THE HOLLY CASE, AND THEY'RE
ACTUALLY TALKING ABOUT HER
CROSS-EXAMINATION IN THAT CASE
WHICH IS DIFFERENT FROM THE
CROSS-EXAMINATION IN THIS CASE.
BUT IT DOES COME UP AGAIN IN
THIS CASE AND, YOU KNOW, THE
PARTIES REACH IT, AND IT'S
CERTAINLY PRESERVED IN THIS
CASE.
BUT IN THAT DISCUSSION THE
DEFENSE HAD FILED A MOTION TO
EXCLUDE THE TESTIMONY.
THE STATE HAS SPECIFICALLY FILED
A MOTION SEEKING ADMISSION OF
THIS TESTIMONY.
AND JUDGE FLEISCHER AT THE
HEARING, ONE OF THE COMMENTS SHE
MAKES IS, YOU KNOW, THE STATE'S
MOTION ONLY REQUESTING THAT
INITIAL TRIAL TESTIMONY.
THE DEFENSE MOTION TO EXCLUDE
TALKS ABOUT ALSO THE
PERPETUATION TESTIMONY IN THE

DEPOSITIONS.
BUT ACCORDING TO JUDGE FLEISCHER, SHE SAID THE STATE ISN'T SEEKING TO INTRODUCE THAT HERE, THEY'RE ONLY SEEKING TO INTRODUCE THE INITIAL TRIAL TESTIMONY.
SO MY UNDERSTANDING ON THIS RECORD IS WHAT WAS INTRODUCED WAS STRICTLY THAT TRIAL TESTIMONY AND NOT FROM THAT DEPOSITION DONE BEFORE EVEN THE FIRST TRIAL.
>> BUT EVEN SO, SOUNDS LIKE THE DEPOSITION -- YOU SAID IT WASN'T EVEN A DISCOVERY DEPOSITION.
>> NO.
>> THE DEFENSE KNEW IT WAS --
>> YES.
EVEN IF IT HAD BEEN THAT, THAT WAS TAKEN AS A DEPOSITION --
[INAUDIBLE]
I'M SORRY, TESTIMONY AT THAT TIME.
NOW, THE FACT THAT THERE HAD BEEN A DELAY IN PROCEEDINGS AND IT IS TESTIMONY FROM LONG AGO IS UNFORTUNATE, AN UNFORTUNATE PASSAGE OF --
[INAUDIBLE]
BUT THE STATE DOESN'T GAIN ANY ADVANTAGE BY THAT.
THE STATE IS JUST AS DISADVANTAGED BY NOT HAVING KOBE HERE.
WE CAN'T ASK WHAT OTHER OBSERVATIONS SHE MIGHT HAVE SEEN.
THE FACT THAT HER CROSS-EXAMINATION IS LIMITED TO THE FACT IN 1991 DOESN'T HURT THE DEFENSE BECAUSE HER DIRECT TESTIMONY WAS WHAT SHE TESTIFIED TO IN 1991.
THERE WAS NO NEW TESTIMONY THAT THEY NEEDED TO HAVE A NEW FOCUS OF CROSS-EXAMINATION OR A NEW AREA OF CROSS-EXAMINATION.
THERE'S NOTHING THAT CAME OUT FROM HER DIRECT THAT DID NOT --
[INAUDIBLE]
AT THE INITIAL TRIAL.
>> WELL, WHAT ABOUT THE ISSUE THAT HOW WOULD SHE KNOW THE DATE?
I MEAN, MAYBE THE STRONGER ARGUMENT -- BECAUSE I THINK THE

CRAWFORD ISSUE IS WEAK.
BUT WHAT ABOUT THIS ARGUMENT
THAT IT'S INTERTWINED, THAT
REALLY HER OBSERVATIONS HAD TO
BE INFLUENCED BY WHAT SHE WAS
TOLD AND, THEREFORE, SOMEHOW
TAINTED OR NOT RELIABLE?
>> WELL, WHEN YOU'RE TALKING
ABOUT SHE MAKES A REFERENCE TO
"THE BODY" IN HER TESTIMONY.
NOW, WE KNOW CERTAINLY BY THE
TIME OF TRIAL THAT WHAT WAS
WRAPPED UP IN HER SHEETS AND IN
HER QUILTS AND DUMPED OUT OF THE
TRUCK, OUT OF MR. BOLIN'S TRUCK
WAS, IN FACT, A BODY, AND SHE
CERTAINLY IS AWARE OF THAT.
EVERYBODY IS AWARE OF THAT BY
THE TIME OF THE TRIAL.
SO THERE'S NO REASON FOR HER
CALLING IT "A BODY" IN TRIAL,
HER ONLY APPRECIATION OF THAT IS
STATEMENTS MR. BOLIN HAS MADE TO
HER.
THAT EVIDENCE WAS PLAINLY
AVAILABLE.
AND AS FAR AS THE LACK OF
CLINICAL RECORDS SHOWING THAT
SHE HAD BEEN TO THE CLINIC ON A
PARTICULAR DATE, OBVIOUSLY,
THERE WERE NO CLINICAL RECORDS
BACK IN 1991, AND THEY COULD
HAVE BROUGHT THAT OUT IF THEY
WANTED TO.
THE REASON THE CLINICAL RECORDS,
I THINK, COME UP IS MORE
RELATING TO -- AND, AGAIN, THEY
TALKED ABOUT THIS IN THE
TRANSCRIPT FROM THE HOLLY CASE,
THERE BEING RECORDS.
AND APPARENTLY WHAT HAPPENED,
THERE WERE SEVERAL PIECES OF
INFORMATION IN THE HOLLY CASE
WHICH THEY WERE CLAIMING WITH
THIS MOTION, THE CRAWFORD
VIOLATION, THAT THERE WERE
THINGS THEY COULD HAVE
CROSS-EXAMINED HER ABOUT IN THE
HOLLY CASE.
ONE ISSUE WAS THERE WAS A PURSE
THAT WAS FOUND AT THE SCENE OF
THE CRIME IN THE HOLLY CAR, THE
VICTIM'S CAR.
CHERYL KOBE'S TESTIMONY
DESCRIBES HAVING TAKEN A PURSE
THAT NIGHT, HAVING TAKEN A PURSE
OUT AND DUMPED IT SOMEWHERE.

SHE SAID WE DIDN'T KNOW BECAUSE APPARENTLY THE PICTURE, THE EVIDENCE OF THE PURSE FOUND IN THE CAR WE'VE NEVER DISCLOSED TO THE DEFENSE, SO THEY WERE KIND OF MAKING THE BRADY ARGUMENT, THAT IF WE'D KNOWN ABOUT THE PURSE FOUND IN THE CAR, WE COULD HAVE ASKED HER ABOUT THAT IN CROSS-EXAMINATION.
WE DIDN'T KNOW ABOUT THAT, AND IT'S KIND OF A DUE PROCESS ALONG WITH CRAWFORD BECAUSE WE DIDN'T HAVE THAT HERE.
THERE HAD BEEN A LETTER, A CLINIC WALK-IN RECORD ABOUT A PREGNANCY TEST THAT WAS FOUND FOR CHERYL KOBE, BUT IT WAS, LIKE, A YEAR AND A HALF BEFORE THIS OFFENSE OCCURRED.
AND I THINK WHAT THEY WANTED WAS TO ASK HER -- I THINK, I HAVE TO QUALIFY THIS BECAUSE IT'S NOT VERY WELL FLESHED OUT AT THE HEARING -- MY IMPRESSION IS THEY WOULD HAVE LIKED TO HAVE ASKED CHERYL, WELL, ISN'T THIS WHEN YOU'RE THINKING ABOUT HAVING GONE TO THE CLINIC, AND THE DATE IS -- IT'S NOT EVEN THE SAME YEAR.
I THINK WHAT HAPPENS IS PEOPLE PUT TOGETHER, THAT RELATES TO ANOTHER PREGNANCY SHE HAD.
SHE TESTIFIES ABOUT THIS IN HER HISTORY.
SHE HAD AN EARLIER PREGNANCY BEFORE THE PREGNANCY THAT SHE FOUND OUT ABOUT IN NOVEMBER OF 1986, AND THAT CLINICAL RECORD APPEARED TO BE SOMETHING THAT CAME OUT OF THAT EARLIER, SEVERAL YEARS AGO TYPE EVIDENCE.
SO I DON'T KNOW HOW THEY WOULD USE THAT IN THIS TRIAL OR, YOU KNOW, MAYBE SHE WOULD SAY THAT'S NOT THE DATE I'M THINKING OF.
I GUESS THEY WANTED TO SHOW SHE WAS CONFUSED ABOUT THE DATE.
NOW, THEY DID HAVE HER FRIEND, PAULA CAMERON, THAT THEY HAD TESTIFY ALSO THAT SHE HAD BEEN WITH HER IN THIS CLINIC IN 1986.
AND WHEN THE ISSUE CAME UP IN THE HOLLY CASE, THE ARGUMENT WAS MADE, WELL, YOU CAN STILL BRING THAT OUT BY ASKING PAULA CAMERON

WHO WENT WITH HER HOW SURE OF
YOU ARE THE DATE, BECAUSE WE
CAN'T FIND ANY RECORD.
NOW, I DON'T SEE THAT THEY WENT
THERE WITH PAULA CAMERON, AND
PAULA CAMERON WASN'T SURE ABOUT
THE --
>> EARLY NOVEMBER.
YES, SHE DID.
SO THEY WERE ABLE TO --
>> THEORETICALLY, THEY COULD
HAVE.
I DON'T KNOW THAT THEY DID.
[INAUDIBLE CONVERSATIONS]
>> TO BRING OUT THAT THERE WERE
NO RECORDS SHOWING THAT NOBODY
HAD BEEN ABLE TO FIND RECORDS OR
I DON'T KNOW WHO SEARCHED FOR RECORDS.
I REALLY DON'T KNOW THE STATUS
OF RECORDS, BUT THAT WAS THE
ARGUMENT, THAT THEY WOULD HAVE
LIKED TO HAVE CROSS-EXAMINED
THIS BIKER.
THE FACT THIS THERE WERE NO
RECORDS SUPPORTING HER CLAIM
THAT SHE HAD GONE TO A WALK-IN
CLINIC THAT PARTICULAR DAY.
>> NOW, WHAT ABOUT THE
OBSERVATIONS ABOUT THE BLOOD?
>> WELL, I THINK THAT JUST COMES
BACK TO, AGAIN, I MEAN, SHE'S
IN -- THIS IS A PLACE WHERE, A
SMALL TRAILER.
SHE GOES IN.
ONE THING SHE OBSERVES IS
EVERYTHING IS WET.
ONE THING CURIOUS, EVERYTHING IS
WET.
HE HAS WASHED EVERYTHING DOWN,
SO THAT'S ONE THING THAT SHE'S
DESCRIBING.
I THINK THAT OBSERVATION MIGHT
GET HER TO LOOK AND SEE THE
BLOOD.
SO, AGAIN, SHE'S JUST NOT
NECESSARILY LOOKING AT THE BLOOD
ONLY BECAUSE OF WHAT SHE'S
HEARD, AND I THINK YOU'RE
CONNECT IN HER CROSS-EXAMINATION
WAS MORE POWERFUL BECAUSE ALL
SHE HAD WAS HER OBSERVATIONS,
AND SHE CLEARLY DID HAVE A
VISION PROBLEM.
SHE DID NOT HAVE A HEARING
PROBLEM.
SHE DID NOT HAVE THAT SAME
AVENUE OF CROSS-EXAMINATION AS

TO WHAT SHE HAD HEARD FROM
MR. BOLIN, BUT EVERYTHING SHE
SAW, SHE SAW.
THE EVIDENCE SHOWS THAT THOSE
OBSERVATIONS, THEY'RE NOT PART
OF THE PRIVILEGE.
THE PRIVILEGE IS JUST
COMMUNICATIONS OR COMMUNICATIVE
ACTS.
AND THAT'S NOT WHAT'S BEEN, UM,
CHALLENGED HERE WITH THIS.
SO THERE'S REALLY -- I DON'T
THINK THERE'S ANY FURTHER WE CAN
GO WITH THE KOBE TESTIMONY.
YES, IT HAS -- IT WAS A PROBLEM
IN THE PAST.
IN THIS CASE IT WAS REDACTED.
THE PRIVILEGES STATEMENTS DID
NOT COME IN, AND IT'S WHERE THE
PROBLEM HAS ALWAYS BEEN IN THE
PAST.
I DON'T THINK THERE'S ANY KIND
OF CRAWFORD, CREDIBLE CRAWFORD
CLAIM GIVEN THE FULL
CROSS-EXAMINATION THE DEFENSE
HAD IN THIS CASE, AND TRIAL
COURT FOUND BELOW IT WAS A
MEANINGFUL CROSS-EXAMINATION,
MORE THAN THE ADEQUATE, MORE
THAN THE OPPORTUNITY, IT WAS
MEANINGFUL.
AND I DON'T SEE HOW YOU COULD
FIND ANY KIND OF CONFRONTATION
VIOLATION ON THIS ACT.
IN TERMS OF THE -- AGAIN, I
THINK THE COMMUNICATIONS VERSUS
OBSERVATIONS WAS NEVER ARGUED IN
ANY MANNER BELOW.
NOW, THEY DID MAKE THE ARGUMENT
ABOUT HER OBSERVATIONS BEING
INTERTWINED WITH HER STATEMENT,
BUT THEY DIDN'T MAKE IT IN THE
TERMS OF THAT BEING ENCOMPASSED
INTO PRIVILEGE AND INADMISSIBLE
BECAUSE --
[INAUDIBLE]
AND THAT ARGUMENT WAS NOT MADE
AND WAS NOT PROFFERED BELOW.
AS FAR AS THE SUICIDE NOTE, THIS
IS, OF COURSE, LAW OF THE CASE.
AND THE PROBLEM AT THIS POINT
WAS EVEN TRYING TO ARGUE WHAT
THEY'RE ARGUING TO GET AROUND
LAW OF THE CASE, THE DEFENSE IS
ARGUING THAT THE SECOND DISTRICT
OPINION IS, THERE MANIFEST
INJUSTICE WITH THE SECOND

DISTRICT OPINION BECAUSE THE
SECOND DISTRICT --
[INAUDIBLE]
WELL, IF THE SECOND DISTRICT HAD
THE FACTS WRONG, THEN IT WAS
INCUMBENT UPON THE DEFENSE TO
COME BEFORE JUDGE FLEISCHER IN
THIS CASE AND MAKE THE ARGUMENT
THAT THE SECOND DISTRICT HAD THE
FACTS WRONG, WE NEED TO HAVE A
NEW EVIDENTIARY HEARING, SHOW
THAT THERE WAS A PROBLEM HERE.
AND THERE WAS NO ATTEMPT BY
THAT, BY THE DEFENSE TO EVER
BRING THAT TO THE COURT'S
ATTENTION BELOW HERE.
THERE WAS NO CHALLENGE TO THE
FACTS BELOW.
MY OPPOSING COUNSEL STANDS UP
HERE AND SAYS THEY WERE NOT
THERE TO INVESTIGATE A SUICIDE,
THEY WERE THERE TO LOOK FOR
EVIDENCE, AND THAT WAS CLEARLY
REFUTED BY THE ARGUMENT AT THE
HEARING WHICH IS WHAT THE SECOND
DISTRICT HAD AS ITS BASIS WHEN
IT REVERSED THE SUPPRESSION AND
SAID THE SUICIDE NOTE WAS
ADMISSIBLE.
NOW, WE DON'T HAVE THAT
SUPPRESSION HEARING IN OUR
RECORDS BECAUSE THAT WAS HELD
BACK IN 1995.
AND YET WHAT WE HAVE IS THE
DEFENSE COMING TO THIS COURT
SAYING THIS COURT DOESN'T HAVE A
RECORD WHICH OFFERS SUBSTANTIAL
COMPETENT EVIDENCE TO SUPPORT
THE FACTUAL FINDS MADE BY THE
SECOND DISTRICT.
WELL, OF COURSE YOU DON'T.
WE DON'T HAVE THE SUPPRESSION
HEARING IN OUR FILES.
SO WE DON'T HAVE WHAT TERRY IS
TALKING ABOUT.
IT IS PART OF HIS JOB
DESCRIPTION TO INVESTIGATE
SUICIDES AND ATTEMPTED SUICIDES
AT THE JAIL.
HE IS THE PERSON THEY CALL WHEN
THIS HAPPENS AT THE JAIL.
HE RESPONDS TO THE JAIL.
SO THERE WAS NOTHING NEFARIOUS
ABOUT HIM GOING TO THE JAIL THAT
DAY.
THERE IS NO EVIDENCE, THERE HAS
NEVER BEEN ANY EVIDENCE TO

SUPPORT THE DEFENSE CLAIM THAT
THEY WERE ONLY THERE TRYING TO,
YOU KNOW, AS A SUBTERFUGE TO TRY
AND FIND EVIDENCE FOR THE CRIME.
THAT ARGUMENT HAS NEVER, HAS
NEVER REALLY GONE.
SO THEY'RE TRYING TO NOW GET
AWAY FROM THE SECOND DISTRICT
FACTS WITHOUT EVER HAVING
CHALLENGED THEM BY ANY PROPER
METHOD EITHER IN THE COURT
BELOW, BY GOING BACK TO THE
SUPPRESSION HEARING, BY SHOWING
THERE'S SOME PROBLEM WITH THE
RECORD, AND YET THAT'S WHERE
THEY'RE CLAIMING THE PROBLEM IS.
WHEN THEY HAD THE HEARING ON THE
HOLLY CASE, AGAIN, ON THIS ISSUE
AND THEY LOOKED AT THE RECORDS
THAT THE SECOND DISTRICT HAD,
AND THE ARGUMENT MADE AT THAT
TIME WASN'T JUST THAT THE SECOND
DISTRICT WAS WRONG FACTUALLY,
THE ARGUMENT WAS, WELL, THE
SECOND DISTRICT SAID THERE'S NO
RIGHT OF PRIVACY, THERE CAN'T BE
A FOURTH AMENDMENT VIOLATION
BECAUSE THIS WAS A JAIL CELL,
AND THERE'S NO EXPECTATION OF
PRIVACY.
YOU CAN'T HAVE THE VIOLATION.
AND THEY DON'T LOOK AT WHY THE
OFFICERS WERE THERE OR THE
INTENT.
AND YET THE SECOND DISTRICT --
TRUE THAT THE SECOND DISTRICT
SAID THAT FIRST, THAT THERE IS
NO FOURTH AMENDMENT VIOLATION
BECAUSE THERE IS NO REASONABLE
EXPECTATION OF PRIVACY, BUT THEY
ALSO WENT BEYOND THAT AND SAID
NOT ONLY THAT, IN THIS CASE WE
CAN DISTINGUISH McCOY, WE CAN
DISTINGUISH ROGERS BECAUSE THE
OFFICERS WERE NOT THERE BECAUSE
THE STATE ATTORNEY HAD CALLED
AND SAID GO SHAKE DOWN THIS CELL
AND FIND THE EVIDENCE OF THIS
CRIME.
THE OFFICERS WERE THERE BECAUSE
THEY GOT A CALL OF AN ATTEMPTED
SUICIDE, AND IT'S THEIR
RESPONSIBILITY TO INVESTIGATE
THE ATTEMPTED SUICIDE.
SO ALL OF THAT WAS, UM, WAS PART
OF THE SECOND DISTRICT OPINION,
AND IT JUST KIND OF IS BEING

IGNORED AT THIS POINT WHEN THE
ARGUMENT BEING MADE TO THIS
COURT IS, WELL, THE SECOND
DISTRICT IS WRONG, BUT YOU'RE
NOT REALLY EVEN BEING TOLD WHAT
THE SECOND DISTRICT HAD IN FRONT
OF IT TO MAKE ITS OPINION.
SO I THINK IF YOU LOOK AT OUR
RECORD, AT EVERYTHING WE HAVE,
THE SECOND DISTRICT'S OPINION,
THE PRIOR OPINION WHERE THIS
COURT AGREES THAT THE SUICIDE
NOTE WAS PROPERLY ADMITTED, YOU
CLEARLY DO NOT HAVE MANIFEST
INJUSTICE TO GET AROUND THE LAW
OF THE CASE AND REVIEW THIS.
THERE'S ANOTHER ISSUE.
AND IF YOU DO LOOK AT IT, YOU'RE
GOING TO FIND THAT IT WAS, IT'S
THE PROPER RULING BECAUSE IT'S,
UM, THE PROPER BASIS AND AS THIS
COURT HAD NOTED, THIS WAS A
LETTER THAT WAS STAMPED AND
ADDRESSED TO THE DETECTIVE
THAT'S READING IT.
SO THERE REALLY IS NO CREDIBLE
ARGUMENT THAT THERE WAS ANY KIND
OF REASONABLE EXPECTATION OF THE
PRIVACY THAT WAS VIOLATED HERE
AND NO BASIS TO REVERSE THIS
CASE BECAUSE OF THE ADDITION OF
THAT SUICIDE NOTE.
ON THE PROPORTIONALITY AND THE
REJECTION OF THE SUBSTANTIAL
IMPAIRMENT, UM, FIRST YOU HAVE
TO GET AROUND THE FACT THAT WHAT
WE HAVE HERE IS DR. BERLIN'S
TESTIMONY, WE HAVE ONE EXPERT,
SO IT'S A LITTLE CLEANER THAN
SOME CASES WE SEE.
WE JUST HAVE DR. BERLIN.
BUT WHAT WE HAVE BEING PROFFERED
TO THE COURT AS MITIGATION IS
BECAUSE, OF COURSE, MR. BOLIN
WAIVED THE MITIGATION BEFORE THE
TRIAL COURT.
SO YOU'RE FACED WITH, FIRST OF
ALL, TO CONSIDER THAT, AND
YOU'RE ASKED TO MAKE A DECISION
AS TO WHETHER THE JUDGE MADE A
MISTAKE IN REJECTING THIS WHEN
THIS WAS NEVER EVEN UNDER THIS
COURT'S CASE LAW OFFICIALLY PART
OF THE RECORD.
IT WAS JUST SOMETHING PROFFERED
TO THE JUDGE TO DEMONSTRATE THAT
MR. BOLIN'S WAIVER WAS

VOLUNTARY, WAS KNOWING THAT
MITIGATION HAD, IN FACT, BEEN
INVESTIGATED AND THAT THERE WAS
A MITIGATION NOTEBOOK THAT WE
PRESENTED TO THE JUDGE AND, IN
FACT, THAT'S WHY THIS CASE HAS
KIND OF GOTTEN DELAYED AS YOUR
HONORS ARE AWARE.
WENT BACK FOR RECONSTRUCTION OF
THE RECORD BECAUSE THAT NOTEBOOK
HAD TO BE PUT BACK TOGETHER.
>> YOU'RE GOING REALLY FAST.
YOU KNOW WHAT YOU'RE TALKING
ABOUT.
>> I'M SORRY.
>> BUT THE IDEA OF A DEFENDANT
GOING THROUGH THE TRIAL
PROCEDURE AND THEN LATER HAVING
MITIGATION PRESENTED TO THE
JUDGE, I MEAN, DOES THIS NOT
FALL WITHIN THAT LINE OF, THAT
LINE OF CASE LAW THAT WE HAVE
INSTRUCTED TRIAL JUDGES THAT
THERE'S AN OBLIGATION TO
DETERMINE WHETHER THERE IS
MITIGATION AND PRETRIAL
SENTENCING INFORMATION AND THOSE
KINDS OF THINGS?
ARE YOU SUGGESTING THAT IF A
DEFENDANT WAIVES MITIGATION AND,
IN A SPENCER HEARING THE MOST
OUTSTANDING CASE OF MITIGATION
THAT SO FAR OUTWEIGHS THE
CONVICTION THAT WE WOULD STILL
EXECUTE THE DEFENDANT?
>> WELL, I THINK THERE ARE A LOT
OF JUMPS TO GET THERE BEFORE YOU
GET THERE.
>> WELL, IT MAY BE.
BUT IT'S A FUNDAMENTAL PREMISE
THAT YOU'RE SAYING THEY CANNOT
EVEN TALK ABOUT THAT, IS WHAT
YOU'RE SAYING TODAY.
YOU'RE SAYING THEY WAIVED IT,
AND WE CAN'T LOOK AT IT, AND I'M
TRYING TO UNDERSTAND BECAUSE
THAT SEEMS TO BE IN CONFLICT
WITH THOSE CASES WHERE WE'VE
INSTRUCTED TRIAL JUDGES THEY
MUST BE CLEAR AS TO WHAT'S
THERE, WHAT'S NOT THERE EVEN IF
A DEFENDANT DOESN'T WANT IT.
>> THERE IS THAT LINE OF CASES
WHERE YOU SAID EVEN IF THE
DEFENDANT WAIVES THIS, THE COURT
MUST ASSURE ITSELF --
>> RIGHT.

AND THIS FALLS --
>> AND THIS FALLS WITHIN, AND THAT'S WHAT JUDGE FLEISCHER DID. SHE VERY THOROUGHLY ANALYZES IT. HOWEVER, THIS COURT SAID WHEN IT'S PROFFERED BY THE DEFENSE TO WAIVE --
[INAUDIBLE]
THAT'S WHAT YOU SAID AND LAMAR SAID.
>> YOU DON'T KNOW WHAT THE EFFECT IS, IS WHAT YOU'RE SAYING.
>> IT SEEMS TO ME, THOUGH, IF BERLIN -- DID HE TESTIFY IN THE LAST TRIAL?
>> NO, HE -- WELL, WHAT HAPPENED --
>> [INAUDIBLE]
>> ON THE MATTHEWS CASE WHICH THIS COURT SAW A NUMBER OF YEARS AGO, HE HAD ALSO, MR. BOLIN HAD ALSO WAIVED MITIGATION IN THAT CASE.
AND THIS WAS SOMETHING PUT TOGETHER.
BERLIN'S TESTIMONY REALLY GOES BACK TO 1991.
>> OKAY.
SO POINT BEING THERE IS TESTIMONY FROM DR. BERLIN THAT WAS CROSS-EXAMINED, AND THAT'S WHAT THE JUDGE CONSIDERED.
>> IT IS.
>> BUT YOUR ARGUMENT, I THINK A PRETTY POWERFUL ARGUMENT, IS THAT ALTHOUGH WE IMPOSE ON TRIAL JUDGES THE OBLIGATION TO LOOK AT THE RECORD AND FIND MITIGATION ANYWHERE IN THE RECORD, A LITTLE BIT DISINGENUOUS THEN TO ARGUE ON APPEAL, WELL, THEY SHOULD HAVE GIVEN IT MORE WEIGHT.
WHILE MR. BOLIN WANTED IT TO BE CONSIDERED, HE SHOULDN'T HAVE WAIVED MITIGATION.
SO I THINK WE WANT TO MAKE SURE WE HAVE THE RECORD, BUT I THINK I WOULD SORT OF SAY THAT IT'S WEAKENED BY THE WAY IT COMES IN.
AND IT WAS CONSIDERED BY THE TRIAL JUDGE.
SO, I MEAN, THAT'S A FRIENDLY QUESTION.
I DON'T KNOW WHERE YOU RECONCILE --
>> WELL, I'M TRYING TO

UNDERSTAND THEN WHY WE EVEN DO
IT.
IF IT'S NOTHING, IF IT MEANS
NOTHING, THEN WHY DO WE FORCE
TRIAL JUDGES TO DO SOMETHING
MEANINGLESS?
>> WELL, IT'S NOT MEANINGLESS,
AND ESPECIALLY IF YOU LOOK AT
THE SPAN WHICH IS WHAT JUDGE
FLEISCHER HAD IN FRONT OF HER,
AND SHE WAS TRYING TO BE CAREFUL
ABOUT THE WAY SHE DID THIS SO
SHE COULD HONOR EVERYTHING YOU
TOLD HER TO DO WITH THIS.
AND IF YOU LOOK AT THESE CASES,
THEY TALK ABOUT MAKING SURE THE
DEFENDANT IS NOT OFFERING THIS
WAIVER SIMPLY BECAUSE THE
ATTORNEY THAT IS REPRESENTING --
>> RIGHT.
HASN'T DONE THEIR WORST, RIGHT.
>> JUST TO VERIFY THAT THERE'S
NOT INEFFECTIVE ASSISTANCE OF
COUNSEL, THAT MITIGATION HAS
BEEN INVESTIGATED, THAT THE
DEFENDANT IS AWARE OF THE
POTENTIAL MITIGATION, SO HE
CAN'T COME BACK LATER AND SAY,
WELL, IF I'D KNOWN THAT
DR. BERLIN WAS GOING TO OFFER
THIS TESTIMONY, I NEVER WOULD
HAVE WAIVED THE MITIGATION.
THEY WANT TO MAKE SURE THE
DEFENSE KNOWS, THE DEFENDANT
KNOWS AS MUCH OF THE MITIGATION
EVIDENCE --
>> WELL, I DON'T DISAGREE WITH
THAT.
I'M TRYING TO UNDERSTAND WHAT
YOU DO WITH IT.
>> RIGHT.
>> I'M TRYING TO UNDERSTAND WHAT
YOU DO WITH IT.
>> THE JUDGE WEIGHS IT.
>> YES.
>> I'M LOOKING AT HER SENTENCING
ORDER.
>> SHE DID.
>> SHE WEIGHED IT, AND SHE GAVE
IT SOME WEIGHT.
>> SHE DID.
SHE DISCOUNTED, AND WE CAN
CERTAINLY LOOK AT THAT, I JUST
DIDN'T WANT TO JUMP THERE
WITHOUT --
>> NO, BUT IT'S IMPORTANT THAT,
TO ME, I THINK THAT IF SOMEBODY

IS A SCHIZOPHRENIC WHATEVER, AND
HE'S WAIVING THE MITIGATION TO
FIND OUT HE CAME OUT OF A MENTAL
INSTITUTION THE DAY BEFORE AND
TRIED TO USE THIS MURDER TO
COMMIT SUICIDE, AND WE'VE HAD
SOME OF THOSE --
>> CERTAINLY.
>> -- THAT WE KNOW IT IN
WEIGHING WHETHER THIS IS A
PROPORTIONATE SENTENCE.
>> SURE.
>> IT LOOKS LIKE THIS WAS DONE.
>> AND JUDGE FLEISCHER DID THIS
JUST LIKE IT WAS A STANDARD
ADVERSARIAL PENALTY PHASE.
SHE TOOK THIS TESTIMONY AT FACE
VALUE AND DID WHAT SHE COULD AND
COMPOSED HER SENTENCING ORDER
OUT OF IT.
SHE RELIED HEAVILY ON IT AND IN
DIMINISHING AND FINDING THAT ON
THE SUBSTANTIAL IMPAIRMENT, YOU
KNOW, SHE RELIED ON DR. BERLIN'S
TESTIMONY.
SHE QUOTES FROM HIM.
AND AT ONE POINT THE STATE'S
CROSS-EXAMINING HIM ABOUT THIS
IMPAIRMENT, AND, OF COURSE,
BERLIN SAYS HE IDENTIFIES A
NUMBER OF PRIOR HEAD INJURIES,
HE IDENTIFIES THE FACT THAT
MR. BOLIN WAS PHYSICALLY ABUSED
AS A CHILD BY HIS FATHER, HE
SAYS, YOU KNOW, THERE'S LIKE --
[INAUDIBLE]
THIS IS, I THINK THERE'S
HALLUCINATIONS, I THINK THERE
MAY BE DELUSIONS.
HE KIND OF -- HE DOESN'T REALLY
IDENTIFY SPECIFICS, HE JUST
TALKS ABOUT HE DID TESTING WITH
HIM.
HE'S GOT ANTISOCIAL PERSONALITY
DISORDER, POSSIBLY BORDERLINE
DISORDER BECAUSE HE'S GOT THE
DEPRESSIVE EPISODES, MANIC
EPISODES, SO HE THROWS A LOT OUT
THERE, BUT HE DOESN'T MAKE
SPECIFIC DIAGNOSIS, AND HE
CLEARLY DOES NOT COME BACK AND
TIE IT TO THE MURDER AND SAY IT
WAS AFFECTING HIM AT THE TIME --
>> WELL, THE BEST WE CAN DO IS
REREAD DR. BERLIN'S TESTIMONY --
>> YES.
>> -- AND SEE WHETHER THE JUDGE

IN GIVING ONE SOME WEIGHT AND
THE OTHER NONE, IT WAS PURELY
CONTRADICTED BY DR. BERLIN'S
TESTIMONY.
>> YEAH.
I THINK YOU CAN SATISFY YOURSELF
FROM THE SENTENCING ORDER
BECAUSE THE JUDGE IS VERY
THOROUGH WHEN SHE TALKS ABOUT IT
AND, OBVIOUSLY, SHE TALKS ABOUT
HOW THE FACTS OF THE CASE -- I'M
SORRY, I KNOW I'M SPEEDING UP
AGAIN -- THE FACTS OF THE CASE
TEND TO REFUTE THIS MITIGATOR OR
ANYWAY.
SO THAT'S ALL SPELLED OUT, AND I
THINK IT'S, YOU KNOW, YOUR
HONOR'S EXACTLY RIGHT, JUST
REVIEWING DR. BERLIN'S TESTIMONY
AND FULLY ANALYZING AND
EXPLORING THE SENTENCING ORDER,
NO ABUSE IN THE WEIGHT THAT
JUDGE FLEISCHER GIVES IT.
>> SO THERE'S NOT A WAIVER.
>> WELL, THERE IS A WAIVER.
AND THAT'S UP TO YOU AS TO HOW
YOU WANT TO RECONCILE YOUR
CASES.
UM, AND WHAT YOU'VE SAID IN THE
PRIOR CASES.
BUT THERE IS A WAIVER.
JUDGE FLEISCHER IN HER
SENTENCING ORDER DOES NOT TREAT
IT LIKE A WAIVER, BUT I THINK IF
YOU'RE LOOKING AT THE ARGUMENT
THAT THEY'RE CLAIMING THAT SHE
IS REJECTING THIS, AND IT'S
SOMETHING THAT HE NEVER OFFERED
BECAUSE HE WAIVED IT, AND HE MAY
HAVE OFFERED IT SO THAT WE WOULD
ALL KNOW THAT IT'S A GOOD
WAIVER.
YOU'RE MIXING APPLES WITH
ORANGES IF YOU'RE GOING TO LOOK
AT IT IN THAT SENSE.
ON THE PROPORTIONALITY,
MR. BOLIN IS A SERIAL KILLER.
HE HAS, ALTHOUGH IT IS ONLY ONE
AGGRAVATOR, IT IS ABOUT AS
STRONG AN AGGRAVATOR AS YOU WILL
EVER GET.
IT IS NOT SIMPLY ONE PRIOR
VIOLENT FELONY CONVICTION, IT IS
A PRIOR VIOLENT CAPITAL FELONY
CONVICTION THAT HAS HIM ON DEATH
ROW FOR MATTHEWS' MURDER.
>> WHAT IS THE STATUS OF THE

MATTHEWS CASE?
>> THAT IS IN FEDERAL COURT.
>> SO IT'S BEEN -- THE MATTHEWS MURDER --
>> MATTHEWS HAS BEEN ALL THE WAY THROUGH STATE COURT, AND I AM NOT SURE IF IT'S STILL IN THE DISTRICT COURT.
I KNOW THAT IF IT WAS IN FEDERAL COURT, I ASSUME IT'S STILL IN FEDERAL COURT AT THIS POINT.
BUT THE MATTHEWS CASE IS ON ITS WAY.
UM, THAT WAS TRIED THREE TIMES, THIS CASE WAS TRIED THREE TIMES, THE HOLLY CASE HAS NOW BEEN TRIED FOUR TIMES.
HE WAS CONVICTED OF THE HOLLY MURDER --
>> WHY WASN'T HOLLY ANOTHER AGGRAVATOR?
>> SHE -- IT HAD BEEN REVERSED AND AT THE TIME OF THE SENTENCING BECAUSE THIS KIND OF GOT, THEY WERE SORT OF BEING TRIED AROUND THE SAME TIME.
HOLLY GOT AHEAD OF THIS CASE.
IT WENT BACK FOR A FOURTH TRIAL, USUALLY JURY INSTRUCTION ON THE CULPABLE MANSLAUGHTER CONVICTION.
HE WAS CONVICTED A FOURTH TIME, CONVICTED OF THE MURDER A FOURTH TIME, AND THAT APPEAL IS NOW BACK IN THE SECOND DISTRICT.
SO THAT WAS NOT USED BECAUSE IT WAS WHILE HIS TRIAL, WHILE THE HOLLY TRIAL WAS BACK PENDING AGAIN BEFORE, WHEN SENTENCING OCCURRED.
SO THEY DID NOT USE HOLLY AT ALL.
THIS COURT CERTAINLY DOES NOT HAVE TO TURN A BLIND EYE TO THE HOLLY TRIAL.
THEY'RE RELYING ON IT VERY MUCH IN THE JOINT HEARINGS THAT WERE HELD.
>> I THINK WE'RE REALLY BETTER OFF --
>> YOU CERTAINLY DON'T NEED IT BECAUSE YOU HAVE, YEAH, YOU HAVE NOT ONLY THE PRIOR MATTHEWS MURDER, YOU HAVE HORRIBLE CRIMES COMMITTED IN OHIO.
HE HAD AN ARMED WITH A KIDNAPPING OF A YOUNG WOMAN WITH

A HANDGUN AND A RAPE, YOU HAVE
AN ATTEMPTED ASSAULT AND AN
ATTEMPTED ESCAPE AND AN ASSAULT
ON A CORRECTIONS OFFICER IN
OHIO.
ALL OF THESE WERE NOTED AS PART
OF --
>> HOW LONG HAS MATTHEWS BEEN IN
FEDERAL COURT?
>> THAT I DON'T RECALL.
I DON'T RECALL.
RIGHT NOW, I KNOW I'VE GOT THE
OPINION RIGHT OVER THERE, I
CAN'T EVEN TELL YOU WHAT YEAR
YOU HAD IT.
IT SEEMS LIKE IT WAS AT LEAST
SEVEN OR EIGHT YEARS AGO THAT IT
WAS HERE.
SO IT'S BEEN THERE A WHILE.
FOR ALL THESE REASONS, I WOULD
JUST ASK THIS COURT TO AFFIRM
THE JUDGMENT AND ENTER THE
SENTENCE BELOW.
THANK YOU.
>> [INAUDIBLE]
UM, DR -- MY NOTES --
DR. BERLIN'S TESTIMONY IS
SEVERAL PLACES, AND YOU CAN FIND
A LIST OF EVERYTHING ON PAGE 16
OF MY BRIEF.
THERE WERE DEPOSITIONS, THERE
WERE PENALTY CASE, THERE WAS
TRIAL TESTIMONY, SO IF YOU
WANT --
>> BUT THE BOTTOM LINE IS AND
WHETHER IT'S EFFECTIVE OR NOT,
MR. BOLIN IN THIS TRIAL WAIVED
HIS RIGHTS TO A PENALTY PHASE.
>> NO.
>> HE DIDN'T?
>> HE WAIVED HIS RIGHTS TO A
JURY.
>> SO WHAT WAS PUT ON BY HIS
DEFENSE LAWYER IN THE PENALTY
PHASE BEFORE THE JUDGE?
>> EVERYTHING THAT WAS IN THE
MITIGATION NOTEBOOK OF WHICH YOU
HAVE THE WHOLE LIST OF.
>> SO ALL OF DR. BERLIN'S
TESTIMONY WAS PUT IN?
>> YEAH.
>> SO THAT WAS -- BUT HE DIDN'T
TESTIFY LIVE?
>> NO.
AND HE CHOSE NOT TO, WHICH WAS
HIS RIGHT.
BUT WHAT, UM, I THINK THE STATE

IS CONFUSING IS THE FACT THAT
HIS DECISION NOT TO GO TO A JURY
PENALTY MEANT THAT HE WAIVED ALL
PENALTY, WHICH HE DID NOT.
I MEAN, THEY WERE CONSULTING HIM
ON THINGS LIKE, WELL, YOU KNOW,
SHOULD WE USE DR. BERLIN'S DEPO,
SHOULD WE USE YOUR WIFE'S
TESTIMONY, AND HE WOULD SAY,
YEAH, YEAH, YEAH.
I MEAN, HE WAS BEING CONSULTED
ON THESE THINGS, AND ON THE
RECORD HE WAS SAYING, YES, I
AGREE TO USE --
[INAUDIBLE]
>> SO IF WE LOOK AT THE
SENTENCING ORDER, THOUGH, THE
JUDGE GOES TO DR. BERLIN'S
TESTIMONY WHETHER TESTIMONY AT
THE FIRST TRIAL OR IN A
DEPOSITION, AND POINTS OUT THE
EVIDENCE THAT BOTH SUPPORTS AND
DOES NOT SUPPORT STATUTORY
MITIGATORS.
AND I THINK I ASKED YOU BEFORE,
IS THERE ANYTHING ELSE THAT
DR. BERLIN SAID THAT YOU, THAT
THE JUDGE IGNORED THAT WOULD
HAVE CHANGED HOW WE WOULD
EVALUATE EITHER OF THOSE
STATUTORY MITIGATORS?
>> WELL, I DON'T HAVE
SUPPLEMENTAL VOLUME FOUR WITH
ME.
IT WAS A TRIAL TESTIMONY FROM
7/29 THROUGH 8/11, AND MY NOTES
SAY THAT AT ONE POINT HE SAYS
THAT THE CONDUCT HAS NOT
SUBSTANTIALLY IMPAIRED HIS
ABILITY TO APPRECIATE THE
CONDUCT OF THE --
[INAUDIBLE]
AND HE DID APPEAR TO APPRECIATE
THE --
>> AND THAT'S WHAT I READ WAS IN
THE SENTENCING ORDER.
>> RIGHT.
BUT HE DOES HAVE A SUBSTANTIAL
IMPAIRMENT IN HIS ABILITY TO
CONFORM HIS CONDUCT TO THE
REQUIREMENTS OF LAW EVEN THOUGH
HE MIGHT APPRECIATE THE
CRIMINALITY OF HIS CONDUCT.
>> I THINK --
>> YOU THINK THAT'S THE SAME
THING.
>> I THINK THAT WAS -- IT SOUNDS

VERY FAMILIAR.
>> UNFORTUNATELY, DR. BERLIN'S STATEMENTS TEND TO REPEAT THEMSELVES.
>> WELL, YOU KNOW, JUSTICE LEWIS LIKES TO USE THE WORD TALKIE TALK, YOU KNOW, LIKE YOU HEAR IT, YOU REALLY SORT OF WONDER WHAT IS, WHAT DOES IT MEAN, AND I DON'T KNOW THAT -- I'D HAVE TO LOOK BACK AT DR. BERLIN -- HOW MUCH SUBSTANCE.
BUT, YOU KNOW, I KNOW YOU'RE DOING THE BEST YOU CAN IN THIS CASE, BUT WITH A DEFENDANT THAT HAS ANOTHER, A PRIOR VIOLENT FELONY THAT IS A, YOU KNOW, A SERIAL MURDERER.
I DON'T KNOW HOW YOU WOULD SAY THE DEATH SENTENCE IN THIS CASE IS NOT PROPORTIONAL.
>> UNLESS YOU'RE CONSIDERING HOLLY, WHICH THE TRIAL JUDGE DID NOT.
>> WHAT'S WRONG WITH MATTHEWS?
>> WELL, MATTHEWS WAS THE ONLY OTHER MURDER --
>> ONLY OTHER MURDER?
>> WELL, I DON'T KNOW WHAT IT TAKES TO GO TO SERIAL, BUT HE HAD --
>> I'M NOT -- OKAY, I WON'T CALL HIM A SERIAL MURDERER IF WE DON'T CONSIDER HOLLY.
YOU GOT THE MOST SERIOUS AGGRAVATOR, A PRIOR VIOLENT FELONY OF A MURDER OF A PERSON, OF A WOMAN IN A TERRIBLE WAY.
SO I'M NOT SURE I UNDERSTAND HOW WE WOULD EVER FIND THIS CASE NOT TO BE PROPORTIONATE.
>> WELL, THE -- YOU HAVE ONE SERIOUS AGGRAVATOR, I AGREE, BUT YOU HAVE SUBSTANTIAL MITIGATION, AND THE BOTTOM LINE IS, IS THERE HEAVILY AGGRAVATED WITH LIGHT TO NONE MITIGATION, AND I DON'T BELIEVE THAT IS TRUE.
I BELIEVE THAT MITIGATION IS SUBSTANTIAL AS OPPOSED TO NONE OR HARDLY ANY.
AND THE ISSUE ISN'T WHETHER OR NOT THERE IS A SERIOUS AGGRAVATOR.
OBVIOUSLY, THERE IS.
BUT ONE AGGRAVATOR, VERY SERIOUS, VERSUS SUBSTANTIAL

MITIGATION.
AND IN THIS PARTICULAR CASE, UM,
I WOULD SAY THAT PROPORTIONALLY
AS THIS COURT MOST RECENTLY WENT
THROUGH IN BALLARD, WE HAVE A
SITUATION WHERE IT'S NOT --
[INAUDIBLE]
AND THE MOST SERIOUS OF
AGGRAVATORS.
SO I DO BELIEVE THAT THAT IS
PROPORTIONATE IN THIS CASE --
[INAUDIBLE]
>> THANK YOU FOR YOUR ARGUMENTS.
THE COURT IS ADJOURNED.
>> PLEASE RISE.
COURT IS ADJOURNED.