>> OUR LAST CASE FOR THE DAY IS
MARQUARDT VERSUS STATE OF
FLORIDA.
YOU MAY PROCEED.
>> MAY IT PLEASE THE COURT.
MY NAME IS MICHAEL BECKER AROUND
I'M ASSISTANT PUBLIC DEFENDER IN
DAYTONA BEACH AND I REPRESENT
THE APPELLANT HERE, BILL PAUL
MARQUARDT IN HIS DIRECT APPEAL
FROM HIS CONVICTIONS FOR TWO
COUNTS OF FIRST-DEGREE MURDER AND
BURGLARY AND HIS SENTENCE TO
DEATH FOR THE MURDERS.
VERY BRIEFLY ARE THE FACT ARE
THAT HOPE WELLS AND MARGUERITE
RUIZ WERE MURDERED ON
MARCH 15th, 2000.
ORIGINALLY THE POLICE WERE
SEEKING A BLACK MALE DRIVING A
GREEN CAR BUT DEVELOPED NO
SUSPECTS IN THE CASE.
THE CASE REMAINED COLD UNTIL
2006 WHEN PURSUANT TO A DNA
MATCH THE DEFENDANT WAS INDICTED
AND EXTRADITED FROM WISCONSIN
WHERE HE WAS SERVING A 75-YEAR
SENTENCE IN A MENTAL HOSPITAL.
THE APPELLANT REPRESENTED HIMSELF AT
TRIAL AFTER THE TRIAL COURT
CONDUCTED, MANY, MANY, FARETTA
HEARINGS.
WE ARE NOT CONTESTING THAT ISSUE
AT ALL.
IN HIS CAPACITY OF REPRESENTING
HIMSELF APPELLANT FILED NO FEWER
THAN 11 MOTIONS TO SUPPRESS.
HE ALSO FILED AT LEAST SIX
MOTIONS TO REQUEST, SPECIFICALLY
REQUESTING A HEARING ON THE
MOTION TO SUPPRESS.
THE STATE FILED RESPONSES
BASICALLY ARGUING THAT EITHER
THE MOTIONS WERE LEGALLY
INSUFFICIENT, OR, APPELLANT WAS
COLLATERALLY ESTOPPED FROM
RAISING THE ISSUE SINCE THE SAME
ISSUE HAD BEEN LITIGATED IN THE
STATE OF WISCONSIN AND AFFIRMED
BY THEIR APPELLATE COURTS.

>> LET'S GO INTO THAT.
CERTAINLY YOU'RE NOT CONTESTING
THAT WISCONSIN AND THE SUPREME
COURT THERE UPHELD THE SEARCH
AND DID NOT SUPPRESS THE
EVIDENCE?
THAT THE EVIDENCE WAS ADMISSIBLE
ULTIMATELY?
>> IT WAS ADMISSIBLE ULTIMATELY
IN WISCONSIN.
>> COULD YOU TELL ME WHY YOU
THINK THAT THE ECHOLS CASE IS
NOT CONTROLLING HERE?
>> FIRST OF ALL, I THINK BEFORE
WE EVEN GET TO I CAN CYCLES,
ECHOLS, IT DOESN'T MEET CRITERIA
FOR COLLATERAL ESTOPPEL
DOCTRINE.
>> HOW ABOUT IF YOU DISCUSS THE
CASE?
I THINK THE COLLATERAL ESTOPPEL
I UNDERSTAND YOUR ARGUMENT.
FLORIDA MAY BE OUTLIER WITH
REGARD TO ITS APPLICATION.
I THINK THE COURT IS AWARE WHAT
THE ELEMENTS ARE AND WHY DON'T
YOU GO DIRECTLY TO THE CASE?
>> THE DIFFERENCE IN ECHOLS AND
SUBSEQUENT PROSECUTION THE
SAME.
HERE IT WASN'T.
THE DEFENDANT ALLEGED THAT THE
POLICE OFFICERS DID SOMETHING
WRONG.
THAT THEY COMMITTED A FRANKS
VIOLATION IN SECURING THEIR
THEIR WARRANT.
THAT IS VERY CONDUCT THAT
EXCLUSIONARY RULE WAS DESIGNED
TO PREVENT DESIGNED TO PUNISH.
>> DOES ECHOLS, WE KNOW WHAT
CASE WE'RE TALKING ABOUT, IS THE
APPLICATION OF THAT CASE
CONDITIONED UPON THAT FACTOR?
>> I BELIEVE IT IS.
>> AND WHY DO YOU SAY THAT?
>> BECAUSE AS, IT DOESN'T SAY
THAT, BUT THEY WEREN'T DEALING
WITH THAT ISSUE EITHER.
THEY WERE SILENT ON THAT ISSUE.

>> BUT WASN'T THAT ISSUE DEALT
IN THE WISCONSIN COURTS ONE WAY
OR ANOTHER?
>> FRANKS ISSUE WAS NOT.
>> WELL, WAS IT WAIVED?
>> I DON'T KNOW.
ALL I KNOW SO APPLY COLLATERAL
ESTOPPEL --
>> WE'RE NOT TALKING ABOUT THAT.
THAT IS A SEPARATE ISSUE HERE
UNDER THIS CASE AUTHORITY WE
HAVE ABOUT THE PURPOSE OF
THE EXCLUSIONARY RULE, OKAY?
THAT, THERE WAS OPPORTUNITY TO
LITIGATE ANY OF ISSUES WITH
RESPECT TO WHETHER THAT EVIDENCE
SHOULD BE SUPPRESSED.
IN WISCONSIN AND IT, AT THE END
OF THE DAY, IT WAS NOT
SUPPRESSED IN WISCONSIN.
RIGHT?
>> TO ME IT WAS ARGUED AND THEN
REVERSED. THAT'S TRUE.
BUT I DON'T BELIEVE, FIRST OF
ALL, THE TRIAL ATTORNEY OR
THE TRIAL COURT DID NOT RELY ON
THAT THEORY AT YOU WILL.
THE TRIAL COURT WENT STRICTLY
COLLATERAL ESTOPPEL HERE AND HE
WAS WRONG IN DOING THAT IT IS
OUR POSITION THAT ONCE HE
MISAPPLIED THE COLLATERAL
ESTOPPEL RULE HE WAS BOUND TO
GIVE AN EVIDENTIARY HEARING.
>> YOU'RE SAYING WE CAN'T RELY
UPON THE ECHOLS OR ECHOLS
DECISION?
I'M LOOKING AT THIS.
I'M TRYING TO UNDERSTAND WHY.
WHILE OUR FOURTH AMENDMENT SAW
IS NOW REQUIRED BY CONSTITUTION
TO FOLLOW DECISIONS OF THE
UNITED STATES SUPREME COURT,
THERE MAY BE OTHER STATES THAT
LOOK AT THE FOURTH AMENDMENT
PROTECTIONS, DIFFERENTLY AND
THEY, YOU MAY HAVE A CASE WHERE
YOU LITIGATE THEM AND IT MAY BE
ONE SET OR EVEN MORE FAVORABLE
TO A DEFENDANT.

DOES THAT MEAN THAT THE STATE
CAN COME BACK IN AND USE THE
EVIDENCE AFTER SMITH EXCLUDED
SOMEWHERE ELSE, AFTER THIS IS
ALREADY, YOU UNDERSTAND WHAT I'M
SAYING?
THIS IS ALMOST LIKE A GIVING
FULL, FAITH AND CREDIT TO
DECISIONS IN OTHER STATES IN
THIS AREA.
SO I'M JUST TRYING TO
UNDERSTAND.
THINK CAN CUT BOTH WAYS IF WE
HAPPEN TO GO A DIFFERENT
DIRECTION.
>> BUT MY PROBLEM WITH THAT
SCENARIO APPLYING TO THIS
SITUATION IS THE ISSUE, THE
CRITICAL ISSUE, THAT BEING THE
FRANKS ISSUE, WASN'T DECIDED BY
THE COURT.
IN WISCONSIN.
AND THAT'S VERY CRUCIAL SINCE
THEIR WHOLE DECISION IN
WISCONSIN WENT ON GOOD FAITH,
APPLICATION OF GOOD FAITH
DOCTRINE WHICH CAN NOT BE
APPLIED IF THERE IS A FRANKS
VIOLATION.
>> IT WASN'T DECIDED BECAUSE IT
WASN'T WAIVED OR PROPERLY
PRESENTED, ISN'T THAT CORRECT?
>> I BELIEVE HE SAID IN THE
FOOTNOTE, AND I QUOTE FOOTNOTE
8, THAT IT WAS MENTIONED AT
ORAL ARGUMENT BUT IT HAS NOT
BEEN PURSUED IN THIS COURT.
>> OKAY.
>> AGAIN I DON'T KNOW IN WHAT
CONTEXT IT WAS.
WE DON'T HAVE ALL THE PLEADINGS
FROM WISCONSIN.
I DON'T KNOW HOW IT WAS
PRESENTED.
>> WAS THERE A COLLATERAL
PROCEEDING WHICH THAT WAS
MENTIONED?
>> THAT I DON'T KNOW.
I THINK HE IS CURRENTLY
UNDERGOING COLLATERAL ATTACK ON

CONVICTIONS UP THERE.
NUMBER ONE, IT WAS IRRELEVANT
BECAUSE HE WAS ACQUITTED AT
TRIAL.
UP THERE ONLY ANIMAL CRUELTY.
IT IS MY UNDERSTANDING FROM
SOLELY TALKING TO MY CLIENT HE
IS PURSUING POST-CONVICTION
REMEDIES UP THERE.
SO, AGAIN, IF THE JUDGE WAS
WRONG IN APPLYING THE COLLATERAL
ESTOPPEL DOCTRINE, THEN HE WAS
BOUND TO HOLD 8.
>> THAT IS THE POINT HERE.
YOU HEARD OF THE TIPSY CASE?
>> I KNOW.
>> WOULDN'T THAT FIT RIGHT IN?
>> AGAIN --
>> IF THIS CASE AUTHORITY --
>> BECAUSE OF THE NATURE OF THIS
THIS CASE AND BASED ON THIS
COURT'S OWN PRECEDENT IN
PRESTON, THEY SAID EVEN IF IT
HAS BEEN DECIDED, AND THE
PRECEDENT WAS THE EXACT SAME
ISSUE.
NO QUESTION ABOUT IT.
AND I KNOW THAT BECAUSE I
HANDLED THE PRESTON CASE, YOU
SAID IN, IT CAN BE REVISITED
ESPECIALLY IN A CAPITAL CASE
BECAUSE OF THE HIGHER STANDARD
THAT YOU GIVE TO THE PROSECUTION
OF CAPITAL CASES.
>> WHICH CASE DO YOU SAY THAT WE
HAVE HELD?
>> PRESTON.
AND I CITE IT IN MY BRIEF.
THE LAW OF THE CASE AND THE
WHOLE BUSINESS, THE COURT
NEVERTHELESS HAS THE POWER TO
RECONSIDER AND CORRECT ERRONEOUS
RULINGS AND THIS IS ESPECIALLY
TRUE IN CAPITAL LITIGATION.
PRESTON VERSUS STATE,
444 SOUTHERN 2ND 939.
AND AGAIN, WE CAN'T EMPHASIZE
ENOUGH THIS IS NOT A SITUATION
WHERE THERE WAS OVERWHELMING
EVIDENCE OF GUILT HERE.

I MEAN, IT WAS A COLD CASE FOR
SIX YEARS.
IT WAS REALLY ODD CIRCUMSTANCES.
>> BUT HOW DOES THIS, I MEAN,
HIS DNA, I MEAN THE DNA EVIDENCE
SEEMS TO BE PRETTY POWERFUL
EVIDENCE IN THIS CASE.
>> BUT THERE IS SO MUCH CONFLICT
SHUN, CONFLICTING TESTIMONY IN
THERE.
YES, THEY DID FIND SOME DNA BUT
THEY ALSO FOUND OTHER PERSONS,
UNIDENTIFIED DNA.
AND THEY FOUND PALM PRINTS THAT
DIDN'T MATCH THE DEFENDANT.
THE WHOLE IDEA THAT THEY
SEARCHED THE HOUSE THREE TIMES
BEFORE THEY FINALLY FOUND
ANYTHING --
>> THEY FOUND THE WEAPON AND
BULLETS.
>> THE GUN AND BULLETS, THEY
DIDN'T FIND UNTIL THE VERY LAST
SEARCH.
>> I KNOW THESE WERE FOUND IN
WISCONSIN FROM WOMEN THAT WERE
KILLED IN FLORIDA.
NOT LIKE IT IS ACROSS THE STREET
OR SOMETHING.
I MEAN THAT --
>> BULLETS ALSO MATCHED THE
BULLETS THAT KILLED HIS MOTHER.
SO THEY WERE USED IN WISCONSIN
ALSO.
>> WELL I UNDERSTAND.
WE'RE TALKING ABOUT, YOU'RE
SAYING THAT IT IS VERY
QUESTIONABLE.
I MEAN THIS IS ONE OF THE MOST
HEAVILY SCIENTIFIC CASES TO TIE
SOMEBODY INTO A MURDER THAT I'VE
SEEN IN A LONG TIME.
>> I WAS REFERRING TO THE, HOW
THINGS CAME ABOUT.
THEY SEARCHED THE HOUSE TWICE
AND DIDN'T COME UP WITH THEM.
THEN ALL OF SUDDEN THE THIRD
TIME THEY DO IT THEY MAGICALLY
FIND THESE THINGS, EVEN THOUGH
THE SEARCH WARRANT SPECIFICALLY

SAID WE'RE LOOKING FOR A WEAPON.
>> AND EXPLANATION FOR THAT THEY
WERE UNDER A REFRIGERATOR THAT
HAD NOT BEEN SUFFICIENTLY MOVED
TO EXPOSE THEM DURING THE FIRST
VISIT.
THAT WAS THE EXPLANATION.
I WASN'T THERE BUT THAT WAS
GIVEN AS THE REASON, WASN'T IT?
>> YES.
>> OKAY.
>> EXCEPT THOUGH IT WAS ALSO
DISPUTED BY THE EVIDENCE BECAUSE
THE EVIDENCE WAS THEY KNOCKED
OUT THE WINDOW IN THE BACK OF
THE HOUSE TO GET IN AND THEY HAD
TO REMOVE THE REFRIGERATOR TO DO
IT.
>> THE EVIDENCE WAS THAT NOT FAR
ENOUGH TO CAUSE THE EXPOSURE OF
THE GUN.
AM I CORRECT?
>> YOU ARE.
I BELIEVE YOU ARE.
>> OKAY.
>> WELL, EVEN IN THE THIRD THING
THEY WEREN'T REALLY EXPOSED, HE
HAD TO GET DOWN AND LOOK.
HE SAW THE YELLOW BOX BUT DID
NOT SEE THE GUN.
SO HE DID THAT ON THE THIRD
TRIP.
THEY DIDN'T BOTHER TO DO THAT IN
THE FIRST TWO.
EVEN THOUGH THEY WERE LOOKING
FOR THE SAME THINGS.
>> WHAT DOES THAT MEAN?
WHAT EXACTLY IS YOUR POINT AS TO
WHETHER IT WAS FOUND THE FIRST
TIME, SECOND TIME, OR THIRD
TIME?
HOW IS THAT IMPORTANT?
>> MY POINT IS THAT THIS, THIS
CASE IS FULL OF REALLY QUIRKY
THINGS THAT AREN'T READILY
EXPLICABLE.
>> WAS THERE ANY ALLEGATIONS
THAT THE POLICE PLANTED THIS
EVIDENCE?
IS THAT WHAT YOU'RE GETTING AT?

>> WELL, NO, BUT THE WHOLE IDEA
THAT THE FRANKS HEARING ALLEGED
THAT THE, IN THE APPLICATION FOR
THE SEARCH WARRANT, THEY MADE
INTENTIONAL AND MISLEADING
REPRESENT STATIONS.
SO, I DON'T KNOW WHAT THOSE
WERE.
I MEAN I, BECAUSE THERE WAS NO
HEARING ON IT BUT IT COULD WELL
HAVE SOMETHING TO DO WITH, WITH
THE, MY UNDERSTANDING.
>> JUST THAT THE FIREARM, THE,
BULLETS THAT, CASES FOUND IN THE
VICTIM IN THIS CASE THE GUN THAT
WAS FOUND IN WISCONSIN, AM I
INCORRECT?
>> NO, YOU'RE NOT INCORRECT.
>> OKAY.
SO HOW IS THAT A PROBLEM?
>> WELL BECAUSE THERE WERE NO
FINGERPRINTS FOUND ON THE GUN.
IT WASN'T FOUND UNTIL A THIRD
SEARCH.
AND -- DID THEY PLANT IT?
I DON'T KNOW.
>> WHAT ABOUT DNA EVIDENCE ON
THE KNIFE?
HOW DID --
>> WELL THE MAJORITY OF THE DNA
EVIDENCE WAS WITH THE MOTHER'S
BLOOD.
>> YEAH.
>> THERE WERE TRACE THAT IS WERE
CONSISTENT WITH RUIZ AND --
>> TWO OTHER WOMEN AT THAT
POINT, YEAH.
>> WE WERE NOT SAYING, I DON'T
THINK, I DON'T THINK THERE WAS
ENOUGH THERE FOR THEM TO
ABSOLUTELY PINPOINT IT WAS BUT
CERTAINLY IT WAS CONSISTENT WITH
THEIR, WITH THEIR DNA.
>> GOING BACK TO MY QUESTION,
I'M SORRY, THE, WHAT WAS
COMPARED, AS FROM THE FIREARM,
WAS IT, WHAT BULLETS OR CASINGS
THAT WERE RECOVERED FROM THE
VICTIM BY THE MEDICAL EXAMINER
COMPARED TO THE GUN?

>> YES.
>> SO ARE YOU SAYING THAT THEY
THE POLICE PLANTED THAT STUFF IN
THERE OR --
>> THAT IS NOT ALLEGATION.
WE'RE SAYING I'M NOT SURE WHOSE
GUN IT WAS.
>> SO YOU'RE NOT --
>> THEY FOUND A GUN IN HIS PLACE
BUT WHETHER IT IS HIS.
>> YOU'RE NOT CHALLENGING THE
FACT THAT THAT GUN IS THE GUN
THAT KILLED THE VICTIM.
>> NOT AT ALL.
THAT IS NOT THE ISSUE AT YOU
WILL.
>> I GET IT. THANK YOU.
>> I WANT TO GO BACK TO THE
PRESTON CASE.
I LOOKED THAT UP.
THAT HAS GOT NOTHING TO DO
WITH ISSUE OF ALL THE
SUPPRESSION OF EVIDENCE OBTAINED
OUTSIDE OF THE STATE, DOES IT?
>> NO.
IT TALKED ABOUT RELITIGATION.
>> IT TALKS ABOUT RELITIGATION
WHERE THERE HAS BEEN AN
INTERLOCUTORY APPEAL IN A CASE
TO A DISTRICT COURT AND THEY
MAKE A CERTAIN DETERMINATION AND
THEN THE CASE BECOME AS DEATH
CASE AND IT COMES TO US, RIGHT?
>> UH-HUH.
>> AND IN THAT CONTEXT THE
WHOLE, ANYTHING IN THAT CASE IS
FAIR GAME FOR REVIEW BY THIS
COURT.
BUT THAT, I'M STRUGGLING TO SEE
HOW THAT HAS ANYTHING TO DO WITH
THIS OTHER PRINCIPLE, THE ECHOLS
CASE?
>> WELL, FIRST OF ALL, THE
OPINIONS UP IN WISCONSIN SUPREME
COURT WERE INTERLOCUTORY
BECAUSE, CERTAINLY AS TO ONE OF
THEM BECAUSE THE TRIAL COURT
GRANTED THE MOTION TO SUPPRESS.
THAT WENT BACK AND THEY TRIED
TO MAKE IT A CAPITAL CASE

EXCEPT, YOU KNOW, IT IS
ACQUITTED AND IT WAS THEN, NOT A
CAPITAL CASE.
THE OTHER ONE WAS CRUELTY TO
ANIMALS.
SO THE NATURE OF THE CASES I
DON'T THINK IT'S CRUCIAL, AND IF
IT IS CRUCIAL IT IS BASICALLY
THE SAME FACTS THERE.
I DON'T THINK PRESTON LIMITS
ITSELF TO ONLY IN-STATE
RELITIGATION.
THIS WASN'T A CASE WHERE IT
WOULD HAVE BEEN UNREASONABLE OR
TOO EXPENSIVE OR WHATEVER.
THEY COULD HAVE DONE IT RIGHT
BEFORE TRIAL WHEN, THEY BROUGHT
ALL THE POLICE OFFICERS FROM
WISCONSIN DOWN FOR THE TRIAL, SO
THIS WOULD HAVE NOT BEEN
NECESSARILY AN ADDED EXPENSE.
THEY COULD HAVE ARRANGED TO DO
IT WHILE THE POLICE OFFICERS
WERE DOWN HERE.
THERE WERE ALSO DEPOSITIONS
TAKEN OF THE POLICE OFFICERS.
YOU KNOW, THERE WAS REALLY NO
REASON FOR THE TRIAL JUDGE NOT
TO GRANT AN EVIDENTIARY HEARING.
>> WELL EXCEPT THAT THE LAW
SAYS, AS I READ IT, THAT IF IT'S
ADMISSIBLE IN A FOREIGN STATE IT
IS NOT RELITIGATED IN FLORIDA.
I MEAN --
>> I THINK YOU HAVE TO READ THAT
IN CONJUNCTION WITH THE TRIAL
COURT'S FINDING THAT IT WAS
COLLATERALLY ESTOPPED.
>> OKAY.
>> THERE WERE OTHER ISSUES
RAISED IN FLORIDA THAT WERE NOT
RAISED IN THERE.
IF EVERYTHING WAS THE SAME, WE
HAVE A LOT CLOSER CASE.
>> YOU CAN'T BE PROSECUTED FOR
THE SAME CRIME BY TWO DIFFERENT
STATES.
YOU'RE PROSECUTED WITHIN THE
STATE, NOT IN SOME FOREIGN
STATE.

HE WASN'T PROSECUTED IN
WISCONSIN FOR FLORIDA CRIMES.
>> RIGHT.
>> THAT IS JUST NOT GOING TO
HAPPEN.
>> RIGHT.
>> YOU WOULD AGREE, IF WE WOULD
ADOPT YOUR VIEW IS THAT, EVEN IF
IN A FLORIDA, DEFENDANT, WERE
STOPPED OR SEARCH WARRANT
HAPPENED TO BE ISSUED IN ANOTHER
STATE AND LITIGATED THERE, AND
THE DEFENDANT PREVAILED ON IT,
THEN IF IT COME BACK TO FLORIDA,
FLORIDA COULD RELITIGATE THAT
AND FIND THE EVIDENCE ADMISSIBLE
EVEN THOUGH IT WAS SUPPRESSED IN
ANOTHER STATE?
IT WOULD CUT BOTH WAYS, WOULDN'T
IT?
>> YEAH I THINK POSSIBLY
THAT'S --
I'D LIKE TO GO TO MY FOURTH
ISSUE THAT I HAVE RAISED IN THE
BRIEF.
AND THAT IS THE EFFICACY OF
TRIAL COURT APPOINTMENT'S
APPELLANT STANDBY COUNSEL AND
HIS INVESTIGATOR TO GATHER AND
PRESENT MITIGATION EVIDENCE FOR
THE COURT.
APPELLANT REPRESENTED HIMSELF
BUT HE DID HAVE STANDBY COUNSEL,
MR. VAUGHN, WHO DID ASSIST HIM
AND HE DID CALL UPON MR. VAUGHN
FOR ADVICE OCCASIONALLY AND TO
DO CERTAIN THINGS FOR HIM.
HE ALSO SECURED THE APPOINTMENT
OF, I BELIEVE IT WAS TWO
INVESTIGATORS, BOTH HERE AND IN
WISCONSIN TO ASSIST HIM AND HE
ACTIVELY USED THEIR ASSISTANCE.
AT THE CONCLUSION OF THE TRIAL
HE ATTEMPTED -- WELL, DID WAIVE
THE PENALTY PHASE WITH THE JURY
AND ATTEMPTED TO WAIVE THE
SPENCER HEARING AND EVERYTHING
ELSE.
HE WANTED TO PROCEED IMMEDIATELY
TO SENTENCING AND THE JUDGE SAID

NO.
HE SAID, WELL I'M NOT PRESENTING
ANY MITIGATION.
I DON'T WANT TO PRESENT ANY.
THE COURT SAID I WANT TO PRESENT
SOME.
>> WE AGREED, HAD THIS YESTERDAY
WHERE THEY'RE ARGUING STANDBY
COUNSEL SHOULD ALWAYS BE
APPOINTED AND HERE THE JUDGE
SEES THIS AS A DEFENDANT WHO WAS
DECLARED INSANE AND IN WISCONSIN
DECIDES BEFORE HE IMPOSES THE
DEATH PENALTY BECAUSE THERE IS
NO JURY, THAT HE WANTS TO BE
SURE ABOUT THE MITIGATION.
SO YOU'RE NOT SUGGESTING THAT
THE JUDGE COULD UNDER MOHAMMED,
ARE YOU?
>> YES, I AM.
>> YOU SAY HE SHOULDN'T HAVE
APPOINTED ANYONE? MOST IMPORTANTLY, THE
SIMILARITIES BETWEEN THE ECHOS
CASE AND THIS PARTICULAR CASE,
THOUGH, YES, WE DO HAVE BILL
MARQUARDT VERSUS THE STATE OF
WISCONSIN VERSUS BILL
MARQUARDT.
THE FACTS WE'RE DEALING WITH
IS A SEARCH CONDUCTED BY LAW
ENFORCEMENT IN WISCONSIN UNDER
WISCONSIN LAW AND IT'S BEEN
RULED ON BY THE SUPREME
AUTHORITY OF WISCONSIN ON
WISCONSIN LAW TO SAY THAT THAT
WAS A LAWFUL SEARCH AND THAT
THE ITEMS SEIZED WERE LAWFULLY
OBTAINED SO.
WHEN WE HAVE THAT PARTICULAR
ISSUE IN CASE, LET'S SAY THAT
THE JUDGE HAD GRANTED AN
EVIDENTIARY HEARING.
WE WOULD STILL BE LOOKING AT
THE SAME GOOD FAITH EXCEPTION
THAT WISCONSIN APPLIES.
THAT IS ONE COMMONALITY THIS
COURT HAS WITH THE WISCONSIN
SUPREME COURT AND THE WAY IT
APPLIES THE CASE.
AND THEN WE WOULD STILL BE

LOOKING AT IF THIS COURT
FROM A PUBLIC POLICY
STANDPOINT, IF THE TRIAL COURT
WERE TO SUPPRESS THAT
EVIDENCE, WHAT FUTURE POLICE
MISCONDUCT WOULD THAT DETER?
IT WOULDN'T DETER A WISCONSIN
LAW ENFORCEMENT OFFICERS FROM
CONDUCTING SEARCHES ANY
DIFFERENTLY THAN THE WAY THEY
DID IN THIS CASE BECAUSE THEY
CONDUCTED THE SEARCH ACCORDING
TO WISCONSIN LAW.
SO FROM THE PERSPECTIVE OF THE
REASONING BEHIND THE
EXCLUSIONARY RULE AS
ARTICULATED, THIS CASE AN
EVIDENTIARY HEARING ON THIS
PARTICULAR SEARCH AND SEIZURE
WOULDN'T GET US ANYWHERE
EXCEPT THE SAME PLACE WE ARE
HERE TODAY.
>> WHAT ABOUT HIS YOUR
OPPONENT'S ARGUMENT THAT THIS
IS A FRANK ISSUE.
THAT IS, THAT THE MA JESS
STRAIGHT IN WISCONSIN WAS
PRESENTED WITH FALSE
INFORMATION AND THAT ISSUE WAS
NOT IN FACT LITIGATED IN
WISCONSIN?

>> WELL, I DON'T KNOW THAT
HE'S OFFICIALLY RAISED THAT
HERE.
I DON'T KNOW THAT HE
SUFFICIENTLY HAS RAISED THAT
IN THE COURT BELOW HERE.
CERTAINLY DIDN'T RAISE IT
WE DON'T HAVE THE COMPLETE
PICTURE OF THE CASES IN
WISCONSIN.
IT WASN'T ARTICULATED THERE.
BUT EVEN IF SORT OF EVEN IF
WE GET TO THERE, THE SEARCH
THAT THEY ARE CONTESTING HERE
IS THE SEARCH FROM MARCH 15 OF
HIS HOME, WHICH THE EVIDENCE
THAT WE HAVE IN THIS CASE
DIDN'T COME FROM DIDN'T

COME FROM THAT SEARCH.
IT CAME FROM THE SEARCH OF HIS
PERSON WHEN HE WAS ARRESTED ON
MARCH 18, THREE DAYS LATER,
AND THEN THE THIRD SEARCH OF
THE HOME ON MARCH 29.
SO WE REALLY HAVE THERE ARE
AN ASSORTMENT OF THINGS THAT
COULD COME INTO PLAY HERE WITH
THE SEARCH OF HIS PERSON AND
THE SEARCH OF THE AUTOMOBILE,
WHICH IS WHERE A LOT OF THE
EVIDENCE THAT WE HAVE COMES
FROM AS FAR AS THE DNA
EVIDENCE, THE KNIFE, THE
CLOTHES HE WAS WEARING, THE
DNA THAT WAS ON THE CLOTHES,
THE JEANS JACKET AND THE
SHOES.
THERE ARE A MYRIAD OF
EXCEPTIONS.
WE HAVEN'T LITIGATED BELOW OR
HAVEN'T BEEN RAISED BELOW AND
HAVEN'T BRIEFED HERE, BUT
WE'RE GOING TO BE IN THE SAME
PLACE NO MATTER HOW WE PEEL
THIS BACK.
WE'RE STILL GOING TO BE HERE
WITH ADMISSIBLE EVIDENCE IN
FRONT OF THIS COURT WITH THE
EVIDENCE FROM THE MARCH 29
SEARCH WITH THE GUN AND THE
EVIDENCE FROM THE CAR AND THE
EVIDENCE FROM HIS CLOTHES.
IF THERE ARE NO FURTHER
QUESTIONS ON THAT, I WOULD
ACTUALLY LIKE TO TURN TO THE
FINAL ISSUE, THE ISSUE OF
APPOINTING STANDBY COUNSEL,
SPECIAL MITIGATION COUNSEL.
I'D LIKE TO POINT OUT THAT IT
APPEARS THAT THIS COURT HAS
SPECIFICALLY AUTHORIZED THAT
VERY ACTION, THE VERY ACTION
THAT THE TRIAL COURT TOOK IN
THIS CASE.
AND AT THE VERY BOTTOM OF THE
RELEVANT PARAGRAPHS ON THIS,
THIS COURT SAYS IF THE TRIAL
COURT PREFERS THAT COUNSEL

PRESENT MITIGATION RATHER THAN
CALLING ITS OWN WITNESSES,
THEY HAVE DISCRETION TO
UTILIZE STANDBY COUNSEL FOR
THIS LIMITED PURPOSE.
CERTAINLY AS MY OPPONENT
POINTS OUT, IN A LOT OF OUR
CASES WE DON'T HAVE THAT
OBJECTION THAT'S RAISED AT
THAT POINT.
THE DEFENDANT LODGES HIS
OBJECTION AT THE BEGINNING,
SAYS I DON'T WANT TO PRESENT
MITIGATION, THIS IS NOT WHAT I
WANT TO DO AND THEN HE JUST
SORT OF SITS QUIETLY AND LETS
THE COURT AND COUNSEL DO WHAT
THEY NEED TO DO.
THIS COURT HAS SAID WHEN WE
HAVE STANDBY COUNSEL, WHO'S
ESSENTIALLY FAMILIAR WITH THE
CASE, HAS BEEN WITH THIS CASE
FOR A LONG TIME AND IN THIS
CASE ATTORNEY VON WAS THE
THIRD ATTORNEY TO BE APPOINTED
TO REPRESENT MR.†MARQUARDT
BEFORE HE INVOKED HIS RIGHTS
UNDER FARETTA.
MR.†VON WAS FAMILIAR WITH THE
CASE AND HAD DONE
INVESTIGATIONS.
HE WOULD HAVE BEEN THE
APPROPRIATE PERSON TO PRESENT
THIS EVIDENCE.
>> BUT LEAVING ASIDE THE
STATUS OF THIS LAWYER AS
STANDBY COUNSEL, WHAT ABOUT
HIS STATUS EARLIER AS COUNSEL
FOR THE DEFENDANT?
THERE'S SOMETHING THAT SEEMS A
LITTLE ODD ABOUT A COURT
REQUIRING SOMEONE WHO HAD
UNDISPUTED LAWYERCLIENT
RELATIONSHIP WITH THE
DEFENDANT TO PLAY A ROLE IN
THE SAME TRIAL PROCEEDINGS
THAT IS OBJECTED TO BY THE
DEFENDANT.
I JUST IT SEEMS LIKE A VERY
UNUSUAL PROCEDURE.

DOESN'T THAT RAISE CONCERNS
THAT WE SOMEHOW CAN TAKE
SOMEBODY'S LAWYER AND FROM
THEIR PERSPECTIVE TURN THE
LAWYER AGAINST THEM IN THE
SAME CASE WHERE THAT LAWYER
HAD REPRESENTED THE CLIENT?
>> AND JUSTICE CANADY, I
SUPPOSE THAT'S DEPENDENT ON
WHAT WE MEAN BY TURN AGAINST
HIM, BECAUSE
>> BUT HIS HE'S BEEN
DETERMINED COMPETENT.
>> CERTAINLY.
>> HIS DETERMINATION OF WHAT
IS IN HIS INTEREST.
>> AND THAT'S WHERE I THINK
SOME OF THIS SOME OF OUR
PRECEDENT ON THE DEFENDANT'S
RIGHT TO SELFDETERMINATION
AND RIGHT TO HAVE IT THE WAY
HE WANTS IT HAS BEEN CLASHING
WITH THIS COURT'S PRECEDENT
OVER THE NEED TO DO AN
ADEQUATE PROPORTIONALITY
REVIEW.
AND THE TRIAL COURTS NEED FROM
THIS COURT'S PRECEDENT TO
CONDUCT AN ADEQUATE WEIGHING
OF AGGRAVATION AND MITIGATION.
WHEN YOU HAVE A DEFENDANT WHO
REFUSES TO CONTEST THE DEATH
PENALTY.
IF ATTORNEY VON HAD BEEN
REQUIRED TO DISCLOSE SOME TYPE
OF CONFIDENTIAL COMMUNICATION
OR INFORMATION THAT HE HAD
LEARNED THROUGH HIS
REPRESENTATION IN THAT
PREVIOUS RELATIONSHIP THAT WAS
I WOULD SAY OBJECTIVELY TO THE
DETRIMENT OF THE DEFENDANT AND
NOT IN A MANNER TO SAVE HIS
LIFE, THEN THAT WOULD CHANGE
THE LANDSCAPE OF THIS
ARGUMENT.
WE WOULD HAVE CERTAINLY A
DIFFERENT ISSUE.
IN THIS CASE WE DON'T HAVE A
CIRCUMSTANCE WHERE ATTORNEY

VON WAS REQUIRED TO OR IN FACT
DID DISCLOSE ANYTHING THAT WAS
CONFIDENTIAL THAT HE WOULD
HAVE LEARNED FROM MR.
MARQUARDT.
>> WELL, IN FOLLOWING UP ON
THAT, THERE WAS A SUGGESTION
YESTERDAY THAT WHAT SHOULD
HAPPEN IS THAT THE REPORTS OF
EXPERTS BE FILED SO THAT THE
COURT HAS THE WRITTEN REPORT
AS OPPOSED TO A PROFFER AS IS
DONE IN COON.
IT SEEMS TO ME AGAIN YOU COULD
SAY SOMEONE COULD SAY THAT
THAT'S SINCE THE REPORT WAS
DEVELOPED CONFIDENTLY UNTIL
THE DEFENDANT PUTS HIS MENTAL
HEALTH AT ISSUE, THAT THAT
ALSO WOULD SOMEHOW VIOLATE,
QUOTE, HIS RIGHTS.
BUT I THINK THAT WE'VE CROSSED
THAT TO SAY THOSE REPORTS ARE
REPORTS THAT SHOULD BE BEFORE
THE JUDGE IF THEY'RE
AVAILABLE.
SO I GUESS WE GO WE SORT OF
TRY TO WALK THIS LINE BETWEEN
FARETTA AND THE NEED TO IMPOSE
THE DEATH PENALTY IN A UNIFORM
WAY.
NOW, MR.†BECKER IS SAYING BUT
THAT'S ALL OKAY.
YOU CAN'T USE THE SAME LAWYER
THAT WAS REPRESENTING HIM.
SO WHEN WE SAID STANDBY
COUNSEL, I DON'T KNOW IF WE
SAID THAT WAS THE COUNSEL THAT
HAD PREVIOUSLY REPRESENTED
HIM.
LET'S GO BACK TO THAT ISSUE
ABOUT THERE'S A DIFFERENCE
BETWEEN A STANDBY COUNSEL WHO
HAS NOT HAD AN ATTORNEYCLIENT
RELATIONSHIP VERSUS STANDBY
COUNSEL WHO'S APPOINTED TO
AT THE COURT'S REQUEST.
>> YES, YOUR HONOR.
AND MOST OF THE CASES THAT
I'VE COME ACROSS WHERE WE HAD

STANDBY COUNSEL, IT'S BEEN THE
LAST ATTORNEY TO HAVE
REPRESENTED THE DEFENDANT
PRIOR TO PROCEEDING PRO SE.
SO WE DO HAVE THAT.
IN A LOT OF OUR CASES, WHERE
THE STANDBY COUNSEL,
>> BUT YOU WOULD AGREE BUT
WE DIDN'T ADDRESS THE ISSUE
WHERE STANDBY COUNSEL LEARNS
INFORMATION THAT IT COULD ONLY
LEARN FROM HIS RELATIONSHIP
WITH HIS CLIENT.
AND LET'S SAY I MEAN, IN
THE THE WORST SITUATION
WOULD BE FROM THE
DEFENDANT'S POINT OF VIEW IS
HE'S ADMITTED TO THIS ATTORNEY
THAT HE COMMITTED THE CRIME.
AND NOW HE'S PUTTING ON
MITIGATION WITH THE KNOWLEDGE,
THOUGH, THAT HE'S TOLD HIM HE
COMMITTED THE CRIME, YET THE
DEFENDANT IS ESPOUSING HIS
INNOCENCE.
THAT WOULD CERTAINLY CLASH
WITH THE ATTORNEYCLIENT
PRIVILEGE IN A VERY
SIGNIFICANT WAY.
>> I SUPPOSE IT COULD, JUSTICE
PARIENTE.
>> IT'S NOT SUPPOSE.
>> WELL, WE'RE LOOKING AT
I'M TRYING TO SEE THIS SORT OF
OBJECTIVELY.
>> AND, AGAIN, I'M WITH YOU ON
TRYING TO GET ALL THIS
INFORMATION BEFORE.
>> RIGHT.
>> BUT I ALSO SEE MR.†BECKER'S
POINT, HOW THERE CAN BE A
COLLISION THAT WE NEVER WOULD
HAVE INTENDED TO OCCUR.
>> AND I THINK WHAT WE HAVE
HERE THE ONLY COLLISION WE
HAVE IS JUST JUST MR.
MARQUARDT'S INSISTENCE THAT HE
DOESN'T WANT ANYTHING
PRESENTED AND SO HE'S GOING TO
OBJECT IN WHATEVER FASHION, AT

THE BEGINNING OF THE
SENTENCING PHASE, WHENEVER HIS
ATTORNEY WHENEVER STANDBY
COUNSEL, FORMER ATTORNEY OF
HIS IS APPOINTED AS SPECIAL
MITIGATION COUNSEL.
HE'S GOING TO OBJECT TO THAT.
BUT AT THE END OF THE DAY,
NOTHING WAS REVEALED FROM THE
INVESTIGATORS OR FROM ATTORNEY
VON IN THIS SPENCER HEARING
THAT WAS I WOULD SAY
OBJECTIVELY TO THE DETRIMENT
OF MR.†MARQUARDT.
IT WAS ALL IN THE FORM OF
MITIGATION FOR THE TRIAL COURT
TO ATTEMPT TO WEIGH.
>> THEY SAY THAT LIFE IN
PRISON IN A SHOEBOX IS WORSE
THAN DEATH.
SO, I MEAN, WHAT ABOUT THAT?
I MEAN
>> AND I SUPPOSE THAT LEANS ON
WHETHER WE LOOK AT THAT FROM
THE SUBJECTIVE OF THAT
PARTICULAR DEFENDANT AND HIS
WISHES OR THE OBJECTIVE
STANDBY OF THIS COURT'S
PROPORTIONALITY REVIEW.
IT'S A CERTAINLY SOMETHING
THAT THIS COURT HAS BATTLED
WITH.
YOU KNOW, OVER THE YEARS
BETWEEN THE VARIOUS
PRECEDENTS.
>> WELL, I'M ALSO CONCERNED
ABOUT THE SORT OF BRUSHING TO
THE SIDE THAT STANDBY COUNSEL
WOULD NOT HAVE AN
ATTORNEYCLIENT PRIVILEGE.
MAYBE WHILE THE ATTORNEY'S
JUST SITTING THERE WATCHING
THE CASE.
BUT IS THERE A CASE THAT SAYS
THAT STANDBY COUNSEL OR THAT
THERE IS NO ATTORNEYCLIENT
PRIVILEGE WITHSTAND BUY
COUNSEL WHEN HE ENGAGES IN
CONSULTATION AND ADVICE TO A
PRO SE DEFENDANT?

>> WHAT'S THE IF THE
DEFENDANT ELECTED TO ACTUALLY
GO AND SEEK LEGAL COUNSEL
>> I MEAN, SITTING IN THE
COURTROOM.
THAT'S WHAT THEY DO.
>> SOMETIMES STANDBY COUNSEL
AREN'T USED.
>> I UNDERSTAND.
BUT IF THEY ARE, IF THEY ARE,
DOES THAT MEAN THAT STANDBY
COUNSEL THERE IS NO
ATTORNEYCLIENT PRIVILEGE?
I FIND THAT I'M NOT AWARE
OF A CASE THAT SAYS THAT
THERE'S NOT AND WE PROTECT
THAT PRIVILEGE, I MEAN, TO THE
FULLEST EXTENT.
>> AND I'M NOT AWARE OF A CASE
EITHER, JUSTICE LEWIS, AND I
AGREE THAT THAT IS A SACRED
PRIVILEGE THAT IS VERY
WELLPROTECTED.
BUT, AGAIN, YOU KNOW, WE'RE
LOOKING AT MOST OF THE WAY IN
WHICH WE HAVE CONTEMPLATED
THIS IS THAT THE ATTORNEY
WOULD NOW, LIKE, FOR INSTANCE,
IN A BUSINESS DEALING, USE
PREVIOUSLY GAINED INFORMATION
TO THE CLIENT'S DETRIMENT THAT
WOULD BE A PROHIBITION OF THE
ATTORNEYCLIENT PRIVILEGE.
IN THIS CASE WE HAVE THE
ATTORNEY WHO'S APPOINTED BY
THE COURT UNDER THIS COURT'S
PRECEDENT TO ACT AS SPECIAL
MITIGATION COUNSEL TO PRESENT
MITIGATION TO IN THE
OBJECTIVE SENSE TO TRY TO SAVE
MR.†MARQUARDT'S LIFE.
AND JUST HALLMAN WAS BENDING
OVER BACKWARDS TO TRY TO
COMPLY WITH THIS COURT'S
PRECEDENCE UNDER MOHAMMED AND
OTHER CASES IN ORDER TO ENSURE
THAT HE HAD EVERYTHING HE
NEEDED TO DO AN ADEQUATE
WEIGHING OF AGGRAVATORS AND
MITIGATORS.

>> I'M CURIOUS ABOUT LET'S
ASSUME AND I'M GOING TO ASK
MR.†BECKER THIS QUESTION.
LET'S ASSUME WE AGREE THIS WAS
THE WRONG PROCEDURE TO FOLLOW.
NOW SINCE UNDER THE CASE
LAW MR.†MARQUARDT IS REQUIRED
TO HAVE AN APPEAL EVEN IF
AND, AGAIN, HE'S CONTESTING
GUILT, BUT LET'S SAY THERE'S
NO GUILT ISSUE, BUT THERE'S A
PROBLEM WITH HAVING USED
SOMETHING THAT STANDBY COUNSEL
PROVIDED AS OPPOSED TO COUNSEL
THAT DIDN'T HAVE AN
ATTORNEYCLIENT RELATIONSHIP.
IT GOES BACK AND MR.†MARQUARDT
STILL DOESN'T WANT WANTS
THE DEATH PENALTY.
WE'RE SORT OF NOW WE'RE
GOING AND WE'RE GOING TO GET A
NEW LAWYER TO DISCOVER THE
SAME INFORMATION.
>> ESSENTIALLY THE SAME THING
AND WE'RE SORT OF RUNNING IN
CIRCLES AT THAT POINT.
>> UNLESS MR.†MARQUARDT HAS
CHANGED HIS VIEW AND HE
ACTUALLY WANTS TO CONTEST HIS
DEATH SENTENCE.
BECAUSE, AGAIN, WHETHER
SOMEBODY THINKS IT'S BETTER TO
SPEND LIFE IN PRISON OR BE
KILLED, BE SUBJECT TO THE
DEATH PENALTY, THE STATE HAS
TO MAKE THAT DECISION, NOT THE
DEFENDANT.
>> CERTAINLY.
>> SO WHAT'S THE UPSHOT OF IT?
>> WELL, ESSENTIALLY EVEN IF
FOR SOME REASON THIS FINDS
THAT ATTORNEY VON SHOULD NOT
HAVE BEEN APPOINTED BECAUSE OF
THAT PREVIOUSLY ESTABLISHED
ATTORNEYCLIENT RELATIONSHIP
WE'RE GOING TO BE RIGHT BACK
HERE IN THE SAME PLACE ANYWAY
WITH POSSIBLY LESS INFORMATION
IF THE DEFENDANT IS STILL
INSISTENT ON NOT

>> BECAUSE HE WOULDN'T ALLOW
THE RELEASES.
SO WE ACTUALLY DIDN'T GET HIS
RECORDS THAT COULD HAVE
EXPLAINED MORE ABOUT WHY HE
WAS HAD BEEN FOUND INSANE
IN THE ANIMAL CRUELTY CASE.
>> THAT WAS THAT WAS
ABSOLUTELY ACCURATE.
AND ONE OF THE THINGS ABOUT
THIS PARTICULAR SPENCER
HEARING IS THAT THE
INVESTIGATORS THEIR
TESTIMONY IS RATHER SHORT.
AND ATTORNEY VON'S
PRESENTATION WAS RATHER SHORT
BECAUSE THE DEFENDANT WOULDN'T
ACTUALLY SHARE MUCH
INFORMATION WITH THEM.
SO
>> COULDN'T THEY WERE THE
RECORDS AVAILABLE FROM
WISCONSIN AS TO I THOUGHT
THERE WAS SOMETHING ABOUT WHAT
LED TO THE FINDING OF INSANITY
AND THEN THOSE RECORDS FROM
THE WISCONSIN COURT ABOUT HIS
MENTAL STATUS.
>> THAT WAS NEVER MADE A PART
OF OUR RECORD.
>> BUT THAT WOULD HAVE BEEN
THAT'S SOMETHING THAT ANY
COUNSEL SHOULD BE ABLE TO
OBTAIN THROUGH YOU KNOW,
IT'S NOT SOMETHING THAT IS
PRIVILEGED TO THAT DEFENDANT
ONCE THEY'RE IN STATE CUSTODY.
>> ONE WOULD ASSUME THAT
COUNSEL COULD HAVE BEEN ABLE
TO ATTAIN THAT.
I DON'T KNOW IF THAT WE
DON'T HAVE IT AS PART OF OUR
RECORD.
I DON'T KNOW IF IT WAS
OBTAINED AND IT WAS SOMETHING
THAT HE DIDN'T WANT TO PRESENT
AND MAKE PART OF THE RECORD.
YOU KNOW, IT'S AN INTERESTING
MECHANISM THE WAY THE
DEFENDANT ENDED UP IN THE

WISCONSIN STATE MENTAL
HOSPITAL THOUGH HE WAS
COMPETENT TO STAND TRIAL AND
GO TO A VERDICT BEFORE JURY.
THEY FASHIONED THIS
STIPULATION OF NOT GUILTY BY
REASON OF MENTAL DEFECT.
>> THAT WASN'T SOMETHING THE
JURY FOUND?
>> THAT WASN'T SOMETHING THE
JURY FOUND, YOUR HONOR.
HE WENT TO VERDICT BEFORE THE
JURY ON THE MERITS OF THE
ANIMAL CRUELTY CASE AND THEN
IN SENTENCING IT WAS SORT OF A
STRANGE SENTENCING MECHANISM.
WE HAVE SOME TESTIMONY TO THAT
IN OUR PENALTY PHASE REBUTTAL
CASE.
BUT IT'S STILL IT'S STILL
UNCLEAR AS TO HOW WISCONSIN
DOES THAT.
BUT HE WAS SEEN AND FOUND
COMPETENT TWICE PRETRIAL.
HE WAS SEEN AGAIN BY THE
DOCTOR IN AN ATTEMPT TO GET
MENTAL HEALTH MITIGATION, BUT
HE WOULDN'T SHARE ANYTHING
WITH DR.†CROP AND THERE WASN'T
MUCH THAT HE WAS ABLE TO
OFFER.
SO THERE WAS NO FORMAL
EVALUATION OR FORMAL REPORT
FILED BY DR.†CROP.
THERE WAS A LETTER WRITTEN TO
JUDGE HALLMAN FILED UNDER SEAL
THAT THIS COURT HAS PART OF
THE SUPPLEMENTAL RECORD NOW
THAT INDICATED HE WOULDN'T BE
A RISK IN GENERAL POPULATION,
BUT THERE WASN'T MUCH ELSE HE
COULD SHARE BECAUSE MARQUARDT
WOULDN'T SHARE MUCH WITH HIM.
>> WELL, WHAT IF VON CONTINUED
TO REPRESENT THE DEFENDANT
THROUGHOUT THE TRIAL AND THE
DEFENDANT DECIDED NOT TO
PRESENT MITIGATION?
WOULD NOT VON HAVE BEEN
COMPELLED TO INDICATE TO THE

COURT WHAT MITIGATION HE HAD
FOUND OVER VON'S OBJECTION?
>> UNDER COON V DUGER,
ABSOLUTELY.
>> AND HOW WOULD THAT HAVE
IMPACTED ATTORNEYCLIENT
PRIVILEGE?
>> WELL, MY INTERPRETATION OF
IT, JUSTICE PERRY, IS IT
WOULDN'T HAVE.
HE WOULD SIMPLY HAVE BEEN
REVEALING THE INFORMATION THAT
HE HAS DISCOVERED IN
MITIGATION THROUGHOUT HIS
INVESTIGATION.
I DON'T KNOW THAT COON V DUGER
WOULD REQUIRE ATTORNEY VON
UNDER THAT HYPOTHETICAL TO
REVEAL NEGATIVE MENTAL HEALTH
INFORMATION.
>> NO.
IT REQUIRES HIM TO REVEAL WHAT
MITIGATION HE FOUND.
>> THIS COURT HAS PRECEDENT
THAT REQUIRES THE DEFENSE
ATTORNEY TO REVEAL THINGS TO
THE COURT, TO TAKE ACTION OVER
THE DEFENDANT'S OBJECTION.
>> THAT'S MY POINT.
SO WHAT'S THE DIFFERENCE IF
HE'S APPOINTED TO SAY THE SAME
THING AS THE STANDBY COUNSEL?
>> AND THAT'S SOMETHING I
ARGUE IN THE BRIEF.
THAT'S AN ARGUMENT I WILL
CONTINUE TO MAKE, THAT HE
WOULD WE WOULD BE IN THE
SAME PLACE AND HE HAS HE
HAS LESS OF A RELATIONSHIP
WITH ATTORNEY VON IN OUR
CIRCUMSTANCE THAN IN THAT
HYPOTHETICAL WHERE HE WOULD
STILL BE REQUIRED TO DISCLOSE
THAT INFORMATION.
>> BUT IT SQUARES UP WITH THE
CONSTITUTIONAL RIGHT TO
SELFREPRESENTATION.
THAT'S THE DIFFERENCE IN THOSE
CASES.
>> IT CERTAINLY DOES.

AGAIN, I ACKNOWLEDGE THAT WE
DO HAVE SORT OF THAT BALANCING
THAT'S CONSTANTLY GOING ON
WITH THIS COURT OVER THE COON
V DUGER PRECEDENT WHERE
COUNSEL HAS TO OVER OBJECTION
REVEAL THIS INFORMATION OR
SORT OF THE SEMINOLE CASE, THE
FARETTA PRECEDENT, WHERE HE
HAS THE RIGHT TO
SELFDETERMINATION AND HE CAN
HAVE IT THE WAY HE WANTS IT.
SO THAT IS SOMETHING THIS
COURT IS CONSTANTLY BATTLING
WITH.
I UNDERSTAND THAT.
IF THERE ARE NO FURTHER
QUESTIONS, WE ASK THE COURT
AFFIRM THE DECISION OF THE
TRIAL COURT BELOW.
>> THANK YOU.
REBUTTAL?
>> AT THE OUTSET, I'D LIKE TO
ASK YOU, HAS YOUR CLIENT
AUTHORIZED THIS APPEAL?
DOES HE SUPPORT THE APPEAL?
>> YES.
>> OKAY.
>> OF COURSE HE'S STILL
CONTESTING HIS GUILT.
>> YES.
>> BUT IF WE ON THE ISSUE
OF BUT OF WHETHER HE
WANTED TO WAIVE MITIGATION, HE
DID IT VOLUNTARILY.
IF WE AGREE WITH YOU ON SOME
POINT ON THE PENALTY PHASE,
THAT THEY SHOULDN'T HAVE
APPOINTED STANDBY COUNSEL,
WHAT'S THE REMEDY?
IT GOES BACK AND WHAT HAPPENS?
>> AND A SEPARATE COUNSEL
UNRELATED TO THE DEFENDANT
>> SO HE'S NOT NOW CHANGING
HIS MIND AND WANTING TO PUT ON
MITIGATION.
>> NO, BUT THAT'S IRRELEVANT.
>> WELL, IT'S RELEVANT TO ME
AS FAR AS IF WE'RE TRYING TO
SEE WHETHER THIS DEFENDANT IS

TRULY, YOU KNOW, WHERE HE
GETS TO PUT ON THE MITIGATION.
HE GOES, OH, MY GOODNESS, I
YOU KNOW
>> I DIDN'T MEAN THAT
FLIPPANTLY, BUT WHERE I THINK
IT'S IMPORTANT IS THAT SOMEONE
TOTALLY UNCONNECTED WILL NOT
GO IN WITH THE KNOWLEDGE THAT
THE DEFENDANT HAS ALREADY
DISCLOSED TO HIM REGARDING THE
FACTS OF THE CASE, HIS
UPBRINGING OR WHATEVER MIGHT
HAVE COME UP.
>> WELL, WOULDN'T THAT BE
BECAUSE THERE'S A DANGER IF
IN A CASE THERE'S A DANGER
THAT ESTABLISHED BUY KNOWS
SOMETHING THAT HE'S CONCERNED
WITH, SHOULDN'T THAT COUNSEL
SAY I CAN'T IN THIS CASE
CONSISTENT WITH WHAT I'VE
LEARNED THROUGH THE
ATTORNEYCLIENT PRIVILEGE DO
THIS AND THEN THAT SIGNALS TO
THE JUDGE THAT THERE'S BEEN
DISCUSSIONS BECAUSE THE
ONLY PLACE WHERE TO ME IT'S
GOING TO BE AN ISSUE IS IN THE
GUILT PHASE.
BECAUSE IN THE PENALTY PHASE
IT'S OFTEN TIME THE CASE THAT
THE DEFENDANT EITHER AT THE
TIME OF TRIAL HAS UNREALISTIC
EXPECTATIONS.
THEY DON'T WANT THEM TO PUT ON
A PENALTY PHASE BECAUSE THEY
FEEL LIKE THAT'S AN ADMISSION
OF GUILT.
OR THEY, YOU KNOW, ARE HAVE
MENTAL ILLNESS AND SAY OR
MAY BE SMART AND SAY I DON'T
WANT TO LIVE MY LIFE IN A BOX
AND I'D RATHER BE KILLED.
>> I CAN ADDRESS THAT.
THAT IS NOT THE REASON.
THE SOLE REASON HE DIDN'T WANT
ANY MITIGATION, HE WANTED THE
DEATH PENALTY BECAUSE THAT'S
HOW HE WAS GOING TO GET REVIEW

BY THIS COURT.
THAT'S ON THE RECORD.
HE SAYS IT WILL GET ME TO THE
SUPREME COURT.
AND THAT WAS KEY TO HIM.
AND HE THOUGHT IF MITIGATION
IS PUT ON, MAYBE HE WOULDN'T
GET THE DEATH PENALTY AND
THERE'S A CHANCE HE WOULDN'T
BE ABLE TO COME UP TO THE
SUPREME COURT.
I'M NOT TALKING ABOUT NOT
ADDRESSING THE EFFICACY OF
THAT, BUT, YOU KNOW, OR THE
ADVISABILITY OF THAT, BUT,
STILL, THAT WAS HIS REASON.
IT WASN'T A CASE THAT HE
DIDN'T WANT TO LIVE IN A BOX
OR ANYTHING LIKE THAT.
HAD NOTHING TO DO WITH THAT.
SO THAT'S A LITTLE BIT
DIFFERENT THAN WHAT WE SEE IN
THIS CASE.
>> IN OUR REVIEW THAN THE 5TH
DISTRICT'S REVIEW.
>> APPARENTLY.
ONE THING I DID WANT TO BRING
TO THIS COURT'S ATTENTION WAS
ON JULY†8, 2010, APPELLANT
FILED A MOTION SEEKING TO
PRESENT EVIDENCE IN A FRANKS
HEARING SPECIFICALLY.
AND I SUGGEST TO THIS COURT
THAT IF THE JUDGE DIDN'T WANT
TO AND DIDN'T HAVE TO GRANT
A FULLBLOWN EVIDENTIARY
HEARING, HE SHOULD HAVE
LISTENED TO THE EVIDENCE IN A
FRANKS HEARING, SINCE THE
DECISION IN THE WISCONSIN
SUPREME COURT WAS GROUNDED ON
LEON.
>> WELL, LEON, THE FIRST
ELEMENT OF LEON IS THE FRANKS
ELEMENT.
>> RIGHT.
>> AND SO THEY WENT RIGHT
THROUGH THAT AND THERE'S NOT
ONLY ONE, THERE'S NOT ONLY ONE
IN THE SUPREME COURT, BUT

THERE'S ALSO A LOWER APPELLATE
COURT THAT ANALYZES THIS AND
SAYS WISCONSIN IN CASE
AND SAYS THAT IT'S WAIVED,
THEY CONCEDED IT, THAT HE
CONCEDED IT.
>> I DON'T THINK THEY SAY HE
CONCEDED IT.
>> I THINK IT DID.
I THINK THERE'S A QUOTE IN THE
FOOTNOTE.
>> ABANDONED IT.
>> CONCEDED IT.
YOU BETTER TAKE A LOOK AT THE
FOOTNOTE.
>> I WILL.
I QUOTED IT IN MY BRIEF.
BUT THE THING IS AND WE
AREN'T PRIVY TO ALL THE STUFF
THAT HAPPENED IN WISCONSIN, SO
I CAN'T SAY FOR ABSOLUTE
CERTAIN.
I DON'T THINK ANY OF US CAN,
THAT WHAT WAS AND WASN'T
LITIGATED UP THERE.
>> WELL, I THINK IT'S CLEAR
THAT THE OPINIONS THAT THE
SUPREME COURT OPINION THERE
DOES NOT MENTION AN ANALYSIS
OF THAT ISSUE.
>> RIGHT.
>> BUT IF YOU TAKE A LOOK AT
THE FOOTNOTE IN THE LOWER
APPELLATE COURT, I THINK IT
CERTAINLY DOES SAY AND THEIR
ANALYSIS WAS THAT YOU CAN'T
GET TO THE ADMISSION OR THE
SUPPRESSION ISSUE WITHOUT
DECIDING THE FIRST ELEMENT OF
LEON.
>> WELL
>> AND THE FIRST ELEMENT OF
LEON IS THE FRANKS ISSUE AND
THAT'S THE QUESTION OF WHETHER
THIS IS A FABRICATED AFFIDAVIT
OR FALSE AFFIDAVIT AND THAT
THING.
>> RIGHT.
>> BUT CLEARLY AND THAT
THIS HAD THE OPPORTUNITY TO

LITIGATE IT HAD HE SO DESIRED.
THE FINDING IS THAT
>> AND THIS IS THE POINT THAT
COMES TO MIND.
AND, AGAIN, I'M JUST THROWING
THIS OUT BECAUSE WE DON'T HAVE
THE ABSOLUTE CERTAIN.
HE WAS REPRESENTED BY COUNSEL
IN WISCONSIN, WHO HE DIDN'T
WANT.
AND IF IT WAS ABANDONED, IT
WAS COUNSEL WHO ABANDONED IT.
IT WASN'T NECESSARILY THE
DEFENDANT HIMSELF WHO
ABANDONED IT.
>> YOU DO A VERY GOOD JOB, MR.
BECKER.