

>> NEXT CASE FOR THE DAY IS
McDADE VERSUS STATE OF
FLORIDA.

>> YOU MAY BEGIN.

>> MAY IT PLEASE THE COURT.
GOOD MORNING, YOUR HONOR.
MY NAME IS CHRISTOPHER, COSDEN.
I REPRESENT RICHARD McDADE WHO
WAS THE DEFENDANT BELOW AND WHO
IS THE APPELLANT HERE.
I WOULD ASK TO RESERVE FIVE
MINUTES FOR REBUTTAL IF I MAY,
PLEASE.

THIS CASES ABOUT JUDICIAL
LEGISLATION OF THE ABSOLUTE
WORST SORT.

MR. McDADE WAS CONVICTED OF A
VARIETY OF CRIMES.

TOOK AN APPEAL TO THE SECOND
DISTRICT.

THE CRIMES AROSE OUT OF THE
ALLEGATION THAT MR. McDADE HAD
FORCED HIS STEPDAUGHTER, WHO WAS
A COMPLAINING WITNESS, TO HAVE
SEX WITH HIM ON A NUMBER OF
OCCASIONS OVER A NUMBER OF
YEARS.

THE STEPDAUGHTER, THE
COMPLAINING WITNESS, HID A
RECORDING DEVICE ABOUT HER
PERSON, APPROACHED MR. McDADE
IN HIS OWN BEDROOM, IN HIS OWN
RESIDENCE, AND RECORDED TWO
CONVERSATIONS WHICH WERE
INTRODUCED AT TRIAL OVER
OBJECTION.

OF COURSE CHAPTER 934 OF FLORIDA
STATUTES REGULATES RECORDINGS
AND PROVIDES THAT THE PERMISSION
OF ALL PARTIES MUST BE SECURED
BEFORE A CONVERSATION IS
RECORDED WHEN THERE IS A
REASONABLE EXPECTATION OF
PRIVACY.

WE'LL COME BACK TO THAT.
MR. McDADE HAD NO IDEA THESE
CONVERSATIONS WERE BEING
RECORDED.

THEY WERE ADMITTED OVER
OBJECTION AT TRIAL.

THE SECOND DISTRICT COURT HELD THAT IT IS PRECISELY BECAUSE THE RAPE OF A CHILD IS SUCH A HEINOUS CRIME WHICH IS SO OFTEN DIFFICULT TO DETECT, THAT SOCIETY HAS A SPECIAL INTEREST IN GUARDING CHILDREN FROM IT AND EXCEPTIONS TO THE LAW EXIST TO FURTHER THAT GOAL.

CONSIDERING THESE VALUES AND THE ALREADY-EXISTING LEGAL EXCEPTIONS THAT REFLECT THEM WE CONCLUDE THAT SUPPRESSING THE RECORDINGS PURSUANT TO CHAPTER 934 UNDER THE CIRCUMSTANCES OF THIS CASE WOULD PRODUCE AN ABSURD RESULT, A RESULT WE CAN NOT FATHOM WAS INTENDED BY THE LEGISLATURE.

THE, THAT PORTION OF THE OPINION CARRIES A FOOTNOTE WHICH ADDRESSES STATE v. WALLS WHICH WAS DECIDED BY THIS COURT IN 1978, STATES, WALLS DEALT WITH RECORDING OF A CRIMINAL ACT BY A VICTIM IN ITS HOME THE HOLDING DOES NOT CONTROL HERE BECAUSE IT DOES NOT IMPLICATE SOCIETY'S SPECIAL INTEREST IN PROTECTING CHILDREN FROM SEX ABUSE.

>> MR. COSDEN, DIDN'T THE SECOND DISTRICT RELY ON OUR OPINION IN INCIARRANO?

>> IT DID.

>> WHAT IS THE UNDERSTANDING OF PARTICULAR CIRCUMSTANCES IN INCIARRANO, THAT INCIARRANO THAT HAD NO EXPECTATION THAT HIS COMMUNICATION WAS NOT SUBJECT TO INTERCEPTION?

THAT IS WHAT THEY CONCLUDED. WHAT CIRCUMSTANCES WERE THE, DECISIVE OR MATERIAL CIRCUMSTANCE THAT IS ARE THE BASIS FOR THAT CONCLUSION IN INCIARRANO.

>> ALL RIGHT.

>> YOU DISTINGUISH THAT CASE. AS PART OF YOUR DISTINGUISHING

THAT, COULD YOU FOCUS ON THE PARTICULAR CIRCUMSTANCES?

>> INCIARRANO WENT TO THE BUSINESS PREMISE OF ANOTHER AND MURDERED HIM.

THE ACT OF THE MURDER WAS RECORDED, APPARENTLY BY A TAPE THAT WAS RUNNING ON INCIARRANO'S DESK.

IT WAS LATER DISCOVERED BY A SHERIFF'S DEPUTY.

THIS COURT HELD THAT THE CONVERSATION BETWEEN THE VICTIM AND INCIARRANO REGARDING A BUSINESS DEAL IN WHICH THE VICTIM NO LONGER WANTED A PART, THE SOUND OF A GUN BEING COCKED, FIVE SHOTS BEING FIRED BY INCIARRANO, SEVERAL GROANS BY THE VICTIM, THE GUSHING OF BLOOD AND THE VICTIM FALLING FROM HIS CHAIR TO THE FLOOR

THIS RECORDING WAS ADMISSIBLE.

THIS COURT REASONED THAT IN FACT ADOPTED THE DISTRICT COURT'S OPINION AND REASONED, ONE WHO ENTERS THE BUSINESS PREMISES OF ANOTHER FOR A LAWFUL PURPOSE IS INVITEE.

AT THE MOMENT THAT HIS INTENTION CHANGES, THAT IS, IF HE SUDDENLY DECIDES TO STEAL OR PILLAGE OR MURDER OR RAPE, THEN AT THAT MOMENT HE BECOME AS TRESPASSER AND HAS NO FURTHER RIGHT UPON THE PREMISES.

THUS HERE, IF APPELLANT EVER HAD A PRIVILEGE, IT DISSOLVED IN THE SOUND OF GUNFIRE.

ACCORDINGLY, THE COURT HELD THAT BECAUSE INCIARRANO HAD NO REASONABLE EXPECTATION OF PRIVACY THE EXCLUSIONARY RULE OF 934.06 DOES NOT APPLY.

>> YOU BELIEVE IT HAS TO DO WITH THE LOCATION A BUSINESS PREMISES AND THE FACT THAT A CRIME WAS COMMITTED AT A BUSINESS PREMISES THAT, KIND OF THE CORE, CIRCUMSTANCES THAT DICTATED THE

RESULT THAT THEY REACHED IN THAT CASE?

>> ACTUALLY TWO REASONS, YOUR HONOR.

THAT BEING ONE.

THE REASON IN INCIARRANO IS THAT THE EVENTS IN INCIARRANO, THE, FIRING, COCKING OF THE GUN, THE FIRING OF THE SHOTS, THE BLOOD GUSHING, THE VICTIM FALLING TO THE FLOOR, THOSE THINGS, OCCURRED ON THE BUSINESS PREMISES OF ANOTHER, THEREFORE, WHEN THOSE THINGS OCCURRED, THE DEFENDANT, INCIARRANO, BECAME A TRESPASSER AND WAS NOT ENTITLED TO A REASONABLE EXPECTATION OF PRIVACY.

IN McDADE, MR. McDADE WAS IN HIS OWN BEDROOM, IN HIS OWN HOUSE, NO MATTER WHAT HE DID, HE COULD NOT BE A TRESPASSER IN HIS OWN RESIDENCE.

THAT CAN'T HAPPEN.

THERE IS NO AUTHORITY OF LAW THAT WOULD MAKE MR. McDADE A TRESPASSER WHEREAS IT IS CRITICAL TO THIS COURT'S HOLDING IN INCIARRANO THAT HE COMMITTED A CRIME.

HE COMMITTED A CRIME AND BECAME A TRESPASSER.

>> I WAS LOOKING BACK.

WE HAD A CASE BEFORE, THE INCIARRANO CASE WAS OVER BY IMPLICATION.

WALLS SAID EXTORTION THREAT WAS PROTECTED BY THE STATUTE.

>> YES.

>> AND THE ARGUMENT THAT IS REALLY BEING, TO ME, THE ARGUMENT IS BEING MADE THAT BY YOU, IS THAT IT IS THE PLACE THAT DETERMINES THE REASONABLE EXPECTATION OF PRIVACY AS OPPOSED TO THE NATURE OF THE COMMUNICATION, IS THAT WHAT YOU'RE SAYING?

>> NO, YOUR HONOR.

I'M SORRY.

>> WHAT, BECAUSE HOLDING IN INCIARRANO.

THIS STATUTE NEVER MEANT TO PROTECT INDIVIDUALS WHO WERE COMMUNICATING CRIMINAL ACTS EVEN IN THEIR OWN HOME.

NOBODY HAS A LEGITIMATE EXPECTATION OF PRIVACY IN COMMITTING A CRIMINAL ACT WITHIN THEIR OWN HOME, OR, SAYING THINGS WITHIN THEIR OWN HOME, WHETHER IT IS TO COMMIT A MURDER, EXTORTION, KIDNAPPING, MURDER OR CHILD ABUSE.

IS IT YOUR POSITION THAT THERE IS, THAT THAT WOULD BE REWRITING THE STATUTE TO SAY THAT, IF THE SUBJECT MATTER IS A CRIME, YOU DO NOT HAVE A REASONABLE EXPECTATION OF PRIVACY?

>> YES, YOUR HONOR, THAT WOULD BE REWRITING THE STATUTE.

>> BUT ISN'T THAT REALLY, AGAIN, AND THAT WAS THE CRITICISM IN INCIARRANO, IN, WHEN JUSTICE EHRLICH AND SHAW, EITHER CONCURRED IN RESULT OR DISSENTED IN PART, TO SAY THAT WE WERE INSTEAD OF LOOKING AT THE PLACE, THERE WAS A SLIPPAGE INTO WHAT WAS BEING RECORDED?

>> WELL, WE HAVE TO LOOK AT TWO THINGS.

ONE IS THE STATUTE.

AND IF WE LOOK AT 934.08, PARAGRAPH 4, THE LEGISLATURE TOLD US THAT A COMMUNICATION LOSING ITS PRIVILEGED NATURE ONLY WHEN IT IS LAWFULLY INTERCEPTED, AND IS IN FURTHERANCE OF A CRIME.

SO, AND I'M PARAPHRASING THE STATUTE.

IT IS UNFORTUNATELY THAT PARAGRAPH IS PRETTY BADLY WRITTEN, BUT THE FIRST THING THAT A COURT WOULD HAVE TO DETERMINE IS THAT THE STATUTE IS LAWFULLY INTERCEPTED AND HERE IT

WAS NOT.

AND I'M GOING TO COME BACK TO THAT IN JUST A MOMENT.

AND WAS IN FURTHERANCE OF A CRIME.

NOW, TO ANSWER THE QUESTION MORE CLEARLY, WE LOOK AT KATZ VERSUS UNITED STATES.

KATZ WAS A BOOKIE WHO WAS USING A PUBLIC TELEPHONE TO COMMUNICATE BETTING INFORMATION TO OTHERS.

THE KATZ COURT HELD THAT THE FOURTH AMENDMENT PROTECTS PEOPLE, NOT PLACES, WHICH IS EXACTLY THE POINT YOUR HONOR WAS MAKING.

BUT THE KATZ COURT, REMAINDER OF THAT QUOTATION IS THAT, WHEN A PERSON KNOWINGLY EXPOSES TO THE PUBLIC, EVEN IN HIS OWN HOUSE OR OFFICE IS NOT THE SUBJECT OF FOURTH AMENDMENT PROTECTION.

WELL HERE THE RECORDING THAT IS AT ISSUE WAS CLEARLY NOT OFFERED TO THE PUBLIC.

THIS WAS A RECORDING BETWEEN TWO FAMILY MEMBERS WHO HAD, NO ONE ELSE PRESENT, IN THE FAMILY RESIDENCE.

IF ANY PLACE IS PROTECTED THAT IS A PROTECTED PLACE.

>> WE'RE NOT DEALING WITH A FOURTH AMENDMENT ANALYSIS, CORRECT?

IF THIS VICTIM HAD GONE TO THE POLICE AND POLICE LISTENED TO HER AND SHE MADE THE ALLEGATIONS THAT SHE MADE AND THEY SAID, PUT A RECORDING DEVICE ON, SO BECAME A AGENT OF THE STATE, IS THERE ANY QUESTION THAT THERE WAS, BASED ON WHAT SHE HAD TOLD, CALLED THE POLICE AND DIDN'T LISTEN, AND THERE WAS PROBABLE CAUSE TO BELIEVE A CRIME WAS COMMITTED?

>> WELL OF COURSE THE POLICE COULD --

>> SO, I GUESS, WHAT I'M TRYING

TO FIGURE OUT HERE IS, AND MAYBE
JUDGE VALENTI SAYS AND JUDGE
ALTENBERND IS TAKING THOSE
FACTS TO PROTECT BY THIS STATUTE,
THOSE THAT WERE COMMITTING
CRIMES WITHIN THEIR OWN HOME.
AND YOU'RE SAYING, OH, YES, IF
THEY'RE IN THEIR OWN HOME, YOU
HAVE AUTOMATICALLY AN
EXPECTATION OF PRIVACY IN
WHATEVER YOU'RE GOING TO SAY?
IS THAT WHAT, ISN'T THAT --
>> YES, YOUR HONOR THAT IS
EXACTLY WHAT --

>> DOESN'T MATTER WHETHER OR NOT
IT IS THE VICTIM'S HOME ALSO.

>> NO, YOUR HONOR, IT DOES NOT
MATTER.

THE LEGISLATURE DECIDED FOR
REASONS KNOWN BEST TO THE
LEGISLATURE, BACK IN 1969, TO
LIMIT RECORDINGS OF
CONVERSATIONS.

1974 THE STATUTE WAS CHANGED TO
REQUIRE PERMISSION OF ALL THE
PARTIES TO THE CONVERSATION FOR
RECORDING TO BE LEGAL, EXCEPT OF
COURSE FOR THE EXCEPTIONS WHICH
HAVE NO APPLICATION HERE.

THE LEGISLATURE COULD HAVE MADE
AN EXCEPTION FOR CRIMES
INVOLVING CHILD MOLESTATION FOR
EXAMPLE.

THERE ARE CERTAINLY OTHER
EXCEPTIONS IN THE STATUTE.

90.404, 90.803 SUB 23.

A VARIETY OF EXCEPTIONS FOR
CHILD MOLESTATION.

THE LEGISLATURE COULD HAVE MADE
AN EXCEPTION BUT THE LEGISLATURE
DID NOT.

>> WELL THEY COULD HAVE MADE AN
EXCEPTION FOR ANYTHING THAT
RELATED TO A CRIME, ANY CRIME?

>> THEY COULD HAVE.

>> WHICH WOULD BE A VERY
RATIONAL CHOICE FOR THE
LEGISLATURE TO MAKE IN THIS
CONTEXT BUT THAT IS NOT A CHOICE
THEY HAPPENED TO MAKE, IS IT?

>> THAT'S CORRECT.
THE LEGISLATURE COULD MAKE THAT
CHOICE BUT THEY DID NOT.
WE CAN NOT CHANGE WHAT THE
LEGISLATURE GAVE US.
WE COULD, IF THERE WERE A
CONSTITUTIONAL CHALLENGE AND
THERE REALLY ISN'T HERE ALTHOUGH
I KNOW THE AMICUS RAISED FIRST
AMENDMENT ISSUES, THERE REALLY
IS NO CONSTITUTIONAL CHALLENGE.
WE CAN'T FIND THE LAW
UNCONSTITUTIONAL.
WE CERTAINLY CAN'T REWRITE IT.
THIS IS ANOTHER IMPORTANT POINT
THAT GOES ALONG WITH THAT.
IF THE TRIAL COURT OR THIS COURT
OR SOME OTHER COURT COULD FIND
THAT MR. McDADE WAS COMMITTING
A CRIME WHEN THE COURT RULED ON
THE ADMISSIBILITY OF EVIDENCE,
THE COURT WOULD BE HAVING TO
MAKE AN INDEPENDENT
DETERMINATION THAT, WELL, HE
COMMITTED A CRIME.
THEREFORE, I'M GOING TO ADMIT
THE EVIDENCE.
NOW, THAT FAILS TWO-WAYS.
ONE, BOOTSTRAPPING.
CAN'T BOOTSTRAP IN EVIDENCE
BASED ON THE NATURE OF THE
EVIDENCE THAT'S CHALLENGED.
MORE IMPORTANT, IT STANDS THE
PRESUMPTION OF INNOCENCE ON ITS
EAR MUCH.
PRETRIAL, A COURT WOULD HAVE TO
DECIDE THE DEFT IS GUILTY, DID
WHAT HE ACCUSED OF DOING, IN
ORDER TO MAKE THE DETERMINATION,
THE DEFENDANT HAS COMMITTED A
CRIME, THEREFORE, THE EVIDENCE
SHOULD BE ADMITTED.
THAT'S NOT SOMETHING THAT OUR
CONSTITUTION ALLOWS.
>> WHAT ABOUT JUDGE ALTENBERND'S
SPECIALLY OCCURRING OPINION? HE
HAD NO REASONABLE EXPECTATION OF
PRIVACY WHILE HE WAS COMMITTING
THIS CRIME AGAINST HER?
SHE WOULD NOT SOMEHOW RECORD

CONVERSATIONS OR TAKE SOME KIND OF ACTION IN SELF-DEFENSE?

>> ONCE AGAIN, YOUR HONOR, THAT'S RELATING LAW, WE NEED TO LOOK AT THE EXTRINSIC CIRCUMSTANCES OF THE EVIDENCE BEFORE WE ALLOW THE EVIDENCE IN. SOME PROCEEDING --

>> HE IS ADDRESSING THE EXPECTATION OF PRIVACY ISSUE, RIGHT?

>> YES, HE IS.

THIS, THIS WOULD BE SIMILAR TO THIS COURT'S RULING IN TOWNSEND VERSUS STATE WHERE THE COURT ADDRESSED THE PROCEDURE FOR ADMISSION OF EVIDENCE UNDER 90.803.23, CHILD SEX ABUSE HEARSAY.

THIS COURT REQUIRED THAT IN ORDER TO ADMIT SUCH EVIDENCE THERE HAS TO BE A DETERMINATION OUTSIDE THE PRESENCE OF THE JURY ADDRESSING THE EXTRINSIC CIRCUMSTANCES OF THE OUT OF COURT STATEMENTS, NOT THE SUBSTANCE OF THE OUT OF COURT STATEMENTS.

THE COURT CAN'T CONSIDER THE SUBSTANCE BEFORE IT DECIDES WHETHER OR NOT TO ALLOW THE STATES IN.

WHAT JUDGE ALTENBERND SEEMED TO BE SAYING AND I'M NOT QUITE CLEAR HOW HE GOT TO HIS CONCLUSION, WAS THAT THE CIRCUMSTANCES THAT SOCIETY IS NOT PREPARED TO RECOGNIZE INCLUDES THE ALLEGED LONG-TERM ABUSE OF A CHILD.

IN OTHER WORDS, IF SOMEONE ALLEGES LONG-TERM ABUSE OF A CHILD, THAT'S ENOUGH TO LET IN THE EVIDENCE.

I DON'T THINK THAT IS THE LAW.

>> BUT DOESN'T THAT KIND OF SOUND LIKE A BAD GUY EXCEPTION?

>> YES.

>> IF THE, IF THE, IF THE PERSON WHO IS GOING TO BE IN TROUBLE

BECAUSE OF THE DISCLOSURE OF THE RECORDING, IS A BAD GUY, THEN WE'RE NOT GOING TO EXCLUDE IT. AND THE OTHER, THIS NOTION THAT PEOPLE WOULD, THAT HE WOULD HAVE EXPECTED THAT HE WOULD BE RECORDED IN HIS CONVERSATIONS, THAT LINE OF LOGIC IT SEEMS TO ME TODAY WOULD TAKE YOU TO A POINT WHERE EVERYBODY CAN EXPECT THAT THEY MIGHT BE RECORDED IN ANY CIRCUMSTANCE BECAUSE IT'S A FACT THAT MANY, IF NOT MOST ADULTS, AND A LOT OF NON-ADULTS ARE CARRYING AROUND ELECTRONIC DEVICE THAT IS WILL RECORD VIDEO AND SOUND AND THEY'RE SMALL. AND THEY CAN BE CONCEALED. NOW IF WE FOLLOW THAT LINE OF LOGIC, THEN, THIS PROHIBITION IN 934.06 IS JUST GONE.

>> ABSOLUTELY RIGHT.

ABSOLUTELY CORRECT, YOUR HONOR. I COULDN'T ARTICULATE IT ANY BETTER.

>> YOU'RE IN YOUR REBUTTAL TIME.

>> THANK YOU, YOUR HONOR.

>> GOOD PLACE TO STOP.

>> YES, YOUR HONOR.

I ALSO WANT TO ADDRESS, IF I MAY DO THAT VERY, VERY BRIEFLY, THE HEARSAY PROBLEM IN THIS CASE.

THE COMPLAINING WITNESS BOYFRIEND GAVE HER THE RECORDING DEVICE.

HE WAS LATER, HE WAS LATER ALLOWED TO TESTIFY AS TO WHY HE GAVE HER THE RECORDING DEVICE AND HE SAID THAT WE, SHE TOLD ME THAT SHE HAD BEEN RAPED MANY TIMES AND THEREFORE I GAVE HER THE RECORDING DEVICE.

THAT SERVED OF COURSE TO BOLSTER HER OPINION.

THIS CASE BASICALLY WAS HE SAID/SHE SAID.

THERE WAS NO PHYSICAL EVIDENCE. ALLOWING THAT IN WAS GROSSLY PREJUDICIAL.

THE TRIAL, OR THE DISTRICT COURT

ALLOWED THAT IN BECAUSE THE STATEMENTS IN QUESTION WERE ENCOURAGED, WERE INTRODUCED TO SHOW ABOUT THE BOYFRIEND ENCOURAGED THE VICTIM TO MAKE THE RECORDINGS.

WELL, WHY THE BOYFRIEND ENCOURAGED THE COMPLAINING WITNESS TO MAKE THE RECORDINGS HAS NOTHING TO DO WITH ANYTHING. CERTAINLY DOES NOT TEND TO PROVE OR DISPROVE ANY MATERIAL FACT AT ISSUE.

THEREFORE I WOULD ALSO ASK THE COURT TO FIND THAT ALLOWING THAT HEARSAY WAS ERROR.

I WOULD LIKE TO RESERVE THE REST OF MY TIME FOR REBUTTAL, PLEASE.

>> MAY IT PLEASE THE COURT.

CHRISTINE ZUCCARO FOR THE STATE OF FLORIDA.

AT THE TABLE IS THOMAS JULIN, AMICUS COUNSEL FOR THE FLORIDA PRESS ASSOCIATION AND FLORIDA SOCIETY OF NEWS EDITORS.

>> WHY ISN'T THE SUMMATION STATEMENT BY JUSTICE CANADY JUST RIGHT ON POINT HERE?

THE LAST STATEMENT?

>> IF I MAY -- MODERN TECHNOLOGY.

I'M TRYING --

>> IF WE ARE JUST GOING TO TURN THIS INTO A BAD GUY EXCEPTION, SOCIETY IS NOT PREPARED TO ACCEPT MUCH CRIME, ANYMORE, SIMPLEST OF CRIMES AND HAVEN'T WE TOTALLY REWRITTEN THE STATUTE AND IT IS NOT JUST WHAT IT SAYS?

>> RESPECTFULLY, NO, YOUR HONOR.

WE ARE NOT ASKING FOR ANY SORT OF EXCEPTION IN THIS CASE OR EVEN AN EXCEPTION FOR CRIMINAL ACTS OR CHILD ABUSE.

WE ARE ASKING THIS COURT TO INTERPRET THE PLAIN LANGUAGE OF THE STATUTE UNDER THE ORAL COMMUNICATION.

>> OKAY.

WILL YOU READ THAT EXACTLY WHAT

YOU'RE INTERPRETING FOR US
TODAY?

>> YES.

THE ORAL COMMUNICATION IS, ANY
ORAL COMMUNICATION UTTERED BY A
PERSON WITH, EXHIBITING AN
EXPECTATION THAT SUCH
COMMUNICATION IS NOT SUBJECT TO
INTERCEPTION, UNDER
CIRCUMSTANCES JUSTIFYING SUCH
EXPECTATIONS.

SO WE HAVE TO LOOK AT IF THE
COMMUNICATION IS UTTERED, UNDER
CIRCUMSTANCES WHERE THERE IS AN
EXPECTATION THAT THERE'S NO
INTERCEPTION OR NO RECORDING.

NOW JUSTICE CANADY --

>> THEN IT IS A CIRCUMSTANCE
THAT DOES NOT JUSTIFY THE
EXPECTATION.

THAT'S WHAT YOU'RE SAYING?

>> YES.

>> SO IF YOU SAY HERE THAT IT
IS THE COMMISSION OF THE
CRIMINAL ACT, THEN, IF THAT IS
WHAT WE'RE GOING TO BE SAYING,
THEN ANYTIME THERE'S A CRIME, I
MEAN THIS IS ONLY TIME THESE
COME ABOUT LIKE THE FOURTH
AMENDMENT.

YOU NEVER FIND A PIECE OF GUM.
YOU ALWAYS FIND CONTRABAND.
THIS IS EITHER GOING TO BE
INTERPRETED AS THE ENGLISH SAYS,
OR WE'RE GOING TO SAY THAT
MEANS, IF YOU EVER FIND ANYTHING
BAD, THE STATUTE DOESN'T APPLY?

>> WELL, IT SHOULD BE APPLIED
EXACTLY AS IT SAYS.

WE HAVE TO LOOK AT ALL OF THE
CIRCUMSTANCES SURROUNDING THE
COMMUNICATION TO DETERMINE
WHETHER THERE IS AN EXPECTATION
OF PRIVACY.

>> WHY WOULDN'T, WHAT OBJECTIVE
BASIS WOULD WE HAVE TO CONCLUDE
HERE THAT IN THAT BEDROOM, HE
WOULD NOT HAVE, HE DID NOT HAVE
A JUSTIFIED EXPECTATION OF
PRIVACY?

I MEAN YOU'RE IN A PRECINCT HERE
THAT IS, IT MAY HAVE BEEN A
PRECINCT THAT WAS
MOST GROSSLY ABUSED, OKAY?
BUT THAT IS NOT REALLY THE
QUESTION THAT WE HAVE HERE.
THE QUESTION IS WHETHER HE
WOULD HAVE REASONABLY BELIEVED
THAT HE WAS NOT GOING TO BE
RECORDED?

AND IT SEEMS LIKE, SOME OF THE
REASONING HERE HAS BEEN, WELL, A
BAD GUY LIKE HIM SHOULD KNOW
THAT SOONER OR LATER SOMEBODY IS
GOING TO RECORD HIM.

AGAIN IT SEEMS LIKE TO ME THAT
IS JUST A BAD GUY EXCEPTION.
AND THAT KIND OF LOGIC, SEEMS TO
ME TO BE HIGHLY PROBLEMATIC
WHEN WE'RE TRYING TO APPLY THE
LANGUAGE OF THE STATUTE.

I MIGHT PERSONALLY THINK THAT
THE POLICY EMBODIED IN THIS
STATUTE IS NOT THE BEST POLICY
IN TERMS OF EXCLUDING THIS
EVIDENCE THAT WOULD BE RELEVANT
TO PROVING A CRIME.

BUT THAT POLICY QUESTION IS A
QUESTION FOR THE LEGISLATURE TO
ADDRESS.

WE'VE GOT TO INTERPRET WHAT THEY
SAID HERE.

AND I'M JUST HAVING TROUBLE
UNDERSTANDING, AND I UNDERSTAND
YOU, YOU ACKNOWLEDGE THAT BUT I
DON'T UNDERSTAND HOW WE CAN JUST
SAY WHAT YOU WANT TO SAY.
HELP ME.

>> THE LEGISLATURE WITHIN THE
DEFINITION OF ORAL COMMUNICATION
GRANTED COURTS WITH THE
AUTHORITY TO LOOK AT THE
TOTALITY OF THE CIRCUMSTANCES
SURROUNDING THE COMMUNICATION.
NOW LET ME TALK ABOUT
EXPECTATION OF PRIVACY.
THERE CERTAINLY IS AN
EXPECTATION OF PRIVACY IN THE
HOME BUT GENERALLY UNDER THE
FOURTH AMENDMENT AND UNDER THE

FLORIDA CONSTITUTION THAT IS AN EXPECTATION FROM GOVERNMENTAL INTRUSION.

UNDER CHAPTER 934, THE EXPECTATION OF PRIVACY IS WITHIN THE COMMUNICATION.

SO WE CAN'T JUST LOOK AT THE LOCATION.

WE HAVE TO LOOK AT THE CIRCUMSTANCES SURROUNDING THE COMMUNICATION.

NOW IN THIS CASE WE HAVE THE COMMUNICATION WAS IN THE HOME, IT WAS ALSO THE VICTIM'S HOME AS WELL.

PETITIONER HAD BEEN SOLICITING THIS CHILD FOR SIX YEARS FOR SEXUAL INTERCOURSE.

HE WOULD DO SO ONCE A WEEK. HE KNEW THAT THE VICTIM HAD DISCLOSED THE ABUSE TO OTHER PEOPLE.

>> ISN'T THAT, HERE'S MY QUESTION WITH THAT.

AS YOU GIVE THOSE CIRCUMSTANCES. WHAT YOUR OPPONENT SAYS, THAT IS KIND OF LIKE BOOTSTRAPPING.

IN OTHER WORDS YOU'RE TAKING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE STATE IN DECIDING THAT ALL OF THAT HAPPENED BUT IN FACT AS THE MAJORITY OPINION BELOW SUGGESTS THIS RECORDING WAS PROBABLY THE MOST COMPELLING EVIDENCE THAT WHAT SHE WAS SAYING, BECAUSE SHE HAD RECANTED, BACK AND FORTH, HAD OCCURRED.

SO I AM AGAIN, I'M SYMPATHETIC. READING MR. JULIN'S BRIEF, IT IS LIKE THE DEMPSEY BARRON EXEMPTION OR SOMETHING, THEY WERE TRYING TO SHIELD THEMSELVES FROM POLITICIANS, TRYING TO SHE HAD THEMSELVES FROM CRIMES. BUT IF WE JUST LOOK AT THE STATUTE AS IT EXISTS, I DON'T KNOW WHAT DISTINGUISHES THIS CASE FROM IF I'M ASKING SOMEBODY IN MY HOUSE TO HELP ME PLAN A

MURDER OR A ROBBERY OR, I MEAN,
IS IT BECAUSE IT IS CHILD ABUSE
THAT IT IS DIFFERENT AND, AND
AGAIN, IF SO, HOW DOES THAT,
WITHOUT ME REWRITING THE
STATUTE, HOW DO WE GET THERE?

>> IT REALLY HAS TO BE LOOKED AT
ON A CASE-BY-CASE BASIS AND
BECAUSE WE HAVE, WE DO HAVE
CHILD ABUSE, WE HAVE THE
COMMISSION OF A CRIME, SPEAKING
OF SOLICITATION, WE HAVE --

>> YOU, COMMISSION OF A CRIME.
SO IS THAT ENOUGH, COMMISSION OF
A CRIME?

>> WHEN A CRIME IS COMMITTED
THERE IS DIMINISHED EXPECTATION
OF PRIVACY BUT THE STATE IS NOT
ASSERTING THAT ALONE YOU LOSE
YOUR EXPECTATION OF PRIVATE
SYSTEM CERTAINLY NOT.
THERE IS ALL OF THE
CIRCUMSTANCES IN THIS CASE WHERE
HE DOES NOT HAVE A EXPECTATION
OF PRIVACY.

>> LET ME SEE IF I, IN
CONSIDERING THE TOTALITY OF THE
CIRCUMSTANCES OF THE PARTICULAR
OFFENSE.

CRIMES AGAINST CHILDREN SUCH AS
THIS TYPICALLY OCCUR, NOT
TYPICALLY BUT OFTEN OCCUR
REPEATEDLY WHERE THE PERSON WHO
IS COMMITTING THE CRIME MAY LIVE
IN THE SAME HOUSEHOLD AND IT
MAY HAPPEN ON A PARTICULAR DAY
OF THE WEEK AND MAY HAPPEN ON A
PARTICULAR WEEKEND OF THE WEEK
OR WHATEVER BUT IT HAPPENS
REPEATEDLY WHERE THE CHILD CAN
EXPECT THAT ON THIS THURSDAY
NIGHT, HE IS GOING TO WALK INTO
MY BEDROOM AND HE IT IS GOING TO
HAPPEN.

AND THAT MAY HAVE BEEN GOING ON
FOR A LONG TIME.

AND I THINK IN LOOKING, THIS IS
A FRIENDLY QUESTION.

DON'T LOOK AT ME LIKE THAT.
LOOKING AT IT FROM THAT TOTALITY

OF CIRCUMSTANCES, I THINK THE EXPECTATION ON THE PART OF THE CULPRIT, THE PERSON COMMITTING THE CRIME BECOMES, SHOULD BECOME MORE AND MORE REASONABLE FOR HIM TO BELIEVE THAT IN THIS DIGITAL WORLD, LIKE, SECOND DCA MENTIONED, HE MIGHT JUST BE RECORDED.

WHEN IT HAPPENS REPEATEDLY. IF IT'S A ONE-TIME THING, OBVIOUSLY NO BUT IF THIS GUY, I'VE HAD CASES AS A TRIAL JUDGE WHERE IT WENT ON FOR 10 YEARS, SINCE THE CHILD WAS NINE UNTIL SHE WAS LIKE 16, OR 17 OR SOMETHING LIKE THAT AND SHE KNEW THAT ON THIS PARTICULAR DAY OF THE WEEK, STEPDAD WAS GOING TO COME IN AND THINGS WERE GOING TO HAPPEN.

I THINK UNDER THOSE CIRCUMSTANCES, GIVEN THE FACT THAT ALL OF US HAVE CELL PHONES TODAY AND THAT KIND OF THING, THAT IT IS REASONABLE FOR A PERSON IN TODAY'S WORLD TO EXPECT THAT HE OR SHE MIGHT BE RECORDED.

>> ABSOLUTELY, YOUR HONOR. BECAUSE IT DID OCCUR OVER A SIX-YEAR TIME PERIOD, HE KNEW THAT SHE HAD DISCLOSED THE ABUSE TO OTHER PEOPLE.

AN ALSO, WHAT IS VERY SIGNIFICANT --

>> DOES THE RECORD SHOW THAT HE KNOWS SHE HAD A RECORDING DEVICE?

>> NO, YOUR HONOR.

>> WHAT IS THE LENGTH OF TIME?

IS IT A YEAR?

IS IT A MONTH?

WHAT'S THE LENGTH OF TIME?

>> THE LENGTH OF TIME FOR WHAT, YOUR HONOR?

>> YOU WERE SPEAKING OF SIX YEARS THAT THIS GOES ON.

SO THAT HAS SOMETHING TO DO WITH IT.

SO WHERE IS THE LINE?
IS IT AFTER THE FIRST TIME, THE
SECOND TIME, THE THIRD TIME?
WHERE IS THAT IN THE STATUTE AND
HOW DOES A COURT MAKE THAT
DECISION?

>> I DON'T THINK WE CAN DRAW A
LINE.

REALLY WE HAVE TO LOOK AT ALL
THE CIRCUMSTANCES.

HERE WE HAVE REPEATED ABUSE.
WE HAVE KNOWLEDGE OF DISCLOSURES
AND WE HAVE, PETITIONER USING
CODE WORDS.

HE WOULD USE CODE WORDS TO
SOLICIT HIS STEPDAUGHTER FOR
SEX.

IN THE VERY NATURE OF HIM DOING
THAT SHOWS THAT HE EXPECTED OR
HE WAS ATTEMPTING TO PROTECT
HIMSELF FROM OTHER PEOPLE
OVERHEARING.

HE THOUGHT THAT THERE WOULD BE A
CHANCE.

>> SO HE HAD A SUBJECT, SEEMS TO
ME, ISN'T THAT, ISN'T THE
STANDARD HERE A SUBJECTIVE
EXPECTATION OF PRIVACY?
SO IF HE IS DOING ALL OF THAT,
IT SEEMS TO ME THAT THAT
INDICATES THAT HE HAD A
SUBJECTIVE EXPECTATION OF
PRIVACY?

I MEAN, HE DID IT WHEN NO ONE
ELSE WAS IN THE HOUSE.

HE USED THESE CODE WORDS.

I MEAN THOSE, TO ME, I
BELIEVE THE STATE'S ARGUMENT.
IT REALLY SHOWS MORE OF HIS
EXPECTATION OF PRIVACY.

>> I DO UNDERSTAND THAT, YOUR
HONOR, HOWEVER IT SHOWS ALSO
THAT HE WAS DOING THIS BECAUSE
HE THOUGHT THERE WAS A CHANCE
SOMEONE ELSE COULD OVERHEAR OR
HE COULD BE RECORDED.

>> BUT THAT IS SUCH, I THINK MY
PROBLEM IS, IF YOU LOOK AT, THIS
STATE IS UNIQUE JUST ABOUT IN
NOT ALLOWING IF ONE PERSON

AGREES TO THE RECORDING, THAT IT CAN COME IN.

IS IT, WE'RE ALWAYS BEING CRITICIZED IF WE DO SOMETHING THAT IS, WE'RE LEGISLATING FROM THE BENCH.

IT SEEMS TO TRY TO GET TO WHERE, AGAIN, EVERYBODY, AGREES THAT THIS IS AGAIN, ONE OF THOSE HARD CASES THAT THIS, THIS CRIES OUT TO ALLOW THIS STATEMENT IN BUT THE STATUTE DOESN'T SEEM TO GO THERE.

THE PROBLEM IN THE LINE-DRAWING, I WOULD BE MUCH MORE COMFORTABLE SAYING SOMEBODY IS COMMITTING A CRIME IN THEIR HOUSE THEY COMMUNICATE, THERE IS NOT REASONABLE EXPECTATION OF PRIVATE SYSTEM YOU'RE SAYING NO, THAT'S TOO BROAD, IT HAS TO BE THE TYPE OF CRIME, HOW LONG IT HAPPENED, WHERE IT IS OCCURRING AND THAT STARTS TO MEAN THAT IT GETS LIKE, TRIAL JUDGES WITHOUT A LOT OF GUIDANCE TO TRY TO INTERPRET A STATUTE THAT SEEMS THAT SEEMS TO BE PRETTY CLEAR THE OTHER WAY.

HELP ON THAT ONE.

THIS THING IS OKAY.

HOW DID THE CERTIFIED QUESTION GO?

WHAT IS THE CERTIFIED QUESTION?

>> RECORDING OF SOLICITATION AND CONFIRMATION OF CHILD

SEXUAL ABUSE MADE BY A MINOR

CHILD FALL WITHIN THE

PRESCRIPTION OF CHAPTER --

>> REALLY IT IS NOT THAT IT WENT ON FOR A LONG TIME.

IF WE ANSWERED THIS, SAY THAT IT DOESN'T, IF IT'S A SOLICITATION OF CHILD ABUSE WE'RE SAYING AS A MATTER OF LAW UNDER THE STATUTE THERE IS NO OBJECTIVE EXPECTATION OF PRIVACY?

ISN'T THAT WHAT WOULD HAVE TO BE THE PRINCIPLE OF LAW?

>> YES, GIVEN THOSE

CIRCUMSTANCES SURROUNDING --
>> NO, IT WOULDN'T HAVE TO BE,
BECAUSE, BECAUSE OF WHAT JUSTICE
LABARGA SAID, BECAUSE OF THE
HOME AND ALL THIS, THAT HAS TO
BE LAW, RIGHT?
>> SURE, YES.
>> BUT THEN IT SEEMS TO ME THAT
I AM SAYING THAT HAS GOT TO BE
THE LAW BUT I'M NOT THE
LEGISLATURE TO REWRITE THE
STATUTE TO HAVE A CHILD ABUSE
EXCEPTION.
SO IT'S A, IT THIS IS A TOUGH
CASE.
>> IT IS, YOUR HONOR.
THE STATE IS NOT SUGGESTING THAT
WE CREATE AN EXCEPTION.
OVER 28 YEARS AGO THIS COURT
FOUND THAT THE RECORDING IN
INCIARRANO DID NOT FALL WITHIN
THE PRESCRIPTION OF CHAPTER 934
BECAUSE OF THE DEFINITION OF
ORAL COMMUNICATION.
THIS COURT LOOKED AT THE
EXPECTATION OF PRIVACY.
AND WE'RE ASKING THE COURT TO DO
THE SAME THING HERE.
WE DON'T NEED EXCEPTIONS BECAUSE
IT WOULD BE VERY DIFFICULT TO
CREATE EXCEPTIONS UNDER EACH AND
EVERY CIRCUMSTANCE IN WHICH THE
RECORDING, OR INTERCEPTION WOULD
BE UNLAWFUL.
BUT BECAUSE THE LEGISLATURE
GRAFTED THAT INTO THE
DEFINITION WE HAVE TO LOOK AT
THAT.
WE DON'T NEED TO GO ANYWHERE
ELSE.
WE HAVE TO ANALYZE THE
EXPECTATION OF PRIVACY.
WHETHER IT WAS SUBJECTIVE AND
REASONABLE UNDER A SOCIETAL
STANDARD AND THAT IS EXACTLY
WHAT WE HAVE HERE.
THIS CASE IS NO DIFFERENT REALLY
THAN INCIARRANO,
EXCEPT WE HAVE EVEN
MORE SIGNIFICANT FACTS.

WE HAVE THIS HEINOUS CRIME.
WE HAVE THIS CONTINUOUS ABUSE.
SOCIETY HAS SUCH A SPECIAL
INTEREST IN PROTECTING CHILDREN.
IF THIS COURT DID IT IN
INCIARRANO AND FOLLOWED THE
LANGUAGE OF THE LEGISLATURE,
THERE IS NO REASON WHY THERE
SHOULD BE ANY --

>> SO WE END UP IN YOUR ANALYSIS
THEN, WITH AN EXCEPTION FOR
MURDER AND THE EXCEPTION FOR
CHILD ABUSE BUT IF, UNDER THESE
SAME CIRCUMSTANCES IF IT WAS
ROBBERY, WE WOULDN'T HAVE, IT
WOULD BE A VIOLATION OF 834?

>> WELL, YOUR HONOR, I DON'T
AGREE WITH IT BEING AN EXCEPTION
BUT IT IS UNDER THE EXPECTATION
THAT THE COMMUNICATION IS NOT
SUBJECT TO INTERCEPTION.

SO IF THERE'S A ROBBERY, WE
WOULD HAVE TO LOOK AT THE
COMMUNICATION INVOLVED OF
CERTAINLY THE PLACE.

WE'RE NOT ASKING --

>> CERTAINLY SOCIETY DOESN'T
EXCEPT, IT IS NOT ACCEPTED
BEHAVIOR FOR PEOPLE TO PLAN TO
ROB, TO BURN DOWN BUILDINGS.
I MEAN WE'RE BECOMING A LESS AND
LESS TOLERANT SOCIETY.

WE, WE'RE GEO TOLERANCE WITH OUR
CHILDREN AND EVERYTHING.

I DON'T SEE HOW YOU THROW IN THE
SOCIETAL ACCEPTANCE.

WE DON'T ACCEPT IT.

TOUGH CASES MAKE TOUGH
DECISIONS.

WHEN YOU COME BACK WITH
CONCLUSORY LANGUAGE AS A
RESPONSE TO WHAT THIS MEANS, IT
IS DIFFICULT TO FIND THAT IT
SAYS THAT AND RESPECTFULLY I
THINK THE HOME IS DIFFERENT THAN
A BUSINESS AND THOSE KIND OF
THINGS AND, EVEN THE RECORDING
OF A SHOOTING IS PROBABLY
DIFFERENT THAN THE WORDS
EXCHANGED BUT, WHO AM I TO

QUIBBLE WITH MAJOR DIFFERENCES
BETWEEN CASES BUT --
>> JUSTICE LEWIS, THE CONDUCT,
WE ARE LOOKING AT BAD
CONDUCT AS YOU SAID.
SOCIETY DOESN'T LIKE THAT
CONDUCT BUT CHAPTER 934 IS ABOUT
THE COMMUNICATION.
SO WE CAN'T JUST FOCUS ON THE
CONDUCT.
WE HAVE TO FOCUS ON THE
COMMUNICATION.
THAT IS WHAT THIS CASE IS ABOUT,
IT IS ABOUT SOLICITATION OF A
MINOR CHILD.
SO UNDER THOSE CIRCUMSTANCES
THERE IS NO EXPECTATION THAT IS
HE WOULD NOT BE SUBJECT TO
INTERCEPTION AND THIS IS REALLY
A ONE OF A KIND CASE.
THE ISSUE IN THIS CASE WOULD
ONLY BE APPLIED --
>> SO IF THE VICTIM WAS 18 YEARS
OLD, WITH THE SAME KIND OF
THINGS WENT ON, OVER A NUMBER OF
YEARS, SHE RECORDS THIS FINALLY,
WE, IT WOULDN'T FALL UNDER THE
STATUTE?
>> AGAIN WE HAVE TO LOOK AT ALL
OF THE CIRCUMSTANCES.
>> BUT YOU SAID BECAUSE THIS IS
A MINOR VICTIM.
>> YES, THIS CASE WE'RE LOOKING
AT JUST THE FACTS IN THIS CASE
AND IT IS SUCH A ONE OF A KIND
CASE.
THE STATE EVEN QUESTIONS WHETHER
THIS COURT HAS JURISDICTION
BECAUSE IT IS SUCH A NARROW,
NARROW ISSUE AND IT DOES NOT
INVOLVE OTHER CASES.
WE'RE JUST LOOKING AT THIS --
>> WAIT A MINUTE.
THE DISTRICT COURT CERTIFIED A
QUESTION.
ARE YOU CONTENDING, OF GREAT
PUBLIC IMPORTANCE.
ARE YOU CONTENDING THEY DIDN'T
PASS ON THAT QUESTION?
>> NO, YOUR HONOR.

I'M --

>> WHY WOULDN'T WE HAVE
JURISDICTION?

>> WELL YOU'RE --

>> EXERCISE IT.

>> EXACTLY.

>> DIFFERENT THING TO SAY WE
SHOULDN'T EXERCISE IT.

>> EXACTLY I'M SORRY.

I MISSPOKE.

>> YOU'RE OUT OF TIME.

LET'S HEAR FROM THE YOUR
CO-COUNSEL.

>> THANK YOU, YOUR HONORS.

>> MAY IT PLEASE THE COURT.

TOM JULIN, FOR THE FLORIDA
PRESS ASSOCIATION AND FLORIDA
SOCIETY OF NEWS EDITORS.

WHAT I WOULD LIKE TO URGE THE
COURT MOST STRONGLY TO DO IS
LOOK AT THE FOURTH AMENDMENT
CASES.

THIS CASE, THAT THIS COURT HAS
DECIDED STATE VERSUS HUME.

I WANT TO TAKE YOU BACK THROUGH
THE HISTORY OF THIS STATUTE.

IT WAS PASSED IN 1969 AND THE
PART WE'RE TALKING ABOUT HAS
REMAINED UNCHANGED SINCE 1969.

THAT PART THAT DEFINED ORAL
COMMUNICATIONS.

AND THOSE THAT ARE PROHIBITED
FROM BEING RECORDED.

IT EXCLUDE THE DEFINITION OF
ORAL COMMUNICATIONS EXCLUDES
THOSE KIND OF COMMUNICATIONS
WHERE THERE IS NO EXHIBITION OF
A, EXPECTATION OF PRIVACY OR THE
CIRCUMSTANCES DON'T JUSTIFY IT.

NOW WHAT THAT MEANT AT THAT TIME
WAS, WHEN YOU WERE SPEAKING TO
ANOTHER PERSON THERE WAS NO
EXPECTATION OF PRIVACY.

WHEN YOU WERE SPEAKING TO
ANOTHER PERSON, IT DIDN'T MATTER
THAT THEY WERE COMMITTING A
CRIME.

DIDN'T MATTER WHERE IT WAS.

IF YOU WERE SPEAKING TO ANOTHER
PERSON WHO COULD DISCLOSE THAT,

WHETHER THEY WERE RECORDING IT OR NOT, THERE WAS NO EXPECTATION OF PRIVACY.

>> WAIT A MINUTE.

YOU'RE SAYING THIS ONLY APPLIES IF YOU'RE TALKING TO YOURSELF?

>> IF YOU'RE, IF YOU'RE TALKING TO ANOTHER PERSON --

>> YOU HAVE NO EXPECTATION OF PRIVACY?

>> YES.

>> BUT THIS ORAL COMMUNICATIONS SO THE ONLY WAY IT COULD APPLY IF YOU'RE TALKING TO YOURSELF.

>> NO.

IT APPLIES AS IN KATZ.

THE KATZ WAS THE MAN IN THE PHONE BOOTH.

>> I UNDERSTAND THAT IT APPLIES TO KATZ.

>> AND KATZ SAYS, UNDER THOSE CIRCUMSTANCES THAT MAN IN THE PHONE BOOTH WHO DOESN'T KNOW THAT HE IS TALKING TO POLICE, HE IS TALKING --

>> HE WAS SPEAKING ON THE PHONE. HE WAS MAKING AN ORAL COMMUNICATION.

>> HE WAS.

>> THAT IS WHAT WAS USED IN EVIDENCE.

>> AND THAT IS WHAT HIS FOURTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE HE DIDN'T, BECAUSE HE HAD A JUSTIFICATION THAT SOMEONE WASN'T INTERCEPTING HIS COMMUNICATION.

>> HE HAD AN EXPECTATION OF PRIVACY ONCE HE CLOSED THE DOOR TO THE PHONE BOOTH.

>> EXACTLY.

>> NOT THAT HE WAS NOT SPEAKING TO SOMEONE.

HE WAS SPEAKING TO SOMEONE AND THAT'S WHAT WAS USED IN EVIDENCE.

>> WHAT WAS USED IN EVIDENCE WAS THE INTERCEPTION BY THE POLICE, NOT THE WORDS HE SAID.

>> THE OTHER PERSON ON THE

PHONE.

>> HIS WORDS, YES.

ORALLY INTERCEPTED, RIGHT.

WHEN YOU COMPARE THE KATZ CASE TO THIS CASE, HERE WE HAVE A DEFENDANT, WHO IS SPEAKING TO HIS STEPDAUGHTER.

HE KNOWS THAT THE STEPDAUGHTER CAN'T DISCLOSE THAT COMMUNICATION.

AND THAT'S WHAT, THAT'S WHY HE HAS NO JUSTIFIABLE EXPECTATION.

>> GUY IN KATZ, FELLOW ON OTHER END OF THE PHONE COULD DISCLOSE THAT INFORMATION.

>> YES, BUT THAT IS NOT WHAT WAS AT ISSUE IN KATZ.

WHAT WAS AT ISSUE IN KATZ WAS THE INTERCEPTION AND DISCLOSURE BY THE POLICE WHICH HE HAD NO REASON TO BELIEVE WAS OCCURRING.

>> WELL YOU HAVE JUST TALKED CIRCLES RIGHT HERE.

I JUST DO NOT, I MUST TELL YOU, I LISTENED TO A LOT OF LEGAL ARGUMENTS BUT THAT ONE TAKES THE CAKE.

I HAVE NEVER --

>> URGE YOU, WHY I FEEL IT IS SUCH AN IMPORTANT CASE HERE IS HUME IS A CASE THAT INVOLVES A POLICE OFFICER WHO IS INVITED INTO A HOME, INVITED INTO THE MAN'S BEDROOM AND HE DOES THE COMMUNICATION AND THIS COURT HOLDS THERE IS NO REASONABLE EXPECTATION OF PRIVACY BECAUSE YOU'RE TALKING TO SOMEONE --

>> IF YOU LOOK AT DEFINITION OF INTERCEPT.

INTERCEPTION, BY THE EAR.

>> OKAY.

>> HERE HE DOESN'T HAVE EXPECTATION OF PRIVACY IN WHAT SHE HEARD.

>> THAT'S CORRECT.

>> WHAT SHE ACQUIRED BY HER EAR.

>> YES.

>> OKAY?

BUT, IT GOES ON TO SAY ALL OR

OTHER ACQUISITION OF CONTENTS OF ANY ORAL COMMUNICATION BUT THROUGH THE USE OF ELECTRONIC, MECHANICAL AND OTHER DEVICE. YOU'VE GOT NOT ONLY DOES SHE HEAR IT AND HE CAN'T COMPLAIN SHE HAS HEARD IT BUT SEEMS TO ME THAT, THAT THERE'S AN INTERCEPT ALSO THROUGH THIS RECORDING THAT TAKES PLACE.

THAT'S ALSO AN INTERCEPT.

>> YES.

>> AND A, AND THE EXPECTATION OF PRIVACY EXISTS WITH RESPECT TO THAT.

AND HE WASN'T EXPECTING THAT TO HAPPEN.

>> BUT IF YOU LOOK AT CASES LIKE STATE VERSUS HUME, THE COURT DECIDED AND EARLIER UNITED STATES SUPREME COURT DECISIONS IN UNITED STATES VERSUS WHITE AND HOFFMAN VERSUS UNITED STATES, AND EVEN WHERE THERE IS INTERCEPTION OF A COMMUNICATION, USING ELECTRONIC OR MECHANICAL DEVICE THE U.S. SUPREME COURT SAYS YOU DON'T HAVE AN EXPECTATION THAT YOU'RE NOT BEING RECORDED.

>> LET'S JUST UNDERSTAND.

>> YES.

>> YOU'RE AMICUS, YOU'RE NOT ONLY AMICUS, YOU'RE HERE FOR THE PRESS, MEDIA.

>> YES.

>> WHO WANT TO BE ABLE TO, AS HAPPENS IN MANY OTHER STATES, RECORD CONVERSATIONS WHERE THAT CONVERSATION IS NOT CONSENTED TO, EVEN IF THERE IS NOT A CRIME.

BUT, ARE YOU, ALL THEY'RE ARGUING IS THAT WHEN CHILD ABUSE IS BEING COMMITTED, THAT THERE ISN'T A REASONABLE EXPECTATION OF PRIVACY THAT YOUR COMMUNICATION ABOUT CHILD ABUSE IS GOING TO BE EXPECTED.

YOUR ARGUING WHERE I'M HEARING

IT THE STATUTE WOULD BE
NULLIFIED BECAUSE THE
REQUIREMENT HAS TO BE CONSENT OF
OTHER PARTY BEFORE YOU RECORD
SOMETHING.

>> IF YOU LOOK AT 934.03 --

>> IS THAT YOUR ARGUMENT?

YOUR ARGUMENT IS, IF IT'S, IF
I'M TALKING TO YOU.

>> YES.

>> I SHOULD KNOW, NO MATTER
WHERE I'M TALKING TO YOU, THAT
YOU MAY BE RECORDING WHAT I SAY?

>> THAT IS PRECISELY THE
RATIONALE OF THE UNITED STATES
SUPREME COURT AND THIS COURT IN
HUME.

>> YOU WANT US TO NULLIFY THIS
STATUTE?

>> NO, IT IS NOT NULLIFYING THE
STATUTE.

IT IS IMPLEMENTING EXACTLY WHAT
THE WORDS WERE INTENDING TO DO
WHEN IT WAS PASSED IN 1969.

>> DO WE EVEN LOOK AT THAT?

WHEN WE'RE INTERPRETING THIS
STATUTES, IF WE LOOK AT IT AND
THE PLAIN LANGUAGE SAYS WHAT IT
SAYS, WE DON'T NEED TO, GO AND
LISTEN TO WHAT MAY OR MAY NOT
HAVE TAKEN PLACE IN 1969.

IF THE LANGUAGE IS PLAIN AND
UNAMBIGUOUS ON ITS FACE, ISN'T
THAT HOW WE INTERPRET THAT
STATUTE?

>> THAT'S CORRECT.

IT IS PLAIN AND UNAMBIGUOUS ON
ITS FACE IT DOES NOT PROHIBIT
RECORDING WHERE THERE IS NOT
JUSTIFIABLE EXPECTATION OF
PRIVACY.

>> THAT IS NOT WHAT WE STATE IN
STATE v. WALLS.

IT WAS CLEAR AND UNAMBIGUOUS IT
COVERED EVEN CRIMINAL
COMMUNICATIONS.

>> AFTER STATE VERSUS WALLS, THE
STATE DECIDED STATE VERSUS
INCIARRANO.

JUSTICE ALTENBERND DISTINGUISHED

CASE.

EHRlich SAYS WE OVERRULED
ALWAYS AND THOSE CASE.

THERE IS NO EXPECTATION OF
PRIVACY WHEN TALKING TO ANOTHER
PERSON.

THE COURT FOCUSES ON THE FACT
THAT --

>> YOU THINK THAT WHAT IS
INCIARRANO CASE DECIDED?
THERE IS NO EXPECTATION OF
PRIVACY

>> DECIDED ON VERY NARROW
FACTUAL GROUND BUT IT IS ROOTED
IN FOURTH AMENDMENT ANALYSIS THAT
COMES FROM KATZ VERSUS UNITED
STATES AND THAT'S WHY YOU CAN,
LOOK TO THAT FOURTH AMENDMENT
ANALYSIS.

AGAIN I WOULD URGE YOU TO READ
STATE VERSUS HUME, WHICH CLEARLY
SAYS WHEN SPEAKING TO ANOTHER
PERSON EVEN IN YOUR OWN HOME YOU
CAN NOT HAVE A REASONABLE
JUSTIFICATION THAT YOU'RE NOT
BEING RECORDED.

NOT JUST THAT THE PERSON IS
GOING TO DISCLOSE IT.
THAT IS ROOTED IN U.S. SUPREME
COURT ANALYSIS.

ONE OTHER POINT I WOULD LIKE TO
MAKE.

>> IS THAT INTERPRETING FOURTH
AMENDMENT OR FEDERAL STATUTE?

>> INTERPRETING THE FOURTH
AMENDMENT, FEDERAL STATUTE.

>> AND FEDERAL STATUTE
DIFFERENT.

>> NOT ON THIS POINT.

IT IS PRECISELY THE SAME ON THIS
POINT.

AND IF YOU LOOK AT THE 19 --

>> UNDER FEDERAL STATUTE IF I
UNDERSTAND IT, AND I'M NOT, I
MAY GET IT WRONG BUT, I THOUGHT
IN THE FEDERAL STATUTE THERE'S
NO, THERE IS NO PROHIBITION AT
ALL ON RECORDING A CONVERSATION
TO WHICH YOU ARE A PARTY?

>> TO, THERE IS NO PROHIBITION

ON THAT.

AND THERE IS NO PROHIBITION ON THE INTERCEPTION OF WIRE COMMUNICATIONS.

AND I WOULD LIKE YOU TO FOCUS ON THE DISTINCTION MADE IN OUR STATUTE BETWEEN WIRE COMMUNICATIONS AND ORAL COMMUNICATIONS BECAUSE THERE IS FLAT-OUT BAN ON INTERCEPTION OF WIRE COMMUNICATIONS.

THAT IS WHY THERE WAS, IT WAS NECESSARY TO HAVE AN EXCEPTION IN BOTH THE FLORIDA STATUTE AND THE FEDERAL STATUTE FOR A PERSON'S OWN INTERCEPTION OF THOSE COMMUNICATIONS.

THAT IS WHAT WAS CHANGED IN 1974.

SO THAT WHEN DEMPSEY BARON WAS SPEAKING TO "MIAMI HERALD" REPORTER, THE "MIAMI HERALD" REPORTER COULDN'T RECORD THE TELEPHONE CONVERSATION BUT THAT DID NOT --

>> WITHOUT TELLING HIM.

>> WITHOUT TELLING HIM.

AND GETTING HIS CONTENT.

>> A REPORTER CAN RECORD ANYBODY THEY WANT TO IF THEY SIMPLY INFORM THEM AND GIVE THEIR CONSENT TO RECORDING?

>> AT TELEPHONE.

BUT WHEN YOU'RE FACE-TO-FACE, THE FLORIDA STATUTE HAS NEVER PROHIBITED INTERCEPTION OF THOSE COMMUNICATIONS BECAUSE THAT FLORIDA STATUTE ENACTED IN 1969 AND HAS NOT BEEN CHANGED, THAT IS 934.022, DEFINITION OF ORAL COMMUNICATIONS HAS NEVER PROHIBITED THE RECORDING WITHOUT CONSENT AFTER FACE-TO-FACE COMMUNICATION.

THAT IS WHAT IS MOST IMPORTANT.

>> YOU'RE OUT OF TIME.

THANK YOU FOR YOUR ARGUMENT.

REBUTTAL.

>> THANK YOU, YOUR HONOR.

>> TWO POINTS I WOULD LIKE TO

MAKE PLEASE.

THERE IS NO DISPUTE THAT THE RECORDINGS THAT WERE ADMITTED THIS CASE INCLUDED WHAT THE STATE CALLED, CODE WORDS. THE DEFENDANT USED PHRASES LIKE, COME SEE ME.

IF WE TAKE THOSE PHRASES IN THE LIGHT MOST FAVORABLE TO THE STATE, OR IN THE LIGHT THE COMPLAINING WITNESS URGE THAT THEY BE TAKEN, THEN THEY ARE DAMNING.

IF, HOWEVER, THAT WAS A EXPRESSION THAT THE DEFENDANT OFTEN USED AS HIS WIFE TESTIFIED, THEN, THEY ARE NOT DAMNING.

WHAT WE NEED TO DO IS LOOK AT WHAT HAD BEEN ESTABLISHED IN THE TRIAL COURT WHEN THE DECISION ON EVIDENCE, OR ADMISSIBILITY OF THE EVIDENCE WAS MADE.

AND AT THAT POINT THERE WAS NO DETERMINATION THAT THE DEFENDANT HAD COMMITTED A CRIME.

OF COURSE, THAT DOES NOT CHANGE THE REASONS THAT THIS COURT SHOULD NOT CREATE AN EXCEPTION. IF A CRIME IS COMMITTED.

THERE IS NO DIMINISHED EXPECTATION OF PRIVACY UNDER THE STATUTE.

THE STATUTE DOES NOT ADDRESS THAT EXCEPT IN THE ONE, ONE LIMITED CIRCUMSTANCE WHICH REQUIRES THERE BE A DIMINISHED OR NO REASONABLE EXPECTATION OF PRIVACY AND A CRIME BEING COMMITTED.

SO ONCE AGAIN WE HAVE TO ASSUME FACTS NOT IN EVIDENCE IN ORDER TO GET TO THAT POINT ON THE FACTS IN THIS CASE.

IS IT REASONABLE TO ASSUME THAT IF A PERSON SEXUALLY ABUSES A CHILD REPEATEDLY THERE IS DIMINISHED EXPECTATION OF PRIVACY?

THERE COULD BE BUT THE LAW

ALLOWS IT, AN AGGRIEVED PERSON,
A CHILD OR AN ADULT OR A CHILD
ACCOMPANIED BY A PARENT OR A
GUARDIAN OR A CLERGYMAN OR A
PHYSICIAN OR SOMEBODY, TO GO TO
THE POLICE AND OBTAIN PERMISSION
TO MAKE A RECORDING.

>> YOU'RE OUT OF TIME.

IF YOU COULD SUM UP VERY QUICKLY
PLEASE.

>> OKAY.

WHAT THE STATE URGES THIS COURT
TO DO IS CREATE AN EXCEPTION
WHERE THE LEGISLATURE CREATED
NONE.

THIS COURT OUGHT NOT TO DO THAT.
THANK YOU VERY MUCH.

>> THANK YOU FOR YOUR ARGUMENTS.
THE COURT IS ADJOURNED.

>> ALL RISE.