

>> HEAR YE, HEAR YE, HEAR YE,
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.

ALL WHO HAVE CAUSE TO PLEA, DRAW
NEAR.

PAY ATTENTION, YOU SHALL BE
HEARD.

GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA.

LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.

PLEASE BE SEATED.

>> GOOD MORNING.

WELCOME TO THE FLORIDA SUPREME
COURT.

THE FIRST CASE ON THE DOCKET
TODAY WILL BE STATE OF FLORIDA
V. DONNA HORWITZ.

COUNSEL, WHENEVER YOU'RE READY.

>> MAY IT PLEASE THE COURT, MY
NAME IS LUKE NAPODANO, AND I
REPRESENT THE STATE OF FLORIDA
WHO IS THE PETITIONER IN THIS
CASE.

THIS CASE IS ABOUT THREE
QUESTIONS ASKED BY THE OFFICER
COMFORTING A FAMILY MEMBER AFTER
A SUICIDE CALL; DO YOU NEED
ANYTHING, DO YOU WANT A BOTTLE
OF WATER, WERE YOU IN THE ROOM
WHEN THE GUN WENT OFF.

THE DISTRICT COURT BELOW HELD
THAT RESPONDENT'S FAILURE TO
ANSWER THESE QUESTIONS WAS
INADMISSIBLE BASED ON THIS
COURT'S DECISION IN HOGGINS, AND
IT ERRED IN DOING SO.

>> DIDN'T THE-- ACTUALLY
LOOKING AT THE TRIAL IN THIS
CASE, THE PROSECUTOR WENT FAR
BEYOND THAT.

HE ASKED THE DETECTIVE WHO
WASN'T EVEN THERE AFTER SHE--
AND SHE DID INVOKE SHORTLY AFTER
THOSE FIRST THREE QUESTIONS, SHE
ACTUALLY DID ASK FOR AN
ATTORNEY.

SO FROM THEN ON THE STATE DID
NOT TRY TO GET THAT IN, RIGHT?

>> RIGHT.

>> YOU KNOW YOU COULDN'T GET IN WHEN SHE ASKED FOR AN ATTORNEY. BUT THEY ASKED QUESTIONS LIKE, WELL, DID SHE SAY ANYTHING TO DETECTIVE-- THERE WAS ANOTHER GUY THERE.

DID SHE EVER SAY-- SO THEY KEPT ON ASKING QUESTIONS ABOUT NOT JUST THAT SHE DIDN'T SAY ANYTHING TO THOSE THREE QUESTIONS, BUT THEY WENT BROADER.

DID YOU, ARE YOU FAMILIAR WITH THE RECORD?

>> YEAH.

>> YOU AGREE THAT THAT HAPPENED?

>> YES.

THAT'S ALSO--

>> OKAY.

>> THAT'S PART OF REDIRECT TESTIMONY, YES.

YEAH.

>> OKAY.

SO WHAT-- YOUR IDEA IS, WHAT? YOU'RE NOT SAYING IT'S HARMLESS?

>> NO.

THE STATE'S ARGUMENT IS THAT CONSTITUTIONAL RIGHTS ARE NOT IMPLICATED BY THE INTRODUCTION OF PRE-MIRANDA SILENCE.

>> GO AHEAD.

>> I'M A LITTLE CONCERNED CONCEPTUALLY WITH THE ARREST AND WHERE THIS WOULD TAKE US IF WE FOLLOW WHAT YOU'RE URGING.

IT SEEMS TO ME THAT IF THAT'S THE POINT THAT WE'RE GOING TO-- IN ALL SITUATIONS-- USE AS THE POINT OF DEMARCATION, IT JUST SEEMS TO ME THAT LAW ENFORCEMENT COULD, AS A PRACTICAL MATTER, JUST DELAY THE ARREST AND LENGTHEN ANY INTERROGATION THAT'S GOING ON AND SAY, WELL, NO, WE HAVEN'T ARRESTED YOU YET. I JUST, I'M TROUBLED BY JUST THAT, THE CONCEPTUAL THOUGHT OF USING THAT AS THE SOLE DEMARCATION.

I DO UNDERSTAND THE IMPORTANCE

OF THAT EVENT, BUT TO JUST SAY THAT'S THE BE-ALL, END-ALL JUST REALLY CONCERNS ME.

HELP REMOVE MY CONCERNS, COULD YOU PLEASE, WITH THAT SCENARIO? >> RIGHT.

THE DEMARCATION IS NOT REALLY AT THE POINT OF ARREST.

THIS COURT IN TRAINOR V. STATE HELD THAT THE RIGHT OF SILENCE APPLIES WHEN A PERSON'S IN CUSTODY UNDER INTERROGATION. IN CUSTODY IS WHEN A REASONABLE PERSON BELIEVES THEY'RE UNDER ARREST, NOT WHEN THE OFFICER TELLS THEM THEY'RE UNDER ARREST. INTERROGATION APPLIES WHEN A REASONABLE PERSON BELIEVES THEY'RE BEING ASKED QUESTIONS THAT ACCUSES THEM OF A CRIME, NOT WHEN A POLICE OFFICER SAYS WE'RE STARTING AN INVESTIGATION. THOSE ARE OBJECTIVE TESTS.

SO THERE'S VERY LITTLE WAY A POLICE OFFICER COULD MANIPULATE THAT.

IT HAS TO DO WITH WHETHER THE PERSON BELIEVES, YOU KNOW, A REASONABLE PERSON WOULD BELIEVE AT THAT POINT THEY'RE IN CUSTODY UNDER INTERROGATION.

>> BUT THAT'S NOT FOR THE-- BUT THIS IS NOT FOR WHEN MIRANDA IS TO BE GIVEN, BECAUSE THAT'S THE ISSUE OF CUSTODY.

YOUR POSITION, AT LEAST IN THE BRIEF, IS THAT THE-- IF SHE HAD INVOKED THE FIRST QUESTION, DO YOU WANT A BOTTLE OF WATER, WHEN SHE DOESN'T ANSWER.

AND, AGAIN, THIS IS DIFFERENT THAN SOME OTHER CASES.

SHE NEVER REALLY ANSWERS ANYTHING.

AND THEN SHE HAS TO PUT ON THAT SHE REALLY COULDN'T HEAR.

BUT THAT SHE WOULD HAVE, IF SHE WANTED TO REMAIN SILENT, SHE NEEDED TO INVOKE AND SAY, WELL, OFFICER SO AND SO, ALTHOUGH I'M

IN SHOCK AND MY HUSBAND JUST DIED AND WAS KILLED AND I SAW THAT, I WOULD LIKE TO INVOKE MY RIGHT TO REMAIN SILENT.

>> YEAH.

>> THAT'S, SO THE IDEA IS THAT A SOPHISTICATED DEFENDANT WOULD KNOW THE FIRST TIME THAT NO MATTER WHAT THE CIRCUMSTANCES THAT A POLICE OFFICER COMES OVER TO QUESTION THEM THAT THE, THAT THEY OUGHT TO INVOKE THEIR RIGHT.

AN UNSOPHISTICATED DEFENDANT WHO'S IN SHOCK GETS THE DETRIMENT OF BEING TOLD OR THE JURY BEING TOLD THAT THEY DIDN'T ANSWER BECAUSE THEY MUST HAVE KNOWN THEY WERE GUILTY.

>> RIGHT.

>> HOW IS THAT GOOD-- I GUESS THAT'S MY QUESTION, IS THAT THIS PERSON-- AND SO LET'S BE CLEAR. SHE DIDN'T TAKE THE STAND. SO WE'RE NOT TALKING ABOUT WHETHER SHE COULD HAVE BEEN IMPEACHED.

YOU DIDN'T TELL THAT STORY WHEN YOU FIRST SPOKE TO THE OFFICERS. THIS WAS USED AS A THEME THAT SHE, THEY'RE USING HER SILENCE AS CONSCIOUSNESS OF GUILT. SO WE'RE NOT EVEN GETTING INTO THE ENTRY ISSUE.

BUT AS A CONSTITUTIONAL RIGHT, HER RIGHT TO REMAIN SILENT WAS THIS FROM THE BEGINNING, WAS IT NOT?

SHE HAD THAT RIGHT.

>> NO.

HER RIGHT TO REMAIN SILENT DOES NOT APPLY UNTIL SHE'S IN CUSTODY UNDER INTERROGATION OR SHE EXPRESSLY INVOKES HER RIGHT TO REMAIN SILENT.

>> WELL, SO WHAT-- WHAT WOULD BE-- WHY DID SHE HAVE A RIGHT TO INVOKE MIRANDA?

YOU'RE SAYING-- IF SHE HAD SAID, NO, I'M INVOKING MY RIGHT

TO REMAIN SILENT, YOU'RE
SAYING--

>> NO.

IF SHE INVOKED HER RIGHT TO
REMAIN SILENT--

>> WELL, THEN SHE DID HAVE A
RIGHT TO REMAIN SILENT.

YOU KNOW, THE QUESTION HERE
AND-- WAS THAT SHE ARGUABLY
INVOKED IT BECAUSE SHE REMAINED
SILENT.

>> UNDER SALINAS V. TEXAS, THE
PLURALITY OPINION EXPRESSLY HELD
THAT A PERSON MUST EXPRESSLY
INVOKE THEIR RIGHT TO REMAIN
SILENT.

>> LET'S NOT CONFUSE--

[INAUDIBLE]

THE POLICE CAN CONTINUE
QUESTIONING UP AND UNTIL A
PERSON INVOKES THEIR RIGHT.

>> RIGHT.

>> THAT'S WHAT YOU'RE SAYING.

>> YES.

>> SO THE JUPITER POLICE
DEPARTMENT COULD HAVE JUST KEPT
ASKING THE QUESTIONS UNTIL SHE
SAYS I WANT A LAWYER OR
SOMETHING LIKE THAT AND THEN
STOPS.

OR SHE'S IN CUSTODY OR SOMETHING
LIKE THAT.

>> UNDER THE OBJECTIVE FACTS.

>> DON'T YOU THINK THERE'S
SOMETHING, YOU KNOW, NOT QUITE
RIGHT HERE WHEN THE POLICE START
OFF WHAT LOOKED TO ME VERY
SOLICITOUS, DO YOU NEED SOME
WATER, THOSE KINDS OF THINGS?
AND THEN THEY POP IN A QUESTION,
DID YOU SEE YOUR HUSBAND GET
KILLED?

>> WELL--

>> AND THE PERSON SAYS NOTHING
IN RESPONSE TO THAT.
AND YOU WANT US TO SAY THAT YOU
CAN NOW SAY THAT SHOWS
CONSCIOUSNESS OF GUILT.
SHE SAID NOTHING TO THE POLICE
AT ANY POINT, DID SHE?

>> NO.

>> AND SO ALL OF THAT IS
CONSCIOUSNESS OF GUILT.

>> YES.

>> AND, YOU KNOW, IT JUST, IT
SEEMS TO ME THAT IF SHE HAD
START, MAYBE STARTED ANSWERING
SOME QUESTIONS AND THEN STOPPED,
YOU MIGHT BE IN A DIFFERENT
POSITION.

BUT TO HAVE NEVER SAID ANYTHING
TO THE POLICE AS THEY'RE TALKING
TO HER, I'M HAVING A HARD
TIME--

>>-- WASN'T THERE AS AN
INTERROGATOR.

SHE TESTIFIED SHE WAS THERE TO
COMFORT THE FAMILY MEMBERS AFTER
A SUICIDE CALL.

>>-- FAMILY, THEN SHE STARTED
WORKING ON THE CASE ITSELF.

>> NO, I DISAGREE.

IF-- ARE YOU IN THE ROOM WITH
THE GUN, IT'S NOT A CRIME TO BE
IN A ROOM WHEN THE GUN GOES OFF.

>> BUT IF THAT DOESN'T MEAN IT'S
A CRIME TO BE IN THE ROOM, THEN
HOW DO YOU TRANSLATE THAT INTO A
CONSCIOUSNESS OF GUILT?

>> IN THIS CASE WHEN THE
SECURITY GUARD ARRIVED, IT
LOOKED LIKE A SUICIDE.

LANNY'S HAND, THE GUN WAS
POSITIONED SO IT WAS KIND OF
POINTED TO HER, AND RESPONDENT
SAID TO GARCIA, "I KNEW HE WOULD
DO THIS."

SO IT LOOKED LIKE A SUICIDE.
THEN SHE COMES IN AT TRIAL AND
SAYS AFTER IT'S, YOU KNOW,
DETERMINED THAT THIS WAS A
MURDER, IT HAD TO HAVE BEEN
RADLEY OR A HIT MAN.

THE QUESTION BECOMES, YOU KNOW,
WHY DIDN'T SHE SAY ANYTHING WHEN
SHE WAS IN THE ROOM WHEN HER
HUSBAND, HER EX-HUSBAND WAS
KILLED.

>> LET ME ASK YOU THIS.

I'M TRYING TO PICTURE IN MY MIND

HOW THIS HAPPENED.
MS. HORWITZ IS STANDING BY A CAR
OUTSIDE THE HOUSE.
>> SHE'S SITTING IN HER CAR.
>> IN A CAR WITH HER SON.
>> YES.
>> AND THAT'S WHEN THE POLICE
OFFICER FROM JUPITER, CHRISTY
COLEMAN--
>> YES.
>>-- APPROACHED THEM.
AND SHE ASKED THOSE THREE
QUESTIONS.
I'M TRYING TO PICTURE THESE
QUESTIONS.
WAS IT SOMETHING LIKE, ARE YOU
ALL RIGHT, DO YOU NEED A BOTTLE
OF WATER?
WERE YOU IN THE ROOM WHEN IT
HAPPENED?
HOW WERE-- WAS THERE AN
INTERVAL BETWEEN EACH ONE, OR
WERE THEY JUST RAPID-FIRE
QUESTIONS?
I BELIEVE SHE HAD HER FINGERS IN
HER EARS NOT LISTENING.
>> RIGHT.
>> HOW DID THAT HAPPEN?
I'M-- WE DON'T HAVE A TAPE.
>> NO, NO, WE DON'T.
>> BUT YOU KNOW ABOUT IT, YOU
KNOW, THE TRIAL, PERHAPS DEFENSE
COUNSEL CAN TELL US.
>> WELL, OFFICER COLEMAN, SHE
TESTIFIED SHE WAS THERE TO
COMFORT THEM.
SO WE HAVE TO LOOK AT IT LIKE
THAT.
SHE WAS THERE TO COMFORT THE
RESPONDENT.
SHE WAS LIKE, DO YOU NEED
ANYTHING?
>> SO THE QUESTION ABOUT WHETHER
YOU WERE IN THE ROOM WHEN IT
HAPPENED, THE PURPOSE OF IT WAS
TO SEE ARE YOU UPSET?
>> YES.
>> AND THAT'S THE REASON FOR IT?
>> YES.
THAT'S THE REASON, YES.

>> ALL RIGHT.
SO YOU HAVE NO WAY OF KNOWING
HOW FAST, WAS IT JUST
ONE-AT-A-TIME-TYPE QUESTIONS OR
RAPID-FIRE QUESTIONS?
>> IT'S NOT REFLECTED IN THE
TRANSCRIPT, NO.
>> SOMEBODY-- CHRISTY--
OFFICER COLEMAN TESTIFIED IN
COURT, AND OBVIOUSLY HER
TESTIMONY REFLECTED THAT.
>> YEAH.
I MEAN, SHE TESTIFIED SHE WAS
THERE TO COMFORT THEM.
SO WE HAVE TO LOOK AT IT LIKE
SHE WAS ASKING COMFORTING
QUESTIONS.
>> AND THIS TESTIMONY, THIS
SILENCE, THE FACT THAT SHE DID
NOT ANSWER THE QUESTION, IT WAS
USED AS SUBSTANTIVE EVIDENCE IN
THIS CASE.
>> YES.
>> SO IT WAS DURING THE STATE'S
CASE IN CHIEF IT WAS PRESENTED
TO PROVE HER GUILT, THE FACT
THAT SHE DIDN'T ANSWER WHEN SHE
WAS ASKED IF SHE WAS IN THE
ROOM.
HOW IS THAT GROUP GUILT?
>> YES.
PART OF THE CIRCUMSTANCES OF THE
CASE TO SHOW IT WAS HER THAT
MURDERED HER EX-HUSBAND AND NOT
HER SON WAS REALLY THE ONLY
OTHER POSSIBLE PERSON THAT COULD
HAVE DONE IT.
>> ONE REASONABLE EXPLANATION
WOULD BE THAT SHE WAS IN A STATE
OF SHOCK, RIGHT?
>> YEAH.
>> THAT WOULD BE AN EXPLANATION.
>> THAT'S WHAT THE--
>> DID THE DEFENSE EVER OFFER
ANY KIND OF EXPLANATION IN TERMS
OF THAT?
>> I BELIEVE SO, YES.
THAT WAS--
>> AND HOW--
[INAUDIBLE]

>> I BELIEVE IT WAS EITHER THROUGH DIRECT OR CROSS THAT OFFICER COLEMAN TESTIFIED THAT SHE LOOKED LIKE SHE WAS IN A STATE OF SHOCK.

>> BUT TO OFFER OTHER EVIDENCE PUTS THE DEFENSE IN A VERY BAD POSITION, DOESN'T IT?

THEN THE CRIME COULD THEN PRESENT THE DEFENDANT'S COMMUNICATION THAT'S THEN SUBJECT TO IMPEACHMENT AND POTENTIAL PROBLEMS WITH HER TESTIMONY.

AND RIGHT TO SILENCE.

>> I MEAN, WELL, IT'S PART OF HAVING A DEFENSE, I GUESS.

>> I'M SORRY, I DIDN'T UNDERSTAND YOU.

>> I SAID IT'S PART OF, YOU KNOW, PRESENTING A DEFENSE. THEN THE JURY CAN DECIDE.

>> BUT, SEE, THAT'S THE WHOLE PROBLEM.

AND I WANT TO FOLLOW UP ON WHAT JUSTICE POLSTON SAID.

SHE'S BEING PENALIZED FOR EXERCISE-- SHE HAS A RIGHT NOT TO INCRIMINATE HERSELF, RIGHT? THAT'S AN ABSOLUTE RIGHT.

AND SHE DOESN'T TAKE THE STAND, OKAY?

AND WE'RE GOING TO DISTINGUISH THAT IF IT SEEMS TO ME TOOK THE STAND AND GAVE ANOTHER VERSION, THAT HOGGINS SAYS IT CAN BE IMPEACHED PRE-ARREST, PRE-MIRANDA SILENCE.

BUT HERE SHE DOESN'T TAKE THE STAND WHICH IS HER ABSOLUTE RIGHT, BUT SHE'S PENALIZED BECAUSE SHE-- THE ONLY WAY MORE HER TO EXPLAIN WHY SHE DIDN'T RESPOND WAS FOR HER TO PUT HER ON A DEFENSE.

AND THAT'S NOT-- THAT'S SHIFTING THE BURDEN AWAY FROM WHAT THE STATE HAS TO DO AND HER RIGHT.

IT IS IMPAIRING HER

CONSTITUTIONAL RIGHT TO REMAIN SILENT.

AND THE COURTS, LIKE THE PENNSYLVANIA SUPREME COURT CASES POST-SALINAS HAVE EXPLAINED THAT'S EXACTLY WHY THIS IS A CONSTITUTIONAL VIOLATION.

DO YOU NOT-- THE STATE DOESN'T SEE THAT AS BEING A PROBLEM?

>> NO, BECAUSE THE BURDEN IS ALWAYS ON THE INDIVIDUAL TO EXERCISE THEIR RIGHTING TO REMAIN SILENT.

IT'S NOT THE BURDEN ON THE STATES.

>> THE OLD WHEN DID YOU STOP BEATING YOUR WIFE THAT WOULD REQUIRE SOMEONE TO TESTIFY I NEVER BEAT MY WIFE.

SAME THING HERE.

THEY ASKED HER WERE YOU IN THE ROOM WHEN THIS HAPPENED?

SILENCE.

AND NOW THEY INTRODUCE IT AS SUBSTANTIVE EVIDENCE.

THAT REQUIRES HER TO TAKE THE STAND TO EXPLAIN WHY SHE DIDN'T SAY ANYTHING.

YOU DON'T SEE A PROBLEM WITH THAT?

>> NO, NO, I DON'T.

THE PLURALITY OF THE U.S. SUPREME COURT DIDN'T EITHER.

>> WELL, THEY-- HERE'S THE OTHER QUESTION I HAVE, BECAUSE WE'VE SPENT MOST OF THE TIME ON THE CONSTITUTIONAL ISSUE, BUT THERE'S AN EVIDENTIARY ISSUE. AND IN THE BRIEF THE LAST LINE OF THE SUMMARY OF THE ARGUMENT SAYS PRE-ARREST, PRE-MIRANDA SILENCE SHOULD NOT BE BARRED AS ITS PROBATIVE VALUE IS NOT ALWAYS OUTWEIGHED BY THE EFFECT. SO THERE SEEMS TO BE A CONCESSION THAT THERE CAN BE CASES WHERE THE PREJUDICIAL EFFECT OUTWEIGHS THE PROBATIVE VALUE.

NOW HERE HER SILENCE, I MEAN, WE

HAD A CASE, WE HAVE CARDONA WHICH HAD AN ISSUE WHERE MAYBE IT'S NOT-- IT'S A DIFFERENT SITUATION.

BUT HERE OFFICER COLEMAN TESTIFIED SHE WAS IN SHOCK.

SHE TESTIFIED TO THAT.

SHE APPARENTLY HAD HEARING LOSS WHICH THEY HAD PUT ON.

IT'S HER SILENCE, AS WE SAID IN HOGGINS BASED ON HALE IS AMBIGUOUS, YET YOU ARE USING IT. YOU, THE STATE, ARE USING IT THROUGHOUT THE CASE AND IN CLOSING AS SUBSTANTIVE EVIDENCE OF GUILT.

WHY ISN'T THIS CASE A CASE WHERE THE PROBATIVE VALUE IS OUTWEIGHED BY THE PREJUDICIAL EFFECT BECAUSE OF THE, BECAUSE IT IS NOT CLEAR THAT HER SILENCE WAS INDICATIVE OF HER CONSCIOUSNESS OF GUILT?

>> WELL, FIRST OF ALL, THE STATE AGREES THAT NORMAL BE EVIDENTIARY RULES APPLY TO SUBSTANTIVE EVIDENCE 4143. BUT YOU HAVE TO, UNDER 403 THE PREJUDICE HAS TO SUBSTANTIALLY OUTWEIGH THE PROBATIVE VALUE. AND THE PROBATIVE VALUE HERE IS PART OF THE CIRCUMSTANTIAL EVIDENCE THAT DEMONSTRATES IT WAS HER AND NOT RADIALY COMMITTING, THAT COMMITTED THE MURDER.

THAT INCLUDES THE BLOOD ON HER FOOT AND THE DNA.

>> SHE WOULD HAVE SAID, WELL, SHE'S IN THE CAR.

SHE WAS TOLD TO WAIT IN THE SUV WITH HER SON.

AND THERE'S CERTAINLY, YOU KNOW, THERE IS CERTAINLY EVIDENCE THAT THEY COULD POINT TO RADLEY WHO WAS, HAD THE \$500,000 LIFE INSURANCE POLICY IN HIS NAME. BUT SHE'S THERE WITH HER SON. SHE'S IN SHOCK.

LET'S JUST SAY THAT SHE, YOU

KNOW, SOMETHING HAPPENED AND SHE SAW HER SON KILL HER HUSBAND. SHE'S GOING TO SAY, OH, I'M IN SHOCK, I'M IN SHOCK BECAUSE I JUST WITNESSED MY SON WHO'S SITTING HERE KILL MY HUSBAND?

>> YES.

>> THAT'S WHAT YOU-- THAT'S WHAT THE STATE WAS REALLY ARGUING IS SHE WOULD HAVE TO SAY THAT.

>> YES.

THAT'S WHAT THE STATE ARGUED, YES.

SO IF THERE ARE NO FURTHER QUESTIONS, I WILL RESERVE THE REST OF MY TIME FOR REBUTTAL.

>> THANK YOU.

>> GOOD MORNING.

GREY TESH ON BEHALF OF DONNA HORWITZ.

THIS IS A CASE ABOUT SILENCE. OR MORE SPECIFICALLY, THE MEANING OF SILENCE.

THIS COURT'S HELD SILENCE IS AMBIGUOUS.

PERSON MAY STAND MUTE FOR MANY REASONS, A VARIETY OF REASONS, NUMEROUS REASONS.

>> WELL, THAT WOULD GO TO THE EVIDENTIARY ISSUE.

WHICH SEEMS TO BE, TO ME, QUITE STRONG IN ANY EVENT.

BUT WOULD YOU GO TO THE CONSTITUTIONAL ISSUE?

AND DO, WOULD YOU AGREE OR DISAGREE THAT SALINAS OUT OF THE U.S. SUPREME COURT, ALTHOUGH IT'S PLURALITY, SEEMED TO SUGGEST THAT SILENCE AS A CONSTITUTIONAL RIGHT HAS, YOU'VE GOT TO EXPRESSLY INVOKE YOUR RIGHT BEFORE THE STATE IS PROHIBITED FROM USING IT AGAINST YOU.

SO WE'VE GOT-- DO YOU AGREE WE HAVE TO GO UNDER OUR STATE CONSTITUTION?

>> CORRECT.

UNDER THE PRINCIPLE OF

FEDERALISM, THIS COURT IS
REQUIRED TO LOOK--

>> ALTHOUGH IT DOES SEEM LIKE
SALINAS, IF THIS WAS SALINAS
HERE, IS THERE A BETTER CASE FOR
USING IT WHERE HE WAS TALKATIVE,
HE ANSWERED ALL THOSE QUESTIONS
AND THEN JUST WHEN IT GOT TO
SOMETHING ABOUT THE GUN, HE
DOESN'T SAY ANYTHING.

>> RIGHT.

>> HERE YOU HAVE, I THINK YOU
HAVE A STRONGER CASE THAN
SALINAS.

I WONDER IF THIS CASE WAS UP
ON-- WHETHER THEY WOULDN'T SEE
THAT HERE WAS A WOMAN THAT WAS
ACTUALLY INVOKING HER RIGHT TO
REMAIN SILENT.

>> RIGHT.

>> AND ONE OTHER QUESTION ABOUT
THAT.

>> YES.

>> AFTER OFFICER COLEMAN IS
ASKED THESE QUESTIONS, DETECTIVE
FRANK AT SOME POINT, SHE
ACTUALLY DOES ASK FOR AN
ATTORNEY.

DO WE KNOW IN THE SEQUENCE OF
THINGS HOW QUICKLY IN TIME THAT
WAS AFTER THIS INITIAL
INTERACTION WITH OFFICER
COLEMAN?

DO YOU KNOW HOW LONG AFTER IT
HAPPENED?

>> I THINK THE RECORD DOES NOT
REFLECT THE EXACT TIME.

>> BUT IT WAS STILL WHILE THEY
WERE BOTH IN THE SUV.

>> I BELIEVE THEY WERE STILL
BOTH IN THE SUV, SO IT WAS A
SHORT TIME AFTER.

I DON'T KNOW HOW LONG.

>> SO DOESN'T THAT SPEAK TO
YOUR, THE ARGUMENT THAT IN THIS
CASE ANYWAY SHE WAS ACTUALLY
INVOKING HER RIGHT TO REMAIN
SILENT?

>> YES.

IF YOU LOOK AT THE DISSENT IN

SALINAS, THEY TALK ABOUT THAT BY ACTUALLY REMAINING SILENT COULD BE INVOKING-- OF COURSE, THAT'S NOT WHAT THE PLURALITY HELD.

BUT, SEE, THE FACTS ARE IS SO DIFFERENT, RIGHT?

THE RECORD FACTS IN THIS CASE SHOW, NUMBER ONE, SHE DIDN'T ANSWER QUESTIONS BECAUSE SHE COULDN'T HEAR.

AND NUMBER TWO, SHE WAS IN SHOCK.

SO HOW COULD YOU EXPRESSLY INVOKE UNDER THOSE CIRCUMSTANCES?

IN SALINAS, THAT PERSON VOLUNTARILY WENT TO THE POLICE STATION, HE VOLUNTARILY ANSWERED QUESTIONS--

>> BUT YOU DON'T REALLY WANT THIS-- WELL, YOU MAYBE DO FOR YOUR CLIENT, TO BE CASE-SPECIFIC.

WE'RE ASKED A QUESTION WHETHER PRE-ARREST, PRE-MIRANDA SILENCE, OR LET ME SEE HOW THE CERTIFIED QUESTION READS.

>> RIGHT.

SO UNDER FLORIDA LAW WITH A PRE-ARREST, PRE-MIRANDA SILENCE CAN BE USED AGAINST A DEFENDANT IF THEY DON'T TESTIFY IN TRIAL.

>> BECAUSE THAT'S THE KEY.

IN HOGGINS WE SAID IT CAN BE USED IF THEY TESTIFY.

>> CORRECT.

BUT I THINK THAT'S UNDER THE FLORIDA CONSTITUTION.

THERE'S STILL THE 90.403 ANALYSIS IN EVERY CASE.

>> RIGHT.

>> BECAUSE SILENCE IS SO AMBIGUOUS--

>> WELL, IT'S NOT ALWAYS SO AMBIGUOUS, BECAUSE IT DOES SEEM TO ME THAT THAT IN SALINAS IT WAS PRETTY UNAMBIGUOUS THAT HE WAS NOT-- I MEAN, HE WAS NOT ANSWERING THAT QUESTION.

IF HE HAD SAID I AM NOW

INVOKING-- WHEN YOU ASK ME THAT QUESTION, I'M INVOKING MY RIGHT TO REMAIN SILENT, THEY COULDN'T HAVE USED IT, CORRECT?

>> RIGHT.

BUT THE DIFFERENCE THERE WAS HE HEARD IT, HE UNDERSTOOD IT, AND THERE WAS ALSO NONVERBAL COMMUNICATION, THE CLENCHING OF FISTS AND THINGS LIKE THAT. SO FACTUALLY IT'S COMPLETELY DIFFERENT.

>> I'M CONCERNED ALSO ABOUT CLOSING ARGUMENT.

THE PROSECUTOR SAYS THE DEFENDANT AT THAT TIME HAD NO RIGHT TO SILENT.

YOU CAN TAKE THAT AS AN EVIDENCE OF CONSCIOUSNESS OF GUILT WHEN SHE DOES NOT SPEAK TO LOUIS GARCIA OR CHRISTY COLE LAN OR-- COLEMAN OR RADLEY.

THERE'S NO RIGHT TO SILENCE AT THAT TIME.

DID SHE HAVE A RIGHT TO REMAIN SILENT AT THAT POINT IN TIME?

>> YES, SHE DID.

>> AND HOW WOULD THAT BE EXPRESSED?

I MEAN, IS IT SOMETHING ALL CITIZENS ARE SUPPOSED TO KNOW? LEGALLY, THE OFFICER DOESN'T HAVE TO READ THE MIRANDA RIGHTS UNTIL SHE IS IN CAN CUSTODY. YOU AGREE SHE'S NOT IN CUSTODY YET.

>> CORRECT.

>> RIGHT.

SHE'S JUST SITTING THERE WAITING FOR THE POLICE OFFICERS TO DO THEIR THING INSIDE THE HOUSE, AND THEN COLEMAN COMES OUT AND STARTS TALKING TO HER, ASKS IF SHE'S OKAY, THAT KIND OF THING. SO HOW WOULD A CITIZEN KNOW THEY HAVE THE RIGHT TO REMAIN SILENT THROUGHOUT THIS WHOLE PROCESS IF NOBODY TELLS THEM AND THEY DON'T HAVE TO TELL THEM UNTIL THEY'RE IN CUSTODY?

HOW DO I KNOW?

HOW DOES ANYONE UP HERE KNOW?

>> WELL, I WOULD MITT THAT A LOT OF PEOPLE-- SUBMIT THAT A LOT OF PEOPLE DON'T KNOW WHAT THEIR RIGHTS ARE.

I DON'T THINK THEY WOULD KNOW.

AND EVEN IF THEY WERE TOLD, LIKE, IF THIS COURT WERE TO FOLLOW SALINAS, LET'S SAY THE COP IS TALKING TO SOMEBODY IN, PERHAPS, A CONSENSUAL ENCOUNTER. PERFECTLY LEGAL FORM TO DO.

HE TALKS TO THEM, THEY DON'T WANT TO TALK.

AND HE SAYS, WELL, MR. JONES, I UNDERSTAND YOU DON'T WANT TO TALK, BUT NOT SAYING I'M GOING TO ARREST YOU, BUT IF I DO AND YOU GET PROSECUTED, THE JUDGE IS GOING TO TELL THIS JURY THEY CAN USE THAT EVIDENCE AGAINST YOU, YOUR SILENCE, AS SUBSTANTIVE EVIDENCE OF GUILT.

NOW, LET'S TALK ABOUT THIS.

>> MY CONCERN, I GUESS WHAT I'M, WHAT'S BOTHERING ME

INTELLECTUALLY IF THAT IS THAT WE HAVE VOLUMES OF LAW BOOKS WHERE WE HAVE BASICALLY GONE BACK AND FORTH ON WHEN IS SOMEONE IN CUSTODY FOR MIRANDA TO HAVE BEEN INVOKED.

WE HAVE ALL THAT-- INVOKED EVERY ALL THAT. -- WE HAVE ALL THAT.

WE HAVE PONDERED THAT FOR YEARS. AND YET HERE I SEE ALL A POLICE OFFICER HAS TO DO IS ASK YOU, BY THE WAY, WERE YOU THE PERSON THAT SHOT HIM?

AND IF THE PERSON DOESN'T ANSWER, THEN THAT COMES IN AS GUILT.

>> RIGHT.

>> AND JUST LIKE THAT IT JUST SEEMS TO ME BE, IT SEEMS ODD TO ME.

THAT'S JUST ME.

>> THERE'S ALSO SERIOUS

IMPLICATIONS OF OTHER RIGHTS.
FOR INSTANCE, IN A SON
SENSUAL-- CONSENSUAL ENCOUNTER
WHERE THE FOURTH AMENDMENT WOULD
PROTECT A PERSON, FOR INSTANCE
IF THEY REFUSE TO ANSWER
QUESTIONS OF POLICE IN A
CONSENSUAL ENCOUNTER, THE FIFTH
AMENDMENT WOULD NOT.

BECAUSE IF THE SILENCE COULD BE
USED AGAINST THEM IN TRIAL, THE
FIFTH AMENDMENT WOULD NOT.

>> YOU AS A DEFENSE LAWYER,
YOU'VE BEEN A CRIMINAL DEFENSE
LAWYER FOR 25 YEARS, IF NOT
MORE?

>> NOT QUITE THAT LONG.

[LAUGHTER]

>> JUST FEELS LIKE IT, RIGHT?

>> YEAH.

>> I'VE KNOWN YOU FOR THAT LONG.

LET ME ASK YOU THIS, WHEN YOU
TRY THESE CASES, IF YOU WERE
TRYING THIS CASE, HOW WOULD
YOU-- IF THIS CAME IN AS
SUBSTANTIVE EVIDENCE, THE
PROSECUTOR INTRODUCED SILENCE,
WHAT WOULD BE YOUR STRATEGY TO
COMBAT?

WHAT WOULD YOU HAVE TO DO TO
DISPROVE THAT?

>> WELL, THE FIRST STRATEGY
WOULD BE I'D SERIOUSLY HAVE TO
THINK ABOUT PUTTING DONNA
HORWITZ ON THE STAND.

AND JUSTICE PARIENTE, YOU KNOW,
MENTIONED THAT.

HAS THE ABSOLUTE RIGHT TO REMAIN
SILENT AND NOT TESTIFY.

YOU KNOW, THAT RIGHT IS ALSO
BEING AFFECTED TODAY POTENTIALLY
BY THIS COURT.

>> SO THAT WOULD BE YOUR FIRST
MOVE, TO PUT--

>> THAT WOULD CERTAINLY BE ONE.
ANOTHER THING WE DID, WE CALLED
AN AUDIO SPECIALIST IN TO SAY
THAT SHE WAS HALF DEAF.

I MEAN, THERE'S 48% HEARING LOSS
IN BOTH EARS, AND THE RECORD

FACTS SHOW THAT SHE DID USE A HEARING AID THROUGHOUT THE TRIAL AND STILL DIDN'T HEAR EVERYTHING.

BUT I CERTAINLY WOULD THINK ABOUT PUTTING THE CLIENT ON THE STAND A WHOLE LOT MORE. BECAUSE YOU'VE GOT TO EXPLAIN IT.

>> WERE YOU THE TRIAL LAWYER?

>> YES, JUDGE.

>> OKAY.

BECAUSE YOU ALSO FILED A MOTION. THE JUDGE WAS FULLY AWARE IT WAS THE STATE.

IT WAS A MOTION TO SUPPRESS.

YOU ACTUALLY DID TAKE THE POSITION THAT SHE WAS-- BECAUSE SHE WAS TOLD TO STAY THERE THAT SHE WAS IN CUSTODY.

AND YOU'RE NOT TRYING TO ARGUE THAT.

>> THAT IS TRUE, JUDGE.

>> WHAT THE PROSECUTOR SAYS AND WHAT JUSTICE LABARGA REALIZE, THE DEFENDANT AT THAT TIME HAD NO RIGHT TO SILENCE.

THAT'S NOT TRUE.

THAT'S ACTUALLY NOT TRUE, CORRECT?

>> CORRECT.

>> BUT SHE, BUT WHAT THE ANSWER NOW IS, OH, YEAH.

YOU HAVE A RIGHT TO SILENCE, BUT YOU'VE GOT TO KNOW YOU HAVE THAT RIGHT, AND YOU'VE GOT TO EXPRESSLY INVOKE IT FOR US TO HONOR IT.

>> RIGHT.

>> SO, AGAIN, A CAREER CRIMINAL WHO IS IN A, YOU KNOW, SOME KIND OF SOPHISTICATED SCHEME--

>> A BERNIE MADOFF, SOMEONE MORE SOPHISTICATED.

>> HE DIDN'T TALK?

>> RIGHT.

>> I DON'T KNOW.

>> NO, I KNOW WHAT YOU'RE GETTING AT.

LIKE THE SOPHISTICATED PEOPLE,

THERE'S ONE STANDARD FOR THEM,
AND THERE'S ONE STANDARD FOR
EVERYONE ELSE.

>> WELL, ESPECIALLY SOMEONE
WHO'S IN SHOCK BECAUSE LET'S
JUST-- WHETHER SHE KILLED HIM
OR HE WAS KILLED HIMSELF WHICH I
GUESS IS NOW NOT POSSIBLE OR
RADLEY KILLED HIM, IT'S-- SHE'S
DEFINITELY UPSET.

I MEAN, EVERYONE SAID SHE WAS
SCREAMING AND UPSET.

RIGHT?

>> IN SHOCK, RIGHT.

AND TO ANSWER ALSO JUSTICE
POLSTON WHEN HE WAS SPEAKING
WITH MR. NAPODANO, YOU HAD
MENTIONED ABOUT THE SHOCK.
DID THE DEFENSE OFFER AN
EXPLANATION.

AND IF YOU LOOK AT THE RECORD
FACT VOLUME SIX, STARTING I
THINK IT WAS PAGE 1055, MAYBE A
FEW LINES, A FEW PAGES DOWN FROM
THERE, THE STATE IN THEIR CASE
IN CHIEF SAID SHE WAS IN SHOCK.
IT WASN'T SOMETHING THAT WE
BROUGHT FORWARD, IT WAS BROUGHT
OUT IN THEIR CASE IN CHIEF.

>> THE STATE ITSELF OFFERED IT.

>> YES, SIR.

>> LET ME ASK YOU, YOU EXPLAINED
VERY WELL THE DISTINCTION IN
FACTS IN THIS CASE AND THE ONES
IN SALINAS, THE U.S. SUPREME
COURT ON THE U.S. CONSTITUTION
GROUNDS.

LET ME TAKE YOU TO THE FACTS OF
THAT CASE, SALINAS.

>> YES, SIR.

>> THAT YOU WENT THROUGH A FEW
MOMENTS AGO.

UNDER OR THOSE FACTS-- UNDER
THOSE FACTS HOW WOULD YOU APPLY
THE FLORIDA CONSTITUTION TO
THOSE FACTS?

HOW DOES THAT COME OUT UNDER THE
FLORIDA CONSTITUTION?

>> HOW DOES IT COME OUT?

>> BECAUSE WHAT YOU'RE ARGUING

HERE TODAY, ISN'T IT, PERHAPS
ARE YOU ARGUING THAT THE FLORIDA
LAW, THE FLORIDA CONSTITUTIONAL
OUTCOME SHOULD BE DIFFERENT THAN
THE U.S. CONSTITUTION.
IS THAT YOUR ARGUMENT?

>> CORRECT, YOUNG.

>> ALL RIGHT.

SO IF THAT'S YOUR ARGUMENT--

>> I THINK THAT'S REQUIRED.

>> HOW DO THE FACTS UNDER YOUR
ARGUMENT APPLY UNDER THE FLORIDA
CONSTITUTION ON YOUR ARGUMENT
HERE TODAY?

>> I THINK ANY VOLUNTARY
STATEMENTS THAT HE MADE, SO THEY
KNOCK ON THE DOOR, HEY, WILL YOU
COME WITH US.

YEAH, I'LL GO WITH YOU.

WE WANT TO ELIMINATE YOU FOR
PRINTS.

HE GOES TO THE POLICE STATION.
ANY VOLUNTARY STATEMENTS THAT HE
MADE WOULD BE ADMISSIBLE.
BUT THE MOMENT HE IS SILENT,
THEY CAN'T COMMENT ON THAT
SILENCE.

I THINK THAT'S PRE-ARREST,
PRE-MIRANDA SILENCE UNLESS HE
TESTIFIED AT TRIAL, AND THEN THE
TRIAL JUDGE HAS TO DO THE
09.403-- 90.403 ANALYSIS.

>> SO YOU WOULD DEPART FROM THE
U.S. SUPREME COURT'S ANALYSIS
FOR FLORIDA PURPOSES ON THAT
POINT, ON THE SILENCE ISSUE.

>> YES, SIR.

AND I THINK THIS COURT IS
REQUIRED TO, BECAUSE IF YOU LOOK
AT THE DECLARATION OF RIGHTS,
WHAT'S THE PURPOSE?

INDIVIDUAL FREEDOM AND AUTONOMY.
AND THIS COURT HAS HELD THE
FIFTH AMENDMENT VERSION THE DUE
PROCESS CLAUSE, ARTICLE I,
SECTION NINE, MUST BE BROADLY
CONSTRUED AND INDEPENDENTLY
CONSTRUED.

>> NOW, IS THERE A REASON WHY WE
SHOULD DO THAT UNDER THE FLORIDA

CONSTITUTION OTHER THAN THE FACT THAT WE JUST DON'T LIKE IT, WHAT THE U.S. SUPREME COURT DID?

>> BECAUSE IT'S RIGHT.

HERE'S WHY IT'S RIGHT.

JUSTICE PARIENTE, SHE ALSO SPOKE ABOUT, YOU KNOW, YOU'RE TREATING DIFFERENT PEOPLE DIFFERENTLY, RIGHT?

ALSO PEOPLE ARE GOING TO HAVE EVEN MORE DISTRUST OF LAW ENFORCEMENT THAN THEY WOULD ALREADY.

POLICE ARE GOING TO PURPOSELY DELAY MIRANDA AND DELAY ARREST IN ORDER TO GET SOME CONFESSIONS, ADMISSIONS BY SILENCE.

THAT'S EXACTLY WHAT'S GOING TO HAPPEN.

AND IT'S NOT RIGHT.

>> SO U.S. SUPREME COURT GOT IT WRONG, WE SHOULD GET IT RIGHT, APPLY FLORIDA CONSTITUTION, THAT'S YOUR ARGUMENT.

>> THAT'S CORRECT.

>> OKAY.

>> WELL, THERE WAS-- FIRST OF ALL, AND I DON'T KNOW, AGAIN, DID THE U.S. SUPREME COURT ADDRESS THE VERY STRONG EVIDENTIARY BASIS WHICH IS IN SOME WAYS, TO ME, LINKED WITH THE CONSTITUTIONAL BASIS WHICH IS THIS, AND READING NOW FROM HOW THE UTAH COURT OF APPEALS EXPRESSED IT.

IF AN INDIVIDUAL IS QUESTIONED BY THE POLICE, THAT INDIVIDUAL'S COMPELLED THEN TO DO ONE OF TWO THINGS, EITHER SPEAK OR REMAIN SILENT.

IF BOTH THE PERSON'S PRE-ARREST SPEECH AND SILENCE MAY BE USED AGAINST THAT PERSON, THAT PERSON HAS NO CHOICE THAT WILL PREVENT SELF-INCRIMINATION.

AND ISN'T-- I MEAN, THAT IS WHAT THE ESSENCE OF THE RIGHT TO REMAIN SILENT IS.

YOU ARE NOT COMPELLED TO GIVE TESTIMONY THAT WILL INCRIMINATE YOU.

YET WHAT WE'RE REALLY SAYING IS MS. HORWITZ EACH THOUGH SHE WAS IN SHOCK-- EVEN THOUGH SHE WAS IN SHOCK AND COULDN'T HEAR, SHE WAS COMPELLED TO GIVE HER EXPLANATION OF WHAT HAPPENED IN THAT ROOM OR FOREVER BE DAMNED BY BEING SILENT.

>> RIGHT.

IMMEDIATELY ASSERT THE TRIAL DEFENSE, YES.

>> NOW WHETHER-- IT'S HARD TO KNOW WHAT THE U.S. SUPREME COURT ACTUALLY SAID BECAUSE, AGAIN, TWO OF THE JUSTICES WOULD ACTUALLY SAY THAT THE RIGHT TO SILENCE DOESN'T EVEN APPLY TO PRE-ARREST SITUATIONS.

IS THAT WHAT--

>> RIGHT.

I THINK JUSTICES SCALIA AND THOMAS CONCURRING IN THE DECISION OR THE RESULT ONLY, I THINK THAT THAT WAS THE CASE, JUDGE.

>> DID THE U.S. SUPREME COURT ADDRESS THE EVIDENTIARY ISSUES OF--

>> NOT TO MY KNOWLEDGE.

>>-- OF THE BALANCING-- AND HAS THE U.S. SUPREME COURT SAID IN OTHER CASE THAT IS THE STATES, UNDER THEIR CONSTITUTION AND EVIDENTIARY PRINCIPLES, CAN LOOK TO THEIR OWN HISTORY? I MEAN, AGAIN, WHETHER IT'S RIGHT OR NOT, THIS COURT HAS SINCE TRAILER AND IN HOGGINS HAS INTERPRETED OUR RIGHT BROADER.

>> RIGHT.

BECAUSE IT'S THE FEDERAL JURISPRUDENCE IS THE FLOOR, NOT THE CEILING.

RIGHT.

AND I THINK EVEN UNDER A 403 ANALYSIS, JUSTICE POLSTON, GO BACK TO THAT, I DON'T KNOW THAT

IT WAS RAISED, BECAUSE I DIDN'T
SEE IT IN THE DECISION.

BUT THIS CASE IS VERY STRONG
EVEN UNDER THE 403 ANALYSIS.
SO EVEN IF YOU HAVE AN ISSUE
WITH THE CONSTITUTIONAL
ANALYSIS, I DON'T SEE HOW UNDER
90.403 IN THIS COULD HAVE
HAPPENED, THIS COULD HAVE BEEN
ADMISSIBLE.

BECAUSE SILENCE IS SO AMBIGUOUS.
SHE'S IN SHOCK, SHE CAN'T HEAR.
IT'S NOT EVEN RELEVANT TO PROVE
ANY MATERIAL FACT OR DISPROVE
ANY MATERIAL FACT.

SO WITHOUT THE RELEVANCE, YOU
DON'T EVEN GET TO THE 403
BALANCING.

>> WOULD YOU GO, WOULD YOU
ADDRESS THE EVIDENTIARY ISSUE
FIRST OR--

>> NO.

I WOULD ADDRESS THE
CONSTITUTIONAL ISSUE FIRST
BECAUSE I THINK IT'S, IT HAS
BROADER IMPLICATIONS FOR
INDIVIDUAL FREEDOM AND AUTONOMY.

>> WHY SHOULD WE ADDRESS THE
CONSTITUTIONAL ISSUE IF IT NEED
NOT BE ANSWERED AND THIS CASE
CAN BE RESOLVED TOTALLY ON AN
EVIDENTIARY BASIS?

>> BECAUSE, WELL, YOU KNOW,
THAT'S A GOOD QUESTION.
I DON'T KNOW THE ANSWER TO THAT,
SIR.

>> I'M LOOKING TO YOU FOR THE
ANSWER.

>> OKAY.

[LAUGHTER]

>> NOT THE QUESTION.

I CAME UP WITH THE QUESTION.

[LAUGHTER]

IT'S YOUR TURN TO COME UP WITH
THE ANSWER.

>> I PLEAD THE FIFTH.

[LAUGHTER]

>> YOU CAN EXPRESSLY INVOKE IT.

[LAUGHTER]

>> THAT'S BECAUSE I KNOW WHAT MY

RIGHTS ARE.

[LAUGHTER]

>> WELL, WE HAVE TO, I MEAN, I GUESS IF WE DIDN'T ADDRESS IT, THE FOURTH DISTRICT-- BECAUSE THE FOURTH DISTRICT DOES IT ON BOTH GROUNDS.

WE WOULD HAVE TO JUST SAY WE'RE NOT REACHING WHAT THE FOURTH DISTRICT SAYS.

SO IT WOULD SORT OF KEEP-- I DON'T KNOW IF THE STATE WOULD PREFER THAT AS A RESULT. IT WOULD KEEP THE FOURTH DISTRICT'S REASONING AS SORT OF THE FLORIDA CONSTITUTION, BECAUSE THEY DID IT ON BOTH, ON BOTH BASES, RIGHT?

>> I'M GOING TO WAIVE MY FIFTH AMENDMENT FOR A SECOND AND TAKE A STAB.

[LAUGHTER]

IF YOU WERE TO COME UP WITH A BRIGHT LINE RULE, PRE-ARREST, PRE-MIRANDA SILENCE NOT ADMISSIBLE UNLESS YOU TAKE THE STAND ON A CONSTITUTIONAL BASIS, FIRST OF ALL, IT ALERTS ALL THE TRIAL COURTS THIS IS WHAT THE LAW IS.

IT ALSO ALERTS THE POLICE OFFICERS THIS IS WHAT IT IS. IF IT'S ON AN EVIDENTIARY BASIS, THEN THE TRIAL JUDGE HAS TO WEIGH EVERY SINGLE CASE. AND DEPENDING ON WHICH TRIAL JUDGE YOU GET, YOU'RE GOING TO GET A DIFFERENT RESULT. SO UNIFORMITY.

>> YOU ADDRESS IN THIS CASE-- CAN YOU ADDRESS IN THIS CASE, WE MENTIONED THE CLOSING ARGUMENT COMMENT.

BUT IT SEEMS THAT THE STATE WENT FARTHER THAN EVEN IF IT WERE SOMEHOW A NARROW RULE, BECAUSE THEY DID ASK ABOUT, WELL, SHE NEVER SAID ANYTHING.

THEY GO THROUGH ALL THE PEOPLE SHE NEVER SAID ANYTHING TO

INCLUDING POLICE OFFICERS.
NOW, IT IS CORRECT THAT ON
RETRIAL IF THERE IS A RETRIAL
THAT WHAT SHE SAYS OR DOESN'T
SAY TO GARCIA--

>> RIGHT.

TO CIVILIANS AND NOT STATE
ACTORS, IT DOESN'T APPLY.

>> RIGHT.

BUT WHEN YOU'RE ASKING A POLICE
OFFICER QUESTIONS ABOUT SHE
NEVER SAID ANYTHING TO THIS
PERSON, THIS PERSON, I DON'T
EVEN SEE HOW THAT IS APPROPRIATE
QUESTIONING EVEN IF THERE WAS
SOME OTHER RULE BECAUSE YOU'RE
NOW PUTTING THE-- THE POLICE
OFFICER IS TESTIFYING THAT SHE
JUST REMAINED SILENT, AND THEN
NOBODY KNOWS, WELL, SHE ACTUALLY
DID INVOKE HER RIGHT TO REMAIN
SILENT BECAUSE YOU CAN'T TALK
ABOUT THAT.

SO IT GIVES THIS FALSE IDEA THAT
SHE NEVER TOLD ANYBODY THE STORY
WHEN REALLY AFTER ALL THIS BEGAN
SHE DID ASK FOR AN ATTORNEY.
AND THE JURY DOESN'T KNOW THAT.
SO IT SEEMS TO ME THAT IT WAS
EVEN MORE UNFAIR IN THIS CASE,
THOSE KINDS OF QUESTIONS.

>> RIGHT, I WOULD AGREE WITH
THAT.

YOU CAN ARGUE IT BETTER THAN ME,
JUSTICE PARIENTE.

[LAUGHTER]

THANK YOU FOR YOUR TIME, GUYS.

>> REBUTTAL?

>> I THINK, FIRST OF ALL, THE
STATE WOULD ASK THIS COURT TO
ADDRESS THE CERTIFIED QUESTION
IN THIS CASE.

OTHERWISE THE CONSTITUTIONAL
RULE SET FORTH BY THE FOURTH
DISTRICT IS BINDING ON ALL THE
TRIAL COURTS UNLESS ANOTHER
DISTRICT COURT HAPPENS TO COME
UP WITH THAT.

THE SECOND POINT I'D LIKE TO
MAKE IS I DISAGREE WITH

MR. TESH'S ANSWER TO JUSTICE
POLSTON'S QUESTION ABOUT
SALINAS.

IN SALINAS, THE DEFENDANT
VOLUNTARILY WENT TO THE POLICE
AND WAIVED HIS RIGHT, WAIVED HIS
RIGHT TO SILENCE IN ANSWERING
THE POLICE OFFICER'S QUESTIONS.
AND ONCE HE FELL SILENT, IT WAS
INCUMBENT ON HIM TO EXPRESSLY
INVOKE HIS RIGHT TO REMAIN
SILENT.

HIS RIGHT TO SILENCE WASN'T--
[INAUDIBLE]

BY HIS FAILURE TO ANSWER ONE
QUESTION.

>> SO YOU THINK THERE ARE ENOUGH
FACTS THERE THAT ARE DIFFERENT
THAT IT CAN BE DISTINGUISHED
FROM THIS CASE?

>> WELL, I GUESS THE STATE'S
POSITION WOULD JUST BE THAT THE
DEFENDANT, SALINAS, WOULD HAVE
TO EXPRESSLY INVOKE HIS RIGHT TO
REMAIN SILENT EVEN UNDER THE
FLORIDA CONSTITUTION.

AND SO IN CONCLUSION, I GUESS
THE STATE WOULD ASK THIS
COURT TO ANSWER THE CERTIFIED
QUESTION IN THE NEGATIVE, THAT
THE DISTRICT COURT ERRED IN
HOLDING THE RESPONDENT'S
PRE-ARREST SILENCE WAS
INADMISSIBLE--

[INAUDIBLE]

RESTATE THE RESPONDENT'S
CONVICTION FOR FIRST-DEGREE
MURDER.

>> THANK YOU FOR YOUR ARGUMENTS.