

>> ALL RISE.
HEAR YE, HEAR YE, HEAR YE,
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.
ALL WHO HAVE CAUSE TO PLEA, DRAW
NEAR, GIVE ATTENTION.
YOU SHALL BE HEARD.
GOD SAVE THESE UNITED STATES,
GREAT STATE OF FLORIDA AND THIS
HONORABLE COURT.
>> 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 IS DAVIS VERSUS STATE OF
FLORIDA.
I THINK YOU'RE UP.
>> MAY IT PLEASE THE COURT,
STEVE BOLOTIN FROM THE PUBLIC
DEFENDER'S OFFICE.
THIS IS A MASSIVE, MASSIVE CASE.
ISSUES ARE FACTUALLY, LEGALLY
COMPLEX AND REALLY DON'T LEND
THEMSELVES VERY MUCH TO 30
MINUTES.
THERE'S A LOT I'M NOT GOING TO
BE ABLE TO COVER, SO AS TO ANY
ISSUE OR ANY ASPECT OF ISSUE
THAT I'M NOT ABLE TO COVER,
OBVIOUSLY I'LL RELY ON THE
BRIEFS.
I WANT TO BEGIN BY FOCUSING ON
THE ISSUE THAT WAS EXPRESSLY
LEFT OPEN BY THE UNITED STATES
SUPREME COURT IN CRAWFORD AND IN
MICHIGAN VERSUS BRYANT, WHICH IS
THE QUESTION -- WELL, IT'S THE
DUAL QUESTION OF WHETHER OR NOT
DYING DECLARATIONS ARE AN
EXCEPTION TO THE CONFRONTATION
CLAUSE.
>> BEFORE WE GET TO THE DYING
DECLARATION AND WHETHER OR NOT
IT ACTUALLY SURVIVES, WHAT IS
CONTEMPLATED IN WRITING
CRAWFORD, LET'S BEGIN THE
ANALYSIS IN A STEP-BY-STEP
BASIS.
CRAWFORD, THE SUPREME COURT
BASICALLY STATED THAT THE
RULINGS IN YOU CRAWFORD, THE
CONFRONTATION RULINGS IN

CRAWFORD, APPLY ONLY TO WHAT
THEY TERM AS TESTIMONIAL
EVIDENCE.

CRAWFORD OPINION WENT ON TO SAY
APPLIES ONLY TO TESTIMONIAL
EVIDENCE, BUT WE'RE NOT GOING TO
TELL YOU WHAT IT IS TODAY.

SO WHAT SINCE THEN?

THERE HAVE BEEN A NUMBER OF
OPINIONS THAT HAVEN'T REALLY
TOLD US WHAT IT IS.

THEY JUST HAVE TOLD US WHAT IT
ISN'T.

AND YOU MENTIONED ALREADY BRYANT
AND THERE'S ALSO THE HAMLIN
CASE, WHERE THE UNITED STATES
SUPREME COURT HAVE ADDRESSED THE
QUESTION OF WHAT IS TESTIMONIAL,
NOT TESTIMONY.

IN BRYANT, THE LANGUAGE IS
STRIKING, AND I PICKED IT OUT
HERE, AND THIS SAYS WE EXPLAIN
THAT A PERSON WHO MAKES A
STATEMENT TO RESOLVE AN ONGOING
EMERGENCY IS NOT ACTING LIKE A
TRIAL WITNESS BECAUSE THE
DECLARANT'S PURPOSE IS NOT TO
PROVIDE SOLEMN -- A SOLEMN
DECLARATION FOR USE AT TRIAL,
BUT TO BRING AN END TO THE
ONGOING THREAT.

THE SAME TYPE OF LANGUAGE WAS
USED IN HAMLIN AND THAT'S THE
LANGUAGE THEY HAVE BEEN USING
SINCE.

SO HERE'S MY QUESTION, APPLYING
TO THESE FACTS, AND LET'S GET TO
THIS FIRST.

BECAUSE WE GOT TO GET PAST THE
TESTIMONIAL PART OF IT.

WE HAVE A SITUATION HERE WHERE
TWO WOMEN ARE SET ON FIRE BY
THIS PERSON.

ONE WANDERS OUT INTO THE PARKING
LOT, BURNING, IN EXCRUCIATING
PAIN, AND SHE IS ALSO SHOT IN
THE HAND.

THE OTHER ONE MAKES IT TO A
RESTAURANT JUST AROUND THE
CORNER AND SHE'S LIKE 25 WEEKS
PREGNANT AND SHE'S ALSO -- 90%
OF HER SKIN IS BURNED, WOULD
APPEAR TO BE THIRD-DEGREE BURNS.
BOTH IN EXCRUCIATING PAIN.

WE HAVE A WITNESS WHO TRIED TO

HELP, AND HE WAS SHOT.
THE AIM WAS FOR THE HEAD, BUT
SOMEHOW HE HIT ONLY THE NOSE.
WE GOT A PERSON WHO'S SHOT.
THE CULPRIT, THE PERSON WHO IS
DOING ALL THESE THINGS, IS NOT
CAUGHT.
THEY DON'T KNOW WHO HE IS YET.
THE POLICE GET THERE, AND THIS
IS WHAT THEY'RE CONFRONTED WITH.
THE OFFICER, I BELIEVE
LIEUTENANT ELROD OR SOMETHING
LIKE THAT?
>> ELROD.
>> HE RUNS OVER TO BOTH
WITNESSES, TOWARD BOTH VICTIMS,
AND HE SAYS TO THEM, WHO DID
THIS?
HE'S TRYING TO FIND OUT WHO THE
KILLER IS BECAUSE THE KILLER,
THE PERSON WHO'S DOING THIS, IS
AT LARGE.
AS BRYANT SAID, WE HAVE AN
ONGOING THREAT OF SOMEBODY OUT
THERE WITH A GUN WILLING TO HURT
PEOPLE BADLY.
HOW IS THIS TESTIMONIAL?
HOW IS THIS A SOLEMN DECLARATION
FOR USE AT TRIAL?
>> I ACTUALLY KIND OF HAVE TO
ANSWER THAT IN PARTS.
FIRST OF ALL, THE TRIAL JUDGE
FOUND THAT IT WAS TESTIMONIAL.
SECOND OF ALL, I ADDRESSED
BRYANT IN MY INITIAL BRIEF AND
THE STATE IN THEIR ANSWER BRIEF
SAID WE'RE NOT CONTESTING IT'S
TESTIMONIAL.
NOW, I UNDERSTAND THE COURT CAN
RAISE THAT ANYWAY, BUT THE STATE
HAS ESSENTIALLY CONCEDED THAT
THEY'RE NOT CONTESTING THE
JUDGE'S RULING THAT IT WAS
TESTIMONIAL.
>> ON YOUR FIRST POINT ABOUT THE
TRIAL JUDGE FINDING THAT IT WAS
TESTIMONIAL, IS THAT A FACTUAL
MATTER OR IS THAT A QUESTION OF
LAW OR MIXED?
>> IT'S A MIXED QUESTION OF LAW
AND FACTS.
>> THE FACTS HERE ARE NOT
REALLY --
>> NO.
THE FACTS ARE PRETTY IMPORTANT,

THOUGH.

>> THE FACTS ARE NOT IN DISPUTE,
ARE THEY?

>> I AM TRYING TO THINK -- I
THINK THE FACTS RELATIVE TO
TESTIMONIAL WERE ACTUALLY
ELICITED BY THE PROSECUTOR AND I
THINK FOR THE MOST PART THEY
WEREN'T IN DISPUTE.

THE TRIAL JUDGE GRANTED, DIDN'T
HAVE THE BENEFIT OF BRYANT.

BRYANT DOESN'T SAY THAT, WELL,
THERE'S AN EMERGENCY, THEREFORE
IT'S TESTIMONIAL.

BRYANT ADOPTS THE PRIMARY
PURPOSE.

IT'S KIND OF CONVOLUTED AS TO
HOW YOU APPLY THAT, BUT THERE'S
LANGUAGE THAT SPECIFICALLY SAYS
THE EXISTENCE OF AN EMERGENCY IS
NOT DISPOSITIVE, DOES NOT
NECESSARILY MAKE IT
NONTESTIMONIAL.

NOW HERE WHAT YOU'VE GOT ON THE
PRIMARY PURPOSE TEST IS ELROD
SAID WHAT HIS PURPOSE WAS.

HE ARRIVES THERE.

HE SEES GREISMAN, WHO HE KNOWS
AS A CITY EMPLOYEE WHO'S GOT THE
WOUND ACROSS THE NOSE.

HE SEES THE BURNED WOMAN.

HE SAYS THAT HE KNEW THAT SHE
WASN'T GOING TO SURVIVE.

SHE DIDN'T NECESSARILY KNOW
THAT, BUT HE KNEW THAT.

WHEN HE WAS ASKED BY THE
PROSECUTOR, DID YOUR OPINION
THAT SHE WAS NOT GOING TO
SURVIVE, DID THAT AFFECT HOW YOU
BEGAN TO GO ABOUT YOUR BUSINESS
AS A POLICE OFFICER ON THE
SCENE?

YES, IT DID.

HOW SO?

WELL, I WANTED TO GET HER
STATEMENT BEFORE IT WOULDN'T
EVER BE GOTTEN.

HE WENT SO FAR AS TO SAY THAT IF
HE THOUGHT SHE WAS GOING TO
SURVIVE AND BE IN THE HOSPITAL,
HE WOULDN'T HAVE ASKED THE
QUESTIONS, HE WOULD HAVE JUST
LET THE PARAMEDICS TAKE CARE OF
HER.

SO HIS PRIMARY PURPOSE -- HE

TOLD YOU HIS PRIMARY PURPOSE.
IT WAS TO GET HER STATEMENT
BECAUSE HE DIDN'T THINK SHE WAS
GOING TO BE ABLE TO TESTIFY IN
COURT.

NOT ONLY THAT, THE NATURE OF THE
QUESTIONING THAT HE ASKED HER
WAS VERY -- WAS OBTAINING A
NARRATIVE.

IT WASN'T JUST WE GOT TO KNOW
WHO THIS IS SO WE CAN FIND HIM.
IT WAS TELL US WHAT HAPPENED,
WHO IS HE, HOW DID YOU KNOW HIM,
DID YOU -- YOU KNOW, HE WAS AN
INSURANCE CUSTOMER.

HE CAME IN THE STORE.

>> LET ME ASK YOU THIS.

ARE YOU SUGGESTING THAT THE
PRIMARY PURPOSE TEST IS A
SUBJECTIVE TEST AS OPPOSED TO AN
OBJECTIVE TEST?

SO THAT IF WE HAD IDENTICAL
CIRCUMSTANCES, IDENTICAL FACTUAL
CIRCUMSTANCES INVOLVING THE
CRIME AND THE SURROUNDING
CIRCUMSTANCES, BUT ONE OFFICER
SAYS I WAS DOING IT TO FIND OUT
WHO DID THIS TO THIS PERSON
BECAUSE I THOUGHT SHE WAS GOING
TO DIE, THE OTHER OFFICER SAYS I
WAS ASKING BECAUSE I WANTED TO
FIND WHO DID IT TO MAKE SURE
NOTHING ELSE HAPPENED TO ANYBODY
ELSE.

YOU GET DIFFERENT RESULTS BASED
ON WHAT THE OFFICER SAYS?

>> I THINK THE WAY BRYANT IS
WRITTEN, IT'S KIND OF HARD TO
FOLLOW.

BUT I THINK THAT IT'S NOT A
SUBJECTIVE TEST.

IN OTHER WORDS, THE OFFICER'S
INTENT, THE OFFICER'S MOTIVE,
WHILE SUBSEQUENT CASE LAW DOES
SAY THAT'S RELEVANT TO THE
ANALYSIS, IT'S NOT DISPOSITIVE.
I'LL GRANT YOU THAT.

AT THE SAME TIME IT VERY CLEARLY
SAYS THAT JUST BECAUSE THERE
EXISTED AN EMERGENCY, THAT'S NOT
DISPOSITIVE, EITHER.

SO WHAT YOU'VE GOT TO LOOK AT
HERE IS THE FACT THAT ELROD TOLD
YOU WHAT HIS PURPOSE WAS.
HIS PRIMARY PURPOSE WAS TO GET

HER STATEMENT BEFORE IT WOULD NEVER BE GOTTEN.

HE EVEN TOLD YOU HE WOULDN'T HAVE ASKED THE QUESTIONS IF HE THOUGHT SHE WASN'T GOING TO DIE.

>> LOOK AT IT FROM AN OBJECTIVE STANDARD, NOT REQUIRED.

IT'S YOUR POSITION THE POLICE OFFICER AT THE SCENE WHERE TWO PEOPLE HAVE BEEN INJURED, ONE HAD BEEN SHOT, THEY DON'T KNOW WHO THE CULPRIT IS, THE PERSON COULD BE AROUND THERE, THAT HIS PRIMARY PURPOSE WAS TO TAKE NOTES DOWN TO PREPARE FOR TRIAL AS OPPOSED TO TRY TO FIND OUT WHO DID IT?

>> THAT'S PRETTY MUCH WHAT IT SAID.

IF THE STATEMENT DOESN'T SHOW YOU, I THINK THE NEXT THING HE SAID -- AGAIN, BEAR IN MIND, THIS IS STATE QUESTIONING.

THE NEXT THING HE SAID, WHICH IS THAT IF I HAD THOUGHT SHE -- I THOUGHT SHE WAS GOING TO DIE. THE PROSECUTOR SAID HE THOUGHT SHE WASN'T EVEN GOING TO MAKE IT OUT OF THE SCENE.

>> DOES IT MATTER THAT SHE THOUGHT SHE WAS GOING TO DIE, TOO?

>> THAT MATTERS TO THE STATE LAW QUESTION OF DYING DECLARATION. THERE'S THE CRAWFORD ISSUE AND THEN THERE'S THE QUESTION -- I'VE ALSO ARGUED THAT EVEN IF CRAWFORD -- DYING DECLARATIONS ARE AN EXCEPTION TO CRAWFORD AND MY ARGUMENT IS THAT THEY'RE NOT. BUT EVEN IF THEY ARE, THAT IT WASN'T -- UNDER ALL THE FACTS OF THIS CASE -- AND THEY'RE VERY COMPLEX FACTS -- THAT IT WASN'T ADMISSIBLE UNDER FLORIDA LAW, EITHER.

THE ONLY DIFFERENCE BETWEEN YVONNE BUSTAMANTE'S STATEMENT, WHICH JUDGE HUNTER LET IN, AND JUANITA LUCIANO'S STATEMENT, WHICH HE EXCLUDED, HINGES ON FRAN MURRAY.

AND I HOPE I HAVE TIME TO GET INTO FRAN MURRAY.

I CERTAINLY DID IN THE BRIEF.

BUT THE TOTALITY OF THE EVIDENCE AS PRESENTED BY NUMEROUS STATE WITNESSES I THINK PRETTY CONCLUSIVELY SHOWS THAT THE CONVERSATION THAT FRAN MURRAY CLAIMED TO HAVE HAD WITH YVONNE BUSTAMANTE COULD NOT HAVE EVEN TAKEN PLACE.

EVEN IF IT DID, THE DYING DECLARATION THAT YVONNE SUPPOSEDLY GAVE TO FRAN MURRAY, WHICH WAS NOT TESTIMONIAL, WAS IT WAS A BLACK MAN DID IT, HE SHOULD BE ON THE CAMERA.

I MEAN, IF SHE KNEW WHO IT WAS BECAUSE HE'S AN INSURANCE CLIENT SHE KNOWS BY NAME, WHY WOULD SHE EVEN SAY THAT.

ACCORDING TO FRAN MURRAY, AT THE TIME SHE WAS HAVING THIS FAIRLY LONG INTIMATE CONVERSATION WITH YVONNE WHICH NOBODY ELSE SAW.

PEOPLE THAT WERE LOOKING STRAIGHT AT YVONNE LEANING ON THAT, NOBODY ELSE SAW.

EVELYN ANDERSON DOESN'T KNOW WHO FRAN MURRAY EVEN IS.

>> YOUR ARGUMENT IS THAT TESTIMONY, RECORD

[INAUDIBLE]

TOLD MURRAY, PRAY FOR ME, I KNOW I'M NOT GOING TO MAKE IT, PRAY FOR ME AND MY CHILDREN?

IS IT YOUR POSITION THAT THAT DID NOT HAPPEN?

>> YES.

THAT'S MY POSITION.

>> WELL, THAT'S THE RECORD.

>> BUT THE STATE'S OWN EVIDENCE SHOWS THAT COULDN'T HAVE HAPPENED.

I'M NOT ARGUING SUFFICIENCY.

I'M ARGUING THE LACK OF A RELIABLE PREDICATE FOR ADMISSIBILITY OF A DYING DECLARATION UNDER STATE LAW.

>> YOU'RE SAYING IT DIDN'T HAPPEN AT ALL.

AND WHAT'S THE PROOF THAT IT DID NOT HAPPEN?

>> I'M GETTING INTO FRAN MURRAY.

>> YOU HAVE TO.

LET ME ASK ONE OTHER PREDICATE QUESTION.

LET'S ASSUME THAT THIS

CONVERSATION TOOK PLACE WITH
MISSMURRAY AND THIS GOES TO
YOUR DYING DECLARATION, WHETHER
IT WAS OR WAS NOT.

AND THE VICTIM SAYS, AS WHAT SHE
SAID HERE, I'M NOT GOING TO MAKE
IT.

>> RIGHT.

THAT'S WHAT FRAN MURRAY SAYS THE
VICTIM SAID.

>> BUT THEN THE IDENTIFICATION
COMES THROUGH A DIFFERENT
WITNESS.

DOES THAT SATISFY THE DYING
DECLARATION?

>> IT COULD UNDER CIRCUMSTANCES
THAT ARE NOT AT PLAY HERE.
GIVEN THE CIRCUMSTANCES IN THIS
CASE IT DOES NOT.

TAKE FRAN MURRAY AND LET'S EVEN
ASSUME -- AND I THINK YOU GOT TO
BE PRETTY FANCIFUL.

AND I DON'T KNOW IF I'M GOING TO
HAVE TIME TO GO INTO THE DETAILS
OF WHY FRAN MURRAY'S TESTIMONY
COULD NOT HAVE BEEN TRUE, BUT
IT'S ALL IN THE BRIEF.

BUT, EVENT, OKAY, AT THE TIME
THAT FRAN MURRAY CLAIMS TO BE
HAVING THIS INTIMATE
CONVERSATION ABOUT RELIGION AND
KIDS AND EVERYTHING ELSE WITH
YVONNE, YVONNE WAS SCREAMING IN
PAIN, SHE WAS IN HORRIBLE PAIN.
AND BY THE TIME THAT ELROD
ENCOUNTERED HER, SHE DIDN'T
APPEAR TO BE IN MUCH PAIN AT
ALL, WHICH ELROD SAID THAT'S
VERY CONSISTENT WITH EVERYTHING
I KNOW ABOUT BURN INJURIES.

BECAUSE AS DR.NELSON EXPLAINED,
ONCE THE NERVE ENDINGS ARE
BURNED, THE PAIN SUBSIDES.

EVEN IF YOU ASSUME FRAN MURRAY
DIDN'T THINK SHE WAS GOING TO
MAKE IT -- I MEAN THAT YVONNE
DIDN'T THINK SHE WAS GOING TO
MAKE IT AT THE TIME SHE WAS
TALKING TO FRAN MURRAY, THAT
DOESN'T MEAN THAT SHE DIDN'T
HAVE SOME HOPE OF RECOVERY AT
THE TIME SHE WAS TALKING TO
LIEUTENANT ELROD.

AS A MATTER OF FACT, WHEN SHE
WAS ASKED ABOUT PAIN AT THIS

POINT SHE WAS MAINLY TALKING ABOUT HER WRIST.
THERE'S NOT ENOUGH OF A DIFFERENCE BETWEEN THE CIRCUMSTANCES AS TO YVONNE AND THE CIRCUMSTANCES AS TO JUANITA TO MAKE YVONNE'S DYING DECLARATION ADMISSIBLE EVEN UNDER TRADITIONAL FLORIDA LAW. BUT TO EVEN GET TO THAT POINT, YOU HAVE TO LOOK AT THE EVOLUTION OF THE DYING DECLARATION EXCEPTION AND WHY I'VE ARGUED SO HEAVILY THAT THE DYING DECLARATION EXCEPTION -- WELL, HAS IT SURVIVED CRAWFORD -- THERE ARE TWO FEDERAL DISTRICT COURT OPINIONS I'VE CITED AND A REALLY INTERESTING LAW REVIEW ARTICLE THAT SAY IT COULD NOT HAVE SURVIVED.
>> BUT THOSE OPINIONS ARE ADMITTEDLY OUTLIERS.
>> CORRECT.
CORRECT.
>> THE OVERWHELMING MAJORITY --
>> I ADMITTED THAT IN MY BRIEF. BUT WHAT HAPPENED AMONG THE STATES, THERE ARE I BELIEVE NOW ACCORDING TO THE MOST RECENT CASE WHICH I CITED AS SUPPLEMENTAL AUTHORITY, THERE ARE NOW 17 STATE SUPREME COURTS THAT HAVE SAID IT IS AN EXCEPTION TO CRAWFORD. WHEN I SAY IT IS AN EXCEPTION TO CRAWFORD, WE HAVE TO TALK ABOUT WHAT IS AN EXCEPTION TO CRAWFORD AND HALES POINTS THAT OUT.
[INAUDIBLE]
CRAWFORD SAID
THERE WERE TWO HEARSAY EXCEPTIONS THAT HAD BEEN THERE SINCE DAY ONE.
ONE WAS THE BUSINESS RECORD EXCEPTION AND TWO --
>> I BELIEVE THE TWO HE WAS TALKING ABOUT WERE DYING DECLARATIONS AND FORFEITURE, AND HE LEFT BOTH OF THOSE OPEN.
>> RIGHT.
>> AND FORFEITURE WAS DECIDED IN GILES, NOT ONLY -- DID DYING DECLARATION EXIST IN COMMON LAW? OF COURSE THEY DID.

THAT'S WHAT THE CALIFORNIA CASE SAID, THAT'S THE LEVEL OF THEIR ANALYSIS.

BASICALLY THE OTHER 17 STATES FELL LIKE DOMINOES.

BY THE FOURTH CASE IT WAS THREE OTHER CASES.

BY THE TENTH CASE IT WAS OTHER CASES.

EVERYBODY HAS DONE THE MATH, BUT NOBODY HAS DONE THE HISTORY UNTIL NOW.

HALES IS A VERY INTERESTING CASE.

DID A DYING DECLARATION SURVIVE CRAWFORD?

IF SO, WHAT IS THE NATURE OF THE DYING DECLARATION THAT SURVIVED CRAWFORD?

HALES SAYS IT'S THE EXCEPTION AS IT WAS UNDERSTOOD IN 1791.

I'D ALSO CITE THE CLAY CASE OUT OF NEWYORK, THE CHAVEZ CASE OUT OF FLORIDA, BEAUCHAMP OUT OF WISCONSIN.

YOU GOT TO LOOK AT THE RECENT APPLICATION OF THE --

>> WHAT'S THE EXACT STATEMENT THAT CAME IN THAT DIRECTLY INCULPATES YOUR CLIENT AS TO BUSTAMANTE?

YOU'RE SAYING THE OTHER STATEMENTS DID NOT COME IN.

WHAT DID SHE SAY?

>> SHE WAS ASKED WHO DID IT AND SHE SAID LEON DAVIS AND SHE WAS ASKED FURTHER QUESTIONS ABOUT WHAT EXACTLY HAPPENED IN THERE.

>> SO IS IT -- SO IT'S EVERY PART OF THE STATEMENT THAT YOU'RE SAYING DOESN'T QUALIFY AS A DYING DECLARATION?

>> CORRECT.

I MEAN, HER -- AND THE TRIAL JUDGE AGREED WITH THAT, TOO. HER STATEMENT IN RESPONSE TO LIEUTENANT ELROD'S QUESTIONING, WHICH WAS OVERHEARD BY OTHER WITNESSES AS WELL, NONE OF THAT COMES IN.

>> NOW, I HAVE A QUESTION ABOUT FORFEITURE BY WRONGDOING.

>> WHICH BY THE WAY CONCEDED WASN'T AT ISSUE HERE, BUT I'M GLAD TO ANSWER IT.

>> APPARENTLY THEY CONCEDED IT WASN'T TESTIMONIAL, BUT --

>> THEY ALSO SAID WE'RE NOT ARGUING FORFEITURE.

>> BUT I WANT TO UNDERSTAND HOW IT WOULD WORK, BECAUSE YOU HAVE HERE A LOT OF OTHER EVIDENCE THAT IT WAS LEON DAVIS IN THIS CASE, CORRECT?

>> YOU HAD -- WELL, YES AND NO.

>> I GUESS THE QUESTION I HAVE IS SOMEBODY IS CLEARLY, FROM THE EVIDENCE, MAYBE NOT BEYOND A REASONABLE DOUBT, BUT EVERYTHING POINTS TO THAT IT'S THIS PERSON.

>> I'M CERTAINLY NOT GOING TO CONCEDE THAT.

>> WELL, HOW DO YOU EVER DECIDE THAT SOMETHING -- SOMEONE PROCURES THE DEATH OF SOMEBODY, THAT WHAT THEY SAY CANNOT COME IN BECAUSE IT'S EITHER -- BECAUSE IT DOESN'T FALL UNDER CRAWFORD?

>> IF WE'RE TALKING ABOUT WHY FORFEITURE CAN'T BE AN ALTERNATIVE REASON FOR LETTING THIS IN.

>> RIGHT.

>> FIRST OF ALL, THE STATE DISAVOWS RELIANCE ON THAT. THERE WAS NO FORFEITURE EXCEPTION AT THE TIME OF THIS TRIAL.

THE SUPREME COURT SAID IN GILES THAT THE RATIONALE THAT JUDGE HUNTER USED, WHICH IS WHY YOU PROCURED HER ABSENCE BY KILLING HER, THAT'S EXACTLY WHAT THE COURT IN GILES SAID IS AN EXPANSION ON THE COMMON LAW FORFEITURE DOCTRINE.

YOU CAN ONLY USE IT, IF AT ALL, IF THERE'S A SHOWING THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF PROCURING --

>> AND I DO -- SO IT WOULD TURN -- I MEAN YOUR ARGUMENT THERE IS IT WOULD TURN EVERY MURDER CASE INTO THE EXCEPTION.

>> WELL, IN ADDITION TO THAT -- YEAH.

AND ACTUALLY SCALIA TALKS ABOUT IN COMMON LAW THERE WERE NO CASES WHERE THEY USED THE

FORFEITURE DOCTRINE WHERE IT WAS
THE MURDER IN THAT CASE THAT
WAS --

>> LET ME ASK YOU THIS.

AND I LOOK AT WITH SOME
AMUSEMENT SCALIA'S DISSENT IN
MICHIGAN VERSUS BRYANT.

PRE-CRAWFORD, DO YOU NOT SEE
THIS COMING IN AS A DYING
DECLARATION?

ARE YOU STILL ARGUING THAT IT
WOULDN'T COME IN AS A HEARSAY
EXCEPTION, IT'S RELIABLE,
IT'S --

>> I WOULD MAKE THE ARGUMENT I
MADE.

I WANT TO SAY PART A THROUGH
PART G.

EVEN PRE-CRAWFORD, EVEN UNDER
OHIO VERSUS ROBERTS, I THINK IT
WOULD STILL NOT COME IN.

>> WILLIAMS VERSUS STATE, THAT
CASE THERE WAS A DYING
DECLARATION --

>> I'M AWARE OF ALL THE CASE LAW
THAT SAYS YOU DON'T ACTUALLY
HAVE TO HAVE -- LIKE THE VICTIM
DOESN'T HAVE TO SAY I'M DYING.
I UNDERSTAND ALL THAT.

I CAN TELL FOR TIME REASONS I AM
PROBABLY GOING TO HAVE TO RELY
ON THE BRIEF ON THAT.

>> I'M CURIOUS.

WHY IS IT THAT THIS IS NOT A
DEATH DECLARATION?

WHY DO YOU THINK IT'S NOT?

>> WHY DO I THINK IT DOESN'T
COME IN AS A DYING DECLARATION?

>> YES.

>> WELL, FIRST OF ALL, HER
SITUATION WAS VERY DIFFERENT AT
THE TIME SHE WAS TALKING TO
ELROD THAN AT THE EARLIER TIME
WHEN SHE WAS SUPPOSEDLY TALKING
TO FRAN MURRAY.

BUT I'M MAKING THE SAME ARGUMENT
THE TRIAL LAWYER MADE, WHICH IS
THE STATE'S OWN PREDICATE
EVIDENCE IS SO JUMBLED THAT IT
DOESN'T SUPPORT A RELIABLE BASIS
FOR ALLOWING THIS IN AS A DYING
DECLARATION.

I'LL TRY TO GO TO THIS -- FRAN
MURRAY.

OKAY.

FRAN MURRAY CLAIMS THAT SHE WAS OUTSIDE IN THE BACK OF HEADLEY AND SHE SAW THE BURNED WOMAN IN THE BACK OF HEADLEY AND IT WAS YVONNE.

AND SHE -- ACCORDING TO HER TESTIMONY, SHE'S NOT CONFUSING YVONNE AND JUANITA BECAUSE SHE SAYS SHE SAW YVONNE GET SHOT IN THE WRIST OUT IN BACK OF HEADLEY.

THAT COULD NOT HAVE HAPPENED ACCORDING TO THE TESTIMONY OF OTHER WITNESSES THAT THE STATE AND THE TRIAL JUDGE RELIED ON, EVELYN ANDERSON, ASHLEY SMITH. THE EVIDENCE IS PRETTY CLEAR THAT WHAT HAPPENED IS THE WOMAN IN THE BACK, IF THERE WAS ANY WOMAN IN THE BACK, HAD TO HAVE BEEN JUANITA.

EVELYN ANDERSON COMES TO HEADLEY TO MAKE A PAYMENT.

SHE TRIES THE DOOR, FINDS IT LOCKED.

AND AS SHE FINDS IT LOCKED, A MAN COMES OUT, A TALL, WELL-BUILT, WELL-DRESSED YOUNG MAN AND HE COMES OUT.

SHE'S HEARD THREE POPS INSIDE. AND SHE SAYS WHAT'S GOING ON? HE SAYS THERE'S A FIRE IN THERE. HE THEN WALKS BRISKLY AROUND, GOES AROUND THE CORNER OF THE BUILDING AND HEADS UP PHILLIPS STREET.

AS HE'S ROUNDING THE CORNER, A BURNED WOMAN WHO HAS TO BE YVONNE, COMES OUT OF HEADLEY, WALKS OVER TO EVELYN ANDERSON'S TAHOE, GETS INSIDE THE OPEN DOOR, WHICH EVELYN ANDERSON WHICH FOR WHATEVER REASON DOESN'T LIKE THAT SITUATION. EVELYN SAYS COME OUTSIDE THE CAR, THE PARAMEDICS ARE ON THEIR WAY.

YVONNE IS THEN LEANING AGAINST THE TAHOE AND SHE'S THERE UNTIL THE PARAMEDICS AND POLICE OFFICERS COME.

ASHLEY SMITH, WHO KNOWS YVONNE PERSONALLY, CORROBORATES EXACTLY WHAT EVELYN ANDERSON SAW. ASHLEY SMITH IS IN FRONT, SHE

HEARS THE POPS, SEES THE BLACK MALE COME OUT, SEES YVONNE COME OUT AND GET IN THE TAHOE AND THEN STANDING BY THE TAHOE.

THE TESTIMONY IS CLEAR THAT YVONNE WAS LEANING ON THE TAHOE FOR THE ENTIRE TIME.

HOW COULD YVONNE EVER HAVE BEEN IN THE BACK?

THE ONLY WAY SHE COULD HAVE BEEN THE PERSON IN THE BACK IS IF SHE WENT BACK INSIDE AND CAME OUT THE FRONT DOOR?

NUMBER ONE, WHY WOULD SHE DO THAT?

IT STILL DOESN'T EVEN MAKE SENSE BECAUSE THE PERPETRATOR WOULD HAVE HAD TO HAVE GONE BACK IN THE BUILDING ALSO IN ORDER TO COME OUT THE FRONT DOOR AND WE KNOW HE DIDN'T BECAUSE FRAN MURRAY, AS WELL AS BRANDON GREISMAN AND ORTIZ HAVE HIM WALKING UP THE STREET TOWARD A CAR, A MAXIMA, WHICH IS NOT DAVIS' CAR.

SO WE KNOW FROM THAT THAT YVONNE BUSTAMANTE COULD NEVER HAVE BEEN IN THE BACK OF HEADLEY.

IT HAD TO HAVE BEEN JUANITA AT SOME POINT, IF ANYBODY WAS IN THE BACK.

IN ADDITION --

>> THE PROBLEM, WHICH IS AN INTERESTING ARGUMENT, WE WERE TALKING ABOUT WHETHER THE TRIAL JUDGE MAKES CREDIBILITY FINDINGS.

DIDN'T THE TRIAL JUDGE, THOUGH, FIND DIFFERENTLY?

>> HE FOUND BOTH.

BUT LOOK AT HIS SENTENCING ORDER.

HE FINDS BOTH BASED ON THE TESTIMONY OF BRANDON GREISMAN THAT IT WAS JUANITA IN THE BACK AND BASED ON THE TESTIMONY OF FRAN MURRAY THAT IT WAS YVONNE IN THE BACK.

BOTH CAN'T BE TRUE.

I'M NOT ARGUING SUFFICIENCY HERE.

I'M ARGUING LACK OF A RELIABLE PREDICATE.

THERE'S MORE TO IT.

IT GETS WORSE.

FIRST OF ALL, ACCORDING TO FRAN MURRAY, CARLOS ORTIZ WAS NEVER IN THE BACK WHEN GREISMAN GOT SHOT AND ANY OF THIS IS GOING ON.

CARLOS ORTIZ DOESN'T COME INTO THE PICTURE UNTIL SHE, FRAN, A FOOT BEHIND BRANDON, WALKED HIM BACK TO HIS DRIVEWAY AND THAT'S WHEN ORTIZ COMES INTO THE PICTURE.

GREISMAN AND ORTIZ HAVE EACH OTHER TOGETHER.

AND ACCORDING TO BRANDON GREISMAN, HE WAS VERY ADAMANT ON THE POINT THAT FRAN MURRAY WAS NOWHERE AROUND AT THE TIME OF THOSE OCCURRENCES.

WAS FRAN MURRAY THERE?

NO, BECAUSE THAT ISN'T WHAT HAPPENED.

ALL RIGHT.

NOW HERE'S THE BIGGEST KICKER ON FRAN MURRAY OF ALL IN TERMS OF THE LACK OF RELIABILITY OF THIS PREDICATE.

SHE SAYS AFTER ALL THIS STUFF HAS BEEN GOING ON, I WANTED TO GO IN THE FRONT AND SEE ABOUT YVONNE.

SO SHE GOES IN THE FRONT AND THERE IS YVONNE ON THE TAHOE. SHE WENT UP TO HER AND THEY HAD A CONVERSATION AND YVONNE WAS SAYING I NEED WATER.

SO FRAN WENT TO GET SOME WATER. THAT WAS THE FIRST TIME SHE SAW JUANITA.

SHE GETS THE WATER, COMES BACK, HOLDS THE WATER WHILE SHE'S GIVING IT TO YVONNE AND THEN THEY HAVE WHAT HAD TO HAVE A FAIRLY PROTRACTED CONVERSATION AS DESCRIBED BY FRAN.

FRAN AT ONE POINT SAID SHE THOUGHT IT TOOK AT LEAST TEN MINUTES, ALTHOUGH SHE LATER SAID, WELL, MAYBE IT SEEMED LIKE THAT.

THERE WAS A LOT OF STUFF SAID BETWEEN THESE TWO WOMEN ABOUT HER KIDS, ABOUT, YOU KNOW, GOD, IF YOU HAVE FAITH, YOU KNOW, THAT YOU NEED TO CALM DOWN

BECAUSE STRESS MAKES THIS WORSE.
THERE WAS A FAIRLY PROTRACTED,
INTIMATE CONVERSATION GOING ON
BETWEEN FRAN AND YVONNE.

OKAY.

ACCORDING TO VICKIE RIVERA, THE
CLOSEST WITNESS TO CORROBORATING
ANYTHING FRAN SAYS, VICKIE SAYS
WHEN FRAN CAME BACK WITH THE
WATER, UNIFORMED PERSONNEL WERE
ALREADY ON THE SCENE ASSISTING
YVONNE.

SO THERE'S NO WAY THAT THAT
CONVERSATION COULD HAVE
OCCURRED.

EVELYN ANDERSON, WHO SAYS SHE
WAS WATCHING YVONNE THE ENTIRE
TIME, SHE SAYS I'VE NEVER SEEN
FRAN MURRAY OR VICKIE RIVERA
BEFORE IN MY LIFE.

SHE DOES SAY SOMETHING TO THE
EFFECT OF SHE CAN'T EXCLUDE THE
POSSIBILITY THAT SOMEBODY GAVE
HER WATER BECAUSE HER ATTENTION
WAS FOCUSED ON YVONNE.

BUT IF HER ATTENTION WAS FOCUSED
ON YVONNE, HOW COULD THIS
CONVERSATION HAVE OCCURRED?
THEN YOU GOT TO FACTOR IN THAT
FRAN MURRAY SAYS THAT -- SHE
ASKS YVONNE WHO DID IT AND
YVONNE SAYS IT WAS A BLACK MAN
AND HE SHOULD BE ON CAMERA.
WHY WOULD SHE SAY THAT IF SHE
KNEW IT WAS LEON DAVIS AND HE'S
AN INSURANCE CLIENT OF THEIRS?
IT'S IMPORTANT TO LOOK AT WHO
THESE PEOPLE WERE.

I'M NOT TALKING ABOUT EVELYN
ANDERSON OR ASHLEY SMITH, BUT
LOOK AT GREISMAN, ORTIZ, FRAN
MURRAY, VICKIE RIVERA.

THAT'S A SLEAZY GROUP OF PEOPLE.
GREISMAN WAS ON PROBATION AT THE
TIME.

WATCH THE DEVIOUSNESS OF ORTIZ
WAS HE TALKS ABOUT -- HE GOT
CAUGHT IN A LIE DURING HIS DEPO
AS TO WHEN HE SAW THE NEWS, WHEN
HE SAW THE NEWSPAPER.

HE REVERSED HIS FIELD AFTER HE
GOT CAUGHT IN THE LIE.

AND HE BASICALLY ACCUSES BOB
NORGARD, WELL, HEY, YOU WERE
CONFUSING ME WITH YOUR

QUESTIONS.

LOOK AT HIS ANSWERS.

THEY'RE VOLUNTEERED.

NORGARD WASN'T CONFUSING HIM
WITH HIS QUESTIONS.

ORTIZ HAD TOLD THE POLICE
DETECTIVE THAT HE HADN'T SEEN
ANY PICTURES OF THE DEFENDANT,
HADN'T SEEN ANY OF HIS REPORTS.
THE DETECTIVE SAID I WOULDN'T
HAVE SHOWN HIM THE PHOTO SPREAD
IF HE HAD.

THEN IN THE DEPO HE VOLUNTEERS
THAT HE SAW IT ON THE NEWS THE
NEXT DAY, HE WATCHES CHANNEL 13,
HE VOLUNTEERS THAT HE SAW IT IN
THE PAPER.

HE EVEN GAVE AN INTERVIEW THAT
GOT INTO A LATER PAPER.

ON THE 15TH THERE'S A BIG, FULL
FACE PICTURE OF LEON DAVIS ON
THE FRONT PAGE.

>> YOU'RE INTO YOUR REBUTTAL
TIME.

>> YEAH, I AM, AND I PROBABLY
SHOULD SIT DOWN.

>> MAY IT PLEASE THE COURT,
TIMOTHY FREELAND ON BEHALF OF
THE STATE OF FLORIDA.

THE STATE AGREED THAT THE
INFORMATION RECEIVED BY
LIEUTENANT ELROD WAS
TESTIMONIAL, BUT THAT'S NOT THE
ONLY STATEMENT THAT WE HAVE IN
THE RECORD HERE.

LET ME TAKE A SECOND AND GO
THROUGH IT.

THE TRIAL JUDGE IN HIS ORDER
ADDRESSING THIS FOUND THAT THERE
WERE STATEMENTS THAT WERE MADE
TO MORE THAN ONE INDIVIDUAL.
WE HAVE -- SPECIFICALLY WE HAVE
EVELYN ANDERSON, WHO STOOD WITH
YVONNE BUSTAMANTE OUT IN FRONT
OF THE HEADLEY INSURANCE
COMPANY.

SHE HEARD THE NAME LEON DAVIS.
AND THIS WAS NOT -- ACCORDING TO
EVELYN ANDERSON, THIS WAS NOT A
STATEMENT MADE IN RESPONSE TO
ANY QUESTIONING.

THIS IS WHAT I HEARD.

THIS IS WHAT SHE SAID WHEN THE
PARAMEDICS WERE THERE.

THAT IS NOT TESTIMONIAL.

THAT IS EVIDENCE FOR THE PURPOSE OF -- FOR SOME OTHER PURPOSE. WHEN WE LOOK AT WHAT HAPPENED AT THE TIME THAT SHE MADE THE STATEMENT AND THE REASON WHY I'M GOING THROUGH THIS IS BECAUSE THIS ADDRESSES THE ISSUE OF WHETHER THIS IS SPONTANEOUS OR AN EXCITED UTTERANCE.

WE KNOW THE FOLLOWING FACTS: SOMEONE WENT INTO THE HEADLEY INSURANCE AT AROUND 3:30. THERE IS EVIDENCE THAT SOMEONE INSIDE THE HEADLEY INSURANCE COMPANY TRIGGERED THE PANIC ALARM, WHICH WAS RECEIVED BY THE ADT SECURITY COMPANY. THAT PANIC ALARM WAS SET OFF AT 3:35.

SOMETHING WAS GOING ON INSIDE THE INSURANCE COMPANY AT THAT POINT.

NOW, IT'S REASONABLE FOR US TO INFER THAT WHEN THE PANIC ALARM WENT OFF, NEITHER ONE OF THE WOMEN WERE ON FIRE AT THIS POINT BECAUSE I THINK WE COULD INFER THAT IF THEY WERE ENGULFED IN FLAMES, THEY WOULD NOT BE THINKING ABOUT PRESSING THE PANIC ALARM.

WE KNOW THAT THE PARAMEDICS ARRIVED AT 3:46, AND THE RECORD IS THAT THAT'S THE TIME WHEN WE HAVE FIRST PATIENT CONTACT BY THE PARAMEDICS.

SO BY THAT TIME YVONNE BUSTAMANTE IS OUTSIDE STANDING BY THE SUV.

WE KNOW THAT BOTH VICTIMS, WELL AT LEAST YVONNE BUSTAMANTE, WAS TAKEN AWAY FROM HELICOPTER AT 4:06.

SO WE'RE TALKING WITHIN THE SPACE OF TIME OF LESS THAN 30 MINUTES FROM THE TIME THE PANIC ALARM WENT OFF TO THE TIME THAT THEY WERE REMOVED FROM THE SCENE.

THIS IS THE SPACE OF TIME WHEN THE STATEMENT WAS MADE.

DURING THAT PERIOD OF TIME WE KNOW THAT UNFORTUNATELY YVONNE BUSTAMANTE HAD THIRD-DEGREE AND GREATER BURNS TO 80% OF HER

BODY.

>> BUT AS FAR AS THE DYING
DECLARATION ISSUE, DOES IT
DEPEND ON FRAN MURRAY SAYING
THAT SHE THOUGHT -- SHE SAID
PRAY FOR ME AND -- DOES THAT
PREDICATE NEED TO COME FROM HER
TESTIMONY OR CAN IT BE JUST FROM
THE CIRCUMSTANCES OF SOMEBODY
BEING BURNED OVER WHAT
PERCENTAGE OF THEIR BODY?

>> GREATER THAN 80%.

WE DON'T -- THERE IS CASE LAW
THAT DOES INDICATE THAT WE ONLY
HAD TO SHOW THAT IT'S LIKELY
THAT THE PERSON BELIEVED THAT
THEY WERE NOT GOING TO MAKE IT.

>> WHO IS THE FIRST PERSON SHE
SAYS IT WAS LEON DAVIS?

>> I BELIEVE THAT WOULD HAVE
BEEN EVELYN ANDERSON.

>> AND SO YOU SAY THAT COMES IN
AS IT WAS -- AT THAT POINT ARE
YOU SAYING IT'S NOT --

>> TESTIMONIAL.

>> IT'S NOT TESTIMONIAL BECAUSE
SHE'S JUST --

>> CORRECT.

>> WHAT DOES SHE SAY?

>> SHE SAYS LEON DAVIS DID THIS.

>> AND SHE DOES THAT IN ORDER TO
-- I MEAN, IF -- READING THE
BRYANT CASE, IS SHE DOING IT TO
GET ASSISTANCE?

>> TO DEAL WITH THE EMERGENCY
SITUATION.

THE PARAMEDICS ARE THERE.
THAT'S WHAT EVELYN ANDERSON
SAID.

THE PARAMEDICS WERE THERE
TALKING TO HER ABOUT WHAT
HAPPENED TO YOU.

AND SO SHE'S, YOU KNOW, STILL
GOING THROUGH THIS -- SHE IS
STILL DYING.

SHE'S STILL GOING THROUGH THAT
PROCESS.

>> BUT WHAT YOU'RE SAYING THERE
IS LET'S JUST ASSUME -- IT
SOUNDS TO ME LIKE YOU'RE SAYING
THAT'S AN EXCITED UTTERANCE,
WHICH STILL-- YOU KNOW, WITH
CRAWFORD, YOU STILL HAVE TO GET
PAST-- IF IT'S JUST AN EXCITED
UTTERANCE, THAT'S NOT ENOUGH TO

SURVIVE CRAWFORD.

>> BUT MY ARGUMENT WOULD BE
THERE IS AN EXCITED UTTERANCE IS
NOT TESTIMONIAL.

IF IT'S NOT TESTIMONIAL, THEN I
THINK WE COULD ARGUE THAT IT
DOES GET PAST CRAWFORD.

>> YOU'RE SAYING THERE'S A
SUPREME COURT CASE THAT SAYS
EXCITED UTTERANCES ARE BY THEIR
NATURE --

>> I'M NOT SAYING THAT.

>> AGAIN, THIS CRAWFORD
SITUATION, SINCE IT'S COME OUT,
HAS CAUSED COURTS ALL AROUND THE
COUNTRY TO BE BAFFLED.

>> IT HAS.

>> BECAUSE TO ME WE'RE LOOKING
FOR THE RELIABILITY OF THE
TESTIMONY.

>> THAT'S WHAT WE WANT.

>> AND CERTAINLY SOMEBODY COMING
OUT BURNED ON 80% OF THEIR BODY
AND SAYS IT'S LEON DAVIS IS
THERE.

BUT YOU'RE SAYING THAT -- WHICH
CASE SAYS EXCITED UTTERANCE IS
BY DEFINITION NOT TESTIMONIAL?

>> WELL, THERE'S NO SUPREME
COURT CASE THAT HAS ACTUALLY
SAID THAT IT'S NOT TESTIMONIAL.
BUT WE DO KNOW IF IT IS NOT
TESTIMONIAL, THEN WE DON'T HAVE
THE SAME KINDS OF ISSUES THAT
WE'RE TALKING ABOUT IN CRAWFORD.

>> WHAT YOU'RE TELLING US IS
THAT EVEN WITHOUT MURRAY'S
TESTIMONY AS TO BUSTAMANTE
SAYING, I'M DYING, I'M NOT GOING
TO MAKE IT, SO ON AND ON, EVEN
WITHOUT THAT TESTIMONY, STILL
QUALIFIES.

IT'S BASED ON THE NATURE OF HER
INJURIES.

SHE HAD 80% BURNS.

SHE WAS SCREAMING IN PAIN.

ONE CAN IMAGINE.

AND, YOU KNOW, THE BURNS
THEMSELVES, ACCORDING TO THE
WITNESSES, ALTHOUGH THIS DOESN'T
COUNT, BUT ACCORDING TO THE
WITNESSES EVERYBODY THOUGHT SHE
WASN'T GOING TO MAKE IT.

SO SHE MUST HAVE BEEN IN A LOT
OF PAIN.

THAT ALONE I THINK IS YOUR POSITION WILL QUALIFY IT AS A DYING DECLARATION. ANY REASONABLE PERSON WOULD BELIEVE THIS PERSON THINKS HE OR SHE IS DYING, CORRECT?

>> CORRECT.

>> THEN WHY DIDN'T HE LET IN LUCIANO, WHO HAD 90% OF HER BODY?

ACTUALLY, SHE SUFFERED GREATER DAMAGES.

WHY DIDN'T HE LET THAT IN?

>> THE TRIAL JUDGE UNFORTUNATELY, HE MADE AN ERROR, AND THAT IS PART OF OUR CROSS-APPEAL WHICH IF WE WANT TO GO THERE, WE CAN.

THAT REALLY IS THE ONLY DIFFERENCE BETWEEN THE TWO. WE HAVE MISLUCIANO, WHO DID NOT SAY I'M DYING. SHE DID NOT SAY THAT. BUT HER INJURIES WERE VIRTUALLY IDENTICAL AND IN SOME RESPECTS WERE WORSE.

SO I THINK THE TRIAL JUDGE JUST -- THE CASE LAW DOES NOT ACTUALLY REQUIRE THAT THE INDIVIDUAL MAKE THAT STATEMENT. I'M DYING.

I KNOW THAT I'M GOING. THE CASE LAW REQUIRES THAT THERE BE ENOUGH OF A PREDICATE TO SHOW THAT THIS PERSON PROBABLY BELIEVED THAT THEY WERE DYING. AND NONE OF THE CIRCUMSTANCES -- THESE -- THE HORRIFIC FACTS THAT WE HAVE HERE DO ESTABLISH THAT.

>> IF I RECALL THE FACTS CORRECTLY, WHEN THE POLICE AND THE PARAMEDICS ARRIVED AT THE RESTAURANT, LUCIANO WAS ACTUALLY SITTING ON A CHAIR AND THEY ACTUALLY STARTED WORKING ON HER. SO I DON'T KNOW.

DID SHE HAVE A HOPE THAT SHE WOULD MAKE IT?

AS OPPOSED TO BUSTAMANTE, WHO WAS IN SUCH PAIN AND ALL SHE WAS TALKING ABOUT AT THE MOMENT IS HER CHILDREN AND PRAY FOR ME, THAT KIND OF THING?

I MEAN, THAT MAY BE A DIFFERENCE.

>> I CAN'T DISPUTE THAT WHAT SHE SAID IN TERMS OF HER CONDITION WAS DIFFERENT FROM --
>> WELL, ABSOLUTELY.
WHAT BUSTAMANTE SAID DIFFERS.
BUT AS FAR AS THE INJURIES WERE CONCERNED, THERE MAY HAVE BEEN MORE TO -- FROM WHAT I'M READING, THERE MAY HAVE BEEN MORE IN LUCIANO'S CASE, INDICATIVE OF THE FACT THAT SHE MAY HAVE THOUGHT, YOU KNOW, I GOT THIS BABY, I'M GOING TO PUSH, I'M GOING TO REALLY TRY TO MAKE IT, THAT KIND OF THING. SHE WAS BEING WORKED ON. SHE WAS TALKING.
SHE WAS TALKING TO THEM ABOUT WHAT HAPPENED, MORE SO THAN BUSTAMANTE, WHO WAS JUST SCREAMING IN PAIN.
SO THAT MAY HAVE BEEN THE DIFFERENCE.
I DON'T --
>> BOTH WITNESSES WERE SCREAMING -- BOTH VICTIMS WERE SCREAMING IN PAIN.
WE KNOW THAT.
MISS BUSTAMANTE IN THE RESTAURANT WERE TALKING ABOUT HER HANDS WERE STILL BURNING AND THEY HAD TO GET WATER TO DEAL WITH --
>> I DON'T THINK THE PAIN -- BUT THIS IS WHY THE JUDGE -- THE MURRAY STATEMENT BECOMES SOMEWHAT EMBLEMATIC OF WHAT WE THINK OF WITH A DYING DECLARATION, THAT A PERSON HAS TO BELIEVE HE OR SHE IS DYING. THE FACT THAT SHE SAYS THAT HELPS.
>> IT'S STRONGER.
>> THE PROBLEM IS IF WE SAY SOMEONE IN PAIN, THEN ANYONE, THAT COULD REALLY EXTEND TO A WHOLE LOT OF VICTIMS THAT SURVIVE A GUNSHOT, BUT -- OR -- AND DON'T DIE.
SO THEY JUST -- SO BUT BACK TO THIS SITUATION.
IS THERE ANY OTHER STATEMENTS THAT ARE -- THAT YOU SAY ARE NOT TESTIMONIAL?
YOU SAID THE FIRST ONE YOU

BELIEVE WAS AN EXCITED
UTTERANCE, NOT TESTIMONIAL.
ANY OTHERS?

>> NO.

NO.

THAT'S IT.

>> WHAT ABOUT CALVIN JOHNSON?

>> MR. JOHNSON, ONE OF THE
EMTs WHO OVERHEARD THE
STATEMENT?

>> RIGHT.

>> ALL OF THAT, WHETHER WE'RE
TALKING ABOUT EXCITED UTTERANCE,
WHETHER WE'RE TALKING ABOUT FOR
THE PURPOSES OF MEDICAL
TREATMENT, ALL OF THOSE
CONSTITUTE AN EXCEPTION WHICH I
WOULD ARGUE WOULD NOT BE
TESTIMONIAL.

THEY'RE NOT -- I MEAN, THE
DEFINITION OF TESTIMONIAL IS
BEING TAKEN FOR THE PURPOSE OF
SETTING UP A COURT HEARING.

>> WHAT DID JOHNSON HEAR?

>> HE HEARD HER IDENTIFY THE
LAST NAME.

HE HEARD SOMETHING DAVIS.

SO THAT IDENTIFIES THE
DEFENDANT.

>> HE HEARD HER SPEAKING TO WHO?

>> HE WAS -- HE HEARD HER
SPEAKING TO LAW ENFORCEMENT.

>> SO, I MEAN, AGAIN, WE'RE NOT
GOING TO GET IN THROUGH THE BACK
DOOR HERE.

I MEAN, IF THE EMTs ARE SAYING
WHAT HAPPENED, THAT THEY WANT TO
TREAT THE PERSON, THAT'S VERY
POWERFUL TESTIMONY AND THAT IS A
STATEMENT THAT -- WHAT'S THE
EXCEPTION?

IN AID OF A MEDICAL DIAGNOSIS.
BUT THAT'S A DIFFERENT
EXCEPTION.

>> WELL, IT'S IMPORTANT TO
REMEMBER HERE THAT WHEN WE LOOK
AT WHAT THE INDIVIDUAL WITNESSES
SAID, I'M NOT GOING TO DISPUTE
THAT THERE MAY BE SOME TROUBLE
WITH REGARD TO WHAT MR. JOHNSON
HEARD.

BUT WHAT WE LOOK AT WHAT
MISS EVELYN ANDERSON HEARD, HER
TESTIMONY WAS THAT I HEARD HER
SPEAKING TO THE PARAMEDICS.

THERE'S NO TESTIMONY THAT EVELYN
ANDERSON HEARD HER TALKING TO
LAW ENFORCEMENT OR MISS --
>> WHY DOESN'T THAT COME IN
THROUGH THE PARAMEDICS.
>> IT COULD.
>> IF SHE MISHEARD WHAT SHE SAID
TO THE PARAMEDICS, SOME OTHER
ISSUE WITH RELIABILITY, I MEAN,
THIS IS -- I'M GETTING THIS
IMAGE.
THIS PLACE IS ON FIRE.
THESE PEOPLE ARE ON FIRE.
>> EMERGENCY SITUATION.
>> IT IS FOR EVERYBODY A VERY
STARTLING EVENT.
AND SO IN TERMS OF RELIABILITY,
IF SOMEBODY'S OVERHEARING
SOMETHING TALKING TO SOMEONE
ELSE, YOU'VE GOT NOW ANOTHER
LAYER, AND I'M NOT SURE THAT WE
WANT TO GO THERE IN THIS CASE.
I DON'T THINK YOU NEED TO.
>> WE DON'T, YOUR HONOR.
IF WE LOOK AT THE REMAINDER OF
THE FACTS HERE, WAS THE
IDENTIFICATION OF LEON DAVIS
RELIABLE?
WELL, THIS IS A SMALL PART OF
ALL OF THE EVIDENCE THAT WE HAVE
IN THIS CASE.
I MEAN, EVELYN ANDERSON HEARD
THE VICTIM SAY LEON DAVIS DID
THIS TO ME.
WE HAVE ALL THIS OTHER EVIDENCE
THAT TIES IN LEON DAVIS TO BEING
THE PERPETRATOR OF THIS CRIME.
WE KNOW THAT HE WAS HAVING
FINANCIAL DIFFICULTIES.
HE WAS BEHIND ON HIS MORTGAGE.
HE HAD A REASON TO NEED TO
GO --
>> NOW, WHAT ISSUE ARE YOU GOING
TO WHEN YOU'RE TELLING US THAT?
>> WELL, ALL OF THIS IS -- WE'RE
STILL TALKING ABOUT THE DYING
DECLARATION.
>> BECAUSE SHE COULD PROBABLY
HAVE GOTTEN THIS CONVICTION
WITHOUT THE STATEMENTS.
>> THERE'S OTHER EVIDENCE.
IT'S CUMULATIVE.
>> IT'S NOT CUMULATIVE.
IT'S PRETTY POWERFUL COMING FROM
THE PERSON.

>> PLUS THE DEFENDANT ADMITTED
IT TO HIS BROTHER.
I COMMITTED A ROBBERY.
THIS WAS WITHIN A FEW MINUTES
AFTER THE ROBBERY WAS COMMITTED.

>> ARE YOU ARGUING HARMLESS
ERROR?

I DON'T THINK THERE'S AN ISSUE
OF SUFFICIENCY OF THE EVIDENCE.

>> IF WE HAD TO REACH THAT
POINT, IT'S CLEARLY HARMLESS,
BECAUSE THERE'S PLENTY OF OTHER
EVIDENCE, INCLUDING THE
DEFENDANT'S OWN ADMISSION.

>> I'D LIKE TO ASK YOU ABOUT
YOUR CROSS-APPEAL ISSUES.
IF THE COURT WERE TO REJECT THE
ARGUMENTS MADE BY THE APPELLANT,
IS THERE ANY REASON AT ALL THAT
WE WOULD NEED TO REACH THE
CROSS-APPEAL ISSUES?

>> NO.

NO.

NO.

I AGREE.

WE HAVE PLENTY OF OTHER EVIDENCE
HERE.

I MEAN, IF YOU'RE TALKING ABOUT
-- YOU'RE TALKING ABOUT IF WE
ELIMINATED THE STATEMENT FROM
YVONNE BUSTAMANTE AS BEING --

>> NO.

NO.

NO.

I'M JUST SAYING WE REJECT THE
ARGUMENT THAT THE APPELLANT IS
MAKING AND THEY DON'T GET A NEW
TRIAL, THEY DON'T GET ANYTHING
ELSE.

I MEAN, WHY WOULD WE ADDRESS THE
CROSS-APPEAL ISSUES?

IT'S PURELY ADVISORY.

>> CORRECT.

I HAVE TO AGREE WITH THAT.

THAT'S CORRECT.

IF WE LEAVE THE CASE EXACTLY AS
IT IS, THE STATE WOULD BE HAPPY.

>> ON THE OTHER HAND --

>> WE'RE NOT LOOKING FOR ANOTHER
TRIAL OUT OF THIS.

>> ON THE ISSUE OF THE EYE
WITNESS -- THE EXPERT SHALL IT
SORT OF HELPS ME IN LOOKING AT
THE RELIABILITY OF THE EYE
WITNESS IDENTIFICATION THAT THE

JURY ALSO HEARD FROM AN EXPERT
AS TO WHAT MAY OR MAY NOT
INFLUENCE THE IDENTIFICATION.
>> I READ YOUR CONCURRENCE IN
PETERSON.
>> OBVIOUSLY THE JUDGE READ
SIMMONS.
>> YES.
>> THIS KIND OF PROTECTS THE
STATE.
YOU KNOW, YOU GET A CONVICTION,
BUT YOU'VE GOT AN EXPERT THAT IS
ABLE TO GIVE THE JURY THE OTHER
SIDE.
BUT I REALIZE, YOU KNOW, YOU'VE
GOT YOUR CROSS-APPEAL.
>> WE'RE NOT PLEASED WITH THE
EXPERT.
WE'RE NOT PLEASED WITH THAT KIND
OF EXPERT TESTIMONY.
SO LET ME ADDRESS THAT JUST FOR
A MINUTE.
AND I'M AWARE THAT THE COURT HAS
AN EXPRESSED AN APPARENT
APPROVAL, NOT EXPRESSLY, BUT
SAID WE DON'T SEE ANYTHING WRONG
WITH THIS KIND OF EVIDENCE
COMING IN.
>> THAT WAS ME.
>> MY CONCERN IS THAT WE'RE
TALKING ABOUT UNDER THE FRYE
TEST, MY ARGUMENT IS THAT THE
TRIAL JUDGE HERE -- AND WE
REMEMBER THAT THE STANDARD OF
REVIEW ON THE FRYE TEST IS
DENOVO, SO THE JUDGE DOESN'T
GET DEFERENCE IN TERMS OF THE
FOUNDATIONAL REQUIREMENTS HE
FOUND.
>> THIS IS REALLY SCREWED UP
BECAUSE NOW WE HAVE DAUBERT AND
WE HAVE A CASE THAT SAYS YOU
LOOK AT THE ISSUE OF RELIABILITY
BASED ON APPEAL, WHICH
APPARENTLY WE SAY, WHICH MAKES
NO SENSE TO ME.
>> WE'RE GOING TO HAVE A LOT OF
FUN WITH THESE ISSUES IN THE
FUTURE.
BUT IF WE CAN FOCUS ON WHAT THE
TRIAL COURT DID IN THIS CASE, I
DON'T THINK THAT IT WAS CORRECT
FOR THE TRIAL JUDGE TO HAVE
FOUND THAT THIS KIND OF EVIDENCE
MEETS THE FRYE TEST.

THERE ARE A NUMBER OF PROBLEMS WITH IT.

FIRST OF ALL, LET'S LOOK AT EVIDENCE THAT THIS KIND OF EXPERT TESTIMONY MEETS THE REQUIREMENT, THAT IT IS WITHIN THE -- IT'S WIDELY ACCEPTED BY THE SCIENTIFIC COMMUNITY.

THE PRIMARY EVIDENCE THAT WE HAVE OF THAT COMES IN THROUGH THE KASSIN SURVEY, WHICH IS A DEEPLY-FLAWED SURVEY.

THIS WAS -- LET'S LOOK AT HOW THE KASSIN SURVEY WAS CONDUCTED. WE HAVE 196 INDIVIDUALS, SOCIAL PSYCHOLOGISTS, ALL CONTACTED THROUGH THE SURVEY.

HOW MANY RESPONDED?

LESS THAN A THIRD OF THOSE RESPONDED.

WHO WERE THE PEOPLE WHO RESPONDED?

95% OF THOSE PEOPLE WHO RESPONDED WERE HIRED REGULARLY BY THE DEFENSE TO TESTIFY IN DEFENSE MATTERS.

SO IS THIS SURVEY A BROAD INDICATION OF ACCEPTANCE BY THE SOCIAL PSYCHOLOGIST COMMUNITY? IT'S NOT.

AND THE TRIAL JUDGE MADE A MISTAKE.

>> I WANT TO ASK YOU ON THE QUESTION OF RELIABILITY -- AND YOU KNOW THAT MOST OF THE STATES SAY THIS TYPE OF EVIDENCE SHOULD COME IN.

WE KNOW THAT EYEWITNESS MISIDENTIFICATION IS THE LEADING CAUSE OF WRONGFUL CONVICTIONS. IF THE -- WHERE IS IT IN THE SCIENTIFIC COMMUNITY WHERE THEY DON'T ACCEPT THE FACT THAT THESE FACTORS THAT DR. BRIGHAM TESTIFIES TO, BEING UNDER STRESS, RACIAL MISIDENTIFICATION, THE LENGTH -- YOU KNOW, THOSE ISSUES, LENGTH OF TIME, IS NOT -- ARE NOT FACTORS THAT CAN AFFECT THE RELIABILITY OF AN EYE WITNESS IDENTIFICATION?

>> HERE IS THE PROBLEM I HAVE WITH THAT.

THE PROBLEM IS THAT WE DON'T

HAVE CLEAR DEFINITION OF TERMS.
WHEN WE'RE TALKING ABOUT STRESS,
FOR EXAMPLE, I THINK MOST PEOPLE
WOULD AGREE THAT WHEN A PERSON
IS UNDER SOME LEVEL OF STRESS,
THAT'S GOING TO AFFECT YOUR
ABILITY TO RECALL.

AND I THINK EVEN THE STATE'S
EXPERT SAID THAT THAT IS A
POSSIBILITY, THAT CAN AFFECT.
BUT THE TESTS, THE STUDIES THAT
WERE DONE TO EXAMINE THAT IN
THIS CASE, THAT DR. BRIGHAM
TESTIFIED TO ARE NOT IN THE
FIELD ACTUAL STUDIES OF CRIME
VICTIMS.

>> DID THE STATE PUT ON AN
EXPERT?

>> RIGHT.

>> AND THEN THERE WAS
CROSS-EXAMINATION?

>> THERE WAS, YES.

SO THE KINDS OF STUDIES THAT
WE'RE TALKING ABOUT, THERE'S
NEVER BEEN ANY ARCHIVAL STUDIES,
ACTUALLY TALKING WITH ACTUAL
CRIME VICTIMS AND EXAMINING HOW
WERE THE FACT THAT THEY HAD A
GUN IN THEIR FACE, HOW DID THAT
AFFECT THEIR ABILITY TO RECALL
OR NOT RECALL.

THE KINDS OF STUDIES ARE STUDIES
THAT WERE DONE -- CLASSROOM
STUDIES WITH STUDENTS, STUDENTS
THAT, FOR EXAMPLE, ARE GIVEN
CREDIT FOR PARTICIPATING IN THE
STUDY AND STUDIES WHERE 100% OF
THE STUDENTS RESPONDED WITH WHAT
THEY SAW OR DIDN'T SEE.

IN REAL LIFE, THAT'S NOT WHAT
HAPPENS.

WE HAVE LAW ENFORCEMENT GOING
OUT DRUMMING UP WITNESSES,
TALKING TO THEM.

YOU WERE THERE.

WHAT DID YOU SEE?

SOME OF THOSE WITNESSES IN REAL
LIFE WILL SAY, I WAS THERE, BUT
I DIDN'T REALLY SEE WHAT
HAPPENED, IN WHICH CASE THE
STATE WOULD SAY THIS IS NOT A
RELIABLE WITNESS, WE WOULD NOT
USE THAT PERSON.

BUT IN THE SURVEY AND THE
STUDIES CONDUCTED BY

DR.BRIGHAM, THAT PERSON WOULD
HAVE BEEN USED AS PART OF THE
RESULT OF THE STUDY.
SO THAT'S PART OF THE FLAW THAT
I HAVE.

THAT'S PART OF THE PROBLEM I
HAVE WITH THAT KIND OF -- THE
OTHER PROBLEM IS WHEN WE'RE
TALKING ABOUT SOCIAL PSYCHOLOGY
-- AND I HATE TO CONDEMN IT AS A
GROUP, BUT I DO -- WE'RE TALKING
ABOUT SOFT SCIENCE AS OPPOSED TO
HARD SCIENCE.

THIS IS NOT THE KIND OF SCIENCE
LIKE IN CHEMISTRY AND PHYSICS A
PLUS B IS C AND I KNOW HOW MUCH
A IS AND I KNOW HOW MUCH B IS
AND I CAN PREDICT HOW MUCH C IS
GOING TO BE.

THAT'S NOT WHAT WE HAVE HERE.
THAT'S DEDUCTIVE REASONING AND
THAT'S RELIABLE AND THAT'S THE
KIND OF EVIDENCE THAT WE WANT TO
HAVE IN THE COURTROOM.

THE KIND OF --

>> LET ME JUST ASK YOU THIS
QUESTION.

>> I'M ON A RANT, SO --

[INAUDIBLE]

IS IT THAT WHAT
IS BEING SOUGHT TO BE INTRODUCED
IN EVIDENCE IS TESTIMONY AS TO
FACTORS, THOSE FIVE FACTORS.
SOMEONE MIGHT AGREE WITH YOU ON
FRAUD ARE NOT ACCURATE.

BUT THOSE FACTORS THAT MAY
INFLUENCE A PERSON'S ABILITY TO
HAVE SEEN WHAT THE PERSON CLAIMS
TO HAVE SEEN OR NOT.

OR IS WHAT IS BEING SOUGHT IS
TESTIMONY THAT BASED -- YOUR
TYPICAL EXPERT BECAUSE THE RULES
OF EVIDENCE NOW ALLOW OBVIOUSLY
AN EXPERT TO PROVIDE AN OPINION
AS TO THE ULTIMATE QUESTION OF
FACT, ISSUE OF FACT IN THE CASE.
SO I'M GOING TO HAVE EXPERTS
COMING IN AND TESTIFYING THAT
BASED ON MY EDUCATION, MY
EXPERIENCE, MY REVIEW OF THE
RECORD, IN THIS CASE THE WITNESS
COULD NOT HAVE IDENTIFIED THIS
PERSON.

>> THAT'S MY PROBLEM.

>> IS THAT THE ULTIMATE QUESTION

OF FACT THAT EXPERTS ARE GOING
TO BE ASKED TO ANSWER?
OR ARE WE JUST PROVIDING
GUIDELINES FOR JURIES TO FOLLOW
IN DETERMINING --

>> MY PROBLEM IS -- THE JUDGE IN
THIS CASE DID LIMIT THE SCOPE OF
THE EXPERT TESTIMONY.

I'LL GIVE HIM THAT.

HE DID SAY YOU'RE NOT GOING TO
-- THIS EXPERT IS NOT GOING TO
SAY MR. GREISMAN COULD NOT HAVE
SEEN WHAT HE SAID HE SAW.

THIS WENT TO A SUBJECT WELL
WITHIN THE REALM OF SOMETHING
YOUR AVERAGE JURY COULD DO.
THEY UNDERSTAND SOMETIMES EYE
WITNESSES DO MAKE MISTAKES.
AND THAT'S SOMETHING THAT WE CAN
ARGUE IN CLOSING.

HAVING AN EXPERT COME IN AND
CONDEMN EYE WITNESSES AS BEING
UNRELIABLE IS BEYOND WHAT THE
EVIDENCE REALLY ESTABLISHES.
IT'S BEYOND IT.

IT DOESN'T MEET THE FRYE TEST.
SO I HAVE REAL ISSUES WITH THAT.
AND I WOULD ASK THE COURT -- I
WOULD HOPE THAT THE COURT WOULD
NOT JUST ACCEPT IT BLINDLY
BECAUSE THIS IS A SCIENTIFIC
EXPERT.

THE SCIENCE IS NOT
WELL-ESTABLISHED IN THIS FIELD.
THAT'S THE EXTENT OF MY
ARGUMENT.

IF YOU HAVE ANY OTHER QUESTIONS.

>> THANK YOU.

>> I'D LIKE TO REQUEST A
FIVE-HOUR REBUTTAL, BUT I KNOW
THAT'S NOT GOING TO HAPPEN.

>> GRANTED.

>> I'M GOING TO START WITH THE
WHOLE THING ABOUT EVELYN
ANDERSON AND CHIP JOHNSON.
EVELYN ANDERSON DIDN'T SAY WHAT
SHE HEARD WAS VOLUNTEER.
FIRST SHE SAID IT WAS A
PARAMEDIC.

THEN SHE SAID IT COULD HAVE BEEN
A PARAMEDIC OR POLICE OFFICER.

THEN SHE SAID IT WAS A
PARAMEDIC.

BUT WE KNOW IT WASN'T BECAUSE
BOTH PARAMEDICS SAID THEY NEVER

ASKED ANYTHING LIKE THAT.
IT WAS ELROD THAT ASKED THE
QUESTION THAT SHE OVERHEARD LEON
DAVIS.
SAME THING WITH CHIP JOHNSON.
CHIP JOHNSON IS EVEN MORE
INTERESTING.
ALL ALONG, AT THE TIME -- AND
THIS IS BROUGHT UP BY THE
PROSECUTOR WHEN HE WAS
INTERVIEWED BY THE DETECTIVE
LIKE A WEEK OR SO AFTER THE
CRIME.
HE SAID THAT IT WAS IN RESPONSE
TO A QUESTION BY A POLICE
OFFICER.
HE SAID THE SAME THING,
VOLUNTEERED THE SAME THING THREE
TIMES AT THE ARTHUR HEARING.
AT THE HEARING ON THE DYING
DECLARATIONS HE SAYS NOW I DON'T
REALLY REMEMBER.
HE GAVE AN INTERNALLY
CONTRADICTORY STATEMENT WHERE HE
SAYS I THINK IT WAS VOLUNTEERED
AND I DON'T REMEMBER IF THE
OFFICER ASKED HER.
AND THEN HE BASICALLY
ACKNOWLEDGES THAT HIS MEMORY WAS
PROBABLY BETTER AT THE EARLIER
THING.
THERE WERE OTHER STATEMENTS THAT
WERE HEARD.
I MEAN, CERTAINLY THE YVONNE
BUSTAMANTE STATEMENT ABOUT IT
WAS A BLACK MAN, HE SHOULD BE ON
CAMERA.
BUT THE ONLY STATEMENTS THAT
IDENTIFY LEON DAVIS WERE PRETTY
CLEARLY MADE IN RESPONSE TO
ELROD'S QUESTIONING AND WERE
OVERHEARD BY OTHER PEOPLE AND I
THINK IF YOU READ JUDGE HUNTER'S
ORDER IN CONTEXT, IT'S PRETTY
CLEAR THAT'S WHAT HE THOUGHT AS
WELL.
I DIDN'T HAVE ENOUGH -- I ARGUED
THE STATE LAW THING, THE FRAN
MURRAY THING PRETTY EXTENSIVELY,
BUT I DIDN'T GET A CHANCE TO
ARGUE WHAT'S IN THE BRIEF, WHICH
IS THE DYING DECLARATION
SURVIVED CRAWFORD.
WHAT SURVIVED CRAWFORD.
AND THE MOST RECENT CASE, THE

HALES CASE OUT OF MARYLAND, THAT I CITED AS ADDITIONAL AUTHORITY SAYS ALL THAT IS NECESSARY FOR US TO HOLD USING CRAWFORD'S ANALYSIS IS THAT THE COMMON LAW CORE CONTENT OF THE DYING DECLARATION AS IT WAS UNDERSTOOD IN 1791 IS EXEMPTED FROM THE COVERAGE OF THE CONFRONTATION CLAUSE.

WE ARE NOT DECIDING ANYTHING BEYOND THAT.

THEY ALSO SAY BECAUSE CRAWFORD'S ORIGINALISM IS DEEPLY ROOTED IN HISTORY, IT IS PROBABLE THAT THE OBJECT OF THE EXEMPTION WILL BE THE COMMON LAW DYING DECLARATION AS IT WAS UNDERSTOOD TO BE IN 1791.

NOW, I DO NOT HAVE -- READ THE HISTORIC ANALYSIS THAT'S IN MY BRIEF AND REPLY BRIEF.

THAT IS CERTAINLY NOT IN ANY OF THE OPINIONS THAT SHOWS HOW THE DYING DECLARATION EXCEPTION EVOLVED INTO SOMETHING COMPLETELY DIFFERENT FROM WHAT IT WAS UNDERSTOOD IN 1791.

IF YOU WANT TO SAY THAT THE COMMON LAW EXCEPTION CAN BE AN EXCEPTION TO CRAWFORD, THEN MAYBE SO, MAYBE DOESN'T VIOLATE THE 6TH AMENDMENT, BUT IT VIOLATES FREEDOM OF RELIGION, THE ESTABLISHMENT CLAUSE, EQUAL PROTECTION.

LOOK AT THE WEST VIRGINIA CASE FROM 1907, HOOD.

LOOK AT THE ALABAMA CASE FROM THE 1930s, WHOSE NAME I'M NOT REMEMBERING RIGHT NOW, BUT IT'S IN THE REPLY BRIEF.

THEY ANALYZE THIS AND TALK ABOUT HOW THE COMMON LAW ABROGATED ON THIS, THAT THE BASIS OF DYING DECLARATIONS IS NO LONGER RELIGIOUS, ASSUMPTION OF SHARED CHRISTIAN DOCTRINE.

IT'S THAT IT'S NOW RELIABILITY AND NECESSITY.

WELL, TO THE EXTENT THAT DYING DECLARATIONS ARE THOSE THINGS, THAT'S OHIO V ROBERTS.

THAT'S WHAT THE ORIGINAL ANALYSIS REJECTS.

>> YOU'RE OUT OF TIME.

>> MY FIVE HOURS IS OVER?

>> YOUR FIVE HOURS IS OVER.

WE DO QUICK THINGS HERE.

OKAY?

THANK YOU.

ARE YOU GOING TO MOVE UP?

>> THIS IS NOT GOING TO TAKE MUCH.

THE POINT IS WITH REGARD TO THE COMMON LAW EXCEPTION TO DYING DECLARATION, WE HAVE TO LOOK AT UNDER JUSTICE SCALIA'S ANALYSIS, WHAT WAS THE STATE OF THE COMMON LAW PRIOR TO 1791, THE DATE THE 6TH AMENDMENT WAS RATIFIED.

99% OF THE CASES CITED BY THE DEFENSE IN THEIR BRIEF POST THE 1791.

WE DON'T REALLY CARE FOR THE PURPOSES OF ANALYSIS HERE WHAT WAS THE STATE OF THE COMMON LAW WHEN WE WERE ENGAGED IN THE CIVIL WAR.

WE DON'T CARE ABOUT THAT.

THERE'S ONE CASE WE HAVE HERE THAT PREDATES 1791 AND THAT IS THE KING CASE, WHICH IS CITED IN THE DEFENSE BRIEF, AND LET ME JUST READ A COUPLE SENTENCES OUT OF KING VERSUS WOODCOCK, 1789.

UNDER WHAT CIRCUMSTANCES DO WE ALLOW A DYING DECLARATION?

THE GENERAL PRINCIPLE ON WHICH THIS IS ADMITTED IS THEY ARE DECLARATIONS MADE IN EXTREMITY, WHEN THE PARTY IS CLOSE TO DEATH, WHEN EVERY MOTIVE TO FALSEHOOD IS SILENCED AND THE MIND IS INDUCED TO SPEAK THE TRUTH.

A SITUATION SO SOLEMN AND SO AWFUL IT'S CONSIDERED BY THE LAW AS CREATING AN OBLIGATION EQUAL TO THAT WHICH IS IMPOSED THROUGH A POSITIVE OATH ADMINISTERED IN A COURT OF JUSTICE.

NOW, THAT IS NOT TALKING ABOUT A RELIGIOUS EXCEPTION OR BASIS.

WE'RE TALKING ABOUT WHY IS THIS STATEMENT DEEMED RELIABLE.

THAT'S WHAT THE STATE OF THE COMMON LAW WAS IN.

>> UNDER THAT, GOING BACK TO YOUR REBUTTAL, THE STATEMENT

FROM LUCIANO, I MEAN, THAT'S A
PRETTY HIGH BAR TO GET TO AS YOU
READ THAT VERY POWERFUL
STATEMENT.

>> YES.

>> ABOUT WHERE SOMEBODY'S ON
THEIR DEATH BED AND MAKING A
DEATH BED CONFESSION.

BUT I APPRECIATE THAT REMINDER
OF WHAT IT IS.

>> THANK YOU.