>> THE NEXT CASE OF THE DAY IS THE CONSOLIDATED CASE OF STATE OF FLORIDA VERSUS OVERHOLT AND OLIVER.

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

EXCUSE ME, MELANIE SURBER ON BEHALF OF THE STATE. AS A PRELIMINARY MATTER I WOULD LIKE TO POINT OUT TO THE STATE LAST WEEK I FILED A SUGGESTION OF MOOTNESS WITH RESPECT TO THE OVERHOLT CASE AS I REVIEWED THE DOCKET AGAIN AND DETERMINED THAT DEFENDANT PRIOR TO A RECALL AND STAY OF THE MANDATE IN THAT CASE HAD PLED GUILTY OR HAD PLED NO CONTEST TO LEWD AND LASCIVIOUS AND RECEIVED A, ACCEPTED A LIFE SENTENCE.

HOWEVER, FOR PURPOSES OF MY ARGUMENT, LEGALLY, THE ISSUES ARE IDENTICAL.

>> THAT IS KIND OF LATE, COUNSEL.

>> I DID NOT KNOW, I WAS NOTIFIED FOR SOME REASON.

I DECIDED TO CHECK THE DOCKET LAST WEEK IN PREPARATION FOR ORAL ARGUMENT AND I APOLOGIZE FOR THAT.

TURNING TO THE CASE, IN THIS

CASE, PARTICULARLY OLIVER, HE
WAS CHARGED WITH AND CONVICTED
OF TWO COUNTS OF LEWD AND
LASCIVIOUS AND MOLESTATION AND
TWO COUNTS OF CAPITAL SEXUAL
BATTERY.
>> COULD I SAY AS PRACTICAL
MATTER, THE THREE CASES THAT THE
FOURTH DISTRICT DECIDED ALL
BEFORE A SINGLE JUDGE, WHO
APPARENTLY THOUGHT, AT LEAST IF
YOU LOOK AT MCLAUGHLIN, THIS
WAS A BETTER WAY TO DO IT
DEFENDANT USE STATUTORY
SCHEME.
THIS IDEA OF THIS PARTITION IS
NOT SOMETHING THAT THE FLORIDA
STATUTE AUTHORIZES?
IF THERE ARE THESE FINDINGS
IS THE WAY TO GO IS
CLOSED-CIRCUIT TELEVISION?
>> IF THE YOUR HONOR IS
REFERRING TO 92.54.
THAT IS THE CLOSED-CIRCUIT
TELEVISION.
HOWEVER IT IS CLEAR FROM THE
RECORDS IN THE CASES THAT TRIAL
COURT RECOGNIZED HE WASN'T GOING
UNDER THAT STATUTE.
HE WAS GOING WITH THE GENERAL
AUTHORITY, GIVEN TO HIM BY THIS

COURT IN SOME OF THE CASE LAW
REGARDING THE TRIAL COURT'S
DISCRETION TO PROTECT THESE
WITNESSES.
>> SO THE MORE, WHAT I'M TRYING
TO UNDERSTAND, IS THIS IN THE
MIND OF THE STATE, IS THIS MORE
OF A PROTECTION FOR THE
DEFENDANT AND LESS OF A
PROTECTION FOR THE VICTIM?
BECAUSE, IF I'M, IF I'M THE
VICTIM, HAVING TO APPEAR IN
COURT, IN FRONT OF A JURY, EVEN
THOUGH I'VE GOT THIS PARTITION
UP, MIGHT BE MORE INTIMIDATING
TO ME THAN BEING CLOSED-CIRCUIT
WHERE I'M NOT IN FRONT OF THE
DEFENDANT?
SO, IT IS, THERE IS THIS TENSION
BETWEEN WHO BENEFITS FROM THIS
PROCEDURE THAT I'M STILL TRYING
TO ENVISION HOW THIS HAPPENS.
THAT THE PARTITION GOES UP AND
THE PERSON COMES IN AND ADDS.
WHAT IS THE STATE'S POSITION
GOING FORWARD?
IS THIS WE DO NOT WANT TRIAL
JUDGES TO DO THIS, OR THAT THIS
IS SOMETHING THAT IS MORE OR
LESS ONEROUS FOR THE STATE OR
FOR THE VICTIM?
>> WELL, IN THIS CASE IT WAS

MORE THAN JUST THE PARTITION.
I MEAN WE HAVE THE CONFRONTATION
ISSUE HERE.
AND THE CONFRONTATION ISSUE IS
REALLY WHAT CAUSE THIS IS CASE
TO COME UP HERE ON THE CONFLICT.
>> I JUST WANT TO KNOW THE
PRACTICAL ISSUES.
GOING FORWARD, OKAY, I'M THE
TRIAL JUDGE UP IN THE 19th
CIRCUIT AND I'M STARTING A TRIAL
NEXT WEEK AND THE STATE SAYS,
OR, YOU KNOW, I SAY I THINK I
WANT TO PUT THIS PARTITION UP AS
THE TRIAL JUDGE.
IS THE STATE SAYING, YEAH, THAT'S
A GOOD IDEA, OR NO, DON'T PUT
PARTITIONS UP.
FOLLOW THE STATUTE?
>> I THINK IT'S GOING TO BE, IT
IS GOING TO DEPEND ON THE CASE
AND I SAY THAT BECAUSE THE
FOURTH DISTRICT, IT IS NOT JUST
THREE CASES.
THE DEFENDANT DID SUPPLEMENT
WITH STATE v. FARMER WHICH IS
ALSO A FOURTH DCA CASE THAT
RECOGNIZED THIS MAY NOT BE AS
ONEROUS AS WAS CITED TO IN THE
FIRST CASE MCLAUGHLIN.
THAT IS WHY WE NEED TO GET BACK

TO WHAT HAPPENED.

IN THIS CASE WE HAVE A PARTITION

AND THERE IS A TELEVISION

MONITOR FOR THE DEFENDANT TO BE

ABLE TO VIEW THE CHILD

TESTIFYING.

THE ISSUE IN THIS CASE, DID THAT

VIOLATE CONFRONTATION AND --

>> YOU KNOW, THERE IS A VERY

SIMPLE QUESTION PENDING.

IT'S A VERY PRACTICAL QUESTION.

AND I'M MISSING WHY WE CAN'T GET

AN ANSWER TO THAT.

I THINK THAT IS AN IMPORTANT

QUESTION TO BE ANSWERED HERE

THIS MORNING.

>> I THINK IT DEPENDS ON THE

CASE, WHETHER OR NOT A PARTITION

OR CLOSED-CIRCUIT TELEVISION IS

GOING TO BE USED AND THIS COURT

HAS GIVEN THE TRIAL COURTS THE

POWER TO MAKE THAT DECISION.

THE PROBLEM --

>> THE PROBLEM THOUGH THAT THE

FOURTH DISTRICT RECOGNIZED AND

THE NEBRASKA SUPREME COURT

RECOGNIZED, AND IS THAT, MAYBE

IT DOESN'T HAVE TO DO

SPECIFICALLY WITH THE SIXTH

AMENDMENT CONFRONTATION RIGHT.

IT HAS TO DO WITH DUE PROCESS

RIGHTS TO A FAIR TRIAL.

THE JUDGE, IT'S ONE THING IF
YOU'RE WATCHING A YOUNG VICTIM
ON CLOSED-CIRCUIT ON THE JURY
BUT THE INHERENT PREJUDICE,
BECAUSE THAT'S WHAT THEY TALKED
ABOUT, THEY DIDN'T TALK ABOUT A
SIXTH AMENDMENT SPECIFICALLY.
INHERENT PREJUDICE AS IDENTIFIED
BY THE NEBRASKA SUPREME COURT
EMBRACED BY THE FOURTH DISTRICT
IS THAT THE JUDGE HAS MADE A
DETERMINATION THAT SOMEHOW THE
DEFENDANT THAT'S, THAT IS, THAT
THE VICTIM IS IN NEED OF
PROTECTION FROM THE DEFENDANT
AND THAT THAT IS BEING
COMMUNICATED NOT BY VERBALLY BUT
BY THE ACTIONS TO THE JURY.
AND THAT'S MY, YOU KNOW, THAT'S
MY CONCERN, AS TO THIS
PROCEDURE.
WHICH IS, IF IT IS INHERENT YOU
CAN JUST, HERE'S NOW, A VERY
SCARY DEFENDANT IN A MURDER
TRIAL, AND THE VICTIM WANTS,
SAYS, I CAN'T LOOK AT THAT
DEFENDANT, DO WE SAY THAT, TRIAL
JUDGES HAVE THE AUTHORITY TO PUT
UP PARTITIONS BEFORE THE VICTIM
TESTIFIES?
>> THE ANSWER IS YES AND I WOULD

EXPLAIN TO THIS COURT NEBRASKA,
IN REVIEWING THAT CASE AND THE
FOURTH'S RELIANCE ON THAT CASE
THERE IS ABSOLUTELY NO REFERENCE
IN THE NEBRASKA CASE TO COY OR
CRAIG.
THOSE ARE UNITED STATES SUPREME
COURT CASES THAT SET OUT HOW,
WHAT WAS PROPER AND WHAT HAD TO
BE LOOKED AT TO DETERMINE --
>> THEY'RE DEALING WITH A
DIFFERENT ISSUE.
THIS IS WHAT IS CONFUSING HERE.
YOU KEEP TALKING ABOUT
CONFRONTATION BUT AS JUSTICE
PARIENTE SUGGESTS, THE DECISION
IN OLIVER DOESN'T TURN ON THE
CONFRONTATION RIGHT.
IF I READ IT CORRECTLY.
IT TURNS ON THE COURT'S
CONCLUSION THAT FUNDAMENTAL
ERROR OCCURRED BECAUSE THE USE
OF THE SCREEN COMPROMISED THE
PRESUMPTION OF INNOCENCE.
ISN'T THAT THE CASE?
>> YES.
>> OKAY?
NOW, IF THAT'S THE CASE, AND,
THAT THAT WAS INHERENTLY
PREJUDICIAL TO THE DEFENDANT'S
DUE PROCESS RIGHTS, FUNDAMENTAL
ERROR, ALL THAT, IF THAT'S THE

CASE, IF THAT IS WHAT THE
HOLDING IN OLIVER IS, I'M NOW
STRUGGLING TO SEE THE CONFLICT
WITH THESE OTHER CASES.
I REALIZE, I VOTED TO GRANT
JURISDICTION BUT SOMETIMES WE
MISS THINGS.
AND SO, IF THAT'S THE HOLDING
IN OLIVER, IF IT HAS TO DO WITH
THE PRESUMPTION OF INNOCENCE,
WHERE IS THAT IN HUGHES OR WHERE
IS THAT IN HOPKINS?
>> I WOULD SUGGEST THAT THIS
COURT AGAIN WOULD NEED TO LOOK
AT COY v. IOWA BECAUSE IN
COY v. IOWA --
>> WAIT, WAIT.
WE DON'T LOOK AT COY v. IOWA,
I DON'T THINK, TO DETERMINE
WHETHER WE HAVE JURISDICTION IN
THIS CASE.
WHETHER THERE IS CONFLICT
BETWEEN OLIVER, ON THE ONE HAND
AND HUGHES OR HOPKINS ON THE
OTHER.
SO, I, GOING DOWN THAT PATH, I
DON'T THINK IS GOING TO ANSWER
MY QUESTION IF THAT IS THE WAY
YOU WANT TO GO, THAT IS THE BEST
ANSWER, HAVE AT IT.
>> FOR PURPOSES OF ERROR,

COY v. IOWA --

>> I'M ASKING ABOUT THERE IS CONFLICT HERE.

>> WE CAME UP WITH CONFLICT FOR FAILURE TO DO HARMLESS ERROR ANALYSIS.

>> THEY DIDN'T SAY, THEY SAID, IS FUNDAMENTAL ERROR.

>> THE STATE'S POSITION IT'S NOT.

>> I UNDERSTAND.
BUT THEY, THEY HAVE MADE A DETERMINATION, THE FOURTH DISTRICT SAID IT IS FUNDAMENTAL ERROR.
WHERE IS THE CONFLICT ON THAT DETERMINATION ABOUT FUNDAMENTAL ERROR?

>> ON, BECAUSE THE DUE PROCESS VIOLATION THAT IS ALLEGED IS ONE AND THE SAME WITH THE CONFRONTATION IN THIS CASE.
IN THESE CASES, THE ANALYSIS WOULD BE THE SAME.
THE INHERENT PREJUDICE, THE TERM HAS BEEN THROWN AROUND AS THOUGH THE WORDS INHERENT PREJUDICE, MEAN, THERE IS A FUNDAMENTAL REVERSIBLE ERROR.
THAT HAS NOT BEEN THE CASE.
IN HUGHES, I MEAN IN ALL OF THE CASES CITED, HUGHES, THERE WAS A

HARMLESS ERROR ANALYSIS DONE
WITH WHETHER OR NOT THE USE OF
THE SCREEN COULD BE HARMLESS.
>> BUT THEY NEVER, THOSE CASES
NEVER LOOKED AT THAT IN THE
CONTEXT OF THE PRESUMPTION OF
INNOCENCE, ISN'T THAT CORRECT?
THAT WAS JUST NOT PART OF THE
ANALYSIS AT ALL.
>> WELL AND I THINK WHEN WE
CONTINUE ON WITH THE EVOLUTION
OF THE CASE LAW AND SEE THAT
CLOSED-CIRCUIT TV HAS NEVER
BEEN, HAS NEVER BEEN THE ONLY
METHOD USED TO PROTECT A WITNESS
AND THIS COURT HAS GIVEN THE
TRIAL COURTS THE DISCRETION TO
PROTECT WITNESSES.
IN THIS CASE, THE REASON I CITE
TO COY BECAUSE THERE WAS A DUE
PROCESS CLAIM MADE IN THAT CASE.
THE UNITED STATES SUPREME COURT
DIDN'T REACH IT BUT FOUND THE
CASE COULD BE SENT BACK FOR
HARMLESS ERROR ANALYSIS.
IF IT WAS A STRUCTURAL DUE
PROCESS ERROR THERE WOULD HAVE
BEEN NO REASON TO SEND THAT
ISSUE BACK TO THE TRIAL COURT
FOR DETERMINATION OF
HARMLESSNESS.

THAT IS WHERE IT IS GOING WITH
REGARD TO THE HARMLESS ERROR
ANALYSIS AND I THINK IT COURT
REALLY NEEDS TO LOOK AT THE
FACTS OF THESE CASES.
>> WHAT WAS THE, WHAT WAS THE
PURPOSE ENUNCIATED BY THE TRIAL
COURT FOR THE SCREEN?
>> WELL, TO PROTECT THE CHILD
VICTIMS FROM TESTIFYING IN FRONT
OF THE DEFENDANT.
>> THAT'S THE ONLY REASON?
>> AND THERE'S AN EXTENSIVE
EXPLANATION BY THE TRIAL COURT.
HE USED THE SCREEN.
IT, HE BELIEVES, THE TRIAL
COURT'S EXERCISED HIS DISCRETION
AND FELT IT WAS LESS ONEROUS
THAN TRADITIONAL CLOSED-CIRCUIT
TV THE CHILD WOULD BE IN THE
COURTROOM.
COULD BE OBSERVED BY THE JURY.
DEFENSE COUNSEL COULD MOVE
AROUND AND CROSS-EXAMINE THE
CHILD.
THE DEFENDANT WOULD BE ABLE TO
VIEW THE CHILD ON A TELEVISION
MONITOR.
AND THEN WENT ON TO MAKE A
FINDING, BASED ON THE TESTIMONY
OF THE CHILD'S MOTHER, AS
REQUIRED BY THE UNITED STATES

SUPREME COURT AND IN FLORIDA
THAT INDIVIDUALIZED FINDINGS OF
HARM FROM THIS, TO THIS CHILD TO
TESTIFYING IN FRONT OF THE
DEFENDANT.
>> WELL WE HAVE THE VIDEO, THE
CLOSED-CIRCUIT PROCEDURE FOR
THAT.
>> IN THE STATE POSITION IS
THAT'S ONE METHOD BUT THE COURTS
ARE NOT --
>> CAN YOU GO BACK TO, YOU KNOW,
YOU REALLY, THIS MORNING, I'M
SORRY, MOST RESPECTFULLY, YOU
HAVE BEEN ASKED AND ANSWERED NOW
THREE TIMES ABOUT THE SCREEN AND
YOU HAVE OTHER METHODS OF DOING
IT.
THERE IS A VERY PRACTICAL
QUESTION ON THE FLOOR AND THAT
IS, WHY SHOULD THIS COURT
ENCOURAGE TRIAL JUDGES TO USE
SCREENS WHEN THERE IS, AS
JUSTICE LABARGA SAID, THERE'S A
STATUTE THAT'S THERE?
YOU'VE TO THE OTHER PROBLEMS
WITH THIS AND, IS IT THE STATE
GOING TO CONTINUE DOWN THAT PATH
OF PUTTING SCREENS IN
COURTROOMS, AND RUN THE RISK,
NOT, TALKING ABOUT THIS

FUNDAMENTAL ERROR OR HARMLESS
ERROR, IS IT ERROR AT ALL?
AND WE HAVE, HAVE WE NOT,
THROUGH OUR JURISPRUDENCE IN THE
STATUTE ESTABLISHED A VERY CLEAN
MECHANISM TO AVOID ERROR IN
THESE CASES?
WHY THE STATE NOT FOLLOW THAT
AND ENCOURAGE THAT?
WOULD YOU ENCOURAGE A PROCESS
GOING TO LEAD YOU TO HERE WE ARE
TODAY, HOW MANY YEARS LATER?
THIS THING COULD HAVE BEEN OVER?
>> I THINK THROUGH THE
JURISPRUDENCE I HAVE CITED CASES
WHERE CLOSED-CIRCUIT TV HAS NOT
BEEN THE ONLY METHOD USED TO
PROTECT WITNESSES AND TO PROTECT
TESTIMONY.
AND YOU KNOW, HOW A PROSECUTOR
CHOOSES TO PROCEED IS GOING TO
BE BASED ON INDIVIDUAL CASES.
AND WHEN READING THESE
TRANSCRIPTS THE TRIAL JUDGE, THE
PROSECUTOR, MADE THE ARGUMENTS
AND THE JUDGE MADE THE FINDINGS
THAT THIS, IN THE TRIAL JUDGE'S
DISCRETION, THIS WAS LESS
ONEROUS.
>> BUT THAT WAS THE PROBLEM, YOU
SAID, YOU SAID THERE ARE OTHER
CASES.

THESE THREE CASES ARE ALL THE
SAME TRIAL JUDGE, MAYBE THE
ARGUMENT WASN'T MADE, WHO
DECIDED, THIS WAS BETTER FOR THE
DEFENDANT, NOT BETTER FOR THE
STATE, BETTER FOR THE DEFENDANT.
NOW THE FOURTH DISTRICT, OVER
AND OVER AGAIN SAID, AFTER
McLAUGHLIN, THIS IS, THERE IS
SOMETHING NOT RIGHT ABOUT THIS
AND IT DOESN'T HAVE TO DO WITH
THE CONFRONTATION CLAUSE WHICH
IS WHAT THE JUDGE WAS CONCERNED
ABOUT.
IT HAD TO DO WITH THIS IDEA THAT
THERE IS SOMETHING THAT THE JURY
IS SEEING ABOUT THIS PARTITION
GOING UP, THAT SMACKS OF THERE
BEING A DETERMINATION HAVING
BEEN MADE.
THIS CREATES SOMETHING LIKE ONLY
THIS GUY IS NOT SEEING THE
WITNESS, WHEREAS IF IT'S CLOSED
CIRCUIT, EVERYBODY IS IN THE
SAME, THE SAME SITUATION.
THEY'RE ALL VIEWING THE WITNESS
IN THE SAME WAY.
>> WELL, I WOULD SUGGEST THAT
THE LATER OPINION, STATE V.
FARMER, WHICH CAME OUT AFTER
JURISDICTION HAD COME UP OUT OF

THE FOURTH DCA HAS NOW SAID IT
WASN'T FUNDAMENTAL ERROR, IT WAS
PRESERVED ERROR IN OLIVER.
>> WASN'T THE -- I THOUGHT YOUR
ARGUMENT SEEMED TO HAVE BEEN
THAT PART OF, THAT THIS WAS A
GOOD METHOD BECAUSE THE
DEFENDANT WAS, IN FACT, VIEWING
THE VICTIM ALSO, THAT THERE WAS
A CLOSED CIRCUIT TV, AND THAT
THE DEFENDANT WAS ACTUALLY
VIEWING THE VICTIM ON THIS
CLOSED CIRCUIT TV SIMILAR TO HOW
HE, THE VICTIM -- THE DEFENDANT
WOULD BE VIEWING THE VICTIM IF
IT WAS THE APPROVED STATUTORY
METHOD.
IS THAT WHAT I'M HEARING FROM
YOU?
>> YES.
IN THIS CASE IF YOU READ THE
TRANSCRIPTS, IT'S PRETTY CLEAR
THAT A PARTITION WAS UP OR A
SCREEN, HOWEVER THEY SET THAT
UP.
THERE WAS ALSO A TELEVISION FOR
THE DEFENDANT TO BE ABLE TO
OBSERVE, AND THE DEFENSE
ATTORNEYS WERE ABLE TO MOVE
AROUND.
THE JURY WAS SEEING THE CHILD
VICTIM TESTIFY LIVE.

>> BUT THE PROBLEM BECOMES THAT WHEN YOU DO IT BY THE STATUTORY METHOD, THE JURY DOES NOT SEE ANY KIND OF PARTITION, WHEREAS WHEN YOU DO IT WITH THIS METHOD, YOU THEN GET THE PROBLEM WITH THE JURY SAYING, OH, THIS IS SUCH A BAD DEFENDANT THAT HE CAN'T EVEN VIEW, YOU KNOW, THIS VICTIM.
SHE HAS TO BE PROTECTED BY THIS PARTITION.
>> WELL, AND AGAIN, I WOULD POINT THIS COURT TO THE FOURTH DCA'S LATER DECISION WHERE THE COURT IN A FOOTNOTE STATED THAT HERE IN FARMER -- ALTHOUGH IT WAS A POSTCONVICTION CLAIM -- THEY DID ADDRESS WHAT HAPPENED IN THE SPECIFIC FACTS.
AND THE FOURTH DCA, THREE OTHER JUDGES FOUND THAT ADVERSE INFERENCES LIKE THOSE SUGGESTED IN McLAUGHLIN COULD SIMILARLY BE DRAWN FROM ALLOWING THE VICTIM TO TESTIFY FROM A REMOTE LOCATION.
INDEED, THE INFERENCE THAT THE CHILD NEEDED TO BE PROTECTED FROM THE DEFENDANT MIGHT BE GREATER IF THE JURY WAS GIVEN

THE IMPRESSION THE CHILD COULD
NOT EVEN BE IN THE SAME ROOM AS
THE DEFENDANT.
SO I THINK THEREIN LIES A
PROBLEM NOW WITH THE EVOLUTION
OF THESE CASES.
WE BEGAN WITH McLAUGHLIN WHICH
DID, IN FACT, CONDUCT A HARMLESS
ERROR ANALYSIS REGARDING THE DUE
PROCESS VIOLATION.
LATER WE HAD OLIVER WHERE THE
FOURTH DCA FOUND THE ARGUMENT
REGARDING HARMLESS ERROR TO BE
INNOVATIVE, DIDN'T ENGAGE IN A
HARMLESS ERROR ANALYSIS.
WE HAVE THE DECISION IN OVERHOLT
WHERE THE FOURTH DCA SIMPLY
FOUND IT TO BE REVERSIBLE ERROR.
AND THEN WE GET THE DECISION IN
FARMER.
SO IT SEEMS AS THOUGH IT BEGAN
AS A DUE PROCESS VIOLATION THAT
COULD, IN FACT, BE HARMLESS.
AND NOW WE HAVE A DUE PROCESS
VIOLATION, IT SEEMS, THAT CAN'T
BE HARMLESS UNDER OLIVER AND
OVERHOLT, YET IN FARMER THEY NOW
SAY IT'S NOT FUNDAMENTAL ERROR
AND IS SUBJECT TO HARMLESS
ERROR.
IT NEEDS TO BE CLARIFIED.
THAT'S THE ISSUE THAT'S PENDING.

>> YOU KNOW, I AGREE IT PROBABLY NEEDS TO BE CLARIFIED, BUT IS IT YOUR POSITION THAT UTILIZING THE STATUTORY SHORT CIRCUIT PLUS THE SCREEN IS WHAT, IS WHAT THE STATE SHOULD DO GOING FORWARD?

>> I THINK THE STATE COULD BE PERMITTED TO DO IT.

>> WHY?

WHY?

I MEAN, THE STATUTE CLEARLY, IF YOU GO BY THE STATUTE AS YOU INDICATED, IF A JURY SEES THAT THE VICTIM'S NOT IN THE ROOM AND ON CLOSED CIRCUIT TV, THEY'RE PROBABLY GOING TO ASSUME CERTAIN THINGS ANYWAY.

WITH THE SCREEN THERE, IT'S A DOUBLE WHAMMY ON THEM.

SO AT LEAST UNDER THE STATUTE IT IS WHAT IS ALLOWED AND SANCTIONED BY THE COURT.

I MEAN, WHY DO THAT PRACTICALLY SPEAKING?

DOESN'T MAKE SENSE TO ME.

>> I THINK IF YOU READ THE TRIAL COURT'S REASON IN THIS CASE --

>> I KNOW YOU SAID ON A CLOSED CIRCUIT TV THEY'LL STILL BE ABLE TO MOVE AROUND, ASK QUESTIONS. EVERYBODY SEES THE SAME THING AT

THE SAME TIME, INCLUDING THE
DEFENDANT.
>> WELL, AND I WOULD DIRECT THIS
COURT TO THE HISTORY OF THE CASE
LAW.
I MEAN, WHEN WE'RE TALKING
ABOUT -- BECAUSE I THINK IT
REALLY DOES MIX THE DUE PROCESS.
BECAUSE REALLY AT ISSUE IS THE
DEFENDANT'S ABILITY TO CONFRONT
THE WITNESS.
AND WHAT WE HAVE HERE IS AN
ATTORNEY ABLE TO QUESTION A
VICTIM WITNESS IN COURT, THE
JURY'S ABLE TO OBSERVE THAT
WITNESS.
AND WHEN YOU LOOK AT THE CASE
LAW FROM COY AND CRAIG, THEY
TALK ABOUT IT'S NOT JUST THE
VICTIM FACING THE DEFENDANT.
THESE ARE EXCEPTIONS THAT CAN BE
CARVED OUT TO PROTECT THESE
CHILDREN BASED ON THE PUBLIC
POLICY.
BUT IT'S ALSO IN THIS CASE WE
HAVE MORE THAN JUST THE CHILD
BEING PULLED OUT OF THE
COURTROOM.
WE NOW HAVE THE JURY ABLE TO
OBSERVE THE DEMEANOR.
AND I THINK JUSTICE SCALIA --
>> YOU CAN OBSERVE DEMEANOR ON

CLOSED CIRCUIT TELEVISION.
>> AND I THINK THE DIFFERENCE IS
WE NOW HAVE THE JURY ABLE TO SEE
THE CHILD LIVE.
AND I'M NOT SURE THAT THAT
NECESSARILY IS ALWAYS GOING TO
BE AN INHERENTLY PREJUDICIAL
PRACTICE.
I THINK --
>> 92--
[INAUDIBLE]
RELATES TO WITNESSES OF VICTIMS
UNDER 16.
SURELY WE HAVE CASES OUT THERE
INVOLVING ORGANIZED CRIME AND SO
ON WITH WITNESSES COMING IN TO
TESTIFY WEARING, LIKE, FENCING
MASKS AND THINGS LIKE THAT.
HAVE THAT BEEN ALLOWED?
WE HAVE A STATUTE HERE THAT
LIMITS IT, IN OUR VIEW, TODAY TO
BASICALLY CLOSED CIRCUIT.
HAS THERE BEEN CASES WHERE
SCREENS, FENCING MASKS, WHATEVER
HAVE BEEN PERMITTED IN OPEN
COURT TO SHIELD A WITNESS?
>> FLORIDA I HAVEN'T FOUND -- IN
FLORIDA I HAVEN'T FOUND.
HOWEVER, I WOULD SUGGEST THAT
SOME OF THOSE CASES MIGHT FALL
UNDER 92.55 OR THIS COURT'S CASE

LAW WHICH ALLOWS A TRIAL JUDGE
THE DISCRETION.
I WOULD -- I CITED TO FARMER.
AND, YOU KNOW, THIS COURT HAS
SAID THAT A TRIAL JUDGE HAS THE
DISCRETION TO USE A METHOD NOT
AUTHORIZED BY THE STATUTE, AND
IN THIS CASE THE TRIAL JUDGE
SPECIFICALLY SAID HE KNEW HE
WASN'T GOING UNDER 92.54.
HE WAS TRYING TO PROTECT THE
CHILD AS WELL AS TO PROVIDE THE
DEFENDANT WITH THE OPPORTUNITY
TO CONFRONT.
AND I WOULD POINT OUT JUST AS I
EXPLAINED, THE DUE PROCESS CLAIM
IS REALLY SO ENTWINED WITH THE
CONFRONTATION ISSUE BECAUSE IN
McLAUGHLIN THERE WAS A
HARMLESS ERROR ANALYSIS DONE.
WE ARE NOW HERE BECAUSE NO
HARMLESS ERROR ANALYSIS WAS
DONE, AND SO I THINK THAT'S
WHERE THE CONFLICT ARISES.
AND I DO SEE I'M OUT OF TIME.
>> DO YOU HAVE A QUESTION?
>> NO.
>> I WILL GIVE YOU AN ADDITIONAL
MINUTE ON REBUTTAL.
>> THANK YOU.
>> THANK YOU.
>> MAY IT PLEASE THE COURT,

CHIEF JUSTICE, JUSTICES, I'M AN
ASSISTANT PUBLIC DEFENDER IN
WEST PALM BEACH, AND I REPRESENT
MR. OLIVER BEFORE THIS HONORABLE
COURT.
THEY ALREADY MENTIONED ABOUT
OVERHOLT, SO WE'LL FOCUS ON
OLIVER.
I WANT TO START OUT BY SAYING,
WITH ALL DUE RESPECT, THIS COURT
HAS NO JURISDICTION OVER THIS
CASE.
AS JUDGE CANADY WAS BRINGING
OUT -- AND I KNOW IT GETS
CONFUSING BECAUSE THOSE TERMS
BEGAN IN THE LOWER COURT, AND
THEN WHEN THE DCA MERGED
CONFRONTATION CAUSING DUE
PROCESS.
BUT IN OLIVER THE HOLDING IS
THAT THERE'S A DUE PROCESS THAT
WAS INHERENTLY PREJUDICIAL, THE
SCREEN.
IT HAD NOTHING TO DO WITH THE
SIXTH AMENDMENT CONFRONTATION
CLAUSE, NUMBER ONE.
HOPKINS IS THIS COURT'S DECISION
ABOUT THE STATUTE, 92.54, AND
HOW, HOW IT WAS RAISED IN THE
LOWER COURT ABOUT WHETHER THE
LAWYER REALLY DID OR REALLY

DIDN'T OBJECT TO THE FINDINGS
THAT WAS MADE BY THE TRIAL JUDGE
AND HOW IT CAME ABOUT.
HUGHES WAS JUST ABOUT THE
STATUTE.
NOTHING TO DO WITH THE DUE
PROCESS.
NOTHING TO DO WITH THE 14TH
AMENDMENT.
SAME THING WITH HOPKINS.
SO IT DOESN'T CONFLICT AT ALL,
THE CASES.
AND I'D RARELY ASK THIS COURT TO
DISCHARGE JURISDICTION.
NUMBER TWO, THIS GETS INTO A
WORD OF ART, AND ALL YOU JUDGES,
JUSTICES HERE WRITE OPINIONS.
SO WHAT WE HAVE TO DO IS LOOK
EXACTLY WHAT A JUDGE SAID IN THE
FOURTH DISTRICT.
BECAUSE WE CONTEND THAT SHE DID,
OR THE FOURTH DID DO A HARMLESS
ERROR ANALYSIS.
THERE ARE LITTLE SUBISSUES TO
GET IT UP TO THIS COURT.
I'M GOING TO READ IT, BECAUSE I
DON'T WANT TO PARAPHRASE IT, AND
IT'S ONLY A COUPLE SENTENCES.
THE STATE ATTEMPTS TO
DISTINGUISH McLAUGHLIN, THE
CASE, THE ORIGINAL CASE, AND
ARGUES THAT ANY ERROR WAS

HARMLESS BECAUSE HERE THE
DEFENDANT ADMITTED TO THE
COMMISSION OF THE ACT, UNLIKE
THE DEFENDANT IN McLAUGHLIN.
WE DISAGREE, PERIOD.
ALTHOUGH INNOVATIVE, THIS METHOD
OF SHIELDING THE CHILD VICTIM IS
NOT AUTHORIZED BY STATUTE AND
VIOLATES THE DEFENDANT'S RIGHT
TO A FAIR TRIAL.
SEE PARTNER.
WHEN JUDGE MAY USED THE WORDS
"WE DISAGREE," WE'RE SAYING THAT
WE DISAGREE WITH THE STATE'S
POSITION THAT IT'S HARMLESS,
BECAUSE IF YOU LOOKED AT THE
BRIEFS, MOST OF THE BRIEFS WAS
ON THAT ISSUE OF HARMLESSNESS IN
THE DCA.
BECAUSE THE ATTORNEY GENERAL'S
OFFICE HAD TO ACKNOWLEDGE THAT
TO THE FOURTH WHEN I WENT UP TO
ARGUE OLIVER THAT, GUESS WHAT?
I HAVE A CASE RIGHT ON POINT.
WELL, THEY SAID, WELL, KIND OF
WRONG, BUT IT'S HARMLESS.
THE WHOLE BRIEF IS ON HARMLESS.
>> COULD I JUST --
>> YEAH.
>> McLAUGHLIN WAS DECIDED, WAS
THE TRIAL IN THESE TWO CASES

AFTER McLAUGHLIN CAME OUT?

>> NO.

>> OKAY.

>> THAT'S WHAT HAPPENED.

>> I WAS TRYING TO --

>> ONE OF THOSE THINGS.

IT TAKES A WHILE, THESE ARE

BIGGER CASES.

YOU HAVE McLAUGHLIN COMES OUT,

THEN I WROTE MY BRIEF, AND THEN

MS.--

[INAUDIBLE]

WROTE HER BRIEF, AND THEN THEY

CAME OUT.

AND I WAS LUCKY BECAUSE WHEN I

WROTE MY BRIEF, McLAUGHLIN WAS

OUT.

>> HOW DO YOU SQUARE -- I KNOW

YOU'RE DISCUSSING THE CONFLICT

ISSUE, BUT THERE IS THIS TENSION

IN THAT FUNDAMENTAL ERROR IS

ERROR THAT REACHES DOWN TO THE

VALIDITY OF THE TRIAL SO THAT

YOU DON'T GET A FAIR TRIAL.

HARMLESS ERROR IS SOMETHING THAT

IS USED WITH PRESERVED ERROR.

>> UH-HUH.

>> SO THE IDEA THAT YOU SAY

SOMETHING'S FUNDAMENTAL THAT

DIDN'T HAVE TO BE RAISED

BELOW --

>> RIGHT.

>> -- BUT THAT IT COULD BE HARMLESS IS --

>> RIGHT.

>> -- IS NOT, IS MIXING TERMS THAT DON'T REALLY, THAT MAKE NO SENSE.

>> EXACTLY.

>> SO WHAT IS, AS THE APPELLATE LAWYER, WHAT'S YOUR TAKE ON IT? ONE IS YOU GET TO RAISE SOMETHING FOR THE FIRST TIME ON APPEAL BECAUSE IT'S FUNDAMENTAL ERROR.

>> RIGHT.

>> IT'S FUNDAMENTAL WHICH IS DIFFERENT FROM CONSTITUTIONAL ERROR.

>> RIGHT.

>> THAT IS SUBJECT TO HARMLESS. WHAT'S YOUR, HOW DO WE SQUARE THAT IF WE TAKE THIS CASE TO MAKE SURE WE DON'T SCREW UP STANDARDS OF REVIEW AND --

>> RIGHT.

IT SEEMS TO ME THAT THE WAY THE FOURTH LOOKED AT THE FUNDAMENTAL ERROR, NO OBJECTION RULES, WAS THAT THEY USED THAT TERM TO MEAN YOU COULD -- IT'S UNOBJECTED TO. YOU COULD RAISE IT ON APPEAL. YOU DON'T HAVE TO OBJECT.

>> WELL, WHAT OTHER THAN
FUNDAMENTAL ERROR CAN BE RAISED
FOR THE FIRST TIME --
>> WELL, THIS IS THE WAY THEY'RE
PHRASING IT.
I KNOW WHAT YOU'RE SAYING.
THEY'RE SAYING THAT -- LET'S
JUST PHRASE IT THIS WAY.
THE, YOU KNOW, CONTAINMENT,
CONTEMPORANEOUS OBJECTION RULE
DOESN'T APPLY TO THIS.
>> BUT WHAT IS THAT CONCEPT?
WHAT IS THAT CALLED?
>> I DON'T KNOW.
>> WELL, YOU SHOULD KNOW, YOU'VE
BEEN DOING THIS FOR MANY, MANY
YEARS.
>> BECAUSE WHENEVER WE ARGUE
THAT IT'S FUNDAMENTAL ERROR, WE
ALWAYS ARGUE THAT'S PER SE
HARMLESS.
BUT OVER THE YEARS -- HARMFUL.
BUT OVER THE YEARS, THE COURTS
HAVE SAID THERE'S REALLY NOT ANY
CONSTITUTIONAL CLAIMS THAT ARE
PER SE EXCEPT TWO OR THREE WE'RE
NOT GOING TO TALK ABOUT TODAY.
AND CONFRONTATION CLAUSE, THE
HARMLESS ERROR RULE APPLIES.
WE'VE NEVER SAID IT.
THIS INHERENTLY PREJUDICIAL
CLAIM, FROM WHAT I'VE READ FROM

THE U.S. SUPREME COURT WHEN
YOU'RE TALKING ABOUT GAGGING A
DEFENDANT, INHERENTLY
PREJUDICIAL.
THE SUIT FOR THE, YOU KNOW,
PRISON GARB, INHERENTLY --
HARMLESS ERROR APPLIES TO THAT,
AND IT WOULD APPLY TO THIS.
AND IT APPLIES -- FROM WHAT I'VE
READ FROM THE FLORIDA
CONSTITUTION --
>> WELL, IT'S SOMETHING IN
SHACKLES.
THAT'S SORT OF THE IDEA, THE
PRESUMPTION OF INNOCENCE IS
DESTROYED IF THE PERSON IS
SHACKLED OR IN PRISON GARB.
CAN THAT BE RAISED FOR THE FIRST
TIME ON APPEAL WITHOUT IT HAVING
BEEN -- BECAUSE WE SEE THIS
SOMETIMES IN POSTCONVICTION.
>> YES, YES.
ACCORDING TO YOUR COURT, NO.
THAT'S SOMETHING THAT HAS TO BE
RAISED, AND ACCORDING TO THE
FOURTH AND THE FARMER CASE, THAT
HAS TO BE OBJECTED TO.
>> SO THIS IS, WHY IS THIS --
THIS IS NOT A FRIENDLY QUESTION.
>> RIGHT.
>> I MEAN, AGAIN, I'M SORRY.

I DON'T, THIS PRACTICE SEEMS TO
ME TO BE SOMETHING THAT SHOULD
NOT BE ALLOWED GOING FORWARD.
BUT I'M JUST FROM A, FROM A
POINT OF VIEW WHY SHOULDN'T HERE
THE DEFENSE LAWYER DID NOT
OBJECT?
YOU KNOW, MAYBE THE DEFENSE
LAWYER THOUGHT THIS WAS BETTER
FOR HIS CLIENT, TO BE ABLE TO
HAVE THE WITNESS BE SEEN IN
PERSON BY THE JURY.
>> IN OLIVER HE DID OBJECT.
HE OBJECTED, AND HE OBJECTED ON
TWO DIFFERENT GROUNDS.
HE FIRST SAID, JUDGE, YOU HEARD,
YOU HEARD THE CHILD'S MOTHER.
THIS WAS LIKE A LITTLE PRETRIAL
HEARING ON THE 92.54 STATUTE.
YOU HEARD THE CHILD'S MOTHER,
AND YOU HEARD THE DETECTIVE WHO
WAS IN THE CASE.
NO PSYCHOLOGIST OR ANYTHING.
WE THINK THIS IS TOTALLY
INADEQUATE.
YOU CAN'T DO A SCREEN, YOU CAN'T
DO THE TAPING BECAUSE IT WOULD
VIOLATE MY CONFRONTATION
POSITION UNDER MARYLAND V.
CRAIG.
YOU HAVE TO HAVE THIS HEARING
FIRST.

BECAUSE THE PRESUMPTION IS
YOU'VE GOT FACE-TO-FACE
CONFRONTATION IN EVERY CRIMINAL
CASE.
NOBODY'S GOING TO -- EXCEPT
WHERE THE STATE COULD MAKE A
HEAVY BURDEN.
>> BUT THEY DIDN'T OBJECT TO THE
SCREEN.
>> THEY OBJECTED TO THE SCREEN,
YES, THEY DID.
>> IN OLIVER.
>> IN OLIVER.
>> NOT IN OVERHOLT --
>> NOT IN OVERHOLT.
BUT OVERHOLT'S GONE.
>> WELL, IT'S NOT GONE.
I MEAN, THE DECISION --
[LAUGHTER]
>> OKAY.
>> WHAT WAS THE BASIS FOR THE
OBJECTION?
ISN'T THAT THE POINT HERE?
THE BASIS THAT WAS RELIED ON FOR
REVERSAL BY THE FOURTH DISTRICT
WAS NOT BASIS THAT WAS
ARTICULATED AS AN OBJECTION.
THAT'S WHY THEY SAID IT'S
FUNDAMENTAL ERROR.
>> WELL, MY ANSWER TO THAT IS --
AND I'VE GOT TO BE, HERE'S THE

LAWYER ANSWER --

[LAUGHTER]

IN OLIVER THE ATTORNEY GENERAL'S

OFFICE DID NOT RAISE WAIVER IN

THE DCA AND HAS NOT RAISED

WAIVER BEFORE THIS HONORABLE

COURT IN OLIVER.

THAT'S NOT BEFORE THIS COURT.

SO THAT'S GONE.

NOW, HOLT THEY DID RAISE IT, AND

THE ANSWER TO THAT QUESTION IS

THAT WHEN THE LAWYER USED THE

WORD "CONFRONTATION," HE DID USE

THAT WORD IN OVERHOLT, THE JUDGE

KNEW WHAT HE WAS TALKING ABOUT.

THEY WERE TALKING ABOUT THE

SCREEN --

>> LET'S TALK ABOUT OLIVER.

LET'S TALK ABOUT OLIVER.

YOU SAID OVERHOLT.

WE'RE ON OLIVER, RIGHT?

>> YES.

>> TELL ME ABOUT OLIVER.

>> OLIVER.

HE OBJECTS.

THERE'S NO QUESTION ABOUT IT.

HE OBJECTS TO THE EVIDENCE THAT

WAS SUBMITTED BY THE STATE TO

GET THEIR SCREEN, TO GET THE

TAPING SIGNAL.

AND HE OBJECTS ON CONFRONTATION

GROUND CLAUSE.

THAT'S IT.

THERE ARE THE TWO GROUNDS.

I CAN'T CHANGE WHAT HE OBJECTED

TO.

THAT'S THE GROUNDS.

>> AND THAT'S NOT WHAT THEY

RELIED ON?

THEY RELIED ON THIS ADVERSE

IMPACT --

>> INHERENTLY PREJUDICIAL.

>> INHERENTLY PREJUDICIAL --

>> YES.

>> -- BECAUSE OF THE SCREEN

COMPROMISED THE PRESUMPTION OF

INNOCENCE.

>> YES.

>> BUT DID I UNDERSTAND YOU TO

SAY THAT THAT REALLY, EVEN THAT

IS SUBJECT TO A HARMLESS ERROR

ANALYSIS?

>> YES, JUDGE.

>> THEY JUST TOTALLY MISSED THE

BOAT.

>> NO, I DON'T THINK THEY MISSED

THE BOAT.

I THINK, I THINK -- WHEN I READ

THAT SENTENCE, THEY SAY "WE

DISAGREE."

NOW, WHAT DOES THAT MEAN?

YOU GUYS WRITE OPINIONS EVERY

DAY.

THEY SAY, THE FOURTH, THE STATE
SAYS McLAUGHLIN, YOU KNOW, YOU
NEED McLAUGHLIN BECAUSE OF THE
HARMLESS ERROR ANALYSIS.
AND THEY SAY "WE DISAGREE."
NOW, DO WE DISAGREE THAT IT IS
HARMFUL?
YOU KNOW, I MEAN, THAT'S THE WAY
WE READ IT, THAT THEY DID THE
ANALYSIS.
THAT'S ALL I CAN TELL YOU.
AND, AND WHICH I ARGUED IN MY
BRIEF, IT IS HARMFUL IN THIS
PARTICULAR CASE.
IN THIS PARTICULAR CASE, WHAT WE
HAVE IS -- I'D LIKE TO GO OVER
THAT.
>> BEFORE YOU GET TO THE
HARMLESS ERROR ANALYSIS --
>> OKAY.
>> -- BECAUSE YOU'VE ARGUED,
AGAIN, YOU'RE NOT GIVING UP THAT
THERE'S NO CONFLICT.
COULD YOU JUST FROM THE POINT OF
VIEW OF THE DEFENDANT GOING
FORWARD, IS THIS SOMETHING THAT
IS, QUOTE, BETTER THAN CLOSED
CIRCUIT?
BECAUSE, AGAIN, YOU STILL HAVE
THE JURY OBSERVING THE WITNESS
AND ANY FACIAL EXPRESSIONS.
AND SO THERE IS THE -- WHY, THEN

THAT'S WHAT THE JUDGE THOUGHT
THAT IT WAS, QUOTE, BETTER FOR
THE DEFENDANT.
WHAT IS YOUR POSITION AS IS IT
BETTER?
>> IT'S NOT BETTER.
IT'S HORRIBLE.
IT'S INHERENTLY PREJUDICIAL.
>> BECAUSE?
>> BECAUSE TWO FUNDAMENTAL
REASONS.
BECAUSE ONCE THAT SCREEN COMES
OUT, WITNESS A TESTIFIES,
WITNESS B TESTIFIES, THEN THIS
PARTICULAR WITNESS, THE CHILD
ACCUSER, COMES ON.
THEN A SCREEN COMES UP, PLACED
THERE BY THE TRIAL JUDGE OVER
THE DEFENSE'S OBJECTIONS.
WHAT'S HAPPENING THERE IS THAT
AT THAT POINT YOU HAVE THE
PRESUMPTION OF INNOCENCE, WE
CONTEND, IS BEING DILUTED THERE.
ALSO THE JUDGE IS KIND OF GIVING
CREDENCE TO THE ACCUSATION.
IT'S SORT OF LIKE --
>> WELL, WHY IS THAT?
AND, AGAIN, I THINK THAT'S
PROBABLY THE CASE, BUT ISN'T
THAT ALL THE WITNESSES TESTIFY
LIVE, AND THEN YOU'VE GOT THE

CHILD THAT'S ON CLOSED CIRCUIT
TV?
THAT CHILD IS BEING TREATED
DIFFERENTLY.
>> WELL, BECAUSE ON THAT,
BECAUSE THAT'S THE STATUTE THAT
FLORIDA, THE FLORIDA LEGISLATURE
CAME UP WITH TO --
>> WELL, DOES THE JUDGE GIVE IT
SPECIAL INSTRUCTIONS?
>> WHAT'S THAT?
>> DOES THE JUDGE GIVE A SPECIAL
INSTRUCTION AS TO WHY THAT CHILD
WITNESS IS TESTIFYING BY CLOSED
CIRCUIT?
>> YEAH.
I THINK THAT'S PART OF THE
STATUTE.
BECAUSE WHAT HAPPENED WAS --
>> YES.
THERE WAS, THERE'S AN -- WHEN
THE CLOSED CIRCUIT TV IS
UTILIZED, THERE'S A STATUTE -- I
MEAN, I'M SORRY, THERE'S AN
INSTRUCTION THE JUDGE IS
REQUIRED TO GIVE TO EXPLAIN WHY
THAT CHILD IS --
>> I DON'T THINK SO, BUT I WOULD
THINK ANY DEFENSE ATTORNEY WOULD
TRY TO DRAFT SOMETHING TO
EXPLAIN WHY THIS IS HAPPENING
AND PUT IT IN CONTEXT SO THERE

WOULDN'T BE ANY ADVERSE --

>> WHAT WAS IT THE DEFENSE PROPOSED AS AN INSTRUCTION ABOUT WHY --

>> WELL, I --

>> ALL THE OTHER WITNESSES ARE LIVE, AND WE JUST SAID THAT. NOW YOU HAVE ONE ON CLOSED CIRCUIT. WHAT WOULD YOU TELL THE JURY ABOUT WHY THIS WITNESS IS ON CLOSED CIRCUIT?

>> UM, I'M NOT CERTAIN, YOUR HONOR, BECAUSE I WOULDN'T REALLY WANT TO BE --

>> BUT IF YOU TELL THEM NOTHING, IT SEEMS TO ME THAT YOU STILL GET TO THE SAME POINT OF, YOU KNOW, THIS CHILD MUST BE FRIGHTENED OF HIM. HE MAY HAVE INTIMIDATED THE PERSON OR WHATEVER. SO --

>> WELL, HERE'S WHAT THE CASE --

>> MY QUESTION IS DON'T YOU GET THE SAME KIND OF THE DEFENDANT HAS DONE SOMETHING OR INTIMIDATED THIS WITNESS OR DONE SOMETHING WHETHER YOU'RE TALKING ABOUT THE PARTITION OR YOU'RE TALKING ABOUT THE CLOSED

CIRCUIT?

>> THE ANSWER IS, YES, YOU DO

GET A SLIGHT.

BUT I THINK THE ANSWER FROM A

DEFENSE POINT OF VIEW WOULD BE

THIS: THAT WHEN YOU USE THE

TAPING METHOD, THE CLOSED

CIRCUIT TV THAT'S APPROVED BY

THE FLORIDA LEGISLATURE, IT MAY

FEEL THAT THE CHILD IS JUST

SCARED OF BEING IN A COURTROOM,

THAT A CHILD IS SCARED OF

TESTIFYING WITH THESE PEOPLE

AROUND.

BUT WHEN YOU PUT UP A SCREEN,

SCREEN A DEFENDANT, THE JURORS

ARE GOING TO THINK THAT IT'S NOT

JUST THE CHILD'S AFRAID BECAUSE

HERE I AM.

HERE'S THE JURORS, HERE'S THE

JUDGE, HERE'S THE WHOLE, YOU

KNOW, ALL THE DIFFERENT PEOPLE

IN THE COURTROOM.

BUT IT'S THE DEFENDANT WHO HAS

TO BE SCREENED.

SO IT ZEROS, THE SCREEN ZEROS IN

ON THE DEFENDANT, AND THAT'S THE

PREJUDICE IN THAT --

>> I THINK THAT'S A, I THINK

THAT'S --

>> CLOSED CIRCUIT TV.

>> IN OTHER WORDS, I THINK IT'S

SCARIER FOR THE CHILD, AND I
THINK THAT'S A GOOD DISTINCTION.
NOW, I STOPPED YOU FROM WHY IT'S
BETTER --
[INAUDIBLE CONVERSATIONS]
>> THE FOURTH DCA, THE FINAL
RULING BASICALLY WAS,
ULTIMATELY, THE FOURTH DCA HELD
THAT THE PARTITION LENT UNDUE
CREDIBILITY TO THE WITNESS.
>> RIGHT.
>> SO IF WE RULE ALONG THOSE
LINES, IT'S NOT GOING TO BE
LIMITED JUST TO CHILDREN
TESTIFYING IN THESE TRIALS.
THAT SAME ARGUMENT'S GOING TO BE
MADE IN ANY OTHER CASE INVOLVING
ADULTS --
>> RIGHT.
>> -- OR CASES INVOLVING
ORGANIZED CRIME OR ANYTHING LIKE
THAT.
SO HAVE THERE BEEN OTHER
INSTANCES IN OUR SYSTEM WHERE
PARTITIONS OR ANYTHING ELSE HAD
BEEN USED TO SHIELD THE WITNESS
FROM THE DEFENDANT IN THE CASE?
CAN YOU RECALL OF ANY OTHER
CASES?
NOT CHILDREN --
>> NOT CHILDREN.

NO.

THE ONLY THING I EVER SAW WAS

ONE IN A TEXAS CASE WHERE

SOMEBODY CAME IN THE COURT, AND

IT WAS AN ADULT, AND IT WAS --

HE WAS AFRAID.

IT WAS LIKE A GANGLAND TYPE

THING, AND HE WORE A MASK TO

COURT.

AND THEY SAID THAT WAS

INHERENTLY PREJUDICIAL, AND THEY

REVERSED THAT CONVICTION.

THAT WAS A TEXAS CASE.

>> I RECALL AS A PROSECUTOR

HAVING A WITNESS TESTIFY WEARING

A FENCING MASK.

IT WAS OBJECTED TO.

WE WOULDN'T ONLY ANSWER BECAUSE

THE GUY WAS ACQUITTED.

>> OH, OKAY.

[LAUGHTER]

WELL, TO PUT THIS ALL IN

CONTEXT, I JUST WANT TO BRING IT

ALL TOGETHER THIS WAY.

SHE TALKS ABOUT COY.

COY'S IMPORTANT BECAUSE -- AND

IT'S A CONFRONTATION CLAUSE.

AND I'M NOT SAYING THAT'S WHAT

IT'S ABOUT.

BUT THAT'S --

[INAUDIBLE]

JUSTICE SCALIA WROTE: THE

QUESTION IS WHETHER THE RIGHT TO
CONFRONTATION WAS VIOLATED IN
THIS CASE.
THE SCREEN AT ISSUE WAS
SPECIFICALLY DESIGNED TO ENABLE
THE COMPLAINING WITNESS TO AVOID
VIEWING THE APPELLANT AS THEY
GAVE THEIR TESTIMONY, AND THE
RECORD INDICATES THAT IT WAS
SUCCESSFUL IN THIS OBJECTIVE.
IT IS DIFFICULT TO IMAGINE A
MORE OBVIOUS OR DAMAGING RIGHT
TO A FACE-TO-FACE ENCOUNTER.
THAT'S THE U.S. SUPREME COURT.
NOW, LATER IN CRAIG, CRAIG COMES
ALONG BECAUSE THAT WAS A SCREEN
CASE.
MARYLAND HAD A CLOSED CIRCUIT TV
THING THAT GOT UP TO THE U.S.
SUPREME COURT IN A 5-4 DECISION
HELD THAT THAT'S THE PROPER
BALANCE THAT'S MADE.
IF A TRIAL JUDGE MAKES CERTAIN
FINDINGS OF NECESSITY WITH THIS
PARTICULAR CHILD -- NOT ALL THE
CHILDREN, BUT THE PARTICULAR
CHILD WOULD HAVE SOME KIND OF
TRAUMA FROM TESTIFYING, THEN
WE'RE GOING TO BALANCE THE
CONFRONTATION THING AND WEIGH IT
AND SAY THAT WILL BE OKAY IN

THOSE SPECIFIC, VERY NARROW

CASES.

>> WELL, NOW BUT COY INSOFAR AS

THE CONFRONTATION ISSUE GOES

SEEMED TO CONTEMPLATE THAT THE

SCREEN MIGHT BE OKAY IF THERE

WERE SUFFICIENT FINDINGS OF

NECESSITY.

IS THAT CORRECT?

AGAIN --

>> MAYBE.

MAYBE.

BUT THAT'S A PRETTY STRONG

STATEMENT THOUGH, I MEAN, ABOUT

THAT --

>> WHERE BUT HE CARVES OUT, HE

SPECIFICALLY ACKNOWLEDGES THE

ABSENCE OF THE FINDINGS.

>> OH, YES.

YES, YOUR HONOR.

>> PART OF THE ANALYSIS.

SO AT LEAST LEAVES THAT OPEN.

BUT AGAIN, THAT'S ONLY ON THE

CONFRONTATION ISSUE, NOT ON ANY

OTHER CONSTITUTIONAL ISSUE THAT

MIGHT BE RAISED ABOUT A SCREEN.

>> THAT'S TRUE TOO.

SO WHAT I'M TRYING TO SAY TO

THIS COURT AND I WANT TO PUT IT

ALL TOGETHER FOR YOU IS THAT YOU

HAVE COY TALKING ABOUT HOW THE

SCREEN, HOW BAD THE SCREEN IS,

LET'S JUST SAY THAT.
THEN YOU HAVE MARYLAND V. CRAIG
THAT APPROVES THIS CLOSED
CIRCUIT TELEVISION WHEN YOU
BALANCE THE TEST AND DO IT THAT
WAY.
THEN YOU HAVE THE FLORIDA
LEGISLATURE ACROSS THE STREET
PASSES A STATUTE THAT'S RIGHT --
THEY LAY OUT THE PROCEDURE HOW
TO DO IT THROUGH CLOSED CIRCUIT
TV IF THERE'S A HEARING, IF
THERE'S FINDINGS BECAUSE THEY
HAVE A U.S. SUPREME COURT CASE
ON POINT.
MARYLAND V. CRAIG SUPPORTS THAT.
AND THEN THAT'S BEEN THE LAW FOR
20 YEARS IN FLORIDA.
THEN WE HAVE A JUDGE THAT
DECIDES THAT'S NOT GOOD ENOUGH,
THAT HE'S GOING TO DREAM UP HIS
OWN WAY OF DOING BUSINESS, AND
THAT'S THE PROBLEM.
IT OPENS UP THE DOORS TO OTHER
THINGS.
THERE WAS AN ALTERNATIVE TO THE
JUDGE IN THE OKEECHOBEE.
THE ALTERNATIVE WAS THE STATUTE.
THAT WAS THE WAY TO GO.
AND BY GOING TO THE SCREEN, HE
OPENED THE DOOR TO THIS PROBLEM

THAT HAS NOTHING TO DO WITH THE
CONFRONTATIONAL CLAUSE BUT IS
INHERENTLY PREJUDICIAL.
>> AS JUSTICE PARIENTE MENTIONED
EARLIER, THIS JUDGE HAS USED
THIS SCREEN IN A NUMBER OF
CASES, CORRECT?
>> RIGHT, FOUR.
>> HE'S NOT INDIVIDUALIZING IT
TO A PARTICULAR CHILD AT THE
MOMENT, IT'S EVERY CHILD GETS A
SCREEN.
>> THAT'S THE UNDERCURRENT HERE.
I MEAN, THE JUDGE DOES MAKE
FINDINGS, BUT WE'RE SAYING THAT
REALLY HE'S JUST GOING THROUGH
THE MOTIONS.
ALL DUE RESPECT TO HIM, AND I'M
NOT SAYING HE'S GOT BAD MOTIVES
FOR WHAT HE'S DOING TO PROTECT
THESE CHILDREN.
BUT TO ME, THERE MIGHT BE ONE
CASE IN PENSACOLA AND MAYBE ONE
CASE IN KEY WEST EVERY COUPLE OF
YEARS.
BUT NOT THIS ROUTINELY IN YOUR
COURTROOM BECAUSE YOU'VE GOT
THIS IDEA BECAUSE YOU'RE NOT THE
SUPREME COURT, AND YOU'RE NOT
THE FLORIDA SUPREME COURT WHEN
YOU'RE A CIRCUIT JUDGE IN
OKEECHOBEE COUNTY.

THANK YOU VERY MUCH.

>> REBUTTAL?

>> I WOULD LIKE TO START WITH THE FACT THAT IN THESE CASES THE TRIAL JUDGE MADE SPECIFIC FINDINGS SPECIFIC TO THESE CHILDREN.

IT'S ON PAGE 215 OF THE TRANSCRIPT WITH RESPECT TO THE CHILD IN OLIVER.

IT WASN'T A GENERAL, OKAY, THIS IS A CHILD VICTIM, HE'S A VICTIM OF A SEX CRIME, HE'S USING A SCREEN.

THE METHOD WAS IMPLEMENTED, AND THEN THE JUDGE -- IT'S, FIRST, THE METHOD IS THERE AN EXCEPTION TO THE CONFRONTATION, AND I WOULD SUGGEST EVEN WITH THE DUE PROCESS.

BUT IN THESE CASES THERE WERE PARTICULARIZED FINDINGS.

I'D ALSO LIKE TO POINT OUT THAT IN THIS CASE WE HAVE THE PROBLEM THAT IT'S NOT CLEAR THAT A HARMLESS ERROR ANALYSIS WAS DONE.

IT'S ACTUALLY QUITE CLEAR IT SEEMS THERE WAS A FUNDAMENTAL DUE PROCESS VIOLATION FOUND WHICH IS NOT CORRECT.

THIS VIOLATION CAN BE FOUND TO
BE HARMLESS, AND THE COURT
SHOULD FIND THAT THE FOURTH DCA
SHOULD HAVE DONE THE HARMLESS
ERROR IN THESE CASES LIKE
McLAUGHLIN POINTED OUT.
THERE WAS A DUE PROCESS
VIOLATION, BUT THERE WAS NO
CONCESSION OR OTHER EVIDENCE.
IN THIS CASE WE DO HAVE SORT OF
A CONFESSION TO THE VICTIM'S, TO
THE DEFENDANT'S FATHER, I'M
SORRY, AND HIS MOTHER ON A
CONTROLLED PHONE CALL.
SO THAT'S THE DISTINCTION THAT
WAS MADE IN THE CASE WITH
RESPECT TO THE HARMLESS ERROR
ANALYSIS.
>> SO WHAT DOES THAT CONSIST OF
THOUGH?
>> WELL, THERE WERE SOME LIMITED
STATEMENTS REGARDING I DID SOME
OF IT BUT NOT ALL OF IT.
BUT, AND I RECOGNIZE THIS
COURT'S STRUGGLE.
HOWEVER, THAT EVIDENCE WAS NOT
EVEN CONSIDERED.
THE FOURTH DCA CITED BOTH TO
PARKER AND McLAUGHLIN, BUT AS
NOTED BY THE FOURTH DCA IN A
LATER OPINION IN FARMER, THEY
FOUND IT TO BE FUNDAMENTAL

ERROR.
AND FARMER POINTED OUT THAT IT
ISN'T.
SO WE NOW HAVE A CONFLICT EVEN
WITHIN THE DISTRICT WHICH IS A
CASE THAT CAME OUT AFTER
JURISDICTION WAS TAKEN.
I'D ASK THAT THIS COURT FIND
THAT THE METHOD USED WAS, IN
FACT, PROPER AND THAT THE TRIAL
JUDGE MADE THE CORRECT
PARTICULARIZED FINDINGS.
AND IF IT'S NOT PROPER, THE
COURT SHOULD HAVE ENGAGED IN
HARMLESS ERROR ANALYSIS.
THANK YOU.
>> THANK YOU FOR YOUR ARGUMENTS.
COURT IS IN RECESS FOR TEN
MINUTES.
>> ALL RISE.