Rosalyn Ann Sanders v. State of Florida

THE NEXT CASE ON THE COURT'S ARGUMENT CALENDAR IS SANDERS VERSUS STATE.

MAY IT PLEASE THE COURT. MY NAME IS STEVEN BEEN. I REPRESENT THE PETITIONER ROSALYN SANDERS. THIS CASE IS AN APPEAL FROM A FIRST-DEGREE MURDER CONVICTION AND LIFE SENTENCE. IT IS IN THIS COURT, BASED ON THE DISTRICT COURT'S CERTIFICATION OF CONFLICT ON THE ISSUE OF WHETHER INSUFFICIENT EVIDENCE AMOUNTS TO FUNDAMENTAL ERROR. THE FACTS IN BRIEF, ARE THE VICTIM, FELIX PARKER, WAS DRIVEN TO A STREET CORNER BY MR. LARRY MOORE, DRIVING A PICKUP TRUCK. AT THE STREET CORNER, MSZ SANDERS AND ANOTHER -- MS. SANDERS AND ANOTHER MAN, MEYER ONE DAVIS, WERE SELLING COCAINE. MR. PARKER LOOKED AT SOME COCAINE AND DID NOT WANT TO BUY. AS MR. MOORE DROVE OFF, ACCORDING TO THE STATE WITNESSES SANDERS INCLUDED THAT THEY HAD DRIVEN OFF WITH SOME OF HER COCAINE, THAT SHE HAD BEEN ROBBED. SHE AND DAVIS YELLED AT THE RETREATING TRUCK, AND THEN SHE SHOT FIVE SHOTS, FIRED HER GUN FIVE TIMES AT THE TRUCK. ONE OF THE BULLETS STRUCK MR. PARKER, KILLING HIM. THERE IS ONE ERROR, FACTUAL ERROR IN THE BRIEFS THAT I NEED TO CORRECT. WE SAID THAT ALL FIVE BULLETS STRUCK THE TRUCK BELOW THE LEVEL OF THE WINDOW. IN REVIEWING THE RECORD BEFORE THIS ARGUMENT, I CONCLUDED THAT THAT WAS INCORRECT. THAT ONE OF THE BULLETS ACTUALLY DID STRIKE THE REAR WINDOW OF THE CAB, AND THAT WAS THE BULLET THAT APPARENTLY STRUCK THE VICTIM. THE OTHER FOUR BULLETS HIT THE METAL, SOLID BODY OF THE TRUCK, EITHER THE REAR OF THE BED OR ONE BULLET HIT THE BACK OF THE CAB. BUT I WANTED TO MAKE THAT CORRECTION, SINCE IT WAS MISSTATED IN THE BRIEFS. AS TO THE SUFFICIENCY OF PREMEDITATION, WHICH I THINK I SHOULD DEAL WITH THAT BRIEFLY, FIRST THERE ARE REALLY TWO REASONS WHY THE EVIDENCE DID NOT ESTABLISH PREMEDITATION HERE. FIRST, THE FACTS AS PRESENTED BY THE STATE WITNESSES, ESTABLISHED THAT THIS WAS AN UNPLANNED, UNREFLECTED, IMPULSIVE KIND OF SHOOTING. THE DEFENDANT, AS THE STATE WITNESSES PRESENTED IT, WAS REACTING TO THIS ROBBERY, THIS THEFT THAT HAD JUST HAPPENED. AND THE STATEMENT, AS MEYER ONE DAVIS TESTIFIED, IT WAS A QUICK BANG, BANG, AND WAS OVER KIND OF THING. HE DID NOT RECALL HER DOING ANYTHING TO INDICATE SHE THOUGHT ABOUT WHAT SHE WAS DOING. IT IS PRETTY MUCH KIND OF A CLASSIC SECOND-DEGREE MURDER KIND OF SITUATION.

LET ME SEE IF I HAVE THE FACTS RIGHT IN MEYER THEN. SHE FELT SHE HAD BEEN RIPPED OFF RELATIVE TO THE PRICE.

AND WHEN THE -- RELATIVE TO THE PRICE, AND WHEN THE VICTIM GETS IN THE TRUCK AND IS DRIVING OFF, SHE COMES UP AND SHOOTS FIVE TIMES AT THE BACK OF THE TRUCK. ARE THOSE THE FACTS HERE?

YES, SIR. THAT'S CORRECT.

AND WHAT IS LACKING IN PREMEDITATION HERE?

WELL, THAT IS WHAT I WAS GETTING TO. THE FIRST THING IS, I MEAN, PREMEDITATION IS, YOU KNOW, DECIDING TO KILL SOMEONE BEFORE YOU KILL THEM, AND HERE THIS WAS A QUICK, A REACTION TO AN EVENT. I MEAN, IT IS REALLY A CLASSIC SGRECKD MURDER SITUATION.

HER REACTION TO FEELING THAT SHE HAS BEEN RIPPED OFF IN THIS DRUG DEAL, AND SHE IS ANGRY, AND SHE IS SHOOTING AT THE BACK OF A TRUCK, TO, OBVIOUSLY SOMEBODY IS DRIVING

THE TRUCK. SHE KNOWS THAT PEOPLE ARE IN THE TRUCK.

CLEARLY IT WAS AN ACT THAT WAS WHAT THE SECOND-DEGREE MURDER STANDARD, IMMINENTLY DANGEROUS TO ANOTHER AND DISREGARDING THE SAFETY OF ANOTHER. I FORGET THE EXACT LANGUAGE OF THE SECOND-DEGREE MURDER STATUTE BUT CLEARLY IT SATISFIED THAT, AND PEOPLE DO GET KILLED, WHEN SOMEONE ACTS IN THAT WAY.

WHAT DO YOU PERCEIVE AS HER INTENT?

WELL, WHEN SOMEONE SHOOTS IN ANGER OR WHENEVER, AT A TRUCK, IT COULD BE INTENT, INTENDED TO GET THE PERSON'S ATTENTION, TO STOP THE TRUCK. SHE HAD YELLED AT THE TRUCK TO STOP AND IT DIDN'T STOP. IT COULD HAVE BEEN FRIGHTENED. IT COULD HAVE BEEN TO VENT HER OWN ANGER. IT CAN'T BE ASSUMED --

WHAT DO YOU PERCEIVE HER INTENT TO BE HERE?

I THINK IT WAS TO STOP THE TRUCK. SHE YELLED AT THE TRUCK TO STOP AND IT DIDN'T STOP. I THINK SHE WAS TRYING TO GET THEIR ATTENTION, SO THEY WOULD STOP AND COME DEAL WITH HER ABOUT THE SITUATION WITH THE MISSING COCAINE, BUT IT IS THE STATE'S BURDEN TO PROVE THAT THE INTENT IS THE INTENT TO KILL, TO ACTUALLY CAUSE DEATH, AND THAT THAT WAS A REFLECTED DECISION PRIOR TO THE ACT, AND THAT EVIDENCE IS LACKING HERE.

ISN'T THERE A RULE, THOUGH, THAT SAYS PEOPLE ARE LEFT WITH THE LOGIC OF THE CONSEQUENCES OF WHAT THEY VOLITIONALLY DO. LET ME CHANGE THE FACTS A LITTLE BIT, AND LET'S ASSUME, INSTEAD OF A TRUCK THAT, THE PERSON THAT SHE PERCEIVED WERE RIPPING HER OFF OR WHATEVER KIND OF THING, JUST RAN FROM THE SCENE, AND SO NOW SHE JUST FIRED AT THEM AS THEY RAN FROM THE SCENE. WHAT LOGICALLY IS GOING TO HAPPEN TO SOMEBODY THAT IS RUNNING AWAY FROM THE SCENE AND HAS FIVE BULLETS FIRED INTO THEM?

LET ME TURN IT AROUND.

ISN'T SOMETHING TERRIBLE GOING TO HAPPEN TO THAT PERSON?

LET ME TURN IT AROUND. LET'S SUPPOSE THAT HER INTENT WAS TO HIT THE TRUCK NOT THE PEOPLE. THE BEHAVIOR IS THE SAME.

WELL, THAT IS FOR A FACTO FINDER TO DETERMINE -- THAT IS FOR A FACT FIND LOWER DETERMINE, IS IT NOT?

THE STATE HAS TO PROVE PREMEDITATED INTENT.

IT IS FOR A FACT FINDTORY DECIDE WHAT DID SHE INTEND TO DO BY FIRING THOSE FIVE SHOTS? DID SHE INTEND TO HURT SOMEBODY, OR DID SHE JUST INTEND TO MAKE SOME NOISE WITH THAT WEAPON? BUT NT ISN'T ONE -- BUT ISN'T ONE OF THE POSSIBLE INFERENCES THAT SHE INTENDED THE INFERENCE THAT SHE INTENDED THE OBVIOUS CONSEQUENCES OF WHAT SHE DID IN FIRING HER VOLITIONAL SHOT. LET ME COME BACK TO WHAT SHE DID AND WE ARE NOW JUMPING INTO THE FACTS OF THE CASE OR WHATEVER. WAS THERE EVIDENCE HERE, TOO, THAT THERE WAS A FELONY EITHER COMMITTED OR BEING COMMITTED? IN OTHER WORDS I REALIZE THAT THE STATE APPARENTLY DIDN'T ARGUE A FELONY MURDER ARGUMENT HERE, BUT WOULD THE EVIDENCE AND THE FACTS OF THIS CASE HAVE SUPPORTED, ALSO, A FELONY?

I THINK IT COULD HAVE SUPPORTED MAYBE A THIRD-DEGREE FELONY MURDER, BASED ON THE COCAINE TRANSACTION. I DON'T THINK THAT IS ONE OF THE ENUMERATED FELONIES FOR FIRST-DEGREE MURDER. FELONY MURDER WAS NOT SUBMITTED TO THE JURY, BY THE WAY.

ISN'T THIS ONE OF THE PROBLEMS, WITH, IF YOU DON'T HAVE SOMEBODY COMPLAINING ABOUT THE ADEQUACY OF THE EVIDENCE ON ONE THEORY, OF WHETHER OR NOT THE STATE, ALSO, WOULD HAVE BEEN ENTITLED TO AN INSTRUCTION TO THE JURY ON FELONY MURDER, IF YOU NEVER GET TO THAT POINT, BECAUSE ONE SIDE DOESN'T CHALLENGE THE CASE GOING TO THE JURY ON THE INTENT, ON THE PREMEDITATION, THEN YOU ARE REALLY LEFT WITH THE STATE, PERHAPS, WOULD HAVE HAD THE OPTION, IF THIS THEORY WOULD HAVE BEEN ARGUED AND THE JUDGE WOULD HAVE AGREED WITH IT, THEN THEY COULD HAVE SUBMITTED THE CASE, I DON'T KNOW WHETHER THEY, THE EVIDENCE WAS SUFFICIENT OR NOT, BUT WE ARE LEFT WITHOUT THOSE THINGS, SO HOW ABOUT GOING BACK TO YOUR ORIGINAL ISSUE HERE ABOUT THAT, NO, THERE IS NO REQUIREMENT IN ORDER TO PRESERVE THIS ISSUE FOR APPEAL, OF HAVING TO SPECIFICALLY ARGUE THE SUFFICIENCY OF THE EVIDENCE, AND HERE WITH REFERENCE TO THE ELEMENT OF PREMEDITATION. WE HAVE JUMPED INTO THE FACTS HERE, RATHER QUICKLY. WOULD YOU, WHEN YOU COME BACK TO YOUR LEGAL ARGUMENT --

ON WHETHER INSUFFICIENCY I IS FUNDAMENTAL -- INSUFFICIENCY IS FUNDAL ERROR, YES. ON THAT PARTICULAR THING. I GUESS I SHOULD START WITH THE ISSUE WHICH YOU HAVE RAISED, WHICH IS, IF A DEFENSE DOES NOT RAISE THE ISSUE AT TRIAL, DOES THAT CHEAT THE STATE SOMEHOW? OUT OF SOME OPPORTUNITY, A OPPORTUNITY TO ASK FOR AN INSTRUCTION IN A DIFFERENT THEORY OR AN OPPORTUNITY TO REOPEN THE CASE AND PRESENT MORE EVIDENCE, SOMETHING LIKE. THAT I MEAN, THE STATE HAS RAISED THAT ISSUE IN ITS BRIEFS. OF COURSE, ONE ANSWER WHICH IS IN THE BRIEFS, IS THE RULE DOESN'T REQUIRE, THE RULE AS THIS COURT HAS INTERPRETED IT IN STEVENS, DOES NOT REQUIRE THE DEFENSE TO MOVE FOR JUDGMENT OF ACQUITTAL AT A TIME WHEN THE STATE HAS ANY OF THOSE OPTIONS, SINCE THE RULE ALLOWS THE MOTION TO BE MADE UP TO TEN DAYS AFTER THE TRIAL IS OVER, AND AT THAT POINT IT IS TOO LATE TO PRESENT MORE EVIDENCE, AND IT IS TOO LATE TO ASK FOR A DIFFERENT JURY INSTRUCTION. THE TRIAL IS OVER. BUT EVEN IF THAT RULE DIDN'T EXIST, THE NOTION THAT THE STATE'S INTEREST IN A SECOND CHANCE TO PROFITS CASE SOMEHOW TRUMPS THE DEFENDANT'S INTEREST IN NOT BEING CONVICTED OF A CRIME THAT WASN'T PROVED, I THINK, DOESN'T MAKE SENSE. THE CONSTITUTION PROTECTS THE DEFENDANT AGAINST BEING CONVICTED OF SOMETHING THAT ISN'T PROVED. I MEAN, THE DUE PROCESS REQUIRES THAT EVERY ELEMENT BE PROVED BEYOND A REASONABLE DOUBT. THE NOTION THAT THE STATE SHOULD GET A SECOND CHANCE, IF ANYTHING GOES CONTRARY TO THE CONSTITUTIONAL POLICIES IN CRIMINAL LAW. I MINE, THE DOUBLE -- I MEAN, THE DOUBLE JEOPARDY BASICALLY PROVIDES THE STATE GETS ONE CHANCE AND THAT IS IT.

BUT YOU HAVE REFERRED TO THIS NOW, AS FAILURE OF PROOF CASE, AND SEVERAL OF THE APPELLATE CASES MAKE A DISTINCTION BETWEEN BETWEEN WHAT IS REFERRED TO AS A USUAL FAILURE OF PROOF CASE AND THEN THOSE CASES WHERE THE EVIDENCE AFFIRMATIVELY SHOWS THAT THE DEFENDANT'S CONDUCT DOESN'T CONSTITUTE THE CRIME CHARGED. DO YOU THINK THAT IS A VALID DISTINCTION, AS FAR AS WHAT -- YOU KNOW, IN FACTUAL INSUFFICIENCY VERSUS LEGAL INSUFFICIENCY, OR IS THAT JUST APPELLATE LINE-DRAWING, WHERE YOU CAN'T DRAW --

THE IMPRESSION I GET IS THAT, WHEN THE COURT WANTS TO REVERSE, IT TRIES TO COME UP WITH SOME SORT OF DISTINCTION LIKE THAT. AND WHEN IT DOESN'T WANT TO REVERSE, IT JUST CITES THE CONTEMPORANEOUS OBJECTION RULE. I DON'T THINK THAT THOSE DISTINCTIONS ARE VERY HELPFUL, BUT I THINK, IF SUCH A DISTINCTION WERE MADE, THIS CASE WOULD FALL ON THE SIDE OF THE EVIDENCE AFFIRMATIVELY SHOWS THAT THIS IS NOT A PREMEDITATED MURDER. IT WAS THE STATE'S WITNESS WHO SAID SHE DIDN'T DO ANYTHING TO INDICATE SHE THOUGHT ABOUT WHAT SHE WAS THINKING ABOUT. IT WAS A BANG BANG, AND IT WAS OVER KIND OF THING. EVEN IF YOU COULD PRESUME INTENT TO KILL, WHICH I DON'T THINK YOU CAN FROM SHOOTING AT A TRUCK, THE STATE'S EVIDENCE AFFIRMATIVELY SHOWS THERE WAS NOT PREMEDITATION.

WELL, THIS IS, I MEAN, WE HAVE, TIME AND AGAIN, REFERRED TO PREMEDITATION, QUESTION, AS TO GOING TO THE SUFFICIENCY OF THE EVIDENCE TO SHOW INTENT. YOU ARE NOT SUGGESTING THAT THAT IS NOT NORMALLY A FACTUAL QUESTION, THAT THE JURY IS ENTITLED TO DRAW REASONABLE INFERENCES FROM EITHER WAY. I MEAN, I WOULD ASSUME THE DEFENSE LAWYER BELOW ARGUED SHE DIDN'T HAVE THE INTENT TO KILL. IS THAT -- WHAT WAS THE DEFENSE SOME.

IN CLOSING ARGUMENT, HE ARGUED THERE WAS NO REFLECTION HERE. SOMETHING LIKE. THAT THERE WAS NO TIME TO REFLECT.

THEY WERE ARGUING SECOND-DEGREE.

RIGHT.

SO NOW WE ARE GOING BACK TO THIS QUESTION, AND WHY, IF THIS CAN JUST BE RAISED ANY TIME, AND PRESUMABLY IT IS SUCH AN INJUNCTIVE, THE COURT OUGHT TO BE ABLE TO RAISE IT ON ITS OWN APPELLATE REVIEW, WHY IS IT THAT IN THAT, THE SPECIAL RULE THAT DEALS WITH DEATH CASES, IT SAYS THE COURT HAS AN OBLIGATION TO REVIEW DEATH CASES FOR DEFICIENCY OF THE EVIDENCE. WHAT YOU WOULD REALLY BE ARGUING FOR IS THAT EVERY CASE OUGHT TO BE INDEPENDENTLY REVIEWED BY THE APPELLATE COURT FIRST TIME AROUND, ON A SUFFICIENCY OF EVIDENCE BASIS, THERE BY NULL FYING ANY REQUIREMENT THAT MOTION FOR JUDGMENT OF ACQUITTAL BE MADE, THAT THE TRIAL COURT HAD THE OPPORTUNITY TO ADDRESS IT.

THE RULE REQUIRING SUFFICIENCY REVIEW IN CAPITAL CASES , CAN IS SOMEWHAT AMBIGUOUS, BUT IT CERTAINLY CAN BE READ TO MEAN THAT IT MUST BE REVIEWED, EVEN IF THE LAWYERS DON'T RAISE IT. THAT THE COURT --

WE DO THAT.

RIGHT. AND I AM NOT SAYING, I AM NOT ARGUING THAT EVERY APPELLATE COURT MUST, IN EVERY CASE, LOOK AT SUFFICIENCY, EVEN IF THE APPELLATE LAWYERS DON'T RAISE IT. AS A PRACTICAL MATTER, WHAT HAPPENS IS THE TRIAL LAWYERS DON'T HAVE TIME TO RESEARCH THESE THINGS, AND THEY MISS THEM AND THE APPELLATE LAWYERS CATCH THEM. IT IS LIKE WITH THE SENTENCING. THE REASON THIS COURT CAME UP WITH THE RULE ALLOWING APPELLATE LAWYERS TO PRESERVE SENTENCING ERRORS. THE TRIAL LAWYERS DON'T ALWAYS CATCH T.

DO YOU HAVE, THEN, -- CATCH IT.

DO YOU HAVE, THEN, TEN DAYS AFTER THE TRIAL? WHAT IS THE TIME PERIOD IN WHICH TO RAISE IT?

SUFFICIENCY? WITH MOTION OF JUDGMENT OF ACQUITTAL, THE RULE PROVIDES TEN DAYS AFTER TRIAL TO MAKE THE MOTION, WHICH MEANS IT IS GOING TO BE THE TRIAL LAWYER, JUST LIKE WITH SENTENCING, WHEN IT WAS TEN DAYS OR 20 DAYS AFTER THE TRIAL THAT IT WAS ALLOWED, THE TRIAL LAWYER WAS GOING TO BE LOOKING AT THAT. THE RULE WAS CHANGED TO ALLOW SENTENCING ERROR TO BE PRESERVED UP UNTIL THE TIME OF THE FILING OF THE INITIAL BRIEF. THAT IS WHAT MADE IT POSSIBLE FOR THE APPELLATE LAWYER TO BE THE ONE TO LOOK AT IT AND MAKING SURE THE ERROR WASN'T MISSED. SO --

YOU ARE SAYING THAT ALL OF THE OTHER DISTRICTS, BECAUSE THIS IS HERE ON A CONFLICT CASE THAT, ALL OF THE OTHER DISTRICTS PLUS THE FIRST DISTRICT, ALLOW SUFFICIENCY OF THE EVIDENCE, ACTUAL INSUFFICIENCY TO BE RAISED FOR THE FIRST TIME ON APPEAL?

I THINK THAT EVERY DISTRICT, INCLUDING THE FIRST, HAS, IN A NUMBER OF CASES, ALLOWED IT. AND EVERY DISTRICT IN AT LEAST ONE OTHER CASE HAS NOT ALLOWED IT. THE LAW IS IN SOMEWHAT OF A STATE OF CONFUSION. I MEAN TO SOME EXTENT, WHEN THE DISTRICT COURT WANTS TO REVERSE, BASED ON INSUFFICIENCY, THEY CITE TRUE DEL AND NEGRON -- TRUDELL AND NEGRON AND VANS, WHEN THEY WANT TO CITE INSUFFICIENCY AS FUND A.M. AL ERROR -- AS FUNDAMENTAL ERROR, AND WHEN DON'T WANT TO HOLD THAT IT IS NOT FUNDAL ERROR, THEY CITE THE BARBER CASE, OR THEY CITE SOME OF THE RECENT CAPITAL CASES WHICH REFER TO THE RULE, ALTHOUGH THEN, OF COURSE, THEY DO GO AHEAD AND ADDRESS THE ISSUE ON THE MERITS, SO I THINK THAT PROBABLY MORE DISTRICT COURT CASES IN THE LAST DECADE HAVE RULED THAT IT IS FUNDAMENTAL ERROR THAN OTHERWISE ESPECIALLY SINCE TRUDELL, BUT IT IS NOT UNIFORM.

YOU ARE IN YOUR REBUTTAL TIME MR. BEEN.

OKAY. I GUESS I WILL SAVE IT. THANK YOU.

THANK YOU. MS. HOLLAND.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM KAREN HOLLAND, AND I AM HERE ON BEHALF OF THE STATE, TODAY, ALONG WITH CO-COUNSEL JIM ROGERS. I WOULD LIKE TO TALK, A MOMENT, ABOUT JURISDICTION, BECAUSE I BELIEVE JURISDICTION WAS IMPROVE DENTLY GRANTED IN THIS CASE. THE FIRST DCA HELD, AND I QUOTE THE STATE'S FAILURE TO PROVE ALL ELEMENTS OF THE CHARGED DEFENSE DOES NOT CONSTITUTE FUNDAMENTAL ERROR WHICH MAY BE RAISED FOR THE FIRST TIME ON APPEAL, AND THEY CERTIFY CONFLICT WITH THE SECOND, THIRD, AND FIFTH DISTRICTS. HOWEVER, THERE APPEARS TO BE NO CONFLICT HERE, FACTUALLY OR LEGALLY. NONE OF THE THREE CERTIFIED CASES INVOLVE MURDER, LET ALONE PREMEDITATION, AND FURTHERMORE, NONE OF THOSE CASES INVOLVE WAIVER, WHICH IS WHAT WE HAVE IN THIS CASE.

LET ME GO, THERE IS SOMETHING TROUBLING ME.

YES.

IF SOMEBODY, BASED ON THE FACTS, CAN'T BE CONVICTED OF PREMEDITATION, BECAUSE THE FACTS DON'T SUPPORT IT, AND THAT MAY NOT BE THIS CASE HERE, AND THE DEFENSE LAWYER, WHO IS AN ASSISTANT PUBLIC DEFENDER, DOESN'T MOVE FOR A JUDGMENT OF ACQUITTAL, AND DOESN'T DO IT TEN DAYS AFTER TRIAL, BUT IF THEY HAD DONE IT, NO QUESTION, A JUDGE WOULD HAVE REDUCED IT TO SECOND-DEGREE, AT WHAT POINT, THEN, IS THE STATE'S POSITION THAT THERE WOULD BE AN INABILITY TO CORRECT WHAT WOULD HAVE TO BE A BASIC MISCARRIAGE OF JUSTICE?

WELL, I KNOW THE DEFENDANT IS ARGUING THAT THE PRESERVATION RULE DOESN'T IMPLY AN OPPORTUNITY FOR THE STATE TO REOPEN ITS CASE, BUT WE TAKE ISSUE WITH THAT RULE THAT PROVIDES A POST VERDICT MOTION. THAT RULE IS EXPANDED DOWN IN CIVIL, WHICH ONLY PROVIDES FOR RENEWAL, UPON POST-VERDICT MOTIONS. I MEAN, ALL THAT RULE DOES IS ALLOW THE DEFENDANT TO BYPASS PRESERVATION, AND IT IS CONTRARY TO THE STATE'S FULL OPPORTUNITY TO PRESENT ITS CASE AT TRIAL, SO THIS WILL REALLY, WE WOULD ASK THE COURT TO RECEDE FROM IT, AND IT IS REALLY CONTRARY TO THE SPIRIT OF THE JUDGMENTAL RULE, BECAUSE WHEN THE JUDGE MAKES HIS RULING --

YOU ARE ARGUING THAT, IF IT IS NOT RAISED, SUFFICIENCY OF THE EVIDENCE IS NOT RAISED AT TRIAL, THEN THE DEFENDANT IS BARRED FOREVER, EVEN IN POSTCONVICTION, FROM RAISING IT, BECAUSE IT IS NOT DEFICIENT FORM AND THE WHOLE IDEA IS BECAUSE THE STATE OUGHT TO HAVE A CHANCE TO BE ABLE TO PUT ON MORE EVIDENCE. IS THAT WHAT YOU ARE ARGUING?

WHAT WE ARE ARGUING IS THEY DO NEED TO PRESERVE IT BELOW, AND IF THIS CASE WAS TRULY DEVOID OF EVIDENCE, THEN THAT IS TRULY DEFECTIVE ON THE PART OF COUNSEL AND HE NEEDS TO RAISE IT UNDER 228, AND THAT IS PROPER AS TO ALL OF THESE CLAIMS. OPPOSING COUNSEL'S POSITION IS REALLY PREMISED ON THE ANOMALY THAT A VALID CLAIM IS A RAISED CLAIM, WHICH THEY REALLY AREN'T. IT IS NOT SUFFICIENT.

ISN'T IT REALLY BETTER FOR AN APPELLATE COURT, WHO IS LOOK O'CLOCK AT FIVE OTHER POINTS ON APPEAL AND HAS THE KNOWLEDGE OF THE EVIDENCE, AND SINCE WE ARE DEALING WITH AN ISSUE OF LAW, TO MAKE THAT DECISION, EITHER IT IS SUFFICIENT OR NOT. MOST OF THE TIME THAT IS A FAIRLY, YOU KNOW, INFERENCES, HERE, I MEAN, I AM SURE YOU ALL ARGUED THE INFERENCES FROM THE EVIDENCE IS THAT THERE WAS PREMEDITATION. CORRECT? I MEAN, ISN'T IT BETTER TO TRY TO SAY, WELL, WE WILL TRY TO SEE WHICH CASE WILL BE PUT IN POSTCONVICTION, WHERE THEY DON'T HAVE LAWYERS, IF IT IS NOT A CAPITAL CASE. IF THE TRIAL JUDGE IS THROUGH TRYING TO DECIDE WHETHER IT IS SUFFICIENT PERFORMANCE OR NOT THEN TO HAVE A SECOND OR THIRD APPEAL?

WELL, THE COURT IS ALWAYS GOING TO ENGAGE IN SOME KIND OF SPECIAL INQUIRY ON APPEALS, BUT TRUE FUNDAMENTAL ERROR BY ITS NATURE, IS APPARENT ON FIRST IMPRESSION AND REALLY DOESN'T REQUIRE TO YOU GO INTO THAT IN DEPARTMENT ANALYSIS OF THE RECORD. I THINK -- IN DEPTH ANALYSIS OF THE RECORD. I THINK TRUE FUNDAMENTAL ERROR, SO OFTEN THEY ARE UNCOMFORTABLE AND TURN AWAY FROM THAT RECORD AND LET IT GO DOWN TO THE TRIAL COURT.

YOU WOULD AGREE THAT CAPITAL CASES, BY TRIAL COURT AND ALSO BY COURT CASE, THAT WE, ON OUR OWN MOTION, RAISE THE SUFFICIENCY OF EVIDENCE, CORRECT?

YES, I AM AWARE OF THAT.

WHAT WOULD YOU ARGUE TO BE THE POLICY THAT, IN A FIRST-DEGREE MURDER CASE AND SOMEONE GETS DEATH, THAT WE ARE REALLY GOING TO REVIEW FOR SUFFICIENCY OF EVIDENCE, BUT IN A FIRST-DEGREE MURDER CASE, IF THEY GET LIFE IN PRISON, THEN THAT SHOULD GO WITHOUT ANY APPELLATE REVIEW, IF IT WASN'T RAISED IN A MOTION?

I THINK YOU KNOW, I AM NOT REAL FAMILIAR WITH DEATH PENALTY CASES BUT I THINK THAT IS SPECIFIC. THERE, YOU KNOW, THAT IS JUST DIFFERENT. YOU ARE IN A SITUATION OF TAKING SOMEBODY'S LIFE, AND I THINK THAT THE COURT OBVIOUSLY HAS GOOD REASON TO AUTOMATICALLY REVIEW THE SUFFICIENCY OF THE EVIDENCE, BUT WE ARE LOOKING HERE AT A SITUATION WHERE WE HAVE GOT AN INCREASING NUMBER OF INVALID CLAIMS, AND WHAT OPPOSING COUNSEL IS SUGGESTING IS THAT BASICALLY YOU REVIEW SUFFICIENCY OF THE EVIDENCE UNDER THIS GUISE OF FUNDAMENTAL ERROR.

DO YOU HAVE, WHAT IS YOUR RESPONSE TO THE DUE PROCESS CONCERN OF HOLDING SOMEONE WHERE THERE HAS BEEN INSUFFICIENT EVIDENCE PRESENTED BY THE STATE AND PROVED THE CRIME? I MEAN, ISN'T THAT WHAT THE US SUPREME COURT HAS DESIGNATED AS A DUE PROCESS VIOLATION?

ARE YOU SUGGESTING THAT THE APPELLATE COURTS REVIEW IT AS A DUE PROCESS VIOLATION? AM I UNDERSTANDING YOUR QUESTION?

WELL, MY QUESTION, I AM JUST SIMPLY, THE FUNDAMENTAL VIEW THAT IF THERE IS, I MEAN, YOU HAVE GOT TO, AT SOME POINT, HAVE THE ABILITY OF A DEFENDANT TO HAVE A REVIEW OF WHETHER THERE IS SUFFICIENCY OF THE EVIDENCE, BECAUSE IF THERE IS, HAS NOT BEEN UFFICIENT EVIDENCE TO PROVE THE ELEMENTS OF THE CRIME FOR WHICH THE DEFENDANT IS INCARCERATED, THEN THAT IS A VIOLATION OF DUE PROCESS.

RIGHT. WELL, THE STATE IS FREE TO ADOPT ITS OWN PROCEDURE. WE DON'T HAVE TO FOLLOW THE FEDERAL PROCEDURE TO AFFORD THE DEFENDANT THE OPPORTUNITY OF REVIEW. THIS COURT HAS COLLECTIVE EFFORTS TO MINIMIZE APPEALS AND MAX MIAMI EFFORTS AND CREATE EFFICIENCY IN THE TRIAL -- AND MAXIMIZE EFFORTS AND CREATE EFFICIENCY IN THE TRIAL COURT, AND IT JUST MAKES FOR SENSE TO BUT DEFICIENCY REVIEW ON THE APPELLATE COURT.

BUT THE STATE HAS NO SENSE IN SAYING SOMEBODY SERVING THE MAXIMUM SENTENCE FOR THAT CRIME, IN OTHER WORDS HOW STRONG IS THE INTEREST OF THE STATE, INSIDE SEEING TO IT THAT -- IN SEEING TO IT THAT SOMEBODY THAT WASN'T PROVEN TO BE GUILTY OF A CRIME STILL MUST SERVE A PENALTY AS IF GUILTY OF THAT CRIME. HERE IS, AS I UNDERSTAND, IT IS LIFE WITHOUT CHANCE FOR PAROLE? THAT IS PRETTY HEAVY STUFF, ISN'T IT, AND WHAT INTEREST DOES THE STATE HAVE IN NOT ALLOWING FOR THERE TO BE A REVIEW FOR THE SUFFICIENCY OF THE EVIDENCE?

THE STATE SIMPLY STATES THAT HE DOES HAVE AN AVENUE OF REVIEW. HE NEEDS TO PRESERVE IT, AND IF HE DOESN'T PRESERVE IT, IT IS INEFFECTIVE ASSISTANCE AND HE NEEDS TO TAKE IT DOWN TO THE TRIAL COURT. THE PRECEDENCE FOR THIS CASE LIES IN BARBER AND THE SUPREME COURT REJECTED THAT. IT SAID IF THE DEFENSE COUNSEL IS INEFFECTIVE FOR FAILING TO RAISE IT, IT IS TO BE TAKEN WHERE THERE IS THE MOST EVIDENCE FOR THE APPELLATE COURT, AND I DID WANT TO POINT OUT THAT ONE OF THE DISTINCTIONS BETWEEN THE FEDS AND FLORIDA IS THAT FLORIDA HAS A WHOLLY CIRCUMSTANTIAL EVIDENCE RULE WHICH DOES NOT EXIST IN THE FEDERAL SYSTEM, AND GIVEN THAT RULE, THE STATE HAS AN ESPECIALLY IMPORTANT INTEREST IN PRESERVING ITS RIGHT TO A FAIR OPPORTUNITY.

THE STATE'S FAILURE TO PROVE THE ELEMENTS OF THE CRIME, IS THE STATE'S POSITION THAT THAT IS OR IS NOT FUNDAMENTAL ERROR?

YES. THE STATE'S POSITION IS THAT, WHEN IT FAILS TO PRESENT EVIDENCE ON EVERY ELEMENT OF THE CRIME, IT IS FUNDAMENTAL ERROR.

SO IT CAN BE RAISED AT ANY TIME. IS THAT CORRECT?

YES. AND IN FACT, SUFFICIENCY OF THE EVIDENCE, IF IT IS TRULY FUNDAMENTAL ERROR, HE CAN RAISE IT ON DIRECT APPEAL. THE POINT IS WE HAVE GOT NUMEROUS CASES OF INVALID, UNPRESERVED CLAIMS THAT ARE ATTEMPTING TO COME THROUGH THE DCA, UNDER THIS GUISE OF FUNDAMENTAL ERROR, AND I CAN TELL YOU FOR SURE, JUST SINCE YOU HAVE ACCEPTED JURISDICTION IN THIS CASE, WE HAVE GOTTEN A LOT MORE BRIEFS IN OUR OFFICE, WHERE SUDDENLY THE TRIAL COURT IS COMMITTING FUNDAMENTAL ERROR, AND I THINK THAT IS QUESTIONABLE AND IF YOU AFFIRM THIS PROCESS, WE ARE JUST GOING TO BE SEEING MORE AND MORE, AND I WOULD SUGGEST AND WOULD POINT OUT, BECAUSE THE FIRST DCA, IN FACT, IF YOU LOOK AT THEIR OPINION, I AM SORRY?

I DON'T UNDERSTAND THE STATE'S POSITION IN THIS CASE. IF YOU CONCEDE THAT IT IS FUNDAMENTAL ERROR IN FAILING, IF THE STATE FAILS TO PROVE THE ELEMENTS OF THE CRIME, WHAT IS YOUR -- I AM NOT SURE I UNDERSTAND THE STATE'S PRESERVATION ARGUMENT.

WELL, IF YOU LOOK AT, I THINK WHAT ESSENTIALLY IS HAPPENING HERE IS THAT THE FIRST D KRA. A, WHEN THEY CERTAIN -- THE FIRST DCA, WHEN THEY CERTIFIED THIS QUESTION ARE TAKING A HARD-LINE VIEW THAT, THERE IS NO SITUATION WHERE YOU CAN RAISE FUNDAMENTAL ERROR ON DIRECT APPEAL. THAT IS NOT WHAT WE ARE SEEING RESPECT, SO BASICALLY THE DEFENSE COUNSEL WANTS YOU TO GET RID OF FUNDAMENTAL ERROR AND THE DEFENSE IS ASKING YOU TO GET RID OF PRESERVATION, SO THE STATE AND THE DEFENSE, IT IS DIFFICULT TO MAINTAIN THE BALANCE THAT WE HAVE NOW AND TO PRESERVE THOSE RULES.

GO AHEAD.

I THINK THE PROBLEM IS, IN LOOKING AT ALL OF THOSE CASES, IS TRYING TO MAKE THAT DISTINCTION THAT YOU ARE MAKING, BETWEEN ELEMENTS OF THE CRIME AS BEING A FUNDAMENTAL ERROR OF THE SUFFICIENCY OF THE EVIDENCE, AS TO AN ELEMENT OF THE CRIME NOT BEING FUNDAMENTAL ERROR. HOW DO YOU, AND I KNOW CASES THAT SAY THAT DISTINCTION, BUT FRANKLY, WE ARE TALKING ABOUT INSUFFICIENCY AS A MATTER OF THE LAW, BASED ON THE FACTS PRESENTED, HOW DO YOU MAKE THAT DISTINCTION?

YOU BROUGHT UP A GOOD POINT ABOUT THE CASES THAT ARE REFERRED TO US, WHERE THE STATE AFFIRMATIVELY PROVES NO CONVICTION OCCURRED OR WERE ON THE UNCONTESTED FACTS AND THE LAW NO CRIME OCCURRED, AND I THINK THERE IS CLEARLY A DISTINCTION HERE, IN THAT THOSE CASES ARE TRULY NOT SUFFICIENCY OF THE CASE ISSUES. JOA, BY VIRTUE OF THE LAW AND THE JUDGE INTENDS IT, BY DECIDING FACTS FOR THE JURY, IN THIS CASE IT IS CLEARLY STATED THAT THE FACTS ARE UNCONTESTED. ALL OF THESE CASES TURN ON A PURE ISSUE OF THE LAW, AND IF YOU LOOK AT THESE CASES CLOSELY, THEY ARE USUALLY STATUTORY CASES ASSIGNMENT CASES, AND THERE IS NO QUESTION HE PROVED POSSESSION OF THAT COCAINE. THE PROBLEM WAS THEY WANTED TO REFINE THE LAW AND THEY SAID TEMPORARY POSSESSION, FOR PURPOSES OF TURNING IT OVER TO POLICE, WE DON'T BELIEVE THIS IS A CRIME F YOU LOOK AT ALL OF THESE CASES, I CAN ONLY FIND ONE THAT STANDS OUT THAT WOULD BE A TRUE FUNDAMENTAL ERROR CASE.

WOULD YOU AGREE THAT THIS PROBLEM THAT WE ARE WRESTLING WITH HERE IS SOMEWHAT SIMILAR, AS MR. BEEN SAID, TO THE PROBLEM THAT WE WERE STRUGGLING WITH, AS TO THE PRESERVATION REQUIREMENT PRESENTING TO THE TRIAL COURT ISSUES, SO THAT THE MATTER WOULD BE PRESENTED A TO THE TRIAL COURT BEFORE -- PRESENTED TO THE TRIAL COURT BEFORE IT WENT TO THE APPELLATE COURT, AND WE AMENDED THE RULE, THE APPELLATE RULE, TO GIVE AN EXTENDED PERIOD OF TIME, BECAUSE THE -- IT STRIKES ME THAT THE WHAT YOU ARE SAYING IS THAT, REALLY, YOU ARE ARGUING AGAINST AN EXPANSION OF FUNDAMENTAL ERROR, IN PUSHING THIS INTO POSTCONVICTION, AS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, AS OPPOSED TO REMOVING THE PRESERVATION REQUIREMENT. IS THAT BASICALLY WHAT THE STATE'S POSITION IS?

YES. WE DO WANT TO GET RID OF PRESS -- WE DON'T WANT TO GET RID OF PRESERVATION. WHY WOULD WE WANT TO GET RID OF A RULE --

BUT YOU ARE SAYING IT CAN PROPERLY BE CONSIDERED IN POSTCONVICTION.

OKAY. THANK YOU.

SO IS, ALSO, A PART OF YOUR ARGUMENT IS, IF WE ACCEPT THE DEFENDANT'S ARGUMENT THAT THIS IS FUNDAMENTAL ERROR, THEN ALL THE LINE OF CASES WHERE WE HAVE TALKED ABOUT WHEN YOU MAKE A JUDGMENT OF ACQUITTAL, THAT, AND YOU RAISE THE ISSUE ON APPEAL BUT IT IS NOT THE SAME ARGUMENT THAT YOU MADE IN THE JUDGMENT OF ACQUITTAL, WILL WE HAVE TO RECEDE FROM ALL OF THAT LINE OF CASES, IF WE ACCEPT THE DEFENDANT'S ARGUMENT HERE?

I THINK THAT IS EXACTLY, YOU KNOW, IF YOU ARE ACCEPTING HIS ARGUMENT, YOU ARE GETTING RID OF THE PRESERVATION RULE COMPLETELY. IT MAKES NO SENSE TO GET RID OF A RULE THAT FORCES A COME OUT COURT TO BE AS -- FORCES A COURT TO BE AS FREE OF ERROR AS POSSIBLE.

WE ARE GETTING RID OF THE REQUIREMENT OF MAKING A JUDGMENT OF ACQUITTAL, ALSO?

THAT IS WHAT WE PROPOSES, I ASSUME. THAT IS WHAT IS GOING TO HAPPEN. IF YOU DON'T REQUIRE COUNSEL TO MAKE A JOA MOTION, HE IS NEVER GOING TO MAKE IT. IT IS NOT GOING TO BE IN THE BEST INTEREST OF HIS CLIENT TO DO SO. WHY WOULD HE LIMIT -- I AM SORRY.

WHY WOULD IT BE IN THE BEST INTEREST, IF THERE IS NO EVIDENCE OF A PARTICULAR CRIME, IN THIS CASE IF IT WAS FIRST-DEGREE PRESENTED BUT ONLY SECOND-DEGREE HAS BEEN PROVEN, HOW IS THAT NOT IN THE BEST INTEREST OF A DEFENDANT TO HAVE THAT RAISED AT THE EARLIEST POSSIBLE TIME?

THAT WOULD BE A BEST INTEREST IF IT IS A TRUE CASE OF FUNDAMENTAL ERROR, BUT I AM ADDRESSING, THAT IS A RARE CASE.

YOU ARE ASSUMING THAT, WHEN AN ASSISTANT PUBLIC DEFENDER RAISES THIS ISSUE ON APPEAL, ARE THAT THEY ARE RAISING IT ON BAD FAITH, THAT THEY REALLY THINK, IN LOOKING AT THIS RECORD, THAT IT WAS AN ISSUE OF FACT, AND THEY JUST WANT TO BURDEN THE APPELLATE COURT WITH THE ISSUE?

WELL, WHAT I AM SAYING IS, IN MOST CASES THEY ARE NOT GOING TO LIMIT THEMSELVES BY MAKING A TRIAL. WHY SHOULD THEY LIMIT THEMSELVES TO A THAT SPECIFIC GROUND OR HYPOTHESIS OF INNOCENCE, WHEN THEY CAN COME TO THAT APPELLATE COURT AND RAISE ANY AND ALL GROUNDS OF HYPOTHESIS OF INNOCENCE, KNOWING THAT THE COURT IS GOING TO ENTERTAIN THEM WHICH IS WHAT THEY ARE ASKING US TO DO.

I AM TRYING TO UNDERSTAND JUSTICE WELLS'S QUESTION THEN. YOU ARE SAYING, IN THIS CASE WE COULD LOOK AT THIS RECORD AND SAY THIS IS NOT PREMEDITATION AS A MATTER OF LAW, THAT THE, WE WOULD PUSH THIS INTO POSTCONVICTION, WHERE THIS DEFENDANT WOULD NOT HAVE A LAWYER, UNLESS THE JUDGE PLANNED TO APPOINT A LAWYER, AND THAT, WOULD IT BE PER SE DEFICIENT PERFORMANCE, IF THE LAWYER DIDN'T RAISE IT BY IT IS NOT PER SE?

NO. IT IS NOT GOING TO BE PER SE.

YOU DECIDE, HOW WOULD YOU DECIDE WHETHER IT IS REASONABLE STRATEGY? WOULD WE HAVE TO LOOK AT WHETHER IT WAS A STRATEGY DECISION TO CALL THAT LAWYER AND ASK WHY HE DIDN'T OR SHE DIDN'T RAISE IT AND THEY WOULD HAVE AN EVIDENTIARY HEARING ON THAT ISSUE?

SURE. THAT IS EXACTLY WHY WE ARE SAYING IT NEEDS TO BE DONE.

THERE ARE SOME PEOPLE IN THE STATE WHO HAD LAWYERS THAT KNEW TO RAISE A PROPER MOTION FOR JUDGMENT OF ACQUITTAL WITH INSUFFICIENT EVIDENCE WOULD GET RELIEF RIGHT AWAY, BUT OTHERS THAT STILL HAVE THE CRIME THAT THEY ARE CHARGED WITH AND CONVICTED IS NOT THE CRIME THAT THEY SHOULD HAVE BEEN SENTENCED TO, JUST THAT COULD BE YEARS DOWN THE ROAD, BEFORE THAT IS EVER DETERMINED.

YES. I UNDERSTAND YOUR CONCERN. INEFFECTIVE ASSISTANCE, WHILE IT GENERALLY HAS TO BE RAISED BELOW CAN BE RAISED ON DIRECT APPEAL, IF IT IS APPARENT FROM THE RECORD, AND IT WOULDN'T BE EFFICIENT TO SEND IT DOWN TO THE TRIAL COURT. I MEAN, HE IS NOT PRECLUDED FROM DOING THAT, IF IT MEETS THAT REQUIREMENT. WE ARE TALKING ABOUT MOST OF THE OTHER CASES THAT DON'T MEET THAT REQUIREMENT. THAT IS WHY WE SEND IT DOWN TO THE TRIAL COURT, BECAUSE THEY CAN INTRODUCE EVIDENCE THERE TO ANSWER ALL THE QUESTIONS THAT YOU JUST ASKED THAT CAN BE ANSWERED ON DIRECT APPEAL.

WHY SHOULD THAT MATTER, WHY THE DEFENSE LAWYER DIDN'T RAISE IT OR NOT, IF IT IS INSUFFICIENT AS A MATTER OF LAW, BASED ON THE FACTS IN THE CASE?

THAT THAT IS WHY THIS DISTINCTION BETWEEN THESE CASES THAT HE RELIES ON ARE VERY IMPORTANT. WE ARE SAYING THAT IT IS INSUFFICIENT AS A MATTER OF LAW, BUT IT IS A VERY FACTO DRIVEN INQUIRY.

WHY ISN'T THE WHOLE PROBLEM SOLVED BY JUST A RULE WHICH SAYS THAT, AT THE CLOSE OF THE STATE'S CASE, THE TRIAL JUDGE SHALL MAKE A DETERMINATION THAT, AS TO WHETHER THERE IS SUFFICIENT EVIDENCE FOR THE MATTER TO GO, TO ESTABLISH A PRIMA FACIE CASE OR SOMETHING TO THAT ORDER. I MEAN THAT IS WHAT IT COMES DOWN TO, RIGHT? IF WE HAD A RULE THAT SAID THAT, THAT THE TRIAL JUDGE SHALL MAKE THAT DETERMINATION, THEN WE WOULD SOLVE THIS WHOLE PROBLEM.

I THINK IT IS THE DEFENDANT'S THE COURT CAN SUA SPONTE ENTER A JUDGMENT OF ACQUITTAL, BUT IT IS THE DEFENDANT'S BURDEN TO BRING FORTH TO THE STATE WHAT ALLEGED ERROR IT IS CLAIMING, AND THE TATE HAS THE RIGHT TO READD -- AND THE STATE HAS THE RIGHT TO READDRESS THAT ERROR AND REOPEN ITS CASE.

BUT WE NEED, WE CONFRONT THE PROCEDURAL QUAGMIRE THAT WE GET IN THAT JUSTICE PARIENTE BRINGS UP, THE DIFFERENCE BETWEEN HAVING COUNSEL IN POSTCONVICTION AND THEN YOU GET INTO THE FURTHER QUESTION AS TO WHETHER, IF IT IS A DUE PROCESS ISSUE, AND CONSTITUTIONAL QUESTION, THEN, THERE IS THE CASE WHICH SAYS THAT COUNSEL CAN BE APPOINTED IN POSTCONVICTION, AND BUT AT ANY RATE IT STRIKES ME THAT WE NEED TO ADDRESS IT PROCEDURALLY.

MAYBE A NEW RULE IS SOMETHING FOR ANOTHER DAY.

BUT YOUR POSITION IN THIS CASE IS THAT THERE WAS SUFFICIENT EVIDENCE.

YES. THE POSITION IN THIS CASE, MORE THAN SUFFICIENT EVIDENCE, AND LIKE I SAID, TO STRESS THIS COUNSEL DIDN'T FORGET TO MAKE A JOA. HE WAS INVITED BY THE TRIAL COURT, AT THE END OF THE STATE'S CASE TO MAKE A MOTION. HE ASKED HIM TO HAVE HIS MOTIONS AND HE SAID NO, YOUR HONOR, AND SO WE HAVE WAIVER ON THIS CASE, AND WAIVER FOREVER PREINCLUDES THE ISSUE FROM ANY FURTHER PROCEEDING, BUT, YES, CLEARLY IN THIS CASE, ANOTHER PROBLEM IS DEFENDANTS ARE TURNING, THINKING TRIALS ARE BECOMING TRYOUTS ON THE WAY TO THE COURT OF APPEALS. IF MY DEFENSE BELOW DIDN'T WORK, AS IN THIS CASE, THE DEFENSE THEORY BELOW IS THAT THE DRIVER OF THE TRUCK SHOT THE VICTIM, AND NOW THE DIRECT APPEAL DIDN'T WORK, SO HE IS SAYING INTENT. I DIDN'T PREMEDITATE. AND AS TO WHAT REALLY WAS HIS INTENT, WHAT WAS THE HYPOTHI SEE OF INNOCENCE? PREMEDITATION, HE ALSO RAISES THAT IT COULD BE HYPOTHESIS OF RAGE ON APPEAL. IT COULD HAVE BEEN RAGE OR COULD HAVE MEANT THAT HE WAS I WAS INTENDING TO FRIGHTEN THEM. CLEARLY SHE HAD TIME TO DISCUSS IT WITH HER MIDDLEMAN BACK AND FORTH AND TIME TO CALL OUT TO THE TRUCK. THAT REFERENCE BETWEEN ME AND YOU OR THE BACK OF THE WALL THERE. SHE WAS VERY ABLE TO DIRECT HER AIM, AND I WOULD SUGGEST THE EVIDENCE SHOWS THAT SHE DID, BY HITTING THE TRUCK ALL FIVE TIMES. SHE HAD TIME TO REFLECT BETWEEN THOSE FIVE SHOTS, AND HER FIXED AND SET PURPOSE WAS TO SHOOT AT THAT TRUCK. SHE WANTED TO STOP THAT TRUCK, AND IF SHE HAD TO SHOOT SOMEONE TO DO IT, SHE WAS GOING TO DO IT AND ALSO I WOULD POINT OUT THAT THAT FIRST SHOT WAS NOT THE FATAL SHOT. THERE WERE SEVERAL SHOTS FIRED AND THEN THE VICTIM TURNED TURNED AND LOOKED BACK, SO WAS NOT THE FIRST SHOT. SHE ALSO HAD CALCULATING BEHAVIOR IMMEDIATELY AFTER THE CRIME, WHICH SHOWS THAT SHE WAS RELATIVELY CAPABLE OF FORMING THIS INTENT. AS SOON AS SHE SHOT AT THE TRUCK SHE RAN BEHIND THE HOUSE AND DISPOSED OF THE GUN AND CAME BACK AND CONCOCTED A STORY SAYING THAT, IF THESE GUYS COME, TELL THEM THAT MY BOYFRIEND SHOT THE VICTIM AND SHE LOOKED DOWN AT THE BODY AND HAD TIME TO SAY "SOMEBODY SHOT THIS MAN".

THANK YOU. YOUR TIME IS UP. MR. BEEN. ISLAND LIKE, UNLESS YOU DIRECT ME OTHERWISE TO COME BACK TO THE SUFFICIENCY, THE ACTUAL SUFFICIENCY QUESTION, BECAUSE I SENSE SOME SKEPTICISM ON THAT ISSUE FROM THE JUDGES, AND MY CLIENT'S OUTCOME IS GOING TO DEPEND ON THAT. FIRST OF ALL, I WOULD LIKE TO DIRECT YOUR ATTENTION TO THE CUMMINGS CASE,

WHICH IS ADDRESSED IN THE BRIEFS, IN WHICH THE DEFENDANTS AND HIS COMPANIONS FIRED 35 SHOTS AT A HOUSE WHERE THEIR TARGET --

IF WE AGREE WITH YOUR LEGAL POSITION, WOULDN'T THAT BE AN APPROPRIATE ISSUE FOR THE DISTRICT COURT OF APPEALS TO DECIDE?

CERTAINLY THIS COURT COULD DETERMINE THAT THIS IS AN ISSUE THAT DOES NEED TO BE ADDRESSED ON THE MERITS AND REMAND TO THE DISTRICT COURT TO CONSIDER THAT.

IF WE AGREE WITH YOUR POSITION, THAT IS EXACTLY WHAT OCCURS, IS IT NOT?

WELL, YOU COULD RESOLVE --

AREN'T YOU SAYING THAT, ISN'T THAT YOUR POSITION, THAT THE DISTRICT COURT ERRED IN NOT TREATING THIS AS FUNDAMENTAL ERROR, AND RESOLVING THE ISSUE?

YES. THAT IS CORRECT.

YOU ARE NOT CLAIMING THAT IT IS THIS COURT THAT IS THE APPROPRIATE ONE TO EXAMINE.

WELL, I THINK THIS COURT COULD SEND IT BACK TO THE DISTRICT COURT FOR THAT DETERMINATION OR COULD DECIDE IT EITHER WAY. EITHER WAY. AS FAR AS THE, BUT I DO THINK THAT THE CUMMINGS CASE, IT DOES GOVERN AS TO WHETHER OR NOT THIS IS PREMEDITATION, IF YOU WERE TO REACH THAT ISSUE. AS TO THE FUNDAMENTAL ERROR QUESTION, THE, AS TO WHETHER IT IS FUNDAMENTAL ERROR, I JUST WANTED TO ADD ONE THING, AND THAT IS TO CONSIDER ANOTHER ISSUE, WHICH IS WIDELY ACCEPTED TO BE FUNDAMENTAL ERROR.

IN THE CUMMINGS CASE, THERE REALLY WASN'T ANY EVIDENCE THAT THE, THESE BOYS, DEFENDANTS HAD FIRED THAT WEAPON, THAT THEY CAME DOWN THAT BLOCK, WERE FIRING AT ANYONE OR THAT THE PERSON INCOMEINGS HAD LAST BEEN IN THE GARAGE WHERE THOSE BULLETS -- HE HAD ALREADY LEFT THE GARAGE.

GOING INTO THE HOUSE.

THIS IS FACTUALLY DISTINGUISHABLE SITUATION.

WELL, I DON'T THINK IT IS.

THEY WERE FIRING AT THE HOUSE.

YES. THEY WERE FIRING AT THE HOUSE.

MAYBE SOMEBODY WAS IN THERE.

THERE WAS GOOD REASON TO THINK THERE WAS SOMEBODY IN THERE. THERE WAS THE CAR THERE. IN FACT, THE CAR, A CAR THAT WAS BELONGED TO THEIR TARGET, AND THE DISTINCTIVE CAR WAS THERE. I MEAN, THEY MIGHT HAVE BEEN INTENDING TO HIT SOMEONE. THEY MIGHT NOT HAVE. THE POINT WAS THAT THIS COURT RULED YOU CAN'T TELL. AND THEREFORE IT IS NOT PROVED, AND THE SAME IS TRUE IN THIS CASE. I MEAN, IT IS NOT ABSOLUTELY IMPOSSIBLE THAT SHE WAS TRYING TO SHOOT THE PERSON, BUT IT IS NOT ESTABLISHED THAT SHE WAS. SHE COULD HAVE BEEN OR SHE COULD NOT HAVE BEEN, AND THAT IS WHERE THE STATE HAS FAILED TO PROVE THAT THE INTENT WAS -- I MEAN, THE STATE'S LAWYER JUST A MINUTE AGO, SAID HER PURPOSE WAS TO STOP THE CAR, AND IF SHE HAD TO HURT SOMEONE TO DO IT, SHE WOULD. THAT IS NOT PREMEDITATED MURDER. THAT IS SOMETHING ELSE. IT IS SECOND-DEGREE MURDER IS WHAT IT IS. ON THE FUNDAMENTAL, GETTING BACK TO THE CERTIFIED QUESTION --

BEFORE YOU MOVE FROM THERE, DOES IT MAKE ANY DIFFERENCE, IN WHETHER IT IS PREMEDITATED OR SECOND-DEGREE, AS TO WHETHER OR NOT YOU KNOW FOR A FACT THAT A PERSON IS PRESENT WHERE YOU ARE SHOOTING? I MEAN, IF I UNDERSTAND INCOMINGS, THE DEFENDANTS -- IN CUMMINGS, THE DEFENDANTS DID NOT KNOW FOR A FACT WHETHER OR NOT THERE WAS ANYONE IN THE HOUSE OR NOT. HERE, IN THE TRUCK, WE KNOW FOR A FACT THAT THERE WERE PEOPLE IN THE TRUCK, SO DOES THAT MAKE A DIFFERENCE?

WELL, I DON'T THINK IT DOES. BECAUSE IN EITHER CASE, THE SHOOTING COULD HAVE BEEN INTENDED TO CAUSE INJURY OR DEATH OR IT COULD HAVE BEEN INTENDED TO SOME OTHER PURPOSE. IT IS NOT LIKE PUTTING A GUN TO SOMEONE'S HEAD AND SHOOTING. IT IS QUITE POSSIBLE TO SHOOT AT A TRUCK, AS 4 OF THESE FIVE SHOTS DID, AND NOT HIT ANYONE, AND EVEN IF SOMEONE WERE HIT, DID NOT KILL ANYONE, JUST AS IT IS POSSIBLE TO SHOOT AT A HOUSE. ON THE OTHER HAND, 35 SHOTS AT A HOUSE, THERE IS A PRETTY GOOD CHANCE SOMEBODY IS GOING TO GET HURT. THE SAME THING, FIVE SHOTS AT A TRUCK. THERE IS A GOOD CHANCE SOMEBODY IS GOING TO GET HURT. IT IS NOT KNOWN THAT SOMEBODY IS GOING TO DIE. IT IS NOT KNOWN THAT SOMEBODY IS GOING TO GET HIT, THERE AND IS NO EVIDENCE IN EITHER CASE THAT THE INTENT WAS TO CAUSE SOMEONE DEATH. THAT, IN THAT SENSE, THE CASES ARE IN DISTINGUISHABLE.

AND HOW DO YOU PROVE INTENT?

WELL, SHALL I ANSWER THE QUESTION? I HAVE A RED LIGHT.

YOU MAY ANSWER THAT QUESTION.

SOMETIMES, OF COURSE, SOMETIMES THERE IS A DIRECT EVIDENCE. THE DEFENDANT TELLS SOMEONE WHAT HIS INTENT WAS. SOMETIMES THERE IS CIRCUMSTANTIAL EVIDENCE THAT MAKES IT VERY CLEAR. THE GRAVE IS PREPARED BEFORE THE MURDER. THE INSURANCE POLICY IS FIXED BEFORE THE MURDER. SOMETIMES I THINK WHEN THE KILLING, ITSELF, THE LETHAL ACT, IS ONE WHICH CANNOT BE DOUBTED THAT IT WILL ABSOLUTELY CAUSE DEATH, I MEAN, FIRING FIVE SHOTS INTO SOMEONE'S HEAD, I THINK, IT WOULD BE HARD TO ARGUE THERE WAS NOT AN INTENT TO KILL THERE. I THINK SOMETIMES THERE MIGHT NOT HAVE BEEN. BUT THAT WOULD BE HARD TO ARGUMENT SHOOTING AT A TRUCK, HOWEVER, IS NOT INEVITABLE LIKE IT IS SHOOTING AT SOMEONE'S HEAD HEAD. SO THANK YOU.

THE COURT WILL BE IN RECESS.