State of Florida v. Shelton Scarlet

THE NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS STATE VERSUS SCARLET. MR. NEIMAND, YOU MAY PROCEED.

THANK YOU. EXCUSE ME. MAY IT PLEASE THE COURT. MIKE NEIMAND, ON BEHALF OF THE STATE. THE ISSUE BEFORE THIS SECURITY WHETHER THE EXCLUSIONARY RULE NO LONGER APPLIES IN.QpaION PROCEEDINGS. THE QUESTION IN CONFLICT IS WHETHER THIS COURT IS BOUND BY THE UNITED STATES SUPREME COURT DECISION IN SCOTT, WHICH HAS7H0 THE EXCLUSIONARY RULE DID NOT APPLY IN PAROLE OR THE CASE IN PROCEEDINGS. THE STATE IS AWARE OF THE DECISIONS OF THIS COURT ALL ACROSS, IN THAT THIS IS NOT A BOOK AND VERSE AND THAT THIS COURT DOES NOT FEEL BOUND OR IS NOT, UNDER THE LAW, BOUND BY THE UNITED STATES HOLDINGS, SO THE QUESTION IS DOES THIS COURT BELIEVE THAT PAROLE IS SUFFICIENTLY SIMILAR TO PROBATION, SO THAT IT WILL APPLY THE PAROLE CASE TO THE PROBATION CASE, AND IF NOT IS IT TIME TO REVISIT THIS COURT'S DECISION IN GRUB, WHICH HELD THAT THE EXCLUSIONARY RULE IS APPLICABLE TO PROBATION REVOCATION HEARINGS. THE STATE'S POSITION, OBVIOUSLY, EITHER WAY WE GO, IS THAT IT SHOULD NOT, AND THE REAL REASON IT SHOULD NOT IS BECAUSE, UNDER PAROLE, EXECUTION ME -- EXCUSE ME, UNDER PROBATION, WE HAVE AN ASIDE THAT SAYS WE ARE GOING TO TRUST TO YOU ABIDE BY THE LAW AND GO OUT AND SERVE YOUR PROBATION UNDER THE LAW AND LIVE FREE UNDER THE LAW, AND THEN, THROUGH WHATEVER MEEPS THERE IS, AN UNLAWFUL SEARCH AND SEIZURE, EITHER BY THE PAROLE PROBATION OFFICER OR THE POLICE OFFICER, WE, NOW, ARE IN, HAVE EVIDENCE AT HAND THAT IS VALID EVIDENCE. IT IS NOT -- IT IS UNLAWFUL SEIZED, BUT IT IS PROPER EVIDENCE THAT THE DEFENDANT HAS COMMIT ADD CRIME.

COULD I JUST GO BACK? WE ARE DEALING HERE --.

PROBATION.

-- PROBATION, AND A POLICE OFFICER THAT CONDUCTED AN UNLAWFUL STOP.

AN UNLAWFUL STOP THAT WAS SUPPRESSED FOR A CRIMINAL CASE.

RIGHT.

ALL RIGHT. WE ARE NOT TALKING ABOUT WHETHER PROBATION AND PROBATION OFFICERS HAVE THE RIGHT TO PROMULGATE REASONABLE RULES CONCERNING HOW PROBATION IS TO BE CARRIED OUT AND TO WHAT RESTRICTIONS THERE MIGHT BE ON A PROBATIONER'S LIBERTY. CORRECT?

CORRECT.

AND NO RULE OF PROBATION HAS EVER SAID THAT SOMEONE ON PROBATION GIVES UP THEIR CONSTITUTIONAL RIGHTS TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES, CORRECT?

NO RULE OF PROBATION. SURE. BUT THAT DOESN'T ANSWER THE QUESTION. THE ANSWER TO THE QUESTION IS THE CONSTITUTIONAL ISSUE, NOT A DEPARTMENT OF CORRECTIONS OR PAROLE AND PROBATION ADMINISTRATIVE RULE AND REGULATION. BECAUSE THE REAL ISSUE HERE IS THAT WHEN THEY ARE LIVING ON PROBATION AND THEY HAVE VIOLATED THE LAW, AS WE HAVE SEEN

FROM THE STATE'S BRIEF, THAT WAS SUBMITTED HERE IN, THE NUMEROUS PROCEDURAL SAFEGUARDS FROM A CRIMINAL TRIAL THAT ARE NOT BROUGHT FORWARD IS TO MAKE SURE THAT THE DEFENDANT, IN FACT, HAS OR HAS NOT ABIDEED BY THE CONDITIONS OF THE PROBATION, AND HERE, WHEN WE HAVE, IN THIS SITUATION, WHAT IS DETERMINED TO BE AN UNLAWFUL STOP AND AN UNLAWFUL SEARCH AND SEIZURE, THE STATE IS NOT SAYING THAT THAT EVIDENCE CAN BE BROUGHT IN ON THE SUBSTANTIVE OFFENSE. THAT IS NOT A QUESTION.

ON THE OTHER HAND, ONE OF THE THINGS THAT CONCERNS ME IN ANALOGIZEING WHETHER OR NOT THE PAROLE AND THE PROBATION, WE SHOULD HAVE THE SAME KIND OF RULE, IS THIS, IN A PAROLE SITUATION, IF YOU VIOLATE YOUR PAROLE AND THEY USE WHATEVER EVIDENCE TO SUBSTANCEIATE THAT, YOU GO BACK TO PRISON TO SERVE OUT YOUR TIME, CORRECT?

UM-HUM.

HOWEVER, IN A PROBATION SITUATION, YOU GO BEFORE THE COURT, AND YOU MAY END UP WITH A LONGER TERM TO SERVE. ISN'T THAT CORRECT?

WELL, A TERM TO SERVE. YOU MIGHT WIND UP IN PRISON. THE FULL TERM THAT HE COULD HAVE GOTTEN, HAD HE BEEN SENTENCED ORIGINALLY.

A TERM THAT YOU COULD HAVE GOTTEN, AT THE TIME THAT YOU WERE ORIGINALLY PLACED ON PROBATION, SO SHOULDN'T THERE BE BECAUSE YOU ARE ACTUALLY FACING SOME MORE TIME, AS IT WERE, SHOULDN'T THERE BE A DIFFERENT RULE HERE?

REALLY NOT, BECAUSE WHAT YOU ARE SAYING, WHEN YOU PUT AN INDIVIDUAL ON PROBATION, BE A GOOD BOY OR ELSE, AND THEY TELL THEM THAT, THAT IF YOU VIOLATE YOUR PROBATION AND YOU COME BACK HERE, YOU CAN BE SENTENCED TO ANY THING THAT YOU COULD HAVE BEEN SENTENCED WHEN I FIRST SAW YOU, BUT I AM GIVING YOU A BREAK BUT I WANT YOU TO ABIDE BY THE LAW, AND IF WE ARE NOT ALLOWED IN THAT SITUATION, ASSUMING THAT THE ONLY EVIDENCE THAT WE HAVE HERE THAT THE INDIVIDUAL VIOLATED THE LAW TO VIOLATE HIS PROBATION, AND WE CAN'T GET HIM ON THE SUBSTANCE CHARGE, THEY BE WE HAVE AN INDIVIDUAL WHO GOES OUT ON A SUBSTANCE CHARGE, BECAUSE THE INDIVIDUAL HAS A FREEBEE, BECAUSE HE SAYS I VIOLATED THE LAW. I WAS ON PROBATION, AND I HAD THE COCAINE. I KNEW I WASN'T SUPPOSED TO HAVE THE COCAINE. I KNEW THAT, HAD I BEEN CAUGHT LEGITIMATELY WITH THE COCAINE, I KNEW THAT I COULD HAVE BEEN SENTENCED TO THE FULL AMOUNT OF TIME THAT I COULD HAVE, HAD I GONE TO TRIAL AND NOT RECEIVED THE PROBATION, THEN WE ARE SAYING TO THAT INDIVIDUAL YOU CAN COMMIT A CRIME AND GET AWAY WITH IT. THE ANALOGY I WOULD LIKE TO BRING FORWARD AS TO WHY THIS WOULD MAKE SENSE IN A PROBATION SITUATION IS, WHEN WE GO TO THE FEDERAL MAYBE YAS CORPUS, UNDER THE FOURTH -- THE FEDERAL HABEAS CORPUS, UNDER THE FOURTH AMENDMENT ANALYSIS UNDER HABEAS CORPUS, IF THE STATE HERE IS GIVEN A FULL HEARING AND IT IS DETERMINED THAT THAT FOURTH AMENDMENT WAS NOT VIOLATED, THE FEDERAL JUDGE WILL NOT HEAR THE FOURTH AMENDMENT CLAIMS, NOT BECAUSE IT IS NOT A CONSTITUTIONAL ISSUE, BUT BECAUSE THEIR ARGUMENT IS THAT, UNDER STONE VERSUS PALS, THAT THAT EVIDENCE IS VALID EVIDENCE, AND IT IS NOT HOW IT WAS GOTTEN. THE FACT OF THE MATTER IS HE WAS IN POSSESSION OF THAT EVIDENCE, AND HE, BECAUSE OF THAT, THE DEFENDANT WAS GUILTY, AND THEY DO NOT WANT TO LOOK AT THAT AT ALL!

SINCE -- BUT SINCE -- I THOUGHT JUSTICE QUINCE WAS ASKING YOU TO ACKNOWLEDGE WHETHER THERE ARE DIFFERENCES, SUBSTANTIAL DIFFERENCES BETWEEN PROBATION AND PAROLE, BECAUSE WHAT, OTHERWISE WHAT YOU ARE ASKING US TO DO IS JUST TO RECEDE FROM STATE V KROS, BECAUSE YOU THINK THAT THE POLICY -- STATE V CROSS, BECAUSE YOU THINK THE POLICY REASONS ARE THE STRONGEST AGAINST ALLOWING THIS IN AGAINST PROBATIONERS THAN IS TO REQUIRE SUPPRESSION, AND SO THAT IS WHAT WE ARE REALLY HEARING. SHOULD WE

RECEDE FROM STATE V CROSS, UNLESS THE PENNSYLVANIA VERSUS SCOTT DIRECTLY SPOKE ON THAT QUESTION?

WELL, NOW, IT IS AND IT ISN'T. THERE ARE TWO ALTERNATIVES HERE. WE CAN LIVE BY CROSS AND STILL SAY THAT, UNLESS THE UNITED STATES SUPREME COURT SPECIFICALLY SPEAKS ON THE SUBJECT MATTER, IN OTHER WORDS IF THEY EVER SPEAK ON PROBATION, THAT WE WOULD BE BOUND ON PROBATION, OR WE COULD RECEDE FROM CROSS IN SAYING IT IS SUFFICIENT, BECAUSE WE LOOK AT EACH INDIVIDUAL ON ITS FACE. OR WE COULD THEN COME BACK AND SAY, WELL, GRUB REALLY ISN'T GOOD LAW, UNDER THE FACTS AND CIRCUMSTANCES OF PROBATION VIOLATION PROCEEDINGS, BECAUSE WE ALLOW HEARSAY, WE DON'T WORRY ABOUT DOUBLE JEOPARDY ON ISSUES. IN OTHER WORDS YOU ARE NOT BOUND BY DOUBLE JEOPARDY. YOU COULD RETRY AN AFFIDAVIT, IF THE FIRST AFFIDAVIT IS ONLY DONE BY HEARSAY. THERE ARE A LOT OF OTHER THINGS WE LIST IN THE BRIEF, OTHER CASES.

LET'S GO TO THE ALTERNATIVE. ARE YOU SAYING THAT WE ARE BOUND BY PENNSYLVANIA V SCOTT CLEARLY TO RECEDE FROM STATE V CROSS?

THAT WOULD BE THE STATE'S FIRST POSITION.

INTELLECTUALLY, CAN YOU --

I HAVE BEEN HERE BEFORE YOU, AND THAT IS WHY I AM MAKING BOTH ARGUMENTS. I AM GIVING THE COURT THE OPTION OF STANDING BY ITS POSITION THAT WE BOOK AND VERSE THE CONSTITUTION, THAT WE HAVE ALWAYS SAID THAT, IF THE UNITED STATES SUPREME COURT DOES NOT SPEAK EXACTLY ON THIS ISSUE, THEN THIS COURT ACTED IN ANOTHER FEDERAL CIRCUIT COURT OF APPEAL AND CAN DETERMINE WHAT THE UNITED STATES CONSTITUTION WOULD SGERPT THAT. ALL RIGHT. -- WOULD INTERPRET THAT, WHICH, AGAIN, WOULD GIVE THE THE STATE THE CHANCE TO GO TO THE UNITED STATES SUPREME COURT, OR IN THIS SITUATION TO MAKE A NATURALIZATION THAT WE CAN ABIDE BY IT, WITHOUT LEAVING CROONS LEAVE THE ANALYSIS AND LEAVE IT THERE, BUT SAY IN THIS SITUATION IT IS TIME TO RECEDE FROM GRUB, BECAUSE GRUB DOESN'T MAKE ANY SENSE.

HAS THE FEDERAL COURT EXTENDED SCOTT TO PROBATION?

THE CLOSEST ONE I WAS ABLE TO FIND, BECAUSE THE ONLY CIRCUIT COURT WAS THE FOURTH CIRCUIT THAT APPLIED IT TO A PROBATION, AND THEY RECEDED FROM THAT IN THE CASE CITED IN MY BRIEF ARMSTRONG, WHICH IS A CONTROLLED RELEASE SITUATION, WHICH IS A LITTLE DIFFERENT THAN PAROLE. IT IS SOMEWHERE BETWEEN PROBATION AND PAROLE, BUT THEY, AGAIN, LOOKED AT THE POLICY REASONS BEHIND THE EXCLUSIONARY RULE. IF YOU LOOK AT THE POLICY REASONS BEHIND THE EXCLUSIONARY RULE, IT IS ONLY TO BE APPLIED IN A CRIMINAL TRIAL, AND AT THE PROBATION REVOCATION HEARING, IT IS TRULY NOT A CRIMINAL TRIAL. THERE ARE CERTAIN MINIMAL DUE PROCESS, BUT THE BURDEN OF PROOF IS VERY LIGHT ON THE STATE, GREATER WEIGHT OF THE EVIDENCE TO SATISFY THE COURT. VERY NEGATIVE TERMS, WHICH, IF THERE IS A PRESUMPTION OF INNOCENCE AND THE BURDEN IS ON THE STATE TO PRESUME -- TO PROVE GUILT, WE WOULD BE BOUNCED OUT. I MEAN, OUR WHOLE SYSTEM WOULD BE FOUND UNCONSTITUTIONAL, BECAUSE IT WOULD VIOLATE BOTH THE STATE AND THE FEDERAL CONSTITUTION, BUT IT WAS NOT THERE. THAT IS WHAT WE ARE SAYING. WE HAVE GONE SO FAR AND IN FACT THIS COURT HAS SAID IT IS A DEFERRED SENTENCING AREA, SO WE SHOULD DECIDE WHAT HIS SENTENCE SHOULD BE, AFTER HE HAS BEEN FOUND GUILTY BEYOND A REASONABLE DOUBT. THAT IS WHY ALLOWS THAT SITUATION TO COME IN AND DOESN'T REQUIRE AS MUCH OF THE RIGHTS. THERE IS GOING TO BE LIMITED DISCOVERY. YOU KNOW, THE REASON COUNSEL IS ALLOWED IN THE COURT IN THE STATE IS BECAUSE THE STATE HAS COUNSEL, NOT BECAUSE IT IS REQUIRED. IT IS NOT A CONSTITUTIONAL REQUIREMENT. IT IS A FAIRNESS REQUIREMENT, AND JUST AS THAT IS A FAIRNESS REQUIREMENT, JUST AS WE ALLOW LIMITED

DISCOVERY AS A FAIRNESS REQUIREMENT, WHY SHOULD THE STATE BE TREATED UNFAIRLY BY EXCLUDING THE EVIDENCE THAT THE DEFENDANT IS NOT ABIDING BY THE TERMS OF HIS PROBATION, SIMPLY BECAUSE IT WAS SECURED BY AN UNLAWFUL SEARCH AND SEIZURE, AND WE ARE NOT SAYING THAT EVERY POLICE OFFICER IS GOING TO GO OUT THERE, AND I DON'T THINK POLICE OFFICERS WILL KNOW WHO IS ON PAROLE OR PROBATION AND WHO IS NOT AND GO OUT AND LOOK FOR PROBATIONERS AND STOP EVERYBODY ON THE STREET. WE KNOW THAT IS UNCONSTITUTIONAL. WE CAN'T PUT UP A ROADBLOCK PROBATIONERS OVER HERE AND EVERYBODY ELSE OVER HERE, WE CAN'T DO THAT, KNOWING FULL WELL THE VIOLATION, BECAUSE I THINK WE WOULD SUFFER MAJOR DUE PROCESS AND MAJOR LAWSUITS AND CIVIL RIGHTS. I DON'T THINK WE CAN DO. THAT I THINK THE WHOLE CONCEPT OF THE FEAR OF THE DEFENSE PART THAT THIS IS GOING TO OPEN UP A WHOLE CAN OF WORMS, WHERE THE STATE IS GOING TO BE RUNNING ROUGHSHOD OVER THE ORIGINAL DEFENDANT, ISN'T THE CONCERN. I THINK WHAT HAPPENED HERE IS THE OFFICER THOUGHT HE HAD A LEGITIMATE STOP. A COURT DETERMINED OTHERWISE, SUPPRESSED THE EVIDENCE IN THE SUBSTANCE CASE, BUT IT SHOULD NOT BE SUPPRESSED IN THE CASE HE WAS ON PROBATION FOR, BECAUSE HE WAS SIMPLY ON PROBATION AS A MATTER OF GRACE AND AS MATTER OF RIGHT, AND WHY SHOULD WE ALLOW THE DEFENDANT, WHO IS TAKING A BENEFIT FROM THE STATE, TO GET AWAY WITH COMMITTING ANOTHER CRIME AND WALK AWAY SCOT-FREE, BECAUSE THAT IS WHAT HE IS DOING AND WHAT DOES THAT SAY TO SOCIETY, IF WE ALLOW THAT TO HAPPEN? AS A SOCIETY, WE ARE SAYING, FINE, YOU COULD BREAK THE RULES AND WE CAN'T DO ANYTHING ABOUT IT. I THINK THAT, FROM THAT POLICY POINT OF VIEW, SO WHETHER YOU WANT TO LOOK AT IT OVERRULING GRUB OR FOLLOWING THE UNITED STATES SUPREME COURT DECISION, FROM THAT POLICY ALONE, IT IS ENOUGH TO CHANGE THE LAW AND HOLD THAT PROBATION REVOCATION PROCEEDINGS SHOULD NOT BE BOUND BY THE INCLUSION AREA RULE.

YOUaken KNOW, WHEN YOU SPEAK OF IT IN MODERATION, AS YOU ARE USING IT NOW, IT DOESN'T SOUND TOO BAD.

THAT IS BECAUSE I AM A GOOD LAWYER.

BUT WHERE IT CAN BE ABUSED, WHAT DO YOU DO WITH THOSE SITUATIONS, WHERE YOU HAVE GOT A PROBATION OFFICER THAT GOES AND KICKS IN A DOOR AND FINDS SOME EVIDENCE AND CAN REACH THE POINT OF HARASSING THOSE THAT ARE UNDER HIS SUPERVISION?

I THINK THE SCOTT DECISION --

AND IT VARIES FROM PERSON TO PERSON. SOME PEOPLE WOULD RECOGNIZE THE RIGHTS. YOU SHOULDN'T DO THAT. BUT THERE ARE OTHERS THAT WOULD NOT RECOGNIZE IT AND WOULD BE KICKING DOORS IN AND STOPPING PEOPLE THE STREET.

I AGREE, AND I THINK THE SCOTT DECISION TALKS OF THAT, BECAUSE ONCE YOU TAKE THE EXCLUSIONARY RULE AWAY FROM THAT SITUATION, THE SCOTT OPINION ALLOWS DAMAGE ACTIONS AGAINST HIM, BECAUSE IT IS A PERSONAL CAUSE OF ACTION, BECAUSE IF YOU HAVE A PROBATION OFFICER WHO IS DOING THIS ON HIS OWN, THEN YOU OUGHT TO BE -- THEN HE ON THE TO BE FIRED, AND HE OUGHT TO BE SUED, AND CONSEQUENCES OF HIS ACTIONS. IF YOU HAVE A PROBATION SUPERVISE ON, ANYONE UP THE LINE THEN YOU HAVE A SERIOUS CIVIL RIGHTS ACTION THAT SHOULD BE TAKEN AND BROUGHT FORWARD, BECAUSE THESE THINGS SHOULD NOT BE ALLOWED, BUT, SEE, THERE IS ALWAYS SOMETHING ELSE TO TAKE CARE OF THE ABUSE, AND I DON'T THINK THAT THE PAROLE AND PROBATION PEOPLE ARE TELLING THEIR PEOPLE TO GO OUT THERE AND ABUSE THE PROBATIONERS. IN FACT, UNDER THE LAW TODAY, UNDER THE --

NOT BE ALLOWED. YOU SAY SOMETHING SHOULD NOT BE ALLOWED.

WELL, ABUSING THE CITIZENS SHOULD NOT BE ALLOWED. THEY DON'T ALLOW IT. IT IS AGAINST

THE LAW. IT IS THE DECISION OF THIS COURT THAT BASICALLY SAYS THE SAME THING. THIS SYSTEM WORKED FOR THIS AMOUNT OF TIME, AND WE ARE GOING TO ALLOW PROBATION OFFICERS TO STILL GO INTO PROBATION HOMES, UNLESS -- UPON A REASONABLE SUSPICION, IF SOMETHING IS GOING ON. IT DOESN'T ALLOW A PROBATION OFFICER TO GO IN AND RUMMAGE AROUND BECAUSE YOU SIGN A WAIVER I WAIVE ALL MY SEARCH AND SEIZURE RIGHT. THAT CASE SHOULD BE UPHELD BY AN INDIVIDUAL DETERMINATION, BUT IN ALL CONSTITUTIONAL ISSUES THAT WE DEAL WITH, WE DEAL WITH WHAT IS EXPECTED IN SOCIETY AND EXPECT OF OUR POLICE OFFICERS AND TRAINED, AND THEN ON THE FLIP SIDE, WHEN WE HAVE THE ABUSE, THAT IS WHEN WE NEED TO TAKE CARE OF THE ABUSE, BUT WE SHOULDN'T ALLOW THE ABUSE TO SWHAL-THE RULE.

BUT THAT IS -- TO SWALLOW THE RULE.

BUT THAT IS AN ARGUMENT FOR THE EXCLUSIONARY RULE, WHICH IS THAT WE HAVE GOT OTHER TYPES OF THINGS TO DETER POLICE OFFICERS FROM VIOLATING THE CONSTITUTION. WE DON'T NEED THE EXCLUSION AREA RULE, BUT WE HAVE PASSED THAT BRIDGE IN THE FLORIDA CONSTITUTION AND REAFFIRMED SUBSEQUENTLY IN THE U.S. SUPREME COURT CASES BURKES HERE THE STATE'S ARGUMENT SEEMS TO HAVE TO BE THAT THERE --, BUT HERE THE STATE'S ARGUMENT SEEMS TO BE THAT THERE IS ENOUGH DETERRENT IN THE EXCLUSIONARY RULE IN THE DETERMINATIONTIVE CASE, TO DETER POLICE OFFICERS FROM STOPPING PEOPLE BECAUSE OF THE POSSIBILITY THEY MAY HAD GET THEM ON PROBE -- THEY MAY GET THEM ON PROBATION, BUT WE HAVE GOT A WHOLE DIFFERENT WORLD OUT THERE, WHERE WE HAVE GOT MILLIONS OF PEOPLE AROUND THE COUNTRY THAT ARE ON PROBATION. WE HAVE GOT SMALL COMMUNITIES, WHERE POLICE OFFICERS, HOW DO YOU FIND THAT HAD HE KNOW WHO IS ON PROBATION OR NOT -- THAT THEY KNOW WHO IS ON PROBATION OR NOT, AND ISN'T THAT THE POLICY DECISION THAT WE ARE REALLY LOOKING AT, WHICH IS THAT YOU ARE SAYING THE EXCLUSIONARY RULE IS NOT NEEDED, BECAUSE WE HAVE GOT OTHER DETERRENTS, AND THE COURTS AND THE CONSTITUTION SAY, NO, THE EXCLUSIONARY RULE IN FLORIDA IS PART OF THE CONSTITUTION.

WELL, THAT IS THE SUBSTANCE OF WHAT WE ARE TALKING B OBVIOUSLY CLEARLY THE EXCLUSIONARY RULE ACTS AS A DETERRENCE, AND THEREFORE WE DON'T GET INTO ANOTHER SUBSTANCE CRIME, BUT WHEN WE COME BACK TO THE PROBATION VIOLATION, IS IT GOING TO REALLY ACT AS A DETERRENT? THAT IS A WEIGHING PROCESS HERE. ARE WE GOING TO CONTINUE TO KEEP THE EVIDENCE OUT, FULL WELL KNOWING THAT THE DEFENDANT HAS TAKEN LIBERTY OF HIS LIBERTIES, SO TO SPEAK? WE ARE GIVING HIM CONDITIONAL LIBERTY IN THIS SITUATION, FULL WELL KNOWING WHEN WE TELL HIM IF YOU DO THIS OR IF YOU DO THAT --

YOU ARE IN YOUR REBUTTAL TIME.

YES, YOUR HONOR. I WILL BE RIGHT FINISHED. IF, IN FACT, EXCUSE ME, WE HAVE TOLD THEM THAT YOU CAN DO THIS AND YOU CAN DO THAT, AND IF YOU DO THIS, WE ARE GOING TO PUT YOU AWAY FOR 15 YEARS, INSTEAD OF THE FIVE YEARS YOU ARE ON PROBATION, AND YOU AND HE KNOWS THAT, AND THEN HE GOES OUT THERE AND -- AND HE KNOWS THAT, AND THEN HE GOES OUT THERE AND DOES THAT, AND WE KNOW THAT BECAUSE A POLICE OFFICER WHO IS DOING HIS JOB AND DIDN'T HAVE MORE INFORMATION TO MAKE A STOP AND A SEARCH, THEN THE DEFENDANT IS ENTITLED TO GO ON HIS WAY, BOTH ON THE SUBSTANCE CRIME AND ON THE PROBATION VIOLATION CRIME, AND HE BASICALLY FLAUNTED HIS ILLEGAL ACTIONS TO THE STATE AND CAN GO ON HIS MERRY WAY, AND THOSE ARE THE BENEFITS VERSUS WEIGHING THE BALANCE OF BENEFITS AS A DETRIMENT TO THIS SOCIETY, AND THIS COURT HAS TO WEIGH IT, WHETHER WE DO IT UNDER THE SCOTT DECISION OR WHETHER THIS COURT WANTS TO RECEDE FROM GRUB. THANK YOU VERY MUCH.

THANK YOU. MR. ALVAREZ.

MAY IT PLEASE THE COURT. MANUAL ALVAREZ, ASSISTANT PUBLIC DEFENDER, ON BEHALF OF THE APPELLEE. AN UNDERLYING FUNDAMENTAL PRINCIPLE THAT IS COMMON TO BOTH GRUBS AND SOKA, IS THAT IN THIS STATE IT IS NOT A CREATURE OF INVENTION BUT A CONSTITUTIONALLY-MANDATED RULE OF SOCIETY, WHICH IS QUOTEED IN ARTICLE I SECTION 12. THEREFORE THIS COURT, I DON'T BELIEVE, COULD RECEDE FROM CROSS UNLESS THERE WAS A U.S. SUPREME COURT DECISION DIRECTLY ON POINT. NOW, THE PENNSYLVANIA CASE IS DISTINGUISHABLE FROM THE SITUATION AT HAND FOR NUMEROUS REASONS. FIRST OF ALL, THE U.S. SUPREME COURT, IN DECIDING THE SCOTT CASE, FOUND IT ABSOLUTELY CRITICAL THAT THE NATURE OF THE PROCEEDING THAT WAS INVOLVED WAS A PAROLE VIOLATION HEARING. THAT IS TO SAY IT IS AN ADMINISTRATIVE PROCEEDING WHICH IS PRESIDED OVER BY NONJUDICIAL OFFICERS, A SERIES OF COMMISSIONERS. THIS COURT, IN FLOYD, SEVERAL YEARS AGO, SAID THAT THERE WAS A DIFFERENCE, A SUBSTANTIVE DIFFERENCE BETWEEN PROBATION AND PAROLE, SUCH THAT AN INDIGENT PAROLE' FACING REVOCATION IS NOT ENTITLED TO COUNSEL, BECAUSE OF THE NONADVERSARIAL ADMINISTRATIVE NATURE OF THE PROCEEDING. A PROBATION VIOLATION HEARING IS IN EFFECT, A BENCH TRIAL, WHERE IT IS PRESIDED OVER BY A JUDGE, WHICH IS ADVERSARIAL INNATE, WHERE THE RULES OF EVIDENCE DO APPLY, AND MOST IMPORTANTLY, IF A PROBATIONER IS FOUND IN VIOLATION OF PROBATION, HE CAN BE SENTENCEED AS IF HE HAD GONE TO TRIAL ORIGINALLY ON THE ORIGINAL CHARGES AND HAVE BEEN CONVICTED.

YOU WOULD AGREE THAT IT IS NOT A, QUOTE, CRIMINAL TRIAL THOUGH.

IT IS NOT A CRIMINAL TRIAL, BUT IT HAS MANY OF THE CHARACTERISTICS OF A CRIMINAL TRIAL AND IS CLEARLY ADVERSARIAL INNATE.

REALLY, THE TEACHING OF THE PENNSYLVANIA CASE BY THE MAJORITY OPINION IS THAT WE HAVE REPEATEDLY DECLINED TO EXTEND THE EXCLUSIONARY RULE TO PROCEEDINGS OTHER THAN CRIMINAL TRIALS. I MEAN, ISN'T THAT THE ESSENCE OF WHAT THE UNITED STATES SUPREME COURT --

YES. I WOULD AGREE WITH YOUR HONOR'S STATEMENT. HOWEVER, THERE ARE DIFFERENCES BETWEEN THE SITUATION THAT THEY WERE CONFRONTING AND THE SITUATION IN FLORIDA. ONE OF THOSE DIFFERENCES IS THAT IN FLORIDA, THE EXCLUSIONARY RULE IS CODIFIED. IT IS NOT AN ALTERNATIVE REMEDY. IT IS A MANDATED REMEDY. SECONDLY, IN THE PENNSYLVANIA CASE, THERE WERE A NUMBER OF FACTUAL DISTINCTIONS, ONE OF WHICH IS A PAROLE' IN PENNSYLVANIA IS CONSIDERED TO BE -- A PAROLE' IN PENNSYLVANIA IS CONSIDERED TO BE UNDER THE CUSTODY OF THE STATE, DURING THE DURATION OF HIS PAROLE. IN SOAKAL, THIS COURT DETERMINED THAT TO BE A FACTOR, IN DETERMINING THE SITUATION IN SOKA FROM GRIFFIN, BECAUSE IN THE WISCONSIN CASE, IF WISCONSIN, IF YOU ARE ON PROBATION, YOU ARE CONSIDERED TO BE IN THE CUSTODY OF THE STATE, WHEREAS IN FLORIDA YOU ARE NOT, AND THIS COURT FOUND IT TO BE A SUFFICIENT DISTINCTION SO AS NOT TO FOLLOW GRIFFIN. MOREOVER, IF THE COURT ACCEPTS THE STATE'S ARGUMENT, THEN THE PROBATION OFFICERS HAVE THE RIGHT TO VIOLATE THE RIGHTS OF ANYONE. THIS IS DIFFERENT, SINCE AS THIS COURT NOTED IN SOKA THERE, IS AN ADMINISTRATION STRUCTURE, SO THAT THIS IS NOT NECESSARILY -- FOR INSTANCE, IF THE PERSON IS SEARCHED FOR AN ILLEGAL AUTOMOBILE. THERE IS A STRUCTURE TO GO THROUGH A PROCESS AND SO FORTH. AND IN THIS CASE, THE LAW ENFORCEMENT OFFICERS WOULD HAVE MORE AUTHORITY AND CONTROL OVER PROBATIONERS THAN PROBATION OFFICERS, AND IN GRUBS, THIS COURT NOTED THAT THERE IS A DIFFERENCE BETWEEN A PROBATION OFFICER AND A LAW ENFORCEMENT OFFICER. A PROBATION OFFICER HAS GREATER ACCESS TO A PAROLEE BECAUSE OF THE NATURE OF THE SUPERVISORY FUNCTION, AND AS THIS COURT NOTED IN GRUBS, TO LIMIT THE AUTHORITY OF A LAW ENFORCEMENT OFFICER, VIS-A-VIS THAT OF A PROBATION OFFICER, IN THIS SITUATION, THIS DEFENDANT WAS STOPPED BY A POLICE OFFICER WHO HAD NO IDEA WHETHER OR NOT HE WAS ON PROBATION. THIS WOULD OPEN THE DOOR TO POLICE OFFICERS TO CONDUCT ARBITRARY STOPS IN A POSITION BECAUSE,

KNOWING THAT A PERSON HAPPENS TO BE ON PROBATION, THEY CAN STOP THEM AT WILL AND SEARCH THEM AT WILL AND SEARCH THEIR RESIDENCES AT WILL. SO YOU ARE RIGHT. THAT WOULD BE THE LOGICAL CONSEQUENCE OF THE STATE'S POSITION, AND BASED ON THE SUBSTANTIVE DIFFERENCES BETWEEN THE PAROLE SITUATION, HAD WHICH WAS CONFRONTED IN THE SCOTT CASE VERSUS THE SITUATION HERE, UNDER THE PRINCIPLE OF PRIMACY AND UNDER THIS COURT'S HOLDING IN SOKA, CLEARLY THE SCOTT DECISION DOES NOT CONTROL HERE. THE ONLY ISSUE THAT REMAINS IS LORNT THIS -- IS WHETHER OR NOT THIS COURT SHOULD RECEDE FROM ALMOST 20 YEARS OF PRECEDENT GOING BACK TO GRUBS.

IN THE COURT CASE, THIS COURT HELD WITH THE GRUBS CASE. DO YOU AGREE WITH THAT, THAT IN THE FOURTH DISTRICT OPINION, IF WE APPROVE THE THIRD DISTRICT COURT OF APPEAL DECISION, THAT WOULDN'T NECESSARILY RESULT IN OUR DISAPPROVING THE RESULT REACHED BY THE FOURTH DISTRICT. ARE YOU FAMILIAR WITH THE FACTS --

ARE YOU FAMILIAR WITH FLOWERS SNURNS.

I AM ASSUMING THAT THIS -- YOUR HONOR?

I AM ASSUMING THAT THIS CASE IS HERE IN CONFLICT.

YES, YOUR HONOR, IT IS.

I AM TALKING ABOUT THE FOURTH DISTRICT CASE --

MY UNDERSTANDING IS THAT THE FOURTH DISTRICT CASE CONCLUDED THAT THE PENNSYLVANIA CASE DID APPLY TO FLORIDA.

BUT THEY FIRST DECIDED THE THE CASE ON ANOTHER GROUND.

YES.

THE POLICE OFFICERS WERE ACTING PURSUANT TO AUTHORITY THAT THE PROBATION OFFICER ALREADY HAD. YOU DON'T DISAGREE WITH THAT PART OF IT.

I THINK THE FOURTH DISTRICT DETERMINED THAT THE SEARCH WAS LEGAL AND THEN WENT TO TO DETERMINE --

SO YOU --

NO. NO. I AM NOT CONCEDING THAT AT ALL. IN THIS CASE, THE STATE IS CONCEDING THAT --

THAT CASE SHOWS THAT PROBATION OFFICERS HAVE SOME FAIRLY BROAD POWERS, ALREADY, TO GO AND SEARCH RESIDENCES AND DOENING AND DO THINGS THAT AN ORDINARY CITIZENS OR A POLICE OFFICER WOULD NOT.

A YES AND UNLESS USED IN AN ARBITRARY FASHION, AS USED BY A POLICE OFFICER ON THE STREET, IN NOT KNOWING WHO HE IS SEARCHING. UNLESS THE COURT HAS ADDITIONAL QUESTIONS, I WOULD REST ON MY BRIEF. THANK YOU VERY MUCH.

THANK YOU. MR. NEIMAND, REBUTTAL.

VERY BRIEFLY. THE FOURTH DISTRICT CASE WOULD NOT FALL BY THE WAYSIDE. IT WAS DECIDED ON THE GROUNDS AS WELL. IN FACT, UP UNTIL THAT POINT IN TIME, I WASN'T EVEN GOING TO MOVE TO INVOKE THE DISCRETIONARY JURISDICTION, BECAUSE THE THIRD DISTRICT, WHEN I ASKED THEM TO CERTIFY THE QUESTION, SAID THEY DID NOTHING TO CERTIFY UNDER CROSS, AND I WAS NOT GOING TO COME HERE AT ALL BECAUSE I HAD NO GROUNDS, AND THEN ON THE

LAST DAY, WE CAME HERE, BECAUSE WE SAW THE DECISION IN THE FOURTH AND DID THE CONFLICT ON THAT. I THINK THE, AGAIN, WE GO BACK TO THE ISSUE, IS THIS A CRIMINAL TRIAL? I THINK IF YOU LOOK AT IT FROM THAT PERSPECTIVE, UNDER CROSS AND ARTICLE I SECTION 12 ANALYSIS, THEN THIS IS NOT A CRIMINAL TRIAL, AND THE EXCLUSIONARY RULE SHOULD NOT BE ANDPLIED WHAT -- APPLIED WHATSOEVER. THAT IS UNDER CROSS.

WHAT YOU JUST SAID, WHEN THE THIRD DISTRICT CASE CAME OUT, YOU DIDN'T FEEL THAT YOU HAD JURISDICTION?

WELL, I ASKED. THEY TOLD ME NO. UNDER CROSS.

IN CONFLICT WITH THE DECISION OF THE UNITED STATES SUPREME COURT?

AM NOT WHAT I DID, I ASKED THE THIRD DISTRICT TO CERTIFY, BECAUSE THE THE FOURTH DISTRICT HADN'T COME OUT, TO CERTIFY THE QUESTION HERE, AND THEY SAID THEY ARE BOUND BY CROSS, AND THEY FOUND THAT SCOTT IS NOT CROSS, SO WE WEREN'T COMING HERE BECAUSE I WOULD HAVE NO CONFLICT CONFLICT. ONE TO LIVE WITH THAT I COULD SEE, BUT THEN IT CAME OUT, INCLUDING THAT WE DID HAVE THE CONFLICT, SO WE CAME HERE TO CLARIFY IT, AND THE CONFLICT, NOW THAT WE ARE HERE AND WE CAN COME FORWARD AS A CRIMINAL TRIAL IF WE WANT TO TAKE THE BROADER AVENUE, THIS IS NOT A CRIMINAL TRIAL PROBATION, AND THAT THE DIRECT HOLDING IS NOT ADDICT A FROM THE UNITED STATES -- IS NOT DICTA FROM THE UNITED STATES SUPREME COURT IN SCOTT, THAT THEY HAVE NEVER EXPANDED THE EXCLUSIONARY RULE TO NON-CRIMINAL TRIAL SETTINGS.

IS THAT IN THE FOURTH DISTRICT? BECAUSE THEY DECIDED THE CASE.

WE ARE NOT FIGHTING NOW.

WELL, IS THERE CONFLICT?

WELL --

THERE REALLY ISN'T CONFLICT BETWEEN THE DECISION OF THE THIRD AND THE DECISION OF THE FOURTH OR THE DECISION OF THE SECOND AND THE DECISION OF THE --

THE FOURTH. THE RESULT WOULD NOT CHANGE. THIS COURT ACCEPTED CONFLICT. I FELT THAT I HAD DUTY BOUND, NOW, ONCE IT WAS IN THE OPINION, TO BRING IT FORWARD TO THIS COURT.

BUT YOU AGREE THAT THE LANGUAGE IN THE FOURTH DISTRICT OPINION IS REALLY DICTA THAT THEY FOUND ON THIS ISSUE.

THEY FOUND THAT IT WAS A LEGAL SEARCH OTHERWISE.

SO THE LANGUAGE ON THAT IS REALLY DICTA?

YES. AND NOBODY IS CONTESTING THAT.

IT IS A CERTIFIED QUESTION, ISN'T THERE, OUT OF THE SECOND ON THIS SAME POINT?

YEAH.

THE SECOND JUST ACKNOWLEDGES THE SAME CONFLICT.

I THINK QUITE FRANKLY, WHETHER IT IS DICTA OR NOT, I THINK THIS COURT IS IN THE POSTURE THAT IT NEEDS TO DECIDE THE ISSUE, BECAUSE IT IS OUT THERE, AND SOMEONE ELSE CAN LOOK AT IT FROM THE FOURTH POINT OF VIEW AND GO FORWARD. ANOTHER SECOND HAS ALREADY

CERTIFIED.

WE ARE HERE. YOU LIKE ME. I ARGUED THE CASE. I AM A NICE GUY WHO CAN DECIDE THIS, SO THERE SHOULD BE NO PROBLEM.

THANK YOU, MR. NEIMAND.

I AM A NICE GUY, I KNOW YOU GUYS HAVE BEEN HEARING ALL MORNING.

THANK YOU VERY MUCH.

WE TAKE A FIVE-MINUTE RECESS AND THEN COME BACK FOR OUR FINAL CASE THIS MORNING.