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State of Florida v. Paul Vanbebber

NEXT CASE ON THE COURT'S DOCKET IS STATE VERSUS VANBEBBER. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS RONALD NAPOLITANO, ASSISTANT ATTORNEY GENERAL REPRESENTING THE STATE IN THIS CASE. THE STATE IS APPEALING THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THIS CASE, WHICH RECOGNIZED CONFLICT IN THE FOURTH DISTRICT, IN STATE VERSUS WARNER. BASICALLY IT IS THE STATE'S POSITION THAT THE COURT ERRED IN FINDING THAT THE FACTUAL CIRCUMSTANCES IN THIS CASE JUSTIFIED A DOWNWARD DEPARTURE, BECAUSE THE MANNER, BECAUSE THE OFFENSE WAS COMMITTED IN AN UNSOPHISTICATED MANNER, FOR WHICH THE DEFENDANT HAS EXPRESSED REMORSE, AND THAT IT WAS AN ISOLATED INCIDENT. THE CRUX OF THE MATTER RIDES ON THE ISSUE OF WHETHER THE OFFENSE WAS COMMITTED IN AN UNSOPHISTICATED MANNER.

COULD YOU JUST CLARIFY, BECAUSE ALL THREE HAVE TO BE FOUND, IN ORDER FOR THAT PARTICULAR MITIGATOR TO BE FOUND OR IS THAT CLEAR?

YES.

IN THE STATE'S POSITION?

YES. IT IS THE STATE'S POSITION THAT ALL THREE FACTORS HAVE TO BE PRESENT, AND THE OTHER DISTRICT COURTS OF APPEAL, AS PER THE CASES THAT I CITED IN MY BRIEF, STATE THAT FOR INSTANCE, REMORSE ALONE, IS NOT SUFFICIENT, THAT THE LEGISLATURE HAS SEEN FIT TO REQUIRE MORE THAN JUST REMORSE. IT HAS TO BE AN ISOLATED INCIDENT, AND THE OFFENSE MUST BE COMMITTED IN AN UNSOPHISTICATED MANNER.

IT YOUR, IS IT THE STATE'S POSITION, AS MATTER OF LAW, THAT A DUI OFFENSE COULD NEVER BE COMMITTED IN AN ISOLATED MANNER? I MEAN, I AM SORRY, IN AN UNSOPHISTICATED MANNER?

IT WOULD BE, I WOULD BE HARD PRESSED, TO FIND A FACTUAL SITUATION WHERE A DUI COULD BE COMMITTED IN AND SOPHISTICATED MANNER, PARTICULARLY A DUI MANSLAUGHTER, BUT SPECIFICALLY IN THIS CASE, THERE WAS NOTHING UNSOPHISTICATED ABOUT THE MANNER IN WHICH THE OFFENSE WAS COMMITTED. NOW, THE DEFENSE --

THE CONFLICT WOULD ONLY BE, IF IT, WITH THE FOURTH DISTRICT SAYING, AS A MATTER OF LAW, THAT IT CAN NEVER BE COMMITTED IN AN UNSOPHISTICATED MANNER. CORRECT?

THAT'S CORRECT.

IF THE FOURTH DISTRICT IS RIGHT, THEN THE FACTS, WE DON'T GET INTO THE FACTS OF THE CASE, IF DUI COULD NEVER, AS A MATTER OF LAW, BE COMMITTED IN AN UNSOPHISTICATED MANNER.

THAT IS CORRECT.

WELL, WHAT IS ACTUALLY MEANT BY THE TERM "UNSOPHISTICATED MANNER"?

THE LEGISLATURE DID NOT SEE FIT TO DEFINE THE TERM, ON WE HAVE TO -- THE TERM, SO WE HAVE TO LOOK AT THE COMMON USAGE OF THE WORD. IN MY BRIEF, I CITED STATE VERSUS WERNER, WHERE THEY TALKED ABOUT UNSOPHISTICATED BEING THE OPPOSITE OF

SOPHISTICATED, AND THEY DEFINE SOPHISTICATED AS ACQUIRING A WORLDLY KNOWLEDGE OR REFINEMENT LACKING IN NATURAL SIMPLICITY OR NAIVETE.

AND WHAT CRIME COULD WE APPLY THAT DEFINITION TO? IS THIS JUST LIMITED TO THIS CIRCUMSTANCE OR HOW DO YOU GO ABOUT, I SAT FOR 23 YEARS AS A TRIAL JUDGE, AND THE WORDS JUST EXCLUDE THE APPLICATION OF THIS STATUTE, IN ANY CIRCUMSTANCE?

GENERALLY, WHEN WE ARE TALKING ABOUT UNSOPHISTICATED OR SOPHISTICATED, WE ARE TALKING ABOUT INTENTIONAL CRIMES. WE ARE TALKING ABOUT OFFENSES THAT THE PERSON INTENDS TO COMMIT, AND HE COMMITS THEM IN EITHER A PLANNED FASHION OR AN UNPLANNED FASHION, OR HE DOESN'T KNOW WHAT HE IS DOING, OR HE EXHIBITS SOME TYPE OF INEPTITUDE IN COMMITTING THE OFFENSE. WHAT WE ARE DEALING WITH HERE, WITH DUI, IN THIS CASE DUI MANSLAUGHTER, WE ARE DEALING WITH A GENERAL INTENT CRIME. SPECIFIC INTENT HAS NOTHING TO DO WITH IT, SO THE QUESTION OF WHETHER SOPHISTICATED, UNSOPHISTICATED HAS ANY PLACE --

HOW DO YOU OVERCOME AT THE OUTSET, THOUGH, IF I UNDERSTAND IT CORRECTLY, YOU ARE MORE FAMILIAR WITH THIS THAN I AM, THAT THE LEGISLATURE BROADLY SET OUT THE CATEGORY OF FELONY OR OFFENSES, THAT THIS PARTICULAR CIRCUMSTANCE WOULD APPLY TO, AND THAT CLEARLY, INsofar AS THEY SAID THAT THIS IS ONE OF THE QUALIFYING OFFENSES THAT THIS FACTOR MAY BE CONSIDERED. IS THAT NOT CORRECT?

WHAT THEY SAID WAS IT APPLIES TO ALL OFFENSES EXCEPT CAPITAL OFFENSES.

AND THIS MEETS THAT CATEGORY, DOES IT NOT?

IT MEETS THAT CATEGORY, BUT THEN THE QUESTION IS DO THE FACTS IN THIS CASE, AND I CAN ONLY, REALLY, DEAL WITH THIS CASE. WE CAN TALK ABOUT IN GENERALITY, BUT WE HAVE TO REALLY DEAL WITH THE SPECIFICS OF THIS CASE, IN THIS CASE THERE IS NO EVIDENCE THAT THE OFFENSE WAS COMMITTED IN AN UNSOPHISTICATED MANNER. WE ARE NOT TALKING ABOUT --

ISN'T THAT UP TO THE LEGISLATURE, TO SAY WHAT FACTORS THEY ARE GOING TO ALLOW TO BE CONSIDERED AND, REALLY, DON'T YOU HAVE TO, THEN, DEMONSTRATE THAT THERE IS, REALLY, NO POSSIBLE WAY, I SUPPOSE, HERE, IF WE ARE GOING TO, NOW, SORT OF STRETCH OUR IMAGINATION, WE CAN SAY, WELL, LET'S SEE, WHAT ABOUT SOMEBODY THAT THEY REALLY THOUGHT THAT THEY COULD DRINK A LOT, AND THEN DRIVE, BUT THEY COULD HIDE IT. AND SO THEY SAID, WELL, YOU KNOW IF I DRINK CERTAIN THINGS, THAT THAT COULD NEVER BE DETECTED ON MY BREATH, AND IN ADDITION TO THAT, WHAT I WILL DO IS I WILL TAKE A MOUTH SPRAY, AND I WILL BE SURE THAT I AM DRESSED JUST PERFECTLY, AND THEN I WILL GET IN THE CAR AND PUT ON MY SEAT BELT AND MY HAIR IS COMBED, AND, BOY, I AM GOING TO FOOL EVERYBODY, INsofar AS ANYBODY THINKING THAT I AM DRIVING WHILE I AM INTOXICATED. BUT SURE ENOUGH, THE INTOXICATION CATCHES UP WITH HIM AND THEY ARE CAUGHT AT THAT. NOW, THAT, I DON'T KNOW, WHAT WOULD YOU SAY? THERE IS SOMEBODY THAT IS PRETTY SOPHISTICATED IN THE WAY THAT THEY THOUGHT THAT, ALTHOUGH THEY KNEW THAT THEY HAD CONSUMED --

CORRECT.

AND -- AND THAT, THERE, IS WHERE PEOPLE ARE OFTEN CITED FOR ACTING INTENTIONALLY, THAT IS --

CORRECT.

-- YOU INTENDED, YOU VOLUNTARILY DRANK THAT, SO WHY, IF WE REALLY STRETCH, THEN, WHY CAN'T WE SAY, WELL, HERE IS SOMEBODY THAT, THEY WERE PRETTY SOPHISTICATED IN THEIR

ATTEMPT TO HIDE THEIR INTOXICATION, AND WHY COULDN'T THAT BE INCLUDED IN THERE?

WELL, UNDER THE FACTUAL CIRCUMSTANCES, I THINK YOU COULD MAKE THAT ARGUMENT. UNDER THAT SCENARIO THAT YOU HAVE JUST --

SO IT IS POSSIBLE, AT LEAST, THAT THIS FACTOR COULD BE A CONSIDERATION IN A DUI, IS THAT CORRECT?

YES. THE, IT IS POSSIBLE THAT THE OFFENSE COULD HAVE BEEN COMMITTED IN, TECHNICALLY, IN A FIST INDICATED -- IN A SOPHISTICATED MANNER, IF YOU WANT TO PUT IT THAT WAY.

SHOULDN'T THAT BE LEFT UP TO THE TRIAL COURT THAT WAY?

IT IS UP TO THE TRIAL COURT TO DETERMINE, BUT THERE HAS TO BE SUFFICIENT EVIDENCE BEFORE THE TRIAL COURT TO SHOW THAT THE MITIGATOR APPLIES. THE QUESTION IS NOT SO MUCH WHETHER THE MITIGATOR CAN APPLY OR, BY LAW IT APPLIES TO ALL THE OFFENSES. THE QUESTION IS WHETHER THE FACTS OF THE SPECIFIC CASE SHOW THAT IT APPLIES IN THAT SPECIFIC CASE. IT DOES NOT.

WHOSE BURDEN OF PROOF IS IT TO ESTABLISH THIS MITIGATION?

WELL, IN THIS CASE IT WOULD BE THE BURDEN OF PROOF WOULD REST ON THE APPELLANT, BECAUSE IT IS A DOWNWARD DEPARTURE, AND HE IS THE ONE WHO IS SEEK THE DOWNWARD DEPARTURE.

BUT DOESN'T THE STATUTE, REALLY, NOT IMPOSE BURDENS OF PROOF? DOESN'T THE STATUTE JUST GIVE THIS DISCRETION AUTHORITY TO THE TRIAL COURT JUDGE?

YES, BUT THE STATUTE, ALSO, PROVIDES THAT IT HAS TO BE ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE. SOMEBODY HAS TO PRESENT THE EVIDENCE, AND IN THIS CASE IT WAS PRESENTED, THE ARGUMENT AND THE TESTIMONY WAS PRESENTED BY THE DEFENSE. OBVIOUSLY THE STATE IS NOT GOING TO ASK FOR A DOWNWARD DEPARTURE OR SEEK A DOWNWARD DEPARTURE IN A CASE SUCH AS THIS.

I HAVE A PROBLEM WITH YOUR PROPOSITION THAT THIS PARTICULAR MITIGATOR COULD ONLY APPLY TO SPECIFIC INTENT CRIMES. IT WOULD SEEM THAT THE LEGISLATURE, IF THEY ARE LOOKING AT REMORSE IN A CRIME THAT OCCURS IN AN ISOLATED MANNER, WOULDN'T WANT THE, A CRIME THAT REQUIRES MORE INTENT TO BE WHERE THIS MITIGATOR APPLIES, BUT IT WOULD SEEM TO BE COUNTERINTUITIVE, THAT IF SOMEBODY IS NOT INTENDING TO DO SOMETHING, AND THEY ARE REMORSE WILLFUL, AND IT HAS ONLY HAPPENED IN AN ISOLATED MANNER, THAT THEY WOULD BE MORE LIKELY TO WANT THAT MITIGATOR TO APPLY THAN SOMEBODY THAT SETS OUT TO COMMIT A CRIME. COULD YOU HELP ME WITH THAT.

WHAT I WAS TRYING TO SAY THERE, WAS THAT IN MOST CASES, WHERE THE, IN THE VAST MAJORITY OF CASES WHERE THIS MITIGATOR HAS BEEN APPLIED AND UPHELD ON APPELLATE, IN APPELLATE, IN APPELLATE COURTS, IS WHERE THE CRIME WAS COMMITTED, WHERE IT WAS AN INTENTIONAL ACT AND NOT A STRICT LIABILITY OFFENSE.

BUT THEN AGAIN, WE WOULD BE SAYING THAT THE IDEA THAT SOMEBODY WOULD HAVE REMORSE AND IT ONLY HAPPENED ONCE WOULD NEVER END UP GETTING TO APPLY TO THOSE THAT HAVE NOT INTENDED THEIR-CRIME TO OCCUR.

YES. YOU HAVE TO HAVE REMORSE, AND IT WOULD APPLY, WHETHER IT IS A SPECIFIC INTENT CRIME. THE LEGISLATURE HAS SEEN FIT THAT REMORSE CAN BE CONSIDERED BUT NOT REMORSE, IN AND OF ITSELF. IT HAS TO BE TIED IN WITH THOSE OTHER TWO FACTORS. I THINK --

BY ACCEPTING THAT THE SCENARIO GIVEN BY JUSTICE ANSTEAD WOULD BE A SOPHISTICATED MANNER OF COMMITTING A DUI MANSLAUGHTER, THEN DON'T YOU HAVE TO, THEN, ACCEPT THE FACT THAT IT CAN, THEN, BE COMMITTED IN AN UNSOPHISTICATED MANNER, AND WOULDN'T THE MERE FACT THAT YOU DROVE A CAR AND COMMITTED MANSLAUGHTER WHILE YOU WERE DRIVING THE CAR AND HAVE BEEN DRINKING, WOULD BE JUST OP -- OPPOSITE OF THE KIND OF SOPHISTICATED SCENARIO THAT HE GAVE YOU AND THAT THAT, IN AND OF ITSELF, WOULD BE AN UNSOPHISTICATED MANNER OF COMMITTING IT?

I WOULD AGREE THAT IT IS CONCEIVABLE THAT IT MAY BE, UNDER SPECIFIC FACTUAL SITUATIONS, BE COMMITTED, DUI MANSLAUGHTER COULD BE COMMITTED IN AN UNSOPHISTICATED MANNER. HOWEVER --

WHAT MORE DO YOU NEED IN A RECORD SUCH AS THIS, WHERE ALL WE HAVE IS THE MERE FACT THAT HE CONSUMED SOME ALCOHOL AND THEN GOT BEHIND THE WHEEL OF THE CAR AND THE MANSLAUGHTER OCCURRED. WHAT MORE WOULD YOU NEED TO SHOW AN UNSOPHISTICATED MANNER?

WHEN WE ARE TALKING, THE, WHAT THE MITIGATOR SAYS IS THE OFFENSE MUST BE COMMITTED IN AN UNSOPHISTICATED MANNER. IT IS NOT THE FACT THAT THE OFFENSE WAS COMMITTED. IT IS THE MANNER IN WHICH THE OFFENSE WAS COMMITTED. FOR INSTANCE, IF, I WILL GIVE YOU AN EXAMPLE. WE ARE NOT TALKING ABOUT CRIMINAL LAW HERE BUT FOR INSTANCE TYPING. IF YOU TYPE WITH TWO FINGERS, YOU ARE TYPING. IS T IS NOT NECESSARILY UNSOPHISTICATED OR SOPHISTICATED. IT IS JUST TYPING. IF YOU TYPE THAT WAY AND YOU MAKE NUMEROUS MISTAKES, YOU ARE NOT A VERY GOOD TYPIST. IF YOU TYPE WITH ALL FINGERS AND YOU TYPE VERY QUICKLY AND YOU ARE VERY ACCURATE, YOU ARE A SOPHISTICATED TYPIST. THE QUESTION IS THERE HAS TO BE FACTORS, OTHER THAN THE OFFENSE, ITSELF, THAT MAKE IT UNCITIES INDICATED -- UNSOPHISTICATED, BECAUSE IF YOU --

CAN YOU THINK OF A SCENARIO WHERE YOU WOULD HAVE AN UNSOPHISTICATED DUI MANSLAUGHTER?

IF THE PERSON DIDN'T REALIZE THAT HE WAS DRUNK. IF THE PERSON DIDN'T REALIZE THAT --

DO YOU THINK THE DEFENDANT, DID THE DEFENDANT IN THIS CASE KNOW HE WAS DRUNK, OR DID HE THINK --

IT WASN'T BROUGHT OUT AT THE TIME OF THE SENTENCING HEARING, BUT THE RECORD OF TRIAL, THE RECORD ON APPEAL INCLUDES THE TRAFFIC HOMICIDE REPORT, AND IN THE TRAFFIC HOMICIDE REPORT, CERTAIN STATES WERE TAKEN FROM THE DEFENDANT BY CORPORAL CORBURN, AND THE DEFENDANT ADMITTED THAT HE HAD BEEN TO THIS PARTY. HE HAD BEEN DRINKING BEERS. HE SAID HE HAD DRUNK ONLY THREE BEERS BETWEEN FIVE O'CLOCK AND 9:10 IN THE EVENING, WHEN THE OFFENSE OTHER-AND 9:10 IN THE EVENING, WHEN THE OFFENSE -- BETWEEN FIVE O'CLOCK AND NINE-TEN IN THE EVENING, WHEN THE OFFENSE OCCURRED. HE ALSO STATED THAT HE HAD ABUZZ. THERE WAS ALSO TESTIMONY IN THE TRAFFIC REPORT FROM TWO OTHER PEOPLE IT AT THE PARTY, AND THE -- FROM THE TWO OTHER PEOPLE WHO WERE AT THE PARTY, AND AMY BLOOMBERG TESTIFIED THE DEFENDANT, AT THE PARTY, WAS TRASHED. SHE ALSO TESTIFIED THAT HE WAS NOT WALKING STRAIGHT AND HE WAS STUTTERING. ANOTHER WITNESS AT THE PARTY TOLD THE POLICE THAT HE WASN'T OKAY TO DRIVE, AND THAT WITNESS, THE PERSON WHO MADE THE STATEMENT, TANYA BRIDGER, ALSO STATED THAT THE DEFENDANT TOLD HER, THEY CAME UPON THE ACCIDENT SCENE, THEY LEFT THE PARTY AT APPROXIMATELY AT OR BEFORE THE SAME TIME. THEY HEARD THE TIRES SQUEAL, AND THEN THEY TURNED THE CORNER ON TO DE SOTO AND THEY CAME UPON THE ACCIDENT SCENE. TANYA BRIDGES STATED THAT THE DEFENDANT TOLD HER THAT HE RAN THE STOP SIGN. THE DEFENDANT KNEW THAT HE RAN THE STOP SIGN. THE DEFENDANT ALSO TOLD CORPORAL COLBURN THAT HE SAW THE STOP

SIGN. THE ACCIDENT INVESTIGATION REPORT REFLECTS THAT THE VICTIM'S CAME, THE VICTIM WAS PASSENGER IN THE CAR, BY THE WAY WAS TRAVELING EAST AND CAME TO THE INTERSECTION. IT WAS A FOUR-WAY STOP. MADE A COMPLETE STOP. TURNED. THE DEFENDANT, WHO IN HIS STATEMENT SAID THAT HE WAS GOING 55 MILES AN HOUR, APPROXIMATELY 55. THE SPEED LIMIT WAS 45, BY THE WAY, WENT THROUGH THE, AFTER THE VICTIM'S CAR MADE THE TURN AND COMPLETED THE TURN, THE DEFENDANT WENT THROUGH THE STOP SIGN AND HIT REAR OF THE DEFENDANT, OF THE VICTIM'S VEHICLE.

I AM STILL HAVING TROUBLE, BECAUSE I THOUGHT THE CONFLICT ISSUE WAS THAT THE FOURTH DISTRICT, IN WARNER, SAID THAT DUI MANSLAUGHTER COULD NEVER BE COMMITTED IN AN UNSOPHISTICATED MANNER, AND I AM HEARING YOU SAY THIS MORNING, THAT ALTHOUGH YOU DON'T SEE THIS CRIME AS QUALIFYING, THIS, BASED ON THE FACTS OF THIS CASE THAT, THE STATE DOES CONCEDE THAT THE IDEA THAT THERE IS A BLANKET EXCLUSION OF THAT MITIGATOR APPLYING TO DUI MANSLAUGHTER THAT, THAT IS NOT CORRECT. SO I --

I WOULD FIND IT VERY DIFFICULT TO FIND, JUST BECAUSE AN OFFENSE CAN BE COMMITTED IN A SOPHISTICATED, DUI CAN BE COMMITTED IN A SOPHISTICATED MANNER, IT WOULD BE VERY DIFFICULT TO COME UP WITH CIRCUMSTANCES WHERE IT COULD BE COMMITTED IN AN UNSOPHISTICATED MANNER.

BUT THAT PROBABLY, GOING BACK TO WHAT JUSTICE HARDING WAS SAYING, THERE ARE A LOT OF CRIMES THAT, YOU KNOW, WE CAN REALLY KIBBL ABOUT, EVEN MAYBE THE -- QUIBBLE ABOUT, EVEN THE TERM, ITSELF, ABOUT WHAT UNSOPHISTICATED MEANS, SOMEONE WHO IS COMMIT AGO OFFENSE FOR THE FIRST TIME AND EXHIBITS REMORSE, IS THAT THE LEGISLATURE - - AND WHO IS COMMITTING AN OFFENSE FOR THE FIRST TIME AND EXHIBITS REMORSE, IS THAT THE LEGISLATURE, SOMEONE HAS COMMITTED A CRIME, DONE SOMETHING ONCE AND THEY REALLY REGRET IT, SHOULD THEY SPEND A LONG TIME IN PRISON, OR SHOULD THE LEGISLATURE LOOK AT THE JUDGE'S GRACE AND SAY THERE ARE PUNISHMENTS IN THIS CASE, IN A PARTICULAR CASE THAT APPLIES, AND ISN'T THAT AN EQUALLY REASONABLE READING OF THE STATUTORY SCHEME, WHETHER WE, HOW WE APPLY IT IN A GIVEN CASE, BEING LEFT TO THE JUDGES.

IT MAY VERY WELL BE THAT IT COULD BE COMMITTED IN AN UNSOPHISTICATED MANNER. I WOULD FIND IT VERY DIFFICULT TO DO SO. THE STATE OBJECTED. THEY DIDN'T FEEL THAT THE OFFENSE COULD BE COMMITTED IN AND SOPHISTICATED MANNER. THE COURT NEVER MADE ANY SPECIFIC FACTUAL FINDINGS. THE COURT, ITSELF, SAID I DON'T SEE HOW IT CAN BE COMMITTED, THE TRIAL COURT, I DON'T SEE HOW IT CAN BE COMMITTED IN A SOPHISTICATED MANNER AND THEN HELD THAT IT WAS COMMITTED IN AN UNSOPHISTICATED MANNER BUT HAD NO EVIDENCE TO BACK THAT UP.

CHIEF JUSTICE: I WANT TO RAE MIND YOU -- I WANT TO REMIND YOU OF YOUR TIME, SO THAT YOU DON'T GET CAUGHT.

THANK YOU.

MAY IT PLEASE THE COURT. COUNSEL. MY NAME IS JOSHUA FAETT. ALONG WITH REXFORD DARROW, I REPRESENT MR. VAN WEB EVER. -- MR. VANBEBBER.

LET'S START WITH WHETHER THIS CAN BE, AS MATTER OF LAW, I AM NOT QUITE READY TO ACCEPT A CON SESSION THAT -- A CONCESSION THAT, THIS, AS A MATTER OF LAW OF SOMEONE GETTING BEHIND THE WHEEL OF AN AUTOMOBILE IN THE STATE OF FLORIDA AND TEST MORE THAN THE DUI LIMIT, CAN DO THAT, IN AN UNSOPHISTICATED OR SOPHISTICATED WAY. IT SEEMS TO ME THAT THAT IS, IS THE LAW IN THIS CASE, IF WE RULE IN YOUR FAVOR, GOING TO BE THAT, IN FLORIDA, YOU CAN GET BEHIND THE WHEEL DRUNK OF AN AUTOMOBILE AND YOU CAN DO IT IN AN UNSOPHISTICATED WAY? IS THAT THE LAW, IF WE RULE IN YOUR FAVOR?

IN OTHER WORDS WHAT YOU ARE ASKING IS, IF THEY SIMPLY GET BEHIND THE WHEEL, WE DON'T HAVE ANY OTHER FACTS ON THE RECORD, IF THEY SIMPLY GET BEHIND THE WHEEL DRUNK, DRIVE --

WHAT I AM ASKING YOU IS WHETHER YOU CAN COMMIT THIS CRIME OF DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL, IN AN UNSOPHISTICATED WAY, OR CAN YOU COMMIT IT IN A SOPHISTICATED WAY?

I THINK THAT, AND ONE OF THE THINGS THAT WE STRUGGLED WITH MOST IS HOW COULD YOU COMMIT IT IN A SOPHISTICATED MANNER, TO BE ABLE TO COME UP WITH A DEFINITION OF UNSOPHISTICATED. I THINK CHIEF JUSTICE ANSTEAD CAME UP WITH A PERFECT EXAMPLE OF HOW IT COULD BE COMMITTED IN A SOPHISTICATED MANNER.

HIS EXAMPLE, AS I UNDERSTAND IT, WOULD BE THE REASON THAT THE THAT COULD BE CONSIDERED TO BE SOPHISTICATED, PERHAPS, WOULD BE BECAUSE THERE WERE STEPS TAKEN TO COVER IT UP. NOW, THAT, BUT THAT DOESN'T LESSEN OR HAVE TO DO WITH WHETHER IT IS DONE IN A SOPHISTICATED OR UNSOPHISTICATED WAY. THAT HAS TO DO WITH WHAT YOU DO IN ORDER NOT TO BE DETECTED. ISN'T THAT CORRECT? WASN'T THAT HIS EXAMPLE?

IT IS CORRECT, AND WHAT HE WAS GETTING AT AND ONE OF THE ASPECTS YOU HAVE TO LOOK AT IS WHETHER OR NOT WHAT THE LEGISLATURE MEANT, BY UNSOPHISTICATED OR SOPHISTICATED IS WHETHER OR NOT MENS REA PLAYS INTO IT. ARE YOU LOOKING FOR SOMEONE WITH CRIMINAL INTENT. YOU ARE LOOKING AT WHAT MANNER DID THEY COMMIT THAT CRIME. CRIMINAL INTENT DIDN'T PLAY INTO IT, BECAUSE THERE WERE ONLY THREE CASES THAT I WAS ABLE TO FIND IN THE STATE OF FLORIDA THAT HAVE DEFINED SOPHISTICATED OR UNSOPHISTICATED. THERE IS, GOING THROUGH THIS, THREE CASES, THERE IS A FLEMING, A FOURTH DCA CASE. THAT CASE WAS A SINGLE SALE OF MARIJUANA. IN THAT CASE, AN INDIVIDUAL COMES. HE KNOCKS ON THE DOOR. HE ASKS FOR SOMEONE. THAT PERSON IS NOT THERE. THEN HE ASKS WHETHER OR NOT HE CAN BUY THE MARB FROM WHOEVER IS THERE -- BUY THE MANNER FROM WHOEVER IS THERE. HE MAKES THE PURCHASE. AT THE -- BUY THE MANNER FROM WHOEVER IS THERE. HE MAKES THE PURCHASE. AT THE SENTENCING THEY SAID THAT CERTAINLY HE COMMITTED MENS REA.

ISN'T THAT SOPHISTICATED AND UNSOPHISTICATED BUSINESS, ISN'T THAT GOING TO SOMEONE THAT IS A CLERK IN AN OFFICE AND COMMITS SOME TYPE OF EMBEZZLEMENT AND DOES IT IN A WAY THAT DEMONSTRATES THAT THEY, REALLY, WERE NOT DOING THIS IN ANY SORT OF CRAFTY SENSE? IT WASN'T WELL PLANNED, AND IT WAS DONE ISOLATED, AND THEY WERE REMORSEFUL ABOUT IT. ISN'T THAT WHAT IT IS INTENDED TO APPLY?

THAT MAY VERY WELL BE WHAT IT IS INTENDED. ONE OF THE OTHER CASES OUT THERE FROM THE FIFTH DCA IS STATE V MERIT, A LEWD ACT CASE, AND IN THEIR DEFINITION OF STATE V MERIT OF UNSOPHISTICATED IS THAT THE ACTS WERE ART LESS, SIMPLE AND NOT REFINED. THE EXAMPLE WHERE YOU GIVE, WHERE YOU HAVE A CLERK THERE, IS A ART TO THAT, EMBEZZLEMENT. THERE IS SOME KIND, ONE I DON'T FEEL THAT THE MENS REA NECESSARILY PLAYS INTO IT BUT ARE WE DEALING WITH A REAL CRIMINAL HERE, OR ARE WE TALKING ABOUT SOMETHING THAT WAS DONE AS A BUMBLING, ART LESS ACT, AND CERTAINLY WHO HAS EMBEST I HAD, THERE IS -- EMBEZZLED, THERE IS AN ART THERE. THERE IS CERTAINLY A REFINEMENT, TO BE ABLE TO PULL THAT OFF AND COVER IT UP. AS FAR AS CHIEF JUSTICE AND STE'S EXAMPLE -- CHIEF JUSTICE ANSTEAD'S EXAMPLE, THERE WAS AN ART THERE. HE PUT SOME THOUGHT INTO THAT AND HAD A SYSTEM FOR WHAT HE WAS GOING TO DO, BEFORE HE ACTUALLY DID. THAT WHAT WE ARE DEALING WITH HERE IS AN INDIVIDUAL IN THE FACTS OF THIS CASE, AND AS I SAY WE DON'T HAVE A WHOLE LOT MORE FACTS TO DEAL WITH OTHER THAN THE INDIVIDUAL WENT TO THE PARTY AND DID ADMIT THAT HE FELT HE WAS BUZZED BUT NOT INTOXICATED AND GOT INTO THE CAR AND UNFORTUNATELY WAS INVOLVED IN THIS ACCIDENT.

BUT DON'T YOU THINK THAT MAYBE WE MIGHT BE DEALING WITH A CASE OF UNINTENDED RESULTS? YOU THINK THE LEGISLATURE EVER THOUGHT THAT WE WOULD BE AGONIZING IN A DUI CASE, OVER WHETHER IT WAS SOPHISTICATED OR NOT? DON'T YOU THINK, PERHAPS, THE LEGISLATURE WAS THINKING OF SOMETHING IN THE NATURE OF A ROBBERY? THEY SAY DILLINGER USED TO PLAN A CRIME FOR A YEAR BEFORE HE WOULD COMMIT IT. BEFORE HE WILL ROB THE BANK -- BEFORE HE WOULD ROB THE BANK, HE WOULD SCOPE IT OUT AND WENT AND LOOKED, A VERY SOPHISTICATED CRIME, BUT HERE DO YOU THINK THE LEGISLATURE THOUGHT THIS WOULD EVER BE EXTENDED TO THE POINT OF IT BEING BEFORE THE SUPREME COURT WHETHER OR NOT A DUI IS SOPHISTICATED OR NOT SOPHISTICATED? JUST SIMPLY GETTING IN A CAR DRUNK AND HITTING SOMETHING, AND WE WOULD BE AGONIZING OVER WHETHER THIS IS SOPHISTICATED OR NOT? DO YOU THINK THAT REALLY WAS THE INTENT OF THE LEGISLATURE?

IF THEIR INTENTION, WHETHER OR NOT THEY SPECIFICALLY INCLUDED DUI, I CAN POINT OUT FROM THE STATE'S BRIEF AS TO WHETHER OR NOT THIS APPLIES TO A DUI CASE. CERTAINLY IT DOES APPLY, IF WE LOOK AT THE CLEAR MEANING OF THE STATUTE. IT APPLIES TO ALL FELONIES EXCEPT CAPITAL CASES. AS TO WHETHER THEY FIND A DUI SOPHISTICATED OR UNSOPHISTICATED THEY MAY NOT HAVE GOTTEN THAT FAR, SIMPLY BECAUSE THEY WOULD HAVE GIVEN US A DEFINITION OF SOPHISTICATED AND UNSOPHISTICATED, ABOUT -- BUT I THINK WHAT THEY DID, IN GIVING US THAT DISCRETION THEY HAVE GIVEN THAT TO THE TRIAL COURT. THE TRIAL COURT, HAVING LISTENED TO THE RECORD AND HAS ALL THE WITNESSES AND LISTENED TO THE FACTS BEFORE IT FIRSTHAND THIS. COURT, IN BANKS C BRIEF -- IN BANKS BRIEF, THE STANDARD FOR ABUSE OF DISCRETION IS WHETHER OR NOT A REASONABLE PERSON OR NO REASONABLE PERSON COULD FIND WHAT THE TRIAL COURT DID.

IF I GET IN A CAR, AND I HAVE HAD SIX DRINKS BEFORE I GET IN THE CAR, AND I AM AT A PARTY, AND I DRIVE A BLOCK, AND I HAVE A TERRIBLE ACCIDENT AND KILL SOMEONE. IS THAT SOPHISTICATED OR UNSOPHISTICATED?

FROM THE FACTS THAT WE HAVE THERE, IT --

FROM THE FACTS I JUST GAVE YOU.

FROM THE FACTS THAT YOU GAVE US, I DON'T KNOW THAT THERE COULD BE A FINDING THAT IT WAS SOPHISTICATED. IT IS A SIMPLE ART LESS ACT, AS WITH THE --

ISN'T THAT THE PROBLEM THAT YOU ARE GOING TO HAVE IN MOST CASES, BECAUSE THAT IS WHAT IS GOING TO HAPPEN. SEE, THAT IS GOING TO BE THE SCENARIO. SO.

AND IT MAY VERY WELL BE THAT THAT IS THE ISSUE WHEN YOU HAVE MORE FACTS BEFORE THE TRIAL COURT. THERE WERE MANY MORE FACTS INVOLVED IN HOW THE ACCIDENT ACTUALLY WENT THROUGH, AND AS TO THE FACT AS TO WHETHER OR NOT, AND THE CASE BEFORE THE COURT TODAY, THAT HE WAS AT THIS PARTY AS TO WHAT HIS FEELINGS WERE, THAT HE WAS SIMPLY DRIVING HOME AND THAT IT WAS IN THE MANNER THAT THE DISAPPEARED, IT WAS SOMETHING WHERE IT WAS TRULY AN ACCIDENT. WE DO HAVE MORE FACTS THAN THAT.

SO YOU WOULD HAVE THESE NUANCES AND SHADES OF GRAY IN EVERY CASE, WE WOULD HAVE TO DECIDE, EVERY TIME THE DUI, WE WOULD HAVE TO GO INTO THESE FINITE NUANCES, UNTIL YOU GET TO JUSTICE ANSTEAD'S SITUATION TO THE ONE I JUST GAVE YOU, WE DRINKS A QUART OF LIQUOR AND DRIVES A LOCK AND KILLS SOMEBODY. ANOTHER TRIAL COURT MAY VERY WELL BE LEFT WITH THESE SHADES OF GRAY IN EACH CASE, AND I THINK THAT IS THE BEAUTY OF OUR SYSTEM, THAT THE TRIAL COURT, IN LOOKING AT THE EVIDENCE, THE RECORD, AND LOOKING AT THE CASE THAT HE HAS FIRSTHAND BEFORE HIM IN DECIDING WHETHER OR NOT THIS WAS SOMETHING COMMITTED IN A SOPHISTICATED OR UNSOPHISTICATED MANNER. THE REAL TWI QUESTION BEFORE THE COURT IS WHETHER OR NOT -- THE REAL QUESTION BEFORE THE COURT IS WHETHER OR NOT THIS WAS DONE IN A SOPHISTICATED OR UNSOPHISTICATED MANNER.

IS IT UNREASONABLE TO THINK THAT IT NEVER INTENDED TO APPLY TO DUI'S?

IN THE STATUTORY CONSTRUCTION IT SAYS IT APPLIES TO ANY FELONY OF OFFENSE EXCEPT CAPITAL FELONY. THEY CERTAINLY INTENDED IT TO INCLUDE, WHEN WE GET TO ONE OF THE RESPONSES, I FORGET WHICH ONE IT WAS, SARX SACKS WAS THE ONE THAT FIRST -- SACKS WAS THE FIRST ONE THAT ADDRESSED REMORSE IN A DUI CASE, IN 1999, WHITING, WHERE REMORSE MAY VERY WELL STILL BE AVAILABLE BY ITSELF WITHOUT THE OTHER FACTORS. HOWEVER, SACKS IS A 1988 CASE WHERE THEY TALKED ABOUT THREE FACTORS, WHERE THEY TALKED ABOUT THE COMMISSION OF THE CRIME, REMORSE AND FACTORS OF THE ACCIDENT. THE LEGISLATURE, IN THE PENAL CODE, THE LEGISLATURE THEN CAME OUT THAT INCLUDED REMORSE WITH THE TWO OTHER FACTORS IN A SESSION.

TWO OTHER FACTORS?

SACKS WAS --

YOU WOULD AGREE THAT THE STATUTE WE ARE TALKING ABOUT IS A CODIFICAITON, BASICALLY, OF THE KINDS EVER MITIGATING CIRCUMSTANCES THAT HAVE BEEN FOUND BY THE COURTS TO BE APPLICABLE IN A -- FOUND BY THE COURT TO BE APPLICABLE IN A NUMBER OF CASES, PREENACT ACT ACTMENT OF -- PREENACT PRESIDENT OF THE -- PREENACTMENT OF THE STATUTE.

FEEL THAT THERE WASN'T ANYTHING IN THAT DIRECT RESPONSE SECTION J THAT IS HERE THERE, ISN'T ANYTHING THAT SAYS THAT THE CODE WITH RELATION TO SACKS, IT IS THE ONLY CASE IN THE STATE OF FLORIDA WHERE IT ADDRESSED THOSE THREE FACTORS, AND THE REAL ISSUE BEFORE SACKS WAS WHETHER OR NOT REMORSE ALONE COULD BE ENOUGH, AND AFTER THAT, WHEN THE CRIMINAL PUNISHMENT CODE CAME OUT AND INCLUDED REMORSE ALONG WITH THE OTHER TWO FACTORS THAT, IS WHEN THE OTHER CASES CAME OUT THAT SAID THAT REMORSE MUST BE CONSIDERED WITH THE OTHER FACTORS. IT IS STILL A CONTENTION IN THE WHITING CASE THAT WHETHER REMORSE, ALONE, CAN BE ENOUGH TO GO FORWARD. IF WE CON SEED THE FACT -- IF WE CONCEDE THE FACT THAT IT MAY VERY WELL HAVE TO HAVE ALL THREE FACTORS, CERTAINLY THERE ISN'T ANYTHING IN THE LEGISLATURE'S INTENTION, OTHER THAN IN ITS RESPONSE TO THE CRIMINAL PUNISHMENT CODE, THAT INCLUDED THOSE THREE FACTORS ALL TOGETHER AND THEY DIDN'T INCLUDE IT IN DUI AT THE TIME. IT MAY BE SOMETHING, AS JUSTICE SHAW SAID THAT, IT WASN'T INTENDED TO BE APPLICABLE TO A DUI.

WAS THE FACT, THE WHOLE ISSUE OF SOPHISTICATED VERSUS UNSOPHISTICATED DISCUSSED IN THE SACKS CASE, OR THAT WAS REALLY A CASE OF WHETHER OR NOT REMORSE WAS.

CORRECT. IT WAS MORE OF REMORSE, AND THE SACKS CASE HAS AN ISSUE AS TO MANNER AND COMMISSION OF THE CRIME. THE SOPHISTICATED OR UNSOPHISTICATED DID NOT BECOME AN ISSUE, UNTIL THE CRIMINAL PUNISHMENT CODE CAME OUT AND THEY ACTUALLY CODIFIED SOPHISTICATED OR UNSOPHISTICATED UNSOPHISTICATED.

PRIOR TO THE CRIMINAL PUNISHMENT CODE, WHAT KINDS OF CASES, DOES YOUR RESEARCH INDICATE WHAT KINDS OF CASES THE SOPHISTICATED VERSUS UNSOPHISTICATED MITIGATING FACTOR HAVE BEEN APPLICABLE TO?

WITH THEIR, THE ONLY THREE CASES THAT ADDRESS IT WAS FLEMING, WHICH IS THE STATE CITED -- WHICH THE STATE CITED, WHICH IS A 1999 CASE. THE MERIT CASE, IN GOING THROUGH THAT, AND I CAN -- THE MERRICK CASE, IN GOING THROUGH THAT, AND I CAN --

KINDS OF CASES ARE THOSE TWO CASES WHICH YOU JUST MENTIONED?

AND RANDALL, WHICH IS A 1999 CASE. PHLEGMING IS A SALE CASE, A SINGLE SALE CASE, AND

THAT IS THE CASE THAT DEFINED SOPHISTICATED AS BASICALLY THE OP SITE AS THE DICTIONARY DEFINITION OF SOPHISTICATED, LACKING SIMPLICITY OR NE. AIVETE. THERE WERE -- OR NAIVETE. THERE WERE MULTIPLE SALES WITHIN A FEW DAYS OF A MAN TRYING TO "UNQUOTE PROVIDE CHRISTMAS FOR HIS FAMILY, WAS UNSFITED. MR. MERRICK COMMITTED, IN THAT CASE, LEWD ACTS WITH A 16 USER OLD GIRL.

-- WITH A 16-YEAR-OLD GIRL.

WHAT WAS THE BLOOD ALCOHOL?

IN THIS CASE IT WAS DOUBLE THE LEGAL LIMIT.

.16?

I BELIEVE SO. AND THE MERRICK CASE WAS A 1988 CASE. JUSTICE QUINCE, I DON'T KNOW OF ANY CASES THAT ADDRESS SOPHISTICATED OR UNSOPHISTICATED IN THE CRIMINAL PUN IRMENT CODE. ONCE THE LEGISLATURE CODIFIED IT WITH THOSE TERMS THAT, IS THE FIRST TIME IT BECAME ISSUE. THE ONLY THINGS THAT COME CLOSE IS THE SACKS CASE THAT DISCUSSES THE MANNER OR COMMISSION OF THE CRIME, AS TO WHETHER THAT GETS TO SOPHISTICATED OR UNSOPHISTICATED IS UNCLEAR. I THINK IN GOING TO THAT WHEN THEY LIMITED THAT, I THINK THAT THE LEGISLATURE MAY HAVE BEEN CONCERNED WITH REMORSE, ALONE, BEING ENOUGH, SIMPLY BECAUSE YOU WANT SOMEONE WHO, ONE, HASN'T DONE THIS BEFORE WITH AN ISOLATED INCIDENT, AND, TWO, WHICH GETS REALLY TO THE CRUX OF THE ISSUE BEFORE THE COURT. THEY DIDN'T WANT SOMEONE WHO IS COMMITTING A SOPHISTICATED CRIME. DILLINGER, WHO PLANS OUT A CRIME WHO HAS SPENT SOME TIME GOING THROUGH THIS, SIMPLY BECAUSE MAYBE IT IS SOMEONE WHO WE CAN SHOW, SHOW SOME REAL MENS REA, SOME REAL CRIMINAL INTENT AND POSSIBLY A REAL CRIMINAL MIND, POSSIBLY SOMEONE WHO COULD BE A REAL CRIMINAL PROFESSIONAL.

BUT DOESN'T THAT, ISN'T THAT CONTRARY TO THE REPORT THAT SOMEONE INTENDED UNDERJECTION J -- UNDER SECTION J IS SOMEONE WITH INTENSE PLANNING, SO YOU HAVE TO DECIDE WHETHER THAT PLANNING, IN FACT WHETHER THAT PLANNING, WHATEVER WAS DONE, WAS DONE IN A SOPHISTICATED OR UNSOPHISTICATED MANNER, BUT A SIMPLE, IT JUST SEEMS TO ME THAT OTHERWISE, THAT SOPHISTICATED VERSUS UNSOPHISTICATED MAKES LITTLE SENSE.

THE PLAN EXAMPLE MAKES AN EASY, IS AN EASY APPLICATION FOR SOPHISTICATED OR UNSOPHISTICATED AND THAT IS THE EASIEST DEFINITION OF IT. HOWEVER, IF YOU LOOK AT, SPECIFICALLY, THE RANTEDAL CASE FOR THE FIFTH -- THE RANDALL CASE FOR THE FIFTH DCA, THOSE ARE MULTIPLE SALES DONE OVER A 13-DAY PERIOD. THERE IS CERTAINLY A PLAN THERE TO COMMIT THE CRIMES. THERE HAD TO BE SOME ACTS LEADING UP TO THAT, ALONG WITH THE LEWD ACT CASE AND MERRICK CASE THERE. IS CERTAINLY A PLAN INVOLVED IN THAT. ALSO WITH THE FLEMING CASE THAT THE STATE CITES. THERE IS CERTAINLY A PLAN INVOLVED. I DON'T KNOW THAT PLAN IS NECESSARILY IT. THEIR CONCERN, WE FEEL, IS WITH THE MANNER OF THE COMMISSION OF THE CRIME. THEN THE DEFINITION THAT TRULY GETS TO THE HEART OF IT IS THE MERRICK DEFINITION, WHERE IT TALKS ABOUT THE ACTS WERE ART LESS, SIMPLE AND NOT REFINED. THE REASON IN GOING THROUGH THE FLEMING CASE WHERE THEY DEFINE UNSOPHISTICATED AS THE OPPOSITE OF SOPHISTICATED, MAKES IT VERY DIFFICULT TO APPLY THAT. IT IS SOMETHING THAT IS SOMEWHAT LOFTY OF AN IDEA FOR US TO BE ABLE TO COME FORWARD WITH A DEFINITION THAT IS GOING TO BE ABLE TO FIT EVERY CRIME OR EVERY SITUATION.

AS THE FOURTH DISTRICT INDICATED IN WARNER, EVERY FIRST DUI, BASICALLY, OR DUI MANSLAUGHTER, BASICALLY, WOULD FALL INTO THIS CATEGORY.

IT WOULD NOT, FOR A FEW REASONS. IT MAY VERY WELL, IF THEY COULD BE CONSIDERED, IF

YOU COULD CONSIDER THE FACTORS INDIVIDUALLY, HOWEVER, YOU CAN, IF YOU HAVE TO CONSIDER ALL THREE OF THE FACTORS, AT THE SAME TIME, THE WHITING CASE THAT WAS CITEED IN OUR BRIEF, THEY FOUND, AND THEY ADDRESSED THE SACKS OPINION, IN REFERENCE TO REMORSE, AND THAT CASE, IN THE FACTUAL SCENARIO, THEY FOUND THAT THAT INDIVIDUAL DIDN'T EXPRESS ANY REMORSE. THEY EXPRESSED REGRET FOR THE CRIME THAT THEY HAD COMMITTED AND AS MUCH REGRET FOR WHAT HAPPENED TO THE VICTIM AS WHAT HAPPENED TO THEMSELVES. IN OTHER WORDS THE TROUBLE THAT THEY GOT IN.

ASSUMING THE REMORSE PART IS ALSO THERE, THEN EVERY FIRST DUI MANSLAUGHTER WOULD FIT INTO THIS CATEGORY.

THE STATE SPECIFICALLY INQUIRED --

THE FIRST WOULD MAKE IT THE ISOLATED INCIDENT. RIGHT?

NOT NECESSARILY. THAT MAY HAVE BEEN THE FIRST TIME, CERTAINLY AND THE STATE DID SOME INVESTIGATION IN THE VANBEBBER CASE AS TO WHETHER OR NOT, AND THERE WERE QUESTIONS ASKED IN THE SENTENCING AS TO WHETHER OR NOT HE WAS SOMEONE WHO REGULARLY DRANK. IS HE SOMEONE WHO EVER HAD DRANK AND DROVE BEFORE?

BUT THE INCIDENT, IT 14R6, WOULD BE ISOLATE -- ITSELF, WOULD BE ISOLATED, IF THERE WERE THE FIRST TIME YOU EVER HAD A DUI SITUATION, WOULDN'T IT?

IT WOULD BE ANIES -- AN ISOLATED INCIDENT, AS FAR AS THE COMMISSION OF THE CRIME, BUT IT MAY HAVE BEEN SOMEONE WHERE AN INDIVIDUAL WAS A REGULAR DRINKER WHICH HE WAS NOT, AND IT MAYBE SOMEONE WHO WAS SIMPLY NOT CAUGHT, AND IT WOULD GO BEYOND SOMEONE BEING CAUGHT FOR THE CRIME.

IS THERE ANYTHING IN THE LEGISLATIVE HISTORY TO TELL US WHAT THE TERMS OF THE DEFINITION OF UNSOPHISTICATED, WHAT THAT WAS, AND IF YOU ARE SAYING IT WASN'T IN THE CASE LAW BEFORE, AS TO WHERE THAT TERM WAS DERIVED FROM?

THAT IS THE DIFFICULTY. WE LOOKED FOR THAT, AND I AM NOT GOING TO REPRESENT TO THE COURT THAT THERE ISN'T ANYTHING OUT THERE, BUT NOTHING THAT WE COULD FIND THAT WOULD LAY A DEFINITION OR PURPOSE BEHIND SOPHISTICATED OR UNSOPHISTICATED.

THE HISTORY OF THE SENTENCING GUIDELINES AND THE DISCRETION OF JUDGE TO SAY BE ABLE TO DOWNWARDLY DEPART HAS BEEN THAT THE LEGISLATURE HAS TAKEN AWAY A GREAT DEAL OF THE DISCRETION OTHER THAN NOW THE ENUMERATED FACTORS, AND THEN THEY HAVE, NOW TAKEN EVEN REMORSE AND ISOLATED INSTANCE, AND PUT THAT ALL INTO ONE, AND ARE YOU ARE YOU ARGUING -- AND ARE YOU ARGUING ALTERNATIVELY THAT THE THREE PRONGS DO NOT HAVE TO BE MET, OR DO YOU CONCEDE THAT, WITH THE USE OF "AND", IT LOOKS LIKE THERE IS A THREE-PRONG.

WITH THE STATUTORY CONSTRUCTION, IT APPEARS AS IF ALL THREE NEED TO BE TOGETHER. THE ONLY ISSUE THAT IS EVER BROUGHT FORWARD IS THE WHITING CASE, WHICH IS A '99 CASE, DOES ADDRESS BOTH CRIMINAL PUNISHMENT CODE AND THE SACKS CASE THAT HELD REMORSE, AND THEY, STILL, ALLUDED TO THE FACT THAT IT MAY STILL BE ABLE TO SIMPLY BE CONSIDERED BECAUSE OF THE SUPREME COURT CASE, BUT IT IS SOMETHING WHERE IT ADDRESSES A LOT OF THE FACTORS AND MAKES SENSE TOO WHAT THEIR INTENT WAS, WHEN THEY HAD ALL THREE OF THEM CONSIDERED TOGETHER. IN US PROCEEDING FORWARD WITH THIS, I CAN TELL THAT YOU IT IS SOMETHING, AS FAR AS PUBLIC POLICY IS CONCERNED, WHAT IS IT, WHAT WAS THE LEGISLATURE'S INTENTION AT THAT POINT, A AND WHEN WE ARE TO DETERMINE, THE LEGISLATURE DETERMINES PUBLIC POLICY THROUGH ITS STATUTORY ENACTMENTS, IN GOING THROUGH, AND THE COURT, IN GOING THROUGH THIS, THIS IT IS NOT THE DUTY OR THE

PREROGATIVE --

BUT THE OVERALL PUBLIC POLICY OF THIS STATE SINCE 1988, HAS BEEN TO BE INCREASINGLY IN TOLERANT IN THE CRIMINAL JUSTICE CONTEXT OF DRIVING UNDER THE INFLUENCE. WOULDN'T YOU AGREE WITH THAT?

I WOULD AGREE WITH THAT, JUDGE, AND THEIR ARGUMENT, THE ARGUMENT WITH WARNER AND THE BECK CASE THAT FOLLOWED, IS SIMPLY STATING THAT IT CANNOT BE APPLIED, SIMPLY BECAUSE OF THE PUBLIC POLICY IN THERE, BUT THE SAME SECTION APPLIES TO MURDERS, WHO ARE NOT CAPITAL MURDERS. IT APPLIES TO BURGLARIES. IT APPLIES TO RAPISTS. IT APPLIES TO LEWD ACTS, AND CERTAINLY THERE IS NO A STRONGER PUBLIC POLICY AGAINST DUI THAN THERE IS AGAINST RAPISTS, SECOND-DEGREE MURDERERS, IN GOING FORWARD, AND WHEN THEY SPECIFICALLY STATED THAT THIS IS SOMETHING THAT APPLIES.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO END ON THAT NOTE. YOUR TIME IS UP. COUNSEL FOR THE STATE.

COUNSEL, I CAN ASK THIS QUESTION BEING A SHORT TIMER, BUT ARE WE TO CONSIDER WHETHER OR NOT THE LEGISLATURE WAS SOPHISTICATED IN THEIR FAILURE TO DEFINE UNSOPHISTICATED? LET ME ASK --

BAD LAW MAKES BAD CASES.

LET ME ASK YOU THIS. AS I UNDERSTAND, WE HAVE A STATUTE. YOU SAY THIS STATUTE APPLIES TO THIS OFFENSE, AND THAT THERE ARE CIRCUMSTANCES --

YOU SAY THE STATUTE APPLIES TO THIS OFFENSE. I SAY IT DOES NOT APPLY TO THIS OFFENSE, WITH ALL DUE RESPECT. I DO NOT BELIEVE, THE STATE DOES NOT BELIEVE THAT THE MITIGATOR APPLIES TO THIS, TO THIS OFFENSE UNDER THESE SPECIFIC FACTS.

WELL, ARE YOU SAYING THAT IT WOULD NEVER APPLY UNDER ANY CIRCUMSTANCE?

IT WOULD BE VERY DIFFICULT FOR ME TO FIND A CIRCUMSTANCE WHERE IT DOES APPLY, BECAUSE IF --

WHAT EXCLUDES, OTHER THAN THE STATUTE, OTHER THAN THE LEGISLATURE PLACING AN EXCLUSION WHAT WOULD EXCLUDE IT FROM BEING CONSIDERED?

THE MITIGATORS WOULD BE CONSIDERED. I MEAN, THEY ARE THERE, AND THEY SAY IT APPLIES TO ALL OFFENSES, BUT FOR INSTANCE, YOU HAVE A MITIGATOR WHERE RESTITUTION OUTWEIGHS THE NEED FOR INCARCERATION. WOULD THAT APPLY IN EVERY SINGLE CASE? NO. IT DOESN'T APPLY IN EVERY SINGLE CASE, BECAUSE THE FACT, IN SOME CASES, THERE IS NO RESTITUTION. IT DOESN'T APPLY IN THE DUI CASE BECAUSE --

WHY WOULD IT NOT APPLY, IN A DUI CASE, IF I DECIDE I WANT TO KILL "X", AND TO LESSEN MY CUPALITY, I AM GOING TO GET DRUNK BEFORE I DO IT. I PLANNED THAT AHEAD OF TIME, THAT I AM GOING TO GET DRUNK, AND I AM GOING TO BE ABLE TO USE THIS, SOMEHOW, AS AN EXCUSE, AND I PLAN IT THAT WAY, AND SURE ENOUGH, THEN, I GO AND RUN OVER. WOULDN'T THAT BE SOPHISTICATEED?

BECAUSE INTOXICATION IS NOT A INTROUNDZ TO DEPART FROM THE GUIDELINES, AND -- IS NOT A GROUNDS TO DEPART FROM THE GUIDELINES. NOT THE ACCIDENT, ITSELF, OF BEING DRUNK AND DRIVING. IT IS NOT SOPHISTICATED BECAUSE SIMPLY A PERSON IS DRIVING AND IS DRUNK. IT IS NOT THE OFFENSE. IT IS THE MANNER IN WHICH THE OFFENSE IS CONVICTED NOT THE OFFENSE, ITSELF, AND I WOULD LIKE TO DISTINGUISH SACKS ON THAT GROUNDS. IN SACKS, THEY TALKED

ABOUT THE MANNER OF COMMITTING THE OFFENSE AND THE FACTS IN SACKS SHOW THAT THERE WAS A QUESTION OF WHETHER THE DEFENDANT WAS MORALLY RESPONSIBLE FOR THE ACCIDENT. EVERYBODY INVOLVED WAS INTOXICATED. THERE WAS A QUESTION OF WHETHER HIS VEHICLE ACTUALLY CAUSED THE ACCIDENT OR NOT.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO END YOUR ARGUMENT ON THAT NOTE, AS WE DID WITH YOUR CO-COUNSEL OVER THERE, SO THANK YOU ALL VERY MUCH. THE COURT IS GOING TO TAKE A RECESS, NOW. WE WILL BE IN RECESS UNTIL A QUARTER OF THE HOUR.

MARSHAL: PLEASE RISE.