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02-219

THE NEXT CASE ON THE COURT'S DOCKET THIS MORNING IS HARRIS VERSUS STATE.

CHIEF JUSTICE: ALL RIGHT. WE OFTEN LECTURE ON PREPARATION AND IT LOOKS LIKE YOU ARE PREPARED AND IF COUNSEL IS READY TO PROCEED , YOU MAY PROCEED.

GOOD MORNING, YOUR HONOR. THIS MORNING I PLAN TO FOCUS ON POINT ONE. MY NAME IS BEN MASARANG , BY THE WAY, FROM THE PUBLIC DEFENDERS OFFICE IN THE 11th JUDICIAL CIRCUIT. I AM HERE REPRESENTING MR . HARRIS. I AM TRYING TO POINT OUT THAT , ON POINT TWO, EVEN IF YOU DECIDE AGAINST MY CLIENT ON POINT ONE , THE PUBLIC DEFENDER ISSUE , POINT TWO CALLS FOR A NEW TRIAL FOR MR. HAIREIES .

LET'S NOT TALK ABOUT POINT ONE OR POINT TWO. LET'S TALK ABOUT THE LEGAL ISSUES THAT ARE BEFORE US, SO IF YOU CAN RESTATE THAT ISSUE THAT YOU ARE GOING TO ARGUE THIS MORNING AND THEN GIVE US YOUR PRESENTATION ON THAT.

THANK YOU , YOUR HONOR. POINT TWO CONCERNS THE EVIDENCE THAT WAS PRESENTED AT TRIAL BELOW .

I REALLY , BECAUSE YOU HAVE A LIMITED TIME , WE ARE HERE ON WHETHER LAWFUL PERFORMANCE OF AN OFFICIAL DUTY, WHAT THAT MEANS , WHETHER THE PERSON HAS TO HAVE , IT HAD TO HAVE BEEN A LEGAL STOP OR NOT. WE REALLY NEED YOU TO JUST FOCUS ON THAT. WE WILL HAVE YOUR BRIEF FOR THE REST OF IT .

JUSTICE PARIENTE, AS TO THAT ISSUE , IN A NUTSHELL ANSWER, YES, THE OFFICER MUST BE IN PERFORMANCE AFTER LAWFUL DUTY AND PERFORMANCE OF A LEGAL STOP.

IT SAYS LAWFUL , BUT NOW THE QUESTION IS HOW THE STATE SAYS THAT WE SHOULD , REALLY, READ LAWFUL TO MEAN OFFICIAL, RATHER THAN PERMITTED BY LAW, AND COULD YOU

ALL RIGHT. THANK YOU.

PRINCIPLES OF STATUTORY CONSTRUCTION APPLY IN THIS CASE.

I THINK YOUR HONOR , YOUR PHRASING OF THAT QUESTION IN A SENSE ANSWER THAT IS QUESTION. THE STATE IS ASKING THE COURT TO READ THE WORD LAWFUL AS BEING SOMETHING ELSE , AS MEANING OFFICIAL. IN THE STATE'S BRIEFS , THE STATE APPEARS TO BE ASKING THE COURT TO READ "LAWFUL" AS MEANING GOOD FAITH, AS OPPOSED TO LAWFUL. LAWFUL MEANS IN ACCORDANCE WITH LAW AND IN ACCORDANCE WITH LAW. AS MR. HAIREIES ARGUES IN HIS BRIEF , LAW INCLUDES THE CONCEPT OF CONSTITUTIONAL , INCLUDING A GOVERNMENT AGENT.

COULD YOU COMPARE OTHER STATUTES THAT ARE SIMILAR THAT USE DIFFERENT WORDS, TO TELL US HOW WE KNOW , SINCE THERE IS NO DEFINITION OF LAWFUL THAT, THE LEGISLATURE DIDN'T MEAN GOOD FAITH OR OFFICIAL .

WELL , YOUR HONOR

BECAUSE , THE LEGISLATURE , WHAT THIS DOES IS TAKES A CRIME THAT WOULD AND

MISDEMEANOR AND MAKES IT INTO A THIRD-DEGREE FELONY , CORRECT?

THAT'S CORRECT, YOUR HONOR .

AND SUBSTANTIAL DIFFERENCE IN TIME THAT THE PERSON IS GOING TO SERVE. THE LEGISLATURE COULD DEFINE THE CRIME AND GIVE THE PENALTY, SO WHAT WE ARE REALLY DEALING HERE SOLELY IS WHAT DID THE LEGISLATURE INTEND TO DO FOR THIS PARTICULAR CRIME. WOULD YOU AGREE WITH THAT?

YES, YOUR HONOR.

AND SO THEREFORE , AGAIN , WHEN YOU SAY LAWFUL CAN'T MEAN OFFICIAL, WHY CAN'T IT MEAN OFFICIAL AND WHY CAN'T IT MEAN GOOD FAITH?

YOUR HONOR , IT CAN'T MEAN THAT , BECAUSE OF THE WORDS CHOSEN BY THE LEGISLATURE.

ALL RIGHT. WELL , WHERE ARE THEY ? OTHER STATUTES USE DIFFERENT WORDS TO SHOW

FOR INSTANCE IN THE STATUTE THAT SEEMS TO MOST FREQUENTLY OCCUR, ALONG WITH BATTERY ON A LAW ENFORCEMENT OFFICER , 776.0511 -1, WHICH MR. HAIREIES A POSITION DIS - - MR. HAIREIES'S POSITION DISQUALIFIES ONE FROM USING FORCE OR FORCEFUL , THE LANGUAGE USED IN THAT , REASONABLE, I BELIEVE, IS THE LANGUAGE USED IN THE STATUTE , A PERSON IS NOT JUSTIFIED IN THE USE OF FORCE TO RESIST AN ARREST BY A LAW ENFORCEMENT OFFICER WHO IS JUSTIFIED OR IS KNOWN TO BE A LAW ENFORCEMENT OFFICER. THE OFFICER DIDN'T USE LANGUAGE LIKE THAT.

HERE THE OFFICER WASN'T EXITING - - WASN'T COMMITTING A CRIME DURING THIS EVENT , WAS HE? HE WASN'T BURGLARIZING A HOUSE OR HE WASN'T ROBBING YOUR CLIENT. HE WASN'T COMMITTING A CRIME. YOU WOULD AGREE. AND THAT IS ONE OF THE USES OF THE WORD "UNLAWFUL " , IS IT NOT , IS THAT UNLAWFUL MEANS VIOLATING THE LAW, AND THAT IS WHAT CRIMES ORDINARILY ARE, AND SO YOU WOULD AGREE , THE OFFICER WASN'T COMMITTING A CRIME , WOULD YOU NOT?

CHIEF JUSTICE ANSTEAD, I WOULD NOT AGREE WITH THAT , AND IN THIS SENSE. CERTAINLY THIS ISSUE WASN'T LITIGATED BELOW . WHETHER THE OFFICER WAS ACTING IN GOOD FAITH OR NOT , BUT IF THE OFFICER WHO THE FOURTH FOUND WAS NOT ACTING CONSTITUTIONALLY , WHEN STOPPING THE VEHICLE, WAS SIMPLY A CITIZEN PULLING OVER A VEHICLE , HE WOULD BE USING A CAR WITH LIGHTS ON IT TO PULL OVER A VEHICLE, I THINK MANY COURTS AND JURIES WOULD FIND THAT WAIT A MINUTE, THAT IS A BREACH OF THE PEACE. THAT IS SOMETHING THAT A REGULAR CITIZEN ISN'T SUPPOSED TO DO.

WOULDN'T WE TOTALLY DISRUPT THE OPERATION OF LAW ENFORCEMENT, IF WE DECIDED THAT EVERY TIME A MISJUDGMENT WAS MADE BY AN OFFICER , THAT THEY HAD COMMITTED A CRIME AND WOULDN'T THAT CONSTITUTE A CRIME, AND WOULDN'T THAT CONSTITUTE, REALLY, AN UNREASONABLE CHECK ON THEM BEING ABLE TO OPERATE OUT THERE IN THE REAL WORLD AND MAKE JUDGMENTS ABOUT WHETHER OR NOT THEY CAN SEE THE LICENSE PLATES OR WHETHER THE LIGHTS ARE OPERATING AND ALL THE , YOU KNOW , THOUSANDS, OBVIOUSLY, OF DIFFERENT FACTUAL SITUATION THAT IS THEY FIND THEMSELVES, IN AND ON THE OTHER SIDE OF THAT , REALLY , SHOULDN'T WE BE DISCOURAGING CITIZENS IN THE FACE OF AND TO COOPERATE WITH LAW ENFORCEMENT AND TO BE REASONABLE IN RESPONSE TO THAT? SO HELP ME WITH , IF YOU SAY THAT , MAYBE HE IS COMMITTING A CRIME, THEN AREN'T WE GOING TO END UP IN A SCENARIO WHERE YOU ARE GOING TO DISRUPT THAT FIRST LINE FOR LAW ENFORCEMENT.

CHIEF JUDGE, YOUR QUESTION IS ASKING ME TWO SEPARATE THINGS. ONE , CERTAINLY POLICE

OFFICERS , BY VIRTUE OF WHAT THEY DO , D O AT TIMES, MAKE MISS JUDGMENTS. THE LAW THAT THEY OPERATE UNDER IS DESIGNED IN A WAY , TO , ON ONE HAND, TO DISCOURAGE UNLAWFUL CONDUCT. WE HAVE THE EXCLUSION AREA RULE THAT IS THE LAW OF OUR LAND, BOTH IN FLORIDA AND THE UNITED STATES. AND THAT EXCLUSIONARY RULE, THEY USE ALL OF THE TIME. THEY RECEIVE EXTENSIVE TRAINING IN IT. THEY RECEIVE ONGOING CLE TRAINING IN WHAT IS THE CURRENT STATE OF THE LAW.

I GUESS I, YOU KNOW , TRIAL JUDGES MAKE MISTAKES IN A CERTAIN PERCENTAGE OF CASES AND APPELLATE COURTS REVERSE THEM, SO I SUPPOSE YOU COULD SAY THAT THE INITIAL RULING BY THE TRIAL COURT , THAT HAS HELD NOT TO BE CORRECT UNDER THE LAW , I S UNLAWFUL. IF YOU WANT TO, YOU KNOW , STRETCH THIS THING OUT. SO WHAT ARE GET WE GOING TO DO , NOW , WITH TRIAL JUDGES , WHO ARE REVERSED BY APPELLATE COURTS, ARE WE GOING TO SAY , NOW , THAT THEY ACTED UNLAWFULLY ?

YOUR HONOR, WHAT THE TRIAL COURT IS DOING OR, EXCUSE ME, WELL , FIRST OF ALL WHAT THE TRIAL COURT IS DOING IS ACTING WITHIN ITS, IN THAT CASE, THE SCOPE OF WHAT THE TRIAL COURT IS TO DO , IS TO MAKE RULINGS ON LEGAL ISSUES.

SORT OF UNDER THE COLOR OF LAW, RIGHT?

AND A TRIAL COURT CERTAINLY IS PERMITTED TO ERR , AS ARE THE DISTRICT COURTS AND STATE SUPREME COURTS. THE OFFICER IS CHARGED WITH ENFORCING LAWS , AND WHEN WE ALLOW OFFICERS TO MAKE MISS STAKES MISTAKES , THEY ARE TESTED . WE APPLY A STANDARD O F GOOD FAITH.

LET ME ASK YOU ABOUT THAT . I MEAN, WHY ISN'T A PERFECTLY REASONABLE INTERPRETATION OF THIS LAWFUL , UNDER THE STATUTE , THE SAME AS UNDE R 768.28, AS TO WHETHER A STATE EMPLOYEE CAN BE HELD PERSONBLY LIABLE FOR ACTIVITY , AND UNDER 768.28 , THAT, SHALL BE HELD PERSONBLY LIABLE IN TORT I N ANY ACTION FOR ANY INJURY SUFFERED AS A RESULT OF ANY ACTOR OMISSION, WHICH IS IN BAD FAITH OR MALICIOUS OR WILLFUL OR WANTON. BUT THAT IS THE BOUNDARY, A AND SHOULDN'T THAT REASONABLY BE THE BOUNDARY THAT WE LOOK TO , TO DETERMINE WHETHER SOMEONE CAN COMMIT A BATTERY ON A LAW ENFORCEMENT OFFICER THAT, IS WITHIN THE SCOPE OF THE LAW ENFORCEMENT OFFICER'S DUTY , BUT COMMITS SOME TYPE OF ERROR IN THE PERFORMANCE OF THAT DUTY , WHICH DOESN'T RISE TO THAT LEVEL .

YOUR HONOR , THAT , I AM NOT FAMILIAR WITH THAT STATUTE SPECIFICALLY, BUT IT APPEARS TO ATTRACT BASICALLY SECTION 1983 STATUTE THAT APPLIES IN FEDERAL COURTS. AS MR. HAIREIES SUGGESTS IN HIS SUPPLEMENTAL BRIEFS , THAT STANDARD ON THE ONE HAND, PROTECTING OFFICERS OR PROTECTING GOVERNMENT EMPLOYEES FROM PERSONAL LIABILITY , AND THAT GIVES THEM THAT LEEWAY THAT JUSTICE ANSTEAD WAS ASKING ABOUT. THERE IS A SEPARATION BETWEEN WHAT THE OFFICER MIGHT BE LIABLE FOR BY A MISJUDGMENT , AND WHAT A CITIZEN CAN BE CONVICTED OF THERE. IS A SEPARATION. THERE IS A , WE ERR ON THE SIDE OF CAUTION, TO PROTECT OFFICERS, SO THAT THEY DON'T NOT USE THEIR PROFESSIONAL JUDGMENT, BUT WE AIR ON THE WE ERR ON THE SIDE OF THE CITIZEN, TO BE PROTECTED FROM BEING CONVICTED CRIMINALLY .

BUT WE ALSO HAVE TO B E CONCERNED ABOUT PROTECTING THE COMMUNITY, IN TERMS OF ALLOWING SOME LATITUDE FOR OFFICERS TO D O THEIR WORK , WITHOUT FEAR THAT A CITIZEN IS GOING TO HAUL OFF AND DO SOMETHING THAT WOULD BE A BATTERY . IS THAT CORRECT?

YOUR HONOR, IF THE OFFICER IS FOLLOWING HIS TRAINING , HE DOESN'T NEED TO HAVE THAT FEAR. IF HE IS ACTING LAWFULLY , CONSTITUTIONALLY AS HE HAS BEEN TRAINED, BOTH IN HIS ACADEMY DAYS AND IN HIS CL EVENT TRAINING , THERE SHOULDN'T BE THAT PROBLEM.

IF THE STATE AS THE STATE POINTS OUT, EVEN THIS COURT CAN'T DECIDE UNANIMOUSLY , WHAT IS OR WHAT I S WITHIN THE FOURTH AMENDMENT. AND SO SOME POOR LAW ENFORCEMENT OFFICER OUT THERE , FINDING SOMEBODY SITTING BEHIND A WAREHOUSE , I S OUT THERE , TO D O SOMETHING ON BEHALF OF THE PUBLIC.

WELL , THAT MAY OR MAY NOT BE SO . AN OFFICER WHO IS ACTING UNLAWFULLY IN THE SENSE O F ROUSING IT SOMEONE BEHIND THE WAREHOUSE HOW IS THING I S SOMEONE BEHIND WHO IS ROUSTING SOMEONE BEHIND A WAREHOUSE.

BUT IN YOUR DISTRICT AS PUBLIC DEFENDER , WHAT DOES THAT DO IN THE COMMUNITY, IF WORDS GET OUT THAT CITIZENS HAVE THE RIGHT T O RESIST AN OFFICER , WITH OR WITHOUT VIOLENCE, IF THE OFFICER I S ACTING UNLAWFULLY?

WELL

SO WE HAVE ALL THESE UNTRAINED LAWYERS WHO DON'T GET THE SAME TRAINING POLICE OFFICERS GET, AS YOU ARGUE, INTERPRETING IN THEIR MIND , UNDER THE INFLUENCE OF ALCOHOL OR COCAINE OR OTHER DRUGS, ANDTHEY ARE MAKING A LEGAL DETERMINATION WHETHER OR NOT THEY WANT TO RESIST THIS OFFICER , BECAUSE IN THEIR SUBJECTIVE MIND , IN ALL SORTS OF HORRENDOUS CIRCUMSTANCES , BELIEVE THAT THE OFFICER MAY BE A CTING UNLAWFULLY.

YOUR HONOR, RESPECTFULLY THAT QUESTION OF WHAT TO DO IN THAT SITUATION IS ONE THAT OUGHT TO BE ADDRESSED WITH THE LEGISLATURE.THEY NEED TO CHANGE THELANGUAGE OF THE STATUTE SO THAT IT SAYS GOOD FAITH.

CAN I ASK YOU A QUESTION. YOU SAID THAT SOMETHING WASN'T LITIGATED BELOW. I THINK YOU SAID GOOD FAITH WASN'T. WHAT WAS , WAS THE ISSUE AS TO WHETHER , WHAT LAWFUL MEANT , WAS THAT AN ISSUE THAT WAS RAISED BELOW?

YOUR HONOR, THAT WAS NOT AN ISSUE IN FRONT OF THE TRIAL COURT.

SO MAYBE , DON'T WE HAVE A PRESERVATION QUESTION THEN?

YOUR HONOR , I DON'T BELIEVE SO. IF THE INTERPRETATION IS , AS MR. HAIRE IES ARGUES , THEN THE ISSUE IS PRESERVED , BECAUSE THE LAWFUL THE CASE IS THAT THE OFFICERS WERE NOT ACTING LAWFULLY. IF MR. HAIRE IES IF MR . HAIRS

THEY DIDN'T IF MR . HARRIS

THEY DIDN'T CHARGE HIM. DO WE KNOW WHY HE WAS NOT CHARGED WITH RESISTING ARREST WITH VIOLENCE?

NO.

BECAUSE UNDER THE POLICY RECOMMENDATION, IF THE Y HADGROUNDS TO ARREST HIM , HE COULD NOT RESIST WITH FORCE. AND THAT IS RETAINED , CORRECT?

YES.

SO THE ISSUE I F THEY HAD CHARGED HIM WITH RESISTING ARREST WITH VIOLENCE , HE COULD HAVE BEEN CONVICTED OF THAT , CORRECT?

YOUR HONOR, THE WAY THAT STATUTE IS WRITTEN , YES , ALTHOUGH THE STATUTE

THERE IS NOTHING THAT NOW , EVEN FIRST OF ALL HE STANDS CONVICTED AFTER BATTERY AT

THE VERY LEAST, IS CONVICTED OF A BATTERY AT THE VERY LEAST, IS THERE ANYTHING THAT PREVENTS THE STATE FROM FILING A SEPARATE CHARGE FOR RESISTING ARREST WITH VIOLENCE?

YOUR HONOR, AS FAR AS WHETHER THERE IS ANYTHING THAT PREVENTS HIM FROM AT THIS POINT DOING THAT, I THINK THERE MIGHT BE THE TRIAL PROBLEMS, THERE MAY BE STATUTE OF LIMITATIONS PROBLEMS ON THAT I DON'T KNOW ABOUT

I AM TRYING TO UNDERSTAND WHY ALL THESE STATUTES GO. I AM TRYING TO UNDERSTAND WHERE ALL THESE STATUTES GO. IN THE POSITION OF AGGRAVATORS, THE WAY THE AGGRAVATOR, WHEN THE VICTIM AFTER LAW ENFORCEMENT READS, IT SAYS THE VICTIM WAS VICTIM OF A LAW ENFORCEMENT OFFICER, IT SAYS THE PERSON WAS A VICTIM CLEARLY PERFORMING HIS DUTY. IT SAYS IF THE PERSON KILLS THE LAW ENFORCEMENT OFFICER, IF IT IS FOUND WHAT WAS GOING ON WAS FOUND NOT TO BE AN IMPROPER STOP, AND WE ALSO HAVE IF THEY ARE ARRESTED, THEY CAN'T USE VIOLENCE, SO IT LOOKS LIKE THIS STATUTE SORT OF STANDS OUT THERE DIFFERENTLY, AND I AM SORT OF LOOKING FOR THE REASON WHY THERE WOULD BE A GOOD POLICY REASON FOR WHY THE LEGISLATURE WOULD NOT WANT SIMILARLY, WHEN SOMEONE IS STOPPED, THAT THE PERSON SHOULD NOT BE ABLE TO USE FORCE IN RESISTING, EVEN THAT IMPROPER STOP.

YOUR HONOR, AS FAR AS THE POLICY REASON, I SEE THAT I AM OUT OF TIME. HOWEVER, I WILL ANSWER THIS QUESTION. POLICY REASONS ARE OUTLINED OR AT LEAST SOME SUGGESTED POLICY REASONS ARE OUTLINED IN MR. HARRIS'S BRIEF. THAT INCLUDES THAT ONE A RULE THAT LAW ENFORCEMENT OFFICERS ARE ALREADY AWARE OF AND THE COURT IS ALREADY FAMILIAR WITH, THAT THE LEGISLATURE MAY HAVE REASONABLY CONCLUDED THAT UNLAWFUL STOPS OR OTHER CONDUCT BY POLICE OFFICERS IS MORE LIKELY TO ELICIT VIOLENCE, AND SO WE ARE SEEKING TO DISCOURAGE OFFICERS FROM ENGAGING IN THAT SORT OF CONDUCT. THERE CERTAINLY ARE REASONS THAT THE LEGISLATURE MAY HAVE CHOSEN TO WORD IT DIFFERENTLY, AND AS YOU POINT OUT, THEY WERE AWARE OF THE LANGUAGE THAT YOU, YOURSELF, JUST POINTED OUT, AS FAR AS OFFICIAL PERFORMANCE OF THEIR DUTIES.

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING.

CHIEF JUSTICE: COULD YOU CUT RIGHT TO THE CHASE, AS FAR AS FOLLOW-UP ON THE DISCUSSION THAT WE HAVE BEEN HAVING ABOUT UNLAWFUL VERSUS OFFICIAL OR HOWEVER YOU WANT TO CHARACTERIZE IT.

YES. MELANIE DALE ON BEHALF OF THE STATE. AS A PRELIMINARY MATTER, THOUGH, I NEED TO EXPOUND ON SOMETHING THAT JUSTICE PARIENTE NOTED AND SAID TO DEFENSE COUNSEL, REGARDING MR. CHIEF JUSTICE

YOUR POSITION?

EXACTLY. IT WOULD BE MY POSITION THAT THIS COURT DOESN'T HAVE JURISDICTION AS WE ARGUED IN OUR JURISDICTIONAL BRIEF. THE WAY THIS CASE AROSE WAS A PROBLEM ARISING FROM EXTENDING 776.051, REGARDING ILLEGAL ARRESTS BEING EXEMPT TO THE DEFENSE TO BATTER AGO LAW ENFORCEMENT OFFICER AND RESISTING ARREST WITH VIOLENCE, TO ILLEGAL DETENTION. THAT WAS DONE IN 1991 BY THE FOURTH DCA, IN A CASE - - BY THE FOURTH DCA, IN A CASE CALLED DOMINIQUE, WHICH WAS DECIDED. THAT IS NOW THIS CASE PROCEEDED THROUGHOUT AND SOMEHOW CHANGED TO THIS ISSUE REGARDING THE MEANING OF THE TERM "LAWFUL PERFORMANCE". IT IS THE STATE'S POSITION AS IT WAS ORIGINALLY THAT, THIS COURT DOESN'T HAVE JURISDICTION ON THIS ISSUE.

THIS WAS EXPRESS AND DIRECT CONFLICT THAT WAS BROUGHT TO THE COURT, SO WHAT WAS THE CONFLICT?

THE CONFLICT ISSUE , WHICH THE STATE ALSO ARGUED THERE WAS NO CONFLICT BETWEEN TAYLOR AND NICOLSI , OUT OF THE FOURTH DCA, THOSE CASES RECOGNIZED THE LAW FROM 776.051 AND THE BATTERY AND RESISTING ARREST WITH VIOLENCE

WE HAD A POLICE OFFICER WHO WENT INTO SOMEONE'S HOME , AND THAT ENTRY WAS ILLEGAL. AND SO IN THIS CASE , WE HAVE A DEFENDANT WHO WAS STOPPED, AND THE COURT HAS SAID THAT THAT STOP WAS ILLEGAL. SO ISN'T THERE A CONFLICT, THEN , IN HOW IT WAS RESOLVED? BECAUSE IN TAYLOR , THEY SAID YOU CANNOT BE PROSECUTED FOR THE BATTERY , AND IN THIS CASE, YOU SAY THAT YOU CAN BE PROSECUTED FOR THE BATTERY OF A POLICE OFFICER.

WELL , I THINK WE NEED TO LOOK AT , RIGHT AT THE LANGUAGE OF TAYLOR , WHERE THE COURT SAID THE COMPARISON BETWEEN A DETENTION AND AN ARREST MAYBE SIMILAR ENOUGH IN THIS CONTEXT, BUT WHAT WE HAVE IN TAYLOR IS WHERE THE OFFICER HAD COME TO TAYLOR'S HOME , AFTER , I THINK , ANOTHER OFFICER HAD COME THERE AND ASKED DEFENDANT TAYLOR TO TURN DOWN THE MUSIC. MR . TAYLOR DID TURN DOWN THE MUSIC WHEN THE OFFICER, IN THIS CASE, ASKED HIM TO TURN IT DOWN. AT THAT POINT , I THINK , LOOKING AT THE LANGUAGE , THE COURT FURTHER SAID THAT WE DO NOT THINK THAT SECTION 776.051 CAN BE EXTENDED TO A SITUATION WHERE AN OFFICER HAS ENTERED THE DEFENDANT'S HOME. I THINK THAT IS A VERY DIFFERENT FACTUAL SITUATION. THAT IS NOT CONSIDERED THE DETENTION. I THINK THAT WAS CONSIDERED THAT THE OFFICER HAD COMPLETED HIS DUTIES , AND THEN WALKED INTO THE DEFENDANT'S HOME TO GET THE DEFENDANT TO COME OUTSIDE.

SO WHERE DID WE GET TO THE POINT WHERE WE ARE NOW TALKING ABOUT THE , WHETHER OR NOT IT WAS A LAWFUL PERFORMANCE? BECAUSE AS I UNDERSTAND THE FIRST ACH APPEAL , THAT THE FIRST APPEAL, THAT CERTAINLY WAS NOT AN ARGUMENT ON THE JUDGMENT OF ACQUITTAL IN THIS CASE , SO HOW DO WE GET TO THE POINT WHERE WE ARE NOW DETERMINING WHAT , WHETHER OR NOT THERE WAS A LAWFUL PERFORMANCE OF A DUTY?

I THINK, THEN , ON THE APPEAL, WHAT HAPPENED WAS THE DEFENDANT HAD ARGUED THAT THE ILLEGAL DETENTION , THEREFORE , DOESN'T SATISFY LAWFUL PERFORMANCE , AND I THINK THAT IS VERY DIFFERENT THAN DEFINING THE STATUTE WITH RESPECT TO THE LAW PERFORMANCE OF THE OFFICER , BECAUSE THERE HAVE ALREADY BEEN DETERMINATIONS BY THE COURT , HOW TO EXTEND THE STATUTE 776.051 REGARDING ILLEGAL ARREST , TO THE DETENTION , BECAUSE IT IS LESS INVASIVE THAN AN ARREST , AND THE LEGISLATURE CLEARLY ADDRESSED THAT.

WAIT A MINUTE. I AM TOTALLY , WAIT , WE ARE REALLY LOST, I AM REALLY LOST HERE. ARE YOU ARGUING THAT WE SHOULD ENGRAFT 776.051 ON TO 784.087?

I THINK IT HAS ALREADY BEEN DONE BY THE COURTS. I THINK THE FOURTH DCA AND

THAT IS WHY WE ARE HERE , RIGHT? BECAUSE THEY ARE DOING THAT, AND THE FIRST DISTRICT IS SAYING YOU CAN'T DO THAT. THIS SAYS LAWFUL PERFORMANCE OF HIS OR HER DUTIES FOR A BATTERY , AND THE OTHER HAS TO DO WITH A PERSON CANNOT RESIST AN ARREST WITH VIOLENCE . IT IS TWO SEPARATE CRIMES.

WELL , I THINK THE POINT OF THE MATTER GOES BACK TO THE POLICY BEHIND. YOU CAN'T

NO. NO. NO. WE FIRST START , THE FIRST PRINCIPLE OF STATUTORY CONSTRUCTION IS THAT WE LOOK AT THE PLAIN LANGUAGE THAT IS USED IN THE CRIME IN WHICH THE DEFENDANT WAS CHARGED. 784.07-2-B, AND IT SAYS "IS ENGAGED IN THE LAWFUL PERFORMANCE OF HIS OR HER DUTIES. IT IS A SEPARATE CRIME FROM THE CRIME THAT WAS NOT CHARGED IN THIS CASE , 776.051, WHICH IS USE OF FORCE AND RESISTING OR MAKING ARREST , WHICH IS A CHANGE FROM THE

COMMON LAW , WHICH NOW NO LONGER ALLOWS CITIZENS TO RESIST ARREST , ON A LAW ENFORCEMENT OFFICER, T O RESIST ARREST WITH VIOLENCE , WHEN A LAW ENFORCEMENT OFFICER IS MAKING AN ARREST, EVEN IF THAT ARREST TURNS OUT TO BE ILLEGAL , IS THAT RIGHT?

YES.

THAT IS ONE CRIME. AND ALSO AS I POINTED OUT , I F A LAW ENFORCEMENT OFFICER WAS A VICTIM AFTER SHOOTING, AMURDER, THEY USE OFFICIAL PERFORMANCE OF THE DUTIES , BUT HERE THE LEGISLATURE USES WORDS THAT YOU ARE NOW TELLING US WE NEED TO CHANGE FROM LAWFUL PERFORMANCE TO OFFICIAL PERFORMANCE , AND I AM HAVING SOME PROBLEMS WITH HOW YOU CAN TAKE A SEPARATE STATUTE THAT I MEAN I CAN UNDERSTAND WE CAN START TO SAY, WELL , MAYBE LAWFUL DOESN'T, IT WOULD MEAN THEY HAD TO VIOLATE THE LAW AS OPPOSED TO JUST STOP WAS LAWFUL AND TRY TO INTERPRET THAT, BUT TO READ IT AND SAYWE HAVE GOT TO REFER TO 776.051 , I DON'T UNDERSTAND WHAT PRINCIPLE WOULD GET US THERE.

QUITE HONESTLY , THE PRINCIPLE THAT I AM RELYING ON IS HOW THE DCA COULD HANDLE IT AND HOW THEY HAVE GOTTEN THERE.

BUT THAT IS WHY WE ARE HERE THOUGH. LET'S GET T O WHY , HOW WE WOULD GET THERE.

WELL, THEN , I WOULD POINT THIS COURT TO ITS DECISION IN SOVARINO VERSUS STATE IN INTERPRETING THIS SPECIFIC STATUTE. THERE IS SPECIFIC LANGUAGE TALK ABOUT YOU HAVE TO DETERMINE IF THE LAW ENFORCEMENT OFFICER OR FIRE FIGHTER IS ENGAGED IN A LAWFUL PERFORMANCE OF HIS DUTIES. IN EXPLAINING THE STATUTE , THIS COURT STATED, WHEN AN OFFICER IS NOT PERFORMING HIS OFFICIAL DUTIES, HE IS NO LONGER PROTECTING THE PUBLIC WELFARE , AND I THINK THIS IS THE INTERPRETATION THAT APPLIES THROUGHOUT AND THAT I S WHY THE STATUTE HAS TO BE INTERPRETED THIS KAY.

ARE YOU SAYING THAT WE HAVE ALREADY DECIDED THIS ISSUE?

AS I HAVE ALREADY CITED IN MY BRIEF, YES , IT HAS BEEN INTERPRETED.

LAW ENFORCEMENT OFFICERS , THE LEGISLATURE SHOULD HAVE SUBSTITUTED "OFFICIAL" FOR "LAWFUL" .

I THINK IT CAN B E INTERPRETED THAT WAY . I LOOKED AT THE PLAIN MEANING OF THE WORD "LAWFUL" , AND IT CAN BE INTERPRETED THIS WAY WITHOUT SUBSTITUTING THAT CAN BE USED AS LAWFUL AND IN LOOK ING AT THE STATUTE AND HOWTHIS COURT HAS INTERPRETED IT IN THE PAST, IT HAS GOT TO BE A POLICE OFFICER ACTING IN GOOD FAITH UNDER THE COLOR OF LAW , DOING HIS OFFICIAL DUTIES IN HIS OFFICIAL CAPACITY, CONDUCTING AN INVESTIGATION.

WHO MAKES THAT DETERMINATION? IS HA IS THAT THE JURY DETERMINATION OR A JUDGE?

I THINK IT IS TWOF OLD. I THINK THE CIRCUMSTANCES SURROUNDING THE OFFICER'S CONDUCT ARE LOOKED AT. IN THIS CASE , I THINK IT IS AN EXAMPLE , THE ILLEGAL DETENTION , I THINK THE FACT OF THE DETENTION IS IRRELEVANT , BECAUSE THE REASONABLE OFFICER , AT THE TIME HE WAS INVESTIGATING THE CRIME , BELIEVED HE WAS ACTING IN , LAWFULLY , DOING HIS JOB .

I JUST WANT , IS THAT, THEN , THE JUDGE MAKES THAT AND INSTRUCTS THE JURY AS A MATTER OF LAW, THAT THE OFFICER WAS ENGAGED IN THE LAWFUL PERFORMANCE O F THEIR DUTY, SO THERE IS NOTHING THE JURY DOES?

ONLY , I THINK THAT I HAVE EXPLAINED PREVIOUSLY IN MY BRIEF, THAT , WITH RESPECT TO THE

ILLEGAL ARREST AND DETENTION THAT, IS A QUESTION OF LAW. HOWEVER , ALL THE FACTS AND CIRCUMSTANCES SURROUNDING HOWTHE OFFICER WAS INVESTIGATINGTHE CRIME, HOW HE CAME T O DETAIN THE DEFENDANT , ARE RELEVANT. IF , SUBSEQUENTLY, A TRIAL COURT WHERE , IN THIS CASE DID NOT GRANT THE MOTION TO SUPPRESS, IT WENT TO TRIAL ANDSUBSEQUENTLY THE DCA REVERSED AND FOUND AN ILLEGAL DETENTION , I DON'T THINK W E CAN THEN, IN HINDSIGHT , SAY CLEARLY THE OFFICER WAS ACTING UNLAWFULLY. I THINK THAT IS HOW IT HAS TO BE LOOKED AT.

CHIEF JUSTICE: JUSTICE CANTERO HAS A QUESTION.

THANK YOU. IF I CAN ADDRESS AND GO BACKTO THE CONFLICT ISSUE YOU WERE TALKING ABOUT , TAYLOR AND THE OTHER CASE, FROM THE FIRST DCA , DID THOSE INTERPRET SECTION 784.07?

BOTH OF THOSE CASES , WERE APPLICATIONS OF 776 ONE WAS 776.051, AND I NEED TO, AND THEN NICOLosi WAS ALSO THE CONVICTION FOR BATTERY O N A LAW ENFORCEMENT OFFICER, SO TAYLOR WAS , RESISTING ARREST WITH VIOLENCE , IF I AM CORRECT.I JUST NEED TO CLEAR UP THE STATUTE. HOWEVER , THEY BOTH ADDRESSED THE FACTS SURROUNDING THECRIME AND DIDN'T FIND THAT THERE WERE LEGAL ARRESTS OR LEGAL DETENTIONS . NICOLosi WAS AN OFFICER OFF DUTY WHO WORKED AT A CLUB. THE DEFENDANT CAME BACK AND HIT THE OFFICER AND THE OFFICER DIDN'T INVESTIGATE THE FAKE ID AND DIDN'T LOOK INTO THE FAKE ID. THE DEFENDANT CAME BACK AND HIT THE OFFICER , SO THAT CASE CLEARLY WASN'T BATTERY ON A LAW ENFORCEMENT OFFICER DURING PERFORMANCE OF HIS DUTIES AND I THINK THAT CASE IS CLEARLY FACTUALLY DISTINGUISHABLE , AND I WOULD RELY ON THE SAME DISTINCTION I MADE IN TAYLOR.

SO YOU ARE ARGUING THAT THIS CASE AND TAYLOR AND NICOLosi CAN BE HARMONIZED.

I THINK SO. YE S. I THINK, WHEN LOOK ING AT THE LAW, RELIED UPON BY EACH COURT, IT IS THE EXACT SAME ANALYSIS THAT ILLEGAL ARRESTS AND ILLEGAL DETENTIONS ARE EXEMPT , AS A DEFENSE TO THIS TYPE AFTER CRIME.

COULD YOU GIVE M E AN EXAMPLE, THEN , OF WHEN AN OFFICER , WHAT WOULD BE AN UNLAWFUL PERFORMANCE AFTER OFFICER'S DUTIES ? WOULD PERFORMANCE OF AN OFFICER'S DUTIES? WOULD HE HAVE TO BE COMMITTING A CRIME HIMSELF, SAY , STOPPING SOMEONE WITH THE INTENT OF ROBBING THEM , AS OPPOSED TO THEM HAVING COMMITTED SOME KIND OF TRAFFIC OFFENSE OR SOMETHING?I MEAN, DOES THE OFFICER , UNDER YOUR INTERPRETATION OF THIS STATUTE, DOES THE OFFICER'S CONDUCT HAVE T O , WOULD HE HAVE TO BE COMMITTING A CRIME?

I THINK THAT IS ONE EXAMPLE, BUT I CAN GIVE ANOTHER EXAMPLE. AN OFFICER WHO MAY BE TAKING A BREAK AND JUST NOT ACTUALLY ONTHE JOB , SITTING AROUND AND SOMEBODY WALKS UP AND HITS HIM , IF HE IS SITTING ON A PARK BENCH. I THINK THE OFFICER AT THAT TIME IS NOT LAWFULLY PERFORMING HIS DUTIES , BECAUSE HE IS NOT UNDER THE COLOR OF LAW. IS HE NOT INVESTIGATING A CRIME.

YOU MEAN HE IS ON HIS LUNCHBREAK?

EXACTLY. I THINK THAT COULD B E AN EXAMPLE AS WELL. IN THAT SITUATION, WE DON'T HAVE THE CONDUCT SURROUNDING THE DETENTION OR THE ARREST , TO LOOK AT. IN THAT CASE , THERE WAS NOTHING GOING ON. IT WAS JUST TWO CITIZENS IN A PARK.

SO YOU WOULDN'T BE ABLE TO PROSECUTE SOMEONE UNDER THIS STATUTE , IF THE OFFICER IS ON HIS LUNCH BREAK AND A PERSON JUST GOES UP AND HIT HIM.

I THINK THAT THAT IS TRUE.I THINK THAT WE HAVE TO LOOK AT THE

PROSECUTE HIM FOR BATTERY , RIGHT , NOT BATTERY ON A POLICE OFFICER.

JUST A SIMPLE BATTERY, YES.

SITING THERE IN HIS UNIFORM , AND SO YOU WOULDN'T HAVE , YOU

I THINK THAT, YES, THAT IS MY ANSWER.I AM SORRY. I JUST THINK THAT THAT OFFICER IS NOT PERFORMING HIS DUTIES . OR THE EXTREME EXAMPLE IS AN OFFICER COMMITTING A CRIME. I THINK

HOW WOULD YOU HANDLE THE INCIDENT IN BETWEEN , WHERE THE OFFICER IS PULLING SOMEBODY OVER BECAUSE THEY ARE BLACK ? OR HAS A PERSONAL VENDETTA , EVEN THOUGH THEY MAY BE, QUOTE , WITHIN THE COLOR OF THEIR OFFICE , BUT IS ACTUALLY NOTACTING IN GOOD FAITH?

WELL THAT , I S THE DISTINCTION.AN OFFICER, THERE IS A CREDIBILITY PROBLEM AT ISSUEHERE AT TIMES , WHEN THE OFFICER IS TESTIFYING. I THINK THE FACTS NEED TO BE LOOKED AT.WHAT THE OFFICER TESTIFIES TO, HOW HE IS DOING HIS JOB , AND WHY HE IS DOING THINGS, I MEAN , I THINK IT IS REALLY, THAT PORTION OF IT , THE CONDUCT OF THE OFFICER , IS DEFINITELY THE FACTUAL QUESTION.

BUT A S JUSTICE PARIENTE , IS THAT A JURY QUESTION OR A JUDGE QUESTION?

THE QUESTION, I THINK IT IS TWOFOLD.AS I SAID , I THINK IT DEPENDS ON THE CIRCUMSTANCES . HOWEVER , I THINK THAT THE FACT OF THE ILLEGAL ARREST OR ILLEGAL DETENTION , ITSELF , IS THE ACT .

BUT AS FAR AS THE GOOD FAITH REASONABLE STANDARD, IS THAT A JURY QUESTION OR A JUDGE'S QUESTION?

I THINK THE GOOD FAITH IS AN OBJECTIVE QUESTION THATCOULD BE PRESENTED TO THE I THINK THAT COULD BE A JURY QUESTION .

DOES IT HAVE TO BE A JURY QUESTION? YOU GO FROM A MISDEMEANOR, I MEAN , UNDER RING , TO A GUYTHAT IS GOING TO SPEND, HOW MANY TEN YEARS?

TEN YEARS AS A HABITUAL OFFENDER.

AND YOU GO TO A THIRD-DEGREE NIL. IF WE SAY THAT LAWFUL IS DEFINED BY THE COURT , THEN THE JUDGE, THEN THE JURY IS DOING NOTHING, AND MY QUESTION TOYOU IS LET'S EVEN ASSUME THATYOU ARE CORRECT. THAT IS THAT YOU HAVE GOT THE ILLEGAL ARREST ISN'T THE DEFENSE.THAT DOESN'T GET HIM A REDUCTION. DOESN'T IT AT LEAST GIVE HIM A NEW TRIAL O N THE BATTERY ON THE LAW ENFORCEMENT OFFICER , WHERE THE JURY, THEN , KNOWS THAT THE ARREST WAS ILLEGAL , AND THEN IT IS UP TO THE JURY TO DETERMINE WHETHER IT , WHATEVER, UNDER THE STANDARD THAT I GUESS WE WERE GOING TO COME UP WITH, THAT IT WAS IN GOOD FAITH OR WHATEVER ? I MEAN , HOW COULD IT BE THE SAME CONVICTION , IF THE JURY DIDN'T KNOW AT THE TIME OR YOUKNOW , AT THE TIME THAT THE ARREST WAS ACTUALLY ILLEGAL?

WELL , THE STATE'S POSITION IS THE FACT OF THE ILLEGAL ARREST OR THE FACT OF THE ILLEGAL DETENTION IS NOTSOMETHING THAT SHOULD BE SAID TO THE JURY, BUT THE SURROUNDING , THE MANNER OF INVESTIGATION. IN THIS CASE , LET'S USE THIS CASE AS THE EXAMPLE.

YOU MEAN AFTER , IF THEJUDGE HAD , LET'S SAY , PROPERLY SUPPRESSED THE, WHATEVER , THE EVIDENCE.

THE DRUG EVIDENCE . EVIDENCE.

AND HAD FOUND THAT IT WAS AN ILLEGAL STOP. AND STILL ALLOWED THIS TO GO FORWARD TO THE JURY, ARE YOU SAYING THAT THE JURY WOULD NOT BE TOLD THAT THE ARREST, I MEAN, THE STOP WAS NOT , WAS NOT LEGAL?

YES.

THAT THEY WOULD NOT B E TOLD THAT.

THEY WOULD NOT BE TOLD THAT. AND I THINK THE, IN THE CONTEXT, I MEAN , AND ALTHOUGH WHY WOULD THAT BE? I AM TRYING TO UNDERSTAND WHY WOULD THAT BE ? IT WOULD AND DIRECTED VERDICT, THEN , UNLAWFUL. SO THERE WOULD BE NO JURY QUESTION UNDER YOUR SCENARIO .

I DON'T THINK SO.I THINK, IF WE USE THIS CASE , AS AN EXAMPLE , WE HAVE OFFICER ME SAY, WHO IS THE VICTIM IN THIS OFFICER NEESE , WHO WAS THE VICTIM IN THIS CASE. IF WE LOOK AT THIS CASE , HOW IT STARTED

WE KNOW HE IS GOING TO BE CONVICTED OF BATTERY , CORRECT? THAT IS A MISDEMEANOR. WHAT IS THE SENTENCE FORMISDEMEANOR?

I DON'T KNOW IN THIS CASE OFF HAND .

GOING TO UP TO A THIRD-DEGREE FELONY.

THIRD-DEGREE FELONY.

THE JURY HAS TO, UNDER RING, THE JURY HAS TO BE THE FINDER OF FACT OF THE AGGRAVATING CIRCUMSTANCE. WHAT IS IT THE JURY IS FINDING, IF THEY ARE NOT BEING TOLD OR NOT , THAT THERE IS A ILLEGAL ARE AES? WHAT IS IT THAT THEY ARE I N INSTRUCTING ON?

I MEAN IN THIS CASE WHAT WE WOULD BE DEALING WITH IS HINDSIGHT, BECAUSE AT THE TIME OF THE DETENTION , THE OFFICER WITH THE SURROUNDING FACTS AS TO HOW HE WAS CALLED IN TO INVESTIGATE THE CRIME, IS RELEVANT TO THAT DETERMINATION.

UNDER YOUR THEORY , YOU WOULD ARGUE THAT, BECAUSE GOOD FAITH WOULD BE SOMETHING THE JURY WOULD CONSIDER UNDER THIS CONCEPT, RIGHT?

YES.

SO THEY COULD BE , EVEN THOUGH THE ARREST WAS ILLEGAL , THE ISSUE FOR YOUR DETERMINATION IS, WHETHER UNDER ALL THE CIRCUMSTANCES , THE OFFICER WAS ACTING IN GOOD FAITH. I MEAN , THAT WOULD , YOU KNOW, THERE HAS TO BE SOME ISSUE FOR THE JURY. OTHERWISE IT I S , YOU HAVE A DIRECTED VERDICT.

WELL , I DON'T THINK SO. I THINK THE ISSUE FOR THE JURY ARE THE SURROUNDING ACTIONS , NOT THE FACT OF THE DETENTION.

BUT THEY HAVE TO HAVE THE LEGAL FRAMEWORK , YOU KNOW, TO DECIDE IT. LET M E SORT OF ASK THE SAME QUESTION. YOU KNOW, IN ANOTHER WAY , WITHOUT YOU , YOU KNOW, LET ME ASK THE QUESTION FIRST. ALL RIGHT. AND THAT IS THAT WE HAVE A LAWYER, NOW , THAT GOES TO THE TRIAL OF THIS CASE , AND HE KNOWS THE JURY IS GOING TO BE INSTRUCTED ON THE STATUTE. WHICH INCLUDES THIS PROVISION ABOUT THE LAWFUL PERFORMANCE OF HIS DUTY , AND THE DAY BEFORE, H E HAD FILED A MOTION TO SUPPRESS, AND HAD WON. THAT IS AND HAD,

IT HAD BEEN ESTABLISHED BY THE TRIAL COURT , THAT IT WAS AN ILLEGAL DETENTION . OKAY. AND HE HAS GOT AN ORDER FROM THE TRIAL COURT . NOW HE IS DEFENDING THE CASE. YOU KNOWS THE COURT IS GOING TO READ THE STATUTE , YOU KNOW , TO THE JURY , SO H E IS SAYING WHAT AM I GOING TO ARGUE TO THE JURY, SO HE GETS TO THE FINAL ARGUMENT , AND HE SAYS , NOW , HERE IS WHAT THE JUDGE IS GOING TO INSTRUCT YOU. PART OF THAT IS THAT THE OFFICER HAD TO BE IN THE LAWFUL PERFORMANCE OF HIS DUTIES. OKAY. AND I DON'T THINK THAT THE OFFICER WAS IN THE LAWFUL PERFORMANCE OF HIS DUTIES. AS YOU HEARD DURING THE COURSE OF THE EVIDENCE, WHICH IS SIMILAR TO THE EVIDENCE THAT WAS PRESENTED AT THE MOTION TO SUPPRESS , HE MAKES A CASE TO THE JURY ESSENTIALLY, THAT HE MADE TO THE JUDGE, AND HE ENDS UP SAYING THEY HAVEN'T PROVEN THAT ELEMENT OF THE OFFENSE . NOW, ARE YOU SAY ING THAT THE LAWYER COULD NOT MAKE THAT ARGUMENT TO THE JURY THAT THE STATE HAD NOT PROVEN THAT ELEMENT OF THE OFFENSE?

NO. WHAT I AM SAYING

WHAT INSTRUCTIONS WOULD THE JUDGE GIVE TO THE JURY, IF ANY , OTHER THAN THE LANGUAGE OF THE STATUTE, AS TO THE REQUIREMENT OF THE STATE TO PROVE THE LAWFULNESS OF THE OFFICER'S ACTIONS?

I THINK THE INSTRUCTIONS GIVEN AS THEY ARE NOW , JUST STATUTE ITSELF. I THINK THE REAL

WHAT IS THE DEFENSE LAWYER, THEN, GOING TO ARGUE TO THE JURY , THE DAY BEFORE HE MADE A SUCCESSFUL ARGUMENT TO THE TRIAL COURT. ALL RIGHT. THAT THIS WAS AN ILLEGAL DETENTION , AND I GUESS PART OF MY CONCERN IS THE POOR PUBLIC OUT THERE , ILLEGAL , UNLAWFUL , SOUNDS AN AWFUL LOT ALIKE. YOU KNOW, IN THE , SO , WHAT IS THE LAWYER, THE LAWYER , IS HE GOING TO BE ABLE TO ARGUE THE SAME THING HE ARGUED AT THE MOTION TO SUPPRESS?

I THINK HE CAN ARGUE THE FACTS AND CIRCUMSTANCES, BUT HE CANNOT ARGUE THAT THE DETENTION ITSELF , WAS ILLEGAL. HE CANNOT USE THOSE WORDS TO ARGUE TO THE JURY. AND I THINK

THE ANSWER TO THE QUESTION IS HE CAN BASE THE JURY INSTRUCTION ON OUR OPINION IN THIS CASE , RIGHT?

I THINK HE CAN BASE THE JURY INSTRUCTIONS ON ALL OF THE CASES THAT ARE ALREADY OUT THERE , WITH RESPECT TO THESE TYPES OF CRIMES.

SO WHEN THE LAWYER GETS INTO THAT PART OF HIS ARGUMENT AND SAYS I THINK I HAVE SHOWN YOU A PRETTY CONVINCING CASE THAT THERE WAS NO LEGALITY IN THIS STOP , THERE WILL BE AN OBJECTION BY THE STATE AND THAT WILL BE SUSTAINED. IS THAT

INNINGS, AND I THINK IT IS IMPORTANT TO NOTE THAT THE DEFENDANT GOT HIS REMEDY. THE MOTION TO HIS REMEDY. THE MOTION TO SUPPRESS WAS DISMISSED AS WERE THE DRUG CRIMES DISMISSED, AND I SEE MY TIME IS UP FARNKS THERE ARE NO OTHER QUESTIONS, I ASK THIS COURT TO AFFIRM .

CHIEF JUSTICE: MR . MARSHAL , HOW MUCH TIME ? THANK YOU .

YOU ARGUED THAT WE UPHOLD THE FOURTH DISTRICT, BECAUSE OF THIS INFORMATION ABOUT THE DRUG USE, BUT HAVE YOU ARGUED THAT HE SHOULD GET A NEW TRIAL BECAUSE IN ANY EVENT, THE JURY HAD A RIGHT TO KNOW THE DETENTION WAS ILLEGAL?

YOUR HONOR, I HAVEN'T ARGUED IT IN THAT MANNER. I WAS ASKED THE QUESTION ABOUT PRESERVATION, WHETHER THIS ISSUE WAS PRESERVED, AND I THINK IN A SENSE, THAT THAT

DOES ANSWER THE QUESTION. I ANSWERED THE QUESTION HALFWAY. IF THE COURT FINDS , AS MR. HAIREIES HAS ARGUED , THAT LAWFUL PERFORMANCE AT EXTRACTS THE ATTRACTS THE EXCLUSIONARY RULE , THEN THE LAWFUL PERFORMANCE AFTER DUT Y WASN'T FOUND BY THE LAW ENFORCEMENT OFFICER, IT IS FUNDAMENTAL ERROR TO HAVE A CONVICTION , WHERE ONE OF THE ELEMENTS WASN'T PROVEN. I AM SORRY.

NO. I INTERRUPTED YOU. I AM SORRY. BUT

BUT YOU ARE RELYING ON THE CONCEPT OF FUNDAMENTAL ERROR , NOT O N THE PRESERVATION

THAT SAME CONCEPT WOULD APPLY IF THE STATE HAD SUGGESTED AT LEAST IN THE PART , WE APPLY A GOOD FAITHSTANDARD. THE JURY IN THIS CASE HAS NEVER FOUND WHETHER THEOFFICERS WERE ACTING IN GOOD FAITH. WHAT THEY SIMPLY FOUND WAS UNLAWFUL PERFORMANCE.

WAS THAT CONTESTED AT TRIAL?

YOUR HONOR, IT WAS NOT CONTESTED IN THAT WAY. AT TRIAL, THE DEFENSE WAS BASICALLY THAT THE BATTERY DID NOT OCCUR.THERE WAS INSINUATION THAT IT WASN'T DIRECT.

ISN'T THE LAW FROM OUR COURT , THAT EXCEPT IN VERY LIMITED CIRCUMSTANCES , IN ORDER TO PRESERVE THE ISSUE OF AN ELEMENT OF THE OFFENSE , EVEN IF IT IS THE STATE'SBURDEN TO PROVE THE ELEMENT, THAT IT HAS GOT TO BE A CONTESTED ELEMENT AT TRIAL?

YOUR HONOR, THAT I S THE STANDARD . CERTAINLY

THE PROBLEM HERE IS THAT THERE IS TWO EXTREMES . THEN THERE IS A MIDDLE. ONE EXTREME IS THAT YOU ARE ASKING THAT WE FIND NO CRIME BATTERY ON A LAW ENFORCEMENT OFFICER OCCURRED, BECAUSE EQUATE ING LAWFUL, AND THAT THERE WOULD BE NO CRIME . THE STATE IS SAYING THERE IS A CRIME A S MATTER OF LAW, BECAUSE HE WAS YOU KNOW , UNDERCOLOR OF LAW. AND THE COURT HAS BEEN ASKING SOME QUESTIONS ABOUT A MIDDLE GROUND, WHERE IT IS NOT EITHER YOU KNOW , BLACK OR WHITE BUT IT I S A GRAY AREA, WHICH ALLOWS THE JURY TO TAKE ALL OF THE CIRCUMSTANCES INTO CONSIDERATION , S O THAT THERE IS A YOU KNOW , EVEN IF THE ARREST WAS FOUND TO BE ILLEGAL , THAT THERE IS SOME GOOD FAITH CONCEPT , AND WHAT I AM HEARINGYOU SAY IS REALLY THAT WE HAVE NEVER, BECAUSE OF THIS ALL APPROACH THAT EVERYONE WAS TAKING, THE ISSUE OF A MIDDLE GROUND WAS NEVER BROACHED AT ALL BEFORE THE TRIAL JUDGE, AND IT DOESN'T LOOK LIKE IN ANY OF THESE CASES , IT LOOKS LIKE IN THE TAYLOR CASE , WHICH DOES SAY THE OTHER STATUTE DIDN'T APPLY, THEY FOUND AS A MATTER 6 LAW THAT THERE WAS N O AS A MATTER OF LAW , THAT THERE WAS NO BATTERY ON A LAW ENFORCEMENT OFFICER PERFORMING HIS OFFICIAL DUTY. THAT DOESN'T HELP YOU IF WE SAY THERE IS NO MIDDLE GROUND. YOU ARE ONLY HELPED IF WE SAYTHAT , AS A MATTER OF LAW , THAT LAWFUL IS EQUATED WITH IT HAS TO BE A PROPER ARREST O R DETENTION. RIGHT? IS THAT CORRECT?

YOUR HONOR , I THINK THIS CASE WOULD BE MORE ALONG THE LINES OF ESPINOSA , WHERE THE CASE WAS ACTUALLY SENT BACK, IBELIEVE , WAS THERE WAS NEVER A FINDING. ESPINOSA IS A CASE

I F WE TAKE THE MIDDLE GR OUND. GOOD FAITH.

RIGHT. IF YOU TAKE THE MIDDLE GROUND. ABOUT BUT JUSTICE CANTERO SAYS IT WASN'T PRESERVED AND WASN'T CONTESTED , SO WE HAVE CASESTHAT SAY THAT WOULDN'T CONSTITUTE FUNDAMENTAL ERROR.

NOBODY ASKED FOR A FINDING .

BUT THERE WAS NO FINDING OF AN ESSENTIAL ELEMENT OF THE CRIME TO ELEVATE THE CRIME.

THERE WAS NO MOTION FOR DIRECTED VERDICT, THAT THAT WAS LACKING OR I MEAN , YOU HAVE BEEN VERY CANDID WITH US ABOUT. THAT ALL RIGHT. THANK YOU BOTH , VERY MUCH.

THANK YOU, YOUR HONOR.