Paul Augustus Howell v. State of Florida

HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. 0jz LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

GOOD MORNING EVERYONE. WELCOME TO THE FLORIDA SUPREME COURT ON THIS BEAUTIFUL FALL DAY. WE APPRECIATE COUNSEL BEING READY TO GO ON THE FIRST CASE, SO WITHOUT ANY FURTHER ADO, WE WILL GO RIGHT TO HOWELL VERSUS STATE.

GOOD MORNING, YOUR HONOR, MAY IT PLEASE THE COURT. I AM BAYA HARRISON ON BEHALF OF PAUL HOWELL, THE APPELLANT. GIVE ME A MOMENT, IF YOU WOULD, TO PUT THIS CASE INTO CONTEXT, IN TERMS OF OUR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. AS YOU RECALL, HOWELL DETONATED -- HOWELL PLACED AN EXPLOSIVE SUBSTANCE INTO A MICROWAVE OFTEN AND IT WAS GIFT WRAPPED. HE WAS GOING TO AMENDMENT TO DELIVER IT TO A WOMAN WHO WAS GOING TO BE A WITNESS AGAINST HIM IN ANOTHER CASE. HOWELL WAS STOPPED BY A TROOPER ON INTERSTATE 10 NEAR MONTICELLO. A FLORIDA HIGHWAY PATROL OPERATING MANUAL AT THE TIME, INTRODUCED AS EXHIBIT 1 IN THE POSTCONVICTION HEARING, CLEARLY PROVIDED THAT LOCKED OR SECURELY WRAPPED LUGGAGE, PACKAGES AND CONTAINERS SHALL NOT BE OPENED, EXCEPT AS OTHERWISE AUTHORIZED BY LAW OR OWNER CONSENT.

MR. HARRISON, I THINK WE ARE FAMILIAR WITH THE FACT, AND AS FAR AS YOUR FIRST MAJOR POINT, MOST OF THE CASES WHERE WE LOOK AT WHETHER TRIAL COUNSEL WAS INEFFECTIVE, INVOLVED SOMETHING WHERE MAYBE THEY WEREN'T AWARE OF A DEFENSE, AND THEN YOU ARE SAYING THEY SHOULD HAVE INVESTIGATED. THIS IS NOT A CASE OF LACK OF INVESTIGATION OF A VIABLE DEFENSE. WOULD YOU AGREE WITH THAT?

I WOULD AGREE, YOUR HONOR.

ALL RIGHT. SO WHAT DO YOU HAVE TO OVERCOME, IN ORDER FOR US TO COUNTER THE TRIAL COURT'S FINDINGS THAT THE DEFENSE COUNCIL WAS NOT IN -- DEFENSE COUNSEL WAS NOT INEFFECTIVE. IN OTHER WORDS WHAT WOULD YOU HAVE TO ESTABLISH FOR US TO FIND THAT TRIAL COUNSEL WAS NOT, WAS DEFICIENT IN NOT PRESENTING THIS DEFENSE, EITHER TO THE JUDGE OR THEN TO THE JURY?

WELL, FIRST OF ALL, I WOULD HAVE TO CONCEDE ANYBODY UP HERE WOULD HAVE TO CONCEDE, THAT THIS CASE PRESENTED A TREMENDOUS OBSTACLE FOR ANY DEFENSE COUNSEL, AND I AGREE THAT MR. SHELF EEL -- SHEFFIELD DID CONSIDER THIS PARTICULAR DEFENSE.

HE ACTUALLY USED OR KNEW ABOUT THE POLICY. HE USED THAT AS PART OF THE BASIS FOR A MOTION TO SUPPRESS, CORRECT?

-- [TECHNICAL DIFFICULTY]

IF WE FOUND EITHER A LEGAL DEFENSE THAT THE JUDGE WOULD FIND AS MATTER OF LAW, THAT THERE WAS AN INTERVENING CAUSE, THEN WOULD YOU AGREE THAT, WITH THE EVIDENCE IN THIS CASE, ASSUMING THERE IS, AND THERE IS LEGALLY INTERVENING CAUSES RECOGNIZED IN CERTAIN INSTANCES, THAT WITH THE FACTS OF THIS CASE PARTICULARLY HIS INTENT TO KILL

SOMEBODY AND ALSO HIS KNOWLEDGE THAT THE CAR HAD BEEN STOPPED AND WAS GOING TO BE IMPOUNDED, THAT [TECHNICAL DIFFICULTIES]

IT WOULD HAVE SOMEHOW REDUCED THIS CHARGE TO SECOND-DEGREE MURDER.

NO. I THINK IT IS SOMETHING THAT WOULD HAVE TO GET TO THE JURY.

ALL RIGHT. SO. ON THE JURY, THOUGH, THE TRIAL COUNSEL TESTIFIED THAT HE HAD CONSIDERED THIS AND FELT THAT, WITH THE, WITH THIS BEING A LAW ENFORCEMENT OFFICER THAT PRESENTING THIS WOULD HAVE BEEN ALMOST EQUIVALENT TO, WOULD HAVE BEEN, INFLAMED THE JURY, AND WHICH I CERTAINLY CAN'T YOU SEE THAT, THIS WOULD HAVE ACTUALLY HAD A, COULD HAVE HAD A REVERSE EFFECT?

IN THESE TYPES OF HORRIBLE CASES, AND I HAVE BEEN INVOLVED IN QUITE A FEW, ILL AGREE THAT, WHEN, THAT THINGS LIKE THIS MIGHT INFLAME THE JURY, BUT YOU HAVE TO BE WILLING TO TAKE THAT CHANCE, WHEN IT IS THE ONLY POSSIBLE DEFENSE YOU HAVE. THE FACT OF THE MATTER IS THAT THE FIRST-DEGREE MURDER INDICTMENT SPECIFICALLY ALLEGED THAT HOWELL COMMITTED THIS CRIME WITH A PREMEDITATED INTENT TO KILL TROOPER FULFORD. NOW, THAT, IN FACT, WAS NOT CORRECT. HE DID NOT INTEND TO KILL THE TROOPER. AND THE FACT IS THAT, BUT FOR THE FACT THAT THE TROOPER DISOBEYED THE DICTATES OF HIS OWN POLICY, WHICH YOU NORMALLY DON'T HAVE IN A SITUATION LIKE THIS, BUT FOR THE FACT THAT HE DID THAT, HE WOULD BE ALIVE TODAY. IN OTHER WORDS, HOWELL WAS NOT --

WHAT WE DO HAVE IN THIS SITUATION, IT IS UNCONTROVERTED THAT HE HAD A PREMEDITATED INTENT TO KILL SOMEONE.

HE DID, YOUR HONOR, AND I AGREED --

AND DOES THE DOCTRINE OF TRANSFERRED INTENT COME INTO PLAY IN THIS CASE?

I WOULD HAVE TO ADMIT THAT THE STATE WOULD HAVE BEEN ENTITLED TO A JURY INSTRUCTION ON TRANSFERRED INTENT, BUT STILL THE DEFENDANT SHOULD HAVE BEEN ABLE TO ARGUE THAT, ACCORDING TO THE INDICTMENT, THAT HOWELL DID NOT INTEND TO COMMIT THIS, TO INJURY THIS TROOPER, AND -- TO JURY THIS TROOPER, AND THE HARD -- TO IN JURY THIS TROOPER, AND THE HARD, COLD FACT ARGUED TO THE JURY --

WHAT WAS ARGUED TO THE JURY? TRANSFERRED INTENT?

YES, THEY DID, YOUR HONOR, AND OBVIOUSLY THAT WOULD HAVE DONE DAMAGE TO THE DEFENDANT, BUT STILL THE DEFENSE COULD HAVE ARGUED THAT THE HARD, COLD FACT IS THAT WE HAVE GOVERNMENTAL POLICY HERE THAT THE TROOPER, HIMSELF, VIOLATED, AND THAT IS WHAT CAUSED HIS DEATH.

HAVE WE ACTUALLY DEMONSTRATED THAT THE TROOPER VIOLATED THIS POLICY?

I THINK IT IS CLEAR. I THINK, I READ OFF A LITTLE INTERPRET FROM THE -- EXCERPT FROM THE POLICY. HE WAS NOT SUPPOSED TO UNWRAP THAT PACKAGE. HE WAS TO INVENTORY IT. THAT POLICY WAS ESTABLISHED TO PROTECT THE TROOPER, IN TERMS OF HIS LIFE, AND ALSO TO PREVENT LIABILITY FROM 1983 CLAIMS, AND --

SO THERE IS NO QUESTION, THEN, IN THIS RECORD, AS TO WHETHER OR NOT, ONCE A CONSENT, YOU AGREE THAT THE DRIVER OF THE CAR GAVE THE POLICE OFFICER CONSENT TO SEARCH THE VEHICLE?

YES, YOUR HONOR.

AND THERE, AND YOU ARE TELLING US THAT THERE WAS NO QUESTION THAT THE OFFICER, THAT CONSENT DID NOT INCLUDE THIS PACKET?

CORRECT. I, THE CONSENT WAS TO SEARCH THE VEHICLE. THE CONSENT WAS NOT TO SEARCH THE ITEMS THAT WERE CONTAINED THERE IN. I THINK THAT IS PRETTY CLEAR FROM THE TESTIMONY OF WATSON, AND, AGAIN, THE FACT OF THE MATTER IS THAT THERE IS A SIGNIFICANT INTERVENING CAUSE HERE, AND IT RELATES TO GOVERNMENTAL POLICY THAT WAS VIOLATED BY THE TROOPER, AND, AGAIN, I UNDERSTAND THAT THIS ARGUMENT HAD IT BEEN MADE, THIS STRATEGY, WOULD HAVE UPSET SOME OF THOSE JURORS, BUT THIS IS PAR FOR THE COURSE.

WHERE IN THE RECORD, IS THE PURPOSE OF THE POLICY OF THE LAW ENFORCEMENT AGENCY, TO PROTECT THE LIFE OR LIMB OF THE OFFICERS, OPPOSED TO SEARCH AND SEIZURE ISSUES?

YOUR HONOR, I THINK THE SPECIFICS RELATED TO THE LATTER, BUT SURELY THIS POLICY, ONE WOULD THINK WOULD BE THERE TO PROTECT LAW ENFORCEMENT OFFICERS, THEMSELVES, FROM INJURY.

BUT IS THERE ANYTHING IN THE RECORD?

NO, SIR, I ADMIT IT IS NOT SPECIFICALLY IN THAT RECORD.

WHAT WAS THE LAW IN THE UNITED STATES AND FLORIDA, AT THE TIME, OVER HERE, AT THE TIME OF THE REPUTATION, REGARDING WHETHER A DEFENDANT'S CONSENT TO SEARCH THE VEHICLE INCLUDED ITEMS THAT WERE CLOSED BUT NOT LOCKED THAT ARE FOUND IN A VEHICLE?

I THINK THAT THE LAW MAY HAVE ALLOWED THE OFFICER TO SEARCH. TO OPEN THAT PACKAGE. I DON'T CLAIM THAT THAT IS NOT THE CASE. BUT, AGAIN, THIS IS NOT SO MUCH A LEGAL ARGUMENT AS ONE THAT SHOULD HAVE BEEN MADE TO THE JURY, TO TRY TO USE THE FEW FACTS THAT HOWELL HAD --

GETTING TO, YOU ARGUE THAT THE POLICE OFFICER VIOLATED DEPARTMENT POLICY, RIGHT?

YES, SIR.

RIGHT?

AND THE POLICY SAYS THAT YOU SHOULD NOT OPEN CONTAINERS EXCEPT FOR CONSENT, EXPRESSLY EXCLUDES CONSENT, CORRECT?

IT DOES, YES, SIR.

IF THE LAW OF THE UNITED STATES INCLUDES, WITHIN CONCEPT, CONSENT TO SEARCH CONTAINERS FOUND IN A VEHICLE, THEN HOW DID THE OFFICER VIOLATE ANY DEPARTMENT POLICY IN OPENING THE PACKAGE?

I THINK IT IS ARGUABLE. I AM NOT SAYING IT SUSWAS SOME TYPE OF LEGAL VIOLATION OF MR. WATSON OR MR. HOWELL'S RIGHTS. THAT IS NOT THE POINT. BUT I THINK THE POLICY, ITSELF, IF YOU ARGUED THAT TO THE JURY, THAT, I MEAN THE HARD, COLD FACT IS THAT THE MAN WOULD BE ALIVE TODAY, HAD HE NOT, HAD HE GIVEN THE LETTER AND SPIRIT AFTER THAT POLICY, ITS PROPER EFFECT.

AREN'T WE, LET ME GO BACK AGAIN, TO WHAT I SEE AS THE FOCUS OF WHAT YOU HAVE TO ESTABLISH FOR US, WHICH IS THAT, BECAUSE THIS DEFENSE LAWYER CONSIDERED THIS DEFENSE, THIS IS NOT, AS WE HAVE DISCUSSED AT THE BEGINNING, THIS IS NOT A CASE OF INADEQUATE

INVESTIGATION, SO THIS DEFENSE LAWYER DECIDED THAT EVEN THOUGH HE COULD MAKE THAT ARGUMENT, THAT, AGAIN, ALTHOUGH WE CALL IT, YOU SEE SAY IT IS INTERVENING CAUSE, BASICALLY THE JURY IS GOING TO HEAR IT, BECAUSE, HE DID IT HIMSELF, HE CAUSED HIS OWN DEATH THAT, THAT THAT, ITSELF, WOULD HAVE BACKFIRED ON THE DEFENDANT, AND WOULD HAVE ACTUALLY HAD A NEGATIVE EFFECT. NOW, HOW CAN WE SAY THAT, AS A MATTER OF SIXTH AMENDMENT AND STRICKLAND LAW THAT, HAVING CONSIDERED THE ALTERNATIVE STRATEGY, HAVING DONE THE INVESTIGATION, HAVING CONSIDERED THE NATURE OF THE JURY IN THIS AREA, THAT THAT, THAT THAT WAS A YOU KNOW, UNREASON ONLY STRATEGY, THE DEFENSE LAWYER WAS NOT FUNCTIONING AS GUARANTEED BY THE SIXTH AMENDMENT. THAT IS WHERE I HAVE THE PROBLEM AS TO, YOU KNOW, I THINK, YOU KNOW, I CAN SEE SOMEONE ARGUING THAT, IF HE HAD MADE THAT ARGUMENT AND WAS 12-0, THAT HE SHOULDN'T HAVE MADE THAT, BECAUSE IT WAS SUCH, WOULD HAVE BEEN A BAD TACTICAL DECISION.

RIGHT.

CLEARLY COUNSEL'S DECISION ARE ENTITLED TO DEFERENCE. NO QUESTION ABOUT IT. AND NO ONE IS QUESTIONING THE INTEGRITY OF THE LAWYER INVOLVED OR HIS ABILITY OR EXPERIENCE. BUT THE DECISION, AS JUDGE SHEVIN SAID IN ONE OF THE CASES THAT WE DECIDED, MUST BE A REASONABLE ONE, AND YOU MIGHT ASK WHAT WAS THE ALTERNATIVE? WHAT HE ARGUED WAS THE ALTERNATIVE, ESSENTIALLY WHICH WAS NO DEFENSE AT ALL, THAT, YES, HOWELL WAS INVOLVED, AND YES, HOWELL WAS SOMEWHAT GUILTY, BUT ONE OF THE CODEFENDANTS WAS EVEN MORE GUILTY.

I THOUGHT HE ARGUED THAT HE DIDN'T INTEND TO KILL THIS LAW ENFORCEMENT OFFICER. I THOUGHT, WASN'T THAT SOMETHING THAT THE DEFENSE LAWYER DID ARGUE?

YES. HE ARGUED THAT, BUT THERE WAS NOTHING TO BACK IT UP, AND THE POINT IS THERE HAD TO BE SOME DEFENSE PRESENTED, AND THE BEST DEFENSE WAS, AGAIN, THE HARD COLD FACT THAT THERE WAS A MANUAL HERE THAT, IF THE OFFICER HAD JUST FOLLOWED THAT MANUAL, HE WOULD BE ALIVE TODAY, AND THAT MIGHT HAVE, THAT MIGHT HAVE RESULTED IN A JURY VERDICT OF SOMETHING LESS THAN PREMEDITATED FIRST-DEGREE MURDER.

DIDN'T YOU ANSWER JUSTICE CANTERO'S QUESTION THAT THE LAW, AT THE TIME OF THIS CASE, WOULD HAVE PERMITTED THE OFFICER TO OPEN THAT PACKAGE? SO, EVEN, IF THE LAW ALLOWED HIM TO OPEN THAT PACKAGE, HOW CAN WE SAY, THEN, THAT HE WAS WRONG IN OPENING THE PACKAGE?

I AM NOT SAYING THAT, BY DOING WHAT HE DID, HE VIOLATED A LAW THAT HE DID SOMETHING THAT WAS PERSONALLY WRONG. I AM SAYING THAT THAT RULE, THAT POLICY WAS THERE. IT HAD TO BE THERE IN PART, TO PROTECT HIM, AND THAT IS AN INTERVENING CAUSE THAT CAUSED, THAT RESULTED IN HIS DEMISE, AND THE JURY COULD HAVE CONSIDERED THAT, AND IT MIGHT WE WILL HAVE RESULTED, I AM NOT SAYING HE WOULD BE ACQUITTED BY ANY MEANS, BUT IT MIGHT HAVE BEEN SOMETHING THAT WOULD HAVE RESULTED IN SOMETHING LESS THAN A FIRST-DEGREE MURDER CONVICTION.

BUT, COUNSEL, WHERE DOES THIS LEAD US, AS WE INTERPRET WHAT IS HAPPENING DURING THE COURSE AFTER ENCOUNTER WITH LAW ENFORCEMENT? THERE ARE MANY AND DIVERSE WAYS IN WHICH LAW ENFORCEMENT MAY VIOLATE INTERNAL POLICIES. THE MANNER IN WHICH A VEHICLE IS STOPPED, THE MANNER IN WHICH A VEHICLE IS APPROACHED, AND IF WE GET INTO IT, A CONCEPT THAT THAT THAT WOULD AND DEFENSE, BECAUSE LAW ENFORCEMENT HAS VIOLATED SOME INTERNAL PROCEDURE. THAT BECOMES AN INTERVENING CAUSE. WHERE DOES THIS LEAVE US, THEN?

I AGREE THAT THIS IS SOMETHING THAT SHOULD NOT BE GIVEN SOME LIBERAL INTERPRETATION. ALL I AM SAYING, THAT IN THIS PARTICULAR CASE, THAT WAS HOWELL'S ONLY CHANCE OF BEING

CONVICTED OF SOMETHING LESS THAN FIRST-DEGREE MURDER. IT WAS THE ONLY OPTION AVAILABLE, AND THEREFORE COUNCIL -- COUNSEL WAS INEFFECTIVE FOR NOT ADOPTING IT.

WOULD THE SAME PRINCIPLE APPLY, IF AN OFFICER WERE NOT WEARING THE BULLETPROOF PROTECTION ON THE BODY AND AS A VIOLATION OF POLICY, AND THEREFORE WE COULD PROVE THAT WOULD NOT HAVE BEN PENN AT ANY RATED, AND THEREFORE -- WOULD NOT HAVE PENETRATED, AND THEREFORE THAT IS A DEFENSE?

THAT MIGHT BE DIFFERENT THAN A SITUATION LIKE THIS. MY POINT IS THAT THE POLICY WAS SO CLEAR, ITS PURPOSE WAS SO EVIDENT, AND IT WAS AN INTERVENING CAUSE THAT MAY HAVE CAUSED THIS JURY TO REACH A DIFFERENT VERDICT.

NOW, GOING BACK TO WHETHER 2458D BE AN INTERVENING CAUSE, THE ISSUE IS WHETHER HOWELL, WHO PUT THIS BOMB IN THE MICROWAVE, COULD HAVE FORESEEN THAT SOMEONE OTHER THAN THE INTENDED VICTIM MIGHT HAVE OPENED IT. HE DOESN'T KNOW ABOUT THE POLICY. HE IS NOT RELYING ON A POLICY THAT SAYS THAT LAW ENFORCEMENT OFFICERS SHOULDN'T OPEN PACKAGES LIKE THAT, SO IN TERMS OF THE, EVEN HOW YOU WOULD ARGUE IT, SEEMS LIKE IT IS NOT EVEN, THAT THAT WOULDN'T BE VIABLE, JUST LIKE THE IDEA THAT SOMEONE WHO SAID, WELL, I THOUGHT, I SHOT THAT LAW ENFORCEMENT OFFICER, BUT I THOUGHT HE WAS WEARING, WOULD BE WEARING A BULLETPROOF VEST, SO I DIDN'T REALLY THINK I WAS GOING TO KILL HIM.

I HAVE TO SAY, YOUR HONOR, THIS IS NOT KIND OF ARGUMENT THAT ONE WOULD MAKE TO JUSTICES OR TO A JUDGE, BUT IT HAS VIABILITY, IN PRESENTING IT TO A JURY, IN TERMS OF THE FACT THAT THE MAN WOULD BE ALIVE TODAY --

ISN'T IT REALLY THE REVERSE OF THAT? DON'T YOU THINK THAT, AS THE DEFENSE LAWYER EVALUATED HERE, THAT ALLAY JURY, THAT THE POTENTIAL FOR OUTRAGE ON THE PART OF ALLAY JURY, PROBABLY WOULD BE MUCH STRONGER THAN IN PRESENTING SOMETHING LIKE THIS TO A PROFESSIONAL TRAINED JUDGE OR JURIST? AND THAT IS THAT ALLAY JURY WOULD BE LIABLE TO TAKE -- IS THAT A LAY JURY WOULD BE LIABLE TO TAKE THIS AS AN OLD CLASSIC STORY OF THE PERSON HAVING MURDERED HIS PARENTS AND CLAIMS TO BE AN ORPHAN, AND MY QUESTION TO YOU IS, HOW DO WE MOVE THIS INTO THE CATEGORY, WHEN WE GIVE COUNSEL, UNDER THE LAW, THIS VERY WIDE RANGE OF OPTIONS, AS FAR AS HOW HE DEFENDS A CASE, HOW DO WE MOVE THIS INTO THE CATEGORY OF OUT OF THAT RANGE? IF YOU COULD PLEASE ARTICULATE HOW YOU CAN GET COUNSEL, IN THIS SITUATION, KNOWING ABOUT THIS, AND THEN EVALUATED IT, AND THEN DECIDING, NO, THERE IS NO WAY I AM GOING TO PRESENT THIS TO ALLAY JURY, AND OUTRAGE THEM WITH IS SOMETHING LIKE THIS, SO HE -- WITH SOMETHING LIKE THIS, SO HE HAS MADE THAT DECISION. IS HE ENTITLED TO ENORMOUS DEFERENCE, HOW DO YOU MOVE THIS OUTSIDE THE CONDUCT OF ANY RATIONAL DEFENSE LAWYER?

IT IS DIFFICULT, BUT THE WAY YOU DO IT IS YOU HAVE TO REALIZE THAT SO FEW OPTIONS WERE OPEN TO POWELL.

IF THIS COURT AGREED WITH YOU, WE WOULD BE DOING IT AS A MATTER OF LAW. WE WOULD BE RULING UNDER THESE PARTICULAR CIRCUMSTANCES, THAT AS A MATTER OF LAW, A DEFENSE LAWYER WOULD HAVE TO PRESENT THIS KIND OF DEFENSE, AND DOESN'T THAT JUST GO, NOT ONLY AGAINST OUR LEGAL STANDARDS THAT HAVE GIVEN THIS WIDE RANGE OF DISCRETION TO THE DEFENSE LAWYER, BUT AS I INDICATED BEFORE, DOESN'T IT, THIS IS ONE OF THOSE RARE CASES WHERE YOU JUST, IT ALMOST GOES AGAINST YOUR GUT INSTINCTS, AS FAR AS THE KIND OF THING YOU ARE GOING TO SAY TO A JURY WITH A STRAIGHT FACE.

WELL, YOU KNOW, AGAIN, THAT IS THE NATURE OF THE BEAST. IN CASES LIKE THIS, THAT ARE ADMITTEDLY EGREGIOUS, THEY ARE HORRIBLE CASES, SO LITTLE IN THE WAY OF OPTIONS IS LEFT

OPEN, AND OUR ARGUMENT IS THAT THIS DEFENSE WAS THE ONLY REASONABLE ONE THAT WAS AVAILABLE, AND IT WAS NOT A GREAT ONE, BUT IT IS ALL HE HAD, AND IT SHOULD HAVE BEEN ASSERTED.

SO IF IT WAS AN INNOCENT BYSTANDER STANDING BY THE INTENDED VICTIM AT THE TIME, I TAKE IT, THAT THE ARGUMENT, THAT YOU WOULD SAY WOULD HAVE TO BE MADE BY THE DEFENSE LAWYERS, THAT THAT DUMMY SHOULD NOT HAVE BEEN STANDING THERE WITH HER FRIEND AT THE TIME THIS PACKAGE WAS OPENED?

THAT ARGUMENT WOULD HAVE FAILED. THIS HAS TO DO WITH FLORIDA HIGHWAY PATROL POLICY. IT WAS CLEARLY VIOLATED, AND THAT IS WHAT CAUSED THE DEATH, AND AS HARD AS IT IS TO DEAL WITH IT, THAT IS ALL COUNSEL HAD TO WORK WITH, AND HE SHOULD HAVE ASSERTED IT.

CAN I RESERVE --

THE MARSHAL REMINDED US AND WE WILL SAVE YOU A COUPLE OF MINUTES. THANK YOU.

THANK VERY MUCH.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING, CHIEF JUSTICE ANSTEAD. MAY IT PLEASE THE COURT. CHARMAINE MILLSAPS, REPRESENTING THE STATE. COUNSEL COULD NOT BE INEFFECTIVE FOR NOT PRESENTING A DEFENSE THAT IS PRECLUDED AS A MATTER OF LAW. FLORIDA DOES NOT RECOGNIZE CONTRIBUTE OTHER NEGLIGENCE OF THE VICTIM, IN A CRIMINAL CASE, AS DEFENSE.

THEY ARE RAISING IT AS INTERVENING CAUSE.

WELL, BUT IT IS NOT. IT IS CONTRIBUTE OTHER NEGLIGENCE. WHEN THE VICTIM, THE RESTATEMENT OF TORTS DEFINES ALL THESE, AND WHEN YOU SAY IT IS CONDUCT ON THE PART OF THE PLAINTIFF IS THE WAY THEY DEFINE IT, OBVIOUSLY, BECAUSE THEY ARE NOT DEALING WITH CRIMES, FALLS BELOW THE STANDARD WHICH HE SHOULD CONFORM TO HIS OWN PROTECTION, THAT IS A CONTRIBUTING CAUSE, COOPERATING WITH THE NEGLIGENCE OF THE DEFENDANT, SO THE RESTATEMENT OF TORTS, IS, SAYS THIS IS CONTRIBUTE OTHER NEGLIGENCE. YOU ARE BLAMING THE VICTIM. AN INTERVENING FORCE --

I WONDER IF WE WERE NOT GETTING OFF IN SORT OF A LEGALESE KIND OF THING HERE, AS OPEN OATSED TO THIS ISSUE ABOUT THE BROAD -- AS OPPOSED TO THIS ISSUE ABOUT THE BROAD DISCRETION OF A DEFENSE LAWYER, I AM SOMEWHAT CONCERNED YOU KNOW, THAT THIS THING WOULD BE DECIDED ON THE BASIS OF SOME LEGAL THEORY OF WHO, LEGALLY, CAN BE HELD LIABLE OR NOT LIABLE, OR WHETHER COMPARATIVE OR CONTRIBUTE I HAVE NEGLIGENCE COULD BE, AS OPPOSED TO FOCUSING ON THE STANDARDS STANDARD FOR EFFECTIVENESS OF COUNSEL -- ON THE STANDARDS FOR EFFECTIVENESS OF COUNSEL.

YOUR HONOR, THE TRIAL COUNSEL'S TESTIMONY AT THE EVIDENTIARY HEARING, WAS CLEAR AND UNREBUTTED, AND HE SAID THIS WOULD BE A HORRIBLE IDEA. HE SAID THINGS LIKE IT WOULD INFLAME THE JURORS, IF I WERE TO BLAME THE TROOPER FOR HIS OWN DOOE. ISN'T THIS, UNDER THE LAW OF STRICKLAND, WHAT THE TRIAL JUDGE -- OWN DEATH.

ISN'T, THIS UNDER THE LAW OF STRICKLAND, WHAT THE TRIAL JUDGE WOULD HAVE TO EVALUATE. ISN'T TRIAL COUNSEL OPERATING UNREASONABLY OUTSIDE OF THE DEFERENCE HE WAS ALLOWED, IN PRESENTING THAT?

THAT WAS NOT PRESENTED. THE ONLY EVIDENCE PRESENTED IN THIS TRIAL COURT WAS THE

TESTIMONY OF THE TRIAL LAWYER SAYING I THINK IT WAS A VERY BAD IDEA TO BLAME AN OFFICER FOR DOING HIS DUTY. IT IS NOT JUST SOMEBODY STANDING NEXT TO A VICTIM. THIS IS AN OFFICER DOING HIS DUTY. THIS WOULD PARTICULARLY IN FLAME A JURY, MORE THAN JUST A FRIEND STANDING BY SOMEBODY. THIS WOULD IN FLAME THEM MORE. YOU ARE BLAMING AN OFFICER FOR DOING HIS DUTY. AND SO, YOUR HONOR, IF YOU WISH TO DECIDE THIS STRAIGHT ON HIS TESTIMONY --

ISN'T THAT THE WAY THE TRIAL JUDGE EVALUATED IT?

THE TRIAL JUDGE REALLY FOUND THIS TO BE PROCEDURALLY BARRED. NOW, HE DID QUOTE, IN THE TRIAL JUDGE'S ORDER, HE DID, HE DID INDEED, QUOTE FROM THE TESTIMONY, AND HE SAID, MR. SHE LETTER TESTIFIED THAT IN HIS I KNOW I DON'T KNOW, STRATEGY -- IN HIS OPINION, STRATEGY WOULD NOT HAVE WORKED IN HIS CLIENT'S BENEFIT, BUT HE SAID, TRIAL COUNSEL, HIMSELF, SAID THAT NEGLIGENCE CONCEPTS SUCH AS THIS HAVE VERY LITTLE APPLICATION IN CRIMINAL LAW. YOUR HONOR, I HAVE ALSO CITED A CASE FROM THE CALIFORNIA APPELLATE COURTS, THAT HAS BEEN ADOPTED BY THE CALIFORNIA SUPREME COURT, WHERE THEY TRIED TO MAKE AN ARGUMENT VERY MUCH LIKE, THIS DEALING WITH THE CALIFORNIA HIGHWAY PATROL MANUAL, AND THE CALIFORNIA APPELLATE COURT DID AFFIRM THE TRIAL COURT THAT HAD EXCLUDED THAT EVIDENCE. AND SO HE WOULD HAVE A VERY HARD TIME. YOUR HONOR, IN NO WAY DO I DISAGREE THAT YOU CAN COMPLETELY DISPOSE OF THIS ON A REASONABLE STRATEGIC MOTION. THAT WAS COMPLETELY UNREBUTTED, BUT TRIAL COUNSEL IS GOING TO HAVE AN EVEN BIGGER PROBLEM. HE IS GOING TO HAVE TO FIGHT WITH THE STATE ABOUT WHETHER YOU CAN EVEN DO THIS AS MATTER OF LAW, SO NOT ONLY IS IT A BAD IDEA. IT CERTAINLY, I DON'T THINK IT IS PERMITTED AS A MATTER OF LAW, SO HE HAS GOT TWO HUGE HURDLES, AND HE SAID HIS FINAL TESTIMONY WAS, I CONSIDERED IT. I WOULDN'T DO IT THEN. I WOULDN'T DO IT NOW. AND AS FOR PRESENTING IT AS A MITIGATOR, HE SAID, IF I HAD PRESENTED SUCH A DEFENSE, I WOULD HAVE GOTTEN A 12-ZIP QUOTE/UNQUOTE, JURY RECOMMENDATION. INSTEAD OF THE 10-2 THAT HE DID GET. AND YOUR HONOR, LET ME ALSO TELL YOU WHAT THE DEFENSE WAS AT TRIAL, NIGHT MERELY TRANSFERRED INTENT. THE STATE DID NOT HAVE AN EYEWITNESS PROVING WHO MADE THIS BOMB. SO A LOT OF THIS WAS REASONABLE DOUBT AS TO "WHO MADE THE BOMB" DEFENSE. THAT WAS REALLY HIS OPENING AND CLOSING STRATEGY THAT, THE STATE DID NOT PROVE WHO, PAUL HOWELL HAD PARTICULARLY MADE THIS BOMB. WHILE WE PROVED THAT IT WAS MADE IN PAUL HOWELL'S HOUSE, WE DID NOT PROVE THAT PAUL HOWELL MADE THE BOMB. IT WAS MORE REASONABLE DOUBT DEFENSE AS TO WHO ACTUALLY MADE THIS BOMB, AND THEN THEY ALSO WENT ON TRANSFERRED INTENT. SO YOU CAN DISPOSE OF THIS ONE OF TWO-WAYS. EITHER IT IS NOT PERMITTED AS A MATTER OF LAW, OR AS THE TRIAL COUNSEL TESTIFIED, THIS WOULD BE A VERY BAD IDEA. MOREOVER, THE POLICY, YOUR HONOR, IF YOU READ THE INTRODUCTION TO THE POLICY, THE INTRODUCTION TO THE POLICY STATES, IN ORDER TO SECURE THE OWNER'S PROPERTY AND TO PROTECT THE DEPARTMENT FROM CLAIMS, THAT IS WHAT THE POLICY, THAT IS THE STATED OBJECT OF THE POLICY. IT IS NOT TO PROTECT OFFICERS FROM BOMBS. THEY DON'T HAVE A STANDARD POLICY ON GIFT WRAP PACKAGES THAT FURNISH OUT -- THAT TURN OUT TO BE BOMBS. THAT IS NOT A STANDARD SITUATION. SO IT IS NOT AT ALL CLEAR THAT THIS IS A VIOLATION, EITHER OF THE FOURTH AMENDMENT OR OF THEIR POLICY. THANK YOU.

CHIEF JUSTICE: REBUTTAL.

JUST VERY, VERY BRIEFLY. I JUST WANTED TO NOTE THAT THIS SITUATION IS A LITTLE BIT LIKE, IN THE REAL WORLD, WHEN YOU ARE TRYING THESE CASES, INVOKING AN INSANITY DEFENSE. IT IS VERY UNPOPULAR TO DO, BUT IT IS WHEN THAT IS ALL YOU HAVE, YOU HAVE GOT TO GO WITH WHAT YOU HAVE GOT, AND THAT IS WHAT WE SAY WAS, SHOULD HAVE BEEN DONE IN THIS CASE. THANK YOU VERY MUCH.

CHIEF JUSTICE: THANK YOU VERY MUCH.