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Anthony Williams v. State of Florida

MARSHAL: PLEASE RISE. 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. BEVERLY POHL THOMAS DUFFY BOL CONTINUE BOLOTIN LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT.

CHIEF JUSTICE: I WOULD LIKE TO ASK EVERYBODY TO REMAIN STANDING A MOMENT FOR A MOMENT OF SILENCE FOR JUSTICE ERVIN, WHO PASSED AWAY LAST WEEK, A GREAT FLORIDIAN WHO SERVED AS ATTORNEY GENERAL FROM 1949 TO 1964 AND IS A JUSTICE OF THIS COURT FROM 1964 TO 1975, SERVING AS ITS CHIEF JUSTICE FROM 1969 TO 1971. THANK YOU. THANK YOU VERY MUCH. PLEASE BE SEATED. WELCOME TO THE FLORIDA SUPREME COURT AND TO THE FIRST DAY OF ORAL ARGUMENT IN OUR NEW TERM. I WILL CALL THE FIRST CASE OF WILLIAMS VERSUS STATE OF FLORIDA. ARE THE PARTIES READY? YOU MAY PROCEED. IT LOOKS LIKE, ON THE FIRST ISSUE, THAT THERE IS NOT TOO MUCH DISPUTE.

THAT IS TRUE.

CHIEF JUSTICE: DO YOU WANT TO INTRODUCE YOURSELF?

GOOD MORNING. MAY IT PLEASE THE COURT. BEVERLY POHL REPRESENTING ANTHONY WILLIAMS IN THIS CASE. THE SIMPLE CERTIFIED QUESTION FROM THE FIFTH DISTRICT COURT OF APPEAL, WHICH IS WHETHER AN ANDERS PROCEDURE SHOULD APPLY IN APPEALS FROM CIVIL COMMITMENT UNDER THE "JIMMY RYCE" ACT, CANNOT BE ANSWERED WITH A SIMPLE YES OR NO. WE THINK THE BROADER QUESTION AND THAT THE ONE THAT IS EMBODIED BY THE CERTIFIED QUESTION, IS HOW DOES THE COURT PROTECT THE RIGHT TO APPOINTED APPELLATE COUNSEL IN A JIMMY RYCE PROCEEDING, WHERE THE LAWYER HAS MOVED TO WITHDRAW.

CAN I BACK UP A SECOND, TO THE ORIGINAL CERTIFIED QUESTION. I AM A LITTLE CONFUSED ON HOW YOU GET hERE, IF YOU DON'T SEEM TO BE A PARTY THAT IS AGGRIEVED BY THE DCA'S DECISION. HOW DO YOU HAVE STANDING TO SEEK REVIEW OF THAT DECISION IN OUR COURT?

ANTHONY WILLIAMS WAS AGGRIEVED. ANTHONY WILLIAMS OBJECTED TO THE PROCEDURE BELOW. THE FIFTH DISTRICT OBJECTED TO AN ORDER TO SHOW CAUSE, WHEN ANDERS FILED A BRIEF AND STATED A MOTION TO WITHDRAW, AND STATED IT ONLY APPLIED TO "BAKER" ACT CASES AND HAD NEVER BEEN EXPANDED TO JIMMY RYCE CASES AND ASKED THE PARTIES TO COMMENT ON WHY THE ANDREWS BRIEF AND MOTION TO WITHDRAW SHOULD NOT BE STRICKEN. APPOINTED COUNSEL FOR MR. WILLIAMS WHO FILED THE ANDREWS BRIEF, ARGUED THAT IT SHOULD NOT BE STRICKEN

BUT PULLEN CONTROLLED, AND MR. WILLIAMS FILED A PRO SE RESPONSE, DEPARTING FROM THE POSITION TAKEN BY HIS COUNSEL AND ASKING THE COURT NOT TO PERMIT AN ANDERS PROCEDURE FOR VARIOUS REASONS, INCLUDING HE DIDN'T FEEL LIKE COUNSEL HAD EFFECTIVELY PRESENTED THE ISSUES IN HIS APPEAL. THE STATE TOOK THE POSITION THAT ANDERS SHOULD APPLY UNDER PULLEN AND THE DISTRICT COURT, IN ITS INTERIM NONDISPOSITIVE OPINION, AGREED THAT IT APPLIED BUT CERTIFIED A QUESTION ACKNOWLEDGING THAT THIS COURT HAD NEVER DECIDED WHETHER ANDERS APPLIES IN A

"JIMMY RYCE" ACT CASE, SO THERE IS AN OBJECTION BELOW.

I AM NOT SURE THAT ANSWERS MY QUESTION, THOUGH, BECAUSE YOU SEEM TO AGREE WITH THE DECISION BELOW, AT LEAST IN YOUR BRIEF, YOU AGREE WITH THE DECISION BELOW, EVEN THOUGH YOU ARE SAYING THAT YOUR CLIENT WILLIAMS, SAID THAT ANDERS DID NOT APPLY, SO EITHER YOUR CLIENT IS SAYING ANDERS DOES NOT APPLY, IN WHICH CASE HE IS A PARTY AGREED AGGRIEVED BY THE DECISION, OR HE SAYS IT DOES APPLY, IN WHICH CASE AGAIN, I AM NOT SURE HOW YOU HAVE STANDING TO OUR REVIEW.

IN OUR BRIEF, WE SAID THAT THE ANSWER TO THE CERTIFIED QUESTION WAS A QUALIFIED YES NOT AN UNEQUIVOCAL YES.

SO WHAT ARE YOU, REALLY, ADVOCATING HERE, BECAUSE AS WE UNDERSTOOD IT, EVERYONE WAS PRETTY MUCH IN AGREEMENT THAT THIS PROCEDURE SHOULD APPLY, AND WHILE I DON'T, MAY NOT AGREE WITH THAT, WHAT DO YOU ADVOCATE AS A SUBSTITUTE?

FAIRLY CONTAINED WITHIN THE CERTIFIED QUESTION, IS THE QUESTION OF WHAT SHOULD BE THE ANDERS PROCEDURE BE IN FLORIDA, AND --

SO ARE YOU ARGUING FOR A DIFFERENT ANDERS PROCEDURE, OR ARE YOU ARGUING JUST IN THE "JIMMY RYCE" ACT, A DIFFERENT ANDERS PROCEDURE SHOULD APPLY?

THE ARGUMENT THAT WE MAKE IN THIS JIMMY RYCE CASE, IS THAT A MODIFICATION OF THE ANDERS PROCEDURE WOULD BE CONSISTENT WITH PULLEN, CONSISTENT WITH THE CONSTITUTION AND CONSISTENT WITH ANDERS, AND BETTER FOR THE JIMMY RYCE DEFENDANT.

YOU ARE SPEAKING OF A DIFFERENT PROCEDURE FOR JIMMY RYCE CASES THAN STANDARD ANDERS PROCEEDINGS, IS THAT WHAT --

NO. MY NEXT STATEMENT WAS GOING TO BE THAT THE ARGUMENT WE MAKE, ALTHOUGH IT IS IN THE CONTEXT OF THIS "JIMMY RYCE" ACT CASE, WOULD NECESSARILY APPLY TO CRIMINAL CASES AS WELL, AND IT IS NOT A MAJOR DEPARTURE FROM THE PROCEDURE THAT THE COURT HAS ESTABLISHED IN ITS 1991 DECISION, AND QUITE HONESTLY, THE CHANGE THAT WE ARE ADVOCATING HERE, WE THINK THAT COURTS WOULD IMPLICITLY EXPECT, ALTHOUGH IT HASN'T BEEN EXPLICITLY REQUIRED, AND THAT IS --

YOUR ARGUMENT IS THAT THERE SHOULD BE A CONSULTATION BETWEEN COUNSEL AND THE CLIENT, BEFORE THE CLIENT, THE LAWYER FILES AN ANDERS BRIEF.

ABSOLUTELY. WE THINK THAT --

WAS THAT ARGUMENT MADE TO THE COURT OF APPEAL?

NOT PRECISELY, BUT WE THINK IT IS FAIRLY CONTAINED AND THERE WAS A SUFFICIENT OBJECTION TO THE PROCEDURE AS IT EXISTS.

THERE WAS AN OBJECTION BECAUSE YOUR CLIENT BELIEVED THAT THE PROCEDURE SHOULDN'T BE UTILIZED AT ALL, CORRECT?

THAT'S RIGHT. HE SAID THAT THE PROCEDURE AS IT EXISTED, SHOULD NOT BE UTILIZED, AND WE ARE SAYING HERE IS HOW THE COURT COULD MAKE IT BETTER AND MAKE IT ACCEPTABLE AND PROTECT HIS RIGHT TO COUNSEL AND PROTECT THE NOTION OF THE MEANINGFULNESS OF AN ATTORNEY CLIENT RELATIONSHIP AT THE APPELLATE LEVEL.

WASN'T YOUR CLIENT'S ARGUMENT THAT HIS LAWYER SHOULD NOT BE ALLOWED TO WITHDRAW,

PERIOD THAT, THERE IS NOT A MODIFIED ANDERS OR ANYTHING LIKE THAT, HIS LAWYER SHOULD NOT BE ALLOWED TO WITHDRAW.

CORRECT.

AND NOW WE SHOULD ADD ON THIS SUPPLY OF A CONSULTATION.

I UNDERSTAND YOUR HONOR'S ARGUMENT, BUT TO IMPOSE UPON THE PRO SE APPELLATE WITH AN EIGHTH GRADE EDUCATION AND INCARCERATED SINCE HE WAS 18 YEARS OLD AND HE IS NOW 23, AS TO WHY I THINK A CONSULTATION REQUIREMENT IS APPROPRIATE, I WOULD LIKE TO ARGUE THAT.

BEFORE YOU MOVE TO IT, MY CONCERN IS THAT WE HAVE, THERE HAS BEEN CRITICISM OF THE ANDERS PROCEDURES, I BELIEVE THAT A COMMITTEE OF THIS COURT MAY BE LOOKING AT IT NOW, AND WHAT YOU ARE ASKING FOR, AS YOU POINTED OUT IN RESPONSE TO A QUESTION FROM JUSTICE LEWIS, IS TO APPLY ACROSS THE BOARD, AND WE DO NOT HAVE, AT THIS TIME WE DON'T HAVE THE PUBLIC DEFENDERS ASSOCIATION. THERE ARE POTENTIALLY BROAD RAMIFICATIONS TO IT, AND IT DOESN'T SEEM THAT THE APPROPRIATE TIME TO LOOK AT IT WOULD BE IN THE CONTEXT OF A, WHERE WE ARE BEING ASKED A SPECIFIC QUESTION THAT NO ONE DISAGREES, AT LEAST THE TWO SIDES HERE THAT, IN LIGHT OF PULLEN, THAT THIS COURT WOULD HAVE TO EXTEND THE ANDERS PROCEDURES TO JIMMY RYCE, SO I GUESS, AND YOU ARE CERTAINLY FREE TO MAKE THIS ARGUMENT, BUT IT JUST DOESN'T SEEM THAT THIS IS THE APPROPRIATE TIME OR FORUM TO, FOR THIS COURT TO DECIDE ON MODIFICATION OF THE ANDERS PROCEDURES.

I THINK, PERHAPS, THE MEMBERS OF THE COURT HAVE OVERSTATED THE LEVEL OF AGREEMENT THAT WE HAVE WITH THE STATE. WE DO NOT BELIEVE THAT ANDERS AS IS PRESENTLY APPLIED IN PULLEN AND PRIOR TO PULLEN, IS SUFFICIENT TO PROTECT "JIMMY RYCE" ACT DEFENDANTS' STATUTORY AND CONSTITUTIONAL RIGHT TO COUNSEL. IF A TRIAL LAWYER APPOINTING APPELLATE --

LET ME GO BACK TO THAT. THE ISSUE BEFORE THE FIFTH DISTRICT WAS WHETHER ANDERS WAS GOING TO BE EXTENDED, WHICH AN ANDERS, WHETHER WE THINK IT DOES OR IT DOESN'T, IS SUPPOSED TO BE A MEASURE OF PROTECTION FOR A PRO SE DEFENDANT, AND IN NSH, WE SAID, NO, SIR, WE ARE NOT GOING TO EXTEND IT, SO BY IMPLICATION WE ARE TALKING ABOUT EITHER HAVING NO PROCEDURE WHERE THERE JUST CAN BE A WITHDRAWAL WITHOUT A, WITHOUT THIS RECORD REVIEW BY THE APPELLATE COURT AND THE STATEMENT, OR WE ARE GOING TO GO AND AT LEAST GIVE THE JIMMY RYCE DEFENDANTS WHAT THE CRIMINAL DEFENSE HAVE, SO YOU ARE SAYING, WELL, WE DON'T, YEAH, WE WANT ANDERS PLUS, AND THAT IS WHERE THE PROBLEM IS, IS THE WAY THE CONTROVERSY WAS FRAMED BELOW, IT WAS, YOU ARE GOING TO GET ANDERS OR NOTHING.

JUSTICE PARIENTE, THERE IS NO ARTICULABLE DIFFERENCE FROM THE STATUS OF DEFINEMENT FROM A JIMMY RYCE DEFENDANT AND A CRIMINAL DEFENDANT, SO WE CAN'T THINK OF ANY BASIS TO MAKE THIS DEFINEMENT BETWEEN A JIMMY RYCE DEFENDANT AND A CRIMINAL DEFENDANT, AND I WOULD POINT OUT THAT THE PUBLIC DEFENDERS OFFICES AROUND THE STATE WHO HAVE NOT BEEN HEARD IN THIS CASE, SHOULDN'T PRECLUDE THE COURT FROM RULING. THE INITIAL BRIEF IN THE CASE AND THE OTHER TWO BRIEFS WERE PROVIDED TO THE STATEWIDE PUBLIC DEFENDERS OFFICE AND TO THE PUBLIC DEFENDERS OFFICE IN THE FIFTH DISTRICT, SO THEY HAD THE OPPORTUNITY TO BE MADE AWARE OF THIS CASE AND TO BE HEARD IF THEY SO WISHED. ALSO THE COURT COULD HAVE INVITED THEM TO PARTICIPATE, SO I DON'T THINK IT IS FAIR TO ANTHONY WILLIAMS, WHO IS FACING AN INDETERMINATE LENGTH OF CUSTODY, POSSIBLY, EVERYONE AGREES POSSIBLY A LIFETIME OF CUSTODY, TO NOT RULE ON THE ISSUE THAT HE HAS FAIRLY PRESENTED HERE, BECAUSE ANOTHER ORGANIZATION HAS ELECTED NOT TO PARTICIPATE. AND AS I WAS GOING TO SAY, IF A TRIAL JUDGE IN THE PROCESS

OF APPOINTING AN APPELLATE LAWYER FOR AN INDIGENT WHO HAS A STATUTORY AND CONSTITUTIONAL RIGHT TO SUCH A LAWYER, HAD TO SAY, MR. DEFENDANT, I AM GOING TO APPOINT YOU A LAWYER FROM YOUR APPEAL, HOWEVER, THAT LAWYER IS NOT HERE SO YOU CAN'T MEET HIM OR HER NOW AND YOU PROBABLY WON'T BE TALKING TO THAT LAWYER, YOU WILL NOT MEET THAT LAWYER FACE TO FACE, YOU MAY NOT HAVE ANY FURTHER CORRESPONDENCE FROM THAT LAWYER, EXCEPT A LETTER GIVING YOU HIS OR HER ADDRESS, UNTIL HE OR SHE DECIDES THEY ARE MOVING TO WITHDRAW FROM YOUR CASE. I DON'T THINK THAT TRIAL JUDGE WOULD BE COMFORTABLE AND I DON'T THINK THIS COURT SHOULD BE COMFORTABLE WITH THE NOTION THAT THAT IS A MEANINGFUL ATTORNEY APPELLATE CLIENT RELATIONSHIP. EVERYONE ASSUMES WHEN THEY HAVE A LAWYER, THAT THEY WILL HAVE AT THE MINIMUM, A CONVERSATION WITH THAT LAWYER.

SO, REALLY, THE WAY, BECAUSE I WOULD THINK THAT IN MANY CASES THAT THERE IS THIS CONSULTATION, REALLY, IF THIS WAS RAISED PROPERLY BELOW, THE ISSUE SHOULD HAVE BEEN THAT HE COULDN'T, THE LAWYER COULD NOT WITHDRAW UNTIL THERE WAS A CONSULTATION WITH HIS CLIENT, TO EXPLAIN YOU KNOW, WHAT HIS REVIEW OF THE RECORD OR HER REVIEW OF THE RECORD HAS SHOWN. IS IT THAT YOUR, IS THAT HOW IT WOULD WORK THAT, IF THEY OPPOSE A MOTION TO WITHDRAW BASED ON THE FACT THAT THERE HASN'T BEEN THIS CONSULTATION, THAT THERE WOULD HAVE TO BE THE CONSULTATION?

OUR PROPOSAL IS THAT, IN THE STANDARD ANDERS PROCEDURE, A LAWYER, PRIOR TO FILING A MOTION TO WITHDRAW, WOULD HAVE TO CERTIFY THAT, IN ADDITION TO MAKING A CON SHE THINKS US REVIEW OF THE RECORD, THAT HE OR SHE HAS HAD A CONSULTATION WITH HIS CLIENT, TO, BOTH EXPLAIN THE LAWYER'S PERSPECTIVE ON THE LEGAL ISSUES THAT MAY OR MAY NOT EXIST, AND, ALSO, TO HEAR THE THOUGHTS AND THE IDEAS OF THE DEFENDANT.

SO YOU WOULD REQUIRE A PERSON TO PERSON MEETING?

THE A LEAST VOCE Y VOCE, A TELEPHONE CALL AT THE LEAST. WE ARE NOT REQUIRING A FACE TO FACE MEETING BECAUSE WE REALIZE THE LOGISTICAL PROBLEMS THAT SUCH A MEETING MIGHT CAUSE, BUT TO ARRANGE SUCH A MEETING OVER THE PHONE IS THE MOST MINIMAL BURDEN FOR AN ATTORNEY, EVEN TO PAY FOR A COLLECT CALL, WHEN A PERSON'S POSSIBILITY OF A LIFETIME AT CUSTODY IS AT STAKE. IT IS NOT TOO MUCH TO ASK.

AS A CRIMINAL DEFENSE LAWYER, I HAVE ACTUALLY THOUGHT THAT THE ANDERS PROCEDURES IN OTHER WAYS, REALLY, POSES TOO MUCH OF A BURDEN ON THE APPELLATE COURT THAT, WHEN A LAWYER IN GOOD FAITH HAS LOOKED AT THE RECORD, TALKED TO HIS OR HER CLIENT AND CERTIFIES THAT THERE ARE NO ISSUES THAT COULD BE RAISED ON APPEAL, THAT WE OUGHT TO THINK ABOUT ACCEPTING THOSE REPRESENTATIONS. HAVE YOU GIVEN ANY THOUGHT TO WHETHER THAT ANDERS PROCEDURE, IN OTHER WORDS, YOU ARE LOOKING AT THE FRONT END, WHICH IS MORE SHOULD BE DONE BETWEEN THE LAWYER AND THE CLIENT, BUT WHAT ABOUT, WHAT IS YOUR VIEW ABOUT HOW THE ANDERS PROCEDURE IS A PRACTICAL MATTER, AS FAR AS IF YOU ASSUME PROFESSIONAL LAWYERS WHO HAVE THEIR CLIENT'S BEST INTEREST, WHY DOES THE COURT NEED TO ENGAGE IN A RECORD REVIEW IN ADDITION TO THE LAWYER, WHEN NO SUCH REQUIREMENT IS IMPOSED, IF IT IS A, YOU KNOW, IN OTHER SITUATIONS?

SITUATIONS? AND I KNOW I MAY BE PUTTING YOU ON THE SPOT.

NOT AT ALL. UNDERSTAND THAT THAT IS ONE OF THE CRITICISMS OF THE PROCEDURE AND THAT SOME MEMBERS OF THE COURT OBJECTED ON THAT BASIS, BUT THAT THE LAWYERS MIGHT PREPREFER TO RELY ON THE CERTIFICATION OF COUNSEL AS BEING SUFFICIENT TO FOREGO ANY JUDICIAL REVIEW OF THE RECORD, I THINK IT IS IMPORTANT THAT THAT CERTIFICATION INCLUDE THE FACT THAT THERE HAD BEEN SOME COMMUNICATION WITH THE CLIENT. IN ADDITION, I BELIEVE THAT THE SUPREME COURT, ALTHOUGH THE SUPREME COURT HAS INVITED THE STATES

TO EXPLORE SOLUTIONS, TO THE PROBLEM THAT IS PRESENTED IN AN ANDERS SITUATION, AND HAS INVITED THE STATES TO CREATE OTHER SOLUTIONS OTHER THAN THE SPECIFIC PROCEDURES IN THE ANDERS CASE, THE SUPREME COURT SEEMS TO REQUIRE MULTIPLE, AT LEAST TWO LEVELS OF REVIEW OF THE RECORD.

ASSUMING WE HAVE AGREED THAT THERE SHOULD BE SOME KIND OF CONSULTATION BEFORE THERE IS AN ANDERS BRIEF FILED OR CERTIFICATION MADE THAT THERE ARE NO, JUST SIMPLE ISSUES, DO WE HAVE IN THIS RECORD, OR IS THERE A SUFFICIENT RECORD HERE, TO DETERMINE WHETHER OR NOT MR. WILLIAMS EVER HAD ANY CONSULTATION WITH HIS ATTORNEY?

NO, OTHER THAN MY REPRESENTATION IN THE INITIAL BRIEF, BASED UPON MR. WILLIAMS' STATEMENTS TO ME, BUT THERE IS NO STATEMENT FROM MR. WILLIAMS IN THE RECORD, ABOUT THAT. THERE IS NOTHING CONTRADICTING THAT AS WELL. CERTAINLY WHAT HAS HAPPENED IN SOME OF THE FEDERAL HABEAS CASES WHERE THIS QUESTION HAS COME UP, IS THAT THE COURT HAS REMANDED FOR AN EVIDENTIARY HEARING ON THE QUESTION OF WHETHER THERE HAD BEEN ANY COMMUNICATION.

LET ME PROBE THAT A LITTLE BIT. ARE YOU BASING THIS REQUIREMENT AS CONSTITUTIONALLY BASED OR STATUTORY BASEED?

YOU KNOW, THE RULES OF PROFESSIONAL CONDUCT CAN BE THE STARTING POINT, BUT IT IS IMPOSSIBLE TO SEPARATE THEM ULTIMATELY, FROM THE DUE PROCESS RIGHT THAT JIMMY RYCE DEFENDANT HAS, TO COUNSEL, SO I THINK THAT THE DECISION COULD BE MADE, BASED ON STATE LAW, AS A MATTER OF PROFESSIONAL ETHICS AND STATUTORY REQUIREMENT, BUT I DON'T THINK THAT THE REQUIREMENT WOULD BE ANY DIFFERENT, UNDER THE CONSTITUTION.

WELL, THE HARM WOULD BE DIFFERENT. IT WOULD BE FUNDAMENTAL ERROR OR HARMLESS ERROR, IF THE CONSULTATION DIDN'T TAKE PLACE. I WAS THINKING WHAT IF THE DEFENDANT REFUSES TO MEET WITH COUNSEL, WHICH OFTEN HAPPENS?

WELL, YOU KNOW, I THINK THAT THOSE KINDS OF CIRCUMSTANCES --

YOU HAVE TO HAVE A HEARING ON THAT, RIGHT?

I AM NOT SURE THAT YOU WOULD HAVE TO HAVE A HEARING ON THAT. I THINK A CERTIFICATION THAT HE HAD MADE GOOD-FAITH EFFORTS TO COMMUNICATE WITH COUNSEL AND HAD BEEN REFUSED, MAY BE SOME SORT OF AN EXCEPTION TO THIS.

BUT IT RAISES THE QUESTION WHETHER OR NOT A HEARING, IF THAT BECOMES A DISPUTED ISSUE, THEN YOU HAVE TO HAVE A HEARING TO RESOLVE THE DISPUTED ISSUE, RIGHT?

IT SHOULDN'T AND DISPUTED ISSUE, IF COUNSEL IS REPORTING ACCURATELY AND IN GOOD FAITH, THE COMMUNICATIONS THAT HE HAS HAD, BUT THAT IS CERTAINLY NOT THE QUESTION HERE. THERE IS NO DISPUTE THAT HAS BEEN MADE KNOWN TO ME OR IN THE RECORD, ABOUT THE REPRESENTATION THAT WE MADE THAT THERE SIMPLY WAS NO COMMUNICATION AT ALL.

YOU ARE IN YOUR REBUTTAL TIME.

YES. I THINK I WILL RESERVE MY TIME FOR REBUTTAL.

CHIEF JUSTICE: MR. DUFFY.

MAY IT PLEASE THE COURT. COUNSEL. MY NAME IS TOM DUFFY. I AM HERE ON BEHALF THE STATE TODAY. THERE IS, IN OUR MIND, ASSUMING YOU CAN REACH THE QUESTION, AND I AM NOT SURE JUSTICE CANTERO AND JUSTICE PARIENTE, YOU RAISED QUESTIONS ABOUT WHETHER THIS

MATTER IS VALIDLY HERE. WE DIDN'T DISPUTE IT IN THE BRIEF, BUT WE ARE NOT CERTAIN, EITHER. THE RECORD BELOW, DOESN'T REALLY, ISN'T REALLY WELL ENOUGH MADE, TO MAKE A DETERMINATION AS TO WHAT HAPPENED HERE, LET ALONE WHETHER ANYONE'S RIGHTS WERE VIOLATED.

CAN WE, JUST FOR THE PURPOSES OF THE ARGUMENT, LET'S GO WITH THOSE ASSUMPTIONS, UNLESS YOU WANT TO CONTROVERT THOSE, WE ALL SEEM TO BE OPERATING ON THE SAME BASIS.

NO.

CAN YOU SHARE WITH ME ANY OTHER AREAS OF THE LAW IN WHICH WE SANCTION, PERMIT, ENCOURAGE, ALLOW, WHATEVER WORD YOU WOULD LIKE TO USE, LAWYERS WHO ARE REPRESENTING AN INDIVIDUAL PERSON, TO NOT SPEAK WITH THEM BEFORE THEY REPRESENT THEIR RIGHTS?

NO. WE HAVE HEARD ABOUT TERRORISM SUSPECTS BEING DENIED THAT, AND THAT IS, THE REASON THAT IS NEWS IS BECAUSE THAT IS UNLIKE EVERY OTHER PROCEDURE IN THIS COUNTRY. NO. LAWYERS HAVE --

SO IT IS NOT THE COMMUNICATION ASPECT. IT IS THE FULL GAMUT OF PROBLEMS THAT ARISE FROM SOME KIND OF MAKING IT WORK. IS THAT REALLY WHAT THE STATE'S PROBLEM WOULD BE WITH THIS?

YES. OUR PROBLEM WITH IT, THERE ARE THREE PROBLEMS, ONE, NO AUTHORITY FOR IT. THERE IS NO NEED FOR IT.

LET'S STOP THERE FOR A MOMENT. NO AUTHORITY FOR IT. I JUST ASKED THAT QUESTION, DO WE KNOW ANY OTHER AREA OF THE LAW WHERE A LAWYER WALKS INTO A COURTROOM OR DEALS WITH A COURT, REPRESENTING AN INDIVIDUAL PERSON, WHERE WE DO NOT EXPECT THAT PERSON WHO HAVE AT LEAST COMMUNICATED WITH THE PERSON?

NO, AND THE RULES OF PROFESSIONAL RESPONSIBILITY ENFORCE ON ALL LAWYERS, AN OBLIGATION TO COMMUNICATE WITH THEIR CLIENTS.

LET'S START THERE AND SEE WHERE OUR PROBLEMS ARE. THEY MAY BE INSURMOUNTABLE. THEY MAY NOT BE. MAYBE THIS IS THE WRONG APPROACH BUT AT LEAST WE CAN EXPLORE THOSE. WHAT IS THE STATE'S PROBLEM WITH HAVING LAWYERS COMMUNICATE WITH INDIVIDUALS?

ABSOLUTELY NO PROBLEM WHATSOEVER.

WHAT IS THE PROBLEM WITH HAVING LAWYERS CERTIFY THAT THEY HAVE COMMUNICATED WITH INDIVIDUALS, BEFORE THEY TAKE ACTION WITH A COURT?

LET'S EXPLORE THAT. THERE MUST BE SOMETHING.

THERE IS NO PROBLEM WITH THAT, AND THANK IS IMPLICIT IN THE ANDERS CONSCIENTIOUS REVIEW STANDARD, THAT THAT IS IMPLICIT IN IT, THAT ALONG WITH THE RULES OF PROFESSIONAL RESPONSIBILITY, THAT OBLIGATION TO KEEP THE CLIENT ABREAST OF THE DEVELOPMENTS AND TO EXPLAIN MATTERS TO THE CLIENT.

WELL, IF IT IS IMPLICIT IN IT AND IT IS PART OF OUR RULES OF WHO WE ARE, AND WHAT WE ARE SUPPOSED TO DO, WHY ARE WE AFRAID TO SAY IT?

WE ARE NOT AFRAID TO SAY IT. WE JUST DON'T THINK THERE IS A CONSTITUTIONAL RIGHT TO A

PHONE CALL, SAYING I AM NOT GOING TO FILE ANYTHING ON YOUR BEHALF. I SEE NO MERIT.

THAT MAY WELL BE AND THERE ARE A LOT OF CASES THAT PROBABLY INDICATE. THAT NOTWITHSTANDING THAT CONSTITUTIONAL BASIS, IF IT IS IMPLICIT, IT IS IN OUR RULES, IT IS EVERYTHING THAT IS THE HEART AND SOLE OF BEING A LAWYER IN THE STATE OF FLORIDA, WHY ARE WE AFRAID TO SAY IT?

THERE ARE, AS JUSTICE BELL ALLUDED, THERE ARE SOME PRACTICAL PROBLEMS WITH THAT. THERE IS, FIRST OF ALL, THERE IS NO EVIDENCE HERE THAT THE CURRENT ANDERS SYSTEM, CREAKY AS IT IS, DOESN'T WORK IN THE WAY IT IS INTENDED TO WORK. I UNDERSTAND THE PROBLEMS WITH THERE BEING A KIND OF PARADOX, WHERE THE LEAST MERITORIOUS CASES GET A HIGH LEVEL OF APPELLATE COURT SCRUTINY, BUT THERE IS NO EVIDENCE THAT THAT SYSTEM IS NOT WORKING IN AT LEAST AT GENERAL WAY. IF ONE ASSUMES THAT COUNSEL ARE ALWAYS PERFORMING ETHICALLY AND ALWAYS PERFORMING TO THE LEVEL REQUIRED OF PROPER REPRESENTATION, IF YOU APPLY THIS RETROSPECTIVELY, WE HAVE AN AMAZING FLOOD GATE OF LITIGATION AND DIFFICULT PROOF PROBLEMS, BECAUSE HOW ARE WE GOING TO PROVE THIS? PRESUMABLY, MAYBE NOT THE FACT OF THE COMMUNICATION, BUT CERTAINLY THE SUBSTANCE OF THE COMMUNICATION, WHICH IS WHAT IS GOING TO COME UP, IS PRIVILEGED, SO YOU HAVE A PRIVILEGE WAIVER PROBLEM POTENTIALLY ON THE PART OF THE DEFENDANT, WHO MIGHT NOT BE INCLINED TO WAIVE IT.

BUT ON THE OTHER HAND, WHEN CLIENTS AND DEFENDANTS QUESTION THE COMPETENCY OF THEIR COUNSEL, THEY ARE WAIVING IT. IF A DEFENDANT CAME FORWARD AND SAID, LOOK, HE MADE THE CERTIFICATION, BUT HE NEVER REALLY EXPLAINED TO ME XYZ, ISN'T HE, BY DOING THAT, WAIVING THAT ATTORNEY/CLIENT PRIVILEGE?

THAT WOULD BE A GOOD ARGUMENT, CERTAINLY, THAT WOULD BE RAISED AT THE TIME. I AM NOT CERTAIN IT IS ABSOLUTELY CRYSTAL CLEAR, BUT, YES, I UNDERSTAND THAT POINT.

NOT ONLY THAT, IS THE FACT OF THE COMMUNICATION WITH COUNSEL, ITSELF, PRIVILEGED, OR IS IT SIMPLY THE COMMUNICATIONS ENGAGED IN WHAT IS PRIVILEGED?

WELL, I MEAN, IF ALL YOU ARE GOING TO REQUIRE IS A CERTIFICATION THAT I TALKED TO MY CLIENT, AND THAT IS ENOUGH.

THERE IS NO PRIVILEGE INVOLVED IN THAT, IS THERE?

THERE IS NO PRIVILEGE INVOLVED IN THAT BUT ALSO THERE IS NO RIGHT INVOLVED IN IT. IN OTHER WORDS, IT WOULD BE DIFFICULT FOR THEM TO SAY, YOU WOULD GET INTO A NOTHING OTHER THAN YES OR NO, AND ONE OF THE PROBLEMS, OTHER PROBLEMS THAT WE HAVE WITH IT, IS WHERE DO YOU START DRAWING LINES, AS TO WHAT WAS SUFFICIENT COMMUNICATION, BECAUSE THAT IS GOING TO BE THE NEXT ARGUMENT. HE TALKED TO ME. HE DID ALL THE TALKING. HE DIDN'T LISTEN. WELL, HE LISTENED A LITTLE BIT. HE DIDN'T BELIEVE ME. THAT SORT OF THING. YOU WOULDN'T TAKE MY REPRESENTATIONS AS TO WHAT I WANTED TO ARGUE. NOW THERE, IS NO, IN THE APPELLATE ARENA, THERE IS NO OBLIGATION TO RAISE A NONMERITORIOUS ISSUE. AND WE SUPPLEMENTED THE RECORD WITH ROWE VERSUS FLORIDA'S ORTEGA, I AM SORRY WITH JONES VERSUS BARNES THAT, STANDS FOR THAT PROPOSITION.

IF WE ACCEPT, HOWEVER, THE LAWYER'S CERTIFICATION OF THAT CONSULTATION, AS PART OF THE PROCEDURE, ALL OF THOSE ISSUES WOULD GO AWAY, WOULD THEY NOT?

PROBABLY. YEAH. I WOULD HATE TO SAY ALL ISSUES WOULD GO AWAY.

WHAT I THINK I AM HEARING IS, IN YOUR CANDOR WITH THE COURT TODAY, IT SEEMS TO ME LIKE YOU ARE SAYING THAT THIS SOUNDS LIKE GOOD POLICY. OBVIOUSLY NOBODY IS IMPLICIT IN A

LAWYER'S REPRESENTATION THAT IT WOULD BE RATHER SHOCKING THAT A LAWYER WOULD REPRESENT A CLIENT AND NOT HAVE SOME CONSULTATION WITH THAT CLIENT, THAT IT IS THE, REALLY, THE ADMINISTRATIVE OR PROCEDURAL HANG-UPS THAT MAY OCCUR AS A CONSEQUENCE OF THAT REQUIREMENT, THAT THE STATE REALLY HAS A DIFFICULTY WITH. I AM ASKING YOU WHETHER, IF WE HAD, AS A, SIMPLY A CERTIFICATION BY COUNSEL, GOOD FAITH CERTIFICATION THAT THAT CONSULTATION HAD TAKEN PLACE, AS SUFFICIENT TO MEET THAT REQUIREMENT, WOULDN'T THAT PRETTY MUCH BE THE END OF THE MATTER?

WELL, NO. AND HERE IS THE {NUB} OF THE PROBLEM WITH IMPOSING YET ANOTHER OBLIGATION OR YET ANOTHER LEVEL.

WHY, YOU HAVE STARTED OUT WITH JUSTICE LEWIS, AND I THOUGHT YOU WERE BEING VERY CANDID --

YES.

-- IN SAYING THAT WE DON'T HAVE ANY PROBLEM WITH THAT AND WE RECOGNIZE IT IS IMPLICIT IN REPRESENTATION OF A CLIENT, YOU KNOW, AND NOW I SEE YOU CHANGING COURSE HERE, IF IT IS IMPLICIT IN REPRESENTATION. CERTAINLY YOU WOULD NOT WANT TO BE REPRESENTED BY A LAWYER THAT NEVER TALKED TO YOU. IT IS VERY DIFFICULT TO IMAGINE THAT THERE COULD BE REPRESENTATION BY A LAWYER THAT DIDN'T HAVE CONTACT WITH THE CLIENT. DO YOU AGREE WITH THAT?

YES. CERTAINLY. BUT CONTACT, DOES CONTACT WITH THE CLIENT IN THE APPELLATE CONTEXT, MEAN ANYTHING MORE THAN A LETTER SAYING HELLO. MY NAME IS SO-AND-SO. I HAVE BEEN APPOINTED TO REPRESENT YOU. PLEASE FEEL FREE CONTACT ME. I AM GOING TO REVIEW --

ISN'T IT A FAR BETTER POLICY THAT THE CLIENT FIRST HEAR FROM THE PERSON THAT HAS THE OBLIGATION TO LOOK OUT FOR THEM, TO HEAR CANDIDLY FROM THAT PERSON, THAT THEY HAVE DONE EVERYTHING IN THEIR PROFESSIONAL ABILITY TO SCRUTINIZE THE RECORD AND EXAMINE THIS, REALIZING THAT HANGING IN THE BALANCE IS A POSSIBLE LIFETIME COMMITMENT HERE.

YES.

AND ISN'T IT FAR BETTER THAT THEY HEAR THAT FROM THAT PERSON THAT IS CHARGED TO REPRESENT THEM AND DO THEIR VERY BEST, THAT, YOU KNOW, YOU ARE ENTITLED TO A LAWYER. I AM THAT LAWYER. I, THIS IS WHAT I DO, AND I HAVE DONE IT, BUT SOMETIMES I HAVE TO TELL MY CLIENTS THAT THEY HAVE NO ISSUE THERE, AND THAT I ACTUALLY WOULD BE EMBARRASSED TO GO BEFORE AN APPELLATE COURT AND TRY TO ARGUE SOMETHING THAT IS NOT THERE. AND PART OF MY PROFESSIONAL OBLIGATION IS THAT, WHEN I COME TO THAT CONCLUSION, IS TO TELL MY CLIENT THAT, AND WOULDN'T IT BE FAR BETTER POLICY FOR THE CLIENT TO FIRST HEAR THAT FROM THAT PERSON?

YES, IT WOULD, BUT I DON'T THINK IT RISES TO THE LEVEL OF A CONSTITUTIONAL VIOLATION.

JUSTICE WELLS.

I GUESS ONE ASPECT OF THIS, JUSTICE ANSTEAD SAYS WHY NOT. MY QUESTION WOULD BE, WHAT WOULD HAPPEN, WHAT IS GOING TO HAPPEN IN A SITUATION WHERE THE LAWYER SAYS HE DID MAKE THE CONTACT AND THE CLIENT OR THE PERSON, THE PRISONER, SAYS THERE WAS NO CONTACT? I GUESS WE WOULD HAVE TO HAVE A HEARING.

THAT IS WHAT JUSTICE BELL INDICATED, YES, AND I THINK THAT WOULD BE, THERE WOULD BE NO OTHER WAY TO RESOLVE IT.

WE ALSO HAVE A QUESTION AS TO WHAT, WHETHER NOT HAVING A CERTIFICATION IS A PRO SE, PER SE VIOLATION AND WHAT THE REMEDY IS FOR A PER SE VIOLATION, OR WHETHER IT, WE GET INTO THE MATTER OF PREJUDICE. I GUESS THOSE ARE OTHER MATTERS WE WOULD HAVE TO CONSIDER.

WELL, UNDER ROWE VERSUS FLORES ORTEGA, WHICH WE DECIDED IN THE SUPREME COURT OF THE UNITED STATES, DIDN'T EVEN FIND A PER SE RULE IN A CLIENT'S OR I AM SORRY, WHEN A LAWYER DID NOT FILE A NOTICE OF APPEAL UPON REQUEST BY THE CLIENT. THEY DIDN'T EVEN MAKE A PER SE RULE THERE. I DON'T THINK, FOR A, THAT THAT BEING THE CASE, THAT THERE IS A CONSTITUTIONAL PER SE RIGHT HERE, FOR THAT, ANY TIME A CLIENT, A LAWYER DID NOT CONTACT A CLIENT, AND SAY WHAT JUSTICE ANSTEAD SAID AND SAY IT PERSONALLY RATHER THAN IN A LETTER, WHICH IS MY UNDERSTANDING OF WHAT IS BEING ARGUED ON THE OTHER SIDE HERE, THAT IT IT BE SAID PERSONALLY, EITHER ON THE TELEPHONE OR FACE TO FACE. THE, WE DON'T THING THAT RISES TO A CONSTITUTIONAL LEVEL, AND WE ALSO THING THAT CHIEF JUSTICE

I THOUGHT THAT THE REAL REASON THAT THIS CONSULTATION WAS BEING SOUGHT AS A REQUIREMENT, IS NOT TO OBSERVE THE NICETIES OF A RELATIONSHIP BUT THAT, IF THE LAWYER IS NOT REPRESENTING THE DEFENDANT BELOW, THAT THERE ARE TIMES THE RECORD MAY BE, SOMETHING MAY BE MISSING FROM THE RECORD. THERE MAY BE A POINT THAT THE CLIENT THINKS SHOULD BE RAISED THAT MAYBE THE LAWYER HADN'T THOUGHT ABOUT, SO THAT IT WOULD MAKE THE DECISION TO FILE THE ANDERS BRIEF, IF YOU HAD THAT CONSULTATION, MAYBE AFTER LISTENING TO THE CLIENT, THEY WOULD SEE THERE IS AN AREA, SO THAT IS HOW I UNDERSTOOD THE REASON THAT WE, IF IT WERE TO BE DONE OR SHOULD BE DONE THAT, IS WHY, IS TO MAKE SURE THAT ALL OF THE ISSUES HAVE BEEN FULLY APPRECIATED AND YOU KNOW, DO YOU SEE THAT AS OPPOSED TO MAKING THE CLIENT FEEL A LITTLE BIT BETTER?

IN THE APPELLATE CONTEXT, IT IS WAY LESS SO THAN IT WOULD BE AT TRIAL. FOR TRIAL, CERTAINLY FACTS ARE GOING TO DRIVE THE LITIGATION. ON APPEAL, YOU ARE TALKING ABOUT LEGAL QUESTIONS, AND APPELLATE COUNSEL IS PRETTY MUCH BOUND BY THE RECORD BEFORE HIM. NOW, I THINK THAT ALL OF THAT COULD BE DONE THROUGH A LETTER, INTRODUCING THE LAWYER, SAYING IF YOU HAVE ANYTHING THAT YOU NEED TO RAISE, RAISE IT. TRIAL COUNSEL WOULD ACTUALLY BE A MUCH BETTER SOURCE THAN THE, YOU KNOW, THE DEFENDANT HIMSELF, WHO IS NOT A LAWYER, DOESN'T NECESSARILY KNOW WHAT LEGAL ISSUES ARE COMPETENT.

SPEAKING OF THAT ISSUE, WOULDN'T IT BE BEST, AS JUSTICE LEWIS AND I, I AGREE WITH THE COMMENT THAT EVERY ATTORNEY SHOULD TALK WITH THEIR CLIENT AS MATTER OF PROFESSIONAL RESPONSIBILITY, BUT SHOULDN'T THE CONSULTATION IN THE APPELLATE CASE WHERE THE APPELLATE ATTORNEY WAS NOT TRIAL COUNSEL, TO SPEAK TO BOTH TRIAL COUNSEL AND THE DEFENDANT?

THAT IS VERY GOOD POLICY, BUT IF YOU ARE NOT GOING TO HAVE A PER SE RULE FOR SOMETHING AS FUNDAMENTAL AS FILING A NOTICE OF APPEAL, AND PROTECTING FUNDAMENTAL APPELLATE RIGHTS, THEN A PER SE RULE MAKES NO SENSE IN THIS CONTEXT, WHEN WHAT WE ARE TALKING ABOUT HERE, IS A, ARE THE LEAST MERITORIOUS CASES. IN OTHER WORDS, WE ARE TAKING THIS ANDERS PARADOX, WHERE THE LEAST MERITORIOUS CASES GET THE HIGHEST LEVEL OF SCRUTINY. WE ARE NOW PUTTING YET ANOTHER REQUIREMENT INTO THAT, AND --

BUT WE ARE ALSO TALKING ABOUT THE FACT THAT THESE DEFENDANTS HAVE BEEN COMMITTED INDEFINITELY, OKAY, TO THE CUSTODY OF THE STATE, IN PRISON-LIKE CONDITIONS, AND SO WHAT WE ARE TALKING ABOUT, OTHER THAN TAKING LIFE OF A DEFENDANT, OF, IN A SENSE, TAKING A LIFE, BUT DOING IT IN A SLOWER WAY, ARE WE NOT? SO YOU HAVE THE PARADOX OF --

BUT THAT PARADOX APPLIES TO EVERY ANDERS CASE. I MEAN, IF IT IS THIRD-DEGREE BURGLARY OF A STRUCTURE, AND THE GUY GOT, YOU KNOW, TWO YEARS IN PRISON AND THREE YEARS' PROBATION.

THAT IS NOT WHAT WE ARE TALKING ABOUT TODAY.

NO.

WE ARE TALKING ABOUT PEOPLE WHO HAVE BEEN COMMITTED INDEFINITELY, POTENTIALLY FOR A LIFETIME, UNDER THE "RYCE" ACT, AND WHETHER OR NOT THE LAWYER SHOULD CONSULT WITH THEM.

THERE IS A HIGHER LIKELIHOOD OF THERE BEING A SERIOUS DEPRIVATION OF LIBERTY IN THE JIMMY RYCE CASE, THAN, PROBABLY, ANY OTHER QUALITY OF CASES, OTHER THAN, PROBABLY, DEATH PENALTY.

LET ME ASK YOU, SHOULD

CHIEF JUSTICE: YOU HAVE A QUESTION.

JUSTICE WELLS HAS OUTLINED THE CONCERNS OR PROBLEMS THAT MAY ARISE WITHIN THE JUDICIAL SYSTEM, ONCE WE START TALKING ABOUT THESE THINGS. WHAT ABOUT ARE THERE ANY PRACTICAL ACCESS TO PRISONER KIND OF ISSUES THAT, NEED TO BE ADDRESSED IN SOME WAY THAT, MAY IMPACT UPON THIS ISSUE THAT, SHOULD BE AT LEAST AIRED OR DISCUSSED?

WELL, MS.^POHL SAID THAT SHE THOUGHT A PHONE CALL WAS SUFFICIENT. THAT DOES GET AWAY FROM ONE OF THE MAJOR PROBLEMS, WHICH IS PUBLIC DEFENDER, TYPICALLY, HAVING TO TRAVEL MANY MILES FOR, YOU KNOW, WHAT MAY BE AN UNPRODUCTIVE MEETING. COULD BE DONE MUCH BETTER OR CERTAINLY MORE EXPEDITIOUSLY OVER THE PHONE. ONE OF THE PROBLEMS --

IS TELEPHONE ACCESS READILY AVAILABLE? IS THAT A SOLUTION?

I AM ASSUMING THAT IT IS. I AM ASSUMING THAT IT S I CAN'T IMAGINE THAT YOU COULD NOT LET SOMEONE WHO IS IMPRISONED, TALK TO HIS LAWYER. THAT DOESN'T MAKE ANY SENSE.

AS A PRACTICAL MATTER, ARE YOU AWARE OF WHETHER THESE ANDERS PROCEDURES HAVE BEEN SOUGHT IN ANY OF THE, IS THIS THE FIRST JIMMY RYCE CASE WHERE SOMEONE SOUGHT TO WITHDRAW? DOES THE ATTORNEY GENERAL HAVE THAT INFORMATION?

I DON'T HAVE ANY LARGE INFORMATION. THERE WAS A CASE THAT WAS ASSIGNED TO ME THAT GOT OVER BEFORE I EVER SAW IT, OUT OF THE FIRST DCA, WHERE THEY HELD THAT ANDERS DIDN'T APPLY.

DID NOT APPLY.

THAT IS WHAT THEY HELD. BECAUSE IT WASN'T CRIMINAL.

CHIEF JUSTICE: IS THAT BEFORE PULLEN?

I HONESTLY DON'T RECALL, BECAUSE MY INVOLVEMENT WITH IT WAS VERY MINIMAL. I MEAN, I RECEIVED A FILE, AND A WEEK LATER I RECEIVED AN OPINION.

BUT YOU WOULD AGREE, AGAIN, I JUST WANT TO MAKE SURE ON THE CERTIFIED QUESTION THAT, IF WE HAVE HELD IN PULLEN THAT ANDERS, IN WHATEVER FORM IS APPLICABLE TO A "BAKER" ACT, THAT THERE IS NO QUESTION THAT IT WOULD HAVE TO BE APPLICABLE TO JIMMY RYCE.

I DON'T SEE HOW YOU COULD. I DON'T SEE HOW YOU COULD MAKE THAT. CHIEF JUSTICE

I STARTED THINKING THERE WAS AN AGREEMENT ON THAT POINT.

THERE DEFINITELY IS ON THE LARGER POINT.

LET ME ASK ONE QUESTION. DO YOU UNDERSTAND THE CERTIFICATION, THE MODIFICATION TO THE ANDERS PROCESS, TO APPLY TO, BOTH, NEW COUNSEL WHO IS NEVER, APPELLATE COUNSEL WHO HAS NEVER MET THE CLIENT, AND TO EXISTING COUNSEL?

THAT IS AN INTERESTING QUESTION, BECAUSE PRETTY CLEARLY, COUNSEL WHO HAS BEEN INVOLVED, WON'T REALLY NEED TO TALK TO HIM, EXCEPT FOR WHAT JUSTICE ANSTEAD MADE REFERENCE TO, AS A MATTER OF GOOD POLICY. I MEAN, BEFORE YOU SAY GOOD-BYE TO SOMEBODY, YOU OUGHT TO AT LEAST EXPLAIN YOURSELF, AND I THINK THAT IS BEING DONE. I THINK THAT IS WHAT PEOPLE DO. BEAR IN MIND THAT ANDERS DOES REQUIRE, DOES INVOLVE A PROTECTION AS WELL, BECAUSE IN ADDITION TO THE ADDITIONAL SCRUTINY, THE DEFENDANT, THE PERSON WHO IS, OR THE PERSON WHO IS UNDER STATE SUPERVISION, HAS A RIGHT TO FILE A PRO SE BRIEF, WHERE THEY CAN RAISE ANYTHING THEY WANT, WHEREAS, AND THAT IS ANOTHER PART OF THE ANDERS PARADOX, SOMEBODY, IF THEY CAN, IF YOU CAN FIND ONE JUSTICIABLE ISSUE, YOU CAN RAISE THAT AND THAT CUTS THAT OFF, AND I MEAN, THAT, ANDERS IS SATISFIED, IF YOU DO. THAT

CHIEF JUSTICE: WE HAVE HELD THAT THERE IS NO RIGHT IN THAT CIRCUMSTANCE, FOR THE DEFENDANT TO FILE A PRO SE BRIEF, ADDING ALL OF THE POINTS THAT HE OR SHE THINKS IS APPROPRIATE.

CORRECT.

CHIEF JUSTICE: AND THAT IS THE ANDERS PARADOX.

RIGHT. I, THE ONE THING I WANTED TO MENTION IS THAT WHAT THIS WOULD IMPOSE, IS ANOTHER BURDEN ON PUBLIC DEFENDERS, TO, AND I KNOW THEY ARE NOT HERE. I DON'T KNOW WHY. BUT TO GO OUT AND MAKE ADDITIONAL EFFORT ON THE PART OF NONMERITORIOUS, IN THEIR PROFESSIONAL JUDGMENT WHAT ARE NONMERITORIOUS ISSUES, TAKING TIME AWAY FROM THE MERITORIOUS ISSUES AND THE MERITORIOUS CLIENTS THAT THEY HAVE.

CHIEF JUSTICE: YOUR TIME IS UP.

OKAY. I GUESS WE ASK THAT YOU AFFIRM THE COURT BELOW AND THAT YOU DO NOT ADD A CONSULTATION REQUIREMENT.

CHIEF JUSTICE: THANK YOU VERY MUCH. MS.^POHL. HOW MANY MINUTES REMAINING?

IF I COULD JUST RESPOND TO A COUPLE OF THE PRACTICALITY TYPE OF ISSUES THAT HAVE COME UP DURING THE STATE'S ARGUMENT.

WHAT DO YOU SEE IS THE REMEDY, IF THERE IS A REQUIREMENT THAT THERE BE SOME TYPE OF CERTIFICATION THAT COUNSEL HAS HAD A COMMUNICATION WITH THE CLIENT. WHAT IS THE REMEDY, IF THAT DOES NOT OCCUR?

ARE YOU REFERRING TO THE REMEDY IN THIS CASE OR GENERALLY?

LET'S TALK IN THIS CASE FIRST.

IN THIS CASE, WE ARE ASKING THAT THE CASE BE REMAND, AND DIFFERENT APPELLATE COUNSEL BE APPOINTED, WHO CAN THEN CONSULT WITH MR. WILLIAMS AND DECIDE, BASED UPON THAT AND BASED UPON THE LAWYER'S CON SHE THINKS US REVIEW OF THE RECORD, CAN DECIDE WHAT TO DO.

IF YOU HAVE A LAWYER THAT SAYS I COMMUNICATED WITH THE CLIENT, AND THE PRISONER SAYS THERE WAS NO COMMUNICATION WITH ME, WHAT HAPPENS THEN?

WELL, THAT IS PRESUMING THAT THERE IS, IT IS BASED ON ONE PERSON'S WORD AGAINST THE OTHER. I AM SITTING HERE THINKING AS THE ARGUMENT IS GOING ON, THAT A LAWYER WHO DESIRES TELEPHONE CALL WITH AN INMATE, HAS TO SEND A FAX CONFIRMING THE TIME OF THE CALL. IT WOULDN'T BE SO DIFFICULT TO ASK THE FACILITY TO JUST CHECK OFF SOME STATEMENT ON THE BOTTOM OF THAT LETTER, THE TIME THAT THE CALL WAS INITIATED AND CONCLUDED, MAYBE, OR EVEN JUST INITIATED AND FAXED BACK TO THE LAWYER. THAT SHOWS THAT THE RECORD IS CREATED AND WOULD BE ATTACHED TO THE MOTION TO WITHDRAW, IF NECESSARY, BUT THOSE KINDS OF PROBLEMS ARE MINIMAL, JUXTAPOSED WITH THE IMPORTANT --

WOULD YOU THEN HAVE TO SAY WHAT TIME THE LAWYER CAME TO THE JAIL TO SEE THE PERSON AND WHAT TIME THE LAWYER LEFT THE FACILITY?

I DON'T KNOW THAT THE TIMES, THE TIME THEY SPEND NEEDS TO BE PUT THERE, BUT IT WOULD BE EASY ENOUGH SINCE YOU HAVE TO GO THROUGH ALL SORTS OF PROCEDURES TO GET INTO THE FACILITY, TO HAVE SOMEBODY INITIAL OR STAMP THAT YOU WERE THERE. THAT WOULD DO AWAY WITH ANY FACTUAL DISPUTE ABOUT WHETHER OR NOT THERE HAD BEEN A VISIT OR A TELEPHONE CALL.

WOULD YOU REQUIRE THE CERTIFICATION BOTH TO NEW APPELLATE COUNSEL AND, IF IT WAS TRIAL COUNSEL FOLLOWING THE ANDERS BRIEF, AND IF NOT, WHY NOT?

I THINK THE ONLY SENSIBLE THING TO DO IS TO HAVE THE SAME CERTIFICATION FOR ALL APPOINTED APPELLATE COUNSEL AND FROM A PRACTICAL MATTER THE STATE OF FLORIDA, I AM NOT SURE THAT ANY PUBLIC DEFENDERS OFFICES THAT ARE TRIAL LAWYERS, MAYBE, DO THEIR APPEALS, MAYBE THEY DO, BUT I THINK THAT THE CERTIFICATION SHOULD BE THE SAME.

IT SEEMS THAT WE HAVE ALL AGREED THAT THIS IS A REQUIREMENT OF THE RULES OF PROFESSIONAL RESPONSIBILITY, SO OUR ASSUMPTION IS THAT IT IS UNIFORMLY BEING DONE. OTHER THAN YOUR CONVERSATION WITH A CLIENT IN 24 CASE,-KNOW THIS CASE, DO YOU HAVE ANY INFORMATION THAT THERE IS MASSIVE DISREGARD FOR THE RULES OF PROFESSIONAL RESPONSIBILITY IN THIS REGARD?

I DON'T HAVE ANY INFORMATION, ANY FACTUAL INFORMATION.

OTHER THAN MAKING SURE THAT THE RULES OF PROFESSIONAL RESPONSIBILITY ARE BEING COMPLIED WITH, WHAT OTHER CONSTITUTIONAL VALUE WOULD BE SERVED BY A CERTIFICATION REQUIREMENT?

I THINK THE EFFECTIVE AND MEANINGFUL ASSISTANCE OF COUNSEL REQUIRES IT. I THINK DUE PROCESS.

BECAUSE OF WHAT? WHAT WILL HAPPEN WHEN THE ATTORNEY SAYS I HAVE NOW LOOKED AT THE RECORD. I FIND NO POINTS TO REVIEW. TO RAISE. NO, THERE ARE NO POINTS?

THAT HAD COULD STILL -- THAT COULD STILL HAPPEN, BUT I THINK YOU HAVE AFFORDED THE RESPECT TO THE PERSON WHOSE LIFE OR LIBERTY IS AT STAKE WHEN THEY ARE ENTITLED TO,

WHEN THE STATE SAYS WE WILL PROVIDE WITH YOU A LAWYER.

CHIEF JUSTICE: DON'T YOU SEE THE SAME PROBLEM, WHERE THERE IS A SENTENCING, A CASE, AND THE ONLY ISSUE RAISED IS A SENTENCING ISSUE? AND I SEE YOUR TIME IS UP, SO ISN'T THAT WHEN THERE IS ONE ISSUE RAISED OUT OF A TWO-WEEK TRIAL? ISN'T THAT THE SAME POTENTIAL FOR THERE NOT TO BE EFFECTIVE ASSISTANCE THERE?

I AM NOT SURE THAT I UNDERSTAND THE CASE.

CHIEF JUSTICE: WE DON'T REQUIRE ANY OF THIS, IF THE LAWYER RAISES ONE ISSUE, IT MIGHT BE A SENTENCING ISSUE AND THERE MIGHT COULD BE TEN GUILT ISSUES THAT COULD BE RAISED.

BECAUSE THERE THE LAWYER IS NOT ASKING TO BE RELIEVED OF HIS RESPONSIBILITY AND LEAVING THE CLIENT WHO MAY NOT BE ACADEMICALLY OR EDUCATIONALLY OR SOCIALLY ABLE TO FULLY AND PROPERLY REPRESENT THEMSELVES. WE ARE ASKING THEM TO DO. THAT

CHIEF JUSTICE: THANK YOU VERY MUCH AND THANK YOU, BOTH YOU MR. DUFFY AND MS.^POHL, FOR ANSWERING OUR QUESTIONS AND FOR YOUR CANDOR ONE ANN FOR A VERY INFORMATIVE -- CANDOR, AND FOR A VERY INFORMATIVE ORAL ARGUMENT. THANK YOU.