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John Richard Therrien v. State of Florida

I BELIEVE, WE WILL CALL THE LAST CASE FOR THIS MORNING. THE CASE IS THERRIEN VERSUS THE STATE OF FLORIDA

MR. PEPLER. MAY IT PLEASE THE COURT. MY NAME IS CHARLES PEPLER, AFTERNOON I REPRESENT JOHN RICH -- AND I REPRESENT JOHN RICHARD THERRIEN, THE PETITIONER IN THIS CASE, WHO WAS 16 YEARS OLD AT THE TIME THAT HE WAS CHARGED WITH SEXUAL BATTERY ON A CHILDLESS THAN 12 YEARS OLD AND LEWD AND LASCIVIOUS CONDUCT. WHEN HE ENTERED HIS PLEA TO A CHARGE OF ATTEMPTED SEXUAL BATTERY ON A CHILDLESS THAN TWELVE AND LEWD AND LASCIVIOUS CONDUCT, HE WAS 17 YEARS OLD, AND HE WAS PLACED ON PROBATION, 11 MONTHS 15 DAYS OF THAT PRISON SENTENCE OR JAIL SENTENCE WAS SUSPENDED, AND A PART OF THE PROBATION WAS THAT HE WOULD UNDERGO COUNSELING. MIDWAY THROUGH THAT PROBATION, THE LEGISLATURE CHANGED THE SEXUAL PREDATOR ACT AND ATTEMPTED THAT CAPITAL SEXUAL BATTERY AFTER PERSON LESS THAN 18 ON A VICTIM LESS THAN ELEVEN, QUALIFIED THAT PERSON FOR SEXUAL PREDATOR TREATMENT. AND YOUR HONORS, I BELIEVE THAT THAT IS A CONSTITUTIONAL DEPRIVATION AFTER LIBERTY INTEREST THAT HE HAD AT THAT POINT. HE COULD PURSUE A LIVELIHOOD IN WORKING WITH CHILDREN IF HE WANTED TO. HE HAD HIS GOOD NAME AT THAT POINT, WHICH WAS DEPRIVED FROM HIM BECAUSE OF THE CHANGE IN THE LAW, AND HE GAVE UP CERTAIN TORT REMEDIES.

YOUR ISSUE, YOU ARE ARGUING NOW IS RETROACTIVITY.

YES.

AND WAS THAT RAISED BELOW? IN THE COURT BELOW?

YES.

ARGUED TO THE TRIAL JUDGE?

YES, YOUR HONOR. IN MEMORANDA PRESENTED TO THE TRIAL JUDGE, WE DID -- IN MEMORANDA PRESENTED TO THE TRIAL JUDGE, WE DID ARGUE.

AND TO THE COURT?

AND TO THE COURT.

DID YOU ARGUE ON THE BASIS OF EX POST FACTO OR WHAT WAS PRESENTED BELOW ON THE ISSUE OF WHETHER THIS STATUTE THAT WAS PASSED AS HE WAS SERVING HIS SENTENCE, WAS APPLICABLE TO THIS DEFENDANT?

IN THE BEGINNING.

HOW WAS THAT PRESENTED?

IN THE BEGINNING, YOUR HONOR, I ARGUED SEVERAL ISSUES THAT I THINK WERE DECIDED. ONE WAS A SEPARATION OF POWERS ISSUE. I DECIDED TO RAISE IT BY THIS COURT AND I ALSO DECIDED TO RAISE THE RETROACTIVITY ISSUE AS I RECALL IN MY TWO SETS OF BRIEFS. THE FI

RST ISSUE WAS IN THE TWO SETS OF BRIEFS AFTER THE U.S. SUPREME COURT ENTE RED ITS DECISION INS DOUG H AND THE COMMITTEE -- DECISIONS IN DOE AND ITS COMMITTEE IN THE DECISIONS IN DOE AND AT THAT POINT I BASICALLY ARGUED THE PREJUDIC IAL DUE PROCESS ISSUE BECAUSE OF T HEFACT THAT THE LAW SEEM ED TO BE IF FA VOR O F MY -- I N FAVOR OF MY CLIENT A T THIS POINT.

THE ISSUE , AT LE AST AS JUDGE BENTON TALKS AB OUT T HEFACT THAT AS OPPOSED TO SOMEONE WHO ENTERS HIS OR HER PLEA AT THE TIME THAT THEY KNOW THAT THE SEXUAL PREDATOR ACT IS IN E FFECT , THAT YOUR ARGUMENT IS NOW NARROWED TO THE FACT THAT H E,AT THE TIME , ANSWERED HIS PLEA, DID NOT HAVE TH OSE EXPECTATIONS OF IMPAIRMENT .

EXACTLY. I MEAN, HE HAD NO INK LING WHATSOEVER WHEN HE ENTERED THE PLEA ON AUGUST 20 OF 1997.

DOES N'T THAT IMP LICATE THE EXPOS FACT-CLAUSE AND -- THE EXPOS THE FACT-ISSUE AND THE SUPREME COURT H ASDECIDED THAT ISSUE AG AINST YOU. THIS SUPREME COURT NOT THE US SUPREME COURT.

I DISA GREE , YOUR HONOR. AS FAR AS THIS COURT'S INTERPRETATION OF CONNECTICUT VE RSUS DOE AND DOE VERSUS SMIT H, THE COURT HELD SEVERAL MONTHS AGO IN MILK, THAT THIS COURT DOES NOT VIOLATE THE PRINCIPLES OF PROCE DURAL DUE PROC ESS.

THE COURT HASN'T HELD THAT IN THE EXPOS FACT-CLAUSE .

-- E X -6 - - EXPOSE THE FACT-.

AND I INTE NT TO ARGUE RETROACTIVITY, WHEN IT APPLIES TO RETROA CTIVITY STATUTES.

THAT IS WHAT I AM TRYING TO GET TO, IF IT IS NOT A N EXPOSE THE FACT-VIO LATION , IS THERE ANY CASE IN W HICH A COURT HAS HELD THAT THERE I S A NOT A VIO LATION OF THE ESPOST FACTO CL AUSE .

YES, YOUR HONOR. THE METRO-DADE COUNTY SAVINGS AND LOAN CASE .

THAT WAS CIVIL.

AND AS FAR AS THE FEDERAL. EXCUSE ME. AS FAR AS THE FLORIDA SEXUAL PREDATOR ACT I S CONCERNED , THAT IS A CI VIL REGULATORY STATUTE BECAUSE THE COURTS HAVE HELD THAT IT DOESN'T INVOLVE COLL ATERAL PUNISHMENT AND IS CONTRIBUTE OTHER TO THE COL LATERAL FACTORS OF SENTEN CING.

YOU WOULD SAY BE FORE IT WHERE WE DID NOT AL LOW BEFORE IT THAT THE STATUTE DID NOT APPLY RETROACTIVELY, WHERE A N INSURANCE COMPANY WAS GOING TO BE LI ABLE FOR MORE DAMA GES , IF SOMEONE IS A CON VICTED F ELON AND THERE AFTER , THIS EVER ARE THE LEGISLATURE SAYS THEY CA N NO LONGER VO TE, AND NOW WE KNOW BEFORE IT, BUT LET JUST ASSUME THAT THEY PASS SOMETHING LIKE THAT , A N OTHER CIVIL RESTRICTION, W OULD THAT , IT BEING THE ANALOGY WHERE IT WOULDN'T AND EXPOSE FACTO DECISION , WOULD THAT NOT BE A CASE WHE RE THEY WOULD HAVE A RI GHT T O DECISION BECAUSE EVER YONE ARGUED THAT .

YES , YOUR HONO R.

THE LIB ERTY INTEREST IS THE FACT THAT YOU CAN'T HAVE CERTAIN JOBS, RIGHT?

THAT IS PA RT OF I T , ALSO , IT IS THE SAME.

BECAUSE OF THE FACT THAT THEY HAVE TO REGISTER AND INFORM THE STATE WHEN YOU MOVE, THAT IS NOT RESTRICTING YOUR LIBERTY BUT IS JUST A REQUIREMENT THAT, WHEREVER YOU MOVE YOU HAVE TO REGISTER. I AM NOT SURE THAT THAT IS REALLY A LIBERTY INTEREST. WE REALLY DIDN'T SAY IN STATE VERSUS ROBINSON THAT THAT WAS A LIBERTY INTEREST PER SE. WHAT WE SAID WAS THE FACT THAT YOU CAN'T WORK AT A PARTICULAR JOB IS WHAT AFFECTED THE LIBERTY INTEREST.

I HAVE NO DISAGREEMENT WITH THAT, YOUR HONOR.

NOW THAT WE HAVE REALLY NARROWED IT DOWN HERE, THE LIBERTY INTEREST IS WORKING INSERT JOBS, IS THERE ANY CLAIM IN THIS CASE THAT MR. THERRIEN WANTED TO WORK INSERT JOBS AND COULDN'T GET EMPLOYMENT?

WELL, CORNERS TO -- WELL, ACCORDING TO THE SEXUAL BATTERY ACT HE COULDN'T ATTEMPT THAT BECAUSE THE NEXT HE WOULD BE CHARGED WITH FELONY IN THE THIRD DEGREE.

SO HAS HE EVER WORKED IN A JOB LIKE THAT BEFORE CENTRAL.

IT IS NOT IN THE RECORD BUT I KNOW FROM PERSONAL CONTACT THAT HE HAS WORKED IN PIZZA PLACES AND OTHER PLACES WHERE CHILDREN WOULD CONGREGATE.

AND IS IT YOUR POSITION THAT HE CANNOT FIND EMPLOYMENT WHATSOEVER IN A JOB AT ALL?

NO. I AM NOT SAYING THAT HE CANNOT FIND EMPLOYMENT WHATSOEVER. HIS RIGHT TO PURSUE IT AS A CONSTITUTIONAL RIGHT, HAS BEEN TAKEN AWAY FROM HIM AS A DIRECT RESULT OF APPLICATION OF LAW.

THIS ISN'T THE CASE WHERE HE WAS AN ATTORNEY AND NOW THE LAW SAYS YOU CANNOT PRACTICE LAW ANYMORE AND HE SAYS I PRACTICED LAW ALL MY LIFE. NOW I CAN'T HE GAUGE IN MY CHOICE HE PROFESSION. I HAVE TO DO SOMETHING ELSE -- TO CHOOSE MY PROFESSION. I HAVE TO DO SOMETHING ELSE. THIS ISN'T A CASE WHERE THERE IS A CHOICE HE PROFESSION, IS IT?

I THINK YOU ARE CORRECT, YOUR HONOR, BUT HAVING TO DO WITH RETROACTIVITY, WHERE IT APPLIES RETROACTIVELY, I THINK THIS COURT HAS SAID YOU HAVE TO LOOK AT WHAT THE LEGISLATURE INTENDED.

THAT IS PRETTY CLEAR HERE. AREN'T WE PASSING THAT IN THIS CASE? THE LEGISLATURE SAYS IT CLEARLY APPLIES TO CASES.

THE SECOND, YOUR HONOR, THING THAT THE COURT HAS TO ADDRESS IS THE CONSTITUTIONAL PERMISSION TO DO SO AND THIS IS A NEW LAW, MR. THERRIEN ATTACHES NEW LEGAL CONSEQUENCES, BASED ON THE FACT WHICH OCCURRED BACK IN NOVEMBER AND AUGUST 20 --

BUT YOU WOULD HAVE IT NOT CONSTITUTIONALLY PERMISSIBLE TO SHOW IT RETROACTIVELY. YOU HAVE GOT TO SHOW MORE THAN THAT, DON'T YOU?

ONE OF THE THINGS THAT WE HAVE SHOWN IN STATE VERSUS -- ONE OF THE THINGS THAT IS WE HAVE SHOWN IN STATE VERSUS ROBINSON, IS THAT HE DOES HAVE A REASON TO ASSUME A LIVELIHOOD.

THE CONSTITUTION SPEAKS IN TERMS OF AFFECTED RIGHTS, AND I AM NOT, WE HAVEN'T APPLIED IT IN CERTAIN CASES OR TALKED ABOUT IT, BUT IS A VESTED RIGHT EQUIVALENT TO A CONSTITUTIONAL INTEREST? IS THAT, WOULD YOU SAY, OR IS THERE SOMETHING ELSE THAT YOU FIND FOUND IN THE CASE LAW THAT FURTHER DEFINES WHAT A VESTED RIGHT IS THAT

YOU KNOW , THEN YOU HAVE IMPAIRMENT OF CONTRACTS AND YOU CAN'T RETROACT IVE LY IMPAIR A CONT RACT AS AFFECTED RIGHT, IF THAT CONTRACT EX ISTS, SO WHAT WOULD BE YOUR DEFINITION?

YOUR HONOR , I HAVE BEEN WITH THIS CASE AL MOST AS LONG AS MR . THERRIEN HAS BEEN CHARGED WITH THESE OFFENSES AND I HAVE YET TO FIND A CASE TO SAY THAT A LIBERTY INTEREST IS A VESTED RIGHT, BUT I THINK IF WE SET ASIDE THAT, WE ALSO HAVE A CASE HERE WHERE WE HAVE AN ADDED OBLIGATION OR A DDED DISABILITY TO MR . THERRIEN THAT HE DIDN'T HAVE WHEN HE PLEADED AUGUST 20 O F 1997. AND THAT ADDED DISA BILITY I S THE PROVISIONS WHICH ILL CALL ONE HUSR USS -- WHICH I WILL CALL ONEROUS OF THE SEXUAL PREDATOR ACT WHICH WAS IM POSED UPO N HIM WHEN HE ENTER THAT PLEA, AND EVE N I F WE LOOK AT THE ACT ITSE LF AND THE ACT SAYS IT SHOULD BE APPL IED TO OFFE NCES WHICH OCCURRED ON AUGUST 21 AND SUBSEQUENT OFFENSES , IF YOU LOOK AT THE PROV ISION OF 522 SUBPAREN ONE 1 SUBPERSON 5 , IS IF YOU LOOK A T THE CONFLICT WITH THE SENT ENCING HEARING , TO IMPOSE THE SEXUAL PRED ATOR PROVISION , BUT MY ARGU MENT IS THAT THAT PARTICULAR PROVISION WOULD NOT APPLY HERE , BECAUSE WE ARE TALKING ABOUT A CHANGE IN THE LAW AND NOT NEW INFORMATION OR NEW FACT WHICH WOULD CA USE HIM TO BE A SEXUAL PREDATOR.

DID SOMETHING HAPPEN IN THIS CASE, BECAUSE THIS DEFENDANT COMMITTED THIS RIME AND WAS ACTUALLY SENTENCED PRIOR TO THIS CHANGE IN THE STAT UTE. CORRECT?

CORR ECT.

AND SO WHEN WAS HE ACTUALLY DESIGNATED A SEXUAL PREDATOR, BECAUSE U SUALLY THIS HAPPENS AT THE TIM E OF SEPTEMBERING, THE TRIAL JUDGE SAYS I FIND HIM TO BE A SEXUAL PREDATOR AND THAT KIND OF THING, S O WHEN WAS YOUR CLIENT ACTUALLY DESIGNATED A SEXULE PREDATOR?

APPROXIM ATELY TH REE YEARS AFTER HE PLEA DED.

WHAT KIND OF SENTENCE WAS GOING?

A MOTION FILE D BY THE STATE ATTORNEYS OFFICE TO DESIGNATE HIM A SEXUAL PREDATOR BASED ON THIS N EWCHANGE IN LAW , EVEN THOUGH THEY WERE A BOUT TWO YEARSBEHIND THE FACT , THEY USED THAT AS THE MEANS TO O B TAIN A RULING IN THEIR FA VOR T HAT MR. THERRIEN WAS A SEXUAL PREDATOR.

WHERE WAS YOUR CLIENT ATTHAT POINT?

HE WAS SERVING HIS PROBATION, LIVING A NO RMAL LIFE.

HE HAD ALREADY STARTED SERVING HIS PROBATION.

ON AUGUST 25 , 1997, SO THE ARGUMENTS HAVE BEEN MADE AND IN MI LK AND IN DO LAN , THAT IF IT IS DETERM INED BY THE TRIAL JUDGE THAT THE DETERMINATION IS THIS PER SO N IS A REASONABLE PERSON AND HERE IS THIS MAN ON PROBATION AND BEING GIVEN THE LI ABLE OF A SEXUAL PREDATOR, WHICH ADD A LOT MORE OBLIGATIONS A NDPENALTIES TO HIS LIFE , W HICH HE NOT HAVE A T THE TIME OF HIS PLEA.

WOULD THE ANAL YSIS BE DIFFERENT, AS TO THE CONSTITUTION AL PART O F IT, IF THIS HAD BEEN A GUILTY FINDING AS OPPOSED TO A PLEA ?

ACCORD ING TO THE TER MS OF THE STATUTE , YOUR HONOR?

WELL , ACCORDING T O YOUR ARGUMENT. I MEAN , AS I UNDER BE CAUSE ARE SAYING , IS THAT PART OF THIS IS THE FUNDAMENTAL UNFAIRNESS OF THE FACT THAT HE PLED , AT A TIME WHEN T HELAW WAS ONE WA Y.

NO, YOUR HONOR. THAT ISN'T THE BASIS OF THE GIST OF MY ARGUME NT. THE GIST IS THAT , THE TIME HE PLE , ALL OF THE FACTS WHICH TOOK PLACE WHICH WOULD PROPOSE LEGAL CONSEQUENCES ON THOSE ACT, HAD TA KEN PLACE, AND THEN A YEAR OR TWO DOWN THE ROAD , WHEN THE LEGISLATURE CHANGES THE LAW , IT IMPOSES NEWMENTS OR NEW OBLIGATIONS WHICH HE DID -- NEW PENALTIES OR NEW OBLIGATIONS WHICH HE K NOW THE HAVE TO SHOULDER BA CK IN 1997.

YOUR ARGUMENT DIDN'T HAVE TO DO WITH WHETHER HE PLED OR HE DOESN'T.

THE JIMMY R YCE CASES IS THAT THE JI MMY RYCE SITUATION IS FOUND TO BE A SITUATION NOT EX POST FACTO BECAUSE THE U.S. SUPREME COURT SAID IT IS N OTCRIMINAL. IT IS CIVI L. BUT THERE IS A CASE BE FORE YOU CAN BE HEL D IN A C I VIL COMMITMENT, THERE HAS TO BE A HEARING , AND THIS GETS BACK TO THE CONF USION ON THE FIRST DISTRICT, I S COMBINING THE RETROACT IVITY ISSUE WITH THE PROCEDURAL PROC ESS. WOULD YOUR ARGUMENT BE THE SAME AS FAR AS THE STATUTE, IF THE STATUTE SAID IT I S GOING TO APPLY RETROACTIVE LY TO ANYBODY WHO HAD AN ATTEMPTED CAPITAL SEXUAL BATTERY, BUT THAT THERE WILL , IN THOSE CASES, HAVE TO BE AN ADDITIONAL FINDING THAT THE PERSON IS A SEXUAL PREDATOR. IT MEETS THOSE CONSEQUENCES. WOULD THAT BE AWA Y THAT THE LEGISLATURE COULD -- WOULD THAT BE A WAY THAT THE LEGISLATURE COULD C URE THAT PROBLEM , OR IS YOUR ARGUMENT THAT IT IS JU ST BECAUSE IT IS RETROACTIVE AND IT I S IMPAIRING RIGHTS AND IMPOSING OBLIGATIONS THAT IT CAN'T BE D ONE?

TONGUE IN CHEEK, I WOULD SAY IT DEPENDS ON THE OUTCOME OF THE HEARING , BUT IN ANSWER TO YOUR QUESTION, YOUR HONOR, I DON'T THINK THE HEA RING WOULD MA KE A DIFFERENCE, BECAUSE THE HEARING IS PROBLEMATTICAL. THAT IS G OING THAT BE TAKEN ON DOWN THE ROAD . AT THE TIME THAT HE SPEAKERS HIS PLEA, THE LAW HAD NOT CHANGED, AND HE WAS NOT UNDER WHAT THIS COURT HAS CALLED CIVIL DISABILITY OF A SEXUAL PREDATOR ACT.

BUT YOU RUN UP AGAINST THERE, THE MUCH MORE SERIOUS CONSEQUENCES THAT ARE INVOLVED IN THE JIMMY RYCE CASES, AND THE COURTS HAVE ALLOWED THE RETROACTIVE APPLICATION OF THE "JIMMY RYCE" ACT , BUT YOU KNOW, WITH THESE PROCEDURAL SAFEGUARD, S O I , THIS IS A LESSER CONSEQUENCE THAN ACTUALLY PUTTING SOME BODY IN A POTENTIALLY LIFETIME DETENTION UNDER THE "JI MMY RYCE" ACT , AND YET THE APPLICATION OF "JIMMY RYCE" ACT GOING AL L THE WAY BACK , HAS BEEN APPR OVED , BECAUSE OF THIS EXPOSE FACT O ANALYSIS, SO I AM HAVING DIFFICULTY WITH RESPONSE TO JUSTICE PARIENTE 'S QUESTION WOULD THAT TAKE CARE OF IT , AND YOU ARE SAYI NG, NO , I T WOULDN'T HELP AT ALL.

THAT WOULD TAKE CARE OF THE ARGUMENT THAT I MAD E AT THE BEGINNIN G OF WHEN THIS CASE WAS FILED , AS FAR AS VIOLATION OF PROCED URAL DUE PROCESS.

I THOUGHT COMING BACK AGAIN TO HOW THIS CASE WAS , EVOLVED , BECAUSE APPARENTLY YOU SAY BECAUSE I QU OTED FROM YOUR BRIE F, THAT HE SHOULD HAVE AN OPPORTUNITYTO SHOW HE IS NOT A DANGER TO SOCIETY. IS HE A FATHER AND MARR IED AND LIVING A NORMAL LIFE , SO YOUR POSITION HAS REALLY CHANGED TO WHAT IT WAS AT THE APPELL ATE LE VEL .

EX POST FACTO ARGUMENT , ISN'T THAT THE BEST YOU C ANHOPE FOR , IS THAT THERE WOULD BE SOME PROB ABLY REQUIREMENT HERE , BEFORE HECOULD BE DESIGNATED A SEXUAL PREDATOR AND HAVE THESE RESTRICTIONS IMPOSED ON HI M? IS THAT THE PE ST YOU CAN DO?

MAYBE I WAS IMPRECISE IN MY ANSWER TO THE COURT. WHAT I WAS SAYING IS , IF THERE WAS A MECHANISM IN THE STATUTE TO ALLOW HIM TO PROVE THAT HE WAS A NOT A PREDATOR OR DANGER TO SOCIETY, BECAUSE I WOULDN'T BE STANDING HERE AND I THINK HE WOULD HAVE PASSED THE TEST WITH AN ABLE TRIAL JUDGE.

CORRECT ME IF I AM WRONG , I DIDN'T SEE ANY THING YOUR BRIEF THAT SAID THAT THE STATUTE IS UNCONSTITUTIONAL AND THEN RETROACTIVE , THEY CAN'T AND MY RETROACTIVE BECAUSE YOU DON'T GET A HEARING T YOU SEEM TO BE ARGUING THAT YOU CAN'T APPLY IT RETROACTIVELY PREFER BECAUSE THERE -- PERIOD , BECAUSE THERE ARE LIBERTY INTEREST STATUTES INVOLVED.

THAT IS THE ARGUMENT I AM MAKING HERE.

YOU HAVEN'T MADE THAT ARGUMENT YET ABOUT THE HEARING, IS WHAT I AM SAYING.

I THOUGHT I HAD WITH REGARDS TO THE PROVISIONAL DUE PROCESS. IF THE STATUTE HAD A MECHANISM FOR A HEARING , THEN WE COULDN'T ARGUE PROCEDURAL DUE PROCESS .

WHAT IF THAT HELD THAT THERE IS NO REQUIRING THAT THERE BE HELD A HEARING.

NOTES.

RIGHT. SO WHY SHOULD THERE BE A HEARING IN YOUR CASE , IF THERE SHOULDN'T AND HEARING WITH ALL OTHER OFFENDERS , RECOGNIZING OBVIOUSLY , THE AMENDMENT TO , BUT WHY SHOULD WE DISTINGUISH IF YOU ARE ADDRESSING THIS ARGUMENT UP IN A PROCEDURAL DUE PROCESS PACKAGE. WHY SHOULDN'T THERE BE A HEARING IN YOUR CASE, WHEN WE HAVE HELD THAT THERE DOESN'T NEED TO BE A HEARING GENERALLY , WITH RESPONSE TO THE DEFENSE --

IN NO WAY I WAS ANSWERING THE QUESTION POSED PLE JUSTICE PARI ENTE , WAS THAT IF THERE WAS A RETROACTIVITY IN THE STATUTE , WOULD CONSTITUTIONAL RETROACTIVITY BE INVOLVED, AND MY RESPONSE TO THAT WOULD BE NO. IF MY ARGUMENT WOULD STAY THE STAGE BECAUSE OF THE FACT THAT THIS IS A LAW THAT IMPOSES ADDED BURDENS AND DISABILITIES ON HIM RETROACTIVELY. NOW , DOES THE HEARING BELIEVE THAT THE BEST CASES THAT DISCUSSING THE PROPOSITION FROM YOUR ANSWER TO THIS STANDPOINT , GIVING US SOME HELP , WE END UP BEING SORT OF BOXED IN , BECAUSE ORDINARILY WE SEE THIS KIND OF ARGUMENT DRAWN UP IN THE EXPOS THE FACT -AND THAT THERE HAS BEEN A CRIMINAL PENALTY TYPE OF THING IMPOSED AND THE OPPORTUNITY IS THAT THE STATE CAN'T DO. THAT,000, WE ARE PASSED THAT HERE AND YOU SEEM TO BE CONSIDERING THAT YOU DON'T HAVE AN EX POST FACTO CONSTITUTIONAL CLAIM.

NO. I AM NOT CONSIDERING THAT.

YOU ARE NOT. I THOUGHT , IN VIEW OF THE FACT THAT THE COURT HAVE HELD THAT THIS IS NOT A, QUOTE , CRIMINAL PENALTY THAT WOULD VIOLATE THE EX POST FACTO-CLAUSE, ISN'T THE U.S. SUPREME COURT HELD THAT CENTRAL.

CORRECT BUT MY ARGUMENT IS THIS , THIS IS A CIVIL REGULATORY STATUTE. IT IMPOSED NEW PENALTIES AND BURDENS WHICH HE KNOWS THEY HAVE.

THAT IS WHAT I AM SAYING. WHAT IS THE CASE THAT YOU BELIEVE IS MOST ANALOGOUS TO THE SITUATION THAT YOU HAVE HERE MOST ANALOGOUS ?

THAT WOULD BE METRO- DADE COUNTY VERSUS CHASE FEDERAL.

DADE COUNTY DIDN'T FIND A VIOLATION.IT TALKED ABOUT THE LAW, BUT DID IT FIND A

VIOLATION?

NO, BECAUSE IT RULED THAT THE COUNTY WAS NOT ENTITLED TO RECOVERY OF COSTS FOR CLEANING UP THE DRY CLEANING FLUID. ROUGH VERSUS -- RUFF VERSUS BRYANT AND THE D.O .T. CASE INVOLVES IMMUNITY UNDER SECTION 73 8 --

PARALLEL IMMUNITY ISSUE IN THOSE CASE.

IF YOU HAVEN'T DEALT WITH THE EXPOS THE FACT -- -THE EXPOS FACT-CASE, IF THE LEGISLATURE DEALT THAT THE JIMMY RYCE WAS NOT AN EXPOST FACTO, THEN HOW WOULD YOURS BE?

BECAUSE IT APPLIES THE LAW.

YOU SAY IT ONLY APPLIES IN CRIMINAL CASES AND THEN WESTERHEIDE SAID IT IS NOT A CRIMINAL CASE. THIS IS A CIVIL TYPE PROCEEDING, WELL, IF THAT IS THE CASE IN WESTERHEIDE ISN'T IT HERE AS WELL A CIVIL PROCEDURE AND THIS IS WHY THE EX POST FACTO DOESN'T APPLY?

YOUR HONOR, I DO HAVE --

MY QUESTION IS, THOUGH, JUSTICE ANSTEAD ASKED YOU HAVE YOU CONCEDED THAT YOU DIDN'T HAVE AN ARGUMENT UNDER THE EX POST FACTO CLAUSE. YOUR ANSWER IS YOU HAVEN'T CONCEDED THAT, SO WHERE IS YOUR ANSWER, GIVEN THE ANSWER IN WESTERHEIDE AND GIVEN -- WESTERHEIDE AND GIVEN YOUR CONTENTION THAT THIS IS -- GIVEN YOUR CONTENTION THAT THIS IS AN EX POST FACTO SITUATION.

EX POST FACTO APPLIES TO CRIMINAL PENALTIES THAT HAVE BEEN IMPOSED AND THE CIVIL ISSUE HAS TO DO WITH WHETHER IT BE IMPOSED RETROACTIVELY, ALONG WITH THE CASES THAT HAVE DRAWN IT. WITH OUR HELP YOU HAVE USED UP YOUR TIME. THANK YOU VERY MUCH. MR. DUFFY.

THANK YOU. JUSTICE PARIENTE. GOOD MORNING. MAY IT PLEASE THE COURT. COUNSEL.

IT LOOKS LIKE YOU CAN TAKE EBB'S POSTFACT-. YOU CAN -- EX POST FACTO. YOU CAN TAKE PROCEDURALLY AND DUE PROCESS AND I GUESS CONCENTRATE ON WHETHER THERE IS A CLAIM THAT THE LAW THAT THE LEGISLATURE INTENDS TO APPLY RETROACTIVELY, CAN BE UNCONSTITUTIONAL -- RETROACTIVELY, CAN BE UNCONSTITUTIONAL, IF IT IMPOSES NEW OBLIGATIONS AND RESPONSIBILITIES AND WOULD TAKE AWAY RIGHTS AND THE CASE THAT I WOULD LIKE TO USE FOR THAT WOULD BE THE STATE FARM VERSUS LAFLERT, WHERE WE HELD THAT A LAW THAT IMPOSED NEW OBLIGATIONS ON AN INSURANCE COMPANY, EVEN THOUGH IT WAS INTENDED TO APPLY RETROACTIVELY, COULD NOT BE CONSTITUTIONALLY DONE.

I UNDERSTAND THAT POINT. MY PRELIMINARY POINT WOULD BE THAT THAT ISSUE ISN'T BEFORE THE COURT. WE HAVE NEVER REALLY ADDRESSED. WE HAVE DANCED AROUND PROCEDURAL DUE PROCESS, OR SUBSTANTIVE DUE PROCESS, AND I TAKE THAT TO BE A SUBSTANTIVE DUE PROCESS ARGUMENT, BUT I WILL ADDRESS IT, BUT THAT IS NOT MY ADDITIONAL -- .

WE CAN GO BACK HERE BUT IN READING JUDGE BENTON'S DEFENSE, HE CLEARLY GOES RIGHT INTO IT, BECAUSE HE TALKS ABOUT THE APPELLANT WAS NOT ON NOTICE WHEN HE ENTERED HIS PLEA AND THE PENAL NOTION AND CITIZEN'S RIGHTS RETROACTIVELY, AND SO HE GOES RIGHT ON IT, SO I DON'T KNOW IF HE JUST CAME OUT OF THIN AIR OR IF IT IS IN THE BRIEFS BELOW, BUT IT DOES SEEM LIKE IT WAS ADDRESSED.

IT WAS ADDRESSED BY JUDGE BENTON. YES. THAT'S CORRECT. MY UNDERSTANDING OF SUBSTANTIVE

DUE PROCESS IS THAT THIS COURT HAS APPLIED AS YOU DID IN THE WESTERHEIDE OPINION, IN THE DISCUSSION OF SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION, THE FIDLE VERSUS REAL PROPERTY FACTORS, I THINK THOSE WOULD BE THE ONES THAT WOULD BE MOST IMPORTANT TO THIS COURT'S ANALYSIS. IN ESSENCE, A STATUTE JUST SIMPLY CAN'T BE DOWNRIGHT IRRATIONAL AND STAND. THERE IS NO RATIONAL BASIS BETWEEN THE STATUTE AND WHAT THE AIM IS, THEN IT CANNOT APPLY RETROACTIVELY.

I WAS ASKING YOU TO USE THE FRAMEWORK THAT WE APPLIED IN LA FLORETT, WHICH IS WHAT JUDGE BENTON TALKS ABOUT, NOT SUBSTANTIVE DUE PROCESS, RATIONAL RELATIONSHIP TO A LEGITIMATE AIM. THAT IS WHEN MR. THERRIEN, AT 16 YEARS OF AGE, OR 17, PLED NOLO, THE JUDGE ACCEPTED A NOLO PLEA, HE KNEW WHAT WAS TO COME WITH THAT. NOW, THREE OR FOUR YEARS LATER, A STATUTE COMES IN, AND ATTEMPTS TO APPLY RETROACTIVELY TO SOMEBODY WHO HAS ALREADY HAD SOMETHING IMPOSED FOR THAT SEPARATE HEARING LIKE THEY DO KNOW JIMMY RYCE, THAT HE NOW, FOR THE REST OF HIS LIFE, FROM AGE 17 UNTIL HE DIES, CANNOT WORK AROUND CHILDREN, AND THAT CERTAINLY IS A MIGHTY ARGUMENT ABOUT MAYBE HE COULD EARN A LIVELIHOOD OTHERWISE, BUT THAT IS CERTAINLY THAT WASN'T IN PLACE AT THE TIME, BUT I AM TALKING ABOUT A CIVIL, THERE ARE OPPOSING CIVIL OBLIGATIONS NOT CRIMINAL OBLIGATIONS THAT WEREN'T IN PLACE AT THE TIME.

WELL, LEGISLATORS MAY DO THAT. AS LONG AS THERE IS NO VESTED RIGHT, THERE IS NO VESTED RIGHT IN THE PARTICULAR EMPLOYMENT.

LET'S SAY THERE WAS IN THIS CASE TO DRAWBACK THAT MAY BE EVEN MORE SYMPATHETIC THAN YOU HAVE HERE, IF THIS PERSON WENT THROUGH COUNSELING AND AT THE END OF THAT, THE DOCTORS AND WHOEVER WAS INVOLVED, PRONOUNCED HIM AS ABSOLUTELY CLEAN AND CURED OF ANY PROPENSITY OR WHAT EVER, AND AS A MATTER OF FACT, HE WOULD MAKE AN EXCELLENT CANDIDATE TO MANAGE CHILDREN AND SUPERVISE CHILDREN AND THEN HE, THEN, FIND A TEN-YEAR CONTRACT WITH THE CHILDCARE, PRIVATE CHILDCARE AGENCY PAYING HIM \$200,000 A YEAR TO BE A MANAGER OF THEIR BIGGEST FACILITY, OF A NURSERY-TYPE OPERATION OR SOMETHING, AND THAT IS WHERE HE WAS WHEN HE GOT THE NOTICE THAT THE STATE WAS GOING TO HAVE HIM DESIGNATED AS A SEXUAL PREDATOR, AND THIS IS WHAT HE PUTS BEFORE THE TRIAL COURT AT THAT HEARING. DIFFERENT OUTCOME?

NO. I DON'T THINK SO AND LET ME MAKE TWO POINTS. FIRST INNING ONE OF THE PROBLEMS THAT HE HAS HERE IS WE DON'T HAVE A -- THAT WE HAVE HERE IS WE DON'T HAVE A FINANCIAL BRACKET, AND I THINK 28D HAVE TO COME BACK THROUGH -- I THINK IT WOULD HAVE TO COME ABOUT THROUGH A CIVIL HEARING AND NOT ON A MOTION BY THE STATE AND A MOTION IN OPPOSITION OF THAT MOTION.

WHY NOT? WHY WOULDN'T NATURALLY, THE LAWYER THAT REPRESENTS THIS INDIVIDUAL, SAY, JUDGE, IF YOU DO THIS, AND YOU RETROACTIVELY APPLY THIS TO MY CLIENT, HE IS OUT, HE HAS TO BREACH HIS CONTRACT. HE IS OUT OF LUCK WITH HIS LIVELIHOOD, AND HE IS JUST LIKE THE LAWYERS. HE HAS LOST HIS LICENSE.

I AM NOT SURE UNDER CERTAIN SUPREME COURT CASES, THAT STATE SUPREME COURT CASES, THAT THAT PARTICULARLY MATTERS, AND THE THREE CASES THAT I RELY ON COME FROM THE SMITH DECISION, WHICH I KNOW IS DECIDED UNDER EX POST FACTO BUT ALL OF THESE DOCTRINES MERGE SOMEWHAT, INTO BASICALLY AS WAS STATED IN THE HUDSON CASE, IS THIS DOWNRIGHT UNFAIR TO APPLY THIS STATUTE TO THIS INDIVIDUAL, SO WITH THAT AS A STARTING POINT, LET ME GO THROUGH HUDSON AND DEVOE VERSUS BRAYSTEAD AND LAWSON OF NEW YORK. HUDSON WAS A CASE WHERE INDIVIDUALS WERE CHARGED WITH BANKING VIOLATIONS AND 5D MIGHT NOT STRAIGHTLY THEY -- AND ADMINISTRATIVELY THEY AGREED IN

A CONSENT DECREE, THAT THEY WOULD GIVE UP BANKING AND PAY SOME FINES. LATER THE JUDGE PRECEDED AGAINST THEM AND THEY SAID THAT IS DOUBLE JEO PARDY AND THE STRENGTH SUPREME COURT SAID IT IS NOT , EVEN THOUGH -- AND THE SUPREME COURT SAID IT IS NOT, EVEN THOUGH YOU ARE BARRED FROM WORKING IN THE BANK ING INDUSTRY WHICH IS WHAT YOU S PENT YOUR LIFE DO ING, THAT DID N OTMAKE IT P UNITIVE , AND I THINK YOU CAN'T GET A WAY FROM THE FACT THAT THIS STATUTE IS NOT GOING TO B E A PUNITIVE STATUTE.

BUT IF THAT , AND I , IS THAT, THAT TA KES CARE OF THE EX POST FACTO .

RIGHT.

SO WAS THE SUBSTA NTIVE DUE PROCESS ARGUMENT MADE I N THAT CASE?

NOT THAT I AM AW ARE OF , NO. THE CHALLENGE , WHAT THEY CHALLENGED IN HU DSON WAS THE GOVERNMENT'S INDICT MENT OF THEM, SO, NO , IT WAS N'T. DeVOE VERSUS BRAY STEAD , SAME SORT OF THING , MORE ANALOGOUS TO THIS STATUTE. IN DeVOE , THE STATES OF NEW YORK AND NEW JERS EY, IN AN EFFORT TO R OO T OUT CORRUPTION ON THE WATERFRONT DOCKS , EN TERED A JOINT STATUTE, WHERE IN THEY SAID THAT, AM ONG OTHER THINGS, IF YOU HAD EVER BEEN CONVICTED OF A FELONY, YOU COULD NOT WORK AS AN UNION OFFI CIAL . I AM NOT SURE WHICH GENTLEMAN IT WAS, DeVOE OR BRAYSTEAD, BUT ONE OF THEM WAS AN OFFICI AL FOR AN UNION. THE UNION WAS NOTIFIED THAT NONE OF THEIR DUES COULD B E COLLECTED.THEY WOULD HAVE TO C E ASE OPERATIONS AS LONG AS HE WAS AN OFFI CER, SO HE WO UL D HAVE TO GIVE UP BEING AN OF FICER IN THIS UNION OR FACE CRIMINAL PROCESS, AND THAT WAS MORE ON A SUBSTANTIVE DUE PROCESS LIKE ANALYS IS.

WHAT WAS THAT CASE?

DeVOE VERSUS BRAY STON A NDI DON'T HAVE THE NUME RICAL CITE.

IS THAT CI TE D I N Y OUR BRIEF?

YES AND ALSO RIGHT ED - - AND ALSO CITED --

363 U. S. 1 4 4 I N YOUR BRIEF .

THE FIRST CASE ANALOGOUS TO, THIS ALSO I N CONTEXT , UNFORTUNATELY , EX POST FACTO BUT JUST LET M E MENTION IT , IS HAWKER VERSUS NEW YOR K. HAWKER WAS CONV ICTED I N 1878 OF PERFOR MING ABORTI ONS. HE WAS A PHYSICIAN AND SENTENCED TO TEN YEARS I N THE PENITENTIARY. AFTER HE WAS RELEASED I N 1893, NEW YORK PA SSED A LA W THAT SAID A NYONE EVER CONVICTED OF A FELONY CAN NO LONGER PR ACTICE MEDICINE. I DON'T KNOW WHE THER NEW YORK LICENSED DOCTORS AT THAT TIME OR NOT , BUT I N ANY EVENT I N 189 6, HE PRACTICED MEDICINE AND HE WAS PROSECUTED, AND THE COURT HELD I N HAWKER , THAT THAT WAS CONSTITUTIONALLY PERMISSIBLE UNDER THE EXPOS FACT-CLAUSE, AND I DON'T SEE WHY THE ANAL YSIS SHOULD B E ANY DIFF ERENT H E RE.

NOW , THAT IS YOUR ADDITIONAL COMMENTARY .

THAT IS MY ADD ITIONAL COM MENTARY.YES. THAT IS MY ARGUMENT.

I G UESS WHAT I AM HAVING TROUBLE WITH, IS WH Y ARE WE, IF YOU ARE CORRECT, THEN , REALLY , A CASE LIKE STATE FARM VERSUS La FLOORET , S AYS THAT WE CAN'T APPLY A STATUTE IF IT IMP AIRS CONSTITUTIONAL RIGHTS OR IMPOSES NEW PENALTY , WHY IS THERE A POLICY REASON THAT , ONCE SOMEBODY IS CONVICTED OF ANY C RIME , THAT T HEY REALLY ARE I N A DIFFERENT STATUS AS A CITI ZEN T HAN SOMEBODY WHO, IS THAT THE ARGUMENT, THAT YOU JUST ANALYZE IT DIFFEREN TLY BECAUSE THEY HAVE BEEN CONVICTED OF A C RIME ?

WELL , IT IS NOT AN IN SIGNIFICANT FACTOR.

I DON'T KNOW. I DON'T KNOW THAT WE HAVE EVER MADE THAT , THAT THIS PRINCIPLE OF , ABOUT YOU CAN , A STATUTE CANNOT RETROACTIVELY TO IMPAIR RIGHTS OR CREATE NEW OBLIGATIONS OR NEW PE MS , UNLESS SOME ONE -- OR NEW PENALTIES, UN LESS SOMEBODY IS A CONVICTED FELON , THEN WHATEVER YOU CAN DO THAT SEEMS TO BE APPROPRIATE , RELATED TO THE N ATURE OF THE CRIME.THAT WOULD BE THE CA VEAT, AND I AM JUST TRY ING TO SEE WHERE WE HAVE SAID THAT.

I AM NOT AWARE ACT UALLY , OF THE STATE FARM CASE OR METRO-DADE CASE OR ANY CASES LIKE THAT BEING APPLIED TO FELONS OR BEING APPLIED MOSTLY TO INDIVIDUALS F ORM THEY SEEM TO BE THE CASES THAT I READ , SEEM TO BE PRIMARILY INVOLVING GOVERNMENT TRANSACTIONS T HAT WOULD BE CERTAINLY THE CASE IN METRO-DADE.

BUT IF YOU WOULD ACCE PT THE, THAT , WHAT BEFORE IT IS TALKING ABOUT , IS THE FACT THAT ONE OF THE IS SUES I N MAKING, IN THE ANALYSIS , I S VESTED RIGHT AND WHETHER THERE IS A VESTED RIGHT , AND I AS KED OPPOSING COUNSEL THE QUESTION OF WHETHER IT WILL MAKE ANY DIFFERENCE IN T HE ANALYSIS, WHETHER THIS WAS GUILTY PLEA OR A NOLO PLE A, IN THIS IN STANCE , AND , OR GUILTY PLEA , AND ONE OF THE THINGS THAT IS KIND OF , APPEARS TO ME WAS BOTHERING JUDGE PENTON , AND IS BOTHER SOME HERE, IS THAT THIS APPEARS TO HAVE BEEN A SITUATION IN WHICH THER E WAS A D EAL THAT THE JUDGE , THIS GUY WOULD PLEAD NOLO. THE JUDGE WOULD WITH H OLE ADJUDICATION, AND THAT AS -- WITH HOLD ADJUDICATION , AND THAT AS LONG AS THE GUY CLEANED HIS ACT UP , T HEN THERE WOULDN'T BE ANY FURTHER CONSEQUENCES , BUT THEN THE LEGISLATURE COMES ALONG AND PASSE S THIS ACT , AND I JUST WO NDER , AS IDE FROM HOW WE FI GURE THIS OUT CONSTITUTIONALLY, THAT JUST FAIRNESS OF THAT. WHAT IS THE STATE'S RESPONSE TO THAT?

WE DON'T BELIEVE IT IS FUNDAMENTALLY UN FAIR TO DO THAT. IN LIGH T OF THE INTERESTS AT STAKE , AND ALSO IN LIGH T OF THE FACT THAT THIS COURT HAS HELD THAT THESE ARE COLLATERAL CONSEQUENCES , THE PEAR MAN DECI SION CONSTR UED , I THINK , OF THE SEXUAL OFFENDER ACT WHICH IS A PARALLEL STATUTE TO THE SEXUAL PRED ATOR ACT , AND SAID THAT YOU DON'T HAVE TO BE INFORM ED OF IT, SO I T COULDN'T HAVE NECESSARILY ADHERED IN THE DEAL THAT HE MADE WITH THE PROSECUTION , IN ORDER TO SE TTLE HIS CRIMINAL SAYS CASE . IT DID NOT , IT WAS -- CRIMINAL CASE. IT DID NOT , IT WAS NOT APART OF THAT. THERE IS NO EVIDENCE THAT THE RECO RD D O ESN'T SHOW ANY SUGGESTION THAT ONE OF T HEREASONS FOR THE PLEA , O NE OF THE RATION ALES FOR THE P LEA WAS THAT HE KNEW HE WOULD NOT BE SUBJECT TO THOSE SEXUAL PREDATOR REGISTRATION , IF HE PLED TO AN AD ATTEMPT .

WELL, I GU ES S YOU SAID THE ISSUE YOU LOO K AT IT THAT GOT DOWNRI GHT UP FAIR , AND JUST MAYBE IT IS A FACT OF THIS CASE , STR IKE ME A S , AGAIN , YOU HAVE THE 16-YEAR-OLD.YOU HAVE GOT, INS TEAD OF AM , NOT JUDGE TO TO A NOLO PLEA , THERE HAS TO BE A CE RTAIN PREREQUISITE THAT , AND PROBATION, IF THE PERSON IS NOT A DANGER , GOES ON AND GETS MARRIED, AND EVEN IN EVERY OTHER TYPE OF CRIME YOU HAVE THE PRIOR TO OR THE ABILITY TO SHOW THAT YOU ARE CAPABLE OF WO RKING AR OUND CHILDREN THROUGH A HEARING. CORRECT? THIS IS THE ONLY , IS N'T THERE SOME STATUTE THAT ALLOWS CONVICTED FELONS TO SHOW THAT HIM HIM , TH EY ARECAPABLE OF WOR KING IN , CERTAINLY IN THESE OCCUPATIONS?

THE ONLY THING I AM AWARE OF ARE STATUTES THAT RELATE TO CHILD CA RRY FAC ILITY AND THE SCHOOL THAT WILL SAY THEY CAN'T HIRE AND IT BECOMING UP FOR THAT LE VEL, THAT THEY CAN, IF THERE HAS BEEN A CERTAIN PASSA GE OF TIME, THEY CAN , UNDER CERTAIN STICK SUBSTANCES , DECIDE IF THE PERSON HAS BEEN RE PILL TATED.

YE S.

I AM NOT AWARE SPECIFICALLY , OF - -

MAYBE THAT WAS THE STATUTE I WAS SAYING.

LET ME , I THINK I CAN GIVE YOU A CITE . WELL ACT UALLY NOT BECAUSE IT IS A SCHOOL STATUTE. I AM SORE I CHT BUT FOR THE CHILDCARE FACILI TIES -- I AM SORRY. BUT FOR THE CHILDCARE FACILITIES, THAT IS IN CHAPTER 4 03 BE AND BOTH THE CHILDCARE STATUTE AND THE SCHOOL STATUTES, WHICH IS LIKE 101.2 SOME THING , RELA TETO CHAPTER 43 5, WHICH CONSIDERS BACKGROUND CHEC KS ON INDIVIDUALS.

BUT WHE N HE , A GAIN , TOOK HIS PLEA OR SEND THE PLEA AND 16 OR 17 , HE , KNOWS HE IS GO ING TO BE LI FTED AS CONVICTED FELON. CORRECT?

YES .

BUT NOW , EVERY , ANY TIME FOR THE REST OF HIS LIFE , NOT ONLY A GAIN , CAN'T HE PURSUE THESE DIFFERENT OCCUPATIONS OR PROFESSIONS , BUT HE WILL BE IN THE REGISTRY AS A SEXUAL PREDATOR .

YES. FOR 20 YEARS, YES.

20 YEARS. ON BA RRING , OF COURSE , SOME COLLATERAL ATTACK THRO UGH , SAY, A DECLARAT ORY JUDG ME NTTHAT HAS BEEN HELD OPEN BY CERTAIN COURTS, SOME OF THE DCA'S IN FACT HAVE SUGGESTEDTHAT THAT IS HOW YOU CHALLENGE ONE OF THESE WHEN IT WAS DONE OF THE FACT ASIT WAS DONE HERE.

THAT --

ACTUALLY I CITED , KOBLENTZ IS ONE OF THE CASES OUT OF THE SE COND DCA THAT THEY SAID CAME UP IN THE CONTEXT OF WHAT IS YOUR POINT OF ENTRY INTO THE SYSTEM, WHEN IT HAP PENED HERE AFTER THE FACT , AND ACTUALLY THE STATE WAS POSSIBLY MORE GENEROUS HERE THAN NECESSARY . IT PROBABLY COULD HAVE JUST SAID HERE IS AN ORDER JUDGE. YOU HAVE GOT TO SIGN IT , AND THE JUDGE COULD HAVE SIG NED IT WITHOUT A HEARING, A NDWHEN THAT HAPPENS , THE SECOND DC A AND THE FI FTH DCA DISAGREE AS TO WHAT YOUR ENTRY POINT IS. THE FIFTH SAYS IT DOESN'T MATTER NOT THAT IT IS TECHNICALLY NOT A SENT ENCE. GO AHEAD AND USE R ULE 3800. THE SECOND SAYS, NO , RULE 1.R5 40 , THE CIVIL -- 1.540 , THE CIVIL RULE .

BUT ONE WAY OR THE OTHER , IT DOESN'T MAKE SENSE TO IT. THAT IS THE WAY WE HAVE INTERPRETED IT .

YES BUT KOBLENTZ , I BELIEVE I HAVE CITED IN OUR INITIAL BRIEF THAT SAYS YOU COULD CHALLENGE THIS BY A INITIAL DECLARATORY ACTION .

WHAT IS THE CHALLENGE?

SAYING I AM NOT DANGEROUS. IT DOESN'T APPLY TO ME.

YOU ARE SAYING IT IS NOT ENTITLED TO A DECLARATORY DECREE ACTI ON.

POSSIB LY. WASN'T K O BLENTZ CITED BE FORE ESPINDOLA AND MICK'S ? AND DOESN'T -- AND MI CKS ?

YES. ON THE DETERMINATION OF FUTURE DANGEROUSNESS A ND IDON'T KNOW ABOUT THAT , BUT THAT DOESN'T NECESSARILY, I MEAN, YOU DIDN'T DIRECTLY ADDRESS WHETHER A COLLATERAL ATTACK COULD BE MA DE.

SO WHAT WOULD BE THE BASIS , I AM TRY ING TO UNDER YOUR ARGUMENT TODAY , WHAT WOULD BE THE BASIS O F THE COLLATERAL ATTACK , UNLESS THERE IS A POTENT IAL SUBSTANTIVE DUE PROCESS PROBLEM?

THAT WOULD BE YOUR C LAIM OR YOU COULD MAKE A 19 83 CLAIM LIKE THE PLAINTIFFS DID IN COMMITTEE AND IN THE ALASKA CASE.

THAT WAS MY QUESTION. IN THE SMIT H CASE , THE ALASKA CASE , THE RE WAS A 1983 CLAI M THAT WAS MADE AND THEN THE COMMITTEE DECISION BY THE U.S. SUPREME COURT , THEY SPECI FICALLY SAY THEY DID NOT AD DRESS THE SUBSTANTIVE DUE PROCESS.

RIGHT.

AND CAN YOU EX PLAIN W HYTHAT HAS NOT BEEN DEALT WITH , BECAUSE UNDER THE FI RST DCA , THEY SPECIFICALLY SAY THAT THERE IS , AS I N COMM ITTEE , THE DEFEND ANT DISAVO WED ANY SUBSTANTIVE DUE PROCESS CLAIM, BUT WE KE EP GOING BACK TO THAT IN OUR DISCUSSION, BUT THAT REALLY IS NOT A CLAIM BEFOR E US , IS IT?

THAT IS MY POSITION , JUDGE, JUST ICE BE LL.

WHY DO YOU UNDERSTAND THAT NOT TO HAVE BEEN RAISED FROM YOUR PERS PECTIVE ?

I DON'T RE CALL ANYTHING ON WHETHER HE GET S A HEARING OR DANGEROUSNESS OR THAT THE ACT DIDN'T APPLY TO HIM BECAUSE OF THE SEPA RATION OF POWERS. THAT IS ALL I RECALL , FUSSING IN THE --

EX CEPT THAT IT SAYS RIGHT IN THE OP INION APPELLATE CHALLENGES ARE A REFLECTION OF THE AMEN DED FLO RIDA ACT TO H IM.

I UNDERS TAND. I HAVE USED UP MY TIME. IF THERE ARE NO M ORE QUESTIONS, WE WOULD ASK THE COURT TO AFFI RM THE DECI SION OF THE FIRST DISTR ICT.

THANK YOU VERY MUCH. WE WILL TAKE THIS MA TTER AS ALL MATTER S THIS MORNING UNDER ADVISEMENT , AND THE COURT WILL BE IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING.

MARSHAL: PLEASE RI SE.