

*The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.*

**03-284**

MARSHAL: PLEASE RISE . CHIEF JUSTICE MENT : GOOD MORNING.

MARSHAL: PLEASE BE SEATED.

CHIEF JUSTICE: ALL RIGHT. WITHOUT ANY FURTHER ADO , WE WILL CALL THE CASE OF BYRD VERSUS STATE. COUNSEL.

MAY IT PLEASE THE COURT. MY NAME IS DOUGLAS BRINKMEYER FROM THE PUBLIC DEFENDERS OFFICE ON BEHALF OF THE PETITIONER . MS. BYRD WAS FOUND COMPETENT TO STAND TRIAL O N APRIL 29 OF 1999 , BY THREE EXPERTS. ALL THREE EXPERTS FOUND THAT SHE WAS MENTALLY RETARDED , HAD AN I Q OF 60-TO-65 , HAD AN ACADEMIC AGE OF HE SECOND OR THIRD GRADE.

COULD YOU INFORM US JUST A LITTLE BIT OF THE PRACTICAL EFFECT. YOU ASKED THAT CHARGES BE DISMISSED , AND THAT AN ORDER OF CIVIL COMMITMENT BE ENTERED.

YES, MA'AM .

WHAT ACTUALLY , IS THE DEFENDANT, THEN , TRANSFERRED TO ANOTHER FACILITY OR WHAT IS THE DIFFERENCE BETWEEN , IF THE CHARGES REMAINED OR SHE IS CIVILLY COMMITTED?

MY UNDERSTANDING IS THAT THE STATE HOSPITAL IN CHATTAHOOCHEE HAS A FORENSIC SIDE AND A CIVIL SIDE.

SO IT WOULD BE THAT SHEWOULD BE TRANSFERRED TO THE CIVIL SIDE?

YES, MA'AM.

AND REMAIN THERE COMMITTED?

YES, MA'AM.

FOR , UNDER WHAT BASIS?

UNDER CHAPTER 393.

WHICH IS WHAT?

MENTALLY RETARDED.

WHY WOULD SHE BE MENTALLY RETARDED? WHY WOULD SHE NEED B E TO CIVILLY COMMITTED?

BECAUSE UNDER CHAPTER 393, IF YOU ARE MENTALLY RETARDED AND A DANGER TO YOURSELF OR OTHERS, YOU CAN BE COMMITTED , A OPPOSED TO 394 , THE "BAKER" ACT , WHICH DEALS WITH MENTAL ILLNESS.

IS THERE SECURITY DIFFERENTIAL BETWEEN THE FORENSIC AND NONFORENSIC SIDE OF THE HOSPITAL?

I DON'T KNOW THE PRACTICALITIES OF THAT. I DO KNOW THAT THE STATUTE REQUIRES THAT ANYONE COMMITTED TO THE FORENSIC SIDE, BE HELD IN A SECURE FACILITY. I DON'T KNOW, I ASSUME THAT THE HOSPITAL WOULD NOT LET SOMEONE WANDER OFF FROM THE CIVIL SIDE, BUT

HOW LONG COULD SHE BE COMMITTED TO THE CIVIL SIDE?

HOW LONG COULD SHE BE SKMITED ?

UNDER THE COMMITMENT THAT YOU WERE REQUESTING, HOW LONG DOO THEY HOW LONG COULD THEY HOLDNER HER?

FOREVER.

COULD THEY HOLD HER?

FOREVER.

I KNOW THIS DOESN'T GET INTO THE CIVIL SENTENCE, BUT UNDER THE STATUTE, IF SHEEVER IS FOUND COMPETENT, THE CHARGES CAN BE REINSTATED.

YES, MA'AM. AND SHE CAN, BUT IN ANY EVENT, SHE REMAINS COMMITTED TO CHATTAHOOCHEE FOR INDEFINITELY?

AND HAS PERIODIC REVIEWS, AND IF SHE EVER IS FOUND COMPETENT, THEN THE JUDGE WOULD HAVE A HEARING AND DETERMINE SHE IS COMPETENT.

WHAT IS THE STATE OF THIS RECORD, IN TERMS OF FINDINGS AS TO ENDANGERMENT TO HERSELF OR OTHERS?

I THINK IT IS CLEAR THAT JUDGE GARY'S ORDER THAT HE ENTE RED BACK IN 1999, FOUND THAT SHE WAS MENTALLY RETARDED, AND THAT SHE WAS IN CAPABLE OF SURVIVING ALONE, AND THAT THERE WAS A SUBSTANTIAL LIKELIHOOD THAT SHE WOULD INFLICT SERIOUS BODILY HARM UPON HERSELF OR OTHER PERSONS, AS EVIDENCED BY HER RECENT BEHAVIOR, WHERE SHE WAS CHARGED WITH FIRST-DEGREE MURDER.

BUT SHE WOULD NOT, SO, EITHER WAY, BECAUSE THE STATE HAS A RIGHT, AS SOON AS SHE IS FOUND TO BE COMPETENT, TO REINSTATE THE CHARGES, SHE WOULD HAVE TO BE, REMAIN COMMITTED TO SOME FACILITY, IS THAT CORRECT?

YES, MA'AM.

SO IN TERMS OF ARE WE TO CONSIDER WHETHER THIS IS A PROCEDURAL OR SUBSTANTIVE ISSUE, THAT THE STATE HAS AN INTEREST IN DECIDING WHETHER THEY ARE, WHAT TYPE OF FACILITY THEY ARE IN, THAT THERE IS AN ISSUE OF FINANCES INVOLVED, IS THERE ANYTHING IN THE RECORD ABOUT THAT? IN OTHER WORDS, IT THAT IT, COST THE STATE LESS, LET ME FINISH MY QUESTION, THAT IT COSTS THE STATE LESS FROM THE PERIOD OF TWO YEARS TO FIVE YEARS.

YES, MA'AM.

TO HAVE SOMEONE IN A CIVIL COMMITMENT AS OPPOSED TO ON THE CRIMINAL SIDE OF CHATTAHOOCHEE?

THE ONLY THING IN THE RECORD IS A MOTION TO INTERVENE FILED BY THE DEPARTMENT OF CHILDREN AND FAMILIES IN THE FIRST DISTRICT BELOW, WHICH THE FIRST DISTRICT DENIED. THE DEPARTMENT WANTED TO INTERVENE, BECAUSE THEY ASSERTED THAT, ACCORDING TO THEIR LEGISLATIVE BUDGET, THEY ARE ONLY BUDGETED TO HOLD SOMEONE IN COMPETENT DUE TO



I KNOW THERE IS A PROVISION FOR IT. I AM LOOKING FOR IT AT THE PRESENT TIME.

WHILE YOU ARE LOOKING FOR THAT, THE ISSUE IN THIS CASE AS I SEE IT, IS WHETHER THE STATUTE IS PROCEDURAL OR SUBSTANTIVE, AND IF WE FIND THAT IT IS SUBSTANTIVE, WE HAVE TO APPLY THE STATUTE. IF WE FIND THAT IT IS PROCEDURAL, WE CAN'T APPLY THE STATUTE. WE HAVE TO APPLY THE RULE. SO THERE IS NO REAL, IT DOESN'T MATTER WHAT THE POLICY BEHIND THE STATUTE IS, DOES IT? IT IS EITHER SUBSTANTIVE OR IT IS PROCEDURAL?

I THINK THE LEGISLATIVE INTENT IS CLEAR THAT THIS COURT ENACTED ITS RULE ORIGINALLY IN 1980. THE LEGISLATURE CAME BACK THREE YEARS LATER AND SPECIFICALLY SAID THE COMMITMENT PERIOD FOR MENTAL RETARDATION IS ONLY TWO YEARS.

THAT BEGS THE QUESTION, DOESN'T IT, ABOUT WHETHER IT IS SUBSTANTIVE OR PROCEDURAL? BECAUSE IF THE TIME LIMIT IS PROCEDURAL, THEN WHILE THE LEGISLATURE CAN REPEAL OUR RULE, THERE IS NOTHING IN THE CONSTITUTION THAT SAYS THAT THEY CAN REPLACE IT WITH THEIR OWN RULE. THEY STILL CANNOT ENACT A PROCEDURAL RULE BY STATUTE. IS THAT RIGHT?

THAT IS TRUE, BUT IN MY MIND, THIS IS A SUBSTANTIVE RIGHT.

SO LET'S GET TO THAT ISH YOUTH. WHY IS THIS, WHY IS THE TWO-YEAR PERIOD VERSUS FIVE-YEAR, A SUBSTANTIVE RIGHT, GIVEN THAT THE STATE CAN ALWAYS REFILE THE CHARGES?

BECAUSE THE LEGISLATURE HAS MADE A REASONED DETERMINATION THAT, DUE TO THE NATURE OF MENTAL RETARDATION AS OPPOSED TO MENTAL ILLNESS, IT IS NOT THE KIND OF THING THAT YOU CAN BE CURED OF. IF YOU ARE MENTALLY RETARDED, YOU CAN BE GIVEN TREATMENT AND TRAINING, BUT IF THE TREATMENT AND TRAINING DON'T WORK AFTER TWO YEARS, THERE IS A VERY GOOD POSSIBILITY THAT YOU ARE NEVER GOING TO REGAIN YOUR COMPETENCE OR BE COMPETENT TO STAND TRIAL.

I UNDERSTAND THAT DETERMINATION, BUT HOW IS THAT A SUBSTANTIVE DETERMINATION, IF THE STATUTE SAID THAT YOU HAVE TO DISMISS THE CHARGES AND COMMIT DEFENDANT, AND CHARGES CAN NEVER BE BROUGHT AGAIN, THEN I CAN UNDERSTAND THAT ESTABLISHES A SUBSTANTIVE RIGHT TO HAVE CHARGES DISMISSED, ONCE TWO YEARS PASS, BUT THE STATE DOESN'T HAVE TO DO THAT. THAT THE STATE CAN REFILE CHARGES IF THE DEFENDANT IS EVER DEEMED COMPETENT, SO HOW DOES THE STATUTE CREATE A SUBSTANTIVE RIGHT?

IT IS IN THE NATURE OF THE STATUTE OF LIMITATIONS.

BUT I DON'T SEE HOW THAT IS BECAUSE THE STATE CAN REFILE THE CHARGES AT ANY POINT, AS SOON AS THE DEFENDANT BECOMES COMPETENT, SO IT IS NOT REALLY A STATUTE OF LIMITATIONS. IT DOESN'T SET AN OUTER TIME LIMIT.

THE LEGISLATURE SETS THE STATUTE OF LIMITATIONS. IF THIS COURT ENACTED A RULE SAYING THERE SHALL BE NO STATUTE OF LIMITATIONS FOR ANY CRIME IN FLORIDA, I DON'T THINK THAT WOULD BE CONSTITUTIONAL.

BUT IF THE STATUTE SAYS, AFTER TWO YEARS, IF A DEFENDANT IS NOT COMPETENT, YOU HAVE TO SMITH THE STATUTE, THE CHARGES WITH PREJUDICE. I WOULD AGREE WITH YOU IT IS A STATUTE OF LIMITATIONS BUT THE STATUTE DOESN'T DO THAT.

BUT IT, ALSO, SUSPENDS THE STATUTE OF LIMITATIONS, PENDING THE COMMITMENT PERIOD.

AND THIS, I GUESS THAT IS WHY, MAYBE WHY I WAS LOOKING AT WHERE, WHETHER, THE SUBSTANTIVE RIGHT IS WHERE SHE IS GOING TO BE ACTUALLY PLACED, IF THERE, THERE IS A DIFFERENCE BETWEEN BEING PLACED CIVILLY COMMITTED, AND WHATEVER TREATMENT SHE

GETS THERE , AND BEING, I MEAN, BUT IS THE RECORD REALLY DEVELOPED ON THAT , THAT IS THAT IT IS ACTUALLY NOT JUST THAT SHE HAS GOT A RIGHT FOR THESE CHARGES T O BE DISMISSED WITHIN TWO YEARS , BUT SHE HAS , ALSO , GOT A RIGHT NOT TO BE IN THE CHATTAHOOCHEE , WHATEVER THE CRIMINAL SIDE OF THE FACILITY IS , MORE THAN TWO YEARS. WOULD THAT NOT BE PART OF THE SUBSTANTIVE RIGHT?

IT IS THE SAME AS ACOMMITMENT FOR MENTAL ILLNESS , WHERE YOU HAVE A FIVE-YEAR COMMITMENT AND THEN IF YOU ARE FOUND STILL INCOMPETENT TO STAND TRIAL , YOU CAN BE CIVILLY COMMITTED UNDER THE "BAKER" ACT AND GO FROM THE FORENSIC SIDE TO THE CIVIL SIDE.

WE CERTAINLY , IT WOULD AND DIFFERENCE , FOR EXAMPLE , IF WE HAD SOMEONE IN PRISON VERSUS A JIMMY RYCE FACILITY. THERE IS SOME GIVE TWINS RENS SOME DIFFERENCE BETWEEN THOSE TWO FACILITIES , CORRECT? AND SO WHERE DO WE GET WITH THAT TIME PERIOD, IF IT IS SUBSTANTIVE OR PROCEDURAL IN NATURE?

I THINK IT IS SUBSTANTIVETHAT THE JUDGE HAS BEEN FOUND THAT SHE SHOULD BE COMMITTED UNDER THE MENTAL RETARDATION STATUTE.

THE PLACE THAT SHE IS COMMITTED TO , IS THAT PART OF THE SUBSTANTIVE RIGHT , NOT JUST RIGHT NOT TO HAVE THE CHARGES REFILED OR THE STATUTE OF LIMITATIONS SUSPENDED BUT PHYSICALLY WHERE SHE IS PLACED.

THE LEGISLATURE HAS DIRECTED DCF TO PROVIDECERTAIN FACILITIES FORSOMEONE WHO I S INCOMPETENT TO STAND TRIAL DUE TO MENTAL RETARDATION , NOT T O BE COMMINGLED WITH SOMEONE WHO IS INCOMPETENT TO STAND TRIAL DUE MENTAL ILLNESS AND, ALSO , TO HAVE SEPARATE FACILITIES FOR SOMEONE WHO IS CIVILLY COMMITTED UNDER EITHER 393 OR 394.

COULD WE SOLVE THIS PROBLEM , AS FAR AS PROCEDURAL SUBSTANTIVE, IF WE AMEND THE RULE TO CONFORM TO THE STATUTE?

YES, MA'AM.

THIS HAS BEEN GOING ON , THIS CASE STARTED ALMOST TWO YEARS AGO , AND HAS THAT BEEN APARTMENTENTED IN THE CRIMINAL ATTEMPTED I N THE CRIMINAL RULES OF PROCEDURE?

NOT TO MY KNOWLEDGE. ACTUALLY IT HAS BEEN GOING ON FOR 20 YEARS, BECAUSE THIS COURT'S RULE CAME INTO EFFECT I N 1980.

HAVE THE Y BEEN FOLLOWING THE RULE OF THE STATUTE ANDTHIS IS THE FIRST TIME IT HAS EVER COME UP?

IT IS THE FIRST TIME IT HAS EVER COME UP. THIS COURT PASSED ITS RULE IN 1980. THE LEGISLATURE PASSED ITS FIRST STATUTE ON THE TWO-YEAR TIME PERIOD, I N 1983. IT HAS BEEN GOING ON EVER SINCE AND APPARENTLY I T HAS NEVER COME UP BEFORE.

IS THAT REALLY BECAUSE OF THE DUAL DIAGNOSIS? BECAUSE TYPICALLY, IF THEY ARE MENTALLY RETARDED , YOU KNOW WITHIN SIX MONTHS TO A YEAR WHETHER THEY ARE GOINGTO BE TRAIN ABLE T O UNDERSTAND AND BE COMPETENT.

YES, SIR.

AND IF THEY ARE NOT WITHIN THAT TIME FRAME , WITHIN TWO YEARS THE STATE AND EVERYBODY AGREES , THE DIFFICULTY HERE IS THAT THE COURT'S FINDING OF INCOMPETENCY BASED UPON A DUAL DIAGNOSIS , SO WHAT DO WE DO WITH THEM?

WELL , I GO BACK TO MY ORIGINAL POINT THAT THE JUDGE NOIT NOTED THE MENTAL THE JUDGE NOTED THE MENTAL ILLNESS BUT THE JUDGE'S PRIMARY REASON FOR COMMITMENT WAS MENTAL RETARDATION .

RIGHT AND THAT IS WHAT THEY HAVE TO DO UNDER THE STATUTE. THEY HAVE TO PICK A PRIMARY ONE. 304

316 SUB3 ON 2-16 , WHICHCONDITION IS PRIMARY MUST BEDIAGNOSED.

SO WE HAVEN'T HAD APROBLEM OVER THE LAST TWENTY YEARS, IF THE PERSON IS NOT MENTALLY RETARDED , THERE IS NOT AN ISSUE IN THE TRIAL COURT. CAN YOU GIVE ME ANOTHER REASON?

SINCE THE JUDGE NEVER HA HEARING ON THE MOTION TO DISMISS, THEN WE DON'T KNOW WHAT HER CURRENT CONDITIONIS AT THE MOMENT. WE DON'T KNOW IF HER CONDITION IS IF HER PRIMARY CONDITION IS MENTAL RETARDATION , ALTHOUGH SHE HAS HAD IT SINCE AGE 5.

THE DEPARTMENT HAS TO LOOK AT THE REPORTS.

YES, SIR.

SO THE REPORTS ARE NOT IN THE RECORD.

THEY ARE NOT IN THE RECORD. THE JUDGE DOES PROVIDE TRANSFER FROM ONE FACILITY OR PROGRAM TO ANOTHER WHEN,IN THE DEPARTMENT 'S JUDGMENT, IS IN THE DEFENDANT 'S BEST TRAINING OR TREATMENT INTERESTS , BUT IT ALSO REQUIRED AN AMENDED ORDERFROM THE JUDGE , SO THE DEPARTMENT CAN'T JUST TRANSFER PEOPLE BACK AND FORTH. THEY MUST GO BACK TO THE COURT AND GET PERMISSION TO DO. THAT I SEE I AM INTO M Y REBUTTAL TIME.I WOULD LIKE TO RESERVE THEREST OF IT.

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. GISELLE LYLEN RIVERA ON BEHALF THE STATE OF FLORIDA. IF I MAY , I WOULD LIKE TO BEGIN BY ASKING THIS COURT TO DECLINE TO REVIEW THIS CASE FOR LACK O F JURISDICTION. APPELLANT PROCEEDS BEFORE THIS COURT UNDER THE PROVISION OF FLUL CONSTITUTION, WHICH PROVIDES THAT THIS COURT HAS MANDATORY JURISDICTION O F TWO TYPES OF CASES , DEATH PENALTY CASES , WHICHOBVIOUSLY THIS IS NOT, AND THOSE CASES IN WHICH A DISTRICT COURT HAS EXPRESSLY FOUND THAT A STATE STATUTE IS INVALID OR UNCONSTITUTIONAL, AND THESTATE RESPECTFULLY SUBMITSTHAT, IN THIS CASE THERE IS NO SUCH EXPRESS FINDING BY THE FIRST DISTRICT COURT . WHAT THE COURT DID WAS THEY INVITED THIS COURT T O , PERHAPS , CONSIDER AMENDING ITS RULE, AND I WOULD SUBMIT THAT THAT IS NOT SUFFICIENT , IN AND OF IT SLFT.

WAIT A SECOND. THE IN AND OF ITSELF.

WAIT A SECOND. THE TRIAL COURT FOUND WHAT , THAT IT WAS PROCEDURAL?

YES, MA'AM.

DID THE TRIAL COURT SAY THE STATUTE WAS UNCONSTITUTIONAL?

NO, MA'AM. THE TRIAL COURT SAID THAT THE RULE SUPERSEDED BECAUSE IT WAS PROCEDURAL .

TO BE SEMANTIC AL HERE , IF IT IS PROCEDURAL THEN IT IS UNCONSTITUTIONAL. CORRECT?

I WOULD DISAGREE AT THIS POINT IN TIME.

SO THE STATUTE , SO WHAT IS THE OTHER ISSUE THEN?

WELL , THE PROBLEM IS , IS IT IS SOMETHING THAT I S VOIDABLE IS NOT NECESSARILY VOID , AND I BELIEVE THAT WHAT APPELLANT WAS RELYING UPON WAS THE IN HEARNS I DOCTRINE, WHICH ESSENTIAL INHERENTY IS DOCTRINE WHICH SAYS THAT , WHICH IN F THAT IS SAID, THEN THAT IS ENOUGH, BUT THE FACT IS THIS COURT DOESN'T SAY THAT BUT THE COURT AMENDED ITS RULES TO SAY THERE MUST BE AN EXPRESS FINDING OF VALIDITY .

IS THAT THE ONLY REASON THAT YOU DON'T THINK WE SHOULD BE REVIEWING THIS C ASE?

NO.I DON'T BELIEVE THAT IF WE DON'T HAVE MANDATORY JURISDICTION, WE ALSO DON'T FALL INTO ANY OF THE AREAS OF DISCRETIONARY JURISDICTION.

THE POLICY IS WE HAVE GOT A STATUTE.YOU AGREE THE STATUTE CONFLICTS WITH THE RULE.

NO, I DO NOT.

THE RULE SAYS FIVE YEARS FOR EVERYTHING. THE STATUTE SAYS TWO YEARS FOR MENTAL RETARDATION .

THAT'S CORRECT , BUT THEY CAN BE READ IN HARMONY , BECAUSE WE NEED TO LOOK AT WHAT WE ARE TALKING ABOUT HERE. THEY ARE NOT TALKING ABOUT THE SAME CATEGORIES OF PEOPLE. WE HAVE THE RULE WHICH DEALS WITH EVERYBODY WHO IS MENTALLY INCOMPETENT AND THEN, IF WE TAKE THAT AS A LARGE SET , WE HAVE SUBSETS WHICH INCLUDE THE MENTALLY ILL AND MENTALLY RETARDED , AND I N THOSE CASES THAT ACTUALLY DOES OVERLAP. SO

SO SOMEBODY IS , LET'S JUST, SO I UNDERSTAND THE STATE'S POSITION, IF , IF THIS DEFENDANT , LET'S FORGET THE DUAL DIAGNOSIS ISSUE, BUT IS FOUND TO BE MENTALLY RETARDED , IS SHE ENTITLED T O DISMISSAL WITHOUT PREJUDICE OF HER CHARGES AFTER TWO YEARS OR AFTER FIVE YEARS?

IT WOULD BE AFTER FIVE YEARS, BECAUSE IT IS A PROCEDURAL MATTER . APPELLANT IS ARGUING THAT THIS IS

SO THE STATUTE , THOUGH , SAYS, DOES THE STATUTE NOT SAY IT IS TO B E DISMISSED WITHOUT PREJUDICE AFTER TWO YEARS?

WHAT THE STATUTE ACTUALLY SAYS IS THAT , AT ANY REASONABLE AMOUNT OF TIME NOT TO EXCEED TWO YEARS AFTER BEING FOUND INCOMPETENT, YOU CAN MOVE FOR DISMISSAL , AND WHAT THAT DOES IS IT GIVES THE TRIAL COURT A GREAT DEAL OF DISCRETION FOR THOSE INDIVIDUALS WHO ARE S O DEVELOPMENTALLY DISABLED THAT THEY CAN NEVER BE TRAINED TO BECOME LEGALLY COMPETENT .

THE JUDGE NEVER ENDED UP HAVING THAT HEARING AT ALL , BECAUSE THE JUDGE SAID THAT THE RULE WHICH SAYS ONLY FIVE YEARS , DOESN'T REQUIRE A LOOK ING AT THE CHARGE AFTER TWO YEARS, CORRECT?

THAT'S CORRECT.

HELP ME , YOU SAID THAT YOU DON'T BELIEVE THAT THE RULE IN THE STATUTE THE RULE AND THE STATUTE CONFLICT, AND THEN JUSTICE PARIENTE POSED TO A HYPOTHETICAL, AND I AM NOT SURE THAT I UNDERSTAND Y OUR RESPONSE TO THE HYPOTHETICAL , IN TERMS OF THE RULE ,

AND THE STATUTE NOT CONFLICTING . HER HYPOTHETICAL WAS ONLY MENTAL RETARDATION , AND SO THAT IS THE ONLY CIRCUMSTANCE, SO NOW THE ISSUE POSED , ANYWAY, IS WHETHER OR NOT THERE IS A ENTITLEMENT TO DISMISSAL WITHOUT PREJUDICE, AFTER TWO YEARS , OR A N ENTITLEMENT ONLY AFTER FIVE YEARS ? AND IF THE, IF THEY DON'T CONFLICT , YOU KNOW , GIVE U S THE ANSWER TO. THAT .

THE STATE WOULD SUBMIT THAT THE FIVE YEARS WOULD CONTROL, AND IT WOULD HAVE TO IN THIS PARTICULAR INSTANCE, BUT TO ANSWER THE QUESTION DIRECTLY , THE TWO YEARS IS A REFINEMENT OF THE FIVE -YEAR PERIOD, WHICH IS ESTABLISHED UNDER THE PROCEDURAL ASPECT . SO

THE STATUTE PUTS A TWO-YEAR CAP ON, IT DOES IT NOT?

THAT'S CORRECT.

OKAY , SO IF YOU HAVE MENTAL RETARDATION AND YOU HAVE BEEN FOUND INCOMPETENT TO STAND TRIAL , TWO YEARSHAVE PASSED , DOES THE STATUTE GRANT YOU THE RIGHTTO HAVE IT DISMISSED WITHOUT PREJUDICE?

NO, YOUR HONOR, BECAUSEIT COMES BACK TO WHETHER IT IS PROCEDURAL O R SUBSTANTIVEIN NATURE YOUR.

LET'S SET THAT ASIDE IF A MINUTE, LET'S SET ASIDE THEPROCEDURAL SUBTANT I HAVE.WHAT DOES THE STATUTE APPEAR TO DO ON ITS FACE ? MENTAL RETARDATION , YOU HAVE BEEN FOUND INCOMPETENT TO PROCEED TO TRIAL. YOU HAVE TWO YEARS PASSES. ON ITS FACE , WHAT DOES THE STATUTE SAY?

IT WOULD SAY AT ANY REASONABLE POINT UP TO TWOYEARS , NOT TO EXCEED TWO YEARS , YOU MAY MOVE FOR DISMISSAL.

THAT IS WHY I SAY TWO YEARS PASSES.

AT THAT POINT IT WOULD SEEM THE STATUTE WOULD NOT APPLY.

IT WOULD SEEM WHAT?

THE STATUTE WOULD NOT APPLY.

SO IF THE DEFENDANT, WHO HAS BEEN COMMITTED , FOR MENTAL RETARDATION , GOES TO THE COURT AFTER TWO YEARS , AND SAYS I HAVE MET ALL THE REQUIREMENTS OF THE STATUTE AND PLEASE DISMISS THE CHARGES, WOULD THE JUDGE SAY, YOU KNOW, WHAT ARE YOU TALKING ABOUT? THE STATUTE DOESN'T SAYANYTHING ABOUT THAT , OR WOULD THE JUDGE SAY, WELL , IT LOOKS LIKE MAYBE YOU ARE RIGHT , READING THE STATUTE. I AM HIM HAVING DIFFICULTY , IS THERE A PURPOSE TO THIS STATUTE?

THE STATUTE SAYS THAT YOU CAN MOVE FOR DISMISSAL , UP UNTIL THE TWO YEARS .

I SEE. SO IF THE TWO YEARS PASSED, THE STATE'S POSITION IS THAT IF YOU DON'T DO IT UP UNTILTWO YEARS AND THE TWO YEARSPASS , THEN YOU ARE OUT OF LUCK. YOU HAVE JUST , UP UNTIL TWOYEARS TO MOVE FOR DISMISSAL.

THE LANGUAGE OF THE STATUTE

THE TWO YEARS PASSED.

THE LANGUAGE SAYS NOT TO EXCEED TWO YEARS. THAT IS SPECIFICALLY WHAT IT SAYS.

IF THE STATE IS READING THE STATUTE , AFTER TWO YEARS THE STATUTE HAS NO EFFECT.

AND YOU MUST LOOK AT WHAT THE RULE APPLIES TO ALL COMPETENT INDIVIDUALS.

I AM LOOKING AT YOUR PREDICATE FOR THAT, AND THAT IS THAT THIS STATUTE, IF MORE THAN TWO YEARS HAVE PASSED , HAS ABSOLUTELY NO EFFECT. AM I RIGHT? IS THAT THE STATE'S POSITION?

YOU CAN LOOK AT IT THAT WAY AND YOU CAN LOOK AT THE STATUTE

AM I ASKING FOR THE STATE'S POSITION. OKAY. YOU REPRESENT THE STATE HERE , AND IS IT THE STATE'S POSITION THAT , ONCE TWO YEARS PASSES, THIS STATUTE HAS NO EFFECT ? YES OR NO .

YES. THAT IS WHAT THE LANGUAGE SAYS IN THIS CASE , YOU CANNOT MAKE THE ARGUMENT THAT IT IS A SUBSTANTIVE RIGHT , AND THE REASON FOR THAT IS APPELLANT IS ANALOGIZING THIS TO A STATUTE OF LIMITATIONS . WE LOOK AT THE PROVISIONS

BEFORE YOU GET, JUST TO FOLLOW THROUGH WITH WHAT JUSTICE ANSTEAD SAID, SO IF THE DEFENDANT ACTUALLY FILED THE MOTION 22 MONTHS INTO THE COMMITMENT , THIS STATUTE WOULD BE APPLICABLE ?

YOU STILL HAVE TO LOOK AT HOW THE RULE APPLIES .

NO. I AM JUST TALKING ABOUT THE STATUTE. ASSUME !!ING, I GUESS WE CAN'T ASSUME, BECAUSE THE RULE , WE WOULDN'T HAVE BUT THE PROBLEM

THAT IS WHAT I AM SAYING.

THE WAY YOU SEEM TO BE READING IT IS THIS STATUTE WOULD HAVE NO APPLICABILITY WHATSOEVER. YOU ARE SAYING THAT, IF TWO YEARS PASSED , YOU GET NOTHING UNDER THIS STATUTE , BUT IF YOU ARE INTO THE 22d MONTH AS OPPOSED TO THE 24th MONTH OF YOUR COMMITMENT , WHAT WOULD HAPPEN?

THAT WOULD, AS LONG AS YOU ARE WITHIN THE TWO YEARS , YOU CAN ASSERT THAT THE STATUTE WOULD APPLY. THE STATE'S POSITION IS THAT , BECAUSE IT IS A PROCEDURAL RIGHT WE ARE TALKING ABOUT HERE, THE FACT THAT THERE IS A TWO-YEAR PROVISION IN THE STATUTE, IS NOT WHAT WE HAVE TO LOOK AT. BECAUSE IT IS PROCEDURAL, WE HAVE TO LOOK AT WHAT THE RULE SAYS.

OKAY. LET'S ASSUME THAT THIS IS A SUBSTANTIVE STATUTE . A DEFENDANT FILES A MOTION , UNDER THIS SUBSTANTIVE STATUTE , ON THE 24th MONTH. WHAT THEN?

IF IT IS A SUBSTANTIVE STATUTE , AND THE STATE HAS NO ARGUMENT THAT THIS IS AT ALL PROCEDURAL, OBVIOUSLY THE TWO YEARS IS GOING TO PREVAIL. WE ARE GOING TO LOSE THIS. TIME HAVING A HARD TIME UNDERGO YOUR ARGUMENT ABOUT WHEN YOU HAD TO UNDERSTANDING YOUR ARGUMENT ABOUT WHEN YOU HAD TO FILE THIS.

YOU ARE REALLY SAYING THAT THIS STATUTE, IF THEY FILE AFTER A 25 MONTHS , THAT THE INTENT OF THIS STATUTE WASN'T THAT, AFTER TWO YEARS , IN THE CUSTODY OF THE DEPARTMENT OF CHILDREN AND FAMILY, THAT AFTER THAT POINT , THAT YOU THEN CAN GO AHEAD AND BE CIVILLY COMMITTED. IS THAT STATUTE , BUT IF YOU WAIT UNTIL 25 MONTHS , THEN YOU DON'T HAVE, YOU LOSE THAT RIGHT?

WELL

EVEN IF IT IS SUBSTANTIVE?

IF YOU ARE LOOKING AT IT ONLY AS SUBSTANTIVE LAW , THAT IS ONE THING.

SO , AGAIN , I WANT TO MAKE SURE, YOU ARE SAYING THAT THE CONSTRUCTION OF THE STATUTE WAS THAT, IF YOU WAITED UNTIL TWO YEARS AND ONE DAY , YOU COULDN'T CLAIM THE RIGHTS UNDER THE STATUTE. YOU HAD WAIVED THEM BECAUSE YOU DIDN'T FILE IT WITHIN THE TWO YEARS.

THE STATUTE SAYS THAT IT HAS TO BE WITHIN TWO YEARS. THE STATE HASN'T MADE THAT ARGUMENT PRECISELY BEFORE.

I WAS TRYING TO LOOK IN YOUR BRIEF AND

THE LANGUAGE WOULD INDICATE THAT THERE MAY BE A CUT OFF THERE.

SO THIS COURT COULD GO AHEAD AND ENACT A RULE TO SAY THAT , AFTER ONE YEAR , THAT THE COURT CAN DISMISS THE CHARGES FOR EITHER MENTALLY RETARDED OR MENTALLY ILL DEFENDANTS WHO ARE FOUND INCOMPETENT , SFRIT ABSOLUTELY.

SIX MONTHS?

THE COURT HAS THE AUTHORITY TO DO THAT , YES, MA'AM.

SO AND THE ISSUE ABOUT WHERE , WOULD YOU AGREE THAT , WHERE THE INMATE IS HOUSED AFTER THERE IS A DISMISSAL WITHOUT PREJUDICE, IS DIFFERENT THAN WHERE THEY ARE HOUSED WHILE THE CHARGE RESPECT PENDING?

YES, MA'AM. THERE IS A DIFFERENCE BETWEEN THE FORENSIC AND THE CIVIL SIDE OF IT, AND THE STATE WOULD SUBMIT THAT , IN THIS CASE WHERE WE HAVE AN INDIVIDUAL WHO HAS PROVEN HERSELF TO BE A DANGEROUS OTHERS, SINCE SHE IS CHARGED WITH ARMED ROBBERY AND FIRST-DEGREE MURDER THAT , SHE NEEDS TO BE LEFT IN A FORENSIC SETTING.

WELL , THAT , THOUGH , THE STATE HAS MADE , HASN'T THE STATE , THROUGH ITS LEGISLATURE'S ENACTMENT , AND THE ALLOCATION TO THE DEPARTMENT OF CHILDREN AND FAMILY, MADE A DECISION THAT THEY DON'T WANT TO HOUSE PEOPLE IN THE FORENSIC SIDE WHO ARE FOUND TO BE MENTALLY RETARDED, MORE THAN TWO YEARS , THAT THEY HAVE MADE A FISCAL DETERMINATION , AND WITH THAT GOES A RIGHT OF SOMEBODY, AND WE DON'T KNOW WHAT THE DIFFERENCE IN THE ACTUAL ACCOMMODATIONS ARE BUT A RIGHT NOT TO BE ON THE CRIMINAL SIDE , AFTER TWO YEARS. WHY ISN'T THAT , WHERE YOU ARE PLACED , WHETHER YOU ARE PLACED IN JAIL VERSUS PRISON , WHETHER YOU ARE PLACED IN A JIMMY RYCE FACILITY VERSUS PRISON, WHY AREN'T THOSE PART OF SUBSTANTIVE PARTS OF THE LAW?

WELL , I WOULD SUBMIT THAT THE RIGHT TO TREATMENT IS, BUT HOW YOU OBTAIN TREATMENT AND HOW YOU OBTAIN DISMISSAL , THOSE ARE PROCEDURAL. AND IN THIS CASE , I WOULD DISAGREE VERY MUCH WITH WHAT MY OPPONENT SAID THIS MORNING, ABOUT THERE BEING A PRIMARY DIAGNOSIS OF MENTAL RETARDATION . EVERYBODY WHO LOOKED AT THIS WOMAN SAID , YES , SHE IS MENTALLY RETARDED , AND SHE WAS DESCRIBED BY DR . McCLAIREN  
A T PAGE 72

IF WE ARE GOING TO GO BACK FOR THE TRIAL COURT TO LOOK AT, IF WE DECIDE SUBSTANTIVE, AND YOU MAY WIN ON THE PRIMARY DIAGNOSIS AS MENTAL ILLNESS , BUT THIS COURT IS NOT, AT LEAST I CAN'T IMAGINE IN THE STATE OF THIS RECORD, THAT WE ARE GOING TO MAKE A DECISION AS TO WHETHER SHE DUAL DIAGNOSED OR WHICH IS HER PRIMARY DIAGNOSIS. YOUR REQUEST WOULD BE THAT IT WOULD GO BACK TO THE TRIAL COURT TO MAKE THAT

DECISION, CORRECT?

ABSOLUTELY. THIS IS NOT A COURT OF FACT. IT IS NOT A FACT FINDER. CERTAINLY THAT CAN BE DONE.

I THINK THE QUESTIONS WERE ANSWERED IN RESPONSE TO JUSTICE BELL'S QUESTION. BUT GOING BACK TO WHERE WE ARE , WE GOT A DISTRICT , WEHAVE GOT A TRIAL COURT THAT IS IGNORED , A STATUTE , BECAUSE IT SAYS IT IS PROCEDURAL, AND WE HAVE GOTAN APPELLATE COURT THAT WOULD AFFIRM THE DENIAL OF A STATUTE, AND YOU WOULD HAVE US LEAVE THOSE TWO, THE RULE AND THE STATUTE, IN CONSISTENT , OR WHAT? IN OTHER WORDS , IF WE TAKE THE CASE, SHOULD WE SAY WE ACKNOWLEDGE THE INCONSISTENCY BUT WE ARE NOT GOING TO HOLD IT UNCONSTITUTIONAL?

THE STATE WOULD SUBMIT , JUSTICE PARIENTE, THAT THIS COURT NEED NOT ACCEPT THIS CASE, WHERE THERE I S NO JURISDICTION TO AMEND THE RULE , SHOULD IT SEE FIT T O DO SO. THAT IS PRIMARY , WHERE THERE IS NO JURISDICTION.

WHAT WOULD HAPPEN , THE NEXT CASE COMES UP AND THERE IS THE STATUTE STILL ON THEBOOKS, WHAT HAPPENS NOW? I MEAN , SAY IT HAPPENS IN THE FIRST DISTRICT , IS THE STATUTE IN EFFECT IN THE FIRST DISTRICT?

WELL , THAT , I THINK ONE THING YOU HAVE TO LOOK AT IS, WHEN THE LEGISLATURE DRAFTED

I AM ASKING YOU THAT QUESTION , IS THE STATUTE IN ITS CURRENT STATE , IN EFFECT IN THE FIRST DISTRICT , BASED ON THE DECISION IN PIRD V STATE?

IN BYRD V STATE?

I CAN'T ANSWER THAT, BECAUSE I DON'T KNOW IF THIS ISSUE HAS COME UP AT A TRIAL COURT LEVEL, WHERE THEY ARGUED WHAT HAPPENED IN THIS CASE .

LET ME ASK YOU A QUESTION ABOUT THE STATE OF THISRECORD. AS I UNDERSTAND WHERE THIS CASE IS , PROCEDURALLY , IS THAT JUDGE LEWIS DENIED THEMOTION TO DISMISS. CORRECT?

YES, SIR.

AND THEN IT WENT ON A WRIT OF CERTIORARI , TO THE DISTRICT COURT. IS THAT CORRECT?

YES, SIR.

OKAY. AND WHAT , AND THE COURT, I TAKE IT , HELD THAT THERE WAS A PROPER CERTIORARI HERE.

THEY DIDN'T ACTUALLY RULE ON WHETHER THEY HAD JURISDICTION, BUT OBVIOUSLY BECAUSE THEY RENDERED OPINION, THEY FO UND THAT THERE WAS.

WHAT WAS THE DISTRICT COURT'S JURISDICTION?

THE STATE WAS, WOULD SUBMIT THAT THERE WAS APROBLEM WITH JURISDICTION BECAUSE IT WAS NOT AN APPELLATE DECISION BY THE CIRCUIT COURT THAT THEY WERE SEEKING RELIEF FROM, SO I THINK THERE WAS A QUESTION FOR THAT. BUT YOU KNOW, I WOULD LIKE TO MAKE THE POINT , SINCE I AM RUNNING OUT OF TIME , THAT SINCE THERE ARE THE DUAL DIAGNOSIS , EVEN IF WE ASSUME THAT THE STATUTE AND THE RULE COEXIST TOGETHER , IT REALLY WOULDN'T MAKE SINCE

IS THERE A FURTHER RECORD IN THE TRIAL COURT , OTHER THAN THE PLEADINGS?

NOT THAT I AM AWARE OF, YOUR HONOR, BUT EVERYONE DID, IN FACT, FIND THAT THIS WOMAN SUFFERED FROM PSYCHOSIS, AND I WOULD POINT TO DR. BENOIT'S TESTIMONY AT 158-TO-159, WHERE HE SAID THAT THIS WOMAN'S PSYCHOSIS HAD TO BE TREATED BEFORE WE CAN EVEN GET TO ANYTHING ELSE.

JUDGE LEWIS SAID THAT THIS ISSUE IS WHETHER IT IS PROCEDURAL OR SUBSTANTIVE IN NATURE YOUR. THE STATUTE OF LIMITATIONS IS CONSIDERED TO BE SUBSTANTIVE. HE GOES ON TO SAY REQUIREMENTS ARE SUPERSEDED BY RULE 3.213. THAT IS A NICE WAY OF SAYING WE ARE IGNORING THE STATUTE BECAUSE IT IS PROCEDURAL. ISN'T THAT WHAT THE ORDER SAYS AND ISN'T THAT WHY THIS DISMISSAL WAS DENIED?

IT IS FINDING THE TIME FRAME TO BE PROCEDURAL. THAT DOESN'T MEAN THAT THE STATUTE WAS UNCONSTITUTIONAL AND THE COURT DIDN'T SAY SO.

ONLY PROCEDURAL CONSTITUTIONAL?

I AM SORRY. WOULD YOU REPEAT THAT PLEASE.

ON WHAT BASIS THIS THIS STATE IS A STATUTE OF THE LEGISLATURE THAT DEALS WITH THE PROCEDURE OF THIS COURT, CONSTITUTIONAL?

AS LONG AS THERE IS NO CONFLICTING RULE, PROVISION ON THE SAME POINT.

RIGHT. AND THAT GOES BACK TO, THAT THE, IT IS PRETTY CLEAR THAT THE RULE SPEAKS, DOESN'T DIFFERENTIATE BETWEEN MENTAL RETARDATION AND MENTAL ILLNESS, AND JUST SAYS IT IS FIVE YEARS, WHEREAS THE STATUTE, WHICH IS WHAT THEY WERE PROCEEDING UNDER, SAYS TWO YEARS, AND JUDGE LEWIS DOESN'T SAY, WELL, IT DOESN'T MATTER, I DON'T NEED TO REACH IT, BECAUSE SHE MENTALLY ILL AS WELL. HE REACHES THE ISSUE. DOESN'T HE?

YES, HE DOES, BUT THAT DOESN'T CHANGE THE FACT THAT THE QUESTION IS IS IT PROCEDURAL? IS IT SUBSTANTIVE? AND THE STATE WOULD SUBMIT THAT, IN A CASE LIKE THIS WHERE THE TIME FRAME CAN BE DISCRETIONARY EXTENDED BY THE TRIAL COURT AS IT SEES FIT, BASED ON CERTAIN FINDINGS OF FACT, SUBSTANTIVE LAW IS SOMETHING IMMUTABLE. WE CAN'T CHANGE IT.

SHE DOESN'T HAVE HER HER CHARGES, THOUGH, DISMISSED AND SHE ENDS UP REMAINING ON THE CRIMINAL SIDE OF CHATTAHOOCHEE. THAT IS IRREPARABLE HARM THAT CANNOT BE REMEDIED ON APPEAL BECAUSE SHE WOULD BE REMAINING THERE FOR FIVE YEARS. THAT IS WHY THE FIRST DISTRICT TOOK THE CASE ON CERT, CORRECT?

THAT ISN'T TRUE, JUSTICE PARIENTE, BECAUSE EVERY YEAR THIS PERSON COMES UP FOR EVALUATION, BECAUSE IT IS NOT THAT WE COMMIT HER AND LEAVE HER FOR FIVE YEARS. SHE IS REVIEWED EVERY YEAR BY EXPERTS.

IF SHE IS FOUND COMPETENT, THEN SHE GOES TO TRIAL.

RIGHT.

BUT IN THE MEANTIME, THE STATE SAYS FOR ONLY TWO YEARS WILL WE HOLD YOU ON THE CRIMINAL SIDE OF A FACILITY. AFTER THAT, YOU ARE TO BE CIVILLY COMMITTED, IF YOU ARE FOUND TO BE INCOMPETENT BY VIRTUE OF MENTAL RETARDATION.

BUT IN THIS CASE, WHEN YOU HAVE GOT TWO TIME FRAMES, AND TWO DIAGNOSIS, IT IS ILLOGICAL TO SAY THAT THE SMALLER OF THE TIME FRAME CONTROLS

IS THAT IN THE RECORD? IS IT IN THE RECORD WHERE SHE IS GOING TO BE HOUSED , ON WHICH SIDE OF THIS, IN THIS RECORD?

IT SAYS IN THE COMMITMENT ORDER SHE IS HELD THAT FOREIGN I CAN SETTING , A A FORENSIC SETTING, A SECURE SETTING.

IS THAT EXPLAINED?

THAT IS THE EXTENT OF THE FINDING. WE HAVE NOTHING FURTHER THAN IN THE COMMITMENT ORDER, IT SAYS THAT SHE IS BEING HELD IN A FORENSIC, SECURE SETTING. THE STATE WOULD THERE FOR

THERE IS NO DIFFERENCE TO WHERE SHE IS BEING HELD , IF SHE IS IN THE SAME PLACE, THEN NOBODY AT ALL SHOULD BE CARING ABOUT THIS , SHOULD THEY?

I DON'T THINK THAT IS TRUE. FIRST OF ALL , I CAN'T STAND BEFORE THE COURT AND MAKE REPRESENTATIONS AS TO HOUSING FACILITY AND WHAT IS THERE.

WHY DO WE CARE? WHY DOES THE STATE , WHY DO WE CARE?

THE STATE HAS A COMMITTED INTEREST IN TRYING PEOPLE WHO ARE COMMITTING CRIMES AND CHAPTER 916 IS RETURNING PEOPLE WHO ARE INCOMPETENT AND RETURNING THEM TO COMPETENCY SO WE CAN DO THAT, SO THE STATE DOES HAVE A COMPELLING INTEREST HERE. FOR ALL THESE REASONS, I STAND ALMOST OUT OF TIME , THE STATE WOULD ASK THIS COURT TO FIND THAT JURISDICTION WAS IMPROVEMENTLY GRANTED , BASED ON LACK OF JURISDICTION , AND IF IT DOES ENTERTAIN THE MERITS OF THE CASE , THEN WE WOULD ASK THAT YOU AFFIRM. THANK YOU.

MAY IT PLEASE THE COURT.

CAN I ASK YOU A QUESTION ON THE JURISDICTIONAL ISSUE.

YES, SIR.

AND THIS IS NOT SOMETHING THAT THE PROSECUTOR JUST RAISED, BUT AS I AM LOOKING AT THE DISTRICT COURT 'S DECISION , AS JUSTICE WELL POINTED OUT , THIS WAS A PETITION FOR WRIT OF CERTIORARI . JUDGE MINER WROTE THE OPINION AND NONE OF THE OTHER PANEL MEMBERS JOINED IN THE OPINION. THEY CONCURRED IN THE RESULT , AND THERE COULD HAVE BEEN MANY BASIS FOR DENYING A WRIT OF CERTIORARI, AND OBVIOUSLY THEY DIDN'T AGREE WITH THE OPINION OF JUDGE MINER , WHICH BASED THE DENIAL ON THE FACT THAT THE RULE SUPERSEDED THE STATUTE , SO DO WE HAVE A DECISION OF A DISTRICT COURT HERE , THAT HOLDS STATUTE UNCONSTITUTIONAL, THAT WOULD GIVE US , WHAT WOULD BE MANDATORY JURISDICTION OVER THIS CASE?

ALL I CAN SAY IS , IT IS CLEAR FROM THE RECORD , AT THE HEARING BELOW BEFORE JUDGE LEWIS, THE STATE TOOK AN AFFIRMATIVE POSITION THAT

LET ME STOP YOU RIGHT THERE, BECAUSE WE CAN'T LOOK IN DETERMINING WHETHER WE HAVE JURISDICTION. WE NEED TO LOOK AT THE OPINION WE NEED TO LOOK AT THE OPINION OF THE DCA.

THERE ARE TWO REASONS WHY THIS IS A COMMON LAW CERT. THE FIRST IS THAT WE FILED , THE TRIAL ATTORNEY DID FILE A NOTICE OF APPEAL FROM THE ORDER , BUT I ADVISED HIM THAT , ACCORDING TO THIS COURT'S DECISION IN VASQUEZ IN 1986 , THAT THIS WAS NOT A MATTER FOR DIRECT APPEAL. THIS WAS A MATTER FOR COMMON LAW CERT. THAT IS WHY IT WENT UP ON

COMMON LAW CERT , BECAUSE OF THIS COURT'S OPINION IN VASQUEZ.

YOU COULD BE COMPLETELY CORRECT , BUT THE PROBLEM ARISES WHEN ONLY ONE OF THE PANEL MEMBERS HAS CONCURRED IN THE OPINION , WHICH SAYS THAT THE RULE SUPERSEDES THE STATUTE, SO WE DON'T HAVE A MAJORITY OF THE PANEL , THEY DID NOT RULE THAT WAY.

I DON'T KNOW THE REASONS BEHIND JUSTICE MINER 'S OPINION.I DO KNOW THAT IT IS CLEAR THAT THE STATE MADE A N AFFIRMATIVE ARGUMENT I N GADSDEN COUNTY IN TRIAL COURT THAT, THE STATUTE WAS UNCONSTITUTIONAL, BECAUSE IT VIOLATED THIS COURT'S RULE-MAKING , RULES AND PROCEDURE POWERS. NOW THE STATE COMES UP HERE AND SAYS, NO, WE ARE NOT ARGUING THE STATUTE IS UNCONSTITUTIONAL. THERE IS NO JURISDICTION. I THINK THE STATE SHOULD BE ESTOPPED FROM MAKING SUCH AN ARGUMENT.

DON'T , ISN'T JURISDICTION SOMETHING THAT , REGARDLESS OF WHETHER ANYBODY RAISES IT , WE NEED TO DETERMINE THAT ON OUR OWN?

YES, SIR.

IF WE DON'T HAVE JURISDICTION, WE CAN'T RULE ON THE CASE.

I ALSO THINK THAT , AS A MATTER OF THIS COURT'S RULE-MAKING AS JUSTICE PARIENTE POINTED OUT , THEREIS A CLEAR CONFLICT BETWEEN THE FIVE-YEAR RULE AND THE TWO-YEAR STATUTE AND THIS COURT NEEDS TO RESOLVE IT.

THAT IS NOT THE QUESTION NAME ASKING. THE QUESTION IS ONLY ONE JUDGE ON THE PANEL HAS STATETHERE HAD IS A CONFLICT .

LIKE I SAID , I DON'T KNOW THE REASON FOR JUDGE MINER'S OPINION , THE WAY HE WROTE IT.

COULDN'T THEY HAVE FOUND CERT, BECAUSE EITHER ONE OF THE TWO BASES FOR CERT JURISDICTION WERE MET?

THEY COULD HAVE DENIED IT WITHOUT AN OPINION . THAT'S CORRECT.

IF THEY HAD DENIED IT WITHOUT AN OPINION , WHAT WOULD HAVE HAPPENED?

WE WOULD HAVE NOWHERE ELSE TO GO. WE WOULD NOT BE HERE TODAY.

THEY DID DENY IT WITHOUTAN OPINION.

THEY DENIED IT AFTER THAT SHORT OPINION , YES .

THE MAJORITY RULES ON THE DCA, AND TWO JUDGES HAVE DENIED IT WITHOUT OPINION , HAVE THEY NOT?

LIKE I SAY, I T IS AN EXTRAORDINARY WRIT. IT IS A PROCEDURE THIS COURTTOLD US TO USE , AND THAT IS WHAT WE USED.

OKAY.

AGAIN, I MEAN , MAYBE THIS ISN'T SOMETHING YOU WERE PREPARED FOR, AND I DIDN'T PICK UP ON THAT AND NO ONE HAS , UNTIL RIGHT NOW , BUT IF YOU ARE CONCURRING I N RESULT , YOU ARE NOT CONCURRING WITH THE OPINION. SO TWO JUDGES ARE ESSENTIALLY DENYING IT , WITHOUT AN OPINION . JUSTICE , JUDGE MINER 'S OPINION WOULD BE A CONCURRENCE NOT THE MAJORITY OPINION.

WELL , I DON'T KNOW. I HAVEN'T BEEN TO JUDGESCHOOL. I DON'T KNOW ABOUT CONCURRING SPECIALLY CONCURRING O R NOT CONCURRING . I, ONCE AGAIN , I WOULD LIKE TO POINT OUT THAT I THINK THIS DUAL DIAGNOSIS THING IS A RED HERRING . IT IS OBVIOUS TO ME THAT THE PSYCHIATRIST , PSYCHOLOGIST EXPERTS AT THE 1999 PROCEEDINGS , WERE CONCERNED THAT SHE WAS IN JAIL. SHE WAS CHARGED WITH FIRST-DEGREE MURDER, AND SHE HAD POST-TRAUMATIC STRESS DISORDER. WELL, THAT BE , TO ME, IS A VERY COMMON THING FOR SOMEONE WHO IS ARRESTED FOR FIRST-DEGREE MURDER.THEY ARE GOING TO BE SUFFERING FROM SOME SORT OF POST-TRAUMATIC STRESS .

WAS THAT ARGUED BEFORE JUDGE LEWIS , THAT IT SHOULDN'T BE DISMISSEDBECAUSE SHE WAS DUAL DIAGNOSIS , THE STATE MAKE THAT ARGUMENT?

NOT TO MY RECOLLECTION , NEW YORK CITY MA'AM.

THAT THAT IS NOT M Y NOT TO MY RECOLLECTION , NO , MA'AM.

THAT DUAL DIAGNOSIS ARGUMENT MADE BY THE STATEWOULD BE IN RESPONSE TO THE PETITION FOR CERT.

I DON'T THINK SO.I THINK THE STATE'S ARGUMENT WAS ON THE STATUTE BEING UNCONSTITUTIONAL AS A VIOLATION OF THE RULE PROCEDURE.

THERE NO CONSTITUTIONAL PROCEDURE , THAT SHE WAS DIAGNOSED WITH MENTAL RETARDATION AND THEN

THE STATE BROUGHT THAT UP AS A RED HERRING.

WE DON'T KNOW THAT THE STATE BROUGHT THAT UP AS A RED HERRING .

CHIEF JUSTICE: THANK YOU .