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Robert Lavon Sanders v. State of Florida; State of Florida v. Solomon Willis

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT WILL HEAR THE NEXT CASE. AS NEXT COUNSEL ARE COMING UP, JUSTICE LEWIS POINTED OUT THAT DAVE HEYMAN IS HERE, THE DIRECTOR OF THE HIGH SCHOOL. WELCOME. YOU ARE GOING TO, MR. DAVIS, YOU ARE GOING TO TAKE ALL OF THE TIME?

IF I DON'T USE IT, YES, BUT WE WILL TAKE ALL OF THE TIME NECESSARY. WITH ME IS BIANCA LISTON, REPRESENTING MR. WILLIS, AND SITTING BACK IS MR. JIM CLARK.

CHIEF JUSTICE: BEFORE WE START, I DO WANT TO THANK BOTH ATTORNEYS, LISTON AND CLARK. AS I UNDERSTAND, YOU WERE APPOINTED BY THE COURT TO HANDLE PROCEEDINGS IN THIS CASE PRO BONO. THE COURT GREATLY APPRECIATES YOUR SERVICE. MR. DAVIS?

MAY IT PLEASE THE COURT. MY NAME IS DAVE DAVIS. I AM REPRESENTING ROBERT SANDERS IN THIS 3.850 CASE IN WHICH MR.^SANDERS WAS CHARGED WITH AND CONVICTED OF ROBBERY WITH A FIREARM. THAT'S A KEY PART OF THIS CASE. HE WAS AFFIRMED BY THE FIRST DISTRICT AND HE FILED A MOTION FOR POST CONVICTION RELIEF ON A 3.850 ALLEGING TRIAL COUNSEL'S FAILING TO REQUEST THE NECESSARY LESSER INCLUDED INSTRUCTION OF ROBBERY WITH A WEAPON. THE FIRST DISTRICT --

HE DID REQUEST OTHER LESSER-INCLUDED OFFENSES THAT WERE GIVEN, RIGHT?

YES, INSTRUCTION ON ROBBERY AS WELL BUT I DON'T RECALL THE RECORD IS NOT CLEAR THAT HE REQUESTED THAT INSTRUCTION.

IS THAT A NECESSARILY LESSER-INCLUDED OFFENSE THAN WHAT HE WAS CONVICTED OF?

I'LL HAVE TO -- I DON'T BELIEVE SO. I DON'T KNOW, I'LL BE HONEST WITH YOU I JUST DON'T KNOW. I WAS FOCUSING ON ONE NECESSARY LESSER-INCLUDED HE HAD WAS ROBBERY WITH A WEAPON.

AND SO THE JURY COULD HAVE CONVICTED HIM ON ROBBERY BUT DIDN'T?

YES.

SO YOU GO ROBBERY WITH A FIREARM, ROBBERY WITH A WEAPON AND THEN ROBBERY?

YES, SO UNDER THE ANALYSIS THAT WOULD BE TWO STEPS REMOVED AND THAT'S WHAT I THINK YOU ARE MAYBE ALLUDING TO BUT ROBBERY WITH A WEAPON WOULD HAVE BEEN ONE STEPPED REMOVED. HE CERTAINLY SHOULD HAVE BEEN INSTRUCTED ON THAT. THE FIRST DISTRICT SAID, YES, TRIAL COUNSEL DID NOT MEET THE STANDARD OF COMPETENT COUNSEL WHEN HE DID NOT REQUEST THAT INSTRUCTION SO THE ONLY QUESTION WAS UNDER A STRICKLAND ANALYSIS WHETHER IT WAS BASICALLY HARMLESS ERROR.

DON'T WE HAVE TO START WITH THE --

JUSTICE CANTERO?

DON'T WE HAVE TO START WITH THE PROPOSITION THAT WHEN A JURY CONVICTS A DEFENDANT

OF A CRIME, WE ARE PRESUMED THAT THE JURY FOLLOWED THE INSTRUCTIONS AND THAT THE JURY FOUND BEYOND A REASONABLE DOUBT THAT THE ELEMENTS OF THAT CRIME, THE UPPER CRIME IN THIS CASE THE ROBBERY WITH A FIREARM HAD BEEN PROVEN?

THAT CERTAINLY IS THE APPROACH THE FIRST DISTRICT TOOK.

WELL, DON'T WE --

NO --

DON'T WE HAVE TO START WITH THE PRESUMPTION THAT THE JURY FOUND THOSE THINGS BEYOND A REASONABLE DOUBT BECAUSE THAT'S WHAT THE JURY SAID THEY FOUND?

NO, IN THIS SORT OF CASE, NO, THAT'S NOT WHAT YOU DO. WHEN THEY SHOULD HAVE BEEN INSTRUCTED ON THE NECESSARY LESSER OF ROBBERY WITH A WEAPON AND WERE NOT, UNDER THE ANALYSIS OF BECK VERSUS ALABAMA AND THIS COURT'S CASE IN STATE VERSUS --

THAT WAS A CAPITAL CASE, CORRECT, AND THAT WAS BASED ON CONSTITUTIONAL PROBLEMS WITH IMPOSING A CAPITAL PENALTY, A DEATH PENALTY WITHOUT GIVING THE JURY THE OPPORTUNITY TO CONVICT ON A LESSER NONCAPITAL OFFENSE.

THAT'S CORRECT.

IT WAS NOT A POST CONVICTION CASE?

NO, BUT THE ANALYSIS IS THE SAME, AND STATE VERSUS BROUGH WASN'T A CAPITAL CASE. THE ANALYSIS IS THE SAME, YOU DON'T HAVE CONFIDENCE IN THAT JURY VERDICT WHEN THEY COULD HAVE FOUND HIM GUILTY OF OR WHEN THE JURY'S DELIBERATIONS DURING THE JURY DELIBERATIONS THEY SIMPLY SAID OUR FINDINGS OF FACT DON'T SUPPORT EITHER ROBBERY WITH A FIREARM OR SIMPLE ROBBERY. THERE IS A MIDDLE THING BUT WE DON'T HAVE A CHOICE.

LET ME GO ONE STEP BELOW JUSTICE CANTERO'S QUESTION. WHAT IF THERE WAS NO QUESTION OF ROBBERY OCCURRED, NO QUESTION A WEAPON WAS USED AND THE ONLY DEFENSE WAS IT WASN'T ME. WOULD YOU BE ARGUING THE SAME THING?

WELL, YOU KNOW, I GUESS THE PROBLEM I HAVE IS BY WHAT AUTHORITY DO WE AS JUDGES AND LAWYERS MAKE THAT DETERMINATION? I MEAN, THAT'S KIND OF WHAT APPRENDI IS TALKING ABOUT. WE LET THE JURIES MAKE THESE DETERMINATIONS AND WHEN JUDGE MAKES THE DETERMINATIONS THIS IS THE REAL ISSUE HERE, WE'RE USURPING THE ROLE OF THE JURY.

THE PROBLEM IS AT LEAST I SEE A PROBLEM THE FIRST DISTRICT TOOK A PER SE APPROACH, YOU'RE SATISFYING A PER^SE APPROACH THE OTHER WAY WHICH IS THAT IT WOULD HAVE BEEN REVERSIBLE ERROR IF REQUESTED BUT WE'VE NEVER SAID IT IS FUNDAMENTAL ERROR IF IT WASN'T REQUESTED, THAT IT IS -- GOES TO SUCH -- GOES TO THE ESSENCE OF THE CASE THAT WOULD BE REVERSIBLE AND HERE MY CONCERN IS THE ISSUE, I MEAN HE HAD A FIREARM. IF ANY --

I'M SORRY. THAT'S THE WAY YOU ARE SEEING IT.

CHIEF JUSTICE: WELL, THEY HAD THE OPTION OF DECIDING THIS ROBBERY. NOW, THAT MAY NOT ABOUT HAVE NOT ABOUT ENOUGH FOR ABREU BUT IN TERMS OF LOOKING AT WHETHER THIS CASE MEETS THE PREJUDICE PRONG I DON'T KNOW. NOW, WILLIS SEEMS TO ME TO PERHAPS BE A DIFFERENT SITUATION. ARE YOU GOING TO ARGUE THE FACTS OF WILLIS?

NO, I WILL TURN MY TIME OVER.

I THOUGHT THAT WAS FACTUALLY STRONGER.

NO, WHAT WE ARE SIMPLY ARGUING IS LIKE YOU SAY THE FIRST DCA HAS TAKEN PER^SE APPROACH THAT YOU HAVE TO ACCEPT THE JURY'S FINDING THAT THEY HAVE FOUND THE FACTS BEYOND A REASONABLE DOUBT AND THERE IS A CERTAIN SORT OF LOGIC TO THAT BUT THAT LOGIC DOES NOT HOLD UP IN LIGHT OF THE EXPERIENCE.

BUT I DON'T SEE IT REALLY IN READING JUDGE ALLEN'S OPINION, JUDGE CLINE'S OPINION, JUDGE SAWAYA'S OPINION ON THIS VERY ISSUE THAT REALLY THE FOCUS IS THAT THERE IS A DIFFERENT BETWEEN IS STRICKLAND PREJUDICE ANALYSIS AND -- WHICH YOU REFER TO AT THE VERY OUTSET AS A HARMLESS ERROR ANALYSIS. THAT'S A DIFFERENT THING, BECAUSE STRICKLAND REQUIRES THERE TO BE A BURDEN ON THE DEFENDANT TO SET ASIDE SOMETHING THAT IS FINAL AND TO COME BACK AND DEMONSTRATE THAT THE WHOLE PROCEEDING IS OVERWROUGHT AND OVERWHELMED BY THE FACT THAT THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL SO YOU LOOK AT THE OUTCOME AND YOU LOOK AT WHETHER IT WOULD HAVE UNDERMINED YOUR COMPETENCE IN THE OUTCOME.

WELL, AT THIS POINT THE TRIAL JUDGE SIMPLY DENIED HIS MOTION SO AT THIS POINT ALL MR.^SANDERS HAS TO DO IS MAKE A CULVER CLAIM AND THAT'S WHERE WE ARE STANDING AT THIS POINT. CAN HE MAKE A CLAIM IN EFFECT --

BUT IT IS A MATTER OF WHETHER, UNDER WHAT'S BEEN ALLEGED THERE IS AN ALLEGATION OF PREJUDICE.

AND --

UNDER STRICKLAND.

AND THE PREJUDICE IS THAT THE JURY WAS NOT GIVEN THIS THIRD OPTION, THIS JURY PARDON OPTION THAT THEY SHOULD HAVE BEEN GIVEN AND UNDER BECK VERSUS ALABAMA, UNDER STATE VERSUS ABREU, THIS COURT AND THE UNITED STATES SUPREME COURT HAVE SIMPLY SAID WHEN THERE IS THAT OPTION AVAILABLE, WHETHER IT IS ON A CAPITAL CASE OR NOT, OBVIOUSLY NOT ON A CAPITAL CASE, BUT WE JUST SIMPLY DO NOT HAVE ANY CONFIDENCE OR SUFFICIENT CONFIDENCE IN THAT VERDICT AND AS THE SUPREME COURT, U.S. SUPREME COURT SAID IN BECK, WE RUN THE SUBSTANTIAL RISK OF THE JURY MAY HAVE CONVICTED OF HIM OF THE CHARGED CRIME AND THAT'S THE PREJUDICE THAT MR.^SANDERS IS ALLEGING IS.

SO IF HIS ONLY DEFENSE WAS IT WASN'T ME, IT WASN'T THAT IT WASN'T A GUN, IT WAS A WATER PISTOL OR SOMETHING LIKE THAT, YOU WOULD MAKE NO DISTINCTION AND YOU WOULDN'T REQUIRE -- LET ME PHRASE IT BETTER. YOU WOULDN'T SAY THAT THE COURT SHOULD REQUIRE IN THE MOTION AN ALLEGATION OF PREJUDICE ALONG THE LINE OF I WAS CONVICTED OF ROBBERY WITH A WEAPON. I HAD A DEFENSE THAT IT WAS A RUBBER MALLET INSTEAD OF A BASEBALL BAT, SOMETHING NOT A DEADLY WEAPON, LET'S SAY THAT.

LET ME BACK UP BECAUSE THE MORE I HAVE THOUGHT ABOUT THE CASE, IF HIS DEFENSE WAS IT WASN'T ME THEN PERHAPS THIS ARGUMENT REALLY IS NOT THAT STRONG THAT I'M MAKING NOW, BUT AT THIS POINT WE DON'T KNOW WHAT HIS ARGUMENT IS. HE IS JUST TRYING TO GET INTO COURT.

DOES HE HAVE TO ALLEGE IT IN THE MOTION?

NO, I THINK AT THIS POINT THIS IS BASICALLY A HANDWRITTEN MOTION THAT HE FILED. HE HAS ALLEGED ENOUGH TO GET HIMSELF IN THE COURT. THAT'S ALL HE HAS TO DO AT THIS POINT AND MAKE A CULLABLE CLAIM AND THEY ARE SAYING HE WILL NEVER MAKE A CULLABLE CLAIM SIMPLY BECAUSE AS JUSTICE CANTERO IS SAYING THE JURY HAS FOUND HIM GUILTY BEYOND A

REASONABLE DOUBT.

I GUESS I HAVE THE PROBLEM, AND THERE ARE JURY PARDONS AS WE USE THAT WORD OR PERHAPS PART OF OUR JURISPRUDENCE BECAUSE WE REFER TO IT IN ABREU AND I THINK GOING BACK TO WHAT JUSTICE WELLS IS SAYING THAT IT WOULD SEEM IN THIS KIND OF SITUATION THERE WOULD HAVE TO BE SOME FACTUAL ALLEGATIONS THAT WOULD SHOW, YOU KNOW, WHY THE PROCEEDINGS WERE NOT FAIR. THE JURY HAD SOME CONCERNS DURING THE DELIBERATIONS, SOMETHING THAT WOULD RAISE THAT THEY WERE REALLY HAVING PROBLEMS WITH THE MAIN CHARGE AND THEY WERE GIVEN NO OTHER ALTERNATIVES. IN WILLIS, AS I UNDERSTAND IT, THEY WERE GIVEN NO OTHER ALTERNATIVES ON ONE COUNT, AND ON THE COUNT WHERE THEY WERE GIVEN A NECESSARILY LESSER-INCLUDED, THEY ACTUALLY CONVICTED OF THE LESSER CHARGE. SO I THINK YOU COULD MAKE SOME LEAP THERE THAT, WELL, MY GOODNESS, THEY DID ACTUALLY CONVICT -- WHERE THEY HAD THE CHANCE ON THE LESSER, THEY, YOU KNOW, CONVICTED OF THE LESSER AND THE ONE THAT WAS ALL OR NOTHING, THEY DIDN'T SO WE DO NEED AN EVIDENTIARY HEARING, BUT THE VERY FACT THAT IT MIGHT HAVE RESULTED IN A REFERAL IS -- REVERSAL IS WHAT I AM STILL STRUGGLING WITH WHETHER THAT IS ENOUGH TO GET YOU THROUGH THE PREJUDICE PRONG OF STRICKLAND.

SO IF I CAN REFLECT BACK TO WHAT YOU ARE SAYING, YOU ARE SAYING JUST MERELY ALLEGING IN A 3.850 PETITION THAT AS MR.^SANDERS SAID BY MERELY THE FACT HE WAS NOT GIVEN THIS LESSER INCLUDED THAT'S NOT ENOUGH, HE'S GOT TO SHOW MORE, AND WHAT THE U.S. SUPREME COURT AND THIS COURT I THINK IN ABREU IS SAYING, YOU KNOW, IT WOULD BE NICE IF WE COULD GO IN THERE AND LISTEN TO WHAT THE JURY IS TALKING ABOUT. YOU DON'T DO THIS. WHEN WE HAVE SECRECY OF THE JURY PROCEEDINGS YOU DON'T KNOW WHAT THEIR DELIBERATIONS WERE AND PROBLEMS WERE WITH THE CASE AND PARTICULARLY IN BECK WHAT THEY ARE SAYING IS WHEN WE DON'T KNOW WHAT THE JURY'S DELIBERATIONS ARE AND THEY HAD THAT CHOICE, THE FINDING OF A LESSER-INCLUDED BUT WE ARE NOT TOLD ABOUT IT, THEN THERE IS A SUBSTANTIAL RISK THAT THEY MAY HAVE COME BACK AND CONVICTED OF A HIGHER OFFENSE SO THAT'S THE FACTS ARE WE JUST SIMPLY DON'T KNOW, AND IN THOSE CIRCUMSTANCES WE HAVE TO GO BACK AND AT LEAST GIVE MR.^SANDERS AN OPPORTUNITY TO SHOW ANY PREJUDICE AND THAT'S ALL WE ARE ASKING FOR. WE'RE NOT SAYING HE IS GOING TO WIN ON THIS OR NOT BUT HE AT LEAST HAS TO -- THE FIRST DISTRICT WAS SIMPLY WRONG WHEN THEY SAID HE CAN NEVER SHOW BECAUSE AS JUSTICE CANTERO WAS SAYING THE FACTS ARE THEY FOUND HIM GUILTY AS CHARGED AND WHAT BECK AND STATE VERSUS ABREU ARE SAYING IS THAT'S NOT -- WE JUST DON'T HAVE THAT CONFIDENCE IN THE VERDICT WHEN THEY COULD HAVE BEEN GIVEN THE LESSER-INCLUDED OFFENSE BUT WERE NOT SO THAT'S WHAT WE ARE SAYING HERE IS THEY SHOULD HAVE -- THE FACTS ARE THAT HE ALLEGED IN HIS PETITION ARE SUFFICIENT TO AT LEAST GIVE HIM THE OPPORTUNITY TO GO TO COURT AND MAKE THIS -- PROVE HIS ALLEGATION. I SEE I HAVE A FEW MINUTES LEFT AND IF MISS LISTON WOULD LIKE TO CLARIFY WHATEVER I HAVE MUDDLED UP.

MAY IT PLEASE THE COURT, MY NAME IS BIANCA^LISTON, IN OUR CASE WE DO HAVE LITTLE FACTUAL DISSIMILAR ISSUES THAT ARE RAISED HERE IN THAT THERE WAS A COUNT THAT WAS PRESENTED THAT DID ALLOW FOR A LESSER-INCLUDED OFFENSE WHICH THE JURY DID FIND MR.^WILLIS GUILTY OF AND THEY WEREN'T ALLOWED THE OPPORTUNITY TO ACTUALLY HAVE THAT IN THE COUNT FOR THE ROBBERY. THEY WEREN'T GIVEN THE OPPORTUNITY OF THE LESSER-INCLUDED OFFENSE OF HAVING IT ROBBERY WITH A WEAPON, AND BECAUSE OF THAT --

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CHIEF JUSTICE: AT THIS POINT BECAUSE IT WASN'T AN EVIDENTIARY HEARING WE DON'T KNOW IF THERE ARE SOME TIMES THAT THE FAILURE REQUESTS COULD BE INADVERTENT OR COULD BE IGNORANCE BUT IT ALSO COULD BE TACTICAL?

CORRECT.

CHIEF JUSTICE: LISTEN. I DON'T WANT TO GIVE THEM A CHOICE. I THINK THE STATE HAS A WEAK CASE AND I WANT TO HAVE IT ALL OR NOT. WE DON'T KNOW THAT.

WE DON'T KNOW AND THAT'S WHY YOU CAN'T ACROSS THE BOARD SAY THAT THERE CAN NEVER BE AN EVIDENTIARY HEARING. I THINK IT NEEDS TO BE ON A CASE-BY-CASE BASIS AND HAVE A HEARING.

HOW DO YOU RESPOND TO MY QUESTION TO MR.^DAVIS, WHICH IS THAT DON'T WE HAVE TO START WITH THE PRESUMPTION THAT WHEN THE JURY FINDS THE DEFENDANT GUILTY OF ROBBERY WITH A FIREARM THAT THE JURY UNANIMOUSLY FOUND BEYOND A REASONABLE DOUBT THAT THE ELEMENTS OF ROBBERY WITH A FIREARM WERE SATISFIED?

I THINK THEY FOUND WHAT WAS GIVEN TO THEM. IT IS HARD TO SIT AND SAY WHAT A JURY HAS DONE IN A ROOM AND THEY SHOULD FOLLOW THE LAW, BUT IN THE SAME CIRCUMSTANCE IF THEY ARE NOT GIVEN THE OPPORTUNITY TO GIVE A LESSER-INCLUDED OFFENSE, YOU KNOW, IT IS HARD TO SAY WHAT WOULD HAVE OCCURRED. I DON'T KNOW IF THAT CLEARLY ANSWERS WHAT YOUR QUESTION IS.

I THINK IT ANSWERS ABOUT AS WELL AS YOU ARE GOING TO BE ABLE TO.

SO WHAT ABOUT MY QUESTION ON THE PLEADING OF THE PREJUDICE PRONG, BECAUSE, YOU KNOW, IN YOUR STATEMENT, IN YOUR BRIEF ALL THAT WAS ALLEGED THAT IT WAS NOT GIVEN OR REQUESTED, SO IT REACHES THE DEFICIENT PERFORMANCE PRONG, BUT THERE IS NO REFERENCE TO AN ALLEGATION AS TO PREJUDICE.

I THINK IT HAS TO SHOW BASICALLY WHAT I THINK WAS ARGUED EARLIER THAT THERE WAS AN UNDERMINING OF THE PROCESS AND BECAUSE THE LESSER-INCLUDED OFFENSE WASN'T GIVEN, WE CAN'T SIT HERE TODAY AND SAY THAT A FAIR TRIAL HAS BEEN GIVEN TO THIS GENTLEMAN BECAUSE HE WASN'T -- THE JURY WASN'T ABLE TO FIND IT.

MY UNDERSTANDING OF STRICKLAND IS THAT THERE IS A PRESUMPTION OF CORRECTNESS AND IT IS THE DEFENDANT'S BURDEN, SO BOTH YOU AND YOUR CO-COUNSEL'S POSITION IS THE DEFENDANT ONLY HAS TO ALLEGE THE DEFICIENCY, HAS NO OBLIGATION TO MAKE ANY ALLEGATIONS AS TO PREJUDICE, AND WE'VE GOT TO HOLD AN EVIDENTIARY HEARING JUST WITH THE MERE ALLEGATION OF DEFICIENCY?

WELL, IF WE LOOK, AND I PROBABLY DIDN'T ADDRESS IT IN MY BRIEF BUT IF YOU LOOK THROUGH THE RECORD I THINK IN WHAT I WAS JUST LOOKING THROUGH THAT THE ARGUMENT THAT ONE OF THE ATTORNEYS DID MAKE AND THEY DID MENTION THAT THERE WAS A LESSER-INCLUDED CHARGE STATING THAT IT WAS A WEAPON AND THAT WASN'T GIVEN, SO I THINK IN MY RECORD, IF THEY WOULD HAVE LOOKED AT IT AND IT WOULD HAVE BEEN RAISED MORE SPECIFICALLY THAT THE COURTS BY LOOKING AT IT WOULD HAVE DETERMINED THAT THERE SHOULD HAVE BEEN AN EVIDENTIARY HEARING TO LOOK INTO THE FACTS OF THIS CASE AND AGAIN THAT'S WHY I GO BACK TO IT JUST CAN'T BE ACROSS THE BOARD A DENIAL THAT THIS CAN OCCUR. IT HAS TO BE, YOU KNOW, A CASE BY CASE BASIS AND LOOK INTO IT, AND --.

CHIEF JUSTICE: SO YOU WOULD AGREE IF THE DEFENSE WAS IT WASN'T ME, IT IS NOT THE SAME SITUATION. IT CAN'T BE A ONE SIZE FITS ALL. THERE MAY BE CIRCUMSTANCES?

AND MAYBE THE RECORD WILL REFLECT THAT WE ARE NOT SEEKING THAT, AND IT NEEDS TO BE A LITTLE BIT MORE, I GUESS ADDRESSED BY A LOWER COURT.

CHIEF JUSTICE: OKAY. THANK YOU. YOU ARE BOTH IN YOUR REBUTTAL. ALL RIGHT.

MR.^WINOKUR.

THANK YOU, THOMAS WINOKUR FOR THE RESPONDENT IN THE SANDERS CASE AND PETITIONER IN THE WILLIS CASE. STATE OF FLORIDA.

CAN I ASK YOU A HYPOTHETICAL HERE?

OKAY.

LET'S SAY THAT THE HUSBAND AND WIFE GET INTO A MARITAL DISPUTE AND THE HUSBAND KILLS THE WIFE AND HIS DEFENSE, HE IS SAYING THAT IT WAS A CRIME OF PASSION, THAT HE THOUGHT SHE WAS HAVING AN AFFAIR AND WHEN THEY GOT INTO AN ARGUMENT HE KILLED HER WITH A GUN, AND THE STATE DOESN'T SEEK THE DEATH PENALTY SO BECK VERSUS ALABAMA DOESN'T APPLY BUT IT DOES SAY THIS IS FIRST-DEGREE MURDER AND THE FIRST IS INSTRUCTED ON FIRST-DEGREE MURDER ONLY, NOT INSTRUCTED ON SECOND-DEGREE MURDER OR MANSLAUGHTER SO THE JURY HAS TO DECIDE EVEN IT IS GOING TO BE FIRST-DEGREE MURDER OR NOT, AND THE DEFENSE COUNSEL DOESN'T REQUEST ANOTHER TYPE OF INSTRUCTION. IS THAT INEFFECTIVE ASSISTANCE OF COUNSEL?

I DON'T THINK THAT IT IS. I THINK THAT THE CHOICE NOT TO REQUEST LESSER-INCLUDED OFFENSES CAN BE A STRATEGIC OR TACTICAL DECISION AND IT VERY WELL MAY HAVE BEEN IN THAT THAT CASE.

CHIEF JUSTICE: BUT THAT WOULD REQUIRE AN EVIDENTIARY HEARING?

NO, IT WOULDN'T.

CHIEF JUSTICE: LET'S JUST ASSUME UNDER JUSTICE CANTERO'S HYPOTHETICAL THE DEFENSE LAWYER IN AN AFFIDAVIT SAYS I BLEW IT, I CANNOT BELIEVE IT. I JUST HAD A BRAIN FREEZE THAT DAY. NOW, GO TO THE SECOND ISSUE OF PREJUDICE. WITH HIS HYPOTHETICAL.

WELL, THE CHOICE NOT TO REQUEST LESSER-INCLUDED OFFENSES.

CHIEF JUSTICE: LET'S ASSUME IT WASN'T A CHOICE. IT WAS A MISTAKE AND THE DEFENSE ATTORNEY SAYS I THOUGHT IT WAS GOING TO BE GIVEN. I DIDN'T REALIZE IT, AND YOU KNOW MY ARGUMENT WAS ALL ABOUT THIS WAS A CRIME OF PASSION AND THE JURY DIDN'T HAVE THAT OPTION BECAUSE LET'S ASSUME THE FIRST PRONG.

IT IS SOMETHING THAT IS CERTAINLY SUBJECT FOR DEBATE WHETHER IT IS TACTICAL OR INCOMPETENT. IF WE ASSUME THAT IT IS INCOMPETENT IT DOESN'T MAKE ANY DIFFERENCE, BECAUSE AS A MATTER OF LAW THEY CANNOT MAKE A CULLABLE CLAIM TO SHOW PREJUDICE WHEN THE JURY HAS FOUND THAT WHEN THERE HAS BEEN, IN FACT, A FINDING THAT THE STATE HAS PROVED EVERY ELEMENT BEYOND A REASONABLE DOUBT BECAUSE WE DO, IN FACT --.

CHIEF JUSTICE: IN EVERY CASE, I MEAN FIRST OF ALL I AGREE THAT WE'VE GOT -- THERE IS A BURDEN, A HIGHER BURDEN ON THE DEFENDANT TO MAKE A SHOWING WHEN YOU HAVE A STRICKLAND CASE, BUT IN EVERY CASE WE'VE GOT A JURY THAT HAS FOUND UNANIMOUSLY, WHETHER IT IS DEATH AND THE WHOLE IDEA IS THAT THE PROCESS, THE STRICKLAND PROCESS WAS SOMETHING THE COUNSEL WAS DOING, THE ACT TO UNDERMINE OUR CONFIDENCE IN THE OUTCOME. SO IF IN JUSTICE CANTERO'S EXAMPLE WE READ THE TRANSCRIPT AND THE TRANSCRIPT IS ALL FULL OF HOW THIS GUY WAS EMOTIONAL AND THIS AND NEVER HAD INTENDED AT ALL TO DO IT, THE CLOSING ARGUMENT WAS ALL ABOUT THAT, BUT THEN THE JURY DOESN'T GET THAT ALTERNATIVE, WHY WOULDN'T THAT BE SOMETHING THAT COULD UNDERMINE CONFIDENCE? I MEAN, IN OTHER WORDS BECAUSE IF WE SAY EVERY TIME A JURY FINDS UNANIMOUSLY SOMETHING THEN IT WOULD NEVER BE A STRICKLAND CLAIM BECAUSE

THE WHOLE THING THERE HAS BEEN A CONVICTION AND THE IDEA OF STRICKLAND IS THAT THERE MIGHT BE SOME FUNCTIONING BY COUNSEL OR LACK OF FUNCTIONING AND AN EFFECT ON THE PROCESS THAT GIVES US PAUSE TO SAY THIS PROCESS WASN'T FAIR. WE ARE NOT SURE WE HAVE CONFIDENCE IN THE RESULTS. ISN'T THAT WHAT STRICKLAND IS ABOUT?

IF SUCH A SITUATION CAME UP THAT THIS COURT DECIDED THAT A JURY DESERVES THE THIRD OPTION, SIMILAR TO THE WAY BECK DID IN THE DIRECT APPEAL CONTEXT, THEN THAT MAY MAKE SENSE, BUT I STILL BELIEVE THAT FOR PURPOSES OF POST CONVICTION RELIEF YOU HAVE TO PRESUME THAT THE JURY ACTED IN ACCORDANCE WITH THE LAW AND FOUND EVERY ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT REGARDLESS OF WHETHER A LESSER-INCLUDED INSTRUCTIONS WERE GIVEN.

CHIEF JUSTICE: WHAT IF, IN WILLIS, LET'S TALK ABOUT THE FACTS IN WILLIS. IS IT CORRECT THAT THERE WAS A KIDNAP, WAS IT AN ARMED KIDNAPPING CHARGE?

THAT'S CORRECT.

CHIEF JUSTICE: ARMED KIDNAPPING AND WHAT WAS THE LESSER OFFENSE INSTRUCTION THAT WAS GIVEN?

OH, GOSH, I DON'T KNOW. I KNOW THE FALSE IMPRISONMENT WAS ONE OF THEM GIVEN. IT CERTAINLY WASN'T THE NEXT STEP REMOVED LESSER.

CHIEF JUSTICE: FALSE IMPRISONMENT IS PRETTY DIFFERENT THAN ARMED KIDNAPPING.

INDEED IT IS.

CHIEF JUSTICE: PRETTY SIGNIFICANT. NOW, ON THE OTHER ONE, WHICH WAS ROBBERY WITH A FIREARM, WAS THE SAME FIREARM THAT WAS BEING USED TO ALLEGE ARMED KIDNAPPING, THAT FIREARM THAT WAS THE ARMED ROBBERY?

YES, IT WAS.

CHIEF JUSTICE: AND WHAT WAS THE NEXT INSTRUCTION GIVEN ON ARMED ROBBERY?

IT WAS ROBBERY WITH UNARMED ROBBERY.

CHIEF JUSTICE: IN WILLIS THEY GAVE A ROBBERY ONE?

YES.

CHIEF JUSTICE: BECAUSE THE FOURTH DISTRICT OPINION AND THE RECORD DIDN'T SHOW THAT.

I DID FIND THE RECORD AND I BELIEVE THAT THE --.

CHIEF JUSTICE: AGAIN THAT'S THE PROBLEM IS THAT --

THE DIRECT APPEAL RECORD DOES REFLECT THAT ROBBERY WAS A GIVEN INSTRUCTION, YES.

DO WE HAVE A COPY OF THE INSTRUCTION IN THE RECORD? OR THE JURY VERDICT?

IT IS IN THE DIRECT APPEAL RECORD.

CHIEF JUSTICE: DOESN'T THAT AT LEAST AGAIN USUALLY AGAIN UNLESS WE ARE GOING TO GO WITH A FIRST DISTRICT PER^SE THEN AT THE VERY LEAST WILLIS WOULD NEED TO GO BACK SO THAT THE TRIAL COURT COULD ATTACH THE PLEADINGS THAT CONCLUSIVELY REFUTE THE

CLAIM?

AGAIN, I DON'T REALLY SEE THAT IT IS NECESSARY UNDER THESE CIRCUMSTANCES, BECAUSE WE AGREE WITH JUDGE ALLEN IN HIS SANDERS OPINION THAT IT IS NOT NECESSARY BECAUSE YOU CAN'T MAKE A CULLABLE CLAIM OF PREJUDICE IN THESE CIRCUMSTANCES. THE FACT THAT THE JURY MAY HAVE CHOSEN NOT TO CONVICT WILLIS OF ARMED KIDNAPPING DOESN'T HAVE ANYTHING TO DO WITH THE EVIDENCE THAT WAS USED TO SUPPORT ARMED ROBBERY AND IF IT HAD ANYTHING TO DO WITH IT, IT WOULD BE THAT IT WAS UNARMED. THERE WAS NO DISPUTE IN ANY OF THESE CASES.

CHIEF JUSTICE: SO HOW DO YOU EXPLAIN A JURY FINDING NO ARMED KIDNAPPING AND YOU SEE THAT'S THE WHOLE THING ABOUT JURY VERDICTS?

ABSOLUTELY.

CHIEF JUSTICE: IT IS NOT ALWAYS, I MEAN WE HAVE CONFIDENCE IN THE JURY SYSTEM BUT WE ALSO WANT TO MAKE SURE THAT THERE ISN'T ANYTHING HAPPENING THAT UNDERMINES THAT CONFIDENCE?

THEY COULD HAVE ASSUMED THAT THERE WASN'T SUFFICIENT MOVEMENT TO SUPPORT A KIDNAPPING CHARGE. THEY COULD HAVE GRANTED A JURY PARDON. WHAT WE DO KNOW IS THAT THEY DIDN'T GRANT ANY KIND OF A JURY PARDON IN THE ARMED ROBBERY COUNT AND IF IT HAD WISHED TO GRANT A JURY PARDON IN THE ARMED ROBBERY COUNTY BELIEVE THAT LOGIC WOULD HAVE DICTATED THAT THEY WOULD HAVE GONE TO WHAT THEY WOULD HAVE CONSIDERED THE NEXT LESSER OFFENSE.

CHIEF JUSTICE: SO AGAIN YOU MIGHT SAY THAT THE RULE THAT COMES OUT IS AS LONG AS THEY ARE GIVEN SOME LESSER-INCLUDED AND THEY DIDN'T -- THEN THEY HAD AT LEAST AN OPTION AND, THEREFORE, THE FAILURE TO NOT GIVE, YOU KNOW, THE A, B, C, FAILURE TO GIVE B POST CONVICTION ISN'T --

I'M AFRAID I WOULDN'T GO THAT FAR, CHIEF JUSTICE. I STILL WOULD ABIDE BY JUDGE ALLEN'S RULING IN SANDERS THAT YOU JUST CAN'T MAKE A CULLABLE CLAIM WHEN THE JURY HAS MADE THIS FINDING BEYOND A REASONABLE DOUBT. AND I THINK THAT'S THE APPROPRIATE WAY TO ANALYZE THIS ISSUE.

CHIEF JUSTICE: I HAVE ANOTHER QUESTION WHICH WOULD RELATE TO INEFFECTIVE ASSISTANCE FOR APPELLATE COUNSEL AND WAS ALLUDED TO IN THE LAST ARGUMENT. LET'S ASSUME THAT TRIAL COUNSEL DID REQUEST, WASN'T GIVEN, NOW IT GOES UP ON APPEAL. ON APPEAL, THE DEFENSE APPELLATE LAWYER DOESN'T RAISE IT. IT WOULD HAVE BEEN A SLAM DUNK UNDER ABREU, IS THERE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL?

WELL, I DON'T THINK THAT IT IS, BECAUSE YOU STILL HAVE TO FIND -- ARE YOU ASKING IF THERE WAS NOT AN OBJECTION?

NO, NO, IT WAS REQUESTED. THE JUDGE DIDN'T GIVE IT. NOW IT GOES UP ON APPEAL AND THE DEFENSE LAWYER, APPELLATE LAWYER FORGETS TO RAISE THAT CLAIM.

OH, I SEE, ON APPEAL.

CHIEF JUSTICE: SO NOW WE ARE GOING TO INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

I WOULD SAY THAT THAT'S PROBABLY A LOT MORE IMMEDIATE. THAT'S SOMETHING THAT THERE IS REALLY NO OTHER RESULT THAT COULD HAVE OCCURRED IF IT HAD BEEN RAISED. IF IT HAD BEEN RAISED IT WOULD HAVE RESULTED IN REVERSAL BECAUSE THIS COURT HAS SAID IN ABREU

AND SUBSEQUENT CASES THAT IT IS PER^SE REVERSIBLE SO IT WOULD SUPPORT INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN THAT REGARD BECAUSE THERE IS REALLY NO OTHER RESULT THAT COULD OCCUR. THAT'S SIMPLY NOT THE CASE WHEN TRIAL COUNSEL DOESN'T REQUEST A LESSER-INCLUDED INSTRUCTION. WHEN THE COURT DENIES A LESSER-INCLUDED INSTRUCTION THIS COURT HAS SAID OVER AND OVER AGAIN THAT THAT'S REVERSIBLE ERROR. WE ALL KNOW THAT THE STANDARDS FOR JUDGING SUFFICIENCY OF COUNSEL IS DIFFERENT THAN JUDGING THE SUFFICIENCY OF TRIAL COUNSEL. THE STATE BEARS THE BURDEN OF DEMONSTRATING PREJUDICE RESULTING FROM ANY ERROR, FROM ANY DISCRETE ERROR IN THE CASE AND AS ABREU BASICALLY SAID IT IS IMPOSSIBLE TO TELL WHETHER THE JURY WOULD NOT HAVE CHOSEN TO EXERCISE A JURY PARDON IF THE COURT FAILS TO GIVE IT. THAT'S SIMPLY NOT THE CASE WHEN WE ARE JUDGING SUFFICIENCY OF COUNSEL. IT IS A COMPLETELY DIFFERENT ANALYSIS, AND THAT ANALYSIS REQUIRES THE DEFENDANT TO SHOW THE PREJUDICE AND STRICKLAND SETS FORTH WHAT THAT PREJUDICE IS IN GREAT DETAIL IN THE OPINION AND IT COULD SCARELY BE MORE CLEAR THAT THE POSSIBILITY OF A JURY PARDON IS NOT SOMETHING THAT CAN CONSTITUTE PREJUDICE FOR THE PURPOSE OF AN INEFFECTIVE ASSISTANCE CLAIM. IT USES THE TERM NULLIFICATION. NULLIFICATION IS ONE OF THOSE PHRASES THAT I THINK BASICALLY MEANS THE SAME THING AS A JURY PARDON. IT IS SIMPLY NOT THE KIND OF THING THAT CAN BE USED TO SUPPORT AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. JUST I WANT TO RESPOND TO A COUPLE OF THINGS THAT COUNSEL ALLUDED TO IN THE OPENING ARGUMENT. FIRST, BECK CERTAINLY DOES NOT SAY THAT YOU CAN'T PRESUME THAT THE JURY DIDN'T FOLLOW THE LAW. BECK WAS NOT EVEN A POST CONVICTION INEFFECTIVE ASSISTANCE CASE. IT HAD NOTHING TO DO WITH PRESUMPTIONS THAT APPLY AFTER A CONVICTION IS CONCLUDED. IT SIMPLY HAD TO DO WITH WHETHER IT WAS FAIR IN A TRIAL SETTING TO STATUTORILY DENY ALL LESSER-INCLUDED OFFENSES, AND THAT'S KIND OF IMPORTANT HERE BECAUSE NO MATTER HOW STRONGLY THIS COURT OR THE UNITED STATES SUPREME COURT VIEWS THE PROPRIETY OF JURY PARDONS AND THE NECESSITY OF LESSER-INCLUDED OFFENSE, NONE OF THEM HAVE EVER SAID, NEITHER OF THEM HAVE SAID THAT RIGHT IS SO FUNDAMENTAL THAT IT CAN'T BE WAIVED BY COUNSEL FOR TACTICAL REASONS SO IT REALLY MAKES NO DIFFERENCE WHAT BECK SAYS OR WHAT THIS COURT HAS SAID IN ABREU AND REDDICK AND THAT LINE OF CASES.

YOU SAID A LOT OF THINGS ABOUT TACTICAL REASONS BUT WE'VE HAD ALSO SAID IT IS INEFFECTIVE ASSISTANCE OF COUNSEL IF COUNSEL DOES SOMETHING FOR NO REASON, NOT FOR A TACTICAL REASON. IN OTHER WORDS, THERE ARE MANY CASES WHERE WE SAY, WELL, IT WAS A TACTICAL DECISION NOT TO DO X OR TO DO Y, BUT IF IT HAD NOT BEEN A TACTICAL DECISION IF IT WAS JUST INADVERTENCE IT WOULD HAVE BEEN INEFFECTIVE ASSISTANCE SO YOU ARE SAYING WE'VE NEVER SAID YOU HAVE TO REQUEST IT OR JURY PARDONS ARE REQUIRED AND CAN'T BE WAIVED FOR TACTICAL REASONS, BUT HAVE WE EVER SAID THEY CAN'T BE WAIVED EVEN FOR INEFFECTIVENESS?

MY POINT, JUSTICE, IS THAT THE RIGHT TO LESSER-INCLUDED OFFENSES AND TO JURY PARDONS DOES NOT EXTEND TO THE FACT THAT THEY CAN'T BE WAIVED BY COUNSEL, EITHER INADVERTENCE OR TACTICAL REASONS SO THE CASES WHICH STATE THAT YOU HAVE THESE RIGHTS, THE LESSER-INCLUDED OFFENSES, THESE RIGHTS TO JURY PARDONS SIMPLY DON'T APPLY IN POST CONVICTION CONTEXT.

CHIEF JUSTICE: ONE OF THE THINGS IN THE OPINION THAT CONCERNS ME THE MOST AND JUDGE ERVIN TALKED ABOUT IS THE STATEMENT BECAUSE WE KNOW THAT JURY PARDONS ARE OCCASIONALLY AWARDED BY ABHORRENT JURIES IT WOULD BE REASONABLE TO CONCLUDE THAT A JURY IN A REASONABLE CASE GIVEN THE OPPORTUNITY WOULD NOT DISOBEY THE LAW AND GRANT A PARDON. I MEAN, THE WHOLE -- THE UNDERLYING THEME OF ALL OF THESE CASES WHERE IT IS INTEGRAL TO FLORIDA LAW IS THAT A JURY CAN BE GIVEN THE OPPORTUNITY TO FIND A DEFENDANT GUILTY OF A LESSER-INCLUDED AND AS YOU SAID IN THIS PARTICULAR CASE, THAT THE STATE TRY TO GET A CONVICTION FOR ARMED KIDNAPPING AND THE JURY DIDN'T FIND THE FACTS ROSE TO ARMED KIDNAPPING HOW DO WE KNOW THAT THEY WEREN'T GIVEN THE

OPTION OF FALSE IMPRISONMENT AND THEY MIGHT HAVE SAID, GEE, SOMETHING HAPPEN, YOU BETTER CONVICT THEM OF SOMETHING, SO I'M A LITTLE CONCERNED ABOUT THE FIRST DISTRICT'S CATEGORIZATION OF THE VERY FACT THAT OF WHAT OUR JURISPRUDENCE RECOGNIZES AS BEING REQUIRED TO BE PUT INTO JURY INSTRUCTIONS.

CHIEF JUSTICE, OUR JURISPRUDENCE REQUIRES THAT JURY PARDONS BE PERMITTED. OUR JURISPRUDENCE RECOGNIZES THAT THEY OCCUR. I BELIEVE THAT THE JUSTICE HAD A GOOD DESCRIPTION OF IT IN HIS CONCURRING OPINION IN VICKERY WHICH I SUPPLEMENTED WITH THIS COURT THAT IT IS AN ERROR THAT MAY NOT BE CORRECTED AND THAT'S BASICALLY THE LEGAL STATUS OF THE JURY PARDON. IT IS NOT A RIGHT THAT THE DEFENDANT HAS. IT IS NOT A RIGHT THAT THE JURY HAS. IT IS A RECOGNITION THAT THOSE THINGS CAN OCCUR AND THAT THEY ARE AN IMPORTANT PART OF OUR JURISPRUDENCE JUST AS SHAW STATED IN HIS DISSENT IN WIMBERLEY IT IS ESSENTIALLY A POLITICAL DECISION TO GRANT THE JURY PARDON. I THINK THAT'S A VERY APT WAY OF CHARACTERIZING IT.

CHIEF JUSTICE: I GUESS MAYBE I'M HAVING TROUBLE WITH THE WHOLE IDEA THAT IT IS ALWAYS THE FACT THAT IF THE JURY FINDS A DEFENDANT GUILTY OF A LESSER-INCLUDED THAT THEY WERE PARDONING THEM FROM THE GREATER OFFENSE.

NOT AT ALL.

CHIEF JUSTICE: SO THAT'S WHY I DON'T UNDERSTAND IF THEY ARE NOT GIVEN THAT CHOICE, THE JURIES ARE EVERYDAY PEOPLE AND THEY ARE MAYBE RELUCTANT TO SET SOMEONE FREE, BUT THEY ARE GIVEN, IF THEY ARE GIVEN AN ALL OR NOTHING CHOICE AS IN JUSTICE CANTERO'S SCENARIO, THEN WE'VE UNDERMINED THE PROCESS, AND SO IT IS NOT JUST ALWAYS THAT THE LESSER-INCLUDED IS THERE JUST TO GIVE THEM A WAY OUT. IT IS BECAUSE THE STATE MAY HAVE NOT PROVEN THE GREATER OFFENSE.

THAT IS ABSOLUTELY CORRECT AND THAT IS THE APPROPRIATE USE OF A LESSER-INCLUDED OFFENSE IS WHEN THE STATE FAILS TO SATISFY THE JURY BEYOND A REASONABLE DOUBT OF ANY PARTICULAR ELEMENT OF THE CHARGED OFFENSE.

CHIEF JUSTICE: TO ME THAT'S WHY IT IS SO ESSENTIAL.

THE REASON IT DOESN'T APPLY HERE IS THAT WE ALREADY HAVE A RULING BY THE JURY THAT THEY DID, IN FACT, FIND EVERY ELEMENT OF THE CHARGE.

BUT THE PROBLEM IS THE PRACTICAL REALITY IN THE DOMESTIC SITUATION IF YOU ARE LOOKING AT AGGRAVATED BATTERY VERSUS BATTERY AND NOT GUILTY. IF YOU ONLY GIVE THE CHOICE OF AGGRAVATED BATTERY AND NOT GUILTY, UNDER THE CIRCUMSTANCES THEY ARE SAYING HE DID SOMETHING, BUT IT IS NOT TO THE AGGRAVATED BATTERY STAGE. LET'S SAY THE WIFE WAS A MONTH PREGNANT AND THEY CHARGE AGGRAVATED BATTERY BECAUSE SHE WAS PREGNANT AND HE DIDN'T KNOW ABOUT IT. THE JURY MAY SAY, SURE, THIS IS BATTERY BUT, YOU KNOW, NOT A SECOND-DEGREE FELONY. AND IF YOU DON'T GIVE THE LESSER-INCLUDED THEN THEY DON'T HAVE THE OPTION.

IF THIS COURT HAS THAT CONCERN THEN I WOULD RECOMMEND THAT THEY ADOPT A RULE OF LAW SIMILAR TO BECK WHICH REQUIRES SOME LESSER-INCLUDED OFFENSE INSTRUCTIONS BE GIVEN IN CERTAIN CASES IN ORDER TO GIVE THE JURY A THIRD OPTION, BUT I WOULD STRONGLY CAUTION THIS COURT AGAINST APPLYING THAT KIND OF RULE IN A POST CONVICTION CONTEXT WHERE WE ARE SUPPOSED TO BE MEASURING THE EFFECTIVENESS OF COUNSEL.

BUT WE DO REQUIRE NECESSARILY LESSER-INCLUDED INSTRUCTIONS BE GIVEN.

THAT'S CORRECT.

AND IT IS THE RARE CASE THAT THE LESSER-INCLUDED INSTRUCTIONS ARE NOT GIVEN, IS IT NOT?

I HAVE NEVER SEEN ONE.

FOR INSTANCE IF THE LAWYER SAYS, JUDGE, I WANT AN ALL OR NOTHING, AND I THINK I HAVE THE RIGHT TO THAT, AS YOU SAY, THAT FOR TACTICAL REASONS, THE LAWYER MAY THINK THAT THE PRESSURE ON THE JURY WILL BE SO GREAT IN TERMS OF FINDING THEM GUILTY OF THE CHARGED CRIME THAT THEY WILL ACQUIT THE DEFENDANT SOONER THAN THEY DO THAT. ISN'T THAT THE RARE CASE, THE VERY RARE CASE WHERE NECESSARILY LESSER-INCLUDEDS ARE NOT GIVEN?

I'VE NEVER SEEN ONE. IF THERE ARE ANY CASES OUT THERE, IT IS BECAUSE IT WORKED.

THEY ARE LISTED IN THE STANDARD INSTRUCTIONS AND ESSENTIALLY THE INSTRUCTION TO JUDGES THERE IS THAT ABSENT SOME UNUSUAL REASON THAT THE NECESSARILY LESSER-INCLUDEDS MUST BE GIVEN, RIGHT?

I UNDERSTAND THAT, JUSTICE, AND I STILL THINK THAT THAT KIND OF A DECISION SHOULD BE MADE AS A MATTER OF TRIAL COURT POLICY, RATHER THAN PUTTING IT ON TO INEFFECTIVE ASSISTANCE OF COUNSEL LITIGATION. I UNDERSTAND IT MAY UNDERMINE THE CONFIDENCE AND IT MAY BE CONSIDERED TO BE UNDERMINING CONFIDENCE AND THE RELIABILITY OF THE VERDICT BUT I THINK THAT THE NECESSITY OF ESTABLISHING PREJUDICE IS SO STRONG AND HAS BEEN SO WELL STATED BY THE UNITED STATES SUPREME COURT AND THIS COURT OVER THE YEARS THAT DISPENSING WITH THE PREJUDICE REQUIREMENT IN THAT KIND OF A CONTEXT WOULD NOT BE GOOD POLICY.

ONE OF THE REASONS THAT THESE CASES ARE RARE IS THAT THE STATE HAS AN INTEREST IN CHARGING THE JURY ON LESSER-INCLUDED OFFENSES. ISN'T THAT RIGHT?

ABSOLUTELY.

THE STATE DOESN'T WANT TO TAKE THE RISK THAT THE JURY SAYS GIVEN ALL OR NOTHING, WE TAKE NOTHING.

THAT'S CORRECT. IT DOES BENEFIT BOTH SIDES AND I THINK THAT'S WHAT THE JURY INSTRUCTIONS THAT THIS COURT HAS CRAFTED TELL THE JURY THAT THAT IS THE APPROPRIATE USE FOR LESSER-INCLUDED INSTRUCTIONS. IF THEY DON'T FIND THE CHARGED CRIME THEY GO DOWN TO THE LESSER-INCLUDED OFFENSES. IT DOESN'T SAY IF YOU DON'T FIND -- IF YOU FIND THE CHARGED CRIME YOU CAN CHOOSE FROM A SMOGASBORD OF LESSER-INCLUDED TO WHICHEVER WAY YOU SEE FIT. THAT'S CONTRARY TO WHAT THE INSTRUCTIONS SAY. SO ABSOLUTELY.

THE STANDARD INSTRUCTIONS SAY THE JURY IS TO CONVICT ON THE HIGHEST CHARGED OFFENSE THAT THEY FOUND PROVEN?

YES, SIR. AND THAT'S -- THAT IS SOMETHING YOU HAVE TO ASSUME IN THE POST CONVICTION CONTEXT. YOU HAVE TO PRESUME IT, AND WHEN YOU DO THE LANGUAGE IN STRICKLAND REGARDING WHAT NEEDS TO BE FOUND IN ORDER TO SUPPORT A REASONABLE PROBABILITY THAT THE RESULTED BEEN DIFFERENT, SPECIFICALLY EXCLUDES THE POSSIBILITY OF A JURY PARDON WHICH IS THE ONLY POSSIBLE HOPE THAT THEY COULD HAVE TO PREVAIL IN THIS PARTICULAR CLAIM AND FOR THOSE REASONS THE STATE WOULD ASK THIS COURT TO APPROVE THE FIRST DISTRICT'S DECISION IN SANDERS, AND DISAPPROVE THE FOURTH DISTRICT'S DECISION IN WILLIS. THANK YOU VERY MUCH.

CHIEF JUSTICE: THAT WAS PERFECT. YOU ENDED JUST WITH THE RED LIGHT. WE HAVEN'T HAD THAT HAPPEN MUCH THIS WEEK. MR.^DAVIS?

LET ME SEE HOW MUCH TIME I HAVE LEFT.

CHIEF JUSTICE: I WAS SAYING HIS TIMING WAS PERFECT.

I UNDERSTAND. LET ME GO BACK, AND JUSTICE BELL ASKED THE QUESTION ABOUT THE DEFENSE IT WASN'T ME. LET ME, I'VE DONE SOME RETHINKING ABOUT THAT AND LET ME, THAT MAY BE PERFECTLY RIGHT IF IT WASN'T ME, BUT THAT'S REALLY WHAT THE PURPOSE OF THE HEARING IS FOR. AT THIS POINT THE FIRST DISTRICT HAS SAID YOU WILL NEVER MAKE A CULLABLE CLAIM AND WHETHER IT WASN'T ME OR I DIDN'T USE A WEAPON, THAT REALLY NEVER COMES UP. SO WHAT WE ARE SAYING AT THIS POINT THE POSTURE THIS CASE IS IN, SANDERS CANNOT EVEN MAKE A CULLABLE CLAIM. THAT'S WHAT THE FIRST DISTRICT IS SAYING SO YOUR QUESTION OF IT WASN'T ME REALLY DOESN'T APPLY AT THIS JUNCTURE. IT MAY APPLY WHEN THEY HAVE THE EVIDENTIARY HEARING BUT NOT AT THIS JUNCTURE

I'M TRYING --

ARE YOU, AS JUSTICE CANTERO SUGGESTED ARE YOU GOING TO THE OPPOSITE EXTREME? DO YOU AGREE OR DISAGREE THERE MUST BE AN ALLEGATION OF DEFICIENT PERFORMANCE AND PREJUDICE IN THE PLEADING?

YES. WHAT I AM SAYING IN THIS PARTICULAR TYPE OF CASE BECAUSE WE ARE TALKING, YOU KNOW, ABOUT THE SORT OF SPECULATIVE THINGS OF WHAT THE JURY COULD OR COULD NOT HAVE DONE, THAT THE -- BY MERELY ALLEGING THAT MY COUNSEL IS INEFFECTIVE FOR NOT REQUESTING THIS NECESSARY LESSER HE HAS SATISFIED THE PREJUDICE PRONG, OKAY, AND I COME TO THAT --

SATISFIED DEFICIENT PERFORMANCE?

WELL, SATISFIED DEFICIENT AND HE AT LEAST GETS TO HAVE HIS HEARING.

HOW ARE YOU GOING TO SHOW PREJUDICE AT THE HEARING?

THAT'S FOR HIM TO WORRY ABOUT.

I UNDERSTAND BUT WE NEED TO FIGURE OUT HERE WHEN WE ARE SAYING YOU CAN'T SHOW IT.

WELL, HE SHOWS IT SIMPLY BECAUSE HE DIDN'T GET THE LESSER-INCLUDED INSTRUCTION, AND --

THEN YOU ARE SAYING IT IS PER^SE AGAIN. YOU ARE SAYING YOU THEREFORE SHOW PREJUDICE IF YOU SHOW INSUFFICIENT PERFORMANCE.

YES, I THINK SO.

WE ARE BACK TO THE PER^SE PERFORMANCE THEN. SO IT IS REALLY A SECOND BITE AT THE APPLE.

YES, BUT LET ME SEE IF I HAVE THIS RIGHT. IF YOU FOLLOW THE FIRST DCA'S APPROACH EVEN ON DIRECT APPEAL HE WOULD HAVE LOST, BECAUSE THE JURY FOUND HIM GUILTY AS CHARGED SO EVEN THOUGH HE HADN'T REQUESTED THE LESSER-INCLUDED IT IS HARMLESS.

BUT YOUR POSITION IT IS PER^SE WHETHER IT IS DIRECT?

YES, BECAUSE THAT'S WHAT ABREU SAYS.

IS IT PER SAY, THOUGH?

YOU SORT OF SAID, WELL, THAT'S WHAT AN EVIDENTIARY HEARING IS ALL ABOUT AND IF YOU GET TO THE EVIDENTIARY HEARING AND THE LAWYER SAYS, LOOK, I KNOW THAT INSTRUCTION WASN'T GIVEN AND THE REASON I DIDN'T ASK FOR THAT INSTRUCTION IS SO AND SO.

YES, YOU CAN COME DOWN HERE AND TRADE PLACES BECAUSE THAT'S WHAT I SHOULD HAVE SAID.

IS THAT YOUR FINAL ANSWER?

I THINK THAT'S MY FINAL ANSWER.

TIME UP?

BUT LET ME, I'M NOT REAL SURE HOW MUCH TIME I HAVE LEFT BUT LET ME READ A QUOTE FROM BECK VERSUS ALABAMA, BECK VERSUS AM BAMA, TRUE IN IF THE PROSECUTION DID NOT ESTABLISH BEYOND A REASONABLE DOUBT EVERY ELEMENT OF THE OFFENSE CHARGE AND IF NO LESSER OFFENSE INSTRUCTION IS OFFERED, THE JURY MUST RETURN A VERDICT OF ACQUITTAL. BUT THE DEFENDANT IS ENTITLED TO A LESSER INCLUDED INSTRUCTION IN THIS OFFENSE OR ANY OTHER BECAUSE HE SHOULD NOT BE EXPOSED TO THE SUBSTANTIAL RISK THAT THE JURY'S PRACTICE WILL DEVERGE FROM THEORY WHERE ONE ELEMENT REMAINS IN DOUBT BUT HE IS GUILTY OF ANOTHER OFFENSE THE JURY IS LIKELY TO RESOLVE ITS DOUBTS IN FAVOR OF THE CONVICTION AND THAT'S WHAT WE ARE SAYING HERE SO I URGE YOU TO REVERSE AND LET MR.^SANDERS AND MR.^WILLIS GO BACK AND, WELL, MR.^WILLIS DOESN'T HAVE TO WORRY ABOUT IT BUT MR.^SANDERS GO BACK AND MAKE A CULLABLE CLAIM TO GET PAST SUMMARY DENIAL. THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT WILL TAKE ITS MORNING BREAK OF 15 MINUTES AND AGAIN THANK PRO^BONO COUNSEL FOR THEIR ASSISTANCE IN THIS CASE. THE COURT WILL BE IN RECESS.

THE MARSHAL: PLEASE RISE.