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Chadwick Willacy v. State of Florida
SC05-189 | SC05-2021

>> HOW IS THAT?
>> MUCH BETTER.
>> GIVEN THE POSTURE THAT
WE'RE IN THE 3850.
IN MY VIEW, THE ANALYSIS
NEEDS TO BEGIN IN THAT 1992
ORDER ON THE MOTION FOR
REHEARING THAT DID HE NIS
THE REHEARING WE SET FORTH
THESE FAC IN THE BRIEF.
WHAT I WOULD LIKE TO DO IS
GO OVER THEM WITH YOU.
IF YOU REMEMBER, THERE IS
EVIDENTIARY HEARING
CONDUCTED.
A MONTH LATER, THERE IS
UNRECORDED WHICH THE JUDGE
ANNOUNCED HIS RULING.
THE OM THING WE KNOW TOWARD
THE DOCUMENTS IN CASE IS THE
JUDGE'S FEELING THAT THIS IS
THE DARNEDEST THING.
WE HAVE NO FINDINGS OF FACT.
>> THE JUDGE DID NOT FIND
THAT THE ATTORNEY FOR THE
DEFENDANT WAS IN FACT TOLD
BY THE PROSECUTORS ABOUT
THIS JUROR?
>> WELL, HOW I WOULD ANSWER
THAT IS WE HAVE ON THE
PROPOSED ORDER THAT FINING
MADE.
WE DON'T HAVE AN ORAL FINING
BY OUR TRIAL JUDGE MAKING
THAT FINDING.
>> BUT HE DIDN'T SIGN THAT?
ESIGNS THAT OVER OBJECTION
THE DEFENSE COUNSEL HAS MADE
A NUMBER OF OBJECTIONS.
HE TOLD THROUGH
CORRESPONDENCE THAT DEFENSE
COUNSEL WILL BE IN COCK
CONTACT WITH OBJECTIONS THAT

HE IS NO AFFIRMING THE ORDER
AS PROPOSED.

DESPITE THAT THE JUDGE SIGNS
THE ORDER.

A FEW DAYS LATER, WITH
WITHIN A WEEK, I DON'T --
WITHIN THREE DAYS, THE
DEFENSE COUNSEL FILES
OBJECTIONS ON THE RECORD.

THOSE GOES UNHEARD.

SO THAT UT PUTS US IN THE
POSTURE THAT MY POSITION IS
THAT DEFENSE COUNSEL THEN
MUST HAVE RAISE HAD ISSUE ON
DIRECT APPEAL FOR YOU.

HE MUST HAVE DONE -- HAD HE
DONE THAT GIVEN THE COURT'S
RULING, IT WOULD HAVE
ARRIVED AT PERHAPS A DIF
KEPT CONCLUSION, BECAUSE HE
TELLS US THAT A TRIAL COURT
MAY NOT DELEGATE ITS
DECISION-MAKING AUTHORITY TO
ANYONE SIDE AND NOT ALLOW
THE OTHER SIDE THE
OPPORTUNITY TO BE HEARD ON
ITS ONJECTIONS.

WE HAVE A FACTLY IDENTICAL
SITUATION AND DESPITE THAT
APPELLATE COUNSEL DID NOT
RAISE THAT ISSUE.

>> LET ME UNDERSTAND.

I THOUGHT YOU SAID THAT THE
PROSECUTOR PROPOSES THE
ORDER.

THE DEFENSE COUNSEL OBJECTS.
THEN, IN A COUPLE OF DAYS
LATER, THE ORDER IS INTERED,
SO WASN'T THE DEFENSE
COUNSEL GIVEN AN OPPORTUNITY
TO OBJECT?

THE TRIAL JUDGE OBVIOUSLY
DIDN'T ACCEPT THOSE
OBJECTIONS?

>> NO, MA'AM.

IT IS A A LITTLE BIT
DIFFERENT THAN THAT.
THEY ARE ATTACHED TO
APPENDIX, THE SEQUENCE OF
EVENTS.

WE HAVE ON DECEMBER 22 OF
'92, THE STATE SUBMIT THESE
PROPOSED ORDER.

AT THAT POINT, HE SAYS WE

HAVE BEEN UNABLE TO CONTACT DEFENSE COUNSEL.

WE DON'T KNOW WHETHER THEY HAVE SEEN THIS OR APPROVED THIS.

I AM PAR PHRASING A LITTLE BIT THE NATURE OF THE ORDER OR THE MATURE OF THE LETTER. THE NEXT DAY, HE SENDS A SUBSEQUENT LETTER AND SAYS WE HAVE CONTACTED THEM. THEY WILL CONTACT YOU DIRECTLY BICEP OPERATE CORE CONSIDERANCE TO VOICE HIS OBJECTIONS.

THAT OCCURS ON SEPTEMBER 23rd OF 1992 ON DECEMBER 28th OF 1992, THE JUDGE SIGN THESE ORDER.

>> BUT THE FACT IN -- IT APPEARS TO ME IN RESPECT TO JUROR CLARK IS THAT WHEN IT GOT HERE ON DIRECT APPEAL, THIS COURT SAYS WILLACY CLAIMS CLARK WAS UNDER CONSIDERATION WHEN SELECTED AS JUROR AND SEATING HIM VIOLATING SECTION 40.013 FLORIDA STATUTES.

WE DISAGREE.

WILLACY MISTAKENLY EQUATES CLARK'S PLACEMENTABLE THE PRETRIAL PRESCRIPTION INTERVENTION PROGRAM WITH PROSECUTOR SINCE WILLACY SINCE CLARK WAS NOT UNDER PROSECUTOR'S PROSECUTION, WILLACY'S MOTION WAS DENIED, SO IT APPEARS TO ME THAT THE ISSUE RAISED HERE AND DECIDED HERE AS TO WHETHER OR NOT CLARK WAS UNDER PROSECUTION.

>> WELL, IF I ANSWER THE QUESTION, MAYBE IN TWO WAYS. THE ISSUE ON THE ORDER BEEN PRESENTED TO YOU, I DON'T KNOW -- LET ME BACKTRACK A LITTLE BIT FURTHER.

AT THE TIME THE JUDGE DOES NOT MAKE THE TIMING AS FACT. HE MUST HAVE DETERMINED WHETHER THERE WAS WAIVER, WHETHER WAS IN PTA.

THE SIGNIFICANCE OF THE PTI
STATUTE.

REMEMBER, THERE IS A STATUTE
THAT TELLS US 944.025, I
BELIEVE IT IS, TALKS ABOUT
CONTINUING A RESUMPTION OF
PENDING PROSECUTION SHOULD
THAT INDIVIDUAL NOT COMPLY
WITH THE TERMS OF THE PTI
PROGRAM.

BASED ON THAT STATUTE, MY
READING OF THAT STIT OUT SAY
THESE CHARGES STAY OUT THERE
UNTIL YOU COMPLETE THAT.

>> PUTTING THAT ASIDE.

THIS COURT, AM NOT CONCERNED
ANY LONGER AS FAR AS MY A
ANALYSIS IS, WITH WHAT THE
TRIAL JUDGE DECIDE.

THIS COURT SAID IN ITS
OPINION, THE ISSUE HAS BEEN
PRESENTED TO THIS COURT AND
THIS COURT MAKES THIS
DECISION.

>> AND YOU ARE ABSOLUTELY
RIGHT.

THAT IS WHAT THE COURT SAID
IS IN THE FIRST WILLACY
OPINION.

HOWEVER, THIS COURT ALSO
SAYS THERE IS A WAIVER,
THERE IS A LANGUAGE OF
WAIVER THAT AM COS IN AND SO
NOW THE PATH THAT YOU CAN
TAKE -- LET ME FLOWCHART
THIS ISSUE BECAUSE IT
BECOMES ALL OF THESE
DIFFERENT ANGLES YOU CAN
TAKE OFF OF IT.

>> BEFORE WE FLOW ON, LET'S
STAY ON WHAT THE COURT
DECIDED.

IT APPEARS TO ME THE COURT
DECIDED IT WAS WAIVED BUT
ALSO DECIDED THE ISSUE ON
THE MERIT.

>> HOWEVER, IF IT IS WAIVED,
THERE IS A VOLATILE
INEFFECTIVENESS OF COUNSEL
PRESIDENT BY THE RECORDING
WORDING OF THE OPINION
ITSELF BECAUSE IF HE WAIVES,
THIS HE WAIVED WHAT WE THEN
SUBSEQUENTLY ALLOWING WHAT

IS DETERMINED TO BE INHERENTLY
PREJUDICE JUROR.

>> AS JUSTICE WELLS READ TO
YOU, HE WINT SAY IT WAIVED,
NOW IT MAY BE, YOU GOT THE
FACS WROPING, AND ARE YOU
ARGUING THAT THE APPELLATE
COUNSEL DIDN'T PRESENT IT
PROPERLY TO THIS COURT?

>> WE HAVE ARE A RAISED THAT
ON THE HABEAS PETITION.

>> THAT IS SEEMS TO BE THE
ONLY WAY YOU CAN GET AROUND
IS TO SAY THAT THE APPELLATE
COUNSEL WAS INEFFECTIVE ON
THE WAY THE APPELLATE
COUNSEL PRESENTED THIS CASE
ON APPEAL AND IF THEY HAD
PRESENTED IT DIFFERENTLY, WE
WOULD HAVE RULED LIKE WE
RULED IN LOWERY.

>> WE HAVE PRESENTED THAT
ISSUE TO YOU, THAT IS PART
OF THE DIFFERENT BRANCHES
THAT I VIEW COME FROM THIS
CASE.

WE HAVE PRESENTED BY WAY OF
MOTION OF REHEARING AND A
NUMBER OF OTHER ANGLES THAT
COULD HAVE BEEN TAKEN, THAT
ISSUE WAS NOT PRESENTED.

THE STATUTE WAS NOT -- THIS
COURT WAS NOT ALERTED TO
STATUTE, WHICH SEEMS VERY
KAERLY IN MY VIEW TO TELL US
THOSE CHARGES ARE OUT THERE.

NOR IN MY VIEW DID THE
COUNSEL DIRECT THE COURT
MORE TOWARD THE STATUTES
ASSOCIATED TO CLEVELAND
BECAUSE THE DECISION IN
CLEVELAND WHICH IS WHAT THIS
COURT USES IN WILLACY, IN MY
VIEW, DISCUSSES ONLY
PROSECUTORIAL DISDIGRESSION
IN TERMS OF PUTTING SOMEONE
TO PTIO ELECTING TO
PROSECUTOR THEM.

IT DOESN'T DEAL WITH
DYNAMICS OR THE PTI PROGRAM
ITSELF.

WHEN YOU ARE ACTUALLY IN
PTI.

HOW DO YOU GET THERE?

WHAT WE HAVE HERE IS THE GENTLEMEN WHO AT THE TIME HE IS SIT, THE FIRST DAVE JURY SELECTION IS NOT IN PTI. HE HAS ONLY BEEN APPROVED. HE NEVER SIGNED THE CONTRACT.

HIS CHARGES REMAIN PENDING UNTIL MAY OF THE FOLLOWING YEAR.

SEVERAL MONTHS LATER.

>> HELP ME OUT WITH THE CIRCUMSTANCE AT THE TIME OF THE APPELLATE COUNSEL, WHERE WAS IN RESPONSE TIMEWISE FOR DECISION IN LOY RY AT THE TIME IT WAS BEING APPEALED?

>> AT THINK TIME OF THE FIRST ONE? I BELIEVE THIS COURT ISSUED THE OPINION, YOU ARE ASKING ME THE TIME PERIOD, I BELIEVE THIS COURT ISSUED THE OPINION IN THE FIRST LOWERY CASE IN 1994.

>> AND THAT IS WHERE WE MADE THE FACTUAL DETERMINATION?

>> RIGHT.

>> IT WAS NOT DECIDED, CORRECT?

>> MY MEMORY.

>> THAT APPELLATE COUNSEL WOULD HAVE BEEN FOLLOWING RODNEY?

IT WOULD HAVE BEEN FOLLOWING ROGERS, BUT ALSO HAVE THE GUIDANCE OF THE STATUTE ITSELF.

>> THIS IS THE PROBLEM I SEE WITH THAT ARGUMENT IS WAS THAT STATUTE, WAS IT ARGUED BEFORE THE TRIAL COURT IN THAT FASHION?

SO THAT APPELLATE COUNSEL WOULD HAVE BEEN ABLE TO PICK THAT UP.

THAT THIS STATUTE SAYS, THIS GUY IS STILL UNDER ACTS OF PROSECUTION.

THEN, THE APPELLATE COUNSEL COULD HAVE MADE THAT ARGUMENT TO THIS COURT.

>> THE STATUTE NUMBERS, MY RECOLLECTION, WERE NEVER MENTIONED ON THE MOTION FOR

NEW TRIAL.

HOWEVER, THE THERE WAS TESTIMONY FROM PROBATION OFFICER FROM THE STATE ATTORNEY WHO OVERSEAS THE PTI PROGRAM, HOW YOU GET IN, THIS GENTLEMEN, THE CHARGES WERE NOT HELD UNTIL MAY OF THE NEXT YEAR AND THAT HE WAS, HE WAS ALERTED AT THE TIME HE SAT, WITHIN A FEW DAYS, 2 TO 3 DAY, THE SITTING ON, SITTING FOR THE JURY SELECTION, THAT HE, HE WAS UP TO SIGN HIS CONTRACT WITHIN THE TIME PERIOD OF THE TRIAL.

SO THAT INFORMATION IS ALL PREVENTED TO THE TRIAL COURT.

THE TRIAL COURT IS GIVEN THE EVIDENCE THAT HE HAS NOT SIGNED HIS CONTRACT.

THAT YOU NEED TO SIGN THE CONTRACT TO GET INTO THE PTI PROGRAM, AN ITS CHARGES WERE NOT UNTIL MAY OF THE FOLLOWING YEAR OF '92 WHEREAS WE ARE SITTING IN TRIAL IN OCTOBER, I BELIEVE, IN '91.

>> JUSTICE CANTERO.

>> I AM CONFUSED ABOUT THE ARGUMENT THAT ATTORNEY DID NOT CITE THE STATUTE.

IN WILLACY ONE, THE 1994 DECISION, WE EXPLICITLY SAID IN HIS CHALLENGE, WILLACY CLAIMS THAT CLARK WAS UNDER PROSECUTION WHEN SELECTED AS JUROR AN SEATED HIM VIOLATED SECTION 40.0131 AND THEN QUOTES AS SAYING NO PERSON WHO IS UNDER PROSECUTION FOR ANY CRIME BE QUALIFIED TO SERVE AS A JUROR.

THEN, WE ALSO SAY, WE DISAGREE.

WILLACY MISTAKINGLY EQUATES CLARK'S PLACEMENT IN THE PREVENTION PROGRAM WITH PROSECUTION, PRETRIAL INTERVENTION IS MARE MERELY AN ALTERNATIVE TO

PROSECUTION.

IT SEEMS LIKE NOT ONLY DID THE ATTORNEY MAKE THIS ARGUMENT, BUT ON THE MERIT, WE REJECTED THAT ARGUMENT. EYE MAY HAVE CONFUSED IT.

I AM TALKING ABOUT THE PRETRIAL, THE PRETRIAL INTERVENTION STATUTE 944.025.

THAT STIT OUT TELLS US ABOUT RESUMPTION OF PROSECUTION. THAT UNTIL THE GENTLEMEN IN THE CASE MR. CLARK COMPLETES HIS PROGRAM, HIS CONDITIONS OF THE PROGRAM, HE CAN, HE CHARGES CAN BE RESUMED. THAT IN OF ITSELF TELLS ME THOSE CHARGES ARE THROUGHOUT.

I THOUGHT THE WAY WE DEDECIDED LOWERY WAS UNTIL THE PRETRIAL INTERVENTION AGREEMENT WAS SIGNED, THAT THEY WERE STILL UNDER PROSECUTION AND THEN THAT WAS, WE DIDN'T SAY IT JUST CONTINUED ON UNTIL THE PRETRIAL INTERVENTION AGREEMENT WAS COMPLETED.

>> I AGREE.

YOU DON'T REACH HA CONCLUSION.

>> AIM TRYING -- AGAIN, I UNDERSTAND, THIS IS, YOU KNOW, MR. WILLACY, WE ARE CONCERNED BECAUSE IT APPEARS THAT IT WAS ADEQUATELY BRIEFED ON DIRECT APPEAL, MAYBE THERE WAS AN UNDERSTANDING OF WHEN PRETRIAL INTERVENTION STARTED IN THIS CASE, IS THAT, IN OTHER WORDS, OR WE JUST MADE AN INCORRECT STATEMENT WHEN WE SAID THAT HE WAS NO LONGER UNDER ACTIVE PROSECUTION, SO WHICH ONE IS IT? WAS IT BRIEFED PROPERLY? WE JUST MISSPOKE? OR IS IT THAT THE RECORD WAS NOT ADEQUATELY UNDERSTOOD BY APPELLATE COUNSEL OR WAS IT

ADEQUATELY DEVELOPED BY TRIAL COUNSEL IT? HAS GOT TO BE ONE OF THE LEE.

>> I THINK IN SOME WAY, IT IS A BIT OF ALL.

ALL OF THOSE.

I TELL YOU, IF I MAY, WILL TELL YOU WHY.

LOWERY IN WILLACY ARE EXACTLY THE SAME.

LOWERY DOES NOT SIGN HIS CONTRACT UNTIL 9 DAYS AFTER THE JURY SERVICE IS COMPLETE.

MR. CLARK DOESN'T SIGN HIS PTI CONTRACT UNTIL ROUGHLY THE SAME PERIOD OF TIME.

>> ALL RIGHT.

LETS ASUM IT IS A MIXTURE OF ALL THREE.

WHY DOES THAT CONSTITUTE INEFFECTIVE ASSIST INANCE OF COUNSEL AS A MATTER OF LAW WHICH IS WHAT I HEAR YOU ARGUING WHICH IS THAT APPELLATE COUNSEL OUGHT TO HAVE ARGUED IT BETTER SO WE WOULD HAVE BEEN CONVINCED IN 1994 RATHER THAN 1998 TO REVERSE MR. WILLACY'S CONVICTION.

ISN'T THAT WHAT YOU ARE ARGUING?

>> IN SOME.

>> YES.

>> IT SEEMS TO ME THAT THAT IS FOR APPELLATE COUNSEL TO NOT BE FUNCTIONING IN THE SENSE OF THE 6th AMENDMENT, THEY WOULD HAVE HAD TO BE, YOU KNOW, SOME OTHER BALLPARK RATHER THAN BASICALLY TRYING THEIR BEST TO ASSERT THE ARGUMENT. SO I AM HAVING TROUBLE WITH SEEING HOW IT WOULD TRANSLATE INTO SOME YOU A AUTO MATIC REVERSEAL FOR YOUR CLIENT.

>> MY VIEW OF IT IS AT THE TIME -- AT THE TIME THAT THE DIRECT APPEAL WAS FILED, 94425 WAS IN PLACE, WE KNOW

IN PENDING PROSECUTION.
THAT THIS ISSUE -- THAT
ISSUE WAS NOT PREVENTED TO
THIS COURT PROPERLY UNTIL
LOWERY WAS DECIDED BECAUSE
WHEN WITH YOU ARE PRESENTED
THE ISSUE, YOU DECIDE THAT A
JUROR BEING PROSECUTED BY
THE SAME STATE ATTORNEY WHO
IS PROSECUTING THE DEFENDANT
WHEN THAT JUROR, WHEN THAT
GENTLEMEN IS ON THE JURY IS
INHERENTLY PREJUDICE.
IT GOES TO THE CORE OF THE
JUSTICE SYSTEM.

>> IN LOWERY, TWO ASPECTS OF
IT.

THE DEFENDANT WAS NOT MADE
AWARE OF THE PTI AND THE
PERSON WAS UNDER PROSECUTION
AND IN THE CASE, THERE IS A
JUDICIAL FINDING THAT THE
DEFENDANT WAS MADE AWARE AND
THERE HAS BEEN THE FINDING
THAT HE WAS NOT UNDER
PROSECUTION.

>> AND I AGREE.

THAT IS A DISTINCTION
BETWEEN THE TWO CASE, BUT
THIS FINDING OF FACT GOES
BACK TO THE ORDER, THAT
STARTS, THAT STARTS THE BALL
ROLLING.

HAD THE JUDGE MADE ITS OWN
FINDING OF FACTS, HE WOULD
HAVE HAD TO DETERMINE THAT
WAIVER ISSUE.

IF THERE IS A FINDING A
WAIVER, THEN THE TRIAL COURT
NOW HEARING THE 3850 CANNOT
SAY WE ARE BARRED ON THE
WAIVER ISSUE.

THIS COURT TOLD US, THERE IS
A WAIVER.

THE TRIAL COURT SAID THERE
IS A WAIVER.

THAT NOW ON 3850, THE TRIAL
COURT IS SAYING PROCEDURALLY
BARRED BECAUSE YOU
DETERMINED THE ISSUE.

>> MAY I ASK A SECOND
QUESTION?

AFTER THIS COURT'S OPINION
IN WALL LUCY ONE, DID HE

FILE A MOTION FOR REHEARING
ON THIS PTI ISSUE?

>> I DONE BELIEVE HE DID.
WE RAISED THAT AS AN ISSUE.
A MOTION FOR REHEARING
SHOULD HAVE BEEN FILED
ALATER LETTERING THIS COURT
TO 944025.

>> I WANT TO COMPLETE YOUR
THOUGHT, SORRY.

>> THAT IS ALL RIGHT.
THAT IS ALL RIGHT.

>> WELL, IT SEEMS TO ME, WE
ARE GOING AROUND IN CIRCLES
HERE.

WHAT YOU ARE SAYING IS IF
THERE IS A WAIVER, THEN WE
HAVE INFEKIVE ASSISTANCE OF
COUNSEL, BUT AT THE TIME
THIS CASE WAS DECIDED WHAT
WOULD HAVE BEEN, WOULD IT
HAVE BEEN DEFISH SENT
CONDUCT?

I MEAN, I THINK THAT IS
WHERE WE GET, IF YOU ARE
CLAIMING INEFFECTIVE
ASSISTANCE BECAUSE THE TRIAL
COUNSEL WAIVED IT AFTER THE
STATE ATTORNEY TOLD MIM.
UNDER ROGERS, WOULD THERE
HAVE BEEN CONDUCT?

>> LET ME SEE IF CAN I
ANSWER THAT.

>> YOU GOT TO DO TWO WRONG
PRONGS NOW.

>> LET ME SEE IF I FOLLOW
YOU CORRECTLY.

AT THE TIME OF THE DIRECT
APPEAL, HAD THIS, HAD
APPELLATE COUNSEL ARGUED THE
944025 TO YOU, MY FEELING IS
THAT YOU WOULD HAVE REACHED
A DIFFERENT CONCLUSION,
WOULD YOU HAVE FOUND THE
STATUTE WOULD DICTATE THE
OUTCOME AS OPPOSED TO
CLEVELAND.

GIVEN THE STATUTE 944025.

>> REMEMBER, THE DIRECT
APPEAL, I AM TALKING ABOUT
COUNSEL'S PERFORMANCE A AT
THE ACTUAL HEARING THAT TOOK
PLACE.

NOW WE ARE IN 3.850, SO WE

GO TOT LOOK AT HIS
PERFORMANCE THAT POINT,
CORRECT?

>>> RIGHT.

>> AT THE POINT OF THIS
HEARING TOOK PLACE, WOULD
THERE BE A DEFICIENCY ON
COUNSEL'S PART BASED ON THE
ROGER'S CASE?

>> YES.

BECAUSE HE, IN MY VIEW, HE
HAS ABSOLUTELY DISQUALIFIED
JUROR.

REMEMBER, TOO, LOWERY IS
BASED ON A TEXAS CASE, THAT
WAS IN EXISTENCE AT THE TIME
THE APPEAL WAS INITIALLY
HEARD, SO NOT OM DID VERY
THE TEXAS CASE, HE HAS THE
STATUTE THAT TELLS HIM, HE
IS PENING PROSECUTION, IF HE
IS PENING PROSECUTION, HE IS
ABSOLUTELY DISQUALIFIED
UNDER 40103, HE IS
ABSOLUTELY DISQUALIFIED.

SO MY ANSWER TO YOUR
QUESTION IS, YES, WE WOO
HAVE BEEN DEFISH SENT UNDER
ROGERS UNDER ANY AND HE
TELLS US HIMSELF THIS IS THE
WORST POSSIBLE JUROR HE
WOULD HAVE COULD HAVE EVER
WANTED.

WE WOULD NOT WANT THIS JUROR
ON OUR JURY.

>> YOU ARE ALMOST OUT OF
EVEN YOUR REBUTTAL TIME, IF
YOU WOULD LIKE TO HIT SOME
OTHER POINTS OR SAVE SOME
TIME.

I THINK WILL DO THAT UNLESS
I LEFT A QUESTION
UNANSWERED.

>> MISS DAVIS?

>> MAY IT PLEASE THE COURT.
MY NAME IS BARBARA DAVIS, I
REPRESENT THE STATE OF
FLORIDA.

I BELIEVE WHAT COUNSEL IS
ARGUING THAT IS APPELLANT
COUNSEL WAS INEFFECTIVE ON
DIRECT APPEAL WHICH WAS YOUR
THIS COURT'S 1994 DECISION
IN WILLACY FOR FAILING TO

CITE SECTION 94025.

I HAVE DIRECT APPEAL INITIAL BRIEF HERE.

I HAVE THE REPLY BREF AND WHAT IS CITED IN THE DIRECT APPEAL BREF ON BOTH PAGES 24 AND PAGES 34 IN FOOTNOTE 8 IS THAT NUMBER 1 ON THE STATE-PREPARED ORDER DENYING THE DEFENDANT'S MOTION WHICH HE GOES INTO SOME DETAIL ON PAGE 25 OF HIS INITIAL BREF ON DIRECT APPEAL THAT THE IN UNREPORTED TELEPHONE CALL AND GOES THROUGH WHAT THEY ARE ARGUING NOW AND THIS WAS ALL IN THE RECORD ON DIRECT APPEAL THE 94 DIRECT APPEAL.

>> HOW DOES THAT GET TO THE RECORD?

>> BECAUSE HE WAS BOTH TRIAL COUNSEL AN APPELLATE COUNSEL IN THIS CASE WROTE A LETTER SAYING THAT WE HAD A TELEPHONE CALL ON THIS DAY AND I OBJECTED AN IN THE STATE SENATE A PROPOSED ORDER AND I OBJECTED SO THOSE LETTERS WERE ATTACHED TO THE -- THERE WAS A SUPPLEMENTAL RECORD ON DIRECT APPEAL.

IT IS VOLUME 22 AND THIS COURT HAD RELINQUISHED PRECEDINGS IN AUGUST OF 92, THE TRIAL FINISHED IN '91. THERE WAS COMPLETE HEARING ON THE ISSUE IN OCTOBER OF '92 AFTER WHICH THESE ORDERS WERE PREPARED AND THERE WERE SOME LETTERS THAT WENT BACK AND FORTH SO IN THAT SUPPLEMENTAL VOLUME IS THE HEARING AN ATTACHED TO THOSE LETTERS IN THE RECORD OF THE '94 DIECISION.

BACK TO THE INITIAL BRIEF, MR. IRWIN BACK ON APPEAL RAISED ISSUE IN FOOTNOTE 8 THAT NOT ONLY ABOUT THE STATE PREPARED ORDER, BUT ALSO, UM, QUOTING SECTION 94808 SECTION 4 WHICH STATES THAT ALLOWS THE STATE TO

RESTART THE PROSECUTION OF A
DIVERTED DEFENDANT FOR THE
PUBLIC INTERESTS AND I
LOOKED AT SECTION 944.025
WHICH THEY QUOTE IN THEIR
BRIEF AT 49 AND IT IS PRETTY
MUCH THE SAME SECTION BUT
APPEARS TO BE RENUMBERED
BAITS SAYS RESUMPTION OF
PENDING CRIMINAL PROCEEDINGS
MAY BE UNDERTAKEN IF THE
PUBLIC INTERESTS ARE
REQUIRES.

SO IN MR. IRWIN --

>> THIS IS THE SAME STATUTE
JUST RENUMBERED OR ONE
PACIFIC TO PRETRIAL
INTERVENTION?

>> WELL IT LOOKS AS THOUGH
THE 91 STATUTE BECAUSE HE IS
CITING 948.084 I AM ON PAGE
35 IN THE FOOTNOTE AND IT
CALLS, IT'S THE PRETRIAL
DIVERSION STATUTE AND IT
SAYS SECTION 948 ALLOW THESE
STATE TO RESTART THE PROS
PROSECUTION OF A DEFENDANT
AT WILL IF THE PUBLIC
INTERESTS SO REQUIRES.

THEREFORE, A CLAIM THAT A
DEFENDANT IN A PROGRAM OR
SEEKING PROGRAM IS NOT UNDER
PROSECUTION IT IS SIMPLY
WRONG.

THAT WAS BEFORE THIS COURT
WHEN IT MADE DECISION IN
1994.

SO IT WAS RAISED IN THE
INITIAL BRIEF.

IT WAS RAISED AT THE SAY IT
OUTS WERE TALKED ABOUT AT
THE TRIAL LEVEL ALSO BECAUSE
IN HIS STATEMENTS OF FACT IN
THE INITIAL BRIEF, IT TALK,
IT ACTUALLY CITES TO THE
RECORD OF THE RELINQUISHMENT
HEARING THAT JUROR CLARK,
THEY TALKED ABOUT 40.013
WHICH US THE STATUTE ABOUT
THE JUROR IS DISQUALIFIED IF
HE INDER PROSECUTION.
SO HE HAD ALL OF THOSE
STATUTES.
QUITE RIRBLINGTS HE ARGUED

THEM TO THIS COURT.

TW APPEALS AGO.

>> WHAT CHANGE THEN BETWEEN WHEN WILLACY AND LOWERY?

>> IN LOWERY WHAT THE COURT FOUND, A JUROR HAD COME IN.

HE WAS, HE HAD A FELONY CHARGES PENDING AND THREE WEEKS AFTER HE SAT ON THE JURY, HE WAS OFFERED A PTI.

>> I GUESS I THOUGHT IT LOOKED LIKE IT WAS ALMOST IDENTICAL IN TERMS OF 1, THE DEFENSE LAWYER WAS NOT TOLD AT ALL AND HERE THERE IS A QUESTION OF FACT AS TO WHAT DEFENSE LAWYER WAS TOLD. I THOUGHT IN THE CASE, THE SIGNING OF THE PTI AGREEMENT WAS NOT UNTIL AFTER THE TRIAL.

IS IT DIFFERENT?

YOU SAID IT IS FACTLY DIFFERENT?

YES, IT IS.

>> IF WE WERE ARGUING DIRECT APPEAL IN WALLACE SY TODAY, LOWERY WOULDN'T REQUIRE REVERSAL?

>> IT MIGHT.

SHE SAID THE COURT HAS ALREADY RESOLVED THE BE SHOE OF WHETHER JUROR CLARK WAS UNDER PROSECUTION AND THE TRIAL -- IT IS A FACTUAL ISSUE WHETHER HE KNEW HE WAS BEING PREPRETRIAL DIVERTED AND JUST FORMALITY OF SIGNING THE PAPERS.

HOW THIS HAPPENS IS, HE HAD TALKED TO HIS PROBATION OFFICER, HE HAD RETURNED THE COMPUTER.

THERE WAS A TOTAL OF \$80 AN INCOME PEWTER BOARD AND -- IN COMPUTER BOARD.

>> HEARING WHAT YOU ARE SAYING BECAUSE WE ON DIRECT APPEAL MADE A FACTUAL FINE EVEN FITS WITH AN ERROR.

LOWERY WOULDN'T HAVE REQUIRED IT?

>> IT WAS NOT AN ERROR. EVEN UNDER LOWERY, THIS

COURT MADE A FINDING AND THE TRIAL COURT MADE A FINDING BECAUSE JUROR CLARKS WITH AWARE HE WAS GOING TO GO INTO THE PRETRIAL INTERVENTION.

>> STILL UNDER ACTIVE PROSECUTION WHEN HE SAT AS A JUROR?

I MEAN, THAT IS PRETTY FUNDAMENTAL TO THE SYSTEM OF JUSTICE.

I MEAN, NOW, WHETHER THEY WERE TOLD OR WEREN'T TOLD OR WE DECIDE WRONGLY, BUT I AM HAVING AS FAR AS THIS WERE TO HAPPEN AGAIN, WE DON'T WANT -- DEFENDANT TO BE HAVE JURORS THAT ARE UNDER PROSECUTION AT THE TIME OF THEIR TRIAL, DO WE?

>> LOWERY SAYS, RIGHT ON ITS FACE, THIS IS NOT AN OVERSWEEPING DECISION.

IT IS LIMITED TO THE FACTS OF THIS CASE ON THE FACTS OF THE WILLACY CASE, THIS COURT DECIDED THAT CHRIS WHITE, THE PROSECUTOR SIGNED OFF BEFORE THE TRIAL.

THE PROBATION OFFICER HAD SIGNED OFF.

>> THERE ARE DAYS BEFORE THE TRIAL.

THEN HE SORT OF JUST SOMEHOW REMEMBERS IT AFTER THE JURY IS PICKED THAT HE SUPPOSEDLY GUESS OVER TO THE DEFENSE LAWYER AND SAY, YOU KNOW, I JUST REMEMBERED.

>> THAT IS NOT HOW IT HAPPENED AT ALL.

>> MR. WHITE, THE PROSECUTOR HAD SIGNED OFF ON THE PRETRIAL INTERVENTION AGREEMENT.

HE HAD SENT THAT TO THE PROBATION OFFICER, THE PROBATION OFFICER SENT A LETTER OUT, THIS IS ALL PRETRIAL.

HE SENT A LETTER OUT, IN FACT, THE LETTER WAS THE FIRST DAVE JUAR RY SELECTION,

DAY OF JURY SELECTION.
HE WAS ON THE SIX JURORS
THAT WEN IN.
JUROR CLARK CALLED THE
PROBATION OFFICER AND IT WAS
ALL DONE.
AND HE JUST HAD TO SIGN THE
AGREEMENT THAT THE PROBATION
OFFICER HAD SIGNED OFF AND
THE PROSECUTOR HAD SIGNED
OFF ON, JUROR CLARK CALLED
THE PROBATION OVER AND SAID,
I AM SITTING IN A MURDER
TRIAL.
I CAN'T COME INTO YOUR
OFFICE AND SIGN THIS UNTIL
AFTER THE TRIAL.

>> THE PROBATION OFFICER
KNEW THAT THE SAME
PROSECUTOR DOES MURDER CASES,
CALLED OVER THERE TO HIS
SECRETARY.

THEY GOT TO MR. WHITE AND
SAID THERE IS A CLARK ON PTI
THAT MAY BE ON YOUR JUROR,
MR. WHITE WENT OVER AND TOLD
THE DEFENSE COUNSEL, THERE
IS A CLARK ON PTI, HE MAY BE
ON JURY.

>> PCI, THAT I WINCE OF THE
PROBLEMS THAT I HAVE HERE IS
WAS HE REALLY ON PP I?
COULDN'T HE, EVEN THOUGH THE
PROSECUTOR HAS SIGNED IT.
THE PROBATION OFFICER KNEW
ABOUT IT.

MR. CLARK KNEW ABOUT IT BUT
HAD NOT SIGNED IT.
IF THE STATE ATTORNEY HAD
FOUND THAT MR. CLARK GOT
DONE SOMETHING ELSE, WERE
THEY FREE TO SAY, OH, WE ARE
NOT GOING TO ALLOW YOU ON
PTI?
WOULD THEY HAVE BEEN FREE TO
DO THAT?

I AM HAVING A PROBLEM, WAS
HE REALLY ON PTI?
OR WAS HE STILL UNDER ACTIVE
PROSECUTION?

>> IN THIS COURT HAS ALREADY
FOUND -- EYE UNDERSTAND.
I UNDERSTAND WHAT WE HAVE
FOUND IN OUR PREVIOUS

OPINION.

I AM STILL CONCERNED WITH
THE QUESTION OF WHETHER OR
NOT THAT WAS CORRECT UNDER
THE FACTS OF THIS CASE?

>> YES.

BECAUSE JUROR CLARK KNEW HE
WAS GOING TO TI.

HE ASKED FOR PTI.

HE KNEW THAT PROBATION HAD
DONE THEIR INVESTIGATION, HE
QUALIFIED, HE KNEW THEY HAD
SENT IT OVER SEPTEMBER 27th

AN JUROR CLARK HAD AN
ATTORNEY X NAMED KATHERINE
CLARK.

>> DID HE HAVE SOME RIGHT TO
PTI THAT POINT?

>> WELL, ONCE PROBATION,
ONCE HE REQUESTED IT, ROW
BATION SIGNED OFF AND
MR. WHITE SIGNED OFF, THAT
IS ALL THAT IS REQUIRED.

THEN, THE LAST FORM AMLITY
IS FOR HIM TO COME IN AND
SIGN THE PAPERWORK.

THAT STARTS THE CLOCK
TICKING.

HE KNEW IT WAS HAPPENING, SO
THIS COURT FOUND HE IS NOT
UPPER PROSECUTION BECAUSE IT
HAS BEEN DY VERTED AT THAT
POINT.

>> JUSTICE CANTERO HAS AS
QUESTION.

I HAD A FOLLOW-UP ON JUSTICE
PARIENTE ABOUT LOWERY.

DID LOWERY RECEIVE THIS
COURT'S DECISION IN WILLACY?

>> INTO, SIR.

>> DID IT DISTINGUISH
WILLACY?

>> NO, IT DID NOT.

I WOULD LIKE TO POINT OUT
THAT LOWERY IS NOT
RETROACTIVE.

THE FACT -- THERE IS NOTHING
CONSTITUTIONAL IN NATURE
ABOUT THIS.

IT IS COMPLETELY A STATUTORY
INTERPRETATION ISSUE.

LOWERY SAYS ON THE FACE, IT
IS LIMITED TO THE FACTS OF
CASE.

AND THEY DID NOT ARLING
ARGUE TO THE TRIAL JUDGE
THAT LOWERY IS RETROACTIVE.

>> IN THE CASE?

>> YES, SIR.

>> SO IT WAS NEVER PROPERLY
PRESENTED TO THE TRIAL
JUDGE, WHEN THE TRIAL JUDGE
FUND IN HIS ORDER THAT
LOWERY WAS DECIDED IN 1998
AND IN THE CASE WAS DECIDED
IN '94, UM, THEY DID NOT
EVEN FILE MOTION FOR
REHEARING RAISING THE
RETROACTIVITY.

THE FIRST TIME RETROACTIVITY
WAS RAISED WAS NOW.

IN THIS COURT?

THE TRIAL, THE JUDGE, OUR
POST-CONVICTION JUDGE WAS
QUITE PROPER FINING THAT
LOWERY WAS THE 1998 CASE,
HOW COULD COUNSEL BE
INEFFECTIVE OR NOT RAISING
THE 1998 CASE WHEN THIS IS
1992?

SO I JUST WANT TO ADD THAT
IN.

IF THERE IS NO FURTHER
QUESTION, I WOULD LIKE TO
COMPLIMENT THE COURT ON THE
RENOVATION WHICH ARE
INCREDIBLE.

>> THANK YOU.

>> THANK YOU VERY MUCH.

>> REBUTTAL?

>> I WILL GIVE YOU A FEW
MINUTES MORE.

WE HAVE USED UP MOST OF YOUR
TIME.

JUST A COUPLE MINUTES.

>> OKAY.

I WILL GO QUICKLY.

WHAT I WOULD LIKE TO DO IS
KIN OF READDRESS THE
CONCERNS THAT YOU WERE
EXPRESSING.

HAD AT THE TIME THAT
MR. CLARK SAT ON THIS JURY,
MY RECOLLECTION OF THE
TESTIMONY IS THERE IS
NOTHING IN CAUGHT THAT HE IS
AWARE OF THE APPROVAL.
I THINK WE HEAD TO TO START

WITH THAT FIRST.
AND CERTAINLY, IF FROM THE
TIME HE GOT THAT APPROVAL,
FROM THE STATE ATTORNEY'S
OFFICE, IF HE HAD GONE OUT
AND COMMITTED A CRIME THAT
NIGHT, THERE WAS NOTHING TO
HOLD ANYBODY TO THAT
AGREEMENT.

IF HE WENT HOME THAT NIGHT
AND SAID, I HAVE CHANGED MY
MIND.

I DON'T WANT TO DO THIS.
THERE WAS NO CONTRACT.
HE HAD NOT, THE PARTIES HAD
NOT COME TO THE TABLE AND
SIGNED THAT CONTRACT
TOGETHER.

>> LET ME ASK.

>> AT RELYNNISHMENT, THERE
WAS A HEARING IN WHICH CLARK
TVRED?

>> I AM SORRY.

I CAN'T HEAR YOU.

>> AT THE HEARING, JUROR
CLARK TESTIFIED BEFORE THE
TRIAL JUDGE, RIGHT?

>> YES.

>> THE ATTORNEYS TESTIFYED?

>> YES.

>> THE STATE ATTORNEYS AND
THE TWO DEFENSE COUNSEL?

>> YES.

>> SO ALL OF THIS WAS
AVAILABLE TO BE MADE OF
RECORD AND REVIEW FWHID
COURT BACK IN WALLACE SY 1
CORRECT?

>> YES.

>> YES.

IMPORTANTLY IN DETERMINATION
OF WHETHER HE WAS ACTUALLY
IN PTI OFFICIALLY IN PTI AT
THE TIME HE RECEIVED THE
NOTICE SAYING YOUR PDI
FINDING SCHEDULED FOR NEXT
WEEK.

ON THE MIDDLE OF THIS TRIAL.
OCTOBER 21st, 1992, A '91.

HE IS SITTING ON THE WILLACY
JURY, WAY SO SAY TO YOU, HE
IS NOT IN PTI AT THAT TIME.

>> WHAT HAPPENS?

>> THAT DOCK DOCKET WAS

CONTINUED THIS THE CONTRACT
WAS SIGNED.

THEN IT IS TAKEN OFF IS MY
UNDERSTANDING OF HOW IT
WOULD THEN WORK?

AT THE TIME HE IS SITTING ON
THIS JURY OCTOBER 21st, SO

--

>> WITH OUR HELP, YOU HAVE
EXHAUSTED YOU'RE DIGSAL
TIME.

THANK YOU.

THANK YOU VERY MUCH FOR A
FINE PRESENTATION OF BOTH
COUNSEL.

WE'LL TAKE THE CASE UNDER
ADVISEMENT, THANK YOU.

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