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**Alvin Leroy Morton v. State of Florida**

**SC06-2091 | SC07-1201**

>> THE NEXT CASE ON OUR CALENDAR  
THIS MORNING IS MORTON V. STATE  
OF FLORIDA.

READY TO PROCEED?

>> THANK YOU.

GOOD MORNING, CHIEF JUSTICE,  
JUSTICES.

MAY IT PLEASE THE COURT --

>> MOVE YOUR MICROPHONE DOWN,  
PLEASE.

>> YES.

IS THAT BETTER?

>> A LITTLE BIT CLOSER.

>> HOW'S THAT?

>> THAT'S GREAT.

>> THE ISSUE I WOULD LIKE TO  
ADDRESS IS THE INEFFECTIVENESS  
OF COUNSEL'S CLAIM, PARTICULARLY  
THE LOWER COURT'S FAILURE TO --  
RELEVANT TESTIMONY.

I THINK THERE'S THREE CRITICAL  
FACTS IN THIS CASE WHICH  
DISTINGUISH IT FROM HEARSAY, AND  
THAT LINE OF CASE WHERE THIS  
COURT HAS HELD IS IT'S  
REASONABLE FOR AN EXPERT, FOR AN  
ATTORNEY TO RELY ON AN EXPERT.  
AND THOSE THREE FACTS ARE THE  
RESENTENCING, THE BIRTH RECORDS,  
AND THE FACT THAT THE DOCTOR IS  
NOT A CREDIBLE WITNESS, AN  
EXPERT WHO SHOULD BE RELIED ON  
IN DETERMINING WHETHER OR NOT  
SOMEONE CAN LIVE OR DIE.

>> AS TO THAT, WE CAN'T WEIGH  
CREDIBILITY OF A WITNESS.

IF THE TRIAL COURT WEIGHED HIS  
TESTIMONY AND SAID I FIND IT  
CREDIBLE, WE CAN'T.

WE CONSIDER THAT, CAN'T WE?

>> I THINK YOU CAN.

THE CASE LAW SAYS THAT,  
OBVIOUSLY, AN APPELLATE COURT  
SHOULD DEFER TO A TRIAL COURT'S  
FINDINGS, BUT THAT DOESN'T MEAN  
THAT YOU WOULD JUST CARTE

BLANCHE ACCEPT A TRIAL COURT'S FINDINGS, AND I THINK THIS IS PRECISELY THAT TYPE OF UNIQUE SITUATION, JUSTICE CANTERO.

>> CAN YOU POINT OUT ANY OTHER UNIQUE SITUATION WHERE WE HAVE REVERSED A TRIAL COURT'S CREDIBILITY IN DETERMINATION OF A WITNESS?

>> WELL, I THINK THERE ARE CASES IN THIS COURT, AND I WOULD HAVE TO REFER TO MY BRIEF.

THERE ARE CASES --

>> THAT WOULD BE PRETTY IMPORTANT BECAUSE I DON'T THINK IT'S VERY COMMON.

>> NO, IT'S NOT COMMON, BUT I THINK IF YOU LOOK AT THAT, THE TESTIMONY OF DR. DELBEATO, THIS COURT HAS A ROLE THAT'S NOT JUST SIMPLY TO SAY SIMPLY BECAUSE A TRIAL COURT MADE A FINDING, AND I THINK ONE -- IN ADDITION, THERE ISN'T A SPECIFIC FINDING THAT DR. DELBEATO'S -- WELL, LET ME REVERSE THAT.

>> WAS THERE A FINDING HE WAS CREDIBLE?

>> THERE'S NOT AN EXPRESS FINDING THAT HE'S CREDIBLE, THERE IS A FINDING THAT THE COURT SAYS THAT HE RELIES ON DR. DELBEATO AND DR. GONZALEZ OVER THE DEFENSE EXPERTS.

>> THAT SEEMS A PRETTY CLEAR STATEMENT THAT HE FINDS THEM CREDIBLE.

>> HE DOESN'T EXPRESSLY SAY HE FINDS THE DOCTOR TO BE CREDIBLE, BUT EVEN IF HE DID, YOU HAVE TO LOOK AT THE DOCTOR'S TESTIMONY. THIS IS AN EXPERT WHO DESTROYED HIS RECORDS, WHO SAID AT AN EVIDENTIARY HEARING THAT THE BUG MAN TOLD ME THAT CARPENTER ANTS DESTROYED MY RECORDS AND THAT HE WOULD NEVER, EVER DESTROY RECORDS BECAUSE THAT WOULD BE UNETHICAL IN A CAPITAL CASE, AND HE WAS UNDER OATH.

AND AT TRIAL IN 1999 WHEN HE WAS UNDER THE SAME OATH TO TELL THE TRUTH, HE SAID HE'D SHREDDDED HIS

RECORDS A YEAR AND A HALF AFTER THE FIRST TRIAL. NOW, ONE OF THOSE STATEMENTS OR AT LEAST ONE OF THOSE STATEMENTS IS UNTRUE.

>> [INAUDIBLE] SOMETHING FOR ME BECAUSE I'M GOING TO, JUST FOR THE SAKE OF THIS ARGUMENT, ASSUME THAT AFTER THERE WAS A 11-1 DEATH PENALTY RECOMMENDATION THAT MR. URSO RECEIVED A CALL FROM SWISHER WHO SAID THAT DELBEATO WASN'T A GREAT WITNESS, THAT HE SHOULD HAVE DONE SOMETHING ELSE. LET'S JUST ASSUME HE THOUGHT, I'VE GOT TO REALLY THINK THIS OUT.

I'D LIKE YOU, IN TERMS OF THE PREJUDICE, TO EXPLAIN TO ME. BECAUSE I HAVE LOOKED AT THE EXPERT YOU PUT ON, DR. SILVA.

I KNOW YOU GET AN EXPERT FROM SAN FRANCISCO COAND A SOCIAL WORKER FROM SAN FRANCISCO, AND THIS ATTORNEY FELT HE WAS LIMITED AT THE TIME OF THE TRIAL.

THERE'S SOMETHING WRONG WITH OUR SYSTEM, BUT LET'S JUST ASSUME THEY HAD THOSE TWO WITNESSES. WHAT DO YOU THINK THAT THOSE WITNESSES, LET'S JUST ASSUME THOSE ARE THE WITNESSES THAT SHOULD HAVE BEEN CALLED, REALLY SAY THAT IS ALL THAT MUCH DIFFERENT THAN DR. DELBEATO IN TERMS OF THE, YOU KNOW, BRAIN DAMAGE AND THE EXISTENCE OF STATUTORY MENTAL MITIGATORS THAT WOULD HAVE MITIGATED AGAINST THIS HORRENDOUS CRIME WITH TWO VICTIMS AND A JUST, JUST, YOU KNOW, GRUESOME DETAILS? SO, YOU KNOW, AND I REALLY, YOU KNOW, ANYWAY, SO LET ME HEAR YOUR BEST SHOT ON THE COMPELLING TESTIMONY THAT REALLY, YOU KNOW, IF SOMEBODY HAD BEEN LOOKING, COULD HAVE GOTTEN JUST EXTRAORDINARILY COMPELLING TESTIMONY TO PUT ON, AND THEY

SHOULDN'T HAVE JUST DONE THE SAME THING.

>> WELL, I THINK THERE ARE TWO POINTS I WANT TO MAKE TO ADDRESS THAT.

FIRST, THE DIFFERENCE BETWEEN THE TESTIMONY KEEPING IN MIND THAT WHAT DR. DELBEATO SAID WASN'T HELPFUL, IT WAS VERY, VERY HARMFUL.

BUT THEN LET'S LOOK AT --

>> WELL, I DON'T --

>> RIGHT.

>> I DON'T QUITE ACCEPT THAT CONSIDERING HOW WE TALKED ABOUT THE MITIGATION AND, YOU KNOW, BUT ANYWAY, LET'S JUST ASSUME THAT IT WASN'T HELPFUL.

>> AND SO LOOKING AT THAT, THEN, LOOKING AT WHAT DR. SILVA HAD AND WHAT DR. -- PRESENTED, FIRST OFF THEY PRESENTED, THEY LINKED THE BIRTH TRAUMA.

AND ANY JUROR WHO'S A PARENT AND READS THOSE BIRTH RECORDS WOULD HAVE TO BE, OBVIOUSLY, COMPELLED AND CONCERNED.

THIS WAS, THIS WASN'T JUST A BAD BIRTH, THIS WAS A REALLY, REALLY BAD BIRTH.

>> WHO LINKS THE BIRTH TRAUMA?

I DON'T SEE DR. -- FIRST OF ALL, WHO ALWAYS SAYS THERE'S STATUTORY MITIGATION AT LEAST IN MY EXPERIENCE OF BEING ON THIS COURT DIDN'T FIND STATUTORY MITIGATION.

AND THE TEST THAT HE

ADMINISTERED WAS THE MMTI.

DR. SILVA, WHO WAS THE OTHER EXPERT, THE PSYCHIATRIST, SAID HE WOULD HAVE DIAGNOSED HIM AS HAVING ASPERGER'S SYNDROME AND, YOU KNOW, THAT HE'S GOT AN ABOVE, ABOVE-AVERAGE IQ.

SO I'M TRYING TO LOOK AT WHERE THEY LINKED UP THE BIRTH RECORDS, THAT IS THAT YOUR THEORY WOULD BE THAT THERE WAS AN -- BIRTH AND, THEREFORE, THIS DEFENDANT SUFFERED FROM LIFELONG BRAIN DAMAGE WHICH WOULD SOUND LIKE A VERY GOOD CASE.

WHERE IS THAT IN TERMS OF WHAT

THESE EXPERTS TESTIFIED TO?

>> DR. SILVA SAID, FIRST OFF, DR. SILVA, HE'S A NEUROPSYCHIATRIST AND BOARD CERTIFIED IN NEUROLOGY. HE ADMINISTERED NUMEROUS TESTS INCLUDING THE WHARTON MEMORY TEST, AND HE TESTIFIED SPECIFICALLY THAT THE -- BIRTH INCLUDING THE TREMORS AND THE RIGIDITY AND CONVULSIONS WERE SPECIAL INDICATORS LEADING TO A HIGH LIKELIHOOD OF BRAIN DAMAGE. HE THEN EXPLAINED THAT ASPERGER'S, WHAT WE KNOW OR WHAT THEY KNOW ABOUT ASPERGER'S IS THAT IT INVOLVES DEFICITS IN THE FRONTAL LOBE AND, TO A LESSER EXTENT, THE AMYGDALA. BECAUSE OF THOSE, ALVIN MORTON IS ABLE TO COGNITIVELY PLAN THIS CRIME, BUT HE'S A PERSON WHO HAS AN INABILITY TO REALLY FULLY UNDERSTAND AND COMPREHEND EMOTION.

AND SO HE'S LOOKING AT PEOPLE AS IF THEY ARE ROBOTS, ROBOT-LIKE. HE HAS, HE'S UNABLE TO UNDERSTAND EMOTION AND TO HAVE THE EMPATHY AND THINK THAT A NORMAL PERSON WOULD HAVE. HE HAD NO -- CLAUDIA BAKER TESTIFIED HE'D HAD NO INTERVENTION, NO TREATMENT, AND THEN HE HAD THIS HORRIBLY SADISTIC FATHER.

SO YOU COMBINE THAT WITH THE ASPERGER'S, AND I THINK THAT'S THE COMPELLING EVIDENCE. I'D HAVE TO RESPECTFULLY DISAGREE ABOUT DR. DELBEATO'S TESTIMONY.

HE SAID THAT ALVIN MORTON HAD THE TRAITS OF A SERIAL KILLER, THAT HE WASN'T EVEN WORTH TRYING TO REHABILITATE, THAT HE WAS JUST AN AMOEBA, THAT HE WAS JUST FLOATING AROUND, AND HE HAD NO DIRECTION.

>> WELL, IT'S YOUR DESCRIPTION OF MR. MORTON, ISN'T THAT SORT OF WHAT WE SEE IN ALL OF THESE CASES WHEN WE TALK ABOUT ANTISOCIAL PERSONALITY, AND

DIDN'T ONE OF THESE EXPERTS SAY THAT THAT WAS MR. MORTON'S PROBLEM HERE?

>> WELL, DR. DELBEATO DID, THE DEFENSE EXPERT AT TRIAL SAID, YES, HE'S ANTISOCIAL, BUT I THINK THAT THAT IS THE PROBLEM. IT'S EXACTLY THE PROBLEM. BUT I GUESS I SEE IT AS A DIFFERENT PROBLEM IN THAT THE JURY WAS TOLD. WHAT THE JURY WAS TOLD HERE ARE THESE HORRIFIC FACTS OF THIS CRIME, AND ANY JUROR WOULD BE THINKING WHO ARE THESE CRAZY KIDS?

WHAT KIND OF A KID DOES THIS? AND THEY WEREN'T GIVEN ANY EXPLANATION OTHER THAN THAT DR. DELBEATO'S, THAT HE'S A BAD EGG AND NOT WORTH FIXING.

>> I GUESS THE QUESTION IS, ANTISOCIAL, AS I UNDERSTAND IT, IS INABILITY TO SHOW COMPASSION AND CARE FOR OTHERS. AND YOU ACT OUT ON THAT. AND SO GIVE US A SUBSTANTIVE DIFFERENCE BETWEEN THAT.

>> WELL, AND I'M GLAD YOU ASKED THAT. ANTISOCIAL IS A PERSONALITY DISORDER. ASPERGER'S IS A DISEASE WHERE THERE IS A DYSFUNCTION IN THE BRAIN. AND IT IS A SOMETHING THAT ALVIN MORTON PROBABLY HAD FROM BIRTH AS A RESULT OF HIS TRAUMATIC BIRTH, AND IT IS MORE THAN JUST ACTING OUT AND A LACK OF EMPATHY. IT IS AN INABILITY, AN ACTUAL PHYSICAL INABILITY IN THAT PART OF HIS BRAIN TO UNDERSTAND EMOTION, TO UNDERSTAND JOY, TO UNDERSTAND PAIN, TO UNDERSTAND LOSS AND SORROW. SO IN THAT REGARD ANTISOCIAL IS A PERSONALITY DISORDER, AND TO MANY EXPERTS SIMPLY A CHOICE. ASPERGER'S IS SOMETHING THAT ALVIN MORTON WAS BORN WITH, AND

CERTAINLY IT WASN'T HIS CHOICE  
TO BE BORN PREMATURE AND HAVE TO  
BE RESUSCITATED, AND IT WASN'T  
HIS CHOICE TO HAVE ASPERGER'S.  
SO I THINK THAT'S THE  
DISTINCTION.

I THINK THAT'S THE COMPELLING  
DIFFERENCE.

SO THAT IF A JUROR DID HEAR  
THAT, THERE'S AN UNDERSTANDING  
OF A CONTEXT --

>> SO IT'S YOUR POSITION HERE  
THAT A CHILD THAT GROWS UP IN AN  
ABUSIVE HOME AND BECAUSE OF THAT  
WITHDRAWAL DEVELOPS ANTISOCIAL  
PERSONALITY DISORDER, THAT  
THAT'S THE CHOICE OF THE ADULT  
WHO LATER COMMITS A HEINOUS  
CRIME?

>> NO, I THINK THERE IS  
TESTIMONY FROM SOME EXPERTS THAT  
ANTISOCIAL PERSONALITY DISORDER  
THAT SOME OF THOSE CONDUCTS ARE  
A CHOICE.

THAT'S WHAT I'M SAYING.

I'M NOT SAYING THAT A PERSON  
CHOOSES, THAT A CHILD WHO'S  
ABUSED CHOOSES TO HAVE AN  
ANTISOCIAL PERSONALITY DISORDER.  
IS THAT THE QUESTION YOU WERE  
ASKING?

I'M NOT SAYING THAT A PERSON IS  
CHOOSING TO HAVE AN ANTISOCIAL  
PERSONALITY DISORDER, BUT IT'S  
STILL ONLY A PERSONALITY  
DISORDER.

I THINK ANOTHER THING THAT'S  
SIGNIFICANT IS THIS COURT FOUND  
THERE WAS NO ERROR IN THE TRIAL  
COURT FINDING NO MENTAL HEALTH  
MITIGATION.

AND THE OTHER THING IS THAT THIS  
COURT --

>> WE FOUND IT WAS HARMLESS  
ERROR.

>> YES, I'M SORRY.

>> COULD YOU ADDRESS, GOING BACK  
TO WHAT JUSTICE CANTERO ASKED  
ABOUT, I AGREE WE DON'T BLINDLY  
JUST GO AND SAY JUST BECAUSE THE  
TRIAL COURT SAID IT WE'RE NOT  
GOING TO LOOK AT IT, BUT HERE,  
AND WE GO BACK TO THIS  
MAGIC ISSUE OF ORGANIC BRAIN

DAMAGE, NEITHER THE DEFENDANT NOR EXPERT WITNESSES WERE ABLE TO ESTABLISH FROM ORGANIC DAMAGE. HE FURTHER SAYS THAT THEY -- ALTHOUGH THERE HAS BEEN TRIAL COUNSEL, FOR FAILURE TO PERFORM NEUROIMAGING OF DEFENDANT'S BRAIN HAS NOT HAD OBJECTIVE EVIDENCE THAT SUCH ORGANIC BRAIN DAMAGE EXISTS.

>> CORRECT OR INCORRECT?

>> THAT IS INCORRECT, CLEARLY ERRONEOUS FACTUAL FINDING. THERE WAS NO NEUROIMAGING PRESENTED, THAT IS TRUE. BUT THERE WAS OBJECTIVE EVIDENCE PRESENTED THAT WAS THE OBJECTIVE TESTING BY DR. SILVA, THE TOP 20 -- QUOTIENT INVENTORY.

>> WHY WASN'T THERE ANY MEDICAL TESTING DONE? MY UNDERSTANDING IS THAT AFTER THE FIRST PENALTY PHASE THAT MR. URSO HAD URGED OR SUGGESTED THAT MR. MORTON HAVE, THIS IS MERELY TESTING, AND HE REFUSED TO HAVE IT. THAT HE HAS NEVER BEEN, AT HIS OWN DOING, TESTED FOR ORGANIC BRAIN DAMAGE; IS THAT CORRECT?

>> WELL, THE TESTIMONY THAT -- THAT FROM MR. URSO WAS THAT THEY TALKED TO OTHER -- TALKED TO ALVIN MORTON ABOUT A BRAIN SCAN. AND HE ALSO SAID THAT HE CONTACTED A NEUROLOGIST AND LATER ON SAID CONTACTING NEUROLOGIST -- I CALLED UNIVERSITY OF SOUTH FLORIDA, THAT IS CORRECT, THAT WAS THE TESTIMONY THAT ALLEGEDLY ALVIN MORTON TOLD HIM HE DIDN'T WANT A BRAIN SCAN. BUT THERE ARE MANY OTHER WAYS TO TEST, TO OBJECTIVELY SCIENTIFICALLY TEST FOR BRAIN DAMAGE. THE DOCTOR, A NEUROPSYCHIATRIST, BOARD

CERTIFICATED NEUROLOGIST, HE DID DO A THOROUGH NEUROPSYCHIATRIC NEUROLOGICAL WORKUP, PRESENTED THAT. I'M NOT AWARE OF ANY CASE BY THIS COURT THAT REQUIRES A TEST SCAN OR MRI IN ORDER TO ESTABLISH BRAIN DAMAGE, THERE IS NO ESTABLISHED SCIENCE, NOT A REQUIREMENT OF THE NEUROPSYCHIATRIST OR NEUROLOGIST WHO DOES PROPER TESTING.

>> I'M GOING TO THE BOARD OF EDUCATION PRONG, WHETHER THIS EVIDENCE WAS PRESENTED TO THE JURY WOULD HAVE BEEN POWERFULLY DIFFERENT THAN WHAT THEY RECEIVED FROM -- AT THE SECOND PENALTY PHASE.

I'M STILL PERSUADED THAT WHAT THEY NOW COME UP WITH SO CHANGES THE PICTURE OF WHAT WOULD HAVE BEEN PRESENTED IN THE PENALTY PHASE TO UNDERMINE CONFIDENCE IN THE OUTCOME. YOU ARE IN REBUTTAL, BUT THAT'S WHAT REALLY QUESTIONS ARE GOING TO, NOT THAT I AGREE THERE ARE OTHER WAYS TO ESTABLISH BRAIN DAMAGE, THAT I MIGHT HAVE APPROACHED THIS CASE VERY DIFFERENTLY THAN MR. URSO AS, OBVIOUSLY, YOU THINK, BUT THE QUESTION REALLY IS IS THIS -- HAS THIS PUT THE CASE IN SUCH A DIFFERENT LIGHT AS TO UNDERMINE OUR CONFIDENCE IN THE OUTCOME OF THE -- ASSUMING EFFICIENT PERFORMANCES.

>> I THINK YOU HAVE TO LOOK NOT JUST AT BRAIN DAMAGE BUT THE TOTAL PICTURE. I REALLY -- I DO THINK THE TOTAL PICTURE HAS BEEN CHANGED IN THIS CASE, WE GOT A VERY MINIMAL PRESENTATION OF WHAT ALVIN MORTON'S CHILDHOOD WAS LIKE, IT WAS NOT A FULL AND COMPLETE PICTURE, IN FACT IT WAS A FALSE PICTURE ABOUT THE

MATERIAL WEALTH WHERE YOU HAVE THE PROSECUTOR IN CLOSING ARGUMENT SAYING HE WAS NOT SOME KID FROM THE GHETTO, HE HAD LIFE ON EASY STREET.

WE NOW KNOW THAT WASN'T TRUE.

LOOK AT THAT.

YOU WILL HEAR ABOUT HIM IN A DISCONNECTED FREEZER, SO ON.

I THINK THE PICTURE HAS CHANGED.

I WOULD LIKE TO --

UNLESS THERE ARE OTHER QUESTIONS FROM THE COURT I WOULD LIKE TO RESERVE REMAINING TIME, IF I MAY.

>> RESPONSE?

>> GOOD MORNING.

SCOTT BROWNE FOR THE STATE OF FLORIDA.

OF THE FOUR

POSTCONVICTION MENTAL HEALTH EXPERTS WHO TESTIFIED BELOW

ONLY DR. SILVA TESTIFIED

THAT HE FOUND A STATUTORY MENTAL MITIGATOR.

JUSTICE PARIENTE, YOU RECOGNIZED

EVEN NORMALLY RELIABLE

DEFENSE ORIENTED DR. BERLIN

COULD NOT SAY IS THE MENTAL

HEALTH MITIGATORS APPLIED IN

THIS CASE MOREOVER YOU DO

HAVE A DETERMINATION OF

CREDIBILITY BY TRIAL JUDGE

BELOW DR. SILVA, DR. BERLIN

DID NOT TAKE INTO ACCOUNT

ANTISOCIAL PERSONALITY

DISORDER, DR. BERLIN DIDN'T

DO IT, DID NOT FIND THAT

WAS MITIGATING, DIDN'T EXAMINE.

>> I'M GOING TO ASK YOU TO FOCUS

ON THE FIRST PRONG THAT IS

CONCERNING ME.

MR. URSO CERTAINLY WAS AN

EXPERIENCED LAWYER.

BUT HE HAD -- OTHER THAN THIS

CASE, WHICH HE TRIED ONCE

AND TWICE, NO PRIOR CAPITAL

EXPERIENCE.

AFTER THE FIRST PENALTY

PHASE WHICH REALLY HAD

REVEALED IN THE SENTENCING ORDER

VERY MINIMAL MITIGATION, HE IS TOLD BY SWISHER, FAR MORE EXPERIENCED, THOUGH NOT A GREAT WITNESS, THAT DELBEATO TOLD HIM "I'M NOT A GOOD WITNESS FOR YOU," INSTEAD OF A TWO-YEAR PERIOD REMAND AND NEW PENALTY PHASE I DON'T THINK THIS IS AN ISSUE OF FAILURE TO INVESTIGATE. I DON'T KNOW THAT ADDITIONAL EVIDENCE THAT THEY WERE IN BANKRUPTCY IS MUCH OF ANYTHING.

BUT INSTEAD OF REALLY LOOKING AND GOING I THINK WE BETTER PURSUE A DIFFERENT TACT, OR LOOK AT MENTAL MITIGATION, JUST GOES BACK TO THE COMPACT SAME OLD THING THAT PRODUCED THE 11-1 VERDICT AGAINST HIM, SO HOW IS THAT -- HOW CAN WE SAY THAT THAT IS ADEQUATE PERFORMANCE IN THE CONTEXT OF A RETRIAL WHERE YOU HAVE GOT THAT ADVANTAGE OF SEEING HOW DID YOUR WITNESSES DO.

>> WELL, YOUR HONOR --

>> I THINK THAT IS AN IMPORTANT POINT, BECAUSE JOHN SWISHER THE LEAD ATTORNEY IN THIS CASE, WAS AN EXPERIENCED CAPITAL LITIGATOR, NOT AS IF THIS CASE CAME BACK, THEY WANTED TO IMPROVE UPON THE PRESENTATION, AND THEY TALKED ABOUT, THEY DISCUSSED IT, ULTIMATELY MR. SWISHER AGREED WITH GARY URSO, ON THE STRATEGY THAT THEY DID IN FACT EMPLOY.

>> EVEN THOUGH MR. -- THOUGHT DELBEATO WAS NOT A GREAT WITNESS HE CONCURRED THAT WAS STILL HER BEST SHOT.

>> YES, YOUR HONOR, HE DID HAVE A CONCERN, ULTIMATELY HE TESTIFIED DURING POSTCONVICTION HEARING THAT HE AGREED WITH THE STRATEGY THAT THEY PURSUED.

AND, AGAIN, THE PROBLEM FOR THE APPELLANT IN THIS CASE MR. MORTON IS THE POSTER CHILD, FOR ANTISOCIAL PERSONALITY DISORDER, EVERY SINGLE MMPI IN THE RECORD THAT MR. MORTON HAS TAKEN, WHETHER IT IS ADMINISTERED BY DELBEATO OR DR. BERLIN IS A CLEAN MMPI, WITH THE EXCEPTION OF A SPIKE ON SCALE FOUR WHICH IS THE PSYCHOPATHIC DEVIANT SCALE.

MR. MORTON TORTURED ANIMALS -- SET FIRES, HE DROPPED OUT OF SCHOOL EVEN THOUGH HE IS VERY INTELLIGENT, WAS NOT MOTIVATED, HE FITS THE CRITERIA TO A TEE.

EVEN THE DEFENSE EXPERT DR. SILVA SAID WELL, IT IS VERY CLOSE, IT IS VERY CLOSE IN THIS CASE.

SO TRIAL COUNSEL TESTIFIED MR. URSO, THE DR. DELBEATO WERE AMONG THE MOST RESPECTED PSYCHOLOGISTS IN PASCO COUNTY IN DADE CITY, HE TESTIFIED IN HUNDREDS OF CASES, PRIOR CAPITAL CASES, HIS TESTIMONY WAS NOT SHOWN TO BE UNRELIABLE AT ALL.

NOW, LET'S TALK ABOUT THE BIRTH RECORDS.

THE BIG GAP THAT THE DEFENSE POINTS TO IN THE EXPERTS, BOTH THE STATE EXPERT AND DR. DELBEATO'S TESTIMONY, THEY DIDN'T HAVE BIRTH RECORDS.

WHAT DO THOSE BIRTH RECORDS SHOW?

UPON DISCHARGE A PREMATURE BABY, A SCORE OF THREE AT BIRTH, BUT UPON DISCHARGE NO ABNORMAL NEUROLOGICAL FINDINGS WERE NOTED BY THE DISCHARGING PHYSICIAN, TRIAL COUNSEL KNEW ABOUT THE DIFFICULT BIRTH EVEN IF HE DIDN'T HAVE THOSE BIRTH

RECORDS THE MOTHER SAID IT DIDN'T SEEM TO HAVE AN ADVERSE IMPACT ON HIM.

NOW WE COME TO THE POSTCONVICTION HEARING, AND THOSE BIRTH RECORDS ARE SHOWN TO DR. DELBEATO, HE SAYS IT DOESN'T CHANGE MY OPINION AT ALL.

THE STATE EXPERT DR. GONZALEZ, A PSYCHIATRIST, MD, TESTIFIED THAT THOSE BIRTH RECORDS DON'T INDICATE TO ME ANY BRAIN DAMAGE, ESPECIALLY WHEN YOU CONSIDER MORTON WAS 122 IQ, NO CREDIBLE EVIDENCE HE SUFFERED FROM BRAIN DAMAGE WHATSOEVER IN THIS CASE.

>> SO DO WE HAVE PEDIATRIC RECORDS FROM ANNUAL PHYSICAL EXAMS, ET CETERA, FOR HIM?

>> ONLY EARLY BIRTH RECORDS AND I THINK HE CAME IN AT THE AGE OF FIVE, AND HE WAS ESSENTIALLY -- HE HAD ALLERGIES, AND THE MOTHER TESTIFIED TO THAT.

>> SO NOTHING IN SCHOOL RECORDS OR OTHER EARLY CHILD RECORDS, THAT INDICATE NEUROLOGICAL --

>> ABSOLUTELY NOT, YOUR HONOR. WE JUST HAVE BIRTH RECORDS, AND, AGAIN, YOU HAVE NO ABNORMAL NEUROLOGICAL FINDING.

>> WHAT ABOUT DR. -- WASN'T HIS TESTIMONY THAT THERE WAS SOME BRAIN DAMAGE?

>> YES, YOUR HONOR.

>> SO HOW DO YOU DEAL WITH YOUR CLIENT'S ARGUMENT THAT THIS WAS HIS WHOLE -- NOT PERSONALITY BUT ALL OF HIS ACTIONS REALLY, WERE THE RESULT OF THE BRAIN DAMAGE, HE DIDN'T HAVE ANY CONTROL, WHEREAS IF YOU WERE TALKING ABOUT AN ANTISOCIAL PERSONALITY DISORDER, THAT YOU REALLY THEN MIGHT BE SOME CHOICE, ON -- MADE IN THAT KIND OF SITUATION.

>> I DON'T THINK DR. SILVA  
EVEN TESTIFIED MR. MORTON  
DIDN'T HAVE A CHOICE, AND  
AGAIN, HE FOUND THAT MORTON  
WAS UNDER AN EXTREME  
EMOTIONAL DISTURBANCE, ONLY  
FOUND A SINGLE STATUTORY  
MENTAL HEALTH MITIGATOR,  
DIDN'T RELATE THAT TO FACTS.  
THIS WAS COLDLY PLANNED.  
THIS WASN'T A REACTIVE MURDER  
WHERE YOU COULD SAY --  
ASPERGER'S SYNDROME CAUSED THE  
COLDLY PLANNED EXECUTED  
SLAUGHTER OF TWO  
INDIVIDUALS IN THEIR OWN  
HOME FOR MONEY, IT IS A  
RATHER ABSURB PROPOSITION,  
IT WOULD BE AN INSULT TO GO  
TO A PASCO COUNTY JURY TO BRING  
IN AN EXPERT, PAY HIM \$40,000,  
HAVE HIM --

>> WOULD YOU ELABORATE -- YOU  
MENTIONED BEFORE, THAT --  
THAT DR. SILVA AND DR.  
BERLIN TESTIFIED IN EFFECT  
IT WAS A VERY CLOSE CASE IN  
TERMS OF THE ANTISOCIAL  
BEHAVIOR DISORDER, SO --

>> AND I TAKE THAT TO BE  
THAT EVEN UNDER THEIR  
TESTIMONY, THAT THEY ARE  
CONCEDING THAT A GOOD CASE  
COULD BE MADE THAT HE IS  
JUST SUFFERING FROM,  
UNFORTUNATELY, WHAT HAS  
BECOME A STANDARD ALMOST  
ANTISOCIAL BEHAVIOR, WHICH IS,  
YOU KNOW, HAS CERTAIN CLASSIC  
SIGNS.

BUT IN TERMS OF THEIR  
TESTIMONY, WOULD YOU  
ELABORATE ON THAT A LITTLE  
BIT?

IN OTHER WORDS, DID THEY  
BOTH CONCEDE THAT, YOU KNOW,  
THAT THEY WOULD REALLY IN  
ESSENCE HAVE A HARD TIME  
AGREEING OR DISAGREEING WITH  
THE CONTRARY OPINION THAT  
SAYS THIS IS AN -- YOU KNOW,  
HELP ME WITH THAT,  
BECAUSE IF IN EFFECT WE END  
UP WITH A NOT VERY DIFFERENT

PICTURE, EVEN IF THEY WERE THE ONLY EXPERTS, THAT TESTIFIED, IT WOULD SEEM THEN THAT THERE WOULD BE A VERY -- A LOT OF DIFFICULTY IN PROVING PREJUDICE IN THIS SITUATION.

I'M LOOKING FOR MEAT ON THE BONES ABOUT THIS.

DID THEY BOTH IN ESSENCE TESTIFY THAT, YOU KNOW, WE REALLY CAN'T DISPUTE WITH AN INDIVIDUAL LIKE THIS WITH SOMEBODY ELSE, THAT MAY JUST SAY THIS IS CLASSIC ANTISOCIAL -- GO AHEAD.

>> IF I COULD QUOTE IF I RECALL CORRECTLY, DR. SILVA, ON CROSS-EXAMINATION WORDS WERE "IT IS CLOSE, IT IS VERY CLOSE."

AND DR. BERLIN DIDN'T VIEW THAT WAS HIS ROLE BUT CONFRONTED WITH BEHAVIORS ONE ASSOCIATES WITH ANTISOCIAL PERSONALITY DISORDER I CAN'T SAY DR. BERLIN SAID IT IS VERY CLOSE.

HE SAID I DIDN'T CONSIDER IT NOR DID HE ASK ABOUT THE FACTS OF THE -- NOR DID DR. SILVA HAVE A CLEAR CREDIBILITY FINDING. LET'S ASSUME FOR A MOMENT DEFENSE EXPERTS, DR. BERLIN WITH A NONSPECIFIC PSYCHOTIC THOUGHT DISORDER WHICH WAS STRONGLY DISPUTED BELOW, OR DR. VAIL, WITH HIS DIFFERING TESTIMONY, A CASE DEFENSE EXPERTS DIDN'T AGREE, DR. BERLIN THOUGHT BASED ON HIS UNIQUE INTERPRETATION OF THE MMPI HE HAD PSYCHOTIC THOUGHT DISORDER, SAID I SEE NO EVIDENCE OF THAT AT ALL, DR. VAIL SAID IT IS VERY CLOSE, I DON'T THINK HE WOULD DISAGREE THAT YOU CAN'T -- A PROFESSIONAL COULD COME TO THAT CONCLUSION, AND

AGAIN -- MORTON IS THE  
POSTER CHILD FOR ANTISOCIAL  
PERSONALITY DISORDER, DR.  
GONZALEZ, EXPERIENCED  
PSYCHIATRIST SAYS IT  
FITS ALL THE CRITERIA,  
DR. DELBEATO, 30  
YEARS' EXPERIENCE, HE FITS  
THE CRITERIA.

>> LET'S GO BACK TO THIS  
ANTISOCIAL PERSONALITY DISORDER.  
ALTHOUGH WE HAVE SAID IT IS  
MITIGATING, IT SOUNDS AS YOU  
SAID LIKE SOMEBODY COMMITS  
CRIMES -- SO IT IS NOT  
REALLY SOMETHING THAT A JURY  
GOES WAIT, THIS GUY HAS ANTISOCIAL  
PERSONALITY DISORDER,  
WE ARE NOT GOING TO IMPOSE A  
DEATH PENALTY, ON THE OTHER  
HAND, IF THE JURY HEARS THAT  
A PERSON HAS BRAIN DAMAGE,  
IN THE FORM OF A -- SYNDROME  
THAT THERE IS THEREFORE AN  
ORGANIC BASIS COMBINED WITH  
THE TERRIBLE THINGS THAT  
HAPPENED TO HIM DURING HIS  
CHILDHOOD, DOESN'T THAT TAKE  
IT OUT OF THE REALM OF NOT  
THAT IT IS --

>> SO -- A MURDER BUT IN  
TERMS OF IT BEING CERTAIN  
MORE COMPELLING MITIGATION?

>> WELL, YOUR HONOR, THAT  
DEPENDS, DON'T YOU LOSE  
CREDIBILITY WITH THE JURY IF  
YOU PRESENT HIGHLY CONTESTED  
MENTAL HEALTH TESTIMONY AS  
IN THIS CASE DIDN'T HAVE ANY  
SOUND SCIENTIFIC BASIS?

>> AGAIN, WE'RE ASSUMING  
THAT WHAT DR. DELBEATO  
TESTIFIED TO WAS REMOTELY --

>> MAYBE YOU COULD  
ELABORATE JUST ON THAT, THAT  
THE WAY THAT THIS IS BEING  
PORTRAYED THAT REALLY THERE  
WOULD HAVE BEEN BIRTH OF --  
NOT TO PUT ON ANY MENTAL  
HEALTH MITIGATION IN THE  
SECOND PENALTY PHASE PUT  
ON DR. DELBEATO BASING --  
THOUGHT THIS GUY WAS NOT  
WORTH SAVING, WHATEVER, TELL

ME MAYBE, HOW IN FACT DR. DELBEATO ACTUALLY HELPED THE DEFENDANT THEREFORE, AGAIN, AND IT IS NOT ALL THAT DIFFERENT, GOING BACK TO THAT QUESTION.

>> YES, YOUR HONOR, HERE IS HOW DR. DELBEATO HELPED, WHAT CAME BEFORE DR. DELBEATO'S TESTIMONY FROM THE MOTHER, SISTER, THREE AUNTS ABOUT THE HORRIBLE UPBRINGING THAT MR. MORTON HAD FROM THE TIME HE WAS BORN, TO THE TIME HE WAS EIGHT YEARS OLD WHEN HIS BIOLOGICAL FATHER WAS IN THE HOME, HE WAS ABUSED ALMOST ON A DAILY BASIS, THE JURY HEARD THAT, THE JURY HEARD FROM PISTERS, RETIRED MENTAL HEALTH WORKER, SOCIAL WORKER DEVELOPED A STUDY OF MORTON'S FAMILY BACKGROUND, AN UNATTACHED UNWANTED, CHILD, SHE WAS EXPLAINING, THE DEFENSE TRIED TO EXPLAIN HOW DO WE GET TO THE POINT WHERE ALVIN MORTON COMMITS THESE HEINOUS CRIMES.

REMEMBER, THE FACTS -- THESE CASES THESE TWO MURDERS ARE HORRENDOUS, A TROPHY FOR -- BEGGING FOR YOUR LIVES, HE MURDERS, IT -- >> WHAT WAS THE THEORY THAT THE DEFENSE WAS PUTTING FORTH?

THE THEORY WAS EXPLAINING HOW AT 19 1/2 YEARS OLD, THIS MAN COULD PREPLAN A MURDER, TAKE PLEASURE IN THE MURDER, REMEMBER THAT IS A MAN WHO CAME BACK AND TOLD PEOPLE YOU SHOULD HAVE BEEN THERE, IT WAS -- IT WAS GREAT, HE WAS EXCITED HE WAS HAPPY THAT HE HAD MURDERED TWO PEOPLE, THERE WERE BLOOD AND BRAINS EVERYWHERE, THE JURY WAS GOING TO HEAR FACTS THAT THEY TOOK A FINGER FOR A TROPHY, HOW DOES A PERSON GET TO THAT POINT?

THE DEFENSE PROBABLY -- THEY TRIED.

>> WHAT I'M TELLING YOU, HAD DR. DELBEATO HELPED THE SITUATION.

>> AS YOU WERE THE LEADUP HE -- THAT IS HIS PERSONALITY WAS FOLLOWED, BY THE TIME HE WAS EIGHT YEARS OLD WHEN THERE WAS ABUSE IN THE HOME AND ALSO, THAT THERE WAS AN ELEMENT OF HEREDITY THE FATHER PROBABLY HAD ANTISOCIAL PERSONALITY DISORDER HE SAID WE ARE NOT SURE EXACTLY HOW ONE DEVELOPS IT HE FIT IN NICELY WITHIN THE DEFENSE CASE THEY WEREN'T TRYING TO SHOW THE JURY HERE, THIS IS HOW MORTON COULD COMMIT THESE HORRIBLE CRIMES.

AND HE HAD THE ADDED BENEFIT OF THIS CASE IN BASICALLY, AGREEING WITH THE STATE EXPERT DR. GONZALEZ HE SAID LOOK HE'S GOT ANTISOCIAL PERSONALITY DISORDER PERSONALITY BY THE TIME HE WAS EIGHT HE IS THE POSTER CHILD IF YOU GO THROUGH EVERYTHING TORTURING ANIMALS HE FITS IT TO A TEE.

>> GOING BACK TO ASPERGER, SILVA TESTIFIED TO IT.

IS IT -- DID I SAY IT WRONG?

>> OKAY.

IS IT -- ASPERGER SYNDROME, ASPERGER'S SYNDROME, DR. SILVA TESTIFIED TO IT.

HOW DO WE TAKE THE RECORD AS TO WHETHER THAT HAS BEEN ESTABLISHED OR IS CONTROVERTED, THAT IS, WHETHER HE HAS ORGANIC BRAIN DAMAGE, IN THE FORM OF AUTISM?

>> IT IS CONTROVERTED NEITHER GONZALEZ MEDICAL DOCTOR TESTIFIED HE SAW NO EVIDENCE MORTON SUFFERS FROM ANY DEGREE OF BRAIN DAMAGE. MOREOVER, DR. DELBEATO DIDN'T SEE EVIDENCE OF BRAIN DAMAGE,

DR. DRLBEATO TESTIFIED HE DOES NEUROPSYCH SCREENINGS FOR BRAIN DAMAGE HAS SINCE 1975 ON S CONTRACT BASIS FOR THE STATE OF FLORIDA, HE'S NOT SOME INEXPERIENCED PSYCHOLOGIST, AND THE EVIDENCE THAT CAME OUT, DURING THE EVIDENTIARY HEARING SHOWS THAT THE DIAGNOSIS OF ASPERGER'S IS HIGHLY SUSPECT THERE WAS NO RELATION OF MILD FORM OF AUTISM TO THE FACTS OF THIS CASE IF YOU A INVESTIGATE AUTISM AT ALL, KIND OF VIOLENCE ASSOCIATED WITH IT, EMOTIONALLY REACTIVE, MISREADING, NOT THIS PREPLANNED DOUBLE HOMICIDE, IT SIMPLY WOULD NOT --

>> IN FACE OF REASON --

>> WHEN DR. SILVA TESTIFIED SOME -- BASIS INTO ANTISOCIAL PERSONALITY DISORDER SOME EXPLAINED BY AUTISM PSYCHOPATH BIOLOGY HE IS NOT TALKING ABOUT THIS PARTICULAR CRIME.

>> HE NEVER RELATED THE FACTS TO THIS CRIME, NOT ONCE DID WE HEAR HIM SAY WELL, YES, SURE, CUTTING THE PHONE LINES, THAT IS PART OF ASPERGER'S, YOU KNOW, PLANNING TO MURDER PEOPLE FOR MONEY, PICKING OUT THE HOUSE BECAUSE THEY HAVE A SATELLITE DISH AND A POOL, TARGETING VICTIMS FOR DEATH, TAKING PLEASURE IN THEIR MURDER, HE CAME UP WITH AN EXTREME EMOTIONAL DISTURBANCE WITHOUT ONCE RELATING ASPERGER'S TO THE FACTS OF THE OFFENSE, A JURY IS NOT GOING TO BUY THAT, WE HAVE CLEAR CREDIBILITY FINDINGS FROM THE TRIAL COURT BELOW, THEIR TESTIMONY THE DEFENSE EXPERTS CONTRADICTED ONE ANOTHER, THEY WERE NOT CREDIBLE.

THIS COURT HAS REPEATEDLY HELD THAT SIMPLY BECAUSE A DEFENSE ATTORNEY, IN POSTCONVICTION

CAN FIND MORE FAVORABLE MENTAL HEALTH EFFORTS IS NOT SUFFICIENT GROUND TO REVERSE THE PENALTY PHASE.

>> DO YOU AGREE WHEN SECOND PENALTY PHASE MIGHT HOLD A DEFENSE LAWYER TO A SLIGHTLY DIFFERENT STANDARD TO REEXAMINE, WHAT HAS BEEN PRESENT, AND TRY A DIFFERENT STRATEGY, CERTAINLY, THAT IS SOMETHING THAT YOU WOULD HOPE A DEFENSE LAWYER WOULD LOOK AT.

>> AND THEY DID LOOK AT IT. THEY LOOKED AT THE POSSIBILITY OF HAVING MENTAL OR NEUROIMAGING DONE, IN THIS CASE MORTON DECLINED, THEY WERE DISCUSSING STRATEGY, AND AGAIN THE STRATEGY THE BENEFIT THAT THEY GOT WHERE THEY WERE CONSISTENT WITH WHAT THE STATE EXPERT FOUND.

>> LET ME -- GO JUST ASK ABOUT THIS SORT OF ADDITIONAL -- MITIGATION THAT THEY ARE CLAIMING SHOULD HAVE BEEN DISCOVERED THE PICTURE PRESENTED AT THE SECOND PENALTY PHASE EVERYBODY AGREES HE HAS A HORRIBLE CHILDHOOD TO AGE 8, THEN HE WAS RESCUED BY HIS MOTHER MARRYING A WONDERFUL GUY, AND HE HAD ALL THE PLEASURE -- HE HAD ALL THE LUXURIES THAT ANYBODY IN THE WORLD WOULD YOU KNOW BE HAPPY WITH, AND SO LOOK AT AND LOOK WHAT HE DOES WITH IT. WHEREAS, IN FACT, THEY ARE SHOWING THAT HE REALLY -- THE ENVIRONMENT WAS NOT A LUXURIOUS ENVIRONMENT, THAT THE THINGS HE GOT, LIKE A TV, WERE SECONDHAND, THAT THERE WAS NO -- THAT THEY WERE IN BANKRUPTCY, A DIFFERENT PICTURE REALLY OF WHAT HAPPENED FROM AGES 8 TILL 19.  
THE JURY

SHOULD HAVE HAD THAT EVIDENCE TO SHOW, NO, IT WASN'T LIKE HE WAS SAVED BY A WHITE KNIGHT AT AGE 8, BUT THINGS REALLY, THEY WERE FORMED, PLUS THEY DIDN'T GET BETTER.

>> YOUR HONOR, THERE WAS ABSOLUTELY NO EVIDENCE DURING THE POSTCONVICTION HEARING BELOW THAT MR. STACY OR THERE WAS ANY ABUSE IN THE MORTON HOUSEHOLD AFTER THE BIOLOGICAL FATHER LEFT THE HOUSEHOLD, THE MOTHER -- >> -- BUT THAT, YOU KNOW, THERE WAS THIS EVIDENCE THAT THE STATE REALLY PICKED UP ON, AT THE SECOND PENALTY PHASE, THAT NOBODY DISAGREED ABOUT THE FIRST EIGHT YEARS BUT THEN HE HAD EVERY -- YOU KNOW, BENEFIT ANY CHILD COULD HAVE.

>> LET'S ASSUME ALL THAT IS TRUE, THE MOST THE STATE -- COULD ELICIT BELOW WAS THAT YES, HE GOT A TV, GAMES, A SECONDHAND -- THE CAR WAS NOT A GOOD CAR, BUT THE FAMILY WAS POOR.

DOES THAT MAKE US FEEL BETTER ABOUT MR. MORTON? HE DIDN'T HAVE A JOB, HE IS 19 1/2 YEARS OLD, HE'S STILL LIVING OFF HIS PARENTS, HE IS NOT CONTRIBUTING ANYTHING TO THE HOUSEHOLD, THEY HAVE TO PAY \$700 TO FIX AN ARSON -- TO FIX A FIRE HE CAUSED, AND HE IS NOT HELPING THE FAMILY OUT AT ALL, NOT REALLY SIGNIFICANT MITIGATIONM THE FAMILY IS -- HE IS SITTING ON HIS BUTT, NOT DOING ANYTHING. THEY STILL PROVIDE BASICS FOR HIM.

>> THE MOTHER'S WORKING HARD, THE FATHER THE STEPFATHER WORKED HARD. DO WE FEEL BETTER ABOUT MR. MORTON? IN CLOSING, THIS IS A CASE

WHERE -- LITIGATION, THERE WERE EIGHT AGGREGATING FACTORS FOR TWO MURDERS INCLUDING HAC, AND CCI. THERE IS NO POSSIBILITY THAT I THINK DEVELOPED DURING POSTCONVICTION WOULD HAVE MADE A DIFFERENCE IN THIS CASE. THE STATE HAS NOTHING FURTHER. THANK YOU.

>> REBUTTAL.

>> THANK YOU, YOUR HONOR. I WOULD LIKE TO ADDRESS SOME POINTS THAT MY OPPONENT MADE.

FIRST, HE SAID THAT DR. BERLIN SAID THERE WAS NO -- THAT THERE WERE NO STATUTORY MITIGATORS. WHAT DR. BERLIN ACTUALLY SAID WAS HE COULDN'T DETERMINE IF THERE WERE ANY MENTAL HEALTH MITIGATORS, HE DIDN'T HAVE THE MMPI OR OTHER RECORDS, BECAUSE THEY HAD BEEN DESTROYED.

>> WAS THERE ANYTHING PREVENTING DR. BERLIN FROM DOING HIS OWN TESTING?

>> HE DID, BUT HE WANTED TO BE ABLE TO RELATE BACK, TO SEE HOW IT COMPARED TO WHAT HAD BEEN DONE BEFORE.

AND, IN ADDITION, MY -- SAID THAT EVERY MMPI SHOWED THAT IT WAS A CLEAN MMPI WITH THE EXCEPTION OF THE ELEVATED SCALE FOUR.

WE DON'T KNOW

THAT BECAUSE, AGAIN, THAT RECORD DOESN'T EXIST, NO ONE EVER SAW -- THE RECORDS --

>> YOU ARE SAYING THERE WAS ONLY ONE MMPI DONE BY THAT ONE WITNESS?

>> NO.

THERE WERE TWO MMPI'S DONE, ONE -- WELL, DR. DELBEATO CLAIMED HE DID AN MMPI IN 1994, BUT A COUPLE OF WEEKS BEFORE THE TRIAL.

NO ONE HAS EVER SEEN HIS RECORDS.

DR. GONZALEZ DIAGNOSED ALVIN MORTON WITH ANTISOCIAL PERSONALITY DISORDER WITHOUT EVER SEEING HIM, WITHOUT SEEING DR. DELBEATO'S MMPI. WHAT THE MMPI SAID, THE ONLY -- THE ONLY THING THAT WE KNOW ABOUT THAT IS THAT DR. DELBEATO SAID THE SCALE FOUR ELEVATED, HE DIDN'T REMEMBER, NOBODY SAW IT.

>> WHAT ABOUT THE DESTRUCTION OF EVIDENCE ISSUE, RATHER THAN EXISTENCE OF WITNESSES TESTIFYING TO SOMETHING, THAT HAS NO SUFFICIENT EVIDENTIARY BASIS UNLESS SOME INTENTIONAL DESTRUCTION OF UNDERLYING RECORDS -- ISN'T THAT WHAT IT DOES BECOME --

>> I THINK IT DOES. THERE IS THE ISSUE OF INTENTIONAL DESTRUCTION HERE. I THINK CONFLICTING STATEMENTS ABOUT WHAT HAPPENED TO THE RECORDS. THEY CAN'T BOTH BE TRUE. THAT IS A CREDIBILITY FACTOR THAT WE HAVE TO CONSIDER, ABOUT A WITNESS WHO IS TESTIFYING IN A CAPITAL CASE.

>> JUSTICE BELL HAD A QUESTION.

>> I WAS SAYING SO YOU -- HOW MANY PEOPLE, HOW MANY MENTAL HEALTH EXPERTS THAT ARE ABLE TO DO AN MMPI HAVE EXAMINED THIS DEFENDANT?

>> TWO.

DR. DELBEATO, DR. BERLIN.

>> DID DR. BERLIN DO AN MMPI?

>> YES, IN EVIDENCE.

>> WHAT DID IT SHOW?

>> DR. BERLIN SAID THAT IT SHOWED PSYCHOSIS, THAT WAS DISPUTED AT TRIAL, BUT THE SCALE FOUR WAS NOT ELEVATED TO THE POINT OF BEING ABNORMAL, AND DR. DELBEATO LOOKED AT THE MMPI, DR. BERLIN'S MMPI, SAID I WOULDN'T DIAGNOSE ANTISOCIAL PERSONALITY DISORDER BASED

ON THAT MMPI, THAT IS A BEAUTIFUL MMPI, ALSO SAID HE WOULDN'T DIAGNOSE BRAIN DAMAGE.

THAT WAS THE TESTIMONY ABOUT THE MMPI.

DR. SILVA

DIDN'T ADDRESS THE MMPI, DIDN'T ADMINISTER IT, SO HE DIDN'T ADDRESS THAT.

IN ADDITION, MY OPPONENT MENTIONED THERE WERE NO ABNORMAL NEUROLOGICAL FINDINGS NOTED WHEN ALVIN MORTON WAS RELEASED FROM THE HOSPITAL AS AN INTERN -- BUT DR. SILVA, BERLIN TESTIFIED

>> BECAUSE NEUROLOGICAL FUNCTIONING WAS NOT ASSESSED AND, DR. DELBEATO SAID THAT'S NOT TRUE.

HE WAS CONFRONTED WITH AN AUTHORITATIVE TREATISE.

KAPLAN TEXTBOOK OF PSYCHIATRY CITED BY THE UNITED STATES SUPREME COURT, AS AUTHORITATIVE TREATISE.

HE SAID HE DIDN'T HAVE TO FOLLOW IT.

HE CITED HIMSELF AS AUTHORITY FOR HIS OPINION.

AND THERE IS NOTHING IN THE RECORD TO SUGGEST THAT THE DR. DELBEATO HAS WRITTEN A TREATISE ON NEUROLOGICAL EXAMINATIONS OF INFANTS.

IN ADDITION --

>> YOU HAVE EXHAUSTED MORE THAN YOUR TIME.

>> THANK YOU.

>> WE'LL TAKE THIS CASE UNDER ADVISEMENT.

THANK YOU BOTH FOR YOUR PRESENTATIONS.

THANK YOU VERY MUCH.

THE FINAL CASE ON OUR CALENDAR THIS MORNING IS THE CROSSINGS AT FLEMING ISLAND VERSE ECHEVERRI.

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

I'M DON LESTER REPRESENTING THE CROSSINGS OF FLEMING ISLAND

DISTRICT.

FOR PURPOSES OF TODAY'S  
ARGUMENT I LIKE TO FOCUS ON  
ZERO IN ON WHAT I THINK IS THE  
KEY ULTIMATE ISSUE.

THAT IS, WHETHER THE SO-CALLED  
DEFENSIVE POSTURE DICTA IN  
LEWIS AND IN FUCHS  
RECONCILED WITH THIS COURT AS  
PREVIOUSLY ANNOUNCED RULES IN  
ATLANTIC COAST.

>> LET ME ASK YOU A QUESTION  
ABOUT THAT.

YOU MAY HAVE A POINT ULTIMATELY  
AND JUSTICE BELL'S CONCURRING  
OPINION IN SUNSET HARBOR WAS  
ELOQUENT.

WE'VE ALREADY HELD SINCE 1922  
YOU CANNOT USE OFFENSIVELY.

>> CORRECT.

>> YOU WANT US TO HOLD THAT YOU  
CANNOT USE IT DEFENSIVELY.

>> CORRECT.

>> THEREFORE, WHEN A PUBLIC  
OFFICIAL BELIEVES THAT A  
STATUTE GOVERNING THE AD  
VALOREM TAX OR ANYTHING IN THIS  
FIELD IS UNCONSTITUTIONAL,  
THEN, THERE IS NO WAY IN WHICH  
TO CONTEST THE  
CONSTITUTIONALITY OF THAT  
STATUTE.

AND IF THE PUBLIC OFFICIAL  
CANNOT CONTEST IT, WHO ELSE IS  
THERE TO CONTEST IT?

>> JUDGE, IF I UNDERSTAND YOUR,  
JUSTICE, IF I UNDERSTAND YOUR  
QUESTION TO BE HOW WILL THE  
ISSUE COME BEFORE THE COURTS, I  
WOULD HAVE SEVERAL RESPONSES.  
FIRST, THAT PRECISE ARGUMENT  
WAS MADE IN ATLANTIC COASTLINE  
AND JUSTICE WHITFIELD'S  
DISSENT.

OBVIOUSLY CONSIDERED AND  
REJECTED BY THE COURT IN THE  
THAT CASE.

SECONDLY, NUMEROUS OPINIONS,  
HORN, LEWIS, THE KREST CASE  
AGAINST LANDIS, THIS COURT  
OBSERVED THE ATTORNEY GENERAL  
AS JUDICIAL OFFICER WITHIN THE  
EXECUTIVE BRANCH HAS AUTHORITY  
AND DUTY TO DO THAT.

MOREOVER, THIS COURT IN BOTH THE LEWIS AND THE HORN CASES AND IN OTHER CASES HAS RECOGNIZED THAT THESE OFFICIALS, IF THEY FEEL SO STRONGLY ABOUT IT, CAN BRING SUCH A SUIT IN THEIR INDIVIDUAL CAPACITY WITHOUT VIOLATING THE RULES SET FORTH IN ATLANTIC, WHICH IS DISOBEYING THE LAW PRIOR TO.

THEY CAN ALWAYS OBEY THE LAW, AND IN THEIR INDIVIDUAL CAPACITIES CHALLENGE THE STATUTE.

>> WHAT YOU'RE SAYING THEN IS THEY CAN DO IT BUT THEY DO IT INDIVIDUALLY?

>> CORRECT.

>> WILL YOU PLEASE ADDRESS, AND I'VE BEEN STRUGGLING WITH THIS, SEEMS TO BE VERY, VERY CLEAR, UNDER CHAPTER 194.036, IT SPECIFICALLY ADDRESSES A PROPERTY APPRAISER AND IT SAYS, QUOTE, THE PROPERTY APPRAISER DETERMINES AND AFFIRMATIVELY ASSERTS IN ANY LEGAL PROCEEDING THAT THERE IS A SPECIFIC CONSTITUTIONAL VIOLATION.

WHAT DO WE DO WITH THIS?

THEN IT GOES ON TO SAY THEY CANNOT INITIATE THIS AS A SEPARATE INDEPENDENT SUIT.

>> JUDGE, JUSTICE, WHAT THE WAY I READ THAT IS THAT THE LEGISLATURE, YOU KNOW, WAS CLEARLY TRYING TO, I THINK THIS COURT LOOKS AT LEGISLATIVE ENACTMENTS FOR EXAMPLE AS THE COURT HELD IN THE SUN 'N LAKE CASE, YOU LOOK AT THESE STATUTES, PRESUMING THEIR CONSTITUTIONAL VALIDITY, INTERPRET THEM IN THE LIGHT OF EXISTING CONSTITUTIONAL PRINCIPLES OR PRECEDENT.

I THINK IF WE LOOK AT IT THAT WAY, THE LEGISLATURE IS TRYING TO SAY, INTO ACCORD WITH THE SEPARATION OF POWERS DOCTRINE WHICH THIS COURT HAS PREVIOUSLY ENUNCIATED, THAT IS WHY WE WOULD PUT SUCH LANGUAGE IN

THERE.

>> I'M SORRY, THAT IS NOT SPEAKING -- DOES IT NOT SAY THAT THE PROPERTY APPRAISER, THIS IS SPECIFIC AUTHORITY TO ASSERT IN A LEGAL PROCEEDING THAT THERE IS A SPECIFIC CONSTITUTIONAL VIOLATION? I DON'T THINK YOU ANSWERED THAT QUESTION.

>> I'M SORRY, I DID MISUNDERSTAND THE QUESTION.

194 --

>> .036.

>> RIGHT.

>> SPECIFICALLY TALKS ABOUT THE AUTHORITY OF THE PROPERTY APPRAISER, NOT EVERYBODY IN GOVERNMENT.

ARE WE NOT TALKING ABOUT A PROPERTY APPRAISER HERE?

>> YES, SIR.

>> AND IT SPECIFICALLY SAYS, ACKNOWLEDGES THAT THAT CAN BE DONE.

NOW, HAS THIS STATUTE BEEN CHALLENGED AS BEING UNCONSTITUTIONAL ITSELF?

>> THAT PROVISION OF LAW, 194?

>> YES, SIR.

>> I DON'T BELIEVE SO.

>> SO I'M TRYING TO UNDERSTAND, THIS STATUTE SPECIFICALLY SAYS, IT DOESN'T SAY YOU CAN GENERALLY SAY YOU CAN, YOU CAN CHALLENGE IT.

BUT IT SAYS SPECIFICALLY.

A SPECIFIC CONSTITUTIONAL OR STATUTORY BUT A CONSTITUTIONAL VIOLATION.

>> I THINK I WOULD RESPOND TO THAT PERHAPS WAY I DID BEFORE BUT MAYBE TRY TO SAY IT A LITTLE MORE ARTICULATELY. I DON'T THINK THE LEGISLATURE BY ENACTMENT OF THAT STATUTE CAN TELL THIS COURT TO OVERRULE ITS PREVIOUS PRECEDENT, FOR EXAMPLE IN ATLANTIC AND IN BARR, WHICH THIS COURT DID SPECIFICALLY HOLD THAT, IF THE OFFICIAL IS ASSERTING THAT IT VIOLATES THEIR OATH OF OFFICE TO ENFORCE A STATUTE, THAT

ALONE WILL NOT GIVE THAT --

>> WHY NOT?

IN OTHER WORDS, IF WHAT, IT SEEMS HAS HAPPENED OVER THE YEARS IS THAT WE'VE GONE FROM AN INTERPRETATION OF LEGISLATIVE POLICY THAT BECAUSE WE ORIGINALLY INTERPRETED THAT AND WE COMMENTED ON IT OVER THE YEARS THAT WE'VE ALMOST TRANSFORMED IT, YOU KNOW, TO SOMETHING ELSE.

SO, AREN'T WE, I MEAN, LET ME ASK TWO QUESTIONS.

>> OKAY.

>> ONE, AREN'T WE TALKING ABOUT LEGISLATIVE POLICY ON THIS ISSUE TO BEGIN WITH?

IT WAS THE LEGISLATURE THAT LOGICALLY, YOU KNOW, MADE THE CONCLUSION TO BEGIN WITH.

WAIT A MINUTE, WHATEVER WE'RE GOING TO DO, WE DON'T WANT MINISTERIAL OFFICIALS TO BE IN A POSITION TO SAY, WELL WHAT YOU DID IS UNCONSTITUTIONAL.

>> RIGHT.

>> WE WANT THEM TO SHUT UP AND DO WHAT WE TELL THEM TO DO, EXCUSE THE LANGUAGE.

>> SURE.

>> AND SO, WE ARE TALKING ABOUT, ARE WE NOT, LEGISLATIVE POLICY, WOULD YOU AGREE WITH THAT?

>> I THINK, I AGREE, YOUR HONOR --

>> ISN'T THAT THE CONTEXT WE'RE -- NOT TALKING ABOUT CONSTITUTIONAL POLICY OR JUDICIAL POLICY OR EXECUTIVE BRANCH POLICY, OR WE'RE TALKING ABOUT THE INTENT OF THE LEGISLATURE.

SO THAT'S WHY I, IF THAT'S WHAT WE'RE TALKING ABOUT, AND THEN WE SEEMINGLY, AS THE CHIEF JUSTICE HAS QUOTED, IN THIS INSTANCE WITH THIS PARTICULAR MINISTERIAL OFFICER, THAT THE LEGISLATURE HAS SEEMINGLY NOW CREATED AN EXCEPTION TO THEIR OWN ORIGINAL POLICY.

>> RIGHT.

>> OF SAYING, BUT, YEAH, WE FEEL THAT WAY BUT WITH REFERENCE TO PROPERTY APPRAISERS, HERE'S WHAT WE HAVE TO SAY.

AND, YOU KNOW, AT LEAST ON ITS FACE, AS I THINK YOU REACTED TOO, SEEMS LIKE THEY PRETTY CLEARLY CREATED AN EXCEPTION TO THE ORIGINAL POLICY OF JUST, BE QUIET AND DO WHAT WE SAY, DON'T CHALLENGE IT.

SO HELP ME WITH THAT.

>> I'LL TRY.

FIRST, I THINK IT GOES BACK TO EARLIER JURISPRUDENCE OF THIS COURT AND, THIS COURT HAS PREVIOUSLY HELD ON ANY NUMBER OF OCCASIONS ALL THE WAY UP THROUGH FUCHS THAT THIS CONSTITUTIONAL OFFICER CANNOT INITIATE A CHALLENGE TO A STATUTE.

WE'RE EXPECTING THESE OFFICERS TO COMPLY WITH AND EXECUTE THE LAWS THAT THEY'RE OBLIGED TO DISCHARGE.

>> WHERE DOES THAT COME FROM?

>> I BELIEVE THAT COMES FROM EARLIER CONSTITUTIONAL JURISPRUDENCE OF THIS COURT.

>> BUT WASN'T THAT EARLIER JURISPRUDENCE, ON BASIS THAT A MINISTERIAL OFFICER IN SEPARATION OF POWERS CONTEXT HAS NO POWER TO DECLARE IS SOMETHING UNCONSTITUTIONAL.

>> CORRECT.

>> ONLY A COURT CAN.

THAT'S WHERE YOU HAVE TO DO IT, IN JUDICIAL, THAT IS THE DIVISION OF POWERS AND THAT THAT MINISTERIAL OFFICER DOESN'T HAVE THAT POWER. ISN'T THAT REALLY THE, THE ORIGINATION OF THIS CONCEPT?

>> I THINK IT IS.

AND I THINK THAT CONCEPT CONTINUES THROUGH TO TODAY WITH THE RECENT PRONOUNCEMENTS OF THIS COURT IN LEWIS AND FUCHS, AND SO FORTH THAT A LAW IS PRESUMED TO BE VALID AND OFFICER MUST OBEY AND CONFORM

THAT LAW UNTIL THE COURT SAYS OTHERWISE.

>> WHY WOULDN'T IT CONFORM WITH THAT POLICY AND ALSO ALLOW A PUBLIC OFFICIAL TO CONTEST THE CONSTITUTIONALITY, IF THE PUBLIC OFFICIAL COULD ENFORCE THE STATUTE AS WRITTEN AGAINST PROPERTY OWNERS, BUT MAY FILE A DECLARATORY JUDGMENT ACTION SEPARATELY TO HAVE THAT DECLARED UNCONSTITUTIONAL?

>> AND I THINK THAT REALLY, THANK YOU FOR MENTIONING THAT, JUSTICE CANTERO.

BECAUSE I THINK THAT REALLY DOES ALLOW US TO SEE A DISTINCTION HERE.

THE OFFICER CAN CHALLENGE CONSTITUTIONALITY WHILE NOT AT SAME TIME DISOBEYING THE LAW. THAT SEEMS TO ME TO BE THE ULTIMATE RUB.

IS THE OFFICER GOING TO BE ALLOWED TO DISOBEY THE LAW, TRIGGER THE LITIGATION, FORCE THEM TO BE SUED AND THEN BASED SOLELY ON THE FACT THAT THIS OFFICER IS IN DEFENSIVE POSTURE WITHOUT THE PUBLIC FUNDS EXCEPTION OR PERSONAL INJURY EXCEPTION BE ABLE TO CHALLENGE THE CONSTITUTIONALITY.

>> OF COURSE I SIGNED ON TO JUSTICE BELL'S CONCURRENCE.

>> RIGHT.

>> I'M SOMEWHAT SYMPATHETIC TO HIS VIEW.

SEEMS TO ME WHAT YOU'RE DOING, WHAT A PROPERTY APPRAISER IS DOING MAKING HIS OR HER OWN DETERMINATION OF CONSTITUTIONALITY ENFORCING THE PROPERTY OWNER TO FILE.

>> RIGHT.

>> THE PROPERTY OWNER DOESN'T HAVE THE WHEREWITHALL TO DO THAT, THEY HAVE ESSENTIALLY BECOME A LAW UNTO THEMSELVES. THAT WOULD BE YOUR POLICY ARGUMENT FOR WHY THIS COURT ALSO SHOULD BE LOOKING AT IT. BECAUSE IT DOESN'T SEEM TO ME THAT'S WHAT WE EXPECT IN OUR,

WOULDN'T WANT A POLICE OFFICER TO SAY, I THINK THIS LAW IS UNCONSTITUTIONAL AND NOT ENFORCE IT.

>> RIGHT, RIGHT. EXACTLY.

>> SAYING EXACTLY BUT IT SAYS IN THE STATUTE, MAYBE THIS IS ALL IN CONTRADICTION OF ONE ANOTHER BUT IT SAYS IF THE PROPERTY APPRAISER DISAGREES WITH THE DECISION OF THE BOARD, VALUE ADJUSTMENT BOARD, IT SAYS HE OR SHE MAY TAKE IT INTO COURT AND DO THESE THINGS. HOW DOES THAT SQUARE WITH THAT?

>> I THINK I WOULD RESPOND TO THAT BY SAYING I'M NOT SO SURE THAT PRESUPPOSE THAT IS THE PROPERTY APPRAISER HAS CHOSEN, UNILATERALLY TO NOT FOLLOW THE LAW BY DETERMINING, IN GOOD FAITH.

NOBODY HAS QUESTION THE BONAFIDES OF PROPERTY APPRAISERS.

>> I STRUGGLE WITH THE CONCEPT OF OFFICER OR APPRAISER, THIS SAYS I CAN DO IT. YOU SAY NOT.

YET I CAN GO OUT AND AS THAT APPRAISER YOU SAY I CAN FILE AN ACTION, I HAVE NO STANDING AS AN INDIVIDUAL TO CHALLENGE IT. I'M NOT IMPACTED BY IT AS AN INDIVIDUAL YET I HAVE THAT POWER TO DO IT.

THIS WHOLE AREA SEEMS SOMEWHAT CONVOLUTED. EACH TIME YOU TURN YOU RUN INTO YOURSELF AGAIN.

>> I AGREE.

I THINK THEREFORE IS SOME CONVOLUTION HERE.

I'M NOT SURE I AGREE THAT THE PROPERTY APPRAISER IN HIS OR HER INDIVIDUAL CAPACITY DOES NOT HAVE INDIVIDUAL STANDING. THE COURT RULED IN THE LEWIS AND HORN, RICKMAN RULE REQUIRING SPECIAL INJURY DOES NOT APPLY IF ONE IS ALLEGING THAT THE LEGISLATURE OR WHATEVER THE ENTITY IS EXCEEDED ITS CONSTITUTIONAL AUTHORITY.

>> SO THE PROPERTY APPRAISER THEN AS THE STATUTES COME OUT CAN TAKE OFF THEIR NAME PROPERTY APPRAISER AND GO AHEAD AND FILE ALL THESE LAWSUITS CHALLENGING THEM?

>> I DON'T THINK THAT'S A PROBLEM.

I BELIEVE IT WAS THE HORN CASE WHERE THIS COURT DID NOTE, INITIALLY THAT WOULD BE THE ATTORNEY GENERAL'S JOB AND PERHAPS IT WOULD BE A BETTER PRACTICE AND PROCEDURE TO GET A CERTIFICATE THAT THE ATTORNEY GENERAL IS NOT GOING TO FOLLOW UP ON THIS.

SO WE DON'T HAVE MULTIPLICITY OF SUITS.

>> I APPRECIATE YOUR BRINGING THIS MATTER BACK TO US BECAUSE OBVIOUSLY WE DIDN'T SETTLE IT ALTHOUGH, FROM MY POINT OF VIEW I THOUGHT WE HAD SETTLED IT.

>> RIGHT.

>> AND BECAUSE ONE THING THAT I'M CONCERNED ABOUT WE MADE PRETTY CLEAR STATEMENTS HERE RECENTLY THAT THIS STATUTE STATUTE AND THE ANALYSIS WAS THEN MADE BY THE FIRST DISTRICT IS WHERE MAJORITY OF THIS COURT IS ON THIS POINT AND THAT IS THAT THERE IS A DEFENSIVE EXCEPTION.

I DON'T KNOW ANYTHING REALLY HAS CHANGED CHANGED SINCE WE CAME OUT WITH FUCHS.

IT WAS RAISED IN DISSSENT IN ROBBINS BUT ONLY DREW TWO VOTES.

>> MAY I RESPOND TO THAT THIS WAY, JUSTICE WELLS.

>> PLEASE.

>> THE ONLY, THE FIRST TIME THAT THE DEFENSIVE POSTURE EXCEPTION APPEARS AS FAR AS I CAN TELL IN FLORIDA JURISPRUDENCE IS THE LEWIS CASE.

IN WHICH IT IS CLEARLY DICTA. THE FUCHS CASE PICKS UP ON THAT DICTA.

THE QUESTION TO ME AS I SEE IT

IS CAN THE DEFENSIVE POSTURE  
STANDING ALONE WITHOUT PUBLIC  
FUNDS AND PERSONAL INJURE BE  
RECONCILED WITH ATLANTIC AND  
BARR?

I SUGGEST IT NOT.

THE ONLY WAY YOU GET TO THAT  
DEFENSIVE POSTURE, BY OFFICIAL  
MAKING UNILATERAL DETERMINATION  
TO NOT FOLLOW THE LAW AND BE  
SUED.

>> I UNDERSTAND THAT BUT WE  
ALSO HAVE TO RECOGNIZE WITHIN  
THE ANALYSIS THAT WE ARE  
DEALING WITH IN MOST INSTANCES  
CONSTITUTIONAL OFFICERS AND THE  
PROPERTY APPRAISER.

>> CORRECT.

>> AND THAT WE HAVE TO ASSUME  
THAT THEY'RE ACTING IN GOOD  
FAITH AND THAT, AND THAT THERE  
IS THE ADDITIONAL FACTOR HERE  
OF THE STATUTE WHICH WE WERE  
REALLY DEALING WITH IN THE  
ANALYSIS IN FUCHS.

>> I UNDERSTAND THAT.

YOUR HONOR, I GUESS, AND I'M  
COMING UP ON MY FIVE MINUTES  
RESERVED HERE, IF I COULD I  
WOULD JUST RESPOND BY SAYING I  
DON'T THINK IT'S THE ISSUE OF  
THEIR GOOD FAITH OR NOT.  
IN BOTH ATLANTIC AND IN BARR,  
I'M SURE THOSE OFFICERS WERE  
ACTING IN GOOD FAITH AND THEY  
TOOK THE POSITION THAT IT WOULD  
VIOLATE THEIR OATH OF OFFICE TO  
FOLLOW THE LAW.

THAT WAS THE SEPARATION OF  
POWERS ISSUE THAT THIS COURT  
HAD A PROBLEM WITH AND WAS  
THESE OFFICERS NOT ONLY  
BELIEVING THAT, BUT FAILING TO  
FOLLOW THE LAW AS, BEFORE THIS  
COURT HAD MADE A DETERMINATION  
THAT THE LAW WAS CONSTITUTIONAL  
OR NOT.

AND I THINK YOU CAN HARMONIZE  
THE DICTA IN FUCHS AND IN LEWIS  
BY LOOKING AT THE CASES THAT  
LEWIS CITED TO.

ALL OF THOSE CASES DEALT WITH  
THE PUBLIC FUNDS DISBURSEMENT  
EXCEPTION AND COULD BE DECIDED

ON THAT BASIS.

SO AS LONG AS THE DEFENSIVE POSTURE EXCEPTION IS COUPLED WITH ONE OF THE TWO TRADITIONAL EXCEPTIONS, PERSONAL INJURY OR PUBLIC FUNDS, I THINK IT CAN BE RECONCILED BUT, IF DEFENSIVE POSTURE ALONE WITHOUT THOSE TWO PREVIOUSLY RECOGNIZED EXCEPTIONS IS ALLOWED, THEN I DON'T THINK CAN YOU RECONCILE THAT WITH THE CONCERNS IN ATLANTIC COASTLINE AND BARR ABOUT THE SEPARATION OF POWERS ISSUE.

>> IS THERE, BECAUSE OF THE NATURE OF THIS OFFICE OR SOMETHING BECAUSE THIS DEALS WITH THE PROPERTY APPRAISER'S OFFICE, NOT SOME OF THESE OTHER THINGS.

>> RIGHT.

>> SO ISN'T THAT A WAY?

WE LOOK AT THIS IN A DIFFERENT POSTURE.

FUCHS WAS SPECIFICALLY ADDRESSING THE STATUTE.

SO AS A PROPERTY APPRAISER FIT INTO A DIFFERENT CATEGORY THAN, I DON'T KNOW, THE DOG CATCHER?

>> WELL, THAT'S AN INTERESTING QUESTION.

HOW FAR DO YOU EXTEND THIS DOCTRINE THEN?

I THOUGHT ABOUT THAT.

AND I'M NOT ASKING THIS COURT,

THIS COURT CAN LIMIT AND I

THINK I CRAFTED MY BRIEF THAT

WAY, TO LIMIT IT TO THE

PROPERTY APPRAISER BECAUSE WHAT

I CONSIDER TO BE THE

MINISTERIAL NATURE OF THAT

OFFICE.

THIS COURT PREVIOUSLY HELD

COMPTROLLERS BACK WHEN WE HAD

THOSE INVOLVED PUBLIC FUNDS

OBVIOUSLY THAT WAS A LITTLE BIT

DIFFERENT.

I DON'T SEE ANYTHING OTHER THAN

MINISTERIAL DUTIES THAT IMPOSED

BY CONSTITUTION IN STATUTE ON A

PROPERTY APPRAISER THAT WOULD

EVER IMPLICATE

THE PERSONAL INJURY PUBLIC

FUNDS EXCEPTIONS.

IF THERE ARE --

>> SAVED SOME OF YOUR TIME.

>> YES, SIR.

THANK YOU.

>> PLEASE THE COURT.

MY NAME IS LARRY LEVY.

I REPRESENT THE APPELLEE TODAY,  
THE PROPERTY APPRAISER.

LET ME MAKE SOME COMMENTS IF I  
WILL.

THE CASE I CITED IN MY BRIEF  
MAKES IT VERY CLEAR THAT IS THE  
LEWIS CASE.

DEPARTMENT OF EDUCATION VERSUS  
LEWIS.

DO IT DEFENSIVELY.

>> LET ME ASK YOU A QUESTION.  
OVER HERE.

YOU AGREE THAT THOSE  
DISCUSSIONS WERE DICTA, RIGHT?  
IN LEWIS?

>> WHAT NOW?

>> WAS DICTA.

IT DIDN'T REALLY ADDRESS  
ATLANTIC COAST?

>> NO, SIR.

I THINK THEY WERE EXACTLY WHAT  
THEY WERE SAYING.

>> LET ME ASK YOU IN SECTION  
193.06 THAT JUSTICE LEWIS IS  
TALKING ABOUT, THAT IS IN THE  
CONTEXT, VALUE ADJUSTMENT BOARD  
DECISION, CORRECT?

>> THAT IS LITTLE DIFFERENT  
ANIMAL, YES, SIR.

>> THAT IS NOT WHAT WE HAVE  
HERE, CORRECT?

>> NO, SIR, IT'S NOT.

>> IN THAT IT ALLOWS  
DEFENSIVELY FOR THE PROPERTY  
APPRAISER TO CONTEST THE  
CONSTITUTIONAL, TO SAY OR  
ALLEGE THAT IN THAT DECISION OF  
THE VALUE ADJUSTMENT BOARD  
THERE WAS SOME CONSTITUTIONAL  
STATUTORY VIOLATION IN THE  
DECISION OF THE BOARD, ISN'T  
THAT WHAT THAT STATUTE IS  
ADDRESSING?

>> YES, SIR. THAT'S RIGHT.

LET ME JUST ADDRESS THAT  
STATUTE.

>> SO WE'RE TALKING ABOUT A

DIFFERENT ISSUE TODAY THAN WE WERE TALKING ABOUT IN THE FUCHS CASE THEN?

>> WE'RE TALKING ABOUT HERE IS A PROPERTY APPRAISER DEFENDING HIS WORK PRODUCT.

>> SO IT'S DIFFERENT THAN IN FUCHS?

>> YES, SIR.

VERY DIFFERENT FROM THE FUCHS. STATUTE IN FUCHS, PARTICULAR STATUTE THAT YOU'RE TALKING ABOUT, THAT SERIES OF STATUTES CAME INTO BEING IN THE MID '70s.

>> TAX -- IS THE TREND.

>> YES, SIR.

PRIOR TO THAT IF A BOARD RULED AGAINST A PROPERTY APPRAISER HE COULD NOT DO ANYTHING.

HE HAD NO AUTHORITY TO DO ANYTHING.

SIMPLY HAD TO GO HOME.

NO MATTER WHAT THEY DID.

THEY HAD A SITUATION IN OVER IN GADSDEN COUNTY, SPOONER CASE CAME HERE WHICH IS EXACTLY THAT SITUATION.

THE VAB WENT HAYWIRE.

BROUGHT THE DOR IN.

WE GOT TO FIX THIS. WE DON'T WANT THIS ANYMORE.

>> EVEN NOW UNDER 194.1815 OF THE SAME CHAPTER IF CITIZEN OR TAXPAYER HAS A QUESTION ABOUT THE CONSTITUTIONALITY OF THE STATUTE, THAT CITIZEN DOES NOT SUE THE PROPERTY APPRAISER.

THAT CITIZEN SUES THE HEAD OF THE DEPARTMENT OF REVENUE.

>> NO, SIR.

THEY WOULD SUE THE PROPERTY APPRAISER.

NOT NECESSARILY CONSTITUTIONALITY.

JUST SAYS THAT, IF IT'S IN VIOLATION OF THE CONSTITUTION, HE HAS TO ADD THE DEPARTMENT OF REVENUE AS PROPERTY APPRAISER. ALWAYS HAS.

>> ASSESSMENT OF ANY TAX IS CONTESTED ON THE GROUNDS IT IS CONTRARY TO THE STATE CONSTITUTION, THE OFFICIAL OF

THE STATE GOVERNMENT  
RESPONSIBLE FOR THE OVERALL  
SUPERVISION OF THE ASSESSMENT  
SHALL BE MADE A PARTY.

>> SHALL BE ADDED, MADE A  
PARTY, PREVIOUSLY UNDER THAT  
SAME STATUTE IT SAYS WHOS THAT  
TO BE A PARTY DEFENDANT.  
IT LISTS PROPERTY APPRAISER.

>> I GUESS WHAT MY BASIC  
POLICY QUESTION IS, UNDER YOUR  
SCENARIO AND ARGUMENT, THERE  
ARE THE 67 PROPERTY APPRAISERS  
WHO ARE PRIMARY MINISTERIAL  
OFFICERS, DO YOU AGREE?

>> WELL, THEY'RE, THEY DON'T --  
THEY'RE CALLED CONSTITUTIONAL  
OFFICERS BECAUSE THEY EXERCISE  
PART OF THE SOVEREIGNTY OF  
GOVERNMENT IN TAXATION.

>> THEY DON'T COLLECT OR  
DISBURSE FUNDS, CORRECT?

>> THEY CONTROL THEM.

THE STATUTORY ADMONITION TALKS  
ABOUT CONTROL AND DISBURSEMENT.  
THEY CONTROL THE MONEY COMING  
IN.

THAT'S WHAT TAXATION DOES.

THE COLLECTOR DOES NOT  
SPECIFICALLY DISPERSE.

HE DISTRIBUTES TO THE COUNTY  
AND SCHOOL AND CITIES.

>> WHO COLLECTS THE MONEY WHEN  
IT COMES IN?

IS, DOES THE PROPERTY APPRAISER  
COLLECT MONEY?

>> NO, SIR.

THE PROPERTY APPRAISER --

>> DOES THE PROPERTY APPRAISER  
DISPERSE MONEY.

>> NO. HE EXTENDS TAXES.

>> VALUATION.

>> NO. HE EXTENDS TAXES.

CALCULATES TAXES AND EACH PART  
AND COLLECTOR COLLECTS IT.

>> HE DOES THAT IN -- EVERY ONE OF  
THE 67 DO THAT UNDER THE  
REGULATION AND SUPERVISION OF  
THE DEPARTMENT OF REVENUE,  
CORRECT?

>> NOT SPECIFICALLY.

THEY DO IT UNDER THEIR OWN  
STATUTORY AUTHORIZATION.

THEY WOULD DO IT WITHOUT THE

DEPARTMENT OF REVENUE INVOLVED.

>> I GUESS THE POINT I'M TRYING TO GOT TO CONSISTENCY IN THE STATE.

UNDER YOUR VIEW, ANY INDIVIDUAL PROPERTY APPRAISER CAN CHALLENGE THE CONSTITUTIONALITY OF A STATUTORY EXEMPTION OR ANY OTHER STATUTE RELATED TO ASSESSMENT?

>> WELL IT WOULD HAVE TO BE OF A STATUTORY EXEMPTION OR SOME THINGS THAT DIRECTLY AFFECTED HIS DUTY AND PREVENTED HIM BEING THE PROPER CONSTITUTIONAL OFFICER IN ASSESSING PROPERTY.

>> WAIT A SECOND.

>> MA'AM?

>> MY PREMISE, AND MAYBE WE WERE DEALING WITH THE DIFFERENT SITUATION BECAUSE WE HAD THE VALUE ADJUSTMENT BOARD IN FUCHS BUT IS THIS CONCEPT THAT, BY WHAT OCCURRED IN THIS CASE THE PROPERTY APPRAISER HAD TO DISREGARD A STATUTE PASSED BY THE LEGISLATURE, CORRECT?

>> THAT WAS PART OF IT.

HE HAD TO RECOGNIZE THAT A CONSTITUTIONAL AMENDMENT FAILED.

>> THEY HAD TO IGNORE A STATUTE?

HE HAD TO SAY THE STATUTE DOES NOT APPLY

>> YES, MA'AM.

>> NOT JUST, BUT DOES IT APPLY BECAUSE THE STATUTE IS NOT CONSTITUTIONAL?

>> HE SAYING IT ISN'T, YES, MA'AM.

>> THAT IS DIFFERENT.

THEY COULD MAKE DECISIONS TO SEE IF THE STATUTE APPLY OR IT DOESN'T.

AND THEIR GOAL IS TO GET AS MUCH MONEY INTO THE COUNTY AS POSSIBLE, CORRECT?

>> HE DOESN'T GET TOO MUCH INVOLVED IN TRYING TO GET MUCH MONEY.

YES, MA'AM.

>> BECAUSE I GUESS IT WOULD BE, THE OTHER OPTION WOULD BE THEY

ACTUALLY GIVE EXEMPTIONS WHERE CONSTITUTIONALLY PEOPLE AREN'T REQUIRED TO DO IT BECAUSE THEY THINK ANOTHER STATUTE IS NOT CONSTITUTIONAL.

I GUESS MY PROBLEM WITH IT IS THAT IN ANY OF EVENT WHETHER IT'S GOOD FAITH, BAD FAITH, POLITICALLY MOTIVATED OR NOT, THEY ARE DISREGARDING A LAWFUL STATUTE AND THEY ARE THEN REQUIRING TAXPAYER TO BRING A LAWSUIT.

AND --

>> THAT'S TRUE.

>> SEEMS TO ME, AGAIN, UNDER WHAT CIRCUMSTANCE DO WE END UP SAYING THAT REALLY PUTTING THE PROPERTY APPRAISER BEING PLACED AND RAISING IN DEFENSIVE POSTURE WHEN WE KNOW IT'S THE PROPERTY APPRAISER BY IGNORING THE STATUTE THAT CREATED THIS SITUATION TO BEGIN WITH?

>> LET ME SEE IF I CAN ANSWER YOUR QUESTION LIKE THIS.

IF THE STATUTES ARE IN THERE, 194.036 HAD NOT BEEN ENACTED, PROPERTY APPRAISER WOULD STILL HAVE TO DEFEND THE LAWSUITS EXACTLY THE SAME WAY.

>> YOU'RE NOT RELYING ON --

>> THEY'RE NOT INVOLVED IN THIS.

>> YOU'RE NOT RELYING ON 194.036?

>> WE'RE NOT UNDER 036.

>> OKAY.

>> SO YOU'RE NOT RELYING ON THAT. SO YOU'RE SAYING THAT, IT IS JUST PART OF THE PROPERTY APPRAISER'S CONSTITUTIONAL DUTY TO IGNORE LAWFULLY PASSED STATUTES?

>> IF, IF IT, IF HE HAS A REASONABLE DOUBT AS TO THE VALIDITY OF THE STATUTE AND IT PREVENTS HIM FROM COLLECTING ASSESSMENT OF PROPERTY.

>> HOW IS THAT NOT DIRECTLY CONTRARY TO ATLANTIC COASTLINE?

>> IT'S CONTRARY TO ONE OF THE STATEMENTS IN ATLANTIC COASTLINE.

IT'S CONSISTENT WITH THE  
STATEMENTS IN CITY OF PENSACOLA  
VERSUS KING, STATE v. HALE,  
LEWIS, THE OTHER CASE.  
CONSISTENT WITH THE ACTION.  
QUITE A FEW CASES READ IT LIKE  
THIS.

THIS IS EXCEPTIONS.

OR THE CITING FROM OLD CASE THE  
COHN CASE, HEAL SAID THE SAME  
THING.

WHERE HE IS CHARGED WITH A  
CONTROL AND DISPERSEMENT OF  
PUBLIC FUNDS.

NOW HE HAS THE TOTAL CONTROL  
OVER WHAT MONEY IS COMING INTO  
THAT TREASURY, INTO THE COUNTY  
COFFERS.

NOBODY ELSE HAS IT.

HE IS ONLY ONE.

>> IF WE ACCEPT YOUR ARGUMENT,  
A CLERK OF THE COURT, THERE IS  
NEW STATUTE PASSED TO RAISE  
ADDITIONAL REVENUES FOR THE  
STATE AND THE CLERK OF THE  
COURT REASONABLY AND HONESTLY  
BELIEVE THAT THAT IMPOSING THAT  
STATUTE VIOLATES A  
CONSTITUTIONAL PROVISION, THEN  
THE CLERK OF THE COURT COULD  
REFUSE TO --

>> KNOWS.

>> WHY NOT?

>> HE IS NOT A CONSTITUTIONAL  
SOVEREIGN.

HE IS NOT EXERCISING ANY PART  
OF THE SOVEREIGNTY IN  
COLLECTION OF TAXES.

ONLY PROPERTY APPRAISER HIS.

>> HE IS CONSTITUTIONAL OFFICER  
COLLECTING FEES.

>> HE IS COLLECTING FEES.

THE ASSESSOR IS THE ONLY  
PERSON, PROPERTY APPRAISER IS  
ONLY PERSON IN THE COUNTY THAT  
CAN HAVE ANYTHING TO DO WITH  
HOW MUCH MONEY COMES IN FROM AD  
VALOREM TAXES.

>> YOU'RE LIMITING THIS TO  
PROPERTY APPRAISERS.

>> SIR?

>> YOU'RE LIMITING YOUR ISSUE  
TO PROPERTY APPRAISERS.

SEEMS TO ME THERE IS AT LEAST A

POTENTIAL FOR BROADENING A HOLDING THAT A PUBLIC OFFICIAL WHO IS IN CHARGE OF APPLYING AND IMPLEMENTING A STATUTE, MAY VIOLATE THE STATUTE IF THAT PUBLIC OFFICIAL BELIEVES, EVEN IN GOOD FAITH THAT THE STATUTE IS UNCONSTITUTIONAL.

AND EVEN IF WE LIMIT IT TO OFFICERS THAT ARE DESIGNATED IN THE CONSTITUTION WE HAVE COUNTY SHERIFFS, WE HAVE THE ATTORNEY GENERAL, WE HAVE THE GOVERNOR, WE HAVE SEVERAL OTHER EXECUTIVE OFFICIALS WHO COULD USE A HOLDING LIKE THAT AND SAY, LOOK, WE'RE USING IT DEFENSIVELY BUT, WE JUST, WE BELIEVE THAT IT'S UNCONSTITUTIONAL AND WE'RE NOT GOING TO APPLY THE STATUTE AND WE'RE GOING TO WAIT UNTIL WE GET SUED AND ARGUE WHY IT'S UNCONSTITUTIONAL.

THAT'S THE BASIC PROBLEM SOME OF US ARE HAVING.

>> LET ME ANSWER YOUR QUESTION LIKE THIS.

EARLIER CASES ONE HELD THAT THE STATE ROAD DEPARTMENT COULD DO IT BECAUSE IT WOULD HAVE TO EXPEND MONEY AND COULD CHALLENGE IT.

YOU HAVE TWO THAT I'VE CITED IN THE BRIEFS; YOU HAVE THE GREEN CASE, THE DICKINSON CASE, BOTH SAID THE STATE COMPTROLLER CAN DO IT. AND THE REASON FOR IT IS BECAUSE YOU HAVE THE PUBLIC FUND ELEMENT OF IT INVOLVED.

YOU HAD, --

>> WHY ISN'T A BETTER JURISPRUDENCE ACROSS THE STATE --

>> SIR?

>> WHY ISN'T IT BETTER JURISPRUDENCE ACROSS THE STATE TO SAY A PUBLIC OFFICIAL MUST ENFORCE THE LAW AS WRITTEN UNTIL IT'S DECLARED UNCONSTITUTIONAL AND IF THAT PUBLIC OFFICIAL BELIEVES THAT A STATUTE IS UNCONSTITUTIONAL,

THE OFFICIAL CAN FILE A  
DECLARATORY JUDGMENT ACTION IN  
THE MEANTIME TO HAVE IT  
DECLARED SO BUT, MUST ENFORCE  
IT UNTIL A COURT DETERMINES  
OTHERWISE?

>> THEN YOU WOULD HAVE TO HAVE  
A LEGISLATIVE ENACTMENT  
AUTHORIZING THE PROPERTY  
APPRAISER TO DO THAT.  
SEE HE DOESN'T HAVE THE  
AUTHORITY TO INITIATE SUITS  
EXCEPT WHAT WAS DONE IN 194 IN  
THE '70s.

HE CAN'T FILE A SUIT.  
HE CAN ONLY DEFEND HIS  
ASSESSMENTS.

>> ALLOW --

>> SIR?

>> LET THE LEGISLATURE AMEND  
THE STATUTE.

>> AND THE OTHER SIDE --

>> OR LET THE PROPERTY  
APPRAISERS, GET, WHO HAVE, I'M  
SURE YOU HAVE AN ORGANIZATION  
LIKE THE CLERKS, LOBBY THE  
LEGISLATURE TO CHANGE WHAT THEY  
PERCEIVE TO BE AN  
UNCONSTITUTIONAL LAW.

>> WELL, I CAN'T REALLY ANSWER  
WHY SOMETIMES THE LEGISLATURE  
DOES THINGS IT DOES BUT --

>> LET ME ASK YOU --

>> THEY DO.

>> LET ME ASK YOU A SOFTBALL  
QUESTION.

>> ALL RIGHT, SIR.

>> TO PLAY IT OUT BECAUSE PART  
OF THE LANGUAGE IN THESE  
DECISIONS HAVE HAD TO DO WITH  
THE OFFICIAL HAVING SOME  
PERSONAL STAKE OR EXPOSURE TO  
THE THING.

LET'S SAY THAT THE LEGISLATURE  
PASSED A LAW AND THEY HAD A  
PROVISION IN THERE THAT SAID  
THE APPRAISER, HERE'S THE  
STANDARDS FOR APPRAISING  
PROPERTY AND EVERYTHING.

AND THEN THEY HAD A CLAUSE, BUT  
IN THE CASE WHERE THE PROPERTY  
OWNER IS A FEMALE, THE  
APPRAISER SHALL DOUBLE THE  
VALUATION PREVIOUSLY DETERMINED

OKAY?

>> I DON'T THINK HE WOULD DO IT.

>> TELL ME, TELL ME, WHAT THE PROPERTY APPRAISER IS TO DO IN A SITUATION LIKE THAT.

>> I THINK --

>> DIFFERENTIATE FOR ME THE OFFICIAL LIABILITY OR THE PERSONAL LIABILITY, WHAT WOULD, HOW WOULD THAT PLAY OUT? BECAUSE I'M TRYING TO GIVE OBVIOUSLY AN EXTREME EXAMPLE.

>> I UNDERSTAND.

>> BUT ON THE OTHER HAND, LOOKING AT OUR HISTORY, THAT SO WHAT WOULD HAPPEN IN A CASE LIKE THAT?

>> I WOULD THINK THAT, I WOULD CERTAINLY HOPE THAT THE PROPERTY APPRAISERS THAT I REPRESENT WOULD NOT DO IT. THAT WE'RE NOT GOING TO DISCRIMINATE.

>> COULD YOU AS YOUR OPPONENT ARGUED IN THAT CASE RAISE THAT QUESTION WITH THE ATTORNEY GENERAL AND SEEK THE ATTORNEY GENERAL'S HELP IN CHALLENGING THE CONSTITUTIONALITY OF THAT LAW?

>> I DON'T KNOW IF HE COULD OR NOT BUT IT'S A ROUNDABOUT WAY TO GO.

PERHAPS THE ATTORNEY GENERAL SAYS I'M TOO BUSY. THEY DON'T HAVE TO DO ANYTHING. THEY, HE DOESN'T HAVE TO FILE -- WHERE HE WANTS TO FILE.

>> I DON'T KNOW IF YOU HAVE READ, I DON'T WANT TO CATCH YOU OFF-GUARD, SECTION 194.181, SUBPARAGRAPH 6, SAYS, IN ANY SUIT IN WHICH THE VALIDITY OF ANY STATUTE OR REGULATION FOUND IN OR ISSUED PURSUANT TO CHAPTERS 192 TO 197, INCLUSIVE, IS CONTESTED, THE PUBLIC OFFICER AFFECTED MAY BE A PARTY PLAINTIFF.

>> YES, SIR.

>> SO THAT SEEMS TO AUTHORIZE A PROPERTY APPRAISER, IF AFFECTED BY THE CONSTITUTIONALITY OF A

STATUTE WITHIN 192 TO 197, TO  
FILE A DECLARATORY JUDGMENT  
ACTION.

>> I WOULD BEG TO DIFFER, YOUR  
HONOR.

THAT IS PART OF STATUTE NAMING  
DEFENDANTS TO LAWSUIT.

THE DEPARTMENT OF REVENUE IS  
NAMED AFTER THE ASSESSOR AND  
PROPERTY APPRAISER AND --

>> SAYS THE PUBLIC OFFICER  
AFFECTED MAY BE NAMED TO A  
PARTY PLAINTIFF.

>> YES, SIR.

THAT PARTICULAR PART OF IT,  
HAS NEVER BEEN TESTED AS TO  
WHAT ACTUALLY IT IS INTENDED TO  
MEAN.

IT'S BEEN THERE A LONG TIME.

>> BUT AGAIN, MAYBE THAT IS  
BETTER THING FOR SOMEONE TO  
TEST, WHETHER THEY CAN GET A  
LAWFUL DETERMINATION OF  
SOMETHING THAT IS OBVIOUSLY OF  
CONCERN TO PROPERTY APPRAISERS.

>> YOU HAVE TO DECIDE WHO WOULD  
THE PROPERTY APPRAISER SUE?  
YOU GOT TO HAVE A PARTY.

ONLY PERSON THEY CAN SUE IS THE  
ONE WITH INTEREST, TO BE THE  
PROPERTY OWNER.

AND GENERALLY YOU DON'T, YOU  
GENERALLY DEFEND SUITS FROM  
PROPERTY OWNERS.

ACCOMPLISH THE SAME THING. IF  
IT'S TAXABLE AS IN THIS CASE  
WHEN THE CONSTITUTIONAL  
AMENDMENT FAILED, YOU PUT IT ON  
THE TAX ROLL, YOU CAN ACCEPT IT  
OR CHALLENGE IT.

IF I HAVE ANY TIME LEFT CAN I  
ADDRESS MY OTHER ISSUE?

>> YOU DO HAVE FIVE MINUTES  
LEFT.

>> I DO?

ALL RIGHT.

THE OTHER ISSUE WHICH I BROUGHT  
TO THE COURT WAS WE THINK THAT  
THE DETERMINATION BY THE TRIAL  
COURT WHICH WAS UPHeld BY THE  
DISTRICT, THAT SAID THIS  
DISTRICT PROPERTY IS EXEMPT, IS  
ERRONEOUS.

WE THINK IT'S IN CONFLICT WITH

THIS COURT'S DECISION IN GAINESVILLE, AND WHOLE LOT OF OTHER CASES THAT DEAL WITH WHAT CONSTITUTES A GOVERNMENTAL PURPOSE.

THE DISTRICT IS AN INDEPENDENT DISTRICT. IT WAS COMMUNITY DEVELOPMENT DISTRICT. IT WAS CREATED AT THE INSTANCE OF THE DEVELOPER.

WHEN YOU HAVE THOSE SITUATIONS THEY'RE FINANCING VEHICLES. THIS COURT SAID IN FRONTIER PROPERTIES IT'S NOT A GOVERNMENTAL, GOVERNMENT LIKE A COUNTY OR A CITY.

IN THIS CASE YOU HAD A DEVELOPER THAT STARTED IT OUT, THE GOLF COURSE, THE BAR, THE RESTAURANT, AND THE TIDE SHOP WERE NEVER OWNED BY THE DISTRICT TO START WITH.

SOME YEARS AFTER THE LOTS ARE SOLD AND EVERYTHING IS MOVING ALONG GOOD, THEN THE DEVELOPER SAYS I'M GOING TO GET OUT OF THE GOLF COURSE BUSINESS AND SELL OUT.

SO, HE IS READY TO DO THAT NOW. AND THEN THE DISTRICT, HE SAID I'LL SELL IT TO THE DISTRICT.

SO THE DISTRICT BORROWED 6.5 MILLION I THINK AND SIGNED A CONTRACT FOR \$180,000 A YEAR TO PAY THE MANAGEMENT COMPANY OF THE DEVELOPER TO DO EXACTLY THE SAME THING IT HAD BEEN DOING BEFORE -- GOLF COURSE.

>> WHAT IS THERE TO PROHIBIT A PUBLIC ENTITY FROM HIRING A MANAGEMENT COMPANY TO MANAGE THE PROPERTY?

PUBLIC ENTITIES DO THAT ALL THE TIME.

DOESN'T MAKE IT INTO A PRIVATE PROPERTY, NOR PRIVATELY OWNED, OR PRIVATELY OPERATED.

>> SOME DO IT AND SOMETIMES THEY LEASE IT BUT THEY DO IT'S TAXABLE.

>> LEASING IS DIFFERENT. I DON'T THINK THERE IS ANY LEASE HERE.

>> MANAGEMENT AGREEMENT FOR

9.9 YEARS.

AT 180,000 A YEAR AND THEY PAID THEM 6.2 MILLION.

>> IS THE PROPERTY MAKING A PROFIT?

IS THE GOLF COURSE SUPPOSED TO MAKE A PROFIT?

>> THEY MAKE \$180,000 A YEAR IN FEES.

>> BUT ARE THEY SUPPOSED TO MAKE A PROFIT?

>> THEY'RE PROFIT-MAKING COMPANY, YES, SIR.

>> NOT WHETHER THEY'RE PROFIT-MAKING COMPANY. IS THE GOLF COURSE --

>> I DON'T HAVE ANY IDEA.

>> -- SUPPOSED TO BE MAKING A PROFIT?

>> IT'S SUPPOSED TO MAKE ENOUGH TO RETIRE ENDEBTNESS AND PAY THE CONTRACT OBLIGATION.

IT'S A PRIVATE COMPANY.

IT DOESN'T CLAIM --

>> IS THE MANAGEMENT COMPANY SUPPOSED TO BE RECEIVING ANY OF THE PROFITS FROM THE GOLF COURSE?

>> YES, SIR.

>> THEY'RE RECEIVING PROFITS?

>> NO. IT RECEIVES A FEE.

>> RECEIVES A FEE BUT DOES NOT RECEIVE PROFITS?

>> THAT'S TRUE.

>> IS IT OPEN TO THE PUBLIC?

>> SIR?

TO ANYBODY.

FEES ARE 2500 TO \$3800.

FEE, IT'S A MONTHLY FEE WHEN YOU GO THERE.

JUST LIKE OTHER COURSES THAT ARE IN THE COUNTY.

IN GAINESVILLE THIS COURT SUGGESTED ON TELECOMMUNICATIONS PART OF IT, THAT WHEN THE CITY DECIDED IT WAS GOING TO GO INTO THE TELECOMMUNICATION BUSINESS IT DIDN'T APPEAR TO OFFER ANYTHING OTHER THAN, ANYTHING NEW.

THEY CLAIMED THIS IS BETTER FOR THE PUBLIC WELFARE.

THIS WOULD NOT BE EXCLUSIVE BECAUSE IT WAS ORIGINALLY OWNED

BY THE MANAGEMENT COMPANY  
DEVELOPER AND STILL IS.  
STILL IS OPERATED BY THEM  
EXACTLY THE SAME WAY.  
AND IS NOT ESSENTIAL BECAUSE IT  
WAS NOT PART OF THE DISTRICT TO  
START WITH.

>> WAS GOLF COURSES ONE OF  
THOSE QUINTESSENTIAL KINDS OF  
AREAS WHERE WE HAVE PUBLIC GOLF  
COURSES ALL OVER THE UNITED  
STATES?

IT'S NOT A NEW AREA LIKE  
TELECOMMUNICATIONS.

>> AND A LOT OF PRIVATE ONES  
TOO.

>> RIGHT.

BUT WE HAVE JUST ABOUT EVERY  
COUNTY YOU FIND THERE IS PUBLIC  
GOLF COURSE.

>> SOMETIME I WOULD SAY YES.  
SOMETIMES I WOULD SAY NO.

SEE IN A GOLF COURSE.

HAS A LITTLE COURSE OUT THERE.  
IT DEPENDS.

I THINK THAT'S WHAT IS THE CITY  
OF GAINESVILLE POINTED OUT.  
IT SAID IT HAD TO BE ESSENTIAL  
TO IT.

COULD NOT HAVE BEEN ESSENTIAL  
TO THE DISTRICT BECAUSE IT  
WASN'T THERE TO START WITH.  
IT WASN'T OWNED BY THE DISTRICT  
TO START WITH.

OWNED BY DEVELOPER.

PRIVATE DEVELOPMENT.

THEY COULD GET MEMBERSHIP  
THERE.

OPEN TO THE PUBLIC.

NOW -- SIR?

>> DOES THE CONCEPT YOU'RE  
SAYING THESE MEMBERSHIP FEES  
AND THOSE KINDS OF THINGS, DOES  
THAT TAKE, IS THAT SOMETHING WE  
SHOULD BE LOOKING AT?

THIS IS REALLY OPERATING LIKE A  
PRIVATE COUNTRY CLUB UNDER THE  
NAME OF BEING SOMETHING PUBLIC?

>> LATTER PART IS WHAT YOU JUST  
SAID, YES, SIR.

>> IS IT?

>> THAT IS PERTINENT.

THE BAR, THE LIQUOR  
LICENSE OF THE BAR AND

RESTAURANT, THAT WAS IN THE NAME OF THE MANAGEMENT COMPANY, NOT THE DISTRICT.

THE SHOP, THEY SELL CLOTHES. THAT WAS HELD TAXABILITY.

GOLF COURSE IS WAS HELD EXEMPT.

>> LET'S MAKE SURE, RESTAURANT, BAR AND CLOTHING STORE ARE NOT SUBJECT?

>> NO, MA'AM.

THE SWIMMING POOL IS EXEMPTED. THE SWIMMING POOL WAS DIFFERENT NOW.

I SAY IT WRONG I'M SORRY.

>> THE PRO SHOP --

>> PRO SHOP IS TAXABLE.

>> IS TAXABLE.

>> PRO SHOP, BAR, RESTAURANT, CLUBHOUSE WAS TAXABLE.

SWIMMING POOL, TENNIS COURTS WERE EXEMPTED.

PARK AREA WAS EXEMPTED.

620 ACRES OF, I THINK THEY CALL IT CONSERVATION LAND WAS HELD TAXABLE.

AND SOME OTHER STRIPS OF PROPERTY WERE HELD TAXABLE. BUT THE GOLF COURSE WHEN TITLE MOVED WAS EXEMPTED, HELD EXEMPT.

>> I KNOW I HAVE JUST A COUPLE OF MINUTES.

JUST BRIEFLY ON THE SECOND ISSUE RAISED BY THE RESPONDENT.

I THINK THE COURT IS AWARE FROM EVEN A BRIEF REVIEW OF THE RECORD THAT THE TRIAL COURT THOROUGHLY CONSIDERED VARIOUS PARCELLS OF THE DISTRICT.

FOUND SOME OF THEM EXEMPT FROM AD VALOREM TAXATION, SOME NOT.

WHAT THEY DID FIND OR WHERE THE TRIAL COURT DID FIND AS EXEMPT, WE BELIEVE AND CONTENDED AT FIRST DISTRICT COURT OF APPEAL WAS BASED ON COMPETENT SUBSTANTIAL EVIDENCE.

THAT THE FIRST DISTRICT --

>> HOW MUCH IS THE MEMBERSHIP FEE?

>> SORRY.

>> THERE IS MEMBERSHIP FEE TO PLAY AT THIS GOLF COURSE?

>> NO. MEMBERS OF THE PUBLIC

CAN PLAY THERE WITHOUT HAVING  
TO PAY A MEMBERSHIP FEE.

THERE ARE MEMBERS.

SO THERE --

>> GENERALLY OPEN TO THE  
PUBLIC?

>> ABSOLUTELY.

>> GOT TO PAY THE GREENS FEES?

>> ABSOLUTELY.

I LIVE IN JACKSONVILLE.

I CAN DRIVE DOWN THERE PAY A  
GREEN FEE AND RENT A CAR AND I  
CAN PLAY.

THAT'S NOT AN ISSUE.

>> SO WHAT'S THE PURPOSE OF THE  
MEMBERSHIP FEES?

>> YOU KNOW, QUITE FRANKLY I'M  
NOT SURE THAT WAS REALLY EVEN  
ADDRESSED AT TRIAL LEVEL AND --

>> THERE IS SOMETHING  
DISCONCERTING ABOUT THAT MAKES  
IT SOUND LIKE A COUNTRY CLUB.

>> IF I WERE TO SPECULATE, YOUR  
HONOR, I WOULD SAY, MAYBE,  
THERE IS SOME PART OF THE CLUB  
OR MAYBE IT'S ACCESS TO THE BAR  
AREA.

WELL, NO, I GUESS THE BAR WAS  
OPEN TO THE PUBLIC AS WELL.

I QUITE FRANKLY DON'T KNOW THE  
ANSWER TO THAT I WAS NOT TRIAL  
COUNSEL.

I APOLOGIZE.

>> WAS IT CONTESTED BELOW  
MEMBERSHIP FEES MADE IT A  
PRIVATE ENTITY?

>> CERTAINLY THE FACT THAT  
MEMBERSHIP FEES WERE CHARGED  
WAS BEFORE THE TRIAL COURT AND,  
I THINK MR. LEVY DID INCLUDE  
THAT AMONG HIS ARGUMENTS.

>> THERE WAS NO EVIDENCE  
PRESENTED ON WHAT MEMBERSHIP  
GOT YOU?

>> YOUR HONOR, THERE MAY VERY  
WELL HAVE BEEN, I JUST HAVE TO  
APOLOGIZE SAY I DON'T KNOW THAT  
FROM THE RECORD.

I DON'T RECALL THAT.

REALLY TO CONCLUDE IN MY  
REMAINING 38 SECONDS, WE WOULD  
ASK THIS COURT TO LOOK AT THE  
REASONING AND RATIONALE IN SUN  
'N LAKE WHICH WE'RE ASKING

COURT TO APPROVE AND DISAPPROVE  
THE ZINGALE DECISION.

WE BELIEVE SUN 'N LAKE ANALYSIS  
OF AND UNDERSTANDING OF  
ATLANTIC COASTLINE AND BARR,  
CORRECTLY PERCEIVED OR  
CHARACTERIZED THE SITUATION  
BEFORE IT, WHICH WAS --

>> I TAKE IT WHAT YOU WOULD ASK  
THE COURT TO DO WOULD BE TO  
LIMIT ITS STATEMENTS IN FUCHS  
TO WHAT MR. LEVY WOULD, WOULD,  
CONCEIVE WERE, HAVING TO DO  
WITH APPEALS FROM THE  
ADJUSTMENT BOARD?

>> THAT OR, IF ALSO IN  
CONJUNCTION WITH OTHER TWO  
RECOGNIZED EXCEPTIONS BY THIS  
COURT SINCE 1922, PUBLIC FUNDS  
OR PERSONAL INJURY, I DON'T  
THINK THOSE APPLY HERE BUT, I  
THINK THE DICTA IN FUCHS AND  
LEWIS CAN BE HARMONIZED WITH  
ATLANTIC IF THOSE  
QUALIFICATIONS WERE ADDED.

>> SO WHY WOULD WE NOT JUST  
ADDRESS THIS FOR WHAT IT IS  
RATHER THAN SOME BROAD  
STATEMENT FOR EVERY OFFICER IN  
THE STATE OF FLORIDA IS  
ADDRESSED TO THIS CASE?  
THIS IS AN APPRAISER AND HOW  
THIS ARISES?

IF THAT'S THE CASE, FUCHS  
ADDRESSES WHAT IT ADDRESSES AND  
THAT STATUTE APPLIES.

>> RIGHT.

>> SO IT'S REALLY DICTA.  
IT'S WHAT THAT CASE IS ABOUT.  
YET WE'RE SAYING THAT IS NOT  
REALLY EVEN AN ISSUE HERE.

>> THE REASON I CALL IT,  
CHARACTERIZE IT AS DICTA, YOUR  
HONOR, IT REFERS BACK TO THE  
LEWIS DICTA.

>> BECAUSE IT RELIED ON SOME  
OTHER CASES?

>> RIGHT THAT'S WHY I  
CHARACTERIZED IT THAT WAY.  
IF I MIGHT RESPOND ONE MORE  
THING THAT YOU SAID.

>> SURE.

>> I HAVE NO PROBLEM, AND I  
THINK THE COURT CAN SEE I

DRAFTED MY BRIEF TO DEAL  
SPECIFICALLY WITH PROPERTY  
APPRAISERS.

I'M NOT NECESSARILY ASKING THIS  
COURT TO MAKE A BROAD  
CONSTITUTIONAL STATEMENT.

>> ALL RIGHT.

THANK YOU VERY MUCH.

THE COURT WILL TAKE THE CASE  
UNDER ADVISEMENT.

WILL STAND IN RECESS UNTIL  
TOMORROW MORNING.

>> ALL RISE.