

>> THE LAST CASE FOR THE DAY IS  
STATE OF FLORIDA VERSUS  
CHUBBUCK.

>> MAY IT PLEASE THE COURT,  
MELANIE D. SURBER ON BEHALF OF THE  
STATE OF FLORIDA.

IN THIS CASE WE'RE HERE BECAUSE  
THE FOURTH DCA HELD PLAIN  
LANGUAGE OF 921.0026, 2-D,  
REGARDING DOWNWARD DEPARTURE  
SENTENCE DOES NOT REQUIRE THE  
DEFENDANT TO ESTABLISH THAT THE  
SPECIALIZED TREATMENT THAT HE  
REQUIRES IS UNAVAILABLE IN THE  
DEPARTMENT OF CORRECTIONS.  
THE COURT FOUND THAT THIS WAS IN  
ESSENCE AN ADDITIONAL ELEMENT.

>> SO IF THEY SAID THE PLAIN  
LANGUAGE DOES NOT, WHERE IN THE  
PLAIN LANGUAGE WOULD YOU SAY IT  
DOES?

>> THE STATE'S POSITION IS  
UNAVAILABILITY OF TREATMENT IN  
THE DEPARTMENT OF CORRECTIONS  
WAS IN FACT THE DEFINITION OF  
SPECIALIZED TREATMENT.  
IT WAS NOT AN ADDITIONAL  
ELEMENT.

IT IS THE ONLY DEFINITION THAT  
THE DISTRICT COURTS HAVE  
RECOGNIZED FOR THE TRIAL COURT  
TO BE ABLE TO DETERMINE WHETHER  
OR NOT A DEFENDANT QUALIFIES FOR  
A DOWNWARD DEPARTURE UNDER THIS  
SUBSECTION.

>> IS THAT DEFINITION IN THE  
STATUTE?

>> NO.

THAT DEFINITION, THE FOURTH DCA  
LOOKED AT ABRAMS AND SPIOCH, TWO  
CASES THAT SEEMED TO HAVE  
COMPETING RESULTS REGARDING WHAT  
SPECIALIZED TREATMENT HAS MET.  
ALL OF THE DCAs FOLLOWED THE  
REASONING THAT SPECIALIZED  
TREATMENT MEANT THAT IT WAS  
UNAVAILABLE IN THE DEPARTMENT OF  
CORRECTIONS.

I WOULD SAY, WE NEEDED TO LOOK  
FURTHER.

LOOK AT THE OTHER STATUTES THAT THE LEGISLATURE HAS ENACTED AND I CITED THOSE STATUTES IN MY BRIEF.

>> ABRAMS SAID THAT?

>> ABRAMS SAID SPECIALIZED TREATMENT, THE DEFENDANT REQUIRED SPECIALIZED TREATMENT UNAVAILABLE IN THE DEPARTMENT OF CORRECTIONS.

>> WHAT DID THEY BASE THAT ON? AS I REMEMBER IN ABRAMS, IT IS A VERY SHORT OPINION THAT DOESN'T SEEM TO HAVE ANY BASIS FOR MAKING THAT STATEMENT.

THE STATEMENT IS THERE BUT WHAT IS IT BASED ON?

>> I AGREE AND I WOULD SUGGEST IT IS BASED ON THE LEGISLATIVE INTENT.

IN ORDER TO DETERMINE THE LEGISLATIVE INTENT IN THIS CASE I HAD TO LOOK AT DIFFERENT STATUTES THE LEGISLATURE HAS CREATED WITH RESPECT TO THE TERM, SPECIALIZED TREATMENT. IT WAS THE ONLY WAY I COULD DETERMINE WHAT IT MEANT BECAUSE I THINK SPECIALIZED TREATMENT, COMMON SENSE WOULD TELL US IN THIS TYPE OF A CASE, IT WOULD STAND TO REASON IF A DEFENDANT CAN RECEIVE THE TREATMENT IN THE DEPARTMENT OF CORRECTIONS THERE IS NOTHING SPECIALIZED.

AND I SAY THAT RECOGNIZING THAT INDIVIDUALS MAY HAVE ILLNESSES THAT ARE UNIQUE TO THEM BUT THAT DOESN'T MEAN THAT THEY REQUIRE A SPECIALIZED TREATMENT.

AND I THINK, IN ORDER TO QUALIFY FOR A DOWNWARD DEPARTURE THIS IS, KIND OF GETTING AT NOT GOING TO JAIL, IN ORDER TO QUALIFY FOR THE DOWNWARD DEPARTURE YOU HAVE TO ESTABLISH A VALID BASIS.

THE FOURTH DCA ELIMINATED THE ONLY DEFINITION THAT WE'VE EVER KNOWN AND NOW WE HAVE OPENED THE FLOODGATES TO SPECIALIZED

MEANING, ANYBODY THAT HAS AN ILLNESS WHO TESTIFIES, SELF-SERVING TESTIMONY IN THIS CASE, I HAVE PTSD. I TAKE ALL OF THESE MEDICATIONS. THEREFORE I'M SPECIALIZED TREATMENT.

YOU CAN DOWNWARDLY DEPART. THAT WOULD OPEN THE FLOODGATES THAT THERE IS REALLY NO DEFINITION FOR SPECIALIZED. IT WOULD BE JUST BE ANYBODY THAT NEEDS TREATMENT.

>> WHAT ARE THE OTHER CRITERIA FOR THAT DOWNWARD, THAT PARTICULAR DOWNWARD DEPARTURE? THERE'S, CERTAINLY THERE'S AN ISSUE, NO ONE IS SAYING THIS GUY WAS A DANGER TO THE COMMUNITY, RIGHT?

I MEAN, THAT THEY ARE IN NEED OF TREATMENT THAT, AND THAT CAN BE DOWNWARD DEPARTURE.

ISN'T IT A TWO-FOLD REQUIREMENT?

>> IT SPECIFICALLY IN THIS CASE, SAYS, 2-D THE DEFENDANT REQUIRES SPECIALIZED TREATMENT FOR A MENTAL DISORDER THAT IS UNRELATED TO SUBSTANCE ABUSE OR ADDICTION OR A PHYSICAL DISABILITY AND THE DEFENDANT IS AMENABLE TO TREATMENT.

THE STATUTE ACTUALLY USES THE WORD, SPECIALIZED TREATMENT AND THEN TREATMENT ITSELF.

THERE HAS GOT TO BE SOMETHING MORE THAN, I NEED TREATMENT.

WHEN YOU LOOK --

>> ISN'T THAT A DIFFERENT ISSUE? THAT IS, WHETHER HE ADEQUATELY DESCRIBED IT AS A VERY SICK, 66-YEAR-OLD MAN WHO REGULARLY GOES TO HAVE?

I WAS LOOKING AT IT, I READ WHAT THE TRIAL JUDGE SAID BUT YOU'VE GOT SOMEBODY THAT THE STATE SAID WOULD BE, YOU WERE ARGUING AS AN ALTERNATIVE FOR PROBATION.

NOW WE'RE SAYING, BUT HE REALLY SHOULD HAVE GOTTEN A THREE-YEAR

SENTENCE, COSTING THE STATE  
\$20,000 A YEAR JUST TO  
INCARCERATE HIM.  
PLUS THE COST OF ALL THIS  
TREATMENT HE WAS GETTING,  
WITHOUT COST TO THE STATE OF  
FLORIDA FROM THE VA AND I'M  
JUST HAVING TROUBLE  
UNDERSTANDING WHY THE FOURTH  
DISTRICT'S INTERPRETATION ISN'T  
A REASONABLE INTERPRETATION OF  
THAT DOWNWARD DEPARTURE  
PROVISION?

>> TWO REASONS.

IN ORDER TO GET A DOWNWARD  
DEPARTURE YOU HAVE TO HAVE THE  
VALID LEGAL REASON AND I WOULD  
SUGGEST IN THIS CASE THERE IS NO  
VALID LEGAL REASON.

THIS DEFENDANT PLED GUILTY TO  
TRAFFICKING IN COCAINE.

HE GOT PROBATION AS PART OF A  
NEGOTIATED PLEA DEAL.

THE DEFENDANT VIOLATED THAT  
PROBATION WITHIN A YEAR AND TWO  
MONTHS I BELIEVE.

AND --

>> YOU KNOW, WHAT YOU'RE SAYING  
ABOUT PARTICULAR CONDITIONS IN  
THIS CASE AND THIS DEFENDANT AND  
WHAT HE DID OR DIDN'T DO REALLY  
HAS NOTHING TO DO WITH WHAT THAT  
STATUTE MEANS, DOES IT?

SEEMS LIKE TO ME THAT'S A  
DIVERSION FROM THE QUESTION THAT  
IS ACTUALLY BEFORE US WHICH IS  
TO DETERMINE WHAT THE STATUTE  
MEANS.

>> YES.

AND IN THIS CASE IT IS THE  
STATE'S POSITION THAT THE  
DEFINITION THAT HAS ALWAYS BEEN  
USED OF THE TERM SPECIALIZED  
TREATMENT WAS TREATMENT THAT'S  
UNAVAILABLE IN THE DEPARTMENT OF  
CORRECTIONS.

>> IT HAS ALWAYS BEEN USED BY,  
IN THESE PRIOR CASES AND THAT  
WAS, I'M STILL TRYING TO FIGURE  
OUT WHERE THE PRIOR CASES GOT

THAT?

>> AND I RECOGNIZE THAT IT IS  
UNCLEAR.

THAT IS WHY I FELT THAT THERE'S  
A NEED TO LOOK AT HOW THE  
LEGISLATURE HAS INTERPRETED THE  
TERM, SPECIALIZED TREATMENT.  
IN THE TWO OTHER STATUTES THAT I  
CITED IN MY BRIEF WHICH I COULD  
GIVE YOU, FLORIDA STATUTE,  
945.12-1 AND FLORIDA STATUTE  
945.11-3-C.

I UNDERSTAND THOSE ARE STATUTES  
DEAL WITH POST-INCARCERATION.  
HOWEVER THEY ARE THE ONLY  
STATUTES THAT USE THE TERM,  
SPECIALIZED TREATMENT AND --

>> BUT THOSE STATUTES USE MORE  
TERMS TOO.

SEEMS THE ARGUMENT YOU'RE TRYING  
TO PULL FROM THAT AND MOVE IT  
INTO THIS STATUTE ACTUALLY MAY  
CUT AGAINST YOU BECAUSE IT  
DEMONSTRATES IF THE LEGISLATURE  
KNEW HOW TO SAY, WHAT YOU'RE  
SAYING, IT MEANS HERE, BUT THEY  
DID IT CLEARLY IN THESE OTHER  
CONTEXTS WHEREAS THEY HAVE NOT  
DONE IT HERE.

>> WELL, ACTUALLY THE ONLY  
STATUTE THAT TALKS ABOUT SUCH  
SPECIALIZED TREATMENT BEING  
UNAVAILABLE IS THE JUVENILE  
STATUTE.

945.12 IS DEALING WITH TREATMENT  
FOR ILLNESSES OR PROBLEMS,  
AMERICAN TALL HEALTH, SUBSTANCE  
ABUSE, ARISE AFTER  
INCARCERATION.

I DON'T THINK IT CUTS AGAINST  
ME.

I THINK IT SAYS, THE PLAIN  
MEANING OF SPECIALIZED TREATMENT  
HAS ALWAYS BEEN INTERPRETED IS  
SOMETHING NOT AVAILABLE IN THE  
DEPARTMENT OF CORRECTIONS.

>> RIGHT.

I THINK THAT IS THE POINT, ISN'T  
IT?

SOMEONE WHO REQUIRES SPECIALIZED

TREATMENT, THEY SAY ONE OF THESE REALLY STRANGE CANCERS DIABETES OR THINGS LIKE THAT REQUIRES CERTAIN TREATMENT THAT THE PRISON SYSTEM IS ILL QUIPPED TO PROVIDE, ISN'T THAT WHAT SPECIALIZED TREATMENT IS ALL ABOUT?

>> THAT IS THE STATE'S POSITION. THE DEPARTMENT OF CORRECTIONS CAN NOT PROVIDE THE TREATMENT IT WOULD BE SPECIALIZED AND THE DEFENDANT QUALIFIES FOR A DOWNWARD DEPARTURE.

>> I, ISSUE HERE I THOUGHT WAS THE DEFENDANT, THE QUESTION WAS AS TO WHO HAD THE BURDEN OF PROVING?

>> THAT WAS THE SECOND QUESTION.

>> RIGHT.

>> I THINK THAT IS A SEPARATE ISSUE.

WHAT HAPPENED IN THIS CASE THE FOURTH DCA ADOPTED JUDGE WARNER'S POSITION IN HUNTER. IN HUNTER JUDGE WARNER WROTE, WE HAVE ADDED AN ELEMENT TO A DOWNWARD DEPARTURE THAT YOU HAVE TO PROVE SPECIALIZED TREATMENT AND IT'S NOT AVAILABLE IN THE DEPARTMENT OF CORRECTIONS. IT IS THE STATE'S POSITION THAT'S THE DEFINITION.

JUDGE WARNER POINTED OUT THAT IT SEEMS THE STATE'S IN A BETTER POSITION, HOWEVER THE STATE WOULD DISPUTE THAT. EVERYONE HAS THE SAME SUBPOENA POWER TO DETERMINE WHAT IS OR IS NOT AVAILABLE.

EVERYONE CAN PRESENT EVIDENCE.

>> NOW REALISTICALLY, REALISTICALLY, THE BURDEN OF ESTABLISHING WHAT THE DEPARTMENT OF CORRECTIONS CAN DO, IS MUCH, IS A MUCH DIFFERENT MATTER FOR THE DEPARTMENT OF CORRECTIONS. I KNOW IT IS A BIG BUREAUCRACY, AND I UNDERSTAND THAT BUT FOR THE DEPARTMENT TO SAY, THAT, OH,

IT IS EASY FOR, FOR THE STATE TO SAY THAT ONE OF ITS DEPARTMENTS, WHAT ONE OF ITS DEPARTMENTS IS DOING CAN EASILY BE DETERMINED BY SOME CRIMINAL DEFENDANT AND HIS LAWYER AS THE DEPARTMENT CAN DETERMINE IT, IT STRAINS CREDIBILITY. IT SEEMS TO ME.

>> I WOULD DISAGREE.

I WOULD SUGGEST THAT IT COULD BE ANY DOCTOR, SOMEONE WHO EITHER WORKED FOR THE DEPARTMENT OF CORRECTIONS.

THERE COULD BE A TESTIMONY FROM A DOCTOR, WHAT IS THESE TREATMENTS AND THE DEPARTMENT OF CORRECTIONS WOULD ILL-EQUIPPED. BURDEN WOULD SHIFT TO THE STATE TO REFUTE THAT TESTIMONY.

I'M NOT SAYING THE STATE DOESN'T HAVE THE BURDEN TO REFUTE THE DEFENDANT'S ALLEGATIONS IF THE ALLEGATION IS PROVEN HOWEVER IT IS ALWAYS BEEN DEFENDANT'S BURDEN WITH RESPECT TO DOWNWARD DEPARTURE SENTENCE TO ESTABLISH THAT HE QUALIFIES FOR THAT SENTENCE.

THIS IS A SENTENCE TO, IN THIS CASE, AVOID COMMITMENT.

WE HAVE TO REMEMBER, SENTENCING IS PUNISHMENT.

THIS IS A DEFENDANT WHO NOT ONLY ADMITTED TO THE TRAFFICKING CHARGE, HE ALSO ADMITTED TO THE VIOLATION OF PROBATION.

>> SINCE YOU'RE GOING BACK TO THE FACTS OF THIS CASE, THE STATE ALSO WAS ARGUING ALTERNATIVELY FOR PROBATION.

SO WE'RE NOT REALLY TALKING ABOUT A SITUATION WHERE, REALLY THE DEFENDANT SHOULD HAVE GOTTEN A 25-YEAR SENTENCE AND THE JUDGE DECIDES BECAUSE HE HAS GOT DIABETES TO LET HIM, YOU KNOW, GIVES HIM A, YOU KNOW, GIVES HIM NO PROBATION OR SENTENCE.

THAT IS NOT THIS CASE.

SO I DON'T, AND IN TERMS OF THIS, THE ISSUE REALLY IS, WOULD THE DEFENDANT HAVE TO SHOW THAT, YOU KNOW IT IS NOT AVAILABLE IN A REASONABLE PERIMETER OR, YOU KNOW, DISTANCE FROM HIS HOUSE OR IF IT'S AVAILABLE UP IN PENSACOLA? THAT'S WHERE THEY WOULD HAVE TO PLACE HIM?

I JUST DON'T SEE HOW THE TRIAL JUDGE AND THIS DEFENDANT GET INVOLVED IN THOSE PLACEMENT DECISIONS BECAUSE IT IS REALLY, IF, SO EXPLAIN THAT TO ME. HOW WOULD THAT REALISTICALLY OCCUR?

>> REALISTICALLY I WOULD SUGGEST IF A DEFENDANT HAS PROVEN THAT HE'S ILL, HOWEVER IT IS NOTHING SPECIALIZED, IF DOC CAN PROVIDE THE TREATMENT, DOC WOULD BE REQUIRED TO PROVIDE HIM TREATMENT.

I DON'T THINK DOC WOULD SAY YOU'RE GOING TO JAIL AND WE WOULD NOT TREAT YOU.

>> I KNOW THE PRACTICALITIES BUT I'M STILL TRYING TO UNDERSTAND THE STATE'S POSITION OF STRONGLY ADVOCATING IN THIS CASE, AND I REALIZE IT GOES FOR OTHER CASES AND I HAVEN'T, I DON'T THINK THE DOWNWARD DEPARTURES ARE VERY FREQUENT, THAT IT IS BETTER FOR THE STATE TO TAKE A NON-VIOLENT, 66-YEAR-OLD, WHO TESTED POSITIVE ONCE FOR COCAINE, AND AT A COST OF, MAYBE 40,000 A YEAR, YOU KNOW, OVER A THREE-YEAR PERIOD THAT IS REALLY BETTER, THAT IS WHAT THE LEGISLATURE INTENDED TO HAVE HAPPEN?

I JUST, NOT SURE I SEE WHERE THAT, WHERE THAT REQUIREMENT IS WRITTEN INTO THE STATUTE. CONSIDERING EVERYTHING, ISN'T IT A MORE LOGICAL READING TO READ IT AS THE FOURTH DISTRICT DID?

>> WELL, THE FOURTH DISTRICT

PROVIDED NO DEFINITION FOR  
SPECIALIZED TREATMENT IN THEIR  
CASES.

THERE'S NOT A DEFINITION.  
THAT'S WHY THE STATE'S POSITION  
IS, IF WE FOLLOW CHUBBUCK, THERE  
IS NO LONGER A DEFINITION FOR  
SPECIALIZED TREATMENT.

THE DEFINITION HAS ALWAYS BEEN  
RECOGNIZED AS TREATMENT THAT'S  
UNAVAILABLE IN THE DEPARTMENT OF  
CORRECTIONS.

SO IF WE FOLLOW CHUBBUCK, WE'RE  
LEFT WITH A COMPLETELY  
OPEN-ENDED INTERPRETATION.

IT SEEMS TO ME THAT UNDER POLICY  
IS THE SUGGESTION THAT WE'VE HAD  
FROM THE DEFENSE SIDE, IT'S A  
SUGGESTION THAT ALL THE  
DEFENDANT REALLY WOULD HAVE TO  
SHOW IS WHAT HE DID IN THIS  
CASE.

I HAVE SOME ILLNESSES AND I  
REQUIRE TREATMENT.

I'M SYMPATHETIC.

I UNDERSTAND THAT THERE ARE  
ILLNESSES HERE.

THERE ARE MEDICATIONS THAT HAVE  
TO BE TAKEN.

HOWEVER THIS DEFENDANT PROVIDED  
HIS OWN TESTIMONY, HIS FIANCE'S  
TESTIMONY AND HIS LAWYER'S  
TESTIMONY.

AND UNDER THE LAW AT THE TIME OF  
THIS CASE THE STATE'S ARGUMENT  
WAS, THIS DEFENDANT HAS NOT  
ESTABLISHED THAT HE NEEDS SOME  
TYPE OF TREATMENT THAT IS  
UNAVAILABLE.

>> HASN'T THIS FOURTH DISTRICT  
GIVEN, IN THIS CASE, BECAUSE OF  
THAT, ALLOWED THE STATE TO GO  
BACK AND PRESENT OTHER EVIDENCE  
THAT MIGHT IMPACT THE SENTENCING  
DECISION?

>> YES. HOWEVER THE --

>> BUT YOU CAN PRESENT THE  
EVIDENCE THAT THIS IS WHAT HE IS  
REQUIRING AS ROUTINE TREATMENT  
AVAILABLE THROUGHOUT THE PRISON

SYSTEM.

AND MAYBE IT IS BEFORE ANOTHER  
JUDGE AND YOU GET A DIFFERENT  
RESULT.

>> THE FOURTH ALSO QUALIFIED IT  
THAT THE JUDGE MAY STILL DEPART.  
THEREFORE ELIMINATING A  
QUALIFIER.

IN ORDER TO BE ELIGIBLE FOR THE  
DOWNWARD DEPARTURE THERE HAS TO  
BE A VALID LEGAL REASON.

WITHOUT A DEFINITION OF WHAT  
SPECIALIZED TREATMENT MEANS, IT  
AGAIN, WOULD MEAN NOTHING BUT  
TREATMENT UNDER THE FACTS, THIS  
CASE SETS THE STAGE THAT THIS  
DEFENDANT PROVED HE NEEDED SOME  
MEDICATION.

HE HAD SOME HEALTH PROBLEMS.

>> YOU'RE SAYING THE TREATMENT  
IS, IN MY ESTIMATION, BY SAYING  
THE TREATMENT IS NOT AVAILABLE  
IN THE DEPARTMENT OF CORRECTIONS  
DOES NOT DEFINE SPECIALIZED  
TREATMENT.

DOES NOT, TO ME DEFINE  
SPECIALIZED TREATMENT.

SPECIALIZED TREATMENT SHOULD BE  
SOMETHING THAT YOU NEED, X, Y,  
Z, IN ORDER TO TREAT THIS  
PARTICULAR DISEASE, NOT, THAT IT  
IS NOT AVAILABLE.

I MEAN THAT WOULD BE A SECOND  
CONSIDERATION SEEMS TO ME.

I NEED THIS KIND OF TREATMENT.  
AND THEN, THAT IT'S NOT  
AVAILABLE AT THE DEPARTMENT OF  
CORRECTIONS.

I DON'T THINK THAT IT'S NOT  
AVAILABLE IN THE DEPARTMENT OF  
CORRECTIONS DEFINES SPECIALIZED  
TREATMENT.

>> WELL, I WOULD, ARGUE THAT IS  
SIMPLY THEN THE DEFENDANT NEEDS  
SOME TYPE OF TREATMENT UNIQUE TO  
THEM.

EVERYBODY'S MEDICAL OR MENTAL  
HEALTH PROBLEMS ARE UNIQUE TO  
THEM.

EVEN IF YOU HAVE AN

INFECTION --

>> COULD BE A DEFINITION, IF THERE IS SOMETHING THAT IS UNIQUE TO A PARTICULAR DEFENDANT, THAT COULD BE SPECIALIZED TREATMENT.

I MEAN IF I HAVE DIABETES AND I DO THE USUAL COURSE OF DRUGS OR WHATEVER THEY GIVE TO PEOPLE WHO HAVE DIABETES AND SOMEONE ELSE IS AT A DIFFERENT STAGE AND NEEDS SOMETHING BEYOND WHAT I AM GETTING FOR THE SAME DISEASE, THAT COULD BE SPECIALIZED TREATMENT.

>> I'M SUGGESTING --

>> I THINK YOU'RE JUST PUTTING NOT AVAILABLE IN THE DEPARTMENT OF CORRECTIONS IN A CATEGORY THAT IS NOT TRULY DEFINED WHAT SPECIALIZED TREATMENT IS.

NOW, THE DEFENDANT MAY NOT HAVE DEMONSTRATED THAT HE NEEDED ANY KIND OF SPECIALIZED TREATMENT BUT, I DON'T THINK THE MERE FACT THAT HE DIDN'T DEMONSTRATE THAT IT WASN'T IN THE DEPARTMENT OF CORRECTIONS, I THINK THERE ARE TWO DIFFERENT ISSUES.

>> I WOULD SUGGEST IF THAT WERE THE CASE THEN THE STATUTE WOULD HAVE READ THE DEFENDANT REQUIRES TREATMENT FOR A MENTAL DISORDER THAT IS UNRELATED TO SUBSTANCE ABUSE OR FURTHER PHYSICAL DISABILITY.

OTHERWISE SPECIALIZED MEANS NOTHING WITH RESPECT TO THE DETERMINING THE LEGAL BASIS. THERE HAS TO BE A BRIGHT LINE TEST,

SO THE STATE KNOWS HOW TO PROCEED, SO TRIAL JUDGES KNOW HOW TO PROCEED.

IT HAS ALWAYS BEEN, AND I UNDERSTAND THE FOURTH --

>> BECAUSE TREATMENT IS NOT AVAILABLE IN THE DEPARTMENT OF CORRECTIONS YOU'RE SAYING THAT MAKES IT SPECIALIZED?

>> BASED ON THE FACT THAT THE LEGISLATURE HAS WRITTEN OTHER STATUTES USING THE SAME TERMS AND THAT IS EXACTLY WHAT SPECIALIZED HAS ALWAYS MEANT ACCORDING TO THE LEGISLATURE.

>> SO THEY KNOW HOW TO WRITE A STATUTE THAT SAYS SPECIALIZED TREATMENT THAT IS NOT IN THE DEPARTMENT OF CORRECTIONS?

>> THEY DIDN'T WRITE IT IN THE FIRST STATUTE.

THEY POINTED TO SPECIALIZED TREATMENT AND SAYS YOU CAN SEND THEN TO ANY FACILITY.

BECAUSE IN THOSE CASES THOSE ARE DEFENDANTS WHO ARE ALREADY INCARCERATED.

THIS IS A STATUTE TO AVOID COMMITMENT.

SO I WOULD SUGGEST SPECIALIZED TREATMENT MEANS, IT'S UNAVAILABLE IN THE DEPARTMENT OF CORRECTIONS.

IF THAT'S THE CASE WE OPEN THE FLOODGATES FOR, IT BECOMES ANY REASON THAT YOU HAVE A HEALTH PROBLEM OR ANY MENTAL HEALTH PROBLEM OR ANY MEDICATION YOU TAKE BECAUSE I ONLY NEED THIS DOSE AND THAT IS UNIQUE TO ME. EVERYBODY'S TREATMENT --

>> AGAIN WE'RE TALKING ABOUT DISCRETION OF SENTENCING JUDGES AND WE SEE IN THESE CASES DISCRETION BETWEEN SIX YEARS AND 70 YEARS, THERE IS A LOT OF DISCRETION, USUALLY IN THE STATE'S FAVOR.

JUDGE GROSS POINTS OUT IN HIS CONCURRENCE IT SAYS THE MITIGATING FACTORS INCLUDE BUT ARE NOT LIMITED TO, AND THEY CONSIDERED, THE COURT ALSO CONSIDERED HIS AGE AND THE FACT HE WASN'T A DANGER TO THE GENERAL PUBLIC.

PLUS HE CONSIDERED HIS, YOU KNOW, BRONZE MEDAL, HIS SERVICE IN VIETNAM.

THIS ISN'T JUST A CASE WHERE THE ONLY, THIS GUY WAS OTHERWISE NOT QUALIFYING FOR A DOWNWARD DEPARTURE.

THERE WERE OTHER FACTORS MENTIONED BY THIS TRIAL JUDGE AS TO WHY THIS DEFENDANT, RATHER THAN PROBATIONARY SENTENCE, QUALIFIES.

>> I AGREE AND THAT MAY BE THE CASE IN THIS CASE HOWEVER WE STILL HAVE THE ELIMINATION OF THE BRIGHT-LINE RULE THAT IS GOING TO AFFECT ALL OF THE OTHER CASES REGARDING SPECIALIZED TREATMENT.

AND IF THERE ARE NO FURTHER QUESTIONS I WOULD LIKE TO RESERVE MY TIME FOR REBUTTAL.

>> THANK YOU.

>> MAY IT PLEASE THE COURT.  
GOOD MORNING.

MY NAME IS PAUL PETILLO,  
ASSISTANT PUBLIC DEFENDER ON  
BEHALF OF MR. CHUBBUCK.

I'M HERE TO TALK ABOUT THE PLAIN AND ORDINARY MEANING OF THE STATUTE AND TO TELL YOU AND TRY TO ARGUE TO YOU, AND I THINK IT IS PRETTY SELF-EST THAT PLAIN AND ORDINARY MEANING DOES NOT INCLUDE UNAVAILABILITY IN PRISON.

IT JUST SAYS SPECIALIZED TREATMENT.

IT DOES NOT SAY SPECIALIZED TREATMENT THAT IS UNAVAILABLE IN PRISON.

THE FACT --

>> HOW DO YOU DEFINE SPECIALIZED?

WHAT DOES THAT MEAN?

>> I WOULD SAY IT HAS SOME CIRCULARITY TO IT BECAUSE IT IS A DEFINITION THAT REALLY CAN ONLY BE MADE IN CONTRAST TO, SAY GENERAL TREATMENT.

I WOULD SAY SOMETHING LIKE TREATMENT THAT IS UNCOMMON, REQUIRES THE SERVICES OF A

SPECIALIST OR IS INDIVIDUALIZED  
IN SOME VERY PARTICULAR WAY TO  
THE PATIENT.

AND OTHER THAN THAT, I DON'T  
KNOW IF YOU CAN GET TOO MUCH  
MORE FINE-TUNED.

>> IF WHAT THIS RELATES TO IS,  
WHAT CATEGORIES, IT IS NOT ALL  
KINDS OF MEDICAL TREATMENT THAT  
WE'RE TALKING ABOUT HERE, IS IT?

>> YEAH.

IT INCLUDES SUBSTANCE ABUSE OR  
ADDICTION PROBLEMS, FOR MENTAL  
DISORDERS.

>> SO IT IS MENTAL HEALTH AND  
WHAT IS THE OTHER CATEGORY?

>> PHYSICAL DISABILITY.  
REQUIRES SPECIALIZED TREATMENT  
FOR PHYSICAL DISABILITY.

>> SO JUST GENERAL HEALTH  
PROBLEMS DON'T FALL WITHIN THE  
SCOPE OF THIS ANYWAY, DO THEY?

>> CORRECT, CORRECT.

AND, SO, WHAT --

>> WHAT WOULD BE SOME EXAMPLES  
JUST TO MAKE SURE, WAS THIS  
DEFENDANT THEN UNDER BOTH  
SPECIALIZED TREATMENT FOR A  
MENTAL DISORDER AND ALSO  
SPECIALIZED TREATMENT FOR A  
PHYSICAL DISABILITY?

>> I THINK HE DID COVER BOTH  
WITH HIS CONSTELLATION OF MENTAL  
AND PHYSICAL PROBLEMS WHICH ARE,  
FROM THE PHYSICAL SIDE, CHRONIC  
OBSTRUCTIVE PULMONARY DISORDER,  
DIABETES, HEPATITIS-C, SEVERE  
ARTHRITIS AND MELANOMA.

AND MENTAL SIDE --

>> LET'S GO OVER IT.  
SEVERE ARTHRITIS, MELANOMA.  
MELANOMA, IS A CANCER.

>> TRUE.

>> WAS HE BEING TREATED FOR  
CANCER?

>> I JUST, I --

>> EVERYTHING WAS THROWN IN BUT  
IT DIDN'T SEEM LIKE THE STATE  
CONTESTED THAT THIS WAS A PRETTY  
SICK 66-YEAR-OLD?

>> RIGHT.

>> THEY SAY WELL, THERE WASN'T A LOT OF TESTIMONY BUT THERE WASN'T ANY CONTRARY TESTIMONY THAT THIS GUY WAS FAKING ALL OF THESE MEDICAL ISSUES?

>> CORRECT.

>> RIGHT.

THERE WAS NO, I DON'T THINK THEY WERE NOT CONTESTING OR DISPUTING THIS.

THEY WERE RELYING ON THE FACT OF THE CASE LAW THAT STOOD AT THE TIME THAT WE DID NOT PROVE UNAVAILABILITY OF TREATMENT IN PRISON.

OF COURSE THAT'S NOT, DOES NOT COMPORT WITH THE PLAIN AND ORDINARY MEANING OF THE DOWNWARD DEPARTURE GROUND.

>> WHAT IS YOUR, IF IT IS PLAIN MEANING WE STILL SORT OF HAVE TO MAKE SURE WE'RE DOING IT CONSISTENT WITH LEGISLATIVE INTENT.

IN MY VIEW, I SORT OF SAW IT AS LISTEN, IF THERE IS NOTHING ELSE HARMING SOCIETY WHY SHOULD WE HAVE TO PAY FOR SOMEBODY THAT NEEDS SPECIALIZED TREATMENT?

I MEAN SORT OF A SELF-PRESERVATION FOR THE STATE OF FLORIDA.

LIKE, WE DON'T NEED, WE HAVE GOT ENOUGH PEOPLE BETWEEN THE AGES, THAT ARE AGING, GERIATRIC PATIENTS IN THE DEPARTMENT OF CORRECTIONS.

SO -- HUH?

WATCH IT.

RIGHT.

THIS IS --

>> RETIRING NOW?

>> WELL THERE MIGHT BE SOME PEOPLE GET BETTER, THOSE THAT DON'T HAVE HEALTH COVERAGE. YOU KNOW, WHAT IS, IS THERE ANY IN CONTEXT THE IDEA OF WHAT THIS WAS SUPPOSED TO BE AIMED AT? YOU KNOW, CONCERN FOR THE

DEFENDANT'S HEALTH?  
CONCERN FOR THE STATE OF FLORIDA  
CONSERVING MONEY?

>>> YEAH.

WELL I'M GOING A LITTLE FAR  
AFIELD BUT I WILL ANSWER  
YOUR QUESTION.

>> THAT'S OKAY.

>> BECAUSE IT WASN'T ADDRESSED  
IN THE BRIEFS, JUSTICE PARIENTE.

>> WELL IF IT'S --

>> IT'S THIS.

TO ANSWER YOUR QUESTION, IF THE  
COURT WOULD LIKE, LOOK AT  
CHAPTER LAW, 93-406 ESPECIALLY  
THE LEGISLATIVE HISTORY OF THAT  
AND READ THE JUNE 1993 STAFF  
ANALYSIS OF THE HOUSE.

AND REASON I SAY THAT --

>> SINCE I ASKED YOU THE  
QUESTION YOU ANSWERED BUT RATHER  
THAN PUT ANYONE IN DISADVANTAGE,  
WHY DON'T YOU FILE IT AS  
SUPPLEMENTAL AUTHORITY.

>> I WILL.

BECAUSE I THINK --

>> BUT YOU WOULD SAY WE DON'T  
LOOK AT LEGISLATIVE HISTORY IF  
IT IS PLAIN AND AMBIGUOUS.

>> ABSOLUTELY.

I HAVE IT ALL ON MY SIDE IF YOU  
WILL.

I HAVE THE PLAIN AND ORDINARY  
LANGUAGE.

>> BUT IF THE STATE IS SAYING  
THERE IS SOME NEED FOR  
DEFINITION THEN IT MAY BE  
APPROPRIATE TO LOOK AT  
LEGISLATIVE HISTORY?

>> YEAH.

WELL, I DON'T THINK YOU CAN GET,  
THIS IS, LET ME GO BACK JUST FOR  
A SECOND BECAUSE I THINK YOU  
BROUGHT IT UP TOO.

OBVIOUSLY THIS DOWNWARD  
DEPARTURE GROUND DOESN'T COMPEL  
A DOWNWARD DEPARTURE.

IT SIMPLY SAYS, THE LEGISLATURE  
HAS SAID THE NEED FOR  
SPECIALIZED TREATMENT IS A

CIRCUMSTANCE WHERE THE LEGISLATURE HAS CHOSEN TO GIVE JUDGES DISCRETION TO GO BELOW THE LOWEST PERMISSIBLE SENTENCE UNDER THE, UNDER THE CRIMINAL PUNISHMENT CODE.

IT DOESN'T COMPEL IT.

AND THE REASON I SAY SPECIALIZED TREATMENT DOES NOT MEAN TREATMENT UNAVAILABLE IN PRISON, IS BECAUSE THAT DOES NOT COMPORT WITH COMMON USAGE.

>> I GUESS WHAT I DON'T UNDERSTAND HERE, THE JUDGE COULD HAVE, WITHOUT EVEN DOWNWARDLY DEPARTING COULD HAVE GIVEN HIM A SENTENCE OF PROBATION AND NOT EVEN RELIED ON THIS OTHER GROUND, CORRECT?

>> CORRECT.

THAT'S WHAT THE STATE WAS ASKING FOR, REINSTATEMENT OF PROBATION. I THINK MY OPPONENT AT ONE POINT SAID THE STATUTE WAS UNCLEAR ABOUT WHAT SPECIALIZED TREATMENT MEANS.

IF THAT'S THE CASE AGAIN I WIN OR MR. CHUBBUCK WINS BECAUSE CRIMINAL STATUTES IN GENERAL AND CRIMINAL SENTENCING STATUTES IN PARTICULAR HAVE TO BE STRICTLY CONSTRUED AND IF THERE'S ANY AMBIGUITY IN THEM THEY HAVE TO BE CONSTRUED IN FAVOR OF THE ACCUSED.

SO IF THERE WERE AMBIGUITY HERE, AND I DON'T THINK THERE IS, AGAIN MR. CHUBBUCK PREVAILS.

>> IF SOMEBODY HAD HIGH BLOOD PRESSURE, IS THAT AND THAT'S ALL THEY HAD, HIGH BLOOD PRESSURE, HIGH CHOLESTEROL, AND THEY WERE MONITORED, IS THAT A PHYSICAL DISABILITY?

>> YES, WOULD I SAY SO.

>> I WOULD SAY, I WOULD SAY IT PROBABLY WASN'T.

>> OH.

>> YOU'RE READING IT MORE EXPANSIVE.

>> THERE IS A LIMIT, IF THEY JUST NEED SPECIALIZED TREATMENT FOR ANY HEALTH CONDITION? I THINK THERE IS, YOU MIGHT BE ARGUING TOO MUCH HERE.

>> OKAY.

I DIDN'T READ ENOUGH INTO IT.

>> TREATMENT, COULD BE A DISABILITY BUT HAS TO REQUIRE SPECIALIZED TREATMENT.

>> RIGHT.

THAT'S WHERE I WAS GOING TO GO NEXT.

ON ITS FACE, HIGH BLOOD PRESSURE FROM THIS LAYPERSON'S POINT OF VIEW DOWN REQUIRE SPECIALIZED TREATMENT.

AND PERHAPS IT'S NOT TECHNICALLY A DISABILITY.

>> MAYBE SOMEBODY SAYS, LISTEN ONLY WAY I KEEP MY BLOOD PRESSURE DOWN IS I HAVE TO EXERCISE, YOU KNOW, THREE HOURS A DAY.

I CAN'T DO THAT IN THE DOC BUT WE'RE TALKING ABOUT CASES THAT ARE NOT BEFORE US.

THE KEY IS, THE JUDGE HAS DISCRETION, I DON'T KNOW A LOT OF JUDGES THESE DAYS THAT ARE IMPOSING DOWNWARD DEPARTURE SENTENCES BUT --

>> YEAH.

I MEAN, YOU KNOW, WE TRUST OUR TRIAL JUDGES TO MAKE THESE CALLS, TO SORT THE GENERAL TREATMENT FROM THE SPECIALIZED. AND I DON'T, I DON'T THINK WE'RE IN GREAT DANGER THERE.

JUST, QUICKLY, THE TWO STATUTES -- GO AHEAD.

I'M SORRY.

>> LET ME ASK YOU THIS BECAUSE JUSTICE PARIENTE ASKED THE QUESTION EARLIER ABOUT JUDGE GROSS'S, I GUESS IT WAS THE CONCURRING OPINION AND IF THE TRIAL JUDGE HAD DONE THE SAME THING, REVOKED THE PROBATION AND SENTENCED HIM TO THE 96 DAYS

SERVED.

AND ALL THAT WAS SAID IS THAT THIS MAN WAS A VETERAN WHO WAS 66 YEARS OLD, WITH MULTIPLE HEALTH PROBLEMS. HE SERVED HIS COUNTRY WELL, HE HAS GOTTEN THE BRONZE STAR AND, YOU KNOW ALL OF THESE OTHER THINGS, WOULD THAT HAVE BEEN SUFFICIENT TO JUSTIFY THE DOWNWARD DEPARTURE?

>> YEAH, I WOULD OF COURSE. THAT'S, IS THAT A RHETORICAL QUESTION? OF COURSE.

OF COURSE JUDGE GROSS, YOU KNOW, HE IS, WAS AHEAD OF ME ON THAT ONE BECAUSE I THINK THAT'S TRUE. THE DOWNWARD DEPARTURE STATUTE SAYS INCLUDE THESE GROUNDS BUT THEY'RE NOT LIMITED TO THEM AND SO THERE CAN BE THOSE SPECIAL CASES.

AND GOODNESS, GRACIOUS, IF THERE IS ANY SUCH CASE IT WOULD BE MR. CHUBBUCK'S CASE.

AND SO THAT WOULD HAVE BEEN ANOTHER REASON THAT JUDGE COULD HAVE DOWNWARD DEPARTED.

JUST THE OUTLINE NOT JUST HIS HEALTH PROBLEMS, MENTAL HEALTH PROBLEMS BUT HAS SERVICE TO HIS COUNTRY.

AND HIS AGE.

AND SAID HE DOES DESERVE A DOWNWARD DEPARTURE.

AND, JUST, BRIEFLY ON THE TWO STATUTES THE STATE RELIES ON, AGAIN AS I SAY, NEITHER ONE OF THOSE STATUTES SAY THEY ARE DEFINING SPECIALIZED TREATMENT.

AND I THINK THEY SUPPORT OUR ARGUMENT THAT IT DOES NOT MEAN UNAVAILABILITY IN PRISON BECAUSE I THINK THOSE SHOW THAT THE DOC DOES HAVE ACT ES IS TO SPECIALIZED TREATMENT.

IN FACT, I THINK IF THE, THE STATUTE SAYS THAT YOU CAN DEPART DOWNWARD IF THE DEFENDANT

REQUIRES SPECIALIZED TREATMENT.  
FOR MANY THINGS IF THE DEFENDANT  
REQUIRES SPECIALIZED TREATMENT  
THE DOC HAS TO PROVIDE IT.  
IT CAN'T MEAN UNAVAILABILITY IN  
PRISON.

THESE STATUTES SHOW THAT  
DEFENDANTS CAN GET SPECIALIZED  
TREATMENT.

AGAIN IT CAN'T MEAN  
UNAVAILABILITY.

AND FINALLY WHAT JUSTICE CANADY  
SAID THEY KNOW  
HOW TO WRITE THAT, SPECIALIZED  
TREATMENT UNAVAILABLE IN PRISON?  
THEY COULD HAVE ADD WHAT THEY  
CALL A STIPULATIVE DEFINITION OR  
OR TELL US WHAT THE DEFINITION  
OF SPECIALIZED TREATMENT IS.  
THEY COULD DEFINE IT THAT WAY.  
THEY DIDN'T DO IT.

BECAUSE THEY DIDN'T, COMMON  
USAGE SAYS IT JUST MEANS  
SPECIALIZES TREATMENT.

IT DOESN'T MEAN TREATMENT  
UNAVAILABLE IN PRISON.

>> WELL THEY CAN DO IT,  
DEPENDING HOW WE RULE, CAN  
CERTAINLY DO IT TO CLARIFY WHAT  
THEY MEANT IF WE'RE WRONG.

>> RIGHT.

>> OR IF THE FOURTH DISTRICT IS  
WRONG.

>> ALL RIGHT.

IF THERE IS NO FURTHER  
QUESTIONS, THANK YOU.

>> THANK YOU FOR YOUR ARGUMENT.  
REBUTTAL.

>> BRIEFLY I HAVE POINT OUT  
OPPOSING COINS COUNSEL DEFINED  
IT AS UNCOMMON AND SOME KIND OF  
SPECIALIST.

THAT GIVES NO GUIDANCE HOW A  
TRIAL JUDGE SHOULD PROCEED TO  
DETERMINE WHETHER OR NOT A TRIAL  
JUDGE HAS A VALID, LEGAL REASON  
TO DEPART.

>> WHAT IS YOUR RESPONSE TO  
COUNSEL'S ARGUMENT THAT THERE  
TRULY IS NO SPECIALIZED

TREATMENT THAT CAN NOT BE AFFORDED BECAUSE THE STATE HAS THE OBLIGATION TO PROVIDE THE TREATMENT THAT A INCARCERATED INDIVIDUAL REQUIRES?

>> I WOULD THINK THAT TAKES IT TO ALMOST AN UNREASONABLE INTERPRETATION FOR PURPOSES OF AVOIDING COMMITMENT OR GETTING A DOWNWARD DEPARTURE.

>> I JUST ASKED THE QUESTION. IS THAT THE LAW?

>> DOC WOULD HAVE TO PROVIDE TREATMENT IF SOMEBODY IN JAIL IS --

>> HOW CAN IT BE IT IS NOT AVAILABLE AND SPECIALIZED MEANS NOT AVAILABLE WHEN ALL TREATMENT IS AVAILABLE?

>> BECAUSE, WHEN YOU CONTINUE READING THOSE STATUTES, THEY GO ON TO DEFINE THE SPECIALIZED TREATMENT AS BEING, BRINGING THE DEFENDANT TO ANOTHER FACILITY FOR THE TREATMENT HE NEEDS.

>> OKAY.

SO THAT'S THE ANSWER.

>> THAT'S THE ANSWER.

>> GO SOMEWHERE ELSE, OKAY.

>> HE NEEDS TO GO SOMEWHERE ELSE.

SO THAT'S WHY THE DISTINCTION OF AVOIDING COMMITMENT OR GETTING A DOWNWARD DEPARTURE REALLY DOESN'T MEAN THAT YOU CAN'T LOOK TO THOSE STATUTES FOR THE DEFINITION OF SPECIALIZED.

>> BUT IN THOSE STATUTES, EVEN IF YOU, EVEN IF, DOC, FOR EXAMPLE, HAS TO TAKE THEM SOMEWHERE ELSE, THAT DOESN'T NECESSARILY MEAN THAT THEY ARE NOT STILL INCARCERATED SERVING THEIR SENTENCE?

I HEARD OF WHERE YOU TAKE THEM, OR WHATEVER TREATMENT IT IS THEY NEED, THAT DOC DOESN'T HAVE AND ONCE THE TREATMENT IS OVER, THEY BRING THEM BACK EVEN IF IT'S A TREATMENT THAT, YOU KNOW, GOES

ON PERIODICALLY.

>> OKAY.

>> YES.

>> BUT THAT IS FOR DEFENDANT WHO  
IS ARE ALREADY INCARCERATED.

WE'RE TALKING ABOUT WHAT DOES  
THE TERM SPECIALIZED TREATMENT  
MEAN, PARTICULARLY IN THIS CASE,  
TO AVOID INCARCERATION.

WITH THAT, WE WOULD ASK THIS  
COURT TO REVERSE THE FOURTH  
DCA'S OPINION.

>> THANK YOU FOR YOUR ARGUMENTS.  
THE COURT IS ADJOURNED.

>> ALL RISE.