

⌘ ALL RISE.

HEAR YE, HEAR YE, HEAR YE, THE
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.

ALL YOU WHO HAVE CAUSE TO PLEAD,
DRAW NEAR.

DAVID: GIVE ATTENTION YOU SHALL
BE HEARD.

GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA AND
THIS HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.

>> GOOD MORNING.

WELCOME TO THE FLORIDA SUPREME
COURT.

BEFORE WE BEGIN WITH THE
PROCEEDINGS THIS MORNING, LET ME
A NUMBER OF GROUPS ARE HERE.

FIRST OF ALL SERVING TODAY, WE
HAVE 35 MIDDLE SCHOOL CIVICS AND
GOVERNMENT TEACHERS FROM
THROUGHOUT THE STATE OF FLORIDA
ATTENDING A STATEWIDE
CONSTITUTIONAL STUDIES INSTITUTE
AT FLORIDA STATE UNIVERSITY LAW
SCHOOL.

WILL THOSE TEACHERS PLEASE
STAND?

..

THANK YOU.

ALSO WITH US TODAY WE HAVE THE
4-H CLUB.

STUDENTS FROM THE 4-H CLUB.

WOULD YOU PLEASE STAND.

WELL, THANK YOU.

AND, KAISER UNIVERSITY HAS
STUDENTS HERE AS WELL, ABOUT 10
OF YOU.

WOULD YOU PLEASE STAND?

I GUESS THEY DIDN'T SHOW UP.

THEY'RE TRYING TO GET IN.

ALL RIGHT.

THANK YOU.

WE'RE HERE TODAY THIS MORNING ON
THE CASE OF AYALA VERSUS SCOTT.
COUNSEL, WHENEVER YOU'RE READY
TO PROCEED.

>> CHIEF JUSTICE, AND MAY IT

PLEASE THE COURT.
MY NAME IS ROY AUSTIN.
I REPRESENT STATE ATTORNEY
ARAMIS AYALA.
GOVERNOR RICK SCOTT KNOWS, JUST
AS I TOLD REPEATEDLY THE
CITIZENS OF THE STATE OF FLORIDA
HE DOES NOT HAVE THE
AUTHORIZATION TO OVERRIDE
PROSECUTORIAL DISCRETION OF A
ELECTED STATE ATTORNEY.
BY TAKING 24 CASES AWAY FROM
STATE ATTORNEY ARAMIS AYALA,
GOVERNOR SCOTT VIOLATED THE
CONSTITUTION AND THE LAW.
ALL STATE ATTORNEY AYALA ASKS OF
THIS COURT IS THAT THIS COURT
RETURN THOSE 24 CASES TO HER AND
TREAT HER THE SAME AND WITH THE
SAME RESPECT THAT IS GIVEN TO
EVERY OTHER STATE ATTORNEY IN
FLORIDA.

>> ONCE YOU COUCH THE QUESTION
IN TERMS OF DISCRETION, THAT
ANSWERS ITSELF.

WHY IS THIS PROSECUTORIAL
DISCRETION WHEN A STATE OFFICER,
AS I UNDERSTAND IT, DID NOT
EXERCISE DISCRETION ON EVERY
CASE, ON WHAT SHOULD APPLY, NOT
APPLY, BUT ANNOUNCED I'M NOT
GOING TO FOLLOW THIS LAW, SO
EVERY CASE?

HOW IS THAT REALLY WITHIN THE
CONCEPT OF DISCRETION?

TO MY MIND, DISCRETION IS WHEN
YOU MAKE A DECISION ON A
CASE-BY-CASE BASIS, HOW YOU'RE
GOING TO HANDLE THE CASE AND
WHAT KIND OF CHARGES.

BUT THIS WAS JUST THE UNIFORM,
OR AM I MISTAKEN?

WAS THERE NOT A STATEMENT, I'M
NOT GOING TO FOLLOW FLORIDA LAW
ESSENTIALLY.

>> FIRST OF ALL, YOUR HONOR,
DISCRETION COMES IN MANY FORMS,
AND WHAT STATE ATTORNEY AYALA
DID IS ABSOLUTELY AN EXERCISE IN
DISCRETION.

WHEN A STATE ATTORNEY DECIDES HOW THEY'RE GOING TO USE THEIR RESOURCES, HOW THEY'RE GOING TO EMPLOY PLOY FELLOW ASSISTANT STATE ATTORNEYS, WHEN THEY DECIDE HOW THEY TREAT SOME CASES VERSUS OTHER CASES THAT IS ABSOLUTELY AN EXERCISE IN DISCRETION.

>> VERY STRONG ON SOMETHING, I DON'T EVEN SEE AS A GRAY AREA. YOU'RE TAKING SUCH A FIRM STANCE HERE.

IT SEEMS TO ME THAT DISCRETION IS NOT TO IGNORE FLORIDA LAW.

>> WELL, YOUR HONOR, RESPECTFULLY, THERE IS NOTHING IN FLORIDA LAW, NOTHING IN FLORIDA LAW THAT REQUIRES STATE ATTORNEY AYALA TO SEEK THE DEATH PENALTY.

>> THIS IS NOT A QUESTION ABOUT SEEKING THE DEATH PENALTY.

THIS IS QUESTION OF FOLLOWING STATUTE AND APPLYING STANDARDS, YOU MAY UP WITH SOME, DEATH PENALTY AND OTHERS WITH NOT.

>> LOOK CLOSELY AT 782.04 AND, THAT IS THE ONLY STATUTE THAT GOVERNS WHETHER OR NOT A STATE ATTORNEY, HOW A STATE ATTORNEY CHOOSES WHETHER TO SEEK THE DEATH PENALTY OR NOT.

ALL 782.04 SAYS IS THAT IF STATE ATTORNEY, IF ANY STATE ATTORNEY WANTS TO SEEK THE DEATH PENALTY, THAT THEY HAVE TO, THEY HAVE TO THEN NOTIFY THE DEFENDANT WITHIN 45 DAYS.

THAT IS THE ONLY, THE ONLY REQUIREMENT IN FLORIDA LAW WITH RESPECT TO A STATE ATTORNEY AND DECISION WHETHER OR NOT TO SEEK THE DEATH PENALTY.

>> UNDER YOUR POSITION, STATE ATTORNEY IN ONE CIRCUIT, TAKE FOR EXAMPLE, PINELLAS COUNTY. STATE ATTORNEY IN THAT CIRCUIT COULD DECIDE, WE'RE GOING TO ABIDE BY THE DEATH PENALTY IN

THIS CASE AND WE'RE GOING TO
EVALUATE EACH CASE AND WE'RE
GOING TO SEEK THE DEATH PENALTY
WHEN WE THINK IT IS PROPER.

SO YOU HAVE THE DEATH PENALTY IN
THAT CIRCUIT.

NEXT DOOR, HILLSBOROUGH COUNTY
THE STATE ATTORNEY COULD DECIDE,
WE'RE NOT GOING TO DO THE DEATH
PENALTY AT ALL IN THIS CIRCUIT.

SO YOU'RE GOING TO HAVE A
SITUATION WHERE IN THE STATE OF
FLORIDA, YOU'RE GOING TO HAVE
ONE CIRCUIT WITH DEATH PENALTY,
ANOTHER CIRCUIT WITHOUT IT ALL
OVER THE PLACE.

HOW IS THAT PROPER?

WHY DO WE NEED LEGISLATURE IF WE
HAVE THAT.

>> YOUR HONOR, THAT IS EXACTLY
WHAT HAPPENS RIGHT NOW.

EVERY STATE ATTORNEY IS ELECTED
BY THE VOTERS OF HIS OR HER
CIRCUIT.

AND THOSE, AND THAT STATE
ATTORNEY MAKE AS DECISION
WHETHER OR NOT THEY ARE GOING TO
SEEK THE DEATH PENALTY, WHETHER
OR NOT CHARGE MINOR MARIJUANA.

>> ON CASE-BY-CASE BASIS.

NOT BLANKET DISAPPROVAL OF A LAW
IN EFFECT IN THE STATE OF
FLORIDA.

>> YOUR HONOR, I WOULD DISAGREE
WITH YOU ON THAT RESPECTFULLY
BECAUSE EVERY STATE ATTORNEY IS
MAKING DECISIONS WHETHER OR
NOT-- FOR EXAMPLE, AM I GOING
TO LOW LEVEL MARIJUANA
POSSESSION OFFENSES?

EVERY STATE ATTORNEY ACROSS THE
STATE OF FLORIDA IS DIFFERENT ON
THAT.

ARE THEY GOING TO CHARGE BAD
CHECK CASES?

EVERY STATE ATTORNEY ACROSS
STATE OF FLORIDA--

>> HOW ABOUT IN THE STATE
ATTORNEY IN MIAMI DECIDES I'M NO
LONGER GOING TO LET MY OFFICE

PROSECUTE DUI CASES?

>> FIRST OF ALL, LET'S MAKE SURE THAT WE ARE DISTINGUISHING BETWEEN WHAT STATE ATTORNEY AYALA DID AND WHAT YOUR HYPOTHETICAL INDICATES.

STATE ATTORNEY AYALA MADE HER DECISION BASED ON SENTENCING. IT IS VERY CLEAR SHE IS GOING TO PROSECUTE HOMICIDE CASES, SHE SO GOING TO PROSECUTE THEM, SHE IS GOING TO SEEK A VERY SEVERE PENALTY WHEN SHE HAS THE FACTS TO SUPPORT THAT.

SO FIRST OF ALL WE HAVE TO SEPARATE SENTENCING FROM WHETHER OR NOT WE'RE CHARGING.

SENTENCING I WOULD NOTE IS CAUSE JUDICIAL FUNCTION THE GOVERNOR CAN NOT INTERVENE ON.

IF THE STATE ATTORNEY OF MIAMI DECIDES HE IS NOT GOING TO CHARGE DUI CASE, YOUR HONOR, THERE IS NOTHING IN THE LAW THAT REQUIRES HIM TO DO SO.

BUT I WOULD NOTE, IN ALL THE YEARS WE'VE BEEN HERE, ALL THE YEARS THERE HAVE BEEN STATE ATTORNEYS IT HAS NEVER HAPPENED. IT HAS NEVER HAPPENED.

THAT IS THE PARADE OF HORRIBLES THAT THE GOVERNOR'S ATTORNEYS WOULD WANT YOU TO BELIEVE IS GOING TO HAPPEN.

IT HASN'T HAPPENED.

IT HASN'T HAPPENED BECAUSE STATE ATTORNEYS RECOGNIZE THEY ARE RESPONSIBLE TO ANSWER TO THE VOTERS AND THEY WILL DO THE THINGS THAT THEIR VOTERS INDICATE THEY SHOULD BE DOING.

>> CAN WE JUST BE CLEAR ABOUT THE POSITION OF THE STATE ATTORNEY.

THE PRESS CONFERENCE WHICH FORMED THE BASIS FOR THE GOVERNOR TO ISSUE THE FIRST ORDER IN THE LLOYD CASE, SHE ANNOUNCED THAT SHE, AT THE PRESENT TIME WAS NOT GOING TO BE

SEEKING THE DEATH PENALTY, NOT JUST IN THAT CASE BUT BECAUSE SHE HAD NOT, NOT BECAUSE IN THAT CASE SHE DETERMINED THAT THE AGGRAVATORS WEREN'T SUFFICIENT, BECAUSE THEY WERE CERTAINLY SUFFICIENT, I MEAN OVERWHELMINGLY SUFFICIENT BUT THAT SHE HAD MADE A DECISION BASED ON THE INEFFECTIVENESS OF THE DEATH PENALTY, THE COSTS OF THE DEATH PENALTY.

THE FACT THAT THERE ARE SO FEW INDIVIDUALS THAT ACTUALLY EVER GET EXECUTED, AND THAT IT WAS MUCH MORE EFFICIENT TO SEEK LIFE.

IT SEEMED IN YOUR PETITION THAT YOU WERE LOOKING TO SAY, WELL, NO, SHE WAS JUST LOOKING AT IT ON A CASE-BY-CASE BASIS.

ARE YOU NOW TAKING THE POSITION FOR THE PETITION THAT THIS WAS A DECISION NOT TO PROSECUTE FOR FIRST-DEGREE MURDER WHERE THE MAXIMUM PUNISHMENT OR ONLY PUNISHMENT IF IT IS NOT DEATH IS LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR ALL CASES IN THE FORESEEABLE FUTURE, OR WHETHER SHE ACTUALLY INTENDED TO LOOK AT EACH CASE, OR MAKE A DECISION ON EACH CASE?

>> SHE IS ABSOLUTELY GOING TO LOOK AT EACH AND EVERY CASE, JUST AS SHE DID WITH THE SIX CASES THAT--

>> SEE THAT IS THE PROBLEM. I THOUGHT WHAT YOU WERE SAYING HERE THAT SHE HAD THE RIGHT AS A PROSECUTOR, EXERCISING DISCRETION, NOT TO SEEK THE DEATH PENALTY BECAUSE HER VIEW WAS, THAT IT WAS COSTLY, IT WAS A WASTE OF RESOURCES FOR THIS, FOR HERRER IS CUT, AND THAT NOT AS OPPOSED TO LOOKING AT EACH CASE BASED ON EACH CASE, THAT IN THAT CASE THAT IT WAS UNLIKELY, THAT THERE WAS AN ISSUE OF THE

GUILT OR INNOCENCE.
THAT THERE WAS A QUESTION OF
WHETHER THE AGGRAVATORS WERE
SUFFICIENT OR WHETHER THERE
WOULD BE A UNANIMOUS JURY
VERDICT.

THERE WAS NOTHING LIKE THAT
EITHER IN HER PRESS CONFERENCE
OR WHAT YOU'RE SAYING TODAY.

>> YOUR HONOR, IT IS BOTH.
SHE IS GOING TO LOOK AT EVERY
SINGLE CASE.

SHE WILL LOOK AT IT INDIVIDUAL.
>> WHAT DID SHE SAY ABOUT THE
LLOYD CASE WHICH IS SORT OF THE
CLASSIC DEATH PENALTY CASE THAT
LEAD THE GOVERNOR TO HAVE
THOUGHT SHE ACTUALLY WAS
EXERCISING HER DISCRETION IN
THAT CASE?

THAT CASE INVOLVED, YOU KNOW,
JUST AGGRAVATED FACTS THAT NO
ONE COULD ARGUE WOULDN'T BE
CONSIDERED QUOTE, A DEATH
PENALTY CASE?

>> CORRECT, YOUR HONOR.
BUT THE, THERE IS NOTHING IN THE
LAW THAT SAYS THAT DISCRETION
HAS TO BE SOLELY ON THE FACTS OF
A SPECIFIC CASE.

>> SO YOU'RE, OKAY, YOUR
ARGUMENT, RISES AND FALLS ON HOW
INDEPENDENT THE PROSECUTOR IS IN
MAKING DECISIONS NOT JUST IN
CHARGING CRIMES, BUT IN THE
PUNISHMENT THAT THEY'RE GOING TO
SEEK?

>> ABSOLUTELY RISES AND FALLS ON
WHAT THIS COURT REPEATEDLY SAID
IS THE ABSOLUTE DISCRETION OF
PROSECUTORS TO DETERMINE WHETHER
AND HOW--

>> WE SAY THAT IN REFERENCE TO
WHETHER THE JUDICIAL BRANCH
COULD INTERFERE WITH THE
PROSECUTORIAL DECISION IN
STATE v. BLOOM.

THAT IS THE CONTEXT.
THIS SITUATION, WHAT IF, GOT 20
STATE ATTORNEYS, ALL

INDEPENDENTLY ELECTED, WHAT IF THEY ALL DECIDED THAT THEY WERE NOT GOING TO SEEK THE DEATH PENALTY?

COULD THAT, WOULD THAT BE PERFECTLY PROPER, THAT THE ELECTED STATE ATTORNEYS COULD OVERRULE THE LEGISLATURE WHO DECIDED THAT WE STILL IN THIS STATE WILL HAVE A DEATH PENALTY?

>> YES, YOUR HONOR THEY COULD, BUT YOUR HONOR, THERE-- IN THE LAW.

IT REQUIRES STATE ATTORNEY AYALA OR ANY STATE ATTORNEY TO SEEK THE DEATH PENALTY.

IT SIMPLY SAYS, THE LEGISLATURE CAN REWRITE THIS IF THEY NEED TO, IF YOU LOOK AT 782.04 THAT IS THE ONLY STATUTE HAS ANYTHING TO DO WITH THE DEATH PENALTY WITH RESPECT TO WHAT PROSECUTORS CAN OR SHOULD DO.

ALL IT SAYS, IF THEY WANT TO SEEK THE DEATH PENALTY, THEY HAVE TO IDENTIFY THE AGGRAVATOR AND NOTIFY THE DEFENDANT WITHIN 45 DAYS.

THE LEGISLATION IN THIS CASE ALLOWS HER TO DO EXACTLY WHAT SHE DID AND IT ALLOWS ANY STATE ATTORNEY TO DO THE SAME.

>> ARE YOU ATTACKING THE STATUTE, 27.14 UNDER WHICH THE GOVERNOR MADE THE DECISION THAT THERE WAS GOOD AND SUFFICIENT REASON WITH THE INTEREST OF JUSTICE TO REMOVE HER FROM DEATH PENALTY CASES?

ARE YOU ATTACKING THE CONSTITUTIONALITY OF THAT STATUTE AS BEING AN INTRUSION ON THE INDEPENDENCE OF THE PROSECUTOR?

>> SO, WE ARE NOT ATTACKING THE CONSTITUTIONALITY OF 27.14, YOUR HONOR.

WHAT WE'RE SAYING IN 1972 WHEN THE VOTERS PUT IN THE LANGUAGE THAT THE PROSECUTING, THAT STATE

ATTORNEYS ARE THE PROSECUTING OFFICIALS FOR ALL TRIALS IN THEIR CIRCUIT, THAT THAT IS THE CONTROLLING.

THIS IS SOMETHING, THAT IS THE CONTROLLING LANGUAGE.

AND THIS COURT HAS REPEATEDLY SAID THAT WHEN YOU HAVE SOMETHING IN THE CONSTITUTION THAT IS ABSOLUTELY CLEAR, AND YOU COULD NOT BE MORE CLEAR THAN SOMETHING THAT SAYS THAT THE STATE ATTORNEY SHALL BE THE PROSECUTING OFFICIAL OFFICER FOR ALL TRIAL CASES IN A CIRCUIT. THAT IS WHAT IT SAYS.

>> WHEN YOU MAKE THAT ARGUMENT, IT SEEMS LIKE TO ME YOU'RE PRECLUDING ANY SORT OF LEGISLATIVE OVERSIGHT OF THE CONDUCT OF THE ELECTED STATE ATTORNEY.

INCLUDING, FOR CIRCUMSTANCES SUCH AS-- IF I UNDERSTAND YOUR ARGUMENT CORRECTLY THE WAY THAT CONSTITUTIONAL PROVISION HAS TO BE APPLIED IN THE CONTEXT OF THE STATUTE, IT WOULD PRECLUDE THE GOVERNOR FROM TAKING A STATE ATTORNEY OFF OF A CASE AN REASSIGNING THE CASE WHERE THE STATE ATTORNEY DID NOT REQUEST THE REASSIGNMENT BUT THERE WAS A MANIFEST CONFLICT OF INTEREST IN THE STATE ATTORNEY HAND LENDING THAT CASE.

NOW, ISN'T THAT, DOESN'T THAT GO ALONG WITH YOUR ARGUMENT?

IT IS VERY ABSOLUTIST POSITION YOU'RE TAKING, AND IT WOULD SEEM TO ALLOW THE SORT OF UNFETTERED POTENTIAL ABUSE OF OFFICE SUBJECT TO KNOW CONTROL?

>> YOUR HONOR, NOT AT ALL BECAUSE IF THE STATE ATTORNEY IS INVOLVED IN SOME KIND OF A MALFEASANCE OR MISFEASANCE THEN ABSOLUTELY THE GOVERNOR CAN STEP IN AND REMOVE HER.

BUT I WOULD NOTE--

>> ARE YOU SAYING SUSPEND HER FROM OFFICE OR SAYING REASSIGN THE CASE TO ANOTHER STATE ATTORNEY?

>> I BELIEVE, IF THERE IS IDENTIFIED MALFEASANCE OR MISFEASANCE THEY COULD REMOVE HER OR TAKE CASES FROM HER BUT THAT IS ABSOLUTELY WHAT HAS HAPPENED HERE.

>> WHY COULDN'T THIS BE VIEWED AT, AS AN INSTANCE OF MISFEASANCE WHERE THE STATE ATTORNEY HAS TAKEN THE POSITION I'M JUST NOT GOING TO APPLY THIS LAW WHICH ALLOWS FOR THE IMPOSITION OF THE DEATH PENALTY IN CERTAIN CASES, I'M TAKING THAT OFF THE TABLE?

WHY COULDN'T THAT BE VIEWED AS FALLING IN THE CATEGORY OF MISFEASANCE.

>> FIRST I WOULD NOTE, 60 PAGES OF ARGUMENT THE GOVERNOR NEVER ONCE SAID THIS IS MALFEASANCE OR MISFEASANCE.

ON PAGE 35 OF THEIR OPPOSITION THEY MADE ABSOLUTELY CLEAR THAT SEEKING THE DEATH PENALTY CAN NOT BE MANDATORY.

SO THERE IS NO, IF THEY HAD THAT CASE, THEN THEY WOULD HAVE ARGUED THAT CASE.

THEY DON'T HAVE THAT CASE HERE. WHAT STATE ATTORNEY AYALA DID IS FOLLOW THE LAW AS IT IS WRITTEN IN THE CRIMINAL STATUTE.

SHE FOLLOWED IT TO THE LETTER. WHAT HAS TO BE DONE NOW, SHE HAS THAT DISCRETION.

IF SHE DID SOMETHING WHERE THERE WAS CLEAR CONFLICT OF INTEREST, THAT IS ALL 5570 CASES THAT THE GOVERNOR NOTES, EVERY SINGLE ONE OF THOSE CASE, YOUR HONOR, IT WAS BECAUSE THE STATE ATTORNEY ALLOWED OR VOLUNTEERED OR ASKED FOR SOMEONE ELSE TO TAKE OVER THOSE CASES.

>> IF YOU'RE NOT ARGUING THAT

THE STATUTE, 27.14-1 IS UNCONSTITUTIONAL I'M HAVING A HARD TIME UNDERSTANDING HOW YOU'RE EVEN PRESENTING A CASE THAT THE GOVERNOR EXCEEDED HIS AUTHORITY BECAUSE THE PLAIN LANGUAGE OF THAT STATUTE SAYS, THE GOVERNOR DETERMINES-- DECISION AS TO WHETHER THE ENDS OF JUSTICE WOULD BEST BE SERVED BY TRANSFERRING THE CASE. THE GOVERNOR MADE THAT DETERMINATION.

THE STATUTE, YOU SAY IS VALID. IT IS NOT UNCONSTITUTIONAL. WHY IS IT SECURING THE UNIFORM APPLICATION OF STATE LAW A, A GOOD AND SUFFICIENT REASON TO DETERMINE THAT THE INTERESTS OF JUSTICE WOULD BE BEST SERVED BY TRANSFERRING THESE CASES?

>> YOUR HONOR, I WOULD NOTE, I WANTED TO SAVE FIVE MINUTES FOR REBUTTAL.

I WILL ANSWER YOUR QUESTION, BUT I WOULD HOPE TO GET THOSE FIVE MINUTES.

YOUR HONOR, THERE IS NO CONFLICT AT ALL.

THE CONSTITUTION IS THE LEAD LANGUAGE IN THE STATE OF FLORIDA.

>> YOU SAID YOU'RE NOT CHALLENGING THE VALIDITY OF THIS STATUTE.

HE ACTED PER STUDENT TO STATUTE. THE STOUT SAYS HE CAN MAKE THIS DETERMINATION.

>> WHERE THERE IS CONFLICT BETWEEN THE CONSTITUTION AND STATUTE, THE CONSTITUTION WINS.

>> YOU'RE ARGUING THAT THE STATUTE IS UNCONSTITUTIONAL NOW?

>> WE NEVER ARGUED IT WAS UNCONSTITUTIONAL, YOUR HONOR.

>> THE STATUTE SAYS HE CAN DO IT.

>> BUT HE CAN NEVER DO IT--

>> WAIT, WAIT.

WHERE IN THE STATUTE DOES HE SAY

THAT HE HAS TO GET SOMEBODY ELSE'S PERMISSION TO MAKE THIS DETERMINATION?

>> YOUR HONOR, THAT IS, THAT IS THE WAY THAT IT HAS BEEN READ FOR 30 YEARS.

THAT IS THE, THAT IS THE FACT OF, THE WAY EVERY SINGLE PROSECUTOR, STATE ATTORNEY, IN THE STATE OF FLORIDA HAS ACTED. THERE HAS NEVER BEEN A CASE, THERE HAS NEVER BEEN A CASE WE CAN IDENTIFY--

>> SEEMS TO ME, IF YOU FOLLOW THAT ARGUMENT, THEN, WHAT WE'RE ENDING UP WITH IS THE GOVERNOR WITH UNFETTERED DISCRETION.

IF YOU CAN NOT BRING A CO-WARRANT ACTION TO CHALLENGE OR TALK ABOUT HIS ACTION, THEN WE END UP WITH A STATUTE THAT GIVES THE GOVERNOR UNFETTERED DISCRETION.

IS THAT WHAT WE'RE TALKING ABOUT HERE?

>> ABSOLUTELY, YOUR HONOR. THAT IS EXACTLY WHAT HAPPENED HERE, IF YOU READ THE GOVERNOR'S BRIEF, WHAT THE GOVERNOR SAYS WHENEVER HE DECIDES HE WANTS TO TAKE A CASE FROM A STATE ATTORNEY HE CAN DO SO.

ALL HE HAS TO HAVE A REASON, HE DOESN'T HAVE TO EXPLAIN THE REASON.

>> AREN'T THEY ARGUING, FOR US TO HAVE SEPARATION OF POWERS, NOT THAT WE CAN'T REVIEW THE DECISION UNDER THE STATUTE, BUT THAT WE HAVE TO GIVE SOME DEFERENCE?

IN OTHER WORDS, IT IS NOT OUR DECISION WHETHER IT IS IN THE BEST INTERESTS BUT IF HE ACTS ARBITRARILY OR CAPRICIOUSLY. THERE IS A LEGAL STANDARD THAT IS APPLIED TO THESE KIND OF DETERMINATIONS OF ANOTHER BRANCH, RIGHT?

>> BUT, YOUR HONOR, WHAT HE HAS

DONE HERE IS HE HAS SIMPLY
DECIDED HE IS TAKING A CASE
AWAY.

WHAT HE HAS WRITTEN HE CAN DO IT
WHENEVER HE WANTS TO DO IT.
HE DOES.

WHENEVER HE WANTS TO SO LONG AS
HE HAS A REASON HE DOESN'T EVEN
HAVE TO IDENTIFY.

>> THERE IS NOT A CASE.

IT IS ENTIRE FLOW OF ALL CASES
IN WHICH THERE HAS BEEN AT
LEAST, THE POSSIBILITY, THERE
HAS BEEN A HOMICIDE, IT IS NOT
JUST ONE CASE.

YOU SAID HE IS TAKING AWAY THE
CASE.

HE IS TAKING AWAY ALL OF THOSE
CASE, IS HE NOT?

>> HE IS-- WELL I WOULD NOT,
YOUR HONOR, CASES IS UNCLEAR
WHAT THOUGHT WENT INTO THE
PROCESS OF TAKING AWAY THOSE
CASES.

>> HE HAS TAKEN AWAY ALL OF
THEM, NOT JUST ONE CASE?

>> CORRECT.

HE HAS TAKEN AWAY 24 CASES,
THAT'S CORRECT, YOUR HONOR.

>> I WANT TO GO BACK TO THE
HISTORICAL FACTS HERE.

IF I UNDERSTOOD WHAT YOU'RE
SAYING THAT NEVER IN THE HISTORY
OF THIS STATUTE HAS A GOVERNOR
REASSIGNED A CASE FROM A STATE
ATTORNEY WITHOUT THE REQUEST OF
THAT STATE ATTORNEY FOR THE CASE
TO BE REASSIGNED, DID YOU SAY
THAT?

>> OR, WE'RE UNABLE TO IDENTIFY
ANY CASE WHERE A GOVERNOR HAS
TAKEN A CASE AWAY FROM THE STATE
ATTORNEY, WHEN THE STATE
ATTORNEY DID NOT CONSENT TO THAT
OR VOLUNTARY GIVE IT UP.

WE HAVE NOT-- THE CASES THAT
THE STATE PUTS IN ITS BRIEF DO
NOT, ABSOLUTELY DO NOT FIT THE
DESCRIPTION OF A CASE THAT WAS
STOLEN FROM A STATE ATTORNEY AS

OPPOSED TO A STATE ATTORNEY EXERCISING HER DISCRETION AND GIVING THAT CASE OR SAYING, YOU KNOW WHAT?

I HAVE A CONFLICT OF INTEREST. SO I WILL GIVE THAT CASE.

SO IF 5000 CASES, WE LOOKED AT ALL THE ONES THAT THE GOVERNOR CITED IN HIS BRIEF.

THOSE CASES ARE CASES WHERE THE STATE ATTORNEY VOLUNTARILY RELINQUISHED CONTROL OF THOSE CASES, WHICH IS AN EXERCISE OF PROSECUTORIAL-- OF THE POWER OF THE STATE ATTORNEY.

WE HAVE TO RESPECT THE RIGHTS OF THE VOTERS TO ELECT THE STATE ATTORNEY--

>> AM I, JUST REMEMBERING INCORRECTLY THAT GOVERNOR CHILES TOOK AWAY DUI CASES FROM A STATE ATTORNEY WHO INDICATED THAT HE WASN'T GOING TO PROSECUTE OR SHE WASN'T GOING TO PROSECUTE DUI CASES?

THAT IS IN THE MATERIALS THAT WAS SUBMITTED.

DID YOU JUST NOT SEE IT?

>> WHAT I SAW THAT WAS SUBMITTED ABOUT THE SEIBERS CASE, YOUR HONOR.

IT WAS VERY COMPLEX CASE, STARTED VOLUNTARILY GIVING UP OF A CASE, CLEAR CONFLICT OF INTEREST WITH RESPECT TO THE STATE ATTORNEY, WHERE IT WAS THE MEDICAL EXAMINER FOR THAT, FOR THAT STATE ATTORNEY WHO WAS ON TRIAL FOR MURDER.

I HAVE NOT SEEN A SINGLE CASE WHERE A GOVERNOR HAS FORCIBLY, INVOLUNTARY TAKEN A CASE AWAY FROM A STATE ATTORNEY SINCE 1972, WHICH IS THE POINT WHERE THE LANGUAGE WAS CHANGED TO THE STATE ATTORNEY SHALL BE THE PROSECUTING OFFICER FOR ALL TRIAL CASE, ALL TRIAL COURTS WITHIN HER CIRCUIT.

>> OKAY.

LISTEN, I'M GOING TO GIVE YOU SINCE, WE TOOK AWAY ALL YOUR TIME, I'M GOING TO GIVE YOU FIVE MINUTES OF REBUTTAL, OKAY?

>> THANK YOU, YOUR HONOR.

>> GOOD MORNING, MR. CHIEF JUSTICE, AND MAY IT PLEASE THE COURT.

SOLICITOR GENERAL AHMED OBRWALD APPEARING ON BEHALF OF GOVERNOR RICK SCOTT AND ATTORNEY GENERAL PAM BONDI.

I'M JOINED BY THE COUNSEL FOR THE POSITIVE.

UNLESS THE COURT WOULD PREFER OTHERWISE I WOULD LIKE TO START OUT WITH A QUESTION THAT JUSTICE LEWIS POSED TO DISTINGUISHED OPPOSING COUNSEL AT END OF THIS ARGUMENT, THAT IS--

>> GO INTO THE MICROPHONE.

CAN YOU HEAR ME NOW?

>> JUST, IF YOU'RE CLOSE.

>> QUESTION AS I UNDERSTOOD IT, JUSTICE LEWIS, IF YOU'RE RIGHT, WHAT PREVENTS A STATE ATTORNEY, FOR EXAMPLE, IN SOUTH FLORIDA, FROM REFUSING TO ENFORCE DUI LAWS OR ANY OTHER LAWS THAT THAT STATE ATTORNEY DISAGREES WITH AS A MATTER OF POLICY?

I BELIEVE DISTINGUISHED OPPOSING COUNSEL'S RESPONSE WAS, I QUOTE, THERE IS NO LAW THAT REQUIRES A STATE ATTORNEY TO BRING CHARGES IN ANY OF THESE KIND OF CASES THAT HELPS TO CLEAR UP AND FRAME THE QUESTION BEFORE THIS COURT. AND THAT QUESTION AS WE UNDERSTAND IT IS THIS.

IS IT REALLY THE CASE THAT EVERY SINGLE ELECTED PROSECUTOR IN THE STATE MAY ADOPT A BLANKET POLICY OF REFUSING TO APPLY OR ENFORCE ANY STATE LAW WITH WHICH THAT PROSECUTOR PERSONALLY DISAGREES AS A MATTER OF POLICY?

AND, THAT THERE IS NOTHING THAT ANYONE SERVING IN ANY OF THE

THREE BRANCHES OF GOVERNMENT CAN DO ABOUT IT?

>> I DON'T THINK-- GO AHEAD.

>> WELL I GUESS I HEARD THAT ANSWER TO THAT QUESTION TO BE SOMEWHAT DIFFERENT WHICH WAS, IT IS DISTINGUISHING BETWEEN BRINGING CHARGES AND WHAT SENTENCE THE PROSECUTOR IS GOING TO PURSUE.

AND I, I UNDERSTOOD THE ARGUMENT TO BE THAT THE PROSECUTOR IS NOT REQUIRED TO PURSUE ANY PARTICULAR SENTENCE ONCE THE DEFENDANT HAS BEEN CONVICTED BUT A SENTENCE WITHIN THE PARAMETERS OF WHAT IS PROVIDED FOR IN THE STATUTE.

NOW, THAT WAS WHAT I THOUGHT I HEARD.

YOU CAN ADDRESS THAT.

IS THE PROSECUTOR IS REQUIRED TO PURSUE IS ANY CASE OR HIGHEST POSSIBLE SENTENCE IN ANY PARTICULAR CASE OR RANGE OF CASES?

>> NO, YOUR HONOR.

WE'RE NOT ARGUING THAT STATE LAW REQUIRES PROSECUTORS TO SEEK THE DEATH PENALTY.

WHAT WE'RE SAYING THERE IS NO PRINCIPLED DISTINCTION CAN BE MADE BETWEEN THE KIND OF BLANKET POLICY YOU HAVE HERE AND THE KIND OF BLANKET POLICY THAT JUSTICE LEWIS POSITED IN HIS HYPOTHETICAL.

>> BUT EXCEPT IT IS DIFFERENT BECAUSE, THE HOUSE OF REPRESENTATIVES IN THEIR THIS THE STATE ATTORNEY HAS THE OBLIGATION TO PURSUE THE DEATH PENALTY IF THERE IS ONE AGGRAVATOR.

THAT IS THE GOVERNOR'S POSITION.

>> NO, YOUR HONOR.

>> THERE IS DISCRETION THAT GOES INTO THE DECISION TO PURSUE A DEATH PENALTY IN A CERTAIN CASE. MR. KING, WHO IS THE PROSECUTOR

ANNOUNCED AT LEAST ONE CASE THAT HE DIDN'T THINK THAT HE COULD GET A UNANIMOUS VERDICT, AND THEREFORE HE WASN'T GOING TO PURSUE THE DEATH PENALTY.

SO THOSE, SO WE'RE REALLY DEALING NOW, NOT WITH SOMETHING WHERE A PROSECUTOR SAYS, I'M NEVER GOING TO CHARGE FIRST-DEGREE MURDER.

I'M ONLY, BECAUSE I DON'T AGREE THEY SHOULD HAVE LIFE IN PRISON. WE'RE REALLY TALKING ABOUT THE QUESTION OF THE PENALTY, THE ULTIMATE PENALTY, I GUESS MY PROBLEM HERE WHETHER THIS IS DISCRETION OR NOT, I DON'T KNOW THAT IT LOOKS LIKE STATE ATTORNEY AYALA MADE A DECISION ON HER PERSONAL VIEWS.

SHE MADE A DECISION BASED ON THE HARD FACTS IN THIS STATE, IN THE YEAR 2015, ONLY EIGHT ADDITIONAL DEFENDANTS WENT ON TO DEATH ROW WHERE OVER 1000 INDIVIDUALS WERE PROSECUTED AND CHARGED WITH MANSLAUGHTER OR HOMICIDES.

SO, WE HAVE THIS FEELING LIKE THE DEATH PENALTY IS ALL OVER THE STATE, AND WE KNOW THAT PROSECUTORS IN MIAMI-DADE MAKE DECISIONS DIFFERENTLY THAN MAYBE PROSECUTORS OTHER PLACES.

SO AREN'T WE DEALING, CAN WE JUST TALK ABOUT THE DEATH PENALTY RATHER THAN WHETHER SHE DIDN'T PROSECUTE OTHER TYPES OF CRIMES?

>> ABSOLUTELY, YOUR HONOR.

AND THE ANSWER TO THE QUESTION IS, YES THE PETITIONER PURPORTED TO BASE HER DECISION IN PART ON CERTAIN FACTS.

THE PROBLEM IS, IT IS HARD FOR ONE PERSON TO SAY, I LOOKED AT RELEVANT FACTS.

DAVID: I STUDIED THIS ISSUE, I CONSULTED WITH EXPERTS AND AVAILABLE EVIDENCE SUPPORTS ONE AND ONLY ONE POSSIBLE

CONCLUSION, AND THAT'S THAT THE DEATH PENALTY IS WRONG AS A MATTER OF POLICY AND SHOULD NEVER BE APPLIED TO OUR COURTS. >> SHE SAID FORESEEABLE FUTURE, RIGHT?

THERE IS UNDENIABLE LAST TWO YEARS DEATH PENALTY IN THE STATE HAS BEEN IN A STATE OF FLUX. SHE DIDN'T SAY THIS WOULD BE HER POLICY THAT SHE IS AGAINST THE DEATH PENALTY.

SHOE HE SAID IS-- SHE SAID, THAT IS WHAT I READ, WOULD YOU AGREE WITH THAT, THAT SHE DIDN'T SAY I DON'T AGREE, IT IS INHUMANE TO PUT PEOPLE TO DEATH? SHE SAID I THINK IT IS NOT WORKING.

IT IS INEFFICIENT.
IT IS COSTLY?

>> WHAT SHE SAID, YOUR HONOR, I THINK WE SHOULD RELY ON HER WORDS, RATHER THAN MY CHARACTERIZATION OF THOSE WORDS. HER WORDS WHICH APPEAR AT PETITION'S APPENDIX, D AS IN DAVID, PAGE 3, ARE, AND I QUOTE, I WILL NOT BE SEEKING THE DEATH PENALTY IN THE CASES HANDLED IN MY OFFICE PERIOD, NO IFS, ANDS OR BUTS.

OUR POINT, YOUR HONOR, IT IS ABUNDANTLY CLEAR FROM THE PRESS CONFERENCE AND FROM THE STATEMENT THAT PETITIONER IS NOT WILLING TO APPLY THE CURRENT DEATH PENALTY STATUTE TO ANY OF THE PENDING CASES.

AND THAT OF COURSE IS THE SUBJECT OF THIS LITIGATION. WE'RE NOT TALKING ABOUT HYPOTHETICAL FUTURE DECISIONS THAT SHE MIGHT MAKE OR GOVERNOR SCOTT MIGHT MAKE.

WE'RE TALKING ABOUT WHETHER GOVERNOR SCOTT HAD LEGAL AUTHORITY UNDER SECTION 27.14 AS JUSTICE LAWSON EMPHASIZED TO REASSIGN THE CASES THAT ARE AT

ISSUE HERE.

AS TO THOSE CASES THERE IS NO DISPUTE AS CHIEF JUSTICE LABARGA POINTED OUT, THAT THE PETITIONER'S POSITION THERE IS NO CIRCUMSTANCE IN WHICH THE CURRENT LAW CAN FAIRLY BE APPLIED.

OUR POSITION, YOUR HONOR, INTELLIGENT PEOPLE OF GOODWILL CANNOT AND DO DISAGREE ABOUT THE DEATH PENALTY BUT NO ONE INDIVIDUAL IN OUR SOCIETY HAS THE RIGHT TO SAY, I'VE TAKEN A HARD LOOK AT THIS, I'VE CONSIDERED ALL THE AVAILABLE EVIDENCE, I HAVE FIGURED OUT THIS ISSUE, AND I'M GOING TO MAKE A POLICY JUDGMENT THAT IS BLANKET ACROSS THE BOARD, IT HAS THE PRACTICAL EFFECT OF EFFECTIVELY NULLIFYING--

>> HOW DO YOU RESPOND TO THE ARGUMENT MADE EARLIER THAT STATE ATTORNEYS DO MAKE THAT POLICY DECISION IN OTHER INSTANCES SUCH AS, LIKE, WE'RE NOT GOING TO PROSECUTE ANY POSSESSION OF MARIJUANA, THAT IS UNDER CERTAIN WEIGHT?

WE'RE NOT GOING TO PROSECUTE THIS, WE'RE NOT GOING TO PROSECUTE THAT?

I MEAN HOW DO YOU JUSTIFY THAT?

>> TWO RESPONSES, YOUR HONOR, TO THAT VERY IMPORTANT QUESTION. THE FIRST IS, THERE'S A WORLD OF DIFFERENCE BETWEEN A DISCRETIONARY, FLEXIBLE, PROSECUTORIAL GUIDELINE THAT KEEPS OPEN THE POSSIBILITY THAT A STATUTE COULD BE APPLIED IN SOME SET OF CIRCUMSTANCES, ON THE ONE HAND, AND THE ACROSS THE BOARD POLICY THAT PETITIONER ARTICULATED HERE WHICH TAKES EFFECTIVELY THE DEATH PENALTY OFF THE BOOKS WITH RESPECT TO THE NINTH JUDICIAL CIRCUIT. SECOND, YOUR HONOR, OUR POINT IS

NOT, OUR POINT IS NOT THAT PROSECUTORS CAN'T COME UP WITH GUIDELINES THAT ARE DISCRETIONARY IN NATURE, ABSOLUTELY CAN, BUT WHAT THIS COURT HAS NOT BEEN CITED TO IS A SINGLE EXAMPLE IN THE HISTORY OF THIS STATE OF A PROSECUTOR WHO HAS EVER DONE WHAT PETITIONER DID HERE, THAT IS TO SAY, I'VE TAKEN A LOOK AT THIS LAW, I HAVE STUDIED IT REALLY CAREFULLY, I THINK THE LAW IN PRESENT FORM IS WRONG, IT DOESN'T WORK, AS FAR AS I'M CONCERNED THAT LAW SHOULD NEVER BE AN FORCED IN MY CIRCUIT.

>> THAT TAKES US TO THE NEXT POINT THOUGH.

>> YES.

>> THE STATUTE, CHAPTER 27, SPEAKS IN TERMS OF DISQUALIFICATION.

>> YES.

>> WHY, WHY DO WE LOOK TO THIS STATUTE WHEN THE CONSTITUTION ITSELF TALKS ABOUT MALFEASANCE, MISFEASANCE?

THIS TO ME IS NOT A CONFLICT OF INTEREST KIND OF ISSUE.

THIS IS, I'M NOT GOING TO FOLLOW THE LAW AS WRITTEN ON THE BOOKS OF THE STATE OF FLORIDA.

SO WHY, WHY SHOULD WE NOT REQUIRE THAT IF THIS KIND OF SITUATION ARISES, THAT 27 IS NOT THE PROPER REMEDY BUT THE PROPER REMEDY IS UNDER THE ARTICLE OF THE CONSTITUTION THAT TALKS ABOUT SUSPENSION AND THEN FOLLOWED BY A SENATE ACTION?

WHY IS THAT NOT THE PROPER APPROACH?

>> YOUR HONOR--

>> I KNOW YOU DID NOT TAKE THAT APPROACH.

I WOULD HOPE THAT THE AT LEAST SOME THOUGHT THAT GOES INTO THAT.

>> YES.

AND THE ANSWER, YOUR HONOR, IS, ARTICLE IV, SECTION 7 OF THE STATE CONSTITUTION DOES GIVE THE GOVERNOR KIND OF A SLEDGE HAMMER TO DEAL WITH SOME IMPLICATE, NEGLIGENCE OF DUTY, MALFEASANCE, MISFEASANCE, SO ON AND SO FORTH BUT BECAUSE THE CONSTITUTION GIVES THE GOVERNOR A SLEDGEHAMMER THAT DOESN'T MEAN THE LEGISLATURE CAN'T GIVE THE GOVERNOR A SCALPEL TO DEAL WITH SMALLER PROBLEMS.

>> THIS MAY NOT BE IN THE EYES OF SOME, JUST A MERE DISQUALIFICATION?

>> WELL, YOUR HONOR, A COUPLE OF POINT THERE.

ONE PETITIONER ACKNOWLEDGES THERE IS THIS VAGUE, NEBULOUS, CONFLICT OF INTEREST OF ARTICLE 5 SECTION 17 WOULD ALLOW REASSIGNMENT WITHOUT HER CONSENT IF THERE IS A CONFLICT OF INTEREST.

THE PROBLEM WITH THAT WE DON'T SEE THE TERM CONFLICT OF INTEREST ANYWHERE IN THE CONSTITUTIONAL PROVISION WHICH PETITIONER IS HANGING HER HAT. WE ALSO DON'T KNOW HOW DO YOU DEFINE A CONFLICT OF INTEREST, WHO GETS TO DECIDE?

SO THE GOVERNOR IN THIS VERY CASE CALLED UP PETITIONER AND GAVE HER A CHANCE TO RECUSE HERSELF WITH RESPECT TO THE PENDING CASES BEFORE HE ISSUED THESE CHALLENGED EXECUTIVE REASSIGNMENTS.

WHY DID HE DO THAT?

BECAUSE HE, THE GOVERNOR, AND THE PUBLIC, COULD-- THAT PETITIONER'S POLICY VIEWS, NO MATTER HOW WELL INTENTIONED THEY ARE, NO MATTER HOW THOUGHTFUL THEY ARE, WERE GETTING IN THE WAY OF HER DISPASSIONATELY ENFORCING AND APPLYING THE LAW OF THAT STATE.

SO EVEN IF YOU ASSUMED THAT THERE IS A CONFLICT OF INTEREST EXCEPTION, WHY COULDN'T THE GOVERNOR REASONABLY INVOKE THAT EXCEPTION HERE?

WE DON'T HAVE ANY ANSWER TO THAT QUESTION.

>> WHAT IS THE, I LOOK AT THE AUSTIN CASE FROM 1975.

WE AGREE THAT STATE ATTORNEYS ARE CONSTITUTIONAL OFFICERS, CORRECT?

>> YES, YOUR HONOR.

AND IT'S, THEY HAVE THE THEY'RE ELECTED.

AGAIN THEY HAVE PROS RESPONSIBILITY FOR PROSECUTION OF CRIMES.

NO DOUBT SHE ANNOUNCED SHE WILL PROSECUTE CRIMES AND HIGHEST CRIME.

SO WE'RE TALKING ABOUT LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE.

COULD SHE HAVE ANNOUNCED, OR SOMEBODY LOOKING AT THE DEATH PENALTY ANNOUNCE THAT THEY'RE NOT GOING TO PROSECUTE DEFENDANTS WHO ARE UNDER THE AGE OF 25?

WOULD THAT STILL BE A, A REASON FOR, GOOD AND SUFFICIENT REASON TO FOR THE GOVERNOR TO REMOVE THEM IF THEY ANNOUNCED THAT KIND OF POLICY?

>> YES, A BLANKET POLICY AND DECLARATION OF THAT KIND IN OUR VIEW WOULD TRIGGER THE GOVERNOR'S EXECUTIVE REASSIGNMENT AUTHORITY.

>> WHAT IF THEY, IF THEY ANNOUNCED THAT THEY WOULD NOT SEEK TO FILE IN ADULT COURT FOR ANY JUVENILE WHO COMMITTED A CRIME, WOULD THAT ALSO BE THE SAME TYPE OF POLICY, THAT GOVERNOR COULD OVERRIDE?

>> THAT'S, OBVIOUSLY A DIFFERENT KIND OF POLICY BUT YOUR HONOR IS RIGHT, IT IS KIND OF A BLANKET

POLICY DETERMINATION.

AND OUR YOUR VIEW WOULD BE YES,
IF YOU HAVE A BLANKET POLICY
DETERMINATION OF KIND THAT
DOESN'T TAKE INTO ACCOUNT THE
SPECIFIC FACTORS PROSECUTORS ALL
OVER THE STATE TAKE INTO ACCOUNT
EVERY SINGLE DAY IN MAKING THESE
KIND OF DECISIONS.

>> HOW DO WE KNOW-- THERE ARE
STATUTES, I THINK IT IS FOR THE,
THREE STRIKES WHERE LEGISLATURE
REQUIRED REPORTING IF THEY DON'T
SEEK THE MAXIMUM.

THERE IS, I LOOKED AT THE DEATH
PENALTY STATUTE.

IT CLEARLY THERE IS NO, YOU
SHALL SEEK THE DEATH PENALTY IF
THERE IS ONE AGGRAVATOR OR MORE.

HOW DO WE KNOW THAT AROUND THE
STATE THAT THE, THAT THE
DISCRETION THAT IS BEING
EXERCISED SO THAT THE DEATH
PENALTY IS CAN BE APPLIED
UNIFORMLY IS OCCURRING?

IN OTHER WORDS, WHETHER, AGAIN
THE PROSECUTOR IN THE
SOUTH FLORIDA IS LOOKING AT THE
SAME CRITERIA AS THE PROSECUTOR
IN NORTH FLORIDA?

BECAUSE IT DOES SEEM OVER THE
YEARS THAT WE GET MANY MORE
PROSECUTIONS FROM CERTAIN PARTS
OF THE STATE THAN OTHERS
WHEREAS, THE CRIMES, THE MURDERS
ARE OCCURRING ALL OVER.

IS THAT, SOMETHING THAT THE
EXECUTIVE BRANCH SHOULD BE
LOOKING AT, OR WOULD THE STATE
ATTORNEY ARGUE THAT THAT NOW
INTERFERING WITH HER
PROSECUTORIAL DISCRETION?

>> I THINK THE ANSWER TO YOUR
HONOR'S QUESTION IS THAT AT SOME
POINT A DIFFERENCE IN DEGREE CAN
TURN INTO A DIFFERENCE IN
CONDUCT.

YOU MIGHT HAVE HARDER, MORE
CHALLENGING HYPOTHETICALS IT
MIGHT NOT BE AS CLEAR THAT THE

GOVERNOR IS IMPROPERLY INVOKING HIS EXECUTIVE REASSIGNMENT AUTHORITY.

IF THOSE HARDER CASES EVER MATERIALIZE, YOUR HONOR, THIS COURT ISN'T GOING ANYWHERE. THE GOVERNOR, UNLIKE PETITIONER IN THIS CASE IS ASSERTING A POWER THAT IS PRESCRIBED AND REGULATED BY STATUTE AND IS SUBJECT TO JUDICIAL REVIEW. AND THERE ARE A LOT OF VERY IMPORTANT CONSTRAINTS BUILT INTO THE EXECUTIVE REASSIGNMENT POWER THAT MAY PERHAPS ADDRESS SOME OF THE CONCERNS.

>> WHAT DO YOU THINK THEY ARE? I GUESS, IS IT ONLY, IS IT I SAID SO BECAUSE I THINK IT IS ENDS OF JUSTICE? CAN THAT BE A QUESTION.

>> I THINK THERE ARE FOUR VERY IMPORTANT CONSTRAINTS ON THE EXERCISE OF THIS POWER. FIRST IS, THAT THE POWER ITSELF IS INHERENTLY LIMITED IN NATURE INSOFAR THE REASSIGNMENT POWER DOESN'T LET THE GOVERNOR TELL ANY LOCAL PROSECUTOR INCLUDING THE PROSECUTOR TO WHOM THE CASE IS REASSIGNED WHETHER TO BRING ANY CASE, WHAT CHARGE TO HE BRING, WHAT SENTENCE ASKED FOR. SO AS A PRACTICAL MATTER, YOUR HONOR, WE'VE GOT 100 YEARS OF PRACTICE WE CAN DRAW ON HERE, THIS TOOL DOES NOT ALLOW THE GOVERNOR TO MICROMANAGE THE CASE SPECIFIC EXERCISE IN PROSECUTORIAL DISCRETION. GOVERNORS HAVE TRIED TO DO THAT IN THE PAST. AS A PRACTICAL MATTER, NO REASON WHY THEY WOULD TRY TO DO THAT IN THE FUTURE. THE SECOND IMPORTANT CONSTRAINT, YOUR HONOR, GOOD AND SUFFICIENT REASON STANDARD WHICH YOUR HONOR REFERRED. AND JUSTICE LAWSON POINTED OUT

THIS COURT'S PRECEDENT, FINCH VERSUS FITZPATRICK ESTABLISH THAT THE GOVERNOR, QUOTE HAS BODIES CORRECTION IN DETERMINING THAT THE STATUTORY STANDARD IS SATISFIED.

BUT, AND THIS IS A POINT I WOULD LIKE TO EMPHASIZE, WE, WE ABSOLUTELY BELIEVE THAT THERE ARE JUDICIALLY ENFORCEABLE, OUTER LIMITS TO THE EXERCISE OF THE GOVERNOR'S EXECUTIVE REASSIGNMENT AUTHORITY, AND THERE IS NOTHING ABOUT OUR POSITION IN THIS CASE THAT WOULD REQUIRE THE COURT TO SAY, WE'RE GOING TO GIVE THE GOVERNOR A BLANK CHECK, PREEMPTIVELY SIGN OFF ON ANY AND ALL HYPOTHETICAL EXERCISES OF THIS AUTHORITY IN THE FUTURE.

>> DO YOU SEE THE ARGUMENT, THAT INDEPENDENCE OF THE PROSECUTORS IN THE STATE OF FLORIDA, THE GOVERNOR'S POSITION IS, THAT HE HE RESPECTS THAT INDEPENDENCE BUT THIS WENT TOO FAR BECAUSE OF ANNOUNCEMENT NOT EVER WILLING TO CONSIDER THE DEATH PENALTY?

>> I THINK THAT IS EXACTLY RIGHT.

THAT IS WHY WE HAVE MORE THAN 100 YEARS OF HISTORICAL PRACTICE AND WHAT WE DON'T HAVE IS A SINGLE CASE FROM THIS OR FROM ANY OTHER COURT HOLDING THAT THE GOVERNOR HAS EVER EXCEEDED THE SCOPE OF HIS EXECUTIVE REASSIGNMENT AUTHORITY UNDER SECTION 27.14.

THAT IS IMPORTANT BECAUSE, JUST IN THE LAST 30 YEARS OR SO, SINCE 1970, JANUARY 1st 197, WE HAVE MORE THAN 5,000 EXECUTIVE REASSIGNMENTS.

>> HAVE YOU LOOKED AT THOSE AS MR. AUSTIN SAY, WHERE THE STATE ATTORNEY SAID I CAN'T PARTICIPATE?

I HAVE A CONFLICT.

MY LOAD, YOU KNOW, WE'RE, WE
HAVE SOME-- FOR REASSIGNMENT TO
SEE WHAT THEY ARE?

>> SO, WE HAVEN'T DONE A
COMPREHENSIVE SURVEY OF THOSE
5,000.

UNFORTUNATELY THAT WAS NOT
PRACTICABLE IN THE SOMETIME WE
HAD.

I CAN TELL YOU THIS MR. AUSTIN
IS WRONG TO SAY THAT EXECUTIVE
REASSIGNMENTS HAVE NEVER BEEN
ORDERED WITHOUT THE REQUEST OF
THE RESIDENT STATE ATTORNEY.
HAVE A SWORN DECLARATION WE
INCLUDED IN THE RECORD FROM
SUSAN SMITH, WHICH IDENTIFIES
SOME EXAMPLES, INCLUDING THE
CASE TO WHICH ONE OF YOUR HONORS
REFERRED IN WHICH SOME CASES
WERE REASSIGNED WITHOUT THE
REQUEST OF THE RESIDENT STATE
ATTORNEY, INCLUDING CASES THAT
INVOLVED SELECTIVE DUI
PROSECUTION.

>> WHAT WERE THE CIRCUMSTANCES
OF THOSE CASES?

>> THERE ARE A BUNCH OF THEM RE
REFERRED TO IN THE DECLARATION.
WE PROVIDED COPIES OF ALL THE
EXECUTIVE ORDERS.

ONE INVOLVED A CHARGE, ONE I
THINK PERHAPS IS MOST RELEVANT
TO THE COURT'S QUESTION, IS, THE
EXECUTIVE ORDER THAT HAD TO DO
WITH SELECTIVE DUI PROSECUTIONS
BY A STATE ATTORNEY I BELIEVE IN
SOUTH FLORIDA BY THE NAME OF--
AND THERE WERE MITIGATIONS THAT
THESE DUI LAWS WERE NOT BEING
FORCED ACROSS THE BOOKS.

THE GOVERNOR AT THAT TIME--

>> THEY WERE BEING ENFORCED
SELECTIVELY?

>> THAT'S RIGHT, YOUR HONOR.

I AS CHIEF JUSTICE LABARGA
EMPHASIZED IF PETITIONER'S
POLICY IS ALLOWED TO STAND, WE
HAVE SITUATION WITH ZONES WITH
RESPECT TO SOME STATUTES IN SOME

PARTS OF THE STATE.
FOR EXAMPLE, A DEFENDANT WHO
COMMITTS EXACTLY THE SAME CRIME
AS MARKEITH LOYD AND IN THE
8th JUDICIAL CIRCUIT OR
10th JUDICIAL CIRCUIT
LOOKING AT POSSIBILITY OF THE
DEATH PENALTY.
BUT THE DEFENDANT WHO COMMITTS
VERY SAME CRIME IN THE NINTH
JUDICIAL CIRCUIT IS IN THE
SITUATION WHERE THE JURY CAN NOT
BE GIVEN OPPORTUNITY.
>> IF THERE IS PLEA ENTERED,
THERE IS SO MUCH THAT SHOWS
UNFORTUNATELY IT WAS DO NOT GET
ENFORCED BECAUSE OF A MULTITUDE
OF FACTORS.
SO IF WE GET INTO THAT, AT THAT
ABOUT WHETHER IT IS EQUAL IN
GAINESVILLE AS IT IS IN DAYTONA,
WE'RE GOING TO BE WHOLE OTHER.
I APPRECIATE YOUR POINT.
>> I THINK YOUR HONOR IS
ABSOLUTELY RIGHT WE WILL NOT
HAVE PERFECT CONSISTENCY IN THE
THE ADMINISTRATION AND
ENFORCEMENT OF STATE LAW.
HERE IS WHAT WE CAN HAVE.
WE CAN HAVE A MODICUM OF
CONSISTENCY IN THE STATEWIDE
ENFORCEMENT OF STATE LAW AND AT
A MINIMUM, THE CHIEF EXECUTIVE
OFFICER OF THIS STATE IS
ALLOWED, UNDER 27.14 TO
DETERMINE THAT THE ENDS OF
JUSTICE WOULD REASONABLY BE
FURTHERED NOT HAVING A SITUATION
WHICH YOU HAVE ENTIRE BIG CHUNKS
OF THE STATE WHICH DULY ENACTED
STATE STATUTE CAN NOT BE
APPLIED.
IT HAS NO FORCE.
LIKE THAT LAW HAS BEEN
NULLIFIED.
YOUR HONOR, I'M HAPPY TO ANSWER
ANY OTHER QUESTIONS THAT THE
COURT MIGHT HAVE.
>> ANYMORE QUESTIONS?
THANK YOU.

>> THANK YOU VERY MUCH.
>> RESPECTFULLY, YOUR HONORS,
ALSO 100 YEARS OF PRECEDENTS IN
WHICH A GOVERNOR HAS NOT TAKEN A
CASE INVOLUNTARILY AWAY FROM A
STATE ATTORNEY.

>> AS TO THE LAST ARGUMENT,
HASN'T SHE EFFECTIVELY NULLIFIED
THE DEATH PENALTY LAW IN THE
NINTH JUDICIAL CIRCUIT?

>> YOUR HONOR, WOULD REVISIT
THIS DECISION IF THE
CIRCUMSTANCES AROUND THE DEATH
PENALTY CHANGE.

WE HAVE TO GO BACK TO THE
STATUTE.

BECAUSE THE REMEDY HERE, IF IN
FACT WHAT SHE DID WAS INCORRECT,
THE PROPER REMEDY HERE IS TO
CLARIFY WHAT THE REQUIREMENTS
ARE FOR A STATE ATTORNEY UNDER
172.04.

>> I WANT TO GO BACK ASK ABOUT
THE HISTORICAL FACT YOU ASSERTED
HERE.

YOU AGAIN ASSERTED THAT A
GOVERNOR HAS NEVER REASSIGN AD
CASE WITHOUT THE REQUEST OF THE
STATE ATTORNEY FROM WHOM THE
CASE WAS REASSIGNED.

>> REQUEST OR CONSENTED.
THEY REQUESTED EVERY TIME OR
CONSENT.

AUSTIN CASE--

>> YOU THINK THAT IS CONSISTENT
WITH THE INFORMATION THAT IS SET
FORTH IN THE AFFIDAVIT OF SUSAN
SMITH.

>> FIRST OF ALL WE HAVE NOT HAD
THE OPPORTUNITY TO TEST THE
AFFIDAVIT.

>> BUT IF I UNDERSTAND IT
CORRECTLY, YOU'RE MAKING
ASSERTIONS ARE ESSENTIALLY
INCONSISTENT WITH THAT
AFFIDAVIT.

>> BECAUSE I LOOKED AT CASES.
THAT IS THE BULK OF THIS, BULK
OF THIS, OF THE EXHIBIT.
SEIBERS CASE.

THAT IS NOT A CASE WHERE THE STATE ATTORNEY AT ANY POINT INVOLUNTARILY TAKEN OFF THE CASE.

THE AFFIDAVIT THEY THROUGH IN THERE, IT IS SOMETHING, IT DOESN'T MEAN ANYTHING IF IT HASN'T BEEN CHALLENGED BECAUSE I LOOKED AT THOSE THINGS.

MY TEAM LOOKED AT THOSE THINGS. WE LOOKED AT THOSE THINGS. EVERYONE THAT THEY SPECIFICALLY CITED WAS A CASE WHERE THE STATE ATTORNEY EITHER ASKED FOR OR CONSENTED TO THE TRANSFER.

AND YOUR HONOR--

>> BY CONSENT, THEY DIDN'T SUE AND CHALLENGE?

>> THEY DIDN'T CHALLENGE IT. THEY DIDN'T QUESTION IT. THEY NEVER SAID--

>> THERE IS NOTHING IN THIS RECORD THAT I SAW THAT INDICATE THAT WHERE THE GOVERNOR ACTED WITHOUT THE REQUEST THAT THERE WAS A CONSENT.

ARE YOU IMPLYING THAT THERE WAS CONSENT BECAUSE THERE WAS NO COURT CHALLENGE LATER?

>> YOUR HONOR, IF WE LOOK SPECIFICALLY AT AUSTIN--

>> PLEASE ANSWER MY QUESTION. IS THAT WHAT YOU'RE DOING?

>> THERE HAS TO BE SOME KIND OF A CONSENT?

>> BECAUSE THE AFFIDAVIT CLEARLY SHOWS THAT THERE WERE CASES HISTORICALLY WHERE THE GOVERNOR TOOK AWAY CASES AND TRANSFERRED THEM.

>> RESPECTFULLY YOUR HONOR, THE AFFIDAVIT IS NOT CORRECT.

THAT LOOKING AT THE SPECIFIC CASES CITED IN THAT AFFIDAVIT--

>> SO THE CASES CITED REFLECT THAT THERE WAS CONSENT?

>> YES, YOUR HONOR.

YES, YOUR HONOR.

THEY DO.

>> LET ME GO BACK TO THE

QUESTION ABOUT WHETHER THIS
NULLIFICATION OF THE DEATH
PENALTY LAW.

ISN'T IT?

THERE A CONCERN, SHOULDN'T THERE
BE A CONCERN THAT IF, SAY IF IT
IS NOT YOUR STATE ATTORNEY, THEY
HAVE NOW FOUR STATE ATTORNEYS
DECIDE THEY'RE NOT GOING TO SEEK
THE DEATH PENALTY.

DON'T WE END UP WITH BASIS FOR
CONSTITUTIONAL CHALLENGE TO THE
EQUAL ENFORCEMENT OF THE DEATH
PENALTY LAW BASED ON THE FACT
THAT IN FOUR CIRCUITS IN THE
STATE OF FLORIDA THAT THERE IS,
HAS BEEN NO DEATH PENALTY?

SHOULDN'T THAT BE A CONCERN NOT
ONLY OF THE GOVERNOR BUT OF THE,
OF THIS COURT WHO'S CHARGED WITH
INSURING CONSTITUTIONALITY OF
THE DEATH PENALTY AS APPLIED?

>> YOUR HONOR, RIGHT NOW, THERE
ARE 20 COUNTS OUT OF THE 300
SOME DEATH PENALTY CASES, DEATH
ROW CASES IN EXISTENCE, 20
COUNTIES DON'T HAVE A SINGLE
PERSON ON DEATH ROW.

>> THERE MAY BE A CHALLENGE TO
THE EQUAL ENFORCEMENT OF THE
DEATH PENALTY BUT IF THIS GOES
FORWARD, IN TWO YEARS THEY COULD
SAY NOW, WE'VE GOT NOBODY FROM
THE NINTH CIRCUIT-- I'M NOT
SAYING WHETHER SHE DID IT FOR
THAT REASON, WHETHER THIS IS
PART OF PEOPLE AS YOU SAID,
PEOPLE OF GOODWILL TO THINK THAT
THE DEATH PENALTY SHOULD BE ON
ITS DEATHBED BUT THAT IS NOT
WHAT THE GOVERNOR, THE GOVERNOR
IS CHARGED WITH FAITHFULLY
CHARGED WITH EXECUTING LAWS.
THAT IS MY CONCERN, THAT WE ARE
REALLY TAKING THE DEATH PENALTY
OFF THE TABLE IN THE NINTH
CIRCUIT.

SHE DIDN'T RUN ON THAT, ON THAT
PLATFORM, AND YET SHE HAS MADE
THIS ANNOUNCEMENT AFTERWARDS.

ISN'T THERE SOMETHING THAT
ALLOWS THE GOVERNOR IN THAT
SITUATION TO SAY, NO, I HAVE
GOOD AND SUFFICIENT REASON TO
REMOVE YOU FROM THOSE DEATH
PENALTY CASES.

>> YOUR HONOR, THE CONCERN HERE
IS THAT THE LAW UNDER 782.04
DOES NOT REQUIRE THE STATE
ATTORNEY TO DO ANYTHING.

IF YOU LOOK AT--

>> WHAT WAS YOUR ANSWER TO
JUSTICE PARIENTE'S QUESTION?

>> WHETHER OR NOT IT TAKES IT
OFF THE TABLE, NULLIFIES IT URN?

>> WHAT WAS ANSWER TO HER
QUESTION?

>> IT DOES NOT ESSENTIALLY
NULLIFY IT.

IT DOES NOT MAKE THE STATE
ANYMORE OPEN TO THE STATE
ATTORNEY, READING 782.04, SAYING
IN HER DISCRETION.

IF IN FACT IT IS NOT IN HER
DISCRETION, AND THERE ARE
CERTAIN STEPS THAT NEED TO BE
FOLLOWED, THE ASK WOULD BE FOR
THIS COURT TO CLARIFY WHO THOSE
STEPS ARE, STATE ATTORNEY AYALA
WILL FOLLOW THOSE STEPS.

THERE IS NOTHING, LOOK AT
STATUTES REGARDING THE DEATH
PENALTY, LEAVES IT ENTIRELY IN
HER DISCRETION, AND WHAT IS DONE
IS EXERCISE HER DISCRETION.

>> BUT THE POINT I THINK WE
STARTED OFF WITH, THAT JUSTICE
LEWIS BROUGHT UP, THE DISCRETION
HAS TO BE EXERCISED IN A
CASE-BY-CASE BASIS.

THAT IS WHAT THE STATUTE
CONTEMPLATES.

IT CONTEMPLATES AN EVALUATION OF
THE CIRCUMSTANCES IN THE CASE
AND EXERCISE OF DISCRETION ON
THAT BASIS RATHER THAN THIS
BLANKET POLICY.

WHY AM I WRONG IN UNDERSTANDING
THAT AS A PROPER WAY TO LOOK AT
THE DISCRETION THAT IS PROPERLY

EXERCISED BY THE STATE ATTORNEY?

>> BECAUSE YOUR HONOR, THERE IS NOTHING IN THE LAW THAT SAYS DISCRETION HAS TO BE EXERCISED ON A CASE-BY-CASE BASIS. THERE IS NOTHING IN THE LAW EVER SAID THAT.

STATE ATTORNEYS ARE ALLOWED TO--

>> WHY ISN'T ANALOGOUS TO THE LARGE BODY OF CASE LAW THAT TALK ABOUT BROAD SENTENCING DISCRETION THAT JUDGES HAVE? IN MOST CASES JUDGES CAN GO FROM PROBATION TO THE HIGHEST, MAXIMUM PENALTY ALLOWED BY LAW. THEY HAVE BROAD DISCRETION. BUT IF THEY SAY-- IF THEY SAY I ALWAYS DO THIS CASE THEY ARE RECUSED, IF THEY DONE IT IN A CASE ON THAT RECORD, THAT CASE WILL GET REVERSED BECAUSE WE CONSISTENTLY SAID, THE DECISION NOT TO EXERCISE INDIVIDUAL DISCRETION BASED UPON APPROPRIATE FACTORS IS NOT AN EXERCISE OF DISCRETION.

>> YOUR HONOR, THERE IS NOTHING INAPPROPRIATE ABOUT ANY FACTOR THAT THE STATE ATTORNEY AYALA LISTED AS THE BASIS FOR HER DECISION TO AS PRESUMPTION THAT SHE IS GOING TO MAKE GOING FORWARD.

>> WHY WOULD THAT BE ANY DIFFERENT THAN HER SAYING I DON'T BELIEVE IN THE WAR ON DRUGS?

I THINK IT IS INEFFECTIVELY POLICY.

I DON'T BELIEVE IN THE LAWS THAT THE LEGISLATURE'S PASSED SO I'M NOT GOING TO ENFORCE DRUG POSSESSION LAWS.

I WILL NOT PROSECUTE THEM HERE? DOES SHE HAVE THE DISCRETION TO CONSIDER THOSE BROAD LEGISLATIVE TYPE POLICY DECISIONS IN DETERMINING NOT TO ENFORCE DRUG LAW.

>> FIRST OF ALL, YOUR HONOR, WE HAVE TO DISTINGUISH BETWEEN CHARGING AND SENTENCING IS WHAT WE HAVE HERE.

SECOND, AS NOTED IN OUR BRIEF AND IN THE AMICUS FROM FORMER PROSECUTORS, THIS IS WHAT STATE ATTORNEYS AND DISTRICT ATTORNEYS DO EVERY DAY.

>> CASE-BY-CASE BASIS.

>> NO.

THEY TRY TO BE CONSISTENT WITHIN THEIR CIRCUIT, WHETHER THEY'RE GOING TO CHARGE BAD CHECKS.

WHETHER THEY CHARGE MINOR MARIJUANA POSSESSION.

THEY DRAW LINES THAT POSSIBLY LEGISLATURE HAS NOT DRAWN.

SO, HERE, THE REQUEST OF STATE ATTORNEY AYALA IS THAT HER DISCRETION BE RESPECTED AS THIS COURT HAS DONE OVER AND OVER AGAIN WHERE SHE HAS ABSOLUTE DISCRETION OVER WHETHER AND HOW TO PROSECUTE, THAT THE VOTERS OF THE NINTH JUDICIAL CIRCUIT'S DECISION TO ELECT STATE ATTORNEY AYALA, BE FULLY RESPECTED, THAT IN FACT HER DISCRETION WAS NOT EXERCISED PROPERLY HERE, THE PROBLEM IS NOT WITH STATE ATTORNEY'S AYALA DECISION, THE PROBLEM IS WITH THE STATUTE DOES NOT CLEARLY IDENTIFY.

THIS IS CLEAR BY THE WAY THE LEGISLATURE FILED THEIR AMICUS BRIEF THAT THE STATE IS NOT, THAT THE GOVERNOR IS NOT EVEN ADOPTING, WHERE THEY LISTED FACTORS THAT NO DON'T EVEN EXIST BECAUSE THAT IS HOW THEY BELIEVE IT SHOULD BE DONE, WORST-CASE SCENARIO WE HAVE UNCLEAR STATUTE WHAT THE STATE ATTORNEY MUST DO.

>> YOUR TIME IS UP.

WAY UP.

THANK YOU FOR YOUR ARGUMENTS.

>> THANK YOU, YOUR HONOR.

>> THE COURT IS IN RECESS UNTIL, IT IS IN RECESS.

