

>> HEAR YE HEAR YE HEAR YE. THE SUPREME COURT OF FLORIDA IS NOW IN SESSION, LET ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR. GIVE ATTENTION. YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THIS GREAT STATE OF FLORIDA, AND THIS HONORABLE COURT.

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

>> Chief Justice Carlos Muniz: WELCOME GOOD MORNING OUR FIRST CASE IS CHRISTOPHER ALLEN PRYOR V. STATE OF FLORIDA CASE NO. 2023-0593.

JUSTICE FRANCIS WASN'T ABLE TO BE HERE THIS WEEK BUT SHE IS CURRENTLY PARTICIPATING IN ALL THE CASES FOR THE WEEK JUST WANT TO SAY THAT FOR THE RECORD.

>> Rachel P. Roebuck, Respondent's Attorney: GOOD MORNING THE ANY CRIME TEST MUST BE DISCONTINUED IN THE MOST SUCCINCT ARGUMENT I THINK FOR THAT IS THAT THEY IN THE VAST MAJORITY OF CASES WHERE YOU HAVE A JOA WAY THAT YOU HAVE BEEN GRANTED IT IS CLEAR THAT THE ERROR COULD NOT HAVE BEEN CURED. CASES LIKE THIS COURT'S MONROE DECISION IN 2016 WHERE YOU WATCH THE PROSECUTOR ON THE RECORD AS THE MENTAL QUESTION AGAIN AND AGAIN AND AGAIN AND JUST GET INSUFFICIENT ANSWERS.

MOST OF THE TIME THE TRIAL RECORD IS CLEAR THAT THE PROSECUTOR IS AWARE OF THE DEFICIENCY AND HE WATCHED HIM TRY AND FAIL TO CURE IT. OR IT PRESENTS LIKE THIS CASE.

WHERE BASICALLY UNDISPUTED FACTS HAVE GIVEN RISE TO A PURELY LEGAL QUESTION.

IN THOSE KINDS OF CASES WHERE YOU CANNOT CURE THE DEFECT RESULT SHOULD BE FUNDAMENTAL ERROR NO MATTER WHAT THE PRESERVATION SAYS. YOU ARE GOING TO HAVE THESE MINORITY OF CASES THAT THE STATE IS WORRIED ABOUT WHERE THEY ARE GOING TO BE ABLE TO MAKE A COLORABLE CLAIM THAT THEY COULD HAVE CURED THE DEFECT AND WE ARGUE IN THOSE SITUATIONS THAT STILL FUNDAMENTAL ERROR BECAUSE IT IS UNFAIR TO ASSUME THE MISSING EVIDENCE EXISTS IF THEY WERE GIVEN AN OPPORTUNITY TO PRESENT IT BUT DID NOT BRING EVEN IF YOU ARE GOING TO ASSUME THAT, YOU SHOULD ONLY DO SO IN THOSE MINORITY OF CASES.

>> Justice: DO YOU CLASSIFY THE ERROR AS A LEGAL ONE AS OPPOSED INSUFFICIENCY OF EVIDENCE SAID THE EVIDENCE GIVES RISE TO LEGAL CONCLUSION I'M CURIOUS IF YOU SEE THE ERROR AS A LEGAL ONE AS OPPOSED TO FACTUAL ONE.

>> Rachel P. Roebuck, Respondent's Attorney: IT IS FACTUALLY INSUFFICIENT IF THIS COURT'S INTERPRETATION OF THE STATUTE IS THE SAME AS A SECOND DCA.

>> Justice John Couriel: WHAT FACTS ARE MISSING THAT WOULD GET US OVER THE SUFFICIENCY HURDLE.

WHAT ELSE WOULD THE STATE HAVE TO PROVE.

>> Rachel P. Roebuck, Respondent's Attorney: THE STATE WOULD HAVE TO PROVE WHAT HE WAS ACTUALLY CONVICTED OF WAS A STATUTE 9440 VIOLATION.

>> Justice John Couriel: THAT SOUNDS LEGAL TO ME IT DOES NOT SOUND LIKE A

FACTUAL. IT SOUNDS LIKE YOU DON'T HAVE A FACTUAL PROBLEM .IT SOUNDS LIKE YOU HAVE AN EXCLUSIVELY LEGAL VARIABLE I JUST WANT TO ISOLATE THE VARIABLE BEFORE WE ADDRESS IT.

>> Rachel P. Roebuck, Respondent's Attorney: I SEE IT AS BOTH.

>> Chief Justice Carlos Muniz: IT IS FACTUAL IN THE SENSE THAT POTENTIALLY THERE COULD'VE BEEN ANOTHER CONVICTION YOU NEED THREE QUALIFYING OFFENSES AND DEPENDING ON HOW YOU INTERPRET THE STATUTE YOU ARGUABLY ONLY HAD TO HEAR.

WHAT'S INTERESTING ABOUT THIS THAT'S DIFFERENT FROM THE OTHER FUNDAMENTAL ERROR CASES IN THIS AREA IS THAT THIS PARTICULAR PROBLEM THE RESOLUTION AS TO THIS PARTICULAR PRIOR CRIME IS NEVER GOING TO BE SOMETHING THAT THE JURY WOULD BE DECIDING ANYWAY. IF SOMEONE HAD RAISED A QUESTION ABOUT WHETHER WAS THE QUALIFYING OFFENSE THAT WOULD'VE HAD TO BE DECIDED BY THE JUDGE AS A LEGAL MATTER AND THEN IT WOULD GO FORWARD.

IT IS NOT LIKE THE JURY IS GOING TO DECIDE IS THIS JUVENILE ESCAPE . DOES THAT SATISFY THE STATUTE.

>> Rachel P. Roebuck, Respondent's Attorney: NOW THEY MIGHT BE ABLE TO.

>> Chief Justice Carlos Muniz: EXCUSE ME.

>> Rachel P. Roebuck, Respondent's Attorney: NOW BECAUSE OF HOW A LAW IS CHANGED.

>> Justice Charles Canady: I CANNOT HEAR YOU. MOVE THE MICROPHONE CLOSER TO YOU

>> Rachel P. Roebuck, Respondent's Attorney: NOW THE WAY THE LAW IS CHANGING. THAT MAY BE REQUIRED TO BE A JURY FINDING A AGREE WITH YOU IN THIS CASE IT WOULD HAVE BEEN JUDICIAL.

>> Chief Justice Carlos Muniz: I DON'T MEAN THE EVIDENCE WOULD NOT HAVE TO GO IN FRONT OF THE JURY THEY WOULD HAVE TO SAY THAT THERE IS THREE QUALIFICATIONS. WHAT I AM SAYING IS WHETHER YOU WOULD NOT ASK THE JURY DOESN'T THIS IS THE LANGUAGE OF THE VCC STATUTE AND ITS LISTING OF OFFENSES HOW DOES THIS CONVICTION FIT INTO THAT?

THE JURY DECIDES WAS THERE A CONVICTION?

I UNDERSTAND THAT.

>> Rachel P. Roebuck, Respondent's Attorney: THEY WOULD BE INSTRUCTED I BELIEVE ON WHAT WOULD QUALIFY.

>> Chief Justice Carlos Muniz: THE PARTICULAR PROBLEM HERE WITH THE STATUTE WAS NEVER ONE OF THE JURY WAS GOING TO RESOLVE.

>> Rachel P. Roebuck, Respondent's Attorney: THE PROBLEM-

>> Chief Justice Carlos Muniz: MEANING WHETHER THIS COULD SATISFY HE NEEDED THREE WHETHER THIS CAN COUNT AS ONE OF THE THREE. PRIOR CONVICTIONS RIGHT.

>> Petitioner's Attorney: I THINK THAT WAS. I THINK THAT IS PART OF THE JURY INSTRUCTIONS THAT WAS PART OF THE THEY ARE GIVEN THE LESSER OF THE CONVICTED FELON I THINK IT WAS UP TO THEM TO DECIDE WHETHER HE WAS A VCC OR MERE FELON.

>> Chief Justice Carlos Muniz:

>> BUT IF THE ISSUE HAD BEEN PRESERVED, IF IT HAD BEEN LITIGATED AND RAISED THE JUDGE WOULD HAVE DECIDED CAN THIS PRIOR CONVICTION QUALIFY AS ONE OF THE THREE. IT'S OK, I MEAN I UNDERSTAND YOUR POINT. CAN YOU BACK UP THOUGH, I THINK BEFORE WE DO THE FUNDAMENTAL ERROR THING IT WOULD BE INTERESTING TO HEAR YOUR POSITION ON WHY UNDER THE DEFINITION OF A VCC AND SPECIFICALLY THE ESCAPE AND THEN YOU HAVE THE WHAT WAS AT THE TIME OF CONVICTION 39.061 SAYING ESCAPE FROM THE JUVENILE FACILITY IS ESCAPE WITHIN THE INTENT AND MEANING OF 944.40 I'M ASSUMING YOU THINK THERE WAS ERROR HERE.

YOU WOULD NOT BE SAYING IT IS FUNDAMENTAL ERROR IF YOU DO NOT THINK IT WAS TO BEGIN WITH. WHAT IS YOUR RESPONSE TO THE STATES ARGUMENT ON THE STATUTORY INTERPRETATION QUESTION.

>> Petitioner's Attorney: I HAVE AN ARGUMENT AS TO CHRISTOPHER AND AN ARGUMENT AS TO STATUTE I REALIZED THE STATUTE SAYS IT LISTS THESE QUALIFYING OFFENSES AND BASICALLY IT SAYS WILL TAKE A ADULT CONVICTIONS AND JUVENILE CONVICTIONS BUT THE ACTUAL LIST IS WHAT IT IS. IT'S OUR POSITION THAT THESE OFFENSES ARE NOT INTERCHANGEABLE AND ESCAPE AS DEFINED BY 944.40 MEANS ESCAPE FROM AN ADULT FACILITY. NOT ESCAPE FROM A DJJ FACILITY.

>> Justice Charles Canady: HOW TO DEAL WITH THE PHRASE THE CHIEF JUSTICE REFER TO THAT WHAT OCCURS IN 39.061 WHICH SAYS AN ESCAPE FROM LAWFUL TRANSPORTATION THERETO THIS IS A STATUTE ABOUT ESCAPE FROM SECURE DETENTION.

RESIDENTIAL COMMITMENT FACILITIES. ESCAPE FROM LAWFUL TRANSPORTATION THERETO OR THEREFROM CONSTITUTES ESCAPE WITH THE INTENT AND MEANING OF SECTION 944.40.

I DON'T UNDERSTAND HOW YOUR POSITION CAN BE RECONCILED WITH THAT PHRASE. HELP ME UNDERSTAND THAT.

>> Petitioner's Attorney: THINK IF THE LEGISLATURE WANTED TO LIST THE JUVENILE ESCAPE STATUTE THEY COULD HAVE OR THEY COULD HAVE SIMPLY.

>> Justice Charles Canady: THE LEGISLATURE CAN DO ALL SUCH OF THINGS BUT THEY DID THIS.

HOW CAN YOU RECONCILE WHAT THEY DID HERE WITH YOUR POSITION.

>> Petitioner's Attorney: THEY DID NOT LIST THE STATUTE HE WAS CONVICTED OF. THAT HOUSE HOW IT IS RECONCILED THE LEGISLATURE COULD HAVE SAID ESCAPE AS DEFINED IN ANY STATUTE OR ESCAPE AS DEFINED IN BOTH OF THESE STATUTES BUT THEY DIDN'T AS TO CHRISTOPHER HIMSELF, THE RECORD THAT PROVES HIS CONVICTION FIRST OF ALL HE WAS 14 YEARS OLD AT THE TIME AND THERE IS

THIRD-DEGREE FELONY NOT A SECOND-DEGREE FELONY CONVICTION WHICH CLUES YOU IN TO THE FACT THIS WAS DEFINITELY NOT A 94440 CONVICTION ALSO THE OTHER CONVICTION ON THE SAME SHEET FOR THE SAME INCIDENT WAS ASSAULT ON A DJJ EMPLOYEE YOU KNOW HE WAS HOUSED AND ESCAPE FROM IT THE DJJ FACILITY NOT AN ADULT FACILITY IS OUR POSITION IN NOTE THERE IS A DEFINITION LINK THAT THOSE TWO STATUTES NEED TO BE LISTED IN THE VCC QUALIFYING OFFENSES LIST TO BOTH QUALIFY THAT ONLY ONE OF THEM QUALIFIES.

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>> Justice: HOW DO YOU THINK 39.06 OPERATES IN THE ABSENCE OF 944.40.

>> Petitioner's Attorney: I THINK IT'S BASICALLY CAME AFTER IT INSTEAD OF.

>> Justice: DOES IT FUNCTION CORRECTLY WITHOUT REFERENCE TO 944.40. ARE THEY INEXTRICABLY LINKED.

>> Petitioner's Attorney: THEY ARE ONLY BECAUSE WE HAD AN ESTATE STATUTE WHY NOT JUST ADOPT THE LANGUAGE IF THE ONLY DIFFERENCE IS ADULT VERSUS JUVENILLE.

>> Justice: THE LEGISLATURE COULD HAVE ADJUSTED 144 THEATERS TO DO SOMETHING DIFFERENTLY AND NOT UNDERSTANDING THE ARGUMENT AS TO WHY WE STILL CANNOT CONSIDER WHAT THE LEGISLATURE DID IN 39.06 INTERPRETING WHETHER IT'S A QUALIFYING OFFENSE.

>> Petitioner's Attorney: YOU CAN IT'S OUR POSITION UNLESS YOU LIST BOTH OF THE STATUTE BECAUSE IF THEY ARE NOT THE SAME CRIME THEY ARE NOT INTERCHANGEABLE.

>> Justice: WHAT SIGNIFICANT DUE PLACE IN A DIFFERENT LEVEL OF CONVICTION 3RD° FELONY FOR SECOND-DEGREE FELONY.

>> 39.06 IT IS A THIRD-DEGREE FELONY AND THAT 944.0 IT IS A SECOND-DEGREE FELONY IT IS JUST A DISTINGUISHING POINT ON THE SHEET.

>> Justice: YOU THINK THAT SUPPORTS YOUR THEORY THAT THEY ARE IN FACT TWO DIFFERENT TYPES OF CRIMES THEY JUST HAVE A SIMILAR DEFINITIONS.

>> Petitioner's Attorney: DO I THINK THE LEGISLATURE COULD HAVE BEEN PERFECTLY REASONABLE IN THEIR INTENT ONLY LIST CERTAIN LEVELS OF OFFENSES OR TO EXCLUDE THIS ONE FOR ANY PARTICULAR REASON.

>> Justice Jorge LaBarga: DO CONCEDE THAT THE DJJ FACILITY IS A PENAL INSTITUTION.

944.0 DISCUSSES ANY PRISONER CONFINED IN ANY PRISON JAIL CONTRACTOR OPERATED CORRECTIONAL FACILITY ROAD CAMP OR PENAL OR OTHER PENAL INSTITUTIONS. WHETHER OPERATED BY STATE A COUNTY OR MUNICIPALITY. OR OPERATOR UNDER A CONTRACT WITH ANY OF THOSE. IT WOULD SEEM TO ME IF A DJJ FACILITY IS ANY OTHER PENAL INSTITUTION YOU ARE TOAST.

>> Petitioner's Attorney: HAVING NEVER RESEARCHED THAT I DON'T KNOW WHETHER IT IS A PENAL INSTITUTION IT IS A DETENTION FACILITY.

>> Justice Jorge LaBarga:

>> Justice John Couriel: IT WOULD SEEM TO ME IF SOMEONE IS DETAINED ON CHARGES IT WOULD SEEM LIKE A PENAL INSTITUTION WOULD IT NOT?

IT'S NOT AN IMMIGRATION DETENTION FACILITY?

>> Petitioner's Attorney: RIGHT.

>> Chief Justice Carlos Muniz: THEN ON THE CONFLICT ISSUE DO YOU ACKNOWLEDGE THAT THE DECISION UNDER REVIEW IS RIGHT UNDER OUR COURTS PRECEDENT IF WE WERE JUST LOOKING I KNOW YOU WANT US TO SORT OF TAKE A COMPLETELY DIFFERENT APPROACH BUT IF WE ARE JUST LOOKING AT THIS COURT'S CURRENT CASE LAW AND FUNDAMENTAL ERROR IN THIS AREA THE DECISION UNDER REVIEW PROBABLY APPLIED IT TO OUR PRECEDENT IN THE SENSE THAT THERE IS A LESSER INCLUDED OFFENSE THE EVIDENCE SHOWED THAT ESSENTIALLY THE FUNDAMENTAL ERROR THAT THE PRESERVATION RULE APPLIES.

>> Petitioner's Attorney: I THINK THE REASON FOR THE CONFLICT IS DIFFERENT COURTS ARE APPLYING THE TEST IN DIFFERENT WAYS.

I AGREE SOME OF THE CASE LAW TO SUPPORT HOW THE DCA DEALT WITH IT I THINK THE REASON CLARIFICATION IS NEEDED BECAUSE THEY'RE NOT ALL DOING THE SAME EXACT THING.

>> Chief Justice Carlos Muniz: BUT WE CAN CLARIFY OUR PRECEDENT BY SAYING IT IS ONLY WHEN THERE IS A LESSER INCLUDED OFFENSE PROVEN.

YOUR CLIENT WOULD STILL LOSE.

THE LAW MIGHT BE MORE CLEAR AFTERWARD BUT YOU WOULD STILL LOSE. THE ONLY "CLARIFICATION" IT WOULD NOT BE A CLARIFICATION IT WOULD BE RECEIVING PRECEDENT TO ADOPT YOUR POSITION THAT ANY TIME ONE OF THE ELEMENTS OF THE OFFENSE OF CONVICTION THERE ISN'T EVIDENCE SUFFICIENT TO PROVE THAT THE FED CAN BE REVIEWED FOR FUNDAMENTAL ERROR.

OR IT IS FUNDAMENTAL ERROR.

>> Petitioner's Attorney: THAT IS WHAT I WANT YES TO BE CLEAR.

>> Chief Justice Carlos Muniz: YOUR POSITION IS TO RECEDE FROM OUR PRECEDENT NOT TO CLARIFY BUT THE TO RECEDE IN OUR POSITION IS THAT THE ANY CONTEST HAS NO PURPOSE DOES NOT MAKE ANY SENSE AND KEEPS PRISON FOR LONGER THAN SPECIFIED A LOT OF THE TIME I WAS SITTING IN THE OPENING YOU HAVE THE SAME RECORD ON DIRECT APPEAL THAT YOU HAVE POSTCONVICTION IT IS GOING TO BE OBVIOUS AND DIRECT APPEAL THAT YOU HAVE AN ELEMENTAL PROBLEM THAT COULD NOT HAVE BEEN FIXED AND THE SAME IS NOT BE TRUE FIVE OR SIX YEARS LATER IN POSTCONVICTION AND THERE SIMPLY TO REASON TO CAUSE THE KIND OF DELAY.

I WILL RESERVE THE REST OF MY TIME.

>> Chief Justice Carlos Muniz: THANK YOU.

>> Jonathan S. Tannen Respondent's Attorney: APPEARING FOR THE ATTORNEY GENERAL'S OFFICE REPRESENTING THE STATE OF FLORIDA THE STATE IS ASKING THIS COURT TO APPROVE THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS AFFIRMING MR. PRYOR'S CONVICTION FOR POSSESSION OF A FIREARM AS A VALID CAREER CRIMINAL. THE SECOND CORRECTLY DETERMINES THE MR. PRYOR HAD FAILED TO PRESERVE HIS CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE IN THE TRIAL COURT AND HE WAS UNABLE TO ESTABLISH FUNDAMENTAL ERROR

BECAUSE AT A MINIMAL EVIDENCE SHOWED THAT HE WAS GUILTY OF THE LESSER INCLUDED OFFENSE OF POSSESSION OF A FIREARM.
AS A CONVICTED FELON.

THIS COURT HAS HELD IN THE CONTEXT OF UNPRESERVED CHALLENGES TO THE SUFFICIENCY OF THE EVIDENCE, FUNDAMENTAL ERROR OCCURS ONLY WHEN THE EVIDENCE IS INSUFFICIENT TO SHOW THAT A CRIME HAS BEEN COMMITTED AT ALL. AND THAT THE COURT ALSO STATED IN FB 15 SUFFICIENCY OF THE EVIDENCE TO PROVE ONE ELEMENT OF THE CRIME DOES NOT CONSTITUTE FUNDAMENTAL ERROR. AND AT THIS COURT HAS HELD ON THREE OCCASIONS IN FB, YOUNG AND MUNROE THAT WHEN THE DEFENDANT IS GUILTY OF A LESSER INCLUDED OFFENSE AT A MINIMUM THE DEFENDANT FAILED TO ESTABLISH FUNDAMENTAL ERROR.

THIS CASE IN THE SECOND DCA PRESENTED A STRAIGHTFORWARD APPLICATION OF THE TEST. MR. PRYOR ARGUED THAT ONE OF HIS THREE CONVICTIONS SUPPORTING HIS VCC STATUS WITHOUT A QUALIFYING CONVICTION UNDER THE VCC STATUTE. THE SECOND FOUND THE SECOND AGREED WITH MR. PRYOR WHICH THE STATE BELIEVES WAS INCORRECT BUT EVEN IF MR. PRYOR WERE CORRECT HE STILL HAS THREE PRIOR FELONY CONVICTIONS THAT WERE APPROVED IN THE TRIAL COURT THE EVIDENCE AT TRIAL SHOWED HE POSSESSED A FIREARM DURING THE CRIMINAL EPISODE THAT FORMED THE BASIS FOR ALL OF THE CHARGES.

AND BECAUSE HE WAS GUILTY AT A MINIMUM OF A LESSER INCLUDED OFFENSE THERE WAS NO FUNDAMENTAL ERROR AND UNDER STAGGER HIS REMEDY IS TO FILE A PETITION FOR INEFFECTIVE ASSISTANCE OF COUNSEL UNDER RULE 3850.

>> Justice John Couriel: HE HAS SOMETHING LIKE 15 OR 16 NONE OF THE OTHER ONES HAVE QUALIFIED.

>> Jonathan S. Tannen Respondent's Attorney: I DON'T KNOW IF ANY WOULD QUALIFY UNDER THE STATUTE THE PROSECUTOR DID NOT ARGUE THAT THEY DID THE STATE SUBMITTED THREE PRIOR CONVICTIONS THAT WERE NOT CHALLENGED AS FAR AS THEIR QUALIFICATIONS UNDER THE STATUTE.

>> Justice John Couriel: COULD THAT POTENTIALLY BE RELEVANT IF THERE WERE INEFFECTIVE ASSISTANCE CLAIM IF THERE WAS ANOTHER ONE THAT WOULD'VE COUNTED DOES THAT MEAN THERE'S NO PREJUDICE?

>> Jonathan S. Tannen Respondent's Attorney: IT WOULD BE YOUR HONOR IF THIS TRIAL COUNSEL LET'S ASSUME HE FILED A MOTION FOR POSTCONVICTION RELIEF UNDER 3850 AND AN EVIDENTIARY HEARING HAPPENS HIS ATTORNEY MIGHT TESTIFY THAT HE HAD THESE OTHER OFFENSES THAT ALL WOULD HAVE QUALIFIED. EVEN IF I CHALLENGE THAT ONE THERE WOULD NOT HAVE BEEN ANY DIFFERENCE IN THE OUTCOME. UNDER THOSE CIRCUMSTANCES ARGUABLY IT WOULD NOT BE DEFICIENT PERFORMANCE TO BEGIN WITH BUT IT WOULD NOT MEET THE PREJUDICE PRONG OF STRICKLAND. MR. PRYOR'S ARGUMENTS WITH RESPECT TO THE CONFLICT ISSUE IS NOT THAT THE SECOND DCA WAS WRONG UNDER THIS COURT'S PRECEDENT THIS COURTS PRECEDENT IS VERY CLEAR THAT IF LESSER INCLUDED OFFENSE IS PROVEN THE STANDARD FOR FUNDAMENTAL ERROR IS NOT MET MR. PRYOR INSTEAD ARGUES THAT THIS COURT SHOULD INTERPRET ANY DEFICIENCY IN THE

EVIDENCE AS FUNDAMENTAL ERROR. IF IT RAISED FOR THE FIRST TIME ON APPEAL. AND THEREFORE ELIMINATE THE PRESERVATION REQUIREMENT FOR MOTIONS FOR JUDGMENT OF ACQUITTAL. EVEN IF THIS COURT BELIEVE THAT THAT WAS A POSITIVE OUTCOME AS A MATTER OF POLICY, NET RESULT IS FORECLOSED BY THE LANGUAGE OF SECTION 924.051 WHICH STATES THAT A JUDGMENT OR SENTENCE MAY BE REVERSED ON APPEAL ONLY WHEN PREJUDICIAL ERROR OCCURRED AND WAS PROPERLY PRESERVED IN THE TRIAL COURT OR IF NOT PROPERLY PRESERVED WOULD CONSTITUTE FUNDAMENTAL ERROR.

THE LEGISLATURE LEFT INTO THIS COURT TO DEFINE FUNDAMENTAL ERROR. BUT AT A MINIMAL THE LANGUAGE WOULD HAVE NO MEANING IF FUNDAMENTAL ERROR WERE NOT A HIGHER BURDEN FOR THE DEFENDANTS.

AN ORDINARY PRESERVED ERROR. THAT ARGUMENT THAT THE COURT SHOULD EFFECTIVELY ABOLISH THE PRESERVATION REQUIREMENT IS NOT AVAILABLE UNDER THE STATUTE.

>> Justice John Couriel: WHAT DO YOU MEAN I DON'T UNDERSTAND THAT.

IT ASSUMES THERE IS A CATEGORY OF FUNDAMENTAL ERROR WHICH BY DEFINITION MEANS THAT THE PRESERVATION RULE YIELDS.

>> Jonathan S. Tannen Respondent's Attorney: THAT IS CORRECT YOUR HONOR IF A PRESERVED ERROR ON A FUNDAMENTAL ERROR OF THE SAME THING IN THIS PARTICULAR CONTEXT AND THERE IS NO NEED TO PRESERVE THE ERROR. THEN THE FUNDAMENTAL ERROR REQUIREMENT HAS ABSOLUTELY NO MEANING. THE COURT WOULD BE.

>> Justice: ISN'T THE ARGUMENT IT IS FUNDAMENTAL ERROR NOT THAT PRESERVATION IS NOT NECESSARY IN CRIMINAL CONTEXT ACCORDING TO THE STATUTE IN THIS CASE IT'S ALWAYS FUNDAMENTAL ERROR.

>> Jonathan S. Tannen Respondent's Attorney: THAT IS THERE FUNDAMENTAL ERROR THAT THEIR ARGUMENT YOUR HONOR A PARTICULAR ERROR IS ALWAYS FUNDAMENTAL ERROR AND THERE IS NO PURPOSE IN THE PRESERVATION PERFORMANCE.

THE STATUTE FURTHER STATES THAT ALL TERMS AND CONDITIONS OF DIRECT APPEAL AND COLLATERAL REVIEW MUST BE STRICTLY ENFORCED INCLUDING THE APPLICATION OF PROCEDURAL BARS TO ENSURE THAT ALL CLAIMS OF ERRORS ARE RAISED AND RESOLVED AT THE FIRST OPPORTUNITY.

IF THERE IS NO NEED TO PRESERVE A MOTION FOR JUDGMENT OF ACQUITTAL OF THE TRIAL COURT THEN THERE IS NO BASIS OR NECESSITY FOR THE DEFENDANT TO RAISE THE ISSUE SO IT IS RESOLVED BY THE TRIAL COURT, IF THERE IS AN ERROR THAT NEEDS TO BE RESOLVED AT THE FIRST OPPORTUNITY.

>> Justice: ON THE QUALIFYING OFFENSE COUNSEL'S ARGUMENT DUE TO THE DIFFERENCE IN DEGREE OF THE OFFENSES THE VARYING STATUTES IT WOULD NOT BE A QUALIFYING OFFENSE.

>> Jonathan S. Tannen Respondent's Attorney: THE DIFFERENCE OF DEGREE MAKES A DIFFERENCE IF THE DEFENDANT IS ACTUALLY BEING CONVICTED OF THE OFFENSE. IF THE DEFENDANT ESCAPES FROM A JUVENILE FACILITY AND IS CONVICTED UNDER

SECTION 39.061 THEN THE OFFENSE IS A THIRD-DEGREE FELONY AND IF THE DEFENDANT ESCAPES FROM AN ADULT FACILITY UNDER 944.40 AND IS CONVICTED UNDER THAT STATUTE AND THE OFFENSE IS SECOND-DEGREE FELONY. THE RELEVANCE OF THE STATUTE AND THE LEVEL OF PUNISHMENT IS CORRESPONDINGLY INCREASED DEPENDING ON THE LEVEL OF THE OFFENSE. THAT IS A SEPARATE QUESTION FROM WHETHER A CONVICTION UNDER 39.061 QUALIFIES AS A QUALIFYING OFFENSE FOR THE PURPOSES OF THE VCC STATUTE. IN THAT REGARD THE JUVENILE STATUTE 39.061 STATES THAT THE OFFENSE UNDER THAT STATUTE OR THE CONDUCT PRESCRIBED UNDER THAT STATUTE CONSTITUTES ESCAPE WITHIN THE INTENT AND MEANING OF SECTION 944.40.

WHILE A CONVICTION UNDER ONE STATUTE OR THE OTHER MAY BE A LESSER OFFENSE FOR PURPOSES FOR COLLATERAL PURPOSES, A CONVICTION UNDER 39.061 IS ESCAPE WITHIN THE INTENT AND MEANING OF SECTION 944.40. AND IT THEREFORE IT QUALIFIES AS AN UNDERLYING OFFENSE HERE.

THERE WAS A DISCUSSION DURING MR. PRYOR'S ARGUMENT REGARDING WHETHER THIS WAS A FACTUAL ISSUE OR A LEGAL ONE, TO SOME EXTENT THE DISTINCTION IS BLURRED IN THIS CASE BECAUSE THE JUDGMENT THAT WAS SUBMITTED INTO EVIDENCE AT MR. PRYOR'S TRIAL LIST BOTH STATUTE NUMBERS.

THE JURY RATHER WAS ASKED TO MAKE A FINDING AS TO WHETHER MR. PRYOR WAS PREVIOUSLY CONVICTED OF ESCAPE AS DESCRIBED IN SECTION 944 I'M SORRY 944.40 FOLLOWING THE LANGUAGE OF THE VCC STATUTE. IN THE STATE SUBMITTED INTO EVIDENCE A JUDGMENT THAT SAID HE WAS CONVICTED OF ESCAPE AND IT LISTED ONE OF THE RELEVANT STATUTE NUMBERS AS 944.40. IT HAD A FLASH THEN ALSO LISTED THE JUVENILE ESCAPE NUMBER. BUT MR. PRYOR DID NOT ARGUE IN THE LOWER COURT THAT THE FACT OF JUVENILE ESCAPE NUMBER WAS ALSO LISTED RENDERED IT A NOT QUALIFYING OFFENSE.

>> Justice John Couriel: THAT IS BECAUSE THE STATE DID NOT QUESTION YOU GUYS MISSED THIS ISSUE BELOW.

>> Jonathan S. Tannen Respondent's Attorney: THAT IS TRUE YOUR HONOR.

HE ALSO DID NOT RAISE IT IN THE TRIAL COURT HE RAISED IT FOR THE FIRST TIME IN A SECOND DCA.

IT WAS UNPRESERVED.

IF HE HAD RESTED THIS WOULD'VE BEEN ISSUE COULD'VE BEEN RESOLVED BY THE TRIAL COURT BUT THE STATE SUBMITS THAT UNDER THE LANGUAGE OF THE JUVENILE STATUTE, ANY CONFUSION ABOUT WHY BOTH STATUTES NUMBER ARE ON THERE IS RESOLVED.

A CONVICTION UNDER THAT SUBSECTION CONSTITUTES ESCAPE WITHIN THE INTENT AND MEANING OF THE SECTION AND 44.40 AND THAT THEREFORE IT WAS A QUALIFYING OFFENSE.

>> THE BOTTOM LINE EVEN IF WE THOUGHT THERE WAS A NEED FOR CLARIFICATION OF ON THE CONFLICT ISSUE IT SEEMED LIKE THE PROPER CASE TO ADDRESS THAT WOULD BE ONE WHERE THERE WAS NOT A LESSER INCLUDED OFFENSE.

WE HAVE TO GO OUT OF OUR WAY WE HAVE PRECEDENT FROM THE COURT THAT IS

CLEAR THAT APPLIES TO THIS CASE.

IF THERE WAS ERROR.

>> Jonathan S. Tannen Respondent's Attorney: THAT IS CORRECT YOUR HONOR.

>> Justice John Couriel: NOW WE HAVE TO SAY WITHSTANDING THIS INVOLVES THIS PATTERN WHERE WE REACH OUR AND SAY IF THIS WAS ONE OF THESE OTHER CASES WHERE YOU GET CONVICTED OF ASSAULT, THEN THERE'S SOME OTHER COMPLETELY DIFFERENT CRIME THAT WE WOULD SAY THAT THE ASSAULT TAKES CARE OF THE OTHER ONE WE WOULD HAVE TO GO OUT OF OUR WAY TO ADDRESS THAT SCENARIO.

>> Jonathan S. Tannen Respondent's Attorney: THAT IS CORRECT THE APPLIANCE ISSUE SEEMS TO BE MORE WITH HR AND.

[LISTING NAMES] WHICH ARE DECISION FROM THE SECOND DCA IN THE THIRD DCA INCLUDING CASES WHERE THERE IS NO LESSER INCLUDED OFFENSE THAT NEEDS CODIFICATION THE FUTURE BUT THAT CIRCUMSTANCE IS NOT PRESENTED HERE. AND IF THIS CASE WITH A VERY CLEAR RECORD THAT SHOWS THAT AT A MINIMUM MR. PRYOR WAS GUILTY OF A LESSER INCLUDED OFFENSE. AND IT'S A BASED ON THAT RECORD THE SECOND DCA CORRECTLY DETERMINED THAT THERE WAS NO FUNDAMENTAL ERROR.

AND ANY OTHER CIRCUMSTANCES OUTSIDE THE CONTEXT OF A LESSER INCLUDED OFFENSE ARE NOT PRESENTED HERE.

IF THE COURT HAS NO FURTHER QUESTIONS I WILL RELY ON THE STATE ANSWER BRIEF FOR ANY FURTHER POINTS. THANK YOU YOUR HONORS.

>> Rachel P Roebuck, Petitioner's Attorney: WE ARE ASKING YOU TO DO AWAY WITH THE ANY CRIME TEST AND IT'S OUR POSITION THAT THIS IS A PERFECTLY GOOD OPPORTUNITY FOR YOU TO DO SO.

THE MECHANICS OF INSUFFICIENCY REVIEW DO NOT CHANGE BASED ON PRESERVATION . IT IS REVIEWED DE NOVO REGARDLESS THE ONLY THING THAT CHANGES IS THE RELIEF.

ALSO AS LONG AS 33.06 FLORIDA ALREADY ALLOWS DEFICIENCY TO BE POINTED OUT BEYOND THE POINT THAT IT CAN BE FIXED.

AND THIS IS SIMPLY THE RIGHT THING TO DO.

TURNING A BLIND EYE ON DIRECT APPEAL TO INSUFFICIENCY OF THE EVIDENCE AND MAKING PEOPLE GO THROUGH PRISON TIME TO EVEN START TO COMMENCE POSTCONVICTION LET ALONE SEE ANY RELIEF FROM IT IS WRONG.

YOU WERE NOT GUARANTEED COUNSEL AND POSTCONVICTION IT IS PERMITTED, BY THE STATUTE IT IS TYPICALLY GIVEN IF YOU GET AN EVIDENTIARY HEARING BUT BASED ON HOW THE TRIAL COURT VIEWS THIS KIND OF CLAIM YOU MAY NOT GET ONE AT ALL. WHEN THE THEATER WHICH IT IS HERE IS A WRONGFUL CONVICTION YOU NEED TO DEAL WITH IT WHEN PEOPLE HAVE THE MOST RELIABLE ACCESS TO COUNSEL. AND THAT IS DIRECT APPEAL NOT POSTCONVICTION.

DOES THE COURT HAVE ANY MORE QUESTIONS?

I'D LIKE TO FINISH THE THOUGHT I STARTED IN THE BEGINNING WHAT TYPICALLY RESULTS FROM OR HOW INSUFFICIENCY TYPICALLY PRESENTS IT IT CANNOT BE

CURED NOT THE OTHER WAY AROUND NOT THE CODE JURY CASES DOES HAPPEN A MINORITY OF THE TIME AND ESSENTIALLY IF YOU KEEP THE ANY CONTEST YOU ARE LETTING THE TAIL WAG THE DOG YOU'RE LETTING SOMETHING THAT HAPPENS ALMOST NEVER GOVERN WHAT THE RULE IS FOR EVERYONE. AND YOU ARE IN AN EFFORT TO SHIELD THE STATE FROM A POTENTIAL HARM CAUSING ACTUAL HARM TO HUMAN BEINGS WHI ARE SITTING IN PRISON DESPITE THEIR CRIMES NOT BEING FULLY PROVEN.

>> Justice John Couriel: I UNDERSTAND PRESERVATION RULE OBVIOUSLY ALWAYS CREATE THIS DILEMMA OF ALLOWING ERRORS TO GO UNCURED. LET ME ASK YOU IT SEEMS LIKE THE FORCE OF WHAT YOU'RE SAYING WOULD MAYBE LEAD ONE TO MORE OF A CASE BY CASE APPROACH BECAUSE FUNDAMENTAL ERROR REALLY ALL THAT MEANS IS A SERIOUS ERROR WHERE YOU CAN HAVE THE COURT AS A MATTER OF DISCRETION DECIDE NOT TO APPLY THE PRESERVATION RULE. THAT IS ALL FUNDAMENTAL ERRORS. IT SEEMS LIKE RIGHT NOW THESE THINGS ARE SET UP WITH THE COURT THEY WANT TO SET THESE CATEGORIES AND KIND OF TAKE CARE OF IT ON THE FRONT END. IF WHAT YOU ARE SAYING IF SOMEONE WERE PERSUADED BY THAT THE ANSWER COULD BE TO JUST SORT OF LOOK AT EACH SITUATION AT THE APPELLATE LEVEL AND DECIDE COULD THIS HAVE BEEN CURED CONVINCED NOT HAVE BEEN CURED AND WHATEVER TO THE EXTENT IT POTENTIALLY COULD HAVE BEEN CURED THE ONE WITH THE CASES WAS THE PERSON WORTH MORE THAN \$100 OR LESS OR WHATEVER YOU WILL TREAT THAT DIFFERENTLY FOR SOMETHING LIKE THIS WHERE IF YOUR CLIENT HAD ONLY HAD THREE FELONY CONVICTIONS AND THIS IS WRONG IN THIS CASE IF YOU STIPULATE THAT ONE OF THE THREE LEGALLY DOES NOT QUALIFY THEN THAT SEEMS LIKE A DIFFERENT KIND OF ISSUE.

>> Petitioner's Attorney:

>> Rachel P Roebuck, Petitioner's Attorney: OUR POSITION THE DEFINITION OF FUNDAMENTAL ERROR THAT IS MOST CITED AND MOST DIFFICULT FOR DEFENDANTS TO PREVAIL ON IS THAT BUT FOR DEFINITION. THAT BUT FOR THE ERROR THE COMMISSION WOULD NOT HAVE BEEN OBTAINED. OUR POSITION IS NOT THAT YOU SHOULD UNDO STAGGER OR LET PEOPLE DO I SEE ON DIRECT APPEAL IT IS JUST THAT INSUFFICIENCY IS DIFFERENT INSUFFICIENCY FITS THAT DEFINITION LIKE A GLOVE IF YOU HAVE A JOA THAT SHOULD'VE BEEN GRANTED AND THE ATTORNEY ALL HE HAD TO DO WAS SAY SOMETHING IN THE JURY WOULD NOT HAVE GOTTEN THE CASE THE CONVICTION THAT THEY OVERTURNED COULD NOT HAVE BEEN OBTAINED. OUR ARGUMENT IS THAT FUNDAMENTAL ERROR EXISTS WHEN YOU HAVE SOMEONE IN PRISON FOR A GREATER CRIME THAN THE ONE THAT WAS PROVEN. IF YOU REFUSE TO ADMIT THAT THAT IS AN APPLICATION OF THIS COURT'S DUTY TO SERVE JUSTICE. THANK YOU.