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NEXT CASE ON THE COURT'S CALENDAR IS JOHN CROCKER VERSUS RICHARD PLEASANT.

MISS WHITFIELD, YOU MAY PROCEED.

YES. WE WILL BE RESERVING FIVE MINUTES FOR REBUTTAL. IF IT PLEASE THE COURT, MY NAME IS V. LYNN WHITFIELD, AND I STAND BEFORE YOU ON BEHALF OF JOHN CROCKER AND BETTY CROCKER, WHO ARE PRESENT IN COURT, WHO ARE THE NEXT OF KIN OF JAY JONATHAN CROCKER. EXACTLY FOUR YEARS AND ONE DAY AGO, JAY CROCKER DIED IN THE CITY OF WEST PALM BEACH. HIS DEATH WAS INVESTIGATED BY THE CITY OF WEST PALM BEACH POLICE DEPARTMENT DETECTIVE PLEASANT. THREE DAYS AFTER HIS DEATH, DETECTIVE PLEASANT FOUND OUT THE IDENTITY OF MR. CROCKER, AND IN FINDING OUT HIS IDENTITY, FOUND, IN HIS PERSONAL BELONGINGS, A HIGH SCHOOL TRANSCRIPT, WHICH CONTAINED THE NAME, THE ADDRESS AND THE TELEPHONE NUMBER OF HIS PARENTS. DETECTIVE PLEASANT CAUSE ADD TELETYPE TO BE SENT TO THE MIAMI SHORES POLICE DEPARTMENT, WHERE THE FAMILY LIVED, ADVISING THEM TO ASK THE FAMILY TO CALL HIM ABOUT THEIR SON. AT NO TIME WAS THERE ANY INDICATION TO THE MIAMI SHORES POLICE DEPARTMENT THAT THIS WAS TO BE A DEATH NOTIFICATION. MIAMI SHORES TELETYPEED BACK THAT SAME DAY, INDICATING THAT THEY HAD GONE BY THE HOUSE. NO ONE WAS HOME. AND THAT THEY WOULD TRY AGAIN LATER. DETECTIVE PLEASANT CAUSED A SECOND TELETYPE TO BE SENT TO MIAMI SHORES, WHICH INDICATED NO EXTRA EFFORT IS NECESSARY TO CONTACT THEM IN PERSON. A NOTE FOR THEM TO CALL ME WILL SUFFICE. NOTHING ELSE WAS DONE TO NOTIFY MR. AND MRS. CROCKER OF THE DEATH OF THEIR SON.

A NOTE WAS NEVER LEFT?

A NOTE WAS NEVER LEFT, BECAUSE MIAMI SHORES FELT IT MUST NOT HAVE BEEN THAT IMPORTANT. AGAIN, THERE WAS NO INDICATION TO THE MIAMI SHORES POLICE DEPARTMENT THAT THIS WAS TO BE A DEATH NOTIFICATION.

HOW OLD WAS HE?

HE WAS APPROXIMATELY 23. THEY KEPT THE BODY, AND AT SOME TIME, IN FEBRUARY, THE CROCERS CAUSED A MISSING PERSON'S REPORT TO BE PLACED THROUGH THE METRO DADE POLICE DEPARTMENT. WEST PALM BEACH STILL DID NOT PICK UP ON THAT MISSING PERSON'S REPORT AND NOTHING WAS DONE. SOMETIME IN MARCH, JAY CROCKER'S BODY WAS TURNED OVER TO PALM BEACH COUNTY. THE AUTHORITY IN PALM BEACH COUNTY THAT HANDLES THE BURIAL OF UNCLAIMED BODIES. WHEN PALM BEACH COUNTY RECEIVED THE BODY, THEY DID NOTHING TO NOTIFY THE NEXT OF KIN, ALTHOUGH THE FLORIDA STATUTES, CHAPTER 245, REQUIRES THAT, WHEN THE PARTIES RECEIVE THE BODY FOR BURIAL, THAT THEY USE A REASONABLE EFFORT TO IDENTIFY THE UNCLAIMED BODY, AND AVIDFYING, THAT THEY GO FURTHER AND USE A REASONABLE EFFORT TO NOTIFY THE NEXT OF KIN. PALM BEACH COUNTY DID NOTHING. THEY SIMPLY BURIED JAY CROCKER. DURING THIS TIME, WHEN PALM BEACH COUNTY AND THE CITY OF WEST PALM BEACH WERE AWARE THAT JAY CROCKER HAD DIED AND WAS, INDEED, BURIED, THE CROCERS WERE CONTINUOUSLY LOOKING FOR THEIR SON.

IS THERE -- WE ARE HERE, TODAY, ON THE DISMISSAL OF THE 1983 ACTION. CORRECT?

YES.

WHAT CLAIMS, IF ANY, ARE STILL PENDING AGAINST THE VARIOUS DEFENDANTS?

THERE WAS A CLAIM FILED AGAINST THE INDIVIDUAL POLICE OFFICER PLEASANT, FOR TORTOUS INTERFERENCE WITH THE BODY, PURSUANT TO THIS COURT'S PREVIOUS CASE LAW. THAT JUDGE SBAERD ORDER -- ENTERED AN ORDER GRANTING SUMMARY JUDGMENT. HOWEVER A FINAL ORDER HAS NOT BEEN ENTERED ON HIS BEHALF. THAT CAUSE OF ACTION, PURSUANT TO THE LAW HERE IN FLORIDA, REQUIRES THAT WE ESTABLISH MALICE, BAD FAITH, WILLFUL AND WANTON DISREGARD. THE CASE LAW IS CLEAR HERE, IN FLORIDA, THAT WE CAN'T BRING THAT CASE AGAINST A MUNICIPALITY OR COUNTY, BECAUSE OF SOVEREIGN IMMUNITY. THERE WAS A CLAIM FOR NEGLIGENCE THAT HAS BEEN FILED AGAINST THE CITY, ALSO, FOR THIS.

IS THAT CLAIM STILL PENDING?

THERE WAS A HEARING ON SUMMARY JUDGMENT BUT NO ORDER HAS BEEN ENTERED AS OF YET.

SO IT IS REALLY, ALTHOUGH, I DEGREES, THE FOURTH DISTRICT -- I GUESS THE FOURTH DISTRICT DIDN'T REALLY DEAL WITH IT, THE CASE IS NOT FINAL AGAINST THE CITY. BUT THAT IS THE ONLY CLAIM THAT YOU PRESENTED AGAINST THE COUNTY, SO IT IS FINAL AGAINST THE COUNTY.

CORRECT. ONE OF THE THINGS THAT I GUEST ARGUMENT IS RELEVANT TO ON THE OTHER REMEDIES THAT ARE AVAILABLE, THE REAL DAMAGE TO THIS FAMILY, BECAUSE THEY WERE LOOKING FOR SIX MONTHS FOR THEIR CHILD AND THE CITY WAS AWARE THAT HE WAS DEAD AT THAT TIME AND AWARE OF HOW TO NOTIFY THEM AND DID NOT TAKE THE NECESSARY STEPS, IS MENTAL LANGUAGE. BECAUSE OF LAWSUIT HERE, IN FLORIDA, AND THE NEGLIGENCE SUIT AGAINST THE CITY, WE COULD NOT RECOVERY FOR THAT MENTAL ANGUISH, BECAUSE THERE IS NO IMPACT, AND BECAUSE WE ARE PRECLUDED FROM GOING AGAINST THE MUNICIPALITY OR THE COUNTY FOR TORTOUS INTERFERENCE, AS A KBEMINGS TO THE IMPACT RULE, WE CAN'T BRING THAT AND SEEK THOSE DAMAGES. THEREFORE THE ONLY CAUSE OF ACTION THAT IS AVAILABLE TO US IS THE 1983 CAUSE OF ACTION.

ARE THE DAMAGES THAT YOU ARE SEEKING INTANGIBLE DAMAGES?

YES. THEY ARE MENTAL ANGUISH DAMAGES.

DID YOUR CLIENTS, THE CROCKERS, EVENTUALLY OBTAIN THE REMAINS OF THEIR SON?

EVENTUALLY, AFTER APPROXIMATELY 171 DAYS, WHEN THEY, ON THEIR OWN, IN DOING AN INVESTIGATION, LEARNED THAT THEIR SON HAD BEEN WORKING IN WEST PALM BEACH. THEY HAD FILED THE JOHN CROCK -- THE FATHER, JOHN CROCKER, TRAVELED TO THE LOCATION WITH A PHOTOGRAPH OF HIS SON AND INQUIRED ABOUT THE SON'S LOCATION, AND THAT IS WHEN HE WAS FIRST INFORMED BY ANYONE THAT HIS SON WAS DECEASED AND BURIED, AND HE WAS DIRECTED TO CONTACT THE WEST PALM BEACH POLICE DEPARTMENT.

YOU ARE CLAIMING THAT THE NATURE OF THE RIGHT THAT WOULD ARISE UNDER 1983 WOULD BE A PROPERTY RIGHT OR A LEGITIMATE CLAIM OF ENTITLEMENT OR A QUASI PROPERTY RIGHT? WHAT BASIS, UNDER THE CONSTITUTION, ARE YOU CLAIMING THAT 1983 ACTION WOULD ARISE?

PURSE UNIT TO THE FEDERAL CASE LAW THAT -- PURSUANT TO THE FEDERAL CASE LAW THAT IS ENTERED IN THE SIXTH CIRCUIT AND ALSO FILED IN THE EIGHTH CIRCUIT, WE ARE CLAIMING THAT THERE IS ACTUALLY A PROPERTY RIGHT. THE COURTS HAVE HELD THAT, IF STATES GRANT CERTAIN RIGHTS TO INDIVIDUALS THAT, THAT CREATES A BUNDLE OF RIGHTS WHICH ARE AKIN TO PROPERTY INTERESTS, FOR WHICH A PERSON CANNOT BE DEPRIVED, WITHOUT PROCEDURAL DUE PROCESS. WHAT THE SIXTH CIRCUIT LOOKED AT, IN DECISION WHETHER OR NOT A STATE HAD CREATED SUCH A RIGHT, IS THE STATE LAWS. WHAT RIGHTS, EXACTLY, HAVE BEEN GRANTED BY THE STATES? BECAUSE THE CONSTITUTION DOES NOT GRANT PROPERTY INTEREST. YOU HAVE TO LOOK TO THE STATE LAWS. IN OHIO, WHAT THEY LOOKED AT WAS THAT THE STATE HAD

GRANTED, AND HAD AN ANATOMICAL GIFT LAW, WHICH ALLOWED FOR THE NEXT OF KIN OR SURVIVING SPOUSE TO MAKE A DECISION ON THE DONATION OF ORGANS, ABS A WILL PROVISION CONTRARY. THEY, ALSO, LOOKED AT THE FACT THAT OHIO HAD GIVEN THE NEXT OF KIN OR SURVIVING SPOUSE THE RIGHT TO POSSESS A BODY FOR BURIAL AND THE RIGHT TO HAVE THAT BODY WITHOUT HAVING IT MUTILATED, AND THEY LOOKED AT ALL OF THE RIGHTS THAT THE STATE OF OHIO HAD GIVEN, AND THEN YOU TURN TO THE FEDERAL CONSTITUTIONAL LAW. THE RIGHTS THAT HAVE BEEN CREATED BY THE STATE. DO THEY RISE TO THE LEVEL OF PROTECTION UNDER THE FEDERAL CONSTITUTION, PROCEDURAL DUE PROCESS CLAUSE?

HOW DOES POWELL, THEN, PLAY INTO YOUR POSITION?

OUR POSITION IS THAT POWELL DOES NOT FROM INCLUDED OUR ACTION. WHAT -- DOES NOT PRECLUDE OUR ACTION. WHAT THE COURT HAD IN 1986 BEFORE IT WAS WHETHER OR NOT A STATE STATUTE, 732.9185 WAS CONSTITUTIONAL. THAT WAS THE STATUTE THAT DEALT WITH REMOVAL BY MEDICAL EXAMINERS. IT WAS ONLY ALLOWING FOR CORNEA REMOVE FOR, ONE, MEDICAL EXAMINERS FOR AUTOPSY. TWO, THERE WAS NO KNOWN OBJECTION BY NEXT OF KIN TO THE CORNEA REMOVAL, AND, THREE, AN EYE BANK HAD REQUESTED THE CORNEAS FOR A TRANSPLANT. THE COURT, THEN, LOOKED AT THAT STATUTE AND DETERMINED THAT STATUTE WAS CONSTITUTIONAL. THEY MADE A LOT OF COMMENTS ABOUT WHY THE NEED FOR THE CORNEAS, THE FACT THAT THE AMOUNT OF CORNEA TRANSPLANTS HAD INCREASED SINCE THE STATUTE HAD BEEN ENACTED. THE FACT THAT PRIVATE DONATIONS OF CORNEAS WOULD NOT USUALLY USABLE, WHILE THE ONES THAT THEY HAD GOTTEN UNDER THE STATUTE WERE 80-85% USABLE, AND THEY MADE AN ARGUMENT FOR A COMPELLING STATE INTEREST AS TO WHY THOSE STATUTES SHOULD BE CONSTITUTIONAL. WHAT THE COURT DID, AND WE AGREE WITH JUSTICE SHAW IN ITS DISSENT, THE COURT WENT TOO FAR.

BUT DIDN'T IT GO? THAT IS THE POINT. DIDN'T IT GO THAT EXTRA STEP THOUGH?

YES, IT DID. IT WENT THAT EXTRA STEP. HOWEVER, JUSTICE SHAW, WHAT WE HAVE HERE IS A FEDERAL CAUSE OF ACTION, A 1983 CAUSE OF ACTION BEING FILED. EVEN THOUGH WE LOOKED TO SEE WHAT THE COURT, THE STATE LAW HAS CREATED, WE MUST LOOK TO THE FEDERAL LAW TO DECIDE WHETHER OR NOT IT IS CONSTITUTIONALLY PROTECTED UNDER THE FEDERAL CONSTITUTION, NOT UNDER THE STATE LAW.

ON THE ISSUE OF WHETHER THERE IS A PROPERTY RIGHT IN A DEAD BODY, IS THAT STATE OR FEDERAL?

AS TO --

DISPOSITIVE?

THE FEDERAL LAW IN THIS CASE IS DISPOSITIVE, BECAUSE WE HAVE FILED IT AS A CAUSE OF ACTION. ONE THING THAT IS REALLY IMPORTANT, IF YOU LOOK AT THE CASES OUT OF THE SIXTH CIRCUIT, IN FACT THEY SAY IT DOESN'T MATTER WHAT THE STATE TENDS TO LABEL IT, WHETHER THE STATE SAYS IT IS A PROPERTY INTEREST OR NOT IS NOT IMPORTANT. IT IS WHAT WE LOOK AT IS WHAT HAVE THEY CREATED? WHAT RIGHTS HAVE THEY GIVEN YOU, AND THEN WHEN WE LOOK AT THE FEDERAL LAW, WE LOOK AT TO WHETHER THOSE RIGHTS THEY HAVE GIVEN YOU RAISE TO THE LEVEL OF BEING PROTECTED UNDER THE FEDERAL CONSTITUTION. THE LAWS HERE, IN THE STATE OF FLORIDA, THERE HAVE BEEN GRANTED, ARE IDENTICAL TO THE LAWS IN OHIO THAT WERE GRANTED AND TO THE LAWS IN MICHIGAN.

ISN'T THE FEDERAL LAW, HOWEVER, ON THIS ISSUE, IT GOES BOTH WAYS? HASN'T THE FIFTH CIRCUIT SAID THAT YOU MIGHT HAVE A QUASI PROPERTY RIGHT IN THE DECEDENT DECEDENT'S BODY, BUT THAT IT IS NOT A CONSTITUTIONALLY PROTECTED RIGHT HERE?

THAT IS NOT -- DON'T YOU HAVE THE FIFTH CIRCUIT AND, I BELIEVE IT IS THE SIXTH THAT YOU ARE RELYING ON, TAKING OPPOSITE POSITIONS?

ACTUALLY THE FIFTH CIRCUIT DID NOT SAY THERE WAS NOT A FEDERALLY PROTECTED RIGHT. THE FIFTH CIRCUIT CASE WAS DECIDED THAT A 1983 ACTION WOULD NOT RELY IN THAT CASE FOR DIFFERENT REASONS. I BELIEVE THERE WAS AN ISSUE THERE ABOUT OTHER REMEDIES AVAILABLE. THEY WENT THE ONE STEP FURTHER THAN WE ARE, REALLY, IN THIS CASE. THEY HELD, THOUGH, THAT THERE WAS A QUASI PROPERTY INTEREST. THE MAIN CASES THAT HAVE BEEN OUT ON THE CIRCUIT CIRCUIT WERE -- ON THE SIXTH CIRCUIT WAS IN 1991, THE BROTHERTON CASES VERSUS CLEVELAND AND IN THE 1995 CASE WITH WHALEY. SINCE WHALEY HAS BEEN DECIDED, THE EIGHTH CIRCUIT, BY ONE OF THE APPELLEES IN THEIR BRIEF, HAS HELD THAT THERE WAS A FEDERAL RIGHT IN THE CONSTITUTION. IF YOU LOOK AT THE RIGHTS THE STATE HAS GRANTED, THEY MAKE UP THESE BUNDLES OF RIGHTS AKIN TO PROPERTY.

AND DID THEY DECIDED THERE WAS A 1983 ACTION?

THEY DECIDED THERE WAS A 1983 ACTION. ALSO I NOTE THAT ONE OF THE APPELLEES HAS CITED TO THE CASE ANOTHER SIXTH CIRCUIT AND THEY INDICATED THAT THE COURT HELD THERE WAS NO PROPERTY INTEREST. THAT WAS UNDER THE STATE CONSTITUTION, THEY HELD THAT THERE WAS NO PROPERTY INTEREST. HOWEVER, THEY SAID THAT THE PARTIES SHOULD HAVE BEEN ALLOWED TO GO BACK AND AMEND THEIR COMPLAINT, TO BRING THE 1983 ACTION, UNDER THE FEDERAL CONSTITUTION, BASED ON THE HOLDINGS OF THE SIXTH CIRCUIT PREVIOUSLY, AND I BELIEVE THAT IS FROM 1999.

COULD YOU ADDRESS THE POLICY CONCERNS THAT WERE RAISED BY THE APPELLEES THAT, IF A PROPERTY RIGHT IS RECOGNIZED, THAT THIS, THEN, MAY GIVE RISE TO CONCERNS ABOUT THE RIGHTS THAT THE HEIRS WOULD HAVE IN THE BODY PARTS AND THE COMMERCIAL SALE AND HOW THAT -- HOW WE CAN MEASURE THESE TWO INTERESTS, WHICH IS THE NEXT OF KIN'S INTERESTS IN HAVING THEIR, THE BODY, VERSUS THE SALE OF THE BODY PARTS?

WELL, THIS COURT HAS ALREADY GRANTED THE NEXT OF KIN IN THE SURVIVING SPOUSE -- AND THE SURVIVING SPOUSE THE RIGHT TO THE BODY. THERE IS A ENTITLEMENT. IF YOU LOOK AT THE FLORIDA STATUTES, EVEN SECTION 732.917, WHICH DEALS WITH DEALING WITH BODIES AND DUTIES AT DEATH, WE USE THE LANGUAGE "CUSTODY OF THE REMAINDER OF THE BODY VESTS IN THE SURVIVING SPOUSE AND NEXT OF KIN". WE HAVEN'T SEEN IN THIS COUNTRY, SINCE WHALEY, WHERE WE HAVE HAD A BIG PROBLEM WITH THE SELLING OF BODY ORGANS. I THINK, TO RULE IN OUR FAVOR IN THIS CASE, YOU DON'T HAVE TO OVERTURN POWELL. YOU JUST HAVE TO LIMIT IT TO WHAT POWELL WAS DEALING WITH, THE CONSTITUTIONALITY.

YOU ARE, THEN, REALLY CLAIMING WHAT WOULD BE A TEMPORARY DEPRIVATION FOR A PERIOD OF TIME, BECAUSE IT WAS NOT A PERMANENT DEPRIVATION OF THEIR RIGHTS. CORRECT? A -- WE ARE STATING THAT THEY WOULD DEPRIVE THE RIGHT TO THE BODY FOR A PERIOD OF TIME WITHOUT NOTICE. YES.

WELL, NOW THAT YOU BRING UP WITHOUT NOTICE, AND I WANT TO GO BACK TO THAT, BECAUSE WITHOUT NOTICE, THEN, RAISES WHAT WOULD BE A PROCEDURAL DUE PROCESS CLAIM. IS THAT A SEPARATE CLAIM FROM THE CLAIM OF THE PROPERTY RIGHT? ARE YOU CLAIMING A SEPARATE DEPRIVATION OF PROCEDURAL DUE PROCESS IN THIS CASE?

WE HAVE ONLY FILED A PROCEDURAL DUE PROCESS. WE HAVE NOT FILED A SUBSTANTIVE DUE PROCESS. WE HAVE FOUND THAT THEY HAD A RIGHT TO POSSESS THE BODY, AND BECAUSE, AND WITH REASON, YOU HAVE TO LOOK AT THE PROPERTY INTEREST, BECAUSE UNDER THE FEDERAL CONSTITUTION, FIRST YOU HAVE TO LOOK AND SEE IF THERE WAS A DEPRIVATION, THEN YOU HAVE TO SEE IF THERE WAS AN INTEREST THAT WAS PROTECTED UNDER THE FEDERAL CONSTITUTION. HERE WE ARE SAYING THAT THEY HAD A DEPRIVATION, BECAUSE THEY WERE

NOT GIVEN THE BODY. THE BODY WAS BURIED, EVEN THOUGH, UNDER FLORIDA LAW, THEY ARE THE ONES WHO HAVE THE RIGHT TO POSSESS THE BODY FOR BURIAL, AND THEN WE LOOK AT, TO SEE WHETHER OR NOT THEY HAD AN INTEREST, WHICH IS PROTECTED UNDER THE FEDERAL CONSTITUTION, AND USING THE CASE LAW AND THE ANALOGIES FROM THE FEDERAL LAW, WHICH IS OUT HERE AND AVAILABLE TO US, WE HAVE NO ELEVENTH CIRCUIT CASE ON THIS ISSUE. WE HAVE NO US SUPREME COURT CASE ON THIS ISSUE. SO WE MUST LOOK TO WHAT IS THE LAW IN THE OTHER CIRCUIT, AND THE CIRCUIT THAT HAS RULED ON THIS HAS BEEN THE SIXTH CIRCUIT, AND THE EIGHTH CIRCUIT, FOLLOWING THEM, AND WHEN WE LOOK TO THAT, WE SEE THAT, BECAUSE OF THE LAWS THAT THE STATE OF FLORIDA HAS ENACTED, THE RIGHT TO GIVE THEM THE POSSESSION OF THE BODY FOR BURIAL, THE RIGHT TO MAKE DECISIONS ON ORGAN DONATIONS, THE RIGHT TO MAKE DECISIONS ON DISINTERMENT, THE RIGHT TO HAVE THE BODY, THAT FLORIDA, INDEED, HAS CREATED THAT BUNDLE OF RIGHTS, WHICH THE FEDERAL LAW RECOGNIZES.

SINCE WE HAVE NO FEDERAL LAW, WHY WOULDN'T WE LOOK TO STATE LAW?

BECAUSE THERE IS A FEDERAL CAUSE OF ACTION. WE LOOK TO THE STATE LAW TO SEE WHAT IS CREATED, BUT WE LOOK TO FEDERAL LAW TO DETERMINE WHAT IS FEDERALLY PROTECTED UNDER THE CONSTITUTION. WE WOULD LIKE TO RESERVE THE REST OF OUR TIME FOR REBUTTAL.

YOU MAY DO SO. MS. McKENNA.

GOOD MORNING. MY NAME IS CLAUDIA McKENNY. I AM THE DEPUTY CITY ATTORNEY FOR WEST PALM BEACH. WITH ME IS LEONARD BERGER, WHO IS THE ASSISTANT COUNTY ATTORNEY AND MAYRA RIVERA RIVERA-DELGADO, WHO IS ASSISTANT CITY ATTORNEY. WE ARE GOING TO DIVIDE OUR TIME.

DO YOU AGREE THAT THERE IS A FEDERAL CAUSE OF ACTION HERE?

JUSTICE SHAW, I AGREE THAT THAT IS HOW THE PETITIONERS HAVE FRAMED THEIR ISSUE. I DON'T AGREE THAT THERE IS A FEDERAL CAUSE OF ACTION. I THINK, TO DON'T THAT POSITION IS TO DON'T -- TO ADOPT THAT POSITION IS TO ADOPT THE MINORITY VIEW THAT WAS ESPOUSED IN THE BROTHERTON CASE, AND A LOOK AT THAT CASE SHOWS THAT THE SIX CIRCUIT REALLY IGNORED THE TEACHING OF THE UNITED STATES SUPREME COURT, WHICH SAID THAT 1983 IS A CAUSE OF ACTION THAT IS BASED ON CONSTITUTIONAL RIGHTS. THOSE CONSTITUTIONAL RIGHTS ARE DERIVED FROM LOOKING AT STATE LAW. SO THE FIRST QUESTION FOR THIS COURT IS WHETHER OR NOT THE ANALYSIS YOU ENGAGED IN, WHEN YOU ISSUED THE POWELL DECISION, WAS AN APPROPRIATE ANALYSIS, UNDER THE TEACH ACTION OF -- UNDER THE TEACHINGS OF THE UNITED STATES SUPREME COURT AND THE FEDERAL ANALYSIS FOR THE 1983 ACTIONS. WHAT THIS COURT DID, THEN, WAS REVIEWED THE JUDGMENT THAT CAME UP FROM THE COURT BE LOAF. THE -- BELOW. THE PETITIONERS ARE SUGGESTING TO YOU THAT YOU WENT TOO FAR IN 1986. THE JUDGMENT BELOW, THE COURT BELOW, HELD THAT THERE WAS A PROPERTY RIGHT, THAT THE STATUTE WAS UNCONSTITUTIONAL, BECAUSE THERE WAS A PROTECTED PROPERTY RIGHT, A PROTECTED LIBERTY RIGHT, AND AN INVIDIOUS SUSPECT CLASSIFICATION. SO WHEN THIS COURT RENDERED ITS DECISION IN POWELL, YOU HAD TO ENGAGE AN ANALYSIS OF EACH OF THOSE SUBSTANTIVE CONSTITUTIONAL PROCEEDINGSS. SO THE POWELL DECISION WAS CORRECT, IN ITS ANALYSIS. THIS COURT DID NOT GO TOO FAR. SECONDLY, THE COURT, IN POWELL, IN 1986, LOOKED AT THE STATE OF THE LAW THEN, NOT ONLY IN THE STATE OF FLORIDA BUT THROUGHOUT THE COUNTRY, AND THE FIRST CIRCUIT THAT IS CITED IN THE POWELL DECISION IS THE EIGHTH CIRCUIT. THEIR DECISION IN THE YEAR PREVIOUS, IN. AND THEN THE COURT ENGAMINGD IN A DETAILED EXPOSITION OF THE AUTHORITIES THAT STAND FOR THE FACT THAT THE DECISION IN POWELL IS THE MAJORITY VIEW.

WHAT RIGHT, IN YOUR OPINION, IS GIVEN, UNDER, IF ANY, IS GIVEN UNDER 1983?

IT ATTEMPTS TO ENSURE THAT THERE IS A REMEDY FOR A VIOLATION BY A STATE ACTER OF A PROTECTED CONSTITUTIONAL INTEREST, SO WHAT THIS COURT HAS TO DETERMINE IS DOES THE NEXT OF KIN'S INTEREST IN A DEAD BODY RISE TO THE CONSTITUTIONAL LEVEL OF PROTECTION? AND IN 1986, THIS COURT ENGAGED IN A VERY CAREFUL ANALYSIS AND SAID, NO, IT DOES NOT. THAT DOESN'T MEAN THAT THERE IS NOT AN INTIMATE, VERY IMPORTANT INTEREST IN THE RIGHT OF THE NEXT OF KIN TO BE ABLE TO HAVE THEIR NEXT OF KIN'S REMAINS FOR BURIAL, FOR WHATEVER APPROPRIATE CEREMONY IS NECESSARY FOR THEM TO SAY THEIR GOOD-BYES AND TO DEAL WITH THEIR GRIEF.

WASN'T THERE AN ENTIRELY DIFFERENT ISSUE, THOUGH, INVOLVED IN POWELL, AND, REALLY, WASN'T THIS COURT ENGAGING IN SORT OF A BALANCING TEST, IN TERMS OF MEASURING WHAT THE INTEREST WAS, WITH REFERENCE TO THIS PARTICULAR STATUTE, OF BOTH THE STATE AND THE SURVIVORS OF THE DECEDENT? IN OTHER WORDS THAT WAS A PRETTY DISCREET ANALYSIS, WAS IT NOT? IN TRYING TO BALANCE OUT THOSE AND COMING TO THE CONCLUSION THAT, IN TERMS OF A CONSTITUTIONAL ATTACK ON THIS PARTICULAR STATUTE THAT, THE COMPELLING INTEREST OF THE STATE WOULD WIN OUT, CONSIDER CONSIDERING WHAT WAS IN THE BALANCE, AND THAT IS THIS PORTION OF THE EYE THAT APPARENTLY WAS DEMONSTRATED ON THE RECORD THERE, AT LEAST, TO SERVE A VERY SUBSTANTIAL STATE INTEREST?

JUSTICE ANSTEAD, YOU ARE CORRECT, THAT THE POWELL DECISION REVOLVED AROUND THE CONSTITUTIONALITY OF THE STATUTE. BUT THE DISCREET ANALYSIS OF THE STATUTE DID NOT CHANGE THE COURT'S OVERALL ANALYSIS OF WHETHER OR NOT THE INTEREST IN A DEAD BODY RISES TO THE LEVEL OF CONSTITUTIONAL PROTECTION. AND IN THAT REGARD, WHAT THIS COURT DID WAS IT ENGAGED IN THE SAME TYPE OF ANALYSIS THAT THE OTHER FEDERAL CIRCUITS HAVE DONE, AND THE SAME TYPE OF ANALYSIS THAT NUMEROUS STATE COURTS HAVE DONE, OTHER STATE SPRECKTS HAVE DONE, IN TRYING TO DETERMINE -- STATE SUPREME COURTS HAVE DONE, IN TRYING TO DETERMINE WHERE TO PUT THIS IN THE CONTINUUM OF INTERESTS OF --

CAN YOU THINK OF ANY OTHER INSTANCE OF A FEDERAL RIGHT, WHERE THERE IS AN ATTEMPT TO PROTECT THE FEDERAL RIGHT THAT YOU HAVE TO LOOK TO THE STATE? TO DETERMINE THE RIGHT THAT IS BEING PROTECTED FEDERALLY. DO YOU UNDERSTAND WHAT I AM ASKING?

I AM NOT SURE THAT I DO, JUSTICE SHAW, BUT --

IF IT IS A FEDERAL RIGHT THAT WE ARE TALKING ABOUT PROTECTING HERE, OR IT IS A FEDERAL ATTEMPT TO PROTECT A RIGHT. WHY SHOULD WE HAVE TO LOOK TO THE STATE? ISN'T THERE SOME INDICATION THAT WE WOULD LOOK TO THE FEDERAL INTERPRETATION OF THIS RIGHT, AND IT HAS DONE THAT IN SOME FEDERAL CASES. SO WHY WOULDN'T THAT BE DISPOSITIVE?

WELL, JUSTICE SHAW, THE -- BECAUSE THE UNITED STATES SUPREME COURT HAS SAID THAT IS NOT THE ANALYSIS WE WANT STATE COURTS TO ENGAGE IN. WE WANT YOU TO LOOK TO YOUR STATE LAW AND SEE WHETHER OR NOT THE INTEREST THAT IS PROTECTED RISES TO THE LEVEL OF CONSTITUTIONAL DIMENSION, AND IN THIS CASE, IT WOULD BE WHETHER OR NOT, AS THE PETITIONERS HAVE ALLEGED, IT RISES TO THE LEVEL OF A PROPERTY INTEREST THAT IS PROTECTED BY THE FLORIDA AND THE UNITED STATES CONSTITUTION. IT IS NOT SOME FEDERAL LAW OR FEDERAL PIECE OF LEGISLATION THAT SAYS THIS IS A RIGHT THAT HAS BEEN CREATED AND SECTION 1983 PROTECTS IT.

WHERE IS THAT SAID?

PARDON?

WHERE IS THAT SAID?

WELL, JUSTICE SHAW, IT IS SAID THROUGHOUT EACH OF THE CASES THAT THE POWELL COURT

RELIED ON, WHEN IT RENDERED ITS DECISION IN IS THE 86. -- IN 1986. AND SPECIFICALLY IN PAUL V DAVIS, THE UNITED STATES SUPREME COURT SAID WE DON'T WANT COURTS TO TAKE SECTION 1983 AND TURN IT INTO A FRONT OF TORT LAW -- INTO A FONT OF TORT LAW REMEDIES. SO WHAT THE COURTS HAVE DONE IS THEY HAVE VERY CAREFULLY, WITH THE EXCEPTION OF THE SIXTH CIRCUIT, AND ILL ADDRESS THAT IN A MOMENT, WHAT THE OTHER STATE AND FEDERAL COURTS HAVE DONE IS VERY CAREFULLY LOOK AT THIS INTEREST OF NEXT OF KIN, AND THEY HAVE REJECTED THE ARGUMENT THAT YOU CAN DECLARE THIS INTEREST A PROPERTY INTEREST THAT REACHES THE LEVEL OF CONSTITUTIONAL DIMENSION.

DOESN'T FLORIDA RECOGNIZE AN INTEREST IN THE NEXT OF KIN? YOU SAY FOR BURIAL RIGHTS OR DISPOSAL RIGHTS OR WHATEVER, DOESN'T FLORIDA RECOGNIZE ABT REST IN THE NEXT OF -- AN INTEREST IN THE NEXT OF KIN?

ABSOLUTELY, JUSTICE ANSTEAD.

LET'S TAKE A MORE FLAGRANT HYPOTHETICAL IN TRYING TO ARRIVE. LET'S ASSUME THAT, IN THIS PARTICULAR CASE, THAT ACTUALLY THE COUNTY MADE THE ATTEMPTS TO CONTACT THE PARENTS, AND IN FACT, THE CONTACT GOT THROUGH, BUT THE COUNTY MOVED FORWARD WITH REFERENCE TO PLANS TO BURY THE BODY IN POTTER'S FIELD OR WHEREVER, WHEREVER THEY DISPOSE OF BODIES THAT ARE UNCLAIMED, BUT THAT BEFORE THEY GOT TO THAT POINT AND WITH THE BODY, NOW, STILL AT A FUNERAL HOME OR SOMEPLACE, THAT THE PARENTS SHOWED UP, AND THEY HAD DOCUMENTATION, THE BIRTH CERTIFICATE OF THE CHILD, THEIR OWN IDENTIFICATION, HAD A LIST A MILE LONG TO ESTABLISH THAT, IN DEED, THEY WERE THE PARENTS OF THIS CHILD CHAFS DECEASED, AND NOTWITHSTANDING THAT, THE COUNTY SAID YOU ARE TOO LATE. WE WROTE YOU A LETTER. TOLD YOU CLAIM THE BODY WITHIN TEN DAYS OR IT WOULD BE BURIED IN POTTER'S FIELD, AND NOW WE ARE A LITTLE LATE, OURSELVES, BECAUSE WE HAVE SO MANY OF THOSE TO DO, BUT YOU ARE TOO LATE. GET OUT OF HERE. WE WILL TAKE CARE OF THIS. AND THEY WENT AHEAD AND BURIED THE BODY IN POTTER'S FIELD, NOTWITHSTANDING THE FACT THAT THE PARENTS HAD SHOWED UP, STOOD RIGHT BY THE COFFIN OF THE DECEASED AND SAID THAT IS OUR BODY. NOW THEY HAD TO GO TO COURT, JUST TO GET THE REMAINS AND DO THIS. NOW, IN THAT HYPOTHETICAL, WOULD THERE BE A SUFFICIENT INTEREST AND THEN A SUFFICIENT VIOLATION BY THE GOVERNMENT TO CONSTITUTE A BASIS FOR A 1983 ACTION?

NO, JUSTICE SHAW, THERE WOULD NOT, BUT THERE CERTAINLY WOULD BE SUFFICIENT BASIS FOR A PETITIONER, IN THAT INSTANCE, TO CLAIM WILLFUL AND WANTON MISCONDUCT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

IN A STATE TORT ACTION.

THE TYPE OF STATE TORT ACTION THAT THIS STATE HAS AVAILABLE TO PETITIONERS IN THIS CIRCUMSTANCE, AND IF I MAY, JUSTICE ANSTEAD, LET ME GIVE YOU AN EVEN MORE GRAPHIC DEMONSTRATION OF THE TYPE OF CONDUCT THAT WOULD CERTAINLY GET A COURT'S ATTENTION.

I WANT YOU TO BE ALERT TO YOUR TIME. YOU INDICATED YOU ARE GOING TO SPLIT IT 10 AND 10, AND I DON'T KNOW WHAT THE MINUTES ARE.

THANK YOU, JUSTICE HARDING. IF I MAY, THEN I WILL YIELD MY TIME TO MR. BERGER. THREE DAYS BEFORE CHRISTMAS IN 1986, DR. CHARLES ODOM, WHO WAS THE DEPUTY CORONER FOR THE LA FAYETTE PARISH IN LOUISIANA, TOOK THE INFANT BODY OF CHRISTINA ARNAUT AND MEASURED AND TOOK IT TO THE BACK OF THE LABORATORY, TO A CONCRETE SURFACE, MEASURED ONE METER UP FROM THE SURFACE OF THE FLOOR AND DROPPED THAT INFANT BODY ON ITS SKULL, TO MEASURE THE IMPACT. THAT WAS A REAL CASE. IT WAS OUT OF THE FIFTH CIRCUIT, AND THERE THE COURT SAID, AND THE PARENTS SUED, AND THEY SOUGHT RELIEF

UNDER 1983, AND THERE THE COURT SAID, AS INTIMATE AS THE RIGHT OF THE NEXT OF KIN TO POSSESS THE BODY OF A LOVED ONE IN THE SAME CONDITION AS IN DEATH, WE ARE UNABLE TO EXTEND, OVER THAT RIGHT, THE CONSTITUTIONAL UMBRELLA OF DUE PROCESS. THIS WAS THE ANALYSIS THAT THIS COURT ENGAGED IN THIS 1986. NOTHING HAS CHANGED. LEGISLATIVELY OR FROM THE PRONOUNCE PRESIDENTS OF THE UNITED STATES SUPREME COURT, TO CHANGE THIS COURT'S ANALYSIS IN POWELL IN 1986 OR THAT ANALYSIS TODAY. THANK YOU.

MR. BERGER.

THANK YOU. I AM LEONARD BERGER REPRESENTING PALM BEACH COUNTY. WHAT YOU HAVE HEARD THUS FAR, REF REBS TO THE SIXTH CIRCUIT -- REFERENCE TO SIXTH CIRCUIT CASE LAW, IS THAT IT WOULD BE UNJUST TO DENY RECOURSE TO 1983 HERE, BECAUSE THERE ARE NO OTHER REMEDIES AVAILABLE, AND IN FACT I WOULD SUGGEST THAT THERE ARE. IN 1983 CASE LAW, IT IS RATHER CLEAR THAT, WHEN THERE EXISTS ADEQUATE STATE REMEDIES, 1983, ITSELF, WILL NOT LIE.

ISN'T THAT TRUE ONLY WHEN YOU ARE DEALING WITH PROCEDURAL DUE PROCESS CLAIMS?

ALL THAT IS AT ISSUE HERE.

MAYBE THAT IS WHAT I AM STILL HAVING TROUBLE WITH, IS THE FACT THAT THAT IS ALL THAT IS AT ISSUE. WE ARE TALKING ABOUT THE FAILURE TO NOTIFY, GIVING RISE TO THE BASIS FOR THE 1983?

AS ALLEGED BY THE PETITIONERS HERE. THAT'S CORRECT.

SO, THEN, HOW DOES POWELL CONTROL THAT ISSUE AT ALL?

WELL, BECAUSE AT THE ROOT OF IT LIES THE ANALYSIS OF WHETHER THERE IS A PROPERTY INTEREST AT ALL. YOU HAVE TO BEGIN WITH A PROPERTY INTEREST, AS IT IS ESTABLISHED IN THE STATE LAW, TO DETERMINE WHETHER -- TO DETERMINE WHAT SORT OF PROCESS OR WHETHER ANY PROCESS IS DUE.

BUT IF THE FEDERAL COURT HAS INTERPRETED THAT STATUTE AND HAS SDERMED WHAT THE GRAVELMENT OF IT IS, AND THAT IS DETERMINATIVE, WHY SHOULD WE COME BACK TO THE STATE LAW?

BECAUSE OF ROTH AND CASE LAW IN THIS COURT, IN POWELL, ALSO, COURTS HAVE STEADFASTLY SAID THAT, TO DETERMINE WHETHER A PROPERTY INTEREST EXISTS, YOU LOOK TO THE CASE LAW AND TO THE COMMON UNDERSTANDINGS AND CUSTOMS THAT EXIST WITHIN THAT STATE. WHAT THEY, ALSO, SAID, AND THIS WAS, ALSO, EXPLAINED IN THE SIXTH CIRCUIT, IN BROTHERTON AS WELL, THAT THE FIRST PLACE YOU LOOK AT IS THE SUPREME COURT OF THAT STATE. IN BROTHERTON, THERE WAS NO SUPREME COURT OPINION THAT WAS RELEVANT IN THE STATE OF OHIO. OBVIOUSLY THERE IS ONE HERE, IN POWELL. BUT EVEN IF YOU CHOOSE TO FIND A KERNEL OF SOME SORT OF PROTECTED PROPERTY INTEREST HERE IN THIS CASE, 1983 WOULD NOT LIE, BECAUSE THERE EXISTS ADEQUATE STATE REMEDIES HERE.

WHAT ARE THOSE -- WHAT ARE THE ADEQUATE STATE REMEDIES?

WHAT HAS BEEN ALLEGED ALTHOUGH NOT FRAMED BY PETITIONERS HERE, IS THAT THE -- FOR EXAMPLE, THAT THE CITY DELIBERATELY, WAS WITH DELIBERATE INDIFFERENCE, ALLOWED THIS POLICE OFFICER, OFFICER PLEASANT, WHO IS NOT A PARTY TO THIS PARTICULAR PROCEEDING, TO REMAIN ON FORCE, WHICH LED TO THE PARTICULAR DEPRIVATION. AS A COUNTY, WE ALONG, AS A MATTER OF COURSE AND PRACTICE, DO NOTHING TO FULFILL OUR STATUTORY DUTY TO TAKE REASONABLE CARE TO NOTIFY NEXT OF KIN. THIS AT LEAST SPEAKS TO INTENTIONAL TORTS.



NOW, THIS COURT, AS EARLY AS 1950, HAS SAID, EXCUSE ME, THAT, IN CASES OF GREAT INDIFFERENCE, THIS IS, AND I AM READING FROM KIRKSEY VERSUS JERNIGAN, THAT THE RIGHT TO RECOVER IN SUCH CASES IS ESPECIALLY APPROPRIATE TO IT. ORTOUS ENTER FIENNES WITH DEAD BODIES, WHERE MENTAL ANGUISH TO LIVING RELY VIFS IS NOT ONLY COMMITTED BUT IS INDEED THE CONSEQUENCE TO FOLLOW FROM IT. THAT IS HERE AND IT HAS BEEN HERE.

KIRKSEY IS LIMITED BY GONSALES, CORRECT?

YES. BUT WHAT YOU HAVE IS, WHEN YOU HAVE OUTRAGEOUS, WHEN YOU HAVE CLAIMS, THOUGH, STILL, OF OUTRAGEOUS ACTIONS THAT LEAD TO CASES THAT WOULD JUSTIFY DAMAGES THAT GO BEYOND MERE COMPENSATORY DAMAGES, I STILL THINK YOU HAVE A VALID CAUSE OF ACTION HERE.

SO THERE WOULDN'T BE ANY SOVEREIGN IMMUNITY?

WELL, IN THE EVENT THAT THERE WAS, I WOULD LIKE TO AT LEAST EXPLAIN TO YOU THAT THAT DOESN'T SPEAK TO THE ADEQUACY OF THE STATE REMEDY, WHEN YOU ARE TALKING ABOUT 1983. OKAY. IT IS INTERESTING TO NOTE THAT, IN PROBABLY THE LEADING CASE OF THE SUPREME COURT PERAT VERSUS TAYLOR, THERE WAS A STATE REMEDY THAT WAS NOT USED. IT DID NOT YIELD THE SAME SORT OF RESULTS. IN THAT CASE IT INVOLVED AN INMATE'S PROPERTY AT THE HANDS AFTER GUARD. THE STATE REMEDY THAT WAS AVAILABLE ALLOWED FOR NO JURY, NO PUNITIVE DAMAGES. YOU COULD NOT CITE THE INDIVIDUAL OFFICER WHO WAS RESPONSIBLE, AND IN CASES WHERE THE DEPRIVATION, FOR EXAMPLE, WHERE IT INVOLVED A PIECE OF PROPERTY THAT HAD NO INTRINSIC VALUE BUT HAD A GREAT DEAL OF EMOTIONAL VALUE AND WAS PERHAPS DONE AWAY WITH BECAUSE OF FLAGRANT INDIFFERENCE ON THE PART OF A PRISON GUARD, FOR EXAMPLE, YOU WOULD STILL BE STUCK IN A SITUATION WHERE YOU WOULD NOT GET THE KIND OF REMEDY YOU COULD UNDER, SAY, A TYPICAL 1983 ACTION. PERAT SAYS THAT THAT IS ADEQUATE STATE REMEDY TO PRECLUDE 1983. OUT OF THE ELEVENTH CIRCUIT, POWELL, NO RELATION, IN POWELL VERSUS GEORGIA, THAT COURT SAID THE FACT THAT THE STATE CAN INVOKE ITS IMMUNITY UNDER THE STATE COURT CLAIMS ACT DOES NOT MEAN THAT STATE REMEDIES THAT ARE AVAILABLE ARE INADEQUATE FOR THE PURPOSES OF 1983.

WELL, ARE THESE CLAIMS BARRED BY TRIANON AND EVERTON?

WELL, AS ALLEGED, I WOULD SAY THE POTENTIAL THERE IS NO. BUT, AGAIN, WE ARE IN A PECULIAR PLACE, PROCEDURALLY, BECAUSE THIS IS OBVIOUSLY A JUDGMENT ON THE PLEADINGS, AND WHAT WE ARE DOING IS TAKING US THROUGH EVERYTHING THAT IS ALLEGED, AND THAT IS FINE, BUT IT IS ANOTHER THING ALL TOGETHER TO ACCEPT THAT IT IS NOD ALLEGED HERE, AND THE FACT THAT A CAUSE OF ACTION WAS NOT PLED HERE DOES NOT MEAN THAT IT DOES NOT EXIST, AND THAT THE REMEDIES AREN'T THE SAME DOES NOT MEAN THAT IT IS NOT ADEQUATE.

IF STATE LAW SAID THAT ONLY INTENTIONAL CONDUCT --

I AM SORRY, JUSTICE SHAW.

IF STATE LAW SAID THAT ONLY INTENTIONAL CONDUCT, RELATIVE TO THE DEAD BODY, WAS ACTIONABLE, WOULD THAT BE SUFFICIENT STATE ACTION TO CIRCYOU MEAN SCRIBE -- TO CIRCUMSCRIBE THE FEDERAL ACT?

WOULD IT BE SUFFICIENT TO CLAIM A STATE LAW?

RIGHT. NOW YOU ARE TALKING ABOUT OUTRAGEOUS CONDUCT AND SO FORTH NOW. YOU HAVE A CAUSE OF ACTION. BUT IF IT IS JUST LIMITED TO INTENTIONAL.

I WOULD SAY THAT IT IS INTENTIONAL PLUS, BUT I WILL REMIND YOU THAT, EVEN THE OPINION IN CROCKER OUT OF THE FOURTH DCA, CHARACTERIZED THE ACTIONS HERE, AS OUTRAGEOUS CONDUCT AND TORTOUS INTERFERENCE. THAT WAS IN THE FIRST DISTRICT'S CASE.

THE ANSWER TO MY QUESTION WOULD BE YES. THAT WOULD BE SUFFICIENT. IS THAT YOUR ANSWER?

NO. I THINK IT WOULD BE INTENTIONAL PLUS SOMETHING ELSE, LIKE OUTRAGEOUS CONDUCT.

LET ME ASK YOU A QUESTION ABOUT THE CONSTITUTIONAL ISSUE IN POWELL. POWELL, IN GOING BACK TO WHAT JUSTICE ANSTEAD WAS ASKING, THERE WAS WHAT SEEMS TO BE A BALANCING GOING ON WITH THE MINIMAL IN -- INTRUSION. LET'S SAY, HYPOTHETICALLY, TOMORROW THE STATE PASSED A STATUTE THAT SAYS WE HAVE DECIDED THERE ARE TOO MANY VALUABLE BODY PARTS IN THE REMAINS, AND THEREFORE WE ARE GOING TO AMEND THE STATUTE, AND WE ARE GOING TO DECIDE WHEN AND IF WE ARE GOING TO RELEASE THE REMAINS TO THE NEXT OF KIN. BASED ON WHAT YOU ARE ARGUING HERE TODAY, THERE WOULD BE NO CONSTITUTIONAL CHALLENGE, BECAUSE THERE WOULD BE NO CONSTITUTIONAL INTEREST IN THE RIGHT OF THE SURVIVORS TO THE REMAINS. HOW DO YOU ANSWER THAT EXTREME SITUATION?

IT IS EXTREME.

WELL, BUT ONCE YOU SAY THERE IS NO INTEREST, THEN THERE WOULD BE, THETICALLY, AT LEAST -- THEORETICALLY, AT LEAST NO CONSTITUTIONAL LIMITATION ON WHAT THE STATE COULD DO.

GETTING PAST THE PROBLEMS OF THE FEDERAL LAW AND OTHER STATE LAWS THAT ARE THERE, WHAT WOULD BE CHALLENGED AT THAT POINT WOULD BE, AT THE VERY LEAST, AN ANALYSIS INTO WHETHER THERE WAS A PREDEPRIVATION PROCESS OR -- THAT WAS ADEQUATE, OR IF THE CIRCUMSTANCES CALLED FOR A POST DEPRIVATION PROCESS, BUT LIKELY IT WOULD BE THE SORT OF CASES THAT WERE LISTED IN PERAT, WHERE, WHICH WAS THE PERAT EXCEPTION, WHERE PREDEPRIVATION PROCEDURES NEEDED TO BE IN PLACE TO MAKE SURE THAT PROTECTIONS WERE ADEQUATELY SAFEGUARDED. IT IS DIFFICULT COMING UP WITH GOOD HYPOTHETICALS, BECAUSE WE ARE, IN MANY WAYS, IN UNCHARTERED TERRITORY, AND IT IS EXTREMELY DIFFICULT, BECAUSE WHILE THIS IS INTENSELY PRIVATE, IT IS, IN MANY WAYS, ALSO INTENSELY PUBLIC, BECAUSE OF THE GOVERNMENT'S NEED TO DEAL WITH BODIES. I SEE I AM OUT OF TIME, BUT I WANT TO MAKE IT CLEAR OBVIOUSLY THE COUNTY ISN'T HERE TO MINIMIZE WHAT THE CROCKERS HAVE ENDURED HERE, BECAUSE THERE ARE FEW THINGS WORSE THAN LOSING A SON OR A DAUGHTER, AND THAT THE COUNTY MIGHT HAVE HAD ANYTHING TO DO WITH IT, IT IS CERTAINLY REGRETABLE THAT THEY MIGHT HAVE HAD ANYTHING ABOUT THE CROCERS NOT FINDING OUT ABOUT IT FOR AN EXTRA THREE OR FOUR MONTHS, BUT UNDER THESE FACTS OR UNDER ANY SET OF CIRCUMSTANCES, IT CANNOT JUSTIFY CREATING A CAUSE OF ACTION THAT DOES NOT AND CANNOT EXIST. SO I WOULD JUST URGE YOU TO REAFFIRM YOUR POSITION IN POWELL AND ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE.

THANK YOU, COUNSEL. REBUTTAL?

MAY IT PLEASE THE COURT. MY NAME IS DEA ABRAMSCHMITT. I AM COCOUNSEL REPRESENTING JOHN AND BETTY CROCKER. I AGREE WITH JUSTICE PARIENTE THAT, HOW I READ POWELL WAS THAT IT REALLY WAS A BALANCING ACT, WHERE THEY WERE TRYING TO DECIDE THE CONSTITUTIONALITY OF A SPECIFIC STATUTE, AND THIS IS A DIFFERENT, IN A LOT OF WAYS, THE CASE IS THE SAME. I MEAN THE PROPERTY INTERESTS ARE WHETHER OR NOT OBVIOUSLY THOSE ARE ISSUES THAT OVERLAP, BUT YOU CANNOT SAY THAT THERE IS A STATE, COMPELLING STATE INTEREST IN NOT INFORMING A FAMILY THAT THEIR CHILD IS DECEASED. THERE IS JUST, YOU KNOW, IT IS JUST TOTALLY DIFFERENT FROM POWELL IN THAT RESPECT.

THAT IS REALLY NOT THE ISSUE, THOUGH, IN A 1983 ACTION, IS IT? DON'T YOU FIRST HAVE TO ESTABLISH THIS RECOGNIZED PROPERTY INTEREST?

RIGHT.

WHAT PRINCIPLE OF COMMON LAW OR WHAT STATUTORY SCHEME DO YOU RELY ON TO ESTABLISH THIS PROPERTY INTEREST THAT, THEN, THE VIOLATION OR THE TAKING AWAY OF WHICH, WITHOUT DUE PROCESS, WOULD CONSTITUTE THE BASIS OF A 1983 ACTION?

COUNSEL POINT POINTED TO -- POINTED TO, CITED ROTH SEVERAL TIMES, TALKING ABOUT HOW THAT IS WHERE WE LOOK TO THE STATE TO DECIDE WHETHER THE STATE HAS MADE THE RIGHTS OR IF THERE IS, IF THEY HAVE CREATED ANY RIGHTS AT ALL, BUT ROTH, ALSO, STATED THAT, WHETHER THE SUBSTANTIVE INTERESTS CREATED BY A STATE RISES TO THE LEVEL OF A CONSTITUTIONALLY PROT PROTECTED PROPERTY AND A QUESTION OF FEDERAL LAW. POWELL WAS DECIDED BEFORE SOME OF THESE CASES CAME UP AND THE SIXTH CIRCUIT CASE HAD NOT BEEN DECIDED YET. I DON'T KNOW IF THAT WOULD HAVE MADE ANY DEFERENCE WITH THAT. BUT -- DIFFERENCE WITH THAT. WHAT WE ARE ASKING IS THAT THE COURT CERTIFY THE CERTIFIED QUESTION RELATING TO ALL INTERFERENCE OF A DEAD BODY, AND WE ARE URGING, OF COURSE, THAT IT IS RIGHT TO LIMIT IT, ESPECIALLY BECAUSE OF THE DIFFERENCES IN WHAT POWELL WAS ACTUALLY DECIDING, AND WHAT WAS BEFORE IT. PERSONALLY, I DON'T THINK THAT THEY HAD TO MAKE A SWEEPING STATEMENT THAT THERE WAS NEVER ANY PROPERTY INTEREST, CONSTITUTIONALLY PROTECTED PROPERTY INTEREST, IN ORDER TO FIND THAT THE STATUTE WAS CONSTITUTIONAL. IT IS A BALANCING ACT. THEY DID HAVE A COMPELLING STATE INTEREST. WE HAVE PROPERTY LAWS. WE HAVE INFRINGEMENTS ON OUR LIBERTY AND FREE SPEECH AND REAL PROPERTY ALL THE TIME. IT IS NOT SOMETHING THAT THEY HAD TO DECIDE ON THAT, AND THEY CAN DECIDE THAT WE HAVE GOT A LEGITIMATE 1983 CLAIM OR A PROPERTY INTEREST, WITHOUT HAVING TO OVERRULE EVERYTHING THAT POWELL DID, AND I DON'T SEE THAT IT IS GOING TO JEOPARDIZE THE RIGHT FOR THE STATE, WHEN IT HAS A LEGITIMATE STATE INTEREST AND IN HARVESTING THE CORNEAS, AND THINGS THAT GO TO THE WELFARE OF THE STATE, I DON'T SEE WHERE THERE THAT IS GOING TO JEOPARDIZE THAT, TO RECOGNIZE THAT WE DO, FLORIDA HAS GIVEN US CERTAIN RIGHTS AND INTERESTS IN THE BODY OF OUR DECEASED LOVED ONE.

IN LOOKING TO WHAT THE CLAIM IS HERE, ARE WE -- WAS THERE AN AMEND COMPLAINT? IS THAT WHAT WE ARE LOOKING TO, WHATEVER WAS ALLEGED IN THE PLAINTIFF'S AMENDED COMPLAINT?

YES.

SO WHATEVER THE ALLEGATIONS ARE HAVE TO BE TAKEN AS TRUE, TO DETERMINE WHETHER OR NOT THERE IS A CAUSE OF ACTION.

CORRECT. CORRECT. AND I SEE THAT MY TIME IS UP. AND WE ARE ASKING AND I HOPE THAT YOU WILL RECEDE FROM YOUR HOLDING IN POWELL AND LET US GO ON.

THANK YOU VERY MUCH. THANKS TO ALL OF YOU, CONES HE WILL. WE WILL BE IN RECESS -- COUNSEL. WE WILL BE IN RECESS FOR 15 MINUTES. BAILIFF: PLEASE RISE.