NEXT CASE ON THE COURT'S CALENDAR IS TROY MERCK VERSUS THE STATE OF FLORIDA. MR. BOLOTIN.

MAY IT PLEASE THE COURT. I AM STEVE BOLOTIN OF THE PUBLIC DEFENDER'S OFFICE IN BARTOW. I REPRESENT MR. MERCK. THIS IS A CASE WHERE THE DEATH SENTENCE IS DISPROPORTIONED AND THE DEATH SENTENCE IS NOT VALIDATED. THAT WAS BE BASED ON THE TOTALITY OF THE CRIME AND THE FACT THAT THIS IS NOT ONE OF THE MOST MITIGATED HOMICIDES AND THERE IS SUBSTANTIAL MITIGATION IN THIS CASE, AND THE BACKGROUND MITIGATION IS INTRICATELY AND CAUSELY RELATED TO THE CIRCUMSTANCES OF THE COMMISSION OF THE CRIME.

IT IS A FACTUAL MATTER, AND I CAN'T RECALL RIGHT NOW. DID THE DEFENDANT AND THE VICTIM KNOW EACH OTHER PRIOR TO THIS EVENING?

NO. THEY DID NOT. THEY WERE BOTH DRINKING IN THE SAME BAR DURING THE COURSE OF THE EVENING BUT THEY APPARENTLY DID NOT EVEN ENCOUNTER EACH OTHER IN THE BAR. THE CIRCUMSTANCES WERE, FIRST, EVERYBODY INVOLVED IN THE CASE, AS FAR AS YOU CAN TELL FROM THE RECORD, WAS SUBSTANTIALLY INTOXICATED.

DOES THAT INCLUDE THE WOMAN WHO WAS THE DRIVER OF THE CAR THAT -- AS I UNDERSTAND IT, THE VICTIM WAS ACTUALLY TALKING TO A WOMAN WHO WAS THE DRIVER OF A CAR.

OKAY.

THAT WAS KATHRYN SULLIVAN, WHO WAS AN OFF DUTY EMPLOYEE OF THE BAR. SHE TESTIFIED THAT SHE HAD BEEN DRINKING. SHE DID NOT THINK SHE WAS DRUNK BUT SHE WAS SUFFICIENTLY CONCERNED THAT SHE DIDN'T FEEL COMFORTABLE DRIVING HOME. THE TESTIMONY OF THE STATE'S KEY WITNESS, NEAL THOMAS, WAS THAT HE AND TROY WERE DRINKING. THEY WERE NECK AND NECK, DRINKING APPROXIMATELY THE SAME AMOUNT, WHICH, ACCORDING TO THE STATE WITNESSES' TESTIMONY, WOULD HAVE BEEN FIVE BEERS AND TWO MIXED DRINKS. THERE WAS, ALSO, TESTIMONY THAT, AT THE END OF THE EVENING, IT WAS DOLLAR TEQUILA NIGHT AT THE BAR. HE TESTIFIED THAT THERE WAS TEQUILA AT THE TABLE BUT HE, NEAL, DID NOT RECALL DRINKING ANY.

WHAT DOES THIS GO TOWARDS, THESE FACTS? IS IT GOING TOWARDS THE JUDGE SHOULD ASSIGN MORE WEIGHT TO UNDER EXTREME MENTAL, WHATEVER --

NO. IT IS GOING BASICALLY TO THREE DIFFERENT THINGS, GOING TO THE TOTALITY OF THE CIRCUMSTANCES OF THE COMMISSION OF THE CRIME, GOING TO THE DUAL TWIN CAMPBELL ISSUES THAT ITCH RAISED IN THE BRIEF, THE FAILURE TO CONSIDER TROY'S LONG HISTORY OF ALCOHOLISM, THE FAILURE TO --

WHEN YOU SAY A LONG HISTORY OF ALCOHOLISM, I DO SEE SOME QUESTION ABOUT HOW SOMEONE AT 19 CAN BE SO USED TO ALCOHOL THAT -- IS THAT WHAT YOU ARE TALKING ABOUT, LONG HISTORY?

YES.

WHEN HAD HE STARTED DRINK HAD GONE?

I WILL GET INTO THAT, BECAUSE THAT IS INTERESTING, BECAUSE THE ONE WITNESS, THE ONLY

WITNESS WHO IS -- WE HAVE GOT FOUR EXPERT WITNESSES, THREE FOR THE DEFENSE AND -- FOUR FOR THE DEFENSE AND THREE FOR THE STATE, ALL OF WHOM AGREE THAT, IF HE WERE TO DRINK FOR HIS BODY WEIGHT, AN APPROXIMATELY 2.1 BLOOD ALCOHOL WOULD HAVE RENDERED HIM SUBSTANTIALLY IN TOX INDICATED. -- INTOXICATED.

THE FACT THAT THIS CRIME OCCURRED AND WHAT HE DID AFTERWARDS, THAT THAT REFUTES HIS ACTUAL STATE. I MEAN HE WASN'T FALLING DOWN DRUNK. HE WAS --

HE WAS PHYSICALLY ABLE TO DO THE ACT. I MEAN THIS IS NOT A LONG SERIES -- THIS IS NOT A CASE LIKE, FOR EXAMPLE, THE PAUL BEASLEY JOHNSON CASE, WHERE THE DRUG MITIGATOR WAS REJECTED ON THE GROUNDS THAT, THROUGH THE COURSE OF THE EVENTS OF HOURS THROUGHOUT AN EVENING, THAT THE EVIDENCE REFLECTED LESS AND LESS DRUG INVOLVEMENT IN THE CASE. THIS WAS A CASE, THIS WAS A SUDDEN SENSELESS, MOTIVE LESS HOMICIDE THAT OCCURRED AFTER A POINTLESS CONVERSATION IN THE BARROW-CONFRONTATION IN THE BAR PARKING LOT AT CLOSING TIME.

BUT THERE WAS ENOUGH TIME. -- THEY DID HAVE THE CONFRONTATION AND HE DIDN'T IMMEDIATELY STAB HIM. DIDN'T HE GO TO THE CAR TO RETRIEVE THE WEAPON THAT WAS USED AND TAKE OFF HIS SHIRT?

THAT IS AN INTERESTING QUESTION. THERE ARE TWO STATE WITNESSES THAT SAY THAT HAPPENED, BUT THE TWO STATE WITNESSES, MAYBE BECAUSE THEY WERE BOTH BOTH INTOXICATED, COMPLETELY CONTRADICT WHAT OCCURRED.

HOW ARE WE TO VIEW THAT?

I AM NOT ASKING YOU, AT THIS POINT, TO FIND THAT NEAL THOMAS COMMITTED THE CRIME OR THAT TROY MERCK DIDN'T. I DO THINK THAT SOME EVIDENCE RELATING TO THE POSSIBILITY THAT NEAL WAS MORE INVOLVED IN THE CRIME THAN WHAT HE SAID SHOULD HAVE BEEN ADMITTED, BUT WHAT I AM ARGUING AT THIS POINT IS JUST CIRCUMSTANCES OF THE CRIME. WHAT YOU HAVE GOT IS THIS 19-YEAR-OLD ALCOHOLIC WITH A BLOOD ALCOHOL OF .21 COMES OUT OF THE BAR. THIS TOTALLY CONTRADICTS THE TESTIMONY OF THE WITNESS KATHRYN SULLIVAN BUT CAME OUT OF THE BAR AND THE WOMAN SAID, IN ATONE OF VOICE, THAT HE THOUGHT HE HAD AN ATTITUDE. GET OFF MY CAR. THE WOMAN SAID SHE THOUGHT IT WAS GLENN THAT SAID THAT, GET OFF MY CAR, BUT THAT IS NEITHER HERE NOR THERE. NEAL SAYS I, NEAL WAS LOOKING FOR SOMEONE TO PROVOKE. I WAS CRUISING FOR A FI. I DIDN'T LIKE THE WOMAN'S ATTITUDE, AND THEN I SAW THAT GUY. JIM NEWTON. THE STATE IT WAS TROY WHO WAS PROVOKING JIM NEWTON BUT NEAL THOMAS SAID, NO, IT WASN'T TROY. IT WAS MAE.

BUT HE DIDN'T SAY THAT HE DID THE ACT.

NEAL DIDN'T SAY HE DID THE ACT. NO WAY. HE IS NOT GOING TO SAY. THAT FRANKLY THE EVIDENCE, IF YOU GO BACK TO THE ORIGINAL TRIAL, THE EVIDENCE ON THAT POINT IS CONFLICTING. I AM NOT SAYING THIS COURT SHOULD FIND, AS A MATTER OF LAW, THAT TROY DIDN'T DO IT. ONE OF THE ISSUES IS THAT THE JURY SHOULD HAVE BEEN ABLE TO HEAR THE COMPLETE CIRCUMSTANCES OF THE CRIME, BUT BASICALLY WHAT I AM GETTING AT HERE AS TO INTOXICATION IS IT IS A CAMPBELL ISSUE, A SENTENCING ORDER HERE TIED UP IN PROPORTIONALITY. WE HAVE GOT A SENTENCING ORDER WHERE THE JUDGE FILED THREE AGGRAVATORS. ONE IS THE FELONY PROBATION AGGRAVATOR, THE EXPOS FACT--- FACTO. I HAVE ARGUED THAT IT SHOULDN'T BE FOUND, BUT EVEN THE INNUENDO THAT IT SHOULD BE FOUND, BUT THAT DOESN'T GET BACK TO THE REGION --

WOULD YOU GET BACK TO THE QUESTION. THIS IS A 19-YEAR-OLD WHO, ALREADY, BY 19 YEARS OLD, HAD ALREADY COMMITTED SEVERAL FELONIES AND HAD ALREADY BEEN COMMITTED TO THE DEPARTMENT OF CORRECTIONS WITHIN A YEAR OR TWO BEFORE THIS MURDER, BUT DID

THOSE OTHER ROBBERIES, DID THOSE INVOLVE ALCOHOLIC STATES?

WE KNOW THERE WERE A SERIES OF FIVE CONVENIENCE STORE ROBBERIES THAT OCCURRED IN THREE ADJOINING COUNTIES IN THE SAME GENERAL PERIOD OF TIME. WE DON'T KNOW WHAT LEVEL OF -- THE ONLY ONE THAT THE STATE PRESENTED EVIDENCE OF WHAT OCCURRED WAS THE ONE FROM PASCO COUNTY, WHERE THERE WAS -- I THINK A KNIFE WAS BRANDISHED AND THE PERSON WAS PUSHED TO THE FLOOR.

WELL, THE TRIAL JUDGE FOUND THAT, IN EACH ONE OF THEM, A KNIFE --

IN THE OTHER FOUR, THE CONVICTION, THE PLEA WAS TO ROBBERY WITH A DEADLY WEAPON, SO WE KNOW THAT A KNIFE WAS USED IN SOME WAY. NOW, GO BACK TO YOUR QUESTION ABOUT WHAT EVIDENCE IS THERE OF ALCOHOL ITCH, THAN IS A GOOD POINT, BECAUSE THE STATE, IN ITS BRIEF, SAYS WE DON'T DISAGREE WITH THE CASES CITED BY THE APPELLANT THAT A HISTORY OF ALCOHOLISM MAY BE A VALID OR IMPORTANT MIGHT GATOR IN A -- MITIGATOR IN A GIVEN CASE. WHAT WOULD BE A BETTER CASE THAN THAT, WHERE THIS ONE REVOLVES AROUND SOMEBODY WHO IS SO CONSUMED BY ALCOHOL, WHO IS NOT EVEN LEGAL AGE, WHO CAN'T DRINK. TROY MERCK IS THE SON OF LOIS MERCK AND NOBODY KNOWS WHO HIS FATHER WAS. HIS STEPFATHER WAS AN ALCOHOLIC. HIS MOTHER WAS ABSOLUTELY VICIOUS THROUGHOUT HIS LIFE, BOTH PHYSICALLY AND MENTALLY. SHE ABUSED DRUGS.

I AM ASKING TO HIS HISTORY.

THIS IS RELEVANT TO HIS HISTORY OF ALCOHOLISM. I WANT TO SHOW IT WAS AVAILABLE IN THE HOUSE. HIS SISTER TESTIFIED THAT THERE WAS ALWAYS SOMEBODY DRUNK THERE, DRUNK HE WILL UNCLES FIGHTING IN THE HOUSE AND ALL. LOIS MERCK SAID THAT ONE OF HER BOYFRIENDS, RAY PRICE, STARTED PUTTING ALCOHOL IN HIS BABY BOTTLE, TO GET HIM TO SHUT UP AND GO TO SLEEP. AS TO WHAT AGE THIS COMES FROM, AS LATE AS 7 OR 4 OR 5, HE WAS TAUGHT BY HIS BROTHER RAY PRICE AND TONY TO START HUFFING CHEMICALS, THE GAS AND THE GLUE. THE TESTIMONY FROM HIS SISTER WAS, WHEN THERE WAS ALCOHOL AROUND, ON THE TABLE ONE THE REFRIGERATOR, HE WOULD GET IT OR SOMEBODY WOULD GIVE IT TO HIM. NOBODY TOLD AM NOT TO DO. THAT WAS THAT A RARE OCCURRENCE THAT THERE WAS THERE WAS ALCOHOL ON THE SNABL UNDER THE TOTALITY -- ON THE TABLE? UNDER THE TOTALITY OF THIS EVIDENCE, I WOULD DOUBT IT, BECAUSE THERE WAS SOMEBODY IN THE HOUSE ALWAYS DRUNK AND BRAWLING. HE STARTED USING ALCOHOL REGULARLY AT THE AGE OF 11. SO YOU HAVE GOT REGULAR DRINKING, ON HIS PART, FROM THE AGE OF 11 TO 19.

WAS THERE OTHER CRIMINAL CONDUCT THAT OCCURRED, FROM 11 ON?

WHAT I KNOW OF IS THIS. I KNOW OF THE FIVE CONVENIENCE STORE ROBBERIES THAT OCCURRED. IT WAS CONSIDERABLY LATER THAN 11. I WOULD SAY PROBABLY ABOUT 17. AND WE, ALSO, KNOW ABOUT THE INCIDENCE WHICH WAS NOT ADMITTED INTO EVIDENCE AT THIS TRIAL, BECAUSE IT WAS -- IT RESULTED -- IT WAS WHEN HE WAS 13 AND IT RESULTED IN A JUVENILE ADJUDICATION, AND THAT WAS THE BASIS OF THE REVERSAL THE FIRST TIME AROUND.

DID HE EVER GET ANY TREATMENT FOR HIS ALCOHOL CONDITION?

NO INDICATION THAT EVER DID. IN ADDITION, HE HAS GOT A SEVERE CASE OF ADHD AND RITALIN WAS PRESCRIBED FOR HIM BUT HIS NEGLECTFUL MOTHER JUST -- HE NEVER GOT IT.

HOW FAR DID HE GO IN SCHOOL?

HE WENT TO THE EIGHTH GRADE. I HOPE I HAVE TIME TO GET TO THE CIRCUMSTANCES UNDER WHICH HE DROPPED OUT OF THE EIGHTH GRADE, BECAUSE IF YOU READ HIS PRO SE BRIEF IN THIS CASE, HE IS A BRIGHT GUY. THIS IS A GUY THAT HAD POTENTIAL AT ONE TIME, AND IT WAS

TAKEN AWAY NOT THROUGH HIS JUST BAD ATTITUDE OR NOT CARING. THERE WAS A POINT IN TIME WHEN THIS GUY COULD HAVE DEVELOPED INTO SOMETHING, AND IT WAS TAKEN AWAY FROM HIM, AND I HOPE I HAVE TIME TO GET TO THAT, BUT I NEED TO CONTINUE --.

YOU ARE GOING OVER A LOT OF HELPFUL INFORM ACHE, BUT IN DOING -- INFORMATION, BUT IN DOING THE PROPORTIONALITY ANALYSIS, IT SEEMS TO ME UNDER THE PROOF THAT WAS SUBMITTED HERE, YOU HAVE TO ACCEPT THIS CASE AS ONE FOUND BY THE TRIAL JUDGE AND FOUND BY THE JURY, TO BE A BRUTAL, SENSELESS, KILLING OF AN INNOCENT VICTIM.

I WOULD AGREE THAT IT WAS BRUTAL. I WOULDN'T NECESSARILY AGREE THAT IT WAS TORTUROUS, IN HAC TERMS.

WHAT I WOULD ASK YOU TO DO NOW, AND DO IT BASED ON YOUR BRIEF OR HOWEVER YOU WANT TO DO IT, BUT IN OUR PROPORTIONALITY REVIEW, WE HAVE GOT TO, NOW, LOOK AROUND AT THE OTHER CASES WE HAVE HAD, WHERE WE HAVE SAID THAT EITHER THE DEATH SENTENCE IS APPROPRIATE OR IT IS NOT, AND WHAT ARE THE OTHER CASES THAT YOU WOULD POINT -- SPECIFICALLY.

I WILL DO THAT. THE FIRST THING I WANT TO POINT OUT ON THAT, AND THIS IS SOMETHING, WHEN I WAS DOING THIS BRIEF AND, ALSO, THE ORIGINAL BRIEF IN '94, I THOUGHT I WOULD FIND CASES WITH SIMILAR FACTUAL CIRCUMSTANCES OF THE MURDER AND I DIDN'T AND THE STATE DIDN'T, AND THAT IS KIND OF STUNNING, BECAUSE IT DOESN'T SEEM LIKE IT WOULD BE AN UNIQUE CRIME, AND IT MAKES ME WONDER IF A LOT OF CRIMES THAT ARE ESSENTIALLY SIMILAR TO THIS WIND UP PLEA TO SAY LIFE OR PLEAS TO DCA AND WIND UP IN COURTS OF APPEAL. I DON'T HAVE ANYTHING DIRECTLY ON POINT BUT I WOULD, ALSO, SAY NEITHER DOES THE STATE. THE COURT SAID IN NEIBERT VERSUS STATE THAT THE COURT INVOLVES SUBSTANTIAL MITIGATION THAT MAY MAKE THE DEATH PENALTY INAPPROPRIATE, EVEN WHEN HEINOUS AND ATROCIOUS HAS BEEN PROVED, AND I CITE FIVE CASES WHERE HAC, HAD AGGRAVATORS, WHERE THOSE WERE FOUND, IN THE COURSE, AND THE DEATH PENALTY WAS FOUND DISPROPORTIONATE. VOORHEES VERSUS STATE, ROBBERY AND HIC. KRAMER VERSUS STATE, PRIOR VIOLENT FELONY IN HAC, WILSON VERSUS STATE, PRIOR VIOLENT FELONY IN HAC. WILSON IS, ALSO, VERY RELEVANT, IN THAT IT WAS A CASE WHERE THERE WAS NO FELONY CLAIMED THERE AND THE COURT FOUND THAT THE PREMEDICATION, IF -- PREMEDITATION, IF ANY, WAS OF SHORT DURATION AND HERE THE SHORT DURATION WAS FUELED BY ALCOHOL.

WHAT IS THE POINT THAT NEEDS TO BE MADE?

THAT IS A POINT THAT NEEDS TO BE MADE AND ALSO RESPONDING TO JUSTICE ANSTEAD'S QUESTION, I AM ARGUING HERE FOR PROPORTIONALITY. I THINK THAT THE LIFE SENTENCE SHOULD BE FOUND THAT JUSTICE WOULD BE A LIFE SENTENCE AND AT SATISFACTORY IN THIS CASE. BUT THE OTHER THING THAT THE COURT COULD DO IS EFFECT THE ERRORS IN THE JUDGE'S CASE, AND THE COURT WOULD PRESUMABLY, I HOPE, POSTPONE ANY DECISION ON PROPORTIONALITY, UNTIL THE ERRORS ARE CLEARED UP. IN THIS CASE, WE HAVE GOT AN AGGRAVATOR THAT WAS FOUND AND GIVEN GREAT WEIGHT THAT WE KNOW IS LEGALLY INVALID BECAUSE IT VIOLATES EXPOSE FACTOR -- EXPOS FACTO, AND IN ADDITION TO THE GREAT DEAL OF MITIGATION IN THIS CASE AND IN ADDITION TO THAT THE JUDGE GAVE THAT AGGRAVATING FACTOR GREAT WEIGHT, THE PROR PORTIONALITY ISSUE IN THIS CASE, THREE AGGRAVATORS ARE IN THIS CASE. WE HAVE THE HISTORY OF FAILING TO EITHER CONSIDER THE LONG HISTORY OF ALCOHOLISM OR ITS EFFECTS AT THE TIME. WHAT THE TRIAL JUDGE DID ON THE LATERAL LEVEL IS ONLY CONSIDER IT STATUTORY ADMITTING TO DECREASED CAPACITY AND HE DIDN'T CONSIDER THAT, EVEN IF IT COULD RISE TO THAT LEVEL, THAT COULD BE A A MITIGATING FACTOR, BECAUSE THAT IS AN ERROR UNDER THE CHESHIRE CASE AND THE CLARK CASE. WE HAVE GOT TWO MAJOR POINTS. AGAIN, THIS IS A 1-YEAR-OLD DEFENDANT WHERE THE UNDON'T DRA DIRECT -- THE UNCONTRADICTED TESTIMONY IS HE HAS GOT THE -- I AM RAMBLING

HERE AND INTO MY REBUTTAL TIME.

DID THE STATE COMMENT ON THAT? EMOTIONAL AGE?

NO, HE DID NOT. THERE WAS NO TESTIMONY AS TO EMOTIONAL AGE. HE TESTIFIES THAT HE HAS A BRIGHT, NORMAL IQ, WHICH THE DEFENSE AGREES. THIS IS SOMETHING THAT HAD POTENTIAL AND MAY STILL HAVE POTENTIAL. NOW, GOING BACK TO DR. MARIN, DOCTOR HEIDI, THE DEFENSE EXPERT, EXAMINED THE DEFENDANT FOR SIX HOURS AND TALKED TO HIS RELATIVES AND PEOPLE WHO KNEW HIM AS A CHILD AND DELVED INTO THIS. DR. MARIN, WHO WAS ORIGINALLY A DEFENSE EXPERT IN THE CASE AND WAS NOT CALLED TO TRIAL AND THEN POPS UP AS A WITNESS IN CASE. I COULDN'T ARGUE IT DUE TO LACK OF EVIDENTIARY DEVELOPMENT, BUT I DON'T KNOW WHAT HE IS DOING TESTIFYING FOR THE STATE HERE, BUT HE SAID I DID NOT EXAMINE THIS MAN. I TALKED TO HIM FOR ABOUT AN HOUR AND I RANSOM PSYCHOLOGICAL TESTS BUT I INTENTIONALLY DID NOT GO INTO HIS BACKGROUND. I DON'T KNOW ANYTHING ABOUT HIS BACKGROUND, BUT THE PERSONALITY DISORDER NOS THAT I FOUND IS CONSISTENTLY WITH A CRUEL AND NURBL UPBRINGING. EVERYBODY AGREES THAT THE AMOUNT HE HAD TO DRINK AND THIS PROBABLE BLOOD ALCOHOL LEVEL, THIS GUY WEIGHS 144 POUNDS AS COMPARED TO NEAL THOMAS'S 165, AND THEY HAD THE SAME AMOUNT TO DRINK. EVERYBODY, INCLUDING DR. MARIN, AGREES THAT THIS WOULD RENDER SOMEBODY INTOXICATION. THE ASSUMPTION THAT THIS GUY HAS BEEN DRINKING LARGE APARTMENTS FROM A VERY YOUNG AGE AND IS SOMETHING THAT HE DOES EVERYDAY AND WOULD HAVE DEVELOPED A TOLERANCE TO IT. NO TESTIMONY THAT HE DOES HAVE A TOLERANCE, JUST THAT ANYBODY THAT DRINKS THAT MUCH WOULD HAVE A TOLERANCE SO THEREFORE WE CAN DISCOUNT THAT.

HOW ABOUT THE SCENE OF THE BAR AND RESTAURANT WITH THROWING THE KEYS ACROSS AND "DON'T USE MY MY REAL NAME". IS THAT PART OF THE EVIDENCE?

YES. THAT IS PART OF THE EVIDENCE BUT NUMBER ONE, I DON'T THINK THE FACT THAT SOMEBODY CAN CATCH A SET OF CAR KEYS, ESPECIALLY WITH SOMEBODY WHO HAS FAIRLY GOOD MOTOR SKILLS, IT DOESN'T SHOW THAT HIS MIND WASN'T IMPAIRED BY ALCOHOL, BUT THE REAL WEIGHING OF THAT IS KATHRYN SULLIVAN, THE ONE WHO SAID THAT THE STABER WAS WEARING KHAKI PANTS, WHICH WE KNOW TROY WASN'T, AND THE WOMAN WHO SAYS THAT HE PICKED THE FIGHT WITH THE VICTIM, WHICH WE KNOW HE DIDN'T, ACCORDING TO NEAL THOMAS, SHE TESTIFIED THAT THE OTHER GUY THREW THE KEYS AND SAID NICE CATCH, TROY, AND TROY SAID DON'T CALL ME BY MY REAL NAME AND THE FIRST GUY SAID I SAID BOY. THE GUY WHO SUPPOSEDLY SAID ALL OF THAINGS, NEAL THOMAS, A KEY STATE WITNESS, WHO WAS NOT LOOKING TO DO TROY MERCK ANY FAVORS IN THIS TRIAL, HE DOESN'T RECALL DOING ANY OF THESE THINGS. THAT TELLS ME EITHER ONE OF THE OTHER OR BOTH OF THESE KEY WITNESSES WAS SO DRUNK THAT THEY DON'T KNOW WHAT HAPPENED OR BOTH OF THOSE KEY WITNESSES IS LYING. I AM NOT ARGUING FOR A JOA AT THIS POINT. I WISH I COULD BUT I CAN'T. WHAT I AM ARGUING FOR IS THAT THE TOTALITY OF THE CIRCUMSTANCES OF THIS CASE IS IT IS A BUNCH OF INTOXICATED PEOPLE OUTSIDE A BAR AT CLOSING TIME. YOU HAVE GOT A 19-YEAR-OLD DEFENDANT WHO SHOULDN'T HAVE BEEN DRINKING IN THE FIRST PLACE, WHOSE BLOOD ALCOHOL, ACCORDING TO THE CHIEF TOXICOLOGISTS, THE LOW END OF THE RANGE IS THE DUI LEVEL AND THE HIGH END IS TYPICAL OF THE DUI LEVEL. THIS IS NOT A DEATH CASE AND I WILL RESERVE MY TIME, IF I HAVE ANY.

MY NAME IS BOB LANDRY WITH RESPECT TO THIS APPEAL AND WITH RESPECT TO THE FIRST COUPLE OF ISSUES REGARDING THE TRIAL COURT'S FAILURE TO GIVE CONSIDERATION TO LONG-TERM ALCOHOL ABUSE AS A MITIGATING FACTOR, AS WE POINTED OUT IN OUR BRIEF, THE TRIAL COURT COULD PER MISERABLY GIVE MINIMAL WEIGHT TO THIS, IN LIGHT OF FACTUAL PREDICATE TESTIMONY SUPPORTING IT.

THE STATE DOESN'T CONCEDE THAT, IF WE WERE TO LOOK AT ALL OF THE RECORDS IN THIS CASE, THAT IT WOULD SUPPORT A FINDING THAT THIS WAS A PERSON THAT HAD ABUSED ALCOHOL FROM AN EARLY AGE?

WELL, I DON'T -- I THINK THE ONLY TESTIMONY THAT COMES IN ALONG THAT LINE IS FROM THE MENTAL HEALTH EXPERTS OR THE DR. MARINE OR DR. HEIDI, WHO TALKED ABOUT, PRETTY MUCH, SELF REPORTS BY MERCK ON. THAT WE HAD TESTIMONY, FOR EXAMPLE, ALL OF THE FOSTER PARENTS, THERAPEUTIC PARENTS, ALL OF THESE PEOPLE WHO WERE TESTIFYING AS TO THE DEFENDANT'S CHARACTER AND UPBRINGING AND THE TIME IN WHICH THEY HAD HIM IN THEIR CUSTODY, AWAY FROM THE MOTHER, I MEAN, THEY DIDN'T MENTION ANYTHING AT ALL ABOUT ALCOHOL. THE TWO COUSINS -- I AM SORRY.

DIDN'T, THOUGH, THE STATE'S EXPERTS GIVE, AS A REASON THAT A .21 WOULD NOT HAVE AFFECTED HIM, THE FACT THAT HE HAD DEVELOPED A TOLERANCE TO ALCOHOL?

YEAH. DR. MARIN GAVE AN OPINION ALONG THAT LINE.

IS DR. MARIN A STATE EXPERT?

HE WAS A STATE EXPERT IN THIS CASE.

WOULDN'T THAT SUPPORT THE POSITION THAT THERE HAD BEEN LONG-TERM ABUSE?

THE KROOINGS -- THE CONCLUSION, I GUESS WE HAVE TO DETERMINE EXACTLY WHAT THAT ALL WAS PREDICATED UPON. I MOON, IF MARIN TESTIFIED THAT HE ONLY TALKED TO MERCK, HE DIDN'T TALK TO ANYBODY ELSE, THE POINT I WAS MAKING IS THAT THERE WERE A LOT OF PEOPLE WHO TESTIFIED AS TO MERCK'S UPBRINGING AND YOUTH, FOR EXAMPLE HIS COUSINS THAT GREW UP ACROSS THE WAY IN THE TEENAGED YEARS, I GUESS, WITH HIM, AND ONE OF THEM SAID I ONLY SAW HIM DRINK ALCOHOL ON ONE OCCASION.

LET ME ASK YOU ABOUT DR. MARIN THEN. HOW IN DEPARTMENT WAS HIS TESTIMONY CONCERNING HOW LONG YOU WOULD HAVE HAD TO HAVE BEEN ABUSING ALCOHOL TO HAVE DEVELOPED THIS? ANY OF THAT? WAS THAT DEVELOPED TO THAT POINT?

I DON'T THINK IT WAS, THROUGH MARIN. I THINK MARIN WAS ASKED YOU KNOW, A QUESTION, QUESTIONS CONCERNING, PRIMARILY I THINK HE WAS TALKING ABOUT EMOTIONAL AND MENTAL DISTURBANCE, AND HE OPINED THAT MERCK DID NOT HAVE THAT. HE WAS ESSENTIALLY AN ANTISOCIAL PERSONALITY WITH NARCISSISTIC FEATURES AND ALL OF THIS, AND THAT HIS DRINKING THAT NIGHT OR DRINK AGO GREAT AMOUNT OF ALCOHOL ON THAT NIGHT -- OR DRINKING A GREAT AMOUNT OF ALCOHOL ON THAT NIGHT WASN'T NECESSARILY, DIDN'T RISE TO THE LEVEL OF EMOTIONAL OR MENTAL DISTURBANCE, BECAUSE HE GATHERED THAT HE HAD HAD A LONG HISTORY OF ALCOHOLIC ABUSE AND HAD BUILT UP A TOLERANCE TO IT, AND SO THAT MARIN'S VIEW OF IT WAS THAT NOT EVERYBODY WHO DRINKS THIS MUCH IS, YOU KNOW, HAS THIS TOLERANCE BUILT UP, IS NECESSARILY GOING TO GO OUT AND COMMIT THIS KIND OF A CRIME, SO HE WAS --

YOU STARTED OUT, WHEN I ASKED YOU ABOUT THE LONG-TERM HISTORY OF ABUSE, YOU SAID THERE IS NO FACTUAL BASIS, BUT YOUR OWN EXPERT, THE STATE'S EXPERT, SAID THE REASON THAT .21, WHICH IS TWICE THE LEGAL LIMIT, WOULDN'T HAVE AFFECTED THIS PARTICULAR PERSON, SO THAT HE COULDN'T HAVE REALLY BEEN SUBSTANTIALLY IMPAIRED ON THIS NIGHT, BECAUSE HE HAD DEVELOPED A TOLERANCE, WHICH WOULD BE CAUSED BY A LONG-TERM USE OF ALCOHOL, SO IT MAY ADD UP TO THE SAME THING, BUT DON'T WE HAVE TO ACCEPT, AS A FACT IN THE RECORD, THAT THIS YOUNG 19-YEAR-OLD HAD A LONG-TERM HISTORY OF ALCOHOL ABUSE?

WELL, IF YOU WANT TO SAY THAT DR. MARIN'S CONCLUSION, WHICH WAS SIMPLY BASED ON THE SELF REPORTING OF MERCK TO HIM, BECAUSE HE TESTIFIED HE DIDN'T TALK TO ANY OTHER FAMILY MEMBERS OR ANYTHING ELSE WHO HAD A BASIS, A BACKGROUND BASIS FOR IT, IF YOU SAID THAT HIS CONCLUSION HAS TO BE ACCEPTED, FINE, BUT THEN AGAIN, THE TRIAL JUDGE INDICATED THAT SHE CONSIDERED THE LONG-TERM ALCOHOL ABUSE AT PAGE 12 OF THE SENTENCING ORDER. I MEAN, AS ONE OF THE FACTORS THAT HAD BEEN PRESENTED TO HER, IN WHICH SHE GAVE, APPARENTLY, SHORT SHRIFT TO. WITH RESPECT TO THE CLAIM THAT MR. MERCK HAD A GREAT DEAL OF ALCOHOL USE ON THE NIGHT OF THE CRIME, CERTAINLY THERE WAS THAT TESTIMONY OF MR. NEAL THOMAS ALONG THAT LINE, AND, OF COURSE, THE TRIAL JUNK WENT INTO THAT IN GREAT DETAIL, IN GREAT DEPARTMENT, WHEN DESCRIBING WHY THE STATUTORY MENTAL MITIGATING FACTOR, WHICH WAS PREDICATED UPON ALCOHOL USE, SHOULD NOT BE GIVEN GREAT WEIGHT, AND THAT WENT TO ALL OF THE FACTORS SURROUNDING THE FACTUAL INCIDENT THAT OCCURRED AT THE TIME OF THE CRIME. HE WAS ABLE TO --

THIS MURDER WAS NOT -- THERE WAS NO ECONOMIC MOTIVE TO THE MURDER. CORRECT?

THAT'S CORRECT.

AND SO IT IS SIMPLY -- I MEAN, HOW LONG BEFORE THE MURDER WAS IT PLANNED? I AM JUST TRYING TO GET A SENSE OF MAYBE IT IS GOING BACK TO WHAT MR. BOLOTIN SAID. WHAT CASES DO WE HAVE WHERE WE HAVE IMPOSED THESE KINDS OF FACTS, WHERE REALLY WE HAVE A SPUR OF THE MOMENT, SENSE, IF HE HAD HAD A GUN HE WOULD HAVE SHOT HIM AND THEN THERE WOULDN'T BE HAC?

YOU KNOW, I AM TRYING TO THINK OF A SIMILAR FACTUAL PATTERN. I THINK, IN ONE OF THE CASES WE CITED IN OUR BRIEF, BANKS WAS A CASE WHERE THE DEFENDANT HAD BEEN DRINKING IN THE BAR FOR SEVERAL HOURS BEFOREHAND AND THEN, I GUESS, WENT HOME AND KILLED THE VICTIM, AND THE COURT YOU KNOW, BOTH, FOUND THE CASE TO BE PROPORTIONATE AND REJECTED THE ALCOHOLIC MITIGATOR -- THE FAILURE TO FIND ALCOHOLISM A MITIGATING FACTOR, POINTING OUT THAT THE DEFENDANT WAS ABLE TO -- THERE WERE NO VISIBLE SIGNS OF IMPAIRMENT. HE WAS ABLE TO WIN POOL GAMES. THAT IS WHAT HAPPENED IN THIS CASE, AFTER THE KILLING, THE -- THOMAS AND MERCK WENT OFF TO A BOWLING ALLY OR SOME KIND OF ESTABLISHMENT AND PLAYED POOL FOR A COUPLE OF HOURS AND MERCK WAS ABLE TO NEGOTIATE THAT GAME FAIRLY WELL, FAIRLY SUCCESSFULLY, SO THE BANKS CASE WOULD BE ONE IN WHICH THE COURT POINTED OUT THAT THE CRIME WAS COMMITTED IN A PURPOSEFUL MATTER. THE FACTS OF THIS CASE SHOW THAT IT WAS COMMITTED IN A PURPOSE US TELEPHONE MANNER. THE DEFENDANT HAD TO GO OVER TO THE LOCKED CAR AND OBTAIN FROM HIS COMPANION, NEAL THOMAS, GO OVER AND UNLOCK THE DOOR AND TO OFF HIS SHIRT AND REACH IN TO RETRIEVE A KNIFE WITH A FOUR AND-A-HALF TO 5 INCH BLADE AND CAME BACK CONCEALING THAT KNIFE IN HIS HANDS, SO THAT THE VICTIM AND NO ONE ELSE COULD SEE IT, AND THEN PROCEEDED TO ATTACK HIM WITHOUT PROVOCATION, STABBING IN SEVERAL TIMES MUCH THE MEDICAL EXAMINER SAID HE HAD SOMETHING LIKE 13 STAB WOUNDS ON HIS BODY. SEVEN OF THEM, I THINK, WERE DEEPER THAN THEY WERE LONG, AND, OF COURSE, ONE OF THE FATAL WOUNDS, IF NOT THE FATAL WOUND, WAS A KNIFE WOUND TO THE NECK, IN WHICH THE DEFENDANT TWISTED THE KNIFE AFTERWARDS, ACCORDING TO THE MEDICAL EXAMINER. NOT ONLY THIS BUT THE DEFENDANT WAS ABLE TO RECOUNT, IN FASCINATING DETAIL, SEVERAL TIMES TO MR. THOMAS ADDS, WHAT HE DID AND HOW HE DID IT -- TO MR. THOMAS AFTERWARDS WHAT HE DID AND HOW HE DID IT AND REJOYS THAT, IF HE HADN'T BEEN YOU CAN -- REJOICE THAT, IF HE HADN'T BEEN SUCCESSFUL IN THAT EFFORT, HE WOULD GO BACK TO THE HOSPITAL AND FINISH THE JOB.

AS OPPOSED TO SOMEONE WHO GOES WHAT DID I DO, WHAT DID I DO, AND TO SHOW THAT THIS WAS A SPUR OF THE MOMENT, THIS PERSON, IF WE COULD LOOK AT THE FACTS OF WHAT OCCURRED AFTERWARDS THAT HE NOT ONLY KNEW WHAT HE DID BUT THAT HE WAS GLAD THAT

HE HAD DONE IT.

NOT ONLY AFTERWARDS BUT HIS CONDUCT THROUGHOUT THE EPISODE. IT SHOWS PURPOSEFUL, MEANINGFUL, GOAL-DIRECTED CONDUCT, AND IT WASN'T SIMPLY JUST A FIGHT THAT OCCURRED.

CAN I ASK YOU? HE WAS ON FELONY PROBATION, AND I WANT TO ASK YOU, JUST IDEA THAT HE HAD BEEN SENTENCED TO PRISON TERMS JUST A YEAR OR TWO BEFORE. DO WE KNOW ANYTHING ABOUT WHY HE WAS RELEASED AND WHAT TYPE OF CONDITIONS OF PROIBATION HE WAS UNDER? WAS HE BEING CLOSELY MONITORED BY THE DEPARTMENT OF CORRECTIONS? WAS HE UNDER ANY REQUIREMENT TO GET ALCOHOL TREATMENT, TO GET A JOB, TO DO ANYTHING THAT MIGHT HAVE PREVENTED THIS CRIME FROM OCCURRING?

WE KNOW THERE WAS TESTIMONY FROM THE PROBATION OFFICER, WHO TESTIFIED THAT, WHEN MR. MERCK WAS RELEASED FROM PRISON, I THINK IT WAS APPROXIMATELY THREE OR FOUR WEEKS BEFORE THIS HOMICIDE, THAT HE SIGNED THE PROBATION OFFICER HAD TO READ TO HIM THE REQUIREMENTS OF BEING ON PROBATION AND ALL OF THAT, AND THAT MR. MERCK HAD SIGNED THAT ORDER, UNDERSTANDING THAT. NOW, THE -- IN TERMS OF WHY HE WAS RELEASED, THAT ISN'T CLEAR. WE HAVE THE EXHIBITS IN THE RECORD, IN WHICH MR. MERCK WAS APPARENTLY CONVICTED OF THREE COUNTS OF -- I SHOULD SAY IN LAKE COUNTY, THREE OFFENSES OF ROBBERY WITH A WEAPON, IN PASCO COUNTY THERE WAS ANOTHER COUNT IN WHICH HE HELD A KNIFE TO THE VICTIM'S NECK, AND ANOTHER ONE IN LAKE COUNTY, AND IN ALL OF THOSE CASES, I THINK HE RECEIVED EITHER BETWEEN FOUR AND SIX YEARS CONCURRENT IN PRISON. NOW, WHY HE WAS RELEASED IN 1991, IS NOT CLEAR AND APPARENTLY IS UNKNOWN.

SO HE HAD SIGNED AN ORDER SAYING HE WASN'T GOING TO DO THICKS LIKE CRIMINAL ACTIVITY -- THINGS LIKE CRIMINAL ACTIVITY, BUT HE DIDN'T -- THERE WEREN'T ANY SPECIFIC CONDITIONS LIKE HE NEEDED TO GET ALCOHOL.

THERE MIGHT HAVE BEEN CONDITIONS IN TERMS OF PAYING RESTITUTION OR SOMETHING ALONG THAT LINE, BUT I DON'T RECALL ANYTHING ALONG THE LINES OF SEEKING TREATMENT OR COUNSELING OR ANYTHING OF THAT NATURE. WITH RESPECT TO THE ISSUE OF PROPORTIONALITY, AS WE HAVE ARGUED IN OUR BRIEF, CERTAINLY THIS -- THE HEINOUS, ATROCIOUS AND CRUEL QUALITY, WHICH THIS COURT FOUND ON THE LAST APPEAL, THIS CASE HAS NOT CHANGED. THIS IS STILL LIKE THE WHITT ENCASE, WHERE BOTH THE DEFENDANT AND THE VICTIM HAD CONSUMED SOME ALCOHOL. THIS WAS A VERY BRUTAL, MULTIPLE STABBING TYPE CASE. THE ADDITIONAL AGGRAVATING FACTOR OF A STRONG QUALITY THAT WE FEEL WAS PRESENT IN THIS CASE IS THE PRIOR VIOLENT FELONY CONVICTIONS. WE HAVE NOT ONLY ONE MISSTEP WITH THE LAW BUT WE HAVE FIVE SEPARATE INCIDENTS, OVER A SEVERAL-MONTH PERIOD, IN WHICH THE DEFENDANT COMMITTED ROBBERIES. AS A MATTER OF FACT, HE TOLD DR. HEIDI, THE DEFENSE EXPERT, THAT HE ESSENTIALLY QUIT HIS JOB TO DO ROBBERIES. NOW, WHETHER OR NOT THAT WAS A FLIPPANT COMMENT OR A SERIOUS ONE IS HARD TO GAUGE, BUT IN ANY EVENT, IT SHOWS THAT WE DON'T HAVE SIMPLY A SINGULAR EPISODE IN HIS LIFE PREVIOUS TO THIS INCIDENT, IN WHICH HE HAS FAILED TO COMPLY WITH THE LAW. ADDITIONALLY, OF COURSE, THE TRIAL JUDGE FOUND THE FELONY PROBATION AGGRAVATOR, WHICH I UNDERSTAND THE COURT HAS STRUCK DOWN IN THE ZACH CASE AS BEING EXPOS FACTO. EVEN IF THE COURT WERE TO CONCLUDE THAT THIS IS EXPOS FOCTO IN THIS CASE, WHEN YOU CONSIDER THE STRENGTH OF THE FACTORS IN THIS CASE AND COMPARE IT TO THE MITIGATING FACTORS OFFERED AND PERMITTED BY THE TRIAL COURT, THAT DEATH IS STILL THE APPROPRIATE SANCTION. WE DO NOT HAVE THE KIND OF MENTAL MITIGATING FACTORS THAT HAVE BEEN FOUND BY THIS COURT IN OTHER PAST CASES. THERE IS NO RETARDATION OR PSYCHOSIS OR HALLUCINATIONS OR DELUSIONS. ESSENTIALLY DR. MARIN'S CONCLUSION IS THAT THIS PERSON IS BASICALLY AN ANTISOCIAL PERSONALITY WITH NARCISSISTIC FEATURES, AND DR. HEIDI DIDN'T DISAGREE WITH THAT. DR. HEIDI AGREED WITH THAT, SO I SUBMIT THAT, WHEN YOU LOOK AT THE QUALITY OF THE MITIGATING FACTORS THAT HAVE BEEN BEEN PRESENTED

AND CONSIDERED AND FOUND BY THE TRIAL COURT, WHEN YOU CONSIDER THE STRENGTH OF THE AGGRAVATING FACTORS, HAC AND PRIOR FELONY VIOLENT CONVICTIONS, TO ME, ARE STRONG IN THIS CASE. WHEN YOU CONSIDER THE FACT THAT THE JURY, IN THIS CASE, RECOMMENDED DEATH BY A VOTE OF 12-0, AFTER HEARING EVERYTHING.

WHAT DID THEY HEAR ABOUT THE MURDER? WHAT WAS IT, AND I WOULD LIKE YOU TO ADDRESS, SPECIFICALLY, WHAT EVIDENCE THE DEFENDANT WANTED TO PUT ON ABOUT THE CIRCUMSTANCES OF THE MURDER THAT THE DEFENDANT COULDN'T PUT ON?

WELL, I THINK THE EVIDENCE THAT THIS JURY HEARD WAS THEY HEARD TESTIMONY FROM KATHRYN SULLIVAN, WHO WAS THE EYEWITNESS HERE, IN THE PARKING LOT, AS TO THE DEFENDANT BEING THE ONE WHO ESSENTIALLY ATTACKED THE VICTIM, AFTER THIS VERBAL PRESIDENT REPARTE BETWEEN THE -- AFTER THIS VERBAL HEPA -- REPARTE BETWEEN THE DEFENDANT AND THE VICTIM. SHE TESTIFIED TO THE MURDER. THERE WAS ADDITIONAL TESTIMONY FROM A WITNESS CONCERNING AFTER THE STABBING HOW HE HAD TRIED TO HELP THE VICTIM OR SOMETHING, WHILE 911 WAS CALLED TO GIVE ASSISTANCE AND HE GAVE TESTIMONY TO THE FACT THAT THE VICTIM WAS ALIVE AND MOANING AND STILL CONSCIOUS AT THAT TIME. WITH RESPECT TO EVIDENCE THAT WAS PRECLUDED, I AM NOT SURE THERE REALLY WAS ANY. THERE WAS A LITTLE BIT OF A PROFFER MADE AS TO CONCERNING THE PANTS OR SOMETHING ALONG THAT LINE, WHETHER OR NOT DETECTIVE NESTOR WAS CHANGING HIS TESTIMONY OR SOMETHING.

I THOUGHT THERE WAS SOME PROFFER TESTIMONY ABOUT WHETHER IT WAS THE OTHER WITNESS THAT ACTUALLY WAS EGG EGGING MERCK ON. WAS THAT NOT PROFFERED EVIDENCE?

I THINK, I MAY BE MISTAKEN, BUT I THINK THOMAS TESTIFIED TO. THAT I THINK THOMAS, IN FRONT OF THE JURY, TESTIFIED THAT HE WAS THE ONE WHO MADE THE STATEMENT TO THE VICTIM, YOU ARE JUST A WIMP OR SOMETHING OF THAT NATURE. THERE MAY HAVE BEEN A SLIGHT CONFLICT BETWEEN THOMAS AND SULLIVAN OR SOME OTHER WITNESS WITH REGARD TO THAT, BUT I THINK THE JURY HEARD THAT. WHOLE -- THE TESTIMONY, THE ISSUE WITH REGARDING THE PANTS, WE SUBMIT, IS REALLY A RED HERRING. IN THE LAST TRIAL, MERCK ADMITTED, WHEN HE TOOK THE STAND, THAT HE WAS WEARING THE PANTS UPON WHICH THE FBI EXPERT FOUND THE VICTIM'S DNA BLOOD AND THOMAS, BOTH IN THE FIRST TIME A -- TRIAL AND IN THIS TRIAL TESTIFIED THAT THOSE PANTS WERE MUCH TOO SMALL FOR HIM TO BE WEARING, SO I THINK WHEN YOU LOOK AT THE TOTALITY OF THE RECORD IN THIS CASE, CLEARLY THE TRIAL JUDGE CONCLUDED THAT DEATH WAS THE APPROPRIATE SANCTION, AS THE TRIAL COURT SHOULD HAVE FOUND. IF THE COURT HAS QUESTIONS ABOUT ANYTHING ELSE, I WOULD BE HAPPY TO TRY TO ANSWER IT. OTHERWISE WE WOULD ASK THE COURT TO AFFIRM.

THANK YOU. REBUTTAL?

THE STATE SAYS THAT THE TRIAL JUDGE GAVE THE EVIDENCE OF TROY'S LONG HISTORY OF ALCOHOLISM SHORT SHRIFT. THE TRUTH IS SHE GAVE IT NO SHRIFT. SHE MISTAKENLY THOUGHT THAT SHE HAD DEALT WITH IT, UNDER THE PARAGRAPH ABOUT THE IMPAIRED CAPACITY BUT SHE HAD NOT. YOU READ THE SENTENCING ORDER IN ITS TOTALITY AND THE LONG HISTORY OF ALCOHOLISM, AND ITS RELATION TO THIS CRIME, WAS NOT CONSIDERED, WAS NOT WEIGHED, WAS NOT FOUND.

DO YOU AGREE THAT, OTHER THAN TESTIMONY FROM EXPERTS ABOUT SELF REPORTING, LET ME FINISH, WITNESSES, ARE THERE ANY RECORDS THAT INDICATE THAT HE HAD AN ALCOHOL OR DRUG ABUSE PROBLEM?

THERE IS NO RECORDS, AND I SUSPECT THE REASON THERE IS NO RECORDS IS BECAUSE THIS IS THE SORT OF THING. I AM SURE IT IS NOT THE KIND OF THING THAT HIS MOTHER, WHEN SHE GOT HIM BACK FROM THE COLLINS CHILDREN HOME, WOULD HAVE SEEN AS BEING A PROBLEM. SHE

WASN'T REAL BIG ON MEDICAL INTERVENTION FOR TROY'S PROBLEMS, BUT THE STATE IS ABSOLUTELY WRONG, AND THE STATE SAYS THAT THERE WAS NO EVIDENCE OF THE LONG HISTORY OF ALCOHOLISM EXCEPT ITS OWN WITNESS, DR. MARIN, WHO IT, THEN, WANTS TO DISCOUNT, BUT THERE WAS, IN FACT, TESTIMONY FROM BOTH EXPERTS, BUT THERE WAS A GREAT DEAL OF LAY TESTIMONY, PARTICULARLY FROM THE TWO SISTERS, WHO ARE THE PEOPLE WHO WOULD KNOW THE BEST. IT GOES, THERE ARE, I AM GOING TO HAVE TO RELY ON THE BRIEF, BUT THERE WAS A GREAT DEAL OF EVIDENCE.

THE BUSINESS ABOUT THE ALCOHOL USE IS INTERTWINED WITH THE HORRIBLE BACKGROUND THAT YOU PORTRAY IN YOUR BRIEF, WITH THE MOTHER AND THE MANY BOYFRIENDS AND SO THAT, REALLY, IS, THE ALCOHOL ABUSE, IN THIS INSTANCE, AS OPPOSED TO A SITUATION WHERE THERE WAS A LOT OF TESTIMONY THAT THERE WAS HAVING TO DO WITH PRIOR ALCOHOL-RELATED CRIMINAL INVOLVEMENT OR SOMETHING OR THAT HE HAD BEEN COMMITTED FOR ALCOHOLISM OR SOMETHING LIKE THAT. THIS INSTANCE, IT IS REALLY ALL WRAPPED UP IN THE CHILD ABUSE.

IT IS NOT THE SAME THING. IT IS -- YOU KNOW, GRANTED, I MEAN, ALL OF THE MITIGATION INTERRELATES IN THE SENSE, I MEAN, TO TRY TO CATEGORIZE IT HERE. HE IS 19 YEARS OLD. HE HAS GOT THE STUNTED EMOTIONAL DEVELOPMENT OF A 10, 12, 14-YEAR-OLD. HE HAS GOT THIS BRUTAL, BRUTAL PHYSICAL AND PSYCHOLOGICAL ABUSE. THE TRIAL JUDGE EVEN FOUND IT EXTREME IN HER SENTENCING ORDER AND YET SHE ONLY GAVE THAT, I THINK, SOME WEIGHT, BUT EVEN SHE AGREED THAT IT WAS EXTREME. THIS IS AN ALCOHOL-RELATED CRIME AND YET NEITHER OF THE TWO ALCOHOL-RELATED MITIGATORS WERE IN ANY WAY CONSIDERED IN THE SENTENCING ORDER, NOT THE LONG HISTORY, NOT THE INTOXICATION AT THE TIME OF THE KRIP. NOW, THE STATE WANTS YOU TO FIND A LOT OF STUFF HARMLESS IN THIS CASE. THEY WANT YOU TO FIND THE LEGALLY INVALID EXPOS FOCTO ERROR IN THE CASE. THEY WANT TO YOU HARMLESS. THAT THEY WANT YOU TO HARMLESS THE FAILURE OF CONSIDERING THE ALCOHOLISM, EVEN THOUGH THIS IS AN ALCOHOL-RELATED CRIME. THEY WANT YOU TO HARMLESS THE FAILURE OF CONSIDERATION OF THE CRIME AS A NONSTATUTORY MITIGATE OR. THEY DON'T WANT YOU TO SEE A PROBLEM WHERE THE ONLY WITNESS WHOSE BEHAVIOR REFUTES THAT HE WOULD HAVE BEEN SUBSTANTIALLY INTOXICATED. THEY ALL AGREE THAT HIS LEVEL OF ALCOHOL CONSUMPTION WOULD DO THAT. THE ONLY ONE WHO SAYS IT WOULDN'T HAVE AN EFFECT IS DR. MARIN. POINT OUT SOMETHING WEIRD ABOUT DR. MARIN, IN THE NEIBERT, CASE, WHERE HE WAS A DEFENSE EXPERT AND RETAINED, AND HE TESTIFIED THAT HE WAS A VERY LONG ALCOHOLIC AND WAS ON ALCOHOL AT THE TIME OF THE CRIME, AND THIS COURT, DUE TO PROPORTION, REVERSED, AND THIS COURT DOESN'T THINK VOLUNTARY INTOXICATION SHOULDN'T BE CONSIDERED BECAUSE ALL PEOPLE WHO ARE DRUNK DON'T DO THIS. YOU CAN POINT TO PEOPLE WHO HAVE THAT MITIGATOR WHO DON'T DO MURDERS, BUT THAT IS NOT THE STANDARD.

YOU ARE GOING TO HAVE TO BRING YOUR REMARKS TO A CLOSE. THANK YOU.

I AM SORRY. I WOULD ASK THIS COURT TO DO, QUICKLY, RATHER THAN STRETCH THIS OUT AND REVERSE THIS CASE FOR A LIFE SENTENCE, WHICH IS APPROPRIATE. OTHERWISE REMAND IT FOR RESENTENCING OR FOR A PROPER SENTENCING ORDER ON ALL OF THESE DIFFERENT GROUNDS. THANK YOU. THANK THE BOTH OF YOU. THE NEXT CASE IS WHITT VERSUS URBIETA. MR. SCHWARTZ.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM TODD SCHWARTZ ON BEHALF OF THE PLAINTIFF IN THIS CASE. THIS IS AN APPEAL FROM THE DISMISSAL, WITH PREJUDICE, OF A COMPLAINT, SOUNDING FOR WRONGFUL-DEATH, NEGLIGENCE. THIS CASE IS WHETHER THE COURT SHOULD ADHERE TO THE SO-CALLED TRADITIONAL RULE FOLLOWED BY THE THIRD DISTRICT IN A NUMBER OF CASES, WHICH I AMNIZES PROPERTY OWNERS ENTIRELY -- I AMNIZES PROPERTY OWNERS ENTIRELY FOR OBSTRUCTIONS CAUSED BY VEGETATION ON THEIR PROPERTY

WHICH EXIST ON THEIR PROPERTY BUT SIMPLY DON'T PROTRUDE OVER THE PROPERTY PHYSICALLY.

LET ME ASK YOU. THIS IS A SERVICE STATION, WHERE WAS IT, IN DOWNTOWN MIAMIY?

ONE OF THE BOYS DEGREES AREAS OF THE -- ONE OF THE BUSIEST AREAS ON THE BEACH, AROUND COLLINS AND 138 STREET.

WAS THIS AN AREA WHERE CONSTRUCTION WAS LEFT UP AND EVERYTHING ELSE KNOCKED DOWN OR IS THIS A SERVICE STATION THAT IS IN A WHOLE FOREST OF TREES? BECAUSE THERE IS NO PICTURES IN THE RECORD OF WHAT THIS LOOKS LIKE.

NO, UNFORTUNATELY, YOUR HONOR, THERE IS NO RECORD. A DISMISSAL OF A COMPLAINT IS BOTH A BLESSING AND A CURSE. IT IS A CURSE, BECAUSE I CAN'T ANSWER YOUR QUESTION. WHAT WE UNDERSTAND FROM THE WELL PUT ALLEGATIONS OF THE COMPLAINT, WHICH THE BLESSING IS THEY ARE TAKEN AS TRUE IN MY BEHALF TODAY, OR THAT A LARGE, DENS STAND OF VISION-IMPAIRING FOLIAGE, NOT A TREE BUT I CAN'T BE ANYMORE SPCK. I DON'T THINK IT HAD A POT UNDER IT, BUT WE DON'T KNOW WHEN IT WAS PLANTED, HOW IT WAS PLANTED.

IF IT WAS PLANTED, ISN'T THAT, THEN, AN EXCEPTION? I MEAN, HOW DO YOU -- I HAVEN'T BEEN ABLE TO FIGURE OUT WHO DECIDES --

OUTSIDE OF THE STATE OF FLORIDA, YOUR HONOR, A LOT OF COURTS GRAPPLING WITH THE HARSH CONSEQUENCES OF THIS ABSOLUTE RULE, HAVE CREATED EXCEPTIONS, WHEN JUSTICE DEMANDED IT. SOME COURTS IN OTHER JURISDICTIONS HAVE SAID IF IT IS A POTTED PLANT, WELL, THAT IS AN ARTIFICIAL CONDITION, BECAUSE IT IS CREATED BY THE OWNER OR THE PREDECESSOR ENTITLED.

DO WE HAVE THAT IN FLORIDA?

I HAVEN'T SEEN IT, YOUR HONOR. THE THIRD DISTRICT HAS REALLY GONE ALONG. THE EVIDENCE CASE IN THE THIRD DISTRICT WAS WEEDS, AND, ALSO, CONSTRUCTION EQUIPMENT ON THE CORNER.

COULD YOU PAINT SORT OF A VISUAL PICTURE OF WHERE THIS FOLIAGE, NO MATTER WHAT IT WAS, IS, OR WAS, IN RELATIONSHIP TO THE CAR THAT WAS LEAVING THE GAS STATION.

OKAY. FROM THE LIMITED RECORD, WHICH IS THE COMPLAINT, IT IS MY UNDERSTANDING THAT THIS STAND OF FOLIAGE WAS SITUATED NEAR THE EXIT TO THE PREMISE, WHERE THE DRIVER IS LEAVING.

TO THE DRIVER'S RIGHT OR LEFT?

I WOULD SAY TO THE DRIVER'S RIGHT, BUT I AM STARTING, NOW, TO GO BEYOND THIS LIMITED RECORD AND SURMISE. IT IS MY UNDERSTANDING THAT THE PEDESTRIANS ARE COMING FROM THE RIGHT, BEHIND THE TREES, AND THE DRIVER CAN'T SEE THEM AS THEY APPROACH TO THE LEFT. THE DRIVER IS, ALSO, SIMULTANEOUSLY, AND THIS IS IN THE COMPLAINT, HAVING TO NEGOTIATE, THIS IS A HIGH SPEED THOROUGH FAIR ALONG COLLINS AVENUE, MIAMI BEACH, SO THE DRIVER HAS GOT TO GET ONTO THIS ROAD FROM A DEAD STOP COMING OUT OF THE GAS STATION AND THEN, ALSO, DEAL WITH PEDESTRIANS AND A TREE.

I GUESS THAT WE ARE DEALING, KIND OF, WITH A DOUBLE-END SWORD, AT THIS POINT, THOUGH. I WOULD TAKE IT THAT YOU, NOW, CANNOT CLAIM -- THE DEFENSE CANNOT CLAIM THAT THE SERVICE STATION SHOULD BE A FABRE PARTY, WHEN YOU CAN'T BRING IN THE TREE, SORT OF THING, UNDER THE THIRD DISTRICT'S CLAIM, BECAUSE THERE ISN'T ANY DUTY ON THE TREE.

YOU ARE REFERRING TO THE DRIVER, YOUR HONOR?

RIGHT. RIGHT.

YES. THE UNDERINSURED OR UNINSURED DRIVER.

SO YOU DON'T HAVE A FABRE PROBLEM. ON THE OTHER HAND --

I WOULD LIKE TO HAVE THAT FABRE PROBLEM IN THIS CASE.

IN THIS CASE, I JUST SEE THAT YOU KIND OF ARE HELPED AND HURT ON THE CLAIMANT'S SIDE IN HAS TO CASES, BECAUSE -- IN THESE CASES, BECAUSE IF THERE IS A RULE THAT SAYS THAT ANY KIND OF NATURAL GROWTH, THE LAND OWNER HAS GOT A DUTY TOY REMOVE IT, THEN YOU GET INTO THE BUSINESS OF WHETHER, THEN, YOU PUT ON THE VERDICT FORM, EVERY TREE.

RIGHT. AND I DON'T THINK THAT IS THE RULE WE ARE ADVOCATING. THIS COURT HAS SAID A FORESEEABLE ANALYSIS APPLIES TO ALL QUESTIONS IN TORT. RISK ALWAYS DEFINES DUTY, AND IT ALWAYS HAS, IN TORT LAW UNIVERSALLY, AND A FORESEEABLE ZONE OF RISK IS WHAT GIVES RISE TO A DUTY, BUT THAT IS JUST TO GET INSIDE THE COURTHOUSE. IT CAN BE EXONERATED FROM LIABILITY, BECAUSE THEIR ACTIONS WEREN'T UNREASONABLE OR THE RISK OF HARM DIDN'T JUSTIFY SUPERIOR MEASURES, BUT THIS RULE, THIS TRADITIONAL RULE, IS BASED SOLELY UPON CONDITIONS WHERE, IN ITS DESCRIBING OF THE BASIS FOR THE RULE, YOU HAVE A SINGLE LAND OWNER, RURAL, WHO IS PROBABLY TAKING CARE OF HUNDREDS OF ACRES OF LAND AND THERE IS PROBABLY ONLY ONE OR TWO CARS THAT COMES BY EVERY MONTH, TO BEGIN WITH, SO IT IS THE RESPONSIBILITY OF THE FARMER, WHO IS NOT ANTICIPATING TRAFFIC AND INTERSECRETARYING TRAFFIC, AT THAT, TO POLICE AND CUT DOWN HIS SUBSTANTIAL ACREAGE?

IN THESE SITUATIONS WHERE SOMEONE IS COMING IN AND OUT OF SOMEONE'S PREMISES, AND YOU ARE TRYING --

RIGHT.

-- TO SEE ON COMING TRAFFIC, I MEAN, I DON'T KNOW IF YOU ARE ADVOCATING WE SHOULD HAVE AN URBAN EXCEPTION AND ONLY APPLY THIS TO AREAS THAT HAVE BEEN ALREADY DEVELOPED, SO THAT SOMEONE HAS MADE THE DECISION ON KEEPING THOSE TREES. THEY LOOK PRETTY. BUT NOT BE LIABLE, IF THEY, ALSO, ARE NOT ONLY PRETTY BUT THEY WILL ARE A HAZARD, SO ARE YOU ADVOCATING A RULE THAT WOULD SAY, IN DEVELOPED AREAS, WHERE THERE HAS BEEN SOME DEVELOPMENT, SO THE DECISION IS MADE THAT THE TREE IS LEFT OR NOT, WHICH I WOULD -- WOULD HAVE TO BE THE SERVICE STATION, SINCE IT IS, I AM PRESUMING, A SERVICE STATION THAT IS A REGULAR GAS SERVICE STATION, THAT YOU WOULD APPLY IT THERE, BUT IF YOU SIMPLY HAD -- SOMEONE HAD A PIECE OF PROPERTY AND THEY JUST HAD A DIRT ROAD, AND THEY HADN'T CONSTRUCTED AT ALL ON THAT PIECE OF PROPERTY, THAT YOU WOULD JUST OUT -- YOU WOULD SAY THEY WERE NOT GOING TO BE LIABLE, UNDER ANY CIRCUMSTANCES, NO MATTER HOW MUCH NOTICE THEY HAD THAT PEOPLE HAD HAD ACCIDENTS COMING OUT OF THEIR DRIVEWAY?

WHAT WE ARE ADVOCATING, YOUR HONOR, IS GO TO YOUR McCAIN FORESEEABLE TEST. AND GET RID AFTER ARBITRARY TEST ON ANY LEVEL. I DON'T THINK YOU CAN SAY, IN A FARMLAND CASE, THERE IS NEVER A DUTY. WHAT HAPPENS IF THE FARM THAT IS BEING ERECTED IS BEING ERECTED NEXT TO I-95 OR THE FLORIDA TURNPIKE, SO IT IS NOT JUST REMOTE FARMLAND. IT MAY BE RURAL. IT MAY BE OUTSIDE THE CITY LIMITS, AND IT MAY BE A FARM, BUT IT IS A FARM IN AN AREA WHERE THERE ARE A LOT OF OTHER THINGS GOING ON, AND THE ZONE OF RISK, THE FORESEEABLEITY OF RISK, IS THE RULE, SO IF YOU IMPOSE, ONE WAY OR THE OTHER, IT IS GOING TO WREAK HAVOC, BUT IF YOU CONFORM TO TRADITIONAL, FARMERS, IN SOME AREAS, WHERE

THEY ARE NOT HAVING A LOT OF TRAFFIC BUT HAVE CREATED OBSTRUCTIONS, SUCH AS THEIR CORN, THEN THAT IS STILL NOT AN EXONERATION IN THEIR MOTION TO DISMISS, BUT YOUR HONOR CAN'T PROPOSE A LESS RADICAL ALTERNATIVE AND GO TO THE EXCEPTION EPINGS OF THE RULE -- THE EXCEPTION OF THE RULE IN TRADITIONAL AREAS.

I WAS ASKING IF THAT WAS YOUR POSITION.

NO. THEY COME TO THIS AREA WHICH IS FREQUENTLY, ALREADY A DANGEROUS THOROUGH FAIR, AND THEY CREATE AN EXIT AND ALLOW THE EXIT TO BE SITUATED AND A PLANT TO BE SITUATED. ANOTHER PERSON WHO IS PLANTING CORN, AS I UNDERSTAND, AGAIN, THE JURISDICTIONS THAT HAVE MADE THE DISTINCTION WOULD SAY IF YOU PLANTED CORN, YOU PLANTED TOO CLOSE TO THE ROAD AND IT WAS OBSTRUCTION.

THAT IS NOT NATURAL.

THAT IS NOT NATURAL.

THAT'S CORRECT.

SO THAT WOULDN'T EVEN HELP FARMERS OUT, WHO WANTED TO PLANT THEIR CORN CLOSE TO THE ROAD.

THAT'S RIGHT. THE WEEDS MAY BE PROTECTED BUT THE CORN WOULDN'T. THAT IS WHY WE SAY BRIGHT-LINE TEST IN HIS TORT ARE NEVER MANAGEABLE. YOU CREATE A FLEXIBLE STANDARD AND LET THE BRIGHT LINES BE AS LOWER COURTS DEVELOP THEM IN INDIVIDUAL CASES.

YOUR RULE WOULD EXTEND TO A HOMEOWNER, CORRECT?

IT COULD. IT COULD.

THAT LET, OR A LAND LORD. LEFT SHRUBBERY GROW UP AND SO IT WAS PROTECTED FROM HIS NEIGHBOR AND THEN PEOPLE HAD TO PAY EXTRA CARE TO LOOK TO GET OUT ON THE HIGHWAY.

IT COULD, YOUR HONOR. AGAIN, WE WANT A FORESEEABILITY FLEXIBLE STANDARD AND SEE WHAT ELSE IS GOING ON IN THIS NEIGHBORHOOD. IS IT A SUBURBAN NEIGHBORHOOD? IS IT A LOT OF TRAFFIC OR IS IT A CUL-DE-SAC AND THE ONLY PEOPLE WHO COME BY IS AN OCCASIONAL CAR AND WE ARE TALKING ABOUT AN OAK TREE WHICH HAS BEEN THERE 200 YEARS.

YOUR RULE WOULD ALWAYS GET THE MATTER TO THE JURY THEN.

NOT NECESSARILY, BECAUSE IF THE TEST IS AN UNREASONABLE RISK OF HARM, A COURT COULD, AT A MOTION TO DISMISS, FIND, AS MATTER OF LAW, THAT, HEY AN ORDINARY OAK TREE AT MY HOUSE AIN'T GOING TO DO IT. GIVE ME SOMETHING LIKE MORE THEY WERE HAVING A STAND OF BUSHES GROWING OUT OF CONTROL AND EVERY THREE DAYS A NEIGHBOR'S CHILD GOT KILLED FOR A PERIOD OF TWO YEARS. AT THAT POINT MAYBE WE HAVE TO STEP IN AND DO SOMETHING, BUT YOU GIVE THE JUDGE THAT FLEXIBILITY WITH THE McCAIN STANDARD. YOU DON'T DO IT BY SAYING THERE IS A RULE, ONE WAY OR THE OTHER. OTHERWISE WE ARE CREATING A JOB FOR EVERY COURT IN EVERY CASE, TO COME UP WITH A STANDARD. IT WOULDN'T WORK.

YOU ARE ARGUING FOR THIS IS A SPECIES OF NEGATIVE MAINTENANCE OF PREMISES.

THAT'S CORRECT. AND THE ONLY EXTENSION IS THE NEGATIVE MAINTENANCE, THE ZONE OF RISK, CAN EXTEND TO PERSONS WHO AREN'T INVITEESE. THEY MAY BE NEXT DOOR ON THE SIDEWALK OR MOTORISTS ON THE HIGHWAY. LOOK AT THE ANOMALY OF THIS RULE. IF THE DRIVER OF THIS VEHICLE WHO STRUCK MY CLIENTS WILL BEEN INJURED IN THIS ACCIDENT, THEN

THEY COULD COLLECT, BECAUSE THE SERVICE STATION DIDN'T MAINTAIN IN A SAFE CONDITION AND GIVE THEM A SAFE INGRESS AND EGRESS. THEY GOT BLOCKED BY THE TREES AND WENT OUT INTO THE ROAD AND HIT SOMEBODY AND THEY GOT HURT. THAT IS WHAT DAWSON V BRIDGES SAYS. THE CAR COMING OUT OF THE SHOPPING CENTER, THE DEFENDANT, RATHER, THEIR CROSSCLAIM STAYED, BUT THE PLAINTIFF, WHO WAS THE MOTORCYCLIST JUST TRAVELING BY ON THE HIGHWAY, HE HAD NO CLAIM, BECAUSE HE WAS NOT AN INVITEE IN THE SHOPPING CENTER. THERE IS NO LOGIC TO A RULE LIKE THAT. THERE IS NO FAIRNESS TO A RULE LIKE. THAT I KEEP GOING BACK TO McCAIN. IF THE ZONE OF RISK IS BROADENED BY THE OWNER'S CONDUCT, THEN ANYBODY COMING WITHIN THAT ZONE OF RISK IS PROTECTED. YOU CAN'T DISCRIMINATE, BECAUSE IT WOULD MAKE NO SENSE. I WOULD LIKE TO SPEND MORE TIME HERE LISTENING TO MYSELF TALK, BUT I THINK I WOULD BE REPEATING MYSELF IN MOST OF THE QUESTIONS. THANK YOU, YOUR HONORS.

GOOD MORNING. NAMES THE COURT. COUNSEL. MY NAME IS SCOTT COLE. I AM HERE ON BEHALF OF THE URBIETAS FORM THE DEFENDANTS BELOW AS WELL AS RESPONDENTS ON APPEAL. I HAVE A BIT OF A SORE THROAT AND I WILL DO MY BEST TO SPEAK UP. LET ME KNOW IF YOU CAN'T HEAR ME.

MR. COLE, INSTEAD OF FOLIAGE BEING IN THIS POSITION, THERE WAS SOME KIND OF SIGN OR SOMETHING LIKE THAT. IS IT CLEAR THAT THE LAND OWNER WOULD, THEN, NOT HAVE THE BENEFIT OF THIS WHOLE IDEA OF NO DUTY?

AS -- YES, JUSTICE QUINCE, I AGREE THAT THAT WOULD BE THE CASE. THAT SITUATION HAS NOT BEEN MADE CLEAR IN FLORIDA, AND THE EVIDENCE CASE, THE THIRD DISTRICT NOTED THERE WERE SOME FACTS THERE, THAT THERE WAS SOME OVER GROWTH OF FOLIAGE, AS WELL AS SOME TRUCKS AND VANS AND OTHER THINGS CREATING AN OBSTRUCTION. INTERESTINGLY ENOUGH, THEY DIDN'T REALLY ADDRESS THE ARTIFICIAL THING THAT IS THE TRUCKS IN AND THE VANS AND OTHER THINGS ON THE PROPERTY. THEY ONLY ADDRESSED THE FOLIAGE. THAT WAS ADDRESSED BY JUDGE SWARTH AND SENT TO THAT CASE, BUT BASED UPON OTHER JURISDICTIONS AND THE RESTATEMENT, I WOULD HAVE TO CONCEDE THAT, YES --

SO MY QUESTION, THEN, IS WHAT REAL PURPOSE ARE WE SERVING, IN HAVING THE DIFFERENT RULE FOR FOLLETT?

THERE ARE SEVERAL PURPOSES, JUSTICE QUINCE, AND I WILL GET TO THAT RIGHT NOW. THE FIRST PURPOSE SAYS AS THE DEFENSE AND THE CASE LAW HAS HELD, A PROPERTY OWNER HAS THE RIGHT TO DO WHAT THEY WANT WITH THEIR OWN PROPERTY, AND IN THIS CASE THE AMOCO STATION, AND IF YOU WOULD ALLOW ME TO, I WILL TELL YOU THE LAYOUT OF THE STATION, IF YOU WANT ME TO GO OUTSIDE OF THE RECORD. IN THIS CASE.

NO.

THE SECOND CASE, IN THIS CASE, THERE WAS A REMEDY HERE FOUND BY THE THIRD DISTRICT. THE REMEDY IS THAT THIS FOLIAGE VIOLATED AN ORDINANCE. THEREFORE THAT YOU DON'T HAVE TO WORRY ABOUT WHETHER IT IS PLANTS OR VANS OR TRUCKS OR OTHER THINGS OR RENTAL TRUCKS OR THAT SORT OF THING.

DOESN'T THAT KIND OF BRING YOU FULL CIRCLE HERE AND GIVE YOU SOME IDEA THAT THE FACT THAT THERE IS A ORDINANCE THAT SAYS THAT YOU NEED TO DO SOMETHING WITH THIS FOLIAGE KIND OF, IN MY MIND, SAYS THAT THERE OUGHT TO BE SOME DUTY TO DO SOMETHING ABOUT THIS FOLIAGE AND KEEP IT IN SOME KIND OF REASONABLE CONDITION OR CARE.

WELL, I WILL ASK THE OPPOSITE, THE SAME QUESTION FROM THE OPPOSITE END, IF I MAY, TO YOU, JUSTICE QENS. -- QUINCE. COUNSEL, MY ESTEEMED COLLEAGUE, HAS SAID, AND AS JUSTICE PARIENTE POINTED OUT THAT MAYBE IN AN URBAN ENVIRONMENT YOU SHOULD HAVE AN

EXCEPTION TO THE RULE FOR YOUR BAN ENVIRONMENTS, BUT THIS COURT DOES NOT NEED TO GO THERE. THIS COURT DOES NOT NEED TO CREATE FOR A COMMON LAW TORT, BECAUSE CITIES AND COUNTIES DON'T HAVE THOSE ORDINANCES, AND AS COUNSEL WOULD HAVE THIS COURT EXTEND THE LONG STANDING LAW, THAT COULD IMPACT --

SO YOU GET A DIFFERENT RESULT.

NOW --.

THAT'S CORRECT.

THE LONG-STANDING RULE IS A RULE BORN FROM AN AGRARIAN CULTURE, CORRECT?

YES. THAT'S RIGHT.

ONE OF THE THING THAT IS STRUCK ME AS BEING MOST IRRATIONAL ABOUT THE RULE, IN LIGHT OF THE -- OF OUR McCAIN DECISION, IS THAT THOSE JURISDICTIONS THAT HAVE MADE A DISTINCTION BETWEEN ARTIFICIAL AND NATURAL CONDITIONS, SO THAT IF WE FOUND, FROM THE EVIDENCE ? YOUR SERVICE -- FROM THE EVIDENCE, THAT YOUR SERVICE STATION HAD, INSTEAD OF JUST KNOCKING EVERY TREE DOWN ON ITS PROPERTY AND LEAVING A COUPLE OF STANDING, HAD KNOCKED THEM ALL DOWN AND THEN HAD A FEW PLANTED, THAT THAT WOULD BE ACTIONABLE CONDUCT, AS FAR AS DUTY, BUT THAT, IF THEY HAD DONE THE FORMER, WHICH WAS TO KNOCK EVERYTHING DOWN AND KEEP A COUPLE OF STANDING, THAT WOULD NOT BE ACTIONABLE. NOW, WOULD YOU AGREE THAT THAT DISTINCTION, BETWEEN WHETHER SOMETHING HAS BEEN PLANTED OR WHETHER IT IS REMAINING ON THE PREMISE, DOES NOT MAKE ANY LOGICAL SENSE?

FOR MY PURPOSES, YES, I WOULD CONCEDE THAT, AND I THINK THE CASE LAW IN OTHER JURISDICTIONS STATES THAT, BUT I WOULD POINT OUT THAT THAT ISSUE IS NOT MADE A PART OF THIS CASE IN THE THIRD AMENDED COMPLAINT OR ANY OF THE PRIOR COMPLAINTS.

THE ISSUE THAT IT WAS PLANTED VERSUS THAT IT WAS --

YES, JUSTICE.

BUT YOU WOULD ADVOCATE THE SAME RULE, WHICH IS IF WE FOUND THAT THIS HAD BEEN PLANTED, AS OPPOSED TO LEFT, AFTER CONSTRUCTION, WHICH SHOULD NOT MAKE ANY DIFFERENCE, THE LAND OWNER SHOULD BE EXEMPT FROM ANY LIABILITY, BECAUSE, AND GIVE ME, AGAIN, THE POLICY RATIONALE, ABOUT WHY THAT MAKES GOOD SENSE IN OUR MODERN-DAY ENVIRONMENT.

WELL, THERE IS MANY POLICY RAGS ANALYSIS, AND THERE IS MANY LEGAL RAGS ALWAYS, THE FIRST BEING A -- RAGS ANALYSIS, THE FIRST BE -- RATIONALES. THE FIRST BEING A LAND OWNER HAS A RIGHT TO DO WHAT HE WANTS WITH HIS LAND.

TO REASONABLY MAINTAIN IN A SAFE CONDITION AND IF THERE ARE HAZARDS ON THEIR PROPERTY, TO ELIMINATE THOSE HAZARDS. NOW, IT MAY BE THAT, IN THIS CASE, THERE MAY NOT BE AS APPROXIMATE CAUSE, YOUR CLIENT MAY NOT HAVE ACTED UNREASONABLY, BUT WE ARE HERE, OF COURSE, AT THE COMPLAINT STAGE, TO SAY, AUTOMATICALLY THERE, IS NO DUTY, SIMPLY BECAUSE THIS WAS A TREE, RATHER THAN, AS JUSTICE QUINCE SAID, A SIGN.

THE DIFFERENCE HERE, JUSTICE PARIENTE, IS THAT THE LAND OWNER DOES HAVE A DUTY TO MAKE THE PROPERTY SAFE ABOUT -- BUT THAT IS NO INVITEESE ON THE PROPERTY, AND WHAT THE PETITIONER WOULD HAVE YOU DO IS EXPAND INVITEESE BEYOND PROPERTY LINES AND THAT WOULD SOMEHOW MAKE OBSTRUCTION IN THE COURTROOM.

THE SAME PROBLEM WOULD COME IF THERE WAS A SIGN RATHER THAN A TREE. YOU MIGHT BE ARGUING THAT THAT IS NOT THE WHOLE -- THAT THIS PLAINTIFF WASN'T WITHIN THE FORESEEABLE ZONE OF RISK, AND THAT MAY BE ANOTHER BASIS ON WHICH YOU WOULD GET, EITHER A SUMMARY JUDGMENT OR A DISMISSAL, BUT WE CAN'T MAKE THAT DECISION, YOU KNOW, ON THE FACE OF THE COMPLAINT, CAN WE?

NO, WE CANNOT, BECAUSE OF THE LIMITED FACTS THAT WE HAVE, AS MY COLLEAGUE POINTED OUT.

THAT MAY BE A FAR BETTER POLICY ARGUMENT, THAT THEY ARE NOT WITHIN THE ZONE OF RISK, BUT I GUESS I AM JUST HAVING A LOT OF TROUBLE WITH THIS CONCEPT, THAT BECAUSE IT IS A GROWING CONDITION, THAT SOMEHOW -- ESPECIALLY IN A DEVELOPED AREA, THAT THAT MAKES SENSE IN THE YEAR 2000, TO KEEP THAT RULE GOING. I MEAN CERTAINLY IF IT WAS AN ENVIRONMENTAL SITUATION, YOU KNOW, WHERE WE WERE TOLD WE HAD TO KEEP THESE TREES UP, THAT WOULD BE A GOOD DEFENSE.

IN THIS INSTANCE, THESE WERE -- THE CLAIMANTS ARE THE PEDESTRIANS. RIGHT?

YES, YOUR HONOR.

AND BASICALLY YOUR ARGUMENT IS THAT THESE -- THIS SERVICE STATION HAD NO DUTY TO THESE PEDESTRIANS, WHO WERE NOT INVITEESE OR LICENSEES OR, REALLY, DIDN'T HAVE ANY CONNECTION WITH THE SERVICE STATION PROPERTY, AND SO YOU CAN'T GET DUTY THAT WAY, AND YOU HAVE GOT TO CONSTRUCTIVE DUTY THAT THESE PEDESTRIANS HAD TO BE PROTECTED BY THE SERVICE STATION OWNER FOR SOME ACT BY THIS CAR DRIVER.

THAT'S CORRECT, YOUR HONOR.

HAVE, IN THE RESEARCH AND WHAT YOU HAVE BEEN WORKING ON, HAD YOU COME ACROSS THE APPLICATION OF THE DOCTRINE IN THE COMMERCIAL SITUATION, WHERE THE COMMERCIAL ESTABLISHMENT HAD CREATED INGRESS AND HE AGREES DIRECTLY IN A CIRCUMSTANCE SUCH AS THIS OR UNDER CIRCUMSTANCES WHERE THERE IS SOMETHING BEING EJECTED FROM A BUSINESS PROPERTY AND IT STRIKES SOMEONE OFF THE PROPERTY? HAVE YOU FOUND ANY OF THOSE WHERE IT IS APPLIED TO THE CIRCUMSTANCE WE ARE DEALING WITH HERE, OR HAVE COURTS SOMEHOW DEALT WITH THOSE A LITTLE DIFFERENTLY?

I REALLY HAVEN'T FOUND, IF I UNDERSTAND THE FIRST PART OF YOUR QUESTION, JUSTICE LEWIS, ANYTHING REGARDING FOLIAGE AND AN ALLEGED BLIND SPOT AND THE STRIKING OF A PEDESTRIAN. USUALLY IT IS TWO VEHICLES AT A COLLISION, AT AN INTERSECTION, AND ALL OF THE FOLIAGE --

NOT AT THE INTERSECTION. ON THE PROPERTY. I AM TALKING ABOUT AT THE TRIF WAY WHERE YOU HAVE A DANG -- AT THE DRIVEWAY WHERE YOU HAVE A DANGEROUS INSTRUMENTALITY AND LOOKING TO BE PROTECTED.

I APOLOGIZE, YOUR HONOR. THE ONLY THING THAT WAS FOUND WAS A CASE CITED BY MY COLLEAGUE WAS IN THE FOLLIETT CASE, WHERE SOMEBODY BECAUSE WAS LEAVING A SHOPPING CENTER AND IT DID NOT GET INTO THE DETAILS. THERE WAS AN ENTRANCEWAY THAT WAS DESIGNED THAT THE PLAINTIFF'SS EXPERT ALLEGED WAS DESIGNED WHERE THEY ERECTED A STOP SIGN AND SOMEONE LEFT THE SHOPPING CENTER, AND I SAY APPARENTLY, BECAUSE THEY DIDN'T GO INTO ANY FACTS, AND THE COURT THREW IN A LINE THAT SAYING THE TRIAL COURT MISTAKENLY RELIED ON THE DAWSON CASE AND SHOULD HAVE LOOKED AT McCAIN AND SHOULD HAVE SAID, LOOKED AT THE FORESEEABLE ZONE OF RISK AND THEREFORE THERE IS NO PRECONCLUSION OF A DUTY TO SOMEONE OUTSIDE THE PROPERTY. THAT IS, REALLY, THE ONLY

ONE I RAN ACROSS OF. THE DIFFERENCES THAT WE WOULD ASSERT BETWEEN THE NAPOLI CASE AND OUR CASE IS THAT WHAT WE ARE DEALING WITH, HERE, IS NOT THE RECONSTRUCTION OF AN ENTRY WAY OR THE EXIT WAY AND WHAT WE ARE DEALING WITH, HERE, IS NOT THER EX-OF A STOP -- IS NOT THE ERECTION OF A STOP SIGN, BUT ARCHITECTS AND DESIGN PLANNERS. WE ARE DEALING WITH FOLIAGE ON THE RIGHT SIDE OF AN EXIT WAY TO A GAS STATION AND SOMEONE MAKING A RIGHT TURN OUT ON TO A THOROUGH FAIR.

IF THE PERSON SUING WAS THE PERSON WHO HAD JUST BOUGHT GAS AT YOUR GAS STATION AND THEN THE PASSENGER IN THE CAR WAS STRUCK BY ANOTHER VEHICLE, WOULD THERE BE LIABILITY IN THAT SITUATION? BASED ON THE ALLEGATION THAT THERE WAS FOLIAGE THAT OBSTRUCTED THE DRIVER'S VISION?

BASED ON THE DAWSON CASE, THE THIRD DISTRICT CASE, THERE WOULD BE LIABILITY.

SO, REALLY, THE IDEA THAT FROM IS A -- THAT THERE IS A LAND OWNER EXCEPTION TO LIABILITY FOR FOLIAGE GROWING ON THEIR PROPERTY, REALLY, IS NOT -- WE ARE REALLY TALKING, YOU ARE TALKING, NOW, ABOUT MORE AFTER McCAIN TYPE OF ANALYSIS, WHICH THE THIRD DISTRICT DIDN'T GET INVOLVED IN THIS ITS DECISION.

WELL, YOUR HONOR, I AM NOT TALKING ABOUT. THAT AND ACTUALLY THE THIRD DISTRICT DID GET INVOLVED IN IT.

THEY SAID McCAIN DIDN'T APPLY BECAUSE WE THINK THAT McCAIN DIDN'T OVERRULE THE EARLIER CASES INVOLVING LAND OWNER LIABILITY FOR FOLIAGE GROWING ON LAND OWNER PROPERTY. THEY DIDN'T TALK ABOUT WHETHER THE PEDESTRIAN WAS WITHIN THE ZONE OF RISK CREATED BECAUSE OF THE FOLIAGE.

RIGHT. WHAT I THINK THEY, ALSO, SAID, IS THAT THE FACTS OF McCAIN DIDN'T APPLY HERE, AND I WOULD LIKE TO ADDRESS McCAIN IN A MOMENT. THE DIFFERENCES IN THIS CASE AND McCAIN, FIRST, QUITE OBVIOUSLY, AND I DON'T BELIEVE I NEED TO GO INTO, AND THERE IS A TOTALLY DIFFERENT SET OF FACTS. IN McCAIN, THE OWNER UNDERTOOK A DUTY FOR TRENCHING FOR ELECTRICAL WIRES AND IT WAS SAFE AND IT WAS LATER FOUND OUT THAT ARGUABLY IT WAS NOT SAFE AND THAT IS HOW THE PLAINTIFF GOT INJURED. IN McCAIN THERE WAS NO ALTERNATIVE REMEDY. THERE WAS NO OTHER PERSON WHO VERY, VERY COMP SKATED THE -- COMPENSATED THE PERSON FOR THE INJURY. IN THIS CASE THEY SUED THE OWNER AND THE DRIVER AND THEY WERE ABLE TO SUE MY CLIENT UNDER THE ORDINANCE THAT HAS BEEN APPLIED HERE. IN McCAIN, THERE WAS NO OVERTURNING OF A STATE OF LAW. THERE WAS REALLY NOTHING APPLYING TO THOSE FACTS. THE RULE, IN THIS CASE, AS TO MY COLLEAGUES' SUGGESTION, BUT AS JUSTICE WELLS SAID, THERE IS NO OPENING OF THE DOOR HERE. THE FORESEEABLE RISK ASAP APPLIED TO McCAIN IS LIMITED TO -- AS APPLIED TO McCAIN, IS LIMITED TO WHAT IS THERE. IN McCAIN, YOU ARE NOT GOING TO HAVE A DOMINO EFFECT OF FURTHER LITIGATION. IN THIS CASE, IF YOU APPLY MY COLLEAGUES RULE THAT THE PEDESTRIANS WERE IN A FORESEEABLE ZONE OF RISK, IN AN URBAN AREA, AS YOU POINTED OUT, JUSTICE PARIENTE, THEN YOU HAVE A SUBURBAN AREA, NOT A RURAL AREA, AND IN READING THE DAWSON CASE, THE DEFENDANT SHOPPING CENTER WAS SUED BECAUSE A CONCRETE POLE OFF THE PROPERTY BLOCKED, ALLEGEDLY BLOCKED THE VIEW OF SOMEONE EXITING THE PREMISES, SO NOT ONLY WILL THE PROPERTY OWNER HAVE TO REDESIGN THEIR ENTRACEWAYS AND EXITS. NOT ONLY WILL THEY HAVE TO WORRY ABOUT THE FOLIAGE OR SIGNS OR CARS OR OTHER THINGS BLOCKING T THEY ARE GOING TO HAVE TO WORRY ABOUT THINGS THAT ARE NOT EVEN ON THEIR PROPERTY.

ARE YOU URGING THAT WE OVERRULE THE DAWSON CASE?

NO, YOUR HONOR, I AM NOT. THE DAWSON CASE, THE SUMMARY JUDGMENT WAS ENTERED IN FAVOR OF THE DEFENDANT. I AM SUGGESTING TO FOLLOW THE DAWSON CASE AND SAY THAT

THE PROPERTY OWNER IS NOT RESPONSIBLE FOR PROPERTY THAT IS ON THE PROPERTY THAT OBSTRUCTS THE MOTORIST'S VIEW BUT, ALSO, THINGS OFF THE PROPERTY.

HOW WOULD WE HANDLE A SITUATION WHERE A COMMERCIAL ENTERPRISE THAT IS DEALING IN AUTOMOTIVE PRODUCTS CREATES AN ONE-WAY EXIT, AND YOU HAVE A DRIVER OF A VEHICLE COMING OUT ON OF THAT EXIT, CAN -- COMING OUT OF THAT EXIT, CANNOT SEE EITHER DIRECTION. THERE IS NO ONE THERE TO HELP THEM OUT. THEY TEND TO INCH ON OUT AND MAKE CONTACT WITH ANOTHER VEHICLE AND A PEDESTRIAN IS KILLED? UNDER THIS THEORY, THERE WOULD BE NO RESPONSIBILITY ON THE PART OF THAT PROPERTY OWNER, BECAUSE THE BUSHES WOULD HAVE BEEN THERE. AM I CORRECT? IF WE APPLY THAT UNDER THAT SCENARIO, THE RULE OF LAW AS IT EXISTS, THERE WILL BE NO RESPONSIBILITY?

I APOLOGIZE, YOUR HONOR. YOU ARE SAYING THERE ARE BUSHES LINING THE ONE-WAY EXIT?

YOU CAN'T SEE. YOU HAVE GOT A SITUATION ONLY ONE WAY OUT AND WE KNOW IT IS A GAS STATION AND THAT IS THEIR BUSINESS, SERVICING CARS, AND CARS KEEP COMING OUT, AND THE ONLY WAY YOU CAN GET OUT IS TO INCH UP AND YOU MAY CONTACT WITH ANOTHER VEHICLE ON THE ROADWAY AND THEN ULTIMATELY KILL A PEDESTRIAN. UNDER THE LAW, AS THE THIRD DISTRICT HAS IT NOW, THERE WOULD BE NO OBLIGATION ON THE PART OF THAT COMMERCIAL PROPERTY OWNER, BECAUSE THAT WOULD BE A BUSH. THAT WOULD BE NATURAL, AND EVEN THOUGH THEY HAD CREATED THEIR EXIT TO GO ONLY THAT WAY, THERE IS NO LIABILITY.

WELL, THERE WOULD BE LIABILITY UNDER THE ORDINANCE. THERE WOULD NOT BE LIABILITY --

THAT IS WHAT I AM SAYING. THERE WOULD BE NO DUTY, COMMON LAW, UNDER THAT CIRCUMSTANCE.

YOUR HONOR, THAT IS CORRECT. THERE WOULD BE NO COMMON LAW DUTY. GETTING BACK TO THE REASON BEHIND WHY THIS LAW WAS CREATED AND WHY IT HAS BEEN APPLIED, CONSISTENTLY THROUGHOUT FLORIDA FOR SOME 60 YEARS, IN ADDITION TO THE PROPERTY RIGHTS WHICH WE ALREADY ADDRESSED, JUSTICE PARIENTE, THE COURTS HAVE FOUND THAT THE DRIVERS ARE IN THE BEST POSITION TO LOOK AT OBSTRUCTIONS AND REACT ACCORDINGLY TO THEM. IN FACT, THE LAW IS, IN THE STATE, STATUTE 316.125, THAT WHEN APPROACHING A SIDEWALK OR AN EXIT AS WE HAVE IN THIS CASE, THE AMOCO SERVICE STATION, THE DRIVER MUST STOP AND LOOK.

DOESN'T THAT SAME RATIONALE, THOUGH, APPLY IF IT IS A SIGN VERSUS A TREE? WE HAVE COMPARATIVE NEGLIGENCE. WE HAVE GOT FABRE. WE HAVE GOT EVERY OTHER WAY TO PUT PEOPLE'S PROPORTIONATE RESPONSIBILITY INTO PERSPECTIVE, BUT TO SIMPLY SAY, WHAT YOU ARE SAYING IS MOTORISTS OUGHT TO JUST WATCH WHERE THEY ARE GOING, AND SO OBSTRUCTION OR NOT, IT SHOULDN'T BE FIR FAULT, BUT I DON'T SEE HOW -- IT SHOULDN'T BE FIR FAULT, BUT -- THEIR FAULT, BUT I DON'T SEE HOW THAT APPLIES TO THE GROWING VERSUS STATION ARIANNA NOT STRO BE WATERED ARE -- VERSE STATIONARY, AND NOT HAVE TO BE WATERED, THAT THAT CHANGES THE RESPONSIBILITY OF THE LAND OWNER.

THE DIFFICULTY THAT I AM HAVING, IN ADDRESSING THIS QUESTION, IS THAT IT WOULD CHANGE THE RESPONSIBILITY OF THE LAND OWNER IN MANY SITUATIONS, BECAUSE, AGAIN, IF YOU FOLLOW THIS FORESEEABLE ZONE OF RISK ARGUMENT THAT MR. SCHWARTZ IS MAKING, IT WON'T BE LIMITED TO AN AMOCO STATION WITH A SIGN OR SOME BUSHES. IN THIS CASE I WOULD CONCEDE A LITTLE DIFFERENCE THERE, THAT IT WOULD BE EXTENDED TO HOMEOWNERS IN THE SUBURBS AND WOULD BE EXTENDED TO FARMERS.

WHAT IF A DEVELOPER GOES AND TAKES DOWN 50 ACRES OF TREES AND LEAVES ONE TREE UP AND HAPPENS TO PUT THAT ONE TREE AT THE VERY PLACE WHERE IT IS GOING TO OBSTRUCT VISION. WHY -- I MEAN, WHAT IS -- WHY SHOULD THAT DEVELOPER BE EXEMPT FROM LIABILITY?

IN THAT SITUATION, I MAY CONCEDE THAT THEY MAY NOT BE. THEY SHOULD BE.

OUR BLANKET RULE DOES NOT ALLOW FOR THAT. IF YOU HAVE GOT A BLANKET RULE, THEN YOU DON'T ALLOW FOR -- YOU ARE TALKING ABOUT SOME HORRIBLES, AND ISN'T THAT WHERE THINGS LIKE PROS MATT CAUSE, THE REASON -- PROXIMATE CAUSE, THE REASONABLENESS OF BEHAVIOR THAT COMES INTO PLAY AND GETS A DIRECTED VERDICT OR SUMMARY JUDGMENT?

MY COLLEAGUE SAYS THAT THAT WOULD BE A MOTION TO DISMISS AND I DON'T AGREE. I AGREE WITH JUSTICE WELLS THAT WOULD BE A JURY SITUATION. I AM SAYING IT CREATES A SIMPLISTIC SITUATION. LET'S LOOK AT THE MIDDLE SITUATION, SOMEBODY IN THE SUBURBS WITH A HALF ACRE LOT AND SOME TREES THERE AND YOU ARE ASKING LAY PERSONS TO DO WHAT SHOULD BE LEFT UP TO THE MUNICIPALITIES SHOULD DO. LET THE MUNICIPALITIES PASSORD NANDZ OR THE ENGINEERS OR -- PASS ORDINANCES OR THE ENGINEERS PASS SITE ORDINANCES. HOW MANY TREES SHOULD I CUT BACK? 10 FEET? IS THAT REASONABLE? 20 FEET? DO I HAVE TO DUTY BACK -- TO CUT BACK 20 TREES? THIS IS OPENING A QUAGMIRE OF THINGS THAT SHOULD BE HANDLED IN THIS CASE. THERE IS A REMEDY HERE. MY CLIENTS HAVE BEEN SUED HERE AND THEY ARE CURRENTLY GOING INTO THE TRIAL COURT ON THIS ISSUE. I WOULD JUST LIKE TO BRIEFLY ADD, JUST FOLLOWING UP ON THE POLICY CONSIDERATIONS THAT WERE RAISED, THE CONSEQUENCES OF THIS WOULD BE THE COST TO THE LAND OWNER, DIFFICULTY OF THE LAND OWNER KNOWING WHAT TO DO. PERHAPS RAISED INSURANCE RATES, IF THERE IS A LITIGATION CRISIS BECAUSE OF THIS, HANDLING A LAND OWNER WITH A TREE ON HER PROPERTY IN COURT, MORE LAWSUITS AGAINST LANDOWNERS. AGAIN I WOULD LIKE TO POINT OUT THAT THERE IS A ADEQUATE REMEDY HERE AGAINST MY CLIENTS, AND, AGAIN, I WOULD LIKE TO POINT OUT THAT THE COURTS HAVE LEFT IT UP TO THE DRIVER, WHO IS IN A BETTER POSITION TO LOOK AT THE CONDITION AND STOP AND SEE WHAT IS APPROPRIATE HERE, AND WITH THAT I WOULD LIKE TO CONCLUDE AND THANK FOR YOU YOUR TIME AND JUST ASK YOU TO AFFIRM THE THIRD DISTRICT ON THE COMMON LAW ISSUE. THANK YOU VERY MUCH.

LET ME GET STRAIGHT BECAUSE ARE ADVOCATING AND THAT IS THAT I HAVE A DRIVEWAY AT MY HOUSE AND IT HAS GOT A TREE NEXT TO IT. CHIEF JUSTICE HARDING GOES DRIVING OUT OF THAT DRIVEWAY, AND HE HITS A CAR, THAT IS COMING UP THE HILL, GOING DOWN MARION AVENUE, AND THAT THE PERSON WHO IS IN THE CAR, DRIVING DOWN MARION AVENUE, WHO I HAVE NO INKLING THAT EITHER HE OR JUSTICE HARDING OR DRIVING OUT OF MY DRIVEWAY, BUT BECAUSE I HAVE GOT A TREE THERE, I HAVE GOT SOME DUTY TO THAT PERSON THAT IS DRIVING DOWN MARION AVENUE, BECAUSE OF THE WAY THAT HE IS DRIVING HIS CAR.

THE ANSWER TO THE QUESTION, YOUR HONOR, THIS IS THE TOUGH ONE, IS MAYBE AND MAYBE NOT. WHAT WE ARE ADVOCATING IS THE FORESEEABILITY TEST, WHICH HAS ALWAYS BEEN THE TEST. MAYBE WHEN WE GET INTO COURT OR WE KNOW A FEW FACTS. HAVE YOU HAD ANY PRIORS? WE ARE TALKING ABOUT A TREE. AN OLD TREE? A BIG TREE? A WIDE TREE? ARE YOU ON NOTEIES THAT OTHER PEOPLE HAVE HAD PROBLEMS? WHAT EXACTLY --

BUT THE DUTY HAS GOT TO START FROM MY CONNECTION TO THAT DRIVER AND THIS TREE.

CORRECT.

NOW, YOU CAN ADD TO IT IN ALL SORTS OF WAYS, BUTED UNDERLYING QUESTION IS DO I HAVE -- BUT THE UNDERLYING QUESTION IS DO I HAVE A DUTY TOY THE PERSON THAT IS INJURED, BY REASON OF HIS NOT LOOKING AROUND THE TREE.

ONLY IF WHAT YOU CREATED BY VIRTUE OF THIS TREE, CREATED A, QUOTE, UNREASONABLE RISK OF HARM, AND WITHOUT KNOWING ALL OF THE CIRCUMSTANCES, WHICH McCAIN WOULD SAY WE NEED TO KNOW, I CAN'T ANSWER THE QUESTION. THAT MAY BE ONE OF THOSE RARE INSTANCES WHERE THE QUESTION, THE LEGAL QUESTION OF DUTY WILL BE A MIXED QUESTION LAWFUL AND

FACT. A TRIAL COURT MAY NEED TO KNOW ALL OF THE CIRCUMSTANCES, TO THEN SAY, NO, THIS IS THE TYPE OF SITUATION WE DIDN'T ENVISION. IT IS NOT AN UNREASONABLE RISK NOR IS IT UNREASONABLE TO REQUIRE JUSTICE WELLS TO START CUTTING HIS TREE AND START BEING PARANOID THAT SOMEBODY SOMEDAY SOME WAY MAY GET HURT, AS A BIZARRE THING THAT JUST HAPPENED, BUT I CAN'T ANSWER IN THE ABSTRACT. THE ORDINARY TREE, NO, IT IS NO DIFFERENT THAN THE CURB CASES. WE STILL HAVE A LAW THAT SAYS A 4-INCH STEP UP CURB AT A SHOPPING CENTER. WE ALTHOUGH KNOW THERE ARE CURBS. IS IT DANGEROUS? ARE PEOPLE GOING TO TRIP? SURE. BUT AT SOME REASON WE HAVE TO THINK OF PUBLIC POLICY. MAYBE, YOUR HONOR, THAT IS WHERE IT SHOULD BE DRAWN, BUT I HAVE NEVER HEARD IT OCCUR IN A RESIDENTIAL SETTING WITH ANY KIND OF VEGETATION OR GIVEN ANY OTHER INSTANCES. IF YOUR HOUSE IS SOMETHING LIKE, OVER THE YEARS, HAS BECOME A COMMERCIAL CENTER BUT YOU ARE STILL LIVING THERE BUT OF GRANDFATHER SEASONING? -- ZONING? YOU ARE IN A COMMERCIAL SITUATION. THE DUTY GROWS AS THE RISK GROWS.

IF YOU ARE NOT AT AN INTERSECTION, THE RISK THAT YOU WOULD BE LOOKING AT IS SIMPLY WHAT INSTRUCTIONS -- WHAT OBSTRUCTIONS THERE ARE AT THE END OF YOUR DRIVEWAY THAT MIGHT OBSTRUCT SOMEONE COMING OUT OF YOUR DRIVEWAY.

OUR CASE IS EASIER. THERE IS A LOT MORE CONNECTION HERE, BECAUSE THEY INVITED A LOT OF ADDITIONAL TRAFFIC TO COME IN AND HAVE TO NEGOTIATE THIS INGRESS AND HE AGREES WAY. A TOTALLY DIFFERENT STORY, OBVIOUSLY, THAN YOUR HYPOTHETICAL.

BUT THE ONLY WAY, IF I HAVE GOT A DUTY TO THE PERSON DRIVING DOWN MARION AVENUE, THEN THE ONLY WAY THAT I CANNOT BREACH THAT DUTY IS BY TAKING DOWN THE TREE. ISN'T THAT RIGHT?

CUTTING IT BACK SO THAT THERE IS NO OBSTRUCTION. HOW WOULD YOU HAVE REASON TO KNOW, UNLESS THERE IS A PRIOR?

I WALKOUT THERE EVERY NIGHT ON A WALK. I DRIVE A CAR.

I AGREE, YOUR HONOR. THAT IS A TOUGH QUESTION, AND FORTUNATELY FOR ME THAT IS NOT MY CASE, BUT I THINK McCAIN CAN DEAL WITH THAT SITUATION AND WILL LEAVE IT TO THE FIRST CASE POST THIS ONE, I HOPE, WHERE McCAIN ANALYSIS DOES APPLY, TO START CARVING OUT THOSE NARROW BUT BRIGHT-LINE EXCEPTIONS. THIS NEW RULE DOES NOT APPLY TO RESIDENTIAL AREAS WHERE YOU ARE TALKING ABOUT A TREE. WE WANT TO HEAR BRANCHES DROPPING AND GARBAGE PILING UP NEXT TO THE TRUNK OR SOMETHING LIKE THAT. WE WANT TO HEAR THAT EVERYONE SHOULD BE ON NOTICE OF THE TREES. I AM TRYING TO FLIP THE TEST. McCAIN NEEDS TO BE THE TEST, THE FLEXIBLE TEST FORM THE TRADITIONAL RULE NEEDS TO BE THE TRADITIONAL EXCEPTION AND YOUR HONOR'S HYPOTHETICAL MAY, INDEED, AND BRIGHT-LINE EXCEPTION TO A MORE FLEXIBLE RULE. I NEED TO CORRECT A FEWENINGS, YOUR HONOR. WE DID PLEA IN OUR COMPLAINT THAT THIS TREE WAS CREATED ORAL ALLOWED TO FLOURISH. WE STILL DON'T -- OR ALLOWED TO FLOURISH. WHEN THEY PLANTED THE TREE AS LANDSCAPING, WHICH I THINK IT IS, OR WHETHER THEY BUILT A SHRINE OF A GAS STATION AROUND THIS EXISTING HEDGE, I DON'T KNOW, BUT WE DID PLEAD IT AS AN ALTERNATIVE, SO IT IS AN ISSUE IN THIS CASE.

WHAT YOU ARE ADVOCATING NOW IS NOT THE STATE OF THE LAW AT PRESENT, CORRECT, AS FAR AS FOLIAGE IS CONCERNED?

IT IS NOT, AS FAR AS FOLIAGE IS CONCERNED, EXCEPT, YOUR HONOR, I HAVE TO ADD AN EXCEPT, THAT THE FIRST DISTRICT'S, DIKES VERSUS CITY OF APALACHICOLA CASE WAS, IN FACT, A YOUNG MAN WHO WAS CUTTING THE GRASS ON HIS, AT HIS HOME OR SOMEBODY'S HOME AND HE, THEN, STEPPED OUT INTO THE RIGHT-OF-WAY, WHERE THE CITY, WHO OWNED THE RIGHT-OF-WAY, HAD A TREE.

I GUESS MY QUESTION, THEN, THIS CASE REALLY DOESN'T CONFLICT WITH McCAIN.

THAT IS WHERE I WAS GOING. THE CITY OF APALACHICOLA CASE, IN FACT, SAYS THE DUTY EXTENDS TO EVEN PEOPLE, PEDESTRIANS, WHO WALK ON TO THE STREET, SO THAT THE CITY, WHICH OWNED THE RIGHT-OF-WAY WHERE THIS TREE EXISTED AND WHICH SAID, WAIT A MINUTE, EVEN IF THERE IS THIS McCAIN ANALYSIS, THERE IS NO DUTY HERE BECAUSE THE YOUNG MAN WALKED INTO THE STREET. HE IS NOT OUR INVITEE. AND IT IS NOT FORESEEABLE, ET CETERA, ET CETERA, AND THE FIRST DISTRICT SAID, NO, AFTER McCAIN EVEN APPLIES IN THIS AREA, SO THERE IS A CONFLICT WITH THE FIRST DISTRICT. ALSO, YOUR HONORS, THERE IS A SQUARE CONFLICT, WHICH IS IRONIC THAT THE COURT WOULD HAVE TO CONFRONT IT IN THIS CASE, BECAUSE WE ARE DEALING WITH A FOLIAGE CASE, BUT THE LAW IS SQUARELY IN CONFLICT, IF IT IS A, QUOTE, CONSTRUCTION CASE. DAWSON WAS A NEGATIVE DESIGN TO AN EXIT TO A SHOPPING CENTER, WITH A CONCRETE POLE ADDING TO THE WHOLE ARE A RAY OF OBSTRUCTIONS. -- A WHOLE ARRAY OF OBSTRUCTIONS.

I THOUGHT COUNSEL DISAGREED AS TO WHETHER IT WAS A NATURAL OBSTRUCTION.

COUNSEL DISAGREED BUT I WOULD ARGUE IN THAT CASE, EVEN WHERE THEY SAID CONCRETE POLE, ARTIFICIAL OB, BUT A FEW -- OBJECT, BUT A FEW YEARS AGO, A NEGATIVE DESIGN OF SHOPPING CENTER WITH THE SIGN IMPROPERLY PLACED, CAUSING A MOTORIST TO GO ON TO THE ROAD AND STRIKE A MOTORIST WHO WAS ON THE HIGHWAY WHO WAS NOT AN INVITEE? WE FIND THERE WAS A DUTY, AND NATURAL OR ARTIFICIAL IS NOT GOING TO RESOLVE THE CONFLICT, BECAUSE THERE IS CONFLICT THERE.

YOU DON'T CONCEDE THIS IS A NATURAL CONDITION.

NO, I DON'T. OUR COMPLAINT SAYS THEY EITHER CREATED IT OR THEY ALLOWED IT TO FLOURISH. SO, AGAIN, I CAN'T CONCEIVE, ON COLLINS AVENUE, OF THERE BEING ANYTHING NATURAL OVER THE LAST 40 YEARS, BUT IT IS POSSIBLE THAT THEY BUILT A SHRINE AFTER GAS STATION AROUND THIS BUSH, I GUESS. BUT I AM BEING CANDID WITH THE COURT FORM WE PLED BOTH. IT IS IN THERE. -- COURT. WE PLED BOTH. IT IS IN THERE. I CAN'T ARGUE THAT IT WAS ARTIFICIAL AND IT WAS A NATURAL ONE AND WHERE AM I THERE?

THE LAW, IN THE THIRD DISTRICT, SAYS IT IS A NATURAL CONDITION. FOLIAGE IS FOLIAGE, WHETHER YOU PLANTED IT.

NO. THEY DID NOT. THEY SAID WE HAVE A BRIGHT-LINE RULE BECAUSE OF THESE AGRARIAN PREACCEPTS.

YOU ARE SAYING IF THERE IS A POLE, IT WOULD NOT BE A NATURAL CONDITION.

IT WAS A POLE. IT WAS A SHOPPING CENTER DESIGN, AND THERE IS CONFLICT, BECAUSE NAPOLI WAS A SHOPPING CENTER. I WANT TO STATE, BEFORE I FORGET, JUSTICE LEWIS ASKED WAS THERE A COMMERCIAL CASE? THERE DOESN'T SEEM TO BE A DICHOTOMY FOR COMMERCIAL VERSUS RESIDENTIAL, HOWEVER, PROBABLY THE BEST AND MOST ANALOGOUS CASE TO OURS IS A MICHIGAN COURT OF APPEALS CASE THAT WE CITED, LANGIN VERSUS RUSHTON AT 315 NORTHWEST SECOND 270. THE PLAINTIFF WAS A PASSING MOTORIST, STRUCK BY ANOTHER MOTORIST, EXITING THE DEFENDANT'S SHOPPING CENTER, DUE TO, ALLEGEDLY, AN OBSTRUCTIVE TREE ON THE DEFENDANT'S PROPERTY. SO IT IS A FOLIAGE CASE. IT IS COMMERCIAL. THE MICHIGAN COURT OF APPEALS SURVEYS ALL OF THIS LAW THAT YOUR HONORS ARE GOING TO HAVE A BIG HEADACHE TRYING TO SORT THIS THROUGH, IN THEIR OWN JURISDICTION, AND THE COURT THROWS UP ITS HANDS AND SAYS THIS IS CRAZY. WE CAN HAVE LEGAL CONDITIONS IN THE RIGHT CASE. LET'S GO TO FORESEEABLE ANALYSIS, BECAUSE THAT IS THE ORIGIN OF TORT LAW. RISK DEFINES DUTY. IF THERE IS FORESEEABLE RISK THERE, IS DUTY, AND SIMPLY FOR

OPENING THE DOORS. AS JUSTICE PARIENTE POINTED OUT, YOUR HONORS, IF THEY HAD A DUTY TO THE MOTORIST FOR PROVIDING A SAFE MEANS EVER EGRESS AND -- OF HE AGREES AND INGRESS, THEN THEY SHOULD -- OF EGRESS AND INGRESS, THEN THEY SHOULD CERTAINLY HAVE IT FOR THE CLIENT ON THE SIDEWALK. THEY SUBJECTED US, THE SIDEWALK PEDESTRIAN,. HOW CAN THERE NOT BE A DUTYY?

THANK YOU. THANKS FOR BOTH OF YOU.