YOU MAY PROCEED.

I AM READY TO PROCEED, YOUR HONOR. YOUR HONOR, MAY IT PLEASE THE COURT. I AM FRED BINGHAM. I AM AN ASSISTANT PUBLIC DEFENDER WITH THE SECOND JUDICIAL CIRCUIT, REPRESENTING THE PETITIONER IN THIS MATTER. THIS MATTER IS BEFORE THE COURT ON A CONFLICT OF DECISIONS THAT DEAL WITH THE QUESTION OF WHETHER THE GIVING OF WHAT WAS THEN THE STANDARD INSTRUCTION ON ENTRAPMENT, WHERE IT WAS NOT OTHERWISE PRESERVED FOR APPEAL BY CONTEMPORANEOUS OBJECTION, CONSTITUTES FUNDAMENTAL ERROR.

IN THIS CASE, JUST SO THE RECORD IS CLEAR, THE DEFENSE LAWYER DID NOT EVEN REQUEST THE INSTRUCTION, BASED ON --

HE, APPARENTLY, HAD REQUESTED THE PRE1987 INSTRUCTION. AND -- BUT THEN IT WAS AGREED THAT THEY WOULD, THEN, GIVE THE STANDARD INSTRUCTION, OR THE INSTRUCTION THAT WAS STANDARD AT THAT TIME.

NORMALLY, AN INSTRUCTION IS NOT FUNDAMENTAL ERROR, TO GIVE -- FAILURE TO GIVE AN INSTRUCTION. WHEN DOES IT BECOME FUNDAMENTAL ERROR? WHEN IS THAT LINE OF DEMARCATION? ISN'T THAT WHAT WE ARE LEALING -- DEALING WITH?

WELL, YOUR HONOR, THAT LINE OF DEMARCATION AND THE FAILURE TO INSTRUCT PROPERLY OR THE FAILURE TO INSTRUCT AT ALL, RISES AS TO THE ELEMENTS THAT THE STATE HAS TO PROVE THE OFFENSE. THAT IS THE MORE TYPICAL CONTEXT. IT IS FUNDAMENTAL ERROR, WHERE THE COURT FAILS TO INSTRUCTOR ERRONEOUSLY INSTRUCTS, WITH RESPECT TO A DISPUTED ISSUE. THERE IS, SOMETIMES, CERTAIN ELEMENTS OF AN OFFENSE THAT ARE NOT DISPUTED. THERE ARE OTHER ELEMENTS THAT MAY BE VERY HOTLY CONTESTED AT TRIAL. AND THERE IS NO DULT I -- DUTY ON DEFENSE COUNSEL TO SAY THAT THAT IS AN ERRONEOUS INSTRUCTION?

THERE IS, BUT THE COURTS, NEVERTHELESS, HAVE SAID, IF THE COURT FAILS TO INSTRUCT ON THAT DISPUTED ISSUE, THEN IT RISES TO THE LEVEL OF FUNDAMENTAL ERROR, BECAUSE IT GOES TO THE HEART OF THE DECISION, THE HEART OF THE CASE INVOLVED IN THAT PARTICULAR TRIAL.

WELL, ISN'T THAT ONE OF THE PROBLEMS THAT YOU HAVE TO OVERCOME HERE? AND THAT IS THAT THIS IS UNIQUELY INVOLVING AN ISSUE ASSERTED BY THE DEFENSE?

CORRECT.

AND SO --

WELL --

IF IT IS AN ISSUE ASSERTED BY DEFENSE, THEN WE COMBINE THAT WITH THE DEFENSE AGREEING TO THIS INSTRUCTION, THEN --

OF COURSE IT WAS, AT THAT TIME, THE ONLY CURRENT STANDARD INSTRUCTION. NEVERTHELESS THE TRIAL COURT HAS AN OBLIGATION TO CORRECTLY INSTRUCT ON THE LAW, NOTWITHSTANDING THE STANDARD INSTRUCTION.

BUT WE ARE NOT TALKING, HERE, ABOUT THE BURDEN OF PROOF OF THE STATE, WITH REFERENCE TO ESTABLISHING THE OFFENSE TO BEGIN WITH. WE ARE TALKING ABOUT --

RIGHT.

-- A MATTER BROUGHT UP BY THE DEFENSE.

RIGHT. BUT IN THIS RESPECT, I -- ENTRAPMENT IS RATHER UNIQUE. LIKE IN SOCIER, I BELIEVE IT WAS A VOLUNTARY INTOXICATION OFFENSE, AND IT WAS NOT INSTRUCTED ON, AND THEY SAID THAT THERE WAS NO FUNDAMENTAL ERROR INVOLVED IN FAILING TO INSTRUCT ON IT. BUT THERE IS AN UNIQUENESS --

WHAT WOULD HAPPEN, FOR INSTANCE, IF THE LAWYER SAID, JUDGE, WE ARE WAIVING OUR DEFENSE OF ENTRAPMENT, AND WE DON'T WANT ANY INSTRUCTION ON ENTRAPMENT AT ALL.

HE HAS WAIVED THE DEFENSE.

WOULD THAT BE EFFECTIVE?

I WOULD THINK WITH THE CONCURRENCE OF THE CLIENT, CONSULTATION AND CONCURRENCE WITH THE CLIENT, YES, BUT ON THE --

WELL, IT IS THE LAWYER --

HERE WE HAVE --

IT IS THE LAWYER THAT HAS THE RESPONSIBILITY FOR PLEADING ENTRAPMENT, TO BEGIN WITH, IS IT NOT? RAISING THE ISSUE. IS THERE A CASE OUT THERE THAT SAYS YOU CAN ONLY DECIDE THIS ISSUE OF WHETHER TO RAISE ENTRAPMENT OR WITHDRAW IT OR WHATEVER, WITH THE CONCURRENCE OF YOUR CLIENT?

I THINK THAT WOULD BE A TACTICAL OR STRATEGIC DECISION WITHIN THE LAWYER'S RESPONSIBILITY.

BUT THE LAWYER COULD MAKE.

THE LAWYER'S RESPONSIBILITY.

IF THE LAWYER COULD MAKE THAT RESPONSIBILITY TO TAKE IT OFF THE TABLE COMPLETELY, THEN WHY WOULDN'T THE LAWYER BE BOUND BY HIS DREAMT GOOD -- HIS AGREEMENT TO THIS PARTICULAR INSTRUCTION TO THE JURY?

WELL, I THINK THAT, BECAUSE THERE -- THE DEFENSE OF ENTRAPMENT IS ONE OF CONFESSION AND AVOIDANCE. THE DEFENDANT HAS, IN ORDER TO ASSERT, IT HAS TO ADMIT ALL OF THE ELEMENTS OF THE OFFENSE TO WHICH HE WAS CHARGED, BUT THEN HE ASSERTS I WAS ENTRAPPED. IN AN INITIAL BURDEN, BECAUSE THIS IS AN AFFIRMATIVE OFFENSE, IS PLACED UPON THE DEFENDANT, TO SHOW THAT THERE WAS AN INDUCEMENT, AND SOME ELEMENT THAT HE DID NOT HAVE A PREDISPOSITION TO COMMIT THE OFFENSE. UNDER MONIOS AND UNDER THE PRESENT INSTRUCTION, THEN THERE IS A BURDEN SHIFTING. THEN THE BURDEN SHIFTS TO THE STATE TO PROVE, BEYOND A REASONABLE DOUBT, THAT HE HAD A PREDISPOSITION.

COMING BACK TO THIS ISSUE ABOUT FUNDAMENTAL ERROR AND WHETHER THERE ARE SOME BRIGHT LINES OUT THERE, SHOULDN'T ONE OF THE LINES BE WHETHER IT DOES GO TO THE FUNDAMENTAL OBLIGATION OF THE STATE TO PROFITS CASE, AND THEN IF THERE IS SOME FLAW OR IF THERE IS SOME PROBLEM WITH THAT, WOULDN'T YOU AGREE --

GENERALLY --

-- THIS GOES TO A DEFENSE. IT DOES NOT GO --

GENERALLY I AGREE WITH YOU, YOUR HONOR, BUT IN THIS CASE, BECAUSE OF THE UNIQUENESS AND THE BURDEN SHIFTING THAT IS INVOLVED IN ENTRAPMENT, THAT, ONCE THE DEFENDANT ASSERTS THAT DEFENSE AND ADMITS ALL OF THE ELEMENTS TO THE OFFENSE, THERE IS NO BURDEN LEFT ON THE STATE. OF COURSE THEY HAVE TO COME FORWARD WITH EVIDENCE, BUT THERE IS NO REAL BURDEN, REAL DISPUTED ISSUE LEFT ON THE TABLE, VISA ADVISE THE STATE -- VIS-A-VIS THE STATE. UNTIL YOU GET INTO THIS, AND THE DEFENDANT PRESENTS SOME EVIDENCE THAT HE WAS INDUCED, THE LAW SAYS THAT AT THAT POINT, THERE IS THIS BURDEN SHIFTING, AND THIS INSTRUCTION RELIEVES THE STATE ENTIRELY OF ANY BURDEN TO COME FORWARD TO SHOW THAT THERE WAS PREDISPOSITION, AND IN FACT, AT THAT POINT, IN THIS CASE, THE STATE HAD NO BURDEN TO MEET AT ALL! THE DEFENDANT CONFESSED EVERY ELEMENT OF THE OFFENSE. AND SAYS HE WAS INDUCED. HE WAS ENTRAPPED.

WHAT IMPACT DOES THE DEFENDANT'S TESTIMONY ABOUT HIS PRIOR CONVICTIONS OF SALE AND DELIVERY OF COCAINE AND HIS USE OF THE SUBSTANCE ON THE DAY OF THE EVENT AND HIS FULL TESTIMONY THAT ESSENTIALLY NEGATES THE CONCEPT OF NO PRIOR PREDISPOSITION, HOW DOES THAT FACTOR IN? IS THERE A HARMLESSNESS THAT WE LOOK TO OR IT IS DISREGARDED?

THAT WOULD HAVE BEEN A MATTER FOR THE JURY TO DECIDE, UNDER A PROPER INSTRUCTION, AND PROPERLY INSTRUCTED ON WHO HAS THE BURDEN OR OBLIGATION TO PROVE WHAT ASPECT, RELATIVE TO THIS DEFENSE, BUT THIS JURY WAS NEVER GIVEN THAT INSTRUCTION OR NEVER ASKED TO ADDRESS IT.

BUT THAT IS THE UNDISPUTED STATE OF THE RECORD. HOW CAN YOUR CLIENT DEMONSTRATE THAT HE HAS BEEN HARMED BY THIS? THAT IS, IF HE HAS GIVEN THIS UNREFUTED TESTIMONY OF HIS OWN THAT HE WAS OUT, BECAUSE HE WANTED MORE DRUGS, TO DO THIS, THAT THIS --

HIS TESTIMONY WAS THAT HE HAD SMOKED, THAT HE HAD SMOKED CRACK WITH HIS FATHER-IN-LAW, AND HE HAD GONE TO THE STORE TO BUY A 50 CENT BEER. HE WAS WALKING BY AND SAID HI TO THESE GUYS, AND THEY SAID, HEY, CAN YOU GET US A TWENTY? THERE IS A LOT OF DISPUTED EVIDENCE IN THE FACTS, BUT THE FACT IS THAT THE JURY WAS NEVER GIVEN THE PROPER STANDARDS UPON WHICH TO ADDRESS THESE FACTS. THAT JURY WAS A FACT FINDER, BUT THEY WERE NEVER GIVEN THE PROPER INSTRUCTION AS TO WHO, RELATIVE TO THIS AFFIRMATIVE DEFENSE, HAD TO PROVE WHAT.

WHAT WAS WRONG WITH THE OLD INSTRUCTION?

THE OLD INSTRUCTION DID NOT CONFORM WITH THIS COURT'S DECISION IN MONIOUS. AND IT IS INTERESTING THAT THIS -- IN MUNOS. AND IT IS INTERESTING THAT THE STATEMENT THAT THE STANDARD INSTRUCTION WAS INCOMPLETE, WITH REGARD TO THE BURDEN OF PROOF, WAS ISSUED IN JULY, SEVERAL MONTHS PRIOR TO THE TRIAL IN THIS CASE, YET NEITHER OF THE ATTORNEYS NOR THE COURTS SEEMED TO HAVE RECOLLECTED READING THAT IN THE FLORIDA LAW WEEKLY. THAT MIGHT HAVE ALERTED THEM TO THE FACT THAT THERE WERE SOME QUESTIONS ABOUT WHETHER THE THEN STANDARD INSTRUCTION WAS CORRECT.

SO ARE WE TALKING ABOUT A AN INCOMPETENCY OF COUNSEL ISSUE?

NO. IT WAS NOT RAISED IN THAT CONTEXT, AND THAT IS, MAYBE, SOMETHING TO ADDRESS FURTHER DOWN THE LINE, BUT THE FACT IS THAT THE ONLY DISPUTED ISSUE THAT EXISTED IN THIS CASE WAS IN THE CONTEXT OF THIS AFFIRMATIVE DEFENSE, BECAUSE HE HAD ADMITTED EVERY ELEMENT OF THE OFFENSE, WHICH WAS -- WITH WHICH HE WAS CHARGED, AS HE IS REQUIRED TO DO. THE INSTRUCTION, WHICH WE CONTEND IS ERRONEOUS, WENT TO THE SOLE

DISPUTED ISSUE, AND JUST LIKE FUNDAMENTAL ERROR GOES TO A DISPUTED ISSUE, RELATIVE TO THE ELEMENTS OF THE OFFENSE THAT THE STATE HAS TO PROVE, IN THIS CONTEXT I THINK IT IS, ALSO, FUNDAMENTAL ERROR ON THE SAME REASONING. IT IS THE SOLE ISSUE LEFT IN THE CASE THAT IS DISPUTED.

BUT CASE LAW HAS ESTABLISHED, PRETTY MUCH AT THIS POINT, WHAT IS AND WHAT IS NOT FUNDAMENTAL ERROR. WOULD YOU AGREE WITH THAT?

IN A VERY GENERAL SENSE, THAT WHAT IS FUNDAMENTAL ERROR HAS BEEN -- HAS HAD MULTIPLE FORMULATIONS. IT EXPRESSES DENIAL OF DUE PROCESS.

THAT CATEGORY.

BUT THE ESSENCE OF IT IS THAT IT GOES TO THE FOUNDATION OF THE VERY DECISION RENDERED IN A CASE.

BUT DO YOU AGREE THAT YOU HAVE TO SHOW SOMETHING UNIQUE ABOUT THIS INSTRUCTION, FAILURE TO GIVE THIS INSTRUCTION OR GIVING AN IMPROPER INSTRUCTION, TO MAKE IT FUNDAMENTAL ERROR? BASICALLY THE FAILURE TO GIVE AN INSTRUCTION IS NOT FUNDAMENTAL ERROR. SO WHAT MAKES YOURS UNIQUE, THE ENTRAPMENT? YOU KEEP SAYING IT IS ENTRAPMENT, AND THE BURDEN IS SHIFTED. THE STATE'S ANSWER TO THAT WOULD BE SO WHAT?

YOUR HONOR, I WOULD AGREE WITH YOU, WITH RESPECT TO MOST AFFIRMATIVE DEFENSE ENCES IN CRIMINAL CASES, THAT THE BURDEN IS ON THE DEFENDANT TO COME FORWARD WITH THE PREPONDERANCE OR THE GREATER WEIGHT OF THE EVIDENCE. BUT THE ENTRAPMENT DEFENSE, AMONG ALL OF THEM, IS UNIQUE, BECAUSE IT INVOLVES THIS BURDEN SHIFTING.

AND WHAT DOES THE STATE HAVE TO SHOW ON THIS SHIFTING OF THE BURDEN?

ON THE SHIFTING, WELL, THE INITIAL BURDEN IS ON THE DEFENDANT TO COME FORWARD WITH A GREATER WEIGHT OF THE EVIDENCE, THAT THERE WAS INDUCEMENT ON THE PART OF THE LAW ENFORCEMENT OR THEIR AGENTS. SOME EVIDENCE OF ABS OF PREDISPOSITION, THAT UNDER MONOS, WHICH ADOPTED THE SAME RATIONAL AS JACOBSEN.

IN THIS CASE IT WOULD BE THE DEFENDANT'S TESTIMONY THAT IT WAS THE OFFICER WHO STARTED THE CONVERSATION CONCERNING GETTING THE DRUGS?

ESSENTIALLY YES. IT ARISES IN SO MANY CONTEXTS, BUT THE BURDEN SHIFTS TO THE STATE, ONCE THERE IS EVIDENCE OF INDUCEMENT. SHIFTS TO THE STATE TO PROVE, BEYOND A REASONABLE DOUBT, THAT THE DEFENDANT HAD A PREDISPOSITION TO COMMIT THIS OFFENSE, NOTWITHSTANDING THAT THERE MAY HAVE BEEN INDUCEMENT. THIS IS THE ELEMENT THAT THIS JURY WAS NEVER ASKED TO ADDRESS. AND THESE TWO ELEMENTS, AND IT HAS BEEN RECOGNIZED THAT THIS DEFENSE HAS TWO ELEMENTS, INDUCEMENT AND THE QUESTION OF PREDISPOSITION, THESE TWO ELEMENTS ARE THE SOLE DISPUTED ELEMENTS IN THIS CASE!

AND IN THIS PARTICULAR CASE, IF WE GET TO THAT POINT, ISN'T THE RECORD PRETTY CLEAR, FROM THE DEFENDANT'S OWN TESTIMONY, ON THE ISSUE OF PREDISPOSITION? I MEAN THE DEFENDANT TALKS ABOUT HIS PRIOR RECORD, HIS USE OF DRUGS, HIM WANTING TO GET A PIECE OF WHATEVER COCAINE THAT THE OFFICER ENDS UP GETTING. DOESN'T THIS SUPPORT THE WHOLE ELEMENT OF PREDISPOSITION?

WELL, HE HAS AN OBLIGATION TO SUBMIT SOME EVIDENCE WITH REGARD TO PREDISPOSITION. I HAVE TO CONCEDE THAT THIS IS NOT WITHIN THE LIT TOUR OF THE -- WITHIN THE LITERATURE OF THE LAW, RELATIVE TO THE ENTRAPMENT ASPECTS. THIS ISN'T THE STRONGEST CASE.

WHY ISN'T THIS HARMLESS ERROR? IF WE GET TO THE POINT OF THIS BEING FUNDAMENTAL ERROR, WHY ISN'T IT HARMLESS?

WHY ISN'T IT WHAT?

WHY ISN'T IT HARMLESS, UNDER THE FACTS OF THIS CASE?

IN ITS DECISION AT THE DCA, THEY NEVER ADDRESS. THAT THEY NEVER GOT TO THE QUESTION OF WHETHER, IN FACT, IT WAS ERROR, BUT THEY ADDRESS ADDRESSED THE ISSUE ON WHETHER, BECAUSE IT WAS NOT OTHERWISE PRESERVED, WHETHER IT WAS FUNDAMENTAL. I THINK THE DCA --

DO YOU THINK FUNDAMENTAL IS SUBJECT TO A HARMLESS ERROR TEST? IS FUNDAMENT ERROR SUBJECT TO A HARMLESS ERROR TEST?

WELL, IN EVERY CONTEXT I HAVE SEEN, I BELIEVE THERE HAVE BEEN A NUMBER OF -- THERE HAD BEEN A NUMBER OF TYPES OF ERRORS THAT HAD BEEN DEEMED FUNDAMENTAL, WHICH ARE NOT SUBJECT TO THE HARMLESS ERROR TEST. THERE ARE OTHERS IN WHICH THE COURTS HAVE PERCEIVED IT AND GONE ON AND DISCUSSED IT. THERE ARE SOME ERRORS THAT CAN BE DEEMED FUNDAMENTAL THAT CANNOT BE EVALUATED.

IT IS SORT OF AN INCONSISTENT THEORY, TO SAY THAT SOMETHING THAT IS FUNDAMENT CAN BE HARMLESS OR SOMETHING THAT IS HARMLESS IS FUNDAMENTAL. IT HAS A HARD TIME COMPUTING, DOESN'T IT, AS A MATTER OF LOGIC?

I MAY BE WRONG, BUT I BELIEVE THAT, IN A NUMBER OF CASES, THEY SAY THIS IS FUNDAMENTAL ERROR. THEY SIMPLY DO NOT ENGAGE IN THE ANALYSIS. IN THE BACK OF MY MIND, I HAVE A RECOLLECTION OF HAVING READ CASES WHERE THEY SAY THIS IS FUNDAMENTAL. WE DEEM THIS TO BE FUNDAMENTAL, SUCH AS IS THE CASE THAT WE DEEM THIS TO BE PRESERVEABLE ON APPEAL, AND IT WAS NOT OTHERWISE PRESERVED, BUT AFTER REVIEWING THE ERROR, THEY CONCLUDE THAT THE ERROR WAS HARMLESS.

I AGREE WITH YOU THERE IS LANGUAGE IN CASES THAT SAYS THAT.

THERE IS A LINE OF CASES HERE. THERE ARE A LINE OF CASES THAT SAY, YOU KNOW, THERE ARE CERTAIN ERRORS, PARTICULARLY IF YOU ARE DEALING WITH THINGS DEALING WITH A JURY, DEALING WITH EXTRANEOUS MATERIALS NOT PRESENTED IN EVIDENCE, YOU CAN'T WEIGH AND EVALUATE THOSE FACTS FOR HARMLESS ERROR. THEREFORE THEY SAY THAT IS FUNDAMENT ERROR, AND THAT IS THE END OF THE ANALYSIS.

YOU ARE INTO YOUR REBUTTAL TIME. YOU CAN CONTINUE, IF YOU WOULD LIKE.

THANK YOU, YOUR HONOR. I WILL RESERVE WHATEVER IS LEFT TO ME.

MAY IT MR. PLEASE THE COURT. MY -- MAY IT PLEASE THE COURT. MY NAME IS CHARMAINE MILLSAPS, REPRESENTING THE STATE. I HAVE THREE MAIN POINTS. THIS IS A ERROR IN AN AFFIRMATIVE OFFENSE INSTRUCTION. ACCORDING TO THIS COURT, BOTH IN SOSHER AND IN SMITH, THAT MUST BE PRESERVED. SMITH WAS VERY MUCH AN ANALOGOUS CASE. WHAT HAPPENED IN THE INSANITY INSTRUCTION WAS THE BURDEN WAS NOT CLEAR, AND IN SMITH, HE WAS GIVEN THE OLD INSTRUCTION, THAT THIS COURT, IN AN EARLIER CASE, HAD DECIDED WAS WRONG, BUT THEN IN SMITH, THEY SAID, YOU SAID, THAT, WHILE THE BURDEN WAS NOT CLEAR ON INSANITY AND NOW WE HAVE MADE IT CLEAR, THAT IS NOT FUNDAMENTAL ERROR, BECAUSE IT GOES TO AN AFFIRMATIVE DEFENSE, AND THE COURT COULD CONSTITUTIONALLY PLACE THE BURDEN ON THE DEFENDANT. AND THEN IN SOSHER, WHERE YOU SAID IT WAS AFFIRMATIVE

DEFENSES, ERRORS, EITHER COMPLETE OMISSION, WHICH IS WHAT HAPPENED IN SOSHER, HE DIDN'T GET ANY INSTRUCTION. THAT IS NOT WHAT HAPPENED HERE. HERE HE GOT AN ENTRAPMENT INSTRUCTION. MY SECOND POINT IS HE GOT AN ENTRAPMENT INSTRUCTION HE WAS NOT ENTITLED TO. NOT ONLY WAS THERE NO EVIDENCE EVER PREDISPOSITION, HE TESTIFIED -- EVIDENCE OF PREDISPOSITION, HE TESTIFIED THAT HE HAD HAD THREE PRIORS AND THAT HE HAD USED CRACK COCAINE ON THAT DATE, BUT HE, ALSO, DIDN'T PRODUCE LACK OF EVIDENCE ON THE THEORY OF INDUCEMENT. HIS THEORY OF INDUCEMENT WAS PULLING OFF A BUMP, A PIECE OF THE CRACK COCAINE THAT YOU BUY WAS INDUCEMENT. IT CANNOT BE INDUCEMENT TO SAY DO YOU WANT TO BUY DRUGS? THAT CAN'T BE INDUCEMENT.

SO WOULD YOUR ARGUMENT BE THAT, IF THE INSTRUCTION THAT IS NOW THE STANDARD INSTRUCTION, HAD BEEN REQUESTED, SO THAT THE ISSUE HAD BEEN PRESERVED, EVEN IN THAT SITUATION, IT WOULD HAVE BEEN HARMLESS?

YES. BECAUSE HE WAS NOT LEGALLY ENTITLED TO PRESENT THIS. HE DID NOT PRESENT ANY EVIDENCE OF INDUCEMENT. REMEMBER HE WAS THE ONE WHO SUGGESTED "GIVE ME A PIECE." THEY ASKED HIM FOR A TWENTY. THIS DEFENDANT INDUCED HIMSELF. IT WAS HIS IDEA TO GET THE LITTLE PIECE. THE OFFICERS, THIS IS ACCORDING TO HIS OWN TESTIMONY, WERE NOT THE ONES THAT CAME UP WITH THIS IDEA OF GIVING HIM THE PIECE OF CRACK COCAINE. IT WAS HIS IDEA. HE TEST HE TESTIFIED TWICE.

BECAUSE THE -- HE TESTIFIED TWICE.

BECAUSE THE DEFENSE ADMITS THE CRIME, IF THE JUDGE HAD SAID YOU ARE NOT ENTITLED TO IT, THE WHOLE WAY HE WOULD HAVE DONE CLOSING ARGUMENT COULD HAVE BEEN DIFFERENT. IN OTHER WORDS IF YOU ARE GOING TO A THEORY OF ENTRAPMENT, BUT IT IS NOT LEGALLY SUFFICIENT, AND YOU ARE TOLD THAT AS THE DEFENSE LAWYER, WELL, THEN, YOU MAY APPROACH IT A DIFFERENT WAY THAN IF YOU ARE THINKING YOU ARE GOING UNDER ENTRAPMENT?

I THINK I WOULD GET A RULING PRETRIAL FROM THE COURT, AS A MATTER OF LAW, AT LEAST, THAT YOU HAVE ESTABLISHED SOME EVIDENCE, YOU KNOW, WHERE YOU ARE SAYING THAT THAT WOULD BE A BAD TRIAL STRATEGY, AND I WOULD PROBABLY AGREE WITH YOU, BUT THAT IS NOT WHAT REAL HAPPENED HERE. HE GOT -- I MEAN THAT IS THE EXACT CONVERSE OF WHAT HAPPENED HERE. WHAT YOU ARE SAYING IS, AT THE END OF THE TRIAL, IN FRONT OF THE JURY, IF HE HADN'T GOTTEN A JURY INSTRUCTION, HE HAD PRESENTED ALL THIS EVIDENCE, INCLUDING ADMITTING TO THE CRIME, OKAY, YES, I DON'T THINK THAT WOULD BE A VERY GOOD TRIAL STRATEGY.

OKAY. SO YOU ARE SAYING WE SHOULD ANALYZE HIS CASE. ARE YOU SAYING THIS, AS IF THE JURY HAD RECEIVED NO INSTRUCTION? THAT HE IS -- THAT THIS DEFENDANT IS IN NO DIFFERENT SITUATION, AS FAR AS HOW THE JURY VOWED THIS -- VIEWED THIS CASE, THAN IF HE HAD GOTTEN NO INSTRUCTION?

I AM SAYING HE IS IN A BETTER POSITION THAN THE DEFENDANT WHO DIDN'T GET ANY INSTRUCTION. HE GOT TO PRESENT EVIDENCE. HE GOT TO ARGUE IN CLOSING, AND HE GOT TO AT LEAST -- MAYBE THE JURY WOULD HAVE BOUGHT THIS. YOU NEVER KNOW. BUT THEY SHOULD HAVE NEVER BEEN INSTRUCTED. HE WAS BETTER OFF THAN A DEFENDANT WHO, IN FACT, NEVER GOT THIS INSTRUCTION, BECAUSE AT LEAST HE GOT AN INSTRUCTION. NOW, THE STATE'S LAST POSITION IS THERE IS NOTHING WRONG WITH THE JURY INSTRUCTION GIVEN IN THIS CASE.

BUT THAT REQUIRES TO RECEIVE FROM PRIOR AUTHORITY. CERTAINLY YOU AGREE WITH THAT.

WELL, IT REQUIRES YOU TO RECEIVE FROM SOME OF THE DICTA IN MUNOS, BUT IT REQUIRES YOU TO CONFIRM HERRERA. THE CASE LAW IS ALREADY DICTA ON THAT, BUT THE STATUTE, WHAT

CONTROLS HERE IS THE STATUTE, AND THE STATUTE PLACES THE BURDEN ON THE DEFENDANT, AND THIS COURT RECOGNIZES THAT IN HERRERA, AND THE DICTA IN MUNOS SHOULD BE DISPROVED. YOU SHOULD DISAPPROVE THIS NEW JURY INSTRUCTION. YOU SHOULD PUT THE BURDEN BACK WHERE THE STATUTE SAYS IT IS, WHICH THIS COURT RECOGNIZED IN THE HERRERA, SO IT IS NOT -- I AM ASKING YOU TO RECEDE FROM A CASE, IT IS JUST I AM ASKING YOU TO ACKNOWLEDGE THERE WAS CONFLICT IN YOUR CASE LAW, AS IT IS, AND I WOULD ARGUE THATION, OBVIOUSLY, IT IS THE STATUTE -- ARGUE THAT, OBVIOUSLY, IT IS THE STATUTE THAT SHOULD CONTROL: IT IS THE DECISION THAT THE JUDGE HAD TO MAKE. AS A MATTER OF FACT THAT IS WHAT THIS COURT JUDGE DID. HE LITERALLY READ, VERBATIM, THE ENTRAPMENT CHARGE TO THE JURY.

LET ME ASK YOU THIS. IF AN OFFICER PLAYS UPON THE WEAKNESS OF A SUBJECT, LOADING UP A PIECE OF CRACK IN FRONT OF A CRACK ADDICT, COULD YOU HAVE ENTRAPMENT THERE?

ENTRAPMENT THERE? OH, I THINK THAT WOULD PROBABLY COUNT AS SOME EVIDENCE OF INDUCEMENT.

BECAUSE THAT IS WHAT THE DEFENSE IS REALLY SAYING HERE THAT YOU DRIVE THIS GUY AROUND IN A CAR AND HE CAN'T FIND IT. HE CAN'T FIND CRACK AT THIS PLACE, AND HE CAN'T FIND IT IN ANOTHER PLACE, AND YOU STILL KEEP HIM THERE, AND YOU ARE TALKING ABOUT CRACK, AND YOU ARE BUILDING IT ALL UP, AND FINALLY HE SAYS IF YOU GIVE ME A PEEVES THE CRACK, THEN I WILL DO. WHY COULDN'T THAT BE ENTRAPMENT? YOU ARE TALKING ABOUT A FUND AMAL WEAKNESS -- A FUNDAMENTAL WEAKNESS, AREN'T YOU?

HE, BEFORE HE GOT IN THE CAR, WAS SUGGESTING THAT THEY GIVE HIM A BUMP. SECONDLY IT WAS NOT THE COP'S IDEA. THE COPS ACTUALLY TRIED TO WITHDRAW FROM THIS, AFTER THEY WENT TO THE FIRST LOCATION. THE COPS WERE TRYING TO BRUSH HIM OFF. HE WANTED THE PIECE OF CRACK COCAINE SO MUCH THAT HE SAID, NO, LET ME FIND A SECOND PLACE. NOW, UNDER YOUR HYPO, WHICH ARE NOT THE FACTS OF THIS CASE, I AGREE THAT SHOWING A, YOU KNOW, IF YOU REPEATED, SOMEBODY REFUSES TO DO SOMETHING AND YOU REPEATEDLY INDUCED THEM AND IT IS YOUR IDEA? YOU HOLD UP THE PIECE OF CRACK COCAINE?

THE POLICE COME TO A CRACK ADDICT AND SAY WE WANT TO BUY SOME CRACKDOWN HERE. AND HE TRIES AT ONE PLACE, AND IT DOESN'T WORK OUT, AND IT FAILS, AND THEY ARE DRIVING HIM AROUND IN THE CAR FOR THREE OR FOUR HOURS, TRYING TO FIND CRACK, TALKING ABOUT CRACK, ISN'T THERE SOME -- HE CAN'T FIND IT IN ONE PLACE. THEY KEEP HIM IN THE CAR. HE GOES TO ANOTHER PLACE AND TRIES TO FIND IT?

BUT THAT WAS HIS SUGGESTION. YOUR HONOR, YOU CANNOT MAKE A CONDITION PRECEDENT TO ENGAGING IN CRIMINAL ACTIVITY AND THEN CALL THAT CONDITION PRESS DEN DENT THAT YOU MADE -- PRECEDENT THAT YOU MADE INDUCEMENT. THE GOVERNMENT HAS TO IN DUES YOU, AND, YES, YOUR HONOR, THERE ARE A WHOLE BUNCH OF FACTS. TO BEGIN, WITH THE COPS DIDN'T KNOW HE WAS A CRACK ADDICT. HE CAME UP TO THEM. THEY HAD NO KNOWLEDGE. THEY HAD NEVER SEEN THIS GUY BEFORE. OKAY. THEY DON'T KNOW IS HE A CRACK ADDICT. THEY HAVE NO KNOWLEDGE OF THAT. BUT, YOUR HONOR, I AM NOT SAYING THAT HYPOTHETICALLY --

TELLING WHERE HE COULD FIND CRACK. HE THOUGHT HE COULD FIND IT FROM THIS PERSON, AND THEN HE THOUGHT HE COULD FIND IT AT ANOTHER HOUSE, AND IF YOU GIVE ME A PIECE OF IT, YOU KNOW, I WILL HELP YOU FIND SOME MORE.

BUT THAT IS YOUR SUGGESTION NOT THE GOVERNMENT'S. THE INDUCEMENT HAS TO COME FROM THE GOVERNMENT. YOU MAY NOT IN DUES YOURSELF, AND THAT IS WHAT THIS DEFENDANT DID. SECONDLY, YOUR HONOR, THE EVIDENCE OF PREDISPOSITION HERE IS PRETTY OVERWHELMING. THREE PRIORS FOR EXACTLY THIS CRIME? THREE PRIOR CONVICTIONS FOR SALE OF DELIVERY, TESTIMONY THAT HE, HIMSELF, WAS USING CRACK EARLIER IN THAT DAY.

THAT IS NOT DISPOSITIVE, AND I HAVE GOTTEN WAY OUT. COME ON BACK.

I THINK DISPOSITIVE OF THIS IS THIS COURT'S DECISION IN SMITH. THAT IS REALLY WHAT IS DISPOSITIVE HERE. YOU, IN EFFECT, IN ANOTHER CONTEXT, YES, IN THE SANITY CONTEXT INSTEAD OF THE ENTRAPMENT CONTEXT, BUT YOU HAVE ALREADY REACHED THIS ISSUE, AND YOU DID IT IN SMITH, OKAY, AND THEREFORE IN CONCLUSION, WE ASK YOU TO AFFIRM THE FIRST DCA'S OPINION AND DISPROVE MILLER AND WOULD LIKE YOU TO REAFFIRM THE WITHHOLD HOLDING IN HERRERA -- THE WITHHOLDING IN HERRERA AND DISPROVE THE JURY INSTRUCTION, BECAUSE THIS NEW JURY INSTRUCTION, IN FLORIDA COURT, HAS THE BURDEN OF PROVING ENTRAPMENT. THANK YOU.

BRIEFLY, I THINK THE ISSUE BEFORE THIS COURT IS A NARROW ONE, WHETHER THE GIVING THE INSTRUCTION WAS FUNDAMENT LAW, AND -- FUNDAMENTAL LAW, AND THE REQUEST THAT THEY MAKE TO CHANGE THE STANDARD INSTRUCTION OR REVISE IT OR RECONSIDER IT, I DON'T THINK, IS BEFORE THIS COURT AT THIS POINT, ON THE ISSUES THAT WERE RAISED.

WHY ISN'T SMITH DISPOSITIVE?

EXCUSE ME?

WHY ISN'T SMITH, THAT HAD TO DO WITH INSANITY, WHY ISN'T THAT CASE CONTROLLING, IN ITS LOGIC HERE?

BECAUSE, IN ASSERTING AN INSANITY DEFENSE, WHICH, ALSO, CAN INVOLVE A BURDEN SHIFTING, IT IS NOT NECESSARILY INCONSISTENT WITH OTHER DEFENSES. ONE CAN SAY I DID IT BUT I WAS LEGALLY INSANE, WHILE, AT THE SAME TIME ASSERTING OTHER OFFENSES THAT ARE NOT NECESSARILY INCONSISTENT WITH THAT.

THAT IS NOT WHAT HAPPENED IN SMITH, THOUGH, IS IT?

IT MAY NOT HAVE BEEN, BUT THAT MAY BE A CONSIDERATION IN TERMS OF WHY IT MAY NOT BE FUNDAMENTAL ERROR IN RESPECT TO THE INSANITY DEFENSE, BUT WHILE IN THE ENTRAPMENT DEFENSE, YOU ASSERT NO OTHER DEFENSES. IN FACT YOU ADMIT YOU ARE GUILTY.

WELL, HOW ABOUT --

REDUCING THE ENTIRE TRIAL TO THE SOLE ISSUE OF WHETHER THERE WAS ENTRAPMENT, AND IT IS CRITICAL, BECAUSE IT GOES RIGHT DOWN TO THE VERY ESSENCE OF THE DECISION IN THE CASE, AND THE ISSUES IN THE CASE THAT THE JURY BE ACCURATELY AND PROPERLY INSTRUCTED ON THAT, JUST AS THEY MUST BE ACCURATELY INSTRUCTED ON DISPUTED ELEMENTS OF THE OFFENSE THAT THE STATE HAS TO PROVE IN THAT OTHER CONTEXT. THEY ARE KIND OF IN AN IDENTICAL SITUATION.

HOW ABOUT ON OTHER TYPES OF AFFIRMATIVE DEFENSES? SELF DEFENSE. JUSTIFIABLE HOMICIDE. ANY AREAS SUCH AS THIS THAT WE HAVE DEALT WITH OR THAT YOU CAN ADDRESS FOR US?

AS BEING FUNDAMENTAL ERROR? A HOW IT HAS TO BE TREATED?

I CAN ONLY SPEAK IN GENERAL TERMS THAT, MOST AFFIRMATIVE DEFENSES, THE BURDEN IS PLACED UPON THE DEFENDANT TO COME FORWARD WITH IT. NOW, THE EVIDENCE SUPPORTING IT MAY ARISE OUT OF CROSS-EXAMINATION IN THE STATE'S CASE-IN-CHIEF AND SO ON AND SO FORTH, AND CERTAIN ELEMENTS OR CERTAIN PARTS OF THE SITUATION HERE IN THIS CASE MAY HAVE ARISEN IN THE STATE'S EVIDENCE OR FROM THAT, AMPLIFIED BY THE DEFENDANT'S OWN

TESTIMONY, BUT THE UNIQUENESS OF ENTRAPMENT IS THAT, WHEN ASSERTED, IT HAS TO BE THE ONLY OFFENSE OR DEFENSE ASSERTED. BECAUSE IT INVOLVES HIS CONFESSION AND AVOIDANCE OF ALL OF THE OTHER AFFIRMATIVE DEFENSES CAN BE RAISED WITH ARGUMENTS, BASED UPON THE FAILURE OF THE STATE TO MEET ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT AND SO ON, BUT THAT IS NOT EVEN THE CASE WITH ENTRAPMENT. HE HAS TO GET UP THERE AND SAY I DID IT, BUT THEY INDUCED ME TO DO IT, SO THIS DEFENSE, IN THAT PERSPECTIVE, IS UNIQUE IN DISTINGUISH -- AND DISTINGUISHABLE FROM EVERY OTHER AFFIRMATIVE DEFENSE OR EVERY OTHER DEFENSE THAT CAN BE FOUND ARISING OUT OF THE STATE'S CASE. THE FAILURE TO PROVE AN ELEMENT OR THE FAILURE TO PROVE IT BEYOND A REASONABLE DOUBT. THE TYPICAL KIND OF DEFENSE, AS WE SEE RAISED. THOSE ARE NOT AFFIRMATIVE DEFENSES, WHERE THEY HAVE A BURDEN TO COME FORWARD ON. IT IS A LIMITED NUMBER OF THOSE WHICH HAD BEEN IDENTIFIED AS AFFIRMATIVE DEFENSES, WHERE THE BURDEN HAS BEEN PLACED UPON THE DEFENDANT, BUT IN THIS CASE IT IS NOT SOLELY HIS, AND THIS JURY, ON THAT DISPUTED ISSUE, ALTHOUGH WE MAY QUESTION HOW STRONG THE FACTS SUPPORT THEM AT THIS POINT, THAT JURY WAS NEVER ASKED TO DECIDE THOSE FACTS, BASED UPON A PROPER AND COMPLETE AND ACCURATE INSTRUCTION. I THANK THE COURT.

THANK YOU.