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GOOD MORNING, LADIES AND GENTLEMEN. WELCOME TO THE FLORIDA SUPREME COURT. WE ARE GOING TO HEAR, FIRST, ON THE CALENDAR, AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE. MR. ROGERS, YOU ARE GOING FIRST AND THEN JUDGE ALTENBERND AND THEN.

GOOD MORNING, MAY IT PLEASE THE COURT. I AM JIM ROGERS OF THE ATTORNEY GENERAL'S OFFICE FOR THE STATE OF FLORIDA. WE DIVIDED OUR TIMES, AND I WILL BE VERY BRIEF WITH YOU. THE STATE'S POSITION, WE HAVE TWO POINTS WE WOULD LIKE TO MAKE WITH YOU. THE FIRST IS THAT THE STATE SHOULD BE PERMITED TO FILE A RULE 3.800 [B] MOTION, JUST AS THE DEFENDANTS ARE, AND THE SECOND POINT CONCERNS AN ENTIRELY DIFFERENT POINT CONCERNING CAPITAL CASES, AND WE FILED SOMETHING WITH YOU YESTERDAY, I BELIEVE, WHICH TOLD YOU THAT WE OPPOSE THE APPLICATION OF 3.800 [B] DEALING WITH CAPITAL CASES.

MR. ROGERS, BEFORE 3.800 [B] WAS AMENDED, WHAT WAS THE STATE DOING? IN OTHER WORDS 3.800 B, FROM ITS INCEPTION, WHEN IT WAS ENACTED IN 1966, DID NOT APPLY TO THE STATE. WHAT EXAMPLES CAN YOU GIVE US OF WHERE, HOW THE STATE HAS BEEN PUT IN A DIFFICULT POSITION, BECAUSE 3.800 [B] DID NOT APPLY TO IT. BECAUSE, REALLY, OUR INTEREST IS WE DIDN'T WANT TO CONFUSE THE LAW OR PROCEDURES, WHERE THERE WASN'T A PROBLEM BEFORE, AND THAT, REALLY, WAS -- IS A CONCERN IN EXTENDING IT TO THE STATE, SO CAN YOU TELL ME HOW IT WAS DEALT WITH BEFORE THIS RECENT AMENDMENT.

CERTAINLY. THE -- OF COURSE THE BEGINNING, THE STATE HAS VERY FEW APPEALS. WE DON'T REALLY FOLLOW APPEALS, SO YOU ARE NOT GOING TO SEE A LOT OF CASE LAW. EVEN SO, YOU ARE GOING TO SEE CASE LAW, SO WE BASICALLY TOOK AN APPEAL AND ARGUED THE ISSUE, AND BASICALLY IF THERE WAS A PRESERVATION ARGUMENT, THE POINT WHERE WE ARGUED THAT IT WAS EITHER AN ILLEGAL SENTENCE AND WHATEVER, AND SO YOU CAN FIND A LOT OF CASES -- NOT A LOT BUT ANY NUMBER OF CASES WHERE THE STATE SIMPLY IS APPEALING A DEPARTURE FROM THE GUIDELINES, FOR EXAMPLE. WE WOULD, ALSO, BE APPEALING SUCH THINGS AS FAILURE TO IMPOSE MINIMUM MANDATORIES. I SUPPOSE THERE WAS SOME RESTITUTION CLAIMS THAT MIGHT HAVE, ALSO, BEEN ADDRESSED BY THE STATE, BUT THE POINT THAT HAS CHANGED, I GUESS, IS THAT THE LAW, WE HAVE ATTEMPTED, WITH 3.800 [B] THE NEW 3.800 [B] TO MAKE IT POSSIBLE FOR EVERY SENTENCING ISSUE TO BE RAISED IN THE TRIAL COURT AND NOT BE RAISED FOR THE FIRST TIME ON APPEAL, AND SO THE STATE FEELS, ON THE ONE HAND, THAT IT IS ENTITLED TO USE PROCEDURES LIKE IT, LIKE ANYONE ELSE, BE ENTITLED TO RAISE IN COURT AND GET A FAVORABLE OPINION, AND THERE IS NO PROCEDURAL BARS TO IT, SO THAT IS BASICALLY WHAT WE WERE DOING. WE WERE JUST APPEALING.

HOW ABOUT ADDRESSING THAT ASPECT OF IT, AND THAT IS SETTING ASIDE THE APPEALS THAT THE STATE MAY HAVE HAD BEFORE OR ATTEMPTED BEFORE, WHAT IS THE STATE DOING IN THE TRIAL COURT, WHEN IT CESA OBVIOUS PROBLEM THAT IT WANTS TO HAVE CORRECTED IN THE TRIAL COURT? YOU KNOW, BEFORE THERE IS ANY APPEAL, AND WE GO, YOU KNOW, WITH A FULL-BLOWN -- SURELY THE STATE, WHEN IT SEES SOMETHING OBVIOUS, YOU KNOW, REGARDLESS OF WHETHER IT IS FAVORABLE TO THE STATE OR FAVORABLE TO THE DEFENDANT, THERE MUST BE INSTANCES WHEN THE STATE SAYS WE CAN'T, YOU KNOW, LET THE JUDGE GO ON AND BE EMBARRASSED LATER OR WHATEVER BY THIS. WHAT -- ARE YOU FAMILIAR WITH THE PRACTICE IN THE TRIAL COURTS THAT THE STATE ATTORNEYS HAVE BEEN DOING?

WELL, YOU KNOW, READING TRANSCRIPTS, IT IS HARD TO CALL UP A TRANSCRIPT AND CITE A PARTICULAR ONE, BUT GENERALLY IF YOU LOOK AT STRIPTS TRANSCRIPTS, AT THE -- AT TRANSCRIPTS, AT THE SENTENCING HEARING, THERE IS SOME DECISION AS TO WHETHER THE

JUDGE IS GOING TO DEPART UPWARD OR DOWNWARD, AND SO BOTH PARTIES, AT THAT TIME, WOULD INDICATE THEIR POSITIONS AS TO REASONS TO DEPART UPWARD OR DOWNWARD OR NOT, AND SO THEY TRY TO PRESERVE THE ISSUES AS WELL AS THEY COULD THERE. ONE OF THE MORE FREQUENT THINGS, OF COURSE, IS SIMPLY THE FAILURE TO FILE A WRITTEN ORDER, AND SO THAT IS NEVER KNOWN OR CANNOT BE KNOWN AT THE SENTENCING HEARING, SO THE 3.800 [B] IS MADE TO ORDER FOR THAT OR, PERHAPS, DESIGNED FOR THAT TYPE OF ERROR, WHERE SOMETHING HAPPENS AFTER THE SENTENCING HEARING, WHERE NEITHER PARTY HAS REALLY HAD AN OPPORTUNITY TO OB, BUT THE VALIDITY -- TO OBJECT, BUT THE VALIDITY OF THE REASONS, WRONGS THE STATE ARGUED THAT -- ONCE THE STATE ARGUED THAT THERE ARE NOT GOOD REASONS TO DEPART DOWNWARD, THE REAL REASON IS THEY ARE NOT VALID, JUST AS THEY WOULD BE WITH UPWARD DEPARTURES.

WE DON'T WANT THE STATE TO LOSE ANYTHING BY THIS, AND WE WANT, OF COURSE, TO EMPHASIZE THE CORRECTION OF ERRORS AT THE TRIAL COURT LEVEL IN THE DEBATE. WE ARE SAYING, WELL, BUT SHOULD WE BE GRANTING THE STATE ADDITIONAL RIGHTS TO APPEAL OR EVEN TO COMPLAIN AT THE TRIAL COURT LEVEL, ISSUES TO BRING THEM OUT MORE FAVORABLY TO THE STATE. MY UNDERSTANDING OF THE THRUST OF WHAT YOU ARE SAYING IS NOT THAT YOU ARE SEEKING ANY ADDITIONAL RIGHTS FOR THE STATE. AM I RIGHT ABOUT THAT?

YES. THAT IS ENTIRELY RIGHT. WE SIMPLY WANT TO BE SURE THAT WE HAVE THE SAME OPPORTUNITY TO RAISE AN ISSUE, WHATEVER THE ISSUE MAY BE, SENTENCING ISSUE, THAT IS, IN THE TRIAL COURT, THAT THE OTHER PARTY HAS, AND THAT IS WHAT WE WANT TO DO. WE DO NOT -- THE QUESTION OF -- ONE THING TO REMEMBER ABOUT THIS, AND WE HAVE ONLY ABOUT THE AMENDED RULE IN EFFECT SINCE THE 12th OF NOVEMBER, BUT YOU ARE SEEING SOME MOTIONS FILED WHERE IT IS FORGOTTEN THAT THIS IS ACTUALLY A MOTION TO CORRECT SENTENCING ERROR. IT IS NOT A MOTION TO MIDGATOR AGGRAVATOR ANYTHING LIKE THAT -- TO MITIGATE OR AGGRAVATOR ANYTHING LIKE THAT, SO OVER TIME WE ARE GOING TO HAVE SOME PROBLEM WITH THAT, BUT WE HOLD EVERYONE TO THE LINE THAT YOU ARE GOING TO IDENTIFY A SENTENCING ERROR AND WHAT YOU PROPOSE DOING ABOUT IT, WE DON'T HAVE ANY PARTICULAR PROBLEM, BUT, NO, WE DON'T WANT ANY ADDITIONAL RIGHTS. YOU KNOW THE RULES AS WELL AS I DO, THAT YOUR OWN RULES, 9.140, AUTHORIZED THE STATE TO APPEAL CERTAIN ILLEGAL AND UNLAWFUL SENTENCES AND DEPARTURES FROM GUIDELINES, AND THAT IS WHAT WE WANT TO DO, AND RESTITUTION, SO WE ARE NOT INTERESTED IN ANYTHING NEW.

WHAT DOES THE STATE PRESENTLY DO, IF THE WRITTEN JUDGMENT AND SENTENCE DEPARTS FROM THE ORAL PRONOUNCEMENT?

YOU KNOW, I DON'T KNOW THAT THAT APPEARS IN THE APPELLATE CASES. WHAT I SUSPECT IS THAT THEY SIMPLY FILE SOME SORT OF A MOTION, LOCAL MOTION, AND HAVE, YOU KNOW, POINT OUT TO THE JUDGE THAT THERE IS SOMETHING WRONG WITH YOUR SENTENCING ORDER, ITSELF. THAT IS WHAT I WOULD HOPE THEY WOULD DO. NOW, THE MORE LIKELY THING THAT HAPPENS IS THAT THE DEFENDANT WOULD BE MORE INTERESTED IN THIS THAN THE STATE, SO YOU SEE, LOTS OF CASES, AND YOU GOT A LOT OF THEM BEFORE YOU, NOW, WHERE THERE ARE SUCH THINGS AS THIS WAS NOT PRONOUNCED AT ORAL PRONOUNCEMENT, AND SO -- BUT IT WAS IN THE WRITTEN ORDER, AND SO YOU WILL SEE THE DEFENDANTS AND APPELLANTS FREQUENTLY RAISING THAT, EVEN THOUGH IT HAD NOT BEEN RAISED BE LE, AND, OF COURSE, THAT IS ANOTHER INSTANCE WHERE THE 3.800 B GIVES THE PARTIES AND THE TRIAL COURT AN OPPORTUNITY TO CLEANUP WHATEVER THEY HAVE IN THE WAY OF ERRORS.

I DON'T KNOW WHAT YOUR TIME IS. I KNOW WE ARE NOT USING THE LIGHTS, BUT YOU SHOULD BE ALERT TO THAT.

LET ME ASK A QUESTION OF MR. MART ELSE, CONCERNING THE SECOND -- MR. MARTELLS CONCERNING A SECOND POINT. I WOULD ASSUME THAT WHAT HAS NOW BEEN FILED AS A

RESPONSE IN THE WHITTLE CASE, THAT THE STATE IS IN THAT PARTICULAR CASE, AND IN ANY -- WE COULD ASSUME THAT IN ANY CASE THAT COMES UP BEFORE THERE WAS SOME TYPE OF CLARIFICATION THAT IT DOESN'T -- THAT THE RULE DOES NOT APPLY TO CAPITAL CASES, IS WAIVING ANY CONTENTION THAT THIS RULE APPLIES IN CAPITAL CASES, SO THAT WE DON'T HAVE -- SO THAT WE CAN ADMINISTRATIVELY DEAL WITH THE CONCERN THAT WAS RAISED IN THE WHITTLE CASE THAT THE RULE IS SILENT AS TO THAT, SO THE DEFENDANT DOESN'T KNOW HOW TO PROCEED. IS THAT CORRECT?

WELL, JUSTICE, YOU KNOW, OUR POSITION IS THAT RULE 3.800(B), PARTICULARLY BECAUSE OF THE POSITION THAT PERMITS A 3.800 MOTION TO BE FILED ANY TIME BEFORE A BRIEF IS FILED IS A REAL WAY TO STRETCH OUT SOME LITIGATION, AND SO THAT --

THE STATE'S POSITION IS THAT IT DOESN'T APPLY, SHOULD NOT APPLY IN A CAPITAL CASE.

SHOULDN'T BE APPLY. YOU KNOW, THE RULE DOES NOT EXEMPT CAPITAL, SO I AM NOT GOING TO TELL YOU THAT WE ARGUE THAT IT DOES NOT APPLY, BUT WE ARGUE THAT IT SHOULD NOT APPLY. I DON'T BELIEVE THAT IT WAS THOUGHT THROUGH AS A CAPITAL RULE.

LET ME ASK YOU SORT OF THE SAME QUESTION JUSTICE WELLS HAS ASKED ON AT LEAST THE SAME TOPIC BUT A DIFFERENT WAY, TO BE CLEAR ABOUT THIS. THE STATE IS IN A POSITION TO ASSERT, NOW, THAT IT IS NOT LATER GOING TO CLAIM THAT, IN A CAPITAL CASE, THAT THE DEFENDANT WAIVES SOME ERROR BY NOT RAISING IT UNDER 3.800(B) IN THE TRIAL COURT, IF THE STATE TAKES THE POSITION THAT IT SHOULDN'T APPLY. THAT IS JUST OTHER SIDE OF THAT COIN. CORRECT?

ABSOLUTELY. IF SOMEONE IS PROHIBITED FROM USING A RULE 3.800(B), THEY OBVIOUSLY CAN'T HOLD IT AGAINST THEM.

THE OTHER SIDE OF THAT IS THAT IT IS RARE FOR A CAPITAL CASE TO NOT HAVE THE ADDITIONAL BAGGAGE, OF COURSE, OF THE OTHER. IT IS JUST THAT I DON'T KNOW THAT I HAVE SEEN ONE, OR MAYBE I HAVE. THE USUAL THING IS THAT THERE ARE OTHER CRIMINAL CHARGES THAT ARE THERE. I ASSUME THE STATE IS SAYING, AS TO THOSE OTHER CRIMINAL CHARGES, THAT THE RULE WOULD APPLY.

YOU KNOW, WE HAVEN'T ACTUALLY TAKEN A POSITION ON THAT. SO --

WE HAVE AN AWFUL LOT OF INSTANCES, OR IT IS SORT OF A CLEANUP, HERE, AS PART OF THE CAPITAL APPEAL, AND NOW WE ARE SORT OF SHIFTING GEARS, AND WE ARE SAYING, WELL, NOW, HERE ARE SOME OTHER ISSUES WITH REFERENCE TO THE KIDNAPPING CHARGE OR THE ROBBERY CHARGE OR WHATEVER, AND IT SORT OF IS ALMOST LIKE PUTTING ON ANOTHER HAT, WHEN WE START DEALING WITH THOSE THINGS. NOW, WHAT IS THE STATE'S POSITION?

YOU COULD LIKELY SAY THAT THESE OTHER OFFENSES COULD BE SEPARATED FROM THE CAPITAL OFFENSE, AND THE CAPITAL OFFENSE APPEAL COULD PROCEED, WITHOUT REGARD TO A 3.800(B) ON AN AGGRAVATED BATTERY OR KIDNAPPING.

HOWEVER, THEY ALL PROCEED IN THIS COURT. THEY ALL PROCEED IN THIS COURT. I TAKE IT, JUDGE ALTENBERND, THAT THIS MATTER HAVING TO DO WITH THE CAPITAL CASES, REALLY DIDN'T COME UP IN YOUR DELIBERATIONS OR DID IT?

THE COMMITTEE DID NOT DISCUSS THIS. WE DID NOT CONSIDER THE ISSUES. FRANKLY IT APPEARS THAT 3.800(B) MAY HAVE, ON IT ITS -- ON ITS FACE, MAY HAVE APPLIED FOR THE LAST THREE YEARS, BUT WE DIDN'T MAKE IT CLEAR ON THAT.

ONE THING THAT WE DID HAVE AVAILABLE, BECAUSE I WASN'T REALLY SURE HOW THIS

ARGUMENT WOULD GO, WHICH DIRECTION IT WOULD GO IN, BUT WE DO HAVE AVAILABLE THE CHIEF OF OUR CAPITAL BUREAU AND RICHARD MARTELL IS AVAILABLE AND I WILL, OF COURSE, BE AVAILABLE FOR ANY REBUTTAL QUESTIONS THAT YOU WANT TO ASK ME, TIME AVAILABLE. THANK YOU VERY MUCH.

JUDGE ALTENBERND. I THINK WE HAVE USED UP YOUR TIME.

MAY IT PLEASE THE COURT. YES. LET ME ADDRESS THE DEATH ISSUE FIRST, SINCE IT IS WHAT WE HAVE JUST BEEN DISCUSSING. THE COMMITTEE HAS NOT HAD A CHANCE TO DISCUSS THIS, AND WE HAVEN'T DISCUSSED IT WITH THE OTHER COMMITTEES THAT WE WOULD FEEL IT APPROPRIATE TO DISCUSS IT WITH, BEFORE TAKING AN OVERALL POSITION, BUT AS JUSTICE WELLS HAS OBSERVED, WE DID NOT DISCUSS THIS BELOW. CANDIDLY I THOUGHT 3.851 HAD SOMETHING THAT EXEMPTED ALL OF 3.800, AND THEREFORE I WASN'T PARTICULARLY CONCERNED ABOUT IT. I DO BELIEVE THAT THERE ARE PROS AND CONS ON THIS. I HAVE ASKED SOME OF MY COMMITTEE MEMBERS ABOUT IT, AND WE DO NOT HAVE A CONSENSUS ON THIS. IN LARGE PART, BECAUSE OF WHAT JUSTICE ANSTEAD HAS RAISED, WHICH IS THAT THERE ARE OTHER OFFENSES THAT RIDE ALONG WITH THESE CASES. IF I WERE CREATING A RULE, TODAY, THAT APPLIED TO CAPITAL CASES, I WOULD BE MUCH MORE CONCERNED ABOUT HAVING NO APPELLATE REVIEW OF THE PROCESS OF INITIATING THE MOTION. SO FAR IN THE LAST TWO MONTHS, IN THE SECOND DISTRICT, ONLY IN ABOUT 2% OF OUR CRIMINAL APPEALS HAVE WE RECEIVED NOTICE AS COMPARED TO A BRIEF. I ASSUME IN CAPITAL CASES, IT WOULD BE CLOSER TO 100 PERCENT THAN TO 2 PERCENT. ONE THING THAT YOU SHOULD BE AWARE, WHEN YOU THINK ABOUT THIS, IS THAT OUR COMMITTEE DID DISCUSS THAT ONE OF THE COMPLEXITIES OF THIS RULE IS THAT IT MAKES A HYBRID. OF INEFFECTIVE ASSISTANCE OF COUNSEL, IF APPELLATE COUNSEL DOESN'T FILE THE MOTION IN TRIAL COURT. THE QUESTION BECOMES, WELL, DOWN THE ROAD SHOULD THE PRISONER FILE A HABEAS FOR INEFFECTIVE ASSISTANCE OR 3.850 IN THE TRIAL COURT FOR INEFFECTIVE ASSISTANCE. IN A STANDARD PRISON TERM CASE, I BELIEVE WE CAN DEAL WITH THAT IN THE CASE AND RESOLVE IT DOWN THE ROAD. IT IS A FAIRLY EASY PROBLEM, BUT IN A CAPITAL CASE, DEPENDING ON WHAT THE LEGISLATURE MAY OR MAY NOT DO THIS VERY WEAK, I BELIEVE THAT ADDS A LEVEL OF COMPLEXITY, SO SPEAKING INDIVIDUALLY, I HAVE SOME ANXIETY ABOUT THIS PARTICULAR RULE APPLYING IN CAPITAL CASES. NOW, YOU, FROM YOUR EXPERIENCE, MAY BE AWARE THAT THERE ARE PROBLEMS WHERE A 90-DAY DELAY MIGHT WELL SAVE YEARS DOWN THE ROAD, BUT I DON'T HAVE THE EXPERIENCE TO TELL YOU WHETHER THAT IS A GOOD IDEA OR NOT. ON THE ISSUE AS TO THE SENTENCE THAT WAS ADDED TO THIS RULE, I POINT OUT THAT THERE ARE BASICALLY THREE NEEDS THAT THE STATE MAY HAVE FOR A RULE OF THIS SORT. ONE IS TO -- BECAUSE THEY WANT TO AVOID POST-CONVICTION MOTIONS DOWN THE ROAD AND CORRECT THINGS FOR THE BENEFIT OF THE DEFENDANT, YOU HAVE SOLVED THAT PROBLEM. ONE IS FOR WHAT I CALL SCRIVENER'S ERRORS, WHEN THE WRITTEN SENTENCE DOESN'T LINE UP WITH THE ORAL SENTENCE. INTERESTINGLY ENOUGH, ALTHOUGH I HAD THOUGHT THAT THE PUBLIC DEFENDERS HAD SAID THAT THEY WANTED THE WRITTEN SENTENCE NOT TO LINE UP WITH THE ORAL, THEY HAVE TAKEN THE POSITION THAT IT WOULD BE FOR THE BENEFIT OF THEIR CLIENTS TO CORRECT SCRIVENER'S ERRORS. IF THAT IS TRUE, EITHER BY A COMMENT IN THE RULE OR EVEN BY A COMMENT IN THE OPINION, YOU COULD CLARIFY THAT WE COULD TAKE CARE OF THOSE. FRANKLY THE SCRIVENER'S ERROR PROBLEM, TODAY THE QUESTION WAS ASKED HOW WAS THIS HANDLED, IF YOU ARE NOT AWARE, THE DEPARTMENT OF CORRECTIONS HAS A RATHER CONSTANT FLOW OF LETTERS BACK AND FORTH TO TRIAL COURTS, TRYING TO CLEANUP ORAL, WRITTEN DISCREPANCIES, NONE OF WHICH ARE REVIEWED BY A TRIAL COURT, AND THAT IS AN AREA OF CONCERN. FINALLY, WHEN THE STATE BRINGS A JUDICIAL ERROR, THEY DIDN'T ADEQUATELY PRESERVE AT THE SENTENCING HEARING, TO ME THAT IS JUST A POLICY DECISION AS TO WHETHER YOU WANT TO ALLOW THEM TO BRING THIS OR NOT. IT IS A LITTLE ONE-SIDED RIGHT NOW, BECAUSE THE PUBLIC DEFENDER CAN AND THE STATE CAN'T, BUT ON THE OTHER HAND THERE ARE CLAIMS MADE AGAINST PUBLIC DEFENDERS THAT ARE NOT MADE AGAINST THE ASSISTANT STATE ATTORNEY, SO THE WAY THE RULE IS NOW, ONE SIDED A LITTLE BIT, DOESN'T CREATE A PROBLEM, AS LONG AS SCRIVENER'S ERRORS ARE

SOMETHING TAKE CAN BE TREATED FOR THE BENEFIT OF THE DEFENDANT.

MEANING WHATEVER THE DEVIATION, IF IT IS MINISTERIAL OR CLERICAL.

RIGHT.

THAT IT IS CONSTRUED TO BE OF BENEFIT TO HAVE THE DEFENDANT HAVE THE ORAL PRONOUNCEMENT.

I MIGHT COMMENT, BECAUSE OF THE CASES THAT YOU HAVE GOT IN FRONT OF YOU RIGHT NOW, YOU MIGHT BE ABLE TO DISCUSS THE ABILITY FOR COURTS, ON A BROAD BASIS, TO CORRECT SCRIVENER'S ERRORS, NOT AS JUDICIAL ERRORS, FUNDAMENTAL OR OTHERWISE, BUT OTHERWISE SIMPLY AS MINISTERIAL THING THAT IS NEED TO BE CLEANED UP.

ARE YOU AWARE OF ANY MADDUX MADDUX-RELATED CASE, WHERE THE CRIMINAL APPEAL FORMAT WAS APPLIED, TO THE DETRIMENT OF THE STATE?

YES.

IN OTHER WORDS --

YES, I DO. THERE MAY NOT BE TOO MANY WRITTEN OPINIONS, BUT I CAN TELL YOU THAT I HAVE PERSONALLY AFFIRMED CASES WITH A CITATION TO A CRIMINAL APPEAL FORMAT, WHERE THERE WAS A SENTENCING ERROR TO THE BENEFIT OF THE DEFENDANT BUT THE STATE DID NOT ADEQUATELY OBJECT TO THE SENTENCING HEARING. DOWNWARD DEPARTURES HAVE BEEN THE MOST COMMON VARIETY OF THOSE.

THANK YOU. MR. WELLS, WE WILL GIVE YOU TWO OR THREE MINUTES. MAY IT PLEASE THE COURT. AGAIN, IT IS AN HONOR TO BE BACK IN FRONT OF YOU. AGAIN, I AM ROBERT WELLS ON BEHALF OF THE CRIMINAL PROCEDURE RULES COMMITTEE. FIRST OF ALL, THE CRIMINAL PROCEDURE RULES COMMITTEE HAS NEVER DEBATED OR DISCUSSED THE ISSUE OF APPLICABLEITY OF 3.800 CRIMINAL CASES. THERE IS, WITHIN THE CRIMINAL PRACTICING COMMITTEE AND THE JUDICIARY, DIFFER VIEWS ON THAT SUBJECT, AND I WILL POINT OUT AS PART OF MY CONCLUSION THAT OUR COMMITTEE IS WORKING ON A FAST-TRACK PROCEDURE THAT, MAYBE, WE COULD PERHAPS UTILIZE TO DEAL WITH THIS AND, PERHAPS, ONE OF THE OTHER ISSUES IN THIS PARTICULAR PROBLEM BEFORE THE COURT TODAY, SO IF OUR COMMITTEE HAS NOT DEALT WITH IT, THERE IS ARGUMENTS ON BOTH SIDES, AND WITH THAT I WOULD LIKE TO JUST LEAVE THAT PARTICULAR ISSUE, EXCEPT TO SAY THAT THAT RULE, AS LONG AS IT HAS BEEN AROUND, THERE IS NOTHING IN THERE TO INDICATE SPECIFICALLY THAT IT DOESN'T APPLY TO CAPITAL CASES.

IT NEVER CAME UP AS AN ISSUE UNTIL IT WAS AMENDED. WOULDN'T THE BEST PROCEDURE RIGHT NOW BE TO EXEMPT CAPITAL CASES AND THEN LET IT BE STUDIED BY THE APPROPRIATE COMMITTEES?

WELL, JUSTICE PARIENTE, THERE ARE SOME GOOD ARGUMENTS ON BOTH SIDES OF THE ISSUE, AND I CAN UNDERSTAND THE COURT MAKING THAT DECISION, AND THAT, FROM A POLICY STANDPOINT, PERHAPS, WILL BE THE BEST WAY TO GO.

IT WAS NEVER A SUBJECT, BUT YOU AGREE THAT THE PROBLEMS IN CAPITAL CASES ARE SO UNIQUE THAT, AND WE HAVE EXAMPLES, IN THE WHITTLE CASE, OR IN THE RESPONSE TO THE WHITTLE CASE, OF IT BEING USED IN WAYS THAT WE WOULD NEVER HAVE INTENDED IT TO BE USED TO ADDRESS PENALTY-PHASE ISSUES, SO --

CERTAINLY I AGREE WITH THAT ANALYSIS, BUT I JUST, I JUST WANT TO SAY THAT OUR

COMMITTEE HASN'T DEALT WITH IT AND DOESN'T HAVE A SPECIFIC POSITION ON THAT ONE. THE SECOND ISSUE THAT I WANTED TO BRING TO THE COURT'S ATTENTION IS THAT WE AGREE WITH JUDGE ALTENBERND, THAT TO THE EXTENT THAT THAT ADDITIONAL SENTENCE THAT WAS ADDED ABOUT BENEFITTING THE DEFENDANT, IF IT IS INCONSISTENT WITH CURRENT LAW, THAT IT, THEN, SHOULD BE DELETED. WE AGREE WITH THEM ON THAT. AT THE SAME TIME WE, ALSO, FIND INTERESTING AND THE ANALYSIS THAT THE PUBLIC DEFENDERS HAVE PROPOSED THAT BASICALLY A SCRIVENER'S ERROR CORRECTION WOULD BENEFIT THE DEFENDANT. THE -- I THINK THAT THIS PARTICULAR ISSUE POINTS OUT WHY OUR COMMITTEE INITIALLY, WHEN WE CAME BEFORE YOU, ARGUED THAT THE RULE BE KEPT INTACT AND ONLY ALLOW THE DEFENDANT TO GO AND RAISE THESE PARTICULAR MOTIONS. THAT WAS OUR INITIAL POSITION. OUR SECOND POSITION WAS THAT, IF YOU WOULD AMEND THE RULE AND ALLOW THE POSITION -- ALLOW THE PROSECUTION, THAT YOU SHOULD SPECIFICALLY DELINEATE THE CIRCUMSTANCES WHEN THE STATE COULD RAISE THAT MOTION. NOW, OUR COMMITTEE, NEXT WEEK, HAS A PROPOSAL BEFORE IT FOR A FAST-TRACK PROCEDURE THAT WE HOPE WOULD BE OF GREAT ASSISTANCE TO THIS COURT. IT WOULD ALLOW US TO GET A PROPOSED RULE TO NEW A VERY, VERY SHORT PERIOD OF TIME. UNDER THIS PROPOSAL, THE CHAIR OF OUR OVERSIGHT COMMITTEE, WHICH HAPPENS TO BE JUDGE EATON, WOULD CHAIR THIS COMMITTEE. MY RECOMMENDATION WOULD BE THAT IF, IN FACT, THE COURT WOULD DEAL WITH THAT ISSUE, REGARDING THE SENTENCE ABOUT WHETHER THE DEFENDANT OR THE STATE SHOULD RAISE THESE MOTIONS, THAT IF, IN FACT, THE COURT MAKES THE DETERMINATION THAT THE STATE SHOULD BE ABLE TO MAKE THE MOTION THAT, WE DO PUT SOME LANGUAGE IN THERE, AND I THINK THAT OUR FAST-TRACK PROCEDURE COULD GET TOGETHER WITH JUDGE ALTENBERND ALTENBERND'S COMMITTEE AND GET SOME LANGUAGE BEFORE THE COURT, AND I THINK THE BASIS THAT JUDGE ALTENBERND GAVE US THIS MORNING ABOUT THE THREE AREAS WOULD PROVIDE A FRAMEWORK. WE CONTINUE TO BE HELPFUL AND AVAILABLE.

THANK YOU VERY MUCH.

THANK YOU.

ALL RIGHT.

GOOD MORNING AND MAY IT PLEASE THE COURT. MY NAME IS ANDREW STANTON. I AM THE ASSISTANT PUBLIC DEFENDER FROM THE 11th JUDICIAL CIRCUIT. I WOULD LIKE TO RESPOND TO A COUPLE OF QUESTIONS I HEARD THE COURT ASK MR. ROGERS. THE COURT ASKED MR. ROGERS IF, I BELIEVE JUSTICE ANSTEAD ASKED IS THE STATE SEEKING ANY ADDITIONAL RIGHTS, AND MR. ROGERS SAID, NO, IT IS NOT, BUT I THINK IF YOU LOOK AT THE PLEADINGS FILED BY MR. ROGERS, THE STATE CLEARLY IS. THE STATE TAKES A POSITION, IN ITS PLEADINGS, THAT 3.800(B) SHOULD NOT ONLY BE EXTENDED TO THE STATE BUT THERE BY COMPLETELY DESTROYS ANY EXPECTATION OF FINALITY IN A LEGAL SENTENCE. IN HIS WORDS THE SENTENCING HEARING IS SIMPLY EXTENDED UNTIL THE FILING OF THE STATE'S INITIAL BRIEF AND THAT ANY TIME UP TO THEN, AN ILLEGAL SENTENCE CAN BE INCREASED. NOW, THAT WOULD WORK AN INCREDIBLE CHANGE ON THE FACE OF FLORIDA LAW, AND CERTAINLY IT WOULD GIVE THE STATE SOMETHING IT DIDN'T HAVE BEFORE. YOU CAN IMAGINE SITUATIONS, FOR INSTANCE, IN WHICH THERE WAS A DOWNWARD DEPARTURE, WHICH THE STATE ATTORNEY IN COURT DID NOT OBJECT TO, AND THEN LATER, DURING THE COURSE OF THE APPEAL, THE ATTORNEY GENERAL HANDLING THE APPEAL DECIDED THAT HE WOULD LIKE TO CHALLENGE THIS DEPARTURE, SOME EIGHT MONTHS LATER, WHEN HE IS READY TO FILE HIS APPELLATE BRIEF, AND GO BACK TO THE TRIAL COURT AND SAY, GEE, NOBODY OBJECTED BEFORE, SO I WOULD LIKE TO PRESERVE THIS ISSUE. LET ME ASK YOU NOT TO MAKE THIS DOWNWARD DEPARTURE. TAKE THAT GUY OFF OF PROBATION AND PUT HIM IN PRISON. CAN THE STATE ARGUE THAT IT WOULD DO THE SAME THING WITH PRISON REOFFENDER ISSUES, THAT SOMEBODY WOULD NOT QUALIFY OR HABITUAL ISSUES, AND THE TIMING IN DOING THIS WOULD PUT A VERY STRONG PRESSSURE ON THE CONSTITUTIONAL RIGHT TO APPEAL. ONE CAN VERY WELL IMAGINE THAT THAT DEFENDANT WHO IS ON APPEAL AND

APPEALING HIS CONVICTION, WE GET A CALL FROM HIS PUBLIC DEFENDER AND SAY, GEE, THE STATE JUST TOLD ME THAT IF WE CONTINUE WITH THIS APPEAL, THEY ARE GOING TO GOING BACK TO THE TRIAL COURT AND ASK THE JUDGE TO PUT YOU IN PRISON, AND THEY CAN DO THAT, AND IF HE DOESN'T, THEY ARE GOING TO ASK THE APPELLATE COURT TO PUT YOU IN PRISON. NOW WHAT DO WE DO? DO WE MAY NOT OBTAIN THE APPEAL OR DO WE DISMISS IT? IN THE ABSENCE OF A LIMITATION ON AND GUIDANCE ON WHAT 3.800(B) FOR THE STATE MEANS, IT COULD MEAN THAT JUST THAT WOULD HAPPEN AND CERTAINLY IN HIS PLEADINGS, HE ARGUES THIS, BECAUSE IT WOULD APPLY.

THAT IS THE THIRD OF JUDGE ALTENBERND'S POSITION THAT YOU ARE TALKING ABOUT.

YES.

WHAT ABOUT THE POSITION WITH 3.800(B) THAT DIDN'T APPLY TO THE STATE FOR ALL OF THESE YEARS, WHAT WOULD GO ON WITH THINGS LIKE SCRIVENER'S ERRORS? WHAT WOULD GO ON WITH THINGS LIKE THAT?

IN MY EXPERIENCE FROM THE TRIAL COURT IS THAT EITHER SOME OF THESE THINGS WERE CORRECTED BY THE CLERK, WHEN A SCRIVENER'S ERROR WAS DEFECKED -- DEFECTED BY ANYBODY, IS THE STATE WOULD FILE A MOTION TO ADDRESS AN ILLEGAL SENTENCE, AND IT HAPPENED IN A COUPLE OF MY CASES, AND, OF COURSE, IN THOSE CASES WHEN THE ORAL SENTENCE WAS GROUNDS AND NOT RECORDED, I HAVEN'T BEEN ABLE TO RAISE AN OBJECTION TO THEM DOING THAT, BECAUSE WHAT IS IMPORTANT IS FOR A DEFENDANT TO HAVE THE CORRECT SENTENCE GO TO THE DEPARTMENT OF CORRECTIONS.

SO SINCE 3.800(A) IS SUSPENDED DURING THE TIME OF APPEAL, WOULD YOU CONSIDER SOMETHING THAT, INSTEAD OF THE LANGUAGE, SAY, BENEFITTING THE DEFENDANT, WHERE IT DOESN'T INCREASE THE DEFENDANT'S SENTENCE, SO THAT SCRIVENER'S ERRORS WOULD BE CLEARLY DISCUSSEDED-.

-- INCLUDED --

I WOULD SAY IT WOULD MAKE IT PERFECTLY CLEAR TO EVERYBODY THAT SCRIVENER'S ERRORS CAN BE CLEARLY CORRECTED IN THIS SITUATION. THE OTHER POINT THAT I WOULD LIKE TO MAKE IS THAT MR. ROGERS SAID THE STATE IS LIKE ANYONE ELSE, AND THEY HAVE THE RIGHT TO MAKE THESE APPEALS, AND THE STATE IS NOT LIKE ANYONE ELSE. THE DEFENDANT HAS A CONSTITUTIONAL RIGHT TO APPEAL, AND THAT IS WHERE 3.800(B) CAME FROM IN THE FIRST PLACE. IN THE RULE ADOPTION OF THE 30-DAY VERSION OF 3.800(B), THIS COURT ANNOUNCED, FOR THE FIRST TIME IN A LONG TIME THAT, IN FACT THERE WAS A CONSTITUTIONAL RIGHT TO GUILT FOR THE DEFENDANT, AND THAT WASN'T A COINCIDENCE, I DON'T THINK. I THINK IT IS ONLY BEEN OUT OF THE TENSION BETWEEN THE CONSTITUTIONAL RIGHT TO APPEAL AND THE CRIMINAL APPEALS REFORMAT, THAT IT COULD HAVE ARE A ROSE.

EVEN THOUGH THE STATE MIGHT NOT HAVE A CONSTITUTIONAL RIGHT, AS THE DEFENDANT HAS, WHY SHOULDN'T THE STATE BE ABLE TO CORRECT THIS?

BECAUSE THE -- UNLIKE WHAT MR. ROGERS SAYS IN HIS PLEADINGS, THE STATE DOES HAVE AN OPPORTUNITY TO CHALLENGE SENTENCING ERRORS. IT CAN MAKE CONTEMPORANEOUS OBJECTION, FOR ONE THING, AND THAT SEEMS TO HAVE BEEN THE INTENT OF THE LEGISLATURE IN ADOPTING THE CRIMINAL APPEALS REFORMAT. IT IS ONLY BECAUSE THE CONSTITUTIONAL RIGHT EXISTS THAT THERE IS A NEED TO PROTECT SOMETHING. THE LEGISLATURE CAN PLACE ANY CONDITION IT WANTED ON THE STATE'S RIGHT TO APPEAL, AND IN THIS CASE IT HAS.

YOU HAVE -- YOU HAD MENTIONED ALL THESE POSSIBLE HORRIBLES, BUT THE STATUTORY RIGHT GIVES THE STATE ONLY THE RIGHT TO APPEAL DOWNWARD DEPARTURES, WHICH, THAT IS WHERE

YOU WOULD ARGUE THAT THEY REALLY HAVE TO OBJECT AT THE SENTENCING HEARING, BECAUSE THEY DON'T HAVE THE SITUATION WHERE, IF WRITTEN REASONS AREN'T FILED, THAT SOMETHING ELSE HAPPENS, THE DEFENDANT STILL GETS THE DOWNWARD DEPARTURE. THE ONLY OTHER RIGHT THE STATE HAS IS TO APPEAL ILLEGAL SENTENCES. NOW, HAS SCRIVENER'S ERRORS, YOU ARE SAYING THAT IS WHERE THOSE HAVE BEEN?

CORRECT. I HAVEN'T SEEN ANY THOUGHTFUL ANALYSIS OF WHETHER OR NOT A SCRIVENER'S ERROR AND WHETHER OR NOT AN ILLEGAL SENTENCE, UNDER THE DAVIS VERSION OF AN ILLEGAL SENTENCE THAT, IS A WHOLE OTHER SET OF QUESTIONS.

IN OTHER WORDS WE HAVE MADE CLEAR IN THE NOTES THAT THE RIGHT, IT IS NOT THAT THIS RULE IS NOT INTENDED TO ALTAR THE STATUTORY OR SUBSTANTIVE LAW, SO THE STATUTORY RIGHTS, ALREADY, SEVERELY LIMIT WHAT KIND OF SENTENCING ERRORS THE STATE CAN APPEAL. CORRECT?

YES. THAT'S RIGHT. BUT, FOR INSTANCE, IN THE INSTANCE OF PRISON RELEASE AND REOFFENDER MATTER, THE STATE WOULD BE ABLE TO AT LEAST MOUNT AN ARGUMENT THAT IT IS ILLEGAL, AT LEAST ONCE THE COURT IS PUT ON NOTICE, NOT TO GIVE THEM THE MAXIMUM SENTENCE. IF THE STATE DIDN'T PUT THEM ON NOTICE, THEY WOULDN'T HAVE ANYTHING TO APPEAL, BUT THEY CAN GO BACK AND SAY NOW YOU ARE ON NOTICE. TAKE THIS GUY OFF THE STREETS AND PUT HIM IN PRISON.

WE DON'T REALLY HAVE CASE LAW WITH 1(E), THE ILLEGAL SENTENCE FOR THE STATE, WHAT THAT MEANS, AS FAR AS WHAT THEY CAN APPEAL.

THAT IS TRUE AND YOU HEARD MR. ROGERS SAY HERE, TODAY, THAT THAT MEANS THIS COURT'S RULE, WHICH CECIL LEGAL OR UNLAWFUL SENTENCES, THAT CAN MEAN ANYTHING. I DON'T THINK THAT IS WHAT THE LAW OF FLORIDA HAS BEEN. I THINK IT IS CLEAR THAT STATUTES CONTROL THE RIGHT TO APPEAL THESE MATTERS AND NOT THE COURT RULES. THIS IS WHAT IS GOING TO BE PRESENTED AS THE NEXT ROUND OF LITIGATION, IF THERE ISN'T CLEAR GUIDANCE ON 3.800(B). I WOULD LIKE TO, ALSO, TRY TO ADDRESS THE COURT'S CONCERNS ABOUT CAPITAL CASES. I HAVE TRIED TO HAVE THE CAPITAL APPELLATE ATTORNEYS IN MY OFFICE TALK TO OTHER CAPITAL APPELLATE ATTORNEYS. THE FACT IS, IN THE TIME ALLOWED, NOBODY HAS BEEN ABLE TO STUDY IT VERY CLOSELY, AND THERE IS DIFFERING INITIAL IMPRESSIONS OF WHETHER THIS WOULD BE A HELPFUL THING OR NOT. WHAT IS CLEAR IS THAT, WHEN THIS WAS ORIGINALLY ADOPTED AS A TEN-DAY RULE, NOBODY COULD EVEN CONCEIVE OF IT APPLYING TO CAPITAL CASE. IT IS IMPOSSIBLE TO REVIEW A CAPITAL OFFENSE DURING THAT TIME, AND I THINK THE SAME THING HAPPENS WITH A 30-DAY RULE. IT IS ONLY WITH THE ADOPTION OF A RULE THAT ALLOWS THE FILING OF A 3.800(B) MOTION, ONCE THE TRANSCRIPT IS REVIEWED AND THE BRIEF IS READY TO BE FILED, THAT THIS HAS BECOME AN ISSUE, AND I THINK THE COURT SHOULD GIVE CLEAR GUIDANCE TO EVERYONE WHETHER OR NOT THIS APPLIES AND STARTING. WHEN OTHER THAN THAT, I AM AFRAID I CAN'T HELP THE COURT ON THAT THE.

THANK YOU. MR. -- MS. BRUCKHEIMER.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM DEBORAH BRUCKHEIMER, VICE CHAIR OF THE APPELLATE RULES COMMITTEE. THE JUDGE CONTINUES TO SUPPORT -- THE COURT -- THE COMMITTEE CONTINUES TO SUPPORT JUDGE ALTENBERND'S RESPONSE, AND THE ONLY THING OTHER THAN THAT IS, IF SCRIVENER'S ERRORS ARE GOING TO BE FILED IN PROCEDURES OTHER THAN THIS ONE, THAT THE DEFENDANT MAY NOT GET NOTICED AND MAY NOT HAVE AN ATTORNEY THERE TO DISCUSS WHAT THE SCRIVENER'S ERROR TRULY IS, UNDER THE 3.800(B)(2), AT LEAST THE DEFENDANT WOULD BE REPRESENTED AND HAVE THE OPPORTUNITY TO QUESTION ANY SCRIVENER'S ERROR. ANOTHER SCRIVENER'S ERROR, IS THAT ENOUGH OF A TERM OF LEGAL ART THAT EVERYONE KNOWS WHAT --

I HOPE SO. YOU KNOW, WHEN -- PERSONALLY, MY EXPERIENCE HAS BEEN, WHEN I HAVE SEEN AN ERROR IN THE STATE'S FAVOR AND AGAINST MY CLIENT ON THE APPELLATE LEVEL, YOU KNOW, I KNOW THAT -- WELL, THE SECOND DISTRICT HAS CORRECTED THEM, EVEN IF THE ATTORNEY GENERAL'S OFFICE HASN'T SEEN THEM, SO, YOU KNOW, THEY WOUND UP BEING CORRECTED, ANYWAY, ON THE DIRECT APPEAL.

SO YOU ARE REALLY JUST TALKING ABOUT THE WRITTEN SENTENCE DEPARTS FROM THE ORAL PRONOUNCEMENT.

CORRECT.

THAT IS WHAT YOU MEAN WHEN YOU SAY SCRIVENER'S ERROR.

THAT IS WHAT I AM LOOKING AT.

SECTIONENT MAYBE NOT WHERE THEY HAVE -- EXCEPT MAYBE NOT WHERE THEY HAVE ADDITIONAL ORAL PRONOUNCEMENT OF PLACEMENT OF CONDITIONS OF PROBATION, WHICH WEREN'T ORALLY PRONOUNCED, NO ONE CONSIDERS THAT TO BE A SCRIVENER'S ERROR.

THEY CONSIDER IT TECHNICAL. THEY ARE NOT LOOKING AT IT AS SOMETHING SO ILLEGAL, THESE DAYS, THAT THEY ARE GOING TO REVERSE ON IT. IT IS GOING TO BE PRESERVED OR IT IS GOING TO BE LIFTED. AS FAR AS OUR COMMITTEE TAKING DEATH CASES AND LOOKING AT IT AND SAID, YES, WE HAVE NOT DONE THAT, BUT I CAN TELL YOU THAT, WHEN THE COMMITTEE HAS DISCUSSED APPELLATE RULES, AND I HAVE MENTIONED HOW WILL THIS APPLY TO A DEATH CASE, THE MOST RECENT EXAMPLE BEING A LIMITATION ON THE SIDE OF MOTION THROUGH REHEARING, THE COMMITTEE HAS SAID THIS IS GOING TO APPLY ACROSS THE BOARD, FAN THE SUPREME COURT WANTS TO INCREASE THE PAGE LIMITS, THEY WILL TELL ATTORNEYS THEY CAN DO IT, SO BASICALLY THE PRESUMPTION IS THAT THE APPELLATE RULES WILL APPLY IN ALL CASES, DEATH INCLUDED, AND THAT, IF THIS COURT WANTS TO CREATE AN EXCEPTION, IT WILL DO SO. I DO NOTE THAT THE CRIMINAL REFORM ACT STATUTE IS THE STATUTE, ITSELF, HAS NO EXCEPTION FOR DEATH CASES, AND THAT THE ATTORNEY GENERAL'S OFFICE IS USING THE CRIMINAL REFORMAT, IN ITS BRIEFS, TO ATTACK ANY KIND OF FUNDAMENTAL ERROR BEING ADDRESSED IN SENTENCING ON DEATH CASES, SO IF THIS COURT IS GOING TO CREATE AN EXCEPTION, THEN IT SHOULD, ALSO, BE LOOKING AT THE FACT THAT THE CRIMINAL REFORM AT IS BEING -- REFORMAT IS BEING APPLIED ACROSS THE BOARD, AS WELL, AND THAT NO EXCEPTION FOR THE STATUTE HAS BEEN ACKNOWLEDGED OR NOTED. IF DEATH IS DIFFERENT --

YOU DON'T KNOW OF A CASE THAT WE HAVE DEALT WITH THAT PRECISE ISSUE, DO YOU?

NO. I DO NOT. I MEAN THE ONLY ONE I CAN SAY IS THAT THE CRIMINAL REFORMAT PORTION THAT TRIED TO DO AWAY WITH DEGULIO HAS BEEN READDRESSED BY THIS COURT, BUT IT HAS NOTHING TO DO WITH THE SENTENCING ISSUES.

RIGHT.

CORRECT. NOW, JUSTICE ANSTEAD SAID WHAT ABOUT THE OTHER CASES? I BELIEVE THAT THE OTHER COMPANION COUNTS THAT GO ALONG SHOULD BE UNDER THIS RULE, BECAUSE TO NOT INCLUDE THEM IS TO PRESUME THAT THE DEATH SENTENCE WILL BE UPHELD AND THE OTHER SENTENCING WON'T MATTER. IF I GET MY CLIENT REDUCED TO LIFE AND HE HAS GOT A SUBSTANTIAL PROBLEM WITH A COMPANION CHARGE, THEN HE WILL NOT HAVE ANY REPRESENTATION FOR THIS.

DO THOSE ISSUES IN A DEATH CASE REALLY HAVE THE SAME PROBLEMS THAT WERE ATTEMPTED TO BE ADDRESSED BY THIS COMMITTEE, IN THE -- UNDER THE APPELLATE REFORMAT? I MEAN, THOSE CASES HAVE ALL GOT SENTENCING ORDERS. THEY HAVE ALL BEEN THROUGH A DIFFERENT

KIND OF PROCESS.

YOU ARE TALKING ABOUT THE NONDEATH CASES THAT GO ALONG WITH IT? ANOTHER NON-DEATH COUNTS THAT GO, BUT THEY ARE ALL INCLUDED IN THE SENTENCE THAT COMES ALONG TO THIS COURT.

RIGHT.

MY CONCERN IS THAT WE, REALLY, HAVEN'T TRIED TO FIGURE -- TO ADDRESS THAT. WHAT WE WERE DEALING WITH WAS PRIMARILY A ROUTING TO THE DISTRICT COURTS BY PEOPLE WHO ARE NOT -- AND BECAUSE, IN POST-CONVICTION, THOSE PEOPLE WERE NOT GOING TO BE REPRESENTED BY COUNSEL, WHICH IS NOT TRUE IN DEATH CASES.

IF I AM NOT ALLOWED TO RAISE A SUBSTANTIAL SENTENCING ERROR, LIKE IN A BURGLARY OR ROBBERY COUNT, AND MY CLIENT'S CASE ON THE DEATH COUNT GETS REDUCED TO LIFE, WHO WILL REPRESENT HIM ON THAT BURGLARY COUNT?

BUT DO YOU RAISE THAT QUESTION IN THE DEATH APPEAL?

WELL, THE CRIMINAL REFORMAT SAYS I CAN'T.

WELL, THAT IS THE REASON I ASK YOU. HAS THERE BEEN -- I DON'T BELIEVE THERE HAS BEEN AN INSTANCE IN WHICH THIS COURT HAS SQUARELY DEALT WITH THAT QUESTION, BECAUSE I DON'T REMEMBER A CASE IN WHICH THAT QUESTION HAS BEEN RAISED.

WELL --

THAT PARTICULAR QUESTION.

THE WHOLE PURPOSE OF THE 3.800(B)(2), BECAUSE WE WEREN'T ALLOWED TO RAISE THEM -- FOR EXAMPLE ALL OF THE CASES THAT THE COURT HEARD IN MAY HAD TO DEAL WITH NONDEATH SITUATIONS. HOWEVER, IF THE RULING SAYING THAT THEY HAVE TO BE PRESERVED UNDER RULE 3.800(B)(2), I DON'T BELIEVE THAT THE CASE LAW SAYS THEY DO NOT APPLY TO YOU.

THERE ARE TWO WAYS TO DEAL WITH THAT. ONE WOULD BE TO ALLOW THE NONDEATH SENTENCEING ERRORS TO BE FILED BUT IT NOT DELAY THE FILING OF THE APPELLATE BRIEF ON THE DEATH CASE. THE OTHER WOULD BE JUST TO GET AN AGREEMENT WITH THE STATE TO NOT, YOU KNOW, IN EXCHANGE FOR THIS NOT APPLYING, THAT THEY NOT, THEREAFTER, MAKE CLAIMS OF LACK OF PRESERVATION, WHERE THOSE COULD HAVE BEEN RAISED, SO THAT WE DON'T HAVE THIS DELAY.

RIGHT. AND THAT IS MY MAIN CONCERN, IS THAT THE COURT SHOULD BE LOOKING AT THIS IN TWO DIFFERENT WAYS. ONE IS DOES IT APPLY IN CASES WHERE THE DEATH PENALTY IS INVOLVED AND WHAT ABOUT ALL OF THOSE ADDITIONAL CHARGES THAT GO ALONG WITH IT? THERE IS A CONCERN THAT THEY WILL NOT -- THAT THEY WILL FALL THROUGH THE CRACKS, AND OTHER THAN THAT, THERE IS A DIFFERENCE IN DEATH CASES AND NONDEATH CASES, AND THAT IS THAT USUALLY IF THE DEATH CASE IS UPHELD, THE DEFENDANT DOES HAVE REPRESENTATION TO ASSIST HIM IN WHATEVER PROBLEMS THAT HE MAY HAVE, AND WHEREAS WE FOUGHT THE 3.800(B)(2), BECAUSE THERE WAS NO REPRESENTATION, IF THE DEFENDANT WAS LEFT OUT ON HIS OWN, SO THERE IS A DISTINCTION HERE, BUT, AGAIN, IF THE DEATH SENTENCE GOES AWAY OR GETS REDUCED OR WHATEVER, THEN THERE ARE STILL PROBLEMS WITH ANYTHING THAT GOES ALONG WITH IT. THANK YOU.

THANK YOU.

MAY IT PLEASE THE COURT. I AM PAULA SAUNDERS, AND I REPRESENT THE PUBLIC DEFENDERS OFFICE OF THE SECOND JUDICIAL CIRCUIT. I WOULD LIKE TO RESPOND TO TWO QUESTIONS RAISED BY JUSTICE PARIENTE, FIRST REGARDING THE SCRIVENER'S ERRORS. IN MY EX-PIRNS -- EXPERIENCE, WHAT I EVER SEEN IS THE STATE FILING THESE LOOSELY TERMED MOTIONS FOR CLARIFICATION OF SENTENCE, AND SCRIVENER'S ERRORS ARE JUST HANDLED KIND OF IN A ROUTINE MATTER BUT HAVEN'T BEEN -- THERE IS NO CITATION TO A RULE, BUT IT IS BEING DONE THROUGH A MOTION. I AM, ALSO, SEEING MOTIONS FOR CLARIFICATION BEING USED IN OTHER CONTEXTS, HOWEVER, SUCH AS WHERE THE STATE HAS INTENDED TO SEEK HABITUAL OFFENDER SENTENCING. THE JUDGE PRONOUNCED THE SENTENCE BUT FAILED TO ANNOUNCE THAT IT WAS A HABITUAL OFFENDER SENTENCE. THE STATE HAS, THEN, COME BACK WITH THIS MOTION FOR CLARIFICATION, ASKING THE JUDGE TO IMPOSE THE SENTENCE AS HABITUAL OFFENDER. THOSE CASES, WHERE THE JUDGE HAS AGREED TO DO SO, DO RAISE SERIOUS DOUBLE JEOPARDY CONCERNS AND HAVE BEEN ROUTINELY REVERSED ON APPEAL. BUT WHAT I AM CONCERNED ABOUT IS THAT, IF WE DON'T HAVE SOME SORT OF QUALIFYING LANGUAGE ON THE STATE'S RIGHT TO APPEAL, THE STATE IS GOING TO USE THE 3.800 PROCEDURE AS IT WAS DOING UNDER THIS MOTION FOR CLARIFICATION, TO CORRECT A GAMUT OF SENTENCING ERRORS THAT MIGHT OTHERWISE NOT BE ABLE TO APPEAL. AS JUSTICE PARIENTE HAS POINTED OUT, THE STATE'S RIGHT TO APPEAL, UNDER THE FLORIDA STATUTE, IS LIMITED TO ILLEGAL SENTENCINGS AND TO -- ILLEGAL SENTENCES AND TO SENTENCES WHICH DEPART FROM THE CRIMINAL CODE F WE ALLOW THE STATE TO FILE 3.800(B) MOTION TO SAY CORRECT ANY SENTENCING ERROR, THEY ARE, THEN, GOING TO BE ABLE TO SEEK CORRECTION OF ERRORS IN THE TRIAL COURT THAT THEY OTHERWISE COULD NOT APPEAL. I THINK WE HAVE TO PUT THAT QUALIFYING LANGUAGE IN THE NEW RULE.

HOW WOULD YOU DEAL WITH THE SCRIVENER'S ERROR?

I THINK THAT CAN BE ADDRESSED VERY EASILY IN THE COMMENTS. NOW, I WOULD LIKE TO POINT OUT THAT, IN CHESHIRE V STATE, WHICH INVOLVED A DOUBLE JEOPARDY ISSUE, THIS COURT NOTED THAT DOUBLE JEOPARDY DOES NOT GUARANTEE THE DEFENDANT THE BENEFIT OF THE JUDGE'S GOOD FAITH, MATHEMATICAL OR CLEARCAL ERROR. I VIEW A SCRIVENER'S ERROR AS NOTHING MORE THAN A CLERICAL ERROR. WE CAN RAISE SCRIVENER'S ERRORS IN THE CONTEXT OF ANDERS. THEY DON'T REQUIRE THE CORRECTION. IT CLEARLY IS PART OF THE JUDGE'S DUTIES.

AS FAR AS THE SCORING, THAT WOULD BE A DIFFERENT ISSUE.

THAT WOULD AND DIFFERENT MATTER. YES. I THINK WE CAN EASILY HANDLE THE SCRIVENER'S ERRORS THROUGH THE 3.800 PROCEDURE, AND I THINK IT CAN BE ADDRESSED IN THE RULE OR IN THE COURT COMMENTS. BUT I WOULD NOT LIKE TO SEE THE COURT DELETE THAT LANGUAGE THAT LIMITS THE STATE'S RIGHT TO FILE THE MOTION, WHERE THE CORRECTION WOULD BENEFIT THE DEFENDANT, BECAUSE, THEN, I THINK WE DO OPEN UP THE DOOR TO THE STATE CORRECTING SENTENCING ERRORS THAT MIGHT OTHERWISE RAISE DOUBLE JEOPARDY CONSIDERATIONS. WITH REGARD TO THE CAPITAL CASES, I CONCUR WITH BOTH MR. WILLS AND JUDGE ALTENBERND'S COMMENTS. THERE ARE PROS AND CONS TO THE ISSUE, AND THERE IS PROBABLY NOT GOING TO BE A CONSENSUS AS TO WHERE WE SHOULD COME DOWN ON THE ISSUE. I THINK IT NEEDS FURTHER STUDY BY THE CRIMINAL RULES COMMITTEE, WITH INPUT FROM PEOPLE HAVING EXPERTISE IN THE APPELLATE CRIMINAL APPEALS PROCESS. I WOULD JUST LIKE TO POINT OUT, WITH REGARD TO THE CAPITAL CASES, THAT SENTENCING ERRORS IN CAPITAL CASES ARE A WHOLE DIFFERENT SPECIES OF ERRORS THAN THE SENTENCING ERRORS YOU SEE IN NONCAPITAL CASES. YOU GET ERRORS IN THE PENALTY PHASE THAT INVOLVE EVIDENTIARY ISSUES, THAT INVOLVE JURY ISSUES, JURY INSTRUCTION ISSUES.

WOULD YOU AGREE THAT WE WOULD PROBABLY BE BEST, HERE, TO JUST CLARIFY THAT, UNTIL SUCH TIME AS THE RULE IS MADE SPECIFICALLY APPLICABLE TO CAPITAL CASES, THAT IT IS NOT?

I THINK THAT WOULD BE ADVISABLE UNDER THE CIRCUMSTANCES, YES.

WHAT WOULD YOU DO WITH THIS RELATED -- THE ISSUE OF THE RELATED COUNTS? THAT IS WHERE YOU HAVE THE BURGLARY, THE ROBLY. -- THE ROBBERY. ROUTINELY WE GO AHEAD AND CORRECT THEM, WHEN WE ARE DOING THE OPINION, AND THEY SEEM TO BE, UNDER ALL THE CIRCUMSTANCES, SINCE THE WHOLE PURPOSE IS TO SORT OF SAVE APPELLATE TIME, WE ARE NOT GETTING SAVED APPELLATE TIME IN A DEATH CASE BY NOT HAVING THAT ONE ISSUE. WE JUST EXEMPT THAT AND ITS RELATED COUNTS.

YEAH. I WOULD NOT LIKE TO SEE THE SENTENCING ISSUES DEALT WITH IN A PIECEMEAL FASHION. I THINK IT IS BETTER THAT REVIEW REMAIN IN THIS COURT AND THAT THE CASE STAY TOGETHER AS A WHOLE, FOR APPELLATE REVIEW PURPOSES.

THANK YOU VERY MUCH.

THANK YOU.

THANK YOU, COUNSEL. APPRECIATE YOUR ASSISTANCE.