Raymond O. Dixon vs. GAB Business Services, Inc.

IT WAS CLEAR, FROM ANYONE WHO WOULD READ THE OPINION, THAT THEY DID SO RELUCTANTLY, AND I BELIEVE THEY SAID THAT THE GRICE DECISION, AS MUCH AS IT DID NOT CONCERN A SITUATION WHERE THE AVERAGE CURRENT EARNINGS EXCEEDED AVERAGE WEEKLY WAGE, ACCORDING TO THE COURT, NOW, ITS PRESIDENTIAL EFFECT WITH REGARD TO THIS CASE IS MUCH IN DOUBT. HOWEVER, YOUR HONORS, THE COURT APPARENTLY CERTIFIED THE QUESTION WHICH IS BEFORE THE COURT TODAY. I THINK AN ATTEMPT AND DESIRE TO STRAIGHTEN THIS MATTER OUT. NOW, I KNOW THE COURT IS INTIMATELY FAMILIAR WITH THE QUESTION WHICH IS PRESENTED, BUT IN ESSENCE, IT REALLY ASKS THAT THIS COURT MAKE A DECISION AS TO WHETHER TO APPLY THE AVERAGE CURRENT EARNINGS HERE OR AVERAGE WEEKLY WAGE. AND SO WE SUBMIT THAT THE QUESTION SHOULD BE ANSWERED IN THE NEGATIVE, AND THAT THE RULING OF THE JUDGE OF COMPENSATION CLAIMS SHOULD BE AFFIRMED, AND THAT IS BECAUSE, YOUR HONORS, THE CLEAR LANGUAGE OF SECTION 440.1510, WHICH IS COUPLED WITH THE SOCIAL SECURITY STATUTE, LILTS THE SOCIAL SECURITY OFFSET AVAILABLE TO AN EMPLOYER CARRIER TO 80% OF THE WORKER'S AVERAGE CURRENT EARNINGS OR AVERAGE WEEKLY WAGE, WHICHEVER IS GREATER. FOCUSING THE COURT'S ATTENTION ON SECTION 440.1510, YOU CAN SEE THE PROVISION OF THAT STATUTE. HOWEVER, IT SHALL NOT OPERATE TO REDUCE A WORKER'S BENEFITS UNDER THE STATUTE TO A GREAT ERECTION TENT WHERE IT WOULD HAVE BEEN UNDER 42 US C-4 24-A, YOU CAN SEE THAT IT USES 80% OF AVERAGE CURRENT EARNINGS. YOUR HONORS, AS AMICUS POINTED OUT AND AS, I BELIEVE, IS EVIDENT IN THE FIRST DISTRICT'S OPINION BELOW, THESE TWO STATUTES TOGETHER HAVE INTERPRETED ESTABLISH, THE FIRST OF THREE POINTS, AND THE FIRST IS AN EMPLOYER CANNOT TAKE AN OFFSET GREATER THAN THE SOCIAL SECURITY ADMINISTRATION CAN TAKE AND THAT IT IS POSSIBLE TO EXCEED THE AVERAGE WEEKLY WAGE, DEPENDING ON THE FACTS OF THIS CASE.

HOW DOES THAT HAPPEN? IN THIS PARTICULAR CASE, WE DO HAVE AN AVERAGE CURRENT EARNING THAT IS MORE THAN THE AVERAGE WEEKLY WAGE, AND HOW DOES THAT OCCUR?

THAT OCCURS BECAUSE OF THE PRACTICAL NECESSITY THAT SOMEONE HAS HAD A CAREER WHICH IS SUCH THAT HIS EARNING HISTORY IS GREATER THAN THE 13 WEEKS PRIOR TO THE TIME THEY WERE HURT. THE AVERAGE CURRENT EARNINGS -- YES, YOUR HONOR.

THE 13 WEEKS IS USED TO DETERMINE THE AVERAGE CURRENT EARNINGS OR THE AVERAGE WEEKLY WAGE?

THAT IS THE AVERAGE WEEKLY WAGE, AND IF YOU WERE TO DRAW AN ANALOGY, JUSTICE QUINCE, YOU WOULD SAY THAT ONE IS AKIN TO A SNAPSHOT, THE AVERAGE WEEKLY WAGE, THAT IS. THE AVERAGE CURRENT EARNINGS IS MORE LIKE A MAJOR MOTION PICTURE. IT IS A LONGER VIEW, A LONGER LOOK-BACK PERIOD, AND IF THE COURT WERE TO INQUIRE ABOUT THE POLICY BEHIND HOW THE STATUTES WORK TOGETHER, YOU WOULD SIMPLY SAY THAT ONE POLICY THAT IS EMBEDDED IN THIS IS THAT, IF YOU WORK LONG ENOUGH IN THIS STATE, YOU EARN YOUR STRIPES, AS IT WERE, SO THAT YOU ARE NOT GOING TO BE PUNISHED BECAUSE OF THE HAPPENSTANCE THAT YOU HAPPENED TO BE INJURED IN A PERIOD WHERE YOU WERE MAKING LESS MONEY THAN YOU DID OVER A LONGER PERIOD. I THINK, THOUGH THAT, THE HISTORY OF THE STATUTE, WHICH IS VERY ELOQUENTLY BRIEFED, I BELIEVE, BY AMICUS, AND SET FORTH IN THE FIRST DCA, ALL ESTABLISH THAT THE STATE OF FLORIDA, WHEN IT WENT INTO BEING A REVERSE OFFSET STATE, I BELIEVE, IN 1973, JUST CLEARLY INTENDED, IN ENACTING SECTION 440.1510, THAT EMPLOYERS WERE NOT GOING TO BE ABLE TO TAKE MORE OF AN OFFSET

THAN THE SOCIAL SECURITY ADMINISTRATION COULD TAKE, AND YOUR HONORS, THE REASON FOR THAT IS QUITE SIMPLY IF, IN THEIR BENEFESENCE THE GOVERNMENT IS GOING TO CONCEDE TO THE STATE OF FLORIDA TO TAKE OFFSETS, AS IT DID, IT IS NOT GOING TO DO SO AND ALLOW A STATE EMPLOYER WHO IS GOING TO TAKE AN OFFSET TO TAKE MORE OF AN OFFSET THAN THE FEDERAL SOCIAL SECURITY ADMINISTRATION WOULD TAKE, AND AS FURTHER EVIDENCE TO THAT, I WOULD CITE TO THE FACT THAT, IF YOU LOOK AT THESE STATUTES TOGETHER AND HOW THEY HAVE BEEN INTERPRETED, SPECIFICALLY THE HUNT VERSUS STRATTON CASE AT 677 SO.2D 644 AND 527 SO.2D 873, THE BRAWN CADILLAC CASE, YOU CAN SEE THAT THE FLORIDA STATUTE IS MORE BENEVOLENT THAN THE SOCIAL SECURITY LAW, BECAUSE IT ALLOWS THE AVERAGE CURRENT EARNINGS AND THAT WHICH IS GREATER, I SUBMIT TO THE COURT, TAKES THE WHOLE PROCESS ONE STEP FURTHER THAN WHAT 424-A WOULD BY ITSELF, SO I THINK THAT SHOWS EVIDENCE THAT THE LEGISLATURE REALLY WANTED TO TREAT WORKERS IN A WAY THAT IS MORE FAIR THAN THE FEDERAL GOVERNMENT, EVEN, WOULD HAVE.

TO GET TO YOUR CONCLUSION, ARE WE, THEN, DEALING WITH A STATUTORY INTERPRETATION OF 440.1510? IS THAT WHAT THIS CASE INVOLVES?

I THINK SO, YOUR HONOR, AND IN PREPARING FOR ORAL ARGUMENT TODAY, I NOTICE THAT YOU MADE A SIMILAR INQUIRY IN THE ACRE DECISION, BACK IN DECEMBER OF 1999, AND I SUBMIT TO THE COURT THAT YOU WERE FACED WITH A VERY SIMILAR ISSUE, AND THAT YOU HAVE A SAME ANALYTICAL TOOL AVAILABLE TO YOU, TO RESOLVE WHAT APPEARS TO BE A STATUTORY CONFLICT IN THIS CASE. THAT IS THE METHODOLOGY THAT YOU USED IN THE ACRE DECISION, AND THE FIRST THING IS WHAT YOU DO IS YOU GET TO THE ROOT OF WHAT THE LEGISLATIVE INTENT IS. THAT IS ALWAYS THE CARDINAL RULE, OF COURSE, IN INTERPRETING STATUTES, AND IT IS CLEAR, HERE THAT, THE INTENT OF THE LEGISLATURE WAS NOT TO ALLOW EMPLOYERS TO TAKE MORE OF AN OFFSET THAN THE SOCIAL SECURITY ADMINISTRATION COULD TAKE. NOW, IF YOU LOOK AT SEX 440.2014, THIS COURT'S MOST RECENT EXPOSITION OF HOW IT FEELS ABOUT THAT STATUTE AND ITS SORT OF DUBIOUS DETECTULE LINEAGE, IS IN THE -- DUBIOUS TEXTUAL LINEAGE, IS IN THE ACRE DECISION, AND YOU SAID IN THAT CASE THAT THAT WAS AN AMBIGUOUSLY-WORDED STATUTE, AND ANOTHER STATUTE WOULD DEFEAT THE LEGISLATURE'S INTENT EMBODIED IN THE OTHER STATUTE, THEN YOU ARE GOING TO DECLINE TO DO THAT, AND WE SUBMIT THAT, IF THAT SAME METHOD IS HERE FOR YOU TODAY, IT IS OBVIOUS THAT THE LEGISLATURE IS NOT GOING TO LET EMPLOYERS TAKE MORE OF THAT OFFSET THAN THE SOCIAL SECURITY ADMINISTRATION WOULD. NOW, IF YOU TAKE SECTION 440.2014, YOU HAVE THESE TWO STATUTES SORT OF BUTTING HEADS, AS IT WERE, AND YOU HAVE TO RECONCILE THAT, AND THE ONLY WAY YOU CAN DO THAT IS THE METHODOLOGY THAT WAS USED IN THE ACRE DECISION, AND YOU HAVE TO ASSUME THAT THE LEGISLATURE WOULD NOT HAVE WANTED TO PERMIT EMPLOYERS IN THE STATE TO TAKE MORE OF AN OFFSET THAN THE SOCIAL SECURITY ADMINISTRATION.

CAN'T -- IS IT YOUR VIEW THAT GRICE AND THE JCC'S DECISIONS CAN LIVE TOGETHER?

THEY CAN LIVE IN HARMONY, YOUR HONOR, BECAUSE, AS WE ATTEMPTED TO POINT OUT IN OUR BRIEFS, YOU NOTE YOU WERE NEVER CALLED UPON IN THE GRICE DECISION, TO DECIDE A SITUATION WHERE IT IS UNDISPUTED, WHERE 80% OF THE WORKER'S AVERAGE CURRENT EARNINGS ARE GREATER THAN THE AVERAGE WEEKLY WAGE. NOW, WHEN YOU ARE DEALING WITH WHAT THE COURT HAS ADMITTEDLY SAID IS AN AMBIGUOUSLY-WORDED STATUTE, AND YOU HAVE THE STATUTE WHICH WE ARE THE ADVOCATE OF HERE, TODAY, WHICH IS 440, SECTION 1510, IT IS OUR POSITION THAT THAT STATUTE WOULD TRUMP THE AMBIGUOUS AMBIGUOUSLY-WORDED STATUTE BY VIRTUE OF THE CARDINAL RULE OF INTERPRETATION THAT THE SPECIFIC STATUTE MUST ALWAYS GOVERN THE GENERAL STATUTE, AND IN THAT CONFLICT, AND GIVEN THE DUTY OF THE COURT TO TRY TO RESOLVE THE STATUTORY CONFLICTS, THAT IS THE WAY THE CASE OUGHT TO COME OUT.

AND THEN IN THIS CASE, BECAUSE ONCE YOU USE THE AVERAGE CURRENT EARNINGS, THERE WOULD BE NO QUESTION OF AN OFFSET. IS THAT CORRECT?

YOU ARE ABSOLUTELY RIGHT.

YOU DON'T HAVE TO REACH THE QUESTION AS TO WHAT GETS OFFSET AND WHAT DOESN'T AND IF THERE ARE CONTRIBUTIONS OR ANYTHING OF THAT NATURE.

THAT IS EXACTLY RIGHT, YOUR HONOR, AND A NETTLESON QUESTION IT IS, BECAUSE WHEN YOU GET INTO THAT SITUATION, WHICH YOU ARE NOT DEALING WITH HERE, TODAY, THEN YOU HAVE A WHOLE SERIES OF QUESTIONS ABOUT WHO GOES FIRST, WHAT OUGHT TO BE TAKEN FIRST, WHAT THE POLICY BEHIND THOSE DECISIONS ARE, WHEN THERE ARE THESE INTERSTIRBL MATTERS WHICH ISN'T BEEN ASSORTED OUT BY THE LEGISLATURE, WHICH IN EFFECT YOU HAVE BEEN CALLED UPON TO RESOLVE, BUT YOU ARE NOT ASKED TO DO THAT A TODAY, AND WE ARE NOT ASKING YOU TO APPLY AN OVER ARCHING PRINCIPLE. ALL WE ARE DOING IS TO ASK YOU TO APPLY THE LAW, TO FOLLOW THE LAW, AND WE SUBMIT THAT THE JUDGE OF COMPENSATION CLAIMS FOLLOWED THE LAW PROPERLY AND THAT DECISION SHOULD BE AFFIRMED, THAT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL SHOULD BE REVERSED AND THE CERTIFIED QUESTION BE ANSWERED IN THE NEGATIVE. YOUR HONORS, THERE IS ANOTHER POINT ON APPEAL WHICH DEALS WITH ATTORNEYS FEES. I WOULD JUST QUITE SIMPLY SAY THAT THAT IS AN ABUSE OF DISCRETION STANDARD AND ALL WHO PRACTICE BEFORE THE APPELLATE COURTS OF FLORIDA KNOW WHAT THAT MEANS, AND QUITE SIMPLY, IT IS WITHIN THE DISCRETION OF THE FIRST DISTRICT TO AWARD FEES, EVEN WHEN YOU DON'T TECHNICALLY PREVAIL, AND SO IT FOLLOWS, BY OPERATION OF LOGIC, THAT IF THE FIRST DISTRICT WERE TO AWARD FEES WHEN YOU DIDN'T PREVAIL, THAT CANNOT BE AN ABUSE OF DISCRETION. YOUR HONORS, I SEE MY TIME IS RUNNING A BIT SHORT HERE. I WOULD BE HAPPY TO ANSWER ANY FURTHER QUESTIONS ON REBUTTAL.

THANK YOU, COUNSEL. MR. STAVER.

MR. CHIEF JUSTICE AND MAY IT PLEASE THE COURT. MY NAME IS MATT STAVER. I REPRESENT THE RESPONDENTS, THE CROSS PETITIONERS IN THIS CASE. I WILL COLLECTIVELY REFER TO THEM AS THE EMPLOYER. THE EMPLOYER RESPECTFULLY REQUESTS THIS COURT TO AFFIRM IN PART AND TO REVERSE, IN PART, THE RULING BELOW. FIRST, THIS COURT SHOULD AFFIRM THAT RULING BELOW THAT ALLOWS AN EMPLOYER TO OFFSET WORKERS COMPENSATION BENEFITS, WHEN COMBINED WITH OTHER COLLATERAL BENEFITS, TO THE EXTENT THOSE BENEFITS EXCEED THE CLAIMANT'S AVERAGE WEEKLY WAGE, RATHER THAN THE SOCIAL SECURITY AVERAGE CURRENT EARNINGS. HOWEVER, THIS COURT SHOULD REVERSE THAT PORTION OF THE RULING BELOW THAT AWARDED ATTORNEYS FEES TO A NONPREVAILING PARTY.

IS THE LYNCH PIN FOR YOUR POSITION GRICE?

THE LYNCH PIN FOR OUR DECISION IS GRICE IN 440.20-14, WHICH THIS COURT DECIDED GRICE, IT WAS 15. IN GOING BACK TO THE HISTORY OF GRICE, JUSTICE SHAW, I DON'T BELIEVE IT IS A DUBIOUS INTERPRETATION OF THE TEXT. IF THIS COURT WERE TO RETREAT FROM GRICE AND USE THE ACE, WHICH COMES FROM FIVE YEARS OF EARNINGS FROM PREVIOUS EMPLOYMENT THAT THE SOCIAL SECURITY ADMINISTRATION CALCULATES THAT MAY BE UNRELATED TO YOUR PRESENT EARNINGS, AS OPPOSED TO YOUR AVERAGE WEEKLY EARNINGS, WHICH IS 13 WEEKS BEFORE THE ACTUAL DATE WITH YOUR PARTICULAR EMPLOYER, WHERE YOU ARE INJURED. IF THIS COURT USES THE ACE, RATHER THAN THE AWW AS THE CAP, THIS COURT WOULD NOT ONLY HAVE TO REVERSE GRICE BUT WALK AWAY FROM A QUARTER AFTER CENTURY OF THIS COURT'S INTERPRETATION OF THAT VERY RULE, 440.20-14.

WHILE THE LANGUAGE IN GRICE WAS RATHER BROAD, IT WAS NOT ADDRESSING THIS PARTICULAR PROBLEM THAT YOU ARE DEALING WITH HERE TODAY.

IT DIDN'T ADDRESS THE SITUATION ABOUT WHETHER SOMETHING EXCEEDED THE AVERAGE WEEKLY WAGE VERSUS THE AVERAGE CURRENT EARNINGS. HOWEVER, IT DID ADDRESS 440.20-15. IF I COULD JUST GIVE A HISTORY OF THAT PARTICULAR SECTION, IT ORIGINALLY STARTED OUT IN THE SEVENTIES, AS IRC RULE NINE. THAT WAS IRC RULE NINE. AND THIS COURT, BACK IN 1975, FIRST ADDRESSED THAT PARTICULAR RULE. IN THE BROWN DECISION, THIS PARTICULAR COURT LOOKED AT THE LANGUAGE, AND IN THAT LANGUAGE, BASICALLY THE ISSUE WAS THIS. IF THE EMPLOYER PAYS PEN GETS -- PEN FITS TO AN INJURED WORKER AND THE CARRIER, THEN, ALSO, SUBSEQUENTLY PAYS PEN GETS -- BENEFITS TO THE INJURED WORKER, THERE WOULD BE AN OFFSET BETWEEN THOSE TWO. NOW, BROWN LOOKED AT WHAT WOULD HAPPEN WHEN THOSE OFFSETS OCCURRED. BROWN LOOKED AT IT FROM A WORKERS' POINT OF VIEW AND WHAT WOULD HAPPEN TO FOLLOW, AND THIS RULE SAID IN IRC NINE. QUOTE, IT IS REASONABLE TO CONCLUDE THAT WORKERS COMPENSATION BENEFITS, WHEN COMBINED BY SICK BENEFITS PROVIDED BY AN EMPLOYER SHOULD NOT EXCEED THE AVERAGE WEEKLY WAGE, BECAUSE A LOGICAL INTERPRETATION OF IRC NINE, WHEN CONSIDERED FROM THE FULL WAGES, WHATEVER THE EMPLOYER'S SOURCE, THAT SHOULD BE THE LIMIT TO WHICH HE IS ENTITLED. BUT NEXT YEAR, YOUR HONORS, THIS COURT ADDRESSED IRC RULE NINE, WHICH, BY THIS TIME, HAD GONE INTO THE FLORIDA RULES OF WORKERS COMPENSATION PROCEDURE, RULE 18. THIS COURT ALREADY DECIDEDED THAT SICK BENEFITS THAT AN EMPLOYER PROVIDED COULD BE OFFSET AGAINST WORKERS COMPENSATION BENEFITS THAT THE CARRIER PROVIDED, TO THE EXTENT THAT THOSE COMBINED BENEFITS EXCEED THE AVERAGE WEEKLY WAGE, SO THAT THE INJURED WORKER DOES NOT HAVE A WINDFALL AS A RESULT OF THE ACCIDENT AND GET PAID MORE AFTER THE ACCIDENT THAN BEFORE. THE NEXT YEAR, THIS COURT, IN THE DEMOOTZ CASE, IN 1976, ADDRESSED THE SAME LANGUAGE. IT SIMPLY MOVED FROM IRC RULE 9 TO RULES OF THE WORKERS COMPENSATION PROCEDURE, BUT IT IS VERBATIM IN THE WORDING. THE ISSUE, THERE, WAS WHETHER PENSION BENEFITS COULD BE OFFSET LIKE SICK LEAVE BENEFITS COULD BE OFFSET. NOW, THE COURT SUGGESTED IN DEMOOTZ THAT, YES, INDEED, THOSE BENEFITS COULD BE OFFSET. NOW, THE OFFSET WAS NOT PERMITTED IN THAT CASE, BECAUSE WHEN YOU COMBINED THE WORKERS COMPENSATION BENEFITS WITH THE PENSION BENEFITS, THE TOTAL DID NOT EXCEED THE CLAIMANT'S AVERAGE WEEKLY WAGE, SO IT NEVER REACHED ABOVE THAT. THEN, TEN OR 11 YEARS AGO, THIS COURT REVISITED THAT SECTION, WHICH --

THESE TWO CASES, THOUGH, DIDN'T REALLY DEAL WITH WHAT WE ARE DEALING WITH HERE, WHICH, IS AGAIN, THAT THE ISSUE IS THE AVERAGE CURRENT EARNINGS IS HIGHER AND THERE ARE OTHER FACTORS, AND YOU DID AGREE WITH THAT. YOU ARE GIVING US A HISTORY --

IT DOESN'T ADDRESS THAT SPECIFIC ISSUE, BUT IN GETTING TO THAT, BARRY BEGAN STARTS TO BRING US CLOSER AND GRICE BRINGS US CLOSER AND THIS CASE BRINGS US RIGHT ON POINT. BARRY BEGAN, IN 1989, SPECIFICALLY ADDRESSED WHAT IS IN THE STATUTE NOW. THE SAME LANGUAGE CAME OVER TO THE PRESENT STATUTE, AND IT SAYS THE EMPLOYER MAY NOT OFFSET WORKERS COMPENSATION BENEFITS AGAINST AN EMPLOYEE'S PENSION BENEFITS EXCEPT TO THE EXTENT THAT THE TOTAL OF THE TWO EXCEEDS THE EMPLOYEE'S AVERAGE MONTHLY WAGE, AND THEN THIS COURT ADDRESSED THE DECISION IN GRICE, WHERE YOU HAVE NOT JUST TWO BENEFITS BUT THREE, AND THE THIRD BENEFIT THAT WAS ADDED INTO THE MIX IS SOCIAL SECURITY. IN GRICE, THE CLAIMANT WAS GETTING WORKERS COMPENSATION BENEFITS, BECAUSE HE WAS PERMANENTLY AND TOTALLY DISABLED. THE CLAIMANT WAS, ALSO, GETTING A STATE RETIREMENT DISABILITY BENEFIT FROM THE STATE OF FLORIDA, AND THE CLAIMANT WAS, ALSO, GETTING SOCIAL SECURITY DISABILITY BENEFITS. AND THIS COURT RELIED UPON BROWN, RELIED UPON DEMOOTS, AND, ALSO, RELIED UPON BARRY BEGAN AND SAID -- BARRAGAN, AND SAID THAT THESE THREE BENEFITS EXCEED THE AVERAGE WEEKLY WAGE, AND TO THAT EXTENT THERE, IS AN OFFSET PERMITTED.

WASN'T THE MAJOR ISSUE IN GRICE IS WHETHER THE THREE BENEFITS COULD BE STACKED, SO THAT THERE WOULD BE A MAXIMUM OF 100%, BUT REFRESH MY RECOLLECTION. IN GRICE, WAS

THERE A QUESTION AS TO WHETHER THE CEILING OF THE 100% COULD BE THE AVERAGE, THE ACE? WAS THAT ADDRESSED IN THAT CASE? RAISED IN THE BRIEF?

NO. IT WASN'T ADDRESSED IN THAT PARTICULAR CASE. LOOKING AT THE FIGURES, HOWEVER, OF THE FIRST DISTRICT COURT OF APPEALS CASE AND THIS COURT'S DECISION IN GRICE, JUST POINTING OUT THIS COURT'S DECISION ON PAGE 897, WHERE THE FIGURES ARE ACTUALLY LISTED, IN THE FIRST DCA'S SAME DECISION THAT THIS COURT REVERSED, ON PAGE 129, WHERE THE FIRST FIGURES ARE MENTIONED. THE DEFENDANT WAS GETTING $392 FROM WORKERS COMP, THE FIRST DCA SAID. THIS COURT AGREED. 392. AND GETTING $398.80 A WEEK FROM SOCIAL SECURITY DISABILITY. WHERE THE FIGURES CHANGED IN THIS NEXT CALCULATION, I DON'T KNOW, BUT THE FIRST DISTRICT COURT OF APPEAL SAID THAT THE CLAIMANT WAS GETTING $208.75 PER WEEK FROM THE FLORIDA DISABILITY RETIREMENT SECTION, AND THIS COURT SAID HE WAS GETTING 167.36. NOW, THERE IS A DIFFERENCE. I DON'T KNOW WHERE THAT CAME FROM, BUT IF YOU LOOK AT THE DCA'S OFFSET, THE DCA'S OFFSET WAS $180.72 PER WEEK. IF YOU USED THE FORMULA FROM THE SUPREME COURT, IT WAS $139.33. NOW, USING THE DCA'S FIGURES, THAT OFFSET ACTUALLY EXCEEDED THE $163.85 PER WEEK FROM THE SOCIAL SECURITY. NOW, THE REASON BEHIND THIS ACE VERSUS AWW IS PARTICULARLY RELEVANT ONLY TO ONE STATUTE, AND THAT IS FOR 440.15-10. I DON'T BELIEVE THAT THERE IS A CONFLICT BETWEEN 440.15-10 HAD, WHICH IS A STRAIGHT SOCIAL SECURITY OFFSET, WHEN YOU OFFSET ONLY TWO BENEFITS AGAINST EACH OTHER. SOCIAL SECURITY, ON THE ONE HAND, WITH WORKERS COMPENSATION ON THE OTHER HAND, WHEREAS THE OTHER STATUTE, 440.10-14, IS AN OFFSET AGAINST THE WORKERS COMPENSATION, ANY OTHER SOURCE. THE REASON I DON'T BELIEVE THERE IS A CONFLICT IS, WHEN YOU THROW IN A THIRD BENEFITS, THEN 440.15-10 DOESN'T APPLY.

WHAT WOULD HAPPEN, THOUGH, IN 440.15-10, IF THERE ARE TWO BENEFITS. DO YOU AGREE THE AVERAGE CURRENT EARNINGS, THEN, IS THE CAP?

NO. I DON'T AGREE THAT THE AVERAGE CURRENT EARNINGS IS THE CAP.

IN NO CASE IN FLORIDA CAN A WORKER WHO BECOMES DISABLED AS A RESULT OF A WORK-RELATED INJURY RECEIVES THE BENEFIT OF THE FEDERAL GOVERNMENT'S CALCULATION OF THE AVERAGE CURRENT EARNINGS. IS THAT YOUR -- WHETHER IT IS TWO, THREE OR FOUR, IF THEY ARE INJURED IN A WORK-RELATED INJURY, THEY DON'T GET THAT BENEFIT?

NO. WHAT I AM SAYING IS BASICALLY WHAT FLORIDA IS SAYING, IS THAT, IF YOU THROW IN SOCIAL SECURITY TO THE OFFSET AND SAY, IN THIS PARTICULAR CASE, THE CLAIMANT IN THIS CASE IS GETTING $237.60 A WEEK, AND ASSUMING THAT YOU ARE OFFSETTING ONLY WORKERS COMP AGAINST SOCIAL SECURITY, THEN 440.15-10 WOULD SAY YOU CANNOT -- YOUR OFFSET CANNOT BE GREAT GREATER THAN WHAT THE CLAIMANT IS GETTING FROM THE SOCIAL SECURITY SOURCE. IN OTHER WORDS YOU COULD NOT IMPOSE AN OFFSET OF $250 PER WEEK, WHEN YOU OFFSET WORKERS COMP WITH SOCIAL SECURITY, BECAUSE THE CLAIMANT IS ONLY GETTING $260.60.

DOES THE WORKER EVER, WHEN THEY ARE DISABLED, RECEIVE LIFETIME EARNINGS GREATER THAN WHAT THEY WERE EARNING 13 WEEKS BEFORE? THE BENEFIT OF GETTING THE AVERAGE CURRENT EARNINGS FROM VARIOUS SOURCES THAT THEY HAVE EITHER EARNED, CONTRIBUTED TO OR OTHERWISE DURING THEIR LIFETIME, IS THERE A SITUATION WHERE THAT CAN OCCUR FOR A WORKER IN THE STATE OF FLORIDA?

ONLY TO THE EXTENT, IF YOU WERE TO TRY TO OFFSET MORE THAN WHAT SOCIAL SECURITY COULD OFFSET, AND SOCIAL SECURITY CANNOT OFFSET UNDER THEIR -- THEY USED THE 80% OF THE AVERAGE CURRENT EARNINGS, AND WHEN THEY DO THAT, THEY ARE PAYING THE INDIVIDUAL THAT IS ELIGIBLE A CERTAIN AMOUNT OF BENEFITS, BASED UPON 80% OF THE AVERAGE CURRENT EARNINGS, AND THEY ARE PAYING THAT EVERY WEEK. IN THIS CASE THEY

ARE PAYING THE CLAIMANT $237.60 A WEEK. NOW, YES, WE COULD NOT OFFSET GREATER THAN WHAT SOCIAL SECURITY, BECAUSE SOCIAL SECURITY, IF THEY WERE NOW GOING TO IMPOSE AN OFFSET AGAINST WORKERS COMPENSATION, BASICALLY THEY CAN'T IMPOSE AN OFFSET GREATER THAN WHAT THEY ARE PAYING THE CLAIMANT. NEITHER CAN WE IMPOSE AN OFFSET GREATER THAN WHAT IS COMING FROM SOCIAL SECURITY, SO THE CLAIMANT WOULD, IN THAT CASE, GET THE BENEFIT OF THE HIGHER PREVIOUS FIVE-YEAR EARNING, FOR WHICH ACE IS CALCULATED, AND IN THIS CASE, YOUR HONOR, YOU DON'T REALLY NEED TO REACH THAT ISSUE, BECAUSE AT NO TIME WAS IT CONTESTED THAT THE EMPLOYER, WHEN THEY COMPOSED ALL THREE BENEFITS TOGETHER, IMPOSED AN OFFSET GREATER THAN WHAT SOCIAL SECURITY IMPOSED. IN FACT THE OFFSET THAT SOCIAL SECURITY HAS ALWAYS IMPOSED IN THIS CASE HAS ALWAYS BEEN LESS THAN $237.60, SO WE HAVE NEVER IMPOSED AN OFFSET GREATER THAN THE BENEFITS FROM THE OFFSET OF SOCIAL SECURITY, ITSELF.

GRICE DIDN'T REALLY DEAL WITH THIS SPECIFIC ISSUE. WHY SHOULDN'T WE TAKE THE FIRST DISTRICT'S DECISION, REALLY, AS AN EXPANSION OF GRICE? AND IF YOU WOULD, THEN, RESPONDING TO THAT, YOU STARTED OUT YOUR ARGUMENT, REALLY, SAYING IF WE RECEDED FROM GRICE, AS YOU KNOW, GRICE HAS BEEN THE RECIPIENT OF CONSIDERABLE CRITICISM FROM MOST OF THE JUDGES IN THE FIRST DISTRICT, THE JUDGES THAT ARE MOST FAMILIAR WITH THE WORKERS COMPENSATION LAW IN THE STATE OF FLORIDA, SO WOULD YOU ADDRESS, REALLY, THOSE TWO RELATED ISSUES, AND THAT IS OF WHETHER OR NOT WE, REALLY, WOULD BE EXPANDING GRICE, A SDWIINGS THAT HAS BEEN -- A DECISION THAT HAS BEEN CONSIDERABLY CRITICIZED BY THOSE JUDGES THAT REALLY KNOW THE MOST ABOUT FLORIDA WORKERS COMPENSATION POLICY AND LAW, OR, REALLY, NOW DIRECTLY CONFRONTING THE QUESTION, SHOULD WE USE THIS CASE TO REEXAMINE OUR DECISION IN GRICE?

I DON'T THINK YOU SHOULD USE THIS CASE, YOUR HONOR, TO REEXAMINE THE DECISION IN GRICE FOR A COUPLE OF REASONS. THERE HAS NOT BEEN VERY MUCH THAT EVER SURVIVED IN THE WORKERS COMPENSATION STATUTE FOR A QUARTER OF A CENTURY. THIS COURT ADDRESSED WHAT IS NOW THE LANGUAGE THAT THIS COURT ADDRESSED IN GRICE 25 YEARS AGO.

WHAT DO YOU ATTRIBUTE THE CONTINUING CRITICISM OF GRICE BY THE JUDGES OF THE FIRST DISTRICT? AND I REALIZE THAT NOT ALL OF US, NOT EVERYDAY, BUT AS I READ IT, I HAVE JUST, ALMOST, WITH EVERY RELEASE OF THEIRS SETS AN OPINION. THERE IS A CONTINUING DISSATISFACTION. AM I CORRECT?

THERE IS, EVER SINCE THIS COURT DECIDED GRICE. THE FIRST DISTRICT COURT OF APPEALS HAS CERTIFIED A NUMBER OF QUESTIONS, WHENEVER A GRICE SITUATION HAS COME FORWARD, AND THAT MAY ULTIMATELY EXPLAIN BELOW WHY THEY AWARDED ATTORNEYS FEES TO A NONPREVAILING PARTY, WHICH I WILL GET TO IN JUST A MOMENT, BUT THEY HAVE CRITICIZED GRICE, BUT THEY HAVE CRITICIZED GRICE FROM THE VERY BEGINNING, AND THIS COURT DIDN'T AGREE WITH THIS FIRST DISTRICT COURT OF APPEALS, IN 1997, WHEN IT SPECIFICALLY REVERSED THE FIRST DISTRICT COURT OF APPEALS, AND IT IS CERTAINLY NOT THE FIRST TIME THIS COURT REVERSED THE FIRST DISTRICT COURT OF APPEALS ON SIGNIFICANT ISSUES. WHY ARE THEY CONCERNED WITH IT? I DON'T KNOW BUT I THINK IN THIS PARTICULAR CASE, THE MAIN ISSUE, THE CRUX OF THIS IS THAT THE CLAIMANT SHOULD NOT RECEIVE A WINDFALL AS THE RESULT OF AN ACCIDENT AND GET PAID MORE, AFTER THE ACCIDENT, THAN THEY WERE RECEIVING BEFORE THE ACCIDENT.

ISN'T THAT JUST ONE SIDE OF THE COIN THOUGH? IN OTHER WORDS THE OTHER SIDE OF THE COIN IS WHETHER OR NOT BENEFITS THAT THEY HAVE CONTRIBUTED TO AND THAT HAVE THE SEPARATE FUNDING SOURCE, THAT THEY MAY BE DEPRIVED OF, AS A RESULT OF THE DECISION --

THAT IS ANOTHER SIDE OF THE SITUATION, BUT THEY ARE NOT GOING TO BE DEPRIVED OF IT FROM THE SOCIAL SECURITY ADMINISTRATION, BECAUSE SOCIAL SECURITY IS GOING TO PAY THE

BENEFITS, ANYWAY, AND BASICALLY THE ONLY THING IT DOES FROM THE EMPLOYER'S STANDPOINT IS SAY WE ARE NOT GOING TO OVER COMPENSATE YOU, BECAUSE BACK IN THE '70s, THIS LEGISLATURE AND THE COURTS HERE, IN THIS STATE, CONFIRMED AND AFFIRMED THAT ONE OF THE BENEFITS THE EMPLOYER PROVIDES IS THROUGH SOCIAL SECURITY, AND THAT THE EMPLOYER OUGHT TO BE ABLE TO RECEIVE SOME KIND OF BENEFIT FROM THAT, AND SO THEY ARE ACTUALLY PAYING TWO DIFFERENT SOURCES, AND THAT IS WHY, IN 1975, THE STATUTE WAS AMENDED, TO ALLOW AN EMPLOYER TO IMPOSE A SOCIAL SECURITY OFFSET, WHEN SOCIAL SECURITY, ITSELF, DID NOT IMPOSE THAT OFFSET. IF YOU RECEDE FROM GRICE, THERE WILL BE SITUATIONS WHERE THE CLAIMANT WILL GET SEVERAL COLLATERAL BENEFITS, AND YOU WON'T BE ABLE TO OFFSET THOSE BENEFITS.

YOU KEEP ON SAYING RECEDE FROM GRICE, BUT I THOUGHT WE ESTABLISHED THAT GRICE ONLY DEALT WITH THE ISSUE AS TO WHETHER THERE SHOULD BE STACKING OF THESE VARIOUS BENEFITS, WHICH OBVIOUSLY IT WAS DECIDED IN 1977, HAD, BEFORE THAT TIME, HAD BEEN GOING ON, WHEREAS THE FIRST TIME THAT EMPLOYERS THOUGHT THAT THEY COULD DO THIS OR TRY TO DO IT WAS RIGHT BEFORE GRICE, AND THEN, SINCE GRICE, AND SO WHAT I AM CONCERNED WITH IS YOU ARE SAYING WE ARE RECEDING FROM SOMETHING THAT WASN'T AN ISSUE IN GRICE, AND IT IS, WAS -- HAD REQUIRED THE WHOLE ISSUE OF THE OFFSET REQUIRED A GREAT DEAL OF JUDICIAL CONSTRUCTION. I MEAN WHAT HAPPENED TO THE ISSUE THAT THE WORKER SHOULD GET THE BENEFIT OF ANY AMBIGUITY OR WHAT HAPPENS TO THE ISSUE OF THE FACT THAT IT IS NOT REALLY A WINDFALL? SOMEONE BECOMES DISABLED ON A JOB, THAT THEY SHOULD BEABLE TO GET WHAT THEY WOULD HAVE BEEN ENTITLED TO, UNDER THE SOCIAL SECURITY ADMINISTRATION ADMINISTRATION'S CALCULATIONS. HOW IS THAT A WINDFALL?

IT IS A WINDFALL, BECAUSE THEY WOULD GET MORE, AND IF YOU DO EXPAND OR RECEDE, WHATEVER, FROM GRICE, THERE WILL BE SITUATIONS WHERE THE EMPLOYER WILL NOT BE ABLE TO OFFSET ANY OF THOSE BENEFITS.

BUT YOU ARE NOT PAYING THE EMPLOYER. FIRST OF ALL, GRICE REALLY DIDN'T DEAL WITH THE ISSUE OF WHO SHOULD GET THE OFFSET. IT DEALT WITH THE ISSUE, THE CORE ISSUE, WAS WHETHER THE THREE BENEFITS, TOGETHER, SHOULD NOT EXCEED 100% OF, IN THAT CASE, THE AVERAGE WEEKLY WAGE, CORRECT?

CORRECT. WHO TAKES THAT OFFSET IS THE EMPLOYER CARRIER.

THE RETIREMENT SYSTEM THAT WASN'T -- THE FLORIDA RETIREMENT SYSTEM THAT WASN'T A PARTY HAS FILED AMICUS, IN ONE OTHER CASE, SAYING HOW DID THIS HAPPEN THAT WE ARE NOT GETTING THE BENEFIT? THAT THE EMPLOYER IS GETTING THE BENEFIT. AS YOU SAID, THE FOCUS WAS, REALLY, WHETHER THE WORKERS SHOULD GET MORE.

RIGHT.

AND NOW WE ARE DEALING, IN THIS CASE, WITH WHAT IS MORE? AVERAGE WEEKLY WAGE OR AVERAGE CURRENT EARNINGS? SO, AGAIN, I URGE YOU TO TELL US HOW WE WOULD BE RECEDING FROM GRICE, IF WE WERE TO DECIDE THIS QUESTION AND ANSWER IT IN THE NEGATIVE?

I THINK YOU WOULD BE RECEDING FROM GRICE, BECAUSE FIRST, YOU DON'T EVEN HAVE TO GET TO THAT QUESTION. IN THIS PARTICULAR CASE, THE FACTS THAT ARE BEFORE THIS COURT DO NOT SHOW AND ARE NOT ARGUED THAT THE EMPLOYER TOOK AN OFFSET GREATER THAN THAT THIS WHICH SOCIAL SECURITY COULD ACTUALLY TAKE. THE SOCIAL SECURITY ADMINISTRATION COULD ACTUALLY TAKE, IF THEY CHOSE, USING THEIR 80% OF THE ACE. $237.60. WE NEVER HAD AN OFFSET ANYWHERE NEAR THAT AMOUNT, SO WE HAVE NEVER EXCEEDED THAT THRESHOLD, SO I DON'T BELIEVE THIS COURT NEEDS TO GET TO THAT AND EXPAND GRICE, AND IF IT DOES EXPAND GRICE, I THINK THERE WILL BE SITUATIONS WHERE, THEN, 440.20-14 WILL BE A NULLITY.

ARE YOU SAYING, THEN, THAT WE SHOULDN'T ANSWER THE QUESTION THAT IS POSED BY THE FIRST DISTRICT?

I THINK YOU SHOULD ANSWER THE QUESTION IN THE AFFIRMATIVE, THAT THE AVERAGE WEEKLY WAGE IS THE CAP, BECAUSE THE AVERAGE WEEKLY WAGE, BY THE WAY, IS THE ONE THAT IS THE MAIN RELEVANT SITUATION, WHERE THE CLAIMANT IS ACTUALLY GETTING INJURED, AND IT IS THE EMPLOYER-CARRIER PROVIDING THOSE BENEFITS, IN THE SAME WAY AS THE CLAIMANT WOULD GET A WINDFALL, THE EMPLOYER/CARRIER SHOULDN'T HAVE TO PAY FOR SOMEBODY'S HIGH AVERAGE CURRENT EARNINGS OVER THE PAST FIVE YEARS. THE RELEVANT SITUATION IS WHAT HAPPENED ON THE DATE OF THEIR ACCIDENT, AND THAT IS WHY THE AVERAGE WEEKLY WAGE IS USED. THERE ARE NOT MANY THINGS THAT HAVE SURVIVED, STATUTORILY, IN THE WORKERS COMPENSATION STATUTE, FOR A QUARTER OF A CENTURY, AND YET THERE WAS A MAJOR REVISION IN 1979 AND THE LANGUAGE STAYED THE SAME. THERE WAS A MAJOR REVISION IN 1987, ANOTHER REVISION IN 1989, A MAJOR REVISION IN 1990 AND IN 1994 A TOTAL REWRITE, AND THROUGH HISTORY THIS STATUTE HAS BEEN INTERPRETED. MANY THINGS HAVE FALLEN OUT OF THE WORKERS COMPENSATION STATUTE OVER THE LAST 25, 26 YEARS, BUT ONE THING THAT HAS SURVIVED IS 440.20-14. IF THE LEGISLATURE DISAGREED WITH THIS COURT, IT COULD HAVE SAID SOMETHING OR DONE SOMETHING OVER THE LAST QUARTER AFTER CENTURY, AND NOT ONCE HAS IT DONE SO. IT HAS MET THREE TIMES, SINCE THIS COURT'S DECISION IN 1997, AND IT HASN'T DONE ANYTHING TO REVERSE THIS COURT OR TO CHANGE THE STATUTE. NOT TO REVERSE IT, BUT JUST TO SAY THIS STATUTE DOESN'T APPLY WHEN AN ACE TAKES PLACE. THERE IS VERY LITTLE IN THE WORKERS COMPENSATION SYSTEM THAT HAS SURVIVED 26 YEARS WITHOUT CHANGE, AND THERE IS VERY FEW THINGS YOU CAN COUNT ON ONE HAND THAT HAVE. ONE OF THOSE THINGS THAT HAVE IS 440.20-14. SO THAT IS WHY I BELIEVE WHETHER THE FIRST DISTRICT COURT OF APPEALS DISAGREES OR AGREES WITH THIS COURT'S DECISION OF GRICE IS, REALLY, NOT THAT RELEVANT. WHAT IS RELEVANT IS WHAT THE STATUTE HAS BEEN INTERPRETED TO MEAN AND THE LEGISLATORS LEGISLATORS'ABILITY, AND THEY KNOW THAT THAT IS OUT THERE. THEY KNOW GRICE IS THERE. THEY HAVE BEEN CONFRONTED WITH GRICE BEFORE GRICE. THEY WERE CONFRONTED WITH IT IN BARRAGAN IN 1989, TEN OR 11 YEARS AGO. A DIFFERENT SITUATION BUT THE SAME CONCEPT. THEY WERE CONFRONTED WITH THE SITUATION IN 1997. THEY ARE AWARE OF ALL OF THE CERTIFIED QUESTIONS. PEOPLE HAVE PRESENTED ISSUES TO THAT LEGISLATURE, AND THEY HAVE NOT MOVED 440.20-14 ONE BIT. AND I THINK WE SHOULD LEAVE IT TO THE LEGISLATURE TO REMOVE THAT, IF, IN FACT, THEY WANT TO CHANGE THE SITUATION. WITH ALL DUE RESPECT, YOUR HONOR, I AM OUT OF TIME. WE JUST REQUEST THAT YOU AFFIRM AND THEN REVERSE THE AWARD OF ATTORNEYS FEES, BECAUSE THE ONLY STATUTORY BASIS IS 440.34, AND THE CLAIMANT DID NOT PREVAIL BELOW, AND CONSEQUENTLY THERE SHOULD BE NO AWARD OF FEES. THANK YOU VERY MUCH.

THANK YOU, MR. STAVER. MR. McCASKILL.

YOUR HONOR. BRIEFLY, YOUR HONOR, I THINK, NOW, THE FULL POSITION OF THE EMPLOYER/CARRIER IN THIS APPEAL HAS BEEN LAID BARE, BECAUSE WHAT THEY ARE REALLY SAYING, NOW, IT APPEARS TO ME, IS BECAUSE OF THE FORTUITY OF THIS $100 A MONTH DISABILITY POLICY, WE, NOW, HAVE IMPLICATED SECTION 440.20-14 IN THE GRICE DECISION, AND BEYOND THAT, THE COURT, NOW, IS BEING ASKED TO EXTEND GRICE TO THIS SITUATION, BECAUSE OF THE $100 A MONTH POLICY THAT HAS BEEN PROVIDED. EVEN THOUGH THERE IS NOTHING IN THE STATUTE WHICH WOULD WARRANT THAT SORT OF EXTENSION.

LET ME -- ANSWER -- DO ANSWER MY QUESTION AS TO WHETHER THE $100 POLICY IS IMPLEMENTED. WE GO BACK TO 440.15-10, BUT MR. STAVER SAYS THAT DOESN'T TELL THAT THE AVERAGE CURRENT EARNINGS BE CAPED. IT JUST COMPELS THAT THE EMPLOYER NOT BE ABLE TO TAKE AN OFFSET GREATER THAN THE SOCIAL SECURITY ADMINISTRATION. COULD YOU ADDRESS THAT?

WELL, I WOULD SAY THAT THERE WOULD BE NO DEBATE IN THIS CASE AS TO WHETHER 440.15-10 WAS ALL DETERMINATIVE. THIS IS ALL IN THE SECTION FOR THE $100 A MONTH POLICY. BECAUSE THAT IS THERE, OPPOSING COUNSEL IS THROWN INTO A SITUATION WHERE SECTION 440.20-14 IS IMPINDICATED, WHICH THIS COURT -- IS IMPLICATED, WHICH THIS COURT HAS ALREADY SAID IS AN AMBIGUOUSLY-WORDED STATUTE, AND TO TAKE THE GRICE DECISION, WHICH IS CLEAR THAT THE COURT HAS CONCERNS ABOUT, EVEN AS WE SPEAK HERE, TODAY, I THINK I WOULD SUGGEST THAT THE COURT SIMPLY NOT GO THERE.

EXCUSE ME, BUT IN ANSWER TO JUSTICE PARIENTE'S QUESTION, WHAT DO YOU MEAN THAT 440.15-10 WOULD BE OUTCOME DETERMINED?

THAT YOU APPLY 80% OF THE AVERAGE CURRENT EARNINGS OR THE AVERAGE WEEKLY WAGE, WHICHEVER.

BECAUSE YOU GO TO THE FEDERAL STATUTE?

THAT'S RIGHT. THAT IS ABSOLUTELY RIGHT. AND NOW THE GRICE DECISION, WHICH IS PROVEN SO TROUBLESOME SOME, AND THAT IS NOT -- IS PROVEN SO TROUBLESOME, AND THAT IS NOT MERELY RHETORIC, YOUR HONOR. WE KNOW THAT THERE ARE CASES STACKED UP LIKE JETS AT O'HARE AIRPORT, TRYING TO FERRET OUT EVERY QUIRK AND TURN OF THE GRICE DECISION. SOME THINGS ARE WORTH IMPOSING AND MAINTAINING FOR 20 YEARS AND SOME ARE NOT. MAYBE THIS STATUTE SECTION 440.20-15 HAS BEEN AROUND FOR 20 YEARS OR MORE, BUT THE GRICE DECISION HASN'T, AND WE ALL KNOW THERE ARE PROBLEMS BASED ON THE DUBIOUS TEXTUAL LANGUAGE. BUT LET ME SAY THIS, IF THE COURT WANTS TO REVERSE THE GRICE POSITION, I MUST SAY FOR OURSITUATION HERE, TODAY, THAT THERE IS NO REVERSAL OF GRICE BEING REQUIRED. YOU ARE ASKED TO EXTEND FACTUAL CIRCUMSTANCES THAT DID NOT APPEAR IN THAT COURT DECISION. WHAT I SUBMIT THAT THE COURT OUGHT TO DO IS LIST THE ANALYTICAL METHOD THAT YOU USED IN THE ACRE DECISION, WHICH IS HOW DO YOU RESOLVE THESE STATUTORY CONFLICTS. WHAT YOU HAVE OVER HERE, IN SECTION 20-14 IS BASICALLY A CAP, AN OFFSETABILITY. WHAT YOU HAVE HERE -- AN OFFSET ABILITY. WHAT YOU HAVE HERE, IN SECTION 440.15-10, IS AN OFFSETTING ABILITY. AND IT IS INTENT NOT TO OFFSET MORE THAN THE SOCIAL SECURITY ADMINISTRATION WOULD TAKE. SO WHAT YOU COULD DO IS VINDICATE AND FOLLOW THE METHOD IN THE ACRE DECISION, AND THERE IS ONE OTHER POINT. THERE IS NO WINDFALL HERE. THERE IS NO WINDFALL, BECAUSE YOU ONLY GET 80% OF YOUR AVERAGE CURRENT EARNINGS, WHICH BY DEFINITION, BY OPERATION OF LOGIC IS LESS THAN 100%. THAT IS NOT WHAT YOU USED TO MAKE. THAT IS NOT A WINDFALL. FURTHER, IT IS A BIG MISTAKE TO JUDGE ON PURELY ECONOMIC TERMS, THIS BUSINESS OF WINDFALL. IF SOMEBODY LOSES AN ARM, IF YOU PUT AN AD IN THE PAPER TODAY, WE WILL PAY $100,000 FOR SOMEBODY'S ARM, YOU WON'T GET ANY TAKERS. THERE IS A LOT MORE GOING ON THAN JUST -- EVEN IF YOU WERE TO GET EXACTLY THE SAME AMOUNT OF MONEY THAT YOU MADE, IN IN WAGES, BEFORE, THAT DOESN'T MEAN THAT YOU ARE GETTING A WINDFALL, BECAUSE OF ALL OF THE OTHER THINGS AND FUNTS THAT YOU HAVE LOST, BUT -- THINGS AND OPPORTUNITIES THAT YOU HAVE LOST, BUT IRRESPECTIVE OF ALL OF THOSE THINGS, THE LEGISLATURE HAS STUDIED THIS. THE LEGISLATURE MADE THIS DETERMINATION, AND THE LEGISLATURE CAN PERMIT A WINDFALL, IF IT WANTS. THAT IS WHAT THE STATUTE SAYS, AND THE INTENT BEHIND THE STATUTE NEEDS TO BE VINDICATED, SO WE WOULD SUBMIT THAT THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

TELL ME, ON ATTORNEYS' FEES, WHY WHAT AUTHORITY DO YOU HAVE FOR AFFIRMING ATTORNEYS' FEES?

FOR AFFIRMING IT? THAT WOULD BE SECTION 440.34 SUBSECTION 5, AND BRIEFLY, YOUR HONOR, THAT SAYS IF ANY PROCEEDINGS ARE HAD FOR REVIEW, READ APPELLATE REVIEW, OF ANY CLAIMS, AWARD OR COMPENSATION ORDER, VERY BROAD. IT IS NOT MEDICAL BENEFITS, NOTICE OF DENIAL, DENYING THAT AN INJURY OCCURRED, BEFORE ANY COURT, THE COURT MAY AWARD

THE INJURED EMPLOYEE OR -- INJURED EMPLOYER OR ATTORNEYS FEES TO BE PAID BY EMPLOYER/CARRIER, WHICH SHALL BE PAID AS THE COURT MAY DIRECT. NOW, THAT STATUTE IS THE ONE THAT GOVERNS ATTORNEYS' FEES ON APPEAL. OPPOSING COUNSEL'S CITATION OF STATUTORY AUTHORITY DEAL WITH HOW YOU GET AT THE ISSUE OF WHAT KIND OF A FEE IS APPROPRIATE FOR THE PROCEEDINGS BEFORE THE JUDGE OF COMPENSATION CLAIMS. THERE IS A LONG LINE OF DECISIONS. WE CITE IN OUR BRIEF, WHICH TALK ABOUT THE ABILITY -- I BELIEVE THERE IS EVEN DECISIONS BY THIS COURT, OF THE FIRST DISTRICT, TO AWARD FEES, EVEN WHEN A PARTY DOESN'T PREVAIL, SO THE AWARD OF FEES SHOULD BE AFFIRMED MUCH THE CERTIFIED QUESTION IS TO THE GRICE ISSUE AND SHOULD BE ANSWERED IN THE NEGATIVE. THE JUDGE OF COMPENSATION CLAIMS SHOULD BE AFFIRMED, AND THE FIRST DISTRICT SHOULD BE REVERSED. THANK YOU, YOUR HONORS.

THANK YOU, MR. McCASKILL AND MR. STAVER. NEXT CASE ON THE COURT'S CALENDAR IS RICARDO GONZALEZ VERSUS THE STATE OF FLORIDA.

MY NAME IS WILLIAM NORRIS. I REPRESENT RICARDO GONZALEZ, WHO IS HERE TO APPEAL HIS DEATH SENTENCE, AFTER REMAND. I WOULD -- I AM SURE THAT THE FACTS OF THIS CASE ARE WELL-KNOWN TO THE COURT. THE BASIC EPISODE HAS PRODUCED A NUMBER OF APPEALS TO THIS COURT. THE ESSENTIAL FACTS THAT RELATE TO RICARDO GONZALEZ ARE THAT HE WAS INVOLVED AS PART OF A GROUP THAT ROBBED A BANK IN NORTH MIAMI ON JANUARY 3 OF 1992. THIS BANK ROBBERY HAD BEEN PLANNED FOR SOME TIME. MR. GONZALEZ WAS ONE OF THE GROUP. ON THE MORNING OF THE BANK ROBBERY, MOMENTS BEFORE THE ACTUAL ROBBERY TOOK PLACE, HE WAS GIVEN A FIREARM. DURING THE BANK ROBBERY, THE VICTIM, WHO WAS AN OFF-DUTY POLICE OFFICER, WAS SHOT AND KILLED. HE WAS HIT BY BULLETS FROM TWO GUNS. IT WAS MR. GONZALEZ'S WEAPON THAT FIRED THE FATAL SHOT. I WOULD LIKE TO ADDRESS, FIRST, WHAT I THINK IS THE MOST IMPORTANT QUESTION HERE, AND THAT IS THE PROPORTIONALITY OF THE DEATH SENTENCE IN THIS CASE. THAT ISSUE OF PROPORTIONALITY RAISES OR ENCOMPASSES SEVERAL OF THE OTHER ISSUES THAT I RAISED IN THE BRIEF. THE POINT OF BEGINNING, OF COURSE, IS WHETHER OR NOT THIS IS AN APPROPRIATE CASE FOR THE DEATH PENALTY, BEARING IN MIND THAT THAT IS APPROPRIATE IN THE MOST AGGRAVATED AND LEAST MITIGATED OF MURDERS. THERE ARE TWO REASONS WHY I THINK THE IMPOSITION OF THE DEATH SENTENCE OUGHT TO BE REVERSED. ONE OF THOSE GOES TO THE AGGRAVATOR. THE FACT THAT SEVERAL OF THE AGGRAVATORS, THREE OF THEM SUMMARIZED OR CONDENSED INTO ONE BY THE DISTRICT JUDGE DEALT WITH THE FACT THAT THE VICTIM WAS A POLICE OFFICER. THE FACT OF THE POLICE OFFICER'S OR THE VICTIM'S IDENTITY AS A POLICE OFFICER WAS SOMETHING WHICH WAS SHOWN DURING THE VOIR DIRE TO BE AN ISSUE OF GREAT CONCERN TO THE POTENTIAL JURORS. IT CERTAINLY WAS A MATTER THAT WAS EMPHASIZED VERY HEAVILY BY THE PROSECUTOR IN THE CASE.

DO YOU HAVE ANY PROBLEM WITH THE PROPOSITION THAT THE LEGISLATURE CAN MAKE THE PENAL FEE HEAVIER, IF IT IS A POLICE OFFICER?

WELL, THAT IS MY POINT. SIR, THE HOMICIDE, A MURDER, IF IT IS FIRST-DEGREE, CARRIES THE PENALTY, EITHER OF LIFE IN PRISON WITH ELIGIBILITY FOR PAROLE AFTER 25 YEARS, OR DEATH. UNLESS, AT THE TIME OF THIS OFFENSE, THE VICTIM HAD HAPPENS TO BE A POLICE OFFICER, IN WHICH CASE THE MINIMUM PENALTY IS AGGRAVATED TO LIFE IN PRISON WITHOUT POSSIBILITY OF PAROLE. THAT --

CONSTITUTIONALLY CAN THE LEGISLATURE DO THAT?

ABSOLUTELY. NO. I AM NOT QUESTIONING, FOR A MOMENT, THAT THE LEGISLATURE CAN DO THAT. ABSOLUTELY. ABSOLUTELY, AND IN FACT, THE LEGISLATURE HAS CHOSEN TO DO THAT, NOW, ACROSS THE BOARD, SINCE THE TIME OF THIS OFFENSE, AND THAT THAT IS ENTIRELY APPROPRIATE. THOSE ARE MY POINT IS THAT, AT THE TIME OF THE OFFENSE, MR. GONZALEZ

ALREADY WAS PENALIZED OR PUNISHED, BECAUSE OF THE FACT THAT THE VICTIM WAS A POLICE OFFICER. THERE WAS, BECAUSE OF HIS STATUS, THERE WAS A MINIMUM SENTENCE OF LIFE IN PRISON WITHOUT PAROLE, SO THAT THAT AGGRAVATOR, WHICH IS, TO THE PEOPLE AT LARGE, AS INDICATED BY THE JURY PANEL, TO THE -- CLEARLY TO THE PROSECUTOR IN THIS CASE, TO OTHER JUDGES WHO HAVE WRITTEN ON THIS SUBJECT, THAT IS A VERY POWERFUL EMOTIONAL AGGRAVATOR, THE FACT THAT THAT VICTIM WAS A POLICE OFFICER.

SO WHAT ARE WE TO DO WITH IT, WHEN, IN THIS PARTICULAR INSTANCE, THE TRIAL JUDGE MERGED THAT WITH MURDER TO AVOID ARREST AND HINDRANCE OF LAW ENFORCEMENT? ALL OF THIS WAS PUT TOGETHER AND, REALLY, CONSIDERED BY THE TRIAL JUDGE AS A WHOLE.

YES. BECAUSE THE OTHER -- THOSE THREE AGGRAVATORS, F, G AND E, ALL RELATE TO THE -- NONE OF THOSE WOULD BE PRESENT, IF IT WEREN'T FOR THE IDENTITY OF THE VICTIM AS A POLICE OFFICER, IN THE FIRST INSTANCE. HERE, THERE WAS -- THE OTHER TWO, IN ADDITION TO THE VICTIM BEING A POLICE OFFICER, THE HINDRANCE OF LAW ENFORCEMENT AND THE AVOIDING ARREST, BOTH ARISE BECAUSE THE VICTIM WAS A POLICE OFFICER. ON THE FACTS OF THIS CASE, THEY WOULDN'T HAVE BEEN THERE, HAD THAT FACTOR NOT BEEN THERE, SO THEY WERE PROPERLY MERGED, BUT THE CONCERN OF WHETHER OR NOT THEY OUGHT TO BEING A VATE VATEORS, IN IMPOSING THE DEATH PENALTY, IS THE SAME FOR ALL THREE OF THEM.

AGAIN, SO, ARE YOU SAYING -- WE HAVE, HERE, A MURDER OF A LAW ENFORCEMENT OFFICER.

YES.

SO WE HAVE AT LEAST ONE AGGRAVATOR MERGED TOGETHER, ARISING OUT OF THAT. CORRECT?

YOU HAVE TO HAVE MORE THAN ONE TO MERGE, BUT YES.

WE HAVE -- WE HAVE GOT SEVERAL ARRESTS AND YOU ARE SAYING SHOULD BE MERGED, BUT WE, ALSO, HAVE CCP IN THIS CASE AS A SEPARATE AGGRAVATOR?

NO. THERE WAS NO CCP. NO. THE THREE AGGRAVATORS THAT WERE MERGED WERE UNDER 5-F, LAW ENFORCEMENT OFFICER PERFORMING HIS DUTIES. G, HINDER LAW ENFORCEMENT, ENFORCEMENT OF THE LAW, AND, E, AVOID ARREST. THEY WERE MERGED INTO ONE BY THE JUDGE. ANOTHER FELONY WAS COMMITTED FOR PECUNIARY GAIN INSTEAD OF AGGRAVATOR.

D, ENGAGED IN A ROBBERY, AND, F, FINANCIAL GAIN, WHICH WERE GIVEN GREAT WEIGHT BY THE SENTENCING JUDGE, WERE MERGED. THAT IS A SEPARATE AGGRAVATOR. IT HAS NOTHING TO DO WITH THE IDENTITY OF THE VICTIM AS A LAW ENFORCEMENT OFFICER, AND IT IS NOT SUBJECT TO THE MATTER BEFORE THE COURT. THAT WASN'T APPEALED AS AN AGGRAVATOR.

LET ME SEE IF I UNDERSTAND WHAT YOU ARE SAYING. THAT, BECAUSE YOU COULD GET LIFE IN PRISON WITHOUT PAROLE, AND IN THE KILLING OF A LAW ENFORCEMENT OFFICER, THAT YOU SHOULD, NOW, NOT CONSIDER ANYTHING ABOUT THE FACT THAT THIS GUY WAS A LAW ENFORCEMENT OFFICER, IN AGGRAVATION. IS THAT WHAT THE BOTTOM LINE OF YOUR ARGUMENT IS?

I WOULDN'T PUT IT QUITE THAT WAY, BUT YES. THE ANSWER IS YES. BECAUSE THE LEGISLATURE HAS THE POWER TO IMPOSE PENALTIES, AS IT WISHES, BUT HAVING MADE THE DECISION TO IMPOSE THE ADDITIONAL PENALTY OF LIFE IN PRISON WITHOUT ELIGIBILITY FOR PAROLE, IF THE IDENTITY OF THE VICTIM IS A LAW ENFORCEMENT OFFICER, THEN TO REUSE THAT VERY SAME FACT OR FACTOR, TO MAKE THE DECISION TO IMPOSE THE DEATH PENALTY, IS A DOUBLE COUNTING OF 9 SAME FACTOR -- OF THE SAME FACTOR. THAT, IN A NUTSHELL, IS THE APPEAL AS TO THE AGGRAVATOR SIDE OF THE EQUATION.

SO LET ME DOES YOU -- LET ME ASK YOU THIS, ALSO. ARE YOU, ALSO, ARGUING THAT YOU CAN NOT CONSIDER THE OTHER TWO THAT WAS MERGED WITH THE FACT THAT THIS WAS A LAW ENFORCEMENT OFFICER. THE "AVOID ARREST" AND THE "HINDRANCE OF THE ENFORCEMENT OF LAW".

IN MY MIND, THOSE THREE AGGRAVATORS, AT LEAST AS TO THE FACTS OF THIS CASE, ARE ALL PART AND PARCEL OF THE SAME THING. SO THAT THE ANSWER WOULD BE YES. YOU SHOULDN'T CONSIDER THE OTHERS INDEPENDENT OF THE IDENTITY OF THE VICTIM AS A LAW ENFORCEMENT OFFICER, BECAUSE HAD THE VICTIM NOT BEEN A LAW ENFORCEMENT OFFICER, THE HINDRANCE OF LAW ENFORCEMENT WOULD NOT HAVE BEEN PRESENT, AND THE AVOIDING ARREST AGGRAVATOR WOULD NOT HAVE BEEN PRESENT.

I DON'T KNOW HOW YOU CAN SAY THE "AVOID ARREST" WOULDN'T BE APPLICABLE. I MEAN, WHETHER HE WAS A LAW ENFORCEMENT OFFICER OR NOT, HE WAS ABOUT TO GET HIS GUN OUT, AND THAT IS WHEN YOUR CLIENT SHOT THE POLICE OFFICER.

BUT THE QUESTION IS WHO WOULD HAVE ARRESTED HIM, AND THE ARREST WOULD HAVE BEEN BY THIS PERSON, HERE, WHO IS A LAW ENFORCEMENT OFFICER, AUTHORIZED BY LAW TO EFFECT AN ARREST ON THE DEFENDANT AND HIS ACCOMPLICES.

IS YOUR ARGUMENT THAT THE "AVOID ARREST" AGGRAVATOR ONLY APPLIES, WHEN THE PERSON WHO IS BEING KILLED IS A LAW ENFORCEMENT OFFICER?

NO, BUT GENERALLY THAT IS SO. THE AGGRAVATOR OF AVOIDING ARREST DOESN'T COME UP IN YOUR TYPICAL MURDER. USUALLY WHAT YOU ARE DEALING WITH IS THE ELIMINATION OF WIT WITNESSES. NOT THE AVOIDING OF ARREST, PER SE.

BUT IF, IN FACT, HE DID KILL THE LAW ENFORCEMENT OFFICER TO AVOID ARREST, HOW DO YOU DEAL WITH THAT? WHY ISN'T THAT AN AGGRAVATOR?

YES, IT IS THE FACT THAT HE KILLED THE LAW ENFORCEMENT OFFICER TO AVOID HAVING THAT LAW ENFORCEMENT OFFICER ARREST HIM. BUT THAT IS THE SAME THING.

HE DID. SO AS A FACTUAL MATTER, HE KILLED THE LAW ENFORCEMENT OFFICER TO AVOID ARREST. THE FACT THAT IT HAPPENS TO, IN YOUR MIND, DOUBLE, BECAUSE HE WAS A LAW ENFORCEMENT OFFICER, IGNORES THE FACTUAL PATTERN.

IF THEY WERE SIMPLY SOMETHING COMING FROM THE ATTORNEY FOR THE DEFENDANT, SKEPTICISM MIGHT BE APPROPRIATE, BUT THIS WAS SOMETHING THAT WAS THE ANALYSIS OF THE SENTENCING JUDGE, AND I HAPPEN TO AGREE THAT IT IS ALL PART AND PARCEL OF THE SAME EPISODE. IT IS DIFFERENT FACETS, IF YOU WILL, OF THE SAME GEM, THE SAME STONE, AND THEY DO MERGE. THE QUESTION, THEN, BECOMES, SINCE THEY MERGE AND SINCE THEY TRIGGER THE MINIMUM PENALTY OF LIFE WITHOUT PAROLE, SHOULD THEY, ALSO, BE USED FOR DEATH.

BUT AREN'T THEY BOTH AGGRAVATORS THAT THE LEGISLATURE THOUGHT SHOULD BE CONSIDERED?

YES. BUT THE LAW TEACHES US AND IT TEACHES THE SENTENCING JUDGE THAT, IN EVALUATING THOSE FACTORS THAT HAVE BEEN DELINEATED AS STATUTORY AGGRAVATORS BY THE LEGISLATURE, THAT BOTH THE ADVISORY JURY AND THE JUDGE HAVE TO CONSIDER WHETHER OR NOT THEY ARE DIFFERENT ASPECTS OF THE SAME OPERATIVE FACTS.

WE HAVE A VERY LIMITED AMOUNT OF TIME FOR OUR ORAL PRESENTATION, AND YOU HAVE, ALSO, MADE A DETAILED ARGUMENT ABOUT THIS ISSUE IN YOUR BRIEF. YOU SAID YOU WERE GOING TO COME TO THE MITIGATING SIDE OF THE EQUATION, AND WOULD YOU PLEASE ADDRESS

THAT.

YES. THANK YOU. IT GOES TO THE FACT THAT THE DEFENDANT HAD, WITHOUT DISPUTE, A PHYSICAL PROBLEM. HE HAD A BRAIN PROBLEM, THAT WAS, IN THE JUDGMENT OF THE MEDICAL WITNESSES, A TRIGGER OR A CAUSE FOR IMPULSIVE BEHAVIOR. THIS WAS REJECTED BY THE SENTENCING JUDGE, WHO WROTE IN HISORDER THAT THERE WAS NO FACTUAL BASIS IN THE RECORD TO CONCLUDE THAT THE DEFENDANT WAS ACTING IMPULSIVELY.

NOW, THE JUDGE WENT -- AND I GOT THE MOST DETAILED SENTENCING ORDER ON THIS I HAVE SEEN, IN GREAT DETAIL AS TO WHY THE JUDGE FOUND THAT THE CONCLUSIONS OF THIS DEFENDANT'S BRAIN DAMAGE HAD NO CONNECTION WITH THE ACTUAL CRIMINAL ACT. NOW THAT, IS A ACTUAL FACTUAL FIND BUYING THE TRIAL JUDGE PROJECTING AND GIVING THE FACTUAL REASONS FOR REJECTING THE EXPERT CONCLUSION, AND ARE YOU SAYING THAT THE JUDGE HAD NO AUTHORITY TO MAKE THOSE FACTUAL FINDINGS AND THEN TO REJECT THE CONCLUSION OF THE EXPERT?

THE SENTENCING ORDER THAT JUDGE SKOLLER WROTE IS OUTSTANDING, BUT HE MADE THE FINDING, HOWEVER THERE ARE NO FACTS AT HAND WHICH SUPPORT THIS OPINION, WHICH IS THE OPINION OF IMPULSIVITY.

IMPULSIVITY BETWEEN -- WHAT WAS IT FOR THIS WHOLE LIFE UP TO 21 YEARS, AND THE KINDS OF THINGS THAT THEY WERE SAYING WOULD CONSTITUTE SOME BRAIN DAMAGE, THAT WOULD -- WOULD A ROBBERY PLANNED FOR TEN DAYS AND WHAT WAS DONE AFTER, THAT WOULD SUPPORT FINDING THAT THE ACT, ITSELF, WAS IMPULSIVE.

THAT IS THE ESSENCE OF THE DISPUTE. THAT IS THE ESSENCE OF MY ARGUMENT.

THIS HAPPENS A LOT. THERE MIGHT AND FINDING OF BRAIN DAMAGE, BUT HOW DOES THAT RELATE TO, IF YOU ARE LOOKING FOR A TRUE STATUTORY AGGRAVATOR OF DIMINISHED CAPACITY OR SOMETHING ELSE, HOW DOES THAT RELATE TO THIS PARTICULAR CRIME, TO MAKE IT LOGICALLY RELATED? ISN'T THAT WHAT THE JUDGE WAS TROUBLED BY IN THIS CASE? THE CONNECTION.

THAT IS THE BASIS FOR MY OBJECTION TO WHAT THE JUDGE DID. THE NEXUS, THE CONNECTION BETWEEN THE OPINION AND THE FACTS OF THE CASE ARE TWOFOLD. FIRST, IT WAS A WELL-PLANNED ROBBERY. IT WAS PLANNED FOR TEN DAYS. BUT THE DEFENDANT HAD NOTHING TO DO WITH THE PLANNING, AND THE SENTENCE WAS NOT IMPOSEED, BECAUSE THE DEFENDANT WAS INVOLVED IN A WELL-PLANNED ROBBERY. HE WAS SENTENCED TO DEATH BECAUSE HE SHOT A POLICE OFFICER, AND THE QUESTION IS DOES THE PLANNING OF THE ROBBERY, BY OTHER PEOPLE, HAVE ANYTHING TO DO WITH THE IMPULSIVITY. THE ANSWER IS NO! AS TO THE SHOOTING, IT CLEARLY WAS AN IMPULSIVE ACT, BECAUSE THE DEFENDANT WAS GIVEN THE FIREARM MOMENTS BEFORE THE ACTUAL ROBBERY TOOK PLACE. HE WASN'T EXPECTING IT. HE HAD THE GUN IN HIS HAND. HE ENCOUNTERS A POLICE OFFICER. HE SHOOTS HIM. THAT IS IMPULSIVE. THE OTHER FACTOR, OF COURSE, IS THAT THE DEFENDANT HAD A LIFE OF BEING A LAW-ABIDING CITIZEN. THERE WASN'T A HISTORY OF VIOLENCE, EXCEPT FOR THIS ONE IMPULSIVE INCIDENT, SO THAT THE JUDGE SAYING THAT THERE WAS NO SUPPORT IN THE RECORD FOR THE OPINION OF THE EXPERT IS NOT SUPPORTED BY THE RECORD, IS CONTRIBUTED BY THE RECORD. IT DOES -- IS CONTRADICTED BY THE RECORD. IT DOES SHOW A MITIGATOR THAT SHOULD HAVE BEEN ACCEPTED.

WHICH MITIGATOR WAS THAT?

THE MITIGATOR WOULD BE 6-B, MENTAL OR EMOTIONAL DISTURBANCE.

THAT HE WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, AT

THE TIME THAT HE SHOT THE POLICE OFFICER?

YES. BECAUSE OF THE PHYSICAL PROBLEM THAT HE HAD WITH HIS BRAIN, WHICH IS UNDISPUTED, AND THE QUESTION IS WHETHER OR NOT THAT WOULD LEAD TO IMPULSIVE ACTION, AND THE JUDGE SAID, NO, THE EXPERTS SAID YES. THE FACTS SUPPORT THE EXPERT.

SO YOU ARE EQUATING IMPULSIVE REACTION TO "UNDER MENTAL OR EMOTIONAL DISTRESS"? I MEAN, THOSE ARE EQUIVALENT?

THAT IS -- HERE, THAT WAS THE BALLPARK THAT EVERYBODY WAS PLAYING IN. I THINK THE ANSWER IS YES. THE QUESTION IS --

I GUESS I READ THIS IS A WHOLE EMOTIONAL DISTURBANCE HAD MORE TO DO WITH THE FACT THAT HE WAS ALLEGING HE WAS UNDER SOME KIND OF STRESS, BECAUSE HIS WIFE WANTED HIM TO MAKE MORE MONEY, AND SO THIS WAS -- HE PARTICIPATED IN THIS ROBBERY, IN ORDER TO DO THAT. I THOUGHT THAT WAS THE EMOTIONAL OR MENTAL STRESS THAT WE WERE TALKING ABOUT.

THE -- THAT WAS A FACTOR IN THE PRESENTATION IN MITIGATION. THAT IS NOT WHAT WAS REJECTED BY THE JUDGE AS UNSUPPORTED, AS AN EXPERT OPINION THAT WAS UNSUPPORTED BY THE FACTS OF THE CASE, AND THAT --

YOU ARE NOT SUGGESTING, ARE YOU, THAT A PERSON CAN KNOWINGLY PLAN OR PARTICIPATE IN AN ARMED ROBBERY OR WHATEVER AND THEN, LATER, SAY THAT, AS A RESULT OF THE STRESS OF THE RESISTANCE TO THE ARMED ROBBERY, OR THE ATTEMPT TO REBUFF IT OR SOMETHING, THAT HE WAS UNDER STRESS WHEN HE FIRED THE WEAPON THAT HE HAD, IN ORDER TO ACCOMPLISH THE ARMED ROBBERY, OR ARE YOU? IS THAT WHAT YOU ARE SAYING THAT SUPPORTS IT?

NO. THAT IS NOT WHAT I AM SAYING.

I AM HAVING A LITTLE DIFFICULTY UNDERSTANDING, TOO, WITH HOW YOU RELY ON THIS MITIGATOR.

WHAT I AM SAYING IS THAT THE DEFENDANT HAD A PHYSICAL DEFECT.

A PREEXISTING MENTAL SOMETHING.

DEFECT IN HIS BRAIN. A PHYSICAL DEFECT IN HIS BRAIN. THE QUESTION IS WHAT IMPACT DID THAT HAVE ON HIS CONDUCT, SPECIFICALLY HIS CONDUCT, FOR WHICH HE IS BEING SENTENCED TO DEATH? THERE WAS EXPERT FEST TESTIMONY THAT THIS CREATED IMPULSIVITY AND THAT THE ACT OF MURDER WAS AN IMPULSIVE ACT.

BUT WHY WOULDN'T THE TRIAL COURT, WITH REFERENCE TO THE EVIDENCE, BE ABLE TO, ALSO, CONSIDER THAT, INDEED, THAT THIS PERSON KNEW HE WAS PARTICIPATING IN A ROBBERY, AN ARMED ROBBERY, A ROBBERY THAT HAD HIGH-RISK, AND THAT THINGS WOULD HAPPEN DURING THE COURSE OF THAT ARMED ROBBERY THAT MAY BE VERY BAD, AND THAT THAT WOULD, REALLY NEGATE AN IMPULSIVITY CONCLUSION IN THE CASE? IN OTHER WORDS WHY WOULD -- I DON'T KNOW WHAT CONCLUSION SOMEBODY MAY COME TO, BUT WHY -- WOULD YOU AGREE THE TRIAL COURT SHOULD BE ALLOWED TO CONSIDER THAT? THAT IS THAT EVERYBODY THAT WAS PARTICIPATING IN THIS KNEW WHAT THEY WERE GETTING THEMSELVES INTO, AND THAT THIS IS HIGH-RISK STUFF.

THERE IS NO INDICATION THAT THE DEFENDANT KNEW THERE WERE GOING TO BE GUNS AND CERTAINLY NO INDICATION THAT THEY WERE GOING TO GIVE HIM A GUN.

THERE IS NO EVIDENCE THAT THE DEFENDANT KNEW THERE WERE GUNS INVOLVED IN THIS?

NOT UNTIL THEY STOPPED FOR COFFEE OR BREAKFAST JUST AFTER THEY HAD CASED OUT THE BANK, BEFORE THEY WENT AND ACTUALLY DID THE ROBBERY. THAT IS WHEN HE GOT THE GUN.

HE GOT THE GUN, IN OTHER WORDS, BEFORE THEY WENT OVER AND DID THE ROBBERY.

MOMENTS BEFORE, AND THE QUESTION -- BUT THAT HAS NOTHING TO DO WITH THE MAN FLORIDAING OF THE -- WITH THE PLANNING OF THE ROBBERY.

WHAT DOES IT HAVE TO DO WITH IMPULSIVITY? IN OTHER WORDS BEFORE THEY GO OVER AND DO THE ROBBERY, AFTER THEY STOPPED AND HAVE COFFEE, AND HE NOW HAS A GUN. THEY ARE ABOUT TO GO DO A ROBBERY. I MEAN, DOESN'T THAT SHED SOME LIGHT ON WHETHER OR NOT HIS, THEN, SUBSEQUENT USEFUL THE GUN DURING THE KOUFERS THE ROBBERY, THAT HE KNOWS HE IS ABOUT TO GO PARTICIPATE IN, WAS IMPULSIVE?

THE JUDGE COULD HAVE WRITTEN HIS ORDER IN A DIFFERENT WAY, BUT HE SAID THAT THERE WAS NO SUPPORT IN THE RECORD FOR THE EXPERT'S OPINION, AND THAT IS WHY HE REJECTED IT, AND THERE WAS SUPPORT. HE SHOULDN'T HAVE REJECTED IT. I AM OUT OF TIME. THANK YOU.

THANK YOU, COUNSEL.

MAY IT PLEASE THE COURT. SANDRA JAGGARD, ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE.

WOULD YOU ADDRESS THIS LAST ISSUE, WHILE REALIZING YOU MAY HAVE THE ORDER OF YOUR ARGUMENT, BUT I WOULD LIKE TO HEAR, IN MORE DETAIL, THE JUDGE DID A DETAILED ORDER HERE, BUT I WOULD LIKE TO HEAR ABOUT THE EVIDENCE, WITH REFERENCE TO THIS DEFENDANT, IN HIS KNOWLEDGE THAT THERE WAS GOING TO BE THIS ROBBERY AND HIS KNOWLEDGE OF WEAPONS AND THE CIRCUMSTANCES AND WHO WAS THERE AT THE BANK AND, YOU KNOW, THIS WAS A UNIFORMED POLICE OFFICER. AM I CORRECT?

ABSOLUTELY.

A HIGHLY-VISIBLE STATUS.

ALWAYS THERE WAS A UNIFORMED POLICE OFFICER ON THIS JOB.

WOULD YOU ADDRESS THE EVIDENCE THERE? INSOFAR AS THE KNOWLEDGE OF THIS DEFENDANT.

THE DEFENDANT HAD AGREED TO PARTICIPATE IN THIS ROBBERY TEN DAYS BEFORE THE ROBBERY OCCURRED. HE CONFESSED THAT HE WAS AWARE OF THE PLAN, THAT HE KNEW THAT THERE WOULD BE GUNMEN. HE JUST DIDN'T THINK HE WOULD BE ASSIGNED AS ONE. HE KNEW THAT MR. FRANKIE WAS IN CHARGE OF SECURITY. HE KNEW THAT THEY WERE ROBBING AN ARMED POLICE OFFICER WHO WOULD NOT GIVE THEM THE MONEY WILLINGLY. AND HE ACCEPTED THE GUN AT THE BAKERY, WHILE THEY WERE HAVING COFFEE, BEFORE THEY GO BACK TO THE BANK TO DO THE ROBBERY.

ASSUMING THAT THERE IS EVIDENCE THAT HE KNEW THEY KNEW THAT THERE WAS GOING TO BE AN ARMED POLICE OFFICER IN THE BANK?

THEY HAD CASED THIS JOB. THEY HAD COME OUT THE DAY BEFORE, PLANING TO COMMIT IT THE DAY BEFORE. EVERY DAY, AT THIS BANK, THERE IS A UNIFORMED POLICE OFFICER WHO DOES THIS JOB. YES, THE DEFENDANT DENNIS KNOWING THAT THAT WAS A UNIFORMED -- AND THE DEFENDANT DENS KNOWING THAT THAT WAS A UNIFORMED -- DENYS THE FACT THAT THAT WAS

A UNIFORMED POLICE OFFICER. IT IS AN INCREDIBLE DENIAL. YOU SEE A UNIFORMED POLICE OFFICER. YOU KNOW IT IS A UNIFORMED POLICE OFFICER. THE ONLY IMPULSIVE ACT THAT THIS DEFENDANT HAS ALLEGEDLY COMMITTED IS PULLING THE TRIGGER. THERE IS NOTHING IMPULSIVE ABOUT THE ROBBERY. THERE IS NOTHING ABOUT THE DEFENDANT'S PARTICIPATION IN THIS ROBBERY. THERE IS NOTHING IMPULSIVE ABOUT THE REST OF DEFENDANT'S LIFE. DEFENDANT'S EXPERT, BRAD FISHER, TESTIFIED THAT HE IS NOT IMPULSIVE, AND THEREFORE AND WITH ALL THE DELVED EVIDENCE THE TRIAL COME -- AND WITH ALL THE EVIDENCE THAT THE TRIAL COURT HAD ABOUT THE RESULTS OF THE TESTING, THE LACK OF NEUROLOGICAL DAMAGE THAT THIS DEFECT CAUSED, THE TRIAL COURT'S FINDING THAT THIS DID NOT RISE TO THE LEVEL OF EXTREME MENTAL OR EMOTIONAL DISTRESS, IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

GOING BACK TO JUSTICE QUINCE'S QUESTION, EVEN IF THERE IS IMPULSIVITY, AS A -- BECAUSE THIS IS A YOUNG MAN THAT HAD A 79 IQ, I GUESS.

80.

THROUGH HIS SCHOOL RECORDS AND A LEARNING DISABILITY, SO MAYBE HIS THOUGHT PROCESSES ARE SOMEWHAT IMPAIRED. BASED ON OUR CASE LAW OF WHAT IS CONSIDERED THE STATUTORY AGGRAVATOR OF "UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE", DOES THAT, DO THOSE TWO EQUATE IN ANY WAY?

NO.

SO IT DOESN'T REALLY -- THIS IS SORT OF -- I MEAN, IT MAY GO, IF HE HAS GOT SOMEWHAT IMPAIRED INTELLECTUAL FUNCTIONING, TO A NONSTATUTORY --

AND IT WAS COUNTED AS SUCH.

IT WAS EVALUATED BY THE JUDGE AS SUCH.

YES, IT WAS.

THE JUDGE WAS JUST QUESTIONING THE FACT THAT THERE WAS A LINK BETWEEN THE BRAIN DAMAGE AND THIS ACT OF INTENTIONALLY SHOOTING A POLICE OFFICER.

YES.

WITHIN THE COURSE OF A PLANNED ARMED ROBBERY.

YES. WITH REGARD TO THE POLICE OFFICER AGGRAVATOR, THE LEGISLATURE DETERMINES WHAT AGGRAVATORS ARE, JUST AS THEY DETERMINE WHAT PUNISHMENT IS AVAILABLE, AND THEY DETERMINE THAT BEING A POLICE OFFICER IN THE COURSE OF YOUR DUTIES, HINDERING LAW ENFORCEMENT AND AVOIDING ARREST ARE PROPER AGGRAVATORS. IT DOES NOT RESULT IN A DOUBLE COUNTING, BECAUSE AS WAS PUT FORWARD IN THE TRIAL COURT IN THIS CASE, THEY USED THE PAROLE INELIGIBILITY AS A MITIGATOR, SO IT ISN'T DOUBLE-COUNTING AGGRAVATORS. AND --

ARE YOU SAYING THAT THIS WAS ACTUALLY ARGUED BY THE DEFENSE ATTORNEY, THAT, LOOK, IF YOU SENTENCE HIM TO LIFE, HE WOULD NEVER HAVE PAROLE, AND SO --

YES.

-- YOU NEED NOT SENTENCE HIM TO DEATH.

ABSOLUTELY. IT WAS ARGUED AS MITIGATION BELOW. AND THEREFORE THIS IS NOT -- IT DOES TRULY NARROW THE CLASS OF PEOPLE ELIGIBLE FOR THE DEATH SENTENCE, AND IT IS ENTIRELY APPROPRIATE.

WOULD YOU JUST ADDRESS, BRIEFLY, THE WHAT DO WE ---WHAT DO WE -- EVEN WHEN WE MERGE ALL OF THESE THINGS, WHAT DO WE HAVE LEFT AS AGGRAVATOR BALANCE AGAINST THE MITIGATING?

WE HAVE -- OUR AGGRAVATING FACTORS ARE PRIOR VIOLENT FELONY, WHICH IS BASED ON THE CON TECH RAINIOUS CRIMES IN THIS CASE.

AND THE CRIMES BEING?

AN AGGRAVATED ASSAULT AND THE ARMED -- AN AGGRAVATED ASSAULT.

ON WHOM?

ON THE BANK TELLER.

HE PERSONALLY COMMITTED OR WAS COMMITTED BY A CODEFENDANT?

WELL, HE IS THE ONE WITH THE GUN WHO COMES OUT, RUNNING AT THEM WITH THE GUNS. SO IT WOULD BE THE STATE'S POSITION THAT IT WAS HIS, AND THE CONTEMPORANEOUS ARMED ROBBERY. THEY WERE THE PRIOR VIOLENT FELONIES. THE ROBBERY OF THE BANK.

WAS THERE A SEPARATE ACT ON A BANK TELLER?

THEY RAN, ALL THREE OF THESE PEOPLE, TWO BANK TELLERS AND A POLICE OFFICER WHO WERE WALKING OUT, THEY RUN AT ALL THREE WITH GUNS. EVERYBODY IS DUCKING, AND THE POLICE OFFICER DUCKS BEHIND A PILLAR, AND UNFORTUNATELY FOR HIM THEY MOVED TO OPPOSITE SIDES OF THE PILLAR AND AMBUSHED HIM AND KILLED HIM.

YOU SAY "THEY". COULD YOU ADDRESS THE -- LET ME --

SHE DIDN'T FINISH HER ANSWER TO THE AGGRAVATING AND MITIGATING.

GO AHEAD.

WE HAVE THE PRIOR VIOLENT FELONY. WE HAVE PECUNIARY GAIN DURING THE COURSE OF A ROBBERY MERGED, AND THEN WE HAVE THE THREE LAW ENFORCEMENT MERGED N MITIGATION, WE HAVE -- MERGED. IN MITIGATION, WE HAVE LACK AFTER PRIOR VIOLENT CRIMINAL HISTORY, THE BRAIN DAMAGE HISTORY AND BELOW INTELLIGENCE MERGED. WE HAVE THE LIFE SENTENCES GIVEN TO TWO OF THE CODEFENDANTS. WE HAVE THE DEFENDANT'S GOOD CONDUCT WHILE INCARCERATED AND POTENTIAL FOR REHABILITATION. THE AGGRAVATORS ARE GIVING GREAT WEIGHT TO THE POLICE OFFICER'S AND THE -- DURING THE COURSE, AND PECUNIARY GAIN AND SOME WEIGHT TO THE CONTEMPORANEOUS FELONY, AND WE HAVE SOME WEIGHT TO THE LACK OF CRIMINAL HISTORY, AND LITTLE WEIGHT TO THE REMAINING MITIGATION.

IN ONE -- MY QUESTION HAD TO DO WITH ONE OF THE MITIGATORS, WHICH WAS THE LIFE SENTENCES GIVEN TO TWO OF THE CODEFENDANTS.

YES.

THERE ARE OTHER --

THERE ARE THREE.

DO WE HAVE -- WERE ANY OF THE OTHER CODEFENDANTS GIVEN A SETH SENTENCE?

-- A DEATH SENTENCE?

YES. THE OTHER GUNMAN HAS A DEATH SENTENCE.

WHICH CODEFENDANT?

FRANKIE, WHO IS PRESENTLY PENDING BEFORE THIS COURT.

ON DIRECT APPEAL? ON RESENTENCING APPEAL.

SO HIS, IN TERMS OF HIS PARTICIPATION, HE IS THE ONE WITH THE GUN, AND HE IS THE ONE THAT ACTUALLY SHOT THE POLICE OFFICER.

BOTH HE AND FRANKLY -- BOTH HE AND FRANKIE ACTUAL SHOOT. HE IS THE ONE THAT FIRED THE FATAL BULLET AND KILLS THE POLICE OFFICER.

AND THE RECORD?

IN THE CASE IS 9-3. IT WAS A FOUR LAST TIME.

A 8-4 ON THE SENTENCING?

AND IT IS 9-3 NOW. IF THE COURT HAS NO FURTHER QUESTIONS, THE STATE WILL REST ON ITS BRIEF, REGARDING THE REMAINING ISSUES.

THANK YOU. COUNSEL, I BELIEVE YOU HAVE USED UP ALL OF YOUR TIME. BEFORE WE TAKE A RECESS, THE COURT WOULD LIKE TO ACKNOWLEDGE THE PRESENCE, IN THE COURTROOM, OF THE FLORIDA A&M UNIVERSITY STUDENT GOVERNMENT SUPREME COURT. WE ARE HAPPY TO HAVE YOU HERE. WE WILL TAKE A 15-MINUTE RECESS. THANK YOU. THE MARSHAL: PLEASE RISE.