Michael W. Moore v. Steven Pearson

MOORE VERSUS PEARSON.

MAY IT PLEASE THE COURT. I AM SUSAN MAHER, ON BEHALF OF THE DEPARTMENT OF -- THE DEPARTMENT OF CORRECTIONS. THE FACTS OF THIS CASE ARE THE --

EXCUSE ME A MINUTE. WOULD YOU EXPLAIN TO ME WHAT IS THE DIFFERENCE BETWEEN

IT DOESN'T APPEAR, IN THE STATUTE, AS AN AUTHORIZED TYPE OF DISCUSSION. HAVING ANOTHER SENTENCE EXPIRE, WHEN ANOTHER SENTENCE DOES EXPIRE. THEY RUN CONCURRENT AND COTERM NEWSLY. THAT IS THE DEFINITION THAT IS SIGNED BY THE COURTS.

BY CONTERMINUS, THAT A WOULD MEAN THAT IT WOULD STOP AT THE TIME OF THE OTHER SENTENCING.

YES.

TELL ME, IF THIS WAS AN INAPPROPRIATE SENTENCE, THE STATE DID NOT OBJECT TO IT, AND, AS A MATTER OF FACT THE STATE DID NOT AGREE TO IT. THE STATE DID NOT APPEAL THE SENTENCE. HOW CAN WE GO BACK, NOW, AND SAY THAT THE STATE AND THE DEFENDANT AND THE JUDGE AGREED TO A SENTENCE, AND THE DEPARTMENT OF CORRECTIONS IS GOING TO SAY NO.

I THINK THE DIFFERENCE, HERE, IS THE DEPARTMENT OF CORRECTIONS IS NOT TRYING TO DETERMINE THAT THIS IS AN ILLEGAL SENTENCE AND CORRECT IT. IN THIS INSTANCE THERE, IS SPECIFIC LEGISLATIVE MANDATE, RELATED TO THE DEPARTMENT OF CORRECTIONS, TO CALCULATE A 85 PERCENT REQUIREMENT ON ANY SENTENCE THAT IS IMPOSED ON AN OFFENSE THAT OCCURS ON OR AFTER OCTOBER 1 OF '95. INSTRUCTURING THE SENTENCE UNDER THAT STATUTORY AUTHORITY, TWO THINGS HAPPENED. ONE IS THAT WE MUST CALCULATE THE 85 PERCENT REQUIREMENT, AND THAT IS BASED UPON TIME SERVED. IT REQUIRES THE OFFENDER TO SERVE 85 PERCENT OF THE SENTENCE. IT, ALSO, INCLUDES THE APPLICATION OF ANY TYPE OF GAIN TIME THAT WOULD REDUCE THE SENTENCE TO LESS THAN THAT 85 PERCENT REQUIREMENT. THAT IS DIRECTED TO THE DEPARTMENT OF CORRECTIONS, IN ACTUALLY CALCULATING A RELEASE DATE AND STRUCTURING THE SENTENCE. IN MANY CONTEXTS, WHERE THE SENTENCING COURTS HAVE AUTHORIZED GAIN TIME, FOR EXAMPLE, IN A PROBATION REVOCATION CASE, THERE IS INDEPENDENT AUTHORITY FOR THE DEPARTMENT OF CORRECTIONS TO FORFEIT GAIN TIME GIVEN TO US BY THE LEGISLATURE. THAT IS, ALSO, GIVEN TO THE SENTENCING COURT. MANY TIMES THE SENTENCING COURTS WILL GIVE THE ENTIRE TERM, INCLUSIVE OF THE GAIN TIME, PURSUANT TO A PLEA, AND HAVE GUARANTEED THE OFFENDER THAT HE WILL GET THE ENTIRE CREDIT. HOWEVER, THIS COURT HAS RECOGNIZED OURABILITY, THE DEPARTMENT'S ABILITY TO FORFEIT THAT GAIN TIME, BECAUSE OF AN INDEPENDENT STATUTE THAT DIRECTS THE DEPARTMENT TO DO SO.

BUT YOU STARTED OUT BY SAYING THAT THE TRIAL COURT VIOLATED THIS PROVISION, WHEN HE IMPOSED THIS SENTENCE, AND SO AT LEAST I TAKE THAT TO MEAN THAT YOU BELIEVE THAT THE TRIAL COURT DID IMPOSE AN UNLAWFUL SENTENCE AND THEREFORE THAT THAT IS THE TIME TO DEAL WITH THAT, THAT IS TO FOCUS ON THAT AT THE TIME, AND FOR THE STATE TO SAY, NO, JUDGE, WE CAN'T AGREE TO THAT, AND IF YOU PUT THAT PROVISION IN THERE, THE CONTERMINUS PROVISION, THAT WOULD BE UNLAWFUL. AND ALTHOUGH WE HAVE HAD ILLEGAL

AND UNLAWFUL AND SO ON AND SO ON, THAT THAT, REALLY, IS BECAUSE ARE SAY RING, TOO, IS THAT UNDER -- SAYING, TOO, IS THAT, UNDER THIS STATUTORY SCHEME, THAT THE JUDGE COULDN'T DO. THAT THE APPROPRIATE TIME TO TELL THE JUDGE THAT IS AT THE TIME THE JUDGE IS DOING SOMETHING DIFFERENT, AND SO HELP ME. IT SEEMS TO ME THAT, WHEN WE JUST CIRCLE AROUND HERE, WHEN WE END UP BACK, SAYING, NO, EVEN THOUGH THE JUDGE SAYS THAT IS WHAT IT IS AND THAT IT IS CONTERMINUS THAT WE CAN WAIT UNTIL THE PERSON STARTS SERVING THE SENTENCE, AND WHEN THE TIME COMES, SAY, NO, NOW WE WILL LET YOU KNOW THAT THE JUDGE HAD NO AUTHORITY TO DO THAT, AND THAT IS A OBLIGATION THAT WE HAD, DESPITE WHAT THE JUDGE SAID.

I WOULD VIEW THE CO-TERMINUS PROVISION AS SURPLUS AGE, AND I THINK THERE IS A BODY OF LAW OUT THERE THAT WE HAVE CITED IN THE BRIEF, THAT SAY WHERE THE COURT HAS EXCEEDED ITS AUTHORITY AND --

HOW CAN IT POSSIBLY BE SURPLUS, WHEN EVERYBODY IS GETTING TOGETHER AND GREG ON WHAT -- I MEAN -- AND AGREEING ON THE FACTS OF LIFE ARE THAT IT IS THE SENTENCE THAT IS THE BOTTOM LINE TO 99.9 PERCENT OF THE PEOPLE THAT ARE CHARGED WITH CRIMES OUT THERE, AND THAT IS WHAT THE DEAL WAS THAT DAY, AND SO IF THAT IS WHAT THE DEAL IS, IN TERMS OF HOW MUCH TIME THEY ARE ACTUALLY GOING TO SERVE, HOW IN THE WORLD COULD WE SAY, WELL, THAT WAS JUST SURPLUS AGE, THAT IT IS LIMITED TO THAT AMOUNT OF TIME?

I DON'T KNOW HOW THE DEPARTMENT OF CORRECTIONS COULD APPLY THE COURT ORDER. WE HAVE A DILL EM-- WE HAVE A DILEMMA HERE. WE HAVE TO EITHER APPLY THE COURT ORDER OR WE HAVE TO APPLY THE LEGISLATION THAT THE LEGISLATURE SAYS TO APPLY.

IF IT SAYS FIVE YEARS, THE JUDGE HAS NO CHOICE BUT TO APPLY FIVE YEARS, RIGHT?

ARE YOU SAYING THAT IF THE JUDGE HAD IMPOSED FIVE YEARS?

EVEN IF THERE WAS A STATUTE OUT THERE THAT SAID THAT THERE WAS A MINIMUM MANDATORY SENTENCE FOR 15 YEARS, THAT THE JUDGE IMPOSED FIVE YEARS, IT IS NOT UP TO THE DEPARTMENT OF CORRECTIONS TO LOOK UP THE LAW AND THE SENTENCING AND SORT OF BE ANOTHER APPEALS COURT AND SAY, WELL, WAIT A MINUTE. THE LAW SAYS THAT IS -- YOU KNOW, AND SO EVEN THOUGH THE STATE DIDN'T OBJECT AND THE STATE AGREED, WE HAVE TO HOLD YOU FOR 15 YEARS, BECAUSE THIS IS A MINIMUM MANDATORY THERE. THE DEPARTMENT OF CORRECTIONS WOULDN'T DO THAT, WOULD THEY?

NO. IT WOULD NOT. I THINK THE DIFFERENCE, HERE, IS, THOUGH, THOSE STATUTES OUT THERE THAT SAY THEY SHALL BE MANDATORY, THOSE ARE DIRECT TO THE JUDICIARY, NOT TO THE DEPARTMENT OF CORRECTIONS. IN THIS INSTANCE, THE 85 PERCENT REQUIREMENT THAT WE MUST APPLY, IT, REALLY, GOES TO CALCULATE AGO RELEASE DATE. IT GOES NOT TO SET AGO TERM BUT CALCULATING A RELEASE DATE AND APPLYING THE VARIOUS CREDITS AND HOW THAT WILL BE DONE. THAT IS CLEARLY OUTSIDE THE JURISDICTION OF THE COURTS. AND THE LEGISLATURE HAS GIVEN THAT TO THE DEPARTMENT OF CORRECTIONS.

BUT YOU AGREE --

JUSTICE PARIENTE.

-- THE TRIAL COURT INTENDED TO LIMIT THAT SENTENCE, RIGHT?

I AM SORRY.

YOU AGREE THAT THE TRIAL COURT INTENDED TO LIMIT THAT SENTENCE.

I EXPECTED THAT HE WOULD BE RELEASED ON A PARTICULAR DATE THAT WAS CONTROLLED BY THE OTHER SENTENCE.

OKAY. I AM SORRY.

JUSTICE PARIENTE.

MORE IMPORTANTLY, I JUST WANT TO MAKE SURE, DO YOU STILL AGREE THAT NOT ONLY DID THE COURT INTEND TO ONLY HAVE THIS DEFENDANT SERVE FIVE YEARS IN PRISON, BUT THAT THE TRIAL COURT COULD HAVE LAWFULLY IMPOSED A CONCURRENT FIVE-YEAR SENTENCE FOR THIS SECOND OFFENSE? BECAUSE THAT IS WHAT WAS IN THE FIRST DISTRICT OPINION THAT SAYS THAT -- IT STATES THAT THE DEPARTMENT CONCEDED THAT. IS THAT CONCESSION, STILL A VALID CONCESSION?

I DID THE ARGUMENT IN THE FIRST DCA. I DON'T THINK THAT I CONCEDED THAT THEY IMPOSE A FIVE-YEAR SENTENCE. WHAT I EXPLAINED TO THEM, THEY COULD GET TO THE RESULT BY IMPOSEING SOME SENTENCE THAT WOULD, PROBABLY, ACCOMPLISH THEIR GOAL.

SO, IN OTHER WORDS, HERE, IF THE JUDGE, INSTEAD OF WHAT WE HAVE GONE THERE THROUGH AND THIS DEFENDANT IS STILL INCARCERATED, IF THE STATE HAD WANTED TO, THEY WOULD SAY, WELL, LET'S GO AHEAD. WE WILL JUST REDID DO THIS BARGAIN -- REDO THE BARGAIN AND WITHDRAW THE PLEA PLEA AND LET HIM HAVE TWO -- THE PLEA AND LET HIM HAVE TWO CONCURRENT FAVOR-YEAR SENTENCES, BUT IT WOULDN'T EFFECTUATE THE BARGAIN THAT THE STATE WANTED, WHICH IS TO GIVE THE ABILITY TO DO SOMETHING WITH THE ADDITIONAL EIGHT YEARS FOR THIS DEFENDANT, CORRECT? THAT IS THE REASON, I GUESS, THAT YOU GIVE A CO-TERMINUS SENTENCE, A LOT OF TIMES, WITH A CONCURRENT SENTENCE THAT OVERRIDES THE POSITION OF THE STATE, RIGHT?

THE DEPARTMENT HAS TO CALCULATE, HE HAVE EARN IF THEY IMPOSE A FIVE ---EVEN IF THEY IMPOSE A FIVE-YEAR SENTENCE, THE DEPARTMENT HAS TO APPLY THAT, SO THEY WILL NOT END AT THE SAME TIME.

SO THE COURTS HAVE NO LEGAL AUTHORITY TO IMPOSE COTERMINUS SENTENCES.

NOT IF IT USURPS THE AUTHORITY OF THE EXECUTIVE BRANCH TO ENFORCE --

WON'T IT, ALWAYS, DOS IT, UNDER YOUR -- -- DO IT, IF THE FIRST SENTENCE IS SHORTER? IT WILL ALWAYS VIOLATE THE 85 PERCENT.

YES. IT WILL ALWAYS VIOLATE THE 85 PERCENT PROVISION. THAT'S CORRECT. THAT IS CORRECT.

MY UNDERSTANDING OF WHAT THE FIRST DISTRICT HELD, IN JUDGE BENTON'S OPINION, WAS THAT WHAT YOU WERE, REALLY, RELYING UPON, FOR THE 85 PERCENT, WAS THE GAIN TIME STATUTE. AND THIS, REALLY, DOESN'T HAVE ANYTHING TO DO WITH GAIN TIME.

BUT IT DOES.

WELL --

I THINK, IF YOU LOOK AT IT, WHAT THEY ARE DOING, IS TO GET FROM THE 13-YEAR SENTENCE TO THE RELEASE DATE ON THE FIVE-YEAR SENTENCE, IT NECESSARILY GIVES HIM BENEFIT OF ALL OF THE GAIN TIME THAT WAS EARNED ON THE FIVE-YEAR SENTENCE, BECAUSE THE RELEASE DATE OF THAT FIVE-YEAR SENTENCE IS WHAT IS GOING TO CONTROL.

IS THAT STATUTE REFERRED TO IN THE SENTENCE?

IN THE SENTENCE? NO.

IS THAT STATUTE -- IS GAIN TIME REFERRED TO IN THE SENTENCE?

NO. BUT GAIN TIME IS, ALWAYS, PART OF A SENTENCE.

ALL THAT THE SENTENCE SAYS IS THAT WE ARE GOING TO HAVE ONE 13-YEAR SENTENCE. ONE FIVE-YEAR SENTENCE, AND THE 13-YEAR SENTENCE TERMINATION IS AT THE SAME TIME THAT THE FIVE-YEAR SENTENCE IS.

IN OTHER WORDS, IT OVERRULES THE LEGISLATURE'S DESIRE THAT THERE BE A 85 PERCENT REQUIREMENT APPLIED TO THE 13-YEAR SENTENCE.

BUT I THINK YOU HAVE TO -- MY -- WHERE I AM HAVING THE TROUBLE, AS I UNDERSTAND WHAT JUDGE BENTON WAS TALKING ABOUT THAT THE STATUTE, ON THE 85 PERCENT RULE, DEALS WITH GAIN TIME, AFTERNOON IF, IN FACT, THERE WAS A REDUCTION TO FIVE YEARS, BY REASON OF SOME IMPROPER IMPOSITION OF GAIN TIME THAT IS PREVENTED BY THE STATUTE. HOWEVER, IF, AND MAYBE THE COURT DOES NOT HAVE ANY AUTHORITY TO DO IT AND THAT WOULD MAKE IT UNLAWFUL OR ILLEGAL OR BE SOMETHING THAT OUGHT TO BE DEALT WITH, BUT IT WASN'T RAISED BY THE STATE, BUT HERE THIS DOESN'T HAVE -- I MEAN IT IS NOT GAIN TIME THAT IS GETTING THIS FELLOW OUT. IT IS THE FACT THAT THE SENTENCE WAS CRAFTED IN THIS WAY. ISN'T THAT RIGHT?

NO, YOUR HONOR. I DISAGREE. I -- THE ONLY WAY THAT THEY -- IT NECESSARILY APPLIES GAIN TIME, EITHER FROM THE FIVE-YEAR SENTENCE, AND WHEN IT RUNS OUT OF GAIN TIME THERE, THE GAP THAT -- BETWEEN THE 13-YEAR SENTENCE'S EXPIRATION DATE IS ESSENTIALLY A COURT-ORDERED GAIN TIME. IT IS GIVING CREDIT --

IS THAT THE ORIGINAL SENTENCE THAT IS FACTORING IN GAIN TIME? IS THAT YOUR PREMISE?

ON THE 13-YEAR SENTENCE, YES. AND THE FIVE-YEAR SENTENCE. THE LEGISLATURE, UNDER 944.275, IT IS MORE THAN GAIN TIME. IT TELLS US HOW TO CALCULATE A SENTENCE. HOW TO CALCULATE A MAXIMUM RELEASE DATE. HOW TO CALCULATE A TENTATIVE RELEASE DATE. HERE, WHAT THE COURT HAS DONE IS CALCULATE THAT RELEASE DATE, BASED UPON A FIVE-YEAR TERM. IT HASN'T, ACTUALLY, SET A TERM. THE TERM OF YEARS IS 13.

BUT YOU DID GAIN TIME AFTER YOU GET INCARCERATED. SO HOW CAN YOU EXTRAPOLATE FROM THERE AND SAY THAT THE JUDGE'S ORIGINAL SENTENCE, WHERE WE ARE NOT EVEN TALKING ABOUT GAIN TIME THERE, JUST SIMPLE REASON THAT IT IS COTERMINUS, IN EFFECT, IS SOMEHOW MANIPULATING GAIN TIME, WHICH DOESN'T OCCUR UNTIL A SUBSEQUENT STAGE.

THE SENTENCE IMPOSED 13 YEARS, AND THEN IT SAYS IT WILL RUN COTERMINUSLY. IT IS A 13-YEAR SENTENCE. NOW, THE FIRST DCA TOOK THE POSITION THAT THAT WAS A 13-YEAR SENTENCE AND, IN REALITY IT WAS SOMETHING ELSE. NOW, THEY WEREN'T CLEAR IN THE DECISION. IF IT WAS A FIVE-YEAR SENTENCE, THEN OUR POSITION WOULD BE THAT WE, THEN, HAVE TO APPLY THE 8 A PERCENT PROVISION TO THAT FIVE ---85 PERCENT PROVISION TO THE FIVE-YEAR SENTENCE AND MAKE THE CALCULATION OR TREAT THE GAIN TIME ACCORDINGLY, OR IT WAS SOME CONSTANTLY MOVING SENTENCE THAT BECAME CRYSTALIZED, WHEN YOU FINALLY REACHED THAT RELEASE DATE ON THE FIVE-YEAR SENTENCE, BY VIRTUE OF GAIN TIME.

JUSTICE QUINCE HAD A QUESTION.

I AM SORRY. YES, JUSTICE QUINCE.

JUSTICE HARDING.

WHY WOULD THEY CRAFT A SENTENCE LIKE THIS?

I DON'T KNOW. I MEAN, WE HAVE SEEN THEM, MORE OFTEN, SINCE THE 85 PERCENT REQUIREMENT, AND I SUSPECT THAT IT IS A WAY TO GET AROUND THE 85 PERCENT REQUIREMENT. IT, ALSO, WOULD GET AROUND ANY SUPERVISION THAT MIGHT BE REQUIRED TO BE, TO FOLLOW, IF HE EARNED GAIN TIME ON THAT SENTENCE, UNDER 947.1405, WHICH IS THE CONDITIONAL RELEASE STATUTE.

YOU DON'T KNOW OF ANY BENEFIT TO THE STATE, TO HAVE A SENTENCE LIKE THIS, AS OPPOSED TO ANOTHER FIVE-YEAR SENTENCE TO RUN CONCURRENTLY.

NO.

THANK YOU.

YOU ARE IN YOUR REBUTTAL TIME. THANK YOU, MS. MAHER.

LET ME ASK YOU WHAT I WAS THINKING ABOUT, WHICH IS WHAT WAS THE SENTENCING GUIDELINE SENTENCE OR WAS THIS A HAS BEEN I HADULE OFFENDER SENTENCE?

THIS WAS A HAS BEEN I HADULE OFFENDER SENTENCE, I BELIEVE.

AND IT WAS A WHAT-DEGREE FELONY?

SECOND-DEGREE FELONY, I BELIEVE. IT WAS A COMBINATION OF A LOT OF SENTENCES. YOU ARE TALKING ABOUT THE POST OCTOBER OPEN 95 SENTENCE, THE -- THE POST-OCTOBER '95 SENTENCE, THE 13-YEAR SENTENCE?

YES.

IT WAS A LOT OF COUNTS, AND NOW THAT I RECALL, IT WAS A THIRD-DEGREE FELONY, BUT IT INVOLVED QUITE A FEW COUNTS.

SO WAS THAT THE MINIMUM SENTENCE THAT COULD BE GIVEN, BEFORE THAT COUNT -- FOR THAT COUNT?

NO, YOUR HONOR. I THINK CLEARLY THAT THE COURT COULD HAVE EXTENDED THAT SENTENCE, HAD THE COURT WANTED TO.

NOT EXTENDED IT BUT IMPOSED A LESSER SENTENCE.

A LESSER SENTENCE, YES, YOUR HONOR, OR A GREATER SENTENCE. BOTH.

WHAT WAS THE RANGE? COULD THE JUDGE HAVE IMPOSED A FIVE-YEAR CONCURRENT SENTENCE?

YES, YOUR HONOR, THE JUDGE --

WE DON'T HAVE THAT RECORD.

NO. BUT THE GUIDELINES WERE BROAD ENOUGH WHERE A GREAT ERROR LESSER SENTENCE COULD HAVE BEEN IMPOSED, HAD THE COURT WANTED TO. JUSTICE QUINCE, IF I CAN JUST NOTE ONE QUESTION THAT YOU HAD EARLIER, THE DEFINITION OF A COTERMINUS SENTENCE IS A SENTENCE THAT RUNS CONCURRENTLY WITH ANOTHER SENTENCE, SO CONCURRENCY IS A PART OF A COME TERM NEWS SENTENCE, BUT THE -- OF A COTERMINUS SENTENCE, BUT THE GREATER

SENTENCE, THE SECOND SENTENCE, TERMINATES SIMULTANEOUSLY WHEN THE FIRST SENTENCE TERMINATES.

WHERE DO YOU GET THAT DEFINITION FROM?

FROM THIS CASE, THE PEARSON COURT BELOW, 767 SO.2D POIGE PAGE -- PAGE 1237.

IS THERE ANY SUCH LABEL THAT THE LEGISLATURE HAS PROVIDED THAT THERE MAY BE, CAN BE, SHALL BE A COTERMINUS SENTENCE? IS THAT SOMETHING THAT THE LEGISLATURE HAS RECOGNIZED?

YOUR HONOR, THAT IS ABSOLUTELY CORRECT. IN SECTION SUN SHUN 19 -- IN SECTION -- IN SECTION 923, THE LEGISLATURE SPECIFICALLY REFERENCES COTERMINUS SENTENCING, AND THIS COURT HAS, TIME AND TIME AGAIN, FOUND THAT COTERMINUS SENTENCING IS PERFECTLY LEGAL.

HOW DOES IT REFERENCE IT IN THAT STATUTE?

WELL, IT IS NOT, REALLY, A MAJOR PART OF THE STATUTE. I THINK IT HAS TO DO WITH DETAINERS, BUT IT TALKS ABOUT A SITUATION WHERE THERE MIGHT BE TWO SENTENCES, AND THEY TALK ABOUT THE FACT THAT ONE OF THEM CAN BE COTERMINUS AND HOW YOU WOULD HANDLE THAT SITUATION. I WILL AGREE THAT THE FLORIDA LEGISLATURE HAS NOT ADDRESSED THIS IN ANY GREAT DETAIL, BUT CLEARLY THE CASE LAW IN FLORIDA IS THAT COTERMINUS SENTENCING IS A PART OF THE CASE LAW OF THE STATE OF FLORIDA.

WELL, COULD YOU EXPLAIN WHAT WOULD BE THE DIFFERENCE, IF THERE HAD BEEN A 13-YEAR SENTENCE IMPOSED, CONCURRENTLY, BUT EIGHT YEARS OF IT HAD BEEN SUSPENDED, SO THERE WAS A FIVE-YEAR CONCURRENT IN INCARCERATION AND THEN AN EIGHT-YEAR TERM, WHICH WOULD HAVE MADE THE DEPARTMENT OF CORRECTIONS -- THAT WOULDN'T HAVE CREATED A PROBLEM. WHAT IS THE DIFFERENCE FOR EITHER THE DEFENDANT OR THE STATE, IN HAVING THIS 13-YEAR COTERMINUS

WHAT IS THE DIFFERENCE?

ASSUMING, NOW, WHAT IS HIS STATUS AS TO THE EIGHT YEARS. IS IT AS IF IT WAS ALREADY SERVED?

I THINK SO, YOUR HONOR. IN THAT CASE, THAT IS TRUE. IT WOULD BE COMPLETELY SERVED UNDER THOSE CIRCUMSTANCES.

WELL, THEN, WHY NOT DO A FIVE-YEAR CONCURRENT SENTENCE?

WELL, THAT, I THINK, IS SOMETHING THAT YOU WOULD HAVE TO ASK JUDGE BRIAN, BUT JUDGE BRIAN HAD THIS CASE BEFORE HIM. THE STATE OF FLORIDA, THE STATE ATTORNEYS OFFICE, HAD THE OPPORTUNITY TO EVALUATE THE STRENGTH OF THAT SECOND CASE. THEY FELT IT WAS APPROPRIATE TO PROCEED AS THEY DID. THERE WAS NO APPEAL, AND THE DEPARTMENT OF CORRECTIONS, YOUR HONOR, WAS PUT ON NOTICE, JUSTICE WELLS. YOU MENTIONED THE DEPARTMENT WAS PUT ON NOTICE OF THIS COTERMINUS SENTENCING, AND THEY DID ABSOLUTELY NOTHING TO CAUSE THAT SENTENCE TO --

WHAT IS THE TIME THAT YOU ARE RELYING ON, WHEN YOU SAY THAT THE LEGISLATURE RECOGNIZES IT. WHAT IS THAT EXACT LANG?

YOUR HONOR, I DON'T HAVE THE SPECIFICS OF THE STATUTE BEFORE ME, BUT IT IS IN SECTION 921.16 SUBSECTION 3. I REFERENCE IT IN THE BRIEF, AND IT DOES USE THE ACTUAL WORD

"COTERMINUS", AND AS I SAID BEFORE, COTERMINUS SENTENCING HAS BEEN A PART OF FLORIDA'S CASE LAW FOR MANY, MANY YEARS.

BUT THAT STATUTE IS NOT A BROAD OMNIBUS-AUTHORIZING STATUTE, IS IT, THAT SAYS TRIAL COURTS MAY, AND THEN LISTS ALL THESE -- IT DOESN'T HAVE THAT LANG.

NO, YOUR HONOR. I WOULD CONCEDE IT JUST MENTIONS IT, SOMEWHAT IN PASSING.

IS THERE ANY DISPUTE, ON THIS RECORD, THAT THE PARTIES AT THE TRIAL LEVEL, THAT THE TRIAL JUDGE AND THE STATE AND THE DEFENDANT INTENDED THIS OUTCOME? THAT IS THAT THE DEFENDANT'S SENTENCE TERMINATE, WITH THE EXPIRATION OF THE FIRST SENTENCE?

I THINK THAT IS CLEARLY WHAT EVERYBODY INTENDED, YOUR HONOR. THERE IS ABSOLUTELY NO QUESTION ABOUT THAT.

IS IT CORRECT, ALSO, THAT LAWFULLY, A SENTENCE COULD HAVE BEEN CONSTRUCTED TO ACCOMPLISH THAT, IN A WAY DIFFERENT THAN THE WAY IT ACTUALLY WAS CONSTRUCTED HERE?

YES, YOUR HONOR. FOR EXAMPLE, I THINK IF THE JUDGE HAD SIMPLY MADE THE SECOND SENTENCE, JUST SAY A YEAR AND A DAY, THEN THE SAME RESULT WOULD HAVE TAKEN PLACE.

HOW MUCH -- WHAT IS THE TIME EFFECT ON YOUR CLIENT? WHEN WAS -- UNDER YOUR THEORY, WHEN WAS HE SBITHSED TO BE RELEASE -- HE ENTITLED TO BE RELEASED?

MR. PEARSON SHOULD HAVE BEEN RELEASED, YOUR HONOR, AT LEAST SEVEN MONTHS AGO. HE WOULD HAVE BEEN RELEASED BY THEN. LET ME NOTE ONE THING THAT MS. MAHER INDICATED. SHE WILL NOT ACKNOWLEDGE THAT WHAT, REALLY, HAS OCCURRED HERE IS THAT ADMINISTRATION OR THE DEPARTMENT OF CORRECTION ACTION, WHICH ESSENTIALLY RESENTENCES MY CLIENT, THEY TALK ABOUT CALCULATING OR RECALCULATING OR RESTRUCTURING WHAT THE JUDGE DID, BUT THAT IS NOT, REALLY, WHAT HAPPENED. THE DEPARTMENT OF CORRECTIONS ARBITRARILY AND ADMINISTRATIVELY, SIMPLY RESENTENCED HIM. I GUESS THAT YOU DETERMINED THAT ON WHOSE OBJECTION IS -- ON WHOSE OX IS BEING GORED. IT SEEMS THAT MR. PEARSON, WHO IS SITTING IN A STATE PRISON AT THIS TIME, THINKING THAT HE SHOULD HAVE BEEN RELEASED SEVEN MONTHS AGO, ACCORDING TO A DEAL THAT HE MADE WITH THE STATE, WHERE HE GAVE UP HIS RIGHT TO A JURY TRIAL, IT CERTAINLY SEEMS, TO HIM, LIKE HE HAS BEEN RESENTENCED, AND LET ME JUST CONCLUDE, IF I MAY, BY REFERENCING WHAT I THINK IS THE DEPARTMENT'S BEST ARGUMENT. THE BEST ARGUMENT AND, REALLY, THE ONLY ARGUMENT THAT HE CAN MAKE IS THAT THE FIRST DISTRICT COURT OF APPEAL IN PEARSON WAS WRONG, WHEN IT LOOKED AT THIS GAIN TIME STATUTE AT THE 85 PERCENT LAW, AND JUDGE BENTON SAID WE DO NOT UNDERSTAND HOW THE 85 PERCENT LAW CAN BE READ AS ANYTHING MORE THAN A LIMITATION ON THE DOC'S AUTHORITY TO GRANT GAIN TIME, AND CHIEF JUSTICE, THAT IS WHAT YOU REFERENCED EARLIER, BUT THE DEPARTMENT IS FORCED INTO A POSTURE OF HAVING TO TAKE A MUCH DIFFERENT TACT. WHAT THEY HAVE GOT TO SAY AND WHAT THEIR BEST ARGUMENT IS, TO TRY TO PREVAIL, IS THAT THE 85 PERCENT LAW, IN FACT, IS A MANDATORY MINIMUM CRIMINAL SENTENCING STATUTE. THAT IS THE ONLY WAY THEY CAN PREVAIL. THEY HAVE GOT TO SAY THAT THIS IS JUST LIKE THE 1020 LIFE STATUTE. -- THE 10-20-LIFE STATUTE. IT IS LIKE THE 15-YEAR MINIMUM MANDATORY STATUTE FOR TRAFFICKING OF SOME FORMS OF CONTRABAND. IT IS A MANDATORY MINIMUM STATUTE.

EVEN IF THEY TOOK THAT POSITION, WOULD IT BE YOUR POSITION THAT THE TIME TO ATTACK THE SENTENCE WOULD BE IT IS NOT THE DEPARTMENT OF CORRECTIONS THAT SHOULD BE ATTACKING IT. IT SHOULD BE THE STATE SAYING WE CAN'T AGREE TO IT. FOR EXAMPLE, IF THERE WAS A THREE-YEAR MANDATORY MINIMUM AND THE JUDGE JUST SAID I AM NOT IMPOSING IT.

ABSOLUTELY, YOUR HONOR, BECAUSE AS I INDICATED, ADMITTEDLY THE DEPARTMENT OF CORRECTIONS HAD NO AUTHORITY TO APPEAL WHAT JUDGE BRIAN DID. HOWEVER, JUDGE BRIAN WAS COURTEOUS ENOUGH TO PUT THE DP. OC -- THE DOC ON SPECIFIC NOTICE OF WHAT HE HAD DONE AND THERE WAS NO EFFORT BY THE D.O.C TO CONTACT THE ATTORNEY AND SAY WE FEEL IT IS A VIOLATION OF THE 85 PERCENT LAW. YOU NEED TO DO SOMETHING ABOUT IT, AND OF COURSE THE STATE DIDN'T DO SOMETHING ABOUT IT, BECAUSE THE STATE WAS INTERESTED IN THAT PLEA AGREEMENT. IT MAY HAVE BEEN, FOR EXAMPLE, THAT THE STATE DIDN'T HAVE PROOF SUFFICIENT TO CONVICT MR. PEARSON. THAT IS WHAT A PLEA AGREEMENT IS ALL ABOUT. AND AS ONE OF THE OTHER JUSTICES HAS INDICATED, IT IS AT THAT POINT IN TIME, IT IS AT THAT POINT IN TIME THAT, IF THE D.O.C WANTED TO DO SOMETHING ABOUT ABOUT PEARSON, THEY SHOULD HAVE DONE, IT BUT THEY DIDN'T.

UNDER THE SENTENCE, IF HE IS RELEASED AS -- ACCORDING TO YOUR ARGUMENT, DOES -- IS THERE ANY -- WHAT HAPPENS TO THAT EIGHT YEARS? DOES IT DISAPPEAR, AS IF IT DIDN'T EXIST?

I SEEK CREDIBILITY WITH THIS COURT, YOUR HONOR, AND FRANKLY I THINK IT DOES, YES. I THINK THAT IS THE WAY THE COOKIE CRUMBLES, IN THIS PARTICULAR CASE.

IT DOESN'T -- IT IS AS IF IT WERE A FIVE-YEAR CONCURRENT SENTENCE.

YES, YOUR HONOR, AND THAT IS THE WHOLE ESSENCE OF COTERMINUS SENTENCING. IT IS SO THAT THE GREATER SECOND SENTENCE EFFECTIVELY, SIMULTANEOUSLY ENDS, WHEN THE FIRST SENTENCE ENDS. BUT IF I COULD JUST --

ISN'T THERE SOMETHING ILLOGICAL ABOUT THAT, THAT THE LESSER WOULD SWALLOW THE WHOLE OF THE GREATER?

YOUR HONOR, I DON'T BELIEVE SO, BECAUSE, AGAIN, WE HAVE COTERMINUS SENTENCING IN FLORIDA. AND SENTENCING SHOULD BE LEFT TO THE JUDICIARY. I DON'T KNOW ALL THE DETAILS, BUT I ASSUME THE THAT JUDGE BRIAN DID, AND COUNSEL WAS ASKED, WELL, GEE, WHY DO YOU THINK EVERYBODY AGREED TO THIS? TO ME THAT IS A LITTLE CYNICAL. I THINK WE NEED TO GIVE THE JUDGE THE RESPECT HE DESERVED. THERE MUST HAVE BEEN SOME VALID REASONS FOR THIS. THE STATE FELT HAD -- IT HAD SOMETHING TO GAIN AND THE DEFENDANT FELT HE HAD SOMETHING TO GAIN, THAN IS WHAT THEY ALL AGREED UPON.

DOES IT PREVENT HIM FROM GETTING OUT, BEFORE HE SERVES 100 PERCENT OF HIS FIRST SENTENCE? IN OTHER WORDS THE FIVE-YEAR SENTENCE, HE COULD HAVE GOTTEN OUT, IF HE HAD GAIN TIME, WITHIN 85 PERCENT OF THAT SENTENCE. IT REQUIRES, REALLY, THAT HE SERVE 100 PERCENT OF THE LESSER SENTENCE, WHICH IS SOMETHING GREATER THAN HE WOULD HAVE TO SERVE, IF HE ONLY HAD THE ONE SENTENCE. OR IS THAT --

AGAIN, I SEEK CREDIBILITY WITH THIS COURT, YOUR HONOR, AND I AM ALMOST AFRAID TO ADMIT IT, BECAUSE I KNOW MISS MAY HER WILL POINT IT OUT IF -- HAHE -- MAHER WILL POINT IT OUT, IF I DON'T, BUT, NO, IF HE SERVED 100 PERCENT, WITHOUT GAIN TIME, THEN HE WOULD BE RELEASED, BECAUSE THE COTERMINUS WOULD EXPIRATE THAT POINT.

HOW MUCH -- WOULD EXPIRE AT THAT POINT.

HOW MUCH TIME DID HE THEORETICALLY SERVE, BECAUSE HE COULD SERVE A 13-YEAR SENTENCE.

THAT'S CORRECT, YOUR HONOR. ON A FIVE-YEAR SENTENCE, HE WOULD HAVE EARNED GAIN TIME, AND PRIOR TO 60 MONTHS THAT, SENTENCE WOULD EXPIRE AND HE WOULD BE RELEASED. NOW, HE WOULD BE ON SOME TYPE OF CONDITIONAL RELEASE OR WHATEVER, REGARDING THAT

FIVE-YEAR SENTENCE, BUT AS TO THE COTERMINUS SENTENCE, THAT WOULD END, WHEN THE FIRST SENTENCE ENDS, AND THAT --

HE WOULD BE ON SOME KIND OF RELEASE ON THE FIRST SENTENCE BUT NOT ON THE SECOND ONE?

IN ALL HONEST DITY, I THINK THAT IS CORRECT, YOUR HONOR. I AGREE WITH THAT -- HONESTY, I AGREE. THAT IS CORRECT, YOUR HONOR. I AGREE WITH THAT. THIS WAS MADE WITH AUTHORITY, WITH REGARD TO WHAT IS IN THE BEST INTEREST OF FLORIDA, WITH REGARD TO SENTENCES, TO THE STATE ATTORNEYS OFFICE, NOT TO THE DEPARTMENT OF CORRECTIONS.

DID YOU FIND ANY AUTHORITY PRIOR TO THE DEFINITION THAT IS OUTLINED IN PEARSON THAT SAYS THAT THAT IS WHAT A COTERMINUS SENTENCE ACTUALLY MEANS?

YES, YOUR HONOR. THE DEFINITION THAT JUDGE BENTON USED, IN THE PEARSON CASE, IS BASED ON ANOTHER CASE. IT IS CITED IN THE BRIEF. IF I HAVE JUST ONE MORE MOMENT, YOUR HONOR, I WANT TO MAKE ONE FURTHER POINT, IF I COULD. AND JUDGE BENTON NOTED THIS, IN HIS OPINION. AS I SAY, THE ONLY WAY THAT THE DEPARTMENT CAN WIN THIS CASE, IF THEY CAN CONVINCE YOU THAT THE 85 PERCENT STATUTE IS LIKE A MANDATORY MINIMUM STATUTE, BUT JUST REMEMBER THIS, WHEN YOU EVALUATE THAT, THAT AS JUDGE BENTON SAID, IN THE CASE BELOW, THAT, WHEN YOU EVALUATE SENTENCING PROVISIONS, WHEN IT COMES TO A CRIMINAL SENTENCE, YOU MUST EVALUATE THAT SENTENCE STRICT LIMIT THE SENTENCE, THE TERMS MUST BE STRICTLY CONSTRUED, AND WHEN THE LANGIS SUSCEPTIBLE OF DIFFERING CONSTRUCTION -- THE LANGUAGE IS SUSCEPTIBLE OF DIFFERING CONSTRUCTION, IT MUST BE FAVORABLE TO THE ACCUSED. NOW, IN THIS CASE, JUDGE BRIAN AND THE FIRST DCA LOOKED AT THIS 85 PERCENT LAW, AND THEY SAID WHAT IT SEEMED, MR. CHIEF JUSTICE, YOU WERE SAYING, THAT THIS IS NOT, THIS 85 PERCENT LAW IS NOT A MINIMUM MANDATORY SENTENCING STATUTE. IT IS A GAIN TIME STATUTE. ALL IT SAYS IS YOU CANNOT GET OUT OF PRISON, WITHOUT SERVING AT LEAST 85 PERCENT OF YOUR SENTENCE, BY GETTING GAIN TIME. NOW, IF THE LEGISLATURE WANTS TO CHANGE THIS LAW NEXT YEAR, LET THEM DO IT, BUT THAT IS NOT WHAT THEY DID, AND THIS 85 PERCENT LAW HAS TO BE CAREFULLY SCRUTINIZED, AND ANY DOUBT ABOUT ITS AMBIGUITY MUST BE RESOLVED IN FAVOR OF THE DEFENDANT. THAT IS ALL IT SAYS T DOESN'T SAY YOU CAN SERVE 85 PERCENT SOME OTHER WAY, AND THE SOME OTHER QUAY WEIGH IS BY VIRTUE -- OTHER WAY IS BY VIRTUE OF COTERMINUS SENTENCING, WHICH IS ACCEPTED IN THE STATE OF FLORIDA. THANK YOU VERY MUCH, YOUR HONOR.

THANK YOU, MR. PEARSON. MS. MAHER.

LET ME GIVE AN EXAMPLE THAT MIGHT BETTER ILLUSTRATE THE DEPARTMENT'S POSITION HERE. AND OUR DILEMMA, INSTRUCTURING THIS, BECAUSE WE ARE GIVEN A MANDATE HERE, AND IT IS, STILL, NOT CLEAR WHETHER WHAT WE ARE DEALING WITH, FROM MR. HARRISON, IS A FIVE-YEAR SENTENCE OR SOMETHING THAT MOVES AROUND AND BECOMES 100 PERCENT SENTENCE, TO WHICH WE ARE UNABLE TO APPLY ANY GAIN TIME. BUT LET'S TAKE, FOR EXAMPLE, THAT THIS 13-YEAR TERM IS A PROBATIONARY SPLIT. IT RUNS COTERMINUS WITH A FIVE-YEAR TERM, AND IT WILL HAVE A PROBATION TO FOLLOW. NOW, WE HAVE TO LOOK AT SOMETHING TO SAY IS IT 13 OR IS IT FIVE, SO THAT WE CAN START APPLYING GAIN TIME, IF THERE IS BASIC GAIN TIME TO BE APPLIED, AND CALCULATE THAT AMOUNT OF GAIN TIME AND, ALSO, THE MONTHLY GAIN TIME. EVEN IF THIS WERE NOT Aq 85 PERCENT SENTENCE, WE WOULD START. THAT WE WOULD LOOK AT THE 13 YEARS. WE WOULD GIVE THAT BASIC GAIN TIME AND START MOVING THIS TENTATIVE RELEASE DATE DOWN, BASED ON THE GAIN TIME, KNOWING THAT THIS OTHER SENTENCE IS, ALSO, MOVING DOWN, AND WHEN WE REACH THAT TENTATIVE RELEASE DATE OF THE FIVE-YEAR TERM, WE ARE SUPPOSED TO SUDDENLY LET THE INMATE GO ON THE 13-YEAR TERM. IF HE WENT TO A PROBATION TO FOLLOW AND THAT PROBATION WAS REVOKED, THEN WE ARE CHARGED WITH GIVING HIM PRISON CREDIT, AND THAT PRISON CREDIT IS COMPRISED OF TIME SERVED,

UNFORFEITED GAIN TIME, TO WHICH SOME GAIN TIME, IF IT IS AFTER 10-1-89, IT SUBJECT TO FORFEITURE. WE HAVE APPLIED BASIC GAIN TIME, INCENTIVE GAIN TIME, AND THEN THERE IS THIS HUGE GAP THAT WE BELIEVE IS, PROBABLY, COURT-ORDERED GAIN TIME. THIS GOES JUST BEYOND THE 85 PERCENT REQUIREMENT. IT GOES TO HOW WE CALCULATE SENTENCES AND DETERMINE RELEASE DATES. TO US, THAT WAS A 13-YEAR DETERMINE -- TERM, WHEN -- A 13-YEAR TERM, WHEN HE CAME IN.

BUT THE COURT AND THE FIRST DISTRICT SAID, NO, IT IS A FIVE-YEAR SENTENCE. IF YOU LOOK AT IT, IT SOLVES THE CALCULATION PROBLEM FOR THE DEPARTMENT OF CORRECTIONS.

IF IT IS REALLY CLEAR THAT WHAT THEY ARE DOING IS IMPOSEING A FIVE-YEAR SENTENCE, BUT I HAVE HEARD TWO THINGS HERE. I HAVE HEARD, IN ONE INSTANCE, IT IS A FIVE-YEAR SENTENCE, AND THEN WE WOULD TAKE OUR STATUTE AND APPLY THE 85 PERCENT REQUIREMENT, OR IF IT IS NOT A 85 PERCENT REQUIREMENT, TOLD WE WOULD APPLY 944.275, TO CALCULATE SOME SORT OF RELEASE DATE. OR --

HOW MANY CASES LIKE THIS, THOUGH, ARE THERE OUT THERE? THAT IS BECAUSE OBVIOUSLY ONE OF THE PRACTICAL SOLUTIONS TO THIS IS FOR THE DEPARTMENT TO SEND OUT A BULLETIN TO THE STATE ATTORNEYS AND SAY DON'T DO THAT! THIS IS CAUSING ALL KINDS OF PROBLEMS FOR US. AND CAN YOU QUANTIFY THIS -- THIS LOOSE, TO ME, TO BE VIRTUALLY A ONE-OF-A-KIND, AND CAN YOU QUANTIFY, OR HAS THE DEPARTMENT ATTEMPTED TO QUANTIFY AND SAY, MY GOSH, ALL OF A SUDDEN WE HAVE GOT TRIAL JUDGES ALL OVER THE STATE OF FLORIDA THAT ARE DOING THIS? HAS THE DEPARTMENT CITED OTHER INSTANCES?

WELL, I CAN'T TELL AWE EXACT FIGURE. I CAN TELL YOU IT IS AN EVER-INCREASING NUMBER, AND I CAN TELL YOU IT IS NOT -- I CAN'T TELL YOU AN EXACT FIGURE. I CAN TELL YOU IT IS AN EVER-INCREASING NUMBER AND IT IS INCREASINGLY COMMON NOW. I CAN TELL YOU THERE IS A SITUATION WHERE A LIFE SENTENCE THAT WAS IMPOSED COTERMINUSLY WITH A PAROLE OUT OF ANOTHER STATE.

AND THAT WAS AGREED TO BY THE STATE.

YES, IT WAS.

OKAY. BUT ISN'T THAT, IN OTHER WORDS, YOU HAVE YOUR BROTHERS OR SISTERS OVER IN ANOTHER STATE OFFICE, CREATING THESE PROBLEMS FOR YOU, AND SHOULDN'T THAT BE PRIMARILY WHERE THE SOLUTION IS? I AM BASING THAT ON THE FACT THAT EVERYBODY SEEMS TO HAVE AGREED HERE, ON THIS RECORD, THAT IF THIS IS WHAT THE GOAL WAS, THAT A SENTENCE COULD HAVE BEEN CONSTRUCTED TO ACCOMPLISH THIS, JUST, YOU KNOW, IN ANOTHER FORM, AND --

THAT IS PROBABLY TRUE. BUT THIS COURT EVEN VERY RECENTLY, RECOGNIZED, IN HE WOULD RIDGE, A VERY SIMILAR -- IN ELDRIDGE, A VERY SIMILAR SITUATION, WHERE THE DEFENSE ATTORNEY AND THE COUNSEL FOR THE AND THE COUNSEL AND THE COURT AGREED TO A SENTENCE, AND THEY EXPECT THAT THERE IS GOING ON TO BE AN AMOUNT OF TIME SERVED ON THAT SENTENCE, AND BECAUSE OF FORFEITURE PENALTIES THAT ARE SOLELY WITHIN THE JURISDICTION OF THE DEPARTMENT OF CORRECTIONS, THAT SENTENCE MAY EVEN EXCEED THE SENTENCE THAT WAS IMPOSED. IN OTHER WORDS THE PENALTY MAY CAUSE HIM TO SERVE LONGER THAN THAT, THAT SENTENCE THAT WAS IMPOSED AND AGREED UPON, AND THERE IS NO OBLIGATION FOR THE DEPARTMENT TO APPEAL THAT SENTENCE. IT IS -- IT APPLIES AS FORFEITURE PENALTY, AND IF THEY DON'T LIKE THAT, THEN THEY HAVE TO SET ASIDE THE PLEA, AND THERE ARE NUMEROUS CASES WE HAVE CITED IN THE BRIEF THAT DEAL WITH GAIN TIME AND OTHER MATTERS THAT ARE, LIKE VISITATION, GROOMING, AND MEDICAL ORDERS.

I THINK YOUR TIME IS UP. THANK YOU VERY MUCH. THANK YOU, COUNSEL. THE COURT WILL BE

IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE RISE.