James Lee Hall v. State of Florida

MR. CHIEF JUSTIE: GOOD MORNING AND I WOULD LIKE TO, ESPECIALLY, WELCOME THE, OUR FORMER COLLEAGUE JUSTICE OVERTON'S CLASS FROM UNIVERSITY OF FLORIDA LAW SCHOOL ON STATE CONSTITUTIONAL LAW AND APPELLATE ADVOCACY. WE ARE VERY PLEASED THAT YOU ALL COULD JOIN US THIS MORNING. THE NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS JAMES LEE HALL VERSUS STATE.

MAY IT PLEASE THE COURT. MY NE S TATJANA OSTAPOFF, APPEARING ON BEHALF THE PETITIONER JAMES HALL. HE ENTERED PLEAS TO SEVERAL OFFENSES, UNNEGOTIATED, OPEN, NO CONTEST PLEAS, TO SEVERAL OFFENSES, INCLUDING GRAND THEFT AND DEALING IN STOLEN PROPERTY, AND HE WAS ADJUDGED GUILTY AND BASICALLY SENTENCEED TO CONCURRENT TERMS OF FIVE YEARS IN PRISON. WE HAVE THE FIRST APPEAL RELATING TO THE PRIOR CONVICTION FOR, BOTH, DEALING IN STOLEN PROPERTY AND GRAND THEFT. THE SECOND ONE, OF COURSE, ATTACKS THE CONSTITUTIONALITY OF THE CRIMINAL PUNISHMENT CODE, PURSUANT TO WHICH SENTENCE WAS IMPOSED IN THESIS CASES. AS TO THE FIRST ISSUE --

THE DISTRICTCOURT CERTIFIED THE CONFLICT, CORRECT?

CORRECT.

AND WHAT WAS THE ISSUE THEY CERTIFIED CONFLICT?

IT IS CLEAR THAT, IF THIS WERE TO GO TO TRIAL, CONCERNING GRAND THEFT AND DEALING IN STOLEN PROPERTY, BOTH COICTIONS WOULD BE ILLEGAL. THE QUESTION REMAINS IS WHETHER THAT PROHIBITION APPLIES WHEN THE DEFENDANT HAS PLEADED NO CONTEST OR GUILTY IN THIS CASE.

YOU SAID IT WOULD BE ILLEGAL. THAT IS BECAUSE OF THE STATUTE?

THAT'S CORRECT.

ARE YOU MAKING A SECOND, DOUBLE JEOPARDY ARGUMENT, THAT, UNDER THE FACTS OF THIS CASE, THAT THERE COULD BE CONVICTIONS FOR BOTH OF THOSE?

I AM NOT, BECAUSE THERE ARE SEPARATE ELEMENTS FOR EACH OF THESE OFFENSES.

THOSE ARE STATUTORY CONSTRUCTIONS.

THAT'S CORRECT, YES.

DO WE HAVE, EXCUSE ME, DO WE HAVE A PRESERVATION ISSUE HERE?

I DON'T THINK SO, BECAUSE THERE WAS NO OBJECTION RAISED BELOW. THIS, THESE COICTIONS, IF THE STATUTE DOES APPLY, THAT MEANS THAT THE DUAL CONVICTIONS ARE ILLEGAL. THEY COULD NOT BE ENTERED. IT IS, THE COURT IN RAMEY SAID, THE FIRST DISTRICT, IT IS AS THOUG HE WERE CONVICTED OF A CRIME WHICH DOES NOT EXIST, SO FOR THAT REASON IT WAS A FUNDAMENTAL ISSUE. IT DID NOT HAVE TO BE RAISED IN THE LOWER COURT.

WHEN WAS THIS PLEA ENTERED? THEY WERE CHARGED AS HAVING BEEN COMMITTED ON

FEBRUARY 20 OF '99.

RIGHT. I AM NOT -- I DON'T REMEMBER THE EXACT DATE.

OCTOBER 15 OF '99, THE TRIAL COURT ADJUDICATED THE APPELLANT GUILTY OF EACH OF THE OFFENSES.

LL GHT. SO THE PLEA WOULD HAVE BEEN ENTERED AT THAT TIME OR SOMEWHAT SLIGHTLY BEFORE THEN. THE CRIMINAL PUNISHMENT CODE DID APPLY. AND THE FLORIDA APPELLATE CRIMINAL APPEAL REFORM ACT, ALSO I THINK WOULD HAVE APPLIED IN THIS CASE. THE BRIEF IN THE APPELLATE COURT WAS FILED IN FEBRUARY OF 200. SO IT ISY RECOLECTIONHAT THE 3.850-B, 2-B AMENDMENT TO THE CRIMINAL, TO RULES OF CRIMINAL PROCEDURE, BECAME EFFECTIVE, I THINK, IN JANUARY OF THAT YEAR.

WHY DOESN'T THE PLAIN READING OF THIS STATUTE RUN AGAINST YOUR POSITION?

AINGE CLOSE READING OF THE STATUTE WILL DEMONSTRATE THAT IT DOES APPLY IN THIS SITUATION, ALTHOUGH THE WORDS, THE STATUTE DOES SPEAK IN TERMS OF THE TRIER OF FACT MAY RETURN A GUILTY VERDICT ON ONE OR THE OTHER BUT NOT BOTH OF THE COUNTS, BUT IF YOU READ THE REST OF THAT STATUTE, IT IS CLEAR THAT THE POINT OF IT IS TO PRECLUDE OR TO ADDRESS THE PROBLEMS IN CONSISTENT VERDICTS. WHEN THE LEGISLATURE DEFINED DEALING IN STOLEN PROPERTY AND, ALSO, THEFT, IN THE OMNIBUS THEFT ACT, THEY CONSIDERABLY EXPANDED THE DEFINITION OF BOTH OF THOSE OFFENSES, AND AS THE STATE POINTS OUT IN ITS OWN BRIEF, BASICALLY ANY THEFT WOULD AUTOMATICALLY BECOME A DEALING IN STOLEN PROPERTY, BECAUSE THE DESCRIPTION, THE DEFINITION OF DEALING IN STOLEN PROPERTY IS SO BROAD. IT RELATES TO BUYING, RECEIVING, POSSESSING, OBTAINING CONTROL OF OR USING PROPERTY WITH THE INTENT TO SELL IT. WELL, ANY THEFT INVOLVES RECEIVING THE PROPERTY, OBVIOUSLY, OR OBTAINING CONTROL OF IT.

BUT IT MAY NOT NECESSARILY HAVE THAT INTENT NOT TO SELL IT.

OR ISSE F IT. EXCUSE ME. OR DISPOSE OF IT. I MEAN, IT IS INCREDIBLY BROADLY WRITTEN.

BUT IF I STOLE A WATCH AND INTENDED TO KEEP IT FOR MYSELF, I WOULD NOT, YOU WOULD NOT HAVE A DEALING IN STOLEN PROPERTY. THAT IS WHAT I AM TRYING --

YES. EXACTLY. AND THAT WOULD PROBABLY BE THE ONLY SITUATION WHERE THE DEAING IN STOLEN PROPERTY WOULD NOT APPLY BUT IN THE NORMAL COURSE OF EVENTS, MANY, MANY, MANY TIMES, THE INTENT OF THE PERSON TAKING THE PROPERTY IS NOT TO KEEP IT, BUT IT IS TO SELL IT OR OTHERWISE DISPOSE OF IT. PAWN IT.

WHY SHOULDN'T THERE BE TWO --

I AM NOT SAYING THAT THERE IS A JEOPARDY ISSUE, WITH RESPECT TO THESE TWO OFFENSES. WHAT I AM SAYING IS THAT THE LEGISLATURE, THE LAW HAD ALWAYS BEEN HAT YOU COULD NOT, TE THIEF COULD NOT BE CONVITED OF RECEIVING STOLEN PROPERTY, THAT THOSE WERE, REALLY, THAT WAS INTENDED, THOSE TWO CRIMES WERE INTENDED TO AND PLAY TO SEPARATE ACTORS NOT THE SAME ACTOR. THAT HAS CONSISTENTLY BEEN THE LAW.

WHY WOULD IT -- WHY WOULD YOU HAVE, THEN, A DIFFERENT RULE FOR ONE WHO GOES TO TRIAL AND ONE WHO DOES NOT GO TO TRIAL?

MY POINT IS THERE IS NO REASON TO HAVE A DIFFERENT RULE, AND MY POINT IS THIS STATUTE DOES NOT CREATE A DIFFERENT RULE. WHAT THIS STATUTE DOES, IT EVIDENCES THE LEGISLATIVE INTENT THAT THE LONG-STANDING PROHIBITION AGAINST DUAL CONVICTIONS

WILL STILL APPLY. WHAT IT DOES IS SPECIFICALLY ADDRESSES THE PROBLEM OF INCONSISTENT VERDICTS. IN OTHER WORDS WHAT IT IS TELLING THE COURTS OF THE STATE IS THAT THE STATE CAN CHARGE BOTH CRIMES. IT CAN CHARM THEFT AND DEALING IN STOLEN PROPERTY IN SEPARATE COUNTS, WHICH MAY BE CONSOLIDATED FOR TRIAL, ALL RIGHT, SO THE STATE IS NOT REQUIRED TO ELECT BETWEEN THOSE TWO OFFENSES. CHIEF CHIEF CHIEF JUSTICE LEWIS HAD A QUESTION.

IT SEEMS TO ME THAT YOU ARE RIDING ON A STATUTORY INTERPRETATION BASIS, AND IT SEEMS THAT WE NEED TO KNOW WHY THE PLEA WOULD SATISFY THE INTRODUCTORY PORTION OF THE STATUTE, WITH REGARD TO THE FINDER OF FACT. COULD YOU ADDRESS THAT, EITHER AT COMMON LAW OR HISTORICALLY, HOW A PLEA WILL SATISFY THE TERMS OF THE STATUTE, ITSELF.

I GUESS ABOUT I AM NOT QUITE UNDERSTAND -- I GUESS I AM NOT QUITE UNDERSTANDING THE QUESTION. WHEN A FACTUAL BASIS IS STATED, FOR THE PLEA IN THIS CASE, WHAT HAPPENED IN THIS CASE IS THAT THE EVIDENCE WAS THAT THE SAME PROPERTY WAS ALLEGED TO HAVE BEEN STOLEN BY MR. HALL AND WAS ALLEGED TO HAVE BEEN BASICALLY PAWNED BY MR. HALL, IN THE COURSE OF A SINGLE TRANSACTION. THAT IS THE FACTUAL BASIS. MR. HALL WAS NEVER QUESTIONED ABOUT HIS UNDERSTANDING THAT, BY PLEADING GUILTY, HE COULD, MIGHT OR WOULD BE WAVING HIS -- WAIVING HIS RIGHT, WHICH WOULD HAVE BEEN CLEAR, IF HE HAD GONE TO TRIAL. IF HE HAD GONE TO TRIAL THERE, IS NO QUESTION HE COULD NOT HAVE BEEN CONVICTED.

BUT ISN'T THAT A SEPARATE ISSUE FROM THE STATUTORY INTERPRETATION, AS TO THE VOLUNTARINESS OF APLA?

I DON'T THINK SO, BECAUSE THE PLEA COULD NOT HAVE BEEN -- IT COULD NOT -- YOU COULDN'T SAY THAT THIS WAS VOLUNTARY PLEA, IF IT WAS NEVER EVEN -- IF THAT ISSUE WAS NEVER EVEN ADDRESSED. I MEAN, THEY WERE SILENT AS TO THAT. THE STATUTE, WHAT IT DOES IS IT ALLOWS TO CONTINUE THE PROHIBITION THAT HAS ALWAYS EXISTED AGAINST DUAL CONVICTIONS FOR BOTH OF THESE OFFENSES.

WHAT -- I MEAN, IF IT IS NOT A DOUBLE JEOPARDY PROBLEM, IF YOU ARE TALKING ABOUT TWO DIFFERENT ACTS, THEN WHAT -- YOU ARE TALKING ABOUT TWO EXISTING CRIMES, TWO SEPARATE CRIMES, JOHN SOMEONE, WHY ISN'T -- TWO SEPARATE CRIMES, SOMEONE, WHY ISN'T IT A KNOWING AND VOLUNTARY ELECTION TO SAY I ELECT TO PLEAD TO THESE TWO EXISTING SEPARATE CRIMES?

I AM NOT SAYING THAT THAT COULD NEVER HAPPEN. WHAT I AM SAYING IS, AMPBLTHS IF IN HE OTER SITUATIONS WHERE A PLE HAS BEEN DEEMED TO WAIVE, LET'S SAY DOUBLE JEOPARDY RIGHTS THAT, IS THE NOVELTON CASE, THERE HAVE BEEN NEGOTIATIONS. THERE HAS BEEN SOMETHING THAT THE DEFENDANT HAS RECEIVED IN EXCHANGE FOR HIS WILLINGNESS TO GIVE UP WHAT WOULD OTHERWISE BE A CLEAR RIGHT. THAT DOESN'T EXIST IN THIS CASE. THERE WERE NO --

AGAIN, THAT IS WHY I ASKED YOU, THERE IS NO DOUBLE JEOPARDY CONSTITUTIONAL IMPLICATION IN THIS PLEA. ISN'T THAT --

HE HAS AN ABSOLUTE STATUTORY RIGHT, WHICH AT LEAST AS STRONG, I MEAN AT LEAST AS STRONG.

THAT IS WHAT WE GO BACK TO, AS TO WHETHER -- THERE IS AN ACTUAL STATUTORY RIGHT, IF HE WENT TO TRIAL.

ABSOLUTELY. THERE IS NO QUESTION ABOUT THAT.

WHAT IF HE WENT TO TRIAL AND DID NOT INVOKE THE PROVISIONS OF THIS STATUTE? WOULD HE STILL BE ENTITLED TO RAISE THE STATUTE ON APPEAL?

YES, HE WOULD.

AND WHERE DO YOU GET THE AUTHORITY FOR THAT?

THERE ARE CASES THAT ARE CITED IN THE BRIEF WITH RESPECT TO. THAT I MEAN THAT HAS BEEN CONSISTENT. THERE IS, YOU KNOW, ANY NUMBER OF CASES THATHAVE HELD THAT.

ON THIS QUESTION?

YES. YES.

IN OTHER WORDS THIS STATUTE, AFTER SOMEBODY HAS GONE TO TRIAL HAS BEEN INVOKED ON APPEAL.

YES.

WITHOUT PRESERVING THE ISSUE IN LOWER COURT.

BECAUSE THE STATUTE ACTUALLY PREINCLUDES THE DUAL CONVICTION.

ARE THERE ANY FACTUAL DISPUTES IN THIS CASE THAT WOULD HAVE TO BE RESOLVED, BEFORE WE COULD MAKE A DETERMINATION AS TO WHETHER THE STATUTE APPLIES, ASSUMING THAT WE FIND THE ASPECT OF WHETHER YOU HAVE TO GO TO TRIAL, IN YOUR FAVOR. ARE THERE ANY FACTUAL DISPUES?

THERE ARE NOT. IT WAS A VERY SHORT FACTUAL BASIS, BUT ALL THE REQUISITE REQUIREMENTS WERE CLEARLY STATED. THE STATE CONCEDED IT WAS THE SAME PROPERTY. IT DID HAPPEN THE SAME DAY. BASICALLY IT WAS ALL PART OF ONE COURSE OF CONDUCT, SO THERE ARE NO ADDITIONAL FACTS THAT WOULD NEED TO BE DEVELOPED.

DO YOU HAVE A SECOND ISSUE?

I DO HAVE A SECOND ISSUE, WHICH IS THE CONSTITUTIONATY OF THE CRIMINAL PUNISHMENT CODE. AND BASICALLY WE ARE RELYING ON A DUE PROCESS ARGUMENT THAT THE CODE, THE WAY IT IS SET UP AT THIS, THE WAY THAT IT IS SET UP, VIOLATES DUE PROCESS, AND MAINLY IN THE DUE PROCESS ARGUMENT, YOU HAVE A RECENT, THE REMEDY THAT THE LEGISLATURE HAS FASHIONED MUST BEAR A REASONABLE RELATIONSHIP TO THE PROBLEM THAT IT IS ADDRESSED, AND IT MUST NOT BE UNUNUSABLE, ARBITRARY OR CAP RISH US, AND -- CAPRICIOUS. FURTHER, THERE WAS THE NONDISCOVERY REQUIRED OF THE STATE BUT NOT TO PARTICIPATE. THERE HAS BEEN GRAFT TO THAT DUE PROCESS REQUIREMENT. IN ADDITION THE BALANCE OF THE FORCES BETWEEN THE STATE AND THE DEFENDANT. IN OTHER WORDS, IN WORDIOUS, THE SUPREME COURT MADE IT CLEAR THAT THERE CAN FOR THE AND ONE-SIDED, UNILATERAL REQUIREMENT FOR THE DEFENDANT TO GIVE EVERYTHING UP AND THE STATE GIVES UP NOTHING AND THE DEFENDANT IS AT A DISADVANTAGE.

YOU ARE NOT STATING THAT THE LEGISLATURE COULD DO AWAY WITH THE SENTENCING GUIDELINES ENTIRELY?

I DO NOT.

AND SO WHAT YOUR ARGUMENT IS, AS I UNDERSTAND IT, IS THAT THERE IS A DUE PROCESS VIOLATION BECAUSE OF THE WAY THAT THE LEGISLATURE HAS SOUGHT TO IMPLEMENT

GUIDELINES.

THAT IS EXACTLY CORRECT.

DOES THIS RELATE TO, YOU SAID OF COURSE IT IS AN UNEVEN PLAYING FIELD BETWEEN THE STATE AND, HAD HERNT -- INHERENTLY, BUT AS TO THE WAY THAT THIS CODE WORKS OUS OUT, AS FAR AS APPELLATE REALM -- WORKS OUT, AS FAR AS APPELLATE REMEDIES, IS THERE SOME PART OF YOUR ARGUMENT THAT TALKS ABOUT HOW THIS STATUTE CHANGED APPEAL RIGHTS, AND IS THAT PART OF YOUR CONSTITUTIONAL ARGUMENT?

YES. THAT IS PART OF IT AND, ALSO, THE SETTING OF WHAT -- THE SENTENCNGGUIDELINES ARE DESIGNED, HAVE BEEN DESIGNED IN THE PAST, TO ELIMINATE DISPARITY IN SENTENCING. THE LEGISLATURE HAS, IN ENACTING SENTENCING DEADLINES, THEY HAVE DEVELOPED FACTORS THAT WILL BE CONSIDERED, IN ARRIVING AT A, IN THE PAST AT A PRESUMPTIVE SENTENCE, PRESUMPTIVE GUIDELINE SENTENCE WACHT HAS HAPPENED, NOW IN THIS -- WHAT HAS HAPPENED, NOW, INTSCENT PUNISHMENT CODE IS THERE IS NO LONGERA PSUMPTIVEUIDELINENTENE THERE. IS ONLY A LOWEST PERMISSIBLE GUIDELINE SENTENCE. NEFERDZ THE TRIAL COURT -- IN OTHER WORDS, THE TRIAL COURT -- IN OTHER WORDS, WHEN WE HAVE NO GUIDELINES AT ALL, THE TRIAL COURT DOES HAVE DISCRETION TO IMPOSE ANY SENTENCE FROM THE MINIMUM UP TO THE STATUTORY MAXIMUM.

THAT, IN AND OF ITSELF, IS A RANGE, CORRECT?

CORRECT.

THAT THERE IS A STATUTORY RANGE.

YES. THAT'S RIGHT. AND THE LEGISLATURE HAS SAID --

THAT THERE IS A SENTENCE WHICH EXCEEDS THE STATUTORY CHAIPING, THEN IT IS, THERE IS PERMITTED TO BE -- STATUTORY RANGE, THEN IT IS, THERE IS PERMITED TO BE AN APPEAL, CORRECT?

YES. IF THAT IS THE SYSTEM. IF IT IS NOT A GUIDELINE SYSTEM, THEN THAT'S CORRECT. YES. NOW WE HAVE THE GUIDELINES, IN A WAY. WE HAVE GUIDELINES THAT SAY --

THERE IN LIES THE QUESTION.

WE HAVE GUIDELINES THAT SET A LOWTPERMISSIBLE SENTENCE, A SENTENCE BELOW WHICH THE COURT CANNOT GO, ABSENT A DEPARTURE REASON, AND ONLY THE STATE CAN APPEAL A DEPARTURE. WE HAVE GUIDELINES THAT CAN RESULT IN A SENTENCE THAT EXCEEDS THE STATUTORY MAXIMUM, BECAUSE IF THE GUIDELINES POINT RESULT IN A SENTENCE, A LOWER PRESUMPTIVE SENSE THAT IS HIGHER THAN STATUTORY MAXIMUM, STATUTORY MAXIMUM DOESN'T APPLY ANYMORE. YOU APPLY A HIGHEST GUIDELINE SENTENCE. BUT WE HAVE NO LIMITATION, NO COUNTERVAILING ON THE OTHER SIDE LIMITATION, ON THE MAXIMUM SENTENCE THAT THE GUIDELINES GRANT THE DEFENDANT.

I THOUGHT THE STATUTORY MAXIMUM --

IF THE GUIDELINES ARE BELOW, THE SENTENCE IS ABOVE THERE. THERE IS NO MAXIMUM SENTENCE ANYMORE. TOTALLY APART FROM THE CONSIDERATION OF HABITUAL OFFENER, PRISONRELEASEE, TOTALLY APAT FROM ALL OF THAT.

EITHER THE GUIDELINE SENTENCEORITY MAXIMUM SENTENCE, ONE OR THE OTHER WOULD HAVE TO BE THE OUTER PERIMETER.

YES. WELL, YES. > SO THERE IS A MAXIMUM.

THERE IS, BUT NOT ANYTHING THAT THE DEFNDANT N GET ANY BENEFIT OUT OF. IN OTER WORDS --

HE HAS TO GET A BENEFIT OUT OF IT?

BASICALLY THAT IS OUR POSITION MUCH THE WAY IT IS SET UP NOW, IT S TOTALLY ONE-SIDED. THE STATE GETS THE LOWEST SENTENCE. THE DEFENDANT DOESN'T GET THE HIGHEST SENTENCE, OTHER THAN POTENTIALLY THE STATUTORY MAXIMUM. EVEN THAT, HE DOESN'T NECESSARILY GET.

I UNDERSTAND YOUR ARGUMENT THAT IT SEEMS TO BE WEIGHTED TOWARDS THE PROSECUTION.

SOMEWHAT, YES.

BUT CAN THE LEGISLATURE NOT DO THAT?

WELL, IT IS OUR POSITION --

WHAT, CONTUSIONALLY, IS PROHIBITIVE OF THAT?

IT IS OUR POSITION THAT --

ESPECIALLY WHEN YOU CONSIDER THE LANGUAGE UNDER WHICH IT FLIES. WE WANT PUNISHMENT TO BE THE PRIMARY OBJECTIVE HERE, REHABILITATION IS INSIDE HE DENIAL, SO WHEN -- IS INCIDENTAL SO WHEN THEY START OUT WITH THAT PREMISE, YOU KNOW IS SORT OF LOADED FROM THERE, ON.

YES. IT IS LEVEL LOADED.

BUT WHAT IS WRONG WITH IT?

OUR POSITION IS, AND I THINK I CAN MAKE IT, PERHAPS, MORE CLEAR, IF I GO BACK TO THE IDEA THE STATE HAS THE RIGHT TO APEA HEE. THE STATE HAS THE RIGHT TO APPEAL A DOWNWARD DEPARTURE. NOW, NORMALLY THE STATE APPEAL OF A SENTENCE, IF THE STATE WERE TO WIN IT, WOULD VIOLATE, AND THEN THE DEFENDANT WOULD GET REMANDED BACK AND RESENTENCED TO A HIGHER TERM. THAT WOULD VIOLATE DOUBLE JEOPARDY. ALL RIGHT. BECAUSE YOU CANNOT BE RESENTENCED TO A HIGHER TERM. NOW, IN DEPRAN CHESS CO,-OPEN DE -- IN DE FRANCESCO, AND IN OUR CASE THAT IS WHAT WE ARGUED IN THE BRIEF, IT DID NOT VIOLATE DOUBLE JEOPARDY FOR THE STATE TO APPEAL A SENTENCE, AND THE REASON THE U.S. SUPREME COURT SAID THAT IS BECAUSE WE HAVE A GOAL OF REDUCING DISPARITY IN SENTENCING, BY ALLOWING THE STATE TO APPEAL. NOT ONLY DOES THE STATE GET THE BENEFIT OF THE APPEAL, BUT THE DEFENDANT GETS THE BENEFIT, BECAUSE THIS WHOLE SYSTEM THAT HAS BEEN SET UP, WHICH REQUIRES ALLOWING STTE TOAPPEAL, IN OTHER WORDS THE SENTENCING GUIDELINE SYSTEMS IS BASICALLY WHAT THEY ARE TALKING ABOUT, HAS BEEN FITS TO THE DEFENDANT AS WELL A O THE STATE. IT REDUCES DISPARITY IN SENTENCE SO THE DEFENDANT GETS SOME BENEFIT OUT OF THAT, AND SO IT IS ALL RIGHT THAT, IN THE COURSE OF GETTING THAT BENEFIT, HE, ALSO, GIVES UP SOME OF HIS DOUBLE JEOPARDY RIGHTS AGAINST BEING PLACED TWICE IN JEOPARDY AND POSSIBLY BEING RESENTENCED TO A HIGHER TERM. MR. CHIEF JUSTICE: YOU ARE WELL INTO YOUR RBUTTAL TIME.

I AM SORRY. BU ITHINK THAHEPIT BING THAT THERE WAS, IN DE FRANCESCO, THERE WAS AN IDEA THAT THIS BENEFITED BOTH PARTIES. THE DEFENDANT GAVE SOMETHING UP, BUT HE, ALSO, GAVE SOMETHING BARKS AND THAT IS EXACTLY WHAT WE ARE MISSING IN THE CRIMINAL

PUNISHMENT CODE, BOTH WITH RESPECT TO THE GUIDEINE SENTENCES, THEMSELVES, AND ALSO WIH THERESPECT TO THE RIGHT TO APPEAL.

LET ME ASK YOU ONE QUESTION BEFORE YOU SIT DOWN. COULD THE LEGISLATUREAKE EACH CRIME AND PLOT OUT A RANGE OF PUNISHMENT FOR THE CRIME?

YES. YES.

INSTEAD OF HAVING THIRD-DEGREE FELONIS OR SECOND-DEGREE FELONIES, ANY CRIME, COULD THEY GO OUT OF RANGE OF PUNISHMENT FOR THE CRIME?

YES.

AND ISN'T THAT WHAT WE HAVE HERE?

NO, BECAUSE THESE ARE NOT MANDATORY MINIMUMS THAT APPLY TO EVERY SINGLE CRIME. THEY ARE SUPPOSED PRESUMPTIVE LEAST-PERMISSIBLE SENTENCES THAT ARE BASED ON THE DEFENDANT'S BACKGROUND, SO YOU HAVE THIS VENEER OF WE ARE REDUCING SENTENCING DISPARITY. THE WAY, THE REASON THEY COME TO THIS LOW PERMISSIBLE SENTENCE, BACKGROUND, NATURE OF THE CRIME AND SO ON AND SO FORTH, IT IS NOT AN AUTOMATIC MANDATORY MINIMUM SENTENCE, BUT IN EFFECT, WHAT IS ACTUALLY HAPPENING IS THEY ARE PRODUCING -- WHAT IS EFFECTIVELY A MANDATORY MINIMUM SENTENCE, BECAUSE YOU KNOW, WITHOUT THE DEFENDANT HAVING ANY UPPER LIMIT, ANY UPPER GRTION. SO IF THEY WERE TO GO THROUGH AND SAY FOREVERYARMD ROBBERY, THIS IS GOING TO BE THE MINIMUM SENTENCE AND THAT WOULD BE THE MAXIMUM SENTENCE, THAT WOULD APPLY ACROSS THE OARD, BUT IN THIS CASE -- MR. CHIEF JUSTICE: COUNSEL, YOUR TIME IS UP.

I AM SORRY. THEY ARE TRYING TO COMBINEBOH SYSTEMS, BUT NL WHHE AE ETNG E ENIT F T THAK YOU VERY MUCH. . HIFUSTCE: MS. MILLSAPS.

MAY IT PLEASE THE COURT. CHARLENE MILLSAPS REPRESENTING THE STATE. FIRST OF ALL, THERE IS NO COLIT BETEENTHE HALL CASE AND VICTORY, THE CASE THEY CERTIFIED WITH. IN VICTORY,THE DEFENDANT HAD RAISED THIS ISSUE AND SPECIFICALLY PRESERVED HIS RIGHT TO APPEAL. HALL DID NOT DO THAT. HALL, AT NO POINT, HASESVD THIS CHALLENGE.

BUT WITHOUT PRESERVATION ISSUE, HOWEVER, WE, THE VICTORY A CASE WHERE THEY VE PLED AND SAID YOU COULD NOT HAVE THE TWO CONVICTIONS?

YES, THEY DID.

BUT IN THIS CASE WE HAVE SOMEONE PLEADING AND SAYING YOU CAN HAVE THE TWO.

YES. THEY CAN CONFLICT ON THAT. OKAY. BUT IN ONE, HE DID PRESERVE IT, AD IN THE OTHER HE DID NOT.

IS THAT ANISS IN THE STICTCOU, THE PRESERVATION?

IN VICTORY? NO.

NO. IN THIS CASE.

NO. THEY DIDN'T REFER TO THAT. THE FOURTH DCA'S HALL DECISION?

YES.

NO. THEY DIDN'T SEEM TO REFER.

WAS IT RAISED BY THE STATE?

IT WAS RAISED IN OUR BRIEF IN FRONT OF THIS COURT. I AM SORRY. I DON'T KNOW WHAT -- I DID NOT HANDLE THE CASE. I DON'T KNOW WHAT THE BRIEF DID IN FRONT OF THE FOUR. E OTHER THING HE DID IS HE AFFIRMATIVELY WAIVED THIS. THIS IS VERY UNIQUE FROM VICTORY. HE ENTERED A WRITTEN PLEA AGREEMENT, IN PARAGRAPH F OF THAT PLEA AGREEMENT, WAIVES THE RIGHT TO APPEAL ANYTHING. OKAY. WE HAVE AN UNIQUE PLEA AGREEMENT HERE, IN THAT HE HAS WAIVED -- HE SHOULD HAVE -- HE WAIVED THE RIGHT TO APPEAL ANYTHING HERE, IN THE TERMS OF THIS WRITTEN PLEA AGREEMENT, SO THIS IS NOT JUST A FAILURE TO BRING IT TO THE ATTENTION THIS. IS AN AFFIRMATIVE WAIVER OF THE RIGHT TO ANY APPEAL. NOW, HE CAN BRING IT COLLATERALLY.

CAN HE AGREE TO AN ILLEGAL SENTENCE BY WAIVER?

COULD HE AGREE BY WAIVER?

AN ILLEGAL SENTENCE.

DON THINK HE COUD BY WAIVER. BY WAIVER, HE COULD. IF HE KNOWS ANY WAY, YES. I MEAN, THAT IS A RHT, LIKE ANYTHING ELSE. I THINK, WHEN YOU HAVE AN AFFIRMATIVE WAIVER, IT IS DIFFERENT, YOUR HONOR MUCH, THAN -- YOUR HONOR, THAN JUST I DON'T THINK YOU CAN ACCIDENTALLY AGREE TO AN ILLEGAL SENTENCE.

COULD HE, ALSO, BY WAY OF A WAIVER, AGREE TO CONVICTION FOR A NONCRIME?

YES. I HIYOU CAN, AS LONGAS -- YOU CAN WAIVE ANYTHING, INCLUDING THAT, IF -

HASN'T THIS COURT HELD TO THE CONTRARY, IN A CASE CALLED BAITS? ARE YOU FAMILIAR WITH BAITS?

-- BATES?

A CAPITAL CASE?

YES.

IN ICHEE WAAN ASSERTION, THERE, THAT THEREAS A WAIVER OF OF, OBVIOUSLY THAT WAS A SENTENCING SITUATION, BUT THIS COURT HELD THAT IT WOULD, A LIFE WITHOUT PAROLE SENTENCE WOULD HAVE BEEN A SENTENCE WHICH WOULDHAVE BEEN ILLEGL, AND THEREFORE COULD NOT BE SUBJECT OF A WAIVER.

OKAY. BUT NOW, IN BATES, IF I REMEMBER BATES RIGHT, WHAT HAPPENED WAS, WHEN HE COMMITTED THE CRIME, HE COULD BE PAR ROLLED, RIGHT?

THAT'S CORRECT.

AND THEN, WHAT HE WANTED TO DO WAS WAIVE THAT AND TELL THE JURY I CAN'T BE PAR ROAD -- PAR ROLLED, AND, YERTION YOU DID HOLD THAT, BUT -- TELL THE JURY I CAN'T BE PAROLEED, YES, YOU DID DO THAT, BUT HE IS NOT ENTITLED TO THE BENEFIT OF ANY STATUTE, WHETHER IT BENEFITS OR IS AGAINST HIM, SO I THINK THAT RAISED THT CONSTITUTIONAL -- BATES RAISED THE MISCELLANEOUS CSTITIL PROVISION WHICH IS DIFFERENT HERE. OKAY. MOREOVER, IT IS NOT REALLY CLEAR WHETHER THIS IS AN ILLEGAL SENTENCE. I DO HAVE, ON THE MERITS, SO TO SPEAK, THESE CONVICTIONS RE NOT BARREDYTHIS STATUTE, GAREFETER THERE IS A TRIAL OR A PLEA. IFT,URONR,THE LEGISLATIVE HISTORY OF THIS ENTIRE, THE MODEL THEFT AND ANTI-

THEFTING STATUTE, MAKES IT CLEAR THAT WHAT THEY WERE DOING HERE WAS THEY WERE WORRIED ABOUT THE FENCE, NOT THE PERSON WHO STEALS AND THEN PAWNS F YOU A AND THEN PAWN- AND THEN PAWNS. IF YOU STEAL AND THEN PAWN SOMETHING, IT IS NOT ONE COURSE OF CONDUCT, AND YOU ARE NOT PROTECTED BY THIS STATUTE.

SO NOW WE ARE GOING BACK TO, SORT OF, THE BASICS.

THE VERY BASICS.

YOU ARE SAYING THAT, IF THIS CASE WENT TO TRIAL.

EVEN IF IT WENT TO TRIAL.

THAT THE PLAIN LANGUAGE OF THE STATUTE ALLOWS TWO SEPARATE CONVICTIONS?

ALLOWSTO SEPARATE CONVICTIONS. ONLY A BUYER OF GOODS IS THE ONE WHO IS PROTECTED, UNDER THIS STATUTE.

WOULD THAT BUYER BE PROTECTED ALSO, UNDER, WOULD YOU SAY IT REALLY IS IRRELEVANT WHETR THE PERSON WENT TO TRIAL OR PLED GUILTY, IF THEY ARE THE FENCE, THEY CAN'T BE CONVICTED OF BOTH?

YES. I WOULD SAY HE CAN'T BE CONVICTED OF BOTH. NOW, REMEMBER HE IS AN UNIQUE BUYER, NOT JUST ANY BUYER. IT IS A BUYER WHO TRULY HAD NO INVOLVEMENT IN THE UNDERLYING THEFT. WHAT HAPPENED HERE, WHERE THIS STATUTE COMES FROM HIS A LAW REVIEW -- COMES FROM, IS A LAW REVIEW. PROFESSOR BAKERY OF CORNELL WROTE A LAW REVIEW. THE LEGISLATURE, THEN, PICKED UP THAT LAW REVIEW AND PASSED THE MODEL ACT ATTACHED TO THAT LAW REVIEW, SO WHAT THIS LAW REVIEW LAYS OUT, AND HE IS AN EXPERT IN ORGANIZED CRIME, AND WHAT THEY ARE TRYING TO GET HERE IS THE FENCE, BUT WHAT THEY ARE WORRIED ABOUT IS THIS. AT COMMON LAW YOU HAD THE CRIME OF LARCENY, AND THEN ANYBODY WHO WAS A RECEIVER OF STOLEN PROPERTY, OKAY, BECAME AN ACCESSORY AFTER THE FACT OF THE LARCENY, BUT, IN FACT, COULD NOT BE CONVICTED OF THE LARCENY.

IF A PLEAD OR STEALS SOMETHING AND THEN SELLS IT WITHIN THE HOUR HE WOULD NOT BE PRCTED Y THIS?

NO. IT IS ONLY THE BUYER.

WHAT WOULD THETATUTE PROTECT THEN?

A BUYER WHO --

IT SAYS, QUITE CLEARLY, THAT HE CAN BE CHARGED FOR THEFT AND DEALING IN STOLEN PROPERTY IN CONNECTION WITH ONE SCHEME OR COURSE OF CONDUCT.

THAT IS --

BUT THE FACT IS THE TRIER OF FACT CAN RETURN A GUILTY VERDICT ON ONE OR THE OTHER. WHAT DOES THAT MEAN?

THE CRITICAL LANGUAGES THE SCHEME OR COURSE OF CONDUCT. THAT IS THE ONE CRITICAL FACTOR HERE. HN STL ANDTEN RN AROUND AND SELL, THAT, BY DEFINITION IS NOT ONE COURSE OF CONDUCT. THAT IS TWO. WHAT WE WERE WORRIED ABOUT HERE IS, WHEN WE CHANGED TO THE OMNIBUS THEFT STATUTE, ANY BUYER AUTOMATICALLY BECAME NO LONGER AN ACCESSORY TO THE LARCENY AFTER THE FACT. HE BECAME A PRINCIPLE TO -- A PRINCIPAL TO

THE UNDERLYING THEFT, EVEN THOUGH HE HAD NO INVOLVEMENT, AND THAT IS THE PERSON THIS STATUTE IS DESIGNED TO PROTECT AND ONLY THAT PERSON.

HOW HAVE THE DISTRICT COURTS OF APPEAL INTERPRETED THE STATUTE?

THEY HAVE NOT GONE INTO THE LEGISLATIVE HISTORY AS DEEPLY AS --

I REALIZE THAT, BUT MY QUESTION IS HOW, THEY HAVE INTERPRETED THE STATUTE THE WAY THAT JUSTICE --

YES. THE DISTRICT COURTS HAVE NOT GONE INTO THE LEGISLATIVE HISTORY AND DON'T REALIZE WHERE THIS STATUTE CAME FROM.

IS THERE ANY DISTRICT COURT DECISION THAT HAS INTERPRETED THE STATUTE THE WAY THAT YOU ARE ADVOCATING?

TWO PRETTY CLOSE, AND THEY ARE THE FIRST DCA CASES. OKAY. THE, THIS COURT, IN HALL, RELYIES ON RELIES ON BROWN, AND IN BROWN THEY SAY IT. THEY USE THE LANGUAGE AND SAY, LOOK, THIS DOESN'T APPLY TO A PLEA, BUT IN THE EARLIER CASE CRIED, THE COLVAN CASE CITED IN THE STATE'S BRIEF DOES, INDEED, LAY SOME OF THIS LEGISLATIVE HISTORY OUT, SO THE FIRST DAS DOING, THIS BECAUSE THEY SEEM TO BE MORE AWARE OF THE LEGISLATIVE HISTORY OF THIS STATUTE.

THERE IS ONLY ONE WAY TO AD THEFT AND DEALING IN STOLEN PROPERTY, AND THAT IS DISJUNKT I FEEL.

I AGREE WITH -- GIST JUNKTIVELY.

I AG -- DISJUNCTIVELY.

I REALIZE THAT, YOUR HONOR, BUT THIS IS NOT ONE COURSE OF CONDUCT. THE BUYER, WHO HAS THE MERE ACT OF BUYING --

BUT YOU WOULDN'T NEED YOUR COURSE OF CONDUCT, IF YOU PURSUER YOUR ARGUMENT, WOULD YOU?

ON, YES, YOU DO. -- OH, YES, YOU DO.

HOW IS THAT?

THE BUYER WOULD BE PROTECTED, BECAUSE BY THE MODEL ACT, HE BECOMES GUILTY OF TWO CRIMES. HE BECOMES, THE MERE ACT, THE ONE ACT OF BUYING, HE BECOMES GUILTY BOTH OF DEALING IN STOLEN PROPERTY AND THE UNDERLYING THEFT.

WOULDN'T THAT PERSON BE PROTECTED BY DOUBLE JEOPARDY, THAT DEFENDANT?

NO.

ONE ACT AND YOU ARE CONVICTED OF THE CRIME ARISING OUT OF THAT ACT, BUT IT IS NOT GOING TO BE DOUBLE JEOPARDY?

SEE, I THINK WHAT THEY WERE WORRIED ABOUT THERE, IS THE OPERATION OF STATUTE. HOW IT OPERATES. OKAY. THE CRIME, THE UNDERLYING THEFT IS ALMOST, BY DEFINITION, A SEPARATE OFFENSE, IN THE FACT THAT IT HAPPENS AT A SEPARATE TIME, SEPARATE OFFENSE, AND IN THIS CASE EVEN INVOLVES SEPARATE VICTIMS FORM THE JEWELRY WAS STOLEN FROM ONE PERSON AND THEN THE DEALING OCCURS AT A PAWNSHOP PAWNSHOP. SEE, THAT IS EXACTLY WHAT I

THINK IT IS DESIGNED TO DO. THE LEGISLATURE DID NOT WANT DUAL CONVICTIONS FOR WHAT I AM GOING TO CALL A BUYER WHO WAS NOT GUILTY OF THEFT.

WOULD YOU MOVE TO THE SECOND ISSUE.

CERTAINLY. OKAY. THEY RAISE A DUE PROCESS CHALLENGE TO THE CRIMINAL PUNISHMENT CODE. THE ONLY THING THAT THEY REQUIRE IS THAT RATIONAL DUE PROCESS REQUIRES IS THAT THERE BE A RATIONAL RELATIONSHIP BETWEEN THE LEGISLATURE'S STATED GOAL, THE STATED GOALS RIGHT IN THE CRIMINAL PUNISHMENT CODE, WITH PUNISHMENT. AS JUSTICE SHAW REFERRED TO, THEY SAID REHABILITATION IS SECONDARY, SO THE ONLY THING THIS HAS TO PASS IS THAT THERE BE SOME RATIONAL RELATIONSHIP BETWEEN PUNISHMENT AND THE PUNISHMENT, AND YOU ARE ALMOST, BY DEFINITION, GOING TO MEET THAT, YOUR HONOR.

WHAT NOTICE DOES A PARTICULAR OFFENDER HAVE OF WHAT THE MAXIMUM PUNISHMENT MIGHT BE, HENN OFFENSE IS COMMITTED? DOES THE OFFENDER HAVE NOTICE OF WHAT THE MAXIMUM PUNISHMENT MIGHT BE, AND GIVE ME A HYPOTHETICAL OR AN EXAMPLE OF THAT, UNDER THIS SCHEME.

OKAY. IN SEVERAL OF THE DCA'S HAVE REACHED, I WILL CALL THAT THE DUE PROCESS NOTICE PART OF THE THEFT, AND SEVERAL DCA'S HAVE REACHED THIS IS, AND WHAT THEY HAVE SAID IS ANY DEFENDANT CAN GET OUT A PIECE OF PAPER AND WORKSHEET AND DO THE MATH, AND HE WILL HAVE A MUCH BETTER IDEA, UNDER THE CODE OR THE GUIDELINES THAN HE DID PRECODE OR PREGUIDELINES. REMEMBER HOW YOUR RANGE COULD BE ANYTHING, I MEAN, LITERALLY FROM ZERO TO --

LET'S CONTRAST THIS, THOUGH, WITH THE SIMPLE, IF WE HAVE A THIRD-DEGREE FELONY, IS THERE A FIVE-YEAR MAXIMUM? THIRD-DEGREE FELONY. YOU KNOW, AT LEAST SUPERFICIALLY OKAY, NOW, BUT THERE ISN'T A FIVE-YEAR MAXIMUM, NOW, FOR A THIRD-DEGREE FELONY, IS THERE?

DEPENDING ON YOUR CRIMINAL HISTORY, YES, THERE IS.

THAT IS WHAT I MEAN. IN OTHER WORDS, SO, IF YOU LOOK UP THE CRIME, IT WILL SUPERFICIALLY APPEAR TO BE THERE WILL AND FIVE-YEAR MAXIMUM PENALTY FOR THIRD-DEGREE FELONY. BUT THAT IS MISLEADING, IS IT NOT, BECAUSE THAT IS NOT WHAT THE MAXIMUM PENALTYWL BE, SO HOW, THIS OBVIOUSLY IS NOT THE ORDINARY NOTICE THAT WE EXPECT, IN TERMS OF SAYING, YOU KNOW, YOU DO THE CRIME, YOU DO THE TIME, AND YOU KNOW WHAT THE TIME IS BY LOOKING UP THE STATUTE, AND T SAYS LIFE, 20 YEARS, FIVE YEARS MAXIMUM. HERE, THERE IS A SCHEME, OKAY, THAT YOU WOULD HAVE TO ACTUALLY, AS YOU SAID, THAT THE COURTS HAVE TALKED ABOUT HE HAS TO GET OUT THE PAPER AND PENCIL AND FIND OUT ALL THE RELEVANT CIRCUMSTANCES AND ALL OF THAT, SO ISN'T THERE A PROBLEM WITH THAT, THAT YOU ARE NOT REALLY PUTTING PEOPLE ON NOTICE, IN THE WAY THAT WE HAVE PREVIOUSLY UNDERSTOOD NOTICE TO BE, THAT THERE IS A DEFINITE MAXIMUM TO A CRIME?

OKAY. BUT, YOUR HONOR, JUST LIKE YOU HAD STATUTORY NOTICE BY GETTING OUT THE STATUTES AND SEEING, YOU ALSO, HAVE STATUTORY NOTICE OF THE CRIMINAL PUNISHMENT CODE. MOREOVER, YOUR HONOR, YOUR PRIOR CRIMINAL RECORD IS SOMETHING YOU HAVE INTIMATE FAMILIARITY WITH. THE WORKSHEETS ARE NOT, REALLY, THEY USED TO BE PRETTY DIFFICULT BUT THE WORKSHEETS, NOW, THEY ARE NOT THAT HARD TO FIGURE OUT, YOU KNOW, THE INSTANT OFFENSE AND HOW MANY POINTS YOU GET. YOUR HONOR, YOU HAVE A GREAT DEAL. THE RANGE, HERE, A GREAT DEAL NEAR REMEMBER THAN IT WOULD HAVE BEEN PRIOR TO THE WORKSHEETS, AND JUST LIKE YOU HAVE STATUTORY NOTICE OF THE STATUTORY MAXIMUM, WHERE THEY SAY THAT, IN THAT THEY, ALSO, REFER TO THE CRIMINAL PUNISHMENT CODE, AND, YOUR HONOR, YOU HAVE, I MEAN, THEY ARE BOTH STATUTES. YOU ARE JUST AS LIKELY TO FIND ONE AS YOU ARE THE OTHER, AND THEY REFER TO EACH OTHER. YOU KNOW, REMEMBER HOW

THE WORKSHEETS, THEY LAY OUT EVERY SINGLE CRIME AND WHAT LEVEL IT IS. YOU ARE MUCH MORE LIKELY TO KNOW -- YOU CANNOT KNOW TO THE DAY, BUT YOU ARE MUCH MORE LIKELY TO KNOW WHAT YOU ARE ACTUALLY LIKELY TO GET, UNDER EITHER GUIDELINES OR THE CRIMINAL PUNISHMENT CODE, THAN YOU WERE PRIOR TO THESE.

WHAT DOES THE STATUTE SAY THAT CONTAINS THE NUMBER? THAT IS THAT SAYS THE PUNISHMENT FOR A VIOLATION OF THIS SEX SHALL BE AS PROVIDED IN SECTION SO-AND-SO, AND THEN YOU GO SECTION SO-AND-SO, AND IT SAYS THE PUNISHMENT FOR A THIRD-DEGREE FELONY IS A MAXIMUM OF FIVE YEARS IN THE STATE PRISON, AND WHAT ELSEST HAET PUTS YOU ON NOTICE THAT IT CAN BE MORE THAN THAT?

OKAY. NOW, CHAPTER 775, ALSO, REFERS TO THE CRIMINAL PUNISHMENT CODE, AND IF YOU ARE GOING TO LOOK UP, IF YOU ARE GOING TO LOOK UP --

ARRIVE WHERE, WHERE YOU FIND THE STATUTORY MAXIMUM IS FIVE YEARS FOR A THIRD-DEGREE FELONY, IT SAYS THERE IS AN ASTERISK THERE, AND IT SAYS DON'T RELY ON THIS, BECAUSE YOU HAVE ANOTHER SCHEME.

NEW YORK CITY YOUR HONOR. NO, IT IS NOT LAID OUT LIKE THAT AND REMEMBER, IF YOU AREALG ABOUT THE SUBSTANTIVE OFFENSE, USUALLY AT THE END, PUNISHMENT AS PRESCRIBED IN, AND THEY TALK ABOUT THE IN DOORSRATION, THE -- THE INCARCERATION, THE FINE AND ALL OF THAT, SO IF YOU ARE GOING TO READJUST THE SUBSTANTIVE OFFENSE, YOU ARE NOT GOING TO KNOW ABOUT THE MIL PUNISHMENT CODE. OKAY. THE BOM LINE OF THAT REFERS TO, BUT IF YOU GO FURTHER AND GO TO THE --

THIS THING, AS LONG AS IT IS SET OUT IN THE CRIMINAL CODE THAT, IS SUFFICIENT NOTICE.

THAT IS SUFFICIENT NOTICE. YES.

I WOULD LIKE YOU TO ADDRESS THIS ISSUE OF THE STATE'S RIGHT TO APPEAL THE DOWNWARD DEPARTURE DEPARTURE. WE HAVE GOT A SCHEME, AGAIN, THAT GIVES THE, BASICALLY A DEFENDANT HAS THE LOWEST PERMISSIBLE SENTENCE, UNLESS THE COURT DEPARTS DOWNWARD, AND THEN UPWARD TO EITHER THE STATED STATUTORY MAXIMUM OR THE GUIDELINES MAXIMUM, WHICHEVER IS GREATER. WHAT IS YOUR ANSWER TO CONSTITUTIONAL INFIRMITY, WITH GIVING THE STATE ONLY THE RIGHT TO APPEAL THE SENTENCE.

OKAY. NOW, YES, THE STATE CAN APPEAL DOWNWARD DEPARTURES, BUT REMEMBER, THEY DID NOT ABOLISH THE RIGHT TO APPEAL UPWARD DEPARTURES. THEY ABOLISHED UPWARD DEPARTURES ALL TOGETHER. WHAT THEY DID WAS THEY GREATLY INCREASED THE RANGE, OKAY, THERE ARE NO UPWARD DEPARTURES LEFT TO APPEAL. THE DEFENDANT CAN APPEAL, A SENTENCE, BEYOND EITHER THE STATUTORY MAX OR, IN THE UNIQUE PERSON WHO DOES HAVE A HIGHER WORKSHEET TOTAL THAN THE STATUTORY MAX, IF SOMEHOW THE JUDGE GOES BEYOND THAT, HE CAN APPEAL THAT, TOO.

COULD THE DEFENDANT APPEAL A FAILURE TO GIVE A DOWNWARD DEPARTURE SENTENCE?

NO. NOBODY, BOTH PEOPLE, NOBODY CAN APPEAL WITHIN THE RANGE. THE STATE CAN APPEAL DOWN, A DOWNWARD DEPARTURE. THE DEFENDANT CAN APPEAL WHAT I AM GOING TO CALL AN ILLEGAL SENTENCE.

I AM ASKING YOU, DOES THAT CREATE A CONSTITUTIONAL INFIRMITY, ON THE BASIS THAT NORMALLY, IF A DEFENDANT GETS A LEGAL SENTENCE, THEN UPON, AFTER APPEAL, THEY CAN'T GET AT HIGHER SENTENCE, BUT IN THIS SITUATION, IF A JUDGE DECIDED TO DOWNWARDLY DEPART, AND THE STATE APPEALS AND WINS, THEY ARE GOING TO GET A HIGHER SENTENCE, BUT THEY CAN'T APPEAL THE FAILURE TO GET A LOWER SENTENCE.

NO. THEY CANNOT APPEAL, WITHIN THE RANGE, BUT THEN NEITHER CAN THE STATE. I SEE THESE AS EQUAL, ON AN EQUAL FOOTING, BECAUSE WITHIN THE RANGE, NOBODY CAN APPEAL. IT IS ONLY EXTREME SENTENCES OUTSIDE THE RANGE THAT EITHER PARTY CAN APPEAL, SO THAT IS HOW I SEE THAT AS ON EQUAL FOOTING. NOW, IS YOUR HONOR, ALSO, TALKING ABOUT THE STATE CONSTITUTIONAL RIGHT TO APPEAL?

YES. YOU ARE TALKING ABOUT THE DEFENDANT'S RIGHT TO APPEAL, BUT THE STATE'S RIGHT TO APPEAL IS CONTROLLED BY CONSTITUTIONAL PRINCIPLES AS WELL, CORRECT? BECAUSE THE STATE CANNOT JUST APPEAL ANYTHING THAT, ANY ADVERSE RULING, SO IN TERMS OF GIVING THE STATE A RIGHT TO APPEAL, I THOUGHT THAT WAS SOMETHING THAT HAD TO BE VERY NARROWLY-CONSTRUED, IN TERMS OF WHAT IT WAS BALANCING FOR THE DEFENDANT. AM I INCORRECT ABOUT THAT?

I HAVE THREE RESPONSES ON. THAT NUMBER ONE, I DON'T BELIEVE DOUBLE JEOPARDY APPLIES TO SENTENCING. IT APPLIES ONLY TO UNDERLYING CONVICTIONS. OKAY. THE FEDERAL CONSTITUTION HAS BEEN INTERPRET ADD THAT WAY. SECONDLY, YOUR HONOR, THE STATE RIGHT TO APPEAL, WE DO HAVE A STATE RIGHT TO APPEAL. YOUR HONOR FOUND A STATE RIGHT TO APPEAL, BUT THAT IS A CONVICTION NOT SAENTSMENT EVEN AT THE TIME -- CONVICTION, NOT A SENTENCE. EVEN AT THE TIME OF THE AMENDMENTS, YOU SAID A DEFENDANT HAS THE RIGHT TO APPEAL, BUT RELYING ON A PRIOR VERSION OF THE CONSTITUTION, EVEN AT THE TIME WHEN IT WAS VERY CLEAR, EXPLICIT ANY STATE CONSTITUTION, THAT THE DEFENDANT HAS A RIGHT TO APPEAL. HE CANNOT APPEAL A SENTENCE. HE CAN ONLY APPEAL A CONVICTION. HISTORICALLY, YOUR HONOR, DEFENDANTS HAVE HAD NO RIGHT TO APPEAL A CONVICTION. THE SENTENCE WAS COMPLETELY REVIEWABLE. A TRIAL JUDGE DETERMINED THAT AND NO APPELLATE COURT SAID ANYTHING ABOUT THAT.

DOES THAT GO BACK TO WHAT HAPPENED WITH THE SENTENCING GUIDELINES? WE HAVE GONE FROM A SYSTEM WHICH REALLY, GAVE THE JUDGE THE DISCRETION TO IMPOSE AND SENTENCE, THEN AND THEREFORE IT WAS UNREVIEW ABLE TO A SYSTEM WHERE THE STATE HAS VIRTUALLY TAKEN AWAY DISCRETION IN SENTENCING FROM THE TRIAL COURT AND THEN NOT GIVEN THE DEFENDANT ANY ABILITY TO REVIEW THAT?

AND I THINK WHAT THEY WERE TRYING TO DO HERE WAS A LITTLE BIT OF BOTH, YOUR HONOR. THAT IS WHAT THE CRIMINAL PUNISHMENT CODE SEEMS TO BE ABOUT. THEY WANT TO CORERAL THE JUDGE SOMEWHAT -- CRALL THE JUDGE SOMEWHAT. OKAY -- TO CORAL THE JUDGE SWA. THEY WANT TO LIMIT THE JUDGE AND GIVE HIM DISCRETION BUT THEY EXPANDED THE RANGE, SO THAT HE DIDN'T HAVE TOO MUCH DISCRETION. I AM OUT OF TIME. CHIEF JUSTICE: THANK YOU. YOU HAVE USED ALL YOUR TIME. I AM SORRY. WE HAVE TO STAY WITHIN OUR TIME LIMITS.