State of Florida v. James Clark

MR. CHIEF JUSTICE

JUSTICE HARDING WILL, ALSO, NOT BE PRESENT FOR THE ARGUMENT OF THIS CASE. HOWEVER, HE WILL PARTICIPATE, AS I ANNOUNCED EARLIER. WE HAVE THE VIDEO AND THE AUDIO, WHICH THE JUSTICES WHO ARE NOT HERE WILL REVIEW, SO THE FINAL CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS STATE VERSUS CLARK.

IF IT PLEASE THE COURT. BARBARA ZAPPI, ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE OF FLORIDA. THE ISSUE IS WHETHER THE STATE OBJECTS TO A DEPARTURE SENTENCE BEFORE THE TRIAL COURT IMPOSES SUCH A SENTENCE, SUCH OBJECTION IS SUFFICIENT TO PRESERVE THE ISSUE OF THE VALIDITY OF THE DOWNWARD DEPARTURE, AND THE STATE DOES NOT HAVE TO OBJECT TO EACH AND EVERY REASON THE COURT GIVES FOR SUCH DEPARTURE, AND THE STATE SUBMITS, UNDER THE FACTS OF THIS CASE, THE ANSWER TO THAT QUESTION IS YES. WHAT WE HAVE HERE IS THE DEFENDANT ORIGINALLY WAS FOUND GUILTY OF TWO COUNTS OF SEXUAL BATTERY ON A MINOR UNDER TWELVE. HE, THE STATE ORIGINALLY AGREED TO A DOWNWARD DEPARTURE, AND THIS DEFENDANT WAS SENTENCED TO FIVE YEARS INCARCERATION PLUS FIVE YEARS' PROBATION. WHILE ON PROBATION, THE DEFENDANT VIOLATED, BY DRIVING UNDER THE INFLUENCE OF ALCOHOLIC BEVERAGE, LEAVING THE SCENE OF AN ACCIDENT, AND THE THIRD VIOLATION WAS CITED AS FAILURE TO PAY COST OF SUPERVISION.

AT THE TIME SENTENCE WAS IMPOSED, DID THE TRIAL JUDGE ARTICULATE ON THE RECORD, THE REASONS FOR THE DOWNWARD DEPARTURE?

JUSTICE QUINCE, ARE YOU ASKING AT THE ORIGINAL SENTENCE OR AT THE VIOLATION?

I AM TALKING ABOUT AT THE VIOLATION.

THE VIOLATION, YES, BUT LET ME EXPLAIN THIS. AT THE VERY OUTSET, PAGE THREE OF THE TRANSCRIPT, AND THIS HEARING TRANSCRIPT IS EXTREMELY SHORT. EIGHT PAGES TOTAL. PAGE THREE, THE TRIAL COURT IS ADVISED THE STATE IS ASKING FOR THE IMPOSITION OF 17 YEARS. AFTER THAT, DEFENSE COUNSEL SAYS WELL, WE WANT TO SEE WHAT HAPPENS IN THIS VIOLATION. MAYBE WE CAN WAIT UNTIL THAT IS RESOLVED, BEFORE YOU DECIDE THE PROBATION VIOLATION. PROSECUTOR INFORMS THE COURT THIS IS A DUI. IT CAN TAKE UP TO ONE YEAR. THE TRIAL COURT DOES NOT WANT TO WAIT A YEAR AND SAYS SO. THEREAFTER, THERE IS A DISCUSSION OFF-THE-RECORD, AND WHEN THEY COME BACK, ALL OF A SUDDEN THE COURT IS TALKING ABOUT, WELL, A PLEA AGREEMENT, AND HAVE YOU CHANGED YOUR PLEA TODAY.

WE UNDERSTAND THAT THE DEFENDANT CHANGED HIS PLEA, AND THE TRIAL JUDGE INDICATED THAT HE WAS GOING TO GIVE A DOWNWARD DEPARTURE, AND THE STATE OBJECTED, BUT AFTER THAT POINT, THE TRIAL JUDGE ARTICULATED REASONS FOR THIS DOWNWARD DEPARTURE?

YES.

AND THEN WHAT DID THE STATE SAY AT THAT POINT? ANOTHER STATE SAID, AND AS I WANTED TO POINT OUT BEFORE, THE PLEA WAS AN UNILATERAL PLEA THAT THE DEFENDANT OFFERED. IT WAS NOT AGREED TO BY THE STATE, AND BEFORE THE JUDGE PRONOUNCED THE SENTENCE, AND

I AM LOOKING AT PAGE 7, THE PROSECUTOR SAYS THE STATE WOULD BE OBJECTING TO THE DOWNWARD DEPARTURE. YOU HAVE THIS WARRANT, AND THERE IS NOT ENOUGH FOR THE COURT TO MAKE AN ADEQUATE DOWNWARD DEPARTURE AT THIS TIME. AND RIGHT AFTER, RIGHT AFTER THE PROSECUTOR SAID THAT, THE COURT IMMEDIATELY RUSHED TOJUT, IMMEDIATELY SAID S TIME THE COURT IS REVOKING PROBATION AND SENTENCING YOU TO 364 DAYS COUNT ILL JAIL TIME. HIS -- COUNTY JAIL TIME. HIS SENTENCE HAS ALREADY BEEN DECIDED ON BY THE COURT.

BUT HAVE YOU ANSD JE QUINCE'S QUESTION? > THEN THE NEXT THING IS, AND I AM SORRY I AM TAKING SO LONG TO ANSWER YOUR QUESTION, JUSTICE QUINCE, BUT THE NEXT THING IS THE TRIAL COURT SAYS, WELL, THERE WAS A DOWD DEPARTURE BEFORE, AND THAT WILL BE REASON ONE, SO THE PROSECUTOR INFORMED THE TRIAL COURT THAT, PURSUANT TO THIS COURT'S REASONING IN FRANQUIST, WHICH IS IF YOU ARE GOING TO USE A DOWNWARD DEPARTURE, YOU MUST STAY WHY, AND IF YOU LOOK, WHEN THE COURT FINALLY ENTEREDS THREE REASONS FOR DEPARTING DOWNWARD, THAT WAS NOT ONE OF THE REASONS. THAT THE TRIAL JUDGE DAVE.

BUT THE POINT HERE IS, ONCE -- THAT THE TRIAL JUDGE GAVE.

BUT THE POINT HERE IS, ONCE THE TRIAL JUDGE ARTICULATED THE THREE REASONS, NOTHING MORE WAS SAID BY THE STATE. IS THAT CORRECT?

WELL, OTHER THAN THE OBJECTION TO THE DOWNWARD DEPARTURE, WHICH THE STATE DID OBJECT TO THE, FOR THE PREVIOUS DOWNWARD DEPARTURE AND SAID IF YOU ARE GOING TO DO THIS, YOU HAVE TO EXPLAIN WHY, AND THEN THE JUDGE SAYS, WELL, REASON ONE E WAVEOMPD VIOLATION, IF HE HADN'T VIOLATED AND HOW DO YOU, I MEAN, THE STATE -- ARE YOU GOING TO COME BACK AND ARGUE THIS? YOU WOULD HAVE COMPLETED, IF YOU HADN'T VIOLATED? BUT HE DIDN'T COMPLETE. AND THEN THEY SAID, WELL, THERE IS A STRONG REASON FOR MITIGATION BY THE PROBATION OFFICER, AND THIS COURT, INSECURE I, SAID RECOMMENDATION BY A PROBATN OFFR IS AN INSUFFICIENT REASON.

AND THEN DID THE PROSECUTOR SAY THAT TO THE TRIAL JUDGE AT THE TIME HE SAID IT?

NO. TO BE PERFECTLY HONEST. AND THEN, FOUR, WAS AGE, BUT THE AGE, WHEN DEFENDANT VIOLATED, WAS 25. HE WAS NO LONGER 17. AND AGE, REALLY, WAS ALREADY TAKEN INTO CONSIDERATION THE FIRST TIME, BECAUSE IT BECAME, IT WAS AN ELEMENT OF THE ORIGINAL CRIME. DEFENDANT WAS CHARGED, UNDER SECTION 794.012, MAKING IT A CRIMEOMMT A SLBATTERY ON A MINOR UNDER TWELV. FOR PERSONS 18 YEARS AND OLDER, IT IS A CAPITAL FELONY,NISH PUNISE BY LIFE, WITH A PLANT PLANTTORY -- WITH A MARY MINIMUM OF 25 YEARS. HOWEVER, THAT SECTION PROVIDES THAT, IF YOU ARE UNDER THE AGE OF 18, WHICH THE DEFENDANT WAS IN THIS CASE. HE WAS 17. IT IS A LIFE FELONY NOT A CAPITAL FELONY, SO THE AGE FACTOR WAS AN ELEMENT OF THE CRIME ORBLINGALLY. HOW CAN YOU GET -- ORIGINALLY. HOW CAN YOU GET THAT? IT IS LIKE DOUBLE DIPPING, IF YOU GET THE BENEFIT OF THE AGE WHEN IT IS AN ELEMENT AND THEN BECOME A MITIGATING FACTOR IN ADMISSION.

HOW CAN YOU, COME BACK FOR THE STATE OR THE JUDGE TO ARTICULATE. POLICY WEISS, ISN'T THIS CONTRARY TO MOVING IN THE DIRECTION OF HAVING, REALLY, JUDICIAL EFFICIENCY AND, REALLY, REQUIRING THAT THOSE THINGS BE ARTICULATED, SO THEY CAN BE CORRECTED AT THE TIME, AND FOR INSTANCE IF YOU SAID TO THE JUDGE, AND I REALIZE EVERYTHING, YOU KNOW, IS IN HINDSIGHT, BECAUSE ESPECIALLY IN THIS PROCEEDING, THE STATE WAS CONCERNED ABOUT WHAT THE JUDGE WAS DOING,, TO BEGIN WITH, AND CERTAINLY THAT HAS BEEN PRESERVED, BUT IF YOU COULD ARTICULATE TO THE COURT, WELL, JUDGE, HERE IS A CASE THAT SAYS YOU CAN'T DEPART DOWNWN THAT GROUN, AND THAT WOULD HAVE RESOLVED THAT HOPEFULLY, AT THAT VERY TIME, AND THAT IS THE WHOLE ALTHOUGH IT IS DIFFICULT TO DO, IN ALL OF THESE PROCEEDINGS, POLICY WEISS WE HAVE BEEN TRYING TO MOVE IN A DIRECTION THAT DOES REQUIRE MORE SPECIFIC PRESERVATION, AND, YOU KNOW, WITH THE TRADITIONAL RULE ABOUT

YOU HAVE TO NOT ONLY OBJECT. I OBJECT, JUDGE. BUT YOU HAVE GOT TO SPECIFY THE REASON. YOU KNOW, AN EXTENSION OF THE LOGIC OF THAT CONCEPT. SO WOULDN'T THIS BE GOING AGAINST THAT POLICY?

NOT REALLY, YOUR HONOR, BECAUSE THE STATE WAS OBJECTING TO THE DOWNWARD DEPARTURE IN ITS TOTALITY. NO MATTER WHAT THE REASONS WERE, WE DIDN'T WANT IT.

ISN'T THAT A SEPARATE, ISN'T THAT A SEPARATE OBJECTION, REALLY, AS OPPOSED TO IF THE COURT COULD DO WHAT IT WAS DOING THAT IS IF THAT WAS PERMISSIBLE, AND THE STATE'S OVERALL OBJECTION WAS NOT VALID, NOW YOU HAVE GOT TO GO TO THE CONSIDERATION OF IF THE COURT CAN DO THAT, ARE THESE VALID REASONS FOR DOING IT, WHICH IS ANOTHER REQUIREMENT THAT THE COURT HAS TO MEET, IN ORDER TO DOWNWARD DEPART, IN ADDITION TO THE OVERALL ISSUE THAT YOU HAVE.

SO THE COURT SPOKE AS TO DIFFERENT REASONS, BUT YOU ARE NOT SURE EXACTY, EXACTLY WHICH REASONS THE COURT IS GOING TO DECIDE TOIN ITS ORDER, UNTIL AFTER YOU HAVE GIVEN THE ORDER. NOW, MAYBE IF THE JUDGE HAD SAID ALL RIGHT, AND THESE ARE MY SONS,D THEMDOWN AND HANSE RO THE PROR ATTHAT TEE PROSER CAN SAY,L, I OBJECT TO THIS ONE, THAT ONE AND THE OTHER ONE, ON SPECIFIC REASONS,- > THE OTHER HAND, DON'TWE, ALSO, REQUIRE THE DEFENDANT, WHEN THERE IS AN UD DEPARTURE,ON'T WEEQUIE THE DDANT TO SPECIFICALLY OBJECT TO THE REASONS FOR AN UPWARD DEPARTURE? WITHOUT THE JUDGE HAVING TO DO THE ORDER THERE AND HAND THE, A COPY OF THE ORDER TO THE DEFENDANT.

YOU DO, BUT OUR POSITION IS THAT BASED ON THE FACTS, THAT THAT WERE IN FRONT OF THE JUDGE AT THAT PARTICULAR TIME, AND THE STATE SPECIFICALLY SAID THAT. YOU HAVE THIS WARRANT, A DUI, LEAVING THE SCENE OF THE ACCIDENT, TWO SUBSTANTIAL VIOLATIONS. THERE IS NOT ENOUGH FOR YOU, ON THE RECORD THAT YOU ARE LOOKING AT RIGHT NOW, NO MATTER WHAT REASONS YOU THERE AFTER CHOOSE. THERE IS NOT ENOUGH IN FRONT OF YOU, AND OTHER THAN THE WARRANT, WHAT WAS IN FRONT OF, IN THIS RECORD, THERE WAS NOTHING ELSE IN THIS RECORD AT THIS PARTICULAR TIME. AND THE STATE'S HANDS ARE TIED BY RULE 9.140-C, WHICH GOVERNS THE ISSUES THE STATE CAN APPEAL, AND IT IS VERY LIMITED. ONE REASON IS A DEPARTURE FROM A RECOMMENDED SENTENCE OR A DEPARTURE FROM A PERMITTED SENTENCE. NOW, THE DEFENDANT IS GIVEN THE OPPORTUNITY, IF THERE IS A PROBLEM WITH THE SENTENCING, UNDER RULE 3.800-B, TO BRING THAT TO THE COURT'S ATTENTION. HOWEVER, OUR HANDS ARE ALREADY TIED IN THE BEGINNING, BY 9.140. THE STATE IS NOT A PART OF RULE 3.800. A SCRIVENER'S ERROR OR AN ERROR THAT WOULD BENEFIT TO THE DEFENDANT. IF WE BELIEVE THERE IS A ERROR OTHER THAN THAT, OUR HANDS ARE NOW TIED BEHIND OUR BACKS. BECAUSE WE HAVE NO OPPORTUNITY TO BRING THAT TO THE COURT'S ATTENTION. IT IS REALLY VERY UNFAIR IN THAT RESPECT. AND IT IS SOMETHING THAT HAS TO BE ADDRESSED BY THIS COURT, BY THE LEGISLATURE OR SOMETHING, BECAUSE WE HAVE SUCH LIMITED RIGHTS TO APPEAL, TO BEGIN WITH. AND --

AREN'T MOST JUDGES, THOUGH, IF YOU ARE SAYING THAT THERE IS SOME SERIOUS ERROR MADE, AND IT WAS JUST A CLERICAL ERROR, YOU DON'T THINK A JUDGE WOULD RESPOND, IF THAT WAS CALLED TO THE JUDGE'S ATTENTION?

A CLERICAL ERROR?

JUDGE, YOU SAID THE SENTENCE WAS GOING TO BE 33 YEARS, AND HERE IS A TRANSCRIPT OF IT AND EVERYTHING, BUT YOU WROTE, IN THE THING, 33 MONTHS. AND YOU DON'TNK IF THE STATE CALLED THAT TO THE COURT'S ATTENTION, THE COURT WOULD JUMP ON IT?

THAT WOULD BE A CLERICAL ERROR WRITTEN DOWN. THE REASONS, ALSO, HAVE TO BE VALID, AND THEY ARE ONLY VALID, IF THEY ARE REASONABLY JUSTIFIED BY THE FACTS AND CIRCUMSTANCES OF A CASE. AND UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE

THREE REASONS IN THE WRITTEN ORDER WERE NOT REASONABLY JUSTIFIED BY THE PREPONDERANCE OF THE EVIDENCE, AND THAT IS PRIOR, BY SECTION 921.0015, AS WELL AS RULE 3171.0-D-11, AND BANKS SAYS THERE HAS TO BE SUBSTANTIAL COMPETENT EVIDENCE, SO WHAT WOULD BE SUBSTANTIAL IN THIS CASE?

BUT YOU WOULD HAVE THE RULE THAT, AT THESE KINDS OF HEARINGS IF THE STATE SIMPLY SAYS TO THE TRIAL JUDGE, WE WILL OBJECT TO ANY DOWNWARD DEPARTURE IN THIS CASE, THAT THAT IS GOING TO BE SUFFICIENT TO PRESERVE ANY REASONS FOR DEPARTURE. THAT IS WHAT YOU WANT US TO SAY.

NOT EXACTLY, JUSTICE. HERE THE PROSECUTOR SAID MORE THAN THAT. HE SAID, UNDER THE FACTS IN FRONT OF YOU AT THIS TIME, IF THERE ARE INSUFFICIENT FACTS FOR THERE TO BE A DOWNWARD DEPARTURE DEPARTURE. THE FACTS IN FRONT OF YOU ARE THE WARRANT.

WHAT DOES THAT ADD TO?

THAT ADDS TO MORE THAN JUST WE OBJECT TO A DOWNWARD DEPARTURE. THERE ISN'T SUFFICIENT EVIDENCE IN THE RECORD BEFORE YOU AT THIS TIME, TO DO THIS. AND WHEN A TRIAL COURT RUSHES TO JUDGMENT LIKE THIS, YOU ARE ALMOST CUTTING THE STATE OFF FROM HAVING THE ABILITY TO APPEAL. THE SENTENCE WAS --

DID YOU SAY THEY WENT OFF THE RECORD HERE FOR SOME PERIOD OF TIME?

THEY WENT OFF THE RECORD.

DO WE KNOW HOW LONG THAT WAS?

THE RECORD DOES NOT INDICATE THAT, BUT THEY WENT OFF THE RECORD. BOTTOM OF PAGE 4. PAGE 3. THE COURT IS INFORMED THE STATE IS LOOKING FOR 17 YEARS, AND UNDER THE RECOMMENDED GUIDELINES ORIGINALLY,9-TEARS AND THE PERMITTED 7-TO-17, AND AFTER THE ONE BUMP UP AFTER VIOLATION, THE RECOMMENDED GUIDELINES SAID 12-TO-17 YEARS WITH PERMITTED OF 9-TO-22. MR. CHIEF JUSTICE

YOU ARE INTO YOUR REBUTTAL TIME.

SORRY. THANK YOU.

MAY IT PLEASE THE COURT. GOODMORNING. MY NAME IS JO ANN KOTZEN. I AM HERE TO RESPOND ON BEHALF OF JAMES CLARK. TO ANSWER YOUR QUESTION, JUSTICE QUINCE, THERE WERE FOUR REASONS GIVEN BY THE TRIAL COURT FOR THE DOWNWARD DEPARTURE. THE FIRST REASON WAS THE PREVIOUS DOWNWARD DEPARTURE NEGOTIATED BETWEEN THE STATE AND THE DEFENDANT IN THE CASE. THAT WAS NOT A LATER WRITTEN REASON, BUT THAT WAS AN ORAL REASON GIVEN BY THE TRIAL COURT.

THEY DID OBJECT TO THAT.

THE STATE DID OBJECT TO THAT WITH SPECIFICITY. YES. THE STATE SAID, WELL, I DON'T THINK YOU CAN DO. THAT I THINK YOU NEED TO GO -- WELL, LET ME QUOTE. THE STATE, WITH SPECIFICITY, SAYS THE ONLY THING, STATE'S POSITION WITH THE PRIOR DOWNWARD DEPARTURE, IT WAS AGREED TO BY THE VICTIM SO THAT THE VICTIM WOULDN'T HAVE TO GO THROUGH THE TRIAL. SHE WAS 8 YEARS OLD AT THE TIME. THE COURT HAS TO MAKE A DETERMINATION HOW THE NEGOTIATED DOWNWARD DEPARTURE PLAY AS PART IN THIS SENTENCE, MEANING IN THE V.O.P. SENTENCE, AND THEN THAT THE JUDGE THEN GOES ON AND EXPLAINS WHY HE FEELS THAT THAT WOULD STILL BE A VALID REASON TO DEPART FROM THE V.O.P. SENTENCE. THEN THE TRIAL COURT GIVES ANOTHER REASON, THE SUCCESS ON PROBATION. THAT IS THE FACT THAT THE

DEFENDANT HAD SUCCEEDED IN HIS FIVE-YEAR PRISON TERM. HAD HE A FIVE-YEAR PROBATION TERM AFTER. THAT HE HAD SUCCEEDED FOUR YEARS AND THREE MONTHS. PROSECUTOR REMAINED SILENT. THE THIRD REASON HE GIVES IS THE RECOMMENDATION BY THE PROBATION OFFICER. THE PROSECUTOR REMAINED SILENT, AND THEN THE FOURTH REASON GIVEN WHICH IS ACTUALLY SUGGESTED BY THE DEFENSE COUNSEL, IS THE DEFENDANT'S AGE, AND IT IS NOT THE DEFENDANT'S AGE AT THE TIME OF THE VIOLATION OF PROBATION. IT IS THE DEFENDANT'S AGE AT THE TIME OF THE OFFENSE. IN 1992, THAT WAS STILL A REASON TO DOWNWARD BILY DEPART, AND THEY WERE -- TO DOWNWARDLY DEPART, AND THEY WERE GOING UNDER THE 1992 SENTENCING GUIDELINES AT THAT POINT, AND ACTUALLY THEN THE PROSECUTOR SAYS, WELL, YES, WE ARE GOING UNDER THE 1992 GUIDELINES, SO HE TELLS THE JUDGE YOU CAN STILL USE THAT REASON, AND THEN THE JUDGE FINISHES OFF BY EXPLAINING SOME OTHER REASONS, GIVING SOME FACTORS REGARDING THE DEFENDANT'S AGE AND SOME FACTORS REGARDING THE PREVIOUS DOWNWARD DEPARTURE, AND BEFORE THE TRIAL COURT CLOSES THE HEARING, HE ASKS IS THERE ANYTHING FURTHER. THE PROSECUTOR THEN STILL REMAINS SILENT, AND AT THE END JUST SAYS THANK, YOUR HONOR. SO THE PROSECUTOR DOES OBJECT GENERALLY, IN THE BEGINNING OF THE SENTENCING HEARING, BY SAYING, JUDGE, WE OBJECT. YOU HAVE THIS, HE SAYS THIS WARRANT. I IMAGINE IT WOULD BE THE V.O.P. WARRANT. JUDGE, WE HAVE THIS WARRANT. YOU DON'T HAVE ENOUGH INFORMATION TO DEPART AT THIS TIME. THAT WAS HIS GENERAL OBJECTION. HE OBJECTS WITH SPECIFICITY ON THE FIRST REASON AND THEN REMAINS SILENT ON THE OTHER THREE.

WAS THE PROBATION OFFICER PRESENT OR WAS THIS IN THE FORM OF A REPORT?

THE PROBATION OFFICER WAS PRESENT. HIS NAME WAS MR. KOONTZ, AND APPARENTLY HE DID TAKE THE STAND AND GIVE SOME RECOMMENDATIONS, BECAUSE WHEN THE TRIAL COURT IS EXPLAINING SOME OF THE REASONS WHY HE IS DEPARTING, BECAUSE HE IS EXPLAINING THE DEFENDANT'S AGE AT THE TIME OF THE DEFENSE, HE DOES SAY THE DEFENDANT WAS, ALSO, ACCORDING TO THE PROBATION OFFICER, WHEN HE TOOK THE STAND, THE DEFENDANT WAS HIGHLY HIGHLY-REGARDED BY HIS EMPLOYER. HE WAS EMPLOYED AT THE TIME.

DO WE HAVE THAT TRANSCRIPT OF THE PROBATION OFFICER OR IS THAT OFF-THE-RECORD?

NO.

IS THAT OFF-THE-RECORD?

I DON'T KNOW WHAT WAS OFF THE RECORD TO ME THE CASE IS CALLED OFF THE REGULAR DOCKET AND THE DEFENSE COUNSEL REMINDS THE COURT THE LAST TIME WE WERE HERE WAS A VOP. THE STATE WAS ASKING FOR 17 YEARS. WE ARE ASKING FOR SOMETHING ELSE ELSE. THEY TRY TO WORK THINGS OUT AND THEY TALK ABOUT THE DUI DISCUSSION. WHAT IS GOING TO HAPPEN WITH THE DUI. THAT IS THE REASON HE VIOLATED HIS PROBATION. AND THEN THE COURT SAYS COME UP HERE, AND THERE WERE PROCEEDINGS HAD OFF THE RECORD THEN THEY COME BACK, DECIDING TO PRONOUNCE THE SENTENCE. I BELIEVE, WITH THE PROBATION OFFICER'S TESTIMONY, IF I COULD HAVE A MOMENT, IT SAYS, ON THE LAST PAGE, PAGE 9 OF THE TRANSCRIPT, IT SAYS LET ME SAY FOR THE RECORD, MR. KOONTZ REPORTS, THAN IS THE PROBATION OFFICER, MR. CLARK HAS BEEN EMPLOYED BY ALL-AIR HEATING AND COOLING SINCE 1997 AND IS HIGHLY HIGHLY-REGARDED BY MR. THOMAS SMITH. HE HAS BEEN GAINFULLY EMPLOYED AND HAS HAD NO CONTACT WITH THE VICTIM OR THE VICTIM'S FAMILY AND HAS PAID PROBATION COSTS AND ACCORDING TO WHAT WAS PROVIDED BEFORE THE COURT, HE WAS AN EXCELLENT PROBATIONER.

THIS IS THE TRIAL COURT RECOUNTING WHAT MR. KOONTZ SAID, APPARENTLY, NOT ON THE WITNESS STAND BUT OFF THE RECORD.

YES, SIR, AND TO GO BACK TO YOUR QUESTION ABOUT JUDICIAL EFFICIENCY, I BELIEVE THAT

THIS APPEAL IS GOVERNED BY THE REQUIREMENTS OF THE CRIMINAL APPEAL REFORM ACT, AND THE GOAL OF THE CRIMINAL REPEAL REFORM ACT IS TO ENSURE THAT ERRORS ARE ADDRESSED AT THE FIRST OPPORTUNITY, BY THE TRIAL COURTS AND THERE IS NO WAY THAT A TRIAL COURT CAN ADDRESS ITS OWN ERROR, IF IT IS NOT GIVEN A CHANCE. IF IT HASN'T BEEN NOTICED OF THAT ERROR, HAS NOT THAT IS WHAT HAS HAPPENED IN THIS CASE. THE TRIAL COURT GIVES ONE REASON FOR A DOWNWARD DEPARTURE. THE PROSECUTOR, ALTHOUGH HE DOESN'T SAY THE WORDS "I OBJECT" DOES GO ON AND EXPLAIN YOU CAN USE THE DOWNWARD DEPARTURE FROM THE PREVIOUS NEGOTIATED SENTENCE AND GIVES AN EXPLANATION, AND THEN WHEN THE TRIAL COURT GIVES THREE OTHER REASONS --

ISN'T YOUR OPPONENT ONT CORRECT THAT WE HAVE -- OPPONENT REALLY CORRECT THAT WE HAVE REALLY TIED THE HANDS OF THE STATE HERE, UNDER 3.800? IF WE HAVE THE, IF THIS WAS COMING FROM THE DEFENSE SIDE, WE SET UP, IN 3.800, UNDER THE REFORM ACT NOW, BEING METHOD BY WHICH ALL OF THIS CAN BE PRESENTED RIGHT UP UNTIL THE BRIEF IS FILED, BACK TO THE TRIAL COURT, WHERE THERE IS THIS KIND OF TECHNICAL PROBLEM, BUT WE LIMITED THE ABILITY OF THE STATE TO DO THAT. ISN'T THAT, AND SO WE ARE KIND OF IN AN UNEVEN SITUATION, BECAUSE OF THAT.

I AGREE THAT THE STATE IS LIMITED IN ITS ABILITY TO APPEAL. THEY CAN'T FILE --

UNLIMITED IN ITS ABILITY TO GO BACK TO THE TRIAL JUDGE.

CORRECT. THAT YES, BUT THE FACT IS THAT THE STATE NEEDS TO BE ABLE TO OBJECT WITH SPECIFICITY, IN ORDER FOR THE TRIAL COURT TO BE APPRISED OF THE GROUNDS FOR WHICH THEY ARE OBJECTING. THE STATE NEEDS TO BE ONLY TO TELL THE -- TO BE ABLE TO TELL THE TRIAL COURT, JUDGE, I BELIEVE THAT REASON IS INVALID. YOU CAN'T USE THAT AS A REASON TO DEPART, THE STATEMENT OF THE CORRECTIONS OFFICER.

WHAT WE HAVE GOT HERE IS A SITUATION THAT I AM ABSOLUTELY POSITIVE OCCURS DAILY IN THE TRIAL COURTS, ESPECIALLY IN THE SEVENTH CIRCUIT AND THE ELEVENTH CIRCUIT, THE METROPOLITAN CIRCUITS, IS THAT THESE, YOU HAVE A VERY CURTAILED PRESENTATION HERE, AND THE JUDGE COMES IN, EIGHT PAGES OF TRANSCRIPT, MATTER MOVES ON, AND IT IS JUST, AND WITHOUT ANY ABILITY TO GO BACK, WHEN YOU, THEN YOU LOOK AT THE TRANSCRIPT, IT SEEMS TO ME LIKE THAT THAT IS FRAUGHT WITH DANGER, JUST BECAUSE THESE CASES ARE BEING MOVED SO FAST.

WELL, I AGREE. OFTEN WHEN I WAS A YOUNG PUBLIC DEFENDER, I WISHED I WOULD HAVE MADE MORE OBJECTIONS THAN I HAD AT THOSE MOTION HEARINGS OR IN TRIALS, AND THINGS DO MOVE FAST, AND YOU CAN'T ALWAYS OBJECT, BUT THAT DOESN'T MEAN THAT, BECAUSE THE STATE COULDN'T OBJECT WITH SPECIFICITY, THAT IT SHOULD BE ABLE TO LATER GO BACK AND SAY, YOU KNOW WHAT JUDGE? YOU SHOULD HAVE REALLY OBJECTED TO THOSE OTHER THREE REASONS, AND HERE IS MY MOTION SAYING THAT THOSE REASONS AREN'T VALID AND THIS IS MY EXPLANATION. ALL THE STATE WOULD HAVE HAD TO DO IS SAY, JUDGE, I OBJECT. THAT REASON IS INVALID, OR JUDGE I OBJECT. THERE NO BASIS ON THE RECORD TO SUPPORT THAT REASON. WHILE THE STATE IS LIMITED IN ITS ABILITY TO GO BACK, ONCE IT HAS MADE, ONCE IT DIDN'T MAKE A CORRECT OBJECTION, THAT IS WHAT --

SO YOUR ARGUMENT ABOUT SPECIFICITY, IS THAT YOU OBJECT TO THE REASON, BUT YOU DON'T HAVE TO SAY WHY THAT REASON IS INVALID? IS THAT GOING TO BE SUFFICIENT SPECIFICITY? JUDGE, I OBJECT TO THAT PARTICULAR REASON. IT IS NOT FACTUALLY BASED, AS OPPOSED TO, OR, JUDGE, I OBJECT TO THAT REASON. IS THAT GOING TO BE SUFFICIENT SPECIFICITY?

I BELIEVE, JUDGE, I OBJECT TO THAT REASON. FOR THE RECORD THE STATE OBJECTS. THAT IS NOT FACTUALLY SPECIFIC, BUT IF THE STATE OR THE DEFENDANT WERE TO SAY, JUDGE, I OBJECT,

THAT REASON IS AN INVALID REASON UNDER THE STATUTE OR, JUDGE, I OBJECT. THAT REASON HASN'T BEEN SUFFICIENTLY -- ISN'T SUFFICIENTLY SUPPORTED BY THE RECORD. I WOULD BELIEVE THAT THAT WOULD BE A SUFFICIENT, SUFFICIENTLY SPECIFIC OBJECTION, IN ORDER TO PRESERVE IT FOR REVIEW, BECAUSE WHAT IT DOES IS IT AND PRICES THE TRIAL COURT OF THE NATURE OF THE OBJECTION. IT SAYS, JUDGE, THIS IS NOT A GOOD REASON AND THIS IS WHY. THAT IS WHAT I WOULD PROMOTE, PROMULGATE. I WOULD, ALSO, ARGUE HERE, IN THIS CASE, THAT THERE ARE TWO VALID REASONS. HE FIRST VALID REASON WAS THE PREVIOUS DOWNWARD DEPARTURE, EVEN THOUGH THE JUDGE DID NOT REDUCE THAT REASON TO WRITING IN HIS WRITTEN ORDER. HE DID STATE THAT ON THE RECORD, AND HE DID EXPLAIN WHY THE PREVIOUS DOWNWARD DEPARTURE WAS STILL VALID AT THE VOP SENTENCE, AND UNDER THIS COURT'S OPINION IN PEESE, AS LONG AS IT IS A VALID REASON, EVEN THOUGH IT IS AN ORAL REASON, IT IS STILL TO BE ACCEPTED. I WOULD, ALSO, SAY THAT ANOTHER VALID REASON HERE, IN THS CASE, WAS THE DEFENDANT'S AGE AT THE TIME OF THE OFFENSE. THE DEFENDANT WAS 17, I BELIEVE IT WAS A MONTH BEFORE HIS 17th BIRTHDAY, AT THE TIME OF THE OFFENSE, AND THAT WAS A GOOD REASON, IN 1992. THAT WAS STATUTORY MITIGATING CIRCUMSTANCE, IN 1992. THE STATE ARGUES, WELL, AGE ALONE ISN'T SUFFICIENT TO SUPPORT A DEPARTURE. I WOULD DISAGREE WITH THAT, BECAUSE I BELIEVE THOSE CASES THAT THE STATE CITES, THEY DON'T CITE, THOSE CASES DON'T CITE TO THE STATUTE, THE SPECIFIC STATUTE THAT ALLOWS THAT. BUT EVEN IF THIS COURT WERE TO ACCEPT THE FACT THAT AGE ALONE DOES NOT SUPPORT A DEPARTURE, THE TRIAL COURT DID GIVE REASONS AFTER HE GAVE THE REASON, WELL, THE DEFENDANT'S AGE IS A REASON TO DEPART, HE DID GIVE SEVERAL REASONS, WHILE AFTER THE DEFENDANT'S AGE HE SAYS MR. CLARK HAS BEEN EMPLOYED FULL-TIME, WAS HIGHLY-REGARDED BY HIS EMPLOYER. HE HAD NO CONTACT WITH THE VICTIM OR HER FAMILY. HE PAID THE COURT COSTS IN FULL AND THE AGE OF THE PROBATIONER. HE DIDN'T GIVE AGE ALONE. HE GAVE FOUR FACTORS IN CONJUNCTION WITH THE AGE, TO EXPLAIN WHY HE WAS DOWNWARDLY DEPARTING.

I THOUGHT THAT A PART OF THE TRIAL JUDGE'S AGE DISCUSSION HAD TO DO WITH THE FACT THAT THIS DEFENDANT, WAS HE CHARGED AS BEING OVER 18, IN --

THERE WAS A LITTLE CONFUSION ABOUT. THAT I BELIEVE THAT THE ORIGINAL INFORMATION SAID THAT THE CHILD WAS OVER 18 AND UNDER 12, BUT IF YOU LOOK AT THE RECORD AND THE TRANSCRIPT OF THE DISCUSSION AT THE SENTENCING HEARING, THE DEFENDANT WAS 17 AT THE TIME OF THE OFFENSE, AND I BELIEVE THAT THE DEFENSE COUNSEL BROUGHT THAT UP. IT WAS SOMETHING ON THE DOCKET AND HE WANTED TO CORRECT THAT.

SO WAS IT THE TRIAL JUDGE'S REASON THAT THE INFORMATION HAD ACTUALLY BEEN INCORRECT, AND THAT THE FACTS OF THE CASE WERE NOT AS THEY WERE ORIGINALLY PLED? I THOUGHT THAT WAS HIS REASON, AS OPPOSED TO THE ACTUAL AGE OF 17.

WELL, I BELIEVE THAT THE TRIAL JUDGE DID GO INTO. THAT THERE WAS SOME DISCUSSION REGARDING THAT THE VICTIM'S DEPOSITION DID NOT, CONTRADICTED WHAT THE POLICE REPORT SAID OR WHAT THE INFORMATION SAID, AND I BELIEVE HE WAS USING THAT AS A FACTOR, TO SUPPORT WHY THE PREVIOUS DOWNWARD DEPARTURE WAS STILL A VALID REASON, BUT AT THE END, HE DOES SAY THE DEFENDANT WAS A JUVENILE, AND THE DEFENDANT WAS A JUVENILE AT THE TIME OF THE OFFENSE, FROM WHAT I UNDERSTAND, FROM GOING BACK ON THE RECORD AND LOOKING AT HIS BIRTHDATE AND LOOKING AT THE POLICE REPORT, THE DEFENDANT WAS 17 AT THE TIME OF THE OFFENSE. SO I BELIEVE WHAT HE WAS TALKING ABOUT, HOW THE FACTS AREN'T ARE AS THE FACTS ALLEGE, IF THAT IS WHAT YOU ARE REFERRING TO, JUSTICE, I BELIEVE IT IS BECAUSE THE VICTIM GAVE CONTRADICTORY STATEMENTS. IT SAYS SOMETHING ABOUT THE VICTIM REDACTED, BUT I IMAGINE THAT THAT SHOULD HAVE BEEN THE VICTIM RECANTED, AND I BELIEVE THAT THAT IS WHY HE SAID THAT IS ANOTHER REASON TO SUPPORT THE PREVIOUS DOWNWARD DEPARTURE AS ANOTHER REASON FOR THE THIS VOP SENTENCE. THE LAST ISSUE I WOULD LIKE TO ADDRESS IS THE STATE'S CASE OF FLEISCHMAN, WHERE THEY SAY A FURTHER DEPARTURE, A FURTHER OBJECTION WOULD HAVE BEEN FUTILE. I DISAGREE WITH. THAT THE

FACTS IN FLEISCHMAN WERE VERY UNIQUE. IN FLEISCHMAN WAS A CASE WHERE THE TRIAL COURT. IT WAS AN UPWARD DEPARTURE. THE TRIAL COURT WANTED TO DEPART UPWARD, BECAUSE IT WAS A BATTERY AND MS. FLEISCHMAN HAD BATTERED HER MOTHER AND MADE THE STATEMENT THAT MS. FLEISCHMAN TALKED ABOUT HER MOTHER AS A PERSON WOULD TALK ABOUT A DOG. WHILE THE DEFENSE OBJECTED AS TO THAT NOT BEING A REASON, THE TRIAL COURT STILL WANTED TO USE THAT AS A REASON, SO WHAT IT DID WAS GET THE AGGRAVATING CIRCUMSTANCES STATUTE AND TRACKING THAT LANGUAGE, IN ORDER TO FIT THAT INVALID REASON INTO VALID REASONS, BECAUSE THERE ARE STATUTORY REASONS. THE DEFENSE COUNSEL DIDN'T OBJECT FURTHER TO THAT, THOSE REASONS LISTED, AND WHAT THE FIFTH DCA SAID WAS THE OBJECTION WAS PRESERVED, BECAUSE WHEN THE TRIAL COURT RESORTED TO TRACKING THE LANGUAGE IN THE AGGRAVATING FACTORS SECTION, IN ORDER TO GET VALID REASONS TO DEPART, IT WAS CLEAR THAT THE COURT INTENDED TO DEPART, AND A FURTHER OBJECTION WOULD HAVE BEEN FUTILE, AND THE FACT THAT IT WAS A SUFFICIENCY OF THE EVIDENCE ARGUMENT IN FLEISCHMAN. THERE WAS NO ABSOLUTELY NO EVIDENCE IN THE RECORD TO SUPPORT THE REASONS OF THE TWO AGGRAVATING STATUTES, TO SUPPORT THOSE TWO REASONS. IN CLARK, IT IS OBVIOUS FROM THE RECORD, THAT THE TRIAL COURT GAVE THE PROSECUTOR AMPLE OPPORTUNITY TO OBJECT. HE ALLOWED THE PROSECUTOR TO OBJECT GENERALLY BEFORE THE SENTENCE WAS IMPOSED. HE ALLOWED THE PROSECUTOR TO OBJECT WITH SPECIFICITY AFTER THE FIRST REASON WAS CITED, AND HE ASKED AT THE END, IS THERE ANYTHING FURTHER. ALSO ALLOWING THE PROSECUTOR TO INTERJECT REGARDING THE 1992 GUIDELINES. THERE IS NO INDICATION THAT A FURTHER OBJECTION BY THE STATE, HERE, WOULD HAVE NOT BEEN ACCEPTED BY THE TRIAL COURT OR THE TRIAL COURT WOULD HAVE CUT OFF THE STATE AND SAID, FINE, PROSECUTOR, YOUR OBJECTION IS NOTED FOR THE RECORD. THAT IS NOT WHAT WE HAVE IN THE FACTS OF THIS CASE, SO I WOULD ARGUE THAT FLEISCHMAN IS QUITE DISTINGUISHABLE FROM CLARK, BECAUSE OF THE UNIQUE FACTS IN FLEISCHMAN. THANK YOU. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. REBUTTAL?

YES, YOUR HONOR. THE STATE WOULD LIKE TO CLARIFY, NUMBER ONE, AS TO THE PROBATION OFFICER, THERE IS NOTHING IN THIS RECORD THAT SHOWS THE PROBATION OFFICER TESTIFIED. PAGE 9 OF THE TRANSCRIPT. LET ME SAY FOR THE RECORD, ACCORDING TO MR. KOONTZ'S REPORT. THERE IS NOTHING ABOUT THE PROBATION OFFICER TESTIFYING. NUMBER TWO, ABOUT THE VICTIM'S DEPOSITION. THIS WAS SOMETHING DEFENSE COUNSEL HAD MENTIONED, WELL, WHENE VICTIM'S DEPOSITION, CERTAIN FACTS DIDN'T COME OUT. WE DON'T HAVE THE VICTIM'S DEPOSITION IN THE RECORD. WE DON'T EVEN KNOW WHAT KIND OF QUESTIONS WERE ASKED TO THE VICTIM AT THE DEPOSITION. AND KNOW WHY CERTAIN QUESTIONS DIDN'T COME OUT. IF YOU DON'T ASK A CERTAIN QUESTION, YOU ARE NOT GOING TO GET THE ANSWER YOU ARE LOOKING FOR AND THAT HAPPENS ALL THE TIME. THERE WAS NO CROSS-EXAMINATION. NOTHING OTHER ABOUT THE VICTIM'S TESTIMONY IN THIS RECORD. BECAUSE THE TRIAL COURT IMMEDIATELY RUSHED IN AND PRONOUNCED SENTENCE, IT WOULD HAVE BEEN FUTILE, NO MATTER WHAT FOR THE PROSECUTOR TO OBJECT, BECAUSE NO MATTER WHAT REASON WAS GIVEN, IT WOULDN'T HAVE MADE ANY DIFFERENCE. WE OBJECT TO THAT. WE OBJECT. AND THE PROSECUTOR SAID, UP-FRONT, BASED ON THE EVIDENCE, AND THE RECORD BEFORE YOU, YOU DO NOT HAVE ENOUGH EVIDENCE AT THIS TIME, TO IMPOSE A DEPARTURE. THE STATE HAS PREVIOUSLY SAID, IN MADDUX, WE HAVE CONSISTENTLY MANDATED THAT NONCOMPLIANCE WITH THE STATUTE AND RULES GOVERNING DEPARTURE SENTENCING SHOULD BE ADDRESSED ON DIRECT APPEAL, EVEN ABSENT A CONTEMPORANEOUS OBJECTION, AND THE STATE WOULD SUN MIGHT IN THIS CASE, WE -- WOULD SUBMIT IN THIS CASE WE BELIEVE THERE WAS A CONTEMPORANEOUS OBJECTION, SUFFICIENT ENOUGH THAT, BASED ON THE RECORD BEFORE YOU, THAT YOU DO NOT HAVE EVIDENCE AT THIS TIME TO ENTER A DEPARTURE SENTENCE. THE STATE WOULD ASK YOUR HONORS TO PLEASE REVERSE. OUR HANDS ARE ALREADY TIED BY 9.140, FURTHER TIED BY NOT BEING ABLE TO AVAIL ITSELF OF 3.800-B. WHAT IF THE TRIAL JUDGE CAME DOWN AND SAID, WELL, YOU OBJECTED TO ALL THE REASONS THEY ARE GIVING, AND THEN SUBMITS AN ORDER

WITH ENTIRELY DIFFERENT REASONS ON IT? WHAT IS THE STATE LEFT TOO? CAN YOU OBJECT AT THAT LATE POINT? WE HAVE NO AVENUE TO OBJECT. WE ASK THAT YOU PLEASE REVERSE. THANK YOU, YOUR HONORS. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. THANK YOU, COUNSEL FOR YOUR ASSISTANCE IN THIS CASE.