Gregory Banks v. State of Florida

THE NEXT CASE ON THE COURT'S DOCKET IS BANKS VERSUS STATE, AND THE COURT WOULD LIKE TO ACKNOWLEDGE THE ELEMENTARY CLASS FROM CLAY COUNTY. THE COURT THANKS FOR YOU ATTENDING. IF YOU ARE READY TO PROCEED, YOU MAY PROCEED.

GOOD AFTERNOON. I AM FROM THE FIRM PHELPS DUNBAR, AND I AM KEVIN O'BRIEN, AND I REPRESENT THE PETITIONER, GREGORY BANKS. THERE ARE TWO ISSUES, AND ONE WAS WHETHER THE REQUEST FOR MOTION ON RULE 3.850 AND THE SECONDISH ON WHETHER IT HAD MERIT. NOW, THIS COURT CAN RULE IN ONE OF TWO ALTERNATIVE WAYS, AND THOSE ARE TWO CERTIFIED QUESTIONS FROM THE FIRST DISTRICT COURT OF APPEAL.

WHAT RELIEF WAS YOUR CLIENT SEEKING AT THE TRIAL COURT LEVEL WITH THIS MOTION?

WHAT MR. BANKS WAS SEEKING AND I BELIEVE WHAT IS SOMEWHAT IMPORTANT IS THAT THE TRIAL JUDGE MAY HAVE ACTUALLY MISSED THIS DREW TO THE MULTIPLE -- MISSED THIS, DUE TO THE MULTIPLE MOTIONS FILED BY MR. BANKS. MR. BANKS WAS TRYING TO SEE SAY THAT THE PLEAS PLEAS HE ENTERED INTO WAS NOT KNOWING AND VOLUNTARY AND HE WAS SEEKING TO POSSIBLY WITHDRAW HIS PLEA OR TO GO TO TRIAL, AND THAT IS ALL THAT MR. BANKS SOUGHT N THIS INSTANCE, AT THE TRIAL COURT LEVEL, HE DID NOT EVEN GET AN EVIDENTIARY HEARING ON THE MATTER.

HAD HE EVER SOUGHT, UNDER A 3.800 MOTION, TO HAVE HIS SENTENCE CHANGED OR DID HE OR HIS ATTORNEY REALIZE THAT HE FELL OUTSIDE OF THE PEOPLE WHO WERE ENTITLED TO DIRECT HEGGS RELIEF?

ACTUALLY MR. BANKS DID SEEK 3.800 RELIEF. HIS POSTCONVICTION MOTIONS UNTIL THEY REACHED THIS COURT AND I WAS APPOINTED, MR. BANKS WAS PRO SE. HE INITIALLY FILED RELIEF UNDER 3.800, SEEKING THAT HIS SENTENCE WAS ILLEGAL. THE TRIAL COURT CORRECTLY POINTED OUT THAT HE ENTERED INTO A PLEA AGREEMENT. THEREFORE HE WAS NOT ENTITLED TO SUCH RELIEF.

PLUS CYST SENTENCE WAS WITHIN THE 1994 GUIDELINES, EVEN THOUGH IT WAS --

THAT'S CORRECT AS WELL.

EVEN IF THIS WAS NOT A PLEA SITUATION, IT WAS A SENTENCE, HE WOULD NOT HAVE GOTTEN HEGGS RELIEF.

RIGHT. IT WAS VERY CLEAR THAT HE WAS NOT ENTITLED TO 3.800 RELIEF.

OTHER DEFENDANTS HAVE GOTTEN THAT, IF THEIR SENTENCE WAS UNDER THE 1995 GUIDELINES.

CORRECT. IF THE SENTENCE, IF THEY WENT TO TRIAL AND WERE SENTENCED, AND THAT SENTENCE EXCEEDED WHAT THE 1994 GUIDELINES WOULD HAVE PROVIDED FOR, THEY COULD HAVE BROUGHT THE MOTION AT ANY POINT IN TIME.

I AM TRYING TO SEE IF WE CAN NARROW THE ISSUE HERE, IN TERMS OF THE RELIEF THAT YOUR CLIENT SEEKS, AND ARE YOU REPRESENTING TO THE COURT THAT THE RELIEF THAT IS SOUGHT HERE IS TO SET ASIDE THE PLEA, BASED ON AN ARGUMENT OF VOLUNTARINESS?

THAT'S CORRECT, JUSTICE ANSTEAD.

SO THAT IS THE RELIEF NOW, THAT YOUR CLIENT IS SEEKING.

CORRECT.

AND SO WHY DON'T YOU FOLLOW-UP ON THAT. WHY IS HE ENTITLED TO HAVE HIS PLEA AGREEMENT SET ASIDE?

WELL, BECAUSE THE PLEA AGREEMENT THAT HE ENTERED INTO WAS NOT KNOWING AND VOLUNTARY. THEREFORE, HE IS ENTITLED TO --

WHY WASN'T IT KNOWING AND VOLUNTARY?

IT WASN'T KNOWING AND VOLUNTARY, BECAUSE WHEN MR. BANKS ENTERED INTO HIS PLEA AGREEMENT, AND THIS IS IN HIS SWORN MOTION, AND THERE IS ALSO EVIDENCE IN THE RECORD, THAT OBVIOUSLY WHEN HE CONSIDERED THE PLEA AGREEMENT BEFORE HIM, THEY, THE PROSECUTOR PRESENTED HIM WITH A UNIFORM SENTENCING GUIDELINE SCORE SHEET. NOW, THIS WAS THE SCORE SHEET THAT WAS CALCULATED UNDER THE 1995 GUIDELINES, WHICH TURNED OUT TO BE UNCONSTITUTIONAL, DUE TO THIS COURT'S DECISION, IN HEGGS, THAT THE NEW GUIDELINES PASSED IN 1995, WERE PASSED UNDER A BILL THAT VIOLATED THE SINGLE SUBJECT RULE.

SO HE THOUGHT HE WAS GETTING A GREAT DEAL.

CORRECT.

ACTUALLY THEY WERE GIVING HIM EVEN BELOW, BY ABOUT A MONTH OR TWO, THE 1995 GUIDELINES.

THE FACTS OF THIS CASE POINT OUT --

I ASSUME HE IS ALLEGING THAT, THAT HE THOUGHT HE WAS GETTING A GREAT DEAL.

EXACTLY. THE FACTS OF THIS CASE POINT OUT HOW THIS MUST HAVE NOT BEEN KNOWING AND VOLUNTARY. UNDER THE 1995 GUIDELINES, MR. BANKS'S SENTENCE WOULD HAVE BEEN 132.35 MONTHS, UP TO 324 MONTHS, OR SOMETHING ALONG THOSE LINES. UNDER THE 1994 GUIDELINES, HOWEVER, MR. BANKS'S SENTENCE WOULD HAVE BEEN 80.1 MONTHS UP TO A MAXIMUM OF 133.5 MONTHS! THAT MEANS THAT, UNDER THE '94 GUIDELINES, THE MAXIMUM SENTENCE HE COULD HAVE RECEIVED WAS SIMPLY FOUR DAYS LONGER THAN THE MINIMUM SENTENCE UNDER THE 1995 GUIDELINES. NOW, MR. BANKS, UNDER THE 1995 GUIDELINES, WHICH WERE WHAT HE THOUGHT, OBVIOUSLY, IT WAS THE LAW AT THE TIME, ALL HE WAS ENTITLED TO, HE SOUGHT A MINIMUM PLEA UNDER THAT, AND AS A MATTER OF FACT, THE SENTENCE THAT HE GOT WAS 132 MONTHS, JUST SLIGHTLY UNDER THE GUIDELINE RULES, BUT IT TURNS OUT THAT THAT 132 --

WAS THERE, IN THE PLEA ITSELF, WHEN IT WAS PRESENTED TO THE COURT, WAS THERE A DISCUSSION OF WHETHER OR NOT, WAS THE PLEA SAYING, JUDGE, WE ARE GOING TO ENTER THIS PLEA, WHETHER IT WAS GUILTY OR NOLO CONTENDERE, TO 133 MONTHS, OR WAS IT, JUDGE, WE ARE GOING TO ENTER THIS PLEA, BASED ON GETTING THE LOW END OF THE 1995 GUIDELINES?

THE PLEA WAS ENTERED INTO FOR ELEVEN YEARS, BUT DURING THE HEARING, OBVIOUSLY THE PLEA AGREEMENT AT THE BEGINNING STATES I UNDERSTAND THAT THIS PLEA AGREEMENT IS BEING ENTERED PURSUANT TO THE UNIFORM SENTENCING GUIDELINES. AT THE HEARING, DEFENSE COUNSEL AT THE TIME, PRESENTED TO THE JUDGE WHAT THE MINIMUM SENTENCE

RANGE WOULD BE, AND THE JUDGE SAID, HEY,WE ARE GOING TO NEED AN AMENDED SCORE SHEET ON THAT, SO IT IS VERY CLEAR AND COMMON SENSE WOULD DICTATE, AND WHAT IS VERY IMPORTANT IN THIS CASE, I THINK ANYBODY ON THE STREET AND ESPECIALLY ANY DEFENDANT, IF YOU ASKED THEM WHAT IS THE SINGLE MOST IMPORTANT FACT THAT YOU ARE GOING TO CONSIDER AS TO WHETHER OR NOT TO ENTER INTO THE PLEA AGREEMENT THAT THE STATE IS OFFERING YOU, IS HOW LONG WILL I GO TO JAIL, IF I GO TO TRIAL? IF I GO TO TRIAL, WHAT CAN THE SENTENCE MEAN TO ME?

SO YOU ARE ANALOGIZING THIS TO CASES WHERE, SAY, IF HE HAD BEEN GIVEN AN IMPROPER SCORE SHEET AND, WOULD THAT BE THE SAME?

THAT IS CORRECT. I POINTED OUT THE CASES IN MY BRIEF, SKID MORE VERSUS STATE, STATE VERSUS GAINER, WHERE THE COURTS HAVE SAID THE FIRST DISTRICT AND THIRD DISTRICT, I BELIEVE, HAS SAID THAT, IF A DEFENDANT IS OFFERED A SENTENCING GUIDELINE SHEET, WHERE THE NUMBERS WERE CORRECT BUT THERE WAS A MISCALCULATION, THAT THEY ARE ENTITLED TO RELIEF TO WITHDRAW THEIR PLEA AS NOT BEING KNOWING AND VOLUNTARY.

YOU ARE NOT ASKING FOR THE WITHDRAWAL. YOU ARE ASKING FOR THE RIGHT TO ESTABLISH THAT HE RELIED ON THE, WHAT THE GUIDELINES WERE IN ENTERING THIS, AND WITH THIS, TO THE, THIS NUMBER OF YEARS. YOU ARE NOT ASKING THAT WE, AS A MATTER OF LAW, SAY THAT HIS PLEA SHOULD BE WITHDRAWN.

NO. EXACTLY. UNDER RULE 9.141-B, IF THE MOVANT DOES NOT RECEIVE AN EVIDENTIARY HEARING, WHICH MR. BANKS DID NOT, THE STANDARD IS SIMPLY THAT, UNLESS THE RECORD SHOWS CONCLUSIVELY THAT THE PETITIONER IS ENTITLED TO NO RELIEF, IT SHOULD BE REVERSED AND REMANDED FOR AN EVIDENTIARY HEARING. THE STATE POINTS THAT OUT VERY CLEARLY IN THEIR BRIEF, AND THANK THAT STANDARD BODES WELL FOR MR. BANKS. I MEAN, HOW COULD ONE SAY THAT THE RECORD, I MEAN, COMMON SENSE WOULD ALMOST DICTATE CONCLUSIVELY, THAT SOMEONE PROBABLY --

FIRST YOU HAVE GOT TO GET TO 3.850 IN YOUR CASE, RIGHT?

THAT IS CORRECT.

OKAY, AND SO WHAT THIS WHOLE BASIS OF THIS ARGUMENT IS, IS TO ESTABLISH THAT, WHAT HAPPENED WITH HEGGS WAS THE CHANGE OF A FACT, RATHER THAN A CHANGE OF THE LAW. THAT IS WHERE WE HAVE GOT TO GO, CORRECT?

EXACTLY.

SO THAT THIS IS A NEWLY-DISCOVERED FACT. IT SEEMS TO ME THAT IS A STRETCH, LOGICALLY, TO SAY THAT A CHANGE IN THE LAW BECOMES A NEWLY-DISCOVERED FACT. WITHIN THE CONTEMPLATION OF OUR CASES IN WHAT POSTCONVICTION IS ATTEMPTING TO DO. I MEAN, I, IT SEEMS TO ME, IF YOU WOULD SPEAK TO THE REAGAN DECISION OUT OF THE FIRST, AND BECAUSE THAT DECISION DEALT WITH THIS AS A WHITT ANALYSIS, AND REALLY, THAT IS, WHITT WAS TRYING, WHITT WAS DEALING WITH THIS TYPE OF SITUATION, WAS IT NOT?

WELL, ACTUALLY, JUSTICE WELLS, IN REAGAN, WHICH IS FROM THE FIRST DISTRICT, AND PRETTY MUCH THE BANKS CASE IS ALMOST THE SAME THING AS REAGAN. THE FIRST DISTRICT SAID THIS IS REAGAN. WE ARE GOING DOWN THE SAME ROAD. BUT IF YOU WOULD LOOK AT REAGAN, IT POINTS OUT THAT, IN THAT CASE, THE PETITIONER DID NOT ARGUE, AND THE COURT SAID, AND BY THE WAY WE DON'T AGREE THAT THIS IS A CHANGE OF FACT. THEY JUST IGNORED THAT ANALYSIS AND JUMPED STRAIGHT TO THE WHITT ANALYSIS, AND IN THAT CASE, IF YOU LOOK AT THE DECISION THERE, SAME AS THE FIRST DISTRICT DECISION HERE, WHAT IS VERY IMPORTANT IS THE FACT THAT THEY DON'T POINT OUT THAT THE PETITIONER WAS CHALLENGING THAT THE

PLEA WAS NOT KNOWING AND VOLUNTARY. AND THAT IS, A CHANGE IN LAW IS NOT ALWAYS GOING TO BE A CHANGE IN FACT. I UNDERSTAND THAT. THAT WOULD BE, BUT WHAT PETITIONER HERE IS ARGUING, IS THAT, UNDER THESE CIRCUMSTANCES, UNDER THE CIRCUMSTANCES OF ENTERING INTO A PLEA AGREEMENT, A CHANGE IN LAW WHICH TELLS A PETITIONER THAT THE POSSIBLE SENTENCES THAT ARE AVAILABLE TO YOU ARE NOT THE REAL LEGAL SENTENCES THAT SHOULD BE AVAILABLE TO YOU, WELL, THAT IS A CHANGE IN FACT. AND IT SOMEWHAT POINTED OUT BY THIS COURT'S DECISION IN FORMER REFORM, WHERE THE DEFENDANT -- IN FERMERE, WHERE THE DEFENDANT ENTERED INTO A PLEA AGREEMENT FOR A SPLIT SENTENCE AND THE COURT THOUGHT IT WAS OKAY, AND LATER ON THE COURT DETERMINES SPLIT SENTENCING IS ILLEGAL AND THE DEFENDANT FORMERE SAID, HEY, WAIT A MINUTE, I WAS OFFERED A PLEA AGREEMENT THAT, AT THE TIME I THOUGHT WAS A LEGAL RANGE OF AGREEMENTS. NOW, HERE, OF COURSE, MR. BANKS DIDN'T ENTER INTO WHAT IS DEFINITELY AN ILLEGAL SENTENCE, BUT THE SENTENCES THAT WERE PRESENTED TO HIM, THE RANGE, PART OF IT WAS ILLEGAL. I MEAN, BASICALLY HE WAS PRESENTED FOUR DAYS OF LEGAL SENTENCE AND SEVERAL YEARS OF ILLEGAL SENTENCE.

WELL, IT SEEMS TO ME, THOUGH, GOING BACK TO REAGAN AND THE WHITT ANALYSIS, IS THAT, IF WE HADN'T ALREADY, IN HAGUE, SAID WHO IS GOING TO GET RELIEF, IN OTHER WORDS LET'S ASSUME THAT MR. BANKS, INSTEAD OF HAVING PLED GUILTY BASED ON A SPECIFIC SENTENCE, HAD BEEN SENTENCED BACK IN WHAT YEAR --

1996, OCTOBER 7, 1996. IT WAS DURING THE TRIAL.

BUT HE WAS ALREADY, AND THE SENTENCE WAS FINAL, AGAIN, THAT IS WHERE I STARTED OUT, HE WOULD HAVE, AND AGAIN I WILL HEAR IT FROM THE STATE, BUT ENTITLED TO HEGGS'S RELIEF, IF HIS SENTENCE HAD BEEN IN THE, IF HIS SENTENCE HAD BEEN IN THE 1995 RANGE, BUT NOW THE PROBLEM I HAVE, AND THIS IS WHERE I AM JUST, BECAUSE HIS SENTENCE, THOUGH, EVEN THOUGH IT WAS AT THE TOP, WAS IN THE 1994 RANGE, I AM JUST HAVING TROUBLE SEEING, WELL, HE WOULDN'T HAVE GOTTEN RELIEF, IF IT HAD BEEN A STRAIGHT UP SENTENCE IMPOSED, WHY SHOULD WE OPEN IT UP TO BE LOOKING AT THE GUILTY PLEA?

BECAUSE I BELIEVE, JUSTICE PARIENTE, THAT THERE IS A DIFFERENCE, BECAUSE HERE WE ARE NOT SIMPLY LOOKING AT A HEGGS ISSUE. WE ARE LOOKING AT BOTH A HEGGS ISSUE, HEGGS ISN'T REALLY THE ISSUE HERE. THE ISSUE HERE IS THE KNOWING AND VOLUNTARY PLEA. HEGGS IS JUST WHAT TURNED OUT TO MAKE THE PLEA NOT KNOWING AND VOLUNTARY.

BUT YOU WOULD, AGAIN, THE JUDGE COULD HAVE LEGALLY, AND HE WOULD NOT HAVE GOTTEN RELIEF, BEGIN HIM THE SENTENCE OF 132 MONTHS.

THAT'S CORRECT. AND SO THEREFORE, IN A WAY, BY MR. BANKS TRYING TO SAVE A TOLL ON THE JUDICIAL SYSTEM, BY ENTERING INTO A PLEA AGREEMENT, IF HE HAD GONE TO TRIAL, BASICALLY, IF --

THIS IS THE MOST HE CAN HAVE GOTTEN ANYWAY.

-- THIS IS THE MOST HE COULD HAVE GOTTEN ANYWAY.

IF HE HAD GOTTEN 4 DAYS, THEN HE WOULDN'T HAVE BEEN ENTITLED TO RELIEVE, BUT UNDER ANY OTHER SENTENCE THAT THE COURT COULD HAVE GIVEN HIM, HE WOULD HAVE BEEN ENTITLED TO RELIEF.

SO BASED ON WHAT YOU ARE SAYING HERE, WOULD ALL OF THE DEFENDANTS WHO HAD ALREADY FILED 3.800 MOTIONS AND BEEN SENTENCED TO THE TOP OF THE 1994 GUIDELINES, BUT THEY NOW STILL HAVE A CLAIM UNDER 3.850.

THE ONLY PEOPLE WHO WOULD HAVE CLAIMS ARE THOSE PEOPLE, OBVIOUSLY ANYBODY WHOSE SENTENCE WAS IMPOSED BY A COURT AND EXCEED THED THE 1994 GUIDELINES -- AND EXCEEDED THE 1994 GUIDELINES, THEY ARE ENTITLED TO RELIEF UNDER 3.800, AND THIS OUTCOME WOULD NOT AFFECT ANYBODY WHO HAD THEIR SENTENCE IMPOSED BY A COURT. THE ONLY PEOPLE WHO THIS OUTCOME WOULD AFFECT ARE THOSE PEOPLE WHO ENTERED INTO A PLEA AGREEMENT, AND BASED UPON SOME EVIDENCE, CAN SAY I RELIED UPON THE 1995 GUIDELINES PRESENTED TO ME, IN ENTERING --

SO THAT WOULD STILL INCLUDE, EVEN THOSE WHO MAY HAVE HAD A 3.800 MOTION, AND HE HAD A PLEA, SO NOW THEY NOW HAVE ANOTHER CLAIM, BASED ON 3.850, IF WE, IN FACT, RULE THE WAY YOU ARE TALKING ABOUT.

YES, YOUR HONOR, THAT IS THE POSITION THAT I AM TAKING. AND I DON'T BELIEVE THAT IT IS A GREAT NUMBER OF PEOPLE.

WOULD YOU THINK THAT, AGAIN, I DON'T KNOW IF WE HAVE THAT CASE THAT, IF SOMEBODY, INSTEAD OF MOVING TO WITHDRAW THEIR PLEA, JUST ASKED TO BE RESENTENCED UNDER THE 1994 GUIDELINES, THAT THEY WOULD PROBABLY GIVE UP, I MEAN, THERE MAY BE A WAIVER OF THEIR RIGHT TO WITHDRAW THE PLEA, I MEAN, IF THEY GO BACK TO THE COURT AND SAY NOW I WANT TO BE RESENTENCED, YOU ARE NOT GOING TO SAY, THEN I WILL ALSO ALLOW THEM TO SAY IF THEY DIDN'T LIKE THAT SENTENCE, THEN I WILL ALLOW THEM TO GO AHEAD AND WITHDRAW THEIR PLEA.

NO. I THINK YOU CAN ONLY HAVE IT ONE WAY OR THE OTHER, AND I DON'T BELIEVE THAT, UNDER THE CIRCUMSTANCES, YOU WOULD BE ENTITLED TO CLAIM, IT WAS ONE OF THE CLAIMS THAT MR. BANKS MADE AT THE TRIAL LEVEL. HE WAS PRO SE. HE SAID I WANT TO BE RESENTENCED TO THE LOW END OF THE 1994 GUIDELINES OR I WANT MY PLEA TO BE WITHDRAWN, AND I BELIEVE THAT THE ONLY RELIEF THAT, IF THIS COURT WERE TO AGREE WITH PETITIONER, THE ONLY RELIEF THAT ANYONE WOULD BE ENTITLED TO IS, FIRST, AN EVIDENTIARY HEARING TO DETERMINE WHETHER OR NOT THEY REALLY RELIED UPON THE '95 GUIDELINES, WHICH IT WOULD SEEM THAT ONE WOULD, AND THEN TO WITHDRAW THE PLEA AND ENTER INTO A NEW PLEA AGREEMENT OR TO GO TO TRIAL AND ACTUALLY BE SENTENCED. I SEE THAT MY INITIAL TIME, I WILL RESERVE THE REST FOR REBUTTAL.

CHIEF JUSTICE: THANK YOU VERY MUCH. GOOD MORNING.

GOOD MORNING, YOUR HONOR. IF IT PLEASE THE COURT, MY NAME IS ALAN DAKAN. I HAVE THE HONOR TODAY TO REPRESENT THE STATE OF FLORIDA WITH RESPECT TO THIS CASE. I THINK THAT THE FOREMOST POINT THAT HAS TO BE MADE HERE, IS THAT MR. BANKS IS NOT ENTITLED TO ANY RELIEF, BECAUSE HIS SENTENCE FELL UNDER THE 1994 GUIDELINES.

LET'S JUST, DOES THE STATE AGREE THAT AT LEAST FOLLOWING, THE COURT'S DECISION IN HAITIAN AND -- IN HAGUES AND THEN IN THE YEARS FOLLOWING AROUND THE STATE, THAT THE DEFENDANTS WHOSE SENTENCES WERE FINAL, WERE GETTING POST-CONVICTION RELIEF, IF THEIR SENTENCE WAS UNDER THE 199, FELL IN THE 1995 GUIDELINES, OUTSIDE OF THE 1994 GUIDELINES.

YES. THAT'S CORRECT.

SO THEREFORE ISN'T THE WHITT ANALYSIS, WHICH TALKS ABOUT WHEN A DECISION OF THIS COURT IS FINAL, WHETHER IT IS GOING TO APPLY TO DEFENDANTS WHOSE CONVICTIONS ARE ALREADY FINAL, HASN'T THAT, BY WHERE WE PUT THE HEGGS WINDOW AND HOW THIS HAS PLAYED OUT IN ACTUALITY, REALLY NOT THE WAY THAT THIS CASE NEEDS TO BE ANALYZEED?

I WOULD AGREE WITH THAT. BECAUSE THE PROBLEM THAT YOU FACE IS THAT, UNDER THE

HAITIAN DECISION, THE LANGUAGE WAS VERY SPECIFIC, AND THAT IS THAT THE COURT THERE SAID WE DETERMINE THAT, IF A PERSON'S SENTENCE IMPOSED UNDER THE 1995 GUIDELINES, COULD HAVE BEEN IMPOSED UNDER THE 1994 GUIDELINES WITHOUT A DEPARTURE, THEN THAT PERSON SHALL NOTE BE ENTITLED TO RELIEF UNDER THE DECISION HERE.

BUT ISN'T THAT A SEPARATE ISSUE THAN THE ISSUE RAISED OF VOLUNTARINESS OF A PLEA? THAT IS HELP ME WITH, LET'S SUPPOSE THAT WE HAD A VERY EXPLICIT VIDEOTAPE OF A PLEA COLLOQUY HERE, AND THE DEFENSE LAWYER SAYS TO THE JUDGE, JUDGE, I HAVE ADVISED MY CLIENT THAT, BECAUSE OF THE SENTENCING RANGE HERE, THAT THIS IS THE VERY LOW END OF THAT SENTENCING RANGE AND THAT THERE FOR HE IS GETTING AN EXTRAORDINARY DEAL FROM THE STATE UNDER THESE CIRCUMSTANCES, AND BECAUSE THE STATE IS OFFERING HIM THE VERY BOTTOM OF THE RANGE OF THE SENTENCING GUIDELINES, I AM ADVISING HIM, YOU KNOW, TO DO THIS, IN HIS OWN INTEREST OR WHATEVER, AND THE JUDGE SAYS TO THE DEFENDANT, IS THAT, YOU KNOW, RIGHT? IS THAT WHY YOU ARE DOING IT, BECAUSE YOUR LAWYER HAS EXPLAINED TO YOU THE SENTENCING RANGES AND EVERYTHING, AND THAT IS WHY HE IS ENTERING INTO THE PLEA HERE, AND HE ACKNOWLEDGES THAT HE IS, AND THEN HE IS SENTENCED. BUT THEN IT TURNS OUT THAT THAT IS AN ILLEGAL RANGE, AN UNCONSTITUTIONAL RANGE, AND THAT HE WAS ENTITLED TO BE SENTENCED UNDER A RANGE WHERE THIS ACTUALLY WOULD BE AT THE TOP OF THE RANGE, IF HE WENT TO TRIAL AND WAS CONVICTED. AND WHY ISN'T THAT A WHOLE SEPARATE ISSUE, AS OPPOSED TO SOMEBODY CLAIMING THEY ARE ENTITLED TO A DIFFERENT SENTENCE, WHICH WOULD BE DPOMPD BY WHAT WE SAID -- WHICH WOULD BE GOVERNED BY WHAT WE SAID IN HEGGS?

I THINK THE ANSWER TO THAT IS THAT WHAT IS HAPPENING HERE, IN THAT CIRCUMSTANCE, IS YOU HAVE TO LOOK AT IT IN TERMS OF RETROACTIVITY, RATHER THAN IN TERMS OF A NEWLY-DISCOVERED FACT. THE PROBLEM IS, AS I THINK, THAT 3.850 REALLY CONTEMPLATES FACTS THAT WERE PRESENT AT THE TIME OF SENTENCING. AND YOUR HONOR, IN YOUR SITUATION, YOU POINTED OUT THAT THE PLEA THERE WAS SPECIFICALLY RELATED TO THE GUIDELINES, SO IT MAY VERY WELL BE THAT THE COURT WOULD HAVE AN ANSWER THERE, IF, IN FACT, THIS COURT WERE TO DETERMINE THAT HEGGS WOULD BE HELD TO BE RETROACTIVE.

WE CLEARLY HELD THAT IT WAS RETROACTIVE IN SAYING THAT IT WAS GOING TO APPLY TO ALL KINDS OF PRISONERS OUT THERE, WHOSE JUDGMENTS WERE FINAL, AND I THOUGHT, IN YOUR EXCHANGE WITH JUSTICE PARIENTE, HAS ALREADY AGREED THAT IT WAS RETROACTIVE AND THAT IT APPLIED TO PRISONERS WHOSE SENTENCES WERE FINAL. I MEAN, WE SAID THAT RATHER EXPLICITLY IN HEGGS, DID WE NOT?

YES, THAT'S CORRECT, YOUR HONOR.

I AM JUST HAVING DIFFICULTY WITH WHY THIS WOULDN'T BE A PROPER BASIS FOR AN INDEPENDENT MOTION TO SET ASIDE A PLEA, BASED ON VOLUNTARINESS. LET'S SAY THE LAWYER HAD TOLD THE DEFENDANT THAT YOU ARE FACING A LIFE SENTENCE HERE, AND, REALLY, ALL HE WAS FACING WAS A MAXIMUM OF FIVE YEARS, AND HE SAID, YOU ARE FACING A LIFE SENTENCE, AND THEREFORE THE STATE IS OFFERING YOU THIS PLEA, AND PROVIDING FOR THIS SENTENCE, AND THEN HE FINDS OUT HE WAS NEVER FACING A LIFE SENTENCE. THE LAWYER, MY GOSH, BECAUSE HE HAD TOO MANY DRINKS OR SOMETHING, WAS READING THE WRONG STATUTE OR SOMETHING, AND I WOULD ASSUME THAT CLEARLY, UNDER THOSE FACTS, THAT A DEFENDANT WOULD BE ENTITLED TO WITHDRAW A PLEA, IF HE WAS OPERATING UNDER THE BASIS THAT HE WAS FACING A LIFE SENTENCE AS OPPOSED TO FACING A FIVE-YEAR SENTENCE. I MEAN, AREN'T THOSE JUST SORT OF CLASSIC GROUNDS FOR WITHDRAWING A PLEA, I MEAN, ASSUMING HE CAN PROVE IT. IF THE LAWYER COMES AND TESTIFIES THAT OH, NO, I KNEW OR I TOLD HIM THAT HE WAS SO LUCKY BECAUSE ANY JUDGE IN HIS RIGHT MIND WOULD HAVE EXCEEDED ANY GUIDELINES, UNDER THE CIRCUMSTANCES OF THIS ROBBERY, WHERE HE BEAT THE VICTIM HELPLESS OR YOU KNOW, MAYBE IT WOULD AND DIFFERENT, AND WE DON'T KNOW ABOUT THAT

YET, BECAUSE OBVIOUSLY THERE HASN'T BEEN AN EVIDENTIARY HEARING, BUT HASN'T HE PRESENTED AT LEAST ENOUGH OF A CLAIM TO GET A HEARING ON THAT, AS TO WHETHER HIS PLEA WAS VOLUNTARY OR NOT?

I THINK THAT THE ANSWER TO THAT IS NO, AND THE REASON FOR THAT, YOUR HONOR, AND I UNDERSTAND YOUR HONOR'S DIFFICULTY WITH IT, BUT WE ARE ALSO DEALING HERE, WITH A DOCTRINE OF FINALITY OF JUDGMENTS, AND WHAT IS ACTUALLY BEING ATTEMPTED HERE, IS TO SAY THAT, LOOK, SOMEWHERE DOWN THE ROAD, FIVE YEARS, TEN YEARS DOWN THE ROAD, IF THIS COURT MAKES A DETERMINATION SUCH AS IT DID IN HEGGS, OR IF A DISTRICT COURT OF APPEAL MAKES A DETERMINATION, THAT AUTOMATICALLY, YOU CAN THEN ARGUE THAT SOME FACT IN THE FUTURE ALLOWS TO YOU COME IN AND FILE A 3.850 AND GET SOME TYPE OF RELIEF. AND I DON'T THINK THAT IS WHAT IS INTENDED BY THE DOCTRINE, UNDER 3.850.

BUT THIS LAW WAS NEVER A VALID LAW, WAS IT?

I AM SORRY?

THIS LAW WAS NEVER A VALID LAW. THE '95 GUIDELINES WERE NEVER VALID.

THAT'S CORRECT. BUT ONLY FROM THE POINT THAT THIS COURT DETERMINED, IN 2000, UNDER HEGGS, THAT THERE WAS A VIOLATION OF THE SINGLE SUBJECT CONSTITUTIONAL PROVISION, AND RELATED BACK TO THE '90, -- THE '94 GUIDELINES.

DON'T WE HAVE ANOTHER VALUE HERE, WHICH IS THAT THE DEFENDANT IS GIVING UP HIS RIGHT TO GO TO A JURY TRIAL, IN EXCHANGE FOR SOMETHING THAT IS CERTAIN, AND, LIKE, ALTHOUGH WE DON'T LIKE THE USE OF THE WORD PLEA BARGAINS, THE IDEA IS THAT THERE IS SOME INCENTIVE THAT IS GOICHB A DEFENDANT, TO -- THAT IS GIVEN TO A DEFENDANT TO PLEAD GUILTY. NOW, OBVIOUSLY IN THIS CASE IT COMES TO LIFE THAT THIS GUY IS A HABITUAL OFFENDER AND THE STATE GAVE UP HER RIGHT TO SEEK HABITUAL OFFENDER STATUS, AS WE HAVE SEEN IN MANY CASES, OR THAT THERE WERE OTHER CHARGES PENDING AND REALLY THIS WAS ACTUALLY A GOOD DEAL, THEN HE IS NOT GOING TO GET ANY RELIEF, AND THE ONLY THING WE ARE REALLY TALKING ABOUT IS WHETHER THERE SHOULD, IN THIS SITUATION, WHETHER, WHERE IT APPEARS AT LEAST ON THE FACE, THAT THE VERY BASIS FOR THE PLEA WAS UNDERMINED BY THE FACT THAT THOSE 1995 GUIDELINES WERE NOT VALID, THAT WE SHOULD AT LEAST GIVE IT A CHANCE TO BE AIRED OUT, AND I GUESS, I THINK, THAT WHEN WE ARE THINKING ABOUT FINALITY, WE ARE NOT REALLY LOOKING AT THE UNDERLYING TRIAL, BECAUSE THERE WASN'T ANY. WE ARE LOOKING AT WHETHER THIS WAS A FAIR SENTENCE, TO GIVE THIS GUY 132 MONTHS, AND HE SAYS LISTEN, I REALLY WASN'T GUILTY. I THOUGHT THAT WAS A GOOD DEAL AND I WAS WORRIED THAT I WAS GOING TO GET 224 MONTHS, AND THAT IS WHY I DID THIS. I REALLY THINK I COULD HAVE DEFENDED THIS CASE.

THAT IS A FAIRLY LOGICAL POSITION TO TAKE, YOUR HONOR, BUT IN THIS PARTICULAR CASE, I THINK WE HAVE TO GO BACK TO THE FACT THAT, UNDER 9.141, THERE WAS A FINDING BY THE TRIAL JUDGE THAT THIS WAS NOT A PLEA UNDER THE GUIDELINES. THERE WAS A SPECIFIC FINDING BY THE TRIAL JUDGE THAT THERE WAS A PLEA TO A TERM OF YEARS. AND IF YOU LOOK AT THE TRANSCRIPT, WHICH IS ATTACHED TO THE TRIAL JUDGE'S ORDER, THE TRANSCRIPT INDICATES THAT. THE PUBLIC DEFENDER DOES NOT COME UP AND SAY, LOOK, WE ARE LEADING, ACTUALLY BELOW THE GUIDELINES, BUT WE ARE PLEADING TO THE LOW END OF THE GUIDELINES, OR WE ARE PLEADING TO THE HIGH END OF THE LOWER GUIDELINES. THE PUBLIC DEFENDER FLAT-OUT SAYS THAT THIS IS A PLEA TO ELEVEN YEARS.

AND BUT WHY WOULD SOMEBODY, LOGIC, WHY WOULD SOMEBODY PLEAD TO THE VERY TOP OF GUIDELINES? I MEAN, WHAT WOULD BE THE POSSIBLE RATIONALE WHY SOMEBODY WOULD DO THAT?

THE RATIONALE TO THAT WOULD BE FEAR OF DEPARTURE, IF IT WERE TO GO TO TRIAL AND THE COURT WOULD DEPART FROM THE GUIDELINES.

AND IT MAY VERY WELL BE THAT THIS DEFENDANT WILL NOT GET TO WITHDRAW HIS PLEA, BECAUSE THERE WILL COME OUT OTHER FACTORS THAT WOULD HAVE LED HIM TO BE CONCERNED ABOUT A DEPARTURE SENTENCE, AND NOTHING WOULD STOP, IF THIS GOES BACK AND HE WITHDRAWS HIS PLEA AND GUESS TO TRIAL, THAT THE JUDGE COULDN'T GIVE AN UPWARD DEPARTURE SENTENCE, IF IT IS NOT BASED ON VINDICTIVE REASONS.

THAT'S CORRECT, YOUR HONOR, BUT I THINK AGAIN, THE REAL PROBLEM IS THAT YOU ARE CORRECT THAT THERE ARE CERTAIN VALUES THERE IN TERMS OF THE DEFENDANT'S SITUATION, BUT THERE ARE ALSO CERTAIN VALUES IN TERMS OF THE STATE'S POSITION. AND I THINK, AGAIN, I HAVE TO UNDERSCORE THE FACT THAT WE HAVE TO LOOK AT THE FINALITY OF THE JUDGMENT.

THEN WHY DIDN'T THE STATE, IN HEGGS, COME BACK FOR REHEARING, AND SAY WE SHOULDN'T BE GIVING RETROACTIVE RELIEF? THAT THIS IS GOING TO HAVE A CATASTROPHIC EFFECT ON SENTENCING, AND YOU SHOULD ONLY APPLY HEGGS TO THOSE DEFENDANTS WHOSE SENTENCES ARE NOT FINAL?

-- SEE, THAT WAS THE TIME TO REALLY MAKE THAT ARGUMENT, BECAUSE LISTEN, WE HEARD ABOUT WHAT WENT ON ALL AROUND THE STATE WITH HE ALL OF THIS -- WENT ON ALL AROUND THE STATE ABOUT ALL OF THIS RESENTENCING.

I THINK THE POSSIBLE ANSWER TO THAT IS, IF THE STATE SAW THE RELIEF THAT WAS FINAL, AND THIS GOES BACK TO THE WORDING THAT, IF YOU WERE SENTENCED UNDER A SENTENCE THAT COULD ALSO BE SENTENCED UNDER THE 1994 GUIDELINES, THAT YOU ARE NOT ENTITLED TO RELIEVE. AND --

HOW MANY DEFENDANTS WERE RESENTENCED AFTER HEGGS? DO WE KNOW?

WE DON'T KNOW, YOUR HONOR.

IT WAS A LOT.

BUT THERE WAS A LOT. THERE IS NO QUESTION ABOUT THAT.

HOW MANY CASES ARE WE TALKING ABOUT THAT FIT INTO MR. BANKS'S SITUATION?

WE DON'T KNOW THE ANSWER TO THAT, EITHER, BUT I THINK THAT THAT THERE WOULD BE A SUBSTANTIAL NUMBER, NOT ONLY OF DEFENDANTS WHO ARE ENTITLED TO RELIEF BUT THE REAL PROBLEM THAT I THINK THAT WOULD FACE THE COURTS, FROM AN ADMINISTRATIVE POSITION, WOULD BE THE FACT THAT THERE WOULD BE A LOT OF CLAIMANTS WHO ARE NOT SBILTHED TO RELIEF, AND, OF COURSE, BANKS AND OUR POSITION IS ONE OF THOSE.

AS I UNDERSTAND THE QUESTION HERE, IS WHETHER BANKS CAN FIT WITHIN, UNDER THE PIGEON HOLE OF 3.850. I MEAN, ISN'T THAT WHAT WE ARE TALKING ABOUT?

THAT'S CORRECT, YOUR HONOR. AND I THINK THE REAL ANSWER IS THE PROBLEM THAT I SEE, TO THE POSITION THAT MR. BANKS IS TAKING IN THIS CASE, IS HE IS CREATING A LEGAL FICTION. HE, WHAT WE ARE SAYING IS, LOOK, YOU CAN TAKE SOME FUTURE FACT. FORGET ABOUT THE FACTS AT THE TIME OF THE CASE. YOU CAN TAKE SOME FUTURE FACT THAT DEVELOPS IN THIS CASE, THE CHANGE IN THE GUIDELINES, AND SAY, LOOK, MY PLEA WAS NOW INVOLUNTARY. AND I THINK THE ANSWER TO THAT, AND WHERE A DEFENDANT GETS RELIEF, IS UNDER SUBSECTION B-2 OF 3.850, WHICH SPECIFICALLY SAYS THAT, IF THERE IS A CHANGE IN THE LAW, AND THAT LAW IS MADE RETROACTIVE, YOU KNOW, THEN A DEFENDANT HAS THE RIGHT TO BRING A 3.850, AND

TAKE ADVANTAGE OF THE RETROACTIVE ANDPATIONCATION. -- APPLICATION.

HE DIDN'T DO. THAT WHY WOULDN'T EVERYONE, THEY HAD TWO YEARS FROM HEGGS. THIS WAS FILED WITHIN TWO YEARS FROM HEGGS.

CORRECT.

THIS ISN'T GOING TO GO ON AND THAT IS WHY I ASKED. THERE IS NOT GOING TO BE OTHER PEOPLE COMING OUT OF THE WOODWORK, BECAUSE IT WAS TWO YEARS FROM HEGGS, AND HEGGS CLEARLY SAID WHO WAS GOING TO BE AFFECTED BY IT, SO I MEAN, I GUESS, IN TERMS OF THIS ISSUE ABOUT HOW LONG THIS COULD GO ON, IT SEEMS THAT THE ISSUE THAT IS THAT THERE WAS ALREADY A DETERMINATION, EVEN THOUGH WE DIDN'T USE THOSE WORDS THAT, HEGGS WAS RETROACTIVE, WAS MADE AT THE TIME OF HEGGS.

WELL, THAT POSITION, I THINK, IS WELL TAKEN, BUT ONE OF THE PROBLEMS THAT YOU FACE, IN TERMS OF THE RETROACTIVITY, IS WHEN WAS THE CASE ACTUALLY RETROACTIVE? WAS IT RETROACTIVE FROM THE TIME THAT THIS COURT MADE THE HEGGS DETERMINATION, IN TERMS OF WHETHER OR NOT A DEFENDANT SHOULD HAVE BROUGHT A 3.850 ACTION, OR DO YOU GO BACK FURTHER THAN THAT? I MEAN, REALLY, ONE OF THE PROBLEMS IS YOU HAVE THE SINGLE SUBJECT WAS THERE FROM THE VERY BEGINNING, AND IF AN ATTORNEY WAS DILIGENT, WHICH OBVIOUSLY AN ATTORNEY WAS WITH RESPECT TO THE SECOND DISTRICT COURT OF APPEAL, THAT ARGUMENT WOULD HAVE BEEN MADE SOME TIME AGO, SO THE QUESTION THEN BECOMES IS, WHEN DO YOU MAKE YOUR POINT AS FAR AS RETROACTIVITY IS CONCERNED?

THAT WOULD HAVE BEEN TRUE OF ALL OF THE PRISONERS WHOSE JUDGMENTS WERE FINAL AT THE TIME HEGGS WAS ISSUED.

YES, YOUR HONOR.

AND THEREFORE WE WOULD NOT HAVE APPLIED IT. WE WOULD HAVE SAID, NO, YOU ARE IN THE SAME POSITION TO MAKE THE CLAIM THAT MR. HEGGS MADE, AND SINCE YOU DIDN'T DO IT BEFORE, YOU ARE NOT ENTITLED TO RELIEVE, BUT THAT IS NOT WHAT WE DID.

NO. THAT'S CORRECT, YOUR HONOR.

SO I MEAN, I AM, THAT IS TOTALLY IN CONSISTENT WITH WHAT WE ACTUALLY DID IN HEGGS, IT NOT?

IT IS INCONSISTENT TO A CERTAIN EXTENT, BUT THE PROBLEM IS, AND, AGAIN, WHAT REALLY CONCERNS ME ABOUT --

WHY DO YOU SAY TO A CERTAIN EXTENT? I AM HAVING DIFFICULTY, IF WE SAID HEGGS IS GOING TO BE APPLIED, TO DEFENDANTS WHOSE SENTENCES AND JUDGMENTS ARE FINAL, OKAY, AND THAT THEY ARE IN THE SAME POSITION TO HAVE ARGUED IT BACK, YOU KNOW, WHEN THEY, THEN IT SEEMS TO ME IT IS DIRECTLY ON POINT NOT JUST TO SOME EXTENT.

UM-HUM.

I AM HAVING LEGITIMATE DIFFICULTY SAYING THAT THAT ISN'T WHAT WE DID IN HEGGS. WE CROSSED THAT BRIDGE IN HEGGS, DID WE NOT?

WELL, I THINK THAT THE COURT REALLY MADE THE DETERMINATION AT THAT POINT, THAT, IF YOU ARE IN THE PIPELINE, YOU WOULD BE ENTITLED TO RELIEF ON THAT.

HELP ME WITH THAT, TOO, BECAUSE I UNDERSTOOD IT TO BE MORE THAN IN THE PIPELINE. IN THE

PIPELINE IMPLIES THAT YOU KEPT THIS ISSUE ALIVE, YOU KNOW, AND YOU KNOW, FROM THE BEGINNING, AND IT JUST HASN'T BEEN RESOLVED AT THE HIGHEST LEVEL. HEGGS EXTENDED TO PRISONERS AS JUDGMENTS WERE FINAL, AND WE ARE NOT IN THE PIPELINE -- AND WERE NOT IN THE PIPELINE, RIGHT?

THAT WOULD BE CORRECT, YOUR HONOR. BUT THE PROBLEM, AGAIN, IS WHERE DO YOU DRAW THE LINE, IN TERMS OF RETROACTIVITY, AND WHERE DO YOU DRAW THE LINE, IN TERMS OF DECLARING THAT A PLEA IS INVOLUNTARY. IN THIS PARTICULAR CASE, AGAIN, I HAVE TO STRESS THAT THE PLEA WAS TO A TERM OF YEARS. THERE WAS NO INDICATION IN THE RECORD THAT, IN THIS PARTICULAR CASE, MR. BANKS WAS RELYING ON THE GUIDELINES.

DON'T YOU HAVE TO FIND OUT ABOUT THAT IN AN EVIDENTIARY HEARING?

UNDER A 9141, I THINK IT HAS ALREADY BEEN CONCLUDED. AND I THINK IT IS CONCLUDE I FEEL DEMONSTRATED IN THIS -- CONCLUDEIVELY DEMONSTRATED IN THIS PARTICULAR RECORD, AND THE REASON I LOOK AT THAT, AT THE PLEA FORM ITSELF, IT SPECIFICALLY SAYS ELEVEN YEARS F YOU LOOK AT THE COLLOQUY THAT WAS BETWEEN THE PUBLIC DEFENDER AND THE COURT, IT SPECIFICALLY SAYS ELEVEN YEARS.

SO IF THE PUBLIC DEFENDER FILED A SWORN AFFIDAVIT THAT SAID THE WHOLE BASIS FOR HIM ENTERING THAT PLEA WAS BECAUSE I TOLD HIM WERE IT WAS IN THE GUIDELINES AND WHAT AN INCREDIBLE DEAL HE WAS GETTING AND EVERYTHING, THAT WOULD HAVE NO EFFECT.

I DON'T THINK IT WOULD IN THIS PARTICULAR INSTANCE, AND, AGAIN, BECAUSE WE ALREADY HAVE THE, WHAT RECORD THERE IS, WHICH IS THE TRUNCATED RECORD THAT YOU GET IN A 9.141, BUT THE DETERMINATION HAD BEEN MADE, YOU KNOW, A THAT IT WAS CONCLUSIVELY DETERMINED THAT HE PLED OUT TO THIS SPECIFIC TERM OF YEARS.

WELL, ISN'T, MY UNDERSTANDING OF, RECOLLECTION OF WHAT THIS COURT HELD IN HEGGS, WAS THAT THE LAW WOULD BE THAT, IF, THAT DEFENDANTS WHOSE SENTENCE WOULD NOT BE CHANGED BECAUSE FALLING BACK TO THE 1994 GUIDELINES WOULD NOT CHANGE THEIR SENTENCE, WOULD NOT BE RESENTENCED, IS THAT, IS THAT CORRECT?

THAT WOULD BE CORRECT, YOUR HONOR.

NOW, THIS, WHAT, THE NUANCE THAT WE ARE DEALING WITH HERE IS THAT YOU HAVE TO GET PAST THAT, BECAUSE HE DID FALL WITHIN THE 1994 SENTENCE, SO THERE HAS TO BE A VEHICLE TO GET A FACTUAL DETERMINATION THAT HE SHOULD BE ABLE TO WITHDRAW IT, BECAUSE HIS RELIANCE WAS MISPLACED. IS THAT CORRECT?

THAT WOULD BE CORRECT, YOUR HONOR.

AND SO THE QUESTION IS, WHETHER, AND THE ONLY MECHANISM THAT WE HAVE TO GET TO A 3., TO GET TO A FACTUAL DETERMINATION, IS THROUGH 3.850.

CORRECT.

OKAY.

ALL RIGHT. BUT THE PROBLEM IS, OF COURSE, IN A SITUATION LIKE THIS, YOU DON'T REALLY HAVE A FACTUAL ISSUE IN THIS PARTICULAR CASE, AND THE REASON FOR THAT IS THERE HAS BEEN A DETERMINATION ALREADY MADE, THAT THE PLEA WAS FOR THE SPECIFIC TERM OF YEARS. WHAT HAPPENS THEN IS, WHAT THIS COURT WOULD HAVE TO DO IN THIS PARTICULAR CASE, IS TO, IN ESSENCE, REVERSE NOT ON THE QUESTION OF HEGGS AND NOT ON THE QUESTION OF RETROACTIVITY, BUT ON THE QUESTION OF WHETHER OR NOT THE TRIAL JUDGE AND THE

DISTRICT COURT OF APPEAL WERE CORRECT IN DETERMINING THAT IT WAS CONCLUSIVELY DETERMINED THAT THIS WAS A PLEA TO A TERM OF YEARS. OUR POSITION IS, BEGIN THE HEGGS LANGUAGE, MR. BANKS SQUARELY FALLS WITHIN THAT PROVISION WHICH SAYS HE IS NOT ENTITLED TO RELIEF.

BUT THAT IS A DIFFERENT QUESTION. WHETHER HE, MR. BANKS, PERSONALLY, IS ENTITLED TO RELIEVE, ISN'T THAT A DIFFERENT QUESTION FROM WHETHER OR NOT MR. BANKS HAD THE RIGHT TO BRING THE CLAIM AT ALL IN A 3.850?

IT IS A DIFFERENT QUESTION TO A CERTAIN EXTENT, BUT THE PROBLEM THAT I HAVE WITH IT IS THAT YOU HAVE A FINAL JUDGMENT. YOU HAVE A FINAL DETERMINATION THAT IS MADE AT THE TIME OF SENTENCING. AND THEN ALL OF A SUDDEN, YOU COME UP TO A CERTAIN POINT, AND EITHER THE DISTRICT COURT OF APPEAL OR THE THIS COURT CHANGES THE LAW IN THE FUTURE. I THINK THAT, UNLESS THIS COURT ENGAGES IN A DETERMINATION AS TO WHETHER OR NOT THERE SHOULD BE RETROACTIVE APPLICATION UNDER THE WHITT DOCTRINE, THAT IT SHOULD NOT MAKE A DETERMINATION THAT THERE IS SOME KIND OF NEW FACTS, SOME KIND OF LEGAL FICTION THAT IS MADE THAT ALLOW THEM TO BRING THE ACTION, SO OUR POSITION BASICALLY IS THAT THIS COURT SPECIFICALLY, IN THIS CASE, NEEDS TO AFFIRM, BECAUSE HE IS NOT ENTITLED TO RELIEVE UNDER HEGGS.

BUT IF HE IS NOT ENTITLED TO THE RELIEF, THEN THE COURT MUST, THEN IT SEEMS TO ME THE COURT ACTUALLY ADDRESSED THE 3.850 ON ITS MERITS.

YES. THAT, WELL, THAT WOULD BE CORRECT IN THE DETERMINATION THAT THE COURT CONCLUDED THAT THERE WAS A CONCLUSIVE DETERMINATION THAT HE PLED TO A TERM OF YEARS. SO THE COURT WOULD THERE FOR ASK THAT THE PETITION BE DENIED AND ACTUALLY WOULD ASK THAT THIS COURT DETERMINE THAT THE JURISDICTION WAS IMPROVE DENTLY GRANTED. THANK YOU -- WAS NOT PROVIDENTLY GRANTED.

THANK YOU VERY MUCH AND WOULD YOU GIVE THE DETERMINATION OF THE CONCLUSION TO THE COURT.

AS FAR AS THE RECOLLECTION FOR PURPOSES OF 9.140, FIRST OF ALL, THE PETITIONER'S 3.850 MOTION WAS A SWORN MOTION, AS IT MUST BE, AND IN THAT MOTION, WHICH IS THE RECORD AT PAGE 4, PETITIONER SWORE THAT, IN CONSIDERING HIS PLEA AGREEMENT, HE CONSIDERED THE 1995 GUIDELINES, AND IF HE WOULD HAVE KNOWN THAT THE 1994 RATHER THAN THE 199 A 5 GUIDELINES -- RATHER THAN THE 1995 GUIDELINES, WHICH WOULD HAVE BEEN HIS LEGAL SENTENCE, HE WOULD NEVER HAVE ENTERED INTO THE PLEA AGREEMENT AS WAS OFFERED TO HIM, AND UNDER THE CASE OF VIO VERSUS STATE, A PETITIONER'S SWORN ALLEGATIONS MUST BE TAKEN AS TRUE, UNLESS CONCLUSIVELY REBUTTED BY THE RECORD, AND, OF COURSE, IN THE RECORD IN THIS CASE, THERE IS ALSO THE RECORD AT 21, THE PLEA AGREEMENT, ITSELF, AS I POINTED OUT BEFORE, SAID I HEREBY UNDERSTAND THAT THIS SENTENCE WILL BE IMPOSED, PURSUANT TO THE UNIFORM SENTENCING GUIDELINES.

DID THE TRIAL COURT, IN FACT, IN THIS CASE, DEAL WITH THE MERITS OF THE 3.850? WAS THERE A DETERMINATION MADE THAT HE WAS NOT ENTITLED TO RELIEVE, BECAUSE HE PLED TO A TERM OF YEARS, AS OPPOSED TO A GUIDELINE SENTENCE?

THERE WAS REALLY NO DETERMINATION OF ANYTHING. WHAT HAPPENED WAS HE HAD FILED THE 3.850 MOTION. -- HE HAD FILED THE 3.800 MOTION AND THEY DENIED THAT PROPERLY. THEN WHEN HE FILED THE 3.850 MOTION, I THINK THE TRIAL COURT, AND THEY ALREADY GET A LOT OF THESE MOTIONS, SAID YOU ALREADY RAISED THIS MOTION AND I DENIED IT BASED UPON THE SAME REASONS, THE PETITIONER TRIED TO POINT OUT TO THE TRIAL COURT AT THE REHEARING, THIS MOTION IS ABOUT MY INVOLUNTARY PLEA, AND THE COURT DENIED IT WITHOUT ANY DISCUSSION AT ALL.

HOW FAR ARE WE GOING TO GO, THOUGH, IN LATER RULINGS, AS YOUR OPPONENT POINTS OUT, GOING TO AFFECT ORIGINAL PLEAS, YOU KNOW, WHAT IF WE HAD A MOTION HERE TO WITHDRAW THE PLEA, BECAUSE IT SAID THAT THE FLORIDA SUPREME COURT HAS NOW RULED A CERTAIN CLASS OF EVIDENCE IS NOT ADMISSIBLE, AND IF I WOULD HAVE KNOWN THAT WHEN I ENTERED MY PLEA, BECAUSE THAT WAS THE VERY EVIDENCE THAT WAS GOING TO BE THE STRONGEST AGAINST ME, AND NOW, TEN YEARS LATER, THE FLORIDA SUPREME COURT HAS RULED DIFFERENTLY ON THAT EVIDENTIARY ISSUE, AND I OUGHT TO GET TO WITHDRAW MY PLEA, BECAUSE THAT EVIDENCE THAT THEY USED AGAINST ME WOULDN'T BE ADMISSIBLE NOW?

WELL, IT WOULD DEPEND ON THE SITUATION THERE. IF THE COURT RULED THAT THAT TYPE OF EVIDENCE IS INADMISSIBLE AND MADE IT RETROACTIVE, MEANING THAT, WHEN THE PETITIONER THERE ENTERED INTO HIS OR HER PLEA, THAT THAT EVIDENCE WOULD NOT HAVE BEEN ENTERED INTO, WOULD HAVE BEEN ALLOWED TO BE ENTERED INTO AGAINST HIM OR HER AT TRIAL, THEN THE SITUATION WOULD BE VERY SIMILAR, AND I THINK THAT WOULD BE IT, MAYBE THAT WOULD HAVE BEEN A MAJOR DECISION-MAKING FACTOR. I DON'T THINK IT IS AS BIG AS THE DECISION-MAKING FACTOR OF WHAT ULTIMATELY CAN I GO TO JAIL FOR?

AREN'T YOU ASKING US, REGARDLESS OF RETROACTIVITY, BY, I MEAN, ASKING US TO HOLD THAT A LEGAL DECISION CAN CONSTITUTE A NEWLY-DISCOVERED FACT, THAT WOULD MAKE EVERY CASE RETROACTIVE, AND YOU WOULDN'T HAVE TO GO BACK TWO YEARS OR FOUR YEARS. YOU COULD GO BACK ADD IN FIBITY YOU MEAN -- AD INFINITUM, BECAUSE NOW THIS IS A NEWLY-DISCOVERED FACT, AND THEN WOULDN'T EVERY DECISION THAT WE RENDER THAT QUASH ES A DISTRICT COURT DECISION, NOW BE A CHANGE IN THE LAW THAT IS A NEWLY-DISCOVERED FACT, AND WOULD ALLOW DEFENDANTS TO WITHDRAW THEIR PLEAS, WHICH THEY MADE BASED ON THESE LEGAL ASSUMPTIONS THAT NO LONGER EXIST?

I DON'T BELIEVE SO, YOUR HONOR, BECAUSE MY POINT IN THE RETROACTIVITY WAS THAT, IF THIS COURT CLARIFIES THE LAW OR TWEAKS THE LAW, A STATUTE INTERPRETATION, IT WOULDN'T HAVE NECESSARILY APPLIED TO THE PETITIONER'S CASE WHEN THEY ENTERED INTO THEIR PLEA, BUT HERE IN THIS INSTANCE, WHEN THE COURT SAID THOSE SENTENCING GUIDELINES THAT YOU LOOKED AT, AND THAT YOU CONSIDERED, OR AT LEAST THE PETITIONER IS ALLEGING THAT HE CONSIDERED, WERE ILLEGAL FROM THE MOMENT. THEY WERE VOID AD MONITIO. THEY DID NOT EXIST. THEREFORE THAT IS A COMPLETELY DIFFERENT FACT FOR HIM TO CONSIDER. IF THIS COURT TWEAKS THE LAW OR MAKES A SMALL INTERPRETATIONAL CHANGE, THAT WOULDN'T HAVE NECESSARILY AFFECTED THEIR DECISION-MAKING PROCESS WAY BACK, TEN YEARS AGO, UNLESS IT WAS THE STATUTE THAT THEY WERE PROSECUTED UNDER OR WAS UNCONSTITUTIONAL.

WHAT ABOUT A DEFENDANT WHO SAYS MY ATTORNEY SAID THAT THIS PARTICULAR PSYCHOLOGIST PRIVILEGE WASN'T AVAILABLE AND NOW IT IS AVAILABLE. NOW THE SUPREME COURT HAS REVERSED AND IT IS AVAILABLE, OR NOW IT IS AVAILABLE AND I DIDN'T PRESENT IT AND I HAD A PRETTY GOOD CHANCE OF BEING FOUND GUILTY, BUT IF I COULD PRESENT THAT EVIDENCE, I THINK I WOULD HAVE GONE TO TRIAL.

I SEE THAT MY TIME IS UP. WOULD YOU LIKE ME TO ANSWER YOUR QUESTION?

YES, PLEASE.

I WOULD SAY THAT, IN THAT INSTANCE, AND THESE ARE GOING TO BE LIMITED INSTANCES WHERE A DECISION OF THIS COURT OR A HIGHER COURT IS GOING TO SAY WHAT WOULD HAVE OR WOULD NOT HAVE BEEN AVAILABLE TO YOU AT THE TIME OF THE TRIAL, YOU KNOW, THAT WE ARE GOING TO CHANGE THE LAW AND SAY THAT WOULD HAVE BEEN AVAILABLE TO YOU FIVE YEARS AGO, THEN I THINK THAT THAT MAY HAVE BEEN A MAJOR FACT. IF THE CASE

INCORPORATED ON THAT. BUT ONCE AGAIN, IT IS JUST GO TO AN EVIDENTIARY HEARING AND DECIDE WOULD THAT REALLY HAVE BEEN A FACTOR.

CHIEF JUSTICE: THANK YOU VERY MUCH. YOUR TIME IS UP. THANK YOU ALL, FOR RESPONDING AND THE EXCHANGE THAT WE HAD HERE. YOU WERE APPOINTED COUNSEL IN THIS CASE. IS THAT CORRECT? WE APPRECIATE YOUR SERVICES ESPECIALLY. THE COURT WILL STAND IN RECESS NOW, UNTIL NINE O'CLOCK TOMORROW MORNING.

EIGHT-THIRTY TOMORROW.