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## **John Hall v. State of Florida**

THE NEXT CASE ON THE COURT'S CALENDAR THIS MORNING IS JOHN HALL VERSUS STATE. MR. BRINKMEYER.

YES, SIR. MAY IT PLEASE THE COURT. MY NAME IS DOUGLAS BRINKMEYER FROM THE PUBLIC DEFENDERS OFFICE REPRESENTING MR. HALL. HE WAS TAKEN INTO CUSTODY OUTSIDE OF A BAR IN GADSTEN COUNTY.

JUST SO WE KNOW, BECAUSE WE HAVE AN AUDIENCE HERE, THIS IS ANOTHER MR. HALL.

A TOTALLY DIFFERENT MR. HALL, NO RELATION TO THE OTHER MR. HALL. HE WAS CHARGED WITH RESISTING ARREST, BECAUSE WHEN HE WAS TAKEN INTO CUSTODY, HE KICKED AT THE OFFICERS, AND WHEN HE WAS SEARCHED INCIDENT TO ARREST, THE POLICE FOUND LESS THAN ONE GRAHAM OF COCAINE IN HIS POCKET. AS A RESULT OF THIS, HE WENT TO TRIAL AND WAS CONVICTED OF RESISTING ARREST WITH VIOLENCE AND POSSESSION OF COCAINE FOR. THOSE TWO CRIMES -- OF COCAINE. FOR THOSE TWO CRIMES, HIS CONVICTION CODE SHEET CONTAINED 452 POINTS AND THAT CALLED FOR A MINIMUM SENTENCE OF 49.8 MONTHS IN PRISON OR JUST OVER A LITTLE OVER FOUR YEARS IN PRISON. IF HE HAD BEEN SCORED OVER THE SENTENCING GUIDELINES, HIS SENTENCE WOULD HAVE A RANGE OF THE SAME 49.8 MONTHS TO 83 MONTHS OR A LITTLE LESS THAN SEVEN YEARS. PURSUANT TO THIS PROSECUTOR'S REQUEST AT SENTENCING, THE JUDGE IMPOSED A FIVE-YEAR SENTENCE, THE STATUTORY MAXIMUM, ON EACH THIRD-DEGREE FELONY AND IMPOSED THEM CONSECUTIVELY, FOR A TOTAL OF TEN YEARS, AND HE OBJECTED TO THE IMPOSITION OF THE CONSECUTIVE SENTENCES.

ON WHAT BASIS?

THAT IT WAS NOT AUTHORIZED BY STATUTE.

IT WAS NOT A CONSTITUTIONAL OBJECTION.

NO, SIR.

AND THE CONSTITUTIONAL OBJECTION WAS FIRST RAISED WHEN?

IN THE DCA. PRIOR TO --

DID THAT CREATOR WAS THAT RAISED, WAS THERE A CHALLENGE TO THAT? --

NOT AT THAT TIME, YOUR HONOR. BACK IN 1999, THE FIRST DCA ALLOWED US TO RAISE FACIAL VALIDITY OF STATUTES FOR THE FIRST TIME, ON APPEAL, THEN THEY ISSUED A DECISION CALLED HARBINE WHICH THEY SAID WE HAD TO USE THE 300-B PROVISION OF THAT, BUT THIS WAS PRIOR TO HARVEY AND THE STATE NEVER RAISED ANY CLAIM THAT IT WAS PRESERVED IN THE DCA WE ARGUED BELOW THAT THE CODE IS UNCONSTITUTIONAL, IS A VIOLATION OF DUE PROCESS AND ACCESS TO COURTS. THE FIRST DCA HELD THAT IT WAS CONSTITUTIONAL, AND CITED MOSTLY AS AUTHORITY, THE PREVIOUS CASE YOU HAVE JUST HEARD, THE OTHER HALL CASE OUT OF THE FOURTH, SO, OBVIOUSLY, THE ISSUES PRESENTED TODAY ARE WHETHER THE CODE IS CONSTITUTIONAL AND WHETHER THIS TEN-YEAR SENTENCE ILLEGAL.

ARE THERE TWO SEPARATE ISSUES? BECAUSE YOU SAID THE ONLY ISSUE RAISED BEFORE THE

TRIAL COURT WAS THAT THE JUDGE COULD NOT IMPOSE CONSECUTIVE SENTENCINGS.

CORRECT -- SENTENCES. ARE YOU STILL MAKING THAT CLAIM?

YES, MA'AM.

AND THAT IS A DIFFERENT ARGUMENT THAN WHETHER THE PUNISHMENT CODE IS UNCONSTITUTIONAL.

IT IS A RELATED ARGUMENT. MAY I REFER TO JUSTICE SHAW'S QUESTION, IN THE PREVIOUS HALL CASE, THE PURPOSES OF THE CODE ARE SET OUT IN THE STATUTE. IT IS A, PLIM EARL A -- PRIMARILY A PENALTY STATUTE. HOWEVER, THE PENALTY IS SUPPOSED TO INCREASE WITH THE LENGTH AND NATURE OF THE SERIOUSNESS OF A DEFENDANT'S PRIOR RECORD. THE LEGISLATURE, ALSO, SAID THAT PRISON IS A PRIORITY FOR SERIOUS CRIMES AND DEFENDANTS WITH LONG RECORDS. HOWEVER, THERE IS NO DIFFERENCE BETWEEN A FIRST-TIME OFFENDER, UNDER THE CODE, AND A CAREER CRIMINAL, UNDER THE CODE. BOTH CAN RECEIVE STATUTORY MAXIMUM. AS A MATTER OF FACT, IT IS EASIER FOR THE STATE TO SEEK AND FOR THE TRIAL JUDGE TO IMPOSE THE STATUTORY MAXIMUM, UNDER THE CODE, AND RUN THEM CONSECUTIVELY THAT IT WOULD BE FOR THE STATE TO SEEK HABITUAL OFFENDER SENTENCING, HABITUAL VIOLENT OFFENDER SENTENCING, VIOLENT CAREER CRIMINAL SENTENCE O'CLOCK ALL OF THESE OTHER RESID JUST STATUTES DON'T COME -- SENTENCING, ALL OF THESE OTHER RESID I JUST STATUTES -- RECIDIVOUS STATUTES DON'T APPLY AND DON'T COME INTO CODE.

YOU KEEP SPEAKING IN TERMS OF LEVELING THE PLAYING FIELD.

YES, SIR.

DOES THERE HAVE TO BE A LEVEL PLAYING FIELD, CONSTITUTIONALLY? IF IT IS NOT, DO YOU RUN INTO, TRULY, A DUE PROCESS OR EQUAL PROTECTION PROBLEM? CAN THE LEGISLATURE NOT WEIGH IT IN FAVOR OF, AS THEY SAY, PUNISHING CRIMINALS. WE HAVE A PROBLEM IN FLORIDA WITH TOO MANY CRIMINALS. WE ARE GIVING STATE ATTORNEYS AND THE STATE SOME ADDITIONAL AMMUNITION. WHAT IS WRONG WITH THAT?

WHAT IS WRONG WITH THAT, THERE ARE TWO REASONS WHY THAT IS WRONG. NUMBER ONE, IT FLIES IN THE FACE OF THE ACCESS TO COURTS PROVISION OF ARTICLE I SECTION 21, FLORIDA CONSTITUTION. WHERE THIS COURT HAS SAID THE DEFENDANT HAS A CONSTITUTIONAL RIGHT TO APPEAL, AND THE STATE, REALLY, HAS A STATUTORY RIGHT TO APPEAL. NOW, THIS CODELLVATES THE STATE'S STATUTORY RIGHT TO APPEAL ABOVE THE DEFENDANT'S CONSTITUTIONAL RIGHT TO APPEAL.

HOW DOES IT TAKE AWAY HIS CONSTITUTIONAL RIGHT TO APPEAL? IT ONLY SAYS THAT THE LOWER END MAY BE APPEALED. THE STATE OR THE DEFENDANT, I CAN'T IMAGINE WHY THE DEFENDANT WOULD EVER APPEAL THE LOWER END, BUT IT SEEMS TO GIVE A RIGHT OF APPEAL, NOT TAKE ANYTHING AWAY.

IT GIVES A RIGHT TO APPEAL, BUT IT IS A HOLLOW RIGHT, BECAUSE HE HAS NO REMEDY. AS LONG AS HIS SENTENCE IS WITHIN THE STATUTORY MAXIMUM, HE HAS NO REMEDY. AND BOTH THE HALL AND, BOTH HALL CASES, THE FIRST AND THE FOURTH, SAID THAT, WELL, HE STILL HAS A RIGHT TO APPEAL AN ILLEGAL SENTENCE. WELL, THAT MAY BE TRUE. HOWEVER, HE HAS NO REMEDY. WHEREAS THE STATE HAS A REMEDY, IF THE JUDGE FAILS TO JUSTIFY A DOWNWARD DEPARTURE.

IF THIS STATUTE DIDN'T HAVE THAT PROVISION, THAT IS ALLOWING THE STATE TO APPEAL A DOWNWARD DEPARTURE, AND JUST ALLOW THAT, THE JUDGE TO DOWNWARDLY DEPART BUT THE STATE COULDN'T APPEAL IT WOULD THAT RENT THEY ARE STATUTE IN YOUR ESTIMATION,

CONSTITUTIONAL?

IT WOULD NOT BE UNCONSTITUTIONAL, AS TO THE DEFENDANT. I AM SURE THE STATE WOULD ARGUE THAT IT WAS UNCONSTITUTIONAL AS TO THEM.

BUT IT WOULD REMEDY YOUR -- SO THAT IS YOUR BASIC ARGUMENT, THAT BY GIVING THE STATE THIS RIGHT TO DOWNWARDLY DEPART, EXCUSE ME, TO APPEAL A DOWNWARD DEPARTURE SENTENCE, THAT THAT IS THE CONSTITUTIONAL FLAW IN THE STATUTORY SCHEME.

WHEN YOU TAKE AWAY THE DEFENDANT'S CONSTITUTIONAL RIGHT TO APPEAL, YES, MA'AM. THIS COURT --

I GUESS YOU ARE SAYING IT IS HOLLOW, BUT THE DEFENDANT DOES -- WHICH RIGHT, SHOULD THEY HAVE THE RIGHT TO APPEAL THE FAILURE TO IMPOSE A DOWNWARD DEPARTURE SENTENCE?

NO, MA'AM.

SO THEY HAVE THE RIGHT TO APPEAL THE SENTENCE, BUT AS YOU SAY, BECAUSE IT IS DISCRETIONARY WITHIN THE RANGE, THEY CAN'T ATTACK THE REASONING OF IT.

IT IS A RIGHT WITHOUT A REMEDY.

WELL, BUT, IF THEY CALCULATE THE GUIDELINES WRONG, I MEAN, THERE IS PLENTY OF DIFFERENT THINGS THAT YOU COULD, STILL --

THAT IS TRUE, BUT IF YOU ASSUME THE SCORE SHEET IS ACCURATE AND IF YOU ASSUME THE JUDGE IS NOT BEING VINDICTIVE IN IMPOSING THE STATUTORY MAXIMUM SENTENCE, THEN THERE IS NO REMEDY.

BUT THE CONSTITUTIONAL QUESTION IS WHAT CONSTITUTES -- WHAT CONSTITUTIONAL RIGHT OF APPEAL THAT THE DEFENDANT HAD THAT WAS TAKEN AWAY BY THIS CODE? I THINK THAT IS WHAT JUSTICE PARIENTE IS ASKING, AND THAT IS MY QUESTION, ALSO.

IN MADDOX AND THE REFORM ACT CASES, THIS COURT FOUND THAT THE DEFENDANT HAS A CONSTITUTIONAL RIGHT TO APPEAL, UNDER ARTICLE V SECTION 4-B. NOW, HE STILL HAS A CONSTITUTIONAL RIGHT TO APPEAL. HOWEVER, HE HAS NO REMEDY.

BUT YOUR OPPONENT HAS LAID OUT THE HISTORY, WITH REFERENCE TO THE SENTENCING AND THE CONSTITUTIONAL RIGHT TO APPEAL, AT ONE TIME, WAS, AS A MATTER OF FACT, EX- INCLUDES I FEEL AS TO THE CONVICTION -- EXCLUSIVELY AS TO THE CONVICTION AND THE PROCEEDINGS LEADING UP TO THE CONVICTION.

THAT'S TRUE.

AND THERE OBVIOUSLY WAS SCHEME IN PLACE THAT IN ESSENCE THAT THERE WAS NO RIGHT TO APPEAL, AS LONG AS THE TRIAL COURT STAYED WITHIN WHATEVER THE TOP MAXIMUMS THAT WE TALKED ABOUT HERE, OF THE SENTENCING.

THAT'S TRU. ISN'T THIS THE SAME THING?

NO, SIR, BECAUSE --

DRESSED IN DIFFERENT CLOTHES?

-- IF YOU LOOK AT THE HIS TRIF THE GUIDELINES BACK IN 1983 THE GUIDELINES WERE ADOPTED

TO LEVEL OUT SENTENCING -- SENTENCES. AT THE SAME TIME, PRIOR TO 1983, WE HAD A SYSTEM OF PAROLE. WHEN THE GUIDELINES WERE ADOPTED WE DID AWAY WITH THE PAROLE SYSTEM. PAROLE, EVEN THOUGH PRIOR TO 1983, A DEFENDANT COULD NOT APPEAL THE LENGTH OF HIS SENTENCE, HE COULD SEEK PAROLE FROM EXECUTIVE BRANCH, AS LEVELING MECHANISM, TO LEVEL OUT HIS SENTENCE.

HASN'T THE U.S. SUPREME COURT MORE OR LESS SAID THAT THE LEGISLATURES HAVE EXCLUSIVE AUTHORITY, WITH REF TONES ESTABLISHING PUNISHMENTS FOR CRIME -- WITH REFERENCE TO ESTABLISHING PUNISHMENTS OF CRIME AND ABSENT A VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE, THAT THERE ARE VIRTUALLY NO RESTRICTIONS ON THE LEGISLATURE, IN TERMS OF SETTING PUNISHMENT? ISN'T THAT SORT OF THE FACT OF LIFE OUT THERE, RIGHT NOW?

IT IS, TO THE EXTENT THAT A STATUTE BEARS A RATIONAL RELATIONSHIP, UNDER THE DUE PROCESS CLAUSE, AND IN FLORIDA, WE HAVE AN UNIQUE PROVISION, UNDER THE STATE CONSTITUTION, IN ARTICLE I SECTION 21, THE ACCESS TO COURTS, WHICH OPERATES INDEPENDENTLY OF THE STATE DUE PROCESS CLAUSE AND OPERATES INDEPENDENTLY OF THE FEDERAL DUE PROCESS CLAUSE.

HELP US WITH, WHETHER THE U.S. SUPREME COURT WAS FIRST FACED WITH THE SITUATION, WHEN SENTENCING GUIDELINES AND THE RIGHT OF THE STATE TO APPEAL FIRST APPEARED IN A STATUTORY SCHEME, IT WAS REVIEWED BY THE U.S. SUPREME COURT, AND THERE WERE DISCUSSIONS ABOUT THE PURPOSE BEHIND SENTENCING GUIDELINES AND DEALING WITH DISPARATE SENTENCING PRACTICES AND THAT THE DEFENDANT RECEIVED A VALUE, TOO, OUT OF THAT. WAS THAT PART OF THE ANALYSIS, IN THE U.S. SUPREME COURT'S DECISION UPHOLDING A STATUTORY SCHEME THAT ALLOWED THE STATE TO APPEAL, A ESSENTIAL INGREDIENT IN THE COURT'S DECISION OF UPHOLDING THAT SCHEME, OR WAS IT JUST A PART OF THE DISCUSSIONS?

I DON'T KNOW WHICH CASE, EXACTLY, YOU ARE REFERRING TO, YOUR HONOR.

YOU WERE HERE WHILE WE WERE DISCUSSING THE ISSUE --

YES, SIR. DE FRANCISCO?

RIGHT.

DE FRANCISCO IS WHAT I WOULD ANALOGIZE TO OUR MANDATORY MINIMUM STATUTE IN FLORIDA, WAS NOT A GUIDELINES CASE, PER SE. THE QUESTION THERE WAS WHETHER THE GOVERNMENT HAD PROVED A PRIOR CONVICTION, SO AS TO ALLOW THIS DEFENDANT TO BE SENTENCED AS A, QUOTE, DANGEROUS SPECIAL OFFENDER.

THE DO. GOVERNMENT -- THE GOVERNMENT HAD THE RIGHT TO APPEAL.

IS THAT RIGHT? AND WHEN THE COURT TALKED ABOUT THE GOVERNMENT BEING GRANTED THE RIGHT TO APPEAL, THEY MENTIONED BENEFITS UNDER THE SCHEME, TO THE DEFENDANT, TOO, IS THAT CORRECT?

YES, SIR.

AND WHAT I AM ASKING YOU IS, DID THEY MAKE IT A PREREQUISITE TO A SCHEME THAT ALLOWED THE STATE TO APPEAL THAT THERE BE BENEFIT TO THE DEFENDANT, TOO? I IMAGINE THAT AWKWARDLY, BUT --

I WOULD CALL THE COURT'S ATTENTION TO THE BEATTY AND EVERHART ARTICLE, WHERE THEIR CONCLUSION IS THAT THE DEFRANCISCO MAJORITY WAS WILLING TO TRADE THE DEFENDANTS FORMED BY DOUBLE JEOPARDY TO THE BENEFIT TO THE DEFENDANTS, AS WELL AS TO THE

STATE, THAT GREATER CONSISTENCY IN SENTENCING WOULD PROVIDE, SO WHAT THEY ARE SAYING IS AND THESE COMMENTATORS HAVE SAID IS THAT THEY DON'T THINK DEFRANCISCO WOULD HAVE BEEN DESCRIBED DECIDED THE SAME, IF THE ONLY SYSTEM THEY HAD WAS SKEWED, WHERE THE STATE WAS PERMITTED TO APPEAL. IS YOUR ARGUMENT UNDER THE FEDERAL AND THE STATE CONSTITUTION, OR IS IT DIFFERENT ANALYSIS UNDER THE FLORIDA CONSTITUTION?

THE ARGUMENT IS THE SAME UNDER BOTH. HOWEVER, WE DO HAVE THE ACCESS TO COURTS, WHICH THE FEDERAL CONSTITUTION DOES NOT HAVE. WE, ALSO, HAVE CRUEL OR UNUSUAL PUNISHMENT.

ON THE ACCESS TO COURTS, HAS THAT PROVISION EVER BEEN INTERPRETED IN A CRIMINAL SETTING?

I AM NOT CERTAIN.

BUT BEFORE THIS CRIMINAL PUNISHMENT CODE, THE PRESENT ONE WAS ENACTED, THERE WERE GUIDELINES, AND THE, THERE WERE UPWARD DEPARTURES ALLOWED IN THAT THE DEFENDANT COULD APPEAL UPWARD DEPARTURE, AND THERE WAS --

YES, MA'AM.

-- LOTS OF CASE LAW ON THAT. ISN'T THAT BASICALLY THE UPWARD, THE ELIMINATION OF THE REQUIRING REASON FOR UPWARD DEPARTURES AND THEN THE ABILITY TO APPEAL THAT, IS THAT OUT OF THE SCHEME?

THAT IS ONE CONSIDERATION, YES, MA'AM.

ONE OF THE OTHER THINGS THAT WAS IN THE PRIOR STATUTE WAS, AS I RECALL, IT WAS THE ABILITY THAT, TO GO OUTSIDE THE STATUTORY MAXIMUM, IF THE GUIDELINES PERMITTED IT. CORRECT?

THAT'S TRUE, AND THAT IS STILL TRUE UNDER THE CODE.

SO IN TERMS OF THERE BEING, BEFORE THIS NEW CODE WAS PUT INTO EFFECT, THERE WAS A RIGHT TO APPEAL, AND YOU SAY THE REMEDY WAS, WHAT WAS THE REMEDY THAT IS THERE THAT ISN'T HERE NOW?

FOR A DEPARTURE SENTENCE?

NO. YOU SAID THERE WAS NO MORE REMEDY BUT THERE WAS BEFORE.

IF YOU, IN THE PRIOR SITUATION, IF MR. HALL HAD RECEIVED A TEN-YEAR SENTENCE, WHEN HIS SCORE SHEET ONLY CALLED FOR 83 MONTHS, THE JUDGE WOULD HAVE HAD TO COME UP WITH WRITTEN REASONS FOR DEPARTURE THAT COULD BE ATTACKED ON APPEAL. ANOTHER UPWARD DEPARTURE.

CORRECT. I WOULD LIKE TO SAVE THE REST OF MY TIME FOR REBUTTAL.

YOU MAY. MS. MILLSAPS.

MAY IT PLEASE THE COURT. CHARMAINE MILLSAPS, REPRESENTING THE STATE IN THIS HALL TWO CASE. FIRST, I WOULD LIKE TO TALK ABOUT THE LEVEL PLAYING FIELD. I DO THINK THAT THE STATE AND THE DEFENDANT MUST BE ON A LEVEL PLAYING FIELD AT TRIAL. THEY DO NOT HAVE TO BE AT SENTENCING OR ANYTHING INVOLVING A SENTENCING SCHEME. AND THAT IS, REALLY,

WHAT WARDOTZ WAS, AND I AM MISPRONOUNCING THAT, BUT ONLY THE DEFENDANT HAS TO GIVE DISCOVERY. THE STATE DID NOT. AND THEY THOUGHT THE DUE PROCESS REQUIRES A LEVEL PLAYING FIELD AT TRIAL, AND THE STATE DOESN'T OBJECT TO THAT. I SEE THE LOGIC OF A LEVEL PLAY PLAYING FIELD AT THE TRIAL LEVEL WHEN THE TRIAL IS GOING ON. BUT ONCE THE TRIAL IS OVER, THE PRESUMPTION OF INNOCENCE VANISHES. THERE IS NO REQUIREMENT THAT THERE BE A TWO-WAY STREET. YOU CAN, CONSISTENT WITH DUE PROCESS IN CLOAKIAL TERMS, THROW THE BOOK -- IN COLLOQUIAL TERMS --.

COULD THERE BE A VIOLATION THERE, PRECONSTITUTIONALLY? THIS CODE, THE WAY IT IS SORT OF SKEWED THAT YOU CAN'T CHALLENGE THE JUDGE GOING OVER THE STATUTORY MAX, IF HE GOES UP TO THE CODE LIMIT.

WELL, EVEN, YOUR HONOR, IN THE CLOSEST CASE I AM GOING TO BE WILLING TO -- I AM GOING TO BE ABLE TO RESPOND TO YOU IN A CRIMINAL CONTEXT IS GOING TO BE THE AMENDMENTS CASE, AND REMEMBER, IN THAT CASE YOU SAID REASONABLE LIMITS WERE NOT THE SAME THING AS A DENY -- AS DENIAL. THAT, TO ME, IS MORE REASONABLE LIMITS, SO I DON'T SEE THAT AS -- REASONABLE LIMITS ARE FINE. YOUR HONOR, I AM MORE FAMILIAR WITH THE ACCESS TO COURTS MORE IN A CIVIL --

WE HAD A PROBLEM IN FLORIDA, AND INDISCRIMINATE SENTENCES ALL OVER. YOU COULD GET ONE THING IN MIAMI FOR STEALING A PIG, AND YOU COULD GET TWO EGGS AND YOU GET LIFE FOR IT, AND THAT IS WHY THE CODE INITIALLY CAME IN, NOT CODE BUT THE SENTENCING GUIDELINES CAME IN TO REMEDY THAT TYPE OF SITUATION, SO YOU WOULDN'T HAVE THAT TYPE OF DISPARITY. NOW THAT, I THINK, ONE OF THE ARGUMENTS IS THAT THE CODE HAS, NOW, DONE AWAY WITH THE SENTENCING GUIDELINES, SO YOU CAN HAVE THIS DISPARITY IN SENTENCING, GETTING ONE THING IN MIAMI, BECAUSE THEY CONSIDER THAT A MORE OFFENSIVE CRIME, AND GETTING SOMETHING ELSE IN TWO EGGS, SO IS THERE A PROBLEM THERE?

ON THE FACE OF THIS, I MIGHT SAY THAT,, TO BEGIN WITH, UNIFORMITY IS NOT REQUIRED, BUT MORE IMPORTANTLY, YOUR HONOR, I LAID OUT THE LEGISLATIVE HISTORY OF THE CODE, AND ONE OF THE THINGS THAT I WAS RATHER SURPRISING TO ME, IS YOU KNOW WHAT THEY WERE WORRIED ABOUT? THE DOWNWARD DEPARTURES UNDER THE GUIDELINES. WHEN THEY MOVED FROM THE GUIDELINES TO THE CODE, THE LEGISLATURE LAID OUT THE LEG I HAVE HISTORY, SINCE SOME OF THEIR FINDINGS, AND DO YOU REALIZE THAT, ACCORDING TO THE STAFF ANALYSIS, 63 TO 85 PERCENT OF SENTENCES IN THIS STATE WERE A RESULT OF DOWNWARD DEPARTURES? YOUR HONOR, THE PROBLEM IS, THE PROBLEM IS JUST NOT AT THE TOP. THERE IS ONLY 1 PERCENT WERE UPWARD DEPARTURES.

BUT, IF YOU HAVE A DEVELOPED PATTERN OF A PERSON FOR THE SAME CRIME, GETTING ONE SENTENCE IN AN AREA OF THE STATE, AND THIS PATTERN OVER A LENGTH OF TIME, SHOWED THAT A DEFENDANT DOING THE SAME THING GETS SOMETHING ELSE IN ANOTHER AREA OF THE STATE, DOES THAT PRESENT A PROBLEM?

BUT, YOUR HONOR, I THINK THEY WERE, IN PART, TRYING TO ADDRESS THAT. REMEMBER, THAT IS WHY THEY DIDN'T JUST ABOLISH. THAT IS WHY THEY MOVED FROM GUIDELINES TO THE CRIMINAL PUNISHMENT CODE. THEY DIDN'T WANT TO GO BACK TO COMPLETE DISPARITY. YOUR HONOR, THIS IS SORT OF HALFWAY IN BETWEEN. NOW, CERTAINLY THERE IS NOTHING WRONG WITH THE LEGISLATURE TINKERING, EVEN IF IT IS RATHER MAJOR TINKERING, WITH THEIR SENTENCING SCHEME. YOUR HONOR, WE HAVE NOT GONE BACK TO FULL, UNBRIDLED DISCRETION HERE. YOU ARE GOING TO BE LIMITING DOWNWARD DEPARTURES. THEY ARE TRYING TO LIMIT THAT, BUT, ALSO, IN A WAY THAT PROVIDES FOR WHAT THEY WANT, WHICH IS LONGER INCARCERATION. OKAY. SO I THINK THIS IS HALFWAY IN BETWEEN. THEY ARE TRYING TO BALANCE THINGS. LEGISLATURES BALANCE THINGS, AND THEY ARE BALANCING, THEY WANT SOME YUCHT IN SENTENCING, BUT THEY, ALSO, WANT INCREASED INCARCERATION, AND THIS IS

THEIR LATEST ATTEMPT TO GET TO TRY TO ACHIEVE THAT BALANCE, AND, NO, LEGISLATURE BALANCING POLICY DECISIONS AND MAKING POLICY DECISIONS DOES NOT VIOLATE DUE PROCESS.

NOW DON'T LET ME THROW IN AN ARGUMENT. ANSWER YOUR QUESTION. EYE, ALSO, WANTED TO TALK ABOUT THE DEFRANCISCO CASE. I DO NOT BELIEVE THAT, YES, THERE IS LANGUAGE IN THE DEFRANCISCO CASE THAT IMPLIES THAT IT IS BOTH, BUT THAT WAS NOT THE LOGIC OF DEFRANCISCO. THE LOGIC WAS THAT THIS DEFENDANT HAD NO REASONABLE EXPECTATION IN THE FINALITY OF HIS SENTENCE, BECAUSE THE STATUTE EXPLICITLY PROVIDED FOR THE GOVERNMENT'S RIGHT TO APPEAL. IT WAS KIND OF A NOTICE. WHAT THEY ARE SAYING IS THAT THE DEFENDANT SHOULDN'T EXPECT THIS TO END OR PUT A PERIOD ON IT, BECAUSE HE HAD NOTICE THAT THE GOVERNMENT, UNDER THE STATUTE, HAD A RIGHT TO APPEAL, WHETHER THE JUDGE IMPOSED THIS OR NOT, NOW, UNDER THAT LOGIC, WE HAVE, IN OUR STATUTES, STATUTORY NOTICE, JUST LIKE THE DEFRANCISCO --

SO THERE WAS NO RATIONALE IN THERE THAT SAID THERE WAS SOMETHING FOR THE DEFENDANT AND SOMETHING FOR THE STATE AND THEREFORE IT IS ALL RIGHT FOR THE STATE TO HAVE THE RIGHT TO APPEAL, SINCE THE DEFENDANT HAS SORT OF SIMILAR RIGHTS? THERE WAS NOT RATIONALE LIKE THAT.

I DON'T THINK THE RATIONALE IS THAT. THE LOGIC AND THE HOLDING IS MORE STATUTORY NOTICE. THEY DID TALK THAT BOTH DO RECEIVE SOMETHING HERE, BUT I WOULD SAY THAT WAS CLOSE TO DICTA, YOUR HONOR.

YOU AGREE THERE CAN BE DISPARATE SENTENCING.

YES, YOUR HONOR.

UNDER THESE SCHEMES, AND THAT THERE IS NO CONSTITUTIONAL PROBLEM WITH THAT.

NO.

YOU COULD HAVE THE SAME SITUATION, WHERE THE JUDGE, HERE GIVES CONSECUTIVE FIVE-YEAR SENTENCES, BUT IN MIAMI, FOR INSTANCE, THE JUDGE WOULD HAVE GIVEN A FOUR-YEAR, YOU KNOW, AS COMPUTED BY THE, AND THERE IS NO FLAW IN THAT.

NO.

WHY DO WE HAVE PROPORTIONAL PROPORTIONALITY IN DEATH CASES, IF THERE IS NO FLAW IN THAT?

OKAY.

WHY DO WE EVEN BOTHER ABOUT PORTIONALITY?

FOR TWO REASONS. NOW, REMEMBER PROPORTIONALITY IS ALSO GOING TO DEPEND ON THE SENTENCE. WE ARE TALKING ABOUT FIVE YEARS HERE, YOUR HONOR, WHICH WAS IMPOSED CONSECUTIVELY. NOW, THERE IS AN IMMENSE DIFFERENCE --

IS THAT NOT THE SAME PRINCIPLE THAT A PERSON COMMIT AGO CRIME ANY PLACE IN THE STATE OUGHT TO GET A SEMBLANCE OF THE SAME SENTENCE?

WELL, BUT, THAT OBVIOUSLY IS MUCH MORE IMPORTANT IN THE DEATH CONTEXT, IN TERMS OF PROPORTIONALITY, BECAUSE CRUEL AND UNUSUAL, WHICH IS WHERE A LOT OF THE PROPORTIONALITY, THAT IS THE UNDERLYING CONSTITUTIONAL PROVISION, REMEMBER YOU

TAKE INTO THE CALCULUS, THE SENTENCE HE GETS. I THINK IT WOULD BE ALMOST IMPOSSIBLE FOR A DEFENDANT, SENTENCED TO FIVE YEARS OR TWO YEARS CONSECUTIVE, WHEN HE COMMITTED TO CRIMES, FOR ANYTHING, FOR ANY SERIOUS CRIME, AND THIS WAS POSSESSION OF COCAINE AND RESISTING WITH VIOLENCE, TO RAISE A VALID PROPORTIONALITY OR CRUEL AND UNUSUAL CHALLENGE TO HIS SENTENCE, BUT THIS SENTENCE WOULD BE DIFFERENT, IN TERMS OF YOU HAVE TO LOOK AT THE ACTUAL PUNISHMENT IMPOSED IN A CRUEL AND UNUSUAL CHARGE, AND THE UNITED STATES SUPREME COURT HAS DONE IT, ITSELF. THEY UPHELD A LIFE SENTENCE FOR A FIRST-TIME OFFENDER, FOR A NONVIOLENT DRUG OFFENSE, BUT THEY WOULD LOOK A LOT MORE CAREFULLY, AT THAT KIND OF THING IF THE PUNISHMENT HAD BEEN SIGNIFICANTLY DIFFERENT. OKAY.

WAS THIS DEFENDANT, WAS HE A FIRST-TIME OFFENDER?

OH, NO, YOUR HONOR. OH, HE HAD A SERIOUS VIOLENT, BOTH SIGNIFICANT AND VIOLENT, AND I LAID THEM OUT, AND I AM GOING TO, IF I DON'T TURN TO THE RIGHT PAGE, THEY WERE THINGS LIKE ATTEMPTED MURDER, BURGLARY, AND IT GOES ON AND ON AND ON, AND I HAVE TO LAY THEM OUT IN THE BRIEF. I THINK, NO, ABSOLUTELY HE WAS NOT A FIRST-TIME OFFENDER, AND THE INSTANT CRIME, ONE OF THEM INVOLVED VIOLENCE, AND, BUT, HE HAD THIS OH, AND MOREOVER, YOUR HONOR, HE WAS ON SOME SORT OF CONDITIONAL RELEASE. I FORGET EXACTLY WHICH TYPE. BUT HE WAS ON, HE WAS CURRENTLY UNDER SANCTIONS FOR HAVING VIOLATED THE LAW, WHEN HE COMMITTED THESE OFFENSES. SO EASY CASE HERE ON THAT.

BUT HE HAD BEEN, WOULD HE, ALSO, QUALIFY FOR HABITUALIZATION?

YES, YOUR HONOR. I THINK HE WOULD HAVE.

I DON'T KNOW IF THERE IS A CONSTITUTIONAL ARGUMENT WITH THAT, BUT THERE WAS A STATEMENT MADE THAT THE WAY THIS CRIMINAL PUNISHMENT CODE HAS GONE, YOU ACTUALLY CAN GET IT, THE STATE HAS AN EASIER TIME OF GETTING A HARSHER PUNISHMENT, JUST GOING STRAIGHT UNDER THE CRIMINAL PUNISHMENT CODE THAN GOING THROUGH HABITUALIZATION. I DON'T KNOW IF WILL IS ANY CONSTITUTIONAL CHALLENGE ON THAT BASIS, BUT IS THAT CORRECT?

NO. I DON'T THINK THERE IS A CONSTITUTIONAL CHALLENGE, BUT I AM NOT EVEN SURE THAT IS TRUE IN THE SENSE. NOW, REMEMBER ONE OF THE OFFENSES HERE WAS POSSESSION OF COCAINE, AND I AM PRETTY SURE YOU CAN'T BE HABITUALIZED ON THAT ONE, OKAY, SO, BUT, YOUR HONOR, IT IS NOT SIGNIFICANTLY HARDER FOR THE STATE TO DO YOU, YOU DO HAVE TO PROVE PRIORS, TO H-0 PERSONS.

HE WOULD HAVE MORE TO APPEAL, CERTAINLY, IN AN APPELLATE CASE.

IT IS TRUE IS HARDTORY APPEAL BUT I AM GOING CALL IT -- HARDER TO APPEAL, BUT I AM GOING TO CALL IT PROCEDURALLY MORE DIFFICULT, BECAUSE OF THE HABITUAL NATURE. I AM ASSUMING BECAUSE HE HAD POSSESSION OF COCAINE IS THE NATURE OF THE CRIME UNDER WHICH THEY DIDN'T HABITUALIZE HIM. I DON'T KNOW, YOUR HONOR. THERE WAS NO TALK IN THE PLEA COLLOQUY ABOUT THAT. WELL, YOUR HONOR, UNLESS YOU HAVE ANYMORE QUESTIONS, I WILL SIT DOWN. THANK YOU.

THANK YOU, COUNSEL. MR. BRINKMEYER, REBUTTAL?

YES, MAY IT PLEASE THE COURT. CO-COUNSEL HAS ADVISED ME, IN RESPONSE TO JUSTICE PARIENTE'S QUESTION, THAT THE BANE CASE IN THE SECOND DCA DID, IN FACT, RELY ON ARTICLE I SECTION 21, ACCESS TO COURTS, AND PAIN WAS CITED WITH APPROVAL BY THIS COURT IN MADDOX AND THE AMENDMENTS IN THE OTHER REFORM ACT CASES. THE MAIN FOCUS HERE, TODAY, SEEMS TO BE DISPARITY, AND THAT IS CERTAINLY TRUE. IN RESPONSE TO JUSTICE SHAW'S

QUESTIONS ABOUT THAT AND JUSTICE ANSTEAD'S QUESTIONS ABOUT THAT, I WOULD DISAGREE WITH COUNSEL FOR THE STATE, BECAUSE WE HAVE, IN FACT, RETURNED TO UNBRIDLED DISCRETION. THERE IS NO DISCRETION BY THE -- THERE IS NO REVIEW OF THE TRIAL JUDGE'S DISCRETION TO IMPOSE A MAXIMUM SENTENCE. AS LONG AS HE STAYS WITHIN THE STATUTORY MAXIMUM. JUSTICE SHAW, YOU ASKED ABOUT PROPORTIONALITY, AND THE STATE SEEMS TO SAY THAT THERE IS NO PROPORTIONALITY REVIEW FOR A NONCAPITAL CRIME. THAT IS NOT TRUE. IN THE HEAL CASE FROM 1983 FROM THIS -- IN THE HALE CASE FROM 1983 FROM THIS COURT, THIS COURT HELD THAT IN NONCONSTITUTIONAL PROVISION, THERE IS REVIEW UNDER THE STATE CONSTITUTION. JUSTICE PARIENTE, YOU ASKED ABOUT THE QUESTION OF HABITUALIZATION. I WOULD REPEAT WHAT I SAID EARLIER, THAT IT IS FAR EASIER FOR THE STATE TO SEEK A CONSECUTIVE SENTENCE, UNDER THE CODE, AS IT DID IN THIS CASE, THAN IT WOULD HAVE BEEN TO PROVE HAS BEEN IEDULE OFFENDER, AND -- HABITUAL OFFENDER, AND NOT ONLY THAT BUT IT IS IS FAR EASIER FOR THE SATE TO PROVE THAT ON APPEAL, BECAUSE AS YOU POINTED OUT, THE HABITUAL OFFENDER STATUTE HAS BEEN SUBJECT TO WHICH LITIGATION, AND THE DEFENDANT ALWAYS HAS THE RIGHT TO APPEAL HIS HABITUAL OFFENDER PROVISION AND PRESENT THE CHALLENGE PRESENTED AS TO THE PRIOR CONVICTIONS.

THAT BEING THE CASE, PERHAPS IS THERE A CONSTITUTIONAL INFIRMITY WITH THAT?

I THINK THERE IS. WHEN YOU LOOK AT THE CONSECUTIVE SENTENCES IN THIS CASE AND COMPARE THEM WITH HALE. MR. HALE RECEIVED CONSECUTIVE SENTENCES FOR TWO DRUG OFFENSES, AND HE WAS SENENCED AS HABITUAL VIOLENT OFFENDER, AND THIS COURT WRESTLED WITH THE PROBLEM OF PROPORTIONALITY IN THAT CASE. AS IT TURNED OUT, THIS COURT DID NOT HAVE TO REACH THAT ISSUE, BECAUSE THIS COURT FOUND THAT THE CONSECUTIVE SENTENCES WERE NOT AUTHORIZED BY THE HABITUAL OFFENDER STATUTE, WHICH RAISES ANOTHER QUESTION. WHY DO WE ALLOW CONSECUTIVE SENTENCES UNDER THE CODE, WHEN WE DO NOT ALLOW THEM UNDER THE HABITUAL OFFENDER STATTE? IN MY OPINION, THE CODE IS, IN FACT, A REST I HAD JUST STATUTE, JUST LIKE HABITUAL OFFENDER, BECAUSE IT DEPENDS UPON THE, IN LARGE PART UPON THE SCORING OF THE PROR RECORD, AND THE MORE SERIOUS PRIOR CRIMES YOU HAVE, THE MORE SERIOUS NUMBER OF PRIOR CRIMES YOU HAVE, THE HIGHER SCORE OU GT. SO IT IS, IN FACT, A RESID JUST STATUTE -- A RECIDIVOUS STATUTE, WITH REGARD TO THE FACT THAT THE PERSON WITH THE PRIOR VIOLENT FELONIES WILL RECEIVE A HIGHER RECOMMENDED SENTENCE OR PRESUMPTIVELY CORRECT SENTENCE, WHATEVER YOU WANT TO CALL, IT THAN SOMEONE WHO IS A FIRST-TIME OFFENDER.

THAT WAS TRUE UNDER THE SENTENCING GUIDELINES, AND THERE IS OTING WRONG WITH THAT KIND OF POLICY, THE LEGISLATURE.

THAT'S CORRECT. NO, SIR. BUT THERE IS A PROBLEM WERE GOING THROUGH THE TIME AND EFFORT OF CALCULATING SCORE SHEETS, AND THEN YOU STILL FACE THE STATUTORY MAXIMUM, AND THE JUDGE CAN IMPOSE IT AND NOT GIVE ANY WRITTEN, ORAL OR OTHERWISE REASONS FOR HIS DECISION. THANK YOU.

JUST ONE, IF THERE WAS AN ERROR IN THE CALCUATONS BUT IT STILL THE SENTENCE IS STILL WITHIN THE STATUTORY MAXIUM, CAN THE DEFENDANT STILL APPEAL THAT?

PRESUMABLY, UNDER 3.800-B, HE COULD ATTACK THE CALCULATION OF THE SCORE SHEET AND PRESERVE IT THAT WAY, YES, MA'AM. MR. CHIEF JUSTICE: THANK YOU, COUNSEL.

YES, SIR. CHIEF CHIEF CHIEF THANK YOU, COUNSEL, FOR YOUR ASSISTACE IN THIS CASE FORM CORT WILL BE IN RECES.