

>> ORDER IN THE COURT.

THE SUPREME COURT OF FLORIDA IS  
NOW IN SESSION.

THE HONORABLE CHIEF JUSTICE  
CHARLES T. CANADY PRESIDING.

>> GOOD MORNING, AND WELCOME TO  
THIS SESSION OF THE FLORIDA  
SUPREME COURT.

THE FIRST CASE ON OUR DOCKET  
TODAY IS THE CASE OF FLORIDA,  
THE STATE OF FLORIDA V. GARCIA.  
COUNSEL?

>> THANK YOU, YOUR HONOR.  
GOOD MORNING.

MR. CHIEF JUSTICE, MAY IT PLEASE  
THIS COURT, ASSISTANT ATTORNEY  
GENERAL PAUL PATTI ON BEHALF OF  
THE STATE.

SEEKING A PROBATIONARY SENTENCE  
ALLEGEDLY HAVING CANCER AND  
ALLEGEDLY FOLLOWING THE  
GUIDELINES FOR HOUSE ARREST, THE  
STATE RELIED ON SEVERAL  
INCIDENTS OF THREATS THAT THE  
RESPONDENT MADE AGAINST TWO  
STATE WITNESSES, A POLICE  
OFFICER AND ONE OF HIS OWN  
FRIENDS WHERE HE PULLED OUT AND  
POINTED A FIREARM AT HIM.

THE FOURTH DCA DISREGARDING THE  
EXPLICIT-- OF THIS, STATED THAT  
THE TRIAL COURT IMPERMISSIBLY  
CONSIDERED SUBSEQUENT MISCONDUCT  
IN OPPOSING SENTENCE IN  
VIOLATION OF THIS COURT.

THIS IS WRONG FOR A MULTITUDE OF  
REASONS.

FIRST OF ALL, AS ALLUDED TO, THE  
EXPRESS LIMITATION BY THE STATE  
CONSIDERING THIS MISCONDUCT IN  
DENYING DOWNWARD DEPARTURE MODE.  
AND DIRECTLY REBUTTING THE  
ASSERTION THAT HE WAS A GOOD  
CANDIDATE FOR PROBATION AND THAT  
HE WOULD FOLLOW THE RULES OF  
HOUSE ARREST.

SECOND, IT'S NOT CLEAR FROM THE  
RECORD AT ALL--

[INAUDIBLE]

DENYING THE DEPARTURE MOTION OR  
CONSIDERED IT AT ALL.

INDEED, THE FOURTH DCA STATED--

[INAUDIBLE]

DETERMINED FROM THE RECORD THAT IT DID, THE TRIAL COURT DID CONSIDER THE INFORMATION OR THAT IT DID NOT CONSIDER THE INFORMATION.

ONLY THAT IT MET.

THIS IS IN EXPRESS AND DIRECT--

[INAUDIBLE]

WE NEED TO TRUST OUR TRIAL COURTS TO PROPERLY FOLLOW THE LAW.

AND, INDEED, IN HARPER, THIS COURT REJECTED AN ARGUMENT STATING THAT THE TRIAL COURT COULD HAVE CONSIDERED IMPROPER SENTENCING FACTORS IN THAT CASE.

>> COUNSEL, IS IT THE STATE'S PERMISSION THAT THE INFORMATION WAS ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE?

>> ABSOLUTELY, YOUR HONOR.

IT WAS-- PREPONDERANCE OF THE EVIDENCE.

THE STATE PRESENTED CERTAIN JAIL CALLS INCLUDING THREATS TO TWO WITNESSES, DIFFERENT PHONE CALLS BETWEEN RESPONDENT AND HIS FAMILY, EITHER HIS EX-WIFE OR HIS SON, AND THE BOND REVOCATION HEARING POSSIBLY DETAILING THREE DIFFERENT WITNESSES AND THE THREATS MADE AGAINST THEM.

SO THE STATE STANDS BEHIND THAT THIS IS PROVEN BY A PREPONDERANCE OF THE EVIDENCE, AND THAT GETS ME TO MY NEXT POINT.

THE NEXT REASON THAT IT'S IMPROPER, THE FOURTH DCA'S OPINION IS IMPROPER, IS THAT SUBSEQUENT MISCONDUCT IS NOT A PROPER CONSIDERATION.

AS CHIEF JUSTICE CANADY--

[INAUDIBLE]

PUT, THE PSI AND THE STATUTES IN THE DUE PROCESS CLAUSE--

[INAUDIBLE]

THE FOURTH DCA AND SECOND DCA--

[INAUDIBLE]

SO THE STATE IS ASKING TO RECEDE FROM-- TO THE EXTENT THAT IT'S BEEN INTERPRETED AS--

[INAUDIBLE]

CERTAINLY, SUBSEQUENT ARRESTS

ARE A VALID CONSIDERATION.  
AND FINALLY, THE STATE FINDS  
THAT THE FOURTH DCA AT THIS  
ISSUE NOT BRIEFED, IT WASN'T  
PROPER FOR THE FOURTH DCA TO  
RAISE AN--  
[INAUDIBLE]  
ISSUE.

NOW, AT THIS POINT I'M PREPARED  
TO RESERVE THE REST OF MY TIME  
FOR REBUTTAL UNLESS THERE'S ANY  
QUESTIONS THAT THIS COURT WOULD  
LIKE TO ASK.

>> I HAVE ONE QUESTION JUST OUT  
OF CURIOSITY.

WHAT ABOUT THE SITUATION WHERE  
THE PERSON IS ARRESTED  
SUBSEQUENT TO THE PARTICULAR  
ARREST AND THAT CASE GOES TO  
TRIAL FIRST AND HE'S FOUND NOT  
GUILTY?

COULD THAT BE CONSIDERED IN THE  
SENTENCING IN THE PREVIOUS CASE?

>> ABSOLUTELY, YOUR HONOR.  
THAT WOULD GO INTO CONDUCT.  
AND I UNDERSTAND THAT FLORIDA  
LAW--

>> WELL, WHAT DOES NOT GUILTY  
MEAN?

THAT HE DIDN'T DO IT UNDER THE  
EYES OF THE LAW.

HOW CAN THAT BE CONSIDERED?

>> WELL, UNDER WATTS, UNDER THE  
DUE PROCESS LAW, IT'S NOT  
IMPERMISSIBLE TO CONSIDER--  
[INAUDIBLE]

BY THE USE OF THE COURT.

THIS IS NOT A SITUATION WHERE--

>> I UNDERSTAND THAT.

I UNDERSTAND THAT.

BUT, AGAIN, YOU'RE DEALING WITH  
THIS NOT GUILTY, AND IT'S NOT  
GUILTY BY A JURY OR A JUDGE OR  
NOT GUILTY BECAUSE YOU'RE  
PRESUMED TO BE NOT GUILTY.  
THE DIFFERENCE BETWEEN THE TWO.

>> I UNDERSTAND, YOUR HONOR.

THERE IS SOME CASE LAW IN TERMS  
OF CONDUCT, BUT THAT'S JUST  
CONJECTURE AT THIS POINT.

NOW, NOT ALL OF THE MISCONDUCT  
THAT OCCURRED IS NECESSARILY  
CRIMINAL.

HE WOULDN'T NECESSARILY BE

ACQUITTED.

THERE WERE SEVERAL VIOLATIONS.  
BOND, HIS CONDITIONS OF BOND  
LIKE NOT DRINKING, STUFF LIKE  
THAT, THAT IS VALID  
CONSIDERATION.

SUBSEQUENT CONDUCT AFTER THE  
UNDERLYING--

[INAUDIBLE]

THIS IS WHY THE INTERPRETATION  
IF BY THE SECOND AND FOURTH  
DCAs IS OVERLY BROAD.

THERE'S NO WAY THAT A TRIAL  
COURT COULDN'T CONSIDER THIS  
INFORMATION.

I ACKNOWLEDGE THERE'S CERTAIN  
FLORIDA CASE LAW AS IT RELATES  
TO CONDUCT.

TO MY KNOWLEDGE, HE HASN'T BEEN  
ARRESTED OR CHARGED FOR ANY OF  
THESE THREATS.

BUT STILL, THIS IS A VALID  
CONSIDERATION AT A MINIMUM TO  
DENY RESPONDENT'S MOTION FOR  
DEPARTURE, EVEN IF IT IS  
ACQUITTED.

HE'S MAKING AN ASSERTION THAT HE  
IS A GOOD CANDIDATE FOR  
PROBATION AND THAT HE HAD  
FOLLOWED THE RULES OF HOUSE  
ARREST.

THE STATE ISN'T ALLOWED TO REBUT  
THAT.

>> COUNSEL, IS IT YOUR POSITION  
THAT THE STATE WOULD HAVE BEEN,  
IT WOULD HAVE BEEN APPROPRIATE  
FOR THE STATE TO PRESENT THIS  
INFORMATION IF HE HAD NOT ASKED  
FOR A DOWNWARD DEPARTURE?

>> IT IS THE STATE'S POSITION  
THAT PROPER TO PRESENT THIS  
INFORMATION REGARDLESS OF THE  
DOWNWARD DEPARTURE.

BUT THAT'S KIND OF OUTSIDE THE  
FACTS OF THIS CASE.

THE RESPONDENT VERY CLEARLY PUT  
THIS AT ISSUE.

SO EVEN IF YOU DEEM THE STATE'S  
INCORRECT ON THAT POSITION,  
THAT--

[INAUDIBLE]

THIS CASE.

>> ONE OTHER QUESTION.

WOULD YOU AGREE THAT THE BEFORE

THIS POST-ARREST MISCONDUCT  
OR-- CONDUCT TO BE CONSIDERED  
IF IT IS ALLOWED, THAT DUE  
PROCESS WOULD HAVE TO BE  
CONSIDERED AND THAT THE  
DEFENDANT WOULD HAVE TO BE GIVEN  
PROPER NOTICE THAT THE STATE  
INTENDED TO RELY ON THAT  
MISCONDUCT AND AN OPPORTUNITY IF  
HE NEEDED TO MARTIAL WHATEVER HE  
NEEDED IN ORDER TO PROVE THAT IT  
COULDN'T BE SUBSTANTIATED?

>> YOU'RE ABSOLUTELY CORRECT,  
YOUR HONOR.

THAT IS AN ABSOLUTE IMPORTANT  
PROSPECT OF DUE PROCESS.

THE STATE IN NO WAY CHALLENGES  
THE DEFENDANT'S RIGHT TO  
CHALLENGE WHATEVER EVIDENCE THE  
STATE PUTS FORTH.

THAT, WE DO NOT CHALLENGE THAT  
AT ALL.

>> RIGHT.

>> DEFENDANT IS CLEARLY WITHIN  
HIS RIGHT TO CHALLENGE SUCH A--  
ALL WE'RE ASKING, IT'S A VERY  
SIMPLE CONCEPT.

WE WANT DUE PROCESS TOO.

ARBITRARILY CUTTING OFF  
SUBSEQUENT MISCONDUCT FOR NO  
PARTICULAR REASON PARTICULARLY  
IN A CASE WHERE THE RESPONDENT  
PUTS FORTH THE EVIDENCE THAT'S  
CONTRARY, OR PUTS FORTH AN  
ASSERTION THAT'S CONTRARY TO  
EVIDENCE THAT THE STATE HAS PUT  
FORWARD, IT'S A PROPER  
CONSIDERATION.

BUT, ABSOLUTELY, THE DEFENDANT'S  
ALLOWED TO-- ALLOWED TO-- IF  
THERE ARE NO FURTHER QUESTIONS,  
I'LL RESERVE THE REST OF MY  
TIME.

>> THANK YOU, COUNSEL.

>> GO AHEAD?

>> PLEASE DO.

>> OKAY.

THANK YOU, YOUR HONOR.

MAY IT PLEASE THE COURT, MY NAME  
IS CLAIRE MIDEL, AND I'M HERE ON  
BEHALF OF THE RESPONSIBILITY,  
TONY GARCIA.

THE PROSECUTOR DID NOT CARE TO  
LEARN THE LAW OR DID NOT CARE

ABOUT WHAT IT WAS.  
THE TRIAL COURT WAS OBVIOUSLY  
INFLUENCED BY THE ARGUMENT.  
IT OVERRULED AN OBJECTION TO THE  
IMPROPER ARGUMENT, SAID IT WAS  
CONSIDERING ALL THE EVIDENCE IN  
THE STATE'S ARGUMENT AND THEN  
IMPOSED THE EXACT SENTENCE THE  
STATE REQUESTED.

THE FOURTH DISTRICT PROPERLY  
APPLIED-- AND CONCLUDED THAT  
THAT MR. GARCIA WAS ENTITLED TO  
A NEW SENTENCING HEARING--

[INAUDIBLE]

TURNING TO THE MERITS,  
PETITIONER HAS ASKED AND MADE SO  
MANY ARGUMENTS THAT IT WAS  
DIFFICULT FOR ME TO KNOW WHERE  
TO START.

I DO WANT TO START WITH THIS  
ASSERTION THAT THE STATE IS  
SAYING THAT THE MISCONDUCT WAS  
DIRECTED AT THE DOWNWARD  
DEPARTURE MOTION.

ABSOLUTELY NOT.

THAT IS NOT WHAT THE RECORD  
SAYS.

I WANT TO POINT OUT THAT'S THE  
FIRST TIME THAT PETITIONER  
BROUGHT THIS UP IS IN HIS  
INITIAL BRIEF TO THIS COURT.

IT WAS NOT IN THE MOTION FOR  
REHEARING, AND THE REASON IS  
BECAUSE IT'S NOT SUPPORTED BY  
THE RECORD.

IF YOU GO TO THE STATE'S MOTION  
IN THIS CASE, THEY HAVE A  
SECTION CALLED, QUOTE,  
DEFENDANT'S CONDUCT SINCE HIS  
ARREST, CAN AND THEN THEY HAVE A  
SEPARATE OBJECTION CALLED  
STATE'S OBJECTION TO DOWNWARD  
DEPARTURE.

AND ALL THE ARGUMENT THERE IS ON  
THE GROUND THAT MR. GARCIA DID  
NOT SUFFICIENTLY SHOW THAT HE  
CURRENTLY HAD CANCER AS OPPOSED  
TO PREVIOUSLY HAD CANCER.

AGAIN, AT THE SENTENCING HEARING  
THE STATE AGAIN FOCUSED ON THERE  
WAS INSUFFICIENT EVIDENCE OF THE  
DEPARTURE GROUNDS.

THEY NEVER USED THE POST-ARREST  
CONDUCT.

AT THE SENTENCING HEARING, THEY SPECIFICALLY TRANSITIONED TO GIVING THEIR 84-MONTH SENTENCE, AND THAT'S HOW THEY USED THE DOWNWARD DEPARTURE. SORRY, THAT'S HOW THEY USED THE POST-ARREST MISCONDUCT. I THINK, YES, THERE IS ONE LINE IN THE DOWNWARD DEPARTURE MOTION MENTIONING THAT HE COMPLY WITH HIS HOUSE ARREST--

[INAUDIBLE]

HOWEVER, OPENING THE DOOR IS LIMITED CONTACT. TO THE EXTENT THAT IT APPLIES WITHIN SENTENCING NEITHER DID THE DEFENDANT, NOR--

[INAUDIBLE]

IT DOES NOT BLOW THE DOOR WIDE OPEN FOR THE STATE TO SPEND TWO-THURSDAY OF ITS TIME TALKING ABOUT--

>> COUNSEL, YOU WOULD AGREE THAT THE-- SPEAKS TO POST-CONVICTION ARRESTS, NOT POST-CONVICTION MISCONDUCT WRIT LARGE, RIGHT?

>> I AGREE THAT THAT IS WHAT THE TEXT SAID.

THAT ARGUMENT RAISED BY PETITIONER SHOULD BE DEEMED RAISED.

FIRST TIME IN HIS REPLY BRIEF TO THIS REPORT, NOT RAISED IN HIS INITIAL BRIEF.

BUT I THINK ON THAT POINT, OF COURSE NORVILLE HAS TO APPLY TO--

[INAUDIBLE]

IF THE CPC PRECLUDES--

[INAUDIBLE]

IT INCLUDES, IT PRECLUDES CONSIDERATION OF POST-ARREST MISCONDUCT.

AND TO SAY THAT WHETHER OR NOT A NORVILLE VIOLATION EXISTS TURNS ON THE PROSECUTOR'S UNREVIEWABLE DISCRETION IS AN ARBITRARY LINE. IT ALSO DISCOURAGES THE STATE FROM COMPLYING WITH THE FEDERAL AND STATE CONSTITUTION BECAUSE--

>> I'M GLAD YOU RAISED THE CONSTITUTION OF THE UNITED STATES.

IF YOUR ARGUMENT IS RIGHT, WHAT DO WE DO ABOUT THE FACT THAT THE U.S. SUPREME COURT HAS REPEATEDLY HELD THAT EVEN ACQUITTED CONDUCT CAN BE CONSIDERED AT SENTENCING?

>> UNITED STATES SUPREME COURT DID HOLD THAT IN-- THE FLORIDA DUE PROCESS CLAUSE IS MORE PROTECTIVE AND CANNOT CONSIDER ACQUITTED CONDUCT.

THE REASON THAT SUBSEQUENT MISCONDUCT IS ALLOWED IN FEDERAL COURT, IT'S NOT A CONSTITUTIONAL CONSIDERATION.

IT'S BECAUSE THE LEGISLATURE HAS A STATUTE THAT EXPRESSLY AUTHORIZES CONSIDERATION OF ALL CONDUCT PAST AND SUBSEQUENT. WE DON'T HAVE THAT.

THE PETITIONER'S ARGUMENT IS THE A TEXTUAL ONE.

WE'RE ALL TEXTUALISTS NOW.

THE CPC'S UNAMBIGUOUS ABOUT WHAT A TRIAL COURT'S ALLOWED TO CONSIDER, AND IT SAYS THE PRIMARY OFFENSE AND PRIOR RECORD.

IT DOES NOT SAY SUBSEQUENT OFFENSE.

SO, YOU KNOW, I THINK THE CONSTITUTIONAL ARGUMENT IS A LITTLE BIT OF A RED HERRING IN THE SENSE THAT THIS NORMAL IS A STATUTORY INTERPRETATION CASE. PETITIONER'S ASKING THIS COURT TO READ WORDS INTO THE CPC, THAT POST-ARREST MISCONDUCT IS ALLOWED.

AND, YOU KNOW, THE FEDERAL COUNTS DON'T REALLY GIVE US MUCH THERE BECAUSE THEY HAVE A SPECIFIC STATUTE.

IF THE FLORIDA LEGISLATURE WANTS TO ADOPT A STATUTE THAT SAYS POST-ARREST CONDUCT CAN BE CONSIDERED, THEN WE'LL DEAL WITH THE CONSTITUTIONAL--

>> IS IT MR. GARCIA'S POSITION THAT THE CPC REQUIRES THE SENTENCING COURT TO CONSIDER ONLY THE PSI AND NOTHING ELSE AT SENTENCING?

BECAUSE I'M NOT SURE I FIND THAT

IN THE CPC.

>> NO.

I AGREE WITH YOUR HONOR.

IT IS NOT OUR POSITION THAT THEY SHOULD ONLY CONSIDER THE PSI.

MOSTLY WHAT OUR POSITION IS RELYING ON IS NEXT 921.002 WHICH SAYS THE PENALTY IMPOSED--

[INAUDIBLE]

WITH THE SEVERITY OF THE PRIMARY OFFENSE AND CIRCUMSTANCES SURROUNDING THE PRIMARY OFFENSE, AND THE SEVERITY-- AND IT ALSO SAYS THE SEVERITY OF THE SENTENCE INCREASES WITH THE LENGTH AND NATURE OF THE PRIOR NATURE.

IT ALSO SAYS-- PRIORITIZE FOR SERIOUS OFFENSES AND PEOPLE WITH LONGER RECORDS.

WHAT HAPPENED HERE IS THE STATE SAID, HEY, I DON'T LIKE-- THE CPC POLICY DOESN'T REALLY HELP US HERE BECAUSE HE DOESN'T REALLY HAVE A SERIOUS PRIOR RECORD.

AND WHILE AN ARSON IS A SERIOUS CASE, NO ONE WAS HARMED IN THIS CASE, NO ONE WAS IN THE HOUSE. BUT WE'VE GOT TO FOCUS ON THINGS THE LEGISLATURE HAS SAID ARE IRRELEVANT OR AT THE VERY LEAST THE LEGISLATURE HAS SAID THAT'S NOT WHAT THE PRIMARY FOCUS IS ON.

IF YOU CONTINUE TO ADHERE TO NORMAL, WHICH IS THE LAW, AND THEIR THESIS PRINCIPLES APPLY, THE STATE TRIAL COURTS WILL STILL HAVE TONS OF DISCRETION AT SENTENCING TO IMPOSE.

THEY CAN-- WITH THE NATURE OF THE PRIOR RECORD, THERE'S SO MANY FACTORS THERE. ESCALATING CONDUCT OR ARE THEY ALL THE SAME CRIMES--

[INAUDIBLE]

AND THEN WITH THE PRIMARY OFFENSE ITSELF, THERE'S SO MANY DIFFERENT ASPECTS CAN BE CONSIDERED.

WAS THERE SOMEONE IN THE HOUSE, WAS ANYONE HARMED, HOW CLOSE WAS MR. GARCIA TO--

[INAUDIBLE]

THE FACT THAT 921.002 LISTS THE APPROPRIATE FACTORS, AND THE PSI STATUTE CONFIRMS WHAT THAT SAYS. BUT I AGREE WITH YOUR HONOR THAT YOU'RE NOT LIMITED TO THE PSI STATUTE.

I ALSO WANTED TO BRIEFLY MENTION ABOUT THE ALLEGATIONS ABOUT THE FACT THAT THE ALLEGATIONS AT THE BOND HEARING, A BOND HEARING THAT WAS HELD OVER DEFENSE OBJECTION WITHOUT REALLY ANY TIME TO PREPARE, THEY'RE NOT RELATED TO THE UNDERLYING FACTS OF THIS CASE.

ALTHOUGH IT INVOLVES A STATE WITNESS, IT'S ONLY BECAUSE THEY'RE NEIGHBORS.

IT'S LIKE A NEIGHBORLY DISPUTE THAT HAS NOTHING TO DO WITH THIS.

ONE NEIGHBOR WANTED TO BORROW MR. GARCIA'S TOOLS, AND MR. GARCIA SAID NO, SO THAT NEIGHBOR GOT MAD AND RUINED HIS RECLINER, AND MR. GARCIA ALLEGEDLY THREATENED HIM. SO WHEN THE STATE IS BRINGING THIS UP AND SPENDING SO MUCH TIME AT SENTENCING, THEY'RE REALLY PULLING THE TRIAL AWAY FROM WHAT IS RELEVANT WHICH IS THE ARSON AND MR. GARCIA'S RECORD.

I ALSO WANTED TO SAY WE DISAGREE WITH THE TRIAL FINISH WITH THE PETITIONER'S TRIAL THAT THE EVIDENCE WAS ESTABLISHED BY A PREPONDERANCE OF THE ED.

THERE WAS NO FINDING EVER MADE ON THAT, AND THIS COURT CANNOT MAKE A FINDING IN THE FIRST INSTANCE.

WE DISAGREE THAT THERE WAS A PREPONDERANCE OF EVIDENCE BECAUSE IT'S NOT CLEAR THE TRIAL COURT LISTENED TO THE JAIL CALLS, AND BOND HEARING, AS I MENTIONED, WAS HELD-- BASICALLY, THE DEFENSE WAS SANDBAGGED BECAUSE THE STATE FILED IT IMMEDIATELY AND BROUGHT IN A NEW WITNESS, AND MR. GARCIA

WAS HOSPITALIZED DUE TO HIS ILLNESS.

SO THEY DIDN'T HAVE AN OPPORTUNITY TO RESPOND OR DO ANYTHING--

[INAUDIBLE]

AT THE VERY LEAST, IF THEY'RE GOING TO OVERRULE NORVILLE AND SEND US BACK, YOU KNOW, THERE NEEDS TO BE A FINDING IN THE FIRST PLACE THAT IT WAS--

[INAUDIBLE]

I WANT TO GO BACK TO ACQUITTED CONDUCT REAL QUICK BECAUSE I THINK JUSTICE LABARGA BRINGS UP A GOOD POINT.

NORVILLE, WHILE I THINK IT'S A STATUTORY INTERPRETATION CASE, DOES HAVE A CONSTITUTIONAL DIMENSION IN THAT THE BRIGHT LINE RULE ASPECT OF IT DOES PROTECT AGAINST CERTAIN CONSTITUTIONAL VIOLATIONS.

FOR EXAMPLE, WHAT DO WE DO IN A SITUATION-- SAY MR. GARCIA WAS CHARGED WITH ASSAULT.

WHAT IF HE WAS A ACQUITTED AT TRIAL?

DOES HE GET TO REDO THIS SENTENCING HEARING?

I DON'T EVEN KNOW WHAT THE PROCEDURAL MECHANISM WOULD BE FOR THAT.

AND ALSO I THINK JUSTICE LAWSON WAS THE ONE WHO ASKED ABOUT GIVING THEM AN OPPORTUNITY TO RESPOND, BUT AS THE FOURTH DCA RECOGNIZED IN ITS ORIGINAL DECISION, THAT PUTS THE DEFENDANT BETWEEN A ROCK AND A HARD PLACE BECAUSE HE THAT HAS TO CHOOSE BETWEEN DEFENDING HIMSELF AT THE SENTENCING HEARING FOR SUBSEQUENT MITT MISCONDUCT AND WAVING HIS PRIVILEGE AGAINST SELF-DETERMINATION, HIS RIGHT TO REMAIN SILENT.

IF HE CHOOSES TO TRY TO REBUT THE ALLEGATIONS, WHATEVER HE SAYS COULD BE USED AGAINST HIM IN A FUTURE CASE.

THE UNITED STATES AND OTHER CONSTITUTIONAL CONVENTIONS

AND-- HAS HELD YOU CANNOT BE--  
[INAUDIBLE]  
IF THERE'S SUBSEQUENT  
MISCONDUCT, THE DEFENDANT SHOULD  
BE PUNISHED FOR THAT CONDUCT AT  
THE SUBSEQUENT HEARING.  
AND, FOR EXAMPLE, IN THIS CASE,  
IF THE STATE HAD CHARGED  
MR. GARCIA WITH A FAULT AT THE  
SUBSEQUENT HEARING, THEY COULD  
RELY ON THE ARSON AND THE FACT  
THAT IT WAS SOMEHOW TIED UP WITH  
THE ARSON, WHICH I DON'T THINK  
IS NECESSARILY TRUE.  
AND AT THAT POINT, THEY WOULD  
GET TO DO ALL THE CONSIDERATIONS  
THEY'RE ASKING FOR HERE.  
MR. GARCIA'S POSITION NOT THAT  
THIS BEHAVIOR CAN NEVER BE  
CONSIDERED.  
HIS POSITION IS THAT THE STATE  
NEEDS TO FOLLOW THE CONSTITUTION  
AND CHARGE AND CONVICT BEFORE  
THE MATERIAL IS CONSIDERED.  
>> DOESN'T THE PSI STATUTE TALK  
ABOUT THE PERSON'S PRIOR ARREST  
RECORD BEING PART OF THE PSI,  
NOT JUST CONVICTION?  
WHICH SEEMS LIKE THAT, YOU KNOW,  
RAISES SOME OF THESE SAME ISSUES  
THAT YOU'RE TALKING ABOUT AND  
THAT THE LEGISLATURE EXPLICITLY  
PUT THAT IN THERE.  
>> IT DOES SAY PRIOR RECORD OF  
ARREST AND CONVICTIONS, BUT IT  
DOES NOT SAY-- I THINK,  
CRUCIALLY-- DOES NOT SAY  
SUBSEQUENT RECORD OF ARREST  
OR--  
>> BUT IT'S, I MEAN, IT'S THE  
SAME, I MEAN, THE SAME PRINCIPLE  
APPLIES.  
IN THE SENSE THAT I UNDERSTAND  
YOU'RE SAYING IF THERE'S PRIOR  
CONVICTION THEN THERE'S BY  
DEFINITION PROCESS AND WHATEVER.  
BUT WITH THE PRIOR ARREST, THERE  
COULD BE THE SAME TYPES OF  
AMBIGUITIES THAT YOU'RE TALKING  
ABOUT NOW THAT THE LEGISLATURE  
STILL EXPLICITLY INCLUDED THAT.  
>> [INAUDIBLE]  
>>-- FROM THE STATUTORY  
PERSPECTIVE IT SEEMS LIKE THAT'S

AN ISSUE THAT'S SORT OF BAKED INTO THE STATUTE.

>> I AGREE.

YES, YOUR HONOR, I AGREE THAT A LOT OF THE CONSTITUTIONAL ISSUES I'VE BEEN TALKING ABOUT DO APPLY TO, QUOTE, PRIOR RECORD OF ARREST.

HOWEVER, I THINK IF WE'RE TALKING ABOUT TEST, IT SAYS PRIOR RECORD OF ARREST. IT DOESN'T SAY SUBSEQUENT RECORD OF ARREST.

AND I DO THINK THAT SUBSEQUENT ARRESTS DO POSE HEIGHTENED CONSTITUTIONAL CONSIDERATIONS BECAUSE OF THE ACQUITTED CONDUCT CONCEPT AND THE PRIVILEGE AGAINST INCRIMINATION.

A PRIOR ARREST AND THEY HAVEN'T ACTUALLY GONE THROUGH THE PROCESS OF CONVICTING THEM, T IT'S MORE LIKELY THAT IT HASN'T HAPPENED YET.

OR, I MEAN, THAT IT'S NOT GOING TO HAPPEN.

AND I THINK--

>> SO WOULD YOU ACKNOWLEDGE-- I'M SORRY TO INTERRUPT YOU.

>> GO AHEAD.

>> BASICALLY, YOUR TEXTUAL ARGUMENT IS IT'S--

[INAUDIBLE]

RIGHT?

THERE'S NO EXPLICIT PROHIBITION. WOULD YOU ACKNOWLEDGE THAT THIS IS SORT OF ON THE, YOU KNOW, IF YOU READ THE PORTIONS IN THE STATUTE THAT YOU CITE, THERE'S NOTHING ON ITS FACE THAT WOULD INDICATE THAT IT'S PURPORTING TO SORT OF LAY OUT A COMPREHENSIVE LIST OF THINGS THAT CAN BE CONSIDERED.

I MEAN, IT SEEMS LIKE IT'S MORE SORT OF STATEMENTS OF PRINCIPLE.

IT JUST, IT SEEMS TO ME LIKE THIS IS A VERY WEAK--

[INAUDIBLE]

APPLICATION.

DO YOU HAVE ANY RESPONSE TO THAT?

>> I DO DISAGREE THAT IT'S NOT PURPORTING TO PUT ON LIMITATIONS

BECAUSE IT DOES SAY THE  
PROVISION OF-- 9.102 SUBSECTION  
ONE SAYS THE LIMITATIONS UPON  
THE APPLICATIONS OF SUCH  
PENALTIES BELONGS TO THE  
LEGISLATURE.

AND THEN THEY SAY BASICALLY,  
HERE WE GO, WE'RE GOING TO LAY  
OUT THOSE PENALTIES AND  
LIMITATIONS.

I THINK THE OTHER--

>> WHERE'S THE-- I'M SORRY.  
I'M SORRY TO INTERRUPT YOU.

>> OKAY.

>> JUST TO BE FAIR, I MEAN,  
WHERE-- YOU'RE ESSENTIALLY  
READING THIS AS IF WE COULD SEE  
ON THE WORDS ON THE PAGE THE  
COURT MAY NOT CONSIDER  
SUBSEQUENT MISCONDUCT.  
OBVIOUSLY, THOSE WORDS ARE NOT  
ON THE PAGE.

SO YOU'RE ASKING US TO KIND OF  
READ THAT LIMITATION, AND I'M  
ASKING YOU TO KIND OF SHOW US  
THE ARGUMENT FOR WHY WE SHOULD  
READ THAT SORT OF A LIMITATION  
INTO THE LINE THAT'S AT THE TOP  
THE PAGE.

>> WELL, THIS COURT ALREADY DID  
READ THIS LIMITATION IN  
NORVILLE.

THAT WAS THE BASIS OF THE  
OPINION.

I THINK SORT OF TO FLIP THE  
QUESTION ON YOUR HEAD, WHAT  
LANGUAGE IS PETITIONER RELYING  
UPON TO SAY THAT YOU CAN  
CONSIDER SUBSEQUENT MISCONDUCT?

I THINK-- AND THE OTHER THING I  
WOULD SAY IS I REALLY DO URGE  
THIS COURT TO LOOK AT THE  
FEDERAL STATUTE.

IT'S CITED-- IT'S TALKED ABOUT  
EXTENSIVELY IN PEPPER WHICH IS A  
CASE BY PETITIONER, THE REPLY  
BRIEF.

IN PEPPER THEY TALK ABOUT THE  
FEDERAL STATUTE THAT AUTHORIZES  
CONSIDERATION OF POST OF  
ARREST-- POST-ARREST  
MISCONDUCT, AND WE DON'T HAVE  
THAT HERE.

SO I THINK THIS COURT IS GOING

TO HOLD THAT A TRIAL COURT CAN  
CONSIDER POST-ARREST MISCONDUCT  
BECAUSE THE CPC DOESN'T  
EXPRESSLY DISAVOW IT, I THINK  
THAT IS AN AN A TEXTUAL POSITION.  
THERE'S NOWHERE IN THE CPC WHERE  
IT SAYS WE ARE LIMITED TO THESE  
FACTORS.

BUT WHAT IS THE POINT OF THE  
LEGISLATURE REPEATEDLY POINTING  
OUT WE CARE ABOUT THE PRIMARY  
OFFENSE AND THE PRIOR RECORD.

WE CAN--

[INAUDIBLE]

WE CARE ABOUT PRIOR RECORD.

WHAT IS THE POINT OF THEM  
REPEATEDLY SAYING THAT--

[INAUDIBLE]

THEY MUST HAVE ALSO INCLUDED  
POST-ARREST MISCONDUCT EVEN  
THOUGH THEY DIDN'T PUT IT IN  
THERE--

>> DOESN'T THE LEGISLATURE  
LEGISLATE AGAINST THAT CERTAIN  
BACKGROUND SUBSTITUTION  
ASSUMPTIONS?

CAN YOU POINT TO ANYTHING THAT  
WOULD SAY THERE'S A LONGSTANDING  
HISTORY IN FLORIDA THAT THE, YOU  
KNOW, THESE ARE THE ONLY THINGS  
THAT MAY BE CONSIDERED BY THE  
COURT?

>> ON THAT POINT, THEY DO-- I  
GUESS, I DON'T KNOW IF I AGREE  
THAT THEY LEGISLATE BASED ON  
BACKGROUND ASSUMPTIONS--

>> WELL, OBVIOUSLY, THAT'S  
REALLY NOT DEBATABLE, BUT GO  
AHEAD.

>> OKAY.

AND I WAS GOING TO SAY ON THAT  
POINT NORVILLE'S EXISTED FOR SIX  
YEARS, AND THE LEGISLATURE  
HASN'T OVERRULED IT EVEN THOUGH,  
YOU KNOW, THEY COULD HAVE AND  
THEY WERE INVITED TO BY A FIFTH  
DCA JUDGE AND, IN FACT, THE CPC  
IS UP FOR DEBATE ON THE  
LEGISLATURE.

THERE WAS A TASK FORCE THIS YEAR  
THAT DID NOT RECOMMEND  
OVERRULING NORVILLE ALTHOUGH IT  
DID APPOINT ANOTHER ONE.

I GUESS IF THEY ARE GOING

AGAINST LONGSTANDING PRINCIPLE,  
I DON'T KNOW WHY THEY SAID IN  
THE CPC THAT THE LIMITATIONS  
UPON SUCH APPLICATIONS OF SUCH  
PENALTIES BELONG TO US AND  
HERE'S WHAT WE SAID.  
WHAT THEY, I GUESS SAY YOUR  
HONORS WANT TO OVERRULE NORVILLE  
AND SAY THAT POST-ARREST  
MISCONDUCT CAN BE CONSIDERED.  
I DON'T THINK IT CAN BE DEBATED  
THAT THE CPC SAYS THE PRIMARY  
FOCUS OF THE SENTENCE SHOULD BE  
ON PRIOR RECORD AND CONTEMPORARY  
OFFENSE.  
AND I ALSO DON'T THINK--  
>> COUNSEL, LET ME ASK YOU THIS,  
COUNSEL.  
COULDN'T WE REASONABLY  
UNDERSTAND THE REFERENCES YOU'RE  
FOCUSING ON THERE AS WHAT IS  
BAKED INTO THE LOWEST  
PERMISSIBLE SENTENCE AND TO THE  
KIND OF THE SCORE SHEET?  
BECAUSE THOSE ARE THE THINGS  
THAT GO INTO THE SCORE SHEET.  
THEN WE'VE GOT THIS OTHER  
PRINCIPLE HERE THAT IS OPERATIVE  
UNDER THE CRIMINAL PUNISHMENT  
CODE WHICH IS KIND OF LIKE THE  
OVERARCHING PRINCIPLE UNDER THE  
CRIMINAL PUNISHMENT CODE, IS  
THAT THE TRIAL COURT HAS THE  
DISCRETION TO GIVE A SENTENCE UP  
TO THE STATUTORY MAXIMUM.  
THAT'S THE BASIC FRAMEWORK.  
AND THEN THERE'S THE LOWEST,  
THERE IS A LIMITATION AT THE, ON  
THE LOW END BUT NOT ON THE HIGH  
END.  
ISN'T THAT CORRECT?  
ISN'T THAT THE BASIC FRAMEWORK  
OF THE CRIMINAL PUNISHMENT CODE?  
>> YOUR HONOR, I THINK THIS IS  
AN ARGUMENT THAT IS RAISED IN  
THE REPLY BRIEF.  
I ACTUALLY CHUCKLED BECAUSE--  
>> THE QUESTION I JUST ASKED  
YOU--  
>> YES, YES.  
LET ME ANSWER.  
THE LOW-- FIRST OF ALL, I WANT  
TO SAY YOU'RE SAYING THAT THE  
PRIMARY OFFENSE AND PRIOR RECORD

ONLY GO--

[INAUDIBLE]

FULL SENTENCE AND OTHER  
CONSIDERATIONS NEED TO BE  
CONSIDERED TO GET US UP TO  
STATUTORY MAX.

THAT'S NOT WHAT 921.002 THE  
SAYS.

IT SAYS THE PENALTY IMPOSED MUST  
BE COMMENSURATE WITH THE WE  
GRAVITY OF THE OFFENSE, AND THE  
SEVERITY OF THE OFFENSE--

[INAUDIBLE]

OF THE PRIOR RECORD.

IT DOES NOT SAY THESE PRINCIPLES  
ARE LIMITED--

[INAUDIBLE]

I HAVE BEEN ARGUING FOR YEARS  
THAT THE LOWEST PERMISSIBLE  
SENTENCE, THAT A JUDGE SHOULD  
NOT BE ABLE TO GO ABOVE THE  
LOWEST PERMISSIBLE SENTENCE  
BASED ON FACTORS ALREADY BAKED  
INTO THE CODE.

IF THIS COURT WANTS TO ADOPT  
THAT RULE, I WOULD BE SO HAPPY,  
AND IT WOULD REQUIRE REVERSAL  
HERE BECAUSE THE--

[INAUDIBLE]

IS ABOVE THE--

>> BUT THAT'S NOT, THIS THAT'S  
NOT-- I MEAN, YOU HAVE NOT  
PREVAILED ON THAT.

>> YEAH.

BUT THAT'S WHAT THE ARGUMENT IS,  
ISN'T IT?

THAT WHAT YOU'RE ASKING ME IS  
YOU'RE ASKING ME TO ADOPT, SAY  
ISN'T THAT A PERFECT--

[INAUDIBLE]

I MEAN, THIS COURT HAS  
REPEATEDLY REJECTED IT, AND THE  
CPC HAS NOT-- NOWHERE DOES THE  
CPC SAY THAT THE LOWEST  
PERMISSIBLE SENTENCE, THAT THESE  
GENERAL PRINCIPLES APPLY ONLY TO  
THE LOWEST PERMISSIBLE SENTENCE.  
AND I THINK THE FACT THAT THAT  
PROVISION OF THE STATUTE IS THE  
ONLY PROVISION THAT PETITION  
THERE CAN POINT TO TO SUPPORT  
HIS ARGUMENT TEXTUALLY IS WHY  
THE STATE'S TEXTUAL ARGUMENT  
IS SO WEAK.

I ALSO POINTED TO SPECIFIC PROVISIONS THAT SAY PRIMARY OFFENSE, PRIOR RECORD. THEY ONLY POINTED TO THAT PROVISION THAT YOU SAY.

BUT KIND OF--

>> COUNSEL, IF I COULD INTERRUPT AND ASK A QUESTION, I'M CURIOUS IF A DEFENDANT IS AT SENTENCE, IS THAT SENTENCING FOR A CHARGE OF BURGLARY OF THE DWELLING, IT'S AN F2 NOT ENHANCED, 15-YEAR MAXIMUM SENTENCE AND SAY THAT THE LOWEST PERMISSIBLE SENTENCE UNDER THE PUNISHMENT CODE'S 48 MONTHS.

AND THE DEFENDANT SAYS I WANT TO SPEAK AT SENTENCING AND THEN GETS UP AND CUTS OUT THE TRIAL D CUSSES OUT THE TRIAL JUDGE, SAYS HE DOESN'T BELIEVE IN THE SYSTEM, HE DOESN'T BELIEVE IN OUR LAWS, HE WOULD CODO THIS AGAIN TOMORROW IF HE GOT OUT, THAT THIS IS THE WAY HE SURVIVES IN THIS F-ING, F-ING COUNTRY AND F-YOU, JUDGE.

COULD THE JUDGE CONSIDER THAT DISCONDUCT IN IMPOSING THE SENTENCE?

>> I WOULD HAVE TO THINK ABOUT IT, YOUR HONOR, BECAUSE OBVIOUSLY THAT'S NOT THE SITUATION HERE.

OBVIOUSLY, THE COURT COULD HOLD HIM IN CONTEMPT AND PUNISH HIM IN CONTEMPT FOR THAT BEHAVIOR.

I THINK A LITTLE BIT OF HIM SAYING HE'S GOING TO DO IT IN THE FUTURE IS ABOUT, YOU KNOW, COULD BE RELEVANT BECAUSE IT'S NOT THE NECESSARILY SUBSEQUENT MISCONDUCT, EXCUSE ME.

>>BUT THE TIRADE WOULD CERTAINLY CONSIDERED MISCONDUCT, RIGHT?

CERTAINLY-- YEAH.

>> I GUESS IT IS.

>> IF YOU SAY SOMETHING ABOUT THE DEFENDANT AND HIS PROPENSITY TO PERHAPS COMMIT A CRIME AGAIN? YOU DON'T, YOU THINK THAT'S QUESTIONABLE AS TO WHETHER THE JUDGE CAN CONSIDER THAT.

>> IT IS QUESTIONABLE.  
MOSTLY-- THIS IS WHY I'M  
HESITATING A LITTLE BIT.  
ONE OF THE BENEFITS OF NORVILLE  
IS THAT IT'S A BRIGHT LINE RULE,  
AND IT'S EASY TO APPLY IN FUTURE  
CASES.  
SO IF WE SAID IT JUST APPLIES TO  
THIS CASE, IT WOULD, YOU KNOW,  
IT WOULD BE EASY, AND WE  
WOULDN'T HAVE TO GO DOWN THESE  
DIFFICULT PATHS OF FIGURING OUT  
WHAT HAPPENED.

I THINK IN THAT CASE--  
>> LET ME ASK YOU A DIFFERENT  
QUESTION, AND I THINK I  
UNDERSTAND THE ANSWER I'M GOING  
TO GET TO THAT QUESTION.

IF THE DEFENDANT COMES IN AND  
SAYS I'D LIKE TO SPEAK AT  
SENTENCE, SENTENCING.  
JUDGE, I KNOW I MADE A MISTAKE,  
I WILL NEVER DO THIS AGAIN.  
IN FACT, THESE ARE THE STEPS  
THAT I'VE TAKEN AFTER MY ARREST  
IN ORDER TO IMPROVE MYSELF.  
I'VE DONE THIS, I'VE DONE THIS,  
YOU KNOW, I'VE TAKEN THIS ANGER  
MANAGEMENT COURSE, I'VE REALLY  
DONE COMMUNITY SERVICE, I'VE  
DONE THIS VOLUNTEERISM, I'VE  
GIVEN BACK TO THE COMMUNITY IN  
WAYS, COULD THE STATE OBJECT AND  
SAY, WAIT, WAIT, WAIT, YOU CAN'T  
CONSIDER POST-ARREST MISCONDUCT  
EVEN IF IT'S NOT MISCONDUCT?  
WOULD THAT BE AN APPROPRIATE  
CONSIDERATION?

>> NO, THEY COULD NOT OBJECT TO  
THAT.

I WROTE A SPECIFIC SECTION ABOUT  
THIS BECAUSE I RECOGNIZE THAT  
SOME PEOPLE THINK IT MIGHT BE  
UNFAIR TO SAY THAT THE DEFENSE  
GETS TO BRING UP POST-ARREST  
BEHAVIOR, BUT THAT THE STATE  
CANNOT.  
AND SO THAT I SAY THE COURT IS  
BOUND BY THE LEGISLATURE'S  
POLICY, AND THE LEGISLATURE, YOU  
KNOW, THEY COULD HAVE REASONABLY  
THOUGHT WE WANT TRIAL COURTS TO  
CONSIDER PRIOR CONTEMPORANEOUS  
MISCONDUCT.

THIS IS ABOUT PUNISHMENT FOR THE  
PRIMARY OFFENSE.

HOWEVER, THE DEFENDANT HAS A  
DIFFERENT CONSTITUTIONAL RIGHT,  
A CONSTITUTIONAL RIGHT TO  
PRESENT ANY AND ALL EVIDENCE  
[INAUDIBLE]

THE STATE DOESN'T HAVE THAT  
RIGHT.

THEY'RE LIMITED IN A LOT OF  
WAYS.

ALTHOUGH, OF COURSE, THE  
DEFENDANT COULD BE BECAUSE OF MY  
RACIAL BACKGROUND, THIS IS WHY  
THIS CASE HAPPENED.

AND ALSO THERE MAY BE NO OTHER  
TIME FOR A DEFENDANT TO BRING UP  
SUBSEQUENT MITIGATING EVIDENCE  
EXCEPT AT THAT SENTENCING  
HEARING.

THE STATE ALWAYS HAS THE OPTION  
TO BRING UP POTENTIAL MISCONDUCT  
THAT RISES TO THE LEVEL OF AN  
ARREST IF THEY CHARGE SOMEONE  
WITH THAT CRIME LATER.

I DON'T--

>> SO IN RESPONSE TO THE  
DEFENDANT'S PRESENTATION, WELL,  
JUDGE, HE SAYS THAT HE'S  
REFORMED, BUT WE HAVE EVIDENCE  
OF MISCONDUCT THAT OCCURRED  
POST-ARREST.

>> THEN MAYBE WE CAN GET INTO  
THE OPENING THE DOOR CONCEPT  
THAT PETITIONER ADVANCES.  
I GUESS THE PROBLEM IN THIS CASE  
IS IF THAT CONCEPT DOESN'T APPLY  
BECAUSE THEY WERE USING IT TO  
ASK FOR A HARSHER SENTENCE AND  
NOT TO RESPOND TO THE DOWNWARD  
DEPARTURE MOTION.

>> I'VE USED ALL YOUR TIME  
PLUS--

>> YES, I KNOW, YOUR HONOR.  
CHIEF JUSTICE CANADY, DO YOU  
MIND IF I DO A CONCLUSION?

>> YOU NEED TO SUM UP IN ABOUT  
15 SECONDS.

>> OKAY, I CAN DO IT.  
IT SHOULD NOT BE CONTROVERSIAL  
TO SAY CRIMINAL DEFENDANTS  
SHOULD BE PUNISHED FOR THE CRIME  
THEY COMMITTED.

IF STATE WANTS TO PUNISH A

DEFENDANT FOR PARTICULAR BEHAVIOR, IT NEEDS TO CHARGE AND CONVICT THE DEFENDANT FOR THAT BEHAVIOR.

RECENTLY SUGGESTED THAT THE TRIAL COURT CONSIDERED POST-ARREST MISCONDUCT. THIS COURT SHOULD DECLINE PETITIONER'S--

[INAUDIBLE]

MORE CONVOLUTED TEXT, AND IT SHOULD NOT OVERRULE NORVILLE SIMPLY BECAUSE--

[INAUDIBLE]

THANK YOU, YOUR HONOR.

>> THANK YOU.

REBUTTAL.

>> THANK YOU, YOUR HONOR.

THERE'S A LOT TO UNPACK HERE.

SO I WANT TO START WITH BASICALLY THAT THE STATE DIDN'T RAISE--

[AUDIO DIFFICULTY]

COUNTERINTUITIVE, THIS ISSUE WASN'T RAISED IN THE BRIEFING BELOW.

I DON'T KNOW HOW THE STATE COULD BE FAULTED FOR NOT ADDRESSING THIS BEFORE THE MOTION FOR REHEARING.

DUE PROCESS ARGUED-- EXCUSE ME, THE DOWNWARD DEPARTURE WAS ME IN THE MOTION FOR REHEARING, AND I THINK OPPOSING COUNSEL--

[INAUDIBLE]

NOT SPECIFICALLY STATING THAT RESPONDENT WAS SEEKING PROBATION--

[INAUDIBLE]

THAT WAS THE ENTIRE PURPOSE. HE WANTED PROBATION AND, YES, THAT WAS ONE LINE, BUT THAT WAS THE ASSERTION THAT WAS MADE, THAT HE FOLLOWED THE RULES OF HOUSE ARREST.

IN TERMS OF THE STRUCTURE THE OF HOW THE STATE LIMITED THIS CONSIDERATION, IT'S IMPORTANT TO REMEMBER THAT THE SENTENCING MEMORANDUM IS BROKEN INTO SEVERAL DIFFERENT SECTIONS. AND IN THE FIRST SECTION, IT IS FACTS RELEVANT TO SENTENCING. THE SECTION THAT OPPOSING

COUNSEL REFERS TO IS, YES,  
THAT'S THE SUBSEQUENT  
MISCONDUCT.

FIRST OF ALL, THAT IS NOT  
MENTIONED IN THE FACTS RELEVANT  
TO SENTENCING SECTION, AND IT  
WAS NOT EVEN PART OF ANY OF THE  
ANALYSIS LATER ON IN THE  
SENTENCING MODEL AND NOT EVEN  
PART OF THE ULTIMATE CONCLUSION  
IN TERMS OF WHAT SENTENCE WAS  
APPROPRIATE FOR RESPONDENT.

AND AT THE SENTENCING HEARING,  
THE FIRST THING OUT OF THE  
STATE'S MOUTH WHEN IT WANTED TO  
ARGUE THE POINT, WE RELY ON THE  
SENTENCING MEMORANDUM IN  
IMPOSING THE PROPER SENTENCE FOR  
RESPONDENT.

BUT THAT IT WANTED TO ARGUE  
AGAINST THE DOWNWARD DEPARTURE  
AND EXPLICITLY BROUGHT OUT ALL  
THIS OR ELABORATED ON THE  
UNSUBSEQUENT MISCONDUCT.

THOSE WERE THE ONLY FOCUS--  
>> CAN YOU SORT OF TIGHTEN THAT  
UP?

SO FOR A FUNDAMENTAL ERROR  
ANALYSIS, THE ERROR HAS TO BE  
CLEAR FROM THE RECORD.

AND SO WHAT I'M HEARING YOU  
SAYING IS THAT PUTTING ASIDE THE  
RIGHTNESS OF NORVILLE AND ALL OF  
THAT, ARE YOU SAYING THAT IT'S  
NOT CLEAR FROM THE RECORD THAT  
THESE FACTORS WERE KIND OF  
IMPLICIT IN THE COURT'S DECISION  
TO IMPOSE THE 7-YEAR SENTENCE?

>> ABSOLUTELY, YOUR HONOR.  
THAT IS--

>> OKAY.

AND SO WHAT'S THE-- SO JUST  
MAKE SORT OF THE MOST CONCISE  
KIND OF STATEMENT THE OF WHY WE  
SHOULD READ THE RECORD IN A WAY  
TO SAY THAT THE, YOU KNOW, THAT  
A REASONABLE READING OF THE  
RECORD WOULD AT LEAST CREATE  
AMBIGUITY AS TO WHETHER THE  
FACTORS WERE CONSIDERED.

>> OF COURSE, YOUR HONOR.

SO THE, I WILL-- THE STATE  
OVERLAPPED THE DOWNWARD  
DEPARTURE EXPECT OVERALL

SENTENCE.

NOW, WHAT MAKES IT CLEAR THAT IT'S UNCLEAR IS THAT THE TRIAL COURT STATED THAT IT CONSIDERED ALL THE EVIDENCE WHICH IS WHAT RESPONSIBILITY--

[INAUDIBLE]

HANG THEIR HAT ON THAT TRIAL WOULD CONSIDER.

BUT THE NEXT STATEMENT OUT OF THE TRIAL COURT'S MOUTH WAS I DON'T THINK THIS IS A CASE THAT I SHOULD PART.

SO I DO NOT BELIEVE THAT IT'S PATENT, THAT IT'S CLEAR FROM THE RECORD THAT ANY OF THE-- SPECIFICALLY ARGUED AT THE SENTENCING HEARING WAS CONSIDERED IN THE--

>> AND SO THE, IT SEEMS LIKE THE STRONGEST ARGUMENT ON THIS ISSUE FOR THE OTHER SIDE IS THAT YOU GUYS ASKED FOR SEVEN YEARS, AND THAT'S WHAT THE COURT DID.

AND SO WHAT'S THE BEST EVIDENCE IN THE RECORD FOR THE NOTION THAT THE SEVEN-YEAR RECOMMENDATION THAT THE STATE MADE DID NOT FACTOR IN THE SUBSEQUENT MISCONDUCT?

>> THAT WOULD BE IN THE SENTENCING MEMORANDUM MADE IT PRETTY CLEAR, LIKE I SAID, THERE IS A SECTION THAT IDENTIFIES THAT THERE IS SUBSEQUENT ACTS, THREATS THAT WERE MADE. BUT THAT WAS NEVER BROUGHT UP AGAIN IN THE SENTENCING MEMORANDUM AND NOT IN THE FINAL CONCLUSION.

THE STATE EMPHASIZED THE UNDERLYING FACTS OF THIS OFFENSE IN COMING TO THE SEVEN-YEAR CONCLUSION.

HAD NOTHING TO DO WITH THE SUBSEQUENT DENIAL AT ALL. SO THAT'S THE CLEAR POINT ON THAT.

IN TERMS OF, VERY QUICKLY, THE DUE PROCESS CLAUSE IN THE FLORIDA CONSTITUTION'S BROADER-- I DON'T BELIEVE THAT'S CORRECT.

THERE'S NO SUBSTANTIVE FROM THE

TEXT THAT THE I CAN SEE FROM THE  
DUE PROCESS SECTION OF THE  
FLORIDA CONSTITUTIONAL DUE  
PROCESS CLAUSE SO--

[INAUDIBLE]

I BELIEVE, CHIEF JUSTICE CANADY,  
YOU HIT IT RIGHT ON THE HEAD IN  
TERMS OF CPC CALCULATION.

IT'S BAKED INTO THAT  
CALCULATION.

THESE THINGS THAT THE  
LEGISLATURE DEEMED APPROPRIATE.  
BECAUSE THEY ONLY WANTED TO  
LIMIT THE DISCRETION OF THE  
TRIAL COURT UNDERNEATH THE  
LOWEST CRIMINAL SENTENCING  
SCORE.

AND IF RESPONDENT'S  
INTERPRETATION IS CORRECT, THEN  
1G OF 921.002 IS BASICALLY  
INVALID.

I DON'T UNDERSTAND HOW WE CAN  
LIST OUT ALL THESE THINGS THAT  
ARE SUPPOSED TO BE CALCULATED IN  
THE SCORE AND SUBSEQUENT STATUTE  
SECTION ARE EXPLICITLY STATED AS  
PART OF THE CALCULATION, HOW YOU  
IGNORE THAT.

THE TRIAL COURT CAN GO UP TO THE  
STATUTORY MAXIMUM.

THE STATE'S NOT ASKING FOR A  
FACT OF FINDING BY THIS COURT,  
IT'S ASKING-- SIMILAR TO WHAT  
WE'D FIND IN THE JOA ARGUMENT A  
SUBSTANTIATION IS JUST--

[INAUDIBLE]

TO SUBSTANTIATE THE UNDERLYING  
MISCONDUCT.

NOW, IT'S OBVIOUSLY NOT A  
PERFECT COROLLARY BECAUSE  
MISCONDUCT DOESN'T NECESSARILY  
HAVE TO BE A CRIME.

SO ALL THE STATE IS ASKING IS  
THERE'S MINIMUM EVIDENCE TO SAY  
SUBSTANTIATION.

BOND REVOCATION HEARING--

[INAUDIBLE]

HANG THEIR HAT ON THAT DEFENDANT  
WASN'T THERE.

FIRST OF ALL, THAT'S KIND OF A  
MISINTERPRETATION OF THE FACT.  
RESPONDENT WAS GIVEN LEAVE TO  
FURTHER SEEK BOND LATER ON.  
IN FACT, TWICE TRIED TO DO SO.

SO EVEN THE ATTORNEYS THAT WERE THERE EVEN CROSS-EXAMINED THE THREE WITNESSES THAT STATED THEY HAD THREATS BY RESPONDENT. STATE WOULD ARGUE THAT DISCRETION WOULDN'T EXIST UNDER RESPONDENT'S INTERPRETATION BECAUSE IF EVERYTHING'S ALREADY CLEAR IN THE CPC CODE AND PSI, I'M NOT EVEN SURE THERE'S A PURPOSE IN--

[INAUDIBLE]

IF EVERYTHING'S ALREADY PRESENTED IN THE CPC CODE, HOW DO YOU HAVE DUE PROCESS WHERE-- AND DUE PROCESS IS A RIGHT THAT BELONGS TO EVERYONE.

YOU HAVE A RIGHT TO REBUT--

>> COUNSEL, WHERE DO YOU GET THE CONCEPT THAT DUE PROCESS BELONGS TO THE STATE?

>> IT'S FROM A MULTITUDE OF DIFFERENT CASES, BUT SIMPLY--

>> CAN YOU CITE ONE FOR ME?

>> PART OF THE REPLY BRIEF.

>> BECAUSE YOU WOULD AGREE THE DUE PROCESS CLAUSE OF THE CONSTITUTION DOES NOT PROTECT THE STATE OR APPLY TO THE STATE.

>> NO, I'M SAYING THAT THE STATE HAS DUE PROCESS RIGHTS IN A JUDICIAL SETTING TO INTRODUCE EVIDENCE.

DUE PROCESS--

[INAUDIBLE]

FUNDAMENTAL FAIRNESS, AS THIS COURT IS WELL AWARE.

IT'S NOT FAIR TO CUT OFF THE STATE'S RIGHTS ARBITRARILY.

AND THAT'S WHAT HAPPENED AT LEAST WITH THE FOURTH DCA AND SECOND DCA'S INTERPRETATION OF NORVILLE.

CANNOT BE--

[INAUDIBLE]

AT ANY TIME FOR ANY PURPOSE.

THAT'S NOT DUE PROCESS.

DUE PROCESS IS WE PUT FORTH OUR EVIDENCE, AND THE DEFENSE IS ABSOLUTELY ALLOWED WHATEVER IMPEACHMENT INFORMATION OR COUNTEREVIDENCE THAT IT WOULD LIKE TO DO.

THAT'S DUE PROCESS.

>> BUT THAT USUALLY ARISES FROM  
A RULE OR A STATUTE, CORRECT?  
THAT ALLOWS THE STATE TO  
PROSECUTE A CASE OR PRESENT  
EVIDENCE.

THAT'S NOT REALLY DUE PROCESS,  
INHERENT DUE PROCESS.

>> I MEAN, I BELIEVE THERE IS  
INHERENT RIGHT FOR A STATE TO  
HAVE SOME DUE PROCESS RIGHTS.  
NOW, CERTAINLY, THERE ARE MORE  
RIGHTS THAT ARE EXPLICITLY  
SPELLED OUT FOR DEFENDANT SUCH  
AS NO DOUBLE JEOPARDY, THAT KIND  
OF THING THAT WILL--

[INAUDIBLE]

DUE PROCESS RIGHTS.

WE DON'T HAVE A RIGHT TO RETRY  
HIM BECAUSE HE HAS A RIGHT OR  
SHE HAS A RIGHT TO NOT BE TRIED  
TWICE FOR THE SAME OFFENSE.

BUT THERE'S NO RESTRICTION  
REALLY THAT THE STATE DOESN'T  
HAVE DUE PROCESS RIGHTS  
OTHERWISE.

I'M HAVING TROUBLE-- IT IS IN  
MY REPLY BRIEF.

I APOLOGIZE, BUT I JUST WANT TO  
KIND OF HIT HOME WITH A COUPLE  
OF POINTS.

I HOPE I'VE ANSWERED YOUR  
QUESTION.

>> THANK YOU.

>> THAT'S SIMPLY NORVILLE'S  
BRIGHT LINE RULE IN PRACTICE HAS  
BEEN ACTUALLY VERY DIM.

IT KIND OF DENIES LOGIC HOW  
NORVILLE EXPLICITLY SAYS THAT  
THE BRIGHT LINE RULE IS YOU  
CANNOT, TRIAL COURT CANNOT  
CONSIDER SUBSEQUENT ARRESTS  
WITHOUT CONVICTION.

HOW THAT, THE FOURTH DCA AND THE  
SECOND DCA GOT TO SUBSEQUENT  
MISCONDUCT OF ANY KIND.

I BELIEVE THIS COMES DOWN TO A  
FUNDAMENTAL CLARITY OF NORVILLE.

I BELIEVE THE ISSUE IN NORVILLE,  
AND LIKE I SAID, THIS IS MY  
INTERPRETATION, IS THAT THE  
UNDERLYING TRIAL COURT RELIED ON  
AN ARREST, A MERE EXISTENCE OF  
AN ARREST TO SUBSTANTIATE OR TO  
FIND THAT THE ACTUAL OFFENSE

OCCURRED.

NOW ARRESTS, THE STATE CONCEDES,  
ARE NOT SUBSTANTIATED.

THAT REQUIRES PROBABLE CAUSE.

>> WELL, I THINK IN NORVILLE  
THERE WAS ACTUALLY SOME  
FINGERPRINTS ON A CD CASE.  
SO IT WAS NOT JUST-- SOME  
EVIDENCE.

WHETHER IT WAS ADEQUATELY PROVEN  
OR WHAT THE MAJORITY THOUGHT  
ABOUT IT IS ONE THING, BUT IT'S  
NOT LIKE-- I DON'T THINK IN  
NORVILLE THERE WAS JUST THE--  
IF THAT'S WHAT YOU WERE SAYING,  
THAT IN NORVILLE IT WAS JUST THE  
FACT OF THE ARREST THAT THE  
STATE WAS RELYING ON.

>> OF COURSE, YOUR HONOR.  
YOU WOULD KNOW BETTER THAN I AS  
YOU WERE--

[INAUDIBLE]

BUT THAT'S KIND OF WHAT I'M  
SAYING.

BUT I THINK WHAT IT CAME DOWN TO  
WAS THAT IT WASN'T  
SUBSTANTIATED.

YOU'RE CORRECT, THERE'S SOME  
EVIDENCE IN TERMS OF  
FINGERPRINTS ON A CD CASE INSIDE  
THE CAR, AND IT KIND OF SOUNDED  
AS IF IT WAS AN AFFIDAVIT, NOT  
TESTIMONY OR ANYTHING LIKE THAT.  
THERE WASN'T ADEQUATE PROOF.

>> COUNSEL, I'M SORRY TO  
INTERRUPT YOU.

THE THING WITH NORVILLE IS THE  
COURT, FOR BETTER OR WORSE RIGHT  
OR WRONG, INTERPRETED THE  
STATUTE AS SUPPOSEDLY  
RUNABOUT IN LISTING OUT THE  
FACTORS THAT CAN WITH  
CONSIDERED. WHICH DON'T, YOU  
KNOW, THERE'S NOTHING IN THERE  
THAT TALKS AFFIRMATIVELY ABOUT  
THESE ISSUES.

AND SO, YOU KNOW, ALTHOUGH THE  
COURT TALKS ABOUT THE BRIGHT  
LINE RULE THAT WOULDN'T APPLY  
HERE, THE INTERPRETIVE PRINCIPLE  
THAT THEY ANNOUNCED IS IF I  
CAN'T FIND AFFIRMATIVE  
PERMISSION TO CONSIDER THIS IN  
THE STATUTE, THEN I CAN'T

CONSIDER IT.

AND SO IT WOULD APPLY TO, YOU  
KNOW, TO ALL POST-OFFENSIVE  
CONVICTION MISCONDUCT.

>> CORRECT.

THAT'S BEEN THE  
INTERPRETATION--

>> IT'S BASED ON WHAT THE COURT,  
YOU KNOW, THE PRINCIPLE THAT IT  
ARTICULATED.

>> RIGHT, I UNDERSTAND, JUDGE.  
ALL-- THAT'S WHY IF NONE OF THE  
OTHER ARGUMENTS ARE ACCEPTED,  
RECEDE FROM ALL OF IT, THAT'S  
NOT AN APPROPRIATE  
INTERPRETATION OF THE STATUTES.  
WITH THAT, I THINK I'M 17  
SECONDS OVER.

QUICKLY, ALL THE STATE IS ASKING  
THAT DUE PROCESS BELONGS TO  
EVERYONE, AND DUE PROCESS SHOULD  
BE FOLLOWED, AND THE STATE  
SHOULD BE ALLOWED TO PRESENT  
EVIDENCE TO SUBSEQUENT ACTS THAT  
BEAR RELEVANCE IN UNDERLYING  
SENTENCE.

IN THIS PARTICULAR CASE, IT WAS  
SPECIFICALLY ONLY INTRODUCED  
FOR--

[INAUDIBLE]

DOWNWARD DEPARTURE, AND THAT WAS  
A PERMISSIBLE CONSIDERATION BY  
THE TRIAL COURT.

WITH THAT, I THANK YOU VERY MUCH  
FOR YOUR TIME.

THANK YOU.

>> WE THANK YOU BOTH FOR YOUR  
ARGUMENTS IN THIS CASE TODAY.