Gerald Lynn Bates v. State of Florida

CHIEF JUSTICE: GOOD MORNING. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED. SENTENCE IN 1990 AND IN 1994, HE WAS CONVICTED OF ARMED BURGLARY AND ROBBERY AND AGGRAVATED ASSAULT AND FOR THOSE CRIMES, HE RECEIVED HABITUAL OFFENDER LIFE SENTENCES. THE 1990 COCAINE CONE VEHICLES WAS ONE OF THE --' IS IT CLEAR ON THE RECORD THAT, IF HE DID NOT HAVE THAT POSSESSION OF COCAINE OFFENSE THAT HE WOULDN'T HAVE BEEN HABITUALIZEED?

THE ONLY THING I CAN POINT TO, YOUR HONOR, IS THE JUDGMENT AND SENTENCE FOR THE HABITUAL OFFENDER CASE OUT OF DUVAL COUNTY, ATTACHED AS AN APPENDIX TO MY BRIEF, WHICH SHOWS THAT JUDGEOLAFTER OVER THERE RELIED ON TWO -- JUDGE OLAF, OVER THERE, RELIED ON TWO, AND ONE WAS THE POSSESSION OF COCAINE. THEREAFTER, HE FILED A MOTION FOR POST-CONVICTION RELIEF AND ALLEGED THAT HIS COUNSEL WAS INEFFECTIVE, CONCERNING HIS 1990 PLEA TO POSSESSION OF COCAINE. HE ALLEGED THAT HE HIS TRIAL ATTORNEY HAD MISSED A ADVISED HIM ON TWO MATTERS. NUMBER ONE, HIS PLEA COULD NEVER BE USED AGAINST HIM IN A LATER CASE, AND NUMBER TWO, THAT POSSESSION OF COCAINE WAS EXCLUDED FROM CONSIDERATION AS A HABITUAL OFFENDER PRIOR CONVICTION.

WHEN WAS THAT FILED?

PARDON ME?

WHEN WAS THAT FILED? WE ARE TALKING ABOUT THE POSTCONVICTION AFTER HIS 1994 CONVICTION, CORRECT?

1999. SHORTLY AFTER THIS COURT'S WOODS OPINION.

SO AT THE TIME, IN 1994, HE WOULD TO HAVE -- HE WOULD HAVE COME INTO THE KNOWLEDGE THAT HIS TRIAL COUNSEL HAD HE, IN FACT, MISINFORMED HIM, CORRECT?

THAT'S TRUE.

AND WAS THERE ANYTHING, WHAT AT THAT POINT PRECLUDED HIM FROM FILING ANY KIND OF A MOTION CONCERNING THE 1990 CONVICTION?

THE CUSTODY REQUIREMENT OF 3.850.

AND WHAT WAS THE STATUS OF CORUM NOVUS IN 1994?

IT IS MY UNDERSTANDING THAT AT THAT POINT CORUM NOVUS WAS NOT AVAILABLE. IN WOODS THIS COURT HELD THAT IT WAS AVAILABLE FOR THE 3.850 CLAIM, WHERE HE WAS SERVING A SENTENCE AFTER AN ATTACK.

WHY WAS IT USED IN OFFENDER, AS A LAW ENFORCEMENT OFFICER, OR IF HE TELLS HIS CLIENT HE IS NOT REQUIRED TO REGISTER AS A SEX OFFEND ERROR HE WILL NOT BE HE WILL -- OFFEND ERROR HE WILL NOT BE ELIGIBLE -- OFFENDER OR HE HE WILL NOT BE ELIGIBLE FOR A JIMMY RYCE SORT OF CONVICTION, ALL OF THESE THINGS ARE MISSED A VICE.

AREN'T YOU TALKING ABOUT THERE OF IMMEDIATE AND DIRECT CONSEQUENCES FROM THE PLEA?

NOT NECESSARILY. JIMMY RYCE IS A COLLATERAL CONSEQUENCE, AND IT MAY OCCUR YEARS DOWN THE ROAD FROM THE CRIMINAL CONVICTION. [TECHNICAL DIFFICULTIES] WE DON'T WANT LAWYERS TO WORRY ABOUT THIS AND SAY DON'T WORRY ABOUT THIS CONVICTION. YOU CAN GO OUT AND COMMIT ANOTHER CRIME AND NOT SUFFER ANY CONSEQUENCES FOR IT. [TECHNICAL DIFFICULTIES]

WE ARE IN THE POSITION OF HAVING TO TRY SOMEBODY FOR A CRIME HE COMMITTED TEN YEARS BEFORE, WHERE WE DON'T KNOW WHERE THE WITNESSES ARE. IS THAT A POSSIBILITY THEN HE?

IT IS BUT IT IS NOT A VERY --

I HIM SORRY?

IT IS NOT A VERY -- I AM SOREY?

IT IS NOT A VERY GOOD -- [TECHNICAL DIFFICULTIES] HE IS HE NOT REQUIRED ALLOWED TO WITHDRAW HIS PLEA. THE TRIAL JUDGE WOULD HAVE TO WEIGH LATCHES AGAINST HIS CLAIM AND DETERMINE WHETHER IT WOULD BE FAIR TO THE STATE, TO ALLOW HIM TO WITHDRAW HIS PLEA.

THEORETICALLY THAT COULD CERTAINLY BE HAPPENING WITH JIMMY RYCE, WHERE THE CONSEQUENCE, ALTHOUGH IT MAY BE CERTAIN, MAY NOT OCCUR FOR MANY YEARS.

YES, MA'AM. THE IMPORTANT THING TO REMEMBER HERE IS THE POSTURE OF THIS CASE. WE HAVE NEFER HAD AN EVIDENTIARY HEARING. -- WE HAVE NEVER HAD AN EVIDENTIARY HEARING, SO WE DON'T KNOW WHAT THE CLAIM OF LATCHES WOULD BE. WE DON'T EVEN KNOW IF HIS CLAIM THAT HIS ATTORNEY MISSED A ADVISED HIM WOULD BE SUSTAINED.

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BUT WHAT WE DO KNOW IS THAT THE GIST OF WHAT IS BEING ASSERTED IS THAT THE LAWYER GAVE THIS PERSON ADVICE ON WHAT WOULD HAPPEN --' YES, SIR.

-- IF HE COMMITTED ANOTHER CRIME.

YES, SIR.

BUT THAT PERSON HAD AN ABSOLUTE OBLIGATION, REGARDLESS OF WHAT THE LAWYER SAID, NOT TO COMMIT ANOTHER CRIME. ISN'T THAT RIGHT?

YES, SIR. HE HAD A CHOICE.

AND SO THE RELATIONSHIP BETWEEN WHAT THE LAWYER TOLD THIS PERSON AND THE PERSON COMMITTING THIS ADDITIONAL CRIME, WHICH IS REALLY THE TRIGGER OF WHAT THE SENTENCE IS GOING TO BE, THEY ARE TOTALLY UNRELATED. AND IT SEEMS TO ME THAT IT IS MORE THAN JUST ATTENUATEED. IT IS THE PERSON HAS CONTROL OVER WHETHER THEY COMMIT THE CRIME OR NOT. ISN'T THAT RIGHT?

YES, SIR. HOWEVER, I WOULD POINT OUT THE OPINION OF THE CHIEF JUDGE BLUE IN THE ALEXANDER CASE IN THE SECOND DISTRICT, WHERE HE SAYS IT IS BAD PUBLIC POLICY TO APPROVE MALPRACTICE BY AN ATTORNEY HIRED BY THE STATE TO REPRESENT THE INTEREST OF THE DEFORMITY WHERE AN ATTORNEY GIVES LEGALLY WRONG ADVICE, THEN IF THE CLIENT

CHOOSES TO GO OUT AND COMMIT ANOTHER CRIME, AREN'T WE, IN FACT, SANCTIONING BAD ADVICE BY THE ATTORNEY?

YEAH, A BUT THE QUESTION OF THE LEGAL RESPONSIBILITY FOR MALPRACTICE IS NOT A MATTER, REALLY, THAT IS PART OF THIS CASE. IT SEEMS TO ME THAT THAT WOULD BE ON THE CIVIL SIDE.

IT IS TO THE EXTENT THAT IT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

BUT ISN'T THE REAL QUERY HERE IS WHETHER OR NOT THE DEFENSE ATTORNEY'S ADVICE INDUCED THE DEFENDANT TO ENTER THIS PLEA?

YES, SIR.

SO ON THIS RECORD, WE CAN'T REALLY SAY --' YOU HAVE AN ALLEGATION, IN HIS MOTION FOR POST-CONVICTION RELIEF THAT, HE WOULD NOT HAVE ENTERED THE PLEA, BUT FOR THE ATTORNEY'S MISSED A VICE, WHICH IS ENOUGH TO GRANT AN EVIDENTIARY HEARING.

BUT IT WOULD -- MISS ADVICE.

BUT IT WOULD SEEM, AS A MATTER OF LAW THAT, THE FIRST PRONG OF INEFFECTIVE ASSISTANCE HAS OCCURRED, THAT WE WOULD HAVE NO PREJUDICE FLOWING. WOULD YOU AGREE WITH THAT?

YES, SIR.

AND HOW FAR ARE THOSE LIMITED? BECAUSE IT SEEMS TO ME TO ME HERE, A THIS CASE IS GOING TO TURN ON THAT PARTICULAR ELEMENT, AND WE KNOW WHAT THE ALLEGATION IS, SO I MEAN, THERE IS NO DISPUTE. IT IS A QUESTION WE ASSUME THAT THAT IS TRUE, THAT HE WAS HABITUALIZED, BECAUSE OF THIS, SO WHERE DOES THAT TAKE US ON OUR PREJUDICE ANALYSIS, BECAUSE THAT SEEMS TO ME, THAT WE CAN TALK ALL DAY ABOUT THE INEFFECTIVE ASSISTANCE, BUT IT COMES DOWN TO THE PREJUDICE ISSUE.

WE DON'T KNOW UNTIL WE HAVE AN EVIDENTIARY HEARING. UNDER A TRADITIONAL 3.850 PRACTICE, A DEFENDANT FILES A PRO SE MOTION. THE JUDGE LOOKS AT IT, DETERMINES IF IT SETS FORTH A CLAIM FOR RELIEF. ALSO DETERMINES WHETHER THE ALLEGATIONS ARE CONCLUSIVELY REFUTED BY THE RECORD. NONE OF THAT OCCURRED HERE.

BUT IF WE ASSUME NONE OF IT WAS REFUTED BY THE RECORD, AS FAR AS WHAT HAPPENED, GOING BACK TO JUSTICE WELLS'S LINE OF QUESTIONING, IS IT NOT A SITUATION WHERE THERE IS NO PREJUDICE AS A MATTER OF LAW, BECAUSE OF THE INTERVENING ACT OF THE PERSON INVOLVED?

I DON'T THINK WE CAN SAY THAT.

CANNOT.

NO, SIR.

DO YOU SEE ANY DISTINCTION BETWEEN A PLEA OF CONVENIENCE, A NO CONTEST PLEA, AS OPPOSED TO IN THIS CASE, A PLEA OF GUILT WHERE HE ADMITS THE UNDERLYING OFFENSE?

NO, SIR.

PARTICULARLY IN A POSSESSION CASE.

NO, SIR. THERE IS NO LEGAL DISTINCTION BETWEEN NOLO AND GUILTY PLEA IN THIS CONTEXT.

WHY NOT?

BECAUSE EITHER ONE HAS TO BE VOLUNTARY, AND EITHER ONE HAS TO BE GIVEN WITH THE EFFECTIVE ASSISTANCE OF COUNSEL AND SOUND ADVICE BY A LAWYER, SO IT DOESN'T REALLY MATTER IF IT IS A GUILTY OR NOLO PLEA. NOW, I WOULD ADMIT THAT, IF SOMEONE PRODUCEED A TRANSCRIPT OF THE 1990 PLEA, AND IF THE JUDGE ASKED HIM HAS ANYONE TOLD YOU IF THIS CONVICTION WOULD HAVE A FUTURE EFFECT ON COLLATERAL CONSEQUENCES, THEN IT IS REFUTE THE BY -- REFUTED BY THE RECORD.

BUT THAT IS NOT REQUIRED IN ORDER TOE ACCEPT, TO MAKE THAT INQUIRY, THE VOLUNTARINESS OF A PLEA.

BUT AS JUSTICE MAJOR NOTED, IT SHOULD BE PART OF THE RULE ON ACCEPTING PLEAS.

HOW FAR WOULD YOU TAKE THAT? THERE ARE SO MANY CONSEQUENCES OF A PLEA.

YES, MA'AM, THERE ARE.

THAT A TRIAL JUDGE COULD BE THERE ALL DAY, TRYING TO ASCERTAIN IF A DEFENDANT KNOWS ALL OF THE COLLATERAL CONSEQUENCES.

YES, MA'AM, THAT IS ABSOLUTELY TRUE.

SO YOU ARE ADVOCATING THAT THAT SHOULD BE THE RULE HERE HE?

THAT WOULD BE THE BEST POSSIBLE SCENARIO, YES, MA'AM.

I GUESS I THOUGHT IN THIS CASE, THAT IF THAT INQUIRY HAD BEEN MADE, IT WOULD HAVE CONCLUSIVELY REFUTED THE ALLEGATION OF THE DEFENDANT, BUT SINCE WE HAVE ALREADY RULED THAT THAT DOESN'T HAVE TO BE MADE, WE ARE REALLY JUST DEALING WITH THIS VERY NARROW ISSUE OF AFFIRMATIVE MISSED A -- MISSED A VICE ON SOMETHING THAT IS -- MISS-MISSED A VICE ON SOMETHING THAT IS MATERIAL TO THE DEFENDANT, IN TERMS OF THE PLEA. I WOULD SUGGEST THAT YOU TAKE A LOOK AT JIMMY RYCE CONSEQUENCES AND NUMBER TWO, HABITUALIZATION. THOSE WOULD BE GOOD PLACES TO START. THANK YOU. I WILL RESERVE THE REST OF MY TIME FOR REBUTTAL.

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING, SIR. DAN DAVID FROM THE ATTORNEY GENERALS OFFICE ON BEHALF OF THE STATE OF FLORIDA. THIS CASE CAN BE RESOLVED, I SUBMIT, BY REFERENCE TO THE STATUTE BOOKS. MR. BATES ALLEGES THE ESSENCE OF HIS CLAIM IS I HAVE THIS POSSESSION CASE AND CAN I BE HABITUALIZED FOR THIS POSSESSION CASE? AND HE SAYS HIS LAWYER TOLD HIM, NO, YOU CANNOT. I CHECKED THE 1991 STATUTE OF CHAPTER 775 FOR TERMS OF HABITUALIZATION. NOT A WORD OR EVEN A HINT OF ANYTHING ABOUT POSSESSION CASES. IT IS NOT UNTIL THE 1993 VERSION OF THE STATUTE, WHERE WE HAVE, UNDER 775.0843, THE FELONY FOR WHICH THE DEFENDANT IS TO BE SENTENCED IN ONE OF THE TWO PRIOR FELONY CONVICTIONS IS NOT A VIOLATION OF 893.13, RELATING TO THE PURCHASE OR POSSESSION OF A CONTROLLED SUBSTANCE. THIS CLAIM COULD NOT POSSIBLY HAVE EVEN COME ON TO THE RADAR SCREEN, UNTIL 1993, THREE YEARS AFTER HE ENTERED HIS PLEA IN THIS CASE.

SO THERE WAS A CHANGE IN THE LAW?

YES, SIR.

SO IT IS A CHANGE IN THE LAW THAT REALLY HAS ACTED HERE, AS OPPOSED TO THE ADVICE OF COUNSEL.

I WOULD SUBMIT THAT IS EXACTLY CORRECT, CHIEF JUSTICE. I REFER TO THE 1991 VERSION OF 775.0841, WHICH SAYS, AND I AM QUOTING HERE, THE DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF ANY COMBINATION OF TWO OR MORE FELONIES IN THIS STATE OR OTHER QUALIFIED OFFENSES, NOT EVEN A HINT OF ANYTHING REFERENCED TO POSSESSION OF A CONTROLLED SUBSTANCE.

WAS THAT ARGUED TO THE FIRST DISTRICT AT THIS POINT?

NEW YORK CITY YOUR HONOR.

BECAUSE WE HAVE A LOT, LET'S ASSUME THAT THIS IS CORRECT THAT, THERE WAS NO MISADVICE, BECAUSE THERE WAS NO HABITUALIZATION FOR COCAINE POSSESSION AT THE TIME HE ENTERED HIS PLEA. WE HAVE SEVERAL TAG, WE HAVE A LOT OF TAG CASES, SO COULD YOU ADDRESS THE SUBSTANCE OF THE ISSUE, AS TO WHETHER, IF THERE IS MISADVICE, LIKE, SAY, THEORETICALLY, MY CLIENT WAS ARRESTED FOR A SECOND DUI, AND HE IS ASKING ME WHAT WOULD, AND HISTORY OF ALCOHOL AND ASSUME HE HAS ALREADY HAD ONE AND THERE IS A QUESTIONABLE ISSUE AS TO WHETHER THE SECOND DUI IS A GOOD ONE, YOU KNOW, WHETHER I COULD GET OUT OF IT, AND I SAID WHAT WOULD HAPPEN, IF I GOT A THIRD DUI, AND MY LAWYER SAID THERE WILL BE NO OTHER ENHANCED CONSEQUENCES, AND IN FACT, THERE ARE VERY SIGNIFICANT ENHANCED CONSEQUENCES. WHAT IS THE, IS IT, THERE IS NO CIRCUMSTANCE WHERE AFFIRMATIVE MISADVICE, NO MATTER HOW BLATANTLY MISREPRESENTED THE ADVICE IS, AND NO MATTER WHETHER THE DEFENDANT RELIES ON IT OR NOT, THAT CAN BE THE BASIS FOR A WITHDRAWAL OF A PLEA? ARE THERE ANY CIRCUMSTANCES? ANY NARROW, BROAD --

YOUR HONOR, I WOULD THINK, UNDER THE RECORD THAT WE HAVE IN THIS CASE, IN APPLYING YOUR QUESTION TOE IT, I DO NOT BELIEVE SO, BECAUSE OF THIS REASON. IT TAKES A SUBSEQUENT AFFIRMATIVE ACT BY THE DEFENDANT. IN OTHER WORDS COMMITTING ANOTHER CRIME, BEFORE ANY OF THE HABITUALIZATION CONSEQUENCES EVEN BECK POSSIBLE.

BUT ISN'T THE ISSUE, REALLY, WHETHER I, AS THE DEFENDANT, MADE A DECISION AS TO WHETHER TO PLEAD GUILTY AND GIVE UP HIS OR HER RIGHT TO A JURY TRIAL, BASED ON SOMETHING THAT WAS SIGNIFICANT THAT THE LAWYER SAID TO HIM OR HER IN RELIANCE? IT'S NOT REALLY THE QUESTION AS TO, I MEAN, THERE IS NO QUESTION THEY IS GOING TO BE CONSEQUENCES FOR THAT NEXT CRIME. YOU ARE GOING TO BE SENTENCED. BUT THE QUESTION IS WHETHER THAT PARTICULAR OFFENSE WAS AN OFFENSE THAT I WOULD NOT HAVE PLED GUILTY TO, BUT FOR THESE ASSURANCES FROM MY LAWYER?

YOUR HONOR, I HAVE TWO RESPONSES TO THAT. AGAIN, IN THIS CASE, THE CONSEQUENCE WAS NOT AS A RESULT OF THIS PLEA. IT WAS NOT AS A RESULT OF A SUBSEQUENT BAD CHECK CHARGE. IT WAS ONLY A DIRECT CONSEQUENCE OF HIS 1994 CONVICTION. AND I BELIEVE, IN YOUR SCENARIO, IT WAS THE FACTUAL PATTERN THAT YOU LAID OUT WAS AN ISSUE RELATIVE TO THAT INSTANT PLEA. I WOULD AGREE THAT, IN TERMS OF THAT INSTANT PLEA TO THE POSSESSION CASE, IF THE LAWYER HAD TOLD HIM, FOR EXAMPLE, AS REFLECTED IN CASE LAW, THIS IS ONLY A MISDEMEANOR POSSESSION OF COCAINE AND OF COURSE IT TURNS OUT TO BE A FELONY, OR IF HE AFFIRMATIVELY MISSED A ADVISED HIM THAT I WORKED IT OUT WITH THE PROSECUTOR. YOU ARE ONLY GOING TO GET 30 DAYS, AND HE GOES IN FRONT OF THE JUDGE AND GETS 30 MONTHS. THAT TYPE OF DIRECT CONSEQUENCE FROM THAT PARTICULAR PLEA, I WOULD AGREE WITH YOU THAT AFFIRMATIVE MISADVICE ON A PARTICULAR OF THAT PARTICULAR CASE, COULD POSSIBLY BE A GROUNDS TO VACATE IT, BUT WE ARE TALKING HERE ABOUT A DIRECT CONSEQUENCE TO CRIMES FURTHER ON DOWN IN TIME.

IF THERE WERE OTHER CHARGES PENDING, THAT IS SO THE OTHER CRIMES HAD ALREADY BEEN

COMMITTED, WOULD THAT BE DIFFERENT?

IT COULD POSSIBLY BE, UNDER THAT SCENARIO, DEPENDING ON IF THIS WAS USED TO ENHANCE HIM ON --' ISN'T IT, I GUESS, AND MAYBE I AM LOOKING AT WHAT JUDGE BLUE SAID IN THE SECOND DISTRICT CASE ABOUT THE POLICY, BECAUSE WE SEEM TO BE HERE, HAVE SOME UNEASE ABOUT THE POLICY, AND BECAUSE THE LEGISLATURE HAS CHOSEN TOE DEAL MORE HARSHLY WITH CERTAIN TYPES OF REPEAT OFFENDERS, WITH THE IDEA THAT NOT THEY ARE JUST GOING TO GET THE HARSH SENTENCE WHEN THEY HAVE THAT REPEAT SENTENCE, BUT THERE IS GOING TO BE A DETERRENT EFFECT, IF I THOUGH THAT THIS -- IF I KNOW THAT THIS NEXT SENTENCE, I AM GOING TO LOSE MY LICENSE FOREVER, THAT THE POLICY SHOULD BE THAT WE WOULD WANT DEFENDANTS TO RECEIVE ACCURATE INFORMATION ABOUT THE FUTURE CONSEQUENCES, TO DISCOURAGE RECIDIVISM, SO IN TERMS OF WHETHER THERE IS, WHETHER THE DEFENDANT HAS A CHOICE OR NOT, REALLY, ISN'T GOING TO WHETHER THE PLEA, ITSELF, WAS VOLUNTARY, AND TO WHETHER THE ADVICE THAT THE ATTORNEY IS GIVEN, GIVING TO THE CLIENT, SHOULD BE ACCURATE, NOT ONLY FOR THE DEFENDANT'S SAKE BUT, ALSO, BECAUSE OF THE POLICY REASONS THAT THESE LAWS ARE PLACED ON THE BOOKS.

I AGREE WITH YOUR HONOR'S POINT COMPLETELY THAT A LAWYER SHOULD GIVE ACCURATE ADVICE TO A CLIENT. THE QUESTION IN THIS CASE BECOMES IN TERMS OF POLICY, WHAT RESULTS FROM THAT, AND IN THIS CASE, ADOPTING A POLICY THAT YOU CAN VACATE A 1990 PLEA, WHICH IS TWO CRIMES PRIOR BACK IN TIME FROM THE CRIME FOR WHICH HE WAS HABITUALIZED, UNDERMINES FINALITY, CREATES ALL SORTS OF LATCHES PROBLEMS, IS GOING TO OPEN A POTENTIAL FLOOD GATE IN THE TRIAL COURTS, BECAUSE EVERYONE WHO IS IN PRISON WHOSE LAWYER HAS DIED OR WHOSE LAWYER, FOR EXAMPLE, IN A CURRENT SITUATION, WE HAVE ANY NUMBER OF ATTORNEYS OVER IN THE MIDDLE EASTED THAT -- MIDDLE EAST ON MILITARY SERVICE THAT ARE NOT AVAILABLE, IN THE MATES ARE GOING TO SUDDENLY HAVE RECOLLECTIONS OF WHAT THE LAWYER DID OR DID NOT TELL HIM. I THINK A SPECIFIC EXAMPLE IS A PARTICULAR CASE WHERE WE CAN LOOK AT THE STATUTE BOOKS AND SAY THIS CLAIM HAD NOT ARISEN UNTIL 1993. I AM NOT GOING TO ATTEMPT ANY PERJURIOUS ATTEMPT AT MR. BATES. I AM GOING TO SAY IT IS A FLAGRANT MEMORY FROM 8 YEARS AGO OR POST 1993 CLAIM, BUT WE CAN SEE FROM THE STATUTE BOOKS IT COULDN'T, AND IT DOES ENCOURAGE RECIDIVISM IN THIS PARTICULAR, IF MR. BATES ISAL ROUD -- IS ALLOWED TO WITHDRAW HIS 1990 PLEA, THEN YOU WOULD HAVE THE ISSUE OF WHAT IS HE GOING TO DO ON HIS 1994 OFFENSES? IS HE GOING TO WANT TO HAVE ANOTHER TRIAL? IS HE GOING TO WANT TO PLEA? YOU OPEN UP A CHAIN OF COLLATERAL CONSEQUENCES, IN TERMS OF SUBSEQUENT OFFENSES. AND IT ALSO IS IMPORTANT TO NOTE THAT, ON THIS PARTICULAR OFFENSE, AND I REFER IT TO THE 1994 CONVICTIONS, THAT MR. BATES RECEIVED, ON THE ARMED BURGLARY, ITSELF, HE COULD HAVE RECEIVED A LIFE SENTENCE.

THAT, SO THAT IS WHAT I HAD ASKED. I MEAN, IT MAY BE THAT AS A MATTER OF LAW ON OTHER GROUNDS, IF THERE WAS A HEARING EVEN ON THE SECOND PRONG, THAT THERE WOULD BE NO PREJUDICE DIVIDES AS MATTER OF LAW, IF -- PREJUDICE, AS A MATTER OF LAW, IF HIS SENTENCE WOULD BE THE SAME.

YES, BECAUSE HE COULD HAVE RECEIVED A SLICHBTS, EVEN IF IT WAS HIS VERY FIRST OFFENSE AND HE HAD NO PRIORS WHATSOEVER, HE COULD HAVE RECEIVED A LIFE SENTENCE UNDER THE ARMED BURGLARY. I WILL SIT DOWN AT THIS TIME AND REFER TO THE THIRD DISTRICT OPINION O

CHIEF JUSTICE: THANK YOU. ANY REBUTTAL?

WHILE IT IS TRUE THAT THE JUDGE DID RELY ONLY ON THIS PLUS A 1993 WORTHLESS CHECK CONVICTION TO IMPOSE THE HABITUAL OFFENDER LIFE SENTENCE, IT ALSO REFLECTS THAT MR. BATES HAD SEVEN FELONY CONVICTIONS, SO IT IS ENTIRELY POSSIBLE THAT THE STATE WOULD NOT BE PREJUDICED, IF WE GOT TO THAT POINT BARKS BECAUSE THERE MIGHT BE OTHER

FELONIES THAT COULD BE USED TO HABITUALIZE. ALSO --

WHAT ABOUT THIS ARGUMENT, THOUGH, THAT THERE REALLY WAS NO HABITUALIZATION FOR POSSESSION OF COCAINE IN 1990, SO WHY WOULD THAT HAVE BEEN HIS LAWYER'S ADVICE?

I DON'T KNOW WHY THE LAWYER WOULD TELL HIM THAT.

BUT IT WOULD HAVE BEEN TRUE IN 1990, IF THE LAW IS WHAT HAS BEEN STATED TODAY, THERE, IT WOULD HAVE BEEN THAT YOU COULDN'T USE IT AS A HABITUAL, TO HABITUALIZE. THAT WOULD ONLY HAVE HAPPENED IN 1993.

BUT EVEN UNDER THE STATUTE, THE CRIME FOR WHICH YOU ARE BEING SENTENCED HAS TO BE A SIMPLE POSSESSION CASE, AS WELL AS THE PRIOR. SOUGHT STATUTE WOULDN'T EVEN APPLY, BECAUSE HE WAS CONVICTED OF BURGLARY AND ROBBERY. I WOULD, ALSO, POINT OUT --

I AM NOT CERTAIN I UNDERSTAND YOUR RESPONSE TO JUSTICE PARIENTE'S QUESTION. SHE IS ASKING YOU WHETHER, I THINK SHE IS, WHETHER YOU AGREE WITH THE STATE THAT THIS, UNDER THE LAW AS IT STOOD AT THE TIME THIS INITIAL PLEA WAS ENTERED, THAT THIS WOULD NOT BE A QUALIFYING OFFENSE. I BELIEVE THAT --

MR. DAVID'S POINT WAS THAT THE LAWYER COULD NOT HAVE GIVEN SUCH ADVICE IN 1990, BECAUSE THE STATUTE WASN'T AMENDED UNTIL '93. BUT EVEN UNDER A '93 AMENDMENT, IN ORDER FOR THE PERSON TO BE HABITUALIZED, THE CURRENT OFFENSE CANNOT BE A DRUG POSSESSION, AS WELL AS ONE OF THE PRIOR OFFENSES CANNOT BE A DRUG POSSESSION, SO EVEN IF THE STATUTE HAD BEEN THEY EFFECT, THE LAWYER COULD NOT HAVE ADVISED MR. BATES THAT HIS PRIOR POSSESSION OF COCAINE COULD NOT BE USED AS A PRIOR, BECAUSE HE WAS NOT BEING SENTENCED IN 1994, ON A POSSESSION. HE WAS BEING SENTENCED ON TWO OTHER CRIMES.

WHAT DO YOU ASSERT AS THE PREJUDICE TO YOUR CLIENT HERE? IS IT THE LATER HABITUALIZATION, OR IS IT THE CONVICTION OF THE EARLIER CRIME?

BOTH. WITHOUT THE ATTORNEY, ALLEGED ATTORNEY MISADVICE IN 1990, THEN HE WOULD HAVE NOT BEEN HABITUALIZED IN 1994, BASED ON THE PRIOR CONVICTION FOR POSSESSION OF COCAINE IN 1990.

WHEN YOU ALLEGE INEFFECTIVE ASSISTANCE IN COUNSEL IN CASE A, DON'T YOU HAVE TO SHOW PREJUDICE IN CASE A NOT IN CASE B DOWN THE ROAD?

HE ALLEGED IN HIS MOTION THAT HE WOULD NOT HAVE ENTERED THE PLEA IN 1990, BUT FOR HIS ATTORNEY'S MISADVICE.

I AM SAYING WE CAN'T CONSIDER WHAT HAPPENED IN 1994. THERE WAS PREJUDICE IN '94. WE HAVE TO CONSIDER WHETHER HE WAS PREJUDICED IN 1990.

THAT IS EXACTLY WHAT HEALLY EDGED. HE MET BOTH PRONGS OF THE STRICKLAND TEST AS TO THE 1990 CONVICTION.

THIS CAME WITHIN THE WOODS' WINDOW, SO THAT REALLY, IN TERMS OF CIRCUMSCRIBEING THE ISSUE HERE, IF SOMEBODY IS IN CUSTODY, THEY HAVE GOT TWO YEARS FROM THE DATE THAT THE PLEA IS ENTERED, NO MATTER, TO MOVE TO WITHDRAW THE PLEA, UNDER 3.850, CORRECT?

YES, MA'AM.

THE ISSUE AS TO WHETHER, IF YOU HAD A JIMMY RYCE COLLATERAL CONSEQUENCE, AS TO WHETHER THEY COULD WAIT UNTIL THEY GOAT OUT OF PRISON, THAT IS NOT, HAS ANY

APPELLATE COURT LOOKED AT HOW FAR DOWN THE ROAD YOU COULD ACTUALLY MOVE TO WITHDRAW YOUR PLEA, SAYING, WELL, I JUST FOUND OUT ABOUT IT?

I KNOW IN THE DEPORTATION CASES, THE CLAIM IS NOT RIPE UNTIL YOU ARE ACTUALLY BEING THREATENED WITH DEPORTATION, NOT JUST POSSIBILITY OF DEPORTATION.

SO THE ARGUMENT THAT THEY COULD WAIT AND SAY THIS, IS REALLY THE SAME, REALLY COMES UP IN DEPORTATION AS WELL.

AND I ASSUME THAT A JIMMY RYCE PERSON WOULD NOT HAVE STANDING TO ASSERT THE CLAIM, UNTIL THEY WERE ACTUALLY FACED WITH A JIMMY RICE PETITION.

WELL, AND ALSO, I MEAN, THE SCENARIO THAT THIS CASE COMES OUT WITH, IS THAT BECAUSE, AS JUSTICE CANTERO SAYS, THE ATTACK REALLY SO THE FIRST CASE. IT COULD COME UP IN THE 3.850 ON THE HABITUALIZATION, FORfa A 1970 CONVICTION, CORRECT?

I DON'T THINK THAT THE WOODS' WINDOW WOULD BE THAT BROAD. NO.

THANK YOU.

CHIEF JUSTICE: THANK YOU ALL VERY MUCH.