Marvin Nettles v. State of Florida

THE LAST CASE ON THE COURT'S DOCKET THIS MORNING IS NETTLES VERSUS STATE.

CHIEF JUSTICE: GOOD MORNING, AND IF YOU ARE READY TO PROCEED, YOU MAY PROCEED.

GOOD MORNING. MY NAME IS ARCHIE F GARDENER, AND I WOULD -- GARDNER, AND I WILL GIVE A BACKGROUND HERE, REPRESENTING MARVIN -- REPRESENTING THE STATE -- REPRESENTING MARVIN NETTLES, AND THERE WAS A SCORE SHEET, AND THIS CAME UP WITH A TOTAL SENTENCING POINTS OF MR. CHIEF JUSTICE

YOU MIGHT TILT THAT MICROPHONE. YOU HAVE A SOFT VOICE.

THANK YOU, SIR, I WILL SPEAK UP.

CHIEF JUSTICE: THAT MAKES A BIG DIFFERENCE.

THE 66.4 MONTHS WAS RECOMMENDED AS MINIMUM BY THE JURY, AND THE TRIAL COURT IMPOSED A 66.4 MONTH PRR SENTENCE, BECAUSE THE STATE WANTED A PRR SENTENCE, AND MR. NETTLES OBVIOUSLY IS ELIGIBLE FOR THE PRR SENTENCE, AND THEN, VORSZ, THERE WAS A -- AND THEN, OF COURSE, THERE WAS A 3.800 BECAUSE THE ILLEGALITY OF THAT SENTENCE WAS DENIED, AND APPEAL, AND THE STATE ISSUED -- AND THE COURT ISSUED THIS OPINION RIGHT OVER HERE, WHICH SUPPOSEDLY FIXED THIS AS, I THINK, A FIVE-YEAR PRR SENTENCE, THEN FOLLOWED BY A ANOTHER SENTENCE, A 6.4 MONTH CRIMINAL PUNISHMENT CODE SENTENCE.

YOUR ARGUMENT IS THAT THE MOST THAT THE DEFENDANT COULD GET IS THE PRR SENTENCE, THE FIVE-YEAR MANDATORY?

YOUR HONOR, UNDER THE CASE LAW THAT I REVIEWED, AS FAR AS WHETHER OR NOT SOMETHING IS CONCURRENT OR CONSECUTIVE, THE MOST THAT HE COULD GET, AS PRR, WOULD BE THE FIVE YEARS. I DON'T BELIEVE THE JUDGE COULD HAVE STACKED IT TO TEN YEARS.

OKAY, SO THE MOST THAT THEY COULD GET IN THIS CASE WOULD HAVE BEEN THE 60 MONTHS THAT. IS YOUR ARGUMENT?

THAT IS MY AERING UNIT.

NOW, YOUR OPPONENT -- THAT HE IS MY ARGUMENT.

NOW, YOUR OPPONENT ARGUES THAT, UNDER, IF WE ADOPT THAT POSITION, OF, THEN, REOFFENDERS WOULD BE GETTING LESS TIME THAN OTHER INDIVIDUALS, BECAUSE IF THIS IN WERE NOT A RE-OFFENDER, HE WOULD BE ELIGIBLE FOR A 66.4 MONTHS BURKES BECAUSE HE IS A RE-OFFENDER, HE IS ONLY ELIGIBLE FOR 60 MONTHS. CAN YOU RESPOND TO THAT ARGUMENT?

YES, SIR. WITH ALL DUE RESPECT, THAT WOULD BE THE CHOICE OF THE STATE ATTORNEY IN IN CASE, BECAUSE IT IS THE STATE ATTORNEY'S DAYS KREINGS AND CHOICE TO DECIDE -- DISCRETION AND CHOICE TO DECIDE WHETHER OR NOT THEY WANT TO MAKE SOMEONE ELIGIBLE FOR THE PRISON RELEASEE REOFFENDER PUNISHMENT ACT, SO IT IS NOT THAT YOU WOULD BE GUARANTEED THAT AN OFFENDER WOULD RECEIVE LESS, TAKING INTO ACCOUNT SCORE SHEETS AND GUIDELINES AND THINGS LIKE THAT, BUT IT IS MORE A MATTER OF WHAT THE STATE IS

SAYING WE WANT IN THIS CASE, AND THE STATE VERY MUCH STATED WE WANT A PRR SENTENCE IN THIS CASE.

DOESN'T THE STATUTE SAY THAT THE INTENT IS THAT THE DEFENDANTS BE GIVEN THE MAXIMUM POSSIBLE, TO THE FULLEST EXTENT OF THE LAW, AND IN INTERPRETING THIS STATUTE, AND RECONCILE GOT VARIOUS STATUTES -- RECONCILING THE VARIOUS STATUTES, DOESN'T THE FULLEST EXTENT OF THE LAW MEAN WHICHEVER IS GREATER?

I WOULD SUBMIT TO YOU THAT THAT IS CORRECT, THAT IN THIS STATE IT SAYS IT IS THE INTENT OF THE LEGISLATURE THAT THE OFFENDER PREVIOUSLY RELEASED, BE PUNISHED TO THE FULLEST EXTENT OF THE LAW, AND IN THIS CASE, IF IT IS A PRR, IT IS A FIVE-YEAR FOR A THIRD, 15 FOR A SECOND, 30 FOR A THIRD, LIFE FOR LIFE, DAY FOR DAY, NO GAIN TIME.

BUT THE FULLEST EXTENT OF THE LAW WOULD INCLUDE NOT ONLY THE MAXIMUM, AS PRISON RELEASE REOFFENDER, BUT, ALSO UNDER THE CRIMINAL PUNISHMENT CODE, THAT WOULD BE THE MAX, THE FULLEST EXTENT OF THE LAW.

I WOULD, WELL, I AM JUST TAKING THEIR WORD HERE, TO THE FULLEST EXTENT OF THE LAW, THE LONGEST SENTENCE POSSIBLE, AND THAT IS THE LONGEST SENTENCE POSSIBLE UNDER THE STATUTORY MAXIMUMS, IS THE FIVE FIVE-TO-15-TO-30, AND I BELIEVE THAT HE THAT IS WHAT AWE ARE REFERRING BACK TO IS THAT, AND WHAT IT DOES CREATE THE AMBIGUITY AND THE CONFLICT HERE, WHEN IT SAYS SUCH DEFENDANT IS NOT ELIGIBLE FOR SENTENCING UNDER THE SENTENCING GUIDELINES, AND I AM ASKING YOU TO TAKE A, THE SCREW THAT I DO, WHICH IS THAT --ET VIEW THAT I DO, WHICH IS THAT THIS -- THE VIEW THAT I DO, WHICH IS THAT THIS IS ESSENTIALLY A GUIDELINES HERE. WHETHER IT IS THE SCORE SHEET UNDER THE PRIOR OR A SCORE SHEET PRIOR TO OCTOBER 19, IT IS IS STILL UNDER THE GUIDELINES TO TRY TO RECOMMEND A SENTENCE AND THE TOTAL SENTENCING POINTS.

AND THE THIRD DCA INTERPRETED THE TERM "ELIGIBLE" TO MEAN ENTITLED TO THE BENEFIT OF, SO THAT THE DEFENDANT IS NOT ENTITLED TO A REDUCED SENTENCE UNDER THE SENTENCING GUIDELINES, BUT MAY BE SUBJECT TO AN ENHANCED SENTENCE UNDER THE SENTENCING GUIDELINES, WHEN THE STATUTE USES THE TERM "ELIGIBLE" FAUX IT.

YOUR HONOR, I GO -- "ELIGIBLE" FAUX IT.

YOUR HONOR, WITH ALL DUE RESPECT, I THINK THAT IS A TWISTED AND UNFORTUNATE READING OF THE WORD "ELIGIBLE", BECAUSE BASICALLY YOU HAVE THE ATTORNEY GENERALS OFFICE TRYING TO GET THE FIRST DCA TO ADOPT THE NOTION THAT ELIGIBLE CAN ONLY MEAN A BENEFIT, SOMETHING HONORIFIC, SOMETHING THAT IS TO THE BENEFIT, AND WITH ALL DUE RESPECT, WE JUST HEARD OVER TWO HOURS OF ARGUMENT WHERE THE WORD ELIGIBLE WAS REPEATEDLY USED FOR THE DEATH PENALTY, WHICH PROVES THAT THE BACKBONE OF THE STATE'S ARGUMENT HERE OR THEIR REASONING AS TO WHY THIS CANNOT BE A, CONSTRUED THE WAY THAT WE ARE CONSTRUING IT, THE WAY THAT IRONS AND WILSON AND THE OTHER TWO DC ALPS As, IS BECAUSE HE WILL -- THE OTHER TWO DCA'S, IS BECAUSE ELIGIBLE MEANS SOMETHING GOOD AND WE SEE HERE THIS MORNING THAT IT DOESN'T SIMPLY MEAN GOOD. IT MEANS CAN-DO, AN OPTION, SOMETHING THAT IS AVAILABLE. SOMETHING THAT, I AM ELIGIBLE FOR THE DRAFT OR ELIGIBLE FOR BEING INDUCTED INTO THE FLORIDA BAR. IT IS EITHER/OR. IT IS NOT ENTIRELY ONE WAY. AND I THINK THAT REALLY DID MAKE, WAS PART OF THE REASON WHY IT CAUSED THIS SOMEWHAT STRAINED ARGUMENT TO BE ILLOGICAL.

WELL, CAN YOU SPEAK UNDER THE, PRIOR TO THE CRIMINAL PUNISHMENT CODE, THE SENTENCINGS WERE UNDER A SENTENCING GUIDELINE, IN WHICH THE COURT WAS GIVEN A LOW RANGE AND A HIGH RANGE AND ONLY ABLE TO DEPART UPWARD FOR CERTAIN STATUTORY REASONS. WHEN THE CRIMINAL PUNISHMENT CODE WAS INSTITUTED, THERE WAS A SCORE SHEET THAT SAID A BASE, AND THEN THE -- THAT HE SET A BASE, AND THEN THE STATUTE SET THE

MAXIMUM. DO YOU SEE ANY DISTINCTION WHATSOEVER, BETWEEN THE PHRASE "SENTENCING GUIDELINE" AS OPPOSED TO A SENTENCING SCORE SHEET? JUDGE CON DISCUSSES THIS ON PAGE -- JUDGE CONN DISCUSSES THIS ON PAGE 247 OF HIS OPINION. I AM NOT GOING TO QUOTE THE LANGUAGE FOR TIME REASONS, BUT DO YOU SEE ANY DISTINGUISHING IN THAT, BECAUSE HAVING BEEN THROUGH IT ON THE TRIAL LEVEL, WE WERE TAUGHT AND HE HAD INDICATED, UNDER THE OLD, YOU WERE SENTENCED UNDER THE GUIDELINES, UNDER THE CRIMINAL PUNISHMENT CODE THERE IS A SCORE SHEET, AND THE TWO PHRASES ARE DIFFERENT.

I SEE THAT YOU STILL BASICALLY HAVE GUIDELINES RIGHT HERE. YOU HAVE A SCORE SHEET THAT RECOMMENDS A SENTENCE.

SAY WHAT IS ON THE TOP OF IT.

IT SAYS CRIMINAL PUNISHMENT SCORE SHEET.

IT DOES THOUGHT SAY GUIDELINES.

PREVIOUS TO THE CRIMINAL PUNISHMENT CODE THAT, DOCUMENT SAID SENTENCING GUIDELINES.

IT DID, WANDER I AM SAYING, ESSENTIALLY YOU DO STILL HAVE GUIDELINES HERE, A WHICH SET FORTH A RECOMMENDED SENTENCE OF 88.6 MONTHS, A LOWEST PERMISSIBLE SENTENCE OF 66.4 MONTHS, AND, OF COURSE, THIS SCORE SHEET IS INCORRECT, BECAUSE IT IT SAYS A MAXIMUM SENTENCE OF TEN YEARS, WHEN, INDEED, A MAXIMUM SENTENCE IN THIS CASE, UNDER THE LAW, AND UNDER OUR RULE, OUR READING OF THE CONSECUTIVE, IS --.

BUT UNLIKE PRIOR TO THE CRIMINAL PUNISHMENT CODE, THERE IS NO RANGE, GUIDELINE RANGE AS THE GUIDELINES USED TO GIVE. WHAT WAVE NOW IS WHAT THE MINIMUM SENTENCE IS AND THE MAXIMUM THAT IS AVAILABLE AND THE DISCRETION IS LEFT UP TO THE TRIAL COURT, CORRECT?

YOUR HONOR, THAT IS STILL A RANGE, A RANGE FROM THE MINIMUM PERMISSIBLE TO THE STATUTORY MAXIMUM.

THE RANGE AND THE GUIDELINES -- THE RAIING, UNDER THE GUIDELINES -- THE RANGE, UNDER THE GUIDELINES, WAS A MUCH NARROWER RANGE.

IT COULD HAVE BEEN, IN ALL CASES, IT WOULDN'T HAVE BEEN. I WAEBT TO GET TO THATISH -- I WANT TO GET TO THAT ISSUE OF NOTICE, TOO. YOU, BEING A TRIAL JUDGE, THERE IS STILL A LOT OF SITUATION, YOU KNOW, SUCH AS WHERE WE ARE STANDING RIGHT HERE, THE SCORE SHEET, THE GUIDELINE, THE RECOMMENDED SENTENCE IS GREATER THAN THE STATUTORY MAXIMUM, AND THE LEGISLATURE ADDRESSED THAT IN 921 AND, ALSO, I AM NOT SURE IF IT IS REFERENCED IN 775, BUT IT MAY, ALSO, BE REFERENCED THERE, BUT ONE OF THE THINGS THAT I WANT TO BRING UP HERE FOR YOU IS THE ISSUE OF NOTICE. WE MAKE AN IMPORTANT POINT THAT PEOPLE, BY THE STATUTE -- STATUTE BOOKS THAT YOU HAVE AT YOUR SIDE, ARE PLACED ON NOTICE AS TO WHAT THE CRIMINAL PUNISHMENT IS, WHAT THE LAW IS AND THINGS LIKE THIS. I CAN TELL YOU FROM EXPERIENCE DEALING WITH CRIMINAL DEFENDANTS, THAT THERE ARE TWO PLACES RIGHT NOW WHERE THERE IS NO DOUBT WHATSOEVER THAT DEFENDANTS ARE PLACED ON NOTICE. ONE IS 10-20-LIFE. THERE AIN'T NOBODY OUT THERE THAT DOESN'T KNOW WHAT THAT IS ALL ABOUT, AND THE OTHER ONE IS THE LECTURE THAT EVERY OWN RECEIVES UPON RELEASE FROM PRISON, AS TO PRR. THERE IS A COUPLE OF HOURS THAT ARE DEVOTED TO MAKING SURE THAT EVERYBODY WHO GETS OUT, AS PART OF THE RELEASE COURSE THAT THEY TAKE OF APPROXIMATELY 100 HOURS OF HOW TO GET HELP AND WHO TO GET HELP FROM, IS TO KNOW THAT HE BY THE WAY, YOU VIOLATED ANY ONE OF THESE LAWS RIGHT HERE THAT ARE A HENIMRATED BY 775 -- THAT ARE ENUMERATED BY 775- 775-SUB-A, SUB-1, KNOWS THAT THESE

ACTS, THAT IF THEY COMMIT ONE OF THESE ACTS, THAT THAT IS WHAT THEY ARE GOING TO GET. IT IS SPECIFICALLY THE FIVE YEARS, THE 15, THE 30 OR THE LIFE, BASED ON WHAT THEYER CHARGED WITH AND WHAT THEY PLEA -- WHAT THEY ARE CHARGED WITH AND WHAT THEY PLEA TO.

THAT SAME STATUTE SAYS THAT THIS IS NOT INTENDED TO ELIMINATE ANY OTHER PUNISHMENT UNDER ANY OTHER PROVISION OF LAW, SOMETHING TO THAT EFFECT?

I BELIEVE THAT I WOULD REFER BACK TO THE REASONING THAT WAS PUT FORTH, IN BOTH IRONS AND WILSON, IS --

BEFORE YOU GET TO THE REASONING, IT SAYS THAT.

I AGREE WITH YOU, SIR. IT SAYS NOTHING IN THIS SUBSECTION SHALL PREVENT A COURT FROM IMPOSE AGO GREATER SENTENCE OF INCARCERATION, AS AUTHORIZED BY LAW, PURSUANT TO 775.084, WHICH IS YOUR ENHANCEMENT, AND ANY OTHER PROVISION OF LAW, AND IRONS AND WILSON, BOTH, INTERPRET THAT, UNDER THE RULE OF ADJUSTEM GENEROUS THAT, THEY ARE TALKING ABOUT OTHER ENHANCEMENT FEATURES.

BEFORE WE GET TO WILSON AND IRONS, THOUGH, THE POPULATION IN GENERAL IS ALSO ON NOTICE OF THAT PROVISION OF THE STATUTE, AS WELL AS THE MAXIMUMS PROVIDED IN THE STATUTE.

AS THEY ARE ON NOTICE OF EVERYTHING ELSE THAT IS WRITTEN IN THE STATUTE, WHAT I SYSTEM SAYING IS VERY SPECIFICALLY THEY ARE TAUGHT THE PRR MEANS STATUTORY MAXIMUM.

WELL, THEN, THIS IS A, DID YOU TRIBUTE ANNOYING THIS BEING A PLEA AGREEMENT, WHERE IN EXCHANGE FOR, AND I DON'T KNOW IF THE RECORD SHOWS WHETHER IT COULD HAVE BEEN POTENTIALLY HARSHER SENTENCE, THIS DEFENDANT PRESUMABLY REPRESENTED BY COUNSEL, AGREED TO CONCURRENT PRR AND CPC SENTENCE OF 66.4 MONTHS AND PRESUMABLY AT THAT TIME, IT WAS GOING TO BE ALL 66 MONTHS WAS GOING TO BE DAY FOR DAY, CORRECT?

YES, YOUR HONOR.

SOUGHT RELIEF HERE IS THE SIX MONTHS, BEING NOT A DAY FOR DAY, CORRECT SOME THAT IS THE RELIEF AS TO THE ANYTHING IN EXCESS OF THE PRR SENTENCE IS GOING TO BE UNDER THE CRIMINAL PUNISHMENT CODE.

IN THAT CASE, YOUR HONOR, WHAT I WOULD SAY TO YOU IS THAT THE VERY LAST THING, UNDER "CONCLUSION", THAT THAT IS IN CONTRADICTION TO THIS COURT'S DECISION IN, I THINK IT IS GRANT, AT PAGE 659, WHERE IT SAYS THAT, IF THERE IS A MINIMUM MANDATORY SENTENCE, THAT GOES ALONG, RIDES ALONG WITH ANOTHER SENTENCE, THAT THE OTHER SENTENCE ACCRUES GAIN TIME, AND THE WAY THAT I AM READING THE FIRST DCA'S DECISION, IT SAYS THAT, AFTER WE HAVE GOTTEN THROUGH WITH FIVE YEARS, THEN WHATEVER THE REMAINING PORTION IS, THE 6.6, BECOMES A CPC SENTENCE, WHICH IS SUBJECT TO GAIN TIME, BUT ALMOST AS IF THEY CUT IT APART AND THEN SEWED IT BACK TOGETHER AGAIN.

BUT YOU GRANT THAT THERE WERE CONCURRENT SENTENCES FOR DIFFERENT OFFENSES, RUNNING TOGETHER.

YES, SIR.

AND THAT IS NOT THE CASE HERE.

WELL, THE CASE HERE, IF WHAT WE ARE TALKING ABOUT IS SOMEONE BEING SENTENCED TO FIVE YEARS AND THEN BEING SENTENCED TO 6.4 MONTHS, I WOULD SAY THAT HE THAT ALMOST RUNS INTO A, BEING SENTENCED TWICE FOR THE SAME CRIME PROBLEM. I AM NOT SURE, I VENT BRIEFED THE IDEA OF WHETHER OR NOT THAT MAY CREATE A DOUBLE JEOPARDY PROBLEM.

YOU HAVE ALREADY CROSSED THAT DOUBLE JEOPARDY ISSUE IN COTTON AND SOME OF THESE OTHER CASES. WE HAVE ALREADY ALLOWED THAT TERRITORY, HAVEN'T WE?

I AM NOT SURE IT IS BEING DONE THE SAME WAY. WHAT I AM SAYING, THAT IF INDEED WHAT THE FIRST DCA SAID, THAT THE 66.4 MONTHS SENTENCE, NOT A 6.4-MONTH SENTENCE BUT A 66.4-MONTH SENTENCE, IS ALL SUBJECT TO GAIN TIME, THEN I DO BELIEVE THAT IT WOULD COMPORT WITH COTTON IN THIS SITUATION. HOWEVER, IF I COULD GET ON TO, I THINK THEY ARE GIVING ME THE LIGHT, AND I THINK I BETTER SIT DOWN, AND I WILL TAKE MY FIVE MINUTES LATER. THANK YOU.

CHIEF JUSTICE: GOOD GOOD AFTERNOON. -- GOOD AFTERNOON.

GOOD MORNING. MY NAME IS KAREN HOLLAND, AND I HEERM ON BEHALF OF THE STATE OF FLORIDA.

IS THE -- IS IT FIRST DAY FOR DAY AND THE GAIN TIME ONLY ACCRUES AFTER THE 60 MONTHS IS SERVED.

I AM SORRY. CAN YOU REPEAT THE QUESTION?

YES. HE AGREED TO A CONCURRENT SENTENCE OF 66.4 MONTHS.

RIGHT.

THE FIRST DISTRICT SEEMS TO SAY THAT, IF THAT WAS OKAY -- SAY THAT THAT WAS OKAY, BUT THAT THE LAST 6.4 MONTHS, THE LAST, 6, IS THAT WHAT IT IS?

RIGHT. 66.4 MONTHS.

THE LAST 6.4 MONTHS WOULD NOT HAVE TO BE DAY FOR DAY. ANOTHER FIRST FIVE YEARS UNDER THE PRR HAVE TO BE 100 PERCENT DAY FOR DAY. THE REMAINDER SIX MONTHS, UNDER THE CODE.

OKAY. AND IS THAT WHAT WAS SUPPOSEDLY AGREED TO AT THE TIME OF THIS --

YES.

-- PLEA COLLOQUY.

YES.

EVERYONE UNDERSTOOD IT WASN'T DAY FOR DAY FOR THE FULL 6 UPON 4 MONTHS.

I KNOW THEY -- FOR THE FULL 6.4 MONTHS.

I KNOW IN THE PLEA COLLOQUY, IT DID SEEM LIKE HE WAS AGREEING TO THE ENTIRE SENTENCE DAY FOR DAY, BUT THE STATE AGREES THAT FOR FIVE YEARS, IT IS THE PRR. BEFORE RETURNING TO THE MERITS, I WANT TO TOUCH BRIEFLY ON JURISDICTION AND SUGGEST THAT THERE NOT BE CONFLICT HERE. IN ORDER TO HAVE TRUE CONFLICT, YOU HAVE TO HAVE THE CASES TO BE FACTUALLY IN DISTINGUISHABLE, AND WE DO HAVE A FACTUAL DIFFERENCE HERE, IN THAT THE DEFENDANTS WERE SENTENCED UNDER THE -- IN THAT THE DEFENDANT WAS SENTENCED UNDER

THE CODE AND IRONS AND WILSON WERE SENTENCED UNDER THE SENTENCING GUIDELINES.

BUT DON'T WE HAVE A CASE ON APPEAL WITH THIS PROBLEM TO RESOLVE THIS, DO WE NOT?

YES F YOU AGREE WITH WHETHER IT WORKS IN TANDEM WITH THE SENTENCING SCHEME, THE STATE DOES NOT WANT BROADER SENTENCE.

WE HAVE VARIOUS COURTS OF APPEAL WITH VARIOUS WAYS ON THIS.

YES. WE WOULD LIKE TO YOU REACH THE MERITS.

WE HAVE TO GIVE SOME CREDENCE OR SOME EFFECT TO THE PROVISION IN THE STATUTE THAT SAYS THAT THE REOFFENDER DEFENDANTS ARE NOT ELIGIBLE FOR SENTENCING, UNDER THE SENTENCING GUIDELINES. WHAT EFFECT DO WE GIVE IT?

I THINK YOU CAN HAVE NO PROBLEM IN ENFORCING THAT PROVISION. THAT STILL INCORPORATES THE DEFENDANT AS HE WAS SENTENCED UNDER THE CODE.

BUT THIS, THE PROBLEM I HAVE WITH THAT IS THIS STATUTE WAS WRITTEN BEFORE THERE WAS A CRIMINAL PUNISHMENT CODE, SO IT COULDN'T HAVE BEEN REFERRING TO A CRIMINAL PUNISHMENT CODE, BECAUSE THAT CODE DIDN'T EXIST BACK THEN.

TRUE, BUT ONCE WE IMPLEMENTED THE CODE, THAT BASICALLY ELIMINATED THE GUIDELINES.

LET'S ASSUME FOR THE MOMENT, THAT WE SAY THAT THE SENTENCING GUIDELINES AND THE CODE ARE ESSENTIALLY THE SAME, FOR PURPOSES OF THIS STATUTE. THEN WHAT EFFECT WOULD WE GIVE IT?

THE EFFECT, I THINK YOU NEED TO LOOK AT THE STATUTE IN ITS ENTIRETY. I WOULD JUST SAY TO ACCEPT DEFENDANT'S ARGUMENT, THIS COURT IS GOING TO HAVE TO RECEDE FOR ITS HOLDING IN COTTON AND GRANT, WHICH STATES A MINIMUM MANDATORY SENTENCING PROVISION. IF I COULD QUOTE COTTON. WHEN THE ACT IS PROPERLY VIEWED AS A MINIMUM MANDATORY STATUTE, IT ITS EFFECT IS ESTABLISHING FLOOR. IF THE DEFENDANT IS ELIGIBLE FOR ANY OTHER SENTENCING STATUTE, THE COURT IN ITS DISCRETION AS A MATTER OF LAW, MAY IMPOSE THE HARSHER SENTENCE. IN GRANT, YOU REITERATED THAT HOLDING, AS ESTABLISHED IN COTTON TO BOTH PROVIDE A MINIMUM MANDATORY IMPRISONMENT PURSUANT TO THE ACT AND TO REALIZE THE GREATEST SENTENCE ALLOWED BY LAW IS CLEAR. HOW THE CONCURRENT SENTENCE APPLICABLE, THIS COULD HAVE ESSENTIALLY DEFEATED THE INTENT OF THE ACT.

BUT THIS CASE, WHILE TOUCHING ON A SIMILAR AREA THAT HAS SOME REFERENCE HERE, IT REALLY DID NOT ADDRESS THE DIRECT ISSUE OF THE CONFLICT BETWEEN THE CODE OR GUIDELINES, AND THE PRISON RELEASEE REOFFENDER ACT. IT WAS TALKING ABOUT HABITUALIZATION AND WHETHER YOU HAD CONCURRENT OF THE SAME, WHETHER YOU COULD ENTER A SENTENCE THAT WOULD HAVE THE SAME AND DID IT NEED TO BE LONGER OR WHAT IF THEY WERE BOTH THE SAME THAT, KIND OF ISSUE, SO WE NEED TO GET, DO WE NOT, TO THIS CONFLICT THAT THE DEFENDANT IS ASSERTING, AND HOW WE RESOLVE IT THE.

I THINK, THEN, THE CONFLICT GOES STRICTLY TO THAT ONE PROVISION, AS JUSTICE CANTERO SAID, A PRR IS EXCLUDED FROM A GUIDELINE SENTENCE, BUT I THINK IF YOU JUST INTERPRET THAT AS MEANING THAT DAEST IS NOT ELIGIBLE FOR A GUIDELINE SENTENCE IN THAT, THE TRIAL COURT MUST IMPOSE THAT MANDATORY MINIMUM. WHETHER OR NOT IT FALLS WITHIN THAT GUIDELINES RANGE OR NOT.

COULD YOU RESPOND TO THE DEFENDANT'S ARGUMENT THAT ELIGIBLE COULD NOT MEAN THAT

YOU ONLY HAVE THE BENEFIT OF, BECAUSE WE DISCUSS ELIGIBLE FOR DEATH AND ELIGIBLE FOR THIS, MEANING DOES THIS PROVISION APPLY, AND IF WE INTERPRET IT THAT WAY, DOES, THAT WHAT IT MEANS IS THE SENTENCING GUIDELINES DO NOT APPLY TO A DEFENDANT WHO IS A PRISON RELEASEE REOFFENDER, THEN WE WOULD HAVE TO INTERPRET THE STATUTE AS SAYING ANY OTHER PROVISION OF LAW MEANS OTHER PROVISIONS OTHER THAN THE SENTENCING GUIDELINES ARE NOT A CRIMINAL PUNISHMENT CODE.

I THINK THE COURT JUST NEEDS TOE LOOK AT THE ENTIRE STATUTE NOT JUST THAT SINGLE PROVISION. WE HAVE GOT AN EXPRESS STATEMENT OF LEGISLATIVE INTENT, WHICH IS TO MAXIMIZE PUNISHMENT AND IN CONJUNCTION WITH THE PRISON RELEASEE RAE OFFENDER ACT.

EVEN TAKING THAT SENTENCE ABOUT MAXIMIZING PUNISHMENT, WOULDN'T YOU HAVE TO AGREE THAT A SENTENCE UNDER THE PRISONER RELEASEE ACT, A FIVE-YEAR SENTENCE UNDER THE FIVE-YEAR PRISONER RELEASEE AECKT, WHERE YOU HAVE TO SERVE EVERY DAY OF THAT FIVE YEARS, IS REALLY A GREATER SENTENCE THAN A 6 OF.4 -- A 66.4-MONTH SENTENCE UNDER THE CRIMINAL PUNISHMENT CODE, BECAUSE UNDER THE CRIMINAL PUNISHMENT CODE, 66.4 MONTHS, YOU GET YOUR GAIN TIME, AND IT REALLY ENDS UP BEING A LOT LESS THAN A PURE FIVE-YEAR SENTENCE, WHERE YOU SERVE DAY FOR DAY.

WELL, SEPARATING THE ISSUE OF GAIN TIME UNDER THE CODE, YOU HAVE TO SERVE 85 PERCENT OF YOUR TIME, SO 8 A PERCENT OF 66.4 -- SO 85 PERCENT OF 66.4 MONTHS IN THIS CASE IS A LITTLE LESS THAN FOUR YEARS.

SO IT REALLY IS A LESSER SENTENCE, AND EVEN THOUGH IN ACTUAL MONTHS IT IS A GREATER SENTENCE, IT ACTUALLY IS A LESSER SENTENCE THAN A FIVE-YEAR SENTENCE UNDER THE CRIMINAL PUNISHMENT CODE.

BUT THE LEGISLATURE'S INTENTION WAS TO MAXIMIZE PUNISHMENT FOR PRISON RELEASEE REOVER ENDERS.

BUT IT IS ALSO CLEAR THAT PRISON RELEASEE REOFFENDERS ARE NOT ELIGIBLE FOR SENTENCING URND UNDER THE SENTENCING -- SENTENCING UNDER THE SENTENCE TENTHSING GUIDELINES. WE HAVE TO WORK UNDER THAT PROVISION.

HE HAS TO GIFT MINIMUM MANDATORY SENTENCE, BECAUSE SOMETIMES PERHAPS THE MINIMUM MANDATORY WOULD BE LESS THAN THAT STATUTORY MAXIMUM. I WOULD DRAW THE COURT'S ATTENTION TO, ALSO, THE LEGISLATIVE HISTORY IN THE CODE. IF YOU LOOK AT THE RILES IMPLEMENTING THE CODE AT 721 SO.2D, CAN YOU HEAR ME OKAY? 265.

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CHIEF JUSTICE: YES.

THE LEGISLATURE INTENT OF THE CODE IS THAT THESE PROVISIONS AND THE MINIMUM MANDATORY ARE MEANT TO WORK TOGETHER. A MINIMUM MANDATORY SENTENCE, IF THE LOWEST PER MIFBL SENTENCE -- PERMISSIBLE SENTENCE EXCEEDS THE MINIMUM MANDATORY, THEN THE PENALTIES APPLY. THAT IS WHAT WE HAVE IN THIS CASE. THE LOWEST SENTENCE UNDER THIS CODE WAS 66.4 MONTHS, WHICH EXCEED THE STATUTORY MAX OF FIVE YEARS, SO THE COURT WAS TROIRD IMPOSE BOTH. IF YOU ALSO LOOK AT THE PRISON RELEASEE REOFFENDER ACT, THE LEGISLATIVE HISTORY THERE ALSO CONTEMPLATES A SENTENCE IN KPEFS THE STATUTORY MAXIMUM. IF YOU LOOK AT CHANT -- IN EXCESS OF THE STATUTORY MAXIMUM. IF YOU LOOK AT HOUSE BILL 121 SUBSECTION 3 OF CHAPTER 29, STATES THAT IN EVERY CASE WHERE THE REOFFENDER DOES IS NOT RECEIVE THE MAXIMUM MANDATORY SENTENCE, THE STATE ATTORNEY MUST STATE IN WRITING EXPLAINING WHY THE QUALIFIED DEFENDANT DID NOT RECEIVE A STATUTORY MAXIMUM SENTENCE. IN THIS CASE THE STATUTORY MAX IS, IN THIS

CASE, ONLY FOR THE PRISON LESSEE REOFFENDER.

DOES THE STATE TAKE THE POSITION THAT ONLY A 60-MONTH SENTENCE COULD BE IMPOSED, THAT THIS WAS A PLEA AGREEMENT AND THEY SHOULD HAVE A RIGHT TO A NEW SENTENCING HEARING. HAS THAT POSITION BEEN TAKING TAEN AT ALL?

NO. THE STATE WANTS TO STRESS THAT THERE IS NO MECHANISM FOR THIS DEFENDANT TO GET A SENTENCE LESSER THAN HE WANTS. HE AGREED TO THE SENTENCE AND DIDN'T RESERVE HIS RIGHT TO APPEAL, SO THE ONLY RELIEF YOU CAN GIVE HIM IS TO ALLOW HIM TO WITHDRAW HIS PLEA, BUT THEN THE STATE CAN GO BACK TO THE STATUS QUO AND PRESENT IT AT TRIAL.

WHAT WAS THE ORIGINAL?

IF HE WAS TO GO TO THE HIGHER, HE IS LOOKING AT A MAXIMUM MINIMUM MANDATORY OF 15 YEARS AND AT JUDGE COULD IMPOSE THAT CONCURRENTLY AND EVEN IMPOSE 30 YEARS. THEY COULD ALSO IMPOSE HFO CONVICTIONS, WHICH THE COURT DID NOT SENTENCE HIM AT THIS TIME, SO I DON'T THINK THE DEFENDANT IS APPRECIATING THE RAMIFICATIONS FOR HIS CLIENT, IF HE IS GRANTED. AND BRIEFLY IN WILSON, THEY WERE DECIDED IN CORRECT AND THEY WERE DECIDED ON THE INCORRECT PREMISE THAT IT ESTABLISHES A FLAT MANDATORY MINIMUM SENTENCE, AND I DON'T THINK THEY RECOGNIZE THAT IT WAS STRICTLY A MANDATORY MINIMUM. JUST TO QUOTE IRONS, WE ALSO THINK THE LEGISLATURE PROBABLY DID NOT INTEND THIS RESULT. NO DOUBT IT CONTEMPLATED THAT THE MANDATORY PRR SENTENCE WOULD EXCEED THE GUIDELINE SENTENCES. HOWEVER HAD, IN THIS CASE IN WILSON, THAT WAS NOT THE SITUATION, BECAUSE OF THEIR EXTENSIVE PRIOR CRIMINAL RECORDS. WELL, THEIR ANALYSIS IS FAULTY RIGHT THERE, BECAUSE THE PRR ALWAYS IS DEALING WITH PEOPLE WITH PRIOR RECORDS, SO YOU ARE ALWAYS GOING TO COUP WITH SOMEBODY, THEY DID NOT CONTEMPLATE THAT THE STATUTORY MAXIMUM WAS GOING TO BE BIGGER THAN THE GUIDELINES.

DO YOU AT LEAST AGREE, BECAUSE PROBABLY THAT IS, IT STRIKES ME THAT HE IS WHAT THE LEGISLATURE MAY HAVE INTENDED, BUT WHEN YOU GET INTO THEY WON'T BE ELIGIBLE FOR THE SENTENCING GUIDELINES, AND ESPECIALLY IN THE, WHERE THE WILSON AND THOSE CASES INVOLVE THE SENTENCING GUIDELINES, ISN'T IT A STRETCH TO, REALLY, SAY THAT, AND ESPECIALLY HOW WE HAVE TO DO THIS, WHERE 60 MONTHS IS, YOU KNOW, DAY FOR DAY AND THEN IT IS GOING TO TAKE 6.4 MONTHS AND START TO APPLY GAIN TIME, THAT YOU ARE REALLY PUTTING TWO STATUTES TOGETHER THAT WERE NEVER INTENDED TO GO TOGETHER, AS OPPOSED TO WHAT JUSTICE LEWIS SAID, THE OTHER TYPES OF STIFF SENTENCES LIKE HABITUAL OFFENDER AND YOU KNOW, ALL OF THOSE OTHERS. ISN'T THAT, AREN'T WE JUST TRYING TO MAKE SOMETHING FIT THAT REALLY WAS, IS NOT HOW THE STATUTE WAS WRITTEN?

I AM NOT SURE I UNDERSTAND YOUR QUESTION.

GAG BACK TO THIS ISSUE OF WHAT IT -- GOING BACK TO THIS ISSUE OF WHAT IT MEANS THAT YOU ARE NOT ELIGIBLE FOR SENTENCING UNDER THE SENTENCING GUIDELINES, AND THE STATE HAS THE CHOIRTION AS YOU HAVE SAID, THEY COULD GO -- HAS THE CHOICE, AS AWFUL SAID. THEY COULD GO AND SAY, WELL, LOOK AT THIS, AND THIS IS A PERSON THAT WE WOULD RATHER GO SENTENCE UNDER THE SENTENCING GUIDELINES, BECAUSE HIS MANDATORY MINIMUM IS GOING TO BE FAR GREATER, YOU KNOW, THAN THE PRR, THEY HAVE THAT CHOICE, SO THEY REALLY CAN LOOK AND ANALYZE WHAT IS THE BETTER THING FOR THE STATE.

UNDER THE GUIDELINES, THE TRIAL JUDGE HAD THAT DISCRETION ALL I CAN SAY IS THAT THAT IS OUR POSITION, IS THAT A HAS NO DISKRERTION AND THAT HE HAS TO -- NO DISCRETION AND THAT HE HAS TO IMPOSE THAT MINIMUM MANDATORY SENTENCE, REGARDLESS OF WHERE IT IS IN THE GUIDELINES. I AM NOT SURE HOW ELSE TO ANSWER YOUR QUESTION.

IF WE FIND THAT THE DEFENDANT IS CORRECT AND THAT, UNDER THE PRISONER RELEASEE ACT, HE COULD ONLY GET THE 60 MONTHS, DOES THAT THEN MEAN, COULD HE HAVE, THEN, SUCCESSFULLY PLED TO MORE THAN THAT 60 MONTHS?

SURE. HE COULD HAVE, I THINK BECAUSE ARE GETTING AT --

DOES IT MAKE THAT AN ILLEGAL SENTENCE THAT HE HAS PLED TO?

IN A NORMAL CASE, YES, BUT WHEN YOU HAVE GOT A PRISON RELEASEE ARE REOFFENDER, THE STATUTORY MAX IS, IN FACT, JUST THEIR MINIMUM. THAT IS WHY I WAS QUOTING THE LEGISLATIVE HISTORY OF THE PRR. PRISON RELEASEE REOFFENDERS KIND OF HAVE AN INDIVIDUALIZED STATUTORY MAX, BECAUSE THE NORMAL MAX IS A STATUTORY MIGHT NOT MUP -- MINIMUM.

BUT IN THIS CASE, THE MAX WAS WHAT?

IF THEY WENT ON THE ORIGINAL OFFENSE, IT WOULD HAVE BEEN 15 YEARS. CONCURRENT WOULD HAVE BEEN 30.

WHAT WAS THE CHARGE?

LEWD AND LASCIVIOUS, TWO COUNTS.

OKAY.

I WOULD JUST SAY, IN LIGHT OF COTTON AND GRANT AND IN LIGHT OF THE LEGISLATIVE HISTORY AND JUST COMMON SENTENCING, THAT THE LEGISLATURE IS CLEAR IN THIS CASE THAT THE PRR SETS A MINIMUM MANDATORY SENTENCE THAT WORKS IN CONJUNCTION WITH THE CODE AND I WOULD ASK YOU TO AFFIRM THAT.

CHIEF JUSTICE: THANK YOU. COUNSEL.

FIRST OF ALL, I JUST WANT TO GET TO THE SEQUENCE OF EVENTS HERE. THE LEGISLATURE WAS NOT THINKING ABOUT THE CODE, WHEN THEY WROTE THIS, AND WHEN THEY WROTE 09-C, IT REFERRED TO 775. THEY WERE CONTEMPLATING HO SENTENCES. INDEED THERE ARE OTHER PLACES WHERE THE JUDGE KNOWS ABOUT SENTENCES ABOVE THE STATUTORY MAXIMUM, WHERE THEY SAY IN THAT CASE, IF THEY HAD INTEND THAT, ALL THEY WOULD HAVE HAD TO DO WAS READ THAT A LITTLE DIFFERENTLY, WHERE THEY WOULD HAVE SAID "IS NOT ELIGIBLE FOR THE CODE" UNLESS, OF COURSE THE CODE OR THE GUIDELINES OR THE SCORE SHEET GOES ABOVE THE STATUTORY MAXIMUM, SO THAT WAS TLA. THEY KNEW KNEW ABOUT IT -- THAT WAS THERE. THEY KNEW ABOUT IT IN OTHER CASES. IF THEY HAD INTEND THAT, THEY COULD HAVE DONE THAT, AND THE FACT THAT THEY DENOT DO THAT, SPEAKS A LOT -- THAT THEY DID NOT DO THAT SPEAKS A LOT TO THEIR INTENT, AND IT CREATES THIS AMBIGUITY HERE THAT WE ARE FACED WITH, WHICH IS THAT, ON ONE HAND, IT APPEARS AS THOUGH THEY ARE SAYING WE WANT THE HIGHEST SENTENCE WE CAN GET, AND ON THE OTHER HAND, WE WANT PRISON RELEASEE REOFFENDERS TO KNOW THE CERTAINTY OF THE STATUTORY MAXIMUM DAY FOR DAY. THAT CREATES THIS AMBIGUITY, WHICH BRINGS US TO THE RULE OF LINITY, AND WHERE YOU HAVE THE RULE OF LINITY COMING IN IN AN AMBIGUITY SITUATION LIKE THIS, DO WE IMPOSE THE STATUTORY MAXIMUM? DO WE GO ABOVE THE STATUTORY MAXIMUM?

WHY SHOULD THE RULE OF LINITY COME IN, IN A CASE WHERE SOMEONE HAS PLED GUILTY, IN EXCHANGE FOR THE STATE GIVING UP VALUABLE OTHER CHARGES THAT, DO YOU AGREE THAT YOUR CLIENT WAS FACING A FAR INCREASED SENTENCE, IF HE HENT PLED TO THIS AGREEMENT?

WHAT -- IF HE HADN'T PLED TO THIS AGREEMENT?

WHAT I AM SAYING IS THAT THE CHARGES AS I READ THEM, SHOWED A RATHER WEAK CASE. THE STATE HAS A NUMBER OF REASONS FOR WANTING TO ENTER INTO A PLEA AGREEMENT, OFTENTIMES IT IS NOT A SENSE OF GENEROSITY TOWARDS A DEFENDANT BUT, RATHER, A SENSE THAT THEIR CASE MAY NOT BE SUPPORTABLE IN LAW.

BUT YOUR CLIENT NEVER, I MEAN, YOU ARE NOT SEEKING HERE, AND WE HAVE HAD THIS COME UP IN A FEW DIFFERENT CONTEXTS, I THINK, IN THE BOVER CASE, ALTHOUGH IT WASN'T DIRECTLY PRESENTED, WHERE IT LOOKS LIKE, IF, THAT THE STATE, IF IT CHOSE, COULD SAY, WELL, NOW THAT WE BOTH ALL AGREED TO 66.4 MONTHS, INCLUDING THIS EXTRA UNDER THE CRIMINAL PUNISHMENT CODE, AND NOW THAT THAT IS NOT GOING TO BE THE WAY THE LAW IS CONSTRUED, THEN THE ONLY APPROPRIATE REMEDY IS TO SET ASIDE THE PLEA AGREEMENT.

I WOULD DISAGREE WITH YOU AS TO THAT AND GET TO A TWO-PART SITUATION. I THINK THAT WE HAVE A VALID PLEA TO THE THIRD DEGREE FELONY. HOWEVER, AND HE CAN AGREE TO THAT, AND THE STATE CAN AGREE TO THAT, BUT HE CANNOT AGREE, NOR CAN THE COURT CON DOME DOANE -- CONDONE AN ILLEGAL SENTENCE, AND IT IS CLEAR FROM THE START THAT THIS WAS AN ILLEGAL SENTENCE.

ISN'T THERE AN ILLEGAL SENTENCE AND ONE THAT IS NOT AUTHORIZED BY LAW, OR DO YOU SEE THOSE AS BEING ONE AND THE SAME?

YOUR HONOR, I AM NOT SURE WHAT THE CONTEXT WOULD BE. I THINK IN THIS CASE, THE ONLY THING I CAN DEAL WITH IS THE CASE RIGHT IN FRONT OF ME, AND THAT CASE IS AN ILLEGAL SENTENCE.

BUT DOESN'T THAT INVITE ABUSE AND GAME PLAYING HERE, IF WE ADOPTED THAT PRINCIPLE, THEN, YOU WOULD JUST INVITE DEFENDANTS HERE, WILL AGREE TO SOMETHING LIKE THIS IS, KNOWING IF WE CHALLENGE THIS LATER, THAT WE CAN SET ASIDE THE PART THAT WE DON'T LIKE, AND WE END UP IN A BETTER SITUATION? THIS REASON OR REASONS FOR THE STATE OR THE DEFENDANT TO AGREE ON THINGS WORKS ON BOTH SIDES, AS FAR AS WHAT IS AT-RISK OUT THERE. I AM VERY CONCERNED WITH THE IDEA THAT YOU WOULD SAY, KNOWING WHAT ALL THE CIRCUMSTANCES ARE AND ALL THE STATUTORY SCHEMES AND THE CHARGES AND THE POTENTIALS, THAT ON THE ONE SIDE, THE STATE IS AT-RISK, BECAUSE PART OF IT MAY BE HELD TO BE HELD TO BE AN ILLEGAL SENTENCE, BUT ON THE OTHER SIDE, THE DEFENDANT HAS NOTHING AT RISK, OTHER THAN TO GAIN A LOWER SENTENCE. ISN'T THERE SOMETHING WRONG WITH THAT KIND OF REASONING IN THE SYSTEM?

I THINK, YOUR HONOR, THAT YOU HAVE TO PUT INTO PERSPECTIVE THAT WE ARE DEALING WITH A SITUATION WHERE WE WANT CERTAINTY. WE WANT FINALITY, AND WE WANT A LEGAL SENTENCE.

HAS CERTAINTY GONE OUT THE WINDOW A LONG TIME AGO, WHEN WE --

CAN I ASK ONE QUESTION?

GO AHEAD.

IF WE APPLY GENERAL CONTRACT PRINCIPLES AND ACCEPT YOUR ARGUMENT THAT THIS SENTENCE WAS ILLEGAL FROM THE BEGINNING, BECAUSE IT WAS ILLEGAL, THAT BASICALLY IT WAS VOID ADMONI KRISMT O.

THE SENTENCE, NOT THE JUDGMENT. -- IT WAS VOID ADMONICIO.

THE SENTENCE NOT THE JUDGMENT.

THE PLEA, WAS IT STRAIGHT UP TO THE COURT AND THE COURT CHOSE THE SENTENCE?

NO. THIS WAS A SPECIFIC SENTENCE. THIS WAS A NEGOTIATED PLEA, AND I THINK THAT, IN THE SITUATION THAT WE HAVE, I BELIEVE THAT THE RECORD AND THE POLICE REPORT WOULD REFLECT A PLEA TO A LESSER, AND I THINK THAT NOW, IF WE DO HAVE TO GO BACK, WE ONLY GO BACK AS TO THE SENTENCE, AND THAT IS TO IMPOSE A LEGAL SENTENCE, SO WHAT I WOULD BE ASKING THE COURT TO DO IS SIMPLY TO, YOU KNOW, THE RELIEF I AM ASKING, FOR THE REMEDY IS TO QUASH THE FIRST DCA'S OPINION, WHICH I THINK IS ALSO AN ILLEGAL SENTENCE, TO APPROVE WILSON AND IRONS, AND IMPOSE THE FIVE-YEAR PRR REQUIRED IN THE STATUTE, BECAUSE THAT IS WHAT PEOPLE ARE ON NOTICE OF. THAT IS THE CERTAINTY MR. CHIEF JUSTICE

YOU HAVE GONE WELL OVER THE TIME.

I APPRECIATE YOUR TIME.

THANK YOU BOTH VERY MUCH, FOR YOUR ARGUMENTS AND SPOONZ TO THE COURT'S INQUIRIES. WE WILL STAND IN RECESS UNTIL 8:30 TOMORROW MORNING.

MARSHAL: PLEASE RISE.