James Michael Hughes v. State of Florida

HUGHES VERSUS

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING, YOUR HONOR. MY NAME IS DOUGLAS BRINKMEYER ON BEHALF OF THE PETITIONER, JAMES MICHAEL HUGHES. THE FACTS ARE NOT IN DISPUTE. PETITIONER WAS CONVICTED AT A JURY TRIAL, OF BATTERY BY A JAIL INMATE ON ANOTHER JAIL DETAIN'. THIS IS A THIRD-DEGREE NECESSARILY ANY, PUNISHABLE BY A MAXIMUM FIVE YEARS IN PRISON. IN HIS 1995 SENTENCING GUIDELINE SCORE SHEET, CONTAINED FOUR POINTS FOR LEGAL RESTRAINT AND 40 POINTS FOR SEVERE VICTIM INJURY. THE SCORE SHEET CALLED FOR A RECOMMENDED SENTENCE OF 80.4 MONTHS, WHICH IS WHAT HE RECEIVED, THAT BEING MORE THAN 20 MONTHS IN EXCESS OF THE NORMAL STATUTORY MAXIMUM.

CAN I ASK, ARE YOU, LET'S ASSUME THAT, BEFORE WE GET TO THE QUESTION OF RETROACTIVITY, BECAUSE I KNOW THAT IS THE PARTICULAR QUESTION RAISED, BUT THE STATUTORY SCHEME THAT WAS SET UP THAT YOU SAY IS NO LONGER IN EXISTENCE, THAT SAYS THAT, AFTER YOU APPLY ALL OF THESE SENTENCING FACTORS THAT, IT EXCEEDS THE STATUTORY MAXIMUM, THAT THE JUDGE CAN EXCEED IT, THAT THAT WOULD BE NOT CONSTITUTIONAL, UNDER APPRENDI?

THAT IS WHAT THE FIRST DCA HELD.

THAT THEY IMPLIED --.

THEY EXPRESSLY HELD THAT APPRENDI OVERRULED MACE, WHICH IS NOT IN THIS COURT.

THAT IS NOT AN IN EXISTENCE ANYMORE?

NO, MA'AM. WE ARE TALKING ABOUT IN 1999, THE ABOLISHMENT.

IS THERE ANYTHING IN 1999 THAT, BECAUSE OF THE SENTENCING FACTOR, IT EXCEEDS THE STATUTORY MAXIMUM. THAT IS SUBJECT TO APPRENDI.

YES, MA'AM. AND PRIOR TO THAT.

IS THERE ANY QUESTION IN THIS CASE THAT THE SENTENCING FACTOR DIDN'T EXIST?

WE DON'T KNOW. THIS CAME UP ON A 3800-A MOTION, WHICH CONSISTS OF THE 16 PAGES OF MOTION THAT WAS DENIED. WE DON'T -- THAT YOU ALL ARE DENYING. WE DON'T KNOW IF THE INSTRUCTION WAS TO FIND ANY SORT OF VICTIM INJURY TO FIND THE DEFENDANT GUILTY. I DOUBT IT, SINCE IT IS NOT IN THE STANDARD INSTRUCTION. WE DON'T HAVE A COPY OF THE VERDICT FORM, SO WE DON'T KNOW IF THERE WAS A SPECIFIC VERDICT FORM SAYING THE VICTIM WAS FOUND WITH INJURY, BECAUSE WHETHER THIS CASE WAS TRIED BACK IN 1998, THAT WASN'T NECESSARY, SO BASED ON THE LIMITED RECORD WE HAVE, WE DO HAVE A SCORE SHEET WHICH ASSESSES 40 SEVERE VICTIM INJURY POINTS "B" BUT AS TO THE OTHER CIRCUMSTANCES SURROUNDING THE TRIAL, WE DON'T KNOW. THE JUDGE DID DENIED. AND AFTER THE STATE RESPOND, THEY APPOINTED MY OFFICE TO REPRESENT THE PAEPTER AND FILE A REPLY. -- THE PETITIONER AND FILE A REPLY.

IS 3.800-A THE PLOPER WAY TO RAISE THIS?

YES, MA'AM.

-- THE PROPER WAY TO RAISE THIS?

YES, MA'AM.

ASIDE FROM THE FACT THAT NONE OF THESE THINGS ACTUALLY OCCURRED, THAT IS IF THE JURY HAD BEEN INSTRUCTED OR IT WAS ACTUAL FOUND, THAT WOULDN'T BE IN ANY RECORD BEFORE A TRIAL COURT, SO EVEN GETTING TO THE PRELIMINARY ISSUE, HOW WOULD YOU, I GUESS --

ON THE BASIS OF THE RECORD, WE HAVE A SCORE SHEET, WITH 40 VICTIM INJURY POINTS, AND IF YOU CAN MAKE A CLAIM OFAL ILLEGAL SENTENCE FROM THE FACE OF A RECORD --

IN A CAPITAL CASE, THE JUDGE CAN FINDING AVATING FACTOR, BUT IF THE JURY IS INSTRUCTED ON IT, THAT WOULD MOOT OUT THE WHOLE ISSUE. I AM HAVING TROUBLE DECIDING HOW WE CAN DECIDE THIS, WITHOUT REALLY SEEING WHAT THE RECORD REALLY LOOKED LIKE.

ONE OPTION WOULD BE TO REMAND FOR AN EVIDENTIARY HEARING.

WHAT IF THERE WAS NO ARGUMENT OR THERE WAS A STIPULATION AS TO THE INJURY?

WE --

I CAN'T TELL FROM LOOKING AT THIS, WHAT THE DEGREE OF INJURY WAS.

WE DON'T KNOW.

THERE MAY NOT HAVE BEEN AN ARGUMENT, BUT AS A TRIAL JUDGE I ASKED ALL THE TIME ANY QUESTION ABOUT THE SCORE SHEET, AND COUNSEL -- SINCE --

THE TRIAL JUDGE SAYS NO.

THERE WAS NO NEED TO ORDER AN EVIDENTIARY HEARING, SINCE THE COUNSEL WAS DENIED BY TRIAL JUDGE.

IN THIS SITUATION --

YES, MA'AM.

-- FOR US TO MAKE A DECISION THAT, IN ALL CIRCUMSTANCES, APPLICATION OF APPRENDI-TYPE OF QUESTION WOULD NEVER BE RETROACTIVE. IT JUST SEEMS UNREASONABLY BROAD. WOULDN'T YOU AT LEAST AGREE THAT WE SHOULD NARROW IT TO WHETHER THIS PARTICULAR STATUTE AND THE CIRCUMSTANCES SHOULD BE CONSIDERED IN A VOTE ROW ACTIVE MANNER -- IN A RETROACTIVE MANNER, RATHER THAN WORRYING ABOUT EVERY OTHER PERMUTATION THAT IT MIGHT EVER COME UP IN.

THAT IS ONE POSSIBILITY.

IT MIGHT BE DIFFERENT FACTORS, RIGHT, UNDER THE WHITT ANALYSIS, DEPENDING UPON WHAT STATUTE IS IN EFFECT. YOU ARE SAYING THIS STATUTE ONLY HAS A LIMITED LIFE.

YES, MA'AM.

THAT IS DIFFERENT THAN OTHER-.

THE LIMITED LIFE IS FOUR MONTHS, OR FOUR YEARS AND NINE MONTHS, WHICH WOULD BE THE WINDOW PERIOD BEFORE THE STATUTE WAS REPEALED. THERE IS NO QUESTION THAT APPRENDI AND RING EMANATED FROM THE U.S. SUPREME COURT AND WERE DECIDED ON CONSTITUTIONAL GROUNDS. THEREFORE THE ONLY DISPUTE IS WHETHER, UNTHE WHITT TEST THIS SHOULD BE GIVEN APPLICATION. IT WILL NOT RESULT IN REVERSING CONVICTIONS. ONLY A FEW SENTENCES WHICH WERE IMPOSEED IN EXCESS OF THE STATUTORY MAXIMUM.

WOULD THERE BE SCENARIOS UNDER THE CRIMINAL PUNISHMENT CODE WHERE THERE WOULD BE SENTENCES THAT WERE IMPOSED BEYOND THE STATUTORY MAXIMUM AND THEREFORE IT WOULD APPLY THERE, TOO?

THE CODE DOES ALLOW 2 IT.

SO WE ARE NOT -- DOES ALLOW IT.

WE ARE NOT TALK BTH FOUR YEAR, PERIOD THEN?

IF YOU LOOK UNDER THE CODE, THE STATE HAS NOT PRESENTED ANY EVIDENCE AS TO HOW MANY CASES WOULD BE AFFECTED. IT IS MERE SPECULATION THAT IT WILL HAVE SUCH A MONUMENTAL EFFECT ON THE SYSTEM OF JUSTICE.

ARE THERE OTHER CASES WHERE WE HAVE DECIDED WHETHER TO APPLY A CASE RECEIPT-ACTIVELY, WHERE WE HAVE -- RETROACTIVELY, WHERE WE HAVE REQUIRED AN ANALYSIS OF HOW MANY CASES WOULD BE AFFECTED OR DO WE JUST IN GENERAL TERMS, FIGURE OUT HEY, THERE IS GOING TO BE A LOT OF CASES OUT THERE.

I THINK THIS COURT SAW THAT THE FIRST DCA EXPRESSED THEIR OPINION THAT IT HAD A MONUMENTAL IMPACT, BUT I DON'T KNOW HOW THEY COULD DO. THAT IT WAS MERE SPECULATION. THERE WERE NO NUMBERS IN FRONT OF THE FIRST DCA. THE ONLY NUMBERS THAT I HAVE LIEN BEEN ABLE TO COUP WITH ARE NOTED IN MY MY FOOTNOTE, WHICH I WAS ABLE TO DISCOVER NINE CASES UNDER THE STATUTORY GUIDELINES, WHERE THE STATUTORY MAXIMUM WAS EXCEEDED.

MY QUESTION IS YOU KEEP SAYING THERE ARE NO STATISTICS, THERE ARE NO NUMBERS. HAVE WE EVER REQUIRED SPECIFIC NUMBERS IN DETERMINING WHETHER TO APPLY A CHANGE IN THE LAW RETROACTIVELY.

I DON'T KNOW THAT THIS COURT HAS EXPRESSLY DISCUSSED NUMBERS. HOWEVER, IF YOU LOOK AT STATE VCAL WAY AND STATE V -- VV CALLOWAY AND STATE V STEPHENS, APPLYING DECISION TO SAY RECEIPT ---DECISION TO SAY RECEIPT-ACTIVE DECISIONS, THIS COURT -- TO RETROACTIVE DECISIONS, THIS COURT FOUND IN CALLAWAY THAT THERE WERE A NUMBER OF DECISIONS THAT WOULD HAVE AN AFFECT ON THE ADMINISTRATION OF JUSTICE, BECAUSE IT ONLY APPLIED TO SECOND HABITUAL OFFENDER SENTENCES OVER A SIX-YEAR PERIOD, THAT PERIOD BEING LONGER THAN THE WINDOW PERIOD HERE.

IF WE ARE SAYING IT APPLIES RETROACTIVELY, ARE YOU SAYING THAT WE CAN HOLD THAT THIS STATUTE APPLIES RETROACTIVELY BUT LIMIT THAT HOLDING TO SENTENCING GUIDELINES CASES, THAT THAT IS IT NOT GOING TO APPLY TO CRIMINAL PUNISHMENT CODE CASES? IT SEEMS TO ME IT EITHER APPLIES RETROACTIVELY OR IT DOESN'T.

YES, SIR. HOWEVER, IF THIS COURT WANTED TO TAKE THE NARROW AND APPROACH AND SEE HOW -- APPROACH AND SEE HOW MANY CASES WERE INVOLVED EXCEEDING THE GUIDELINES, BECAUSE THAT IS THE TROUBLE THAT WE ARE HAVING HERE TODAY. EYE GUESS I AM HIM PUTTING THE CART BEFORE THE HORSE, SO TO SPEAK, REALLY IN TERMS OF HAVING A CASE IN

CONTROVERSY. IF YOU WERE HERE TO SAY THAT YOUR CLIENT WAS PRO SE BELOW, THAT IT WOULD BE FAR MORE INFORMATIVE TO ACTUALLY HAVE THE, AS JUSTICE BELL SAID, WHAT IS, THIS IS SEVERE VICTIM INJURY, AND THE INJURY WAS ACTUALLY PRESENTED TO THE JURY AS PART OF THE EVIDENCE, AND IT WAS UNDON'T DACKTED -- UNCONTRADICTED. IN TERMS OF THE ISSUE AND FAIRNESS AND WHY YOU WOULD APPLY A RULE RETROACTIVELY, IT REALLY WOULD, TO ME, MAKE A DIFFERENCE, AND SO IF IT, OR IF IT WAS STIPULATED TO OR YOU KNOW, IF THE, TYPICALLY A SENTENCING GUIDELINE IS PREPARED, AND IT IS NOT EXACTLY SOMETHING THAT TAKES A GREAT DEAL OF SOMEBODY'S EVIDENTIARY TIME. THEY ARE NOT USUALLY CONTESTED, AND IF THIS ONE WAS OR WASN'T, IT MIGHT MAKE A DIFFERENCE AS TO WHY WOULD A JURY DETERMINATION HAVE GIVEN YOUR CLIENT ANY GREATER RIGHTS THAN A JUDGE DETERMINATION. IT JUST REALLY IS TRANSFERRING THE PROCEDURE, THAT DECISION-MAKING BACK TO A JURY, IN A NARROW CLASS OF CASES, SO ARE YOU SAYING THERE IS NO RECORD THAT WE HAVE TO LOOK AT, BECAUSE OF THE PROCEDURAL POSTURE IN WHICH THIS CAME UP?

THAT'S CORRECT. AND ONE OPTION WOULD BE TO REMAND FOR AN EVIDENTIARY HEARING.

WAS THAT ASKED, WAS THAT SOMETHING THAT WAS ASKED FOR REDISTRICT COURT OF APPEAL LEVEL THAT, IT HAD BEEN BROUGHT UP IN A WRONG WAY BY JUST HAVING A 3.800, AND THAT REALLY NEEDED TO BE, I MEAN, THAT IS AN EVIDENTIARY HEARING IN 3.800-A. IS THAT HOW THE CASE IS FILED?

WE CAME IN SO LATE ON THE CASE, I DON'T RECALL HOW IT WAS FILED. IF THERE WAS ANY DISCUSSION BY THE STATE OR THE COURT PRIOR TO OUR INVOLVEMENT THAT, IT SHOULD BE REMANDED. I THINK IT IS CLEAR THAT WE MUST THE THIRD FACTOR OF THE WHITT TEST AND BY THE NEW RULE, WHICH WOULD GIVE THE DEFENDANT CONSTITUTIONAL FACTORS IN SENTENCING AND TO REQUEST A JURY TO FIND THESE FACTORS BEYOND A REASONABLE DOUBT. AS WE HAVE DISCUSSED ALREADY, THE SECOND PART OF THAT FACTOR, THERE IS NOT MUCH RELIANCE ON THE OLD RULE. AS I SAID EARLIER, IT ONLY APPLIES, WHEN THE SCORE SHEET SENTENCE EXCEEDS THE STATUTORY MAXIMUM AND ONLY --

LET'S BACKTRACK A SECOND. WHEN YOU SAY THERE IS NOT MUCH RELIANCE ON THE OLD RULE, I GUESS IT DEPENDS ON HOW YOU DEFINE THE RULE, BECAUSE CERTAINLY COURTS THROUGHOUT FLORIDA HAVE RELIED ON THE FACT THAT THE JUDGE CAN ENHANCE SENTENCES, BASED ON FINDINGS OF FACT THAT THE JURY DID NOT FIND. IF YOU DEFINE THAT AS THE OLD RULE, THEN THERE HAS BEEN DECADES OF RELIANCE ON THAT RULE.

BUT AS FAR AS THE GUIDELINES ARE CONCERNED, THERE ARE, THERE IS NOT A GREAT NUMBER OF CASES WHERE THE SCORE SHEET CALLS FOR A SENTENCE IN EXCESS OF THE STATUTORY MAXIMUM.

ARE YOU SAYING THE CURRENT SENTENCING UNDER THE CRIMINAL PUNISHMENT CODE, WHERE A JUDGE NOW IS SENTENCING IN EXCESS OF THE STATUTORY MAXIMUM UNDER APPRENDI, HAS THAT ISSUE BEEN LITIGATED YET?

NOT TO MY KNOWLEDGE.

IT SEEMS LIKE THAT WOULD BE A NICE PLACE TO START.

THAT WOULD BE THE NEXT STEP, IF THERE WAS SUCH A CASE, BUT I AM NOT AWARE OF ANY.

YOU ARE NOT AWARE OF ANY THAT THEY HAVE EXCEEDED THE STATUTORY MAX HUM MINCE THE NEW -- MAXIMUM SINCE THE NEW CRIMINAL PUNISHMENT --

NO, MA'AM.

HOW DOES THE CLAIM OF ERROR OR INFIRMITY HERE PLAY INTO THIS. THAT IS THERE IS NOT EVEN A CLAIM HERE, THERE, THAT ANY OBJECTION WAS RAISED ON THIS BASIS IN THE PROCEEDINGS IN THE TRIAL COURT. IS THAT CORRECT?

YOU MEAN THE ORIGINAL TRIAL PROCEEDINGS?

RIGHT.

THERE WOULD NOT HAVE BEEN ANY BASIS FOR AN OBJECTION THERE, BECAUSE THE LAW IN 1988 WAS WELL-SETTLED, THAT THE JUDGE WAS PERMITTED TO MAKE A FINDING OF THE DEGREE OF VICTIM INJURY WITHOUT A JURY.

WELL, THAT IS PART OF THIS CIRCLE THING ABOUT WHETHER WHETHER YOU MAKE THE CLAIM AND PRESERVE THE ERROR, BASED ON THE EXISTING LAW OR BASED ON THE FACT THAT THAT IS YOUR CLAIM, AND THAT EVENTUALLY IT WILL WIN OUT.

A LAWYER CANNOT BE EXPECTED TO ANTICIPATE THAT THE LAW WOULD BE CHANGED THREE YEARS LATER IN APPRENDI.

BUT WE ARE NOT TALKING ABOUT, NECESSARILY, THE CONFIDENCE OF THE -- THE COMPETENCE OF THE LAWYER HERE.

NO. NO.

WE ARE TALKING ABOUT THE ISSUE, IN OTHER WORDS WHETHER, IN MANY INSTANCES, REGARDLESS OF WHETHER THERE IS A NEW RULE, SUBSEQUENT HOLDINGS HAVE BEEN ENOUGH THAT IT IS ONLY IN THOSE CASES WHERE THE ISSUE WAS PRESERVED --

THAT IS WHY WE HAVE TWO RULES ON COLLATERAL, 3.800 AND 3.850, TO RAISE THESE ISSUES.

OKAY. BUT THERE HAS BEEN, IN ANY CASE, DOES THE RECORD TELL US, EITHER WAY, THERE IS NO CLAIM, I ASSUME, THAT THIS ISSUE WAS PRESERVED.

WE DON'T KNOW. THERE IS NOTHING IN THE RECORD TO SAY, ONE WAY OR THE OTHER.

OKAY.

THE DISTRICT COURT DID, IN FACT, SAY THAT 3.800 WAS THE PROPER WAY --

YES, MA'AM.

-- TO BRING THIS CLAIM. IT SEEMS TO ME THAT SOMEONE MUST HAVE RAISED THIS KIND OF ISSUE BEFORE THE COURT.

I DON'T KNOW.

YOU JUST DON'T KNOW WHETHER THAT IS TRUE OR NOT.

I DON'T KNOW. BUT I AGREE THAT IT IS A PROPER REMEDY. EITHER THIS OR 3.850.

WELL, IT IS A BIG DIFFERENCE, THOUGH, I GUESS, IF YOU SAY THAT THE ONLY THING THAT YOU, LET'S JUST ASSUME WE SAID IT WAS RETROACTIVE ON A CASE-BY-CASE BASIS, DEPENDING, YOU WOULDN'T JUST, THIS ISN'T, YOU KNOW, THAT IS WHY CALLAWAY AND THOSE CASES REQUIRED AN EVIDENTIARY HEARING, BECAUSE YOU NEEDED TO FIND OUT IF IT AROSE OUT OF THE SAME CRIMINAL EPISODE. HERE, IF IT WERE STIPULATED TO, IF IT WAS, IT WOULD DEPEND ON WHAT THAT SENTENCING FACTOR WAS, TO EVEN START THE BALL ROLLING AS TO WHETHER IT WOULD

AND APPRENDI TYPE SITUATION. RIGHT?

WELL, I DISAGREE TO THE EXTENT THAT CALLAWAY AROSE, VIA 3.800-A, JUST LIKE THIS CASE.

WELL, THEN, WE HAVE SAID SUBSEQUENTLY, THEY TO BE BROUGHT UNDER 3.850, BRAU THEY REQUIRED A -- BECAUSE THEY REQUIRED AN EVIDENTIARY DETERMINATION.

TRADITIONALLY 3.800-A HAS BEEN USED FOR SCORE SHEET ERRORS. IT IS RIGHT IN THE RULE.

HOW IS IT A SCORE SHEET ERROR, THOUGH, IF THE RECORD WOULD DEMONSTRATE OR THE HEARING WOULD DEMONSTRATE THAT IT WAS AGREED? IN OTHER WORDS BEFORE THE TRIAL COURT, YOU HAD A TYPICAL SITUATION WHERE THE COMPUTATION HAS BEEN MADE AND BOTH SIDES AGREE THAT THAT IS A CORRECT CONSIDERATION AND A CORRECT COMPUTATION TO INCLUDE YOU KNOW, VICTIM INJURY OR WHATEVER IT IS, AND A RECORD OF THE COLLOQUY WOULD SHOW THAT THEY AGREED, AND EVERYBODY SIGNED OFF.

WELL, WE DON'T KNOW, BUT THE PROBLEM IS, WHEN YOU LOOK AT A SCORE SHEET, UNLESS IT IS A SEXUAL BATTERY CASE, WHERE YOU HAVE EITHER PENETRATION OR CONTACT, WHICH ARE FAIRLY EASY TO DISTINGUISH, WE HAVE SEVERE MODERATE AND SLIGHT. SO HOW DO YOU MAKE THAT DETERMINATION?

WELL, WHAT I AM SAYING IS THAT, IF YOU HAVE A DETERMINATION WHERE EVERYBODY AGREED, INCLUDING THE DEFENDANT, THAT IT WAS PROPERLY SCORED AND IN THE SCORE SHEET. HOW, YOU ARE SAYING, I ASSUME, THAT IT HAS NO IMPACT ON THE RESOLUTION OF THE ISSUE. ANOTHER RESOLUTION WOULD BE TO SEND IT BACK FOR AN EVIDENTIARY HEARING, TO DETERMINE EXACTLY WHAT THE OFFICER, THE INMATES ---THE INMATE'S INJURIES WERE.

CHIEF JUSTICE: THE MARSHAL HAS TURNED ON HIS LIGHT, REMINDING US THAT WE ARE IN THE REBUTTAL TIME, SO IF YOU WANT TO RESERVE THAT TIME.

THANK YOU.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS TRISHA MEGGS, REPRESENTING THE STATE OF FLORIDA. FIRST, THE SAME PROVISION THAT ALLOWS THE INDIVIDUALIZED OR FLOATING STATUTORY MAXIMUM 921, IS UNDER THE CODE AS IT WAS UNDER THE SENTENCING GUIDELINES, SO IT DOES IN FACT TAKE US FROM 1994 UNTIL PREPARED HI CAME OUT.

I NOTICE YOU USED THE WORD FLOATING STATUTORY MAXIMUM. ARE YOU SAYING IT IS REALLY NOT A QUESTION OF EXCEEDING THE STATUTORY MAXIMUM. IT IS A QUESTION OF WHAT THE STATUTORY MAXIMUM IS?

RIGHT. FLORIDA HAS TWO STATUTORY MAXIMUMS FORM WE HAVE THE ONE IN 775, WHICH DECIDES THE MAXIMUM FOR EACH DEGREE. ALSO CHAPTER 921 SAYS, LOOK, IF THIS INDIVIDUAL SCORES SO MANY POINTS THAT THE 775 MAXIMUM IS NOT ACCURATE, THEN IN 198 -- IN CHAPTER 921, WE HAVE A FLOATING OR INDIVIDUALIZED MAXIMUM THAT SAYS THAT YOU CAN SENTENCE UP TO THE SENTENCING GUIDELINE SCORE, SO IT IS OUR POSITION THAT THE STATE HAS TWO STATUTORY MAXIMUMS,.

AND THEREFORE APPRENDI DOESN'T EVEN APPLY.

IT DOESN'T APPLY.

IS THAT TRUE AS TO BOTH OF THE STATUTES THAT WERE IN EFFECT FOR 4 YEARS 9 MONTHS AND

THE CURRENT, OR IS THERE A DIFFERENCE IN THE WAY THE STATUTES WERE WRITTEN? SOMEHOW I REMEMBER UNDER MACE, THAT STATUTE WAS -- UNDER MAYS, THAT STATUTE WAS TALKING ABOUT EXCEEDING THE STATUTORY MAXIMUM.

IT IS NOT THE SAME.

DO WE HAVE TO DECIDE WHETHER APPRENDI APPLIED RETROACTIVELY?

NO. AND APPRENDI FAILS THE WHITT TEST. IT DOES NOT MAKE REQUIREMENTS FOR RETROACTIVITY. THE U.S. SUPREME COURT AND IN COTTON, HAS DECIDED IT HAS TO BE PRESERVED, TO EVEN BE RAISED ON DIRECT APPEAL, AND IT IS SUBJECT TO HARMLESS ERROR.

HOW DO YOU PRESERVE A CLAIM THAT DIDN'T EXIST AT THE TIME? I MEAN, WHAT CONCERNS ME ON THE ONE HAND, WE ARE TELLING LAWYERS NOT TO FILE FRIVOLOUS MOTIONS OR MAKE FRIVOLOUS ARGUMENTS. ON THE OTHER HAND, YOU ARE SUGGESTING THAT, EVEN THOUGH THE LAW HAS BEEN IN FORCE FOR DECADES AND IT IS PART OF OUR JURISPRUDENCE, THAT DEFENDANT SHOULD STILL MAKE ARGUMENTS LIKE THE DEATH PENALTY IS UNCONSTITUTIONAL OR INJECTION IS CRUEL IS UNUSUAL PUNISHMENT AND THINGS LIKE THAT THAT IS BEEN DECIDED COUNTLESS TIMES, WE STILL NEED TO FILE A MOTION OUTLINING ALL OF THESE FRIVOLOUS ISSUES, JUST SO WE CAN PRESERVE THE ARGUMENT.

THAT IS WHAT THE SUPREME COURT SAID IN COTTON.

COTTON HAD TO DO WITH THE IN TIME IMENT HAD -- THE INDICTMENT HAD TO DO WITH WEIGHING OUT THE FACTORS, AND I DON'T THINK THIS COURT HAS TO DECIDE WHETHER THE APPRENDI REASONING GOES THERE, BUT THAT HAS TO DO WITH A QUESTION OF NOTICE OF SOMETHING.

CORRECT. THERE WAS NO JURY FINDING AND THEY SAID BUT IT IS SUBJECT TO HARMLESS, BECAUSE THERE IS AN ABUNDANT EVIDENCE OF THE AMOUNT THAT HE WAS TRAFFICKING IN COTTON.

YOU SAY IT IS SUBJECT TO HARMLESS-ERROR ANALYSIS, THEN YOU ARE, THE ISSUE OF IT HAS TO BE PRESERVED IS A LITTLE BIT DIFFERENT. THEN YOU ARE REALLY LOOKING AT WHETHER THE, WHICH IS WHAT, TO ME, YOU NEED TO FOCUS ON, IS THIS UNDERMINING SOMETHING THAT, THIS CHANGE OF LAW UNDERMINING THE INTEGRITY OF THE PROCESS THAT HAS BEEN IN PLACE, AND I, IT --

I DON'T THINK THERE IS ANY QUESTION AS TO THE ACCURACY. I DON'T THINK A JURY IS GOING TO MAKE ANY DIFFERENT FINDING THAN A JUDGE, IF A JAW IS BROKEN IN TWO DIFFERENT PLACES THAT REQUIRES SURGERY AND METAL PLATES. IT IS SEVERE.

ARE YOU SAYING WE SHOULD NARROW, IS APPRENDI RETROACTIVE TO THE PARTICULAR FACTS OF THE, NOT THE FACTS, THE STATUTE THAT WAS UNDER SCRUTINY IN THIS CASE, WHICH IS THIS ONE THAT WAS IN EFFECT FOUR YEARS NINE MONTHS, RATHER THAN BROADLY SAY IS APPRENDI, BECAUSE APPRENDI IS A CASE THAT DEALS WITH SOMETHING ELSE. IS APPRENDI RETROACTIVE. SHOULDN'T THE CERTIFIED QUESTION BE REWORDED?

NO, MA'AM. I THINK APPRENDI EITHER APPLIES RETROACTIVELY OR IT DOESN'T. SENTENCING FACTORS THAT INCREASE THE SENTENCE ABOVE THE STATUTORY MAXIMUM EITHER APPLIES RETROACTIVELY OR IT DOESN'T, AND IT DOESN'T MEET THE WHITT TEST, AND IF YOU LOOK AT CASES THAT APPLY --

IN ONE CASE WHETHER A JAW IS BROKEN OR NOT MIGHT BE A VERY SIMPLE QUESTION. AS IT APPLIES IN THE DEATH-PENALTY CASE, WHETHER THERE IS CCP OR HAC, MAYBE A VERY MUCH

MORE SOPHISTICATED FACTUAL DETERMINATION, SO IF IT IS GOING TO GO, BASED ON HOW SIMPLE THE FACTUAL DETERMINATION IS, THAT THAT IS GOING TO BE, THAT THAT IS, THERE IS NO WAY UNDER THESE SET OF FACTS THAT A JURY OR A JUDGE WOULD MAKE ANY DIFFERENT DETERMINATION, BECAUSE IT IS SORT OF JUST A GIVEN, LIKE THE AGE OF THE VICTIM OR THE FACT AFTER PRIOR CONVICTION, WHICH HAS ALREADY BEEN EXCEPTED FROM THE APPRENDI THING. IT DOES MATTER WHAT THAT SENTENCING FACTOR IS, IN DECIDING HOW CRITICAL A DETERMINATION IT IS. YOU DON'T SEE THE CORRELATION?

I SEE THE CORRELATION, BUT I THINK THAT GOES TO WHETHER THE APPRENDI ERROR WAS HARMLESS OR NOT. I THINK, IF YOU LOOK AT APPRENDI, WHAT IS APPRENDI? IT IS A CHANGE OF PROCEDURE AT WHICH TIME IS CHANGING THE PROCEDURE AS TO FINDS CERTAIN SENTENCING FACTORS, AND THAT CHANGE OF PROCEDURE IN EVERY OTHER COURT THAT HAS REALLY ADDRESSED THE ISSUE IS HOW IT DOESN'T APPLY RETROACTIVELY. GIDEON APPLIED RETROACTIVELY, BECAUSE A DEFENDANT NOT REPRESENTED BY COUNSEL, HIS CHANCES OF A CONVICTION ARE MUCH MEYER. HE IS NOT GOING TO -- ARE MUCH HIGHER. HE IS NOT GOING TO KNOW THAT THIS EVIDENCE IS SUBJECT TO AN ILLEGAL SEIZURE. HE IS NOT GOING TO FILE A MOTION TO SUPPRESS. HE DIDN'T KNOW TO DO THAT. THERE IS NO SHOWING THAT APPRENDI ERROR IS GOING TO AFFECT THE PROCEEDINGS. EVEN THOUGH THEY MAY BE COMPLICATED, THEY DIDN'T SAY JUDGES OR JURIES ARE MORE ACCURATE. THERE IS NO SHOWING THAT THEY ARE GOING TO EXCEED THE SENTENCE. JUST DIFFERENT PROCEDURES. THE JUNKET JURY TRIAL APPLYING THAT TO THE STATE, THAT WASN'T RETROACTIVELY.

MOUNT V OHIO AND WAS NOT APPLIED RETROACTIVELY. THE JURY INSTRUCTION HELD OUT AS UNCONSTITUTIONAL, AND IF THE JURY CAN UNDERSTAND IT TO ALLOW CONVICTION BEYOND A REASONABLE DOUBT, THE COURT SAID THAT WASN'T RETROACTIVE. THIS COURT SAID DELGADO AND GRAY IS NOT RETROACTIVE. APPRENDI IS NOT ONE OF THOSE CASES LIKE GIDEON, THAT IS OF SUFFICIENT MAGNITUDE THAT IT HAS TO BE APPLIED RETROACTIVELY. AND IF YOU, SO, IT JUST DOESN'T HAVE THAT SUFFICIENT, THAT SIGNIFICANT MAGNITUDE THAT REQUIRES RETROACTIVE ANDTATION -- APPLICATION. I WAS GOING TO ADDRESS YOUR EARLIER QUESTION A 3.800-A MOTION. YOU CAN'T HAVE AN EVIDENTIARY HEARING, AND COTTON MAKES IT CLEAR THAT YOU CAN DO A HARMLESS-ERROR ANALYSIS IN APPRENDI ISSUE, SO IT WOULD HAVE TO BE A 3.850. IT CAN'T BE A 3.800.

HAS THE STATE RAISED THAT ISSUE BEFORE?

I BELIEVE WE ARGUED IT IN OUR BRIEFS, BUT --

I AM SAYING BEFORE YOU GET TO THIS COURT.

I DON'T BELIEVE SO, BECAUSE I DON'T BELIEVE THAT WAS REALLY ADDRESSED BY THE DCA KIND OF DID THAT. ALSO IT DIDN'T, THE APPRENDI DOESN'T OVERRULE MAYS.

DID THAT ISSUE DECIDE WITHOUT ANY INPUT FROM EITHER SNAERT.

THE PARTIES WERE ASKED TO ADDRESS THE APPRENDI ISSUE.

NO. I AM TALKING ABOUT THE ISSUE OF THE 3.800679 THE DCA JUST DECIDED THAT 3 -- ABOUT THE 3.800. THE DCA JUST DECIDED THAT 3.800 WAS APPROPRIATE AND THEY DECIDED THAT, WITHOUT ANY INPUT FROM EITHER PARTY ABOUT WHAT WAS RELEVANT TO THESE CLAIMS?

THAT WAS NOT REALLY ADDRESSED TO THE DCA. IT WAS JUST ADDRESSED TO RETRO ACT IFLT ONLY. -- RETROACTIVITY ONLY. ALSO IN DECIDING WHETHER IT APPLIED RETROACTIVELY, IT DIDN'T OVERRULE MAYS OR IN 1991, THE ACTUALIZED MAXIMUM, BECAUSE APPRENDI DOESN'T SAY YOU CAN ONLY CONSIDER CERTAIN FACTORS IN SENTENCING. IT JUST CHANGED THE PROCEDURE AS TO WHO DECIDES THEM.

BUT YOU HAVE ACTUALLY SAID IN MAYS, EVEN IF MAYS CAME UP AFTER APPRENDI THAT, MAYS, THAT THE STATUTE? EFFECT IN MAYS, WOULD NOT HAVE TO BE FOUND UNCONSTITUTIONAL, EVEN ON A DIRECT APPEAL.

CORRECT.

NOW, I GUESS I AM HAVING TROUBLE ABOUT WHEN, NORMALLY, WHEN WE DECIDE RETROACTIVITY, WE FIRST DECIDE WHETHER THE DECISION IS, SHOULD, YOU KNOW, WHAT, WE FIRST LOOK AT THE SUBSTANTIVE ISSUE. IT IS JUST VERY HARD, AT LEAST FOR ME CONCEPTUALLY, TO START ON RETROACTIVITY, BEFORE I KNOW WHAT IT IS THAT IS BEING STATED AS RETROACTIVE, AND FROM THE STATE'S POINT OF VIEW, ESPECIALLY IF IT APPLIES TO THE CRIMINAL PUNISHMENT CODE, THINKS THAT APPRENDI WOULDN'T REQUIRE A DIFFERENT TYPE OF ANALYSIS, IT WOULD SEEM THAT THAT FIRST ISSUE NEEDS TO BE ADDRESSED, BECAUSE AS JUSTICE CANTERO SAID EARLIER, YOU KNOW, WE MAY JUST BE DEALING WITH THIS STATUTE, BUT IT HAS IMPLICATIONS FOR THE CRIMINAL PUNISHMENT CODE. I GUESS, HAS THAT, HAS ANYONE REALLY BRIEFED THAT CORE ISSUE, THE FIRST ISSUE, OR ARE WE JUST GOING TO ASSUME THAT MAYS WAS WRONG?

I DON'T THINK MAYS IS WRONG. WE CAN HAVE OUR STATUTORY MAX, WE CAN HAVE THE INDIVIDUALIZED STATUTORY MAXIMUM. WE MAY NEED TO CHANGE THE PROCEDURES AS TO HOW WE DO IT. WE MIGHT NEED TO HAVE, FROM NOW ON, SPECIAL VERDICT FORMS, YOU KNOW, ASK THE JURY DO YOU FIND A BATTERY OCCURRED? YES. IF SO, WHAT IS THE, YOU KNOW, THEN THE JURY, ON A SPECIAL VERDICT FORM, WAS THE JURY SEVERE, MODERATE, MILD?

OKAY.

WE MAY HAVE TO MODIFY OUR PROCEDURES FROM NOW ON. BUT NOT --

BECAUSE I THOUGHT WHEN YOU WERE SAYING THERE WAS A FLOATING STATUTORY MAXIMUM, YOU WERE SOMEHOW SAYING THAT APPRENDI WOULDN'T APPLY. YOU ARE JUST MORE CONCERNED WITH IT THAN RETROACTIVE EFFECT, AS OPPOSED TO SAYING A JURY TRIAL WOULD START TOMORROW AND THERE IS SOME FACTOR THAT IS GOING TO INCREASE THE SENTENCE BEYOND THE STATUTORY MAXIMUM FOR THAT CRIME, THAT THE JURY WOULD NEED TO, PERHAPS, DO A SPECIAL VERDICT FORM.

WELL, THE STATE'S FIRST ARGUMENT WOULD BE THERE IS TWO STATUTORY MAXIMUMS, SO APPRENDI SHOULDN'T APPLY, BUT IF YOU FIND THAT APPRENDI APPLIES, THEN WE NEED TO MODIFY OUR RULES A LITTLE BIT, TO HAVE SPECIAL VERDICT FORMS. THAT IS OUR ALTERNATIVE ARGUMENT, I GUESS, IS WHAT I AM, WHAT, IF I AM ANSWERING YOUR QUESTION CORRECTLY.

DON'T WE SEND OUT A SIGNAL, IF WE SAY IT IS NOT RETROACTIVE, THAT WE IMPLICITLY FOUND THAT TAP APPLIES OR DO WE JUST SAY WE ARE NOT DECIDING WHETHER IT EVEN APPLIES, BUT IF IT DID IT IS NOT RETROACTIVE, THAT THAT WOULD BE A DECISION OUT OF THIS COURT THAT WOULD HELP THE SITUATION?

I GUESS IF YOU, I THINK YOU CAN SAY IT IS NOT RETROACTIVE, WITHOUT DECIDING THE MAXIMUM, BUT IF YOU DECIDE THE MAXIMUM, THEN IT DOESN'T APPLY, SO I GUESS YOU DON'T HAVE TO ADD DEGREES -- TO ADDRESS RETROACTIVE. IT IS A VERY CIRCULAR CASE. EVERYTHING SEEMS TO RUN TOGETHER. I THINK IF YOU LOOK AT COTTON, I THINK THE U.S. SUPREME COURT HAS SAID IT IS HARMLESS. IT IS NOT OF SIGNIFICANT MAGNITUDE TO REQUIRE RETROACTIVITY, AND SO WE WOULD ASK YOU TO AFFIRM THE FIRST PART OF THE DCA'S DECISION BUT REVERSE THE PART REQUIRING IT TO, SAYING THAT IT OVERRULED MAYS IN OUR 921 STATUTORY MAXIMUM. THANK YOU.

CHIEF JUSTICE: HOW MUCH TIME IS LEFT FOR REBUTTAL? OKAY.

MAY IT PLEASE THE COURT. I AM SO SHOCKED TO HEAR THE STATE TALK ABOUT FLOATING STATUTORY MAXIMUM, SINCE I WAS HERE A YEAR AGO IN THE HALL CASE AND ARGUED THE CRIMINAL PUNISHMENT CODE WAS UNCONSTITUTIONAL, BECAUSE THERE WAS A FLOATING STATUTORY MAXIMUM WHICH THIS COURT REJECTED. NOW THE STATE WANTS THIS COURT TO ADOPT A FLOATING STATUTORY MAXIMUM.

WE DON'T HAVE TO REACH THAT ISSUE IN THIS CASE, DO WE?

NO, SIR.

IN HALL, WAS THE ISSUE RAISED AS TO WHETHER THE CRIMINAL PUNISHMENT CODE WAS, AS WRITTEN, WAS UNCONSTITUTIONAL?

YES, MA'AM.

UNDER APPRENDI?

NO. NOT UNDER APPRENDI. APPREHEND 3I HI WAS AN ELEMENT -- APPRENDI WAS AN ELEMENT, BUT IT WAS NOT A GOOD CASE FOR APPRENDI, BECAUSE APPRENDI DID NOT EXCEED THE STATUTORY MAXIMUM.

IS THAT CASE OUT THERE BEING LITIGATEED?

WELL, THIS COURT IN THE HALL DECISION, USED THE LANGUAGE WE DON'T HAVE ANY FLOATING STATUTORY MAXIMUM UNDER THE CODE. WITH REGARD TO THE QUESTION ABOUT OPENING THE DOOR TO CODE CASES, I SEE EVERY APPELLATE RECORD THAT COMES INTO OUR OFFICE, AND I HAVE NOT YET SEEN ONE UNDER THE CODE, WHICH HAS BEEN IN EFFECT FOR FOUR OR FIVE YEARS, WHERE THE SENTENCE, SCORE SHEET SENTENCE EXCEEDED THE STATUTORY MAXIMUM. THE STATE'S RELIANCE ON COTTON IS NOT WELL-FOUNDED. COTTON WAS, AS MENTIONED EARLIER, WAS INDICTMENT CASE, WHERE THE AMOUNT OF DRUGS HAD TO BE ALLEGED IN THE INDICTMENT. IT WAS NOT RAISED PROCEDURALLY CORRECTLY. THEY ARE ARGUING PLAIN ERROR, WHATEVER THAT IS, IN THE FEDERAL COURT. WE HAVE ALWAYS HAD A REQUIREMENT IN FLORIDA THAT THE AMOUNT OF DRUGS FOR TRAFFICKING BE ALLEGED AND FOUND BY THE JURY, JUST LIKE USE OF A FIREARM. SO COTTON IS A RED HERRING. THE STATE ARGUES THAT APPRENDI IS A MERE CHANGE IN PROCEDURE. I WOULD SAY NO. IT IS A CHANGE IN SUBSTANTIVE SENTENCING LAW, JUST LIKE CALLAWAY AND STEPHENS. IT GOES TOWARD THE QUANTUM OF PUNISHMENT THAT THE DEFENDANT RECEIVES FOR A PARTICULAR CRIME. IT GOES BEYOND MERELY HOW YOU FIGURE UP THE SCORE SHEET. REGARDING THE QUESTION OF WHETHER 3.800-A WAS A PROPER REMEDY --

I THOUGHT THAT, IF YOU TAKE WHAT HAPPENED WITHCAL CAME WAY -- WITH, WHAT CALLAWAY WAS ABOUT, WAS THAT, IF IT WAS DETERMINED, THAT BECAUSE IT CHANGED THE LAW AS TO WHETHER THERE COULD BE CONSECUTIVE --

-- HABITUAL OFFENDER --

-- ACTUAL MAXIMUM, SO YOU COULD MAKE SOMEBODY WITH A 30-YEAR SENTENCE HAVE A 60-YEAR SENTENCE.

YES, MA'AM.

HERE, IF THE SENTENCING FACTOR WAS STIPULATED TO, IT WOULD HAVE, WHETHER THE JURY DECIDED OR THE JUDGE, YOU WOULD HAVE THE SAME EXACT SENTENCE. I THINK THAT IS PRETTY

DIFFERENT TO ME QUALITATIVELY, AS FAR AS THE FAIRNESS TO THE DEFENDANT.

I DON'T THINK SO, BECAUSE IT IS SUBSTANTIVE CHANGE IN THE STATUTORY MAXIMUM.

HAS ANYBODY, HAS ANY COURT APPLIED APPRENDI RETROACTIVELY? I MEAN, THE ARIZONA SUPREME COURT JUST ANNOUNCED THAT RING WASN'T GOING TO BE APPLIED RETROACTIVELY. DO YOU KNOW OF ANY CASES WHERE THEY HAVE, ANY COURT HAS APPLIED APPRENDI RETRO ACT I FEEL -- RETROACTIVELY?

NO, MA'AM. THE PROBLEM IS THE FEDERAL COURT, THE ARIZONA SUPREME COURT, THE NEVADA SUPREME COURT, ALL USE A TEST WHICH IS MORE STRICT THAN OUR WHITT TEST.

CHIEF JUSTICE: ON THAT NOTE WE WILL HAVE TO END IT.

THANK YOU, YOUR HONOR.

CHIEF JUSTICE: THANK YOU ALL VERY MUCH. THE COURT WILL NOW STAND IN RECESS.

MARSHAL: PLEASE RISE.