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State of Florida v. Antoine L. McBride

STATE OF FLORIDA VERSUS ANTOINE McBRIDE. GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS KELLIE NIELAN, AND I AM HERE ON BEHALF THE PETITIONNER THE CASE, THE STATE OF FLORIDA. THIS CASE IS BASED ON A CERTIFIED QUESTION FROM THE FIFTH DISTRICT COURT OF APPEAL. THE FACTS OF THIS CASE ARE SET FORTH AND UNDISPUTED. McBRIDE ENTERED A PLEA TO THREE OFFENSES IN 1993, ATTEMPTED MURDER WITH A FIREARM, WHICH IS A FELONY, ROBBERY WITH A FIREARM, AND BURGLARY. HE HAS FILED 3.850 AND SEVERAL 3.800 MOTION TO SAY CORRECT ILLEGAL SENTENCE. THE TWO THAT ARE SIGNIFICANT IN THIS CASE ARE IN JUNE OF 2000, HE FILED A MOTION TO CORRECT ILLEGAL SENTENCE, CLAIMING THAT THE OFFENSE OF ATTEMPTED MURDER WITH A FIREARM IS A LIFE FELONY FROM WHICH HE COULD NOT BE HABITUALIZED.

THAT IS TRUE.

YES. THAT IS TRUE. THE TRIAL COURT RENDERED AN ORDER STATING YOU ARE CORRECT. HOWEVER, YOU HAVE TWO OTHER HABITUAL OFFENDER SENTENCES THAT ARE RUNNING CONCURRENT WITH THIS, SO IT IS OF NO CONSEQUENCE, SO IN ADDITION IF YOU GO BACK FOR RESENTENCING, YOU COULD BE SENTENCED TO LIFE UNDER THE GUIDELINES. DENIED THE MOTION. McBRIDE DID NOT APPEAL THIS. SEVEN MONTHS LATER, IN JANUARY 2001, HE FILED A SUCCESSIVE MOTION TO CORRECT ILLEGAL SENTENCE.

WAS McBRIDE REPRESENTED, AT THE TIME OF THIS 3.850, THE FIRST 3.800 MOTION THAT WE ARE TALKING ABOUT HERE? WAS HE REPRESENTED BY COUNSEL AT THE TIME?

NO, I DON'T BELIEVE HE WAS. BUT HE HAD, I HAS PRO SE, THROUGHOUT THE COURSE OF THE YEARS, AND NOT A PROLIFIC FILER BUT A RATHER FREQUENT FILER. THAT MOTION TO CORRECT ILLEGAL SENTENCE WAS ACTUALLY THE THIRD 3.800 THAT HE FILED, IN RELIES TO THESE CASES.

IT WAS THE THIRD 3.800 MOTION, AND THE OTHER TWO? WAS THIS ISSUE RAISED --

NO. NO. IT WAS NOT RAISED UNTIL JUNE OF 2000.

YOU KNOW, IF IT DOESN'T MAKE A DIFFERENCE IF THE, IT GETS CORRECTED ON ONE COUNT, I GUESS WHAT I AM TRYING TO UNDERSTAND IS WHY THE STATE WOULDN'T JUST HAVE AGREED WITH MR. McBRIDE AND CORRECTED THE ONE COUNT THAT NEEDED CORRECTION.

BECAUSE HE HAD AN OPPORTUNITY TO GET THIS CORRECTED. ALL HE HAD TO DO WAS APPEAL THE TRIAL COURT'S ORDER, THE FIRST ONE, WHICH EVEN ACKNOWLEDGED THAT HE WAS CORRECT. HE DID NOT TAKE ADVANTAGE OF THIS. THIS COURT, ALL THE COURTS IN THE STATE OF FLORIDA HAVE RECOGNIZED THAT, IF YOU DEFAULT ON A CLAIM, IT IS NO LONGER RECOGNIZABLE BEFORE THE COURT.

THE STATE ENDS UP WITH THE POSITION, DOESN'T IT, THAT IT CAN HOLD A PERSON ON AN ILLEGAL SENTENCE, THAT IS THE STATE'S BOTTOM LINE. FINALITY TRUMPS JUSTICE.

YES, YOUR HONOR.

ISN'T THAT WHERE YOU END UP?

YES. AND I WOULD --

IS THAT A GOOD RESULT, THAT FINALITY WOULD TRUMP JUSTICE? IF THE SENTENCE OBVIOUSLY IS ILLEGAL, HE SHOULD NOT BE INCARCERATED ON AN ILLEGAL SENTENCE, WHY ISN'T THAT FUNDAMENTAL? HE CAN BRING IT UP ANY TIME. SAY MY SENTENCE IS ILLEGAL. I SHOULDN'T BE HERE, AND WHY SHOULD FINALITY TRUMP THAT?

BECAUSE THIS COURT HAS SAID SO IN THE CASE THAT ACKNOWLEDGED THAT THERE WERE CLASSIC CASES WHERE FUNDAMENTAL ERROR COULD RESULT FROM AN ILLEGAL SENTENCE T SAID NEVERTHELESS THE CONCEPT OF FUNDAMENTAL ERROR WAS NEVER INTENDED TO PROVIDE LITIGANTS WITH THE MEANS TO CIRCUMVENT THE TYPE OF PROCEDURAL BAR THAT OCCURS WHEN THE EXACT CLAIM HAS ALREADY BEEN DECIDED ON THE MERITS AND IS THUS RES ADJUDICATA. -- RES ADJUDICATA. FOR US TO CONCLUDE OTHERWISE WOULD BE RAISING ISSUES SIMPLY ON THE MERIT BY LABELING THEM AS FUNDAMENTAL ERROR. THIS WOULD BE A WASTE OF JUDICIAL RESOURCES. THEREFORE FUND AMOUNTAL ERROR CANNOT BE -- FUNDAMENTAL ERROR CANNOT BE RAISED ON THE CLAIMS WHERE ALL APPELLATE REVIEW HAS BEEN EXHAUSTED.

YOU SEE NOTHING WRONG WITH A PERSON STAYING IN JAIL BEING INCARCERATED FOR 20 YEARS ON AN ILLEGAL SENTENCE. HE SHOULD JUST STAY THERE. EVERYBODY CON SEEDS HIS SENTENCE IS -- EVERYBODY CONCEDES HIS SENTENCE IS ILLEGAL, BUT FINALITY SAID YOU DIDN'T APPEAL IT ON TIME. IT IS NOT FUNDAMENTAL OR IT IS FUNDAMENTAL, BUT STILL YOU CANNOT NO RELIEF. ISN'T SOMETHING WRONG WITH THAT PRINCIPLE?

YOUR HONOR THAT, IS EXACTLY WHAT THE STIN SON CASE SAYS. HE HAS NEVER ALLEGED THAT HE WAS IMPEDED IN ANY WAY, FROM CHALLENGING THIS BY THE STATE. HE HAS NEVER CLAIMED, HE IS ENTITLED TO A BELATED APPEAL BECAUSE HE DID NOT GET THE ORDER DENYING RELIEF, AND IN ANY OTHER INSTANCE WHEN A PERSON DOES NOT FOLLOW THROUGH, IT IS PRESUMED THAT THEY HAVE WAIVED THE CLAIM. AS I SAID, HE HAD THE OPPORTUNITY TO. THE JUDGE POINTED OUT HE HAS GOT NOTHING TO GAIN BY PURSUING THIS CLAIM. HE ONLY HAS SOMETHING TO LOSE, AND HE MAY HAVE, AT THIS POINT IN TIME, SAID YOU KNOW, THE JUDGE IS RIGHT.

YOU KEEP SAYING HE, BUT IN FACT OF THE MATTER, THE PRACTICAL MATTER IS HE HAD A LAWYER, AND SUPPOSE THE LAWYER WAS NOT SHARP ENOUGH TO PICK UP ON IT AT THAT POINT? HE IS GOING TO BE PENALIZED, IN MY HYPOTHETICAL, FOR 20 YEARS, AND REMAIN IN JAIL ON AN ILLEGAL SENTENCE, BECAUSE HIS LAWYER WAS NOT SHARP ENOUGH TO PICK UP ON IT.

WELL, GENERALLY, IF IT IS AS A RESULT OF A DIRECT APPEAL, THEN DOES HE HAVE A BASIS FOR RELIEF. HE CAN FILE A 3.850 AND CLAIM THAT HIS LAWYER WAS INEFFECTIVE, WHICH HAS RESULTED IN HIM BEING INCARCERATED ILLEGALLY. IN THIS CASE, WE DON'T HAVE THAT ISSUE HERE. AS I SAID --

THIS RULE 3.800, WHAT DISTINGUISHING IT FROM THE OTHER RULES IS WE HAVE THAT PHRASE "AT ANY TIME", WHICH I DON'T THINK IS CONTAINED IN ANY OF THE OTHER RULES, SO DOES THAT PHRASE AT ANY TIME CHANGE THE ANALYSIS AND PREVENT THE APPLICATION OF RES ADJUDICATA MINCE POLLS INTO ILLEGAL SENTENCES?

NO, I DON'T THINK IT DOES. I THINK AT ANY TIME MEANS YOU CAN FILE IT SIX MONTHS AFTER YOU WERE SENTENCED. YOU CAN FILE IT 40 YEARS AFTER YOU WERE SENTENCED. THERE IS NOT A SPECIFIC, LIKE 3.850 HAS, A SPECIFIC TWO-YEAR TIME LIMIT ON IT, BECAUSE YOU DON'T HAVE TO WORRY ABOUT THE FACTS GETTING COLD, PEOPLE'S MEMORIES, YOU KNOW, FACTS FADING, THINGS LIKE THAT, PEOPLE DYING. IT IS SOMETHING THAT CAN BE DETERMINED STRICTLY ON THE FACE OF THE RECORD, SO YOU CAN RAISE THIS AT ANY TIME, BUT YOU CAN'T KEEP RAISING IT OVER AND OVER AND OVER AGAIN. THE COURTS HAVE ALWAYS HELD YOU GET ONE BITE OF

THE APPLE. HE, WHAT HE DID IN THIS CASE WAS HE GOT THE DISTRICT COURT TO RESURRECT A CLAIM THAT HE HAD WAIVED BY NOT PREVIOUSLY APPEALING IT.

BUT ISN'T THE PROBLEM WITH ILLEGAL SENTENCES, FIRST OF ALL IT IS A VERY NARROW CLASSIFICATION, WHAT AN ILLEGAL SENTENCE IS, AND AS YOU HAVE SAID, IT IS SOMETHING THAT CAN BE DETERMINED ON THE PHASE OF THE RECORD. WE HAVE GOT PRISONERS AROUND THE STATE THAT, IN THEIR POSTCONVICTION ARE NOT REPRESENTED, EXCEPT IN DEATH CASES, BY LAWYERS, AND WHAT WE SEE ROUTINELY, IS THAT THE TENANCY IS THAT -- THE TENANCY IS THAT THESE CLAIMS GET MADE, EVEN IF THEY ARE APPEALED, BY AND LARGE WHAT HAPPENS IS THEY ARE PCA, SO THAT THERE IS NOT AN ACTUAL DECISION ON THE MERITS, AND THEN SOONER OR LATER, SAY THERE IS A ISSUE LIKE THIS WHETHER YOU CAN HABITUALIZE FOR A LIFE FELONY, SOME DISTRICT COURT ENDS UP WRITING AN OPINION AND FILING, AND MAYBE IT GETS UP TO OUR COURT AND WE SAY NO, FOR SURE THAT IS AN ILLEGAL SENTENCE. IT CAN BE RAISED AT ANY TIME, AND THEN THERE IS THOSE PRISONERS THAT MAY HAVE BEEN RAISING THOSE ISSUES UNSUCCESSFULLY, AND WE ARE GOING TO ANNOUNCE A RULE THAT EVEN THOUGH THEY RAISED IT, THE TRIAL COURT DIDN'T REALIZE THAT IT WASN'T A LEGAL SENTENCE. THE APPELLATE COURT PCA DID, AS TO THOSE VERY NARROW CLASSIFICATIONS, WHAT ARE TRULY ILLEGAL, TO SAY YOU ARE OUT OF LUCK?

TWO THINGS, YOUR HONOR. FIRST YOU ARE PRESUMING THAT THE TRIAL COURT AND THE DISTRICT COURT IS GOING TO BE WRONG ICHLT SAYING IN MY EXPERIENCE THAT UNFORTUNATELY, BECAUSE THERE ARE SO MANY OF THESE OF WHAT ARE FRIVOLOUS MOTIONS THAT, IN BETWEEN, SOMETIMES IT IS DIFFICULT, TRIAL COURTS DON'T HAVE LAW CLERKS TO SEPARATE THE WEAK FROM THE CHAF, SO IT IS JUST A FACT OF LIFE⁵. IT IS NOT ANYBODY'S INTENT TO BRING HARM, AND HERE YOU HAVE THE ONLY ENTITY THAT REALLY KNOWS IF THERE IS A VALID CLAIM IS THE STATE, AND MOST OF THE TIME WE DENY THOSE WITHOUT EVEN ASKING THE STATE TO COME ALONG, AND MOST OF THE TIME WE DENY THEM AS PROCEDURALLY-BARRED, BUT EVERY SO OFTEN THERE IS TRULY AN ILLEGAL SENTENCE, AND WHAT WE CAN HOPE IS THAT WE CAN COUNT ON THE STATE OF FLORIDA TO HELP US RECOGNIZE THAT AND CORRECT WHAT IS TRULY AN ILLEGAL SENTENCE. WHAT IS WRONG WITH THAT POLICY?

BECAUSE IN THIS PARTICULAR CASE, AND THIS IS LIMITED TO CERTIFIED QUESTION ASKED, WHETHER SOMEONE IS ENTITLED TO RELIEF ON A SUCCESSIVE 3.800, WHERE THE IDENTICAL ISSUE HAS ALREADY BEEN RULED ON BY THE TRIAL COURT, BUT WAS NEVER PRESENTED TO THE DISTRICT COURT OF APPEAL. SO IN THIS CASE, WE HAVE AN ABANDONMENT OF THAT CLAIM. WE HAVE A WAIVER OF THAT CLAIM. HE NEVER PURSUED HIS REMEDIES.

I GUESS WHAT I AM SAYING IS THAT, IF THE STATE, WHICH CONCEDED IT BEFORE THE TRIAL COURT, HAD JUST HELPED THE DEFENDANT CORRECT IT THE SECOND TIME AROUND, IT WOULDN'T HAVE GOTTEN TO THE POINT OF THE APPELLATE COURT HAVING TO GIVE US A CERTIFIED QUESTION ON THIS IDEA, BECAUSE WE DON'T CERTAINLY LIKE TO SEE REPRESENTATIVE MOTIONS FROM PRISONERS, BUT THIS IS ONE THAT IS CORRECT. IT IS ILLEGAL, AND YOU HAVE CONCEDED IS.

AND YOUR HONOR, WE CONCEDED IT WHEN HE FILED THE FIRST 3.WILL 00 MOTION. THE -- THE FIRST 3.800 MOTION. THE TRIAL COURT FOUND THAT HE WAS CORRECT, THAT HE COULD NOT BE HABITUALIZED FOR THIS BUT THEN DID A HARMLESS-ERROR ANALYSIS. PERHAPS THE TRIAL COURT WAS WRONG IN THAT, BUT ALL HE SIMPLY HAD TO DO AT THAT POINT WAS TO APPEAL IT TO THE DISTRICT COURT.

LET'S LOOK AT THE MERITS, BECAUSE WE ARE SITTING HERE WITH A GUY THAT WAS SERVING 50 ADDITIONAL YEARS, I DON'T THINK WE WOULD, WITH A STRAIGHT FACE, BE ABLE TO SAY THAT WE ARE GOING TO LET SOMEBODY STAY IN FOR 50 MORE YEARS BECAUSE HE DIDN'T REALIZE HE NEEDED TO APPEAL THIS, BUT WHAT IS THE EFFECT IN THIS SITUATION? ARE YOU SAYING THAT IT

MATTERS NOT AT ALL, BECAUSE HE IS HABITUALIZED ON TWO OTHER COUNTS? ZERO EFFECT ON HIS SENTENCE?

NO, ACTUALLY AT BEST THERE IS ZERO EFFECT. AT WORST, HE GOES BACK, IS RESENTENCED ON THIS COUNT WHICH IS A LIFE FELONY. HE COULD BE SUBJECT TO A LIFE SENTENCE INSTEAD OF A 30-YEAR HABITUAL OFFENDER SENTENCE.

WOULD THE STATE CONCEDE THAT YOU HAVE A MANIFEST INJUSTICE HERE BUT ONE THAT CAN'T BE REMEDIED. IS THAT THE STATE'S POSITION?

NO, YOUR HONOR. OUR POSITION IS HE WAIVED THIS CLAIM. HE NEVER APPEALED IT. HE IS NOT ENTITLED TO KEEP FILING THESE MOTIONS, UNTIL HE HITS THE RIGHT COURT. HE HAD HIS CHANCE. AND WHERE WILL YOU DRAW THE LINE ON THIS? WHAT IF HE FILED ON THESE EVERY THREE YEARS IN THE TRIAL COURT, EVERY SIX MONTHS IN THE TRIAL COURT? THE TRIAL COURT KEEPS DENYING IT, DENYING IT, DENYING IT. HE NEVER APPEALS IT. TEN YEARS LATER, THE TRIAL COURT HAS DENIED 40 MOTIONS AND BACKLOG JAM HAVING TO DEAL WITH THESE CASES, AND FINALLY HE TAKES THE INITIATIVE TO DO WHAT HE SHOULD HAVE DONE ALL ALONG. THAT IS THE PREMISE OF THE STATE'S ARGUMENT HERE. THE STATE DID NOT, IN ANY WAY, PRECLUDE HIM FROM RAISING THIS CLAIM. HE, HIMSELF, FAILED TO APPEAL IT. AND AS I SAID, THIS WAS HIS THIRD 3.800. HE HAD FILED A 3.WILL 50. HE WAS FULLY A -- HE HAD FILED A 3.850. HE WAS FULLY AWARE OF HOW TO TAKE THESE CASES THROUGH APPELLATE COURTS. IN FACT IN ONE OF THE EARLIER CASES HE EVEN SOUGHT TO INVOKE THE JURISDICTION OF THIS COURT, I THINK IT WAS ON THE 3.850, SO HE CLEARLY KNEW HOW TO PROCEED IN EVERY COURT. THIS WAS NOT A CASE OF I WAS DENIED ACCESS TO THE LAW LIBRARY. I COULDN'T APPEAL IT ON TIME. AND TO THIS DAY HE HAS NOT SAID IT WAS THE STATE'S FAULT NOT TO PROCEED FOR FILING IT IN DISTRICT COURT. THE COURT OVERLOOKED THIS, IN OVERLOOKING THE CASE DOCTRINE, STATING AS I SAID, THAT THEY LET HIM RESURRECT THE CLAIM SIMPLY BECAUSE THEY SAID THEY NEVER LOOKED AT IT BEFORE. THE REASON THEY NEVER LOOKED AT IT BEFORE WAS BECAUSE HE NEVER GAVE THEM THE OPPORTUNITY TO LOOK AT IT BEFORE. AND AGAIN THAT IS OUR BASIC PREMISE HERE. THIS IS NOT THE STATE'S FAULT THIS. IS NOT THE PEOPLE'S FAULT, AND THIS COURT SAID IN THE CLAIM OF ILLEGAL SENTENCE, THIS COURT SAID THAT IS NOT GOING TO GET YOU AROUND PROCEDURAL DEFAULT.

LET'S GO BACK JUST FOR A MINUTE. I DIDN'T REALLY HEAR YOUR FULL ANSWER TO JUSTICE PARIENTE'S QUESTION ABOUT THIS HAVING NO EFFECT ON A DEFENDANT SENTENCE. WE KNOW THAT HE HAS THREE HABITUAL OFFENDER SENTENCES, BUT DON'T YOU GET INTO, IF YOU HAVE ONE THAT DOES NOT, IS NOT A HABITUAL OFFENDER SENTENCE, AREN'T THERE SOME PRINCIPLES OF WHETHER OR NOT YOU CAN GET RELEASED ANY EARLIER OR THOSE KINDS OF THINGS THAT WOULD COME INTO PLAY HERE?

HE WOULD STILL HAVE TO COMPLETE TWO 30-YEAR HABITUAL SENTENCES, SO THAT WOULD BE THE LONGEST PERIOD HE WOULD BE INCARCERATED, ASSUMING HE GETS LESS THAN 30 YEARS UPON RESENTENCING. HOWEVER, IF HE GOES BACK AND IS RESENTENCED TO LIFE ON THIS, AND --

THE COURT HAD SOME ISSUES OF WHETHER OR NOT YOU REALLY COULD GIVE HIM LIFE AND WHETHER OR NOT THAT IS VINDICTIVENESS OR YOU MIGHT END UP WITH THOSE KINDS OF ISSUES ON A RESENTENCING, ASSUMING THAT HE STILL GOT A 30-YEAR SENTENCE, LET'S SAY, FOR THIS LIFE FELONY, THAT WOULD HAVE NO EFFECT ON WHEN HIS ACTUAL INCARCERATION WOULD END?

NO. NO. AS FAR AS I KNOW, IT WOULD NOT.

WELL, ON THIS ISSUE OF THE JUDGE TELLING HIM ON THE SECOND 3.800 THAT YOU CAN GET RELIEF, BUT IF YOU GET RELIEF, YOU ARE GOING TO RUN THE RISK OF A LIFE SENTENCE, CERTAINLY THIS IS AN EVIDENTIARY HEARING SITUATION, BUT IF I WERE A PRISONER

UNREPRESENTED, I WOULD SAIL I HAD BETTER NOT RUN THAT RISK. I THEN GO BACK AND I GET WITH A LAWYER, MORE THAN 30 DAYS AFTER, OR THE LAW, I LOOK AT THE LAW AND I GO YOU KNOW, THAT JUDGE GAVE ME THE WRONG THREAT HERE THAT IS NOT ACCURATE. HE CAN'T, I CAN'T BE SENTENCED TO A LIFE IMPRISONMENT NOW, AFTER HAVING A 30-YEAR SENTENCE. NOW I AM GOING TO RAISE IT. THAT WOULD BE, I THINK THAT WOULD BE A PRETTY RATIONAL THING TO DO, NOT TO APPEAL SOMETHING, WHEN THE JUDGE HAS TOLD HIM THAT THERE COULD BE A LIFE SENTENCE. IF THAT IS NOT TRUE, THEN YOU KNOW, WE ARE HERE ON A WHOLE, SOMEBODY WAS MISINFORMED BY THE OFFICER OF THE COURT, BY THE JUDGE, ABOUT SOMETHING, AND --

YOUR HONOR, HE HAS NEVER CLAIMED THAT IN THIS CASE.

HE CAN'T, BECAUSE HE HAS PASSED THE 3.850 TIME. THERE CAN'T BE AN EVIDENTIARY HEARING, SO WE REALLY DON'T HAVE A QUESTION AS TO WHY HE DIDN'T APPEAL, BUT I THINK THAT WOULD BE A PRETTY GOOD REASON.

AGAIN HE IS SUBJECT TO BEING RESENTENCED UNDER THE GUIDELINES, WHICH IS WHAT THE JUDGE PUT IN HIS ORDER. YOU WILL BE SUBJECT TO A GUIDELINE SENTENCE WHICH COULD SCORE OUT TO LIFE, AND HE HAS GOT, LIKE I SAID THIS IS A LIFE FELONY. HE ALSO HAVE ADDITIONAL OFFENSES OF POSSESSION OF A FIREARM BY A CONVICTED FELON ALONG WITH ARMED ROBBERY, AND HE ALSO HAS QUITE A SUBSTANTIAL RECORD.

CHIEF JUSTICE: IF YOU WANT TO SAVE A COUPLE OF MINUTES FOR REBUTTAL, THIS MIGHT BE A GOOD TIME.

OKAY. THANK YOU.

MAY IT PLEASE THE COURT. BEVERLY POHL FOR THE RESPONDENT ANTOINE McBRIDE. BEFORE GETTING INTO THE OVER ARCHING POLICY ISSUES, COULD YOU ADDRESS, SINCE YOU ARE NOW REPRESENTING THIS PERSON, WHAT IS THE STATUS, WHAT IS THE ACTUAL EFFECT, IF THE FIFTH DISTRICT'S OPINION IS APPROVED BY US, AS TO MR. McBRIDE'S SENTENCING POET SNENTION IN OTHER WORDS, YOU HAVE GOT OWNER OWNIOUS SENTENCE, BUT HE HAS THE POTENTIAL OF SERVING A LIFE SENTENCE?

THERE IS NOTHING IN THE RECORD SHOWING THE COMP YOUTATION FOR THE CHARGE OF FIRST-DEGREE MURDER, SO IT WOULD BE ENTIRELY SPECULATIVE TO KNOW EXACTLY WHAT THAT GUIDELINE SENTENCE WOULD BE. IT IS POSSIBLE, I SUPPOSE, THAT, IF THE JUDGE FOUND SUFFICIENT REASONS THAT THE SENTENCE COULD EXCEED THE 30 YEARS QRX THAT ALWAYS RAISES A QUESTION, UNDER NORTH CAROLINA VERSUS PIERCE, BUT THE ANSWER SHRIMP ISN'T IN THIS RECORD, BUT IT IS NOT JUST ABOUT THE LENGTH OF SENTENCE OVERALL THAT MR. McBRIDE WOULD BE REQUIRED TO SERVE. IT HAS TO DO, ALSO, WITH THE COLLATERAL CONSEQUENCES OF EVERY HABITUAL OFFENDER SENTENCE, AS THIS COURT RECOGNIZE HAD IN CARTER, I BELIEVE, IN FOOTNOTE 6, THE COLLATERAL CONSEQUENCES AFTER HABITUAL OFFENDER SENTENCE ARE ENOUGH, IN AND OF THEMSELVES, TO WARRANT CORRECTION OF AN ILLEGAL SENTENCE, IF THE HABITUAL SENTENCE IS ILLEGAL. SO I DON'T THINK IT IS APPROPRIATE TO SPECULATE, AS THE TRIAL COURT DID, IN ITS ORDER DENYING THE FIRST MOTION, THAT IT HAS NO REAL CONSEQUENCE. THEREFORE WE ARE NOT GOING TO GRANT HIM RELIEF. THAT IS NOT WHAT THE RULE REQUIRES.

SO THE 30 YEARS ON THE TWO REMAINING COUNTS ARE NOT HABITUAL OFFENDER SENTENCES?

THEY ARE. HE PLED, AND THE PLEA AGREEMENT, HE AGREED TO 30-YEAR HABITUAL OFFENDER SENTENCE FOR ALL THREE OF THOSE COUNTS.

TWO ARE VALID.

TWO ARE NOT REVERSED BY THE --

SO WHY, IN THAT SITUATION, DOESN'T HE GET THE COLLATERAL CONSEQUENCES FOR THE TWO COUNTS? SO WHAT DIFFERENCE DOES IT MAKE TO MR. McBRIDE, AND ISN'T HE, IN FACT, FACING A POTENTIAL LIFE SENTENCE ON THE THIRD ONE, IF WE WERE TO LET THIS GO?

IT IS A COMPOUND QUESTION. THE FIRST QUESTION IS WHAT DIFFERENCE DOES IT MAKE? IT IS HARD TO KNOW, BECAUSE WE DON'T KNOW WHAT OTHER LEGAL CHALLENGES MAY BE ABLE TO BE MADE AT SOME POINT, AND FRANKLY, ANY INMATE SERVING A SENTENCE IN THE STATE OF FLORIDA, AND IF IT IS AN ILLEGAL SENTENCE, HAS THE ENTITLEMENT TO HAVE THAT CORRECTED. I DON'T THINK IT IS RIGHT TO COUNSEL OR THE COURTS TO SPECULATE, AS TO WHAT THE PRACTICAL EFFECTS OF THAT MAY BE, AND AN ILLEGAL SENTENCE IS, BY DEFINITION, AN ASTHEMA. IT IS NOT SOMETHING THAT THE STATE OUT TO COUNTENANCE OR THIS COURT. I THINK IT IS VERY INTERESTING, FOR REASONS THAT ARE NOT CLEAR, THIS SEEMS TO BE THE FIRST CASE IN WHICH THE STATE HAS NOT CONCEDED THAT RES ADJUDICATA DOES NOT PRECLUDE THE CORRECTION OF AN ILLEGAL SENTENCE.

LET'S TALK FOR A MINUTE ABOUT RES JUDICATA AND EXPLAIN, IF YOU WOULD, WHY THE DOCTRINE OF RES ADJUDICATA IS NOT APPLICABLE HERE.

FIRST IT IS NOT RAISED BY THE STATE IN THE CIRCUIT COURT. IT WAS NOT RAISED BY THE STATE IN THE DISTRICT COURT OF APPEAL, SO UNDER THE WELL-ESTABLISHED PRINCIPLES THAT THE SPECIFIC OBJECTION HAS TO BE MADE BELOW, THE WHOLE CONCEPT OF RES ADJUDICATA, REALLY, HAS BEEN WAIVED BY THE STATE. IT IS NOT TO BE CONSIDERED, BUT EVEN ON THE MERITS, IT IS NOT A WINNING ARGUMENT FOR THE STATE, BECAUSE RES ADJUDICATA IS A JUDGE-MADE DOCTRINE, WHICH, REALLY, IS NOT UNSALABLE. IT CAN BE ADORED, SO TO SPEAK, IN THE INTEREST OF JUSTICE. HISTORICALLY IN COMMON LAW, RES ADJUDICATA DID NOT APPLY TO HABEAS CORPUS PROCEEDINGS. WE REPLIED IN OUR BRIEF, REFERRING TO THE CASES OF WHAT IS LIKE 3.800 HAS THE LANGUAGE IN IT THAT THE ILLEGAL SENTENCE MAY BE CORRECTED AT ANY TIME.

PUT OURSELVES IN, JUST DEALING WITH THIS WHOLE CONCEPT UNDER 3.800, IN TRYING TO KEEP SOME ORDER IN THESE POSTCONVICTION MATTERS, THAT THIS ISSUE IS RAISED IN THE TRIAL COURT, AND A JUDGMENT IS ISSUED ON THE MATTER, AND THERE IS NO APPEAL TAKEN. NOW, IF INMATES CAN THEN RAISE THE SAME ISSUE AGAIN AND THEN HAVE AN APPEAL, I MEAN, DON'T WE HAVE A SITUATION IN WHICH YOU PUT THIS, YOU ARE JUST GOING TO HAVE CHOICES THAT ARE MADE AS TO WHAT TIME YOU, WHEN YOU WANT TO APPEAL. I MEAN, 30 DAYS FROM THE ENTRY OF THE JUDGMENT IS GOING TO HAVE NO MEANING AT ALL, IS IT?

FROM A PRACTICAL POINT OF VIEW, JUSTICE WELLS, INMATES HAVE NO INTEREST IN NOT APPEALING THE DENIAL AFTER MOTION TO VACATE AN ILLEGAL SENTENCE. THE VAST MAJORITY OF THESE DO GET APPEALED AND EITHER AFFIRMED OR REVERSED ON APPEAL. THERE AREN'T VERY MANY CASES INVOLVING THE ON-AND -- THE UNAPPEALED DENIAL OF A MOTION TO CORRECT AN ILLEGAL SENTENCE. THIS IS ONE OF FEW. BUT I WAS ABOUT TO SAY EARLIER UNDER HEFLIN VERSUS UNITED STATES AND A CONKERING OPINION BY THE FIFTH JUSTICES OF THE SUPREME COURT, THEY RECOGNIZED THAT FEDERAL RULE 35, WITH THE "AT ANY TIME" LANGUAGE, RES ADJUDICATA SIMPLY DOES NOT APPLY AND THAT DOCTRINE SIMILARLY SHOULD NOT APPLY TO RULE 3.800, WHICH DOES NOT ON ITS FACE PROHIBIT SUCCESSIVE MOTIONS AND IS, REALLY, ONE OF THE FEW RULES IN OUR CRIMINAL LAW THAT DOES ALLOW SOMETHING TO BE DONE AT ANY TIME. I WOULD DRAW AN ANALOGY TO RULE 3.1 THE 90, WHICH IS -- TO RULE 3.190, WHICH IS WHEN A DEFENDANT CAN MOVE TO DISMISS CRIMINAL CHARGES AGAINST HIM. THERE IS A TIME LIMIT FOR THAT. IT HAS TO BE DONE BY THE TIME OF RARMENT -- OF ARRAIGNMENT, EXCEPT THAT IT CAN BE DONE AT ANY TIME INSERT CIRCUMSTANCES -- IN CERTAIN CIRCUMSTANCES THAT ARE NECESSARY FOR THE ADMINISTRATION OF JUSTICE, SUCH AS IF THE

DEFENDANT HAS ALREADY BEEN PARDONED FOR THAT CRIME, IF THERE IS A DOUBLE JEOPARDY PROBLEM, IF THE DEFENDANT HAS BEEN GIVEN IMMUNITY FOR THAT CRIME, SO WHEN THE LAW ALLOWS FOR SOMETHING TO BE DONE AT ANY TIME THERE, ARE VERY IMPORTANT POLICY REASONS FOR THAT, AND THAT IS WHAT IS THE SITUATION IN RULE 3.800.

SUCH IS THE CASE WITH JURISDICTIONAL CASES. THEY CAN BE RAISED AT ANY TIME, CORRECT, BUT THAT DOESN'T MEAN THAT, ONCE RAISED, THERE IS NO RES ADJUDICATA THAT APPLIES WHEN THAT ISSUE IS NOT APPEALED. THE TROUBLE THAT I AM HAVING IS I ENVISION A SCENARIO THAT WOULD BE PERMITTED, IF WE ACCEPTED YOUR ARGUMENT, AND THAT IS A DEFENDANT FILES 3.WILL 00 MOTION, GETS DENIED, APPEALS TO THE DCA AND -- FILES 3.800 MOTION, GETS DENIED, APPEALS TO THE DCA AND THAT IS NOT A FRIENDLY DISMISSAL, FILED ANOTHER 3.800, GETS DENIED, APPEALS TO THE DCA, DISMISSES THE APPEAL AND DOES THAT UNTIL HE GETS EITHER THE RIGHT TRIAL JUDGE OR THE RIGHT PANEL. COULDN'T THAT HAPPEN, IF WE ACCEPTED YOUR POSITION?

THERE IS NO EVIDENCE THAT THAT HAS EVER HAPPENED BEFORE, BUT HERE THE REASON THAT THIS CASE IS SO DIFFERENT IS THE STATE'S CONCESSION FROM DAY ONE, THAT THIS IS AN ILLEGAL SENTENCE. THAT WHERE WE HAVE TO PROCEED FROM IN THIS CASE, NOT FROM SOME HYPOTHETICAL --

CAN OUR, CAN WE WRITE AN OPINION THAT SAYS WHERE THE STATE EXPRESSLY CONCEDES THAT IT WAS AN ILLEGAL SENTENCE, WE CAN DO IT, BUT IF THE STATE DOESN'T, THEN RES ADJUDICATA WOULD APPLY? HOW WOULD WE DISTINGUISH THAT?

I DON'T THINK THAT YOU CAN WRITE AN OPINION THAT WAY, BECAUSE WE CAN'T LEAVE IT UP TO THE STATE TO DECIDE.

EXACTLY. SO THE FACT THAT THE STATE HAS CONCEDED IT, I DON'T SEE HOW WE CAN WRITE AN OPINION THAT WOULD BE SO NARROWLY DRAWN THAT IT WOULD APPLY WHERE THE STATE CONCEDES AN ILLEGAL SENTENCE.

THE OPINION YOU SHOULD WRITE SHOULD BE ONE THAT SAYS, WHEN THE SENTENCE IS ILLEGAL, UNDER THIS COURT'S NARROW DEFINITION OF WHAT AN ILLEGAL SENTENCE IS, THAT CAN BE RAISED AT ANY TIME, NO MATTER WHAT, EVEN IF IT HAS BEEN UNAPPEALED ON A PRIOR DENIAL, BECAUSE THIS STATE HAS NO INTEREST IN KEEPING A DEFENDANT INCARCERATED UNDER A SENTENCE THAT, UNDER THE DEFINITION THAT THIS COURT ADOPTED IN CARTER, COULD NOT LAWFULLY BE OPPOSED BY ANY JUDGE UNDER ANY CONSTRUCTION OF STATE LAW.

LET ME ASK, WAS THE DEFENDANT REPRESENTED AT THE TIME HE ENTERED THE PLEA?

YES.

AND IT IS CLEAR THAT, AT ANY TIME -- THAT, AT THE TIME THAT HE ENTERED A PLEA, YOU COULD NOT DO A HABITUALIZATION OF A LIFE FELONY, CORRECT?

YES.

AND THIS DEFENDANT HAS FILED 3.850 MOTION INS THE PAST?

NOT ON THIS POINT.

WELL, DID HE RAISE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, MAYBE, AT THEUx'L IT SEEMS COUNSEL HOPEFULLY TALKED TO HIM ABOUT ENTERING THIS PLEA, AND AT THE TIME THAT HE DID, YOU COULDN'T HABITUALIZE, SO DIDN'T THE DEFENDANT HAVE, AT SOME POINT, A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL POSSIBLY, ON THE SAME ISSUE, AND I AM

TRYING TO GET TO WHETHER OR NOT HE ACTUALLY RAISED THE CLAIM OF INEFFECTIVE ASSISTANCE -- ASSISTANCE OF COUNSEL.

ACCORDING TO THE RECORD THAT WE HAVE IN THIS CASE, THE FIRST TIME THAT THE CLAIM OF THIS ILLEGAL SENTENCE WAS RAISED, HAVING TO DO WITH THIS HABITUALIZATION OF ATTEMPTED MURDER, WAS BEYOND THE TWO-YEAR PERIOD FOR FILING A INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. I DON'T HAVE IN THE RECORD HIS 3.850 MOTION, SO I AM NOT SURE EXACTLY WHAT WAS RAISED, BUT THIS APPEARS TO HAVE BEEN RAISED FOR THE FIRST TIME IN THE YEAR 2000, PURSUANT TO A 3.800 MOTION.

IN TERMS OF TRYING TO WRITE THIS NARROWLY AND PREVENT WHAT WE SEE ASTINIOUS ABUSE - - AS A CONTINUOUS ABUSE BY PRISONERS, YOU WRITE WHEN A SENTENCE IS ILLEGAL IT CAN BE CORRECTED. WHAT IS YOUR POSITION ON, LET'S SAY THAT MR. McBRIDE'S CLAIM WAS NOT VALID. IT WAS NOT WITHIN THE CARTER NARROW WINDOW, AND HE WAS RAISING SOMETHING ELSE, BUT HE KEPT ON SAYING IT WAS ILLEGAL. ARE COURTS PERMITTED TO PREVENT THE SUCCESSIVE ATTACK ON, BASED ON THE SAME POINT OF LAW, AFTER IT HAS BEEN RAISED TWO OR THREE TIMES, OR ARE PRISONERS JUST ENTITLED TO KEEP ON RAISING IT?

ONCE IT HAS BEEN RAISED AND APPEALED, THEN IT IS RES JUDICATA, A AND ANY SUBSEQUENT REHASHING OF THAT SAME ARGUMENT WOULD BE SUBJECT TO A SANCTIONS MOTION.

WHAT IF, IN THIS CASE, THE SAME THING HAPPENED, HE APPEALED, BUT THE FIFTH DISTRICT, NOT REALIZING THE CARTER DECISION WAS OUT THERE OR, AGAIN, SOME OF THESE THINGS SEEM APPARENT DOWN THE ROAD BUT THEY OBVIOUSLY AREN'T APPARENT TO THE PEOPLE THAT ARE INVOLVED IN THE SENTENCING PROCESS, OR THEY WOULDN'T HAPPEN, WHAT IF THERE WAS A PCA SAYING THAT, EVEN IF THERE WAS SOMETHING SAYING THAT THE SENTENCE WAS CLEARLY ILLEGAL, WOULD MR. McBRIDE BE BARRED FROM HAVING CORRECTION OF HIS ILLEGAL SENTENCE?

IT IS VERY DIFFICULT TO ENVISION EVERY POSSIBLE SENTENCING THAT MIGHT OCCUR, BUT UNDER JULIAN-, IT MAY OR MAY NOT -- UNDER GUILIANO, IT MAY OR MAY NOT BE, BECAUSE OF THE POSITION OF THE COURT OF APPEALS AND WHAT IT SAYS.

NARROWLY, WOULDN'T YOU APPLY, YOU SAY THERE IS RES ADJUDICATA OF THE CASE BUT THAT THE PRINCIPLES THAT MANIFEST INJUSTICE WOULD APPLY OR DOES APPLY, IF SOMETHING IS PATENTLY ILLEGAL, AS A SENTENCE?

ARE YOU SAYING THAT THAT WOULD BE ANOTHER EX-SNEPTION.

THAT IS A RECOGNIZED EXCEPTION, BUT IT IS A VERY NARROW ONE, BECAUSE THERE WOULD BE VERY FEW MANIFEST INJUSTICE, AND THIS CASE MIGHT NOT FIT INTO THAT, BECAUSE YOU HAVEN'T REALLY POINTED OUT TO ME THAT AS MUCH OF A DIFFERENCE THAT IS SUBJECT TO HABITUALIZATION ON TWO OF THE THREE COUNTS, AND HE COULD FACE POTENTIALLY, A LIFE SENTENCE IF THIS OTHER ONE WAS SET ASIDE, WHY, YOU KNOW, AND THERE MAY HAVE BEEN OTHER REASONS, MAYBE THE STATE GAVE UP OTHER THINGS WHEN IT ENTERED INTO THE PLEA AGREEMENT, WHY THIS WOULD BE A MANIFEST INJUSTICE.

THAT WOULD REALLY BE WHY THIS CASE WOULD BE A MANIFEST INJUSTICE? WE DON'T HAVE TO REACH THE MANIFEST INJUSTICE EXCEPTION TO THE LAW OF THE CASE DOCTRINE HERE, BECAUSE THERE IS NO PRIOR APPELLATE OPINION. I THOUGHT THAT WAS A HYPOTHETICAL THAT YOU WERE ASKING, REGARDING AN EXCEPTION TO THE LAW OF THE CASE DOCTRINE.

BUT YOU ARE ESSENTIALLY ASKING FOR A MANIFEST INJUSTICE EXCEPTION TO RES ADJUDICATA PRINCIPLES, SO I THINK WHAT JUSTICE PARIENTE IS GETTING AT, IF WE ARE GOING TO WRITE A MAN TEST -- A MANIFEST INJUSTICE TO RES JUDICATA, A WHICH WOULD OTHERWISE APPLY IN

THIS CASE, WHY WOULDN'T IT MANIFEST IN THIS CASE, SO WE COULD APPLY THAT EXCEPTION TO YOUR CASE?

IT DOESN'T HAVE TO BE TERMED IN THE FRAME OF A MANIFEST INJUSTICE EXCEPTION. IT IS SIMPLY AN ILLEGAL SENTENCE. YOU DON'T NEED TO LOOK ANY FURTHER THAN THAT ACTUALLY. AN ILLEGAL SENTENCE DEFINED UNDER THIS COURT'S NARROW DEFINITION, ON THE NOT TO BE SERVED BY ANY INMATE IN THE CUSTODY OF THE STATE. I THINK IT IS VERY INTERESTING THAT, IN MADDUX, THE STATE OF FLORIDA AGREED THAT THE STATE HAS NO INTEREST IN A DEFENDANT SERVING AN ILLEGAL SENTENCE. IN THE FORD CASE CITED IN OUR BRIEF, THE STATE CONCEDED THAT RES ADJUDICATA DIDN'T APPLY IN THIS SITUATION. IN THE LAWTON CASE, THE STATE CONCEDED, BUT FOR THIS SOME REASON IN THIS CASE THE STATE IS TAKING A DIFFERENT POSITION, BUT YOU DON'T NEED TO LOOK THEY FURTHER THAN RULE 3.80 O IT DOES NOT PROHIBIT SUCCESSIVE -- IT DOES NOT PROHIBIT SUCCESSIVE MOTIONS. IT ALLOWS RELIEF AT ANY TIME. THAT PROVISION FOR RELIEF, IN AND OF ITSELF, IS AN ACKNOWLEDGMENT OF THE IMPORTANCE OF ACKNOWLEDGING AND ACCEPTING AN ILLEGAL SENTENCE.

IT DOESN'T SAY ANY TIME. IT JUST SAYS NO STATUTE OF LIMITATIONS ISSUE. IT DOESN'T NECESSARILY MEAN, UNLESS WE SAY SO FOR POLICY REASONS, THAT AT ANY TIME YOU CAN FILE SUCCESSIVE MOTIONS. IT IS JUST SILENT ON THE ISSUE, AND THERE ARE MANY RULES THAT ARE SILENT ON SUCCESSIVE MOTIONS BUT THERE ARE OTHER PRINCIPLES THAT HAVE TO BE CONSIDERED, ALONG WITH THOSE RULES, TO SAY THAT YOU CAN'T FILE SUCCESSIVE MOTIONS?

I THINK THE ONLY LOGICAL READING OF "AT ANY TIME" IS ONE THAT THE FIFTH DISTRICT TOOK IN THIS CASE, AND THAT IS AS LONG AS ANOTHER APPELLATE COURT HASN'T FOUND, ON THE MERITS DIRECTLY, WHEN DIRECTLY PRESENTED WITH THAT QUESTION THAT, THE SENTENCE WAS INDEED NOT ILLEGAL. AS LONG AS THAT DOESN'T APPEAR IN THE RECORD, THEN IT CAN BE RAISED AND CORRECTED AT THAT TIME. BUT THE CONCERNS THAT THE COURT HAS FOR FINALITY OF A POSTCONVICTION LITIGATION, CAN BE MET BY APPLYING THE LAW OF THE CASE DOCTRINE AS THAT DOCTRINE HAS BEEN DESCRIBED IN THE JULY AND-CASE, AND -- IN THE GULIANO CASE, AND QUITE INTERESTING THE DEFENDANT HAS NO INTEREST IN DEL AGO POSTCONVICTION APPEAL. THE DEFENDANT, ACTUALLY THERE WAS AN APPEAL FILED TO THE FIFTH DISTRICT EARLIER BUT IT WAS UNTIMELY FILED. THAT ISN'T WHAT HE WANTED TO HAPPEN. THAT IS JUST WHAT HAPPENED. BUT WHERE THE SENTENCE IS ILLEGAL AND WHERE THE STATE HAS CONCEDED AS MUCH, THEY HAVEN'T PRESENTED ANY LEGITIMATE INTEREST IN HAVING MR. McBRIDE SERVE THAT SENTENCE, WHETHER OR NOT ON REMAND, IT MAKES NO DIFFERENCE, IN TERMS OF TIME, IS A QUESTION FOR ANOTHER DAY. IT IS NOT A QUESTION FOR THIS COURT, WHICH OUGHT TO REMEDY AS A MATTER OF PUBLIC POLICY, ANY DEFENDANT'S ILLEGAL SENTENCE THAT THE STATE HAS AGREED COULDN'T HAVE BEEN IMPOSED LAWFULLY BY ANY JUDGE.

WHY SHOULD WE NOT CONSIDER THAT, BECAUSE YOU GO ACROSS THE BOARD, AND WHETHER OR NOT WE AGREE WITH THE LIMITATION THAT IS, OVER THE YEARS HAVE BEEN CREATED ON A 3.850 AND ALL OF THE COLLATERAL PROCEEDINGS, WHETHER YOU AGREE WITH THEM OR NOT THEY ARE THERE. WHY SHOULD WE NOT LOOK TO WHAT IS GOING TO HAPPEN IN THIS CASE, BEFORE STRIKING OUT TO CREATE EXCEPTIONS THAT, YOU KNOW, OTHERWISE MAY APPEAR TO BE CONTRARY TO MANY OF THE LIMITATIONS THAT ARE ALREADY IN PLACE?

BECAUSE WE CAN'T BE THAT PRESSUREIENT. WE DON'T KNOW WHAT -- THAT PRESCIENT. WE DON'T KNOW WHAT WILL HAPPEN ON REMAND AT SENTENCING. IT IS IMPOSSIBLE TO KNOW.

IN OTHER CASES, WE HAVE SAID, WELL, YOU HAVE TO DEMONSTRATE A SUBSTANTIAL LIKELIHOOD THAT A NEW TRIAL WOULD HAVE RESULTED IN AC WRIT K ACQUITTAL OR -- IN ACQUITTAL OR SOMETHING LIKE. THAT WHY CAN'T WE SAY IN ORDER TO BE ABLE TO FILE A SUCCESSIVE MOTION, YOU HAVE TO SHOW A SUBSTANTIAL LIKELIHOOD THAT THE SENTENCE WOULD BE REDUCED?

I THINK HABITUAL OFFENDER SENTENCE, BY DEFINITION, IS GENERALLY AN ENHANCED SENTENCE, SO I THINK THE PRESUMPTION WOULD BE THAT THAT WOULD BE A PRETTY HIGH SENTENCE FOR THE OFFENSES IN THIS CASE, BUT IMPORTANTLY THERE IS JUST NOTHING IN THE RECORD, OTHER THAN THERE IS A REFERENCE AT PAGE 14 IN THE RECORD, IN THE MEMORANDUM FILED BY THE DEFENDANT PRO SE, REFERRING TO ATTEMPTED FIRST-DEGREE FELONY MURDER. NOW, THE INFORMATION IN THIS CASE IS NOT IN THE RECORD. I AM NOT SURE IF THE CHARGE WAS ATTEMPTED FIRST-DEGREE FELONY MURDER, BUT IF IT WERE, THAT PRESENTENCE ANOTHER CURIOUS QUESTION ON REMAND ABOUT WHETHER THE TRIAL COURT CAN RESENTENCE HIM FOR ATTEMPTED FELONY MURDER, WHICH IS NO LONGER A CRIME, SO WE DON'T KNOW WHAT IS GOING TO PLAY OUT ON REMAND.

ISN'T THAT ACTUALLY, AGAIN, BECAUSE WE HAVE TO DEAL WITH THE CASE IN FRONT OF US, AGAIN THIS IS THE CASE WHERE WE WERE SITING THERE AND MR. McBRIDE HAD 20 MORE YEARS THAN HE WAS SUPPOSED TO HAVE, I THINK THAT THE STATE WOULD, WOULD BE A TOUGHER ARGUMENT EVEN FOR THE STATE, TO TRY TO ADVANCE, BUT MY CONCERN HERE, AND I REMEMBER IT WAS SOMETHING THAT CAME UP IN THE CARTER AND THERE WAS SOME OTHER CASE WITH CARTER, THAT YOU HAVE GOT SOMETIMES THESE DEFENDANTS WHO HAVE MULTIPLE COUNTS, AND THE STATE AGREED AS PART OF THE PLEA, TO DISMISS CERTAIN COUNTS IN EXCHANGE FOR OTHERS. IF THAT IS THE CIRCUMSTANCE AND WE DON'T KNOW IT, BUT BECAUSE THIS WAS A PRODUCT OF A PLEA, AND THE STATE GAVE UP CERTAIN COUNTS, AND NOW WHAT WE REALLY WOULD BE TALKING ABOUT IS THE STATE MIGHT BE ENTITLED TO SAY, WELL, WE ARE NOT WILLING TO, YOU KNOW, WE ARE GOING TO HAVE TO START FROM SCRATCH, AND NOW WE HAVE GOT A SENTENCE AND A CASE THAT WAS 15 YEARS OLD. DON'T WE HAVE SOME OTHER POLICY RAMIFICATIONS IN THIS CASE, IF YOU CAN'T TELL US HOW THE CORRECTION OF A SENTENCE WILL ACTUALLY WORK, OTHER THAN JUST THAT THE ONE COUNT IS CORRECTED? YOU SEEM TO BE CONCEDING THAT THERE MIGHT BE, HAVE TO BE SOME OTHER PROCEEDINGS, AND THAT IS WHY I AM NOW CONCERNED ABOUT THAT ASPECT OF IT.

WELL, THE OTHER PROCEEDINGS WOULD BE RESENTENCING ON THE REMAND.

CAN I ASK ONE MORE QUESTION, CHIEF JUSTICE?

CHIEF JUSTICE: YEAH.

ARE YOU SUGGESTING THAT WE ARE USING THIS MECHANISM TO GO BEHIND SOMETHING AND GET AT THROUGH THE BACK DOOR WHAT MAY NOT BE ABLE TO BE REACHED THROUGH THE FRONT DOOR. SHALL THAT BECAUSE ARE SUGGESTING, WE ARE GOING TO GO BACK NOW AND LOOK AT THE UNDER LYING PLEA, THAT IS SOMETHING BASED ON SUBSEQUENT DECISIONS AND NOW WE ARE GOING TO BACK IN ON THE 3.800 AND LOOK AT COLLATERAL ISSUES FOR ISSUES THAT COULD HAVE BEEN RAISED AT THE TIME?

NO. I AM NOT SUGGESTING. I AM JUST SAYING IN RESPONSE TO YOUR -- IS THAT BECAUSE YOU ARE SUGGESTING?

NO. I AM NOT SUGGESTING. I AM JUST SAYING IN RESPONSE TO YOUR EARLIER POSITION, THAT MR. McBRIDE NEVER MENTIONED THAT THIS COULD LEAD TO FELONY MURDER.

IS THAT NOT HONESTLY WHERE IT COULD LEAD YOU?

IT COULD BE RAISED.

CHIEF JUSTICE: THANK YOU, COUNSEL.

JUST VERY BRIEFLY, I WOULD JUST POINT OUT THAT, IF A DEFENDANT COULD CONTINUAL GO IN AND FILE 3.8 -- CONTINUALLY GO IN AND FILE 3.800 MOTIONS, AS HAS BEEN DONE IN THIS CASE,

THIS COURT --

WHAT IS YOUR RESPONSE TO THE WAIVER ARGUMENT ON RES ADJUDICATA?

I DON'T BELIEVE THE STATE WAIVED IT. WHAT WAS ARGUED WAS HE RAISED IT. IT HAS BEEN DECIDED. HE DIDN'T APPEAL IT. HE DEFAULTED ON IT. THE WORDS RES ADJUDICATA WAS NOT USED BUT THAT IS WHAT THE PRINCIPLE OF RES ADJUDICATA IS, AND THAT IS EXACTLY WHAT THE STATE ARGUED BELOW. THAT WAS THE WHOLE BASIS OF THE STATE'S RESPONSE, THE STATE'S RESPONSE IN THE DISTRICT COURT AND THE TRIAL COURT, TOO. AGAIN THE MAGIC WORDS WERE NOT USED BUT THE PRINCIPLE WAS SET FORTH THERE. OKAY. IF THERE IS NO FURTHER QUESTIONS, I WOULD --

THE LAST QUESTION THAT I HAD POSE ODD TO COUNSEL. IS THIS, ARE WE ATTEMPTING TO SOMEHOW CONVERT A 3.WILL 00 INTO A MECH-- A 3.800 INTO A MECHANISM, BECAUSE NOW WE HAVE GOT THE STATE AGREEING TO SOMEHOW GO BACK AND GO BENEATH WHAT HAPPENED BEFORE AND GO THROUGH THE BACK DOOR TO REANALYZE THIS ATTEMPTED FIRST-DEGREE MURDER OR WHATEVER IS INVOLVED, IS THAT WHAT IS HAPPENING HERE?

THIS, THE STATE HAS NEVER HEARD THIS ATTEMPTED FELONY MURDER ISSUE BEFORE, SO OTHER THAN THAT --

IF THEY RAISED THAT, IS THAT WHAT THEY ARE DOING?

I AM SORRY?

IF THEY RAISED THAT ISSUE, IS THAT REALLY WHAT IS LURKING IN THE BACKGROUND OF THIS CASE?

THAT I DO NOT KNOW. IT HAS NEVER BEEN RAISED. I HAVE NEVER BEEN REQUIRED TO LOOK AT IT. ALL I LOOKED AT WAS ATTEMPTED FIRST-DEGREE MURDER. I DID NOT GET INTO THE FACTS OR ANYTHING.

CAN YOU TELL US FROM THE RECORD WHETHER THIS DEFENDANT ATTEMPTED TO WITHDRAW HIS ORIGINAL PLEA OR THE PLEA DEAL?

FROM THIS RECORD? NO, IT DOESN'T DEMONSTRATE THAT.

DID THE STATE ARGUE THE LAWFUL THE CASE OR RES ADJUDICATA?

ESSENTIALLY RES JUDICATA A THE ISSUE WAS RAISED. IT WAS RULED ON. YOU DID NOT APPEAL. YOU WAIVED ANY FURTHER OVERT IT. SO I WOULD ASK THIS COURT TO ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE AND QUASH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL.

CHIEF JUSTICE: THANK YOU. THANK YOU BOTH. THE COURT WILL NOW TAKE A 15-MINUTE RECESS BEFORE HEARING THE LAST CASE ON THIS MORNING'S DOCKET.

MARSHAL: PLEASE RISE.