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## **Paul Thompson v. State of Florida**

CHIEF JUSTICE: GOOD MORNING.

MARSHAL: PLEASE BE SEATED.

CHIEF JUSTICE: ALL RIGHT. THOMPSON VERSUS STATE. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

GOOD MORNING, YOUR HONORS. MY NAME IS JAMES BAXLEY. AT COUNSEL TAKE TABLE IS MY CO-COUNSEL AND WE REPRESENT PAUL THOMPSON.

WOULD YOU START OFF TELLING US THE JURISDICTIONAL BASIS FOR THIS CASE BEING IN THIS COURT? WHAT HAVE YOU ALLEGED AS THE CONFLICT HERE?

THERE IS A CONFLICT BETWEEN THOMPSON AND INSTITUTES. INSTITUTES WAS A -- AND STUTTS WAS A HOLDING SO THAT STUTTS IS NOT DIRECTLY APPLIED UNDER THE WITT ANALYSIS.

IS THAT THE CASE THAT WAS ARGUED FOR JURISDICTION?

I DON'T BELIEVE IT WAS ARGUED FOR JURISDICTION, NO.

WHAT WAS ARGUED AS THE JURISDICTIONAL BASIS FOR THIS COURT?

FOR THIS COURT?

WAS IT CONFLICT WITH HUSS, ITSELF?

YES, YOUR HONOR. MR. THOMPSON IS CURRENTLY INCARCERATED. HE FILED A NOTICE OF APPEAL, SEEK DISCRETIONARY REVIEW, AND THERE IS A CONFLICT WITH HUSS, AND THAT BEING HUSS, WHEN IT INTERPRETED THE STATUTE, DID NOT, WAS NOT A REFINEMENT OR A CHANGE IN THE LAW FOR WHICH A RETROACTIVE ANALYSIS SHOULD BE APPLIED. HUSS BASICALLY STATED, BY READING THE PLAIN WORDING OF THE STATUTE, THAT ANY CONVICTION THAT IS HAPPEN PRIOR TO 1997 COULD NOT BE USED, WHEN ENHANCING AN INDIVIDUAL'S SENTENCE FROM A MISDEMEANOR TO A FELONY.

I UNDERSTAND THE FACTS OF HUSS, AND WHAT HUSS ACTUALLY HELD, BUT DID THE COURT, IN THIS INSTANCE, ACTUALLY GO TO THAT KIND OF AN ANALYSIS, AS TO WHETHER OR NOT THE THE NEW STATUTE, ALLOWED IT.

THE FIFTH DISTRICT DID NOT CERTIFY A QUESTION OR DID NOT CERTIFY A DISTINCTION BETWEEN HUSS AND ITSELF, BUT WHAT IT DID DO, THOMPSON STATED THAT HUSS CANNOT BE APPLIED RETROACTIVE. IF YOU READ THE HUSS DECISION, THE HUSS DECISION BASICALLY JUST INTERPRETED THE STATUTE, AND IN INTERPRETING THE STATUTE, PRIOR TO 1997 CONVICTIONS CANNOT BE USED TO ENHANCE SOMEONE'S SENTENCE, SO IF YOU DO THAT BY THE PLAIN MEANING OF THE STATUTE, THEN MR. THOMPSON'S PRIOR 1997 CONVICTIONS CANNOT BE USED TO ENHANCE HIM.

CAN YOU HELP ME WITH THE PROCEDURAL POSTURE OF THIS CASE. IN HIS DIRECT APPEAL, THAT

WAS THE STATE HAD APPEALED THE DOWNWARD DEPARTURE, BECAUSE HE HAD ORIGINALLY GOTTEN 36 MONTHS FOR THIS, AND THIS WAS PURSUANT TO A PLEA OF GUILTY, CORRECT?

THAT'S CORRECT.

ALL RIGHT. SO AT THAT POINT WAS THERE A CROSS-APPEAL, THAT WAS POST, THE NEW STATUTE, WAS THERE A CROSS-APPEAL BY THE APPELLATE ATTORNEY, TO SAY THAT THOSE WERE, THE CONVICTIONS WERE INVALID, BECAUSE OF THE FACT THAT THEY HAD OCCURRED BEFORE, THE PREDICATE CONVICTIONS WERE INVALID? WAS THAT RAISED IN THE INITIAL APPEAL?

I DON'T BELIEVE THAT WAS RAISED IN THE INITIAL APPEAL. IF I MAY PROCEED, IF I COULD LAY OUT SOME OF THE GROUNDWORK, I THINK WE COULD, THE FACTS OF THE CASE MAY SHED SOME LIGHT ON THIS. MR. THOMPSON ENTERED A GUILTY PLEA BACK IN JULY OF 1999. HE WAS SENTENCED TO 36 MONTHS, DEPARTMENT OF CORRECTIONS. THE STATE ATTORNEYS OFFICE SUCCESSFULLY APPEALED THAT, BECAUSE THEY WENT BELOW THE GUIDELINES. IT WAS REVERSED AND REMANDED.

BUT YOU ARE SAYING THAT PLEA WAS NOT EVEN EVER VALID, BECAUSE HE DIDN'T HAVE THE PREDICATE FELONY.

THAT IS CORRECT.

WHY, THEN, DIDN'T HE MOVE TO WITHDRAW HIS PLEA?

WELL, HE COULD HAVE MOVED TO WITHDRAW HIS PLEA AT THAT TIME. I BELIEVE THE CASE MADDOX, WHICH CITES LEONARD, MADDOX, WHICH WAS DECIDED BY THIS COURT, SAID THAT THERE ARE SOME SENTENCING ERRORS THAT ARE SO FUNDAMENTAL THAT THEY CAN'T BE WAIVED, OR IF THEY ARE UNPRESERVED, THAT THEY CAN'T, THAT --

ISN'T THIS REALLY A SENTENCING ERROR? IF, IN FACT, THE INFORMATION, AND CORRECT ME IF I AM WRONG, THE INFORMATION ACTUALLY CHARGED A FELONY.

THAT'S CORRECT.

AND SO THE COURT WAS FACED WITH THE FACT THAT HE WAS CHARGED WITH FELONY DRIVING WITHOUT, WITH LICENSE SUSPENDED, NO ONE CONTESTED THE UNDERLYING FACTS OF THAT, AND SO THE COURT WOULD SENTENCE HIM ACCORDINGLY.

THAT'S CORRECT.

SO WITH AM NOT HAVING BROUGHT THAT TO THE COURT'S ATTENTION, WHERE IS THE FUNDAMENTAL ERROR?

THE FUNDAMENTAL ERROR IS THAT MR. THOMPSON DID FILE, AFTER HE WAS RESENTENCED TO 59.7 MONTHS DEPARTMENT OF CORRECTIONS, HE FILED A 3.850 MOTION FOR POST-CONVICTION RELIEF, STATING THAT THE PRE-97 CONVICTIONS WHICH THE STATE USED TO ENHANCE HIS SENTENCE COULD NOT BE USED, ACCORDING TO HUSS. THAT IS WHERE HE RAISED THE ISSUE.

AND THAT WAS IN TWO YEARS AFTER, I MEAN, THAT WAS WITHIN THE PROPER WINDOW PERIOD OF TWO YEARS?

YES, YOUR HONOR. THAT WAS A TIMELY 3.850 MOTION, AND SINCE HE DID FILE THAT, THAT WAS THE FIRST TIME THAT IT WAS RAISED. THERE WERE --

WHAT WAS THE ISSUE THAT WAS ACTUALLY RAISED, IN A 3.850? HE DIDN'T RAISE INEFFECTIVE

ASSISTANCE OF COUNSEL, DID HE?

NO, YOUR HONOR.

SO HE REALLY WAS RAISING WHAT ISSUE IN THE 3.850?

HE RAISED THE ISSUE THAT HIS JUDGMENT SHOULD BE VACATED ON THE GROUNDS THAT THE PRE-- 97 CONVICTIONS CANNOT BE USED TO ENHANCE HIS CONVICTION FROM A MISDEMEANOR TO A FELONY.

ISN'T THAT MORE OF AN ILLEGAL SENTENCE ARGUMENT UNDER 3.800? THAT KIND OF ARGUMENT?

IT COULD BE IN A WAY, YES. IT COULD BE AN ILLEGAL SENTENCE, BUT IF MR. THOMPSON'S CONVICTIONS HAD OCCURRED PRIOR, AFTER '7 OR AFTER THE NEW RULES WERE -- AFTER '97 OR AFTER THE NEW RULES WERE PROMULGATED, THEY BE THE SENTENCE HE RECEIVED WAS NOT IN ACCORDANCE WITH THE GUIDELINES. HIS CONVICTION AS A FELONY WAS WHAT WAS ERRONEOUS, SO THE SENTENCE THAT WAS RECEIVED WAS THE COURT SENTENCED HIM PROPERLY BUT IT WAS TO AN ILLEGAL CONVICTION, BECAUSE ACCORDING TO THE STATUTES HE ONLY HAS ONE DRIVING WHILE LICENSE SUSPENDED AND IT SHOULD BE A MISDEMEANOR AT THAT TIME.

WHAT IS THE REMEDY?

THE REMEDY WOULD BE TO VACATE HIS SENTENCE AND SEND HIM BACK AND HAVE HIM SENTENCED AS A MISDEMEANOR.

WANT THE REMEDY BE TO HAVE HIM VACATE THE PLEA AND HAVE HIM GO TO TRIAL?

THAT COULD BE A REMEDY AS WELL.

ON THIS, HE WAS ARRESTED FOR DRIVING WHILE HIS LICENSE WAS SUSPENDED OR REVOKED.

THAT IS CORRECT.

THE REASON IT QUALIFIED AS A FELONY IS BECAUSE HE HAD, ON PRIOR OCCASION, DRIVEN WHILE HIS LICENSE WAS SUSPENDED OR REVOKED, AND WAS CONVICTED OF THAT, CORRECT?

THAT IS CORRECT.

AND HOW MANY TIMES HAD HE DRIVEN WHILE HIS LICENSE WAS SUSPENDED OR REVOKED?

PRIOR TO, I BELIEVE, I KNOW THERE WAS AT LEAST TWO. I BELIEVE THERE WAS FOUR. I CAN'T, I DON'T WANT TO MISLEAD THE COURT. I BELIEVE THERE WAS FOUR, BUT ALL OF THESE WERE PRE-- 97, WHEN THE ELEMENT OF KNOWLEDGE WAS NOT EVEN REQUIRED.

IS THE HUSS CASE, AND OF COURSE WE HAVEN'T EVEN RULED ON THIS ISSUE, SAYS THAT NO MATTER, EVEN IF THE STATE COULD PROVE THAT HE KNEW HIS LICENSE WAS SUSPENDED IN THE PRIOR CONVICTIONS, THAT THEY CAN'T RELY ON ANY CONVICTIONS BEFORE 1997, BECAUSE THE, BECAUSE KNOWLEDGE WAS NOT AN ELEMENT?

THAT IS OUR POSITION. BEFORE --

WE WOULD HAVE TO GET, YOU KNOW, THE PROBLEM WITH THAT IS WE HAVE NEVER EVEN RULED ON THAT ISSUE, HAVE WE? I MEAN, WE HAVE TO FIRST DECIDE WHETHER WE AGREE THAT THAT IS A PROPER RULE, PROPER INTERPRETATION OF THE STATUTE.

THAT IS CORRECT.

BUT IS THAT, SO IS THAT ISSUE BEFORE US, IS THAT WE HAVE TO DECIDE WHETHER HUSS, IS THAT THE FIRST THRESHOLD WE HAVE TO GET TO, WHETHER HUSS, BY SAYING UNDER NO CIRCUMSTANCE, CAN YOU EVER HAVE A PREDICATE CONVICTION BEFORE 1997, FOR THIS RESPECT THAT, BECAUSE OF THE -- FOR THIS, THAT BECAUSE OF THE FACT THAT KNOWLEDGE WASN'T AN ELEMENT, THAT WE HAVE TO, FIRST, MAKE THAT HOLD SOMETHING.

I WOULD HOPE THAT THE COURT, THAT IS WHAT WE WERE HOPING THAT THE COURT WOULD DO, FIND THAT THE INTERPRETATION OF HUSS, WELL, HUSS WAS BASICALLY INTERPRETATION OF THE STATUTE, AND THAT IF YOU READ THE STATUTE, IT STATES ALL OF THE ELEMENTS, THERE IS NO AMBIGUOUS TERM FOR WHICH A COURT TO RULE ON. EVERYTHING IS LAID OUT PRETTY --

WHAT I AM GETTING, HAVING A HARD TIME WITH IS THE FACT THAT WHAT HE PLED GUILTY TO WAS THE CHARGE THAT HE WAS CHARGED WITH DRIVING WHILE HIS LICENSE WAS SUSPENDED AND THAT HE PLED GUILTY TO THE FACT THAT HE WOULD BE SUBJECT TO THE ENHANCEMENT CORRECT? SO NOW WHAT HE IS TRYING TO DO IS SAY, WELL, ACTUALLY I GET THE BENEFIT OF A STATUTE WHICH HAS A KNOWLEDGE FACTOR IN IT, EVEN THOUGH I PLED GUILTY TO THE FACT THAT I WAS GUILTY OF THE STATUTE! SO I AM HAVING A HARD TIME WITH THAT.

WELL, I DON'T BELIEVE --

IF THIS WAS AN INEFFECTIVE ASSISTANCE OF COUNSEL AND HE WAS SAYING I WAS MISLED, I DIDN'T UNDERSTAND IT, THAT IS NOT THE POINT HERE. THE POINT HERE IS HE PLED GUILTY TO THE STATUTE, TO A VIOLATION OF THE STATUTE.

THAT'S CORRECT. HE DID PLEAD GUILTY, BUT I BELIEVE THE CASE LAW IN OUR POSITION IS THAT, EVEN THOUGH MR. THOMPSON DID PLEAD GUILTY, WHAT HE WAS SENTENCED TO WAS AN ILLEGAL CONVICTION. THE DUE PROCESS, BAY THE FEDERAL, THE 14th AMENDMENT, STATES THAT, BEFORE A PERSON CAN BE CONVICTED, EACH ELEMENT OF A CRIME MUST BE PROVED BEYOND AND TO THE EX-LUTION OF EVERY REASONABLE DOUBT. IN THIS CASE, UNDER THE NEW STATUTE, WHICH MR. THOMPSON, WHICH HE ENTERED HIS PLEA VOLUNTARILY TO, STATES THAT YOU HAVE TO HAVE KNOWLEDGE. IN THE OTHER CONVICTIONS, WHICH THE STATE IS RELYING UPON, THEY DIDN'T PROVE THE KNOWLEDGE ELEMENT. WHEN THE NEW 3.22342-C WAS ENACTED, IT BASICALLY, IN EFFECT, CREATED A NEW STATUTE, A NEW LAW, AND I BELIEVE THE COURT IN HUSS, HAD, MADE THE SAME STATEMENT, THAT --

DIDN'T YOUR DEFENDANT, BY, I THINK THE POINT HERE IS DIDN'T YOUR DEFENDANT, BY PLEADING GUILTY, ACKNOWLEDGE THAT HIS PRIOR CONVICTIONS SATISFIED THE REQUIREMENT OF HAVING HAD YOU KNOW, TWO PRIOR CONVICTIONS, BEFORE YOU ARE ELIGIBLE FOR A FELONY CONVICTION? SO BY PLEADING GUILTY TO THAT, HE SAID, YES, I MEET THAT CRITERIA.

I DON'T BELIEVE HE DID THAT BY ENTERING HIS PLEA OF GUILTY.

WHAT DOES THAT MEAN, ENTERING A PLEA OF GUILTY?

HE ENTERED HIS PLEA OF GUILTY AS TO THE OFFENSE, EVEN THOUGH IT WAS, I THINK I AM GETTING MYSELF CONFUSED HERE.

ARE YOU ANALOGIZING THIS TO A SITUATION WHERE SOMEBODY PLEADS TO BEING A HABITUAL OFFENDER AND THERE IS NO DOUBT THAT THE UNDERLYING PREDICATE FELONIES WOULD NOT STATUTORILY BE PERMISSIBLE, THAT THERE IS NO WAY, LEGALLY, THAT THE COURT WOULD EVER CONVICT THE PERSON NOW, THE PROBLEM IS HERE, AGAIN, BACK TO WHAT JUSTICE WELLS IS SAYING, THAT BY PLEAING GUILTY, HE HAD -- BY PLEADING GUILTY, HE HAD THESE PRIOR CONVICTIONS AND WE CANNOT SET THAT ASIDE ON SOME OTHER BASIS, THAT HE ADMITTED

THOSE PRIOR CONVICTIONS SATISFIED THAT HE KNEW HE DIDN'T HAVE A LICENSE WHEN HE WAS DRYING AND THAT THERE FOR THOSE -- DRIVING, AND THAT THERE FOR THOSE PRIOR CONVICTIONS, IT HAPPENED TEN TIMES IN A YEAR AND THEREFORE THERE WAS EVIDENCE IN HIS TRIAL THAT HE DID KNOW. WHY DO WE JUMP AND SAY THAT THEY COULD NEVER BE USED, EVEN IF SOMEONE PLED GUILTY TO THE CRIME?

I BELIEVE, IF THE STATE WAS ABLE TO PROVE THAT AT THAT POINT IN TIME, THE PRIOR CONVICTIONS, THAT THERE WAS KNOWLEDGE, THEN THEY COULD BE USED, BUT JUST MERE FACT THAT HE ENTERED HIS PLEA OF GUILTY, IT IS OUR POSITION THAT DOESN'T WAIVE A FUNDAMENTAL ERROR HERE THAT THE STATE, WHO HAS THE BURDEN OF PROVING THAT, HAS NOT PLOVED. THAT.

WHEN YOU PLEAD -- HAS NOT PROVED THAT.

WHEN YOU PLEAD GUILTY, DON'T YOU, IN FACT, RELIEF THE STATE OF HAVING TO GO THROUGH PROVING THE ELEMENTS, BECAUSE YOU ARE ACKNOWLEDGING THAT THE ELEMENTS OF THE CRIME, IN FACT, EXIST.

THAT IS TRUE FOR DRIVING WHILE LICENSE SUSPENDED. FOR THE MAIN PORTION THAT HE HAD ACTUAL KNOWLEDGE IN THIS CASE, YES, I WOULD SAY THAT IS TRUE, BUT AS FOR THE PRE'97 CONVICTIONS, I DON'T BELIEVE SO, AND I BELIEVE HIS MOTION FOR POST-CONVICTION RELIEF OUTLINES THAT HE DID NOT BASICALLY PLEAD TO THOSE PRIOR CONVICTIONS.

WAS THERE A PLEA BARGAIN HERE OR DID HE JUST PLEAD GUILTY IN AN OPEN PLEA AND TAKE WHATEVER THE SENTENCE THAT THE COURT HAD?

THERE WAS A PLEA BARGAIN THAT SAID BEFORE HE WAS ORIGINALLY SENTENCED, TO 36 MONTHS, BECAUSE OF SOME AILING HEALTH, AND AFTER THAT, THE STATE DID APPEAL THE SENTENCE, BECAUSE IT DID GO BELOW THE GUIDELINES, AND THEN HE WAS RESENTENCED TO 59.7 MONTHS.

WELL, IF YOU, I AM STILL NOT SURE THAT I UNDERSTAND CLEARLY. YOU SAY THERE WAS A PLEA BARGAIN.

THAT'S CORRECT.

WAS THERE A PLEA BARGAIN IN WHICH THE STATE.

I BELIEVE THAT IS CORRECT.

DID THE STATE GO BELOW THESE GUIDELINES?

YES, IT IS MY UNDERSTANDING THAT THEY DID.

SO THE STATE AGREED TO THAT SENTENCE BUT THEN TOOK AN APPEAL?

THAT WAS MY UNDERSTANDING BECAUSE OF SOME FACTS THAT HAPPENED AFTER THE SENTENCE WAS, I HAVE, I SEE I AM RUNNING OUT OF MY TIME HERE. I CAN ANSWER YOUR QUESTION, BUT I BELIEVE THERE WAS SOME EXTENUATING CIRCUMSTANCES THAT HAPPENED AFTERWARDS WHICH WARRANTED THE STATE ATTORNEYS OFFICE TO APPEAL THE SENTENCING. IF I COULD PLEASE JUST SAVE THE REST OF MY TIME FOR REBUTTAL.

CHIEF JUSTICE: ABSOLUTELY. THANK YOU.

THANK YOU.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS PAM KOLLER. I AM THE ASSISTANT ATTORNEY GENERAL FOR THE STATE OF FLORIDA.

COULD YOU GIVE REFERENCE TO HOW THIS STARTED OUT, WHETHER THERE WAS A PLEA NEGOTIATION AND WHAT THE TERMS OF THAT WERE AND WHAT HAPPENED.

ALL I AM BASING MY KNOWLEDGE IS ON THE RECORD, AND THERE WAS NOTHING ON THE RECORD TO INDICATE THAT THERE WAS ANY KIND OF PLEA AGREEMENT, AND IT IS MY UNDERSTANDING THAT THE STATE DID NOT AGREE TO A DOWNWARD DEPARTURE AND THAT IS WHY WE APPEALED, BUT I DO NOT KNOW, BASED ON THE RECORD THAT WE HAVE BEFORE US.

SO THIS GOT BACK INTO COURT, AFTER THE DEFENDANT, ON HIS OWN, NOTICED THE DECISION OUT OF THE FIRST DISTRICT, AND FILED A PRO SE?

NO.

TELL ME.

HE HAD AN ATTORNEY, WHO FILED, HE FIRST FILED IN APRIL OF 19 OR APRIL OF 2001. HE FILED A 3.850 QUORUM NOVUS, AND THE STATE SAID IT DIDN'T MEET THE REQUIREMENTS AND SO FORTH, SO HE REFILED UNDER A 3.850-A, BASICALLY, AND THAT WAS THE CONVICTION IN HUSS.

THAT WAS THE SOLE ISSUE THAT WAS RAISED THEN?

YES, AND THE ISSUE BECAME WHETHER OR NOT HUSS WAS RETROACTIVE DOWN BELOW AND IN THE FIFTH DISTRICT COURT OF APPEALS.

SEE, THIS IS WHERE I AM HAVING TROUBLE ABOUT WHERE WE ARE. IF THE LAW, IN 1997, WAS THAT IT CHANGED TO REQUIRE KNOWLEDGE, AND IF THE KNOWLEDGE ISN'T -- LET ME GO BACK ONE. DOES THE STATE AGREE THAT HUSS IS THE PROPER INTERPRETATION OF THE FELONY DUI, DWLS STATUTE?

NO, MA'AM.

IS THAT THE FIRST ISSUE WE HAVE TO GET TO? BECAUSE IF HUSS IS WRONG, THEN WE DON'T EVEN GET TO THE NEXT STEP.

OBVIOUSLY FOR PURPOSES OF THE STATE'S POSITION, OUR FIRST STANCE IS THAT THERE IS NO CONFLICT ON THE FACE OF THOMPSON AND HUSS, AND THEN SECOND, WE WOULD BASICALLY ARGUE, WHICH THIS COURT HAS ALLUDED TO, THAT HE IS PROCEDURALLY BARRED FROM RAISING THIS ISSUE ON A 3.850, THE HUSS ISSUE, BECAUSE HE DID NOT RESERVE THE ISSUE WHEN HE FILED HIS PLEA AND HE DID NOT WITHDRAW HIS PLEA AND THE CLAIM IS CHALLENGING CONVICTION RATHER THAN CHALLENGING EFFECTIVENESS OF HIS COUNSEL OR MOVING TO WITHDRAW HIS PLEA, AND THAT IS WHY I SUPPLEMENTED THE COURT WITH THE JONES CASE, WHERE THE FIRST DCA AGREED THAT THE DEFENDANT FAILED TO RAISE IT ON DIRECT APPEAL AND FAILED TO CHALLENGE IT ON THE 3.850, HE WAS BARRED TO DO SO AND THAT WAS THE POSITION IN HUSS, SO THAT IS THE SECOND POSITION. OUR THIRD POSITION IS, YES, HUSS IS WRONGLY DECIDED. THERE HAS ALWAYS BEEN KNOWLEDGE AS AN ELEMENT TO THIS OFFENSE AND PREVIOUSLY IT WAS IMPLICITLY THERE AND NOW IT IS EXPLICITLY THERE. AS I SAID TO THE COURT, THERE IS A DRIVERS LICENSE SUSPENDED AND REVOKED, RESULTING IN DEATH.

THAT SEEMS, TO ME, THAT IF THE FIRST DISTRICT IS SAYING THAT IT IS, THAT HUSS IS -- THAT HUSS IS THE LAW, AND IF THEY ARE NOT GOING TO APPLY IT RECEPT ROW ACTIVELY -- RETROACTIVELY, THAT IS THE POINT.

THAT IS THE POINT. KIND OF GOING BACK TO MY OTHER ARGUMENT, THAT BY GOING TO THE ISSUE OF RETROACTIVITY, THEY ACKNOWLEDGE THAT THIS PROCEDURE IS -- THAT THIS ISSUE IS PROCEDURALLY BARRED, BECAUSE THE ONLY WAY IT CAN GET AROUND THE BAR IS IF THIS IS SUBJECT TO RECEIPT-ACTIVITY.

I DON'T UNDERSTAND HOW SOMETHING CAN BE A CHANGE OF LAW, IF THIS COURT HASN'T YET EVEN SPOKEN ON IT.

ABSOLUTELY IT CANNOT BE. THERE CANNOT BE A CHANGE OF LAW WITHOUT THIS COURT'S ISSUING AN OPINION ON IT.

CAN I ASK YOU SOMETHING ABOUT THE STATUTE.

YES, SIR.

BEFORE 1997, THE STATUTE PROTECTED SOMEONE FROM DRIVING WHILE LICENSE WAS CANCELLED, SUSPENDED OR REVOKED, AND IF YOU DROVE WHILE LICENSE WAS SUSPENDED OR REVOKED, YOU COULD GET, IT WAS A MISDEMEANOR THE FIRST TIME, A MISDEMEANOR OF THE FIRST-DEGREE THE SECOND TIME, AND THE THIRD TIME IT WAS A THIRD-DEGREE FELONY.

CORRECT.

WITHOUT ANY KNOWLEDGE REQUIREMENT AT ALL.

I DISAGREE WITH THAT.

THE STATUTE ITSELF, DOESN'T IMPUTE A KNOWLEDGE REQUIREMENT, DOES IT? THE PRE'97 STATUTE.

IT DOESN'T LIST ONE.

THEN, IN 1997, WE HAVE A NEW STATUTE THAT SAYS, IF YOU ARE DRIVING WHILE LICENSE HAS BEEN CANCELLED, SUSPENDED OR REVOKED, YOU ARE GUILTY OF A MOVING VIOLATION, RIGHT?

EVEN WITHOUT KNOWLEDGE, CORRECT.

THAT IS THE SAME LANGUAGE THAT WAS IN THE PREVIOUS STATUTE IS NOW IN THIS STATUTE, BUT INSTEAD OF BEING A MISDEMEANOR OR FELONY, IT IS NOW A MOVING VIOLATION. THAT SAME LANGUAGE.

I WOULD CHARACTERIZE IT AS THAT THEY ADDED A LACK OF KNOWLEDGE MOVING VIOLATION.

WE HAVE ALREADY AGREED THAT THERE WAS NO LANGUAGE REQUIREMENT IN THE STATUTE, ITSELF, BEFORE.

NOT EXPLICITLY.

RIGHT. OKAY. AND THERE IS NONE IN THE FIRST PART OF THIS STATUTE, EITHER, SO THEY ARE ABOUT THE SAME THING, JUST MOVE IT OVER AND NOW INSTEAD OF BEING A CRIME, IT IS A MOVING VIOLATION.

OKAY.

AND THEN NUMBER TWO SAYS IF YOU HAVE BEEN DRIVING WHILE CANCELLED, SUSPENDED OR REVOKED, KNOWING OF SUCH CANCELLATION OR SUSPENSION, THE FIRST TIME IT IS A MISDEMEANOR, THE SECOND TIME A THIRD-DEGREE MISDEMEANOR -- A FIRST-DEGREE

MISDEMEANOR AND THE THIRD TIME A FELONY. SO THAT SAYS TO ME THAT IF YOU ARE CONVICTED OF DRIVING WHILE KNOWING OF SUCH CANCELLATION, REVOCATION OR SUSPENSION, YOU ARE GUILTY OF A SECOND-DEGREE MISS DHON OR AND SO ON AND SO -- MISDEMEANOR AND SO ON AND SO FORTH, SO EACH CONVICTION HAS TO BE WITH THE KNOWLEDGE REQUIREMENT.

THERE HAS ALWAYS BEEN A KNOWLEDGE ELEMENT.

CAN YOU TELL ME WHERE THAT IMPLICITLY COMES FROM.

SURE. THIS COURT READ INTO THE DRIVING WHILE LICENSE SUSPENDED OR REVOKED, UNDER 322.24 BASICALLY RESULTING IN DEATH. AND THE STATE CHALLENGED AND SAID ALL YOU HAVE DONE IS CRIMINALIZED SIMPLE NEGLIGENCE. YOU CAN'T DO THAT. AND THIS COURT SAID THE CRIME IS KNOWINGLY DRIVING WITH A SUSPENDED LICENSE. THAT IS THE WILLFUL ACT THAT CONSTITUTES THE CRIME IN THIS OFFENSE. IN WAITS V STATE, THE DEFENSE CHALLENGED CONVICTION FOR OPERATING A VEHICLE WITHOUT A DRIVERS LICENSE, RESULTING IN DEATH, AND THE FIFTH DISTRICT COURT OF APPEAL RESULTING IN COMBS, SAYS WE DON'T LIKE SPECIFIC CRIMES WITHOUT THEIR BEING A KNOWING ELEMENT, AND WAITS SAID I DIDN'T KNOW MY LICENSE WAS NOT VALID.

DIDN'T CHACONE SAY IT WAS UP TO THE LEGISLATURE TO SET OUT THE ELEMENTS OF A CRIME?

I THINK THAT IS BASICALLY WHAT THEY DID WHEN THEY AMENDED THE STATUTE ON OCTOBER 1997. THEY SAID THERE IS KNOWLEDGE AND WE ARE GOING TO INCORPORATE IT UNTIL THE STATE APPROVES IT. YOU PROVE IT WITH A PRIOR UNDER SUBSECTION ONE, FOR A FINAL JUDGMENT IN COURT, THAT SORT OF THING.

THE PROBLEM THAT I HAVE IS THIS IDEA THAT EITHER IT IS UP TO THE COURT TO SET OUT ELEMENTS OF A CRIME OR IT IS UP TO THE LEGISLATURE TO SET OUT ELEMENTS OF A CRIME. IN FACT, I WROTE AN OPINION NOT LONG AGO, IN WHICH I VOICED THAT STATEMENT, IN A CASE CALLED SCOTT. I THINK THE LEGISLATURE SUBSEQUENTLY HAS MADE IT PRETTY CLEAR THAT IT IS UP TO THEM TO SET OUT ELEMENTS OF A CRIME, AND SO I AM SOMEWHAT CONCERNED ABOUT THIS IDEA THAT THERE CAN BE AN IMPLICIT ELEMENT.

WELL, THE PROBLEM WITH THAT IS THE STATE WAS BURDENED WITH THAT ELEMENT, REGARDLESS, BECAUSE IN WAITS, THE FOURTH DISTRICT COURT OF APPEALS AGREED WITH THE DEFENDANT, NEW YORK CITY YOU DIDN'T HAVE KNOWLEDGE. THE STATE PROVE ALL ELEMENTS, THERE FOR YOU ARE NOT GUILTY AND THEY DISMISSED HIS CONVICTIONS, SO PRIOR TO OCTOBER 1997, WE HAD TO PROVE KNOWLEDGE, AND IF IT DIDN'T, HIS CONVICTION GOT REVERSED, SO WE ALWAYS HAD TO PROVE KNOWLEDGE. IT JUST DIDN'T EXPLICITLY SAY HOW HE HAD TO DO SO. THAT WAS THE ARGUMENT BEFORE OCTOBER OF OF 1997, THAT THERE WAS A KNOWLEDGE ELEMENT AND THE STATE DIDN'T PROVE IT SO WE ARE NOT GUILTY. NOW THEY TURN AROUND AND SAY THERE WAS NO KNOWLEDGE ELEMENT BEFORE.

DOES THE RECORD HERE CONTAIN WHAT THE PLEA, WHAT THEY TALKED ABOUT THE JUDGE AND THE DEFENDANT, AT THE TIME THE PLEA WAS ENTERED?

I DON'T SEE, I DON'T THINK IT WAS EVER TRANSSCRIBED.

OKAY.

BECAUSE ALL WE DID WAS WE APPEALED THE SENTENCE, SO I DON'T KNOW THAT IT WAS EVER TRANSSCRIBED. PERHAPS IT WAS. I DON'T KNOW.

WAS STATE V SMITH DECIDED IN 1984, AROUND THERE?

YES.

AND WERE ALL OF THE PRIOR CONVICTIONS AFTER STATE VERSUS SMITH WAS DECIDED?  
IN THIS CASE?

YES.

YES. IT WAS TWO IN 1992 AND ONE IN 1997, ACCORDING TO THE INFORMATION FILED IN THIS CASE.

WASN'T STATE VERSUS SMITH NOT JUST DRIVING WITH A LICENSE SUSPENDED, BUT WAS DRIVING WITH, WHILE A LICENSE WAS SUSPENDED AND CAUSING GREAT BODILY HARM OR SOMETHING. AREN'T THOSE TWO DIFFERENT STATUTES WE ARE TALKING ABOUT HERE?

IT IS JUST A DIFFERENT SUBSECTION OF 322.234.

A DIFFERENT SUBSECTION OF THE STATUTE.

CORRECT.

SO WHAT DO YOU HAVE THAT SAYS EXPLICITLY, THAT THERE WAS A KNOWLEDGE ELEMENT TO JUST DRIVING WITH A LICENSE SUSPENDED?

WELL, JUST BASED ON THOSE CASES, WHERE IT IS HARD TO GET A SIMPLE MISDEMEANOR CASE UP TO THE SUPREME COURT OR CERTAINLY EVEN THE DISTRICT COURTS OF APPEAL, SO THE CASES INVOLVING DEATH ARE THE CASES THAT GET UP TO THAT COURT, AND I MEAN, THAT IS WHY I CITED WAITS AND I CITED TO BROWN, WHERE IT IS SIMILAR TO THE SUBSECTION RESULTING IN DEATH CASES, THAT THEY READ INTO IT A KNOWLEDGE REQUIREMENT, AND THEY FOCUSED ON NOT THE ACCIDENT, ITSELF, OR THE CAUSATION OF DEATH. THEY FOCUSED ON THAT YOU KNOWINGLY DROVE ON THE STREETS WITHOUT EITHER A VALID LICENSE OR A SUSPENDED LICENSE, SO THAT IS WHERE I AM GETTING THAT THERE WAS ALWAYS A KNOWLEDGE ELEMENT TO THIS OFFENSE.

WHAT IF THERE WAS A CASE, AND I AM JUST TRYING TO THINK PROCEDURALLY WHAT WE HAVE DONE WITH NOT LETTING FUNDAMENTAL ERROR BE RAISED ON DIRECT APPEAL AND THEN WHETHER YOU HAVE LAWYER OR NOT. IF THERE WAS A CASE WHERE, CLEARLY, THE OFFENSE WAS A MISDEMEANOR, BUT THE STATE WAS CHARGING -- THE STATE, THROUGH ITS CHARGING DOCUMENTS, HAD CHARGED THE DEFENDANT WITH IT AS A FELONY, AND THE DEFENDANT PLED GUILTY TO THAT FELONY, YOU KNOW, WITH OR WITHOUT A LAWYER, WHAT IS THE, IN TERMS OF 3.800, AGAIN, IT TALKS ABOUT THE ILLEGAL SENTENCE, BUT IF SOMEONE DOESN'T HAVE JURISDICTION, IN OTHER WORDS IF SOMEBODY IS CONVICTED AFTER FELONY THAT IS CLEARLY A MISDEMEANOR, WHAT IS THE STATE'S POSITION ABOUT WHAT IS THE TIME PERIOD IN WHICH TO REMEDY THAT. CAN THAT BE RAISED ON A DIRECT APPEAL WITHOUT AN OBJECTION, OR DOES THAT, IS IT 3.800, WHICH ONLY DEALS WITH SENTENCE, OR IS IT 3.850, WHICH HAS A TWO-YEAR TIME LIMIT?

IT WOULD BE THE STATE'S POSITION, BASICALLY, AT LEAST MY POSITION, THAT HE IS CHALLENGING HIS CONVICTION. HE IS NOT CHALLENGING HIS SENTENCE, BECAUSE BASICALLY WHEN YOU ARE CHALLENGING YOUR SENTENCE, YOU ARE SAYING YES, I WAS PROPERLY CONVICTED. I AM JUST CHALLENGING THE APPLICATION OF THE SENTENCING STATUTES TO MY CONVICTION. IN THIS CASE AND LIKE IT, HE IS CHALLENGING HIS CONVICTION. HE SAYS I WAS WRONGLY CONVICTED OF A FELONY, SO I WOULD SAY THAT IT IS UNDER THE 3.850 TIME PERIOD.

SO HE DID, SO IF, IN FACT, HUSS IS CORRECT, THEN HE DID CHALLENGE IT TIMELY, BECAUSE HE

CHALLENGED IT THE ONLY TIME WITHIN THE TWO-YEAR PERIOD. IF, AS A MATTER OF LAW, YOU COULDN'T USE PRE-1997 CONVICTIONS FOR THE POST 1997 STATUTE, CORRECT? IT WOULD ONLY BE GUILTY OF A MISDEMEANOR.

I WOULD SAY HE IS PROCEDURALLY-BARRED. I MEAN, HE -- WHAT IS THE CONCEPT?

IF HE HAS PUT THE CASE OR PUT HIS ISSUE IN TERMS OF EFFECTIVE ASSISTANCE OF COUNSEL OR - OF INEFFECTIVE ASSISTANCE OF COUNSEL OR A CHALLENGE AFTER MOTION TO A PLEA. THAT IS NOT HOW WE GOT HERE. HE CHALLENGED THAT IS NEVER CHALLENGED BEFORE, AND HE IS NOT ALLOWED TO CHALLENGE IT.

DO YOU THINK IF SOMEBODY PLEADS TO A FELONY THAT IS UNDISPUTEBLY A MISDEMEANOR, THAT THEIR ONLY RECOURSE IS TO SAY THAT THEIR LAWYER WAS INEFFECTIVE, AS OPPOSED THAT THE CIRCUIT COURT, HAD JURISDICTION TO EVEN IMPOSE, EVEN TO CONVICT HIM TO BEGIN WITH?

WELL, I ASSUME IF HE WAS IN DISPUTEBLY GUILTY AFTER NINES OR, HIS ATTORNEY WOULD HAVE BEEN SCREAMING FROM THE GET-GO, FROM THE TIME HE WAS SENTENCED TO THE CRIME THAT -- TO THE TIME YOU RAISE IT ON DIRECT APPEAL AND YES, HE IS INEFFECTIVE FOR NOT RAISING IT, AND THAT IS HUSS'S CONVICTION.

IF IT WAS NOT CHALLENGED AT THE TIME THAT THE ATTORNEY ENTERED THE PLEA, WHY WOULD THE ATTORNEY BE INEFFECTIVE?

THOMPSON'S ARGUMENT IS THAT THE LAW CHANGED OR IF THERE WAS ANY CHANGES OCCURRED PRIOR TO OCTOBER 1, 1997, HIS ATTORNEY WAS ON NOTICE. HUSS'S ATTORNEY DID T HUSS'S -- ATTORNEY DID IT. HUSWAS ARRESTED IN MARCH 1999 FOR AN OFFENSE.

WHAT IF THE ATTORNEY DOESN'T RAISE IT AND WE SAY JUST BECAUSE YOU DON'T FIGURE OUT THE LAW CORRECTLY, DON'T WE SAY IT IS INEFFECTIVE ASSISTANCE OF COUNSEL? OUR DEATH SENTENCES ARE REPLETE WITH THAT, WHERE SOMEBODY GETS THE PEN FIT OF SOMEBODY -- BENEFIT OF SOMEBODY WHO HAS FIGURED OUT THE LAW AND SOMEONE ELSE'S LAWYER DOESN'T FIGURE OUT THE ISSUE. I AM CONCERNED ABOUT US TURNING PURE LEGAL ISSUES INTO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AND TRYING TO KEEP THIS TO WHERE, IF YOU ARE RIGHT THAT HUSS IS WRONG, THAT IS WHAT WE SHOULD BE DEALING WITH, BUT IF HUSS IS RIGHT, I AM TRYING TO UNDERSTAND WHY THIS DEFENDANT, WHO IS NOW, I ASSUME HE IS STILL SERVING THIS 58-MONTH SENTENCE, HE SHOULD BE STILL IN THE PRISON OF THE STATE, IF HE HAS ONLY BEEN, IF HE IS ONLY GUILTY AFTER MISDEMEANOR.

WELL, I MEAN, WE HAVE ALWAYS BEEN, THE KURTS HAVE ALWAYS BEEN IN -- THE COURTS HAVE ALWAYS BEEN IN A BALANCING POSITION, AS FAR AS FINAL CONVICTIONS.

WHAT IS THE STATE'S INTEREST IN WANTING THIS TO HAPPEN IN THIS CASE?

WELL, THE FINALITY OF JUDGMENT THAT WE DON'T HAVE TO WORRY ABOUT PROSECUTING SOMEBODY, BECAUSE WE CAN PROVE KNOWLEDGE IN THIS CASE. WE CAN PROVE KNOWLEDGE. I MEANS, HE HAD THREE PRIORS, SO EVEN IF YOU THROW OUT THE FIRST ONE AND SAY HE DIDN'T KNOW WHAT HE WAS DOING, BY THE THIRD TIME HE GETS ARGESTED IN 1999, WHICH -- ARRESTED IN 1999, WHICH IS THE INSTANT ARREST, WE CAN PROVE KNOWLEDGE.

THE ISSUE ISN'T WHETHER YOU CAN PROVE KNOWLEDGE NOW, BECAUSE UNDER THE STATUTE, HE HAD TO HAVE BEEN CONVICTED OF DOING IT WITH KNOWLEDGE BACK THEN. THE ONLY THING YOU CAN PROVE NOW IS WHETHER HE DID IT WITH KNOWLEDGE IN THIS CASE, NOT WHETHER HE DID IT IN HIS PRIOR CONVICTIONS.

I THINK THE PROBLEM WITH HUSS IS BASICALLY IT NULLFIES THESE PRIOR CONVICTIONS, THAT, I MEAN, IF THEY HAD REPEALED 322.24 COMPLETELY, THOSE PRIOR CONVICTIONS IN A 322.24 WOULD STILL BE VALID CONVICTIONS, BUT WITH HUSS THEY ARE NOT. THEY ARE IN SOME KIND OF LIMBO.

THEY ARE NOT CONVICTIONS UNDER THE NEW STATUTE OF DRIVING WITH LICENSE SUSPENDED, KNOWING OF SUCH SUSPENSION. THEY ARE JUST CONVICTIONS OF DRIVING WHILE LICENSE SUSPENDED OR REVOKED.

LACK OF KNOWLEDGE IS NOT A --

I KNOW YOU ARE ARGUING THAT WE IMPUTED KNOWLEDGE IN THE OTHER CASES, AND I UNDERSTAND THAT, BUT I AM JUST SAYING YOUR ARGUMENT THAT HE WAS, THAT YOU CAN PROVE KNOWLEDGE IN THIS CASE, I DON'T THINK IT IS UP TO YOU TO PROVE KNOWLEDGE ANYMORE. HE WAS CONVICTED UNDER THE PRIOR STATUTE, AND THAT EITHER I AM PUTS KNOWLEDGE OR DOESN'T. HIS OTHER CONVICTIONS AREN'T UNDER THE STATUTE. THE ONLY THING YOU CAN PROVE IN THIS CASE IS THAT HE HAD KNOWLEDGE, AND YOU MAY BE ABLE TO PROVE THAT, BUT I DON'T THINK IT IS UP TO YOU TO PROVE THAT HE HAD KNOWLEDGE IN THE OTHER CASES.

NO. AND THAT IS PART, THAT IS MY PROBLEM WERE GOING BACK THAT FAR. I MEAN, THAT IS MY WHOLE PROBLEM WITH HUSS IS SAYING NOT ONLY DO YOU HAVE TO, NOT ONLY ARE WE GOING TO IN VAM DATE THIS PRIOR CON -- INVALIDATE THIS PRIOR CONVICTION WHICH YOU PLED TO, THEN WE ARE GOING TO TURN AROUND AND SAY WE ARE GOING TO INVALIDATE THE TWO OR THREE PRIOR CONVICTIONS THAT YOU WERE CONVICTED OF. HOW FAR BACK ARE YOU GOING TO GO?

UNDER THE NEW STATUTE, IF HE HAD BEEN CONVICTED AFTER 1997 WITHOUT KNOWLEDGE, ALL HE WOULD HAVE GOTTEN WAS A MOVING VIOLATION. ISN'T THAT CORRECT? UNDER THE NEW STATUTE, IF HE WAS DRIVING WITH SUSPENDED, WITHOUT KNOWLEDGE --

THEN WE ARE SUPPOSING AGAIN. WE DON'T KNOW WHAT THE FACTS OF THAT CASE ARE, AND THAT IS THE PROBLEM WITH TRYING TO GO BACK AND FIGURE IT OUT FROM THIS VANTAGE POINT. WE DON'T KNOW WHAT THE STATE COULD HAVE PROVEN AT THAT TIME, SO YOU ARE PRESUMING THAT HE WOULD NOT HAVE HAD KNOWLEDGE. WE PROBABLY OR MAYBE COULD HAVE PROVEN IT, UNDER THIS, UNDER THE NEW STATUTE. WHY SHOULD IT BE FULL NEED, JUST BECAUSE THE -- NULLFIED, JUST BECAUSE THE STATUTE SPECIFICALLY AS A KNOWLEDGE ELEMENT.

THOSE CONVICTIONS HAVE NEVER BEEN SET ASIDE, IS THAT CORRECT?

NO, SIR.

OR CHALLENGED.

NO, SIR. AND HE HAS NEVER CHALLENGED THE KNOWLEDGE ASPECT, EITHER. HE HAS NEVER SAID HE DOESN'T HAVE KNOWLEDGE. THIS IS SO FAR BACK, 1992 THAT THESE PRIOR CONVICTIONS CAME FROM.

HOW MANY PRIOR CONVICTIONS WERE THERE, BY THE WAY?

I DON'T HAVE HIS CERTIFIED DRIVING RECORD. THE ONLY INFORMATION THAT I HAVE LISTS THREE, TWO IN 1991 AND ONE IN 1997. SO THAT IS ALL THAT I HAVE GOT IN FRONT OF ME.

WE LOOK BACK AT WHAT WAS FILED, SO THE STATE WOULD SAY THAT WHAT SHOULD HAVE

HAPPENED HERE IS BECAUSE THE DEFENDANT WANTS TO PROVE THAT HE DIDN'T HAVE KNOWLEDGE, THAT HE SHOULD HAVE TO WITHDRAW HIS PLEA, AND THEN THAT WOULD GIVE THE STATE A CHANCE TO PROVE THAT, THE VALIDITY OF THOSE PRIOR CONVICTIONS, BASED ON THAT, WHEN THEY, THAT THE CONVICTION WAS BASED ON KNOWLEDGE.

HIS PRIOR CONVICTIONS WERE BASED ON KNOWLEDGE? YOU KNOW, AGAIN, THAT GETS INTO A PROBLEM, AS FAR AS HOW LONG IS THE STATE GOING TO BE REQUIRED TO PROVE A PRIOR CONVICTION? IT IS JUST --

YOUR ARGUMENT IS THAT THEY HAD TO HAVE BEEN BASED ON KNOWLEDGE BECAUSE OF STATE VERSUS SMITH. HE COULD NOT HAVE BEEN CONVICTED UNLESS HE HAD KNOWLEDGE.

CORRECT. I PROSECUTED THESE CASES BACK IN, BEFORE, PRIOR TO 1997, AND A DEFENDANT COMES IN AND SAYS I DIDN'T KNOW ANYTHING ABOUT MY LICENSE BEING SUSPENDED. THEY SENT IT TO THE WRONG P. O. BOX WHEN THEY SENT ME NOTICE. IT WOULD BASICALLY BE LIKE YOU COME BACK WITH A VALID DL AND THE CASE IS GONE, SO IN ESSENCE WE WERE DOING THIS, IT IS JUST THAT IN 1997 THEY ACKNOWLEDGED IT AND MADE IT EXPLICIT THAT YOU HAVE TO DO THAT.

IS THAT AN ELEMENT OR AN OFFENSE?

ISN'T IT TRUE --

JUST A ELEMENT.

-- THAT THERE IS KNOWLEDGE THAT IS MAILED, THERE IS A PRESUMES, AND IT IS UP TO THE -- A PRESUMPTION, AND IT IS UP TO THE DEFENSE TO COME FORWARD AND SAY, WELL, I NEVER RECEIVED IT. BUT THE STATUTE --

CORRECT.

-- PROVIDES THE PRESUMPTION.

ACCORDING TO THE CASE LAW, WE STILL HAVE TO PROVE KNOWLEDGE ELEMENT BEYOND A REASONABLE DOUBT. WE STILL HAVE TO PROVE THAT.

SINCE WE ARE GETTING THE WHOLE GAMUT IN THIS CASE, I AM JUST, WHAT, WAS HE SIMPLY DRIVING, AND THEN HE DIDN'T HAVE A LICENSE? WAS, OR ARE THE FACTS ANYMORE --

ALL I KNOW IS HE WAS ARRESTED, LET'S SEE, WHEN IS IT, JANUARY 24 OF 1999, FOR DRIVING WHILE LICENSE SUSPENDED OR REVOKED, AND I DON'T KNOW THE SPECIFIC FACTS.

HE HAS BEEN IN STATE PRISON SINCE 1999. WHATEVER.

HE WAS ORIGINALLY SENTENCED IN JULY 1999 AND WE GOT HIM RESENTENCED ON AUGUST 16 OF 2000.

OKAY. YOU HAVE BEEN VERY HELPFUL WITH YOUR RESPONSES. THANK YOU VERY MUCH. COUNSEL, YOU STILL HAVE TIME FOR REBUTTAL.

COUNSEL, COULD YOU RESPOND TO THE STATE'S ARGUMENT THAT STATE VERSUS SMITH IMPUTED A KNOWLEDGE REQUIREMENT AND THEN, THEREFORE, THESE PRIOR CONVICTIONS HAD TO HAVE INCLUDED A KNOWLEDGE ELEMENT?

WE WOULD DISAGREE WITH THE STATE'S POSITION THERE. WHEN YOU INTERPRET THE STATUTE, WHEN AN INDIVIDUAL IS BEING CONVICTED OR BEING PROSECUTED, AND THE STATUTE IS BEING

USED, YOU HAVE TO LOOK AT THE PLAIN WORD, THE PLAIN WORDING OF THE STATUTE, AND AT THAT TIME, BEFORE 1997, IT DID NOT STATE THAT THERE WAS ANY KNOWLEDGE THAT WAS REQUIRED, TO ENHANCE AN INDIVIDUAL'S CONVICTION FROM A MISDEMEANOR TO THAT OF A FELONY. THE STATE SAYING THAT THEY COULD IMPLY IT IN THERE, BUT THAT IS NOT THE PLAIN READING OF THE STATUTE. AND WHAT WE HAVE TO DO IS THE STATUTE HAS TO BE CONSTRUED IN FAVOR OF THE DEFENDANT IN THIS CASE, AND SO READING THE STATUTE ON ITS PLAIN WORDING, THERE IS NO KNOWLEDGE REQUIREMENT BACK THEN.

HAVE YOU LOOKED AT THE JURY INSTRUCTIONS AT THE TIME, BECAUSE OFTEN THE STATUTE WILL NOT HAVE ELEMENTS THAT CASE LAW REQUIRES, AND JURY INSTRUCTIONS ARE MODIFIED TO ADD THOSE ADDITIONAL ELEMENTS.

I HAVE NOT LOOKED AT THE JURY INSTRUCTIONS. I AM SORRY, NO. WHAT, IF I MAY CONTINUE, WHAT THE STATE IS SAYING HERE IS WHAT THEY WANT IN THIS CASE IS SOME FINALITY. BUT WHAT MR. THOMPSON IS LOOKING FOR IS DUE PROCESS. MR. THOMPSON IS SITTING IN THE DEPARTMENT OF CORRECTIONS FOR A CRIME OF A FELONY, WHEN HE HAS, THE STATE HASN'T PROVEN THAT HE HAS COMMITTED A FELONY. WHEN THE LEGISLATURE, WHEN IT ENACTED THE NEW STATUTE, LAID ALL THE ELEMENTS OUT, AND THE NEW ELEMENT WAS KNOWLEDGE. PRIOR TO THAT, THERE WAS NO KNOWLEDGE. SO WHAT THE STATE IS IN FACT TRYING TO DO IS USE THE, A DIFFERENT CRIME, IT IS A COMPLETELY DIFFERENT CRIME, A DIFFERENT STATUTE, DIFFERENT ELEMENTS, EVERYTHING, WELL, NOT EVERYTHING IS DIFFERENT, BUT THE ADDITION OF THE KNOWLEDGE ELEMENT MAKES IT A COMPLETELY DIFFERENT CRIME, AND THE STATUTE SAYS THAT THERE HAS TO BE THREE CONVICTIONS UNDER THIS STATUTE. EVEN THOUGH MR. THOMPSON PLED TO THIS, THE KNOWLEDGE REQUIREMENT WASN'T BEFORE. THAT IS A FUNDAMENTAL ERROR, AND THEY COULD SAY HE CAN COUCH IT AS INEFFECTIVE ASSISTANCE OF COUNSEL, A MOTION TO VACATE HIS SENTENCE, A MOTION TO CORRECT ILLEGAL SENTENCE. THAT IS FORM OTHER SUBSTANCE. WHAT IS HAPPENING HERE IS MR. THOMPSON IS BEING INCARCERATED FOR A CRIME WHICH THE STATE DID NOT PROVE! EVEN IF HE ENTERED HIS PLEA OF GUILTY.

YOU ARE SAYING, AS A MATTER OF LAW, THAT ANY CONVICTION, UNDER THE PRIOR STATUTE, PRIOR TO 1997, COULD NEVER QUALIFY AS A PREDICATE FELONY FOR THIS NEW STATUTE.

THAT IS ABSOLUTELY RIGHT.

AND YOUR REASON BEING, BECAUSE THEY HAVE UPPED THE ANTE, AS FAR AS WHAT THE THIRD CONVICTION IS TO BE, THAT THE STATE IS JUST GOING TO HAVE TO HAVE A HIGHER LEVEL OF PROOF.

THAT IS CORRECT. AND IF YOU LOOK AT SOME OF THE OTHER STATUTES, WHICH ENHANCE A DEFENDANT'S SENTENCE, THERE IS BATTERY ON A SECOND, BATTERY, NOW, THAT IS, THAT CAN BE USED TO JUMP IT UP TO A FELONY. ALSO IN DUI'S, THAT CAN BE USED IN PETTY THEFTS. ON THE THIRD PETTY THEFT THAT, CAN BE SENTENCED AS A FELONY.

MY UNDERSTANDING, FROM THE FIFTH DISTRICT'S OPINION, IS THAT THE ATTACK IN THE TRIAL COURT WAS THAT BECAUSE HE WAS CHARGED WITH A FELONY AND THE MOST HE COULD BE CHARGED WITH WAS A MISDEMEANOR. IS THAT CORRECT?

YES, YOUR HONOR.

AND SO IN ORDER TO GET THERE, YOU HAVE TO CONCLUDE THAT ALL OF THE PRE1997 SUSPENSIONS -- PRE1997 CONVICTIONS WERE ELIMINATED BECAUSE THEY WERE NOT KNOWLEDGE IN THE STATUTE, IS THAT CORRECT?

YES, BECAUSE THEY WERE USED TO ENHANCE THE SENTENCE. THAT IS CORRECT.

SO YOUR ARGUMENT NECESSARILY FOLLOWS THAT, UNTIL THERE IS AN ELEMENT WRITTEN INTO THE STATUTE BY THE LEGISLATURE, EVEN KNOWLEDGE, AS AN ELEMENT, DOES NOT EXIST.

THAT IS EXACTLY RIGHT. AS I WAS SAYING, I AGREE WITH THAT.

HOW DO YOU SQUARE THAT WITH CHACONE?

COULD YOU REPEAT THE QUESTION. I AM SORRY.

THIS COURT HELD, IN CHACONE, THAT, IN ORDER TO HAVE, BE CONVICTED OF POSSESSION OF AN ILLEGAL SUBSTANCE, THAT YOU HAD TO HAVE KNOWLEDGE, BUT THERE WASN'T A KNOWLEDGE ELEMENT EXPLICITLY WRITTEN INTO THAT STATUTE. THAT WOULD BE INCONSISTENT, WOULD IT NOT?

IN CHICONE, THE COURT HELD THAT, EVEN THOUGH THERE WAS NO KNOWLEDGE ELEMENT IN THE STATUTE THAT, THEY HAVE TO HAVE THE KNOWLEDGE?

RIGHT.

IN THE CASE AT HAND, THE DRIVING WHILE, MY TIME IS UP. MAY I CONTINUE?

YOU CAN FINISH YOUR RESPONSE.

IN THE CASE AT HAND, THE KNOWLEDGE REQUIREMENT FOR THE STATE IS THAT THE DEFENDANT HAS TO HAVE KNOWLEDGE THAT HE DID THAT, BEFORE HE CAN BE CONVICTED. I BELIEVE IN CHICONE, IT IS KIND OF SHIFTING THE BURDEN FROM THE DEFENDANT TO THE STATE, I BELIEVE, IF I AM UNDERSTANDING CORRECTLY. IN CHICONE, THEY HAD TO HAVE KNOWLEDGE THAT THE DRUG WAS ILLICIT IN NATURE. I BELIEVE THAT IS CORRECT. AND THAT, THE STATE HAS TO PROVE THAT, THAT HE HAD KNOWLEDGE BEFORE HE CAN BE FOUND GUILTY, BUT IN THE INSTANT CASE, THE STATE HAS TO PROVE THE KNOWLEDGE. IT IS SHIFTING THE BURDEN FROM THE PLAINTIFF TO THE DEFENDANT IN THIS CASE.

CHIEF JUSTICE: OKAY. THANK YOU VERY MUCH. THANK YOU ALL VERY MUCH.