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State of Florida v. Erick Richardson

CHIEF JUSTICE: THE NEXT CASE ON THE CALENDAR IS RICHARDSON, SO I AM GOING TO BE RECUSED FROM THE CASE AND WILL LEAVE THE BENCH AND JUSTICE WELLS WILL PRESIDE.

GOOD MORNING, MAY IT PLEASE THE COURT. DAN HINDMAN ON BEHALF OF THE STATE OF FLORIDA. WE ARE HERE ON THE McCALL DECISION OUT OF THE SECOND DISTRICT, AND I WOULD ADD THAT ALL OTHER DISTRICT COURTS HAVE, NOW, CERTIFIED CONFLICT WITH THE INSTANT DECISION. WE ARE REQUESTING THAT IT BE QUASHED AND THAT CONFLICT BE RESOLVED, IN FAVOR OF McCALL, AND THE OTHER DECISIONS.

HOW DOES IT FACTOR INTO THE ANALYSIS THAT THIS IS ONE FROM A POSTCONVICTION MOTION? DOES THE FOURTH DISTRICT SEEM TO IGNORE THAT PART OF THE CASE?

WELL, WHAT WE ARE LOOKING AT, IT IS STILL A DE NO VO REVIEW.

IT DIDN'T SEEM TO USE STRICKLAND STANDARDS, BECAUSE WHAT THE DEFENDANT WAS SAYING IS THAT HIS LAWYER WAS INEFFECTIVE FOR NOT MAKING THIS ARGUMENT AT TRIAL. AND SO IT SEEMS LIKE YOU WOULD HAVE TO GO THROUGH A DEFICIENT PERFORMANCE PREJUDICE ANALYSIS, WHICH THE COURT DID NOT UNDERTAKE.

IT DID APPEAR THE MERITS SUCH AS THEY WERE, WITH THE PRO SE APPELLANT, THAT IS TRUE, IF WE WERE TO TAKE A LOOK AT STRICKLAND, OF COURSE, OUR POSITION IS THAT THE ARGUMENT IS MERITLESS. THOSE ARE THE REASONS THAT WE HAVE ARGUED THAT THERE WOULD CERTAINLY BE NO DEFICIENT PERFORMANCE.

THE RULING IN YOUR FAVOR WOULD MOVE THE UNDERLYING ISSUE OF BEING INEFFECTIVE AS COUNSEL.

NO REMAND IS NECESSARY, EVEN IF YOU WIN THIS APPEAL. IS THAT WHAT YOU ARE SAYING?

I DON'T BELIEVE THAT REMAND, WELL, IT WOULD HAVE TO BE REVERSED, AND --

THERE WERE OTHER INEFFECTIVENESS CLAIMS, RIGHT? THIS WAS NOT THE ONLY CLAIM WITH INEFFECTIVE ASSISTANCE.

HE RAISED OTHER CLAIMS WITH INEFFECTIVE ASSISTANCE CLAIMS, THE CLAIMS THAT WE ARE DISCUSSING TODAY AND ALSO SOME EVIDENTIARY QUESTIONS THAT WERE RAISED AS WELL.

DO YOU HAVE TO DETERMINE THOSE ON OR REMAND FOR THE FOURTH DISTRICT TO DETERMINE?

I WOULD LOOK AT THE FACTS THAT, NO, I WOULD NOT THINK SO. THE FACT THAT THE FOURTH DISTRICT PASSED OVER THOSE, I THINK IT WAS BINDING BY THE FOURTH DISTRICT AND THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL. AS TO THE EVIDENTIARY ISSUES --

THE OTHER WAY TO INTERPRET IT IS THAT THOSE CLAIMS BECAME MOOT BECAUSE A NEW TRIAL WAS ALREADY NEEDED BECAUSE OF THIS ISSUE.

NO. THERE IS JUST A NEW SENTENCING THAT WOULD BE REQUIRED. THE CONDITION STILL STANDS.

DS , WHETHER HE SER VE S IT OR HE SERVES IT AS A HABITUAL OFFENDER OR AS IT STANDS, I BELIEVE THAT IS THE ONLY QUESTION BEFORE THE COURT.

IS THERE ANY INDICATION IN THE FOURTH DCA OPINION THAT THEY IMPLICITLY R ULED ON THIS? DID THEY SAY DEN THEM O R ANYTHING LIKE THAT? -- DID THEY SAY DENY THEM O R ANYTHING LIKE THAT?

NO. BUT I THINK THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL ON THESE TRIAL ISSUES, EVIDENTIARY ISS UES. THAT WOULD HAVE BEEN REMANDED FOR REHEARING ON THAT. THE CONVICTION, IT SELF , JUSTICE CA NTERO , STOO D, A ND THE FACT THAT THE FOURTH PASSED ON THE CONVICTION, ITSELF, I BELIE VE THERE WAS IMPLICIT STRICKLAND ANALYSIS. YES. IT MAY HAVE BEEN HELP FUL I F THAT WAS ACTUALLY IN THE OPINION, ITSELF , BUT IT WASN'T, BY THE FACT THAT THE CONVICTION, ITSELF , WAS SUSTAINED BY THE FOURTH DCA. I BELI EVE THAT THERE WAS IMPLICIT ANALYSIS GOING ON THERE. I BELIEVE THE ONLY QUESTION BEFORE THIS COURT , IS THE FOURTH DISTRICT'S READING OF 775.084.

DOUBTFUL THAT THE STRONGEST POINT YOU HAVE TO MAKE IN THIS COURT -- DO YOU FEEL THAT THE STRONGEST POINT YOU HAVE TO MAKE IN THIS COURT IS THE CONTENT OF SUBSECTION 2?

YES, JUSTICE ANSTEAD . THE PLAIN LANGUAGE O F SUBSECTION 2 , IT DEFINITELY CLAIMS THAT THE ACTUAL PLACING OF A PERSON ON PROBATION OR COMMUNITY CONTROL , S HALL BE TREA TED A S A PRIOR CONVICTION .

WHAT WERE THE ACTUAL DATES HERE, AS FAR AS WAS IT A MATT ER OF SIX MONT HS OR WHAT? IT WAS THE SAME YEAR, WAS IT NOT? SIX MONTHS.

NOT , IN THE I N STANT CONVICTION.

I AM TALKING AB OUT DUE PROCESS.

YES, JUSTICE ANSTEAD. THE FIRST ONE WAS ACTUALLY APRIL 14 , 1 993. MR. RICHARDSON WAS CONVICTED OF POSSESSION OF CO CAINE . HE WAS GIVEN TWO YEAR S' PROBATION.

HE WAS ADJUDICATED GUILTY.

HE WAS ADJUDICATED GUILTY. AROXIMATELY 6 MONTHS LATER ON SEPTEMBER 23 , 1993 , THE RESPONDENT WAS CONVICTED AFTER GRAND THEFT A ND VIOLATION OF PRO BATION ON THE POSSESSION CHARGE, A ND HE WAS SENTENCED TO 15 MONTHS IN THE DEPA RTMENT OF CORRECTIONS.

HOW DID THE FOURTH DISTRICT DISTINGUISH THE ALICABILITY AND THE PROVISIONS OF SUB SECTION 2?

WELL , I REALLY DON'T THINK THEY DID. THEY DISC USSED SUBS ECTION 2 , BUT THEY INTERPRETED IT I N SUCH A WAY THAT THEY REQUIRED AN ACTUAL VIO LATION OF PROBATION, BEFORE THEY WOULD EVEN CONSIDER THE SUBSECTION, AND THAT IS CLE ARLY CONT RARY TO THIS SUBS ECTION. THE SUBSECTION SAYS THAT IT IS THE P L ACING OF THE DEFENDANT ON PROBATION , THAT TRIGGERED THE PRIOR CONVICTION .

YOU SAID -- BUT THE SECTION 2, DOE S IT REALLY ANSWER THE QUESTION THAT HE HAVE HERE? SECTION 2 REALLY SAYS THAT , SOMEONE WHO I S ADJU DICATED , IS A CONVICTION , CORRECT?

YES.

BUT DOES IT ANSWER THE QUESTION OF WHETHER OR NOT, WHEN YOU ARE PLACED ON PROBATION, THAT IS A SENTENCE. THAT IS THE REAL QUESTION. THAT IS BEFORE THE COURT. THAT IS NOT WHETHER OR NOT HIS PRIOR RULINGS OF THE COURT WAS HIS CONVICTION, I THINK WE CAN ACCEPT THAT, BUT WHEN HE WAS PLACED ON PROBATION, WAS THAT A SENTENCE? THAT IS THE REAL QUESTION. SO HOW DO YOU GET AROUND THE CASE LAW THAT TALKS ABOUT PROBATION ISN'T REALLY A SENTENCE, ISN'T TECHNICALLY A SENTENCE? HOW DO YOU GET TO A POINT OF SAYING THIS CONTEXT, IT IS A SENTENCE.

BECAUSE IF WE DON'T INTERPRET IT, THAT SECTION HAS NO MEANING WHATSOEVER. BECAUSE WE HAVE SECTION 5, WHICH IS A SEPARATE SENTENCING REQUIREMENT, WHICH WAS IMPLEMENTED BY THE LEGISLATURE AFTER THIS COURT'S BARNES DECISION IN 1993. WHAT THE COURT, IN SUBSECTION 5 SAYS IT IS MODIFYING SUBSECTION 2, BUT IT REALLY MODIFIES SUBSECTION 2 OUT OF EXISTENCE, IF YOU WILL. SUBSECTION 2 ONLY HAS EFFECT, IF WE COME TO THE CONCLUSION THAT THE ACTUAL PLACING OF THE DEFENDANT ON PROBATION IS A SENTENCE, BECAUSE IF NOT, THEN IT IS ALWAYS GOING TO RUN OUT OF THE SEPARATE SENTENCING REQUIREMENT, AND IT IS TRUE, AS YOU SAID, THERE ARE CASES FROM THIS COURT AND THE DISTRICT COURT, THAT PROBATION AND A SENTENCE OF INCARCERATION, ARE TREATED AS DISTINCT CONCEPTS, BUT THERE ARE ALSO A NUMBER OF CASES IN THIS COURT AND, CORE, LARSON AND LIMAN, THAT SAYS THAT PROBATION, OF COURSE, IS ONE OF THE FIVE BASIC ALTERNATIVES IN FLORIDA TO SENTENCING, AND WE HAVE TO LOOK AT HOW, WHAT DOES SENTENCING MEAN IN THE CONTEXT OF HABITUAL OFFENDER SENTENCING, AND BASED ON SUBSECTION 2, CONSISTENT READING WITH SUBSECTION 5, MUST LEAD TO THE CONCLUSION THAT THE PLACING OF THE DEFENDANT ON PROBATION, TRIGGERS A SENTENCING EVENT. OTHERWISE THE SUBSECTION HAS NO MEANING WHATSOEVER.

THERE IS NO OTHER AREA IN THE HABITUAL OFFENDER STATUTE THAT SUBSECTION 2 WOULD HAVE ANY REAL MEANING, IF IT IS NOT A PART OF SUBSECTION 5.

SUBSECTION 5 RUNS THE WAY IT IS INTERPRETED, WITH ALL DUE RESPECT, MISINTERPRETED BY THE FOURTH DCA, WIPED OUT SUBSECTION 5. I CAN FIND NO OTHER SIGNIFICANCE TO THAT SUBSECTION THAN IF SUBSECTION 5 IS READ THE WAY IT IS. NOW, THE FOURTH TRIES TO READ AN INTERPRETATION INTO SUBSECTION 2 THAT WOULD MAKE IT CONSISTENT WITH FIVE, I DO NOT FIND IT VERY COMPELLING, BECAUSE THAT WOULD ACTUALLY REQUIRE A VIOLATION OF PROBATION, BEFORE YOU WOULD EVER GET TO SUBSECTION 2.

SO A CRIMINAL CONVICTION FOLLOWED BY PLACING ON PROBATION, COULD NEVER SERVE AS A PREDICATE OFFENSE, THE FOURTH DISTRICT'S RULING, EVEN IF THE TERMS OF PROBATION WERE FOR ONE YEAR, WHATEVER, AND THEN THEY COMPLETED THOSE TERMS, IF THEY HAD BEEN ADJUDICATED GUILTY AND THEN A YEAR LATER, THERE WAS AN OTHER OFFENSE, THAT FIRST OFFENSE, IN SPITE THE LANGUAGE OF SUBSECTION 2, COULD NEVER BE USED.

IT WOULD MEAN NOTHING AS A PREDICATE. YEAH.

WELL, IN THIS CASE, I THINK YOU SAID THAT THE DEFENDANT WAS ADJUDICATED GUILTY.

YES.

SO ISN'T THAT A CONVICTION, EVEN WITHOUT SECTION 2?

YES. IT WOULD BE AND THEN WE HAVE TO LOOK AT IN ORDER TO SATISFY THE SEPARATE SENTENCING REQUIREMENTS.

ISN'T, REALLY, SUBSECTION 2 IRRELEVANT HERE, BECAUSE SUBSECTION 2 SAYS THE PLACING AFTER PERSON ON PROBATION OR COMMUNITY CONTROL, WITHOUT AN ADJUDICATION OF GUILT, SHALL BE TREATED AS A PRIOR CONVICTION. HERE WE HAVE AN ADJUDICATION OF GUILT, SO,

REALLY, WE NEED TO DECIDE THIS CASE, BASED ON SUBSECTION 5 AND THE DEFINITION OF CHRONIC OFFENDER BUT NOT SUBSECTION 2.

NO, I BELIEVE SUBSECTION 2 ALIENS AND IT DOES HAVE TO APPLY --

HOW DOES IT APPLY, IF THERE IS NOT AN ADJUDICATION OF GUILTY.

WHAT THE LEGISLATURE IS DOING THERE IS MAKING IT CRYSTAL CLEAR.

PLACING ON COMMUNITY CONTROL WITHOUT ADJUDICATION OF GUILT, .

YOU KIND OF GET INTO A --

SO IF WE READ THEM TOGETHER, THAT IS WHAT IS ADOPTED BY ALL DISTRICT COURTS, WITH THE EXCEPTION OF THE FOURTH DISTRICT.

BUT McCALL, DIDN'T REALLY GET INVOLVED WITH SECTION 2 SIMPLY, IN A STRAIGHTFORWARD WAY, HELD THAT PROBATION IS A SANCTION AND THEREFORE, IT IS A BASIS FOR THE HABITUAL OFFENDER STATUTE. IS THAT CORRECT?

YES, JUSTICE WELLS.

WOULD YOU GO THROUGH AND CAPITALIZE ON WHAT YOU BELIEVE TO BE THE PARAMETERS OF THE SEPARATE SENTENCING REQUIREMENT AND THE PURPOSE AND SPECIFIC LANGUAGE UPON WHICH THE STATE RELIES, TO GET TO, TO TAKE US WHERE WE NEED TO BE IN THIS CASE.

WELL, LET ME DISCUSS THE, I GUESS YOU ARE ASKING FOR DISCUSSION OF SUBSECTION 5, WHY WE HAVE SUBSECTION 5, A SEPARATE SENTENCING REQUIREMENT.

IT SEEMS TO ME THAT IS WHAT WE ARE --

YEAH.

I WOULD LIKE TO KNOW WHAT THE STATE'S PARAMETERS ARE AND WHAT IS THE PURPOSE AND WHAT IS THE SPECIFIC WORDING THAT LEADS YOU TO YOUR PARAMETER DISTINCTION -- PARAMETER DESCRIPTION.

WE HAVE SUBSECTION 5, WHICH HAS A SEPARATE SENTENCING REQUIREMENT, AND THAT WAS PASSED, BASED ON THIS COURT'S BARNES DECISION. THE CONCERN IN BARNES IS THAT THERE WAS AN INDIVIDUAL WHO WAS BEFORE THE COURT, WITH TWO PRIOR CONVICTIONS. HE QUALIFIED AS HABITUAL OFFENDER, BUT HE WAS SENTENCED ON THE SAME DAY AT THE SAME SENTENCING PROCEEDING, AND THEN THE VERY NEXT TIME HE WAS IN COURT, HE WAS BEING TREATED AS HABITUAL OFFENDER, AND WHAT THIS COURT DISCUSSED AT THAT TIME, WAS, WELL, UNLESS THERE IS AN OPPORTUNITY FOR SOMEONE TO REFORM WITH HIS TWO PRIOR CONVICTIONS, GIVEN TWO CHANCES, IF YOU WILL, THEN WE ARE GOING TO GET A LOT OF DEFENDANT QUALIFYING FOR HABITUAL OFFENDER SENTENCING AND POSSIBLY, IMAGINE CLOGGING UP THE CORRECTION SYSTEM. SO THE LEGISLATURE THEN TOOK ACTION ON THAT AND ENACTED SUBSECTION 5 AND GAVE US A SEPARATE SENTENCING REQUIREMENT, WHICH, AS THE PARAMETERS OF THIS CASE, THAT IS DONE. THIS IS, IN THIS CASE, OUR ARGUMENT IS IN THE SPIRIT OF BARNES. THE DEFENDANT, MR. RICHARDSON, HAS BEEN GIVEN TWO OPPORTUNITIES TO REFORM. HE WAS PLACED ON PROBATION. THE FIRST TIME. THAT WAS HIS FIRST OPPORTUNITY. HE VIOLATED PROBATION SHORTLY THEREAFTER. THAT WAS THE SECOND OPPORTUNITY, AND THE ROBBERY AND THE INSTANT OFFENSE, THAT WAS HIS THIRD OPPORTUNITY. HE WAS BEFORE THE COURT THREE SEPARATE TIMES FOR SENTENCING. THE CONCERN WITH BARNES WAS THAT A PERSON WOULD NOT BE IN FRONT OF A COURT THE REQUISITE NUMBER OF TIMES ENVISIONED BY

THE LEGISLATURE BEFORE HE IS HIT WITH HABITUAL SENTENCE. THAT IS WHY OUR ARGUMENT IS CONSISTENT WITH SUBSECTION 5 , UPHOLD SUBSECTION 5, UP HOLDS THE SPIRIT OF BARNES.

SO YOU ARE SAYING THAT ESSENTIALLY WHAT THE LEGISLATURE HAS INTENDED IS THAT THE DEFENDANT HAS BEEN CONVICTED FOR THREE SEPARATE INCIDENTS AND NOT THREE SEPARATE CRIMES ARISING FROM ONE INCIDENT.

I BELIEVE THAT IS A FAIR READING , JUSTICE CANTERO .

DO YOU BELIEVE THAT IS A FAIR READING OF BARNES ?

WELL , BARNES WE LOOK AT THE ORIGIN OF SUBSECTION 5. IN A SENSE BARNES GIVE BIRTH TO SUBSECTION 5 BUT IN A WAY WAS OVERRULED BY SUBSECTION 5, SO WHAT THE COURT WANTS TO SEE IS THREE , OR TWO PRIOR SENTENCING EVENTS. THAT IS WHAT IT COMES DOWN TO. TWO PRIOR SENTENCING EVENTS.

YOU KEEP TALKING ABOUT SENTENCING EVENTS . BARNES ACTUALLY SAYS , WHILE WE AGREE THAT THE UNDERLYING PHILOSOPHY OF HABITUAL OFFENDER STATUTE MAY BE BETTER SERVED BY A SEQUENTIAL CONVICTION REQUIREMENT , WE AGREE THAT THE DISTRICT COURT , THAT THE CURRENT STATUTE IS CLEAR AND UNAMBIGUOUS AND CONTAINS NO SEQUENTIAL CONVICTION REQUIREMENT . I AM TALKING ABOUT A CONVICTION REQUIREMENT AS OPPOSED TO A SENTENCING REQUIREMENT. ARE THEY NOT?

I WOULD HAVE TO LOOK AT BARNES AGAIN. WHAT I TAKE FROM BARNES , THOUGH, WHAT THIS COURT WANTED TO DO IN BARNES WAS TO GIVE THE DEFENDANT THE OPPORTUNITY TO REFORM. THAT IS THE WHOLE SPIRIT OF BARNES, GIVE HIM AN OPPORTUNITY TO REFORM, BEFORE HE IS HIT WITH A HABITUAL SENTENCE. AND WHAT WE GOT WAS OBVIOUSLY SUBSECTION 5 RIGHT FROM THAT. WITH PERMISSION OF THIS COURT, I WOULD LIKE TO RESERVE MY REMAINING TIME FOR MY REBUTTAL ARGUMENT .

MAY IT PLEASE THE COURT. I AM JOE LANG FROM CARLTON FIELDS AND I AM HERE REPRESENTING ERIC RICHARDSON AND AT COUNSEL TABLE WITH ME ARE JOHN BLUE AND KRISTIN DEAN.

MR. LANG, WOULD YOU ADDRESS THIS LAST DISCUSSION WE HAVE HERE , THE , WITH REGARD TO THE SCOPE OF WHAT BARNES REALLY MEANS AND PARAMETERS OF THE SUBSECTION , AND YOUR TAKE ON THAT , AS FAR AS THE PARAMETERS AND THE WORDING THAT WE RELY ON FOR THE LAST THREE OR FOUR QUESTIONS THAT WE HAVE BEEN DISCUSSING.

YES, YOUR HONOR. THE BARNES DECISION, IT IS NOT CRYSTAL CLEAR AS TO WHAT IT WAS MEANING , BUT WHAT IS CRYSTAL CLEAR IS SUBSECTION 5, AND SUBSECTION 5, THE LEGISLATIVE HISTORY, FIRST OF ALL, WHICH YOU CAN FIND IN OUR BRIEF, I BELIEVE, ON PAGE 23 , AND IT MAKES IT VERY CLEAR THAT, WHAT THE LEGISLATURE WAS DOING IN RESPONSE TO THE BARNES CASE , WAS, IN ORDER TO BE COUNTED AS A QUALIFYING PRIOR FELONY , THE FELONY MUST HAVE A RESULTED IN A CONVICTION , SENTENCED SEPARATELY, PRIOR TO THE CURRENT OFFENSE AND SENTENCED SEPARATELY FROM EACH OTHER FELONY.

SO YOU ARE TAKING FROM THAT, THE LEGISLATIVE HISTORY THAT TALKS ABOUT A SENTENCING PRIOR, BECAUSE IT SEEMS AS THOUGH THE STATUTE USES THE WORDS "SEPARATE SENTENCING". IT DOESN'T USE THE WORD "PRIOR" DOES IT?

I BELIEVE THAT IT HAS TO BE SEPARATE SENTENCING .

RIGHT.

MAYBE NOT PRIOR BUT THEY HAVE TO BE SEPARATE. AND IN THIS CASE --

SEPARATE WITH REGARD TO THE PROCEEDING OR SEPARATE WITH REGARD TO THE EVENTS?

I BELIEVE IT IS SEPARATE AS REGARD TO THE PROCEEDING .

AND WHAT DO YOU RELY ON FOR THAT, BECAUSE THANK IS REALLY WHERE OUR BATTLE HERE IS BEING DISCUSSED . WHAT DO YOU DRAW THAT FROM , SEPARATE WITH REGARD TO PROCEEDING, AS WITH REGARD , AS OPOSED TO SEPARATE WITH REGARD TO EVENTS OR OFFENSE ?

I BELIEVE THAT, FOR THE SENTENCING, THE B OVER VERSUS STATE CASE GIVES SUPPORT TO THE FACT THAT YOU HAVE TO BE SEPARATE PROCEEDINGS. YOU CAN ACTUALLY OPEN ONE UP, DO IT, AND THEN DO A SEPARATE ONE RIGHT AFTER.

ON THE SAME DAY.

RIGHT.

WHILE YOU THERE ARE BUT IF THEY ARE ALL AT ONE TIME .

AND I THINK IT IS IMPORTANT THAT THEY HAVE TO BE SEPARATE PROCEEDINGS , AND THAT IS JUST , WELL , TO BE PERFECTLY HONEST, WE DON'T KNOW FOR SURE THAT , WHAT HAPPENED HERE, BECAUSE OUR RECORD IS NOT VERY GOOD , BUT THE STATE HAS NOT CONTINUED THAT --

THE SENTENCING FOR THE FIRST OFFENSE, IF I CAN CALL IT THAT , WAS SENTENCED AT THE SAME TIME OR AS PART OF THE SENTENCING FOR THE SECOND FELONY OFFENSE. IS THAT CORRECT?

RIGHT. THAT IS OUR POSITION. THE STATE HAS NOT TAKEN AN OPPOSITE POSITION.

ONCE THE FIRST ONE HAPPENED IN APRIL 1993 , AND WHAT HAPPENED AFTER THAT CONVICTION, WAS HE WAS PLACED ON PROBATION . IN SEPTEMBER OF '93 , HE COMMITTED A ROBBERY AND WAS CONVICTED , AND AT THAT TIME , THERE WAS A VIOLATION OF PROBATION , AND THAT WAS THE VIOLATION OF PROBATION , WAS DEALT WITH AT THE SAME TIME AS THE ROBBERY. CORRECT?

CORRECT. YES , YOUR HONOR .

LET ME ASK YOU THIS , THIS, REALLY, STARTS WITH JOYNER , IT SEEMS TO ME , AND JOYNER IS DEALING WITH THE CONCEPT THAT, LATER, GOT INTO JUSTICE OVERTON'S OPINION IN BARNES, AND THAT WAS THAT THIS HABITUAL OFFENDER SENTENCING , WAS DEALING WITH SEQUENTIAL CONVICTIONS . IN OTHER WORDS, THERE SHOULD BE AN OPPORTUNITY FOR THE PERSON TO REFORM, AND IF YOU HAVE A DEMONSTRATION BY THE FACT THAT YOU ARE SEQUENTIALLY CONVICTED OF CRIMES, OF FELONIES , THEN , THAT IS WHEN THE HABITUAL OFFENDER SENTENCING SHOULD COME INTO PLAY . ISN'T THAT WHAT JOYNER SAYS, AND THEN THAT IS WHAT BARNES SAYS, BECAUSE THEY ARE TALKING ABOUT SEQUENTIAL CONVICTIONS NOT SENTENCINGS .

YOUR HONOR , WITH ALL DUE RESPECT , I THINK THAT YOU CAN READ BARNES TWO DIFFERENT WAYS , BUT CERTAINLY THERE IS LANGUAGE IN BARNES THAT WOULD INDICATE THAT THEY ARE TALKING ABOUT SEQUENTIAL CONVICTIONS NOT SENTENCES, BUT SUBSECTION 5 ON ITS FACE , SAYS THAT YOU HAVE TO HAVE SEPARATE SENTENCING PROCEEDINGS , AND I JUST DON'T --

WAIT A MINUTE. YOU ARE ADDING THE WORD PROCEEDINGS. YOU ARE ADDING THAT WORD PROCEEDINGS. THAT IS WHAT I AM TRYING TO FIND. IS THAT WORD IN THAT SUBSECTION 5? IT

SAYS SEPARATE SENTENCES. AS I BELIEVE .

IT SAYS SENTENCED SEPARATELY FROM ANY OTHER FELONY CONVICTION , RIG HT?

ACTUALLY IT SAYS CONVICTION SENTENCED .

RIGHT. WHAT WE HAVE HERE, LET ME MAKE SURE THAT WE HAVE ALL THE FACTS RIGHT. WE HAVE A POSSE SION OF COCAINE CONVICTION , S O SUBSECTION 2, BY THE WAY , JUSTICE CANTERO I S ABSOLUTELY CORRECT. SUBSECTION 2 IN THIS CASE , IS NOT EVEN ALICABLE. BECAUSE IT JUST HAS NO MEANING AT ALL. HE WAS CONVICTED , BUT THE SENTENCE WAS WITH HELD ON THE POSSESSION OF CO CAINE CHARGE . THEN HE GOT CONVICTED ON A GRAND THEFT IN SEPTEM BER OF '93. AND THAT, ALSO , THEN , BECAME A VIO LATION OF PROBATION .

WA IT. I AM SO RRY. IN APRIL, DI D YOU SAY THAT THE ADJUDICATION WAS WITHHELD?

NO.NO. NO. HE WAS ADJUDICATED .

HE WAS ADJUDICATED.

HE WAS CONVICTED BUT THE SENTENCE WAS WITHHELD IN APRIL OF ' 93.

HE WAS PL ACED ON PROBATION.

RIGHT.

YOU CHARACTERI ZE IT AS A SENTENCE THAT. IS, R EALLY , AT THE HE ART OF WHAT WE HAVE TO DEAL WITH HERE.

THAT IS WHAT THIS CASE I S ABOUT.

WHAT I AM HAVING TROUBLEWITH IS THAT, FROM MY UNDERSTANDING OF THE HABITUAL FELONY OFFENDER STATUTE, AND VIOLENT FELONY OFFENDER, IS IT IS REALLY A "THREE STRIKES" AND AWE ARE OUT -- AND YOU ARE OUT , KIND OF LAW, WHERE YOU NEED TWO PREVIOUS CONVICTIONS, AND IT IS THE THIRD CONVICTION THAT MAKES YOU THE HABITUAL FELONY OFFENDER , AND I T SEEMS LI KE HE IS ONLY CONVICTED OF TWO CRIMES , AND THEN THE VIOLATION OF PROBATION WAS KIND OF LIKE THE THIRD STRIKE. IS THAT WRONG ?

HE , THERE ARE THREE CONVICTIONS. HE HAS A VIOL ATION , HE HAS A POSSESSION OF COC AINE THAT HE GOT CONVICTED ON , BUT I SAY THE SENTENCE WASWITHHELD. HE WAS PUT ON PROBATION. THEN IN SEPTEMBER OF '93 , HE HAD A GRAND THEFT , AND THAT WAS HIS SE COND CONVICTION . AND HE WAS, THEN , SENTENCED , WE BELIEVE , AT THE VERY SAME PROCEEDING, FOR TH OSE TWO , BUT THEN THE THIRD ONE IS A CONVICTION FOR ROB BERY.

THAT IS THE THIRD ONE .

RIGHT. AND THERE IS A THIRD CONVICTION FOR ROBBERY , A NDWHAT OUR POSITION IS , IS THAT SUBSECTION 5 SAYS THAT ALL THOSE SENTENCES HAVE TO BE SEPARATE SENTENCES .

IT ALL COMES DOWN TO THE DEFINITION.

LET ME TAKE THIS , I AM SORRY. LET ME TAKE THIS TO ITS LOGICAL CONC LUSION FROM YOUR STANDPOINT. YOU ARE SAYING THAT PROBATION IS NOT A SENTENCE , CORRECT?

YES, YOUR HONO R.

SO THE PURPOS E OF THE HABITUAL OFFENDER STATUTE , YOU WOULD AGREE , I S THAT PEOPLE

WHO HAVE BEEN CONVICTED OF MULTIPLE OFFENSES, SHOULD, THEN, BE GIVEN HEAVIER SENTENCES, BECAUSE -- SENTENCES, BECAUSE THEY HAVE DEMONSTRATED THEY ARE NOT GOING TO BE REBILITATED, ET CETERA. CORRECT?

I THINK THAT IS PROBABLY IS THE LEGISLATIVE INTENT.

ALL RIGHT. AND SO IF WE ACCEPT YOUR PROPOSITION THAT PROBATION IS NOT A SENTENCE, THEN, IF A DEFENDANT IS PUT ON PROBATION, MULTIPLE TIMES, AND THEN WHEN HE GETS BEFORE THE COURT, SAY, THE THIRD OR THE FOURTH OR EVEN THE FIFTH TIME, THE HABITUAL OFFENDER STATUTE WOULD NEVER BE APPLICABLE TO HIM, BECAUSE YOU SAY HE HAS NEVER BEEN SENTENCED. EVEN THOUGH HE HAS BEEN GIVEN MULTIPLE OPPORTUNITIES AND NOW HE IS BEFORE THE COURT AND YOU CANNOT USE THE HABITUAL OFFENDER STATUTE. DOES THAT, REALLY, MAKE ANY SENSE, AND DO YOU THINK THAT THAT IS WHAT THE LEGISLATURE, REALLY, INTENDED?

I BELIEVE THE LEGISLATURE INTENDED THAT YOU HAVE SEPARATE SENTENCES. THAT IS WHAT THEY WROTE. THAT IS THE PLAIN LANGUAGE. I DO AGREE THAT THAT IS WHAT WE ARE SAYING, THAT I THINK A COMMENT WAS MADE IN THE OPENING ARGUMENT, THAT IF YOU GET THAT PROBATION THE FIRST TIME, AND YOU SERVE IT OUT, JUSTICE ANSTEAD MADE THIS COMMENT, AND YOU SERVE IT OUT, THAT WILL NEVER BE COUNTED AS A SENTENCE UNDER OUR THEORY OF THE CASE, AND THAT IS CORRECT.

HOW CAN THAT SQUARE, THOUGH, WITH WHAT WE KNOW THE LEGISLATURE WAS THINKING, WHEN THEY PROVIDED FOR SUBSECTION 2?

AGAIN, I WOULD SAY SUBSECTION 2 IS NOT APPLICABLE TO THIS CASE, BUT I UNDERSTAND IT MAY IN FORM HOW YOU READ SUBSECTION 5.

HOW DOES IT INFORM US IN THAT? DOESN'T THAT SEND OUT A STRONG SIGNAL THAT THE LEGISLATURE INTENDED, EVEN WHEN ADJUDICATION IS WITHHELD, AND PROBATION IS IMPOSED, THAT THAT STILL SHOULD BE COUNTED, THEN, AS A PREDICATE PRIOR OFFENSE. IT SAYS THAT. RIGHT?

I UNDERSTAND, YOUR HONOR, BUT I HAVE TWO ANSWERS.

WOULDN'T IT MAKE SENSE TO EXTEND FROM THAT, WELL, IF THE LEGISLATURE FELT THAT WAY, THEY WOULD FEEL EVEN STRONGER, IF THERE IS AN ADJUDICATION, AND THERE IS PROBATION. I MEAN, WOULDN'T THAT BE A LOGICAL INTERPRETATION OF THE LEGISLATURE'S INTENT FLOWING FROM READING THAT PROVISION?

I DON'T THINK SO. I MEAN, I UNDERSTAND HOW THAT COULD INFORM SUBSECTION 5, BUT I THINK SUBSECTION 5 IS DEPRIVED OF MEANING, IF YOU DON'T READ IT BY ITS TERMS, AND I DON'T KNOW THAT WE HAVE TO GET EVEN TO LEGISLATIVE INTENT. I THINK SUBSECTION 5 IS PLAIN --

I REALIZE WE STILL HAVE TO DEAL WITH THIS THING ABOUT SENTENCED SEPARATELY FROM ANY OTHER FELONY CONVICTIONS, AND THAT WAS, REALLY, THE BASIS OF THE FOURTH DISTRICT'S RULING, RIGHT, THAT THE --

RIGHT.

IN THEIR VIEW THE SENTENCING OCCURRED FOR THIS FIRST OFFENSE IN SEPTEMBER, WHEN THE PROBATION WAS VIOLATED, AND NOW THE SUBSEQUENT -- OFFENSE THAT WAS USED AS THE VIOLATION OF PROBATION AND THE INITIAL OFFENSE, THE JUDGE IMPOSED THE GUIDELINES FOR THOSE. WERE THE SENTENCING GUIDELINES INVOLVED IN THIS CASE, OR --

OUR RECORD IS NOT , I AM NOT SURE .

WOULD YOU HAVE TO AGREE THAT THE TERM "SENTENCE" HAS , DEPENDING UPON THE CONTEXT , BEEN DEFINED BY THIS COURT , BOTH AS S A ENTS AND NOT A SENTENCE, CORRECT? I MEAN, LA RSON , WE -- BOTH AS A SENTENCE AND NOT A SENTENCE, CORRECT? I MEAN, LAR SON WE QU OTED AS DEFINED IN BLAC K'S DICTIONARY, PROBATION IS A SENTENCE, RELE ASING T HEDEFENDANT INTO THE COMM UNITY UNDER THE SUPERVIS ION OF A PROBATION OFF ICER , AND THE FIVE BASIC SENTENCING ALTERNATIVES IN FLORIDA , PROBATION IS LI STED AS ON E OF THEM , BUT THERE WE SA ID IT WAS. I RECOGNIZE THAT WE HAVE, ALSO, SAID IT IS TECHNI CALLY NOT A SENTENCE .

I R EALLY THINK WE H AVE THE BETTER SI DE OF THAT ARGUMENT. 948.01 IS VE RY CLEAR THAT YOU WORK TO KEEP THOSE AP ART . RULE 3.790 ON ITS FACE , SAYS PRONOUNCEMENT AND IM POSITION OF SENTENCE OF IMPRISONMENT SHALL NOT BE MADE ON A DEFENDANT WHO IS PLACED ON PROBATION.

THAT IS SENTENCE OF IMPRISONMENT. IF WE LO OK WITHIN 775, IF YOU LOOK A L I TTLE F URTHER UP IN SE CTION 2 , AND 1- A , 2-A , IT SAYS WH ILE THE DEFENDANT WAS SER VING A PRISON SENTENCE OR OTHER SENTENCE. A COURT-OR DERED OR LAW FUL LY IMPOSED SUPERVIS ION. IN SUBSECTION B, IT SAYS RELEASED FROM A PRI SO N SENTENCE, PROBATION COMMUNITY CONTROL, CONTROLLED RELEASE , PROBATION , OR OTHER LAWFUL RELEASE, I ASS UME I T MEANS PAROLE, IF WE ACCEPT YOUR ARGUMENT, THEN IT HAS N O MEANING WHEN THEY SAY A PRISON SENTENCE OR OTHER SENTENCE, OR IF I GO T O 948.012 AND I T TAL KS ABOUT SPLIT SENTENCE IN SUBSECTION 2, IT SAYS THE COURT MAY ALSO IMPOSE A S PLIT SENTENCE, WHEREBY THE DEFENDANT IS SENTENCED TO A TERM O F PROBATION, WHICH MAY BE FOLLOWED BY A PER IOD OF INCARCERATION. ALL OF THOSE SP EAK OF SENTENCING IN MORE THAN J UST A PERIOD OF IMPRISONMENT .

BUT I DON'T THINK T HAT YOU CAN SAY THAT A SENTENCE AND PROBATION ARE THE SAME. I DON'T HAVE TIME, I DON'T THINK, TO GET TOTALLY INTO MY DO UBLE JEOPA RDY AR GUMENT , BUT WE HAVE A DOUBLE JEOPARDY ARGUMENT IN OUR BRIEF, AND I WOULD VERY MUCH SAY THAT, IF THERE WAS A SENTENCE AND THEN A RESENTENCING , IN THIS CASE , THERE ARE REAL DOUBLE JEOPARDY PROBLEMS AT IS SU E, BUT I WA NT TO , ALSO, TUR N TO THE COMMITTEE NOTE TO RULE 3.790 , WHICH SAYS FLAT-OUT, A PROBATIONARY PERIOD IS NOT A SENTENCE, AND ANY PROCEDURE THAT TENDS TO M IX THEM, UNDESI RABLE , EVEN IF THE MI XTURE IS ACCOMPLISHED BY NOTHING MORE THAN THE TERMINOLOGY US ED BY THE TRIAL COURT I N A DE SIRED - - IN A DESIRE TO PLACE PERSON ON PROBATION.

LET ME ASK YOU A HYPOTHETICAL IF I COULD.

JUSTICE QU INCE .

GIVEN OUR JURISPRUDENCE THAT HAS PROBATION IS A SENTENCE IN SOME RESPECTS , AND PROBATION IS NOT A SENTENCE IN OTHER RESPEC TS , AND GIVEN THE LEGISLATIVE INTENT B E HIND HABITUAL OFFENDER STATUTE, WHAT GOOD POLICY, PUBLIC PO LICY REA SON WOULD THERE BE TO SAY , UNDER THESE CIRCUMSTANCES , PROBATION IS NOT A SENT ?

I THINK BEING FAIR T O SUBSECTION 5, GIVING THE LEGISLATURE THE PLAIN INTENT WHAT HAVE IT ENA CTED , AND I THINK THE RULE OF LI NITY . I MEAN, I F IT IS AMBIGUOUS AS TO HOW YOU READ THIS SUBSECTION, I THINK MR . RICHARDSON WINS UNDER THE RULE OF LIN ITY. I THINK THAT THEY HAVE TO , I THINK THE S TATE HAS THE BURDEN OF SHOWING THAT THIS IS UNAMBIGUOUS , IN ITS FAVOR , AND I DON'T THINK THEY C ANDO THAT .

LET ME POSE A HYPOTHETICAL TO YOU. AND THAT IS THAT , LET'S ASSUME THAT ALL OF THE

SAME THINGS HAENED HERE WITH THE EX CEPTION THAT, WITH THE FIRST OFFENSE , THAT THE JUDGE DID WITHHO LD ADJUDICATION AND PLACED THE , YOUR CL IENT ON PROBATION. AND THEN ALL THE SAME THINGS HAENED. SAME OUTCOME?

I DO THINK THE SAME OUTCOME.

SO SUBSECTION 2 WOULDN'T HAVE ANY ALI CATION THERE?

I WOULD, THEN , TU RN TO THE FOURTH DISTR ICT'S EXAMPLE THAT SUBSECTION 2 DEALS WITH THE PRIORNESS OF CONVICTIONS AND THEY GIVE THE EXAMPLE AS TO HOW YOU CAN READ THESE TO GETHER , AND THEY ARE NOT INCONSISTENT , BUT THEY MAY B E AMBIGUOUS. I MEAN , STUF FING THOSE TWO SUBSECTIONS TOGETHER CAN B E DIFFICULT , BUT THE FOU RTH DISTRICT HAS A RATIONAL WAY OF DOING IT , AND , AGAIN , I WOULD RESORT TO THE RUL E OF LINITY. I MEAN, I DON'T THINK IT IS CLEAR HOW THE STATE WINS , EVEN IN THAT EXAMPLE , BUT THAT IS NOT OUR CASE. AND MR. RICHARDSON SH OULD NOT HAVE TO FACE THE WH OLE SUBSECTION 2 PROBLEM ANYWAY. THANK YOU.

THANK YOU, MR . LANG , AND WE CERTAINLY WANT , MR . HYNDMAN, YOU HAVE GOT SOME TIME LEFT , SO W E HAVE G OTSOME TIME WITH YOU .

UNLESS THE COURT HAS SOME QUESTIONS .

HOW DOES IT FAC TOR I NTO THE ANALYSIS HERE , ALL E LSE BEING EQUAL, AND REALLY WHAT IT COMES DOWN TO IS THE DEFINITION OF WHAT A SENTENCE IS, WHY SHO ULDN'T WE ALY THE RULE OF LINI TY?

IT DOESN'T , JU STICE CANTERO , IT DOES NOT ALY TO THIS CASE T ONLY AL IES WHEN THE STATUT ORY SECT IONS IN QU ESTION ARE SUSCEPTIBLE TO DIFF ERING CONSTRUCTIONS. WE SUBM IT IN THIS CASE THAT THEY NORTH SUS CEPTIBLE TO DIFFERING CONSTRUCTIONS. THAT IS VERY CLEA R.

IT DOESN'T DEF INE A SENTENCE, RIGHT?

IT DOESN'T DEFINE IT IN THE STATUTE , ITSELF.

IN STATUTE 048. IS THERE ANYTHING IN CHAP TER 775 THAT DEFINES F ORPURPOSES OF THE STATUTE ?

Y ES. I DON'T THINK SO . I THINK IT IS CLEAR HOW IT IS BEING USED , THOUGH , AND THIS COURT HAS THE PROBATION AND SENTENCE ON. THAT.

I DON'T KNOW IF IT WAS POINTED OUT BY THE OTHERSIDE, BUT RULE 3.700-A , IT SAYS "SENTENCE DEFINED". IT SAYS , THE TE RM SENTENCE MEANS THE PRONOUNCEMENT B Y THE COURT OF THE PENALTY IMPOSED ON A DEFENDANT FOR THE OFFENSE OF WHICH THE DEFENDANT HAS BEEN ADJUDICATED GUILTY.

EXACTLY. WHICH IS EXACTLY WHAT WE HAVE IN THIS CASE. THE COURT PRONO UNCED A PENALTY WHEN HE WAS PLACED ON PROBATION , WHEN MR. RICHARDSON WAS ADJUDICATED GUILTY THE FIRST TIME , THE COURT PRONOUNCED THE PENALTY, AND THIS COURT HAS RECOGNIZED THAT THE PENALTY IS THAT THE IMPOSITION OF A SANCTION, AND A SA NCTION C ANINCLUDE PROBATION. IT CAN INC LUDE A J AIL TERM. OR THERE IS VARIOUS SP LIT SENTENCES, ALSO , SO I THINK OUR ARGUMENT IS COMPLE TELY CONSISTENT WITH THAT RULE AND COM MENTARY . ONE OR TWO OTHER THING S IF I MIGHT , AND IN ADDITION TO BEING CONTRA RY TO THE P LAINLANGUAGE OF THE STAT UTE , I THINK , WHAT THE RESPONDENT IS ASKING US TO D O AND BASICALLY WHAT THE FOURTH IS ASKING US TO DO IS , REALLY , SOMETHING CONTRARY TO

JUDICIAL ECONOMY, IN ORDER TO SATISFY THE SEPARATE SENTENCING REQUIREMENT. IF THE DEFENDANT IS IN COURT , THEY ARE ASKING TO DO A SEPARATE SENTENCE ON ONE CHARGE. IF -- GIVE THE DEFENDANT ALL HIS RIGHTS. LET'S CLOSE THE FILE ON THIS ONE AND OPEN THE FILE ON THAT ONE. IT IS THE SAME RIGHTS AND EVERYTHING, THAT KIND OF ACTIVITY IS CONTRARY TO JUSTICE AND THAT IS WHAT IS BEING REQUIRED UNDER THE FOURTH DISTRICT . THAT IS SOMETHING TO CONSIDER. JUSTICE LEWIS AND WELLS, WE DISCUSSED BARNES BEFORE. I LOOKED AT IT AGAIN AND BARNES DOES ADDRESS A SEQUENTIAL CONVICTION REQUIREMENT. WHEN THAT BECAME SUBSECTION 5, THEN IT WAS ADDRESSED IN TERMS OF SEPARATE SENTENCING REQUIREMENT. I THINK THEY ARE CONSISTENT , THOUGH, AND I THINK THE STATUTE MAINTAINS THE SPIRIT OF BARNES, BECAUSE WHAT WE HAVE IN BOTH OF THOSE ISN'T GIVING THE DEFENDANT AN OPPORTUNITY TO REFORM, WHETHER IT IS , HE KNOWS ABOUT THE CONVICTION, HE KNOWS ABOUT THE SENTENCE. HE IS GIVEN AN OPPORTUNITY TO REFORM. THAT IS REALLY WHAT WE GET OUT OF BARNES , AND IN THIS CASE, MR . RICHARDSON WAS GIVEN TWO OPPORTUNITIES TO INFORM, TO REFORM HIS CRIMINAL ACTIVITY. HE DID NOT , AND HE HAD A THIRD CONVICTION, AND HE WAS PROPERLY SENTENCED AS A HABITUAL OFFENDER. I WOULD LIKE TO THANK THE COURT FOR ITS TIME, AND WE WOULD LIKE TO ASK THAT THIS COURT QUASH THE DECISION OF THE FOURTH DISTRICT AND CERTIFY CONFLICT IN FAVOR OF McCALL AND THE DECISIONS OF THE OTHER DISTRICT COURTS. THANK YOU.

THANK YOU .

ONCE AGAIN, THE COURT WOULD VERY MUCH LIKE TO EXPRESS ITS APPRECIATION TO MR. LANG , MR . BLUE , AND MS. DEAN, FOR VOLUNTEERING YOUR TIME PRO BONO , TO PROVIDE A SERVICE WHICH IS ESSENTIAL TO THE ADMINISTRATION OF JUSTICE IN THIS CASE , AND IN FLORIDA THAT WE HAVE LAWYERS TO DO THAT, AND THE COURT IS VERY APPRECIATIVE OF IT. WE WILL BE IN RECESS , WE WILL ONLY TAKE A FIVE- MINUTE RECESS THIS MORNING , SO THE THIRD CASE, PLEASE BE PREPARED.

MARSHA L: PLEASE RISE.