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## State of Florida v. Jerry D. Anderson

CHIEF JUSTICE: THE LAST CASE ON THIS MORNING'S DOCKET IS STATE OF FLORIDA VERSUS ANDERSON. VERSUS ANDERSON.

GOOD MORNING . MAY IT PLEASE THE COURT. MY NAME IS RONALD NAPOLITANO AND I REPRESENT THE STATE OF FLORIDA IN THIS CASE.

THIS ISN'T A HEGGS CASE , IS IT?

WELL , I THINK IT IS A HEGGS CASE, BECAUSE THE ISSUE STILL HAS TO DO WITH THE UNCONSTITUTIONALITY OF CHAPTER 95.137. 194.137. EXCUSE ME.

ISN'T IT A SENSE OF DIDN'T THEY USE THE RIGHT SCORE SHEET HERE?

THEY USED THE RIGHT SCORE SHEET. THE PROBLEM WAS THAT THEY WERE BASING, THE QUESTION WAS HOW TO SCORE THE ATTEMPTED HURD ATTEMPTED MURDER, AND THEY WERE USING THE 1995 STATUTE, WHICH WAS WHICH WAS DECLARED , PART OF NUMEROUS STATUTES THAT WERE DECLARED UNCONSTITUTIONAL IN HEGGS. THIS WAS ONE OF THEM. THIS ONE WAS HOW DO YOU SCORE ATTEMPTS. UNDER THE '95 STATUTE , IT IS TWO LEVELS BELOW. UNDER THE '94 STATUTE , EXCUSE ME, THE '95 STATUTE , IT IS - -

WHY DON'T WE ASSUME FOR THIS CASE , THAT IT IS NOT A HEGGS SITUATION.

A DISTINCTION IN THE SENSE

SO THAT WE CAN UNDERSTAND THAT, IF WE ARE TALKING ABOUT A STANDARD SENTENCING SCORE SHEET ERROR , WHICH RULE 3.800 PROVIDES FOR RELIEF, ARE YOU CLAIMING THAT HEGGS CHANGED THE LAW, THAT THOSE , IF IT COULD HAVE MADE A DIFFERENCE , THAT IT SHOULD BE

I SUPPORT THE RATIONALE THAT THE FIRST DISTRICT ADOPTED IN HUMMEL, AND IN HUMMEL , IT SAYS THAT THE SUPREME COURT

THIS CURE. YES. THE FLORIDA SUPREME COURT ESTABLISHED A NEW STANDARD REGARDING SCORE SHEET ERRORS, AND THAT IS

WE DID THIS SUPPOSEDLY IN HEGGS , WHICH DEALT WITH

WE DID THIS IN HEGGS .

BEFORE HEGGS , WAS , OUT THERE , WE HAD 3.800 FOR A LONG TIME. HOW WERE TRIAL COURTS HANDLING IT ? SCORE SHEETS.

BEFORE HEGGS, THE COURTS LOOKED AT IT AS A QUESTION OF COULD, EXCUSE ME, WOULD THE COURT HAVE IMPOSED THIS SAME SENTENCE , REGARDLESS OF THE SCORE SHEET ERROR.

IS THAT THE SAME STANDARD, WHETHER IT IS ON DIRECT APPEAL OR IT IS OPPOSE THE CONVICTION?

WELL , THAT IS WHERE I TAKE EXCEPTION. THE WOULD -HAVE-BEEN IMPOSED , IN EFFECT HARMLESS ERROR ARGUMENT, THE STATE WOULD HAVE TO SHOW HARMLESS ERROR, IS FINE WHEN YOU ARE , AND I AGREE BASED UPON GOODWIN, THAT THAT HARMLESS ERROR ARGUMENT THAT THE STATE WOULD HAVE TO OVERCOME , IS FINE WHEN YOU ARE DEALING WITH DIRECT APPEAL , BUT NOT WHEN YOU ARE DEALING WITH COLLATERAL ISSUES. WHEN YOU COME DOWN TO THE COLLATERAL QUESTION OF RAISING IT IN A POSTCONVICTION ACTION, EITHER IN A 3.800 OR IN A 3.850 MOTION , YOU HAVE A DIFFERENT STANDARD.

WHY SHOULD THERE BE A DIFFERENT STANDARD, IF THE RULE EXPRESSLY PROVIDES FOR THE CORRECTION OF THIS KIND OF MISTAKE? THAT IS THAT WE ARE DEALING , REALLY, WITH AN EXCEPTIONAL SITUATION HERE , AND I WOULD LIKE YOU TO ADDRESS , FOR INSTANCE , JUDGE ALTENBERND 'S COMMENT THAT , IF WE SHOULD CHANGE THE STANDARD UNDER THAT, THAT WE JUST AS WELL DO AWAY WITH THAT PROVISION IN THE RULE NOW THAT ALLOWS TO CATCH THOSE ERRORS , EVEN IN POSTCONVICTION?

THE RULE WAS ESTABLISHED IN THE WOODFIELD CASE , AND WHAT WE WERE DEALING WITH IN THE WOODFIELD CASE WAS , AS A RESULT OF THESE SCORE SHEET ERROR , THE SENTENCE WAS A DE FACTO ILLEGAL SENTENCE. YOU COULDN'T IMPOSE THAT SENTENCE UNDER THE CORRECTED SCORE SHEET.

BUT AREN'T WE , REALLY , IF WE ARE TAKING AS A PREDICATE , FOR A SENTENCING DECISION , OKAY, A MISTAKE , SHOULDN'T THE PERSON THAT IMPOSES THAT SENTENCING DECISION , NOW , HAVE AN OPPORTUNITY TO SAY , HERE IS WHAT I WOULD DO , IF MY MISTAKE IS CORRECTED. AND NOW WE GET IT RIGHT. IF IT TURNS OUT TO BE THE SAME , THEN THAT IS , SO BE IT , BUT WE DON'T WANT TO HAVE THE SENTENCES THAT WERE IMPOSED, BASED ON MISTAKES , AND , OF COURSE, THESE MISTAKES CAN BE LITTLE MISTAKES THAT EVERYBODY WOULD SORT OF AGREE , WELL , HOW COULD THAT POSSIBLY MAKE A DIFFERENCE , TO MISTAKES THAT, BUT SHOULDN'T THE ONE THAT DECIDES THAT , BE HOPEFULLY , THE SAME TRIAL COURT THAT IMPOSED THE SAME , OR IMPOSED THE SENTENCE, SO THAT THEY CAN MAKE THAT JUDGMENT ABOUT IT , BUT IT SEEMS THAT HEGGS , BECAUSE WE KNEW WE WERE GOING TO HAVE LARGE NUMBERS AND EVERYTHING , WE SORT OF CUT THEM OFF AT THE PASS , AND, REALLY , HAD A VERY EFFICIENT RULE , BECAUSE YOU COULD JUST LOOK AND SAY IF IT WAS POSSIBLE FOR THE SENTENCE TO BE IMPOSED UNDER THE GUIDELINES NOW, THAT WOULD APPLY , THEN WE ARE GOING TO LEAVE IT ALONE , AND THAT TOOK CARE OF A WHOLE CLASS OF CASES. THERE IS NO INDICATION IN HEGGS , THAT WE INTENDED TO INFLUENCE THE RULE THAT HAD THIS EXPRESS PROVISION. THAT IS WHAT I AM CONCERNED ABOUT , IS THAT WE ARE TAKING SOMETHING YOU KNOW. WE HAVE HAD CASES FROM TIME TO TIME WITH REFERENCE TO COMPUTING TIME SERVED IN PRISON AND ALL OF THOSE, AND WE TRY TO DEAL WITH THAT CLASS OF CASES , AND THAT IS , I BELIEVE, WHAT WE WERE DOING IN HEGGS , SO I AM CONCERNED ABOUT BRINGING THAT OVER TO SOMETHING WHERE WE ADOPTED A PARTICULAR RULE .

I DON'T , THE DEFENDANT HAS REMEDIES HERE. HE CAN RAISE IT ON DIRECT APPEAL BY FILING A 3.800- B -1 OR 2 MOTION. HE CAN, ALSO , RAISE IT POSTCONVICTION. HE CAN RAISE THIS ERROR IN SEVERAL WAYS .

HE CAN RAISE IT ON DIRECT APPEAL. HE CAN, ALSO , SINK RELINQUISHMENT AND RAISE IT DURING THE PENDENCY.

CORRECT.

IF IT WASN'T FIRST RAISED BELOW.

HE HAS TO RAISE IT BELOW , BECAUSE OBVIOUSLY YOU CANNOT RAISE SENTENCING ISSUES , EVEN FUNDAMENTAL ISSUES , ON DIRECT APPEAL IF IT WASN'T PRESERVED IN THE TRIAL COURT .

3.800-B, DID WE AMEND TO ALLOW FOR RELINQUISH MENT AND TO BE FILED IN THE TRIALCOURT , A FTER WE HAD 3 00-A , I MEAN 800-A , TO SAY THAT SCORE SHEET ERRORS WERE ONE OF THE THINGS THAT COULD BE

30 0-A WAS AMENDED MA NY YEARS BEFORE, IN 1986, I BELIEVE , IN THE WHITFIELD C ASE.

IT SEEMS TO ME , IN READING JUDGE ALTENBERND 'S CONCURRENCE , THAT WHAT YOU MAY BE ADVOCATING FOR ISTHAT THE POLICY THAT PROVIDES THAT A LEGAL SENTENCE THAT IL LEGAL SENTENCES CAN BE CORRECTED ANYTIME, THAT MAYBE THERESHOULD BE A DIFFERENT STANDARD FOR SCORE SHEET ERRORS. MAYBE THEY SHOULDN'T HAVE UNLIMITED TIME , BUT GIVENTHAT THE RULE EXPRESSLY PUTS THESE CAT GOERS OF ERROR INTO A SEPARATE PLACE , SOMETHING THAT CAN BE RAISED AT ANY TIME, I AM HAVING TROUBLE UNDERSTANDING WHY THE STANDARD SHOULD BE DIFFERENT , I F THE LAW YER HADN'T CAU GHT IT EARLIER , WHY ISN'T I T GOING BACK TOTHE ORIGINAL JUDGE, TO LOOK AT IT , TO SEE WHETHER HE OR SHE WOULD HAVE IMPOSED A DIFFERENT SENTENCE, THE APPROPRIATE THING TO DO? AND IF THERE IS A ISSUE ABOUT SHOULD THERE BE A DEADLINE FOR THESE KINDS OF THINGS , WE LO OK AT THAT PROSPECTIVE LY AS FAR AS A RULE CHANGE , BECAUSE I HAVE ALWAYS THOUGHT THAT THOSE TYPES OF ERRORS SHOULD HAVE A TIME LIMIT ON THEM.

I AM TRYING T O ADDRESSTHAT. THE REMEDIES ARE ALREADY THERE.IF YOU DON'T RAISE IT ON DIRECT APPEAL, YOU HAVE SEVERAL OTHER WAYS OF RAISING THIS MATTER. YOU CAN RAISE IT IN A 3.800-C MOTION, WITHIN 60 D AYS AFTER THE MANDATE ON DIRECT APPEAL OR SUBSEQUENT MANDATES, IF IT GOES HI GHER.

I KN OW YOU CAN RAISE IT, BUT THE POIN T IS THAT RULE 3 .800-A SPECIFICALLY AL LOWS THIS ONE TYPE OF ERROR TO B E RAISED AT ANY TIME , NOT WITH A RESTRI CTIVE STANDARD BUTWITH THE INTENT THAT , IF, AS JUSTICE AN STEAD SAID , THAT WE WANT TO HAVE CORRECT SCORE SHEETS, AND IF WE DON'T HAVE THEM , THEN WE CAN'T HAVE RELIANCE THAT THE SENTENCING DECISION WAS CORRECT .

BUT THE 3.800-A, WHEN THEY ADDED THAT IN ADDITION TO THE SENTENCE BEING ILLEGAL , TO CORRECT INACCURACIES IN THE SCORE SHEET , THE COURT , THIS COURT , ADDED THAT , IN THE WHIT FIELD CASE. IN THE WHITFIELD CASE , THE REASON THAT T HEY ADDED IT , WAS BECAUSE, AS A RESULT OF THAT SCORE SHEET ERROR , THAT SENTENCE WAS A DE FACTO ILLEGAL SENTENCE , IN EFFECT. IF A CORRECTED SCORE SHEET WERE AVAILABLE, THAT SENTENCE COULD NOT BE I MPOSED . ABS A DEPART URE.

WHY WOULD WE HAVE NEEDED, WHY WOULD WE HAVE NEEDED TO A MEND THE RULE, IF IT WAS ALREADY COVERED BY IT BEING AN ILLEGAL SENTENCE?

BECAUSE WE ARE DEALING WITH IT IN 19 86. WE WEREN'T DEALING WITH THESE C ELLS AND 25 PERCENTUP AND DO WN AND WE WEREN'T DEALING WITH THE CRIMINAL PUNISHMENT CO DE.

MY QUESTION WAS, THEN , MAYBE IT SEEMS THE RULE NEEDS TO BE AMENDED , BUTGIVEN THE CURRENT STATE OF THE LAW , YOU HAVE AS SERTED THAT HEGGS CHANGED THE LAW F OR ALL OTHER KI NDS OF SCORE SHEET ERRORS, AND THERE IS NO IND ICATION THAT HEGGS INTENDED TO DO THAT.

I DON'T SEE , WELL , MAYBE HEGGS DIDN'T SAY THAT , BECAUSE HEGGS WAS TALKING ABOUT SI NGLE SUBJECT VIOLATION, BUT I DON'T SEE ANY REASON WHY THAT RULE OR THAT HOLDING CANNOT APPLY TO ANY SCORE SHEET ERROR , BECAUSE

GONE ON. FINISH UP.

YOU ARE GO ON. FIN YOU SHALL UP.

YOU ARE NOW A POSTCONVICTION ACTION. IN A POSTCONVICTION ACTION, YOU DO NOT HAVE THE SAME STANDARDS THAT YOU HAVE IN AN ACTION ON DIRECT APPEAL. THIS WAS A LEGAL SENTENCE. IT WAS WITHIN THE RANGE THAT WAS AVAILABLE, EVEN UNDER THE CORRECTED SCORE SHEET. A GAIN, THIS COURT STATED, IN LEBANON, AND I STATED THAT IT IS NOT DIRECTLY ON POINT BUT THE REASONING IS THE SAME, THAT THE INTENTION IN HEGGS WAS NOT FOR THE TRIAL COURT TO APPLY SUBJECTIVE HINDSIGHT ANALYSIS, AND EVEN JUSTICE PARIENTE, IN THE DISSENTING OPINION, A LONG WITH JUSTICE SHAW, SAID THAT THE COULD-HAVE-BEEN-IMPOSED RULE UNDER THE GUIDELINES APPLIES TO A NONDEPARTURE SENTENCES AND WHAT WE HAVE HERE IS A NONDEPARTURE SENTENCE. NOW, THE DEFENDANT COULD RAISE IT AS I SAID ON DIRECT APPEAL. THEN YOU HAVE THE HARMLESS ERROR ARGUMENT. IT HAS GOT TO GO BACK BECAUSE YOU DON'T KNOW.

I GUESS ONE OF THE PROBLEMS I AM HAVING WITH THE STANDARDS THAT, AS ARTICULATED, WHETHER IT SHOULD BE WOULD HAVE BEEN IMPOSED OR COULD HAVE BEEN IMPOSED, THAT, SINCE YOU CAN BRING THE SCORE SHEET ERRORS AT ANY TIME, YOU KNOW, IT COULD BE FIVE YEARS DOWN THE ROAD, IF YOU USE THE WOULD HAVE BEEN IMPOSED, IF THE TRIAL JUDGE IS NO LONGER THE SENTENCE I AM WORKING ON HOW WOULD A SHOULD HAVE BEEN IMPOSED, BE A WOULD HAVE BEEN IMPOSED STANDARD.

THE WOULD HAVE BEEN IMPOSED STANDARD, YOU CAN USE IT IN A CASE WHERE YOU ARE RAISING IT IN A 3.850, BUT THEN THE BURDEN IS GOING TO BE ON THE DEFENDANT, TO SHOW THAT THE JUDGE, THE SENTENCE WOULD HAVE BEEN DIFFERENT, BECAUSE WE ARE TALKING IN A SENSE, TALKING BASICALLY THAT DEFENSE COUNSEL RENDERED AN EFFICIENT

WE ARE JUST TALKING ABOUT APPELLATE LAW, ARE WE NOT, THAT IF YOU FOUND AN ERROR, THE NEXT WHAT QUESTION IS WAS IT PREJUDICIAL ERROR OR WAS IT HARMLESS, AND THAT IS WHERE THE "WOULD" COMES IN, BUT I GUESS MY, I HAVE ALWAYS TAKEN THE EXPRESS PROVISION OF THIS KIND OF ERROR, IN THE RULE, TO SIMPLY MEAN TO ENGRAFT IN THE RULE, REALLY, A SORT OF SUPER APPELLATE PROCEEDING. THAT IS TO SAY WE ARE GOING TO ALLOW THIS. WE MAY NOT HAVE HAD TO, THEN YOU TALK ABOUT THE ILLEGAL SENTENCE THAT WAS IN THE CASE THAT ORIGINATED THIS, BUT NEVER THELESS THE RULE WAS CHANGED, AND THE WAY THAT IT HAS BEEN INTERPRETED IS THAT YOU TREAT IT JUST AS IF YOU WERE ABLE TO RAISE IT AN APPEAL, AND THIS WAS AN APPEAL. THAT IT GOES BACK UNDER THAT SAME STANDARD. I AM JUST CONCERNED ABOUT, AS JUSTICE PARIENTE SAYS, PERHAPS WE NEED TO REEXAMINE, YOU KNOW, THAT, AND IN THE CONTEXT OF WHAT WE DID IN HEGGS, AND THAT IS A PERFECTLY APPROPRIATE WAY, BUT I THINK WE ARE SORT OF UPSETTING THE STABILITY OF ACTUALLY WHAT OCCURRED, IN TERMS OF AMENDING THAT RULE, AND THAT IS THE BUMP THAT I HAVE TO GET OVER HERE, THAT IS, SO IF YOU CAN HELP US WITH THAT. DON'T YOU AGREE THAT THAT IS WHAT, REALLY, THE INTENT, THE IMPACT OF HAVING THAT SPECIFIC PROVISION WAS, WAS TO PUT IT IN THE SAME CATEGORY AS IF HE HAD RAISED ON APPEAL, THAT THAT, WE WANTED TO BE SURE, WITH THE INTEGRITY OF THAT SENTENCING PROCESS, THAT EVEN THOUGH IT WAS LATER, THAT YOU COULD STILL RAISE IT AND GET A RECONSIDERATION?

WELL, THAT WOULD BE FINE, BACK IN 1986, BUT I DON'T THINK IT IS VIABLE TODAY, BECAUSE NOW YOU, YOU KNOW, YOU HAVE THESE PROCESSES IN PLACE WHERE YOU CAN RAISE, THERE IS NO REASON WHY IT CANNOT BE RAISED ON DIRECT APPEAL. I MEAN, IT IS THERE. FOR EVERYONE TO SEE.

YOU MAY HAVE A GOOD ARGUMENT THAT WE OUGHT TO RELOOK AT ALL OF THIS, IN TERMS OF THE WAY THE RULE READS AND EVERYTHING, BUT I WONDER WHETHER JUST SAYING NO, THAT WHEN WE DECIDED HEGGS, THAT WE DECIDED, YOU KNOW, BECAUSE THAT JUST DIDN'T HAPPEN, THAT WAS NOT ON OUR MINDS IN HEGGS.

WELL, AGAIN, I CAN'T READ WHAT THE COURT'S THINKING

YOU DON'T HAVE TO READ THE COURT'S MIND. THAT IS WHAT WE WERE DEALING WITH AT THE TIME.

WHAT THE COURT SAID IN HEGGS WAS , IF THE SENTENCE COULD HAVE BEEN IMPOSED - - KNEW A NUMBER OF CASES.

I AM SO RRY .

WE KNEW THERE WERE GOING TO BE A NUMBER OF CASES. WE NEVER TALKED ABOUT THIS POSTCONVICTION RULE .

BUT ISN'T IT A DISTINCTION WITH OUT A DIFFERENCE? YOU ARE STILL , IN OTHER WORDS YOU ARE DENYING ALL THESE PEOPLE REL IEF IN HEGGS

I THINK THAT THAT IS THE SAME ARGUMENT MADE ON THE OTHER SIDE , OBVIOUSLY, TOO , IS THAT , AREN'T YOU , REALLY RATIONALIZEING BECAUSE YOU ARE WOR RIED ABOUT A LARGENUMBER OF CASES, AND YOU REALLY SHOULDN'T HAVE DONE THAT, THAT THAT , REALLY , WAS AN ERROR, IN THE FACE OF THIS OTHER LAW, THAT EXISTED.BUT WE WENT A HEAD AND DID IT , JUST AS WE HAVE GONE A H EAD AND DONE IT IN A LOT OF THESE CASES WITH PR ISON CREDIT AND WHATEVER.WE HAVE SAID WE ARE GOING T O NARROWLY, YOU KNOW, G RANT HE ON GR ANT RELIEF, EVEN THOUGH WE HAVE T HIS ISSUE OF TIME.

I THINK THE STANDARD SHOULD BE , WHEN IT COMES TO POSTCONVICTION ACTIONS , WHENYOU ARE DEALING WITH SOMETHING THAT HAS TAKEN PLACE THAT THE CONVICTION HAS BEEN AFFIRMED ON DIRECT APPEAL AND THIS IS SE VERAL YEARS DOWN THE ROAD , THAT THE DEFENDANT HAS TO BRING IT IN A TIMELY FASHION, AND IN A TIMELY FASHION

ISN'T THAT DISTURBING THE INTEGRITY , THOUGH , OF SENTENCING, THAT HERE IS A SET OF CIRCUMSTANCE THAT THE T RIAL JUDGE WHO IS IMPOSING THIS V ERY S E RIOUS THING OF HOW LONG A PERSON IS GOINGTO BE , HAVE THEIR FREEDOMTAKEN AWAY FROM THEM , HAVE ACCURATE DATA TO MAKE THAT DECISION, AND SO IF IT TURNSOUT THERE IS A BIG FLAW IN THAT , THEN THE WHOLE INTEGRITY OF THE SENTING PROCESS IS CA LLED INTO OF THE SENTENCING PROCESS CALLED INTO QUESTION, IS IT NOT, AND WITH THE MOST IMPORTANT VALUE THAT WE HAVE IN OUR SOCIETY , PEOPLE'S FREEDOM, BEING AT-RISK?

BUT IT STILL IS A LEGAL SENTENCE. IT IS WITHIN THE RA NGE. THE COURT DID NOT IMPOSE A SENTENCE THAT IT COULD NOTHAVE IMPOSED . NOW , IF THERE WAS SOMETHING IN THE RE CORD THAT SPECIFICALLY INDICATED THAT THE COURT SAID , W ELL , I AM IMPOSING THE BOTTOM, I WISH I COULD GO LO WER BUT I CAN'T. I AM GIVE YOU GO THE BOTTOM OF THE GUIDELINES I A M GIVING YOU THE BOTTOM OF THE GUIDELINES, THAT IS ONE THING , BUT WHERE YOU ARE DEALING WITH IN THE MIDDLE , OR WHEREAS IT IS NE AR THE TOP AND NOW IT IS IN THE MIDDLE BE FORE IT WAS NEA R THE BOTT OM. NOW IT IS IN THE MIDDLE , NEAR THE TO P , IT IS ALL SUBJECTIVE, AND WE SHOULD N'T HAVE TO DEAL WITH THAT , IN A POSTCONVICTION ACTION SHALL!

WELL , THAT IS ACTION!

WELL THAT , IS THE TRADE-OFF IS WE ARE MAKING SOME ADMINISTRATIVE VENT ACT THAT, REALLY, DEVALUES JUSTICE IN THE INDIVIDUAL CASE, IN F A VOR OF EFFICIENCY OF THE SYSTEM, ARE WE NOT?

WE ARE NOT DEVALUING JUSTICE , IF THE DEFENDANT CAN RAISE IT. HE CAN STILL RAISE IT I N A 3.800-C MOTION, I M EA N EXCUSE ME, A 3.850 MOTION , BUT THE DEFENDANT SHOULD HAVE SOME

KIND OF A THRESHOLD BURDEN TO SHOW HARMFULNESS. I MEAN, THE SENTENCE IS LEGAL. THERE IS NOTHING, UNLESS THERE IS SOMETHING IN THE RECORD THAT SHOWS THAT THE COURT WAS INTENDING TO GIVE HIM EXACTLY THE MIDDLE OF THE GUIDELINES OR GIVE HIM THE BOTTOM OF THE GUIDELINES, WHERE, WHERE IS THE HARM HERE? THERE IS NO HARM HERE.

PRESUMABLY THE JUDGE PAID ATTENTION TO ALL OF THESE THINGS THAT HE WAS SUPPOSED TO PAY OR SHE WAS OPPOSED TO -- WAS SUPPOSED TO PAY

ISN'T THE VAST MAJORITY OF SENTENCING BASED UPON PLEA AGREEMENTS, AND THE DEFENSE COUNSEL AND STATE AN ATTORNEY GET TOGETHER AND LOOK AT THE SCORE SHEET, LIKE IN THIS CASE HE WAS LOOKING AT A RANGE FROM 81-TO-136 MONTHS, AND THEY WERE IN THE BOTTOM OF THAT RANGE. AND IF IT WAS CORRECT AND THEY WERE LOOKING AT THE BOTTOM RANGE, HE MIGHT BE LOOKING AT 75 MONTHS, SO WE ARE TALKING ABOUT OVER A YEAR OF SOMEBODY'S LIFE IN PRISON, AND IN THE CALCULATION THE WHOLE PROCESS THAT GOES ON, YOU ARE LOOKING AT AN INACCURATE SCORE SHEET, WHICH IS ONE OF THE FIRST THINGS THAT ONE LOOKS AT, IN TRYING TO NEGOTIATE WHAT A REASONABLE SENTENCE WOULD BE, WHICH OCCURS IN, LIKE, 98 PERCENT OF SENTENCING.

WHEN YOU ARE DEALING WITH NEGOTIATED SENTENCES, NOW YOU ARE DEALING WITH A DIFFERENT BALLGAME, BECAUSE THE DEFENDANT IS RELYING, HE IS ACCEPTING A SENTENCE, THINKING THAT, WELL, THIS IS THE BOTTOM OF THE GUIDELINES. THEY ARE OFFERING ME THIS. AND I WILL TAKE IT, BECAUSE I KNOW I AM GOING TO BE FOUND GUILTY ANYWAY. WHEREAS WITH THE CORRECTED SCORE SHEET, NOW IT IS THE TOP OF THE GUIDELINES. THE COURT HAS, IT IS CLEAR THAT HE IS ENTITLED TO WITHDRAW HIS PLEA IN A SITUATION LIKE THAT. BUT WE ARE NOT DEALING WITH THAT HERE.

EVEN IN THIS CASE AS JUSTICE ANSTEAD SAID, WHEN A TRIAL COURT IS LOOKING AT IT, HE IS LOOKING AT THE RANGE, LOOKING AT A WHOLE FACTOR OF THINGS, BUT ONE OF THE FIRST THINGS THEY ARE LOOKING AT IS WHAT IS THE RANGE. THE RANGES NO LONGER EXIST, SO WE ALL HAVE TO

BUT THE SENTENCE IS STILL WITHIN THE RANGE. IT IS STILL A LEGAL SENTENCE. HOW DO WE KNOW, WE ARE SPECULATING. WE ARE SPECULATING AS TO WHAT THE COURT INTENDED, AND THIS COURT HAS STATED

CHIEF JUSTICE: WELL, I THINK WE UNDERSTAND YOUR ARGUMENT. BECAUSE YOU USED OR HAD SUCH A SMALL TIME FOR REBUTTAL, WE ARE NOW IN AN EXHAUSTED OR USED UP YOUR REBUTTAL TIME, BUT DEPENDING ON WHAT GETS RAISED ON THE OPPOSING ARGUMENT, I MAY GIVE YOU A FEW SECONDS.

THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH.

IF IT PLEASE THE COURT. RICHARD NAPOLITANO. RICHARD SANDERS FOR THE RESPONDENT. LET ME MAKE SURE WHAT WE ARE TALKING ABOUT. FIRST OFF, THIS IS NOT A PLEA CASE. IT WAS NOT. THIS WAS A, IN THE BRIEF, AN IMPOSED SENTENCE. YOU MADE AN INTERESTING POINT THAT THE TRIAL JUDGE MAY HAVE HAD AN INACCURATE SCORE SHEET THAT MAY HAVE GONE 75 MONTHS OR SO AND COLLECT DOC WEB SITE, THAT IS EXACTLY SENTENCE HE GOT. HE HAS BEEN RESENTENCED, AND HE GOT A 75-MONTH SENTENCE OUT OF THIS. IF THE COURT RECALLS, YOU DENIED THE MOTION FOR THE STAY AND THAT IS WHAT HE GOT, 75 MONTHS.

AS OPPOSED TO WHAT?

9 0 IS WHAT HE GOT ORIGINALLY.

A GOOD GUESS , HUH?

VERY GOOD GUESS. I CALCULATED IN THE ANSWER BRIEF, THAT IF YOU TOOK IT AS A MATTER OF PERCENTAGE , AS TO WHAT THE PERCENTAGE WAS HE GOT AND WHAT THE PERCENTAGE WOULD HAVE BEEN IF IT HAD BEEN THE SAME UNDER THE ACC URATE SCORESHEET , I FIGURED IT AT ABOUT 77 MONTHS, SO APPARENTLY THE TRIAL COURT DID THE SAME THING.

LET ME ASK YOU SOMETHING. WHAT I AM HAVING TROUBLE WITH IS THE DIFFERENCE BETWEEN A DIRECT APPEAL AND POSTCONVICTION.

RIGHT.

I HAVE NO PROBLEM WITH THE IDEA THAT A WOULD-HAVE-BEEN IMPOSED STANDARD SHOULD APPLY ON DIRECT APPEAL , BUT IT SEEMS LIKE A FEW YEARS AGO WHERE WE HELD THAT IN ORDER TO RAISE IT ON APPEAL YOU SHOULD HAVE PRESERVED IT , AND WE HAD A LOT OF TROUBLE AMENDING THE RULE TO ALLOW THE DEFENDANTS WHO HADN'T AMENDED AT SENTENCING, TO GO AHEAD AND FILE A POST SENTENCE MOTION TO CORRECT THE ERROR SO THEY CAN APPEAL IT ON DIRECT APPEAL, AND IT SEEMS LIKE WE WENT TO A LOT OF TROUBLE TO ALLOW DEFENDANTS TO GET THAT DIRECT APPEAL IN , HOWEVER , IF WE ARE NOW GOING TO IMPOSE THE SAME STANDARD OPPOSE THE CONVICTION THAT WE DO ON DIRECT APPEAL, THEN IT SEEMS LIKE ALL THAT EFFORT IN 3.800-B , IS IRRELEVANT, BECAUSE THE DEFENDANT DOESN'T HAVE TO PRESERVE IT AT THE TRIAL COURT , DOESN'T HAVE TO RAISE IT ON APPEAL , ALL HE HAS TO DO IS WAIT UNTIL POSTCONVICTION AND RAISE THE EXACT SAME ISSUE. HE WILL HAVE THE EXACT SAME STANDARD, AND THERE IS NO INCENTIVE TO RAISE THAT ISSUE BEFORE POSTCONVICTION.

IT IS IRRELEVANT IN THE SENSE THAT YOU DON'T HAVE TO USE 3.800-B , THAT IS TRUE , BUT YOU CAN ALSO USE 3.800-A OR 3.850 DURING THE SAME TIME FRAME. YOU DON'T HAVE TO DO A DIRECT APPEAL.

3.800- B, IS THAT , WHATEVER THE RULE IS THAT WE AMENDED, APPLIES TO ALL SORTS OF ERRORS.

RIGHT.

I WOULD IMAGINE THAT, IF A DEFENDANT KNOWS THERE IS A SCORE SHEET ERROR , THERE IS NO INCENTIVE FOR THE DEFENDANT TO WAIT AS LONG AS POSSIBLE TO RAISE IT , SINCE THE WHOLE IDEA IS THAT IT IS GOING TO GIVE THEM, MAYBE , A LESSER SENTENCE.

EXACTLY . EXACTLY POINT I WAS ABOUT TO MAKE. EXACTLY RIGHT. THERE WAS NO TACTICAL REASON TO DO THIS , NO TACTICAL REASON, IF YOU KNOW THE ERROR IS THERE, YOU WANT TO GET IT RAISED AS QUICKLY AS POSSIBLE.

I DON'T UNDERSTAND. WHY DID WE GO THROUGH ALL THE TROUBLE TO SAY YOU HAVE TO RAISE IT ON APPEAL , YOU HAVE TO HAVE PRESERVED IT BELOW, AND IF YOU DIDN'T PRESERVE IT BELOW, YOU ARE NOT ALLOWED TO RAISE IT ON APPEAL, WELL , THEN , PRESERVATION IS ALSO IRRELEVANT, BECAUSE YOU CAN JUST, IF YOU DIDN'T RAISE IT BELOW, YOU JUST WAIT UNTIL POSTCONVICTION. YOU RAISE IT THEN YOU GET THE SAME STANDARD , SO

YES.

WE HAVE LOST ALL OF THE BASIS FOR SAYING YOU HAVE TO HAVE PRESERVED THIS ERROR .

I WOULD SAY THIS , FIRST OFF , IF YOU ARE DEALING WITH THIS TYPE OF CLAIM AS INEFFECTIVE ASSISTANCE CLAIM , IN WHICH CASE , OF COURSE YOU HAVE A TWO-YEAR TIME LIMIT , IF YOU ARE DEALING WITH IT AS AN INEFFECTIVE ASSISTANCE CLAIM , THEN YOU HAVE TO ASK YOURSELF , WHAT DOES THE DEFENDANT HAVE TO SHOW , IN ORDER TO ESTABLISH THE PREJUDICE PRONG OF INEFFECTIVE ASSISTANCE. IT SEEMS CLEAR TO ME , PARTICULARLY IN THIS CASE , THESE TYPE OF FACTS, YOU HAVE DEFICIENT PERFORMANCE CLEAR ON THE FACE OF THE RECORD. YOU DON'T EVEN NEED AN EVIDENTIARY HEARING ON THAT . THIS ERROR SHOULD HAVE BEEN SPOTTED BY EVERYBODY, THE PROSECUTOR AND TRIAL COURT AND ORIGINAL COUNSEL AT SENTENCING AND IT WASN'T. YOU HAVE GOT DEFICIENT PERFORMANCE. WHAT DOES THE DEFENDANT HAVE TO SHOW, TO SHOW PREJUDICE , AND YOU ARE SUGGESTING , AND I BELIEVE YOU ARE, THAT IN SOME CIRCUMSTANCES THE STANDARD OF PREJUDICE IN A 3.850 , IN INEFFECTIVE ASSISTANCE CLAIM, IS DIFFERENT THAN A STANDARD HARMLESS ERROR CLAIM THAT WOULD APPLY IN A DIRECT APPEAL AND IN THIS CASE THAT IS CERTAINLY TRUE IN THIS CASE, WHAT DID HE HAVE TO DO TO SHOW PREJUDICE? IF YOU ARE GOING TO IMPOSE SOMETHING OTHER THAN THE SAME WOULD-HAVE-BEEN IMPOSED TEST, HOW IS THE DEFENDANT SUPPOSED TO SHOW THAT PREJUDICE? THE ONLY WAY TO DO IT , IT SEEMS TO ME , IS TO BRING THE ORIGINAL TRIAL JUDGE IN AND PUT HIM UNDER OATH AND SAY WHAT WOULD YOU HAVE DONE , HAD YOU KNOWN THE SCORE SHEET WAS INACCURATE ? THAT DOESN'T SEEM TO BE A PARTICULARLY GOOD WAY TO HANDLE THIS. I WOULD, ALSO, ARGUE THIS POINT . WHAT DO YOU MEAN WHEN YOU ARE SHOWING PREJUDICE? REASONABLE PROBABILITY THAT THE OUTCOME OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT . IN THIS CIRCUMSTANCE , IF YOU ARGUE THAT THE DEFICIENCY WAS FAILURE TO PRESERVE THE ISSUE FOR APPEAL , THEN I WOULD SAY THE PREJUDICE IS, IF THERE IS A HIGHER STANDARD IN A POSTCONVICTION MOTION A HIGHER STANDARD THAN POSTCONVICTION MOTION THAN WHAT HE HAS LOST BY COUNSEL'S FAILURE TO PRESERVE THE ISSUE , IS THE MORE FAVORABLE STANDARD THAN WHAT WOULD HAVE APPLIED ON DIRECT APPEAL IN THE FIRST PLACE HAD, WHICH IS THE WOULD-HAVE-BEEN IMPOSED TEST , SO YOU ASK YOURSELF THIS , IF COUNSEL WOULD HAVE PRESERVED THE ISSUE IN THE TRIAL COURT AND DIDN'T, AND THE DEFENDANT LOST THE APPLICATION OF THAT WOULD-HAVE-BEEN IMPOSED TEST AND ENDS UP WITH A HIGHER STANDARD, COULD-HAVE-BEEN IMPOSED OR WHATEVER IT IS , THEN DON'T YOU HAVE TO SAY, HAD COUNSEL PRESERVED IT , YOU WOULD HAVE GOTTEN THAT WOULD-HAVE-BEEN IMPOSED 12D AS THE STANDARD AS THE TEST. THEREFORE YOU HAVE TO APPLY THAT WOULD -HAVE-BEEN IMPOSED TEST, TO SEE WHAT HE WOULD HAVE GOTTEN ON DIRECT APPEAL , HAD THE ISSUE BEEN PROPERLY PRESERVED.

THIS IS ALL 3.850 YOU ARE ARGUING NOW.

3.850.

SO , AGAIN , THE REQUIREMENT IN 3.800-B THAT YOU HAVE TO PRESERVE THIS ISSUE IN THE TRIAL COURT , UNDER YOUR ARGUMENT IS IRRELEVANT , AT ANY POINT , BECAUSE IF YOU DIDN'T PRESERVE IT, THEN YOU HAVE A 3.850 CLAIM.

RIGHT.

AND SO YOU GET THE SAME STANDARD ANYWAY, SO YOU DON'T , ESSENTIALLY YOU DON'T HAVE TO PRESERVE ANY SENTENCING ERROR. IT DOESN'T MATTER. YOU CAN RAISE IT AT ANY TIME, AND IF IT IS NOT A 3.800-B , THEN IT IS A 3.800-A OR A 3.850 .

3.850 IS APPORTIONED TO YOUR TIME LIMIT , AND 3.800-B IS IRRELEVANT.

3.800-A IS AT ANY TIME, SO YOU HAVE THREE SHOTS. YOU GET TO PRESERVE IT OR YOU CAN DO A 3.850 BUT YOU MISSED THAT TIME. IT IS TWO YEARS. SO THEN FIVE YEARS LATER YOU SAY, WELL , NOW I HAVE GOT 3.800-A. IT SAYS AT ANY TIME I GET THE SAME STANDARD, SO I WILL RAISE THAT.

THIS IS MY THIRD BITE.

ONLY IF IT IS APPARENT ON THE FACE OF THE RECORD. IF IT IS A SCORE SHEET ERROR SUCH AS WHETHER A PRIOR CONVICTION WAS PROPERLY SCORED THAT MAY REQUIRE AN EVIDENTIARY DETERMINATION, THEN YOU MAY BE OUT OF LUCK IN A 3.800-A MOTION, SO THERE IS A TIME LIMIT IN THAT SENSE, ON SOME OF THESE CLAIMS, BUT THIS IS OBVIOUSLY NOT ONE OF THEM. THIS IS SOMETHING THAT IS PLAIN ON THE FACE OF THE RECORD, BUT, AGAIN, MY ARGUMENT WOULD BE YOU ARE TALKING ABOUT 3.800 B, WHO IS SUPPOSED TO DO THAT? THE TRIAL COUNSEL OR PELL AL AT COUNSEL. OR APPELLATE COUNSEL.

IN THIS CASE ARE WE TALKING ABOUT WHETHER OR NOT SOMETHING SHOULD HAVE BEEN SCORED AT AN EIGHT LEVEL OR NINE LEVEL, AND SO WHY IS THAT PLAIN ON THE RECORD, WHEN YOU HAVE TO GO BACK AND CONSULT AN OTHER STATUTE, TO DETERMINE WHICH ONE APPLIED? I AM NOT SURE I, THAT PART OF IT KIND OF ESCAPES ME.

WELL, I THINK IT IS PLAIN ON THE FACE OF THE RECORD WHAT HE WAS CHARGED, WHAT HE PLED TO, WHAT, IT WAS A PLEA ORIGINALLY. WHAT HE PLED TO.

BUT IS IT PLAIN ON THE FACE OF THE RECORD WHAT LEVEL IT SHOULD BE VERY IT SHOULD HAVE BEEN?

IT IS PLAIN ON THE FACE OF THE RECORD, IN THE SENSE THAT YOU KNOW WHAT HE PLED TO AND THEN YOU LOOK AT THE STATUTE AND SEE WHERE IT IS SUPPOSED TO BE SCORED.

PLAIN ON THE RECORD IS THAT IT DOESN'T REQUIRE AN EVIDENTIARY

RIGHT. EXACTLY. YES.

BUT DO YOU, GOING BACK TO THIS ISSUE ABOUT WHAT JUSTICE CANTERO RAISED, THAT IS THAT, WHEN WE PUT 300-A TOGETHER AND ADDED THE SCORE SHEET ERRORS, THERE WERE TWO DIFFERENT THINGS. FIRST OF ALL, THERE WASN'T A SAFETY VALVE LIKE WE HAVE NOW.

RIGHT.

AND, ALSO, SENTENCING WAS DIFFERENT. YOU KNOW, AS FAR AS, SO IS THERE AN ARGUMENT TO BE MADE THAT, WHETHER WE DO IT FOR THIS CASE OR NOT, THAT THE RULE SHOULD BE AMENDED TO HAVE A TIME LIMIT ON SCORE SHEET ERRORS OR WHY SHOULD THEY BE RAISED AT ANY TIME? AGAIN, BECAUSE AT LEAST IF YOU RAISE THEM QUICKLY, YOU HAVE THE ORIGINAL SENTENCING JUDGE, REALLY, WHO KNOWS WHAT HE OR SHE WOULD HAVE DONE. I DON'T KNOW IF THIS CASE WENT BACK TO THE SAME SENTENCING JUDGE. BUT IF YOU HAVE TO HAVE A WHOEM WHOLE NEW RESENTENCING A WHOLE NEW RESENTENCING SEVERAL YEARS LATER AND YOU HAVE ADDITIONAL BURDEN ON THE STATE, SO IS THERE AN ARGUMENT TO BE MADE THAT WE, REALLY, OUGHT TO PUT, NOT, YOU KNOW, SINCE THIS IS NOT A LEGAL, UNDER, UNDER OUR DEFINITION, THAT WE, REALLY, OUGHT TO PUT A TIME LIMIT ON SCORE SHEET ERRORS?

I THINK THE ARGUMENT HERE GETS BACK TO THE POINT JUSTICE ANSTEAD WAS MAKING, IS THE TRADE-OFF BETWEEN FINALITY, SHALL WE SAY, AND EFFICIENCY, AS OPPOSED TO ULTIMATE JUSTICE.

WE MAKE THAT, THOUGH, ALL THE TIME IN 3.850, UNFORTUNATELY, WHEN YOU HAVEN'T GOT YOUR WITNESS YOU, FOUND THAT WITNESS BUT YOU DIDN'T RAISE IT WITHIN THE TWO YEARS, SO THERE IS ALREADY THAT TRADE-OFF OF THE TWO YEARS.

EXACTLY.

AND THERE MIGHT BE WORSE ERRORS IN , THAT AREN'T RAISED WITHIN THE TWO YEARS THAN THE SCORE SHEET ERROR , SO WE HAVE ALREADY MADE SOME TRADE-OFFS.

CORRECT. YES. WELL , CERTAINLY. BUT MY ARGUMENT WOULD BE THIS. WE ARE TALKING ABOUT THIS SPECIFIC TYPE OF ERROR, NOT GENERAL PRINCIPLES HERE BUT THIS SPECIFIC TYPE OF ERROR. YOU HAVE A SCORE SHEET ERROR , PLAIN ON THE FACE OF THE RECORD. EVERYBODY SHOULD HAVE SPOTTED IT. THE TRIAL JUDGE SHOULD HAVE SPOTTED IT. THE TRIAL JUDGE IS THE ONE WHO HAS THE ULTIMATE RESPONSIBILITY FOR ENSURING THAT THE SCORE SHEET IS ACCURATE. STATE ATTORNEY SHOULD ENSURE IT IS ACCURATE. THAT IS THE ONE THAT ALWAYS PREPARES IT

YOU BROUGHT IT IN THE 3.850.

RIGHT.

BUT I AM TALKING ABOUT GENERALLY, THAT IF IT IS A WOULD -HAVE COULD-HAVE SITUATION AND YOU DON'T HAVE THE ORIGINAL SENTENCING JUDGE, THEN , THERE IS A BURDEN TO THE SYSTEM , THAT IT IS , REALLY HAS TO GO THROUGH A WHOLE NEW RESENTENCING, BECAUSE THAT SECOND JUDGE DOESN'T KNOW WHAT WAS IN THE FIRST JUDGE'S MIND, BECAUSE THERE IS PRETTY MUCH A LOT OF DISCRETION.

EXACTLY.

SO SHOULDN'T THERE BE , AT LEAST IF WE DON'T SAY THERE IS A DIFFERENT BURDEN , SOME LIMIT IN WHICH THE STATE SHOULD BE BROUGHT ?

WHAT WOULD THAT LIMIT BE?

YOU KNOW , THREE YEARS , FOUR YEARS, FIVE YEARS?

YEAH. WELL , I DIDN'T MEAN THE TIME LIMIT. I MEAN, WHAT IS THE LIMIT , AS FAR AS THE STANDARD?

NO. I AM NOT. I AM SUGGESTING THAT JUST BECAUSE WE ARE TALKING ABOUT, YOU KNOW, TAKING ADVANTAGE OF THE SYSTEM , THAT WE , IF THAT OCCURS, I MEAN , IN YOUR EXPERIENCE, ARE THESE SCORE SHEET ERRORS GENERALLY FOUND WITHIN THE FIRST COUPLE OF YEARS, IF THEY ARE NOT SPOTTED IMMEDIATELY?

IN MY EXPERIENCE , THEY ARE FOUND WITHIN A FEW YEARS. I AM SURE THERE IS SOME. I KNOW I HAVE HANDLED CASES WHERE IT IS BEYOND A TWO-YEAR THING, BUT THAT WAS THE POINT. THE ONLY PERSON INVOLVED IN THE SENTENCING PROCESS WHO IS NOT EXPECTED TO KNOW THE RULES , IS THE DEFENDANT. EVERYBODY ELSE IS EXPECTED TO KNOW THE RULES. EVERYBODY ELSE HAS THE OBLIGATION OF MAKING SURE THAT THIS SCORE SHEET IS ACCURATE.

AND THAT IS PRECISELY WHY WE AMENDED 3.800-B , RIGHT? TO ALLOW , WHERE THE TRIAL COUNSEL MISSED IT , APPELLATE COUNSEL SUPPOSEDLY CAN FIND IT IN MOST CASES, SO THAT WE SAY

RIGHT.

YOU CAN PRESERVE IT, NOT PRESERVE THE TRIAL BUT EVEN PRESERVE IT IN RELINQUISHMENT.

RIGHT , AND IF APPELLATE COUNSEL MISSES IT, TOO , HOW IS THAT THE DEFENDANT'S FAULT?

DID YOU RAISE THIS AS AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AS WELL AS TRIAL

COUNSEL?

IN THE 3.850 MOTION , IT WAS DONE PRO SE . HE RAISED IT STRICTLY AS A SENTENCING ERROR. HE DIDN'T RAISE IT AS INEFFECTIVE , THERE WAS AN INEFFECTIVE ASSISTANCE CLAIM IN THE MOTION BUT THAT WAS NOT THE SENTENCING ISSUE. HE RAISED AN INEFFECTIVE ASSISTANCE ISSUE AND A STRICKLAND CLAIM, JUST IN THE SENTENCING ERROR.

AND THAT IS WHY IT WAS A 3.800 INSTEAD OF A 3.850?

IT WAS CONSIDERED AS A 3.850 BUT I THINK THIS COURT CAN CONSIDER IT AS A 3.800 , GIVEN THE LIBERALITY .

YOU ARE SAYING IF IT IS AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL , THEN YOU ARE ARGUING FOR PREJUDICE BECAUSE IT SHOULD HAVE BEEN RAISED ON DIRECT APPEAL AND IT WAS SO CLEAR, THAT IT SHOULD HAVE BEEN .

EXACTLY BUT THERE WAS NO APPEAL IN THIS CASE , FROM THE ORIGINAL APPEAL. THIS WAS RAISED IN A PER SE 3.850 MOTION. HE ENTERED A PLEA ORIGINALLY. HE WAS ON PROBATION. HE VIOLATED THE PROBATION AND WAS RESENTENCED UNDER THE '94 SCORE SHEET. THERE WAS NO DIRECT APPEAL FROM THE VIOLATION , FROM THE VIOLATION SENTENCING , AND THEN HE RAISED IT PRO SE IN A 3.850 MOTION , AND EVEN IF THERE HAD BEEN AN APPEAL , I WOULD ARGUE IT IS IN HIS ACCOUNT OF ASSISTANCE OF APPELLATE COUNSEL , PLAIN ON THE FACE OF THE RECORD , TO FAIL TO SPOT THIS ISSUE. THIS IS SUCH AN OBVIOUS ISSUE , SOMEBODY SHOULD HAVE SPOTTED IT BEFORE THIS TIME, AND I DON'T BELIEVE THERE IS ANY RATIONAL ARGUMENT THAT CAN BE MADE THAT HE IS SOMEHOW GAMING THE SYSTEM HERE , THAT HE IS LETTING THIS GO FURTHER DOWN THE LINE AND THEN BRINGING IT UP LATER , IN KIND OF A GOTCHA KIND OF A TECHNIQUE , BECAUSE HE IS THE ONE SERVING THE TIME .

WE HAVE TO ADOPT A BROAD RULE, NOT JUST FOR THIS DEFENDANT BUT FOR ALL DEFENDANTS.

RIGHT. RIGHT.

WE ARE NOT JUST CONSIDERING WHAT HE DID , WHAT HIS INTENT , WE HAVE GOT TO CONSIDER THE BROADER RAMIFICATIONS OF THE RULE.

RIGHT. AND WHAT WOULD BE THE RATIONALE FOR ANY DEFENDANT TRYING TO GAIN THE SYSTEM THIS TRYING TO GAME THE SYSTEM THIS WAY. AGAIN, WE ARE DEALING WITH A SCORE SHEET RECORD , PLAIN ON THE FACE OF THE RECORD , THAT DOES NOT REQUIRE ANY FACTUAL IF IT WAS ARGUED ABOUT WHETHER VICTIM INJURY SHEETS WERE IMPROPERLY SCORED AND YOU COULD ARGUE THAT THERE WAS A PLEA AND HE DIDN'T REALLY GET INTO THIS AT THE PLEA AND THE DEFENDANT MAY LET IT GO TO A WHILE AND THEN THE VICTIM DISAPPEARS AND THEY CAN'T PROVE VICTIM INJURY POINTS , THEN I THINK YOU HAVE GOT AN ARGUMENT , YOU SHOULD HAVE BROUGHT THIS UP EARLIER, BUT UNDER THOSE CIRCUMSTANCES , 3.850 IS THE VEHICLE FOR THAT TYPE OF CLAIM, IF YOU ARE CLAIMING VICTIM INJURY REPORTS ARE IMPROPERLY SCORED. YOU NEED AN EVIDENTIARY HEARING ON IT , 3.850 , YOU HAVE GOT A TWO-YEAR TIME LIMIT.

I DON'T UNDERSTAND THE STATE ARGUING THAT WE NEED THIS RULE BECAUSE DEFENDANTS ARE NECESSARILY PLAYING GAMES. I THINK THEY ARE SAYING WE NEED THIS RULE BECAUSE WE ARE NOW IN POSTCONVICTION. THERE NEEDS TO BE DIFFERENT STANDARDS BECAUSE OF THE STATE'S INTEREST IN FINALITY AT THAT POINT , NOT BECAUSE DEFENDANTS ARE GAMING THE SYSTEM.

IF THE COURT BELIEVES THAT THE INTEREST IN FINALITY OUTWEIGHS DEFENDANT'S INTERESTS IN, AND SOCIETY'S INTEREST IN MAKING SURE THAT THESE SENTENCING GUIDELINES SENTENCES ARE IMPOSED UNDER AN ACCURATE SCORE SHEET , SO THAT THE TRIAL COURT CAN EXERCISE ITS

DISCRETION ITS BROAD DISCRETION TO SENTENCE WITHIN THAT BROAD PERMITTED RANGE, IF THIS COURT BELIEVES THAT FINALITY OUTWEIGHS THOSE INTERESTS, THEN CLEARLY YOU WANT TO ADOPT SOME TYPE OF A TIME LIMIT RULE. I WOULD SUGGEST THAT IS NOT THE PROPER BALANCE. AND, AGAIN, IT IS NOT THE PROPER BALANCE, BECAUSE THIS IS NOT THE DEFENDANT'S FAULT. THIS IS THE FAULT OF THE OTHER THREE LAWYERS, POSSIBLY FOUR IF THERE WAS AN APPEAL, WHO MISSED THIS ORIGINALLY.

LET ME, EVEN UNDER A COULD-HAVE-BEEN IMPOSED STANDARD, THERE WILL BE CASES, WON'T THERE, WHERE THE DEFENDANT WILL PREVAIL OPPOSE THE CONVICTION, BECAUSE THE SENTENCE IS OUTSIDE OF THE RANGE IN WHICH IT COULD HAVE BEEN RENDERED.

YES. CORRECT.

IN THIS CASE IT WASN'T, BUT THERE ARE MANY CASES IN WHICH THERE MAY BE SEVERAL BUMPS, SEVERAL LEVELS DOWN, AND SO IT COULD NOT HAVE BEEN IMPOSED WITHIN THAT RECOMMENDED RANGE.

THAT'S CORRECT. BUT THERE COULD BUT THE COULD-HAVE-BEEN IMPOSED TEST WOULD HAVE BEEN IMPLIED, ONLY IF THERE WAS A DEPARTURE UNDER AN ACCURATE SCORE SHEET. THE SITUATION WE HAVE HERE IS THE SENTENCE IS WITHIN THE RANGE OF A PROPERLY CALCULATED SCORE SHEET. NOW, AS I ARGUED IN THE BRIEF, THE GUIDELINES, PARTICULARLY SINCE THE 1988 AMENDMENT, THE GUIDELINES HAVE ALWAYS WORKED ON THE PREMISE THAT THE TRIAL COURT HAS, IN EFFECT, UNLIMITED DISCRETION FROM AN APPELLATE PERSPECTIVE, IN THE SENSE THAT YOU CAN'T RAISE THIS ON APPEAL. THE TRIAL COURT HAS UNLIMITED DISCRETION TO SENTENCE ANYWHERE WITHIN THE PERMITTED RANGE, AND YOU CAN'T ARGUE ABOUT THAT ON APPEAL. HOWEVER, THE STRUCTURE OF THE GUIDELINES IS SUCH THAT IT IS, THE COURT'S DISCRETION IS GUIDED, NOT REVIEWABLE ON APPEAL BUT GUIDED NONETHELESS, BY THE STRUCTURE OF THE GUIDELINES. THE BASIC FRAMEWORK OF THE GUIDELINES IS THAT A SENTENCE ABOUT THE MIDDLE RANGE OF THE GUIDELINES IS PRESUMED TO BE APPROPRIATE. I BELIEVE THAT IS THE LANGUAGE IN THE RULES. AND THAT THE EXTENT TO WHICH YOU VARY FROM THAT MIDPOINT RANGE, THE RECOMMENDED SENTENCE IS THE PHRASE THEY USE, THE EXTENT TO WHICH YOU VARY FROM THAT MIDPOINT RANGE WITHIN THE RECOMMENDED RANGE, IS WITHIN THE COURT'S FULL DISCRETION BUT THAT DISCRETION YOU ARE SUPOSED TO, I THINK IT SORT OF ASSUMES THAT YOU GO A LITTLE BIT BELOW, IF, THE DISCRETION IS GUIDED IN THE SENSE THAT, YOU GO ABOVE OR BELOW THAT MIDPOINT RANGE, DEPENDING ON THE EXTENT TO WHICH YOU THINK THIS CASE IS GREAT ERROR LESSER THAN THE AVERAGE CASE OF THIS NATURE. WHATEVER, EXACTLY, THAT MIGHT BE. BUT THE LOGIC OF THE WHOLE THING IS THAT, IN ORDER TO, FOR THE TRIAL COURT TO PROPERLY EXERCISE THAT DISCRETION YOU HAVE TO HAVE AN ACCURATE SCORE SHEET THAT TELLS YOU WHERE THAT MIDPOINT RANGE IS AND WHERE THAT UPPER AND LOWER PERMITTED RANGE IS. IF YOU HAVE A CIRCUMSTANCE, AS YOU DID IN THIS CASE, WHERE THE TRIAL COURT BELIEVES, IS LOOKING AT AN INACCURATE SCORE SHEET AND BELIEVES IT IS SENTENCING AT THE LOWER END EVERY TIME RANGE, AND IT TURNS OUT UNDER AN ACCURATE SCORE SHEET YOU ARE IN THE MID, MAYBE UPPER END OF THE RANGE, THEN IT SEEMS TO ME YOU HAVE A SITUATION WHERE YOU CANNOT SAY, WITH ANY DEGREE OF CONFIDENCE, USING STANDARD HARMLESS-ERROR ANALYSIS, AT LEAST, THAT THIS SENTENCE WOULD HAVE BEEN THE SAME, HAD THE TRIAL COURT HAD AN ACCURATE SCORE SHEET IN FRONT OF IT. NOW, THE QUESTION OF WHETHER YOU RAISE THAT ON DIRECT APPEAL OR WHETHER YOU RAISE THAT SOMETIME DOWN THE ROAD, IS A TRICKY QUESTION. I CERTAINLY WILL ADMIT, BUT, AGAIN

DO YOU HAVE ANY ALTERNATIVE TESTS FOR POSTCONVICTION PURPOSES, THAT IS NOT EITHER WOULD-HAVE-BEEN OR COULD-HAVE-BEEN?

I DON'T. I HAVE THOUGHT ABOUT THIS AND I DON'T THINK THERE IS ONE. I DON'T SEE HOW YOU

COULDCOME UP WITH ONE. A COULD -HAVE-BEEN IMPOSED TEST, IT SEEMS TO ME, CONFLICTS WITH BASIC HARMLESS ERROR. CERTAINLY A COULD -HAVE-BEEN IMPOSED TEST ON DIRECT APPEAL, CONFLICTS WITH DeGUILIO AND BASIC HARMLESS E RROR TESTS LIKE THAT.

I THINK THE STATE AGREES THAT WOULD NOT BE THE STANDARD FOR DIRECT APPEAL .

SO THEN THE QU ESTION BECOMES WH Y YOU SHOULD USE A DIFFERENT STANDARD ON COLLATERAL REVIEW AND WHAT WOULD THAT STANDARD BE? I CAN'T THINK OF AN OTHER ONE OTHER THAN COULD -HAVE-BEEN IMPOSED. THE PROB LEM WITH COULD -HAVE-BEENI AM POSESSED IS , AS IN THE HYPOTHETICAL THAT I RAISED IN THE BRIEF , EVEN IF THE TRIAL COURT IS CLEAR THAT IT WOULD NOT HAVE CHANGED THE STANDARD WITH A CORRECT SCORE SHEET, THEN

HOW ABOUT IF I T SAYS COULD HAVE BEEN IMPOSED , UNLESS THE RECORD IS CLEAR , OTHERWISE IT IS CLEA R ON THEFACE OF THE RECORD THAT THE TRIAL JU DGE WOULD NOT HAVE IMPOSED THAT SENTENCE?

THE PROBLEM I HAVE WITH THAT IS FIRST OFF , W HAT DO YOU MEAN BY CLEAR ON THE RECORD? IF YOU ARE TALKING ABOUT THE HYPOTHE TICAL I HAVE GOTWHERE THE TRIAL COURT SAYS , GEE, I WI SH I COULD GO LOWERBUT I CAN'T , THAT IS ONETHING. IF YOU HAVE THE CIRCUMSTANCE WHERE THE SENTENCE IS AT THE LOWEST PERMIS SIBLE SENTENCE BUT THE TRIAL JUDGE DIDN'T SAY ANYTHING

I THINK THE ONLY WAY YOU WOULD KNOW THE TRIAL JUDG E'S SUBJECTIVE INTENT, WOULDHAVE BEEN IF THE TRIAL JUDGE MAKES SOME STATEMENT TO THAT E FFECT.

EXACTLY, AND THAT , IN MY EXPERIENCE OF 20 YEARS OF DOING IT , IS VERY RARE, TO PUT IT M I LDLY. WHAT IF YOU HAD A SENTENCE AT THE B O TTOM

YOU DID HAVE THAT YOUWOULD BE T AKING CA RE OF THAT KIND OF SITUATION THAT, YOU POSTED IN YOUR BRIEF.

IF YOU WOULD , YES.

CHIEF JUSTICE: YOU HAVE USED UP YOUR TIME. THANK YOU VERY M UCH. HAV MENT HAL F A MINUTE. HALF A MIN UTE. A MINUTE.

THANK YOU . I THINK YOU HAVE TO HAVE A DIFFERENT STANDARD . YOU HAVE TO HAVE A DIFFERENT STANDARD IN POSTCONVICTION. WHAT THAT STANDARD IS HA S TO BE DETERMINED BY THIS COURT. I THINK IT IS CLEAR THAT UNDER , IF YOU ARE GOING TO RAISE IT IN A 3.850 MOTION,IT IS GOING TO HAVE TO BE SOMETHING THAT YOU ARE GOI NGTO HAVE TO HAVE AN EVIDENTIARY HEARING, ANDTHAT IS WHY YOU HAVE A TWO-YEAR LI MIT ON THAT. YOU CAN BRING THE JUDGE BACK,AND I AM SORRY IF THE JUDGEIS GOING TO BE EMBARRASSED, BUT THAT IS WHY WE HAVE 3.850s , AND THAT IS WHY W E HAVE EVIDENTIARY HEARINGS . BUT , AGAIN , IF IT IS, YOUKNOW, HE HAS HAD NUMEROUS OPPORTUNITIES , AND HE HASN'T TAKEN ADVANTAGE OF THEM , AND THE SENTENCE IS A LE GAL SENTENCE. I CAN UNDERSTAND , RAISING IT AT ANY TIME IF THE SENT ENCE W AS ILLE GAL AS A RESULT OF THE SCORE SHEET ERROR , BUT IT IS NOT AN IL LEGAL SENTENCE.

SO IF WE WOULD AGREE WITH YOU , THEN THIS DEFENDANT WOULD HAVE TO BE RESENTENCED UP FROM 75 MONTHS TO 90 MONTHS?

NO. THE SENTENCE COULD NEVER BE INCREASED.THAT WOULD BE A DO UBLE JEOPARDY VIOLATION, IN A SITUATION LIKE THAT.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT IS IN RECESS UN TIL NINE O'CLOCK TOMORROW MORNING .

MARSHAL: PLEASE RISE.