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Alexander Galindez v. State of Florida
SC05-1341

WILL CALL T HE LAST C ASE T HI S M ORNING WHI CH I S G ALIN DE Z V ERSUS STAT E OF F LO RI DA . GOO D MOR NING.

GOOD MORNING AND MAY IT P LEASE THE COURT. SHA NNON McK EN NA , A SSIS TANT P UBLI C D EF EN DE R O N B EHALF OF THE PETITIONER , M R. GAL IN DEZ. THIS COURT HAS ALW AY S APPLIED THE S ENTE NC IN G L AW IN E FFEC T AT T HE T IM E O F THE D EFENDANT'S R ESEN TE NC E , EVE N IF THI S LAW HAS CHA NG ED SIN CE T HE D EF ENDA NT 'S O RIGI NA L CONVICTION AND SENTENCE WERE FINAL . J US TICE : L ET M E A SK Y OU A BOUT THIS C ASE. M R. GAL INDEZ ADM IT TED T O MANY OF T HE FACTS T HA T W ER E ALL EG ED ; IS THAT RIGHT?

THERE WAS A CON FE SS IO N A DMITTE D.

JUSTICE: AND WHAT D ID T HA T CONFESS IO N CON TA IN AS FAR AS HIS A DM ISSI ON?

I N HIS C ONFE SSIO N H E ADM ITTE D THAT H E D ID H AV E S EXUA L I NTER COUR SE W IT H T HE V ICTI M.

JUSTICE: AND D OESN 'T BLA KELY S PE CI FI CALL Y E XE MP T FAC TS T HA T ARE ADM IT TE D B Y T HE D EF EN DANT FRO M THE R EQ UIREMENT OF A J URY F INDING ?

WHA T BLA KE LY , T HE SPE CIFI C POINT T HA T B LA KELY E XEMPTS FRO M T HE J UR Y F INDING I S I F T HE DEF EN DANT E NTERS A P LE A O R I F HE E NTERS A W RI TTEN F INDING O R A STI PU LATI ON . > > J USTI CE: W ELL , THE E XA CT L AN GU AGE I S THA T F OR P RINTIN G P URPO SE S , T HE MAXIM UM SEN TENC E , IS T HA T T HE J UDGE M AY I MPOS E S OL ELY ON THE BAS IS O F T HE F AC TS REF LECTED IN THE J UR Y VERDICT OR ADMITTED B Y T HE D EFENDA NT. NOW, IF THE DEFENDANT HAS A C ONFESSION THAT I S A DMIT TE D A T T RIAL , W HY I SN'T THA T P ART OF THE F AC TS THAT A RE ADM IT TED BY T HE D EFEN DA NT ?

YOUR H ON OR , T HE SIM PL E A NSWE R T O T HA T I S T HA T T HE WAY T HE COU RT S HAV E I NTER PR ETED THE LAN GU AG E I N B LAKELY I S T HA T T HE RE H AS T O B E A SPE CI FI C A DMIS SION , E IT HE R D URIN G S ENTE NC IN G O R I N A P LE A C OLLO QUY. NOW , T HE S TATE , NEI THER THE S TATE N OR T HE T HIRD DIS TR IC T COURT OF APPEA L ADD RESS ED T HAT ISS UE , A ND T HAT' S W HY I T IS NOT A DD RESS ED I N ANY OF THE BRIEFS O R A NY THING T HAT WAS P RE SENT ED T O T HI S COURT. IF THAT IS A N ISS UE T HE N I WOULD BE H AP PY T O BRI EF T HA T S MALL ISSUE BEF OR E T HI S C OURT AND PRO VI DE THI S C OURT WITH THAT CAS E L AW . G ENER AL LY THAT'S THE WAY I T H AS BEEN. CHIEF JUSTICE: WE HAV E SEVERAL PENDING C ASES O N T HIS I SSUE A S T O W HE THER A PPREND I A ND BLA KELY APP LY T O A R ESEN TE NCIN G P ROCE EDING.

YES, YOUR HONOR, I BELIEVE THERE ARE SEVEN C ASES P EN DING O N THAT I SSUE. CH IEF JUSTICE: NOW, THE FAC TUAL FIN DING S WOU LD H AV E T O , A RE M AD E D URIN G T HE N OT D URIN G S ENTE NCIN G BEC AU SE S ENTE NC ING I S A , OTHE R THA N A D EA TH CAS E I S A J UD GE -O NL Y P RO CEEDING , S O S INCE T HE C ONVI CTION WAS F INAL , W HY W OULD, W OULD N' T T HA T B E A R ETROACTI VE APP LI CATION O F A PPRE ND I AND BLA KE LY ? THE ANS WE R T O T HA T I S B ECAUSE T HI S C OURT I S USE D E XTENSI VE LY AND T HE FED ER AL C OU RT S TATE D THA T A PPRE ND I AND BLA KELY A PPLY T O S ENTENCING. T HEY DO NOT APP LY TO C ONVI CTIONS . I N T HE H UGHE S COU RT WHE N T HEY LOOKE D A T THE R ET RO A CTIVIT Y A NALYSI S

W HE N T HI S C OURT EXA MINE D I T I T S PE CI FICALLY NOT ED T HE F AC T THAT APPRENDI A ND S PECIFI CALL Y WAS L OOKE D A T DOES N OT I MP UG N T HE A CCUR AC Y OF CON VICTIO NS . CHIE F JUS TICE: B UT I 'M T HINKING SINCE Y OU AGR EE WE H EL D APP RE ND I N OT T O B E R ETROAC TIVE.

YES. CHIE F J US TICE : S O S IN CE T HE , AND , T HERE FORE , NOT O F T HE C AT EGOR Y OF ERR OR S T HA T T HERE WOU LD B E A V ALUE O F I NDIC ATED B Y R ET RO AC TIVE A PPLI CATION , THE O NL Y REMED Y I N C AS ES W HERE T HE C ONVICTIO N I S F INAL A ND THE O THER E XC EPTI ON S D O NOT A PPLY WOULD B E T O H AV E T O R ECONVE NE A J UR Y T O M AK E S PECI FI C FAC TUAL FIN DING S , IS T HA T W HA T Y OU R ARG UM EN T W OULD BE?

THAT WOULD B E T HE O NL Y R EMED Y , A ND I N T HI S CAS E T HAT REM ED Y W OU LD B E P RE SIP O --- P RECI PI TE D B Y DOU BL E J EOPARDY . > > JUSTI CE: IT S EEMS TO M E YOU CAN'T H AVE IT BOTH WAYS. EITHE R T HE JUR Y DID N OT DETERMINE IT, AND , T HE REFO RE , B ECAUSE O F B LA KELY , Y OU HAV E T O R EVER SE , O R T HE JUR Y D ETER MI NE D I T , DID D ETER MI NE I T AND B LA KELY D OE SN'T A PP LY . B UT I N THI S C AS E THE J UR Y SEE MED , THE J URY WAS ASK ED WHE THER T HERE WAS PENET RA TION O R CON TA CT . YES , YO UR HONOR. JUSTICE: AND THE JUR Y S AID YES THE RE WAS P ENET RATION O R CON TACT BUT T HEY WER EN 'T A SK ED WHICH IS EXA CTLY WHY Y OU ARE ARG UI NG THAT WE SHOULD REV ER SE UND ER B LAKELY T HE Y W ER EN'T ASK ED WHETH ER THERE W AS PEN ETRATI ON I TS EL F AND T HEREFORE I F B LAKE LY D OE S A PP LY HOW C AN T HERE B E A D OUBLE JEO PARD Y I SS UE? I T S EE MS T O M E I T H AS T O B E O NE O R T HE O THER. IT CAN'T BE BOTH.

WELL , YOUR HON OR , T HE ANSWER TO THAT W OU LD LIE M ORE SPECI FI CALLY IN THE B ROADER RANGE O F DOU BL E JEOPA RD Y CAS E L AW WHI CH AGAIN UNFORTUNA TE LY BECAUSE OF THE STATE , N EI THER THE S TATE NOR THE THI RD D ISTR IC T C OURT O F A PPEA L R AI SE D T HAT ISSUE, THAT CASE L AW I S N OT BEFORE THIS COURT . N OW, WHA T I WOU LD A RGUE H ER E I S T HA T .

JUSTICE: WE H AVE T O DETERMINE WHAT THE REMEDY I S , T HOUGH , AND Y OU 'RE SAY IN G THE REMEDY I S Y OU HAV E T O TAKE AWAY T HOSE POI NTS. Y OU CAN'T HAV E A J UR Y D ETERMI NA TION BUT I T S EE MS TO ME THAT THE W HO LE PUR PO SE O F BLA KELY I S THA T I F I T W ASN'T D ON E NOW I T H AS TO B E DONE AND A JUR Y HAS T O DETERMINE IT AND Y OU R E NTIRE A RGUMENT I S B ASED O N THE FACT THAT THE JUR Y DI D NOT D ETERMI NE P ENET RATION. WELL, IF THE J UR Y DI D NOT DET ERMINE P EN ETRA TION T HE N THERE IS N O DOU BL E J EO PARD Y I SSUE. W HA T THE P ET ITIO NE R W OULD ASK I S T HA T I F THE REM ED Y I S FAS HI ONED T HIS SHOULD BE R EMAN DED FOR A J UR Y TO D ECIDE WHET HER OR NOT THE RE WAS PEN ET RATI ON , T HA T THA T WOU LD T HE N LEAVE T HE I SSUE OF D OUBLE J EOPA RD Y O PE N TO B E REL IT IG ATED F OR THE TRI AL C OURT BECAUSE I T HAS NOT B EEN L IT IG AT ED NOW . J USTI CE : W AS T HERE ONL Y ONE VICTI M I N T HI S C AS E? YES , YOUR HONOR.

JUSTICE: AND THERE W ERE SEVERAL CONVICTIONS IN T HIS C ASE?

YES, HE WAS C ONVICT ED OF T HREE O F F IV E C OUNT S H E W AS CHA RGED WITH.

JUSTICE: AND ONE OF T HOSE C OUNT S W AS I MP REGN AT IO N O F A M INOR C HILD ?

YES, YOUR HONOR.

JUSTICE: SO M Y Q UE ST IO N IS THEN O N THA T P ARTI CULA R COUNT, I W OULD A SSUM E ISN 'T P ENETRATI ON S ORT O F A SSUM ED I N THA T COU NT ? Y ES , YO UR H ONOR , I T I S , AND W E'RE O NL Y ARG UI NG THE P ENETRA TION P OINTS ASS ESSE D FOR THE F IR ST C OUNT O F L EW D A ND LAS CI VI OU S CON DUCT . WE ARE N OT DIS PU TING THA T THE PEN ETRA TI ON P OINTS ON T HA T C OU NT S HO UL D BE I NC LUDE D.

CHIEF JUSTICE: THAT WAS A DIFFERENT ACT?

YES, IT WAS A D IF FERE NT ACT. IN FACT , H E W AS C HARG ED W IT H F IVE DIFFE RE NT ACT S A ND T HE Y A LL S PA N D IFFE RENT T IMES I N THE I NF ORMA TION . JUSTI CE: I T W AS NOT A LL O NE CRIMI NA L EPI SO DE?

NO , IT W AS ALL EGED THA T TH ERE W ER E S EV ERAL D IFFE RE NT CRI MI NAL E PISO DE S THA T OCCURRED OVER A PERIOD OF MONTHS IF NOT A L ON GE R P ERIOD OF T IME. JUSTI CE : BUT I F WE I GNOR ED THAT , T HE POI NT S FOR THAT, AND I F YOU ACC EP T T HE P OI NT S FOR THE O THER C OU NT S THA T Y OU A CC ED E , DOE S T HE S CORE S HEET G O TO THE LEV EL O R DOES IT A LLOW S ENTE NCIN G B EYOND THE S TA TUTORY M AXIM UM? Y ES , I T D OE S. T HE S TA TU TE , THE SEN TENC IN G R ANGE WOULD BE B ET WEEN 16 Y EARS AND 2 6 YEA RS . JUSTI CE : S O WOU LD T HE PART THAT YOU ARE NOT D ISPUTING THA T W AS F OUND B Y THE JUR Y , H E WOU LD B E S UBJECT T O A S ENTE NC E B EY ON D T HE STA TU TORY MAX IM UM ? YES , YO UR H ON OR , H E WOULD BE AND I B ELIE VE THI S COU RT HAS T HE BRIEFS FROM THE THIRD D ISTRICT COURT O F APPEAL AND IN T HE BRIEFS IN THE THIRD DISTRIC T COURT O F A PPEAL I'M MOR E A T LEN GT H D ISCUSS THE DIF FERE NT S ENTE NCING R ANGE S. J US TI CE : O KA Y . JUSTI CE : F ROM WHAT I R EA D OF THE I ND ICTM EN T O R THE I NFOR MATION, T HE D ATES I N COUNT ONE AND COU NT FIV E A RE E XACTLY THE S AM E F RO M OCT OBER ' 97 T HR OUGH S OM ETHING ' 98 . H E C OM MI TTED THE SE A CT S. SO THE FAC T THA T H E ADM IT TE D I MPRE GNAT ION DURING THOSEDATES, WHY WOULDN'T THATRELATE TO COUNT ONE S3 IMPREGNATION DURING THOSE DATES, WHY WOULDN'T THATRELATE TO COUNT ONE SINCE THEY RELATE TO THE SAME DATES?

WELL, THE FIRST ANSWER , YOUR HONOR, IS THAT IT IS THE LAW T HA T Y OU C AN'T TAK E PRO OF FRO M O NE C OU NT AND C ROSS I T O VER T O A NO THER COU NT AND, IN FACT , THE J UR Y W AS I NS TR UCTE D I N THI S COU RT , T HE J UR Y WAS INS TRUC TE D T HA T J UST B EC AUSE T HERE A RE SOM E F ACTS FOR O NE C OU NT YOU H AV E T O D EC ID E T HE P RO OF F OR EAC H COU NT I ND IV IDUALL Y . AND D IGGA LL Y , A ND A DD ITIO NA LLY THE POINTS A RE A SSESSE D F OR EAC H IND IVID UA L COUNT AND YOU HAVE T O L OO K AT EAC H C OU NT I NDIV ID UA LL Y AND FINALLY B ECAU SE T HE RE W ERE SEVERAL I NSTA NC ES DURING THAT SAM E P ERIO D O F T IME WE CAN NO T B E S UR E I F T HE JUR Y L OOKED A T O NE I NSTANCE TO D ECID E T HE V ERDICT FOR EAC H C OUNT . CHIEF JUSTICE: G OING BACK TO WHAT JUS TICE B ELL ASK ED , ON THE ISS UES T HA T ARE NOT IN C ONTR OV ER SY , THE S ENTE NC ING RANGE IS A LREA DY OVER THE STATUTO RY M AX IMUM . Y ES, YOUR H ON OR . CH IE F J USTICE: AND HE W AS S ENTE NCED O N R ESEN TENC IN G WITHIN THAT RANGE , R IGHT , 2 4 Y EARS? YES , YOUR HONOR. CHIEF J USTICE: SO WHY I S T HAT T HE N A N APP RE ND I V IOLATION , BEC AUSE I THO UG HT T HE W HOLE P OI NT I S T O MAK E S URE A J UR Y DET ER MINA TION D ETERMI NES IF I T I S G OING T O B E OV ER THE STA TU TO RY M AXIM UM T HAT A JUR Y M AK ES T HAT D ETER MI NATI ON B UT S INCE T HEY HAV E A LR EADY MAD E I T A S T O A NO THER C OU NT THA T' S NOT IN ISSUE, DOE SN 'T T HA T OBV IATE T HE APP RENDI P ROBLEM?

IF I A M UND ERST AN DI NG Y OU , Y OU'RE S AY IN G THA T B ECAU SE H IS S ENTE NC E W HE N A NOTH ER C OUNT E XC EEDE D THE S TA TUTO RY M AX W HERE I T W AS A PP ROPR IA TE , T HEN W HY DOE S I T M ATTE R REG ARDING THI S C OUNT? CH IEF J USTICE: BECAUSE YOU ARE NOT STACKING THESE. T HESE ARE BEI NG R UN C ONSECU TIVE LY , ARE N'T T HEY? Y ES. WELL, YOUR HONOR, A C OUPL E OF P OINTS WITH T HAT. S PECIFICALLY BECAUSE WE A RE O PERATI NG UNDER THE GUI DE LINE S YS TEM BET WEEN '94 A ND ' 98 .

CHIE F J USTI CE: D ON'T T HROW T HA T I N . WHAT H APPENED IS THA T T HE L IMIT O N CON SE CUTI VE S ENTENCIN G I S FOU ND B Y THE UPP ER P ORTION O F THE CCALUIDELI NE S AND T HAT'S WHY W E H AVE A N APP REND I VIO LATI ON HER E , B EC AUSE T HE UPP ER B OUND WIT H T HE M AX IMUM S ENTENC E P RE SCRI BE D WIT HO UT T HE P EN ETRA TION P OINT S O N T HI S C OUNT I S LES S THA N I T W OULD B E I F THE PEN ET RA TI ON POI NTS WOULD BE INC LU DE D , AND SO W E'RE NOT L TIING THING AT THE I ND ADIDUAL COUNT S. WE'RE LOOKING AT T HE M

AXIM UM S ENTENC E P RE SCRIBED BY THE CCALUIDELI NES , W HICH IS S PECIFI C TO T HE ' 94 T O '98 G UIDELI NES. CHIEF JUSTICE: WE'LL TAKE YOUR WORD O N IT.

JUS TI CE : LET M E G ET B AC K TO THE R ET RO A CT IVIT Y ANA LYSI S AND I T HINK I T RELATES A LITTLE BIT TO YOUR D OUBLE J EO PA RD Y C LAIM T HA T WE C AN 'T I MP AN EL ANO TH ER J URY. NOW, FOR T HE S EN TENC IN G , A ND I T S EE MS T O M E THA T IF YOU C AN'T D O THA T , I F Y OU ARE C OR RECT , T HE N T HI S R EALL Y DOE S R ELATE TO T HE C ONVICTIO N BECAUSE A T T HA T T IME THAT THE J UR Y D ETER MI NES ALL O F T HE SE F ACTS AND THE RE FORE IF THE JURY CANNOT GO BAC K A ND D ETERMINE ALL O F T HE SE F AC TS T HE N W E A RE M AK IN G A PP REND I R ETROAC TIVE AND I T D OE S R ELATE TO T HE C ONVI CTIO N. L THERE WOULD BE T WO P OINT S T O THAT, YOUR HON OR . F IRST O F A LL T HE R EMED Y O F I MPANEL ING A J UR Y R EGAR DI NG D OUBL E JAND IPA RD Y FOR R IGWITH NOW I'M ONLY M AK IN G T HA T A RGUMENT S PECI FI C T O MR. G AL INDEZ SO AS A R UL E O F DDONAW, WHETHER OR NOT D OUBL E J EOPARD Y WOU LD P ROHI BI T THAT R EMED Y IN O THER C AS ES , Y OU KNOW, I THE R NOT C OMME NTIN G O N T HAT. J USTICE: WE H AV E T O M AK E R ULES T HA T A PP LY T O CCUTNFORTU NATELY PAND IHEYE OTHER THAN YOUR C LIEN T I N THE F UTURE CASES . YES, YOUR HON OR , A ND W HA T I WOULD SAY THE N I S THA T YOU C OULD P ROVI DE FOR THA T REM EDY THAT A J UR Y B E I MPAN ELED AND THEN T HE C OURT WOULD T HEN HAVE T O CON SI DER WHETHER OR NOT THAT WAS D OUBLE J EO PARD Y U NDER S PECIFI C F ACTU AL C ASES . T HERE A RE S OM E TYP ES O F C ASES FOR E XAMP LE I F T HE S ENTE NC ING F ACTOR I S B AS ED O N WHETH ER A MIN OR C HILD W AS PRE SENT A T THE INC IDEN T A ND P OINTS CA N B E ADDED FOR T HA T , A ND THA T TIDERE O F F AC TO R W OULD P ER HAPS NOT B E S UBJE CT T O DOUBL E JEO PA RD Y BEC AU SE T HA T WAS N OT BEF ORE THE JURY.

JUSTICE: BUT AGAIN I F THIS IS S OMETHING THAT THE JURY HAS T O D O U PO N C ONVICT ION AT THE SAME TIMETHAT IT DET ER MI NE S GUILT , THE N A PPLY IN G B LAKE LY A ND A PPREND I , W E A RE APP LYIN G I T TO THE CON VI CTIO N T HA T DOES A PPLY AND I T WOULD B E R ETROACTI VE. WELL , YO UR H ONOR , I T MAY H AVE THE E FF ECT THAT THE C OURT, T HE S TATE C ANNO T N OW G O B AC K A ND PRO VE T HAT. I N FAC T , Y OU C AN'T I MPAN EL ANO THER JURY, B UT W E H AV E T WO C OMPE TI NG P RINC IP LE S O F DDON SP HER E. W E HAVE T HE BED RO L P RINCIPLE T HA T THI S C OURT HAS STATED AND A LW AY S I MPLEME NTED IS THAT T HE R ESENTE NC ING I S A CLE AN SLA TE, AND THE C ONCE SSIO NS A RE ATTAC HE D.

JUSTICE: A CLEAN S LATE FOR THE STATE AS WELL A S T HE DEF ENDANT, T HE STATE WOU LD PRESENT, FOR E AS A GGRAVATING C IR CUMS TA NCES THAT IT DIDN'T P RESE NT BEFORE, RIGWITH?

AND I N FAC T I N C OU CHER V ERSUS S TATE THEY S AI D T HE S TATE COU LD G O S O FAR A S T O NNT C APITAL M UR DE R C ONVI CT IO N A FTER . J USTI CE : T HE N W HY IS TH ER E A D OU BL E J AND I PARD Y ISSUE IF IT IS A CLE AN S LATE?

THE D OUBL E J EO PARD Y ISS UE W OULD IMP LICA TE D IF FE RE NT C ONCERN S , A ND I THE R S IMHEY Y S AYING THA T T HE RE A RE D IFFERE NT A VE NUES O F LAW AND T HAT THERE A RE D IFFE RE NT CONCEN APS IMPLICATE D I N T HE D OUBLE JEOPA RDY.

JUSTICE: T HE D OU BL E IIDEREAND I PARDY C ON CEN APS W HETHER A DEFEN SLNT CAN BE CONVICTEDOF A C RIME TWI CE O R WHE TH ER H E C AN B E I MPOS ED , A S ENTENC E CAN B E E NHAN CE D? D OU BLE J EOPA RD Y GOE S T O B OT H SEN TE NCES A ND I N H ER E THE D OUBL E J AND I PARD Y V IO LA TION WHICH HAS N OT BEE N BRI EF ED B EFOR E THE C OURT B UT I T W OU LD E NTAI L T HE FAC T THAT THE JUR Y WAS ACT UALL Y P RESE NTED W IT H T HE QUE ST IO NS T O WHETHE R OR NOT T HERE W AS CCUTNION OR PEN ET RA TI ON I N THI S C OUNT .

JUSTICE: BUT IT D ID N' T ANSWER THAT QUESTION. AND T HAT' S COR RE CT . EE COW, T HE C AS E L SP , AGA IN , YOU KNOW , I'M S OR RY BEC AUSE I DON'T HAV E ANY CAS E L SP T O S PECI

FICALLY REFER T O ON THI S ISSUE , W OULD STA TE THA T B ECAUSE THE Y WERE PRE SENTED WITH THAT QUE ST IO N , D OUBL E IIDEREAND IPA RDY W OULD A PP LY . J USTI CE : BUT THE Y WER EN'T P RESE NTED WITH , I G UE SS I T IS Y OU R E NT IRE P OINT H ERE I S T HEY WER EN 'T PRE SE NTED WIT H T HAT Q UEST ION. THE Y W ER EN'T P RE SE NTED WITH THE NARROW N.UE ST IO N W AS T HERE PEN ETRA TI ON . THEY WERE PRESENTED W ITH T HE QUE STIO N WAS T HE RE NNT

YES, YOUR H ON OR , AND THE S TATE , I N FAC T , YOU K NO W , E VE N D URIN G I TS C LOSI NG A RGUM ENT T HE Y R EQUE ST ED A N I NSTRUCTION O N CON TA CT AND REG ARDI NG UCKON. THE S TATE A RG UE D B OT H ALT ERNATIVES. WE HAVE DIF FE RE NT H ER E FRO M OTHER C ASES I S W E D O HAV E T HE S EN L V ER DICT AND THA T SHO WS THA T T HE J UR Y W AS PRE SENTED W IT H BOT H O PT IONS B UT THE Y W ERE ONL Y A SKED T O FIND ONE, AND, Y OU K NO W , AGA IN BECAUSE OF T HE D OUBL E J EOPA RD Y POINT WE W OULD BE HAPPY TO FULLY BRI EF T HI S I SSUE A S I T HAS N OT B EE N P RESENTED BEF ORE THIS C OU RT , BUT Y OU A LS O M EN TION ED T HE F AC T THAT , Y OU K NO W , I T I S A C LEAN S LATE FOR BOTH PAR TIES A ND THA T GOE S T O O NE O F THE NNT RES ENTENCING IS THAT IT IS , I N FAC T , I T I S A B RI GHT- LINE R ULE AND S OM ET IMES I T B ENEF IT S THE STATE AND S OMETIM ES I T BEN EFIT S THE DEF ENDA NT , A ND T HI S C OU RT S CKOULD N OT NOW CARVE O UT A N E XCEPTION T O T HA T BRIGHT-LINE RULE . JUS TI CE : BUT Y OU S EE M T O BE WANTING T O CARVE OUT A N EXCEPTION, TOO, BECAUSE Y OU ARE SAY ING IT I S A G OT CHA , Y OU ON NO W , B LA KE LY R EQ UI RE S THIS. I T DID N'T REQ UI RE I T A T T HE TIME OF THE TRIAL B UT N OW THAT I T RRULE

JRES IT YOU H AV E T O R EVER SE B UT Y OU CAN'T A PPLY I T. YOUR HONOR, THA T TIDER E O F CCALOTCH A ANA LY THERES W OU LD A PPLY T O A THAT Q DEF EN DANT W HO SE SEN TENCE A ND C ON VICT IO N HAD N OT BEE N F INAL A T THE T IM E THDON' WERE ISSUEAS S A DDITIO NALLY THE C ON CEPT B EHIND APPRE ND I AND B LA KELY IS N OT N EW T O F LORISL. NNETRAVER S INCE THI S C OURT ISS UE D O VERFELT AND A LL O F I TS P ROGENY THE F AC T THA T T HE IIDEREURY MUS T F IN D FAC TS S PECIFI C TO T HE C RI MINA L E PISODE I S L ON GSTA NDIN G FLO RISL PRE CE DE NT AND F OR T CKOSE REA SO NS IT WOULD NOT BE, YOU KNOW, U NFAI R I N THI S S ITUA TION . CH IE F JUS TICE: LET'S G O BACK TO THE ISSUE OF WHAT LAW APPLIES. YOU ARE I N YOUR REB UTTA L B UT --LIOU TAL ING THING ABOUT G

JDELINES AND WHAT WAS I N E FFECT IN '94 TO '96 . IF THE G UI DELI NE S CHA NG ED A T T HE TIME O F R ES ENTE NCINNCESIT IS THE G

JDELINES IN EFFECT AT THE TIME THE CRI ME O CCURRED THAT WOULD A PP LY , C ORRECT?

YES.

S O I T I SN 'T J US T THA T I T IS T HE L AW A T T HE T IM E O F RES ENTE NCING . I T A PP LIES I N A C LE AN SLA TE D E NOV O S ITUA TI ON . YE S , T HERE A RE O THER I MPLICATI ONS THAT ARE R ETERMSE D W ITH WHE N YOU L OO K A T WHI CH G UIDELI NES A PP LY . S OME O F T HO SE CON THEREDE RA TI ON S C ONCEN AP T HE E X-SE D ST FAC T O C LAUS E T HAT A RE N' T A T ISS UE IN T HIS C AS E . CH IE F J USTICE: DO YOU WANT TO SAVE T HE REST O F YOUR TIME FOR R EBUT TA L? T HANK YOU V ER Y M UCH . MAY I T PLE AS E T HE COURT, NNT THE STATE. I THINK THE C OURT R EC EPCK ZES THAT THIS I S , I N F AC T , A C ONVICT ION ISSUE. IT IS A N I SSUE T HA T ACC ORDING T O A PPRE ND I SCKO UL D H AVE B EE N DEC IDED B Y T HE IIDEREURY. CH IEF JUSTICE: I'M N OT S URE, W E ARE STR UG GLIN G WIT H THAT ISSUE, I S THA T I T SEE MS T O ME THA T THE RE I S GOO D ARG UMEN TS O N BOT H SID ES NNETRASSENTI AL LY , THA T I S T HA T B ECAUSE Y OU'VE GOT A SIT UATION W HE RE THE T IM E T HAT S EN TE NCIN G THA T I S A DELIEC TED B Y A PP RE ND I AND B LAKELY , B UT THE DET ERMINA TION M ADE B Y A J UR Y WERE N OT I N ANY P AR TI CULA R C LEAR -C UT S IT CES TION S O WE R EALL Y ALMOST HAVE T O THINK OF THE P OLIC Y ISS UE S T HA T CCALAS S G THIS I S A S CUT AND DRY T O S AY I T I S SOM ETHI NG THA T H AD O CCUR RE D DURING THE J URY P ORTI ON O F THE CON VI CT IO N AND T HE REFORE IT IS

FINAL A S T O T HA T AND T HAT'S THE END OF THE STO RY ? W HICH W OULD BE E AS Y . I THI G THAT THI S C OURT R ECOGNIZE D IN HUGHES T HA T W HAT APPRE ND I I S T ALING THING A BOUT I S T HE S IXTH A ME ND MENT R IGHT FOR A J UR Y T RIAL O N THI S ISS UE T HA T I S G OING T O DET ERMINE THAT IS GGN NG TO BE A FACTOR IN T HE SEN TENCING D ETER MINATION. THIS IS WHY ALL O F T HE COURTS THAT HAVE LOU I T , ET- LYTT F OR T HE I SA AC C AS E FR OM T HE FIR ST D ISTR IC T W HERE T HE Y SETERM D THI S CAN A PPLY T O RES ENTE NC IN G , H AV E ALL S AID T HIS IS NOT A SEN TENCIN G I SSUE. T HIS I S A C ON VICT IO N I SSUE . T HI S I S W HY I T G EN IT IS SOMETHING T HA T HAS T O B E D EC IDED B Y T HE J UR Y A T C ONVI CT IO N, AND T HIS I S WHY J UDGE K AH N S AI D ONC E T HE CON VI CT ION I S OVE R WIT H , I T I S O VE R W ITTHO W E CAN'T G O B AC K A ND CHA NG E IT . I N T HE O PINI ON B EL OW , REC EP CKE FD THAT , AND A T H ED C OUNS EL A T O RA L A RGUM EN T A RE YOU SAYING T HA T I F WE G O B AC K N OW , THE O WO Y R EMED Y WOULD B E A N ND C TRI AL ? A RE Y OU S AYIN G T HA T YOU WOU LD WAIVE T HE DOU BL E IIDERE- IIPARDY A RGUM EN T A ND C OUNSEL S ETERMD NO. T HERE I S A D OU BL E J EOPA RD Y I SSUE WIT H T HIS. N OT O NO CARRIER RING CONNECT 115200 CHIEF JUSTICE: IN THE PRESENCE OF A CHI LD , AN D THE A RGUM ENT AT THA T POINT WAS , NO, THERE IS N O J UR Y DET ERMINATI ON THAT IT W AS IN THE PRE SENCE OF T HI S C HI LD , A ND W HY WOU LDN' T T HA T BE S OMETHI NG T HA T WOU LD B E SUB JECT T O THE A PP REND I A NALY SI S ? I 'M NOT - - I WOU LD L IK E TO POINT O UT T O T HE C OURT THAT THIS SENTENCE WAS , I N F AC T , F INAL . T HE RES ENTE NC IN G C AM E A BOUT A S A R ES UL T O F A COL LA TERA L P ROCE ED ING. CHIEF JUSTICE: BUT T HEN AT THAT P OINT THA T' S W HE RE W E G O B AC K T O DE N OV O , EVE N T HE SEN TE NCE A T THE TIM E IF IT WAS FIN AL W E W OULD B E IN A RETRO A CT IVIT Y I SSUE , B ECAUSE T HE SEN TE NC E WA SN'T , W AS V AC ATED , I T WAS R ESENTE NCING , T HE S ENTE NC E W AS NO LON GE R F INAL . WE LL , FOR RET RO ACT IVIT Y PUR POSE S , W E G O B AC K TO THE C ONVICTION, WHE N T HE C ONVICTIO N I S AFF IR ME D O N D IREC T APP EAL. THE C ON VICTION I S S ENTE NC E I S USUALLY B ROUG HT T OGET HE R O N DIREC T A PPEAL . J US TICE : W HAT WAS T HE C OURT TO D O O N T HE R ESENTENCING U NDER T HE ORD ER O F T HE T HI RD D IS TR IC T ? T HE O NL Y I SS UE O N R ESEN TE NCING WAS REG AR DI NG T HE V ICTI M I NJ UR Y POI NT S T HAT W ERE A SS ESSE D O N C OUNT F OUR. T HE C OU NT FOU R C HARG ED S EXUAL CON TA CT , B UT T HE V ICTI M I NJUR Y P OINT S W ER E A SSESSE D FOR P ENET RATI ON . T HE RE WER E 8 0 P OI NT S O F P ENETRATI ON.

JUS TI CE : S O W HA T D ID T HE T RIAL C OURT DO?

THE TRIAL COURT HAD T O R ECALCULA TE THE G UI DE LINE S F OR HIM W IT H ONL Y 4 0 P OINT S OF V IC TI M I NJ UR Y I NS TEAD O F 80 POI NTS. S O THE ONL Y I SS UE B EFOR E THE C OURT A T THE TIM E WAS C ONCERN ING T HE 4 0 P OI NT S O N C OUNT FOU R . B UT A S C OUNS EL POI NT S OUT T HIS WAS A D E N OV O S ENTE NCING WHERE W E HAD T O GO BAC K A ND T HE Y C OU LD HAV E , T HEY HAD T O REA SSES S T HE G UIDELI NES S CO RE S HE ET A ND A T T HA T POINT T HE D EFEN DANT WOULD HAVE THE O PP ORTU NI TY T O R AI SE A NY OTH ER OBJ EC TION S AND THE S TATE WOULD HAVE THE O PPOR TU NITY T O BRING IN , I'M S ORRY ? CH IE F JUSTICE: NO , G O AHEAD. I WAS GOING T O S AY J USTI CE Q UINCE WILL HAVE A Q UEST IO N B UT C OM PLET E J US TICE W EL LS . AL L RIGHT. BUT IT DOESN'T G IV E THE DEFENDANT THE RIGHT TO R ELY O N C AS E L AW THA T HAD O CCUR RED PRI OR TO THE C ONVICT IO N T O C OM E FINAL , I MEA N SUBSEQUEN T TO THE CONVICTION BECOMING FINAL THAT DOES NOT APPLY R ETROAC TI VELY. IF IT DID A PPLY T O I T , T HE N T HAT WO ULD B E A R ETRO ACTI VE A PP LICATION OF IT , WHE RE THIS COURT H AS HEL D T HA T IT DO ES N OT A PPLY RET RO ACTI VELY . JUSTI CE : NOW , YOU D O A GREE THA T T HE CON VICT IO N I N T HIS CASE I S F INAL ? C OR RE CT . J US TICE : A ND I N O RDER T O H AVE A J UR Y DET ER MINA TION O F W HETHER OR NOT T HERE WAS P ENET RATION A T THI S P OI NT I N ORDER T O HAVE A JUR Y D ETERMINATION O F PEN ET RATI ON , Y OU W OULD HAVE T O H AV E A J URY COM E I N A ND P RESE NT E VIDENCE O F W HA T WEN T O N I N T HIS E PISO DE , C OR RECT ? C OR RECT .

JUSTICE: A ND T HE N ISN 'T THAT IN ESSEN CE A R ETRI AL ? CORRE CT .

JUSTICE: S O I T I S Y OU R P OI NT THAT YOU CAN 'T DO THAT? CAN'T D O T HA T , AND I F YOU W ERE T O A PPLY I T A T THA T R ETRIAL T HA T W OULD BE A R ETROACTIVE APP LI CATION OF IT. J USTICE: S O W E'RE AT T HE S ENTENCING, AND YOU 'VE GOT TO TAK E A T THI S NEW S ENTENC ING YOU 'VE GOT T O T AKE THE R ECOR D A S I T EXI ST S , C ORRECT?

CORRECT, CORRECT .

JUSTICE: SO T HE R ECOR D A S I T E XIST S D OES NOT H AV E P EN ET RATION WITH T HE C OUNT THAT WE ARE C ONCE RNED WIT H. SO I F T HE S TA TE , I N FAC T , U SED T HO SE 4 0 POI NT S YOU GET 4 0 POI NT S FOR P EN ETRA TI ON ? 8 0 POI NTS.

JUS TI CE : I F T HE STA TE A TT EM PTED TO U SE T HA T A T T HIS POI NT I N T IM E WOU LD N OT T HAT BE A N A PPRE ND I VIO LATI ON ? I T W OU LD B E - -. JUSTICE: B ECAUSE I C AN 'T UNDERSTAND YOUR ARGUMENT I F YOU A CC EP T T HA T T HE C ONVI CTION IS F INAL AND YOU CAN DO N O MOR E ABO UT I T. R IGHT . B UT THA T' S THE W HOLE POI NT A BOUT RET RO A CTIV IT Y I N T HA T Y OU C AN NO T G O B EY ON D WHE N T HE C ON VI CT IO N B ECAM E F INAL . W HE N THE C ONVI CT IO N B ECAM E FINAL , T HE R ECOR D IS S ET A ND A T T HA T P OI NT A PP REND I D ID N OT E XI ST . J US TI CE: WELL , I THI NK THAT THE PROBLEM THAT I 'M A T LEA ST S TRUG GLIN G WIT H I N T HI S A RG UM EN T IS H AV E W E , I R EC OGNIZE THE P REST ON C ASE A ND I RECOG NI ZE THA T W E HAV E R EPEA TE DL Y SAID T HA T I N R ESENTE NCING A ND D EATH CAS ES , A ND THEN T HE USU AL T YP E O F R ESEN TENC ING THAT W E H AV E A LL B EE N U SE D T O , THA T T HE C LE AN SLA TE R ULE APPLI ES . H AVE W E S AI D THA T I N R ESPE CT T O A STR IC T C ORRE CT IO N O F O UR S CORE SHE ET ? I THI NK I N T HE C AS ES WHE RE THE RE H AS B EE N S CORE SHE ET E RROR U NLESS IT I S J UST B EING A S CRIV EN ER 'S ERROR, IF THE S CORE S HEET , THE RECAL CULA TION O F T HE SCO RE S HE ET I S G OI NG T O R ESULT I N --.

JUSTICE: THAT'S THE REASON I ASK Y OU WHA T T HE T HIRD D IS TRIC T ORD ER ED , AND I THO UG HT Y OU SAI D T HAT THE THI RD DISTRIC T O RD ERED T HA T T HE RE B E A R ED UCTI ON O F 4 0 P OINTS . THA T I S E XACT LY COR RE CT . JUSTI CE : AND THE SCO RE S HEET R EC ALCU LATE D THE R EDUCTI ON AND THE N OBV IOUS LY T HA T W OULD IMP LI CATE O TH ER S ENTENCING S TATU TE S , B UT I D ON'T K NO W WHY T HE STATE W OULD GET T O P UT O N A DDIT IONA L E VI DENC E I N THA T C IRCU MS TANCE, Y OU K NO W , W HA T S ENSE IT W OULD MAK E O R W HA T S EN SE I T W OULD M AK E T HAT T HE D EF ENDANT W OULD G ET T O D O A NYTHING D IFFE RENT LY . > > ONL Y B ECAU SE T HE S ENTE NC E G OT, THE S ENTE NC E WAS V ACAT ED , A ND ALT HOUG H T HI S WAS J US T FOR BEC AU SE O F THE C ORRECTION OF T HE S EN TENC IN G , T HE SEN TENC IN G POI NT S , THE F AC T IS T HAT T HE S EN TE NCE WAS VACATED , AND I N ORD ER T O I MPOS E A N EW SEN TENC E , T HE Y NEE DE D T O H AV E BEE N A NOTH ER S ENTENCIN G HEARING, B UT THE FACT THA T W E G OT A NEW SENTE NCING HEA RI NG D OE S NOT E NTITLE T HE D EFEN DA NT T O T HE BEN EFIT OF CAS E L AW T HA T W AS D ECIDED A FT ER HIS CONVI CTIO N B ECAM E FIN AL T HA T HAS BEE N H ELD N OT T O A PPLY RET ROAC TIVELY . IN T HI S C AS E , ALF ON SO G REEN , A CAS E T HA T T HE PET IT IO NE R C IT ES , S UPPO RT S T HE A RGUM EN T T HAT THI S COU RT H AS I MPLICI TLY A PP LIED B LAKE LY O R MOR E S PE CI FI CALLY APP RENDI T O A RES EN TENC IN G .

JUSTI CE : I T HINK M Y T ROUBLE W IT H T HI S W HOLE S IT UATION I S T HA T F RO M W HAT I HAV E R EA D , T HA T WHA T T HI S CAS E I S D EA LI NG W IT H I S NOT , T HA T T HE T HIRD D IS TRIC T WHE N I T ORD ER ED RES EN TENC IN G D IDN'T ORDER THAT THE RE B E ANY THIN G F AC TU ALLY F URTH ER D ETERMI NED . I T M ER EL Y W AN TE D THE L EG AL APP LICATION O F T HE S EN TENC E T O B E REC ALCU LATE D. I S THA T C OR RECT ?

JUS TICE W ELLS , I U NDERST AN D YOUR Q UE STION , AND I THINK THAT YOU ARE C ORRECT , BUT WHE N THE Y W EN T B ACK , THE Y DID , I N F AC T , H AVE A NOTH ER S EN TENC IN G H EARI NG.

J USTICE: LET ME A SK Y OU THIS IN A CAS E D EC ID ED A FTER A PPRENDI I F I T WER E A D IREC T A PP EA L , A ND T HE JUD GE I MPOSED P OI NTS F OR P ENET RA TION T HE J UR Y DID N' T F IN D IT AND T HA T W EN T O N APPEAL, WHAT I S THE S TATE 'S POSITION AS TO WHAT T HE REM EDY WOULD B E I F A PP RE ND I W ERE VIO LA TE D?

I T HINK I T DEP ENDS ON WHETHER OR N OT F IR ST O F A LL IT W OU LD HAV E T O H AV E B EE N P RESERV ED IN T HE T RIAL COURT.

JUSTICE: YES, LET 'S A SSUME ALL OF THAT.

IF I T W AS P RO PE RL Y P RESERVED T HEN THERE ARE T WO THINGS THAT COULD HAP PE N AND I'M NOT SURE WHICH WOU LD HAPPEN. E ITHER , I T I S T RE ATED A S T HE C ASE W HERE A N I SS UE W AS P RESENTED T O THE JUR Y BUT THERE WAS N O S PE CI FI C F INDING B Y THE J UR Y , S O S OMETIMES IT W OU LD G O A S I N P ER HAPS THE J UR Y INS TR UCTI ON AND T HEN THAT WOU LD P RO BABL Y H AVE TO G O BAC K T O R ET RIAL , O R YOU WOU LD JUS T HAV E T O , T HE DEF EN DANT I N T HAT C AS E M IGHT J US T GET T HOSE POI NT S D EDUCTED FROM THE SEN TENC E.

JUSTICE: WHICH O NE W OULD IT BE? CAN Y OU I MPAN EL A JUR Y A T T HAT P OINT SOL EL Y F OR SEN TENCIN G PURPOSES?

NO , YOU CAN'T , AND THI S IS ONE OF O UR O THER A RGUMEN TS W HY T HIS IS N OT A R EMEDY , BEC AU SE THE RE I S N O P ROCE DURE I N FLO RI DA F OR I MPANEL IN G A J UR Y T O M AK E A DDIT IO NAL F INDING S O N S ENTENC ING F AC TO RS .

JUSTICE: BUT IF I T WER E C ONSTIT UT IONALLY R EQ UI RED MAYBE THERE WOULD BE A PROCEDURE.THERE WAS NO P RO CE DURE F OR R EPRESENTATIO N O F EVERY I NDIGEN T D EFEN DA NT U NT IL G IDEO N V ERSU S W AI NW RIGH T A ND SO SOMETIM ES T HE C ONSTITUT IONAL R EQ UIRE MENT S PRO CEED T HE PRO CEDU RE. I DON 'T KNOW T HE A NSWER TO THAT. IT I S E IT HE R T HA T T HI S C OURT I S G OING T O , AND I DON 'T KNO W I F T HI S C OU RT H AS T HE A UTHORITY T O D IR EC T A LOW ER C OURT T O IMP ANEL A J UR Y S PECI FI CA LLY F OR T HAT. CHIE F JUSTICE: F OR EXAMPLE WE'VE HAD THE F IR EARM ISS UE FOR MAN Y Y EARS , A ND AS FA R A S WHE TH ER T HE RE H AS TO B E A N A DDIT IO NA L F INDI NG O N FIR EA RM S. N OW, I F T HERE I SN 'T O NE M AD E , T HEN T HE S TA TE DOE SN 'T GET T O HAV E A NO THER TRI AL O N W HETH ER T HERE I S A FIR EA RM , C ORRECT? THEY JUST CAN'T HAV E THA T A S A S ENTE NC IN G ENH AN CE MENT ? SO I N TER MS O F W HA T JUS TI CE C ANTE RO I S ASK IN G IF THE F INDING WAS N' T M ADE , THE N THE STA TE R EALL Y E ND S U P N OT B EING A BL E T O A SS ER T I T. I F THE FIN DING W AS N' T M ADE AND THE RE W AS N O E VIDENCE FROM WHICH W E C OULD F IND THAT T HE J UR Y W OU LD H AVE FOU ND THA T , BUT I N T HI S C ASE TH ERE I S O VERW HE LM IN G EVIDENCE, INCLUDING A S J USTICE C ANTE RO I S POI NTIN G O UT , THE C ONFE SS IO N B Y T HE D EFENDA NT THAT T HI S DID, I N FACT, O CCUR .

JUSTICE: BUT HE W AS T ALKING A BOUT A DIR EC T A PPEAL C AS E , AND T HE N Y OU H AVE P IP E LINE CAS E , A ND S O A S I U ND ERSTOO D Y OU R A RGUMEN T T HA T W OU LD B E D IFFERE NT THAN A C AS E I N W HICH C OMES TO U S I N A 3 .8 00 S ETTING. C ORRE CT . JUS TICE : IS THAT RIGHT? I N T HE P IP ELIN E C AS E THE D EFENDANT WOULD GET T HE B EN EFIT O F I T, B UT I N A C AS E T HA T I S F INAL O N D IREC T A PPEAL T HAT IS NOT A P IPELINE C ASE , T HE DEF ENDA NT W OULD NOT GET THE BEN EF IT O F IT. THIS IS JUS T HOW .

CHIEF JUSTICE: I GUESSTHE QUESTION IS WHAT BEN EF IT , A SSUMING T HE H YPOT HE TICA L T HAT JUS TICE CAN TERO GIV E , - - GAV E , W HA T W OULD THE B ENEF IT ?

THE BEN EF IT W OULD B E UNLESS YOU CAN S AY THE RE ARE CAS ES THA T S AY I F YOU L OO K A T T HE C HARG IN G DOC UM EN T AND YOU LOOK A T T HE E VIDENC E P RESENTED F OR I NS TANC E I N T HIS CAS E I F I T W AS N' T C HARGED IN THE ALT ER NA TI VE , IF IT WAS J US T C HARG ED W IT H S EXUAL B AT TERY B Y PENET RATI ON AND T HERE I S A JURY FIN DING CON

VICT IN G A S C HARGED Y OU C AN S AF EL Y S AY T HAT THE F IN DI NG O F T HE GUI LT A S C HARG ED T HA T P ENETRA TION WAS INH ER EN T I N T HAT VER DI CT. I F YOU CAN'T SAY T HA T T HE N I N A PIP EL IN E C AS E , THE R EMEDY F OR T HE D EF ENDA NT WOULD BE THA T THO SE P OINT S W OULD HAV E T O B E D ED UC TE D F ROM T HE S CO RE SHE ET . T HEY CO ULD N OT B E A SS ESSE D. JUSTI CE : B UT WHA T L AW A LA WED THE TRI AL JUD GE T O A SSES S T HOSE P OI NTS B EFOR E A PPRENDI ? O UTSIDE O F W HAT W AS S PECI FICA LLY I NHER EN T I N THE J URY' S V ER DI CT ? THE VIC TI M I NJUR Y POI NT S , T HE CHARG E H AS A LWAY S B EE N H AD T HE DIS CRET ION T O A SS ES S T HOSE P OI NT S , B ASED O N THE E VIDENC E T HAT W AS P RE SENT ED A T TRI AL R EGAR DL ES S O F W HA T THE J URY A CT UA LL Y FOU ND .

JUSTICE: S O Y OU R P OSIT IO N IS PRIOR TO A PP REND I , THA T W AS SOL EL Y A SEN TE NC IN G D ECISIO N?

CORRECT, AND I T HINK THERE WAS A LIN E O F C AS ES W HERE T HI S H AD H AP PE NE D WHE RE AT THE TIM E T HE TRI AL J UDGE , T HE TRI AL J UDGE COU LD MAK E T HO SE S ENTE NCIN G , W EL L , T HOSE FIN DING S , AND THE P OI NT S WER E BEI NG A SS ES SE D F OR P ENET RA TION A ND I N C CACHEF SK Y T HE Y S AI D T HERE HAD TO BE S OM E SOR T O F I NJURY , OTHER T HAN PENETRATION. IN T HA T CAS E THE COU RT A PPLI ED T O R ET ROAC TI VE LY A ND S AID AL L O F THO SE D EFEN DANT S C OULD B RING T HE C LAIM U ND ER 3.8 00 AND T HE TRI AL C OURT BECAUSE T HIS IS SOM ETHI NGTHAT THE TRI AL COU RT C OULD DET ER MI NE FRO M THE REC OR D , T HE T RI AL COU RT CAN M AK E THA T D ET ER MINA TI ON A S TO WHETHER OR NOT T HERE WAS A NY A SCER TA INABLE PHY SICAL INJURY BUT IN T HI S C AS E THI S IS N OT SOM ET HI NG THA T THE TRI AL C OURT I S S PECI FI CA LL Y SAYING. THIS IS SOMETHING THAT THE JURY MUST DET ER MINE AND THEREFORE YOU CAN NO T SEN D I T B ACK AND SAY MAK E THA T DET ERMI NATION .

JUSTICE : I A SSUM E THE S TA TE'S POSITION IS THA T A N A PPRE ND I O R B LAKE LY E RROR IS S UBJECT TO HAR MLES S E RR OR ANA LYSIS , B UT CAN YOU A DDRE SS T HA T I SSUE AND I T S EEMS T O M E T HA T T HE DEFENDA NT'S C ONFESSION C OMES INT O P LA Y B OT H O N T HE FRO NT E ND A S T O WHE THER THE RE W AS A B LAKE LY VIO LATI ON A T ALL , A ND WHE THER T HE C ON FESS IO N C ONSTIT UTES AN A DMIS SION OF THE D EFENDANT BUT A LS O E VEN A SSUMING T HAT IT DOE SN'T , AND THA T YOU R O PP ONEN T I S C ORRECT THA T A CON FE SS ION D OE S NOT C ON STIT UT E A N A DMISSI ON AND H AS TO B E A P LEA O R T ESTIMONY AT TRI AL T HE N I T SEEMS T O M E Y OU CAN A NALYZE THE CON FE SS ION I N T ER MS O F HAR MLES S E RROR A ND W HETHER A NY A PPRE ND I V IOLATION W OULD R ESUL T I N A D IFFERENT S CE NARI O . I W OULD DIS AG RE E W IT H C OUNS EL AS T O T HE F AC T T HA T THIS A DM ISSI ON MUS T B E D URING A PLE A C OL LOQU Y. T HE D EF EN DANT D ID A DM IT T O A LL O F T HE SE A ND I T HI NK B AKELY BLA KELY W OULD P RECL UD E , THA T WOULD B E SUFFICIENT FOR BLAKELY, T HE FACT THAT HE HAS A DMIT TE D I T.

JUSTICE: THAT WOULD B E A N EASY WAY TO DECIDE T HIS CASE , W OULDN'T IT? RIG HT. BUT I THINK A LSO I T D OE S G O INTO THE HAR MLES S ERR OR ANALY SIS , B ECAU SE THE RE I S A BSOL UTEL Y O VE RWHE LMIN G EVI DENCE O F M UL TIPL E P ENET RATION IN T HI S C AS E A ND T HE FAC T THA T T HE STA TE CHO SE O NL Y T O C HA RG E ESSEN TI ALLY ONE P EN ETRA TI ON , T HE SEC ON D PEN ETRA TI ON THA T R ESULTED IN THE I MPRE GNAT IO N C OUNT BUT THE O NL Y C OU NT T HAT'S C HARGED A SP EN T RATI ON I S COU NT ONE , WHI CH I S THE O NE AT I SSUE H ER E , BUT T HE RE I S OVE RW HE LM IN G E VIDE NC E T HA T T HI S I S A N O NGOI NG REL ATIO NSHIP. I T B EGAN I N O CT OB ER OF ' 97 A ND I T C ON TINU ED A CC OR DING TO T HE A LLEG AT IO N I N T HE I NFORMA TION , IT C ONTI NUED U NTIL THE E ND O F J ANUA RY 1 99 8. AT THE TIME OF TRIAL T HE V ICTI M TESTIFIED , THE VIC TI M A T THAT TIM E I T HI NK W AS FIVE M ONTHS P RE GNAN T W IT H T HE DEF EN DANT 'S C HI LD , S O T HERE W AS N O TES TI MO NY B UT THE D EF ENDANT ADM IT TE D THAT HE WAS THE ONL Y ONE T HA T THE VIC TIM HAD SEX UA L REL ATIO NSHI P S W IT H , A ND EVE N B Y THE EVI DENC E WHE N W E L OO K A T THE L ENGT H O F T IM E THA T T HIS OCCUR RE D, T HE F AC T T HA T SHE W AS A BOUT F IV E M ONTH S P REGN AN T AT

THE T IM E , I T S HOWE D THA T A LO NE S HOWE D T HAT T HE RE M US T H AV E B EE N MORE T HA N ONE P ENET RA TI ON . JUS TICE: LET ME A SK Y OU A QUE STION. FOR T HE C OUNT A T I SS UE , I F T HE Y W ER E A PP LI ED 4 0 POI NT S A S OPPOS ED T O 8 0 W HA T WOU LD T HE G UIDE LI NE S ALL OW A S T O T HE M AXIM UM S ENTE NCE? M Y U ND ERST AN DING , AND I'M N OT 1 00 % SUR E A BO UT I T , B ECAUSE I T IS NOT THE SAM E A S C OUNS EL H AS JUS T T OL D T HE COURT , M Y UND ERST AN DING I S T HA T THI S I S A S EC ON D D EGRE E F ELONY A ND T HE S TA TUTO RY M AXIM UM FOR T HI S IS 1 5 YEA RS . W ITH THE INC LU SI ON O F THE 8 0 P OI NT S I T B RING S I T UP T O A ND T HE RE W AS S OM E D ISCUSSION THA T R ES EN TENC IN G , WHE THER OR N OT THE G UIDE LINES CAL CU LATI ON P UT S IT NOW T O 1 8 Y EA RS I NSTE AD O F 5 0 AND UND ER THE G UIDELI NES I N E FFECT THEN , THE GUIDELI NE S S ENTE NC E THE N BEC AM E AND THERE WAS SOM E D ISCUSS ION AS T O W HETH ER T HAT W AS NOW THE STA TUTO RY M AXIMUM O R WH ETHE R OR N OT THE C OURT C OU LD G O A BOVE THA T AND I N A N A BU ND ANCE O F C AUTI ON T HE C OU RT S AID I 'M GOING TO STICK W IT H 1 8 W HICH I S T HE L OWES T G UIDE LI NE . S O M Y U NDER STAN DI NG I S WIT H THE I NCLU SI ON O F THE 4 0 P OINTS, I T T AK ES I T U P T O T HE 1 8 Y EARS . JUS TICE : W ITH T HE 4 0 POINTS IT TAK ES I T T O 1 8 Y EARS? WITHOUT THE 4 0 P OI NT S YOU'RE BACK DOWN TO T HE 1 5 Y EARS , THE S TATUTO RY MAX IM UM 15 YEA RS .

CHIEF JUSTICE: THANK Y OUVERY MUCH , MISS TAYLO R . W E WIL L TAK E -- WE W IL L HEA R I N REB UTTA L FRO M M IS S M cKENNA .

THANK YOU, M A' AM . J US TI CE: C AN Y OU A DDRE SS T HE ISSUE O F H ARML ESS E RR OR ? I S I T YOU R P OS ITIO N T HAT A PPRE ND I ERR OR I S NOT S UBJECT T O H AR M LE SS E RR OR R EVIEW O R I S IT THA T THE RE W AS N OT H AR M LE SS E RROR I N T HI S C ASE? MY P OS ITIO N I S BOT H. BAS ED ON T HI S C OURT 'S L ONGS TA NDING P RECE DENT STARTING WITH OVERFELT VER SUS S TATE AND ALL O F ITS P ROGENY T HI S C OU RT H AS N EVER A PPLI ED A H AR ML ES S ERROR A NALYSI S WHEN A J UR Y I S R EQUI RE D TO F IN D T HE F ACT. T HI S C OU RT HAS REPEA TEDL Y STA TE D THE E VI DE NC E I S U NCONTRAD ICTED I F A JUR Y I S R EQUIRED T O FIN D T HE F ACT THE JURY MUST F IND T HE F ACT. NOW , SECONDLY I WOULD SAY I T A HAR MLES S I N THI S C AS E A ND THE R EASO N W OULD B E THA T G EN ER AL V ERDI CT S A RE D IFFERENT. E VEN UND ER FED ER AL LAW . J US TI CE : W ELL , HER E Y OU HAVE A CASE W HERE A DEFENDANT HAS A CONFESS IO N T HAT WAS INT RODU CE D. S O W HE TH ER Y OU C ON SIDER I T AS OUT SI DE O F BLA KE LY BEC AUSE I T I S A N ADM IS SION OF T HE DEF ENDA NT OR NOT , W HY D OESN 'T T HA T FAC T REN DE R I T H ARMLES S E RR OR? BEC AUSE GEN ER AL VER DI CT S ARE DIFFERENT AND UND ER F EDERAL LAW , EVE N I F THE RE I S OVE RW HELM IN G EVI DENC E , F OR EXAMPLE , T HAT T HE L IN E OF CAS ES W OULD BE THE 11T H C IRCUIT D EC IDED I N UN ITED STATES VERSUS A LLEN AND THI S A RISE S WHE N A N IND ICTM EN T O R THE JURY IS C HARG ED W ITH T HE FACT THAT THERE WER E T WO CON TROL LED S UB ST ANCE S IN THE C ONSPIR ACY , MAR IJ UANA A ND COCAINE I T HINK IN THIS C AS E IT WAS COC AINE . EVEN I F T HERE I S OVE RW HE LMING EVI DE NCE T HA T THE JUR Y FOU ND HIM G UI LT Y O F T HE C ON SPIR AC Y B ASED O N THE H IGHE R , Y OU KNO W , H IGHE R PEN ALTY S UB STAN CE , T HE COURT SAI D BECAUSE THERE W AS O NL Y A GEN ER AL V ER DI CT , T HE C OU RT C AN ONL Y S EN TENC E I N A CCORDANCE WIT H A L OWER V ERDI CT AND THE N F IN AL LY W IT H R EG AR D T O H ARML ES SNES S IN THIS CAS E - -.

JUSTICE: I SN'T THAT SOMETHING THAT YOU WOULD H AVE A RG UE D LON G B EFOR E N OW , T HA T G EN ERAL V ERDICT HAS BEEN THERE FOR A LON G TIM E. Y OU C OU LD HAV E T OL D T HE J UDGE A T THE VER Y BEG IN NING O F SENTE NC IN G , Y OU C AN 'T S ENTENC E THI S P ER SO N W IT H P ENET RA TI ON P OINT S B EC AU SE T HE J URY F OUND O NL Y F OUND O R , IT WAS A GEN ER AL V ERDI CT .

YO UR HON OR , I 'M N OT S UR E I K NOW THE A LL EN CAS E W IT HI N 200 2 AND I B ELIE VE THE O THER CAS ES, I BEL IE VE I T IS T HE D ALE C AS E O R R YA N C AS E AND T HE Z IL GE T CAS E I N THE 1 99 7 OR T HE LAT E '90 s , I 'M N OT S UR E , A ND A LSO W E D O HAV E THE DE N OV O R ESEN TE NCIN G HERE, A ND F INAL LY I W OULD P OINT OUT A S I DID I N M Y B RIEF THA T THE S TATE S PECIFICA LLY ARG UE D C ON TACT AND IN I TS INS TRUC TIONS TO T HE JUR Y D UR IN G I TS CLO

SI NG A RGUM ENT AND, I N F AC T , D ESPITE WHAT THE S TATE C ALLS O VERWHELM ING EVIDENCE, THE JURY, IN FACT , A CQ UITT ED MR. G ALIN DEZ OF T WO C OU NT S S O THI S C OURT I S NOT IN T HE P OSITION TO GUESS A T WHAT THE JURY WOULD HAV E D ON E.

JUSTI CE: I SN'T T HA T BECAUSE ALL T HE S TATE H AD T O P ROVE FOR G UILT WAS C ON TACT. IT DIDN'T HAVE TO P ROVE P ENETRATION?

I'M NOT S UR E W IT H R EGAR D TO THIS COUNT? JUS TICE : Y ES , WIT H R EGAR D TO COUNT ONE ALL T HE S TATE HAD TO PRO VE WAS THA T T HERE W AS UNI ON. T HEY DID NOT HAVE T O PRO VE P ENETRATI ON SO W HY SHO UL D I T G O BEY ON D W HA T I T HAD T O P ROVE IN ITS A RG UMENT TO THE JURY? I T A RG UE D BOT H P OI NTS TO T HE JURY. T HE S TA TE HAS CHA RGED THI S S OLEL Y A S A P EN ETRA TI ON O R S OLELY UNION C RIME . W HAT I W OULD L IK E T O BRI EFLY A DDRE SS I S T HA T --.

JUSTICE: LET M E ASK A QUEST ION. D O Y OU AGR EE W IT H THE STA TE THAT THE ASS ESSM EN T O F THE P OINT S PRIOR TO A PP REND I W AS A J UD GE'S DEC IS IO N A T S ENTE NC ING?

YES, AND I B EL IEVE T HE C ASE M OS T R EL IE D O N T HA T I S - -.

JUSTICE: AND I F A PP RE ND I S AYS C LEAR LY WE' RE N OT Q UEST IONING T HE D ECISIONMAKER B UT P OST- APPR ENDI I WE' RE S AYIN G T HAT T HI S DEC IS IONM AK ER HAS TO BE THE JURY B UT B EF OR E THAT WE'RE NOT Q UEST IONI NG IT, ARE N'T YOU R EA LL Y U NDER CUTTING THAT BECAUSE YOU ADMIT THA T P REAP PREN DI T HE JUD GE COU LD H AV E MAD E T HIS DECISION BUT NOW T HAT WE'RE GOING BACK YOU'R E SAY ING THAT THE J UDGE C AN'T M AK E T HA T D EC ISIO N , B ASED S OLEL Y O N A PP REND I? I'M N OT C ERTA IN I F I U NDERSTAND T HE D IF FE RENC E. J US TICE : APP RE ND I WAS C LEAR T HA T T HE RE S IMPL Y IS N OT A S UBST ANTI VE ISS UE B UT A P RO CEDU RA L I SS UE A S T O W HO IS THE D ECIS IO NM AK ER ? YES , YOUR H ONOR.

J US TI CE: IS T HA T CORRECT?

WELL , I T I S A L IT TL E B IT MORE THAN THAT. IT ALSO INVOLVES THE STANDARD OF PROOF. T HE R EASO NA BL E D OUBT S TANDARD V ERSU S THE P REPOND ERANCE OF EVI DE NCE STANDARD SO I T G OE S BEY ON D T HAT. I W OULD LIK E T O CONCLUDE BY - -.

CHIEF JUSTICE: PLEASE B RIEF LY CONCLUDE. BY P OINT IN G OUT T O T HI S COURT THAT EVERY CASE THA T IS A CTUA LL Y A NALY ZE D , T HE QUE STION O F APP REND I A PPLY IN G T O R ESEN TENC IN G PRO CEEDINGS HAS F OUND THA T IT IS N OT , Y OU D ON 'T L OO K T O T HE C ONVICT IO N AS I T R EL ATES TO GUILT OR I NN OCEN CE . YOU L OOK TO T HE FIN ALIT Y O F T HE S EN TENC E.

JUSTICE: WELL , T HI S CAS E IS AN E XA MP LE WHE RE T HE Y D IDN'T DO T HAT. EVERY C ASE OT HE R THA N T HE DISTRICT COURT OF APPEALS D ECISIO NS H AV E FOUND T HE R ETROACTIVE DEC ISIO NS AND THE PRICE C AS E AND THE S ANDE RS C AS E B OT H FED ER AL C ASES AS W EL L A S T HE FED ER AL T RIAL COU RT CAS ES O F ELI AND R ENNICK , A S W EL L A S OTH ER S TATES , THE M IN NE SO TA C ASES HAV E SAI D T HE PRO PE R ISS UE TO LOO K A T I S THE F IN AL IT Y OF T HE SEN TENC E. A S T HE C OU RT REP EATE DL Y STA TED I N HUG HE S IT GOE S NOT TO THE GUILT OR INNOC ENCE BUT TO THE SENTENCING PHASES. CHIE F JUS TICE: THANK Y OU , M ISS M cKEN NA . W E H AV E H AD MAN Y DIF FE RE NT O RAL ARGUMENTS, MANY D IFFERENT STYLES. WE'VE SEEN SOM E E XA MP LES OF SOME VERY U NPRO FESS IO NA L ORAL ARGUMENTS, A ND I HOP E FOR THE S AK E OF O UR STU DE NT INT ERNS AS W EL L AS T HE A UDIENCE THAT W E S EE T HI S A RGUMENT AS AN EXA MPLE O F A VERY P RO FE SS IONA L A RGUM EN T A ND B OTH O F Y OU B EI NG V ER Y R ESPONSIVE T O O UR QUE ST IONS IN A V ER Y T ECHN ICAL D IFFICU LT BUT BEF OR E C ASE. T HANK YOU VERY MUCH. THE C OURT WILL BE IN R ECES S . THE MAR SHAL : P LE ASE RIS E .