

THE NEXT CASE ON THE COURT'S
AGENDA IS STATE V. ISAAC.

>> MS. GUARD, ARE YOU READY TO
PROCEED?

>> I AM, YOUR HONOR.

MAY IT PLEASE THE COURT,
CHRISTINE GUARD ON BEHALF OF
THE STATE OF FLORIDA.

I WILL JUST RUN THROUGH A QUICK
TIME LINE OF FACTS BECAUSE EACH
AND EVERY ONE OF THESE CASES IS
IN A DIFFERENT PROCEDURAL
POSTURE.

>> LET'S TALK ABOUT ISAACS.

LET ME JUST GET YOU TO STATE IT IF
YOU WOULD THE, WHAT WE ARE
REVIEWING.

IN THIS CASE ARE WE REVIEWING A
DECISION OF THE FIRST DISTRICT
WHICH WAS ON APPEAL FROM THE
DENIAL OF A 3800A MOTION?
IS THAT CORRECT OR INCORRECT?

>> I BELIEVE IT IS -- THAT IS WHERE IT
GETS A LITTLE INTERESTING, YOUR
HONOR.

IT LOOKS LIKE IT IS EITHER, IT LOOKS
LIKE IT IS A POST CONVICTION.

IT LOOKS LIKE A 3850.

>> WE ARE HERE, WE ARE IN POST
CONVICTION LAND.

IS THAT CORRECT?

>> YES.

MR. ISAAC WAS CHARGED BACK IN
1995 WITH A SERIES OF CRIMES.
A PORTION OF THOSE PROCEEDED TO
JURY TRIAL WHICH IS THE PORTION
CHALLENGED HERE.

ANOTHER PORTION PLED.

HE WAS ORIGINALLY SENTENCED
WITHIN THE GUIDELINES TO 20
YEARS AS COUNSEL POINTED OUT.

IT IS WITHIN THE 244 MONTHS OF A
LIMIT OF THE GUIDELINES AT THE
TIME.

THESE ARE THE '95 GUIDELINES.
HE COMES BACK AND THERE IS A
REMAND AFTER DIRECT APPEAL.
IT IS DUPLICATIVE OF ONE OF THESE
OTHER CHARGES.

THAT IS IN 1999.

THEN HE FILED THE 3800A MOTION
ON JUNE 2ND, 2000, PURSUANT TO
THIS DECISION.

SO WE END UP WITH COMING UP
AFTER EARLY THEREAFTER.

HE FOUNDED 3850 ON NOVEMBER
13TH, 2000.

>> LET'S GO WITH BEFORE YOU GET
TO THE 3850, 2001 AFTER IT CAME
OUT.

>> THAT IS ON THE SENTENCING.

>> HIS RE-SENTENCING.

SO THE ISSUE THAT WE NEVER
RESOLVED.

I KNOW WE CAN SPEND A LOT OF
TIME ON PROCEDURAL POSTURE.

A RE-SENTENCING FOR A CASE
WHERE THE CONVICTION AND
ORIGINAL WERE BEFORE APPRENDI
BUT THE RE-SENTENCING IS AFTER
APPRENDI.

DO THEY APPLY TO THE RE-
SENTENCING PROCEDURE?

THE STATE'S POSITION IS, NO, YOU
LOOK BACK TO THE DATE OF THE
ORIGINAL CONVICTION AND
SENTENCE.

THE FIRST DISTRICT'S POSITION IS
YOU LOOK AT BECAUSE RE-
SENTENCING IS DE NOVO YOU LOOK
AT THE DATE OF THE RESENTING.

IF THE CASES WERE DECIDED AFTER
APPRENDI OR BLAKELY, AND BECOME

EVEN THOUGH THE PROCEDURAL POSTURE IS DIFFERENT THAT IS WHAT WE HAVE GOT TO PROMOTE WE DID NOT DECIDE IN VALINDEZ THAT WE WERE SUPPOSED TO BE DECIDING.

IS THAT CORRECT?

>> CORRECT, ALMOST.

IN THIS CASE WE ACTUALLY HAVE AN APPLICATION OBLIQUELY LONG AFTER THE RE-SENTENCING.

>> AND THIS CASE MAY FAIL BECAUSE OF THAT.

>> CORRECT.

>> MAYBE THAT IS AS WELL AS THE FACT THAT IN THIS CASE SUBSEQUENTLY THE FIRST DISTRICT IN OUT WITH A DECISION SAYING IT WAS HARMLESS ERROR.

I KNOW WE SAID DON'T ADDRESS IT. THE FIRST DISTRICT HAS ALREADY KIND OF DECIDED THAT ISSUE.

>> I BELIEVE THE FIRST DISTRICT BEAT BOTH COUNSEL TO THE PUNCH ON THAT ONE.

>> BUT IN THIS CASE IT SEEMS --

>> SENTENCING WAS FINAL IN 2002, RIGHT?

>> IT WAS ACTUALLY WOULD HAVE BEEN FINE OF 30 DAYS FOLLOWING JUNE 11TH, 2001, RE-SENTENCING UNDER HAGUE.

>> BUT IN THAT SAME PROCEEDING WASN'T THERE, HE OBJECTED TO THE RE-SENTENCING.

HE BROUGHT HIS APPRENDI ISSUE AT THAT TIME.

>> I'M SORRY.

I JUMPED THE GUN.

IT WAS A PART OF THAT SENTENCING.

A 3800B1 MOTION.

HE FILED A 3800B1.

THAT IS TRUE.

WHICH IS OF JULY 23RD, 2002, OR
SHORTLY THEREAFTER.

>> YOUR POSITION WOULD BE EVEN
IF, YOUR POSITION IS YOU WOULD
NOT EVEN LOOKED TO THE DATE OF
THE RE-SENTENCING.

>> CORRECT.

WE FIND THAT LANGUAGE FROM
HUGHES.

THE DISCUSSION OF THE COURT
WHERE THEY DISCUSS CONVICTION
VERSUS SENTENCE.

THE STATE'S INTEREST IN FINALITY OF
THE CONVICTION ITSELF WHICH IS
WHAT OCCURS IN THIS CASE.

WAS ABLE TO TRY HIM AND HAVE
THE ELEMENT FOUND.

>> THAT IS FINE.

BUT THEN THE JUDGE FOUND HE
WOULD HAVE BEEN SENTENCED
WITHIN THE GUIDELINES BASED ON
HAGUE.

THE JUDGE FOUND A PROGRESSIVELY
INCREASING VIOLENT CRIME
CONSTITUTING AN ESCALATING
PATTERN OF CRIMINAL ACTIVITY.
THAT WOULD BE NORMALLY OF
FACT.

REQUIRED TO BE FOUND BY A JURY
BASED ON APPRENDI.

>> THE STATE'S POSITION ON THAT IS
THAT, NO, THAT IS NOT A FACT.

>> THEN THIS WOULDN'T EVEN BE A
GOOD CASE FOR CONFLICT.

>> CORRECT.

>> FOR OUR PURPOSES NOW.

>> SORRY.

>> ASSUME THAT IS A FACT AND
UNDER APPRENDI AND BLAKELY
SOMEONE IS BEING TRIED.

LET ME TAKE YOU BACK TO THE PROCEDURAL POSTURE OF THIS CASE, WHICH ULTIMATELY IS KIND OF IMPORTANT TO THIS CASE.

I KNOW WE HAVE GOT THESE ISSUES OUT THERE.

ULTIMATELY WE HAVE TO DECIDE THIS CASE.

SO IN JULY OF 2002 THAT RE-SENTENCING, THE RE-SENTENCING WITH THIS FINDING MADE BY THE TRIAL COURT BECAME FINAL.

THE APPEAL WAS THE FIRST DCA ISSUED A DECISION AFFIRMING THE DENIAL OF THE APPRENDI CLAIM.

>> CORRECT.

>> SO AFTER THAT INSOFAR AS HAT IS OVER AND DONE WITH EXCEPT TO THE EXTENT THAT RELIEF IS AVAILABLE AND POST CONVICTION LAND.

RIGHT?

>> YES.

>> WHEN WE MOVED INTO POST CONVICTION LAND YOU CAN'T GIVE THIS GUY RELIEF BECAUSE THOSE ARE CASES THAT DON'T HAVE RETRACTED A FAX IN POST CONVICTION LAND.

>> QUITE FRANKLY, YOUR HONOR, THE STATE WAS NOT INVITED TO THE PARTY.

THAT HAPPENS.

OTHER THAN THE FACT THAT THE DEFENDANT FILED A MOTION.

AND THESE THINGS ARE RAISED IT IS SELDOM THE STATE IS EVEN ASK FOR A RESPONSE.

THE STATE'S POSITION TAKEN BELOW IF THERE WAS INDEED AN ORDER ISSUED, WHICH IF HE WOULD GIVE ME ONE MOMENT I WILL LOOK.

WE ISSUED A TOLER ORDER IN ISAAC
THREE.

THE STATE INDICATED THAT THE
COURT WAS BOUND BY ITS PRIOR
HOLDING AS TO APPRENDI.

SO THE STATE DID NOT HAVE
ANYTHING TO PRESERVE.

THAT HAPPENED.

>> WAIT.

OKAY.

YOU HAVE GOT -- HELP ME
UNDERSTAND THIS.

>> YES.

>> 3800A MOTION ALLEGING ERROR
ON RE-SENTENCING.

THAT IS DENIED.

>> YES.

>> IT IS ALL OVER AND DONE WITH.
THE APPEAL IS OVER.

THIS IS ALL 3800A.

>> HE ACTUALLY FILES AN AMENDED.

>> EARLIER THE 3800B WHILE THE
POOR, THE HAGUE'S RE-SENTENCING
WAS FINAL.

>> HE FILED --

YES.

>> THAT IS HISTORY AT THIS POINT.

>> YES.

BUT HE FILED AN AMENDED 3850 ON
JUNE 2ND, 2003.

THE TRIAL COURT FOUND THAT THAT
MOTION WAS TIME BARRED AND
ASKED FOR THE APPRENDI CLAIM.

THEN IT COMES UP ON APPEAL OF
THE SUMMARY DENIAL OF THE 3850
TO THE FIRST DISTRICT.

THE FIRST DISTRICT ISSUED THE
OPINION ON WHICH WE ARE HERE
TODAY WHICH FOUND --

>> BLAKELY IS THEN DECIDED AFTER
THE 3800A MOTION HAS BEEN

DECIDED, BUT BEFORE THE APPEAL OF THAT, CORRECT?

>> AFTER THE AMENDED 3850 IS DECIDED, AND, I THINK, WHILE IT WAS PENDING ON APPEAL.

THE FIRST DISTRICT ISSUED AN ORDER ON TWO REQUIRED BRIEFINGS FOR THE FIRST TIME IN 2005.

I DON'T HAVE IN MY NOTES THAT HE REQUESTED A BELATED APPEAL IN THIS CASE.

I ASSUME IT WAS A TIMELY APPEAL. I CAN CHECK THE DATE.

>> THIS ISN'T PENDING.

LET ME ASK YOU.

WHEN YOU ARE IN YOUR APPEAL OF THE DENIAL.

NOT YOUR APPEAL, BUT THE DEFENDANT'S APPEAL OF THE DENIAL OF HIS MOTION FOR A POST CONVICTION OF RELIEF, HOWEVER IT WAS FILED THAT RAISED THE APPRENDI ISSUE THAN YOU HAD AN OPPORTUNITY IN THE FIRST DCA TO SAY, HEY, DOES NOT APPLY BECAUSE WE ARE IN POST CONVICTION LAND. RIGHT?

>> CORRECT.

A TOLER ORDER WAS ISSUED IN THIS CASE.

I DID NOT BRING THE FULL FILES OVER BECAUSE OF THE SHEER VOLUME OF THE CASES.

WHAT I CAN TELL YOU FROM MY NOTES IS THAT IT APPEARS THAT WE AT THE VERY LEAST REFERENCED THIS COURT, THE FIRST DISTRICT'S PREVIOUS RESPONSE FINDING THAT APPRENDI DID NOT APPLY.

>> SO YOU HAVE THAT ISSUE.

>> AT LEAST.

>> THE FIRST DISTRICT.

I WANT TO BE SURE.

WE CERTAINLY UPHELD YOU CAN'T
APPLY APPRENDI RETROACTIVELY TO
SENTENCES THAT WERE FINAL.

WE HEAR A LOT ISSUE AS TO
WHETHER A RESENTING WHICH IS DE
NOVO DEFENDANT HAS THE BENEFIT
OF APPRENDI OR WE WOULD NOT BE
HERE ON THIS CASE.

WHEN THE COURT, THE SENTENCES,
HE WAS RE-SENTENCED IN 2001, DID
YOU SAY?

THERE WAS A MANDATE.

IT WENT UP ON APPEAL ON 2002.

>> THE MANDATE WAS ISSUED SOME
TIME.

I DON'T HAVE NOTED THAT THERE
WAS A MOTION FOR REHEARING.

IT WOULD HAVE BEEN ISSUED
SOMETIME AFTER JULY 23RD, 2002.

>> THE QUESTION I HAVE, WHAT
WERE THE ISSUES FROM RE-
SENTENCING?

WHAT WAS RAISED ON APPEAL AND
WHAT WAS RAISED?

DO WE KNOW THAT?

WAS HE PRO SE?

>> HE WAS PRO SE AT THE TIME AND
IT WAS A SUMMARY DENIAL.

>> DENIAL OF HIS APPEAL?

>> WHICH APPEAL?

>> THE APPEAL FROM THE RE-
SENTENCING.

>> CORRECT.

HE HAD A PUBLIC DEFENDER THERE.
IT CAME UP IN A POST CONVICTION.
LET'S SEE WHAT WE DID.

>> TO BE CLEAR HE DID, IN FACT,
RAISE APPRENDI ON THAT APPEAL,
AND THE COURT, THAT IS THE
APPEAL OR THE COURT SAID

APPENDI DOES NOT APPLY BECAUSE HE WAS SENTENCED WITHIN THE STATUTORY MAXIMUM.

>> CORRECT.

IT IS NOT A PART OF THIS RECORD.

>> IN THAT CASE, IN THIS CASE THAT WOULD END UP, WE WOULD NOT THEN HAVE TO REALLY DECIDE ANYTHING MORE OTHER THAN DOES BLAKELY APPLY BECAUSE BLAKELY WASN'T DECIDED AT THE TIME OF THE RE-SENTENCING?

>> YES.

>> THAT IS THE ONLY ISSUE.

APPENDI APPLIED.

YOU DON'T AGREE WITH THAT.

IT DOES NOT GIVE THE DEFENDANT ANY RELIEF.

>> CORRECT.

AT THE TIME THE STATUTORY MAXIMUM.

>> WE ARE NOT HERE ON THAT DECISION, ARE WE?

THE DECISION WAS FINAL IN THE YEAR 2002.

>> CORRECT.

>> WE ARE HERE ON A POST CONVICTION CHALLENGE ARISING FROM THAT?

>> CORRECT.

AND NONE OF THE FEDERAL COURTS PERMIT A COLLATERAL CHALLENGE TO A FINAL SENTENCE OR FINAL SENTENCE AND CONVICTION.

SO THAT IS THE PROBLEM WITH WHAT THE FIRST DISTRICT DID HEAR.

>> YOU NEVER ANSWERED, IN MY ESTIMATION, WHAT JUSTICE KENNEDY ASKED YOU, WHICH IS, AT THIS NOW PROCEEDING THAT WE ARE LOOKING AT DID THE STATE ACTUALLY ARGUE THAT WE ARE

NOW IN POST CONVICTION AND
BLAKELY AND APPRENDI DID NOT
APPLY BECAUSE THIS MEANT
CONVICTION AND SENTENCE ARE
FINAL?

>> IF THE STATE DID NOT ARGUE
THAT THE STATE WAS NOT REQUIRED
TO ARGUE THAT.

THIS WAS A SUMMARY DENIAL.
THERE WAS NO BRIEFING REQUIRED.
THE STATE WOULD HAVE ALL THE
RESPONDED TO THE QUESTION
ASKED BY THE FIRST DISTRICT WHICH
WOULD HAVE BEEN THE ONLY THING
WE RESPONDED TO.

WE DID NOT HAVE A PRESERVATION
DUTY WITH THE APPELLATE DID.
THAT IS THE BEST I CAN ANSWER
YOUR QUESTION.

I WOULD BE HAPPY TO SUBMIT A
SUPPLEMENTAL BRIEF.

>> I DO WANT TO ASK ONE OF THE
PROCEDURAL QUESTION.

WE ARE HERE ON ISAAC, WHAT WE
ARE CALLING ISAAC THREE, 2005
DECISION THAT DECIDED THAT
BLAKELY WAS A CLARIFICATION OF
APPRENDI.

A MANIFEST INJUSTICE NOT TO
APPLY IT.

>> CORRECT.

>> SUBSEQUENTLY IN ISAAC FOR
2008 DECISION

WE WOULD SAY IT IS HARMLESS
BEYOND A REASONABLE DOUBT.

>> THIS IS THE FUNDAMENTAL
PROBLEM WITH THAT.

THERE IS AN EXEMPTION TO BLAKELY
TO THE EXEMPTION THAT DEALS WITH
RECIDIVIST-BASED SENTENCING.

THEIR REASONS ARE PURELY
RECIDIVIST-BASED.

THE RESULT OF THAT IS NEITHER
BLAKELY NOR APPRENDI APPLIES TO
THIS CASE.

>> I AM GIVING YOU THE EASIEST
REASON.

THEY HAVE ALREADY SAID--

>> YOU ARE WRONG ON THAT ISSUE.

>> ISAAC IS STILL GOING NOWHERE,
RIGHT?

>> CORRECT.

>> THIS CASE IS SURELY AN
ACADEMIC EXERCISE.

WE MAY HAVE JURISDICTION OVER
IT, BUT IT IS NOTHING BUT AN
ACADEMIC EXERCISE.

>> THAT IS CORRECT.

THIS IS THE LEAD CASE.

THIS IS WHERE IT HAS DRAWN ITS
LINE IN THE SAND, IN ITS ENTIRE
LINE OF OPINION.

>> WE WILL HAVE A CHANCE IN
ANOTHER CASE TO DISCUSS THE
MERITS WHICH IS, AGAIN IN A CASE
IN BLAKELY WE ARE DESCRIBING THE
RESENTENCING.

THIS COURT HAS NOT DECIDED THE
ISSUE, THAT THAT WOULD APPLY ON
RESENTENCING AND I GUESS YOU
WILL HAVE A CHANCE IN ANOTHER
CASE.

>> THE IMPORTANT ONE HERE IS,
THE IMPORTANCE OF ISAAC RELATIVE
TO THE OTHER CASES BECAUSE AS I
SAID THEY EACH HAVE FACTUAL
HISTORIES THAT ARE VERY
DIFFERENT.

ISAAC SOUGHT RECIDIVIST-BASED
REASONS FOR THE APPLICATION OF
BLAKELY.

[INAUDIBLE]

THAT IS NOT SOMETHING WHERE YOU CAN JUST LOOK AT THE RECORD OF CONVICTION AND AS A MATTER OF LAW DETERMINE IT.

WHY ISN'T THAT A FACTUAL DECISION THAT HAS TO BE MADE BASED ON LOOKING AT ALL OF THOSE THINGS?

>> IT IS NO MORE FACTUAL THAN WHAT IS EXEMPTED FROM BLAKELY AND IS NO MORE FACTUAL THAN WHAT WE HAVE EXEMPTED FROM BLAKELY. THE ESCALATING PATTERN UNDER THE SENTENCING THAT OCCURRED AT THAT TIME REQUIRED PROXIMITY OF THE CRIMES TO ONE ANOTHER, I.E. THE DATE OF CONVICTION, AND REQUIRED A PATTERN OF THOSE CRIMES BEING SIMILAR, PROPERTY AND PERSONAL PROPERTY.

>> THERE IS THE QUESTION THAT THE PEOPLE CAN DISAGREE ABOUT. IT IS NOT SOMETHING WHERE WHEN, YOU LOOK AT A PIECE OF PAPER AND SAY YEAH THAT IS WHAT IT IS.

>> I AM SORRY, YOUR HONOR.

>> I AM TRYING TO EXPLAIN MY CONCERN HERE.

THE COURT WAS TALKING ABOUT THAT, SOMETHING THAT IS ALREADY ESTABLISHED.

YOU CAN LOOK AT IT AND YOU CAN SEE, YOU CAN LOOK AT THE RECORD AND ALL YOU HAVE TO DO IS LOOK AT THAT RECORD AND SEE THAT THAT CONVICTION IS THERE.

THIS TAKES EXTRA STEPS TO REACH THE CONCLUSION OF THE ESCALATING PATTERN.

ISN'T THAT CORRECT?

>> NO, THE ALTERNATIVE, YOUR HONOR, IS YOU CAN LOOK AT THE

PATTERN OF CRIMINAL ACTIVITY
SURELY FROM CONVICTION SO YOU
HAVE FELONIES, THIRD DEGREE AND
SECOND-DEGREE FELONIES, AND
FIRST-DEGREE FELONIES, AND IF I
MAY RESERVE THE REST OF MY TIME
FOR REBUTTAL.

>> ALRIGHT.

>> MAY IT PLEASE THE COURT.

>> I AM ASSUMING YOU WERE
APPOINTED PRO BONO.

>> I AM, YOUR HONOR, AND THE
PROCEDURAL HEADACHE IT HAS GIVEN
THIS COURT HAS GIVEN ME MORE OF
A HEADACHE SINCE I DON'T DO
CRIMINAL WORK AT ALL.

>> BUT YOU ARE YOUNG.

>> I SO WANT TO ADDRESS THE
FUNDAMENTAL ISSUES BECAUSE I
KNOW THE COURT WILL TAKE THE
OPPORTUNITY TO ADDRESS IT IN
SUBSEQUENT CASES WHETHER OR NOT
THE COURT BELIEVES THIS CASE IS
MOOT AT THE END OF THE DAY.

>> LET ME JUST MAKE SURE THAT
YOU AGREE ABOUT THE FACT THAT WE
ARE IN--

THIS IS THE REVIEW OF THE
DECISION IN THE POST-CONVICTION
MOTION.

>> THAT IS RIGHT.

>> WHAT HAPPENED IN THE
SENTENCING ITSELF AND WHAT COULD
BE BROUGHT UP THERE OR WHAT
APPLIED THERE IS REALLY NOT THE
ISSUE.

THE ISSUE IS WHAT CAN BE APPLIED
IN POST-CONVICTION.

>> THAT IS RIGHT YOUR HONOR.

THE STATE DID NOT, AS FAR AS I
CAN TELL, RAISE THE ISSUE AS THE
COURT POSED THE QUESTION BEFORE

AS TO WHETHER OR NOT BLAKELY AND APPRENDI WOULD BE AND WOULD APPLY.

>> THESE SUMMARIES, DENIAL OF POST-CONVICTION MOTION, ARE AN UNUSUAL ANIMAL IN THE APPELLATE, BECAUSE THE APPELLATE AND THE STATE'S INVOLVEMENT IS QUITE LIMITED.

SO WHAT WAS, WHAT WAS THE OPPORTUNITY THE STATE WAS GIVEN? WAS THE STATE ASKED TO ADDRESS A PARTICULAR ISSUE OR WHAT HAPPENED?

>> FRANKLY YOUR HONOR, I DON'T KNOW.

WE MOVED TO COMPEL THE RECORD TO GIVE ME A COPY OF THE RECORD AND THIS COURT DENIED OUR MOTION TO COMPEL THE RECORD BEING PRODUCED BECAUSE THE ORDER THAT GALINDEZ--

>> WE DECIDED.

>> SOME OF THESE RECORD QUESTIONS I DON'T REALLY HAVE. PERHAPS THE STATE DOES HAVE ACCESS.

[INAUDIBLE]

>> PART OF IT, YOUR HONOR.

>> THAT IS WHAT I AM TALKING ABOUT.

IT WOULD BE IN THE RECORD IN THIS PARTICULAR CASE.

>> IT IS THE RECORD IN THIS CASE AND I DON'T UNDERSTAND WHY THAT WAS JUST AUTOMATICALLY PART OF THE RECORD IN THIS CASE.

YOU HAVE THE RECORD IN THIS CASE DON'T YOU?

>> I HAVE THE RECORD IN THIS CASE FROM THE APPENDIX ATTACHED BECAUSE OF THE FIRST DISTRICT'S

RELUCTANCE TO PROVIDE PRO BONO COUNSEL IN THE RECORD.

THE ANSWER TO YOUR QUESTION IS I DO NOT HAVE THAT PARTICULAR ONE.

>> IN YOUR TIME, BECAUSE AGAIN WE TRIED TO SELECT CASES THAT WE THOUGHT WOULD PRESENT THE ISSUE THAT WE DIDN'T DECIDE IN GALINDEZ, SO WOULD YOU STATE WHAT YOU SEE THE ISSUE TO BE GLOBALLY AND HOW YOU WOULD ANSWER IT?

>> ABSOLUTELY.

>> WE HAVE ALREADY DECIDED APPRENDI IS NOT RETROACTIVE BUT DO YOU AGREE UNDER THIS CASE THEY ALREADY DECIDED THAT IF YOUR CLIENT SIMPLY HAD THE BENEFIT OF APPRENDI, THAT WOULD NOT HELP?

>> THAT IS TRUE.

THE BLAKELY ISSUE IS STILL ALIVE FIRST AND FOREMOST AND SECONDLY I'M NOT SURE THIS COURT ON THE APPRENDI ISSUE, AND WHETHER OR NOT IT APPLIES, AND IT COMES IN WITH THIS IDEA AND AT THE END OF THE DAY THAT WILL BE A CHOICE.

>> WE ARE NOT HERE ON THE RESENTENCE.

WE ARE HERE ON THE POST-CONVICTION CHALLENGE, AND THAT SEEMS TO BE MOVED INTO A DIFFERENT WORLD.

IN ORDER FOR YOU TO PREVAIL HERE IN THIS CASE, WOULD WE NOT HAVE TO DECIDE THAT BLAKELY IS APPLIED RETROACTIVE?

>> I THINK IT WOULD, BUT AND I DID BRIEF THE ISSUE OF THE RETROACTIVE APPLICATION OF BLAKELY.

I DO NOT BELIEVE, AND THIS I THINK HINGES ON THE FUNDAMENTAL ISSUE OF FEDERALISM, I KNOW THERE HAS BEEN SOME CONFUSION, AT LEAST FOR ME, LOOKING AT THE RETROACTIVITY TEST AS THEY EMERGE WITH RESPECT TO CRIMINAL LAW FROM THIS COURT VERSUS WHAT THE U.S. SUPREME COURT HAS DONE WITH RETROACTIVE TEST.

AT THE VERY LEAST THE RETROACTIVITY TEST MUST BE AT LEAST AS EXPANSIVE AS THE ONE THE U.S. SUPREME COURT USES. IN MY BRIEF I WENT TO THE TEAGUE ANALYSIS OF THE BLAKELY ISSUE AND OF COURSE THE QUESTION IS WHETHER OR NOT A NEW CONSTITUTIONAL RULE IS BEING PROMULGATED BY THE UNITED STATES SUPREME COURT, AND I WENT THROUGH THE BLAKELY DECISION AND I DON'T NEED TO DO IT HERE AGAIN AS TO WHY I DON'T THINK BLAKELY IS ANNOUNCING A NEW CONSTITUTIONAL RULE.

I THINK CLEARLY THE UNITED STATES IS MERELY APPLYING APPRENDI.

>> HAVE ANY OF THE FEDERAL CIRCUIT COURTS AGREED WITH YOUR VIEW ON THAT?

>> NO YOUR HONOR, AND THE U.S. SUPREME COURT HAS YET TO RULE ON THIS PARTICULAR ISSUE BUT I WOULD POINT OUT, AND I DECIDED THE CASE OUT OF THE KANSAS SUPREME COURT, ACTUALLY APPLIES, ESSENTIALLY DID CONDUCT THE BLAKELY ANALYSIS TO ITS OWN STATE SENTENCING GUIDELINES AFTER APPRENDI AND BLAKELY WAS

DECIDED TO SHOW JUST HOW OBVIOUS IT WOULD BE TO A STATE COURT THAT APPRENDI MEANT WHAT BLAKELY SAID IT MEANT RATHER THAN WHAT APPRENDI MEANT.

>> THE PROBLEM THERE, IN BLAKELY THE COURT TALKED ABOUT OUR PRECEDENT BUT THE USE OF THE TERM STATUTORY MAXIMUM IN APPRENDI REALLY PUTS A WRINKLE IN THERE BECAUSE WHEN YOU PUT THAT IN THE GUIDELINES YOU ARE DEALING WITH SOMETHING THAT DOESN'T FIT WHAT HAD PREVIOUSLY BEEN CONCEIVED OF AS A STATUTORY MAXIMUM.

>> THAT MIGHT VERY WELL BE AND IF THIS COURT IS INCLINED TO GO DOWN THAT PATH THAT IS WHY THINK IT IS STILL CLEAR ASSUMING ARGUENDO, THIS COURT FIND IT IS THE CASE THAT IT IS ANNOUNCING THE WATERSHED RULE IN A CRIMINAL PROCEDURE.

>> THAT IS WHERE, IT IS HARD THAT APPRENDI ARE NOT RETROACTIVE.

WHEN THE SUPREME COURT FOUND THAT RING WAS NOT RETROACTIVE, THEY HAVE JUST-- THEY HAVE DONE SOMETHING THAT HAD CATAclysmic EFFECTS ACROSS A LOT OF STATES. THAT IS NOT RETROACTIVE.

APPRENDI IS NOT RETROACTIVE.

I DON'T THINK YOU GET THERE ON BLAKELY BEING RESURRECTED BUT IF YOU ARE SAYING BLAKELY IS A CLARIFICATION, THEN YOUR APPLICATION OF IT WOULD BE-- IT WOULD HAVE TO FIT INTO THE MANIFEST INJUSTICE EXCEPTION TO THE LAW OF THE CASE.

IS THAT WHAT YOUR ARGUMENT IS?

>> THAT IS RIGHT YOUR HONOR.

>> BUT HERE, THIS IS HARD TO APPLY IT BECAUSE YOUR CLIENT HAS BEEN FOUND HELD HARMLESS SO IT BECOMES SELF-DEFEATING.

>> I THINK IT WOULD REVOLVE ON THE ABILITY OF THE PROCESS CHALLENGE IN THIS TYPE OF SITUATION.

THE STATE HAS POINTED IT OUT.

>> YOU SEE THAT BLAKELY CLEARLY, AND I THINK, I DON'T THINK ANYONE COULD ARGUE THAT WE THOUGHT THEY WERE DEALING WITH THE REAL STATUTORY MAXIMUM BUT WHEN YOU READ BLAKELY IT MAKES COMPLETE SENSE WHAT THEY WERE, WHAT THEY WERE INTENDING TO DO, THAT THEY NEVER SAID THEY WERE DOING.

>> THAT IS RIGHT AND PERHAPS THE BEST WAY TO DEAL WITH IT AND THE WAY THAT I BRIEFED IT IS TO REVIVE THE RULE ABOUT DISTINCTION THAT THIS COURT HAS RAISED IN PRIOR VERSIONS OF RETROACTIVITY TEST IN THE CLARIFICATIONS OF THE LAW.

IF IT WAS MERELY A CLARIFICATION OF THE LAW THEN I THINK IT COULD HAVE, JUSTICE AS IF IT WERE NOT A NEW CONSTITUTIONAL RULE.

>> IT WOULDN'T FIT IN THE MANIFEST LAW CASE SO LET'S SAY HYPOTHETICALLY HERE, MAYBE NOT HYPOTHETICALLY, WHAT WAS YOUR CLIENT'S ORIGINAL SENTENCE?

>> IT WAS 20 YEARS I BELIEVE.

>> OKAY AND IF HE HAD GOTTEN THE BENEFIT OF THE GUIDELINES SENTENCE.

WHAT WAS THE SENTENCE?

>> THE EXACT NUMBER WOULD HAVE BEEN--

119.25 MONTHS WOULD HAVE BEEN THE TOP OF THE GUIDELINES SENTENCE SO IT WOULD HAVE BEEN UNDER 10 YEARS.

>> THAT IS A SIGNIFICANT DIFFERENCE IN THE SENTENCE SO IF YOU TOOK SOMETHING WHERE SOMEONE COULD BE SENTENCED TO 50 YEARS AND UNDER THE GUIDELINES ONLY GOTTEN 10 YEARS, AND IT IS CLEAR BLAKELY WAS GIVEN A RELEASE, YOU COULD GIVE A VERY COMPELLING ARGUMENT THAT IT IS A MANIFEST INJUSTICE NOT TO IMPLY BLAKELY WHICH IS DIFFERENT THAN THE RETROACTIVE APPLICATION.

>> THAT IS EXACTLY RIGHT.

>> IF YOU ARE DISTINGUISHING THOSE TWO.

>> THE FINAL POINT TOO IS ONE OF THE CONCERNS JUSTICE CANTERO RAISED WITH THE STATE INTEREST IN THE FINALITY OF THESE THINGS IN THE QUESTION ABOUT WHETHER OR NOT AND THIS IS CERTAINLY A CONCERN THIS COURT HAS EXPRESSED THROUGHOUT HIS WHETHER OR NOT THERE'S GOING TO BE THE EFFECTIVE JUDGES OR THE STATE AND I KNOW WE ARE ON POST-CONVICTION RELEASE, BUT THE QUESTION OF WHETHER NOT A RESENTENCING IS COMING BACK AND ATTEMPTING TO IMPOSE THE ORIGINAL SENTENCE THAT WILL SUBSEQUENTLY FIND TO BE LEGAL FOR WHATEVER REASON UNDER THE ANALYSIS, SO NOW IT SHOULD BE A MAXIMUM OF UNDER 10 YEARS BUT

FOR THE FIRST TIME ON A RESENTENCING THE STATE IS TAKING THE DE NOVO PROCEEDING ONCE AGAIN THAT ORIGINAL SENTENCE THAT WAS ILLEGAL.

>> SO THEY ACTUALLY, THEY ARE SAYING YOU COULDN'T, YOU CAN'T, YOU HAVE GOT TO RELY ON THE CONVICTION.

YOU CAN'T HAVE THE TRIAL BY JURY BUT ON THE OTHER HAND THEY ARE INTRODUCING ALL OF THIS EVIDENCE TO SHOW THE DEPARTURE?

>> THAT IS EXACTLY RIGHT IN THAT IS THE CONFLICT BETWEEN HAVING A DE NOVO SENTENCING IN THE FIRST PLACE AND THEN THE ISSUE OF WHETHER OR NOT THE CONVICTION IS GOING TO BE FINAL AND I KNOW THE COURT MAY CONSIDER IT IN ANOTHER CASE BUT I WOULD LIKE TO MAKE THE ARGUMENT, I DON'T THINK THIS IN TURN, AS JUSTICE CANTERO POINTS OUT, ON THE AVAILABILITY OF A JURY IN A RESENTENCING PROCEDURE BECAUSE I THINK IT IS VERY CLEAR THAT ANY DUE PROCESS CONCERNS WE HAVE FLOW FROM THE DEPRIVATION OF LIBERTY IN AN ENHANCED PRISON SENTENCE.

>> HAVE THE COURTS AROUND THE COUNTRY, WHERE THEY HAVE APPLIED APPRENDI, AND BLAKELY APPLY, HAVE THEY CONVENED A JURY FOR SOMETHING WHERE THE STATE WAS SEEKING AN ENHANCED SENTENCE OR DO THEY JUST SAY WHATEVER IS IN THE CONVICTION FINAL, YOU DON'T HAVE A SECOND SHOT ACCORDING TO THE JURY AND YOU COULDN'T DO THIS AT ALL?

[INAUDIBLE]

>> AT THAT POINT WE COULD AT LEAST COME TO A DEFINITE CONCLUSION.

IS THERE A CONSTITUTIONAL ERROR IN SAYING WHERE THE STATE IS SEEKING SOMETHING, THAT MAYBE THEY WOULD HAVE BEEN ABLE TO SEEK APPRENDI IF IT HAD BEEN AROUND AT THAT TIME, THAT CONVENING A JURY TO DECIDE THAT FACT WITH BOTH SIDES ABLE TO CROSS EXAMINE DOESN'T VIOLATE ANYTHING.

YOU ARE APPLYING APPRENDI BUT YOU ARE JUST HAVING A LIMITED JURY FOR THAT PURPOSE. HAS ANY STATE OR ANY COURT DONE THAT?

DO YOU SEE ANY CONSTITUTIONAL PROHIBITION?

>> THERE COULD BE SOME DOUBLE JEOPARDY CONCERNS AND ONE THING I WOULD POINT OUT THOUGH IS THE FACT IN THIS CASE, FROM THAT SITUATION, IS APPRENDI HAD ISSUED BEFORE THE RESENTENCING SO THE STATE WOULD ESSENTIALLY BE AWARE OF THE FACT THAT APPRENDI WAS OUT THERE BEFORE THE RESENTENCING WHEN IT DID SEEK THE DEPARTURE SENTENCE FOR THE FIRST TIME AND THAT WAS AGAIN RAISING CONCERNS ABOUT MOTIVATION TO TRY AND REIMPOSE AN ORIGINAL SENTENCE THAT HAVE BEEN SUBSEQUENTLY FOUND TO BE ILLEGAL.

>> IF WE ARE IN A RESENTENCING POSTURE AND IN THIS CASE APPRENDI HAD COME OUT BEFORE THE RESENTENCING WAS COMPLETE, WHAT IS WRONG WITH THE STATE AND THE

RESENTENCING WITH THE NEW
PROCEDURE?

WHAT IS WRONG WITH THE STATE
HAVING AN OPPORTUNITY TO DEAL
WITH THE DEPARTURE.

YOUR CLIENT HAS THE OPPORTUNITY
TO ARGUE HIS APPRENDI ISSUES, SO
WHY AREN'T BOTH OF THEM LIKE A
NEW PLAYING FIELD HERE?

>> WHAT IS WRONG WITH IT--

THAT RIGHTS FOUND IN APPRENDI
AND SUBSEQUENTLY EXPLAINED IN
BLAKELY WERE NOT FULLY
AVAILABLE.

THE FULL PANOPLY OF RIGHTS THAT
JUSTICE CANTERO TALKS ABOUT WHEN
YOU HAVE SENTENCING, WHEN YOU
HAVE THE DUE PROCESS RIGHTS THAT
ARE IMPLICATED BY THE POTENTIAL
LOSS OF LIBERTY WEREN'T THERE
BECAUSE THE NEW JURY WAS NOT
RECONVENED FOR THE PURPOSE OF
DETERMINING THE ENHANCEMENT, IN
THIS CASE THE IDEA OF ESCALATING
PATTERN OF VIOLENCE.

>> THE WHOLE NOTION OF THE NEW
JURY BEING CONVENED, HOW FAR
DOWN THE LINE DO YOU GO?
YOU ALMOST END UP RETRYING THIS
CASE.

I THINK THERE ARE SOME REAL
SERIOUS ISSUES WITH THAT.

>> I THINK WHAT IT FUNDAMENTALLY
DOES IS THAT IT FORCES THE STATE
TO SEEK THE DEPARTURE SENTENCE
FOR THE FIRST TIME.

IF IT HAS THE BEST CARDS OR ITS
BEST HAND, SO TO SPEAK, TO PUT
ITS BEST HAND FORWARD AT ITS
FIRST OPPORTUNITY FOR
SENTENCING.

>> BUT YOU ARE SAYING NO, YOU

DON'T THINK THERE SHOULD BE A JURY CONVENING.

THE STATE CAN'T PROVE IT BASED ON WHAT ALREADY IS IN THE RECORD.

>> THAT IS EXACTLY RIGHT.

>> BUT YOU SAID IT MIGHT RAISE DOUBLE JEOPARDY CONCERNS.

DO YOU HAVE ANY AUTHORITY IN THE COURT OR CONCLUSION OR SUGGESTION THAT THERE WOULD BE A LEGAL IMPEDIMENT FOR A JURY IN CIRCUMSTANCES WHERE THERE IS GOING TO BE A RESENTENCING? IN CIRCUMSTANCES WHERE THERE WAS GOING TO BE A RESENTENCING, AND THE DEFENDANT SAID HEY, YOU CAN'T DO THAT WITHOUT A JURY AND THEN THE STATE SAYS BRING THE JURY ON.

TELL ME WHAT SPECIFICALLY YOU KNOW OF THAT THE AUTHORITY SAYS THAT CANNOT BE DONE.

WHEN THE STATE SAYS BRING THE JURY ON, THE STATE SAYS YOU CAN'T DO THAT BECAUSE--

>> UNFORTUNATELY, I'M NOT AWARE.

WE ARE JUST LEFT WITH OUR THINKING ABOUT WHAT THE CONSTITUTION MEANS AND SAYING WHERE WE GO FROM THERE AND I THINK IT MIGHT IMPINGE ON SOME RIGHTS GIVEN A PRIOR JURY WAS OUR LADY PANEL THEN DETERMINED.

>> IF WE REALLY SAY A DE NOVO FOR PURPOSES OF THE SENTENCING, WE IMPANEL JURIES ALL THE TIME, NOT ALL THE TIME, BUT WITH SOME FREQUENCY WE HAVE IMPANELED NEW JURIES IN CAPITAL CASES, SO IF WE CAN DO IT THERE, WHY COULDN'T WE DO IT IN THIS

CONTEXT?

ARE YOU SUGGESTING THAT THOSE PROCEEDINGS ARE ILLEGAL?

>> NO YOUR HONOR.

>> I HAD ACTUALLY FORGOTTEN THAT ONE, AND THAT IS AGGRAVATING CIRCUMSTANCES BUT IT IS FOUND BY A JURY.

>> THAT IS RIGHT.

THIS PUSHES-- WHAT APPRENDI AND BLAKELY IS FORCING THIS COURT TO DO IS REEVALUATE THE IDEA OF DE NOVO SENTENCING REALLY BECAUSE IT'S A DE NOVO SENTENCING MEANS TRULY TO NOBLE SENTENCING THAT THE STATE WILL HAVE THE OPPORTUNITY AND REALLY IT WILL BE THE STATE TO PRESENT ADDITIONAL EVIDENCE AND IN THIS CASE SEEK A DEPARTURE SENTENCE FOR THE FIRST TIME IN THE APPRENDI AND BLAKELY RIGHTS OF HAVING A JURY THERE ARE REALLY IMPLICATED.

>> THE DEFENDANT WOULD BE ABLE TO EXERCISE HIS RIGHTS, BUT THEY COULDN'T SAY YOU CAN'T PRESENT IT FOR THE FIRST TIME UNLESS THERE IS A CHANGE IN THE DE NOVO SENTENCING.

>> THAT IS EXACTLY RIGHT.

>> GOING BACK TO THE ORIGINAL QUESTION ABOUT THE BLAKELY INTERPRETATION, THE FIRST DISTRICT I KNOW REALIZES-- I AM READING IT-- IF THERE IS A CLARIFICATION OF THE LAW THAT I AM NOT APPLYING IT THAT WILL RESULT IN MANIFEST INJUSTICE, WE HAVE ALLOWED ATTEMPTS TO SHOW THE COURT THAT THERE WAS A MANIFEST INJUSTICE.

IN THOSE CASES, BUT AGAIN, AND
MAYBE YOU SAID THIS, AND I JUST
WANT TO MAKE SURE WE ARE NOT
DEALING WITH THE RETROACTIVE
APPLICATION OF THE STATUTE IN A
TRADITIONAL SENSE THAT THIS
APPLIES TO EVERY CASE THAT HAS
PREVIOUSLY BEEN FINAL.

WE ARE LOOKING AT THE SPECIFIC
FACTS OF THE CASE AND SEEING
WHETHER IN THAT CASE THE
MANIFEST INJUSTICE WOULD APPLY
BY MISAPPLYING WHAT APPRENDI
MEANT TO SAY AS CLARIFIED IN
BLAKELY.

>> THAT IS EXACTLY RIGHT AND
THAT IS WHY THIS CASE MAY NOT IN
AND OF ITSELF BE MOOT.

>> LET ME TRY AND UNDERSTAND
THAT, BECAUSE WE ARE HERE IN
POST-CONVICTION, AND IS THAT
BASICALLY-- I'M NOT SURE I
UNDERSTAND THE POST-CONVICTION.
WE HAVE GOT A CONVICTION AND A
SENTENCING.

IT SEEMS LIKE TO ME WHAT WE ARE
TALKING ABOUT IS RETROACTIVE
APPLICATION.

MANIFEST INJUSTICE OR ANYTHING
LIKE THAT, WHATEVER YOU ARE
GOING TO DECIDE, WHETHER YOU ARE
GOING TO GIVE IT RETROACTIVE
APPLICATION, BECAUSE THE WHOLE
QUESTION, WHEN WE LOOK IT,
RETROACTIVITY IS WHETHER THE
CASE THAT ANNOUNCES A NEW RULE
IS GOING TO BE AVAILABLE ON
POST-CONVICTION, IN
POST-CONVICTION PROCEEDINGS,
RIGHT?

>> YES, BUT IT NECESSARILY
IMPLICATES THE LAW OF THE CASE

DOCTRINE.

I'M NOT SURE HOW YOU CAN GET AWAY FROM THE LAW OF THE CASE DOCTRINE THERE AND THAT IS WHAT WOULD GIVE ESSENTIALLY THE FINALITY.

>> THE CASE IS A DOCTRINE THAT COMES INTO PLAY-- IN A CASE WHILE PROCEEDINGS ARE ONGOING.

>> IN THE APPEAL, YES YOUR HONOR.

>> BUT BEFORE IT IS FINAL, ISN'T THAT CORRECT?

>> IT IS THE LAW, THE END OF THE LAW OF THE CASE DOCTRINE IS THE IDEA OF FINALITY IN THAT FIRST APPEAL AND THAT IS WHY I THINK WE CAN DISCUSS IT IN POST-CONVICTION AS JUSTICE PARIENTE HAS POINTED OUT.

>> I'M NOT SURE.

I ACTUALLY CLARIFY YOUR ARGUMENT.

THAT IS HOW I UNDERSTAND THE FIRST DISTRICT APPLIED HERE.

>> JUSTICE PARIENTE IS CERTAINLY RIGHT.

THEY TALK ABOUT IT, BUT IT SEEMS LIKE A CATEGORY MISTAKE.

THEY ARE TALKING ABOUT SOMETHING THAT DOES NOT FIT IN THE POST-CONVICTION WORLD THAT WE ARE ACTUALLY AND IN THIS CASE.

MAYBE I AM FORGETTING WHAT THE LAW OF THE CASE IS, BUT I THOUGHT THAT WAS SOMETHING WE HAVE PROCEEDINGS ONGOING BUT SOME THINGS ARE AN APPELLATE DECISION ON SOMETHING IN THAT CASE.

IF THAT IS DONE, I MUST BEAR

SOME GOOD REASON TO UNDO IT.

>> THIS IS FINAL.

SO I DON'T SEE HOW THE LAW OF
THE CASE COMES UP AFTER THE CASE
IS FINAL.

>> THE CASE IS MANIFEST
INJUSTICE, LIKE I BELIEVE IT IS
IN FIORI.

>> FIORI VERSUS WHITE, THAT IS
RIGHT AND I THINK THAT IS WHAT--
THE FIORI VERSUS WHITE CASE, SO
IF THIS COURT WERE TO FIND THAT
THIS IS NOT MOOT THE REAL
QUESTION IS THE EVALUATION
BETWEEN, AND I WILL WRAP UP
QUICKLY, THE EVALUATION OF DE
NOVO SENTENCING VERSUS THE IDEA
OF APPRENDI AND BLAKELY APPLYING
AT THE SENTENCING PROCEEDING.
THANK YOU.

>> YOU HAVE ABOUT A MINUTE AND A
HALF TO WRAP UP.

>> I WILL ANSWER JUSTICE
CANADY'S QUESTION.

I DID REVIEW THE RECORD.
BUT I JUST WANTED TO POINT OUT
THAT STATE DID PUT FORWARD UNDER
THE CASE THAT EXISTED AT THE
TIME HE WAS SENTENCED.

THE GUIDELINES WERE FOUND TO BE
UNCONSTITUTIONAL, IN VIOLATION
OF THE SINGLE SUBJECT RULE.

>> ARE YOU TALKING ABOUT IN THIS
CASE OR AN EARLIER CASE?

>> IN 1995.

WE PUT THE BEST CASE FORWARD.

[INAUDIBLE]

>> THAT IS WHY IT WOULD MAKE IT
LATER IN TIME.

THE STATE THEN HAS ASKED FOR
DEPARTURE TO KEEP MR. ISAAC IN
CUSTODY FOR THE

ORIGINALLY-INTENDED SENTENCE.
THEIR STATE TEST, WHICH IS OUR
ANALYSIS, REACHED THE DECISION
THAT BLAKELY SHOULD NOT BE
APPLIED RETROACTIVELY.
EVERY COURT HAS FOUND IT SHOULD
NOT BE APPLIED RETROACTIVELY.

>> A QUICK QUESTION.

EXPLAIN TO ME HOW, IF WE HAD
STAYED AT THIS CASE, HOW THE
FIRST DISTRICT CAME OUT WITH THE
SUBSEQUENT DECISION?

>> YOUR HONOR, WE MOVED BELOW--
THE STATE ACTUALLY MOVED BELOW
THE STAY AS A MANDATE ON ISAAC
FOR APPEAL, AND IT WAS DENIED.
THE STATE UNDERSTOOD THE EFFORT
AND ALERTED OPPOSING COUNSEL TO
THAT IN AN ATTEMPT TO STOP THAT
FROM HAPPENING.

>> BUT THIS CASE WAS STAYED.
WHAT SUBSEQUENT CASE WAS THERE?

>> YOUR HONOR, THE FIRST DCA DID
NOT STATE THE ISSUE AS A MANDATE
ON ITS ISAAC THREE APPEAL AND
THIS COURT APPARENTLY DID NOT,
AND I DIDN'T CATCH IT.

THIS IS APPARENTLY WHAT
HAPPENED.

THIS COURT DID NOT STAY THE
MANDATE IN ISAAC THREE FROM THE
DISTRICT COURT SO IT WENT BACK
DOWN ON ISAAC THREE.

IT FINISHED ITS PROCEEDINGS ON
ISAAC THREE AND THEN CAME BACK
UP.

I THINK THAT IS IT, AND, YOUR
HONOR, THE APPELLATE ORDER IS
THE EXHIBIT OF THE APPRENDI.

>> THANK YOU BOTH FOR YOUR
ARGUMENTS.

THE COURT WILL NOW TAKE ITS

MORNING RECESS FOR 10 MINUTES.

>> PLEASE RISE.