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State of Florida v. Owran Green
Docket Number: SC05-687

PLEASE THE COURT, JAMES CARNEY FROM THE STATE OF FLORIDA.

CHIEF JUSTICE: YOU MIGHT WANT TO SPEAK UP AND W E'LL TRY TO GET THE MIC TO S PEAK UP.

JIM CARNEY FOR THE S TA TE OF FLORIDA, PETITIONER . JUST L IKE T O BRI EF LY D O A BRIEF HISTORY O F THE O UT LINE OF THE HISTORY IN T HIS CAS E. T HE DEFENDANT PLED THE TWO MISDEMEANORS, APPROXIMATELY TEN YEARS LAT ER HE M OV ED T O A G AU SE P LE A S AYIN G H E WAS SUPPORT TO D EP OR TATI ON A S A RESULT OF THE TWO MISDEMEANORS.

JUSTICE: AS A PRELIMINARY QUESTION, I S T HERE A - - I N THE RECORD IN THI S C AS E A TRANSCRIPT OF T HE P LE A ?

NO, YOUR H ONOR , I 'M N OT QUITE SURE WHERE T HE F OURT H DISTRICT GOT THAT FROM. IT IS UND IS PUTED BETWEEN THE PARTIES THAT THERE IS NO TRANSCRIPT. I T DOESN'T EXIST.

JUSTICE: S O WE D ON'T K NO W ONE WAY OR THE OTHER WHETHER THE TRIAL COURT ADVIS ED A S A MATTER OF THE R EC OR D W HETHER THE TRIAL C OURT A DV ISED THI S DEFENDANT.

CORRECT, YOUR HONOR.

JUSTICE: IS THAT COR RE CT?

YES. ANYWAY, THE DEF ENDANT M OV ED ABOUT TEN YEARS AFTER T HE PLEA TO WIT HD RA W T HE P LE A , ALLEGING THAT HE WAS DEP ORTABLE AS A RESULT OFTHE PLEA.

CHIEF JUSTICE: DID HEMOVE TO D O THIS WI THIN T HE WINDOW THAT P EART S ET OUT ?

IT IS NOT C LEAR F RO M T HE PLEADING. THAT IS ONE O F T HE STA TE 'S ARGUMENTS THAT IS T HA T T HE PLEADING WAS I NSUFFI CI ENT BECAUSE HE DOESN'T ALLEGE WHEN HE LEA RNED O F D EPOR TATION N O MAT TE R H OW I T IS DEFINED.

CHIEF JUSTICE: BUT IT IS THE S TATE'S POSITION THAT THE P REJUDICE THAT W OULD REQUIRE OR STA RT THE CLO CK T ICKING WOULD BE T HE ACT UA L INITIATION OF DEPORTA TION?

YES, YOUR HONOR.

CHIEF JUSTICE: MY C ONCERN WITH THAT, WHICH I S I T DOE S SEE M LIKE THAT IS A BRIGHT-LINE RULE B UT WOULDNT THAT MEAN THE N T HA T IN CERTAIN SIT UA TI ON S I T COULD BE TWO D EC ADES L AT ER THAT A D EFEN DA NT SEEKS T O W ITHDRAW ?

I F E VE R , BUT T HA T I S THE POINT.IT MAY NEVER H AP PE N .

CHIEF JUSTICE: BUT THE STATE FEELS THAT THAT'S A B ETTER POLICY THA N T HE EARLIER D AT E

W H I C H I S I F T H E R E I S A P O S S I B I L I T Y O F T H A T H A P P E N I N G I T S H O U L D J U S T B E W I T H I N T W O Y E A R S O F T H E P L E A A C T U A L L Y H A V I N G B E E N E N T E R E D T H A T S O M E O N E H A S T O B R I N G A C L A I M T H A T T H E Y W E R E M I S I N F O R M A T I O N E D ? I M E A N , T H O S E A R E S O R T O F T H E T W O , Y O U K N O W , O N E - H A N D E D , Y O U ' V E G O T T O D O I T T W O Y E A R S A F T E R Y O U R P L E A W A S E N T E R E D , W I T H D R A W I T W I T H Y O U W E R E N ' T A D V I S E D O F T H E C O N S E Q U E N C E S O F D E P O R T A T I O N A N D Y O U T H I N K Y O U H A V E A P O S S I B I L I T Y O R T H E O T H E R I S Y O U J U S T H A V E T O W A I T U N T I L T H E G O V E R N M E N T I S G O I N G T O D O S O M E T H I N G B E F O R E Y O U G E T T O W I T H D R A W A P L E A O N T H A T B A S I S .

W H A T T H E T E S T W A S I N P E A R T W A S W I T H I N T W O Y E A R S O F W H I C H H E L E A R N S O F T H E T H R E A T O F D E P O R T A T I O N . T H E Q U E S T I O N I S - - .

C H I E F J U S T I C E : T H E Q U E S T I O N I S W H A T D O E S T H E T H R E A T M E A N ?

T H A T R E A L L Y W A S N ' T A N I S S U E I N P E A R T , B U T - - .

J U S T I C E : A N O T H E R P R A C T I C A L Q U E S T I O N W I T H R E G A R D T O T H A T , I ' M N O T S U R E T H E R E C O R D D E M O N S T R A T E S , B U T I F W E T A K E T H I S B R I G H T - L I N E A P P R O A C H T H A T H E M U S T B E S U B J E C T T O D E P O R T A T I O N , W H A T A R E T H E P R A C T I C A L I T I E S . I M E A N , C O U L D A N I N D I V I D U A L O N C E T H E Y R E C E I V E T H A T N O T I C E O R W H A T E V E R I T I S , T H E N A T T E M P T T O F I L E T H E P L E A I N A N D C O U L D I T P U T U S I N A C I R C U M S T A N C E S O T H A T Y O U A R E D E P O R T E D B E F O R E Y O U C A N G E T T H E P R O C E E D I N G S T O T A L L Y F I N I S H E D ? I T C O U L D E N D U P H E R E A N D T A K E A Y E A R O R S O O R T W O Y E A R S ? W H A T D O W E K N O W A B O U T P R A C T I C A L R A M I F I C A T I O N S O F S E L E C T I N G T H A T D A T E ? W O U L D T H A T M A K E I T E L U S A R Y ?

F I R S T O F A L L , I F S O M E O N E I S H O N E S T L Y P A R A N O I D A B O U T T H A T T H E Y C O U L D A L R E A D Y H A V E T H E P L E A I N G P R E P A R E D I F T H E Y W E R E W O R R I E D A B O U T T H A T .

J U S T I C E : T H E Y W O U L D N ' T K N O W .

O K A Y . I ' M S O R R Y .

J U S T I C E : T H E Y W O U L D N O T K N O W . Y O U S A Y T H E Y H A V E I T P R E P A R E D . I G U E S S Y O U C O U L D P R E P A R E I T T H E D A Y A F T E R T H E P L E A , B U T S I G N I F Y ! ! I E S T H E Y K N O W S O M E T H I N G S O I T H I N K W H A T Y O U W E R E S A Y I N G I S I M E A N W E N E E D A D A T E W H E N T H E Y K N O W W H A T I S G O I N G O N . I F Y O U S A Y T H A T T H E N I T S E E M S T O M E T H A T T H E T H R E A T T H A T T H E Y K N O W A T T H E T I M E O F T H E P L E A T H E N W H A T A R E W E H E R E A B O U T ?

N O , I W O U L D T H A N A S S U M I N G T H E Y W O U L D F I N D O U T A F T E R T H E P L E A B U T B E F O R E D E P O R T A T I O N P R O C E E D I N G S .

W O U L D N ' T T H A T U N D E R P E A R T T H E N S A Y Y O U N E E D T O F I L E I T W I T H I N T W O Y E A R S F R O M T H E N ?

I T H I N K T H A T ' S W H A T P E A R T D O E S S A Y . I ' M S O R R Y , N O , N O .

J U S T I C E : Y O U A R E N O T S A Y I N G T H A T ?

N O .

J U S T I C E : I ' M T R Y I N G T O U N D E R S T A N D T H E P R A C T I C A L I T I E S O F T H I S .

L E T M E S A Y T H A T I ' M N O T A N E X P E R T I N I M M I G R A T I O N L A W B U T I D O K N O W T H A T D E P O R T A T I O N P R O C E E D I N G S D O N ' T H A P P E N O V E R N I G H T . Y O U G E T A N O T I C E T O A P P E A R U N D E R T H E S T A T U T E . Y O U H A V E T I M E T O G E T A N A T T O R N E Y . Y O U T H E N A P P E A R B E F O R E A

JUDGE, IMMIGRATION JUDGE . YOU THEN HAVE A RIGHT OF APPEAL TO THE BOARD AND IN CERTAIN CIRCUMSTANCES LIMITED YOU DON'T HAVE AN ABSOLUTE RIGHT TO APPEAL. YOU HAVE A RIGHT TO APPEAL TO THE FEDERAL COURTS SO IT IS NOT SOMETHING THAT YOU ARE NOT GOING TO BE PUT ON A BOAT OVERNIGHT .

JUSTICE: THAT'S EASY FOR YOU TO SAY BUT THAT MAY NOT BE THE REALITY AND MAY NOT BE THE REALITY WITH REFERENCE TO WHETHER OR NOT SOMEBODY IS BEING DETAINED OR THAT KIND OF THING . HOW ABOUT ARTICULATING FOR US JUST EXACTLY WHAT THE STATE'S POSITION IS. IN OTHER WORDS, WHAT RULE WOULD YOU HAVE US ANNOUNCE COMING OUT OF THIS ASSUMING THAT WE GET THAT FAR IN THE CASE? WHAT RULE WOULD YOU HAVE US ANNOUNCE ?

THAT THE THREAT OF DEPORTATION ARISES AT THE TIME THAT THE NTA IS ISSUED.

JUSTICE: DOESN'T THAT GO CONTRARY TO US WANTING TO ENCOURAGE PEOPLE, YOU KNOW , TO ACT PROMPTLY AND QUICKLY AND DISPOSE OF THESE CLAIMS AND ALSO ALLOW MOST REQUIRE PEOPLE THAT, YOU KNOW , ONCE THEY ARE PUT ON NOTICE OF SOMETHING THAT REALLY THE CLOCK OUGHT TO START RUNNING AND ACTUALLY THEY SHOULD BE THEN CUT OFF FROM BRINGING THE CLAIM IF THEY HAD AN EARLIER OPPORTUNITY WHEN THEY WERE ON NOTICE. WHY WOULDN'T THAT MAKE A LOT MORE SENSE? THAT IS , TO VIRTUALLY REQUIRE THEM. THAT IS, IF YOU COULD FIND OUT AFTER THEY BROUGHT A CLAIM, FOR INSTANCE, WELL , FIVE YEARS BEFORE THEY ACTUALLY GOT A LETTER , THAT SAID, YOU KNOW , WE'VE CHECKED YOUR RECORD AND IT LOOKS LIKE YOU'VE GOT A PROBLEM , AND , YOU KNOW , BECAUSE OF THIS PRIOR OFFENSE AND IF YOU COULD ACTUALLY USE THAT LETTER TO PREVENT THEM FROM BRINGING A CLAIM BECAUSE THEY KNEW FIVE YEARS BEFORE THAT THEY WERE UNDER THREAT. WOULDN'T THAT BE A BETTER THING TO ENCOURAGE THE EARLIER BRINGING OF CLAIMS AND ACTUALLY CUT OFF THESE CLAIMS IF SOMEBODY WAS ON NOTICE AND THEY DIDN'T ACT ?

I THINK AS A PRACTICAL MATTER, THE HYPOTHETICAL YOU ARE OUTLINING WOULD BE A RARE OCCASION. I THINK UNDER THE TEST THAT THE FOURTH DCA OUTLINED I THINK IT WOULD BE VERY HARD FOR THE STATE IN MOST CIRCUMSTANCES TO DISPUTE WHEN THE DEFENDANT CLAIMS THAT HE LEARNED OF THE THREAT OF DEPORTATION. SO I DON'T THINK THAT WOULD NECESSARILY RESULT IN THESE CLAIMS BEING BROUGHT ANY EARLIER.

CHIEF JUSTICE: IF WE TAKE A TWO-YEAR -- YOU SEE , THE PROBLEM I'M HAVING IS I GUESS DO YOU LEARN YOU COULD BE DEPORTED OR YOU WOULD BE DEPORTED AND THE WHOLE IDEA OF THE INVOLUNTARY PLEA IS THAT HOPEFULLY TRIAL COURTS DO TELL THE DEFENDANT AS PART OF THE STANDARD COLLOQUY THAT THEY COULD BE DEPORTED AND ALL WE ARE TALKING ABOUT IN PART IS THAT IF THEY DON'T TELL THEM THAT THEN THEY HAVE THE RIGHT TO WITHDRAW THE PLEA FROM THE TIME THAT THEY KNOW THAT THEY KNOW THEY COULD BE DEPORTED.

RIGHT. BUT WHAT I AM SAYING IS THAT FIRST OF ALL THE STATE HAS AN INTEREST IN FINALITY.

CHIEF JUSTICE: THAT'S WHY I AM WONDERING WHY YOU DON'T WANT IT TO BE JUST IF TWO YEARS IS GONE UNLESS THEY REALLY DIDN'T LEARN OF IT FOR YEARS LATER , BUT , YOU KNOW , SOMEBODY WHO IS SUBJECT TO DEPORTATION WHICH MEANS THAT THEY ARE HERE ON SOME KIND OF VISITOR STATUS WOULD ALMOST BE ON NOTICE THAT THAT'S A POSSIBILITY AND CERTAINLY LEARN OF IT IN TWO YEARS .

WELL , IF THIS COURT WANTED TO MAKE IT A STRAIGHT TWO YEARS THE STATE PROBABLY WOULDN'T HAVE A PROBLEM WITH THAT.

JUSTICE: WITH THE EXCEPTION, OF COURSE, IF THEY COULD DEMONSTRATE THAT THEY WEREN'T AWARE OF IT.

THE PROBLEM WITH THAT EXCEPTION IS THAT THEY COULD -- IN A LOT OF CIRCUMSTANCES THEY COULD JUST PICK OUT ANY TIME THEY WANTED. BECAUSE IT WOULDN'T RESULT IN THE CLAIMS NECESSARILY BEING BROUGHT ANY SOONER. THEY COULD SAY, HEY, I'M GOING TO --

JUSTICE: BUT THIS IS THE CIRCLE ABOUT REQUIRING THE COURT TO DO IT. THAT IS THAT THE WHOLE REQUIREMENT OF HAVING THE COURT DO IT IS THAT EVEN THOUGH YOU WOULD HOPE THAT PEOPLE WOULD BE KNOWLEDGEABLE ABOUT THE RISKS THEY ARE TAKING, YOU KNOW, DEPENDING ON THE CIRCUMSTANCES OF BEING HERE AND NOT BEING ACQUITTED OR A RESIDENT, THAT THEY WOULD KNOW THEMSELVES WITHOUT THE COURT TELLING THEM, BUT BECAUSE WE KNOW THAT THE SECONSEQUENCES ARE SO SERIOUS AND ON THE OTHER HAND WE KNOW THAT THEY ARE JUST SIMPLY LOTS OF PEOPLE THAT DON'T KNOW, YOU KNOW, ABOUT THIS. WE WERE ACTUALLY REQUIRING THE COURT TO KNOW IT. SO IT IS SORT OF IMPLICIT THAT THERE HAS TO BE SOME -- GAIN SOME KNOWLEDGE SOME WAY BEFORE MAKING THE CLAIM. ISN'T THERE? WHY WOULD YOU MAKE A CLAIM IF YOU DIDN'T KNOW IT?

WELL, WHAT I AM SAYING IS THAT YOU COULD LEARN THE CLAIM AND STILL WAIT TO MAKE IT AND IT WOULD BE VERY DIFFICULT FOR THE STATE TO PROVE WHEN THE PERSON ACTUALLY LEARNED OF THE CLAIM SO IT WOULDN'T NECESSARILY -- YOUR RULE WOULDN'T NECESSARILY RESULT IN THE CLAIMS BEING BROUGHT ANY SOONER BECAUSE THE DEFENDANT MAY WANT TO WAIT UNTIL THE EVIDENCE IS GONE AND THEN BRING THE CLAIM.

JUSTICE: WELL, DOESN'T THAT BRING UP THE WHOLE PROBLEM WITH WHETHER YOU ARE TALKING ABOUT AT THE TIME DEPORTATION PROCEDURES ARE INSTITUTED OR AT THE TIME THE MAY LEARN THAT THEY MAY INSTITUTE DEPORTATION PROCEEDINGS, THE STATE REALLY GETS CAUGHT IN A SITUATION WHERE THIS COULD BE YEARS DOWN THE ROAD SUCH AS IN THIS CASE, YOU KNOW, TEN YEARS LATER WHO KNOWS WHERE THE WITNESSES WHO COULD HAVE TESTIFIED AT A TRIAL IN THIS CASE WOULD BE, WHERE ALL OF THE EVIDENCE IS. I MEAN, THE STATE REALLY IS CAUGHT. SO WHY, WHY ISN'T THE STATE HERE ARGUING THAT REALLY IN THESE KINDS OF SITUATIONS EVERYONE IS ON NOTICE, THE RULES CLEARLY SAY THAT THIS IS WHAT THE JUDGE IS SUPPOSED TO SAY DURING THE PLEA COLLOQUY, GIVE YOU THAT INFORMATION ABOUT THE POSSIBILITY IMMIGRATION CONSEQUENCES OF YOUR PLEASO WHY ISN'T A DEFENDANT REQUIRED TO BRING THAT CLAIM WITHIN THE TWO YEARS? LIKE ANY OTHER 3.850 CLAIM?

I THINK A DEFENDANT SHOULD -- SHOULD BE, BUT PEART DOES NOT SAY THAT. I WOULD AGREE WITH YOU. I THINK THAT'S WHAT THE DISSENT IN PEART SAID.

JUSTICE: BECAUSE BEYOND THE TWO YEARS, I MEAN, WHAT I SAY IS A PROBLEM WITH HOW IN THE WORLD IF YOU SAY HE SHOULD HAVE BEEN, WE KNOW HE SHOULD HAVE BEEN GIVEN THAT INFORMATION BUT WHAT HAPPENS FROM THERE? DOES THE STATE HAVE ANY KIND OF LATCHES ARGUMENT?

WELL, NOT -- FIRST OF ALL THE STATE WOULD BE HAPPY WITH THE TWO-YEAR CUT OFF. I THINK THAT WOULD BE A GOOD SOLUTION BUT THAT'S NOT WHAT IS HELD IN PEART.

CHIEF JUSTICE: WASN'T PEART BECAUSE OF THE FACT THAT THESE WERE DEFENDANTS THAT WERE NOT IN CUSTODY AND A GAIN I HAVE GOKTOLOOK BACK. MY CONCERN IS THIS: IS THAT AGAIN IF WE SAY THAT THE CLOCK DOESN'T START TICKING UNTIL DEPORTATION PROCEEDINGS START AND SOMEBODY IS -- HAS KNOWN FOR YEARS THAT THEY COULD BE SUBJECT TO IT, YOU REALLY HAVE INTERFERED WITH TWO POSSIBLE SITUATIONS, WHICH IS THAT THE GOVERNMENT IS FINALLY DECIDING TO DEPORT THIS PERSON. NOW THERE IS AN ISSUE OF THE VOLUNTARINESS OF THE PLEA. YOU HAVE GOT THE GOVERNMENT WHO P

ROSECU TE D T HE STATE OF FLORIDA WHO MAY NOT HAV E THAT INFORMATION ANY MORE , AND INSTEAD O F S OMEB OD Y , Y OU KNOW , T HE W ITHD RAWA L O F THE PLEA DOESN'T MEAN THEY ARE NOT GOING TO BE CON VI CT ED I T MEANS THEY HAVE GOT TO B E PUT TO THE TES T S O A LL O F THE SUDDEN 20 YEARS L ATER THEY HAVE GOT TO WITHD RA W THE PLEA. THE EVIDENCE I SN'T THERE A ND NOW BOTH THE STATE AND T HE FEDERAL GOVERNMENT A RE ACTUALLY I N A BAD POS ITION BECAUSE OF THAT. WHE REAS IF W E DO I T A T THE EARLIEST POSSIBLE D AT E HOPEFULLY THE EVIDENCE IS REASONABLY F RE SH AND W E AR E NOT RUN NING INT O T HE P ROBL EM THAT JUSTICE LEWIS SAID , WHICH IS SORT OF L OO KING AT TWO SEPARATE PRO CE EDIN GS I N STATE AND FEDERAL COURT AND KIND O F H AVIN G U S B E R US HI NG IN ONE OR THE OTH ER O F T HE M . >> WELL, I W IL L G O BAC K TO MY POINT THAT I NSTI TU TING THAT RULE WOULD NOT GUARANTEE THAT THE D EFEN DANT REALLY BROUGHT IT WHEN H E ACTUALLY LEARNED OF IT. SEC OND , I F THE L EG ITIM AT E CLAIMS THAT THE VAST MAJORITY OF THESE C AS ES A RE LIKELY TO BE VERY OLD , ANYWAY , B EC AU SE T HE R UL E WAS ENA CTED IN 198 9 , I B ELIE VE , AND IT IS P RE TTY MUCH A MATTER OF C OU RS E I N WRI TTEN PLEA AGREE ME NTS AS WEL L AS COLLOQUYS THAT THIS I S DON E NOW.

J US TICE : DOESN'T THE DEFENDANT HAVE AN I NCENTIVE TO BRING THE SE C LA IM S A S SOON AS POS SI BL E B EC AU SE I F IT MATTERS TO HIM A T A LL HE IS GOING TO BE I NCA R CE RATE D AND, THE REFORE, I F A W HA T DRAWL OF THE PLEA IS GOING TO REM OV E HIS INC AR CE RATION O BVIOUSLY HE HAS AN INCENTIVE TO BRING THE CLAIM SO WHY WOULD H E WAI T A FTER FINDING OUT A POSSI BI LI TY O F DEPORTATION TO FILE T HE CLAIM?

WELL, IF H E IS N OT I NCA R CERATED HE WOULD NOT NECESSARILY B RING THE C LA IM.

JUSTICE: I'M SORRY?

IF H E IS N OT I N C US TO DY AT THE TIME HE WOULD NOT NECESSARILY BRING T HE C LA IM . UNTIL -- WHICH IS T HE F ACTS OF T HIS C ASE , W HICH ARE THE FACTS OF THIS CASE. THE DEFENDANT WAS NOT I N CUSTODY AT THE TIME HE M OV ED TO WITHDRAW HIS P LE A.

JUSTICE: LET ME A SK YOU THIS. WE SEEM TO SAY T HA T W E SHOULD IMPOSE A BRIGHT-LINE RULE THAT THE A CT UA L INITIATION OF DEPORTATION P ROCEEDINGS SHOULD BEGIN THE PERIOD. IT SEEMS TO ME THA T A LT HO UG H WE CAN RULE T HA T W AY , I N ORDER TO R ESOL VE THE CONFLICT IT IS NOT NEC ESSA RY BECAUSE THE CONFLIC T APP EA RS TO INVOLVE WHE THER THE DENIAL OF PERMA NENT RESIDENCY S TA TU S IS I TSEL F THE THREAT OF DEPORTATION AND WE CAN SIMPL Y A NSWE R , WELL, THAT C ER TAINLY I S N OT ENOUGH TO BE A THREAT T O DEPORTATION , B UT T HERE M AY BE S OM ETHI NG SHORT O F INITIATION OF PROCE EDIN GS THAT WOULD C ONST IT UTE S UCH A THREA T.

WELL , E XCEPT THAT THE PETITION MAKES THE ALLEGATION THAT HE I S DEPORTABLE AS A RESULT OF THE TWO M ISDEME AN OR POS SESSIONS.

JUSTICE: BUT THE CONFLICT IS THE CASES IS B AS ED O N T HE DENIAL O F P ER MANENT RESIDENCY STATUS . IT SEEMS TO ME AND T HE T HI RD DCA SAY S T HA T' S NOT E NOUGH TO CONSTITUTE A T HREAT. THE FOURTH D CA S AY S I T I S AND WE HAVE TO RESOL VE T HA T PARTICULAR CONFLICT. WE COULD RES OLVE IT B ROAD LY OR WE C OU LD R ES OLVE I T N ARROWLY.

I TH I NK T HA T THE 4TH ACT UALLY S AID T HA T THE DEFENDANT ALLEGING THAT HE IS GOING TO B E DEPORTE D AS A RESULT OF THE SE TWO CONVICTIONS CONSTITUTES A THREAT OF DEPORTATION . >> JUSTICE: CERTAINLY I THINK ALL OF THE CASES REQUIRE MORE THAN AN ALLEG ATION THAT HE IS DEPORTABLE NOW.

AT T HAT POINT YOU CAN G ET A N E VIDE NT IARY H EARING AFTER YOU MADE THE A LLEGAT IO N.

JUSTICE: SO IN THAT SENSE THEN EVERY DEFENDANT WHO - - EVERY ALIEN WHO HAS BEEN CONVICTED OF AND PLED CAN NOW SAY HE IS DEPORTABLE BECAUSE ALL HE HAS TO DO IS ALLEGE IT AND HE GETS AN EVIDENTIARY HEARING ?.

IT APPEARS THAT WAY UNDER THE 4TH DISTRICT'S CASE .

CHIEF JUSTICE: I GUESSTHE PROBLEM IS THAT THE DEFINITION UNDER RULE 3 .1 72 ABOUT UNDER 8 , MUST BE SUBSECTION I OF PREJUDICE , THAT'S WHERE WE GET, I'M TRYING TO SEE WHERE WE GOT BACK TO PREJUDICE IT DOESN'T ALLOW DEFENDANTS JUST TO FILE A MOTION TO WITHDRAW THE PLEA JUST BECAUSE SOME OF THE PROCEDURES IN THE RULE WERE NOT FOLLOWED. IT HAS TO BE A SHOWING OF PREJUDICE AND NOW WE GET BACK TO WHAT PREJUDICE MEANS , AND I GUESS THE QUESTION GOES BACK TO AS WE SAID IT MEANT A THREAT OF DEPORTATION , AND THAT COULD BE DEPORTED OR WOULD BE DEPORTED. ARE THOSE THE TWO SORTS OF ENDS OF IT , WHETHER THEY COULD BE DEPORTED ? OR THAT THEY WOULD, IN FACT , BE DEPORTED?

THE STATE IS SUGGESTING THAT THE BRIGHT-LINE OF DEPORTATION PROCEEDINGS DOESN'T NECESSARILY MEAN THEY WILL ACTUALLY BE DEPORTED. THEY MAY HAVE SOME DEFENSES . BUT THAT STRIKES A REASONABLE BALANCE BETWEEN SHOWING PREJUDICE AND LETTING THE DEFENDANT HAVE RELIEF . >> JUSTICE: I WOULD LIKE TO JUST ADDRESS MOMENTARILY FOR BOTH OF YOU ACTUALLY IT IS GOING TO BE A JURISDICTIONAL QUESTION AND THAT IS WHETHER THE NOTICE OF APPEAL IN THIS CASE WAS TIMELY FILED. DO WE KNOW FROM THIS RECORD? DO WE HAVE A PROBLEM WITH THAT? WHERE ARE WE WITH REGARD TO THE JURISDICTION WHICH IS AS I WOULD ASSUME THE SUBJECT MATTER JURISDICTION ISSUE? WOULD YOU ENLIGHTEN US ON THAT?

YES, WHAT HAPPENED IN THIS CASE IS THAT I BELIEVE IN OCTOBER OF 2003 , THE TRIAL COURT DENIED RELIEF. IN FEBRUARY OF 2004 , THE DEFENDANT FILED A MOTION TO SET ASIDE , I BELIEVE IS WHAT HE CALLED IT, AND SAID HE DID NOT - - IT WASN'T SWORN. HE SAID HE DID NOT RECEIVE THE ORDER UNTIL FEBRUARY 2004. THE TRIAL COURT DENIED THAT MOTION TO SET ASIDE BUT REPORTEDLY GAVE THE DEFENDANT 30 DAYS TO APPEAL. I DON'T THINK HE COULD DO THAT. I THINK THE PROPER PROCEDURE --.

JUSTICE: LET ME ASK YOU A MORE FUNDAMENTAL QUESTION. WAS THE NOTICE OF APPEAL FILED WITHIN 30 DAYS OF THAT ORDER?

I BELIEVE IT WAS .

JUSTICE: IT WAS. SO THEN THE ISSUE WOULD BE WHETHER THEY COULD EXTEND IT AND BY WITH THE DENIAL ARE WE GOING TO REALLY LOOK AT THE DENIAL OF THE ORDER OR THE ORDER THAT WAS ENTERED IN FEBRUARY, IS THAT REALLY WHAT WAS BEFORE THE APPELLATE COURT OR DID IT BRING UP THE PRIOR ORDER IN NOVEMBER? I GUESS THAT'S THE JURISDICTIONAL QUESTION WE'RE TALKING ABOUT THEN.

YES, YOUR HONOR .

JUSTICE: OKAY.

AND THE STATE'S POSITION IS THAT THEY SHOULD HAVE FILED A BELATED APPEAL IN THE 4TH DISTRICT.

CHIEF JUSTICE: THERE SEEMS TO BE A LOT OF PROBLEMS IN THE 4TH DISTRICT OPINION IN TERMS OF THE PROCEDURAL POSTURE OF THIS CASE SAYING THERE WAS A TRANSCRIPT WHEN THERE WASN'T A TRANSCRIPT REQUIRING - - RELYING ON AN UNSWORN REPLY . CERTAINLY WE

WILL C O N S I D E R T H O S E I S S U E S I N R E S O L V I N G T H I S C A S E B U T I T D O E S A P P E A R T H E R E I S A C L E A R C O N V I C T B E T W E E N T H E W A Y T H E 4 T H D I S T R I C T I S A P P R O A C H I N G T H E S E C A S E S A N D T H E W A Y T H E 3 R D D I S T R I C T I S . D O Y O U A G R E E W I T H T H A T ?

Y E S , Y O U R H O N O R . A L S O P O I N T O U T - - .

C H I E F J U S T I C E : D O Y O U K N O W W H A T ? I H A V E N ' T B E E N K E E P I N G T R A C K . S I N C E Y O U A R E T H E S T A T E I ' M A S S U M I N G Y O U A R E G O I N G T O U S E A L L O F Y O U R T I M E . I W I L L G I V E Y O U A C O U P L E O F M I N U T E S I N R E B U T T A L .

Y E S , T H A N K Y O U . D O I H A V E - - I R E S E R V E F I V E M I N U T E S ?

C H I E F J U S T I C E : T H E Y E L L O W L I G H T W E N T O N A N D W E W E R E S O E N G A G E D I N C O N V E R S A T I O N T H A T I W A S T H I N K I N G T H A T Y O U W E R E T H E S T A T E A N D Y O U W E R E A L R E A D Y U P O N T H E O T H E R S I D E .

M A Y I T P L E A S E T H E C O U R T .

C H I E F J U S T I C E : I ' L L G I V E Y O U A C O U P L E O F M I N U T E S .

I ' M S O R R Y , Y O U R H O N O R . M Y N A M E I S M I K E C O H E N A N D I R E P R E S E N T E D O W R A N G R E E N B E L O W . I A M H O N O R E D T O A P P E A R B E F O R E Y O U T O A R G U E T H I S S I G N I F I C A N T Q U E S T I O N . I K N O W T H E J U S T I C E H A S A S K E D A B O U T T H E T W O - Y E A R R U L E .

J U S T I C E : B E F O R E T H A T , I S T H E R E A B A S I S I N T H I S A P P E L L A T E R E P O R T T O C O N C L U D E T H A T T H I S T R I A L J U D G E D I D N O T A D V I S E T H I S D E F E N D A N T ?

Y E S , J U S T I C E W E L L S . > > J U S T I C E : I S T H E R E A T R A N S C R I P T ?

T H E R E I S N O T R A N S C R I P T . > > J U S T I C E : T H E F O U R T H D I S T R I C T I S W R O N G .

A N D W H A T I S A I D I N M Y B R I E F , J U S T I C E W E L L S , I S T H A T T H E E R R O R W A S H A R M L E S S , B E C A U S E I F Y O U L O O K A T T H E R E C O R D , T H E R E E X I S T E D N O T R A N S C R I P T B E C A U S E O F T H E P A S S A G E O F T I M E . T H E R E I S A N A D M I N I S T R A T I V E R U L E I N B R O W A R D C O U N T Y W H E N A C A S E I S M O R E T H A N T E N Y E A R S O L D T H E R E A R E N O S T R A N S C R I P T S O - - T R A N S C R I P T S A V A I L A B L E B U T I F Y O U L O O K A T T H E W A I V E R O F R I G H T S F O R M S A N D I C A N T E L L Y O U T H E W A I V E R O F R I G H T S F O R M S I N P R E S E N T D A Y B R O W A R D C O U N T Y A L W A Y S H A V E A N A D M O N I T I O N A S T O D E P O R T A T I O N W A R N I N G S . T H I S W A I V E R O F R I G H T S F O R M D I D N O T . A N D M R . G R E E N H A D W O R N I N T H I S P E T I T I O N - - .

J U S T I C E : S O I N O R D E R F O R U S T O R E S O L V E T H I S C A S E , W E W O U L D H A V E T O H O L D T H A T I T I S N O T W H A T W E N T O N I N B E T W E E N T H E J U D G E A N D T H E D E F E N D A N T O R A L L Y . I T I S W H A T ' S I N T H E R I G H T S ?

N O , S I R . T H E R E I S A S W O R N P E T I T I O N F R O M M R . G R E E N T H A T I T D I D N O T G E T T H E A D M O N I T I O N F I R S T O F A L L I N C O N N E C T I O N W I T H T H E W A I V E R O F R I G H T S F O R M A S W E L L W H I C H H A S N O D E P O R T A T I O N W A R N I N G . > > J U S T I C E : M Y S E C O N D Q U E S T I O N I S . I S T H I S M O T I O N U N D E R 3 . 8 5 0 ?

I T I S , S I R .

J U S T I C E : N O W , W H A T S P E C I F I C P R O V I S I O N U N D E R 3 . 8 5 0 D O Y O U S A Y A V O I D S T H E T W O - Y E A R L I M I T A T I O N O F 3 . 8 5 0 ?

A N D I T H I N K T H A T ' S W H A T I S S O S I G N I F I C A N T A B O U T T H E D I F F E R E N C E O F T H E S E T Y P E O F C A S E S

TO ADD RE SS S OM E O F JUSTICE L EW IS ' C ON CE RNS , A ND THE NORMAL 3 .8 50 C AS E W HERE YOU HAVE T WO YEARS FROM T HE TIME OF THE JUD GMENT O R CONVICTION TO BRING IT. THE I SSUE ALL REV OL VE S A ROUND PREJUDICE. IN THIS C AS E W HAT H AP PE NE D WAS IT WAS A N I MM EDIATE R ELATIVE PETITION F ILED B Y MR. GREEN'S WIFE . TOE ALLOW HIM T O ADJUS T - - TO ALLOW HIM T O ADJ US T HIS STATUS TO A PERMANENT RESIDENT. B ECAUSE HE HAD A C RIMINA L CONVICTION HE DID NOT L EA RN OF THE CONSEQU ENCE S O F DEPORTABILITY OF THE WAIVER.

JUSTICE: I'M M OR E CONCERNED ABOUT THE PROCEDURE, AND T HE PRO CEDU RE UNDER OUR 3.850 RUL E A S A VERY B RIGH T -L IN E T WO -YEA R RULE THERE ARE THREE EXCEPTIONS TO IT. W HICH EXC EPTION D O Y OU CLA IM WITH THIS N EW LY D ISCO VE RED EVIDENCE? WAS T HIS A CON ST ITUT IONA L --

NO, SIR. IT IS BAS ED O N PEA RT V ERSUS STATE. I N P EART V ER SUS STATE T HI S COURT RULED T HA T T HE DEFENDANT HAD TWO YEARS FROM THE TIME T HAT H E L EA RNED OF THE DEP ORTATI ON CON SE QUEN CES T O FILE THI S K IN D OF PETITION.

JUSTICE: YOU WOULD AGREE THAT PEART W AS A S IT UATI ON IN WHICH WE WER E D EA LING WITH A N E RR OR - - > I REA LL Y D ID N' T A DD RESS THIS ISSUE, B UT I THINK W HA T THE COURT D ID RECOGNIZE , JUSTICE WELLS, IS THAT THIS IS A DIFFERENT FOR M WHE N I T COMES TO PEOPLE WITH IMM IGRATION PROBLEMS. FOR INSTANCE IN THIS CASE , THE DEFENDANT WAS R ENDERE D IN AD MI SS IB LE B EC AU SE H IS STATUS WAS IN QUEST ION. IN OTHER WORDS, H E WAS CONVICTED OF ASSAU LT A ND BATTERY.WHAT WE S AY WER E A B AS IS FOR T HE R IGH T T O S ET A SI DE T HE PLEA. UNTIL H E FIL ED A W AI VE R AND UNTIL THAT WAIVER WAS D EN IE D MANY YEARS LATER, HE WAS NOT P REJUDICED. BY THE DENIAL OF T HA T W AI VE R .

JUSTICE: THE QUESTION IS WHETHER HE IS PREJUDICE D EVEN NOW.

VERY MUCH SO.

JUS TICE: T HAT'S CERTAINLY AN ISSUE HERE.

VERY MUCH SO AND I 'L L EXPLAIN WHY, JUDGE, I F Y OU LOOK AT MY BRIEF. WHEN THE WAIVER WAS D EN IE D ON THE BASIS O F T HI S CONVI CTION , H E N O LON GE R HAD ANY RIGHT TO R EMAI N AND S TAY IN THE UNITED STATES. HE WAS A N OVE RSTA Y. HE HAD O VE RS TA YE D H IS V IS A S O HE BECAME DEP ORTA BL E A T THAT POINT. HE DIDN'T BECOME D EPOR TA BL E BECAUSE OF THE CONVICTION UNTIL THE WAIVER WAS DENIED SO TO HAVE A STR AI GHT TWO-YEAR RULE WOU LD FLY IN THE FACE OF PREJU DI CE . HE WAS NOT P RE JU DI CED U NTIL THE POINT THAT THE WAIVER WAS DENIED , S IR.

JUSTICE: DO WE KNO W IF A MISDE MEANOR R EN DERS A DEFENDANT DEPOR TA BLE?

IT DOES FOR T WO REA SO NS AS I'VE S TA TE D I N M Y BRI EF . TWO CRIMES O F M OR AL TURPI TUDE U NDER A N IMM IGRATION LAW C AN REN DE R AN ALIEN I N AD MI SS IBLE A ND D EPORTABLE. THE STATE 'S S AY T ATIO N I S A MATTER OF V A ND E WHI CH WER E CASES CITED IN NEW YORK AND MASSACHUSETTS WHICH HAS NOTHING TO DO WITH THE LAW HERE IN SOUTH FLO RIDA. SAY THEY ARE NOT C RI ME S O F MORAL T URPI TUDE. WE SAY THEY ARE U NDER T HE LAW OR ALTERNATIVELY - - .

JUSTICE: WASN'T THAT THE WHOLE PURPOSE OF REQUIR NG INITIATION OF DEPORTATION PROCEEDINGS IS S O THA T T HE COU RT COU RT S D ON 'T H AVE T O GET INVOLVED IN MATTERS OF IMMIGRATION LAW WHICH THEY DON'T UNDERSTAND AND IT IS UP TO THE FEDERAL GOVERNMENT TO DECIDE WHETH ER S OM ETHING RENDERS SOMEONE DEPOR TA BL E OR NOT AND A T T HAT POI NT THEY CAN S HOW PREJU DICE . ANYTHING OTHER THAN THAT IS SPECULATION.

I WOULD SAY NOT, SIR. IT IS INCUMBERT UPON CONSEQUENCE TO PRESENT AN EXPERIMENT WITHNESS, FORMER IMMIGRATION JUDGE OR FORMER EXPERIMENT IN IMMIGRATION LAW WHO WILL OPINE TO WHAT THE EFFECTS OF THIS WILL BE AND A CIRCUIT COURT WOULD BE IN FINE POSITION TO MAKE THAT.

JUSTICE: THE Y CANNOT TESTIFY ABOUT SOMEONE, WHETHER THE GOVERNMENT IS ACTUALLY INITIATED DEPORTATION PROCEEDINGS IF THAT'S THE POINT.

WELL, I THINK IN POINTING OUT, JUSTICE ANSTEAD'S CONCURRING OPINION IN PEARL, ALTHOUGH HE DIDN'T DEFINE THREAT OF DEPORTATION HE TALKED ABOUT THE LEGAL POSSIBILITY OF DEPORTATION WITH THE 4TH DCA TALKED ABOUT THE MARRIOTT POSITION. PEARL APPROVED MARRIOTT AND IT HAS TO BE THE LEGAL POSSIBILITY OF DEPORTATION WHICH IS THE TEST BECAUSE TO USE AN ILLUSTRATION IT IS COMMON KNOWLEDGE IN SOUTH FLORIDA THAT CUBAN NATIONALS ARE NOT DEPORTED BACK TO THE ISLAND OF CUBA, EVEN THOUGH DEPORTATION PROCEEDINGS ARE COMMENCED AND EVEN THOUGH THEY ARE TECHNICALLY ENTERED AN ORDER OF DEPORTATION SO YOU HAVE SUCH SITUATION WHERE IF YOU USE THE STATE'S TEST IT DOESN'T MAKE SENSE UNTIL THE GOVERNMENT OF CUBA TALKS ABOUT --

YOU ARE TALKING ABOUT A SUBSET OF IMMIGRANTS WE HAVE TO WRITE THE LAW FOR THE ENTIRE STATE.

NO, I UNDERSTAND THAT, SIR, BUT WHAT I'M SAYING IS UNTIL SUCH TIME AS THE GOVERNMENT OF CUBA CHANGES ITS POLICY IT WOULD HAVE A SITUATION WHERE SOMEONE WOULD HAVE BEEN DEPORTED, THE NOTICE TO APPEAR WOULD HAVE BEEN FILED AND THEY WOULD HAVE HAD TO ENTER AN ORDER OF DEPORTATION AND YET THEY WOULD STILL BE HERE. SO THE BRIGHT-LINE TEST THAT THE STATE IS SUGGESTING.

JUSTICE: I GUESS YOU ARE PROVING TOO MUCH BECAUSE THAT ARGUMENT SAYS EVEN THE INITIATION OF DEPORTATION PROCEEDINGS IS NOT ENOUGH. IT IS AN ARGUMENT THAT STARTED EVEN LATER, NOT BEFORE.

I'M JUST USING THAT AS AN ARGUMENT, JUDGE, TO SHOW YOU THAT A BRIGHT-LINE TEST DOESN'T WORK.

CHIEF JUSTICE: THE BRIGHT-LINE TEST AND JUSTICE ANSTEAD IN HIS CONCURRENCE, THE DISSENT SAID THERE WOULD BE ACTUAL DEPORTATION AND HE SAID AS OPPOSED TO THE INITIATION OF DEPORTATION PROCEEDINGS. SO ALTHOUGH THE MAJORITY DIDN'T TALK ABOUT THE THREAT BEING THE INITIATION OF DEPORTATION PROCEEDINGS, THAT'S AN EARLIER DATE THAN THE ACTUAL DEPORTATION AND LET ME ASK YOU. IT SOUNDS LIKE YOU HAVE IMMIGRATION LAW KNOWLEDGE.

SO MEWHAT. I RELY ON INFORMATION I'VE RECEIVED.

CHIEF JUSTICE: WELL, THE QUESTION I HAVE IS, AND MAYBE IT DOESN'T APPEAR IN THIS RECORD, BUT IF THERE IS ANYTHING WE CAN REFER TO FROM THE POINT OF THE INITIATION OF DEPORTATION PROCEEDINGS, WHAT IS THE USUAL TIME PERIOD UNTIL AN ORDER OF DEPORTATION?

I'M GLAD YOU ASKED THAT BECAUSE IT IS VERY IMPORTANT TO UNDERSTAND FROM WHAT I UNDERSTAND, REASONABLY SPEAKING TO A FORMER UNITED STATES IMMIGRATION JUDGE WHO I ASKED THAT VERY QUESTION ABOUT, SOMETIMES IMMIGRATION JUDGES DON'T GRANT YOU CONTINUANCES SO WHAT HAPPENS AS A PRACTICAL MATTER IS IF YOU GO IN AND THEY BEGIN DEPORTATION PROCEEDINGS YOU DON'T HAVE TIME TO COME BACK TO THE STATE COURT TO VACATE. SO IF YOU USE THIS INITIATION TEST, THEN YOU WON'T

B E A B L E T O V A C A T E A N D T H E W H O L E R U L E U N D E R 3 0 . 5 5 0 W I L L B E F R U S T R A T E D .

C H I E F J U S T I C E : B U T W O N ' T T H A T R E Q U I R E T H E T R I A L J U D G E I N A N Y G I V E N C A S E T O H A V E T O O E V A L U A T E T H E L E G A L E F F E C T O F W H A T E V E R I T I S T H A T T H E D E F E N D A N T R E C E I V E S T O K N O W W H E T H E R T H I S I S S O M E T H I N G L I K E Y O U A R E S A Y I N G H E R E T H A T W I L L C O M E O U T B U T T H E W A I V E R , W H E N T H E W A I V E R W A S D E N I E D H E W A S N O W D E P O R T A B L E ?

Y E S , M A ' A M .

C H I E F J U S T I C E : B U T T H A T W I L L H A V E T O B E E S T A B L I S H E D A N D T H A T W I L L R E Q U I R E A T R I A L J U D G E I N E V E R Y C A S E T O M A K E A D I F F E R E N T L E G A L D E T E R M I N A T I O N A B O U T W H A T T H E E F F E C T I S O F A G I V E N S T A T U S ?

R E S P E C T F U L L Y I D O N ' T T H I N K S O , J U D G E . I T H I N K Y O U W O U L D P R E S E N T T H E I M M I G R A T I O N L A W Y E R W H O R E P R E S E N T E D T H E P E R S O N W H O T O L D H I M W H E N H E E X P L A I N E D T H E E F F E C T O F T H E W A I V E R .

W E L L , W H A T C A U S E D Y O U R C L I E N T T O F I L E A R E Q U E S T F O R A W A I V E R ? > > I ' M S O R R Y , M A ' A M ?

J U S T I C E : W H A T P R O M P T E D Y O U R C L I E N T T O F I L E T H E R E Q U E S T F O R T H E W A I V E R ?

H E H A D B E C O M E I N A D M I S S I B L E B E C A U S E O F T H E C O N V I C T I O N F O R A S S A U L T A N D B A T T E R Y , A N D D U E T O T H A T H I S L A W Y E R -- .

J U S T I C E : S O H E K N E W T H A T A L O N G T I M E B E F O R E H E A C T U A L L Y F I L E D T H E W A I V E R R E Q U E S T ?

N O , B E C A U S E W H A T H A P P E N S I S U N T I L S U C H T I M E A S T H E W A I V E R I S D E N I E D , H E D I D N ' T B E C O M E D E P O R T A B L E . H E I S I N A D M I S S I B L E H E I S O U T O F S T A T U S I N T H E U N I T E D S T A T E S .

J U S T I C E : S O A T T H E T I M E T H A T -- D I D H E H A V E A V I S A A T S O M E P O I N T ?

I ' M S O R R Y , M A ' A M ?

J U S T I C E : D I D H E H A V E A V I S A A T S O M E P O I N T ?

Y E S , B U T H E O V E R S T A Y E D .

J U S T I C E : A T T H E P O I N T H E O V E R S T A Y E D D O E S N ' T H E B E C O M E D E P O R T A B L E A T T H A T P O I N T ?

N O , B E C A U S E H E H A S A W A I V E R A V A I L A B L E T O H I M F R O M A C L O S E F A M I L Y R E L A T I V E , H I S W I F E , B U T W H E N H E W A S C O N V I C T E D T H E B A S I S F O R T H E D E N I A L O F H I S W A I V E R W O U L D H A V E B E E N T H E C R I M I N A L C O N V I C T I O N .

J U S T I C E : B U T I N A G E N E R A L C A S E W O U L D N ' T A P E R S O N B E C O M E D E P O R T A B L E O N C E T H E I R V I S A H A S E X P I R E D ?

N O T D E P O R T A B L E . I N A D M I S S I B L E .

J U S T I C E : B U T E I T H E R W A Y , Y O U A R E N O L O N G E R L E G A L L Y I N T H E U N I T E D S T A T E S , C O R R E C T ?

T H A T ' S C O R R E C T , B U T Y O U H A V E A N A V A I L A B L E -- .

J U S T I C E : S O W H Y W O U L D N ' T T H A T B E A G O O D P O I N T A T W H I C H A N Y D E F E N D A N T W O U L D H A V E T O T H E N R A I S E T H E C L A I M T H A T H E W A S N O T P R O P E R L Y I N F O R M E D O F T H E I M M

IGRA TI ON C ONSEQUENCES OF HIS PLE A?

BECAUSE HE B EC AM E DEPORTABLE ONLY BECAUSE OFHIS CRIMINAL CON VICTION. DESPITE THAT, H E WOULD HAV E HAD THE WAIVER A VA ILABLE TO HIM TO OVERC OM E THA T.

JU STICE: WELL , W E'RE TALKING ABOUT, YOU'RE TALKING A BOUT YOUR C LI EN T I N PARTICULAR.

YES, MA'AM.

JUSTICE: BUT I'M TALKING ABOUT ALIEN S I N GENERAL.

IN MY BRIEF I M AK E MENTION OF CERTA IN INDIVIDUALS WHO ARE NEVER IN A SITUATION WHERE THE Y CAN APPLY FOR WAI VER. FOR I NS TANCE , D RU G DEFENDANTS WERE CON VI CTED O F D RUG C ONVICTIO NS , DOM ES TI C V IOLENCE DEFENDANTS WHO A RE CONVICTED OF THOSE KINDS OF CONVICTIONS HAD N O WAI VE R.

JUSTICE: EVEN IN THO SE CASES WHEN YOU CAN'T GET A WAIVER YOU STILL HAVE T O WAIT UNTIL INS D EC ID ED T O INSTITUTE DEPORTATI ON PROCEEDINGS, SO A DEF ENDA NT CAN REALLY JUST S IT A ROUN D AND WAIT A ND , Y OU KNO W , A LL O F T HE E VIDE NC E D IS APPEARS AND ALL OF THE WITNE SSES DISAP PEAR AND THEN FIL E A CLAIM T HAT U ND ER 3.8 50 T HA T HE WAS NOT PRO PE RL Y INF OR MED OF THE IMMIGRATION CONSEQUENCES?

WELL , I 'M N OT S UR E THA T THAT WOULD BE THE CASE. IF HE D IDN'T GET H IS W AR NI NG , THE WHOLE POINT GOES T O T HE V OLUNTARINESS OF THE PLE A SO HE WOULD NOT KNOW UNTIL H E CONSULTED WITH A LAW YER . UNTIL HE GOT T HO SE W AR NINGS AND SOMEONE INVE TI GA TE D THAT THAT W AS THE C AS E , TOGETHER WITH W OU LD R ES UL T IN PREJUDICE WHETHER HE WOULD BE SUBJECT TO DEPORTATION AND I THINK THAT'S WHY THE COURT IN PEART VERSUS STATE SAID Y OU HAVE TWO YEARS FROM THE T IM E YOU LEARN ABOUT THAT. THIS IS A DIFFERE NT S PE CIES OF CASE. IT IS C OM PLETELY D IFFERENT.

CHIEF JUSTICE: JUSTICE CANTERO HAS A Q UE ST IO N.

GETTING BACK TO YOU R ANSWER TO THE CHI EF J USTI CE ABOUT THE INITIATION OF PROCEEDINGS IT SEEMS TO ME THAT AND Y OU W ER E T AL KI NG ABOUT S OMETIMES THE IMMIGRATION JUDGE WON'T GRA NT THE C ONTINUANCE.

YES, SIR.

JUS TI CE: E VE RY ALI EN A S FAR AS I UND ERSTAND H AS AN ABSOLUTE RIGHT TO AN APPEAL TO THE BOARD OF I MM IGRA TION APPEALS, CORRECT?

THAT'S CORRECT.

JUSTICE: AND FROM T HERE AN APPEAL CAN GO TO THE UNITED STATES C IRCUIT COURT OF APPEALS IN THA T PARTICULAR CIRCUIT.

THAT'S C ORRECT.

JUSTICE: AND T HA T W HOLE PROCESS COULD TAKE AT A MINIMUM S EVERAL MONTHS , USUALLY MORE THAN A YEA R. ISN'T THAT CORRECT?

THAT'S CORRECT . BUT STILL THE I SSUE I S IS THE P LEA V OL UN TARY AND CAN IT BE SET ASIDE?

JUSTICE: I UNDERSTAND. I'M JUST TALKING ABOUT SOME OF THE JUSTICES A RE CONCERNED

THAT IF WE MAKE THE BRIGHT-LINE INITIATION OF PROCEEDINGS THAT THERE ISN'T ENOUGH TIME THEN TO SEEK A WITHDRAWAL OF THE PLEA AND I BELIEVE THAT THERE IS AT LEAST OVER A YEAR THAT HAPPENS BETWEEN THE TIME OF INITIATION OF PROCEEDINGS AND THE TIME WHEN A DEFENDANT OR AN ALIEN CAN EXHAUST HIS ADMINISTRATIVE REMEDY.

BUT THE MORE IMPORTANT QUESTION I THINK, JUSTICE CANTERO, IS THE TEST OF THE LEGAL POSSIBILITY OF DEPORTATION SUPERSEDING THE BRIGHT-LINE TEST.

JUSTICE: I UNDERSTAND THAT'S YOUR POSITION.

JUSTICE: SHOULD WE HAVE OR IS THERE A NECESSITY FOR AND WHAT IS YOUR RESPONSE TO THE ISSUE WITH A LIEN SENT UNDER DIFFERENT STATUS. SOME MAY COME UNDER A VISA. SOME MAY JUST ENTER. SHOULD THERE BE A DISTINCTION FOR THOSE THAT JUST ENTERED BECAUSE THEY SHOULD KNOW, IF YOU LOOK AT PEART, SHOULD KNOW OR SHOULD HAVE KNOWN, THEY ARE SUBJECT TO DEPORTATION AT ANY POINT EVEN WITHOUT REGARD TO THE PLEA. SO IS THE LEGAL REASON FOR A DISTINCTION BETWEEN GROUPS WITHIN THAT GROUP? I MEAN, IS THAT AN ISSUE?

I THINK THERE MAY BE MANY LEGAL DISTINCTIONS BETWEEN GROUPS BECAUSE THE IMMIGRATION LAW IS VARIED BUT I THINK THAT'S WHY YOU HAVE AN IMMIGRATION LAWYER WHO IS GOING TO EXPLAIN TO AN IMMIGRATION DEFENDANT WHEN HE BECOMES DEPORTABLE.

CHIEF JUSTICE: THE ANSWER TO THAT QUESTION, THOUGH, IS IF SOMEBODY IS ILLEGALLY IN THIS COUNTRY THEN THEY ARE GOING TO BE DEPORTABLE REGARDLESS OF WHETHER THEY HAVE BEEN CONVICTED OF A MISDEMEANOR OR NOT SO THEY ARE NOT GOING TO BE ABLE TO PROVE PREJUDICE BECAUSE THEY -- BECAUSE THEY WOULD BE DEPORTABLE OTHERWISE?

NOT NECESSARILY. A LEGAL RESIDENT WHO WAS HERE LEGALLY, BUT IN THE CASE OF A DRUG CONVICTION --.

CHIEF JUSTICE: BUT I SAY IN THE CASE OF A DEFENDANT WHO WAS IN THIS COUNTRY ILLEGALLY, THEN THEY ARE PROBABLY NOT GOING TO BE ABLE TO PROVE A PREJUDICE PRONG OF THE UNDERPEART BECAUSE THE REASON FOR THE BEING SUBJECT TO DEPORTATION IS BECAUSE THEY WERE NEVER IN THIS COUNTRY LEGALLY, NOT BECAUSE OF A SUBSEQUENT CONVICTION, AND THAT SHOULD BE A QUESTION OF PROOF. DO YOU AGREE WITH THAT?

I UNDERSTAND WHAT YOU ARE SAYING AND I TAKE EXCEPTION TO IT BECAUSE THEY WOULD STILL HAVE AS MR. GREEN DID. HE WAS HERE AS A SON OF A BORN HERE BUT HE HAD AVAILABLE TO HIM. ONCE THE WAIVER WAS DENIED HE BECAME DEPORTABLE.

CHIEF JUSTICE: I'M TALKING ABOUT SOMEONE THAT DOESN'T COME INTO THIS COUNTRY LEGALLY.

A MEXICAN CROSSING THE BORDER?

CHIEF JUSTICE: THERE ARE MILLIONS OF PEOPLE IN THIS STATUS.

OF COURSE. I THINK THAT THE ISSUE IS THE TWO-YEAR RULE, IT IS VERY IMPORTANT TO UNDERSTAND WHEN ONE PERSON LEARNS OR SHOULD LEARN OF THE CONSEQUENCES OF DEPORTATION. THAT'S WHY THE COURT CAN HAVE THIS TWO-YEAR RULE --.

JUSTICE: IT SEEMS TO ME THAT THIS WHOLE THING IS JUST, AND I RECORDIZE THAT I DISSENTED ON THIS VERY BASIS, BUT HOW IN THE WORLD, PRACTICALLY SPEAKING, ARE YOU GOING TO OBJECTIVELY BE ABLE TO COME UP WITH A POINT IN TIME WHEN SOMEONE S

HOULD HE HAVE KNOWN THAT THEY WERE SUBJECT TO DEPORTATION ? IT SEEMS TO ME THAT I
S JUST FRAUGHT WITH INEQUITABLE ADMINISTRATION.

IN THIS CASE WHEN THE CLIENT WAS INFORMED BY THE IMMIGRATION LAWYER THAT THAT WAS
THE EFFECT OF THE DENIAL.

JUSTICE: THEN HE KNEW IT OR SHOULD HAVE KNOWN IT.

MOST OF THESE PEOPLE ARE NOT EDUCATED PEOPLE , JUSTICE WELLS.

JUSTICE: WHEN YOU COME INTO ANY COUNTRY, YOU REALIZE THERE IS A BASIC CONDITION OF
ENTRY INTO THE COUNTRY YOU'VE GOT TO ABIDE BY THE LAWS AND RULES OF THE NATION,
RIGHT?

OF COURSE.

JUSTICE: AND IF YOU VIOLATE IT THEN ANYONE WITH ANY COMMON SENSE KNOWS THAT IF YOU
HAVE A SPECIAL PERMISSION TO BE IN A COUNTRY IF YOU VIOLATE THAT COUNTRY'S LAW
THAT IT MIGHT SUBJECT YOU TO BEING AT THE TIME YOU ENTERED THIS PLEA IN THIS CASE
, WOULD NOT ANY PERSON WITH ANY COMMON SENSE UNDERSTAND THAT THEY VIOLATED
THE LAW IN THE UNITED STATES AND WERE HERE ON A WAITH SOME PERMISSION THAT IT
MIGHT IMPACT THEIR ABILITY TO REMAIN ?

IN THAT LIMITED CASE BUT MOST OF THE TIME THIS MAY INVOLVE ILLEGAL RESIDENTS
WHO ARE HERE AND WAITING TO BECOME NATURALIZED. A CONVICTION OF A DRUG CONVI
CTION OR A DOMESTIC VIOLENCE MISDEMEANOR WOULD SUBJECT A LEGAL RESIDENT TO
DEPORTATION AND THEY WOULDN'T KNOW, JUDGE , UNLESS THEY GOT THE - -.

JUSTICE: WHEN YOUR CLIENT ENTERED THIS PLEA WAY BACK WHEN.

YES, SIR.

JUSTICE: WAS HE SUBJECT TO BE DEPORTED BECAUSE OF THAT PLEA AT THAT TIME?

YES , THERE ARE TWO BASES FOR IT. IF HE WAS INVOLVING HIMSELF WITH THE
CONVICTION OF MORAL TURPITUDE WHICH IS THE ASSAULT AND BATTERY CONVICTION, WHICH
IS UNDER IMMIGRATION LAW DETERMINED TO BE A CRIME NOT OF A SINGLE SCHEME OF
CONTACT. UNDER THAT STANDARD , YES . OR ALTERNATIVELY , WHEN HIS WAIVER WAS
DENIED DOWN THE LINE HE ALSO BECAME DEPORTABLE SO THE ANSWER TO THE QUESTION IS
YES, SIR, AND I THINK IF YOU LOOK AT MY FOOTNOTE IN MY BRIEF IT SPEAKS TO THAT .

JUSTICE: DID HE HAVE A RIGHT TO THE WAIVER OR IS THE WAIVER A DISCRETIONARY?

THE WAIVER IS DISCRETIONARY BUT AS I POINT OUT UNDER HCF R 212.7 DO YOU MUST SHOW AN
EXTREMELY UNUSUAL HARDSHIP TO HAVE THE WAIVER GRANTED SO THE FACT THAT EVEN THOUGH
IT IS DISCRETIONARY REALLY DOESN'T COME INTO PLAY. IT IS REALLY NOT GOING TO
GET THAT WAIVER GRANTED BECAUSE OF THE CONVICTION IN THIS CASE.

JUSTICE: LET ME ASK YOU HOW DOES THE COUNSEL'S CONVERSATIONS WITH YOUR CLIENT
ALSO ENTER INTO THE CALCULUS IN DETERMINING WHETHER THE CLIENT KNEW. THERE MAY
BE CASES WHERE THE JUDGE DOES NOT ADVISE THE DEFENDANT OF THE PORTABILITY BUT THE
COUNSEL DOES AND , THEREFORE, THE CLIENT DID KNOW ABOUT IT AND THERE WAS NO
PREJUDICE . DOES THE STATE NOW HAVE TO PRESENT THE DEFENSE COUNSEL AT TRIAL TO
SHOW THAT THE DEFENDANT ACTUALLY DID KNOW ABOUT THE POSSIBILITY OF THE DEPOR
TABILITY?

I THINK THE JUSTICE IS ON THE DEFENDANT TO PRODUCE -- BECAUSE THE RULE IN PART I S IT IS TWO YEARS FROM THE TIME YOU LEARNED OR SHOULD HAVE LEARNED OF THE HEAR T OF DEPORTATION.

JUSTICE: SO PART OF THAT ONUS AT THE EVIDENTIARY HEARING IS TO PRESENT DEFENSE COUNSEL TO SAY THAT DEFENDANT DID NOT ADVISE HIM OF THE POSSIBILITY IS IT ?

THE DEFENDANT CAN SAY WITH CREDIBILITY FINDINGS BEING WHAT THEY ARE, PRUDENT DEFENSE COUNSEL WOULD WANT TO PRESENT A LAWYER TO PRESENT SUCH TESTIMONY.

JUSTICE: BUT THE DEFENDANT CAN SAY IT HIMSELF IF HE CHOOSES?

IF HE CHOOSES BUT, OF COURSE, PRUDENT DEFENSE COUNSEL WOULD WANT TO BET REST THAT TESTIMONY IN AN APPROPRIATE WAY. I ALSO WANTED TO SPEAK --.

CHIEF JUSTICE: YOU ARE OUT OF YOUR TIME. DID YOU WANT TO MAKE ONE CONCLUDING COMMENT ?

WITH REGARD TO THE WAIVER WE STILL THINK THERE IS A WAIVER WITH REGARD TO THE STATE'S FAILURE TO RAISE THESE ISSUES BELOW, WE THINK THAT IF THE PETITION WAS INSUFFICIENT IT CAN BE DISMISSED WITHOUT PREJUDICE AND AS TO THE JURISDICTIONAL ISSUE, WE AGAIN WOULD ASK THE COURT TO ALLOW US TO AMEND OR TO EXTEND THE TIME TO FILE. WE DID FILE A NOTICE TO APPEAL BASED ON MISTAKE IN INTERPRETATION BY THE TRIAL COURT. THANK YOU VERY MUCH.

CHIEF JUSTICE: WE'LL GIVE YOU A MINUTE.

OH, OKAY. AS TO THE DEFENSE'S WAIVER ARGUMENT, THE CLAIM THAT I WAIVED THE CLAIM THAT THE MOTION WAS BASICALLY INSUFFICIENT, I DIDN'T WAIVE THOSE UNDER THE RIGHT FOR ANY REASON RULE. THE TRIAL COURT INITIALLY DENIED THE MOTION AT THE 4TH DISTRICT THEY SHOULD HAVE BROUGHT THOSE UNDER THE --.

CHIEF JUSTICE: THEY SHOULD HAVE WHAT?

THEY SHOULD HAVE FOUND THE PETITIONS SUFFICIENT UNDER THE RIGHT FOR ANY REASON RULE.

CHIEF JUSTICE: DID YOU RAISE ALL OF THOSE POINTS IN THE BRIEF TO THE APPELLATE COURT?

WELL, ACTUALLY THERE WASN'T A BRIEF. WHAT HAPPENED IN THIS CASE IS THAT IN THE 4TH DC WHEN THERE IS A SUMMARY DENIAL YOU PROBABLY KNOW THIS, JUSTICE PARIENTE, THE Y DON'T -- THE STATE DOESN'T RESPOND UNLESS IT IS ORDERED TO RESPOND AND IN THIS CASE THE OPINION CAME OUT WITHOUT IN REVERSE WITHOUT ORDER IN THE STATE'S RESPONSE OF WHAT HAPPENED IS THAT I THEN FILED SOMETHING CALLED I BELIEVE I CALLED IT A MOTION FOR REHEARING OR -- REHEARING OR A MOTION FOR A CHANGE TO RESPOND AND I DID RAISE IT IN THAT, YES. CAN I SAY ONE MORE THING?

CHIEF JUSTICE: ONE MORE THING.

ALSO IF THIS COURT WERE TO FIND IT DIDN'T HAVE JURISDICTION THERE IS ANOTHER CASE BEFORE THIS COURT, THE GATSON CASE, YOU ARE PROBABLY AWARE OF THAT, AND OBVIOUSLY THAT'S BASED ON CONFLICT WITH THIS CASE BUT ARGUABLY YOU COULD FIND, POSSIBLY FIND JURISDICTION BASED ON MISAPPLICATION OF PEART.

CHIEF JUSTICE: YOU WANT US TO KEEP THIS CASE BECAUSE YOU DON'T WANT THE 4TH DISTRICT

CASE TO STAND ?

RIGHT. I'M JUST SAYING THAT. ALSO THERE IS A CASE THAT DEFENSE COUNSEL CALLED ALGUNO OUT OF THE 4TH AND AGAIN I'M NOT CONCEDEING IT BUT IT MAY BE A BASIS FOR YOU TO TAKE JURISDICTION IN GATSON IF YOU DO.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT WILL TAKE ITS MORNING RECESS OF 15 MINUTES