

THE LAST CASE ON THE COURT'S
AGENDA TODAY IS THE STATE V.
FLEMING.

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

I'LL READ YOU THE PROCEDURAL
HISTORY OF MR. FLEMING'S CASE.
IT'S CERTAINLY THE LEAST
COMPLICATED OF THE CASES.

[INAUDIBLE]

>> FROM THE RESENTENCING, YES.
PART OF THE REASON WE GOT INTO
THIS WAS THE BELATED APPEAL WAS
GRANTED FROM THE RECENT GAINS
AND THAT SORT OF HOW WE GET TO
YOUR KIND IS SO LATE RELATIVELY
SPEAKING.

SO HE, MR. FLEMING, WAS
SENTENCED IN JUNE 1997.
HE TOOK A DIRECT APPEAL AND HIS
DECISIONS BECAME FINAL SOMEWHERE
AROUND AUGUST OF 1999.
APPRENDI WAS NOT DECIDED UNTIL
2000 IN JUNE 2001 TO 3800 A
MOTION.

APPARENTLY THE CIRCUIT COURT
DIDN'T TAKE IT SO WELL AND
REQUIRED A REVERSAL AND REMAINS
BACK DOWN TO CONSIDERATION OF
THE MOTION.

HE WAS PRESENTED ON APRIL 3,
2003.

HE TOOK NO APPEAL AT THE
APPOINTED TIME.

BUT NOW WE'RE HERE -- THAT'S
WHERE WE GET TO THE BELATED
APPEAL.

BUT IT JUMPS WAY FOR THEIR HEAD
AND THEN WE HAVE THE 3800 MOTION
IN A 3800 B2 MOTION DURING THAT.
THAT RELATES THAT.

>> ASCENDANCY AS A FINAL SO BOTH AFTER APPRENDI AND BLAKELY.

>> SO I'LL JUST FAST-FORWARD TO THE TAIL END I'LL COME BACK TO THE BLAKELY ISSUE.

IN THIS CASE WE DON'T HAVE A BLAKELY VIOLATION OR A APPRENDI VIOLATION BECAUSE WE HAVE A FINDING THAT THE INHERENT IN THE VERDICT.

THIS IS AGGRAVATED BATTERY WITH A FIREARM FOR HE SHOT OFF THE VICTIMS EAR AND WE HAVE A CONFESSION BY COUNSEL AT THE RESENTENCING HEARING THAT THE INJURY WAS SEVERE.

SO THE FINDING IS INHERENT IN THIS COURT FOUND --
[INAUDIBLE]

>> RIGHT, THE FIRST DISTRICT IRONICALLY FOUND THE ASSESSMENT OF THE 40-POINT INJURY WAS INHERENT IN THE VERDICT, BUT THE DEPARTURE, WHICH IS SPECIFICALLY FOUND IN THE JURY VERDICT, THEY WENT AND HAD AND SAID IT BEEN FILED.

>>
[INAUDIBLE]

>> THE JURY VERDICT -- I HAVE IT.
I'M SORRY.

HE WAS GUILTY TO CHARGES AGGRAVATED BATTERY CAUSING GREAT BODILY HARM, PERMANENT DISABILITY OR PERMANENT DISFIGUREMENT.

THAT'S HOW THE VERDICT READ. THEN THE DEPARTURE REASON, WHICH HAPPENS TO BE A DEPARTURE REASON TO, WAS THE VICTIM SUFFERED PERMANENT PHYSICAL INJURY.

>> AM I MISSING SOMETHING THERE?
>> IT CREATES GREAT BODILY HARM,
PERMANENT DISFIGUREMENT AND THE
ADMISSION BY COUNSEL AT THE
SENTENCING HEARING WAS THAT THE
INJURY WAS SEVERE AND REMOVED
HALF OF THE EAR REQUIRING
RECONSTRUCTIVE SURGERY.

[INAUDIBLE]

>> I THINK IT WAS IN A
DISJUNCTIVE.

I'M SORRY, IT IS.

SORRY, YOUR HONOR.

[INAUDIBLE]

>> GREAT BODILY HARM, PERMANENT
DISABILITY OR PERMANENT
DISFIGUREMENT.

AND FIND THE NUMBER TWO HAS
SUFFERED PERMANENT INJURY.

[INAUDIBLE]

AND AGAIN AS SOME MAY SEE, YOU
HAVE AN ADMISISON AT THE
SENTENCING HEARING THAT IS
TURNED TO SCROLL DOWN TO IT VERY
QUICKLY.

DURING THE RESENTENCING HEARING,
THERE WAS SPECIFICALLY SAID
THERE WAS NO DISPUTE OF THE
INJURY, BUT ARGUED -- AMOUNT OF
THE FULL TEXT OF IT.

IT'S FOUND ON PAGE 106 OF THE
RECORD THAT IT WAS NOT PROPERLY
SCORE BECAUSE IT WAS THOUGHT
OTHERWISE ON THE SCORE SHEET.
THE STATE'S ASSERTION AS DEFINED
IN BY THE JURY.

>> IT DOESN'T MATCH THE
LANGUAGE.

MAYBE IT'S SEMANTICS --

[INAUDIBLE]

>> OR SEVERITY POINTS WAS BASED
ON CASE LAW SEEMED FOR THE GREAT

BODILY HARM OR PERMANENT
DISFIGUREMENT UNDER THE CASE LAW
IN FLORIDA BY USF WITH 40
POINTS.

>> RIGHT NOW THE APPELLATE
COURT'S DECISION SAYS ALL COURT
ROUNDS RATED TO UPPER DEPARTURE.

>> CAROL MOSELEY HANDLED THIS
FOR THE STATE.

>> THAT'S WHAT THE APPELLATE
DECISION SAYS.

>> THAT'S WHAT IT SAYS, BUT THAT
I WOULD HAVE BEEN.

>> AGAIN, WHERE HER FOR THE
SIGNIFICANT CONFERENCE.

THE STATE MUST WANT US TO DECIDE
THIS ISSUE AT SOME POINT AND IF
WE'VE GOT ON THE FOUR CORNERS
THEY CONFLICT WITH THE OTHER
APPELLATE COURT, ISN'T THIS --
YOU CAN MAKE YOUR BEST ARGUMENT
THAT BLAKELY AND APPRENDI, WHICH
IS WHY YOU'VE BEEN MAKING DO NOT
APPLY TO RESENTENCING, TO
RESENTENCING OR TO SENTENCING.
OR CAN YOU SAY THAT?

>> YOUR HONOR, WE GO BACK TO THE
LANGUAGE USED AGAIN AS WE STATED
PREVIOUSLY THAT IS THE
CONVICTION DATE THAT IS THE
DETERMINING FACTOR.

SO YOU'RE BACK FOR MR. FLEMING,
THEY'LL BE JUNE 30 -- I'M SORRY
AUGUST 2, 1999.

>> THIS CLEARLY PRESENTS THE
ISSUE THAT WE DID NOT DECIDE IN
GALINDEZ, CORRECT?

>> YES.

>> AND SO YOUR ANSWER WAS YES,
CORRECT?

[INAUDIBLE]

>> YOU ALSO TALKED AROUND IT IN THE CONVICTION HERE BEFORE SENTENCING AND AFTER THAT YOU GO BY THE CONVICTION DATE.

>> CORRECT.

>> YOU'RE NOT ABANDONING YOUR ARGUMENT THAT THEY FAILED TO PRESERVE, NOT ADEQUATELY PRESERVE THIS ISSUE IN THE RESENTENCING?

>> NO, WE'RE NOT ABANDONING IT.

>> SO THAT ARGUMENT IS THE RESENTENCING PRECEDING AND THESE THINGS ARE IN ISSUE.

NOBODY SAYS WE NEED A JURY TO MAKE THOSE FINDINGS.

YOU CAN DO THAT WITHOUT A JURY.

NOBODY SAID THAT.

THEN, THEY FILED A 3000 B MOTION AND RAISED THE APPRENDI BLAKELY.

UNDER JACKSON, THAT'S A SORT OF THING THAT IS FIRST SENTENCING PRACTICE IS NOT CONSERVATIVE LAWYER AND THEIR 3000 B, THEY SHOULD'VE SAID SOMETHING THAT THE SENTENCING PROCEEDING, IS THAT CORRECT?

>> SO BASICALLY OBVIOUS TAG CASES WE'VE DISCUSSED THIS WHEN IT SHOULD BE RESOLVED ON ANOTHER BASIS RATHER THAN THE LEGAL ISSUE WE THOUGHT WE WERE GOING TO DO, IS THAT A FAIR STATEMENT?

>> OF THE FIRST AND THAT THERE ARE NUMEROUS OTHER WAYS TO RESOLVE EACH AND EVERY ONE OF THESE CASES.

[INAUDIBLE]

[INAUDIBLE]

>> YOU DID, BUT I'VE SINCE BEEN LIKELY HAPPY ABLE TO -- BUSH IS

ONE OF THEM.

>> WHERE IS THAT FROM?

FROM THE FIRST.

[INAUDIBLE]

>> I'M NOT AWARE OF ANY.

>> THERE'S A REAL PROBLEM

BECAUSE OF THE CASES WHERE THE
DEFENDANT ARE PRO SE IN IT FOR
THEIR DISTRICTS ARE DECIDING THE
CONTRARY.

YOU'VE GOT A REAL ISSUE WITH THE
CREDIBILITY OF THE
ADMINISTRATION OF JUSTICE.

>> I WILL TELL YOU WHY BUSH DOES
HAVE AN ACCOUNT FROM THE PUBLIC
DEFENDERS OFFICE.

THE OTHER ONE IS THE WRONG
JOHNSON.

HE IS PRO SE.

>> BUT EVEN IF WE END UP
DECIDING THIS ISSUE, THAT THE
FIRST DISTRICT IS RIGHT OR ONE
OF HIS RUN, UNLESS WE DECIDE
THAT HER OPINION WILL HAVE
RETROACTIVE EFFECTS SOME OF
THOSE CASES FROM THE OTHER
APPELLATE COURTS WHERE THEY
DECIDED DIFFERENTLY WILL BE
DEFIANT.

EVEN IF WE DECIDE THIS ISSUE
WHETHER OUR DECISIONS SHOULD BE
GIVEN RETROACTIVE EFFECT.

>> I THINK THAT'S TRUE TO SOME
EXTENT.

MOST OF THOSE AGAIN HAVE BEEN
DEALT WITH ANONYMOUS ERROR.
SO AGAIN THE DECISION WOULDN'T
AFFECT ANY OF THOSE.

I THINK THERE'S ANOTHER CLAUSE
THAT SAYS THAT MIGHT HAVE WITHIN
THE OTHER AVAILABLE REMEDIES

EITHER 3851 AND AFFECT APPELLATE CLAIM.

THERE ARE SOME OTHERS.

RAY BUSH.

>> WHAT'S THE OTHER ONE?

>> SARRON JOHNSON.

[INAUDIBLE]

>> NO, I KNOW THERE'S APPOINTED COUNSEL FROM THE PUBLIC DEFENDERS OFFICE.

I CAN'T SAY WHETHER THAT TROUBLES OF BURNOUT GOES ALL THOSE PLEADINGS WERE TYPEWRITTEN AND THAT'S GENERALLY A GOOD PRESENTATION THAT IS NOT A PROSE BUT I DIDN'T.

AND I REMEMBER HEARING SOME MOTION BACK AND FORTH WITH ONE OF THE COUNCIL MEMBERS.

[INAUDIBLE]

>> SARRON JOHNSON AND PRODUCERS A POSTCONVICTION CASE.

ROY BUSH I AM NOT -- I DON'T TAKE YEARS, BUT IF YOU TAKE A LOOK AT THE FILE YOU CAN TELL IT'S IN A DIFFERENT PROCEDURAL POSTEL AND INVOLVES A PROBATIONARY HEARING.

>> WHILE THAT'S PROBABLY A WHOLE DIFFERENT --

>> ON THIS ISSUE WHETHER WAS PRESERVED PROPERLY IN THIS CASE AND I AGREE WITH JACKSON AS HE DIDN'T INTEND FOR THE EXCEPTION TO BE ANYTHING, HAVE WE HELD WORTH IN THE COURT DECIDED -- WE DECIDED THAT APPRENDI ISN'T RETROACTIVE, BUT THE DENIAL OF THE RIGHT INJURY TRIAL, HAVE WE IN THE APPRENDI BLAKELY CONTACTS SAY THAT SOMETHING THAT CAN BE WAIVED BY NOT HAVING WAVED IT IN

A TIMELY WAY WHEN THE APPELLATE COURT ELECTED THAT ISSUE.

>> I'M NOT AWARE UNLESS I CITED A CASE IN A BRIEF OF ANY FEDERAL OR OTHER STATE CASE.

THAT DOESN'T MEAN I THERE IS NOT ONE.

IT'S A HUGE BODY OF LAW NOW.

IT GROWS EXPONENTIALLY EVERY TIME I GO TO LOOK LOOK AT IT.

I DON'T KNOW ANY OTHER STATUS FOUND ANYTHING ON PRESERVATION TYPE GROUND.

>> EITHER WAY.

>> EITHER WAY.

>> THAT ARGUMENT WHETHER THAT WOULD BE FUNDAMENTAL ERROR WE HAVE IN A FUTURE BRIEF THAT ISSUE.

>> NO, BUT WE KNOW IT'S NOT FUNDAMENTAL ERROR.

>> UNDER OUR ISSUE, WE SAY THAT CAN BE RAISED -- WE HAVE IT SO THAT IT MUST BE RAISED, BUT IN THE FUTURE IF THE JUDGES OF FOR THE DEFENDANT THE RIGHT TO JURY TRIAL AND THE FACTS ARE FOUND, IT ISN'T THE DEFENDANT THAT DIFFER MEANINGFULLY REQUEST JURY TRIAL OR IS THE TRIAL COURT CHARGED WITH THE RESPONSIBILITY IN CONJUNCTION WITH THE STATE?

>> I TAKE BACK MY PREVIOUS STATEMENT.

I WASN'T THINKING OF ROSEN CAN TELL YOU DISCUSSED SUBSEQUENTLY.

IN ROSEN, TAKING A LITTLE BIT DIFFERENT ISSUE, THE COURT I THINK IT'S THE FIFTH DISTRICT DECIDED IN THE BRIEF AND LITTLE, I HOPE I DECIDED TO BRIEF IN THIS CASE AS KEEPING THEM ALL STRAIGHT.

THAT'S THE PROBLEM.

THE COURT IN ROSEN FOUND THAT
BLAKELY AND APPRENDI -- APPRENDI
ERRORS SHOULD BE PRESERVED.

>> I MEAN, IN ONE WAY IT MAKES
SENSE TO ME THAT IT'S THE RIGHT
OF THE DEFENDANT THAT THEY CAN
WAVE.

BUT NORMALLY WHEN THERE'S A
RIVER OF THE RIGHT TO TRIAL BY
JURY, THERE'S GOT TO BE AN
KNOWING LABOR NOT JUST A FAILURE
TO RESERVE IT.

SO THAT'S WHY I'M CONCERNED THAT
IT'S A DIRECT APPEAL THAT CAN BE
LOOKED AT.

SO THE DEFENDANT MADE A KNOWING
WAIVER OF THE RIGHT TO CHARM A
JURY.

>> WELL AGAIN, HE DID MAKE A
WAIVER OF THE RATE.

HE EXPRESSLY INTENDED TO GO FOR
THE JURY TRIAL AND ON A JURY
TRIAL.

AND HE COULD DO -- YOU SHOULD
DOES UNASSERTIVE DURING THAT
JURY TRIAL THAT IF YOU DON'T
HAVE THE SPECIFIC FINDINGS, THEN
YOU DON'T GET WHAT YOU WANT.

>> AGAIN, THE IDEA THAT IF THE
DEFENDANTS RESPONSIBILITY IS NOT
SOME OF THE SUPREME COURT HAS
SAID TO BE A FIRMLY ASSERTED BY
THE DEFENDANT OR THE FUTURE
THESES WERE NOT GOING TO THE
SAME THERE'S A PROCEDURE WHERE
THE RULES CHANGE FOR THE
DEFENDANT IS THE ONE THAT HAS
TO -- IT'S THE STATE'S BURDEN
THAT THEY'RE GOING TO ASK OR
ENHANCEMENT OF A SENTENCE BASED
ON THE FACT, THE JURY IS GOT TO

FIND IT.

THEY CAN'T SAY WHAT THE
DEFENDANT DID NOT ASK FOR THAT.
THE DEFENDANT DOESN'T KNOW WHICH
FACTS THEY ARE GOING TO RELY ON.
ISN'T IT THE STATE'S BURDEN TO
BRING THAT FORTH?

>> AGAIN, IF YOU LOOK AT THE
ROSEN COURT'S OPINION THEY RULE
BASED ON THE OBJECTION CASELAW.
AND THE PURPOSE OF CONTEMPORARY
SUBJUNCTIVE IS BY CRAFTY
LITIGANTS AND OBJECTIVE ERROR TO
A TRIAL.

>> ISN'T THE RIGHT TO A JURY
TRIAL TREATED UNDER DIFFERENT
RULES OF PROCEDURE AND
PRESERVATION OF THOSE ISSUES?

>> AGAIN, THE RIGHT TO JURY
TRIAL.

HE DENIED HIS RIGHTS TO JURY
TRIAL BUT HE WASN'T DENIED THE
RIGHT TO JURY TRIAL.

HE HAD A JURY TRIAL.

>> SEVERAL DOZEN THINGS MAY BE
ENTITLED TO PRIVACY ISSUES.

THAT'S A DESIGN FOR YOUR TRIAL
AND THAT SHOULD'VE HAPPENED
DURING THE TRIAL.

ISN'T BOTH OF THOSE?

>> AGAIN, IF WE DON'T INSTRUCT
AN ELEMENT OF A CLAIM WE DON'T
SUDDENLY REGRET REVERSAL ON JURY
CHARGE GONE THROUGH TO IT UNDER
THE CONTEMPORARY OBJECTION RULE.

>> I'M NOT THAT THIS FUNDAMENTAL
ERROR.

>>

[INAUDIBLE]

ARE YOU TELLING ME THAT IT'S THE
DEFENDANT GOT BETTER SAY YOU
NEED TO PUT THAT FINDING IN THE

SENTENCE.

IT'S WHEN THE DEFENDANT WANTS TO
BENEFIT IS ONE THING.

BUT WHEN THE STATE IS ASKING FOR
THE BENEFIT, THAT'S EXACTLY WHAT
APPROACHING BLAKELY ARE SAYING.
THERE'S GOT TO BE A BLAKELY
DETERMINATION.

>> I UNDERSTAND THE DECISION BUT
TO GREAT RELIEF YOU HAVE TO
OBJECT TO SEND THE EVEN THOUGH
THE TRIAL ERROR THAT OCCURS
DURING TRIAL IT BECOMES MANIFEST
AT THE SENTENCING PROCEEDING.
HE DIDN'T OBJECT THE SENTENCING
PROCEEDING OUT ON THESE GROUNDS.
THE RESULT IS A MATTER WHICH WAY
YOU LOOK AT IT UNDER THE FACTS
OF THIS TYPE OF CASE AND UNDER
SOME OF THE CASES REFERRED TO
DISCUSS TODAY, THE CONCLUSION
HAS TO BE THAT HE DIDN'T
PRESERVE IT PROPERLY.
AND WITH THAT I'LL RESERVE THE
REMAINDER OF MY TIME FOR
REBUTTAL.

>> MAY I PLEASE THE COURT.

MY NAME IS DAVID HUGHES
REPRESENTING MR. CHRISTIAN
FLEMING.

AND SO DID THE TWO ARGUMENTS AND
HAVE GREATER APPRECIATION OF MY
CASES AS I DON'T SEE REALLY BIG
PROBLEM HERE BECAUSE JUSTICE
CANADY, GOING BACK TO YOUR
POSTCONVICTION MONTH STATEMENT
AND WAS BROUGHT UP BY MR. MILL'S
EARLIER YOU TALK ABOUT 3800 A
YOU'RE TALKING ABOUT BRINGING
AND THE LEGAL CENTER THAT
ANYTIME TIME, DATES, WEEKS,
MONTHS.

>> YOU WOULD AGREE IN A NOTE OR
HERE TO REPEAL THAT IN A PRINTED
ERROR THAT LINKS THE ERROR IS
NOT GOING UNDER THIS 3800 A.
WE COULD EVEN HOLD IT WAS
RETROACTIVE IN THE PRIMARY.
SO THAT'S NOT THE KIND OF AIR
THAT MAKES THE SENTENCE IS
ILLEGAL THAT CAN BE RAISED AT
ANY TIME.

>> WELL, I DON'T KNOW.

>> I'LL TELL YOU THE ANSWER IS
YOU CAN'T.

>> LET ME SAY THIS IS WHAT
HAPPENS WHEN YOU GO TO A BRING
RESENTENCING AND SO THE STATE OF
FLUX IS DOING AT THE TIME OF THE
RECEPTIVE THING APPLIES.

>> SOME OF US, WE AGREE WITH YOU
ON THAT.

LET'S TALK ABOUT THEN THIS ISSUE
AGAIN THE QUESTION IS DO WE TALK
ABOUT THE ISSUE.

>> IT WAS PRESERVED.

HE FOLLOWED A 3800 B.

>> WHEN I READ JACKSON COMING IN
THE THINGS IN JACKSON OR CAN BE
COVERED UNDER 3800 B TO IT IN A
PRESERVATION ERROR COULD BE
PACKED UP -- I'LL BE HONEST WITH
YOU.

PRESERVATION WAS NOT RAISED BY
THE STATE HERE.

AND SO I DID NOT REALLY LOOK AT
IT THAT SERIOUSLY BECAUSE FOR ME
THE 3800 B2 WAS NOT RULED ON
FRANKLY BY THE TRIAL COURT.

IT WAS CONSIDERED BY THE PRINTED
BLAKELY ISSUE WAS CONSIDERED AT
THE FIRST DCA THAT'S WHY THEY
REVERSED IT.

AT NO TIME TO I SEE IN ANY ANY

OF THE STATES --

>> IN FAIRNESS TO THIS DAY, AND
LOOKING AT THE VERDICT.

THEY SAY A LOT OF THINGS ALL
OVER THE PLACE, BUT THEY DO SAY
INITIALLY IN THE CASE THEY MADE
NO BASED ON THE APPRENDI.

>> IT WAS ON THE 3800 B2.

>> THEN THEY ALSO SAY, DON'T
THEY ARGUE HERE -- DON'T THEY
ARGUE THAT JACKSON THINKS IT'S
NO GOOD.

OR AM I GETTING THIS MIXED UP?

>> LIKE I SAY, IF THEY SAID THAT
I WISH I WOULD'VE RESPONDED TO
IT, BUT I DON'T RECALL SAYING
THAT.

I MAY BE WRONG, YOUR HONOR.

>> THEY MAKE THAT ARGUMENT
BEFORE THE FIRST DISTRICT?

>> I DON'T KNOW.

>> IT WOULD HAVE TO PRESERVE --
[INAUDIBLE]

>> THAT CERTAINLY WASN'T
MENTIONED BY THE FIRST DCA IN
THEIR OPINION.

[INAUDIBLE]

>> WELL, THAT'S TRUE, BUT LIKE
I SAY WHEN I GET THE BRIEFS
HERE, OF THEIR INITIAL BRIEFS IN
THIS CASE I DON'T FIND ANY
OBJECTION ON JACKSON BROWNE.

[INAUDIBLE]

[INAUDIBLE]

>> WELL, THE JUDGE ALSO HAD FOUR
REASONS FOR DEPARTING.

>> I WOULD LIKE TO HEAR THE REAL
WORLD ISSUE.

WHAT WAS HIS ORIGINAL SENTENCE
BEFORE HAND?

>> I THOUGHT IT WAS 20 YEARS.
IT WAS 25.

[INAUDIBLE]

WHAT WOULD HIS SENTENCE BE
WITHOUT THIS DEPARTURE?

>> I DON'T KNOW.

>> A VERY SIGNIFICANT
DIFFERENCE.

EVEN THOUGH, WOULD THAT BE
INCLUDING IN THAT 55 MONTHS,
DOES NOT INCLUDE THE 40-POINT
EXTENSION OR NOT?

[INAUDIBLE]

>> IT DOES.

SO WHAT WAS THE DEPARTURE

SENTENCE WAS WHAT?

>> ABOUT 10 YEARS.

>> SO HE AT LEAST GOT --

>> I'M SORRY, HE GOT FIVE YEARS
AND WHEN THEY APPROVED THE 40
POINTS, THE COURT GAVE THEM 20
POINTS WITH THOSE FOR THEIR
DEPARTURES.

>> WHAT DOES A JUDGE
RESENTENCING DO?

>> 20 YEARS.

>> AND WHAT WOULD SHE HAVE ON
DEPARTURE GROUNDS

>> SEEMED LIKE TO WOULD'VE BEEN
55 TO 92.

>> WHAT WOULD BE LEFT TO REVERSE
ON?

IS THE STATE CONCEDED ERROR ON
ALL FOREGROUNDS RELATED TO
DEPARTURE WHICH IS WHAT THEY
SAY.

BUT ARE YOU SAYING THAT THE
STATEMENT ERROR IN THE
ASSESSMENT OF 40-POINT THAT
THEIR VICTIM INJURY IS SOMETHING
THAT THE JURY -- YOU'VE GOT TO
KNOW WHETHER THEY ARE SAYING IT
OR NOT.

WHAT'S THE RELEASE HEREAS
ENFORCE?

HE DIDN'T GET A JURY TRIAL IN
RESENTENCING, BUT THEY VERY
STATED HE CAN'T GET UPWARD
DEPARTURE GROUND AND IT LOOKS AT
THE 40 POINTS ARE INHERENT IN
WHAT WAS FOUND.

>> THAT'S A GOOD POINT.

ONCE YOU POINT THAT OUT, WHAT
SENTENCE WE ARE ASKING FOR THAT
HE WOULD'VE GOTTEN RELEASED
UNDER BLAKELY AND APPRENDI.
I HADN'T QUITE LOOK AT IT THAT

WAY. SO I THINK YOU OUGHT TO JUST
SIMPLY AFFIRM AND SCHLEP IT GO
ON ITS WAY INTO EVERY SENTENCE
WITHOUT THOSE FOUR REASONS.

>> SO HE GOES BACK AND
RESENTENCE.

>> BUT THEN THE BLAKELY APPRENDI
ISSUE IS COMPLETELY --

[INAUDIBLE]

>> WE ARE NOT LAUGHING AT THE
SITUATION.

I KNOW EVERYONE IS TRYING TO BE
EARNEST IN THIS AND IT'S REALLY
UNFORTUNATE SITUATION.

IN THE COURT CAN'T TAKE THE
CASES.

AND SO, WHEN THE COURTS WE HAD
TO BE DEALING WITH THE CASE IN
FRONT OF US.

>> YOU KNOW, I THINK OF THE
FIRST DCA IS CORRECT, BLAKELY
AND APPRENDI APPLY.

WITH THE FIRST DCA IS SAYING YOU
HAVE ANOTHER MINI TRIAL ON THOSE
FOUR ISSUES ARE FOR DEPARTURE
REASONS.

THEY WERE SAYING, WHAT THE
STATES CONFESSION, THERE'S
REALLY NO NEED TO DO THAT
BECAUSE THE STATE CONCEDED THOSE
RAISES ARE VALID SO WE HAVE
CONSTRAINTS WITHIN THE CONFINES.

>>

[INAUDIBLE]

>> WHEN THE STATE CONCEDED THOSE
FOUR REASONS, THERE IS REALLY NO
ISSUE.

REALLY FIND I'LL LET YOU MENTION
THERE'S NO ISSUE BECAUSE THE
STATE CONCEDED THOSE
FOREGROUNDS, SO WHAT DO WE DO?

>> LET ME GO BACK --

[INAUDIBLE]

>> LET ME TAKE YOU BACK TO THE PRESERVATION ISSUE.

YOU DIDN'T SAY THAT I'VE BEEN REALLY BEEN RAISED AT GREAT LENGTH, I'VE GOT A BRIEF.

STARTING ON PAGE 32 GOOD STARTS AND GOES ON FOR SEVERAL PAGES WHERE THEY END BY SAYING FLEMING BY 3800 B2 IS LIKELY IN EFFICIENT AND MUCH INTO A DISCUSSION OF JACKSON AND THE FLEMING CLAIMS ARE NOT PRESERVED BY RULE 3800 B2 MOTION.

WHAT IS WRONG WITH THAT?

>> AT THE FIRST DCA RULE A CONCERTED THOSE FOUR ROUNDS.

>> ISN'T WHAT THEY CONCEDED IS THE STATE OF THE LAW IN THE FIRST DISTRICT?

>> STATE CONCEDED ERROR ON ALL FOUR ROUNDS.

>> I KNOW WHAT THE PHYSICIAN SAYS.

>> WE'VE GOT TO DEAL WITH PIPE THINK AT THAT POINT IN THE WAY THE FIRST DISTRICT HAD DECIDED ISAAC, ISN'T WHAT THEY WERE CONCEDING?

>> LET'S JUST GO WITH THE BIG CONCEDING.

[INAUDIBLE]

[INAUDIBLE]

[INAUDIBLE]

[INAUDIBLE]

[INAUDIBLE]

BY THE JURY OR THAT A JURY

[INAUDIBLE]

THE RESENTENCING OR THE DEPARTURES

[INAUDIBLE]

>> LET ME SEE IF I --

>> AND ASKING WHETHER APPRENDI SHOULD'VE BEEN FOLLOWED. AND IT SEEMS TO ME IN THIS CASE BUT THAT WOULD MEAN THAT HE WOULD GET A CHERRY TRIAL ON THE THREE DEPARTURES. OR IF ANY OF THEM END UP BEING CONCEDED TO, THEN I DO NEED IS ONE DEPARTURE REASON TO UPWARDLY DEPART, CORRECT?

>> IT'S NOT A VERY DISCRETIONARY RULING SO I GUESS THAT THE LATTER PART OF YOUR QUESTION. I THINK YOU NEED TO TURN BACK TO THE COURT AND MOTIVATE THE DISCRETIONARY RULING. TO LET THEM MAKE A DETERMINATION WHETHER THEY WOULD'VE SENTENCED HIM AS HEAVILY AS IT DID WITHOUT THOSE OTHER THREE FACTORS.

>> CAN I TAKE YOU BACK TO THE QUESTION I WAS TRYING TO ASK ABOUT THE 3800 B2. LET'S PUT ALL THIS ASIDE. I UNDERSTAND WHAT YOU SAID ABOUT ALL THAT.

PUTTING ALL THAT ASIDE, CAN AN APPRENDI BLAKELY ISSUE BE RAISED BY WAY OF 3800 B2?

>> LIKE I WAS RESPONDING TO JUSTICE PARIENTE, THAT WAS NOT PRESENTED TO MY MIND BY THIS CASE BECAUSE --

>> IT WAS STATED VERY CLEARLY. >> IF YOU REJECT THEN, I THINK JACKSON CAN BECAUSE IT'S ONE OF THOSE ERRORS THAT IT HEARS THE SENTENCEING ITSELF.

IT'S PART OF THE SENTENCING. >> DOES THE RIGHT TO COUNSEL IN HERE IN THIS ROOM?

>> HE HAS A RIGHT TO COUNSEL.

>> WHAT I'M AGAIN GOING BACK TO THIS ISSUE OF ONE IS YOU DIDN'T RESPOND IN THE BRIEF AS I'M UNDERSTANDING BECAUSE WE ONLY HAVE TWO IF WE WANT TO CONSIDER THE B2 ISSUE.

>> CLEARLY IF YOU WANTED TO DO THAT, I'D BE GLAD TO DO THAT.

>> THE OTHER QUESTION IS WHICH I DO TAKE A NARROW GROUP OF ISSUE THAT COULD REALLY BE RESOLVED THERE IS A SCORESHEET ERROR OR THEY DIDN'T CHECK THIS BOX.

ISSUES THAT COULD BE IF THERE WAS NO COUNSEL SENTENCING, WHETHER THAT THE B2, THAT COULDN'T BE REACHED ON DIRECT APPEAL WITHOUT HAVING OBSERVED. BUT WE GOT TO GET INTO THAT QUESTION TO OTHERS BEING RAISED THE FIRST TIME OF APPEALS AFTER B2 AND IT WAS AN OPPORTUNITY TO ADDRESS THAT.

>> IN ANY EVENT, I THINK THE POINTS I WANT TO MAKE IS 3800.8 ALLOWS YOU TO RAISE STANDARDS AT ANY TIME IT TAKES A LOT HAS EXISTED AT THAT TIME.

>> ARE YOU CONCERNED THAT APPRENDI ERRORS OR BLAKELY ERRORS RESULT IN THE LEGAL IN ILLEGAL SENTENCES UNDER 3800 A?

>> YES.

>> WE DON'T NEED TO DECIDE THAT BIGGER ISSUE.

>> NOT IN THIS CASE.

IT WAS SENT BACK.

THANK YOU VERY MUCH.

>> JUST BRIEFLY, YOUR HONOR, WE DID NOT CONCEDE ERROR WITH THE EXCEPTION TO GROUND FOR WHICH IS LOWER SEVEN AND EIGHT DEFENSE.

THAT'S THE ONLY THING WE
CONCEDED ERROR TO.
THE OTHER ONES WE CAN STATE THE
STATE OF THE LAW IS WE HAVE
ISAAC.

AS A RESULT UNDER ISAAC, THE COURSE DECISION IS PREDETERMINED, WHICH IS WHAT YOU SAID.

THERE WAS NO CONFESSION OF THE OTHER THREE DEPARTURE REASONS WERE NOT VALID.

>> SO WHAT YOU'RE CONCEDED IS THAT APPRENDI BLAKELY WOULD APPLY, THE OTHER THREE DEPARTURE REASONS WOULD BE FINED AS REASON THAT THE JURY?

>> OR I MUST ERROR UNDER GALINDEZ.

>> SO AT LEAST THAT'S WHAT IT SAYS.

AT LEAST WE GOT THAT SQUARELY PRESENTED.

>> NOW WITH THE 300 B TO PAY RAISE THAT ISSUE AND THE APPELLATE COURT DECIDED THIS THEY BRING ON APPEAL TO THE FIRST DISTRICT, THAT IT WAS NOT PROPERLY PRESERVED BECAUSE IT SHOULD'VE BEEN RAISED --

>> THE STAY WAS NOT REQUIRED TO BECAUSE THE STATE WAS NOT THE APPELLANT.

WITH THE APPELLEE BELOW SO THE STATE DOESN'T HAVE A PRESERVATION REQUIREMENT BEFORE IT.

>> BUT IF THEY'RE MAKING A ARGUMENT AND A APPRENDI OR BLAKELY APPLIED THEY LOVE TO SAY THAT WASN'T OBSERVED.

>> WE MIGHT LOVE TO SAY.

THE STATE OF THE LAW THAT WAS IT DID.

>> JUSTIFIES THE APPELLATE COURT OUTSIDE.

>> THERE WAS A PRESERVATION

ISSUE.

WE WERE NOT THE APPELLANT AND
BECAUSE OF THE STATE OF THE LAW,
THE STATE OF THE LAW IN THIS
CASE -- IT'S ESSENTIALLY A
REASON TO AFFIRM.

TO REVERSE, I'M SORRY.

>> WHEN THAT ISSUE WAS BEING
BRIEFED, BEFORE THE APPELLANT
COURT ON WHETHER BLAKELY OR
APPRENDI SHOULD APPLY, THE
ANSWER BRIEFS I COULD DOES NOT
PROPERLY BEFORE THE COURT
BECAUSE THE ISSUE WAS PRESERVED.

>> I DON'T KNOW.

I DON'T HAVE THE BRIEF WAS TO
HEAR FROM THE LOWER COURT.
WHAT I CAN TELL YOU IS JACKSON
DIDN'T COME OUT UNTIL LONG AFTER
HIS BRIEF TRIP SAID THE ISSUE OF
3800 B2 WOULD NOT HAVE BEEN AS
JACKSON WAS WRITTEN HERE EVEN
AVAILABLE.

[INAUDIBLE]

>> CORRECT.

>> CAN YOU ASSERT IT BACK AND
LEVEL THOUGH WE ARE REVIEWING?

>> I'D BE HAPPY TO BRIEF THE
ISSUE.

I DON'T KNOW.

>> HOW IS VERY TIPSY COACHMAN
ISSUE IS NOT DECIDING DEPARTURE
REASONS WITHOUT A JURY FINDING,
WHAT TIPSY COACHMAN WOULD ALLOW
YOU TO AFFIRM ON ALTERNATIVE
GROUND THAT THE TRIAL COURT
DIDN'T EARN.

>> THE TRIAL COURT FOUND IF I
REMEMBER CORRECTLY GOING BACK,
THEY FOUND APPRENDI DIDN'T APPLY
AT ALL, WHICH THE STATE'S
ARGUMENT THAT THE CONVICTION

DATE IS WHAT CONTROLS UNDER
HUGHES.

SO THAT'S WHERE THAT COMES FROM.

AS A RESULT, THEIR DECISION
WOULD BE TO BE AFFIRMED.

>> BEST ACHIEVEMENT SAY NO
MORNING AS YOU WANT TO GO US TO
THE OTHER FOUR DISTRICTS NUMBER
DON'T HAVE A RESENTENCING HERE,
CORRECT?

>> NO, THAT BLAKELY AND APPRENDI
DON'T APPLY TO A RESENTENCING
LIKE THIS.

>> LIKE THIS ONE IS A
MINISTERIAL ONE.

IT DOESN'T APPLY TO
RESENTENCING.

>> THIS PARTICULAR RIGHT DOES
NOT ATTACH TO THE RESENTENCING
BECAUSE THE CONVICTION CONTROL
SIGHTINGS FOR THE PROPOSITION.
AND WITH THAT, I THANK OF COURT
FOR ITS INDULGENCE.

>> THANK YOU FOR ARGUMENTS HERE
TODAY.

THE COURT IS NOW IN RECESS.

>> PLEASE RISE.