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**Willie Earl Luton v. State of Florida**

**SC06-1800**

PLEAS RISE,,

>> GOOD MORNING GOOD MORNING.  
SUPREME COURT, PLEASE BE SEAT\$\$  
SEATED.,,

GOOD MORNING THE NEXT CASE ON  
OUR CALENDAR THIS MORNING IS  
LUTON LUTOP VERSUS STATE OF IN  
ORDER.

>> THAT YOU YOUR HONOR MAIRPT  
ANTHONY PLUSTO ON BEHALF OF  
WILLIE LUTON RULE 3.8 --  
MOTION CAN BE USED TO CORRECT  
ANY TYPE OF SENTENCING ERROR.  
THOSE ARE THE WORDS OF THIS  
COURT.

WORDS OF THIS COURT, IN THE IN  
AN CREATED THAT RULE, AND OVER  
THE YEARS, THE EIGHT YEARS,  
SINCE YOUR HONOR -- THIS RULE  
WHOSE NEVER BEEN AMENDED IN  
ANY WAY TO RESTRICT THE TYPE  
OF SENTENCING ERRORS THAT CAN  
BE CONSIDERED.

>> BUT DO YOU AGREE, THAT AT  
THE TIME WE CAME UP WITH THE  
RULE WE WERE REALLY THINKING  
OF ERRORS, THAT OCCURRED IN  
THE SENTENCING PROCESS,  
BECAUSE THOSE WERE THE ONES  
THAT WERE REALLY BOTHERSOME  
FOR THE APPELLATE COURT.

>> I THINK THAT WAS CERTAINLY  
A KEY CONSIDERATION, BUT THIS  
COURT TOOK PAINS TO TALK ABOUT  
HOW DIFFERENT ERRORS HAD BEEN  
TREATED DIFFERENTLY, AND THEN  
CAME TO THE CONCLUSION THAT WE  
ARE DOING THIS TO PRESERVE ANY  
TYPE OF SENTENCING ERROR, AND  
ELSEWHERE IN THE APPROXIMATE  
POSITIVE.

>> DID HAVE TO DO WITH  
ANYTHING THAT OCCURRED DURING  
THE TRIAL PROCEED WHEN WE  
REVIEWED ALL THOSE ERRORS?

>> WELL, I DON'T KNOW THAT IT

OCCURRED DURING THE TRIAL PROCESS, BUT I SUBMIT TO YOU, THAT WHAT HAPPENED HERE DIDN'T OCCUR DURING THE TRIAL PROCESS EITHER.

>> BUT YOU ARE ASKING FOR SOMETHING THAT WOULD SAY THAT SOMETHING THAT A -- A FINDING THAT NEEDED TO BE MADE DURING THE GUILT CAUSE OF THE CASE.

>> I'M SORRY THAT WHAT NEEDS.

>> DURING THE THAT IS THAT THERE NEEDED TO BE A JURY FINDING OF SOMETHING DURING THE GUILT PHASE THAT AFFECTED THE SENTENCE.

>> NOT NECESSARILY, IT COULD HAVE BEEN DONE THAT WAY OR IT COULD BE DECENT BIFURCATED PROCEDURE SIMILAR TO CAPITAL CASE THE IT PROCEDURE STATE SUGGESTION IN BRIEF THE TO ME THAT IS AN IMPORTANT POINTED THAT YOU ARE MAKING, BECAUSE WE HAD A CASE,\$\$ --

>> GEL INDEZ, THE DEFENSE ATTORNEY IN THAT CASE SAID DOUBLE JEOPARDY WOULD PROHIBIT A JURY FROM NOW BEING IMPANELED\$\$

IMPANELED, BECAUSE THE JURY HAD ALREADY DETERMINED, GUILT, NOW, I DISAGREE WITH THAT, BECAUSE THE ARGUMENT WAS THAT THE JURY HAD NOT DETERMINED THAT SENTENCING ISSUE, AND THEREFORE DOUBLE JEOPARDY COULD NOT APPLY.

BUT YOU CONCEDE THAT A POSTCONVICTION JURY O "-- JURY SENTENCING JURY COULD BE ENPANELED TO DETERMINE THOSE SENTENCING ISSUES.

>> I WOULD AGREE, THAT IT COULD BE IMPANELED FOR THE VERY REASONS THAT IS IN YOUR O CONCURRING OPINION I WOULD ALSO POINT OUT IT DOESN'T NECESSARILY HAVE TO BE UNDER THE FACTS OF THIS CASE, AND UNDER THE FACTS OF THIS ISSUE. FOR TWO REASONS, FIRST OF ALL, YOU CAN TAKE THE SAME JURY AND THEN JUST MOV P TO A SECOND

PHASE, LIKE YOU DO IN A CAPITAL CASE, THAT IS NUMBER ONE, NUMBER TWO, DEPENDING ON HOW THIS COURT DEALS WITH THE MERITS OF THIS CLAIM, AND I'M GOING TO OF COURSE TAKE THE POSITION THAT ALL THE FACTORS YOU -- REQUIRED IN HABITUAL VIOLENT OFFENDER STATUE HAVE TO BE PROVEN TO JURY ONE STANDS OUT THE LENGTH OF TIME, IF YOU FIND IT IS JUST THE LENGTH OF TIME, BETWEEN THE PRIOR CONVICTION, AND THE CURRENT CONVICTION, THAT COULD BE DONE BY CHECKOFF BOX ON THE VERDICT TOMORROW.

-- FORM.

>> WHERE DOES THE HARMLESS ERROR, ISSUE COME INTO PLAY, BECAUSE WE ALSO HELD THAT IF BLAKELY ERROR CAN BE HARMLESS, SO IF THAT IS THE CASE, WHY COULD YOU RAISE IT ON A 3800 B, UNTIL THE THIRD DCWHATEVER DCA TERMS THAT -- DETERMINED THE ERROR WAS HARM FULL THAT IT NOW WOULD REQUIRE, A JURY SENTENCING\$\$ SENTENCING?

>> WELL, I WOULD SUGGEST, THAT IN ORDER TO REACH THE QUESTION OF HARMLESS ERROR INHERENT IN HARMLESS ERROR IS THAT THERE IS ERROR.

IT IS A TYPE OF ERROR.

THEREFORE\$\$

THEREFORE, IN ORDINARY TO GET TO THAT POINT YOU HAVE TO CONCLUDE FIRST OF ALL THAT IT HAS BEEN PRESERVED, AND SECOND OF ALL THAT IT IS ERROR, SO IF WE GET TO THE POINT HARMLESS ERROR, THEN WE HAVE ALREADY ESTABLISHED THOSE TWO, AND INHERENT IN BLASHING THOSE THAT IT WAS PROPERLY HE PRESERVEED IN 3.800 MOTION.

>> ASSUME FOR THE MOMENT COULD YOU RAISE IT ON 3800 BMOTION WOULD YOU FILE THAT MOTION BEFORE THE JUDGE -- CORRECT.

>> COULD THE JUDGE DEN -- DETERMINE WELL YES WERE YOU

ENTITLED TO THIS, BUT I FIND IT HARMLESS, BECAUSE THE EVIDENCE WAS OVERWHELMING A JURY WOULD HAVE FOUND THAT --

>> WELL, I THINK, UNDER THIS \$\$ COURT'S IN ANY GEL INZEZ AND SUPREME COURT OPINION.

>> -- RIGHT, I THINK, CLEARLY, THERE IS THE CONCEPT OF HARMLESS ERROR RECOGNIZED, I WOULD SUBMIT, HOWEVER, THAT EVEN AT THAT STAGE, WE WOULD HAVE TO TRANSFER THE STANDARD TO THAT THE \$\$STATE'S BURDEN PROVING IT IS HARMLESS BEYOND A REASONABLE DOUBT OF COURSE IF THE TRIAL JUDGE MADE THAT FINDING THAT WOULD BE SUBJECT TO REVIEW ON APPEAL.

>> I WOULD LIKE TO GO BACK TO YOUR NOTION, THAT THE JURY COULD HAVE MADE THESE KINDS OF FINDINGS\$\$

FINDINGS, THAT YOU THINK SHOULD BE MADE, BY A JURY, IN THE GUILT PHASE IF WE ASSUME THAT THE THERE IS NO EVIDENCE SUBMITTED ABOUT THE \$\$ DEFENDANT'S PRIOR HISTORY,CH THAT CERTAINLY IN ORDER TO HAVE A CHECKOFF BOX, AS TO WHETHER OR NOT THAT PRIOR CONVICTION OCCURRED, WITHIN FIVE\$\$

FIVE YEARS, OF THIS THIS POSSIBLE NEW CONVICTION, THE JURY WOULD HAVE TO KNOW THAT THERE WAS A PRIOR CONVICTION. WOULD THEY NOT?

>> NO THEY WOULD NOT. AND IF I DIDN'T MAKE MY POSITION CLEAR, LET ME LET ME BACKTRACK A LITTLE BIT. I'M NOT SAKE THAT ALL OF THE FACTORS COULD BE DONE DURING THE GUILT PHASE FOR INSTANCE THE LACK OF PARDON, THE FACT THAT IT HASN'T BEEN SET ASIDE THAT COULD NOT BE DONE IN THE GUILT PHASE BECAUSE THAT INHERENTLY INFORMS THEM OF THE CONVICTION\$\$

CONVICTION. BUT, THE FIVE YEARS.

>> WHY, WHY -- A LACK OF A PARDON\$\$  
PARDON, I MEAN THAT IS SUCH A STATIC CONDITION, AS OPPOSED TO TO SAY IN WHAT IS IT AP\$\$ APPRENDE WHEN OR NOT REPAIR\$\$ REPAIRSHAL ANIMUS THAT LED TO THIS CRIME IS, MEAN THAT IS A SORT OF FACT, THAT -- IT IS NOT JUST THERE, SO THERE IS SOMETHING FOR A TRIER OF FACT TO MAKE A DETERMINATION, OF. WHERE\$\$  
WHEREAS, WHETHER OR NOT, THIS CONVICTION OCCURRED ON A CERTAIN DATE, ACCORDING TO THE RECORDS\$\$  
RECORDS, IS NOT SOMETHING THAT EITHER DID OR DIDN'T, SO I'M HAVING A HARD TIME EVEN FOLLOWING YOUR ARGUMENT THAT THESE ARE THE KINDS OF FACTS THAT NEED TO BE DETERMINED BY A JURY.

>> OKAY.

>> BECAUSE THERE REALLY -- THERE OR THEY ARE NOT THERE  
>> I THINK THE FACTS FALL IN MY MINDP THEY FALL O O INTO TWO DIFFERENT CATEGORIES, ONE IS THE LACK OF -- LACK OF A PARDON LACK OF A CONVICTION, LACK OF A -- OVER TURNING OF THE CONVICTION, THAT SHOULD BE LOOKED AT IN ONE CATEGORY. THE AMOUNT OF TIME, SHOULD BE WELCOMED AT IN ANOTHER CATEGORY.

SO, SINCE YOU ARE --

>> WHY?

>> BECAUSE -- THE LACK OF PARDON\$\$  
PARDON, AND THE LACK OF OVER TURNING\$\$  
TURNING, ARE MATTERS THAT RELATE TO THE PRIOR CONVICTION\$\$ CONVICTION.

AND THE CASES THE STATE CITES TALK ABOUT SITUATIONS WHERE THEY ARE DIRECTLY DERIVERTIVE FROM THAT CAN VICKION OR IN -- INTIMATELY RELATED THOSE ARE --

>> YOU ARE PLEADING THAT THOSE

O DO NOT HAVE TO BE OH --  
>> I'M NOT CONCEDED IT I'M  
SAYING THE STATE HAS MUCH  
STRONGER ARGUMENT AS TO THOSE  
I'M SAYING THE U.S. SUPREME  
COURT 1240\$\$SHOULD BE TAKEN AT FACE  
WHEN IT SAYS FACT OF  
CONVICTION BUT THAT  
APPROXIMATE THE STATES  
ARGUMENT THAT THESE THINGS  
FALL IN SORT OF A PER NUMRA OF  
THAT CONVICTION A MUCHL  
STRONGER ARGUMENT THAN THEIR  
ARGUMENT AS TO LENGTH OF TIME,  
AND HERE IS WHY.

THE LENGTH OF TIME, REQUIRES  
PROOF TWO OF THINGS, IT  
REQUIRES PROOF THAT THE PRIOR  
CONVICTION OR DATE OF RELEASE  
OCCURRED ON SUCH AND SUCH A  
DATE, BUT IT ALSO REQUIRES,  
PROOF THAT THIS CRIME, THE NEW  
CRIME, OCCURRED ON A CERTAIN  
DATE, AND THE PROOF  
NECESSARILY TO ESTABLISH THAT  
SECOND PART OF IT,  
INDEPENDENCE STRICT MATTERS  
RELATING TO THE NEW OFFICE IT  
HE'S OFFENSE NO RELATION TO  
OLD OFFENSE.

>> THAT IS NOT INHERENT --  
>> I THINK WE ARING ASKING THE  
SAME QUESTIONS ISN'T THAT  
SOMETHING THE JURY DETERMINED  
IN THIS CASE?

>> NO.  
DID NOT.

THINKS SOMETHING I'M SAYING  
THAT THIS ASPECT OF IT COULD  
BE DETERMINED BY A CHECKOFF  
BOX, IT WAS NOT DETERMINED IN  
THIS CASE, BECAUSE THE JURY  
WAS NOT INSTRUCTED, AS TO THE  
DATE OF THE CRIME, THE VERDICT  
FORM DID NOT CONTAIN ANYTHING  
REFERRING TO THE DATE OF -- OF  
THE CRIME, AND --

>> BUT THE INFORMATION DID DID  
IT NOT?

>> WELL, THE INFORMATION --  
HASN'T\$\$  
HASN'T.

>> WAS THE INFORMATION SENT  
BACK WITH THE JURY.

>> WELL.

>> -- MAY WHATEVER THE DATE  
WAS --

>> THE INFORMATION SAID ON OR  
ABOUT.

>> RIGHT

>> DID NOT SPECIFY A SPECIFIC  
DATE.

I TRIED TO DETERMINE FROM THE  
RECORD WHETHER THE INFORMATION  
WENT BACK TO THE JURY AND HAVE  
BEEN UNABLE TO SEE AN  
INDICATION FOR CERTAIN ONE WAY  
OR THE OTHER.

I BELIEVE IT IS LIKELY THAT IT  
DID NOT, BECAUSE THE  
INFORMATION THIS CASE WAS  
TRIED ON CONTAINED FOUR COUNTS\$\$  
COUNTS, THE STATE DID NOT  
PROCEED ON TWO OF THOSE  
COUNTS.

SO THEY CERTAINLY WOULDN'T  
HAVE SENT THAT INFORMATION  
BACK IF THERE WAS SOME SORT OF  
A REDACTED INFORMATION I WOULD  
ASSUME THERE O WOULD HAVE BEEN  
DISCUSSION OF THAT.

>> THE TESTIMONY IN THE  
ARGUMENT OF COUNSEL IN WHAT  
ANY DISPUTE ON THE DATE.

>> THERE WAS NO DISPUTE THAT I  
REMEMBER --

>> PART OF THE ELEMENT THAT  
THE STATE HAS TO PROOF IF IT  
IS IN THE INFORMATION THAT THE  
CRIME OCCURRED OH, ON SUCH AND  
ZAICHT JURY MAY NOT HAVE TO  
MAKE INDEPENDENT FINDING BUTH  
PART -- OF.

>> THAT IS KEY, BECAUSE WHAT  
BLAKELY TALKS ABOUT IT MUST BE  
DECIDED BY A JURY SO HE.

>> IS THIS A 6TH AMENDMENT  
RIGHT?\$\$  
RIGHT\$\$

THAT YOU ARE ALINGING?

.  
>> WELL, IT IS -- PARTLY 6TH  
AMENDMENT PARTLY DO YOU  
PROCESS PARTLY JUST.

>> --

>> BECAUSE, DID IT ATTACH AT  
THE TIME THE RIGHT TO JURY  
TRIAL ATTACHED AT THE

BEGINNING WHAT I WANT YOU TO  
SPEAK TO IS PREFERRINGS ISSUE  
IF THIS -- PRESERVATION IF 6TH  
AMENDMENT RIGHT YOU HAD RIGHT  
TO JURY DIDN'T RAISE UNTIL  
AFTER THE JURY WAS CHARGED IS  
IT NOT WAIVE WAIVED.

>> I SUGGEST NOT99WAIVED FOR A  
COUPLE REASONS FIRST OF ALL  
THE BORNS CASE OUT OF MINIMUM  
SOUGHT HE MINNESOTA I CITE IN  
REPLY BRIEF THEY TALKED ABOUT  
THE FACT THAT THE NEEDS TO BE  
A WAIVER ON THE RECORD, OF THE  
RIGHT TO A JURY TRIAL BUT  
SENDING OF ALL, EVEN IF WE PUT  
THAT ASIDE, IT IS PRESERVED BY  
THE 3800 MOTION, THAT IS THE  
PROCEDURE THIS COURT ADOPTED  
TO PRFSH SENTENCING ERRORS  
THROUGHOUT THE THE FOR YOU  
AMENDMENTS CASES THIS COURT  
SAID REPEATEDLY THE PRIME  
REASON WE ARE DOING THIS IS TO  
GIVE THE DEFENSE A CHANCE TO  
PRESERVE UNPRESERVED ERROR.

>> ISN'T IT TRUE EVEN UNDER  
BLAKELY OTHER CASES IN FLORIDA  
THE JUDGE DOES SENTENCING, BUT  
IF THE JUDGE IS GOING TO RELY  
ON A FACT THAT UNDER BLAKE IT  
NEEDS TO BE BOUND BY THE JURY  
THAT JURY NEEDS TO MAKE THAT  
FINDING THE JURY IS NOT  
PARTICIPATING IN SENTENCING IT  
IS THE JUDGE THAT DOES THE  
SENTENCING\$\$  
SENTENCING.

.  
>> THAT IS CORRECT.

>> IS THAT NOT CORRECT?

>> THE JUDGE US THE ONE THAT  
IMPOSED SENTENCE HE IS, YES.

>> LET'S GO TO -- THE HARMLESS  
ERROR BECAUSE I THINK, EVEN  
THOUGH FRANKLY, 3800 B IS NOT  
INTENDED TO DEAL WITH THIS,  
THIS APPRENDI ISSUE JUST -- I  
BELIEVE WAS NOT ON A RADAR  
SCREEN BUT LET'S ASSUME THAT  
OF YOU -- YOU HAVE GOT A GOOD  
ARGUMENT THAT IT SAYS ANY  
SENTENCING ERROR.  
I'M IN TERMS OF THIS HARMLESS

ERROR NOT ONLY TO ME, DOES IT  
FLOW FROM THE PRIOR CONVICTION\$\$  
CONVICTION, BUT THERE IS NO  
DISPUTE AS TO THE DATE THAT  
THIS INCIDENT OCCURRED, SO  
AREN'T WE REALLY AS FAR AS  
HARMLESS ERROR ISN'T THAT YOUR  
WEAKEST LINK IN THIS, IN OTHER  
WORDS\$\$

WORDS, YOU CAN GET THROUGH THE  
FIRST AND SECOND HOOPS, AND  
MAYBE THAT IS YOU KNOW, THAT  
IS SOMEWHAT SIGNIFICANT BUT  
THEN, WE REALLY GOT TO LOOK  
AND SAY, ARE WE SERIOUSLY  
TALKING ABOUT HAVING A JURY  
EMBEANEM PANELED TO DECIDED  
THE ISSUE OF THE DATE THE  
OFFENSE OCCURRED?

IS THAT WHAT YOU ARE ASKING?  
>> THAT IS CORRECT, THAT WHAT  
IS I'M ASKING.

>> AND YOU ARE SAYING, "YOUR  
COURT APPOINTED IN THIS --

>> I'M FARMED OUT FROM THE  
PUBLIC \$\$

PUBLIC DEFENDER'S OFFICE.

>> THAT THAT IS IN GOOD FAITH  
THERE IS A DISPUTE AS TO THE  
DATE THAT THE INCIDENT  
OCCURRED\$\$

OCCURRED?

>> I DON'T THINK THERE IS  
ANYTHING IN THE RECORD THAT  
MAY DISPUTE WHEN THE INCIDENT  
OCCURS I THINK THERE IS  
SOMETHING THAT GIVES US REASON  
AS TO HOW THE JURY MAY HAVE  
INTERPRETED WHAT THE FIVE YEAR  
PROVISION --

>> SO MAYBE IF THERE REALIZE  
IS AN ISSUE ABOUT THAT, THEN  
MAYBE TRIAL COUNSEL WAS  
INEFFECTIVE FOR NOT ARGUING  
THAT TO THE JUDGE, BECAUSE  
THAT IS CLEARLY AFTER --  
ASCERTAINABLE\$\$

ASCERTAINABLE, UNLIKE  
SOMETHING IS JOIST JUSTICE  
SAID COULD BE VARIABLE LIKE A  
RACIALLY ANIMUS NATURE OF THE  
CRIME, BUT, WHY WASN'T THAT  
THEN RAISED TO THE JUDGE?

>> WELL, THE -- DATES, ON

WHICH VARIOUS THINGS OCCURRED  
ARE GENERALLY GOING TO BE  
REASONBLY ASCERTAINABLE I WILL  
GRANT YOU, THAT ALTHOUGH EVENT  
-- EVEN THAT IS NOT  
NECESSARILY THE CASE, BECAUSE  
I CAN POINT OUT TO YOU FOR  
INSTANCE, IN THE \$CLERK'S  
RECORD THAT WAS SENT UP HERE  
WITH THIS CASE THEY HAVE THE  
WRONG FILING DATES FOR ALL OF  
THE BRIEFS IN THE THIRD  
DISTRICT SO IF YOU LOOK AT  
THAT IT DOESN'T NECESSARILY  
MEAN THAT THAT IS THE CASE.  
BUT, WHAT I'M POINTING OUT IN  
THE HARMLESS ERROR ARGUMENT,  
IN RESPONSE TO THE \$STATE'S  
HARMLESS ERROR ARGUMENT FIRST  
OF ALL I SUBMIT THE STATE  
WAIVED THAT THEY NEVER RAISED  
IT IN DISTRICT COURT THEREFORE  
SHOULDN'T BE BROUGHT UP AS NEW  
ISSUE HERE AT THIS POINT BUT  
INDEPENDENT OF THAT, IF YOU  
LOOK AT THE STATUTE, THE  
STATUTE IS SUSCEPTIBLE TO TWO  
DIFFERENT INTERPRETATIONS AS  
TO WHEN THAT FIVE YEAR  
PROVISION MIGHT KICK IN.  
THE STATUTE.  
REFERS TO IT BEING THAT THE  
MUST BE WITHIN FIEFRN YEARS OF  
THE DATE OF CONVICTION, FIVE  
YEARS -- OF THE LAST  
ENUMERATED FELONY, OR FIVE  
YEARS OF HIS RELEASE FROM A  
SENTENCE IMPOSED AS THE A  
RESULT OF PRIOR -- CONVICTION.  
>> I DON'T WANT TO QUIBBLE BUT  
IF THAT IS THE CASE YOU CAN  
BRING THAT UP AS A SENTENCING  
ERROR, AND -- IN 3800 THEN YOU  
SHOULDN'T HAVE WOULDN'T KWAFL  
FOR THIS STATUS -- THAT IS NOT  
ANYTHING WE NEED TO HE IMPANEL  
A JURY.  
>> REMIND YOU YOU ARE WELL  
INTO YOUR REBUTTAL SO IF YOU  
WANT TO ANSWER AND SAVE  
SOMETIME YOU NEED TO --  
>> THANK YOU I WILL.  
>> I WILL, THE POINT I'M  
MAKING WITH THIS THAT IS

BECAUSE THAT COULD BE  
INTERPRETED TWO DIFFERENT WAYS  
IF THIS WENT BEFORE A JURY WE  
DON'T KNOW WHICH WAY JURY  
WOULD WHEN INTERPRETED IT  
COULD HAVE INTERPPRITED  
FIVERABLE TO MR. LUTON  
THEREFORE THE STATE HAS NOT  
MET BURDEN SHOWING BEYOND A  
REASONABLE DOUBT THIS HARMLESS\$\$  
HARMLESS.

>> BUT, DOESN'T THAT STATUTE  
REALLY MEAN EITHER/OR, OR YOU  
HAVE, WHAT DOES THAT STATUTE\$\$  
STATUTE --

>> I THINK, THAT IS SOMETHING  
THAT HASN'T BEEN DETERMINED,  
AND SINCE IT HASN'T BEEN  
DETERMINED, WE ARE GOING TO  
ASSUME I THINK THAT A JURY  
INSTRUCTION WOULD TRACK THE  
STATUTORY LANGUAGE AND WHAT  
I'M SAYING IS THERE IS ROOM  
FOR THE JURY TO HAVE INTERPRET\$\$  
INTERPRETED EITHER WAY AND AS  
LONG AS THAT --

>> BUT REAL PROBLEM I HAVE  
WITH THIS ARGUMENT IS THAT WE  
ARE GOING TO END UP IF WE  
ACCEPT YOUR ARGUMENT, WE ARE  
GOING TO END UP WITH ALL KINDS  
OF -- ADDITIONAL JURY  
DETERMINATIONS OF A MYRIAD OF  
THINGS THAT JUST -- GOING TO  
BOG THE SYSTEM DOWN.

>> YOUR HONOR THE ANSWER TO  
THAT IS VERY SIMPLE, ALL THE  
POLICY REASONS THE STATE  
ASSERT\$\$  
ASSERTED, AND PRESUMABLY THAT  
IS WHAT THE THIRD DISTRICT  
MEANT WHEN THEY SAID LOMG\$\$  
LOMGICALLY BECAUSE THEY DIDN'T  
REALLY EXPLAIN THEIR REASONING\$\$  
REASONING, THOSE MAY BE  
REASONS TO CHANGE THE RULE,  
BUT THE FACT IS THE RULE SAID  
WHAT IT SAID, AT THE TIME THIS  
OCCURRED\$\$  
OCCURRED, MR. LUTON COMPLIED  
WITH THE RULE, AND, THEREFORE,  
HE IS IN COMPLIANCE SHOULD NOT  
BE PENALIZED.

>> WHI WHICH RULE.

>> RULE 3800B.

AND IF IT NEEDS TO BE CHANGED,  
AND ZWRIS PARIENTE.

>> I'M THINKING MORE MERITS  
THESE KINDS OF ISSUES WHETHER  
OR NOT EVERY LITTLE THING,  
NEEDS TO GO BEFORE A JURY,  
WHEN THOSE FACTS, ARE READILY  
ASCERTAINABLE ON THE RECORD,  
WITHOUT THESE KINDS OF JURY  
DETERMINATIONS\$\$  
DETERMINATIONS, AND I JUST  
DON'T SEE -- WANTING TO  
IMPANEL JURIES TO MAKE THOSE  
KINDS OF FINDINGS.

>> FIRST OF ALL, I THINK IT I  
CLEAR FROM BLAKELY BOOKER AP\$\$  
APRENDI ET AL EVERYTHING  
EXCEPT FACT OF PRIOR  
CONVICTION DOES HAVE TO GO TO  
JURY I THINK THE ISSUE IN THIS  
CASE WHAT IS EMCOMPASSED BY  
TERM FACT OF A PRIOR  
CONVICTION\$\$  
CONVICTION.

>> THAT'S CORRECT.

>> SO I THINK THAT UNDER FACTS  
OF THIS CASE CERTAINLY THE  
TIME LINE IS NOT-ENCOMPASSED  
BY THAT BECAUSE IT IS BASED  
SOLELY ON THE FACTS RELATING  
TO SECOND OR NOT SOLELY BUT  
ONE OF THE TWO KEY AS PENTHS  
BASE THE ENDS FACTS OF THE  
SECOND CONVICTION NOT THE  
FIRST ONE.

>> MAY IT PLEASE THE COURT.

>> PULL MICROPHONE DOWN,  
PLEASE.

>> LINDA KATZ OF THE ATTORNEY  
GENERAL'S OFFICE, HERE ON  
BEHALF OF THE STATE OF IN  
ORDER, THE RESPONDENT IN THIS  
ACTION\$\$  
ACTION.

FIRST WE LOOK AT PRESERVATION,  
IN TERMS OF PRESERVATION AS  
THE STATE RAISED IN ITS  
RESPONSE WHEN ASKED TO DO SO,  
BY THE THIRD DISTRICT COURT OF  
APPEAL UPON REHEARING, APRENDI  
WAS THE APPROPRIATELY CLAIM TO  
HAVE BEEN MADE TO PRESERVE  
THIS ISSUE, FOR PIPELINE.

BLAKELY HAS TO DO WITH SENTENCING GUIDELINES, THIS DEFENDANT WAS COMMITTED WHO IS FENCE AT TIME WHEN THE CRIMINAL PUN MEANT CODE WAS IN EFFECT.

AT THAT POINT, APRENDI DEALT WITH STATUTORY MAXIMUMS.

>> DIDN'T THE THIRD DISTRICT IN THIS CASE, TELL THE DEFENDANT, TO FILE THIS AND SO ARE WE HERE ON SOMETHING THAT REALLY US THE LAW OF THE CASE HERE -- BECAUSE THEY HAD TOO MANY HIM TO -- THEY TOLL HIM TO FILE THE -- EIGHT -- 3800B TYPE MOTION.

>> THEY DID NOT TELL HIM, WHAT HAPPENED PROCEDURALLY WAS THAT BLAKELY CAME OUT A DAY AFTER THE DEFENDANT HAD FILED HIS BRIEF IN THE THIRD DISTRICT COURT OF APPEAL, NOW, THIS IS NOT THE POINT THAT I WANT TO FOCUS ON BUT IN TERMS OF TIMELINESS THE STATE DOES QUESTION WHETHER OR NOT THE DISTRICT COURT CREATED A LEGAL FICTION BY ALLOWING THE DEFENDANT TO WITHDRAW HIS BRIEF, SO THAT HE COULD FILE HIS 3.800 B2 BUT THE DEFENDANT SOUGHT TO FILE THAT IN LIGHT OF BLAKELY IN TERMS OF PRESERVATION BLAKELY WAS THE WRONG CLAIM YOU HAVE TO MAKE A SPECIFIC CLAIM IF YOU WANT TO REVIEW A CLAIM I WANT HAS TO BE ON THE SAME THING YOU OBJECTED TO BELOW.

>> YOU ARE SAYING BECAUSE HE OBJECTED ON BASIS OF APRENDI INSTEAD OF BLAININGLY FLOO REVERSE HE OBJECTED, ON BLAKES\$ BLAKELY, HOWEVER, APRENDI. WAS IN EXISTENCE.

>> IT DID IT CLARIFIED IT WILL BUT IT DEALT WITH GUIDELINES, AND THIS CASE, THAT WAS NOT A HABITUAL SENTENCING GUYS WOULD NOT HAVE BEEN A GUIDELINES CAN CASE THE GUIDELINES NO LONGER EXIST\$\$ EXISTED, WHAT I'M SUGGESTING.

>> ARE YOU SAYING, IN THIS  
3800B THE LAWYER -- IF THE  
LAWYER DIDN'T RAISE THE --  
PRENDI INSTEAD OF BLAKELY.

>> CORRECT.

>> AREN'T WE REALLY AGAIN NOW,  
SO ARE YOU AGREEING, THOUGH,  
THAT IF HE HAD SAID, APRENDI  
IN 3800B, THAT THAT BY ITS --  
PLAIN LANGUAGE WOULD APPLY TO  
PRESERVE THE ERROR.

>> NO WERE A -- WHAT I'M  
SAYING 3.800 VEHICLE, HE SAID  
HE ONLY RAISES 3.800 BECAUSE  
BLAKELY WAS ISSUED THE DAY  
AFTER, HOWEVER, WHAT WE ARE  
SAYING IS APRENDISHI HAVE BEEN  
RAISE NEED TRIAL COURT, FOR  
PRESERVATION ISSUES, AS YOU  
SUGGESTED\$\$  
SUGGESTED, EARLIER.

>> APRENDI HAD BEEN --

>> IT WAS IN ISSUED IN 2000.

>> SO WAS THAT EVER -- RELIED  
ON TO ASK THE JURY TO MAKE  
THESE DETERMINATIONS.

>> NEVER, AND --

>> -- THE POINT IS IF IT IS  
SENTENCING ISSUE, ISN'T 3.800B  
DESIGNED FOR SITUATIONS WHERE  
THEY DIDN'T PRESERVE IT AT  
TRIAL, NOW GET A CHANCE TO  
PRESERVE IT BEFORE IT GOES UP  
ON APPEAL.

>> JUSTICE CANTERO ABSOLUTELY  
BUT THE QUESTION IS IF IT IS A  
SENTENCING ISSUE.

AS JUSTICE PARIENTE SUGGESTED,  
THIS HAPPENED IN CONNECTION  
WITH THE GUILT PHASE PORTION  
OF THE PRE-- PROCEEDING.

IT I AMPLICATES THAT JURY THAT  
JURY WAS IN ESSENCE, IN EFFECT  
DISCHARGED BY THE POINT LONG  
GONE BY THE POINT THAT THIS  
WAS RAISED.

THE PURPOSE OF CONTEMPORANEOUS  
OBJECTION IS TO ALLOY THE  
TRIAL COURT THE OPPORTUNITY TO  
BE NOT FIVED OF THE ERROR AND  
HOPEFULLY, RECTIFY IT.

>> IN THIS A HYBRID THAT WE  
DIDN'T THINK ABOUT IT\$AT THE TIME  
AND THE PROBLEM I HAVE WHETHER

THE AMEND IT SO MANY ASPECTS  
OF THIS RULE PROBLEMATIC BUT I  
THINK\$\$  
THINK, THAT WE MAY BE STUCK  
WITH WHAT THE LANGUAGE SAYS,  
WHICH IS SENTENCING ERROR, AND  
SENTENCE THAT IS BASED ON A  
FACT THAT SHOULD HAVE BEEN  
DETERMINED BY THE JURY I THINK  
IS A STRETCH TO SAY IT IS NOT  
A SENTENCING ERROR.

>> IT IS A HYBRID I THINK THAT  
IS MORE ACCURATE, BUT BECAUSE.  
>> AS OPPOSED TO LIKE VICTIM  
INJURY POINTS ONLY COMES UP AT  
THE ACTUAL SENTENCING -- IT IS  
A DIFFERENT TYPE OF -- ERROR.  
>> YOU WOULD AGREE THAT THIS  
ONE THE JURY IF THIS WAS ALL  
THOUSAND BE DETERMINED, BY THE  
JURY\$\$

JURY, HABITUAL OFFENDER  
STATUTES THAT O IS IT STATS  
WOULD HAVE HAD TO BE DONE  
SECOND FACE.

>> ABSOLUTELY BIFURCATEED IN  
TERMS OF JUDICIAL ECONOMY I  
KNOW JUSTICE CANTERO  
CONSIDERED THE POSSIBLE  
MECHANISM WHEREBY, A SECOND  
JURY COULD BE IMPANELED, IT  
WOULD BE -- THE MOST OPTIMUM  
AND IDEAL FUNCTION IF WE COULD  
IN FACT ANTICIPATE THIS, AND  
HAVE THE SAME JURY BUT HAVE IT  
BE BIFURCATED, IN SIMILAR WAY  
AS A VERDICT FORM HAS A  
CHECKOFF BOX, AFTER GUILT IS  
DIRMD\$\$

DIRMD, YOU COULD CHECK OFF,  
THESE FACTORS, HOWEVER -- THIS\$\$  
THIS --

>> I SEE THAT THERE ARE  
CERTAIN FACTORS CERTAIN FACTS  
THE JURY WOULD NOT BE ABLE TO  
HEAR, IN THE DPULT PHASE  
PORTION.

>> ABSOLUTELY IT WOULD HAVE TO  
BE AFTERWARDS, BECAUSE THERE  
WOULD BE PREJUDICE TO THE  
DEFENDANT IF IT WERE ANY OTHER  
WAY.

HOWEVER\$\$

HOWEVER, WHOA WE HAVE --

HAVEN'T TOUCHED UPON WHAT THEY  
OPPONENT HASN'T TOUCHED UPON  
IS THE FACT THAT THERE IS A  
VERY LONG CERTAIN HISTORY IN  
THIS COURT THAT SAYS APRENDI  
DOES NOT INCLUDE OR IMPLICATE  
RECIDIVISM STATUTES BECAUSE IT  
DOES NOT DEAL WITH THE OFFENSE  
FOR WHICH THE DEFENDANT IS  
BEING SENTENCED ON.

THIS HAS TO DEAL WITH THE  
PRIOR CONVICTION.

AND THIS COURT HAS RECOGNIZED  
THAT TIME AND TIME AGAIN,  
IN --

>> AND YOUR OPINION HOW DO YOU  
READY APRENDI WHEN IT SAYS  
EXCEPT FOR THE FACT OF A PRIOR  
CONVICTION WHY DID THE COURT  
IN APRENDI ACCEPT THAT FACT  
OUT OF EVERYTHING ELSE, THAT  
HAS TO BE SUBMITTED TO A JURY?  
WHAT WAS THE PURPOSE BEHIND  
THAT EXCEPTION.

>> BECAUSE THE JURY THERE IS  
TO DETERMINE THE GUILT OF THE  
DEFENDANT FOR THAT PARTICULAR  
OFFENSE AND IF SENTENCE FORDS  
THAT PARTICULAR OFFENSE IF  
GOING TO BE ENHANCED BASED ON  
A FACT THAT INVOLVED THAT  
OFFENSE, THEY SHOULD DETERMINE  
IT.

IF IT.

>> WHAT ARE CASES THAT WE SAID  
THAT THESE RECIDIVISM STATUTES\$\$  
STATUTES, DO NOT IMPLICATE AP\$\$  
APRENDI DENNIS VOLUMES  
HABITUAL OFFENDER SENTENCING  
ROBINSON MCGREGOIRE BARNES AND  
SMITH WHICH ARE INVOLVED --  
THE P-R.R. ACT WHICH HAS THE  
SIMILAR TIME TRAIL PRSAYS THE  
PRIOR CONVICTION MUST HAVE  
OCCURRED WITHIN THREE YEARS.  
HERE IN HABITUALIZATION WE SAY  
IT MUST HAVE OCCURRED WITHIN  
FIVE YEARS.

>> THE -- SPECIFIC IN ISSUE  
THOSE CASES LOW --.

>> THE TIMING THE COURT HAS  
LOOKED AT IT AND THE COURT HAS  
SAID, THIS CONSIDERATION IS  
OUTSIDE THE MANDATE OF AP\$\$

APRENDI, AND BLAKELY -- WITH  
-- AS WELL THE SAME PORTION,  
THAT WE ARE DEALING WITH TODAY  
HVFOH, APRENDI DOES NOT APPLY  
TO RECIDIVISM THEREFORE THERE  
CAN NO BE NO MERIT TO THIS  
CASE I KNOW JUSTICE PRESENT  
ANYWAY YOUR SPECIALLY  
OCCURRING IN ANY EVANS WHICH  
DEALT WITH APRENDI RING CLAIM  
IN A CAPITAL CASE, YOU DID NOT  
FEEL THAT THE PROCEDURAL SHSH  
BE RAISED BECAUSE CLEARLY IT  
WAS WITHOUT MERIT.

AND THIS CASE, IS IN THE SAME  
POSTURE.

EVEN IF WE GET THROUGH THE  
FIRST HOOP, OR THE FIRST  
HURDLE\$\$

HURDLE, AS WAS REFERRED TO  
BEFORE AND WE SAY THERE WAS  
PRESERVATION\$\$

PRESERVATION, THERE CAN BE NO  
MERIT\$\$

MERIT, IT HAS BEEN ESTABLISHED  
BY THIS COURT, AND EVEN AS  
JUSTICE QUINCE SAYS IF WE  
LOOKED AT FROM IT A HARMLESS  
POINT OF VIEW, ITP CERTAINLY  
IS HARMLESS IT IS A STATIC  
PROVABLE ISSUE I WOULD LIKE TO  
PINT OUT THERE WAS A CASE OF  
CALLAWAY OUT OF THE SECOND,  
THAT SURVEYED CASES FROM THE  
FEDERAL CIRCUIT COURT OF  
APPEALS\$\$

APPEALS, AND THERE WAS ONE  
PARTICULAR CASE, USC --  
RODRIGUEZ WHICH WAS OUT OF THE  
10th CIRCUIT THAT TALKED ABOUT  
TIMING AND THEY SAID THAT THE  
FACT OF THE DATE OF \$\$  
DEFENDANT'S RELEASE FROM  
CUSTODY WHICH WE ARE DEALING  
WITH HERE, AND THE FACT THAT  
THE DEFENDANT WAS ON  
SUPERVISION DURING COMMISSION  
OF THE OFFENSE, INSTANT  
OFFENSE CALLS UNDER THE PRIOR  
CONVICTION EXCEPTION, BECAUSE  
THEY ARE SUBSIDIARY FINDINGS,  
THAT ARE MERELY ASPECTS OF THE  
DEFENDANT'S REINDIVIDUAL VICT  
O SE INDIVIDUAL VICT

POTENTIAL EASILY VERIFIED  
REQUIRED NOTHING MORE THAN  
OFFICIAL RECORDS A CALENDAR  
AND THE MOST SELF-EVIDENT  
MALIGNANT MATKAL COMTAILGS.  
>> -- HAVE OTHER COURTS DECIDE  
WHETHER RECIDIVIST STATUTES  
FALL WITHIN THE P\$\$RENDI BLAKE\$\$  
BLAKELY.

>> THERE HAS BEEN NO COURT  
THAT HAS SAID, EVERY DISTRICT  
COURT OF APPEAL OF THIS COURT  
AS -- STATE FEDERAL AUTHORITY  
AS WELL AS THIS COURT FOUND  
THAT ANOTHER POINT I WOULD  
LIKE TO POINT OUTGOING BACK TO  
THE HARMLESS ERROR, ARGUMENT,  
WHICH WAS RAISED DURING GIL  
ENZEZ IS A FACT ADMITTED BY  
DEFENDANT, AND AT THE  
SENTENCING\$\$  
SENTENCING, THE DEFENDANT  
ACKNOWLEDGED THAT HE WAS ONLY  
IN HIS ESTIMATION, 30 DAYS SHY  
OF MAKING FOR IT THE FIVE  
YEARS WITHOUT COMMITTING  
ANOTHER OFFENSE.

TO -- DEFENSE COUNSEL  
CAPITALIZE HANDS TO CONCEPTED  
IT WAS ACTUALITIES 41 DAYS,  
AND SAID, HE SHOULD BE  
CONSIDERED FOR LENIENCY IN  
SENTENCING\$\$  
SENTENCING, BECAUSE HE ALMOST  
MADE IT TO THE FIVE YEARS.  
SO IT WAS ACKNOWLEDGED, THIS  
IS A FACT THAT HAS BEEN  
ACKNOWLEDGED\$\$!!!!!!!!!!!!!!

ACKNOWLEDGED, AND GL ENDEZ IN  
MAJORITY OPINION SAID  
ADMISSIONS DURING SENTENCING  
CAN BE CONSIDERED AS AN  
EXCEPTION TO APRENDNSNOOI WERE  
ANY OF THE FACTORS, THAT THE  
DEFENDANT IS NOW CLAIMING, TO  
HAVE BEEN FOUND BY THE JURY,  
WERE ANY OF THOSE FACTORS  
DISPUTED?

.  
>> ABSOLUTELY NOT.  
AND IN ALL THE PLEADINGS, IT  
HAS NEVER BEEN DISPUTED THE  
OENLT ARGUMENT TO SUGGEST,  
THAT THERE IS POSSIBLY, A

REASON, WHY THIS SHOULD BE CONSIDERED, BY A JURY, IS SOME KIND OF INTERPRETATION OF THE STATUTE.

HOWEVER!!\$\$!!!!!!!!!!!!

HOWEVER, FOR THE REASON WHY THE DEFENSE ARGUES THE STATE -- STATUTE IS HARD TO

UNDERSTAND, THAT IS WHY 775.084 ADMINISTRATES -- MANDATES THAT IT IS THE JUDGE WHO SHOULD MAKE THOSE DETERMINATIONS BECAUSE THE JUDGE IS WELL AWARE OF THE SENTENCING SCHEME TOP.

>> WHAT IS YOUR UNDERSTANDING THAT THE DISTRICTS ARGUING REGARD!!\$\$!!!!!!!!!!!! REGARDING THE ASKING THE JURY TO DO IS IT A LEGAL INTERPRETATION OR A FACTUAL?

>> WELL, IN TERMS OF OUR ARGUMENT IS THIS IS SENTENCING ISSUE, PURELY LEGAL. THE DEFENDANT IS TRYING TO MAKE IT SOMETHING THAT SHOULD BE FACTUALLY ESTABLISHED BEYOND A REASONABLE DOUBT, THIS IS A FACT WHICH AS JUSTICE QUINCE SAID IS STATIC IT EXISTS, AS YOU ALSO SUGGESTED IN THE COURSE OF A TRIAL, TYPICALLY, THE DATE IS REFERRED TO WHEN THE WITNESSES ARE TESTIFYING AND ON THE DATE THIS HAPPENED THERE WAS NEVER DISPUTE AS TO THAT.

>> THE FACTS ESTABLISHED -->> WOULDN'T WE WANT TO FOR THE FUTURE I'M CONCERNED YOU MENTIONED MCGREGOIRE ROBINSON MED!!\$\$!!!!

MEDINAS, THAT WAS -- FOR THE FUTURE -- TRIAL JUDGES PROSECUTORS OUGHT TO ERR ON THE SIDE UNLESS THE DEFENDANT AGREES THAT PUT THINGS LIKE THE DATE, IS AS MUCH AS THE JURY CAN DETERMINE SO WE DON'T HAVE TO KEEP ON LITIGATING WELL SHE THIS FACT BE FOUND OR NOT, WOULD YOU AGREE, AS FAR AS THE FUTURE THAT THAT WOULD BE A --

>> YES IT WOULD --

>> WE HAVE NO IDEA WHETHER  
U.S. SUPREME COURT IS GOING TO  
GO YOU KNOW, WITH APRENDI AND  
BLAKE!!\$\$!!!!!!!!!!  
BLAKELY.

>> BUT IN TERMS OF YOU KNOW IN  
A PERFECT WORLD IT SHOULD BE  
THAT WAY BUT BECAUSE THE STATE  
MAINTAINS!!\$\$!!!!!!!!!!!!!!!!!!!!  
MAINTAINS, IT WAS CLEARLY A --  
ESTABLISHED BUT EVEN IF IT WAS  
NOT ESTABLISHED, IT WAS NOT  
OBJECTED TO.

>> -- RIGHT, SO I'M JUST  
CONCERNED, THAT --

>> THAT WE DON'T WE CAN'T COME  
UP WITH A RULE THAT SAYS IF  
SOMETHING IS EASILY ASCERTAIN!!\$\$!!!!!!!!!!!!!!!!!!!!  
ASCERTAINABLE!!\$\$!!!!!!!!!!!!!!!!!!!!  
ASCERTAINABLE, IT IS NOT  
SUBJECT TO A JURY FIND,  
BECAUSE THAT IS NOT WHAT AP!!\$\$!!  
APRENDI SAYS, WHAT WE ARE  
TALKING ABOUT HERE IS TWO  
THINGS, ONE DOES IT FLOW FROM  
THE PRIOR CONVICTION, THAT IS  
IS IT INHERENT, IN A PRIOR  
CONVICTION!!\$\$!!!!!!!!!!!!!!!!!!!!  
CONVICTION, AND TWO, IS IT'S  
HARM!!\$\$!!!!!!  
HARMLESS, BECAUSE!!\$\$!!!!!!!!!!!!!!THERE IS NO QUESTION  
ABOUT THE DATES THAT SET FORTH  
THE -- HIS QUALIFICATION FOR  
THIS STATUS CORRECT?

>> IS THAT RIGHT.

>> YES.

>> THAT IS WHY WE ARE SAYING  
IN THIS CASE --

>> ABSOLUTELY, THE STATE  
MAINTAINS THAT THE ARGUMENT  
SET FORTH BY THE DEFENDANT IS  
IN CONTRAVENTION OF 757.84.  
WE DON'T EVEN HAVE TO GO  
THERE, TO SAY IS IT  
QUESTIONABLE!!\$\$!!!!!!!!!!!!!!!!!!!!  
QUESTIONABLE, BECAUSE, THE  
SENTENCING STATUTE REQUIRES  
THESE FINDINGS, TO BE MADE BY  
THE JUDGE, SO UNLESS WE ARE IN  
FACT GOING TO FIND THAT THOSE  
STATUTES ARE UNCONSTITUTIONAL  
WHICH NOW IS A WHOLE ANOTHER  
IRIT IS NOT SOMETHING THAT --  
>> WE DON'T KNOW, BECAUSE

AGAIN I DON'T WANT TO BE HERE  
IN A SITUATION WHERE SOMETHING  
IS VERY EASY FOR THE JURY TO  
DETERMINE OR STIPULATION, THAT  
MAYBE THAT SOME OF OUR  
STATUTES THAT SAY JUDGES ARE  
MAKING FINDINGS HAVE TO BE  
ALTERED IN LIGHT OF APRENDI  
AND BLAKELY SO I WOULDN'T GO  
AND SAY THE REASON THE JUDGE  
HAS TO MAKE THIS DETERMINATION  
IS BECAUSE THE STATUTE SAYS  
SO.  
BECAUSE THE SUBSTITUTE  
PROBABLY DIDN'T CONTEMPLATE AP!!\$\$!!  
APRENDI AND BLAKELY.

>> IT WOULD BE A GOOD THING  
BUT THE STATE FEELS THAT IN  
THE CURRENT LEGAL LANDSCAPE,  
IT IS NOT NECESSARY, CERTAINLY  
NOT IN THIS CASE, BUT IT WOULD  
BE HELPFUL THE MORE SERENITY  
WE HAVE -- CERTAINTY WE HAVE  
IN TRIAL COURT CONVICTIONS IS  
BETTER FOR EVERYBODY INVOLVED  
IN THE JUDICIAL SYSTEM THERE  
IS NO DOUBT ABOUT THAT.  
HOWEVER IT IS NOT NECESSARY,  
IN THIS CASE, THE STATE  
MAINTAINS!!\$\$!!!!!!!!!!!!!!!  
MAINTAINS, CLEARLY --

>> AFTER THE STIPULATION, FROM  
THE DEFENDANT, TO ALL OF THESE  
FACTORS!!\$\$!!!!!!!!!!!!!!!  
FACTORS, IN ANY CASE, WHERE  
THE STATE IS SEEKING HABITUAL  
OFFENDER SENTENCING, WE WOULD  
HAVE TO MAINTAIN THE JURY AND  
HAVE THE JURY THEN MAKE THESE  
DETERMINATIONS?

.  
>> IF THERE WAS --  
>> IF THE DEFENDANT DOES NOT  
STIPULATE TO IT.  
>> IF THERE WAS MERIT, IN A  
HABITUALIZATION CASE IT IS  
OUTSIDE AOF APRENDI SO I GO  
BACK TO LACK OF MERIT ARGUMENT  
IF IT WAS VICTIM INJURIES  
POINTS WHICH DID IN FACT GO  
BACK TO IT OFFICE FOR WHICH  
THE -- OFFENSE FOR WHICH  
DEFENDANT IS BEING TRIED THAT  
IS DIFFERENT STORY, IN THIS

CASE THOUGH CLEARLY THESE ARE NOT ISSUES, TO BE FOUND BY THE JURY BECAUSE THEY DEAL WITH PRIOR CONVICTIONS WHICH ARE EXPRESS!!\$\$!!!!!!!!!!!!!! EXPRESSLY, CLEARLY ESTABLISHED EXCLUSIONS FROM APPRENDI AND BLAKELY ONE THING THAT HE DOES ARGUE, IS THAT THE PRESENT CASE, WHAT YOU NEED FROM THE PRESENT CASE IS WHEN THIS PRESENT OFFENSE TOOK PLACE. >> BUT THIS COURT HAS DECIDED BOAT IN HABITUAL OFFENDER STATUTES!!\$\$!!!!!!!!!!!!!! STATUTES, AND IN PRSTATUTES, THE -- ACT THAT IS, THAT THAT TIMING, ELEMENT IS NOT SUBJECT TO APPRENDI. >> BASICALLY FOR THE REASON THAT YOU PICKED UP ON EARLIER, IT IS A FACT, IT IS BLIBD FOR THE -- ESTABLISHED FOR THE PURPOSE THAT IT NEEDS TO BE IT DOES NOT GO BACK TO THE OFFENSE FOR WHICH THE JURY IS CONSIDERING!!\$\$!!!!!!!!!!!!!! GUILT OR INNOCENCE. >> RESPECTFULLY DISAGREE WITH YOU BECAUSE THE CURRENT OFFENSE, IS THE ONE THAT IS GOING TO CAUSE HIM TO BE HABITUALIZED!!\$\$!!!!!!!!!!!!!! HABITUALIZED, SO IF IT IS THE FACT OF THE PRIOR CONVICTION THAT IS EXEMPTED, THEN ANYTHING FLOWING FROM THE PRIOR CONVICTION BUT THIS CONVICTION WHICH IS GOING TO QUALIFY HIM IF THE DATE OF THE INCIDENT HERE YOU ARE SO CLOSE TO IT, WAS REALLY IN DISPUTE, I'M NOT SURE THAT YOU CAN REALLY SAY THAT THAT WAS -- WOULD BE OUTSIDE APPREHEND SNOOI IF IT WAS IN DISPUTE BUT IN MOST TRIALS, AND NO TRIAL IS PR, IN MOST -- IS PERFECT, IN MOST TRIALS IN ORDER TO GET A CONVICTION THESE BASIS ELEMENTS HAVE BEEN ESTABLISHED!!\$\$!!!!!!!!!!!!!! ESTABLISHED. >> THAT IS DIFFERENCE WHETHER APPRENDI APPLIES AND IS HARM!!\$\$!!!!!!

HARMLESS VERSUS DOESN'T SFLOOI  
RIGHT BUT THE STATE WOULD  
RESPECTFULLY GO BACK TO THE  
PRIOR CASES WHERE THIS COURT  
DECIDED THIS IS AN ISSUE, THAT  
THAT "OUTSIDE APPRENDI BUT IN  
LIGHT OF YOUR SUGGESTION, THAT  
IF WE WANT TO MAKES -- MAKE  
SURE THIS DOES NOT PRESENT  
ITSELF PERHAPS A CHECKLIFT  
WOULD BE SUGGESTED YOU KNOW IN  
THE FUTURE.

HOWEVER!!\$\$!!!!!!!!!!!!!!

HOWEVER, THE STATE DOES  
MAINTAIN THIS IS REALLY A  
TECHNICAL MATTER THAT DOES NOT  
NEED TO BRING IN A JURY.

IF A JURY WAS SOMETHING THAT A  
DEFENDANT WAS ENTITLED TO, THE  
STATE WOULD HAVE NO OBJECTION  
TO GO THROUGH WHATEVER  
PROCEDURES NECESSARY, TO HAVE  
HIS RIGHTS HONORED, THIS DOES  
NOT APPEAR TO BE ONE OF THOSE  
SITUATIONS!!\$\$!!!!!!!!!!!!!!

SITUATIONS.

IF THE COURT HAS NO FURTHER  
QUESTIONS, THE STATE WOULD  
MAINTAIN THAT THE LOWER \$\$  
COURT'S OPINION SHOULD BE  
AFFIRMED!!\$\$!!!!!!!!!!!!!!

AFFIRMED, BOTH FOR LACK OF  
PRESERVATION CERTAINLY FOR  
LACK OF MERIT.

THANK YOU.

REBUTTAL!!\$\$!!!!!!!!!!!!!!

REBUTTAL.

>> THANK YOU YOUR HONOR.

>> FIRST OF ALL, AS FAR AS NOT  
MENTIONS NOT ARGUING APPRENDI,  
THREE OF THE FOUR QUOTED  
PARAGRAPHS FROM BLAKELY IN THE  
TRIAL COURT MOTION QUOTE  
APPRENDI!!\$\$!!!!!!!!!!!!!!

APPRENDI.

SO I THINK IT IS CLEARLY  
ENCOMPASSED BY IT I DON'T  
THINK IT HAD TO BE BUT IT IS  
CLEARLY ENCOMPASSED.

>> I GUESS THE POINT THAT  
PROSECUTOR WAS MAKING IS THAT  
APPRENDI HAD BEEN DECIDED WAY  
BEFORE THE TRIAL HERE, SO IT  
IS NOT THE FACT THAT YOU

DIDN'T FILE THE MOTION, AT TRIAL BECAUSE BLAKELY HADN'T BEEN DECIDED YET.

BECAUSE APPRENDI HAD BEEN DECIDED, BUT IF YOU ARE CORRECT, THAT THIS IS A APPROPRIATELY -- APPROPRIATELY UNDER 3800 B, THEN IT DOESN'T MATTER BECAUSE YOU COULD ASSERT IT AFTER TRIAL.

>> CORRECT AND ALSO I RECALL YOUR \$HONOR'S ATTENTION TO THE VERMONT AND INDIANA CASES CITED IN MY REPLY BRIEF THE SUPREME COURTS OF THOSE CASES STATES BOTH DEALT WITH THIS BOTH HELD BLAKELY WAS SUFFICIENT CHANGE IN THE LAW AND ONE CASE THEY SAID THAT COUNSEL WAS NOT YEKT -- NOT INEFFECTIVE NOT ARGUING APPRENDI THE OTHER ONE ALLOW ORDER I WOULD CITE TO YOU THOSE CASES

>> WERE THE GUIDELINE STATES?

>> I DON'T KNOW THE ANSWER TO THAT.

>> DOES IT MAKE DIFFERENCE?

>> YOU HAVE TO ADMIT BLAKELY WAS A DPLIEN CASE.

>> BLAKEBLY WAS A GUIDELINES CASE OBVIOUSLY.

>> THIS IS NOT A GUIDELINE CASE DEALING WITH HERE THE THAT IS CORRECT I DON'T KNOW THE ANSWER AS TO --

>> LET ME CIRCLE BACK TO THE VERY BEGINNING HERE, CAN YOU GIVE ME, YOUR99WORKING DEFINITION OF A SENTENCING ERROR.

>> OKAY ACTUALLY, WHAT I CAN DO IS GIVE YOU THE DEFINITION THIS COURT REFERRED TO,\$\$!!!! IF I CAN FIND I WANT HERE.

IF I CAN FIND IT HERE.

WHEN YOU ADOPTED RULE, 3800 B2, YOU REFERRED TO THE PRESENTATION OF PRESENTED --

TO YOU AS DEFINING IT AS HARM FULL ERROR ENTERED AS A RESULT OF A SENTENCING PROCESS.\$\$!!!! THAT IS WHAT IS IN YOUR OPINION.

AND I WOULD ALSO POINT OUT,

THAT SUBSEQUENT TO THE  
ADOPTION OF THIS RULE THE  
APPELLATE COURTS OF THIS STATE  
HAVE REPEATEDLY CONSIDERED  
THESE ISSUES, ON COMING UP ON  
# 800 AND HAVE CONSIDERED THEM  
TO BE PRESERVED SO THE  
COURTS --

>> WHAT ISSUES ARE YOU.

>> BLAKE -- BLAKELY RESIDENCE  
THEY HAVE CONSIDERED THEM  
PROVEED IN THAT MATTER, THIS  
CASE STANDS ALONE.

>> WHAT I'M CONCERNED ABOUT IS  
THE WHAT JUSTICE PARIENTE  
JUSTICE QUINCE -- WERE TALKING  
-- HOW OPEN IS THE BARN?

WHEN YOU WHEN YOUR REFERRING  
TO SENTENCING ISSUES?

DO WE GO BACK TO WHETHER THERE  
WAS SOME HEARSAY QUESTION THAT  
WAS BROUGHT IN, IN ORDER TO  
AFFECT THE SENTENCE?

WELL I THINK IF YOU ARE  
TALKING ABOUT MATTERS BEING  
HEARD BEFORE A JURY, THAT  
CERTAINLY EVIDENTIARY, MIGHT  
COME UP DURING THAT I DON'T  
KNOW HEARSAY WOULD -- I DON'T  
KNOW HEARSAY WOULD BE ONE BUT  
EVIDENTIARY ISSUES COULD  
INDEED BE A FARC COULD RESULT  
IN REVERSAL OF A SENTENCE  
BASED ON THAT.

BUT IN TERMS OF HOW FAR WE ARE  
HE OPENING THE DOOR, I DON'T  
THINK WE ARE OPENING IT FAR IN  
THIS CONTEXT, FOR A COUPLE OF  
REASONS!!\$\$!!!!!!!!!!!!!!

REASONS, FIRST OF ALL THE VAST  
MAJORITY OF THESE CASESE  
POINTS GOING TO BE STIPULATED  
TO IT IS VERY UNUSUAL, THAT  
YOU ARE GOING TO HAVE A CASE  
WHERE A DEFENDANT REQUIRES THE  
STATE TO HOLD TO ITS BURDEN OF  
PROOF!!\$\$!!!!!!!!!!!!!!

PROOF, SECOND OF ALL,  
DEPENDING HOW YOUR HONORS  
DECIDE MERITS AND I FREELY  
CONCEDE STATE HAS MUCH  
STRONGER ARGUMENT AS TO THE  
PARDON AND AS TO THE LACK OF  
REVERSAL THAN AS TO THE

PASSAGE OF TIME, IF YOUR HONORS HOLD JUST THAT THE PASSAGE OF TIME ENCOMPASSED THAT IS SOMETHING THAT CAN BE DONE YOU WITH A CHECK OFF BOX FAIRLY EASY.

>> WHAT ABOUT THE CASES THAT ROBINSON, McGREGOIRE HUE TODAY ONNIS WHY AREN'T THOSE APPLICABLE TO BE ABLE SAY AAPPREHENDOE -- APPRENDI DIES NIGHT PLY TO TRR, HFSC, THOSE.

>> HE FILL OF A ARE A LOT OF NUMBERS OF KIDS A CITED BY STATE CAME OUT PRIOR TO BLAKE!!\$\$!!!!!!! BLAKELY SECOND OF ALL, AS FAR.

>> CAME OUT PRIOR TO --

>> BLAKELY.

>> WERE WAS APPRENDI OUT WHEN THOSE CASES WERE DECIDED.

>> WELL THEY SAY THAT APPRENDI DOESN'T APPLY SO YES, IT WAS.

>> RIGHT.

SO I THINK THAT IS THAT IS ONE ASPECT OF IT,SECOND I HAVEN'T SEEN ANY OF THESE CASES, THAT REALLY SPECIFICALLY ADDRESS THE TIME LINE ISSUE, THE TIME FRAME ISSUE, BECAUSE THAT IS ONE WHERE CLEARLY, ONE OF THE ELEMENTS THAT HAS TO BE PROVEN THE DATE OF THE NEW OFFENSE HAS NO RELATION TO THE PRIOR OFFENSE AND I HAVEN'TS SEEN ANY OF THESE CASES THAT ADDRESS THAT THEY SWRAIK -- MAKE A BROAD GENERAL SWEEPING PRONOUNCEMENT!!\$\$!!!!!!!!!!!!!!!!!!!!!! PRONOUNCEMENT.

>> DID YOU BRING YOUR THOUGHTS TO A CONCLUSION YOU ARE WELL BEYOND YOUR TIME.

>> I WILL LAST THING I WILL TOUCH ON JUSTICE CANTERO ASKED THE QUESTION WHETHER WHAT IS THE PURPOSE OF THE RULE AND I THINK!!\$\$!!!!!!!

THINK, WHERE THE STATE IS GOING OFF ON TANGENT THEY ARE SAYING IT IS EASY TO PROOF I DON'T THINK THAT IS WHAT IT IS ABOUT THERE'S LOTS OF THINGS EASY TO PROOF MOST MURDER CASES THE FACT THE \$\$VICTIM'S IS

DEAD TOEZ APPROVE YOU STILL  
HAVE TO PROOF I IT, I THINK  
I'M SPECULATE\$\$!!!!ING THE REASON  
THEY DID THAT THE QUESTION OF  
OF WHETHER THERE IS A  
CONVICTION IS A QUESTION OF  
LAW!!\$\$!!!!  
LAW.

YOU HAVE GOT A NO CONTEST PLEA  
A WITHHOLD OF ADJUDICATION IF  
YOU HAVE GOT ALL THESE SORT OF  
THING I THINK THEY ARE SAYING  
WE'RE NOT GOING TO LEGALITY  
JURIES DETERMINE THAT,ALL  
THESE OTHER THINGS ARE ISSUES  
OF FACT, AND THEREFORE THEY  
HAVE TO BE PROVEN.

.  
>> THANK YOU VERY MUCH WE WILL  
TAKE THE CASE UNDER ADVISEMENT