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Dale Johnson v. State of Florida

SC07-368

>> THE NEXT CASE ON OUR KALANBER THIS MORNING IS JOHNSON v. STATE OF FLORIDA. >> MAY IT PLEASE THE COURT. DAVID McPHERRIN ON BEHALF OF THE PETITIONER DALE JOHNSON. THE ISSUE BEFORE THE COURT THIS MORNING IS WHETHER MR. JOHNSON EXECUTED A VALID WAIVER OF HIS RIGHT TO HAVE A JURY DETERMINE IF HE HAD THE THREE PRIOR CONVICTIONS NECESSARY FOR THE OFFENSE OF FELONY DUI.

AND IT IS THE POSITION -- PETITIONER'S CONTENTION THAT HE DID NOT VALIDLY WAIVE THAT JURY TRIAL IN -- RIGHT IN THAT CASE.

>> DO YOU AGREE THAT IF WE AGREE WITH YOUR PREMISE, YOUR BASIC PRINCIPLE THAT THERE WAS NOT A VALID, WAL UD-- VALID WAIVER BUT UNDER THESE CIRCUMSTANCES THAT IS A SUBJECT OF THE HARMLESS ERROR ANALYSIS?

>> YES.

AND THAT'S CERTAINLY THE ACHILLE'S HEEL OF MY CASE.

>> WELL, WE APPRECIATE YOUR CANDOR AND THAT'S WHAT WE NEED TO DISCUSS.

>> AND SINCE WE'RE DISCUSSING IT, JUST A COUPLE THOUGHTS ON THAT. CERTAINLY YOU HAVE MENTIONED THAT PREVIOUSLY IN HAR BAL, THE CASE WHERE YOU ADOPTED THE BIFURCATED JURY PROCESS FOR FELONY DUI.

YOU RELIED ON A SUPREME COURT CASE THERE IN THE MATTER WHICH DEALT WITH THE

ELEMENT OF MATERIALITY AND YOU SAID THESE THINGS ARE SUBJECT TO HARMLESS ERROR ANALYSIS, AND THAT'S CONSISTENT WITH WHAT THE UNITED STATES SUPREME COURT HELD IN THE MATTER.

>> AND EVEN SINCE THEN IN GULINDAS, WE SUBJECTED AN APRENDY ERROR, WHICH IS REALLY THE SAME THING, TWO HARMLESS AERROR ANALYSIS.

>> GULENDS DID APPLY HARMLESS ANALYSIS IN APRENDY.

I WOULD NOT SUGGEST APREPDY APPLIES IN THIS CASE.

>> I AM JUST SAYING ACCORDING TO CURRENT U.S. SUPREME COURT LAW ANYTHING THAT ENHANCE ADSENTENCE IS -- ENHANCES A SENT SENSE WHAT THEY CALL THE SUBSTANTIAL EQUIVALENT OF THE ELEMENTS OF A CRIME AND NEED TO BE DETERMINED BY A JURY SO THERE'S REALLY VERY LITTLE DIFFERENCE ANYMORE BETWEEN THIS KIND OF CASE AND THAT KIND OF CASE.

>> IN TERMS OF HARMLESS ERROR, YOU'RE RIGHT. GULENDAS AND WASHINGTON. BUT JUST A COMTHOUGHTS ON THAT.

ONE IS JUSTICE SCALIA'S DISSENT IN THE MATTER, AND I REALIZE IT'S A DISSENT. BUT HE DOES MENTION IN THERE THAT AT WHAT POINT DOES THE HARMLESS ERROR TEST STOP?

>> SINCE NETTER THE SUPREME COURT HAS DECIDED WASHINGTON.

>> YES. BUT THERE ARE DIFFERENT -- I KNOW THAT THESE ENHANCEMENT ELEMENTS ARE NOW BEING TREATED THE SAME AS COURT ELEMENTS IN TERMS OF WHAT HAS TO BE SUBMITTED TO THE JURY.

BUT THERE IS STILL A LITTLE BIT OF DIFFERENCE BETWEEN

THEM AND I THINK IT SHOULD DETERMINE WHETHER HARMLESS ERROR SHOULD APPLY.

JUSTICE SCALIA AGREED BUT IN THERE YOU HAD AN ELEMENT THAT WAS BEING USED TO ENHANCE A SENTENCE AND IF YOU DIDN'T PROVE THAT ELEMENT, YOU STILL HAD THE COMMISSION OF A CRIME. THERE WERE THESE CORE ELEMENTS THAT WERE STILL PROVING AND HE AGREED THAT WHEN IT'S A SENTENCING ENHANCEMENT ELEMENT, THAT HARMLESS ERROR APPLY!!IED THERE.

THERE'S A DIFFERENT BETWEEN A CORE ELEMENT AND THAT IS WITHOUT THESE ELEMENTS, THESE CORE ELEMENTS, THERE IS NO COMMISSION OF A CRIME. >> BUT AS YOU ADMIT EVEN IN NETTER, THAT A MAJORITY OF THE COURT SAID.

>> YES, AND THAT'S WHAT I'MVER SAYING.

>> I INTERRUPTED YOU. WHAT DID SCALIA SAY IN HIS DISSENT.

>> LOOK WE HAVE A CRIME WITH TWO ELEMENTS AND ONE OF THEM SHOULD BE SUBMITTED TO A JURY BUT ISN'T.

IS THAT HARMLESS?

OR IS IT HARMLESS WHETHER IT'S FIVE ELEMENTS SO EVEN 20% IS NOT SUBMITTED TO THE JURY.

AT WHAT POINT IF NO ELEMENTS IS BEING SUBMITTED TO THE JURY IS STRUCTURAL DEFECT --

>> HOW DO YOU FACTOR IN THERE WHETHER IT'S A DISPUTED ELEMENT?

LET'S SAY IT WASN'T THE NUMBER OF PRIOR FELONY CONVICTIONS BUT IT WAS A MATTER OF THE PERSON'S AEGIS?

-- AGE.

LIKE IN SOME OF THE SEX OFFENSES.

>> SPEAK TO THAT.

>> MY POINT IS THAT THIS IS A POINT THAT HASN'T BEEN ADOPTED BUT MY POINT IS THAT THERE ARE CERTAIN CORE ELEMENTS THAT HAVE TO BE SUBMITTED TO A JURY AND THOSE CORE ELEMENTS AREN'T SUBMITTED TO THE JURY AND THAT THERE ISN'T AN WAIVER THAT YOU CAN'T HAVE HARMLESS ANALYSIS BECAUSE AT SOME POINT YOU ARE GOING TO HAVE TO GET IN A POSITION OF SIGHING HOW MANY ELEMENTS CAN GET INTO HARMLESS ERROR AND HOW MANY ELEMENTS IS TOO MANY NOT TO BE HARMLESS ERROR.

>> ANDINATE -- AND ISN'T THE ANSWER TO THAT DISPUTED VERSUS NOT DISPUTED.

>> WELL, AND THAT MAY BE BUT THAT'S NOT WHAT IT'S TALKED ABOUT.

IFTS JUST TALKED ABOUT THIS AS JUST ONE ELEMENT.

AND WHEN IT'S ONLY ONE ELEMENT --

>> BUT WHEN WE TALK ABOUT HARMLESS ERROR, WAS THE ERROR HARMLESS WHETHER IT'S ONE ELEMENT OR IF I EVER ELEMENTS, IF THE DEFENDANT DOESN'T DISPUTE THEM, SEEMS TO ME THAT'S HARMLESS ERROR. WHETHER IT'S ONE ELEMENT OR FIVE ELEMENTS, IF THE DEFENDANT DID DISPUTE IT, IF THERE WAS CONTRARY EVIDENCE PRESENTED AT TRIAL, AND A FACT FINDER WOULD HAVE TO DETERMINE THE CREDIBILITY OF THE WITNESSES IT SEEMS TO ME THAT IS HARMFUL ERROR BUZZ YOU HAVE THAT'S EXACTLY WHY JURIES ARE THERE.

>> THAT ASSUMES HARMLESS ERROR CAN APPLY TO APPLY A FAILURE TO SUBMIT.

>> AS YOU SAID WE HAVE NETTER AND THAT'S WHAT WE ARE DEALING WITH HERE.

>> RIGHT, AND THAT'S --

>> COULD YOU EXPLAIN AS IN

THE TRIAL, THE TRIAL, THAT
WAS BEFORE THE JURY, THE
JUDGE, WATT OZ, WHAT WAS,
WHAT -- HOW WAS THE EVIDENCE
OFFERED?

WHAT HAPPENED IN THAT TRIAL?

>> THERE WAS A DRIVING
RECORD OF MR. JOHNSON'S THAT
WAS INTRODUCED INTO
EVIDENCE.

>> WAS THAT OBJECTED TO?

>> IT WAS NOT OBJECTED TO.

>> WERE THERE OPENING
STATEMENTS AND CLOSING
ARGUMENTS?

IN PHASE ONE THERE WAS.

>> YEAH, I KNOW BUT THE ONE
THAT YOU ARE SAYING IS
DEFECTIVE HERE.

>> NO.

>> IT WASN'T OPENING
STATEMENTS?

>> NO.

IN THE SECOND PHASE WHERE WE
WERE DETERMINING THE PRIOR
DUIS, THERE WERE NO OPENING
ARGUMENTS IN THAT AND NO
CLOSING ARGUMENTS.

>> WHAT WAS --

>> IT WAS NO OBJECTION.

>> SO WHAT YOU'RE REALLY
AGAINST, WE DON'T KNOW WITH
THE ELEMENTS AND -- WE DON'T
GO WITH THE ELEMENTS AND WE
GO WITH DISPUTED VERSUS
UNDISPUTED HARMLESS ERROR IN
OTHER WORDS WHAT YOU ARE
SAYING IS WHAT YOU WANT THIS
COURT TO DO WOULD BE TO
REVERSE THIS CONVICTION AND
HAVE IT GO BACK SO IT CAN
CONVENE, PICK A JURY, AND
HAVE WHAT WOULD HAPPEN IN
THE JURY TRIAL?

>> WHAT I REALLY THINK I'M
ASKING THIS COURT TO DO IS
THAT RECOGNIZING HARMLESS
ERROR ANALYSIS GOING TO
APPLY IN THIS CASE AND
RECOGNIZING THAT SOMETIMES
YOU CAN'T GET EVERYTHING YOU
WANT.

SOMETIMES YOU CAN ONLY GET
HALF A LOAF.

>> SO MEN EXPLAIN WHAT YOU WANT -- WHAT WOULD YOU SAY WHAT THIS OPINION WOULD SAY -- SHOULD SAY.

>> FIRST THIS OPINION SHOULD DISAGREE WITH THE COURT'S ANALYSIS THAT THERE IS A -->> THAT WOULD BE THE IMPORTANT --

>> IN TERMS OF HARMLESS ERROR, THE FACT THAT WE DID NOT CONTEST THE ACCURACY OF THE DRIVING RECORD, CERTAINLY DOESN'T TAKE AWAY FROM THE FACT THAT THE STATE STILL HAS TO AFFIRMATIVELY PROVE EACH AND EVERY ELEMENT OF THE CRIME.

NOW WE HAVE A STATUTE IN FLORIDA NOW THAT SAYS IF YOU HAVE A DRIVING RECORD AND IT REFLECTS PRIOR DUI --

>> BUT YOU HAVEN'T GIVEN ME -- CAN'T YOU SAY WHAT THE OPINION WOULD SAY NOT ON THE TEST.

>> NOT HARMLESS?

>> IT'S NOT HARMLESS?

>> BECAUSE?

>> IT'S NOT HARMLESS BECAUSE, AND --

>> IN OTHER WORDS WHAT YOU ARE SAYING IS IF YOU WANT US TO HOLD IF IT'S ELLE AN ELEMENT OF THE CRIME IT CAN NEVER BE HARMLESS NOT TO SUBMIT IT TO A JURY.

>> WELL, BUT THEN I WOULD BE GETTING INTO STRUCTURAL DEFECT, AND I KNOW --

>> THAT'S WHAT WE WOULD HAVE TO HOLD IN ORDER TO ADOPT YOUR POSITION.

>> IN THIS CASE IT'S NOT HARMLESS AND HERE IS WHY IT'S NOT HARMLESS.

YOUR GULINDEZ TEST, AND I THINK, I DON'T KNOW EXACTLY WHAT YOU WROTE COULD ANY RATIONAL JUROR HAVE COME TO A DIFFERENT CONCLUSION? THAN WHAT WAS REACHED HERE BY THE JUDGE?

AND WE HAVE IN FLORIDA NOW A

STATUTE THAT SAYS IF YOU
HAVE A DRIVING RECORD AND IT
SHOWS THAT THERE ARE DUI
PRIOR CONVICTION, THAT'S
PRESUMPTIVE PROOF THAT THEY
EXIST.

IT'S REBUTTABLE BUT IT'S
PRESUMPTIVE PROOF.

NOW THAT STATUTE WAS ADOPTED
ABOUT A MONTH BEFORE
MR. JOHNSON'S CRIME WAS
ALLEGED TO HAVE BEEN
COMMITTED.

BEFORE THAT THERE THESE
DRIVING RECORDS ARE NOT
SUFFICIENT TO ESTABLISH
PRIOR DUI CONVICTIONS.

>> BUT THOSE PRIOR STATUTES
DON'T APPLY TO THIS CASE.

>> I AGREE.

I AGREE.

WE NOW HAVE THIS STATUTE AND
THERE WAS NO ARGUMENT BELOW
THAT THIS WAS
UNCONSTITUTIONAL
PRESUMPTION.

THAT WASN'T RAISED AT ALL.
SO WE DO DEAL WITH THAT
STATUTE.

>> SO IT SEEMS TO ME WHERE
YOU ARE DEALING WITH A
PUBLIC RECORD, HERE, THAT IS
NOW PRESUMPTIVELY RELIABLE,
YOU HAVE THE WORST CASE
SCENARIO FOR YOUR POSITION,
REALLY.

>> WELL, I THINK THE POINT
THAT I AM TRYING TO MAKE AND
MAYBE I'M STRETCHING, BUT --

>> YES, AND BUT THIS, YOU'RE
UP HERE, YOU'RE GOING TO
WRITE IT WAS AN INVALID
WAIVER AND THAT IT'S NOT
HARMLESS.

>> AND IT'S NOT HARMLESS
BECAUSE PRIOR COURSEWISE
HELD LOOK THESE THINGS ARE NOT
SUFFICIENTLY RELIABLE.

COULDN'T A JUROR DESPITE
WHAT THE LEGISLATURE HAS NOW
DONE WITH THIS STATUTE
BELIEVE THE SAME THING?
AND SAY LOOK, THIS IS A
COMPUTER PRINTOUT.

WE GET BILLS IN THE MAIL
EVERY DAY.

>> WOULDN'T YOU HAVE TO
BELOW AT LEAST HAVE
CONTESTED IT?

THAT'S WHY I GO BACK TO WHAT
I THINK JUSTICE CANTERO WAS
SAYING IS THAT THE BEST
THING DISPUTED OR UNDISPUTED
ELEMENT.

THERE'S NO DISPUTE.

IF THE LAWYER BELOW HAD
ARGUED THAT IT WAS NOT
RELIABLE, THEN YOU'D HAVE AT
LEAST SOME BASIS TO SAY THAT
IT WAS DISPUTED BECAUSE IT
WASN'T RELIABLE.

BUT NOT HERE.

>> AND I CAN'T DISAGREE WITH
YOU ON THAT AND THAT'S WHY I
SAY I'M JUST SAYING IT
THEORETICALLY A JUROR COULD
SIT THERE AND SAY I'VE HAD
EXPERIENCE WITH COMPUTER
PRINTOUTS BEFORE AND I KNOW
THEM AT TIMES TO BE
INACCURATE.

IN FACT, PLY MOST RECENT
BILL WASN'T RIGHT.

>> YOU ARE ARGUE AGJURY
PARDON KIND OF THING YOU
KNOW THAT A JURY FEELS SORRY
FOR THIS PERSON AND WHICH IS
NOT SOMETHING REALLY THAT WE
-- I MEAN, I UNDERSTAND AS A
LAWYER YOU MAY GO INTO A
COURTROOM AND TRY TO MAKE
ARGUMENTS THAT WILL LEAD
THEM THAT WAY BUT AS A COURT,
WE'VE NEVER WRITTEN THAT,
THAT IS AN APPROPRIATE
APPROACH TO THESE CASES.

>> I DON'T KNOW IF I AM
SAYING JURY PARDON SO MUCH
AS COULD WE FIND A RATIONAL
JUROR FIND WHAT A TRIRL
COURT FOUND COULD A JUROR
SAY I DON'T TRUST COMPUTER
PRINTOUT WITH SOME JUDGMENT
OF CONVICTION OR SOME COURT
DOCUMENT.

>> BUT THAT'S NOT THIS CASE.
WE ARE DEALING WITH THIS
CASE WHICH IS IF YOU ARE THE

LAWYER ARGUED WITH THE JUDGE
IT IS NOT RELIABLE THE STATE
HASN'T MET ITS BURDEN OF
PROOF BUT INSTEAD IT
STIPULATED TO AND THERE'S
NO, THERE WAS NO ARGUMENT
MADE.

SO HOW UNDER THIS FACT WAS
UNDISPUTED AND THERE WAS NO,
THERE WAS NO ATACK ON THE
LIABILITY?

SO EVEN IF WE -- IN THIS
ISSUE, THAT'S NOT EVEN
PRESENT HERE BECAUSE THERE'S
NO ATTEMPT TO ARGUE IT
WASN'T RILIALE AND.

>> I CAN ONCE AGAIN SAY I
DON'T DISAGREE WITH YOU.
YOU ASKED ME FOR AN
ARGUMENT.

I'M MAKING AN ARGUMENT.

>> WE APPRECIATE THAT.

>> BUT HOW DISS THIS FIT
WITH A SITUATION FOR
INSTANCE WHERE THE STATE
DOES NOT YOUR CASE, YOU KNOW,
WITH THE PRIOR CONVICTIONS
BUT THAT FOR SOME REASON
THERE HAS NOT BEEN A
SUFFICIENT WAIVER IN A
MURDER CASE?
OF THE JURY TRIAL ON GUILT.

>> OKAY.

>> AND THAT THE STATE
PRESWRENS AN UNREBUTTED CASE,
-- PRESENTS AN UNREBUTTED
CASE THAT IS OF THE GUILT OF
THE DEFENDANT.

THAT'S ALL THAT'S PRESENTED.
BUT THEN IT'S DISCOVERED
THERE WAS AN INSUFFICIENT
WAIVER OF THE RIGHT TO A
JURY TRIAL.

YOU KNOW, THE TRIAL JUDGE
CONCLUDES WITH THE
UNREBUTTED STATE'S CASE THAT
HE'S GUILTY OF FIRST-DEGREE
MURDER.

WOULD HARMLESS ERROR ALLOW
US THEN TO AFFIRM THE
CONVICTION WITH THE BENCH
TRIAL?

IN THAT FIRST-DEGREE MURDER
CASE DESPITE THE FACT THAT

THERE WAS AN INVALID WAIVER?

>> I THINK THAT GETS US BACK TO THE QUESTION OF HOW DO WE QUANTIFY, HOW MANY ELEMENTS WE CAN HAVE AND STILL HAVE, AND STILL ALLOW HARMLESS ERROR TO BE APPLIED AS OPPOSED TO SAY THIS CAN'T BE SUBJECT TO HARMLESS ERROR ANALYSIS ANYMORE?

IF ONE ELEMENT, WHY NOT ALL THE ELEMENTS?

THAT'S WHAT WE'RE GETTING BACK TO ON THIS.

>> WHY NOT ALL THE ELEMENTS IF ALL THE ELEMENTS ARE DISPUTED.

>> BECAUSE WE HAVE A 6th AMENDMENT TO THE UNITED STATES CONSTITUTION ARTICLE 11622 OF THE FLORIDA CONSTITUTION.

>> THE SUPREME COURT HAS SAID A VIOLATION OF THE CONFRONTATION CLAUSE IS OR THE RIGHT TO COUNSEL NEITHER OF THOSE ARE STRUCTURAL DEFECTS.

THEY ARE SUBJECT TO HARMLESS ERROR ANALYSIS.

SO THAT'S WHAT WE'RE TALKING ABOUT WHY WOULDN'T IT BE HARMLESS ERROR REGARDLESS OF HOW MANY ELEMENTS IF THEY'RE ALL UNDISPUTED THEN WHATS THE DIFFERENCE BETWEEN HAVING A JURY AND A JUDGE? AND THEY SAID IT IN NETTER. THEY SAID IT IN -- WE SAID IT IN GULINDEZ.

>> THEY DID WITH ONE ELEMENT, NOT ALL ELEMENTS BUT I THINK IT WOULD GO TO A PARAGRAPH OR TWO IN A CASE OF BLARE IN WHICH IT WAS VERY ARKICKULATELY STATED THE IMPORTANCE OF THE JURY TRIAL RIGHT AND UNITED STATES AND IN THE STATE OF FLORIDA AND IT'S THIS PROTECTION THAT HAS THE CITIZEN BETWEEN GOVERNMENT AND --

>> WELL, IF THEY WERE THAT WAY IT WOULD BE PER SE

REVERSIBLE.

>> AND MAYBE WE'LL GET THERE WITH THAT SOMEDAY BUT WE'RE NOT NOW.

GUT TO GET BACK TO YOUR QUESTION, HOW ARE WE GOING TO DRAW THAT DIVIDING LINE? YOU ARE GOING TO HAVE A SITUATION THERE ARE WE GOING TO SAY WELL IT'S HARMLESS BECAUSE THE DEFENSE DIDN'T CONTEST IT BUT THE DEFENSE STILL HAS RIGHT TO PUT THE STATE'S FEET TO THE FIRE AND THE STATE HAS TO COME FORWARD AND PUT A CASE.

>> WE ARE NOT TALKING ABOUT PUTTING THE STATE'S FEATS TO THE FIRE WE ARE TALKING ABOUT WHETHER IT'S A JUDGE DECIDING IT OR A ZWRURY DECIDING IT.

YOU STILL HAVE THE PROVE IT.

>> RIGHT AND UNDER OUR CONSTITUTIONAL PROTECTIONS YOU HAVE TO PROVE IT TO A JURY.

UNLESS YOU HAVE A VALID WAIVER OF IT AND I THINK YOU ARE GOING TO RUN INTO A BIG PROBLEM IN THAT SITUATION AND THAT SHOULDN'T BE HARMLESS ERROR WHERE YOU HAVE AN INN EVERY ELEMENT OF A MURDER CHARGE NOT SUBMITTED TO A JURY?

>> THAT'S WHAT HAPPENS IN A PLEA AGREEMENT.

>> BUT THERE ARE, THE ADEQUATE PROTECTIONS THERE THAT IN A PLEA AGREEMENT YOU ARE GOING TO GO THROUGH A COLLOQUY WITH THE DEFENDANT WHERE THE DEFENDANT IS GOING TO KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY AGREE TO THE PROTECTIONS AND AGREE TO ENTER A PLEA A TO CHARGE AND THAT IS A FAR DIFFERENT SCENARIO THAN NOT HAVING THE ELEMENTS PRESENTED TO THE JURY DESPITE FAILURE TO AGREE TO THAT AND IF I MAY RESERVE THE REMAINDER OF MY

TIME.

>> SURE.

>> STATE'S VIEW?

>>> MAY IT PLEASE THE COURT
I'M SUEF-ELLEN KENNY WITH
THE OFFICE OF THE ATTORNEY
GENERAL AND REPRESENTING THE
STATE IN THIS MATTER.

>> WOULD YOU AGREE AT THE
OUTSET THAT A, A WAIVER
SIGNED BY THE LAWYER IS NOT
SUFFICIENT?

>> NOT IN THIS CASE.

IN THIS CASE, WE'RE DEALING,
YOU'RE TALKING ABOUT THE
UPTON AND TUCKER CASES, AND
IT'S THE STATE'S POSITION
THAT THERE IS NO CONFLICT
WITH REGARD TO THIS BECAUSE
WE'RE DEALING WITH APPLES
AND ORANGES.

WE HAVE GOT A BIFURCATED
PROCEEDING HERE WHERE WE ARE
DISCUSSING ONLY THE ISSUE OF
PAST CONVICTIONS, WHERE AS
APRENDY'S ALREADY TOLD US WE
DON'T NEED TO HAVE A JURY
FINDING ON PAST CONVICTIONS.

>> BUT I UNDERSTAND YOUR
ARGUMENT BUT APRENDY DID NOT
CONCERN AN ELEMENT OF THE
DEFENSE.

I MEAN, NOW ESSENTIALLY THEY
ARE ELEMENTS OF THE OFFENSE
THE SUPREME COURT HAS SAID
BUT, BUT SPECIFICALLY, THAT
CONCERN, AN ENHANCEMENT NOT
A AN ELEMENT OF THE OFFENSE.

>> I UNDERSTAND THAT HOWEVER
WITH THE EVOLVEMENT OF THAT
AND WITH THE FEDERAL
AUTHORITY THAS BEEN
CONSIDERED THE SAME.

>> I THINK YOU WERE GETTING
TO HARMLESS ERROR.

THE CHIEF JUSTICE QUESTION
WAS MORE, IS THIS ERROR AT
ALL?

WHAT IS YOUR POSITION ON --

>> OUR POSITION IS THAT NO
IT'S NOT ERROR.

THAT WHAT THE PETITIONSER
ESSENTIALLY ASKING FOR IS
THE EXTENSION OF A PRINCIPLE

THAT'S BEEN HELD IN TRIALS
THAT ARE NOT BIFURCATED,
THAT THAT HE WANTS TO HAVE
THAT EXTEND INTO THESE
BIFURCATED PROCEEDINGS
WHEREAS IF YOU HAVE A TUP ON
OR TUCKER, YOU DON'T HAVE
SAVALID WAIVER YOU JUST HAVE
THE LAWYER'S SIGNATURE OR
YOU DON'T HAVE A ORAL
CULILOQUY ON THE RECORD THIS
COURT OVERTURNED THOSE OR
REVERSED THOUGH.

>> -- THOSE.

>> SOW SO ARE YOU SAYING IN
A DEATH PENALTY CASE THAT IS
BIFURCATED THE LAWYER COULD
WAIVE THE DEFENDANT'S RIGHT
TO A TRIAL IN A PENALTY
PHASE?

>> I, I CAN'T ANSWER THAT
WITH CASE LAW BECAUSE I'M
NOT AWARE OF THAT.

I CAN TELL YOU DEALING
SPECIFICALLY WITH THIS CASE
AND WITH THE BIFURCATION
PROCEEDINGS AND THE DUI
UNDER THE DUI STATUTE THAT
YES, THAT CAN BE.

BUT EVEN GETTING AWAY FROM
THAT, THE STATE'S ARGUMENT
THAT THERE IS NO CONFLICT IN
GOING ON TO THE MERITS OF
THIS, WE WOULD SAY THAT
AGAIN IT IS ABSOLUTELY
HARMLESS THAT THE QUESTION
HERE IS WHETHER --

>> AGAIN YOU ARE TRYING TO
GET OVER AND THAT'S FINE.
BUT WE NEED --

>> I'M SORRY, I MISSED PART
OF WHAT YOU SAID.

>> YOU ARE SLIDING OVER TO
HARMLESS ERROR I THINK YOU
ARE HEARING THE QUESTIONS
THAT CERTAINLY THE LAW SEEMS
TO BE IN YOUR FAVOR BUT WE
NEED TO ANSWER SOME OTHER
QUESTIONS AS WELL AND IF YOU
WOULD ADDRESS JUSTICE
PARIENTE'S QUESTION AND YOU
HAVE ELEMENTS OF WHAT HAS TO
BE PROVEN AND ESTABLISHED
AND IF YOU TAKE THIS, THIS

CASE, WELL, LET HER FINISH.
I THOUGHT I HEARD YOU SAID
THAT IT'S IS NOT, IT'S
SUFFICIENT TO ALLOW THE THE
LAWYER TO WAIVE THE CLIENT'S
RIGHT TO A JURY TRIAL IF
IT'S THE SECOND PHASE OF A
TRIAL.

IS THAT WHAT YOUR POSITION
IS?

THAT IS WHAT MY POSITION IS
AND.

>> AND THEN I ASKED YOU HOW
WOULD THAT WORK IN A DEATH
PENALTY CASE WHERE THERE IS
A SECOND PHASE FOR THE
PENALTY PHASE FOR THE JURY
TO HEAR T. YOU SAID YOU
DIDN'T KNOW HOW YOU WOULD
HANDLE IT.

I GUESS WHAT I THOUGHT I WAS
TRYING TO GET YOU TO AGREE
TO IS THAT THE BIFURCATED
NATURE REALLY SHOULDN'T
INFLUENCE WHETHER THAT IS
THE DEFENDANT'S RIGHT TO
WAIVE IT.

IN TERMS OF ONE OR MORE
RECENT CASE, REGARDING THE
DEATH PENALTY, AND PENALTY
PHASE WE ARE TALKING ABOUT
DEFENSE'S SILENCE THROUGHOUT
THAT.

PROCEEDING 'T WAS FOUND THAT
THE LAWYER DID NOT
INEFFECTIVELY PERFORM BY BY
PROVIDING AND NOT GETTING
HIS CLIENTS ON THE RECORD ON
THE RECORD AGREEMENT BECAUSE
THE CLIENT WAS SO
UNRESPONSIVE IN THAT MATTER.
AND THIS COURT OR EXCUSE ME,
IN, I THINK THAT WAS THE 96B
CASE DEALT WITH THE DEATH
PENALTY.

>> WHAT SPECIFICALLY
HAPPENED HERE WITH THIS
DEFENDANT?

>> PARDON ME.

>> WHAT SPECIFICALLY
HAPPENED?

>> IN TERMS OF PRIOR TO
STARTING THE FIRST PART OF
THE TRIAL, THE STATE

INTRODUCED IN THE REDACTED COPY OF DRIVER'S RECORD TRANSCRIPT FROM DMV. IT IT'S OBVIOUS BY THE RECORD DISCUSSION THAT A DISCUSSION HAD OCCURRED PRIOR TO BEING PUT ON THE RECORD.

THE PARTIES AGREED THIS WAS, THIS WAS PRESENTED THE WAY THE PARTIES AGREED.

THE LEADING CERTAIN ITEMS. IN UNREDACTED COPIES WAW ACCEPTED AS COURT'S EXHIBIT 1, AND THE DEFENDANT'S COUNSEL SAID THIS IS SUFFICIENTLY REFLECTED.

IN LOOKING AT THE RECORD.

THE DRIVER'S RECORD.

AFTER THE CONCLUSION OF THE FIRST PART OF THE TRIAL, WE COME UP TO THE SECOND PART OF THE TRIAL AND THE JUDGE READS OFF THE RECORD OR EXCUSE ME THE STATE READS OFF THE RECORD.

THE COURT ASKS IF THERE IS ANY QUESTION.

ANYBODY HAVE ANYTHING TO ADD?

NO.

NOW IS THE TIME TO SPEAK UP. THE ONLY PERSON WHO SAID ANYTHING IS THE DEFENDANT WHO DIDN'T UNDERSTAND WHAT -- HE SAID, YOU KNOW, WHAT'S, YOU WANT ME TO SAY SOMETHING?

AND THE JUDGE ASKED AGAIN, AFTER ALL OF THIS, IS THERE ANYTHING ANYBODY HAS TO SAY?

NO.

NOBODY DISPUTED THAT THIS IN FACT WAS THE DEFENDANT. THIS WAS IN FACT HIS RECORD. THESE THREE CONVICTIONS THAT THE STATE LISTED --

>> BUT WHAT ABOUT THE SPECIFIC STATEMENT AS TO THE STIPULATION THAT THIS GO FORWARD.

>> PARDON ME.

>> DEFENSE STIPULATED A BIRCH TRIAL AND AFFIRMED THE,

-- BENCH TRIAL SCPUFIRMED
THIS STIPULATION AT TRIAL IN
JOHNSON'S PRESENCE.
NOW WHAT SPECIFICALLY IS THE
COURT DISTRICT REFERRING TO
IN THE RECORD?

>> IN TERMS OF THE END OF
THE FIRST TRIAL, THE JUDGE
SAID YOU HAVE PREVIOUSLY
AGREED THAT THE COURT COULD
DECIDE THAT WHETHER OR NOT
MR. JOHNSON HAD PREVIOUSLY
BEEN CONVICTED OF A DUI, IS
THAT CORRECT?

BOTH ATTORNEYS, YES, YES.
AND THAT IS ON 172.
OF THE TRANSCRIPT.

THEN YOU GO ON TO 173 OF THE
TRANSCRIPT AFTER READING ALL
OF THE PRIOR CONVICTIONS,
THE COURT SAID, MR. EARLY,
WHO WAS DEFENSE COUNSEL S
THERE ANYTHING YOU WISH TO
PRESENT.

NO.
THEN THE JUDGE, WHEN, WHEN
THE DEFENDANT ASKED A
QUESTION, THE COURT
RESPONDED, WELL, RIGHT NOW,
I MEAN, THE JURY FOUND WHAT
WE AGREED THE PROCEDURE WE
AGREED TO FOLLOW IS THAT THE
JURY WOULD ONLY BE PRESENTED
THE ISSUE OF DUI.

AT THAT POINT, I WOULD HAVE
TO MAKE THE DECISION AS TO
WHETHER OR NOT YOU HAD
PREVIOUSLY BEEN CONVICTED.
BOTH SIDES STIPULATED AND
AGREED.

MR. EARLY, THE DEFENSE
COUNSEL, CORRECT.

MS. BEN DEL, THE PROSECUTOR,
CORRECT.

AND THIS IS WHAT HAPPENED.
THE JUDGE SAID IT INDICATES
YOU HAVE BEEN PREVIOUSLY
CONVICTED THREE TIMES S.
THAT INACCURATE?
SOMEBODY TELL ME NOW.
I'M ASKING AT THIS POINT IN
TIME FOR SOMEBODY TO CONTEST
THIS.
OR DISPUTE IT IN ANY MANNER.

NOBODY DISPUTED THIS IN ANY MANNER.

AND THAT'S HOW IT CAME OUT, AND THE JUDGE HAD TWICE TALKED ABOUT THE STIPULATION.

>> YOU SAY THAT THERE IS A QUESTION BY THE DEFENDANT. WHAT WAS THE QUESTION?

>> OKAY.

ON 173, THE COURT SAID, TO MR. EARLY, DEFENSE COUNSEL, DOES YOUR CLIENT WISH TO TESTIFY AS TO THIS ISSUE? IS THERE ANYTHING JUST AS TO THIS ISSUE?

>> THE DEFENDANT ASKED THE QUESTION ABOUT.

WITH A QUESTION MARK.

AND THE COURT THEN EXPLAINED ONCE AGAIN.

BOTH SIDES STIPULATED AND AGREED.

BOTH TAERNDS SAID YES, THAT'S -- ATTORNEYS SAID YES, THAT'S WHAT HAPPENED.

THE JUDGE THEN SAID WELL NOW WE'RE AT THAT SECOND PHASE.

AND THIS IS WHAT I'M DECIDING.

IS ANYTHING INACCURATE?

IS THERE ANYBODY WHO CAN DISPUTE --

>> LET ME ASK YOU JUST ONE QUESTION THAT IF THIS HAD OCCURRED BEFORE THE FIRST PHASE OR AS BEFORE THE TRIAL HAD BEGUN, AND THE, THE COURT SAID, YOU KNOW, THERE'S BEEN A STIPULATION BUT THERE'S NO, NO, COLLOQUY AS REQUIRED BY LAW THAT'S INVOLVED AND THE, THERE'S NO STIPULATION SIGNED BY THE DEFENDANT OR STIPULATION MADE BY THE DEFENDANT. IT MAY HAVE BEEN IN HIS PRESENCE.

WOULD THIS COURT OR DID THE COURTS HOLD THAT AS ERROR OR NOT.

>> AS TO THE FIRST PART OR JUST TO THE SECOND PART?

>> AS IF WE WERE BEGINNING

THIS TRIAL AND THE SAME
THING HAPPENED AND -- AND
THE ENTIRE TRIAL WAS JUST
CONDUCTED BEFORE THE JUDGE.

>> OH, OKAY.

>> THEN WOULD WE HOLD THAT
THAT IS AIRER?

>> YES, YOU WOULD.

>> AND WE WOULD HOLD THAT
FOR, FOR WHAT REASONS?
BECAUSE THERE WAS NO
COLLOQUY, CPREKT.

>> CORRECT.

>> AND BECAUSE THE DEFENDANT
HAD NOT SIGNED OFF ON IT,
CORRECT?

>> CORRECT.

>> AND CAN YOU EXPLAIN THEN
WHY IT'S DIFFERENT IT AND WE
HAVE ORDERED A BIFURCATION
AND WHY IS IT DIFFERENT IF
THAT IS CONSIDERED TO BE AN
ELEMENT AND, AND WE'VE HELD
THAT, IT'S ALAN ELTHAT --
IT'S AN ELEMENT THAT MUST BE
PROVEN WHY WOULD IT BE
DIFFERENT IN THE SECOND
PHASE BECAUSE YOU HAVE THE
SAME THING, IT'S NO COLLOQUY
AND YOU HAVE THE SAME THING,
A LAWYER'S STIPULATION, NO
WRITTEN BY THE DEFENDANT AND
SO WHY WOULD THAT BE
DIFFERENT?

>> WELL, APRENDY TELLS US WE
DON'T NEED A JURY
DETERMINATION OF PRIOR
RECORD.

WE WERE JUST LOOKING AT
SNESH THIS IS AN ELEMENT OF
THE CRIME AND WE TALKED
ABOUT THAT.

YOU DISAGREE THAT THIS IS
DIFFERENT?

>> I WOULD SAY THAT THE
ANALYSIS WAS ESPECIALLY THE
WAY THAT IT'S BEEN DEVELOPED
WOULD BE THE SAME.

AND I WOULD ALSO SUBMIT TO
YOU THAT IN THIS PARTICULAR
INSTANCE, WE HAVE ABSOLUTELY
NO DISPUTED FACT.

>> WELL, I UNDERSTAND BUT
ISN'T --

>> THAT'S --

>> THAT'S TO HARMLESS.

WE ARE TRYING TO GET TO YOUR
FIRST POINT, WE ARE TRYING
TO GET TO -- YOUR HELP ON
IT.

IF WE ARE MISCONSTRUING WE
NEED YOUR HELP.

YOUR POSITION, THE STATE'S
POSITION.

>> OUR POSITION IS THAT IT
IS COMPLETELY DIFFERENT WHEN
YOU ARE ASKING A COURT TO
MAKE A DETERMINATION
REGARDING A, AN UNDISPUTED
FACT.

IN THIS CASE.

AND, AND, THE COURT IS NOT
BEING ASKED IN, IN ESSENCE,
TO BE A TRIER OF FACT OR A
DETERMINER OF CREDIBILITY OF
WITNESSES IN THIS INSTANCE.

IN THE DUI BIFURCATION
PROCEEDING, THAT SECOND
PHASE IF YOU'VE GOT THE
RECORD, THE RECORD'S NOT
DISPUTED.

JUDGE ISN'T MAKING ANY
FINDING OF FACT.

AND THAT IN THAT CASE, WE'RE
NOT DEALING WITH SOMETHING
THAT YOU NEED THAT, THAT
SAME WAIVER FOR.

WE'RE NOT HAVING THE JUDGE
RELY ON THE PERFORMANCE OF
THE WITNESSES.

WE'RE NOT HAVING THE JUDGE
DETERMINE WHETHER OR NOT THE
EVIDENCE IS SUFFICIENT OR
NOT SUFFICIENT.

WE'VE GOT UNDISPUTED FACTS
HERE.

AND THAT WOULD BE, I HOPE,
RESPONSIVE TO YOUR QUESTION.

IF IT'S NOT, PLEASE LET ME
KNOW AND I'LL TRY TO --

>> NO, I THINK YOU ARE
ARGUING THE HARMLESS ERROR
ASPECT OF IT, WHICH IS IT'S
NOT IN DISPUTE AND I WAS
TRYING TO GET TO THE FIRST
TWO PARTS BEFORE WE GET TO
THE HARMLESS ERROR ANALYSIS.
THAT'S FINE.

I AM JUST TRYING TO SEE IF
WE WRITE AN OPINION IF WE DO
THIS WHAT WOULD YOU SAY?
>> AND IN TERMS OF THE DUI
THE DUI BIFURCATION
PROCEEDING, WE WOULD ARGUE,
WELL, IN THIS INSTANCE, WE
DO, IT SKIPS RIGHT INTO THE
HARMLESS BECAUSE OF THE
FACTS OF THIS CASE.
BUT ALSO THAT WE DON'T NEED
JURY DETERMINATION, AND I
UNDERSTAND THAT APRENDY WAS
DEALING WITH THE ENHANCEMENT
BUT THE INVOLVEMENT OF THAT
HAS LIKENED IT TO AN ELEMENT
AND THE THAT WOULD BE THE
STATE'S POSITION AT THIS
POINT IN TIME.

DID THAT ADDRESS YOUR
QUESTION.

>> I THINK IT DOES.

THE POSITION OF THE STATE IS
THAT IT DOES NOT REQUIRE
JURY DETERMINATION.

APRENDY SAYS THIS DIDN'T
REQUIRE IT.

>> THAT'S, CORRECT.

AND.

>> SO THEREFORE --

>> YOU DON'T HAVE THE SAME
RIGHTS YOU WOULD HAVE
OTHERWISE.

>> AND IN THIS PARTICULAR
CASE SITUATION, WARE RR
LOOKING AT -- SITUATION
WE'RE LOOKING AT, IT'S
HARMLESS -- EVEN IF YOU ARE
GOING TO DETERMINE THAT OUR
POSITION IS NOT THE
POSITION.

>> I UNDERSTAND.

I UNDERSTAND.

HOW DO YOU WORK THROUGH THE,
THE STRUCTURAL PART OF THIS
FIRST?

THAT'S FINE.

THAT'S FINE.

>> OKAY.

>> THIS IS WHAT I WAS
THINKING ABOUT BECAUSE I
GENERALLY THINK THIS HAS TO
BE HARMLESS BUT IF THE
SCENARIO WAS SOMEONE HAD

PLED GUILTY TO THIS DEFENSE
AND THERE WASN'T A PROPER
PLEA COLLOQUY, THE DEFENSE
TO, AND YOU SAID WELL YOU'VE
GOT TO WITHDRAW THE PLEA BUT
THAT WOULDN'T BE SUBJECT TO
A HARMLESS ERROR TO SAY,
LISTEN, HE HAD NOTHING TO
DEFEND ON ANYWAY ANY, SO
WE'RE NOT GOING TO HAVE,
WE'RE NOT GOING TO HAVE HIM,
HE DOESN'T NEED TO GO
THROUGH A JURY TRIAL.
WE'D NEVER DO THAT AS TO A,
IN A GUILTY PLEA SITUATION,
CORRECT?

>> I'M SORY.

>> YOU'RE NOT GETTING THAT?

>> NO.

>> SOMEBODY, INSTEAD OF,
THIS BEING A, A JURY TRIAL,
HE PLEASE GUILTY TO THIS
OFFENSE.

>> RIGHT.

>> ALL RIGHT?

WE'RE NOW GOING TO THAT IT
WASN'T, THE JUDGE DIDN'T DO
THE PROPER COLLOQUY.

>> OKAY.

>> HE'S NOW PROVING TO
WITHDRAWAL WITHDRAW HIS
PLEA.

>> AT THAT POINT, YOU SAY,
YEAH, IT WAS ERROR BUT HE HE
HAS NOTHING TO DEFEND SO
THEREFORE WE ARE GOING TO
HOLD IT HARMLESS.

WE WOULD NEVER DO THAT ON AN
ISSUE OF WHETHER SOMEBODY
HAD VALIDLY WAIVED HIS, HIS
OR HER RIGHT TO GO TO TRIAL
AND TO PUT THE STATE TO ITS
BURDEN OF PROOF, CORRECT.

>> WELL, IN THE MOTION TO
WITHDRAW THE PLEA, YOU'RE
LOOKING AT IS THE ANALYSIS
THAT YOU'RE CONDUCTING IS
WHETHER OR NOT BUT FOR
WHATEVER ERROR I WOULD'VE
PROCEEDED TO TRIAL AND IS
THAT A REASONABLE ASSUMPTION
THAT YOU WOULD IN FACT
PROCEEDED TO TRIAL WITH SOME
OF THE OTHER MORE RECENT

CASES.

AND YOU'RE WE'RE NOT
LOOKING AT THE SAME ERROR.
WE'RE NOT CONDUCTING THE
SAME ANALYSIS.

>> THE OTHER ANSWER IS THAT
IT'S NOT THE DIFFERENCE
BETWEEN TRIAL VERSUS NO
TRIAL.

IT'S THE DIFFERENCE BETWEEN
JURY TRIAL AND JUDGE TRIAL.
YOU'RE STILL GETTING A TRIAL
IN THESE.

>> CORRECT.

CORRECT.

UNDER THE WITHDRAWAL PLEA,
THE DEFENDANT HAS TO REALLY
TELL -- ALLEGE THAT HE
WOULD'VE GONE TO TRIAL
OTHERWISE.

AND I'M NOT SURE IF THAT'S
ANSWERING YOUR QUESTION OR
IF IT'S NOT MAYBE I DIDN'T
HEAR IT CORRECTLY.

>> TIME.

>> OKI.

>> IF ALL NO OTHER
QUESTIONS, THE STATE WOULD
ASK THAT YOU AFFIRM THE
FOURTH DCA'S OPINION IN THIS
MATTER.

>> THANK YOU.

>> THANK YOU.

REBUTTAL?

>> IN TERMS OF THE
BIFURCATED PROCESS AND
WHETHER WHAT WE WOULD
NORMALLY REQUIRE AT THE
BEGINNING OF THE TRIAL I
DON'T SEE ANY REASON OF WHY
WE SHOULD HOLD ANYTHING LESS
IN TERMS OF A WAIVER.

BLARE, WHICH IS A CASE FROM
THIS COURT DEALT WITH
REDUCING THE JURY FROM 6 TO
5 ASIMILAR ANALOGOUS
SITUATION WHICH IS WHEN YOU
ARE DOING THAT YOU ARE
GETTING LESS THAN WHAT THE
CONSTITUTION ALLOWS YOU.
THAT'S THE SAME THING HERE.
THE JURY GOT LESS THAN WHAT
THE CONSTITUTION GUARANTEED
HIM.

AND BLARE REQUIRED THAT THERE BE SOME DISCUSSION WITH THE DEFENDANT ON THE RECORD AND THAT HE BE THE PERSON THAT PERSONALLY CONSENTS TO THE REDUCTION IN HIS JURY TRIAL RIGHT.

SO I THINK THAT THAT WOULD CARRY OVER INTO THIS CASE ALSO.

>> ARE THERE OTHER TYPES OF SITUATIONS WHERE SOMETHING OF A GOVERNMENT RECORD THAT MAY BE OUTSTANDING OR SOMETHING, THAT'S THE ONLY SUBJECT TO PROOF.

SOMETHING, ANYTHING AT ALL SIMILAR TO THIS DRIVING RECORD WHERE THIS KIND OF ISSUE HAS EVER BEEN DISCUSSED?

>> WELL, I CAN SEE IT COMING UP IN SOME CONTEXT IN POSSESSION OF A FIREARM BY A CONVICTED FELON CASES. HOWEVER, THERE'S NOT GOING TO BE DRIVING RECORD, THAT TYPE OF THING.

I THINK IN THAT SITUATION YOU ARE GOING TO HAVE A JUDGMENT OF CONVICTION THAT'S PROBABLY GOING TO GO ENTERED INTO EVIDENCE WITH FINGERPRINTS THAT ARE GOING TO TIE THE PERSON IN DOCUMENTARY EVIDENCE. THAT'S THE ONE THING I CAN THINK OF.

I DON'T KNOW, WELL, FELONY PETTY THEFT.

SITUATION THAT WOULD BE SIMILAR TO THIS.

AGAIN, YOU PROBABLY HAVE JUDGMENTS OF CONVICTION THERE, NOT SOME COMPOSIT LIKE A -- I THINK THAT AS I SAID I UNDERSTAND THAT I MAY BE HERE FOR JUST HALF A LOAF TODAY.

AND IT MAYBE ULTIMATELY AT THE END OF THE DAY YOU ALL ARE GOING TO DECIDE THIS WAS HARMLESS ERROR ALTHOUGH I'VE ASKED YOU NOT TO, THAT MAY

HAPPEN BUT I THINK IT'S VERY
IMPORTANT THAT YOU DO SET
OUT, THAT HERE IS WHAT A
VALID OR WAIVER, THE RIGHT
TO JURY IS, AND IT'S NOT
WHAT OCCURRED IN THIS CASE
AND IT DOES APPLY TO
BIFURCATED PROCEEDINGS.
SO THAT THIS TYPE OF THING
DOESN'T HAPPEN AGAIN.

>> WE THANK YOU FOR YOUR
CANDOR IN PRESENTING YOUR
ISSUES TO THE COURT WE ARE
ENLIGHTENED ON THIS ISSUE.
THE COURT WILL TAKE IT'S
MORNING RECESS NOW.

>> ALL RISE,,,,,
THE COURT STANDS RECESSED