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Bertha Jackson v. State of Florida

SC07-659

THANK YOU.

THE NEXT CASE ON OUR
CALENDAR THIS MORNING IS
JACKSON v. STATE OF FLORIDA.

>> MAY IT PLEASE THE COURT.

MY NAME IS PAM IZACK WS.

I AM WITH THE THE PUBLIC --

>> YOU ARE GOING TO HAVE TO
SPEAK A LITTLE LOUDER THERE.

>> MAY IT PLEASE THE COURT.

MY NAME IS PAMELA IZACK WSWITS
WITH THE PUBLIC DEFENDER'S
OFFICE THE 10th DISTRICTER
OFFICE AND I REPRESENT THE
PETITIONER IN THIS CASE
BERTHA JACKSON.

FIRST I WOULD LIKE TO SAY
WHAT THIS CASE IS NOT.

THIS IS NOT A SENTENCINGIRER
CASE NOR IT IS IS IT A CASE
WHERE THE COUNSEL FAILED TO
MAKE CONTEMPORANEOUS
OBJECTION.

THIS CASE INVOLVES LACK OF
COUNSEL IN THE CRITICAL CASE
OF THE PROCEEDINGS.

IT IS FUNDAMENTAL ERROR.

>> WELL IF YOU ARE SAYING IT
IS KIND OF CONTRADICTIONARY TO
SAY IT DOESN'T INVOLVE A
LACK OF OBJECTION BUT YET
IT'S FUNDAMENTAL ERROR.

>> WELL IT INVOLVES THE FACT
THET THE DEFENSE -- INSECOND
DCOES SAID THERE WAS A LACK
OF OBJECTION.

THE ARGUMENT HERE IS DEFENSE
COUNSEL WASN'T PRESENT IN
ORDER TO MAKE OBJECTION.

>> BUT I THINK THAT WOULD
YOU AGREE THAT FIRST OF ALL,
AND I WILL ASK THE STATE
THIS QUESTION THAT ANY ERROR

OCCURRING DURING THE SENTENCING PROCESS IS NOT SUPPOSED TO BE SENTENCING PURPOSE WITH 3 AG.

I PROBABLY AGREE WITH YOU. I SHARE JUDGE ALTENBURN'S DISMAY ABOUT WHAT'S GOING ON BUT ON THE OTHER HAND WE AGREE THAT THE RECORD'S CLEAR.

HE DIDN'T HAVE COUNSEL FOR A PART OF THE VICTIM'S TESTIMONY.

BUT THE LAWYER GOT ON AT THE POINT WHERE AT SOME POINT THE WITNESS WAS STILL THERE. THE WITNESS AND THE LAWYER SAYS NOTHING AND SO THE QUESTION IS IS IN THIS, WHERE IT'S NOT TOTAL LACK OF COUNSEL, AS IN GUN SWROL DSS WHERE THERE WAS A -- GONZALEZ WHERE THERE WROS A COMPLETE LACK OF REPRESENTATION, ISN'T THAT DENIAL OF THE RIGHT TO COUNSEL SUBJECT TO A HARMLESS ERROR ANALYSIS?

>> I THINK IF IN THIS CASE THE PROBLEM WAS THAT BY THE TIME THE DEFENSE COUNSEL WAS NOTIFIED, THE JUDGE HAD ALREADY ASKED 44 QUESTIONS, SEVEN PAGES OF TESTIMONY. THE VICTIM TESTIFIED TO LOTS OF INFORMATION THAT WASN'T IN THE TRIAL, BY THE TIME DEFENSE COUNSEL WAS NOTIFIED, THE ERROR HAD ALREADY OCCURRED --

>> WHAT WAS THE -- WHAT WAS THE -- I GUESS I'M LOOKING AT THIS IS A VICTIM THAT ENDS UP SAYING NO, I DON'T THINK THAT YOUR CLIENT SHOULD GET A 30-YEAR SENTENCE.

IT LOOKS LIKE IT, AND THAT WHAT WOULD THE CROSS EXAMINATION HAVE BEEN WHEN HE WASN'T PRECLUDED FROM CROSS-EXAMINING TO MAKE IT ANY BETTER THAN THE WITNESS WAS SORT OF SYMPATHETIC TO

YOUR CLIENT.

>> WELL, THE VICTIM WAS SYMPATHETIC TO THE CLIENT BUT THE JUDGE WAS ASKING QUESTIONS THAT I, HARD TO KNOW BECAUSE DEFENSE COUNSEL WASN'T THERE WHO COULD'VE OBJECTED BUT THE JUDGE IS ASKING QUESTIONS ABOUT THE HISTORY OF WHETHER THESE TWO WOMEN SHARED THE SAME MEN, WHETHER THE VICTIM FATHER OF THE CHILD -- IF THE FATHER OF THE CHILD THAT THE VICTIM HAD WAS ANY RELATION TO --

>> WELL, DON'T YOU HAVE TO SHOW THEN HERE THAT COUNSEL BEING ABSENT, THAT THERE WERE, THERE WAS EVIDENCE THAT CAME IN THAT THE JUDGE SHOULDN'T HAVE CONSIDERED AND WOULDN'T THAT, THAT BE THE, THE WAY TO APPROACH THIS?

YOU HAVEN'T SHOWN THAT. YOU JUST SAID WELL HE WASN'T THERE FOR PART OF IT. IT SEEMS LIKE THERE WAS A MIX UP, A MISUNDERSTANDING, AND, AND THAT IT WASN'T ANY INTENTIONAL ATTEMPT TO DENY THE CLIENT COUNSEL.

>> WELL, THERE WAS AN ATTEMPT TO DENY COUNSEL.

>> WELL, WHAT I'M ASKING YOU IS DON'T YOU HAVE TO SHOW NOW WHAT OBJECTION -- WHAT SOMETHING OBJECTIONABLE THAT CAME IN THAT PREJUDICED YOUR CLIENT.

>> I THINK IT'S PER SE FUNDAMENTAL ERROR WHEN DOLLAR IS A SENTENCING PROCEEDING AND DEFENSE COUNSEL IS ABSENT AND THE JUDGE KNOWING THAT HE COMMITTED REVERSIBLE ERROR. HE SAID, AND I QUOTE FROM THE RECORD,.

>> WE'RE NOT GOING TO TAKE THE JUDGE'S VIEW OF --

>> WELL, LET ME ASK YOU BECAUSE WAS THERE A SUBSEQUENT SENTENCING

HARING.

>> THERE WAS.

>> AND DID YOUR CLIENT HAVE COUNSEL?

>> YES.

>> WAS HE ABLE TO PRESENT TESTIMONY?

>> THERE WAS NO TESTIMONY TAKEN AT THAT TIME.

>> WOULD HE HAVE BEEN ABLE TO TAKE --

>> I DON'T KNOW.

I'M NOT SURE.

I DON'T KNOW.

IT WAS JUST A SENTENCING, THE DEFENSE COUNSEL SPOKE ON THE RECORD.

THERE WAS NO TESTIMONY TAKEN AT THAT TIME.

>> WAS THERE A REQUEST TO PRESENT ANY TESTIMONY.

>> NO, THERE WAS NOT.

>> SO THERE WOULD'VE BEEN AN OPPORTUNITY TO SUBS-- GET A COPY OF THE TRANSCRIPT, OF WHATEVER HAPPENED WHILE HE WAS NOT ON THE PHONE, AND COULD HAVE PRESENTED THE, THE WITNESS BY PHONE AT THE SUBSEQUENT SENTENCING HEARING.

>> I THINK THAT'S POSSIBLE.

THE PROBLEM IS THAT BY THE TIME HE WAS, THE REASON THERE WAS NO OBJECTION WAS BY THE TIME HE WAS,.

>> WE UNDERSTAND THAT.

WE UNDERSTAND THERE COULDN'T HAVE BEEN OBJECTION DURING THE TIME THAT -- HE WAS TESTIFYING.

BUT, OUT OF THE UNITED STATES SUPREME COURT, WE'RE NOT OBLIGATED I GUESS TO FOLLOW IT IN LOOKING AT OURS BUT IN SIXTH AMENDMENT SAYS THAT THERE'S ONE THING WHEN THERE'S DEPRIVATION OF THE RIGHT TO COUNSEL FOR THE ENTIRE PROCEEDING BUT WE HAVE PERMITTED.

HARMLESS, NONCAPITAL CASES WHERE THE EVIL CAUSED BY THE 6th AMENDMENT IS LIMITED TO

THE ERRONEOUS ADMISSION OF
PARTICULAR EVIDENCE.
SO THAT'S WHAT I'M ASKING
WELL WHAT WAS ERRONEOUS AND
ISN'T THAT THE WAY TO SAY
WELL THAT WAS WOULD'VE BEEN
ONLIED TO AND SHOULDN'T HAVE
COME IN?

>> WELL, WHAT WAS ELOANIOUS
IS THE JUDGE WENT WAY BEYOND
WHAT THE INFORMATION CAME
OUT AT TRIAL.

HE WAS ASKING THE VICTIM
ABOUT HER PERSONAL
RELATIONSHIP WITH
MS. JACKSON, ASKING HER
PERSONAL QUESTIONS ABOUT THE
FATHER OF HER CHILD, WHETHER
THEY SHARED MEN, WHETHER IT
WAS, THAT TO ME WAS
OBJECTIONABLE.

HAD I BEEN THERE, I PROBABLY
WOULD'VE OBJECTED BECAUSE I
DON'T THINK THAT WAS
RELEVANT TO SENTENCING.

>> WELL YOU KEEP SAYING HE
HAD NO OPPORTUNITY TO OBJECT
AND HE FINALLY GOT ON THE
PHONE WITH THE JUDGE,
CORRECT?

>> AFTER SEVEN PAGES.

>> HE FINALLY GOT ON THE
PHONE WITH THE JUDGE.

>> YES.

>> AND THE JUDGE ADMONISHED
HIM BECAUSE HE HAD SAID
NOBODY LEAVE THE COURTROOM.
I'M GOING TAKE THE TESTIMONY
OF THE VICTIM SO SHE DOESN'T
HAVE TO FLY BACK LATER,
CORRECT.

>> YES.

>> AND HE LEFT ANY.

>> IT WAS NEVER CLEAR ON THE
RECORD WHY HE LEFT, WHERE HE
WENT.

>> I UNDERSTAND THAT BUT HE
DID LEAVE.

>> YES.

>> AND AT SOME POINT, THEY
WERE ABLE TO GET HIM ON THE
PHONE.

>> YES.

>> AND THE JUDGE SAID DID

YOU NOT UNDERSTAND THAT I WAS GOING TO TAKE THE VICTIM'S STATEMENT SO THAT SHE WOULDN'T HAVE TO COME BACK FROM NORTH CAROLINA AND DEFENSE SAID NO I'M SORRY I CERTAINLY DIDN'T AND THE COURT, I THOUGHT I MADE IT CLEAR, I'VE TAKEN PART OF OUR STATEMENT YOU CAN LISTEN TO THE REST I WILL GO FURTHER AND TELL YOU WHAT I'VE GOTTEN SO FAR.

OKAY.

IT SEEMS TO ME AT THAT POINT COUNSEL HAD EVERY OPPORTUNITY TO OBJECT AND SAY JUDGE, TO TELL YOU THE TRUTH, I THINK WE SHOULD START ALL OVER IN THE QUESTIONING THE WITNESS BECAUSE I WASN'T PRESENT AND HE LACKED COUNSEL AND THAT WAS A PERFECT OPPORTUNITY TO, OKAY, LET'S JUST GO BACK FROM SCRATCH.

THAT'S START THE QUESTIONING OVER AND YOU CAN PARTICIPATE.

SO TO SAY THAT HE HAD NO OPPORTUNITY TO OBJECT QUITE FRANKLY I THINK IS TOTALLY MISCONSTRUES THE RECORD.

>> I THINK WHAT HAPPENED WAS THAT BY THE TIME HE WAS NOTIFIED AS TO WHAT HAPPENED, IT WAS ALREADY TOO LATE.

>> WELL, YOU SAY IT'S TOO LATE.

WAS IT TOO LATE TO SAY JUDGE I THINK WE SHOULD START OVER.

HE DID NOT HAVE HIS 6th AMENDMENT RIGHT TO COUNSEL.

>> HE DID NOT SAY THAT.

>> WAS, LET'S FOCUS ON 3.800, THE AND AS I UNDERSTAND, THAT'S THE CONFLICT ISSUE.

>> THAT'S THE CONFLICT, YES.

>> THAT WE'RE DEALING WITH.

AND NOW AFTER THE SENTENCING PROCEEDING IN THE TRIAL COURT, YOUR CLIENT WAS REPRESENTED BY COUNSEL ON

APPEAL, CORRECT.

>> YES.

>> AND HAD AN OPPORTUNITY TO REVIEW THE TRANSCRIPT PRIOR TO THE TIME WHEN A 3.800 B 2 MOTION WOULD'VE BEEN REQUIRED?

>> CORRECT.

>> IT SEEMS TO ME THAT IN ALL OF THE LITIGATION NOW THAT'S FLOWED OUT OF THIS PROVISION OF THE RULE THAT WE HAVE A SITUATION IN WHICH IT'S, IT IS CLEAR THAT THE RULE IS DESIGNED TO TRY TO CATCH THE SENTENCING ERRORS. AT THE TIME THAT THEY CAN BE PRESENTED SO AS TO DEAL WITH THEM THEN.

-- DEAL WITH THEM THEN RECOGNIZING FOR SEVERAL REASONS BUT REGARDLESS OF THAT WHY IS THIS NOT A SENTENCING AIRER?

>> WELL, THERE WAS NO SENTENCE IN PLACE.

THERE WASN'T A SENTENCE -- A SENTENCING ERROR INVOLVES THE STATUTORY MAXIMUM SENTENCE OR INVOLVES THE LENGTH OF SENTENCE OR IMPOSING A MANDATORY SENTENCE.

THERE WAS NO SENTENCE.

>> THERE WAS A SENTENCE.

>> THERE WASN'T A SENTENCE HERE.

THIS WAA SENTENCING PROCEEDING WHERE THE JUDGE WAS TAKEN TESTIMONY FROM THE VMENT -- VICTIM.

>> DID THE JUDGE HAND OUT A SENTENCE?

>> NOT AT THAT POINT.

NO.

THERE HAD BEEN NO SENTENCE IMPOSED AND MS. JACKSON DID FILE A MOTION TO CORRECT SENTENCING ERROR, WHICH THE RULE APPLIES IN THIS CASE BECAUSE THERE WAS A DISCREPANCY BETWEEN THE ORAL PRONOUNCEMENT AND THE WRITTEN PRONOUNCEMENT, WHICH

IS PRECISELY WHAT 3800 IS FOR, TO CORRECT THE ERRORS AT SENTENCING AFTER SHE WAS SENTENCED SHE WAS ACTUALLY CONVICTED OF AGGRAVATED BATTERY WITH A WEAPON. THE DOCUMENT SHOWED AGGRAVATED BATTERY WITH A FIREARM.

38 MOTION WAS FILED. THE JUDGE SAID YOU'RE CORRECT.

THERE'S A PROBLEM WITH THE DOCUMENTS AND HE REISSUED THE SENTENCE.

I MEAN, THIC THE SENTENCE HADN'T CHANGED BUT THE DOCUMENTATION CHANGED. THAT'S EXACTLY WHAT THE 3800 WAS FOR BUT IN THIS INSTANCE THERE WAS NO SENTENCE.

>> SO YOU ARE ARGUING, IN YOUR OPINION IT IS YOUR POSITION THAT 3800 B IS LIMITED TO INSTANCE WHERE THE WRITTEN SENTENCE SOMEHOW ILLEGAL OR CONTRARY TO THE RULES OR ANYTHING LIKE THAT OR, IS, IS CONTRADICTORY TO THE ORAL SENTENCE, THINGS LIKE THAT?

>> THAT'S, THAT'S HOW I READ THE RULE.

THAT'S WHAT MADDOX HAS, A LONG LIST OF WHAT'S INVOLVED IN A 3800.

>> THE PROBLEM I SEE WITH THAT IS THAT THIS COURT SEEMS TO HAVE EXPANDED IF, IF INDEED THAT WAS THE ORIGINAL INTENT OF THE RULE, IT SEEMS TO HAVE EXPANDED THE REACH OF 38 B BEYOND THOSE KINDS OF THINGS TO ERRORS THAT ACTUALLY OCCURRED DURING THE SENTENCING HEARING. ISN'T THAT CORRECT?

>> THAT'S CORRECT.

>> SO WE DON'T HAVE TO RECEDE FROM A FEW TACE CASES IN ORDER TO ADOPT YOUR POSITION.

>> I DON'T THINK YOU'D HAVE

TO RECEDE AT ALL.
I DON'T THINK THAT A
CONSTITUTIONAL VIOLATION
WHERE DEFENSE COUNSEL'S NOT
PRESENT AND THE SECOND DCA
SAID THIS WAS A DUE PROCESS
VIOLATION.

>> I AM NOT ARGUING THAT
POINT.

I AM NOT ASKING YOU ABOUT
THAT PART.

I AM ASKING YOU ABOUT THE
PART WHERE THIS COURT HAS
EXPANDED THE REACH OF 3.800
B BEYOND ERRORS THAT
OCCURRED IN THE SENTENCING
ORDER.

WOULDN'T WE HAVE TO RECEDE
FROM SOME OF THOSE CASES.

>> I DON'T THINK THAT THIS
CALLS FOR RECEDING FROM
ANYTHING.

I THINK THAT THIS IS A
CONSTITUTIONAL VIOLATION
THAT STILL FUNDAMENTAL ERROR
STILL APPLIES AIOHAVEN'T
THROWN OUT FUNDAMENTAL
ERROR.

>> I GUESS THAT'S WHY WE
WERE SPENDING THE FIRST HALF
OF THE ARGUMENT ON HOW IS
THIS FUNDAMENTAL ERROR AND
JUSTICE CANTERO WAS POINTING
OUT WHERE AN OBJECTION COULD
BE MADE.

3800 B WAS DESIGNED TO
REDUCE THE NUMBER OF APPEALS
IF SOMETHING COULD BE
CORRECTED WHILE STILL AT THE
TRIAL STAGE AND SO HERE
AGAIN WHAT WE'RE TALKING
ABOUT IS WHETHER EITHER WAY
BY FILING THIS 3.800 B
COULD'VE SAID OKAY I'D LIKE
THE JUDGE TO TAKE -- NOT
TAKE INTO CONSIDERATION THE
VICTIM'S TESTIMONY.
IN OTHER WORDS, SOMETHING
THAT COULD HAVE BEEN
CORRECTED.

WHAT YOU'RE SORT OF SEEKING
IS YOU WANT A WHOLE NEW
SENTENCING PROCEEDING.

>> CORRECT.

>> BECAUSE YOU'RE POINTING TO THE FACT THAT FOR SOME PART OF THE VICTIM'S TESTIMONY, THE DEFENDANT WASN'T REPRESENTED.

AND I GUESS I'M STILL HAVING TROUBLE, MAYBE JUST WITH THE GENERAL NOTION, BECAUSE I, I CAN SEE HOW IF THERE IS NO LAWYER DURING THE WHOLE SENTENCING PROCEEDING IT WOULD BE KIND OF SILLY TO SAY WELL BRING THAT UP AT 3.800 B BECAUSE THE ONLY REMEDY IS A WHOLE NEW SENTENCING PROCEEDING BUT HERE WE'RE STILL DEALING WITH A PART OF IT.

SO MAYBE MY OTHER QUESTION IS IS THIS REALLY, IS THIS SECOND DISTRICT OPINION IN CONFLICT WITH THE, THE FIRST DISTRICT OPINION BECAUSE IT INVOLVES A COUNSEL THAT WAS NOT PRESENT FOR PART OF THE PROCEEDING.

THE OTHER INVOLVES COUNSEL THAT WAS WHOLLY ABSENT FOR THE ENTIRE PROCEEDING.

AND SHOULD THAT MATTER.

>> SHOULD IT MATTER?

WELL, IT MATTERS HERE I THINK.

I THINK THAT THE WHOLE SENTENCING PROCEEDING INVALID.

I THINK THAT MS. JACKSON'S ENTITLED TO A WHOLE NEW SENTENCING PROCEEDING WHERE DEFENSE COUNSEL IS SITTING THERE WITH HER.

DEFENSE COUNSEL HAS AN OPPORTUNITY TO OBJECT TO TO EVERY SINGLE QUESTION THAT IS BEING ASKED.

I ALSO WANT TO POINT OUT, AND THIS WASN'T ADDRESSED ANYWHERE, THIS WAS EX PARTE PROCEEDING.

THE JUDGE AND THE PROSECUTOR WERE SITTING THERE QUESTIONING THIS WITNESS, DEFENSE COUNSEL WASN'T THERE, THERE'S NO MENTION ANYWHERE

IN ANY OF THE SECOND
DISTRICT OPINIONS THAT THIS
WAS EX PARTE PROCEEDING.

>> WASN'T THE DEFENDANT
THERE?

>> THE DEFENDANT WAS THERE
UNREPRESENTED.

>> SO IT WASN'T EX PARTE.

>> BOTH PARTIES WERE THERE
HE JUST DIDN'T HAVE COUNSEL.
I JUST WANT TO CLARIFY.

THE QUESTION IS WHETHER SHE
HAD COUNSEL.

SHE WAS PRESENT.

>> SHE WAS PRESENT BUT SHE
WAS NEVER ASKED DO YOU WANT
TO HAVE SOMEBODY ELSE
REPRESENT YOU SHE WAS NEVER
ASKED IF SHE WANTED TO
REPRESENT HERSELF.

IN ESSENCE IT WAS AS IF SHE
WASN'T SITTING THERE BECAUSE
SHE -- WE DON'T KNOW WHAT
SHE KNEW WHAT DIDN'T KNOW
WHAT HER RIGHTS WERE.

NOBODY TOLD HER WHAT HER
RIGHTS WERE.

>> WHAT WAS THE PERIOD OF
TIME BETWEEN THIS PROCEEDING
WHICH WAS RIGHT AFTER THE
TRIAL, CORRECT?

>> YES.

>> WHAT WAS THE LENGTH OF
TIME BETWEEN THAT AND THE
ACTUAL SENTENCING?

>> I THINK IT WAS ABOUT FOUR
WEEKS.

>> FOUR WEEKS.

AND WAS THE TRANSCRIPT EVER
ASKED FOR BY DEFENSE COUNSEL
OR THE DEFENDANT?

>> NO.

I'D LIKE TO RESERVE THE
REMAINDER OF MY TIME FOR
REBUTTAL.

>> OKAY.

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

MY NAME IS DOW.

I AM HERE ON BEHALF OF THE
STATE OF FLORIDA.

IT'S MY PRIVILEGE.

THE FIRST QUESTION THAT THE
COURT SHOULD ASK IS, IS

RESENTENCING A BENEFICIAL CHOICE FOR THE PETITIONER UNDER THIS SET OF FACTS. AND I WOULD ARGUE TO YOU THAT WHAT HAPPENED DOWN BELOW DID NOT HAPPEN DURING A CRITICAL STAGE OF THE PROCEEDING.

>> MAYBE WE OUGHT TO START REALLY WITH THE RULE BECAUSE EVEN THOUGH THIS IS A FASCINATING SUBISSUE, LET'S TALK ABOUT THE STATE'S POSITION AT 300 B.

>> CERTAINLY, YOUR HONOR.

>> MY CONCERN WOULD BE THAT IF WE SAY THESE ARE SUBJECT TO 300 B, THEN THAT WOULD MEAN THAT I, SOMEBODY COULD NOT OBJECT TO ENTIRE SENTENCING PROCEEDING ON ALL SORTS OF EVIDENTIARY THINGS, FINISH THAT PROCEEDING, AND THEN FILE A 3.800 B AND GO, THOSE WERE ALL ERRORS THAT I DIDN'T OBJECT TO AT THE TIME AND NOW THOSE WOULD BE CONSIDERED ON APPEAL AS IF THEY WERE PRESERVED AND I DON'T THINK WE WERE INTENDING TO DO THAT.

>> CORRECT.

>> WE WERE INTENDING TO FIX THINGS, AND I KNOW MAYBE WE'D LIKE A BRIGHT LINE BUT THINGS THAT COULD BE CORRECTABLE AND PREVENT AN APPEAL SUCH AS, YOU KNOW, THINGS THAT ARE IN THE SENTENCE ITSELF OR AARISING FROM THE SENTENCE.

NOT EVIDENTIARY MATTERS SO WHAT'S THE STATE'S POSITION ABOUT THAT.

IS IT MORE LIKE JUDGE STRINGER?

I MEAN HE SEEMS TO HAVE KIND OF CAPTURED, MAYBE IS WHAT I'M THINKING.

>> WELL, I WOULD LIKE TO GO BACK TO JUSTICE PARIENTE'S --, YOUR OWN DEFINITION OF WHAT SENTENCING ERROR MEANS AND YOU WROTE IN HARVEY v.

STATE, YOU SAID THERE THAT SENTENCING ERRORS ARE THOSE THAT ARE CAPABLE OF BEING ADDRESSED AND CORRECTED. AT THE TRIAL COURT LEVEL.

SO BY DEFINITION I WOULD URGE YOU TO CONSIDER THAT UNDER THE FACTS OF THIS CASE, THE ERROR IF ANY WAS CERTAINLY CAPABLE OF BEING ADDRESSED AT THE TRIAL COURT LEVEL AS YOU HAD SEEN.

>> WHAT WOULD HAVE HAPPENED? THEY FILE AD3.800 B AND WHAT WOULD THEN HAVE OCCURRED? WHAT YOU WOULD HAVE WANTED THE JUDGE TO HAVE DONE?

>> THERE ARE SEVERAL OPTIONS AT THE MOMENT THAT DEFENSE COUNSEL JOINED UP WITH THE COURT BY TELEPHONE.

HE APPEAR BIDE TELEPHONE AND HE SAID --

>> 3.800 -- NOTHING HAPPENED DURING THE HEARING.

YOU NOW HAVE A 3.800 B FILED.

>> IT, IT --

>> WHAT WOULD THE JUDGE THEN DO?

THE SENTENCE HAS ALREADY BEEN ENTERED.

THE VICTIM IS BACKEN NORTH CAROLINA.

HOW WOULD THE JUDGE CORRECT SNAT THAT?

>> TRIAL COURT CAN CORRECT IT NO DIFFERENT THAN IN A VINDICTIVE SENTENCING CASE, YOUR HONOR, IN TERMS OF, YOU KNOW, THE, THE COMPLAINT HERE IS THAT WHATEVER WAS TAKEN DURING THIS PROCEEDING PLAY INTO THE JUDGE'S ULTIMATE DECISION IN SENTENCING.

THAT'S THE WHOLE GIST OF IT.

>> HOW WOULD IT BE CORRECTED? DWL I'M ASKING YOU WHETHER THE STATE'S POSITION IS WHETHER THIS COULD BE PRESERVED THROUGH A 3.800 B.

>> AT THAT MOMENT, PARTICULARLY IN, IN THAT

MOTION TO CORRECT SENTENCE
UNDER 3.800 B THEY COULD ASK
FOR A RESENTENCE BY A
DIFFERENT JUDGE.

>> AREN'T YOU REALLY THOUGH
BY EXTENDING THIS CONVERTING
THE 3.800 B INTO A FIRST
APPEAL?

THAT IS THAT, IF WE TAKE
THIS ISSUE AND WE DON'T HAVE
TO GO MUCH FURTHER THEN
SAYING, WELL, THERE WAS
EVIDENCE RECEIVED AT THE
SENTENCING HEARING, AND SOME
OF IT WAS OBJECTED TO AND
SOME OF IT WASN'T AND THE
JUDGE RECEIVED IT AND NOW
WE'VE GOT THE POTENTIAL THAT
WE WOULD CONVERT 300 B INTO
A FIRST APPEAL WHERE NOW
THEY'D SAY, WELL, WE THINK
THE JUDGE ERRED IN RECEIVING
THIS EVIDENCE.

OR WE THINK THE JUDGE ERRED
IN EXCLUDING THIS EVIDENCE.
AND I'M HAVING DIFFICULTY
WITH THAT BEING THE PURPOSE
OF --

>> OF THE RULE.

>> OF 3.800 B, WHICH IS
REALLY WAS INTENDED TO CATCH
SOME ERRORS THAT, WELL, AT
ONE CATEGORY WOULD BE THAT
PROBABLY EVERYBODY WOULD
AGREE, THAT, YOU KNOW, THAT
THERE WAS A MISTAKE AND WE
JUST DON'T WANT TO WAIT FOR
THE TIME THAT IT TAKES TO
GET INTO THE APPELLATE COURT
BECAUSE OF ALL THAT DELAY.

>> YES.

>> TO CORRECT SOMETHING THAT
COULD'VE BEEN CORRECTED
EARLIER BUT NOT AS A FIRST
APPEAL.

THAT IS.

>> I UNDERSTAND.

>> AND THIS IS WHERE I'M
HAVING TROUBLE.

>> AND I AGREE WITH YOU.

I AGREE WITH YOU
WHOLEHEARTEDLY IN THAT WE
DON'T NEED TO RESORT THE
RULE EVEN TO CORRECT THIS

ERROR.

NOW I WILL TELL YOU WHY.
WHAT HAS BEEN OVERLOOKED IN
ALL OF THIS IS THAT THE
VICTIM'S STATEMENT HERE IS
DIFFERENT THAN LET'S SAY AN
AFT SUPPORTING AN ENHANCED
SENTENCE OR AN AFT REGARDING
PRIOR CONVICTION.

YOU KNOW, BY CONSTITUTIONAL
AMENDMENT, THE, THE VICTIM
HAS THE RIGHT TO COME BEFORE
THE COURT BEFORE SENTENCING
OR AFTER SENTENCING HEARING.

>> WELL NOW YOU ARE DEALING
YOU KNOW, WITH THE MERITS OF
THE, OF THE UNDERLYING ISSUE,
AND ISN'T THAT REALLY WHAT
WE SHOULD FOCUS ON THEN?

>> YEAH.

>> SO, SO WHY DON'T YOU GO
AHEAD AND HELP US WITH THAT
BECAUSE I MUST SAY I'M
HAVING SOME DIFFICULTY --

>> I UNDERSTAND.

>> WITH THE FACT THAT, THAT
A, REALLY WHAT THE TRIAL
JUDGE DID WAS START THE
SENTENCING HEARING AT THAT
TIME AND IS IT APPEARS THAT
THERE'S LOTS OF FAULT TO GO
AROUND INCLUDING ESPECIALLY
THE DEFENSE LAWYER BECAUSE
IF WE TAKE THE RECORD THE
WAY IT IS, IT APPEARS THE
DEFENSE LAWYER WAS TOLD ON
THE RECORD, OKAY, WITH THE
TRANSCRIPT AVAILABLE TO US,
NOT TO LEAVE.

>> THAT'S CORRECT.

>> AND WAS AND THE DEFENSE
LAWYER DID LEAVE.

NOT ONLY DID THE DEFENSE
LAWYER LEAVE, LATER WHEN THE
DEFENSE LAWYER WAS ON THE
PHONE WHILE THIS WAS GOING
ON AFTER HAVING LEFT AS
JUSTICE CANTERO INDICATES,
HE DID NOT SAY TO THE TRIAL
JUDGE, WELL, HOLD IT.

YOU KNOW, I'M GOING TO COME
RIGHT OVER THERE AND, YOU
KNOW, MAYBE WE CAN START
THIS THING OVER AGAIN OR

SOMETHING.

AND THEN TO COMPOUND IT EVEN FURTHER, WHEN THERE WAS A SENTENCING HEARING LATER, HE DIDN'T SAY, WELL, JUDGE, WAIT A MINUTE.

YOU KNOW, I'VE HAD TIME NOW TO THINK ABOUT IT.

AND I DON'T THINK YOU SHOULD PROPERLY CONSIDER THE, THE TESTIMONY YOU TOOK OF THE VICTIM BECAUSE I WASN'T THERE OR WHATEVER.

BUT WE GO ALL THE WAY BACK TO THE FACT THAT THERE WAS A PERIOD OF TIME WHEN THE JUDGE WAS ASKING --

>> JUSTICE ANSTEAD?

>> WE'LL TAKE -- THE COURT WILL TAKE A 10-MINUTE RECESS.

>> ALL RISE. \S RESUMPTION OF CASE 2 >> COURT IS BACK IN SESSION, PLEASE, BE SEATED.\E >> JUSTICE QUINCE IS FINE, SHE'S RESTING RIGHT NOW, AND SHE HAS ACCESS TO THE TAPE, THE GAVEL TO GAVEL PRESENT IT IS ENTIRE ARGUMENT JUST AS THOUGH SHE WAS SITTING HERE, AND SHE'LL HAVE THE OPPORTUNITY TO PARTICIPATE IN THAT FASHION IF SHE DECIDES TO PARTICIPATE IN THE CASE.\E >> THANK YOU, YOUR HONOR.\E >> OKAY?\E AND SO WE'LL GO --\E >> YES.\E >> SHORTER NOW THAT YOU'VE HEARD THE PRELIMINARY PART OF IT.\E >> YES.\E >> AND CAN FOCUS HERE.\E THAT IS THAT WE'RE LEFT, THOUGH, WITH REALLY THE BEGINNING OF THE SENTENCING HEARING.\E WITH A, AN APPRECIABLE PART OF THE TESTIMONY OF THE VICTIM, YOU KNOW, FOR SENTENCING PURPOSES WHERE THE DEFENDANT IS UNREPRESENTED BY COUNSEL.\E AND THAT'S THERE, THAT IS -- AND WE CAN'T, YOU KNOW, IT'S THERE.\E AND SO I AM HAVING DIFFICULTY WITH THE FACT THAT WE ESSENTIALLY HAD THE SENTENCING HEARING START EARLY, AND THAT HE'S UNREPRESENTED.\E AND AS MUCH AS I, I HAVE TO SAY LOOKING AT THE CONDUCT OF DEFENSE COUNSEL, I FEEL LIKE JUSTICE CANTERA.\E THERE WERE MANY OPPORTUNITIES FOR THE DEFENSE LAWYER TO STRAIGHTEN THIS OUT AND GET THIS CORRECTED, BUT THAT'S NOT THE DEFENDANT, THAT'S THE DEFENSE LAWYER.\E HELP ME WITH NOT BEING A FUNDAMENTAL PROBLEM OF THE SENTENCING PROCEEDING COMMENCING, AND THE DEFENDANT BEING DEPRIVED OF COUNSEL.\E ASSUMING THAT COUNSEL WAS THERE, THE STATUTE, THE SIOUXAL.\E >> WE'VE SEEN IT IN MANY INSTANCES WHERE VICTIMS OF CRIMES WOULD COME BEFORE THE COURT AND EXPRESS, AMONG OTHER THING, OUTRAGE AND HIGHLY-EMOTIONAL OUTBURSTS.\E DURING THOSE OCCASIONS, THE DEFENSE DOESN'T HAVE THE RIGHT TO CROSS EXAMINE.\E THEY DON'T HAVE THE RIGHT TO THE VICTIM, CONTAIN YOURSELF, WE DON'T WANT TO HERE R HEAR THESE OUTBURSTS OR CHALLENGE THE BASIS OF THE IMPACT THAT IT HAS ON THE VICTIM AS FAR AS THE CRIME GOES.\E MY ANSWER TO YOU IS WE DON'T HAVE TO RESORT TO 3800B2 TO RESOLVE THE ISSUE BEING PRESENTED.\E FURTHERMORE, WHY IS IT -- IS IT FUNDAMENTAL?\E >> I HAVE TO GET BACK TO SOMETHING BECAUSE WE'RE HERE, THERE'S A CONFLICT OF THAT, WHETHER 3800B IS REQUIRED FOR THESE KINDS OF ERRORS.\E WHAT -- DOES THE STATE'S POSITION THAT IF THEY HAD, LET'S JUST -- OBJECTED THROUGH FILING A 3 800 B MOTION THAT THEN THE APPELLATE COURT COULD LOOK AT THIS ON THE BASIS OF AS IF IT HAD BEEN PRESERVED AND LOOK AT IT HARMLESS ERROR.>>

>> IT IS A SENTENCING ERROR IN THE SENSE THAT IT AFFECTED THE SENTENCE ULTIMATELY.

LOOK, THE SECOND DISTRICT SAID HE DIDN'T RAISE THE ISSUE AS A MOTION TO CORRECT SENTENCING ERROR FILED PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 300 B 2. THE FIRST DISTRICT THAT'S IN FLICT SAYS YOU WOULDN'T HAVE TO FILE A 308 B 2.

WHAT I'M SAYING IS WHAT I'M ARE ASKING IS IT THE STATE'S POSITION THAT THIS HAD TO BE FILED AS A SENTENCING ERROR THROUGH 3800 B AND THEN IT WOULD'VE BEEN PRESERVED OR THAT 3800 B IS IRRELEVANT TO THIS.

IT'S, YOU LOOK AT IT AS IF 300 B DIDN'T EXIST.

THAT IT IS, IT SHOULD'VE BEEN OBJECTED TO BELOW AND IF IT WASN'T OBJECTED TO, IT WOULD'VE BEEN LOOKED AT AS A CLAIM OF FUNDAMENTAL ERROR.

>> THE STATE'S POSITION IS THAT IT COULD HAVE BEEN RESERVED AND PRESERVED BELOW.

>> BUT THAT MAKES -- WHY? THAT'S WHAT I ASKED YOU BEFORE.

IN OTHER WORDS, IF THE LAWYER HAD FILE AD3800 B AND THE JUDGE DIDN'T RULE WITHIN THE TIME PERIOD, THEN THE APPELLATE COURT WOULD BE OBLIGATED TO TREAT IT AS IF IT HAD BEEN PRESERVED.

WHAT I'M ASKING YOU IS, UNLESS WE'RE GOING TO MAKE THIS RULE IS GOING TO BECOME AN ABSURDTY, WHICH IS TO SAY IT WASN'T DESIGNED TO, TO ADDRESS CERTAIN KINDS OF ERRORS, BUT THERE STILL WOULD BE A CLASS OF FUNDAMENTAL ERRORS THAT YOU WOULD ADDRESS ON APPEAL BUT YOU CAN'T TURN SOMETHING THAT'S NOT TRULY MEANT FOR 300 B INTO A PRESERVED ERROR SIMPLY BY FILING THAT MOTION.

>> THAT'S WHAT YOU SAID IN

MADDOX AND HARVEY.

>> SO YOU -- SO THEREFORE
YOU AGREE THAT YOU DISAGREE
WITH THE SECOND DISTRICT'S
READENING?

-- REASONING.

>> I DISIEGRY TO THE EXTENT
THAT THERE'S NO CONFLICT.
BETWEEN THE DECISIONS.
AND MAYBE I'M NOT
UNDERSTANDING JUSTICE
PARIENTE'S --

>> YOU ARE SAYING IT WASN'T
PRESERVED BY A 3800 B 2 AND
YOU ARE SAYING OR I'M SAYING
THIS SHOULDN'T HAVE TO BE --
IT WOULD BE RIDICULOUS TO
HAVE THIS GO THROUGH A 300 B
2 BECAUSE THE JUDGE CAN'T DO
ANYTHING ABOUT IT AT THAT
POINT.

WHAT WOULD WE ENCOURAGE, I
MEAN THIS IS SORT
AFFFRIENDLY QUESTION OF THE
STATE.

WHY WOULD WE ENCOURAGE
SOMEONE TO SIT BACK DO
SOMETHING -- NOTHING DURING
THE WHOLE SENTENCING H} IN WITH A 00B --

>> YOU DON'T.

>> THE JUDGE DENIES IT --

>> CORRECT.

YOU DON'T.

WE DON'T WANT TO ENCOURAGE THAT,
AND THAT WOULD FLY IN THE FACE
OF -- AND THAT'S THE CRIMINAL --

>> OKAY, ON THE OTHER HAND, IF
SOMETHING IS TRULY A FUNDAMENTAL
ERROR, SUCH AS THE COMPLETE
ABSENCE OF AN ATTORNEY -- WELL,
THEN YOU AGREE THE FIRST
DISTRICT IS RIGHT?

>> THE FIRST DISTRICT OPINION IS
RIGHT ON ITS OWN FACT.

>> ALL RIGHT, SO, THEREFORE,
WHAT YOU WOULD SAY IS WE SHOULD
ADOPT WHAT JUDGE STRINGER SAID
IN HIS CONCURRENCE IN THIS
CASE --

>> YOU CERTAINLY COULD DO THAT.
AND AND ALSO APPROVE THE FIRST
DISTRICT'S OPINION AS WELL?

>> WELL, THE DECISIONS ARE RIGHT
ON THEIR OWN FACTS AND MERIT,

JUDGE.

YOU WOULDN'T HAVE TO PRESERVE
THAT --

>> CORRECT.

>> THAT WOULD REMAIN THE SAME
POSITION BECAUSE THAT'S A
CONSTITUTIONAL IMPERATIVE.
YOU CANNOT DENY THE ACCUSED THE
RIGHT TO COUNSEL.

BUT I WANTED TO GO BACK AND
ADDRESS THE FACTS, BECAUSE I
THINK IT'S IMPORTANT TO SEE THAT
RESENTENCING IS NOT THE IDEAL
SITUATION IN THIS CASE.

WHEN YOU LOOK AT THE FACTS, YOU
SEE CLEARLY THAT JUSTICE WILL
NOT BE SERVED.

BEFORE SENTENCING THE JUDGE SAID
SEVERAL TIMES, THIS IS NOT A
SENTENCING HEARING.

I'M NOT PASSING ANY JUDGMENT,
AND YOUR COUNSEL AND YOU WILL
HAVE A CHANCE TO DO SO LATER.

>> WAS THAT IMMEDIATELY AFTER
THE TRIAL?

>> YES.

>> AFTER THE GUILTY VERDICT?

>> YES.

>> AND THAT'S WHY THE VICTIM WAS
STILL THERE?

>> CORRECT.

AND I DON'T KNOW IF THIS IS
FEASIBLE, BUT, YOU KNOW, SHE'S
HERE, SHE'S BEEN FLOWN IN AT
PUBLIC EXPENSE, AND SHE WOULD
LIKE TO SAY SOMETHING AT
SENTENCING, AND THE JUDGE WAS
AMENABLE TO THAT.
HE FACED 30 YEARS IN PRISON.
THE JUDGE EXPRESSED THAT
SLASHING THE VICTIMS IN THE FACE
AND HEAD, LEAVING POSSIBLY
PERMANENT INJURY INCLUDING THE
LOSS OF SIGHT IN ONE EYE IS A
CONCERN, AND HE SAYS THE CONDUCT
WAS SIMILAR TO WAR CRIMINALS.

AND HE CITED YUGOSLAVIA TROOPS
DISFIGURING WOMEN.

AND HE SAID I HAVE A CONCERN
ABOUT THAT, AND MY FIRST
INCLINATION IS TO IMPOSE THE
MAXIMUM.

AND DEFENSE COUNSEL ADOPTED THE
VICTIM'S EXPRESSION, AND SAID,

JUDGE, THE VICTIM WAS NOT OF A VINDICTIVE FRAME OF MIND, AND I WOULD URGE YOU TO CONSIDER WHAT SHE SAID.

NOT ONLY DID THEY WAIVE THE ISSUE, THEY EXPRESSLY ADOPTED WHAT THE VICTIM SAID IN TERMS OF A LEAN LENIENT SENTENCE.

PETITIONER WAS IN CUSTODY AS OF MAY 2005.

>> WHAT WAS THE MIN MOMENTUM SENTENCE SHE COULD HAVE RECEIVED?

>> SHE SCORED OUT TO 39.4 MONTH MONTHS.

AND THE JUDGE SAID I'M NOT OBLIGATED TO INPOSE THE MINIMUM. IN IN CASE --

>> HAVE WE GOTTEN TO A POINT IN SENTENCING WHERE THE JUDGE COULD HAVE IMPOSED 34 MONTHS TO 30 YEARS AND IT'S NOT REVIEWABLE?

>> I'M NOT SAYING THAT AT ALL, YOUR HONOR.

>> COULD HAVE DONE ANYTHING UP TO 30 YEARS?

>> YES.

THAT'S WHAT -- YES.

>> CRIMINAL PUNISHMENT CODE CASE, RIGHT?

>> YES.

SO IN THAT REGARD, IF ANY, IN YOU ARED TO THE PETITIONER'S BENEFIT.

>> BUT ISN'T THAT A CHOICE THE DEFENDANT HAS TO MAKE?

THAT IS, IF IT TRULY IS FUNDAMENTAL, YOU KNOW, LET'S JUST SAY THEY HAD A SENTENCING HEARING, AND THE LAWYER DIDN'T SHOW UP.

BUT THE JUDGE WENT AHEAD WITH THE SENTENCING HEARING, AND THE SAME OUTCOME, YOU KNOW?

BUT I WONDER WHETHER OR NOT THAT THE TWO CONCEPTS OF HARMLESS ERROR AND FUNDAMENTAL R OR -- ERROR REALLY AREN'T MUTUALLY EXCLUSIVE.

THAT IS IF THE DEFENDANT CHOOSES TO ASSERT THE RIGHT, THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING HEARING, WHICH NOBODY DENIES THE

DEFENDANT HAD THE RIGHT TO, IT'S THE DEFENDANT, NOW, THAT'S GOING TO BE TAKING THE RISK --

>> YES.

>> YOU KNOW, ALL LOGIC SUPPORTS WHAT YOU'RE SAYING, THAT IT SURE LOOKS LIKE SHE CAME OUT SMELLING LIKE A ROSE.

>> YES.

>> WHATEVER.

BUT THE REALITY IS WE HAVE THERE DEPRIVATION OF COUNSEL AT A CRITICAL STAGE, IN ESSENCE, THE BEGINNING OF THE SENTENCEING HEARING.

>> YES, YOUR HONOR, BUT U.S. SUPREME COURTS HAVE TIME AND TIME AGAIN SAID THAT A BRIEF ABSENCE FROM A CRITICAL PROCEEDING SUCH AS TRIAL IS MEASURED BY THE HARMLESS ERROR ANALYSIS.

I MEAN, THIS COURT HAS SAID SO ON THE CASES THAT PETITIONERS CITED TO OUT OF THE FOUR DISTRICTS.

THERE WAS A BRIEF ABSENCE OF COUNSEL IN SEVERAL FACTUAL PATTERNS.

ONE WAS A JURY CHARGE CONFERENCE.

ONE WAS DURING THE GIVING OF JURY INSTRUCTIONS, ONE WAS COUNSEL WAS TEMPORARILY UNAVAILABLE FOR JURY DELIBERATIONS.

SO I ASK YOU TO USE THOSE FACTUAL PATTERNS AS WELL --

>> ARE THOSE IN THE SAME CATEGORY AS WHEN SOMEONE IS SPEAKING TO THE COURT AND GIVING INFORMATION UPON WHICH SOME ACTION'S GOING TO BE TAKING? WHEN A JURY'S SITTING IN A JURY ROOM DELIBERATING, THERE'S NOT MUCH HAPPENING THAT A LAWYER REALLY DOES.

AREN'T THOSE DIFFERENT THAN WHEN YOU HAVE SOMEONE SPEAKING TO THE COURT?

>> IN THE SENSE THAT SOMEONE IS SPEAKING TO THE COURT, I WOULD SUBMIT TO YOU THAT TRIAL WAS OVER.

THE RIGHT TO CONFRONTATION HAD ALREADY BEEN FULLY EXERCISED.

>> BUT THIS HAS TO BE CONSIDERED TO BE PART OF THE SENTENCING PROCESS.

I MEAN, EVEN THOUGH YOUR OPPONENT POINTS OUT, YOU POINT OUT THAT THE SENTENCE WAS NOT ACTUALLY HANDED DOWN THAT DAY, THIS WAS STILL PART OF THE SENTENCING PROCEEDINGS.

BECAUSE THIS WAS CONSIDERED INFORMATION THAT WAS CONSIDERED IN HANDING DOWN THE SENTENCE.

>> YES.

>> WHICH BRINGS US BACK FULL CIRCLE TO 3.800B AND THAT WE'VE GOT TO ARTICULATE SOME WAY THAT TRIAL COURTS ARE GOING TO BE ABLE TO FIGURE OUT WHEN SOMETHING -- AND THE APPELLATE COURTS, WHEN SOMETHING COMES UNDER A 3.800B AND WHEN IT DOES NOT.

BECAUSE WE HAVE LANGUAGE IN OUR CASES WHICH TALK ABOUT THIS IT HAS TO DO WITH ANY SENTENCING ERROR.

AND ANY SENTENCING ERROR SOUNDS TO ME LIKE IT MEANS SOMETHING THAT HAPPENS DURING THE SENTENCING PROCEEDING.

>> I AGREE WITH YOU.

BUT THIS IS NOT THE RIGHT CASE OR THE RIGHT VEHICLE TO DO THAT. I MEAN, THIS CASE IS UNIQUE IN ITS OWN FACTS.

AND IF YOU START CARVING OUT, I MEAN, JUSTICE -- EXPRESSED THIS CONCERN IN MAD COX.

SHE SAID I'VE LISTED SEVERAL CATEGORIES OF SENTENCING ERRORS, BUT I'M NOT SATISFIED THEY'RE ALL EXHAUSTIVE, AND I RESERVE -- IN YOUR WORDS, A SPECIES OF ERRORS THAT WE WILL ALWAYS VIEW AS CONSTITUTIONAL ISSUE.

WHETHER SENTENCING TRIAL RELATED, AND I WOULD URGE YOU TO COME BACK TO THAT POINT IN THE SENSE THAT WHAT HAPPENED IN TERMS OF WHAT GOVERNORS THE CONDUCT, A TRIAL CAN BE BROUGHT INTO BEAR IN THE SENTENCING

CONTEXT.

HOWEVER, THIS CASE IS NOT THE RIGHT CASE.

IF YOU DO ISSUE AN OPINION ON THIS, YOU'RE, IN FACT, CARVING OUT EXCEPTIONS, AND THEN YOU GO DOWN THAT PATH OF, WELL, HOW MUCH OF AN ABSENCE?

AND WHAT HAPPENED DURING THE ABSENCE?

HOW MUCH OF A PREJUDICE?

AND THEN IT BRINGS US FULL CIRCLE TO WAS THERE ANY HARM?

>> IF YOU COULD BRING YOUR ARGUMENT TO A CONCLUSION.

>> CERTAINLY, YOUR HONOR.

>> YOU'RE BEYOND YOUR TIME.

>> AND I'VE LAID OUT THE REALISTIC RESULT IN TERMS OF WHAT WE WOULD DO, WHAT WOULD HAPPEN IN A CASE OF RESENTENCING, WHETHER OR NOT THIS IS THE ONE CASE WHERE JUSTICE WILL BE SERVED BY GIVING THAT RELIEF.

BUT I WOULD URGE THE COURT FIRST AND FOREMOST THAT THERE'S NO CONFLICT IN THESE TWO DECISIONS. THEY, THE LAW AS ANNOUNCED BY THIS COURT AND AS EXISTS, ARE TRUE AS APPLIED TO EACH OF THE CASES IN KNOWN FACT, AND I WOULD ASK YOU TO DECLINE JURISDICTION AS IT WAS IMPROVIDENTLY GRANTED, EVEN THOUGH THE STATE CONCEDED IT FIRST, CORRECT?

>> YES.

THANK YOU VERY MUCH.

>> THANK YOU.

>> REBUTTAL?

>> I THINK THIS IS THE PERFECT CASE TO SAY WHAT IS AND WHAT ISN'T OKAY UNDER 3.800.

THIS IS THE PROBLEM AS APPELLATE LAWYERS, WE NEED TO KNOW IF IT'S NOT FUNDAMENTAL ERROR, DO WE HAVE TO RAISE EVERY SINGLE ISSUE?

>> SO YOU WOULD AGREE THAT THE PUBLIC DEFENDERS WHO ARE MOSTLY THE ONES THAT ARE GOING TO GET INTO THIS, WOULD NOT SEE, WOULD NOT TRY TO GET AROUND A LACK OF PRESERVATION FOR NO OBJECTION

MADE DURING THE ENTIRE
SENTENCING HEARING SAYING, OH, I
CAN NOW FOLLOW 3800B AND I'LL
HAVE EVERYTHING --

>> NO, I DON'T THINK SO.

>> YOU AGREE THAT THAT WOULD BE
A MISUSE OF 3800B?

>> CERTAINLY.

FIRST OF ALL, I DON'T THINK THIS
CASE IS --

>> I WANT TO MAKE SURE THAT
THAT -- BECAUSE THAT WOULD BE
THE PERVERSION OF THE RULE.
AND HERE WHAT YOU'RE SAYING IS
THAT IT WASN'T -- YOU SAYING IT
WASN'T PRESERVED, YOU AGREE WITH
THAT, BUT YOU, THEN, WANT US TO
LOOK AT IT AS WHETHER OR NOT
IT'S FUNDAMENTAL.

>> CORRECT.

>> ALL RIGHT.

AND IF WE DISAGREE THAT IT'S
FUNDAMENTAL ERROR, THEN YOU
LOSE.

>> THAT'S RIGHT.

>> OKAY.

BUT YOU, YOU DON'T WANT TO LOSE
BECAUSE WE SAY YOU SHOULD HAVE
PRESERVED IT THROUGH 3800B?

>> RIGHT.

IF APPELLATE COUNSEL HAS TO
RAISE EVERY SINGLE, EVERY CASE
THAT WE GET WE HAVE TO RAISE A
3800B MOTION, THAT'S WHERE I
THINK MAYBE THE COURT IS GOING.
IT'S EVERY SINGLE SENTENCING, IF
IT'S ERROR, IF IT'S FUNDAMENTAL
ERROR, WHATEVER IT IS, ARE WE
GOING TO HAVE TO --

>> YOU WOULD ADMIT THAT THE A
FAIR BREEDING OF BRANDON AND
HARVEY THAT THIS COURT WAS
HEADED DOWN THAT ROAD, THAT ANY
SENTENCING ERROR MEANT ANY
SENTENCING ERROR, RIGHT?

>> WELL, I THINK THAT'S TRUE,
BUT I DON'T THINK THIS IS A
SENTENCING ERROR, SO PERHAPS
THIS COURT HAS TO BE CLEAR --

>> ANY ERROR OCCURRING DURING
THE SOMEBODIESING PROCESS IS NOT
A SENTENCING ERROR.

>> WHAT IS IS IT?

IS IT FUNDAMENTAL ERROR?

TO ME, THIS WAS FUNDAMENTAL ERROR.

>> LET'S BE CLEAR ABOUT JUSTICE PARIENTE'S QUESTION TO YOU BECAUSE IT'S SORT OF THE OTHER SIDE OF WHAT YOU'RE POSTURING ABOUT THE NECESSITY TO DO IT, AND THAT IS ASSUME YOU WOULD AGREE ON A CLEARER HYPOTHETICAL WHERE SOME QUESTION WAS ASKED OF A WITNESS AT THE SENTENCING HEARING, AND THE LAWYER DOESN'T OBJECT, AND WHATEVER THAT QUESTION GETS ANSWERED, AND THAT EVIDENCE GOES IN.

AND LATER AN APPELLATE LAWYER, LIKE YOURSELF, LOOKS AND SAYS, MY GOSH, LAWYER SHOULD HAVE OBJECTED.

I THINK THERE'S A PROBLEM WITH THAT.

MAYBE IT'S EVEN FUNDAMENTAL ERROR, OKAY?

THAT'S NOT AN APPROPRIATE 3800B ISSUE.

>> CORRECT.

>> THAT'S AN ISSUE, IF IT ENDS UP BEING RULED THAT IT WAS WEIGHED BY -- WAIVED BY FAILURE TO OBJECT, IT WASN'T PRESERVED, SO BE IT.

BUT YOU DON'T GO TO 3.800B AND SAY HERE'S ALL THE ISSUES AND THE ADMISSION OF EVIDENCE AND EVERYTHING THAT I'VE BEEN ABLE TO FIND.

IT'S NOT A FIRST-ROUND APPEAL.

>> THAT'S CORRECT.

>> SO WHY DON'T YOU COME BACK, THEN, AND SEE IF YOU CAN CONVINC US IN THE LAST COUPLE OF MINNESOTAS THAT FUNDAMENTAL ERROR OCCURRED HERE.

BECAUSE THE STATE'S MADE A PRETTY PER SWAIS I HAVE CASE THAT, MY GOSH, YOUR CLIENT SEEMED TO REALLY GET A GOOD DEAL HERE CONSIDERING THE WAY THAT THIS TRIAL JUDGE STARTED OUT SAYING, BOY, I'M GOING TO UNLOAD ON THIS ONE AND THEN ENDING UP WITH JUST WHAT?

A YEAR OVER THE MINIMUM?

>> I DON'T THINK THE END JUSTIFY

IT IS MEANS.

>> BUT THAT'S WHAT I JUST WANT
YOU TO HELP US --

>> FIRST OF ALL, THIS WASN'T
SIMPLY A MINTARIAL FUNCTION THAT
COUNSEL WASN'T PRESENT.

HE WASN'T PRESENT.

JUDGE ASKED THE VICTIM 44
QUESTIONS, OKAY? COUNCIL WASN'T
PRESENT THE STATE DIDN'T SAY
ANYTHING IT WAS JUDGE ASKING
44 QUESTIONS I DON'T THINK
IT MATTERS.

>> WELL YOU SEE IF YOU SPEAK
THE NUMBERS SPEAK OF
SUBSTANCE, THAT WAS HARM
FULL TO YOUR CLIENT.

>> ABOUT QUESTIONS ABOUT HER
RELATIONSHIP WITH -- I DON'T
HAVE A PROBLEM WITH ACT --
ASKING SEEMED TO ME PERSONAL
QUESTIONS ABOUT -- WHO ABOUT
HER CHILD, ABOUT HER
RELATIONSHIP!!\$\$!!!!!!!!!!!!!!!!!!!!!!
RELATIONSHIP, WITH MANN
WHETHER, JACKSON -- SHE --
SEEMED TO ME THAT IT WAS
IRRELEVANT FOR SENTENCING
PROCEEDING IT SEEMED
IRRELEVANT!!\$\$!!!!!!!!!!!!!!!!!!!!!!
IRRELEVANT, TO WHAT THE
JUDGE NEEDED TO UNDERSTAND.

>> -- HAD IT IMPACT
SENTENCING!!\$\$!!!!!!!!!!!!!!!!!!!!!!
SENTENCING?

>> WELL, I THINK IF DEFENSE
COUNSEL HAD BEEN THERE MAY
HAVE OBJECTED SHE MAY HAVE
DONE BETTER THAN FIVE YEARS
IN PRISON IN SEVEN YEARS'
PROBATION WE DON'T KNOW WHAT
WOULD HAVE HAPPENED SHE WAS
LOOKING AT 30 YEARS JUDGE
GAVE HER FIVE.

WITH DEFENSE --

>> SENTENCING DEFENSE
COUNSEL USE AS STATE SAID
USED THE I'M VERY'S LACK OF
NOTICE THAT TESTIMONY.

>> WELL, I WILL WILL READ
WHAT YOU -- THE JUDGE SAID,
THE JUDGE SAID, AT
SENTENCING I HAVE TAKEN INTO
ACCOUNT THE STATE'S

RECOMMENDATION!!\$\$!!!!!!!!!!!!!!!!!!!!!!!!!!!!

RECOMMENDATION, I HAVE TAKEN INTO ACCOUNT THE RASHGZ MADE BY TO THAT VICTIM AT THE END OF THE TRIAL, WHO --

>> IN THIS VINDICTIVE FRAME OF MIND.

>> YOUR -- INTO YOUR TIME I WANT TO BE SURE YOU HAD OPPORTUNITY TO FULLY ANSWER JUSTICE ANSTEAD\$\$'S QUESTION WHY THIS IS NOT HARMLESS AND JUSTICE CANTERO HAS QUESTION BEFORE YOU FINISH DID YOU FINISH ALL YOU WANTED TO ADD TO --

>> DID.

>> ARE YOU SAYING THAT -- WITH THE, THE DEPRIVATION OF COUNSEL, THAT WE CAN'T CONSIDER HARMLESS ERROR? OR ARE YOU SAYING YES YOU CAN CONSIDER IT, BUT THAT IT IS NOT HARMLESS ERR NOR THIS PARTICULAR CASE.

>> I THINK IF IT WAS -- MINUTE ISTERIAL FUNCTION DEFENSE COUNCIL WASN'T PRESENT FOR IN THIS INSTANCE WHERE THERE WAS SEVEN PAGES OF TESTIMONY, THAT DEFENSE COUNSEL WASN'T NOTIFIED THE JUDGE THE JUDGE HIMSELF QUESTIONED THE \$\$VICTIM'S PROSECUTOR DIDN'T THE JUDGE QUESTIONED THE VICTIM I DON'T THINK THAT HARMLESS ERROR I THINK BEYOND THAT.

>> JUSTICE CANTERO ONE LAST QUESTION.

>> DUFF A RIGHT TO CROSS-EXAMINE THE VICTIM AT THIS HEARING INTO YES, IT IS ONE THING VICTIM JUST SUBMITS A STATEMENT, FINE NOBODY NEEDS TO QUESTION THE VICTIM, THAT IS 2350I7B EVERYBODY CAN LOOK AT THAT STATEMENT IF VICTIM IS UNDER OATHS TESTIFYING -- DEFENSE HAS AN OBLIGATION TO QUESTION HER.

>> DID YOU IDENTIFY QUESTIONS THAT YOU WOULD

HAVE HAVE ASKED INTO SORRY.

>> DID YOU IDENTIFY ANY
QUESTIONS THAT YOU WOULD
HAVE ASKED THE VICTIM?
DIDN'T THE VICTIM CONTINUE
TO TESTIFY AFTER A COUNCIL
FROM THE GONE.

>>.

>> DID DEFENSE COUNSEL ASK
VICTIM ANY QUESTIONS THEN.

>> NO.

>> WITH THAT YOU HAVE
EXHAUSTED REBUTTAL TIME
THANK YOU VERY MUCH WE WILL
CAKE THE GUYS CASE UNDER
ADVISEMENT