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State of Florida v. Glenn Kelly

SC07-95

LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT PLEASE BE SEATED.

THE NEXT CASE ON OUR CALENDAR THIS MORNING IS STATE OF FLORIDA VERSUS KELLY.

GOOD MORNING.

MOURN -- MAY IT PLEASE THE COURT ON BEHALF OF THE STATE OF FLORIDA FLA KELLY CAME TO THIS COURT, AS A RESULT OF A STATE APPEAL WHERE,!!\$\$!!!!!!!!!! WHERE,IN, THE STATE APPEALED!!\$\$!!!!!!!!!!!!!! APPEALED, THE MOTION TO DISMISS GRANTED BY THE TRIAL COURT, REGARDING INFORMATION AGAINST MR. KELLY. THAT INFORMATION, AGAINST MR. KELLY STATE WAS ATTEMPT TO DO TRY MR. KELLY AS A FIRST DEGREE FELONY DUI CASE, BASED ON TWO CONVICTION ONE FROM 1995 ONE FROM 1997, BOTH CASES, RESPECTIVELY MR. KELLY WAS FACING SENTENCE OF NINE MONTHS AND 12 MONTHS.

THE CASE WAS DISMISSED AT THE TRIAL LEVEL, THE FOURTH DISTRICT COURT OF APPEAL AFFIRMED THE TRIAL COURT AND, IN ITS JOURNEY FAIRMING THEY TRIAL COURT CERTIFIED THE FOLLOWING QUESTIONS.

AND -- WE DO UNDERSTAND, THE FACTUAL UNDER PECUNIARIES HERE, AND, UNDERPINNINGS HERE COMES DOWN TO THE QUESTION OF -- OF, IS IN REGARD LAW DIFFERENT WITH REGARD TO COUNSEL THE RULED SET THAT UP WHETHER REQUIRED BY, BY, THE CONSTITUTION OR NOT, AND BASED ON THAT, IS THAT IT IS SOME WHAT DINT THAN THE FEDERAL -- DIFFERENT THAN FEDERAL INTERPRETATION ISN'T THAT YOU ARE SAYING FEDERAL INTERPRETATION SHOULD CONTROL YOUR OPPONENT IS SAYING NO FLORIDA LAW IS DIFFERENT FOR COUNSEL TO BE APPOINTED THEREFORE WHEN YOU APPLY THESE ELEMENTS, THE UNREPRESENTED PLEA IN THIS CASES CAN'T BE USED ISN'T THAT REAL WHAT OUR DISPUTE IS THERE -- ABOUT.

YOUR HONOR THAT IS I JUST OF THE ARGUMENTS.

YES.

WHETHER.

ISN'T THAT REALLY WHEN IT IS ABOUT?

YES.

OKAY.

BUT THE -- I WOULD ALSO SAY THAT AS I YOU INDICATED, IN THE BRIEF THIS COURT -- THAT CASE MAY HAVE BEEN IN THERE IN THE DISCUSSION, IN THERE REALLY, ISN'T OUR JOB, REALLY NOT TO GET BOGGED DOWN IN ALL OF THESE HOW MANY JUSTICES SAID THIS SOME JUSTICES SAID THAT.

UM-HMM.

THIS TO SEE SEEMS WE OVER COMPLICATED SOMETHING NEED NOT BE THAT COMPLICATED IT SEEMS TO ME WE CAN SAY YES THIS WHAT WE DO NO, WE DON'T.

I AGREE WITH THE COURT I THINK THAT THE ISSUE AND THE QUESTION CERTIFIED, IS A HE IS NS A SIMPLE QUESTION, IN ORDER FOR THIS COURT TO GIVE GUIDANCE TO THE COURTS OF THE STATE. AND THAT IS REALLY THE GIST OF THE STATE'S ARBITRARILY IS THAT!!\$\$!!!!!!!!!!!!!! -- \$\$STATE'S ARGUMENT THIS COURT FOUND A PREDICATE CONVICTION CAN BE USED, WHERE ONE IT WAS NOT INCARCERATED!!\$\$!!!!!!!!!!!!!! INCARCERATED, OR A DEFENDANT WAS FACING A SENSE OF LESS THAN SIX MONTHS. THIS COURT FOUND, THIS AND UNDER THE HE FLORIDA CONSTITUTION, IT IS OUR CONTENTION!!\$\$!!!!!!!!!!!!!! CONTENTION, THAT THE NICKLES CASE WHICH EXPANDS THAT, DOES NOT -- GOES -- QUESTION THE ESSENCE OF IT DOES NOT O FEND THE FLORIDA CONSTITUTION, THAT THE FLORIDA RULES AND THE THE CONSTITUTION, COMPORT WITH THE HOLDING IN NICKLES, WHICH WE ARE ASKING THIS COURT TO FOLLOW, IN TERMS OF THE QUESTION, SO.

THERE IS A DIFFERENCE IN YOUR MIND, WHETHER OR NOT THE PRIOR CONVICTION IS USED AS A SENTENCING FACTOR AS OPPOSED TO TO AN ENHANCEMENT LIKE IN THIS CASE MAKING THE OFFENSE A FELONY AS OPPOSED TO TO A MISDEMEANOR.

NO, YOUR HONOR, THE CASES, SEEM TO INDICATE THE A QUESTION OF SOMEWHAT SEMANTICS BUT USED THE TERM RECLASSIFICATION OR ENHANCE IN THE MEANTIME WE SUGGEST THAT IS RECLASSIFICATION OF THE OFFENSE AND I.

TWO TERMS AREN'T INTERVENTION CHANGEABLE ARE THEY A RECLASSIFICATION IS ONE THING, BUT WHEN YOU HAVE A TRUE ENHANCEMENT, THAT IS A DIFFERENT CONCEPT ISN'T IT.

THAT IS CORRECT YOUR HONOR THAT IS WHY WE SUGGEST THIS IS --

OKAY.

--

-- CLASSIFICATION --

BASES OF THE NICKLES OPINION WAS THAT THESE STATUTES!!\$\$!!!!!!!!!!!!!! STATUTES, ENHANCEMENT STATUTES WHETHER, GUIDELINES OR RECIDIVIST STATUTES, THE \$\$ STATE'S APPLY THEM, DO NOT ENHANCE THE PENALTY FOR THE PRIOR CONVICTION.

THAT IS -- THAT IS O THAT IS THE BASES WHY THEY SAID THIS WAS OKAY.

THAT -- THAT IS THE BASIS ONE OF THE BASES OF OUR ARGUMENT, AND THAT IS -- THAT IS THIS COURT UPHOLD RECIDIVIST STATUTES HAVE AN -- HABITUAL OFFENDER FOR INSTANCE BASED ON THAT PARTICULAR PHILOSOPHY THAT THE ORIGINAL THAT ONE IS NOT PUNISHED FOR THE ORIGINAL CRIME ONE IS -- WHERE THEY ARE PREZAESHTS IN TERMS OF -- WHERE THEY ARE REGARDING THE SUBSEQUENT OFFENSE, AND THAT IS WHAT -- IS REALLY, THE ISSUE REGARDING AS TO WHETHER WE SEASONAL WON BEING PUNISHED FOR THAT. YOU WOULD AGREE WOULDN'T YOU WE ARE NOT COMPELLED TO FOLLOW THE NICKLES CASE. THE STATES ARE FREE TO DO SOMETHING DIFFERENT. CORRECT?

BUT THAT IS CORRECT, I BELIEVE NICKLES CASE -- STATED THAT.

OKAY, SO -- TELL US WHAT -- WHAT WOULD BE THE REAL POLICY REASONS BEHIND US CHANGES!!\$\$!!!!!!!!!!!!!! CHANGING AS I SEE WHITE WOULD HAVE TO CHANGE RULED IN ORDER HAVE TO ACCOMMODATE THIS CHANGE WHAT IS THE POLICY BEHIND IT? WHY WOULD WE WANT TO MAKE THOSE CHANGES? .

WELL, AS I -- BEGAN TO SAY PREVIOUSLY, THE LAW IN FLORIDA FOR THE LAST, I THINK 19 YEARS, HAS BEEN THAT A PREDICATE CONVICTION UP TO SIX MONTHS WHERE SOMEONE FACING INCARCERATION UP TO SIX MONTHS WHERE THEY WERE NOT INCARCERATED CAN BE USED AS PREDICATE CONVICTION TO ENHANCE OR RECLASSIFY THE SENTENCE HAS BEEN THE LAW IN THE STATE FOR 19 YEARS, I'M NOT SO SURE MOST RESPECTFULLY THAT RULES WOULD HAVE TO BE CHANGES IN THAT AREA, O CHANGED IN THAT AREA CLEARLY THE PROCEDURE UNDER BEACH WHERE SOMEONE COMES TO COURT, AND HAS TO THE DEFENDANT COMES TO COURT HAS BURDEN TO SHOW THAT THEY WERE NOT -- GOING INCARCERATED MORE THAN SIX MONTHS THAT PROCEDURE MAY HAVE TO CHANGE.

WELL THE RULE SAYS THAT THE JUDGE HAS TO CERTIFY, THAT THAT HE IS THAT PERSON IS NOT GOING TO -- GET THIS KIND OF SENTENCE, AND SO WHEN THE STATE IS PRESENTING THESE FORMERE THINGS THEY EITHER HAVE TO SHOW THAT THE TRIAL JUDGE DID THAT, OR THE OTHER ALTERNATIVE SO WOULDN'T THAT RULE HAVE TO BE CHANGED? YOU DON'T THINK SO?

WELL, I THINK THAT IT -- UNDER -- -- NIXELS, WHICH NICKLES REAFFIRMED SCOTT V.

ILLINOIS!!\$\$!!!!!!!!!!!!!! ILLINOIS, A JUDGE UNDER THAT RULE WOULD HAVE TO STATE IF HE IS NOT GOING PROVIDE COUNSEL TO INDIGENT DEFENDANT HE IS NOT GOING TO INCARCERATE THAT DEFENDANT.

I THOUGHT YOUR CAN ARGUMENT WAS IF YOU SEE THAT THE DEFENDANT HAS NOT BEEN, INCARCERATED!!\$\$!!!!!!!!!!!!!! INCARCERATED, THAT THAT IS SUFFICIENT. IF THE -- IF THE JUDGMENT THAT IS ENTERED SIMPLY SAYS SAY HE IS -- PROBATION SOMETHING TO THAT EFFECT NOT INCARCERATED THAT WOULD BE SUFFICIENT.

THAT WOULD --

TO USE AS A PREDICATE OFFENSE!!\$\$!!!!!!!!!!!!!! OFFENSE.

WELL I DON'T THINK NECESSARILY THAT IS MUTUALLY EXCLUSIVE OF THE RULE IN TERMS OF THE JUDGE IN TERMS OF THE RIGHT TO COUNSEL THAT SOMEONE HAS LIKE IN GO BACK

COLLATERAL!!\$\$!!!!!!!!!!!!!!!!!!!! COLLATERALIE ATTACK THE RATE TO COUNSEL.

I JUST WANT TO MAKE SURE I UNDERSTAND WHERE WE ARE IN THE LAW, BASED ON OUR PRIOR CASE LAW. THE -- MAJORITY IN THE -- THE -- HOW DO YOU SAY IT --!!\$\$!!!!!!!! IT --!!\$\$!!!!!!!!IT -- -- SAID THAT THERE WERE GOING TO FOLLOW THIS SIX MONTHS IMPRISONMENT; CORRECT? THE DEFENDER SAID NO NO, WE -- IF THERE IS SUBJECT TO ANY IMPRISONMENT, THEY OUGHT TO HAVE -- OUGHT TO APPLY THAT IS WHERE THE BREAK OCCURRED IN THAT CASE.

YES.

ALL RIGHT SO WHAT YOU ARE SAYING IS SINCE THAT CASE EVEN IF -- SOMEBODY IS SUBJECT TO IMPRISONMENT FOR -- IF SUBJECT LESS THAN SIX MONTHS, STILL COUNTS, EVEN IF IT WAS UNCOUNSELED, FOR A PREDICATE?

THAT IS CORRECT.

OFFENSE.

ALL RIGHT.

BUT WITH THIS IN THIS CASE, AND JUST FOLLOWING UP ON WHETHER THERE IS A DIFFERENCE BETWEEN SENTENCING FACTORS, ENHANCEMENTS!!\$\$!!!!!!!!!!!!!!!!!!!! ENHANCEMENTS, RECLASSIFICATION!!\$\$!!!!!!!!!!!!!!!!!!!! RECLASSIFICATION, IT SEEMS TO ME, AND I DIDN'T I MEAN -- READ EVERY WORD OF THE NICKLES OPINION THAT THERE WAS DISCRETION FOR THE COURT AS TO HOW THEY WERE GOING TO TREAT THAT -- UNCOUNSELED PRIOR MISDEMEANOR; IS THAT CORRECT? AS TO -- AS TO THE FEDERAL SENTENCING GUIDELINES?

IN TERMS OF NICKLES CASE?

YES.

WELL THE COURTSO COURT INDICATED THAT SEEMS MORE OF A -- RELAXED TYPE OF ENVIRONMENT, IN TERMS OF WHAT THAT HE COURT --

OKAY BUT HERE, UNDER THE FLORIDA SCHEME, WHAT HE IS BEING WHAT THE STATE IS CHARGING HIM WITH IS REALLY, IT IS THERE IS NO -- IF WE FOLLOW YOUR REASONING, THERE WOULD BE NO DISCRETION THAT COUNTS AS ONE OF THE PREDICATE CRIMES IN ORDER FOR HIM TO BE CONVICTED OF DUI THE FOURTH TIME AROUND; IS THAT CORRECT?

I MEAN.

IS IN A -- YOUR HONOR, NOT ENTIRELY, I MEAN.

OKAY HOW IS THAT NOT CORRECT.

IFRLOE FIRST OFF I BELIEVE DEFENDANT WOULD STILL FOUR TO RIGHT TO I

COLLATERAL!!\$\$!!!!!!!!!!!!!!!!!!!! COLLATERALIE ATTACK THAT PREDICATE CONVICT SHANE ASSUME\$!!\$\$ING FROM THIS COURT WAS TO FOLLOW IN NICKLES ALLOW, HE ESSENTIALLY ANY MISDEMEANOR CONVICTION, IN FLORIDA, WHERE SOMEONE HAS NOT BEEN INCARCERATED, THAT IS REALLY WHAT NICKLES IS ABOUT, UP TO ONE YEAR HERE IN FLORIDA FOR MISDEMEANOR CASES, AS APPLIED HERE, THE DEFENDANT COULD STILL GO BACK ATTACK HIS CONVICTION COLLATERALLY TAKE FOR VARIOUS REASONS IN TERMS OF MOTION WITHDRAW THE PLEA AT THE BEGINNING.

BASED ON SOMETHING -- YOU ARE TALKING ABOUT VOLUNTARYNESS!!\$\$!!!!!!!!!!!!!!!!!!!! VOLUNTARYNESS.

OR THE FACT OR THAT -- FOR INSTANCE, THAT HE ACTUALLY WAS INCARCERATED.

WHAT ABOUT THE SITUATION, BUT -- IN THE SITUATION WHERE HE IS NOT ACTUALLY INCARCERATED BUT WAS SUBJECT TO INCARCERATION MORE THAN SIX MONTHS, ON THIS ISSUE, I DON'T MEAN OTHER ISSUES, BASICALLY!!\$\$!!!!!!!!!!!!!!!!!!!! BASICALLY, THIS IS NOW, THE -- BEING USED AS A RECLASSIFICATION TO A FELONY!!\$\$!!!!!!!!!!!! FELONY; CORRECT?

YES.

ALL RIGHT, SO TO ME, THAT IS -- DIFFERENT THAN NICKLES!!\$\$!!!!!!!!!!!! NICKLES, WHICH I DON'T EVEN KNOW POST APPRENDI EVERYTHING ELSE THAT HAPPENED WHERE NICKLES FALLS!!\$\$!!!!!!!! FALLS, FRANKLY, BUT LUCKILY WE DON'T HAVE TO WORRY ABOUT THAT, IT SEEMS TO ME, THAT THAT IS A DISTINGUISHING FACTOR YOU DON'T SEE THAT AND I DON'T KNOW WHETHER IT IS CONSTITUTIONALLY SIGNIFICANT, BUT, YOU DON'T SEE THAT AS A -- ANOTHER REASON WHY THIS COURT MIGHT DECLINE TO FOLLOW NICKELS? .

WELL, IN TERMS OF -- OF -- WHAT -- YOUR HONOR JUST ASKED I WANTED TO ALSO SAY THAT WE ALSO SEE THIS AS A SITUATION WHERE A DEFENDANT IS NOW CHARGED WITH A

FELONY!!\$\$!!!!!!!!!!!! FELONY, THERE IS NO MANDATORY SENTENCE AT THAT POINT HE FACES FIVE YEARS ON THE FELONY BUT THE COURT STILL HAS SKRERGS NOTWITHSTANDING PREDICATE CONVICTION TO GIVE HIM SENTENCE LESS THAN FIEFRN YEARS, THE COURT STILL HAS DISCRETION!!\$\$!!!!!!!!!!!!!! DISCRETION.

I DIDN'T REALM KNOW THERE WAS ANY DISCRETION LEFT IN SENTENCING IN THE STATE OF FLORIDA!!\$\$!!!!!!!!!!!!!! FLORIDA.

IN TERMS VLT!!\$\$!!!!OF THE FIVE YEARS I DON'T BELIEVE IT IS MANDATORY SENTENCE FOIR THE FELONY -- DUINSIDE WHAT IF THE JUDGE CERTIFIED IN UNDERLIE!!\$\$!!YING THAT IS THERE WOULD BE NO PROSPECT OF IMPRISONMENT, HOW DOES THAT WORK THEN?

THAT -- UNDERLYING PLEA.

CORRECT.

WELL, INDIVIDUAL COMES INTO COURT, AND IF A COURT, IN WRITING, I THINK TODAY THAT HE RULE IS 15 DAYS, PRIOR TO TRIAL, INDICATES, THAT IT WILL NOT UNDER ANY CIRCUMSTANCES, INCARCERATE THE DEFENDANT, EITHER AT THAT TIME, OR AT A LATER TIME, ON A VIOLATION OF PROBATION!!\$\$!!!!!!!!!!!!!! PROBATION, NOW, IN REALITY, I HAVE SEEN VERY FEW COURTS, EVER GIVE SOMEONE A SUSPENDED SENTENCE AND TELL THEM IF YOU VIOLATE PROBATION I'M NOT GOING TO INCARCERATE YOU AT LATER DATE. BUT THAT IS THE RULE IN FLORIDA NOW, THAT RULE WAS AMENDED IN 2002 BASED ON ALABAMA V. SHELTON, WHICH, STATED THAT INNS INCAR IS!!\$\$!! ISRATION DEFINED IN A SUSPENDED SENTENCE --

WHAT WOULD THAT -- SENTENCE, WOULD THAT -- CASE MISDEMEANOR BE SUBJECT TO -- TO BEING USED AS AN ENHANCEMENT!!\$\$!!!!!!!!!!!!!! ENHANCEMENT?

THAT PARTICULAR MISDEMEANOR? IF IT WAS CERTIFIED THERE WOULD BE NO IMPRISONMENT NOW OR IN THE FUTURE?

I -- I THINK THAT THE REAL ISSUE THERE ISN'T HOW -- THAT IT WAS CERTIFIED THAT WOULD BE MORE, AS WAY TO -- CONVICTION FOR INSTANCE THE COURT DIDN'T -- THERE WOULD SAY NO VALID WAIVER THE COURT DIDN'T ISSUE THAT ORDER I THINK THE REAL QUESTION IS WHETHER SOMEONE WAS ACTUALLY INCARCERATED FOR --

SHE NEEDS TO -- ANSWER TO YOUR QUESTION YOU KIND OF WENT AROUND IT.

IS THE THE QUESTION.

CAN YOU NOT?

CAN YOU USE IT? A CERTIFIED THAT -- THAT -- WOULD IT -- THERE WOULD BE NO IMPRISONMENT NOW IMPORTANT IN THE FUTURE CAN THAT BE USED.

YES WE BELIEVE THAT CAN BE USED.

WELL.

LET ME ASK YOU ABOUT THIS ACTUAL SENTENCE YOUING SAID -- THAT ON THIS FELONY WE NOW HEAD ADD FELONY WE HAVE FOR THE PREDICATE OFFENSES CAN:00 UNCOUNSELED DUI\$\$'S WHERE HE WAS -- NOT GIVEN A SENSE OF IMPRISONMENT; CORRECT SO WE HAD A FELONY, AND, UNDER THE CRIMINAL PUN!!\$\$!!!! PUNISHMENT CODE, WITH THOSE -- WOULD THOSE MISDEMEANOR DUI!!\$\$!!!! DUI'S BE COUNTED TOWARD AS -- STILL A POINT SYSTEM? WOULD THOSE DUI\$\$'S THEN BE COUNTED AS POINTS, IN ORDER TO GET TO THE SENTENCE THAT YOU WOULD GET -- FOR THE FELONY!!\$\$!!!!!!!!!!!! FELONY.

YES, THEY ARE YOUR HONOR I BELIEVE, BUT THEY ARE VERY MINIMAL!!\$\$!!!!!!!!!!!!!! MINIMAL, EVERY MISDEMEANOR HAS THE SAME SCORE WHICH I BELIEVE IS!!\$\$!!!!!!\$\$!!!!!!!!!!!!!! BELIEVE.2, FELONY SCORE SHEET.

WE HAVE USED THEM ALREADY TO GET TO THE FELONY, AND THEN WE HAVE USED THEM, WE GET TO USE THEM AGAIN, IN ORDER TO GET TO THE SENTENCE. IS THAT -- IS THAT CORRECT? YES, THAT CAN BE CONSIDERED BY THE COURT BUT AS I INDICATED, THERE ARE VERY MINIMAL AND I ALSO -- THINK THIS GETS TO BE ARGUMENT THAT WE WOULD MAKE, IS THAT IT IS ONE HARD-PRESSED TO IN TERMS OF THIS QUESTION, THAT HAS BEEN CERTIFIED TO THE COURT, TO SAY WHAT THE DIFFERENCE IS WHEN THE SAME STANDARDCH P\$\$!!!! PROOF99POSSIBLY SAME ISSUES IN THE SWAYS WHETHER ONE FACING A SENSE OF SIX MONTHS NINE MONTHS OR 12 MONTHS.

THAT IS REALLY AN ARGUMENT FOR RECEDE\$\$!!!!ING FROM -- AND ADOPTING JUST -- BAR QWEST AND COGAN\$\$'S VIEW -- BAR QWEST AND COGAN\$\$'S VIEW IT COULD BE USED THAT WAY.

WE DON'T INTERPRET THAT IT WAY THAT IS RIGHT.

JUSTICE BELL HAD A QUESTION.

-- WHAT IS THE SITUATION IF WE AFFIRM THE LOWER COURT HERE? IF -- YOU DO NOT HAVE A FELONY BECAUSE YOU DO NOT HAVE THE PRIOR DUI'S, AND JUST TREATED AS A MISDEMEANOR DUI, COULD THESE CONVICTIONS STILL BE USED FOR SENTENCING PURPOSES?

AT THIS POINT, THE COURT HAS FOUND THAT -- WE --

IS UNDER NICKLES, CLEARLY, YES.

YES UNDER NICKLES YES, THE FOOTNOTE TO THE KELLY CASE SEEMS TO INDICATE THEY BELIEVE THAT THE COURT MAY HAVE FOUND THERE IS NOT A VALID WAIVER OF COUNSEL, WE ARGUED BELOW, AND ALSO WOULD ARGUE HERE IT IS UNCLEAR WHETHER THE COURT --

THAT IS A QUESTION WHO HAS THE BURDEN ON THAT ISSUE?

THE BURDEN IS ON THE DEFENDANT.

WHAT ABOUTED DID THE DEFENDANT -- ACCORDING TO YOUR BRIEF, HE SAID THAT HE WAS INFORMED THAT HE HAD A RIGHT TO AN ATTORNEY, AS TO THE 95 OFFENSE, HE SAID HE COULD NOT AFFORD ONE BUT HE COULD NOT RECALL WHETHER OR NOT THE JUDGE ASKED HIM IF HE WANTED AN ATTORNEY.

HIS MEMORY WAS HAZY AS TO -- HE SIDE-BY-SIDE A PLEA FORM, WHERE HE -- SIGNED A PLEA FORM INDICATED HE WOULD WAIVE RIGHT TO COUNCIL IN 95 AND 999HE WAS AWARE THAT HE HAD THE RIGHT TO COUNCIL.

WE DON'T HAVE THE COLLOQUY!!\$!!!!!! COLLOQUY.

WE DON'T HAVE COLLOQUY TRANSCRIPT NOT AVAILABLE, NOT PART OF THE RECORD.

I'M NOT SURE I UNDERSTOOD MAKE MAKE SURE THIS CLEAR YOUR VIEW IS THAT THE DEFENDANT HAS THE BURDEN TO DEMONSTRATE A WAIVER?

I -- I THINK JUST WHAT YOU SAID.

IN TERMS OF USING PREDICATE CONVICTION.

OKAY.

UNDER STATE V-- PROCEDURE WAS -- ESTABLISHED, WHERE THE DEFENDANT HAD THE BURDEN TO SHOW, FOUR THINGS ONE THAT HE WAS NOT SUBJECT TO INKRAIRGS HE WAS SUBJECT TO INCARCERATION!!\$!!!!!! INCARCERATION.

RIGHT.

OVER SIX MONTHS, TWO THAT HE WAS INDIGENT, THREE HE HAD THE RIGHT TO COUNSEL, FOUR HE DID NOT -- VOLUNTARILY WAIVER.

DID NOT WAIVER THE PROO OF WAIVER IS --

IT SHIFTS TO THE STATE.

RIGHT.

I MISUNDERSTOOD I GUESS WHAT WERE YOU --

YOU ARE INTO REBUTTAL IF YOU WOULD LIKE TO SAVE SOMETIME.

THANK YOU.

OKAY. .

!!\$!!

GOOD MONK, MAY IT PLEASE THE COURT I'M FRANK WITH GARY ELSE I THINKER REPRESENTATIVE KELLY IN THIS CASE.

WHY SHOULD WE NOT FOLLOW THE UNITED STATES SUPREME COURT PRECEDENTS.

BECAUSE FLORIDA LAW IN FOUR DIFFERENT PLACES, KACONSTITUTION, ARTICLE ONE SECTION 16, FLORIDA RULE IS CRIME PROCEDURE 3.111B, 3.160, AND FLORIDA STATUTE 27.51B 1 AND TWO ALL SAY EXACTLY THIS, COUNSEL SHALL BE PROVIDED TO YIJ DINL ENT PERSONS IN ALL PROSECUTIONS ALL THE CONSTITUTION IT SAYS IN ALL CRIMINAL PROSECUTION AS THE ACCUSED SHALL UPON DEMAND, AND THEN GOES INTO A.

THE DEFENDANT CAN WAVE THAT WAIVER IS ONE OF THE THING THE DEFENDANT CAN DO KNOWINGLY INTELLIGENT VOLUNTARY WAIVER, AS SET OUT BY THE RULES OF CRIMINAL PROCEDURE ADOPTED BY THIS COURT WOULD --

IF THE DEFENDANT, IF THE PLEA AGREEMENT IF THE DEFENDANT WAIVERS IT. -- WAIVES IT DESPITE THE FACT THAT THE TRIAL COURT DID NOT CERTIFY, THAT SHE WAS NOT GOING TO

IMPOSE A TERM OF IMPRISONMENT, IF THE TRIAL COURT ULTIMATELY DOES NOT IMPOSE IMPRISONMENT, BETWEEN WHAT IS THE THE HARM IN THAT TECHNICAL ERROR.

THE TECHNICAL ERROR?

THE TECHNICAL ERROR OF THE JUDGE NOT CERTIFYING THAT SHE WOULD NOT IMPOSE A TERM OF IMPRISONMENT.

THERE ISN'T ONE. IF THE DEFENDANT EXECUTES A KNOWING INTELLIGENT AND VOLUNTARY WAIVER OF COUNSEL, I LOSE. BUT I CHALLENGE THE PRIOR IN HIGHER COURT.

OKAY.

AND -- BY THE WRITTEN ORDER NO INCARCERATION -- LOSES IN HIGHER COURT -- IF THE DEFENDANT DOESN'T EXECUTE KNOWING AND VOLUNTARY WAIVER OF COUNSEL, DOES THE DEFENDANT THEN HAVE THE RIGHT TO SEEK TO WITHDRAW THE PLEA AS INVERO IN COLLATERAL CASE.

YES, HE DOES.

WHY SHOULDN'T THE LAW BE THAT FOR PURPOSES OF A -- FELONY!!\$\$!!!!!!! FELONY, CONVICTION FOR DUI, IF THE PRIOR MISDEMEANOR CONVICTION IS VALID, THAT CONVICTION COUNTS, IF IT IS NOT VALID, THE DEFENDANT SHOULD FILE A POSTCONVICTION MOTION TO INVALIDATE THAT CONVICTION SO THAT IT THEN CANNOT BE USED.

PRACTICAL REALITY OF THAT SORT OF SITUATION, IS EXACTLY WHAT HAPPENED HERE IN KELLY, GLENN KELLY WALKED INTO ARRAIGNMENT IN 1987 PLEAD STRAIGHT OUT NO CONTEST NO COUNSEL, 1995, PLED STRAIGHT UP NO CONTEST NO COUNSEL, 1997, STRAIGHT UP NO CONTEST NO COUNCIL AT ARRAIGNMENT COMES TO COURT IN 2003 ON THIS CASE, WALKED UP TO JUDGE SAYS I PLEAD NO CONTEST, JUDGE SAYS WHOO, I'M NOT TAKING YOUR PLEA. THIS IS A -- FOURTH DUI ARE YOU SPEND YOUR LICENSE THE REST OF YOUR LIFE GUYS CASE FORWARD.

KELLY DIDN'T CAN REALIZE HEAD OF A PROBLEM DIDN'T REALIZE HE HAD RIGHT TO COUNSEL UNTIL --

WAIT.

THAT'S WHAT JUSTICE CANTERO IS SAYING THERE IS A WAY TO CHALLENGE THAT THAT IS BY GOING BEHIND THOSE PRIOR PLEAS AND THAT IS WHAT HE IS ASKING WHY SHOULD WE NOT FOLLOW THAT PROCEDURE RATHER THAN THIS THEORETICAL PROCEDURE I THINK WHERE HIS QUESTION IS GOING WHAT HE NEEDS AN ANSWER TO.

THAT WOULD BE -- SPEAK TO -- THE CASE LAW, AND THOSE CASE LAW CITED IN ORIGINAL MOTION WHICH SAYS THAT THE DEFENDANT CAN ATTACK, PRIOR UNCOUNCILELED PLEASE INDIGENT DATE OF TALKING PRIOR UNCOUNSELED PLEAS IN FELONY COURT SUBJECT COURT WHEN THE NEW KIMES TAPES WLISHD LAW IN FLORIDA AT THIS TIME, I APOLOGIZE I DON'T HAVE CITE FOR YOU AT THIS TIME.

ARE YOU TALKING ABOUT THE BEACH?

YOU ARE TALKING ABOUT BEACH.

YES, JUDGE.

WELL BEACH NOEL ESSENCE -- CHANGED WHAT WOULD NORMALLY BE THE PROCEDURE FOR MOST PREDICATE CONVICTIONS, AS TO HOW YOU CHALLENGE THEM; IS THAT CORRECT?

YES, THAT WAS -- SOMETHING THAT BEACH CAME UP WITH -- YOU WANT TO TALK ABOUT -- COUNSEL OPPOSING COUNSEL, TALKS ABOUT UNITED STATES SUPREME COURT CASE LAW, THAT PROCEDURE, THAT FOUR PRONGED ATTACK SO IT IN BEACH AND LADD -- PUNISHABLE BY MORE THAN SIX MONTHS NO VALID WAIVER NO COUNSEL INDIGENT AT THE TIME THAT WAS CREATION OF THIS COURT THIS COURT CAME UP WITH THAT FOUR PRONGED ATTACK THAT WASN'T SOMETHING THAT CAME FROM THE UNITED STATES SUPREME COURT CASE LAW.

LET ME ASK YOU, THE I ASSUME THAT THE PURPOSE BEHIND REQUIRING THAT OR -- ENCOURAGING THE COUNSELING OF AT THE MISDEMEANOR STAGE IS THAT A LAWYER WOULD BE ABLE TO COUNSEL THE DEFENDANT, LOOK YOU MAY WANT TO PLEAD IN THIS CASE, A MISDEMEANOR BUT IF YOU COMMIT ANOTHER DUI, IT IS GOING TO BE A FELONY.

ABSOLUTELY.

WHAT DOES OUR CASE LAW SAY ABOUT WHEN A LAWYER DOES NOT ADVISE THE DEFENDANT, THAT THAT THAT ANOTHER DUI MAY RESULT IN A FELONY CONVICTION AND THE DEFENDANT IS LATER CONVICTED OF A FELONY HAVE WE HELD THAT THAT IS A REASON TO WITHDRAW A PLEA?

OR THAT IF INEFFECTIVE ASSISTANCE OF COUNSEL DO WE HAVE FLORIDA LAW ON THAT. THERE IS NO LAW ON WE HAVE -- HAPPENS IF THEY DON'T ADVISE THAT A FUTURE DUI CAN BE -- ENHANCE TO DO FELONY I WANT TO BE TALKING THAT IN A SECOND WE DO HAVE CASE LAW THAT SAYS, IF A LAWYER PLEADS A CLIENT, TO A FELONY DUI, AND DOESN'T ADVISE HIM, THAT PERHAPS WE SHOULD LOOK INTO THE PRIOR UNCOUNSELED PLEAS OR PRIOR PLEAS SEE IF THEY WERE UNCOUNSELED THAT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL. MY POINT IS I THINK OUR CASE IN STATE VERSUS DICKEY SPEAKS TO THE FACT THAT THERE IS NO, THERE IS NO RIGHT OR THERE IS NO INEFFECTIVE ASSISTANCE IN NOT IN EVEN MISADVISES\$!!!!!!ING ABOUT A POSSIBLE FUTURE CRIME, SO IF A IF AN ATTORNEY IS NOT REQUIRED TO COUNSEL A DEFENDANT AT THE MISDEMEANOR STAGE, ABOUT THE CONSEQUENCES OF A FUTURE DUI!!\$\$!!!! DUI, THEN, WHAT IS -- WHAT PURPOSE IS FULFILLED WHERE WE ARE REQUIRING COUNSEL? IN ORDER TO KOUBLT IT LATER ON -- COUNT IT LATER ON. THE PURPOSE OF REQUIRING COUNSEL IS BECAUSE IT IS REQUIRED BY THE FLORIDA CONSTITUTION THE RULES OF CRIMINAL PROCEDURE NO FLORIDA THE LEGISLATIVELY ENACTED FLORIDA STATUTE THEY SAY INDIGENT DEFENDANT SHALL BE APPOINTED COUNSEL. NOT IF WAIVED HERE WE ARE ALL AGREEING. IT IS NOT WAIVEED IN THIS CASE CERTAINLY WAS NOT WAIVED THE CIRCUIT COURT AND DISTRICT COURT IN THEIR OPINION WROTE THE CIRCUIT COURT CLEARLY WAS OFF WAIVER AGAINST THE DEFENDANT THE REASON THEY WROTE THAT IF HE FOUND HE WAIVED. WOULD YOU LOWS. CORRECT. IF A VALID WAIVER. IT WILL CAN BE WAIVE. AS YOU WERE THERE WAS NO RECORD -- WELL A CERTIFIES. THERE WAS NO PLEA COLLOQUY!!\$\$!!!!!!!!!!!!!! COLLOQUY, AND SECOND OF ALL. NO PLEA COLLOQUY VEILORABLE NO PLEA COLLOQUY GIVEN THESE TWO AT ARRAIGNMENT WE KNOW HOW THESE GO IN COUNTY COURT PEOPLE COME UP DON'T WANT TO SIT IN JAIL TRYING TO GET DONE QUICKLY AS THEY CAN GET IN GET THE OUT STRAIGHT OUT FOR NO PRISON TIME THESE THINGS MOVE VERY QUICKLY, BUT IN THIS CASE, THERE WAS NO RECORDING OF THE COLLOQUY!!\$\$!!!!!!!!!!!!!! COLLOQUY; CORRECT? NO TRANSCRIPT. AND THE DEFENDANT SAID HE COULDN'T WLEM WHAT THE JUDGE TOLD HIM ONE WAY OR OTHER CORRECT. CORRECT. HE DEFENDANT HAS NOT SAID ANYTHING THAT HE HAD A -- A VIABLING DEFENSE OR ANYTHING ELSE TO CHARGES. CORRECT. CORRECT. AND WOULD I LIKE ONE MORE. WHAT IS UNRELIABLE ABOUT THE CONVICTIONS IN THIS CASE. OTHER THAN THE FACT THAT THERE IS NOT A -- ROUSHED OF A VOLUNTARY WAIVER WHAT IS UNRELIKELY TRYING TO GET TO WHAT THE POLICY IS BEHIND ALL OF THIS. WHAT IS UNRELIABLE IS HE WAS ENTITLED TO COUNSEL. THE COURT THIS COURT HAS. WHAT DID HE LOSE WHAT DO WE KNOW THAT HE LOST BY NOT HAVING A COUNSEL STAND UP BESIDE HIM AT ARRAIGNMENT SAY YOU CAN'T GET A BETTER DEAL THAN NO PRISON PAY FINE AND LEAVE. HE -- SOMEBODY WHO WOULD INVESTIGATE THE CASE INVESTIGATE WHETHER OR NOT HE WAS STOPPED INITIALLY ILLEGALLY WHETHER STOPPED FOR A VALID REASON OR NOT WHETHER CORRECTLY ORDERED OUT OF THE VEHICLE, WHETHER IMPLIED CONSENT WAS READ BEFORE THEY SECURED BREATH TESTS WHETHER THEY PUT HIM IN HANDCUFFS SAID --. THE BENEFIT OF THAT HE GOT A CONVICTION AND A FINE AND NO INCARCERATION. BUT THE PROBLEM WITH THAT IS IT LEAVES US WITH NO INDICATION OF RELIABILITY, THE LAW IN --

THAT IS WHAT I'M ASKING THE THE LAW WAS NOT FOLLOWED. IT IS AN ONGOING CONSTITUTIONAL VIOLATION TO TAKE THOSE INDIGENT UNCOUNSELED CONVICTIONS WHERE THE LAW WAS NOT FOLLOWED IN SECURING THE CONVICTION, THAT IS THE PROBLEM. THE LAW WAS NOT FOLLOWED WHEN THOSE CONVICTIONS WERE SECURED!!\$\$!!!!!!!!!!!! SECURED, WOULD I ARGUE YOU CANNOT THEN TAKE THOSE CONVICTIONS AND CONTINUE TO USE THEM AGAINST THE DEFENDANT.

BUT -- ESPECIALLY --

LET ME JUST CLARIFY, BECAUSE I'M A LITTLE CONFUSED ON THIS POINT. YOU SAY DEFENDANT IS ENTITLED TO -- COUNSEL, AND ALL CASES IN FLORIDA.

ALL FORMER CASES YES, SIR.

ISN'T THAT WHERE IMPRISONMENT WILL BE IMPOSE!!\$\$!!!!!!!!!!!! IMPOSED? .

THAT IS THE CASE WHERE -- MAY BE IMPOSED --

A CRIMINAL INDICATE IS ANY CASE WHERE IMPRISONMENT MAY BE IMPOSED. IT IS NOT IT DOESN'T BECOME A CRIMINAL CASE BECAUSE A SENTENCING JUDGE PUTS SOMEBODY IN JAIL. A DUI IS A CRIMINAL CASE WHETHER YOU GO TO JAIL OR NOT JUST AS GRAND THEFT IS A CRIMINAL CASE WHETHER YOU GO TO JAIL OR NOT.

IS THE DEFENDANT ENTITLED TO COUNSEL WHERE THE COURT CERTIFIES THAT NO IMPRISON!!\$\$!!!!!!!!!!!!!! IMPRISONMENT WILL BE IMPOSE!!\$\$!!!!!!!!!!!! IMPOSED? .

IF THE COURT FOLLOWS THE RUE THE O PROCEDURE IN 3.160 CERTIFIED IN WRITING AT LEAST, 15 DAYS PRIOR TO ANY TRIAL DATE, ORDER NO INCARCERATION AT THAT POINT DEFENDANT IS NOT EP TITLED BY LAW OR STATUTE --

WHAT IS THE TEXTBOOK -- DIFFERENCE BETWEEN THAT AND THE STATE OFFERING A PLEA AGREEMENT THAT WOULD PROMISE NOT TO ASK FOR AND NOT TO SEEK ANY IMPRISONMENT. THE DIFFERENCE IS, THAT -- THAT IS NOT WHAT THE LAW SAYS, THAT IS NOT -- WHAT RULES SAY. BUT PRACTICALLY SPEAKING TALKING PRACTICALLY SPEAKING AS HARM AS HARMLESS ERROR WHAT IS THE DIFFERENCE BETWEEN A JUDGE CERTIFYING NO IMPRISONMENT AND THE STATES WILL ESSENTIALLY CERTIFYING NOISMPRISONMENT IN THERE IS NO ADDITIONAL EFFECT DHEEVENT BUT THERE IS EFFECT ON THE PROCESS, THE LAW WASN'T FOLLOWED, AND IF YOU IF YOU.

THERE IS A LOT OF CASES WE HAVE WHERE THE LAW IS NOT FOLLOWED, AND WE SAY ON APPEAL!!\$\$!!!!!!!!!!!! APPEAL, THE JUDGE WAS WRONG, HOWEVER!!\$\$!!!!!!!!!!!!!! HOWEVER, IT IS HARMLESS ERROR, BECAUSE IT DOESN'T GO TO THE VALIDITY OF THE CONVICTION OR WE ARE STILL CONFIDENT IN THE OUTCOME SO WHY ISN'T THAT ONE OF THOSE SAME SITUATIONS WHERE THE DEFENDANT KNOWS WHEN FROM THE JUDGE, OR FROM THE STATE, THAT HE IS NOT GOING TO GET IMPRISONMENT.

I CAN ONLY SPEAK TO KELLY, KELLY WAS MISADVISED AT THE TRIAL COURT INITIAL COUNTY COURT LEVEL AS TO HIS RIGHT TO COUNSEL THIS A WAS PLEA FORM HANDLED OUT SAID YOU ARE ENTITLED TO A LAWYER IF THE JUDGE IS -- IS GOING TO PUT IN YOU JAIL IN THIS CASE. THAT IS WRONG, KELLY WAS ENTITLED TO LAWYER --

IT IS WRONG AND MIB IF KELLY WAS ACTUALLY IMPRISON!!\$\$!!!!!!!!!!!!!! IMPRISONED IN THAT CASE WOULD YOU HAVE AN EXCELLENT POINT ABOUT WITHDRAWING THE PLEA!!\$\$!!!!!! PLEA, BUT HES WERE A -- WASN'T IMPRISONED SO WHERE IS HARM IN THAT ADMITTED ERROR?

LADD, AND BEACH SAY THAT WE ARE NOT GOING TO USE WE ARE NOT GOING TO ALLOW STATE OF FLORIDA IN PROSECUTING THESE CASES TO USE, CONVICTIONS THAT WERE SECURED IN VIOLATION OF STATE LAW.

DID HE SAY HE WAS MISLED?

IN HIS AFFIDAVIT.

-- IS THE PLEA BOARD SAID THAT BUT A LOT OF THINGS -- NEVER READ THEM BECAUSE WE'VE GOT CASES OTHERWISE THAT IS WHY WE REQUIRED JUDGES TO GO THROUGH ORAL COLLOQUIES WE CAN'T NECESSARILY RELY ON EVERY DEFENDANT TO READ A PLEA AGREEMENT THE QUESTION IS THERE ANY IN HE ANYTHING IN THE AFFIDAVIT SAYING THE DEFENDANT WAS MISLED BY THE STATEMENT IN THE PLEA AGREEMENT.

IN THE AFFIDAVIT AFFIDAVIT THAT WE FILED IN KEIR KOUT COURT NO HE TESTIFIED KEIR KOUT COURT HE HAS TO ONCE WE FILED THE AFFIDAVIT HE TESTIFIED THAT -- I BELIEVE, JUDGE I

BELIEVE HE SAID THAT HIS UNDERSTANDING WAS WHAT IT SAID ON THE PLEA PERFORM HE WAS ENTITLED TO LAWYER IF THE JUDGE WAS GOING TO PUT HIM IN JAIL THE JUDGE I THINK THE WORD IS CONSIDERING IF THE JUDGE IS CONSIDERING INCARS CAN!!\$\$!!!! INCARCERATION!!\$\$!!!!!!!!!!!!!!!!!!!!!!!!!!!! INCARCERATION.

THE ISSUE IS NOT REALLY HARM OR HARMLESS ERROR IS IT? .

NO ISN'T THIS CASE ABOUT THE STATE IS ASKING, THAT THIS COURT, RECEDE FROM ITS PRIOR CASES.

CORRECT.

WE ARE HERE TO TALK -- I MEAN.

THAT IS RIGHT.

AND SO, REALLY IS THE QUESTION WHETHER THE CHANGE IN THE LAW AT THE -- UNITED STATES SUPREME COURT LEVEL HAS SOMEHOW CHANGED WHAT FLORIDA LAW SHOULD BE.

WOULD I LIKE TO.

THAT WHAT WE ARE HERE ABOUT.

YES.

OKAY.

THIS IS NOT SENTENCING ISSUE THIS COURT.

THAT IS WHAT I WANT YOU TO DO THEN I WANT YOU TO SET OUT FOR US EXACTLY WHAT YOU BELIEVE THE FLORIDA LAW TO BE AND WHERE IT WOULD GO UNDER THE UNITED STATES SUPREME COURT AUTHORITY.

-- VERY CLEARLY WITHOUT A LOT OF WORDS VERY DIRECTLY.

CONSTITUTION SAYS IN ALL CRIMINAL CASES IN THE --

YOU TOLD US THAT.

LADD, AND BEACH HAVE ACTUALLY NARROWED THAT THEY SAID NO, WE DON'T THINK THAT TOUGH HAVE A RIGHT TO COUNSEL, IF THE CRIME IS PUN!!\$\$!!!! PUNISHABLE BY INKRAIRGS OF SIX MONTHS OR LESS.

INA CATEGORIESRATION OF SIX MONTHS OR LESS, THE UNITED STATES SUPREME COURT CASE NICKLES IS SENTENCING CASE, WHERE THEY WERE TALKING ABOUT THE A -- APPLICABILITY OF DUI TO SENTENCING PROCESS CHARGED WITH ENORMOUS AMOUNT OF KOIK THEY APPLIED -- COCAINE A LESS EXACTING STANDARD THE NICKLES COURT ACTUALLY SAID THE SENTENCING COURT, WHO SENTENCED MR. NICKLES COULD HAVE CONSIDERED EVIDENCE, OF HIS CONDUCT, AT SENTENCING. ON A CASE WHERE HE --

ON CASE WHERE HE WAS NEVER CHARGING ON CASE WHERE HE WAS NEVER CONVICTED ON A CASE WHERE HE WAS TRIED AND ACQUIT THEY HAD COULD CONSIDER THAT AS PART OF THE STONES!!\$\$!!!!!!!!!!!! STONES.

SO THE POINT IS THAT UNDER SENTENCING WHETHER SENTENCE\$\$!!!!ING OR WHATEVER, TO BE ABLE TO UTILIZE, THAT PRIOR CONDUCT, IS THAT IT IS A -- A MUCH BROADER!!\$\$!! USE OF THAT, IN UNDER THE NICKLES CASE, THAN IS PERMIT UNDER FLORIDA LAW AS IT CURRENT EXISTS!!\$\$!!!!!!!!!!!! EXISTS.

THE PREPONDERANCE OF THE EVIDENCE, WHEN THIS COURT DECIDED THEY CASE CALLED WOOD ROFFE --

-- WOODRUFF.

BEFORE YOU STRAY INTO, THAT WHAT YOU -- YOU ARE ASKING THIS COURT TO DO IS TO REAFFIRM THE LADCASE, OR NOT? I MEAN ARE YOU ASKING THIS COURT TO DO THAT OR NOT? YES, HOWEVER, I DON'T THINK LADDGOES FAR ENOUGH.

I UNDERSTAND THAT, BUT --

THAT IS NOT.

BUT AT PRESENT STATE OF FLORIDA LAW, IS LADD; CORRECT?

YES, SIR.

SO THE ISSUE THAT THE FOURTH DISTRICT CERTIFIED TO THIS COURT IS WHETHER WE CONTINUE TO HAVE LADDAS THE CASE OR WHETHER WE ARE GOING TO DEFER TO THE UNITED STATES SUPREME COURT IN NICKLES!!\$\$!!!!!!!!!!!! NICKLES.

YES.

OKAY, AND THAT IS THE ISSUE THAT IS REALLY PRESENTED TO US.

THAT IS THE ISSUE.

EVEN THOUGH NICKLES CONCERNED A SENTENCING, THAT THERE IS LANGUAGE IN THAT OPINION THAT APPLIES EQUALLY TO RECIDIVIST STATUTES LIKE THIS ONE.

THERE IS SOME LANGUAGE IN THERE, I DON'T SEE HOW THE ISSUE THAT WAS DECIDED IN NICKLES COULD POSSIBLY SAY AFFECT FLORIDA LAW TO THE EXTENT THAT HE WE ARE GOING TO ALLOW INDIGENT UNCOUNSELED PRIORS TO BE USED TO ENHANCE A MISSES NOR OFFENSE INTO A FELONY.

LET ME ASK YOU THIS QUESTION, ARE YOU FAMILIAR WITH THE CASE OF STATE V. DICKY!!\$\$!!!!!!! DICKY.

-- THERE IS A SOMETHING THAT AND I DON'T KNOW IF THE STATE CAN ADDRESS THIS, BUT -- I WAS IN THE DISSENT IN STACY!!\$!!YS DEAKY THE WHOLE IDEA WAS I HAVE ALWAYS THOUGHT THAT LAWYERS ESPECIALLY IN CASES LIKE THIS, THAT THEY DO HAVE AN OBLIGATION TO TALK ABOUT THIS IS MIGHT BE SOMETHING IN THE FUTURE THAT COULD BE USED AGAINST YOU. HOWEVER!!\$!!!!!!! HOWEVER, IN STATE V. DICKEY THE COURT HELD NO, THAT YOU -- THAT IS ARE NOT TOO OF THE OBLIGATION OF COUNSEL REASONBLY EFFECTIVE COUNSEL GIVEN THAT AND I REALIZE THIS IS -- THAT WASN'T BRIEFED, BUT IF THAT IS THE LAW, AS TO OTHER KINDS OF CASES, MAY IT BE THAT BEACH ITSELF IS MAY NO LONGER BE MAY BE QUESTIONABLE, BASED ON WHAT I JUST EXPLAINED WITH THE LAW IN DICKEY, BECAUSE YOU SAID TO JUSTICE CANTERO THERE IS A CASE THAT SAYS THAT YOU WOULD BE OWE HAD CANCELED MR. KELLY HAD NOT TOLD ABOUT FOURTH DUI WOULD YOU BE INEFFECTIVE BUT I DON'T THINK SUCH A CASE EXISTS OUT THERE, AND IF IT DID, WE MIGHT HAVE OVERRULED IT IN DICKEY. SO COULD YOU ADDRESS IF THE IDEA IS THAT REALLY, THE HARM WOULD BE, THAT THAT PERSON DIDN'T KNOW IN THE FUTURE THAT HE MIGHT THIS MIGHT BE USED AGAINST HIM AND COUNSEL WOULD HAVE ADVISED HIM OF THAT, AND THAT IS NOT PART OF \$\$ COUNSEL'S OBLIGATIONS UNDER THIS \$COURT'S CASE LAW, THEN HOW WHY DOES IF THERE AREN'T ANY OTHER BASES THAT HE IS SAYING THE PLEA WASN'T VOLUNTARY WHY WOULD THAT BE STILL SOMETHING THAT WE WOULD ALLOW TO BE WITHDRAWN IN EFFECT? DOWNED THE QUESTION? I THINK OH, DO YOU UNDERSTAND THE.

WITHOUT DICKEY --.

THE ANSWERING TO THAT CASE, THAT -- I WOULDN'T BE HERE, AND I'M CERTAINLY NOT HERE TO SAY THAT THE FAILURE OF THE LAWYER OR DEFENDANT NOT KNOWING THAT HIS CURRENT CONVICTION IS GOING TO AFFECT HIM IN THE FUTURE, I DON'T THINK THAT IS THE BASIS TO DECLARE THESE PRIORS UNRELIABLE I DON'T THINK THAT IS THE ISSUE AT ALL. THE ISSUE THAT IS THESE PRIORS WERE OBTAINED ILLEGALLY!!\$!!!!!!! ILLEGALLY. THEY WERE OBTAINED IN VIOLATION OF THE FLORIDA THE CONSTITUTION AND FLORIDA STATUTES!!\$!!!!!!! STATUTES, SO CRIMINAL PROCEDURE ACT IT IS NOT ISSUE WELL HE SHOULD HAVE BEEN TOLD THIS, NO, NO, NO, NO, HE WAS ENTITLED TO COUNSEL, HE DIDN'T GET COUNSEL, HE DIDN'T WAIVE COUNSEL, AND THE JUDGE DIDN'T CERTIFY AN ORDER OF WRITTEN ORDER OF -- IF US THE THE CASE THE DEFENDANT IS CORRECT, THAT THESE -- LIKE YOU SAY THESE CONVICTIONS WERE OBTAINED, ILLEGALLY!!\$!!!!!!! ILLEGALLY. YES, SIR.

-- THEN WOULDN'T THE DEFENDANT HAVE A RIGHT TO FILE A POSTCONVICTION MOTION TO INVALIDATE THOSE CONVICTIONS!!\$!!!!!!! CONVICTIONS?

I THINK THAT THERE ARE TIME LIMITATIONS THAT APPLY, TO POSTCONVICTION MOTIONS TO VACATE.

AND THESE GUYS DON'T KNOW THESE DEFENDANTS DON'T KNOW SOMETIMES THAT THEY HAVE A RIGHT TO COUNSEL, CERTAINLY THEY DON'T KNOW THAT THEY HAD A RIGHT TO COUNSEL. WE HAVE.

UNTIL YEARS LATER.

THERE ARE MANY CASES IN FLORIDA LAW WHERE THE DEFENDANT MAY NOT KNOW THAT THEY HAVE A RIGHT OR THAT THE CONVICTION WAS ILLEGAL, OR CERTAIN OTHER OR THAT COUNSEL WAS INEFFECTIVE, BUT WE STILL IMPOSE THOSE TIME LIMITATIONS!!\$!!!!!!! LIMITATIONS, ON DEFENDANTS, SO ASSUMING THE DEFENDANT COMPLIES WITH THE TIME

LIMITATIONS THEY DO HAVE HAVE A RIGHT TO INVALIDATE THOSE PRIOR CONVICTIONS.
YES.

SO IN A SUBSEQUENT CONVICTION FOR FELONY OR A PROSECUTION FOR FELONY, DOESN'T THE COURT IN THE STATE HAVE A RIGHT TO ASSUME THAT PRIOR CONVICTION ARE VALID CONVICTIONS, UNLESS THE DEFENDANT HAS FILED MOTIONS TO INVALIDATE THEM?

NO. THEY ARE NOT ENTITLED TO ASSUME THAT THEY ARE NOT ENTITLED TO ASSUME THAT BECAUSE THESE UNCOUNSELED PEOPLE, DO NOT HAVE LAWYERS, APOINTED BY THE STATE OR OTHERWISE!!\$\$!!!!!!!!!!!!!! OTHERWISE, LOOKING INTO THESE CASES, AND ADVISING THEM OF WHAT THEIR RIGHTS ARE, UNTIL THE NEXT ARREST, THAT MIGHT BE FIVE, 10, OR IN THIS CASE 20 YEARS LATER.

THIS ISN'T THE ONLY RECIDIVIST STATUTE IN THE FLORIDA CODE.
I'M SORRY.

THERE ARE MANY RECIDIVIST STATUTES!!\$\$!!!!!!!!!!!!!! STATUTES, SO, WHAT CONCERNS ME IS THAT IN -- IN ALL OTHER KINDS OF RECIDIVIST STATUTESINGS WHERE THE STATE -- STATUTES WHERE THE ONLY ONLY HAS TO P\$\$ROVE PRIOR CONVICTION OR CONVICTIONS LET'S SAY FOR A HABITUAL OFFENDER, OR A VIOLENT FELONY OFFENDER, ALL OF THOSE RECIDIVIST STATUTES, THEY ONLY REQUIRE THE STATE TO PRESENT THE CONVICTION, NOW WE ARE GOING TO GO BEHIND ALL THOSE CONVICTIONS!!\$\$!!!!!!!!!!!!!! CONVICTIONS, AND THE DEFENDANT IS GOING TO BE ABLE TO ARGUE I WASN'T READ MIRANDA RATES IN THOSE CONVICTIONS THAT IS INVALID CONVICTION, OR, I WASN'T -- GIVEN A JURY TRIAL IN THAT CONVICTION OR SOME OTHER BASIS TO INVALIDATE THE PRIOR CONVICTION, IN THE SUBSEQUENT PROSECUTION.

THOSE ARE MIRANDA IS A -- A COMPLETELY SEPARATE ISSUE TO THIS AS IS THE RIGHT TO A JURY TRIAL. IF THE STATE IS GOING TO RELY ON UNCOUNSELED PRIOR CONVICTIONS THE LAW MUST HAVE BEEN FOLLOWED IN ORDINARY TO OBTAINO IN ORDER TO OBTAIN CONVICTIONS.

I THINK YOU ARE MISUNDERSTOOD HEING TRIED RESTATE IT HE SAID IN MANY INSTANCES UNDER FLORIDA LAW WE USE PRIOR CONVICTIONS, FOR PURPOSES LATER.

YES, SIR.

AND IN NONE OF THOSE OTHER CIRCUMSTANCES DO WE ALLOW THE DEFENDANT TO SAY O WAIT A MINUTE, THAT WAS NOT A GOOD CONVICTION. I THINK THAT IS WHAT HE IS TRYING TO SAY SO HE IS SAYING WHY SHOULD THAT NOT APPLY HERE.

NO, WE SHOULD WE SHOULD ALLOW, THIS IS -- THIS OPINION SHOULD CAUSE THE SAME RESULT IN THOSE RECIDIVIST STATUTES HAD HE -- STATUTES BEING BUMPED UP TO FELONIES DRIVING ON SUSPENDED LICENSES NOW.

DON'T THAT I IF YOU ARE HAVING TROUBLE CONVINCING CURRENT LAW MAYBE YOU HAVE A PROBLEM TRYING TO GET IT EXPANDED FURTHER?

WELL.

YOU THINK BEACH APPLIES INSTITUTIONALIZE THESE CASES.

PARDON ME.

DO YOU BELIEVE THAT THE CURRENTLY STATE OF FLORIDA LAW APPLIES INSTITUTIONALIZE THESE OTHER -- APPLIES TO ALL THEORIZE OTHER CIRCUMSTANCES.

YES, I DO.

IT HAS TO BE THAT WAY, THESE -- TDU. -- DUI FORCED DUI NO SUCH THING AS WITHHELD ON DUAYE FOURTH DUI WILL BE A CONVICTED FELON IF HE -- IF HE IS CONVICTED IN THE CIRCUIT COURT OF FOURTH DUI ONE OTHER THING THE QUESTION, WAS ASKED, WHAT HAPPENS IF WHAT HE WE UPHOLD THE CIRCUIT COURTS OR DISTRICT COURTS OPINION THE ANSWER THIS CASE THEN GOES BACK TO COUNTY COURT OR CASES LIKE THIS THEN GO BACK TO THE COUNTRY COURT THE COUNTRY COURT JUDGMENTALLY WILL SENTENCED FOR A FOURTH DUI HE WILL KNOW ABOUT ALL OF THE PRIORS IT IS CONSISTENT WITH, NICKLES CONSISTENT WITH THE SENTENCING PROCESS, WHEN THIS COURT DECIDED WOODRUFF SAID WE REJECT THE DISTRICT \$ COURT'S CONTENTION THIS IS MERELY BUMPING A MISDEMEANOR DUI TO A FELONY THIS COURT, ZWRIS WELLS WROTE SEPARATELY IN CONCURRING OPINION, AND BOTH THE OPINION AND CONCURRING OPINION SAID WE REJECT DISTRICT \$COURT'S ASSERTION THIS IS MERELY A SENTENCING ISSUE, FELONY DUI IS A COMPLETELY SEPARATE OFFENSE FROM MISDEMEANOR DUI!!\$\$!!!! DUI, BECAUSE IT REQUIRES P\$\$!!!! PROOOOF DAILGS ELEMENT PROOF OF PRIOR DUI\$\$'S HAS TO BE PROVEN

BEYOND TO EXCONCLUDE!!\$\$!!!!!!!!!!!!!!!!!!!! EXCONCLUSION OF EVERY REASONABLE DOUBT JUST LIKE EVERY OTHER ELEMENT IN EVERY OTHER CRIMINAL CASE, NICK!!\$\$!!!!!! NICARAGUAELS CANNOT STAND IMPORTANT!!\$\$!!!!!!!!!!!!!!!!!!!! NICKLES CANNOT STAND FOR PROPOSITION ELEMENT OF OFFENSE UNDERSTOOD ONLY BE PROVEN BY PREPONDERANCE OF EVIDENCE NICKLES STINSING ISSUE THIS IS AN ISSUE OF PROOF BEYOND A REASONABLE DOUBT OF ESSENTIAL ELEMENT.

WITH OUR HELP YOU HAVE FAR EXCEEDED YOUR TIME. SO I THINK YOU HAVE MADE YOUR POINT VERY WELL THE LAST COMMENT.

THANK YOU.

THANK YOU.

REBUTTAL?

A EXCESSIVELY MINUTES FOR THAT.

THANK YOU, FIRST LIKE TO ADDRESS!!\$\$!!!!!!!!!!!!!! ADDRESS, JUSTICE PARIENTE\$\$'S QUESTION ABOUT -- I THINK DICKEY IS PARTICULARLY -- VALID TO THIS CASE, IN THIS REGARD, FIRST, IT IS THE COURT AND OPINION FOUND COLLATERAL CONSEQUENCE THEREFORE!!\$\$!!!!!!!!!!!!!!!!!!!! THEREFORE,99ATTORNEY WAS NOT INEFFECTIVE!!\$\$!!!!!!!!!!!!!!!!!!!! INEFFECTIVE, TO NOT INFORM THE DEFENDANT.

WAS ON IT THE BRIDGES PRONG OR -- PREJUDICE PRONG OR WAS IT ON THE PRONG WITH REGARD TO -- WHETHER THERE YOU HAD FALLEN BELOW THE STANDARD OF COMPETENT COUNSEL?

I DON'T KNOW THE ANSWER TO THAT QUESTION.

ISN'T THAT PRETTY IMPORTANT?

THE ANSWER IS NO MAJORITY ON THAT.

ALSO I BELIEVE --

BUT ALSO, BUT ALSO.

NOW I REMEMBER THAT CASE.

ALL RIGHT. BUT, THE CASE THAT MAJOR, I BELIEVE, DICKEY WAS -- CITED IN DICKEY, ALSO STANDS FOR THAT PROPOSITION, REGARDING COLLATERAL CONSEQUENCES. BUT -- MAJOR WAS A FAILURE TO ADVISE CASE, WHEREAS DICKEY WAS A MISADVISED CAUSE. MISADVISED BY COUNSEL.

MAJOR APPLIES HERE, BECAUSE,WHAT HAPPENS IF THE IF THE COUNSEL IN MISDEMEANOR CASE, FAILS TO ADVISE THE DEFENDANT, THAT A FUTURE DUI MAY RESULT IN A FELONY!!\$\$!!!!!!!!!!!!!! FELONY?

THAT IS CORRECT YOUR HONOR I WAS ABOUT TO GET TO -- TO THE MAJOR CASE, WHICH IS GOING TO SAY, IN TERMS OF -- OF DICKEY. THE ALSO, JUSTICE CANTERO MENTIONED IS THE STATE COULD COME INTO COURT SAY WE ARE NOT GOING TO INCARCERATE YOU THAT IS PART OF PLEA, THE RULE IS IMPORTANT, BECAUSE IN TERMS OF THIS ISSUE, BECAUSE THE COURT IS SAYING TO A DEFENDANT YOU WILL NOT BE INCARCERATED, THEREFORE, THAT CONQUICKION CAN BE USED IF NOT INCARCERATED HOWEVER AS I STATED EARLIER IN MY ORIGINAL COMMENTS, THE REAL ISSUE HERE IS ACTUAL INCARCERATION!!\$\$!!!!!!!!!!!!!!!!!!!!!! INCARCERATION, IF THE DEFENDANT IS NOT BEEN INCARCERATED FOR THE CHARGE, THAT -- INCARCERATION -- THE -- THAT CONVICTION CAN BE USED THAT MISDEMEANOR CONVICTION WAN BE USED AS PREDICATE THAT I --

ISN'T IT ISN'T YOUR OPPONENT CORRECT THAT IS NOT THE CONSTRUCT THAT THE FLORIDA LAW HAS DEALT WITH THIS ISSUE, I MEAN IT -- IT -- OUR RULE THE STATUTE IN BEACH, AND LADD, ALL DEAL WITH A MATTER AS TO THE FACT THAT COUNSEL IS GOING TO BE APPOINTED BUT THEN LADD, AND BEACH PUT EXTRA CONDITION IN THERE SAYING ONLY IF THERE IS HE GOING MORE THAN SIX MONTHS.

THAT IS OH --

SO IF HE WERE WERE GOING SWITCH TO NICKLES WE REALLY HAVE TO COME BACK, AND RECONSTRUCT IT.

WELL,S THIS -- THIS GOES TO CHIEF JUSTICE LEWIS' FIRST QUESTION, AT THE BEGINNING OF THE ARGUMENT. WOULD I LIKE TO I THINK THAT THIS ISSUE, HAS TO BE VIEWED ALSO HISTORICAL CONTEXT, I MEAN THAT IS VERY IMPORTANT, AS A MATTER OF FACT I THINK THAT THIS COURT WAS PRESH CHENTOE PRESH SHEBT IN TERMS OF -- PRESCIENT IN TERMS OF THIS ISSUE.

I WILL GAVE DPEFL MINUTES TO FINISH UP.

IN THAT, THIS COURT -- -- BASICALLY ADOPTED JUSTICE BLACK!!\$\$!!!!!!! BLACKMAN'S VIEW, IN BALANCED CZAR, BALANCED -- BALDZAR IS A PLURALITY DECISION DID NOT ALLOW ON PRIOR MISDEMEANOR CONVICTION USED AS PREDICATE JUSTICE BLACK MON IN TIEBREAKING DECISION, IN CONCURENS!!\$\$!!!!!!! CONCURENS, IN THE CONCURRENT OPINION INDICATED THAT HE WOULD BE FINE WITH A SIX MONTH WINDOW SIX MONTH OUTER END OF THAT, AND THAT WAS BASED ON HIS DISSENT IN SCOTT V. ILLINOIS, THIS COURT, IN LADD, IN ESSENCE, ADOPTED THE DEFENSE IN BALDZAR, AND AT LEAST, JUSTICE BLACK MON CAME HALFWAY TO THE YEAR ON A MISDEMEANOR!!\$\$!!!!!!! MISDEMEANOR, REGARDING HIS CONCURRING OPINION THEY ADOPTED, THEY FOUND HIS CONCURRING OPINION COMPELLING!!\$\$!!!!!!! COMPELLING. INSPECT TERMS OF THIS ISSUE, IN TERMS OF UNITED STATES SUPREME COURT PRECEDENT, AND WE WOULD SAY, UNDER FLORIDA CONSTITUTION!!\$\$!!!!!!! CONSTITUTION.

NICKLES!!\$\$!!!!!!! NICKLES, LEAST TEN YEARS LATER!!\$\$!!!!!!! LATER, AFTER THE LAW HAD BEEN WHAT IT WAS IN FLORIDA UNDER LADD, ADOPTED THE DIS-- DEFENSE IN THE BALDZAR CASE, ACCORDINGLY, AS I SAID.

THAT WAS IN THE SENTENCING CONTEXT.

. BUT ALDIZAR WAS DIFFERENT.

LATER THEY ADOPTED THAT DISSENT IN A SENTENCING -- -- CONTEXT.

BUT THE BALDIZAR CASE I BELIEVE WAS ALSO INVOLVED ENHANCEMENT TO FELONY FROM A MISDEMEANOR!!\$\$!!!!!!! MISDEMEANOR. I DON'T BELIEVE THAT THE LADD CASE REALLY ADDRESSES THAT PARTICULAR ISSUE, IT THE QUESTION WAS AND I THINK THE SUBTECHS ARE PRIOR CONVICTIONS RELY UPON SEEMS SUBTECHS INTO ALL THIS.

WITH THAT YOU ARE WELL OVER YOUR TIME I THANK YOU VERY MUCH.

THE COURT ANSWER TO THE QUESTION.

THANK BOTH OF YOU WE'LL TAKE THE CASE UNDER ADVISEMENT!!\$\$!!!!!!! ADVISEMENT, THANK YOU VERY MUCH!!\$\$!!!!!!! MUCH.

.
MR. MARSHALL?

OPEN THE DOOR, PLEASE.