>> OUR NEXT CASE IS STATE VS. JOHNSON.
>> GOOD MORNING. MY NAME IS JAY KUBICA REPRESENTING THE STATE OF FLORIDA.
REPEATING WHAT APPRENDI SAID IN DIFFERENT WORDS.
WHEN WE LOOK AT ISAAC, WHICH IS A FIRST DISTRICT CASE THAT STARTED US ON THIS PATH TO CONFLICT, WE SEE THAT IS EXACTLY WHAT THE FIRST DISTRICT HELD.
THEY DIDN'T HOLD THAT BLAKELY WAS RETROACTIVE.
THEY HELD THAT BLAKELY DID NOTHING MORE THAN EXPLAIN WHAT APPRENDI ALREADY SAID.
SO RETROACTIVITY WAS NOT --
>> IF THAT IS, I AGREE WITH YOU, APPRENDI IS NOT RETROACTIVE, LIKELY RETROACTIVE.
THAT IS HOW I SEE IT IN TERMS OF THE ANALYSIS.
I WAS SOMEWHAT DRAWN TO THE IDEA AFTER APPRENDI IS DECIDED AND THE SUPREME COURT USES THE WORDS, MAXIMUM SENTENCE, EVERYBODY, AT LEAST EVERYBODY IN THE COURT THOUGHT THAT MEANT STATUTORY MAXIMUM.
SO, IF, FOUR YEARS LATER, I MEAN IF THEY HAD CLARIFIED IT A MONTH LATER, WE WOULDN'T HAVE THE PROBLEM.
WHAT IS THE DIFFERENCE, IF ANY? IS THERE ANALYSIS IF, FOR FOUR YEARS APPRENDI THEY'RE OPERATING UNDER A MISCONCEPTION ABOUT THE APPLICATION OF APPRENDI. WOULD YOU STILL SAY IT IS RETROACTIVE, IT IS APPLIED RETROACTIVELY, IS THAT THE ANSWER?
>> I'M NOT SURE.

>> IN OTHER WORDS IS THERE
ANYTHING ABOUT A REVOLUTIONARY
REFINEMENT THAT ALLOWS A
DEFENDANT, WHEN A COURT SAYS,
WE DIDN'T MEAN THAT.
THIS IS WHAT WE MEANT TO GET
THE ADVANTAGE POST-APPRENDI,
PRE-BLAKELY, OF THEM, TAKING
FOUR YEARS TO EXPLAIN IT.
>> NO, THERE IS NOT.
THE REASON WHY TO DETERMINE
SOMETHING IS A NEW RULE IF
SOMETHING A NEW RULE THAT IS
ONLY TIME WE WORRY ABOUT
RETROACTIVITY.
WE LOOK TO WHETHER OR NOT ALL
THE REASONABLE JURISTS WERE
CLEAR ON THAT ISSUE.
THIS COURT HELD APPRENDI
ONLY APPLIED TO STATUTORY
MAXIMUMS OR SENTENCE IN EXCESS
OF STATUTORY MAXIMUM.
CERTAINLY ALL THE FEDERAL
CIRCUIT COURTS REACHED THAT
CONCLUSION.
IT IS NOT A SURPRISE BECAUSE
APPRENDI SPECIFICALLY SAYS,
THAT A JUDGE CAN NOT IMPOSE A
SENTENCE BEYOND THE STATUTORY
MAXIMUM, MAXIMUM SENTENCE
ALLOWED BY THE STATUTE.
IT MAKES SENSE NO ONE REALIZED
THAT.
THE SUPREME COURT FELT THAT WOULD
BE A DIFFERENT DEFINITION,
BLAKELY MAKE THAT CHANGE.
BECAUSE ALL THE OTHER COURTS IN
THE NATION WERE OPERATING UNDER
A DIFFERENT RULE.
NOW, THE FIRST DISTRICT, AFTER
ISAAC, CAME BACK AND SAY BLAKELY IS
RETROACTIVE. THAT IS WHAT THEY
HAD BEEN SAYING, IN ISAAC.
THAT IS STILL INCORRECT.
THAT IS IN CONFLICT WITH ALL
THE OTHER DISTRICT COURTS IN

FLORIDA.
WHEN WE LOOK AT NUMBER OF OTHER CASES THAT HOLD THAT BLAKELY IS NOT RETROACTIVE, WE SEE THAT THE ANALYSIS DOESN'T USUALLY GO MUCH FURTHER. THAN IF APPRENDI IS NOT RETROACTIVE, THEN BLAKELY CAN'T BE RETROACTIVE.
THAT MAY SEEM AT FIRST GLANCE TO GIVE THE ISSUE, SHORT-SHRIFT BUT REALLY DOESN'T
BECAUSE IT'S REALLY A MATTER OF SIMPLE LOGIC.
IF APPRENDI CAN NOT BE RETROACTIVE, BLAKELY, WHICH ADDS TO AND INCORPORATES APPRENDI IT CAN NOT ALSO BE RETROACTIVE, BECAUSE IT CONTAINS WITHIN IT ALL THE SAME THAT COURT HAD IN HUGHES REGARDING APPRENDI.
WHEN WE'RE DOING A RETROACTIVITY TEST,
WE REACH THE SAME RESULT AS IN HUGHES AND THEN SOME.
THOSE WERE ALL THE CONCERNS OF HUGHES IN THE NEW RULE OF ADMINISTRATION OF JUSTICE AND APPRENDI AND THEN SOME BECAUSE BLAKELY ADDS TO THAT.
ONE OF THE EFFECTS THE RETROACTIVE APPLICATION OF BLAKERY WOULD HAVE, IN ESSENCE, WHEN IT GOES BACK THROUGH TIME IN ITS APPLICATION, BECAUSE IT CONTAINS APPRENDI WITHIN IT, IT WOULD ALLOW A RETROACTIVE APPLICATION.
THAT IS ANOTHER REASON WE CAN NOT ALLOW IT BECAUSE IT WOULD BE IN CONFLICT WITH HUGHES.
OF COURSE EVEN, EVEN IF, BLAKELY APPLIED RETROACTIVELY, THE DEFENDANT DID NOT PRESERVE THE ISSUE, CAN NOT BE PRESERVED BY 3800-A.

3800-A ONLY APPLIES TO
SENTENCES THAT ARE ILLEGAL. THEY
CAN'T BE IMPOSED UNDER ANY
FACTUAL CIRCUMSTANCES.
>> YOU NEVER ARGUED THAT.
NEVER MADE THAT POINT IN THE
DISTRICT COURT.
>> THAT'S CORRECT.
>> THE DISTRICT COURT INVITED
YOU TO SAY WHAT YOU HAD TO SAY,
HAD THE OPPORTUNITY TO FILE A
BRIEF, UNLIKE NOT AUTOMATIC.
>> CORRECT.
>> THEY ISSUED AN ORDER,
OPPORTUNITY TO FILE A BRIEF
WHERE YOU COULD HAVE RAISED
THAT.
NOT YOU PERSONALLY BUT THE
STATE.
>> THE DISTRICT COURT DID ISSUE
AN INVITATION OF SORTS TO FILE
A RESPONSE, HOWEVER, AFTER
ISSUING THAT INVITATION, THEY
DID NOT GIVE THE STATE AN
ACTUAL OPPORTUNITY TO DO THAT
RESPONSE.
THE STATE HAD AN OPPORTUNITY
AND THE RESPONSIBILITY TO MAKE
SURE THAT THE RECORD WAS CLEAR
AND SO IT MOVED TO SUPPLEMENT
TWO TIMES.
ONCE BECAUSE THE CIRCUIT COURT
CLERK DIDN'T GET THE
INFORMATION CORRECT.
AND THEN, BECAUSE THE ORDER TO
SHOW CAUSE HAD CITED TO ISAAC.
AND ISAAC WAS STILL PENDING IN
THIS COURT.
THERE'S A GOOD ARGUMENT AS A
MATTER OF JUDICIAL ECONOMY, THE
PROCEEDINGS IN THIS CASE SHOULD
HAVE BEEN STAYED.
SO THE STATE MADE THAT REQUEST,
PRIOR TO ISSUING ITS
SUBSTANTIVE RESPONSE WHICH IS
THE CORRECT PROCEDURAL WAY TO

GO ABOUT IT.
BUT THE FIRST DISTRICT CHOSE TO
TREAT THAT MOTION TO STAY AS
SUBSTANTIVE RESPONSE, WHICH IT
WAS NOT IN ANY WAY.
THAT WAS A MISTAKE.
AND IT HAD THE EFFECT OF
PREVENTING THE STATE FROM
MAKING ITS ARGUMENT.
AND --.
>> [INAUDIBLE].
-- AS OPPOSED TO FILING A RESPONSE.
THAT HAPPENED AT LEAST TWICE IN
THIS CASE AS I RECALL.
>> THERE WERE THREE MOTIONS TO
FILE.
THERE WERE TWO MOTIONS TO
SUPPLEMENT THE RECORD.
>> I GUESS IT BOTHERS ME YOU
WOULD SAY YOU DIDN'T HAVE THE
OPPORTUNITY BUT YOU ACTUALLY
HAD THE OPPORTUNITY BUT YOU
CHOSE, THE STATE CHOSE TO DO
SOMETHING ELSE.
>> BEFORE ANY LITIGANT FILES A
RESPONSIVE PLEADING THEY NEED
TO MAKE SURE FIRST THE RECORD
IS IN A STATE WHICH THEY CAN
MAKE PROPERLY THEIR ARGUMENTS.
AND SECTION THEY NEED TO MAKE
SURE THE LAW IS IN A STATE IT
WILL BEST REACH THE RIGHT
RESULT.
THESE ARE ALL MATTERS THAT
SHOULD BE TAKEN CARE OF BEFORE
A RESPONSIVE PLEADING ARE
FILED.
I DON'T THINK ANYONE WOULD
DISAGREE WITH THAT.
THE STATE FILED RESPONSIVE
PLEADING AND MADE ITS ARGUMENT,
ALLOWED THE COURT TO RULE, AND
THEN FILED A MOTION TO STAY.
THAT WOULD BE A BIT BACKWARDS.
THE STATE DID IT CORRECTLY
HERE.

>> IF THE COURT ENDED UP, IF
THE COURT ENDED UP AGREEING
WITH YOUR -- THIS OTHER STUFF
IS BESIDES THE POINT.
PROBABLY PREFER FOR US TO
DECIDE THIS CASE --
[INAUDIBLE]
PROCEDURAL ISSUES, RIGHT?
>> YOU ARE RIGHT, YES.
BUT BLAKELY OF COURSE CAN NOT
BE RETROACTIVE.
EVEN IF IT IS WASN'T PRESERVED
BUT AS YOU SAY IT IS MUCH
BETTER TO DECIDE THIS ISSUE AND
FINALLY RESOLVE THE CONFLICT,
AND HOLD, VERY CLEARLY FOR
FLORIDA, THAT BLAKELY IS NOT
RETROACTIVE.
AND I WILL RESERVE THE REST FOR
REBUTTAL.
>> MAY IT PLEASE THE COURT.
MY NAME IS HENRY GUYDEN.
I REPRESENT THE RESPONDENT,
SIRRON JOHNSON.
WE LOOK TO WELL REASONED
OPINION OF THE FIRST DISTRICT
IN JOHNSON VERSUS STATE.
INITIALLY I WANT TO CLARIFY AS
JUSTICE QUINCE POINTED OUT THE
STATE WAS GIVEN MULTIPLE
OPPORTUNITIES TO FILE THE
BRIEF.
THE STATEMENT THE STATE DID NOT
HAVE OPPORTUNITY TO FILE BRIEF
TO THE FIRST DISTRICT'S
REQUEST IS SIMPLY INCORRECT.
THE STATE FILED THE MOTION, WHAT
ESSENTIALLY HAPPENED THE FIRST
DISTRICT ISSUED ORDER TO SHOW
CAUSE INDICATING IT WAS
INCLINED TO GRANT OR REVERSE
THE SUMMARY DENIAL, RATHER THAN
FILE A RESPONSIVE PLEADING OR
EXCUSE ME, RESPONSIVE BRIEF.
THE STATE FILED A MOTION TO
SUPPLEMENT THE RECORD AND A

MOTION TO CORRECT THE RECORD.
BOTH OF THOSE MOTIONS WERE
GRANTED AND FIRST DISTRICT GAVE
THE STATE ANOTHER OPPORTUNITY
TO FILE THE BRIEF, SAYING SEND
US SOMETHING WITHIN 20 DAYS.
THE STATE CHOSE ON ITS OWN NOT
TO FILE BRIEF AND INSTEAD FILE
A MOTION TO STAY, ONLY ISSUED
IT RAISED WAS THE RETROACTIVE
APPLICATION OF BLAKELY.
SO WE WOULD ASSERT THAT
THE ONLY ISSUE, PROPERLY BEFORE
THIS COURT IS WHETHER OR NOT
BLAKELY CAN BE GIVEN LIMITED
RETROACTIVE APPLICATION.
NOW, AS TO THAT ISSUE, I
DISAGREE WITH COUNSEL AS FAR AS
THIS COURT'S POWER TO CRAFT THE
SCOPE OF THE RETROACTIVE
APPLICATION OF BLAKELY.
WHAT THE FIRST DISTRICT
DETERMINED THAT WAS THAT
BLAKELY WAS A CLARIFICATION OF
WHAT THE SUPREME COURT MEANT IN
APPRENDI AND THEY RECOGNIZED
THAT APPRENDI GRANTED FAIRLY
SUBSTANTIAL RIGHTS.
THE APPRENDI COURT DETERMINED
THAT THE DEFENDANT HAS RIGHT TO
JURY TRIAL ON SENTENCING
ENHANCEMENT FACTORS.
NOT ONLY RIGHT TO BE DETERMINED
BY A JURY BUT THAT
DETERMINATION MADE BEYOND A
REASONABLE DOUBT WHICH IS --.
>> [INAUDIBLE].
THAT IS DIFFERENT FROM A --
[INAUDIBLE]
>> I THINK IT IS A CHANGE IN
THE LAW BECAUSE THIS COURT
ISSUED ITS DECISION IN MAGRUDER
VERSUS STATE IN 2001
ESSENTIALLY SAYING THAT
APPRENDI WOULD NOT APPLY TO
SENTENCES THAT DID NOT EXCEED

THE STATUTORY MAXIMUM.
SO THAT BECAME THE LAW IN THIS STATE.
TO THE EXTENT BLAKELY CHANGED THE LAW IT WAS A CHANGE OF LAW.
THE PURPOSE OF BLAKELY WAS TO CLARIFY WHAT THE SUPREME COURT OF THE UNITED STATES INTENDED WHEN IT ISSUED ITS DECISION IN APPRENDI.
>> WELL, THAT IS SORT OF A NICE ARGUMENT BUT WHERE DOES THIS FIT IN WITH THE JURISPRUDENCE ON RETROACTIVITY?
BECAUSE YOU'RE STILL SAYING, THAT FOR THE FOUR YEARS AFTER APPRENDI, THAT JUDGES WERE, AS LONG AS THEY WERE SENTENCING UNDER THE STATUTORY MAXIMUM THEY DIDN'T, WE DIDN'T THINK APPRENDI APPLIED.
NOW HOW DO YOU THEN, IF, BLAKELY IS THEN TO BE APPLIED TO THIS DEFENDANT'S SENTENCE, YOU ARE APPLYING IT RETROACTIVELY?
SO I DON'T UNDERSTAND HOW YOU GET AROUND, BECAUSE IT'S A MILDER, SITUATION, IT IS NOT A CATACLYSMIC CHANGE, IT IS A EVOLUTIONARY REFINEMENT, YOU'RE STILL APPLYING IT OR ASKING THAT IT BE APPLIED RETROACTIVELY.
DON'T WE STILL HAVE TO GO THROUGH THE SAME ANALYSIS THAT WE WOULD GO THROUGH UNDER WITT, AND I THINK YOU MAKE THAT ARGUMENT?
YOU SAY WE'RE ONLY ASKING FOR FOUR YEARS SO IT IS NOT AS MUCH OF AN UPHEAVAL AS IF IT WENT BACK TO THE BEGINNING OF TIME.
IT IS ONLY GOING TO BE CASES WITHIN THAT 4-YEAR PERIOD.
BUT YOU STILL HAVE TO GO

THROUGH THE WITT ANALYSIS.
DO YOU AGREE WITH THAT?
>> I DEFINITELY AGREE WITH THAT, YOUR HONOR.
I THINK THAT BLAKELY CAN BE TREATED DIFFERENTLY FROM APPRENDI EXACTLY BECAUSE OF THE LIMITED SCOPE OF THE REMEDY.
WHAT THE FIRST DISTRICT DETERMINED WAS THAT, IN APPLYING BLAKELY RETROACTIVE FOR THAT FOUR-YEAR PERIOD, YOU ARE ONLY DEALING WITH THE LIMITED CLASS OF CRIMINAL DEFENDANTS.
ONE, APPRENDI WAS ALREADY IN APPLICATION, SO THEREFORE YOU WOULD ONLY BE DEALING WITH SENTENCES IN WHICH THE SENTENCE WAS ENHANCED DUE TO JUDICIAL FINDINGS, BUT THAT ENHANCEMENT DID NOT EXCEED THE STATUTORY MAXIMUM.
THE OTHER ISSUE IS JUST GIVEN THE TIME THAT HAS OCCURRED HERE, MOST OF THESE SENTENCES, MANY OF THESE SENTENCES WOULD HAVE ALREADY EXPIRED.
I WAS HIGHLY LIKELY WE AREN'T TALKING ABOUT A LARGE NUMBER OF CASES IF BLAKELY WAS GIVEN THIS RETROACTIVE APPLICATION.
>> THE CASE WOULD STILL HAVE TO BE, THE STATE WOULD HAVE TO MAKE A DECISION.
DO THEY GO WITH THE SENTENCE THAT YOU WOULD HAVE WITHOUT DEPARTING OR THEY WOULD HAVE TO HAVE ANOTHER JURY TRIAL?
>> RIGHT.
WELL FIRST THE DEFENDANT WOULD HAVE TO ESTABLISH THAT THE ERROR WAS NOT HARMLESS.
THIS COURT ESTABLISHED THAT HARMLESS ERROR --
>> HOW ABOUT SINCE WE'RE

LOOKING, THIS CASE, CAN YOU DO
THAT? TO SHOW THAT IT IS NOT
HARMLESS?
>> I THINK IN THIS PARTICULAR
CASE OF MR. JOHNSON YOU WOULD
NOT BE ABLE TO SHOW THAT BEYOND
A REASONABLE DOUBT.
I THINK AT THIS POINT WE STILL
HAVE A VERY LIMITED RECORD.
WHAT ESSENTIALLY HAPPENED, IS
MR. JOHNSON HAD A RECOMMENDED
GUIDELINES SCORE OF 11.8 YEARS,
MEANING ENDED UP GETTING
SENTENCED TO 48 YEARS, OVER
FOUR TIMES THE RECOMMENDED
GUIDELINE SENTENCE.
THAT WAS BASED SOLELY ON
JUDICIAL FINDINGS THE SUPREME
COURT OF THE UNITED STATES HAS
HELD SHOULD HAVE BEEN
DETERMINED BY A JURY AND
DETERMINED BEYOND A REASONABLE
DOUBT.
>> WAIT A MINUTE. HIS
RESENTENCING WAS SOMETHING A LITTLE
LESS?
>> HE WAS RESENTENCED TO 40 YEARS
ON TWO OF THE COUNTS.
ONE COUNT HAS 48 YEARS.
>> HE IS STILL SERVING 48
YEARS.
>> STILL SERVING 48 YEARS.
>> WHAT WERE THE DEPARTURE
REASONS?
>> DEPARTURE REASONS, YOUR
HONOR, UNSCORED JUVENILE
DEFENSES.
ESCALATING PATTERN OF CRIMINAL
ACTIVITY AND THAT THE CRIME WAS
PREMEDITATED AND CALCULATED.
CALCULATED AND PREMEDITATED.
THOSE WERE --
>> THOSE, THE PREMEDITATED,
CALCULATED, THOSE ARE
ADDITIONAL, THAT WAS NOT
ENCOMPASSED WITHIN THE CRIME HE

WAS CONVICTED ON?
THAT WAS NOT AN ELEMENT OF THE
CRIME.
>> YES, YOUR HONOR.
>> THAT WAS NOT?
>> THAT WAS NOT ELEMENT OF THE
CRIMES HE WAS CONVICTED ON AND
THOSE WOULD BE A FACTUAL
FINDINGS THAT THE JURY WOULD
NEED TO DETERMINE.
>> THE UNSCORED JUVENILE
OFFENSE, THAT IS, NOT QUITE
LIKE THE FACT OF A PRIOR
CONVICTION BUT IT IS READILY
ASCERTAINABLE, WOULD YOU AGREE
THAT MIGHT BE LESS PROBLEMATIC?
>> I THINK THAT MAY BE SIMILAR
TO PRIOR CONVICTIONS AND THAT
MAY BE ABLE TO BE DETERMINED BY
THE JUDGE.
NOW, I WILL, IN ISAAC VERSUS STATE
THE FIRST DISTRICT DETERMINED
THAT THE SENTENCE ENHANCEMENT
FOR CRIMINAL ACTIVITY WAS A
FACTUAL DETERMINATION FOR THE
JURY ALSO.
I WOULD HAVE BOTH OF THOSE
FACTORS HERE.
>> YOU MAKE IT, OR THE FIRST
DISTRICT MADE, AND YOU MAKE AN
INTERESTING ARGUMENT.
DO WE HAVE ANY CASES THAT TAKE
THE SAME PRINCIPLE OF LAW,
WHICH HERE IS, JURY MUST FIND
CERTAIN FACTS IN ORDER FOR A
SENTENCE TO BE INCREASED, AND
APPLY IT DIFFERENTLY BECAUSE
THE TIME PERIOD IS MORE
CIRCUMSCRIBED? DO WE HAVE ANY
PRECEDENT ON THAT.
>> YOUR HONOR, I THINK THE, NOT
IN THE SPECIFICALLY WAY THE
FIRST DISTRICT HANDLED IT.
IN THE PAST WHEN THIS COURT HAS
ANALYZED CHANGED AND RULES
UNDER THE WITT ANALYSIS, IT HAS

NOTED THAT BECAUSE OF THE
LIMITED APPLICATION, AN EXAMPLE
I WILL GIVE THE COURT IS THE
CASE OF CALLAHAN VERSUS STATE
AND BECAUSE THAT IS 658
SOUTHERN SECOND 983.
THAT CASE WAS DEALING WITH
CONSECUTIVE IMPOSEMENT OF
HABITUAL OFFENDER SENTENCE
WHICH THIS COURT IN HOWELL
VERSUS STATE DETERMINED WAS
IMPROPER AND THE COURT APPLIED
ITS HOLDING IN HOWELL
RETROACTIVELY.
ONE OF THE REASONS THAT IT DID
SO IT LOOKED AND SAID THAT THE
HABITUAL OFFENDER STATUTE WAS
AMENDED IN 1989.
SO COURTS COULD HAVE ONLY BEEN
RELYING ON, BY AMENDED, IT WAS
AMENDED TO ALLOW FOR A HABITUAL
OFFENDER SENTENCE TO EXCEED THE
STATUTORY MAXIMUM.
THE COURT SAID THAT THE TRIAL
COURTS IN THE STATE COULD HAVE
ONLY BEEN RELYING ON THAT LAW
FOR SIX YEARS.
SO THEREFORE IT WASN'T A
SIGNIFICANT RELIANCE ON THE OLD
LAW, AND THEY USED THAT HAS A
BASIS DETERMINING RETROACTIVE
APPLICATION WAS PROPER.
>> YOU'RE BEING VERY, I THINK
YOU'RE MAKING A CREDIBLE
ARGUMENT BUT ISN'T THERE, WHAT
IS THE EFFECT ON THE
ADMINISTRATION OF JUSTICE WHICH
ALSO DOES MEAN THAT SENTENCES
END UP BEING TRIED BY JURIES
WHEN YOU HAVE A SITUATION AGAIN
WHERE THIS ISN'T, I DON'T KNOW
ABOUT THE PREMEDITATED ELEMENT
BY THE IDEA OF THE ESCALATING
PATTERN IS PRETTY WELL NOT
SUBJECT TO A LOT OF ACTUAL
DISPUTE AND THE JURY DOESN'T

KNOW THEY'RE GOING TO BE
DECIDING BETWEEN 12-YEAR
SENTENCE AND A 48-YEAR
SENTENCE.
>> RIGHT.
>> WHICH, WE DON'T TELL THEM
THAT, OTHER THAN IN A DEATH
CASE.
SO DON'T WE HAVE THAT CONCERN
ABOUT THE EFFECT ON THE
ADMINISTRATION OF JUSTICE TO
MAKE THIS RETROACTIVE?
>> WELL, I THINK ANYTIME YOU
APPLY ANY RULE CHANGE
RETROACTIVELY THERE WILL BE
SOME EFFECT BUT THE QUESTION
IS, IS THAT EFFECT GOING TO BE
SUBSTANTIAL OR BEYOND A LEVEL
THAT WARRANTS IT?
WITT IS ESSENTIALLY A BALANCING
TEST AND I THINK WHAT A LOT OF
COURTS IN READING THESE CASES
HAVE FAILED TO DO IS EVALUATE
EACH FACTOR AND COME TO A
CONCLUSION BASED ON ALL OF THE
FACTORS.
I THINK IN THIS CASE --
>> UNDER WITT IT IS
EVOLUTIONARY REFINEMENT DO YOU
GET INTO THE BALANCING?
>> WELL, THE, I BELIEVE THAT, I
BELIEVE THAT YOU DO.
I THINK MOST OF THE CASE IS
TALKING ABOUT THE EVOLUTIONARY
REFINEMENT ARE SPEAKING MORE
UNDER A TEAGUE STANDARD RATHER
THAN A WITT STANDARD.
I THINK THE ISSUE WITH WITT IS
WHETHER THE CASES OF
SUBSTANTIAL OR EXCUSE ME,
FUNDAMENTAL SIGNIFICANCE.
AND WHEN YOU ARE EVALUATING
THAT ISSUE I THINK ONE OF THE
THINGS YOU SHOULD LOOK AT, IS
WHAT DID APPRENDI AND BLAKELY
DO.

WHAT APPRENDI DID, WAS APPLY,
THE BEYOND A REASONABLE DOUBT
STANDARD TO A SENTENCING
ENHANCEMENT FACTOR.
THAT TO ME --
>> WE ALREADY DECIDED APPRENDI
IS NOT RETROACTIVE.
>> THIS COURT CONDUCTED A WITT
ANALYSIS AND I THINK
ESSENTIALLY WHAT THIS COURT
DETERMINED, IF YOU READ THIS
COURT'S DECISION IS IT WAS
CONCERNED WITH THE FACT IF IT
APPLIED APPRENDI RETROACTIVE
BACK OVER THE 20-YEAR SPAN WE
HAD THE SENTENCING GUIDELINES,
THAT WOULD ESSENTIALLY BE TOO
HEAVY OF A BURDEN ON THE COURT
SYSTEM.
>> WHAT DID WE SAY ABOUT
WHETHER IT WAS, WHETHER
APPRENDI WAS, A CASE OF
FUNDAMENTAL SIGNIFICANCE?
>> THIS COURT, ESSENTIALLY,
RULED THAT APPRENDI DEALT WITH
A PROCEDURAL ASPECT.
>> WELL, ISN'T THAT, THAT
REALLY IS YOUR BIGGER PROBLEM.
IF WE SAID THAT, WHICH WE WERE
SAYING I THINK, BASED ON THE
SUPREME COURT, MADE THIS
WHOLE BIG DEAL ABOUT APPRENDI,
SAID IT IS NOT RETROACTIVE.
LET'S, IF WE SAID THAT, IN
HUGHES, HUGHES IS THE CASE.
HOW CAN WE SAY SOMETHING
DIFFERENT AND SAY THIS WAS
BIGGER DEAL THAN IT WAS WHEN WE
DECIDED HUGHES?
>> WELL, BECAUSE THE COURT'S
ANALYSIS, I DON'T THINK THE
COURT'S ANALYSIS WAS LIMITED TO
A FINDING THAT BECAUSE THE
CASE, LET ME FIRST START BY
SAYING, AS YOU STATED IN YOUR
DISSENT JUSTICE PARIENTE, THERE

WERE TWO ISSUES IN APPRENDI.
ONE THE ISSUE OF THE JURY TRIAL
AND ALSO THE BEYOND A
REASONABLE DOUBT STANDARD WHICH
IMPLICATED THE FIFTH AMENDMENT
DUE PROCESS RIGHTS.
AND AS TO THE BEYOND A
REASONABLE DOUBT STANDARD, THAT
ISN'T PROCEDURAL.
I THINK THAT THE ISSUE OF A
BURDEN OF PROOF GENERALLY IN
THE COURT'S JURISPRUDENCE HAS
BEEN CONSIDERED A SUBSTANTIVE
ISSUE, NOT MERELY A PROCEDURAL
ISSUE.
>> HOWEVER BRILLIANT THAT
DISSENT MIGHT HAVE BEEN, IT WAS
A DISSENT SO WOULDN'T IT
REQUIRE US TO RECEDE FROM
HUGHES IN ORDER TO GET TO
YOUR --
>> I DON'T THINK SO BECAUSE
LIKE I SAID IN THE CALCULUS OF
THE ENTIRE WITT ANALYSIS, WHAT
YOU CONSIDERED IN APPRENDI WHAT
WAS THE PURPOSE OF THIS LAW.
WHAT IS THE IMPACT IS THIS LAW,
ASSUME RELIANCE ON THE OLD LAW,
EXTENT OF RELIANCE AND IMPACT
ON ADMINISTRATIVE JUSTICE.
BECAUSE APPRENDI WOULD HAVE
GONE BACK OVER A SPAN OF 20
YEARS AND WOULD HAVE,
INVALIDATED NUMEROUS, THAT HAD
BASICALLY BEEN RELYING ON
JUDICIAL FINDINGS IN THIS
COURT.
>> BLAKELY WOULD HAVE A
PURPOSE.
>> IT WOULD NOT HAVE THE SAME
IMPACT.
>> CORRECT. SORRY.
>> WOULD HAVE THE SAME PURPOSE
THAT APPRENDI HAD, TO MAKE SURE
THAT, THOSE FACTORS THAT WOULD
ENHANCE -- [INAUDIBLE]

I DON'T, BEYOND A PRIOR RECORD
ARE FOUND BY JURY BEYOND A
REASONABLE DOUBT.
THAT IS THE PURPOSE OF
APPRENDI, CORRECT?
>> THAT IS THE PURPOSE OF
APPRENDI.
I THINK BLAKELY HAS ADDITIONAL
PURPOSE IN THAT BLAKELY HAD THE
PURPOSE OF CLARIFYING WHAT THE
SUPREME COURT OF THE UNITED
STATES INTENDED IN APPRENDI.
I THINK THAT IS THE PURPOSE
THAT THE FIRST DISTRICT RELIED
UPON OR LATCHED ON TO BECAUSE
THEY SAID, WELL, IF BLAKELY IS
INTENDED TO CLARIFY WHAT
APPRENDI MEANT, THEN IT MAKES
SENSE THAT BLAKELY SHOULD BE
APPLIED TO CASES THAT IN WHICH,
APPRENDI WOULD APPLY.
AND THEY SAID FOR JUST THIS
FOUR-YEAR PERIOD, THAT IS SHORT
ENOUGH PERIOD THAT TO GIVE THE
FULL EFFECT OF APPRENDI, THE
FULL, I'M SORRY, YOUR HONOR.
>> HAS ANY OTHER STATE
DECIDED THAT BLAKELY IS TO
BE APPLIED RETROACTIVELY BASED
ON THOSE KIND OF FACTORS?
>> NO, YOUR HONOR.
NOT THAT I FOUND.
LOOKING AT MOST OF THE STATES
HAVE DECIDED THE ISSUE, MANY OF
THEM HAVE FOLLOWED THE TEAGUE
ANALYSIS WHICH WOULDN'T BE
APPLICABLE IN FLORIDA.
NONE OF THEM HAVE ADDRESSED
WHETHER OR NOT BLAKELY CAN BE
GIVEN LIMITED RETROACTIVE
APPLICATION.
ALL OF THEM HAVE SIMPLY
DETERMINED, AND I ANALYZED IT
UNDER THE THOUGHT BEING THAT
BLAKELY WOULD GO BACK TO
BEGINNING OF TIME WHICH IS NOT

WHAT THE FIRST DISTRICT COURT
DID, WHICH IS NOT WHAT WE'RE
ASKING THIS COURT TO DO.
>> CERTAINLY COULDN'T, GO BACK
TO THE END OF TIME, WE'VE
ALREADY SAID IN APPRENDI, WE'RE
NOT GOING TO GO BACK THAT FAR.
>> CORRECT. CORRECT.
THAT IS WHY THE FIRST DISTRICT
REACHED THE RULING THAT IT DID,
BECAUSE IT FELT THAT A LIMITED
APPLICATION FELL WITHIN THIS
COURT'S JURISPRUDENCE.
>> I LOOKED AT THIS, AS BLAKELY
BEING EVOLUTIONARY REFINEMENT
WHICH I THINK SAYS THAT YOU
DON'T, IT IS NOT APPLIED
RETROACTIVELY IF IT IS SIMPLY
EVOLUTIONARY REFINEMENT.
YOU MAKE AN INTERESTING
ARGUMENT BUT I AM STILL NOT
CONVINCED THAT THIS IS NOT A
EVOLUTIONARY --
>> I CERTAINLY UNDERSTAND THE
COURT'S POINT BUT I THINK, AS
FAR AS THE CASE LAW IN FLORIDA,
IT WAS A CLEAR CHANGE OF LAW.
THIS COURT ISSUED AN OPINION
THAT GOVERNED FLORIDA SAYING
THAT APPRENDI OPENLY APPLIED TO
OUR, DID NOT APPLY TO SENTENCES
THAT DID NOT EXCEED THE
STATUTORY MAXIMUM.
SO TO THE EXTENT WAS THE LAW IN
FLORIDA, BLAKELY WAS A CLEAR
DEFINITIVE CHANGE IN THE LAW IN
THIS STATE.
I DON'T THINK NECESSARILY IT IS
REFINEMENT.
I THINK IT IS CHANGE OF RULE OF
LAW JUST LIKE ANY OTHER. EITHER,
JUST LIKE APPRENDI ITSELF WAS.
YOUR HONOR,
IN SUM, YOUR HONOR,
ESSENTIALLY, WHAT WE'RE ASKING
THE COURT TO DO IS TO CRAFT A

LIMITED REMEDY, OR ESSENTIALLY
AFFIRM THE LIMITED REMEDY THAT
THE FIRST DISTRICT COURT OF
APPEAL THOUGHT WAS PROPER.
THE BASIS FOR THAT RULING IS
BECAUSE THIS COURT DETERMINED
THAT APPRENDI WOULD APPLY TO
RESENTENCING IN THE STATE
VERSUS FLEMING.
THAT APPRENDI WOULD APPLY TO
THESE SENTENCES THAT OCCURRED
AFTER APPRENDI WAS DECIDED EVEN
IF THE CONVICTION OCCURRED
PRIOR TO APPRENDI.
THE FIRST DISTRICT DETERMINED
THAT TO GIVE THAT RULING ITS
FULL EFFECT BLAKELY SHOULD BE
ALSO GIVEN LIMITED RETROACTIVE
APPLICATION SO WHEN THESE
RESENTENCES OCCUR, THEY CAN BE
GIVEN THEIR FULL, PROPER,
EFFECT AS THE SUPREME COURT
INTENDED UNDER APPRENDI.
>> IF THERE IS PROBLEM WITH
THAT, I FIRST THOUGHT THAT IS
WHAT WE WERE DEALING WITH.
WE HAD A WHOLE RATIONALE IN
FLEMING ABOUT THE RESENTENCING
IS DE NOVO.
SO THE DEFENDANT GETS THE
BENEFIT OF THE LAW AT THAT TIME
SO IT IS NOT A RETROACTIVITY
ANALYSIS.
SO THEN I THINK THAT IS
CONFLATING TWO REALLY DIFFERENT
CONCEPTS.
WHEN HE WAS RESENTENCED,
BLAKELY HAD NOT BEEN DECIDED
RIGHT?
>> CORRECT. YOUR HONOR.
WHEN YOU HE WAS RESENTENCED HIS
RESENTENCE BECAME FINAL IN
2002.
I AGREE WITH THE COURT.
THAT THIS WOULD BE SOMEWHAT
DIFFERENT, BUT I THINK THAT,

WITHIN THIS COURT'S DISCRETION
TO GIVE BLAKELY A LIMITED
RETROACTIVE APPLICATION.
I THINK THAT WOULD NOT BE
INCONSISTENT WITH APPRENDI, YOU
ARE NOT DEALING WITH THE SAME
TIME SPAN.
AND I THINK YOU HAVE TO
EVALUATE EACH CASE ON THEIR OWN
MERITS, UNDER A WITT ANALYSIS.
IN LOOKING AT THE SUPREME COURT
DECISIONS, IN DUNCAN AND OTHER
CASES IF YOU ACTUALLY READ
THOSE OPINIONS, ALL OF THEM ARE
BASED ON THE FACT IF THEY
APPLIED THE DECISION
RETROACTIVELY, THEY WOULD BE
REVERSING DECADES OF CRIMINAL
CONVICTIONS.
THAT WAS THE CRUX OF THE
HOLDING IN THOSE CASES, AND
THAT IS NOT WHAT IS AT ISSUE
HERE.
THAT IS WHY WE BELIEVE THAT IS
DISTINGUISHABLE, AND WOULD
WARRANT THIS COURT AFFIRMING
THE FIRST DISTRICT'S OPINION.
THANK YOU.
>> BLAKELY CAN NOT BE LIMITED
BECAUSE RETROACTIVITY BY ITS
NATURE IS NOT LIMITED.
RETROACTIVITY GOES BACK TO THE
BEGINNING OF THE REPUBLIC.
>> BUT OF ALL THE ARGUMENTS,
IT SEEMS TO ME THAT IS A
STRONGER ARGUMENT WHICH IS THAT
APPRENDI WAS DECIDED AT THAT
TIME, EVERYBODY ASSUMES
STATUTORY MAXIMUM, WHAT IT
MEANT AND WHAT WE THOUGHT THEY
WERE SAYING.
FOUR YEARS LATER THE U.S.
SUPREME COURT SAYS, NO.
AND AS FAR AS WHETHER IT IS
FUNDAMENTAL SIGNIFICANCE, THIS
GUY MIGHT BE SUBJECT TO

11-YEAR SENTENCE.
INSTEAD HE IS SERVING 48 YEARS
IN THE DEPARTMENT OF
CORRECTIONS.
AND YOU'RE ONLY TALKING ABOUT A
RESENTENCING, NOT GUILT.
THE BALANCE MAY WEIGH IN FAVOR
OF THIS.
DOES THE STATE KNOW HOW MANY
DEFENDANTS ARE TALKING ABOUT
MIGHT HAVE HAD ENHANCED
SENTENCES, DEPARTURE SENTENCES
IN THAT 4-YEAR PERIOD, THAT
WOULD HAVE TO BE RESENTENCED?
>> WE DON'T HAVE A SPECIFIC
NUMBER.
>> DO WE HAVE ANY IDEA?
LET ME ASK YOU THIS WAY.
WHAT IF THIS WAS THE ONLY CASE,
WOULD THAT MATTER AT ALL?
DOES IT MATTER WHETHER IT'S ONE
CASE OR 10,000 CASES?
>> FOR THIS ISSUE, IT WOULD NOT
MATTER BECAUSE IT IS STILL NOT
AN ISSUE OF FUNDAMENTAL
SIGNIFICANCE THAT IS STILL
EVOLUTIONARY REFINEMENT
OF THE LAW.
IT IS STILL PROCEDURAL.
>> FOR THIS DEFENDANT THE
CONSEQUENCES OF IT ARE,
SIGNIFICANT AS IT GETS.
I MEAN HE, HE WOULD BE OUT OF
PRISON AT THIS POINT.
I UNDERSTAND WE USE THESE
WORDS.
IT IS VERY DIFFERENT
OVERTURNING A CONVICTION.
ISSUES OF FINALITY COME IN.
IN A SENTENCE THAT MAY BE
UNJUST BECAUSE A JURY MAY HAVE
NOT FOUND THOSE AGGRAVATORS,
THAT'S, BEYOND A REASONABLE
DOUBT THAT IS A BIGGER DEAL.
WE MAY BE HAMSTRUNG BY HUGHES
BUT TO SAY IT IS JUST NOT

REALLY A BIG DEAL, I THINK, WE,
WE SORT OF THROW COMMON SENSE
OUT THE WINDOW WHEN WE SAY
SOMETHING LIKE THAT.
>> WE'RE NOT SAYING IT IS NOT A
BIG DEAL, BUT IT IS A MISTAKE
TO SAY THAT JUST BECAUSE
SOMETHING IS IMPORTANT TO AN
INDIVIDUAL OR IN GENERAL, THAT
IT ALSO IS OF THE KIND OF
FUNDAMENTAL SIGNIFICANCE THAT
WE CONSIDER UNDER THE WITT
ANALYSIS.
>> SO IN HUGHES WE DIDN'T HAVE
TO GET ANY FARTHER THAN SAYING
IT IS NOT OF FUNDAMENTAL
SIGNIFICANCE?
THE ISSUE, BECAUSE YOU KEEP ON
TALKING ABOUT THIS GOES BACK TO
THE BEGINNING OF TIME.
AND I WOULD JUST RESPOND TO
THAT.
SO LET'S JUST ASSUMING IT
DOESN'T GO BACK TO THE
BEGINNING OF TIME.
IT GOES BACK FOUR YEARS AND
ASSUMING IT IS ONLY A COUPLE OF
CASES, WOULD YOU SAY THAT UNDER
THE COURT'S HUGHES OPINION,
THIS DEFENDANT IS STILL OUT OF
COURT BECAUSE HUGHES TREATS IT
AS A PROCEDURAL ISSUE?
>> YES.
>> OKAY.
SO THAT'S REALLY THE BETTER WAY
THEN TO GO RATHER THAN ARGUE
ABOUT THE LENGTH OF TIME.
>> CORRECT.
>> THERE IS SOMETHING
APPEALING.
I KNOW IN CALLAHAN YOU LOOK HOW
MANY SENTENCES AND SENTENCES
ARE NOT AS BIG DISRUPTION OF
THE COURT SYSTEM AS RETRYING A
DEFENDANT'S GUILT.
>> THAT WOULD BE TRUE.

HOWEVER IF WE WERE IMPANELING A JURY FOR A RESENTENCING THE ULTIMATE EFFECT WOULD BE THE SAME FOR LOGISTICS FOR THE TIME PERIOD.
WE WOULD HAVE TO GET A JURY AND FIND ALL THESE WITNESSES NOW FROM THE ORIGINAL SENTENCING IN 1996.
>> WHAT KIND OF WITNESSES WERE THERE?
>> I'M NOT AWARE.
>> I THOUGHT THERE WAS UNSCORED JUVENILE RULING.
MAYBE BECAUSE WE DON'T KNOW THIS RECORD, IS IT CLEAR IT WAS PREMEDITATED?
I DON'T EVEN KNOW, WHAT WAS THE CRIME HERE?
>> BECAUSE WE DON'T HAVE THE FULL TRIAL TRANSCRIPT WE DON'T KNOW WHAT HAPPENED ORIGINALLY.
HOWEVER, EVEN IF THERE WERE NO SPECIFIC WITNESSES CALLED FIRST, IN ORDER TO PROVE THIS TO A JURY THE STATE MIGHT NEED TO DO THAT NOW.
SO WHAT HAPPENED BEFORE WOULDN'T NECESSARILY DETERMINE WHAT HAPPENS NOW.
I WOULD LIKE TO TOUCH ON SOMETHING YOU MENTIONED THAT, THE DEFENDANT IS REALLY AT A DISADVANTAGE HERE.
THIS COURT RECOGNIZED IN HUGHES IS THAT IS NOT THE CASE.
THERE IS NOTHING TO SAY.
THAT THE PROCEDURE WE USED BEFORE OF A JUDGE FINDING THE FACTS HAS ANY LESS VALIDITY THAN A JURY FINDING THE FACTS.
EVEN UNDER SLIGHTLY DIFFERENT STANDARDS OF PROOF.
>> BUT THEN THE ISSUE OF IT BEING FOUND BEYOND A REASONABLE DOUBT IS, I HAVE NOT BEEN ABLE

TO CONVINCE OTHER PEOPLE OF
THIS, SEEMS LIKE IT IS NOT
PROCEDURAL.
BEYOND A REASONABLE DOUBT IS A
SIGNIFICANT STANDARD BUT I
DIDN'T PREVAIL.
>> YES, YOUR HONOR.
THIS COURT IN HUGHES RECOGNIZED
THAT THAT WAS NOT A FACTOR
WHICH SWAYED THE ANALYSIS.
AND ULTIMATELY, THERE WAS STILL
NO REASON TO QUESTION THE
VALIDITY OF THE PROCEDURE.
AND ULTIMATELY UNDER WIT, THAT
IS WHAT WE'RE LOOKING FOR.
THAT IS WHAT ALL THESE FACTORS
HELP US DETERMINE.
WHETHER THE VALIDITY OF THE
PROCEDURE IS REALLY IN
QUESTION.
THIS COURT READS THE CONCLUSION
THAT IT DID NOT CALL THAT INTO
QUESTION.
IT IS A MATTER OF LOGIC BECAUSE
DUNCAN, THE RIGHT TO A JURY
TRIAL IS NOT RETROACTIVE, AND
BECAUSE THIS COURT HAS HELD
THAT APPRENDI IS NOT
RETROACTIVE.
BLAKELY WHICH CONTAINS WITHIN
IT AND ADDS TO BOTH OF THOSE
PRIOR HOLDINGS, BLAKELY ITSELF,
CAN NOT RISE TO THE LEVEL OF
FUNDAMENTAL SIGNIFICANCE.
IT TO BE RETROACTIVE.
THE STATE ASKS THIS COURT QUASH
THE OPINION OF THE FIRST
DISTRICT.
REAFFIRM THE TRIAL COURT'S
HOLDING THAT THE DEFENDANT IN
ITS MOTION WAS PROPERLY DENIED
AND HOLD THAT BLAKELY IS NOT
RETROACTIVELY APPLIED.
THANK YOU.
>> THANK YOU FOR YOUR
ARGUMENTS.

THE COURT WILL BE IN RECESS FOR
10 MINUTES.
>> ALL RISE.