

We now go to the fourth and
final case on today's docket,
Dunbar versus the State of
Florida.

[UNINTELLIGIBLE]

--

AND THE RULES, THAT IF THE
STATE RULE HAD NOT BEEN
IMPOSED, THEY WOULD BE --

>> I THINK SO.

>> BUT UNDER THE STATUTE.

>> I'M SORRY, I THINK THE
RULE, 9140, I DON'T HAVE MY
BOOK WITH ME.

>> BUT IT ESTABLISHES THE
RIGHT BY THE FACT THAT IT --
THE LEGISLATURE >> --

>> YES,

>> THE JUDGE HAD NO
DISCRETION, CORRECT?

>> SO MY PROBLEM HERE, AND I
CONCURRED RELUCTANTLY IN
ASHLEY, BUT ASHLEY WAS A
DIGRESSIONARY FILING, IT'S
REALLY GOING BACK TO --

AND I KNOW THAT IT'S ON YOUR
SIDE, NOT ONLY THE SECOND
DISTRICT, BUT I SEE THAT
CHARLES OFFSET IT, BUT I
CAN'T IGNORE THE FACT THAT
THE STATE STILL COULD HAVE
HAD THE SAME RESULT.
I GUESS THE ISSUE IS, HOW IS
THERE AN EXPECT OF FINALITY.
AT LEAST DURING THE TIME
THAT THE STATE HAS APPEALED
IT.

I DON'T KNOW THAT --
YOU SAID [UNINTELLIGIBLE]
>> HOW CAN THEY HAVE AN
EXPECTATION OF FINALITY IN
THE 30 DAYS AFTER IT IS
IMPOSED BEING WHAT IS
CLEARLY ON ILLEGAL THING.
>> BECAUSE, AND I'M SURE
WE'LL DISAGREE WITH THE
DEFINITION, BUT THIS COURT
HAS SAID THAT THE CONTRARY
WRITTEN ORDER --
CONTRARY TO THE

PRONOUNCEMENT IS THE ILLEGAL
SENTENCE.

>> I UNDERSTAND THAT, BUT
IT'S ONE THAT UNDER ANY
DEFINITION NOBODY COULD EVER
IMPOSE.

AND IT SEEMS LIKE --

I'M NOT DISPUTING IT, THERE
WAS --

IT WAS MINISTERIAL.

HE HAD NO CHOICE BUT TO GIVE
HIM --

AND I'M NOT SURE THIS IS A
TEN-YEAR MANDATORY MINIMUM
TOGETHER WITH THE LIFE
SENTENCE, SO THAT WHATEVER
THAT WAS FOR THE ULTIMATE
SENTENCE, I DON'T THOUGH,
BUT I'M ASSUMING IT'S
IMPORTANT TO YOUR CLIENT.

SO I JUST DON'T GET HOW THIS
DOUBLE JEOPARDY IN THIS
PARTICULAR CASE, AT LEAST
FOR THE 30 DAYS WHERE THE
STATE COULD HAVE APPEALED

IT, AND THE JUDGE HADN'T
DONE WHAT THE JUDGE DID.
OR LET ME GIVE IT TO YOU
ANOTHER WAY.
YOU'RE CORRECT THAT THE
DEFENDANT SHOULD BE THERE --

>> YES ABSOLUTELY.

>> GOING BACK TO
RESENTENCING, AND THE JUDGE
AGAIN DOESN'T IMPOSE THE TEN
YEAR.

I'M ASSUMING THE STATE'S
APPEAL THAT ILLEGAL
SENTENCE.

>> I THINK, YES.

>> MAYBE IT'S --

SO I DON'T --

MAYBE IT IS A PROCEDURAL
GLITCH, BUT I THINK THAT
WHAT WE ARE LOOKING AT IS
WHAT IS A CONSTANT --
A DOUBLE JEOPARDY UNDER THE
LAW OF THE SUPREME COURT --

>> AS FAR AS THE LAW IN THIS
STATE, THE DOUBLE JEOPARDY

LAW, IT'S ONCE THE SENTENCE
IS IMPOSED, THE SENTENCING
HEARING IS CONCLUDING, AND
YOU START SERVING A
SENTENCE, THAT'S WHEN DOUBLE
JEOPARDY HAPPENS.

>> BUT YOU AGREED UNDER THE
STATUTE AND THE RULES, THE
STATE APPEALS AND THE LEGAL
SENTENCE --

>> WELL, OF COURSE, THE
STATE NEVER GOT THE
OPPORTUNITY.

>> OF COURSE, SO WE GO AND
SO OKAY, WE TAKE THIS AND
SAY ALL RIGHT IT GOES BACK
TO RESENTENCING, THE JUDGE
ON RESENTENCING IS REQUIRED
TO IMPOSE THE TEN YEARS.

WE COULD SAY THAT?

>> WELL NOTHING WILL GOING
TO MAKE MY CLIENT --
HE'S GOT A LIFE SENTENCE.

>> HE HAS A LIFE SENTENCE,
HOW DUH THE TEN YEAR

MANDATORY, HOW DOES THAT
EFFECT HIM?

>> I DON'T KNOW, BUT I KNOW

IT WAS NOT PRONOUNCED, AND I
LOOK AT THE LAW --

[UNINTELLIGIBLE]

IT'S BASED ON THE OLD
PRONOUNCEMENT OF --

[UNINTELLIGIBLE]

WHILE HE ISN'T A HABITUAL
OFFENDER --

NOT A HABITUAL VIOLENT --

>> RIGHT NOT VIOLENT.

>> AT THAT POINT THAT WAS A
DIGRESSIONARY CALL ON THE
JUDGE'S PART.

>> YES.

>> THE JUDGE DIDN'T HAVE TO
DO THIS?

>> THAT'S CORRECT, YOUR
HONOR.

>> SO THE JUDGE PRONOUNCING
IN COURT WAS HIS DECISION.

>> YES.

>> SO --

IT'S BASED ON THE NOTION

THAT THE PRONOUNCED --

[UNINTELLIGIBLE]

>> AND THE PROCESS RIGHT TO

BE PRESENT WHEN THE SENTENCE

IS IMPOSED.

>> I UNDERSTAND THAT

ABSOLUTELY.

[UNINTELLIGIBLE]

>> I'M AGREEING WITH YOU

ABOUT IT.

>> [UNINTELLIGIBLE]

>> THAT IS CORRECT.

>> WHAT THIS IS ACTUALLY

ABOUT, IF I REMEMBER

DIRECTLY, IF I'M

UNDERSTANDING THIS, IS A

JUDGE REVISITING A

DIGRESSIONARY DECISION.

>> YES, YOUR HONOR.

THAT'S NOT WHAT WE HAVE

HERE.

>> YES, BUT REGARD TO THE

QUESTION MANY TIMES, WE

SPEAK OF "ILLEGAL

SENTENCES".

WHAT ROLE IS THE

AVAILABILITY OF WHAT

OCCURRED PLAY?

BECAUSE IT SEEMS TO ME THAT

THE EXPECTATION OF FINAL SHY

DOESN'T TURN ON JUST THE

MAGIC WORLD, IT TURNS ON

WHETHER THE STATE CAN SEEK

REVIEW OF THAT, OR FOR THE

EXPECTATION OF FINALITY.

IS THAT WHAT IT'S IN TERMS

OF?

>> YOUR HONOR, I MUST ADMIT

THAT I UNDERSTAND WHERE

WE'RE GOING, AND THE FACT OF

THE MATTER IS THAT IT'S

GOING TO UNDERMINE CASE LAW

AND RULES OF CRIMINAL

PROCEDURE.

ONE OF THEM SAYS IT IS A

FINE, A SENTENCE FOR

DISPOSITION.

>> WHERE IT COMES FROM IS

JUST BECAUSE A SENTENCE HAS

BEEN PRONOUNCED DOESN'T MEAN
THAT'S ALWAYS GOING TO BE IN
PLACE AND THAT ANY CHANGE OF
IT WILL RESULT IN DOUBLE
JEOPARDY, YOU AGREE WITH
THAT?

>> I AGREE WITH WHATEVER
THIS CO-HORT SAYS.

SERIOUSLY, AND I'M NOT
TRYING TO BE SMART.

>> ME TOO, AND IT SEEMS TO
ME THAT IT COMES DOWN TO THE
ISSUE OF IF THAT SENTENCE IS
IN A CATEGORY THAT CANNOT BE
CHANGED ON APPEAL.

IF IT CAN BE CHANGED ON
APPEAL THERE IS NO
EXPECTATION OF FINALITY AND
THERE'S NO DOUBLE JEOPARDY
VIOLATION IF A SENTENCE
RESULTED FROM AN APPEAL.

IT'S NOT EVERY CASE THAT A
STATE CAN TAKE AN APPEAL ON,
AT LEAST RIGHT NOW, AND SO
WOULD IT NOT TURN ON WHETHER

THE STATE CAN HAVE THE LEGAL
AUTHORITY TO SEEK REVIEW OF
WHATEVER HAS OCCURRED?
BECAUSE IF NOT, THEN YOU ARE
THROWN INTO WHETHER,
WHATEVER YOU CALL IT, IF NO
ONE CAN SEEK REVIEW, THERE
IS AN EXPECT IN PLACE IT
SEEMED TO ME, WHETHER YOU
TERM IT MUMBOJUMBO WERE OR
WHATEVER THE TERM IS, DOES
THE DEFENDANT HAVE A
REASONABLE RATIONAL
EXPECTATION THAT IT WILL NOT
BE INCREASED FOR DOUBLE
SENTENCING PURPOSES?
>> I DON'T KNOW MANY
REASONABLE RATIONAL
DEFENDANTS.
AND I HAVE TO CONCEDE, YES,
IT'S NOT FINAL UNTIL THE
EXPOSURE --
>> WHY WOULDN'T A BETTER
CASE FOR THIS TO BE FIRST OF
ALL TO SAY THE JUDGE DOESN'T

--

YOU CAN'T GO BACK AND MAKE A

CHANGE WITHOUT ALL OF IT --

AT THAT POINT, BOTH PARTIES

THERE SAY NO, I

INTENTIONALLY LEFT OFF IN

TERMS OF WHATEVER --

AND THE STATE GOES, YOU

CAN'T DO THAT.

AND THE JUDGE SAYS I'M DOING

IT.

AND AT THAT POINT, THE STATE

GOES, OKAY, AND THEN GOES TO

COURT.

AND THE APPELLANT COURT SAYS

THAT'S AN EXPRESSION.

SO WE MADE THE --

SO THAT WE HAVE THE PROCESS

PROTECTED.

BUT FOR DOUBLE JEOPARDY

PURPOSES, WE HAVE DEALING

WITH THIS DISCRETION AND IT

IS NOT ACTUALLY FOR DOUBLE

JEOPARDY PURPOSES.

>> I UNDERSTAND.

>> AND I WILL ASK YOU, COULD
THE STATE AND THE DEFENDANT
AGREE TO WAIVE A MANDATORY
MINIMUM AND ASK THE JUDGE
NOT TO IMPOSE IT, DOES THE
STATE HAVE THAT ABILITY?

>> I DON'T KNOW THE CASE
NAME OFF OF THE TOP OF MY
AHEAD, BUT I HAVE SEEN.

>> SO THAT'S WHY I DON'T
REALLY AGREE, AND I DON'T
KNOW, I HAVE NEVER SEEN THE
STATE USE 3.800A THAT THEY
CAN COME IN ANY TIME TO GET
THIS CORRECTED.

AND A SAYS IT'S NOT FOR THE
BENEFIT OF THE DEFENDANT.
SO I THINK THEY HAVE, MY
VIEW, IS THAT THEY HAVE THAT
30 DAYS TO DECIDE IF IT'S
LEGAL OR ILLEGAL, AND IF
IT'S ILLEGAL THEY APPEAL IT,
AND IF THEY DON'T IT'S DONE
WITHIN THE 30 DAYS.

>> SO --

>> SO YOU KIND OF WIN AND
LOSE.

[LAUGHTER]

WHAT BOTHERS ME MOST ABOUT

THIS IS THAT IT HAPPENED THE
WAY IT DID THAT HE WASN'T IN
FRONT OF THE JUDGE.

>> AND I THINK WE HAVE TO
MAKE SURE, BECAUSE WE HAVE
SEEN IN THESE CASES, THAT
WHEN A JUDGE GOES, UT OH,
THE JUDGE IS BUSY, THE JUDGE
HAS TO --

THEY CAN'T JUST GO UT OH
BECAUSE THEY CAN'T CALL THE
JUDGE AND HE SAYS YOU CAN'T
DO THAT.

ON THAT POINT IT'S WELL
TAKEN, AND WE WANT TO MAKE
SURE THAT IS DONE CORRECTLY.

AND IT'S TELLING, AND HERE
ON DIRECT CONFLICT, BUT YOU
CAN'T EVEN TELL ME THE
EFFECT THIS --

EFFECT THIS MANDATORY

MINIMUM WILL HAVE ON HIS
SENTENCE.

>> IT WILL HAVE NO EFFECT.

>> BUT HE DOESN'T GET ANY
GAIN TIME --

>> GAIN TIME ON WHAT?

>> HE IS DEFINITELY GOING TO
DO TEN YEARS, THAT WE KNOW.

BUT OTHER THAN THAT, I

REALLY REALLY SEE NO

PRACTICAL IMPACT ON HIS
SENTENCE.

I JUST DON'T.

BUT AGAIN, I'M PLAYING TO

THE AUDIENCE, I'M COMING

BEFORE THIS COURT, I'M NOT

JUST ARGUING ONE CASE.

I WANT EVERYBODY TO HAVE A

CHANCE TO BE BEFORE THE

COURT WHEN THEY'RE

SENTENCED.

THAT'S MY CASE, THANK YOU

VERY MUCH.

>> MAY IT PLEASE THE COURT,

I'M ANN PHILLIPS HERE ON

BEHALF OF THE STATE OF

FLORIDA.

IT'S THE STATE'S POSITION

THAT THE 5TH DISTRICT COURT

DIRECTLY DETERMINED THAT

DOUBLE JEOPARDY WAS NOT

VIOLATED IN THIS INSTANCE.

THE TRIAL COURT DID NOT HAVE

ANY DISCRETION.

>> LET'S TALK ABOUT THE

PROCEDURE.

IF THIS HAD GONE ON AND THIS

JUDGE HAD NOT DONE SOMETHING

AND TEN YEARS OR FIVE YEARS

LATER, THE GUY IS SOMEHOW

GOING TO GET OUT.

AND THEY SAY STATE, YOU

FORGOT TO PUT THE TEN YEARS

ON THERE, CAN THE STATE USE

3800A.

>> YEA.

>> BUT B. SAYS THEY CAN'T.

THEY SAY FOR THE SHORTER RUN

THE STATE CAN, BUT WE NEVER

HAD A CASE UNDER A., AND

IT'S PRETTY CLEAR THERE IS
AN APPEAL BY THE STATE THAT
CAN APPEAL.

SO THEY HAVE 30 DAYS TO I A

--

TO APPEAL AND THAT'S IT.

>> THIS FALLS IN A PROCEDURE
BLACK HOLE.

>> I WOULD THINK AFTER 30
DAYS, THE STATE CAN TRY TO
BRING MOTIONS TO A
DEPARTMENT WHO IS NOT
REPRESENTED, AND YEARS LATER

--

YOU KNOW I JUST DON'T THINK
THE STATE --

I CAN'T THINK IN MY 18 YEARS
AS A JUDGE, THAT THAT IS
EVER HAPPENED.

>> CORRECT, AND AT A
MINIMUM, I WOULD SAY THAT'S
THE EARLIEST THAT HE'S GOING
TO HAVE V A LEGITIMATE
EXPECTATION OF FINALITY IN
HIS SENTENCE.

THE STATE WOULD SAY THERE'S
NO EXPECT OF FINALITY IN
THAT, AND THAT THE STATE
UNDER 3800A COULD CORRECT
THAT AT ANY TIME.

>> THAT'S A HYPOTHETICAL
WITH NOTHING TO DO WITH THIS
CASE, CORRECT?

>> CORRECT.

>> SO LET'S GO BACK TO THE
QUESTION, THE STATE EXPERT.

CAN THE STATE APPEAL ANY
ADVERSE SENTENCE?

>> NOT ANY ADVERSE, BUT IN
LIMITED CIRCUMSTANCES --

>> THERE YOU GO, SO IS EVERY
APPEAL THAT CAN BE TAKEN, OR
EVERY SENTENCE THAT CAN BE
TAKEN, EVERY SENTENCE FOR
WHICH AN APPEAL CAN BE
TAKEN, ARE THERE OTHER KINDS
OF ILLEGAL SENTENCES FOR
WHICH, OR CONTRARY TO THE
LAW, FOR WHICH AN APPEAL
CANNOT BE TAKEN?

>> IF IT IS ILLEGAL, I CAN'T
IMAGINE A SITUATION WHERE
THE STATE COULD NOT APPEAL.

>> SO THE ANSWER IS ANY TIME
IT'S ILLEGAL ACCORDING TO
THE STATE, THEN THE SENTENCE
IS SUBJECT TO APPELLANT
RELIEVE?

>> --

RELIEF.

>> AND THE DEFENDANT DOESN'T
DISAGREE WITH THAT.

>> RIGHT, SO TO INCLUDE THAT
MINIMUM MANDATORY, WHEN
YOU'RE TALKING ABOUT A
NONDISCRETIONARY ITEM YOU
WILL NOT VIOLATE DOUBLE
JEOPARDY PRINCIPALS.

THIS ISN'T A DOUBLE JEOPARDY
ISSUE.

THERE MAY BE A
CONSTITUTIONAL GLITCH IN THE
WAY IT HAPPENS, BUT IT'S NOT
GOING TO BE DOUBLE JEOPARDY
THAT BARS THE IMPOSITION OF

A MINIMUM MANDATORY IN THIS
CASE.

>> HELP ME UNDERSTAND THIS,
THAT THE DEFENSE ATTORNEY
AGREES THAT THIS IS AN
ILLEGAL SENTENCE?

>> YES.

>> SO, THE DEFENSE ATTORNEY
AGREES THAT NOT DOING THE
MINIMUM MANDATORY
CONSTITUTES --

>> I BELIEVE THAT'S CORRECT,
YES.

>> CAN THE STATE AND THE
DEFENDANT GEE TO WAIVE THE
MANDATORY MINIMUM?

>> THE STATE IS THE ONLY ONE
THAT CAN WAIVE A MINIMUM
MANDATORY AND THAT MUST BE
DONE IN WRITING AND APPEAR
IN ANY INDIVIDUAL COURT
CASE.

WHERE THEY DO WAIVE IT.

>> TO ME THAT SUGGESTS, AND
WE'RE NOT HERE, I AGREE WITH

JUSTICE --

I WANT TO MAKE SURE THE LAW
IS NOT MISDATED, THAT THE
STATE CAN WAIVE THIS TO THE
STATE'S BENEFIT, AND WE'RE
SHOT HERE ON WHETHER 30
YEARS LATER THEY COULD TRY
TO HAVE RELIEF.

WE'RE HERE TO SAY A FEW
THINGS SHOULD HAPPEN.
SOMETHING LIKE THIS OCCURRED
AGAIN.

THE STATE OUGHT TO FILE A
MOTION, BRING IT BACK BEFORE
THE JUDGE, THE JUDGE THEN,
WITH THE DEFENDANT THERE,
CALL THE JUDGE UP AND SAY
HEY, THIS NEEDS TO BE IN
HERE, AND THEN IF THE JUDGE
STILL DOESN'T OPPOSE IT,
THEY WOULD APPEAL IT.

IS THAT THE WAY WE WOULD
WANT TO TELL PEOPLE TO
FOLLOW --

>> YES, THIS IS NOT --

IT'S A PROCEDURAL ISSUE, NOT
A CONSTITUTIONAL DOUBLE
JEOPARDY ISSUE.

>> AT LEAST WITHIN THE FIRST
30 DAYS.

>> CORRECT.

>> SO AS I SAID, THE STATE
COULD DO A 3800A DEPENDING
ON HOW IT IS READ.

IT DOES NOT PROCOLLUDE THE
STATE.

SO DO YOU WANT TO READ AT
ANY TIME AS THE COURT
REALIZED IT AND DID THIS
HERE AND CHECKED IT, DO YOU
WANT TO LOOK AT IT WHERE THE
DEFENDANT WAS CALLED BACK
AFTER THE LUNCH BREAK AND AT
THAT TIME REALIZED THE
ILLEGALITY OF IT'S SENTENCE
AND CORRECTED IT AT THAT
TIME AND SORT OF LOOK AT IT
AS A 3800A CORRECTION --

>> BUT BECAUSE THE STATE CAN
WAIVE IT YOU WOULD WANT THE

PARTIES BACK TO SEE IF FOR
SOME REASON IT WASN'T
DISCUSSED.

AND WE HOPE AND WE KNOW THE
SENTENCES CAN BE
COMPLICATED, BUT AS I READ
BACK IN ASHLEY, BECAUSE I
STRUGGLED WITH THAT CASE, WE
REALLY IMPOSE ON THE STATE
THE OBLIGATION TO BE ABLE TO
ADVISE THE TRIAL COURT FOR
THE PROPER SENTENCE FOR
ERRORS AND OMISSIONS.

>> ABSOLUTELY.

>> CAN I FOLLOW UP HERE
ABOUT THE ISSUE OF THE STATE
WAIVING THE MINIMUM
MANDATORY?

AS I UNDERSTAND, YOU SAY THE
STATE COULD WAIVE IT BY AN
EXPRESS WRITTEN WAIVER ON
THE RECORD?

>> CORRECT.

>> AS THE STATE'S WAIVER
LIMITED TO THOSE

CIRCUMSTANCES, IS THAT YOUR
POSITION?

>> YES, ABSOLUTELY, THEY
CANNOT WAIVE IT BY FAILURE
TO MAKE A PROCLAMATION OR AN
OBJECTION.

IT IS A SINGLE SOLITARY WAY
THAT THE STATE CAN WAIVE IT,
AND IT MUST APPEAR IN
WRITING IN EACH CASE.

>> THE JUDGE WITHOUT THAT
EXPRESS WAIVER HAS NO
AUTHORITY.

>> CORRECT, IT IS MANDATORY
IN ALL CIRCUMSTANCES IN THAT
INSTANCE.

SO THE STATE WOULD SEEK TO
HAVE THIS COURT ALLOW SOME
SORT OF PROCEDURE FOR --
PROCEDURE FOR CASES LIKE
THIS BECAUSE SENTENCING IS A
VERY --

IT HAPPENS QUICKLY, AND
THERE ARE LOTS OF THINGS
THAT NEED TO BE PRONOUNCED

AND NOT EVERYTHING WILL BE
CAUGHT EVERY SINGLE TIME,
IT'S IMPERATIVE THAT THE
STATE AND THE DEFENDANT GO
IN PREPARED, BUT EVERYONE IS
HUMAN AND AT SOME POINT THIS
CAN SLIP THROUGH AND THERE
NEEDS TO BE A LEADS FOR
WHICH THE STATE CAN SEEK
CORRECTION TO THE SENTENCE
TO WHICH THE DEFENDANT IS
MANDATORYLY THAT HE SHOULD
RECEIVE THAT PORTION OF THAT
SENTENCE.

SO, IT'S NOT A DOUBLE
JEOPARDY ARGUMENT THAT WOULD
PROCOLLUDE THIS, MAYBE A
PROCEDURAL GLITCH, BUT THERE
NEEDS TO BE A PROCEED THAT
THE STATE CAN ENSURE THAT
THE LEGISLATIVE MANDATES ARE
MET AND THE DEFENDANT
RECEIVED THE SENTENCE THAT
HE IS STATUTORILY REQUIRED
TO RECEIVE.

IF THERE ARE NO FURTHER --

>> AS MENTIONED BY JUSTICE

PARIENTE, ALL THE STAKES ARE

WHEN THE PROSECUTOR IS

PRESENT, AND THE JUDGE IS

ANNOUNCING THE SENTENCE, PAY

ATTENTION, AND HE COULD HAVE

BROUGHT IT UP.

WE ASK THAT YOU AFFIRM,

THANK YOU.

>> I AGREE WITH YOU THAT

EVERYBODY SHOULD DO WHAT WE

SAY, IT WOULD BE A MUCH

HAPPIER WORLD.

HAVE A GOOD AFTERNOON, THANK

YOU.

>> WE THANK YOU BOTH FOR

YOUR ARGUMENTS, THAT'S THE

LAST CASE OF THE DAY, THE

COURT NOW STANDS ADJOURNED.

ALL RISE.