

We now move to the second case
on today's docket.

The state of Florida versus John
McMahon.

>> May it please the court.

My name is Helene Hvizd with the
opposite attorney general and
together with Janine Germanowicz
I represent the petitioner of
the state of Florida.

The state respectfully request
this court crossed a decision of
the fourth District Court of
Appeals below and expressly
recognized the state has the
right to appeal pursuant to nine
to 4.07 and illegal sentence
entered as the result of sham
sentencing proceedings.

>> Let me ask you this for a
second because your initial
premise is that the court in
this particular case initiated
the dialog.

Is that correct?

>> Yes, Your Honor.

Not just initiated that far
overstepped the bounds.

>> I disagree with you in here
is why.

I have a transcript of the
entire proceedings and again in
considering these types of
situations, one needs to
consider the setting in which
this occurred.

This is a criminal trial judge
and he has three state attorneys
in the courtroom.

A packed courtroom and he is
trying to move cases along in
the docket.

The whole thing started with the
defense lawyer, Mr. Lewis.

Judge, good morning.

Judge, have John McMahan who
is on page four of your docket.

The court, what are you doing
with Mr. McMahan?

Then the defense basically says,

Your Honor may I approach?

Yes, under your case now, the state notices the habitual offender.

The defense lawyer says, we are very hopeful to resolve this case this morning.

This is a defense lawyer.

We are very hopeful to resolve this case this morning.

That may be a good idea if he did.

Defense lawyer, that is what I'm thinking.

Judge, and I think in one cocaine case in the grand theft case is he had made someone else -- he asked somebody else in the car who picked up an old power washer that I seriously doubt was worth more than \$100.

He was making his pitch to the judge as to just how aid -- cases laws.

The judge, state what you are

looking for.

What kind of prior says he have?

The court says, he scores 18
months?

At that point in time he said,
you can have the bottom of the
guidelines today.

I won't habitualized him if he
wants that today.

That is where the fourth DCA
began the colloquy.

Now, I don't see that as the
court initiating this.

I say -- .

>> Your Honor even if it was a
situation where you would say
although the state began with,
we want 15 years.

Here is the notice of the
habitual offender and 10 to a
Ebo.

That's what the state was
saying.

We want 15 years.

Defense counsel came back with,

we kind of like 18 months or goes.

>> That is not addressing the question that Justice Labarga has resented you and that is the -- fundamental question which I agree with him --

Please would you address this question?

>> Yes, Your Honor.

The state will agree that defense counsel did begin the colloquy by saying we would not hold -- we would like to settle.

He did say we would like to settle.

>> It is right in there.

It is right in there.

If we are here on a premise, which is that the judge didn't initiate this.

The defense lawyer as Justice Labarga went through is initiating it.

>> Your Honor we are not here on

a false premise.

We are here on the trial
court did not enter into a plea.

The trial court in this case
entered into the plea with the
defendant over the objection of
the this day.

The trial court --

>> We said in Warner that is
exactly what a judge is allowed
to do.

Warner does not require that
both the state and the defense
agreed to a negotiation.

Only one party needs to --

>> Your Honor I believe Warner
does not hold that the state is
completely left out of the
contract.

IN THIS CASE, MR. LEWIS'
STATEMENT, WE WOULD LIKE TO
RESOLVE THIS MATTER IS
ENOUGH TO INVITE THE TRIAL
COURT TO THEN BECOME PART OF
THE PLEA NEGOTIATIONS.

IT CERTAINLY WAS NOT
APPROPRIATE FOR THE TRIAL
COURT AT THAT POINT TO SAY,
MY OFFER TO YOU RIGHT NOW,
18 MONTHS TAKE IT OR LEAVE
IT.

BUT WE OBJECT YOUR HONOR.

>> BUT WE DON'T GET TO
DECIDE IF THIS COMPLIES OR
NOT.

THIS IS AN ILLEGAL SENTENCE.

THE STATE AGREES THAT 18
MONTHS IS THE BOTTOM OF THE
GUIDELINES.

>> YES, YOUR HONOR.

>> SO IT'S A LEGAL SENTENCE.

YOU DON'T HAVE, INNS YOU --
UNLESS YOU FIND ANOTHER HOOK
TO APPEAL WHAT HAPPENED, THE
PEAL WAS CORRECTLY DISMISSED
BY THE 4TH DISTRICT.

SO WE DON'T GET INTO SHOULD
IT BE EXPANDED, CONTRACTED,
OR CHANGED.

THE ONLY ISSUE IS WHAT IT A

LEGAL SENTENCE OR IS IT

ILLEGAL.

AND YOU SAID SOMETHING AT

THE BEGINNING THAT REALLY

CONCERNED ME.

YOU SAID THIS WAS A

SHAM-SENTENCING PROCEEDING.

WHAT DO YOU MEAN BY THAT?

>> WHAT I MEAN IS THAT A

PLEA NEGOTIATION MUST

INVOLVE THE ASSISTANT STATE

ATTORNEY AND THE DEFENDANT.

IN THIS CASE THIS PLEA

NEGOTIATION WAS BETWEEN THE

TRIAL COURT AND THE

DEFENDANT.

AT NO TIME BE THEY

PARTICIPATE IN THIS PLEA

NEGOTIATION, OBJECTED 3

TIMES EVEN AFTER THEY SAID

YOU AGREE THIS IS IN THE

GUIDELINES --

>> BUT A PLEA IN THE STATE

OR THE DEFENDANT, THE JUDGE

APPROVES OR DOESN'T.

A PLEA DOESN'T INVOLVE
SOMEBODY ASKING THE JUDGE TO
CONSIDER A SENTENCE IN
EXCHANGE FOR THEM PLEADING
TODAY OR DOING SOMETHING,
NOT DROPPING ANY CHARGES, IS
WHAT THEY TALK ABOUT.

I'M HAVING A HARD TIME, AND
THE OTHER THING THAT I READ,
WAS THAT THE RULE WAS REALLY
CRAFTED TO MINIMIZE THE
POTENTIAL COERCING EFFECT ON
THE DEFENDANT.

IT WASN'T REALLY THERE TO
PROTECT THE STATE.

>> AND YOUR HONOR, THAT'S
WHAT WE'RE ARGUING IN OUR
BRIEF.

WE HAVE AN OBLIGATION TO
PROTECT THE VICTIM'S OF
CRIME, THE CITIZEN'S OF THE
STATE OF FLORIDA, THAT
PRECISELY WHAT THIS JUDGE
TURNED A BLIND EYE TO.

>> WHAT YOU THINK --

THE OBJECTION MADE IN THE
TRIAL COURT IS, HEY, WE'RE
ENTITLED TO HAVE A HEARING
ON OUR MOTION TO HABITUALIZE
THIS OFFENDER, AND THE
PROCESS DIDN'T GIVE THAT.

THE TRIAL JUDGE IGNORED THE
STATUTORY REQUIREMENT FOR
THE JUDGE TO CONDUCT A
HEARING ON THAT AND TO MAKE
A FINDING IF THE TRIAL JUDGE
WAS NOT GOING TO IMPOSE THE
HABITUAL OFFENDER --

AND FIND THAT WAS THE
STANDARD.

YOU TELL ME.

AND THE TRIAL COURT JUST DID
NOT DO THAT.

ISN'T THAT AN INDEPENDENT
BASIS FOR YOUR APPEAL?

>> YES, YOUR HONOR, WE ARGUE
IN FACT THAT FROM THE VERY
BEGINNING OF THIS SENTENCING
HEARING, HAVE TRAIN GOT OFF
THE NEUTRALITY TRACK.

THIS JUDGE BEGAN BY SAYING
MY OFFER TO YOU TODAY IS
THIS, ACCEPT IT, AND WENT ON
AS THE STATE SAID YOUR
HONOR, WE'RE ASKING FOR 15
YEARS WE HAVE THE RIGHT TO.

>> WHAT IS YOUR CONFLICT
CASE?

THE 20 MILLION DECISION, AND
WHAT?

BECAUSE McMAHON AND CHAVEZ
WAS ON THE INITIATED
DISCUSSION THAT'S ON THE
PLEA.

THIS IS MORE SUBSTANTIVE
ISSUE NOW THAT WE'RE TALKING
ABOUT.

WHAT'S THE CONFLICT CASE ON
THAT ISSUE?

>> WE'RE HERE ON CERTIFIED
AMENDMENT --

>> BUT CHAVEZ- MENDEZ, THE
SUBSTANCE --

AS I READ IT IT'S A COURT'S
NEGOTIATION --

IN MY MIND, STAY WITH ME, IF
I LOOK AT THAT AND I SAY I
DON'T BELIEVE THAT'S A
CONFLICT, IS THERE A
CONFLICT ON THE SUBSTANTIVE
ISSUE?

>> NO, YOUR HONOR, I CANNOT
POINT TO THAT.

WE SUPPLEMENTED AUTHORITY
FOR CLARK VERSES STATE --
FOR THE CONFLICT --

>> I UNDERSTAND THAT, I'M
LOOKING TO SEE IF THERE IS A
CONFLICT CASE ON THE
SUBSTANTIVE ISSUE AND YOU'RE
TELLING ME NO THERE IS NOT.

>> I CAN'T POINT TO A CASE
THAT WHEN A TRIAL COURT
REFUSES TO EXERCISE WHAT IT
MUST EXERCISE BY STATUTE.

IF THAT WERE THE BASIS --
IF THAT WAS THE ORIGINAL
STATE APPEAL, WOULD YOU
AGREE THERE'S NOT A
INDIVIDUAL BASIS FOR THE

STATE TO APPEAL THIS JUDGE'S
FAILURE TO HOLD A HEARING OR
A REQUEST FOR THE STATUS?

>> YOUR HONOR, WE WOULD
AGREE AND HOPE THAT THIS
COURT WOULD RECOGNIZE THAT
ONE MUST LOOK AT THE
ENTIRETY AND WHAT OCCURRED
IN ORDER TO DETERMINE
WHETHER A FENCE SENTENCE
FROM THAT PROCEEDING IS
LEGAL.

>> ISSUES THAT CAN BE
APPEALED BY THE STATE, AND
YOU SAID OVER AND OVER THAT
IT'S VERY NARROW.

IT WOULD SEEM TO ME THAT WE
KNOW THAT A DEFINITION OF A
LEGAL SENTENCE IS A
SITUATION, FOR EXAMPLE,
WHERE SOMEONE HAS MANDATORY
LIFE.

THERE'S NO OTHER DISCRETION
THAT THE COURT HAS, AND THE
SUBJECT IS A TEN YEAR

SENTENCE IF THAT WOULD BE AN
ILLEGAL SENTENCE FOR THE
STATE TO APPEAL.

I THINK THE CATEGORY OVER
SENTENCES THAT THE STATE
WOULD WANT TO APPEAL, THAT
ARE ACTUALLY --

THEN THE STATE WOULD WISH,
IT WOULD BE VERY NARROW.

IT WOULD ONLY BE THAT THE
JUDGE, COULD NOT UNDER ANY
VERSION OF THE FACTS OF THE
LAW IMPOSE THE SENTENCE THAT
THE JUDGE IS IMPOSING.

ARE YOU ASKING FOR --

AND I DON'T THINK YOU WANT
TO HAVE US CHANGE THE
DEFINITION OF A LEGAL
SENTENCE OR WE ARE GOING TO
BE OPENING IT UP.

SO WHAT IS YOUR DEFINITION

--

WHAT'S THE STATE'S
DEFINITION OF A LEGAL
SENTENCE?

>> WHEN THERE IS NO PLEA.

THERE IS NO PLEA AGREEMENT
IN THIS CASE.

>> LET ME ASK YOU THIS.

WHY IS THE DEFINITION OF
ILLEGAL SENTENCE, THAT IS
APPLIED IN THE CONTEXT OF
3800A, NECESSARILY GOING TO
BE TRANSFERRED OUT OF THAT
VERY SPECIALIZED CONTACT
OVER INTO THIS CONTACT WHICH
IS ENTIRELY DIFFERENT.

THERE WE'RE LOOKING AT
UNSETTLING SENTENCES THAT
HAVE RUN THROUGH THE
ORDINARY APPELLANT PROCESS,
AND TELLING THE POST
CONVICTION PROCESS, WHERE
HERE WE'RE LOOKING AT
CORRECTING AN ERROR THAT WAS
MADE THAT RESULTED IN A
PARTICULAR SENTENCE.

NOW ISN'T THERE A
DISTINCTION BETWEEN THESE
CONTEXTS THAT MIGHT MEAN

THAT THOSE WORDS WOULD BE
UNDERSTOOD DIFFERENTLY?

>> THERE HAS TO BE A
DIFFERENT, AND THIS COURT
ITSELF RECOGNIZED ITSELF.
SENTENCES MAY BE ERRONEOUS.

IT PROVIDES FOR THE STATE
HAS THE RIGHT TO APPEAL AN
UNLAWFUL AND ILLEGAL OR A
SENTENCE THAT FALLS OUTSIDE
THE GUIDELINES.

SO THIS COURT, ITSELF HAS
RECOGNIZED THERE WILL BE
SITUATIONS WHEN AN ILLEGAL
SENTENCE IS NOT JUST A
SENTENCE, BUT FALLS OUTSIDE
THE GUIDELINES PERMITTED OR
RECOMMENDED BY THE
SENTENCING GUIDELINES OF THE
CRIMINAL PUNISHING CODE.

ALMOST 12 YEARS AGO --

>> WHAT IS IT AGAIN THAT
YOU'RE CONSIDERED TO BE
ILLEGAL ABOUT THE SENTENCE?

>> THERE IS NO PLEA.

THERE WAS NO PLEA.

>> SO LET ME ASK YOU THIS.

YOU'RE ASKING FOR A PLEA

INQUIRY WHERE A DEFENSE

LAWYER ASKS A JUDGE, AND

SAYS MY CLIENT WILL TAKE X,

Y, Z TODAY.

WILL YOU DO THAT?

OR WHAT WILL YOU GIVE MY

CLIENT IF THEY PLEAD GUILTY

TODAY.

AND THEY SAY THE PROSECUTOR

OBJECTS, DOES THE MERE

OBJECTION --

>> IT WOULD DEPEND ON THE

CIRCUMSTANCES OF THAT CASE.

IN THIS CASE ALL THE WAY

FROM THE PLEA TO THE VERY

END, THE STATE CONTINUES TO

SAY YOUR HONOR WE'RE

REQUESTING A HABITUAL

OFFENDER HEARING.

IN THIS CASE, IT'S A

SITUATION WHERE THE

INTEREST OF JUSTICE ARE

SERVED BY A TRIAL COURT

ATTEMPTING TO MOVE IT'S

DOCKET ALONG, CLEARLY.

JUSTICE IS NOT SERVED --

>> SO YOUR STATEMENT THAT

ANY TIME A PROSECUTOR

DOESN'T AGREE TO A PLEA,

THAT IS WORKED OUT BETWEEN

THE JUDGE AND THE DEFENSE,

THAT RENDERS IT AN ILLEGAL

SENTENCE.

>> THIS COURT OVERRULED IT

TO THE EXTENT THAT IT WAS IN

OPPOSITION TO THIS COURT'S

HOLDING IN WARNER.

THIS DOES NOT SAY THAT A

PLEA AGREEMENT IS VALID IF

ENTERED INTO BETWEEN THE

TRIAL COURT AND THE

DEFENDANT WITHOUT THE

PARTICIPATION OF THE STATE.

>> BECAUSE OF THE REQUIRED

STATE PARTICIPATION.

LET'S SET ASIDE

HYPOTHETICALLY, NO HABITUAL

OFFEND HERE IN THIS CASE.

AND THE DEFENSE SAYS TO THE
JUDGE, JUDGE MY CLIENT WANTS
TO PLEA AND RESOLVE IT
TODAY, WE WANT TO PLEAD
GUILTY TO THIS.

AND THE JUDGE SENTENCE IT'S
WITHIN THE GUIDELINES.

THE STATE OBJECTS, DOES THAT
RENDER THAT SENTENCING
LEGAL?

>> I DON'T KNOW THAT THAT
SENTENCE WOULD BE, BUT
THAT'S NOT THE FACTS WE
HAVE.

>> I'M ASKING YOU BECAUSE
YOU SAY ANY TIME THE
PROSECUTOR OBJECTS TO A PLEA
NEGOTIATION BETWEEN THE
COURT AND THE DEFENDANT THAT
RENDERS IT ILLEGAL.

>> IF THEY SIGN IT WITHOUT
OBJECTION?
DID THE STATE SAY YOU'RE
GOING TO BE GIVEN THIS AND

FINE WE'LL SIGN THIS
CONTRACT BETWEEN US AND THE
DEFENDANT?

>> THE STATE COMPLETELY
OBJECTS.

THEY SENTENCE THE DEFENDANT
IN THE SENTENCING
GUIDELINES.

>> IF THE STATE IS NOT A
PARTY TO PLEASE, AND THEY'RE
NOT VALID.

IT IS BETWEEN THE STATE AND
THE DEFENDANT.

>> I GUESS MAYBE THIS IS
WHERE I CAN LOOK AT THE
CASE, AND WE'LL DEFER TO
ANYBODY WITH EXPERTISE, IF A
DEFENDANT SAYS I'M WILLING
TO PLEAD GUILTY, THE JUDGE
CAN CALL A COLLOQUY
BEFOREHAND, AND DISCUSS WHAT
SENTENCE THEY'RE WILLING TO
GIVE THIS DEFENDANT --
I'M STILL HAVING TROUBLE
UNDERSTANDING HOW THE STATE

HAS THE ABILITY TO SAY NO,
THIS CAN'T HAPPEN, AND IT
DOESN'T INVOLVE A DROP IN
CHARGES TO BE ABLE TO SAY,
NO, JUDGE, I OBJECT TO IT,
YOU CAN'T SENTENCE HIM TO 18
MONTHS.

IT'S NOT THAT YOU CAN'T
SENTENCE HIM, IT'S A LIGHT
TO BE HEARD, AND WE DO NOT
AGREE TO WHAT IS INCURING IN
THE ENTIRETY.

>> IF WE AGREE WITH YOU,
WHAT IS THE STATE SEEKING IN
THIS CASE.

ARE THEY SEEKING THAT WE CAN
GET A NEW SENTENCING
HEARING?

THAT IT WILL BE A HABITUAL
OFFENDER COLLOQUY OR
HEARING?

AND THEN THE JUDGE COULD
DECIDE NOT TO HABITUALIZE
HIM.

>> A DIFFERENT JUDGE, YES

YOUR HONOR.

>> AND THEY CAN BE RESNBSED
BEFORE A DIFFERENT JUDGE IN
15 YEARS?

>> WHEN THE INTEREST OF
JUSTICE HAS BEEN SERVED, ALL
PARTIES HAVE BEEN HEARD OF
AND THERE'S A VALID CONTRACT
BETWEEN THE DEFENDANT AND
THE STATE OR NOT, THE
DEFENDANT HAS THE RIGHT TO
WITHDRAW HIS PLEA AT THAT
POINT.

>> A DIFFERENT JUDGE WOULD
REQUIRE --
WHAT REQUIRES A DIFFERENT
JUDGE?

>> THE STATE WAS ASKING THIS
JUDGE TO PLEASE ALLOW THE
STATE TO BE HEARD AND THE
JUDGE REFUSED.

WE AS A STATE HAVE
ABSOLUTELY EVERY REASON TO
DOUBT THE NEUTRALITY AND
IMPAR PAR PAR --

I'M IMPARTIALITY OF THE

JUDGE.

>> IT GOES BACK TO THE SAME

JUDGE.

>> VERY WELL.

>> IS THAT CORRECT OR

INCORRECT.

>> WE ASK THAT IT GOES BACK

TO A DIFFERENT SENTENCING

JUDGE, BUT IF YOU SAY THE

SAME JUDGE AND ALLOW THE

OPPORTUNITY TO FILE A MOTION

WE WOULD DO SO.

>> YOU HAVE USED ALL OF YOUR

TIME, BUT IF YOU WANT A

MINUTE FOR REBUTTAL I WILL

ALLOW YOU TO HAVE THAT.

>> I WOULD LOVE THAT THANK

YOU.

>> THANK YOU, PUBLIC

DEFENDER FOR JOHN McMAHON.

>> THE REALLY SIGNIFICANT

ISSUE, WILL YOU ADDRESS THE

EXCLUSION OF THE STATEMENT

OF A HABITUAL OFFENDER CASE.

IS THAT UNLIKE OTHER
SITUATIONS?

I THINK IN READING THE
TRANSCRIPT THEY DIDN'T
MENTION WHAT IT WAS, IT
WASN'T A FULL HEARING BY ANY
MEANS, SO WILL YOU ADDRESS
THAT ISSUE.

>> THE QUESTION BY THE
CHIEF, WHY COULD YOU NOT WE
VERSE THIS ON A BASIS THAT
IT WAS NOT ALLOWED TO BE
HEARD IN THIS CASE AND WE'RE
DEALING WITH A THAT PITCH
CHYLE --

HABITUAL OFFENDER --

>> BUT A LOT OF THAT CASE
LAW YOU SIGNED, I BELIEVE
HAS TO DO WITH THE TERM
ILLEGAL SENTENCE FOR THE
CONTEXT OF RULE 3800.

>> NO LASE TALE --

NO THESE DEAL WITH --

>> DON'T YOU TRACE ALL OF
THAT BACK TO THE DEFINITION

OF ILLEGAL SENTENCE IN THE
CONTEXT OF 3800?

>> I DON'T THAT WAY, THE
JACKSONVILLE CASE CAME OUT
GOING BACK TO 1994 WITH FG.
THESE CASES TALK ABOUT WHAT
IS AN ILLEGAL SENTENCE IN
TERMS OF 924.

>> WE KNOW THE HISTORY ABOUT
ILLEGAL SENTENCES UNDER
3800.

AND I MEAN --

>> THERE'S A GREAT HISTORY.

>> WHY IS THAT THE CASE?
WHATEVER THAT HISTORY IS
WITH RESPECT TO THE WAY WE
UNDERSTAND ILLEGAL SENTENCES
WITHIN THE POSTCONVICTION
CONTEXT, THAT WE WOULD NOT
LOOK AT THIS ISSUE OF WHAT
IS AN ILLEGAL SENTENCE UNDER
THE RULE ALLOWING THE STATE
TO APPEAL AS A SEPARATE
QUESTION, NOT NECESSARILY
DETERMINED BY THE

UNDERSTANDING OF THAT TERM
KNOWLEDGE.

IT --

TERMINOLOGY.

IT IS VERY COMMON THAT ONE
TERM WILL HAVE A SPECIALIZED
MEANING THAT IS DIFFERENT
FROM THE MEANING APPLIED IN
ANOTHER CONTEXT.

AND WHY ISN'T IT THE CASE,
THAT AT A CERTAIN LEVEL WE
WOULD UNDERSTAND THAT THIS
SENTENCE, WHICH WAS IMPOSED
BY THE TRIAL COURT, AFTER IT
TOTALLY IGNORED THE
REQUIREMENTS OF FLORIDA LAW,
WITH RESPECT TO
HABITUALIZATION AND THE
HEARING THAT IS TO BE HELD
AND THE FINDINGS AND ALL OF
THAT, WHY WOULD WE
UNDERSTAND THAT THIS
SENTENCE WAS A, IMPOSED
AFTER THE TRIAL COURT HAS
FAILED TO COMPLY WITH THE

REQUIREMENTS OF FLORIDA LAW,
AND IN THAT SENSE WAS
ILLEGAL.

>> AGAIN, THIS IS AN ERROR
IN THE SENTENCING PROCESS,
AND THE CASES HELD THAT AN
ERROR IN THE SENTENCING
PROCESS DOES NOT RENDER AN
OTHERWISE ILLEGAL SENTENCE,
ILLEGALLY.

>> WHAT IF IT WAS EX PARTE.
THE JUDGE ENTERS A PLEA WITH
THE DEFENDANT AND IT GOES.

>> AN OTHERWISE LEGAL
SENTENCE THEN THE STATE
WOULD STILL HAVE THE SAME
PROBLEM.

THEY CAN ONLY APPEAL FROM AN
ILLEGAL SENTENCE.

>> HOW LONG AS THE USE OF
THE WORD, ILLEGAL, BEEN IN
924.

I CAN'T TELL YOU HOW FAR
THAT GOES BACK, BUT I KNOW
IT GOES BACK TO 1994.

IT WAS A JUVENILE CASE
DISPOSITION, AND SINCE THEN
THEY HAVE ALWAYS CITED FG
FOR WILLIAMSS VERSES STATE,
UNDER THE ENTIRE BODY OF
SENTENCING STATUTES.

>> YOU'RE SAYING THAT WE
WERE DEFINING THAT UNDER 924
IN WEAPONS OF MASS
DESTRUCTION.

>> I BELIEVE SO.

>> WELL YOU SHOULD --

>> MAYBE I'M INCORRECT ABOUT
THAT?

AND YOU DID IT GET IN
ANOTHER CASE ON MAY 26TH.

>> I THINK IN FAIRNESS THAT
WE'RE VERY SURE ABOUT THIS,
IN AIKENS, WE WERE DEFINING
FOR HAD 384A.

WHERE DID THE COURT USE THE
LEGISLATIVE USE OF THE TERM
ILLEGAL.

WE'RE NOT MAKING OUR OWN
POLICY ON THIS, WE'RE TRYING

TO GIVE, EFFECT, TO THE
LEGISLATIVE INTENT AND THE
LEGISLATURE COULD SAY
SEPARATELY THAT THE STATE
COULD APPEAL ANY SENTENCE
WHERE THE JUDGE DOES NOT
CONDUCT A HABITUAL OFFENDER.
THAT COULD BE A CATEGORY OF
CASES.

>> IF THEY WANTED TO THEY
COULD HAVE SAID THAT, BUT
CASE LAW SAYS THAT'S A
PROCEDURE ERROR.

MY SPOINT THIS --

MY POINT IS THIS HAS BEEN
AROUND FOR A LONG TIME WE WE
COULD HAVE AMENDED THE
STATUTE IF THERE IS NO
HEARING HELD.

>> WHAT I'M SENSING, AND I
WOULD HAVE TO GO BACK FOR
THE WAY THE ORAL ARGUMENT
WENT, IS THAT THE STATE
WASN'T SAYING THAT THE
ABILITY TO HOLD A HABITUAL

OFFENDER --

WHAT THEY'RE SAYING, GOING
BACK TO THE POINT, IS THAT
IF WE DECIDE THAT THE
FAILURE TO DECIDE TO ALLOW
THE STATE TO PARTICIPATE IN
THE PLEA COLLOQUY
NEGOTIATION, WE CAN ADDRESS
THE QUESTION OF THE
SECONDARY QUESTION ON
HABITUALIZATION, IS THAT HOW
YOU UNDERSTAND IT?

>> THAT MAY BE A POSITION
BUT THEY NEVER RAISED IN
THIS TRIAL COURT AND
OBJECTED SAYING, "YOU
NEGOTIATED PLEA
NEGOTIATIONS, YOU CAN'T JUST
ENTER THE NEGOTIATIONS" THE
ONLY THING THEY OBJECTED TO
IS WE DIDN'T GET A HEARING
ON OUR HABITUALIZATION.
THAT'S THE ONLY THING.

>> SO WHEN IT WENT UP BEFORE
THE FOURTH DISTRICT, DID

THEY RAISE AS THE REASON IT
WAS ILLEGAL WAS THE FAILURE
TO JUDGE'S INITIATION OF
PLEA NEGOTIATIONS AS WELL AS

--

>> THEY SAID THE HEARING,
THEY DIDN'T GET A HEARING,
AND --

>> FOR BEING ILLEGAL.

>> ON THE FIRST TIME IN
APPEAL.

THEY ADDED AT THE VERY END,
THE JUDGE NEGOTIATED PLEA
NEGOTIATIONS.

>> WHAT DISTRICT WERE THEY

--

DID EVERYONE HAVE THE SAME
PLEA COLLOQUY THAT THE
JUSTICE HAD THAT THE JUDGE
DIDN'T INITIATE IT?

>> I DIDN'T UNDERSTAND IT
AT ALL, WE WON THE OPINION,
I DIDN'T UNDERSTAND THAT,
AND THEY SAID IT WASN'T
CLEAR FROM CHAVEZ-MENDEZ

THEY WERE DEALING WITH AN
ILLEGAL SENTENCE.

AND IT SAYS THE STATE IS
APPEALING, AND THE RULE SAYS
THE STATE CANNOT APPEAL A
LEGAL SENTENCE, AND IT GETS
PROBATION, AND THE FLAGS
SHOULD UP, IS CHAVEZ-MENDEZ
ONE THAT THE STATE COULD
APPEAL.

>> YES IN THE FOOTNOTE.

>> YOU AGREE THAT WAS AN
ILLEGAL SENTENCE?

>> YES, IT WAS AN ILLEGAL
SENTENCING.

ON THE LAST FOOTNOTE, THEY
SAY THE NOTE TO THE TRIFLE
JUDGE IS THE ONLY SENTENCE
HE CAN GIVE IS LIFE --

>> THAT IS A SITUATION WHERE
I WAS SAYING THE SENTENCE OF
LIFE WITHOUT THE POSSIBILITY
OF PAROLE, AND THAT'S AN
ILLEGAL SENTENCE.

>> A QUICK QUID PRO QUO

HERE.

THE TWO THINGS THAT STOOD
OUT IN MY MIND, HE WAS
CHARGED AS A PRINCIPAL, HE
DID NOT ACTUALLY STEAL IT
HERE.

THE MERE PRESENCE AND
KNOWLEDGE OF THE CRIME
DOESN'T NECESSARILY MAKE YOU
SUBJECT TO CONVICTION.

ANOTHER MORE IMPORTANT
ISSUE, THE DEFENSE COUNCIL
CLAIMED THIS WAS AN OLD
WASHER NOT WORTH MORE THAN
\$200.

THAT WOULD BE MISDEMEANOR
LEFT.

AND THEY WOULD NOT BE ABLE
TO HABITUALIZE HIM.

THE JUDGE SAID I WILL GIVE
YOU 18 MONTHS ANDLY NOT
HABITUALIZE YOU.

THE DEFENDANT TOOK IT IN
EXCHANGE FOR GOING TO TRIAL
AND TRYING TO CONTEXT THE --

CONTEST THE VALUE OF THE
WASHER.

SO ASSUMING IT'S RIGHT, IT'S
AN OLD ONE THAT DOESN'T
WORK, THE STATE CAN'T PROVE
THE 3RD DEGREE GRAND THEFT.

>> CAN THE JUDGE --

IS THAT SOMETHING THAT IS
THAT THE OPTION IF HE MAKES
THE PROPER --

>> THAT'S THE WHOLE THING.

THEY DO, AND SAY HE DOES,
OKAY, YOU'RE QUALIFIED, BUT
I'M NOT GOING TO HABITUALIZE
HIM.

>> BUT ISN'T IT THE CASE

THAT JUDGES WHO HAVE THE
POWER TO MAKE DIGRESSIONARY
DECISIONS, STILL, THEY HAVE
TO CONSIDER THE RELEVANT
CONSIDERATIONS.

THEY CAN'T JUST SAY WELL I
ALREADY MADE UP MY MIND.

I DON'T WANT TO HEAR WHAT
ONE PARTY HAS TO SAY, AND

THEREFORE WE'RE OFF TO THE
RACES.

AND I'M GOING TO IMPOSE
SENTENCE WITHOUT FOLLOWING
WHAT STATUTE SAYS.

WOULDN'T YOU ADMIT THAT WHAT
THE TRIAL COURT HERE DID WAS
ERRONEOUS.

I KNOW YOU'RE NOT GOING TO
SAY THAT IT RESULTED IN A --

>> RIGHT.

>> IT'S AN ERROR, YES.

WE'RE NOT ARGUING THAT, BUT
IT'S SIMPLY AN ERROR IN THE
SENTENCING.

>> AND THE FACT THAT THE
TRIAL COURT HAD DISCRETION
DOES NOT MEAN THAT WHAT
TRIAL COURT DID WAS NOT
ERRONEOUS, RIGHT?

>> RIGHT, BUT BOTTOM LINE,
THAT DOESN'T RENDER AN
OTHERWISE LEGAL SENTENCE.

IF HE QUALIFIED, THE JUDGE
SAID I'M NOT GOING TO

HABITUALIZE HIM.

>> BUTT CASE LAW --

BUT THE CASE LAW WAS CLEAR

THEN IT WAS A HABITUAL

OFFENDER HERE.

THE ONLY ISSUE IS THE STATE

--

IF THAT WAS THE ONLY ERROR

HERE, COULD THE STATE APPEAL

TO THAT UNDER THE PROVISION

THAT SAYS --

>> IT DOESN'T RENDER IT

ILLEGAL.

>> ARE THERE ANY DECISIONS

OTHER THAN THE HEWITT CASE

THAT THE FOURTH DISTRICT

RELIES ON WITH THE REGARD TO

FAILURE TO CONDUCT THE

HABITUAL OFFENDER HEARING,

IS OR IS NOT A REPEATABLE

ISSUE.

>> THAT'S THE RILEY FILING.

THE LANGUAGE IN A FOOTNOTE

THAT A JUDGE DOESN'T REALLY

HAVE TO MAKE THE FINDINGS

BECAUSE IT DOESN'T GIVE THE
SENTENCE --

A MORE LENIENT SENTENCE, AND
THE FOOTNOTE WAS TALKING
ABOUT THAT IF HE DECIDES TO
GIVE A MORE LENIENT
SENTENCE.

IT'S NOT MANNED.AERO.

--

IT'S NOT MANDATORY.

>> AMENDING THE STATUTE AND
SAYING IF YOU DON'T AFFORD
THE STATE AN OPPORTUNITY TO
PRESENT EVIDENCE AT A
EVIDENCE SHARE HEARING
BEFORE ANY SENTENCE IN THIS
CASE, IT'S AN ILLEGAL
SENTENCE.

AND WHAT'S BEING ASKED HERE
TODAY, I TAKE IT, IS FOR
THIS COURT TO LEGISLATIVE
THAT LANGUAGE.

>> I'M SAYING IT'S BEEN
AROUND FOR A LONG TIME.
YOU KNOW, I HAVE BEEN AT

THIS COURT AND AT THE DCA,
RILEY GOES BACK TO THE
1990S, A LOT OF THEM DO,
LEGISLATURE HASN'T DONE
ANYTHING ABOUT IT, AND THEY
DON'T SEEM TO BE WORRIED
ABOUT THE RULINGS.
AND THEY IMMEDIATELY ASK,
YOU KNOW, IF MAY VERY WELL
BE AN ERROR, I'M NOT
ARGUING, BUT THIS IS AN
ERROR IN THE SENTENCING
PROCESS, AND WE BELIEVE THIS
UNDER DEFINITION IS
SOMETHING THE JUDGE COULD
IMPOSE.
EVEN IF HE FINDS THEY
QUALIFY HAS A HABITUAL
OFFEND ERE, I'M NOT GOING TO
ADJUDICATE HIM.
>> IF WE TAKE OUT THAT THIS
IS A THAT --
THAT PITCH --
THAT --
OFFENDER CASE.

SAY THIS WAS A OPEN PLEA,
AND THE COURT CAN ARRIVE AT
THE SAME POSITION, I FIND 18
MONTHS, AND THE RESULT IS
THE SAME.

I DON'T SEE HOW THIS IS A
SHAM AT ALL.

IF IT'S IN THE GUIDELINES,
IT CAN'T BE A SHAM.

THEY SET THE GUIDELINES.

THIS PERSON HAS THE 18 MONTH
TIME LINE, AND TALLAHASSEE
BIT OF A QUID PRO QUO
BECAUSE THERE WAS A QUESTION
IF THE STATE COULD GET THE
CONVICTION ON THE GRAND
THEFT.

AND YOU DON'T EVEN THINK
THAT THE ADJUSTING TO THE 18
MONTH SENTENCEING IN THIS
CASE, THE HEARINGS AND THE
PLEADING TO THIS.

I THINK IN EXCHANGE FOR THE
FACT THAT HE WON'T GET THE

--

THAT'S THE WAY I READ THIS.

IT WENT ON HERE AND THE
STATE COULD APPROVE THAT.

AND THE JUDGE SAYSLY GIVE
YOU 18 MONTHS IF YOU WANT TO
TAKE THAT NOW.

IF YOU WANT TO PLEASE I WILL
GIVE YOU THAT AT THAT TIME.

>> THANK YOU, I JUST WANT TO
LEAVE ONE COMMENT, IT'S A --
IT IS NOT PER SE AN ERROR.

IF YOU LOOK AT THE FOOTNOTE
ON PAGE FIVE ON THE WARNER
CASE.

.

A PEELS AND BASE --
BASIS ON CLAIMS, AND THE
ERROR ANAL THIS THIS WILL

COME PLAY.

--

COMPLY.

>> IT IS TRUE IN WARNER IN A
WE WERE INITIALLY AND MAINLY
CONCERNED WITH THE COERCIVE

EFFECT IT MIGHT HAVE ON THE
DEFENDANT.

>> RIGHT, AND OBVIOUSLY
THERE IS NO COERCIVE EFFECT
HERE, SO WE STILL MAINTAIN
THE POSITION THAT NO
CONFLICT HERE AT ALL WITH
CHAVEZ-MENDEZ, AND THAT THE
COURT COULD EXERCISE
DISCRETION, AND THEY COULD
SAY I'M NOT GOING TO
HABITUALIZE YOU, THE LEGAL
SENTENCE, AND THE STATE,
THANK YOU.

>> THANK YOU.

>> ONE MINUTE.

>> THANK YOU, MAY IT PLEASE
THE COURT, THE FACT THAT WE
HAVE TO STAND HERE TODAY AND
TALK ABOUT WHAT PRICE OF A
POWER WASHER WOULD BE ON
SEARS.COM IS EXACTLY WHY
EVERYTHING THAT OCCURRED
BELOW IS ERROR.
THE POSITION AND

RESPONSIBILITY OF A TRIAL

COURT JUDGE IS TO SERVE

JUSTICE BY WEEDING OUT

PUBLICMENT AFTER

CONSIDERATION OF THE

CIRCUMSTANCES OF THE CRIME

AND THE CRIMINAL.

THAT DID NOT OCCUR HERE.

>> WHAT WOULD YOU HAVE US DO

AND HOW WOULD THAT EFFECT --

THIS DEFENDANT AS I

UNDERSTAND HAS BEEN RELEASED

FROM CUSTODY, CORRECT?

>> THE 18 MONTHS HAVE BEEN

SERVED BY THIS POINT, YES.

>> WHAT WOULD BE THE IN

EFFECT THIS PARTICULAR CASE

IF WE ACCEPTED YOUR POSITION

THAT THE STATE WAS ENTITLED

TO HAVE THIS IN THE HEARING,

AND WE TURN IT BACK TO THAT,

WHAT WOULD HAPPEN?

>> WE WOULD SUGGEST THAT THE

DEFENDANT WOULD HAVE THE

RIGHT TO APPEAR BEFORE THE

COURT TO DETERMINE HIS PLEA
SHOULD HE DO THAT AND WOULD
BE SUBJECT TO APPROPRIATE
PLEA NEGOTIATIONS WHERE
THERE ARE TWO PARTIES AND
ONE OF THEM IS NOT THE
JUDGE.

IT DOES NOT VIOLATE DUE
PROCESS BECAUSE THERE IS NO
EXPECTATION OF FINALITY IN A
SHAM SENTENCE.

>> I REALLY THINK IT'S A
SENTENCE --

YOU CALL IT SHAM SENTENCING,
WE REALLY FOR A TRIAL JUDGE,
WENT THROUGH THE PROCESS.
WHILE YOU MAY NOT AGREE WITH
IT, I DON'T THINK WE CAN
CALL THIS A SHAM PROCEEDING.

>> I MEAN NO OFFENSE, YOUR
HONOR, BUT THERE MUST BE A
CONTRACT BETWEEN THE
DEFENDANT AND THE STATE TO
BE A VALID PLEA, AND THAT'S
WHAT WE NEED.

THERE IS NO VALID CONTRACT.

>> YOU CAN'T MAKE --

>> IF THE STATE AGREES TO AN

OPEN PLEA WITHIN THESE

CONFINES.

>> THE STATE --

THE STATE WON'T AGREE?

>> IT HAS TO BE IN THE

CONFINES, AND SIGN A PAPER,

THANK YOU YOUR HONOR.

>> THANK YOU, WE THANK BOTH

OF YOU FOR YOUR ARGUMENT.

THE COURT WILL NOW STAND IN

RECESS FOR 10 MINUTES.

>> ALL RISE.