

>> ALL RIGHT, THE NEXT CASE ON THE DOCKET IS ACEVEDO VERSUS STATE.

I BET I SAID THAT BETTER THAN YOU GUYS.

TAKE YOUR TIME.

>> MAY IT PLEASE THE COURT. CHRISTINE GRAVES ON BEHALF OF THE PETITIONER, CARLOS ACEVEDO. THERE IS ONE DISCRETE CONFLICT ISSUE BEFORE THIS COURT, HOW IS A COURT SUPPOSED TO DETERMINE WHETHER ONE CRIMINAL STATUTE IS SIMILAR IN ELEMENT TO ANOTHER IN PURPOSES OF DESIGNATING AN INDIVIDUAL AS DANGEROUS SEXUAL FELONY OFFENDER, THEREBY SUBJECTING THAT PERSON TO ENHANCED MANDATORY SENTENCE. THE FOURTH DISTRICT IN THIS CASE THAT COURTS SHOULD LOOK ONLY TO SIMILARITIES OF A STATUTE AND NOT DISSIMILARITIES IN THE STATUTE IN MAKING THIS ANALYSIS. THAT HOLDING IS CONTRARY TO EVERY PRECEDENT THAT WE'VE CITED IN OUR BRIEFS, INCLUDING PRECEDENT FROM THIS COURT. THE STATE HAS NOT CITED ONE CASE APPLYING SUCH A SIMILARITY ANALYSIS.

THE CONFLICT CASE FROM THE FIFTH DISTRICT ON THE OTHER HAND IS CONSISTENT WITH THE PRECEDENT FROM THIS COURT AS WELL AS OTHER DISTRICT COURTS OF APPEAL.

IN THAT CASE THE COURT CONSIDERED THE STATUTES AS A WHOLE IN CONSIDERING WHETHER THE ELEMENTS WERE SIMILAR.

THEY LOOKED TO, WHICH INCLUDED LOOKING TO BOTH THE SIMILARITIES AND DISSIMILARITIES.

IN DOING THAT, UNDER THE DSFO STATUTE, THE COURT HELD THESE STATUTORY ELEMENTS WERE NOT SIMILAR.

THE STATUTES IN THOSE CASES ALTHOUGH THEY WERE INVOLVING DIFFERENT YEARS INVOLVED THE

EXACT SAME STATUTES HERE.  
IN DURANT AND THE CONFLICT CASE  
THE PRIOR OFFENSE OF THE  
DEFENDANT WAS UNDER SECTION, THE  
1995 VERSION OF SECTION 800.0,  
SUBSECTION 1 WHICH IS SIMILAR TO  
THE 1981 SECTION OF 804 WHICH  
MR. ACEVEDO WAS CONVICTED UNDER.  
THE COURT HELD THAT THAT STATUTE  
IS NOT SIMILAR IN ELEMENTS TO  
SUBSECTION 4 OR 5 EVER THE, OF  
THE 1995 VERSION OF 804 BECAUSE  
ONE STATUTE REQUIRED SEXUAL  
BATTERY WHILE THE OTHER DID NOT,  
AND ONE REQUIRED THAT THE  
PERPETRATOR INTENTIONALLY  
TOUCHED CERTAIN PARTS OF THE  
VICTIM WHILE THE OTHER DID NOT.

>> LET ME ASK YOU THIS.

THE STATUTE THAT WE'RE TALKING  
ABOUT THAT DSFO STATUTE, TALKS  
IN TERMS, SPEAKS IN TERMS OF  
DOESN'T SAY IDENTICAL ELEMENTS.  
EXPLAIN TO ME WHY YOU BELIEVE  
SUBSECTION FIVE DOES NOT HAVE  
SIMILAR ELEMENTS TO THE 1981  
VERSION OF 800.04.

>> THE STATUTE REQUIRES YOU TO  
LOOK AT CONVICTIONS WHICH LOOKS  
TO THE STATUTORY ELEMENTS AND  
WHEN YOU LOOK TO THE 1991  
VERSION OF SECTION 800.04, THAT  
THE DEFENDANT FONDLE, HANDLE OR  
ASSAULT A CHILD IN A LEWD AND  
LASCIVIOUS MANNER OR THAT IT  
COMMIT A LEWD AND LASCIVIOUS ACT  
IN FRONT OF A CHILD.

>> FONDLE AND HANDLE ARE TERMS  
THAT I WOULD SUBMIT INCLUDES  
TOUCHING?  
OKAY.

>> HOWEVER WHEN YOU LOOK TO  
SUBSECTION 5-A OF THE 2005  
VERSION OF 800.04 IT REQUIRES  
ELEMENT OF INTENT SNOOP DOESN'T  
LEWD AND LASCIVIOUS, OR  
INDECENT MANNER ISN'T THERE  
INTENT INVOLVED IN THAT?  
I DON'T KNOW HOW YOU, IT IS NOT,  
IT WON'T BE IN A LEWD OR

LASCIVIOUS OR INDECENT MANNER IF THERE IS NOT SOME LEWD OR LASCIVIOUS OR INDECENT INTENT, WOULD THERE BE?

>> YOUR HONOR I HAVE NOT SEEN A CASE WHERE REQUIRING LEWD AND LASCIVIOUS AS INTENT.

>> IT IS INHERIT IN THE CONCEPT, SEEMS TO ME.

WHAT AM I MISSING THERE?

>> WELL THE, MY RESPONSE TO THAT WOULD BE THAT IT DOESN'T, ANY STATUTE THAT REQUIRES INTENTIONAL CONDUCT THE LEGISLATURE SAYS REQUIRES INTENTIONAL CONDUCT, I UNDERSTAND WHAT YOU'RE SAYING IF IT IS LEWD AND LASCIVIOUS IT'S BAD AND I DON'T KNOW IF THERE CAN BE AN EXAMPLE WHERE YOU ACCIDENTALLY IN THIS, NOT THE GREATEST TOPIC TO TALK ABOUT BUT THAT YOU FONDLE A CHILD IN A LEWD AND LASCIVIOUS MANNER IN A WAY THAT WASN'T INTENTIONAL BUT WHEN YOU LOOK AT STATUTES, ESPECIALLY CRIMINAL STATUTES AND ESPECIALLY ONES THAT WILL ENHANCE A DEFENDANT AND IMPOSE A VERY STRICT DESIGNATION ON THEM AS A DANGEROUS SEXUAL FELONY OFFENDER, COURTS HAVE DISTINGUISHED BETWEEN THE ACTUAL EXPLICIT REQUIREMENT OF INTENT AND NOT REQUIRING INTENT. AND WHEN YOU LOOK AT 1981 VERSION OF THE STATUTE, WHILE IT DOES SAY LEWD AND LASCIVIOUS CONDUCT, IT DOES NOT REQUIRE ANY ELEMENT OF INTENT.

IN FACT IT--

>> IT SAYS WHO SHALL KNOWINGLY COMMIT ANY LEWD OR LASCIVIOUS ACT.

>> WITHOUT THE INTENT TO COMMIT SEXUAL BATTERY.

UNDER THE CRIMINAL PUNISHMENT CODE THEY DEFINE KNOWINGLY AND INTENTIONALLY AS TWO SEPARATE THINGS.

WHILE YOU CAN KNOWINGLY TOUCH--  
I UNDERSTAND IT IS A FINE  
DISTINCTION AND IT'S A FINE LINE  
BUT FROM THE CASES WE LOOKED AT  
AND THE CASES WHERE THE COURT  
MADE THESE DISTINCTIONS BY  
LOOKING AT SIMILARITIES AND  
DISSIMILARITIES OF THE STATUTE  
THEY HAVE REQUIRED OR THEY HAVE  
DIFFERENTIATED BETWEEN THE  
EXPRESS REQUIREMENT OF INTENT  
VERSUS THE HANDLING OR FONDLING  
IN A LEWD OR LASCIVIOUS MANNER  
WHICH IS EXACTLY WHAT THE FIFTH  
DISTRICT--

>> SEEMS TO ME YOUR ARGUMENT  
SUGGESTS THAT THAT THE ELEMENTS  
HAVE TO BE IDENTICAL, AND NOT  
SIMILAR AS OPPOSED TO WHAT THE  
STATUTES REQUIRE WHICH IS  
SIMILAR ARGUMENTS.

WHICH YOUR ARGUMENT SEEMS TO  
REQUIRE THERE BE IDENTICAL  
ELEMENTS AND I DON'T THINK  
THAT'S WHAT THE STATUTE--

>> I AGREE WITH YOU THE STATUTE  
DOES NOT REQUIRE IDENTICAL  
ELEMENTS.

IT REQUIRES SIMILAR ELEMENTS,  
UNDER THE FIFTH DISTRICT'S  
ANALYSIS WHICH WE THINK IS  
CORRECT IN THE CONFLICT CASE YOU  
HAVE TO CONSIDER THE STATUTES AS  
A WHOLE AND CONSIDER ALL THE  
ELEMENTS TOGETHER TO DETERMINE  
WHETHER IT IS ESSENTIALLY THE  
SAME OFFENSE AS THE ONE HE IS  
BEING CONVICTED OF NOW OR THE  
UNIDENTIFIED IN THE DFSO  
STATUTE.

SO WHILE IT DOESN'T HAVE TO BE  
IDENTICAL, IT DOES HAVE TO BE  
SIMILAR.

AND THIS COURT, FOR EXAMPLE IN  
THE DOTEL CASE WHEN APPLYING  
SIMILARITY ANALYSIS, IN A  
SENTENCING CASE SAID THE STATUTE  
WASN'T SIMILAR, ONE REQUIRED AN  
AGE REQUIREMENT AND THE OTHER  
ONE DIDN'T.

THAT ASK SMALLER DISTINCTION BUT YET THAT WAS DISSIMILAR AND THE PERSON COULDN'T BE DESIGNATE AD HABITUAL FELONY OFFENDER BECAUSE OF THAT SIMILAR OR DISSIMILARITY.

>> YOU'RE SAYING THESE ARE NOT SIMILAR BECAUSE YOU BELIEVE THAT THE '81 STATUTE DID NOT REQUIRE INTENT AND THE-- 2005, I GUESS STATUTE REQUIRES THE TOUCHING OF SPECIFIC PARTS?

IS THAT--

>> THAT'S RIGHT AND THAT'S EXACTLY WHAT THE HELPED THE FIFTH DISTINGUISH IT IN THE CONFLICT CASE.

IT REQUIRES TOUCHING OF CERTAIN PARTS AND IDENTIFY CERTAIN PARTS, AND IT REQUIRES IT TO BE INTENTIONAL IN A LEWD AND LASCIVIOUS MANNER AND IT FORCES-- I'M SORRY, GO AHEAD.

>> DOESN'T LEWD AND LASCIVIOUS, BECAUSE I GO BACK TO THE '81 STATUTE, WHICH IS, TALKS IN TERMS OF LEWD AND LASCIVIOUS, DOESN'T LEWD AND LASCIVIOUS, INCLUDE A SEXUAL ELEMENT?

SO YOU HAVE TO HAVE BE TOUCHING THOSE PARTS THAT WE CONSIDER TO BE SEXUAL ORGANS, SUCH AS, THE STATUTE SAYS, THE GENITALS, THE GENITAL AREAS?

>> LEWD AND LASCIVIOUS WOULD INDICATE ADVERSE CONDUCT.

>> OF A SEXUAL NATURE?

>> OF A SEXUAL NATURE OF FONDLING, RIGHT, BECAUSE THE TITLE OF THE CHAPTER IS INDECENT ACTS, EXPOSURE.

BUT WHEN YOU LOOK AT THE CASE THAT HAVE ACTUALLY APPLIED THE SIMILARITY ANALYSIS THAT WE PROPOSE HERE, THEY DO MAKE THAT DISTINCTION BETWEEN WHETHER THERE'S INTENT REQUIREMENT IN A LEWD AND LASCIVIOUS CONDUCT REQUIREMENT.

THERE'S, FOR EXAMPLE, THE FOURTH

DISTRICT ITSELF IN ANOTHER DECISION, FROM A DIFFERENT PANEL JUST MONTHS BEFORE THIS CASE, ISSUED A DECISION UNDER HABITUAL FELONY OFFENDER DESIGNATION THAT DIDN'T INVOLVED LEWD AND LASCIVIOUS BUT IT MADE A DISTINCTION BETWEEN THE FACT THAT ONE REQUIRED A DIFFERENT TYPE OF FORCE THAN THE OTHER WHICH WAS DIFFERENT, AND THOSE, IN MY OPINION, WHEN YOU'RE TALKING ABOUT INTENTIONALLY TOUCHING CERTAIN BODY PARTS, THAT'S MORE OF A DISTINCTION THAN SAYING, WELL, THE DEGREE OF FORCE WAS DIFFERENT.

IN DOTELE IN THIS CASE, YOU ALSO INVOLVED, THE DOTELE CASE ALSO INVOLVED LEWD AND LASCIVIOUS CONDUCT.

UNDER THE FLORIDA ACT AND THEN FROZE SEXUAL IMPOSITION UNDER AN OHIO ACT DETERMINING WHETHER SOMEONE SHOULD BE DESIGNATED AS A HABITUAL FELONY OFFENDER AND THE COURT DIDN'T FOCUS ON LEWD AND LASCIVIOUS.

IT FOCUSED ON THE FACT THAT THERE WAS AN AGE DIFFERENCE, JUST AN AGE DIFFERENCE.

SO WHERE ONE OF THE STATUTES HAD A AGE REQUIREMENT AND THE OTHER ONE DIFFERENT.

EVEN THOUGH BOTH STATUTES INVOLVED LEWD AND LASCIVIOUS TYPE CONDUCT.

SO THE KEY HERE IS TO DETERMINE NOT WHETHER THEY'RE IDENTICAL, WHETHER THEY ESSENTIALLY WOULD BE THE SAME OFFENSE OF THE WE RECOGNIZED OR WE POINTED OUT IN OUR INITIAL BRIEF THAT HAD THE 2005 CONVICTION THAT MR. ACEVEDO WAS CONVICTED OF BEEN, OCCURRED IN 1981, IT WOULD HAVE BEEN UNDER ENTIRELY DIFFERENT STATUTE.

IT WOULD HAVE BEEN UNDER THE SEXUAL BATTERY STATUTE.

SO HE WOULD NEVER HAVE BEEN CONVICTED, WHICH IS WHAT HE WAS CHARGED WITH, BUT NOT CONVICTED OF.

SO HE WOULD HAVE NEVER EVEN REACHED THIS TYPE OF CONDUCT IN 2005.

THE OTHER POINT OF, THAT THE FOURTH DCA WAS WRONG ABOUT WE BELIEVE, IT LOOKED TO THE ARREST AFFIDAVIT AND THE UNDERLYING RECORD TO DETERMINE WHETHER TO UPHOLD THE DFSO DESIGNATION.

THIS COURT IN DOTEL, THE UNITED STATES SUPREME COURT IN THE CAMPS CASE YOU'RE NOT TO LOOK TO THE UNDERLYING FACTS.

PLAIN LANGUAGE OF THE STATUTE REQUIRES THAT YOU LOOK TO STATUTORY ELEMENTS, WHICH MEANS YOU COMPARE ELEMENTS.

YOU'RE NOT LOOKING WHAT HAPPENED PERHAPS DECADES AGO AND IN THIS CASE THE ARREST AFFIDAVIT WAS WHAT THE OFFICER REPORTED WHEN HE WAS CONDUCTING HIS INVESTIGATION.

IT HAD NOTHING TO DO WITH WHAT THE DEFENDANT, WHAT MR. ACEVEDO ULTIMATELY PLED TO, WHICH WAS VIOLATION OF SECTION 800.04 IN 1981 AND IT CONTAINED FACTS THAT WERE NOT PERTINENT AT ALL TO THAT DESIGNATION.

THAT IS ONE OF THE MAIN REASONS THAT THE FIFTH, THE FOURTH DISTRICT UPHELD THE DSFO DESIGNATION IN THIS CASE.

THE UNITED STATES SUPREME COURT ACTUALLY HAS A GOOD QUOTE IN THERE WHEN IT REJECTS THE PRACTICE OF LOOKING BEYOND THE ELEMENTS OF THE OFFENSE SAYING THAT YOU WOULD LOOK TO LEGALLY EXTRANEIOUS STATEMENTS FOUND IN AN OLD RECORD TO DETERMINE WHETHER PRIOR CONVICTION WAS SIMILAR AND, THAT IS EXACTLY WHAT THE FOURTH DISTRICT DID HERE BY WOULD BE INCONSISTENT

WITH ALL OF THE PRECEDENT THAT WE HAVE CITED IN OUR BRIEF WHERE YOU DO NOT LOOK TO UNDERLYING FACTS.

FINALLY THE ERROR WE SUBMIT IS NOT HARMLESS AS THE STATE HAS SUGGESTED.

THE COURT'S DECISION, NOT THIS COURT'S DECISION BUT THE FOURTH DCA'S DECISION IN ABRAMS VERSUS STATE IS DIRECTLY ON POINT IN THAT REGARD.

THE DEFENDANT IN THAT CASE WAS DESIGNATED AS A DSFO AND SENTENCED TO LIFE IN PRISON. HE HAD TWO COUNTS AS A DSFO. HE WAS SENTENCED TO LIFE IN PRISON.

ONE OF THOSE COUNTS WAS IMPROPERLY DESIGNATED AS A DSFO. THE COURT HELD THAT ONE COUNT HE HAD TO BE GO BACK AND RESENTENCED BECAUSE IT WAS ILLEGAL SENTENCE.

>> WOULD YOU GO BACK, WOULD THAT BE DESIGNATION OR DOES IT IMPACT THE LIFE SENTENCE?

>> IT IMPACTS THE SENTENCE BECAUSE YOU WOULD HAVE TO REMAND FOR A SENTENCE WITHOUT THE DESIGNATION WHICH WOULD GIVE THE COURT THE DISCRETION TO DETERMINE WHETHER HE IS SUBJECT TO A 30-YEAR MAXIMUM FOR EACH COUNT AS HABITUAL OFFENDER, OR WHETHER HE IS SUBJECT TO LIFE BASED ON A SCORE SHEET.

BUT THE BIG DISTINCTION IT HAS TO TAKE THE DESIGNATION OFF. BECAUSE THE DESIGNATION MAKES A VERY BIG DIFFERENCE IN THE LIFE SENTENCE COMPARED TO A REGULAR LIFE SENTENCE.

>> I UNDERSTAND THAT. BUT WHY IS THE, HOW IS THE LIFE SENTENCE AFFECTED BY TAKING OFF THE DESIGNATION?

>> WHEN YOU TAKE OFF THE KFSO DESIGNATION, YOU TAKE OFF 25 YEAR MANDATORY MINIMUM AND TAKE

OFF ALL OF THE RESTRICTIONS SET OUT IN THE DFSO STATUTE, SUBSECTION 7 WHERE IT SAYS THAT THE DEFENDANT IS NOT ENTITLED, NOT ELIGIBLE FOR STATUTORY GAIN TIME OR ANY SORT--

>> I UNDERSTAND THAT.

IT AFFECTS WHETHER HE IS GOING TO SERVE, IF LIFE MEANS LIFE.

>> RIGHT.

>> BUT DOES IT AFFECT, AGAIN, THE LIFE SENTENCE?

DOES THE JUDGE, ARE YOU SAYING THAT SOMEHOW THE JUDGE BECAUSE THERE WASN'T THIS DESIGNATION WOULDN'T IMPOSE A LIFE SENTENCE?

>> NO, THE JUDGE COULD SAY WITHOUT THIS DESIGNATION BASED ON HIS SCORE SHEET I WILL STILL IMPOSE A LIFE SENTENCE BUT IT WOULD BE A LIFE SENTENCE WITHOUT THE DSFO STATUTE.

>> SO YOU'RE SAYING THAT THE DSFO DESIGNATION AFFECTS THIS SCORE SHEET WHETHER SOMEONE GETS LIFE OR NOT TO BEGIN WITH?

>> THERE IS, WELL, THERE'S A, THERE IS A CHECKED BOX ON THE SCORE SHEET SAYS WHETHER YOU'RE DESIGNATING SOMEONE AS A DFSO. IF YOU DO THAT THEY'RE SUBJECT TO THE MANDATORY MINIMUM UP TO LIFE.

SO BASED ON THE SCORE SHEET, THE COURT COULD FIND WITHOUT THE DSFO DESIGNATION HE MAY BE SENTENCED TO LIFE.

LIKE IT WOULD BE A DIFFERENT LIFE SENTENCE BUT WITH DIFFERENT CONSEQUENCE.

>> NOT A MANDATORY LIFE SENTENCE FOR DIFFERENT CRIMES COMMITTED?

>> WELL, IT'S A MANDATORY MINIMUM OF 25 YEARS TO LIFE. BASED ON HIS SCORE SHEET HE IS ELIGIBLE FOR A LIFE SENTENCE BECAUSE OF POINTS ON HIS SCORE SHEET.

BUT IT WOULD BE A DIFFERENT LIFE SENTENCE BECAUSE IT WOULD NOT

HAVE THAT DFSO DESIGNATION.

>> AM I CORRECT IN UNDERSTANDING THAT THE ONLY PRACTICAL IMPACT OF IT, OF THE ELIMINATION OF THE DESIGNATION WOULD BE IF THERE IS A COMMUTATE OF THE LIFE SENTENCE TO A SENTENCE OF A TERM OF YEARS?

>> I THINK THAT--

>> THAT IS THE ONLY TIME, THE GAIN TIME OR ANY OF THAT OTHER STUFF IS GOING TO HAVE AN IMPACT.

>> RIGHT.

ONLY TIME IT COMES INTO PLAY. THINK THAT'S RIGHT.

I DON'T KNOW THAT I WOULD SAY IT IS THE ONLY ONE.

>> ONLY ONE YOU CAN THINK OF?

>> I THINK, OF COURSE IT COULD IMPACT WHERE HE'S PLACED IN THE SYSTEM.

>> THIS IS ONLY ONE YOU BROUGHT UP.

>> I BROUGHT UP THE MANDATORY, THE GAIN TIME AS WELL AS CONDITIONAL EARLY RELEASE FOR MEDICAL REASONS, AND I THINK IT COULD ALSO IMPACT WHERE HE'S PLACED IN THE SYSTEM OR WHAT HIS VISITATION RIGHTS ARE.

BUT, SO THERE IS OTHER THINGS THAT COULD AFFECT.

I DON'T KNOW AN EXHAUSTIVE LIST WHAT IT COULD.

YOU'RE RIGHT THE PRIMARY ONE IS GAIN TIME.

BUT UNDER THE COURT'S DECISION IN CARTER AND FOURTH DISTRICT'S DECISION IN ABRAMS THAT IS ENOUGH.

WHEN YOU HAVE AN ILLEGAL SENTENCE BASED ON THAT DESIGNATION--

>> CAN THE JUDGE STRICTLY ON THE GUIDELINES SENTENCE SAY THE POINTS QUALIFY SOMEONE FOR A LIFE SENTENCE?

ON THE APPROPRIATE MOTION AND FOR THE APPROPRIATE GROUND A

JUDGE CAN GO BENEATH THE GUIDELINES.

>> CORRECT.

>> SO WHAT IF HE HAD A 25 YEAR MINIMUM HE COULD NOT OR SHE COULD NOT.

>> EXACTLY.

>> THAT IS A BIG DIFFERENCE, RIGHT?

>> IF YOU SEND IT BACK TO WHILE THE SENTENCING COULD GIVE THE JUDGE DISCRETION TO IMPOSE LIFE BASED ON HIS SCORE SHEET, THAT IS AT HIS DISCRETION.

>> THAT IS MY NEXT QUESTION TO YOU.

ASSUMING THAT WE AGREE WITH YOU, FIND THAT THE FOURTH DISTRICT COURT OF APPEALS WAS WRONG, DO WE SEND IT BACK-- I GUESS WE NEED TO SIPPED IT BACK FOR A NEW HEARING, SENTENCING HEARING, BECAUSE THE JUDGE CAN ALWAYS GO BENEATH THE GUIDELINE BECAUSE THE 25 YEAR MINIMUM IS NOT THERE?

>> RIGHT.

HE CAN AND HE WOULD HAVE THE DISCRETION TO DO THAT.

WE DO NOT KNOW WHAT THE TRIAL JUDGE WOULD DO.

THE FOCUS, THE KEY IS THAT THIS DESIGNATION AS A DSFO IS ILLEGAL AND SO AS AN ILLEGAL SENTENCE HE IS ENTITLED TO BE RESENTENCED ON THOSE COUNTS BASED ON DSFO WHICH IS COUNTS ONE THROUGH FOUR.

>> YOU ARE DEEP INTO YOUR REBUTTAL TIME.

>> I WILL RESERVE MY TIME. THANK YOU.

>> MAY IT PLEASE THE COURT. MARK HAMEL FOR THE STATE OF FLORIDA.

THREE YEARS AGO THE STATE OF FLORIDA DECIDED THE CAMPS DECISION.

MY OPPONENT LEAVES OUT THE MOST IMPORTANT PART OF THAT DECISION.

THAT DECISION SAID IN GENERAL YOU'RE NOT ALLOWED TO LOOK TO THE FACTS OF THE OFFENSE BUT IN CERTAIN CIRCUMSTANCES YOU ARE. HERE IS WHAT THEY SAID.

WHEN A PRIOR CONVICTION IS FOR A STATUTE WITH MULTIPLE ALTERNATIVE ELEMENT, SENTENCING COURTS ARE PERMITTED TO EXAMINE A LIMITED CLASS OF DOCUMENTS TO DETERMINE WHICH OF A STATUTE'S ALTERNATIVE ELEMENTS FORM THE BASIS FOR THE DEFENDANT'S PRIOR CONVICTION.

WE HAVE SUCH A CASE HERE BECAUSE THE PRIOR CONVICTION WAS FOR A STATUTE WHICH COULD BE COMMITTED IN MULTIPLE WAYS.

SOME OF THOSE WAYS WOULD QUALIFY AS ENUMERATED OFFENSE AND OTHERS WOULD NOT.

NOW IT IS NOT A MATTER OF COMPARING THE FACTS.

IT IS ONLY A MATTER OF LOOKING AT FACTS TO SEE WHICH ELEMENTS WOULD BE USED IN COMPARISON.

IT IS STRICTLY A COMPARISON OF ELEMENT.

THE PROPER ELEMENTS OF THE OLD OFFENSE TO THE ELEMENTS OF THE CURRENT OFFENSE.

I ALSO WANT TO CORRECT ONE OTHER THING.

THE CONFLICT ISSUE IS WHETHER THE FOURTH DISTRICT COURT OF APPEAL DID A PROPER ANALYSIS OR WHETHER THERE WERE SIMILAR ELEMENTS.

FOURTH DISTRICT COURT OF APPEAL, IF YOU LOOK, IF YOU READ THAT DECISION, IT DOES NOT SAY WE ARE IGNORING THE SIMILARITIES.

IT SAID THE FOCUS IS ON THE SIMILARITIES.

THAT DOES NOT MEAN THEY IGNORED ANY DISSIMILARITIES.

IT IS A COMPARISON TO SEE WHETHER THE OFFENSES ARE SIMILAR IT IS PROPER TO FOCUS ON THE SIMILARITIES.

SO THE FOURTH--

>> LET ME ASK YOU THIS.

THE DSFO STATUTE SPECIFICALLY  
REFERS TO-- 800.04, 4 OR 5?

CORRECT, YOUR HONOR.

>> AS OFFENSES THAT FIT UNDER  
THE STATUTE.

IT DOES NOT REFER TO 800.04-6.

>> CORRECT, YOUR HONOR.

>> WHEN YOU LOOK AT 800.06, IT  
SEEMS TO ME IT IS A BETTER FIT  
FOR 800.04 IN 1981.

AND SO, DOES THE, DOES THE FACT  
THAT, IT IS NOT INCLUDED, PAREN  
6, IS NOT INCLUDED IN THE DSFO  
STATUTE, DOES THAT MEAN THAT, I  
MEAN, DOES THAT MEAN THAT 10 FOR  
A CRIME THAT FITS, WITHIN THAT  
DEFINITION, TO BE USED IN THAT  
STATUTE?

>> YOUR HONOR, I THINK THE  
PROBLEM WITH TRYING TO DO THE  
ANALYSIS LIKE THAT IS THAT ANY  
OF THOSE FOUR OFFENSES, EITHER  
SUBSECTION 4, 5, 6, OR 7, COULD  
FALL WITHIN THE 1981 VERSION,  
ANY OF THEM.

YOU SAID THAT, YOU THOUGHT, I  
THINK 7 OR 8 WAS BETTER FIT OR 6  
OR 7, WHICH IS LEWD AND  
LASCIVIOUS CONDUCT.

LEWD AND LASCIVIOUS BATTERY IS  
4.

THE OLD STATUTE, '81 TALKS ABOUT  
ASSAULT, IT MUST BE ASEXUAL  
ASSAULT.

THAT WOULD BE GIVE LENT OF A  
BATTERY.

I MADE A COMPARISON IN MY BRIEF  
OF BOTH FOUR AND FIVE.

IT REALLY REQUIRES A LOOK AT THE  
FACTS TO SEE WHICH ELEMENTS  
WOULD APPLY BECAUSE ANY ONE  
COULD FIT.

I WOULD AGREE WITH YOU, IF YOU  
WERE LOOKING AT IT WITHOUT  
KNOWING THE FACTS IT WOULD NOT  
BE FAIR TO APPLY THE DESIGNATION  
IN THE THIS CASE BECAUSE YOU  
NEED TO KNOW WHAT THE FACTS WERE

TO KNOW WHICH ELEMENTS APPLIED,  
TO KNOW WHICH ELEMENTS YOU USE  
IN THE COMPARISON.

>> LET ME TALK ABOUT ANOTHER  
ASPECT OF YOUR ARGUMENT.  
HOW DO YOU DEAL WITH THESE  
FACTUAL ISSUES IN THE CONTEXT  
AFTER 3800.

>> IT HAS TO BE APPARENT ON THE  
FACE OF THE RECORD, YOUR HONOR.  
YOU CAN NOT HAVE A HEARING ON  
SOMETHING LIKE THIS IN A 3800.  
SO YOU WOULD HAVE TO ALLEGE IN  
THE 3800 IT IS APPARENT ON THE  
FACE OF THE RECORD, BASED ON  
WHAT THE TRIAL COURT CONSENTED  
OR WHAT THE TRIAL COURT SAID,  
POINT TO WHAT THE TRIAL COURT  
SAID, SHOW WHAT THE COMPARISON  
WAS MADE.

WE REALLY DON'T HAVE THE RECORD  
FOR THAT HERE.

>> YOU HAVE ALSO ARGUED THIS IS  
NOT AN ILLEGAL SENTENCE?

>> CORRECT, YOUR HONOR.

>> EVEN IF, EVEN IF THERE WAS AN  
ERROR?

>> CORRECT, YOUR HONOR.

>> IT IS NOT IN THE CATEGORY,  
THE SPECIAL CATEGORY OF ILLEGAL  
SENTENCE.

WOULD YOU LIKE TO EXPLAIN MORE  
ABOUT THAT?

>> BECAUSE IT'S A TYPE OF  
SENTENCE THAT A JUDGE IS  
PERMITTED TO IMPOSE UNDER SOME  
FACTUAL CIRCUMSTANCES.

SO THEREFORE, IT WOULD NOT  
QUALIFY AS AN ILLEGAL SENTENCE.  
BECAUSE A JUDGE COULD IMPOSE THE  
SENTENCE WITH THE 25-YEAR  
MINIMUM MANDATORY.

>> [INAUDIBLE]

>> YOU WOULD NEED THE DSFO TO  
IMPOSE 25-YEAR MINIMUM MANDATORY  
THAT WAS HERE AND THAT IS THE  
TYPE OF A SENTENCE A JUDGE CAN  
IMPOSE.

>> I'M CONFUSED.

IF SAYS THAT WE FIND THAT THE

DFS0 CLASSIFICATION WAS  
IMPROPERLY IMPOSED IN THERE,  
COULD A JUDGE STILL SENTENCE HIM  
TO A 25-YEAR MINIMUM?

>> NO, YOUR HONOR.

>> SO THERE IS DIFFERENCE THEN  
WITHOUT THE DSFO CLASSIFICATION?

>> CORRECT, YOUR HONOR.

>> OKAY.

>> ISN'T THE QUESTION WHETHER,  
FOR ANY MANDATORY MINIMUM, IF IT  
CAN BE, IF IT INVOLVES FACTUAL  
DETERMINATION IT IS NOT SUBJECT  
TO A 3800 MOTION WE'RE LOOKING  
LEGALITY WHAT THE FIFTH DISTRICT  
HAS DONE, LOOK AT ONE STATUTE  
AND COMPARED IT TO ANOTHER  
STATUTE.

THAT'S DOESN'T REQUIRE FACTUAL  
DEVELOPMENT.

>> CORRECT.

IT DOES NOT INCLUDE FACTUAL--

>> SO IF IT CAN'T FIT UNDER THE  
REQUIREMENTS, AND SO THEREFORE A  
JUDGE LEGALLY COULD NOT IMPOSE  
IT, HOW IS IT NOT AN ILLEGAL  
SENTENCE?

>> YOUR HONOR, MAYBE A TYPE OF  
COMPLAINT COULD BE RAISED ON  
DIRECT APPEAL BUT NOT  
APPROPRIATE FOR A 3.800 MOTION.

>> BECAUSE IT'S A DESIGNATION  
RATHER THAN THE SENTENCE ITSELF?  
WHAT IF THIS WAS MANDATORY  
MINIMUM LIFE AND THERE WAS A  
THEY MISCONSTRUED THE MANDATORY  
LIFE SENTENCE?

THAT CAN'T BE RAISED ON A  
3.800-A?

I'M MISSING SOMETHING.

SO HELP ME OUT ON THIS.

>> YOUR HONOR, I WOULD JUST RELY  
ON MY BRIEF ON THAT ISSUE, IT IS  
TYPE OF SENTENCE THAT CAN BE  
IMPOSED AND SHOULD BE CONSIDERED  
A LEGAL SENTENCE AND NOT--  
UNDER 3.800-A.

ON THAT ISSUE.

I WOULD JUST RELY ON MY BRIEF.

I WOULD LIKE TO GET BACK TO

WHETHER IT WAS PROPER FOR THE FOURTH DISTRICT COURT OF APPEAL TO CONSIDER THE AFFIDAVIT IN THIS CASE.

NOW, BECAUSE THIS AROSE AT 3.800-A THE FOURTH DISTRICT COURT OF APPEAL ONLY HAD REPORT THAT WAS SUBMITTED.

THE CONFLICT CASE WAS RAISED ON DIRECT APPEAL.

IN THIS CASE THE FOURTH DISTRICT COURT OF APPEAL HAD THE AFFIDAVIT AND THE JUDGMENT FOR THE 1981 CONVICTION OF THE TYPE OF DOCUMENTS YOU WOULD TYPICALLY LOOK FOR TO SEE WHAT THE FACTUAL BASIS OF A PLEA WOULD BE JUDGMENT AND MAYBE THE PLEA COLLOQUY.

OFTEN IN THE PLEA COLLOQUY THE DEFENDANT WILL STIPULATE IN THE FACTS ALLEGED IN PC AFFIDAVIT OR ARREST AFFIDAVIT.

BECAUSE THE ARREST AFFIDAVIT WAS CONTAINED IN THE AFFIDAVIT HERE THE FOURTH DISTRICT COURT OF APPEAL LOGICALLY LOOKED AT THAT WHAT THE FACTUAL BASIS WAS ARRIVED TO THE ELEMENTS COMPARISON.

>> IS THERE ANYTHING IN THE RECORD THAT SHOWS HE ACTUALLY STIPULATED THAT.

>> THERE IS NOT, YOUR HONOR.

>> HOW CAN YOU KNOW ANYTHING ABOUT THAT THEN?

>> BECAUSE--

>> THAT IS JUST AN ALLEGATION THAT'S FLOATING THERE AND WE KNOW, I JUST DON'T, ASSIGNMENTS TO ME TO BE KIND OF MURKY.

>> THIS IS 3.800-A MOTION, SO WHAT REALLY MATTERS WHAT THE TRIAL COURT LOOKED A THE TO DO THE STATUTORY COMPARISON.

MAYBE FOURTH DISTRICT COURT OF APPEAL HAD DONE THE ANALYSIS.

IF THEY HAD DONE THE ANALYSIS INCORRECTLY IT WOULD BE

APPROPRIATE FOR THE COURT TO SAY

WE DON'T AGREE WITH HOW THE FOURTH DISTRICT COURT DID THAT. THEY DON'T RAISE THIS IN THE TRIAL COURT, IN THE 3.800 TRIAL MOTION THAT THE COURT LOOKED AT IMPROPER DOCUMENTS.

NOW WE LOOK AT FOURTH DISTRICT COURT OF APPEAL'S DECISION, THEY ARE SAYING COURT SHOULDN'T HAVE LOOKED AT THE AFFIDAVIT.

THERE WAS NO COMPLAINT THAT THE AFFIDAVIT DIDN'T REPRESENT THE FACTS OF PRIOR CONVICTION.

SO THE FOURTH LOGICALLY RELIED ON IT.

THERE WAS NO COMPLAINT MADE.

THERE IS REALLY NO GROUND TO FAULT THE FOURTH DISTRICT IN RELYING ON THAT AFFIDAVIT NOW WHEN THEY HAVEN'T RAISED THAT ISSUE.

IF THERE ARE NO FURTHER QUESTIONS, I'M GOING TO ASK THAT THE COURT UPHOLD THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL AND AFFIRM THE CONVICTION AND SENTENCE.

>> THANK YOU.

>> TRY TO GO THROUGH THESE REALLY QUICKLY.

AS FAR AS THE UNDERLYING FACTS, THE CASES WE CITED IN OUR BRIEF SHOW UNEQUIVOCALLY THAT DO NOT LOOK TO THE UNDERLYING FACTS.

I FEEL LIKE HE SAID THAT AND MAYBE DIDN'T SAY THAT BUT THE COURTS ARE CLEAR YOU DO NOT LOOK TO THE UNDERLYING FACTS.

YOU LOOK ONLY TO THE STATUTORY ELEMENTS.

THE EXCEPTION HE WAS TALKING ABOUT IS A VERY LIMITED EXCEPTION UNDER THE UNITED STATES SUPREME COURT DECISION IN DESCAMPS.

THE COURT ALSO RECOGNIZED IT IN DOTEL I THINK.

WHEN THAT COMES INTO PLAY WHEN YOU HAVE A DID I VISIBLE STATUTE AND ALTERNATIVE ELEMENTS TO A

CRIME AND YOU CAN'T DETERMINE  
WHAT ELEMENTS THAT PERSON WAS  
CONVICTED OF.

IN THAT INSTANCE YOU LOOK TO  
VERY RESTRICTED SET OF DOCUMENTS  
AND AN ARREST AFFIDAVIT IS NOT  
ONE EVER THEM.

DOTEL AND DESCAMPS YOU DOESN'T  
LOOK TO POLICE REPORT SAID TO  
DETERMINE WHAT HE WAS CONVICTED  
OF.

JUSTICE CANADY, THAT IS NOT WHAT  
HE WAS CONVICTED.

STATUTE SAYS LOOK TO THE  
CONVICTIONS.

HE WAS CONVICTED OF 800.04.

THE AIRS AFFIDAVIT IS WHOLLY  
IRRELEVANT HERE.

I'D LIKE TO MENTION ALSO THAT TO  
THE EXTENT, WE MENTIONED THIS IN  
OUR BRIEF.

TO THE EXTENT THERE IS ANY  
AMBIGUITY TO THE STATUTES.

THE COURT LOOKS TO RULE OF LEN

90 WHEN YOU LOOK AT 100.04

WHETHER THERE IS ANY AMBIGUITY

WHAT LEWD LOU MEANS OR WHETHER

IT SHOULD MEAN INTENTIONAL

CONDUCT, YOU HAVE TO LOOK AT THE

RULE OF LENITY AND INTERPRET IT

IN FAVOR OF THE ACCUSED.

JUSTICE QUINCE, I AGREE WITH

YOU, THAT SUBSECTION 6 OF THE

2005 VERSION OF 800.04 IS MORE

SIMILAR IN ELEMENTS ALTHOUGH IT

DOES REQUIRE INTENT IT IS

DIFFERENT THAN STATUTE IN 1981

THAT DOES NOT EXPLICITLY REQUIRE

INTENT.

>> AND AGAIN, YOU DON'T BELIEVE

THAT BECAUSE, THE USE OF THE

LANGUAGE, LEWD AND LASCIVIOUS,

DOES REQUIRE INTENT?

>> NO.

NO, AND I HAVE NOT FOUND A CASE

AND I ADMIT I HAVEN'T LOOKED AT

EVERY SINGLE CASE OUT THERE THAT

INVOLVES LEWD AND LASCIVIOUS

CONDUCT BUT I HAVE NOT FOUND A

CASE AND IN DURANT THEY

EXPLICITLY REJECTED THAT ARGUMENT BECAUSE IT INVOLVED INTENTIONAL CONDUCT THAT WAS A DISTINCTION AND WHICH BELIEVE THAT WOULD BE CORRECT BECAUSE IF THE LEGISLATURE WANTS IT TO BE INTENTIONAL AND THEY WOULD SAY IT IS INTENTIONAL AND NOT IMPLIED INTENTIONAL.

YOU HAVE TO APPLY THE RULE OF LENITY.

I BELIEVE MR. HAMEL MENTIONED THAT ALL OF THESE WOULD BE THE SAME UNDER 800.04.

OF COURSE SEXUAL BATTERY INVOLVES PENETRATION, WHICH IS NOT SOMETHING THAT WHAT HAPPENED IN 1981, AND I KNOW I'M RUNNING OUT OF TIME.

I'M OUT OF TIME.

IF THERE IS ANY QUESTIONS.

>> THANK YOU.

>> THANK YOU.

>> MISS GRAVES, ARE YOU REPRESENTING MR. ACEVEDO ON PRO BONO BASIS?

I WANT TO THANK YOU ON BEHALF OF THE COURT DOING SO.

IT IS IMPORTANT THAT LAW FIRMS LIKE YOURS DONATE THEIR TIME AND I WANT TO THANK THE LAW FIRM OF CARLTON FIELDS.

WHO IS OFTEN HERE ON PRO BONO THEY BASIS REPRESENTING INDIGENT PEOPLE.

THANK YOU FOR YOUR SERVICE.

THANK YOU FOR YOUR ARGUMENTS.

WE'LL TAKE A RECESS FOR ABOUT TEN MINUTES.