>> ALL RISE.
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.
PLEASE BE SEATED.
>> THE LAST CASE ON THE DOCKET
FOR THIS WEEK IS GOD WYNN V.
STATE.
WHENEVER YOU'RE READY.
>> MAY IT PLEASE THE COURT, GOOD
MORNING, MR. CHIEF JUSTICE, YOUR
HONORS, I'M JORGE SANTIAGO AND
WE REPRESENT THE PETITIONER IN
THIS MATTER, JONATHAN GODWIN.
WE'D LIKE TO RESERVE FIVE
MINUTES FOR REBUTTAL.
COURTS IN THIS STATE HAVE
ROUTINELY HELD--
[INAUDIBLE]
AND WHEN A SENTENCE IS IMPOSED,
TAKING THOSE FACTORS INTO
CONSIDERATION, THE SENTENCE MUST
BE REVERSED WHEN THE RECORD MAY
REASONABLY BE READ TO SUGGEST
THAT THOSE CONSIDERATIONS ARE
TAKEN INTO ACCOUNT.
SENTENCING TRANSCRIPT HERE
CLEARLY REFLECTS THAT THE
SENTENCING COURT TOOK INTO
CONVERSATION GODWIN'S EXERCISE
OF RIGHT TO TRIAL AND FAILURE TO
SHOW REMORSE IN IMPOSING A LIFE
SENTENCE AND A 15-YEAR
CONCURRENT SENTENCE WHEN PRIOR
TO TRIAL HE INDICATED HE WAS
WILLING TO SENTENCE HIM TO TEN
YEARS, CONCURRENT SENTENCES IN
FIVE SEPARATE CHARGES.
>> ARE YOU SUGGESTING THIS WAS
RETALIATION FOR NOT ACCEPTING
THE TEN-YEAR PLEA?
>> I AM NOT SUGGESTING
RETALIATION, YOUR HONOR.
I AM SUGGESTING THAT THE TRIAL
COURT TOOK INTO CONSIDERATION
THOSE FACTORS IMPROPERLY.
IT'S DIFFERENT FROM A VINDICTIVE
SENTENCE.
THESE ARE JUST TAKING THOSE
FACTORS INTO ACCOUNT.
>> ONE TAKE THOSE FACTORS INTO

AN ACCOUNT OF EVALUATING
MITIGATION AND WHETHER A
SENTENCE OUGHT TO BE MITIGATED?
>> YOUR HONOR, I DON'T BELIEVE
THAT THEY CAN--
>> NOT EVEN THEN.
SO ANY MENTION OF THOSE WORDS
DURING A TRIAL THEN ARE GOING TO
BE PER SE REVERSIBLE ERROR?
>> WHEN A DEFENDANT EXERCISES
HIS RIGHT TO TRIAL, YES.
>> THAT'S WHAT I'M SAYING.
WHEN THOSE WORDS ARE USED, IT'S
REVERSIBLE ERROR.
>> YES.
>> OKAY.
>> I BELIEVE THAT'S LAW IN
FLORIDA AND THIS COURT HAS HELD
SO IN CERTAIN CIRCUMSTANCES, AND
THE STATE CITES NO CASES IN
SUPPORT OF ITS BROAD PROPOSITION
THAT WHENEVER A DEFENDANT
REQUESTS MITIGATION OF ANY KIND,
THAT THE STATE AND THE COURT CAN
CONSIDER A DEFENDANT'S LACK OF
REMORSE IN IMPOSING SENTENCE.
AND THE SECOND DCA APPEARS TO
HAVE RELIED ON THE SAME TYPE OF
REASONING AS THE STATE HAS
OFFERED HERE, AND PUTTING ASIDE
THAT GODWIN HERE DID NOT
ACTUALLY REQUEST MITIGATION, IN
FACT--
>> WELL, HIS LAWYER DID THOUGH,
RIGHT?
>> I DON'T BELIEVE THAT'S
MITIGATION.
I BELIEVE HIS LAWYER ARGUED FOR
THE REASONABLENESS OF HIS
SENTENCE.
HE CLAIMED THAT HIS SENTENCE,
TEN YEARS WAS REASONABLE.
HE DID NOT ALLEGE OR--
>> HE DID SAY HE LEARNED HIS
LESSON.
>> YOU'RE RIGHT, YES.
IN THAT SENSE, HE'S CONTENDED
THAT HE WOULD HAVE LEARNED HIS
LESSON, BUT HE HAS NOT ARGUED
THAT HE'S LESS MORALLY CULPABLE

FOR THIS OFFENSE.
HE'S NOT IN ANY WAY INTENDED
THAT HE'S CULPABLE FOR THIS
OFFENSE WHICH IS THE DISTINCTION
BETWEEN THE MITIGATING FACTORS,
THE MITIGATING CIRCUMSTANCES
THAT ARE STATUTORY.
FOR INSTANCE, YOU KNOW, ONE OF
THEM IN PARTICULAR DOWNWARD
DEPARTURE SENTENCE REQUEST, YOU
HAVE TO SHOW REMORSE.
THAT ONE IS, YOU KNOW, ISOLATED
INCIDENT.
I'M AGREEING I COMMITTED THIS
CRIME.
I SHOW REMORSE FOR IT.
NONE OF THOSE CIRCUMSTANCES WERE
RAISED BY GODWIN HIMSELF.
HIS DEFENSE COUNSEL WHO WAS JUST
APPOINTED MOMENTS BEFORE
SENTENCING SIMPLY STATED,
SPEAKING LOOSELY, I THINK HE'LL
LEARN HIS LESSON AFTER TEN
YEARS.
IT'S A REASONABLE SENTENCE.
>> I THINK WHAT WE'RE BEING
ASKED HERE-- BECAUSE THE
JUDGE'S COMMENTS ARE CLEAR.
AND I QUOTE, "I DON'T THINK
YOU'VE SHOWN ONE OUNCE OF
REMORSE, NOT ONE OUNCE."
"I DON'T THINK YOU EVEN
ACKNOWLEDGED YOU COMMITTED THE
CRIME."
"TO THIS DATE, YOU DON'T
ACKNOWLEDGE THAT."
"I DON'T HAVE A DOUBT THAT YOU
COMMITTED IT."
THERE'S NO DOUBT THAT THE JUDGE
IMPOSED OR INJECTED THE LACK OF
REMORSE INTO HIS CONSIDERATION.
THAT'S THERE.
SO THE QUESTION I HAVE IS, IS
SHOULD-- IS THERE A POINT WHERE
A JUDGE IS PERMITTED TO SAY
THOSE THINGS IN RESPONSE TO A
MITIGATION, A MITIGATION
ARGUMENT?
SHOULD WE HAVE A BRIGHT LINE
TEST THAT SAYS UNLESS THAT

HAPPENS, YOU CANNOT SAY THAT?
>> I BELIEVE THERE SHOULD BE A BRIGHT LINE TEST THAT LACK OF REMORSE SHOULD NOT BE CONSIDERED WHENEVER A DEFENDANT MAINTAINS HIS INNOCENCE.
I UNDERSTAND THE DISTINCTION THE STATE'S TRYING TO DRAW THAT, THEREFORE, IT OPENS UP THE DOOR.
BUT THAT'S NOT THE LAW IN FLORIDA.
THE LAW IN FLORIDA IS A DEFENDANT-- COURTS CANNOT INFER LACK OF REMORSE FROM THE EXERCISE OF RIGHT TO TRIAL.
IT'S A MISTAKE.
THIS COURT HAS CALLED IT A MISTAKE.
YOU CAN'T THEN TURN IT ON ITS HEAD AND SAY WHEN MITIGATION CONTEXT, IT'S NOT A MISTAKE ANYMORE.
IT'S PERFECTLY FINE.
IT GOES-- ITS PEEN LOGICAL INTERESTS ARE SIGNIFICANT.
YOU CAN'T DO THAT.
AND THIS COURT HALLS IN HOLTON V. STATE SAID SPECIFICALLY SENTENCING COURT REJECTING MITIGATING CIRCUMSTANCES, STATUTORY MITIGATING CIRCUMSTANCES SAID YOU CAN'T USE A RIGHT TO TRIAL AGAINST THE DEFENDANT IN THOSE CIRCUMSTANCES.
AND, YOU KNOW, ANOTHER CASE THAT ALSO HELD SIMILARLY WAS DELL PECIA WROTE THE COURT SAID SPECIFICALLY THERE'S NOTHING WRONG WITH CONTESTING YOUR INNOCENCE AND PUTTING THE STATE TO ITS PROOF.
THAT'S WHAT IS HAPPENING HERE.
IN MITIGATION OR IN AGGRAVATION, THE SAME CIRCUMSTANCES ARE OCCURRING.
DEFENDANTS OR, IN GODWIN'S CASE, HE'S BEING SUBJECTED TO PUNISHMENT FOR EXERCISING HIS RIGHT TO TRIAL BY INFERRING LACK

OF REMORSE FROM THAT.
AND THIS COURT HAS ALSO STATED THAT YOU CANNOT CONCURRENTLY OR, YOU KNOW, SAME TIME, YOU CANNOT CONSIDER A DEFENDANT'S EXERCISE OF RIGHT TO TRIAL TO BE A LACK OF REMORSE BECAUSE YOU CANNOT SHOW REMORSE AT THE SAME TIME AS MAINTAINING INNOCENCE.
>> YOU KNOW, IN CONNECTING THE DOTS HERE AS TO WHAT THE JUDGE'S INTENTIONS WERE, I THINK WE NEED TO BEGIN WITH YOUR FIRST ARGUMENT OR YOUR ARGUMENT THAT HIS RIGHT TO JURY TRIAL MAY HAVE BEEN IMPACTED UPON.
AND DURING THE-- WHEN THE STATE MADE THE PLEA OFFER RIGHT BEFORE JURY SELECTION AND THE DEFENDANT, YOUR CLIENT, BASICALLY SAID I'M NOT TAKING IT, HERE'S WHAT THE JUDGE SAID.
YOU REALIZE IF YOU'RE CONVICTED, IT PROBABLY WOULD NOT BE A TEN-YEAR MANDATORY MINIMUM.
HE CAUGHT HIMSELF IN THE NEXT SENTENCE AND CLEANED IT UP A LITTLE BIT BY SAYING THAT'S A POSSIBILITY.
I DON'T KNOW IF IT'S PROBABLE, BUT IT'S A POSSIBILITY.
BUT AGAIN, I MEAN, I SEE THAT AS FAR AS WHEN I LOOK AT THESE ISSUES OF COMMENTS ON LACK OF REMORSE OR WHETHER OR NOT A JUDGE IS BEING VINDICTIVE BECAUSE A DEFENDANT DID NOT TAKE A PLEA AND FORCED A JURY TRIAL, THOSE THINGS-- I LIKE TO CONNECT THE DOTS HERE.
AND IT BEGAN, I THINK THE WHOLE ISSUE WITH ME BEGAN DURING JURY SELECTION, DURING PLEA COLLOQUY WHERE THE JUDGE BASICALLY WAS DISPLAYED THAT YOUR CLIENT WOULD NOT TAKE THE PLEA AND MADE THAT COMMENT AND THEN, OF COURSE, CAUGHT HIMSELF.
AND THEN LATER ON, YOU KNOW, AT SENTENCING HE SAYS ALL THOSE

THINGS ABOUT REMORSE.
SO IT SEEMS TO ME LIKE BOTH OF THOSE ARE CONNECTED IN DETERMINING THE JUDGE'S MOTIVATION IN THE SENTENCE IN THIS CASE.
NOW, THAT SAID, ONCE AGAIN IF I'M THE DEFENDANT AND I GET UP THERE IN SENTENCING AND ALL OF A SUDDEN, YOU KNOW, MY LAWYER IS SAYING WHAT A GREAT PERSON I AM, HOW HORRIBLE I FEEL ABOUT THIS WHOLE THING, AND I'M STANDING THERE BASICALLY LOOKING BLANK, WHAT-- WHY SHOULD NOT THAT BE ALLOWED TO REBUT THAT?
I MEAN, THAT'S, THAT'S WHAT WE, WHAT I'M BATTLING WITH RIGHT NOW, WHETHER WE SHOULD COME UP WITH SOME KIND OF TEST THAT SAYS YOU DON'T MENTION THE LACK OF REMORSE.
BUT IF HE BRINGS OUT THE FACT THAT HE'S SORRY FOR WHAT HE DID BY CALLING WITNESSES AND THINGS LIKE THAT, THEN PERHAPS THAT COMMENT SHOULD BE ALLOWED.
>> RIGHT, YOUR HONOR.
WE'RE NOT SUGGESTING THAT IF THE DEFENDANT HIMSELF CLAIMS TO BE REMORSEFUL OR RAISES ISSUES RELATED TO REMORSE THE SENTENCING COURTS CANNOT CONSIDER LACK OF REMORSE.
THAT'S NOT THE BRIGHT LINE RULE THAT WE'RE PURSUING HERE.
WE'RE SUGGESTING WHERE A DEFENDANT DOES NOT HIMSELF INJECT REMORSE, DOES NOT ASK FOR A DOWNWARD DEPARTURE SENTENCE INCLUDING REMORSE AND DOESN'T OTHERWISE HAVE EVIDENCE THAT'S NOT BASED ON HIS EXERCISE TO RIGHT TO TRIAL REGARDING REMORSE, IT SHOULD NOT BE CONSIDERED BY SENTENCING COURTS.
THE DANGER IS WHEN YOU HAVE A DEFENDANT WHO'S MAINTAINING INNOCENCE AND HE'S BEFORE THE COURT, NOT RAISED ANY

MITIGATION, YOU HAVE THE
POTENTIAL FOR A DEFENDANT WHO'S
ACTUALLY INNOCENT DECIDING TO
SHOW REMORSE FOR THE HOPE OF
REDUCED SENTENCE AT THE 1 IS
19TH HOUR.
BUT SENTENCING COURTS CAN TURN
THAT ON ITS HEAD AND SAY IT'S AN
INSINCERE SHOW OF REMORSE.
AND, AGAIN, THIS COURT HAS
STATED YOU CANNOT SHOW REMORSE
WHILE SIMULTANEOUSLY CONTENDING
YOU'RE INNOCENT.
REMORSE REQUIRES AB SUSPECT OF
GUILT-- ABSENCE OF GUILT.
SO IT WOULD BE IMPROPER TO
SUGGEST YOU DIDN'T SHOW REMORSE,
I'M GOING TO REJECT ANY
UNRELATED MITIGATION, I'M TO
GOING TO REJECT ANYTHING YOU'VE
OFFERED HERE.
DOESN'T MATTER IF YOU'VE RAISED
CULPABILITY, IF YOU'RE
CONTENDING YOU'RE INNOCENT.
I BELIEVE THE LAW SIMPLY REFUSES
TO ACKNOWLEDGE THAT AS A PROPER
GROUND FOR REJECTION OF
MITIGATION.
>> WHAT WAS ACTUALLY SAID BY THE
TRIAL JUDGE ABOUT CALLING
WITNESSES AND MAKING THE VICTIM
TESTIFY OR SOMETHING?
>> YES, YOUR HONOR.
LET ME FIND IT FOR YOU IN THE
RECORD.
THE COURT SAID IN ITS SENTENCING
COMMENTS' COLLOQUY I UNDERSTAND
WHY THE STATE OFFERED THE TEN
YEARS, IT WAS REJECTED BY YOU.
AFTER HAVING HEARD THE ARGUMENT,
EXCUSE ME, HEARING THE TESTIMONY
OF THE WITNESSES, SEEING THE
ABSOLUTE FEAR IN THE FACE OF ONE
OF THE WITNESSES, I UNDERSTAND
EXACTLY WHY THEY ELECTED NOT TO
CALL THAT LADY.
THE THEY IN THAT SENTENCE IS, OF
COURSE, THE STATE.
WHY THEY ELECTED NOT TO CALL
THAT LADY.

WE MAY-- THAT IS A COMMENT ON
THE RIGHT TO TRIAL BECAUSE A
DEFENDANT EXERCISING THE RIGHT
TO TRIAL HAS THE RIGHT TO
EXAMINE OR CROSS-EXAMINE
WITNESSES AGAINST HIM.
THAT'S PART OF HIS RIGHT TO
TRIAL.
SO FOR THE COURT TO SAY I SAW
THEM, YOU KNOW, THE STATE DIDN'T
WANT TO CALL THAT LADY, YOU WERE
ABSOLUTELY WITHOUT A DOUBT IN MY
MIND YOU COMMITTED THIS ROBBERY,
SIR, THAT'S A COMMENT THAT YOU
BROUGHT THIS CASE BEFORE THE
COURT UNNECESSARILY, AND YOU
HAVE NOW PUT A WITNESS ON THE
STAND.
THAT'S IMPROPER.
>> NOW, HE SAYS-- AND THIS GOES
BACK TO WHAT SOMEONE SAYS AND
THEN AS JUSTICE LABARGA WAS
SAYING, DOES EVERYTHING THEN GET
PUT INTO THE MIX.
DID THIS WHOLE I DON'T WANT TO
SAY DIATRIBE, BUT DISCUSSION BY
THE COURT FOLLOW AFTER GODWIN
ASKED IF HE HAD ANYTHING TO SAY,
SAID, YES, I'D LIKE TO SAY ONE
THING TO THE COURT.
I BELIEVE IT WAS ELEANOR
ROOSEVELT WHO SAID IT, NO ONE
CAN MAKE YOU FEEL INFERIOR
WITHOUT YOUR CONSENT.
WHICH IS-- WHAT DOES THAT HAVE
TO DO WITH WHETHER HE'S GOING TO
GET A LIFE SENTENCE?
SO YOU ALMOST COULD FEEL-- AND,
AGAIN, YOU KNOW, NOT HAVING BEEN
A TRIAL JUDGE AS JUSTICE
LABARGA-- THAT YOU'RE GOING, I
JUST LISTENED TO THIS WHOLE
TRIAL, WHAT THIS MAN DID, AND
THAT'S THE BEST HE CAN TELL ME?
I MEAN, WHERE DOES THAT FIT IN
AS FAR AS IF THIS WAS REALLY
WHAT THE JUDGE WAS DOING, WAS
SAYING I'M PUNISHING YOU FOR
EXERCISING YOUR RIGHT TO TRIAL
BY JURY BY GIVING YOU A LIFE

SENTENCE OR WHAT I HEARD DURING
THIS TRIAL SHOWS ME THAT THIS
CRIME WAS COMMITTED BY YOU WAS A
CRIME THAT DESERVES A LIFE
SENTENCE.
I MEAN, IT JUST-- SO THAT
WHOLE-- THE CONTEXT OF WHAT THE
JUDGE WAS RESPONDING TO WHEN THE
JUDGE MADE THE STATEMENTS THAT
YOU JUST QUOTED.
>> YOUR HONOR, FROM CONTEXT I
UNDERSTAND YOUR POSITION OR YOUR
POINT, BUT IN CONTEXT THIS IS
NOT WHAT OCCURRED HERE.
THE SENTENCING COURT DOES NOT
REFER TO ANY COMMENTARY THAT
GODWIN MADE DURING THE TRIAL.
THE COURT DOESN'T MAKE ANY
REFERENCE TO THOSE, TO
BEHAVIOR--
>> WELL, IS THE ELEANOR
ROOSEVELT, DID THAT OCCUR DURING
SENTENCING OR A TRIAL?
>> THAT OCCURRED DURING
SENTENCING.
>> SO DIDN'T IT OCCUR, THAT
STATEMENT, RIGHT BEFORE HE
STARTS TO SAY WHATEVER, YOU'RE
NOW QUOTING?
>> YES, YOUR HONOR.
THAT OCCURRED BEFORE THE DEFENSE
COUNSEL CAME BACK AND SPOKE
AGAIN AFTER GODWIN MADE THAT
COMMENT.
BUT LIKE YOU MENTIONED, I DON'T
THINK ANYONE HERE KNOWS WHAT HE
MEANT BY THAT.
I CERTAINLY BELIEVE IT'S
CONSISTENT WITH MAINTAINING
INNOCENCE ESPECIALLY WHEN HE
THINKS HE'S BEING WRONGFULLY
CONVICTED.
AND--
>> BUT ISN'T IT INCONSISTENT
WITH THE CLAIM THAT HE'S LIKELY
TO LEARN HIS LESSON AFTER TEN
YEARS?
ISN'T THAT-- THE FACT THAT HE'S
STANDING THERE MAKING SUCH AN
ASSERTION INCONSISTENT WITH WHAT

HIS LAWYER HAS ASSERTED AS A
BASIS FOR THE TEN-YEAR SENTENCE
WHICH IS HE'S LIKELY TO HAVE
LEARNED HIS LESSON AFTER TEN
YEARS.
IT DOESN'T SOUND LIKE A
PERSON-- I MEAN, I THINK WHAT I
INFER FROM WHAT THE JUDGE IS
SAYING IS I DON'T THINK YOU'RE A
PERSON WHO'S LIKELY TO HAVE
LEARNED YOUR LESSON BASED ON
WHAT I'VE SEEN HERE, THE WHOLE
THING.
INCLUDING THAT STATEMENT THAT
IS-- WELL, I DON'T KNOW HOW TO
CHARACTERIZE.
>> YOUR HONOR, THAT'S PERFECTLY
REASONABLE, BUT WE ALSO HAVE
CASE LAW SUGGESTING THAT IF A
SENTENCING TRANSCRIPT MAY BE
READ TO SUGGEST THAT A
SENTENCING COURT HAS TAKEN
IMPROPER FACTORS INTO
CONSIDERATION, WE MUST REVERSE
SENTENCE.
HERE ALTHOUGH THE COURT MAY HAVE
BEEN REFERRING TO THAT AND MAY
BE CONSIDERING THOSE FACTORS,
THIS COLD RECORD, THIS COLD
STATEMENT RIGHT HERE, I DON'T
THINK YOU'VE SHOWN ONE OUNCE OF
REMORSE, NOT ONE OUNCE, I DON'T
THINK YOU'VE ACKNOWLEDGED YOU
COMMITTED THIS CRIME, TO THIS
DAY YOU DON'T ACKNOWLEDGE THAT,
I DON'T HAVE A DOUBT YOU
COMMITTED IT.
HE'S NOT ONLY SAYING LACK OF
REMORSE, HE'S ALSO SAYING YOU
DIDN'T ADMIT GUILT.
YOU DIDN'T PLEAD GUILTY.
>> BUT IS THERE SOME INFORMATION
THAT'S BEFORE US IN THE RECORD
WITH REGARD TO PRIOR BAD CONDUCT
BY THIS DEFENDANT?
>> A PRIOR CONVICTION?
>> YES, SIR.
>> YES.
THERE'S A PRIOR CONVICTION,
JUVENILE OFFENDER.

>> WELL, JUVENILE OR NOT--
>> RIGHT.
>>-- IT CAME BEFORE THE COURT, AND SOME PROBLEM WITH THE FULFILLING THE OBLIGATIONS UNDER THE WHATEVER SENTENCING THERE MAY HAVE BEEN THERE?
>> YES.
THE STATE RAISED THAT IN ITS ARGUMENT IN SENTENCING.
>> WELL, IT SEEMS TO ME THAT THIS IS IN PART IN RESPONSE TO-- OR TELL ME WHY IT'S NOT IN RESPONSE TO SOME OF THE DISCUSSION WITH REGARD TO, WELL, HE DIDN'T LEARN HIS LESSON BEFORE, AND HE WAS GIVEN A BREAK, AND IT WAS GIVEN, HE WAS GIVEN AN OPPORTUNITY, AND HE COMES IN HERE TODAY AND HAS DONE IT AGAIN.
AND HE'S BEATEN THIS YOUNG GIRL IN THE HELD WITH A GUN.
IN THE HEAD WITH A GUN.
AND HE STILL DOESN'T EVEN ACKNOWLEDGE HE'S DONE THAT.
HOW DO YOU CUT SOMEBODY A BREAK FOR DOING THAT?
IS THERE SOMETHING WRONG WITH THE TRIAL JUDGE SAYING SOMETHING LIKE THAT?
>> YES, YOUR HONOR.
UP UNTIL YOU MENTIONED THAT THIS CASE HERE HAVING ACKNOWLEDGED GUILT, HE HAS A RIGHT TO CONTINUE TO MAINTAIN INNOCENCE.
>> YEAH.
OH, I UNDERSTAND.
I UNDERSTAND.
I'M TRYING TO DETERMINE WHETHER A TRIAL JUDGE IS PER SE ERROR WHEN THAT GET INTO THE DISCUSSION THAT'S GOING ON.
I AGREE WITH YOUR BASIC PRINCIPLES.
I THINK WE'RE TALKING ABOUT HERE TODAY HOW DO THOSE, HOW DO YOU APPLY THOSE IN THE REAL WORLD IN A SENTENCING CONTEXT THAT'S GOING ON BEFORE A TRIAL JUDGE?

>> YOUR HONOR, I JUST THINK THE ISSUES WE'RE HAVING HERE ARE-- THE APPELLATE COURTS ARE TRYING TO DIVINE WHAT A SENTENCING COURT WAS TRYING TO DO.
AND IT'S CLEAR AS DAY THAT A COURT CAN SIMPLY NOT REFER TO LACK OF REMORSE WHEN A DEFENDANT HAS MAINTAINED HIS INNOCENCE.
WE HAVE A SITUATION HERE WHERE COURT COULD HAVE OMITTED ALL OF THIS, COULD HAVE SIMPLY SAID YOU BEAT HER ON THE HELD WITH A FIREARM, AND IT WAS A SERIOUS CRIME.
YOU'VE DONE IT AGAIN, YOU KNOW, YOU COMMITTED THIS CRIME A SECOND TIME.
HE COULD HAVE SAID THAT, HE COULD HAVE STOPPED RIGHT THERE.
BUT HE CONTINUED, I DON'T THINK YOU'VE SHOWN ONE OUNCE OF REMORSE.
REMORSE IS NOT A REQUIREMENT FOR ANYTHING, BUT HE CONTINUED.
IT'S-- AND THE LAW IN THIS STATE IS THAT A COURT MENTIONS LACK OF REMORSE WHEN A DEFENDANT HAS MAINTAINED HIS INNOCENCE AND HAS NOT ARGUED FOR REMORSE, HAT NOT CONTENDED OR THERE'S NO OTHER EVIDENCE IN THE RECORD, HE SHOULDN'T CONTINUE.
>> I KNOW YOU'RE IN YOUR REBUTTAL, BUT IS IT THE TRIAL COUNSEL THAT INTERJECTED THE LEARN YOUR LESSON AND SHOULD THE-- AND THAT MAY BE THE INEFFECTIVE ASSISTANCE.
I MEAN, IF THAT'S WHAT THEN OPENED THE DOOR TO LETTING HIM, THE JUDGE, DO THAT, THE TRIAL COUNSEL DID MORE HARM THAN HELP, THIS DEFENDANT.
>> THAT'S CERTAINLY POSSIBLE, YOUR HONOR, BUT I ALSO THINK THAT EVEN IF A DEFENSE COUNSEL SAYS SOMETHING THAT, YOU KNOW, POTENTIAL FOR REHABILITATION, SENTENCING COURTS CANNOT

CONSIDER THAT WHEN A DEFENDANT
HAS MAINTAINED INNOCENCE.
THAT'S NOT-- HE'S NOT
CONTENDING IN ANY WAY, SHAPE OR
FORM THAT HE'S LESS MORALLY
CULPABLE FOR A CRIME.
>> BUT HE COULD HAVE SAID I WENT
TO TRIAL, BUT I NOW REALIZE I,
THIS WAS A TERRIBLE THING I DID.
HE COULD HAVE OFFERED THAT.
IF HE OFFERED IT, THEN WE'D BE
IN A DIFFERENT SITUATION.
>> CERTAINLY.
IF HE HAD CONTENDED HE WAS
GUILTY OR--
>> OR THAT HE-- NO.
I MAINTAIN MY INNOCENCE, BUT I
UNDERSTAND THE JURY HAS FOUND ME
GUILTY, AND I AM, YOU KNOW,
AGAIN, THIS IS THAT THING OF
WHETHER EVEN IN BAR CASES
WHETHER LACK OF REMORSE, YOU
KNOW, IF THEY SAY, NO, I DIDN'T
DO IT--
>> I GUESS HE COULD HAVE SAID,
YOU KNOW, HAD I DONE THIS, IT
WOULD HAVE BEEN DEVASTATING.
[LAUGHTER]
>> AND I'D BE VERY SORRY.
>> WELL, YOUR HONOR, I'D LIKE TO
RESERVE THE REST OF MY TIME FOR
REBUTTAL.
>> ABSOLUTELY.
>> THANK YOU.
>> MAY IT PLEASE THE COURT,
PETER COCLAN NECESSARY FOR THE
ATTORNEY GENERAL'S OFFICE.
I'D FIRST LIKE TO POINT OUT THAT
THE ISSUE IN THIS CASE IS
TECHNICALLY NOT WHETHER THE
TRIAL JUDGE'S COMMENTS WERE
IMPROPER.
IT'S ACTUALLY WHETHER COUNSEL
WAS INEFFECTIVE--
>> OBJECTING.
>>-- AND THAT MAY SEEM LIKE A
TECHNICAL DISTINCTION, BUT IT'S
GOING TO GET MORE IMPORTANT AS I
GO ALONG BECAUSE UNDER THE
PRINCIPLES OF STRICKLAND,

COUNSEL, YOU KNOW, WE PRESUME
COUNSEL IS EFFECTIVE, WE PRESUME
THE INTEGRITY OF THE CONVICTION.
THE DEFENDANT HAS THE BURDEN,
AND COUNSEL IS NOT EXPECTED TO
LAUNCH EVERY PROBABLE OBJECTION,
EVEN EVERY POSSIBLE MERITORIOUS
OBJECTION.
SO IF SEEING EVERYTHING COUNSEL
SAW AND HEARD THERE'S A
REASONABLE ARGUMENT THAT I
INVITED THIS, I OPENED THIS DOOR
AS PART OF A GLOBAL MITIGATION
STRATEGY TO BRING UP THE STATE'S
PLEA OFFER FIRST TO SAY HE COULD
LEARN HIS LESSON FIRST, THEN A
REASONABLE COUNSEL COULD JUST
CHOOSE TO NOT OBJECT BELIEVING
HE HIMSELF OPENED THE DOOR.
AT LEAST WE CAN'T SAY HE'S
TOTALLY CONSTITUTIONALLY
DEFICIENT UNDER THE SIXTH
AMENDMENT.
NOW, THERE'S--
>> WELL, IF YOU WIN ON THE FIRST
POINT, THERE'S NO SECOND--
>> RIGHT.
>> THERE'S NO ISSUE.
>> NO PREJUDICE PRONG, CORRECT.
>> RIGHT.
>> AND THAT, IN OUR OPINION,
IS-- THE INEFFECTIVE PRONG HAS
NOT BEEN ADEQUATELY ADDRESSED.
YOU COULD READ THE
POST-CONVICTION COURT'S OPINION,
IN FACT, YOU COULD HAVE POPPED
IN AND LISTENED TO THE PRECEDING
ARGUMENT AND THOUGHT YOU WERE IN
A DIRECT APPEAL POSTURE.
AND IT'S OUR POSITION WE HAVE TO
FILTER THIS THROUGH STRICKLAND
AND THE DEFERENCE THAT IS GIVEN
TO COUNSEL AND THE DOORS THAT HE
HAS ALLOWED TO OPEN.
>> YOU'RE SAYING THAT IT WAS A
STRATEGIC DECISION ON HIS PART
NOT TO OBJECT.
BECAUSE HE WAS PRESENTING THE
REMORSE.
>> IT COULD BE STRATEGIC EVEN IF

HE DIDN'T CONSCIOUSLY CHOOSE NOT TO OBJECT, IT SHOULD BE STRATEGIC TO VIEW IT AS HAVING BEEN OPENED AND CHOOSE NOT TO OBJECT.
BECAUSE HE WOULD HAVE ALREADY KNOWN AT THAT POINT THAT HE DID OPEN THE DOOR.
I MEAN, LET'S LOOK AT IT THROUGH HIS EYES, EVERYTHING HE HAD SEEN AND HEARD.
WHEN THE JUDGE SAYS THE WORDS, THE FIRST COMMENT, YOU REJECTED THAT PLEA, YOU KNOW, IF THAT OCCURRED IN ISOLATION WITH NO OTHER COMMENTS, MAYBE THAT WOULD INSPIRE MOST REASONABLE COUNSEL TO OBJECT.
BUT GIVEN THAT WE JUST SAW THREE PAGES PRIOR IN THE TRANSCRIPT COUNSEL BROUGHT UP THAT PLEA OFFER FIRST.
IN FACT, HE KIND OF HARPED ON IT USING THE TEN-YEAR AS A BASELINE TO SAY, YOU KNOW, THAT'S SUFFICIENT FOR THE DEFENDANT TO HAVE BEEN REHABILITATED IN THAT TIME AND, YOU KNOW, THE STATE-- IT'S ARGUABLY AN IMPROPER TACTIC.
I DON'T MEAN LEGALLY IMPROPER, I JUST MEAN KIND OF A CHEAP TACTIC TO SAY, WELL, THE STATE OFFERED TEN YEARS, THEY COULD LIVE WITH THAT SO, YOU KNOW, NOW THEY'RE ASKING FOR LIFE.
OBVIOUSLY, THE STATE MAKES ITS OFFERS UNDER RISK OF LOSING UNDER THE VERY HIGH REASONABLE DOUBT STANDARD.
SO IF THE STATE OFFERS TEN YEARS, IT'S NOT BECAUSE WE THINK HE'S A FAIR GUY WHO CAN BE REHABILITATED IN TEN YEARS, IT'S BECAUSE WE'D RATHER TAKE TEN YEARS THAN LOSE AT TRIAL AND GET ZERO YEARS.
SO IT'S A BIT OF A MISCLASSER--
>> WELL, AND HERE IT MIGHT HAVE ALSO BEEN BECAUSE OF THE

WITNESS, THE VICTIM--
>> RIGHT.
>>-- THE HARDSHIP ON THE VICTIM REQUIRING TESTIMONY AND ALL THAT.
SO THAT'S ANOTHER REASON THAT THE STATE MIGHT--
>> AND THAT'S DEFINITELY PRESENT HERE WHICH JUST ADDS TO THAT.
BUT IN ANY, YOU KNOW, IN ANY CASE THERE'S ALWAYS THAT EVIDENTIARY ISSUE OF BEYOND A REASONABLE DOUBT.
>> LET'S GO TO THE MERITS.
HAD THERE NOT BEEN THE STATEMENT BY THE DEFENSE LAWYER THAT HE'S A BETTER GUY NOW, WHATEVER HE SAID, HAD THAT NOT BEEN THERE, WOULD THE JUDGE'S COMMENTS HAVE BEEN REVERSIBLE ERROR?
REMORSE?
>> ONLY IF UNDER A DIRECT APPEAL STANDARD, AND I WOULD ALSO POINT OUT THAT THE DEFENDANT INDEPENDENTLY OPENED THE DOOR HIMSELF THROUGH HIS ELEANOR ROOSEVELT QUOTE.
BECAUSE NOW YOU'VE GOT TWO BASES FOR THE JUDGE TO SAY I HAVEN'T SEEN ANY REMORSE.
YOU'VE GOT COUNSEL SAYING HE COULD HAVE LEARNED HIS LESSON, SAYING I HAVEN'T SEEN ANY REMORSE REFUTES THAT, AND YOU'VE GOT THE DEFENDANT, AND IT'S OUR POSITION THAT THAT'S A WAIVER OF HIS RIGHT TO REMAIN SILENT.
COUNSEL TURNS TO HIM DURING SENTENCING AND SAYS WOULD YOU LIKE TO MAKE A STATEMENT TO THE COURT DURING SENTENCING.
RATHER THAN SAYING, NO, THE DEFENDANT SAYS, YES, AND QUOTES ELEANOR ROOSEVELT, NO ONE CAN MAKE YOU--
>> SO WHAT DOES THAT STATEMENT MEAN?
>> WELL, I'LL INTERPRET--
>> YOU INTERPRETING THAT STATEMENT TO MEAN THAT HE'S NOT

SHOWING ANY REMORSE, THAT HE'S
SAYING HE'S A GOOD GUY?
WHAT?
>> NOT THAT HE'S-- THERE'S TWO
LEVELS OF INTERPRETATION.
THE FIRST LEVEL IS HE CHOSE TO
MAKE A STATEMENT IN THE CONTEXT
OF SENTENCING, AND WHATEVER IT
MEANS, IT DOESN'T CONTAIN
REMORSE.
SO IT'S ENOUGH FOR THE JUDGE TO
SAY OUT OF ALL THE THINGS YOU
COULD HAVE SAID, THERE'S NO
REMORSE IN THAT STATEMENT.
>> DOES HE HAVE TO MAKE A AT THE
SAME TIME ABOUT REMORSE?
>> NO.
BUT HE DOESN'T HAVE TO MAKE ANY
STATEMENT.
>> YEAH.
BUT IF THE STATEMENT DOESN'T
HAVE ANYTHING AT ALL TO DO WITH
REMORSE, HOW DO YOU INTERPRET IT
AS NOT SHOWING REMORSE IN.
>> WELL, BECAUSE YOU'RE NO
LONGER INFERRING THE LACK OF
REMORSE FROM HIS SILENCE, YOU
INFERRING IT FROM THE FACT THAT
HE CHOSE TO MAKE A STATEMENT,
YOU KNOW?
I UNDERSTAND THAT THAT'S A SMALL
THING TO INTERPRET IT FROM, BUT
IT'S NO LONGER STEMMING FROM THE
FIFTH AMENDMENT RIGHT.
HE WAIVED THE FIFTH AMENDMENT
RIGHT BY CHOOSING TO MAKE A
STATEMENT.
AND THE CONTEXT WAS SET UP IN
TERMS OF COUNSEL SAYING DO YOU
WISH TO MAKE A COMMENT TO THE
COURT ON SENTENCING, YOU KNOW?
COUNSEL DIRECTED THAT AFFECTING
YOUR SENTENCE, AND THE DEFENDANT
MADE THAT STATEMENT.
AND THEN IF WE ACTUALLY
INTERPRET THE STATEMENT,
REMEMBER, THE TRIAL JUDGE HAS
DEMEANOR, TONE OF VOICE, BODY
LANGUAGE, SO I WOULD ASK THE
COURT TO DEFER TO THE TRIAL

JUDGE'S SUPERIOR VANTAGE POINT
AND SAY AT LEAST ON THE
TRANSCRIPT IT'S CONSISTENT WITH
AN AFFIRMATIVE LACK OF REMORSE.
OR TO PUT IT ANOTHER WAY, WE
CAN'T SAY COUNSEL
CONSTITUTIONALLY DEFICIENT FOR
NOT OBJECTING TO THAT.
AND REMEMBER, COUNSEL HEARD THAT
AND, YOU KNOW, HE MAY HAVE KIND
OF WINCED IN HIS HEAD WHEN HE
HEARD THAT AND TRIED TO DO
DAMAGE CONTROL WHICH IS EXACTLY
WHY THE DEFENDANT'S COMMENT
OCCURS MIDWAY THROUGH COUNSEL'S
SPEECH, AND THEN IT'S AFTER THAT
THAT COUNSEL LAUNCHES INTO, YOU
KNOW, LET ME SAY ONE MORE THING,
JUDGE.
AFTER TEN YEARS HE'LL HAVE
LEARNED HIS LESSON AND GO ON TO
BE A CONTRIBUTING MEMBER.
COUNSEL HAS A TOUGH JOB HERE.
HE IS NOT COUNSEL AT TRIAL.
HE'S ONLY PUT IN HALFWAY THROUGH
THE SENTENCING HEARING BECAUSE
YOU CAN SEE IN THE TRANSCRIPT
THE DEFENDANT WON'T EVEN GIVE UP
THE REINS TO LET HIM ARGUE THE
RENEWED JAIL WAY.
FINALLY HE'S PUT IN LATE IN THE
GAME AND EXPECTED TO WORK SOME
MAGIC THAT LATE.
AND SO HE ENGAGES IN A COUPLE
REASONABLE STRATEGIES.
AND THIS KIND OF RESPONDS TO
SOMETHING YOU SAID, JUSTICE
PARIENTE, THAT ISN'T INEFFECTIVE
TO OPEN THE DOOR.
WELL, I'D SAY IT'S INHERENTLY
STRATEGIC TO OPEN THE DOOR UNDER
THESE CIRCUMSTANCES, BECAUSE
WHAT ELSE HAS HE GOT TO WORK
WITH?
HE'S GOT THE STATE'S PLEA OFFER
OF TEN YEARS.
HE'S GOT, YOU KNOW, MAYBE HE CAN
BE REHABILITATED, SO, YOU KNOW,
THOSE ARE REASONABLE ARGUMENTS
CONSISTENT WITH WHAT COUNSEL

WOULD SAY, YOU KNOW, IN AN
AVERAGE SENTENCING HEARING.
>> IF WE GET TO THE ULTIMATE
ISSUE AND DECIDE THAT THE JUDGE
DID USE LACK OF REMORSE, RIGHT
TO JURY TRIAL, WHAT'S THE
REMEDY?
>> WELL, I WOULD SAY THAT THAT'S
NOT-- IT DEPENDS HOW YOU USE
LACK OF REMORSE.
I THINK THEY'RE SIMPLIFYING THE
CASE BY SAYING JUDGE CAN NEVER
USE LACK OF REMORSE.
YOU CANNOT USE IT AGAINST THE
DEFENDANT AND PUNISH HIM,
HOWEVER YOU WANT TO PUT IT, FOR
THAT RIGHT.
>> RIGHT.
>> BUT IF YOU'RE USING IT TO
SHOOT DOWN MITIGATION IN
WHATEVER CONTEXT--
>> SO YOU'RE SAYING THE
MITIGATION HERE WAS SIMPLY THE
DEFENSE ATTORNEY SAYING HE
LEARNED HIS LESSON, AND THEY
OFFERED-- THAT'S NOT
MITIGATION.
YOU COULDN'T HAVE POSSIBLY
OPENED THE DOOR TO LET THE JUDGE
CONSIDER LACK OF REMORSE.
>> WELL, IT'S TWO SEPARATE
COMMENTS.
MENTIONING THE STATE'S PLEA
OPENED THE DOOR TO THE JUDGE
SAYING YOU REJECTED THAT PLEA.
>> OKAY.
>> AND BOTH THE DEFENDANT
QUOTING ELEANOR ROOSEVELT AND
COUNSEL SAYING, YOU KNOW, HE
COULD HAVE LEARNED HIS LESSON
AFTER TEN YEARS, HE CAN GO ON TO
BEING A CONTRIBUTING MEMBER OF
SOCIETY, THAT OPENED THE DOOR TO
LACK OF REMORSE, IS OUR
POSITION.
>> WELL, AGAIN, IF WE DECIDE THE
JUDGE IMPROPERLY CONSIDERED IT
AND WE CAN'T SEPARATE IT OUT,
WHAT'S THE REMEDY?
>> WELL, WE WOULD STILL MAINTAIN

OUR-- I MEAN, IF YOU REJECT ALL
OUR ARGUMENTS, OBVIOUSLY, THE
REMEDY IS RESENTENCING, BUT--
>> ANOTHER JUDGE CAN STILL--
>> IMPOSE LIFE.
>>-- SENTENCE LIFE IN PRISON.
>> CORRECT.
BUT WE WOULD STILL MAINTAIN OUR
INEFFECTIVENESS LAYER WHERE IF
REASONABLE MINDS CAN DIFFER,
OPEN TO INTERPRETATIONS, WE
CAN'T SAY THAT NO REASONABLE
COUNSEL WOULD HAVE FAILED TO
OBJECT.
>> WHAT WAS THE RANGE HERE OF
WHAT THE JUDGE COULD HAVE
IMPOSED?
>> BASED ON THE 10-20-LIFE, THE
BOTTOM WAS TEN YEARS, THE MAX
WAS LIFE.
>> HE DIDN'T DISCHARGE THE
FIREARM?
>> HE DID NOT DISCHARGE IT.
HE POSSESSED IT.
AND THE JURY FOUND ACTUAL
POSSESSION.
I WOULD POINT OUT THAT AS TO THE
PRETRIAL COMMENTS WHICH YOU
MENTIONED, JUSTICE LABARGA, THE
IMPORTANT THING TO NOTE ABOUT
THAT IS THAT THE DEFENDANT WAS
PRO SE AT THAT POINT.
SO ALTHOUGH THOSE COMMENTS ARE,
PARTICULARLY THE SECOND ONE, ARE
ARGUABLY QUESTIONABLE WHERE THE
JUDGE SAYS YOU'RE PROBABLY NOT
GOING TO GET THAT AFTER TRIAL,
IT'S A POSSIBILITY, NOT A
PROBABILITY, THE DEFENDANT WAS
PRO SE AT THAT POINT.
SO IF SOMEONE HAS TO OBJECT OR
ASK THE JUDGE, IT'S THE
DEFENDANT AT THAT POINT.
AND THAT OCCURS TWO WEEKS PRIOR
TO THE SENTENCING WHERE
COUNSEL'S APPOINTED.
SO COUNSEL'S NOT RESPONSIBLE FOR
THOSE COMMENTS, AND I THINK IT'S
UNFAIR TO COMBINE THEM TO MAKE
THE JUDGE LOOK MORE UNFAIR IN

POST-CONVICTION WHEN THE
DEFENDANT CHOSE TO REPRESENT
HIMSELF AT TRIAL.
THE CASE LAW'S 100% CLEAR THAT A
PRO SE DEFENDANT CANNOT RAISE A
CLAIM OF INEFFECTIVE ASSISTANCE
AGAINST HIMSELF IN A 3850.
THAT'S THE WHOLE REASON WE DO IT
SUCH A THOROUGH WE RELATE THAT
HEARING.
OBVIOUSLY, EVERY PRO SE
DEFENDANT IS GOING TO BE
INEFFECTIVE IN SOME WAY OR
ANOTHER PROBABLY.
AND THE OTHER POINT I WOULD MAKE
IS THAT THERE IS TECHNICALLY, AS
WE ARGUED IN OUR BRIEF, NO
EXPRESS OR DIRECT CONFLICT.
THERE'S TWO TYPES OF CASE LAW,
THERE'S THE CASE LAW WHICH I
CALL THE OUT OF THE BLUE CASE
LAW WHICH DEALS WITH THE
SITUATION WHERE THE JUDGE MAKES
SOME COMMENT ON REMORSE OUT OF
THE BLUE, AND THAT SEEMS TO
PRESUME THAT THE JUDGE IS
RELYING ON THAT OR USING IT
BECAUSE, AFTER ALL, HE BROUGHT
IT UP OUT OF THE BLUE.
THEN THERE'S THE CASE LAW WHICH
UNDERLIES THESE CASES SUCH AS
PETERS AND RANKIN AND THE GODWIN
CASE BELOW WHICH SAY THAT A
DISTINCTION ARISES OR AN
EXCEPTION ARISES WHEN COUNSEL
OPENS THE DOOR BY RAISING OR
INJECTING THE ISSUE OF
MITIGATION.
THAT CASE LAW CAN BE COMPLETELY
HARMONIZED, BECAUSE AS THE
RANKING COURT EVEN PUTS IT,
COUNSEL INJECTED THE ISSUE, AND
THE EXCEPTION ARISES TO THE
GENERAL RULE.
SO I DON'T THINK THAT'S OF THE
EXPRESS AND DIRECT CONFLICT THAT
WOULD BE REQUIRED FOR THE RULE.
>> I THINK YOUR OPPONENT HAS
CAPABLY ARGUED THAT WE NEED TO
CLARIFY THAT, THAT THERE IS NO

SEPARATE OR EXCEPTION TO PERMIT
IMPROPER STATEMENTS LIKE WAS
MADE IN THIS CASE.
HOW WOULD YOU DEAL WITH THAT?
WE HAVE-- THERE ARE NONE, NO
CASES FROM OUR COURT THAT
APPROVE THAT KIND OF STATEMENT
WHERE THERE'S BEEN A MITIGATION
KIND OF ISSUE.
IT'S ALL DCAs?
>> YEAH.
I WOULD-- THE DCAs ORIGINALLY
RELY ON TANZI AND SINGLETON
WHICH ARE THIS COURT'S CASES.
THOSE ARE GRANTED DEATH PENALTY
CASES, BUT THE RULE THAT THE
COURT ENUNCIATED IN THOSE CASES,
AND I'LL QUOTE IT: THIS COURT
HAS PERMITTED LACK OF REMORSE TO
PROPOSE REMORSE OR
REHABILITATION.
AND IF YOU TAKE JUST THAT
HOLDING, THAT'S NOT LIMITED TO A
DEATH PENALTY SITUATION.
AND IF YOU LOOK AT THAT, WHAT
IT'S REALLY IS JUST AN
APPLICATION OF THE CONCEPT OF
OPENING THE DOOR.
IT'S BEEN APPLIED TO THE DEATH
PENALTY CASES, AND THERE'S NO
LOGICAL REASON WHY IT WOULDN'T
BE ABLE TO BE APPLIED TO ANY
GENERAL SENTENCING HEARING WHICH
IS EXACTLY WHAT THE DCAs,
PARTICULARLY THE FOURTH DISTRICT
CAN, A HAVE DONE IN THE PETERS
AND RANKIN CASE AND JUST SAY,
WELL, GENERALLY A JUDGE
SHOULDN'T BRING THIS UP ON HIS
OWN BECAUSE IT SEEMS LIKE HE'S
RELYING ON IT.
BUT IF THE CONTEXT IS SUCH THAT
COUNSEL BROUGHT IT UP FIRST, THE
CONTEXT IS GOING TO SEEM LIKE
IT'S NOW RESPONSIVE TO THAT
RATHER THAN SOMETHING THE JUDGE
INDEPENDENTLY DID.
>> I GUESS I'M ALWAYS THINKING
THAT-- AND, AGAIN, THIS IS IN
THE CONTEXT OF AN INEFFECTIVE

ASSISTANCE CASE.
BUT IT SEEMS TO ME THERE'S A DIFFERENCE WHERE THE DEFENDANT REALLY TRIES TO PUT ON EVIDENCE OF REMORSE.
VERSUS A COMMENT OF A DEFENSE LAWYER THAT IS REALLY, IT'S NOT EVIDENCE.
BUT YET NOW THEY, THE JUDGE GOES OFF ON THAT.
>> RIGHT.
>> ALMOST APPEARS-- AND, AGAIN, WE DON'T HAVE THE VIDEO OR MAYBE WE DO-- THAT HE GOT, IS IT A HE?
>> THE DEFENDANT, YEAH.
>> NO, THE JUDGE--
>> COME-- YEAH, THEY'RE ALL MEN.
>> THAT HE GOT UPSET, HE GOT ANGRY THAT THIS WAS EVEN, THIS WAS OFFENSIVE TO HIM.
HE WATCHED THAT TRIAL, AND THIS GUY IS STILL TRYING TO SAY THAT, YOU KNOW, HE DIDN'T DO IT.
AND THAT'S MY CONCERN, IS THAT THAT'S, YOU KNOW, IF IT WAS JUST LIKE, WELL, I UNDERSTAND, YOU TOOK THIS-- YOU KNOW, YOU DIDN'T TAKE A THE PLEA.
SO HOW DO WE FERRET THAT OUT?
THE RESPONSE WAS MUCH MORE, IT WAS DISPROPORTIONATE TO WHAT WAS OFFERED WHICH WASN'T EVEN EVIDENCE.
>> RIGHT.
WELL, THERE'S TWO COMPONENTS, THE EVIDENCE COMPONENT AND THE JUDGE'S COMMENTS ON CALLING WITNESSES.
AS TO THE JUDGE'S COMMENTS ON CALLING WITNESSES, I DON'T THINK HE WENT AS FAR AS SOME OF THE IMPROPER CASES WHERE THE JUDGE SAID, YOU KNOW, YOU TOOK OUR TIME, YOU KNOW, YOU TOOK A WEEK OF OUR TIME WITH THE TRIAL OR YOU REFUSED TO ADMIT YOUR INCIDENCE.
HE DOESN'T SPECIFICALLY FRAME IT

IN THAT WAY.
AND GIVEN THAT THE WILSON CASE PUTS IT INCUMBENT UPON JUDGES WHEN THEY MAKE A COMMENT ON THE PLEA IN THE FIRST PLACE ARE, AS THE JUDGE SORT OF DID, NOW THE JUDGE HAS TO EXPLAIN HIMSELF IN ORDER TO AVOID BEING VINDICTIVE.
SO WE'RE KIND OF PUTTING JUDGES IN BETWEEN A ROCK AND A HARD PLACE.
YOU'VE GOT TO EXPLAIN THE EVIDENCE YOU SAW AT TRIAL TO JUSTIFY WHY YOU'RE IMPOSING SUCH A HARSH SENTENCE, BUT IF YOU TALK IT TOO HARSHLY, I THINK HE'S JUST SUMMARIZING THE TRAUMA THAT THE WITNESSES EXPERIENCED.
>> LET ME ASK YOU THIS.
A JUDGE COULD HAVE TECHNICALLY SAID IT IS A JUDGMENT IN THE SENTENCE OF THIS COURT BE CONFINED IN PRISON FOR LIFE IMPRISONMENT WITH TEN-YEAR MANDATORY MINIMUM.
HAVE A NICE LIFE, GOOD-BYE.
>> RIGHT.
>> THAT'S ALL HE NEEDED TO SAY.
>> CORRECT.
>> THIS WHOLE BUSINESS ABOUT REMORSE, LACK OF REMORSE, THAT'S JUST A JUDGE PRETTY MUCH SAYING THINGS HE DOESN'T NEED TO SAY IN COURT.
WE WOULDN'T BE HERE IF HE HADN'T SAID THAT.
>> RIGHT.
>> SO, I MEAN, WHAT IS, WHAT IS THE POINT IN SAYING THAT UNLESS YOU MEAN TO SHOW THAT YOU FELT THAT WAY, AND THIS IS WHY I'M SENTENCING YOU THIS WAY?
>> WELL, I--
>> IT DOESN'T ADD INTO THE EQUATION.
>> I THINK, AGAIN, WE'RE PUTTING JUDGES IN BETWEEN A ROCK AND A HARD PLACE.
ALTHOUGH THE JUDGE COULD SAY

THAT, THAT'S NOT CONSISTENT WITH
WHAT JUDGES HISTORICALLY DO.
IT'S A CHANCE FOR THE COMMUNITY,
THE VICTIMS ARE GOING TO BE
THERE, THE DEFENDANT'S FAMILY,
AND BOTH OF THEM MIGHT WANT AN
EXPLANATION.
JUST HISTORICALLY SPEAKING, THIS
IS THE TYPE OF THING THAT JUDGES
DID.
AND GIVEN THE VINDICTIVE
SENTENCE CASE LAW, YOU KNOW, IF
A JUDGE ACCIDENTALLY MENTIONS--
AS HE DID IN THIS CASE, I WOULD
IMPOSE THAT PLEA-- NOW YOU'VE
GOT TO JUSTIFY YOUR SENTENCE
OTHERWISE THEY'RE GOING TO ARGUE
THAT IT'S VINDICTIVE.
AND THE VINDICTIVE CASE LAW
REQUIRES YOU TO PUT ON REASONS.
SO A JUDGE IS KIND OF IN A ROCK
AND A HARD PLACE, YOU KNOW,
SHOULD I JUSTIFY MY SENTENCE IN
CASE THERE'S ANY ALLEGATION OF
VINDICTIVENESS, OR SHOULD I JUST
SAY NOTHING AND THEN MAYBE
THAT'LL BE A PROBLEM TOO?
AND AS FAR AS THE--
>> IT'S ALWAYS AMAZING TO ME
THOUGH, AND THIS IS A GOOD
EXAMPLE, YOU KNOW?
WE HAVE DEATH PENALTY CASES
WHERE EITHER DEATH OR LIFE
IMPRISONMENT THERE'S A WHOLE
PROCESS, MITIGATION, AGGRAVATION
AND SENTENCING.
HERE WE'VE GOT A JUDGE THAT HAD
THE DISCRETION TO GO ANYWHERE
FROM TEN TO LIFE AND REALLY AS
WE HAD SAID THE OTHER DAY, THERE
DOESN'T HAVE TO EVEN BE A REASON
GIVEN--
>> RIGHT.
>>-- FOR IT.
SO WHEN THEY START TO GIVE
REASONS THOUGH AND,
UNFORTUNATELY, IF YOU'RE GOADED
OR FEEL GOADED, I MEAN, HE MAY
HAVE BEEN VERY UPSET WITH THIS
DEFENDANT HAVING TO DEAL WITH A

PRO SE LITIGANT.
LIKE ENOUGH ALREADY.
YOU KNOW?
LOOK WHAT YOU PUT THE VICTIM
THROUGH.
LOOK WHAT YOU PUT EVERYONE
THROUGH.
THE STATE OF FLORIDA.
YOU'RE NOT EVEN TODAY SHOWING
REMORSE.
THAT'S THE PROBLEM.
>> AND I THINK IN CONTEXT THAT
WAS GIVEN IN THE COURSE OF THIS
IS WHAT THE VICTIM SUFFERED BY
YOUR CRIMES, NOT, YOU KNOW, YOU
EXERCISE YOUR TRIAL--
>> BUT WHY DID YOU, WHY DID HE
HAVE TO SAY AND OUT THE VICTIM
ON AND EVEN THE STATE--
>> WELL, I THINK THAT WAS--
>> NOW, WASN'T THE JUDGE--
WE'RE HYPOTHESIZING HERE.
BUT FOR THE COMMENTS OF THE
DEFENSE ATTORNEY, NONE OF THIS
WOULD HAVE COME OUT.
>> RIGHT.
>> I MEAN, SO THE JUDGE JUST
IGNORES WHAT THE DEFENSE
ATTORNEY SAYS AND GO INTO THE--
[INAUDIBLE]
I MEAN, I THINK WE'RE PUTTING
THE JUDGE BETWEEN A ROCK AND A
HARD PLACE.
>> I AGREE.
>> I THINK THE CONTEXT, YOU
KNOW, BUT FOR THE DEFENSE
ATTORNEYS OPENING THE DOOR, NONE
OF THIS WOULD HAVE BEEN SAID.
AND HE ONLY SAID DIDN'T ACCEPT
THE PLEA, NOW AFTER HAVING HEARD
THE EVIDENCE, I UNDERSTAND WHY
THE OFFER WAS GIVEN.
>> RIGHT.
>> AND HE SIMPLY LAID OUT WHAT
HE HEARD AND SAW.
>> RIGHT.
AND THE FACT THAT THE DEFENSE
ATTORNEY MAKES A COMMENT, IT
ALMOST GOES TO CAUSALITY.
IF THERE'S NOTHING THAT INVITES

IT, THAT'S WHY WE CAN PRESUME
THE SENTENCE IS BASED OR RELIED
ON THE THINGS THE JUDGE SAID.
BUT ONCE THE DEFENSE ATTORNEY
SENATORS INJECTING-- STARTS
INJECTING THINGS, YOU KNOW,
THERE'S AN OLD SAYING YOU OPEN A
DOOR, SOMEONE CAN WALK THROUGH
IT.
AND, OF COURSE, THE JUDGE COULD
IGNORE EVERYTHING THE DEFENSE
ATTORNEY SAID AS IF IT'S HOT
AIR, BUT THE ARGUMENTS ARE MEANT
TO HAVE PERSUASIVE WEIGHT.
AND AS TO THE DISTINCTION
BETWEEN EVIDENCE VERSUS
COMMENTS, I THINK IT'S--
COUNSEL ARE GIVEN SIGNIFICANT
LATITUDE.
THEY CAN PUT THINGS IN THE
RECORD THAT AREN'T IN THE
RECORD.
LIKE THE DEFENDANT, HE SERVED
EIGHT YEARS IN IRAQ, HE'S A GOOD
GUY, HE'S GOT FAMILY IN TAMPA.
WE DON'T EXPECT EVERYTHING TO BE
REPRESENTED BY EVIDENCE.
SO WHAT COUNSEL SAYS
HISTORICALLY IN REFERENCING IS
ALMOST QUASIEVIDENCE AT LEAST IN
THE SENSE HE'S GIVEN SOME
LATITUDE.
BUT IT ALSO MEANS WE HAVE TO
OPEN THE DOOR TO THE JUDGE OR
THE STATE TO RESPOND TO THAT IN
SOME WAY.
WE CAN'T JUST PRETEND COME'S
ARGUING IN A DIFFERENT
DIMENSION, AND IF HE OPENS THE
DOOR AS JUDGE CANADY SUGGESTED
BY SAYING YOU COULD HAVE LEARNED
YOUR LESSON WHICH IMPLIES YOU'RE
GUILTY--
>> WHEN WAS HE APPOINTED?
RIGHT BEFORE SENTENCING?
>> CORRECT.
>> SO IT'S SORT OF LIKE WE SAY,
WELL, MAYBE THERE WAS OTHER
MITIGATION.
HE DIDN'T HAVE THE TIME TO PUT

IT TOGETHER.
WE CAN'T HOLD HIM INEFFICIENT OR DEFICIENT FOR THAT.
>> RIGHT.
>> BUT ONE THING HE SAYS GETS THE JUDGE OFF AND ANGRY.
AND, YOU KNOW, I FORGET WHAT I WAS-- THE QUESTION I WAS ASKING YOU, BUT IT WAS REALLY ABOUT THE FACT THAT HE HAD-- WELL, IN ANY EVENT.
ISN'T THAT THE CONCERN HERE, THAT IF WE'RE GOING TO RELY ON THE ATTORNEY OPENING THE DOOR BUT SAY, WELL, WE CAN'T REALLY BLAME THE ATTORNEY WHO WAS JUST APPOINTED BEFORE, BUT YET THAT MAY HAVE BEEN THE BASIS FOR THE JUDGE'S SENTENCING, WE DON'T KNOW.
WHY ISN'T IT BETTER JUST TO, YOU KNOW, HE'LL PROBABLY GET, HE MAY GET LIFE AGAIN.
BUT GIVE HIM A NEW SENTENCING AND HAVING IT CLEAN, AND MAYBE THERE IS MITIGATION.
>> WELL, TECHNICALLY THE DEFENDANT ASKED FOR AN ATTORNEY LIKE TWO WEEK BEFORE, AND COUNSEL WAS TOLD THAT HE WOULD BE, YOU KNOW, APPOINTED AT SOME POINT IN BETWEEN THEM.
AND COUNSEL COULD ALWAYS ASK FOR A CONTINUANCE.
I THINK IT'S INHERENTLY STRATEGIC WHEN COUNSEL TRIES TO OPEN THESE DOORS IN THIS MANNER.
>> WAS THERE AN EVIDENTIARY HEARING?
>> YES, THERE WAS.
IT DOESN'T COVER A LOT OF THIS BECAUSE THEY BASICALLY JUST CONFIRMED THAT HE DIDN'T OBJECT.
BUT THERE WAS AN EVIDENTIARY HEARING.
>> THANK YOU.
>> I RESPECTFULLY ASK YOU TO AFFIRM.
>> I BELIEVE THIS COURT IS VERY CONCERNED OR SEEMS CONCERNED

WITH PUTTING A JUDGE BETWEEN A ROCK AND A HARD PLACE.
I THINK THAT'S THE REASON A BRIGHT LINE RULE HERE WOULD HELP JUDGES AND PRESERVE THE CONSTITUTIONAL RIGHT.
BECAUSE JUDGES DO NOT HAVE A CONSTITUTIONAL RIGHT TO CONSIDER A DEFENDANT'S LACK OF REMORSE IN SENTENCING.
BUT A DEFENDANT HAS A CONSTITUTIONAL RIGHT TO MAINTAIN HIS INNOCENCE AND EXERCISE THE RIGHT TO TRIAL.
THAT'S LOST UPON THE STATE HERE.
AND ALSO ANOTHER FACTOR, THIS-- THE STATE NOW HAS HAD AMPLE OPPORTUNITY TO POINT OUT A CASE PRECISELY ON THIS ISSUE FROM THIS COURT AND CONTINUES TO SPEAK IN GENERALITIES ABOUT CASE LAW WITHOUT POINTING TO ONE CASE WHERE A DEFENDANT HAS MAINTAINED HIS INNOCENCE THROUGH TRIAL, THROUGH SENTENCING, AND THE COURT HAS CONSIDERED LACK OF REMORSE OR THE EXERCISE OF RIGHT TO TRIAL.
THAT CASE DOES NOT EXIST.
THESE COURTS, THE ONE-- THE TIMES THEY DO TALK ABOUT OPENING THE DOOR, IT'S NOT IN THIS CONTEXT.
IT'S WHEN A DEFENDANT IN TANZI ADMITS HIS GUILT.
HE PLED GUILTY.
AND SINGLETON, LACK OF REMORSE FOR PRIOR CRIMES.
WE'RE NOT TALKING ABOUT THE EXERCISE OF RIGHT TO TRIAL.
THEREFORE, I ASK THIS COURT TO-- ALSO, SORRY.
THE, WHEN TALKING ABOUT THE CONTEXT OF LACK OF REMORSE, COURTS HAVE HELD IT'S FUNDAMENTAL ERROR.
SO FOR THEM TO, FOR THE STATE TO SAY IT'S NOT SIGNIFICANT ERROR AND NOT AN ISSUE, IT IS FUNDAMENTAL ERROR.

THEREFORE, I ASK THIS COURT TO QUASH SECOND DCA'S DECISION, VACATE SENTENCE AND REMAND FOR RESENTENCING AND PREFER A DIFFERENT JUDGE.
>> ONE QUESTION.
IS THERE ANYTHING IN THIS RECORD THAT INDICATES THE JUDGE WAS ANGRY WHEN HE WAS GIVING HIS SENTENCING RATIONALE?
>> NO, YOUR HONOR.
NO, COUNSEL DIDN'T MENTION JUDGE WAS ANGRY OR-- BUT THE CONTEXT WHICH THE STATE REFERS TO CONTEXT THAT'S NOT IN THE RECORD, THE CONTEXT EARLIER IN THE TRIALS, THE COURT WARNED GODWIN REPEATEDLY ABOUT YOU'RE FACING A LIFE SENTENCE, DON'T DO THIS.
AND THEN PRIOR TO TRIAL EVEN THOUGH WE'RE NOT HOLDING DEFENSE COUNSEL RESPONSIBLE FOR THIS, BUT PRIOR TO TRIAL THE COURT DID INDICATE IT WOULD IMPOSE TEN-YEAR MANDATORY MINIMUM SENTENCES IF HE ADMITTED GUILT. THAT GOES TO CONTEXT OF WHAT THE COURT WAS CONSIDERING.
BUT AGAIN--
>> WELL, THAT WASN'T PROPOSED. THAT WAS AN OFFER BY THE STATE, AND THE COURT WAS ACKNOWLEDGING THAT THE COURT WOULD ACCEPT IT. I MEAN, THAT-- DO YOU THINK IT'S A FAIR ARGUMENT TO SAY THAT THIS JUDGE WAS PROPOSING A TEN-YEAR SENTENCE?
>> NO, YOUR HONOR.
I'M NOT SAYING HE WAS PROPOSING A TEN-YEAR SENTENCE, I'M SAYING HE INDICATED PRIOR TO TRIAL HE WOULD IMPOSE--
>> HE WOULD ACCEPT THE OFFER OF A PLEA.
>> THAT'S NOT IMPROPER, WHAT I'M SAYING IS THE COURT PRIOR TO TRIAL ALREADY INDICATED IT WOULD, IF HE PLED GUILTY, IN OTHER WORDS, FAILED TO EXERCISE

RIGHT TO TRIAL--
>> WELL, I THINK THAT'S A PRETTY DIFFERENCE PRECEDENT ALSO, IS THAT IF ANY TRIAL JUDGE EVER INDICATES THAT THE STATE MAKES AN OFFER, THE DEFENDANT HAS NOT DECIDED YET, AND THE COURT'S SAYING I WILL ACCEPT THAT, THAT THAT WOULD THEN BIND THE JUDGE TO THAT SENTENCE.
OTHERWISE IT'S VINDICTIVE.
I THINK THAT'S A VERY DANGEROUS PRECEDENT.
>> THAT IS NOT THE PRECEDENT WE'RE ASKING THE COURT TO SET, AND--
>> THAT'S JUST THE ARGUMENT YOU MADE.
>> I'M NOT ARGUING IT'S VINDICTIVE.
I'M ARGUING THAT GOES TO CONTEXT FOR CONSIDERATION OF--
>> WELL--
>> THERE IS A WAY FOR JUDGES TO HANDLE THAT DIFFERENTLY, AND THAT IS, YOU KNOW, START OUT ON THE RECORD BY TELLING THE DEFENDANT I HAVEN'T HEARD THE EVIDENCE YET, I DON'T KNOW WHAT THE WITNESSES ARE GOING TO SAY, ALL I KNOW IS WHAT I'VE BEEN TOLD HERE TODAY.
AND BASED ON WHAT I KNOW, I'M WILLING TO ACCEPT TEN YEARS IN PRISON.
IF YOU GO TO TRIAL, I MAY HEAR DIFFERENT THINGS, AND THAT MAY CHANGE.
THAT'S HOW YOU HANDLE THAT.
THAT WASN'T DONE HERE.
>> IT WAS DONE DURING THE SENTENCING.
HE SAID I DIDN'T KNOW ANYTHING ABOUT THE CASE PRIOR TO THIS.
NEGOTIATION HAPPENED THROUGH TWO OR THREE DAYS OF TESTIMONY.
NOW I UNDERSTAND WHY-- AND THAT BASICALLY WHAT HE SAID, IS IT NOT?
>> YOUR HONOR, IT'S, AGAIN,

WE'RE NOT CONTENDING IT'S
IMPROPER FOR THE COURT TO--
>> I KEEP HEARING THESE
ARGUMENTS THAT SEEM TO BE
POINTING IN THAT DIRECTION.
>> NO, THAT'S NOT IMPROPER--
>> I'M NOT SAYING--
>> RIGHT.
IT'S NOT IMPROPER FOR THE COURT
TO CONSIDER THAT FACTOR, IT'S
SIMPLY WHEN ONE OF THE FACTORS
IS AN IMPROPER FACTOR, THE
SENTENCE MUST BE REVERSED.
THANK YOU, YOUR HONOR.
>> OKAY.
AND I THANK YOU FOR YOUR
ARGUMENTS, AND I WANT TO THANK
COUNSEL AND HIS LAW FIRM,
CARLTON FIELDS, FOR DOING THIS
CASE ON A PRO BONO BASIS.
AND I KNOW THE LAW FIRM OF
CARLTON FIELDS IS KNOWN TO DO
THAT AND TO LET US BORROW THEIR
LAWYERS TO REPRESENT FOLKS WHO
CANNOT AFFORD TO HIRE LAWYERS.
SO I THANK YOU.
I THANK YOU FOR YOUR
REPRESENTATION.
>> THANK YOU, YOUR HONOR.
>> AND WE'RE IN RECESS.
>> ALL RISE.