

>> WE WILL NOW MOVE FORWARDS TO THE SECOND CASE ON TODAY'S DOCKET. LAVERNE BROWN V. STATE OF FLORIDA.

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

MY NAME IS MATTHEW THUNDERBIRD

-- MATTHEW FUNDERBUNK.

WE ARE HERE TO DISCUSS THE COURT OF APPEALS OPINION REGARDING 22 POINT STATUTE SPECIFICALLY THE SECOND SENTENCE OF THAT STATUTE.

THEY HELD IT DID NOT APPLY PRIMARILY BECAUSE OF THE MEDICATION STATUTE.

THIS WAS INCORRECT FOR A NUMBER OF REASONS.

THIS MITIGATES AN OFFENDERS SENTENCE AS THE DISSENT STATED THE MAJORITY SIMPLY REWROTE THE STATUTE AND TURNED IT ON ITS HEAD AND DOES NOT PLACE THE BURDEN ON THE DEFENDANT AND THAT THEY LACK FUTURE DANGER, FOR ENHANCING THE SENTENCE, MANDATORY STATE PRISON SECTION. WITHOUT ANY JURY INVOLVEMENT, THIS COURT HAS CATEGORIZED THE STATUTE FOR ENHANCEMENT.

OUT OF 2014, I THINK THE FIFTH HOLDING MAKES SENSE IF YOU FIND IT IS A MITIGATION STATUTE BUT IF YOU DON'T, I THINK --

>> LET ME ASK A QUESTION OF MINE ABOUT THE PROCESS AS TO HOW THIS WORKS.

STATUS PERSON GETS CONVICTED AND THERE IS A SENTENCING HEARING. DOES THE PROSECUTOR MAKE THE REQUEST TO THE JUDGE TO EXCEED THE GUIDELINES?

IS THAT HOW IT STARTS?

DOES THE JUDGE DO IT ON HIS OR HER OWN?

>> IT IS A REQUEST BY THE STATE, THE CIRCUIT JUDGE.

>> ONCE THE REQUEST IS MADE, WALK ME THROUGH THIS, AT THE HEARING, WHAT DOES THE JUDGE DO? HOW DOES THE JUDGE GET THE

INFORMATION HE NEEDS OR SHE NEEDS?

>> THAT IS PART OF THE PROBLEM. AT LEAST IN THIS CASE THE JURY VERDICT WAS THE ONLY THING BEFORE THE TRIAL COURT. IT WAS VERY LIMITED, PETTY THEFT.

>> DOES THE STATE PROFFER ANY TESTIMONY, ANY EVIDENCE TO ASSIST THE JUDGE? THAT THIS PERSON WILL PRESENT A DANGER?

>> THERE IS NOT REALLY ANY GUIDANCE IN THE STATUTE.

>> HOW DOES IT WORK PRACTICALLY?

>> PRACTICALLY IT SEEMS THEY WERE REQUESTED AND THE JUDGE FIND WHATEVER HE HAS AVAILABLE TO USE IN THIS CASE AND MISS BROWN'S CASE, THAT SHE COMPLAINED OF CHEST PAINS AND USED HER FATHER'S ILLNESS AS A JUSTIFICATION TO GET OUT OF CRIMES.

>> SOMEWHERE ALONG THE LINE THE JUDGE HEARD HISTORY FROM THIS PERSON THAT SHE WOULD FEIGN THIS TYPE OF INJURY AND ILLNESSES SOMEWHERE THE JUDGE HEARD THAT. WHERE DOES HE HEAR THAT? IS THE COURTHOUSE GOSSIP OR OTHER JUDGES?

>> THAT IS PROBABLY PRESENTED BY THE PROSECUTOR IN MAKING ARGUMENT THEY THINK THIS PERSON SHOULD BE SENTENCED TO PRISON. WAS THERE A PSI HERE?

>> NOT SURE ABOUT THAT IN THIS CASE.

>> LET ME ASK YOU THIS. IF THE JURY HAD TO MAKE THIS FINDING, YOU WOULD HAVE TO HAVE A QUESTION ON THE FORM THAT WOULD ASK THE JURY IF THIS PERSON IS A DANGER TO SOCIETY.

>> CORRECT.

YES.

THAT WOULD CURE THE SIXTH AMENDMENT PROBLEM BECAUSE THE

JURY WOULD MAKE THE DETERMINATION IN A BIFURCATED HEARING WHERE IT IS JUST TO DETERMINE A DANGER TO THE PUBLIC.

>> DO THEY HAVE SOMETHING? IS THAT A NORMAL PROCESS TO HAVE SUCH A BIFURCATED DETERMINATION?

>> YOU COULD DO IT SIMILAR TO BIFURCATING THE FIREARM POSSESSION.

ONE PORTION OF THE TRIAL TO BEGIN WITH AND THE SECOND TO THE FIREARM SO IT DOESN'T TAKE THE FIRST TRIAL, THIS WOULD BE THE SAME THING.

YOU DON'T WANT TO CO-MINGLE THAT INFORMATION IN THE FIRST TRIAL BUT YOU COULD SEPARATE IT OUT AND HAVE A DANGER.

>> BECAUSE OF RECIDIVISM STATUTE THERE WOULD BE A BIFURCATED PROCEEDING FOR PRIOR MISDEMEANORS.

EXCEPT IT STIPULATED THAT.

>> SHE DID NOT DISPUTE THAT.

>> ASSUMING WE AGREE WITH YOU, INTERESTED IN WHETHER YOU SEE THE PROBLEM WITH THIS KIND OF DANGEROUS FINDING THAT THE TRIAL JUDGE MADE HERE.

YOU HAVE A RECIDIVIST STATUTE AND THE ONLY BASIS FOR RECIDIVISM IS PRIOR THEFT BECAUSE IT IS ALL REFLECTED IN THE SCORE SHEET ALTERING THE SCORE OF 22 OR LESS AND IN THE OFFENSE ITSELF, WOULD THAT BE A PROPER CONSIDERATION IN YOUR VIEW?

>> I DO NOT BELIEVE SO.

YOU WERE CORRECT IN SAYING THAT WAS USED IN THE CALCULATION OF GETTING TO 22 POINTS.

WE ARE SAYING THIS IS A LOW-SCORING OFFENDER BUT THEN USED APPLICABLE HE TO INCREASE THE SENTENCE TO PRISON SO IT SEEMS LIKE YOU'RE GOING AROUND THE LEGISLATURE TO TRY TO KEEP

THESE PEOPLE THOUGHT OF
INCARCERATE OF SENTENCES AND
KEEP THEM --

>> THE LEGISLATURE PRESUMED ALL
THESE PETTY THEFTS --

>>.2 ON A PRIOR RECORD BASIS.
VERY SMALL.

>> WHAT WOULD COUNT AS EVIDENCE
TO SUPPORT A DETERMINATION OF
THIS, THE INDIVIDUAL COULD
PRESENT A DANGER TO THE PUBLIC?
IT IS NOT THOSE THINGS IN THE
RECORD THAT ARE EFFECTIVE.

>> IT IS VERY DIFFICULT IN CASES
OF PETTY THEFT TO FIND SOMEBODY
TO BE A DANGER.

THE AVERAGE PERSON --

>> NOT ASKING WHAT COULD BE
CONSIDERED BUT WHAT WOULD COUNT.
THE UNDERSTANDING WHAT YOU ARE
SAYING, NOTHING REFLECTED IN THE
SCORE SHEET.

IT IS NOT THAT.

WE KNOW THE LEGISLATURE IS
CONTEMPLATING SOMETHING.

IT WOULD COUNT FOR THAT
DETERMINATION SO WHAT WOULD IT
BE?

>> WHAT THEY ARE TALKING ABOUT
IS PEOPLE THAT GET UNDER 22
POINTS YET THEY ARE INVOLVED IN
PHYSICAL ALTERCATION, PHYSICAL
HARM TO OTHER PEOPLE.

BATTERY IS ONE OF THE
CONVICTIONS WHERE WHAT WE
PRACTICALLY DEAL WITH IN THESE
CASES IS BATTERY, LICENSE
SUSPENDED OR PETTY THEFT, THE
THREE PRIMARY ONES.

I CAN UNDERSTAND BATTERY CAN BE
A SLIGHT TOUCH OR MORE AND I
WOULD THINK THE LEGISLATURE IS
PROBABLY CONTEMPLATING PEOPLE
THAT ARE COMMITTING BATTERY, THE
SAME PERSON BUT STILL SCORE VERY
LOW.

IT IS POSSIBLY SOMETHING LIKE
THAT WHERE YOU HAVE TESTIMONY
FROM THE VICTIM COME IN, HAVE
THE TRIAL COURT HAVE SOME

TESTIMONY.

>> IN THIS CASE YOUR CLIENT
SERVED HER TIME IN PRISON.

>> YES.

THE ISSUE THEREFORE ABOUT THE
REMEDY IS LIKELY MOVED.

WHAT IS YOUR VIEW OF THE REMEDY,
WHAT IT SHOULD BE?

SHOULD IT BE AN AUTOMATIC
REDUCTION TO A NONSTATE
SENTENCE?

OR SHOULD IT BE CONSISTENT WITH
OTHER PRESIDENT THAT THERE IS,
GOES BACK FOR SENTENCING IF THE
STATE CHOOSES TO DO THAT BEFORE
JERRY?

>> THE BEST EXAMPLE.

>> IN THE FIRST DISTRICT CASE
THEY TALK ABOUT GOING BACK TO A
PRIOR STATUTE WHICH WOULD
SUBJECT THE PERSON TO A GREATER
SENTENCE, DOESN'T MAKE SENSE TO
ME.

>> I WOULD ASK THE COURT TO
FOLLOW ROGER WILLIAMS, THE SAME
REMEDY, THERE WAS SOME
CONTENTION ABOUT WHAT THE PROPER
REMEDY WAS THERE.

I THINK THIS COURT GOT IT RIGHT
AND I THINK THE PENDING CASE
SHOULD BE RESENTENCED UNDER THE
FIRST SECTION WHICH INVOLVES NO
FINDING.

>> AT THE VERY MOST IT WOULD BE
A NEW SENTENCE, RESENTENCING BY
A JURY.

>> RIGHT, CORRECT.

AND NO HARMLESS ERROR DOES ENTER
INTO THIS DISCUSSION, I DON'T
REALLY THINK IT IS VERY EASY TO
HIND -- FIND HARMLESS ON THESE,
THERE ARE FACTS ON THE RECORD,
ERRORS ARE SUBJECT --

>> SOUNDS LIKE SHE HAD SOME
SIGNIFICANT MENTAL ISSUES.

>> THERE WAS OTHER STUFF GOING
ON AND TO SAY NO RATIONAL JURY
WOULD EVER FIND THAT SHE WAS NOT
A DANGER TO THE PUBLIC IS
FAR-FETCHED AND THE SAME IN A

LOT OF CASES.

YOU JUST DON'T HAVE ENOUGH.

>> WHEREVER SHE WENT I HOPE SHE GOT HELP FOR UNDERLYING ISSUES.

>> AND IN CONCLUSION, THIS COURT SHOULD REVERSE THE FIFTH DISTRICT COURT OF APPEAL ON THIS AND RESENTENCE UNDER THE FIRST SECTIONS OF THE STATUTE.

AND, OBVIOUSLY, MOVING FORWARD ON THESE CASES THE FINDING, YOU KNOW, NEEDS TO BE MADE BY A JURY.

AND I'LL USE THE REST OF MY TIME ON REBUTTAL IF I NEED IT.

THANK YOU.

>> GOOD MORNING, YOUR HONORS, AND MAY IT PLEASE THE COURT, MY NAME IS MARJORIE VINCENT TRIPP, AND I AM APPEARING ON BEHALF OF THE STATE OF FLORIDA.

AS COUNSEL NOTED, THE UNDERLYING ISSUE IN THIS CASE IS THE CONSTITUTIONALLY OF SUBSECTION TEN, SPECIFICALLY THE SECOND SENTENCE.

AND I THINK THE KEY ISSUE IN RESOLVING THAT DETERMINATION IS WHAT THE RELEVANT STATUTORY MAXIMUM IS--

>> LET ME, LET ME FOCUS YOU ON BLAKELY V. WASHINGTON.

IN THAT CASE MR. WASHINGTON PLED TO KIDNAPPING HIS WIFE, CORRECT?

>> CORRECT.

>> AND UNDER WASHINGTON LAW, THAT WAS A CLASS B FELONY, CORRECT?

>> CORRECT.

>> AND THE SUPREME COURT EXPLAINED IN THERE THAT A CLASS B FELONY SHALL BE PUNISHED ACCORDING TO STATUTE BY CONFINEMENT UP TO TEN YEARS IN PRISON.

SO THAT, THAT WAS THE MAXIMUM PENALTY, CORRECT?

>> CORRECT.

BASED ON THE FACTS--

>> AND THEN THEY SAY, I'M

QUOTING FROM THE BLAKELY PENALTY, FURTHER LIMIT THE RANGE OF SENTENCE A JUDGE MAY IMPOSE. NOW, WOULDN'T THAT THAT DESCRIBE THE CIRCUMSTANCE HERE?

THERE IS A MAXIMUM PENALTY OF FIVE YEARS BECAUSE IT'S A THIRD-DEGREE FELONY UNDER FLORIDA LAW, BUT THERE'S ANOTHER PROVISION OF STATE LAW THAT FURTHER LIMITS THE RANGE OF SENTENCE THAT A JUDGE MAY IMPOSE.

>> YOUR HONOR, I THINK THERE'S A KEY DIFFERENCE BETWEEN--

>> BUT THAT IS THE CASE.

>> YES, THERE IS.

THERE'S A DIFFERENCE THOUGH.

IN BLAKELY THE DEFENDANT'S PLEA TRIGGERED THAT SENTENCING RANGE. IN THIS CASE, THAT DIDN'T HAPPEN WITH THE JURY'S VERDICT.

THE JURY'S VERDICT TRIGGERED THE MAXIMUM PENALTY OF UP TO FIVE YEARS IN PRISON.

THE JURY'S VERDICT DIDN'T AUTOMATICALLY TRIGGER A NONSTATE PRISON SANCTION.

THAT SANCTION DOES NOT COME INTO PLAY UNTIL THE--

>> BUT WITH HER PRIOR RECORD, IT TRIGGERED A PROVISION OF FLORIDA LAW THAT SAYS THAT YOU CAN'T SEND SOMEONE TO STATE PRISON WITHOUT A FINDING, RIGHT?

>> JUSTICE LAWSON, I WOULD RESPECTFULLY DISAGREE.

I THINK THE PROPER ANALYSIS IN LOOKING AT THE STATUTE IS TO START WITH THE JURY'S VERDICT. THIS DEFENDANT WAS CONVICTED OF A THIRD-DEGREE FELONY, AND AS WE ALL KNOW, IT'S SUGGEST TO UP TO FIVE YEARS IN PRISON.

OFF THE BAT FIVE YEARS WAS WHAT SHE WAS ELIGIBLE FOR.

WE DON'T GET TO STEP TO--

>> I HEAR WHAT YOU'RE SAYING, BUT IT JUST SEEMS TO FLY IN THE FACE OF WHAT THIS TEXT THAT

WE'RE LOOKING AT SAYS.

[LAUGHTER]

THE LANGUAGE THERE SAYS UNDER THESE CIRCUMSTANCES, WHICH ARE DEFINED IN SOME DETAIL THERE, IF THESE CONDITIONS ARE MET, THE COURT MUST SENTENCE THE OFFENDER TO A NONSTATE PRISON SANCTION. THAT SEEMS TO BE WHAT THE LAW OF FLORIDA SAYS, AND-- BUT THEN THERE'S AN OUT--

>> CORRECT.

>>-- THAT WE'RE TALKING ABOUT HERE, THE SECOND SENTENCE, AND THIS WRITTEN FINDINGS WITH RESPECT TO DANGEROUSNESS THAT CAN, THAT JUSTIFIES AGGRAVATION OF THAT SENTENCE THAT IS-- BECAUSE THAT, WHAT'S IN THE FIRST SENTENCE FLOWS INEVITABLY FROM THE JURY'S DETERMINATION, OKAY?

BASED ON THE JURY'S DETERMINATION HERE, WHAT'S GOING TO HAPPEN IS WHAT IT SAYS MANY IN THE FIRST SENTENCE. THAT'S WHAT'S GOING TO HAPPEN. IT'S GOING TO BE A NONSTATE PRISON SANCTION.

AND TO GET, TO NOT HAVE A NONSTATE PRISON SANCTION, SOMETHING ELSE HAS TO HAPPEN. THERE HAS TO BE AT LEAST WHAT THE STATUTE REFERS TO AS WRITTEN FINDINGS BY THE TRIAL COURTS. I'M JUST, I'M HAVING TROUBLE UNDERSTANDING HOW THAT'S NOT SOMETHING THAT'S GOING ABOVE. HOW THAT'S NOT A FINDING THAT GOES ABOVE WHAT WAS AUTHORIZED BY THE VERDICT OF THE JURY.

>> WELL, I THINK IF YOU LOOK AT IT THIS WAY, YOUR HONOR-- WHICH IS THE STATE'S POSITION-- IS THAT YOU HAVE TO START WITH, BASED ON THE VERDICT, THE STATUTORY MAXIMUM THAT THIS DEFENDANT WAS ELIGIBLE FOR, WHICH IS FIVE YEARS.

WE CAN'T--

>> THAT'S NOT WHAT THE STATUTE SAYS THAT JUSTICE CANADY WAS JUST TALKING ABOUT.

>> I UNDERSTAND, YOUR HONOR, BUT YOU HAVE TO START FROM POINT A BEFORE YOU GET TO POINT B--

>> WHETHER THAT'S TRUE IN BLAKELY, POINT A WAS THERE WAS A TEN-YEAR STATUTORY MAX IN BLAKELY.

>> LIKELY THERE'S A SIGNIFICANT DIFFERENCE FROM THIS CASE AND THE DETERMINATION THAT WAS MADE IN THIS PARTICULAR CASE.

IN BLAKELY THE FINDING THAT AGGRAVATED IN THAT CASE, AND IT ESSENTIALLY RECLASSIFIED TO OFFENSE THAT THAT DEFENDANT WAS CONVICTED OF WAS SPECIFICALLY RELATED TO HOW THE OFFENSE WAS COMMITTED.

THE JUDGE MADE SPECIFIC FINDINGS WHICH RECHARACTERIZED THE OFFENSE THAT THE DEFENDANT WAS CONVICTED OF.

THAT HASN'T HAPPENED HERE.

>> SO THE STATUTE IN WASHINGTON SAID IF SOMEONE CONVINCED THIS IS THE RANGE OF SENTENCING UNLESS THE TRIAL JUDGE FINDS EXCEPTIONAL CIRCUMSTANCES.

AND THEN THERE WERE SOME EXAMPLES IN THE STATUTE OF WHAT CONSTITUTED EXCEPTIONAL CIRCUMSTANCES, RIGHT?

>> AND THE CIRCUMSTANCES THAT THE JUDGE FOUND IN THAT CASE SPECIFICALLY RELATED TO COMMISSION OF THE OFFENSE.

AND I'D LIKE THE POINT OUT THE LANGUAGE IN APPRENDI THAT I THINK ILLUSTRATES THE DIFFERENCE.

IN APPRENDI THE SUPREME COURT LOOKED AT THE REQUIREMENTS OF WHY WE HAVE A JURY TRIAL AND WHY HAVE WE HAVE SPECIFIC JURORS, THE JURY MAKES SPECIFIC FINDINGS.

BUT ON PAGE 484 OF THE OPINION,

THEY NOTED THAT, QUOTE, IF A DEFENDANT FACES PUNISHMENT BEYOND THAT PROVIDED BY STATUTE WHEN AN OFFENSE IS COMMITTED UNDER CERTAIN CIRCUMSTANCES BUT NOT OTHERS, IT IS OBVIOUS THAT BOTH THE LOSS OF LIBERTY AND THE STIGMA ATTACHING TO THE OFFENSE ARE HEIGHTENED.

THAT WAS KEY TO APPRENDI, TO BLAKELY AND ALL THE SUBSEQUENT DECISIONS.

>> LET ME ASK YOU THIS.

IT JUST SEEMS TO ME I THOUGHT YOUR ARGUMENT REALLY WAS ONCE THE PERSON WAS CONVICTED, THEY WERE SUBJECT TO THE FIVE-YEAR STATUTE FOR A THIRD-DEGREE FELONY.

SHE WAS CONVICTED OF THE THIRD-DEGREE FELONY.

BUT YOU HAD TO TAKE ANOTHER STEP--

>> CORRECT.

>>-- AFTER THAT CONVICTION TO GET TO POINT OF WHERE 775 WOULD COME IN BECAUSE YOU'D HAVE TO FIGURE OUT THE POINTS.

>> CORRECT.

>> AND SO JUST BY THAT CONVICTION, YOU DON'T HAVE 22 POINTS OR LESS.

AM I MISSING SOMETHING IN YOUR ARGUMENT?

>> NO.

>> SO, SO WHAT IS THE NEXT STEP? THAT'S WHAT I WANT TO KNOW.

>> SO IS WE HAVE A DEFENDANT WHO'S CONVICTED, AS IN THIS CASE, OF A THIRD-DEGREE FELONY. WE START OFF WITH ELIGIBILITY FOR UP TO FIVE YEARS.

THE NEXT STEP BASED ON WHAT THE STATUTE SAYS WE LOOK AT TO OFFENSE TO MAKE SURE THERE'S A QUALIFYING OFFENSE, NOT A CONVICTION OF CHAPTER 810, AND THEN WE SEE-- LOOK AT THE TOTAL SENTENCE POINTS.

AND JUDGE OSTERHAUS IN THE FIRST

DCA OPINION IN HIS CONCURRENCE
MADE A GOOD POINT.
HE SAID IF WE LOOK AT THE SCORE
SHEET AND THE FACTORS CONSIDERED
IN THAT SCORE SHEET TO ESTABLISH
THE STATUTORY MAXIMUM, THEN
WE'RE ACTUALLY DOING OPPOSITE OF
WHAT APPENDI STATES.

>> ISN'T THAT ARGUMENT
COMPLETELY INCONSISTENT, IT
SEEMS, WITH BOOKER?
BECAUSE IN BOOKER THE U.S.
SUPREME COURT WAS LOOKING AT THE
FEDERAL GUIDELINES WHICH WAS A
POINT SYSTEM THAT CONSIDERED ALL
THESE OTHER THINGS.

AND THEY SAID IT CAN'T, IT CAN'T
SET-- IT WAS A MINIMUM SENTENCE
HERE-- YOU CAN'T SET A MINIMUM
SENTENCE BASED ON THESE
SENTENCING FACTORS THAT ARE NOT
DETERMINED BY THE JURY.

THAT SEEMS TO BE, YOUR ARGUMENT
SEEMS INCONSISTENT, TO ME.

>> NOT-- IF YOU LOOK AT THE
STATUTE, AND THERE ARE DIFFERENT
WAYS TO LOOK AT THE STATUTE
BECAUSE, OBVIOUSLY, EVEN THE
DISSENTING OPINIONS AND THE
CONCURRING OPINIONS IN WOODS
HAVE HAD-- LOOKED AT THE
STATUTES DIFFERENTLY.

IF YOU LOOK AT SUBSECTION 10
TOTALLY IN A VACUUM, OBVIOUSLY,
YES.

IF YOU'RE GOING FROM A NONSTATE
PRISON SANCTION TO A THREE-YEAR,
FOUR-YEAR OR FIVE-YEAR PRISON
TERM, OBVIOUSLY THAT WOULD BE AN
INCREASE FROM THAT PARTICULAR
STARTING POINT.

BUT YOU CAN'T LOOK AT THE
STATUTE IN A VACUUM.

YOU HAVE TO LOOK AT IT AS A
WHOLE.

AND IN THAT CASE IT REALLY IS
MORE OF A MITIGATION STATUTE
WHICH GIVES THE TRIAL JUDGE
UNDER SPECIFIC CIRCUMSTANCE THE
DISCRETION TO IMPOSE A SENTENCE

THAT--

>> IT SEEMS LIKE THAT IS A
REWRITING OF WHAT THE
LEGISLATURE'S DONE.

THE LEGISLATURE COULD HAVE DONE
THAT, BUT THEY CHOSE NOT TO DO
IT.

THEY COULD HAVE ALLOWED THE
TRIAL COURT TO MAKE A FINDING
THAT THE OFFENDER DOES NOT
PRESENT A DANGER TO PUBLIC AND
ALLOW A REDUCTION TO A NONSTATE
PRISON SANCTION BASED ON THAT
MODEL.

BUT THAT'S NOT WHAT THEY DID, IS
IT?

>> THEY DID NOT WRITE IT IN THAT
SPECIFIC WAY, BUT AGAIN--

>> WELL, IT'S THE EXACT
OPPOSITE, IT SEEMS TO ME.

>> BUT THE REASONABLE
INTERPRETATION, AND IT IS AN
INTERPRETATION, AND, YOU KNOW,
THIS COURT, I'M SURE, IS WELL
AWARE IF YOU CAN UPHOLD THE
CONSTITUTIONALITY OF A STATUTE
AS LONG AS IT DOESN'T CONFLICT
WITH A FEDERAL OR STATE
CONSTITUTIONS OR--

>> BUT WE HAVE TO UPHOLD THE
CONSTITUTIONALITY OF A STATUTE
THAT THE LEGISLATURE ACTUALLY
WROTE.

>> ABSOLUTELY, YES.

AS LONG AS IT DOESN'T CONFLICT
WITH THE LEGISLATIVE INTENT.
AND THE PROPER READING OF THE
STATUTE, THE STATE'S POSITION,
IS THAT YOU HAVE TO CONSIDER THE
SUBSECTION 3E WHICH ALLOWS FOR
THE STATUTORY MAXIMUM OF UP TO
FIVE YEARS, AND THEN YOU GET TO
POINT B WHICH WOULD BE
SUBSECTION 10.

>> WHEN WAS SUBSECTION 10
ENACTED?

>> THAT WAS ENACTED IN 2009.

>> SO, OKAY.

SO WE GO BACK TO THIS ISSUE
WHICH IS THE LEGISLATURE, YOU'RE

SAYING THE LEGISLATURE INTENDED A TOP SENTENCE BUT THAT THE COURT HAD TO MAKE WRITTEN FINDINGS.

>> THE INTENT OF THE STATUTORY MAXIMUM ALWAYS TO BE FIVE YEARS. THAT NEVER CHANGED.

>> JUST, AGAIN, I GUESS WE GO BACK TO THIS, THAT IT LOOKS LIKE THE PRESUMPTIVE SENTENCE IS NONSTATE IF THEY'RE SCORED AT BELOW THOSE NUMBERS, AND THEN THERE IS THE ADDITIONAL STEP TO INCREASE THE SENTENCE.

AGAIN, MAYBE I'M JUST ECHOING WHAT SOME OF MY COLLEAGUES ARE SAYING.

I DON'T KNOW HOW-- THE LEGISLATURE COULD REWRITE IT TO DO THAT, BUT IT DOESN'T APPEAR THAT'S WHAT THEY DID.

ESPECIALLY IF THE POLICY WAS TO ENCOURAGE NONSTATE SANCTIONS TO TRY TO SHIFT THESE LOW-LEVEL CRIMES, SHIFT THE RESPONSIBILITY TO COUNTIES FOR JAIL AS OPPOSED TO CORRECTIONAL FACILITIES.

>> CORRECT.

BUT ONE OF THE OTHER POLICIES ALSO WAS TO PROVIDE JUDGES THE OPPORTUNITY TO TAKE PUBLIC DANGER WHICH IS A TRADITIONAL FACTOR THAT JUDGES CONSIDER AND TAKE THAT INTO CONSIDERATION IN DETERMINING IF A PARTICULAR DEFENDANT IS NOT APPROPRIATE FOR A NONSTATE PRISON SANCTION.

>> WELL, I GUESS, WHY NOT-- I MEAN, IN THIS CASE, AND MAYBE IT'S DIFFERENT WHEN IT'S ASSAULT, BUT I DON'T KNOW HOW SOMEBODY BEING A SERIAL PETTY THIEF, I MEAN, THAT'S-- ANY CRIME, I GUESS YOU COULD SAY, IS A DANGER BECAUSE IT'S A CRIME. BUT AS FAR AS A DANGER TO THE PEOPLE, HOW-- IT SEEMS TO ME THAT SECTION CONTEMPLATES SOMETHING ELSE ABOUT DANGEROUSNESS WHICH WOULD BE

HARM BEYOND HARM TO A STORE FOR STEALING THINGS.

AND SO MAYBE THIS CASE, YOU KNOW, MAYBE IT WOULD HAVE BEEN BETTER IF THIS WAS AN ASSAULT CASE, BUT THESE PETTY THEFT CASES SEEM LIKE YOU WOULD HAVE TO REALLY FIND SOME ADDITIONAL EVIDENCE IN ORDER TO ENHANCE THE SENTENCE.

>> WELL, THE WAY THE STATUTE IS WRITTEN, THE LEGISLATURE CLEARLY WROTE IT AS, QUOTE, COULD PRESENT A DANGER TO PUBLIC. THEY DIDN'T PUT LIMITATIONS ON THE DEFINITION OF DANGER. SO THAT INDICATES THAT THE LEGISLATURE CONTEMPLATED THAT JUDGES COULD CONSIDER VARIOUS ACTIONS OR FACTORS IN DETERMINING DANGER.

BUT IN THIS SPECIFIC CASE AS AN EXAMPLE, YES, THIS DEFENDANT WAS CONVICTED OF PETTY THEFT WITH TWO PRIOR CONVICTIONS, AND IN THE WRITTEN ORDER THE JUDGE WROTE AFTER THE FILING OF THE 3800B MOTION, THE JUDGE SPECIFICALLY FOUND THAT A NONSTATE PRISON SANCTION WOULD NOT DETER THIS DEFENDANT FROM COMMITTING ANOTHER THEFT. AND HE LOOKED AT SPECIFICALLY THE FACT THAT THIS PARTICULAR CRIME IN THE CASE WAS COMMITTED IN OCTOBER OF 2015.

SHE HAD A PRIOR CONVICTION IN FEBRUARY OF 2015 FOR THEFT, AND THEN SHE HAD ANOTHER CONVICTION THE FOLLOWING MONTH FOR THEFT AGAIN.

AND HERE WE ARE AGAIN A FEW MONTHS LATER AND YET ANOTHER THEFT.

>> IT JUST SEEMS TO ME THAT A JURY HEARING THIS AND HEARING WHAT SHE WAS GOING THROUGH AND CLEARLY, YOU KNOW, SHE HAD A FATHER WHO, YOU KNOW, AGAIN-- THERE WERE CONTESTED ISSUES AS

WELL ABOUT WHETHER SHE HAD A SICK IS FATHER.

I MEAN, SHE'S GOING ALONG-- WAS SHE HOMELESS AT THE TIME?

>> THAT IS NOT CLEAR IN THE RECORD, YOUR HONOR.

>> RIGHT.

BUT IF IT'S PRESENTED TO A JURY, THERE'S A LOT TO ARGUE IN THIS CASE.

>> WELL, WE'RE SPECULATING AS TO WHAT THE BACKGROUND FACTOR WAS. AND AS JUSTICE CANADY NOTED, WE'RE NOT SURE IF THERE IS A PSI, SO WE DON'T KNOW WHAT TYPE OF BACKGROUND THIS--

>> A JUDGE WILL LIKE AT IN THAT THERE ARE REAL ISSUES OF FACT THAT A JURY COULD DETERMINE AND SHOULD DETERMINE IF THEY'RE GOING TO BE GIVEN A STATE PRISON SENTENCE WHEN THEY DON'T SCORE FOR A STATE PRISON SENTENCE.

>> I THINK IN THIS CASE, OBVIOUSLY, BECAUSE THIS DEFENDANT IS NO LONGER INCARCERATED IN OUR HARMLESS ERROR AN DECISION-- WHICH IS WHAT I THINK YOU'RE TRYING TO GET TO, YOUR HONOR-- LET'S ASSUME SHE WAS STILL

INCARCERATED, I THINK A REASONABLE JURY COULD INFER THE CRIMINAL HISTORY THAT THE COURT CITED WHICH DATED BACK TO 2004, THE FACT THAT THESE THEFTS OCCURRED IN SUCH A SHORT PERIOD OF TIME AND THE DEFENDANT DID NOT LEARN FROM THE TWO PRIOR CONVICTIONS FOR THEFT--

>> HOW DO WE DO HARM-- ISN'T IT THE BURDEN ON THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT NO REASONABLE JURY WOULD HAVE CONCLUDED OTHERWISE?

>> CORRECT.

AND LOOKING BACK, AGAIN, AT THE CRIMINAL HISTORY, THE THREE THEFTS THAT OCCURRED WITHIN THIS TIME FRAME, THE FACT THAT THIS

DEFENDANT WAS NOT DETERRED AND COMMITTED YET ANOTHER THEFT, WE THINK THAT A REASONABLE JURY-- IF THEY WERE SUBMITTED WITH THIS-- WOULD CONCLUDE THAT THIS DEFENDANT WILL NOT LEARN FROM A NONSTATE PRISON SANCTION.

BUT, JUDGE, YOU ALLUDED-- OR JUSTICE, RATHER, YOU ALLUDED TO COSTS TO SOCIETY.

AND THEFT DOES HAVE A COST TO SOCIETY--

>> OH, NO, I'M NOT SAYING THAT THEFT IS A-- THERE'S NO CRIME THAT'S A GOOD CRIME, OKAY?

I JUST, LOOKING AT WHETHER A DANGER IN DIFFERENT THAN, I MEAN, AND IT USED TO BE WITH DEPARTURE SENTENCE, YOU KNOW, AN ESCALATING PATTERN OF CRIMINAL ACTIVITY.

THERE ARE ALL SORTS OF THINGS THAT COULD ALLOW FOR AN INCREASED SENTENCE.

DANGER, TO ME, IS NOT THE SAME THING AS SAYING THAT THERE IS A POTENTIAL.

AGAIN, JUST-- A PERSON WHO HAS A MENTAL ILLNESS, WHO'S MAYBE HOMELESS, THAT'S NOT, TO ME, THE KIND OF DANGER.

AND THAT'S WHY, AGAIN, I THINK THIS JURY MIGHT HAVE-- I DON'T THINK YOU CAN SAY IT'S HARMLESS IF WE WERE TO REACH THAT, THAT'S ALL.

MAYBE WE'RE JUST LOOKING AT DANGER DIFFERENTLY.

>> I WANT TO FOCUS BACK ON YOUR EARLIER STATEMENT THAT THE LEGISLATURE OBVIOUSLY INTENDED THE STATUTORY MAXIMUM PENALTY TO REMAIN FIVE YEARS AND GIVE YOU AN OPPORTUNITY TO ADDRESS THE LANGUAGE IN BLAKELY SAYING THAT THE STATUTORY MAXIMUM FOR APPRENDI PURPOSES IS THE MAXIMUM SENTENCE THAT A JUDGE MAY IMPOSE SOLELY ON THE BASIS OF THE FACTS REFLECTED IN THE JURY'S VERDICT

OR ADMITTED BY THE DEFENDANT.
BECAUSE IT JUST, IT SEEMS PRETTY
CLEAR THE WAY THAT THE STATUTE
THAT WE'RE TALKING ABOUT IS
DRAFTED, THAT THE MAXIMUM
SENTENCE THE JUDGE MAY IMPOSE
ABSENT A FINDING OF
DANGEROUSNESS IS A YEAR IN THE
COUNTY JAIL.

IS THAT CORRECT?

>> WELL, IF YOU LOOK AT IT THAT
WAY, YOUR HONOR, IT WOULD STILL
BE THE STATE'S POSITION THAT
THERE IS NO CONSTITUTIONAL ISSUE
BECAUSE THE FINDING OF DANGER
PARTICULARLY TO HOW IT WAS MADE
IN THIS CASE DID NOT VIOLATE THE
SIXTH AMENDMENT.

IT'S A FINDING THAT--

>> BUT THE JURY DIDN'T MAKE A
FINDING OF DANGEROUSNESS.

>> THEY DID NOT MAKE THAT
SPECIFIC FINDING, BUT THE TRIAL
COURT'S--

>> WAS THE FINDING OF
DANGEROUSNESS NECESSARY UNDER
FLORIDA LAW IN ORDER TO HAVE A
SENTENCE OVER A YEAR IN THE
COUNTY JAIL?

>> IF YOU GET TO THIS SUBSECTION
AFTER SUBPOINT A, IF YOU GET TO
SUBSECTION 10, YES.

THE LEGISLATURE STIPULATED THAT
A FINDING OF PUBLIC DANGER HAD
TO BE MADE--

>> SO THE MAXIMUM SENTENCE IN
THIS CASE ABSENT A FINDING OF
DANGEROUSNESS WAS A YEAR IN THE
COUNTY JAIL.

>> IF THE DEFENDANT QUALIFIES
UNDER SUBSECTION 10, YES.

>> WHICH SHE DID.

>> WHICH SHE DID, CORRECT.

>> OKAY.

SO FOR APPRENDI PURPOSES, WHY
ISN'T A YEAR THE MAXIMUM
SENTENCE?

UNDER BLAKELY, I MEAN, JUST
READING IT.

>> RIGHT.

WELL, TWO POINTS I WOULD MAKE.
NUMBER ONE, AS I ARGUED EARLIER,
I THINK YOU REALLY DO NEED TO
CONSIDER SUBSECTION 3E WHICH IS
THE STARTING POINT, THE
STATUTORY MAXIMUM.

BUT THE OTHER POINT WOULD BE,
AND I APOLOGIZE, I CAN'T RECALL
WHICH SPECIFIC U.S. SUPREME
COURT CASE DISCUSSED THIS, BUT
THERE WAS A DISCUSSION THAT THE
STATUTORY MAXIMUM THAT THEY
LOOKED AT, THE RELEVANT
STATUTORY MAXIMUM REALLY HAD
MORE TO DO WITH WHETHER THE
COURT WAS CONSIDERING OTHER
FACTORS THAT ENHANCED HOW THAT
CRIME WAS COMMITTED IS AND,
THEREFORE, ENHANCED THE
DEFENDANT'S POTENTIAL EXPOSURE
TO CRIME.

ESSENTIALLY, WHERE THE STATUTE
RECLASSIFIED THE OFFENSE FROM,
FOR EXAMPLE, A SECOND-DEGREE
FELONY IN BLAKELY AND TURNED IT
INTO A FIRST-DEGREE FELONY.
AND IT WAS A DEFENSE THE
DEFENDANT COULDN'T HAVE
CONTEMPLATED BECAUSE HE WASN'T
CHARGED WITH A SECOND-DEGREE
FELONY.

THIS DEFENDANT ALWAYS KNEW THAT
A CONVICTION FOR THIRD-DEGREE
FELONY SUBJECTED HER TO A
STATUTORY MAXIMUM OF THREE
YEARS, AND IT WAS ONLY BY
QUALIFYING--

>> WELL, I MEAN, IF SHE HAD PLED
TO THIS, WOULDN'T SHE KNOW THAT
ABSENT A FINDING OF
DANGEROUSNESS, ALL SHE COULD
FACE WAS A YEAR IN THE COUNTY
JAIL?

>> EVEN KNOWING THAT I'M NOT
SURE-- I DON'T THINK THERE'S
ANY EVIDENCE IN THE RECORD THAT
THIS PARTICULAR DEFENDANT
BELIEVED THAT THAT WAS A
STATUTORY MAXIMUM VERSUS THE
MAXIMUM IF SHE QUALIFIED UNDER

THE STATUTE.

>> THE APPRENDI ANALYSIS DOESN'T
DEPEND ON THE SUBJECTIVE
APPRAISAL--

>> CORRECT.

>>-- OF THE PARTICULAR
DEFENDANT, DOES IT?

>> NO, IT DOES NOT.

BUT IN THIS CASE WE REALLY NEED
TO LOOK AT THE ENTIRE STRUCTURE
AND READ BOTH SUBSECTIONS
TOGETHER BEFORE-- BUT THE
BOTTOM LINE IS IF YOU JUST LOOK
AT SUBSECTION 10, IT'S NOT
PROVIDING THE BIG PICTURE.
SUBSECTION 10 IS A PART OF
APPLICATION OF THE ORIGINAL
STATUTE--

>> WOULDN'T THE DEFENDANT KNOW
OR WOULDN'T THE COURT KNOW THAT
THIS DEFENDANT SCORED, THE SCORE
WAS 22 POINTS LOWER?

IS THAT DONE BEFORE THE TRIAL OR
AT THE CONCLUSION OF THE TRIAL?

>> I BELIEVE, IF I RECALL
CORRECTLY, IT WAS AT THE
SENTENCING HEARING WHERE THE
SCORE SHEET WAS DONE.

AND I BELIEVE THERE HAD TO BE
SOME CORRECTIONS MADE TO SCORE
SHEET, AND THAT'S WHEN THEY
REALIZED THE SENTENCING POINT
WAS 16--

>> SO AT THE TIME OF TRIAL, THIS
WAS A THIRD-DEGREE FELONY.

>> CORRECT, CORRECT.

>> AND ONLY WHEN WE GET TO POINT
WHERE THERE WAS SENTENCING AND A
SCORE SHEET WAS ACTUALLY DONE
AND THE NUMBER OF POINTS A
APPLICABLE TO THIS PARTICULAR
DEFENDANT WAS DETERMINED DO WE
GET TO SUBSECTION 10.

>> CORRECT.

AND IF I-- I KNOW I'M RUNNING
OUT OF TIME.

IF I MAY QUICKLY ADD, YOUR
HONOR, AND THAT GOES TO WHOLE,
THE IDEA OF NOTICE TO A
DEFENDANT.

THE DEFENDANT HAD NOTICED THAT THE MAXIMUM WAS THREE YEARS. SO THERE WAS NO DUE PROCESS IMPLICATIONS UNDER THE FOURTH AMENDMENT OF ANY KIND OF NOTICE FOR THIS PARTICULAR CASE.

TO SUMMARIZE, THIS IS NOT AN ENHANCEMENT STATUTE.

THE STATUTE, IF YOU LOOK AT BOTH SUBSECTIONS, WORKS TO MITIGATE A DEFENDANT'S EXPOSURE, POTENTIAL EXPOSURE FOR A THIRD-DEGREE FELONY, WE WOULD ASK THAT THIS DOES NOT AND AFFIRM THE FIFTH DCA.

THANK YOU.

>> JUST A FEW POINTS.

I THINK THE ARGUMENT THAT FIVE YEARS PRISON IS ON THE TABLE FOR MS. BROWN, THE BEST WAY TO SHOW THAT IT WASN'T IS THAT IF THE TRIAL JUDGE HERE IMPOSED A THREE-YEAR PRISON SENTENCE WITHOUT MAKING THE ADDITIONAL FINDINGS, HE'D BE REVERSED.

SO IT WASN'T ON THE TABLE. THAT WASN'T AN AVAILABLE OPTION.

ALSO THE STATUTE DOESN'T REFERENCE ANYTHING WITH 3E--

>> THE SAME PRINCIPLE, ALTHOUGH APPRENDI WOULD NOT BE INVOLVED, WOULD APPLY IF THE JUDGE WANTED TO GO BENEATH THE RECOMMENDED SENTENCING GUIDELINES, WOULDN'T IT?

JUSTIFY GOING BENEATH WHAT THE GUIDELINES CALL FOR.

>> CORRECT.

>> AND THAT WOULD NOT BE, OBVIOUSLY, A VIOLATION--

>> NOT UNDER APPRENDI, BUT IT'S THE SAME PROCESS THAT TAKES PLACE.

>> CORRECT.

>> THE JUDGE HAS TO WRITE WRITTEN IMPACT IN MOST SENTENCING ORDERS.

>> CORRECT, YES.

>> THERE ARE A NUMBER OF FACTORS THAT JUSTIFIES A COURT GOING

BENEATH THE GUIDELINES, AND
NOWADAYS ALL THE JUDGE HAS TO DO
IS CHECK TWO OR THREE OF THOSE.

>> CORRECT, YES.

>> AND THOSE ARE THE WRITTEN
FINDINGS.

THERE HAS TO BE SOMETHING IN
WRITING TO JUSTIFY A JUDGE
GOING--

>> CORRECT.

YES, AND THAT'S OBVIOUSLY THE
SIXTH AMENDMENT DOESN'T, YOU
KNOW, PROHIBIT--

>> SO HERE, SO HERE ONCE THE
DEFENDANT WAS CONVICTED, THE
SENTENCING HEARING IS CONVENED,
THE SCORE SHEET DEVELOPED, WE
SEE THAT THE DEFENDANT IS LESS
THAN THE 22 POINTS.

AND SO WHAT IN PRACTICAL TERMS
SHOULD HAVE HAPPENED AT THAT
POINT?

WHAT ARE YOU SAYING THE JUDGE
SHOULD HAVE DONE AT THAT POINT?
ASSUMING THE JUDGE WAS NOT GOING
TO GIVE HER THE NONSTATE--

>> NONSTATE, RIGHT.

>>-- SANCTION CALLED FOR UNDER
775, WHAT SHOULD HAVE HAPPENED
BEFORE THAT POINT?

>> WELL, EVEN BEFORE THAT THE
PROSECUTOR COULD HAVE USED A
SPECIAL INTERROGATORY OR A
SPECIAL VERDICT FORM TO HAVE THE
JURY DETERMINE WHETHER THE
PERSON WAS A DANGER TO PUBLIC OR
IF THEY WANTED TO PRESENT
ADDITIONAL--

>> WELL, I ASSUME THE PROSECUTOR
WOULD HAVE THEN HAD SOME NOTION
THAT THIS PERSON WAS GOING TO
SCORE--

>> RIGHT.

>>-- 22 POINTS OR LESS.

>> RIGHT.

>> OKAY.

>> AND IF THEY DIDN'T DO THAT,
WHICH THEY OBVIOUSLY DIDN'T
HERE, THEN, YOU KNOW, THE JUDGE
WOULD HAVE TO HAVE EITHER THE

SAME JURY MAKE THAT DETERMINATION OR IF IT WAS A PLEA, YOU KNOW, IMPANEL A JURY SPECIFICALLY TO MAKE THE FINDING.

>> HOPEFULLY WITH A PLEA, IT'S CONTEMPLATED.

>> RIGHT, RIGHT.

>> I MEAN, IF THE STATE IS GOING TO SEEK ABOUT WHAT THE JURY WOULD HAVE FOUND--

>> CORRECT.

>> I THINK, GOING BACK TO JUSTICE LAWSON AS YOUR OPPONENT, I DON'T THINK THERE WAS ANYTHING BETTER THAN THE STATEMENT BLAKELY V. WASHINGTON THAT, YOU KNOW, PAGE 503 THAT THE ONLY, THE SENTENCE IS THE ONE THAT CAN BE IMPOSED BASED ON WHAT THE JURY FINDS.

>> RIGHT.

>> AND THERE'S NO QUESTION HERE THAT THAT WAS-- WHAT WAS ACTUALLY, I MEAN, IT'S A JURY ISSUE.

WHAT WAS, I DON'T KNOW IF OUR RECORD HAS IT, WHAT'S THE, WHAT WAS THE EVIDENCE THAT YOU STOLE? WHAT WAS THE DEFENSE?

>> RIGHT.

THERE WERE VERY FEW WITNESSES. I THINK IT WAS JUST THE LOSS PREVENTION OFFICER, MAYBE A VIDEO--

>> AND WHAT WAS HER DEFENSE? WHAT DID SHE PRESENT AS A DEFENSE?

>> THERE WASN'T MUCH.

IT WAS ON VIDEO SO, YOU KNOW, IT WAS A PRETTY SHORT TRIAL.

>> AND THE JURY, THE FINDING OF THE JURY WAS SHE STOLE THESE ITEMS.

>> CORRECT.

>> NO ISSUE ABOUT WHAT SHE HAD DONE BEFORE.

>> CORRECT.

>> NOTHING.

DID SHE TAKE THE STAND?

>> SHE DID NOT, TO MY KNOWLEDGE.
>> AND SO SHE WAS CONVICTED OF A
THIRD-DEGREE FELONY--
>> CORRECT.
>> AND SO THAT JURY VERDICT
ALONE WOULD HAVE SUBJECTED HER
TO FIVE YEARS.
JUST THAT VERDICT.
WE HAVEN'T GOT INTO A SCORE
SHEET YET--
>> IGNORING THE STATUTE, YES.
YES.
>>-- WOULD HAVE SUBJECTED HER
TO FIVE YEARS.
SO SOMETHING HAD TO, ELSE HAD TO
BE DONE IN ORDER TO HAVE
SUBSECTION 10 COME INTO PLAY,
CORRECT?
>> CORRECT.
>> OKAY.
WHICH WAS THE DEVELOPMENT OF THE
SCORE SHEET--
>> CORRECT.
>>-- AND SO I'M JUST TRYING TO
FIGURE OUT HERE IF BLAKELY AND
APPRENDI AND ALL THOSE TALK
ABOUT THE ONLY SENTENCE THAT YOU
COULD HAVE BEEN IMPOSED BASED
SOLELY ON THE JURY VERDICT IN
THIS CASE WOULD HAVE BEEN THE
FIVE YEARS.
>> PRISON?
>> THE FIVE-YEAR-- THAT'S THE
MAXIMUM SENTENCE FOR THE
THIRD-DEGREE FELONY, RIGHT?
AND WITHOUT ANYTHING MORE,
THAT'S THE SENTENCE THAT COULD
HAVE BEEN IMPOSED.
>> YOU'RE SAYING PRISON THOUGH.
FIVE--
>> FIVE YEARS IN PRISON.
>> FIVE YEARS' DURATION--
>> FIVE YEARS, YES.
>> FIVE YEARS' DURATION IS ON
THE TABLE BUT PRISON IS NOT.
THAT REQUIRES THE ADDITIONAL
FINDING UNDER THE STATUTE.
SO THE TRIAL COURT--
>> SO WAIT A MINUTE.
SO-- I'M SORRY.

IF YOU'RE CONVICTED OF A
THIRD-DEGREE FELONY, FIVE YEARS
PRISON IS NOT ON THE TABLE?

>> NOT FOR MS. BROWN.

>> NO, NO.

I'M TALKING ABOUT A THIRD-DEGREE
FELONY, THE MAXIMUM SENTENCE IS
FIVE YEARS.

>> FOR A THIRD-DEGREE FELONY,
YES.

>> AND THAT'S WHAT SHE WAS
CONVICTED OF, A THIRD-DEGREE
FELONY.

>> CORRECT.

>> OKAY.

>> ADHERENCE TO GUIDELINES,
RECOMMENDED SENTENCES IS
MANDATORY UNLESS THE JUDGE CAN
FIND A REASON NOT TO EXCEED OR
GO BENEATH, AM I CORRECT?

>> CORRECT.

YEAH, THE FIRST SENTENCE SAYS--

>> DESPITE THE FACT THE STATUTE
CALLS FOR A FIVE-YEAR SENTENCE,
THE JUDGE CANNOT GIVE A
FIVE-YEAR SENTENCE UNLESS
THERE'S A REASON TO EXCEED THE
RECOMMENDED SENTENCE BY THE
GUIDELINES.

>> CORRECT.

>> AND ONCE THERE IS A REASON TO
EXCEED BE THE GUIDELINES, THE
JUDGE CAN SENTENCE ALL THE WAY
UP TO FIVE IF HE WANTS TO.

>> THAT'S CORRECT.

>> BY STATUTE DOES THAT MEAN THE
SENTENCE TO BE IMPOSED IS
ALREADY SCHEDULED AND SET?

>> RIGHT, YES.

AND I WOULD JUST LIKE TO NOTE
TOO, I KNOW THE STATE'S IN A
DIFFICULT POSITION HERE, BUT,
YOU KNOW, IN TRYING TO DEFEND
THE DECISION OF THE FIFTH
DISTRICT COURT OF APPEAL, BUT
THE ATTORNEY GENERAL IN THE
FIRST DISTRICT COURT OF APPEAL
DID CONCEDE THAT APPRENDI AND
BLAKELY APPLIED TO SAME FACTS OF
THIS CASE.

I KNOW, AGAIN, IT'S A DIFFICULT POSITION TO DEFEND, BUT WE THINK IT'S PRETTY CLEAR HERE THAT APPRENDI AND BLAKELY APPLIED, AND WE JUST ASK THAT YOU REVERSE THE DECISION OF THE FIFTH. IF THERE'S NO FURTHER QUESTIONS, THANK YOU.

>> ALL RIGHT.

WE THANK YOU BOTH FOR YOUR ARGUMENTS.

THE COURT WILL NOW STAND IN RECESS FOR ABOUT TEN MINUTES.

>> ALL RISE.