

>> ALL RISE.

HEAR YE, HEAR YE, HEAR YE, THE  
SUPREME COURT OF FLORIDA IS NOW  
IN SESSION, ALL WHO HAVE CAUSE  
TO PLEAD, DRAW NEAR, GIVE  
ATTENTION AND YOU SHALL BE  
HEARD.

GOD SAVE THESE UNITED STATES,  
THE GREAT STATE OF FLORIDA, AND  
THIS HONORABLE COURT.

LADIES AND GENTLEMEN, THE  
SUPREME COURT OF FLORIDA,  
PLEASE BE SEATED.

GOOD MORNING AND WELCOME TO THE  
FLORIDA SUPREME COURT.

WE TURN TO THE FIRST CASE ON  
TODAY'S DOCKET WHICH IS SHINE  
VERSUS THE STATE OF FLORIDA.

>> MISTER CHIEF JUSTICE AND MAY  
IT PLEASE THE COURT.

ONE OF THE GUIDING PRINCIPLES  
OF SENTENCING UNDER THE  
CRIMINAL PUNISHMENT CODE IS THE  
BROAD DISCRETION IN VIEW OF  
CIRCUIT JUDGES TO HOPEFULLY  
REACH THE RIGHT OUTCOME IN EACH  
CASE BUT IN TWO WAYS THE THIRD  
DISTRICT DECISION CURTAILED  
THAT DISCRETION.

FIRST, THE SENTENCING COURT  
LOOKING AT THE TOTALITY OF  
CIRCUMSTANCES CONCLUDED THAT  
THE VERY SAME CONCERNS WERE  
DRUG REHABILITATION THAT  
ANIMATED THE DOWNWARD DEPARTURE  
WERE STILL PRESENT LATER AND  
WARRANTED A SECOND DEPARTURE.  
ON YOUR DECISION IN FRANKIE'S  
THAT WAS A VALID EXERCISE OF  
DISCRETION AND WITHOUT CITING  
THAT OPINION THE THIRD DISTRICT  
REVERSED THE DEPARTURE.

>> IN FRANKIE, DIDN'T WE SAY  
THE JUDGE HAD TO SAY SOMETHING  
MORE THAN JUST THE FACT THAT  
THAT WAS THE DOWNWARD  
DEPARTURE?

>> YES.

>> WHAT MORE CAN A JUDGE SAY?

>> IN THIS PARTICULAR CASE THE

JUDGE NOT ONLY POINTED TO THE FACT OF THE ORIGINAL DEPARTURE. HE THEN ASSESSED THE TOTALITY OF THE CIRCUMSTANCES IN WRITING AND WROTE THAT THE NEW DEPARTURE WOULD ADDRESS MY CLIENT'S DEMONSTRATED NEED FOR DRUG REHABILITATION, THERE WOULD NOT ONLY BE A LENGTHY PERIOD OF INCARCERATION BUT ALSO RESIDENTIAL INPATIENT TREATMENT.

>> IF THE ORIGINAL OFFENSE WAS A DRUG-RELATED ISSUE, THEN I CAN SEE WHERE A JUDGE COULD SAY THE VIOLATION IN YOUR CASE INVOLVED HIM TESTING POSITIVE TO SOME CANNABIS PRODUCT.

I CAN SEE A JUDGE SAYING LET'S CONTINUE WITH THAT BECAUSE WE ARE TALKING ABOUT LONG-TERM TREATMENT FOR THAT TYPE OF THING BUT WHAT HAPPENS IF THE ORIGINAL OFFENSE WAS NON-DRUG-RELATED.

SAY IT WAS A ROBBERY AND TESTED POSITIVE FOR SOMETHING.

HOW IS THAT IN LINE WITH THE ORIGINAL THOUGHT OF THAT DEPARTURE?

>> I CAN TELL YOU WHAT MOTIVATED THE PARTIES TO REACH THE ORIGINAL PLEA AGREEMENT WAS CONCERN OF MY CLIENT'S DRUG REHABILITATION WHICH IS WHY THEY AGREED TO 6 MONTHS JAIL FOLLOWED BY 3 OF DRUG OFFENDER PROBATION.

THAT WAS THEIR AGREEMENT AND WHEN MY CLIENT VIOLATES BY TESTING POSITIVE FOR DRUGS IT IS IN THE SENTENCING JUDGE'S DISCRETION TO LOOK BACK AT THAT AND SAY I STILL BELIEVE HERE IS HOW WE ARE GOING TO FIX THE PROBLEM AND ADDRESS IT GOING FORWARD AND EFFECTIVELY WHAT THE JUDGE DID WAS REALIZE THE PATH TO RECOVERY FOR RECOVERING DRUG ADDICTS IS NOT GENERALLY

LINEAR.

IT IS A BUMPY ROAD OFTENTIMES  
SO WHAT THE JUDGE DID WAS  
REASSESS THE FACTS OF THE CASE,  
UPDATED HIS DISCRETIONARY  
CALCULUS AND CONCLUDED THE  
ORIGINAL CONCERNS WERE PRESENT  
AND ANOTHER DEPARTURE WAS  
WARRANTED AND THAT IS  
APPROPRIATE UNDER THE FRAMEWORK  
YOU LAID OUT IN BANKS WHICH  
SAYS AS SOON AS UNDERSTAND ONE  
THE JUDGE REACHES THE VALID  
MITIGATING FACTOR IN THE FACT  
OF PRIOR DEPARTURE COUNTS UNDER  
STEP ONE.

IT GOES TO STEP TWO WHICH  
POINT IT IS DOING AND IN RANGE  
SENTENCING CALCULUS THAT LOOKS  
AT THE TOTALITY OF  
CIRCUMSTANCES AND HAS TO MAKE A  
DECISION ABOUT WHAT IS THE BEST  
SENTENCING OUTCOME GIVEN THIS  
PARTICULAR SET OF FACTS AND  
THAT IS WHAT YOU HAVE HERE.  
WE NOT ONLY RELY ON YOUR  
DECISION IN FRANKIE BUT THERE  
IS A TEXTUAL BASIS FOR THE  
OUTCOME YOU REACHED IN  
FRANKIE'S AND THAT IS TWO FOLD.  
MOST SIGNIFICANTLY THE TEXT OF  
THE PROBATION REVOCATION  
STATUTE 938.06 SUBSECTION TWO BE  
INDICATES IF A JUDGE REVOKES  
PROBATION, HE IS AUTHORIZED TO  
IMPOSE, QUOTE, ANY SENTENCE  
WHICH HE MIGHT ORIGINALLY HAVE  
IMPOSED.

BECAUSE OF THE TIME OF THE  
ORIGINAL DEPARTURE, A DEPARTURE  
WAS AN AVAILABLE SENTENCE AT  
THE TIME OF REVOCATION, THAT  
WAS STILL AVAILABLE TO HIM.  
HE HAD TO EXERCISE HIS  
DISCRETION.

>> THE PROBLEM WITH THAT IS IT  
SEEMS IF THERE HAS BEEN A  
CHANGE IN THE CIRCUMSTANCES,  
I'M HAVING TROUBLE  
UNDERSTANDING HOW SOMETHING THE

STATE AGREED TO IS STILL  
SOMETHING THAT WOULD FALL  
WITHIN THE SCOPE OF THAT.  
PREDICATED ON THE STATE'S  
AGREEMENT.

>> I THINK THAT IS RIGHT.

>> LIKE AMBER, ALWAYS AND  
FOREVER AVAILABLE NO MATTER  
WHAT HAPPENS SUBSEQUENTLY.

>> IF YOU LOOK AT THE TEXT OF  
921.00620 A WHICH IS THE  
MITIGATING FACTOR FOR UNCOERCED  
PLEA-BARGAIN'S IT DOESN'T SAY  
THAT IS A MITIGATING FACTOR  
UNTIL THE POINT THE DEFENDANT  
VIOLATES PROBATION.

IT SAYS THE FACT OF THE PLEA IS  
A VALID MITIGATING FACTOR AND  
WE ARE NOT THANK MY CLIENT WAS  
AUTOMATICALLY ENTITLED TO  
DOWNWARD DEPARTURE.

WHAT WE ARE SAYING IS UNDER  
STEP ONE OF THE BANK'S  
FRAMEWORK THE FACT OF THE PRIOR  
DEPARTURE OPENED THE DOOR AND  
EVERYTHING ELSE WAS THE JUDGE'S  
DISCRETION.

>> HOW DO WE KNOW WHAT PART OF  
THE JUDGE'S COMMENTS WITH  
RESPECT TO THE SENTENCING AND  
WHAT FALLS WITHIN STEP 2?

>> I DON'T THINK IT IS CLEAR.  
IN THIS CASE BASED ON THE  
STRUCTURE AND TEXT OF THE  
DOWNWARD DEPARTURE ORDER THE  
JUDGE IDENTIFIES WHAT HE CALLS  
NONSTATUTORY MITIGATE OR AND  
POINTS TO THE FACT OF THE PRIOR  
DEPARTURE AND IN THE REST OF  
THE PARAGRAPH APPEARS TO DO A  
MORE TRADITIONAL IN RANGE  
SENTENCING CALCULUS GOING  
THROUGH TO TELL YOU WHY HE  
BELIEVES THE PRIOR DEPARTURE  
WARRANTS THE NEW DEPARTURE SO I  
DON'T THINK YOU HAVE THAT IN  
THIS CASE, THAT IS WHAT  
FRANKIE'S TELLS THE JUDGE TO  
DO.

HE DIDN'T JUST LOOK AT THE

PRIOR DEPARTURE AND  
AUTOMATICALLY GRANT A NEW ONE.  
HE UPDATED THE CALCULUS AND  
TREATED THE CASE A NEW TO HAVE  
A LOOK AT THE TOTALITY OF  
CIRCUMSTANCES AND THAT IS WHAT  
WE WANT OUR SENTENCING JUDGES  
TO DO, TO LOOK AT THE POSITION  
HE IS CURRENTLY IN WHEN MAKING  
THAT DECISION.

>> IF THE JUDGE FOUND THAT YOU  
PROVED THE VIOLATION BUT I  
ELECTED TO CONTINUE PROBATION I  
AM NOT GOING TO REVOKE.  
THE PROBATION WOULD HAVE  
CONTINUED.

THERE WOULD BE NO REQUIREMENT  
NO MATTER WHAT THE LAW WAS TO  
DO ANYTHING THEN.

IT WOULD BE ODD THAT PROBATION  
IS A MATTER OF GRACE OF THE  
COURT TO SAY THE JUDGE COULD  
CONTINUE THE PRIOR SENTENCE OR  
COULD DO 6 PLUS YEARS IN PRISON  
BUT DOESN'T HAVE THE  
FLEXIBILITY TO DEAL WITH THE  
DEFENDANT CONSISTENT WITH THE  
THEORIES OF PROBATION.

>> I AGREE.

IT WOULD BE ANOMALOUS TO SAY HE  
COULD CONTINUE PROBATION BUT  
NOT DO A DOWNWARD DEPARTURE.  
IT WOULD BE A VERY ODD OUTCOME.  
TO THE STATE'S AGREEMENT  
INSIGNIFICANT OF THE STATE'S  
AGREEMENT, I THINK THERE ARE  
TWO BARGAINS STRUCK BY MY  
CLIENT.

THE FIRST WAS THE ORIGINAL  
DOWNWARD DEPARTURE.

MY CLIENT'S CONSIDERATION HE  
OFFERED TO THE STATE WAS A  
GUILTY PLEA AND HE KEPT THAT  
PART OF THE BARGAIN.

THE STATE CONSIDERATION WAS TO  
WAVE THE BOTTOM OF THE  
GUIDELINES AND RECOMMEND A  
DEPARTURE SENTENCE AND THEY DID  
THAT.

HE HASN'T VIOLATED THAT IN ANY

WAY.

WHAT HE DID WAS VIOLATED THE SECOND BARGAIN BETWEEN HIMSELF AND THE COURT.

WHEN THE COURT PUT HIM ON PROBATION IT WAS TELLING HIM YOU ARE NOT GOING TO GET A PRISON SENTENCE AND IN EXCHANGE YOU MUST ABIDE BY THE TERMS OF PROBATION.

HE DIDN'T DO THAT BUT THAT MEANS IT WAS UP TO THE JUDGE AT REVOCATION TO DECIDE WHAT HIS FATE WOULD BE AND THAT IS WHAT THIS JUDGE DID.

IF THERE ARE NO OTHER QUESTIONS.

>> I HAVE ONE QUESTION.

AS A MATTER OF STATUTORY CONSTRUCTION IT SEEMED FRANKIE'S SEEMED ODD TO ME BECAUSE IT SEEMS THE STATUTE SAYS THIS IS A VALID BASIS FOR DEPARTURE BUT IT DOESN'T -- YOU COULD READ IT TO MEAN IF THERE IS ORIGINAL DEPARTURE BASED ON A PLEA THAT IS THE BASIS FOR DEPARTURE ON PROBATION, YOU COULD READ IT AS SAYING NO. IT IS NOT PARTICULARLY CLEAR ON THE ISSUES WE ARE TALKING ABOUT BUT IT WOULD SEEM THAT IF THE STATUTE MEANT THE BASIS, THE ORIGINAL PLEA TO A DOWNWARD DEPARTURE JUSTIFIED A DEPARTURE ON A VIOLATION OF PROBATION THAT THAT WOULD ALWAYS BE THE CASE.

AS A MATTER OF STATUTORY CONSTRUCTION EITHER IT IS OR IT ISN'T.

YOU WANT TO ADDRESS THAT IF YOU CAN?

>> THE WAY I UNDERSTOOD FRANKIE'S IN LIGHT OF SUBSEQUENT BANKS FRAMEWORK. THE WAY FRANKIE'S WAS SAYING OR THE BEST WAY TO READ IT AS IT IS A VALID STEP ONE FACTOR, THE FACT OF THE PRIOR DEPARTURE AND

AGREEMENT.

THE JUDGE STILL HAS TO DO -  
THAT IS A VALID WAY TO READ  
FRANKIE'S.

>> WITH EVERY OTHER FACTOR  
LISTED IN THE STATUTE IT IS  
UNFETTERED DISCRETION.

IF YOU FIND THE FACTOR IT IS  
WHAT THE JUDGE DECIDES.

THERE IS NO SAYING THAT IS NOT  
A GOOD ENOUGH REASON TO  
EXERCISE YOUR DISCRETION.

THIS ONE WOULD BE DIFFERENT IN  
THAT REGARD.

>> IF YOU WOULD IS A FINE  
FRANKIE'S TODAY, YOU MIGHT  
REACH A BROADER RESULT WHICH IS  
THE FACT OF THE PRIOR DEPARTURE  
AUTHORIZES DISCRETION, WE DON'T  
LOOK AND QUESTION WHAT THE  
DISCRETION WAS.

DOESN'T HAVE TO BE NEXT NATION  
TO TIE TO THE ORIGINAL  
DEPARTURE.

THAT WOULD BE A VALID OUTCOME.  
WE TAKE FRANKIE'S AS WE FIND IT  
AND THE LANGUAGE OF FRANKIE'S  
IS EFFECTIVELY YOU SATISFY STEP  
ONE AND HAVE TO TURN AND  
EXPLAIN YOUR DISCRETIONARY  
CALCULUS AND THAT IS WHAT THE  
JUDGE DID.

>> THE DOWNWARD DEPARTURE IN  
ONE OR TWO CATEGORIES IN MY  
EXPERIENCE.

ONE IS BASED ON THE  
CIRCUMSTANCES OF THIS CASE AND  
THIS DEFENDANT DOESN'T JUSTIFY  
THE SENTENCE GUIDELINES CALL  
FOR.

THE OTHER IS WE HAVE A REAL  
PROBLEM WITH THIS CASE AND WE  
ARE WILLING TO GIVE A PLEA WE  
WOULDN'T OTHERWISE BECAUSE  
THESE FACTS DON'T JUSTIFY THAT.  
A LOT OF TIMES IT IS REFLECTED  
ON THE RECORD WHEN JUDGES SAY  
WHY SHOULD I ACCEPT THIS PLEA.  
IT DOES SEEM TO ME IN THOSE  
INSTANCES WHERE THE STATE MAY

HAVE A WITNESS PROBLEM OR SOMETHING AND THERE'S THAT KIND OF RECORD IT MIGHT BE VERY HARD FOR THE TRIAL JUDGE TO JUSTIFY VIOLATION OF PROBATION REASONS WHY PROBATION SHOULD BE CONTINUED BUT IT ALSO SEEMS IN THE OTHER KIND OF CASE IT WOULD BE ALMOST ALWAYS EASY FOR THE JUDGE TO SAY THESE CONDITIONS ARE STILL IN PLAY DOES THAT MAKE SENSE?

>> SOUNDS FAIR TO ME.

I WOULD POINT OUT THIS IS THE CIRCUMSTANCE IN WHICH IT WASN'T THAT THE STATE HAD A WITNESS PROBLEM.

WE KNOW THE REASON FOR FIRST CLEAR THAT IS DRUG REHABILITATION BUT ONE WAY OR ANOTHER THERE IS CLEARLY IN OUR VIEW A STATUTORY BASIS FOR FRANKIE'S WHETHER YOU SEE IT AS THE PLEA BARGAINS MITIGATE OR PROBATION REVOCATION STATUTE. THIS JUDGE HAD AS AN AVAILABLE SENTENCE ANY SENTENCE HE MIGHT'VE ORIGINALLY IMPOSED, EXPLAINS WHY HE FELT THAT THE PARTY WAS RELEVANT SO THAT IS HOW WE SEE IT.

>> REMEDY.

WHAT REMEDY ASSUMING WE AGREE WITH YOU, WHAT IS THE REMEDY FOR THE TRIAL COURT?

>> THE REMEDY IS CONTROLLED BY JACKSON AND GLOVER AND THAT IS REMAND FOR RESENTENCING.

>> THAT IS WHAT THE THIRD DCA DID INCORRECTLY ACCORDING TO YOUR ARGUMENT.

>> CORRECT.

THE ORIGINAL PANEL DECISION WAS A REMEDY WE AGREED WITH AND ON REHEARING THE PANEL CHANGED ITS MIND.

NOW THE SENTENCING JUDGE HAS ITS HANDS TIED AT RESENTENCING BELIEVE THERE IS A VALID MITIGATE OR AND IF IT BELIEVES



A DOWNWARD DEPARTURE IS NOT THE MOST APPROPRIATE SENTENCE.

>> IT IS 70 MONTHS.

WE DON'T NEED TO REACH THAT ISSUE.

>> THAT IS CORRECT.

>> BECAUSE OF THE OTHER ISSUE WE HAVE BEEN TALKING ABOUT.

>> YES.

IF YOU WERE TO DISAGREE WITH OUR READING OF FRANKIE'S IN THE STATUTORY SCHEME YOU WOULD ADDRESS THE REMEDY QUESTION. I WOULD START BY NOTING UNLIKE WHAT THE STATE IS ARGUING IN THIS CASE JACKSON IS ON ALL FOURS.

JACKSON IS UPON FURTHER REFLECTION NOT JUST A CASE IN WHICH THERE WAS REVERSAL OF THE PARKER FOR PROCEDURAL REASONS. IT IS TRUE THERE WERE NO WRITTEN REASONS.

THE FIRST DISTRICT IN JACKSON, THE ORAL REASON PROVIDED BY THE SENTENCING JUDGE IS SUBSTANTIVELY INVALID.

WE LOOK AT THE STATUTORY SCHEME.

THEY PRECLUDED ON A MANNED FROM DOING EXACTLY WHAT THEY EXPECT SENTENCING JUDGES TO DO.

LOOK AT THE CASE, THE TOTALITY OF CIRCUMSTANCES AND REACH WHAT WE BELIEVE IS THE CORRECT RESULT.

IF THE COURT HAS ANY QUESTIONS ABOUT THE REMEDY.

>> ON YOUR POINT ABOUT THE TWO BARGAINS DOESN'T THAT UNDERCUT THE IDEA OF RELYING ON THE BARGAIN USE IT IS BASICALLY KIND OF NEGATED AS THE GATEWAY STEP ONE FOR THE DEPARTURE?

>> I DON'T THINK SO.

IN MY VIEW OF THE TWO BARGAINS, IT IS THE BARGAIN WITH THE STATE THE WAVE THROUGHOUT THE BOTTOM OF THE GUIDELINES. AND THE DOWNWARD THE PRESSURE

IS A BALANCING SENTENCING  
OUTCOME.

THAT'S WHEN THE JUDGE GET THE  
ORIGINAL DEPARTURE.

THE SECOND IS YOU MUST ABIDE BY  
PROBATION.

IT IS A MATTER OF JUDICIAL  
GRACE AND IF YOU VIOLATE  
PROBATION IT IS NOT AGAINST THE  
PROSECUTION BUT AGAINST THE  
COURT ITSELF IT BECAUSE IT IS  
AN OFFENSE AGAINST THE COURT IT  
IS THE COURT'S RESPONSIBLY TO  
DECIDE HOW TO PUNISH THE  
VIOLATION AND THAT IS WHY THE  
JUDGE AT THE END OF THE DAY HAS  
THE RIGHT TO SAY I'M EXERCISING  
MY DISCRETION AND DON'T THINK A  
LENGTHY PRISON TERM IS  
REQUIRED.

THAT IS HOW WE VIEW IT.

>> DOESN'T THE FRANKIE'S CASE  
JUST THAT WHEN IT SAYS IT CAN  
SOMETIMES BE OKAY, I TOOK THAT  
TO MEAN IT CAN BE OKAY AS STEP  
ONE BUT YOU ARE SAYING WHEN IT  
IS NOT OKAY DOES MORE BECAUSE  
OF THE STEP 2 REASONS.

I MEAN - THIS IS A MADE-UP  
CONSTRUCT BUT IF YOU KNOW WHAT  
I AM SAYING.

>> THE CONFUSION IN FRANKIE'S  
IS LIKELY BECAUSE IT PREDATES  
YOUR DECISION IN BANKS.

DIDN'T HAVE THE BENEFIT OF THE  
BOXES, STEP ONE AND STEP 2.

THE WAY WE UNDERSTOOD FRANKIE'S  
IS IT IS A PRECURSOR TO THAT  
2-STEP FRAMEWORK WHERE THE  
REASON IT IS SOMETIMES  
APPROPRIATE TO DEPART LIKE IT  
IS A VALID FACTOR IS UNDER STEP  
2 THE JUDGE IS NOT REQUIRED TO  
AUTOMATICALLY DEPART, HE HAS  
DISCRETION TO DECIDE IF THAT IS  
THE PROPER OUTCOME FOR THIS  
DEFENDANT UNDER THESE FACTS.

>> THE JUDGE GAVE SEVERAL  
REASONS.

DO YOU AGREE THAT SOME WERE NOT

VALID?

THE ONES ABOUT THE SENTENCE  
BEING TOO LARGE?

ABSENT THE DRUG REHABILITATION  
PART DO YOU AGREE THE OTHER  
STUFF WOULD BE ERROR?

>> I THINK IF THEY WERE THE  
STANDALONE MITIGATING FACTORS  
UNDER STEP ONE THEY WOULD BE  
PROBLEMATIC AND WE WOULDN'T BE  
RAISING THAT CLAIM BUT AS SOON  
AS THE JUDGE IDENTIFIES THE  
VALID MITIGATE OR WHICH WAS THE  
FRANKIE'S PRIOR DEPARTURE IT  
THEN HAS TO DO WITH MUCH  
BROADER CALCULUS UNDER STEP 2  
AND AT THAT POINT AS SOON AS  
STEP ONE BEGAN IN OUR REVIEW OF  
THE BOTTOM OF THE GUIDELINES  
BECOME 0 MONTHS.

WHAT THE JUDGE IS DOING IS  
EXERCISING IN RANGE DISCRETION  
FROM 0 MONTHS UP TO THE  
STATUTORY MAX AND WE KNOW IN  
RANGE DISCRETION IS APPROPRIATE  
FOR A JUDGE TO CONSIDER THINGS  
LIKE THE HARSHNESS OF THE  
SENTENCE OR THE NEED FOR DRUG  
REHAB.

STEP ONE IS SATISFIED, THE  
BOTTOM OF THE GUIDELINES NO  
LONGER EXISTS AND YOU DO IN  
RANGE DISCRETION AND EVERYTHING  
IS ON THE TABLE EXCEPT FOR  
THOSE STATUTORILY OR  
CONSTITUTIONALLY IMPERMISSIBLE  
FACTORS LIKE RACE A MORSE.  
THOSE THINGS YOU CAN DO BUT  
EVERYTHING ELSE IS IN RANGE  
DISCRETION.

>> FOR THOSE REASONS WE ASK YOU  
REVERSE ON EITHER OF THE  
ISSUES, THANK YOU SO MUCH.

>> MAY IT PLEASE THE COURT,  
JONATHAN TANOOS ON BEHALF OF  
THE STATE.

JUSTICE LAWSON AND I AGREE THAT  
FRANKIE'S IS UNCLEAR IN THE WAY  
IT EXPLAINS HOW THE DOWNWARD  
DEPARTURE WORKS HERE BUT WHAT I

BELIEVE IS EVEN FRANKIE'S IT IS  
SAYING IT IS SOMETIMES A  
FACTOR.

IT CAN'T ALWAYS BE A FACTOR.  
THE TRIAL COURT NEEDS TO  
EXPLAIN WHAT FACTS OR EVIDENCE  
IT IS RELYING ON TO EXPLAIN WHY  
IT IS A FACTOR AND THAT MAKES  
SENSE TO THE EXTENT THAT --  
>> THE TRIAL COURT DID THAT  
HERE.

>> I THINK THE FACTS OR  
EVIDENCE THE TRIAL COURT DID  
RELY ON.

>> YOU AGREE WITH FRANKIE'S.  
YOU ARE NOT ASKING US TO RECEDE  
OR ANYTHING LIKE THAT.

>> I'M NOT ASKING --

>> IF THERE WAS PLEASE TO A  
DOWNWARD DEPARTURE HERE AND  
UNDER FRANKIE'S THAT JUSTIFIES  
DOWNWARD DEPARTURE AS LONG AS  
THERE'S A REASONABLE  
EXPLANATION WHY THE JUDGE  
THINKS THAT SHOULD BE TRUE, ARE  
YOU SAYING THE EXPLANATION WAS  
NOT REASONABLE?

>> WHAT I'M SAYING IN THE  
NORMAL COURSE WITH THE DOWNWARD  
DEPARTURE ALL THE JUDGE HAS TO  
DO IS LIST THE FACTOR OR GROUND  
THEY ARE RELYING ON TO JUSTIFY  
THE DEPARTURE, BUT WHAT SETS  
FRANKIE'S APART IS IT SAYS IT  
IS NOT ALWAYS -- IT IS NOT  
NEVER AND WHAT IT IS SAYING,  
THE TRIAL JUDGE IS SUPPOSED TO  
EXPLAIN IN WRITING WHAT FACTS  
OR CIRCUMSTANCES SURROUNDING  
THE PERFORMANCE OF THE  
DEFENDANT UNDER THE AGREEMENT  
WOULD JUSTIFY THE PRIOR  
BREACHED AGREEMENT FOR A NEW  
MITIGATED SENTENCE.

>> I ASKED MY QUESTION TO GIVE  
YOU TIME TO THINK ABOUT IT  
BECAUSE TO ME FRANKIE'S DOES  
MAKE SENSE WHEN YOU CONSIDER  
THERE ARE PLEAS TO DOWNWARD  
DEPARTURE WHERE THE PROBLEM IS

THE STATE'S PROOF AND THAT MAY BE REFLECTED ON THE RECORD AND IT WOULD SEEM LIKE IN A CASE LIKE THAT THAT WOULD BE A RARE INSTANCE WHERE AN APPELLATE COURT COULD SAY THAT IS AN ABUSE OF DISCRETION IF ALL YOU DO IS SAY THERE WAS A PLEA ORIGINALLY AND THE RECORD REFLECTS THAT THE GUIDELINE SENTENCE WAS FULLY JUSTIFIED BUT THERE WAS A PROOF PROBLEM. I CAN'T THINK OF ANOTHER DEPARTURE WHERE THAT MIGHT BE TRUE.

IN LIGHT OF THE WEIRD FACT ABOUT TWO WAYS WE GET TO DOWNWARD DEPARTURE PLEA, DOESN'T FRANKIE'S MAKE SENSE? >> THE PROBLEM IS THIS IS A NEW GROUND.

WE ARE NOT RELYING ON THE OLD GROUNDS AND IN THE STATUTE DRUG ADDICTION OR SUBSTANCE ABUSE IS NOT A MITIGATING FACTOR UNDER ANY CIRCUMSTANCES OF DRUG OFFENDER PROBATION.

I UNDERSTAND DRUG OFFENDER PROBATION WAS PART OF THE INITIAL AGREEMENT AND THAT WAS AN AGREEMENT BETWEEN THE DEFENDANT AND THE STATE BECAUSE THE TRIAL COURT WAS NOT ALLOWED TO OFFER PROBATION WITHOUT THE STATE'S CONSENT.

THE DRUG OFFENDER PROBATION MUST HAVE 60 SENTENCING POINTS OR LESS AND THE DEFENDANT WAS WELL OVER 60 POINTS.

>> THE NATURE OF PROBATION IS THE TRIAL COURT'S GRACE.

IT IS SO CLEAR IN OUR LAW. THE DEFENDANT AGREES, THE JUDGE'S HANDS TO DO WHAT JUDGES REALLY DO, IN THE PROBATION CASE.

WOULD IT BE ODD TO HAVE THE STATE COME BACK AND SAY WE DON'T KNOW HOW WE ARE DEALING WITH THIS MATTER.

WE ARE GOING TO UNDO THE  
BARGAIN AND SAY WE TAKE THIS  
BACK TO OUR OWN HANDS.  
DON'T THE STAKES GIVE THE RIGHT  
TO EJECT AWAY AT THE TIME OF  
THE PLEA BARGAIN WHEN THEY SAY  
PROBATION IS GOOD?

>> IN NICKERSON IN A CIGAR  
WHERE BASICALLY IT SAYS ONCE  
THE DEFENDANT BREACHES OR  
VIOLATES THE AGREEMENT THE  
STATE IS NO LONGER BOUND TO THE  
AGREEMENT SO WHAT NICKERSON WAS  
TRYING TO DO IS LOOK AT THAT  
ROLE AND THE STATUTORY GROUNDS  
WHICH ALLOWS FOR DOWNWARD  
DEPARTURE IS.

>> THE TRIAL JUDGE COULD HAVE  
FOUND PROBATION VIOLATION, WE  
CONTINUE PROBATION OR WOULDN'T  
BE HERE.

>> THAT IS AN OPTION AND THEY  
CAN ALWAYS IMPOSE A TERM OF  
JAIL TIME AS WELL.

IT IS JUST THAT THIS IS A VERY  
UNUSUAL CIRCUMSTANCE WHERE AT  
THE TIME OF FRANKIE'S,  
SUBSTANCE ABUSE TREATMENT WAS A  
STATUTORY GROUNDS THE TRIAL  
COURT COULD RELY ON, SO AT THAT  
TIME IF THE DEFENDANT HAD  
BROUGHT THIS ARGUMENT, YOU HAVE  
A PRETTY GOOD ARGUMENT BUT  
SINCE THE LEGISLATURE HAS TOLD  
US WE CAN'T JUST RELY ON  
SUBSTANCE ABUSE OR ADDICTION.

>> I THOUGHT IT WAS BEFORE  
THIS.

>> I THINK IT WAS MADE AFTER  
THE CODE.

I THINK FRANKIE'S IS 87-88  
DECISION.

>> OKAY.

>> LET ME ASK YOU THIS.  
IN THIS CASE HE WAS BASED ON  
PROBATION.

>> CORRECT.

>> HE DIDN'T QUALIFY FOR THAT  
EXCEPTIONAL STATUTE HAD THE  
JUDGE MENTIONED IT IN THIS

ORDER.

I AM REINSTATING HIM ON  
PROBATION ON SENTENCING 40  
MONTHS OR WHATEVER IT IS  
BECAUSE HE IS ON DRUG  
PROBATION.

>> CORRECT.

THE PROBLEM IS, GIVEN THIS IS A  
NEW DOWNWARD DEPARTURE WE HAVE  
TO LOOK AT 92010026 AND  
SPECIFICALLY TELLS THE JUDGE  
THAT THEY CANNOT RELY ON  
SUBSTANCE ABUSE TREATMENT OR  
ADDICTION AND THE DEFENDANT  
DIDN'T HAVE BENEFIT OF  
AGREEMENT WITH THE STATE AT THE  
REVOCATION SENTENCING.

>> HE WAS SENTENCED, TO USE THE  
WORD SENTENCE IN PROBATION,  
PLACED ON PROBATION.  
DRUG OFFENDER PROBATION FOR  
YEARS.

HE WAS ON DRUG OFFENDER  
PROBATION.

CORRECT?

AM I RIGHT?

>> CORRECT.

>> HAD THE JUDGE SAID IN THE  
REVOCATION OR SENTENCING ORDER,  
I AM REINSTATING HIM OR  
SENTENCING 240 MONTHS, AS AN  
EXCEPTION UNDER THE DRUG  
OFFENDER PROBATION IT WOULD  
HAVE BEEN FINE.

>> I THINK WITH REINSTATEMENT  
THERE IS STRICTLY LIMITED JAIL  
TIME SO THE 40 MONTH SENTENCE  
MAY NOT HAVE BEEN AVAILABLE,  
BUT THE DEFENDANT BREACHES THE  
AGREEMENT BASED ON POSSESSING  
DRUGS AND RESISTING ARREST.  
ONE OF THE INTRA-GOAL  
PROVISIONS OF THE AGREEMENT IS  
THE DEFENDANT WON'T USE DRUGS  
AND WILL FOLLOW THE LAW SO I  
THINK THIS COURT'S DECISION IN  
CIGARA KICKS IN AND THE STATUS  
AND BOUND BY THE AGREEMENT.  
THE TRIAL COURT ISN'T WITHOUT  
THE BENEFIT OF STATE AGREEMENT

TO DEPART DOWNWARD SO IT HAS TO FIND OTHER GROUNDS TO JUSTIFY THIS NEW DEPARTURE.

THE DEFENDANT MENTIONED IF A DEFENDANT REVOKES THAT WE SHOULD CONSIDER THAT THIS IS SIMPLY A MODIFYING OF WHAT WAS INITIALLY AGREED.

THAT WAS ACTUALLY DISCUSSED IN FIFTH DCA CASE THAT IS DISCUSSED IN FRANKIE ABSENT FRANKIE'S OUTRIGHT REJECTED THAT ARGUMENT AND SO I THINK IT IS SORT OF A CATCH-22 SITUATION BUT UNDER THESE CIRCUMSTANCES AND GIVEN FRANKIE'S, THERE JUST WASN'T ENOUGH IN THE ORDER. THE ORDER REALLY SHOULD LOOK AT THE NATURE OF THE AGREEMENT, THE TERMS OF THE AGREEMENT AND THE DEFENDANT'S PERFORMANCE UNDER THAT AGREEMENT TO EXPLAIN THE FACT THAT WOULD SUPPORT THAT GROUND FOR THE DOWNWARD DEPARTURE.

AS TO THE REMEDY, THE REMEDY HERE IS GUIDELINE SENTENCE, THAT IS THE REMEDY IN FLORIDA FOR THE PAST 30 YEARS.

THE DCAS UNIFORMLY APPLIED THAT REMEDY BEFORE THE CPC.

I THINK WE CAN PRESUME THAT THE LEGISLATURE WAS AWARE OF THAT REMEDY WHEN IT ENACTED THE CPC AND WE HAVE SEEN A CHANGE IN THAT RULE SINCE THE COURT CASE IN JACKSON AND WE THINK JACKSON IS DISTINGUISHABLE IN THAT THERE WAS NO WRITTEN ORDER. NONE OF THE CONFLICT CASES IN JACKSON.

>> THE COURT IN JACKSON DID NOT DEAL WITH THE ISSUE AS IF THAT WAS THE ONLY ISSUE.

THEY SPECIFICALLY SAID THERE IS NO WRITTEN ORDER AND THE ORAL REASONS GIVEN DO NOT SUPPORT A DOWNWARD DEPARTURE SO THEY LOOKED SUBSTANTIVELY, THERE WAS NO BASIS GIVEN THAT WAS



JUSTIFIED UNDER THE STATUTE AND  
THEY FRAMED THE ISSUE WHETHER  
AN APPELLATE COURT REVERSES  
IMPOSITION OF DOWNWARD  
DEPARTURE SENTENCE MUST REMAIN  
FOR A SENTENCING IN THE CPC OR  
WHETHER IT MAY REMAIN FOR A  
SENTENCING OUTSIDE THE CPC AND  
THAT IS WHAT THE COURT SAID,  
RIGHT?

>> THE COURT DID RELY ON THE  
CPC STATUTORY REQUIREMENT OF  
THE WRITTEN ORDER AND I THINK  
THE COURT WAS TRYING TO ANCHOR  
THEIR IN THE CPC.

>> IT ALSO REQUIRES A VALID  
REASON.

THE DISTINCTION BASED ON THE  
WRITTEN ORDER VERSUS THE  
REASON, I DON'T UNDERSTAND HOW  
IT IS DIFFERENT UNDER THE  
STATUTE.

THE REQUIRED MEANT IS WRITTEN  
REASONS AND VALID REASONS,  
CORRECT?

>> CORRECT.

OF THE COURT DOESN'T THINK IT  
IS A MEANINGFUL DISTINCTION WE  
WOULD ASK THE COURT TO RESEED  
FROM JACKSON.

THERE IS NO CONCEIVABLE  
STRATEGIC REASON.

>> HOW WOULD THAT IF WE DID  
THAT HOW WOULD THAT FIT WITHIN  
THE LAW OUT THERE THAT  
RESENTENCING PROCEEDINGS ARE  
DAY NOVO.

>> THE CASE LAW ARE GENERALLY  
HIGGS VIOLATIONS IN THOSE  
SITUATIONS.

IT IS ESSENTIALLY A SCORESHEET  
WHICH IS CONSISTENT WITH THE  
COOL THAT THE TRIAL COURT MUST  
COMPLY WITH THE CODE SO TO THE  
EXTENT THE TRIAL COURT DOESN'T  
COMPLY WITH THE CODE OR RELIES  
ON AN INVALID SCORE SHEET THIS  
THEY WOULD AGREE THAT IT WOULD  
GO BACK FOR RESENTENCING BUT  
THE TRIAL COURT COMPLIED WITH

THE CODE, THE DEFENDANT WAS  
GIVEN A FULL AND FAIR SHOT TO  
PRESENT GROUNDS IN SUPPORT OF  
THE DEPARTURE AND SO UNDER  
THOSE CIRCUMSTANCES --

>> YOUR POSITION ISN'T REALLY  
ABOUT NECESSARILY ABOUT WHAT  
THE DEFENDANT HOW THE DEFENDANT  
HAS PRESENTED THINGS BUT WHAT  
THE TRIAL COURT DOES.

IT SEEMS A VERY ODD TO SAY THAT  
THE DEFENDANT IS GOING TO BE  
JAMMED BY A MISSTEP OF THE  
TRIAL COURT.

WHETHER THE DEFENDANT WAYS  
SOMETHING IS A DIFFERENT ISSUE.  
I THINK OUR RULES ABOUT  
SENTENCING HAVE AN ANSWER FOR  
THAT AS WELL BUT YOUR POSITION  
HERE SEEMS TO BE VERY KIND OF  
GO AS FAR AS AN EXALTATION OF  
THIS FORMALISTIC THING THAT THE  
TRIAL COURT MISSES THE BOAT,  
GOT ONE SHOT, THAT IS IT AND  
I'M STRUGGLING TO SEE HOW THAT  
MAKES SENSE.

>> THE DEFENDANT, IT IS AN  
UNUSUAL CIRCUMSTANCE IN A  
CRIMINAL CASE WHERE THE  
DEFENDANT HAS THE BURDEN TO  
PRESENT EVIDENCE.

THE TRIAL COURT IS FREE TO  
IMPOSE DOWNWARD DEPARTURE  
WITHOUT THAT BUT GIVEN THAT.

>> YOUR POSITION IS REGARDLESS  
OF WHAT THE DEFENDANT PRESENTS  
AND WHAT THE DEFENDANT DOES, IF  
THE TRIAL COURT MISSTEPS, THAT  
IS IT.

>> I THINK IT IS DIFFERENT.

>> AM I CORRECT IN  
UNDERSTANDING THAT IS THE  
STATE'S POSITION?

>> IT IS DIFFERENT BETWEEN A  
MISSTEP.

>> IT OCCURS HOWEVER YOU WISH.

>> TRIAL COURT FAILS, CORRECT  
SCORESHEET FAILS TO --

>> SAY THE DEFENDANT PRESENTS  
TWO BASIS FOR DOWNWARD

DEPARTURE EVIDENCE ON TWO AND THE EVIDENCE WOULD SUPPORT A FINDING ON TWO BUT THE TRIAL COURT MAKES THE FINDING ON ONE AND THE DEFENDANT IS WHAT ABOUT OTHER GROUNDS?

I DON'T NEED TO ADDRESS THAT AND THEN ON APPEAL THEY FIND THAT WAS NOT A VALID REASON BUT THE OTHER ONE WOULD HAVE BEEN, THE TRIAL JUDGE DIDN'T ADDRESS IT.

IT IS A PRESERVED ISSUE.

IT IS AN ISSUE WHERE IF IT WAS REMANDED EVEN ON THAT EVIDENCE THE TRIAL COURT COULD COME UP WITH A VALID BASIS BUT EVEN IN THAT CIRCUMSTANCE YOU ARE SAYING IT IS A MANNED FOR GUIDELINE SENTENCE.

>> I KNOW THAT IS THE RULE, ARE THERE ANY VALID REASONS IN THE TRIAL COURT'S ORDER.

>> YOU THINK THEY'LL BE A FAIR AND JUST OUTCOME?

>> I WOULD SAY THE DEFENSES ON NOTICE OF THIS LONG-STANDING RULE AS LONG AS THEY WERE ABLE TO PRESENT THOSE REASONS AS WELL, THIS HAS BEEN INCORPORATED INTO THE CPC AS PART OF THE LARGER STATUTORY SCHEME, MAYBE TO THE EXTENT THAT THERE NEEDS --

>> I'M NOT FOLLOWING YOU. HOW HAS THIS BEEN INCORPORATED INTO THE CPC?

>> 3704 BE SAYS ANY PRIOR PRECEDENT IMPLEMENT THE GUIDELINES TO THE EXTENT NOT INCONSISTENT WITH THE OR THE GUIDELINES CONTINUES TO BE GOOD LAW.

IN MY MIND, WE HAD A UNIFORM DISTRICT RECORD UNIFORMLY APPLYING THE FULL.

WE DON'T HAVE A DECISION FROM THIS COURT BECAUSE IT WAS UNIFORMLY APPLIED SO TO THE EXTENT THE LEGISLATURE WAS

AWARE OF THE WAR, PERHAPS A NEW  
RULE NEEDS TO COME FROM THE  
LEGISLATURE, BUT ULTIMATELY  
WHERE THERE WERE IN VALID  
REASONS IN THE WRITTEN ORDER  
AND RULE OF LAW FOR THE PAST 30  
YEARS HAS BEEN RE-MANNED FOR  
RESENTENCING WITHIN THE  
GUIDELINES WE ASK THAT YOU  
AFFIRM THE THIRD DISTRICT'S  
OPINION.

THANK YOU.

>> I WANT TO MAKE SURE I HAVE  
ADDRESSED ALL OF YOUR  
QUESTIONS.

BUT ENCLOSING WHAT I WOULD SAY  
IS THE OVERARCHING PRINCIPLE  
THAT CONTROLS THIS CASE IS OUR  
SENTENCING JUDGES HAVE THE  
AWESOME RESPONSIBILITY AND  
ULTIMATE RESPONSIBILITY OF  
ARRIVING AT THE JUST AND MOST  
APPROPRIATE SENTENCE FOR EVERY  
GIVEN OFFENDER UNDER THOSE SET  
OF FACTS AND WHERE THE PARTIES  
HAVE SPECIFICALLY PUT INTO  
ISSUE DRUG OFFENDER PROBATION

--

>> SUBJECT TO THE RESTRICTIONS  
THE LEGISLATURE HAS PLACED ON  
THE SUBSTANCE AND PROCESS.

>> THE PRIOR AGREEMENT, THE  
PARTIES HAVE PUT INTO ISSUE  
THIS CONSIDERATION ABOUT DRUG  
REFORM AND DRUG REHABILITATION.  
WE BELIEVE THAT IS A VALID  
CONSIDERATION FOR THE TRIAL  
JUDGE TO TAKE INTO ACCOUNT  
UNDER STEP 2 BASED ON THE PRIOR  
AGREEMENT AND WE HAVE THAT  
UNDER FRANKIE'S, THE DEPARTURE  
WAS VALID.

THANK YOU FOR YOUR TIME.

>> THANK YOU FOR YOUR  
ARGUMENTS.