

>> 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, WELCOME TO THE SUPREME COURT.

THE FIRST CASE IS DAVIS VERSUS THE STATE OF FLORIDA. COUNSEL?

>> GOOD MORNING.

MAY IT PLEASE THE COURT, MY NAME IS LORI WILLNER.

I REPRESENT MISTER ALVIN DAVIS AND I WOULD LIKE TO RESERVE 7 MINUTES FOR REBUTTAL.

I DID NOTHING WRONG.

I AM NOT GUILTY OF THIS CRIME. I AM INNOCENT.

ALMOST IMMEDIATELY THEREAFTER THE TRIAL COURT SAID YOUR FAILURE TO TAKE ANY RESPONSIBILITY, YOU STILL FAIL TO TAKE ANY RESPONSIBILITY. THESE COMMENTS WERE A VIOLATION OF MISTER DAVIS'S RIGHT TO MAINTAIN HIS INNOCENCE. THE QUESTION BEFORE THIS COURT IS WHETHER FAILING TO TAKE RESPONSIBILITY IS A VIOLATION OF THE RIGHT TO MAINTAIN INNOCENCE BECAUSE THAT IS ALL THIS CASE WAS ABOUT.

IT DIDN'T INVOLVE RE-MORRIS, DIDN'T REVOLVE BACK - LACK OF REMORSE OR REHABILITATION OR CHARACTER.

THIS WAS STRICTLY ABOUT MISTER DAVIS MAINTAINING HIS INNOCENCE.

>> I TO DROPPED.

CAN YOU BE MORE SPECIFIC. WHEN YOU SAY THE RIGHT TO

MAINTAIN YOUR INNOCENCE WHAT ARE YOU REFERRING TO?

THERE IS THE JURY TRIAL RIGHT WHICH IS NOT IMPLICATED HERE.

>> CORRECT.

>> THERE IS THE RIGHT AGAINST SELF-INCRIMINATION.

HOW IS THE DEFENDANT VOLUNTARILY CHOOSING TO MAKE THOSE STATEMENTS?

HOW DOES THAT VIOLATE -- I DON'T WANT TO PUT WORDS IN YOUR MOUTH, WHICH SPECIFIC GREATEST YOU ARE SAYING IS VIOLATED?

>> THE JURY VERDICT DOESN'T WAIVE MISTER DAVIS'S RIGHT TO MAINTAIN HIS INNOCENCE AND THE REASON FOR THAT WOULD BE MISTER DAVIS BELIEVED HIMSELF TO BE INNOCENT.

HE HAD THE RIGHT TO APPEAL AND NOTHING ABOUT THE JURY FINDING HIM GUILTY WHO FORCES THEM TO GIVE UP THE MAINTENANCE OF HIS INNOCENCE.

>> THE RIGHT TO MAINTAIN YOUR INNOCENCE, GIVES YOU A RIGHT TO PLEAD NOT GUILTY AND OF ALE YOUR SELF OF THE RIGHT TO A TRIAL, HE WAS AFFORDED THAT.

HE HAS A CHOICE WHETHER TO SPEAK AT ALL AT THAT POINT.

IF HE CHOOSES TO SAY WHAT HE SAID, COULD YOU BE MORE SPECIFIC AND REFER SPECIFICALLY TO THE CONSTITUTIONAL TEXT AND TELL US WHAT RIGHT IS BEING VIOLATED.

>> I THINK THE LANGUAGE OF THE FIRST DCA MIGHT ANSWER YOUR QUESTION.

DUE PROCESS GUARANTEED HIS RIGHT TO MAINTAIN HIS INNOCENCE THROUGH ALL THE PROCEEDINGS AND THIS COURT HAS SAID THAT AS WELL.

THE FIRST DCA SAID TRIAL COURT VIOLATES DUE PROCESS BY USING A PROCLAMATION OF INNOCENCE AGAINST THE DEFENDANT AND THE LANGUAGE OF THE FIRST DCA SAID

THAT MERELY REFERRING TO REFUSAL TO ACCEPT RESPONSIBILITY DOESN'T IMPLICATE THAT CONSTITUTIONAL DUE PROCESS RIGHT.

I THINK WHAT YOU ARE ASKING IS IT UNDER THE FIFTH AMENDMENT, UNDER THE SIXTH AMENDMENT, IT IS UNDER THE DUE PROCESS CLAUSE AND UNDER THIS COURT'S PRIOR OPINION THAT ACKNOWLEDGED THE DEFENDANT DOESN'T HAVE TO GIVE UP THAT RIGHT AT SENTENCING.

>> HE DOESN'T HAVE A RIGHT TO LIE.

THERE IS NOT A CONSTITUTIONAL RIGHT FOR HIM TO GO AND GIVE A STATEMENT IN COURT THAT IS FALSE.

>> OF COURSE NOT, HE HAS THE RIGHT TO TRUTHFULLY BUT THIS WASN'T A SITUATION LIKE MISTER BURNS WHERE SOMEONE MADE A STATEMENT UNDER OATH.

WHAT THIS WAS WAS MISTER DAVIS AS A LAYPERSON NOT UNDERSTANDING CONSTRUCTIVE POSITION.

HE BELIEVED HIMSELF TO BE INNOCENT AND HIS COMMENT WHEN THE JUDGE SAID THEY FOUND YOU WITH THE GUN MISTER DAVIS SAID, THEY FOUND ME WITH THE GUN? HE DID NOT BELIEVE HIMSELF TO BE IN POSSESSION OF A FIREARM.

THERE WAS NO ALLEGATION LIKE IN SOME OF THE CASES THAT HE LIED. I AGREE WITH YOU THAT YOU DON'T HAVE THE RIGHT TO LIVE BUT THAT IS NOT WHAT THIS IS.

THE TRIAL JUDGE IS FACED WITH LOTS AND LOTS OF FACTORS IN THE PSI AND LOTS OF OTHER FACTORS AND THEY CONSIDER THOSE BUT WHAT THEY CAN'T DO IS CONSIDER SOMETHING THAT IS THE VIOLATION OF THE EXERCISE OF A CONSTITUTIONAL RIGHT.

THIS WASN'T A PERJURY SITUATION.

>> THE RIGHT YOU ARE REFERRING TO IS HIS RIGHT TO DUE PROCESS, EXERCISING THE RIGHT TO DUE

PROCESS.

I AM TRYING TO FIGURE OUT WHAT THE POINT IS.

>> I THINK THAT IS CORRECT. AS THIS COURT HAS SAID YOU HAVE THE RIGHT TO PLEAD NOT GUILTY TO GO TO TRIAL INTO MAINTAIN THAT INNOCENCE.

WHAT WOULD BE THE POINT IN ADMITTING YOUR GUILT SIMPLY BECAUSE THE JURY FOUND YOU GUILTY IF YOU BELIEVE YOURSELF TO BE INNOCENT?

WE ALL KNOW OF CASES WHERE PEOPLE HAVE BEEN FOUND INNOCENT LATER.

>> DO YOU AGREE IT IS APPROPRIATE CONSIDERATION OF SOMEONE SHOWS GREAT REMORSE FOR THEIR CRIME?

>> YOUR HONOR, SURE, REMORSE IS FINE.

THAT WASN'T THE CASE HERE, THE PROBLEM IS WHEN THE JUDGE TAKES INTO CONSIDERATION LACK OF REMORSE.

THE REASON IS --

>> LET ME EXPLORE THAT WITH YOU FOR A SECOND.

SO IF YOUR CLIENT WERE TO EXPRESS GREAT REMORSE, THEN THE JUDGE COULD HAVE CONSIDERED THAT AND GIVEN HIM A LESSER SENTENCE.

>> YES, YOUR HONOR.

>> IF YOUR CLIENT DOESN'T COME IN AND SHOW REMORSE AND GETS A HIGHER SENTENCE, HOW IS THAT -- IF ONE IS APPROPRIATE AND NECESSARILY MEANS THE PERSON WHO DOES NOT GET THE REMORSE DISCOUNT IS IN SOME SENSE BEING PUNISHED FOR LACK OF REMORSE WHETHER IT IS ARTICULATED OR NOT, IF APPROPRIATE WOULD YOU AGREE, IF IT IS APPROPRIATE TO GIVE A LESSER SENTENCE FOR REMORSE, THEN THE FACT THAT YOU DON'T GIVE THE LESSER SENTENCE IS BASED ON LACK OF REMORSE WHETHER IT IS ARTICULATED OR

NOT, HOW DO YOU DEAL WITH THAT?

>> I DISAGREE FOR TWO REASONS. ONE IS WE USE REMORSE AND LACK OF RE-MORRIS IN THE WAY YOU JUST DESCRIBED IN CAPITAL CASES FOR AGGRAVATING A MITIGATING SITUATION, WE USE IT IN DOWNWARD DEPARTURE CASES BUT NOTHING GIVES THE INDIVIDUAL A REQUIREMENT TO EXPRESS REMORSE. IN OUR CASE MISTER DAVIS DIDN'T SPEAK ABOUT REMORSE AND THE TRIAL JUDGE NEVER MENTIONED REMORSE.

>> THERE IS NO REQUIREMENT TO SPEAK AT ALL BUT YOUR CLIENT SPOKE.

>> THE TRIAL JUDGE DIDN'T MENTION THAT IS A REASON. THE TRIAL JUDGE GIVE THE REASON IS BEING BECAUSE YOU FAILED TO TAKE RESPONSIBILITY, THE COURT HAS TO DETERMINE WHETHER FAILURE TO TAKE RESPONSIBILITY IS A VIOLATION OF HIS RIGHTS.

>> YOU WOULD AGREE UNDER FLORIDA SENTENCING STATUTE CHAPTER 921 THE JUDGE, WE ARE NOT TALKING ABOUT UPWARD DEPARTURE, THE JUDGE HAS DISCRETION FOR ANY LEGAL VALID REASON TO GIVE UP TO THE MAXIMUM SENTENCE ON THE CRIME YOUR CLIENT WAS PUNISHED FOR SO THERE IS A LIMITATION ON CONSIDERING LACK OF REMORSE WHETHER IT IS ARTICULATED OR NOT IN FLORIDA STATUTORY SENTENCING LAWS.

>> IT IS NOT MENTIONED.

>> IF THERE'S A PROHIBITION AGAINST CONSIDERATION IT DOESN'T HAVE TO BE IN THE CONSTITUTION.

>> CORRECT.

>> I THINK THIS COURT'S OPINION IN WHICH THERE MIGHT ANSWER THIS AS WELL.

THE INDIVIDUAL SAID IT WAS SOMEONE ELSE.

I LOST BECAUSE THE ALLEGED VICTIM HAD MONEY AND THIS COURT

HELD THAT WASN'T DEMONSTRATING A LACK OF REMORSE, IT WAS SIMPLY THAT INDIVIDUAL MAINTAINING THEIR INNOCENCE.

THAT IS SIMILAR TO WHAT WE HAVE HERE.

AS I MENTIONED, THIS CASE WAS ONLY ABOUT MAINTAINING INNOCENCE, REMORSE WASN'T MENTIONED SO I THINK THAT IS WHY THE QUESTION HAS TO COME BACK TO THAT.

IN ADDITION TO THAT CASE --

>> THOSE CONCEPTS ARE SIMILAR, RIGHT OR PRETTY MUCH THE SAME.

IF YOU ARE ESPECIALLY REMORSE DON'T YOU HAVE TO HAVE ADMITTED YOU HAVE DONE THE CRIME?

>> I WOULD THINK SO.

I AM NOT QUITE SURE HOW SOMEONE COULD ACCEPT RESPONSIBILITY WITHOUT ADMITTING THEY COMMITTED THE CRIME AND IF YOU ARE REQUIRING THEM TO ADMIT EVEN AFTER THE JURY HAS COME BACK WITH A GUILTY VERDICT THEN YOU ARE INNOCENT SAYING THE RIGHT TO MAINTAIN YOUR INNOCENCE ENDS AT THE TIME THE JURY COMES BACK WITH THEIR VERDICT.

>> OR YOU COULD JUST LIE AT SENTENCING TIME AND SAY I AM NOW UNREAL MORSEL.

>> THAT IS CORRECT.

>> WHAT HAPPENS IN TROY'S, THE CRIMINAL DEFENSE LAWYER CAN TELL THEIR CLIENTS I WANT YOU TO SIT THERE STILL THROUGHOUT THE ENTIRE TRIAL, REACT TO THE EVIDENCE AND THEY ARE DOING WHAT THE LAWYER IS GOING TO DO.

THIS REMORSE BUSINESS IS NOT JUST AT SENTENCING TIME.

THE JUDGE IS WATCHING THEM THROUGHOUT THE ENTIRE TRIAL TO SEE HOW THEY REACT TO THE VICTIM'S TESTIMONY AND TO WITNESSES TESTIMONY AND THAT KIND OF THING SO WHEN YOU ARE TALKING ABOUT REMORSE, IT IS AN

ALL-ENCOMPASSING THING.

>> YES, YOUR HONOR.

I DON'T THINK THIS IS THE CASE FOR THIS COURT TO REALLY GO INTO WHEN A JUDGE CAN REQUIRE A SHOWING OF REMORSE BECAUSE THAT WASN'T THE BASIS OF THE TRIAL COURT'S DECISION.

>> WE DON'T NEED TO ADDRESS THE SITUATION OF SOMEONE WHO REALLY DOES CHOOSE TO REMAIN SILENT. WHO CHOOSES TO SAY NOTHING.

>> UNLESS WHAT YOU ARE LOOKING AT IS WHETHER OR NOT THEY CHOSE TO REMAIN SILENT ON THE ISSUE OF REMORSE.

MAYBE I DON'T UNDERSTAND YOUR QUESTION.

>> YOUR CLIENT CHOSE TO SPEAK AND SAID WHAT HE SAID.

YOU CAN IMAGINE SOMEONE ELSE WHO SAYS I PLEADED NOT GUILTY, I WAS CONVICTED, I CONTINUE TO REMAIN SILENT, MAINTAIN MY INNOCENCE, WE DON'T NEED TO ADDRESS THAT SITUATION.

>> I THINK IF YOU LOOK AT ALL THE FACTORS A TRIAL JUDGE CAN CONSIDER AT SENTENCING AS A PIE CHART I THINK THE BLUE IS THE MAJORITY OF THAT CIRCLE AND THAT IS EVERYTHING THE TRIAL JUDGE CAN CONSIDER.

I THINK THERE'S A PLETHORA OF REASONS THE TRIAL JUDGE CAN CONSIDER.

THERE IS A SMALL SLICE OF THE PIE FOR CONSTITUTIONAL VIOLATIONS AND A SMALL SLICE FOR STATUTORY VIOLATIONS.

IN NO SITUATION HAS ANY COURT SAID THAT THE TRIAL JUDGE CAN VIOLATE AN INDIVIDUAL'S DUE PROCESS RIGHTS AT SENTENCING.

>> DOES THE THINKING CHANGE IF THE DEFENDANT SAID, PLEADS GUILTY?

>> SURE.

>> AND THERE IS A SENTENCING HEARING LATER ON, CAN THE JUDGE

AT THAT TIME DOING SENTENCING
SAY I HAVEN'T SEEN YOU SHOW ONE
BIT OF REMORSE ABOUT WHAT YOU
DID?

AFTER A GUILTY PLEA CAN REMORSE
BE BROUGHT UP?

>> OBVIOUSLY THAT IS NOT OUR
CASE.

I DIDN'T GO INTO REMORSE THAT
MUCH.

HONESTLY I DON'T KNOW THE
ANSWER.

IN MY PERSONAL OPINION YOU HAVE
ACCEPTED RESPONSIBILITY SO IS
THERE A NEXT STEP THAT THE JUDGE
CAN TAKE AND REQUIRE REMORSE?

I DON'T THINK SO AND THE REASON
I SAY THAT IS WHAT THIS COURT
HAS SAID ABOUT REMORSE IN
CAPITAL CASES IS A NEGATIVE
EMOTION, THAT PERSON HAS GIVEN
UP RIGHTS BY PLEADING GUILTY.
HOW DOES THE GOVERNMENT REQUIRE
SOMEBODY TO FEEL A CERTAIN WAY.
HOW DOES THE GOVERNMENT COMPEL
YOU TO BELIEVE A CERTAIN WAY.
I DON'T SEE HOW THAT COULD
HAPPEN.

>> IT'S NOT A MATTER OF BEING
COMPELLED.

IT IS A MATTER OF EVIDENCE OF
NOT.

THEIR CONSEQUENCES FLOW FROM
THAT.

>> IN SOME SITUATIONS.

>> THE IDEA A SENTENCE MIGHT NOT
BE MORE HARSH IF THE DEFENDANT
PUT THIS EXTREME CASE, PLEADS
GUILTY AND AT SENTENCING STAND
UP BEFORE THE COURT AND TELLS
THE COURT I DID IT.

I KNOW IT IS A CRIME.

I'M NOT SORRY I DID IT.

I'M GLAD I DID IT, THE VICTIM
DESERVED IT.

AND YOU ARE SAYING IF I
UNDERSTAND YOU CORRECTLY IT
WOULD BE INAPPROPRIATE FOR THE
TRIAL COURT TO CONSIDER THOSE
EXPRESSIONS IS THAT WHAT YOU ARE

SAYING?

>> I THINK -- WHAT I THINK IS A LOT OF IT DEPENDS ON HOW IT GETS INJECTED INTO THE PROCEEDING.

IF IT IS THE DEFENDANT WHO BRINGS UP THAT ISSUE OBVIOUSLY THE TRIAL JUDGE DOESN'T HAVE TO IGNORE THAT, IF THE DEFENDANT BROUGHT UP I AM A WHITE WOMAN AND WE GOT GOOD SENTENCES IN THIS COURT THE TRIAL JUDGE CAN'T SAY YOU DON'T TAKE SOMETHING, I WILL MAX YOU OUT.

WE ALL AGREE THERE ARE THINGS THE JUDGE CAN'T CONSIDER WHICH IS WHY WE GO BACK TO WHETHER IT IS A GUILTY VERDICT AND NOT A PLEA.

CONSIDER THE RIGHT TO MAINTAIN YOUR INNOCENCE.

>> MY EXPERIENCE WITH THE REMORSE BUSINESS, IN CASES INVOLVING DWI MANSLAUGHTER WHERE YOU HAVE A DRUNK DRIVER AND HE OR SHE KILLS SOMEONE.

THOSE ARE TRULY SAD CASES, AND FAMILIES CRYING AND THE DEFENDANT'S FAMILY CRYING, THEIR CHILDREN BEGGING PLEASE DON'T SEND MY DAD TO PRISON AND SO ON. THOSE ARE THE SADDEST CASES.

AND SOME SHOW NO REMORSE. AND THEY GET A HEAVY SENTENCE AND A MOTION TO RECONSIDER SENTENCE LATER ON, THE DEFENDANT TAKES THE STAND AND SAID MY LAWYER TOLD ME TO PLAY STRAIGHT. I WAS DYING INSIDE.

I WISH I COULD HAVE TOLD YOU BUT I WAS TOLD BY MY LAWYER TO PLAY IT STRAIGHT, DON'T REACT.

THOSE ARE THE SITUATIONS YOU ARE DEALING WITH HERE.

WHAT THE JUDGE SAID, YOU HAVE TO TAKE RESPONSIBILITY FOR YOUR ACTIONS.

THE JUDGE BASICALLY WANTED HIM TO SAY I AM GUILTY, YOUR CLIENT IS SAYING I DON'T THINK I POSSESSED THAT GUN.

UNTIL YOU TELL ME YOU DID THIS,
UNDER THAT CONCEPT, NO ONE COULD
EVER BE NOT GUILTY.

>> IF YOU THINK OF THE RIGHT WE
ARE PROTECTING IS HIS RIGHT TO
PLEAD NOT GUILTY, IF YOU ARE
SITTING IN THAT COURTROOM AND
SOMEBODY CONVICTED BY THE JURY
AND THE JUDGE SAID YOU FAILED TO
TAKE RESPONSIBILITY, THE ONLY
WAY TO DO THIS IS TO PLEAD
GUILTY.

I DON'T HAVE A RIGHT TO GO TO
TRIAL AND WILL BE PUNISHED FOR
IT.

THAT IS A LOGICAL CONCLUSION
FROM COMMENTS THAT WERE MADE
HERE.

>> YOU HAVE EXHAUSTED MORE THAN
HALF THE TIME YOU RESERVED FOR
REBUTTAL.

YOU CAN CONTINUE OR SAVE IT.

>> I WILL SAVE IT, THANK YOU.

>> MAY IT PLEASE THE COURT.

MY NAME IS BENJAMIN HOFFMAN AND
I REPRESENT THE STATE.

WHEN A DEFENDANT CHOOSES TO LOQ
THERE IS NO CONSTITUTIONAL OR
STATUTORY, ON A JUDGE
CONSIDERING WHAT HE OR SHE HAS
TO SAY.

AFTER THE PETITION WAS FOUND
GUILTY OF POSSESSION OF A
FIREARM, ALLOCATED A SENTENCING
HEARING AND THAT OUR LOCATION
WITH 3 PAGES OF TRANSCRIPT, HE
SAID SO MUCH MORE THAN I'M
INNOCENCE, I DON'T DO IT.

>> NO REMORSE, COLD AND THE
JUDGE THEN SAY YOU REFUSED TO
SHOW ANY REMORSE.

>> SAID NOTHING AT SENTENCING?
THEN I THINK WE ARE TALKING A
SITUATION LIKE GREEN AND ALAN
WHERE YOU REFERRING A LACK OF
REMORSE FROM SILENCE AND THAT IS
NOT THE POSITION I'M TAKING.

>> WE CAN HAVE AN OPINION ABOUT
REMORSE HERE.

>> YOU ARE GOING TO WRITE AN

OPINION BUT THIS COURT DOESN'T HAVE TO ADDRESS WHETHER LACK OF REMORSE OR FAILURE TO TAKE RESPONSIBILITY CAN BE INFERRED FROM SILENCE BECAUSE THE DEFENDANT CHOSE TO SPEAK.

>> WHAT IS THE ANSWER TO HIS QUESTION?

WHAT IS THE ANSWER?

>> THE ANSWER QUITE CANDIDLY IS IT WOULD DEPEND ON THE CIRCUMSTANCES BUT IF YOU JUST HAVE NO OTHER CIRCUMSTANCES, THE DEFENDANT CHOOSES NOT TO TESTIFY AT TRIAL, DOESN'T SHOW ANY REACTIONS OR DOESN'T HAVE A Demeanor THAT DEMONSTRATES LACK OF REMORSE, IT IS JUST COMING FROM SILENCE I DON'T THINK YOU CAN INFER FROM JUST THAT.

>> IN SUCH AN INSTANCE YOU HAVE A PERSON WHO HAS A PERSONALITY THAT DOESN'T SHOW ANY TYPE OF EMOTION, WE ALL KNOW PEOPLE LIKE THAT, AND THE PERSON TAKES POSITION DURING THE TRIAL AND SENTENCING, DESPITE THE FACT THAT YOU ARE HEARING THE SADDEST STORIES IN THE WORLD AND HE OR SHE STANDS THERE WITHOUT ANY EMOTION, SAYS NOTHING, THE JUDGE COMES OUT AND SAYS YOU FAILED TO TAKE RESPONSIBILITY FOR YOUR ACTIONS.

WHAT SHOULD WE DO?

>> IN A CASE LIKE THAT THE STATE IS NOT ASKING THAT THIS COURT AFFIRM THE SENTENCE AFTER THAT STATEMENT.

>> YOU ARE HERE TO ARGUE THE FACTS OF THIS CASE.

>> LET'S TALK ABOUT THAT HYPOTHETICAL.

IN THAT INSTANCE, IS IT PERMISSIBLE FOR THE COURT TO MAX OUT A SENTENCE?

>> IF THEY ARE RELYING ON AN IMPERMISSIBLE FACTOR, IF YOU ARE INFERRING LACK OF REMORSE FROM NOTHING BUT THE EXERCISE OF THE

RIGHTS REMAIN SILENT THEN KNOW
IT IS NOT A LEGAL SENTENCE
BECAUSE IN THAT CASE YOU ARE
RELYING ON AN IMPERMISSIBLE
FACTOR.

UNDER THE FACTS OF THAT CASE.

>> WHAT YOU SAID IN THIS CASE
THE DEFENDANT DID SPEAK UP AND
THE JUDGE BASICALLY DIDN'T
BELIEVE, WHEN HE SAID I DID NOT
KNOW THERE WAS A GUN OR BELIEVED
HE WASN'T IN POSITION.

>> THE JUDGE DIDN'T HAVE TO
BELIEVE HIM.

THERE IS NO REQUIREMENT THAT
JUST AS ANY WITNESS TAKES THE
STAND IN A JURY TRIAL THE JURY
CAN BELIEVE OR DISBELIEVE ANY OR
ALL OF THE TESTIMONY.

AT SENTENCING THE JUDGE IS FREE
TO ACCEPT OR REJECT ANYTHING THE
DEFENDANT SAID, DOESN'T HAVE TO
FIND A GENUINE.

>> THE REALITY IS THE JUDGE
COULD SIT AND OBSERVE ALL THIS.
AND THEN SAY GIVING YOU THE
MAXIMUM SENTENCE AND THAT WOULD
BE THE END OF IT.

THE JUDGE COULD HAVE SAID MISTER
DAVIS, YOU'VE BEEN FOUND GUILTY
BY JURY OF YOUR PEERS BY
POSSESSION OF A FIREARM,
SECONDARY FELONY, I SENTENCE YOU
TO THE MAXIMUM WHICH IS 15 YEARS
AND THERE WOULD BE NO WAY TO
ATTACK THAT ON APPEAL.

>> THE ONLY REASON THIS COMES UP
IS IF THE TRIAL COURT, THE
SENTENCING JUDGE SPEAKS AND
TALKS ABOUT THE COURT'S
REASONING PROCESS.

THERE IS NO REQUIREMENT THAT THE
COURT GIVE JUSTIFICATION FOR A
SENTENCE THAT IS UP TO THE
STATUTORY MAXIMUM AND HAS TO
GIVE JUSTIFICATION FOR DOWNWARD
DEPARTURES, BUT ISN'T THAT
CORRECT THAT THE TRIAL COURT
COULD JUST SIT THERE AND AS YOU
SAID JUST IMPOSE THE SENTENCE

AND THAT WOULD BE THE END OF IT?
>> THAT IS CORRECT.

UNDER THE CURRENT CRIMINAL PUNISHMENT CODE JUDGE CAN AS YOU SAID JUST SIT THERE AND SAY NOTHING, HERE ARGUMENT AND SAY I SENTENCE YOU TO THE MAXIMUM, I SENTENCE YOU TO 15 YEARS. FROM A POLICY STANDPOINT WE WOULD LIKE JUDGES TO BE TRANSPARENT IN THEIR THOUGHT PROCESS.

THE US SUPREME COURT CHASING GRAYSON THAT TRIAL JUDGE SAID OUT OF FAIRNESS I WANT TO REVIEW IN COURT TO KNOW MY REASONS SO FOR ME FAIRNESS STANDPOINT WE WANT TO ENCOURAGE JUDGES TO BE TRANSPARENT BUT UNDER THE CURRENT STATE OF THE LAW A JUDGE COULD SIT THERE AND SAY NOTHING MORE THAN YOU HAVE BEEN FOUND GUILTY, I SENTENCE YOU TO THE MAXIMUM AND THAT IS A LEGAL SENTENCE THAT CAN'T BE ATTACKED ON APPEAL.

>> HOW COULD YOU HAVE A SITUATION LIKE THIS WHERE A DEFENDANT IS FOUND GUILTY BY THE JURY AND COMES TO SENTENCING AND BUY A SILENCE OR LACK TO AFFIRMATIVELY EXPRESS REMORSE OR TO ADMIT GUILT THROUGH THAT PROCESS, THEN BE SUBJECTED TO A HARSHER PENALTY JUST BECAUSE OF MAINTAINING SILENCE ABOUT ADMISSION OF GUILT, WHY ISN'T THAT A CONSTITUTIONAL VIOLATION?

>> THE QUESTION HAS A PREMISE THAT ASSUMES THE JUDGE WENT UP FROM A BASELINE SENTENCE THAT WE DON'T KNOW SO THE TWO POSSIBILITIES ARE IN THIS CASE THE JUDGE COULD HAVE, AFTER HEARING THE NUMBER 15 FROM TWO SOURCES, THE JUDGE COULD HAVE HAD 15 IN HIS MIND AND AFTER THE DEFENDANT SPOKE SAID YOU HAVEN'T GIVEN ME A REASON TO COME OFF OF 15.

EVERYONE AGREED THAT IS PERMISSIBLE FOR A JUDGE TO DECLINE TO GO DOWN BASED ON LACK OF REMORSE.

THE OTHER OPTION, THE OTHER POSSIBILITY IS THE JUDGE HAD A DIFFERENT NUMBER, DIDN'T WANT TO GO ALONG WITH 15, WANTED TO GIVE SOMETHING A LITTLE LESS BUT THEN HEARD THE DEFENDANT SPEAK AND DECIDED YOU HAVEN'T TAKEN RESPONSIBLE YOUR SHOWN REMORSE SO I WILL ADD THREE YEARS TO WHAT I WAS GOING TO GIVE YOU BEFORE.

WE DON'T HAVE A BASELINE TO KNOW WHAT HAPPENED.

>> ISN'T HE REALLY BEING PUNISHED FOR NOT SPEAKING IN A WAY THAT THE JUDGE IS REQUIRING HIM TO SPEAK ABOUT TAKING RESPONSIBILITY OR SHOWING REMORSE?

>> IN THIS CASE THE JUDGE DIDN'T REQUIRE HIM TO SPEAK AT ALL.

>> IS BEING PUNISHED BY NOT ADMITTING IT.

>> IF WE TAKE THE CASE OF DOWNWARD DEPARTURE WHERE EVERYONE AGREES IT CAN BE USED TO DOWNWARD DEPART IF A DEPENDENT ASK FOR DOWNWARD DEPARTURE AND DOZENS OF REMORSE, HE IS NOT BEING PUNISHED DO NOT GET THE DOWNWARD DEPARTURE.

>> IT SEEMS DIFFERENT TO ME ON ONE HAND IF SOMEONE EXPRESSES REMORSE, TO CONSIDER THAT AS MITIGATION AND REDUCTION OF SENTENCE, BUT ON THE OTHER HAND SOMEBODY WHO IS MAINTAINING INNOCENCE, THINK THEY HAVE A POSSIBILITY THEY ARE GOING TO GET THIS TURNS AROUND ON APPEAL OR GET A NEW TRIAL AND SOMEDAY BE FOUND INNOCENT, IT HAPPENS. WHY ARE THEY THEN SUBJECTED TO A HARSHER SENTENCE FOR THE REQUIREMENT TO SAY THEY ARE GUILTY WHEN THEY DON'T THINK

THEY ARE.

>> I DISAGREE THIS IS A CASE WHERE THE TRIAL JUDGE CONDITIONED THE SENTENCE ON HIM ADMITTING GUILT.

THIS IS A CASE WHERE HE SAID A LOT MORE THAN I AM INNOCENT, DIDN'T DO IT.

HE WENT ON FOR 3 PAGES WHERE HE CAME UP WITH AN ELABORATE CONSPIRACY WHERE EVERYONE IN THE COURTROOM IS OUT TO GET HIM, CUTE HIS OWN LAWYER OF SELLING HIM OUT, ACCUSED THE WITNESS OF LONG, ACCUSED THE POLICE OF PUTTING THE WITNESS UP TO LYING, DIDN'T SPARE THE TRIAL JUDGE BY ESSENTIALLY SAYING HE LET THIS GO ON.

>> IT WAS A TIRADE AGAINST THE WHOLE SYSTEM.

THAT IS A FAIR WAY TO DESCRIBE IT.

HE CAN SAY WHAT HE WANTS TO BUT THAT IS WHAT HE SAID.

IT WAS A TIRADE.

>> HE CHOSE A DEFENDANT HAS A RIGHT OF ALLOCUTION AT SENTENCING, THE RIGHT RAIN SILENT AS WELL AND THE DECISION OF WHETHER TO MAKE THAT ALLOCUTION AT SENTENCING IS A DECISION THAT IS NO DIFFERENT THAN A DEFENDANT FACING THE DECISION DO I TESTIFY OR NOT TESTIFY IN FRONT OF THE JURY? IF I CHOOSE TO TESTIFY THE JURY CAN USE WHAT I SAY AGAINST ME. IT IS NO DIFFERENT IN THE SENTENCING CONTEXT.

I CAN CHOOSE TO SPEAK UP AND SEEK A MORE LENIENT SENTENCE OR CHOOSE TO REMAIN SILENT AND UNDERSTAND IF I CHOOSE TO SPEAK AT SENTENCING, WHAT I SAY MIGHT BE USED AGAINST ME.

>> IF THE DEFENDANT SPEAKS AT ALL AT SENTENCING, THEN THEY HAVE TO ADMIT GUILT.

THEY HAVE NO RIGHT TO MAINTAIN

INNOCENCE OR ARE SUBJECTED TO A HARSHER SENTENCE.

IS THAT THE RULE?

>> AND SOME OTHER COURTS THAT KIND OF IS THE RULE, NOT NECESSARILY ADMIT GUILT BUT THERE ARE MANY OTHER JURISDICTIONS WHERE THE RIGHT OF ELOCUTION IS RECOGNIZED AND TRIAL JUDGES ARE GIVEN DISCRETION IF A DEFENDANT STRAYS FROM WHAT IS UNDERSTOOD TO BE THE BALANCE OF ALLOCUTION. THE JUDGE FOR INSTANCE CAN CUT THEM OFF AND SAY THAT IS NOT WE ARE HERE FOR, NOT TO ARGUE INNOCENCE, THAT WAS THE TRIAL PHASE.

WE ARE HERE FOR SENTENCING. I DON'T AGREE IN AN ALLOCUTION THAT A DEFENDANT HAS THE RIGHT TO ARGUE INNOCENCE.

FLORIDA COURTS HAVE BEEN REMARKABLY SILENT ON THAT.

I DON'T KNOW IF IT IS INTENTIONAL OR NOT BUT EVERY JURISDICTION RECOGNIZES THE RIGHT OF ALLOCUTION HAS MADE CLEAR DEFENDANTS DON'T GET TO JUST SAY ANYTHING AND EVERYTHING AND MANY OF THEM SPECIFICALLY NOTE THE DEFENDANT DOES NOT GET TO ARGUE INNOCENCE DURING ALLOCUTION BECAUSE THAT'S NOT THE DECK OF ALLOCUTION.

>> ANYTHING TEXTUALLY DIFFERENT FROM THE FEDERAL CONSTITUTION THAT WOULD JUSTIFY OR REQUIRE US TO HAVE A DIFFERENT STANDARD THAN THE FEDERAL STANDARD ON THIS?

>> KNOW.

THE ONLY WAY THIS FITS WITHIN A CONSTITUTIONAL FRAMEWORK IS IF WE GO INTO THE DUE PROCESS CLAUSE AND LOOKING AT THE FEDERAL DUE PROCESS CLAUSE VERSUS THE FLORIDA DUE PROCESS CLAUSE I DON'T SEE ANYTHING THAT WOULD REQUIRE FLORIDA TO HAVE A

DIFFERENT STANDARD.

>> IF I WALKED INTO YOUR STORE WITH A 30% COUPON I CLIPPED OUT OF YOUR ADVERTISEMENT AND GOTTI 30% DISCOUNT AND JUSTICE PAULSON COMES BEHIND ME AND WALKED INTO THE STORE AND DOESN'T HAVE A COUPON CARD, WOULD HE BE JUSTIFIED IN COMPLAINING THAT YOU'RE PUNISHING HIM FOR NOT GETTING THE COUPON.

YOU REWARDED ME FOR TAKING TIME TO CLIP THE COUPON, CORRECT?

>> THAT IS CORRECT.

YOU HAVE GOTTEN A DISCOUNT FOR HAVING THE COUPON.

>> BOTH PARTIES AGREE A SHOW OF REMORSE AND TAKING RESPONSIBILITY IN THIS CONTEXT, IS A VALID COUPON.

I AM STRUGGLING TO UNDERSTAND WHY IF THERE IS A CASE - THERE ARE CASES WHERE IT DOESN'T MATTER, THE PRIOR RECORD IS REMORSE WOULD MAKE A DIFFERENCE. REMORSE COULD MAKE A DIFFERENCE WHERE SOMEONE WALKS IN WITH A COUPON.

IF THEY DON'T, YOU'RE PUNISHING THEM IN THE SAME WAY YOU'RE PUNISHING SOMEBODY FOR NOT HAVING A COUPON BECAUSE THEY DON'T GET THE DISCOUNT.

THAT IS SORT OF WHAT YOU ARE ARGUING BUT I AM STILL STRUGGLING WITH THE FACT THAT ONCE YOU ACCEPT REMORSE AS AN APPROPRIATE SENTENCING, WHETHER IT IS ARTICULATED OR NOT IF SOMEONE DOES NOT GET THAT REDUCED SENTENCE FOR A SHOW OF REMORSE WHETHER THEY HAVE ALLOCUTION OR NOT THEY ARE EASILY GETTING THE GREATER SENTENCE BECAUSE THEY DID NOT SHERRY MORRIS, CORRECT?

>> THAT IS CORRECT.

THEY ARE GETTING A GREATER SENTENCE FOR NOT SHOWING REMORSE BUT THE OTHER PART OF THAT IS IF

REMORSE OR RESPONSIBILITY ARE TRULY IMPERMISSIBLE FACTORS THERE SHOULDN'T BE AN UP OR DOWN DISTINCTION AT ALL.

SO FOR INSTANCE EVERYONE AGREES RACE, RELIGION, NATIONAL ORIGIN, THOSE ARE IMPERMISSIBLE FACTORS. THERE WOULD BE NO UP OR DOWN DISTINCTION, IT WOULDN'T ACCEPT A SCENARIO WHERE A JUDGE SAYS YOU ARE A GOOD CATHOLIC FELLOW AS I AM WHICH WAS ACTUALLY THE FACT OF ONE OF THE CASES IN THE BRIEFS, YOU'RE GOING TO GET A LESSER SENTENCE OR YOU HAVEN'T DISAVOWED CATHOLICISM WHICH I AM AGAINST, YOU GET A GREATER SENTENCE WAS WE WOULDN'T HAVE AN UP OR DOWN DISTINCTION.

IF IT IS TRULY IMPERMISSIBLE YOU CAN'T CONSIDER IT AT ALL.

REMORSE IS THE ONLY FACTOR THAT APPEARS TO BE ABLE TO WORK ONE WAY AND NOT THE OTHER WAY.

FROM A POLICY STANDPOINT IT DOESN'T MAKE SENSE FROM A POLICY STANDPOINT IT IS UNWORKABLE.

>> WHAT HAPPENS IF YOU ARE REALLY NOT GUILTY?

YOU DID NOT DO THE CRIME, YOU ARE FOUND GUILTY.

YOU REFUSE TO TELL THE JUDGE I DID NOT DO THIS?

>> OF THOSE ARE THE ONLY WORDS SPOKEN AT THE SENTENCING HEARING IT IS A CLOSER CALL TO JUDICIAL VINDICTIVENESS.

>> YOU DO AGREE THAT PEOPLE HAVE BEEN EXONERATED IN FLORIDA BEING ON DEATH ROW.

>> I DIDN'T KNOW ABOUT THE DEATH ROW PART BUT I KNOW PEOPLE WHO HAVE BEEN FOUND GUILTY THAT ARNESON END OF BEING CLEARED.

>> IT HAPPENS.

THE SUGGESTION HERE IS IF YOU ARE NOT GUILTY, THE JURY FINDS YOU GUILTY FOR WHATEVER REASON YOU APPROACH SENTENCING, YOUR LAWYER IS GOING TO TELL YOU THIS

JUDGE IS A HARD SENTENCE OR, YOU BETTER TELL HIM YOU DID IT COME YOU ARE SORRY, YOU FEEL HORRIBLE, LIE.

YOU WANT TO GET IF YOU DON'T WANT TO GET THE MAX.

>> BUT THE OTHER PART OF THAT THE WE HAVEN'T ADDRESSED IS THE STANDARD OF REVIEW AND HOW YOU DETERMINE ASSUMING IT IS EVEN ERROR TO START WITH.

FOR THE SAKE OF ARGUMENT LET'S SAY IT IS ERROR, NOT ALL ERRORS ARE REVERSIBLE SO THE SECOND PART OF THE INQUIRY IS HOW TO DETERMINE IF IT IS REVERSIBLE ERROR AND NOBODY HAS ADDRESSED THE STANDARD OF REVIEW YET.

>> YOU WOULD AGREE IF IT IS A DUE PROCESS VIOLATION IT WOULD BE FUNDAMENTAL ERROR AND WOULDN'T BE A HARMLESS ERROR TEST.

>> I AGREED.

>> IF IT IS AN INAPPROPRIATE SENTENCING CONSIDERATION AND THE CONSIDERATION IS MADE LIKE ANY OTHER CONSTITUTIONALLY INAPPROPRIATE SENTENCING CONSIDERATION IT WOULD BE REVERSAL FOR SENTENCING BEFORE ANOTHER JUDGE.

>> I DON'T AGREE WITH THAT AND THE DISTRICT COURT'S UP TO THIS POINT, ALL FIVE OF THEM EVEN THOUGH I THINK FOR LACK OF A BETTER TERM THEY BUTCHERED THE STATE UNDER REVIEW ALL OF THEM AGREE JUST BECAUSE EVEN IN THE CONTEXT OF LACK OF REMORSE IT IS NOT AUTOMATICALLY REVERSIBLE.

>> IF YOU CAN TELL FOR CERTAIN THE SAME SENTENCE WOULD HAVE BEEN GIVEN.

>> IT DOESN'T AFFECT THE SENTENCE, PART OF THAT FUNDAMENTAL ERROR ANALYSIS. THE PROBLEM WITH WHAT DISTRICT COURT HAS BEEN DOING IS REQUIRING EVEN IN AN PRESERVED

CASE WHERE WE SHOULD BE IN
FUNDAMENTAL ERROR LAND THEY HAVE
BEEN REQUIRING THE STATE TO
DEMONSTRATE THE ERROR WAS
HARMLESS AND FOR THE STATE TO
DEMONSTRATE WHY REVERSE WAS NOT
WARRANTED.

WHEN A COMMENT IS NOT OBJECTED
TO AND NOT PRESERVED IT HAS BEEN
UNDERSTOOD IN EVERY CONTEXT THAT
IT IS A DEFENDANT'S BURDEN TO
SHOW TO DEMONSTRATE FUNDAMENTAL
ERROR AND IN THE SENTENCING
CONTEXT IS A QUALITATIVE
COMPONENT AND QUANTITATIVE
COMPONENT.

THE QUANTITATIVE COMPONENT THEY
ARE MISSING OUT ON, FOR THE
QUANTITATIVE COMPONENT YOU HAVE
TO SHOW THE SENTENCE WAS
AFFECTED BY THIS FACTOR.

WE DON'T HAVE A BASELINE TO KNOW
WHETHER THE JUDGE DECLINED TO
SHOW LENIENCY OR IMPERMISSIBLY
DECIDED TO GO UP.

UNDER THE FUNDAMENTAL ERROR
STANDARD THE DEFENDANT'S BURDEN
TO DEMONSTRATE WHICH OF THOSE
HAPPENED AND SINCE WE DON'T
KNOW, THAT REALLY BY ITSELF
SHOULD REQUIRE REFORM AND EVEN
IF YOU DON'T WANT TO HOLD THE
LACK OF REMORSE OR LACK OF
FAILURE TO TAKE RESPONSE A
BELIEVER PERMISSIBLE SENTENCING
FACTORS.

IF NOTHING ELSE BECAUSE THEY
CAN'T DEMONSTRATE AND HAVEN'T
ATTEMPTED TO ARTICULATE A TEST
FOR HOW TO DETERMINE WHETHER THE
JUDGE PERMISSIBLY CHOSE TO GO UP
TO 15 WE DON'T KNOW AND IF
NOTHING ELSE I THINK THE COURT
SHOULD CLARIFY WHAT THE STANDARD
OF REVIEW IS WHEN A SENTENCING
ERROR LIKE THIS IS AN PRESERVED
AND IT SHOULD BE FUNDAMENTAL AIR
AND STAGED AND HAVE A BURDEN.

>> WOULD YOU AGREE THAT IF IT IS
A DUE PROCESS VIOLATION TO

CONSIDER LACK OF REMORSE, TO TAKE RESPONSIBILITY FOR YOUR ACTIONS, THEN IT WOULD SEEM TO ALSO BE A DUE PROCESS VIOLATION NOT TO GIVE THE DEFENDANT THE SAME SENTENCE HE WOULD'VE GOTTEN IF HE HAD TAKEN RESPONSIBLY BY A PLEA.

>> I DON'T AGREE WITH THAT.

IN THE CONTEXT OF PLEA-BARGAINING IN GENERAL, THIS COURT, CERTAINLY THE US SUPREME COURT HAS ACKNOWLEDGED WE ARE RACES I THAT ENCOURAGES GUILTY PLEAS AND THE GOVERNMENT CAN, THE STATE CAN ENCOURAGE SOMEONE TO PLEAD GUILTY BY OFFERING A SENTENCE THAT WOULD BE LESS THEN THEY WOULD GET AT TRIAL.

HAVING BEEN A PROSECUTOR MYSELF BEFORE COMING TO THE ATTORNEY GENERAL'S OFFICE IN A CASE WHERE DRUG MINIMUM MANDATORY WHERE THEY ARE LOOKING AT A 3 YEAR MINIMUM MANDATORY SENTENCE IF THEY ARE FOUND GUILTY AT TRIAL THE STATE CAN WAIVE MINIMUM MANDATORY TO GET A DEFENDANT TO PLEAD.

WITHOUT A MINIMUM MANDATORY THE STATE CAN ENCOURAGE A GUILTY PLEA BY OFFERING TO DOWNWARD DEPARTURE.

THAT IS ONE OF THE BASES FOR DOWNWARD DEPARTURE, LEGITIMATE UNCOERCED PLEA BARGAINS ADJUST BECAUSE THE DEFENDANT DIDN'T PLEAD GUILTY GOES TO TRIAL AND THEN GETS THE MINIMUM MANDATORY, I DON'T KNOW WE WOULD SAY HE WAS UNCONSTITUTIONALLY PUNISHED FOR THAT.

>> WE WAIT FOR THE SAME REASON THAT IS OKAY.

>> I MISUNDERSTOOD.

WE WOULDN'T SAY IT IS UNCONSTITUTIONAL.

>> IT IS NOT A DUE PROCESS VIOLATION BUT WOULDN'T YOU DESCRIBE THAT IS PUNISHING THE

DEFENDANT FOR NOT TAKING THE PLEA?

HE DIDN'T ACCEPT RESPONSIBILITY, DIDN'T TAKE THE PLEA, GETTING A GREATER SENTENCE, THE FACT THAT THAT IS CLEARLY ESTABLISHED AS NOT A DUE PROCESS VIOLATION.

>> I THINK THE SUPREME COURT SAID YOU ARE BEING PUNISHED BUT YOU ARE NOT BEING PUNISHED IN ANY WAY THE CONSTITUTION PROHIBITS AND I SEE MY TIME IS EXPIRING SO IF THERE ARE NO OTHER QUESTIONS.

>> BECAUSE REMORSE WAS NEVER MENTIONED BY THE TRIAL JUDGE THE ONLY WAY I CAN INTERPRET THE FIRST DCA USING THAT IS INTERCHANGEABLY WITH MAINTAINING YOUR INNOCENCE AND IF YOU HAVE A RIGHT TO MAINTAIN YOUR INNOCENCE AND HAVE A RIGHT NOT TO EXPRESS REMORSE WAS THE MOST IMPORTANT THING I DIDN'T SAY IN MY INITIAL ARGUMENT WAS WE SHOULD BELIEVE TRIAL JUDGES.

WE NEED TO BELIEVE THEM.

THE JUDGE IN THIS CASE TOLD US WHAT HE WAS CONSIDERING IN THE SENTENCE, MISTER DAVIS'S RECORD, THE FACT THAT HE HAD A FIREARM AND HE SAID NOT ONCE BUT TWICE YOU STILL FAIL TO TAKE RESPONSIBILITY.

IF THERE ARE NO FURTHER QUESTIONS.

>> WOULD YOU AGREE TO THE POINT OPPOSING COUNSEL MADE THAT WE DON'T KNOW WHETHER THE JUDGE THOUGHT THAT A 15 YEAR SENTENCE WAS APPROPRIATE UNLESS REMORSE WAS SHOWN OR THE THOUGHT MAY BE A 10 YEAR SENTENCE WAS APPROPRIATE BUT NOW I'M GOING TO PUNISH YOU BECAUSE YOU DIDN'T EXPRESS REMORSE, WE HAVE NO WAY OF KNOWING WHICH OF THOSE TWO IS TRUE SO WE DON'T KNOW WHETHER CONSIDERATION OF LACK OF REMORSE MADE A DIFFERENCE IN THE LENGTH

OF SENTENCE.

>> JUSTICE LAWSON, WE DON'T KNOW THAT BUT THAT IS SOMEWHAT IRRELEVANT IN A SITUATION WHERE THE RIGHT WAY OF PROTECTING IS NOT TO A CERTAIN SENTENCE BUT TO BE SENTENCED BASED ON PERMISSIBLE FACTORS AND THAT IS THE HARM DONE HERE TO MISTER DAVIS.

HIS SENTENCE WAS BASED ON IMPERMISSIBLE CONSIDERATION OF HIS RIGHT TO MAINTAIN HIS INNOCENCE AND BECAUSE OF THAT HE SHOULD GET A NEW SENTENCING HEARING BEFORE A DIFFERENT JUDGE.

>> YOU KEEP SAYING THE RIGHT TO MAINTAIN INNOCENCE.

SHOW ME IN THE CONSTITUTION WHERE IT SAYS THAT.

YOU HAVE A RIGHT TO A JURY TRIAL, YOUR CLIENT GOT THAT. NOW WE ARE TALKING WHETHER HE CHOOSES TO SPEAK AT SENTENCING AND IF SO WHAT HE CHOOSES TO SAY.

WHAT IS THE RIGHT TO MAINTAIN INNOCENCE YOU ARE REFERRING TO?

>> I'M REFERRING TO THE DUE PROCESS RIGHT.

>> TELL ME WHAT THE WORDS ARE THAT IT SAYS?

>> I DON'T HAVE THE 14TH AMENDMENT OR THE STATE'S CONSTITUTION --

>> NOT TO BE A WITNESS AGAINST YOURSELF?

>> KNOW.

>> THAT IS WHAT THE WORDS IN THE CONSTITUTION -

>> I AM SORRY.

IN THE FLORIDA CONSTITUTION I WOULD SAY IT IS ARTICLE 1 SECTION 22 AND --

>> WHICH SAYS WHAT?

>> THE RIGHT TO PLEAD GUILTY AND GO TO TRIAL BUT THIS COURT'S INTERPRETATION THAT THAT RIGHT CARRIES THROUGH ALL THE

PROCEEDINGS AND THE FIRST DISTRICT OR ANY OTHER DISTRICT IN THE STATE DISAGREES WITH THAT.

THE FIRST DISTRICT SAYS YOU HAVE THE RIGHT TO MAINTAIN YOUR INNOCENCE BUT FAILURE TO ACCEPT RESPONSIBILITY HAS NOTHING TO DO WITH THAT AND THAT IS WHERE WE DISAGREE.

>> IF THE TRIAL JUDGE SAID WHAT I'M ABOUT TO SAY AT SENTENCING YOU WOULD THINK THERE WAS A DUE PROCESS VIOLATION.

I HAVE LOOKED CAREFULLY AT YOUR PRIOR CRIMINAL RECORD, AND FOR ALL THE TESTIMONY, I THINK OF 15 YEAR SENTENCE, GIVING THOSE TWO FACTORS.

IF I THOUGHT REHABILITATION WAS POSSIBLE FOR YOU I MIGHT CONSIDER REHABILITATIVE SENTENCE, MAYBE 5 YEARS IN PROBATION, BUT SINCE YOU AREN'T TAKING RESPONSIBLY I DON'T THINK REHABILITATION IS APPROPRIATE SO I WILL GIVE YOU THE APPROPRIATE SENTENCE BASED ON YOUR CRIMINAL HISTORY AND FACTS OF THIS CASE, THAT WOULD BE A DUE PROCESS VIOLATION.

>> I DON'T UNDERSTAND HOW REHABILITATION WOULD BE RELEVANT WHERE THE CLIENT DIDN'T ASK FOR A DEPARTURE SENTENCE AND LOOKING AT A SENTENCE BETWEEN 10-15 YEARS.

>> IN THE BRIEFING, MOST FOLKS CONSIDER LACK OF REMORSE AND APPROPRIATE CONSIDERATION BECAUSE IT INDICATES TAKING RESPONSIBILITY IS THE FIRST STEP IN REHABILITATION.

>> I DON'T THINK REHABILITATION OPENS --

>> FORGET REHABILITATION. I WOULD GIVE YOU A 15 YEAR SENTENCE BASED ON YOUR HISTORY AND IF YOU HAVE SHOWN REMORSE I WOULD HAVE REDUCED IT BUT YOU

DIDN'T, WOULD THAT BE A DUE
PROCESS VIOLATION?

>> YES.

THE SENTENCE WOULD HAVE BEEN
IMPROPER IF MISTER DAVIS SAID
SAID NOTHING.

THE STATE BELIEVES IT IS EVEN
MORE PROPER BECAUSE OF WHAT HE
SAID BUT THAT'S NOT THE LAW.

HE HAD THAT RIGHT, THAT'S WHAT
HE WAS DOING BASED ON WHAT THE
COURT SAID IN THE PAST.

HE WAS MAINTAINING HIS
INNOCENCE, HE BELIEVED HIMSELF
TO BE INNOCENT.

>> THE STATE HAS CONCEDED IF I
UNDERSTAND CORRECTLY IT WOULD BE
A DIFFERENT CASE IF HE SAID
NOTHING.

THEY ARE NOT ARGUING ABOUT A
DIFFERENT CASE WHERE THE
DEFENDANT SAID NOTHING IN THE
SENTENCING.

>> WHEN MISTER HOFFMAN SPOKE TO
THAT IT WAS AN ANSWER TO THE
QUESTION OF WHETHER LACK OF THE
MORRIS CAN BE INFERRED FROM
SILENCE.

WHAT I AM SAYING, BECAUSE
REMORSE ISN'T PART OF THIS CASE,
WHAT I AM SAYING IS THE TRIAL
JUDGE AIRED IN TAKING INTO
CONSIDERATION HIS CONSTITUTIONAL
RIGHT TO MAINTAIN THAT INNOCENCE
EVEN THOUGH THE JURY CAME BACK
WITH A GUILTY VERDICT.

>> YOU ARE 2 MINUTES OVER IF YOU
COULD SUM UP QUICKLY.

>> THANK YOU.

>> THE CLOCK HAS BEEN RUNNING.

>> WE WOULD JUST ASK THAT YOU
REVERSE THE OPINION OF THE FIRST
DCA AND GO BACK TO THE TESTS
THAT HAS BEEN THE LAW IN FLORIDA
FOR 30 YEARS AND THAT IS WHETHER
OR NOT THE RECORD CAN BE READ TO
REASONABLY SHOW THE TRIAL COURT
RELIED ON IMPERMISSIBLE FACTOR.

>> THANK YOU FOR YOUR ARGUMENTS.

