

>> THIS CASE CONCERNS ONE DRIVING INCIDENT WHERE SOMEONE WAS CHARGED WITH DRIVING WITH A SUSPENDED LICENSE.

>> BEFORE WE GET STARTED I WOULD LIKE TO ASK BOTH OF YOU THIS QUESTION.

SUBSECTION ONE SPECIFICALLY SAYS ACCEPT HABITUAL TRAFFIC OFFENDER, ACCEPTING THEM OUT. SUBSECTION TWO, AGAIN ACCEPTING THEM OUT.

I MEAN THIS WHOLE FIGHT IS ABOUT THIS GUY IS ALLEGEDLY A HABITUAL TRAFFIC OFFENDER. HOW IN THE WORLD WAS HE CONVICTED OF THOSE OTHERS WHEN HE'S SPECIFICALLY EXCLUDED FROM THOSE?

>> WELL WE AGREE THAT HE SHOULDN'T BE, HOWEVER WHEN THE STATE CHOSE TO PROSECUTE HIM FOR SUBSECTION TWO THEY WERE THEREFORE PRECLUDED FROM PROSECUTING UNDER SUBSECTION FIVE.

>> DID YOU MAKE THAT ARGUMENT IN THE BRIEF AND IN THE THIRD DISTRICT WITH REGARD TO THIS CASE?

I MEAN THAT TO ME IS ALMOST THE CLEARER VISION OF WHAT'S INTENDED IN THIS LEGISLATION.

>> I THINK WHAT THE STATE WAS ARGUING WAS THEY COULD PROSECUTE HIM AND HIS LICENSE WAS SUSPENDED SO HE COULD PROSECUTE HIM.

>> AM I CRAZY?

I'M TRYING TO UNDERSTAND THIS. DOES IT NOT ACCEPT SOMEONE IN THE STATUS OF HABITUAL TRAFFIC OFFENDER?

>> IT DOES.

THEY WOULDN'T BE ABLE TO PROSECUTE UNDER FIVE OR UNDER TWO.

WHAT I THINK THE LEGISLATURE DID HERE --

>> ISN'T THE ISSUE JUST THE

CLIENT REALLY PREFERS TO BE CHARGED AS A FELON?

>> HE WAS CHARGED WITH A MISDEMEANOR BEFORE THEY CHARGED HIM WITH A FELONY. THEY TURNED AROUND AND PROSECUTED HIM FOR A FELONY AFTER HE PLED GUILTY TO THE MISDEMEANOR SO HE FILED A MOTION.

>> DID HE PLEAD GUILTY TO THAT AND WOULDN'T THAT BE THE END OF IT?

>> IT'S THE SAME TO CHARGE HIM WITH WHATEVER CRIME THEY FEEL IS APPROPRIATE. HE COULD NOT PLEAD GUILTY TO THAT.

>> IF IT WAS MY CLIENT AND I KNEW HE WAS A HABITUAL TYPE OF OFFENDER AND HE WAS CHARGED WITH DUS, I WOULD GO INTO COURT THE NEXT MORNING AND PLEAD GUILTY AND THAT WOULD BE THE END OF IT.

>> YOU WOULDN'T BE ABLE TO DO THAT --

THE STATE HAS TO MAKE THE CHARGE TO MAKE IT APPROPRIATE SO OBVIOUSLY THE STATE THEY COULD HAVE CHOSEN TO CHARGE HIM UNDER FIVE WHICH WOULD BE A FELONY COUNT AND NOT UNDER TWO BUT THEY CHOSE TO CHARGE HIM UNDER TWO RATHER THAN FIVE.

>> I THINK WHAT JUSTICE LEWIS IS SAYING, AND I'M TRYING TO UNDERSTAND THIS, IS THAT UNDER THIS CLEAR TERM OF TWO THEY CAN'T CHARGE HIM.

HE IS EXCLUDED BECAUSE HE IS A HABITUAL OFFENDER.

YOU HAVE THIS CASE BUT WE HAVE GOT THE WHOLE PICTURE TO LOOK AT AND SO IN THE END IF SOMEBODY IS A HABITUAL OFFENDER AND CAN ONLY BE PROSECUTED UNDER THE FELONY AND NOT AS A MISDEMEANOR THAT DOESN'T REALLY --

IT MIGHT HELP YOUR CLIENT IN THIS SITUATION BUT NOT THE GROUP

OF DEFENDANTS IN THE FUTURE SO
WHAT IS YOUR POSITION ON THAT?
IT IS NOT A CRIME IN SUBSECTION
TWO AND A HABITUAL OFFENDER CAN
BE CONVICTED?

>> WELL I THINK TO BE A HABITUAL
OFFENDER THE STATE HAS TO CHARGE
YOU.

I DON'T THINK IT'S THE
DEFENDANT'S OBLIGATION TO TURN
AROUND AND BE CHARGED WITH A
MISDEMEANOR AND SAY WAIT A
MINUTE --

[INAUDIBLE]

>> I'M NOT PUTTING IT ON YOU.
I DON'T THINK THAT'S WHAT WE ARE
SAYING HERE.

IF A HABITUAL OFFENDER IS
EXCLUDED FROM TWO THEN IN A
FUTURE CASE THE ONLY OPTION THE
STATE WOULD HAVE WOULD BE TO
CHARGE SOMEBODY LIKE YOUR CLIENT
UNDER THE MORE SEVERE PENALTY.

>> I THINK THAT'S RIGHT IF THEY
BELIEVE THAT HE IS A HABITUAL
TRAFFIC OFFENDER BUT THAT'S THE
DECISION THEY HAVE TO MAKE AND
THEY HAVE TO DECIDE WHETHER THEY
HAVE TO PROVE IT OR WHETHER HE
IS QUALIFIED AS A HABITUAL
TRAFFIC OFFENDER.

IF THEY CHARGE HIM AS A HABITUAL
TRAFFIC OFFENDER HE WOULD BE
CHARGED UNDER FIVE.

IF HE'S CHARGED WITHOUT
KNOWLEDGE HE WOULD HE CHARGED
UNDER TWO.

>> HE COULD NOT BE CHARGED UNDER
SUBSECTION TWO BECAUSE HE IS A
HABITUAL TRAFFIC OFFENDER, THEN
WHAT HAPPENS TO THAT CONVICTION?

>> UNDER TWO?

>> IN THIS CASE OR IN ANY CASE
WHERE THE STATE -- YOU CHARGE
THEM BUT IN FACT THEY SHOULD
HAVE BEEN CHARGED UNDER
SUBSECTION FIVE.

>> I DON'T THINK -- WHEN THEY
CHARGED HIM UNDER TWO THEY
HAVEN'T ALLEGED THAT HE'S A

HABITUAL TRAFFIC OFFENDER.
THEY JUST ALLEGED HE WAS DRIVING
WITH KNOWLEDGE.

>> THE ARGUMENT IS, ONCE HE HAS
PLED TO SUBSECTION TWO, HE
CANNOT BE CHARGED WITH
SUBSECTION FIVE BECAUSE WHAT?
IS IT A LESSER PROVEN OFFENSE?
IS IT A DEGREE OF THE SAME
CRIME?

WHAT IS YOUR ARGUMENT WHY HE
CAN'T BE CHARGED UNDER
SUBSECTION FIVE?

>> WHAT THE COURT SAID IN VALDES
WHICH PROHIBITS DOUBLE JEOPARDY,
CONCERNS PEOPLE FROM BEING
PROSECUTED FOR THE SAME CRIME
APPLIES HERE.

WHAT THE LEGISLATURE DID IN
3.2.34 IS THEY CREATED AN
ESCALATING SERIES OF PENALTIES
DEPENDING ON HOW SEVERE THEY
VIEW THE CONDUCT UNDERLYING IT
SO YOU CAN DO IT WITHOUT
KNOWLEDGE UNDER ONE AND YOU CAN
DO IT WITH KNOWLEDGE AND IT'S
EITHER A SECOND-DEGREE FELONY --
SECOND-DEGREE MISDEMEANOR
THIRD-DEGREE MISDEMEANOR OR
FELONY OR IF YOU'RE A HABITUAL
TRAFFIC OFFENDER THAT IS EVEN
MORE SERIOUS AND YOU WOULD HAVE
TO PROVE KNOWLEDGE AND IT'S
AUTOMATICALLY A THIRD-DEGREE
FELONY UNDER FIVE.

WHAT THE LEGISLATURE HAS DONE IS
SET UP AN ESCALATING THEORY OF
OFFENSES.

THEY RATCHETED UP THE PENALTIES
DEPENDING ON THE CONDUCT AND
WHAT THAT DOES --

>> THAT THE VERDICT SAYS IT'S A
THIRD-DEGREE FELONY, CORRECT?
AND SO IS A HABITUAL --

[INAUDIBLE]

THAT'S A THIRD-DEGREE FELONY
ALSO.

>> THEY ARE DIFFERENT BECAUSE IN
THE THIRD OFFENSE UNDER TWO THE
STATE HAS TO PROVE KNOWLEDGE.

IT'S A HIGHER BURDEN TO THE STATE.

IF YOU QUALIFY AS A HABITUAL TRAFFIC OFFENDER THE STATE DOESN'T HAVE TO PROVE KNOWLEDGE. IT'S JUST AUTOMATIC.

>> IT'S THE SAME EFFECT ONE WITH KNOWLEDGE AND THE OTHER YOU DON'T HAVE TO PROVE KNOWLEDGE.

>> THAT'S THE DIFFERENCE?

>> I DON'T THINK THEY ARE THE SAME OFFENSE EXACTLY.

THEY ARE RELATED IN THE SENSE THAT THEY BOTH PUNISHED WITH A HABITUAL TRAFFIC OFFENDER.

>> HOW ARE YOU SAYING THAT THEY ARE --

>> THEY ARE NOT THE EXACT SAME OFFENSE.

THEY HAVE DIFFERENT ELEMENTS. ONE OF THE ELEMENTS IS HABITUAL TRAFFIC OFFENDER IN ONE OF THE ELEMENTS IS KNOWLEDGE AND THEY DON'T OVERLAP.

HOWEVER THEY PUNISH THE SAME UNDERLYING CONDUCT.

THE LEGISLATURE CREATED A RATCHETING UP OF BOTH PENALTIES DEPENDING ON WHAT THEY DO FOR THE UNDERLYING PENALTY.

>> LET ME ASK YOU THIS.

LET'S SAY FOR A SECOND THAT HYPOTHETICALLY SOMEONE PLEADS GUILTY TO DRIVING UNDER THE STATUTE AND THEY ARE PLACED ON PROBATION, KNOWLEDGE PROBATION. COULD HE COME BACK AND SAY WELL JUDGE, I SHOULD NOT HAVE BEEN PUT ON PROBATION.

I SHOULD NOT HAVE PLED GUILTY TO THAT CRIME BECAUSE I'M A HABITUAL OFFENDER.

DO YOU NOW THROW OUT THE INITIAL GUILTY PLEA?

>> I DON'T THINK SO.

>> BUT HE PLEADED TO A CRIME HE WAS NOT SUPPOSED TO.

>> IT'S NOT AN ELEMENT OF SUBSECTION TWO THAT THE STATE HAS TO PROVE THAT YOU'RE NOT

HABITUAL TRAFFIC OFFENDER.
HE PLED TO A CRIME UNDER TWO
THAT HE COMMITTED.

>> IS THAT DONE CUSTOMARILY?
NOBODY APPEALS UNLESS SOMEONE
FINDS OUT BUT IS THERE A PLEA
BARGAIN SAY IN DADE COUNTY?
DO PEOPLE PLEAD DUS JUST TO GET
THE CASE MOVING?

>> I DON'T HAVE THE ANSWER TO
THAT QUITE HONESTLY JUSTICE
LABARGA.

ULTIMATELY IT'S UP TO THE
PROSECUTOR TO DECIDE.

FIRST OF ALL THE MISDEMEANOR,
YOU ARE PROSECUTED UNDER THE
MISDEMEANOR.

>> I CAN SEE THE SITUATION WHERE
THE PROSECUTOR WOULD OFFER A DUS
AND IF YOU DON'T I'M GOING
TO GO OUT WITH A FELONY.
I CAN'T BECAUSE YOU'RE HABITUAL
OFFENDER.

>> I CAN SEE THAT HAPPENING TOO
BUT I JUST DON'T HAVE THE
KNOWLEDGE.

>> IS THIS A FELONY CASE?

>> I WOULD ASSUME SO.

>> IF HE POINTED TO A
NONEXISTENT CRIME BECAUSE IT'S
NONEXISTENT BECAUSE IT EXCLUDES
THE HABITUAL TRAFFIC OFFENDER
WHAT HAPPENS THEN TO THE --

>> NOTHING HAPPENS.

HE COMMITTED, HE ADMITTED TO
COMMITTING THE ELEMENT WHICH IS
MY LICENSE WAS SUSPENDED.

THOSE WERE THE ELEMENTS AND HE
ADMITTED TO IT.

IT'S NOT AN ELEMENT THAT HE'S
NOT A HABITUAL TRAFFIC OFFENDER
SO IT'S NOT THAT HE PLED TO
SOMETHING HE DID NOT COMMIT.

>> ISN'T IT -- IT SEEMS LIKE IF
IT EXCLUDES THIS PARTICULAR
CATEGORY OF PEOPLE FROM A
MISDEMEANOR WOULDN'T IT SEEM
THAT THE LEGISLATURE IS INCLUDED
AS A FELONY CHARGE?

>> I THINK THAT WAS THE INTENT

OF THE LEGISLATURE AND CERTAINLY THE STATE COULD HAVE CHARGED IT AS A FELONY BUT WHEN THEY CHOSE TO CHARGE IT AS A MISDEMEANOR --

>> CAN YOU PLEAD TO A NONEXISTENT CRIME?

>> I THINK GENERALLY THE ANSWER TO THAT IS NO HOWEVER I DON'T THINK IT'S A NONEXISTENT CRIME. THIS IS A CRIME THAT EXISTS -- THAT HE COMMITTED EVERY ELEMENT OF.

>> ASSUME THAT WHERE NONEXISTENT CRIME AND NOT A MISDEMEANOR. WHAT WOULD HAPPEN?

>> I DON'T KNOW TO THE ANSWER TO THAT QUITE HONESTLY BECAUSE HE STILL HAS A DOUBLE JEOPARDY EXPECTATION.

IN A TYPICAL SITUATION YOU WOULD BE TRYING TO MAKE A PLEA IN A WAY THAT WOULD THEN IF IT'S THE OFFENDER.

THIS WOULD BE VACATING A PLEA IN A WAY THAT WOULD PENALIZE HIM AND I'M NOT AWARE OF ANY SITUATION WHERE THAT HAS HAPPENED SO I CAN'T GIVE YOU AN ANSWER.

IF I COULD JUST ANALOGIZE.

>> SO THE MISDEMEANOR WOULD NOT STAND AND YOUR ARGUMENT WOULD BE THAT THE FELONY, YOU COULDN'T DO THE FELONY CONVICTION EITHER UNDER DOUBLE JEOPARDY.

>> RIGHT.

THAT'S MY ARGUMENT RIGHT NOW AND THAT'S WHAT THE STATE IS TRYING TO DO RIGHT NOW WITHOUT VACATING THE MISDEMEANOR.

THEY ARE TRYING UNDER THE SAME CONDUCT TO CONVICT WITH A FELONY.

>> EXPLAIN TO ME HOW THE DOUBLE JEOPARDY RULE WOULD APPLY IN THIS?

>> IN YOUR HYPOTHETICAL OR IN THIS CASE?

>> HYPOTHETICAL.

>> WELL BECAUSE THE WHOLE IDEA

BEHIND DOUBLE JEOPARDY IS THAT YOU'D HAVE AN EXPECTATION THAT THEY ARE ONLY GOING TO BE PLACED IN JEOPARDY ONE TIME FOR A PARTICULAR OFFENSE SO IN THAT SITUATION IF THE STATE WOULD TURN AROUND AND SAY OH WE MADE A MISTAKE AND WE WANT TO VACATE YOUR PLEA AND THE PENALTY YOU HAVE ALREADY DONE FOR THIS MISDEMEANOR SO WE CAN PROSECUTE YOU MORE SEVERELY WITH A FELONY, THAT WOULD VIOLATE HIS EXPECTATIONS OF DOUBLE JEOPARDY. I DON'T THINK THERE IS AN ALLEGATION THAT HE HAD SOME NEFARIOUS MOTIVES AND TRY TO GAME THE SYSTEM BY TAKING THE PLEA THAT HE SOMEHOW KNEW THAT HE WOULD DISQUALIFY SO HE REALLY SHOULD HAVE BEEN PROSECUTED WITH A FELONY BUT THEY CHARGED HIM WITH THAT AND HE RESOLVED THAT BY A PUT.

I WOULD ANALOGIZE TO STATUTE 790.15, THE FIREARMS STATUTE. THEY LOOKED AT THAT STATUTE IN VALDES AND IT SPECIFICALLY SAID THAT THE DISCHARGE OF A FIREARM STATUTE, THERE ARE THREE SUBSECTIONS, 12 AND THREE. EACH OF THEM DEAL WITH DIFFERING CONDUCT.

ONE OF THEM IS SHOOTING A GUN IN A PUBLIC PLACE AND ONE OF THEM IS SHOOTING A GUN OUT OF A CAR WITHIN 1000 FEET OF A PERSON AND THE THIRD ONE IS DIRECTING SOMEONE ELSE OR KNOWING SOMEONE ELSE.

THE COURT SAID ALL THREE OF THOSE WERE --

IN 70.9.5 IT HAD THAT SAME LANGUAGE THAT APPEARED IN THE STATUTE.

SUBSECTION ONE, THIS IS A CRIME EXCEPT AS DIVIDED INTO --

[INAUDIBLE]

JUST LIKE IN THIS CRIME IS PROVIDED IN SUBSECTION FIVE.

THIS COURT FOUND THAT THE DISCHARGE OF THE FIREARM STATUTE CREATED A NEW BARRIER AND SOMEONE COULD NOT BE PROSECUTED FOR ONE ACT WHICH IS A SEPARATE STATUTE IN A SEPARATE SUBSECTION.

THE SAME SHOULD APPLY THERE BECAUSE THE SAME LANGUAGE UNDERLIES THE STATUTE.

>> WOULD THIS ACCEPT LANGUAGE -- AND COULD THEY PROSECUTE IN MAKING A DECISION THAT KNOWING A DEFENDANT IS A HABITUAL UNDER SUBSECTION FIVE.

COULD THE PROSECUTOR MAKE A DECISION TO PROSECUTE ONLY UNDER SUBSECTION FIVE?

>> YEAH.

I BELIEVE THE PROSECUTOR COULD MAKE THAT DECISION.

WHETHER THEY WANT TO DO IT AS IT WILL BE MORE EFFICIENT FOR THE SYSTEM TO CREATE LESS FELONY CASES OR WHETHER THEY WANT TO DO IT JUST TO BE LENIENT TOWARDS A PARTICULAR DEFENDANT I THINK THEY COULD DO IT.

THE DEFENDANT I SUPPOSE WOULD HAVE THE OPTION TO FILE, TO ARGUE YOU CAN'T GRAVITATE UNDER THIS.

YOU NEED TO PROSECUTE ME UNDER THE FELONY.

BUT THE STATE, HE HAS COMMITTED EVERY ELEMENT TO THAT MISDEMEANOR.

>> I JUST WANT TO MAKE SURE BECAUSE YOU ARE IN YOUR REBUTTAL BUT I'M THINKING THAT MAYBE IT IS DIFFERENT THAN SAY A SEXUAL BATTERY CRIME.

THERE WOULDN'T BE PROSECUTORIAL DISCRETION TOWARDS SOMEBODY UNLESS THERE WAS A PENALTY CRIME BECAUSE SECTION 8, UNDER 12 OR OVER 12 YOU KNOW BUT IN TERMS OF WHAT A HABITUAL OFFENDER IS EVEN THOUGH THE STATUS IS STILL SOMETHING THAT HAS TO BE PROVEN,

THAT THEREFORE IT'S NOT A
NONEXISTENT CRIME?

>> RIGHT.

THEY WOULD CHARGE HIM UNDER FIVE
AND THEY WOULD HAVE TO PROVE AN
ELEMENT OF THE CRIME THAT HE WAS
A HABITUAL TRAFFIC OFFENDER AND
HE HAS A REQUISITE THREE
CONVICTIONS.

>> THE PROSECUTOR CHOOSES TO DO
IT UNDER TWO, THE PROSECUTOR
SAYS I DON'T HAVE TO WORRY ABOUT
THIS HABITUAL OFFENDER STATUS?

>> EXACTLY RIGHT.

THAT IS WHAT THEY DID HERE AND
THEREFORE A DOUBLE JEOPARDY
PRECLUDED THEM FROM BEING ABLE
TO PROSECUTE HIM FROM UNDER
FIVE.

I WILL SAVE THE REMAINDER OF MY
TIME FOR REBUTTAL.

THANK YOU.

>> GOOD MORNING, YOUR HONORS.

MAY IT PLEASE THE COURT.

MY NAME IS NICHOLAS MERLIN AND
I'M HERE ON BEHALF OF THE
ATTORNEY GENERAL'S OFFICE.

>> THE DEFENDANT UNDER THE
FELONY, HABITUAL OFFENDER, YOU
WOULD HAVE TO PROVE IS AN
ELEMENT THAT HE IS A HABITUAL
OFFENDER, CORRECT?

>> THAT IS CORRECT.

>> LET'S SAY YOU DON'T.

FOR WHATEVER REASON THE PERSON
WHO IS SUPPOSED TO COME IN AND
TESTIFY OR INVESTIGATE THIS
PARTICULAR CASE IS NOT AVAILABLE
AND YOU DO NOT PROVE IT.

WOULD THE DEFENDANT IN SUCH AN
INSTANCE HAVE THE CHOICE TO HAVE
A LESSER CRIME UNDER SUSPENSION?
I'M TALKING STRICTLY
HYPOTHETICAL HERE.

WOULD IT BE LESS OF A CHARGE?

>> ABSOLUTELY NOT.

>> WHY?

>> THESE ARE NOT DEGREE-VARIANT.
THE SITUATION WE HAVE HERE --

>> WAIT A MINUTE.

ALL YOU HAVE TO PROVE FOR THE FELONY IS YOU HAVE TO PROVE DRIVING UNDER SUSPENSION AND THE FACT THAT HE'S A HABITUAL OFFENDER.

THAT IS ONE ADDED INGREDIENT. AM I CORRECT?

>> YOU HAVE TO PROVE THAT HE WAS DRIVING AND HIS DRIVING IS SUSPENDED AND HE'S A HABITUAL OFFENDER.

>> UNDER SUBSECTION TWO THERE'S A REQUIREMENT.

>> WHY ISN'T DRIVING ON SUSPENSION A LESSER-INCLUDED CHARGE?

>> FIRST OF ALL YOUR HONOR WE HAVE THE ACCEPT LANGUAGE ALSO WHEN WE TALKED ABOUT THE THREE VARIANTS.

ONE OF THE THINGS WE HAVE IN SUBSECTION TWO IS A STRUCTURED AND FIRST-DEGREE MISDEMEANOR SECOND-DEGREE MISDEMEANOR THIRD-DEGREE FELONY AND WE HAVE THE HIGHEST FELONY UNDER SUBSECTION FIVE SO IT'S NOT A DEGREE-VARIANT IN THAT SENSE. WE HAVE FIRST DISSOLVED THE FACT THAT THESE ARE MUTUALLY EXCLUSIVE BUT WE ALSO HAVE THE FACT --

>> WAIT JUST ONE SECOND. THE ACCEPT LANGUAGE.

YOUR OPPOSITION SUGGESTS THAT IF THE STATE TAKES THE CHARGE THAT THIS ACCEPT LANGUAGE IS REALLY IRRELEVANT IN THE CHARGES UNDER ONE OR TWO BECAUSE IT'S NOT AN ELEMENT OF THE CRIME, IT'S JUST THE STATE COULD DO THAT.

COULD THE STATE CHARGE SOMEONE WHO NEVER COMES OUT AND THIS PERSON IS A HABITUAL OFFENDER, COULD THE STATE DO THAT BECAUSE APPARENTLY THEY HAVE DONE IT HERE.

>> FIRST OF ALL YOUR HONOR THERE WAS NO FACTUAL BASIS TO BEGIN WITH.

>> WAIT, WAIT.
IF YOU WILL ANSWER MY QUESTION.
I WANT YOU TO MAKE YOUR ARGUMENT
BUT I'M TRYING TO STRAIGHTEN
THIS THING OUT.
AND I NEED YOUR HELP.
>> OF COURSE.
>> SO THE QUESTION IS NOT
WHETHER THERE IS OR IS NOT, ARE
YOU SAYING THAT THE STATE COULD
NOT CHARGE THIS DEFENDANT IN
THIS CASE AS HE WAS CHARGED?
>> THAT IS CORRECT.
>> JUST AS A REALISTIC KIND OF
APPROACH IF THE FELLOW SHOWS UP
BEFORE THE JUDGE AND NOBODY
TELLS THE JUDGE ANYTHING ABOUT
THE HABITUAL OFFENDER STATUS, SO
WHAT IS THE JUDGE SUPPOSED TO DO
WITH THAT CRIME?
HOW IS THAT HANDLED?
>> WELL YOUR HONOR, IT'S A
HYPOTHETICAL SITUATION BUT IF I
COULD ANSWER HYPOTHETICALLY.
>> IT HAS TO BE THE SAME HERE
BECAUSE THE STATE SAID THEY
VIOLATED NUMBER TWO AND NOBODY
MENTIONED THE HABITUAL OFFENDER
AND WE HAVE A CONVICTION.
THOSE ARE THE FACTS.
>> I WOULD LIKE TO CLARIFY THAT
THESE WERE TRAFFIC CITATIONS AND
NOT OFFICIAL INFORMATION FROM
THE STATE ATTORNEY'S OFFICE.
>> DOES THAT MAKE A DIFFERENCE?
>> I THINK IT DOES.
WE HAVE A DEFENDANT.
>> WHAT DIFFERENCE DOES THAT
MAKE TO A DEFENDANT?
>> IN THIS PARTICULAR CASE WE
HAVE A PRO SE LITIGANT WHO FOR
ALL INTENSIVE PURPOSES RECEIVED
A TRAFFIC CITATION, RUNS TO THE
COUNTY COURT PLEADS TO THE
CHARGE AND I WOULD SAY AS I
UNDERSTAND IT THE STATE THEN
FILED FELONY INFORMATION BECAUSE
PERHAPS THIS WAS A SITUATION
WHERE ONE HAND DIDN'T KNOW WHAT
THE OTHER WAS DOING.

>> SO YOU SAY THEY ARE PRACTICAL PROBLEMS THAT THE STATE MAY NOT KNOW THE TIME BUT HOW DOES THAT FACT OR INTO A DOUBLE JEOPARDY ANALYSIS AND WHAT HAS HAPPENED HERE?

>> WELL AS FAR AS DOUBLE JEOPARDY ANALYSIS, WE DECIDED CONVICTION AS AN ACCESSORY AFTER-THE-FACT WERE EXCLUSIVE AND THAT DID NOT IMPLICATE THE DOUBLE JEOPARDY PRINCIPLE. JUST BECAUSE TWO PROVISIONS ARE MUTUALLY EXCLUSIVE. WHAT WE HAVE IS, THERE'S A PLAIN LANGUAGE PROBLEM NOT NECESSARILY DOUBLED JEOPARDY PROBLEM. WE HAVE A SITUATION WHERE HE CANNOT HAVE A CONVICTION UNDER BOTH TWO AND FIVE AND HAVE EITHER ONE OR THE OTHER.

>> TO GO BACK TO JUSTICE LABARGA'S QUESTION. IF IN FACT HE WAS CHARGED WITH HABITUAL OFFENDER AND YOU HAD PROVED HE WAS DRIVING WITH A SUSPENDED LICENSE AND A NEW HIS LICENSE WAS SUSPENDED THAT FOR WHATEVER REASON THERE WAS A FAILURE TO PROVE THAT HE WAS A HABITUAL TRAFFIC OFFENDER. YOU ARE TELLING ME THAT IT WOULD BE ALL OR NOTHING. HE WOULD NOT HAVE A CONVICTION UNDER SECTION 2. HE WOULD JUST BE DISCHARGED BECAUSE HE DIDN'T PROVE THE HABITUAL ELEMENT?

>> FIRST OF ALL YOUR HONOR --
>> IS THAT CORRECT?
YOU COULD NOT, IF YOU PROVED EVERYTHING OTHER THAN HIM BEING A --
HE WOULD NOT HAVE A CONVICTION?
>> IF HE WAS NOT A HABITUAL TRAFFIC OFFENDER, YES.
>> IF YOU DID NOT PROVE HE WAS A HABITUAL FELONY OFFENDER.
>> IF THERE WAS NO PROOF OF THAT PARTICULAR ELEMENT THEN YES THAT

IS A DIFFERENT SITUATION.
THERE WOULD BE NO BASIS FOR
GOING FORWARD UNDER FIVE IF
THERE WAS NO PROOF.

>> I'M NOT SAYING UNDER FIVE.
I AM SAYING YOU ARE IN A TRIAL
UNDER FIVE BUT YOU DID NOT PROVE
THE HABITUAL OFFENDER ELEMENT.
COULD A JURY OR A JUDGE CONVICT
HIM OF SIMPLE DRIVING WITHOUT A
LICENSE?

>> I WOULD SAY NO YOUR HONOR.
I WOULD SAY NO BECAUSE THAT
WOULD MAKE IT A DEGREE-VARIANT
AND IT'S NOT A DEGREE-VARIANT
SITUATION.

>> I UNDERSTAND WE ARE IN A CASE
HERE WHERE IN THE CIRCUMSTANCE
HERE THAT THE STATE MADE A
MISTAKE.

I'M NOT SAYING THE STATE
ATTORNEY BUT THE OFFICER WHO
ISSUED THE CITATION AND ISSUED
CITATIONS FOR THESE TWO OFFENSES
AND THEY ARE MUTUALLY EXCLUSIVE.
SO THE SOURCE OF THE PROBLEM
HERE IS A MISTAKE THAT WAS MADE
BY AN OFFICIAL OF THE EXECUTIVE
BRANCH.

ISN'T THAT CORRECT?

>> THAT IS CORRECT.
IN RESPONSE TO THAT LAST
QUESTION, IN TRYING TO
UNSCRAMBLE THIS MISTAKE THAT THE
STATE HAS MADE, WHICH YOU WANT
TO REALLY ADHERE TO THE POSITION
YOU JUST ARTICULATED IN RESPONSE
TO THAT QUESTION.

>> FIRST OF ALL I WOULD POINT
OUT THAT THERE WAS ONLY ONE
CONVICTION AND THEY DID NOT
CHALLENGE THAT CONVICTION AND I
BELIEVE THAT JUSTICE LABARGA --
AND I'M ANSWERING YOUR QUESTION
IN TURN.

JUSTICE LABARGA ASKED THE
QUESTION ABOUT THE STRATEGY I
THINK.

THERE WAS NO INDICATION ONE WAY
OR ANOTHER WHETHER THERE WAS A

QUESTION OF STRATEGY ON HIS PART.

IT WAS A MISTAKE AS WAS POINTED OUT HOWEVER THE DEFENDANT IS IN THIS CASE SHOULD BE ALLOWED TO WITHDRAW HIS PLEA AND GO FORWARD WITH THE FELONY INFORMATION FOR WHICH THE STATE DOES ADMITTEDLY, IN THE DEFENSE COUNSEL --

>> DID YOU SAY THE DEFENDANT CAN WITHDRAW HIS PLEA?

WHY WOULD HE?

>> BECAUSE THERE IS NO BASIS FOR IT.

THERE IS NO BASIS FOR IT.

>> DID HE ACCEPT THAT?

>> THE PLEA WAS ACCEPTED AND I BELIEVE HE ASKED DEFENSE COUNSEL, IT WAS ABOUT -- HOWEVER THERE WAS NO BASIS FOR IT.

>> IS IT UP TO THE DEFENDANT TO VOLUNTARILY GIVE THE BASIS SAYING I HAVE OTHER CONVICTIONS? WHY SHOULD HE DO THAT?

THAT IS NOT HOW THE SYSTEM WORKS.

THE BURDEN IS ON THE STATE ISN'T IT?

>> YOUR HONOR TO ANSWER YOUR QUESTION AND JUSTICE LEWIS' QUESTION.

JUSTICE LEWIS WANTED TO UNSCRAMBLE WHAT'S GOING ON HERE. WE HAD A MISTAKE ON THE PART OF THE STATE.

ONE HAND DID NOT KNOW WHAT THE OTHER HAND WAS DOING AND IN THOSE CIRCUMSTANCES WE HAD A SITUATION WHERE THE DEFENDANT SHOULD BE ALLOWED TO WITHDRAW HIS PLEA SO THE STATE CAN GO FORWARD.

>> IS THAT THE ONLY WAY THAT A DEFENDANT CAN GO FORWARD?

I UNDERSTAND WHAT YOU'RE SAYING BUT IS THE DEFENDANT NOT ALLOWED TO SAY OKAY I'VE ALREADY GOT THIS CONVICTION AND I SHOULD HE ALLOWED UNDER OUR CONSTITUTION

TO SAY THAT THIS IS DOUBLE
JEOPARDY?

>> IT'S NOT DOUBLE JEOPARDY,
YOUR HONOR.

>> I HAVE ALREADY BEEN CONVICTED
OF THIS CRIME.

I'M SAYING I'VE BEEN CONVICTED
OF THIS CRIME ON THIS DAY AND
HERE IS THE CONVICTION AND SO
NOW YOU ARE CHARGING ME WITH A
FELONY FOR THE SAME CONDUCT THAT
OCCURRED ON THE SAME DAY AT THE
SAME TIME.

THAT IS NOT THE SAME?

>> AGAIN, THE ISSUE IN THIS CASE
IS MUTUAL EXCLUSIVITY.

WE HAVE TWO DIFFERENT
PROVISIONS.

YOU CAN'T HAVE ONE OF THE OTHER.

>> I UNDERSTAND THAT WHAT I'M
ASKING IS, YOU ARE SAYING THE
DEFENDANT HAS TO ASK TO WITHDRAW
THE PLEA AND REQUEST THE STATE
CHARGE HIM WITH A FELONY AND I'M
ASKING COULD THE DEFENDANT NOT
TAKE THE OTHER ROUTE AND SAY YOU
HAVE ALREADY CONVICTED ME AND
UNDER THE CONSTITUTION YOU CAN'T
CONVICT ME TWICE FOR THE SAME
OFFENSE?

THAT IS DOUBLE JEOPARDY.

>> IT HAS TO BE THE SAME
OFFENSE.

>> OR A VARIANT OF THAT.

>> CORRECT BUT YOUR HONOR THIS
IS NOT THE SAME OFFENSE.

>> WOULD YOU FINISH ANSWERING
JUSTICE CANADY'S QUESTION?

>> OF COURSE.

ON THE MISTAKE.

COULD YOU HELP US UNDERSTAND THE
APPROACH FROM JUSTICE CANADY
THAT THE STATE HAS MADE A
MISTAKE HERE.

>> THEY HAVE, YES.

>> SO ARE YOU SAYING THAT THE
ONLY REMEDY IS THAT THE
DEFENDANT MUST SAY I WANT TO
WITHDRAW THE PLEA SO YOU CAN
CHARGE ME WITH A HIGHER CRIME.

IS THAT THE STATE'S POSITION?
>> THE STATE'S POSITION IS THAT
THERE IS NO DOUBLE JEOPARDY
ISSUED AND IN ORDER TO RESOLVE
THIS ISSUE, IN ORDER TO DO THAT
YES, THE ANSWER WOULD BE THAT
THE DEFENDANT SHOULD HAVE TO
WITHDRAW HIS PLEA SO THAT THE
STATE CAN GO FORWARD.

>> I DON'T UNDERSTAND --
I DON'T REALLY UNDERSTAND.
I'M NOT SURE I UNDERSTAND THE
DISTINCTION THAT YOU MAKE TO SAY
THERE IS NO DEGREE-VARIANT IF
THE CRIMES ARE MUTUALLY
EXCLUSIVE.

WHAT IF YOU'VE GOT A THEFT WHERE
THERE IS A SERIES OF CATEGORIES
OF THEFT BASED ON THE AMOUNT OF
THE THEFT.

THOSE ARE MUTUALLY EXCLUSIVE.
THE AMOUNT IS A CERTAIN AMOUNT
BUT AREN'T THOSE DEGREE-VARIANT?

>> THEY ARE.

>> I DON'T UNDERSTAND HOW THAT
IN PRINCIPLE IT IS DIFFERENT
THAN WHAT WE HAVE HERE.

>> THE DISTINCTION IS, AND AGAIN
IN THE VALDES CASE, THEY REFER
TO JUSTICE CANTERO'S THE PLAIN
MEANING OF THE STATUTE.

>> THE PLAIN MEANING OF THE
STATUTE WOULD NEED X AMOUNT
INVOLVED IN X CATEGORY SO I
DON'T UNDERSTAND HOW IN
PRINCIPLE THAT IS ANY DIFFERENT
THAN WHAT WE HAVE HERE BECAUSE
WE ARE TALKING ABOUT THE SAME
CONDUCT, DRIVING A CAR WHEN YOU
SHOULDN'T BE DRIVING.

WHEN YOUR LICENSE HAS BEEN
REVOKED OR SUSPENDED AND YOU ARE
NOT ALLOWED TO DRIVE.

>> EXCEPT THERE IS THAT
LANGUAGE, EXCEPT FOR THOSE
PEOPLE WHO ARE DEFINED UNDER
SUBSECTION 32.64 SO WE HAVE THAT
ACCEPT LANGUAGE AND GIVEN THAT
ACCEPT LANGUAGE THEY ARE
MUTUALLY EXCLUSIVE CASES.

I UNDERSTAND THAT HOW IS THAT MUTUALLY EXCLUSIVE RELATIONSHIP ANY DIFFERENT FROM THE MUTUALLY EXCLUSIVE RELATIONSHIP UNDER THE THEFT STATUTE BASED ON THE AMOUNT OF THE THEFT?

>> TO PROVE THE GREATER THEFT, LET'S SAY IT'S GRAND THEFT. YOU WOULD HAVE TO PROVE X AMOUNT OF DOLLARS AND APPROVE THE LOWER THEFT, PETTY THEFT WE DON'T HAVE THAT HERE.

WE HAVE MISDEMEANORS, SECOND DEGREE MISDEMEANOR AND A FIRST-DEGREE MISDEMEANOR AND A THIRD-DEGREE FELONY.

WE ONLY HAVE THE EQUIVALENT MAXIMUM GREATER CHARGE FOR SUBSECTION FIVE VIOLATION SO ONE IS NOT NECESSARILY SUBSUMED BY THE OTHER.

WE HAVE THE ACCEPT LANGUAGE, ACCEPTING THOSE PEOPLE THAT ARE HABITUAL TRAFFIC OFFENDERS AND THE KNOWLEDGE REQUIREMENT. THEY ARE DIFFERENT STATUTES.

>> IF YOU TAKE WHAT JUSTICE QUINCE ASKED EARLIER WHICH IS THE STATE GOES AHEAD AND CHARGES AS A HABITUAL OFFENDER AND IT GOES TO TRIAL AND THE STATE NOT BEING ESTABLISHED FOR WHATEVER REASON AS A HABITUAL OFFENDER AT THAT POINT, NOT GUILTY. THEY CAN THEN GO INTO -- THEY GO IN AND CHARGE A MISDEMEANOR UNDER TWO?

>> HE SHOULD NOT BE CHARGED UNDER TWO.

HE SHOULD HAVE NEVER BEEN CHARGED UNDER TWO.

IT WAS A DECISION UNDER THE POLICE OFFICER.

>> THE HYPOTHETICAL IS THAT HE HAS CHARGED UNDER FIVE AND THE STATE ENDS UP PROVING FIVE, PLEADED NOT GUILTY.

CAN THEY GO IN AND PROSECUTE UNDER TWO?

>> IF HE IS NOT HABITUAL.

>> I MEAN THE STATE DIDN'T ESTABLISH ITS OWN AT THAT POINT SINCE THEY DIDN'T ESTABLISH IT IT'S NOT SO UNDER YOUR THEORY THEY COULD GO AND NOW TRY HIM FOR THE MISDEMEANOR?

>> ASSUMING THAT THERE WAS NO PROOF AT ALL THAT HE WAS A HABITUAL TRAFFIC OFFENDER, ASSUMING THERE WAS A KNOWLEDGE REQUIREMENT BY THE STATE AND ASSUMING THOSE OTHER FACTORS THEN UNDER THOSE FACTS, THEN YES.

>> AND THEN IN THE NEXT SITUATION BECAUSE YOU HAVE A CASE INVOLVING MUTUALLY-EXCLUSIVE TYPES OF CRIMES.

IF THE STATE CHOSE TO PROSECUTE UNDER TWO AND FIVE IN THE SAME TRIAL, CAN THEY DO THAT?

>> NO, ABSOLUTELY NOT.

FIRST OF ALL AGAIN THEY ARE MUTUALLY EXCLUSIVE.

>> YOU CAN'T CHARGE RELATED OFFENSES AND TRY THEM IN ONE CASE?

>> AGAIN AS YOU ARE TALKING ABOUT EARLIER CASES WITH THIS COURT.

THERE WERE CASES CITED UNDER SUPPLEMENTAL AUTHORITY AND IN THAT CASE SAYS JUST BECAUSE TWO PROVISIONS ARE MUTUALLY EXCLUSIVE BUT THAT DOES NOT VIOLATE DOUBLE JEOPARDY.

>> BUT IN THAT, IF THEY CHARGE BOTH, THE JUDGE WOULD HAVE TO SAY YOU CANNOT CONVICT THE DEFENDANT AND MAKE THOSE CHARGES.

IS THAT CORRECT?

>> UNDER THOSE FACTS, YES.

>> EVEN THOUGH IT DOESN'T SOUND LIKE DOUBLE JEOPARDY, IT'S SORT OF SOUNDS LIKE DOUBLE JEOPARDY. YOU CAN'T HAVE TWO CONVICTIONS WITH THE SAME CONDUCT.

>> YOUR HONOR UNDER THE FACTS OF

THIS CASE FIRST OF ALL I RESPECT IT BUT I WOULD POINT OUT UNDER THE FACTS OF THE CASE THERE WAS NO DISPUTE THAT THERE WAS IT HABITUAL TRAFFIC OFFENDER. HE DOES QUALIFY UNDER FIVE.

>> LET ME ASK YOU THIS.

[INAUDIBLE]

CAN THE STATE WITH THE CONVICTION ON THE BOOKS OR A SUBSECTION TWO OFFENSE PROSECUTE HIM UNDER FIVE?

>> BUT THE FACT OF THIS CASE, IT'S ONE INCIDENT.

HE HAS ALREADY HAD A CONVICTION UNDER SUBSECTION TWO AND HE IS NOT GOING TO WITHDRAW HIS PLEA. THEY FORCED HIM TO WITHDRAW HIS PLEA OR THE JUDGE WITHDRAWS --

[INAUDIBLE]

>> YOU ASKED TWO QUESTIONS. FIRST OF ALL KNOW THE STATE CANNOT PROSECUTE BOTH AT THE SAME TIME SO THE ANSWER TO THAT QUESTION IS NO.

CAN THE STATE FORCE THE DEFENDANT TO WITHDRAW HIS PLEA? THE STATE CAN MAKE A MOTION TO THE COURT AND UNDER EXTRAORDINARY CIRCUMSTANCES, AND THIS IS A UNIQUE CASE, THIS IS NOT A CONVICTION.

>> A MOTION TO WITHDRAW?

>> A MOTION TO VACATE.

THE STATE ON ITS OWN COULD PROBABLY FILE A MOTION TO WITHDRAW.

>> A MOTION TO FORCE THE DEFENDANT TO WITHDRAW?

>> NOT AT ALL YOUR HONOR.

>> I DON'T UNDERSTAND WHAT KIND OF MOTION YOU ARE TALKING ABOUT THEN.

>> THE STATE WOULD FILE SOME SORT OF MOTION TO WITHDRAW. SOME FORM OF EXTRAORDINARY RELIEF.

>> YOU ARE GOING TO THESE EXTRAORDINARY LENGTHS WHEN YOU HAVE ADMITTED THAT THE PROBLEM

COMES FROM THE STATE.
ISN'T THE SOLUTION GOING FORWARD
EITHER TO ASK THE LEGISLATURE TO
AMEND THIS TO MAKE SURE IT'S
CLEAR OR GET SOMETHING CORRECT
WITH THE TRAFFIC OFFICERS THAT
ARE FILING THE TRAFFIC
CITATIONS, RATHER THAN TURN THE
LAW ON ITS HEAD AND SAY WE ARE
GOING TO RECOGNIZE A MOTION TO
REQUIRE DEFENDANTS TO WITHDRAW
THEIR PLEA?

>> AGAIN YOUR HONOR, I THINK
THAT'S A MATTER OF PUBLIC POLICY
AND PERHAPS THAT IS A QUESTION
FOR THE LEGISLATURE BUT AS FAR
AS THIS COURT, AS FAR AS THE
ISSUE BEFORE THIS COURT WAS
THEIR DOUBLE JEOPARDY VIOLATION
THERE WAS NOT.

>> WHAT SHOULD THIS COURT DO
ABOUT THIS CASE AND KEEPING IN
MIND IT WOULD BE APPLICABLE TO
ALL OTHER CASES IN THE STATE
WHAT SHOULD THIS COURT TO?
I MEAN IT SEEMS TO ME THAT WHAT
YOU'RE SAYING IS WE HAVE TO TELL
THE DEFENDANT THAT HE MUST
WITHDRAW HIS PLEA TO A
SUBSECTION TWO OFFENSE.

>> THERE WAS NO BASIS FOR IT AND
YOUR QUESTION IS WHAT TO DO?
THIS COURT SHOULD APPROVE THE
DECISION OF THE THIRD DISTRICT
COURT OF APPEAL BECAUSE THERE
WAS NO DOUBLE JEOPARDY VIOLATION
AND THAT IF THIS CASE GOES TO
TRIAL, BECAUSE IT STILL HASN'T
HAPPENED, AND IT STILL HAS A
PENDING CHARGE, IF THE CASE GOES
TO TRIAL AT THAT POINT IT WOULD
BE INCUMBENT UPON THE DEFENDANT
TO FILE A MOTION TO WITHDRAW.
UNDER THOSE CIRCUMSTANCES THEN
THE STATE COULD GO FORWARD WITH
THE FELONY CHARGES.

>> CAN I ASK YOU A QUESTION?
ABOUT THE MISTAKE OF THE POLICE
OFFICER AND I'M ASKING THIS
BECAUSE I DON'T KNOW.

WHAT CHOICES DO THE OFFICERS HAVE?

LET'S SAY YOU STOP SOMEONE IN THIS CASE AND HE'S AWARE HE'S DRIVING UNDER A SUSPENDED LICENSE.

THE MOST HE COULD DO AT THAT JUNCTURE IS GIVE A NOTICE TO APPEAR AND HE DOESN'T HAVE THE AUTHORITY TO CHARGE HIM WITH A HABITUAL CHARGE.

WHAT CHOICES DO OFFICERS HAVE ON THE SCENE WHEN THEY FIND OUT SOMEONE IS DRIVING UNDER SUSPENSION?

ONCE HE CHARGES HIM WITH DRIVING UNDER SUSPENSION THAT CAUSES A PROBLEM EVERY TIME IF LATER IT'S FOUND OUT HE IS A HABITUAL OFFENDER.

>> UNFORTUNATELY THE OFFICER HAD WHATEVER WAS ON THE SCREEN AND WHATEVER CAME UPON THE SCREEN SO HE CHARGED HIM WITH WHAT HIS KNOWLEDGE WAS AT THAT TIME.

>> SUPPOSE THAT IT CAME UP ON THE SCREEN THAT HE WAS IN FACT A HABITUAL TRAFFIC OFFENDER.

WHAT WOULD THE OFFICER DO THEN?

>> HE WOULD PUT IT ON THE TRAFFIC CITATION THAT THE DEFENDANT WAS A HABITUAL TRAFFIC OFFENDER BUT AGAIN I BELIEVE THIS WAS A CIRCUMSTANCE WHERE ONE HAND DID NOT KNOW WHAT THE OTHER WAS DOING.

I'M SORRY, TRAFFIC CITATIONS WERE GIVEN TO THE CLERK.

SOME WENT TO THE COUNTY COURT AND SOME WENT TO THE COUNTY CLERK.

>> AM I WRONG IN MY UNDERSTANDING THAT CITATIONS WERE ISSUED FOR BOTH OFFENSES?

>> THAT IS CORRECT.

>> THE OFFICER ISSUED THE FELONY OFFENSE AND THE MISDEMEANOR.

>> WHAT DID HE GIVE HIM FOR BEING A HABITUAL OFFENDER?

>> APPARENTLY IT DOESN'T SHOW UP

ON THE CITATION THAT HE WAS A HABITUAL OFFENDER BUT AT SOME POINT THE CITATIONS WERE BROUGHT TO THE COUNTY COURT OR TO THE CLERK'S OFFICE AND THEN GIVEN TO EITHER -- THEY WERE DISTRIBUTED TO THE COUNTY COURT AND THE CIRCUIT COURT.

>> THE ARREST REPORT SHOWS BOTH SECTIONS.

>> CORRECT, PAGE 18.

>> IN TERMS OF THE SURPRISE, YOU ARE MAKING US FEEL LIKE WE SHOULD FEEL SORRY FOR THE STATE HERE WHEN THE POLICE OFFICER HAD THIS INFORMATION AND COULD HAVE TALKED TO THE PROSECUTOR AND SAID THAT THIS GUY NEEDS TO BE PROSECUTED AS A FELON.

>> AGAIN I THINK THAT WOULD GO TOWARDS, JUST AS LABARGA ASKED WHETHER THIS WAS A STRATEGY AND PERHAPS A STATE WOULD NOT GO THAT FAR, BUT THERE WAS KNOWLEDGE ON BEHALF OF THE DEFENDANT THAT AT THAT POINT HE HAD A TRAFFIC CITATION. HE COULD'VE PLED IN THE COUNTY COURT.

>> IT'S NOT THE DEFENDANT'S RESPONSIBILITY TO CORRECT THE MISTAKE, IS IT?

>> NOBODY KNEW THERE WAS NO FACTUAL BASIS FOR THIS PLEA.

>> I MEAN THAT'S, AND AGAIN I REALIZE YOU HAVE A JOB TO DO BUT THE IMPLICATION FOR THE DEFENDANT WHO IS APPEARING BEFORE THE STATE AND GETS BOTH CHARGES --

>> WE WOULDN'T GO THAT FAR, YOUR HONOR.

WE WOULD SIMPLY SAY IT'S EITHER BY LUCK OR STRATEGY AND WE REALLY DON'T KNOW.

IT COULD'VE HAPPENED IN A NUMBER OF WAYS.

WE DO KNOW THAT HE ENTERED HIS PLEA AT THE TIME HE ENTERED IT.

>> ISN'T THAT PRECISELY THE

REASON FOR DOUBLE JEOPARDY, SO THAT THE CITIZENS OF FLORIDA AND THE CITIZENS WILL KNOW THAT THEY CAN'T BE PROSECUTED TWICE BY THE GOVERNMENT EVEN IF THE GOVERNMENT MAKES A MISTAKE?

>> OBVIOUSLY IN THE GENERAL PRINCIPLE THAT'S ABSOLUTELY CORRECT YOUR HONOR.

I DISAGREE HOWEVER UNDER THE FACTS OF THIS CASE YOU HAVE TWO MUTUALLY EXCLUSIVE PROVISIONS AND THAT DOES NOT IMPLY DOUBLE JEOPARDY.

>> THANK YOU FOR YOUR ARGUMENT.

>> THANK YOU.

REBUTTAL?

>> THANK YOU YOUR HONOR.

I JUST WANT TO POINT OUT THAT DIFFERENT POSITIONS ARE BEING ARTICULATED BY THE STATE ARTICULATED IN THE BRIEF AND APPEARS IN THE THIRD DISTRICT'S DECISION.

THE THIRD DISTRICT DECISION IN THIS CASE THAT THE COURT IS REVIEWING SAID HE COULD BE PROSECUTED FOR BOTH COUNTS AND EVEN THOUGH HE ALREADY PLED TO THE SECTION TWO COUNT THEY CAN STILL PROSECUTE HIM FOR THE FIVE COUNT.

>> IF WE END UP BEING MUTUALLY EXCLUSIVE AND THE STATE CANNOT PROSECUTE BOTH, DON'T YOU GET TO THE SAME RESULT?

WE ARE DEALING WITH DOUBLE JEOPARDY.

IT'S NOT CONSTITUTIONAL BUT --
[INAUDIBLE]

IF THIS STATUTE DOES NOT ALLOW BOTH TO BE PROSECUTED AND FOUND GUILTY, THEN YOU END UP WITH THE CLIENT IN THE SITUATION WITH THE SAME RESULT.

UNLESS THERE IS SOME WAY THAT SOMEONE FIGURES OUT IN THE CRIMINAL JUSTICE SYSTEM TO MAKE YOUR CLIENT WITHDRAW THE PLEA YOU CANNOT BE PROSECUTED UNDER

FIVE.

IT DOESN'T REALLY MATTER WHAT WE CALL IT.

WE ARE TRYING TO DEFER TO THE LEGISLATION AND IF IT'S MUTUAL EXCLUSIVITY WHEN YOUR CLIENT IS IN DOUBLE JEOPARDY?

>> I THINK IT'S EXACTLY THE SAME THING.

I AM MAYBE NOT SMART ENOUGH TO UNDERSTAND THE DISTINCTION BUT I DON'T EVEN SEE WHAT THE DISTINCTION IS WHEN YOU CAN'T BE A PRINCIPLE ACCESSORY AFTER-THE-FACT BECAUSE IT'S MUTUALLY EXCLUSIVE.

BETWEEN THAT AND THIS DOUBLE JEOPARDY, SAYING YOUR HONOR ARTICULATED THIS IS WHAT THE LEGISLATURE INTENDED AND THIS IS WHAT THE LEGISLATURE INTENDED HERE.

>> GOING BACK TO MY INITIAL QUESTION, THE QUESTION I ASKED COUNSEL.

THE POLICE OFFICER AT THE SCENE STOPPED SOMEBODY.

HE COMES BACK WITH A SUSPENDED DRIVER'S LICENSE AND IS NOW FORCED WITH THE CHOICE OF GIVING A NOTICE TO APPEAR WHICH IS THE SAME INFORMATION FOR THE CRIME OF DRIVING UNDER SUSPENSION.

EVEN THOUGH THE SCREEN SAYS THIS GUY IS A HABITUAL OFFENDER HE CAN'T CHARGE HIM WITH A NOTICE TO APPEAR, WITH A FELONY CHARGE. AM I CORRECT?

>> YOU ARE RIGHT.

>> SO HE'S PRESENTED WITH A CHOICE OF EITHER GIVING HIM A NOTICE TO APPEAR FOR A DRIVING SUSPENSION OR LETTING HIM GO.

>> HE CAN'T CHARGE HIM.

HE'S NOT ALLOWED TO CHARGE HIM WITH A FELONY BUT HE CAN ARREST HIM.

>> SO INSTEAD OF GIVING HIM A NOTICE TO APPEAR AND LETTING HIM GO, YOU HAVE TO ARREST HIM?

>> HE WAS IN FACT ARRESTED
WASN'T HE?

>> YES, AND SAY YOU GOT ARRESTED
AND COMMITTED DUI MANSLAUGHTER.
THE OFFICER CAN'T CHARGE YOU
WITH A TRAFFIC TICKET BUT IF HE
BELIEVES YOU HAVE PROBABLE CAUSE
HE CAN ARREST YOU.

AND YES HE WAS ARRESTED.

>> THIS IDEA THAT SOMEHOW IT'S
THE OFFICER, I MEAN YEAH THE
OFFICER WROTE THE MISDEMEANOR
TICKET.

HE STARTED THE CRIMINAL PROCESS.
THIS WAS RESOLVED IN COUNTY
COURT PRESIDED OVER BY A
MISDEMEANOR JUDGE ELECTED BY THE
PEOPLE OF THIS STATE.

THE PROSECUTOR WAS APPOINTED BY
THE PROSECUTOR OF THE STATE AND
WAS IN THE COURTROOM
PROSECUTING.

IF THEY DIDN'T WANT TO CHARGE
HIM THEY DIDN'T HAVE TO.

THERE ARE PLENTY OF TIMES THE
STATE DETERMINES WE ARE NOT
GOING TO GO FORWARD ON THIS
CHARGE FOR WHATEVER REASON.
THEY COULD HAVE DONE THAT HERE
AND THEY DIDN'T.

THE PROSECUTOR IN THE COURTROOM,
THEY CHARGED HIM AND HE PLED.
THERE IS NO PROVISION IN THE
COURT, NO PROVISION TO FORCE THE
DEFENDANT TO WITHDRAW HIS PLEA
IN OUR SYSTEM.

AS MR. GILL'S ATTORNEY, I CAN
TELL YOU MR. GILL DOES NOT WANT
TO WITHDRAW HIS PLEA.

THEREFORE, THE THIRD DISTRICT
WAS WRONG IN THIS CASE.

THEY BARRED THE PROSECUTOR FOR
THE FELONY TO REMAND THE
DIRECTION, TO REFER TO TRIAL
COURT JUDGMENT IN THE CASE.

>> THANK YOU FOR YOUR ARGUMENTS.
THANK YOU VERY MUCH.

THE NEXT CASE ON THE DOCKET
TODAY IS THE FLORIDA BAR VERSUS
SWANN.

