

>> LAST CASE ON THE DOCKET TODAY  
IS KELLY V. STATE.  
READY WHEN YOU ARE.

>> GOOD MORNING.

MAY IT PLEASE THE COURT, I'M  
M.J. LORD FROM THE PUBLIC  
DEFENDER'S OFFICE HERE ON BEHALF  
OF THE PETITIONER.

THE POSTURE OF THIS CASE THIS  
MORNING IS A LITTLE UNUSUAL  
BECAUSE IT SEEMS THAT THE  
PARTIES ARE IN AGREEMENT ON THE  
ISSUE THAT THE PETITIONER  
BROUGHT UP AS A CONFLICT ISSUE.  
SO I'M WONDERING IF YOU WANT ME  
TO JUST MOVE ON TO THE SECOND  
ISSUE THAT'S IN CONTROVERSY.

[LAUGHTER]

HAVING TO DO WITH INCREASING THE  
25-YEAR MANDATORY MINIMUM  
SENTENCE.

I'LL JUST DO THAT.

YOUR HONORS, THIS CASE, THIS  
ISSUE ORIGINATED WITH A RULE,  
3800B2, MOTION TO CORRECT AN  
ILLEGAL SENTENCE.

AND THE ILLEGALITY WAS THERE  
WERE TWO COUNTS OF AGGRAVATED  
BATTERY WITH A FIREARM IN THIS  
CASE, BUT BECAUSE OF THE WAY  
THE, I BELIEVE IT WAS THE  
VERDICT FORM WAS WORDED, THE  
CASE LAW PRECLUDED THE  
SENTENCING COURT FROM  
RECLASSIFYING THOSE OFFENSES  
FROM SECOND-DEGREE FELONIES TO  
FIRST-DEGREE FELONIES BASED ON  
THE USE OF A FIREARM.

AND THE TRIAL COURT RECOGNIZED  
THAT AND MADE THE CORRECTION.  
TAKING THE TWO AGGRAVATED  
BATTERIES FROM FIRST-DEGREE  
FELONIES BACK TO SECOND-DEGREE  
FELONIES.

BUT WHAT THE TRIAL COURT ALSO  
DID AT THAT TIME WAS INCREASE  
THE LENGTH OF THE MANDATORY  
MINIMUM SEASONS FROM 25 YEARS---

>> THE STATUTE SAY THAT IS THE  
MANDATORY MINIMUM IS ANYWHERE

FROM 25 YEARS--

>> YES.

>>-- TO LIFE, CORRECT?

>> IT DOES.

>> AND YOU HAD GOTTEN A NEW SENTENCING BASED ON YOUR 800 MOTION--

>> RIGHT.

>>-- CORRECT?

AND A NEW SENTENCING, ARE WE STARTING FROM SCRATCH? BECAUSE IT SEEMS TO ME YOU'RE SAYING THAT YOU HAVE TO START IN A NEW SENTENCING WITH THE 25-YEAR MINIMUM MANDATORY THAT WAS GIVEN IN THE OLD SENTENCING.

>> WELL, WHAT I AM SAYING IS THE JUDGE DIDN'T HAVE DISCRETION TO CHANGE THAT TO A LONGER TERM BECAUSE IT WAS NOT CHALLENGED. AND I DID PROVIDE A NUMBER OF CASES TO THE COURT IN SUPPLEMENTAL AUTHORITY ON THE LIMITATIONS INVOLVED WHEN THERE'S A 380B2 MOTION CHALLENGING A SENTENCING ERROR.

>> SO YOU REALLY AREN'T GETTING A NEW SENTENCING, YOU'RE GETTING WHAT?

>> A CORRECTION.

THE ONLY THING THE COURT REALLY HAS JURISDICTION TO DO UNDER 3800B2 IS CORRECT THE ILLEGAL PART OF THE SENTENCE.

AND IT DID.

BUT THEN IT WANTED TO MAKE THE SENTENCE LONGER, SO THE TRIAL COURT-- CAN IN FACT, I WENT BACK AND READ THE RESENTENCING TRANSCRIPT, AND THE TRIAL COURT KIND OF CAME UP WITH THIS ON ITS OWN TO RAISE THE MANDATORY MINIMUM FROM 25 YEARS TO 37.

>> SO ARE YOU MAKING ANY ARGUMENT THIS WAS SOME KIND OF RETALIATION FOR SOMETHING FOR HAVING--

>> WELL, I DID NOT ARGUE IT'S LEGALLY VINDICTIVE, NO, I ARGUED IT'S DOUBLE JEOPARDY BECAUSE THE

DEFENDANT HAS ALREADY BEGUN  
SERVING THE 25-YEAR MINIMUM  
MANDATORY.

>> BUT ISN'T IT THE CASE THAT  
HE'S NOT UNDER, THE WAY THIS HAS  
BEEN RESTRUCTURED, HE'S NOT  
EXPOSED TO STAYING IN PRISON ANY  
LONGER THAN HE WOULD HAVE BEEN  
UNDER THE ORIGINAL SENTENCE.

>> RIGHT.

AND, BASICALLY, THAT QUESTION  
IS, IS THIS A MORE ONEROUS  
SENTENCE.

AND I'VE GIVEN THAT SOME  
THOUGHT, AND I THINK IT ACTUALLY  
IS FOR SEVERAL REASONS, ONE OF  
WHICH IS ANYTIME YOU HAVE A DAY  
FOR DAY SENTENCE, 37 YEARS IS  
LONGER THAN 25 YEARS.

THERE'S A REMEDY THAT IF  
OPPORTUNITY A GENERAL SEASONS  
WOULD BE AVAILABLE TO HIM UNDER  
3800C WHEN ALL THE SENTENCING  
WAS OVER TO SEEK MODIFICATION OR  
MITIGATION.

HE WOULD NOT BE ABLE TO DO THAT  
WITH A DAY-FOR-DAY SENTENCE.

AND I ALSO THINK IT'S A LITTLE  
SPECULATIVE TO ASSUME THAT IN 37  
YEARS THERE WOULD NOT BE ANY  
CHANGES IN THE LAW THAT IF HE  
HAD A GENERAL SENTENCE WOULDN'T  
PERTAIN TO HIM AND DECREASE THE  
AMOUNT OF TIME HE ACTUALLY  
SPENDS IN PRISON.

>> YOUR BASIC POINT IS WHEN B  
IT'S-- IF IT'S A CORRECTED  
SENTENCE, YOU GO BACK AND IT'S  
JAIL CREDITED OR WHATEVER IT  
MIGHT BE--

>> RIGHT.

>>-- THIS DOESN'T OPEN UP, THIS  
ISN'T A RESENTENCING.

>> RIGHT.

AND I BELIEVE THERE ARE A LOT OF  
CASES THAT SAY WHEN YOU START  
WITH A 3800B2, YOU ARE LIMITED  
TO GOING BACK AND CORRECTING  
THAT SENTENCE.

>> WELL, IN THE ORIGINAL

SENTENCING BEFORE THE  
RESENTENCING--

>> YES.

>>-- THE 25-YEAR MINIMUM  
MANDATORY BUT ALSO A TERM OF 40  
YEARS IN BOTH THE FIRST COUNT  
AND THE SECOND COUNT, RIGHT?

>> RIGHT.

THE 40 YEARS, ACTUALLY ALSO WAS  
INCORRECT AT THE TIME, BUT IT  
WAS KIND OF SUPERSEDED BY THE  
BIGGER INCORRECT WHICH WAS TO  
RECLASSIFY IT AS A FIRST-DEGREE  
FELONY.

>> SO IT SEEMS LIKE ON THE FACE  
OF THAT THAT THE TRIAL COURT  
REALLY DID INTEND ALL ALONG TO  
IMPOSE SOMETHING MORE THAN A  
25-YEAR--

>> WELL, IT DID.

BUT IT DID SO--

>> THEY NOT THEN PERMITTED TO  
CORRECT THAT ON REHEARING?

>> WELL, THE-- THE WAY I  
UNDERSTAND IT IS THE TRIAL COURT  
IMPOSED THIS 40-YEAR SENTENCE  
WHICH-- AND IT DID IT CON  
CURRENTLY ON THE TWO COUNTS THAT  
IT HAD RECLASSIFIED WHICH  
TECHNICALLY IT COULDN'T DO  
EITHER, IT COULD ONLY DO 30  
UNLESS IT WANTED TO ADD--

>> AND ON THAT POINT--

>> THAT'S NOT REALLY AN ISSUE  
HERE BECAUSE TAKING IT BACK AND  
SAYING THIS IS NOT A  
FIRST-DEGREE FELONY LIMITS THE  
COURT TO 15 YEARS ON EACH OF  
THOSE TWO COUNTS WHICH, GRANTED,  
IT COULD PROBABLY STACK THOSE  
TOO IN THE RESENTENCING.

>> THE WHOLE ISSUE ABOUT  
CONSECUTIVE CONCURRENCE NOT IN  
THIS CASE.

>> I DO NOT BELIEVE IT IS IN  
THIS CASE, AND I DON'T THINK IT  
CAN BE IN THIS CASE.

>> OKAY.

>> AND BELIEVE ME, I HAVE  
THOUGHT ABOUT THAT HORNET'S NEST

IN WILLIAMS, AND I WOULD REALLY LIKE TO AVOID IT. BUT I THINK THE SAME RATIONALE WOULD KEEP THE JUDGE FROM MAKING THAT CHANGE.

>> OKAY.

ASIDE FROM THE SECOND CONSECUTIVE CONCURRENT ISSUES, THEY HAD A 25-YEAR MINIMUM MANDATORY.

>> RIGHT.

>> AND ALSO A 40-YEAR TERM WHICH WAS INCONSISTENT, THEREFORE, THEY HAD TO GO BACK AND RESENTENCE, RIGHT?

>> THAT'S CORRECT.

BUT THE ONLY THING THAT WAS WRONG B AND THAT WAS CHALLENGED WAS THE 40-YEAR SENTENCE, NOT THE 25-YEAR SENTENCE.

AND I THINK THERE IS A REASON WHY THE 25-YEAR MINIMUM MANDATORY SENTENCE SHOULD BE TREATED AS A SEPARATE SENTENCE.

AND THAT IS THE 10-20-LIFE STATUTE REQUIRES SEPARATE CHARGING IN THE INFORMATION, IT REQUIRES SEPARATE FINDINGS OF FACT IN ORDER TO IMPOSE IT, AND IT'S CLEAR FROM THE MENDENHALL CASE THAT IT APPLIES WITHOUT REGARD TO THE GENERAL SENTENCE. AND IT CAN BE LONGER EVEN IF THE GENERAL SENTENCE IS THE MAXIMUM IS SHORTER.

>> IT SEEMS LIKE HERE THE JUDGE SIMPLY INTENDED TO HAVE A LONGER SENTENCE BUT CHECKED THE WRONG BOX, IN ESSENCE.

AND BECAUSE THEY CHECKED THE WRONG BOXES, ARE THEY NOT THEN PERMITTED TO GO BACK AND IMPOSE D.

>> I DON'T THINK THIS WAS BASED ON A MISTAKE.

THE ONLY MISTAKE WAS THE RECLASSIFICATION THAT WAS ILLEGAL.

BUT I DON'T THINK THIS WAS, LIKE, A SLIP OF THE TONGUE OR I

CHECKED THE WRONG BOX.

I DON'T THINK THAT'S HOW THE PROBLEM AROSE IN THIS CASE.

UM, LET ME SEE.

>> SO YOU THINK THE JUDGE HERE WENT BACK AND DELIBERATELY IMPOSED A TERM OF 37.75 YEARS WHEN REALLY THE JUDGE INTENDED ALL ALONG INTENDED TO IMPOSE 25?

>> THE JUDGE DID IMPOSE-- THE JUDGE DID EXERCISE DISCRETION. IT COULD HAVE CHOSEN LIFE THE FIRST TIME AROUND.

BUT IT CHOSE TO PICK--

>> BUT IT ALSO CHOSE 40.

>> BUT THAT WAS WRONG WHEN THE JUDGE SAID I'M SENTENCING FOR FIRST-DEGREE FELONIES, THERE SHOULD BE A RECOGNITION THAT, NO, THESE ARE NOT FIRST-DEGREE FELONIES, THEY'RE SECOND-DEGREE FELONIES, AND THEY'RE INHERENTLY LESS SERIOUS, I GUESS YOU COULD SAY.

SO THE FIRST TIME AROUND THE 40 YEARS WAS IMPOSED UNDER THE WRONG IMPRESSION OF THE DEGREE OF THESE FELONIES.

>> BUT IT'S ALL INTERTWINED. I UNDERSTAND IT'S YOUR POSITION THAT YOU'VE GOT THE PART ABOUT THE MANDATORY MINIMUM--

>> YEP.

>> BUT IN REALITY, IN THE SENTENCING COURT ALL OF THAT IS INTERTWINED.

>> I DON'T THINK IT IS.

>> IT SEEMS LIKE THE SEPARATION OF THEM IS A FORMALISTIC APPROACH TO IT THAT I UNDERSTAND HAS SOME VIRTUE FROM THE PERSPECTIVE OF YOUR CLIENT, BUT IT JUST DOESN'T SEEM TO REALLY FIT THE REALITIES OF IT.

WHY IS THAT PERSPECTIVE WRONG?

>> WELL, I THINK IT DOES FIT THE REALITIES OF IT BECAUSE THE 10-20-LIFE STATUTE ALLOWS THE COURT TO DO THINGS THAT IT CAN'T DO UNDER THE GENERAL SENTENCING

STATUTES.

AND SO, I MEAN, IN THAT WAY  
THEY'RE VERY SEPARATE ISSUES  
THAT THE SENTENCING COURT HAS TO  
DEAL WITH.

I DON'T SEE THEM AS INTERTWINED,  
I SEE THEM AS VERY SEPARATE  
BECAUSE OF THE WAY THE  
10-20-LIFE HAS TO BE CHARGED AND  
PROVEN AND SELECTED.

AND I'M-- TO THE EXTENT YOU'RE  
SAYING THERE'S SOME KIND OF  
WINDFALL INVOLVED, I DON'T  
BELIEVE THAT'S THE CASE WHEN  
YOU'RE TALKING ABOUT A 25-YEAR  
DAY-FOR-DAY SENTENCE.

>> WELL, ON THIS ISSUE THAT THE  
STATE HAS BROUGHT UP, SHOULD WE  
REALLY BE GETTING INTO THIS?

>> THE ISSUE THE STATE HAS  
BROUGHT UP ON CHANGING THE  
25-YEAR MINIMUM MANDATORY?

>> YEAH.

>> WELL, I MEAN, IT'S DEBATABLE.  
I WOULD SAY IT WAS WEIGHED  
BECAUSE IT WAS NEVER  
RAISED PREVIOUSLY.

>> BUT HOW CAN-- THE STATE IN  
CONNECTION WITH THAT IS ASKING  
FOR A REVERSAL OF THE DISTRICT  
COURT.

>> RIGHT.

FIRST OF ALL, ON THE CONFLICT  
QUESTION WE WERE ASKING FOR--

>> I UNDERSTAND THAT.

>> AND ON THE SECOND QUESTION  
WE'RE ASKING FOR THE DCA TO BE  
AFFIRMED BECAUSE THEY HAD CASE  
LAW THEY RELIED ON--

>> WELL, IS IT COMMON FOR A  
RESPONDENT TO BE IN THE POSITION  
TO GET A REVERSAL?

>> WELL, NO, I DON'T THINK IT  
IS.

[LAUGHTER]

>> OKAY.

>> I THINK IT'S VERY UNUSUAL,  
BUT I ALSO KNOW THIS COURT ONCE  
IT HAS JURISDICTION CAN PRETTY  
MUCH ANSWER ANY QUESTION IT

WANTS TO IN THE CASE.  
SO I CAME PREPARED TO ADDRESS  
IT.  
BUT, YES--  
>> BUT WHAT'S YOUR POSITION?  
>> MY POSITION ON THE 25-YEAR  
MINIMUM MANDATORY THAT THE JUDGE  
INCREASED IT TO 37.5 IS THAT AS  
THE DCA SAID, IT COULDN'T DO  
THAT.  
IT'S A DOUBLE JEOPARDY  
VIOLATION.  
>> I UNDERSTAND THAT'S YOUR  
POSITION ON THE MERITS OF IT.  
BUT MY QUESTION IS WHAT'S YOUR  
POSITION ON THE PROPRIETY OF  
THIS COURT--  
>> RIGHT.  
>>-- ADDRESSING THAT ISSUE AND  
REVERSING THE DISTRICT COURT ON  
THE BASIS--  
>> RIGHT.  
>>-- OF THE STATE, AN ARGUMENT  
THE STATE HAS MADE HERE AS THE  
RESPONDENT.  
>> RIGHT.  
>> THEY'VE NOT BROUGHT THIS UP.  
>> THAT'S TRUE.  
IT'S TRUE, I MEAN, THEY  
DIDN'T--  
>> I UNDERSTAND IT'S TRUE.  
WHAT IS YOUR POSITION ABOUT THE  
PROPRIETY OF THAT?  
>> WELL, MY POSITION, I WOULD  
LIKE TO TAKE THE POSITION THAT  
THEY ABSOLUTELY CAN'T DO IT.  
BUT AS I SAID, I UNDERSTAND THAT  
THE CASES I HAVE READ--  
>> SO YOU THINK WE CAN DO IT.  
>> I THINK YOU CAN IF YOU WANT  
TO.  
I WOULD SAY YOU DON'T THESE TO,  
AND YOU SHOULDN'T.  
THE DCA WAS RIGHT ON THAT POINT.  
UM, IF THERE ARE NO FURTHER  
QUESTIONS, I'LL JUST SIT DOWN.  
>> MAY IT PLEASE THE COURT,  
KATHERINE LANE FOR THE STATE.  
THIS IS THE DEFENSE'S REQUEST  
FOR RELIEF--



>> COULD YOU JUST COME A LITTLE  
CLOSER TO YOUR MICROPHONE?

>> OF COURSE.

THIS IS THE DEFENSE'S REQUEST  
FOR RELIEF IN THEIR 3800B2  
MOTION.

WHERE JR. FOR DEFENDANT OPPONENT  
MOVE IT IS COURT TO VACATE THE  
SENTENCES IMPOSED FOR THE  
AGGRAVATED BATTERIES AND  
RESENTENCE HIM TO NO MORE THAN  
25 YEARS CONCURRENT FOR THOSE  
OFFENSES.

IF THERE COULD BE ERROR IN THE  
TRIAL COURT VACATING THE  
SENTENCES AND RESENTENCING THE  
DEFENDANT, IT WAS INVITED, AND  
THE DEFENDANT CANNOT CLAIM NOW  
THAT THE TRIAL COURT COULD NOT  
RESENTENCE HIM AS PART OF A  
3800B2 PROCEEDING WHEN THEY ARE  
PRECISELY THE ONES WHO ASKED FOR  
THAT TO HAPPEN.

AND THAT IS WHY DOUBLE JEOPARDY  
DOES NOT APPLY THERE.

BECAUSE WHEN THE DEFENDANT IS  
THE ONE ASKING FOR THE OLD  
SENTENCE TO GO AWAY, THERE'S NO  
EXPECTATION OF FINALITY.

IT IS A COMPLETELY DE NOVO  
SENTENCING PROCEEDING.

>> SO YOU DON'T SEE THIS AS  
BEING A 3800B CORRECTION OF AN  
ILLEGAL SENTENCE?

THEY WERE ACTUALLY GOING BACK  
FOR A FULL DE NOVO RESENTENCING?

>> THAT IS WHAT THE DEFENSE  
ASKED FOR, AND THAT IS  
ULTIMATELY WHAT THEY GOT.

AND IN THE CONTEXT OF WHAT THEY  
WERE TRYING TO ACHIEVE, THAT WAS  
THE ONLY WAY TO CORRECT THE  
SENTENCE.

WAS, IN FACT, TO HOLD A  
RESENTENCING HEARING BECAUSE  
CONTRARY TO WHAT THE DEFENSE  
SAYS, THE PORTION OF A SENTENCE  
WHICH IS ENACTED PURSUANT TO THE  
10-20-LIFE STATUTE, THAT IS NOT  
A SEPARATE SENTENCE.

10-20-LIFE STATUTE ONLY CREATES A WAY OF SERVING A SENTENCE THAT IS DONE DAY FOR DAY AS OPPOSED TO BEING ELIGIBLE FOR GAME TIME. TO SAY THAT IT CREATES A WHOLE SEPARATE SENTENCE, THAT ACTUALLY WOULD VIOLATE DOUBLE JEOPARDY BECAUSE THEN YOU'D HAVE TWO SENTENCES FOR THE SAME CRIME, AND THAT WOULD BE MORE THAN ONE PUNISHMENT.

THE WELL-SETTLED PROPOSITION IS THAT THERE WAS NOTHING WRONG WITH WHAT THE TRIAL COURT DID WHETHER IT'S IN TERMS OF VINDICTIVE SENTENCING OR IN TERMS OF DOUBLE JEOPARDY.

AND, IN FACT, BECAUSE THE TRIAL COURT TOOK INTO ACCOUNT POTENTIAL GAME TIME THAT THE DEFENDANT WOULD HAVE GOTTEN ON A 40-YEAR SENTENCE, THE DEFENDANT IS NOW GUARANTEED TO GET THAT TIME THAT HE ONLY COULD POSSIBLY HAVE GOTTEN BEFORE.

HE COULD HAVE DONE THINGS DURING THAT 40 YEARS THAT WOULD HAVE FORFEITED HIS GAME TIME, BUT NOW HE HAS THAT DEFINITELY.

SO HE HAS ACTUALLY GOT CANNEN A BENEFIT, AND IN TERMS OF THE COMPLICATED HISTORY OF THIS CASE, IT SHOULD BE REMANDED TO THE DISTRICT COURT AFTER THE OPINION HAS BEEN QUASHED, AND IT SHOULD BE CONSOLIDATED WITH THE OTHER SENTENCE WHICH ISN'T REALLY PART OF THIS RECORD.

BUT IT NEEDS TO GO TO THE DISTRICT COURT IN ONE CASE WITH INSTRUCTIONS TO REINSTATE THE SECOND SENTENCE BECAUSE THAT IS THE LEGALLY CORRECT SENTENCE. THANK YOU.

>> REBUTTAL?

>> WELL, OBVIOUSLY, MY POSITION IS THAT THE ORIGINAL CHALLENGE IN THE 3800B2 MOTION WAS TO THE RECLASSIFICATION TO FIRST-DEGREE FELONIES AND THEN THE IMPOSITION

OF THAT GENERAL SENTENCE.  
I DON'T BELIEVE THERE'S ANYTHING  
IN THAT MOTION THAT SAID THE  
25-YEAR MANDATORY MINIMUM ITSELF  
IS ILLEGAL BECAUSE IT WAS  
LEGAL--

>> WHAT SHOULD THE TRIAL JUDGE  
HAVE DONE ON REMAND?

I MEAN--

>> OF THE RESENTENCING?  
ENTER YEAH.

>> I BELIEVE THE TRIAL JUDGE  
COULD HAVE SAID HERE WE HAVE TWO  
SECOND-DEGREE FELONIES, 15 YEARS  
EACH.

THOSE COULD BE STACKED FOR A  
TOTAL OF 30 YEARS FOR A GENERAL  
SENTENCE.

BUT THE 25-YEAR MANDATORY  
MINIMUM AT THAT POINT COULD NOT  
BE CHANGED, AND I THINK IT IS A  
SEPARABLE PART OF THE  
SENTENCING.

BECAUSE OF THE REASONS I  
MENTIONED PREVIOUSLY.

AND I ALSO THINK THAT THE  
10-20-LIFE SENTENCING STATUTE  
DOES NOT JUST CREATE ANOTHER WAY  
OF SERVING A SENTENCE.

IT'S VERY CLEAR THAT FOR A  
SECOND-DEGREE FELONY THAT WOULD  
ORDINARILY BE 15 YEARS, THE  
JUDGE CAN JUST TOTALLY DISREGARD  
THAT, GO TO THE 10-20-LIFE  
STATUTE AND IMPOSE-- IF  
SOMEBODY IS INJURED IN THIS WAY,  
GREAT BODILY INJURY-- 25 TO  
LIFE.

SO I SEE THEM AS VERY SEPARABLE.  
IF THERE ARE NO FURTHER  
QUESTIONS, THANK YOU, YOUR  
HONORS.

>> THANK YOU FOR YOUR ARGUMENTS.  
THE COURT IS IN RECESS UNTIL  
9:00 TOMORROW MORNING.