Lennard Lapoint Jenkins vs State of Florida

NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS JENKINS VERSUS STATE.

MS. DAVIS?

MAY IT PLEASE THE COURT, MY NAME IS BARBARA DAVIS. I REPRESENT THE APPELLANT, LENNARD JENKINS.

COULD YOU REMIND US OF THE BASIS THAT WE HAVE JURISDICTION IN THIS CASE.

I THINK YOU TOOK JURISDICTION ON THE BASIS OF THE HAWK CASE WHICH ORIGINATED IN THE FIFTH DISTRICT COURT OF APPEALS AND THIS COURT QUOTED HAUCK AND IT SAID THAT AS A MATTER OF LAW THE JUDGE SHOULD DECIDE WHETHER PAVEMENT WAS A WEAPON.

OBVIOUSLY THIS CASE DOESN'T INVOLVE PAVEMENT. BUT DID THE MAJORITY OPINION OF THE 5TH DISTRICT IN JENKINS, IN THIS CASE, DISCUSS HAUCK?

NO, IT DID NOT.

WELL, HELP ME WITH WHERE THERE'S ANY CONFLICT WITH HAUCK.

JUDGE, THE BASIC LAW IS AND HAUCK ESTABLISHED THIS THAT WHEN AN ITEM IS NOT ORDINARILY USED AS A WEAPON, THEN THE JUDGE AS A QUEFL SHOULD DETERMINE WHETHER OR NOT THAT IS A WEAPON. IN HAUCK IT WAS PAVEMENT. AND THIS COURT SAID AN ITEM THAT IS NOT ORDINARILY USED AS A WEAPON MUST BE DETERMINED AS A QUESTION OF LAW BEFORE IT GOES TO THE JURY.

DOES THAT LEAD US THOUGH, TO ANY TIME THERE'S AN ISSUE ABOUT THE USE OF AN ITEM OR WHATEVER AS A WEAPON AND THERE IS A SUBMISSION OF THAT ISSUE TO THE JURY AS OPPOSED TO A DIRECTED VERDICT OF ACQUITTAL, THAT WE'RE GONNA HAVE TO REVIEW ALL OF THOSE CASES NOW UNDER THE LAW SET OUT IN HAUCK? AND I HAVE SOME CONCERN, YOU KNOW, FOR THAT.

HAUCK ESTABLISHED THAT THERE ARE ITEMS THAT SHOULD NOT BE USED. I THINK IF THIS COURT ESTABLISHES AT THIS POINT THAT WHEN AN ITEM CANNOT ORDINARILY BE USED AS A WEAPON, THE JUDGE SHOULD DETERMINE AS A MATTER OF LAW THAT IT IS OR IS NOT A WEAPON.

THERE'S NO CONTENTION IN THIS CASE, IS THERE, THAT AN AUTOMOBILE, FOR INSTANCE, CAN'T BE USED AS A WEAPON?

WELL, AND THAT WAS JUDGE HARRIS REESE DESCENT IN THE FIFTH DCA.

YOU'RE NOT CONTENDING IN THIS CASE THAT AREN'T TIMES WHEN AN AUTOMOBILE CAN'T BE USED AS A WEAPON OR ARE YOU?

WE'RE NOT ABANDONING THE POSITION THAT UNDER THE ROBBERY STATUTE THERE IS A DISTINCTION THAT IT SHOULD BE CARRIED AND IF AN AUTOMOBILE IS USED FOR INSTANCE IN THIS CASE, THEN THE APPROPRIATE CHARGE WOULD BE AGGRAVATED BATTERY R -- WITH INJURY RATHER THAN ADDING THAT AS A WEAPON ON TO STRONG ARM ROBBERY.

BUT TO ANSWER MY QUESTION YOU'RE NOT MAKING A CONTENTION THAT AN AUTOMOBILE CAN NEVER BE USED AS A WEAPON? I'M ASKING THAT IN THE CONTEXT AGAIN OF OUR JURISDICTION. AND WHETHER THERE REALLY IS A CONFLICT WITH HAUCK WHERE WE HAD THE SITUATION WHERE, IF I RECALL THE VICTIM'S HEAD WAS BEING BEAT AGAINST THE PAVEMENT.

SGLE AND THE CLAIM WAS THE PAVEMENT WAS A WEAPON.

YES.

AS OPPOSED TO HERE WHERE WE HAVE AN AUTOMOBILE. ALL RIGHT, WELL, I THINK YOU'VE ANSWERED. SO IT'S CONFLICT WITH HAUCK.

YES, IS HOW YOU ACCEPT JURISDICTION. JUST SO THE COURT IS CLEAR, MR. JENKINS WAS CHARGED WITH PRINCIPAL TO ORMD ROBBERY WITH A WEAPON AND PRINCIPAL TO AGGRAVATED BATTERY. WE HAVE NO PROBLEM WHATSOEVER WITH THE STRONG ARM ROBBERY OR THE AGGRAVATED BATTERY BY BODILY INJURY. THE SOLE PROBLEM IS WITH THE WEAPON, BECAUSE THE CAR WAS NOT USED OR INTENDED TO BE USED AS A WEAPON IN THIS EVENT. YOU HAVE TO UNDERSTAND, HE WAS CHARGED WITH PRINCIPLE. IN ORDER TO BE CONVICTED AS A PRINCIPAL WHEN HE'S THE PASSENGER AND NOT DRIVING THE CAR, THE STATE SHOULD HAVE SHOWN THAT HE HAD THE CONSCIOUS INTENT TO USE THAT CAR AS A WEAPON, AND THAT HE DID SOME ACT TO ASSIST IN THE USE OF THAT AS A WEAPON.

YOU'RE SAYING FOR INSTANCE IF THERE WAS A CONVERSATION IN THIS CASE OVERHEARD BY THE DRIVER -- YOU'RE CLIENT WAS THE PASSENGER?

YES.

-- IN WHICH THEY WERE TALKING AND THEY SAID ALL RIGHT, SHE'S GOT THE PURSE AND YOU DRIVE UP AND KNOCK HER DOWN SO THAT THE PURSE WILL FALL, YOU KNOW. AND THEN I'LL GET OUT OF THE CAR AND GRAB THE PURSE AFTER YOU USE THE AUTOMOBILE TO KNOCK HER DOWN THAT IF THERE WAS EVIDENCE LIKE THAT, YOU WOULDN'T BE HERE?

NO, SIR. WE STILL ARE DISTINGUISHING JACKSON AND MR. NATION WAS THE CO-DEFENDANT OF MR. JACKSON. AND THE FIRST DCA IN BOTH OF THOSE CASES WHERE THEY RAN THE VICTIM DOWN AND THEN RAN OUT AND GOT THE WALLET, THEY SAID THAT THAT WAS A QUESTION OF FACT THAT THIS WAS USED AS A WEAPON SO THE JURY COULD MAKE THAT DETERMINATION UNDER THOSE FACTS. NOW, JUDGE HARRIS IN THE 5TH DCA HIS DISSENT SAYS YEAH BUT JACKSON IS DISTINGUISHABLE BECAUSE THAT WAS EXTREMELY EGREGIOUS AND THEY DIDN'T ADDRESS THE ISSUE OF WHY DIDN'T THE ROBBERY STATUTE SAY CARRY WHEN THE WEAPONS STATUTE SAYS --

SO YOU'RE ARGUING AN AUTOMOBILE CAN NEVER BE USED AS A WEAPON IN THIS CONTEXT?

YES. I DO NOT WANT TO AN BAN DON AN ARGUMENT.

I'M ASKING WHAT YOUR ARGUMENT IS. IS IT YOUR ARGUMENT BEFORE THIS COURT --

YES.

-- THAT AN AUTOMOBILE CAN NEVER BE USED AS A WEAPON?

UNDER THE ROBBERY STATUTE BECAUSE IT IS NOT CARRIED. IF THIS COURT THINKS THAT IT CAN BE USED AS A WEAPON IN THIS CASE IT WAS NOT USED AS A WEAPON AS A MATTER OF LAW. AND THIS COURT HAS SAID THAT REPEATEDLY. THE ONLY CASE WHERE THIS COURT STARTED TO DEVIATE FROM THAT IS IN THE DALE CASE. BUT THAT INVOLVED A BB GUN.

I'M STILL -- IS THIS AN ARGUMENT THAT YOU MADE IN THE TRIAL COURT AND THEN TOOK UP TO THE 5TH DISTRICT, THAT IS, THE ARGUMENT THAT AN AUTOMOBILE CAN NEVER BE USED AS A WEAPON UNDER THE STATUTE THAT THE STATE CHARGED THE DEFENDANT?

I DON'T THINK TRIAL COUNSEL ACTUALLY ARGUED THAT. I THINK HE GLANCED OFF THAT. BUT HE ARGUED EXTENSIVELY THAT AS A MATTER OF LAW, A CAR CANNOT BE USED AS A WEAPON UNDER THE ROBBERY STATUTE. SO IT'S BORDERLINE. HE DIDN'T MAKE THE SPECIFIC ARGUMENT THAT JUDGE HARRIS BROUGHT UP IN HIS DISSENT AND THAT I THINK MAY BE MERITORIOUS, BUT THEY ARGUED ALL OVER THAT. AND IT WAS PAGES AND PAGES. THE TRIAL JUDGE NEVER RULED ON THE WEAPON PART OF THE ARMED ROBBERY. HE SEEMED TO FOCUS ON THE FORCED PART TO EVEN GET IT TO A ROBBERY.

WELL, SO YOUR ARGUMENT IS THAT IF THE BRINKS GUY IS COMING OUT OF THE SUN BANK AND THE DEFENDANT HAS DESIGNED -- HAS PLOTTED, THAT THE WAY THAT I'M GOING TO GET THIS BRINKS GUY STOP BEFORE HE GETS TO HIS TRUCK IS THAT I'M GOING TO USE MY VOLKSWAGEN AND I'M GOING TO RUN UP ON THE SIDEWALK AND KNOCK HIM DOWN AND THEN GRAB THE SATCHEL, AND RUN, THAT THE AUTOMOBILE WOULD NOT BE A WEAPON?

UNDER THE ROBBERY STATUTE, NO IT WOULD NOT. YOU HAVE AN AGGRAVATED BATTERY, PERHAPS AN ATTEMPTED MURDER DEPENDING ON HOW HE FELT ABOUT THE BRINKS FELLOW, AND THEN YOU HAVE STRONG ARM ROBBERY. AND THAT'S THE DIFFERENCE. BECAUSE THE ROBBERY STATUTE SAYS "TO CARRY A WEAPON."

WOULDN'T I BE USING THE VEHICLE THE SAME WAY THAT I'D BE USING A GUN? THAT I'D BE USING IT AS AN INSTRUMENT OF FORCE TO EXACT THE BAG FROM THE BRINKS GUY?

YES, AND SO YOU HAVE NOW AGGRAVATED BATTERY OR PERHAPS ATTEMPTED MURDER.

BUT I DON'T HAVE ROBBERY EVEN THOUGH -- BUT IF I USED A GUN TO DO IT, I'D HAVE ROBBERY.

IF YOU USE A GUN TO DO IT THEN YES, YOU HAVE A WEAPON, BECAUSE YOU'RE CARRYING A FIREARM.

SO WHAT'S YOUR DEFINITION OF CARRY AS IT'S USED IN THE ROBBERY STATUTE?

CARRY WOULD BE -- YOU HAVE TO LOOK AT THE DEFINITION OF WEAPON A DIRT, A GUN, A CLUB, ANYTHING LIKE THAT IS SPECIFICALLY DEFINED. BUT THEN WHEN YOU GET INTO THESE OTHER ASPECTS, YOU KNOW, YOU CAN'T CARRY PAVEMENT. YOU CANNOT CARE ARE RI A BATHROOM FIXTURE. HOWEVER, ONCE YOU DETACH THE BATHROOM FIXTURE AND HIT SOMEBODY WITH THAT, YOU ARE THEN CARRYING IT. AND THE JACKSON COURT JUST SEEMED TO BLUR THE DISTINCTION, WHEREAS THIS COURT IN HAUCK SAID THE STRICT INTERPRETATION, YOU FOLLOW THE STRICT INTERPRETATION OF WHAT THE STATUTE SAID. IN THE JACKSON COURT IT SAYS WE'RE GOING TO MAKE CARRY BE USED LIKE IT IS IN THE RECLASSIFICATION SFATOUT AND WE'LL ALLOW A CAR TO BE A WEAPON AND THE DEFENSE POINTED OUT THEY'RE KIND OF MISSING THE BOAT HERE BECAUSE YOU CAN HAVE -- THE STATE CAN HAVE THEIR CAKE AND EAT IT TOO BECAUSE YOU HAVE STRONG ARMED ROBBERY AND AN AGGRAVATED BATTERY WHEN THE CAR IS USED IN THAT METHOD IN WHICH IT STRIKES THE VICTIM.

SO IN THIS STATUTE, YOU CANNOT INTERPRET THE TERM CARRY TO MEAN MANIPULATE, MAYBE. BECAUSE YOU CAN MANIPULATE A CAR. YOU CAN'T MANIPULATE PAVEMENT. SO CLEARLY, I THINK THAT THE CASE LAW THAT SAYS THE PAVEMENT IS NOT A DEADLY WEAPON WOULD CERTAINLY APPLY. BUT YOU CAN MANIPULATE THE CAR JUST AS YOU CAN MANIPULATE A GUN OR KNIFE. SO WHY WOULDN'T THAT BE AN INTERPRETATION WE COULD GIVE TO THE TERM CARRY?

THE DIFFERENCE WITH THE CAR IS THAT YOU HAVE TO GO THROUGH A PROCESS TO USE THE CAR. BUT YOU ARE NOT BEING ABLE TO CARRY THE CAR. THE CAR IS CARRYING YOU. AND THAT'S WHAT THE FIRST DISTRICT SAID IN JACKSON. IS WE DON'T CARE ABOUT THE DISTINCTION WHETHER YOU CARRY IT OR IT CARRIES YOU. WHY WOULDN'T THE LEGISLATURE SAY JUST LIKE IT DID IN 775087, USE CARRY, DISPLAY, THREATEN TO USE, RATHER THAN JUST CARRY? SO IT IS A MORE NARROWLY DRAWN STATUTE. IT'S NOT ECLIPSING THE STATE FROM CHARGING THAT, BECAUSE THEY HAVE ALL THESE OTHER BACK-UP POSITIONS THAT CAN BE ENHANCERS, THAT CAN BE COMPLETELY SEPARATE CHARGES.

WHAT DO YOU THINK THE EVIL IS THAT THE LEGISLATURE WAS ADDRESSING HERE? WAS IT HAVING A WEAPON DURING A ROBBERY? ISN'T THAT THE EVIL -- COMMITTING A ROBBERY WITH A WEAPON?

AND BEING ABLE TO THREATEN SOMEONE AND PUT THEM IN FEAR WITH A WEAPON. SEE, A CAR IS ORDINARILY NOT SOMETHING THAT WILL PUT YOU IN FEAR. AS IS PAVEMENT NOT SOMETHING THAT WOULD PUT YOU IN FEAR UNLESS YOU CUT A JAGGED PIECE OUT AND PICK IT UP AND CARRY IT.

HOW IS THAT IF YOU HAVE THE VICTIM STANDING THERE, FOR INSTANCE, THE BRINKS GUY, WITH THE BAGS OF MONEY AND YOU STICK YOUR HEAD OUT OF YOUR TRUCK AND YOU SAY DROP THAT MONEY, OR I'M GONNA RUN YOU OVER RIGHT HERE, AND I'VE GOT YOU CORNERED AND YOU DROP THE MONEY OR THIS TWO-TON TRUCK IS GONNA BE SMASHING YOURY IN JUST A MINUTE, AND THE BRINKS MAN DROPS THE MONEY AND THE DRIVER GOES AND GETS THE MONEY AND PUTS IT IN THE TRUCK? NOW, YOU DON'T THINK THAT THE THREAT OF THE USE OF THAT TRUCK WAS BEING USED AS A WEAPON IN THAT CASE?

I THINK THERE YOU PROBABLY -- YOU HAVE BORDERLINE STRONG ARM ROBBERY BECAUSE THERE WAS NOT AN ACTUAL USE OF FORCE BUT YOU PROBABLY HAVE AN AGGRAVATED ASSAULT BECAUSE YOU ARE IN POSSESSION --

YOU JUST SAID THAT THE WEAPON CONTEMPLATED YOU COULD MAKE A THREAT AND YOU WERE GOING TO USE IT THEN AND THAT YOU CAN'T DO THAT WITH AN AUTOMOBILE BECAUSE IT'S JUST LIKE THE PAVEMENT. BUT IT ISN'T JUST LIKE THE PAVEMENT, IS IT?

NO, A CAR IS NOT AT ALL LIKE A PAVEMENT ONCE YOU PICK IT UP. IT IS LIKE THE PAVEMENT WHEN IT'S DOWN THERE. I SAY, I'M GONNA TAKE YOUR HEAD AND SLAM IT ON THE PAVEMENT, AGAIN, THAT IS A THREAT, BUT THE PAVEMENT IS NOT A WEAPON. JUST LIKE A CAR IS NOT A WEAPON. I CANNOT CARRY THAT PAVEMENT. I CAN TAKE OFF A PIECE OF THE CAR, CAN TAKE OFF THE FENDER AND GO UP AND SAY, NOW I'M GONNA WHACK YOU IN THE HEAD WITH THE FENDER.

BUT YOU CAN ALSO TURN THE KEY ON THE CAR AND MOVE IT AT THAT SPEED AND WHATEVER THAT FORCE IS AND MOBILIZE IT IN THAT WAY. UNLIKE PAVEMENT, UNLIKE A BUILDING OR THAT YOU SAY THOSE THINGS.

I THINK THAT'S ONE OF THOSE VERY FINE DISTINCTIONS, IS A CAR MORE LIKE PAVEMENT, A BATHROOM FIXTURE, SOMETHING THAT CANNOT BE CARRIED BUT COULD BE TAKEN APART AND CARRIED? OR IS A CAR MORE LIKE A FIREARM OR A PIECE OF GLASS OR A KNIFE? AND MY POSITION IS THAT IT IS NOT SOMETHING YOU CAN CARRY. IT CAN BE DISMANTLED AND CARRIED BUT IT'S NOT SOMETHING YOU CAN CARE ARE RI.

WOULD YOU BE HERE IF SECTION B READ, "IF IN THE COURSE OF COMMITTING THE ROBBERY, THE FENDER USED A WEAPON" INSTEAD OF CARRIED A WEAPON? WOULD YOU BE HERE TODAY?

YES, SIR, I WOULD STILL BE HERE. BECAUSE EVEN IF YOU COULD UNDER THE ROBBERY STATUTE YOU WOULD -- COULD DESIGNATE A CAR AS A WEAPON, THAT'S A QUESTION OF LAW THAT THE

JUDGE SHOULD HAVE DETERMINED BECAUSE A CAR IS NOT ORDINARILY WITHIN THE STATUTE IN 790 OR IN ANY OTHER CASE SOMETHING THAT WOULD BE A WEAPON.

IT'S NOT A GUN BUT IF YOU AIM A CAR INTENTIONALLY AT SOMEBODY AT 100 MILES AN HOUR, DON'T YOU HAVE TO CONCEDE THAT IN ORDER TO EXTRACT MONEY FROM THEM OR COMMIT A ROBBERY OR SOMETHING, DON'T YOU HAVE TO CONCEDE THAT IT'S BEING USED AS A WEAPON AT THAT POINT?

THAT'S SOMETHING THE JUDGE SHOULD DECIDE AS A MATTER OF LAW. IF IT'S SOMETHING THAT'S EASY, IF IT'S A FIREARM, IF IT'S A BOWIE KNIFE IF IT'S A BILLY CLUB THAT GOES TO THE JURY.

YOU WOULD HAVE THE JUDGE THEN TELL THE JURY THAT THE AUTOMOBILE IS A WEAPON?

NO, I WOULD HAVE ARE THE JUDGE --

-- AND THEREFORE -- I'M HAVING TROUBLE. DIDN'T THE JUDGE DECIDE IT AS A MATTER OF LAW BY ALLOWING IT TO BE SUBMITTED TO THE JURY? THAT'S REALLY WHAT OUR RULING WAS IN HAUCK, WASN'T IT? THAT IS THAT THE JUDGE DOES HAVE TO MAKE A PRELIMINARY DECISION.

OH.

-- AS TO WHETHER THE ALLEGED WEAPON USED IN THE PARTICULAR CRIME IS SUFFICIENT TO TAKE IT TO THE JURY. IN HAUCK WE RULED THE PAVEMENT WASN'T SUFFICIENT SO YOU SHOULDN'T HAVE SPLIT THAT TO JURY BUT IN CASES WHERE THE JUDGE DECIDE YES, IT COULD DEPENDING ON ITS USE COME WITHIN THE STATUTE, THEN THAT'S THE LEGAL RULING THAT'S CALLED UPON, ISN'T IT?

AND THIS JUDGE NEVER MADE THAT DETERMINATION.

I THOUGHT HE'D MADE THE DETERMINATION BY SUBMITTING IT TO THE JURY.

WELL, IF YOU COULD SAY THAT I HAVE PRESERVED ALL MY ISSUES IN A JUDGMENT OF ACQUITTAL BECAUSE I SAID THE STATE DIDN'T PRESUME A PRIMA FACIE CASE THEN YES BUT WE MADE THE SPECIFIC ARGUMENT THAT ON THE WEAPON PART OF THE ARMED ROBBERY AND HIS RULING WAS THAT I DON'T HAVE A PROBLEM WITH COUNT I, THE ROBBERY. THERE WAS A LOT OF CONFUSION ABOUT THE TWO WAYS TO PROVED AGGRAVATED BATTERY BUT HE WAS FOCUSING ON THE FORCE PART OF IT. HE NEVER SAID, I FIND AS A MATTER OF LAW THAT A CAR IS A WEAPON THAT CAN GO TO THE JURY. HE JUST NEVER RULED ON THAT. AND WE'VE GOT THE SITUATION HERE WHERE HE SHOULD HAVE RULED ON THAT, AND IF HE HAD PROPERLY RULED ON THAT, IT WOULD NOT HAVE GONE TO THE JURY IN THIS CASE.

BUT IF THE JURY -- DID THEY MAKE TWO SEPARATE FINDINGS OR THREE SEPARATE FINDINGS IN THIS CASE? FIRST YOU HAVE YOU SAY THE ROBBERY.

YES.

YOU'RE NOT DISPUTING THERE WAS A ROBBERY.

YES IT DEFINITELY WAS, YES.

THERE'S ALSO THE AGGRAVATED BATTERY.

YES.

YOU'RE NOT DISPUTING THERE WAS AN AGGRAVATED BATTERY.

NO.

THE THIRD IS WHETHER THIS WAS IN THE COURSE OF COMMITTING THE ROBBERY THE DEFENDANT CARRIED A WEAPON SO THAT THEY CAN BE CONVICTED OF THAT ENHANCED FELONY EVEN IF THEY DON'T USE THAT WEAPON, IF THEY'RE SIMPLY CARRYING IT IN THE COURSE OF PUTTING THE VICTIM IN FEAR, CORRECT?

YES, WHICH IS THE --

WAS THE JURY SEPARATELY INSTRUCTED ON THAT AND DID THEY SEPARATELY RETURN THE SPECIAL INTERROGATORY VERDICT IN THIS CASE?

I'D HAVE TO LOOK AT THAT BUT I'M PRETTY SURE THIS WAS A SPLIT VERDICT WHERE THEY FOUND HIM GUILTY OF THE ROBBERY NND THE COURSE HE USED A WEAPON AND THE COUNT III THAT DROPPED OUT WAS AGGRAVATED BATTERY. I SEEM TO RECALL THEY DID HAVE A SEPARATE FOR THE WEAPON BUT I CAN KETCH THAT AND TELL YOU ON REBUTTAL BUT I JUST WANT TO REITERATE THAT HE WAS ALSO CHARGED AS A PRINCIPAL SO THE STATE WOULD HAVE TO SHOW THE INTENT THAT HE USED THIS AS A WEAPON, OR TO BE PRINCIPAL THAT THE DRIVER INTENDED TO USE IT AS A WEAPON. AND THE FACT IN JUDGE HARRIS' DISSENT SHOW THERE WAS NO COMMUNICATION SHOWN. LIKE, "HIT HIM," LIKE ACCELERATE I'VE GOT THE PURSE. NOBODY KNEW WHAT WAS GOING ON ON EITHER SIDE OF THE CAR.

I THOUGHT YOU STARTED OUT WITH AN ABSOLUTIST POSITION THAT A CAR CAN NEVER BE A WEAPON. WAS THAT YOUR POSITION?

YES, IT IS, IT IS. AND IF YOU FOUND THAT A CAR COULD BE A WEAPON UNDER THE ROBBERY STATUTE IN THIS CASE AND IN EVERY CASE WHEN A CAR IS USED AS A MATTER OF LAW, THE JUDGE SHOULD MAKE THAT DETERMINATION, IF YOU FIND THAT A CAR CAN BE A WEAPON UNDER THE ROBBERY STATUTE. SO THERE'S MORE THAN ONE THING GOING ON IN THIS. IT SHOULD NEVER HAVE BEEN CHARGED AS A WEAPON. IF YOU SAY THAT IT CAN BE CHARGED THAT WAY, THE JUDGE SHOULD DETERMINE AS A MATTER OF LAW WHETHER OR NOT IT IS A WEAPON, AND IN THIS CASE, IF HE HAD MADE THAT DETERMINATION, HE COULD HAVE NEVER FOUND THAT THIS WAS -- THAT MR. JENKINS INTENDED TO USE THIS AS A WEAPON, NOR DID MS. HAYDEN AND THE JURY FOUND THAT SHE DID NOT USE IT AS A WEAPON.

YOUR POSITION REALLY HAS TO BE THAT A CAR CANNOT BE A WEAPON BECAUSE THAT'S THE ONLY WAY THAT THERE COULD POSSIBLY BE ANY CONFLICT WITH HAUCK.

YES, AND THAT IS MY POSITION.

RIGHT. YOU'RE IN YOUR REBRUTAL. THANK YOU.

THANK YOU.

MAY IT PLEASE THE COURT, MY NAME IS WESLEY HEIDT I REPRESENT THE STATE OF FLORIDA ON THIS CASE. BEFORE LOOKING AT THE MERITS OF THE CASE THE STATE WOULD LIKE TO MAKE A COUPLE POINTS AS TO JURISDICTION. IT IS OUR OPINION THAT AS ARGUED IN OUR JURISDICTIONAL BRIEF THIS CASE IS NOT IN CONFLICT WITH HAUCK. WHEN YOU LOOK AT THE SITUATION IN HAUCK, HAUCK TALKED ABOUT AS A MATTER OF LAW THERE ARE A CATEGORY OF WEAPONS WHICH CAN NEVER IN ANY FACTUAL CIRCUMSTANCE BE A WEAPON. THAT IS NOT THE SITUATION THAT EXISTS IN THIS CASE. IN FACT THAT'S NOT EVEN THE SITUATION ALLEGED BY THE PETITIONER.

LET ME CLEAR AWAY SOME OF THE UNDERBRUSH BEFORE -- HOW DO YOU GET AROUND THE CLEAR MEANING OF THE STATUTE THAT IF IN THE COURSE OF COMMITTING THE ROBBERY THE

DEFENDANT CARRYrd A WEAPON? NOW, THIS IS A PENAL STATUTE AND WE CONSTRUE IT.

WELL, I THINK TO REFERENCE THE JACKSON CASE WHICH WAS CITED BY THE PETITIONER AND BY THE RESPONDENT, BY THE STATE, JACKSON, THAT WAS THE ISSUE, WHETHER YOU COULD CARRY, WHETHER YOU COULD -- WHETHER USING AN AUTOMOBILE FITS THE DEFINITION. INITIALLY IT'S OUR POSITION THAT THAT WAS NEVER ARGUED BY THE PETITIONER. WHEN YOU LOOK AT THE 5TH DISTRICT COURT OF APPEALS OPINION ON PAGE 999, SINCE DISCUSSION OF JACKSON IS NOT WITHOUT INTEREST, IF WE WERE FACED WITH DECIDING WHETHER A CAR COULD BE CARRIED WE MIGHT DECIDE TO EITHER EMBRACE THE FIRST DISTRICT COURT'S OPINION OR NOT. HOWEVER THIS ISSUE HAS NOT BEEN RAISED ON APPEAL AND HAS NOT BEEN ARGUED BEFORE US. WHEN YOU LOOK AT THE JURYIC DUCK SHUNS, THE JURY INSTRUCTION WAS MODIFIED WITH AGREEMENT OF TRIAL COUNSEL. I'M REFERRING TO PAGE 104 FROM THE DEFENSE ATTORNEYS' STATEMENTS. WHY DON'T WE USE CARRIED AND USED. THE DEFENSE AND THE PETITIONER IN THEIR BRIEF CITE THE CASE OF TRAUB.

DON'T YOU THINK WHAT THE LEGISLATURE REALLY HAD IN MIND THAT THEY WEREN'T THINKING ABOUT AUTOMOBILES, BEING USED AS WEAPONS AND THIS TYPE OF THING THEY WERE REALLY THINKING ABOUT THE EVIL THEY WERE ADDRESSING WAS HAVING A WEAPON ON YOU DURING THE COURSE OF A ROBBERY? WASN'T THAT DON'T YOU THINK THAT'S REALLY WHAT THE LEGISLATURE HAD IN MIND? AND WHEN THEY'RE TALKING ABOUT A WEAPON THEY'RE TALKING ABOUT A KNIFE OR A GUN OR SOMETHING OF THEY NATURE, NOT USING A CAR IN A METHOD THAT NORMALLY YOU WOULDN'T BE USING A CAR IN? DON'T YOU THINK THAT'S THE EVIL THEY'RE ADDRESSING.

I THINK THE EVIL THEY WERE ADDRESSING IS THE USE OF ANY OBJECT WHICH COULD HAVE A GREATER DANGER. THE STATUTES ARE FILLED AND CASE LAW IS FILLED WITH REFERENCES TO AUTOMOBILE AS A POTENTIAL WEAPON. IT'S A FACTUAL DETERMINATION DEPENDING SPECIFICALLY ON HOW IT WAS USED.

BUT THEY DIDN'T USE THE WORD "USE" IN THE STATUTE. ISN'T THAT THE PROBLEM HERE?

FIRST OF ALL, JACKSON SAYS THAT'S NOT THE PROBLEM. YOU HAVE TO USE A COMMON SENSE DEFINITION OF "USE" TO CARRY TO ALSO MEAN USED.

YOU THINK THAT'S COMMON SENSE THAT WHEN SOMEONE SAYS CARRY SOMETHING, THAT YOU THINK OF IT AS CONTROLLING SOMETHING AS OPPOSED TO HOLDING IT IN YOUR --

WE COULD LOOK AT THE DEFINITION USED BY HAUCK. HAUCK TALKED ABOUT THIS IS A PASSIVE PIECE OF ASPHALT BUT WHAT THEY WANTED IN HAUCK WAS THIS COURT WROTE WAS SOMETHING THAT COULD BE USED AS AN INSTRUMENT OF ATTACK. SOMETHING THAT COULD BE OWNED, SOMETHING THAT COULD BE USED TO DEFEAT ANOTHER. THAT'S EXACTLY WHAT HAPPENED IN THIS CASE.

HAUCK WAS MY UNDERSTANDING UNDER 775 IS THAT IT WAS A USE. THAT WAS THE DEFINITION. USE OF WEAPON. NOT CARRY A WEAPON, WASN'T IT?

YOUR HONOR, I THINK THAT THE USE IS DEFENSE COUNSEL EVEN CONCEDES AT TRIAL, HE'S ASKING FOR A JURY INSTRUCTION FOR USE. THEY GAVE A MODIFIED JURY INSTRUCTION. IT'S NEVER BEEN DISPUTED THAT USE COULD QUALIFY IT.

DON'T WE HAVE ROW THER WEAPONS STATUTES WHERE WE TALK ABOUT USE, CARRY, DISPLAY? AND IT SEEMS TO ME IN THIS INSTANCE WE HAVE THE LEGISLATURE CHOSE TO PICK OUT ONE OF THOSE USE, CARRY, OR DISPLAY, PUT THE CARRY IN THE STATUTE WITHOUT THE OTHER TWO, AND HOW CAN WE JUST IGNORE THAT?

I THINK FIRST OF ALL THE CASE LAW SAYS IGNORE IT. THE CASE LAW CITED BY THE PETITIONER SAYS IGNORE IT AND THE ARGUMENT MADE BELOW WAS THAT THE USE WAS PART OF THE DEFINITION OF CARRY. AGAIN, THE PETITIONER ASKED FOR THE INSTRUCTION GIVEN. THE USE WOULD MODIFY IT --

LET ME ASK YOU THIS: HOW DOES THIS THEN DIFFER FROM EVEN THE PAVEMENT CASE? IF I AM HAVING A FIGHT WITH SOMEONE AND I SEE THE PAVEMENT, I'M NOT ON THE PAVEMENT, WE'RE NOT NEAR IT, AND I DRAG THE VAC TIM OVER TO THE PAVEMENT BECAUSE I KNOW I CAN DO MORE DAMAGE WITH IT, SO AREN'T I EVEN IN THAT SITUATION USING THE PAVEMENT AS A WEAPON? BECAUSE I KNOW I CAN INFLICT GREATER BODILY INJURY WITH IT? HOW DOES THE PAVEMENT AND THE CAR DIFFER THEN?

WELL, THEY DIFFER IN SEVERAL WAYS. THE HAUCK CASE TALKED IN TERMS OF USING THE COMMON SENSE DEFINITION OF WEAPON AND THEY CITED WEBSTERS. WEBSTERS AS I PREVIOUSLY SAID AN INSTRUMENT TO ATTACK, AN INSTRUMENT CAPABLE OF BEING OWNED. AN INSTRUMENT USED TO DEFEAT ANOTHER. AGAIN THAT'S WHAT HAPPENED IN THIS CASE. PAVEMENT IS NOT CAPABLE -- THE CASE LAW TALKED ABOUT HAUCK, YOU HAD AN ATTACHED TOILET AND IF IT'S ATTACHED IT'S NOT A WEAPON. IF YOU TAKE IT OFF AND HIT SOMEONE IF YOU USE IT AS AN INSTRUMENT TO ATTACK, THE DISSENT IN THE 5TH DISTRICT COURT OF APPEALS IN HAUCK AGREED THAT THE PAVEMENT COULD ALSO BE A WEAPON BUT THIS COURT UNANIMOUSLY DISAGREED AND GAVE US A DEFINITION THAT THE CAR CLEARLY FALLS WITHIN. THE CAR WAS AN INSTRUMENT TO USE TO DEFEAT THE VICTIM. THE CAR IN THIS CASE ACCELERATED TOWARD THE VICTIM, HIT THE VICTIM.

WHEN WE SAY CARRIED WE CAN ALSO SAY CARRY IS SYNONYMOUS WITH USE?

I THINK TO STATE A POSITION THAT CARE ARE RI MEANS USED. AGAIN THAT'S NOT THE ARGUMENT POSTED BY THE PETITIONER. THAT WAS NOT THE ARGUMENT PRESENTED AT TRIAL OR THE ARGUMENT PRESENTED TO THE FIFTH DISTRICT COURT OF APPEALS.

U I UNDERSTAND BUT SINCE WE'RE TALKING ABOUT IT, I WANT -- SO I CAN JUST -- YOU BELIEVE WE CAN JUST SAY THAT THIS STATUTE REALLY SAYS THAT IF A PERSON CARRIES, USES OR DISPLAYS, THEN -- A WEAPON, YOU CAN HAVE THAT ENHANCEMENT UNDER SUBSECTION B.

YES.

GOING TO JUDGE HARRIS'S DISSENT, HE HAD SOME HYPOTHETICALS. ONE OF THE HYPOTHETICALS WAS SUPPOSE JENKINS USED A BICYCLE IN THE SAME FASHION AND WITH THE SAME RESULTS, WOULD THE BICYCLE BE A WEAPON? IS THE STATE'S POSITION THAT IF THE SAME SITUATION OCCURRED BECAUSE SHE WAS INJURED BECAUSE SHE FELL AFTER BEING STRUCK, THAT IT WOULD A BICYCLE BE A WEAPON UNDER THIS ROBBERY ENHANCER?

I THINK THAT'S A FACTUAL DETERMINATION TO BE MADE BY THE JURY.

WOW IT COULD BE?

COULD BE. AND THE PROBLEM WITH THE CAR, THAT'S WHY THERE'S NUMEROUS STATUTES DEALING WITH THE CAR AND NUMEROUS CASES DEALING WITH THE UNIQUE NATURE OF A VEHICLE, YOU HAVE A 3,000 POUND WEAPON. YOU HAVE A VEHICLE UNLIKE THE PET PER TRIES TO ASSERT THAT'S SIMPLY A CONVEYANCE. THIS IS NOT A SITUATION WHERE HE RAN BY ON FOOT AND JUMPED IN A CAR OR A SITUATION WHERE HE WENT BY ON ROLLER SKATES. HE TOOK A CAR AND DRAGGED HER DOWN. A BICYCLE WOULD NOT DRAG A VICTIM. THAT'S WHY IT'S A FACTUAL DETERMINATION IN THE HAUCK INSTRUMENT OF ATTACK ARGUMENT WAS MET, THIS WAS AN APPLICATION OF HAUCK WHICH IS WHY THERE'S NO CONFLICT.

WHAT IS THE PRACTICAL EFFECT IN THIS CASE? HE WAS CONVICTED OF BOTH THE ROBBERY AND THE AGGRAVATED BATTERY? IS THAT CORRECT?

YES.

AND HE WAS GIVEN -- HE GOT A 20 YEAR PRISON TERM FOR BOTH TO RUN CONCURRENT?

CORRECT.

IN TERMS OF JUST UNDERSTANDING WHAT THE ENHANCER IS, WHAT WOULD BE THE DIFFERENCE IF THIS WAS -- THE ROBBERY WAS ENHANCED? WHAT WOULD BE THE DIFFERENCE IN THE SENTENCE?

I BELIEVE ROBBERIES ARE A SECOND DEGREE FELONY AND WITH THE WEAPON IT'S A FIRST DEGREE FELONY.

BUT HE'D STILL BE GETTING THE AGGRAVATED BATTERY OF THE 20 YEARS?

CORRECT, AND. IT HAS NO PRACTICAL EFFECT ON HIS SENTENCE.

SINCE THERE'S A CONCESSION THAT THESE ARE ALWAYS -- THEY WOULD BE AGGRAVATED BATTERIES, WHERE WOULD IT EVER HAVE A PRACTICAL EFFECT?

IN THIS CASE IT HAS NONE. ARGUABLY IF THE STATE HAD NOT CHARGED AGGRAVATED BATTERY IN SOME MANNER THEN YOU MAY HAVE A SITUATION WHERE THE ROBBERY WITH A WEAPON COULD --

ISN'T THAT REALLY SINCE WE'RE REALLY, SINCE IT SO CLEARLY FITS INTO AN AGGRAVATED BATTERY AND IT SEEMS LIKE WE'RE REALLY STRETCHING HERE TO GET THIS INTO THIS ROBBERY WITH THIS ENHANCER WHEN ALL THE OTHER WEAPONS SEEM TO BE WEAPONS YOU CAN CARRY, WHY SHOULD WE BE STRETCHING THE LAWS TO DO SOMETHING THAT ACTUALLY ISN'T EVEN GOING TO HAVE A PRACTICAL EFFECT IN MOST CASES?

WELL, BECAUSE IT'S NOT A STRETCH. IT'S A SITUATION --

ISN'T IT UP TO THE LEGISLATURE? YOU AGREE WITH THAT, IT'S UP TO THE LEGISLATURE TO DECIDE IF THEY WANT TO DOUBLE CHARGE IN SITUATIONS LIKE THIS TO PREVENT CERTAIN EVILS?

WELL, I THINK IT'S UP TO THE LEGISLATURE TO SET OUT THE DEFINITION OF AN OFFENSE BUT IT'S UP TO THE COURTS TO DEFINE. JACKSON HAS DEFINED THE CAR AND DEFINED CARRYING AS ENCOMPASSING USE. THEY REFER TO THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE AND SAY CARRY CLEARLY USE FOLLOWS WITHIN THE DEFINITION OF CARRY. THAT'S REALLY NOT BEEN DISPUTED. CASE LAW CITED BY THE PETITIONER IT'S LEGAL STATUS THAT NECESSARILY DEPENDS ON THE USE MADE. THIS IS THE PETITIONER'S BRIEF AT PAGE 6. THEY CITE NATION, THEY CITE JACKSON. IT'S NOT BEEN DISPUTED THAT CARRY ENCOMPASSES USE AND AT THIS POINT THEY'RE ARGUING NOW THAT THE AUTOMOBILE DID NOT ENHANCE THE INJURY AND WAS SIMPLY A CONVEYANCE. I THINK THE FACTS CLEARLY REFUTE THAT.

SO IF I HAVE A GUN AND I HAVE IT STUCK DOWN IN MY BELT, CLEARLY VISIBLE, BUT I DON'T TAKE IT OUT AND SAY GIVE ME YOUR MONEY, SO I DIDN'T USE IT, RIGHT?

GUNS ARE IN A UNIQUE CATEGORY WHICH HAVE ALWAYS --

LET'S TRY SOMETHING OTHER THAN A GUN. I HAVE SOME KIND OF OBJECT HERE.

IF YOU'RE CARRYING AN OBJECT THAT'S NOT LISTED AS ONE OF THE SPECIFIC WEAPONS IN SECTION 790 AND IT'S NOT USED THEN IT'S NOT A FACTUAL DETERMINATION AND IT DOES NOT MEET THE DEFINITION. YOU HAVE THE HAUCK CATEGORY OF THE PASSIVE PAVEMENT AND YOU HAVE THE PER SE CATEGORIES OF WEAPONS. HAUCK TALKS ABOUT GUNS BEING DIFFERENT AND YOU HAVE A CATEGORY LIKE CARS WHICH CAN BE USED AND YOU'LL GET THE USE TO DETERMINE WHETHER IT QUALIFIES AS A WEAPON. OTHERWISE THE TRIAL COURT IN HAUCK WOULD NEVER HAVE THAT DETERMINATION TO MAKE. IN HAUCK THEY TALKED ABOUT IF THE TRIAL COURT --

IF IT'S A WEAPON THAT'S DEFINED IN THE STATUTE THAT WE CLEARLY KNOW IS A WEAPON LIKE A KNIFE OR A GUN, DERRICK AND ALL THOSE THINGS AND YOU JUST HAVE IT ON YOU, THAT'S ENOUGH. BUT IF IT'S SOMETHING ELSE, THEN YOU HAVE TO USE IT IN ORDER TO FALL UNDER THIS STATUTE. IS THAT WHAT YOU'RE SAYING?

I BELIEVE THAT'S HOW THE CASE LAW CHARACTERIZES GUNS AND THE OTHER SPECIFICALLY DEFINED WEAPONS. THERE ARE A GROUP OF WEAPONS WHICH ARE NOT DEFINED. HAUCK TALKS IN TERMS AND PROVIDES THAT THE TRIAL COURT WILL MAKE A DETERMINATION IF WHAT FITS THE DEFINITION OF BEING AN INSTRUMENT USED TO ATTACK. IF IT DOES, THE SOLE QUESTION IS WHETHER THERE'S SUFFICIENT EVIDENCE TO GO TO THE JURY.

AS A POINT OF INFORMATION, WHAT WERE THE ELEMENTS OF THE AGGRAVATED BATTERY THAT WERE CHARGED HERE? THAT IS, WHAT ARE THE ELEMENTS OF AGGRAVATED BATTERY THAT WERE CHARGED IN THIS CASE AND PROVEN IN THIS CASE?

TRUTHFULLY, YOUR HONOR, THERE WERE TWO COUNTS OF AGGRAVATE BATTERY. ONE OF GREAT BODILY HARM OR SERIOUS BODILY INJURY AND THE OTHER OF USING A WEAPON. THE JURY CAME BACK WITH BOTH AND CASE LAW PROVIDES YOU CHARGE BOTH AND DROP ONE. THAT'S HOW IT OCCURRED. I DO NOT REMEMBER WHICH ONE WAS DROPPED.

BUT PART OF THE CHARGE OF AGGRAVATED BATTERY WAS THAT IT WAS A BATTERY USING A WEAPON.

CORRECT.

AND I ASSUME THE WEAPON WAS THE AUTOMOBILE.

YES, YOUR HONOR. BUT AGAIN, THEY WERE, THE DEFENDANT WAS FOUND GUILTY OF BOTH. AND THE COURT DROPPED THE TRIAL COURT DROPPED ONE WITH AGREEMENT BY BOTH PARTIES. THAT'S HOW IT WAS DECIDED TO BE DONE BECAUSE CASE LAW REQUIRES AGGRAVATED BATTERIES BE PROVEN BUT I DO NOT REMEMBER WHICH THEY END UP DROPPING AND THE PARTIES DID NOT BELIEVE THAT TO BE OF ANY CONSEQUENCE. IT COULD BE THE INJURY WHICH IS WHAT HAPPENED TO THE VICTIM IN THIS CASE OF BEING HIT AND DRAGGED AND SHE SUFFERED A BROKEN SHOULDER AND THE PERMANENT SCARRING REFERENCED IN THE BRIEF OR IT COULD BE THE SIMPLE USE OF THE WEAPON WHICH WOULD BE THE AUTOMOBILE IN THIS CASE. BUT IF YOU LOOK AT THIS AS BEING IN COMPLIANCE AND APPLICATION OF HAUCK AND THE JUDGE DID MAKE THE MATTER OF LAW DETERMINATION THAT A CAR COULD BE USED AND THAT WAS ARGUMENT MADE BELOW WAS THERE WAS INSUFFICIENT EVIDENCE OF HOW IT WAS USED AND THE TRIAL COURT SIMPLY FOUND THAT THIS IS A DETERMINATION OF SUFFICIENCY OF EVIDENCE. THAT IS THE EXACT ARGUMENT THAT WAS PRESENTED TO THE DISTRICT COURT OF APPEALS.

WAS THE SAME ARGUMENT MADE? IN OTHER WORDS, WAS THERE A DIRECTED VERDICT ON THE AGGRAVATED BATTERY WITH A WEAPONS CHARGE TOO?

NO, SIR. THEY CONCEDED THE FACT THAT THE WEAPON WAS SUFFICIENT FOR THE AGGRAVATED

BATTERY, AND THEY TRIED TO ARGUE THE FACT THAT THE AUTOMOBILE WAS A CONVEYANCE IN TERMS OF THE ROBBERY BUT THE ARGUMENT WAS MUDDLED AT BEST. THE FIFTH DISTRICT COURT OF APPEALS MAJORITY OPINION SAYS THE CENTRAL ISSUE ON APPEAL IS WHETHER THE SPECIFIC CIRCUMSTANCES OF THIS CASE, THE CAR WAS USED AS AN AUTOMOBILE. WE AGREE WITH THE LOWER COURT THAT EVIDENCE WAS SUFFICIENT FOR A JURY TO FIND THAT THE AUTOMOBILE WAS USED AS A WEAPON. THE NOTION THAT EVIDENCE AT TRIAL DOES NO MORE THAN SHOW THE VEHICLE WAS USED AS TRANSPORTATION OR THE CONVEYANCE ARGUMENT WE HAVE BEFORE US -- IGNORES --

SECTION 812 DOES NOT AND THE SECTION WE'RE DEALING WITH, DOES NOT DEFINE A WEAPON. IS IT PROPER FOR THE STATE TO GO TO A SECTION 790 AND USE -- WHICH DOES DEFINE A WEAPON AND USE THAT DEFINITION?

I THINK IT COULD BE USED --

IS THAT A PROPER EXTRAPOLATION.

I THINK IT CAN BE USED AS PERSUASIVE AUTHORITY. IT DENIES IT'S APPLICATION BEYOND TO SECTION 790 WHICH IS WHY IN HAUCK WE TURNED TO THE WEBSTER'S DICTIONARY AND SAID IT GOES TO HOW THE INSTRUMENT IS USED TO DEFEAT ANOTHER.

BECAUSE IT SEEMS TO ME THE STATE WOULD HAVE TO AVAIL ITSELF OF THE LANGUAGE "OR OTHER DEADLY WEAPON" IN ORDER TO DO THAT AND THAT'S THE DEFINITION UNDER 790. YOU DON'T FIND THAT DEFINITION UNDER 812.

THE DEFINITION OF WEAPON IS NOT GIVEN. IF YOU LOOK AT A BREAK DOWN OF ROBBERY THERE IS A CATEGORY OF ROBBERY WITH A DEADLY WEAPON AND ROBBERY WITH A WEAPON. IF I'M CORRECT I THINK JACKSON ACTUALLY DEALT WITH ROB BROI WITH A DEADLY WEAPON. AND THE JACKSON COURT THE FIRST DISTRICT COURT OF APPEALS FOUND THE A AUTOMOBILE WAS A DEADLY WEAPON. IN THIS INSTANCE WE USED THE ROBBERY WITH A WEAPON SUBSECTION AND IT'S OUR POSITION THAT OBVIOUSLY AN AUTOMOBILE CAN BE A DEADLY WEAPON, IT CLEARLY CAN BE A WEAPON ALSO AND THE EVIDENCE SHOWS IT WAS SO USED. IF YOU LOOK AT THE MAJORITY OPINION IN THIS CASE YOU SEE THE FACT THEY SIMPLY APPLIED HAUCK, THERE IS NO CONFLICT AND IT'S SUFFICIENCY OF THE EVIDENCE SO WE SAY JURISDICTION WAS PROPERLY GRANTED AND WE THINK THE STATUTE SHOWS THE AUTOMOBILE CAN BE USED AS A WEAPON AND THE EVIDENCE SHOWS IT WAS USED. IF THERE ARE NO FURTHER QUESTIONS.

THANK YOU. REBUTTAL?

JUST BRIEFLY, I DIDN'T BRING THAT PART OF THE RECORD THAT HAD THE VERDICT FORMS, BUT THE ONE QUESTION THAT JUSTICE PARIENTE ASKED ABOUT THE SENTENCE, WHAT EFFECT WOULD IT HAVE ON THE SENTENCE? IN MR. JENKINS' CASE IT'S NOT GOING TO HAVE AN EFFECT BECAUSE HE WAS GIVEN A 20 YEAR SENTENCE ON THE ARMED ROBBERY UNDER THE HABITUAL OFFENDER STATUTE AND 20 YEARS ON THE AGGRAVATED BATTERY. THE AGGRAVATED BATTERY, THE REASON THE STATE HAD TO CHARGE IT IN TWO SEPARATE WAYS, THE GREAT BODILY HARM AND THE DEADLY WEAPON IS BECAUSE UNDER CLARK CASE, IN ORDER TO TALK ABOUT INJURIES YOU HAVE TO CHARGE IT BOTH WAYS. AFTER THE VERDICTS WERE IN, THE STATE RECOMMENDED THAT COUNT III THE DEADLY WEAPONS CHARGE, BE THE ONE THAT'S DROPPED. SO THE JUDGE PROCEEDED TO SENTENCING ON COUNT II. I'D ALSO LIKE TO POINT OUT THAT THE AGGRAVATED BATTERY STATUTE IS 784.045. THAT SAYS THAT YOU USED A DEADLY WEAPON. SO THAT'S DISTINGUISHED FROM THE ROBBERY STATUTE WHICH SAYS YOU CARRY.

WOULD YOU AGREE THAT TRIAL COUNSEL HAD THE JURY INSTRUCTIONS MODIFIED AND ACTUALLY AGREED TO THAT, THAT TO INCLUDE USE AS WELL AS CARRY?

I DON'T KNOW BUT HE MIGHT HAVE.

THAT IS NOT A PROBLEM FOR THIS CASE?

THE THING IS, HE ARGUED THAT UNDER THE ROBBERY STATUTE, THAT THIS COULD NOT BE A WEAPON. AND THEN LATER ON IN THE INSTRUCTIONS -- NOW, I DON'T KNOW WHETHER YOU CAN ACTUALLY WAIVE THAT IF YOU SAY WELL, JUDGE, I THINK YOU SHOULD GIVE IT AWAY AND YOU SAY OKAY I'VE PRESERVED THAT, NOW USE A WEAPON THAT BECAUSE SEE HE WAS FIGHTING THIS PRINCIPAL ISSUE, BECAUSE SHE WAS DRIVING. MR. JENKINS HAD NO IDEA WHAT SHE WAS DOING. SO HOW COULD THE JURY FIND THAT HE USED IT WHEN SHE WAS DRIVING? SO I DON'T THINK HE WAVED THAT BY ALLOWING THAT INSTRUCTION TO GO. I THINK HE WAS TRYING TO DOVE TAIL THAT WITH HIS ARGUMENT THAT MR. JENKINS NEVER USED IT.

IN OTHER WORDS, IF THE DRIVER HAD A KNIFE AND MR. JENKINS DIDN'T. AND KNIFE WAS NOT USED IN THE ROBBERY, MR. JENKINS COULDN'T BE CHARGED AS A PRINCIPAL UNDER THIS ENHANCEMENT? IS THAT WHAT YOU'RE SAYING?

IF SHE CARRIES IT BUT SHE NEVER USES IT? NO.

BECAUSE HE DOESN'T HAVE IT.

BECAUSE NOBODY EVER USED IT. NOBODY EVER HAS THE INTENT TO USE IT AND HE NEVER KNEW SHE WAS GOING TO USE IT. IF SHE'S CARRYING A CONCEALED WEAPON AND IT'S NEVER USED TO THREATEN OR PUT ANY ONE FEAR THEN UNDER A KNIFE HE WOULD BE OKAY. I THINK A FIREARM COULD BE A DIFFERENT PROBLEM. ANY TIME YOU CARRY A FIREARM TO THE SCENE OF A CRIME, THAT'S GOT ITS OWN LITTLE CLASSIFICATION.

BUT THE ROBBERY STATUTE DOESN'T LIMIT ITSELF TO A FIREARM. IT SAYS CARRY A WEAPON. AND A KNIFE IS A WEAPON. SO EVEN IF SHE JUST CARRIED IT YOU WOULD HAVE THE ENHANCEMENT UNDER THE ROBBERY STATUTE, WOULDN'T YOU?

IF SHE CARRIES IT. BUT THEN YOU DON'T HAVE ANY THREAT OF FORCE. FOR ROBBERY YOU HAVE TO HAVE SOME KIND OF FORCE USED. AND JUSTICE PARIENTE WAS SAYING SHE JUST CARRIED IT. SHE DIDN'T USE IT. SHE NEVER PULLED IT OR THREATENED THE PERSON. THAT'S HOW I UNDERSTOOD THAT. BUT NORMALLY THE ENHANCER WOULD ELEVATE SECOND DEGREE FELONY TO A FIRST DEGREE FELONY. ORDINARILY THAT WOULD BE A VERY LARGE PROBLEM.

THANK YOU, MS. DAVIS. THOUSAND, COUNSEL. COURT WILL BE IN RECESS FOR 15 MINUTES.

PLEASE RISE.