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Gayson J. Mills v. State of Florida

THE NEXT CASE ON THE COURT AND ORAL ARGUMENT CALENDAR IS MILLS VERSUS STATE.

MAY IT PLEASE THE COURT. MY NAME IS JOEL ARNOLD. I REPRESENT THE PETITIONER. THE QUESTION IS WHETHER THERE IS A VIOLATION OF DOUBLE JEOPARDY, IN CLEAR LEGISLATIVE INTENT FOR THE ENHANCEMENT.

WOULD YOU KEEP YOUR VOICE UP.

I WOULD LIKE TO FURNISH HALE VERSUS FLORIDA, FOR THE SUPPOSITION THAT THE POSITION IS NOT INTENDED TO PRODUCE MULTIPLE MUST NOTISHMENTS. CLEAR -- PUNISHMENTS. CLEAR LEGISLATIVE INTENT IS THAT MULTIPLE PUNISHMENTS IS NOT INTENDED.

ISN'T IT CLEAR UNDER THE COMMON LAW, AS WE INTENDED IT, UNDER THE COMMON LAW AND UNDER THE STATUTE?

I DON'T THINK THERE IS A DIFFERENCE OF DEGREE, SUCH AS AN AGGRAVATED BATTERY WOULD BE A FUND AMENDMENT AL -- A FUNDAMENTALLY DIFFERENT OFFENSE THAN A MERE BATTERY.

BUT IF YOU COMMITTED A BATTERY ON A LAW ENFORCEMENT OFFICER, SOMEBODY THAT IS THERE TO ENFORCE THE LAW, ISN'T THERE A QUALITATIVE, I MEAN, JUST --

WHAT YOU HAVE HERE IS ESSENTIALLY A MISDEMEANOR BATTERY, WHICH IS BEING ENHANCED UNDER THE BATTERY ON A LAW ENFORCEMENT OFFICER STATUTE, WHICH THIS COURT HAS SPECIFICALLY AND UNANIMOUSLY HELD TO BE AN ENHANCEMENT STATUTE, RATHER THAN A STATUTE CREATING AND DEFINING A NEW SUBSTANTIVE OFFENSE.

WHAT WAS THE CONTEXT IN WHICH WE --

THE ATTEMPTED BATTERY ON A LAW ENFORCEMENT OFFICER, WHICH IS AN OFFENSE NOT SPECIFICALLY ENUMERATED IN 784.07.

WHAT IS THE ISSUE BEFORE US?

THIS COURT HAD TO DETERMINE WHETHER THE ATTEMPT STATUTE WOULD -- THE INTENT STATUTE WOULD APPLY, AND TO DO THAT, THIS COURT HAD TO DETERMINE WHETHER 784.07 WAS AN ENHANCEMENT STATUTE OR A SUBSTANTIVE STATUTE. THIS COURT LOOKED AT THE LAIN LANGUAGE OF THE STATUTE AND CAME TO THE CONCLUSION THAT IT WAS HAD, IN FACT, AN ENHANCEMENT STATUTE, AND THIS IS A STATEMENT THAT THE LOWER COURT SHOULD ADHERE TO, IN WHICH THE MAJORITY IN THE FIRST DISTRICT COURT HERE DID NOT, AND I WOULD POINT OUT THAT THE FOURTH DISTRICT COURT IN STAND AND THE -- IN STAN AND THE FIFTH DISTRICT COURT, SAID CLEARLY --

BUT WHAT WAS SAID, IN FACT, WAS THERE COULDN'T BE AN ATTEMPT BASED UPON THIS STATUTE, BECAUSE THIS STATUTE WOULD MAKE WHAT WAS A MISDEMEANOR IF, ON AN ORDINARY CITIZEN, A FELONY, IF, ON A LAW ENFORCEMENT OFFICER. WHY DOES THAT MEAN THAT THIS CANNOT BE USED, EXCEPT THAT IT IS A FELONY, AS A BASIS FOR THE RECIDIVIST STATUTE?

I WOULD POINT OUT --

IS THERE ANY CASE LAW THAT SAYS THAT THIS CANNOT BE DONE?

I FURNISHED THE COURT SUPPLEMENTAL AUTHORITY IN GRANT AND HALE, FOR THE PROPOSITION THAT WE NEED A CLEAR INDICATION OF LEGISLATIVE INTENT IN THE STATUTE, BEFORE WE CAN IMPOSE MULTIPLE PUNISHMENTS. IN THIS STATUTE, WE HAVE A COMPLETE OMISSION OF ANY REFERENCE TO 775.084, UNLIKE OTHER STATUTES IN THE CHAPTER.

BUT THAT DOESN'T IMPLICATE DOUBLE JEOPARDY. I MEAN, THAT WOULD BE A STATUTORY CONSTRUCTION. CORRECT?

WELL, YOU WOULD NEED TO LOOK AT THE LEGISLATURE'S INTENT AS EXPRESSED IN THE STATUTE, BEFORE REACHING THE CONSTITUTIONAL ISSUE, AND THIS CASE MAY, IN FACT, BE DISPOSED THROUGH A STRICT STATUTORY CONSTRUCTION. THIS COURT, IN MERIT, WAS NOT CARELESS WITH ITS WORDS. THE COURT EXPRESSED ITSELF PRECISELY, BECAUSE IT WAS COMPELLED BY THE FACTS TO DO SO, AND THIS IS A STATEMENT THAT THE LOWER COURT SHOULD FOLLOW. IT WAS NOT DICTA. IT WENT TO THE VERY CRUX OF THE DECISION, AND AGAIN, THE DOCTRINE WOULD COMPEL THE COURT TO FOLLOW THIS COURT'S CLEAR EXPRESSION. I DON'T KNOW HOW MUCH CLEARER THE COURT CAN BE THAN 784.07 IS AN ENHANCEMENT STATUTE, RATHER THAN A SUBSTANTIVE STATUTE CREATING A NEW OFFENSE.

WOULD THAT HOLD TO OUR ULTIMATE HOLDING IN MERIT? IN OTHER WORDS IF YOU TAKE AWAY THAT HOLDING, COULD WE HAVE REACHED THE CONCLUSION THAT WE REACHED?

I THINK IT WAS ESSENTIAL, BECAUSE, AGAIN, ATTEMPTED BATTERY ON A LAW ENFORCEMENT OFFICER WAS SPECIFICALLY NOT AN ENUMERATED OFFENSE, AND IN ORDER TO DECIDE WHETHER THE INTENT STATUTE APPLY, THE COURT -- APPLIED, THE COURT HAD TO DETERMINE IF IT WAS AN INTENT STATUTE, AND THIS COURT INTENDED THAT IT WAS ENHANCED PENTS FOR MISDEMEANOR BATTERY, GIVEN THE VICTIM'S STATUS AS A LAW ENFORCEMENT OFFICER.

OTHER THAN MERIT, HAVE WE SAID, IN ANY OTHER CASE, THAT IT IS AN ENHANCEMENT? WAS MERE I THINK THE ONLY ONE THAT HAD THAT LANGUAGE?

THE COURT FOUND THE -- WAS MERRICK THE ONLY ONE THAT HAD THAT LANGUAGE?

THE COURT FOUND THAT THAT WOULD VIOLATE DOUBLE JEOPARDY.

CRUMLY DECIDED IT WAS A SINGLE EPISODE AND OTHER THAN A BATTERY ON A LAW ENFORCEMENT OFFICER, FOR THE SINGLE EVENT, DID IT NOT?

THAT'S CORRECT.

WE DON'T HAVE THAT KIND OF CIRCUMSTANCE HERE, DO WE?

IMPORTANT IN CRUMLY WAS THE COURT'S STATEMENT THAT BATTERY AND AGGRAVATED BATTERY OR BATTERY ON A LAW ENFORCEMENT OFFICER ARE DIFFERENT AGGRAVATED VERSIONS OF BATTERY, THAT THEY ARE NOT SUBSTANTIVELY DIFFERENT OFFENSES, AND IN CRUMLY, THE COURT DID STATE THAT THE MULTIPLE PUNISHMENTS ARE NOT AUTHORIZED, AND THE LACK OF THE CLEAR LEGISLATIVE INTENT TO IMPOSE THE MULTIPLE CUMULATIVE PUNISHMENT.

I GUESS WHAT I AM HAVING TROUBLE, WITH AND MAYBE IT IS FOLLOWING UP ON WHAT JUSTICE WELLS SAID. ASSUMING IT IS AN ENHANCEMENT STATUTE. THE PENALTY IS ENHANCED BECAUSE THE VICTIM IS A LAW ENFORCEMENT OFFICER. CORRECT?

THAT'S CORRECT.

THE HABITUAL OFFENDER STATUTE IS DIRECTED TOWARDS ANOTHER ISSUE, WHICH IS THE STATUS OF THE OFFENDER AS SOMEBODY WHO HAS PREVIOUSLY COMMITTED OFFENSES. CORRECT?

THAT'S CORRECT.

I DON'T THIS IS A STATUTE WHERE WE ARE GOING TO ENHANCE THE PUNISHMENT OFFENSE. WE ARE GOING TO ENHANCE THE PUNISHMENT BECAUSE THE VICTIM IS A LAW ENFORCEMENT OFFICER, AND NOT FOR ALL INDIVIDUALS, BUT IF THE OFFENDER WOULD QUALIFY OTHERWISE, THEN THERE WOULD BE ADDITIONAL PUNISHMENT.

WE DO NEED TO LOOK AT THE CLEAR EXPRESSION OF LEGISLATIVE INTENT AS IT IS SET FORTH IN THE STATUTE, AND WHAT WE FIND, IN 784.07, IS A COMPLETE OMISSION OF ANY REFERENCE TO THE HABITUAL OFFENDER STATUTE, AND THAT OMISSION SHOWS THE LEGISLATURE'S INTENT NOT TO HAVE THIS STATUTE OR THIS OFFENSE FURTHER ENHANCE THE INDIVIDUAL OFFENDER. AGAIN, WE DO NOT PRESUME THAT THE LEGISLATURE INTENDED MULTIPLE PUNISHMENT. WE NEED A CLEAR EXPRESSION, IN 784.07, THAT THAT OFFENSE MAY QUALIFY FOR --

THAT IS DIFFERENT THAN A DOUBLE JEOPARDY ARGUMENT. NOW YOU ARE MAKING THE ARGUMENT THAT, ON ITS FACE, THE HABITUAL OFFENDER STATUTE WOULDN'T APPLY, AND THAT WOULD HAVE NOTHING TO DO WITH DOUBLE JEOPARDY.

THAT'S RIGHT. WELL, WE WOULD NEED TO LOOK AT THE LEGISLATIVE INTENT, BEFORE WE REACHED THE ISSUE OF --

THE LEGISLATIVE INTENT FOR WHICH STATUTE?

FOR 784.07.

PAREN 2?

JUST EXPRESS, I BELIEVE IN THIS CASE, IT WOULD BE TWO. SB-2.

SO ANY PERSON WHO IS CONVICTED F A FELONY OR ATTEMPT TO COMMIT A FELONY, REGARDLESS OF WHETHER THE USE OF WEAPON IS AN ELEMENT AND THE CONVICTION WAS FOR AGGRAVATED BATTERY. THAT IS THE STATUTE THAT WE HAVE TO INTERPRET.

THAT APPEARS CORRECT.

AND SO WE WOULD HAVE FELONY, BECAUSE IT WAS AN AGGRAVATED BATTERY ON A LAW ENFORCEMENT OFFICER.

WE DON'T HAVE AN AGGRAVATED BATTERY IN THIS CASE. IT IS A SIMPLE BATTERY ON A LAW ENFORCEMENT OFFICER, WHICH DOES MAKE A DIFFERENCE, AND, AGAIN, THE STATUTE DOES NOT HAVE AN EXPLICIT REFERENCE TO 775.084, UNLIKE SOME OF THE OTHER STATUTES IN FLORIDA LAW, AND SIMILAR TO THE OMISSION IN THE FELONY PETTY THEFT STATUTE, WHERE THE LEGISLATURE DID OMIT A REFERENCE TO 775.084, THERE BY MAKING THAT OFFENSE NOT SUBJECT TO THE HABITUAL OFFENDER STATUTE AND I WOULD ARGUE THAT THE OMISSION HERE, TO 778.084, LIKEWISE WAS TO NOT HAVE A MISDEMEANOR OFFENSE AGGRAVATED BY A DEGREE OF INJURY, TO BE SUBJECT TO A HABITUAL OFFENDER, AND I WOULD POINT OUT SOME SIMILAR OMISSIONS OF REFERENCE TO 775.084, SUCH AS IN CHAPTER 784.08, FOR ASSAULT AND BATTERY ON A 65-YEAR-OLD OR 784.081 FOR ASSAULT AND BATTERY ON STATE UNIVERSITY EMPLOYEES OR EMPLOYEES AT THE SCHOOL FOR THE DEAF AND BLIND AND OTHER STATUTES. NOW, THERE ARE

STATUTES WITH SPECIFIC REFERENCES TO 775.084, SO, OF COURSE, WE WILL PRESUME THAT THE LEGISLATURE INTENDED FOR HABITUAL OFFENDER SANCTIONS TO IMPOSE IN THOSE CASES, SUCH AS IN 784.075, FOR BATTERY ON A DETENTION OR COMMITMENT FACILITY STAFF OR PROBATION OFFICER, 784.086, BATTERY ON HEALTH SERVICES PERSONNEL. THE LEGISLATURE'S USE OR EXPRESS REFERENCE TO 775.084 IN SOME STATUTES INDICATES THE LEGISLATURE IS PRETTY CLEARLY INTENDING FOR THOSE PARTICULAR OFFENSES TO BE SUBJECT TO FURTHER ENHANCEMENT THROUGH HABITUAL OFFENDER.

BUT THE HABITUAL OFFENDER SCHEME IS REALLY A FREE-STANDING SCHEME, IS IT NOT? IT DOESN'T DEPEND ON SOME SPECIFIC REFERENCE BACK TO THE UNDERLYING CRIMINAL STATUTES, IN ORDER TO BE APPLICABLE, DOES IT?

WELL, LET ME ADDRESS THAT POINT, BY, EXCUSE ME, BY POINTING OUT THAT NOT EVERY FELONY OFFENSE IS SUBJECT TO A HABITUAL OFFENDER SENTENCE. THE HABITUAL OFFENDER STATUTE PROVIDES EXPRESSLY, FOR INSTANCE THAT POSSESSION OF COCAINE WILL NOT TRIGGER A HABITUAL OFFENDER SENTENCE. SIMILARLY, INGRIDLY, WHICH I FURNISHED THE IS UP -- IN GRIDLY WHICH VACATED A HABITUAL OFFENDER SENTENCE FOR PETTY THEFT, BECAUSE THE LEGISLATURE OMITTED THE REFERENCE TO 784.085 IN THAT STATUTE, SO I THINK IT IS A REFERENCE TO AN INSTRUCTION OF THE HABITUAL OFFENDER STATUTE HERE, WHERE WE HAVE OTHER STATUTES WITH A SPECIFIC REFERENCE, AND YOU DO NEED TO LOOK AT THE INTENT, NOT JUST IN THE HABITUAL OFFENDER STATUTE BUT IN THE BATTERY ON A LAW ENFORCEMENT OFFICER STATUTE, AND AGAIN, THERE IS NO CLEAR EXPRESSION OF LEGISLATIVE INTENT FOR THE ENHANCED PENALTY, AND IF THERE ARE NO FURTHER QUESTIONS, I WILL RESERVE THE REMAINING TIME FOR REBUTTAL. MR. CHIEF JUSTICE: THANK YOU. MR. SQUIRE.

MAY IT PLEASE THE COURT. MY NAME IS DOUGLAS SQUIRE. CO-COUNSEL IS JIM ROGERS, AND WE REPRESENT THE RESPONDER, THE STATE. IN MILLS V STATE, THE FIRST DCA HEALTH THAT -- THE FIRST DCA HELD THAT THERE IS NO VIOLATION OF THE STATUS, BECAUSE THE VICTIM'S STATUS AS A LAW ENFORCEMENT OFFICER WAS AN ELEMENT OF THE CRIME CHARGED.

AND THAT IS THE ISSUE THAT WE HAVE BEFORE US. IS THAT CORRECT? THE DOUBLE JEOPARDY ISSUE?

YES, SIR. IN MERRICK, THIS COURT FOUND THAT THE ENHANCEMENT STATUTE, THE 784.07, CONTAINS NO ENHANCEMENT OR RECLASSIFICATION OF PENALTIES FOR THE OFFENSE OF ATTEMPTED COMMISSION OF THE ENUMERATED OFFENSES. THEREFORE ATTEMPTED ASSAULT AND ATTEMPTED BATTERY, AS WELL AS AGGRAVATED ASSAULT AND AGGRAVATED BATTERY AFTER LAW ENFORCEMENT OFFICER ARE OFFENSES OFFENSES. THEREFORE IT DID NOT CREATE CRIMINAL INTENT.

YOU SAID IT IS ENHANCEMENT.

YES, YOUR HONOR. IN MILLS --

IS THAT A DOUBLE JEOPARDY PRINCIPLE, OR IS THAT BASED ON STATUTORY CONSTRUCTION OR WHAT?

-- IT SEEMS TO ME THAT ONE OF THE ARGUMENTS HERE IS THAT THAT IS A DIFFERENT ARGUMENT FROM DOUBLE JEP 5RD I, AND IS IT -- JEOPARDY, AND IS IT, IN FACT, A DIFFERENT ARGUMENT?

IS WHAT?

THE FACT THAT YOU CAN'T HAVE A DOUBLE ENHANCEMENT. IS THAT THE SAME AS A DOUBLE JEOPARDY ARGUMENT?

NO. IF THE LEGISLATURE INTENDED ENHANCEMENT, THAT IS THE END OF THE PRONOUNCEMENT.

HOW CAN WE DETERMINE WHETHER IT IS INTENDED?

IN THIS CASE IT IS CLEAR THAT THE BATTERY ON A LAW ENFORCEMENT OFFICER IS A FELONY. THEY RECLASSIFIED THE MISDEMEANOR OFFENSE TO A FELONY. AS TO WHETHER OR NOT THE PETITIONER SHOULD HAVE BEEN CLASSIFIED AS A HABITUAL OFFENDER ENHANCED, YOU MUST LOOK TO THE HABITUAL OFFENDER STATUTE.

SO IF IT IS RECLASSIFIED AND SENTENCING FOR, WHY ISN'T THAT AN ENHANCEMENT STATUTE AS OPPOSED TO A NEW SUBSTANTIVE OFFENSE?

MILLS, WITHOUT CALLING IT A SUBSTANTIVE OFFENSE, POINTED OUT THAT THE VICTIM'S STATUS AS A LAW ENFORCEMENT OFFICER, WAS AN ELEMENT OF THE CRIME. THIS HOLDING WAS, IN PART, BASED OR DICTATED BY AND RENT I VERSUS -- BY APRENDI VERSUS NEW JERSEY FROM THE SUPREME COURT. IN APRENDI, IT WAS HELD THAT ANY CRIME BEYOND THE MAXIMUM PENALTY MUST BE SUBMITTED TO A JURY AND PROVED BEYOND A REASONABLE DOUBT DOUBT.

LET ME ASK YOU THIS. WE ARE UNDER, AM I CORRECT IN MY UNDERSTANDING, THAT THE STATUTE THAT WOULD BE THE HABITUAL OFFENDER PROVISION WOULD BE 775.084? CORRECT?

YES, YOUR HONOR.

AND WHAT WE ARE DEALING WITH, HERE, IS THAT THE PROVISION HAVING -- THAT WOULD BE THE CONVICTION OF AN AGGRAVATED BATTERY?

BATTERY ON A LAW ENFORCEMENT OFFICER. FELONY BATTERY.

WHERE IS THAT, IN 775.084? WHERE IS THE LANGUAGE IN THAT STATUTE THAT YOU WOULD HAVE HABITUAL, THE BASE, CRIME, BATTERY UPON A LAW ENFORCEMENT OFFICER? IS THAT IN THAT STATUTE?

IN MERRICK, THIS COURT HELD THAT THE SUBSTANTIVE CRIME WAS BATTERY, AND THAT IT WAS RECLASSIFIED OR POINTED THAT OUT THAT IT WAS AN ENHANCEMENT STATUTE.

IT BECAME A FELONY, AN AGGRAVATED BATTERY, IN MERRICK WAS AN AGGRAVATED BATTERY SITUATION, RIGHT?

NO. I DON'T BELIEVE SO. I THINK IT WAS --

PERHAPS IT WASN'T.

ATTEMPTED BATTERY ON A LAW ENFORCEMENT OFFICER. IT WAS A SHOVE.

WHAT I AM REACHING FOR IS AN UNDERSTANDING, UNDER 774.084, HOW THIS BATTERY, EVEN ASSUMING THAT IT WAS A FELONY BATTERY, BECAUSE IT WAS A BATTERY UPON A LAW ENFORCEMENT OFFICER, CAN BE THE BASE, UNDER THE RECIDIVIST STATUTE. WHERE, IN THE RECIDIVIST THE STATUTE, DO I FIND THAT THAT CRIME WOULD BE A BASIS FOR THE --

THAT CRIME WOULD AND BASIS.

SO YOUR ANSWER IS THAT IT DOESN'T HAVE TO LIST, CORRECT, WHAT THE UNDERLYING FELONY IS?

CORRECT. I DON'T BELIEVE THAT IT DOES.

IF ENHANCEMENT LANGUAGE IN MERRICK IS NOT DICTA, WOULDN'T WE HAVE TO RECEDE FROM MERRICK, IN ORDER TO BRACE YOUR POSITION, THE STATE'S POSITION?

IN MERRIT, IT ADDRESSED WHETHER THE OFFENSE EXISTED. IT DID NOT ADDRESS AN ENHANCEMENT STATUTE. IF THE DOUBLE JEOPARDY IS INTENDED, ENHANCEMENT IS THE STATUTE. THE BATTERY ON LAW ENFORCEMENT OFFICERS BE FELONIES, THE LEGISLATURE INTENDED. THE LAW ENFORCEMENT OFFICER INCREASED SENTENCES FOR REPEAT FELONS WHO COMMITTED FELONIES, AND THERE WAS NOT THE ONE SENTENCE UNDER THE REOFFENDER ACT WAS NOT PROPER. THIS IS FOLLOWED HERE. IF THIS COURT'S RULING IN STATE V WHITEHEAD, THE PUNISHMENT FOR CRIMES IS NOT A LEGISLATIVE MATTER. BECAUSE THE LEGISLATURE PROVIDED THAT BOTH SECTIONS BE FOLLOWED, ABSENT ANY INDICATION FROM THE LEGISLATURE THAT THESE SUBSECTIONS ARE AN EITHER/OR PROPOSITION, BOTH SECTIONS SHOULD BE FOLLOWED.

BUT, ONCE YOU GET INTO AN ISSUE THAT, DOUBLE ENHANCEMENT IMPLICATES DOUBLE JEOPARDY --

IT CAN. CORRECT.

VERSUS JUST A QUESTION OF STATUTORY CONSTRUCTION FOR STATUTES, DON'T WE REQUIRE THAT THERE BE A CLEAR EXPRESSION IN THE STATUTE OF THE INTENT TO INCREASE THE PUNISHMENT? BECAUSE OTHERWISE THE MERE FACT THAT THE ARGUMENT WAS, WELL, THE FACT THAT THEY PASSED TWO SEPERATE STATUTES, INDICATES THAT THEY WANT TWO SEPERATE CRIMES TO BE IMPOSED FOR A SINGLE ACTOR WHATEVER, WE WOULDN'T HAVE TO GO THROUGH A DOUBLE JEOPARDY ANALYSIS, AND DON'T WE REQUIRE MORE OF THE LEGISLATURE, WHEN IT COMES TO THE ISSUE OF MULTIPLE PUNISHMENTS FOR A SINGLE CRIME? THAN JUST SAYING, WELL, THEY MUST HAVE INTENDED IT, BECAUSE ONE IS A STATUS OF THE VICTIM. THE OTHER IS THE STATUS OF THE OFFENDER.

AS FAR AS THE HABITUAL OFFENDER STATUTE, IT DOES NOT SPECIFY WHICH FELONIES QUALIFY, AND AS FAR AS THE STATUTE AT ISSUE AND THE BATTERY ON A LAW ENFORCEMENT OFFICER, IT CONTAINS NO REFERENCE TO ANY PUNISHMENT.

SO ISN'T THAT A PROBLEM? WHY ISN'T THAT A PROBLEM, THEN, IF IT IS NOT, YOU SAY THEY DON'T NEED TO MAKE IT CLEAR. WE MUST KNOW THAT IT IS CLEAR, BECAUSE ONE IS PUNISHING THE STATUS OF THE OFFENDER AND THE OTHER IS ENHANCING FOR THE STATUS OF THE VICTIM. IT IS JUST COMMON SENSE THEY WOULD HAVE WANTED DOUBLE ENHANCEMENT. ISN'T THAT YOUR ARGUMENT?

I DON'T KNOW IF I HAVE THE QUESTION, BUT I BELIEVE TO DETERMINE THE INTENT, AS FAR AS HABITUALIZATION, YOU SHOULD LOOK TO THE HABITUALIZATION STATUTE. IN THE REFERENCE TO THE STATUTE, THEY AMEND THE STATUTE TO TAKE IT OUT, SO THE PRESENCE OR ABSENCE OF THAT REFERENCE REALLY DIDN'T INDICATE THE LEGISLATIVE INTENT IN THAT SITUATION.

BUT IN THE OTHER CASES, IF WE ARE NOT DEALING WITH THE ENHANCEMENT OF THE PUNISHMENT, LIKE WE ARE IN LAW ENFORCEMENT, BATTERY ON A LAW ENFORCEMENT, THEN YOU ARE NOT, THEN, FACED WITH A DOUBLE JEOPARDY PROBLEM. DOESN'T THIS ARISE BECAUSE OF THE FACT THAT -- DOESN'T THIS ARISE BECAUSE OF THE FACT THAT THERE IS AN INCREASED PUNISHMENT DUE MERELY TO THE STATUS OF THE VICTIM?

I WOULD SAY THAT, SINCE APRENDI, EVEN IF YOU CALL IT AN ENHANCEMENT, ANYTHING THAT INCREASES BEYOND THE MAXIMUM STATUTORY SENTENCE, IS THE ELEMENT OF A GREATER OFFENSE, AND THAT WAS IN THE MAJORITY, AND THEY CITED TO JUSTICE THOMAS'S CONCURRENCE, WHERE HE NOTED THAT ONE NEED ONLY LOOK TO THE KIND, DEGREE OR RANGE OF PUNISHMENT TO WHICH THE PROSECUTION IS, BY LAW, ENTITLED FOR A GIVEN SET OF FACTS. EACH FACT NECESSARY FOR THAT ENTITLEMENT IS AN ELEMENT. AND IN THIS CASE, THE,

ANY APPLICATION OF THIS STATUTE, AUTOMATICALLY MOVES OR INCREASES THE PUNISHMENT BEYOND THE STATUTORY MAXIMUM. FROM A MISDEMEANOR IT BECOMES A FELONY, SO WHAT WE HAVE IS, AS STATED IN APRENDI, THE FUNCTIONAL EQUIVALENT OF A LATER OFFENSE, REGARDLESS OF THE LABEL OF WHETHER IT IS AN ENHANCEMENT STATUTE, THE JURY FOUND THAT HE HAD COMMITTED A BATTERY ON A LAW ENFORCEMENT OFFICER.

I UNDERSTAND YOUR ARGUMENT FOR OUR ANALYSIS HERE, MAY NOT REALLY MATTER WHETHER WE CALL IT AN ENHANCEMENT OR A SUBSTANTIVE STATUTE, PARTICULARLY WITH REGARD TO APRENDI. THE JURY IS GOING TO HAVE TO STRUGG TOLL FIND IT. I AM PARTICULARLY INTERESTED, IF THERE IS AN APPLICATION REQUIRING MULTIPLE PUNISHMENTS, DO WE REQUIRE MORE FROM THE LEGISLATURE TO INDICATE THAT THEY DO, IN FACT, WANT AN ENHANCED, A DOUBLE ENHANCEMENT, RATHER THAN JUST FACT THAT, WELL THERE ARE TWO SEPERATE FREE-STANDING STATUTES, AND WE HAVE GOT TO LOOK TO BOTH. WOULD YOUR ANSWER TO THAT, I GUESS, IS, NO, WE DON'T.

THAT IS SUCH A BROAD QUESTION I CAN ONLY LIMIT IT TO MY SITUATION, AND THAT THEIR INTENT IS CLEAR FROM BOTH STATUTES THAT THERE IS NO QUESTION THEY WANTED THIS OFFENSE TO BE A FELONY, AND UNDER THE HABITUAL OFFENDER STATUTE, FELONIES, HE QUALIFIED FOR THAT STATUTE, BASED ON HIS PAST FELONIES, AND IT IS WHETHER THIS CAN BE A QUALIFYING FELONY, AND CLEARLY IT WAS THE INTENT THAT IT BE A FELONY. I SEE THERE IS NO AMBIGUITY. IF THERE ARE NO FURTHER QUESTIONS, FOR THE REASONS ARGUED HERE IN ITS BRIEF, THE STATE REQUESTS THAT THE PETITIONER'S JUDGMENT AND SENTENCE BE AFFIRMED. MR. CHIEF JUSTICE: THANK YOU. MR. ARNOLD.

THANK YOU. THE COURT, THE DISTRICT COURTS IN KING AND SPAN, AS WELL AS THIS COURT, ALL IMPROPERLY REJECTED THIS COURT'S UNANIMOUS AND CLEAR HOLDING IN MERIT, THAT THIS IS AN ENHANCEMENT STATUTE AT ISSUE.

YOU ARE NOT SAYING THAT THERE CAN'T BE MORE THAN ONE ENHANCEMENT FOR DIFFERENT VARIATIONS OF A PARTICULAR CRIME ARE YOU?

IF THE LEGISLATURE INTENDS FOR MULTIPLE ENHANCEMENTS TO ATTACH, THEY NEED TO BE CLEAR AND UNAMBIGUOUS.

YOU AGREE THAT, IF THE LEGISLATURE, FOR INSTANCE, IS TAKING BATTERY, WANTED TO ENHANCE IT BECAUSE IT WAS A LAW ENFORCEMENT OFFICER, THEY COULD OBVIOUSLY DO THAT, AND THEN IF THEY WANTED TO ENHANCE IT, BUT IN ADDITION, IF THERE WAS A PERMANENT INJURY INFLICTED ON THE VICTIM, THAT THERE WOULD BE AN ADDITIONAL ENHANCEMENT, UP TO A SECOND-DEGREE FELONY OR FIRST-DEGREE, WOULD YOU AGREE THAT -- UNDER CERTAIN --

THAT THERE BE -- THAT --

UNDER CERTAIN --

THAT THERE BE A DOUBLE JEOPARDY ENHANCEMENT. CERTAINLY YOU WOULDN'T INTEND TO DO THAT.

UNDER CERTAIN CIRCUMSTANCES, WHERE YOU HAVE A MISDEMEANOR BATTERY BUT IT HAPPENED TO BE COMMIT ODD A LAW ENFORCEMENT OFFICER, YOU REALLY NEED TO BE LOOKING FOR A CLEAR LEGISLATIVE INTENT, WHEN YOU HAVE A MISDEMEANOR SUCH AS THIS, AND THEN EXPOSING THE DEFENDANT TO UP TO TEN YEARS HABITUAL OFFENDER, AND --

I WANT TO COME BACK TOO THE QUESTION THAT -- TO THE QUESTION THAT I ASKED YOU AT OPENING, SO I DON'T HAVE TO GO BACK AND LOOK IT UP AND SEE WHAT WE ARE EXACTLY TALKING ABOUT, THOUGH, BUT I WANT TO KNOW WHAT IS THE RECIDIVIST STATUTE THAT WE

ARE DEALING WITH. IS IT 775.084. IS THAT WHAT WE ARE DEALING WITH?

RIGHT. THE HABITUAL VIOLENT FELONY OFFENDER.

DO YOU AGREE WITH YOUR OPPONENT THAT IT DOES NOT LIST THE SPECIFIC FELONIES WHICH ARE THE BASE FELONIES THAT ARE SUBJECT?

IT IS CAST IN FAIRLY GENERAL TERMS, BUT, AGAIN, NOT EVERY FELONY WOULD QUALIFY FOR SUCH A SENTENCE. FOR INSTANCE, THE -- CANNOT GET A HABITUAL OFFENDER SENTENCE FOR FELONY PETTY THEFT. YOU WOULD NOT BE ABLE TO GET A HABITUAL SENTENCE FOR FELONY FOR POSSESSION OF COCAINE.

IS THERE A HABITUAL OFFENDER CATEGORY?

IN 774.084, UNLIKE THE STATUTE HERE. I THINK WHEN THE LEGISLATURE USES ITS WORDS CAREFULLY AS IN 775.084, THAT THAT INDICATES THEIR INTENT TO HAVE THAT SENTENCE BE FURTHER ENHANCED PURSUANT TO THAT STATUTE, AND THE OMISSION OF A REFERS -- REFERENCE, A CLEAR REFERENCE THAT 775.084 IS THAT THE LEGISLATURE DOES NOT INTEND TO HAVE THAT OFFENSE ENHANCED AND WE DO NOT PRESUME THAT THE LEGISLATURE INTENDS FOR THE DOUBLE ENHANCEMENT AND THAT THERE NEEDS TO BE A CLEAR QUESTION OF LEGISLATIVE INTENT, WHICH IS LACKING IN THIS CASE.

I AM HAVING THIS PROBLEM. WHEN YOU TALK ABOUT THE PROBLEM THAT SOMEONE WHO POSES COCAINE AS A PRIOR, THAT CAN'T BE -- WHO POSSESSES COCAINE IS A PRIOR, THAT CAN'T BE -- HOW IS THAT STATEED?

THAT CAN'T BE A HABITUAL OFFENDER.

THAT IS CLEAR FOR STATUTORY CONSTRUCTION AND NOT THE DOUBLE JEOPARDY.

THAT WOULD BE CORRECT.

NOW, IN THIS CASE, YOU ARE MAKING THE ARGUMENT THAT NOT ONLY JUST A LEGISLATIVE INTENT, BUT, TOO, DOUBLE JEOPARDY INDICATIONS. CAN YOU POINT TO ANY AREA OF OUR PRIOR CASE LAW THAT WOULD SAY THAT WE HAVE TO GO THROUGH A HEIGHTENED ANALYSIS, BECAUSE IT IS NOT JUST A QUESTION OF WHETHER IT IS AMBIGUOUS OR NOT, THAT FOR DOUBLE JEOPARDY PURPOSES, THERE HAS GOT TO BE A CLEAR -- IS THERE A DIFFERENT MAXIM THAT APPLIES, BECAUSE WE ARE DEALING WITH DOUBLE JEOPARDY IMPLICATIONS?

I BELIEVE THIS COURT MAY BE GUIDED BY ITS DECISION IN HALE, WHERE THE COURT DECLINED TO UPHOLD THE CONSECUTIVE HABITUAL OFFENDER SENTENCES, IN THE ABSENCE OF A CLEAR LEGISLATIVE INTENT, THAT THE SENTENCES WHICH HAVE BEEN ENHANCED HABITUAL OFFENDER BE FURTHER ENHANCED BY RUNNING THEM CONSECUTIVE, AND I THINK THAT THAT PRINCIPLE WOULD APPLY HERE, THAT US PRESUMING THAT THE LEGISLATURE DOES NOT INTEND A MULTIPLE PUNISHMENT, THAT WE NEED TO LOOK FOR THAT CLEAR EXPRESSION OF LEGISLATIVE INTENT IN 774.087 AND NOT JUST LIKING AT 774.085 BY ITSELF THAT THE INTENT NEEDS TO BE EXPRESSED IN BOTH OF THE STATUTES, AND THERE IS A REASONABLE BASIS FOR CONCLUDING THAT THE LEGISLATURE DID NOT INTEND THE MULTIPLE PUNISHMENTS THAT THE COURT IS HOLDING IN CRUMLY, WOULD DICTATE THAT THE RULES OF STATUTORY CONSTRUCTION IN LIMIT, WOULD CONCLUDE THAT THE MULTIPLE PUNISHMENTS ARE NOT PERMITTED.

CERTAINLY RECOGNIZING THAT CERTAINLY GAMEN WAS SUPERSEDED BY A STATUTE ALTERATION, WHAT WAS FUNDAMENTAL BY THE PUNISHMENT IN GAMEN, BECAUSE TAKING THAT ANALYSIS, IT WOULD SEEM TO FIT PRETTY CLOSELY HERE, IF WE WOULD JUST REMOVE THE STATUTORY CHANGES, AND CERTAINLY THOSE STATUTORY CHANGES DID NOT AFFECT THE

UNDERLYING LEGAL REASONING, IT SEEMS TO ME. COULD YOU HELP ME WITH THAT?

IN GAMEN, THE COURT NOTED THAT FELONY PETTY THEFT IS, IN FACT, A SUBSTANTIVE OFFENSE, AND I THINK THAT MADE A KEY DIFFERENCE HERE, THAT IT IS OKAY TO HABITUALIZE A NEW SUBSTANTIVE OFFENSE, WHEREAS THE DOUBLE ENHANCEMENT IS NOT PERMISSIBLE.

IT SEEMS TO ME THAT THEY ARE REKFERING, THOUGH, A PETTY THEFT IN GAMEN, WERE THEY NOT? DO YOU READ IT DIFFERENTLY THAN THAT?

I READ THAT THE PETTY THEFT REPEAT OFFENDER WOULD BE SUBJECT TO A NEW OFFENSE, DEPENDING ON THE REPRESENTATIVE AND AGGRAVATING NATURE OF THE OFFENSE, BUT ON THE OTHER HAND, WHAT WE HAVE HERE IS SIMPLY A MISDEMEANOR BATTERY THAT IS BEING, THAT EXPOSES A DEFENDANT TO TELL TO TELL ANY SANCTIONS -- TO FELONY SANCTIONS, BASED ON THE VICTIM'S STATUS. THIS COURT WAS CLEAR, WHEN IT FOUND THAT THE STATUTE IS AN ENHANCEMENT STATUTE, SO IN THAT REGARD, IT WOULD DIFFER FROM GAMEN, WHERE YOU ARE DEALING WITH A FELONY PETTY THEFT, WHICH IS A SUBSTANTIVE OFFENSE, IN AND OF ITSELF.

THANK YOU, COUNSEL.

THANK YOU. MR. CHIEF JUSTICE: THE COURT WILL NOW TAKE ITS MORNING RECESS. THE COURT WILL BE IN RECESS FOR 15 MINUTES.