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**Terry P. Sanders v. State of Florida
SC05-2115**

THE COURT WILL TAKE THE NEXT CASE . SANDERS VERSUS STATE.

CHIEF JUSTICE: GOOD MORNING AGAIN.MS. HOPKINS ARE YOU READY TO PROCEED?

MAY IT PLEASE THE COURT . KIM HOPKINS FOR THE APPELLANT.THIS CASE IS BEFORE THECOURT ON A CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL WHICH ASKED YOU TO DETERMINE WHETHER A LESSER INCLUDED OFFENSE ON THE VERDICT FORM MUST BE, BOTH, LESSER IN DEGREE AND IN.

CHIEF JUSTICE: DOES IT MATTER THAT THIS WAS DONE WITH FULL KNOWLEDGE OF THEDEFENDANT , THAT THERE WAS A DISCUSSION ABOUT WHETHER AGGRAVATED BATTERY SHOULD BE PLACED ON THE VERDICT FORM AND THE JUDGE DECIDED THAT WOULD BE A SECOND BITE , THAT THERE FOR THAT IT WAS DONE WITH FULL KNOWLEDGE OF THE DEFENDANT?

WELL, IN THIS CASE THE DEFENSE ATTORNEY DID MAKE EVERY EFFORT TO ARGUE THE CONCEPT OF THE SECOND BITE. I THINK IT ALSO APPLIES TO WHAT HE WAS ULTIMATELY CONVICTED , AND THE DCA ACTUALLY FOUND WHAT YOU ARE REFERRING TO , OF COURSE , THAT GRAY REQUIRES THAT THE DEFENDANT NOT GO ALONG WITH IT, AND I THINK THAT IT WAS FOUND --

CHIEF JUSTICE: I GUESS I THOUGHT , WAY HIM SAYING IS WE WOULD HAVE TO FIND THIS AS FUNDAMENTAL ERROR, NOT JUST A SITUATION WHERE -- WHAT I AM SAYING IS WE WOULD HAVE TO FIND THIS AS FUNDAMENTAL ERROR AND NOT ASUGGESTION WHERE THEY FIND IT SPECIFICALLY , AND I SEE THOSE AS TWO DIFFERENT CIRCUMSTANCES AS TO WHETHER IT CAN BE FUNDAMENTAL ERROR TO CHARGE THEM SOMETHING THAT THAT IS CERTAINLY LESSER IN DEGREE AND LESS ARE IN POINT -- LESSER IN POTENTIAL PENALTY .

RIGHT. IT IS A FUNDAMENTAL ERROR REVIEW AND WE SUBMIT THAT.

CHIEF JUSTICE: THAT IS WHAT I AM TRYING TO FIND OUT WHY IN THIS CASE AS OPPOSED TO GRAY FUNDAMENTAL ERROR.

THE DIFFERENCE IS THE DCA DID NOT COMPLY THAT THEY MADE THE DEFENSE ARGUMENT ALBEIT TO THE ARGUMENT BELOW AND WAS TRYING TO PREVENT A SECOND BITE OF THE APPLE AND WHAT WAS HAPPENING IS THE STATE DID GET THAT SECOND BITE OF APPLE.

CHIEF JUSTICE: HE DIDN'T KNOW THAT IT WOULD WORK OUT THAT THE SECOND-DEGREE MURDER, EVEN THOUGH WITH A FIREARM , COULD RESULT IN A LIFE SENTENCE?

I AM NOT SURE WHAT HE UNDERSTOOD.

CHIEF JUSTICE: THAT WOULD BE IN THE CASE, BUT AS FAR AS HERE , I AM TRYING TO UNDERSTAND. IT WAS WAIVED. WE WOULD HAVE TO DECIDE WHY --

IN THE SENSE THAT HE DID NOT RELY UPON THAT AS --

CHIEF JUSTICE: WHY, THEN, IS IT FUNDAMENTAL ERROR? WHAT MAKES IT FUNDAMENTAL ERROR?

IT IS FUNDAMENTAL ERROR BECAUSE IT WAS NOT A LESSER PENALTY AND ALSO BECAUSE HE DID NOT RELY UPON THAT CHARGE, IN THE SENSE THAT HE WAS NOT ARGUING THE ULTIMATE CONVICTED CHARGE OF ATTEMPTED SECOND-DEGREE MURDER . FIREARM .

JUSTICE: LET ME ASK, THE SECOND BITE OF THE APPLE, IF YOU REALLY LOOK AT ATTEMPTED MURDER REQUIRES A SPECIFIC INTENT, BATTERY, ATTEMPTED, THE BATTERY IS A GENERAL INTENT CRIME. THE ATTEMPTED SECOND-DEGREE MURDER IN THIS CASE IS A DIFFERENT DEGREE OF INTENT SHOWN. ISN'T THAT TYPICALLY WHAT THE JURY IS INSTRUCTED AND WHAT WE HAVE JURIES FOR, IS WE GIVE THEM THE LAW, AND THEY ARE SUPPOSED TO DETERMINE THOSE ELEMENTS OF THE OFFENSES, AND IN THIS CASE THE DIFFERENT DEGREES OF INTENT THAT THE STATE HAS TO PROVE, BETWEEN AN ATTEMPTED FIRST-DEGREE MURDER, SECOND-DEGREE MURDER AND INVOLUNTARY MANSLAUGHTER, ALL OF THOSE DIFFERENT PRIMARILY ON THE DEGREE OF INTENT, CORRECT?

RIGHT AND THAT IS CERTAINLY PART OF THE ANALYSIS.

JUSTICE: WHEN HAVE WE EVER ASKED JURIES TO GET INVOLVED WITH DETERMINING THE DEGREE OF PUNISHMENT OTHER THAN THE DEATH PENALTY?

I THINK IN THIS COURT AND OTHER COURTS IN THIS STATE, THE PURPOSE OF EVEN HAVING LESSER OFFENSES ON THE VERDICT FORM IS TO ALLOW FOR A PARDON POWER OF DEGREE.

JUSTICE: WHAT IS THE LOGIC BEHIND THAT?

THE LOGIC BEHIND THAT, THERE ARE TWO THINGS, THE PARDON POWER AND WHETHER OR NOT THE STATE HAS ACTUALLY MET THE BURDEN OF THE CHARGE SUBMITTED, AND I WOULD SUBMIT IN EITHER CASE WHERE YOU HAVE SOMEONE THAT ULTIMATELY THE LESSER PROVIDES FOR THE SAME PENALTY, THAT YOU HAVE NOT PERMITTED THAT POWER TO OCCUR. I THINK IT IS VERY COMMON SENSE THAT A JURY WOULD ASSUME IN CONVICTING SOME ONE OF A LESSER OFFENSE THAT, THEY ARE GIVING THEM A LESSER OFFENSE.

JUSTICE: WHY ISN'T --

CHIEF JUSTICE: JUSTICE CANTERO.

IN THIS CASE DO YOU AGREE THAT THE DISTRICT COURT DETERMINED AND DO YOU AGREE WITH ITS DETERMINATION THAT, NUMBER ONE IT WAS LESSER IN DEGREE, AND NUMBER TWO, IT GAVE THE TRIAL JUDGE THE DISCRETION TO IMPOSE A LESSER PENALTY, SO THE MINIMUM PENALTY THE JUDGE COULD HAVE IMPOSED WAS LESSER, ALTHOUGH THE ULTIMATE ONE WAS NOT.

I AGREE THAT IT IS LESSER DEGREE. I WOULD DISAGREE WITH THE ANALYSIS OF THE ABILITY OF THE JUDGE TO GIVE A RANGE. PRIMARILY BECAUSE THIS IS THE DUTY OF THE JURY, AND WHAT WE ARE LOOKING AT IS HOW THE PENALTY IS DEFINED. AND --

JUSTICE: WHAT IS THE DUTY OF THE JURY?

THE DUTY OF THE JURY IN TERMS OF FINDING OUT WHETHER IT ANSWERS THE CRIME . BATTERY WITH A FIREARM, AND ALLOWING THE JUDGE TO INCREASE SENTENCE LATER ON, SENTENCING, SUCH AS WAS DONE IN THIS CASE SUBJECT TO HFO OR HABITUAL FELONY OFFENDER VIOLENT, THAT IS NOT THE QUESTION OF THE ANALYSIS.

JUSTICE: MY QUESTION IS THE WAY THE PENALTIES ARE DONE ON THE JURY FORM, IT SEEMS

LIKE THEY GO IN DESCENDING ORDER IF YOU LOOK AT THE MINIMUMS AND THE DISCRETION THAT THE JUDGE HAS AS TO THE MINIMUM SENTENCE. IT MAY NOT GOING IN DESCENDING ORDER AS TO THE MAXIMUMS.

I THINK THERE ARE TWO DIFFERENT WAY TO SAY LOOK AT IT. YOU CAN ARGUE THAT IT HAS TO ULTIMATELY GUARANTEE OR THE DCA'S DECISION THAT, IF IT IS A RANGE THAT ALLOWS FOR A SENTENCE THEN IT IS OKAY. I SUGGEST THERE IS A THIRD CATEGORY WHERE YOU LOOK TO THE MINIMUM MANDATORY, BECAUSE YOU HAVE TO GIVE THE JURY THE POWER TO GIVE SOMETHING THAT IS POTENTIALLY LESS AND THAT IS WHAT IS WRONG HERE.

JUSTICE: IT MAY BE A GREAT ARGUMENT WHEN THERE HAS BEEN AN OBJECTION BUT WHY IS THAT THE SAME ARGUMENT WHEN WE ARE TALKING ABOUT FUNDAMENTAL ERROR?

IT IS FUNDAMENTAL ERROR WHEN YOU YOU ARE NOT GIVING SOMETHING THAT IS LESSER DEGREE AND PENALTY AND THE DEFENSE DOES N'T RELY ON IT, AND I THINK THAT IS WHAT HAPPENED HERE.

JUSTICE: LET ME ASK YOU HERE, THIS SEEMS TO ME THAT COULD BE A VERY SIMPLE SITUATION AS OPPOSED TO WORRYING ABOUT WHETHER THE TRIAL JUDGE IS GOING TO ENHANCE, WHETHER OR NOT THERE IS GOING TO AND MANDATORY MINIMUM. WHEN YOU ARE LOOKING AT LESSER INCLUDED OFFENSES, WHY NOT SIMPLY LOOK AT SUCH AS IN THIS CASE HE WAS CHARGED WITH A FELONY, CORRECT, AND THE SECOND-DEGREE ATTEMPTED MURDER, HE WAS CONVICTED OF IS A FIRST-DEGREE FELONY, CORRECT?

FIRST- DEGREE --

JUSTICE: IT IS CLASSIFIED AS A FIRST-DEGREE FELONY, RIGHT?

UNTIL THE ENHANCEMENT, YES.

JUSTICE: WITH NO ENHANCEMENT, IT IS A FIRST-DEGREE FELONY.

CORRECT.

JUSTICE: SO YOU WOULD AGREE THAT A FIRST-DEGREE FELONY IS LESSER THAN A --

WITH THE ENHANCEMENT --

JUSTICE: WITHOUT CONSIDERATION OF THE ENHANCEMENT OF THE LESSER OFFENSE.

LESSER.

JUSTICE: AND A LIFE FELONY HAS A PARTICULAR, UNDER 775 YOU CAN GET A CERTAIN SENTENCE FOR LIFE FELONY. WE ARE NOT TALKING ABOUT ENHANCEMENT. WE ARE NOT TALKING ABOUT MANDATORY MINIMUM, AND UNDER 775, YOU CAN GET A PARTICULAR SENTENCE FOR A FIRST-DEGREE FELONY. CORRECT? WHY NOT, WHEN WE ARE LOOKING AT WHETHER OR NOT AN OFFENSE IS A LESSER OFFENSE, WE SIMPLY LOOK AT HOW THE OFFENSE IS CLASSIFIED, AND WHAT UNDER 775, YOU CAN GET FOR THAT, AND WITHOUT CONSIDERATIONS OF ENHANCEMENT, BECAUSE OTHERWISE WE ARE ASKING JURIES, AND WE ARE ASKING TRIAL JUDGES TO GO THROUGH A LOT OF INFORMATION BEFORE THEY CAN EVEN DO A VERDICT FORM.

CORRECT, AND THE NUMBER ONE OPTION WOULD BE THAT HE COULD GET, IF THE FIRST WOULD BE THE CHARGE OF ATTEMPTED FIRST-DEGREE FIREARM, DISCHARGING A FIREARM AS WAS CHARGED IN THE INFORMATION, THE NEXT WOULD HAVE TO SKIP DOWN TO ATTEMPTED

SECOND-DEGREE MURDER . THAT IS AN OPTION , BUT ACCORDING TO APPRENDI IF YOU MAKE THESE FINDINGS, IT BECOMES ENH ERNT IN THEIR POWER AND IF YOU EXERCISE THAT POWER, YOU DON'T END UP WITH THE SAME SENTENCE OR EVEN THE SAME RANK.

JUSTICE: THE JURY DOES N OT HAVE TO DEPART . IN THIS SITUATION THERE WERE HOW MANY OFFENSES LISTED ON THE VERDICT FORM , ELEVEN?

SOMETHING LIKE THAT.

JUSTICE: AND THERE WERE,IN FACT, OTHER OFFENSES LISTED ON THIS VERDICT FORM THAT THIS THE JURY COULD HAVE CH OSEN .

CO RRECT.

JUSTICE: THAT WOULD HAVE UNDER ANY CIRCUMSTANCES, ENDED UP WITH A LESSER OFFENSE.

CORRECT.

JUSTICE: SO THE JURY HA D THE OPPORTUNITY TO IN FACT PARDON THIS JURY.

BUT THEY WERE CONFUSED . THAT OPPORTUN ITY WAS TAKEN A WAY FR OM THEM , IN THE SENSE THAT THEY WERE GIVEN AN OPPOSITE THAT DI DN'T DO THAT , AND WHAT WE ARE SAYING ISTHAT THE OPTION HAS TO DESEND IN SOME MEANINGFUL WAY , WHETHER IT BE AN ABSOLUTE DIMINISHMENT LIKE YOUR EXAM PLE IF YOU WENT F ROM FIRST-DEGREE , A LIF E TO FIRST-DEGREE AND ALL YOU COULD GET WAS UP TO 30 Y EARS IN A SECOND-DEGREE, OR WHETHER IT BE LOOKIN G AT THE MANDATORY MINIMUM THAT THIS COURT DID IN S TATE VERSUS WELLER , AND IN THAT CASE WE STILL HAVE A PROBLEM IN THIS PARTICULAR END.

CHIEF JUSTICE: YOU DON'T SEE ANY DIFFEREN CE IN THE ANALYSIS, DEP ENDING ON WHETHER IT IS SOMETHING THAT THE DEFENDANT AFFIRMATIVELY REJECTS OR JUST IS SI LENT ABOUT. IN OTHER WORDS YOU DON'T SEE THAT THE ANALYSIS TO THE COURT SHOULD BE SORT OF A GOTCHA THING, WHERE THE JUDGE IS T RYING TO DO HIS OR HER BEST TO GO I N DESCENDING ORDER OF DEGREE , AND AS FAR AS WHAT THE JURY KNOWS OR DOESN'T KNOW , DOESN'T, I MEAN I DON'T KNOW WHERE THIS FITS IN , BUT 1 020 -- -- 10-20-LIFE I S CERTAINLY ONE OF THE MOST VISIBLE SENTENCING STRUCTURES OF THE STATE. IT HAS CERTAINLY BEEN THECALL OF THE GOVERNMENT TO KNOW THAT WHEN YOU U SE A G UNYOU WILL GET LIFE , SO TO K NOW WHAT THE JURY KN EW OR DIDN'T KNOW , SO WHY ISN'T IT DIFFERENT FOR THE ANALYSIS, WHETHER THE DEFE NDANT HAS AFFIRMATIVELY REQUESTED IT OR THE DEFENDANT REMAINS SILENT OR DOESN'T O BJECT ?

THAT IS HOW THE CASE HAS PURPOSE.

CHIEF JUSTICE: I AM TRYING TO FIGURE OUT THE LOGIC OF IT , BECAUSE GRAY WAS DE ALING WITH SOMETHING THAT CL EARLY WAS AN IMPROPER LESSER SENTENCE.

IF YOU ARE GOING TO AFFIRMATIVELY ASK FOR THE LESSER OFFENSE AND AFFIRMATIVELY RELY ON THE OFFENSE IN CL OSING ARGUMENT, THEN YOU CERTAINLY CAN'TCHANGE THAT LA TER.

JUSTICE: THE CONSTITUTIONAL PARDON IS NOT CONSTITUTION -- THE JURY PARDON IS NOT CONSTITUTIONALLY BASE D IS IT? IT IS SOMETHING THAT WE HAVE SORT OF M A DE A GI FT IN THAT SITUATION HERE.

CORRECT.

JUSTICE: MY CONCERN IS THAT, IF WE MA KE THIS SO COMPLICATED AND WE PUSH THE ENVELOPE

SO FAR , THAT NOW WE GETTING DOWN , PERHAPS THE N EXT ST EP FROM WHERE YOU ARE NOW IS THAT WE WOULD BE DOWN TO HABITUALIZATION OR OTHER THINGS THAT REACH OUT THAT HAVE TO DO WITH THE DEFENDANT'S PR IOR RECORD OR WHATEVER . AT SOME P O INT , THERE IS A DISTINCT POSSIBILITY THAT WE COULD THROW OUR HANDS UP AND S AY THIS IS NOT A CONSTITUTIONALLY BASED RIGHT THAT WE HAVE GIVEN TO DEFENDANTS TO HAVE JURIES INSTRUCTED ON THE LESSER INCLUDED, AND IT HAS BECOME TOO COMPLICATED , AND WE ARE JUST GOING TO REMOVE THAT , AND I A M SERIOUS ABOUT THAT , IN TERMS OF WHAT HAS OCCURRED HERE , THAT THE CHIEF HAS POINTED OUT THAT ALL OF THIS WAS DISCUSSED. THERE WAS ABSOLUTELY NO OBJECTION TO THE WAY THAT THIS WAS DONE. THE T R IAL JUDGE WAS OBVIOUSLY BE NDING OVER BACKWARDS TO BE SURE , AND IN FACT IN ONE INSTANCE , SAID I AM NOT GOING TO LE T THE STATE GET AWAY , REALLY , WITH A SECOND BITE AT THE APPLE , SO REPRESENTING DEFENDANTS AS YOU DO, DON' T YOU HAVE A CONCERN THAT IN SITUATIONS LIKE THIS , THAT WE REALLY ARE , WE REALLY ARE P USHING THE EN VELOPE S O FAR THAT THE PRACTICALITY OF CONTINUING TO RECOGNIZE THIS JURY PARDON CONC EPT IS GOING TO BE EXHAUSTED?

WELL , I WOULD RESPECTFULLY DISAGREE. I SPOKE WITH THE DCA ABOUT THAT ANALYSIS IN THE SENSE OF WHAT IS ACCOMPLISHED . CLEARLY THE SENTENCING HAS BECOME COMPLEX. NO ONE WOULD DISAGREE WITH THAT , BUT APP RENDI SETS FORTH THAT YOU ARE NOT GOING TO ASK THE JURY TO LOOK A T PRIOR CRIMES. THAT IS THE DISTINCTION. WE ARE ASKING THEM T O ENHANCE ON DISCHARGING OF A FIREARM AND VI OLENT CR IME. IT HAS BECOME AN ELEMENT OF THE OFFENSE AND THAT IS WITHIN THE PURVIEW OF THE JURY. BUT ULTIMATELY --

JUSTICE: TELL ME SOMETHING THAT WAS FUNDAMENTALLY UNFAIR ABOUT THE TRIAL AND THE INSTRUCTIONS WITH REFERENCETO THIS DEFEN DANT.

WHAT IS FUNDAMENTALLY UNFAIR IS THAT THE JURY HAD NO OPTIONS TO GIVE HIM A LESSER SENTENCE, AND I THINK THAT IF YOU ASK THE PERSON ON THE STR EET WHY THOSE ARE E VEN THERE AS AN OPTION, CLEARLY THEY CAN'T POSSIBLY IMAGINE THAT THEY DON'T EV ENHAVE THE POTENTIAL FOR A LOWER SENTENCE. I THINK WHEN THE DCA --

JUSTICE: WAIT A MINUTE. THE JURY COULD HAVE SAID THERE WAS NO FIREARM INVOLVED. THAT WOULD HAVE GIVEN A LESSER SENTENCE , WOULDN'T I T ? AND THE JURY CLE ARLY HAD AN OPPORTUNITY TO GIVE A LESSER SENTENCE.

YES. THEY HAD AN OPPORTUNITY TO PICK ONE OF THE OTHER OPTIONS, BUT YOU HAVE TO LOOK AT IT AS A W HOLE AND IF IT DOES NOT DESCEND , TH EN I THINK THAT IS ILLOGICAL , AND I THINK THAT W HEN YOU TRY TO ARGUE --

JUSTICE: YOU ARE SA YING THAT, WHEN THE JUDGE INSTRUCT ODD FIRST-DEGREE ATTEMPTED M URDER , HE SHOULD NOT HAVE INSTRUCTED ON SECOND-DEGREE, CO RRECT?

I THINK HE SHOULD NOT HAVE INSTRUCT ED ON ATTEMPTED SECOND-DEGREE WITH A FIRE ARM .

JUSTICE: SO IF THE ELEMENTS OF FIRST-DEGREE MURDER LIKE PREMEDITATION ARE NOT PRESEN T, THE JURY FIND THEY ARE NOT PRES ENT, WHY DOESN'T THE STATE HAVE THE RIGHT TO HAVE THE JURY DETERMINE THAT EVEN THOUGH THERE WAS NO PREMEDITATION , THAT THE E L EMENTS OF ATTEMPTED SECOND-DEGREE MURDER WERE PRESENT , EVEN THOUGH THAT WOULD GIVE THE DEFENDANT THE SAME SENTENCE? WHY DOESN'T THE STATE HAVE THE RIGHT TO SAY EVEN IF YOU FIND NO PREMED ITATION, YOU SHOULD FIND ATTEMPTED SECOND-DEGREE MURDER?

BECAUSE I THINK THAT IGNORES THE COU RT'S AND OTHER COURT 'S UNDERSTANDING OF WHY THE LESSERS ARE EVEN THERE. THE COURTS HAVE SAID THE LESSERS EVEN EXIST FOR THE PURPOSES OF A PARDON .

JUSTICE: WHAT HAPPENS WHEN THE TWO CRIMES ARE NOT NECESSARILY LESSER. THEY ARE EQUAL. WHERE DO YOU PUT THAT ON THE VERDICT FORM? DO YOU HAVE TO REMOVE ONE TOTALLY FROM THE VERDICT FORM, EVEN THOUGH IT HAS DIFFERENT ELEMENTS? LET'S SAY FIRST-DEGREE ATTEMPT -- ATTEMPTED MURDER AND SECOND-DEGREE WERE EQUALLY LIKE YOU ARE SAYING , BECAUSE THEY WOULD BOTH RESULT IN LIFE SENTENCES , YOUR POSITION IS THAT THE JURY CAN ONLY BE INSTRUCTED TO DO ONE OF THOSE?

RIGHT. IF IT IS THE SAME SENTENCING RANK , I WOULD THINK THAT IS EQUAL TO THE ELEMENTS. WE ARE TALKING ABOUT IT HAS TO BE DIFFERENT IN DEGREE AND PENALTY.

JUSTICE: BUT ARE YOU ARGUING THAT THE ELEMENTS OF FIRST-DEGREE ATTEMPTED MURDER AND SECOND-DEGREE ARE THE SAME?

NO.

JUSTICE: SO IF WE ACCEPT YOUR ARGUMENT , ISN'T THE EASY WAY AROUND IT FOR THE STATE, EVEN IF WE WERE TO ACCEPT YOUR ARGUMENT THAT COUNT ONE IS ATTEMPTED FIRST-DEGREE MURDER AND COUNT TWO IS AGGRAVATED BATTERY , THEY COULD NOT BE SENTENCED ON BOTH BUT THEY COULD BE CONVICTED OF EITHER. COULDN'T THE STATE SIMPLY DO THAT?

I AM NOT SURE I UNDERSTAND.

JUSTICE: THE SECOND BIT AT THE APPLE ARGUMENT.

RIGHT.

JUSTICE: WHAT YOU ARE SAYING IS THAT THE STATE, IT IS NOT TRULY A LESSER-INCLUDED OFFENSE. IF IT IS NOT A LESSER-INCLUDED OFFENSE , THEN CAN IT NOT BE CHARGED AS A SECOND COUNT?

NO.NO.

JUSTICE: WHY NOT?

BECAUSE IT IS BOTH. IT IS NOT ONE OR THE OTHER. THE ELEMENTS HAVE , IT HAS TO BE DIFFERENT IN DEGREE AND OBVIOUSLY YOU CAN'T CHARGE SOMEONE WITH THE SAME ACT , WITH TWO SEPARATE OFFENSES .

CHIEF JUSTICE: IT DEPENDS IF IT IS DOUBLE JEOPARDY ISSUES OR NOT .

DOUBLE JEOPARDY.

CHIEF JUSTICE: I MEAN, THAT IS A WHOLE OTHER ISSUE. YOU MIGHT WANT TO SAVE THE REST OF YOUR TIME FOR REBUTTAL.

I WILL RESERVE .

MAY IT PLEASE THE COURT. GOOD MORNING. MY NAME IS SUZANNE BECHARD AND I AM HERE FOR THE STATE. THERE ARE A COUPLE OF THINGS WE NEED TO CLARIFY RIGHT OFF THE BAT AND NUMBER ONE IS LOOKING AT WHAT PETITIONERS ARGUE HERE. PETITIONER IS ARGUING THAT BY DEFINITION A LESSER INCLUDED OFFENSE MUST CARRY A LESSER PENALTY THAN THE CHARGED OFFENSE. THE CERTIFIED QUESTION IN THIS CASE IS , IN ORDER FOR AN OFFENSE TO BE A LESSER-INCLUDED OFFENSE, MUST IT NECESSARILY RESULT IN A LESSER PENALTY THAN EITHER THE PENALTY OF THE MAIN OFFENSE OR THE NEXT GREATER OFFENSE ON THE VERDICT FORM. NOW, AS A PRACTICAL MATTER, THE ANSWER TO THAT IS ALREADY KNOWN . ESPECIALLY IF YOU LOOK

AT THIS STATUTE. A DEFENDANT CAN GET LIFE FOR , AND IT WAS APPOINTED OUT FOR FIRST-DEGREE MURDER AND FOR SECOND-DEGREE MURDER , SO THAT IS UNQUESTIONABLY A LESSER - INCLUDED OFFENSE. SECOND-DEGREE MURDER IS UNQUESTIONABLY A LESSER-INCLUDED OFFENSE.

CHIEF JUSTICE: I THOUGHT THAT WAS THE QUESTION. IT ISN'T. IT USED TO BE BUT NOW, WITH 10-20-LIFE -- .

THIS IS JUST IN THE ABSTRACT. WE ARE JUST TALKING ABOUT HOMICIDE.

CHIEF JUSTICE: I THINK WHAT THE DEFENDANT IS INTERESTED IN IS THE REAL WORLD OF WHAT HE OR SHE GETS SENTENCED TO. IT SORT OF --

EXACTLY BUT I WOULD LIKE TO DRAW THE COURT'S ATTENTION BACK TO, OKAY, HERE IS WHAT THE CERTIFIED QUESTIONS IS, AND I WANT TO POINT OUT THE DIFFERENCE BETWEEN THIS CASE AND THE RAY CASE WHICH IS BEING RELIED UPON IN THE PETITION .

CHIEF JUSTICE: LET'S STAY WITH THE FIRST POINT, WHICH IS THAT HISTORICALLY IT WOULD BE VERY FULL OF THE COMPLEXITY OF THE SENTENCING LAW. PEOPLE GET FIRST-DEGREE PREMEDITATED MURDER. THAT IS THE WORST .

RIGHT.

CHIEF JUSTICE: SECOND-DEGREE, THEN WHAT IS IT, WHAT IS THE NEXT ONE?

A LESSER.

CHIEF JUSTICE: AND THERE IS A PSYCHOLOGICAL THING. YES, AS WE GO DOWN, THAT DEFENDANT IS GOING TO HAVE LESSER.

LESSER CULPABILITY.

CHIEF JUSTICE: OF A PUNISHMENT.

WELL.

CHIEF JUSTICE: NOW, WHAT IS WRONG WITH THAT PARADIGM , AS FAR AS WHAT REALLY THE SIMPLICITY IS OF THAT, AS YOU GO DOWN , THE PUNISHMENT ISN'T AS GREAT?

WELL, WHAT WE ARE TALKING ABOUT HERE IS , YOU KNOW , WE HAVE GOT SITUATIONS ALREADY IN THE REAL WORLD , AND THE EXAMPLE IS THE HOMICIDE STATUTE. WHERE A PERSON CAN IN FACT , GET THE SAME PENALTY FOR A TRADITIONAL LESSER-INCLUDED OFFENSE.

CHIEF JUSTICE: BUT THE QUESTION I WOULD HAVE , IS IF YOU HAVE FIRST-DEGREE MURDER , SECOND-DEGREE MURDER AND YOU WENT DOWN AND THEORETICALLY , BECAUSE EACH ONE OF THOSE INVOLVED DISCHARGE OF A GUN, THE STATE , REALLY , WOULD HAVE FIVE BITES AT THE APPLE, BECAUSE IT IS ALWAYS GOING TO END UP WITH LIFE IN PRISON, SO WHY ARE WE GOING TO GO THROUGH , YOU REALLY DON'T EVEN HAVE TO WORRY ABOUT THE PREMEDITATED MURDER, UNLESS YOU ARE TRYING TO GET THE DEATH PENALTY, BECAUSE YOU HAVE GOT THE , AS LONG AS YOU HAVE THE USE OF THE GUN , YOU HAVE GOT LIFE IN PRISON . WHICH IS -- IN PRISON, WHICH IS WHAT THE LEGISLATURE INTENDS, BUT THEN WHY ARE WE WORRYING ABOUT LESSERS ANYMORE?

WELL , I THINK THAT GETS US TO THE ULTIMATE QUESTION OF WHAT DO WE DO WITH LESSER ED WHEN WE HAVE GOT RECLASSIFICATION OF ENHANCEMENT IN THE REAL WORLD. THE STATE

SHOULD ADOPT A STANDARD TEST TO DETERMINE WHAT IS AN APPROPRIATE LESSER-INCLUDED OFFENSE. LOOK AT THE OFFENSE ITSELF. LOOK AT THE OFFENSE THAT PROSCRIBES THE BEHAVIOR, WITHOUT REGARD TO --

JUSTICE: WHAT IS THE JURY LED TO BELIEVE BY GIVING THEM A VERDICT FORM WITH ALL OF THESE VARIOUS ITEMS?

WELL, FIRST OF ALL THE JURY DOES NOT HAVE, JURIES ARE NOT TOLD ABOUT SENTENCES. JURIES ARE NOT INVOLVED IN THE SENTENCING PROCESS. THE FACT THAT JURIES HAVE TO FIND FACTUAL MATTERS THAT HAVE TO DO WITH THE CRIMINAL EPISODE, DOES NOT TRANSFORM THOSE FACTS INTO ELEMENTS OF THE OFFENSE.

JUSTICE: IS THAT WHAT THE JURY IS TOLD AS TO WHY THEY HAVE THIS A, B, C, D, E, F THROUGH K TO CHECK OFF?

NO. THEY ARE NOT TOLD ANYTHING ABOUT THE SENTENCE, YOUR HONOR, AND JURIES ARE NOT --

JUSTICE: THAT IS JUST A MATTER THAT THEY ARE NOT TOLD ANYTHING AS TO WHY, WHAT THE VERDICT FORM IS ABOUT?

JURIES ARE EXPLAINED THE VERDICT FORM, YES, YOUR HONOR, AS TO MUST FIND MAIN OFFENSE IF YOU FIND ALL THE ELEMENTS THERE, AND IF YOU DON'T, YOU NEED TO DETERMINE IF ONE OF THE LESSER OFFENSES FIT?

CHIEF JUSTICE: DOESN'T LESSER, WHAT IS THE LESSER TO THE JURY MEAN, AND DO YOU AT LEAST A GREE HISTORICALLY THE LESSERS WERE THERE TO GIVE THE JURY THE OPTION TO CONVICT THE DEFENDANT OF A LESSER CRIME?

I THINK TRADITIONALLY, AND EVEN NOW, THE LESSERS ARE THERE TO GIVE THE JURY A CHANCE TO DETERMINE WHETHER THE STATE HAS PROVEN CERTAIN ELEMENTS, AND AS JUSTICE BELL POINTED OUT, YOU HAVE GOT THE ISSUE OF INTENT INVOLVED, AND I THINK JURIES ARE, THAT IS THE REASON FOR HAVING THE JURY, OPPORTUNITY FOR A JURY PARDON. JURIES ARE NOT TOLD ABOUT SENTENCES.

JUSTICE: BUT IN ESSENCE WHAT YOU ARE SAYING IS THAT THIS VERDICT FORM THAT WAS USED IN THIS CASE, WAS ESSENTIALLY AN INTERROGATORY VERDICT. IT DOESN'T READ LIKE IT, BUT IT SAYS BECAUSE IT SAYS WE THE JURY FIND AS FOLLOWS, AS TO COUNT ONE OF THE CHARGE. CHECK ONLY ONE COUNT. BUT WHAT YOU ARE SAYING IS THAT, WHAT THIS IS REALLY WORTH, IS THAT THESE ARE THE JURY'S FACTUAL DETERMINATIONS AS TO EACH OF THESE ITEMS.

WELL, IF I UNDERSTAND --

JUSTICE: AM I UNDERSTANDING YOU CORRECTLY?

WELL, I GUESS THE ANSWER TO THAT WOULD BE YES, BUT IF I UNDERSTAND YOUR QUESTION CORRECTLY, THEY ARE MAKING A FACTUAL DETERMINATION, ALONG WITH DISCUSSING WHAT, WHICH OFFENSE THE DEFENDANT COMMITTED.

CHIEF JUSTICE: WOULD IT BE CONSTITUTIONAL, AND JUST FOLLOWING UP WITH WHAT JUSTICE WELLS WAS SAYING, WHY DOESN'T THE JURY NEED TO KNOW WHETHER IT IS FIRST-DEGREE OR SECOND-DEGREE MURDER? WHY WOULDN'T IT JUST BE THE FIRST THING YOU NEED TO FIND OUT IS WHETHER THIS CRIME WAS COMMITTED WITH PREMEDITATION OR WITH RECKLESS DISREGARD, AND THEY JUST FIND THAT. THEN THE NEXT THING YOU NEED TO FIND IS WAS A FIREARM USED? IN OTHER WORDS WOULD IT BE CONSTITUTIONAL FOR THE JURY NOT TO BE TOLD, THEN, WHAT THE CRIMES WOULD BE THAT WOULD END UP BEING, THE DEFENDANT WOULD BE CONVICTED OF

, BASED ON WHAT THEY CHECK ON THE VERDICT FORM .

I GUESS WHAT YOU ARE ANTICIPATING THERE IS A VERDICT FORM THAT HAS EACH SEPARATE ELEMENT LISTED , AND THEY HAVE TO GO THROUGH IT.

CHIEF JUSTICE: I AM JUST ASKING YOU WOULD THAT BE OKAY, SO WE WOULDN'T HAVE TO WORRY ABOUT 25 OR HOWEVER MANY CRIMES.WE WOULD JUST TRY TO DECIDE,WELL, WHAT IS THE COMMON ELEMENT AND THEN WE WOULD JUST NOT TELL THE JURY. WHAT IS THE CRIME. RIGHT. WOULD THAT BE OKAY , CONSTITUTIONALLY?

I DON'T REALLY KNOW THE ANSWER TO.THAT I MEAN, I DON'T SEE HOW IT WOULD BEND THE CONSTITUTION. I THINK IT WOULD MAKE IT EXTREMELY COMPLICATED , AND --

JUSTICE: THE WAY IT IS NORMALLY DONE IS YOU HAVE ALL OF THE ELEMENTS OF THE PRIMARY CHARGED OFFENSE AND THEN YOU HAVE THE INSTRUCTION ON THE LESSER OFFENSES, AND THEN THE JURY'S INSTRUCTION ON EACH OF THE ELEMENTS INCLUDED IN EACH OF THE LESSER - INCLUDED OFFENSES.

CORRECT.

AND THEN FOR APPROPRIATE PURPOSES OR WHATEVER , THE SEPARATE INTERROGATORIES THAT JUSTICE PARIENTE WAS TALKING ABOUT , REGARDING POSSESSION OF A FIREARM, DISCHARGING IN PUBLIC OR WHATEVER OR GREAT BODILY HARM, WHATEVER THE ELEMENTS MAY BE. BUT DO YOU SEE , THOUGH, A DIFFERENCE BETWEEN AN ENHANCEMENT AND A RECLASSIFICATION? MY CONCERN IS , IF YOU HAVE A REFERENCE THAT TAKES WHAT WAS -- RECLASSIFIED THAT TAKES WHAT WAS A FIRST -- -A RECLASSIFICATION THAT TAKES WHAT WAS A FIRST-DEGREE MURDER AND MAKES IT A LIFE. HOW DO YOU ADVOCATE OR DEAL WITH THAT , WHAT MAY HAVE BEEN A LESSER INCLUDED OFFENSE BY ELEMENT BUT BY THE CASE BECOMES A SAME LEVEL FELONY?

MY POSITION IS THAT THE COURT NEEDS TO DEVELOP THE DEVELOPMENT TEST TO DETERMINE IT , BY LOOKING AT THE SUBSTANTIVE CRIME WITHOUT REGARD TO RECLASSIFICATION AND ENHANCEMENT , BECAUSE THOSE ARE NOT ELEMENTS OF THE CRIME.

CHIEF JUSTICE: ISN'T THAT JUST THEN WOULD BE LIMITED TO NECESSARILY LESSER-INCLUDED OFFENSES VERSUS PERMISSIVE?

I DON'T SEE HOW IT WOULD CHANGE.

CHIEF JUSTICE: BUT IT WOULD ONLY BE THAT THE ONLY LESSERS WOULD BE ONES THAT ARE NECESSARILY --

I REALLY DON'T SEE HOW --

CHIEF JUSTICE: YOU SAID YOU WOULD JUST ADOPT THE SUBSTANTIVE ELEMENT TEST , WITHOUT REGARD TO THE FACTS OF THE CRIME . DIDN'T YOU SAY THAT?

NO. NOT WITHOUT REGARD TO THE FACTS OF THE CRIME . WITHOUT REGARD TO WHETHER THE DEFENDANT WOULD GET A RECLASSIFICATION ENHANCEMENT. JUST BECAUSE ONE OF THESE FACTORS MAY OR MAY NOT HAVE TO BE FOUND BY THE JURY , IT DOESN'T MEAN THAT IT IS TRANSFORMED INTO AN ELEMENT OF THE CRIME.

CHIEF JUSTICE: LET ME ASK YOU THIS WAY , WHICH JUSTICE INSTEAD ASKED WHETHER THE JURY PARDON WASN'T CONSTITUTIONALLY BASED. THE FLIP SIDE I AM ASKING YOU IS DOES , IF THE DEFENDANT HAD OBJECTED TO THE SECOND-DEGREE MURDER CHARGE, BECAUSE THEY SAID IT IS GOING TO END UP WITH THE SAME PENALTY, WOULD THE STATE HAVE HAD A RIGHT TO

HAVE THE JURY DECIDE IT, BECAUSE IN DEGREE IT WAS LESSER? DO YOU THINK THE STATE WOULD HAVE HAD A RIGHT FOR POTENTIALLY THE SECOND BITE , THIRD BITE , FOURTH BIT E?

IF YOU WANT T O TA LK ABOUT SECOND BITES, THIS ALSO GIVES THE DEFENDANT A SECOND B ITE AT THE POSSIBILIT Y OF A LESSER SENTENCE.

CHIEF JUSTICE: BUT I AM ASKING IF THE STATE HAD REQUESTED IT, WITH A JUDGE WHO HAD TO GIVE THE SECOND-DEGREE ANYWAY , EVEN OVER THE DEFENDANT'S OBJECTION ? WHAT IS THE CORRESPONDING RIGHT OF THE STATE, IF ANY? ON THESE LESSERS.

WELL, I MEAN , I THINK THE ALTERNATIVE WOULD BE THAT THE DEFENDANT MIGHT HAVE AN EITHER /OR OR AN ALL OR NOTHING VERDICT FORM. I AM NOT SURE AND I DON'T WANT TO MAKE A PRONOUNCEMENT HERE, BUT I AM NOT SURE THAT THE STATE WOULD HAVE A RIGHT TO SAY WE MUST HAVE LESSERS. I THINK THAT, IF ANYTHING , LESSERS ON A VERDICT FORM IS AN OPPORTUNITY FOR THE DEFENDANT MORE THAN ANYTHING. I MEAN, LOOK AT THE, AND I DON'T WANT TO GET TOO FAR OFF TRACK BECAUSE THERE ARE A COUPLE OF OTHER POINTS I WANT TO MAKE, BUT LOOK AT THE SITUATION IN THIS CASE. THIS COULD HAVE BEEN AN EITHER /OR VERDICT FORM , PAPS PRACTICE, IF THAT IS -- PERHAPS , IF THAT IS WHAT THE DEFENDANT HAD WANTED , AND INSTEAD OF THE POSSIBILITY OF SECOND-DEGREE OR VOLUNTARY MANSLAUGHTER , HE WOULD HAVE HAD EITHER ATTEMPTED FIRST-DEGREE MURDER OR NOTHING ON THE VERDICT FORM, THE JURY MIGHT HAVE LOOKED AT THIS, AND WE DON'T KNOW WHY THE JURY CAME BACK THE WAY THEY DID WITH ATTEMPTED SECOND-DEGREE MURDER INSTEAD OF ATTEMPTED FIRST-DEGREE MURDER , BUT THEY MIGHT HAVE LOOKED AT THE FACTS OF THIS CASE AND SAID THIS IS SO BAD , EVEN THOUGH WE MIGHT NOT FIND PREMEDITATION OR WHATEVER IT IS THEY DIDN'T FIND HERE , WE ARE GOING TO GO AHEAD AND FIND HIM GUILTY ANYWAY BECAUSE WE KNOW HE DID SOMETHING AND WE WANT TO KEEP HIM OFF THE STREETS.

JUSTICE: BUT YOU SAID EARLIER THAT THE PURPOSE OF THESE LESSER -INCLUDED OFFENSES , IF I UNDERSTOOD YOU CORRECTLY , ALSO ONE OF THE PURPOSES IS SO THAT IF THE STATE , IN FACT, HAS NOT PROVEN ONE OF THE ELEMENTS OF THE CHARGED CRIME , BUT HAS IN FACT , PROVED ALL THE ELEMENTS OF SOME OTHER CRIME , THE STATE , ALSO , HAS AN OPPORTUNITY FOR CONVICTION , WHEREAS IF THE DEFENDANT SAID, THERE IS NO PREMEDITATION AND NO OTHER OPTION, THEN THE DEFENDANT IS CONVICTED OF EVERYTHING .

CHIEF JUSTICE: THE QUESTION A MINUTE OR TWO AGO , I ASKED IF THE STATE HAD A CORRESPONDING RIGHT , YOU SAID, NO, THE JURY --

I UNDERSTOOD YOUR QUESTION TO BE DID THE STATE HAVE AN ABSOLUTE CONSTITUTIONAL RIGHT.

CHIEF JUSTICE: THE JURY , WE ARE APPARENTLY NOT DEALING WITH CONSTITUTIONAL RIGHTS ON EITHER SIDE , WHICH MAKES IT VERY , WE ARE TRYING TO UNDERSTAND THE , THEREFORE THERE AREN'T CONSTITUTIONAL VALUES INVOLVED , AT LEAST FROM MY POINT OF VIEW, I AM TRYING TO THINK OF WHAT THE POLICY VALUES INVOLVED ARE.

PERHAPS I MISUNDERSTOOD YOUR QUESTION. I UNDERSTOOD YOU ASKING WOULD THE STATE HAVE A CONSTITUTIONAL RIGHT TO DEMAND THAT LESSER INCLUDED BE ON VERDICT FORMS, SO IF I NEED TO CLARIFY. BUT I WANT TO GET BACK TO THE FACTS OF THIS CASE AND HOW THIS DIFFERS FROM RAY. FIRST OF ALL THIS IS A FUNDAMENTAL ERROR ANALYSIS THAT WE HAVE GOT HERE. THERE WAS NO OBJECTION TO THE GIVING OF ATTEMPTED SECOND-DEGREE MURDER IN THE WAY IT WAS GIVEN . RAY WAS ALSO --

JUSTICE: WAS THERE AGREEMENT , THERE WAS NO OBJECTION. WE KNOW THAT, BUT WASN'T THERE AGREEMENT TO THE LESSER-INCLUDED THAT WAS GIVEN?

YES.

JUSTICE: THEY STARTED OUT WANTING AGGRAVATED BATTERY. AND EVERYONE AGREED NOT TO DO THE AGGRAVATED BATTERY.

THE STATE OBJECTED TO THAT.

JUSTICE: BUT THEN, OKAY, THERE WAS A DISCUSSION OF ALL OF THE OTHER LESSERS THAT COULD BE THERE, AND THE DEFENDANT WAS THERE, AGREEING THAT THESE WERE THE LESSER-INCLUDED THAT COULD BE GIVEN.

YES.

JUSTICE: SO ISN'T IT REALLY NOT ONLY A FAILURE TO OBJECT, ISN'T THIS AGREEMENT WITH WHAT WAS IN FACT GIVEN?

LET'S TALK ABOUT RAY FOR A MINUTE AND HOW THIS CASE IS LIKE RAY AND HOW IT IS NOT LIKE RAY. IN RE, THE DEFENDANT WAS CONVICTED OF A CRIME THAT WAS NEITHER A CATEGORY ONE OR A CATEGORY TWO LESSER INCLUDED. IN FACT HE WAS CONVICTED OF A CRIME THAT WAS CHARGED. THAT IS NOT WHAT HAPPENED HERE. IN RE THE COURT WAS LOOKING FOR FUNDAMENTAL ERROR ANALYSIS. WHAT TO DO IF A DEFENDANT IS CONVICTED OF A CRIME NOT CHARGED. IN THAT VERY PARTICULAR NARROW CIRCUMSTANCE, THE COURT SAID, OKAY, IT IS NOT GOING TO BE FUNDAMENTAL ERROR, I.E. NOT A DUE PROCESS VIOLATION, IF THE CHARGE AND CONVICTION WAS, BOTH, LESSER IN DEGREE AND PENALTY, OR THE DEFENSE REQUESTED THAT CHARGE OR RELIED ON IT, LIKE IN AN ARGUMENT. IN THIS CASE WE HAVE AN APPROPRIATE CATEGORY ONE LESSER-INCLUDED OFFENSE. I DON'T THINK THERE IS ANY QUESTION THAT SUBSTANTIVELY THIS WAS A LESSER-INCLUDED OFFENSE.

JUSTICE: SO IS IT THE STATE'S POSITION, THEN, THAT WHEN IT WAS A LESSER-INCLUDED OFFENSE, THAT IT ONLY HAS TO REALLY BE A CHARGE -- A LESSER INCLUDED DOESN'T REALLY HAVE TO HAVE A LESSER PENALTY?

THAT'S CORRECT. THAT IS NOT WHAT RAY SAID.

CHIEF JUSTICE: COULD IT HAVE A GREATER PENALTY? ISN'T THERE A CONSTITUTIONAL ISSUE IF THERE WAS A GREATER PENALTY?

THERE MIGHT BE, BUT THAT IS REALLY NOT WHAT WE ARE DEALING WITH HERE ANYWAY. WE ARE DEALING WITH SOMETHING WHERE HE HAD THE POSSIBILITY OF GETTING THE SAME SENTENCE. AND I DON'T THINK RAY EVER SAID THAT IN EVERY SINGLE CIRCUMSTANCE, IT MUST BE LESSER DEGREE AND PENALTY, IN ORDER FOR IT TO BE AN APPROPRIATE LESSER. AND THE OTHER THING IS THAT RAY DIDN'T DEAL WITH WHAT WE HAVE GOT HERE, WHICH IS RECLASSIFICATION ENHANCEMENT, AND WHEN THIS COURT FORMULATED THE SCHEDULE OF LESSER-INCLUDED OFFENSES, IT ALSO DIDN'T APPEAR TO TAKE INTO CONSIDERATION WHAT DO WE DO WHEN THERE IS RECLASSIFICATION S AND ENHANCEMENT S?

CHIEF JUSTICE: WELL, THAT DOESN'T SAY THAT THAT WAS FROM SOME INTELLIGENT DESIGN, SO TO SPEAK, OF, I GUESS THAT IS NOT A GOOD WORD TO USE, BUT SOME STUDY OF THIS TO REALLY LOOK AT THE PENALTY PART OF THE LESSERS. DO YOU KNOW IF THERE WAS, IN OTHER WORDS, AN ATTEMPT TO NOW, WITH ALL OF THE DIFFERENT ENHANCEMENTS AND RECLASSIFICATIONS TO GIVE GUIDANCE TO THE TRIAL JUDGES WITH THAT IN MIND?

I DON'T THINK SO, YOUR HONOR. I DON'T THINK THAT THE SCHEDULE OF LESSER-INCLUDED, THE SCHEDULE OF STANDARD JURY INSTRUCTIONS REALLY --

CHIEF JUSTICE: IT PROBABLY WAS FROM THE GOOD OLD DAYS WHEN SENTENCING WAS --
-- SO SIMPLE AND EASY.

JUSTICE: AND NOW IT EVOLVED, RIGHT?

PARDON ME?

JUSTICE: IN OTHER WORDS IT EVOLVED.

IT STARTED OUT AS INTELLIGENT DESIGN AND THEN IT EVOLVED. YES, YES IN DEED. ULTIMATELY, IT IS THE STATE'S POSITION THAT THE COURT SHOULD EXAMINE WHAT IS AN APPROPRIATE LESSER INCLUDED OFFENSE, BY LOOKING AT IT, LOOKING AT THE SUBSTANTIVE ELEMENTS OF THE CRIME, BECAUSE FIRST OF ALL, THE REASON FOR LESSERS IS TO PROVIDE TO A JURY PARDON. JURIES ARE NOT TOLD ABOUT SENTENCING, SO THE JURY PARDON, REALLY, IS NOT INVOLVED IN THE SENTENCING. THE LEGISLATURE FORMULATES APPROPRIATE CRIMES OR PARDON ME, APPROPRIATE PENALTIES FOR VARIOUS CRIMES, AND IF YOU LOOK AT, FOR EXAMPLE 10-20-LIFE WHICH IS WHAT WE HAVE GOT HERE, THE LEGISLATURE PROVIDED FOR A SITUATION WHERE THE MINIMUM MANDATORY IS GREATER THAN THE STATUTORY MAXIMUM, AND THE LEGISLATION HAS SAID WE WANT THE MINIMUM MANDATORY. IT MUST BE IMPOSED IN THAT CIRCUMSTANCE. THE LEGISLATURE DID NOT, ALSO, SAY, OH, BUT IF IT IS A LESSER-INCLUDED OFFENSE, WE HAVE GOT TO DO SOMETHING ABOUT THAT, AND MAKE IT LESSER IN SOME WAY OR ANOTHER PIECE OF THE BY. SOUGHT LEGISLATURE WAS CLEAR ABOUT WHAT IT WANTED, AND IT DIDN'T SAY ANYTHING ABOUT LESSER-INCLUDED OFFENSES THERE.

JUSTICE: DO YOU MEAN STILL CONFUSED. IF AS YOU SAY THE JURY PARDON IS PURELY A PRIVILEGE OF THE DEFENDANT, WHY DOESN'T THE TRIAL COURT JUST SAY, DEFENDANT, GIVE ME WHATEVER LESSERS YOU WANT ME TO INSTRUCT ON AND THE DEFENDANT IS STUCK TO THOSE, BECAUSE THE DEFENDANT HAS SPECIFICALLY REQUESTED THAT THESE LESSER-INCLUDED OFFENSES BE GIVEN, AND THE COURT GIVES THEM, AND THEN THEY HAVE NO RIGHT TO CONTEST IT, BECAUSE THEY SPECIFICALLY REQUESTED IT. BUT IT SEEMS TO ME IN MANY CASES, THE STATE IS INTIMATELY INVOLVED IN DETERMINING WHAT THE LESSER-INCLUDED OFFENSES ARE. WHICH --

CERTAINLY THERE IS A LOT OF NEGOTIATION THAT GOES ON.

JUSTICE: WHICH LED ME TO BELIEVE THAT IT IS NOT JUST A PRIVILEGE OF THE DEFENDANT BUT THAT THE STATE HAS SOME STAKE IN THE LESSER-INCLUDED OFFENSES AS WELL.

I DON'T DENY THAT, BUT I AM SIMPLY SAYING THAT WE HAVE GOT LESSER-INCLUDED OFFENSES. WE HAVE THAT, AS WE BASICALLY ALWAYS HAVE HAD, BUT NOW WE HAVE GOT OTHER THINGS THAT BEAR ON SENTENCING THAT ARE NOT ELEMENTS OF THE CRIME, EVEN THOUGH IN SOME CIRCUMSTANCES, THE JURY HAS TO MAKE FACTS OF THE CRIME --

CHIEF JUSTICE: COULDN'T WE IN THIS CASE DECIDE THE ISSUE OF WHERE THE -- WHERE THE ISSUE IS SUE OF WHERE THE STATE SAYS COMPETING ELEMENTS OF THE STATE SAYS I WANT THIS AND THE DEFENDANT SAYS I DON'T, BECAUSE IN THIS CASE IT WAS NOT OBJECTED TO AND APPARENTLY AGREED TO, THAT AT LEAST WE CAN CALL THAT IT IS NOT FUNDAMENTAL ERROR IN A WAY, AND WE DON'T HAVE TO MAYBE GO TO THE NEXT STEP OF WHAT HAPPENS WHEN THE STATE WANTS IT AND THE DEFENDANT DOESN'T.

RIGHT, IN THIS CASE THIS IS NOT HAD, THIS IS NOT A FUNDAMENTAL ERROR SITUATION. THIS WAS A CATEGORY.

CHIEF JUSTICE: WE REALLY NEED TO REPHRASE THE CERTIFIED QUESTION, IF WE WANT TO KEEP

IT NARROW.

IF YOU WANT TO ONLY DEAL WITH THIS CASE.

CHIEF JUSTICE: WELL, THE IDEA OF WHEN IT IS NOT OBJECTED TO .

YES. WELL , THE STATE WOULD SUBMIT THAT IT WOULD BE APPROPRIATE FOR THE COURT TO GO FARTHER AND DECIDE THAT THEY ARE GOING TO ADOPT A SUBSTANTIVE ELEMENTS TEST , AND DECIDE THAT YOU ARE ONLY GOING TO LOOK AT THE ELEMENTS OF THE CRIME AND FORMULATING APPROPRIATE LESSER-INCLUDED OFFENSES. THE OTHER THING IS THAT THE DEFENDANT CAN STILL BE FOUND GUILTY OF THE SUBSTANTIVE CRIME , WITHOUT ANY PROOF OR WITHOUT ANY FINDINGS BY THE JURY THAT ARE FACTS THAT LED TO THE ENHANCEMENT WERE THERE IN THE FIRST PLACE . AND THESE FACTORS , THESE DO NOT PROVIDE FOR DOUBLE JEOPARDY. WE SEE THAT , SO THE STATE'S POSITION IS THAT A FACTOR THAT IS NOT AN ELEMENT, A SUBSTANTIVE ELEMENT OF THE CRIME FOR DOUBLE JEOPARDY PURPOSES, DOESN'T HAVE ANY PLACE IN THE ANALYSIS OF WHETHER OR NOT IT IS A APPROPRIATE LESSER OFFENSE. SO THE STATE WOULD RESPECTFULLY, FIRST OF ALL , REQUEST THAT THIS COURT FIND THAT THIS WAS NOT FUNDAMENTAL ERROR IN THIS CASE AND ADOPT A SUBSTANTIVE ELEMENTS .

CHIEF JUSTICE: THE ONLY THING THAT WOULD MAKE THIS CASE MORE INTERESTING IS IF WE HAD TO LOOK AT DOUBLE JEOPARDY AS WELL AS LESSER-INCLUDED OFFENSES AT THE SAME TIME. THANK YOU.

THANK YOU.

CHIEF JUSTICE: MS . HOPKINS . I ARGUE THAT IT'S FUND AMOUNT --.

I ARGUE THAT IT'S FUND AMOUNTAL ERROR .

CHIEF JUSTICE: YOU DON'T HAVE TO ARGUE.

I AM PAID TO DO SO BUT RAY SUPPORTS ME. RAY SPECIFICALLY SAYS NOT WHETHER DEFENSE COUNSEL OBJECTED TO IT OUTRIGHT BUT WHETHER HE REQUESTED IT OR RELIED ON THE CHARGE , AND THAT IS NOT WHAT HAPPENED HERE.

JUSTICE: DO YOU AGREE WITH THE STATE THAT RAY INVOLVED THE SITUATION WHERE THE DEFENDANT WAS NOT CONVICTED OF EITHER A REQUIRED OR PERMISSIVE LESSER-INCLUDED OFFENSE?

YES .

JUSTICE: IT WAS SIMPLY A DIFFERENT CRIME.

YES.

JUSTICE: WHY WAS RAY NOT COMPLETELY --

RAY HAS BEEN USED IN THIS INCIDENT. RAY HAS BEEN USED BY MANY COURTS IN THE SAME TYPE OF ARGUMENT AS WE ARE DOING TODAY.

JUSTICE: YOU COULD HOLD THAT IT IS A COMPLETELY DIFFERENT SITUATION.

I WOULD URGE YOU NOT TO BUT YOU COULD. THE POINT I WANT TO MAKE IS TWOFOLD. A QUICK POINT IS IN THIS CASE THE JURY WAS NEVER TOLD THAT ENHANCEMENT COULD INCREASE THE PENALTY THAT IS POSSIBLY A REMEDY IN THE SENSE THAT IT WOULD MAKE THEIR PARDON POWER MORE INFORMED .

JUSTICE: WELL, DO WE EVER TELL THE JURY ABOUT THE SENTENCING OPTION?

NOT SENTENCING OPTION. I AM MAKING A DISTINCTION BETWEEN ENHANCEMENTS IN THIS CASE AND SENTENCING OPTIONS, AND THAT HAS TO BE DISTINGUISHED THROUGHOUT THE ARGUMENT IN THIS CASE TODAY. BECAUSE THE JURY HAS TO FIND THESE ENHANCEMENTS.

JUSTICE: THE INFORMATION ABOUT SENTENCING, WHY WOULD WE MAKE THE EXCEPTION FOR ENHANCEMENTS THEN?

BECAUSE IT IS REQUIRED THAT THE JURY MAKE A FINDING, IF YOU SEPARATE THAT OUT AND TREAT IT LIKE PRIORS BUT THEY ARE NOT SUPPOSED TO BE CONCERNED WITH IT, THEN YOU ARE JUST TAKING AWAY THEIR POWER.

JUSTICE: IN A SITUATION WHERE IT IS AN ENHANCEMENT OF, BECAUSE OF PRIOR CONVICTIONS, YOU WOULDN'T HAVE TO TELL THEM. IT WOULD ONLY BE IF YOU ARE TALKING ABOUT 10-20-LIFE OR A MINIMUM MANDATORY.

I THINK THEY HAVE TO HAVE A FINDING FOR IT. THAT IS THE DISTINCTION. I THINK IT IS IMPORTANT AND I REALLY WANT TO MAKE THIS POINT, BECAUSE THE DCA ACTUALLY SET OUT EACH OFFENSE AND SHOWED YOU WHAT THE MAXIMUMS WOULD BE WITH THE ENHANCEMENT AND ALSO MENTIONED WHAT SENTENCING MIGHT BE WITH HBFO AND THAT IS IRRELEVANT. OKAY. THE JURY IS NEVER CONCERNED WITH PRIOR CONVICTIONS. THEY ARE CONCERNED WITH THING THAT IS ENHANCE. THAT IS WHAT APPRENDI REQUIRES THAT THEY MAKE A FINDING.

JUSTICE: THEY ARE CONCERNED IN THE SENSE OF WHETHER OR NOT THEY ARE GOING TO MAKE A FINDING IF THERE WAS, IN FACT, A FIREARM.

EXACTLY, AND WHAT I AM SAYING IS, IF THEIR PARDON POWER HAS ANY REAL POWER, IT HAS TO GIVE THE POTENTIAL FOR A LESSER SENTENCE.

JUSTICE: SOUGHT ANSWER TO YOUR QUESTION, REALLY IS WHAT JUDGE ALTENBERND SAID. HE SAID FOR EACH OF THESE OFFENSES THE JURY WAS INFORMED THAT IT WOULD NEED TO MAKE DECISIONS ABOUT THE USE OR DISCHARGE OF A FIREARM AND THE NATURE OF ANY INJURY. THAT IS THE COMPONENTS IN ORDER TO RECLASSIFY, BUT THEN HE SAYS THE JURY WAS NOT TOLD THAT THESE DECISIONS -- THE JURY WAS NOT TOLD THAT THESE DECISIONS WOULD NOT RESULT IN THE RECLASSIFICATION OR ENHANCEMENT TO THE PENALTY. AND WHAT YOU ARE DOING IS SAYING THE JURY BASICALLY HAS TO BE TOLD THAT, IF THEY MAKE THESE FINDINGS, IT WILL RESULT IN --

IT IS ONE WAY TO FIX THIS PROBLEM, I THINK, AND THE ANSWER IS YES, BECAUSE OTHERWISE THEIR PARDON POWER HAS NO POWER. IT HAS TO BE GIVEN THE POTENTIAL OF LESSERS.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT WILL TAKE THIS CASE UNDER ADVISEMENT AND TAKE ITS MORNING RECESS OF 15 MINUTES.