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State of Florida v. Bill Monroe Hearn

SC05-2122

PLEASE RISE.

HEAR YE, HEAR YE, HEAR YE.

THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.

ALL WHO HAVE CAUSE TO PLEA, DRAW
NEAR, GIVE ATTENTION, AND YOU
SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA, AND
THIS HONORABLE COURT.,,

LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

GOOD MORNING FRIENDS.

WELCOME TO THE FLORIDA SUPREME
COURT.

WE'RE READY FOR THE ARGUMENTS
FOR FRIDAY, NOVEMBER 3.

2006.

FIRST CASE IS STATE OF FLORIDA
VERSUS HEARN.

MR. GLAID, READY TO PROCEED?

YES.

GOOD MORNING, MAY IT PROCEED THE
COURT.

DOUGLAS J. GLAID, ASSISTANT
ATTORNEY GENERAL.

I HAVE THE PRIVILEGE OF
REPRESENTING THE STATE OF
FLORIDA ON THIS APEOPLE.

THE DEFENDANT IN THIS CASE WAS
CONVICTED OF UNLAWFUL POSSESSION
OF A FIREARM BY A THREE TIME
CONVICTED FELON, AN SENTENCED TO
LIFE IN PRISON AS A VIOLENT
CAREER CRIMINAL.

AFTER HIS CONVICTION WAS
AFFIRMED BY THE DISTRICT COURT,
DEFENDANT FILED A MOTION FOR
POST CONVICTION RELIEF IN WHICH
HE ALLEGED THAT ONE OF HIS THREE
PRIOR CONVICTIONS, ONE FOR
BATTERY ON A LAW ENFORCEMENT
OFFICER DID NOT QUALIFY AS A
FORCIBLE FELONY.

LET ME ASK YOU SOMETHING.
THE ONLY WAY THAT YOU GET IT IS
BY IT BEING A FORCIBLE FELONY,
AND THE ONLY PROVISION IN THE
FORCIBLE FELONY STATUTE, 776.08
THAT WOULD APPLY IS THE CATCH
ALL PROVISION THAT SAYS, AND ANY
OTHER FELONY WHICH INVOLVES THE
USE OR THREAT OF PHYSICAL FORCE
OR VIOLENCE AGAINST ANY
INDIVIDUAL, IS THAT CORRECT?
THEARNG -- THAT'S CORRECT,
YOUR HONOR.
SO IF WE LOOK AT THE OTHER
DEFINITION OF FORCIBLE FELONY,
IT'S TREASON, MURDER,
MANSLAUGHTER, AND IT SAYS SEXUAL
BATTERY.
IT TALKS ABOUT AGGRAVATED
BATTERY.
BUT IT DOESN'T TALK ABOUT
BATTERY.
SO ISN'T THE FACT THAT IT
SPECIFICALLY MENTIONS SEXUAL
BATTERY AND AGGRAVATED BATTERY
MEAN THAT THE LEGISLATURE DID
NOT INTEND TO INCLUDE ALL
BATTERIES, OTHERWISE IT JUST
WOULD HAVE PUT BATTERY OF ANY
KIND?
WELL, YOUR HONOR, THE STATE'S
ANSWER WOULD BE NO, I DON'T
BELIEVE THE LEGISLATURE INTENDED
THAT.
I THINK --
WHAT RULE OF STATUTORY
CONSTRUCTION WOULD YOU USE TO
SUPPORT YOUR ARGUMENT THAT NO?
WELL, YOUR HONOR, I THINK
WHAT WE HAVE IS THE FINAL
CLAUSE, AS YOUR HONOR MENTIONED,
TALKS ABOUT A FELONY WHICH
INVOLVES THE USE OF PHYSICAL
FORCE.
THAT'S THE FINAL CLAUSE.
IT SAYS -- YES, AND WHAT IS
THE DEFINITION OF A BATTERY IN
THE STATUTE?
WELL, THE DEFINITION OF
BATTERY IS INTENTIONAL TOUCHING
OR STRIKING ANOTHER INDIVIDUAL.
ACTUAL AND INTENTIONAL TOUCHING
OR STROOKING OF AN INDIVIDUAL.
SO WHAT I'M SAYING IS THE

LEGISLATURE I THINK REASONABLY
COULD HAVE CONCLUDED THAT THERE
WAS NO NEED TO HAVE BATTERY ON A
LAW ENFORCEMENT OFFICER INCLUDED
WITHIN THE FORCIBLE FELONY
STATUTE.

WELL, TO THE CONTRARY,
WOULDN'T THEY JUST HAVE PUT
BATTERY AND THEREFORE THERE
WOULD BE NO NEED TO PUT SEXUAL
BATTERY AND AGGRAVATED BATTERY?
WELL, YOUR HONOR, THE PROBLEM
WITH BATTERY, IT'S A MISDEMEANOR
IF THEY JUST PUT BATTERY, THEN
IT COULDN'T BE A FORCIBLE
FELONY.

THE ONLY DIFFERENCE BETWEEN
THE MISDEMEANOR CRIME OF BATTERY
AND BATTERY ON A LAW ENFORCEMENT
OFFICER IS THE PERSON WHO IS
BATTERED, CORRECT?

CORRECT.

SO YOU COULD HAVE AN
INTENTIONAL TOUCHING, OTHERWISE
WOULD BE A MISDEMEANOR, NOT A
FORCIBLE, NOT THREAT OR USE OF
FORCE, JUST A TOUCHING, AND THE
FACT THAT IT'S A LAW ENFORCEMENT
OFFICER TURNS IT FROM A
MISDEMEANOR INTO A FELONY.

CORRECT, YOUR HONOR.

BUT IF YOU LOOK BACK AT THE
PERKINS TEST, AND THAT'S WHAT
I'M URGING THIS COURT TO
REMEMBER, IS YOUR HONOR'S 15
YEARS AGO DECIDED PERKINS, AND
WHAT PERKINS SAYS IS WHEN YOU
DECIDE WHAT'S A FORCIBLE FELONY,
YOU LOOK AT THE STATUTORY
ELEMENTS OF THE CRIME, AND --
THE ELEMENTS OF BATTERY DO
NOT NECESSARILY INCLUDE USE OF
FORCE.

WELL, I THINK WHEN YOU LOOK
AT -- WHAT YOU SUGGESTED ARE
INSTRUCTIONS IN PERKINS IS A
NECESSARY ELEMENT CAN BE, AS FAR
AS THE FOREST, DOESN'T HAVE
TO --

TO -- THE REASON THAT A CRIME IS
FORCIBLE FELONY DOESN'T HAVE TO
BE BECAUSE OF FORCE, I GUESS
THAT'S WHAT I'M SAYING.

[INAUDIBLE]

CORRECT.

[INAUDIBLE]

CORRECT, YOUR HONOR.

[INAUDIBLE]

!!!!

[INAUDIBLE]

THE PHYSICAL TOUCHING IS NOT
NECESSARILY --

[INAUDIBLE]

WELL, THAT'S WHERE THE STATE
DISAGREES.

WE SAY WHEN YOU HAVE AN
INTENTIONAL ACTUAL TOUCHING, YOU
HAVE SOME FORCE.

YOU HAVE TO HAVE SOME FORCE.

[INAUDIBLE]

CORRECT, YOUR HONOR.

[INAUDIBLE]

[INAUDIBLE]

WELL, YOUR HONOR, --

[INAUDIBLE]

WELL, YOUR HONOR, I DID CITE
THE L.D. CASE IN MY BRIEF, WHICH
STATES THAT YOU DON'T NEED
INTENT, YOU DON'T NEED FORCE
ENOUGH TO INJURE, AND I THINK
THAT'S THE PROBLEM, BUT WHAT WE
HAVE IN THE JOHNSON CASE, THE
JOHNSON CASE, WHICH IS REALLY
THE ROOT OF THE HEARNS CASE, AND
WHAT JOHNSON HELD WAS, UNWANTED
TOUCHING, AND SPITTING, THAT WAS
INVOLVED WITH SPITTING AN
OFFICER WASN'T ENOUGH, BECAUSE
IT WAS WHAT THE COURT TERMED AN
UNWANTED TOUCHING.

BUT THE STATE WOULD SUBMIT,
BASICALLY, OUR ARGUMENT RESTS ON
A FACTUAL BELIEF THAT WHEN YOU
TOUCH SOMEBODY INTENTIONALLY,
NOW WHEN YOU HAVE INADVERTENT
TOUCHING --

JOHNSON DECIDED INCORRECTLY,
BECAUSE OTHERWISE THIS CASE
SEEMS TO FALL DIRECTLY IN THE
JOHNSON LINE OF CASES, IF THE
THROWING OF SPITBALL ON SOMEONE
IS NOT A FORCIBLE FELONY, HOW
CAN JUST THE SIMPLE TOUCHING BE
A FORCIBLE FELONY?

SO WAS JOHNSON DECIDED CORRECTLY
OR NOT?

AND IF NOT, WHY NOT?

NO IT WAS NOT, YOUR HONOR,
BECAUSE IT SPRAYED STRAYED --
STRAYED FROM THIS HONOR'S
INSTRUCTIONS IN PERKINS, WHICH
YOU DECIDED YOU SAID THIS IS THE
EXACT MEANING OF THE FINAL
CLAUSE OF THE FORCIBLE FELONY
STATUTE AND THEN YOU SAID, THUS
IN THE STRICT AND LITERAL SENSE,
THIS LANGUAGE CAN ONLY MEAN THAT
THE STATUTORY ELEMENTS OF THE
CRIME ITSELF MUST INCLUDE OR
ENCOMPASS CONDUCT OF THE TYPE
DESCRIBED.

IF SUCH CONDUCT IS NOT A
NECESSARY ELEMENT OF THE CRIME,
THEN THE CRIME IS NOT A FORCIBLE
FELONY.

AND THAT ANSWERS JUSTICE!!!!!!!!!!!!!! JUSTICE
CANTERO'S QUESTION.

BATTERY HAS AN ELEMENT THAT
INVOLVES PHYSICAL FORCE,
INTENTIONAL TOUCHING.
BUT IT SAYS NECESSARY
ELEMENT.

IT SAYS NECESSARY ELEMENT.

IT IS NOT NECESSARY TO COMMIT
THE CRIME OF BATTERY, TO USE
FORCE.

YOU CAN DO IT WITH AN
INTENTIONAL TOUCHING AND PERKINS
SAYS IT MUST BE A NECESSARY
ELEMENT OF THE CRIME.

YOUR HONOR, WHEN YOU SAY
INTENTIONAL TOUCHING, YOU'RE
ASSUMING THAT'S NOT FORCE.

THAT'S WHERE THE STATE -- THAT'S
OUR ARGUMENT.

WE SAY, WHEN YOU INTENTIONALLY
TOUCH, YOU USE FORCE.

SEE --

HOW ABOUT A WATER GUN?

PARDON ME?

HOW ABOUT A WATER GUN, I
TOUCH YOU WITH WATER, WOULD THAT
BE A BATTERY?

CORRECT, BECAUSE YOU'RE USING
FORCE WITH YOUR FINK ARS.

YOU'RE USING PHYSICAL FORCE.

THAT'S A PHYSICAL MEANS, A
DIGIT, YOU'RE USING PHYSICAL
FORCE.

AND SPITTING IS CLEARLY -- SEE,
WHEN I STARTED GETTING IN TO

THESE FACTS, THEN I'M STRAYING MYSELF.
I'M STRAYING FROM PERKINS.
PERKINS SAYS YOU DON'T LOOK INTO THE FACTS.
AND THAT'S THE PROBLEM WITH THE JOHNSON CASE.
I'M NOT GOING TO CIRCLE BACK AROUND TO THE QUESTION BEFORE, THAT IT MUST BE A NECESSARY ELEMENT.
YOU'RE LEAVING OUT THE WORD NECESSARY.
WELL, NO, YOUR HONOR, I BELIEVE -- PERKINS SAYS NECESSARY ELEMENT, BUT I THINK INTENTIONAL TOUCHING MEANS FORCE99!!!!!!!!!!
FORCE.
I THINK THAT'S AGAIN WHAT WE'RE SAYING.
IT'S AN ALTERNATIVE.
[INAUDIBLE]
[INAUDIBLE]
[INAUDIBLE]
I'M TRYING TO HELP YOU IN EVERY DAY I POSSIBLY CAN.
HE WILL WITH, THE LEGISLATURE --,
WELL, THE LEGISLATURE SEEMS TO BE FOCUSED ON VIOLENCE HERE.
YOU WOULD AGREE THAT IF IT'S JUST A BATTERY AGAINST SOMEBODY NOT A POLICE OFFICER OR THAT HAS SOME OTHER SPECIAL PROTECTION IN THAT REGARD, THAT IT WOULD NOT COME WITHIN THIS STATUTE, RIGHT? IT WOULD HAVE TO, BECAUSE A SIMPLE BATTERY IS NOT A FELONY.
I THINK PRACTICALLY SPEAKING, THE STATE ATTORNEY'S OFFICE THROUGHOUT THE STATE OF FLORIDA, GENERALLY THEY FILE CASES WHEN THERE'S A FORCE SUFFICIENT ENOUGH TO -- YOU KNOW, IF IT'S INADVERTENT TOUCHING -- WE'RE TALKING ABOUT A SIMPLE BATTERY, OK, JUST AGAINST A NEIGHBOR, ALL RIGHT.
WOULD THAT MAKE THEM ELIGIBLE UNDER THIS.
A SIMPLE BATTERY NO, WOULD BE A MISDEMEANOR.
A SIMPLE BATTERY AGAINST ANY OTHER HUMAN BEING, OK, WOULD NOT

QUALIFY, DO YOU AGREE?

WELL, CORRECT.

SIMPLE BATTERY IS NOT A FORCIBLE
FELONY.

WHAT THE LEGISLATURE WAS
FOCUSING ON WERE CRIMES OF
VIOLENCE THEN WHY WOULDN'T THEY
JUST HAVE INCLUDED BATTERY HERE
AS JUSTICE CANTERO ASKED YOU
THAT IN ANOTHER WAY AS FAR AS
SAYING THEY COULD HAVE JUST
PROVIDED FOR BATTERY, AND OF
COURSE, THAT WOULD HAVE INCLUDED
SEXUAL BATTERY, OR AGGRAVATED
BATTERY, WHICH WE KNOW BOTH 6
YOU'LL BATTERY AND AGGRAVATED --
SEXUAL BATTERY AND AGGRAVATED
BATTERY OBVIOUSLY ARE VERY
SERIOUS CRIMES OF VIOLENCE,
RIGHT?

IF YOU LOOK AT THE LIST --
THE LEGISLATURE WAS FOCUSED
ON VIOLENCE, HOW DO YOU GET
SIMPLE BATTERY INTO THAT -- THE
VIOLENCE THAT THE LEGISLATURE
WAS FOCUSING ON?

WELL, WITH ALL DUE RESPECT
YOUR HONOR, I DISAGREE WITH YOUR
HONOR'S ASSESSMENT THAT THE
LEGISLATURE WAS JUST CONCERNED
WITH VIOLENCE.

FORCIBLE FELONIES, YOU DON'T
THINK THEY WERE CONCERNED WITH
VIOLENCE?

THEY WERE CONCERNED WITH
VIOLENCE, BUT I DON'T THINK
THAT'S THE PARAMOUNT INTEREST.

IF YOU LOOK AT THE LIST OF
OFFENSES IN FORCIBLE FELONIES,
IT ALSO LISTS TREASON, IT
LISTS --

BUT THOSE ARE ALL EXPLICIT.
YOU DON'T NEED SO SAY FORCIBLE
FELONY.

WELL, CORRECT, THEY'RE
ENUMERATED, BUT I THINK ANOTHER
KEY THING AS FAR AS THE
VIOLENCE, JUST AS IMPORTANT IF
NOT MORE IMPORTANT, WOULD BE
PROTECTION OF THE SAFETY OF LAW
ENFORCEMENT OFFICERS THROUGHOUT
THE STATE, WHICH I CITED A CASE
WHICH YOUR HONOR STATED THE
LEGISLATURE INTENDS TO GIVE THE

MAXIMUM PROTECTION TO POLICE OFFICERS IN THE STATE OF FLORIDA AND I THINK THAT'S A KEY ELEMENT TOO, AS FAR AS WHY THE LEGISLATURE WOULD HAVE PASSED THIS STATUTE, IN LOOKING TO THAT INTENT WHEN YOU'RE LOOKING FOR A DEFINITION AS TO THE FORCIBLE FELONY.

BUT THE STATE WOULD SUBMIT THAT THE THIRD DISTRICT HERE DID STRAY FROM PERKINS, THE STATE WOULD URGE THIS COURT TO STICK WITH PERKINS, THE 3rd ALSO BASICALLY CREATED A DISTINCTION HERE, BASICALLY IT WAS CREATED IN JOHNSON, IT WAS REITERATED HERE IN HEARNS, IT WAS SET FORTH BY JUDGE IRVIN IN HIS OPINION IN JENKINS, THE FACT THAT YOU HAVE INTENTIONAL TOUCHING FORM OF BATTERY AND A BODILY HARM FORM OF BATTERY, AND BASICALLY, THE 3!!

3rd IS SAYING NOW, AND THIS IS THE FIRST TIME IN THE STATE OF FLORIDA, THEY'RE SAYING, THE ONLY TIME YOU CAN HAVE A FORCIBLE FELONY IS IF YOU HAVE BODILY HARM FORM OF BATTERY, NOT INTENTIONAL.

ISN'T THE 3rd DISTRICT GO A LITTLE BIT FURTHER AND EVEN GIVE YOU MORE THAN MAYBE THE STATE WAS ENTITLED TO, WITH AN OPPORTUNITY TO GO BEHIND WHAT THE ELEMENTS WERE AND TO GO INTO THE FACTS, TO GIVE YOU THE OPPORTUNITY TO PROVE THAT THAT HAPPENED TO BE A VIOLENT BATTERY, IF YOU WILL, AND THAT WAS CONTRARY, IN YOUR FAVOR, WAS IT NOT, TO PER KUNZ?

-- TO PERKINS?

WELL, AS FAR AS PERKINS? LOOKING AT THE ELEMENTS AS OPPOSED TO GOING BEHIND. REALLY, DIDN'T THEY GIVE YOU AN OPPORTUNITY TO GO PROVE THAT? IT'S ACTUALLY BENEFICIAL TO THE STATE TO BE ON PERKINS IS WHAT THE 3rd DISTRICT RULED, WASN'T IT?

CORRECT.

PERKINS IS THE TEST THAT HAS TO BE FOLLOWED, AND YOU SHOULDN'T -- WE SHOULDN'T BE GOING BEHIND THE CONVICTIONS. THAT'S EXACTLY THE POINT OF THE QUESTIONS I THINK IS THAT YOU MUST LOOK AT THE ELEMENTS THAT ARE INVOLVED.

CORRECT.

AND NOT THE EVIDENCE, ISN'T THAT THE POINT OF THE QUESTIONS THAT YOU'VE BEEN RECEIVING THIS MORNING IT SEEMS?

YES, YOUR HONOR, THAT'S WHAT THE STATE IS ARGUING, THE ELEMENTS ARE THE KEY THING AND IF YOU LOOK AT THE ELEMENTS, THE STATE SUFFICIENTLY BELIEVES THAT BATTERY ON A LAW ENFORCEMENT OFFICER QUALIFIES, IS A QUALIFYING OFFENSE.

UNLESS THE COURT HAS ANY FURTHER QUESTIONS I'LL SAVE MY REMAINING TIME FOR REBUTTAL.

MR. GODFREY?

GOOD MORNING YOUR HONOR, ROBERT GODFREY ON BEHALF OF THE F.L.E., MR. HEARNS.

THERE ARE THREE SEPARATE REASONS WHICH I THINK THE COURT HAS TOUCHED UPON WHY THE LOWER DECISION WAS CORRECT AND WHY THE STATE'S ARGUMENT HERE IS INCORRECT.

NUMBER ONE, YOU HAVE THE FACT THAT A SIMPLE BATTERY IS A MISDEMEANOR, THE ADDED ELEMENT OF BEING AGAINST A LAW ENFORCEMENT OFFICER.

BUT AS TO THAT, WE KNOW THAT BATTERY IS A MISS GLEANER, BUT -- MISDEMEANOR, BUT BATTERY OF A LAW ENFORCEMENT OFFICER IS A FELONY, AND THE BATTERY -- THE OTHER KINDS OF BATTERIES THAT ARE FELONIES ARE IN FACT INCLUDED IN THIS STATUTE, THE AGGRAVATED BATTERY, THE SEXUAL BATTERY, SO WHY DOESN'T THAT EVENT, A LEGISLATIVE INTENT THAT THE FELONY FORMS OF BATTERY SHOULD IN FACT BE INCLUDED AS -- UNDER THIS STATUTE?

WELL, AS YOU PUT IT YOUR

HONOR THE OTHER FORMS ARE LISTED, AND IN FACT, THERE'S ACTUALLY A THIRD FORM OF BATTERY JUST LISTED AS A DCC PREDATOR AND THAT IS IF YOU LOOK AT 775.084, THE ACTUAL VIOLENT CAREER CRIMINAL STATUTE, IT LISTS AS A PREDICATE ANY LEWD

AND LA SIEVOUS CONDUCT. ONE IS AGAINST LEWD AND LA SIEVOUS BATTERY.

SO YOU HAVE SEXUAL BATTERY, AGGRAVATED BATTERY.

ALL OF THOSE ARE FORMS OF FELONY BATTERY.

CORRECT.

BATTERY ON A LAW ENFORCEMENT OFFICER IS A FELONY FORM OF BATTERY.

CORRECT.

SO IF YOU LIST THREE FELONIES AND DON'T LIST THE FOURTH, IT'S A CLEAR CAUTION THAT THE LEGISLATURE DID NOT INTEND THE FOURTH ONE TO BE A PREDICATE.

[INAUDIBLE]

WELL, ACTUALLY, THE FORCIBLE FELONY STATUTE YOUR HONOR IS FOUND WITHIN THE CHAPTER THAT DEALS WITH THE JUSTICE USE OF FORCE.

[INAUDIBLE]

SURE, YOUR HONOR, YOU DON'T USE FORCE WHEN SOMEONE TOUCHES YOU LIKE THAT OR WHEN SOMEONE SQUIRTS WATER AT YOU.

YOU USE FORCE IF YOUR LIFE IS IN DANGER OR IF YOUR PROPERTY OR LIFE IS THREATENED.

[INAUDIBLE]

-- FORCIBLE FELONY FOR OTHER PURPOSES --

[INAUDIBLE]

ABSOLUTELY.

[INAUDIBLE]

I COULDN'T FIND ANY IN TERMS OF DIRECTLY OF BATTERY ON A LAW ENFORCEMENT OFFICER.

THIS COURT ABOUT 10 YEARS AGO IN ROBINSON DECIDED THE QUESTION ABOUT USE OF FORCE IN THE CONTEXT OF THE ROBBERY STATUTE.

AND ROBINSON, WHAT THE COURT HELD BASICALLY WAS ALTHOUGH THE STATUTE PROVIDES THAT ROBBERY IS THE TAKING WHEN FORCIBLY TAKING, THRTION THE ULES OF FORCE, THE COURT DECIDED THAT ANY FORCE WOULDN'T DO TO MAKE A ROBBERY. INSTEAD THE AMOUNT OF FORCE HAD TO BE MORE THAN THE FORCE NECESSARY, REMOVE THE PROPERTY FROM THE PERSON, AND IMPORTANTLY, IN ROBINSON, THE COURT SPECIFICALLY APPROVED AN EARLIER DECISION BY THE 3rd!!!!!! 3RD DISTRICT IN WALKER VERSUS STATE, AND IN WALKER V STATE, DIRECTLY FROM THAT OPINION SHOW THAT THE DEFENDANT TOOK A NECKLACE FROM THE VUK!!!!!!! VICTIM AND AS THE DEFENDANT STOOD NEXT TO THE VICTIM, SHE FELT HIS FINGERS ON THE BACK OF HER NECK. THOSE FINGERS WOULD BE CONTACT, WHICH WOULD BE FORCE ACCORDING TO THE STATE. SO THE 3rd DISTRICT DISAGREED WITH THAT AND SAID THAT THAT WASN'T SUFFICIENT FORCE TO MAKE IT ROBBERY AND THIS COURT APPROVES THAT DECISION. YOU'RE SAYING IT WOULD HAVE IMPLICATIONS PERHAPS, TO ACTUALLY SAY THAT FORCIBLE FELONY INCLUDES INTENTIONAL TOUCHING, FOR OTHER AREAS OF THE LAW? ABSOLUTELY. I CAN GIVE YOU AN EVEN BETTER EXAMPLE OF HOW IT WOULD HAVE AN UNINTENDED CONSEQUENCE. THE USE OF THE TERM PHYSICAL FORCE MEANS THE SAME THING THROUGHOUT THE STATUTE. IF YOU LOOK AT SECTION 944.35 OF THE FLORIDA STATUTES, THAT DEFINES WHEN AN EMPLOYEE OF THE DEPARTMENT OF CORRECTIONS IS AUTHORIZED TO APPLY PHYSICAL FORCE UPON AN INMATE. IT FURTHER REQUIRES THAT ANY TIME THAT PHYSICAL FORCE IS APPLIED, AN INCIDENT REPORT HAS TO BE PREPARED WITHIN 24 HOURS. UNDER THE STATE'S ARGUMENT HERE,

ANY TIME A CORRECTIONS OFFICER TOUCHES AN INMATE ON THE SHOULDER, SHOOK AN INMATE'S HAND, PATTED HIM ON HIS BACK -- WE'RE TALKING ABOUT AN UNWANTED TOUCHING, RIGHT, WHEN WE TALK ABOUT BATTERY? NOT A SHACKING OF HIS HANDS. CORRECT.

NOT TALKING ABOUT BATTERY, TALKING ABOUT THE TERM PHYSICAL FORCE AND WHETHER OR NOT PHYSICAL FORCE, IN OTHER WORDS, THE STATUTES DEALING WITH WHEN A DEPARTMENT OF CORRECTIONS EMPLOYEE CAN USE PHYSICAL FORCE, DOESN'T TALK ABOUT IT BEING UNWANTED FORCE.

ARE THERE ANY OTHER PLACES WHERE FORCIBLE FELONY ITSELF IS USED?

YOU MENTIONED IN THE QUESTION OF WHETHER SELF-DEFENSE IS JUSTIFIED, IS THERE ANY OTHER PLACES OR IS THAT THE MAIN AREA?

I CAN'T ANY OF ANY OTHERS, YOUR HONOR.

IF YOU'RE TALKING ABOUT THE CATCH ALL, WHICH IS ANY FELONY THAT INVOLVES THE USE OR THREAT OF PHYSICAL FORCE OR VIOLENCE AGAINST AN INDIVIDUAL, AND THE LEGISLATURE HAS INCLUDED ALL THOSE OTHER FORMS OF CRIMES, HOME INVASION, ROBBERY, KIDNAPPING, WHAT OTHER CRIMES WOULD -- IF IT'S NOT BATTERY ON A LAW ENFORCEMENT OFFICER, WOULD BE WITHIN THE CATCHALL, THAT ISN'T DIRECTLY LISTED?

ONE I CAN THINK OF YOUR HONOR WOULD BE RESISTING WITH VIOLENCE.

THAT'S NOT LISTED, BUT THAT WOULD INCORPORATE AS A NECESSARY ELEMENT OF VIOLENCE, YES YOUR HONOR, SO THAT WOULD BE A BEST EXAMPLE I COULD THINK OF.

BUT ARE THERE LOTS OF OTHERS?

IT'S ALWAYS INTERESTING WHEN THE CATCHALL IS USED, DOES THAT MEAN YOU GO BROADER?

I MEAN, IF THERE'S JUST ONE OTHER, THEN WHY WOULDN'T THE

LEGISLATURE HAVE JUST LISTED THE
ONE OTHER?

I'M NOT SURE, YOUR HONOR.

THE REPORTED DECISIONS APPEAR TO
CONCENTRATE MORE ON WHAT IS NOT
A FORCIBLE FELONY UNDER THAT.

I WAS JUST GOING TO SAY IN LOPEZ
VERSUS STATE, THE 2nd DISTRICT

IN 2003, DECIDED THAT

SOLICITATION TO COMMIT FIRST
DEGREE MURDER DID NOT
NECESSARILY USE THE THREAT OF
FORCE OR VIOLENCE.

IN GAMBLE VERSUS STATE, THE 3rd
DISTRICT DECIDED CONSISTENT WITH
PERKINS THAT NEITHER CONSPIRACY
NOR INTENT NECESSARILY INVOLVED
THE USE OF THREAT, PHYSICAL
FORCE OR VIOLENCE.

WE TALKED ABOUT -- IF WE
ACCEPT THE LOWER COURT DECISION
IN YOUR ARGUMENTS, THAT WOULD
ALSO PRECLUDE THE MORE CLEAR
BATTERY, WHERE SOMEBODY PUNCHES
A LAW ENFORCEMENT OFFICER IN THE
FACE, BUT DOESN'T CAUSE SERIOUS
BODILY INJURY, THEN THAT WOULD
NOT BE INCLUDED IN HERE, IS
THAT CORRECT?

THAT'S CORRECT, YOUR HONOR,
THAT'S THE SAME RESULT UNDER
PERKINS.

ATTEMPTED TRAFFICKING OR
TRAFFICKING IN COCAINE IS
EXCLUDE, EVEN IF GUNS ARE USED
AND GUNS ARE SHOT.

THAT'S THE NATURE OF THE
CATEGORICAL CAP.

WELL, ONE OF THE ELEMENTS
ENCOMPASSED WITHIN BATTERY
INCLUDES STRIKING OR PHYSICAL
FORCE.

INCLUDES INTENTIONAL --
BUT IT DOESN'T RISE TO THE
LEVEL OF SERIOUS BODILY INJURY
TO MAKE IT AN AGGRAVATED
BATTERY, BUT YOU CAN HAVE
VERY -- A VERY HARD FORCE, MORE
THAN SIMPLE TOUCHING,
ENCOMPASSED WITHIN THE CRIME OF
BATTERY, AND BATTERY ON A LAW
ENFORCEMENT OFFICER.

SURE, THAT'S A POSSIBILITY,
YOUR HONOR.

YOU ALSO CAN HAVE A LIGHT TOUCH,
NOT A DIRECT TOUCH UPON THE
PERSON, FOR EXAMPLE, IF THE
PERSON -- SAY THE POLICE OFFICER
WAS WEARING A CAP --
WE SPENT THE WHOLE TIME
TALKING ABOUT LIGHT TOUCHING.
I WANT TO MAKE THE POINT IS THAT
THE STATE ARGUED, ARE THE
REASONS FOR THE FELONY OFFENSE
AGAINST LAW ENFORCEMENT, IS YOU
DON'T WANT PEOPLE -- YOU NEED TO
PROTECT LAW ENFORCEMENT OFFICERS
FROM PEOPLE STRIKING, CORRECT?
AND IF WE ACCEPT YOUR ARGUMENT,
THEN THOSE WOULD ALSO NOT BE
ABLE TO BE INCLUDED IN THESE
OFFENSE.

WE COULD ALL AGREE THAT LAW
ENFORCEMENT OFFICERS SHOULD BE
PROTECTED, YOUR HONOR.
THE LEGISLATURE HAS DONE THAT,
WITH THE BATTERY ON A LAW
ENFORCEMENT OFFICER STATUTE.
HERE'S WHAT THE LEGISLATURE HAS
DETERMINED, IS THAT THE
PUNISHMENT FOR BATTERY SHOULD BE
QUINN TOMBED FROM 364 DAYS TO
FIVE YEARS FOR BATTERY ON A LAW
ENFORCEMENT OFFICER.
IF THE LEGISLATURE HAS NOT
SOUGHT IN ITS WISDOM TO MAKE
THAT A POSSIBLE PREDICATE FOR A
LIFE SENTENCE, WHERE IT COULD
INVOLVE JUST A LIGHT TOUCHING,
AND THAT RESPECTFULLY IS A
DECISION FOR THE LEGISLATURE TO
MAKE.

LET ME ASK YOU THIS.
HOW DOES IT FACTOR INTO OUR
ANALYSIS THAT THIS CASE IS HERE
ON POST CONVICTION RELIEF?
I DIDN'T SEE THAT THE 3rd D.C.A.
REALLY FOCUSED ON THAT ASPECT OF
THE PROBLEM, SO THERE'S NO
ANALYSIS WHATEVER ABOUT WHY YOU
DESERVE OF RELIEF, EVEN IF
YOU'RE CORRECT AND IT MAY BE
TRUE THAT YOU DO, BUT SINCE THEY
DIDN'T CONDUCT THE ANALYSIS, I
DON'T KNOW WHERE THAT LEADS US.
WELL I'M NOT SURE BECAUSE
THAT OBVIOUSLY IS NOT AN
ARGUMENT RAISED BY THE STATE

EITHER.

BASICALLY HE SHOULD BE ENTILED TO RELIEF BY A COUPLE OF REASONS, ONE, INEFFECTIVE AVE STANDS OF COUNSEL, FOR FAILING TO OBJECT TO PREDICATES THAT AREN'T PREDICATES, NUMBER TWO, YOU CAN'T AGREE TO -- HE AFFIRMATIVELY ADVISED THE DEFENDANT THAT HE DID HAVE THREE PREDICATES, AN THEY STIPULATED TO THAT.

THAT'S CORRECT.

AND THAT SIMPLY WAS A RUN-IN. WHAT WAS THE LAW IN FLORIDA AT THE TIME?

THAT IS IN MY RESPONSE TO THE 3rd DISTRICT.

WAS THERE ANY LAW AT THE TIME OF THAT STIPULATION OTHER THAN THE STATUTES THEMSELVES?

WELL, ITS STIPULATION WAS -- THE STIPULATION WAS JUST IN 2000, YOUR HONOR, THAT'S WHEN THE TRIAL TOOK PLACE.

SO IT WAS BEFORE JOHNSON, I BELIEVE.

IT WAS BEFORE JOHNSON, THAT'S CORRECT.

AND IT WAS BEFORE SEVERAL OF THE CASES THAT ARE IN CONFLICT HERE.

CORRECT.

[INAUDIBLE]

RIGHT.

RIGHT, THAT WAS THE SECOND ARGUMENT I MADE TO THE 3rd DISTRICT, IN ANY EVENT, YOU CAN'T STIPULATE TO OR AGREE TO A SENTENCE THAT IS CLEARLY ILLEGAL, IN ABSENCE OF PROPER PREDICATES, VIOLENT CAREER SENTENCING.

YOU HAVE TO BE CONVICTED AS A VIOLENT CAREER CRUMBNAL OR ISN'T TENSED AS A VIOLENT CAREER CRIMINAL.

[INAUDIBLE]

I'M NOT SURE, YOUR HONOR.

THOSE ARE THE ONLY ONES THAT WERE LISTED BY THE STATE.

I THINK THAT WOULD BE REQUIRED UPPED THE LAW, BECAUSE -- UNDER THE LAW,

BECAUSE -- HAD DEFENSE COUNSEL
OBJECTED, I THINK, THEN YOU
COULDN'T DO THAT.

WELL, THE 3!!!! 3rd DISTRICT DEALT
WITH THIS UNDER 3.850, CORRECT?
THAT'S CORRECT.

THEY DIDN'T DEAL WITH IT AS
AN ILLEGAL.

NO, YOUR HONOR.

3.850 WAS TWO YEARS AFTER
MR. HEARNS' CONVICTION BECAME
FINAL UNDER HIS APPEAL.

[INAUDIBLE]

YES, YOUR HONOR.

I'M ACTUALLY QUITE SURPRISED BUT
NONE OF THE OPINIONS THAT THE
STATE RELIES UPON HAVE TALKED
ABOUT AND HAVEN'T EVEN MENTIONED
PERKINS.

SO IT WASN'T RAISED BY DEFENSE
COUNSEL IN EITHER OF THOSE
CASES.

PERKINS, TALKING ABOUT THE
DIFFERENT FACTS AND THE LIGHT
TOUCHING OR SHOOTING WITH WATER
OR THE TOUCHING OF THE HAIR,
WE'RE NOT LOOKING INTO THE SAME
FACTS, WE'RE TESTING WHETHER THE
ELEMENTS NECESSARILY INVOLVE THE
PHYSICAL FORCE OF VIOLENCE.
THERE'S NOTHING IMPROPER WITH
THAT.

THAT'S HOW YOU TEST IT.

YOU LOOK TO SEE IF THERE'S
EXAMPLES WHERE IT DOESN'T
INVOLVE THE USE OF PHYSICAL
FORCE OR VIOLENCE.

[INAUDIBLE]

RIGHT.

I THINK HIS ARGUMENT IS THEY DO
QUALIFY.

MY ARGUMENT IS THEY DON'T
QUALIFY.

THERE'S A --

[INAUDIBLE]

OH, IT CLEARLY WOULD BE A
BATTERY.

IT'S AN INTENTIONAL TOUCHING,
BUT --

[INAUDIBLE]

WELL, HOW WOULD YOU DEFINE
PHYSICAL FORCE?

PHYSICAL FORCE, I WOULD GO
UPON THE DEFINITION CONTAINED IN

PEOPLE V. FLYNN, THE NEW YORK
CASE I CITED, IT IS POWER OR
STRENGTH OR VIOLENCE AGAINST A
BODY.

WE DON'T HAVE THAT HERE, YOUR
HONOR.

OR AT LEAST WE POTENTIALLY DON'T
HAVE THAT HERE UNDER THE BATTERY
STATUTE.

SO YOU WOULD READ THE STATUTE
WHERE IT SAYS USE OR THREAT OF
FORCE OF PHYSICAL VIOLENCE.

IT WOULD IN ESSENCE READ THE
SAME AS FORCE AND VIOLENCE.

FORCE AND VIOLENCE ARE
EQUIVALENT.

YOU WOULD READ PHYSICAL FORCE TO
BE EQUIVALENT TO THE TERM
VIOLENCE?

NO, PHYSICAL FORCE WOULD BE
ENCOMPASSED IN VIOLENCE, BUT IT
COULD HAVE A SEPARATE DID HE
HAVE NOTION.

-- DEFINITION.

THE DEFINITION I JUST READ IS
POWER OR STRENGTH OR VIOLENCE.

THE SAME AS HERE, IT'S PHYSICAL
FORCE OR VIOLENCE.

WHAT DO WE DO WITH THE FACT
THAT THE 3rd DISTRICT DID NOT
MAKE A DETERMINATION ON WHETHER
COUNSEL WAS INEFFECTIVE OR NOT?

I BELIEVE IMPLICITLY, THEY
DID, YOUR HONOR.

WHAT ELSE CAN THERE BE.

WELL, IT DOESN'T SAY THAT.

THAT'S CORRECT, YOUR HONOR.

SO THERE HASN'T BEEN ANY
DETERMINATION ON ISSUE OF
PREJUDICE.

WELL, SPOIS R!!!!!!!!!!!!!! I SUPPOSE YOUR HONOR,
YOU CAN DO ONE OF TWO THINGS,
YOU COULD DECIDE THE CASE ON
YOURSELF OR REMAND IT BACK TO
DETERMINE IF IT IS INEFFECTIVE.

BUT IF YOU DETERMINE THE BATTERY
ON A LAW ENFORCEMENT IS NOT A
PREDICATE, THEN IT SEEMS CLEAR
THAT IT WAS INEFFECTIVE AND THAT
IT WAS A PREDICATE.

[INAUDIBLE]

YES YOUR HONOR, IT'S A POST
CONVICTION --

[INAUDIBLE]

I THINK YOU COULD DO THAT
YOUR HONOR MPL BASICALLY FOR ALL
THREE REASONS THAT THE COURT HAS
ARTICULATED, THE FACT THAT THE
SUM.

MATTER IS -- SIMPLE MATTER IS A
MISDEMEANOR AND SEEING A LAW
ENFORCEMENT OFFICER AS OPEN TO
THE VIOLENCE, THE FACT THAT
UNDER PER KUNZ, FORCE OF
VIOLENCE IS NOT NECESSARILY AN
ELEMENT OF TOUCHING AND THE FACT
THAT THE LEGISLATURE HAS CHOSEN
TO LIST OTHER FORMS OF BATTERY,
FELONY BATTERY, HAS NOT CHOSEN
TO LIST THIS FORM OF BATTERY AS
A PREDICATE FOR THE DCC
SENTENCING, FOR ALL THOSE
REASONS, THE RULING BELOW IS
CORRECT.

ANY OTHER QUESTIONS?

I HAVE NOARP QUESTION.

DO YOU AGREE WITH THE STATE TO
THE EXTENT THAT THE STATE ARGUES
THAT UNDER PERKINS, THE THIRD
D.C.A. DECISION WAS WRONG IN
SAYING THAT UNLESS THE STATE
COULD PROVE FACTS AT A HEARING
THAT THERE WAS FORCIBLE ACTION
INVOLVED IN THIS CASE, THEN
IT -- IT COULDN'T USE THIS AS A
PREDICATE, IN OTHER WORDS, IT
WOULD DEPEND ON THE FACTUAL
CIRCUMSTANCES OF THE PARTICULAR
CASE, ACCORDING TO THE 3rd!!!!!!
3RD D.C.A.?

I DON'T THINK THAT THAT WAS
WHAT THE 3rd D.C.A. WAS SAYING,
YOUR HONOR.

BASICALLY, THERE ARE TWO
DIFFERENT PRONGS FOR BATTERY.

WELL, IT SAYS THAT THE STATE
HAS NOT SHOWN WITH ANY
CERTAINTY, HAS NOT SHOWN AT ALL
IN FACT WHETHER THE BATTERY ON A
LAW ENFORCEMENT OFFICER WAS A
MERE UNWANTED TOUCHING, OR
CAUSED BODILY HARM.

LEAVING OPEN THE FACT THAT IF
THE STATE PROVED THAT A HEARING,
THAT THERE WAS BODILY HARM IN
THIS CASE, THEN THEY COULD USE
IT AS A PREDICATE.

RIGHT.

I AGREE WITH YOU THAT THE --
THAT THAT SENTENCE IS UNCLEAR.
BUT I DON'T THINK THEY'RE
REFERRING TO A FACTUAL HEARING.
WHAT THEY'RE REFERRING TO A
ILLEGAL.

IF IT CAN BE PROVEN THROUGH THE
RECORDS THAT THE BATTERY IS
COMMITTED UNDER THE PRONG THAT
INVOLVES INTENTIONALLY CAUSING
BODILY HARM TO ANOTHER PERSON --
OH, THEY'RE TALKING ABOUT A
OR B?

EXACTLY YOUR HONOR.

LET ME ASK YOU THIS.

WHAT IF THEY HAD CHARGED THE
INFORMATION OR THE CONVICTION ON
THE BATTERY, HAD SPECIFICALLY
SAID THAT HE WAS CONVICTED UNDER
784.031B, WHICH SAYS CAUSED
BODILY HARM, WOULD THAT NOW
BRING IT INTO THE FORCIBLE
FELONY?

I THINK THAT'S WHAT THE 3rd!!!!!!
3RD DISTRICT WAS GETTING AT,
EXACTLY.

WOULD YOU AGREE WITH THAT?

I WOULD HAVE TO BECAUSE
BODILY HARM IS BODILY HARM AND
BODILY HARM INVOLVES THE USE OF
PHYSICAL FORCE OR VIOLENCE BUT
THAT WASN'T THE CASE HERE.

MR. HEARNS WAS CHARGED WITH
INTENTION FAMILY STRIKING
ANOTHER PERSON.

-- INTENTIONALLY STRIKING
ANOTHER PERSON.

[INAUDIBLE]

I THINK YOUR HONOR IS RIGHT.
I QUITE FRANKLY HAVEN'T THOUGHT
ABOUT IT BECAUSE IT WANT AN
ISSUE RAISED HERE.

ON THIS DEFINITION IT SALES
THE USE OF FORCE OR THE THREAT
OF FORCE.

THERE'S ALSO THE STATUTE THAT
MAKES THE FELONY COMMIT AN
ASSAULT ON A LAW ENFORCEMENT
OFFICER, WHICH DOES NOT, WHICH
IS THE THREAT OF FORCE.

SO WOULD YOUR ARGUMENT ALSO
APPLY TO THAT OR NOT?

HOW DO YOU DIFFERENTIATE THE
TWO?

I'M SAYING REQUIRING THE ACTUAL FORCE, IT SAYS USE OR THREAT OF FORCE, SO IF WE ACCEPT YOUR ARGUMENT THAT THE SIMPLE BATTERY, THE ONLY DIFFERENCE IS IT'S A LAW ENFORCEMENT OFFICER, WHICH THE SAME ANALOGY APPLIES TO ASSAULT, CORRECT?

I THINK IT WOULD BE A HARDER CASE IF YOU HAD AN ASSAULT, BECAUSE THE ASSAULT IS THREAT TO DO VIOLENCE TO ANOTHER PERSON, WHEREAS A TOUCHING DOESN'T THREATEN TO DO VIOLENCE.

TOUCHING MAY BE NOTHING MORE THAN THAT.

I'M SORRY, OFFICER, LET ME BACK AWAY FROM YOU.

SO AN ELEMENT YOU OF ASSAULT APPEARS TO BE VIOLENCE OR THREAT TO DO VIOLENCE WHEREAS THE TOUCHING DOES NOT INCLUDE THAT THREAT.

WITH OUR ASSISTANCE, YOU HAVE NOW USED ALL YOUR TIME.

THANK YOU FOR VERY MUCH.

THANK YOU, YOUR HONOR.

YOU HAVE A COUPLE OF MINUTES FOR REBUTTAL.

THANK YOU, YOUR HONOR.

AS TO THE LEGISLATIVE INTENT QUESTION, THE STATE WOULD POINT OUT THAT IT'S CLEAR THAT THE LEGISLATURE AGREES WITH THIS COURT'S DECISION IN PERKINS.

THE LEGISLATURE -- PERKINS WAS DECIDED IN 1991, THE LEGISLATURE HASN'T SEEN FIT TO ALTER PERKINS IN ANY WAY SINCE IT WAS DECIDED.

OVER THE YEARS, THE LEGISLATURE OBVIOUSLY HAS SHOWN IT DOESN'T HAVE A RELUCTANCE TO AMEND CRIMINAL STATUTES DUE TO DECISIONS OF THIS COURT, SO THEREFORE THE STATE WOULD SUBMIT THAT IT CAN BE REASONABLY PRESUMED THAT THE LEGISLATURE AGREES WITH PERKINS --

[INAUDIBLE],,

[INAUDIBLE]

CORRECT.

I DON'T THINK IT'S PROPER TO GO ON A CASE BY CASE BASIS OR GO BEYOND THE CONVICTIONS HERE.

[INAUDIBLE]

WELL, YOUR HONOR, IN THIS PARTICULAR CASE, JUST WITHOUT MEANING TO CONCEDE ANYTHING AS FAR AS WHAT'S GOING TO HAPPEN IF YOUR HONORS DO DECIDE TO SEND IT BACK, I MEAN, I THINK, YOU KNOW, WE HAVE A MOTION FOR POST CONVICTION RELIEF HERE, THERE WAS NO HEARING BELOW AS FAR AS ANY INEFFECTIVE AVE STANDS, SO -- ASSISTANCE, SO I MEAN AT THIS POINT, AND SINCE THE RECORD IS AS IT IS INsofar AS THE LACK OF INFORMATION ABOUT THIS -- THE FACTS OF THIS, I MEAN, THE STATE STRENGTHOUSLY BELIEVES WE SHOULDN'T GET IN TO THE FACTS, BECAUSE WHAT IT'S DOING, IT'S GOING TO CREATE A LOT OF MINI TRIALS AND THESE JUDGES ARE GOING TO HAVE TO GO BACK YEARS AFTERWARDS.

[INAUDIBLE]

[INAUDIBLE]

WELL, YOUR HONOR, IF HE DOESN'T QUALIFY AS A FORCIBLE FELONY, I THINK THE LAW IS RIGHT, AS I UNDERSTAND THE LAW, I GUESS IT WOULD BE ILLEGAL.

WELL, IT SEEMS LIKE YOU CONCEDE THE ISSUE OF IF WE HOLD AGAINST YOU ON THE LAW, THAT THIS WAS EITHER INEFFECTIVE AVE STANDS OR AN ILLEGAL -- ASSISTANCE OR AN ILLEGAL SENTENCE, BECAUSE YOUR BRIEF DOESN'T ARGUE THAT EVEN IF THIS WAS ILLEGAL, EVEN IF A BATTERY IS NOT A PREDICATE OFFENSE, THEY DON'T DEMONSTRATE THE ELEMENTS FOR INEFFECTIVE ASSISTANCE.

YOU DON'T ARGUE THAT.

WELL, THE STATE WOULD NOT CONCEDE THAT, YOUR HONOR. YOU'VE CONCEDED IT BY NOT ARGUING IT.

IT'S NOT PART OF YOUR BRIEF.

RIGHT, YOUR HONOR.

THE INEFFECTIVE AVE STANDS QUESTION, THE REASON I DIDN'T, IT WAS REALLY NOT BEFORE THE COURT.

WELL THEN YOU CONCEDED IT

THERE TOO.

YOU COULD HAVE MADE THE ARGUMENT EVEN THOUGH IT'S NOT A PREDICATE OFFENSE, THIS DOESN'T FULFILL THE PREDICATES FOR INEFFECTIVE ASSISTANCE, YOU COULD HAVE MADE THAT ARGUMENT BUT YOU DIDN'T.

WE CAN ONLY RESPOND TO IT'S ALLEGED BY THE DEFENDANT.

THE DEFENDANT DIDN'T ALLEGE INEFFECTIVE ASSISTANCE.

WHAT DID HE ALLEGE?

HE ALLEGED BASICALLY ILLEGAL SENTENCES.

OK.

SO THEN YOU CONCEDED ILLEGAL SENTENCE BECAUSE YOU DIDN'T ARGUE THAT IT WOULD BE AN ILLEGAL SENTENCE.

YOU CONCEDED THAT ISSUE.

NO, WE DIDN'T CONCEDE ILLEGAL SENTENCE.

OUR RESPONSE IN THE TRIAL COURT, WE FOUND A WRITTEN RESPONSE.

DID YOU ARGUE IT IN YOUR BRIEF IN THIS COURT THAT IT WOULD NOT BE AN ILLEGAL SENTENCE?

WELL, NO, YOUR HONOR.

I GUESS --

THE OPINION THAT WE'RE DEALING WITH WAS ONE ON REHEARING.

PARDON ME, YOUR HONOR?

WE'RE DEALING WITH AN OPINION OUT OF THE 3rd DISTRICT WHICH WAS ON REHEARING, RIGHT?

CORRECT, YOUR HONOR.

DID THEY ISSUE A PRIOR OPINION AND THEN WITHDRAW IT?

YES, YOUR HONOR.

THEY I NUCIALLY AFFIRMED -- INITIALLY AFFIRMED.

WITHOUT AN OPINION.

RIGHT.

RIGHT.

THANK YOU.

WITH OUR ASSISTANCE, YOU'VE USED YOUR TIME.

WE THANK BOTH THE PARTIES FOR THEIR EXCELLENT ARGUMENTS AND WE'LL TAKE THE CASE UNDER ADVISEMENT.

THANK YOU.