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State of Florida v. Steven Paul

LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING LADIES AND GENTLEMEN, AND WELCOME TO THE FIRST ORAL ARGUMENT OF 2006. THE FIRST CASE ON THIS MORNING'S DOCKET IS STATE OF FLORIDA VERSUS STEVEN PAUL. THE PARTIES READY? YOU MAY PROCEED.

GOOD MORNING TO ALL OF YOU. MY NAME IS JEANINE GERMANOWICZ. I AM HERE TODAY TO REPRESENT THE STATE OF FLORIDA IN THIS MATTER, AND LET ME TAKE A MOMENT TO GIVE YOU A BRIEF SUMMARY. VERY BRIEFLY, I WILL TELL YOU WHAT HAPPENED. THE DEFENDANT, MR. PAUL, A 43-YEAR-OLD MAN AT THE TIME, THE VICTIM A 13-YEAR-OLD BOY, THE VICTIM INVITED HIM IN. THEY ARE STANDING IN THE LIVING ROOM. AFTER CONVERSATION, MR. PAUL REACHES OVER AND TOUCHES THE VICTIM BY KISSING HIM ON THE NECK. THEN HE PROCEEDED TO TOUCH THE VICTIM'S GENITAL AREA. THEN MR. PAUL SEES THAT THERE IS AN EMPTY BEDROOM AND HE SUGGESTS THAT THEY RELOCATE TO THAT BEDROOM, SO THERE WOULD BE LESS LIKELY TO BE HAPPENED UPON BY SOMEBODY ELSE. THEY MOVED IN TO THE BEDROOM. MR. PAUL PROCEEDED TO EXPOSE HIS GENITALS TO THE VICTIM. AND THEN HE PROCEEDED TO RUB HIS PENIS ON THE VICTIM'S STOMACH. AFTER WHICH POINT, ANYTHING FURTHER CAN HAPPEN. THE VICTIM AND MR. PAUL ARE DISCOVERED BY THE VICTIM'S SISTER AND HER BOYFRIEND, AND THOSE ARE REALLY ALL OF THE PERTINENT FACTS. THE STATE END UP CHARGING THE VICTIM WITH SIX COUNTS OF LEWD AND LASCIVIOUS CRIMES.

DO YOU DISPUTE THAT THERE WERE TWO --

DO YOU DISPUTE THAT THERE WERE TWO SEPARATE INCIDENTS HERE? ONE THAT TOOK PLACE IN THE FOYER AND -- TOOK PLACE IN THE FOYER AND ONE IN THE BEDROOM?

READ THAT PORTION OF THE FOURTH DC A'S OPINION. THERE ARE TWO CRIMINAL EPISODES, ESSENTIALLY, BECAUSE THERE WAS A SEPARATE ISSUE GOOD THE LIVING ROOM AND A SEPARATE ISSUE BETWEEN WHAT HAPPENED IN THE BEDROOM. THAT OPINION.

CHIEF JUSTICE: MY UNDERSTANDING IS THAT THE DEFENDANT DOES NOT SEEM TO DISPUTE THAT, BUT THE STATE, AS I AM UNDERSTANDING IT, HAS TAKEN EACH AND EVERY SEPARATE ACT FROM THE KISSING TO THE TOUCHING TO THE EXHIBITION, AND CHARGED THOSE AS SEPARATE COUNTS, AND IT IS YOUR POSITION THAT EACH OF THOSE ARE SEPARATE CRIMES?

THAT'S CORRECT. AND THERE IS ABSOLUTELY NO REASON WHY WE CAN'T DO THAT, AND THE REASON FOR THAT IS, IN 1988, THE LEGISLATURE ISSUED A SECTION 775.0212 SUBSECTION 1, WHICH IS A DOUBLE JEOPARDY STATUTE. IN THAT STATUTE, THEY ABOLISHED THE SINGLE TRANSACTION RULE, AND BASICALLY WHEN THEY DID THAT, THEY SAID, QUOTE, WHOEVER IN THE COURSE OF ONE CRIMINAL TRANSACTION OR EPISODE, COMMITS AN ACTOR ACTS WHICH CONSTITUTE ONE OR MORE SEPARATE CRIMINAL OFFENSES UPON CONVICTION AND ADJUDICATION OF GUILT, SHALL BE SENTENCED SEPARATELY FOR EACH CRIMINAL OFFENSE. NOW --

CHIEF JUSTICE: WE HAVE ONLY A SHORT TIME. LET'S GO TO 5-A AND 6-A, THAT IS THE LEWD OR LASCIVIOUS MOLESTATION AND LEWD OR LASCIVIOUS CONDUCT. WHAT IS IT THAT 6-A HAS

THAT 5-A DOES N'T HAVE ?

WELL --

CHIEF JUSTICE: OR VICE VERSA. IN OTHER WORDS, IT SEEMS TO ME THAT ANY VIOLATION OF 5- A WOULD NECESSARILY BE A VIOLATION OF 6-A.

WHICH MIGHT PERHAPS BE RELEVANT AS THE TOUCHING THAT WAS CHARGED UNDER 5-A WAS THE SAME TOUCHING CHARGED UNDER 6-A, BUT IN THIS CASE THEY ARE COMPLETELY DIFFERENT TOUCHING AND WE HAVE TO GO BACK AND LOOK AT WHAT HAD ENDED . THE LEGISLATURE AMENDED THE STATUTE IN 1999.

WOULDN'T YOU AGREE THAT THE ELEMENTS ARE THE SAME ? THAT THE ELEMENTS OF BOTH OF THOSE SECTIONS --

I WOULD AGREE THAT ONE OF THE ELEMENTS , THE CONDUCT COULD STEM , I AM SORRY. ONE OF THE ELEMENTS OF MOLESTATION COULD BE SUBSUMED UNDER THE ELEMENT FOR CONDUCT. SUCH THAT , IF IT WAS THE SAME ACT OF TOUCHING , THEN THERE MIGHT HAVE BEEN A DOUBLE JEOPARDY VIOLATION HERE, BUT IN THIS CASE WE HAVE CHARGED DIFFERENT ACTS OF TOUCHING .

CHIEF JUSTICE: IS IT YOUR POSITION IN THIS CASE THAT , IF THE DEFENDANT HAD KISSED ONE SIDE OF THE NECK AND THEN AN OTHER SIDE AND THEN BACK TO THE SAME OTHER SIDE AND BACK AGAIN , BACK AGAIN, BACK AGAIN , BACK AGAIN SIX TIMES , THOSE WOULD BE SIX DIFFERENT CRIMES ?

THAT COULD VERY WELL BE SO, YES , AND THE REASON FOR THAT IS BECAUSE YOU CAN COMMIT, YOU CAN CONVICT A SEPARATE ACT, EVEN IF THEY ARE COMMITTED DURING THE SAME CRIMINAL TRANSACTION . NOW , YOU HAVE TO REMEMBER THAT WHAT HAD ENDED IS , UP UNTIL 1999 , THE STATUTE IS A GENERAL STATUTE , OR A HODGEPODGE, COLLECTING ALL OF THE LEWD AND LASCIVIOUS OFFENSES UNDER A GENERAL HEADING , AND IN 1999 , THE LEGISLATION -- LEGISLATURE SEES THE TREND IN THE CASE LAW AND THEY RECALL THAT THE SINGLE TRANSACTION RULE HAS BEEN ABOLISHED , AND THEY SAY WE NEED TO MAKE IT CLEARER WHAT OUR LEGISLATIVE INTENT WAS, WHICH IS A PENALTY FOR EACH SEPARATE ACT THAT OCCURS DURING THE COURSE OF THE TRANSACTION , REGARDLESS OF WHETHER IT IS A SINGLE TRANSACTION OR NOT.

WELL , BEFORE -- BEFORE WE GET THERE , THOUGH , WHAT IS, WHERE ARE WE , IN OUR DOUBLE JEOPARDY ANALYSIS? DO WE ACTUALLY LOOK , NOW , AT THE CHARGING DOCUMENT , TO DETERMINE WHETHER A CRIME CONTAINS DIFFERENT ELEMENTS, OR DO WE ONLY LOOK TO THE STATUTE TO DETERMINE WHETHER THERE ARE DIFFERENT ELEMENTS ?

WELL , BY ANALOGY , THERE ARE SEVERAL OTHER STATUTES WHERE YOU CAN HAVE MISDEMEANOR AND FELONY OFFENSES, BASED ON THE SAME ACT , AND THERE IS NOTHING , THERE IS NOTHING WRONG WITH CHARGING UNDER BOTH OF THOSE SUBSECTIONS , IF IT WAS EXACTLY THE SAME ACT , BUT , OKAY, THE COCAINE , TRAFFICKING IN COCAINE , AND YOU ARE ALSO POSSESSING THE SAME COCAINE, AND THE ONLY DIFFERENCE BETWEEN TRAFFICKING IN COCAINE , YOU REQUIRE AN AMOUNT MORE THAN 20 GRAMS OF COCAINE , POSSESSION OF COCAINE IS UNDER 20 GRAMS, BUT IT IS EXACTLY THE SAME ACT AND THE SAME POSSESSION OF COCAINE , THERE IS A DOUBLE JEOPARDY VIOLATION HERE, BUT THAT DOESN'T MEAN THAT THE STATUTES, THEMSELVES, ARE AUTOMATICALLY DOUBLE JEOPARDY VIOLATIONS. IN THOSE SITUATIONS IT DEPENDS ON THE FACTS OF THE CASE. THIS IS THE SAME THING IN THIS SITUATION. IT DOES DEPEND ON THE FACTS OF THE CASE, BECAUSE WE HAVE CHARGED TWO SEPARATE TOUCHING. THEY ARE NOT THE SAME TOUCHING . THEREFORE THERE IS NO DOUBLE JEOPARDY VIOLATION IN THAT SENSE.

WHAT ABOUT UNDER THAT SITUATION? THE FACTS OF THIS CASE INDICATE THAT THIS THE DEFENDANT -- THE DEFENDANT EXPOSED HIS PENIS AT THE TIME THAT HE, ALSO, RUBBED IT AGAINST THE VICTIM'S STOMACH, SO, UNDER THOSE CIRCUMSTANCES, DO THOSE TWO ACTS, THE ONE OF EXHIBITION AND THE ONE OF CONDUCT, MERGE?

NO. AND THE REASON FOR THAT, I WILL REFER YOU TO ANOTHER EXAMPLE. SOMEBODY WHO IS CHARGED WITH POSSESSION OF A FIREARM BY A CONVICTED FELON AND SOMEBODY WHO IS, ALSO, CHARGED WITH MURDERING SOMEBODY BY SHOOTING THEM WITH THAT FIREARM AFTER DISPLAYING IT TO THEM.

ISN'T THAT BECAUSE OF WHAT THE TWO STATUTES ARE AIMED AT, THAT IS THAT THEY ARE AIMED IN THAT SITUATION, WITH A FIREARM, TWO DIFFERENT EVILS, ONE BEING A FELON MERELY POSSESSING A FIREARM. HERE THE WHOLE IDEA IS THAT WE DON'T WANT DEFENDANTS MOLESTING CHILDREN, BUT THE IDEA OF FOCUSING ON EVERY SINGLE PART OF THE ACT, FROM TAKING THE PENIS OUT TO, IF IT WAS PUT ON THE STOMACH AND THEN IF IT WAS MOVED TO ANOTHER PART OF THE BODY, SEEMS -- MOVED TO ANOTHER PART OF THE BODY, SEEMS THAT WE WOULD HAVE A LEWD REDUCE SITUATION OF 100 DIFFERENT ACTS FOR ONE SPECIFIC EVIL, SO HOW IS THAT? I DON'T SEE YOUR ANALOGY BEING A GOOD ONE, BECAUSE I THINK HERE THESE ARE ALL AIMED AT THE SAME EVIL. WHAT IS YOUR RESPONSE TO THAT?

WELL, THE FACT THAT THEY ARE ALL A PART OF THE SAME STATUTE AT THIS POINT, MAYBE A LITTLE CONFUSING, BECAUSE REALLY WHAT THEY ARE IS SEPARATE CRIMES. AND THE WAY THAT YOU SEE THAT IS THAT YOU SEE THE LEGISLATURE HAS SEPARATED THE CRIMES. THEY HAVE GIVEN THEM FOUR DISTINCT NAMES. THEY HAVE GIVEN THEM FOUR DISTINCT DEFINITIONS, THEY HAVE GIVEN THEM DISTINCT PENALTIES DEFINITELY, AND DEPENDING ON THE AGE OF THE VICTIM, IF IT RANGES ANYWHERE FROM A FIRST-DEGREE FELONY TO A THIRD-DEGREE MISC.

CHIEF JUSTICE: IS THAT BECAUSE THE LEGISLATURE WANTED WHATEVER THE HIGHEST CRIME WAS TO BE CHARGED, SO IF SOMEBODY EXHIBITED THEIR PRIVATE PART, AND THAT IS ALL THAT HAD ENDED, THAT WOULD BE A CRIME. THEY DIDN'T, THEY WANTED TO MAKE SURE THAT ANY TYPE OF LEWD OR LASCIVIOUS CONDUCT WAS CHARGED AND PUNISHED, BUT THE IDEA OF THIS MULTIPLE HEAPING FOR ONE SPECIFIC EPISODE, I AM NOT SURE, WHERE WE GET THE JUMP TO THAT IN THIS, JUST BECAUSE OF THE CHANGE IN THE LEGISLATION.

WELL, AGAIN, YOU HAVE TO GO BACK TO THE FACT THAT THE SINGLE TRANSACTION RULE WAS ABOLISHED IN 1998 BY THE ENACTMENT OF 775.02 SUBSECTION 4, AND THAT IS SPECIFICALLY SAYING THAT THE SEPARATE ACT, EVEN IF THEY ARE COMMITTED DURING THE COURSE OF A SINGLE TRANSACTION, CAN BE PUNISHED SEPARATELY.

THE DISTRICT COURT DID NOT RELY ON THE SAME TRANSACTION RULE, DID IT?

WELL, YES, THEY DID. WHAT HAD ENDED, WELL, THEY RECOGNIZED THAT THERE WAS A TEMPORAL AND SPATIAL BREAK BETWEEN THE ACTS THAT OCCURRED IN THE LIVING ROOM AND THE ACTS THAT OCCURRED IN THE BEDROOM, BUT WHAT THEY DIDN'T RECOGNIZE WAS THAT THE ACT IN THE LIVING ROOM, THE TWO ACTS IN THE LIVING ROOM WERE, ALSO, SEPARATE ACTS THAT WERE CHARGED UNDER SUBSECTIONS OF THE STATUTE.

SO IS THAT YOUR CLAIM HERE, IS THAT THIS DISTRICT COURT, NOW, HAS RETURNED TO ENFORCING THE SAME TRANSACTION RULE THAT THE LEGISLATURE ABOLISHED? IS THAT, REALLY, THE GIST OF YOUR CLAIM HERE?

THE GIST, YES, AND I WAS GOING TO POINT OUT THE LEGISLATURE HAD NOTICED THE TREND OF CASES WHICH SEEMS LIKE A TREND BACK TO THE SINGLE TRANSACTION RULE, EVEN THOUGH THAT RULE IS ABOLISHED IN 775.021, SO THE LEGISLATURE BASICALLY SAID, IN 1999, THAT WE

ARE WE GOING TO MAKE IT VERY CLEAR THAT THEY SUFFERED AND NEED TO BE PUNISHED SEPARATELY AND THAT IS WHEN THEY AMENDED THE STATUTE.

WHY IS THE DISTRICT COURT, THE DISTRICT COURT ACTUALLY, ITS HOLDING WAS WE DEEM THE ACTS LEADING UP TO AND OCCURRING, AS PART OF THE MOST SERIOUS IN EACH ROOM, TO BE PERMISSIVE, LESSER OFFENSES? WHY IS THAT INCORRECT?

WELL, IF YOU LOOK AT THE STATUTE, YOU WILL REALIZE THAT, REALLY, THEY ARE RELYING ON ANY LESSER-INCLUDED OFFENSES IN THE STATUTE. THEY ARE ROUGHLY EQUAL OFFENSES. WITH, PERHAPS, THE EXCEPTION OF THE MOLESTATION AND THE CONDUCT. SUBSECTION OF THE STATUTE WHICH, UNDER SOME CASES IT MIGHT BE POSSIBLE TO COMMIT DOUBLE JEOPARDY, BY CHARGING SOMEBODY UNDER MOLESTATION AND UNDER CONDUCT, BUT ONLY IF THEY ARE COMMITTING EXACTLY THE SAME ACT OF TOUCHING. FOR EXAMPLE IF THEY CHARGED THE DEFENDANT UNDER MOLESTATION PART OF THE STATUTE AND UNDER THE CONDUCT PART OF THE STATUTE, FOR THE SINGLE ACT OF TOUCHING HIS PENIS, I AM SORRY, OF TOUCHING THE VICTIM'S PEEPIES, GENITAL AREA, THEN ON -- PENIS, GENITAL AREA, THEN THAT MIGHT BE DOUBLE JEOPARDY. THE STATE HAS NOT CHARGED THAT. THE STATE HAS CHARGED TWO SEPARATE TOUCHING, AND IT IS NOT DOUBLE JEOPARDY IN THAT SITUATION. THERE ARE TWO DIFFERENT ACTS HERE, AND, AGAIN, THE LEGISLATURE HAS RECOGNIZED THAT, HOWEVER MANY ACTS THERE ARE, IF THOSE ACTS CONSTITUTE CRIMINAL OFFENSES, THEN THEY NEED TO BE PUNISHED SEPARATELY, REGARDLESS OF WHETHER THEY ARE COMMITTED DURING THE SAME CRIMINAL TRANSACTION, AND I WOULD POINT OUT THAT THERE IS A GREAT POLICY REASON FOR NOT TAKING THE DEFENDANT'S POSITION IN THIS CASE, AND THE REASON FOR THAT IS, IF YOU ARE GOING TO START LUMPING ALL OF THIS STUFF TOGETHER, YOU ARE GOING TO ESSENTIALLY ENCOURAGE THE DEFENDANT TO COMMIT MORE AND MORE EGREGIOUS ACTS DURING THE COURSE OF A SINGLE TRANSACTION.

ISN'T THIS SORT --

THEY GET TWO OFFENSES FOR THE PRICE OF ONE, SO TO SPEAK.

CHIEF JUSTICE: IS THIS ANALOGOUS TO A SITUATION WHERE THERE IS A ROBBERY, AND IN THE COURSE OF THE ROBBERY THEY TAKE, OUT OF THE PERSON'S POCKET, A, FIRST THEY TAKE THE WALLET, THEN THEY TAKE THE KEYS. THEN THEY TAKE THE CASH. IN THAT SITUATION, IS IT YOUR POSITION THAT THE STATE COULD CHARGE THREE DIFFERENT ROBBERIES?

UNDER THE ROBBERY STATUTE, I AM NOT QUITE SURE ABOUT THE ROBBERY STATUTE. I DO KNOW ABOUT THE SOCIAL POLICY BEHIND THE SEXUAL BATTERY STATUTE AND BEHIND THE LEWD AND LASCIVIOUS STATUTE, WHICH SEXUAL POLICIES ARE ESSENTIALLY IDENTICAL. THAT SEXUAL POLICY SAYS THAT SOCIETY LOOKS UPON SEXUAL CRIMES AS MUCH MORE IMPORTANT THAN THE GENERAL CRIMES OF ROBBERY OR WHAT HAVE YOU. THOSE ARE CRIMES AGAINST PEOPLE THAT CAUSE MORE DAMAGE TO SOCIETY THAN JUST ROBBERY OFFENSES, AND THOSE CRIMES ARE THE ONES THAT ARE MOST DESERVING OF MORE SEVERE PUNISHMENT AND MULTIPLE PUNISHMENTS.

CHIEF JUSTICE: I WANT TO REMIND YOU YOU ARE IN YOUR REBUTTAL.

OKAY.

IF WE ACCEPT YOUR THEORY, WHAT WILL IT DO TO THE LAW OF LESSER-INCLUDED OFFENSES? IN OTHER WORDS, MORE PRECISELY, IF WE ACCEPT YOUR THEORY, WHY WOULDN'T THE STATE BE ALLOWED TO SEPARATELY CHARGE NOT ONLY THE HIGHEST OFFENSE THAT AROSE OUT OF A CIRCUMSTANCE, BUT, ALSO, ALL OF THE LESSER-INCLUDED OFFENSES THAT ARE A ROWS OUT OF THE OFFENSE, AND SEPARATE -- THAT AROSE OUT OF THE OFFENSE, AND SEPARATELY CHARGE PUNISH THE DEFENDANT FOR EACH OF THOSE.

WELL , THEY COULD DO THAT AND THEY DO DO T HAT IN O THERCASES. WHAT HAENS IS, IF IT IS EXACTLY SAME ACT THAT IS CHARGING ALL OF THESE GREATER AND LESSER-INCLUDED OFFENSES UNDER , THEN WHAT HAENS IS AT THE E ND OF T HECASE, A DI RECTED VER DICT FOR WHICH EVER COU NTS THE JURY FINDS THE DEFENDANT GUILTY OF, BUT THAT IS IF IT IS EXACTLY THE SAME ACT. FOR EXAMPLE IF IT IS THE SAME TOUCHING OF THE P ENISIN THIS CASE , BUT , AGAIN , THOSE ARE DIFFERENT TOUCH INGS HERE, SO WHAT HAEN S HERE IS AN IMPACT ON YOUR QUESTION. I HOPE I HAVE ANSWE RED YOU.

THANK YOU.

OKAY.

THANK YOU VERY M UCH.

CHIEF JUSTICE: MS. GRIFFIN.

GOOD MORNING. YOUR HONOR. COUNSEL.MY NAME IS ELLEN GRIFFIN. I AM WITH THE PUB LIC DEFENDERS OFFICE, AND I REPRESENT THE RESPONDENT IN THI S CASE, MR . STEVE PAUL. AS TO THE FACT OF THE CASE , THE STATE HAS PR ETTY MUCH COVERED THAT AND I DON'T FEEL A NEED TO REITERATE THEM, EXCEPT TO THE FACT THAT THE ACTS ALLEGE D IN THE LIVING ROOM AND THE ACTS ALLEGED IN THE BEDR OOM OCCURRED SIMULTANEOUS. IT IS NOT THAT - -

CHIEF JUSTICE: THEY COULDN'T HAVE OCCURRED SIMULTANEOUS, BECAUSE THEY HAD TO HAVE GONE FROM ONE ROOM TO THE OTHER.

THE TWO ACTS IN THE LIVING ROOM OC CURRED SIMULTANEOUS WITH EACH OT HER, THE KISSING AND THE TOUCHING , THEN THE TWO ACTS IN THE BEDROOM OCCURRED AT THE SAMETIME.

WELL , THE STATE DO ESN'T ARGUE THAT THOSE WERE SEPARATE CRIMINAL HE OLD , ONLY THAT THEY OCCURR ED IN THE SAME -- EPISODES , O NLY THAT THEY OCCURRED IN THE SAME CRIMINAL ACTS THAT CAN BE PUNISHED SEPARATELY.

YES, AND THE STATE RE LIES ON 775.021 FOR THAT , AND AS FAR AS IT GOES , SEPARATE ACTS COMMITTED IN A SINGLE TRANSACTION AT SOME PO INT MAY BE PUNISHED , BUT YOU HAVE TO LOOK F URTHER D OWN INTO THE STATUTE , TO THE EXCEPTION S TO 775.021, W HICH ARE LISTED, THOSE BEING OFFENSES WHICH , WELL , THE FIRST BEING PR ETTY MUCH NECESSARILY INCLUDED ACT , OFFENSES WHICH ARE IDENTICAL TO EACH OTHER. THE SECOND EXCEPTION, WHICH WOULD BE THE CORE OFFENSE , DEGREE VARIANCE, AND THE THIRD EXCEPTION WOULD BE THE PERMISSIVE LESSER-INCLUDED FACTS.

WELL , BEFORE YOU G ET THERE, YOU MAKE THE ANALYSIS REQUIRES THE DETERMINATION AS TO WHETHER IT IS CLEAR THAT THE LEGISL ATURE INTENDED THERE TO BE SEPARATE PUNISHMENTS FOR EACH CRIME. CORRECT?

CORRECT.

AND WHEN THE LEGISLATURE CAME ALONG AND AM ENDED THIS STATUTE , IN 1999 , WHY ISN'T IT CLEAR THAT THE LEGISLATURE IN TENDED MOLESTATION , EXHI BITION ISM , SEXUAL BAD BA TTERY , THOSE ---SEXUAL BATTERY , THOSE FOUR TO BE SEPARATELY PUNISHED?

BECAUSE THEY DI DN'T S AY SO.

WELL, THEY SET TH EM U P THAT WA Y. IT HAD BEEN SET UP THAT WAY BEFORE. THE LEGISLAT

URE CAME ALONG AND SAID THIS IS WHAT CONSTITUTES THIS CRIME IN EACH PARAGRAPH. ISN'T THAT WHAT HAENED?

WELL, EACH OF THOSE , EVERY OFFENSE THAT I S CURRENTLY IN THIS STATUTE WAS, ALSO , PUNISHED IN THE PREVIOUS 19 84 STATUTE. AND LOOKING AT THE HI STORY OF THE WAY THE STATUTE EVOLVED, WHEN THE LEGISLATURE HAD AMENDED THE STATUTE PREVIOUSLY , THEY HAD SPECIFICALLY STATED THEIR INTENT. THERE HAD BEEN PREAMBLES , LIKE THE ' 84 STATUTE , THEY SAID WHEREAS IT ISN'T OUR INTENT TO MAKE SURE THAT PRIOR CHASTITY IS NOT A SUBJECT, THAT VICTIM CON SENTDOES NOT IMPA CT ON THAT. THAT IS NOT WHAT HAENED WHEN THEY REORGANIZED THIS STATUTE IN 1999. IT WAS DONE IN A , AS A B ROAD GROUP. IT WAS A CHILDREN 'S PROTECTION ACT OF 19 IS 9 9. THEY -- OF 1999. THEY DIDN'T REORGANI ZE J UST THIS STATUTE. THEY AMENDED S E VERAL STATUTES. THEY DIDN'T SAY WE WANT THEM PUNISHED SEPARATELY. THEY SIMPLY IN OUR OPINION , REORGANIZED THEM, M ADE IT CLEARER, PERHAPS, FOR CHARGING PURPOSES, BUT THEY DID NOT ANYWHERE SAY THAT THEIR INTENT WAS TO CHARGE SEPARATELY, LIKE THEY HAVE IN SOME OTHER STATUTES.

THEY DID HAVE INTENT TO CREATE SEPARATE CRI MES.

YES, BUT NOT NECESSARILY TO CHARGE THEM SEPARATELY . FOR INSTANCE IN THE SITUATION AFTER CARJACKING AND ROBBERY. THAT IS A SITUATION WHERE THE LEGISLATURE SPECIFICALLY STATED THEIR INTENT. THESE ARE TO BE CHARGED SEPARATELY. THESE ARE TO BE PUNISHED SEPARATELY. THEY SAID THAT IN THEIR PREAMBLE THEY C ITED TO THE FBI ST UDIES , BUT TO THE CASES SUCH AS ROBBERY AND GRAND THEFT , THEY ARE SEPARATE CHARGES BUT THEY NEVER STATED THEY ABSOLUTELY NEEDED TO BE PUNISHED SEPARATELY.

CAN YOU RESPOND TO THE STATE'S ARGUMENT ON THE ALICATION OF SECTION 775.0214, THE BLOCKBERGER , AND THE STATES STATE'S POSITION IS ESSENT IALLY IF YOU COMMIT ONE ACT , ONE SPECIFIC CONDUCT, YOU CAN'T BE, LET'S SAY , PROSECUTED ON BOTH 5 -5 AND 6 - A -- 5-A AND 6-A UNDER THE EXCEPTIONS , BECAUSE IT WOULD REQU IRE THE IDENTICAL ELEMENTS OF PROOF. IT IS ONLY ONE A CT.

CORR ECT.

HOWEVER, W HERE THERE A RESEPARATE ACTS , KI SSING AND TOUCHING , THAT NO LO NGER BRINGS IT WITHIN THE EXCEPTIONS, BECAUSE THERE ARE , YOU NO LONGER RE QUIRE SEPARATE ELEMENTS OF PROOF. THERE ARE DIFFERENT FACTS TO PROVE EACH ONE.

AS TO 5 AND 6 , THE CONDUCT IN THE MO LESTATION , IT WOULD BE IMPOSSIBLE TO COMMIT THE CONDUCT , WITHOUT THE MOL ESTATION , THE MOLESTATION WITHOUT THE CONDUCT.YOU CAN'T HAVE ALLUDE TOUCHING OF A SP ECIFIC BO DY PART WI THOUT ALLUDE TOUCHING OF THE BO DY.

THAT IS WHY, IF THERE WAS ONLY ONE ACT, YOU COU LDN'T CONVICT AND SENT ENCE FOR BOTH 5-A AND 6-A , BUT THE STATE IS SAYING WHERE THERE IS TWO ACTS , YOU CAN CONVICT ONE FOR 5-5 AND AND FOR 6 -- -5 -A AND ONE FOR 6-A.

YOU CAN ANALOGIZE THIS TO A ROBBERY IF SOME ONE T AKESMY KEYS AND WA LLET AND PURSE AND THEY TAKE THEM ALL AT THE SAME TIME, THAT IS ST IL L ONE GRAND THEFT. IT IS NOT A S E RIES OF GRAND THEFTS.

CHIEF JUSTICE: UNDER THAT ANALYSIS AND, AGAIN , I K NO W THAT WE HAVE HAD A COUPLE OF CASES WITH THIS. IF YOU TAKE ROBBERY , EVERY SINGLE, ROBBERY IS A IMED AT PROTECTING THE VICTIM, SO YOU , IF THERE ARE TWO SEPARATE VICTIMS , THERE IS TWO , CAN BE CHARGED WITH TWO ROBBERIES , ABOUT THE FACT THAT THERE ARE MULT IPLE ITEMS TAKEN IN THE COUR SE OF A SINGLE ROBBERY , IS, THE CHARGE IS ONE ROBBERY . THE IDEA OF A CONTINUING

OFFENSE IS , REALLY , AS WE GO INTO SEXUAL CRIMES , AND WE WOULD HAVE TO GO BACK IN TIME, BUT WHAT THEIR POINT IS, IS THAT THE EXHIBITION OF THE PENIS COULD BE , IS A SEPARATE CRIME , AND THE TOUCHING IS A SEPARATE CRIME , BUT EACH KISSING IS A SEPARATE CRIME , AND WHERE IS IT IN OUR JURISPRUDENCE THAT WE HAVE LOOKED AT THIS TYPE OF SITUATION, AND I GUESS IT WOULD BE ANALOGOUS TO , OR IS IT ANALOGOUS TO SOMEONE WHO GETS IN A FIGHT, IS EVERY PUNCH A SEPARATE ASSAULT OR DO YOU, OR ARE ALL OF THE PUNCHES ONE ASSAULT ? THAT IS WHAT WE HAVE TO LOOK AT IN THE AREA OF CHILD MOLESTATION , AND THE POLICY OF THE STATE WAS THE INTENT THAT EVERY TIME THERE WAS A KISS, NO MATTER WHETHER IF THIS WENT ON FOR A DAY WHERE THEY KEPT SOMEBODY CAPTIVE, THAT THERE WOULD BE LITERALLY COULD BE MAYBE 1,000 ACTS, AND EACH OF THOSE WERE INTENDED TO BE CHARGED SEPARATELY. WHERE DO WE LOOK TO MAKE THAT DECISION, WHETHER THIS IS MORE LIKE ROBBERY OR ASSAULT OR IS IT BECAUSE IT IS A MOLESTATION AFTER CHILD , THAT THE LEGISLATURE'S INTENT WAS TO CHARGE AS MANY ACTS AS COULD POSSIBLY BE CHARGED?

HISTORICALLY , OF COURSE , THE FIRST TO LOOK AT IS SINGLE EPISODE. THREE FACTORS. IS THERE ONE VICTIM IN THIS CASE, YES . DO THE ACTS OCCUR IN THE SAME PLACE? YES . AND IS THERE A TEMPORAL BREAK IN THE ACTS? NO. SO THAT IS THE FIRST ANALYSIS AS TO THE SINGLE EPISODE, AND I BELIEVE THAT COMES FROM RUSSO. LOOKING BACK HISTORICALLY AS TO HOW THESE CASES HAVE BEEN PUNISHED, IN A VARIETY OF CASES , CAUSE OF HE WOULD , EDIE, MAZARUS , ACTS THAT OCCUR, SEPARATE TOUCHINGS THAT OCCUR WITHIN ONE TEMPORAL SITUATION WITHOUT BREAK, HAVE BEEN CONSIDERED DOUBLE JEOPARDY. TOUCHING OF SEVERAL DIFFERENT BODY PARTS AT ONE POINT IN THOSE CASES , THE COURTS HAVE FOUND THAT THIS IS ONE OFFENSE THAT CAN BE PUNISHED WITH ONE PUNISHMENT, SO HISTORICALLY THEY HAVE BEEN PUNISHED AS A SINGLE OFFENSE.

HOW DOES THAT COMPLY WITH AM 75.021-4 , WHERE THE EXPRESS PURPOSE OF THE LEGISLATURE WAS, AND THEY SAY IT, WHOEVER IN THE COURSE OF ONE CRIMINAL TRANSACTION OR EPISODE, SO WE ARE CLEAR THEY ARE ALREADY TALKING ABOUT ONE EPISODE , COMMIT AN ACT OR ACTS WHICH CONSTITUTE ONE OR MORE SEPARATE CRIMINAL OFFENSES , UPON CONVICTION AND ADJUDICATION OF GUILT , SHALL BE SENTENCED SEPARATELY FOR EACH CRIMINAL OFFENSE. SO HOW DOES YOUR THEORY JIVE WITH THE EXPRESSED PURPOSE OF THE LEGISLATURE AND THE BLOCKBERGER IS SIMPLY DETERMINING THE LEGISLATURE'S INTENT?

YOU HAVE TO GO FORWARD DOWN TO THE EXCEPTIONS FROM THAT THAT ARE LISTED BEFORE, AND WE WOULD ARGUE THAT AS TO 5 AND 6 , THESE ARE NECESSARILY INCLUDED LESSER OFFENSES. THEY ARE COMPLETELY SUBSUMED. YOU CAN'T COMMIT ONE WITHOUT THE OTHER. ALSO WE --

WE CIRCLE BACK TO MY PREVIOUS QUESTION, WAS I AGREE WITH YOU IF IT WAS ONE ACT IF IT WAS ONLY THE KISSING, THEN THEY WOULD BE WHETHER YOU CALL THEM LESSER-INCLUDED OR WHATEVER YOU ARE REQUIRING IDENTICAL ELEMENTS OF PROOF , BUT WHEN THERE ARE TWO SEPARATE ACTS, WHY ISN'T THE LEGISLATURE'S INTENT AS EXPRESSED IN 775.021 WHERE THERE IS A KISSING AND TOUCHING, TO SENTENCE SEPARATELY FOR EACH OF THOSE?

THESE ARE ALL CORE VARIANTS OF A SEPARATE OFFENSE . SUBSUMED FROM THE ORIGINAL CORE VARIETIES WANT, FROM THE SAME CHANTORY ADDRESS THE SAME EVIL , THE ORIGINAL HOMICIDE, THEFT , BATTERY, IN THIS CASE ACTS THAT COULD BE LEADING TO THE NATURE AFTER SEXUAL BATTERY , BUT THEY WEREN'T LIMITED TO THE ORIGINAL ONES SET OUT IN SERMON. THEY HAVE BEEN EXPANDED TO A GREAT MANY DIFFERENT ACTS, AND I WOULD GO BACK, AGAIN, TO, I BELIEVE ROBBERY WITH A WEAPON AND GRAND THEFT AUTO. THE TAKING OF THE ROBBERY AND THE AUTO, THOSE COULD BE CHARGED SEPARATELY , BUT WHEN ANALYZED UNDER THE -- BUT WHEN ANALYZED UNDER THE CORE VARIANTS, IT CAN BE PUNISHED AS ONLY ONE OFFENSE.

THAT IS NOT WHAT WE HELD -- HOW DO YOU EXPLAIN "CRUELER" UNDER THAT ANALYSIS, IN WHICH WE HELD THAT YOU COULD BE CHARGED FOR THE ROBBERY OF THE PROPERTY AND THE CAR?

CRUELER IS DIFFERENT IN THAT, IN CRULLER, THE LEGISLATURE UNLIKE THE OTHER STATUTES, SPECIFICALLY STATED THEIR INTENT IN THE PREAMBLE, THAT THOSE WERE TO BE CHARGED SEPARATELY.

WELL, IT DIDN'T SAY IT IN THE PREAMBLE. IT SAID IT, I MEAN, WHAT WE HELD WAS THAT THERE WAS A CLEAR INTENTION THAT CARJACKING BE A SEPARATE CRIME.

AND THAT WAS BASED ON THE STATUTE FROM THE LEGISLATURE. WE WOULD ARGUE THAT, IN THIS STATUTE, AND IN THE OTHER ONES THAT WE ARE DISCUSSING, THAT THE LEGISLATURE DID NOT MAKE SUCH AN INTENT CLEAR.

WELL, THAT IS WHERE THE FIFTH DISTRICT DISAGREED WITH YOU, BECAUSE JUDGE SOWALIA HELD THAT, BY BREAK THESE INTO FOUR DIFFERENT CRIMES, THAT WAS THE CRULLER SITUATION. CORRECT?

CORRECT.

CHIEF JUSTICE: JUSTICE QUINCE.

IN THE FRONT ROOM OF THE HOUSE, THERE WAS KISSING, AND THEN THERE WAS TOUCHING FROM THE OUTSIDE OF THE CLOTHING, CORRECT?

YES.

SO WHAT IS THE CORE? YOU SAY THEY ARE JUST VARIANCES OF THE SAME CORE OFFENSE, SO WHAT IS THE CORE OFFENSE HERE?

THE CORE OFFENSE IS LEWD AND LASCIVIOUS BEHAVIOR UPON OR IN THE PRESENCE OF A CHILD.

BUT WHEN YOU ACTUALLY LOOK AT THE STATUTE, WE DON'T JUST HAVE LEWD AND LASCIVIOUS BEHAVIOR ANYMORE. WE ACTUALLY HAVE LEWD AND LASCIVIOUS BATTERY, LEWD AND LASCIVIOUS MOLESTATION, LEWD AND LASCIVIOUS CONDUCT, LEWD AND LASCIVIOUS EXHIBITION, SO WE DON'T REALLY JUST HAVE THAT ONE LEWD AND LASCIVIOUS ANYMORE, SO WHY ISN'T, DESPITE YOUR SAYING IT IS A CORE OFFENSE, IF YOU HAVE A SITUATION WHERE A DEFENDANT ACTUALLY DOES SEVERAL THINGS THAT ARE COVERED BY THIS ACT? I CAN UNDERSTAND PART 5 AND PART 6, WHICH ARE, REALLY, BOTH TOUCHING ACTS, BUT THEN WHEN YOU GET TO THE OTHER ONES, WHICH ARE BATTERY, YOU GET TO THE OTHER ONES, WHICH ARE EXHIBITION, WHY ISN'T, I AM HAVING A HARD TIME TRYING TO FIGURE OUT WHY THEY ARE NOT DIFFERENT CRIMES.

IF YOU CAN ANALOGIZE IT TO PERHAPS A HOMICIDE STATUTE, WHERE YOU HAVE FIRST-DEGREE. YOU HAVE MANSLAUGHTER. YOU HAVE CULPABLE NEGLIGENCE. THOSE ARE ALL SET OUT AND LABELED SEPARATELY, ALSO, BUT THEY ARE STILL ALL THE SAME CORE OFFENSE, AND THEY ARE ALL STILL ADDRESSED TO THE SAME EVIL.

BUT YOU EVEN TALKED ABOUT LESSER-INCLUDED OFFENSES. WHEN YOU LOOK AT THIS STATUTE, NONE OF THESE SEEM TO BE REALLY LESSER-INCLUDED OFFENSES, BECAUSE ALL OF THEM ARE SECOND-DEGREE FELONIES OR THIRD-DEGREE FELONIES. ONE IS EVEN A FIRST-DEGREE FELONY, BUT ALL OF THEM ARE BROKEN DOWN INTO SECOND-DEGREE FELONIES AND THIRD-DEGREE FELONIES, DEPENDING UPON THE AGE OF THE ACTUAL VICTIM, SO IF THE VICTIM

IS OVER THE AGE OF TWELVE, AND YOU ACTUALLY TOUCH THE VICTIM ON ONE OF THE GENITAL AREAS , AND THE VICTIM IS OVER THE AGE OF TWELVE, AND YOU EXHIBIT YOUR SEXUAL PARTS TO THAT VICTIM , BOTH OF THOSE ARE SECOND-DEGREE FELONIES OR THIRD-DEGREE FELONIES , ONE OF THOSE , SO THEY DON'T SEEM TO BE LESSER OFFENSES THAN THE OTHER .

IN THAT ANALYSIS , DIRECTLY AS TO SEPARATE DEGREES, NO , BUT YOU CAN LOOK AT, ALSO , THEY ARE ALL PUNISHED AS DIFFERENT LEVEL OFFENSES, NOT JUST AS DIFFERENT DEGREES.

DIFFERENT LEVEL , MEANING?

UNDER THE CRIMINAL PUNISHMENT CODE. EXHIBITION IS A LEVEL 5 . CONDUCT IS, I BELIEVE , A LEVEL 7. MOLESTATION IS A LEVEL 9. AND WITH OUR DEGREE --

SO WE NEED TO LOOK BEYOND THE FACT THAT THE STATUTE ACTUALLY SAYS IT IS A SECOND-DEGREE, THAT EACH ONE IS A SECOND -DEGREE FELONY.

PARTICULARLY IN COMBINATION WITH OUR ARGUMENT WITH A DEGREE VARIANT , WHICH IS CLEAR THAT THOSE DO NOT HAVE TO BE FIRST, SECOND OR THIRD-DEGREE FELONIES , TO BE VARIANTS ON THE SAME OFFENSE.

CHIEF JUSTICE: HAVE YOU CONCEDED THAT THE TWO LIVING ROOM AND BED ROOM CONSTITUTE A BREAK , SUFFICIENT FOR THERE TO BE A SEPARATE TRANSACTION?

THAT IS NOT BEFORE THIS COURT .

CHIEF JUSTICE: O K A Y .

YES. IF THE COURT HAS NO OTHER QUESTIONS , WE WOULD RESPECTFULLY - -

CHIEF JUSTICE: I DO HAVE ONE OTHER PRACTICAL QUESTION. IN THESE SITUATIONS , JUST REFRESH MY RECOLLECTION , EVEN THOUGH ALL OF THESE MULTIPLE ACTS ARE CHARGED AND SENTENCED SEPARATELY, DO THE SENTENCES RUN CONCURRENTLY?

IN THIS CASE THEY DO , YES , YOUR HONOR. WE RESPECTFULLY ASK THIS COURT TO AFFIRM THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL AND DISALLOW THAT IN THE FUTURE. THANK YOU.

CHIEF JUSTICE: RE BUTTAL .

THANK YOU VERY MUCH. I WOULD LIKE TO MAKE A COUPLE OF POINTS IN REBUTTAL. FIRST OF ALL , THE FACT THAT THERE IS NO MAGIC WORDS OR INCANTATION OR COMMUNICATION OF THE PHRASE "LEGISLATIVE INTENT AND FINDING." THE BEST EVIDENCE OF LEGISLATIVE INTENT IS OBVIOUSLY THE AMENDMENT OF THE STATUTE, ITSELF, BECAUSE IF THE LEGISLATURE WAS SATISFIED WITH THE WAY THE FOURTH DCA OR THE OTHER COURTS WERE TREATING THE STATUTE AND FINDING ONLY ONE OFFENSE TO BE PERMISSIBLE , THEY WOULDN'T HAVE BOTHERED TO CHANGE THE STATUTE THE WAY THEY DID AND SET THEM OUT IN SEPARATE OFFENSES AND GIVE THEM SEPARATE NAMES AND SEPARATE PENALTY , AND SEXUAL BATTERY STATUTE , THERE ARE NO MAGIC WORDS IN OUR STATUTE , AND THERE IS NO QUESTION THAT YOU CAN CONVICT A DEFENDANT OF ORAL SEX AND ANAL SEX , VAG-- AND ANAL SEX, VAGINAL SEX , REGARDLESS OF WHETHER THEY OCCURRED IN THE SAME TRANSACTION, MOMENTS APART, SO THE CASE REALLY IS VERY SIMILAR TO THE SEXUAL BATTERY STATUTE. THE SOCIAL POLICY BEHIND BOTH IS THE SAME. THERE IS REALLY NO REASON TO TREAT THE TWO STATUTES DIFFERENTLY FOR PURPOSES OF CHARGING AND CONVICTING MULTIPLE OFFENSES , AND ONCE AGAIN , THE DEFENDANT'S INTERPRETATION MIGHT ENCOURAGE A DEFENDANT TO COMMIT MORE OFFENSES BECAUSE THEY CAN DO IT FOR THE PRICE OF ONE , AND -- CHIEF BEING

THE SAME AGAIN , DO YOU AG RE E OR WHAT IS THE SITUATION WITH A BATTERY IN THE COURSE OF A FI GHT AND TH ERE ARE TEN DIFFERENT PUNCHES? IS THAT TEN DIFFERENT CRIMES ?

IT IS A GRAY AREA , BUT THE LEGISLATURE HAS SPECIFICALLY SAID THAT WE ARE GOING TO PUNISH FOR EACH ACT THAT CONSTITU TES A SEPARATE OFFENSE, S O IT IS POSSIBLE. YES . IT DOESN'T NO RMALLY HAEN BECAUSE PROSECUT ORS DON'T PREFER TO, QUOTE, OVERCH ARGE THEIR VICTIM OR THEIR DEFENDANTS, UN QUOTE , BUT I T IS PO SSIBLE . THE THING IS , WHETHER IT I S CONSIDERED TO BE THE SAME ACTOR NOT, THE SAME PUNC HING . BUT IN THIS CASE , W E HAVE GOT SEPARATE ACTS , SEPARATE TOUCHINGS, SO THAT PARTICULAR ANALOGY IS NOT IN ISSUE IN THIS PARTI CULAR CASE. OKAY. THE LEGISLATURE , WE WERE MAKING A POINT ABOUT LESSER-INCLUDED OFFENSES, BUT LESSER-INCLUDED OFFENSES ARE REALLY RE LEVANT WHERE THERE IS ONLY ONE ACT, A ND THAT IS THE SAME ACT THAT HAS BEEN U SED THROUGHOUT, BUT IN THIS CASE WE HAVE GOT DIFFERENT ACTS OF TOUCHING , SO, AGAIN , LESSER-INCLUDED OFFENSES ANALOGY REALLY DOESN'T AL Y TO THIS CASE . AND WITH RE GARD TO, I THINK , ROBBERY, THE TAKING OF A PURSE AND CHARGING THE DEFENDANT FOR TAKING T HEPURSE AND THEN TAKING A LL OF THE THING THAT IS ARE INSIDE THE PURSE, THE REASON THAT DOES NOT HAVE SOMETHING THAT YOU CAN CHARGE SEPARATELY I S BECAUSE THE ROBBER DO ESN'T NECESSARILY KNOW WHAT IS INSIDE THE PURSE THAT HE IS TAKING THERE. IS NO SEPARATE INTENT TO TAKE EACH OF THE PARTI CULAR ITEMS THAT ARE IN THE PURSE , SO THERE IS ONE INTENT , WHICH IS TO TAK E THE PURSE ITSELF. NOW, IN OUR CASE YOU HAVE GOT SEPARATE INTENT. THE DEFEN DANT KNOWS EX ACTLY WHAT HE IS DOING. HE IS TOUCHING THE VICTIM. HE KNOWS THAT. HE HAS AN INTENT TO DO. THAT HE IS TOUCHING THE VICTIM 'S GENI TALS . HE HAS AN INTENT TO DO THAT. THAT IS SEPARATE.HE IS EX POSING HIM SELF. AGAIN AN OTHER SEPARATE INTENT. SO --

CHIEF JUSTICE: I WANT T O REMIND YOU YOUR T IME HAS EXPIRED .

IF THERE ARE NO OTHER QUESTIONS , THE STATE WOULD RESPECTFULLY URGE THIS COURTT O RE VERSE THE DECISION OF THE FOURTH DCA , INSOFAR AS REVERSE HIS CONV ICTION AND TO AFFIRM ALL FOUR OF THE CONVICTIONS HERE. THANK YOU VERY M UCH.

CHIEF JUSTICE: THANK YOU .