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Dewarn Antonio Brown v. State of Florida

SC06-628

THE NEXT CASE ON OUR CALENDAR
THIS MORNING IS BROWN VERSUS
STATE OF FLORIDA.,,

>> GOOD MORNING.

I'M FROM THE MIAMI PUBLIC
DEFENDER'S OFFICE AND I
REPRESENT --

>> MR. HEIMLICH, THE SOUND IS
NOT WORKING WELL.

PULL THE MICROPHONE OVER CLOSER
TO YOU PLEASE, SIR.

>> MY ARGUMENT THIS MORNING IS
UNDER HORN, THE VERDICT
CONVICTING DEFENDANT THE MISS
NENOR -- MISS DMOANOR THEFT
PRECLUDED A CONVICTION FOR ANY
FELONY AS A RESULT OF THE
TRANSACTION FOR WHICH THE JURY
CONVICTED BROWN OF MISS MISDEMEANOR
FELONY THEFT, BECAUSE THE PETTY
THEFT CONVICTION PRECLUDED A
NEGATIVE ANY FELONY.

WE ALSO CONTEND THAT THE ERA IN
THE VERDICTS WAS SUFFICIENTLY
PRESERVED BY DEFENDANT'S POST
VERDICT MOTION THAT SET THE
FELONY MURDER VERDICT ASIDE.

>> LET ME ASK A QUESTION.
HERE OBVIOUSLY THE PROBLEM WAS
IN COUNT TWO THE JURY WAS NOT
GIVEN THE OPTION TO CHOOSE
ATTEMPTED ROBBERY OR ARMED
ROBBERY AS A LESSER INCLUDED
OFFENSE, CORRECT?

>> I DON'T AGREE WITH THAT, YOUR
HONOR, BECAUSE THE JURY
CONVICTED THE DEFENDANT OF PETTY
THEFT.

>> LET ME ASK YOU.
WAS THE JURY IN COUNT ONE
INSTRUCTED AS A POTENTIAL LESSER
INCLUDED OFFENSE ATTEMPTED
ROBBERY?

>> NO.

THE STATE ALLEGED ATTEMPTED ROBBERY IN THE INDICTMENT, THEY DID NOT REQUEST AN INSTRUCTION ON ATTEMPTED ROBBERY, NO INSTRUCTION WAS GIVEN ON ATTEMPTED ROBBERY --

>> IN COUNT ONE?

>> IN COUNT ONE OR COUNT TWO. COUNT ONE, THE JURY WAS INSTRUCTED THAT A MURDER WAS FELONY MURDER IF IT WAS COMMITTED IN THE COURSE OF A ROBBERY OR ATTEMPTED ROBBERY THERE WAS NEVER ANY EXPLANATION OF WHAT ATTEMPTED ROBBERY WAS, THERE WAS NEVER ANY EXPLANATION THAT AN ATTEMPTED ROBBERY REQUIRES SPECIFIC INTENT.

>> ARE THE FACTS IN THIS CASE CONSISTENT WITH AN ATTEMPTED ROBBERY?

>> THEY'RE ABSOLUTELY INCONSISTENT WITH AN ATTEMPTED ROBBERY, YOUR HONOR.

>> HOW IS THAT?

>> BECAUSE THE DEFENDANT'S WALLET WAS FOUND IN A DUMPSTER WITH THE MONEY GONE AND THE CREDIT CARDS GONE AND THE FINGERPRINTS OF ONE OF THE PARTICIPANTS IN THE OFFENSE, JACKIE, ON THE WALLET AND ON THE THINGS IN THE WALLET, AND THE TESTIMONY OF THE --

>> THAT'S THE COMPLETION. WASN'T THE TESTIMONY OF THE DEFENDANT THAT HE AND THE OTHER TWO DECIDED THAT THEY WERE GOING TO GO IN AND ROB THIS GUY BECAUSE HE HAD \$3,000 OR \$4,000 ON HIM?

AND THAT THEY WENT TO THAT AND THEY GOT THE STRUGGLE, THE GUN WENT OFF AND HE RAN?

>> IT'S THE WORD ROB THAT I HAVE DIFFICULTY WITH, YOUR HONOR. A ROBBERY CONSTITUTES A LARCENY AND AN ASSAULT.

THE JURY CONVICTED THE DEFENDANT IN THIS CASE OF THE LARCENY. A PETTY LARCENY.

THEY DID NOT CONVICT HIM OF THE ASSAULT.

IF THEY HAD FOUND HIM GUILTY OF THE ASSAULT, THEY WOULD HAVE FOUND HIM GUILTY OF THE ROBBERY.

>> OF BEFORE THE CONVICTION.

I'M TALKING ABOUT THE FACTS.

THE FACTS AS ADMITTED BY THE DEFENDANT, WOULD THEY HAVE NOT INCLUDED AAT THE TIMED ROBBERY?

-- ATTEMPTED ROBBERY.

BASICALLY THAT'S WHAT WAS ADMITTED TO ARE CONSISTENT?

>> MY UNDERSTANDING OF THE TESTIMONY WAS THAT THEY WERE GOING TO STEAL THE VICTIM'S MONEY, THAT THERE WAS NO AGREEMENT ON AN ASSAULT, THAT THE DEFENDANT DID NOT KNOW THAT BLACK HAD A GUN, THAT THERE WAS NO INDICATION --

>> HOW WERE THEY GOING TO STEAL IT?

IT WAS ONLY THE BODY, RIGHT?

>> HE MIGHT BE SLEEPING, HE MIGHT NOT BE WEARING HIS PANTS.

THERE WAS NO TESTIMONY IN THE RECORD THAT THEY AGREED TO ASSAULT HIM.

THE ONLY TESTIMONY IN THE RECORD WAS THAT HE AGREED TO STEAL THE MONEY.

NOW, IT'S CERTAINLY TRUE, THEY ARGUED AT TRIAL, THAT THE EVIDENCE WARRANTED AN INFERENCE THAT THEY AGREED TO ROB HIM.

THE JURY REFUSED TO DRAW THAT INFERENCE.

>> WAIT, LET'S GET TO THE NEXT -- THAT TO ME IS THE NON SEQUITUR HERE, BECAUSE IN COUNT TWO, THE JURY WAS NEVER GIVEN THE OPTION TO ADDRESS, THEY WERE JUST GIVEN THE OPTION OF THE ROBBERY OR THE PETTY THEFT, CORRECT?

>> ARMED ROBBERY, ROBBERY WITHOUT A WEAPON, GRAND THEFT AND PETTY THEFT WERE THE FOUR CHARGES THAT WERE SUBMITTED AND THE PROSECUTOR SAID THOSE WERE THE LESSER.

>> ATTEMPTED ROBBERY WAS NOT AN OPTION OF THE JURY, CORRECT?

>> CORRECT.

>> AND WHEN THE DEFINITION OF

PETTY THEFT INCLUDES TO OBTAIN
OR ENDEAVOR TO OBTAIN, CORRECT?

>> YES.

>> AND IS NOT A SYNONYM TO EN --
A CINNAMON SYNONYM TO ENDEAVOR IS TO
ATTEMPT.

>> THE QUESTION FOR THE
ATTEMPTED ROBBERY WAS WAS THERE
AN ASSAULT OR AN ATTEMPTED
ASSAULT, AND THERE IS NO FINDING
THAT THERE WAS AN ASSAULT OR
ATTEMPTED ASSAULT AND MOREOVER,
I DON'T UNDERSTAND HOW THE STATE
CAN COME BEFORE THE COURT IN
GOOD FAITH AND SAY WE ALLEGED IN
COUNT ONE OF THE INFORMATION
THAT IT COULD BE A ROBBERY OR AN
ATTEMPTED ROBBERY, BUT WE NEVER
ASKED THE JUDGE TO EXPLAIN TO
THE JURY WHAT AN ATTEMPTED
ROBBERY WAS, BUT WE THINK THAT
THE JURY CONVICTED OF ATTEMPTED
ROBBERY, ALTHOUGH NOBODY EVER
TOLD THEM WHAT THAT REQUIRED,
AND WE THINK THAT BECAUSE THEY
CONVICTED HIM OF PETTY THEFT.
ATTEMPTED ROBBERY IS A CATEGORY
TWO PERMISSIVE LESSER OFFENSE OF
ROBBERY.

>> CAN I JUST -- ON WHAT THE
JURY WAS TOLD, I'VE BECOME
MORE -- I AM -- I TEND TO AGREE
WITH YOU ON THIS ISSUE THAT
THERE WAS TRULY INCONSISTENT
VERDICTS BASED ON -- OR
PRECEDENT.

MY CONCERN IS THE JURY
INSTRUCTION THAT WAS GIVEN, AND
THAT WAS URGED TO BE GIVEN BY
THE DEFENDANT, THAT IS 3.12.

[A.

[WHICH ESSENTIALLY TELLS THE
JURY THAT THEY CAN CONSIDER EACH
CHARGE SEPARATELY AND I'VE
LOOKED AT JUDGE HARRIS'
CONCURRENCE FROM 1999, AND HE
SUGGESTS THAT WE'VE GOT TO DO
SOMETHING WITH THESE JURY
INSTRUCTIONS TO -- BUT GIVEN
THAT THE JURY INSTRUCTION
EXISTS, THAT THE DEFENSE LAWYER
IN THIS CASE URGED THIS TO BE
DONE, WHY ISN'T IT THEREFORE
SOMETHING THE JURY BELIEVED THAT

THEY COULD MAKE THE DECISION THAT THEY MADE, AND THAT THIS ARGUMENT THEN IS WAIVED?

>> IN THE FIRST PLACE, YOUR HONOR, THE DEFENSE COUNSEL DID NOT URGE THAT IT BE DONE. HE DID NOT SAY ANYTHING ABOUT IT BEING DONE.

IT WAS REQUESTED BY THE PROSECUTOR.

IT WAS DONE, THERE WAS NO OBJECTION TO IT, I ADMIT THERE WAS NO OBJECTION TO IT, BUT IT WAS NOT AS REQUESTED BY DEFENSE COUNSEL AND DEFENSE COUNSEL DID NOT ATTEMPT TO TAKE ANY ADVANTAGE OF THE FACT THAT THE VERDICTS WOULD BE SEPARATE. ACTUALLY, WHAT IS DEFENSE COUNSEL SUPPOSED TO DO WITH RESPECT TO THAT INSTRUCTION? HE'S SUPPOSED TO ASK THE JUDGE, DON'T GIVE THAT INSTRUCTION, INSTRUCT THE JURY TO RETURN A GENERAL VERDICT.

>> WELL, DON'T YOU THINK THAT BETWEEN 1999 AND NOW, SOMEBODY OUGHT TO ALERT THIS CRIMINAL JURY INSTRUCTION COMMITTEE, THAT IT IS GOING TO SET UP AN INTERLOCKING VERDICT, WHICH A FELONY MURDER WITH THE PREDICATE FELONY IS ALWAYS GOING TO CREATE THIS PROBLEM, TO ASK FOR A SPECIAL INSTRUCTION THAT WILL TELL THE JURY THAT YES, THAT IF YOU -- YOU'VE GOT TO FIND THEM GUILTY OF A FELONY, IN ORDER FOR THERE TO BE FELONY MURDER AND IF YOU DON'T FIND HIM GUILTY -- AND THAT'S THE FIRST CHARGE TO CONSIDER, AND IF YOU FIND HIM GUILTY OF A FELONY, THEN YOU GO ON TO THE FELONY MURDER INSTRUCTION, BUT WITHOUT ANY GUIDANCE, IT SEEMS THAT THE POSSIBILITY EXISTS THAT THE JURY THINKS THAT THEY'RE GIVING THIS DEFENDANT SOME ASSISTANCE BY EXERCISING POWER ON ONE COUNT AND NOT ON THE OTHER.

>> WELL, I DON'T THINK IT'S A BAD IDEA TO CLARIFY THE INSTRUCTION, BUT I WANTED TO

MAKE IT CLEAR THAT THE CLARIFICATION THAT YOU'RE REFERRING TO ONLY APPLIES WHERE THERE ARE INTERLOCKING COUNTS, AND THE AGREEMENT THAT THEY'VE ISSUED BE SEPARATE VERDICTS ON TWO COUNTS IS NOT IN ANY RESPECT A WAIVER OF THE RIGHT TO HAVE THE INTERLOCKING COUNT FOUND IN THE FELONY MURDER CAP. THE SEPARATE VERDICT INSTRUCTION IN THIS CASE INSTRUCTS THE JURY, FOR EXAMPLE, THAT THEY CAN CONVICT THE DEFENDANT OF ROBBERY, BUT NOT OF FELONY MURDER. FIND HIM NOT GUILTY OF FELONY MURDER EVEN THOUGH THEY FIND HIM GUILTY OF ROBBERY. THE DEFENDANT DOESN'T HAVE TO WAIVE THAT BENEFIT, DOESN'T HAVE TO WAIVE THAT EFFECT OF THAT INSTRUCTION IN ORDER TO HAVE THE VERDICT BE CONSISTENT AS TO THE INTERLOCKING PORTION. THE DIFFICULTY IN THESE VERDICTS IS THAT THE FELONY MURDER VERDICT DEPENDS UPON A FELONY AND THERE IS TO FELONY. THE JURY DID NOT FIND A FELONY. IN ADDITION, THE DEFENSE COUNSEL DID NOTHING TO TAKE ADVANTAGE OF THE FACT THAT THIS INSTRUCTION REQUIRES A SEPARATE VERDICT. THERE WAS NO ARGUMENT THAT THE JURY SHOULD DO WHAT IT DID. THERE WAS NO ARGUMENT THAT THE JURY SHOULD FIND THIS COUNT OR THE OTHER COUNT. THE DEFENDANT'S ARGUMENT AT TRIAL WAS THE EVIDENCE SHOWS THE COMMISSION OF A CRIME BY BLACK AND SHORT HOI AND JACKIE, AND THAT THE DEFENDANT'S STATEMENT ABOUT WHAT HAPPENED SHOULD NOT BE BELIEVED BECAUSE HE WAS TOLD BY THE POLICE WHEN HE WAS INTERROGATED, THAT IF HE TOLD THEM WHAT HAPPENED, HE WOULD LET THEM GO AND HE TOLD THE POLICE WHAT THEY WANTED TO HEAR. THAT WAS THE ARGUMENT. >> LET ME ASK YOU THIS. IF THE STATE HAD NOT CHARGED HIM

WITH ROBBERY, BUT DID IN FACT
CHARGE FELONY MURDER, WOULD A
FELONY MURDER CONVICTION STAND
WITHOUT A ROBBERY CONVICTION?

>> I HAVEN'T FOUND A CASE THAT
SAYS THAT, BUT THE LOGIC
CERTAINLY SUGGESTS THAT.

THE JURY FOUND FELONY MURDER ON
AN INDICTMENT OR INFORMATION
THAT ALLEGED MURDER IN THE
COURSE OF A ROBBERY OR ATTEMPTED
ROBBERY.

I WOULD ASSUME THAT THE JURY
FOUND ROBBERY OR ATTEMPTED
ROBBERY.

I DON'T ASSUME THAT IN THIS CASE
BECAUSE THE JURY FOUND PETTY
THEFT AND WHAT THE JURY FOUND IN
THIS CASE WAS MURDER IN THE
COURSE OF A PETTY THEFT.

NOBODY TOLD THE JURY THAT PETTY
THEFT IS A MISDEMEANOR.

THE PROSECUTOR TOLD THE JURY
DURING CLOSING ARGUMENTS THAT IF
YOU COMMIT A CRIME WITH OTHER
PEOPLE AND ONE OF THOSE PEOPLE
KILLS SOMEBODY IN THE COURSE OF
A CRIME, YOU'RE GUILTY OF FELONY
MURDER.

THAT'S ON PAGE 699 OF THE
TRANSCRIPT.

THAT'S WHAT OF THE JURY FOUND.
HE AGREED TO STEAL HIS MONEY AND
IN THE COURSE OF STEALING HIS
MONEY, BLACK SHOT HIM AND KILL
HIM, SO HE'S GUILTY OF FELONY
MURDER.

THAT'S NOT RIGHT THOUGH.
HE DID NOT PARTICIPATE IN THE
UNDERLYING FELONY.

THE INTERLOCKOR IS NOT PRESENT,
IT'S NOT THERE.

>> THAT GOES BACK TO MY
FUNDAMENTAL QUESTION, BECAUSE
WHAT THE JURY WAS TOLD, BECAUSE
THEY DID NOT KNOW WHETHER THE
PETTY THEFT WAS A FELONY OR NOT
A FELONY, THAT MR. BROWN
KNOWINGLY AND UNLAWFULLY
OBTAINED, ENDEAVORED TO OBTAIN
OR ENDEAVORED TO OBTAIN THE
PROPERTY OF THE VICTIM.

HOW IS THAT, ON THAT ALONE,
INCONSISTENT?

WITH COUNT ONE?

>> I WANT TO COME BACK TO THE SEPARATE VERDICT QUESTION, BUT LET ME ADDRESS YOUR QUESTION. THE DEFECT IN THE JURY IN STRKSS IN THIS CASE, IS THAT THE STATE DID NOT ASK THE JUDGE TO INSTRUCT THE JURY ON COUNT TWO, AS TO ATTEMPTED ROBBERY AS A LESSER AND DID NOT DEFINE WHAT AN ATTEMPTED ROBBERY WAS AND DID NOT DEFINE THE INTENT ELEMENT OF ROBBERY.

IF THE COURT HAD DONE THAT, THEN EITHER THE JURY WOULD HAVE FOUND PETTY THEFT OR THEY WOULD HAVE FOUND ATTEMPTED ROBBERY. IN EITHER CASE, I WOULDN'T BE HERE.

I'M HERE BECAUSE THE STATE IN THE TRIAL COURT WAIVED THE ARGUMENT THAT IT'S MAKING NOW THAT THE JURY FOUND ATTEMPTED ROBBERY BECAUSE THE STATE IN THE TRIAL COURT NEVER ARGUED ATTEMPTED ROBBERY, NEVER TOLD THE JURY THAT IT WAS ATTEMPTED ROBBERY, NEVER ASKED FOR AN INSTRUCTION ON ATTEMPTED ROBBERY, NEVER GOT AN INSTRUCTION ON ATTEMPTED ROBBERY AND NOW AFTER THE JURY WANDERED IN THE DESERT AND CAME UP WITH A KILLING IN THE COURSE OF A PETTY THEFT, THE STATE SAYS WELL IT REALLY SHOULD HAVE BEEN ATTEMPTED ROBBERY.

I THINK THE ISSUE IS COMPLETELY WAIVED BY THE STATE.

>> CAN YOU CLARIFY SOMETHING FOR ME ON THE VERDICT FORM, I DON'T THINK -- THERE HASN'T BEEN AN ARGUMENT MADE ON THIS, JUST TO CLARIFY, THE VERDICT, ONE OF THE POSSIBILITIES IS DEFENDANT IS GUILTY OF MURDER IN THE FIRST DEGREE.

NOW NORMALLY, THAT WOULD INCLUDE EITHER PREMEDITATED MURDER OR FELONY MURDER.

IN THIS CASE, THE STATE I DON'T THINK IS MAKING AN ARGUMENT THAT IT COULD HAVE INCLUDED PREMEDITATED MURDER, BUT DID THE

STATE NOT ARGUE AT ALL THAT THE FIRST DEGREE MURDER COULD BE EITHER PREMEDITATED --

>> THERE'S NO ALLEGATION OF PREMEDITATION IN THE INDICTMENT, SO THAT WAS NEVER IN THE CASE.

I WANT TO COME BACK TO THIS ISSUE OF SEPARATE VERDICT.

THE TIME TO OBJECT THAT THE VERDICTS ARE INCONSISTENT, BECAUSE THE INTERLOCKING ELEMENT IS MISSING, IS OF AFTER THE VERDICT IS RETURNED.

HOW CAN YOU OBJECT DURING THE CHARGE CONFERENCE, JUDGE, DON'T GIVE THE SEPARATE VERDICT

INSTRUCTION, BECAUSE I THINK THIS VERDICT IS GOING TO COME BACK AS AN INCONSISTENT VERDICT, HOW CAN YOU DO THAT?

THAT'S FRIVOLOUS, THAT'S RIDICULOUS.

THE TIME AS I SAY TO OBJECT IS AFTER THE OBJECTION WAS RAISED AT THAT POINT AND I THINK THE CASES THAT HOLD THAT THIS ISSUE WAS WAIVED ARE A REFLECTION OF A BELIEF IN THE COURTS, PRY MEAFERL IN THE THIRD --

PRIMARILY IN THE THIRD DISTRICT, THAT IF THE DEFENDANT IS NOT CONVICTED OF ALL THE CHARGES FOR WHICH THE JUDGES WOULD HAVE VOTED HIM GUILTY IF THEY HAD BEEN ON THE JURY, THE RESULT IS A PARDON.

AND THE PARDON SHOULD BE LIMITED TO THE PARDON THE JURY GAVE HIM.

WELL THE PROBLEM IS, THAT IF THE JURY PARDZ YOU AS TO THE INTERLOCKING CHARGE, THEN THE PARDON THAT THE JURY GAVE YOU IS BOTH AS TO THE ATTEMPTED ROBBERY OR THE ROBBERY, AND THE FELL PHI MURDER.

-- FELONY MURDER.

IN THE MCCRAY CASE, THE JUDGE TALKS ABOUT THE DEFENDANT HAVING HAD THE ADVERTISER IN THE MAIN COURSE AND NOW HE WANTS COFFEE AND DESSERT.

>> LET ME ASK YOU THIS.

IN THE CIVIL CONTEXT, I UNDERSTAND IT'S TOTALLY

DIFFERENT, SO MAYBE YOU CAN SHED SOME LIGHT ON IT FOR ME, THERE ARE SOME CASES WHERE THE JURY RETURNS A VERDICT THAT ARE NOT CONSISTENT, AND THE COUNSEL HAS AN OBLIGATION AT THAT POINT TO IDENTIFY THE PROBLEM, SO THE JUDGE CAN IDENTIFY IT FOR THE JURY AND THE JURY CAN GO BACK AND CORRECT IT.

SHOULD THERE BE ANY KIND OF OBLIGATION IN THE CRIMINAL CONTEXT, ONCE THE INCONSISTENCY IS APPARENT IN THE VERDICT, FOR COUNSEL TO IDENTIFY IT SO THE JUDGE CAN INFORM THE JURY THAT THOSE VERDICTS ARE INCONSISTENT, THEY CAN'T RETURN THOSE VERDICTS AND THEY MUST GO BACK AND CORRECT IT?

>> PLEASE BE AWARE YOU'RE INTO YOUR REBUTTAL, BUT PLEASE ANSWER THE QUESTION.

>> I CAN'T SHED ANY LIGHT ON WHAT THE CIVIL PRACTICE IS. I THINK THE OBJECTION TO THIS VERDICT WAS CALLED TO THE COURT'S ATTENTION VERY PROMPTLY AND THE COURT ELECTED NOT TO SEND IT TO THE JURY.

THAT'S MY RECOLLECTION. I MAY BE IN ERROR ON THAT. I WANT TO ADD ONE FURTHER THING. THE THIRD DISTRICT RELIES UPON PITT.

IN PITTS, THE COURT DISTINGUISHED REDONDO AND HORN ON THE BASIS THAT THOSE COURTS INVOLVED A CONVICTION.

NOW THE COURT IS APPLYING PITTS TO THIS CASE, WHICH ALSO DID NOT INVOLVE A CONVICTION.

I THINK REDONDO AND HORN ARE CORRECT AND THEY CONTROL THIS CASE.

>> MAY IT PLEASE THE COURT, MAW RHEA-- TO QUALIFY AS A TRULY OR LEGALLY INCONSISTENT VERDICT, THE JURY'S VERDICT WOULD HAVE HAD TO KNEE GATE ROBBERY AND ATTEMPTED ROBBERY AS AN UNDERLYING VERDICT.

IT WAS ADDRESSED IN THE INDICTMENT AND IN THE JURY

INSTRUCTION --

>> BUT DOESN'T THE STATE HAVE AN OBLIGATION, WHEN THEY'RE LOOKING AT THE PREDICATE FELONY, IF THEY WANT THE JURY TO DECIDE ON ATTEMPTED ROBBERY, TO ASK FOR THAT?

THE JURY HERE MADE A SPECIFIC FINDING -- THEY WENT THROUGH SEVERAL LESSERS AND GOT TO PETTY THEFT.

I AM VERY CONCERNED THAT WITH THE STATE NOT ASKING FOR ATTEMPTED ROBBERY, THAT SOMEHOW WE WOULD SPECULATE THAT THEY, ON ANOTHER CHARGE, WHICH WAS RISING OUT OF THE IDENTICAL FACTS, THAT THEY MUST HAVE FOUND ATTEMPTED ROBBERY ON THAT, WHEN THE STATE HASN'T ASKED FOR IT.

>> WELL, YOUR HONOR, I WOULD GO BACK TO ONE OF THE POINTS THAT YOU MADE EARLIER WITH REGARDS TO WELL, SHOULD THE JURY HAVE CONSIDERED THIS INDEPENDENT COUNT ONE VERSUS COUNT TWO AND NEITHER ONE IMPACTING UPON THE OTHER, OR SHOULD THE JURY HAVE BEEN TOLD, START WITH COUNT TWO, WHICH IS YOUR FELONIES, AND IF YOU REACH TO THAT POINT, THEN YOU CAN CONSIDER THE FELONY MURDER.

WELL, THIS WAS NOT DONE HERE BECAUSE THE JURY WAS INSTRUCTED TO CONSIDER COUNT ONE SEPARATE AND APART FROM TWO.

>> THE PROBLEM IS I THINK WE HAVE THESE STANDARD JURY INSTRUCTIONS THAT HAVE BEEN IN EFFECT SINCE 1981, AND THE STANDARD JURY INSTRUCTION COMMITTEE FROM MY POINT OF VIEW AFTER THIS CASE, THEY'VE GOT TO ADDRESS THIS ISSUE, BECAUSE THIS SHOULD NOT, YOU KNOW, THE STATE, THE DEFENSE, THE TRIAL COURTS OUGHT TO, YOU KNOW, ESPECIALLY WITH JUDGE HARRIS' OPINION SINCE 1999, SHOULD HAVE IN THIS CASE, COME UP WITH A SPECIAL INSTRUCTION.

THAT WASN'T DONE.

GIVEN THAT IT WASN'T DONE, I

DON'T SEE HOW UNDER OUR CASE LAW, BECAUSE WE'RE HERE ON CONFLICT, HOW WE DISTINGUISH THE CASES THAT SAY THAT THESE ARE TRULY INCONSISTENT VERDICTS.

>> WELL, THE SITUATION IN MAHAN IS DISTINGUISHABLE FROM THE SITUATION IN THIS SPECIFIC CASE. IN MAHAN, THE JURY WAS GIVEN THE OPTION TO CONVICT OR ACQUIT THE DEFENDANT TORE ATTEMPTED AGGRAVATED CHILD ABUSE AND THE JURY DID THAT.

THEY ACQUITTED AS --

>> I GUESS THIS IS REALLY WHERE YOU GET INTO THE ARGUMENT.

>> EXACTLY.

>> WHICH IS YOUR TAKE ON THIS, WHICH I UNDERSTAND YOU HAVE TO MAKE, WHICH IS WHEN THE JURY FINDS AFFIRM AFFIRMATIVELY PETTY THEFT, THAT TO ME IS AN ACQUITTAL OF ANYTHING THAT IS HIGHER THAN THAT, EVEN IF IT WASN'T SPECIFICALLY INSTRUCTED ON. THAT JUST SEEMS LOGICAL.

>> BUT AGAIN, THE JURY IS NOT TOLD TO CONSIDER COUNTS ONE AND COUNTS TWO TOGETHER.

>> LET ME -- DON'T WE HAVE A CASE OR TWO OUT THERE THAT SAYS THAT A PERSON CAN BE CONVICTED OF FELONY MURDER WITHOUT THERE BEING A CONVICTION OF THE UNDERLYING FELONY?

>> AM I AWARE OF --

>> OF A CASE THAT SAYS THAT? A CASE THAT SAYS THAT THERE DOESN'T HAVE TO BE A DETERMINATION BY THE JURY OF ROBBERY OR ARSON OR ONE OF THE ENUMERATED FELONIES IN ORDER FOR THERE TO BE A FELONY MURDER CONVICTION?

>> I AM NOT AWARE OF THAT, YOUR HONOR.

BUT I WOULD SAY THAT IN THIS PARTICULAR SITUATION, WE DON'T JUST HAVE THE JURY BLINDLY LOOKING AT THIS.

THEY WERE THERE, THEY SAT THROUGH THE EVIDENCE, THEY SAT THROUGH THE CONFESSION OF THE DEFENDANT.

WHERE HE TALKS ABOUT HIS ROLE IN THE ATTEMPTED ROBBERY. HE DOESN'T ADMIT TO BEING PART OF THE COMPLETED ROBBERY. WE HAVE THE SITUATION OF THE WALLET BEING FOUND IN A DUMPSTER AND HIS FINGERPRINTS ARE NOT ON IT, BUT HE CLEARLY TALKS ABOUT WHAT HIS PARTICIPATION WAS IN THIS CRIME.

AND THE JURY WAS TOLD, DURING THE READING OF THE JURY INSTRUCTIONS WITH REGARDS TO FELONY MURDER, THAT ONE OF THE WAYS THAT YOU MAY CONVICT A DEFENDANT IS IF THE DEATH OCCURRED AS A CONSEQUENCE OF THE DEFENDANT'S ATTEMPT TO COMMIT A ROBBERY.

>> WOULD YOU AGREE THAT THE SEPARATE ATTEMPT INSTRUCTION WAS NOT GIVEN?

>> OH, YES, YOUR HONOR. IT'S CLEARLY STATED IN THE RECORD.

WE HAVE THE DEFINITION, BUT WE DO HAVE IT AS PART OF COUNT ONE.

>> RIGHT.

>> BUT IT WASN'T GIVEN AS TO COUNT TWO.

>> AS TO COUNT TWO.

>> WHY NOT?

WHY SHOULDN'T THAT BE THE STATE'S RESPONSIBILITY TO ENSURE THAT -- WHY SHOULDN'T WE PUT THE BURDEN ON THE STATE TO REQUEST THAT INSTRUCTION?

IT'S A CATEGORY TWO INSTRUCTION, IT'S NOT MANDATORY TO THE TRIAL JUDGE.

IT'S THE STATE'S CASE, THE STATE CHARGED IT, IT WAS CLEAR THAT THEY WERE SEEKING IT IN COUNT ONE.

WHY NOT REQUIRE THE STATE TO DO IT AS TO COUNT TWO?

>> AGAIN, IT SHOULD HAVE BEEN DONE, BUT IT WASN'T DONE.

>> AND ESPECIALLY IF THE JURY COMES BACK HERE AND ASKS A QUESTION, WE NEED THE DEFINITION OF ROBBERY AS A LESSER INCLUDE PETTY THEFT, SO THERE WAS EVEN OPPORTUNITY AT THAT TIME FOR THE

STATE TO RECOGNIZE.

>> TO RECOGNIZE AND TO LET THE JURY KNOW THAT OH, THERE'S MORE HERE, BUT THEN WE COME ALSO TO THE POINT OF JUSTICE CANTERO AS TO WHETHER, ONCE THAT VERDICT CAME BACK, AND THE DEFENSE IS NOW CLAIMING THAT THIS IS AN INCONSISTENT VERDICT, SHOULDN'T THE JURY THEN AT THAT POINT HAVE BEEN GIVEN THE BETTER INSTRUCTIONS TO RELY UPON?

>> WHY SHOULDN'T WE PLACE THAT BURDEN ON THE STATE INSTEAD OF THE DEFENDANT?
THE STATE TO RECOGNIZE THAT THERE IS AN INCONSISTENT VERDICT AND SAY OOPS, WE NEED TO CORRECT THIS?

>> I CAN UNDERSTAND PLACING THE BURDEN ON THE STATE WHEN WE'RE TALKING ABOUT THE JURY INSTRUCTIONS BEING GIVEN TO THE JURY, PRIOR TO THE JURY RETIRING TO DELIBERATE.

WHEN THE JURY COMES BACK WITH ITS FINDING, WITH ITS DECISION, I THINK BOTH THE DEFENSE AND THE STATE ARE IN EQUAL POSITION TO OBJECT AND TO TRY TO GET THE JURY TO CONSIDER --

>> WHY WOULD THE DEFENDANT DO THAT?

I MEAN, THE DEFENDANT -- WHY WOULD A DEFENDANT DO THAT, WHEN WE HAVE CASE LAW ABOUT INCONSISTENT VERDICTS AND IF HE CAN DEMONSTRATE THAT, AS IN THIS CASE, THERE WAS NO UNDERLYING FELONY CONVICTION, WHY WOULD THE DEFENDANT THEN STAND UP AND SAY THIS IS INCONSISTENT, YOU NEED TO REINSTRUCT THE JURY?

>> WELL THAT'S PRECISELY THE POINT.

THE DEFENDANT IN THIS CASE RECEIVES A BENEFIT FROM THE JURY'S FINDINGS.

THE JURY ACQUITS AS TO ROBBERY, ONLY FINDING HIM GUILTY OF PETTY THEFT.

THE JURY DOES NOT KNOW THAT THIS IS SIMI A MISDEMEANOR, DOES NOT RISE TO THE LEVEL OF FELONY,

IT'S NOT PART OF THE JURY
INSTRUCTION.

>> IN A CRIMINAL PROSECUTION
BEINGS THE BURDEN IS ON THE
STATE, AND SO WHY SHOULD THE
DEFENDANT THEN, WHEN YOU GET AN
INCONSISTENT VERDICT OR WHAT
THEY MAY PERCEIVE TO BE A
CONSISTENT VERDICT, WHY SHOULD
THE DEFENDANT THEN STEP FORWARD
TO HELP THE STATE OUT?

>> IN THIS CASE, WHERE THE
DEFENDANT IS ALLEGING THAT
THERE'S AN ERROR, WHICH WOULD
RESULT IN THE DEFENDANT'S
ACQUITTAL OF THE FELONY MURDER,
THEN YES, THERE'S A BURDEN TO
SAY YES, WE OBJECT.

WE WANT TO HAVE THE JURY COME
BACK AND RECONSIDER THIS.

>> WHAT INTEREST DOES THE STATE
HAVE IN TRYING TO UPHOLD A
CONVICTION FOR FIRST DEGREE
FELONY MURDER WHEN A JURY HAS
FOUND THAT THE PREDICATE OFFENSE
IS A MISDEMEANOR AND THEREFORE
THAT THE DEFENDANT IS NOT GUILTY
OF FELONY MURDER?

WHAT INTEREST DOES THE STATE
HAVE FOR OPPOSING THE FINDING OF
THE JURY THAT THIS WAS A
MISDEMEANOR, ESPECIALLY IF YOUR
OPPONENT IS CORRECT, AND THAT IS
THAT THE STATE JUST GENERALLY
ARGUED THIS THING TO THE JURY,
THAT THE DEFENDANT IS -- IF
SOMEBODY IS KILLED WHILE A CRIME
IS COMMITTED, THAT THAT'S A
FELONY MURDER AND YOU SHOULD
FIND HIM GUILTY?

BUT WHY, NOW THAT THE JURY HAS
FOUND THAT THIS DEFENDANT IS
ONLY GUILTY OF A MISDEMEANOR, AS
FAR AS ANY KIND CONCEPT OF
FELONY MURDER, YOU AGREE THAT IF
THEY FIND THAT IT'S NOT A
FELONY, THERE IS NO FELONY, THAT
HE COULDN'T N FOUND GUILTY OF
FELONY MURDER, SO I'M HAVING
DIFFICULTY WITH WHAT INTEREST
THE STATE HAS, NOW THAT THE JURY
HAS FOUND THIS DEFENDANT ONLY
GUILTY OF A MISDEMEANOR, WHY THE
STATE SHOULD CONTINUE TO

ADVOCATE THAT HE SHOULD BE FOUND GUILTY OF FELONY MURDER?

WHAT INTEREST DOES THE STATE HAVE IN THAT?

>> I WOULD BEGIN BY SAYING THAT THE JURY DID NOT FIND THAT PETTY THEFT WAS A MISDEMEANOR, IT WAS SIMPLY ONE OF THE OPTIONS PRESENTED TO THEM.

>> ISN'T THIS THE SAME CROIM THAT WE'RE TALKING ABOUT, THAT THE STATE WAS TRYING TO ARGUE, TO GET A CONVICTION FOR FELONY MURDER, IS THAT NOT CORRECT?

>> WELL, THE STATE IN CLOSING ARGUMENT TOLD THE JURY, YOU CAN FIND THE DEFENDANT GUILTY IF, ONE, HE COMPLETED THE ROBBERY, OR TWO, IF HE ATTEMPTED THE ROBBERY.

SO IT WASN'T A GENERAL ARGUMENT THAT WAS PRESENTED TO THE JURY. THIS IS QUITE SPECIFIC.

>> BUT YOU AGREE THAT IF THE DEFENDANT ONLY COMMITTED A MISDEMEANOR, A PETTY THEFT, THAT HE CAN'T BE CONVICTED OF FELONY MURDER?

DO YOU NOT AGREE WITH THAT?

>> YOU I WOULD AGREE WITH THAT, BUT I WOULD ALSO POINT OUT TO THE COURT THAT THE JURY WAS NOT ASKED TO CONSIDER THE CASE ON THAT BASIS, THEY WERE NOT ASKED WHETHER OR NOT THERE WAS A FELONY AND THEN DECIDE WHETHER THERE WAS A FELONY MURDER. THEY WERE ASKED TO CONSIDER COUNT ONE SEPARATE, APART FROM COUNT TWO.

>> IT WAS BOILER PLATE ANYWAY.

>> CAN YOU TELL ME IN THIS CASE, MR. HEIMLICH'S RECOLLECTION WAS HAZY ON THE EXACT OBJECTION THAT WAS MADE, IF ANY, AFTER THE VERDICT CAME IN, WHETHER THE DEFENDANT RAISED AN OBJECTION SAYING IT WAS INCONSISTENT AND WHAT THE JUDGE DID OR REFUSED TO DO TO RECTIFY ANY INCONSISTENCY?

>> I BELIEVE THAT AFTER THE JURY WAS DISMISSED, WE HAVE THE DEFENSE COUNSEL COMING FORWARD AND SAYING, WELL, WE WANT TO

FILE AN OBJECTION, WE WANT TO MOVE WITH REGARD TO AN INCONSISTENT VERDICT, AND THEY ASKED FOR 10 DAYS TO DO THAT.

>> THERE WAS NOTHING OBJECTED TO BEFORE THE JURY WAS DISMISSED?

>> I DON'T BELIEVE SO, YOUR HONOR.

>> AND THAT'S WHERE --

>> I DON'T HAVE THAT PART OF THE TRANSCRIPT WITH ME.

>> I'M WONDERING WHY SHOULD WE NOT REQUIRE THE DEFENDANT TO OBJECT, IF THE DEFENDANT IS GOING TO THEN APPEAL ON THE BASIS OF THE INCONSISTENT VERDICTS, WHY, AT LEAST AT THAT POINT, IF WE'RE NOT GOING TO SAY IT'S A WAIVER BY ACQUIESCING TO INSTRUCTION 3.12, AT LEAST AT THE TIME WHEN THE INCONSISTENT VERDICTS ARE RETURNED, THE DEFENDANT DOESN'T HAVE AN OBLIGATION TO RAISE AN OBJECTION AT THAT POINT, SO THE JURY CAN BE INSTRUCTED THAT THEY CAN'T RULE THE WAY THEY DID, IS THERE ANY CONSTITUTIONAL IMPEDIMENT TO INSTRUCT BEING THE JURY THAT THEY HAVE TO GO BACK AND THAT THOSE VERDICTS CANNOT BE RENDERED THE WAY THEY DID?

>> I DON'T BELIEVE WE HAVE A SITUATION WHERE THE JURY CANNOT RECEIVE ADDITIONAL INSTRUCTION AND THEN BE ASKED TO CONSIDER ITS VERDICT ON THE BASIS OF ADDITIONAL INSTRUCTION.

ESPECIALLY IF IT'S GOING TO RESULT IN CLARITY FOR THE JURY TO HAVE GUIDELINES BEFORE THEM AS THEY MAKE THEIR DECISIONS.

>> ARE THERE OTHER SITUATIONS IN THE CRIMINAL LAW, I'M NOT FAMILIAR WITH ANYWHERE, A JURY COMES BACK WITH A VERDICT OR VERDICTS IN THE CASE AND THE JUDGE SAYS, GO BACK AND DELIBERATE, YOU KNOW, YOU CAN'T HAVE THESE VERDICTS --

>> I'M NOT AWARE OF A JURY COMING BACK AND THE COURT SENDING THEM BACK TO CONTINUE DELIBERATION UNTIL YOU'RE

TALKING ABOUT AN ALLEN CHARGE,
WHERE THE JURY COMES ALONG AND
SAYS WELL, WE'RE DEADLOCKED, AND
WE CAN'T COME TO A DECISION AND
THE JUDGE GOES AHEAD AND SAYS
WELL, GIVE IT SOME MORE TIME.
CONTINUE WITH YOUR
DELIBERATIONS.

>> I'M TRYING TO THINK OF --
WITH JUSTICE JUSTICE CANTERO, MY
RECOLLECTION IN THE CIVIL ARENA
IS WE MAKE A DISTINCTION BETWEEN
FACTUAL INCONSISTENCY AND LEGAL
INCONSISTENCY, ABOUT WHEN YOU
HAVE TO OBJECT, BUT MY CONCERN
IN THIS SITUATION ABOUT AT WHAT
POINT THERE NEEDS TO BE
OBJECTION, AND IT MAYBE IT GOES
BACK TO WHOSE RESPONSIBILITY IT
IS, THE JURY -- THE CHARGES TO
THESE JURIES, THE INSTRUCTIONS
TO THE JURY, WERE REALLY
CONFUSING.

THEY DIDN'T HELP THE JURY TO
MAKE A LEGALLY CONSISTENT
VERDICT.

AND IT JUST SEEMS TO ME THAT THE
STATE HAS THAT RESPONSIBILITY,
THAT IS, TO HAVE EXPLAINED THAT
PETTY THEFT IS A MISDEMEANOR,
THAT THAT COULD NOT BE A
PREDICATE FOR THE FELONY MURDER
CHARGE, TO EXPLAIN THAT THOSE
CHARGES WERE INTERLOCKING, AND
I'M NOT SURE HERE WHERE THE
STATE DOES NOTHING, BURR AGREES,
DOESN'T ASK FOR ATTEMPTED
MURDER, WHY WE SHOULD GIVE ALL
THE BENEFIT TO THE STATE WHEN
THE JURY HAS CLEARLY FOUND THIS
DEFENDANT GUILTY OF ONLY A
MISDEMEANOR?

>> AND I COME BACK TO THE POINT
THAT IS STICKING WITH YOU, WHICH
IS WITH REGARDS TO THE JURY WAS
ASKED TO CONSIDER EACH OF THESE
COUNTS SEPARATELY.
THEY WERE NOT TOLD COUNT TWO
PRECEDES COUNT NUMBER ONE.
IF YOU CAN'T COME TO THE POINT
THAT THIS IS A FELONY, THEN YOU
CANNOT FIND THE DEFENDANT GUILTY
OF THE FELONY MURDER.

>> BUT THOSE WERE LEGALLY INCON

CORRECT, BASED ON OUR LAW,
BECAUSE THESE WERE INTERLOCKING
CHARGES.

THE PROBLEM THAT I SEE IS 3.12A
IS REALLY INCORRECT, AS AN
INSTRUCTION, WHEN IT IS DEALING
WITH INTERLOCKING CHARGES.
AND I THINK AGAIN, IT'S
SOMETHING THAT WE'RE ALL
RESPONSIBLE FOR, BECAUSE WE'VE
KNOWN THIS FOR YEARS, AND NOBODY
HAS DONE ANYTHING ABOUT IT,
EITHER THE STATE OR THE
DEFENDANT.

YOU SEE THIS UNFORTUNATELY FROM
TIME TO TIME WITH JURY
INSTRUCTIONS, THIS HAS TO BE
REMEDIED FOR THE FUTURE.

THE QUESTION NOW WHO GETS THE
BENEFIT OF THE EITHER THE
DEFENDANT BENEFIT FROM THIS OR
IS THERE REALLY ENOUGH TO SAY
THERE'S A WAIVER AND THAT'S I
GUESS WHAT WE'RE STRUGGLING
WITH.

>> AND I UNDERSTAND THAT, BUT IN
THIS PARTICULAR SITUATION, IT'S
A SITUATION WHERE THE JURY HAD
EVIDENCE BEFORE THEM, THEY WERE
TOLD IN THE INDICTMENT, THEY
WOULD TOLD UNDER COUNT ONE OF
THE JURY INSTRUCTIONS, THAT AN
ATTEMPTED ROBBERY WOULD ALSO
RESULT IN A CONVICTION FOR THE
MURDER CHARGE.

THE FINDING OF GUILT AS TO PETTY
THEFT DID NOT NEGATE THE
ATTEMPTED ROBBERY.

>> YOU COULD HAVE WAIVED THAT
WHOLE COUNT AND SAID WE'RE JUST
GOING ON THE FELONY MURDER
COUNT, CORRECT?

>> IF WE HAD DONE THAT, I
CERTAINLY WOULDN'T BE HERE RIGHT
NOW.

>> THEREIN LIES THE PROBLEM.
AND THAT IS THAT WE'VE GOT ONE
SET OF EVIDENCE, AND IF YOU WILL
ASSUME WITH ME THAT WE DO HAVE A
CASE OR TWO OUT THERE THAT SAYS
THAT A PERSON CAN BE CONVICTED
OF FELONY MURDER WITHOUT THERE
BEING A SIMULTANEOUS CONVICTION
OF AN ENUMERATED FELONY IF THE

EVIDENCE IN THE RECORD SUPPORTS ONE OF THE EVE NUMBER RATED FELONIES, -- ENUMERATED FELONIES, BUT HERE WE DON'T HAVE THAT SITUATION.

WE HAVE A SITUATION IN WHICH THERE IS A SPECIFIC FINDING OF NOT A FELONY, BUT OF A LESSER INCLUDED OVER FENCE.

-- OFFENSE.

ISN'T THAT THE PROBLEM?

>> THAT IS THE PROBLEM, BUT AGAIN, IT'S A SITUATION WHERE THE FINDING OF THE CONVICTION OF THE PETTY THEFT DOES NOT NEGATE THE ATTEMPTED ROBBERY AND THE JURY WAS NOT GIVEN THAT OPPORTUNITY TO MAKE THAT SPECIFIC FINDING AS THE JURY DID IN M HA HAN AND AS ARGUABLY THE WAS ABLE TO DO IN REDONDO.

>> IF IN THIS CASE THE VERDICT FORM HAD SAID FELONY MURDER, BY ARMED ROBBERY, FELONY MURDER BY ATTEMPTED ROBBERY, FELONY MURDER, ALL THE PURE MUTATIONS OF ROBBERY AND THE JURY HAD IN FACT FOUND THE DEFENDANT GUILTY OF FELONY MURDER BY ATTEMPTED ROBBERY, AND THEN IN THE SECOND COUNT THEY HAD FOUND THE DEFENDANT GUILTY AS THEY DID HERE OF PETTY THEFT, WOULD THE FELONY MURDER CONVICTION BE ABLE TO STAND IN THE FACE OF THE MISDEMEANOR CONVICTION?

>> I BELIEVE SO, YOUR HONOR, IF YOU HAVE THE SITUATION OF THE JURY BEING TOLD COUNT ONE MUST BE CONSIDERED SEPARATE AND APART FROM COUNT TWO.

AND ALSO, IF YOU HAVE --

>> HOW ABOUT IF YOU DIDN'T HAVE THAT INSTRUCTION?

>> WHERE THE JURY IS TOLD, WELL, WITHOUT A FELONY CONVICTION, THE UNDERLYING FELONY --

>> IF THE JURY IS TOLD EVERYTHING THEY'VE BEEN TOLD IN THIS CASE, EXCEPT THE INSTRUCTION ABOUT CONSIDERING THESE SEPARATELY AND THERE HAD BEEN A SPECIAL VERDICT FORM, THEY HAD FOUND HIM GUILTY OF

FELONY MURDER BY ATTEMPTED ROBBERY, AND CONVICTED HIM OF PETTY THEFT, COULD BOTH OF THOSE VERDICTS STILL STAND?

>> I WOULD HAVE TO SAY THAT YES, IF YOU HAVE THE EVIDENCE TO SUPPORT THE ATTEMPTED ROBBERY IN THAT PARTICULAR SITUATION.

THE PETTY --

>> DOES THE ANSWER TO THE QUESTION DEPEND ON, IN COUNT TWO, WHETHER THE VERDICT FORM INCLUDES A LINE FOR ATTEMPTED ROBBERY OR NOT?

>> WELL, THAT'S WHAT I WAS GOING TO GET AT, IS IF YOU WOULD HAVE THE PETTY THEFT AND YOU HAVE A SITUATION OF THAT NEGATING THE ATTEMPTED ROBBERY, THEN CLEARLY THERE'S --

>> THERE'S A LESSER INCLUDED OFFENSE, DOES IN FACT NEGATE ATTEMPTED ROBBERY?

IT SEEMS TO ME, IF YOU ARE CHARGED WITH ROBBERY AND YOU HAVE ALL THE LESSER INCLUDED OFFENSES INDICATED AND THE JURY PICKS THE PETTY THEFT, THEY SAID YOU ARE NOT GUILTY OF ROBBERY, WITH A FIREARM, ROBBERY WITHOUT A FIREARM, ATTEMPTED ROBBERY, ALL THOSE THINGS?

>> IF THAT WERE THE SITUATION, YOU COULD -- ANOTHER THING WAS THE JURY EXERCISING ITS PARDONING POWER TO SAY YES, GUILTY OF THE FELONY MURDER ON THE BASIS OF ATTEMPTED ROBBERY BUT AS TO THE ROBBERY CHARGE ITSELF, WE WILL FIND THAT FOR EXAMPLE, NO, YOU DIDN'T STEAL -- GENTLEMAN.

>> THAT'S NOT MUCH OF A PARDON GIVEN THE DIFFERENT SENTENCES.

>> IT MAY NOT BE, BUT IT'S THERE FOR THE JURY TO DECIDE.

>> WHAT IS THE DEFENDANT'S SENTENCE?

>> I DON'T KNOW THAT HE HAS BEEN SENTENCED.

DOES THIS COURT HAVE ANY OTHER QUESTIONS FOR THE STATE?

>> NO, THANK YOU.

>> IF I MAY PLEASE SUM UP.

IN THIS PARTICULAR SITUATION,
AGAIN, THE JURY WAS TOLD TO
CONSIDER COUNT ONE, COUNT TWO
SEPARATE AND APART FROM EACH
OTHER.

THE JURY DID NOT HAVE THE
OPPORTUNITY TO REJECT ATTEMPTED
ROBBERY AS THE UNDERLYING FELONY
OFFENSE.

THE TWO VERDICTS IN THIS
SITUATION CAN BE LOGICALLY
FILED.

THE STATE ASKED THE OPINION OF
THE THIRD DISTRICT COURT BE
AFFIRMED.

THANK YOU.

>> THANK YOU.

REBUTTAL?

>> IN MY REMAINING NINE SECONDS,
I HAVE ONLY THREE POINTS.

THE FIRST IS THAT THE ATTEMPTED
ROBBERY IS NEGATIVE BY THE
VERDICT FOR PETTY THEFT BECAUSE
PETTY THEFT AND ATTEMPTED
ROBBERIES ARE BOTH LESSERS OF
THE ARMED ROBBERY THAT WAS
CHARGED AND IT'S FUNDAMENTAL
THAT YOU CAN'T BE CONVICTED OF
TWO LESSORS.

THIS IS A TWO COUNT INDICTMENT.
ACCORDING TO THE STATE, THE
DEFENDANT HAS BEEN CONVICTED AN
A TWO COUNT INDICTMENT OF THREE
OFFENSES, FELONY MURDER,
ATTEMPTED ROBBERY AND PETTY
THEFT.

THAT CAN'T BE.

>> WELL IN THE SITUATION THAT I
POSTITED, WHERE THESE FOUND
GUILTY OF FELONY MURDER BY
ATTEMPTED ROBBERY AND THEN FOUND
GUILTY OF THE PETTY THEFT, THEN
DO YOU JUST NOT FIND HIM GUILTY
AND NOT SENTENCE HIM ON THE
PETTY THEFT?

>> THE FINDING OF PETTY THEFT IS
INCONSISTENT WITH THE FINDING OF
ATTEMPTED ROBBERY ON THE FIRST
COUNT, BECAUSE THEY'RE TWO
LESSERS OF THE ROBBERY THAT'S
CHARGED AND YOU CAN'T BE
CONVICTED OF TWO LESSERS.

>> WHAT IF UNDER COUNT TWO THEY
DIDN'T INCLUDE A LINE FOR

ATTEMPTED ROBBERY?

>> IT DOESN'T MATTER.

HE'S CHARGED WITH ATTEMPTED ROBBERY.

HE'S CHARGED WITH ARMED ROBBERY.

ATTEMPTED ROBBERY AND PETTY THEFT ARE TWO LESSERS.

>> BUT THE JURY DOESN'T KNOW THAT.

>> HE CAN BE CONVICTED ONE OR THE OTHER BUT NOT BOTH.

>> THE JURY DOESN'T KNOW THE LEGAL EASE.

ALL THEY KNOW IS ON COUNT ONE, THEY THOUGHT HE WAS GUILTY OF ATTEMPTED ROBBERY, SO THEY FOUND FELONY MURDER BY ATTEMPTED ROBBERY, BUT ON COUNT TWO, THEY DIDN'T HAVE A CHOICE OF ATTEMPTED ROBBERY, SO THEY TOOK PETTY THEFT.

>> THAT'S EXACTLY WHY THE SEPARATE VERDICT INSTRUCTION DOESN'T WAIVE THE POINT.

THE JURY'S JOB IS NOT TO RETURN SEPARATE VERDICTS, CONSISTENT VERDICTS.

THE JURY IS NOT INSTRUCTED --

>> DOESN'T THERE HAVE TO BE --

>> THE CONSISTENCY OF THE VERDICT IS FOR THE COURT.

>> ONCE THERE ARE INCONSISTENT VERDICTS AN YOU HAVE AN APPEALABLE ISSUE, DON'T YOU HAVE TO AT LEAST OBJECT SO THAT THAT CAN BE CORRECTED BEFORE YOU HAVE --

>> I WANT TO COME TO THAT.

I LOOKED IT UP WHILE MY COLLEAGUE WAS TALKING.

THE VERDICT IS RETURNED ON PAGE 757 OF THE TRANSCRIPT, THE JURY HAS BEEN TOLD, AFTER THE JURY -- THE JURY IS POLLED, AFTER THE JURY IS POLLED, THE COURT DISCHARGED THEM, THE JURY LEAVES THE COURTROOM, THE COURT SAYS MR. BROWN I ADJUDICATE YOU AND THE DEFENSE COUNSEL SAYS WE NEED A HEARING POSTPONED SO I CAN LOOK AT SOME LAW, JUDGE. I DON'T THINK THAT PETTY THEFT CAN BE A BASIS FOR FELONY MURDER.

>> THAT'S MY POINT.

LET ME ASK YOU THIS.

THAT'S MY POINT.

IN ORDER TO PRESERVE AN
OBJECTION, THE WHOLE POINT OF IT
IS SO THAT THE ERROR CAN BE
CORRECTED.

ONCE THE JURY IS DISCHARGED, THE
ERROR CAN NO LONGER BE
CORRECTED, DOESN'T THE DEFENDANT
HAVE AN OBLIGATION TO OBJECT
BEFORE THE JURY IS DISCHARGE SO
THAT THE TRIAL COURT CAN
INSTRUCT THE JURY THAT THEY
CANNOT RENDER THOSE TWO VOARDZ VERDICTS
AND THEY GO BACK AND CORRECT IT?

>> THE ANSWER TO YOUR QUESTION,
YOUR HONOR, IS YOU'RE ASKING ME
TO ADDRESS A QUESTION THAT WAS
NOT RAISED.

IT WAS NOT RAISED IN THE TRIAL
COURT, NOT RAISED IN THE
APPELLATE COURT, IT'S NOT RAISED
IN THE BRIEFS IN THIS CASE.

>> ONE SECOND.

WOULD YOU PLEASE ANSWER JUSTICE
CANTERO'S QUESTION, BECAUSE IN
THE CIVIL LAW, IT'S VERY CLEAR
THAT YOU MUST OBJECT BEFORE THE
JURY IS DISCHARGED TO PRESERVE
THAT ERROR.

I UNDERSTAND YOUR POSITION THAT
IT'S NOT RAISED BUT COULD YOU
PLEASE ANSWER HIS QUESTION IS
THERE A DIFFERENCE IN THE
CRIMINAL LAW AND THE CIVIL LAW.

>> I THINK THERE SHOULD BE.

>> AND WOULD YOU EXPLAIN TO HIM
WHY?

>> I THINK THERE SHOULD BE A
DIFNS BECAUSE I THINK THAT THE
CONSIDERATIONS THAT ARE
IMPLICATED HERE HAVE TO DO WITH
DOUBLE JEOPARDY, AND DOUBLE
JEOPARDY WOULD NOT PERMIT THE
STATE TO CONVICT THE DEFENDANT
OF TWO LESSERS OF THE SAME
OFFENSE.

DOUBLE JEOPARDY, AS I RECALL, IS
FUNDAMENTAL ERROR, NOT REQUIRED
TO BE RAISED BY OBJECTION.

SO I WOULD -- IF I WERE
RESEARCHING THIS ISSUE, I WOULD
LOOK FOR LAW SAYING THAT THE

DEFENDANT'S CONVICTION FOR TWO
LESSORS CAN'T STAND EVEN IF HE
DIDN'T MAKE AN OK AT ALL.

>> THANK YOU VERY MUCH.
WITH OUR HELP, YOU HAVE
EXHAUSTED YOUR TIME.

WE THANK YOU BOTH FOR YOUR
PRESENTATIONS THIS MORNING.

WE'LL TAKE THE CASE UNDER
ADVISEMENT.

THE COURT WILL TAKE ITS MORNING
RECESS BEFORE OUR FINAL CASE.

>> PLEASE RISE.