

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

Eli Enrique Valdes v. State of Florida

SC07-2256

>> PLEASE RISE.

>> GOOD AFTERNOON.

>> LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> THE LAST CASE ON TODAY'S
CALENDAR IS VALDES VERSUS
STATE.

>> MAY IT PLEASE THE COURT.
MARIA LAUREDO, ASSISTANT PUBLIC
DEFENDER ON BEHALF OF
MR. VALDES.

THE ISSUE IN THIS CASE IS
WHETHER DUAL CONVICTIONS,
ARISING OUT OF ONE SHOOTING
EPISODE UNDER 790.15 SUBSECTION
2, FOR A SHOOTING FROM A
VEHICLE WITHIN 1,000 FEET OF
ANOTHER PERSON, AND, THE CRIME
UNDER 790.19 WHICH IS SHOOTING
AT, WITHIN, OR INTO A VEHICLE
OCCUPIED BY ANOTHER PERSON
VIOLATES DOUBLE JEOPARDY.

>> THE SPECIFIC QUESTION IS,
ARE THEY DEGREES OF THE SAME
OFFENSE?

>> YES, YOUR HONOR.

>> NOW I'M GOING TO ASK YOU
SOMETHING THAT YOU MAY NOT LIKE
BUT I'M GOING TO ASK IT ANYWAY,
WHICH IS, WHY SHOULDN'T WE
PROCEED FROM ALL OF OUR
PRECEDENT AND GO WITH WHAT
JUSTICE CANTERO HAS SAID, IS
THAT DEGREES OF THE SAME
OFFENSE, SIMPLY MEAN IT'S
WITHIN A CHAPTER THAT THE
LEGISLATURE SET OUT ONE
OFFENSE, AND, AS, PUT DIFFERENT
DEGREES THERE, THAT'S WHAT THAT
MEANS.

IT MEANS NOTHING MORE, NOTHING
LESS?

AND REASON I SAY THAT, IS
BECAUSE THIS CASE TO ME POINTS
OUT THE WAY THE, OUR

JURISPRUDENCE HAS GONE,
YOU HAVE TWO VERY FINE
APPELLATE COURTS LOOK AT SAME
OFFENSE AND THEY COME UP WITH
DIFFERENT RESULTS.

AND I JUST FOR ONE, BEEN AT
THIS DOUBLE JEOPARDY STUFF FOR
15 YEARS AND CAN'T MAKE HEAD OR
TAIL OF IT MYSELF.

THAT IS THE QUESTION.

WHY ISN'T IT LOGICAL IF YOU
LOOK AT DEGREES OF THE SAME
OFFENSE AND WE HAVE REJECTED
THIS SERMONS BROAD, THERE ARE
ONLY FOUR CATEGORIES OF FOUR
OFFENSES WHICH MADE SENSE TO ME
BUT THAT IS NOT WHAT THE LAW
IS, JUST GO WITH SOMETHING
EVERYONE CAN APPLY AND END THIS
ENDLESS LITIGATION ON THESE
DOUBLE JEOPARDY CASES?

>> THE ANSWER IS BECAUSE,
ALTHOUGH THAT MAY BE THE
SIMPLEST TEST, IT WOULD LEAD TO
ABSURD RESULTS IN SEVERAL
SCENARIOS BECAUSE FLORIDA
STATUTES CONTAIN SEVERAL
EXAMPLES OF CRIMES THAT ARE NOT
DESIGNATED AS DEGREE VARIANCE
BUT AT THE HEART ARE THE VERY
SAME CRIME.

I THINK A VERY GOOD EXAMPLE OF
THAT IS THIS COURT'S DECISION
IN ANDERSON.

ANDERSON ADDRESSED TWO CRIMES,
ONE BEING PERJURY IN AN
OFFICIAL PROCEEDING, AND,
MISREPRESENTATION IN
APPLICATION FOR BAIL.

AND THIS COURT RIGHTFULLY FOUND
THAT THOSE TWO CRIMES WHICH ARE
FOUND IN DIFFERENT CHAPTERS OF
FLORIDA STATUTES AND ARE BY NO
MEANS DESIGNATED AS DEGREES OF
EACH OTHER AT HEART ARE THE
SAME CRIMES I WHICH IS
ESSENTIALLY --

>> THE LEGISLATURE CAN PUNISH
THE SAME CONDUCT AT LEAST IN
SOME CIRCUMSTANCES BY TWO
DIFFERENT, BY DESIGNATING THEM
TO INVOLVE TWO DIFFERENT
CRIMES, RIGHT?

>> THE LEGISLATURE CAN DO THAT.

>> THE LEGISLATURE CAN DO THAT.
THIS ALL COMES DOWN TO A
QUESTION OF WHAT THE
LEGISLATURE INTENDED WHY
WOULDN'T WE CONCLUDE THAT THE
LEGISLATURE INTENDED TO IMPOSE
TWO DIFFERENT PUNISHMENTS FOR
DIFFERENT ASPECTS OF THAT
CONDUCT?

WHICH ARE DISTINCT ASPECTS
WHICH ARE CULPABLE AND WORTHY
OF PUNISHMENT?

>> BECAUSE, THERE ARE CERTAIN
CRIMES WHERE I THINK, WHAT THE
LEGISLATURE INTENDED WAS TO
CALL ATTENTION TO A SPECIFIC
FACTUAL SCENARIO WITHOUT
INTENDING THAT ONE ACT BE
PUNISHED UNDER BOTH THOSE
CRIMES AS IN THE ANDERSON CASE
WHERE CLEARLY IT'S, IT IS ONE
CRIME TO MISREPRESENT OR NOT
FOLLOW ONE'S LEGAL OBLIGATION.

>> WE'VE ALREADY, TO ME WE HAVE
PASSED THAT POINT.

WHEN WE SAID, YOU HAVE NOT
CHALLENGED THE THREE COUNTS OF
ATTEMPTED SECOND-DEGREE MURDER
AND SINCE THERE ARE GOING,
MAYBE THERE WILL BE A FEW
PEOPLE LISTENING TO THIS.

WE NOTE THAT ALL OF THESE
SENTENCES RAN CONCURRENTLY WITH
THE ATTEMPTED SECOND-DEGREE
MURDER BEING THE SUBSTANTIAL
CRIME.

ATTEMPTED SECOND-DEGREE MURDER
OCCURRED WHEN HE SHOT FOUR OR
FIVE TIMES INTO THE VEHICLE.
AND I GUESS, ATTEMPTED TO
MURDER THIS THREE VICTIMS IN
THERE.

IT'S THE SAME EXACT FOUR OR
FIVE SHOTS THAT LED TO ONE
COUNT OF DISCHARGING A FIREARM
FROM A VEHICLE WITHIN 1,000
FEET OF A PERSON AND ONE COUNT
OF SHOOTING INTO AN OCCUPIED
VEHICLE.

SO THE FACT THAT THERE IS A
SINGLE ACT THAT GIVES RISE TO
SEVERAL CRIMES WHICH AGAIN, I
NEVER UNDERSTOOD IT BUT THAT'S
THE LAW AS JUSTICE CANADY SAID

ALLOWS THAT.

HERE THEY DISTINCT, WHAT I GO
BACK TO, IT SEEMS THAT IF WE
FOLLOW ALONG WITH OUR
PRECEDENT, THEN THE THIRD
DISTRICT IS PROBABLY RIGHT.

MAYBE YOU KNOW, YOU MIGHT WANT
TO ADDRESS THAT TOO BECAUSE IT
LOOKS LIKE THE FIFTH DISTRICT
DID IN THIS CASE IS GO BACK TO
PREGORDON CASES AND SAY THAT
THE CORE OFFENSE WAS CORE
OFFENSE, BATTERY VERSUS
HOMICIDE, END UP WITH VERY FEW
VARIANCE OF THE SAME OFFENSE.
THE TERM VARIANT IS NOT IN THE
STATUTE.

IT SAYS DEGREES OF SAME
OFFENSE.

WHEN I WENT BACK, WHERE DID WE
GET THIS VARIANT OF THE SAME
OFFENSE WHEN IT SAYS DEGREES OF
THE SAME OFFENSE?

COULD YOU I GUESS, GO TO THE
FACT THAT A SINGLE ACT OCCURRED
IN THIS CASE AND BY THAT
SINGLE, OR ACTIONS HE WAS
CONVICTED ALSO OF ATTEMPTED
MURDER.

WE ALSO KNOW THAT IF HE HAD
MURDERED THIS VICTIM, HE
WOULDN'T, ALL THE OTHER CRIMES
WOULD HAVE BEEN SUBSUMED
BECAUSE THAT IS ANOTHER ONE OF
OUR ASPECTS OF DOUBLE JEOPARDY.
WE HAVE MERGER WITH THE, YOU
KNOW, THE BATTERIES OR
ATTEMPTED BATTERIES BUT THAT
THIS IS REALLY, THAT THE, A
QUESTION OF THE LEGISLATURE
INTENDING TO PUNISH DIFFERENT
EVILS AND THE DIFFERENT EVILS
OF JUST SAYING CORE OFFENSE IS
BATTERY IS WAY TOO BROAD-BASED
ON OUR PRIOR JURISPRUDENCE.
EITHER WE CHANGE OUR EXISTING
JURISPRUDENCE BUT EVEN UNDER
THE EXISTING JURISPRUDENCE WHY
ISN'T THE THIRD DISTRICT CORRECT?
I'M LOOKING AT OUR
PRECEDENT AND I CAN'T SEE WHERE
THE FIFTH DISTRICT OPINION IS
CONSISTENT WITH OUR PRIOR
RECENT JURISPRUDENCE.

>> I'LL TRY TO TAKE YOUR
QUESTIONS ONE AT A TIME.

>> OKAY.

>> I THINK THE THIRD DISTRICT
ANALYSIS WAS COMPLETELY
INCORRECT BECAUSE THE THIRD
DISTRICT TRIES TO DISTINGUISH
THESE TWO STATUTES BY SAYING
ONE PUNISHES INTENT TO INJURE
OR TO CAUSE FEAR.

AND THE THIRD DISTRICT IS WRONG
ABOUT THAT, JUST, THE PLAIN
LANGUAGE OF THE STATUTE DOES
NOT REQUIRE ANY SUCH INTENT.
THE STATUTE REQUIRES WANTON OR
MALICIOUS STATE OF MIND.
AND IT ALSO APPLIES TO, IT
WOULD APPLY TO AN ABANDONED
BUILDING WITH NO ONE INSIDE.
SO I THINK THE THIRD DISTRICT
IS INCORRECT IN DISTINGUISHING
THOSE TWO STATUTES ON THAT
BASIS.

ADDRESSING THIS COURT'S CONCERN
WITH LIMITED SUBSET OF CORE
OFFENSES, I THINK THAT, THAT
INITIALLY CAME ABOUT IN JUSTICE
KOGN CONCURRENCE SERMONS.
I THINK HE MET THOSE FOUR
OFFENSES BY WAY OF EXAMPLE.
SINCE SERMONS, I THINK IT FOUND
THOSE GO BEYOND THOSE AND DON'T
HAVE TO BE LIMITED TO THOSE.
THEREFORE CONCERN ABOUT THAT
WAS MISPLACED.

SUBSEQUENT TO THAT THIS COURT
CAME OUT WITH PRIMARY EVIL
TEST.

I THINK --

>> WHERE DID THAT COME FROM?
ONCE YOU GET TO WHEREVER A CORE
OFFENSE MEANS, THE PRIMARY EVIL
ALLOWS APPELLATE COURT TO DO
WHAT THE THIRD DISTRICT DID.
PRIMARY EVIL IS SHOOTING A
WEAPON IN PUBLIC WHERE THERE
ARE PEOPLE AROUND.
AND PRIMARY EVIL IN THE OTHER
IS SHOOTING INTO BUILDINGS.
RIGHT? THOSE ARE THE TWO
THINGS.

SO, WHY CAN'T I SAY THOSE ARE
THE TWO, THERE ARE TWO
DIFFERENT PRIMARY EVILS?

WHAT'S WRONG WITH THAT LEGAL ANALYSIS? IN OTHER WORDS, THEY WERE INTENDING TO PUNISH DIFFERENT THINGS BECAUSE YOU CAN, FOR THE VERY REASON CAN YOU HAVE ONE AND NOT THE OTHER, BUT BECAUSE THEY ADDRESS DIFFERENT TYPES OF EVIL? ONE DOING SOMETHING IN PUBLIC WITH PEOPLE AROUND, AND THE OTHER, YOU KNOW, INTO BUILDINGS?

>> WELL, I THINK THE THIRD DISTRICT AS I SAID BEFORE WAS CLEARLY INCORRECT ON THE PRIMARY EVIL THAT 719 --

>> HOW WOULD YOU DEFINE THE PRIMARY EVIL?

IT CAN'T BE BATTERY.

TELL ME THEN IF, WHAT IS YOUR BEST BET ON WHAT'S THE COMMON PRIMARY EVIL IN THIS CASE?

>> JUST TO ADDRESS WHAT YOUR HONOR BROUGHT UP BEFORE, I DO BELIEVE THAT THE PRIMARY EVIL TEST IS NOT THE PROPER TEST.

I BELIEVE THAT THE CORE OFFENSE TEST OF SERMONS IS THE BEST TEST FOR THIS COURT TO APPLY.

THE REASON BEING THAT PRIMARY EVIL LOOKS SOLELY AT A CONSEQUENCE FOR EXAMPLE.

AND THE CORE OFFENSE TEST LOOKS AT THE WHOLE OFFENSE.

I THINK THE REASON WHY WE CANNOT GO TO THE LITERAL INTERPRETATION OF 775.021 IS

BECAUSE, THE WAY THAT FLORIDA STATUTES ARE SET UP, IT IS VERY

COMMON FOR TWO CRIMES THAT ARE AT HEART THE SAME CRIME,

THEY'RE JUST ALTERNATIVE FORMS OF PROSECUTION, TWO CRIMES

BECAUSE THE LEGISLATURE INTENDED TO CALL ATTENTION TO SPECIFIC FACTUAL PERMUTATIONS, THAT

DOES NOT MEAN THE LEGISLATURE INTENDED FOR THEM TO BE

PUNISHED FOR ONE --

>> WHY NOT?

>> TO JUSTICE CANADY'S QUESTION TO BEGIN WITH, HAVEN'T WE

GOTTEN OFF TRACK?

BECAUSE, YOU KNOW, YEARS AGO

WHEN THE SUPREME COURT DECIDED THE CASE AND SAID, ESSENTIALLY THE LEGISLATURE CAN MAKE ONE ACT OR WHATEVER, ALL THE CRIMES IN THE WORLD THAT THEY WANT TO, IF THEY INTEND TO DO IT.

>> CORRECT.

>> SO, THAT, YOU JUST START WITH A PROPOSITION.

YOU START WITH THE PROPOSITION THAT THIS IS STRICTLY A LEGISLATIVE INTENT QUESTION, AND THAT ONCE THE LEGISLATURE DECIDES TO CREATE TWO INSTEAD OF ONE, OKAY, TO COVER, YOU KNOW, WHATEVER HAPPENED OUT THERE, THAT THERE HAS, IN OTHER WORDS, THAT CREATES A PRESUMPTION THAT THE LEGISLATURE INTENDED THAT, THAT IS WHAT THEY INTENDED TO DO, IS TO PROVIDE RELIEF TWO SEPARATE OFFENSES AND TWO SEPARATE CRIMES.

AND STRICTLY LIMIT, AS JUSTICE PARIENTE THEN ASKS, THIS DEGREE OF OFFENSES TO, PURE DEGREE OF OFFENSES WHEN THE LEGISLATURE HAS SAID, MURDER, OKAY. FIRST DE, SECOND DEGREE, THIRD-DEGREE, OR PERHAPS ROBBERY, FIRST DEGREE, SECOND DEGREE AND, YOU KNOW, WHATEVER THE THING IS BECAUSE WHEN YOU'RE TALKING ABOUT CORE OFFENSE AND PRIMARY EVIL AND THE THINGS THAT INDIVIDUAL CASE AND CIRCUMSTANCES HAVE SEEMED TO INFLUENCE THIS COURT, THE CASE THAT YOU CITED AT THE OUTSET, SEEMS TO ME THAT IS WHAT WE DECIDED REALLY WAS, THOSE WERE ALL THE SAME ELEMENTS.

IT WAS REALLY JUST DESCRIBING THE OFFICIAL COURT PROCEEDING, YOU KNOW WHAT THEY HAVE, REALLY JUST DESCRIBING THE SAME ELEPHANT, YOU KNOW, YOU KNOW, BY USING DIFFERENT WORDS. BUT IT WAS THE SAME ELEMENT, ELEPHANT.

IT WAS THE SAME THING THAT WAS GOING ON.

BUT WE'VE JUST GOTTEN OURSELVES
IN TROUBLE THAT WE CAN'T SEEM
TO RETREAT FROM WITH PRIMARY
EVIL AND THESE OTHER CASES
WHERE THE FACTUAL
CIRCUMSTANCES.

BUT WHY IN THIS CASE, WHAT'S
WRONG WITH THE FACT THAT THE
BLOCKBURGER APPLICATION SEEMS
TO INDICATE THESE ARE TWO
SEPARATE OFFENSES? YOU CAN FIRE
A GUN INTO A VEHICLE FROM THE
ROOF CROSS THE STREET, OR FROM
THE SIDEWALK AND, YOU'RE
FOCUSING ON YOUR FIRING OF THE
GUN INTO THIS VEHICLE.

YOU CAN DO IT IN ALL KINDS OF
DIFFERENT WAYS.

YOU DON'T HAVE TO DO IT FROM
ANOTHER VEHICLE IN ORDER TO DO
IT.

AND SO, DON'T WE JUST HAVE A
CLASSICAL CASE HERE OF
LEGISLATURE'S DEALING WITH
PEOPLE SHOOTING WEAPONS, OUT,
FROM INSIDE A VEHICLE IN ONE
INSTANCE AND THE OTHER INSTANCE
THEY'RE DEALING WITH WHEN SHOTS
ARE FIRED INSIDE A VEHICLE?
BUT THEY HAVE CREATED TWO
SEPARATE CRIMES.

I DON'T KNOW IF THERE IS A
QUESTION IN THERE OR NOT BUT IT
REALLY IS SAYING HAVEN'T WE
REALLY GONE ASTRAY?

IF WE'VE DONE IT IN GOOD FAITH
BECAUSE THIS DOUBLE JEOPARDY
THING HAS BEEN, LIKE THE
CHAMELEON IN MANY LEGAL
DOCTRINES, WHY SHOULDN'T WE
JUST GO BACK TO THE U.S.

SUPREME COURT DECISION THAT
SAID, THE LEGISLATURE CAN DO
WHATEVER THEY WANT TO DO.

AND ONCE YOU FIGURE OUT THEY
HAVE MADE IT MORE THAN ONE
CRIME, THAT'S IT?

AND WHY SHOULDN'T THAT APPLY
HERE?

>> LET ME BACKTRACK A LITTLE
BIT BEFORE I GET TO WHY IT
SHOULDN'T APPLY HERE.

WHEN THIS COURT WENT ASTRAY IN
CARAWAN,

THE LEGISLATURE DECIDED
SERMONS, DECIDED 15 YEARS AGO
DID NOT GET THE RESPONSE
CARAWAN GOT WITH PRIMARY EVIL.
I THINK THE REASON FOR THAT
BECAUSE IT IS A TEST THAT
YIELDS LOGICAL RESULTS.
AND BECAUSE THE OTHER REASON IS
THAT, AN EXAMINATION OF FLORIDA
STATUTES AS A WHOLE BEARS OUT
THE FACT THAT IT IS NOT THE
CASE THAT THE LEGISLATURE
SPECIFICALLY DESIGNATES DEGREES
AS THE ONLY TIME TWO CRIMES ARE
NOT MEANT TO BE PROSECUTED
TOGETHER.

IN THE EXAMPLE OF ANDERSON,
THIS COURT DECIDED IT ON THE
DEGREE VARIANT EXCEPTION
BECAUSE THE BLOCKBURGER TEST
WAS PASSED.

EACH HAD ELEMENTS THAT THE
OTHER DID NOT AND THIS COURT I
THINK VERY CORRECTLY DECIDED
THAT, YES, IT MET BLOCKBURGER.
HOWEVER THE EXCEPTIONS TO
BLOCKBURGER EXIST FOR A REASON
AND THAT IS, YOU CAN LOOK AT
TWO CRIMES AND SAY THIS IS THE
SAME CRIME.

THIS IS NOT TWO SEPARATE
CRIMES.

WHAT IT REALLY IS TWO FORMS OF
PROSECUTION.

>> EXPLAIN HOW THESE ARE THE
SAME CRIME.

BECAUSE IT SEEMS TO ME, AND,
YOU KNOW, I GUESS I'M SOMEWHAT,
AND JUSTICE PARIENTE'S
POSITION, WE HAVE GONE AROUND
AND AROUND ON THESE DOUBLE
JEOPARDY ISSUES HERE.

AND IT SEEMS TO ME, DISCHARGING
FIREARM, FROM A VEHICLE WITHIN
A THOUSAND FEET OF A PERSONAL,
IS NOT THE SAME EVIL, AS,
SHOOTING UNTIL AN OCCUPIED
VEHICLE.

SO EXPLAIN TO ME, HOW THEY ARE.

>> OKAY.

BOTH CRIMES ARE THE SAME CORE
OFFENSE, AND THAT CORE OFFENSE
IS THE RECKLESS SHOOTING --

>> I THOUGHT YOU SAID THAT CORE

OFFENSE WASN'T, WHAT WE SHOULD BE LOOKING AT?

>> NO, I SAID THE PRIMARY EVIL IS NOT WHAT THIS COURT SHOULD BE LOOKING AT.

>> OH, OKAY.

>> OKAY.

CORE OFFENSE IS WHAT IS AT ISSUE HERE.

THE SAME CORE OFFENSE IS, THE RECKLESS DISCHARGE IN AREAS WHERE PERSONS MAY BE.

BECAUSE THE BATTERY AND ASSAULT STATUTES GOVERN SHOOTING AT PEOPLE TO INJURE THEM OR SHOOTING AT PEOPLE TO CAUSE FEAR.

THAT IS NOT WHAT THE WAS BEING PUNISHED BY THESE TWO CRIMES WHICH ARE BOTH IN CHAPTER 790. THESE TWO CRIMES PUNISH RECKLESS DISCHARGE IN PLACES WHERE PEOPLE MAY BE.

>> YEAH, BUT IN ONE, IT SEEMS TO ME, IF YOU'RE SHOOTING INTO AN OCCUPIED VEHICLE, THAT REALLY, THE EVIL IS, YOU ARE TRYING TO INJURE SOMEONE. THE OTHER ONE, WHICH IS THE DISCHARGE FROM, OF A FIREARM FROM THE VEHICLE, YOU KNOW, WE HAVE ALL THESE CRIMES OF DRIVE-BY SHOOTINGS AND UNINTENTIONAL VICTIMS WITH THESE DRIVE-BY SHOOTINGS, SO I'M NOT SURE THAT WE REALLY HAVE THE SAME CORE OFFENSE -- IS THAT YOUR -- CORE OFFENSE HERE.

>> YES.

I THINK IT IS THE SAME CORE OFFENSE BECAUSE THE 790.15 WHICH IS SHOOTING FROM A CAR, SPECIFICALLY INCLUDES SHOOTING FROM A CAR WITHIN 1,000 FEET OF ANOTHER PERSON WHICH IS AN EXTREMELY RECKLESS ACT THAT ENDANGERS OTHER PEOPLE.

THE OTHER CRIME IS THE SAME --

>> BUT YOU MAY NOT HAVE ANY INTENT TO ACTUALLY INJURE SOMEONE, OR SHOOT AT ANY PARTICULAR PERSON IN THAT SITUATION?

>> CORRECT.

YOU NEED NOT HAVE THAT INTENT.

IT IS THE SAME CORE OFFENSE --
>> BUT ISN'T, SEE, I'M LOOKING
AT 790.15, WHICH SAYS
DISCHARGING FIREARM IN PUBLIC.
AND SUBSECTION 2 WHICH IS WHAT
HE WAS CHARGED WITH, SAYS IF
ANY OCCUPANT OF VEHICLE
KNOWINGLY WILL FULLY DISCHARGES
A FIREARM FROM A VEHICLE WITHIN
A 1,000 FEET COMMIT AS FELONY
IN THE SECOND DEGREE.
HOWEVER IF HE, IF THAT SAME
PERSON KNOWINGLY DISCHARGED A
FIREARM IN A PUBLIC PLACE, IT
IS A, ISN'T IT A LESSER, IT'S A
MISDEMEANOR IN THE FIRST
DEGREE.

SO HAVEN'T THEY SET UP THAT THE
FACT IF IT'S WITHIN A THOUSAND
FEET OF A PERSON, THAT THE,
ONE, IF THERE IS IT NO PERSON
AROUND, THAT WOULD BE A DEGREE
VARIANT, THAT IS SUBSECTION 1,
WOULD BE A DEGREE VARIANT OF
SUBSECTION 2, CORRECT?

>> THAT IS CORRECT.

>> SO NOW WE HAVE THAT, THAT IS
IN FACT, THAT'S THE ONE CRIME
THAT AGGRAVATES IT BECAUSE IT
IS WITHIN A THOUSAND FEET OF
THE VEHICLE.

THEN YOU GO TO, SO IT'S NOT
JUST, THAT'S WHAT WE'RE GOING
BACK TO, IT'S NOT JUST THE
RECKLESS DISCHARGE OF THE
FIREARM IN ONE.

IT'S THE FACT THAT IT'S WITHIN
A THOUSAND FEET OF A PERSON.
ISN'T THAT THE CRIME UNTIL THIS
SITUATION?

>> CORRECT.

CORRECT.

>> OKAY.

AND THEN NOW, IT'S, SUBSECTION
19 IS, IT AL PRICE TO BOTH
OCCUPIED OR NON-OCCUPIED
VEHICLES BUILDINGS?

>> NO.

AS TO VEHICLES IT MUST BE
OCCUPIED.

AS TO BUILDING IT'S OCCUPIED OR
UNOCCUPIED.

AND THAT'S WHY REALLY THEY'RE
THE SAME IN THIS CASE BECAUSE

SUBSECTION 2 IS SHOOTING FROM
WITHIN A THOUSAND FEET OF
ANOTHER.

790.19 IS SHOOTING AT A CAR
OCCUPIED BY ANOTHER.

>> WHY WOULD WE, NOW YOU HAVE
RAISED SOMETHING ELSE.

WHY WOULD WE, IN ANALYZING
DEGREES OF THE SAME OFFENSE,
LOOK TO THE ACTUAL FACTS OF THE
CASE IF WHEN WE ARE APPLYING
THE SAME ELEMENTS FOR PURPOSES
OF DOUBLE JEOPARDY WE DON'T
LOOK TO THE FACTS? WHY WOULDN'T
WE JUST LOOK AT WHAT THE CRIME
IS ITSELF TO SEE IF THERE IS AN
OVERLAP FOR PURPOSES OF DOUBLE
JEOPARDY?

I'M NOT SURE I, YOU KNOW, I
NEVER UNDERSTOOD THE FIRST ONE
EITHER BUT THAT'S WHAT WE DO.
WHY WOULDN'T WE JUST COMPARE
WHAT THESE STATUTES ACTUALLY
SAY ON THEIR FACE AND TO SEE IF
THERE IS ONE IS SUBSUMED BY THE
OTHER?

>> BECAUSE THIS COURT HELD IN
GIBBS AND VERY RECENTLY IN
PAUL, THAT YOU ARE DOING, EVEN
THE BLOCKBURGER, THE STEP ONE
COMPARISON, AND YOU HAVE AN
ALTERNATIVE CONDUCT STATUTE ONE
THAT PROHIBITS A BROAD RANGE OF
CONDUCT, YOU LOOK IN PERFORMING
BOTH BLOCKBURGER AND THE
EXCEPTIONS, THOSE TEST, YOU
LOOK TO THE ALTERNATIVE CONDUCT
CHARGED.

THAT IS WHAT HAPPENED IN GIBBS.
FOR EXAMPLE IN THE TRAFFICKING
SCENARIO, YOU'RE LOOKING AT,
WHETHER THERE WAS DOUBLE
JEOPARDY VIOLATION BETWEEN
TRAFFICKING AND POSSESSION, YOU
DON'T LOOK TO TRAFFICKING FOR
SALE, TRAFFICKING FOR
MANUFACTURE.

YOU LOOK AT THE CHARGE,
TRAFFICKING POSSESSION AND
COMPARE IT TO THE POSSESSION,
VERSUS THE DIFFERENT FACTUAL
SCENARIO, IF THE SALE WERE
CHARGED WITH THE POSSESSION,
THEN, THAT, YOU LOOK TO THOSE

ALTERNATIVE FORMS OF CONDUCT.

>> AND WITH THAT, YOU HAVE EXCEEDED YOUR TIME.

WE THANK YOU VERY MUCH FOR YOUR ARGUMENT.

>> THANK YOU, YOUR HONOR.

>> MR. HELLER?

>> MAY IT PLEASE THE COURT.

JOSH HELLER ON BEHALF OF THE STATE OF FLORIDA.

AS JUSTICE CAN THAT POINTED OUT LEGISLATIVE INTENT IS THE POLE STAR OF DOUBLE JEOPARDY ANALYSIS.

>> I WANT TO, SINCE YOU ARE SITTING THERE THINKING YOU WERE PRETTY HAPPY WITH ALL THESE QUESTIONS, I WANT TO ASK YOU, MAYBE, IF YOU CAN ANSWER IT, IT WILL BE SIGNIFICANT TO ME.

THERE'S TWO, WE ALL AGREE THAT THIS ISN'T A SITUATION OF LESSER INCLUDED OFFENSES OR SAME ELEMENTS.

SO IT FALLS WITHIN THE EXCEPTION IF IT DOES AT ALL, OF DEGREES OF THE SAME OFFENSE. ARE THERE SITUATIONS WHERE DEGREES OF THE SAME OFFENSE ARE NOT LESSER INCLUDED OFFENSES?

>> I THINK THAT THE ONE OF THE STATUTES AT ISSUE IN THIS CASE ADDRESSES YOUR CONCERN.

THE FIRST NINE WORDS OF DISCHARGING A FIREARM IN PUBLIC STATES, EXCEPT AS PROVIDED IN SUBSECTION 2 AND SUBSECTION. WE HAVE AN EXPRESS INDICATION OF LEGISLATIVE INTENT IN THIS STATUTE THAT INDICATES THAT THE OFFENSES SET OUT IN DISCHARGING A FIREARM IN PUBLIC IN SUBSECTIONS 1, 2, AND 3 ARE DEEMED BY THE LEGISLATURE TO BE THE SAME OFFENSE.

>> THAT'S WHAT I'M ASKING YOU IS, WHEN IS IT, TELL ME A SITUATION WHERE DEGREE OF THE SAME OFFENSE WOULD NOT BE SUBSUMED WITHIN LESSER INCLUDED OFFENSES.

IN OTHER WORDS, HERE, THE LESSER INCLUDED OFFENSE WOULD BE THAT THERE WASN'T SOMEBODY

WITHIN A THOUSAND FEET.

THAT WOULD BE A, BUT IT WOULD ALSO BE A DEGREE OF THE SAME OFFENSE.

SO WHY WOULD IT BE NECESSARY TO HAVE TWO SEPARATE SECTIONS IF LESSER INCLUDED OFFENSES INCLUDED DEGREES OF THE SAME OFFENSE?

CAN YOU GIVE ME A SITUATION, IN OTHER WORDS, WHERE DEGREE OF THE SAME OFFENSE WOULD NOT BE A LESSER INCLUDED OFFENSE?

>> I THINK THAT, IN THIS CASE --

>> JUST WANT, JUST TELL ME.

>> I'M ACTUALLY GOING --

>> OKAY.

>> REFERENCE THE PARTICULAR STATUTE TO ADDRESS YOUR QUESTION.

WHAT YOU HAVE IS THAT THE STATUTORY CONSTRUCTION EXCEPTION, THE BLOCKBURGER EXCEPTION HERE YOU'RE REFERENCING ACTUALLY HARMONIZES WITH THE STATUTE.

I THINK THAT'S WHAT THE LEGISLATURE INTENDED.

ONE OF THE STATUTES IN THIS CASE.

BY SAYING THAT EXCEPT AS PROVIDED IN SUBSECTION TWO OR SUBSECTION 3 THE LEGISLATURE IS INDICATING IN THE PARTICULAR STATUTE THESE ARE SEPARATE, THAT THESE ARE, DEGREES OF THE SAME OFFENSE.

THAT THE LEGISLATURE IS SAYING, THIS STATUTE HAS WITHIN IT, EVEN THOUGH, AND IF YOU LOOK AT THE STATUTES, 1 AND 2, AND 1 AND 3, THEY DON'T MEET BLOCKBURGER.

THESE WOULD BE SEPARATE OFFENSES UNDER A STRICT BLOCKBURGER ANALYSIS.

BUT, WHAT WE HAVE IS THE LEGISLATURE, IS STATING EXPRESSLY PROVIDING BY STATUTE THAT THESE ARE DEGREES OF THE SAME OFFENSE.

THAT'S WHAT, --

>> WOULDN'T THEY ALSO BE LESSER

INCLUDED OFFENSES?

>> NO, THEY'RE NOT NECESSARY
LESSER INCLUDED OFFENSES.

>> BECAUSE?

>> BECAUSE, FOR EXAMPLE, IF I
WERE ON PRIVATE PROPERTY
DRIVING A VEHICLE WHERE THERE
IS NO ROADWAY, AND, OR TO FIRE
A, FIREARM FROM THE VEHICLE
WITHIN A THOUSAND FEET OF A
PERSON, I VIOLATED SECTION 2,
BUT I HAVEN'T NECESSARILY
VIOLATED SUBSECTION 1.

SIMILARLY FOR SUBSECTION 3, IF
I DIRECT SOMEBODY TO FIRE A
WEAPON, FROM A VEHICLE, I
HAVEN'T NECESSARILY VIOLATED
SUBSECTION 1 BUT THE STATUTE
ITSELF INDICATES THAT, THAT WE
AS A STATE CANNOT PROSECUTE AND
YOU AS A JUDICIARY CANNOT
PUNISH FOR THOSE TOGETHER.
HOWEVER, NOTICEABLY ABSENT FROM
THAT, FROM THE DISCHARGING OF A
FIREARM IN PUBLIC STATUTE, IS
ANY REFERENCE TO 791.9.

THERE IS NO PLACE WHERE IT IS
PROVIDED BY STATUTE INDEED
THESE ARE THE SAME OFFENSE.
NOW, THE COURT AND I DON'T
THINK THERE IS ANY DISPUTE THAT
THE ELEMENTS ARE DIFFERENT.
SO, THAT TAKES US TO THE
EXCEPTION.

WELL THE EXCEPTION HARMONIZES
WITH EXACTLY WHAT'S HAPPENING
IN DISCHARGING A FIREARM IN
PUBLIC.

THERE IS AN EXPRESS INDICATION
IN THE STATUTE.

THERE IS SAYING IT'S DEGREE OF
SAME OFFENSE AS PROVIDED BY
STATUTE.

NOW WE'VE TOSSED AROUND A LOT
OF PHRASES.

I THINK WITH REGARDS TO THE
DIFFERENCE BETWEEN CONDUCT AND
OFFENSES.

AND I THINK IT'S IMPORTANT THAT
THE COURT RECOGNIZE BECAUSE, IN
REVIEWING SOME OF THE COURT'S
CASE LAW THERE SEEMS TO BE SOME
QUESTION WITH REGARDS TO
PARTICULAR LANGUAGE.

THE DOUBLE JEOPARDY ANALYSIS
REQUIRES FIRST, THAT THE COURT
LOOK TO WHETHER OR NOT THERE'S
MORE THAN ONE EPISODE.

IF THERE'S MORE THAN ONE
CRIMINAL EPISODE THEN THERE IS
NO DOUBLE JEOPARDY VIOLATION.
IF WE HAVE NO CRIMINAL EPISODE
WE MOVE TO THE NEXT STEP.
WHETHER THERE IS MORE THAN ONE
ACT.

THAT IS THE CONDUCT SECTION
THAT INVOLVES DOUBLE JEOPARDY.
THE CONDUCT, IF WE HAVE MORE
THAN ONE ACT WE DON'T HAVE A
DOUBLE JEOPARDY VIOLATION.
THEN WE MOVE TO THE QUESTION OF
THE OFFENSE.

THE OFFENSE IS THE
LEGISLATIVELY DEFINED OFFENSE.
THE LEGISLATURE HAS MEN THAT
AUTHORITY TO DECIDE WHAT IS AND
WHAT IS NOT AN OFFENSE.

PLENARY.

ACCORDINGLY IF THE LEGISLATURE
HAS DEFINED SEPARATE OFFENSES
THEN WE DON'T HAVE A DOUBLE
JEOPARDY PROBLEM.

WHERE WE HAVE A DOUBLE JEOPARDY
PROBLEM IF WE HAVE WITHIN THE
SAME EPISODE THE SAME ACT AND
THE SAME OFFENSE, THEN, WE HAVE
A DOUBLE JEOPARDY ISSUE.

HERE WE DON'T HAVE THE SAME
OFFENSES THAT WERE BEING
CHARGED BASED ON WHAT IS
ARGUABLY THE SAME ACT ALTHOUGH,
THERE COULD BE SOME ARGUMENT
THERE.

>> SO YOU AGREE THAT THIS WAS,
ONE EPISODE AND ONE ACT?

>> I THINK --

>> HE FIRED ONE TIME INTO OR,
INTO AN OCCUPIED VEHICLE?

>> I THINK THAT THE COURT'S
PRECEDENT RAISES SOME QUESTION
AS TO WHETHER OR NOT IN FACT IT
WAS IN FACT ONE ACT IN APPLYING
THE CARAWAN ANALYSIS.

>> HE SHOT ONE TIME?

>> NO, HE SHOT FIVE TIMES.
FOUR TO FIVE TIMES.

>> THAT GETS US INTO ANOTHER
THING.

YOU COULD HAVE CHARGED ACTUALLY
BASED ON YOUR ANALYSIS BECAUSE
THERE WERE THREE COUNTS OF
ATTEMPTED MURDER.

I DON'T KNOW IF THOSE WERE FOR
THE SIMULTANEOUS DISCHARGE OR
SUBSEQUENT BUT YOU MIGHT HAVE
AND THE STATE SOMETIMES
OVERCHARGE, QUOTE, OVERCHARGES
AS MUCH AS IT CAN, COULD HAVE
FOR EACH DISCHARGE MAYBE HAVE,
CHARGED A COUNT OF DISCHARGING
A FIREARM AND SHOOTING INTO AN
OCCUPIED VEHICLE?

>> WELL, THE CONCERN WHICH I
THINK THAT YOU'RE GETTING AT
WHICH IS ULTIMATELY THE
STATE'S, WHETHER OR NOT THE
STATE HAS OVERCHARGED.

IN THIS PARTICULAR CASE --

>> THERE WERE SEVERAL
DISCHARGES.

THEY ONLY CHARGED ONE COUNT OF
EACH.

>> WE HAVE TO REMEMBER WITH
REGARDS TO THAT ISSUE WE AS A
STATE WHEN IT COMES TO TRIAL
ARE REQUIRED TO PROVE BEYOND A
REASONABLE DOUBT EACH OF THESE
OFFENSES.

THAT YOU KNOW, WE HAVE, AND,
ACCORDINGLY, IF WE HAVE FIVE
SHOTS, AND WE ANCHOR, CAN
ANCHOR THE OFFENSE IN ANY ONE
OF THOSE SHOTS.

SO WHEN WE GET TO THE POINT OF
APPEAL, OR ADDRESSING THE
CONVICTION AFTER A CONVICTION,
IT'S A DIFFERENT, THAT PROVIDES
BASICALLY ESSENTIALLY OUR
CONTROL.

ONE OF THE QUESTIONS THAT YOU

--

>> THERE WERE NOT FOUR OR FIVE
COUNTS IN THIS INFORMATION?

>> THERE WERE SIX COUNTS IN THE
INFORMATION.

ONE OF THE COUNTS REALLY
DOESN'T DEAL WITH THE FIRING OF
A WEAPON.

>> POSSESSION OF A FIREARM BY A
CONVICTED FELON.

>> CORRECT.

>> SO, ARE YOU SAYING THAT THIS

INFORMATION WAS BASED ON THE
FACT THAT THERE WERE FIVE
COUNTS, AND FIVE SHOTS, THAT'S
WHY THE FIVE COUNTS?

>> WE COULD BASE, WE COULD BASE
OUR CONVICTIONS ON ANY OF THOSE
PARTICULAR ACTS.

>> BUT LET'S JUST BE -- THERE
WERE THREE COUNTS OF ATTEMPTED
SECOND-DEGREE MURDER.

>> CORRECT.

>> WHICH ARE NOT BEING
CHALLENGED ON APPEAL.

>> RIGHT.

>> THOSE WERE THREE OF THE
COUNTS.

THERE WAS ONE COUNT OF A
VIOLATION OF 790.15.2 AND ONE
VIOLATION, ONE COUNT OF 790.19,
CORRECT?

>> CORRECT.

WAS THERE A QUESTION YOU WANTED
ME TO PARTICULARLY ANSWER?

>> WELL --

>> THAT WAS TWO COUNTS.

>> BASED ON WHETHER IT WAS ONE
DISCHARGE OR FIVE DISCHARGES
ONLY ONE COUNT OF EACH WERE
CHARGED AND HE WAS CONVICTED
OF?

>> CORRECT.

BUT I THINK WHAT YOUR QUESTION
WENT TO WAS THE DANGER OF US
OVERCHARGING ON PARTICULAR
CASE.

WE CAN ANCHOR THOSE CONVICTIONS
IN ANY ONE OF THOSE PARTICULAR
ACTS WITH REGARDS TO APPEAL
BECAUSE WE VIEW IN LIGHT MOST
FAVORABLE TO CONVICTION ON
APPEAL.

AND THAT REALLY DOES PROVIDE A
LEVEL OF CONTROL, JUSTICE
PARIENTE, IN A PRIOR ORAL
ARGUMENT YOU ASKED FOR EXAMPLE
ABOUT A BATTERY WAS THE EXAMPLE
THAT YOU USED.

AND IF, WE HIT SOMEBODY OR KICK
SOMEBODY AND HIT THEM AGAIN,
YOU KNOW, HOW MANY TIMES DOES
THE STATE CHARGE?

THE ANSWER TO THE QUESTION,
PROPERLY WAS ONE.

BUT THAT'S NOT BECAUSE IT'S A

CONSTITUTIONAL SAME OFFENSE
ISSUE.

THAT'S BECAUSE, WE AS A STATE
HAVE TO PROVE BEYOND A
REASONABLE DOUBT, AND WE CAN
ANCHOR THAT IN ANY ONE OF THOSE
TOUCHING.

IF WE HAVE A SITUATION WHERE
THERE MULTIPLE ISSUES RAISING
ISSUES WE RAISE CONCERNS ABOUT
THAT WE RAISE LIKELIHOOD WE
AREN'T GOING TO MEET OUR TRIAL
BURDEN.

THAT, IS WHY WE DO THAT.
IT'S NOT BECAUSE SAME OFFENSE
APPLIES TO CONDUCT.

SAME OFFENSE APPLIES TO
OFFENSES.

IT APPLIES TO THE LEGISLATIVE
DETERMINATION OF WHAT VIOLATES
THE LAW.

THAT, AND THAT IS EXACTLY WHY
THE CONCEPT OF CORE OFFENSE AND
THE CONCEPT OF SAME EVILS
FAILS.

AND, I MEAN, FRANKLY, SEARCHED
AND LOW TO FIGURE OUT EXACTLY
WHERE IT IS IN THE CONSTITUTION
OR IN THE STATUTE THOSE TERMS
COME.

IT'S OBVIOUS.

>> IT COMES FROM THE FACT THAT,
I LOOKED WHAT JUDGE BRITON SAID
IN ANDERSON, IT'S SANITY OF
WHAT GETS CHARGED.

WHEN YOU HAVE A SINGLE
DISCHARGE OF A FIREARM AND YOU
HAVE TEN COUNTS OF THINGS THAT
WHERE THE STATUTES ARE,
TECHNICALLY DIFFERENT, IT JUST,
I THINK IT MUST STRIKE, AT
LEAST IT HAS IN THE PAST,
PEOPLE ON A, APPELLATE JUDGES,
THAT THIS CAN'T BE WHAT
LEGISLATURE INTENDED.

FROM MY POINT OF VIEW I'VE
ALWAYS HAD SOME SOLACE IN THE
FACT THAT THESE ARE ALL
CONCURRENT SENTENCES EVEN
THOUGH I UNDERSTAND THAT MAY
HAVE IMPLICATIONS FOR THE
PRISONER.

LIKE IN THIS CASE, NO MATTER
WHAT WE DO, THIS DEFENDANT IS

GOING TO SERVE, WHAT, A 30-YEAR TERM WITH A MANDATORY MINIMUM FOR THE THREE COUNTS OF ATTEMPTED MURDER.

SO WE'RE TALKING ABOUT SOMETHING THAT IS, SEEMS LIKE IT GETS YOU AT THE CORE. THERE DOESN'T SEEM SOMETHING FAIR ABOUT IT, BUT YET, THE CONSEQUENCES IN MOST CASES ARE ALMOST NONEXISTENT.

AND SO THAT'S, WHY AFTER LOOKING AT ALL THIS, I'M STARTING TO TEND TO THINK THAT DESPITE FAIRNESS OR RATIONALITY, THAT, THE YOU KNOW, JUSTICE CANTERO HAS A POINT IN PAUL THAT WE MAY BE SHOULD JUST STICK WITH THE ACTUAL LANGUAGE OF THE STATUTE.

>> I THINK THAT'S CORRECT. THE TWO --

>> I WOULD THINK YOU WOULD.

>> BUT I THINK THAT'S CORRECT, I THINK FOR AN IMPORTANT REASON AND LET ME EXPLAIN WHAT THAT IS.

AND THAT IS THAT WITH BOTH OF THESE TESTS, THESE ALTERNATIVE TESTS, THESE CORE OFFENSES, SAME EVIL, WHAT YOU'RE DOING IS, THE JUDICIARY IS REDEFINING WHAT THE OFFENSE IS.

THE LEGISLATIVE DEFINITION OF OFFENSE IS THE CRITICAL KEY DETERMINATION.

AND IN A SENSE THIS COURT IS OVERSTEPPING ITS BOUNDS TRYING TO TAKE THAT CONDUCT IDEA, WHICH IS PROPERLY WITHIN THE JUDICIARY SIDE, THE DEFENDANT'S CONDUCT, WHICH IS SEPARATE INQUIRY WHICH IS LEGISLATIVELY DEFINED OFFENSE. THAT IS WHERE THE PROBLEM COMES IN.

IN YOUR DISSENTING OPINION IN FLORIDA, JUSTICE PARIENTE, YOU INDICATED UNDER SERMONDS THE DETERMINATION OF A CORE OFFENSE TAKES INTO ACCOUNT THE CRIMINAL CONDUCT AS A WHOLE. THAT MIXES THE OFFENSE IDEA, WHAT IS A CORE OFFENSE WITH THE

IDEA OF THE CONDUCT.

AND, SINCE REALLY SINCE --

>> BASED ON THAT THOUGH,
WOULDN'T WE HAVE TO, I HAVEN'T
LOOKED BACK AT OUR PRECEDENT,
UNLESS IT'S IN THE STATUTES,
THAT WHEN THERE'S A MURDER,
LIKE IF THIS, IF SOMEBODY HAD
BEEN TRAGICALLY SHOT, WE, THERE
IS A MERGER DOCTRINE AND WE
DON'T HAVE, ALLOW FOR SEPARATE
CRIMES TO BE CHARGED THAT ARE,
WOULD BE THE SAME CORE OFFENSE.
SO HOW DO YOU, HOW DO YOU,
SQUARE THAT WITH WHAT YOU WOULD
BE PROPOSING THAT WE DO?

>> I'VE ACTUALLY LOOKED AT THIS
COURT'S PRECEDENT WITH REGARDS
TO HOMICIDE AND WHAT THE
PRECEDENT INDICATES IS THAT
THERE IS A FUNDAMENTAL
FAIRNESS.

IT DOESN'T REALLY ANCHOR THAT
INTO DOUBLE JEOPARDY
EXPLICITLY.

AND IT SAYS AS A RESULT OF
MERGER, YOU KNOW, THE CONCEPT
OF MERGER IS THAT LEVEL OF
FUNDAMENTAL FAIRNESS.

IT DIDN'T SAY THAT IS COMMANDED
BY THE DOUBLE JEOPARDY CLAUSE
BASE IT'S THE SAME OFFENSE. IT
FALLS INTO A CONCEPT OF MERGER.
IT IS NOT NECESSARILY SOMETHING
THAT FALLS INTO THE INQUIRY OF
THE COURT.

>> SO THAT'S WHAT I'M -- I
REMEMBER LOOKING AT THOSE
CASES.

YOU'RE NOT HERE TELLING US WE
SHOULD RECEDE FROM THOSE CASES
BUT IT SEEMS WHEN YOU'RE ASKING
OR, POSITING WHY HAVE COURTS
GOT INTO IT, I GUESS THE NOTION
OF DOUBLE JEOPARDY, WHICH HAS A
CONSTITUTIONAL BASIS AT LEAST,
THIS FUNDAMENTAL FAIRNESS,
SEEMS TO PLAY A PART IN WHAT,
AT LEAST JUDGES AND JUSTICES
OVER THE YEARS HAVE TRIED TO DO
WITH THIS JURISPRUDENCE.

I THINK YOU HAVE A GOOD POINT
WHETHER WE LOOK AT PRIMARY
EVIL, WHICH IS DEFINITELY OUR

TRYING TO FIGURE SOMETHING OUT
THAT WE'RE NOT EVEN GOING TO
THE LEGISLATIVE HISTORY, OR THE
CORE OFFENSE THAT WE ARE REALLY
SUBSTITUTING OUR JUDGMENT FOR
WHAT THE LEGISLATURE SAID,
UNLESS THEY HAVE SAID IT.
NOW THAT.

WOULD BE, SO WHAT WE WOULD
REALLY ASKING US TO DO IS SAY
THAT, WE THINK THAT UNLESS THE
LEGISLATURE EXPLICITLY SAYS
THAT IT SHOULD NOT BE PUNISHED
SEPARATELY, THAT WE'RE GOING TO
PRESUME THAT IT SHOULD BE
PUNISHED SEPARATELY.

AND THAT WOULD REALLY BE
RECEDING FROM MANY YEARS OF
PRECEDENT.

WOULD YOU AGREE IF WE DO THAT
AND, ADOPT THAT, THAT IS A,
WE'RE FLIPPING ON ITS SIDE?
IF THE INTENT TO IS PUNISH
SEPARATELY WE DON'T NEED TO
HAVE LEGISLATIVE INTENT TO SAY
SO?

>> I THINK THE BETTER WAY TO
LOOK AT IT IS IT PUTS THIS
COURT'S ANALYSIS BACK INTO
CONFORMITY WITH 300 YEARS OF
ANALYSIS OF THE PREDECESSORS TO
THE DOUBLE JEOPARDY CLAUSE AND
THE DOUBLE JEOPARDY CLAUSE
ITSELF.

THAT THE CONCEPT OF CONDUCT
AND OFFENSES ARE DIFFERENT.
AND THE COURT ERRED IN
ALTHOUGH, WELL-MEANING AND,
CERTAINLY THERE IS A,
ATTRACTIVENESS TO THE IDEA OF A
SAME CONDUCT TEST, IN FACT
THAT'S PROBABLY WHY THE U.S.
SUPREME COURT IN 1990 TOED IT
AND OVERTURNED IT THREE YEARS
LATER AND DETERMINED IT
UNWORKABLE AND OVERTURNED IT IN
DIXON.

BUT THAT DOESN'T ADDRESS THE
INQUIRY OF THE CLAUSE.
THE CLAUSE SAYS A PERSON MAY
NOT BE TWICE PLACED IN JEOPARDY
FOR THE SAME OFFENSE, NOT FOR
THE SAME CONDUCT, NOT FOR THE
SAME TRANSACTION.

AND EVEN IF THE LEGISLATURE'S
BLOCKBURGER CODIFICATION, THE
CONCEPTS OF TRANSACTION AND
EPISODE, ACT AND OFFENSE ALL
EXIST, YET THE LEGISLATURE
STATES THAT THEY WANT OFFENSES
TO BE TREATED SEPARATELY.
WHICH TAKES US TO THE EXCEPTION
WHICH STATES OFFENSES ARE
DEGREES OF THE SAME OFFENSE AS
PROVIDED BY STATUTE.
ACCORDINGLY IT HARMONIZES.
FOR EXAMPLE, WITH 791.5, THE
LEGISLATURE IS PROVIDING YOU
WITH A KEY, AN ANCHOR TO
INDICATE THAT THIS IS IN FACT A
DEGREE OF THE SAME OFFENSE.
THAT HARMIZATION IS WHAT I
WOULD SUGGEST PART TWO, SECOND
EXCEPTION, DEGREE VARIANT
EXCEPTION IS MAKING REFERENCE TO.
AND IT'S THAT ANALYSIS THAT IS
THE PROPER WAY FOR THIS COURT
TO GO FORWARD WHEN ADDRESSING
THE CONCEPT OF OFFENSES.
ACCORDING AND, I THINK, JUST TO
JUMP BACK TO THIS PARTICULAR
CASE I THINK WE'VE GOTTEN,
CERTAINLY A LITTLE BROAD IS IF
YOU LOOK AT THAT, THAT ANCHOR
IN THE DISCHARGE OF A FIREARM
IN PUBLIC STATUTE, THAT ANCHOR
DOES NOT MAKE REFERENCE TO THE
OTHER STATUTE AT ISSUE IN THIS
CASE.
THE LEGISLATURE HASN'T STATED
THAT IT'S THE SAME OFFENSE OR
DEGREES OF THE SAME OFFENSE.
THAT ANCHOR IS JUST NOT THERE.
>> YOU WANT TO JUST MAKE A
BRIEF ARGUMENT EVEN IF WE
DON'T ACCEPT, I GUESS YOUR
INVITATION OR MY INVITATION TO
RECEDING FROM PRECEDENT, WHY
THE THIRD DISTRICT GOT RIGHT
AND OR, DOES THIS SHOW, AGAIN
WHAT THE THIRD DISTRICT AND
FIFTH DISTRICT HOW MALLEABLE
THIS CORE OFFENSE IS?
>> THE EVILS TEST IS UNTENABLE.
IN FACT A DIFFERENT CASE CITED
BY DEFENDANT IN DUFF OUT OF THE
FIFTH DCA SAY BOTH.
INSTANT OFFENSES ADDRESS EVIL

OF THE DEFIANCE OF THE LAW.
THAT IS PRETTY BROAD
EXAMINATION OF THE SAME EVIL
TEST AND THE IS PRETTY
MALLEABLE.

>> THIS COURT DECIDES TO STICK
WITH THAT TEST, I THINK I
PRETTY AGGRESSIVELY ARGUED
AGAINST, I THINK THAT THE THIRD
DCA PROPERLY RECOGNIZED THAT
HOW COULD THEY BE PART OF THE
SAME CORE OFFENSE OF BATTERY IF
THERE IS NO TOUCHING INVOLVED
IN EITHER OF THE OFFENSES?

MOREOVER, ALTHOUGH THE FIFTH
DCA POINTED OUT THAT THE, BOTH
OF THE OFFENSES AT ISSUE IN
THIS CASE INVOLVE OR ARE WITHIN
THE SAME CHAPTER OF THE
STATUTE, I THINK IT'S QUITE
TELLING THAT BATTERY ISN'T IN
THAT CHAPTER.

>> AGAIN, IF I'M GOING TO PICK
SOMETHING, I THINK THAT, WHY
ISN'T THE CORE OFFENSE, IF WE
TAKE RECKLESS DISCHARGE OF
FIREARMS, ISN'T THAT, I MEAN
THAT IS, RECKLESSLY DOING
SOMETHING, DISCHARGING A
FIREARM, WHICH IS, YOU KNOW,
AND IS, THAT IS WHAT IS THE
CONDUCT THAT IS BEING PUNISHED
BY BOTH?

>> I THINK THE QUESTION TAKES
US BACK TO THE INITIAL INQUIRY
WHICH IS WHY THE CORE OFFENSE
CONCEPT DOESN'T WORK.

WHEN YOU CREATE --

>> BUT I'M ASKING YOU IF WE
STICK TO CORE OFFENSE WHY ISN'T
THAT THE MORE, ISN'T THAT THE
APPROPRIATE CORE OFFENSE?
NOT BATTERY BUT RECKLESS
DISCHARGE OF FIREARM?

>> I DON'T LIKE THINK THAT IS
NECESSARILY THE CASE, JUSTICE
PARIENTE.

>> NOT NECESSARILY BUT WHY
ISN'T THAT LOGICALLY THE CASE?

>> I THINK IN BRIEF WE'VE
INDICATED IT'S NOT RECKLESS,
DISCHARGE OF A FIREARM
NECESSARILY.

ONE OF THE OFFENSES ADDRESSES,

SHOOTING INTO A PARTICULAR OBJECT.

ANOTHER ONE ADDRESSES SHOOTING THE FIREARM BUT IT DOESN'T INDICATE WHERE ANYTHING, ABOUT WHERE THE PROJECTILE IS GOING. YOU'RE TALKING, IT'S VERY DIFFICULT TO ARGUE THAT THE CONCEPT, WHAT THE CORE OFFENSE IS WHEN THE LEGISLATURE HAS DEFINED THE OFFENSES SEPARATELY.

THE LEGISLATURE HASN'T INDICATED THAT THEY ARE SEPARATE OFFENSES.

SO, TO SAY, WELL, LET'S AS JUDICIARY EVEN THOUGH THE LEGISLATURE HAS GONE THROUGH AN EXTENSIVE EXAMINATION OF WHY IT IS THAT THE OFFENSE THAT, HOW YOU SHOULD ANALYZE OFFENSES BUT WE'RE GOING TO USE AN EXCEPTION TO THAT, AND DEFINE INSTEAD, WHAT THE OFFENSES REALLY ARE, THAT IS WHY THE CORE OFFENSE ANALYSIS ITSELF DOESN'T WORK. TO SAY WHAT WOULD BE THE CORE OFFENSE IS PROBLEMATIC BECAUSE THE LEGISLATURE HASN'T DEFINE AED A CORE OFFENSE.

THE CONCEPT OF CORE OFFENSE IS FOREIGN TO THE CODE.

SO IT'S DIFFICULT TO PROVIDE AN EXACT ANSWER OF SURMISING WHAT THE CORE OFFENSE WOULD BE WHEN THE CONCEPT ITSELF DOESN'T WORK.

ACCORDINGLY, BECAUSE DEGREES OF THE SAME OFFENSES IS PROVIDED BY STATUTE MEANS AS PROVIDED BY STATUTE, NOT CORE OFFENSES OR THE SAME EVILS THE STATE RESPECTFULLY REQUEST THE COURT APPLIES THE PLAIN LANGUAGE OF THE EXCEPTION AND AFFIRM THE THIRD DISTRICT COURT OF APPEAL.

>> THANK YOU.

AND THANK BOTH OF YOU FOR YOUR ARGUMENTS HERE TODAY.

THIS COURT WILL BE IN RECESS UNTIL 9:00 TOMORROW MORNING.

>> PLEASE RISE.