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State of Florida v. Joshua Meshell

SC08-903

>>> THE NEXT CASE ON THE STATE'S
DOCKET FINAL CASE, STATE
VERSUS MESHELL.

>> MAY IT PLEASE THE COURT.
MY NAME IS CHRIS DAVENPORT.
I REPRESENT THE STATE OF FLORIDA.
THIS AN APPEAL FROM THE DISTRICT
COURT DECISION REVERSING TWO
COUNTS OF LEWD AND LASCIVIOUS
BATTERY ON A 13-YEAR-OLD
CHILD.

THE DISTRICT COURT
FOUND THAT IT WAS A DOUBLE
JEOPARDY VIOLATION, BOTH ACTIONS
TOOK PLACE DURING THE SAME
CRIMINAL EPISODE.

THEY CERTIFIED TO THIS COURT
WHETHER OR NOT THE TWO
PENETRATIONS CAN BE DISTINCT
ACTS AND SEPARATELY
PUNISHABLE.

>> STATUTE 800 OR 8794.

>> WE ARE UNDER 800.04, SAME
LANGUAGE AS THE SEXUAL BATTERY
STATUTE.

>> DOES NOT INVOLVE 794.

>> RIGHT.

THE PROSECUTION WAS
BROUGHT UNDER SECTION 800.04.

>> COULD YOU --

>> DISTRICT COURT THREW -- 794

--

>> THEY THREW THAT IN BECAUSE
IT USES THE SAME LANGUAGE,
AND BECAUSE IN DISCUSSING THE
WAY THE DIFFERENT COURTS HAVE
RESOLVED THIS, THEY NOTED THAT
UNDER THE SEXUAL BATTERY
STATUTE THEY OFTEN DON'T FIND
THE DOUBLE JEOPARDY VIOLATION
FOR A DISTINCT ACT.

>> TO PUT IT BACK INTO SOMETHING
I MIGHT BE ABLE TO UNDERSTAND
GENERALLY, TAKE -- FORGET THE
SEX PART, TAKE BATTERY.

SOMEONE GETS IN A FIGHT, THEY PUNISH SOMEBODY, THEY KICK THEM, THEN THEY TAKE A BAT AND HIT THEM AGAIN.

DOES THE STATE CHARGE ALL UNDER THE BATTERY STATUTE?

DOES THE STATE CHARGE THAT AS SEVERAL DIFFERENT COUNTS OF BATTERY?

>> IN GENERAL, THIS IS GOING TO BE CHARGED AS ONE COUNT OF BATTERY.

>> HERE, JUST AGAIN, TO TRY TO UNDERSTAND THE REAL WORLD HERE, THIS WAS OVER A THREE-DAY PERIOD THAT THERE WAS SEXUAL -- MISCONDUCT GOING ON, AND THERE WAS ANAL, OR MAYBE -- IT WAS ANAL OR VAGINAL.

>> VAGINAL AND ORAL.

>> AND HIM TOUCHING HER, AND SO WOULD THIS GO TO THE FACT THAT IF OVER A THREE-DAY PERIOD EVERY TIME -- THIS, AGAIN, JUST SO I UNDERSTAND EVERY TIME HE TOUCHED HER BREASTS THAT WOULD BE A SEPARATE ACT, AND SEPARATELY PUNISHABLE EVERY TIME HE TOUCHED HER, TOUCHED PART OF HIS PENIS A THREE-DAY PERIOD COULD BE 100 COUNTS OF -- OF SEXUAL BATTERY.

>> THAT IS NOT WHAT HE WAS CHARGED WITH.

>> I JUST WANT TO UNDERSTAND ABOUT THIS, WHAT WE ARE DEALING WITH, HOW DO WE ANALYZE.

SO THEN WHAT YOU SAY IS THAT WE -- THAT THIS ISN'T REALLY -- THIS ISN'T THE SAME ELEMENT ISSUE, BECAUSE IT IS ALL UNDER THE SAME STATUTE.

>> RIGHT.

>> SO WHICH CASE IS CLOSEST TO THE WAY WE ANALYZE DOUBLE JEOPARDY WHEN THEY ARE BEING CHARGED UNDER THE STATUTE HOW MANY DIFFERENT TIMES IN A SINGLE CRIMINAL EPISODE CAN YOU CHARGE SOMEBODY?

AND, AGAIN,
I USE BATTERY BECAUSE NOBODY
EVER CHARGES SOMEBODY WITH 100
COUNTS OF BATTERY BECAUSE OF A
FIGHT.

SO I'M TRYING TO SEE IF THERE
IS --

WHERE THE ANALOGOUS CASES
ABOUT HOW WE ANALYZE WHEN THEY
ARE THE SAME -- THE SAME
CRIMINAL STATUTE, BUT THEN IT
IS JUST BEING DONE AS PART
OF A -- YOU KNOW, DIFFERENT
TYPE OF VIOLATION, KISSING,
TOUCHING, EVERYTHING THAT COULD
POSSIBLY HAPPEN?

>> FIRST OF ALL, LET ME MAKE
IT CLEAR.

HE WAS NOT CHARGED
WITH KISSING OR TOUCHING.
IT WAS PENETRATION ONLY.

SO WE ARE
NOT TALKING THE LEWD MOLESTATION
THE LEWD BATTERY CASES
OR SEXUAL BATTERY.

>> YOU COULD HAVE CHARGED --
>> COULD HAVE.

>> -- WITH MOLESTATION.

>> IT IS OUR POSITION THEY
COULD HAVE, THE CASES THAT ARE
CLOSEST TO ALL THE RAPE CASES
COMING OUT OF THE DISTRICT
COURTS, THE WAY THAT THE
DISTRICT COURTS HAVE BROKEN ON
THIS, THEY SAID WITH MOLESTATION,
THE LEGISLATURE
INTENDED TO PUNISH SEXUAL
INTERLUDE PUNISH TOUCHING,
WHATEVER TOUCHING TAKES PLACE
IN ONE EPISODE IS ONE CRIME.
BUT, THEY RECOGNIZE WHERE YOU
ARE CHARGING SEXUAL BATTERY OR
LEWD OR LASCIVIOUS UNDER THE
STATUTE IT IS PENETRATION BY
VERY NATURE EACH PENETRATION
IS A DISTINCT ACT WHAT RAPE
CASES TEND TO FIND, VAGINALLY
PENETRATED HER, ANALLY
PENETRATED HER, EVEN THOUGH IT'S THE
SAME EPISODE, THEY ARE DISTINCT
CRIMINAL ACTS, YOU KNOW YOU
CAN --

>> WHAT WE HAVE IS -- AS I
UNDERSTAND IT, HE WAS CHARGED

UNDER 800 WITH VAGINAL
PENETRATION.

>> UM-HMM.

>> AND THEN ORAL PENETRATION?

>> YEAH, HE PUT HIS PENIS IN
THE VICTIM'S MOUTH.

>> OKAY.

>> SO YOU ARE --

>> ANALOGIZING THIS TO
SITUATIONS WHERE IF THIS HAD
BEEN UNDER 794 --

>> RIGHT.

>> -- IT WOULD HAVE BEEN TWO
SEPARATE ACTS OF SEXUAL
BATTERY.

>> EXACTLY, BECAUSE THE
STATUTES DEFINE THE CRIMINAL
ACT THE SAME WAY.

BUT I'M TRYING TO --

>> I'M TRYING TO UNDERSTAND
HOW DID WE DECIDE OR THE
DISTRICT COURTS DECIDE THAT
SEXUAL MOLESTATION HAS TO HAVE
INTERLUDES.

SEXUAL BATTERY

DOES NOT -- THINKING OF MURDER
CASES THE CONTEMPORANEOUS ACT
OF -- I HAVE NEVER SEEN THEM
SAY FOUR VAGINAL ANAL, THEN
WHATEVER THAT THERE WERE -- 20
RAPES THAT OCCURRED.

AND I MEAN IT SEEMS TO ME THAT
WOULD BE ABLE TO BE CHARGED
THAT WAY, THOSE WOULD BE,
YOU KNOW, A LOT OF -- SEPARATE
PRIOR VIOLENCE FELONIES, A BIG
QUESTION NOT FOR JUST THIS
CASE.

SO HOW DO WE MAKE
THE DISTINCTION BETWEEN THERE
HAVING TO BE AN INTERLUDE FOR
SEXUAL MOLESTATION AND NOT
TO BATTERY?

THIS IS, AGAIN, A
QUESTION OF WHAT THE
LEGISLATURE INTENDS, NOT WHAT
WE THINK MAKES SENSE WHETHER THERE IS
OVERCHARGING GOING ON, BUT
WHETHER THE LEGISLATURE
INTENDED THIS TO BE PUNISHED
SEPARATELY FOR EACH
TIME THERE WAS AN ACT.

>> EXACTLY.

IT IS UP TO THE

LEGISLATURE.

>> SO YOU --

>> DRAWN THAT DISTINCTION --
SO WHAT IS THE DIFFERENCE IN
THE SEXUAL -- THE STATUTES,
WHERE THE DISTRICT
COURT IS SAYING THAT TOUCHING
IS ALL ONE, BUT THAT
PENETRATION, IS -- CULPABLE.

>> MADE SENSE IN THE CONTEXT
OF THE OLD LEWD MOLESTATION
STATUTES DEFINED AS
ANY TOUCHING OF A CHILD, AND IN
A LEWD OR LASCIVIOUS
MANNER IS A CRIME.

YOU LOOK AT

IT, TOUCHING, THAT SEEMS LIKE IT
IS A CONTINUOUS OFFENSE, LOOKS
AT THE BIGGER PICTURE OF A
SEXUAL INTERLUDE, AS THE
STATUTE IS WRITTEN NOW, LEWD
MOLESTATION DEFINED
TOUCHING CERTAIN BODY PARTS
WRITTEN DIFFERENTLY, AND THAT
IS CAUSED CONFUSION IN THE FIFTH
DISTRICT, THE DISTINCTION
THERE SHOULDN'T BE A
DISTINCTION --

>> THIS REALLY, THINK OF THAT
AS A UNIT OF PROSECUTION.

>> THAT IS -- THAT IS ONE WAY TO
ANALYZE, YEAH, I MEAN --

>> BECAUSE TO ME, IT SOUNDS
LIKE THE IDEA OF -- OBVIOUSLY THE
BATTERY OCCURS AT YOU KNOW,
2:00 IN THE AFTERNOON, AND THE
GUY COMES BACK, AT YOU KNOW --
YOU KNOW THE ISSUE IS,
SEPARATE ACT, BUT IF THERE
REALLY WAS -- YOU CAN COMMIT
BATTERY -- THIS WAY A SUBSECTION
DOES SOMETHING ELSE.

>> IF THE BATTERY STATUTE WAS
WRITTEN THE WAY THE SEXUAL
ACTIVITY STATUTE IS WRITTEN IT
IS A BATTERY TO PUNCH SOMEBODY
IN THE FACE OR PUNCH SOMEBODY
IN THE TORSO OR TO STEP ON
THEIR FOOT.

AND IF YOU DID ALL THREE OF THOSE
ACTS, THOSE ARE DISTINCT.
THIS COURT SAID IF DISTINCT
ACTS YOU CAN PUNISH SEPARATELY.
THAT IS WHAT OUR U.S. SUPREME

COURT SAID, THAT THIS HAS BEEN THE LAW FOREVER, IF YOU COMMIT A CRIME A BUNCH OF DIFFERENT TIMES YOU ARE PUNISHED FOR EACH TIME YOU COMMIT THE CRIME, EACH CRIMINAL ACT CAN BE SEPARATELY PUNISHED WITHOUT VIOLATION OF DOUBLE JEOPARDY, THE UNIT OF PROSECUTION, DOES THE LEGISLATURE INTEND TO PUNISH ENGAGING IN PATIENT BROKERING SCHEME.

FOR EXAMPLE,

WITH RUBIO, WAS THE INTENT TO PUNISH THAT SCHEME OR WAS THE INTENT TO PUNISH EACH ACT WITHIN THAT SCHEME.

THEY LOOKED

AT THE STATUTORY LANGUAGE, AND THE HISTORY, AND ALL OF THOSE FACTORS.

AND THE INTENT WAS TO PUNISH EACH ACT, SO IN THIS CASE IF WE LOOK AT THE LANGUAGE OF THE STATUTE, YOU SAY IS THE LEGISLATURE INTENDED TO GO PUNISH A CRIMINAL INTERLUDE WITH THIS CHILD OR EACH INDIVIDUAL ACT IN THE STATUTE SAYS, SEXUAL ACTIVITY IS DEFINED AS ORAL OR VAGINAL, OR ANAL PENETRATION, EACH OF THOSE DIFFERENT WAYS OF DOING THAT ACT IS SEPARATED BY "OR" INDICATES LEGISLATIVE INTENT EACH ACT ITS OWN CRIME.

>> ONLY -- FACING -- EITHER HELP OR CONFUSE --

PAUL HELPS IN THE SENSE THE COURT MADE IT CLEAR EACH DISTINCT CRIMINAL ACT CAN BE PUNISHED WITHOUT VIOLATING DOUBLE JEOPARDY, REAFFIRMED SOMETHING THAT HAS BEEN LONGSTANDING LAW.

IT CONFUSED

THE ISSUE IN THE SENSE THAT IT IS LOOKING AT ONE OF THE INCIDENTS WAS TOUCHING OF THE BREASTS AND GENITALS IN A SINGLE CRIMINAL EPISODE, WE MOVED ON TO WHETHER OR NOT YOU ASSUMED IT WAS ONE ACT, CAN

YOU PUNISH THAT UNDER TWO DIFFERENT STATUTES.

>> -- IS IT CLEAR, AS TO WHETHER THOSE ACTS WERE TAKING PLACE SIMULTANEOUSLY COULD IT MAKE A DIFFERENCE THERE WERE SIMULTANEOUS -- IF SIMULTANEOUS TOUCHING THEY SAID ONE ACT, PAUL DOESN'T DISCUSS THAT IT KIND OF SEEMS IT IS ONE ACT MUST NOT HAVE BEEN ARGUED.

>> PAUL WAS REALLY A TEMPORAL KIND OF ONE LINK, ONE LOCATION IN THE LIVING ROOM, AND I DON'T THINK THERE IS ANYTHING IN THAT CASE THAT INDICATES THAT THERE IS SIMULTANEOUS KISSING AND TOUCHING, IS THERE?

>> IT SAYS ONE EPISODE MOVES ON TO WHETHER OR NOT IT ASSUMES ONE EPISODE OF EQUIVALENT OF ONE ACT. I THINK THAT IS WHERE THE DISTRICT COURTS HAVE GONE WRONG MAKING THOSE TWO THINGS THE SAME THING.

>> THE -- WE HAVE TO GO BACK TO THE STATE, I WOULD ASSUME THE STATE MADE THAT ASSUMPTION, TOO, IN PAUL.

>> IT PROBABLY DID.

>> THEY DON'T --

>> DOUBLE JEOPARDY LAW IS CONFUSING, PEOPLE HAVE A HARD TIME WITH IT WILL, AND I THINK THAT IS CAUSE FOR CONFUSION.

>> I DO.

>> THIS IS KIND OF A UNIQUE PART OF DOUBLE JEOPARDY LAW INSTEAD OF GETTING ON TO ONE BEING A, IN VIOLATING A BUNCH OF DIFFERENT STATUTES, CAN CONSTITUTE A BUNCH OF OFFENSES IN THIS CASE, IT IS MULTIPLE ACTS, AND MULTIPLE OFFENSES, IN THAT

--

>> IN THIS IS CASE YOU ARE DEALING WITH A DIFFERENT PROVISION UNDER 800.04; CORRECT? THAN WE WERE DEALING WITH IN

PAUL.

>> RIGHT PAUL DEALING WITH MONTHLESS TAXATION.

>> -- MOLESTATION.

>> FOUR IS SPECIFICALLY WRITTEN IN SUCH A WAY TO INDICATE THE LEGISLATURE RECOGNIZED THAT THESE WERE SEPARATE ACTS, AND EACH TIME YOU COMMIT AN ACT THAT IS CRIME UNDER THE STATUTE, YOU CAN GET CHARGING WITH THAT WITHOUT VIOLATING DOUBLE JEOPARDY, AS A MATTER OF COMMON SENSE EVEN IF THE SIMULTANEOUSLY VERSUS SEQUENTIAL DISTINCTION AS A MATTER OF FACT YOU CAN'T PENETRATE TWO ORIFICES AT THE SAME TIME WITH YOUR PENIS NOT PHYSICALLY POSSIBLE. CLEARLY, THIS IS WHY THE CASES GO IN TWO DIFFERENT DIRECTIONS.

IT IS INTUITIVE THAT THESE ARE DISTINCT ACTS WHEN YOU VAGINALLY PENETRATE AND THEN --

>> IF WE ARE REALLY GOING TO GET THERE COULD BE -- THERE COULD BE -- DILDO USED, AND --

>> RIGHT, SO THEN THE QUESTION WOULD BECOME IT IS TWO PENETRATIONS, IS EACH PENETRATION PUNISHED THE WAY THE STATUTE IS WRITTEN EACH PENETRATION SHOULD BE PUNISHED? THE COURTS THERE ARE SAYING IF IT HAPPENS AT THE SAME TIME IT IS ONE ACT, THAT DOESN'T MAKE A LOT OF SENSE, EITHER, BECAUSE I CAN WALK AND CHEW GUM AT THE SAME TIME, THEY ARE SIMULTANEOUS BUT NOT THE SAME ACT UNDER THE DOUBLE JEOPARDY CLAUSE YOU CAN BE PUNISHED FOR EACH CRIMINAL ACT THAT TAKES PLACE.

THE QUESTION IS WHAT DID THE LEGISLATURE INTEND THE CRIMINAL ACT TO BE HERE?

THE WAY THE STATUTE IS

WRITTEN IT CLEARLY IS EACH
PENETRATION OR UNION WITH AN
INDIVIDUAL CRIMINAL ACT.

THAT
IS WHY EACH PENETRATION HERE
WAS PROPERLY SEPARATELY
PUNISHED.

THE DISTRICT COURT
ERRED CONCLUDING TO THE
CONTRARY.

THE -- THE
PROSECUTION CASES ARE HELPFUL
LOOKING AT HOW YOU ANALYZE
TO DETERMINE LEGISLATIVE
INTENT, IT IS LIKE THE LANGUAGE OF
THE STATUTE THE USE OF THE
WORD "OR" HERE AND TAKE THE
COMMONSENSE APPROACH TO THIS,
IF YOU COULD TAKE THE
DEFENDANT'S POSITION THAT EACH
INDIVIDUAL RAPE IS JUST ONE
PART OF ONE BIG CRIME, THAT
CERTAINLY REWARDS THE
DEFENDANT WHO SAYS WELL, I GOT
THE VICTIM HERE, I MIGHT AS
WELL DO EVERYTHING I CAN
POSSIBLY THINK OF, AND AS LONG
AS THERE IS NOT SOME KIND OF
TEMPORAL SIGNIFICANT BREAK IT
IS GOING TO BE ONE CHARGE,
THAT IS CONTRARY TO COMMON
SENSE, CONTRARY TO THE PURPOSE
OF THE STATUTE, WHICH IS TO
PROTECT THE BODILY INTEGRITY
OF THE VICTIM, AND EACH OF
THOSE PARTS ARE INDIVIDUALLY
PROTECTED THE WAY THE STATUTE
IS WRITTEN.

>> SO WE WOULD ASK YOU TO
REVERSE THE DISTRICT COURT AND
I WILL SAVE THE REMAINING TIME
FOR REBUTTAL.

>> THANK YOU.

>> MISS RYAN.

>> GOOD AFTERNOON.

MAY IT PLEASE THE COURT.
NANCY RYAN REPRESENTING THE
RESPONDENT JOSHUA MESHELL.
I SUBMIT TO YOU YOU HAVE ALREADY
DECIDED THIS CASE IN PAUL,
WHEN YOU HELD THAT IN THE
CASES UNDER SECTION 800.04,
THE UNIT OF PROSECUTION IS THE
EPISODE OR TRANSACTION NOT THE

ACT I SUBMIT TO YOU,
UNCONFUSED THE LAW IN PAUL,
EXCEPT FOR FOOTNOTE THREE IS
CONFUSING BECAUSE IT REFERS TO
ACTS.

>> WELL, NOW, IN PAUL AS I
RECALL, YOU HAD TWO INCIDENTS,
ONE IN THE LIVING ROOM, AND
ONE IN THE BEDROOM, AND HE WAS
CHARGED WITH A COUPLE OF
OFFENSES IN THE BEDROOM AND WE
SAID THAT THERE WAS NOTHING
WRONG WITH HIM BEING PUNISHED
FOR BOTH IN -- BOTH OF THE
ACTS THAT TOOK PLACE IN THE
BEDROOM.

SO EXPLAIN TO ME HOW THAT
HELPS YOU.

>> BLOCKBURGER -- CAME INTO
PLAY AND ALICE COMES INTO
PLAY WHENEVER DIFFERENT
SUBSECTIONS -- THE ISSUE IN
BLOCKBURGER IS HOW MANY OFFENSES HE
CAN BE CONVICTED OF, UNDER
EACH -- EACH UNIT OF
PROSECUTION.

>> UNDER ONE SUBSECTION.

>> THIS INVOLVED SOLELY ONE
SUBSECTION.

>> YOU WOULD ALSO AGREE, THAT
IF YOU HAD TAKEN THIS VICTIM
AND TAKEN HER FROM SAY THE
LIVING ROOM, AND MOVED HER
INTO THE BEDROOM, START ANEW,
THAT UNDER PAUL THAT WOULD BE,
NOW, A SEPARATE CRIMINAL
ACTION.

>> YES, YOUR HONOR, EXACTLY
WHERE THERE IS TIME TO
PAUSE AND REFLECT THIS COURT
IN PAUL ADOPTED THE ANALYSIS
ABOUT HALF THE CASES, AND SAID
WHERE THERE IS TIME TO PAUSE
AND REFLECT THERE IS A NEW
EPISODE OR TRANSACTION.

YOU ARE

STUCK WITH THAT LANGUAGE
EPISODE OR TRANSACTION.

IT APPEARS IN 7.0521.

>> WHY ISN'T THERE A --
CONFLICT CHANGE ONE ACT TO
ANOTHER WHY DON'T YOU --
DISTINGUISH.

>> WELL -- IT'S UP TO THE STATE TO

PROVE THERE WAS TIME TO PAUSE
AND REFLECT, ONCE THEY PROVED
THAT --

>> -- [INAUDIBLE], CHANGE IN
DOING VAGINAL SEXUAL ACTIVITY
TO ORAL WHY DOESN'T THE SAME
APPLY TO -- OKAY, NOW
CHANGED JUST LIKE -- A
DIFFERENT ROOM, SOMETHING ELSE
DIFFERENT GOING ON, YOU HAD
CERTAINLY TIME TO REFLECT.

>> WELL, THE ANALYSIS, THE
PAUSE-AND-REFLECT ANALYSIS
TAKES INTO ACCOUNT I THINK
THAT SEXUAL EVENTS, SEXUAL
EPISODES, SEXUAL TRANSACTIONS
ARE JUST MORE FLUID.

THE STATE
IN ITS BRIEF NOTES A PERSON CAN
GLIDE FROM ONE END TO ANOTHER
OVER A PERSON'S BODY WITHOUT
MORE THAN ONE ACT HAVING BEEN
COMMITTED, THERE IS I SUBMIT,
THAT YOU COULD HAVE MORE THAN
ONE, TOUCHING OF -- TWO
DIFFERENT ORIFICES WITHOUT A
SEPARATE ACT BEING
COMMITTED.

THAT IS WHERE WE GET
CONFUSED WHEN WE TALK ABOUT
ACTS IF YOU DEVOTE YOURSELVES
TO PAUSE-AND-REFLECT ANALYSIS,
AND SAY, ORANGE
COUNTY IN PAUL WE HAD TWO, IN
THIS CASE THERE WASN'T --
THERE WASN'T EVER PROVEN WE
HAD --

>> UNDER YOUR THEORY THIS
COULD BE GOING ON ALL DAY
LONG, IF ONE ACT AFTER ANOTHER
AS WE WOULD SPEAK OF IT IN
COMMON PARLANCE WOULD YOU SAY,
THIS IS ONE THING, ONE CRIME.
AND THAT SEEMS TO DEFY COMMON
SENSE THE WAY THE LEGISLATURE
WOULD UNDERSTOOD IT WHEN USING
THESE TERMS, WE TALK ABOUT SEX
ACTS, AND PEOPLE UNDERSTAND
WHAT THEY ARE TALKING ABOUT,
AND THESE ARE DISTINCT SEX
ACTS, AND TO TRY TO SAY THAT,
WELL, YOU KNOW, THIS IS ALL
JUST KIND OF FLUID, AND --
JUST IT SEEMS TO ME AT LEAST

ARGUABLY, THAT TO BE DETACHED FROM REALITY THAT THE LEGISLATURE UNDERSTOOD --
>> JUSTICE CANADY POINTED OUT TO YOU THE FACT THE LEGISLATURE DID NOTHING WHEN THIS COURT DECIDED PAUL, PAUSE-AND-REFLECT ANALYSIS WAS APPROPRIATE IN CHAPTER 00 CASES WITH THE LEGISLATURE KNOWS VERY WELL HOW TO MAKE IT CLEARER TO THIS COURT WHEN IT DISAGREES WITH IT.

THEY DIDN'T --

>> SOMETIMES THEY DON'T SUCCEED EVEN WHEN THEY TRY, ONE MIGHT OBSERVE.

>> TRUE, YOUR HONOR --

>> REFRESH MY RECOLLECTION. JUSTICE CANADY IS TALKING ABOUT DIFFERENT ACTS, AND PAUL, ISN'T PAUL DIFFERENT?

YOU ARE

SAYING PAUL DECIDED THIS AND I DON'T KNOW THAT IT NECESSARILY DID.

WEREN'T WE TALKING ABOUT THERE TWO MEMBERS, A MAN AND YOUNG MAN AND KISSING AND TOUCHING AND THAT WAS NOT THE ISSUE.

THE ISSUE IS WHETHER THERE -- AM I CORRECT?

>> THE -- WELL, THERE WERE -- MULTIPLE ISSUES MULTIPLE STATUTES AND MULTIPLE LOCATIONS IN PAUL YOU DECIDED THE UNIT OF PROSECUTION ANALYSIS BY SAYING OKAY WE ARE GOING TO ADOPT PAUSE AND REFLECT.

>> AGAIN --

>> JUST A LITTLE BIT --

>> I'M SORRY, YOUR HONOR.

>> AGAIN, AS JUSTICE CANADY POINTED OUT, THAT THERE ARE DIFFERENT THINGS INVOLVED IN THIS CASE.

THAT WOULD NOT NECESSARILY MATCH UP WITH PAUL.

>> WELL, IN THIS CASE, WHAT YOU HAD WAS A FAILURE TO PROVE THERE WAS ANY KIND OF PAUSE AND REFLECT BETWEEN THE ACT OF FELLACIO AND INTERCOURSE.

>> THERE ARE TWO DIFFERENT SEXUAL ACTS DEFINED IN THIS THAT WE WERE NOT DEALING WITH IN PAUL; AM I CORRECT?

>> YES.

>> I THINK THAT MAKES A DIFFERENCE ONE IS A GENERIC MOLESTATION KIND OF THING -- JUSTICE WELLS WAS ALSO -- THIS IS A DIFFERENT CONTEXT A DIFFERENT STATUTE, THAT IS -- VERY SPECIFIC WHY DOESN'T THAT MAKE IT DIFFERENT THAN THE PAUL SITUATION THE GENERICS, BASED ON THE SITUATION IS THAT WHAT WAS OCCURRING IN THE LIVING ROOM WOULD BE TREATED AS ONE TYPE OF MOLESTATION, NOT KISSING AND UP TO -- WHEREAS THIS ONE AS JUSTICE CANADY POINTED OUT DIFFERENT THINGS IDENTIFIED IN THE STATUTE.

>> THERE ARE JUDGE, THERE IS -- THERE IS -- THE STATUTE IN ISSUE IS BOTH THE SEXUAL BATTERY STATE, AND LEWD AND LASCIVIOUS, WHICH IS ORAL, ANAL OR VAGINAL PENETRATION OR UNION WITH THE SEXUAL ORGAN WITH ANOTHER OR SOME OTHER KIND OF PENETRATION.

THE STATE WOULD HAVE YOU BELIEVE THAT THIS STATUTE, AS DISTINCT FROM THE COLORADO STATUTE IN THE BRIEFS IS TOTALLY FOCUSED ON EACH PENETRATION, THEY ARE SAYING YOU GOT TO LOOK AT THE STATUTES, AND SAY WELL, EACH PENETRATION IS A SEPARATE CRIME, IT SAYS THE STATUTE I WOULD SUBMIT TO YOU TALKS IN TERMS OF PENETRATION OR UNION, THIS IS -- BECOMING GLOBAL, THIS IS LIKE THE COLORADO STATUTE.

>> WHY SHOULDN'T WE INTERPRET THIS SINCE IT USES BASICALLY THE SAME LANGUAGE AS 794 IN THE SAME MANNER THAT WE HAVE INTERPRETED 794?

>> JUDGE MY UNDERSTANDING YOUR HONOR THIS COURT HAS NOT --

SECTION 794, DKRAI'S HAVE SPLIT THIS COURT HAS NOT SPOKEN YET TO THE LANGUAGE AT ISSUE HERE WHICH APPEARS IN BOTH STATUTES.

>> ANY NUMBER OF CASES, OF COURSE WHERE PEOPLE HAVE BEEN CONVICTED, OF SEXUAL BATTERY, BY PENETRATION, AND SEXUAL BATTERY BY ANAL PENETRATION, SEXUAL BATTERY BY ORAL PENETRATION, IN THE SAME CRIMINAL EPISODE.

>> CORRECT, YOUR HONOR, THE DCA SPLIT ALL OVER THE PLACE.

IT IS NOT CLEAR TO ANY ONE PROSECUTOR OR ANY ONE JURY WHICH LAW IS GOING TO APPLY TO THEM.

YOU GET DEFENDANTS CONVICTED OF MULTIPLE SEX ACTS IN SOME DCA'S YOU GET THEM -- YOU GET THOSE CONVICTIONS REVERSED IN OTHER DCA'S THEY APPLY PAUSE-AND-REFLECT ANALYSIS. I SUBMIT TO YOU THAT THERE IS NOTHING WRONG WITH THE PAUSE-AND-REFLECT ANALYSIS, BECAUSE -- BECAUSE BACK IN THE EARLIER POINT, SEXUAL EVENTS ARE JUST MORE FLUID, THAN THAT.

>> THAT, REALLY, TAKES US AWAY FROM WHAT WE'VE BEEN -- THE WAY WE'VE BEEN ANALYZING THESE CASES, GOING BACK TO STATE VERSUS PAUL, I'M LOOKING AT IT, AND WE WERE DEALING THERE WITH 8.045A AND 800.046A, AND WE -- LOOKED AT THOSE TWO SECTIONS AND THEY BOTH HAD TO DO WITH TOUCHING.

AND SO WE CAME TO THE CONCLUSION THERE THAT SINCE THEY -- BOTH OF THOSE ON THE GROUNDS PROVISIONS HAD TO DO WITH TOUCHING THAT THAT WAS THE SAME PROSECUTION. THAT IS WHAT WE HELD IN PAUL. RIGHT?

>> RIGHT, THAT WAS THE LIVING ROOM ANALYSIS.

>> AGAIN, THAT IS WHERE -- SO WE DON'T -- THAT IS WHERE THERE IS

ONE TOUCHING AND THE -- STATE CHARGES TWO DIFFERENT CRIMES THAT IS WHAT WAS -- YOU KNOW IF YOU READ JUSTICE CANTERO'S CONCURRENCE HE SAYS YOU, KNOW, WE GOT -- WE GOT TO CHANGE THE WAY WE EVEN LOOK AT THAT ISSUE, SO WE WERE REALLY FOCUSED ON ONE -- JUST ONE ACT BUT WHETHER THERE COULD BE MULTIPLE CONVICTIONS, THAT IS NOT WHAT THIS CASE IS ABOUT. THAT IS WHY AGAIN I'M GOING TO GO BACK AND -- READ PAUL WITH A FINE-TOOTH COMB, THAT IS WHY I THINK IT IS A LITTLE CONFUSING, WHAT WE SAID IN PAUL AND WHAT YOU ARE SAYING KEY ALREADY DECIDED, AND WHAT JUSTICE IS SAYING BECAUSE WE WERE DECIDING SOMETHING WE REALLY FOCUSED ON THE SAME ELEMENT TEST OF BLOCKBURGER, NOT CHARGING ON THE SAME STATUTE, AND HOW MANY SEPARATE UNITS OF YOU KNOW TIMES COULD YOU PROSECUTE.

DO YOU NOT AGREE WITH THAT?

>> WELL -- PAUL IS A MUCH MORE COMPLEX CASE THAN THIS BECAUSE IT IS A MULTICIPPLICITY OF THE STATUTE BLOCKBURGER ANALYSIS DOESN'T FEATURE IN THIS CASE. THIS CASE IS A GREAT OPPORTUNITY TO CLARIFY PAUL AND SAY WHETHER YOU ARE GOING TO USE PAUL'S REFLECT ANALYSIS IN THE SEX CASES OR WHETHER YOU ARE GOING TO USE ACT BY ACT ANALYSIS IN THE SEX CASES, DOUBLE JEOPARDY DOESN'T HAVE TO BE OF THAT -- IT DOESN'T HAVE TO BE CURIOUS, OR CURIOUSER, WHAT YOU NEED I THINK WHAT THE COURT NEEDS TO DO IS TAKE A UNIT OF PROSECUTION ANALYSIS OVER HERE AND HAVE THAT -- TAKE INTO ACCOUNT ALL THE FACTS, EVERYTHING IN THE CHARGED DOCUMENT, EVERYTHING IN STATE BRIEF --

>> GET THAT DOWN -- THE FACTS I THINK THAT THE IDEA OF HOW

DO YOU SEPARATE AND SAY
MULTIPLE TOUCHING THAT YOU
KIND OF KNOW THERE MAY NOT
BE-- =THERE IS NOTHING TEMPORAL,
BUT GETTING INTO THE FACTS OF
THIS -- APPROACH THAT YOU'VE
GOT A PENETRATION, WE
KNOW AS A MATTER OF FACT, THAT
THAT THEN THIS -- USING THIS
DEFENDANT'S AND HIS SEXUAL
ORGAN, THERE HAS GOT TO BE --
WITHDRAWAL BEFORE YOU CAN THEN
HAVE ANAL PENETRATION.
I DON'T UNDERSTOOD YOUR
ARGUMENT THAT WOULDN'T BE TWO
SEPARATE SEXUAL ACTS THAT
COULD BE PUNISHED.
AND I DON'T KNOW WHY THE
LEGISLATURE WOULD SAY THAT
SOMEBODY THAT SIMPLY RAPES
SOMEBODY VAGINALLY, THAT PERSON
IS NO DIFFERENT THAN SOMEBODY
THAT RAPES THEM VAGINALLY, AND
THEN GOES ON AND RAPES THEM
ANALLY, JUST TAKING THAT, NOT
TALKING ABOUT A TOUCH, A TOUCH
OF THE BUTTOCKS, I TOUCHED THE -- YOU
KNOW, THAT PART -- WHICH
STARTS TO BECOME A LITTLE
ABSURD, BUT HERE WE'RE TALKING
ABOUT YOU KNOW, TWO THINGS
THAT ARE RAPE -- BY DIFFERENT
YOU KNOW DIFFERENT TYPES OF
RAPE.

>> I THINK IF THE STATUTE
800.04 SUB4 BATTERY STATUTE AT
ISSUE HERE I THINK IF IT WERE
PHRASED SOLELY IN TERMS OF PENETRATION
THE STATE WOULD HAVE AN
EXCELLENT POINT WHAT THE
LEGISLATURE WAS GETTING AT,
WAS EACH PENETRATION, IS
-- IS THEIR DECIDED UNIT OF
PROSECUTION, BUT WHAT YOU
DON'T HAVE HERE IS ANY
INDICATION THAT THE
LEGISLATURE MAINSTREAM EVERY
UNION, AND EVERY PROSECUTION
TO BE BROKEN UP LIKE A
BATTERY.

>> IN THE GROSSEST WAY A MALE
PERFORMS DIFFERENTLY SO WE ARE
REALLY SAYING THE MALE THAT
IS ABLE TO RAPE A YOUNG GIRL

AND THEN HAVE THE STAMINA TO RAPE HER AGAIN ANALLY IS GOING TO BE PUNISHED A DIFFERENT WAY THAN SOMEBODY THAT EJACULATES, ABLE TO DO SOMETHING MORE THEN AFTER A COUPLE OF MINUTES OR HOUR, RAPE AGAIN?

>> AFTER AN HOUR YOU HAVE GOT A NEW EPISODE TO THAT.

>> BUT IT IS ONLY DUE TO THE PHYSICAL ABILITY OF THE DEFENDANT, AND THAT DOESN'T SEEM LIKE IT MAKES A LOT OF SENSE THE LEGISLATURE WOULD -- YOU KNOW, WOULD TAKE -- YOU KNOW, SOMEBODY WHO COULD OTHERWISE PERFORM IN A PORNOGRAPHIC MOVIE SAY THAT PERSON IS NOT PROSECUTED PUSH TO THREE DIFFERENT ACTS SOMEBODY THAT IS -- BEYOND THE AGE OF ADOLESCENCE, YOU KNOW MIGHT HAVE TO TAKE A PAUSE, AND YOU KNOW, SINCE WHAT IS THE -- WE'RE TALKING ABOUT REAL LIFE STUFF HERE.

I DON'T KNOW.

I'M STARTING TO THINK THAT THAT MAKES NO SENSE WHEN IT COMES TO -- WE CALL IT SEXUAL BATTERY, YOU KNOW.

IT IS RAPE.

AND THAT IS -- THEREFORE, THIS IDEA THAT WE ARE GOING TO HAVE YOU KNOW, MULTIPLE TOUCHING OF A BREAST, AND THAT DOESN'T MAKE ANY SENSE THAT THAT IS GOING TO BE CHARGED WITH A SEPARATE PENETRATION, IS A DISTINCT SEXUAL ACT, THAT YOU KNOW, I DON'T SEE ANY REASON THE STATE COULDN'T INTEND -- DIDN'T INTEND TO PUNISH THOSE SEPARATELY.

>> BUT THEY WROTE IN THE STATUTE EVERY PENETRATION BY OR UNION WITH SEXUAL ORGANS IS ILLEGAL.

THEY DIDN'T SAY

WHETHER IT IS ONE OR MORE, IT IS AMBIGUOUS STATUTE BECAUSE IT DOESN'T SAY A PENETRATION, THE ONLY TIME THIS COURT FINDS

THE STATUTE UNAMBIGUOUS IS WHEN THEY SAY A -- OR SOMETHING OF THAT -- WHETHER THEY SAY ANY GUN, ANY KNIFE, ANY PENETRATION, THIS AMBIGUITY, THERE IS NEITHER AN "A," "OR" AN "ANY" IN THIS CASE.

>> -- ABOUT THIS I MEAN, WHAT I JUST SAID THAT THERE IS A GOOD REASON, THAT THERE IS A DIFFERENCE BETWEEN SEVERAL TOUCHES AND SEVERAL RAPES.

>> WHAT ABOUT UNION -- IF YOU DECIDED THAT THIS CASE STANDS FOR THE RULE THAT EVERY PENETRATION AND EVERY UNION SUPPORTS A SEPARATE PROSECUTION, YOU WOULD HAVE -- THE PARADE OF HORRIBLES, EVERY TOUCH, PROSECUTORS HOVERING OVER --

>> MOST CASES, THAT IS THE BOTTOM LINE, AT SOME POINT RIDICULOUS, IF THEY HAD TO TRY TO PROVE YOU KNOW, IN A 20 MINUTE HEARING, YOU KNOW, 20 DIFFERENT SEXUAL ACTS I THINK THERE IS SOME -- YOU KNOW THE BREAKS ON IT REALLY HAVE TO DO WITH AGAINST SOMETHING LOGICAL ON THEIR PART, NOT WHETHER IT'S A DOUBLE JEOPARDY VIOLATION.

>> YOUR HONOR, I MEANT TO -- ASSERT FOR YOU THAT THE FACTS OF THE CASE THAT YOU WERE REFERRING TO, THREE DAY EPISODE, THERE WAS A THREE DAY SORT OF AFFAIR THAT WENT ON HERE, BUT THE TWO EVENTS THAT WE ARE TALKING ABOUT, THE TWO EVENTS INVOLVED IN THE DIRECT APPEAL TO THE FIFTH TOOK PLACE UNSPECIFIED MINUTES APART. THERE IS NO THERE, WHEREAS, NO INDICATION IN PROSECUTION THERE WAS ANY TIME TO PAUSE AND REFLECT.

OF COURSE OUR POSITION THAT WE ARE STICKING TO THERE HAS GOT TO BE TIME TO PAUSE AND REFLECT THE SIMPLEST BEST ANALYSIS, BECAUSE DOUBLE JEOPARDY HAS BECOME A BIG MESS, BECAUSE TALK ABOUT

EPISODES, TRANSACTIONS ALL GET SNARLED UP AT THE CIRCUIT LEVEL, DCA LEVEL.

>> THERE WOULD NOT BE A DIFFERENCE BETWEEN -- ATTEMPTING YOU KNOW MAYBE TRYING THREE DIFFERENT TIMES TO PENETRATE THE STATE CHARGING THAT VERSUS VAGINAL RAPE, ANAL RAPE.

>> I SAY THEY DIDN'T MAKE THE DIFFERENCE SUFFICIENTLY CLEAR. THEY TALK IN TERMS OF PENETRATION OR UNION OR PENETRATION. THAT IS OUR POSITION, YOUR HONOR.

>> I'M NOT SURE THAT, JUSTICE CANADY ASKED A DIRECT QUESTION THAT WAS CONVINCING TO ME AND I'M NOT SURE I UNDERSTAND YOUR RESPONSE TO IT. WHY CAN'T THE LEGISLATURE, THESE ARE DISTINCT, VERY DISTINCT.

WHY CAN'T THE LEGISLATURE DO THAT AND WHY HAVEN'T THEY DONE THAT HERE AND, THAT THERE CAN BE PROSECUTION FOR THESE ACTS? THAT'S WHAT HE ASKED YOU. I'M NOT SURE I HEARD THE ANSWER TO THAT.

>> ALL THE LEGISLATURE HAS TO DO IS TWEAK THE STATUTE TO THE SAY THAT A PENETRATION IS A CRIME. THEN THIS COURT WOULD HAVE NO CHOICE BUT TO GO ALONG WITH ITS INSTINCT AND SAY A PENETRATION IS A CRIME.

>> I DIDN'T ASK ABOUT AN AMENDED STATUTE. WHY HAVEN'T THEY DONE THIS? THAT WAS HIS QUESTION. WHY HAVEN'T THEY DONE THIS IN THIS STATUTE?

>> I SUBMIT THERE IS AMBIGUITY, IT TALKS PENETRATIONS OR UNIONS WITH. THAT IS ANALOGOUS WITH THE COLORADO STATUTE WITH THE MINTZ CASE DISCUSSED IN THE BRIEFS, PENETRATION OR INTRUSION OR

CONTACT.

I SUBMIT THEY MUDDIED WATERS
ADDING PENETRATION OR UNION.
PENETRATION OR UNION IS
DIFFERENT VISIBLE MULTIPLY JUST
LIKE BATTERY.

JUSTICE PARIENTE ASKED MY
OPPONENT FOR A CASE SAYING
THERE IS NO SEQUENTIAL
PROSECUTIONS FOR A BUNCH OF
BATTERIES.

MICHELLE IN THE DISTRICT COURT
COMES OUT SAYS THAT BECAUSE IT'S
A NEGATIVE.

WE DON'T, WE DON'T PROSECUTE A
BUNCH OF BATTERIES EVEN THOUGH
THERE IS ALTERNATE WAYS OF
PROVING IT. WELL, NOW YOU HIT
HIM, NOW YOU HIT HIM AGAIN, NOW
YOU PUSHED HIM DOWN.
YOU CAUSED HARM.

IT'S NOT DONE THAT WAY.

IT'S NOT PRESUMED TO BE THE
LEGISLATURE'S INTENT.

>> HOW DOES THE BATTERY STATUTE
READ IN COMPARISON TO THIS
STATUTE?

>> INTENTIONAL TOUCHING OR
BODILY HARM ARE THE WAYS OF
PROVING BATTERY.

>> BUT WHAT MISS DAVENPORT IS
SAYING IF IT WAS THE BATTERY
STATUTE WAS WRITTEN SIMILAR TO
THE SEXUAL BATTERY WHERE IT WAS
SAYING BATTERY BY, YOU KNOW,
HITTING, YOU KNOW, WITH A FIST,
BATTERY BY KICKING IN THE
GROIN, YOU KNOW, THAT, THAT
MIGHT BE DIFFERENT.

>> IT VERY WELL MIGHT BE
DIFFERENT BECAUSE IT'S ENTIRELY
UP TO THE LEGISLATURE HOW MANY
PROSECUTIONS THEY WANT.

>> OKAY.

THAT I PROBABLY OF ALL THE
THINGS, THAT'S WHAT, STRIKING
ME, THIS IS GOING BACK TO,
ALTHOUGH WE'RE CALLING IT
DOUBLE JEOPARDY I SEE IT SO
MUCH MORE, I DON'T KNOW WHICH
CASE WE TALKED ABOUT IT,
PROSECUTION'S CASE AND WHETHER
THE LEGISLATURE INTEND AD
SINGLE UNIT OR MULTIPLE

DISTINCT ACTS DURING A
CRIMINAL EPISODE OR THEY,
INTENDED ONE.

AND I GUESS, THAT I AM LEANING
AT THIS POINT TO SAY, IT'S
LOGICAL, AND MAY NOT GO WITH
OUR CASE LAW, THAT THEY
INTENDED MULTIPLE ACTS OF
SEXUAL BATTERY TO BE PROSECUTED
DURING A SINGLE EPISODE, AND
NOT WORRY ABOUT THIS PAUSE AND
REFLECT.

SERIOUSLY, THINK ABOUT HOW YOU
ESTABLISH THAT LET'S SEE AFTER
YOU VAGINALLY RAPE, YOU ASK THE
VICTIM AND HOW MANY, A MINUTE
PASSED.

DID HE EJACULATE.

IT SEEMS LIKE WE'RE GETTING
INTO SOMETHING THAT IS.
SEPARATE CRIMINAL ACTS.

THERE HAPPEN TO BE, GOT TO BE
SEPARATED IN TIME BY AT LEAST A
COUPLE SECONDS, YOU AGREE WITH
THAT.

>> AS FAR AS THE UNION IS
CONCERNED I WOULD NOT.
THERE COULD BE PENETRATIONS AND
UNIONS GOING ON SEPARATELY AT
THE SAME TIME.

REMEMBER THE RULE OF LENITY,
APPLIES TO THIS DETERMINATION
OF LEGISLATIVE INTENT.

IMPLIES UNIT OF PROSECUTION
AS SAID UNDER THE SANABRIA CASE
WITH MULTIPLE FIREARMS.

>> MULTIPLE INTENDED UNIONS
THAT IS THE NOT ALTERNATIVE IF
IT'S SUBMITTED IN ALTERNATIVE
WAYS WHICH IS VAGINAL RAPE
VERSUS ANAL RAPE THAT THAT
WOULD BE A SEPARATE UNIT OF
PROSECUTION?

YOU DON'T SEE THAT AS BEING A
BIT OF GROUNDS FOR THIS? YOU DON'T
GET ABSURD RESULT OF EVERY
ATTEMPT TO THE PENETRATE
DURING, YOU KNOW, FIVE-MINUTE
PERIOD, SEPARATE UNIT, SO, A
SEPARATE TYPE OF ACT BEING A
SEPARATE UNIT OF PROSECUTION?

>> I THINK ULTIMATELY IT'S UP
TO THE LEGISLATURE TO MAKE IT
AS CLEAR AS IT CAN BECAUSE OF

THE RULE OF LIENTY, THIS COURT HAS A CHECK ON THE LEGISLATURE IN THAT THEY HAVE TO MAKE IT CLEAR WHAT'S THE UNIT OF PROSECUTION.

>> WHAT DID, THE RULE OF LENITY. DIDN'T APPLY IN BLOCKBURGER?

>> IT APPLIES UNIT OF PROSECUTION UNDER GRAPPIN AND SANABRIA.

YOU'RE DETERMINING WHAT THE UNIT OF PROSECUTION WAS SOLELY IN THIS STATE.

I WOULD ASK THE COURT TO AFFIRM THE DECISION OF THE FIFTH DCA.

I ASK YOU TO CLARIFY MATTERS BY POSSIBLY CONSIDERING RECEDING FROM THE REFERENCE TO ACTS IN FOOTNOTE THREE OF PAUL.

BUT OTHERWISE TO REAFFIRM PAUL IN THAT, PAUL IS REFLECTION ANALYSIS IS CORRECT, EPISODIC OR TRANSACTIONAL ANALYSIS IN THESE CASES.

>> THANK YOU VERY MUCH, MISS RYAN.

MISS DAVENPORT.

>> JUST A COUPLE POINTS.

PAUL HAD NOTHING TO DO WITH THIS CASE.

THE ONLY THING THAT PAUL MENTIONED WAS IN THE FOOTNOTE.

OF COURSE IF THESE WERE DISTINCT ACTS IT WOULDN'T BE A DOUBLE JEOPARDY VIOLATION. END OF ANALYSIS.

THEY WEREN'T DISTINCT ACTS IN PAUL BECAUSE OF MOLESTATION.

>> YOU DON'T THINK WE CONFUSE THINGS?

>> PARDON ME?

>> YOU DON'T THINK WE CONFUSE THINGS.

PAUL DOESN'T ANSWER THIS QUESTION, IF IT DID WE WOULD NOT BE HERE.

>> EXACTLY.

PAUL SAID IT'S ONE ACT BECAUSE IF IT WAS DISTINCT ACTS ALL THREE WOULD HAVE TAKEN CARE OF IT.

IT WAS ONE ACT, THEY WILL CHARGED UNDER TWO STATUTES IT WAS MORE A BLOCKBURGER

ANALYSIS.

>> CAN I ASK THE QUESTION THAT JUST ENDED WITH IS THAT UNIONS ATTEMPTED UNION VERSUS A SEPARATE ACT FOR A DIFFERENT, YOU KNOW, PENETRATION, AND, VAGINAL PENETRATION, ANALLY, IT WAS STATE'S POSITION BE THE SAME AND IF THE DEFENDANT ATTEMPTED UNION AND, YOU KNOW, KEPT ON ATTEMPTING IT, AND THERE WAS, YOU KNOW, STARTED, COULDN'T PENETRATE.

STARTED AGAIN, AND YOU KNOW, WOULD THAT BE, ARE YOU STILL SAYING THAT THOSE MULTIPLE ATTEMPTS AT UNION OR, ACTUAL UNION, TOUCHING BUT NOT PENETRATION WITH WERE EACH TIME THAT HAPPENED BE A SEPARATE UNIT OF PROSECUTION?

OR ARE YOU ONLY SAYING IF IT HAPPENED IN A DIFFERENT WAY DURING THE SAME ACT THAT IT DOESN'T MATTER, THERE'S A PAUSE?

>> IT WOULD DEPEND ON THE FACTS.

>> MY FACT IS IT'S A DEFENDANT WHO IS HAVING TROUBLE HAVING AN ERECTION AND.

>> RIGHT.

>> AND IS INTENDING --.

>> TRYING, THAT WOULD BE ONE ACT.

THERE IS NOTHING DISTINCT ABOUT IT. THERE IS DIFFERENCE BETWEEN DOING THE SAME THING OVER AND OVER.

PENETRATING HER, VAGINALLY, AND IS NOT PUNISHED.

THAT IS ONE THING.

THAT'S ONE CONTINUOUS ACT.

>> SO THE LEGISLATURE, THOUGH, HOW DO WE KNOW THE LEGISLATURE JUST DIDN'T INTEND TO ALSO JUST PUNISH, YOU KNOW, EVERY ATTEMPTED UNION IS A UNIT OF PROSECUTION?

>> WELL, IF THERE WAS A BREAK IF THERE WAS A PAUSE AND REFLECT, THAT APPLIES HERE TOO. THE PROBLEM IS, PAUSE AND REFLECT IS A GOOD TEST FOR AN

EPISODE BUT IT'S NOT ONLY TEST
FOR A DISTINCT ACT.

THAT'S WHERE THE COURTS ARE
GETTING CONFUSED BELOW.

IT CAN BE A DIFFERENT QUALITY
OF ACT TOO WITHOUT A TEMPORAL
BREAK AND STILL A DISTINCT ACT
THAT WAY.

YOU CAN VAGINALLY PENETRATE AND
ANALLY PENETRATE IMMEDIATELY
FOLLOWING EACH OTHER.

THEY'RE DIFFERENT IN QUALITY.
THAT MAKES THEM DISTINCT ACTS
VERSUS, YOU KNOW, UNITE WITH
THE VAGINA AS YOU'RE
PENETRATING AND THAT IS ONE
ACT.

>> HAVE WE EVER SAID THAT?
THAT SOUNDS LOGICAL.

ARE WE MAKING STUFF UP AS WE GO
ALONG?

>> IT COMES FROM, COMES FROM
BLOCKBURGER. THERE ARE TWO DRUG
SALES, ONE RIGHT AFTER THE
OTHER.

THEY SAID ONE ACT WAS
COMPLETED.

NEXT ACT TOOK PLACE.

>> I KEEP ON THINKING IF WE --
THIS IS UNIT OF PROSECUTION.
WE STAY AWAY FROM ALL THOSE
DOUBLE JEOPARDY CASES AND WE
JUST DEAL WITH THAT.

>> RIGHT.

>> ARE THERE ANY CASES?

>> THERE IS NOT A LOT OF LAW IN
DISTRICT COURT.

COMING OUT FROM DISTRICT
COURTS.

THAT'S WHY THIS COURT NEEDS
GUIDANCE AND SHOWS IN THE
OPINION BELOW.

WE WOULD ASK YOU TO REVERSE
THAT. THANK YOU.

>> THANK YOU VERY MUCH.

THANK BOTH OF YOU.

THE COURT WILL NOW BE IN RECESS
UNTIL TOMORROW MORNING.

>> PLEASE RISE.