

>> All rise.

>> The Supreme Court of Florida
is now in session.

Please be seated.

>> We now go to the third case
on our docket today come the
state of Florida versus
Sturdivant.

>> May it please the court.

I am the Assistant Attorney
General representing the state.

>> Could you speak up a little
bit?

>> Certainly Your Honor.

The state request that this
court reduced its prior decision
in Brooks.

In brooks this court held
aggravated child abuse for
felony murder is limited to
situations where there are
multiple acts of --

>> But are you saying there is a
novel argument that you made I

think it is novel.

But for child abuse there are three ways or for ways that child abuse can be committed, A.

B and C.

>> A B and C.

>> Aggravated batteries A, willfully tortures, maliciously punishes, B abuse of a child to cause great bodily harm.

This case is actually not even an aggravated battery case.

The jury was instructed on willfully torture.

>> Subsection B.

>> Actually the jury instruction was under B, not under A.

>> That's right, yeah.

>> So this is not a book situation because it is not an aggravated battery.

It is not A.

>> Remember the problem with that is Brooks was not charged with the underlying felony so I

don't know in Brooks whether
they were under a, B or C.

>> Assuming it is A, D or C,
they were instructed under B.

You are suggesting we
distinguish between an
aggravated battery and other
types of child abuse?

Maybe you can recite or
re-recite what your argument is.

Revisited Brooks but you would
want the courts to hold what?

>> It is in the alternative.

First of all under plain text
you can use A, B and C but in
the alternative via merger
doctrine based on the
legislative history, the merger
doctrine is a rule of statutory
construction.

>> Going back to A.

I read your argument is being
that we should be defined away
from multiple acts.

>> It would limited to B in the

alternative.

>> But the plain language does not even give us that alternative, does it?

>> No Your Honor.

In a plain text analysis, and that was the argument made in Brooks and I repeated that argument here.

Under plain text analysis what you do is there is no limit on it because aggravated child abuse is an enumerated felony.

Your Honor other supreme courts invoke the merger doctrine what they are doing is they are doing a merger when they don't have enumerated felonies.

Aggravated felony is an aggravated felony.

It is section H of this.

Not only is it an enumerated felony Your Honor but the first felony murder statute was specifically amended.

This was a specific amendment to the statute.

Not only is this enumerated it is a specific particular amendment.

Now, and I also provided supplemental authority with a recent case from Idaho saying the merger doctrine is not the law in Idaho and it was dealing with an aggravated child abuse.

Because the statute, Idaho's felony murder statute was specifically amended to include aggravated child abuse on a child and then they said the plain language of the statute is not trumped by the judicially created doctrine and by that they mean the merger doctrine that is applied in states without a similar statute.

This alone implies the merger doctrine dealing with an enumerated felony.

The Supreme Court said Arizona
can do this.

Mississippi and Tennessee have
all rejected merger doctrine
when it is dealing with an
enumerated felony.

Courts limit that to when you
have a catchall.

California second-degree murder
statute, any felony.

Originally in Kansas there is
the catchall, and the Kansas
Supreme Court applied the merger
doctrine because it was a
catchall, not an enumerated
felony but said to the Kansas
Legislature if you want to
aggravated child abuse as they
fell in a for murder, please
amend the statute.

The Kansas Legislature took them
up on that invitation and in the
Kansas Supreme Court after that
amendment said, this is a plain
amendment.

>> I want us to receive from
Brooks and essentially it would
be to adopt Justice Lewis'
separate opinion?

>> Yes.

>> Justice Lewis got it right?

>> Basically yes Your Honor we
think Justice Lewis got it
right.

>> It sounds to me like he did
too as I look at this and I want
to see -- my concern has been
that that it seems to me that
you were arguing for something
in the statutory construction
that to me would be closer to
what it should be which is an
aggravated battery that then
becomes felony murder should be
under the merger doctrine
however I agree with you that
the plain language doesn't
appear to allow that and yet,
there can be situations where
there can be an unjust situation

but that is something for the legislature to address, not this court.

>> Yes, Your Honor.

>> Explain to me why you would have a situation where you would have two convictions.

Explain to me why -- what other elements of each -- usually when you have two convictions you have an element of one crime that is not in the other one so explain to me what are the separate elements that would be in the felony murder and the felony.

>> Okay, that is a lot like a double jeopardy analysis.

Remember merger and double jeopardy are two separate things.

>> Tell me what are the separate elements.

>> This court has a whole series of questions saying that double jeopardy is not violated when

Edmund, going back 33 years that
when you have an underlying
felony and a conviction for
felony murder that does not
violate double jeopardy.

None of the enumerated felonies
for felony merge, be it, sexual
battery, trafficking robbery
etc. etc..

>> You may have dual convictions
for most of those.

>> The answer is there is none.

That is the specific question I
asked you about a separate
element.

There is no separate element.

Is that what you are saying?

>> Your Honor first of all, yes
there would read the felony
murder first of all would
require the death of a child and
aggravated child abuse requires
you know, if you look at the
definition none of them talked
about death.

So there are going to be
different elements.

>> If you would just answer the
question, whether you believe or
not, I would like you to just
answer the question.

You have been those two crimes,
what is the separate element?

The death would be the separate
element and the murder and the
actual death of the trial,
correct?

>> Yes and aggravated child
abuse does not under its
definition necessarily require
the death of a child.

If you look at A, B and C, death
is not required for that so one
of the differences would need
death, but Your Honor, I mean
what you are really asking me is
does double jeopardy preclude a
conviction for the underlying
felony and felony murder and the
answer is knowing the answer has

always been no.

>> I think my concern in Brooks that warrants proportionality that somebody who commits an aggravated battery that ends up where the child dies, the child is under 12.

There is an underlying felony.

I think probably the way to address those cases is there is nothing else abrogating that would render its disproportionate sentence.

It is really not what we are dealing with your.

>> No, Your Honor.

>> I mean there could be that problem in a death penalty case that would be here in a case but the death penalty is not being sought.

>> Yes Your Honor.

Depending on the facts.

You all do, you call it doubling like you are doubling analysis

in the death penalty aggravators
context.

It is a lot like a double
jeopardy and you require
different sets of facts
underlying the aggravator from
the crime and depending --
Your Honor it would be hard for
me to answer that in the
abstract but under your doubling
analysis, you would probably
have to have another aggravator.

Prior violence or something.

>> That came in what year?

>> 2005 Your Honor.

>> Is there anything in the
argument that for the six years
the Legislature saw how the
courts had narrowed the felony
child abuse underlying felony
and didn't really amend the
statute?

Does that not apply to cousin of
the language analogies?

>> Well Your Honor that is

something that courts often look at.

We interpreted the way the Legislature did but understand something Your Honor, don't think that applies here and here's why.

No conviction until now has been reversed on Brooks grounds.

Brooks itself the conviction was not reversed.

I don't think the legislature reaches out to correct errors when no convictions are getting reversed.

Until this case, no conviction has been reversed.

In the wake of Brooks, the fifth DCA in a case called Dorsey held that shaken baby syndrome, that was one of the big concerns in the wake of Brooks.

I had a lot of calls about Brooks and that was a big concern, whether shaken baby

would be prohibited under the
Brooks decision.

I thought now, they went ahead
and Rossi gated shaken baby and
the Dorsey, the fifth DCA said
that was fine.

Your Honor the first time the
DCA reverses the shaken baby
conviction I think the
legislature will act.

I think this is a unique
situation.

Brooks itself was not reverse.

No conviction has been reversed
until now based on a single
multiple acts dichotomy.

The legislature is not going to
reach out until convictions get
reversed.

They are not going to do that.

While I realize something that
courts normally look at whether
the legislature reacts, that is
just a general principle.

You need to look at an actual

context.

Until convictions are reversed
they are not going to --

>> Is really something we do
only if the language isn't
plain.

>> Yes Your Honor.

Aggravated child abuse is an
enumerated felony.

My argument in the alternative
about limiting is if you are
going to do the merger doctrine
it should be a merger doctrine
based on the actual legislative
history of this amendment.

The state's real position both
in Brooks and here is a plain
text analysis.

And it is clean sweep Your
Honor.

People are up here and talk
about the Supreme Court of
Arizona, Kansas, Mississippi and
Tennessee I always think to
myself okay what about the other

45?

It is a clean sweep Your Honor.

Dealing with an enumerated
felony, they do not apply the
merger doctrine.

They follow the plain text of
the statute.

So that is what this day
would --

>> Let me ask this question.

In Mills, we held back in 85
that it is not proper to convict
someone of the underlying felony
and felony murder.

Of course the underlying felony
was aggravated battery which was
not an enumerated crime at the
time.

I think the the decision as to
Brooks improperly relying on
Mills because of that factor.

But in this instance here
aggravated child abuse is a an
aggravated crime in the statute.

For purposes of double jeopardy

or even merger, why is it that
it is enumerated making it
different?

What fact is that --

>> Your Honor there are really
two different merger doctrines.
Old common-law merger was a
Preib cursor, a judicially
created precursor to double
jeopardy and that is not the
kind of merger we have in
Florida.

What we have in Florida in the
merger doctrine as a rule of
statutory construction.

You are really just looking at
it for the purposes of that.

So the difference there I think
is when you are dealing with an
unenumerated felony, one of the
things that the state that do
follow merger with on enumerated
felony, their logic is the
following.

If it is unenumerated them

something like aggravated battery could serve as the underlying felony and all murders -- because the vast majorities of murders involve an aggravated battery.

All murders would automatically become first-degree and that would negate the second degree and manslaughter.

It would take them off the table so it is a matter of statutory determination.

It would have the consequence of taking both second-degree and all the lesser forms of murder, second-degree manslaughter, third-degree felony murder off the table and we don't believe the legislature meant to do that.

So they invoked invoke the merger doctrine really as a rule of statutory construction.

I do not think the merger is

proper in the old double

jeopardy sense.

That was old common law, really

old common law.

We have now prior to

Blockberger, and we have a

statute codifying when dual

convictions are proper and when

they are not.

So we are not dealing with the

old judicially or created kind

of merger.

My merger argument is more a

rule of statutory construction.

That is the only kind of merger

that exists.

The old common-law merger does

not.

Merger is not correctly

understood.

It is not a form of double

jeopardy.

It should not be.

It is just a rule of statutory

construction.

Understandably employed when you think that the consequence of letting aggravated battery serve as an enumerated felony is going to negate all other types of murders.

What they said to themselves as we don't believe the legislature intended that.

>> You have used all your time of three minutes and 13 seconds.

>> I will save my three minutes and 13 seconds for rebuttal.

Thank you Your Honor.

>> May it please the court.

My name is Paula Saunders.

I represent the respondent, Robert Sturdivant.

Let me address Justice Perry and today's comments.

When the legislature included aggravated child abuse as an enumerated felony for felony murder in 1984, there were three alternative methods in which

child abuse could be committed.

There was an aggravated battery,
malicious punishment, and
torture.

The case that gave rise to the
statutory Amendment involves a
case of systematic abuse of a
child.

There was repeated beatings and
withholding of food and water.

The 5-year-old child succumbs and
the body was hidden.

By the time the body was
discovered it was decomposed and
they cause of death could not be
determined.

>> I understand this history and
actually the state has a
detailed a lot of this history
in the states brief.

What has that to do with
anything unless the statute is
ambiguous?

>> Okay, the statute is not
ambiguous.

>> It could be an important concession on your part.

>> I agree, but I also think there is a significance to the word and it.

When the cause of death cannot be determined, you could have had an aggravated child abuse based on aggravated battery based on malicious-- or willfull torture in and the legislature said any of those three alternatives will support a conviction for felony murder.

And aggravated battery can be multiple beatings with multiple injuries.

Malicious punishment or torture can withhold food and water which don't involve battery at all.

There was nothing in the legislative intent however that addresses whether that single -- one battery with only one injury

should constitute felony murder.

>> I am sorry.

I don't understand that

argument.

You are speculating about

legislative intent when we have

the words that are unambiguous

and you have conceded that the

words in the statute are

unambiguous.

Why doesn't that just settle it?

>> Because any refers to any

alternative methods of

aggravated battery but it

doesn't express an intent to one

do the merger with regard to

that single injury.

And in fact, Justice Lewis

invited the legislature to

re-examine and reevaluate the

statute if the Brooks opinion

did not follow that legislative

intent.

In the last six years the

legislature has not revisited or

re-examined or clarified its intent and we certainly know that the legislature doesn't hesitate to enact new laws where it disagrees with the opinions of this court.

When you look at -- Chacon, and Delgado, just to name a few.

But the legislature cannot silently abrogate the common-law merger doctrine and it has never expressly abrogated the merger doctrine.

>> But, is Ms. Millsaps correct that the common-law merger doctrine was a double jeopardy doctrine, a common-law merger doctrine?

>> Correct in we are not dealing with double jeopardy here.

>> Now we get back to do you agree that the merger doctrine then becomes a statutory construction principle.

>> Yes.

>> And if so so and this is my problem, whatever I read six years ago, is if the statutory language is clear and the way that the legislature could have made it clear is either not included in A.

A commits aggravated battery was fair at the time the statute was amended and it is there now. Or it said something about it had to be one or more acts which to me, I can understand.

To me there's a difference between slapping a child who then dies by hitting their head on the table versus what we think of as child abuse, the kind of child abuse that is --

>> Systemic abuse.

>> Exactly and I agree that is a difference but it doesn't appear that the legislature made that difference.

In this case and I realize it is

a single versus a multiple act
but the one I was concerned
about was aggravated battery and
this one was a malicious
punishment.

So the jury had to find
something separate, that it
wasn't just a slap that ended up
by chance ending in death, but
there was a malicious punishment
and that it was willfully
tortured.

So, child abuse means an
intentional act that reasonably
could expect physical injury or
mental injury and it went on.

The the jury instructions in
this case.

So my concern that I had an
Brooks are really less of a
concern here assuming my concern
should mean anything, which in
plain language is really
irrelevant.

>> Okay.

First of all he was charged in the alternative with malicious punishment or willful torture or by intentionally causing great bodily harm.

>> Let me just say the jury instructions only stated --

>> I can clarify that.

>> 316-2317 of the transcript.

>> Right and when the motion for acquittal was made in the trial court the judge said, I agree that the aggravated battery in subsection A and subsections the causing of great bodily harm would merge.

I am only allowing this to go to the jury under malicious punishment or willful torture.

But I don't think it matters --

>> It matters to me in terms of this case.

We are going to be deciding a broad issue and narrowly this is only under B, that the jury was

instructed and he was found
guilty.

>> It was still battery so
whether you call that battery --
or malicious punishment or cause
a great bodily harm it is a
battery.

It is not the label we put on a.

>> No because I think in arguing
to a jury if the slap ended up
causing a death by them falling
off of -- again just giving a
hypothetical, the argument could
be made by the defense lawyer
that this wasn't what we mean by
child abuse if we are looking at
willfully tortures or
maliciously punishes.

That seems like a higher burden
than an aggravated Ateret.

>> It is not a higher burden.

Is all the same act.

They charged it as being a
single slap.

>> What were the facts of the

jury's burden in the case?

>> Alright Mr. Sturdivant gave a videotaped reenactment of the crime.

He comes out of the bathroom and finds the child standing on a coffee table.

He has told a child in the past not to climb on the coffee table.

He hits the child one time on the back of the head and there is in fact a pattern injury on the back of the head with the fingers of the hand in a pattern.

That is one slap.

It wasn't a punch.

It was a slap with a finger pattern.

The child fell off the table, hit his head on a concrete wall and the child then succumbs to a head injury.

There is no question that it is

a single slap and in fact, when the state moves to consolidate the information in the indictment for purposes of a trial, they filed in the information is second-degree murder because they were worried about the Brooks merger issue.

So it was a fallback position and filed the information on second-degree murder and on the hearing in the motion to consolidate the prosecutor acknowledged this case involves a single slap.

There are no other injuries.

There are no other allegations from abuse in this case.

>> But I thought you said in this case that not only was there a single slap, but the single slap resulted in the child hitting his head on a concrete wall.

>> It is cause and effect.

I mean there was one slap and the child fell and hit his head.

>> In my mind it makes a difference.

If the child had died from a single slap as opposed to the child having died from hitting his head on the concrete wall, you don't think those are two different issues?

Or does it matter?

>> No, because the actual act that caused the child's death was a slap, one slap.

If the victim in this case had been an adult and had been punched in the head, fallen over backwards and hit his head on the ground, and died as a result, that traditionally has been treated as either manslaughter or second-degree murder in the Mills merger doctrine would apply.

>> But does not an adult.

The court of law protects the disabled, the elderly and children specifically under this statute, doesn't it?

>> Yes it does.

>> Because of the status of the individual.

>> Aggravated child abuse was incorporated into the child abuse -- punishable by a maximum term of 16 years.

Aggravated child abuse is a first-degree felony.

There clearly is the legislative intent to punish people who abuse children more severely and it doesn't matter whether it is a caregiver or whether it is a stranger.

Abuse of a child is punished very severely.

The question is whether we want to elevate that child abuse to a capital felony when it is the result of a single act with a

single injury.

>> That is a good policy
argument to make to the
legislature.

The problem is that we don't --
the legislature and they
enumerated this felony.

Child abuse, aggravated child
abuse.

And that as far as I'm
concerned, unless you can show
me any other reason other than
we don't think the
legislature -- did he get a life
sentence?

>> Yes mandatory life sentence.

>> I don't see how we get around
the language by the Legislature
legislature since 1984.

>> The merger doctrine is a
long-standing doctrine.

>> But let's go back.

It is a doctrine of statutory
construction.

>> Correct.

>> Which means that there is some ambiguity.

We obviously decided in Mills that the ambiguity was because it was an enumerated felony that it couldn't be that the legislature intended that every aggravated battery was going to be prosecuted as a first-degree murder case.

We made that judgment.

The legislature hasn't changed to put aggravated battery as an enumerated felony.

>> Correct and I think that is a recognition by the legislature that single battery should not be elevated to a felony murder by virtue of the merger doctrine.

>> What the happened with aggravated child abuse over the last 30 years is a recognition of raising it to 30 years, that if anything this is consistent

with the legislative intent that
to punished as severely as we
can anybody that would abuse a
child.

How old was this child?

>> Two.

>> A 2-year-old child.

He slapped a child so hard that
there were finger marks left on
the back of the child's head.

It doesn't sound like a little
slap to me to begin with.

Again I'm sympathetic.

In looking at this in this
context, I don't see how you get
around the plain language.

>> I think there is a clear
recognition by the legislature
that an aggravated battery would
merge with the homicide and for
that reason aggravated battery
has never been included in the
felony murder statute.

I think the legislature at least
implicitly has applied that in

the context of the aggravated child abuse because we know we can have aggravated child abuse by an aggravated battery where there are multiple beatings and multiple injuries.

The legislature has never expressly stated that the merger doctrine should not apply where there is a single battery without any additional injury.

>> In this case, the defendant struck the child, right?

>> Yes.

>> The child fell off of the table that the child was on and hit his head on a wall.

>> Correct.

>> And the medical examiner said the child died from what?

>> From a hematoma that formed in the brain.

At either one could have been the cause of death, either the hitting of the head by the hand

or the hitting on the wall.

I don't know that it was clear
and in fact a medical examiner
who performed the autopsy, Dr.
Seibert, was not a medical
examiner who testified at the
trial.

>> So you don't see this case as
a different situation from a
single act?

It seems to me no matter how you
look at it --

>> It is one act, the slap.

>> It is one act but two things
happen.

>> There is a cause and effect
which he typically have when you
have a battery or a homicide.

>> Obviously there were two
injuries here also.

The slap from the defendant and
the hitting of the head on
whatever wall -- is that what
you said?

Okay so you know I am really

looking at this now as a
different case from just the
defendant hit the child and the
child so hard that the child
died.

This child not only was hit
hard, if you have these prints
left on up at the child also hit
his head on the wall.

>> That's correct.

>> The medical examiner did
testify that the blow to the
head of the the 2-year-old was
sufficient to cause his death.

Correct?

>> Yes.

>> You keep talking about it
being one slap.

It was one slap enough to cause
his death.

>> That's correct but that was
the premise of Brooks, that it
is a single assaulted fact that
does not cause additional injury
and that is what we have got

here.

If it were an adult, clearly that would apply in the battery would emerge into homicide and the only difference here is that it is a child.

It is a single act.

>> Justice Lewis said there is a big difference between the 2-year-old child and it is not an adult in the middle of some fight and each slap the other person and and and the one person fell and died.

>> Well, I think the state agrees that the legislature did not intend to abrogate the merger doctrine when it incorporated aggravated child abuse into the felony murder charge.

>> I don't think they agreed to that at all.

They argued every state that looks at the enumerated, they

the sheet that differently.

The argument may be totally different if he didn't have the enumerated statement.

>> The state has asked this court to simply redefine the merger doctrine and consider the caregiver versus the stranger situation and has not argued that there is no longer a merger.

And if merger is a rule of statutory construction, then we have to look at our legislative history and it doesn't matter what any other state has done.

But in the last minute I have remaining I would like to address the remedy in this case.

Brooks -- the law at the time this offense occurred.

Mr. Sturdivant should have the benefit of the Brooks decision.

Had the trial court followed Brooks than a motion for

judgment of acquittal as to the felony murder should have been granted.

What is noteworthy about this case is the defense was involuntary manslaughter and the defense counsel objected to the trial court giving an instruction on manslaughter by culpable negligence.

The first District has remanded this case for entry of a conviction for second-degree murder and it is our contention that second-degree murder conviction can't stand because of the flawed Montgomery instruction on voluntary manslaughter.

The Montgomery instruction's fundamental error and this case would have to be remanded for a retrial on second-degree murder with proper instruction given on the manslaughter by act.

And since that was the defense in the case and manslaughter is one step removed from second-degree murder, this case should be remanded for a new trial.

>> Thank you.

>> Your Honor I would like to just get a couple of things straight.

>> Could you respond to that last argument about the remedy in this case?

Is there a broad Montgomery instruction that was given?

>> Yes but there was also all alternative kind of -- the remedy here if you do reverse this would be just to enter judgment, exactly what the first DCA did for second-degree murder.

There was intent to kill given but there was also manslaughter by culpable negligence.

All five DCA's have held that
when there is an alternative --
the problem in Montgomery was
only the one kind, manslaughter
by act.

Manslaughter by culpable
negligence was not given in
Montgomery but it was here.

All five DCA's held that it was
not fundamental error.

He gave as part of his testimony
and example of a single act
where a boyfriend punch the
crying toddler once in the
stomach and the boy hemorrhaged
from a lacerated liver.

The legislative history clearly
shows the one multiple acted not
matter to the legislature.

They were given out as an
example.

Moreover Your Honor, think there
is a little confusion about what
the aggravated child abuse
statute said at the time, and I

put that on page 45 in my brief.

There were in fact for ways to
prove aggravated child abuse at
the time the statute was
amended.

>> You could do it by aggravated
battery on a child and willful
torture.

Three was maliciously punished
and five was willfully -- .

I would like to get straight,
the argument was only an
alternative.

No I do not agree.

The merger doctrine does not
apply when you are dealing with
the enumerated felonies.

No state Supreme Court is said
that.

Every Supreme Court is not a
double jeopardy construct or
goat is a rule of statutory
construction and you don't even
need to get to it under the
plain text but if you are going

to get to looking at the legislative history, it is very clear that one act multiple acted not matter.

>> In fairness to Ms. Saunders you read your summary of the argument on page five.

It says here that you are saying that we should not limit -- I mean we should limit the types of child abuse that would be underlying felony.

You are not downed by whatever you said.

>> No but Your Honor look at footnote 4.

I was the attorney in Brooks. I made a straight point text argument and I also reiterated that in not only the initial brief but in this case the reply brief as well.

I'll also provide a supplemental authority.

I didn't want to confuse, do

want to get it straight that the state states original position was and remains plain text but in the alternative the merger should be a proper kind of merger.

For your going to do mergers should be the right kind.

I also wanted to just very quickly --

The first DCA was a little confused about the Brooks opinion.

I would like to explain that I think what you did was a holding but you and the alternative found the error to be harmless.

The United States Supreme Court in a recent case has receded from yes you may do that and you were free to do that at the time and he did do it.

I would also Your Honor just to get a fact through, when you say slap it makes it sound like, and

they realized they used it in
the charging document but
understand how hard this child
was hit.

This child flew off the coffee
table.

This child did not fall into the
wall.

It flew off his coffee table
into a concrete wall.

This child was hit so hard that
the treating physician couldn't
even -- thought maybe the blow
itself would have been fatal.

This child was hit that hard so
let's not get the wrong
impression from the word slap.

This child was severely hit and
hit so hard he flew into the
wall.

Thank you..

>> We thank both of you for your
arguments.