

>> SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
PLEASE BE SEATED.

>> OUR LAST CASE FOR THE DAY IS
STATE OF FLORIDA V. DRAWDY.

>> MAY IT PLEASE THE COURT --

[INAUDIBLE]

THE CASE INVOLVES A CONVICTION
FOR SEXUAL BATTERY AND A
CONVICTION FOR LEWD OR
LASCIVIOUS MOLESTATION FOR SUCH
A MISCONDUCT OCCURRING DURING
THE SAME CRIMINAL EPISODE.
THE STATE'S ALLEGATIONS AT TRIAL
WERE THAT THE DEFENDANT PULLED
THE VICTIM, WHO WAS HIS
STEPDAUGHTER, OUT OF BED AND
VAGINALLY PENETRATED HER WITH
HIS PENIS, AND THEN SHORTLY
THEREAFTER HE BEGAN THAT
PENETRATION, THAT HE REACHED HIS
HANDS UP UNDER HER SHIRT AND
FONDLED HER BREASTS WITH HIS
HANDS.

THOSE WERE FOUND TO BE BY THE
SECOND DISTRICT COURT OF APPEAL
TO BE A DOUBLE JEOPARDY
VIOLATION --

>> WELL, DID THEY HAVE A
DIFFERENT -- APPARENTLY, THE
SECOND DISTRICT DID NOT
UNDERSTAND THE FACTS TO BE AS
YOU HAVE JUST RECOUNTED THEM.

>> THAT'S ABSOLUTELY CORRECT.

>> WELL, I'M HAVING TROUBLE
UNDERSTANDING THAT, BECAUSE I
READ THE TRANSCRIPT IN WHICH THE
YOUNG, THE VICTIM INDICATED THAT
THE DEFENDANT PUT HIS HAND
UNDERNEATH HER SHIRT TO TOUCH
HER BREAST, ISN'T THAT WHAT IT
SAYS?

>> BUT -- YES AND NO.

THERE IS ONE WORD THAT HAS
BECOME SORT OF A FACTUAL DISPUTE
IN THIS PROCEEDING REGARDING
THAT VERY SPECIFIC TESTIMONY.

>> WELL, I UNDERSTAND -- I THINK
I UNDERSTAND WHAT YOU'RE SAYING,
BUT I DON'T WHY YOUR ANSWER IS

YES AND NO.

BECAUSE SHE DID SAY THAT HE PUT HIS HAND UNDER HER SHIRT TO TOUCH HER BREAST, DIDN'T --

>> SHE WAS ASKED THE QUESTION BY THE PROSECUTOR, DID -- THE WAY THAT THE TRANSCRIPT REFLECTS IT IS, "DID HE PUT HIS HANDS UNDER YOUR SHIRT," AND SHE ANSWERS, "YES, SIR."

SO IT WAS EITHER A MISSTATEMENT OR TYPO OF SOME KIND, BUT CERTAINLY IN THE CONTEXT OF THE ENTIRE TRIAL INCLUSIVE OF THE PROSECUTOR'S OPENING STATEMENTS AND CLOSING ARGUMENTS IN WHICH HE VERY SPECIFICALLY --

>> I'M NOT FOLLOWING YOU.

I UNDERSTAND THAT AT SOME POINT AFTER SHE HAD SAID THAT THE DEFENDANT PUT HIS HAND UP UNDER HER SHIRT, SHE WAS ASKED THE QUESTION DID YOU PUT YOUR -- WELL, I CAN'T QUOTE IT, BUT THE REFERENCE CHANGED TO "YOU" AS OPPOSED TO "HE."

AND THEN SHE SAID, "YES."

>> I HAVE THE QUOTE.

I'M HAPPY TO SHARE IT WITH THE COURT.

I'M SORRY IF I'M BEING UNCLEAR. THE PROSECUTOR SAYS, "WHAT OTHER PARTS OF YOUR BODY DID HE TOUCH?"

THIS WAS DIRECTLY AFTER SHE HAD TESTIFIED TO THE VAGINAL PENETRATION.

HE SAYS, "WHAT OTHER PARTS OF YOUR BODY DID HE TOUCH?"

SHE SAYS, "MY BREAST."

"DID HE TOUCH THEM OVER YOUR SHIRT OR UNDER YOUR SHIRT?"

SHE SAYS, "UNDER MY SHIRT."

I THINK THAT'S PROBABLY WHAT YOUR HONOR IS REFERRING TO --

>> YES.

>> AND THAT IS A CORRECT INTERPRETATION OF THE --

>> I THINK THESE QUESTIONS ARE REALLY FACTUALLY INTENSIVE.

DID TOUCHING OF THE BREASTS, DID IT OCCUR WHILE HE WAS, DURING THE VAGINAL PENETRATION, VAGINAL INTERCOURSE?

AT THE SAME TIME?

>> YES.

THEY WERE SIMULTANEOUS AT ONE POINT, ALTHOUGH THE PENETRATION OCCURRED --

>> BUT IT'S THE SAME ACT.

>> YES.

>> YOU CAN IMAGINE A SITUATION WHERE HE COULD HAVE TOUCHED HER BREASTS FIRST AND THEN LATER TOUCHED -- VAGINAL PENETRATION TAKES PLACE.

THAT COULD BE TWO SEPARATE INSTANCES.

BUT THIS COULD BE ONE INSTANCE IF HE IS TOUCHING THE BREASTS WHILE HE'S CONDUCTING, WHILE VAGINAL INTERCOURSE IS TAKING PLACE.

>> WELL, IT WOULD BE ONE CRIMINAL EPISODE REGARDLESS OF THE ORDER OF THOSE TOUCHINGS. BUT THEY ARE DISTINCT ACTS. THEY'RE TWO SEPARATE ACTS, AND THAT REALLY IS THE POINT HERE. THAT IS WHERE THE SECOND DISTRICT FIRST WENT ASTRAY, IS BY FAILING TO RECOGNIZE THAT THERE WERE, IN FACT, TWO ACTS AT ISSUE ACCORDING TO THIS RECORD. AND THAT'S VERY CLEAR, AGAIN, IN THE CONTEXT --

>> AND THEY'RE TWO ACTS UNDER WHAT THEORY?

ARE THERE TWO ACTS BECAUSE THEY PASSED THE --

[INAUDIBLE]

TEST?

ARE THEY TWO ACTS BECAUSE THEY'RE OF A SEPARATE CHARACTER AND TYPE?

ARE THEY TWO ACTS BECAUSE THEY'RE --

[INAUDIBLE]

SEPARATION?

WHY ARE THEY TWO ACTS?

>> WELL, THEY ARE TWO ACTS
BECAUSE THEY ARE TWO PHYSICAL
ACTS BY DEFINITION.

PART OF THE REASON --

>> I UNDERSTAND THEY'RE TWO
PHYSICAL ACTS BY DEFINITION.
BUT I AM ASKING YOU WHY THEY ARE
TWO ACTS FOR PURPOSES OF DOUBLE
JEOPARDY ANALYSIS.

>> WHEN WE'RE TALKING ABOUT
DOUBLE JEOPARDY, WE'RE TALKING
ABOUT TWO OFFENSES WHICH DO NOT
NECESSARILY EQUATE TO TWO ACTS,
AND IT IS A PROBLEM IN DOUBLE
JEOPARDY ANALYSIS.

THERE'S SO MUCH VOCABULARY
INVOLVED THAT WE SOMETIMES
CONFUSE THE TERMS.

BUT WHAT WE'RE TALKING ABOUT, IF
THERE'S A DOUBLE JEOPARDY
VIOLATION, THAT IS OFFENSES.
AND ONE ACT CAN'T BE MORE THAN
ONE OFFENSE.

>> ARE WE TALKING ABOUT THAT
HERE, ONE ACT AND MULTIPLE
OFFENSES?

OR ARE YOU SAYING -- BECAUSE,
AGAIN, IN A, I WOULD THINK --
[INAUDIBLE]

TALKS ABOUT THE FACT THAT IT
WOULD BE HELPFUL TO GET THIS
CLARIFIED BY THE LEGISLATURE.
A RAPE IS ALMOST INVARIABLY
GOING TO INCLUDE THE LEWD AND
LASCIVIOUS AT THE SAME TIME.
IT MAY BE DIFFERENT ELEMENTS,
BUT IT'S ALMOST INVARIABLY GOING
TO DO THAT.

THERE MAY BE THE TOUCHING OF THE
VAGINAL AREA FIRST, AND THEN THE
PENETRATION.

SO IS THE STATE ARGUING IN THIS
CASE THE REASON FOR THE CONFLICT
THAT WE'RE DEALING WITH ONE ACT
WHETHER THAT CAN BE TWO
OFFENSES, OR ARE WE TALKING
ABOUT A CASE THAT IS FACTUALLY
DISTINCT BECAUSE THE BREAST
TOUCHING WAS SEPARATE AND APART
FROM THE SEXUAL BATTERY?

>> WHAT WE'RE ASSERTING IN THIS CASE IS THAT IT INVOLVED TWO ACTS WHICH COMPRISED TWO SEPARATE OFFENSES FOR PURPOSES OF DOUBLE JEOPARDY.

ONCE WE MAKE THAT DETERMINATION, WE CAN THEN GO ON TO DETERMINE WHETHER THE ACTS WERE DISTINCT. IF THEY ARE, WE DO NOT PROCEED TO BLOCKBERGER.

>> THE SECOND DCA TAKES THE POSITION THAT VAGINAL INTERCOURSE CANNOT OCCUR PHYSICALLY WITHOUT TOUCHING OTHER PARTS OF THE BODY. SO YOU NECESSARILY HAVE TO TOUCH EITHER, ACCORDING TO THE SECOND DCA, THE BUTTOCKS OR THE BREAST IN ORDER TO COMMIT THE CRIME. AND SO, I MEAN, HOW -- WHY -- HOW CAN YOU BE CHARGED WITH TWO DIFFERENT CRIMES IF YOU CAN'T DO ONE WITHOUT DOING THE OTHER?

>> WELL, YOU CAN DO ONE WITHOUT THE OTHER.

I SUBMIT THAT THE SECOND DISTRICT WAS SIMPLY WRONG WHEN IT CAME TO A CONTRARY DETERMINATION.

AND THE HOLDING THERE SPECIFICALLY SAID -- BECAUSE THE SECOND DISTRICT AT LEAST REALIZED THAT WE WERE DEALING WITH A VAGINAL PENETRATION AND A TOUCHING OF THE BREASTS, SO SPECIFIC TO THOSE TWO BODY PARTS THE SECOND DCA SAID THAT ONE CANNOT COMMIT VAGINAL PENETRATION WITHOUT A TOUCHING OF THE BREAST, AND THAT IS JUST WRONG.

IT JUST IS NOT CORRECT. AND IT ALSO DOES NOT TAKE INTO ACCOUNT THE VARIOUS WAYS THAT SEXUAL BATTERY CAN BE COMMITTED --

>> WHAT IS THE CONFLICT ISSUE?

>> BECAUSE THE ULTIMATE DETERMINATION BY THE SECOND WAS THAT LEWD OR LASCIVIOUS

MOLESTATION, CONVICTIONS FOR LEWD OR LASCIVIOUS MOLESTATION AND SEXUAL BATTERY ARISING DURING THE SAME CRIMINAL EPISODE VIOLATE DOUBLE JEOPARDY.

WE HAVE ROBERTS, AND WE HAVE MURPHY WHO CAME TO THE EXACT OPPOSITE CONCLUSION.

>> BUT IF YOU HAD IT -- SO IS THE STATE CONCEDING THAT THE BREAST TOUCHING WAS PART OF THE RAPE?

I MEAN, A NECESSARY PART, IT DIDN'T HAPPEN LIKE ONE -- SOMETIME BEFORE THERE WAS BREAST TOUCHING AND THEN THE RAPE OCCURRED WITH A BREAK?

YOU'RE AGREEING IT OCCURRED DURING THE SAME EPISODE?

>> THAT'S CORRECT.

AND THAT'S NEVER BEEN IN DISPUTE.

>> AND, AGAIN, IN MOST CASES -- AND I REALIZE WE HAVE TO DECIDE THE LEGAL ISSUE, BUT THE SEXUAL BATTERY HERE EITHER GOT YEARS.

NORMALLY IT'S LIFE IN MOST OF THE CASES, IT CAN BE LIFE. AND THEN THEY'RE SAYING FOR THE SEXUAL, FOR THE LEWD AND LASCIVIOUS IT'S, WHAT, THE JUDGE GAVE PROBATION?

>> FIVE YEARS' PROBATION CONSECUTIVE.

>> I MEAN, HE COULD HAVE GIVEN YEARS PLUS FIVE YEARS' PROBATION AND BEEN WITHIN THE GUIDELINES, RIGHT?

I MEAN, I GUESS WE FIGHT ABOUT THIS, THERE'S A LOT OF CASES ABOUT IT, BUT THE PRACTICAL EFFECT OF THE SORT OF THE OVERCHARGING IS THAT IT CREATES THESE PROBLEMS FOR THE COURT TRYING TO FIGURE OUT ARE WE TALKING ABOUT THE SAME ACT, SAME EPISODE, DISTINCT ACTS?

THE EASIEST THING TO DO WOULD BE TO FIND THAT LEWD AND LASCIVIOUS

IS A SEPARATE CRIME AND THAT ONE DOESN'T CONSTITUTE THE OTHER. COULD YOU AGREE WITH THAT AND THEN THEY COULD CHARGE --

>> THAT'S CORRECT.

AND FACTUALLY, THESE ARE DIFFERENT PHYSICAL ACTS.

>> LET'S JUST ASSUME, THOUGH, THE CASES, THAT THEY'RE USING -- AGAIN, IN THE ACT OF PENETRATION THERE WAS TOUCHING IN THE VAGINAL AREA.

TWO CRIMES?

>> WE SUBMIT THAT IT COULD BE. NOW, THE STATE IS ALWAYS GOING TO BE CONSTRAINED BY WHAT IT CAN PROVE AT TRIAL.

SO IN A REAL WORLD APPLICATION, THAT'S VERY UNLIKELY TO HAPPEN. IT'S WHY THE STATE WOULD NOT CHARGE MULTIPLE COUNTS FOR EACH THRUST WHEN WE'RE TALKING ABOUT PENETRATION.

IT DOESN'T MAKE SENSE IN THE REAL WORLD.

BUT LEWD OR LASCIVIOUS, THE TOUCHING OF THE BREAST AND THE VAGINAL PENETRATION, THOSE BEING TWO ACTS AND TWO OFFENSES, THAT DOES MAKE SENSE.

AND THAT IS A WORKABLE APPLICATION WHEN WE VIEW IT THROUGH THE PRISM OF ACTS THAT ARE OF A SEPARATE CHARACTER AND TYPE.

AND THAT'S REALLY WHAT WE'RE TALKING ABOUT HERE.

>> BUT LET ME ASK YOU THIS, THE LEWD AND LASCIVIOUS MOLESTATION STATUTE, YOU CAN COMMIT AN ACT OF LEWD AND LASCIVIOUS MOLESTATION BY THE TOUCHING OF BREASTS, THE VAGINAL AREA, THE BUTTOCKS OR AREA AROUND THE VAGINAL AREA, CORRECT?

>> THAT'S CORRECT.

>> YOU CAN, UNDER THE SEXUAL BATTERY STATUTE, YOU CAN COMMIT SEXUAL BATTERY BY PENETRATION OR UNION, WHICH I INTERPRET AS

CONTACT WITH THE VAGINAL AREA,
THE ANUS, WHATEVER THOSE THINGS
ARE LISTED.

SO BOTH OF THEM, BOTH THE
SEXUAL -- THE LEWD AND
LASCIVIOUS MOLESTATION AND THE
SEXUAL BATTERY STATUTE, IN MY
MIND, SAYS THAT YOU CAN COMMIT
EITHER ONE OF THESE ACTS BY THE
TOUCHING OF THE VAGINAL AREA.
IS THAT CORRECT OR NOT?

>> THAT'S CORRECT.

>> YOU CAN COMMIT SEXUAL BATTERY
BY TOUCHING THE VAGINAL AREA,
YOU CAN COMMIT A LEWD AND
LASCIVIOUS MOLESTATION BY THE
TOUCHING OF THE VAGINAL AREA.

>> THAT'S CORRECT.

>> AND SO WHY AREN'T THEY THEN,
WHY ISN'T ONE THEN SUBSUMED INTO
THE OTHER?

>> WELL, IF THAT WAS ONE ACT,
THEN WE WOULD BE GOING TO --

>> WHEN YOU SAY "IF THAT IS ONE
ACT," WHAT DO YOU MEAN?

>> WELL, BECAUSE WE HAVE SOME
VAGINAL SCENARIOS THAT INVOLVE
TWO OR MORE PHYSICAL ACTS AS IN
THIS CASE, THE VAGINAL
PENETRATION AND THE TOUCHING OF
THE BREASTS.

BUT THEN THERE ARE ALSO CASES
WHERE WE ONLY HAVE ONE PHYSICAL
ACT, AND THIS INCLUDES --

>> WELL, LET'S ASSUME THAT THE
FIRST FOR WHATEVER REASON,
SOMETHING OUTSIDE TOUCHING OF
THE VAGINAL AREA AND THEN
DECIDES TO DO PENETRATION OF THE
VAGINAL AREA.

IS THAT TWO SEPARATE ACTS, OR IS
THAT ONE ACT?

>> THOSE ARE TWO ACTS.

NOW, WHETHER THEY --

>> SO HE COULD BE CONVICTED OF
TWO SEXUAL BATTERIES FOR HAVING
CONTACT WITH THE VAGINAL AREA
AND THEN A SEXUAL BATTERY FOR
HAVING HAD PENETRATION OF THE
VAGINAL AREA?

>> THAT'S CORRECT.
BUT AGAIN, THE WAY THAT THIS
ANALYSIS SHOULD WORK PURSUANT TO
MICHELLE -- AND LET ME BACK UP A
LITTLE BIT, BECAUSE MICHELLE
HAD, MICHELLE INVOLVED TWO
DIFFERENT TYPES OF PENETRATION
BUT BOTH UNDER THE LEWD OR
LASCIVIOUS BATTERY STATUTE WHICH
WAS, AGAIN, TO THE SEXUAL
BATTERY STATUTE AS WE WELL KNOW.
WHAT THIS -- THAT CASE REALLY
PRESENTED A SORT OF RENAISSANCE
FOR THIS DOUBLE JEOPARDY
JURISPRUDENCE.

IT MAKES GREAT SENSE TO CONSIDER
BEFORE YOU EVER GET TO
BLOCKBERGER, TO CONSIDER WHETHER
THE ACTS AT ISSUE ARE DISTINCT
FROM ONE ANOTHER.

BECAUSE IF THEY ARE, THERE IS NO
DOUBLE JEOPARDY VIOLATION.

THAT IS A VERY SIMPLIFIED,
REASONABLE, LOGICAL, RATIONAL,
WORKABLE ANALYSIS THAT GIVES US
THE INTENT OF THE LEGISLATURE,
MULTIPLE PUNISHMENTS FOR VARIOUS
CRIMINAL OFFENSES.

AND THAT IS, AT THE END OF THE
DAY, WHAT WE'RE CONCERNED WITH.

>> SO WE CAN SAY THEN THAT AS
LONG AS YOU TOUCH DIFFERENT
PARTS, YOU NEVER HAVE TO GET TO
A BLOCKBERGER ANALYSIS, THAT'S
WHAT YOU'RE SAYING?

>> NOT QUITE, BECAUSE YOU STILL
HAVE TO CONSIDER IT'S NOT ENOUGH
TO HAVE TWO OR MORE ACTS.

OF COURSE, THAT IS THE BEGINNING
STEP OF THE -- WE WOULD START BY
DETERMINING WHETHER THERE IS ONE
OR MORE CRIMINAL EPISODES.

HERE WE KNOW IT'S ONE CRIMINAL
EPISODE.

THEN WE HAVE TO ASK HOW MANY
PHYSICAL ACTS ARE WE DEALING
WITH?

WELL, HERE IT'S TWO.

OKAY.

THEN, ARE THOSE DISTINCT FROM

ONE ANOTHER?
IF WE SAY, YES, THEN WE DO NOT
GET TO BLOCKBERGER BECAUSE WE
KNOW THEN --
>> AND THEY ARE DISTINCT FROM
ONE ANOTHER BECAUSE --
>> BECAUSE --
>> -- THEY TOUCH DIFFERENT BODY
PARTS.
>> THE QUALITY OF THE TOUCHING,
THEY BEING OF A SEPARATE
CHARACTER AND TYPE.
THIS CASE OFFERS A FAIRLY
OBVIOUS DISTINCT ACTS ANALYSIS
BECAUSE HE USED HIS HANDS FOR
ONE TOUCHING, AND HE TOUCHED A
DIFFERENT BODY PART IN ITS
ENTIRETY.
THE OTHER TOUCHING WAS VAGINAL
PENETRATION WITH HIS PENIS.
THOSE TWO ACTS ARE DISTINCT FROM
ONE ANOTHER.
AND BECAUSE OF THAT, THERE IS NO
DOUBLE JEOPARDY --
>> AND BY SAYING THEY'RE
DISTINCT, ARE YOU ALSO SAYING
THAT ONE IS NOT INTEGRAL TO THE
OTHER?
I MEAN, THAT ONE IS NOT
NECESSARILY DONE IN THE COURSE
OF DOING THE OTHER ACT?
>> THAT'S ABSOLUTELY CORRECT.
THAT'S ABSOLUTELY CORRECT.
AND --
>> BUT THAT'S REALLY NOT A, TO
ME, THAT'S NOT A LEGAL ANALYSIS,
THAT'S A FACTUAL ANALYSIS, YOU
KNOW?
THAT, I MEAN, AGAIN, IF YOU HAD
A SITUATION WHERE AFTER HE
VAGINALLY RAPED HER IN THE SAME
TIME FRAME HE ANALLY RAPED HER,
THE STATE COULD CHARGE TWO ACTS
OF RAPE?
>> YES.
>> SEXUAL BATTERY?
BECAUSE THERE'S -- SO THAT'S
NOT -- AGAIN, YOU DON'T GET INTO
THE SAME ELEMENTS.
>> THAT'S CORRECT.

IT IS A FACTUAL ANALYSIS, BUT
IT'S A FACTUAL ANALYSIS THAT THE
SECOND DISTRICT SKIPPED
ENTIRELY.

AND THAT'S WHY THE SECOND
DISTRICT CAME TO THE WRONG
CONCLUSION IN THIS CASE.

IT DIDN'T GIVE EFFECT TO THE
INTENT OF THE LEGISLATURE FOR
IMPOSITION OF THESE SENTENCES
BECAUSE IT DIDN'T RECOGNIZE AT
OUTSET THAT WE ARE DEALING WITH
TWO PHYSICAL ACTS AND TWO
PHYSICAL ACTS THAT ARE DISTINCT
FROM ONE ANOTHER.

I BELIEVE WHAT THE SECOND
DISTRICT DID IN THIS CASE AND
WHAT COURTS BEFORE IT HAVE DONE
THAT YIELDS FAULTY
DETERMINATIONS OF DOUBLE
JEOPARDY VIOLATIONS IS THE COURT
CONSIDERED ONE EPISODE TO BE ONE
ACT.

THOSE TWO THINGS ARE NOT THE
SAME THING.

NOW --

>> SO WE'RE, I KNOW YOU'RE
SAYING THAT THEY WERE TWO ACTS
OF SEPARATE CHARACTER AND TYPE.
SO WHERE DID THAT ACTUAL
LANGUAGE ABOUT -- I KNOW IT'S IN
THE MICHELLE CASE ABOUT SEPARATE
CHARACTER AND TYPES.

WHERE IS THAT?

IS THERE ANYWHERE IN THE
STATUTE, OR IS THAT OUR
CHARACTERIZATION?

>> IT IS, IT IS THIS COURT'S
CHARACTERIZATION.

AND A GOOD ONE.

A SENSIBLE ONE.

ONE SUPPORTED BY COMMON SENSE.
THAT IS NOT IN THE STATUTE, BUT
IT GIVES EFFECT TO LEGISLATIVE
INTENT --

>> WHICH IS WHAT?

>> TO IMPOSE MULTIPLE
PUNISHMENTS FOR MULTIPLE
CRIMINAL OFFENSES AS DEFINED BY
THE STATUTES.

NOW, SOME CASES ARE GOING TO INVOLVE TWO ACTS, AS DID THIS ONE.

SOME CASES ARE GOING TO INVOLVE POTENTIALLY A HUNDRED ACTS, AND THAT MAY NOT BE A SEXUAL OFFENSE CASE, THAT MAY BE SOME OTHER TYPE OF COMBINATION OF CRIMINAL OFFENSES AS DEFINED BY THE LEGISLATURE.

BUT WHEN WE FAIL TO DO ANY ANALYSIS REGARDING WHETHER THE ACTS ARE DISTINCT FROM ONE ANOTHER AND THEN WE GO ON TO BLOCKBERGER, WE REALLY MISS THE BOAT.

BECAUSE THE LEGISLATURE CERTAINLY -- AND WITH REGARD TO SEXUAL OFFENSES, THE LEGISLATURE MOST CERTAINLY RECOGNIZED THAT THESE TYPES OF ENCOUNTERS CAN AND VERY OFTEN DO INVOLVE MORE THAN ONE PHYSICAL ACT.

>> YOU ARE IN YOUR REBUTTAL.

>> WELL, THEN I'LL SAVE THE REMAINDER OF MY TIME FOR REBUTTAL.

THANK YOU.

>> GOOD MORNING.

MY NAME IS STEVE GROGOZA, I'M THE SPECIAL ASSISTANT PUBLIC DEFENDER FOR MR. DRAWDY.

FIRST, LET ME CLARIFY THE RECORD. IT'S NOT REALLY CLEAR EXACTLY HOW THE TOUCHING OCCURRED AND WHEN IT DID TOUCH.

WHEN I WROTE MY INITIAL BRIEF, BASICALLY, I WAS FOCUSING ON THE TEMPLE ASPECT OF THE ACTS.

HOWEVER, THE ORAL ARGUMENT DID COME UP ABOUT --

[INAUDIBLE]

HIS CHEST TO HER BREASTS DURING THE ACT.

THAT WAS ONE ACT.

AND I THINK THAT'S WHERE THE SECOND DCA -- I'M SORRY.

>> WELL, BUT I'M LOOKING AT YOUR BRIEF AND WHAT YOU QUOTE FROM THE TRANSCRIPT WHICH WAS READ

EARLY.

AND WHEN THE VICTIM IS ASKED
WHAT OTHER PARTS, AFTER HE TALKS
ABOUT THE VAGINAL PENETRATION,
ASKED WHAT OTHER PARTS OF YOUR
BODY DID HE TOUCH?

THE ANSWER "MY BREASTS."

QUESTION "AND DID HE TOUCH THEM
OVER YOUR SHIRT OR UNDER YOUR
SHIRT OR SOMETHING ELSE?"

ANSWER "UNDER MY SHIRT."

I DON'T KNOW WHAT'S -- TO TOUCH
HER BREASTS UNDER HER SHIRT,
HE'S GOT TO PUT HIS HAND UNDER
HER SHIRT.

ISN'T THAT A CONCLUSION?

>> I'M SORRY, JUDGE.

I BELIEVE THERE WAS A QUESTION
ASKED, DID YOU REACH UNDER YOUR
BREASTS --

>> THAT'S FOLLOWED SUBSEQUENTLY.
I UNDERSTAND THAT.

>> RIGHT.

>> BUT THAT DOES NOT -- MAYBE
SHE ALSO REACHED UNDER THERE, I
DON'T KNOW.

I THINK THAT'S A MISSTATEMENT.
I THINK SHE MISUNDERSTOOD THE
QUESTION.

I THINK IF YOU LOOK AT IT IN
THIS CONTEXT --

>> RIGHT.

>> -- SHE THOUGHT HE WAS, SHE
WAS BEING ASKED AGAIN.
BUT WHATEVER THAT MEANS, THAT
DOES NOT TAKE AWAY WHAT SHE SAID
EARLIER.

THAT HE TOUCHED HER BREASTS
UNDER HER SHIRT.

>> AND I DON'T DISPUTE THAT.
BUT YOU'VE GOT TO LOOK -- WELL,
I THINK IF YOU LOOK AT THE
ENTIRE QUESTIONING IN CONTEXT,
NOW, OF COURSE, IF IT'S A
MISSTATEMENT DID YOU REACH
UNDER, THAT'S ONE THING.

BUT I THINK --

>> COULDN'T THE JURY UNDERSTAND
FROM THIS, COULDN'T THE JURY
UNDERSTAND FROM THIS THAT HE

REACHED UNDER HER SHIRT TO TOUCH
HER BREASTS?

>> WELL, THE ISSUE HERE IS
DOUBLE JEOPARDY, NOT THAT THE
JURY FOUND HIM GUILTY OF THIS.
AND THE QUESTION REALLY COMES
DOWN TO --

>> BUT, OKAY.

IF THEY CAN UNDERSTAND THAT, AND
HE REACHED UNDER HER SHIRT TO
TOUCH HER BREAST, I DON'T
UNDERSTAND HOW THAT'S NOT A
DISTINCT -- THIS NOTION THAT YOU
CAN'T, I MEAN, THIS ACROBATIC
STUFF, I MEAN, THAT'S JUST --

>> I DON'T THINK SHE'S SAYING
THAT HE REACHED UNDER MY SHIRT.
SHE SAYS, HE TOUCHED MY SHIRT,
HE TOUCHED MY BREAST.

DID YOU REACH UNDER YOUR SHIRT,
AND SHE SAID, YES.

SO THERE'S AN IMPRESSION ONE CAN
GET IS THAT HE'S NOT THE ONE WHO
REACHED UNDER, SHE OPENED HER
SHIRT AND HIS CHEST TOUCHED HER
BREAST.

I THINK THAT IS POSSIBLE TO
INFER FROM THAT, AND THAT'S AN
ISSUE THAT CAME UP IN ORAL
ARGUMENT.

I THINK THAT'S WHAT THE SECOND
DCA WAS FOCUSING ON.

I AGREE WITH THE COURT.

IF SHE'S SAYING, NO, HE REACHED
UNDER, THEN CLEARLY HE COMMITTED
THE ACT AND THE ISSUE COMES DOWN
TO SEPARATE AND DISTINCT FROM A
SEXUAL BATTERY.

THAT'S NOT --

>> YOU'RE CONCEDED THAT?

>> I'M SORRY, JUDGE?

>> THAT IF HE REACHED UNDER THE
BREAST -- IF HE TOUCHED HER
BREAST, THAT THIS CASE IS OVER?

>> NO, I DON'T NECESSARILY AGREE
WITH THAT, JUDGE, BECAUSE --

>> WELL, THAT'S WHAT IT SOUNDED
LIKE YOU WERE SAYING.

>> NO, NO, NO, NO.

I'M SAYING, WELL, I'M SAYING

WITH JUDGE CANADY, THE COURT CAN
LOOK AND SAY, NO, I THINK IT'S
SEPARATE AND DISTINCT.

BUT MY ARGUMENT ISN'T WHAT THE
SECOND DCA'S ARGUMENT IS THAT IF
YOU --

[INAUDIBLE]

ONE CANNOT TOUCH THE BODY PARTS
IN A SEXUAL BATTERY WITHOUT
TOUCHING THOSE --

[INAUDIBLE CONVERSATIONS]

>> WASN'T THAT OVERRULED IN
ROBERTS?

I'M SORRY?

>> WELL -- I'M SORRY, JUDGE.

>> THE PROBLEM IS AS JUSTICE
CANADY POINTED OUT NOW, IF
YOU'RE TALKING ABOUT HIS BODY
TOUCHING HER BODY, TOUCHING HER
BREASTS WHILE HE'S PENETRATING
HER, THAT'S ONE THING.

BUT YOU DON'T REACH UNDER THE
SHIRT TO DO THAT.

BUT THE QUESTION WAS NOT DID
HE --

>> BUT THE QUESTION WAS NOT "DID
HE REACH UNDER," IT'S "DID YOU
REACH UNDER?"

>> WHAT?

"DID HE TOUCH ANY OTHER PARTS OF
YOUR BODY?"

"YES, SIR."

"WHAT OTHER PARTS OF YOUR BODY?"

"MY BREASTS."

"AND DID HE TOUCH THEM OVER YOUR
SHIRT OR UNDER YOUR SHIRT?"

"UNDER MY SHIRT."

SO IF THE SHIRT IS ON AND HE'S
DOING WHAT HE'S DOING, HOW DO
YOU REACH UNDER IT WITH THE REST
OF YOUR BODY OTHER THAN YOUR
HANDS?

>> BECAUSE HER NEXT STATEMENT IS
SHE REACHED UNDER HER DRESS.

SO I THINK WHEN YOU READ THAT IN
CONJUNCTION --

>> IT SEEMS LIKE TO ME YOU'RE
READING WAY TOO MUCH INTO THAT.
YOU'RE SAYING THAT STATEMENT,
THAT IF IT MEANS SOMETHING,

YOU'RE SAYING THAT IT MEANS THAT HE DIDN'T REACH UNDER HER SHIRT. AND I DON'T SEE HOW YOU CAN INFER THAT FROM THE CONTEXT HERE.

THAT SEEMS TO BE AN UNREASONABLE --

[INAUDIBLE]

ABOUT WHAT SHE HAD EARLIER SAID.

>> WELL, THE QUESTION THOUGH, JUDGE, IS, IS IT DOUBLE JEOPARDY?

AND THE SECOND DCA SAID IT IS.

>> WELL, I UNDERSTAND THAT.

THAT'S WHAT --

[LAUGHTER]

>> RIGHT.

SO THE ISSUE IS REALLY YOU --

>> YOU CAN'T HAVE SEX WITHOUT TOUCHING SOMEBODY'S BREASTS OR BUTTOCKS, DIDN'T THEY?

>> I AGREE.

>> I MEAN, AGAIN --

>> YOU AGREE WITH THAT STATEMENT?

>> YOU CANNOT HAVE SEX WITHOUT TOUCHING ONE OF THESE BODY PARTS?

IS THAT WHAT THE COURT ASKED?

ONE CANNOT HAVE SEX WITHOUT TOUCHING A BODY PART?

>> WITHOUT TOUCHING BUTTOCKS OR BREAST.

DIDN'T THEY SAY THAT?

>> I THINK, NO, I THINK ONE CAN HAVE SEX WITHOUT TOUCHING A BUTTOCKS AND BREAST, BUT I THINK ONE DOES HAVE TO TOUCH A BODY PART LISTED IN 8.04.

>> I THINK WE HAVE UNIVERSAL AGREEMENT ON THAT.

>> LET ME JUST GO BACK TO THIS, SORT OF JUST UNDERSTANDING THE TWO CRIMES.

IF ALL HE HAD DONE WAS TO REACH UNDER HER SHIRT AND TOUCH HER BREASTS, HE WOULD HAVE, HE WOULD HAVE BEEN -- WITHOUT HER CONSENT, WHAT WAS HER AGE AT THE TIME?

>> I'M SORRY, SAY IT AGAIN?
>> WHAT WAS HER AGE AT THE TIME?
>> .

, I'M SORRY.

>> IF HE HAD DONE THAT
PROHIBITED ACT, HE WOULD BE
GUILTY OF LEWD AND LASCIVIOUS
CONDUCT, CORRECT?

>> WELL, I THINK THAT'S A --

>> WELL, HE WOULDN'T BE GUILTY
OF SEXUAL BATTERY.

>> RIGHT.

HE WOULD NOT BE GUILTY OF --

>> SO LEWD AND LASCIVIOUS ACT,
YOU'RE SAYING IS NOT A CRIME --

>> NO, NO.

I'M SAYING -- NO, HE WOULD BE IF
THERE WAS NO SEXUAL BATTERY, IT
WOULD DEFINITELY BE SEXUAL
MOLESTATION.

>> SO THE ISSUE, IN ANY EVENT,
IS -- I SEE THIS, AGAIN, AS
BEING FACTUALLY DISTINCT BECAUSE
HE DOESN'T HAVE TO TOUCH HER
BREAST IN ORDER TO PENETRATE HER
VAGINA.

SO THERE ARE TWO SEPARATE ACTS
EVEN IF IT'S WITHIN THE SAME
CRIMINAL EPISODE.

BUT GETTING BACK TO THE
BLOCKBERGER CASE OR TEST AND HOW
IT'S BEEN REFINED, IN ANY EVENT,
IT DOESN'T PASS THE SAME
ELEMENTS TEST.

SO EITHER WAY I DON'T SEE HOW
THE DEFENDANT PREVAILS HERE.

>> THIS COURT REFERRED TO
BECAUSE OF THE ISSUE OF INTENT?

>> BECAUSE OF IT HAVING
DIFFERENT ELEMENTS THAT ONE
DOESN'T NECESSARILY, IT'S NOT A
NECESSARILY-INCLUDED OFFENSE OF,
LIKE, IF THEY HAD CHARGED ONE
BEING A NECESSARILY-INCLUDED
OFFENSE OF THE OTHER.

>> RIGHT.

BUT WHEN I'VE SEEN THE
COMPARISON OF THE BLOCKBERGER
WITH SEXUAL MOLESTATION AND
SEXUAL BATTERY, USUALLY IT'S,

THE ISSUE IS --

[INAUDIBLE]

THEY NEVER COMPARE THE ISSUE OF INTENT WHERE SEXUAL BATTERY DOES NOT REQUIRE INTENT, BUT SEXUAL MOLESTATION DOES.

THAT'S THE ONLY DIFFERENCE, THEY'RE SAYING IT'S A SEPARATE, IT'S SEPARATE IN SEXUAL MOLESTATION BECAUSE IT REQUIRES INTENT, BUT IT DOES NOT REQUIRE SEXUAL BATTERY.

HOWEVER I THINK THERE IS A RATIONAL EXPLANATION AS WHY THE COURTS ARE POSSIBLY LOOKING AT THAT ASPECT.

I COULD SUGGEST TO THE COURT WHETHER DEALING WITH SEXUAL BATTERY, INTENT IS NOT AN ELEMENT, IN REALITY, INTENT IS STILL THERE.

ONE CAN NOT COMMIT SEXUAL BATTERY WITHOUT COMMITTING PENETRATION OR UNION. THAT IS INTENT.

SAME WITH SEXUAL MOLESTATION.

FOR EXAMPLE THE MOLESTATION SAYS, POTENTIALLY TOUCHED IN A

LEWD AND LASCIVIOUS MANNER IF YOU TOOK OUT SEXUAL BATTERY ONE COULD STILL NOT TOUCH IN LEWD AND LASCIVIOUS MANNER WITHOUT INTENT.

EVEN THOUGH INTENT IS NOT MENTIONED IN SEXUAL BATTERY IT IS STILL THERE AND STILL IN SEXUAL MOLESTATION.

I THINK I CAN ONLY SPECULATE THAT'S WHERE THE COURTS HAVE LOOKED AT.

WELL THE BIG ISSUE IS, CAN ONE TOUCH A BODY PART FROM A SEXUAL MOLESTATION, WELL --

>> THAT'S THE BIG ISSUE.

I'M JUST GOING TO GO WITH THE JUSTICE CANADY SAYS HERE IS THAT PUTTING YOUR HAND UNDER A 14-YEAR-OLD'S BREAST IS NOT NECESSARY IN ORDER TO COMMIT THE SEXUAL BATTERY AND I DON'T THINK

WE NEED TO BE EXPERTS IN THE FIELD TO UNDERSTAND THAT. IT WOULD BE, I MEAN IF THE QUESTION WAS, HE HAD PUT HIS HAND RIGHT UNDER HER BUTTOCKS AS HE WAS THRUSTING INTO, AND THEY CHARGED LEWD AND LASCIVIOUS FOR THE HAND MAYBE WE HAVE THE HAND TOUCHING OF THE BUTTOCKS BUT IT'S --

>> THE OTHER ISSUE JUDGE, JUDGE ALTENBERG SAID THERE ARE NUANCES IN SEXUAL MOLESTATION OR SEXUAL CONDUCT QUESTIONS, REALLY THE QUESTION IS WHAT IS HUMAN NATURE?

HOW DOES THIS WORK IN THE REAL WORLD?

>> WHAT HE WAS SAYING THIS IS MUCH ADO ABOUT NOTHING IN 99% OF THE CASES BECAUSE A SEXUAL BATTERY, WHEN YOU RAPE A 14-YEAR-OLD YOU ARE GOING TO GET A SENTENCE THAT COULD RANGE UP TO LIFE IN PRISON FOR THE MOST PART WHETHER YOU'VE COMMITTED ORAL SEX FIRST BEFORE YOU PENETRATE OR ABUSED YOUR STEPDAUGHTER OVER SEVERAL DAYS IT WILL BE THE SAME THING. YOU'RE GOING TO BE IN PRISON FOR A VERY LONG TIME SO HAVING TO WORRY ABOUT THE NUANCES ABOUT WHAT GETS TOUCHED FIRST IS REALLY NOT VERY PRODUCTIVE FOR JURORS TO BE ENGAGED HERE WHEN IT MAKES SO LITTLE DIFFERENCE. I THOUGHT THAT WAS THE THRUST OF JUDGE ALTENBERG'S --

>> I SUGGEST JUDGE ALTENBERG'S RESPONSE IS HOW TO HANDLE THIS THE SAME WAY TRIAL JUDGES HANDLE WITH DEALING WITH STOLEN PROPERTY AND STOLEN PROPERTY. CAN'T BE CONVICTED OF BOTH. THE COURT COULD DISMISS AND --

>> SAME ACT, ISN'T IT?

>> SEEMS TO ME HERE WHAT YOU'RE ARGUING OVERLOOKS THE FACT THAT

THE, THAT JUSTICE PARIENTE WAS FOCUSING ON, THERE ARE TWO SEPARATE, PHYSICAL INSULTS TO THE VICTIM.

THERE ARE TWO SEPARATE ACTS OF PHYSICAL VIOLENCE AGAINST THE VICTIM AND YOU KNOW, SOMETIMES THESE THINGS GET ANALYZED ALMOST LIKE THIS IS A ORDINARY KIND OF SEXUAL EPISODE.

THIS IS NOT.

THESE ARE ACTS OF VIOLENCE AGAINST A VICTIM.

AND IT SEEMS TO ME WHEN YOU LOOK AT IT IN THAT CONTEXT, YOU UNDERSTAND THAT THAT IS SOMETHING, THAT WHEN HE PUT HIS HAND UP UNDER HER SHIRT TO DO WHAT HE DID, THAT IS A SEPARATE ACT WHICH IS WORTHY OF A SEPARATE PUNISHMENT.

WHY AM I WRONG?

>> I'M NOT SAYING YOU'RE WRONG, JUDGE, THIS --

>> YOU DON'T THINK, YOUR UNDERSTANDING OF THE FACTS OF THIS IS BECAUSE OF SOME CRYPTIC ANSWER TO A QUESTION LATER THAT UNDOES WHAT SHE HAD SAID EARLIER ABOUT HIM TOUCHING HER BREAST UNDER HER SHIRT.

I JUST, I HAVE TROUBLE WITH THAT.

IF YOUR WHOLE CASE DEPENDS ON THAT, THAT IS PROBLEMATIC.

>> MY POSITION IS, MY PERSONAL POSITION FOR WHATEVER IT MATTERS IS THAT THIS COURT HAS TO DETERMINE IN THE COURSE OF, LET'S SAY SEXUAL INTERCOURSE OR OF SEXUAL BATTERY, WHERE ARE THE LINES IN TOUCHING A BREAST OR TOUCHING ANOTHER BODY PART? IS IT PART OF THE ACT, THE SEXUAL ACT, TOTAL ACT?

CAN YOU REALLY BREAK IT DOWN INTO SEGMENTS AND SAY NO, WE'LL BREAK THIS DOWN INTO SEGMENTS, AND THIS INTO SEGMENTS?

WHERE IS THIS, WHERE IS THE

REALITY OF THE ACT?

THE REALITY OF THE ACT REALLY ENCOMPASS THAT OR DOES IT NOT AND I THINK THAT IS WHAT THE COURT HAS DETERMINED.

IF THE COURT SAYS NO, EVEN THOUGH IT CAN BE WE THINK IT IS NOT THEN THAT'S --

>> BUT IN THIS CASE I THINK WITH WE'RE SAYING IT'S NOT.

IF IT WAS HE HAD TO HOLD ON TO HER BUTTOCKS IN ORDER TO RAPE HER AND THEY WERE CHARGING THAT ON CLOSER, COME ON, STATE, WHAT ARE YOU DOING IN CHARGING TWO SEPARATE ACTS.

>> LET'S --

>> BUT IF THERE WAS, YOU KNOW, FIVE MINUTES BEFORE HE FORCED HER TO COMMIT, YOU KNOW, HAVE ORAL SEX AND HE HAD ORAL SEX WITH HER AND HE TOUCHED, THEY COULD CHARGE SEPARATELY.

NOW, WE, REALISTICALLY THE COURT'S GOING TO MOST OF THE TIME RUN THESE SENTENCES CONCURRENTLY.

SO THAT IS WHY IT --

>> LET'S ASSUME, JUDGE, WHEN HE IS COMMITTING A SEXUAL BATTERY, AS HE IS COMMITTING A SEXUAL BATTERY AS JUDGE CANADY SAYS HE REACHES UP UNDER HER DRESS AND TOUCHES HER BREAST.

IS THAT REALLY PART OF THE SEXUAL ACT OR IS THAT SEPARATE AND DISTINCT?

>> I THINK WHAT WE'RE SAYING IT IS NOT NECESSARY IN ORDER TO COMMIT THE SEXUAL BATTERY, SO YES, IT IS A SEPARATE ACT.

IF ON THE OTHER HAND HE WAS IN THE PROCESS OF RAPING HER AND HIS CHEST WAS AGAINST HER BREASTS, YOU KNOW, PROBABLY NOT. I MEAN BUT I DON'T THINK THAT'S A HARD DISTINCTION TO MAKE FOR THE PURPOSES OF TRYING TO EFFECTUATE LEGISLATIVE INTENT. WE'RE NOT HERE GIVING OUR OWN

POLICY STATEMENTS, RIGHT?
WE'RE TRYING TO DECIDE WHAT THE
LEGISLATURE INTENDED BY HAVING
TWO SEPARATE STATUTES.

CORRECT?

>> I AGREE AND THIS IS, I MEAN
THIS IS AN ISSUE, I KNOW IT IS
COMING UP WITH IN FRONT OF THE
COURT WITH ROFTON AND MURPHY.
THESE ARE TOUGH DECISIONS TO
MAKE BECAUSE YOU'RE DEALING WITH
HUMAN NATURE AND HUMAN SEX ACT,
THAT IS VERY PERSONAL AND
INTIMATE RELATIONSHIP.

>> IT IS NOT A HUMAN SEX ACT?

>> I'M SORRY, JUDGE?

>> THIS IS NOT A HUMAN SEX ACT.

>> I AGREE.

I THINK IT'S A ACT OF VIOLENCE.
I DON'T DISPUTE THAT BUT I'M
SAYING OVERALL PICTURE.

>> LET ME ASK YOU THIS.

DO YOU AGREE WITH THE STATE'S
POSITION THAT ONCE YOU SAY THIS
IS TWO SEPARATE ACTS YOU DON'T
HAVE TO DEAL WITH BLOCKBURGER?

>> YEAH, I, EVERYTHING --

>> IT IS CLEAR IN MY MIND THAT
YOU, THAT TOUCHING OF A BREAST
IS CERTAINLY NOT THE SAME AS
PENETRATION OF THE VAGINA.
AND SO IS THAT, SIMPLY ENOUGH
BECAUSE THOSE TWO ACTS OCCURRED,
YOU DON'T NEED ANY ANALYSIS OF
WHETHER, UNDER THE STATUTE, WHAT
IS IT, LEWD AND LASCIVIOUS
MOLESTATION HAS ANY, ANY
ELEMENTS THAT SEXUAL BATTERY
DOES NOT?

>> YOU KNOW, JUDGE, I WOULD
GENERALLY SAY YES BUT THE
PROBLEM THAT I SEE --

>> YES TO WHAT?

>> YES, IF IT CAN BE SHOWN AS
REALLY TWO SEPARATE DISTINCT
ACTS.

>> YOU DON'T NEED A BLOCKBURGER
ANALYSIS?

>> BUT I THINK THE ISSUE, IF THE
COURT HAS TO DECIDE IS THAT,

TEMPORAL ISSUE.

IF IT IS STILL, IS THAT PART OF THE ACT?

CAN YOU BREAK IT DOWN INTO PIECES?

YOU KNOW IS THAT, IS THAT REALISTIC TO --

>> MICHELLE WAS THERE DID WE GO, I DON'T BELIEVE, AND MAYBE YOU CAN CORRECT ME IF I'M WRONG, ONCE WE GOT TO THE PART OF A SEPARATE CHARACTER AND TYPE I DON'T THINK, WAS THERE ANY DISCUSSION OF, TEMPORAL RELATIONSHIP?

>> NO, I THINK THE COURT, MICHELLE GOT RID OF THE TEMPORAL ISSUE.

BUT THAT WAS A SEXUAL BATTERY. NOW WE'RE DEALING WITH A SEXUAL MOLESTATION.

>> I THOUGHT MICHELLE WAS ABOUT TWO SEXUAL LEWD AND LASCIVIOUS --

>> CERTAINLY SAID, IT WAS LEWD AND LASCIVIOUS BATTERY, NOT MOLESTATION.

I THINK THAT IS WHAT THE WHOLE ISSUE IS.

THAT IS WHAT THE COURT HAS TO DECIDE.

IS IT PART OF THE ACT, IS IT NOT PART OF THE ACT?

HOW DO YOU BREAK IT DOWN?

>> IT SEEMS TO ME IF YOU CAN GET WITHOUT ANY DOUBLE JEOPARDY PROBLEMS, TWO CONVICTIONS UNDER THE SAME STATUTE THEN WHY ARE WE HERE WORRYING ABOUT TWO CONVICTIONS UNDER DIFFERENT STATUTES?

>> WELL, I THINK WE'RE DEALING WITH A SEX OFFENSE AND I THINK, LIKE DEATH IS DIFFERENT, I THINK FOR THE COURT SEX OFFENSES ARE DIFFERENT. THIS IS NOT WHERE LEWD BATTERIES STARTED AND ENDED, STARTED AND ENDED. BLOCKBURGER INVOLVED FIVE SEPARATE SALES OF DRUGS.

WASN'T EVEN CONTEMPLATING
APPLYING SALES OF DRUGS TO SEX
OFFENSES.

SO I SUGGEST WHEN WE'RE DEALING
WITH A SEX OFFENSE MAYBE THAT'S
DIFFERENT.

MAYBE IT'S NOT.

AN ACT IS AN ACT AND THE COURT
HAS DETERMINED HOW THESE ACTS
BREAK DOWN.

THANK YOU VERY MUCH.

>> REBUTTAL.

>> MAY IT PLEASE THE COURT.

THERE ARE JUST A COUPLE OF
POINTS THAT I WANT TO MAKE.
THIS CASE REALLY PRESENTS THIS
COURT AN EXCELLENT OPPORTUNITY
TO CLARIFY DOUBLE JEOPARDY
ANALYSIS AND IN SO DOING TO
CLARIFY THE VERNACULAR OF DOUBLE
JEOPARDY ANALYSIS.

FIRST, WE DETERMINED HOW MANY
EPISODE THERE ARE.

IF THERE'S ONLY ONE EPISODE WE
HAVE TO DETERMINE THE NUMBER OF
PHYSICAL ACTS THAT OCCURRED
WITHIN THAT EPISODE.

IF THERE ARE TWO OR MORE, WE
NEED TO ANALYZE WHETHER THEY ARE
DISTINCT FROM ONE ANOTHER.

IF THEY ARE DISTINCT FROM ONE
ANOTHER, THERE IS NO DOUBLE
JEOPARDY VIOLATION.

>> WHEN YOU SAY DISTINCT FROM
ONE ANOTHER, YOU'RE USING IT AS
THAT SEPARATE CHARACTER OR TYPE?

>> YES, JUSTICE QUINCE.

ARE THE ACTS OF A SEPARATE
CHARACTER AND TYPE, DO THEY HAVE
A DIFFERENT QUALITY ABOUT THEM?
AND WHAT WE --

>> WHAT ABOUT THAT?

HAVEN'T WE ALREADY SAID?

I MEAN YOU'RE SAYING WE NEED TO
CLARIFY IT.

IT SEEMS TO ME READING ALL OF
OUR CASES, THAT'S CORRECT.

>> WELL, ABSOLUTELY I AGREE.

BUT THE, YES, YES MUCH WHY WOULD
I LIE.

BUT THE SECOND DISTRICT IN ITS
OPINION SPECIFICALLY REJECTED
MICHELLE ON THE GROUND THAT IT
APPLIED ONLY TO SECTION
800. --

>> THEY HAD A DIFFERENT VIEW
WHAT TOUCHING THE BREASTS HAS TO
DO WITH RAPE.

>> RIGHT.

>> IT APPEARS THAT WAY.

SO I DON'T KNOW HOW MUCH
FARTHER WE NEED TO GO ABOUT THE
CLARIFICATION BUT, SO AGAIN IF
WE DECIDE THESE ARE SEPARATE
CHARACTER AND TYPE, AND YOU
DON'T GET TO, AS YOU ADMITTED
YOU DON'T GET TO THE BLOCKBURGER
ANALYSIS.

>> THAT'S CORRECT.

SO IF THERE ARE NO OTHER
QUESTIONS WE WOULD JUST ASK THIS
HONORABLE COURT REVERSE THE
SECOND DISTRICT.

THANK YOU VERY MUCH.

>> THANK YOU FOR YOUR ARGUMENTS.
COURT IS ADJOURNED.

>> ALL RISE.