>> AND THE NEXT CASE WILL BE RAMROOP V. STATE.
>> WHENEVER YOU'RE READY.
>> GOOD MORNING, MAY IT PLEASE THE COURT, MY NAME IS WILLIAM PONALL, AND I REPRESENT GANGAPERSAD RAMROOP IN THIS CASE.
FIRST, THE 5TH DCA APPOINTED THE WRONG REMEDY FOR THE ERRONEOUS JURY INSTRUCTION PROVIDED TO THE JURY ON ATTEMPTED MURDER OF A LAW ENFORCEMENT OFFICER.
SECOND, THE PROSECUTOR'S STATEMENT DURING CLOSING ARGUMENT WERE HIGHLY IMPROPER AND SUPPORT REVERSAL UNDER ANY STANDARD OF REVIEW.
THIRD, THE 5TH DCA ERRONEOUSLY CONCLUDED THAT THE IMPROPER ADD MISSION OF THE PHOTOGRAPH-- ADMISSION OF THE PHOTOGRAPH OF ROBERT HUNTER LYING IN A POOL OF BLOOD WAS HARMLESS.
AND, FOURTH, THE CUMULATIVE EFFECT OF THE ERRORS MADE BY THE TRIAL COURT SUPPORT REVERSAL OF ALL OF MR. RAMROOP'S CONVICTIONS.
IT'S OUR POSITION, AGAIN, THAT THE PROPER REMEDY WAS A NEW TRIAL, NOT RESENTENCING ON COUNT ONE OF THE INFORMATION--
>> COULD THIS HAVE BEEN-- AND THIS IS A QUESTION I'M GOING TO ASK THE STATE.
I WAS LOOKING AT THE ACTUAL VERDICT FORM FOR THE COUNT ONE, AND THE CHARGE HAD BEEN ATTEMPTED FIRST-DEGREE MURDER AS CHARGED IN THE INFORMATION.
AND THE INFORMATION CHARGED IS ATTEMPTED FIRST-DEGREE MURDER WITH A FIREARM OF A LAW ENFORCEMENT OFFICER.
WHAT ARE THE LESSER INCLUDED-- ONE OF THE LESSER INCLUDEDS, IRONICALLY, IS THEY COULD HAVE FOUND OFFENSE OF AGGRAVATED ASSAULT ON A LAW ENFORCEMENT

OFFICER.
THERE'S NO QUESTION, AND THE JURY INSTRUCTIONS READ THAT KNOWLEDGE OF THE DEFENDANT, I MEAN, OF THE VICTIM BEING LAW ENFORCEMENT IS AN ESSENTIAL ELEMENT.
SO THE-- WE'RE SEEING IN THIS WHOLE WHAT HAPPENED HERE IS THAT YOU'VE GOT AN ELEMENT OF THE LESSER OFFENSE THAT IS DIFFERENT THAN THE WAY THE JURY HEARS THE ELEMENT OF THE GREATER OFFENSE.
AND I DON'T KNOW, DOES ANY--
WAS THAT ARGUED BEFORE THE 59 DISTRICT THAT WAY? -- 5TH DISTRICT THAT WAY?
I MEAN, TO ME, THAT IS ONE OF THE PROBLEMS.
I MEAN, NOT ONLY DOES IT APPEAR THAT THE ATTEMPTED-- THAT AGGRAVATED ASSAULT HAS BEEN, THERE'S NO QUESTION THAT IT'S A SUBSTANTIVE OFFENSE, HOW COULD ATTEMPTED FIRST-DEGREE MURDER OR SECOND-DEGREE MURDER BE TREATED DIFFERENTLY?
>> YOUR HONOR, I WAS NOT COUNSEL IN THE 5TH DCA, BUT I DON'T BELIEVE IT WAS ARGUED IN THAT MANNER.
I AGREE WITH THE COURT'S QUESTION OR OBSERVATION THAT THERE'S REALLY NO WAY TO DISTINGUISH THE FACT THAT IT'S CLEAR THAT AGGRAVATED ASSAULT, THAT THE KNOWLEDGE IS AN ELEMENT AND THAT--
>> SO IF THERE HAD BEEN A CASE WHERE THE DEFENDANT DIDN'T STAND GUILTY OF AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER AND THEY GAVE, THE JUDGE GAVE AN ERRONEOUS INSTRUCTION THAT SAID KNOWLEDGE WASN'T REQUIRED, WOULD THE REMEDY BE-- AND THIS IS, REALLY GOES BACK TO, BECAUSE THEY ACKNOWLEDGE KNOWLEDGE, THE 5TH DISTRICT SAYS KNOWLEDGE IS REQUIRED-- TO THE LESSER

INCLUDED OFFENSE OF ASSAULT?
WOULD YOUR ARGUMENT BE THE SAME
IF THAT, THE STATUTE ACTUALLY
DOESN'T ALLOW THE REDUCTION
WHERE YOU'VE GOT AN ERRONEOUS
INSTRUCTION ON THE ELEMENT?
SO WOULD THE SAME ANALYSIS
APPLY?
>> SAME ANALYSIS WOULD APPLY,
YOUR HONOR, AND THE REMEDY WOULD
BE NEW TRIAL NOT FOR REMAND OF
ENTRY OF CONVICTION ON A
LESSER--
>> BUT THIS SEEMS IN A WAY, AND
I WAS LOOKING AT ALL THESE
CASES, ORTEZ, WHICH YOU CITE,
ACTUALLY, IT WAS THE
DEFENDANT--
>> SURE.
>>-- THAT WANTED TO GET THE
LESSER.
HEY, GIVE ME THE 15-YEAR
SENTENCE.
AND, FRANKLY, IF YOU DIDN'T HAVE
THE MURDER OF THE, FELONY MURDER
OF THE OTHER VICTIM, YOU MIGHT
SAY, YEAH, GIVE ME 15 YEARS.
THAT'S A GOOD DEAL.
>> SURE.
>> BUT IS THAT, WE'VE GOT TO
APPLY IT CONSISTENTLY.
SO HAVE WE-- WHAT IS THE
DISTINCTION BETWEEN WHEN WE
ALLOW, BECAUSE WE'RE REALLY
TALKING ABOUT THE REMEDY HERE AS
OPPOSED TO THAT KNOWLEDGE IS THE
REQUIREMENT.
WHAT'S THE DIFFERENCE?
HOW HAVE WE DRAWN THE LINE
BETWEEN CASES WHERE WE ALLOW IT
TO BE REDUCED TO THE LESSER
INCLUDED OFFENSE VERSUS THOSE
WHERE THE ERRONEOUS JURY
INSTRUCTION AND WE REQUIRE A NEW
TRIAL?
>> YOUR HONOR, THE ANSWER IS IN
924.34 WHERE THE APPELLATE COURT
FINDS THAT THERE'S INSUFFICIENT
EVIDENCE ON A L., THEN THE
APPELLATE COURT HAS THE ABILITY

TO REMAND ON THE LESSER INCLUDED
IF THERE'S SUFFICIENT EVIDENCE
TO SUPPORT THE LESSER INCLUDED.
WHERE THERE'S A NEW PROPER JURY
INSTRUCTION ON THE TO ESSENTIAL
ELEMENT OF THE CHARGE, THE
REMEDY IS ALWAYS A NEW TRIAL ON
THE OFFENSE OF CONVICTION.
SO THAT'S THE DISTINCTION.
INSUFFICIENT EVIDENCE ON AN
ELEMENT, THEN YOU REMAND FOR
ENTRY OF THE LESSER, IMPROPER
JURY INSTRUCTION ON AN ELEMENT,
YOU REMAND FOR A NEW TRIAL.
THAT'S THE IMPORTANT
DISTINCTION, AND THAT'S WHAT WE
HAVE HERE.
>> OKAY, NOW LET'S TALK ABOUT
THIS JURY INSTRUCTION.
APPARENTLY, WE HAVE CONTRIBUTED
TO THE PROBLEM, BECAUSE THE JURY
INSTRUCTIONS ACTUALLY DO NOT AT
THE PRESENT TIME REQUIRE
KNOWLEDGE, AND THE STATE THINKS
IT'S NOT AN ISSUE THAT, OF
COURSE, KNOWLEDGE IS REQUIRED.
SO IT WAS NOT OBJECTED TO BY
TRIAL COUNSEL; THAT IS, THE FACT
THAT KNOWLEDGE WASN'T REQUIRED.
SO WE'VE GOT TO FIND ON THAT
THAT IT WAS FUNDAMENTAL ERROR,
DON'T WE, TO REQUIRE A NEW
TRIAL?
>> WELL, THE 5TH DCA ALREADY
FOUND THAT, AND THAT HAS NOT
BEEN APPEALED--
>> NO, THEY FOUND IT WAS ERROR,
BUT IF THE JURY-- BUT IN ORDER,
SINCE THERE WAS NO OBJECTION,
DON'T WE HAVE TO FIND THAT IT
WAS FUNDAMENTAL ERROR?
>> I BELIEVE THE 5TH DCA ALREADY
FOUND IT WAS FUNDAMENTAL.
THEY ACKNOWLEDGED IN THE OPINION
THAT THERE WAS NO OBJECTION, AND
THEY FOUND OUT TO BE
FUNDAMENTAL.
THE ONLY, THE ONLY KISS 2006 AND
ISSUE BEFORE THIS COURT IS THE
REMEDY FOR THE FUNDAMENTAL

ERROR.
5TH DCA, BECAUSE THEY BELIEVE
THAT THE LAW ENFORCEMENT ISSUE
WAS NOT AN ELEMENT, IT WAS A
SENTENCING ENHANCEMENT, THEY
BELIEVE THAT REMAND TO
RESENTENCING WAS APPROPRIATE.
>> SO THE CASES THAT WE TOOK
JURISDICTION, YOU KNOW, DARST,
WAS THAT NOT ARGUED TO THEM,
THAT IT WAS-- WE'VE ALREADY
SAID IT WAS A SUBSTANTIVE
OFFENSE?
>> IN THE-- THERE'S NOT A LOT
OF ARGUMENT IN THE BRIEFS BELOW
ABOUT REMEDY.
THE ARGUMENT WAS MADE BY THE
DEFENDANT, MR. RAMROOP, THAT
THIS WAS FUNDAMENTAL ERROR TO
NOT GIVE THE INSTRUCTION AND
THAT THE CONVICTION SHOULD BE
REVERSED FOR A NEW TRIAL.
THERE WAS AN ARGUMENT BACK AND
FORTH ABOUT REMEDY BETWEEN THE
PARTIES IN THE BRIEFS.
>> WHY IS IT THE PROPER
REMEDY TO--
[INAUDIBLE]
>> BECAUSE YOU HAVE, BECAUSE YOU
HAVE, YOUR HONOR, THIS COURT HAS
SAID THAT THESE, THE 5TH DCA
SAID THE REMEDY WAS RESENTENCING
BECAUSE THIS WASN'T A NEW
SUBSTANTIVE OFFENSE, ATTEMPTED
MURDER OF A LAW ENFORCEMENT
OFFICER.
THE LAW ENFORCEMENT ELEMENT WAS
JUST A SENTENCING ENHANCEMENT.
AND THIS COURT HAS FOUND TO THE
CONTRARY WHEN IT INTERPRETED
784.07 IN DARST AND WRIGHT WHERE
THEY SAID, THIS COURT SAID IN
WRIGHT THAT 784.07 DEFINES A
SUBSTANTIVE OFFENSE OF BATTERY
ON A LAW ENFORCEMENT OFFICER
BACK IN 1991, AND IN DARST IN A
UNANIMOUS DECISION FROM THIS
COURT IN 2002, THIS COURT SAID
IN MILLS WE HELD THAT 784.07 IS
A RECLASSIFICATION STATUTE, NOT

AN ENHANCEMENT STATUTE AND,
THUS, CREATES A SUBSEQUENT
CRIME.
THAT'S A UNANIMOUS 7-0 DECISION.
>> BUT WHEN YOU LOOK AT THE
ACTUAL FACTS THAT ARE PRESENTED
AT THE TRIAL--
>> SURE.
>>-- EVERY-- AND WHEN YOU GET
TO THE VERDICT, THE JURY HAS TO
DETERMINE THAT THERE WAS AN
ATTEMPTED FIRST-DEGREE MURDER,
CORRECT?
AND THEN THE JURY THEN GOES ON
TO FIND THAT THAT PERSON WAS A
LAW ENFORCEMENT OFFICER?
IS THAT A PART OF THE JURY
VERDICT FORM?
>> THERE WAS THE VERDICT FORM IN
THIS CASE, IT WAS A VERDICT FORM
THAT THEY HAVE A I TEMPTED
FIRST-DEGREE, ATTEMPTED
SECOND-DEGREE OR ATTEMPTED
MANSLAUGHTER, AND IT WAS A
SPECIAL FORM WHERE THEY ASKED
WHETHER THE PERSON, THE ALLEGED
VICTIM WAS A LAW ENFORCEMENT
OFFICER.
>> SO IT SEEMS TO ME WITH THAT
KIND OF VERDICT FORM THAT YOU
ARE, IN FACT, WHEN YOU FIND A
SEPARATE LAW ENFORCEMENT PART OF
IT, THAT YOU ARE SIMPLY
ENHANCING WHAT YOU'VE FOUND AS
THE ATTEMPTED MURDER.
>> WELL, THAT'S THE PRACTICAL
EFFECT.
BUT UNDER THIS COURT'S CASE LAW
AND THE U.S. SUPREME COURT'S
CASE LAW, THE LEGISLATURES HAS
CREATED A NEW SUBSTANTIVE
OFFENSE, ATTEMPTED MURDER OF A
LAW ENFORCEMENT OFFICER--
>> IS THAT IN A SEPARATE STATUTE
ALSO?
>> THERE IS A SEPARATE STATUTE.
>> 782--
>> 065, YES.
AND PURSUANT TO WRIGHT AND DARST
WHERE THEY INTERPRETED THE

PREDECESSOR STATUTE, THIS COURT INTERPRETED 784.07, IT'S CLEAR THAT THE 782.065 ALSO CREATED A NEW SUBSTANTIVE OFFENSE.
AND THE--
>> SO IF WE'RE GOING TO SEND THIS BACK FOR A NEW TRIAL, THEN YOU NEED A NEW TRIAL ON BOTH OFFENSES.
>> WE DO, YOUR HONOR.
>> LET ME ASK YOU ON THIS, THE ISSUE-- AND, AGAIN, I THINK THAT THE WAY IT WAS CHARGED, I DON'T KNOW THAT ANYONE EVER THOUGHT IT WAS CHARGED ANYTHING OTHER THAN ATTEMPTED FIRST-DEGREE MURDER ON A LAW ENFORCEMENT OFFICER.
I MEAN, THEY'RE TREATED-- AND, AGAIN, I CAN'T SEE ANY DIFFERENCE BETWEEN THE CRIME OF ATTEMPTED FIRST-DEGREE MURDER OF A LAW ENFORCEMENT OFFICER AND AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER.
THE STATUTES LOOK JUST ABOUT IDENTICAL IN THE WAY THAT 782.065 AND THEN THE STATUTE THAT HAS AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER, 784.07 WHICH HAS IT AS AN ADDITIONAL ELEMENT.
BUT LET ME ASK YOU ABOUT THE CLOSING ARGUMENTS.
>> SURE.
>> AND REVERSE ON YOUR FIRST GROUNDS, WE DON'T GET THERE.
I, YOU KNOW, I'M-- CERTAINLY DON'T CONDONE ANY OF THESE ARGUMENTS THAT WERE MADE AND NEITHER DID THE 5TH DISTRICT.
BUT WHEN THEY MADE THE FIRST STATEMENT, IT WASN'T A LONG CLOSING ARGUMENT, ABOUT THE MAGIC MOVIE STORY FROM SEINFELD--
>> SURE.
>>-- THE OBJECTION WAS IT WAS A MISSTATEMENT OF WHAT COUNSEL HAD SAID.

THAT'S NOT THE-- WHAT YOU--
THE PROPER OBJECTION WOULD HAVE
BEEN YOU'RE DISPARAGING COUNSEL,
AND YOU'RE MOCKING COUNSEL.
THAT WASN'T, DO YOU AGREE THAT
WASN'T THE PROPER OBJECTION?
>> I AGREE THOSE WORDS WEREN'T
UTTERED.
>> WELL, I MEAN, AGAIN, IT WAS
APPARENTLY SOME IDEA ABOUT HOW
THIS BULLET HAD NOT REALLY
REACHED-- AND WHO KNOWS, SINCE
THEY FOUND ATTEMPTED
SECOND-DEGREE, THEY FOUND THAT
TO BE-- MAYBE THEY FOUND THAT
TO BE PLAUSIBLE, THAT THIS WAS
NOT AN ATTEMPT TO KILL THE
VICTIM.
FIRST VICTIM.
BUT, SO THERE WAS NO-- THAT'S
NOT THE PROPER OBJECTION.
AND THEN THEY GO TO-- YOU KEEP
ON, THE ARGUMENT GOES ON AND ON
UNTIL FINALLY THEY GO AND THEY
OBJECT TO, YOU KNOW, IT WAS THE
THEORY WAS ABSOLUTELY LUDICROUS,
AND THEN THERE'S A WHOLE LONG
ARGUMENT WHERE FINALLY THE
DEFENSE SPEAKS UP AND SAYS
THEY'RE DISPARAGING THE DEFENSE
COUNSEL AND THE DEFENSE, RIGHT?
AND AT THAT POINT, THE JUDGE
THEN OVERRULES THAT.
BUT ISN'T THAT TOO LATE IN THE
ARGUMENT TO HAVE MADE-- AGAIN,
BECAUSE YOU'RE SAYING THE 5TH
DISTRICT SHOULD HAVE REVIEWED IT
FOR, ON HARMLESS ERROR.
AND I'M JUST LOOKING, AND I'M
COMPARING IT TO CARDONA WHERE
ARE WE REVERSED IT WHERE THERE
WERE LOTS OF SPECIFIC OBJECTION
TOES.
SHOULDN'T THERE HAVE BEEN AN
OBLIGATION ON DEFENSE LAWYER TO
HAVE OBJECTED SPECIFICALLY AND
EARLIER BEFORE THIS WHOLE TIRADE
HAD STARTED?
>> YOUR HONOR, I THINK THE FIRST
AND PROPER ARGUMENT ABOUT THE

MAGIC MOVIE, I THINK, OBVIOUSLY,
THE BETTER OBJECTION WOULD HAVE
BEEN DENIGRATING THE DEFENSE.
I THINK THAT FROM THE CONTEXT,
IT'S OBVIOUS IT WAS ERRONEOUS,
AND THE TRIAL JUDGE SHOULD HAVE
KNOWN IT, SO I THINK THE
OBJECTION IS SUFFICIENT.
I UNDERSTAND IT WOULD HAVE BEEN
BETTER, CERTAINLY, IF THE
DEFENSE LAWYER HAD, SAY,
DENIGRATED THE-- HAD SAID
DENIGRATED THE DEFENSE.
BUT EVENTUALLY THE LAWYER DOES
DISPARAGE THE COUNSEL AND
DEFENDANT, AND THAT'S
OVERRULED--
>> HE SAID IT, BUT YOU CAN'T
DISPARAGE DEFENSE COUNSEL?
>> THAT'S WHAT THE TRIAL JUDGE
SAID.
AND THEN THE PROSECUTOR
CONTINUED ON AND AGAIN
DISPARAGED DEFENSE COUNSEL.
AND IN CARDONA, THIS COURT
POINTED OUT THAT WHEN THE JUDGE
OVERRULES AN OBJECTION, IT
TACITLY APPROVES IT.
SO THE JURY WAS TOLD IS THE
ESSENTIALLY OKAY.
AND I THINK IT'S IMPORTANT.
SO WE CONTINUE TO BELIEVE
THAT-- AND THESE ARE THE TWO
ISSUES THAT WERE OBJECTED TO--
SHOULD BE REVIEWED UNDER
HARMLESS ERROR.
BUT EVEN IF THAT'S NOT THE CASE
AND THE COURT REFERS TO
FUNDAMENTAL ERROR, THAT THESE
ARGUMENTS ROSE TO THAT LEVEL
UNDER ITERATION OF FUNDAMENTAL
ERROR, I WOULD NOTE THAT TWO
MOTIONS FOR NEW TRIAL WERE ALSO
FILED ON THIS ISSUE IS A MOTION
FOR MISTRIAL WAS MADE AT
CLOSING.
SO WE DO BELIEVE THIS ISSUE WAS
PRESERVED FOR REVIEW AT LEAST ON
THE TWO ISSUES OBJECTED TO.
BUT AGAIN, WE STILL BELIEVE

COMBINED THE OBJECTED TO AND
UNOBJECTED TO ISSUES RISE TO THE
LEVEL OF FUNDAMENTAL ERROR
BECAUSE THIS ARGUMENT WAS
ADDRESSED AS THE CRITICAL ISSUE
IN THE CASE.
WHETHER MR. RAMROOP WAS SHOOTING
AT THE OFFICER.
AND IT WAS OVER AND OVER AGAIN,
IT WAS AN EGREGIOUS ATTACKING
THE DEFENSE AND ATTACKING THE
DEFENSE COUNSEL.
THERE'S NO REASON FOR THE
PROSECUTOR TO EVER ADDRESS THE
DEFENSE COUNSEL BY NAME OR POINT
TO THE DEFENSE COUNSEL AND SAY
SHE'S MAKING THE ARGUMENT SHE
HAS.
IT'S ACTUALLY ACCUSING THE
DEFENSE LAWYER OF KIND OF
PERPETRATING A FRAUD OR
PERPETRATING SOME MISSTATEMENT
TO THE JURY.
THAT'S WHY IT'S IMPROPER.
BUT ITS REBUTTAL CLOSING, IT'S
THE LAST THING THE JURY HEARS,
AND IT'S THE CRITICAL ISSUE
BEFORE THE JURY THAT REMAINS IN
DISPUTE, WHETHER MR. RAMROOP WAS
SHOOTING AT THIS OFFICER AND
KNEW THE PERSON WAS THE
OFFICER--
>> THESE ARGUMENTS WERE IN
REBUTTAL?
>> YES.
THESE WERE REBUTTAL/CLOSING.
SO IT'S OUR POSITION THAT TAKEN
TOGETHER-- AND THE 5TH DCA SAID
TAKEN TOGETHER THESE COMMENTS
UNDOUBTEDLY SERVED
SARCASTICALLY OR OTHERWISE
RAMROOP'S THEORY OF DEFENSE AND
RAMROOP'S COUNSEL.
SO IT'S OUR POSITION THAT WE
WANT TO FOLLOW THIS COURT'S
DICTATE IN CARDONA THAT THE
PURPOSE OF OUR THE BEDROCK
PRINCIPLE OF OUR CRIMINAL
JUSTICE SYSTEM IS THAT THE CASE
SHOULD BE DECIDED ON THE MERITS.

THE PROSECUTOR'S ARGUMENTS IN
REBUTTAL MADE THAT IMPOSSIBLE
FOR THE CASE SOLELY TO BE
DETERMINED ON THE MERITS.
I SEE I HAVE FOUR MINUTES
REMAINING, AND I'LL RESERVE THE
REST FOR MY REBUTTAL.
THANK YOU.
>> GOOD MORNING.
MAY IT PLEASE THE COURT, ANDREA
TOTTEN ON BEHALF OF THE STATE OF
FLORIDA.
YOUR HONOR, I WOULD LIKE TO
START WITH THE DECISION OF THE
5TH DISTRICT COURT OF APPEAL
WITH REGARDS TO WHETHER THIS
CASE SHOULD BE REMANDED FOR A
NEW TRIAL--
>> COULD WE JUST START WITH THE
ISSUE OF TELL ME, BECAUSE I WAS
REALLY NOT AWARE OF THE NICETIES
OF POST-APPRENDI, WHAT THE
DIFFERENCE IS IN ENHANCEMENT
STATUTES AND RECLASSIFICATION
STATUTES.
AND DID THE 5TH DISTRICT ASSUME
THAT THEY WERE, THAT IT WAS,
LIKE, THERE WERE THREE TYPES?
THERE'S ENHANCEMENT
RECLASSIFICATION AND THEN
SUBSTANTIVE?
>> YES, YOUR HONOR.
I THINK THAT THAT IS HOW IT'S
BEEN INTERPRETED.
>> NOW, LET ME-- GO TO
AGGRAVATED ASSAULT ON A LAW
ENFORCEMENT OFFICER.
IS THAT A, AN ENHANCEMENT
STATUTE, A RECLASSIFICATION
STATUTE OR SUBSTANTIVE STATUTE
OR NONE OF THE ABOVE?
>> YOUR HONOR, I WOULD SAY
THAT'S A RECLASSIFICATIONING
STATUTE.
>> AND, IN FACT, THE STATUTE
SAYS IT.
SO HOW-- DOES THAT MAKE IT THEN
A SUBSTANTIVE STATUTE?
>> I THINK THAT THERE IS A
DIFFERENCE BETWEEN WHAT PEOPLE

GENERALLY MEAN WHEN THEY USE THE
WORD "SUBSTANTIVE STATUTE" AS
OPPOSED TO RECLASSIFICATION.
GENERALLY SPEAKING, WHEN THE
ISSUE IS RECLASSIFICATION, A
DEFENDANT IS CONVICTED OF A
PARTICULAR CRIME.
ROBBERY, FOR EXAMPLE.
WELL, THAT MIGHT NOT BE A GOOD
ONE BECAUSE THAT'S AN ESSENTIAL
ELEMENT IN ARMED ROBBERY.
BUT RECLASSIFICATION OF
FIREARMS, FOR EXAMPLE.
THE DEFENDANT IS CONVICTED BY
FOR SUCH AND SUCH DELINEATED
FELONY OFFENSE, THEN THE JURY'S
ASKED TO FIND DID HE USE, CARRY,
DISPLAY, DISCHARGE A FIREARM
FOR--
>> SO BUT ON AN AGGRAVATED
ASSAULT ON A LAW ENFORCEMENT
OFFICER, ONE OF THE
LESSER-INCLUDED OFFENSES OF THE
VERDICT FORM, THE JURY
INSTRUCTIONS READ IT'S AN
ESSENTIAL ELEMENT OF THE
OFFENSE.
THIS DEFENDANT WAS NOT CHARGED
WITH SEPARATELY ATTEMPTED
FIRST-DEGREE MURDER.
HE WAS CHARGED WITH ATTEMPTED
FIRST-DEGREE MURDER OF A LAW
ENFORCEMENT OFFICER, AND THE
JURY VERDICT WAS ASKING WAS HE
GUILTY AS CHARGED IN THE
INFORMATION.
SO ASSUME-- PRESUMABLY, THE
INFORMATION WENT BACK TO THE
JURY.
I MEAN, AND I THINK WE'RE
COMPLICIT IN WHAT'S HAPPENED
HERE BECAUSE THE JURY OR
INSTRUCTIONS-- JURY
INSTRUCTIONS ARE, FRANKLY,
THEY'RE STILL CONFUSING.
BUT I DON'T GET THE DIFFERENCE
BETWEEN THE TWO STATUTES THAT I
JUST MENTIONED, AND THAT'S WHAT
I-- CAN YOU HELP ME WITH THAT.
AGGRAVATED ASSAULT ON A LAW

ENFORCEMENT OFFICER, AND IF THEY MISINSTRUCTED ON THE KNOWLEDGE, WOULD THE PROPER REMEDY BE TO JUST REMAND IT FOR AN AGGRAVATED ASSAULT?
>> I BELIEVE, WELL, IT DEPENDS ON WHETHER THERE'S A FIREARM ASPECT OF IT.
BUT I THINK THE ANSWER WOULD BE YOU WOULD GO BACK AND CONVICT ON THE MISDEMEANOR ASSAULT.
I DIDN'T CITE-- I DON'T THINK THE CASES THAT I CITED IN MY BRIEF PERTAIN TO ASSAULT ON A LAW ENFORCEMENT OFFICER PARTICULARLY, BUT I DID CITE A COUPLE OF CASES, FOR EXAMPLE, JASR V. STATE AND RODRIGUEZ V. STATE THAT WERE VERY SIMILAR ISSUES.
DEFENDANT WAS CONVICTED OF BATTERY ON A LAW ENFORCEMENT OFFICER.
FOR SOME REASON IN THOSE CASES, IT WAS-- THE OFFICER WAS NOT ACTING AS A LAW ENFORCEMENT OFFICER AT THE TIME.
SO THE COURT FELT THAT THE PROPER REMEDY IS TO STRIKE THAT LAW ENFORCEMENT OFFICER RECLASSIFICATION THAT WAS IMPOSED--
>> BUT I THOUGHT, YOU SEE, AND I'M CONCERNED.
WE WANT TO GET THE LAW RIGHT ACROSS THE BOARD X I'M CONCERNED IN THAT THE STATUTE THAT WAS RELIED ON OR IS RELIED ON DEALS WITH THE SUFFICIENT IS CITY OF THE EVIDENCE.
YOUR OPPOSING COUNSEL SAYS THAT WHEN THERE'S A ERRONEOUS JURY INSTRUCTION-- WHICH HERE THERE IS AN ERRONEOUS JURY INSTRUCTION THAT THEY DIDN'T NEED TO, THEY DIDN'T HAVE TO KNOW HE WAS A LAW ENFORCEMENT OFFICER TO CONVICT OF THIS OFFENSE-- THAT THE REMEDY IS NOT TO GO TO THE LESSER-INCLUDED OFFENSE.

WE, CAN YOU HELP ON THAT,
WHETHER WE'VE ACTUALLY EMPLOYED
THAT REMEDY IN CASES WHERE
THERE'S AN ERRONEOUS JURY
INSTRUCTION AND GONE AND SAID,
WELL, WE'LL JUST PUT IT DOWN TO
WHATEVER LEVEL OF OFFENSE IS
APPROPRIATE?
>> WELL, YOUR HONOR,
RESPECTFULLY, I WOULD DISAGREE
THAT THERE WAS AN ERRONEOUS JURY
INSTRUCTION HERE--
>> WELL, I THOUGHT THAT-- WHAT
ABOUT, WERE THEY TOLD THAT THEY
NEEDED TO FIND KNOWLEDGE?
>> THEY WERE ASKED TO FIND A
SEPARATE VERDICT FORM FIRST, WAS
THE DEFENDANT GUILTY OF
ATTEMPTED FIRST-DEGREE MURDER,
ATTEMPTED SEND-DEGREE MURDER.
THE JURY MADE A FINDING THE
DEFENDANT ATTEMPTED
SECOND-DEGREE MURDER.
ON A SECOND SPECIAL --
THE JURY IS ASKED TO FIND IF THE
LAW ENFORCEMENT OFFICER, IN
FACT, A LAW ENFORCEMENT OFFICER.
THAT PART OF IT IS RELEVANT ONLY
TO THE RECLASSIFICATION FOR THE
SENTENCING ASPECT OF IT.
>> BUT THEY WERE-- BUT, AGAIN,
THAT'S-- SOME OF THE PROBLEM IS
AND I TAKE IT IN OUR JURY
INSTRUCTIONS, BECAUSE OUR JURY
INSTRUCTIONS TREAT AGGRAVATED
ASSAULT ON A LAW ENFORCEMENT
OFFICER WITH THAT BEING AN
ESSENTIAL ELEMENT OF TO OFFENSE
BEING CHARGED. -- OF TO OFFENSE
BEING CHARGED.
AND THEN YOU CAN GO BACK DOWN IF
THERE'S NOT SUFFICIENT EVIDENCE
THEY'RE A LAW ENFORCEMENT
OFFICER.
SO THIS IS, I THINK, HAS TO BE
REMEDIED BY THIS COURT WITH OUR
JURY INSTRUCTIONS AND VERDICT
FORM, BECAUSE THE STATE IS NOT
CONTESTING THAT KNOWLEDGE IS AN
ESSENTIAL ELEMENT, CORRECT?

>> THAT IS CORRECT, YOUR HONOR.
THEY DID CONCEDE THAT KNOWLEDGE WAS AN ESSENTIAL ELEMENT HERE.
AND THE RECLASSIFICATION BASED ON THE SPECIAL STATUS OF THE VICTIM AS A LAW ENFORCEMENT OFFICER IN THIS CASE WAS ERRONEOUS, AND THE PROPER REMEDY IS TO GO BACK FOR RESENTENCING, STRIKING THAT LAW ENFORCEMENT OFFICER RECLASSIFICATION.
THE JURY FOUND HIM GUILTY OF ATTEMPTED SECOND-DEGREE MURDER.
THERE'S NEVER BEEN ANY ARGUMENT THAT THERE'S ANY ERRONEOUS JURY INSTRUCTION WITH REGARDS TO THE ATTEMPTED--
>> BUT DO YOU THINK THAT-- AND, AGAIN, WE DON'T KNOW WHAT WAS IN THE JURY'S MIND.
IF I'M READING THIS AND GOING, WELL, LET'S SEE, AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER REQUIRES KNOWLEDGE.
SO WE DON'T WANT TO-- HE CAN'T BE CONVICTED OF THAT, BECAUSE WE DON'T KNOW THAT HE HAD KNOWLEDGE THAT HE WAS A LAW ENFORCEMENT OFFICER.
I DON'T KNOW WHAT, YOU KNOW, BUT WE CAN-- WE'RE NOT FINDING HIM GUILTY OF ATTEMPTED FIRST-DEGREE BECAUSE WE DON'T THINK IT WAS INTENTIONAL.
IT WAS RECKLESS BUT, BOY, WE CAN SURE FIND HIM GUILTY OF THIS OTHER OFFENSE AS CHARGED IN THE INFORMATION, BECAUSE HE DIDN'T NEED TO KNOW FOR THAT OFFENSE THAT HE WAS A LAW ENFORCEMENT OFFICER.
I MEAN, WE DON'T-- THAT, TO ME, IS WHY THIS WHOLE VERDICT FORM IS, UNFORTUNATELY, CONFUSED BECAUSE WE-- WHEN YOU'VE GOT A LAW ENFORCEMENT OFFICER INVOLVED, THAT'S A BIG DEAL FOR JURORS TO KNOW THAT THE PERSON YOU WERE SHOOTING AT WAS A LAW ENFORCEMENT OFFICER.

IF FOR SOME REASON THEY DON'T
BELIEVE HE KNEW IT, THEY COULD
SAY, WELL, WE CAN STILL FIND HIM
GUILTY OF ATTEMPTED
SECOND-DEGREE MURDER.
SO ISN'T THAT WHY THESE
INSTRUCTIONS ARE FUNDAMENTALLY
ERRONEOUS AND CONFUSING?
>> AGAIN, YOUR HONOR, THEY WERE
PROPERLY INSTRUCTED THAT THEY
COULD FIND THE DEFENDANT GUILTY
OF ATTEMPTED SECOND-DEGREE
MURDER, AND THAT WAS ON A
SEPARATE VERDICT FORM, AND THEY
WERE ASKED TO MAKE A FINDING ON
THAT FIRST AND THEN GO ON TO
THOSE OTHER STORIES WHERE THERE
WAS--
>> YOU TELL ME HOW YOU CAN HAVE
A LESSER-INCLUDED OFFENSE OF
AGGRAVATED ASSAULT ON A LAW
ENFORCEMENT OFFICER THAT
REQUIRES KNOWLEDGE WHERE THAT'S
NOT REQUIRED IN THE GREATER
OFFENSE?
>> I'M SORRY, CAN YOU REPEAT
THAT AGAIN?
>> HOW CAN YOU HAVE A
LESSER-INCLUDED OFFENSE OF
AGGRAVATED ASSAULT ON A LAW
ENFORCEMENT OFFICER WHICH
REQUIRES KNOWLEDGE WHEN THAT'S
NOT PART OF THE ELEMENTS OF THE
GREATER OFFENSE?
>> YOUR HONOR, THAT, THAT MAY BE
A PROBLEM.
I HAVE TO SAY, THAT ISSUE HAS
NEVER BEEN RAISED IN THE 5TH
DISTRICT COURT OF APPEAL.
I HAVEN'T SPENT A LOT OF TIME ON
THAT AND, OF COURSE, HERE THE
JURY DID FIND HIM GUILTY OF THE
GREATER OFFENSE.
THAT MIGHT HAVE BEEN AN ARGUMENT
IN SOME OTHER CASE THAT MAY HAVE
SOME TRACTION TO IT.
BUT THAT'S SIMPLY NOT THE FACTS
OF THIS CASE.
HERE THE JURY IS, AS ALWAYS,
INSTRUCTED TO FINE THE DEFENDANT

GUILTY OF-- FIND THE DEFENDANT
GUILTY OF THE HIGHEST OFFENSE
THAT THEY BELIEVE THE STATE HAS
PROVEN BEYOND A REASONABLE
DOUBT.
THEY WERE ASKED DID HE OR DID HE
NOT COMMIT ATTEMPTED MURDER, AND
THEY FOUND BASED ON THE FACT
WHICH CERTAINLY SUPPORTS THE
CONVICTION THAT, YES, HE DID.
AND, AGAIN, HIS SPECIAL STATUS
AS A LAW ENFORCEMENT OFFICER IS
RELEVANT ONLY TO THAT
RECLASSIFICATION, THE
SENTENCING.
THAT'S WHAT IS THE RUB HERE.
THE DIFFERENCE BETWEEN A LIFE
FELONY BECAUSE OF THE SPECIAL
STATUS OF THE VICTIM-- AND IN
THIS CASE IT WOULD HAVE BEEN A
FIRST-DEGREE FELONY BECAUSE IT
WAS RECLASSIFIED BASED ON USE OF
THE FIREARM, BUT WOULD OTHERWISE
HAVE BEEN A SECOND-DEGREE FELONY
FOR ATTEMPT.
>> NOW, I DO WANT TO MAKE SURE
ABOUT THIS.
IF WE AGREE WITH YOU THAT THIS
IS NOT A BIG, YOU KNOW,
BASICALLY IT CAN BE JUST REDUCED
AND IT'S OKAY, THE ATTEMPTED--
BECAUSE THE BIG DEAL IS HERE THE
LIFE SENTENCE FOR THE FELONY
MURDER OF THE PERSON WHO HE HIT,
IT WOULD HAVE-- IT DOESN'T
MATTER FOR THAT, FOR
FIRST-DEGREE FELONY MURDER THAT
THE CRIME IS ATTEMPTED
SECOND-DEGREE MURDER, IS THAT
STILL A FIRST-DEGREE FELONY?
>> CORRECT.
WHETHER THE RECLASSIFICATION FOR
SPECIAL STATUS OF THE VICTIM IS
APPLIED OR NOT, THAT WOULD NOT
AFFECT THE FIRST COUNT, THE
FELONY MURDER.
I WOULD LIKE TO POINT OUT
THOUGH, JUDGE, THAT THE CASE OF
THE WRIGHT AND DARST WHICH WERE
RELIED UPON FOR JURISDICTION IN

THIS CASE ARE NOT AT ALL UP
CONSISTENT WITH-- INCONSISTENT
WITH WHAT THE 5TH DISTRICT COURT
HAS HELD HERE.
IN THIS COURT PREVIOUSLY IN
MILLS AND MERIT INTERPRETING THE
PREDECESSOR STATUTE HAVE SAID
VERY CLEARLY THAT THIS IS A
RECLASSIFICATION STATUTE.
AND IT'S WELL -- THAT IN
RECLASSIFICATION STATUTE THE
CASE GOES BACK FOR
RESENTENCING--
>> BUT IT'S-- HOW, I SEE MERIT
OUT THERE, AND LET'S JUST SAY
THAT WE ARE, OUR JURISPRUDENCE
IS NOT CLEAR.
IT'S ACTUALLY, IN MY VIEW, IT'S
CONFUSING.
AND THAT'S WHY I HAD ASKED YOU
THIS QUESTION.
AND, I MEAN, AGAIN,
PRE-APPRENDI, POST-APPRENDI,
THINGS ARE DIFFERENT.
I'M SORRY, AGGRAVATED ASSAULT ON
A LAW ENFORCEMENT ARE OFFICER IS
A RECLASSIFICATION STATUTE.
>> CORRECT.
>> OKAY.
IT REQUIRES KNOWLEDGE AS AN
ESSENTIAL ELEMENT.
>> CORRECT.
>> IN DARST WE SAID THAT THIS
PARTICULAR OR STATUTE IS A
SUBSTANTIVE OFFENSE THAT IS A
RECLASSIFICATION STATUTE, DID WE
NOT?
>> THAT IS WHAT DARST SAYS.
>> OKAY.
AND IN MERIT, IT SAID THAT THE
SAME JUSTICE THAT SAID ONE SAID
THE OTHER, CLEARLY WE WEREN'T
FOCUSED ON THESE ISSUES, AND
CERTAINLY IN MERIT IT WAS A
DIFFERENT ISSUE.
AND SO I THINK THAT THE ISSUE
THOUGH IS DARST IS DIRECTLY
CONTRARY TO WHAT THE 5TH
DISTRICT DID, AND THEY DIDN'T
EVEN CITE IT.

>> THAT'S RIGHT, THEY DID NOT CITE IT.
AND I WOULD RESPECTFULLY DISAGREE THAT DARST IS CONTRARY. MILLS, WHICH WAS DECIDED SIX MONTHS EARLIER, AND SPECIFICALLY SAYS THAT THE STATUTE IS A RECLASSIFICATION STATUTE.
I CAN ONLY SURMISE THAT IN DARST THE INTENT WAS TO DRAW FOCUS TO THE DIFFERENCE BETWEEN ENHANCEMENT STATUTES AND RECLASSIFICATION STATUTES.
THERE'S NOTHING IN DARST TO SUGGEST THAT IT INTENDED TO OVERRULE MILLS, THAT THIS COURT HAD CHANGED ITS MIND AS TO WHETHER OR NOT IT WAS A RECLASSIFICATION STATUTE.
AND THERE'S CERTAINLY NOTHING IN THERE TO SUGGEST AS PETITIONER DOES THAT THE STATUTE, EITHER THE PREDECESSOR OR THE CURRENT VERSION HAS CREATED A SEPARATE, SUBSTANTIVE OFFENSE OF ATTEMPTED MURDER OF A LAW ENFORCEMENT OFFICER.
THERE'S NO UP THING. -- NO SUCH THING.
THERE'S A MURDER STATUTE, THERE'S AN ATTEMPT STATUTE, AND THEN THERE'S THE RECLASSIFICATION SENTENCING STATUTE.
THEY ARE ALL THREE SEPARATE.
>> IF WE WERE TO FIND THAT IT'S A RECLASSIFICATION BUT SUBSTANTIVE IN NATURE, NOT JUST AN ENHANCEMENT, WHAT IS THE APPROPRIATE REMEDY HERE?
>> IF IT WAS DETERMINED THAT IT WAS A COMPLETELY SEPARATE SUBSTANTIVE STATUTE ASIDE FROM THE EXISTING ATTEMPTED MURDER-- EXCUSE ME, MURDER STATUTE AND ASIDE FROM ATTEMPT AND THE STATUTE IN AND OF ITSELF, THEN UNDER THIS SET OF CIRCUMSTANCES, THEN HE PROBABLY WOULD BE ENTITLED TO A NEW TRIAL.

BUT IT'S VERY CLEAR HERE THAT
THE LEGISLATURE HAS NOT CREATED
A STATUTE TITLED ATTEMPTED
MURDER OF A LAW ENFORCEMENT
OFFICER.
IT'S CREATED A MURDER STATUTE,
AN ATTEMPT STATUTE AND A
RECLASSIFICATION STATUTE WHICH
IS APPLIED ONLY BASED ON THE
SPECIAL STATUS OF THE VICTIM.
IT'S REALLY NO DIFFERENT THAN
THE FIREARM RECLASSIFICATION
STATUTE WHERE THE DEFENDANT HAD
TO BE FOUND GUILTY OF A
DELINEATED FELONY, AND THEN
SEPARATELY THE JURY IS ASKED DID
HE USE OR NOT USE A FIREARM.
AND IF THAT FINDING IS FOUND,
THEN THE OFFENSE IS
RECLASSIFIED.
IF THERE'S A PROBLEM WITH THAT,
THE COURTS HAVE REPEATEDLY FOUND
THAT WAS THE JURY-- BECAUSE THE
JURY WASN'T ASKED THE RIGHT
QUESTION OR THEY WEREN'T ASKED
AT ALL, YOU STRIKE THAT
RECLASSIFICATION, AND YOU GO
BACK FOR RESENTENCING ON THE
UNDERLYING OFFENSE.
AND THERE'S NO REASON TO TREAT
THE STATUTES HERE DIFFERENTLY.
THEY SHOULD OPERATE THE EXACT
SAME WAY AS ANY OTHER
RECLASSIFICATION OR, FOR THAT
MATTER, ENHANCEMENT.
THE ISSUE IS SENTENCING, NOT THE
UNDERLYING OFFENSE OF ATTEMPTED
SECOND-DEGREE MURDER OR WHICH HE
WAS PROPERLY CONVICTED OF.
YOUR HONOR, I HAVE A COUPLE OF
MINUTES LEFT.
I WOULD LIKE TO TAKE A MOMENT TO
ADDRESS THE CLOSING ARGUMENT.
AGAIN, THERE WAS NO CONFLICT
WITH THE 5TH DISTRICT, DCA'S
DECISION THERE.
THEY PROPERLY APPLIED THE
CORRECT FUNDAMENTAL ERROR
ANALYSIS.
THE FIRST ARGUMENT THAT WAS NOT

PRESERVED BY OBJECTION WITH
REGARDS TO THE SEINFELD ANALOGY
WHICH, AS I NOTE, IT WAS
DIRECTLY RESPONSE I TO DEFENSE
COUNSEL'S ARGUMENT--
>> IT WAS PRESERVED BY, IT
WAS-- THERE WAS AN OBJECTION,
IT JUST WAS A MISSTATEMENT.
WASN'T THERE AN OBJECTION?
>> THERE WAS AN OBJECTION BUT
NOT THAT IT WAS DISPARAGING OR
RIDICULING OR ANYTHING TO THAT
EFFECT, WHICH IS WHAT WAS LATER
ARGUED.
THAT WAS NOT THE OBJECTION IN
THE TRIAL COURT PROBABLY BECAUSE
IN CONTEXT IT WAS DIRECTLY
RESPONSIVE, IT WAS JUST AN
ANALOGY TO DRAW A PICTURE FOR
THE JURORS, TRYING TO RELATE TO
POPULAR CULTURE--
>> SO YOU THINK THOSE KIND OF
ARGUMENTS ARE ACTUALLY
PROPER?
>> I THINK THEY CAN GO TOO FAR
DEPENDING ON THE CIRCUMSTANCES,
BUT THEY HAVE TO BE REVIEWED IN
CONTEXT.
THIS WAS SIMPLY, THIS REMINDS ME
OF THIS TELEVISION SHOW,
SOMETHING THAT'S NOT UNCOMMON
THIS MANY TRIAL PRACTICE IN
GENERAL-- IN TRIAL PRACTICE IN
GENERAL FOR ATTORNEYS TO TRY TO
RELATE TO THE JURY.
AND, AGAIN, IT WAS DIRECTLY
RESPONSIVE TO THIS ARGUMENT SET
FORTH THAT THE BULLET COULD GO
FORWARD, TURN AROUND, COME BACK
AGAIN IN THE OTHER DIRECTION.
AND I WOULD NOTE IT WAS ALSO
VERY BRIEF.
IT WAS LESS THAN A PAGE IN THE
TRIAL TRANSCRIPT, MAKING THIS
ANALOGY.
THEN AN OBJECTION CAME TO, WELL,
THAT'S NOT EXACTLY WHAT I SAID,
YOUR HONOR, WHICH IS NOT THE
CORRECT OBJECTION TO PRESERVE IT
FOR APPELLATE REVIEW.

SO THAT ISSUE WAS PROPERLY
ANALYZED UNDER THE FUNDAMENTAL
ERROR ANALYSIS.
THE ONLY ONE THAT WAS PROPERLY
PRESERVED BY OBJECTION WAS THE
PROSECUTOR MAKING A COMMENT THAT
DEFENSE COUNSEL JUST HAS TO DO
HER JOB HERE.
AND, AGAIN, THE COURT PROPERLY
ANALYZED THAT WHEN IT'S READ IN
CONTEXT, IT PROBABLY
SHOULDN'T-- IT WAS NEEDLESS.
THERE WAS NO REASON FOR THE
PROSECUTOR TO SAY THAT, BUT IT
WAS ONE MOMENT IN THE CONTEXT OF
AN ENTIRE ARGUMENT.
HE WENT ON TO OTHER ISSUES.
AGAIN, THERE WAS NO OTHER
PRESERVED ISSUES AFTER THAT.
SO THE 5TH PROPERLY LOOKED AT
THE ENTIRE, THE ENTIRETY OF THE
REBUTTAL CLOSING ARGUMENTS AND
CONDUCTED--
>> WELL, THEY--
[INAUDIBLE]
THEY JUST DIDN'T THINK IT WAS
REVERSIBLE.
ISN'T THAT--
>> EXACTLY.
>> I MEAN, THIS ARGUMENT, THIS
PROSECUTOR WENT ON AND ON ABOUT
THE SCENARIO'S JUST SO
INCREDIBLE, IT'S NOT WORTHY, I
WOULD SUBMIT.
BUT BEFORE THAT HE-- AND YOU
CERTAINLY CAN SHOW WHY THE
THEORY DOES NOT MAKE ANY SENSE.
SO I THINK THE QUESTION OF
WHETHER HE WENT FARTHER OR NOT,
IT SEEMS LIKE THE 5TH DISTRICT
ALREADY MADE THEIR COMMENTS THAT
THEY THOUGHT IT WAS
INAPPROPRIATELY DISPARAGING,
DIDN'T THEY?
>> YES.
ON THE WHOLE, THE 5TH DISTRICT
POINTED OUT THAT THEY DIDN'T
LIKE THAT ARGUMENT WITH THE
"SEINFELD" ANALOGY AND SOME OF
THE OTHER COMMENTS THAT THE

PROSECUTOR MADE.
BUT, AGAIN--
>> DO YOU THINK THE 5TH DISTRICT WAS WRONG?
WOULD YOU SAY THOSE ARE APPROPRIATE COMMENTS?
>> I-- RESPECTFULLY, I DO THINK THEY WERE WRONG WITH REGARDS TO THE FIRST ONE.
I THINK THE "SEINFELD" ANALOGY READ IN CONTEXT REALLY DIDN'T GO VERY FAR.
IT WAS A BRIEF ARGUMENT DIRECTLY RESPONSIVE.
>> WHICH IS MOCKING-- THE WHOLE REBUTTAL IS MOCKING THE DEFENSE AND THE DEFENSE LAWYER.
I MEAN, IT'S, YOU KNOW, IT'S THERE, AND I THINK THAT'S WHAT THE 5TH DISTRICT SAW AND PROBABLY IS NOT-- I WOULD AGREE WITH YOU, IT MAY NOT BE FUNDAMENTAL ERROR, BUT TO SAY IT WAS JUST A BRIEF COMMENT, IT WASN'T EXACTLY A LONG ARGUMENT, BUT THE WHOLE ARGUMENT WAS THIS IS, HE'S MAKING FUN OF THE DEFENSE AND THE DEFENDANT.
>> I WOULD CHARACTERIZE IT AS JUST SAYING, RECITING FOR THE JURY WHICH IS WHAT THE DEFENDANT SAID,
HERE'S HIS TESTIMONY--
>> IT REMINDS ME OF "SEINFELD" WHEN EVERYONE THINKS THAT'S A COMEDY.
HE'S SAYING THIS WHOLE DEFENSE IS A COMEDY.
>> I WOULD DISAGREE WITH THAT CHARACTERIZATION--
CHARACTERIZATION, YOUR HONOR.
I THINK IT WAS MADE SPECIFICALLY AS TO THE THEORY OF THE TRAJECTORY OF THE BULLET, AND HE MADE THAT POINT ABOUT THE TRAJECTORY OF THE BULLET, AND THEN HE MOVED ON.
HE WENT ON TO SAY HERE IS WHAT DEFENDANT IS TESTIFYING TO.
HERE IS WHAT HE IS SAYING

HAPPENED.
THAT DOESN'T MAKE SENSE, THAT'S NOT COMMON SENSE.
AND THAT'S DIRECTLY RESPONSIVE TO THE DEFENSE AND WHOLLY APPROPRIATE FOR A PROSECUTOR TO POINT OUT WHICH PART OF THE DEFENSE DOESN'T MAKE SENSE AND WHY THE JURY SHOULD NOT ACCEPT THAT VERSION.
AND, AGAIN, WITH REGARDS TO FUNDAMENTAL ERROR, THE QUESTION IS DOES IT REACH DOWN INTO THE HEART OF THE TRIAL SUCH THAT A VERDICT OF GUILTY COULD NOT HAVE BEEN OBTAINED BUT FOR THESE COMMENTS.
HERE THERE WAS A PLETHORA OF EVIDENCE.
THE DEFENDANT ADMITTED TO VIRTUALLY EVERY FACT ASIDE FROM SAYING THAT HE WAS SHOOTING INTO THE AIR CELEBRATION.
SO GIVEN THE TESTIMONY OF THE DEFENDANT HIMSELF AS WELL AS THE LAW ENFORCEMENT OFFICERS INVOLVED, THERE'S NO WAY THAT THESE HANDFUL OF COMMENTS IN CLOSING ARGUMENT WERE FUNDAMENTAL ERROR--
>> [INAUDIBLE]
>> I'M SORRY, YOUR HONOR?
>> WHY SAY THOSE THINGS?
WE GO THROUGH THIS CASE AFTER CASE AFTER CASE WHERE THE PROSECUTOR SAYS HARMLESS ERROR.
LOOK AT ALL THE EVIDENCE WE HAVE.
I MEAN, WAS THERE ANY EVIDENCE IN THE TRIAL ABOUT THE "SEINFELD," KEITH FERNANDEZ, KENNEDY ASSASSINATION THING?
WAS THERE ANY EVIDENCE OF THAT IN TRIAL?
>> NO, NO, YOUR HONOR.
>> WHERE DID THAT COME FROM?
I THOUGHT WE WERE SUPPOSED TO SPEAK FROM EVIDENCE.
>> AGAIN, I THINK IT WAS JUST AN ANALOGY REGARDING THE TRAJECTORY

OF THE BULLET, AND THERE WAS A
COMMENT ON THE EVIDENCE OR THE
EVIDENCE THAT SUGGESTED IT
SHOULD BE VIEWED BY DEFENSE
COUNSEL.
AS TO WHY OCCASIONALLY
PROSECUTORS MAKE AN ERRANT
COMMENT HERE AND THERE IN
CLOSING ARGUMENT, I CAN ONLY
BE--
>> YOU'RE BEING KIND WITH THE
WORD "OCCASIONALLY."
[LAUGHTER]
>> THANK YOU.
>> THANK YOU.
>> MAY IT PLEASE THE COURT, I
WOULD SUGGEST TO THE COURT THAT
THE FACT THAT IT WAS A SEPARATE
VERDICT FORM ON A LAW
ENFORCEMENT ISSUE IS IRRELEVANT.
THE KNOWLEDGE OF LAW ENFORCEMENT
IS AN ESSENTIAL ELEMENT OF THE
OFFENSE OF ATTEMPTED MURDER OF A
LAW ENFORCEMENT OFFICER, AND
THAT'S CLEAR BASED ON THE UNITED
STATES SUPREME COURT'S DECISION
IN APPRENDI AND THE CASES AFTER
THAT INCLUDING ONE DECIDED IN
2013 WHERE THE U.S. SUPREME
COURT SAID WHERE AN AGGRAVATING
FACT PRODUCES A HIGHER
SENTENCING RANGE, THE FACT IN
QUESTION IS AN ELEMENT OF A
DISTINCT AND AGGRAVATED CRIMINAL
OFFENSE.
THAT'S WHAT WE HAVE HERE.
>> BUT THEY, THEY'RE SAYING THAT
IN THAT CASE-- HOW DO YOU
PRONOUNCE IT?
AL DEAN?
>> I THINK SO.
>> THAT THE REMEDY WAS TO REDUCE
IT TO THE NEXT OFFENSE.
IT GOES BACK-- I THINK WE'RE
ALMOST HERE ARGUING BACK TO THE
REMEDY AS OPPOSED TO WHETHER IT
WAS WRONG OR NOT--
>> THE REASON--
>> AND WHETHER, ALTHOUGH I HEARD
THAT-- I HEARD THE STATE SAY IF

IT WAS AN ESSENTIAL ELEMENT,
THEY'D AGREE.
SO WHAT'S THE DIFFERENCE WITH
WHAT HAPPENED?
>> IN--
[INAUDIBLE]
THE JURY WAS GIVEN THE
OPPORTUNITY TO MAKE A FINDING
THAT INCREASED THE MANDATORY
MINIMUM FROM FIVE TO SEVEN
YEARS.
IT STARTED OUT AS FIVE AND ENDED
UP SEVEN IF THE DEFENDANT
BRANDISHED A FIREARM DURING THE
OFFENSE.
THE JURY FOUND HE DID NOT, SO
THEY WERE ACTUALLY GIVEN THE
PROPER INSTRUCTIONS, AND THE
VERDICT ITSELF SAID WE'RE NOT
FINDING BRANDISHING.
THEN THE TRIAL JUDGE MADE THAT
FINDING AND INCREASED THE
MANDATORY BY HIMSELF.
SO IT'S DIFFERENT HERE.
AND THE IMPORTANT DISTINCTION
AND WHY I DISAGREE WITH THESE
CASES CITED BY THE CASE, JASR,
RODRIGUEZ WHERE THE COURTS
REMANDED FOR RESENTENCING ON
BATTERY ON LEO SITUATION--
CASES, IN BOTH OF THOSE CASES
THE APPELLATE COURT FOUND THERE
WAS INSUFFICIENT EVIDENCE TO
SUPPORT THAT THE OFFICER WAS
ENGAGED IN THE LAWFUL
PERFORMANCE OF A LEGAL DUTY.
SO THERE WAS INSUFFICIENT
EVIDENCE, NOT AN ERRONEOUS JURY
INSTRUCTION OR TO OMITTED
ELEMENT.
>> IS THERE ANY DIFFERENT YOU
CAN SEE LOOKING AT THE
STATUTES-- AGAIN, I JUST WANT
TO MAKE SURE-- BETWEEN
AGGRAVATED ASSAULT ON A LAW
ENFORCEMENT OR AGGRAVATED
BATTERY AND AGGRAVATED-- AND
ATTEMPTED FIRST-DEGREE MURDER OF
A LAW ENFORCEMENT OFFICER?
>> I DO NOT SEE A DIFFERENCE,

YOUR HONOR.
AND I THINK THE REMEDY IS CONTROLLED NOT BY JASR AND NOT BY RODRIGUEZ, BUT AS JUSTICE PARIENTE INDICATED, BY THE ORTIZ CASE WHERE THERE WAS AN IMPROPER INSTRUCTION ON AGGRAVATED BATTERY ON A VICTIM 65 OR OLDER.
THE JURY WAS INSTRUCTED ON AN UNCHARGED THEORY, AND THEY REMANDED FOR A NEW TRIAL--
>> YOU REALIZE THIS WORKS BOTH WAYS.
IN SOME CASES THE DEFENDANT ACTUALLY WANTS THE LESSER CRIME, AND THEY WOULD BE HAPPY TO TAKE THE 15-YEAR SENTENCE.
SO IT CUTS BOTH WAYS.
>> IT DOES.
AND IN THIS CASE, IT WOULD WORK IN THE DEFENDANT'S FAVOR--
>> YOUR ARGUMENT, KIND OF BACKING UP, MAKES IT SOUND LIKE AN ENHANCEMENT TO ME.
DO YOU HAVE ANOTHER ARGUMENT AS TO WHY THIS SHOULD BE TREATED SUBSTANTIVELY AS OPPOSED TO ENHANCEMENT?
>> WELL, IT'S CLEAR WHERE THE AGGRAVATED FACT REDUCES A HIGHER SENTENCING RANGE, IT'S THE ELEMENT OF A DISTINCTIVE AGGRAVATED CRIME.
AND THIS COURT'S DECISION IN DARST CLEARLY SAYS THAT IT'S A UNANIMOUS DECISION FROM THIS COURT.
I DON'T KNOW HOW THE COURT DOESN'T FIND IT TO BE A DISTINCT CRIMINAL OFFENSE, ATTEMPTED MURDER OF A LAW ENFORCEMENT OFFICER, WHEN YOU READ THE LANGUAGE AND WHEN YOU APPLY THIS COURT'S DECISION IN DARST.
I THINK THOSE CLEARLY ESTABLISH THAT THIS OFFENSE IS DISTINCT FROM ATTEMPTED MURDER OF A--
ATTEMPTED MURDER, ATTEMPTED SECOND-DEGREE MURDER.

ATTEMPTED SECOND-DEGREE MURDER
OF A LAW ENFORCEMENT OFFICER.
THAT'S INDICATED BY THIS COURT'S
DECISIONS AND THE U.S. SUPREME
COURT'S DECISIONS.
AS TO CLOSING, JUSTICE LABARGA
HAS IT RIGHT, THERE'S ABSOLUTELY
NO REASON TO MOCK-- THE WHOLE
REBUTTAL IS MOCKING.
IT'S COMPARING IT TO A COMEDY,
COMPARING IT TO AN OUTRAGEOUS
CONSIDERATION, A SHOW THAT'S
CONSIDERED OUTRAGEOUS.
IT'S THE LAST WORD THE
PROSECUTOR MAKES.
WE THINK UNDER ANY STANDARDS
HARMLESS ERROR, FUNDAMENTAL,
ABUSE OF DISCRETION, IT REQUIRES
A NEW TRIAL ON ALL THREE
CONVICTIONS, AND WE'D IS THAT
ALL THREE CONVICTIONS BE
REVERSED.
THANK YOU.
>> THANK YOU FOR YOUR ARGUMENTS.
WE'RE IN RECESS FOR TEN MINUTES.