

>> SUPREME COURT FLORIDA IS NOW  
IN SESSION, PLEASE BE SEATED.  
>> WE APOLOGIZE FOR THAT.  
OUR NEXT CASE IS NUMBER 120 FUN,  
14, 79, DAVID WILLIAM TRAPPMAN  
VERSUS THE SUPREME COURT.  
>> THANK YOU, MISTER CHIEF  
JUSTICE.  
MAY IT PLEASE THE COURT AND  
COUNSEL.  
MY NAME IS MICHAEL MCNAMARA FOR  
THE SEVENTH JUDICIAL CIRCUIT AND  
I'M REPRESENTING DAVID WILLIAM  
TRAPPMAN, THE PETITIONER HERE.  
WHAT THE PETITIONER IS  
REQUESTING THE COURT DO IN THIS  
CASE IS SEND THE CASE TO THE  
SANTA ROSA COUNTY TRIAL COURT  
WITH INSTRUCTIONS TO VACATE  
COUNT 2 ON DOUBLE JEOPARDY  
GROUND AND RESENTENCED ACCOUNT  
ONE, THAT WAS THE FIRST DEGREE  
MISDEMEANOR, THE COURT WOULD  
CERTAINLY HAVE IMPOSED THE SAME  
SENTENCE ON THAT ONE.  
THE REASON IS THE FIRST DISTRICT  
COURT OF APPEAL --  
>> WHAT WERE THE SENTENCES?  
>> 10 YEARS ON COUNT ONE, 5  
YEARS ON COUNT 2, WHEN YOU'RE ON  
COUNT 3, EVERYTHING CONCURRENT.  
EVERYTHING CONCURRENT.  
>> COUNT ONE --  
>> AGGRAVATED BATTERY ON A  
LAW-ENFORCEMENT OFFICER, COUNT 2  
WAS BATTERY.  
>> COUNT 2 WAS FELONY?  
>> YES, SIR.  
>> COUNT ONE WAS THE SECOND.  
>> THE FIRST-DEGREE FELONY,  
MAXIMUM PUNISHMENT, MAXIMUM  
EXPOSURE 36 YEARS IN THE  
DEPARTMENT OF CORRECTIONS.  
THE REASON THE PETITIONER  
BELIEVES IT SHOULD BE SENT BACK  
TO THE TRIAL COURT AND FIRST  
DISTRICT COURT OF APPEALS IS THE  
DUAL CONVICTION VIOLATES DOUBLE  
JEOPARDY.  
THE REASON FOR THAT IS THE  
CHARGING DOCUMENT DOES NOT  
ALLEGE SPECIFICALLY THE BATTERY  
ON LAW ENFORCEMENT OFFICER WAS A

SHOW.

THEY HAVE BEEN WHAT THEY BELIEVE SHOWED BUT THIS COURT HAS BEEN CLEAR WHEN YOU DO A DOUBLE JEOPARDY ANALYSIS BEFORE YOU REACH THE DISTINCT ASK ANALYSIS YOU LOOK AND SEE WHETHER OR NOT THE CHARGING DOCUMENT WHICH IS ON PAGE 17 OF THE RECORD ALLEGES DISTINCT ACTS AND COUNT 2, THE LANGUAGE OF COUNT 2 IS THE LESSER INCLUDED LANGUAGE OF COUNT ONE.

COUNT ONE DOES -- THE ONLY ACTUAL DIFFERENCE BETWEEN COUNT 2 AND COUNT ONE IS IN COUNT ONE, THE INTENTIONAL TOUCH OR STRIKE WAS AGAINST THE WILL OF OFFICER BIRD AND COUNT 2 SAID THE INTENTIONAL TOUCH OR STRIKE WAS WITHOUT OFFICER BIRD'S CONSENT.

>> SAME DOUBLE LIBERTY ANALYSIS HAD IT BEEN SEPARATELY ALLEGED. FOR DETERMINING WHETHER OR NOT THE CLIENT WAS TWICE IN JEOPARDY FOR LOSS OF LIBERTY.

>> ULTIMATELY, WE WOULD SHOW DOUBLE JEOPARDY BARS CONVICTION HEADED BEEN PROPERLY WHY AND COUNT ONE, THE BULLDOG IS THE DEADLY WEAPON, HEADCOUNT 2 ALLEGED THE INTENTIONAL AND ACTUAL TOUCH BEEN A SHOVE THAN WE WOULD MOVE TO THE DISTINCT ACTS ANALYSIS AND THE FOUR FACTORS EXPRESSED, CITED IN THE BRIEFS, GOES THROUGH NUMBER ONE WHETHER THERE IS A BREAK.

IT IS NOT A TEMPORAL BREAK.

THIS WAS OFFICER BIRD'S TESTIMONY, HE TRIED TO SHOVE DAVID WILLIAM TRAPPMAN OUT OF HOUSE, DAVID WILLIAM TRAPPMAN SHOVED HIM BACK.

OFFICER BIRD REENGAGED, HE SAID DOG UP.

>> TELL ME UNDERSTAND HOW THE INTENTION IS THE SAME, TAKE A STEP BACK, THERE'S A DESIRE TO REPEL THE OFFICER BUT IT IS FAIR TO SAY IT IS MORE GRANULAR THAN THAT.

THE INTENTION OF THE SHOVE IS TO PUSH HIM BACK WHEREAS THE

INTENTION OF STICKING A DOG ON SOMEONE IS TO INFLICT GRIEVOUS BODILY HARM, THAT WOULD BE AKIN TO CHANGING WEAPONS IN THE MIDDLE OF A BATTER WHICH MIGHT CAUSE TWO SEPARATE OFFENSES.

>> THAT IS NUMBER 4, STRAIGHT TO NUMBER 4 AS FAR AS CONSIDERATIONS.

THE LANGUAGE IS NOT THAT IT IS THE SAME INTENT BUT WHETHER A NEW INTENT IS FORMED BETWEEN THE ACTS A WE ARE LIMITED TO LOOKING BETWEEN THE SHOVE AND DOG UP AND IN BETWEEN THOSE TWO THINGS IS THERE CHANGE IN THE INTENT.

BASED ON THE TESTIMONY OF OFFICER BIRD THERE WAS NO CHANGE OF INTENT BECAUSE OFFICER BIRD TESTIFIED THEY STARTED, THEY ENTERED --

>> WHY IS OFFICER BIRD'S TESTIMONY AS TO THE INTENT UNDER CONSIDERATION?

HE IS PERCEIVING THE ACTIONS. ISN'T THE RELEVANT INTENTION THE INTENT OF THE DEFENDANT?

>> OFFICER BIRD'S TESTIMONY RELATING TO WHAT THE DEFENDANT WAS DOING BECAUSE OFFICER BIRD'S OBSERVATIONS OF THE DEFENDANT SHOW THE DEFENDANT'S INTENT. WHEN THE OFFICERS ARRIVED AT THE HOUSE THE DOGS ARE MILLING AROUND THE OFFICERS, NOT POSING ANY THREAT AT ALL.

MR.

DAVID WILLIAM TRAPPMAN IS CONFRONTATIONAL WITH THE OFFICERS, INSTRUCTED TO GO OUTSIDE, HE GOES OUTSIDE AND OFFICER BIRD TESTIFIES HE HAS TWO DOGS OUT THERE, BASHING THEIR HEADS TOGETHER, RILING THEM UP, GETTING THEM READY TO GO.

ACCORDING TO OFFICER BIRD AND ONE OF THE OTHER OFFICERS WHEN THEY ENTER THE HOUSE MR.

DAVID WILLIAM TRAPPMAN MADE A COMMENT ABOUT MY DOGS DON'T BITE YOU.

>> THAT ALL MIGHT BE INDICATIVE OF DESIRE TO INTIMIDATE AND

CREATE FEAR, HAVE NOTION OF INTENT A MOMENT AND IMPULSES. WHY WON'T WE THINK OF THE SCENARIO HERE IN WHICH THERE IS A SEPARATE IMPULSE WHICH ACTUATES THIS COMMAND TO THE DOG WHICH RESULTS, IN THE BITING OF THE VICTIM AND THE THAT IS WHAT OUR FOCUS SHOULD BE?

>> THE FOCUS NEEDS TO BE ON THE INTENT, NOT NEW OR SEPARATE IMPULSE.

>> THERE'S A LOT OF TALK ABOUT IMPULSE.

GOING BACK TO THAT.

SOMETIMES THERE IS CONFUSION, LET'S STIPULATE, IT IS NOT A MODEL OF CLARITY AND SOMETIMES I THINK THERE'S A CONFLATION OF THE NOTIONS OF IMPULSE AND INTENT BUT THERE'S A DIFFERENCE BETWEEN INTENTION AND VOLITIONAL.

>> I UNDERSTAND YOUR POINT.

THE ISSUE IS CLEAR BECAUSE THE CHARGING DOCUMENTS, COUNT 2 IS LESSER INCLUDED, THE JURY INSTRUCTIONS, LESSER OF COUNT ONE IS THE SAME LANGUAGE, VERBATIM AS COUNT 2.

THEY DON'T GET THE DISTINCT ACT ANALYSIS.

THE POINT ABOUT THE DOG AND THE IMPULSE TO USE THE DOG WAS PRESENT, THAT'S SHOWN BY THE FACT THAT DAVID WILLIAM TRAPPMAN DID NOT LEAVE THE DOGS IN THE YARD, IT WOULD BE DIFFERENCE TO CONSIDER THE DOGS BEING A GUN, IF HE'S BRINGING THE GUN WITH THEM, CHAMBERING ROUNDS, OFFICERS IN THE HOUSE, ONE OF THE FIRST THINGS HE SAYS AS I HOPE YOU DON'T GET SHOT WHEN YOU'RE IN HERE, AND ASSAULT IS A BATTERY THAT HASN'T HAPPENED YET.

WHEN IT COMES TO THE LANGUAGE I THINK THAT HE DOES HAVE THAT INTENT THE ENTIRE TIME.

WHEN YOU READ THE RECORD, WHEN YOU READ THE TESTIMONY OF THE OFFICERS, IT'S JUST, YOU KNOW, THE ANXIETY IS PALPABLE.

YOU KNOW THESE DOGS ARE GOING TO GET USED, IT'S JUST A QUESTION OF WHEN BASED ON THEM KNOWING ABOUT AND PARTICULARLY MR. TRAPPMAN AGITATING THE DOGS OUT IN THE YARD BEFORE HE GOES BACK IN THE HOUSE TO REENGAGE WITH THE OFFICERS.

>> LET ME -- JUST TO CLARIFY WHAT HAPPENED HERE, MY UNDERSTANDING IS, IS THAT HE WAS TOLD HE COULDN'T COME IN. WHEN HE TRIED TO COME IN, THE OFFICER TOLD HIM HE COULDN'T COME IN, AND THEN HE SHOVED THE OFFICER. ONE HAND.

IS MY -- AND AT THAT TIME, THE OFFICER SHOVED BACK.

DID MR. TRAPPMAN AT THAT POINT IN TIME HAVE THE PIT BULL BY THE COLLAR WITH THE OTHER HAND?

>> I DON'T, I DON'T REMEMBER.

>> I MEAN, I THOUGHT, I THOUGHT HE HAD THE DOG IN ONE HAND, THE PIT BULL IN ONE HAND HOLDING HIM BY COLLAR, AND THAT'S WHEN THE OFFICER, HE PUSHED -- SHOVED THE OFFICER, THE OFFICER SHOVED HIM BACK.

HE FELL KIND OF BACK, AND HE TOLD THE DOG, YOU KNOW, DO WHATEVER.

>> AND, JUSTICES, I STAND HERE RIGHT NOW, I DON'T REMEMBER THAT NUANCE IN THE TESTIMONY.

>> OKAY.

>> LET'S SAY IF HE DID HAVE THE DOG AT THE SCRUFF OF THE NECK, THAT'S WHAT THE TESTIMONY -- SCRUFF OF THE NECK OR THE COLLAR -- I THINK THAT WOULD SHOW EVEN MORE HE HAS THE INTENT TO USE THE DOG.

BUT DOGS ARE SUCH YOU DON'T NEED TO HAVE PHYSICAL CONTACT WITH THEM.

YOU CAN ORDER A DOG TO DO SOMETHING FROM A GREAT DISTANCE AWAY, AND THE DOG WILL ACT.

>> OKAY.

I MEAN, BECAUSE WHAT I'M SAYING IS IF THAT'S THE CASE, IT SEEMS TO BE ONE EPISODE OF THE

SHOVING, SHOVING BACK, THE DOG AS OPPOSED TO BEING SHOVED BACK AND GOING TO GET THE DOG AND COMING BACK.

THAT WOULD INDICATE TWO EPISODES.

>> I WOULD SAY THAT IN THE SECOND PART OF THE EXAMPLE YOU GAVE WHERE HE NEEDS TO GO RETRIEVE THE DOG AND COME BACK, I THINK THAT WOULD STILL BE THE SAME EPISODE.

BUT I THINK YOU WOULD BE TALKING ABOUT WHETHER OR NOT DISTINCT ACTS THAT THE LEGISLATURE INTENDED TO PUNISH DIFFERENTLY TO OCCURRED DURING THAT EPISODE.

SO I THINK HERE WHEN WE RUN THROUGH THE ANALYSIS FOR THE DISTINCT ACTS WHICH, AGAIN, THE PETITIONER SAYS WE DON'T EVEN ARRIVE AT SINCE THE CHARGING DOCUMENT --

>> COUNSEL, COULD YOU POINT ME TO EXACTLY WHERE IN YOUR BRIEF YOU POINT TO THE CHARGING DOCUMENT?

>> IN MY BRIEF IT HAS BEEN ARGUED THE CHARGING DOCUMENT?

>> YES.

>> I BELIEVE WE CITED TO LEE WHICH THE COURT IS AN --

>> BEG YOUR PARDON?

>> WE CITED TO LEE, THIS COURT'S OPINION FROM 2018 WHERE IT RESOLVED -- WELL, IT REVERSED THE FIRST DISTRICT COURT OF APPEAL WHERE IT JUMPED STRAIGHT FROM THE INFORMATION AND SKIPPED OVER THE CHARGING DOCUMENT AND RIGHT INTO ANALYZING THE EVIDENCE.

>> IS THAT IN YOUR INITIAL BRIEF?

>> I DON'T RECALL IF IT'S IN THE INITIAL --

>> YOU NEED TO ARGUE THINGS HERE THAT ARE ARGUED IN YOUR INITIAL BRIEF, AS I'M SURE YOU KNOW.

>> YES, SIR.

>> SO IF YOU COULD MAYBE FIGURE OUT EXACTLY WHERE THAT IS IN YOUR INITIAL BRIEF, IT'D BE HELPFUL.

I'M NOT SAYING IT'S NOT --

>> YES, SIR.

I'LL TAKE A LOOK AT IT DURING MY  
DOWN TIME AND ADDRESS IT.

>> DOESN'T THE TEXT OF THE  
BATTERY STATUTE ESSENTIALLY MAKE  
IT A MATTER OF PROSECUTORIAL  
DISCRETION WHETHER TO CHARGE,  
YOU KNOW, EACH SEPARATE KIND OF  
UNWANTED TOUCHING AS ITS OWN  
DISTINCT ACT VERSUS KIND OF  
TREATING IT ALL AS A COURSE OF  
CONDUCT IN YOU JUST POSITION ON  
THE WORDS OF THE STATUTE?

>> YES, I THINK THERE IS A BROAD  
AMOUNT OF PROSECUTORIAL  
DISCRETION TO CHARGE SEPARATE  
ACTS, BUT HERE THE SEPARATE ACTS  
WERE NOT ALLEGED IN THE  
INFORMATION.

>> BACKING UP A QUOTE FROM  
WHALEN V. UNITED STATES, UNDER  
THE QUESTION UNDER THE DOUBLE  
JEOPARDY CLAUSE WHETHER  
PUNISHMENTS ARE MULTIPLE IS  
ESSENTIALLY ONE OF LEGISLATIVE  
INTENT.

SO THAT'S WHERE WE START.

AND I'M WONDERING, AS I  
UNDERSTAND YOUR ARGUMENT,  
77501.124 GIVES US THE ANSWER IN  
THIS CASE, IS THAT CORRECT?

>> YES.

SPECIFICALLY IN 4B, 2 AND 3.

>> AND I WANT TO GO UP TO A AND  
LOOK AT 4A.

WHOEVER IN THE COURSE OF ONE  
CRIMINAL TRANSACTION OR EPISODE  
COMMITS AN ACT OR ACTS WHICH  
CONSTITUTE ONE OR MORE SEPARATE  
CRIMINAL OFFENSES.

AND HERE, AS I UNDERSTAND YOUR  
ARGUMENT, THE CRIMINAL  
TRANSACTION RELATED TO THE  
AGGRAVATED BATTERY CHARGE  
ARGUABLY STARTED IN THE YARD  
WHEN THE DEFENDANT WAS EXCITING  
THE DOGS, IS THAT CORRECT?

>> OR EVEN EARLIER THAN THAT  
WHEN HE MAKES THE COMMENT ABOUT  
I HOPE MY DOGS DON'T BITE YOU.

>> AND THEN WHEN WOULD THAT  
EPISODE HAVE ENDED?

>> WHEN HE WAS TACKLED IN THE

YARD AND TAKEN INTO CUSTODY  
AFTER RESISTING WITHOUT  
VIOLENCE.

>> OKAY.

AND YOU ARGUED IN YOUR INITIAL  
BRIEF THAT THAT WAS ONE EPISODE,  
AND I DON'T BELIEVE THE STATE  
CONTRADICTED THAT.

THEY AGREED WITH YOUR STATEMENT,  
IS THAT CORRECT?

>> I BELIEVE THE LANGUAGE WAS  
THEY DID AGREE WITH THE  
STATEMENT OF FACTS AND THEY HAD  
OTHER ONES THEY WANTED TO  
EMPHASIZE, IS THE POSITION THEY  
TOOK IN THEIR ANSWER BRIEF.

>> SO THE ARGUMENT IS WE HAVE  
ONE CRIMINAL TRANSACTIONAL  
EPISODE THAT CONSTITUTES THE  
AGGRAVATED BATTERY THAT  
TEMPORARILY STARTS IN THE YARD  
EARLIER AND ENDS WHEN, AS YOU  
INDICATED, THEN WHOEVER THE  
COURSE OF THAT CRIMINAL EPISODE  
COMMITS AN ACT OR ACTS WHICH  
CONSTITUTE ONE OR MORE SEPARATE  
CRIMINAL OFFENSES, YOU HAD  
ARGUED THAT THE BATTERY  
COMMITTED DURING THAT PERIOD WAS  
A SEPARATE CRIMINAL OFFENSE.

>> THE STATE IS ARGUING THAT.  
I'M ARGUING THAT IT'S NOT.  
THE STATE COULD HAVE CHARGED IT  
THAT WAY BY SAYING IN COUNT TWO  
THE ACTUAL AND INTENTIONAL TOUCH  
OR STRIKE WAS THE SHOVE, BUT  
SINCE THEY DID NOT DO THAT IN  
THE INFORMATION, THEN WE DON'T  
REACH THE DISTINCT ACTS  
ANALYSIS.

IT'S RESOLVED JUST ON THE  
CHARGING DOCUMENT AND COUNT TWO  
IS THE LESSER OF COUNT ONE.

>> OKAY.

BUT UNDER THE STATUTE THEY --  
OKAY, I UNDERSTAND YOUR  
ARGUMENT.

WHEN YOU GET DOWN TO B, WHEN IT  
TALKS ABOUT THE SPECIFIC  
LEGISLATIVE INTENT, DOESN'T IT  
INDICATE THAT EVEN IF IT IS  
CONSIDERED A SEPARATE ACT UNDER  
A BECAUSE IT'S AN ACT THAT'S  
COMMITTED AS PART OF ONE

TRANSACTION OR DURING THE COURSE OF ONE TRANSACTION OR EPISODE, THAT IT IS STILL SUBSUMED AND ONLY ONE PUNISHMENT IS GIVEN BECAUSE OF THE DEFENSES OR DEGREE VARIANCE OF ONE ANOTHER OR, ALTERNATIVELY, IT'S A LESSER INCLUDED.

>> YES, EITHER THAT OR ALTERNATIVELY.

>> LET ME ASK YOU ABOUT B AND WHAT B IS REALLY ABOUT.

NOW, IF WE HAD A CIRCUMSTANCE HERE WHERE THERE WAS NO SHOVING, THERE'S NO PUSHING BY YOUR CLIENT, MAYBE HE GETS SHOVED AND THEN HIS RESPONSE TO THAT IS UP DOG, UP DOG, THAT'S IT.

NOW, WE KNOW THAT -- AND LET'S JUST SAY THIS, A JURY COULD CONCLUDE THAT THE ACTS INVOLVED THERE CONSTITUTE A BATTERY. AND THEN BASED ON OTHER THINGS THEY COULD CONCLUDE THAT THE ACT INVOLVED THERE CONSTITUTED AGGRAVATED BATTERY.

ISN'T THAT THE KIND OF SCENARIO THAT B, 4B IS DESIGNED TO DEAL WITH SO THAT YOUR CLIENT WOULD NOT BE EXPOSED TO THE PUNISHMENT FOR THE BATTERY, BUT HE CAN'T COMMIT THE AGGRAVATED BATTERY WITHOUT COMMITTING A BATTERY. AND YOUR CLIENT WOULD NOT BE EXPOSED TO A PUNISHMENT FOR THE BATTERY AND THE AGGRAVATED BATTERY BASED ON THAT ONE ACT.

ISN'T THAT WHAT 4B IS ABOUT?

>> 4B YOU HAVE TO COME BACK AND YOU HAVE TO LOOK AT WHAT WAS CHARGED --

>> WELL, LET'S PUT ASIDE THAT BECAUSE I'M STILL -- I'VE LOOKED IN YOUR BRIEF.

I CAN'T FIND IN YOUR TABLE OF CASES A REFERENCE TO LEE.

AGAIN, IT MIGHT BE THERE.

THAT MIGHT BE A MISTAKE AND, UNFORTUNATELY, I DON'T HAVE MY iPad WHERE I COULD SEARCH.

BUT LET'S PUT THAT ASIDE SO YOU CAN COME BACK AND SHOW ME WHERE THAT IS.

BUT PUTTING THAT ASIDE, ISN'T

THAT WHAT -- AND WE GET TO THIS  
DISTINCT ACTS ISSUE.  
ISN'T THAT WHAT B IS ABOUT?  
IT'S ABOUT NOT DOUBLING UP WHERE  
THERE'S A PARTICULAR ACT THAT  
CONSTITUTES AN AGGRAVATED LEVEL  
OF A CRIME BUT ALSO CONSTITUTES  
THE SUBSUMED CRIME.  
>> AND THAT IS A LEGAL QUESTION  
THAT THE COURT WOULD HAVE TO  
DETERMINE AFTERWARDS.  
I THINK THAT UNDER THE SCENARIO  
THAT YOU GAVE WHERE THERE WAS NO  
SHOVE, IT'S JUST DOG UP IN  
RESPONSE TO BEING PUSHED OUT OF  
THE DOOR BY THE OFFICER, THE  
STATE -- I BELIEVE THE STATE  
WOULD HAVE IN THEIR DISCRETION,  
IT WOULD BE PERMISSIBLE FOR THEM  
TO FILE THE EXACT INFORMATION  
THAT THEY FILED IN THIS CASE AND  
ALLEGE A LESSER INCLUDED OFFENSE  
IS COUNT TWO AND THEN WHETHER OR  
NOT THOSE TWO WITH CONVICTIONS  
COULD BOTH STAND WOULD BE A  
LEGAL ISSUE FOR THE COURT TO  
DECIDE AFTERWARDS.  
IF THE JURY FELT THAT COUNT ONE  
HAD ALL THE ELEMENTS MET THAT  
THEY WOULD NECESSARILY NEED TO  
FIND HIM GUILTY OF COUNT TWO AS  
WELL BECAUSE IT'S SIMPLY A  
LESSER INCLUDED OF COUNT ONE.  
>> COUNSEL, YOU'VE USED UP THREE  
MINUTES OF YOUR TIME.  
>> YES, THANK YOU, CHIEF  
JUSTICE.  
I'LL RESERVE THE REST.  
>> GOOD MORNING.  
THANK YOU, YOUR HONORS.  
MY NAME'S DAVID WELCH, AND I  
REPRESENT THE STATE OF FLORIDA  
IN THIS CASE.  
I BELIEVE THE COURT HAS STATED  
PREVIOUSLY IN THEIR CASES THAT  
THE DOUBLE JEOPARDY ANALYSIS IS  
A THREE-STEP ANALYSIS.  
DID THE OFFENSES OCCUR DURING  
THE SAME CRIMINAL EPISODE.  
DIFFERENT EPISODES, CLEARLY NOT  
DOUBLE JEOPARDY.  
YOU DON'T MOVE ON.  
BUT IF IT WAS THE SAME EPISODE  
AND THE STATE DID CONCEDE IN

THIS CASE THAT THIS TRANSACTION WAS ONE CRIMINAL CODE, YOU HAVE TO ASK IF THE OFFENSES WERE DISTINCT CRIMINAL ACTS.

AND AS THE STATUTE STATES, THE INTENT OF THE LEGISLATURE IS TO CONVICT FOR EACH CRIMINAL OFFENSE DURING EACH CRIMINAL EPISODE.

AND YOU CAN GO BACK TO BLOCKBERGER ITSELF, AS THIS COURT DID, I BELIEVE, IN GRAHAM, AND BLOCKBERGER LOOKED AT THE TWO ISSUES, WHETHER THE DEFENDANT COULD BE CHARGED MORE THAN ONCE UNDER THE SAME STATUTE FOR MULTIPLE ACTS WITHIN THE SAME CRIMINAL EPISODE AND, TWO, WHETHER DEFENDANT COULD BE CHARGED UNDER MORE THAN ONE STATUTE FOR A SINGLE ACT THAT OCCURRED WITHIN ONE CRIMINAL END EPISODE.

>> DO YOU -- THIS RUN BY YOUR UNDERSTANDING OF THE FACTS, HOW'D THIS HAPPEN?

>> MY UNDERSTANDING IS THE OFFICERS, THE THREE OF THEM ARRIVED AT VARIOUS POINTS OBSERVE A FELONY WARRANT ON THE APPELLANT'S WIFE.

HE WAS, I THINK, THE MAN IN THE SEALED WARRANT, I BELIEVE THE FIRST OFFICER WHO RESPONDED DIDN'T HAVE IT, SO THAT KIND OF STARTED THE CONFRONTATION BETWEEN THEM.

AT ONE POINT HE GOES OUTSIDE, AND THAT'S WHEN THE OFFICERS SAY HE SEEMS TO BE RILING UP THE DOGS.

AS I THINK AT SOME POINT THEN HE ATTEMPTS TO COME BACK INSIDE, AND THAT'S WHEN SERGEANT BYRD INITIALLY TRIED, AND I THINK IN HIS WORDS WERE GUIDE HIM BACK OUTSIDE WITH ONE ARM.

THE DEFENDANT RESPONDED TO THIS ONE- -- ONE ARM GUIDING HER BY PUSHING SERGEANT BYRD AT LEAST HARD ENOUGH, HE SAID, TO KNOCK HIM BACK SEVERAL FEET.

AT THIS POINT SERGEANT BYRD RESPONDED BY -- HE GRABBED

APPELLANT WITH TWO HANDS TO DRIVE HIM OUT, FORCIBLY TAKE HIM OUTSIDE.

AND THAT'S AT THE TIME WHEN APPELLANT SAID UP DOG, UP DOG.

>> SO WHERE WAS THE DOG AT THAT TIME?

DID HE HAVE HIM BY THE COLLAR?

>> I DON'T RECALL IF HE WAS HOLDING HIM BY THE COLLAR OR IF THE DOG WAS -- ONE OF THE DOGS, IT SOUNDS LIKE ONE OF THE DOGS WAS IN THE ROOM.

I'M NOT 100% SURE IF THE APPELLANT WAS HOLDING HIM OR NOT.

AND THEN THE OTHER DOG WAS SOMEWHERE ELSE IN THE HOUSE.

>> SO THE ENTIRE INCIDENT OCCURRED WHEN HE CAME BACK THE SECOND TIME.

>> YES.

>> THAT'S WHEN THE SHOVING --

>> THE TWO ACTS, YES.

>> -- AND THE DOG OCCURRED.

>> YES.

>> GO AHEAD, FINISH YOUR ANSWER, I DIDN'T MEAN TO --

>> OH, I WAS GOING TO GO BACK.

IF THEY'RE TWO DISTINCT CRIMINAL ACTS, WE DON'T GO TO

BLOCKBERGER, THE ELEMENTS.

BECAUSE I THINK ONE OF YOUR HONORS WAS TALKING ABOUT -- THE ELEMENTS TEST WOULD BE IF IT'S A SINGLE CRIMINAL ACT.

AND SO AN EXAMPLE OF ONE CRIMINAL ACT I BELIEVE THIS COURT'S USED IN THE PAST IS IF I CARJACK SOMEONE WHILE HOLDING A KNIFE, IT'S ONE ACT.

I'M HOLDING A KNIFE WHILE STEALING A CAR, NOW WE LOOK AT THE ELEMENTS TEST, AND THE THREAT AND THAT'S AN AGGRAVATED ASSAULT.

WHEREAS CARJACKING REQUIRES ME TO STEAL A CAR.

SO THOSE HAVE DIFFERENT ELEMENTS.

SO THAT'S ONE ACT.

>> SO, I GUESS, ONE WAY TO STATE THE QUESTION WHICH WE'LL CALL UNIT OF PROSECUTION IS, ARE YOU

SUGGESTING WHEN WE'RE TRYING TO DECIDE WHETHER TWO THINGS ARE SEPARATE UNITS OF PROSECUTION, THAT THE TEST IS WHETHER IT'S BLOCKBERGER, WHETHER THEY HAVE DIFFERENT ELEMENTS OR IS THERE A MORE NUANCED WAY OF DETERMINING WHETHER THE UNITS OF PROSECUTION IS DIFFERENT?

>> YEAH, IT'S A MORE -- AND THAT'S WHERE MY ORIGINAL POINT OF IT'S A THREE-STEP ANALYSIS. FIRST, YOU LOOK AT THE EPISODE. IT'S DIFFERENT EPISODES, OBVIOUSLY, DIFFERENT CHARGES. THEN IS IT A SEPARATE --

>> SO JUST SO WE'RE CLEAR, SO OBVIOUSLY THE STATE'S POSITION WOULD BE THAT HAD THIS DEFENDANT DONE EITHER OF THE TWO THINGS, THE SHOVE OR THE UP DOG, EITHER ONE OF THEM WOULD BE SEPARATELY CHARGEABLE FROM THE STANDPOINT OF UNIT OF PROSECUTION.

>> YES, YOUR HONOR. AND I BELIEVE BORROWING THIS COURT'S LANGUAGE FROM DROWDY, IS IT A SEPARATE, DISTINCT ACT BY ITSELF.

SO AS THE STATE, IF I PROVE THAT HE SHOVED THE OFFICER, THAT HAS NOTHING TO DO WITH MY PROOF THAT HE ORDERED THE DOG TO ATTACK THE OFFICER.

>> ALL RIGHT. SO THEN I GUESS THE NEXT QUESTION BECOMES -- SO THERE IS SOME UNIVERSE OF DIFFERENT UNITS OF PROSECUTION, THE SIMULTANEOUS PURSUIT OF WHICH DOES NOT CONSTITUTE DOUBLE JEOPARDY.

>> RIGHT.

>> OKAY. HELP ME SORT THE WHEAT FROM THE CHAFF ON THOSE.

>> UNFORTUNATELY, I DON'T THINK THERE'S A BRIGHT LINE RULE. IT'S GOING TO BE VERY FACT-SPECIFIC TO THE CASE, YOU KNOW?

YOU MIGHT DEFINE ACT AS LIKE A SEPARATE IMPULSE OF DISTINCT CHARACTER, BUT THEN YOU NEED TO LOOK AT EACH INDIVIDUAL CASE,

YOU KNOW, AND I THINK EACH ONE'S  
GOING TO BE DIFFERENT BECAUSE,  
YOU KNOW, WHAT'S THE IMPULSE?  
IS IT ONE VICTIM OR ARE THERE  
MULTIPLE VICTIMS?

WHAT'S THE CHARACTER AND THE  
TYPE OF THE ACT?

IS THERE A TEMPORAL BREAK?  
IS THE ACT A NECESSARY AND  
INTEGRAL PART OF THE OTHER ACT,  
DO THE LOCATIONS CHANGE IN  
POTENTIALLY HOW IT IS CHARGED IN  
THE INFORMATION.

NONE OF THESE ARE DEFINITIVE FOR  
EXAMPLE.

USUALLY IF WE HAVE --

>> WHAT DO YOU THINK MAKES THE  
DEFINITIVE HERE?

>> OBVIOUSLY, IT IS THE  
DEFINITIVE HERE.

WHAT'S THE CHANGE THAT MAKES  
THESE TWO THINGS CHARGEABLE AND  
PROSECUTABLE AS SEPARATE UNITS  
OF PROSECUTION?

>> WELL, I THINK IN HERE  
DIFFERENT IMPULSES, DIFFERENT  
CHARACTER, THE NATURE AND  
CHARACTER -- THE TYPE AND  
CHARACTER OF THE ACTS ARE  
DIFFERENT.

ME SHOVING SOMEONE IS DIFFERENT  
THAN ME ORDERING A LARGER DOG TO  
ATTACK SOMEONE AND BITE THEM AND  
TO KIND OF BELIEVE HE STILL HAD  
SCARS OVER A YEAR LATER FROM THE  
ATTACK.

SO IT'S OBVIOUSLY SOMEWHAT  
SERIOUS.

>> THUS, THE AGGRAVATED BATTERY.

>> YES.

YES, YOUR HONOR.

AND, AGAIN, IT GOES BACK TO IF I  
PROVE THE SHOVE, I HAVEN'T  
PROVED THE DOG ATTACK.

AND IF I PROVE THE DOG ATTACK, I  
HAVEN'T PROVED THE SHOVE.

THEY REQUIRE DIFFERENT ELEMENTS  
OF PROOF FROM THE TESTIMONY  
HERE.

AND THEN THE TEMPORAL BREAK,  
SOMETHING YOU LOOK AT, BUT IT'S  
NOT NECESSARILY DEFINITIVE.

BECAUSE IF YOU LOOK AT A CASE  
LIKE DROWDY, THE SEXUAL ASSAULT

WHERE IT WAS SIMULTANEOUS.  
YOU HAD THE LEWD AND LASCIVIOUS  
TOUCHING AND PENETRATION  
OCCURRED SIMULTANEOUSLY.  
BUT THEN ON THE OTHER HAND, YOU  
COULD HAVE A THEFT TYPE CASE  
WHERE THAT'S GOING TO TAKE PLACE  
OVER A PERIOD OF TIME, BUT IT'S  
THE SAME -- IF IT'S ONE VICTIM,  
YOU'RE STEALING ALL THEIR STUFF,  
YOU KNOW, IT'S THE SAME IMPULSE  
TO STEAL.  
AND THERE AGAIN, YOU HAVE TO  
LOOK AT IT INDIVIDUALLY.  
AND THEN EVEN VICTIMS, USUALLY  
IF YOU SHOOT TWO PEOPLE, TWO  
VICTIMS, THAT'S GOING TO BE TWO  
SEPARATE CHARGES.  
HOWEVER, THERE WAS THAT CASE  
WITH CATTLE THEFT WHERE IT WAS  
THE CATTLE BELONGED TO TWO  
INDIVIDUAL OWNERS, BUT THEY WERE  
IN THE SAME FIELD.  
SO IT WAS ONE IMPULSE TO STEAL  
THE CATTLE FROM THAT FIELD.  
AGAIN, IT'S NOT DEFINITIVE, IT'S  
GOING TO BE CASE BY CASE.  
AND HERE HE WAS CHARGED WITH THE  
AGGRAVATED ASSAULT FOR THE DOG,  
AND HE WAS CHARGED WITH JUST --  
OR AGGRAVATED BATTERY, EXCUSE  
ME, AND THEN HE WAS CHARGED WITH  
THE BATTERY FOR THE SHOVE.  
BOTH -- THE TESTIMONY PROVED  
THAT BOTH OCCURRED.  
>> SEE, MY CONCERN IS THAT WE  
SIT HERE AND ANALYZE THE FACTS  
OF THIS CASE IN SLOW MOTION.  
>> RIGHT.  
>> I MEAN, THIS IS HAPPENING  
LIKE THIS.  
AND, YOU KNOW, IN MY MIND THAT  
DETERMINES WHETHER IT WAS ONE  
EPISODE OR NOT.  
I MEAN, IF IT'S HAPPENING  
QUICKLY, HE SHOVES THE OFFICER,  
THE OFFICER SHOVS BACK.  
SUDDENLY GO GET HIM, DOG.  
IT SEEMS TO BE HAPPENING REALLY  
QUICKLY.  
>> RIGHT.  
AND THAT IS A FACTOR TO  
CONSIDER.  
BUT AGAIN, LIKE I SAID, IN

DROWDY, THE ACTS CAN BE SIMULTANEOUS.

OR, YOU KNOW, IN THE CASE WHERE YOU HAVE TWO VICTIMS, IF SOMEONE SHOOTS BOTH, THEN IT'S TWO, BANG, BANG, TWO TRIGGER PULLS IMMEDIATELY AFTER EACH OTHER, THAT WOULD BE A SEPARATE AND DISTINCT ACT.

>> TWO SHOTS, THE SAME VICTIM OR TWO VICTIMS?

>> IT COULD BE -- IF IT'S TWO VICTIMS, IT'S EASY POTENTIALLY. BUT THEN AS A COUNTEREXAMPLE, IT WOULD DEPEND ON THE TYPE OF GUN USED AND THE SETTING USED.

SO IF IT WAS A SEMIAUTOMATIC PISTOL AND YOU HAVE TWO TRIGGER PULLS, THAT'S TWO SEPARATE ACTS. BUT SAY I HAVE AN ASSAULT RIFLE, I PULL THE TRIGGER, THREE OR MORE BULLETS COME OUT, THAT'S ONE TRIGGER PULL, ONE ACT POTENTIALLY IF THEY HIT THE SAME PERSON, YOU WOULD HAVE ONE CHARGE AND POTENTIALLY EVEN IF THEY HIT TWO PEOPLE DEPENDENT ON THE REST OF THE FACTS, YOU'D POTENTIALLY HAVE ONE CHARGE BECAUSE IT WAS ONLY THE ONE SINGLE TRIGGER PULL.

THAT'S WHY IT'S NOT A BRIGHT LINE RULE.

EACH CASE YOU'RE GOING TO HAVE TO LOOK -- GO BACK AND LOOK AT THE SPECIFIC FACTORS.

>> COULD I ASK YOU TO NOT THINK ABOUT THE FACTS OF THIS CASE OR ANY OTHER CASE AND LOOK AT THE TWO ELEMENTS THAT WERE CHARGED AND AT ISSUE IN THIS CASE, AGGRAVATED BATTERY AND BATTERY. AND WOULD YOU AGREE THAT BATTERY IS SUBSUMED WITHIN AGGRAVATED BATTERY?

IF YOU'VE COMMITTED AN AGGRAVATED BATTERY, YOU'VE NECESSARILY COMMITTED A BATTERY.

>> YES, I AGREE WITH THAT.

AND IF WE WERE TO GET TO THE THIRD STEP, BLOCKBERGER, BECAUSE WE HAVE A SINGLE ACT, FOR EXAMPLE, IF I WERE TO -- IF THE DEFENDANT WERE TO --

>> AND ANOTHER WAY TO SAY THAT IS THAT THE AGGRAVATED BATTERY STATUTE DOESN'T REQUIRE PROOF OF AN ELEMENT THAT THE BATTERY STATUTE DOES.

>> RIGHT, RIGHT.

AND IF YOU'RE A SINGLE ACT. SO A DEFENDANT PUNCHES A 70-YEAR-OLD, THEY'RE GOING TO BE -- THEY CAN'T -- THEY'RE NOT SIMULTANEOUSLY GOING TO BE CONVICTED OF A BATTERY OF SOMEONE OVER 65 AND JUST A BATTERY.

>> SO THINKING STILL GENERALLY ABOUT THE LAW AND WHAT THE STATUTE LAYS OUT AS THE OFFENSES, AND WE HAVE HERE AND GOING BACK TO 7750421A, WHOEVER IN THE COURSE OF ONE CRIMINAL TRANSACTION OR EPISODE CONCEDED THERE'S ONE LARGE CRIMINAL TRANSACTION OR EPISODE, THAT'S THE ONE THAT WAS CHARGED AS THE BATTERY, THE DEFENDANT COMMITS AN ACT OR ACTS WHICH CONSTITUTES ONE OR MORE SEPARATE EPISODES, WE HAVE THAT.

SEPARATE CRIMINAL OFFENSES.

>> RIGHT.

>> SO HE DID COMMIT A BATTERY, AND DURING THE COURSE OF THE BATTERY THEN, THE LEGISLATURE SAYS THEY SHOULD BE PUNISHED SEPARATELY IF THEY ARE SEPARATE OFFENSES.

AND THEN IT SAYS FOR PURPOSES OF THIS SUBSECTION, THE OFFENSES ARE SEPARATE IF EACH OFFENSE REQUIRES PROOF OF AN ELEMENT THAT THE OTHER DOES NOT WITHOUT REGARD TO THE ACCUSATORY PLEADING OR THE PROOF PRODUCED AT TRIAL.

SO IN THIS CASE BECAUSE AGGRAVATED BATTERY IS SEPARATE UNDER THAT DEFINITION, IT'S COMPLETELY SUBSUMED, WHY ISN'T THIS STATUTE, SUBSECTION A, TELLING US THAT BECAUSE IT WAS ONE CRIMINAL TRANSACTION OR EPISODE, ALL THE ACTS, BOTH ACTS ARE NOT TREATED AS SEPARATE BECAUSE THEY'RE NOT SEPARATE

UNDER THE DEFINITION?

>> WELL, I BELIEVE IN THIS CASE THE DIFFERENT ELEMENT OF PROOF IF WOULD BE WITH THE DOG ATTACK VERSUS THE SHOVE.

THOSE ARE DIFFERENT --

>> BUT THE STATUTE'S TALKING ABOUT WITHOUT REGARD TO THE ACCUSATORY PLEADING OR PROOF REDUCED AT TRIAL.

WE'RE TALKING ABOUT WHEN WE'RE DECIDING WHETHER SOMETHING IS SEPARATE UNDER SUBSECTION A, IT'S VERY CLEAR THE LEGISLATURE SAYS ONLY LOOK AT THE STATUTE AND THE ELEMENTS OF THE FENCES AND WHETHER ONE IS COMPLETELY SUBSUMED WITHIN THE OTHER.

THAT'S WHAT THE STATUTE --

>> RIGHT.

AND THAT WOULD BE FOR ONE SINGLE ACT --

>> NO, IT SAYS FOR ANY ACT COMMITTED DURING ONE CRIMINAL TRANSACTION OR EPISODE.

>> YES, BUT ANY SEPARATE ACT SHOULD BE PUNISHED SEPARATELY.

>> BUT THEN IT SAYS THAT DEFINITION SAYS DON'T LOOK AT THE FACTS AT ALL, LOOK ONLY AT THE STATUTES, AND IF ONE IS SUBSUMED WITHIN THE OTHER, IT'S NOT SEPARATE.

I DON'T KNOW HOW YOU CAN READ SUBSECTION A --

>> THAT WOULD INVALIDATE BLOCKBERGER ITSELF, BECAUSE THERE THEY SAID THIS IS ONE CRIMINAL EPISODE, AND IT WAS A SERIES OF SIMILAR CHARGES, SO DRUG TRANSACTIONS OVER SEVERAL DAYS, AND --

>> WELL, THAT THAT, BUT THEN YOU LOOK AT WHETHER IT'S ONE TRANSACTION OR EPISODE.

IF THERE'S A TEMPORAL BREAK, THAT THAT KIND OF THING --

>> WELL, AND GOING TO BLOCKBERGER, THEY SAID THESE SERIES OF DRUG TRANSACTIONS ARE ONE EPISODE.

>> BUT IF IT'S AN ISSUE OF CRIMINAL INTENT UNDER THE DOUBLE JEOPARDY CLAUSE AND THE FLORIDA

LEGISLATURE HAS ANSWERED THE QUESTION IN THIS CASE, WHY WOULD WE LOOK ANYWHERE ELSE?

>> BECAUSE AGAIN, YOUR HONOR, BY THAT -- THE INTERPRETATION YOU'RE POTENTIALLY SAYING SKIPS THE SECOND PART OF THE ANALYSIS.

>> THE SECOND PART OF THE ANALYSIS ACCORDING TO THE STATUTE?

WHERE IS THAT IN THE CHUTE?

>> THE INTENT OF THE LEGISLATURE FOR EACH CRIMINAL OFFENSE TO BE PUNISHED DESPERATELY DURING EACH EPISODE.

I DON'T BELIEVE IT'S THE INTENT AS LONG AS I COMMIT THE SAME OFFENSE OVER AND OVER AND OVER AGAIN, I ONLY GET PUNISHED ONCE FOR IT.

>> I THINK, AND THIS IS AN INTERESTING QUESTION OF INTERPRETATION OF THIS STATUTE. I THINK WHAT JUSTICE LAWSON IS SUGGESTING IS THAT, ESSENTIALLY, WE WOULD -- THAT PROVISION SHOULD BE READ AS SAYING OFFENSES ARE SEPARATE ONLY IF EACH OFFENSE REQUIRES PROOF OF AN ELEMENT THAT THE OTHER DOES NOT.

AND I THINK THE QUESTION IS WHETHER THAT'S THE PROPER WAY TO READ IT WHEN YOU LOOK AT IT IN CONTEXT OF WHAT GOES BEFORE AND THIS EXPRESSION OF THE LEGISLATIVE INTENT TO PUNISH FOR EVERY SEPARATE OFFENSE.

>> RIGHT.

>> AND WHETHER THIS IS A SPECIFICATION THAT THIS EXCLUSIVE -- OR THIS IS JUST SPECIFYING A CIRCUMSTANCE IN WHICH OFFENSES ARE SEPARATE.

>> RIGHT.

AND I AGREE WITH THAT.

AND I THINK THIS COURT PROVIDES, FOR EXAMPLE, IN DROWDY WHEN IT TALKS ABOUT HOW THE MOLESTATION OF GROPING THE VICTIM'S BREASTS WAS A SEPARATE AND DISTINCT THE ACT FROM THE PENETRATION AND THEN GIVES A COUNTEREXAMPLE SAYING THAT, LIKE, IN THE COURSE

OF THE PEN PENETRATION, THE DEFENDANT HAD GROPED THE VICTIM'S BUTTOCKS TO ASSIST IN THE PENETRATION, THAT'S NOT A SEPARATE AND DISTINCT ACT BECAUSE IT'S AN ACT IN FURTHERANCE OF THE PENETRATION VERSUS WHEREAS THE GROPING, YOU KNOW, YOU DON'T HAVE TO DO ONE TO DO THE OTHER.

>> I'M SORRY, CAN I ASK YOU A QUESTION?

SO IF WE JUST TAKE, IF WE TAKE THE BATTERY STATUTE AS IT'S WRITTEN AND WE TAKE THE BLOCKBERGER IMPLEMENTING STATUTE AS IT'S WRITTEN, IS IT PERMISSIBLE IN, YOU KNOW, IF YOU HAVE A SITUATION WHERE THERE'S A NIGHT, THERE'S ONLY ONE VICTIM AND THERE ARE TEN PUNCHES THROWN, COULD THE STATE CHARGE TEN DIFFERENT CRIMES?

AND, YOU KNOW, IF THERE'S PROOF THAT, YOU KNOW, IF THERE'S -- THE JURY BELIEVES THAT --

>> YEAH.

POTENTIALLY YOU COULD IF YOU COULD PROVE THAT EACH ONE WAS A DIFFERENT IMPULSE.

AND I THINK A GOOD EXAMPLE --

>> AND I'M SORRY, OKAY.

AND SO WHERE DOES THE IMPULSE, WHERE DOES THAT -- IS THAT -- ARE YOU GETTING THAT FROM THE CASE LAW?

OR WHERE -- I'M TRYING TO UNDERSTAND IF THAT'S A TEXTUAL THING OR WHERE -- I'M TRYING TO UNDERSTAND WHAT MAKES THIS CASE DIFFERENT FROM A SINGLE FIGHT WHERE TWO PUNCHES ARE LANDED.

>> I BELIEVE THE IMPULSE LANGUAGE COMES, AND I DON'T HAVE THE EXACT WHERE IT COMES FROM BLOCKBERGER ITSELF --

>> THAT IS DEFINITELY A BLOCKBERGER --

>> I WAS GOING TO SAY, IT'S A LITTLE ARCHAIC, SO IT'S HARDER TO MEMORIZE.

>> I'M NOT SAYING IT'S WRONG, YOU'D JUST HAVE TO READ THE --

>> RIGHT.

>> THERE'S NOTHING YOU WOULD POINT TO TEXTUALLY THAT KIND OF LEADS YOU DOWN THAT PATH.

>> YEAH, OUTSIDE OF THE INTENT IS TO PUNISH EACH CRIMINAL OFFENSE WITHIN EACH EPISODE. GOING BACK IS A LITTLE EASIER. IF I HOLD UP, YOU KNOW, DEFENDANT ROBS A BANK AND THERE IS TEN VICTIMS AND HE GOES THE EACH PERSON AND ROBS THEM INDIVIDUALLY, THAT'S, YOU KNOW, TEN INDIVIDUAL ROBBERIES.

>> WHY WOULDN'T YOU ANSWER THAT QUESTION IN TERMS OF THE --

>> COUNSEL, FOR THE STATE TO PREVAIL IN THIS CASE, THE COURT WOULD NOT HAVE TO ADOPT A PER-TOUCH THEORY.

I MEAN -- I MEAN, THIS IS A DIFFERENT KIND OF CIRCUMSTANCE.

>> RIGHT.

AND, LIKE I SAID, THERE'S NO BRIGHT LINE RULE --

>> COULD YOU JUST BE, BECAUSE YOU'RE ALMOST OUT OF TIME, BE AS CLEAR AS POSSIBLE THOUGH AS TO WHAT IS THE PRINCIPAL DISTINCTION.

I THINK EVERYBODY'S WORRIED ABOUT A PER-TOUCH THING OR EVERYONE WOULD WANT TO KNOW THAT'S, YOU KNOW, THAT WOULD BE THE IMPLICATION OF WHATEVER GETS DECIDED HERE, BUT WHAT IS IT ABOUT -- CAN YOU BE AS CLEAR AS POSSIBLE AND SAY WHAT IS THE RULE THAT WE WOULD ARTICULATE THAT WOULD SEPARATE THIS CASE FROM A, YOU KNOW, ONE FIGHT, TWO PUNCHES EQUALS TWO CRIMES.

>> WELL, AND I DON'T KNOW IF YOU COULD NECESSARILY COMPLETELY SEPARATE THEM BECAUSE THERE WOULD BE POTENTIAL CIRCUMSTANCES WHERE MULTIPLE PUNCHES WOULD BE TWO OFFENSES SIMILAR TO THE FIRST DISTRICT'S OPINION IN MERCER WHERE YOU HAD A PUNCH AND THEN -- WHERE, THERE'S A PUNCH AND THEN A KICK.

>> BUT THOSE WERE ADMINISTERED BY TWO DIFFERENT PEOPLE.

>> RIGHT.

>> ONE IS AS A PRINCIPAL AND ONE IS --

>> AND HERE YOU COULD ARGUE HE IS A PRINCIPAL TO THE DOG ATTACK BY ORDERING THE DOG TO ATTACK AND HE PHYSICALLY PUSHED THE OFFICER HIMSELF.

I MEAN, IT'S NOT A PERFECT ANALYSIS --

>> THE DOG, I MEAN, THAT'S --

>> I THINK HERE YOU WOULD HAVE TO, THE COURT SHOULD ARTICULATE THAT IT'S A THREE-PART TEST.

FIRST, IS IT THE SAME CRIMINAL EPISODE OR NOT.

IF IT'S DIFFERENT CRIMINAL EPISODES, YOU DON'T MOVE ON.

SECOND, IS IT A DISTINCT CRIMINAL ACT, IS IT A SEPARATE IMPULSE OF A DISTINCT CHARACTER.

IF IT IS A DISTINCT CRIMINAL ACT, YOU DON'T MOVE ON.

>> WHY ARE YOU EVEN CONCEDED THAT IT'S THE SAME CRIMINAL EPISODE?

>> YEAH, I WAS GOING TO ASK THAT TOO.

>> BECAUSE I THINK IT'S -- YOU HAVE THE SAME VICTIM, AND WE'RE TALKING ABOUT A MINUTE OF TIME. IT'S A, AN ACTION BY THE OFFICER, A REACTION BY THE APPELLANT.

>> WELL, YOU'RE CONCEDED THAT PARTLY BECAUSE IT WAS CONCEDED IN THE DISTRICT COURT, I WOULD ASSUME.

THAT'S BEEN CONCEDED --

>> IT HAS.

>> RIGHT?

>> AND I THINK HERE IT WOULD BE HARD TO ARTICULATE THAT THIS WOULD BE WITH TWO THE DISTINCT EPISODES, AND I THINK THAT'S THE CONFUSION THAT SOME PARTS OF --

>> WOULDN'T IT BE MORE SIMPLER TO JUST APPLY THE PLAIN LANGUAGE OF THE STATUTE?

BECAUSE WE'RE TALKING WHOEVER IN THE COURSE OF THE TRANSACTIONAL EPISODES, WE KNOW WE HAVE THE LARGER TRANSACTION OR EPISODE, A PERSON COMMITS AN ACT OR ACTS THAT CONSTITUTE SEPARATE

CRIMINAL OFFENSES.

WE KNOW WE HAVE THAT SCENARIO  
HERE.

>> RIGHT.

>> AND SO IF THE STATUTE GIVES  
THE ANSWER IN THE FRAMEWORK IN  
WHICH THE STATUTE TALKS ABOUT  
THE LEGAL ISSUE, WHY WOULD WE  
ADD AN ADDITIONAL, WHY WOULD WE  
TALK ABOUT WHETHER ONE OF THE  
ACTS WE'RE TALKING ABOUT IS A  
DISTINCT ACT?

WHAT DOES THIS JUDICIALLY  
CREATED LOOK AT SOMETHING ELSE  
MAKE SENSE GIVEN THE PLAIN  
LANGUAGE OF THE STATUTE.

>> WELL, THINK WHAT WE'RE SAYING  
IS DISTINCT ACT IS MIRRORING  
THE --

>> THE DISTINCT ACT WOULD BE AN  
ACT, RIGHT?

WHETHER DISTINCT OR NOT.

SO IF IT HAPPENS DURING THE  
COURSE OF A DIFFERENT CRIMINAL  
TRANSACTION -- IN THIS CASE, THE  
AGGRAVATED BATTERY -- IT CAN BE  
A DISTINCT ACT, BUT IT'S STILL  
AN ACT.

AND THE STATUTE TELLS YOU WHAT  
TO DO WITH AN ACT DEPENDING ON  
WHETHER IT'S SEPARATE OR NOT.

>> YES.

AND I BELIEVE THAT'S WHAT THE  
STATE IS ARGUING HERE.

IF IT'S SEPARATE ACTS, AND  
AGAIN, THIS IS A DISTINCTION  
BETWEEN LIKE THE RIVIERA CASE  
WHERE POTENTIALLY YOU HAD  
SOMEONE STABBING AND PUNCHING IN  
THE SAME ACT.

>> SO BUT, AGAIN, I KNOW YOU'RE  
OUT OF TIME, BUT FOR PURPOSES OF  
THIS SUBSECTION, OFFENSES ARE  
SEPARATE IF EACH OFFENSE  
REQUIRES PROOF OF AN ELEMENT  
THAT THE OTHER DOES NOT WITHOUT  
REGARD TO THE FACTS OF THE CASE  
OR ACCUSATORY PLEADING.  
UNDER THAT DEFINITION ARE THEY  
SEPARATE?

>> YES, BECAUSE OTHERWISE YOU  
WOULD END UP IN THE SITUATION --

>> WELL, WAIT, WAIT.

YOU CONCEDED EARLIER THAT ONE

WAS CONSUMED, THE ELEMENTS OF ONE WERE CONSUMED WITHIN THE OTHER WHEN YOU LOOK ONLY AT THE STATUTES, DON'T CONSIDER AS STATUTE DIRECTS --

>> RIGHT.

BUT UNDER THAT, IF YOU WERE TO TAKE THAT TO EXTREME, YOUR HONOR, YOU WOULD HAVE A CASE LIKE BLOCKBERGER WHERE YOU HAD THE SAME CHARGE WHERE THEY'RE THE EXACT SAME ELEMENTS, BUT THEY WERE ABLE TO BE WITHSTOOD BECAUSE THEY WERE DIFFERENT ACTS.

>> WAS THE UNITED STATES SUPREME COURT APPLYING 7750214 IN BLOCKBERGER?

>> NO, BUT 77214 WAS ADOPTED IN BLOCKBERG AS THE STANDARD. AND, AGAIN, YOU WOULD END UP IN THE SITUATION WHERE I WOULD NEVER CHARGE YOU WITH THE SAME OFFENSE EVEN IF THEY ARE DISTINCT ACTS BECAUSE OF THE EXACT SAME ELEMENT.

SO BY, AGAIN --

>> NO.

IF THEY'RE SEPARATE CRIMINAL TRANSACTIONS OR EPISODES, YOU COULD, CORRECT?

>> WELL, I THINK --

>> SO, FOR EXAMPLE, YOU HAD THE SIMPLEST OF BATTERIES, DO NOT TOUCH ME, AND THE PERSON GOES -- TOUCHES YOU THREE TIMES. ONE TRANSACTION OR TWO?

>> I THINK ONE TRANSACTION --

>> THREE ACTS.

YOU HAVE ANOTHER CIRCUMSTANCE WHERE THE PERSON SAYS DO NOT TOUCH ME.

THERE, I TOUCHED YOU.

I DARE YOU TO DO THAT AGAIN.

DO NOT TOUCH ME.

TWO OR ONE?

>> THE STATE'S POSITION THERE IS POTENTIALLY YOU HAVE ONE EPISODE WITH TWO DISTINCT ACTS.

>> EVEN WITH THE TEMPORAL BREAK AND THE DIFFERENT INTENT?

THE FORMULATION OF A NEW INTENT TO TOUCH A SECOND TIME?

>> I THINK THAT THAT'S WHAT

MAKES IT A NEW ACT IS THE NEW  
INTENT -- NOT NECESSARILY A NEW  
INTENT, BUT A NEW IMPULSE.

>> OKAY.

>> BECAUSE AGAIN, IN  
BLOCKBERGER, THE SERIES OF DRUG  
TRANSACTIONS, EACH TRANSACTION  
WAS A NEW IMPULSE.

AND FOR THE REASONS ARGUED NOW  
AND IN OUR BRIEF, THE STATE ASKS  
THIS COURT TO UPHOLD THE FIRST  
DISTRICT'S DECISION.

THANK YOU.

>> THE STATE'S CONCESSION TO A  
SINGLE CRIMINAL EPISODE DOES  
ALLOW THIS COURT TO RESOLVE THE  
ISSUE HERE WITH THE STATUTE.  
JUSTICE CANADY, I TOLD YOU I'D  
GET BACK TO YOU ON THE CITATION  
ON LEE.

IT'S CITED IN THE RESPONDENT'S  
ANSWER BRIEF.

YOU ARE CORRECT, IT IS NOT IN  
THE TABLE OF CASES CITED IN THE  
PETITIONER'S --

>> YOU DIDN'T REALLY ARGUE THIS  
ISSUE ABOUT THE WAY IT WAS  
CHARGED IN YOUR INITIAL BRIEF.

>> THE --

>> YOU MADE AN ARGUMENT HERE.  
YOU STARTED OFF RELYING ON THE  
WAY THE STATE CHARGED THE CASE.  
AND YOU SAID THAT YOU SHOULD  
PREVAIL ON THAT.

WHAT I ASKED YOU, YOU MENTIONED  
A CASE, BUT WHAT I SPECIFICALLY  
ASKED YOU ALSO WAS WHERE YOU  
ARGUED THAT IN YOUR INITIAL  
BRIEF.

AND IF YOU DIDN'T ARGUE IT IN  
THE INITIAL BRIEF, JUST SAY YOU  
DIDN'T.

IF YOU DID, JUST POINT ME TO  
WHERE IT WAS.

>> I DON'T SEE IN THE INITIAL  
BRIEF WHERE THE ARGUMENT WAS  
MADE.

THE INITIAL BRIEF DISCUSSES THE  
DISTINCT ACTS --

>> OKAY, SO YOU DIDN'T MAKE  
THAT.

ARGUMENT YOU STARTED OFF WITH IN  
ORAL ARGUMENT WAS AN ARGUMENT  
THAT WAS NOT MADE IN THE INITIAL

BRIEF.

>> THE ARGUMENT OF MOVING PAST THE CHARGING DOCUMENT AND INTO THE DISTINCT ACTS, I THINK, IS WHAT THE INITIAL BRIEF CENTERS ON.

AND IT TALKS A LOT ABOUT THE INITIAL BRIEF, THE INITIAL BRIEF TALKS A LOT ABOUT HOW IT'S A SINGLE CRIMINAL EPISODE AND HOW THESE ARE NOT DISTINCT --

>> WELL, I KNOW THAT.

I KNOW THAT.

I READ THE BRIEF.

BUT WHAT MYSTIFIED ME WHEN I HEARD YOUR ARGUMENT, DID I MISS THAT IN THE BRIEF?

THEN I FOUND OUT I DIDN'T MISS IT IN THE BRIEF, YOU WERE JUST ARGUING SOMETHING THAT WASN'T IN THE BRIEF, CORRECT?

>> AND THERE WAS A LOT OF TALK ABOUT THE TESTIMONY IN THE BRIEF.

>> I UNDERSTAND.

>> AND HOW IT COMES BACK TO, YOU KNOW, THE TESTIMONY AT THE TRIAL CANNOT CURE WHAT IS A CHARGING DEFECT IN THE RECORD.

>> COUNSEL, I JUST, YOU KNOW, IF YOU DIDN'T ARGUE IT, YOU DIDN'T ARGUE IT.

WE CAN MOVE ON.

>> COUNSEL, YOU CAN HAVE 30 SECONDS TO SUM UP.

>> THANK YOU, CHIEF JUSTICE.

THE EXCEPTION TO THE LEGISLATIVE INTENT TO CONVICT AND SENTENCE FOR EACH OFFENSE IS, DOESN'T APPLY WHERE THE OFFENSES ARE THE LESSER OFFENSES IN THE STATUTORY ELEMENTS OF WHICH ARE SUBSUMED BY THE GREATER OFFENSE.

THAT IS WHAT WE HAVE HERE, AND IT DOES CONFLICT WITH WHAT THE FOURTH DISTRICT DID IN OLIVER, THAT'S WHY THIS COURT HAS JURISDICTION, AND THAT'S WHY THIS COURT SHOULD GRANT THE RELIEF THAT I REQUESTED AT THE BEGINNING OF MY ORAL ARGUMENT. THANK YOU.

>> THANK YOU.

