ALMOST GOOD AFTERNOON. WELL CAN. WE ARE READY TO -- WELCOME. WE ARE READY TO HEAR THE CASE OF BROWN VERSUS THE STATE OF FLORIDA. MS. DAVIS.

MAY IT PLEASE THE COURT. MY NAME IS BARBARA DAVIS, AND I REPRESENT THE PETITIONER, DARNELL BROWN, AND THIS COMES TO THE COURT FROM THE CERTIFIED QUESTION OF THE FIFTH DISTRICT AS TO WHETHER THE CRIME OF ADEPTED SECOND-DEGREE MURDER EXISTS. NOW, THE CRIME OF ATTEMPTED SECOND-DEGREE MURDER AND THE CRIME OF THIRD-DEGREE MURDER WERE ENDORSED IN GENTRY IN 1983, WHERE THIS COURT SAID THERE ARE CERTAIN CRIMES THAT THE STATE DOES NOT NEED TO PROVE THE SPECIFIC INTENT. AS YOU KNOW, THIRD-DEGREE MURDER HAS NOW BECOME A NONEXISTENT CRIME, SO THAT PART OF GENTRY, THIS COURT HAS ALREADY IMPLICITLY OVERRULED IN GRAY, SO WE NOW HAVE GENT I OUT THERE -- WE NOW HAVE GENTRY OUT THERE STILL SAYING YOU DON'T NEED TO PROVE INTENT AS TO THIRD BUT THE SECOND STILL STANDS. NOW ATTEMPTED SECOND-DEGREE MURDER, THE COURT HAS TRADITIONALLY DEFINED AS ATTEMPT REQUIRES AN INTENT. GENTRY SAID, WELL, BUT IN THE GENERAL INTENT CASES, THE STATE DOESN'T HAVE TO PROVE INTENT, SO ATTEMPT TOOK ON A WHOLE DIFFERENT MEANING HERE N GRAY, AND REMEMBER THAT AMLOT HAD ENDORSED ATTEMPTED FELONY MURDER, AND 11 YEARS LATER, IN GRAY, THIS COURT SAID, NO, THERE IS NO SUCH CRIME AS ATTEMPTED FELONY DEGREE MURDER, AND IN A FOOTNOTE IT CITES TO THOMAS, WHICH WAS AN INTERMEDIARY CASE, WHERE THE COURT HAD SAID IN AN ATTEMPTED POSSESSION OF BURGLARY TOOLS, YOU CANNOT HAVE AN ATTEMPTED UNINTENDED CRIME, SO THEN IT SAID BUT SEE GENTRY, SO WHAT WE HAVE GOT RIGHT NOW, AND I THINK THE FIFTH DCA AND, ALSO, THE SECOND DCA IN QUISENBERRY, WERE SAYING THE SUPREME COURT NEEDS TO TAKE A LOOK AT THIS, BECAUSE WE HAVE HALF OF GENTRY HAS NOW BEEN EXTINGUISHED BY GRAY. THE THIRD-DEGREE FELONY MURDER PART OF IT, WHICH GENTRY SAID IS JUST LIKE ATTEMPTED SECOND-DEGREE MURDER. YOU DON'T NEED TO PROVE THE INTENT. WE HAVE THE GRAY OUT THERE, CITING TO THOMAS, WHICH SAYS YOU DO NEED THE SPECIFIC INTENT, BUT, SEE, GENTRY, AND THEN WE HAVE ALL OF THE COURTS, THE DCA'S STILL FOLLOWING GENTRY BLINDLY, SAYING, WELL, IT EXISTS, GENTRY, UNTIL, ODDLY ENOUGH, THE FIFTH DCA, WHO HAD SENT AMLOT ORIGINALLY UP TO THE SUPREME COURT AND, ALSO, GRENA GE., WHICH WAS THE COMPANION CASE TO GRAY --

LET'S SEE WHERE WE ARE. YOU ARE SAYING THAT ALL ATTEMPT CRIMES REQUIRE SPECIFIC INTENT.

NO. ONLY ATTEMPTED SECOND-DEGREE MURDER, AND I THINK THE BRIEFS ADDRESS ATTEMPTED RAPE, ATTEMPTED ROBBERY, THINGS LIKE THAT.

I THOUGHT IT SAID ALL ATTEMPTED CRIMES REQUIRE A SPECIFIC INTENT, AND THEN YOU LOOK AT THE -- LIKE YOU CAN HAVE ATTEMPTED SEXUAL BATTERY, BUT YOU HAVE TO HAVE THE INTENT TO HAVE COMMITTED THE SEXUAL BATTERY, EVEN THOUGH SEXUAL BATTERY IS A GENERAL INTENT CRIME.

RIGHT.

BECAUSE ATTEMPT MEANS INTENT.

INTENT.

SO THEN YOU LOOK AT, IF ALL ATTEMPTED CRIMES REQUIRE INTENT, THEN CAN YOU COMMIT ATTEMPTED SECOND-DEGREE MURDER.

YES.

IS THAT THE WAY THE ANALYSIS YOU GO?

MORE THAN THAT. I THINK THE COURT, IN FREY, IT KIND OF ADDRESSED THE ISSUE OF DOES SPECIFIC INTENT, IS THAT, REALLY, VIABLE ANYMORE? AND WHEN YOU LOOK AT MURDER, MURDER IS A VARYING DEGREES OF INTENT, SO WE HAVE -- IF WE HAVE ROBBERY, WE HAVE DIFFERENT LEVELS THAT ARE EASY TO DISTINGUISH. IT IS PETTY THEFT OR OVER 300, IT IS GRAND THEFT, AND THEN YOU GET INTO USING FORCE, IT IS ROBBERY, AND THEN I HAVE A DEADLY WEAPON, AND IT GOES UP-AND-UP AND UP. IN MURDER WHAT YOU HAVE IS VARYING DEGREES OF THE MIND.

BECAUSE ARE ESSENTIALLY SAYING IS THIS COURT SHOULD DECIDE THAT IT WAS SIMPLY WRONG IN GENTRY FIRST.

YES. AND THIS COURT HAS ALREADY DECIDED IT WAS PARTIALLY WRONG IN GENTRY, WHEN IT OVERRULED THE THIRD-DEGREE FELONY MURDER.

BUT YOU DO HAVE TO SAY THAT THERE IS A DIFFERENCE BETWEEN ATTEMPTED FELONY MURDER, WHERE THE THEORY BEING, AND THE PROBLEM WITH THE INSTRUCTIONS BEING THAT YOU ARE SUBSTITUTING THE FELONY FOR THE INTENT OF FIRST-DEGREE, OF PREMEDITATION IN FIRST-DEGREE MURDER, AND THAT AN ATTEMPTED FELONY DOESN'T MEASURE UP TO BEING ABLE TO DO THAT. AND THAT IS A DIFFERENT SITUATION THAN DEALING WITH THIS MATTER OF GENERAL INTENT, AS PART OF SECOND-DEGREE MURDER. ISN'T THAT?

THAT IS WHAT JUSTICE OVERTON WAS SAYING, IN THE DISSENT IN AMLOT. HE WAS TRYING TO DISTINGUISH CONVENIENTRY IN SAYING FELONY MURDER IS A LEGAL FICTION, ANYWAY. WE TAKE UNDER LYING FELONY AND BOOT STRAP IT TO A MURDER AND THEN WE HAVE FELONY MURDER, AND THEN TO TAKE IT ONE STEP FURTHER AND MAKE IT AT AMENDMENT --

THAT IS -- ATTEMPT --

THAT IS WHAT WE DON'TED IN GRAY? WE ADOPTED WHAT JUSTICE --

WHAT THIS COURT DID IN GRAY WAS KIND OF WENT OVER THE INTENT ISSUE. IT WENT OVER THE FELONY MURDER PART, SAYING YOU CANNOT INTEND AN UNINTENDED CRIME.

BUT WE DIDN'T GLOSS -- WE COULDN'T HAVE GLOSSED OVER IT IN BRADY, BECAUSE WE SPECIFICALLY UPHELD ATTEMPTED SECOND-DEGREE MURDER, OR WE FOUND THAT WAS THE CRIME THAT SHOULD HAVE BEEN SENTENCED, WHERE THERE WAS A SITUATION IN WHICH A SHOOTING IN A BAR AND A SECOND PERSON WAS KILLED, EVEN THOUGH THE DEPRAVED ACTOR -- WAS AIMED AT ANOTHER PERSON, SO WE HELD THAT THAT COULD BE ATTEMPTED SECOND-DEGREE MURDER, DIDN'T WE?

YES, YOU DID, AND LET ME JUST RECOGNIZE THAT YOU DECIDED BRADY IN AUGUST, AND YOU ACCEPTED JURISDICTION IN THIS CASE IN NOVEMBER. THE ISSUE THAT WE ARE TALK ABOUT TODAY WAS NOT RAISED IN BRAID, AND YOU NOT ONLY UPHELD AN ATTEMPTED SECOND-DEGREE MURDER CONVICTION IN BRADY BUT, ALSO, HARRIS AND WILSON, JUST LIKE THE SECOND DCA COURTS HAVE SAID A SECOND EXISTS. GENTRY. THIS IS THE FIRST TIME THAT IT HAS COME BEFORE THE COURT ON THE ISSUE, WELL, DOES IT EXIST, SO IN BRADY WHAT HAPPENED IS THAT YOU JUST SAID, WELL, THERE IS ENOUGH EVIDENCE FOR ATTEMPTED SECOND-DEGREE MURDER. YOU DIDN'T TALK TO WHETHER SECOND-DEGREE MURDER EXISTS THAT WASN'T AN ISSUE BEFORE THE COURT, AND THEN FIVE MONTHS LATER THE COURT ACCEPTED JURISDICTION IN THIS CASE, WHICH IS THE SAME PATTERN, IF YOU LOOK AT GRAY, IF YOU RUN AMLOT ON THE COMPUTER. IF

YOU RUN IN GRAY, BEFORE AND AFTER, THE ISSUE SIMPLY WASN'T RAISED, SO WE ARE NOT GOING TO ADDRESS WHETHER ATTEMPTED FELONY MURDER EXISTS. IN WATKINS, THE FIFTH DISTRICT COURT OF APPEAL, THERE WAS ONE MAJORITY, ONE SPECIALLY CONCURING AND ONE DISSENT, AND THAT IS WHERE JUSTICE COBB SAID I CANNOT SEE THE DISTINCTION BETWEEN ATTEMPTED FELONY MURDER AND ATTEMPTED SECOND-DEGREE MURDER, CITING JUSTICE OVERTON. NOW, JUSTICE OVERTON TRIED TO DISTINGUISH THOSE IN HIS AMLOT DISSENT. GRAY DOES NOT TALK ABOUT THAT. IT DOES NOT TALK ABOUT THE DISSENT T ADOPTS THE PART -- IT ADOPTS THE WART WHERE -- THE PART WHERE YOU SAYS YOU CANNOT UNATTEMPT AN INTENTIONAL CRIME. IN GENTRY, IT EXISTS, JUSTICE LOTT SAID, AND SEE HOW CAN YOU UNINTEND AN INTENTIONAL CRIME? NOW, TAKE IT ONE STEP FURTHER. BACK IN THE TAYLOR CASE IN 1984, THE COURT DID AWAY WITH INVOLUNTARY MANSLAUGHTER, SO INVOLUNTARY MANSLAUGHTER, WHICH IS THE CULPABLE NEGLIGENCE PART OF IT, DEFINES THE MANSLAUGHTER AS A GROSSLY RECKLESS ACT, WITHOUT REGARD FOR LIFE. SECOND-DEGREE MURDER, ATTEMPTED SECOND-DEGREE MURDER, IMMINENTLY DANGEROUS, WITHOUT REGARD FOR HUMAN LIFE. VERY, VERY SIMILAR, AND YET TAYLOR ELIMINATED THIS IN 1984, SO THERE IS DEFINITELY A DISTINCTION THERE. IF YOU LOOK AT THE INSTRUCTIONS NOW, FOR VOLUNTARY MANSLAUGHTER, WHICH STILL EXISTS, BECAUSE YOU INTEND THE ACT, THE INSTRUCTION SAYS THERE DOES NOT HAVE TO BE A PREMEDITATED INTENT. BUT YOU HAVE TO INTEND A DEATH FOR VOLUNTARY MANSLAUGHTER. YOU GOT UP TO ATTEMPTED SECOND-DEGREE MURDER, THEY HAVE TAKEN OUT THE PREMEDITATED INTENT PART OF THE INSTRUCTION, AS OF 1997, AND IT SAYS THE STATE DOESN'T HAVE TO PROVE ANY INTENT IN SECOND-DEGREE MURDER. SO WE HAVE A LESSER CRIME, VOLUNTARY MANSLAUGHTER, WHERE THEY MUST PROVE AN INTENT, JUST NOT A PREMEDITATED INTENT, AND THEN YOU LOOK AT THE STATUTE FOR ATTEMPTED SECOND-DEGREE MURDER, AND IT SAYS ANY PREMEDITATED INTENT, AND YET THE INSTRUCTIONS HAVE NOW DELETED ANY IN INTENT, SO WHAT WE HAVE IS ATTEMPT, MEANING INTENT TO COMMIT THE SECOND-DEGREE MURDER, WHERE WE HAVE ELIMINATED ALL INTENT, AND YET THE LESSER CRIME VOLUNTARY MANSLAUGHTER, WE LEAVE IN THE INTENT. NOW, THE COURT, IN TAYLOR, WAY BACK WHEN, SAID THAT VOLUNTARY MANSLAUGHTER STILL EXISTS BUT YOU CAN'T HAVE CULPABLE NEGLIGENCE. COMPARE THE INSTRUCTIONS BETWEEN CULPABLE NEGLIGENCE AND WHAT YOU NOW HAVE FOR SECOND-DEGREE MURDER. JUST A COUPLE MORE POINTS. IF YOU LOOK, ALSO, AT THE GRENAGE CASE, IT WAS THE ONE WHERE THE FIFTH DCA QUESTIONED THE ATTEMPTED FELONY MURDER, AND THIS COURT TOOK THAT CASE UP, AND IT WAS DECIDED A WEEK AFTER GRAY. THE FIFTH IS NOW USING THAT SAME LOGIC, AND IF YOU LOOK AT JUSTICE -- JUDGE COBB'S DISSENT IN WADKINS OR HIS SPECIAL CONCURRENCE, THE SAME EXACT LOGIC, NOW, HOW CAN YOU ESCAPE THE LOGIC OF INTEND TO DO AN UNINTENTIONAL CRIME THAT THIS COURT HELD IN GRAY AND THEN SAY BUT YOU CAN INTEND TO DO A COMPLETELY UNINTENTIONAL CRIME, WHERE THE STATE DOES NOT HAVE TO PROVE ANY INTENT WHATSOEVER, YET YOU GO TO A LESSER VOLUNTARY MANSLAUGHTER. AGAIN NOW WE HAVE TO PROVE INTENT AGAIN. SO IT SIMPLY IS COMPLETELY DEFYING LOGIC. WHAT THEY ARE DOING. AND THE ODD THING ABOUT THIS IS THAT THIS DEFENDANT WAS CONVICTED OF ATTEMPTED SECOND AND AGGRAVATED BATTERY, WITHIN THE INTENT TO CAUSE GRIEVOUS BODILY HARM WITH A FIREARM. IT IS THE SAME EXACT DEGREE OF CRIME. AND YET THE STATE, THE JUDGE STRUCK THE AGGRAVATED BATTERY AND PURSUED THE ATTEMPTED SECOND-DEGREE MURDER, AND THAT IS THE WHOLE IRONY OF THE SITUATION THAT THIS CASE IS UP HERE, BECAUSE THEY COULD HAVE HAD THEIR KAGAN EAT BE IT, TOO. -- AND EATEN IT, TOO.

IF WE SHOULD FIND IN YOUR FAVOR, WHAT WOULD THAT DO TO A CAN YOU BELIEVE JEOPARDY ISSUE?

WELL, I THINK, IN GRAY, THEY JUST -- WHAT THEY DID IS THEY REMANDED IT FOR RESENTENCING, AND I THINK WILSON CLARIFIED THAT AND SAID THAT WHAT YOU CAN DO IS THE JUDGE COULD, THEN, CONVICT HIM OF ANY LESSER THAT WAS INSTRUCTED UPON. IN THIS CASE, ON THE ATTEMPTED SECOND-DEGREE MURDER, THE JURY WAS INSTRUCTED ON VOLUNTARY MANSLAUGHTER WITH -- ON INVOLUNTARY MANSLAUGHTER WITH A FIREARM.

WHAT ABOUT THE AGGRAVATED BATTERY? WHAT IS THE STATUS OF THAT, IF WE WERE TO SEND, QUASH THE DECISION BELOW?

I WOULD -- MY ANSWER IS, AND I THINK THIS IS IN THE BEST INTEREST OF MY CLIENT, TOO, THAT THE STATE MADE THEIR CHOICE, AND THAT ONE HAS BEEN STRICKEN. THEY, NOW, WOULD BE STUCK WERE GOING TO WHATEVER LESSER THE JURY WAS INSTRUCTED, PURSUANT TO STATE VERSUS WILSON.

AND THERE HAS BEEN A JUDGMENT OF -- ON THAT CASE, ON THE AGGRAVATED BATTERY?

THE AGGRAVATED BATTERY WAS STRICKEN, BUT THE JURY RETURNED A VERDICT OF GUILT ON. THAT YES.

HOW DID THE JUDGE DO THAT? BY AN ORDER?

IT WAS ARGUED AT SENTENCING, AND THE STATE ARGUED THAT IT WAS NOT DOUBLE JEOPARDY, AND THE JUDGE STRUCK THAT ONE.

SO YOU WOULD SAY THAT HE COULD BE RESENTENCED ON ATTEMPTED VOLUNTARY MAN SLAUGHTER?

YES. YES BECAUSE THAT EXISTS, AND THAT, SINCE 1984, TAYLOR, AND THAT HAS NEVER BEEN QUESTIONED, SO I WOULD THINK THAT WOULD BE THE ONLY PLACE THE STATE COULD GO AT THIS POINT.

SO IT IS YOUR OPINION THAT IF WE KILL THIS ONE, THAT NO LIFE IS BREATHED INTO THE AGGRAVATED BATTERY?

WELL, I AM NOT REALLY A DOUBLE JEOPARDY SCHOLAR.

OKAY. THAT'S FINE.

I WOULD THINK THAT, IN THIS CASE, UNDER THE STRICT DICTATES OF GRAY AND ALL ITS PROGENY, WHAT HAPPENS IS WHEN THEY FIND A NONEXISTENT CRIME AND THE OTHER ONE HAS ALREADY BEEN STRICKEN, I THINK THAT WOULD VIOLATE DOUBLE JEOPARDY. THAT ONE HAS BEEN STRICKEN. THIS IS A CONVICTION. WE HAVE TO GO TO THE LESSER.

THANK YOU. MR. HEIDT.

MAY IT PLEASE THE COURT MY NAME IS WESLEY HEIDT IN THIS CASE FOR THE CASE. WE ARE HERE TO SEE WHETHER THETATE IS RECOGNIZED ATTEMPTED SECOND-DEGREE MURDER. WE WOULD LIKE TO POINT OUT THAT THE STATE HAS POSTPONED ITS JURISDICTION IN THIS CASE WHERE THE COURT HAS SET OA, SO WE WOULD ENCOURAGE THIS COURT NOT TO ENTERTAIN JURISDICTION. IN 19843, GENTRY SAID YOU COULD ATTEMPT A GENERAL INTENT CRIME AND ATTEMPT A SPECIFICALLY SECOND-DEGREE MURDER. THE COURT ALSO SAID, IN GENTRY, THAT THIS COURT COULD HAVE LEGISLATIVE ATTEMPT. THAT WAS IN 1983. THE LEGISLATURE HAS READOPTED THE SECOND-DEGREE MURDER STATUTE AND THE FIRST-DEGREE MURDER STATUTE.

YOU CONCEDE THAT THERE HAS BEEN A CHIP AGO WAY AT GENTRY.

-- A CHIPPING AWAY AT GENTRY.

THERE HAS BEEN THE ONLY MAIN AUTHORITY CITED BY THE DEFENSE IS GRAY. GRAY IS A COMPLETELY DIFFERENT ISSUE. GRAY IS AN ISSUE OF FELONY MURDER, WHICH IS NOT WHAT GENTRY WAS ABOUT. SECOND-DEGREE MURDER IS NOT FELONY MURDER. IT IS A GENERAL

INTENT CRIME.

WHAT ABOUT OTHER JURISDICTIONS? HOW MANY STATES CONCUR WITH YOUR POSITION THAT THIS SHOULD REMAIN AN OFFENSE?

I DID A FAIRLY EXTENSIVE RESEARCH INTO OTHER JURISDICTIONS. THE MAJORITY OF THEIR DISCUSSION ANALYZES OUR CASE WITH TAYLOR AND DEALS WITH THE DIFFERENCES BETWEEN INVOLUNTARY MANSLAUGHTER AND VOLUNTARY MANSLAUGHTER. EACH ONE IS UNIQUE TO ITS PARTICULAR WORDING OF THE STATUTE, AND FLORIDA'S SECOND-DEGREE MURDER IS DEPRAVED MIND. IT IS DIFFERENT THAN MANSLAUGHTER, AND IT IS NOT FIRST-DEGREE. IT IS NOT MANSLAUGHTER. SO I AM NOT REALLY SURE THAT ANY OF THE OUT-OF-STATE AUTHORITY THAT I FOUND WAS HELPFUL.

WOULDN'T YOU HAVE TO CONCEDE, THOUGH, EXCEPT THROUGH SOME LEGAL FICTION THAT, THIS DOESN'T MAKE MUCH SENSE?

AGAIN, IT IS A GENERAL INTENT CRIME. IT HAS THE SAME MENTAL INTENT ELEMENT OF THE UNDERLYING OFFENSE, LIKE ARSON. IN THE SECOND DISTRICT COURT OF APPEAL, THEY TRIED TO USE GRAY TO ELIMINATE THE OFFENSE OF SECOND-DEGREE ARSON. THE SECOND DISTRICT COURT SAID, NO, THAT IS NO -- THAT SNOT WHAT GRAY STOOD FOR. YOU HAVE THE UNDERLYING FELONY, A SPECIFIC INTENT CRIME, AND THE FELLOW DEGREE MURDER. WHEN YOU HAVE A DEAD BODY, YOU HAVE THAT RESULT --

WHEN YOU INTEND THE FELONY --

IT IS A LEGAL FICTION, AND THEN YOU FURTHER REMOVE IT WITH THE ADEPT. WE DO NOT HAVE THAT IN THE SITUATION, THE DOUBLE STACKING OF LEGAL IF I CAN SHUNS. -- OF LEGAL FICTIONS. WHEN YOU FOUND --

IF YOU CONSIDER THE ELEMENTS OF SECOND-DEGREE MURDER, BACK TO MY QUESTION, I GUESS, HOW -- WHERE DO YOU GET YOUR INTENT? THERE.

THE INTENT IS THE SAME LEVEL OF INTENT AS TO SECOND-DEGREE MURDER. YOU JUST DON'T HAVE A DEATH. THE-KNOW FELONY MURDER, YOU HAVE NO SBEBT -- NO INTENT. IT IS A STRICT LIABILITY CRIME, AND SECOND-DEGREE MURDER, YOU HAVE -- IN FIRST-DEGREE MURDER YOU HAVE AN INTENTIONAL ACT THAT INDICATES A DEPRAVED MIND, AN ACT DONE WITH ILL WILL OR AN ACT DONE WITH SPITE OR EVIL INTENT. YOU HAVE A REQUIREMENT. IT IS A DEPRAVED MIND INTENT AT WHICH TIME IS A GENERAL INTENT CRIME. FELONY MURDER HAS NO INTENT REQUIREMENT. BASICALLY STRICT LIABILITY. ISN'T THERE, THOUGH, AN INTELLECTUAL INCONSISTENCE I OR REALLY, ALMOST, DISHONESTY GOING ON HERE WITH THIS. AN ATTEMPT IS WHEN YOU ARE TRYING TO DO SOMETHING AND YOU DON'T QUITE GET IT DONE AND THEREFORE YOU ARE CHARGED WITH THE ATTEMPT. IS THAT RIGHT?

WELL, IF YOU DEFINE ATTEMPT AS INTENDING A SPECIFIC-INTENT CRIME, WELL, IN GENERAL INTENT CRIMES, I WOULD DEFINE IT AS A GENERAL INTENT. WE HAVE THE SAME EXACT CULPABLE ACT.

WHAT IS A GENERAL INTENT?

YOU HAVE THE ACT WHICH, IN ADEPTED SECOND-DEGREE MURDER, COULD HAVE KILLED.

WELL, YOU DON'T AGREE WITH ME THAT AN ATTEMPT IS TRYING TO DO SOMETHING ELSE, BUT YOU ARE UNSUCCESSFUL AT COMPLETING?

I THINK, IF YOU USE THAT DEFINITION FOR SPECIFIC-INTENT CRIMES --

I AM NOT TALKING ABOUT SPECIFIC-INTENT CRIMES RIGHT NOW. I AM TRYING TO GET TO THE BOTTOM OF IT TO USE SOME COMMON-SENSE LANGUAGE, TO SEE WHETHER WE ARE OR ARE NOT BEING INTELLECTUALLY CONSISTENT OR INCONSISTENT, AND SO I AM LOOKING FOR SORT OF A COMMONSENSE DEFINITION OF ATTEMPT, AND ONE OF THE WAYS THAT IT OCCURS TO ME IS THAT IT IS SOMEBODY TRYING TO DO SOMETHING THAT THEY ARE UNSUCCESSFUL AT AND THAT THEY DON'T COMPLETE, AND YOU WOULD NOT AGREE WITH THAT, I TAKE IT.

IN THE ARENA OF SECOND-DEGREE MURDER, I WOULD STATE THAT SOMEONE HAS DONE SOMETHING. FORGET TRYING TO. THEY HAVE DONE THE INTENTIONAL ACT. THEY HAVE DONE SO WITH A DEPRAVED MIND N THIS PARTICULAR CASE HE GETS OUT OF THE CAR AND WALKS UP TO THE VICTIM AND SHOOTS THE VICTIM, HITTING HIM IN THE CHEST CAPACITY. THE STATE ORIGINALLY CHARGED THAT WITH FIRST-DEGREE MURDER AND HAEMEDED THAT TO SECOND, PERHAPS -- AMENDED THAT TO SECOND, PERHAPS NOT HAVING A PREMEDITATION IN THAT PARTICULAR INSTANCE, BUT THE ACT DEPRAVED MIND.

GO AHEAD.

IN A GENERAL, SECOND-DEGREE MURDER SENSE, I THINK THAT YOUR INTENT COMES FROM THE SAME INTENT.

IS THERE A DEFINITION OF INTENT THAT WE CAN APPLY TO ALL CRIMES ACROSS THE BOARD. THAT IS THAT THERE ARE ELEMENTS OF AN ATTEMPT THAT WOULD APPLY TO ALL CRIMES, REGARDLESS OF WHATEVER THE CRIME IS? ARE THERE SOME STANDARD FEATURES OF THAT THAT WE WOULDN'T BE TALKING ABOUT SECOND-DEGREE MURDER OR FIRST-DEGREE MURDER OR BURGLARY OR WHATEVER? WE WOULD SAY THERE ARE SOME STANDARD INGREDIENTS IN AN ATTEMPT THAT APPLY ACROSS THE BOARD.

I THINK IT WOULD VARY WITH THE OFFENSE.

SO THERE ARE, REALLY --

NO STANDARDIZED ON ATTEMPT. NO.

WHAT IS THERE BETTER ABOUT ATTEMPTED SECOND-DEGREE MURDER THAN AGGRAVATED BATTERY?

BETTER. IT IS A DIFFERENT OFFENSE.

I KNOW IS A DIFFERENT OFFENSE. BUT WHAT IS BETTER ABOUT A SECOND-DEGREE, ATTEMPTED SECOND-DEGREE MURDER THAN HAVING -- THEY CONVICTED THIS FELLOW OF BOTH.

BATTERY OR AGGRAVATED BATTERY IS A CATEGORY TWO, LESSER ATTEMPTED SECOND-DEGREE MURDER. IT IS A SPECIFIC INTENT CRIME. IN THIS INSTANCE YOU DON'T HAVE A SPECIFIC INTENT. YOU HAVE THE DEPRAVED MIND INTENT. I CAN GIVE EXAMPLES OF ATTEMPT THEED SECOND-DEGREE -- OF ATTEMPTED SECOND-DEGREE MURDER WHERE YOU HAVE NO BATTERY.

OKAY. BUT IN THIS PARTICULAR CASE, WHAT HAPPENS IF WE WERE TO RULE IN FAVOR OF THE DEFENDANT? WOULD DOUBLE JEOPARDY ATTACH?

TO THE SPECIFIC AGGRAVATED BATTERY THAT WAS DISMISSED BELOW?

YES.

I DO NOT BELIEVE SO, BECAUSE IT WAS DISMISSED BECAUSE WE HAD THE LEGITIMATE ATTEMPTED SEC DEGREE MURDER. -- SECOND-DEGREE MURDER, WHICH EXISTED WHEN THE

CONVICTION OCCURRED, SO THAT IS THE ONLY REASON THE AGGRAVATED BATTERY WAS DISMISSED, BUT AGAIN THE DEFENSE TRIES TO ARGUE THAT ATTEMPTED BATTERY WOULD SUBSUME OR TAKE UP THE SLACK, IN THIS ATTEMPTED SECOND-DEGREE MURDER. THERE ARE MANY INSTANCES WHERE THIS IS NOT TRUE.

YOU DON'T MEAN ADEPT. YOU MEAN ACTUAL AGGRAVATED BATTERY.

YES. AGGRAVATED BATTERY OR AGGRAVATED ASSAULT. IF YOU HAVE A SITUATION IN WHICH YOU HAD A PHARMACIST WHO INTENTIONALLY CHANGED THE PRESCRIPTIONS ON SOMEONE AND DID SO AS AN INTENTIONAL ACT AND WITH A DEPRAVED MIND. IN THAT INSTANCE YOU HAVE NO AGGRAVATED BATTERY OR BATTERY OBVIOUSLY, BUT WOULD YOU HAVE AN INTENTIONAL ACT? WOULD YOU HAVE A DEPRAVED MIND? YES. IF YOU HAD A DEATH, WOULD YOU HAVE SECOND-DEGREE MURDER? YES. OBVIOUSLY. WOULD YOU HAVE FIRST-DEGREE MURDER?

NO. WHAT YOU HAVE IS ATTEMPTED AND SECOND-DEGREE MURDER. AGGRAVATED BATTERY IS NOT A FALL BACK. IT IS A LOGISTIC OFFENSE. IT IS NOT A FALL BACK. GRAY TALKED ABOUT THE ILL LOGIC OF THAT OFFENSE. YOU DO NOT HAVE THAT SITUATION IN THIS INSTANCE. YOU DO DO NOT HAVE AN INSTANCE OF A LOWER COURT APPLYING IT. WHAT YOU HAVE IS A SPECIFIC INTENT CRIME APPLIED TO THE GENERAL SECOND-DEGREE MURDER OFFENSE AND IN THE COSTON CASE CITED IN OUR BRIEF --

YOUR HYPOTHETICAL, WHAT WAS THE REASON THAT THE CHARM CYST CHANGED THE PRESCRIPTIONS? -- THAT THE PHARMACIST CHANGED THE PRESCRIPTIONS?

HE HAVE AN EVIL MAN AND DECIDED HE WANTED TO PLAY GAMES WITH THE PRESCRIPTION AND SEE WHAT RESULTS OCCURRED. GIVEN THE STATE'S DESCRIPTION, I BELIEVE THAT WOULD FIT THE DESCRIPTION OF SECOND-DEGREE MURDER. IF YOU HAD A DEAD BODY, A PERSON OF ORDINARY JUDGMENT WOULD BE CERTAIN THAT THAT WOULD KILL OR CAUSE SERIOUS BODILY INJURY AND IN THAT INSTANCE YOU HAVE NO AGGRAVATED BATTERY. YOU HAVE NO BATTERY AT ALL. SO YOU MEET THE ELEMENTS OF SECOND-DEGREE MURDER, IF SOMEONE IS FORTUNATE NATIONAL ENOUGH NOT TO DIE, THIS COURT WROTE IN GENTRY, WHY REWARD THE DEFENDANT? YOU HAVE THE SAME CULPABLE ACT. SO, AGAIN, SIMPLY BECAUSE THE VICTIM IS FORTUNATE NATIONAL ENOUGH NOT TO DIE, HE TAKES THE POISONED MEDICINE AND DOES NOT DIE, WHY REWARD HIM WITH WHATEVER OFFENSE WOULD EXIST?

IN YOUR EXTENSIVE RESEARCH AROUND THE COUNTRY, YOU INDICATE THAT THERE IS JUST NO FACTUAL SITUATIONS THAT YOU CAME UP WITH THAT WOULD BE CONSISTENT OR SIMILAR TO THIS ISSUE WITH THE DEFINITIONS?

I FOUND NONE, NO, YOUR HONOR.

AND, BUT, DID GENERALLY, THE ANALYSIS OF THE OPINIONS WIND UPHOLDING THAT THERE WAS NO LOGIC TO THIS TYPE OF OFFENSE?

I THINK, LIKE THIS COURT FOUND IN TAYLOR, WITH THE OFFENSE OF NEGLIGENCE, THERE IS THE DIFFICULTY OF BEING ILLOGICAL TO ADEPT, BECAUSE YOU DON'T HAVE THE DEPRAVED MIND, THE EVIL INTENT THAT EXISTS IN SECOND-DEGREE MURDER. SECOND-DEGREE MURDER IS MORE THAN MANSLAUGHTER. IT IS MORE THAN INVOLUNTARY MANSLAUGHTER, AND YOU DON'T HAVE THE SAME ELEMENTS. YOU DON'T HAVE THE SAME MENTAL STATE. WHAT YOU HAVE IS A SITUATION IN WHICH YOU HAVE THE INTENTIONAL ACT, CHANGESING THE PRESCRIPTIONS -- CHANGING THE PRESCRIPTIONS. YOU HAVE THE ACT OF IF YOU HAD A CANOIST AND YOU HAD A BIG GIANT BOAT AND YOU SWAMPED THAT PERSON AND TWO PEOPLE DIED AND THE THIRD HAPPENED TO LIVE. YOU HAVE NO BATTERY. YOU HAVE NO -- YOU HAVE MORE THAN MERE NEGLIGENCE. WHAT YOU HAVE IS SECOND-DEGREE MURDER. A DEPRAVED MIND. YOU HAVE AN INTENT ELEMENT. THIS HAPPENS TO BE A GENERAL INTENT. SO I DO NOT FIND THE OUT-OF-STATE

JURISDICTION WOULD REALLY BE HELPFUL, BECAUSE OUR STATUTE IS REALLY UNIQUE. OUR CASE LAW COMES OUT OF GRAY AND OUT OF TAYLOR. WHAT WE HAVE IN THAT SITUATION IS GRAY, AGAIN, HAS THE DOUBLE STACKING WITH INFERENCES. THEY WANT TO APPLY GRAY AND EXPAND GRAY TO ELIMINATE THE ATTEMPT OF GENERAL INTENT CRIME. THIS COURT FOUND IN GENTRY THAT THEY DO EXIST AND THIS COURT FOUND THAT IT WAS LEGISLATIVE INTENT. I DO NOT BELIEVE THAT THIS COURT HAS PRESENTED ANYTHING THAT SHOWS THAT WAS NOT THE LEGISLATIVE INTENT. I DO NOT BELIEVE THAT THEY HAVE SHOWN ANYTHING TO EXPAND GRAY. IT IS OUR BELIEF THAT IT IS A GENERAL INTENT CRIME AND WE SHOULD NOT ELIMINATE SECOND-DEGREE MURDER.

THANK YOU, COUNSEL. MS. DAVIS, REBUTTAL.

YES, SIR. JUST BRIEFLY. WE HAD CITED SEVERAL OUT-OF-STATE JURISDICTIONS IN THE BRIEF, AND A POLLING OF THE JURISDICTIONS, AND THERE WAS A CASE WHICH WAS CITED JUST IN THE REHEARING ON BRADY, CALLED KOBLE, OUT OF NORTH CAROLINA IN 1999, AND I CAN'T FIND THAT CASE, BUT IT HAD A WHOLE LAUNDRY LIST OF EVERY JURISDICTION THAT ADDRESSED THIS ISSUE AND WE HAVE THE "YES BUT" ISSUES. IN THE DEPRAVED MIND ONES, THEY ARE JUST NOT GOING WITH THE DEPRAVED MIND ONES, THE OTHER STATES. MARYLAND, IN THE SELBY CASE THAT WE CITED, YOU CAN HAVE "YES BUT" BUT ONLY IN THE ATTEMPT OF SECOND-DEGREE MURDER THAT INCLUDES INTENT. IDAHO, THE ARRIBRIETO CASE. YES, BUT YOU HAVE TO HAVE THE INTENT IN THERE. INDIANA. HALL IS A "YES BUT" CASE. INDIANA WADU AND WADU. THE COURT DIDN'T INSTRUCT THE JURY THAT YOU MUST HAVE SPECIFIC SBEBT INTENT. TENNESSEE IS ANOTHER "YES BUT" CASE. UTAH SAID NO. IN THE COBLE CASE, THE LAUNDRY LIST. NORTH CAROLINA SAID YES, BUT IT IS A YES BUT CASE. ALASKA NO. IDAHO YES BUT. ILLINOIS NO. KANSAS NO. LOUISIANA YES, BUT IF THERE IS A SPECIFIC INTENT TO CAUSE DEATH. MARYLAND YES IF THERE IS SPECIFIC INTENT. NEVADA NO AND SOUTH CAROLINA NO. THAT WAS MY POLLING OF THE OTHER STATE'S CASES, SOME OF WHICH WE CITED AND THE OTHER WHICH WE CITED IN THE COBLE CASE. YOU ASKED ABOUT A DEFINITION OF ATTEMPT, AND IN THE AMLOT CASE, THEY SAID THAT THE DEFINITION OF ATTEMPT IS THERE IS TWO ESSENTIAL ELEMENTS: A SPECIFIC INTENT TO COMMIT THE CRIME AND A SEPARATE, OVER EARTH, IN EFFECTULE ACT DONE TOWARDS ITS COMMISSION, AND THAT IS OUT OF AMLOT. IN THE STATE VERSUS GRAY, THIS COURT, AND YOU ARE TALKING ABOUT LEGAL FIXES HERE. GENTRY SAID THERE ARE CRIMES WHERE THE STATE DOESN'T HAVE TO PROVE SPECIFIC INTENT, WHICH IS EXACTLY WHAT GRAY WAS SAYING IN THAT WE ARE NOT GOING TO, AND I AM ON PAGE A 53, WE ARE NOT GOING TO PRESUME THE EXISTENCE OF THE SPECIFIC INTENT. THEY ARE SAYING THE EXACT SAME THING. THE STATE DOESN'T HAVE TO PRESUME. IT SAYS IT DOESN'T HAVE TO PROVE IT, SAYS GENTRY, SO THAT MEANS IT IS PRESUMED. GRAY SAID, NO, WE ARE JUST NOT GOING TO PRESUME SPECIFIC INTENT IN THE FELONY MURDER SCENARIO. IN THE EXAMPLES THAT HE GAVE IN THE CANOE, THE SPLASHING, THERE IS A BATTERY THERE. THEY INTENDED. THE WATER HIT. THANK IS AN AGGRAVATED BATTERY. IF YOU SHOOT AND MISS, YOU HAVE AGGRAVATED ASSAULT WITH A FIREARM. NOW, IF YOU LOOK AT HOW THE CRIMINAL REFORM ACT, AND THE AMENDMENTS IN OCTOBER OF '98, NOW YOU DO NOT NEED A REASON FOR DEPARTURE, SO THE STATE DOES HAVE THIS ENORMOUS SAFETY NET, AS SOON AS YOU GET TO THE LEVEL OF FELONY, IN MY CASE IT WOULD BE AGGRAVATED BATTERY WITH A FIREARM. YOU CAN GO UP TO THE STATUTORY MAXIMUM. SO THAT IS THEIR RANGE ANYMORE. MY CASE HAPPENED BEFORE OCTOBER OF '98. IT WAS IN AUGUST OF '97, SO I WOULD GO BY GUIDELINES: THAT WOULD SAVE ONE LEVEL FOR ME, IF WE WENT TO AGGRAVATED BATTERY.

WHAT ABOUT HIS EXAMPLE OF THE PHARMACIST? WHAT CRIME WOULD THAT BE?

NOW, HE HAS A PHARMACIST THAT IS POISONING PEOPLE.

NO. THAT IS INTENTIONALLY SWITCHING PRESCRIPTIONS, NOT REALLY KNOWING -- JUST DOING IT BECAUSE HE HAS GOT A DEPRAVED MIND.

AND HE HASN'T KILLED ANYBODY OR MADE THEM SICK?

APPARENTLY HASN'T KILLED ANYBODY.

WELL, THE PERSON GOT SICK BUT DIDN'T DIE.

I WOULD SAY PROBABLY A BATTERY ON THAT ONE. OBVIOUS MALPRACTICE.

A BATTERY?

SEE, THERE IS SIMPLY NO INTENT TO KILL ANYBODY. IF THEY COULD PROVE THAT --

THAT IS TRUE IN EVERY SECOND-DEGREE MURDER.

IF HE KILLED SOMEBODY AND IT WAS A DEPRAVED MIND, THE DIFFERENCE IS YOU HAVE A BODY HERE. IF HE MEANT TO KILL SOMEBODY AND HE IS SITTING THERE GOING I AM GOING SWITCH THESE PRESCRIPTIONS. I AM GOING TO KILL ALL THESE PEOPLE, THAT IS FIRST-DEGREE. ATTEMPTED FIRST.

BUT IF WHAT HE WAS DOING WAS HE KNEW, IN HIS MIND, THAT IF HE SWITCHED THESE MEDICATIONS, THAT THE PERSON WOULD PROBABLY DIE.

THEN THAT WOULD BE --

BUT IT WASN'T HIS INTENT TO KILL ANYBODY. IT IS JUST THAT HIS ACT WAS SUCH THAT HE WAS ACTING OUT OF CLASSIC DEFINITION OF THE FLORIDA SECOND-DEGREE MURDER.

WELL, UNDER OUR INSTRUCTIONS NOW, THOUGH, HE WAS INTENDING TO KILL SOMEBODY. HE KNEW, IF HE DID THIS, HE WOULD KILL SOMEBODY. SO YOU MAY HAVE FIRST-DEGREE MURDER. YOU MAY HAVE VOLUNTARY MANSLAUGHTER. RECKLESS DISREGARD, WANTONNESS, GROSS DISREGARD. BUT UNDER THE INSTRUCTIONS, SEE, THE INSTRUCTIONS SAY YOU -- THE STATE DOESN'T HAVE TO PROVE ANY INTENT, AND THERE IS THE IRONY OF THE WHOLE THING IS THE HIGHER OFFENSE, THE STATE PROVES NO OFFENSE, AND YET YOU GO TO VOLUNTARY MANSLAUGHTER, THEY DO HAVE TO PROVE INTENT. THEY JUST DON'T HAVE TO PROVE A PREMEDITATED INTENT. BUT THEY STILL HAVE TO PROVE AN INTENT TO KILL, AND THAT IS WHY TAYLOR UPHELD THAT.

IS THERE SOMETHING WRONG, THEN, WITH THAT JURY INSTRUCTION?

BEG YOUR PARDON?

IS THERE SOMETHING WRONG WITH THE JURY INSTRUCTION? SHOULD WE BE LOOKING AT THAT?

THERE IS SOMETHING VERY WRONG WITH THE ATTEMPTED SECOND-DEGREE MURDER AND THE CASE LAW SAYS THERE IS NO INTENT TO KILL IN SECOND-DEGREE MURDER. NOW, THE STATUTE SAYS ANY PREMEDITATED INTENT.

THERE IS NO INTENT TO KILL, BUT THERE IS SOME GENERAL INTENT TO DO THE ACT THAT IS A DEPRAVED MIND ACT. CORRECT?

YES.

AND SO IF YOU HAVE A JURY INSTRUCTION THAT SAYS THERE IS NO INTENT, SHOULDN'T WE, REALLY, BE LOOKING AT THAT, BECAUSE IN TRUTH THERE IS A SBEBT.

THE ONLY WAY -- INTENT.

THE ONLY WAY THE LEGISLATURE COULD SAVE ATTEMPTED SECOND-DEGREE MURDER IS PUT "INTENT -- BACK IN THERE, AND THAT IS WHAT ALL THE STATES ARE SAYING, IS THAT THERE MUST BE SOME INTENT TO KILL, IN A DEPRAVED MIND, AND OUR JURY INSTRUCTIONS HAVE TAKEN OUT AND SPECIFICALLY SAYS THE STATE DOESN'T HAVE TO PROVE ANY SBEBT -- INTENT, SO THE LEGISLATURE COULD SAVE THIS, AND THEY HAVE HAD OPPORTUNITIES TO SAFE THIS, BUT -- TO SAVE THIS, BUT THEY HAVE TO EITHER REDEFINE A SECOND-DEGREE, SO THAT YOU HAVE GOT SOME INTENT IN THERE, OR THE WAY IT IS RIGHT NOW, IT SIMPLY DOESN'T EXIST.

ARE THERE MANY STATES THAT HAVE INTENT AS A PART OF THE SECOND-DEGREE?

THE STATES THAT I CITED, THE ONES THAT THEY UPHOLDED, IT IS YES, BECAUSE WE HAVE INTENT. JUST DEPRAVED MIND, IT IS NOT GOING TO DO, WITH NO INTENT, AND IN CLOSING, I WOULD JUST LIKE TO CITE JUSTICE HARDING, IN GRAY, WHERE HE SAID THAT IT DOES NOT COMMAND BLIND ALLEGIANCE TO PRECEDENT. THANK YOU.

THANK YOU. THANKS TO BOTH OF YOU.