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Bryan Gordon vs State of Florida

THE NEXT CASE ON THE COURT'S CALENDAR IS BYRON GORDON VERSUS THE STATE OF FLORIDA. YOU MAY PROCEED.

GOOD MORNINGS JUDGES, MR. CORRENTE. I AM NANCY RYAN ASSISTANT PUBLIC DEFENDER, REPRESENTING THE PETITIONER MR. BYRON GORDON. MR. GORDON, AS YOU KNOW, STANDS CONVICTED OF FOUR CRIMES, BASED ON A SINGLE SERIES OF EVENTS. I WOULD LIKE TO SAY THAT MR. GORDON ADAMANTLY MAINTAINS HIS INNOCENCE AND HAS AT ALL TIMES DURING THIS PROCEEDING. HE DOES STAND CONVICTED OF WALKING UP TO A VICTIM AND PULL A GUN AND DEMANDING MONEY AND WHEN HE RECESSED, HE -- RESISTED, HE SHOT THE GUN ONCE AND CAUSED INJURY TO THE VICTIM AND TOOK HIS MONEY. MR. GORDON CONCEDES HE IS GUILTY OF ARMED ROBBERY, AND CAUSING BODILY INJURY DURING THE COURSE AFTER FELONY, ATTEMPTED FIRST-DEGREE MURDER AND AGGRAVATED BATTERY.

YOU DO AGREE THAT ATTEMPTED FIRST-DEGREE MURDER AND ARMED ROBBERY ARE AT LEAST SEPARATE OFFENSES?

NO, JUDGE. WE ARE GOING TO ATTEMPT TO ARGUE THAT THEY SHOULD BE TREATED THE SAME. WE DO MAKE SOME CONCESSIONS, YOUR HONOR. WE CONCEDE THAT UNDER A STRICT BLOCK BERGER VERSUS UNITED STATES ANALYSIS, ALL FOUR CONVICTIONS WOULD STAND. WE, ALSO, CONCEDE THAT THE ROBBERY AND ONE OF THE OTHER OFFENSES CAN STAND.

THAT IS WHAT I WAS ASKING, SO THE ATTEMPTED FIRST-DEGREE MURDER WOULD STAND, ALONG WITH THE ARMED ROBBERY.

CORRECT. THOSE TWO CAN STAND. THE STATE APPEARS TO BE EXPECTING A FRONTAL ASSAULT ON ITS NEW STATUTE, CAUSING BODILY INJURY DURING A FELONY. OUR POSITION IS THAT THE SUBSECTION OF THAT STATUTE INVOLVED IN THIS CASE, WHICH IS SUBSECTION ONE OF THE 1997 VERSION, WHICH IS DIFFERENT FROM THE CURRENT VERSION, IS IN NO WAY AN UNCONSTITUTIONAL STATUTE. IT IS NOT A PROBLEM. IN THAT STATUTE THE LEGISLATURE SAID, IF YOU COMMIT ONE OF A SERIES OF ENUMERATED OFFENSES AND DURING THE COURSE OF COMMITTING THAT OFFENSE CAUSE ANOTHER PERSON BODILY INJURY, THEN YOU ARE GUILTY OF A FIRST-DEGREE FELONY FOR THE BATTERY. THEY DON'T WANT ANYBODY WALK AWAY FROM A POTENTIAL FELONY MURDER SITUATION WITH ONLY A SIMPLE BATTERY CONVICTION OR ONLY A THIRD-DEGREE FELONY AGGRAVATED BATTERY CONVICTION. THEY ARE MAKING IT A FIRST-DEGREE FELONY IN ALL CASES. WE DON'T OBJECT TO THAT. I REALLY DO NOT OBJECT TO THE STATE KEEP HAD GONE THAT CONVICTION AND THE ARMED ROBBERY CONVICTION.

WHAT SECTION, WHAT SUBSECTION OF 775.021 DO YOU MAINTAIN MAKES THESE THE SAME OFFENSE? IS IT -- IS THIS AN OFFENSE WHICH REQUIRES IDENTICAL ELEMENTS OF PROOF? IS THIS AN OFFENSE WHICH INGRESS, OR IS THIS AN OFFENSE WHICH IS A LESSER-INCLUDED OFFENSE?

THAT ONE IS NONE OF THE ABOVE. OUR POSITION IS THAT THE STATE CAN KEEP THE ARMED ROBBERY CONVICTION AND THE FELONY CAUSE BODILY INJURY CONVICTION.

I AM TALKING ABOUT THE THREE THAT ALL INVOLVE THE SHOOTING. FIRST-DEGREE MURDER, THE FELONY, THE BODILY HARM DURING THE FELONY, AND THE AGGRAVATED BATTERY. OKAY. YOU ARE MAINTAINING THAT THE AGGRAVATED BATTERY, AND THE BODILY INJURY DURING THE

COURSE OF A FELONY, ARE SUBSUMED UNDER THE FIRST-DEGREE ATTEMPTED MURDER. CORRECT?

JUDGE, IT IS OUR POSITION THAT THEY ARE MERITORIOUS UNDER THE FELONY OFFENSE.

SUBSECTION TWO OF THAT STATUTE IS WHAT YOU ARE PEGGING THIS ON.

YES, YOUR HONOR.

OFFENSES WHICH ARE DEGREES OF THE SAME OFFENSE, AS PROVIDED BY STATUTE.

YES, YOUR HONOR, AND SINCE YOU QUOTE THAT LANGUAGE, I WILL ACKNOWLEDGE THE DIFFERENCE BETWEEN THAT LANGUAGE AND THIS COURT'S CONSTRUCTION OF IT AND THE CASES STARTING WITH SERMANS. AS THE COURT KNOWS, BACK IN 1987 THE COURT DECIDED THE ILL-FATEED CAROLINE VERSUS STATE CASE AND THE COURT CAME BACK IMMEDIATELY AND SAID, NO, WE DO NOT WANT YOU PHRASING DOUBLE JEOPARDY IN BROAD TERMS. WE WANT YOU TO LOOK AT BLOCK BERGER ANALYSIS FIRST AND WE WANT YOU TO LOOK AT THESE THREE DIFFERENT EXCEPTIONS. IN COURT, IN 1994, IN SERMANS, AT THE PERSUASION OF AN ADAMANT PUBLIC DEFENDER, BROADLY CONSTRUED THE LANGUAGE, THAT WE ARE RELYING ON TODAY, WHICH IS THE EXCEPTION FOR DEGREE OF OFFENSES AS PROVIDED BY STATUTE. THIS COURT READ THIS TO MEAN WHEREVER TWO OFFENSES ARE MERE DEGREE VARIANCE ON THE SAME CORE OFFENSE, THEN CONVICTIONS ON TWO OFFENSES CANNOT STAND, WHEN BASED ON MERITORIOUS OFFENSES.

CAN YOU MAINTAIN YOUR POSITION AND STILL HONOR BLOCKBERGER?

YES, JUDGE. SERMANS IS NOT RELATED TO BLOCK BERGER. ANOTHER LEGISLATIVE PRONOUNCEMENT THAT TWO CRIMES CAN FLOW OUT OF IT, IT IS LEGISLATIVE INTENT THAT SHOULD YOU SHOULD HAVE AS MANY CRIMES AS YOU CAN GET OUT OF IT.

CORRECT, JUDGE.

A COUPLE THAT WAS BLOCK BERGER, AND YOU STILL DON'T HAVE A PROBLEM?

NO, JUDGE, NOT WITH THESE FOUR OFFENSES, BUT OUR ENTIRE ARGUMENT, TODAY, IS BASED ON THE LINE OF CASES WHICH BEGINS WITH SERMANS AND WHICH WE SUBMIT ARE CORRECT.

YOU STARTED OUT CONCEDED THAT, IF YOU APPLIED JUST A STRICT BLOCK BERGER ANALYSIS, THAT YOU LOSE.

YES, JUDGE.

YOU AGREE WITH THAT.

YES, JUDGE. BUT THIS COURT HAS NOT FOLLOWED A STRICT BLOCK BERGER ANALYSIS SINCE 1994, WHEN IT DECIDED SERMANS. OUR POSITION IS THAT --

MP WAS A PRETTY STRICT BLOCK BERGER ANALYSIS, RIGHT?

YES, BUT --

WHAT WE ARE DEALING WITH, HERE, IS AN ANALYSIS OUT OF THE FIFTH DISTRICT, WHICH ATTEMPTS TO GIVE MEANING TO WHAT THIS COURT HELD, IN MP, AS TO THE FACT THAT YOU LOOK AT DIFFERENT ELEMENTS, AND WHEN YOU LOOK AT ATTEMPTED MURDER, AND YOU LOOK AT THESE OTHER COUNTS, THEY ARE DIFFERENT ELEMENTS. AREN'T THEY?

YES, JUDGES AS WE CONCEDE READILY, IF YOU APPLIED A STRICT BLOCK BERGER ANALYSIS, AS YOU ENDED UP DOING --

IF YOU APPLY MP, THAT IS WHAT YOU END UP DOING.

JUDGE, IT IS MY POSITION THAT MP IS A CORRECT APPLICATION OF LAW BECAUSE NO SERMANS ISSUE AROSE IN MP. ONE INVOLVED CARRYING A CONCEALED WEAPON AND THE OTHER ONE WAS POSSESSION OF A FIREARM BY A MINOR AND THE LEGISLATURE, IN A LATTER STATUTE, SAID THIS IS SEPARATE TO AND IN ADDITION TO ANY OTHER STATUTE. IT WAS CLEARLY THE LEGISLATURE'S INTENT THAT MORE THAN ONE CONVICTION COULD RELY LIE ON THE FACTS PRESENTED IN MP.

WE HAVE HAD OTHER CASES WHICH GIVE THE SUPPLIED BLOCK BERGER, ATTEMPTING TO WRESTLE WITH THE CONCEPT OF POSSESSION OF DRUGS VERSUS SALE OF DRUGS. I MEAN, WE HAVE GOT A WHOLE LINE OF CASES, NOW, SINCE SERMANS, WHICH HAVE GIVEN LIFE TO THE STATUTORY AMENDMENT AFTER CAROINE, WHICH APPLIED BROCKBERG.

IT DOESN'T DIRECTLY APPLY BLOCKBERGER, WHICH INCLUDE MP AND GIBBS, THE PROBLEM THAT THE LEGISLATURE RECOGNIZES IS THAT IT CONTINUES TO CLOSE GAPS IN THE LAW, TRYING TO CONTINUALLY MAKE EVERY HARMFUL ACT A CRIME. CONTINUING TO PLUG UP A GAP, AS PERCEIVED HERE. SERMANS WASN'T A GOOD CASE BUT AFTER SERMANS. JOSEPH THOMPSON INVOLVED SEXUAL BATTERY ON A MINOR AND SEXUAL IMPROPRIETY IN ONE'S PRESENCE. IN BOTH OF THOSE CASES THE PROSECUTORS TOOK ALL OF THE POSSIBLE RELEVANT STATUTES TO THE BANK AND GOT CONVICTIONS ON THEM ALL AND THE COURT SAID, WAIT A MINUTE, THAT VERY SPECIFIC STATUTE WASN'T INTENDED TO COVER A SITUATION WHERE MAYBE THE GENERAL STATUTES DIDN'T APPLY.

HOW ABOUT WORKING YOUR WAY THROUGH, TALKING ABOUT GENERAL LAW AND BLOCK BERGER. HOW ABOUT WORKING YOUR WAY THROUGH. YOU HAVE TAKEN ARMED ROBBERY OFF THE TABLE. IS THAT RIGHT?

YES, JUDGE.

AND THE CERTIFIED QUESTION ONLY APPLIES TO FIRST-DEGREE MURDER AND THEN THE BATTERY AND THEN THE BODILY INJURY DURING A FELONY CHARGE, SO HOW ABOUT ADDRESSING THOSE THREE AND WHY, IN THE CONTEXT OF THIS CASE, THERE IS ANY PROBLEM WITH THE CONSTITUTIONALLY CONVICTING AND PUNISHING SOMEBODY FOR ALL THREE OF THOSE, AND LET ME HELP YOU WITH IT A LITTLE BIT, TO, AS FAR AS WHY IT MAY POSSIBLY BE ALL RIGHT, WHEN THE STATE IS TRYING TO CONVICT SOMEBODY FOR ATTEMPTED FIRST-DEGREE MURDER, EVEN GOING BACK, IF WE WERE STILL APPLYING COROWIN, IN THAT THEORY, WOULDN'T IT BE THE HARM THAT THEY WERE TRYING TO AVOID IS THAT WE DON'T WANT PEOPLE GOING AROUND, TRYING TO KILL OTHER PEOPLE, AND SO IF THEY ATTEMPT TO KILL OTHER PEOPLE, IT IS TRYING TO AVOID THAT, THAT THEY HAVE A CRIME OF ATTEMPTED MURDER. WOULD YOU AGREE WITH THAT? I MEAN, ISN'T THAT WHAT THE SOCIAL POLICY IS INVOLVED THERE?

JUDGE, I THINK THAT IS SORT OF SPECULATION THAT IS EXACTLY WHAT THE LEGISLATURE DIDN'T LIKE IN COROWIN. THEY DIDN'T LIKE THE COURT SPECULATING ABOUT WHAT EVILS IT WAS TRYING TO PREVENT.

I GUESS WHAT I AM TRYING TO BE AS KIND TO YOU AS I CAN, WITH REFERENCE TO OUR SUBSEQUENT CASE LAW, AFTER THE LEGISLATURE RESPONDED TO CAROWIN, AND THAT, INDEED, WE HAVE RECOGNIZED THAT THERE MAY BE INSTANCES WHEN JUST STRICT APPLICATION OF BLOCK BERGER MIGHT NOT YIELD THE COMPLETE ANSWER TO A QUESTION, AND I AM TAKING, REALLY, WHAT I PERCEIVE THAT WE HAVE DONE SINCE THEN AND APPLYING IT TO THESE THREE, SEEING,000 WORKS BUT -- SEEING HOW IT WORKS BUT WOULDN'T YOU AGREE, AT LEAST, INSOFAR AS THE EVE THAELL IS SOUGHT TO BE AVOIDED BY THE MURDER AND ATTEMPTED MURDER, IS

WE DON'T WANT PEOPLE GOING AROUND, TRYING TO KILL OTHER PEOPLE.

WE DON'T WANT PEOPLE TRYING TO HARM OTHER PEOPLE AT ALL, AND I SUBMIT TO YOU --

NOW I AM HAVING TROUBLE ABOUT THAT. IN OTHER WORDS, YOU ARE SAYING THAT THE ATTEMPTED MURDER AND THE FIRST-DEGREE MURDER IS JUST PART OF A BROADER THING OF WE DON'T WANT PEOPLE TO GET HURT AT ALL?

JUDGE THAT, IS MY ULTIMATE ARGUMENT, BUT LET ME PLEASE MAKE AN EARLIER, AN EASIER ARGUMENT FIRST, WHICH IS THAT THE AGGRAVATED BATTERY SHOULD DROP OUT OF THE CASE HERE. THE CONVICTION SHOULD DROP OUT, BECAUSE, UNDER SERMANS, AGGRAVATED BATTERY AND CAUSING A FELONY DURING A BODILY INJURY.

DO YOU HAVE AN ARGUMENT --

I HAVE AN EASIER ARGUMENT FOR ONE TO DROP OUT AND A HARDER ARGUMENT FOR THE OTHER OFF TONES DROP OUT. CAUSING BODILY INJURY DURING A FELONY AND AGGRAVATED BATTERY ARE MERE DEGREE VARIANCE ON THE CORE OFFENSE OF BATTERING ANOTHER PERSON.

WAS THE BODILY INJURY PROVEN, ALLEGED AND PROVEN IN EACH OF THOSE TWO CHARGES, THE SAME BODILY INJURY IN THIS CASE?

YES, JUDGE, IT WAS A SINGLE GUNSHOT WOUND. ALL FOUR OFFENSES ARE PREDICATE ODD A SINGLE GUNSHOT WOUND.

NONE OF THESE WERE PREDICATED ON THE, IF I UNDERSTAND IT YOUR CLIENT WAS ALLEGED AND THERE WAS EVIDENCE THAT HE, ALSO, STRUCK THE VICTIM?

YES, JUDGE, HE DID.

THAT IS NOT PART OF THE BODILY INJURY CLAIM IN THESE CASES?

I DO KNOW IT WASN'T THE BASIS FOR THE AGGRAVATED BATTERY. THE DISTRICT COURT OF APPEALS SPECIFICALLY FOUND THAT ALL FOUR OFFENSES WERE PREDICATED ON THE SINGLE GUNSHOT WOUND.

WASN'T COUNT TWO CHARGING AGGRAVATED BATTERY, CAUSING GREAT BODILY HARM WITH A FIREARM?

YES, SO CLEARLY THE OFFENSE DOESN'T SUPPORT THE BODILY INJURY OR THE BATTERY, EITHER, BECAUSE THE COURT EXPRESSLY FOUND THAT THERE WAS NO BODILY INJURY FROM THE PUNCH. IT WAS A QUICK BLOW.

YOU ARE SAYING THE BODILY INJURY DURING A FELONY SHOULD BE DELETED OR THE -- DELETED OR THE AGGRAVATED BATTERY? ANOTHER AGGRAVATED BATTERY, BECAUSE IT IS TIME OUT, ONCE THE DEFENSE SUCCEEDS WITH A BODILY INJURY ARGUMENT. THEY ARE BOTH MERE DEGREE VARIANCE ON THE SAME CORE OFFENSE OF BATTERY, THE ARGUMENT, WHICH I AM TRYING UNSUCCESSFULLY, THIS MORNING, TO SELL, THAT ATTEMPTED MURDER SHOULD BE TREATED AS PART OF THE SAME CORE GROUP OF OFFENSES, JUST, REALLY, BECAUSE IT MAKES THE ANALYSIS A LOT EASIER. THERE HAVE BEEN TWO CASES DECIDED IN THE FIRST DCA AND THE FOURTH DCA, SINCE THE BRIEFS WERE FILED IN THESE CASES ON FELONY BODILY INJURY AND ATTEMPTED MURDER.

ARE YOU SAYING, AND I KNOW YOU HAVE GOT THIS ALL DOWN, BUT WE ARE LOOKING AT THESE. ARE YOU SAYING THAT THE AGGRAVATED BATTERY CAUSING GREAT BODILY HARM, WHICH IS

COUNT THREE, IS SUBSUMED WITHIN CAUSING GREAT BODILY INJURY DURING A FELONY?

YES, JUDGE.

AND NOW YOU ARE ARGUING TO SAY BOTH OF THOSE SHOULD BE SUBSUMED WITHIN ATTEMPTED FIRST-DEGREE MURDER?

YES, JUDGE, AND THE BASIS FOR THAT IS THAT ATTEMPTED MURDER SHOULD BE TREATED AS IF ITS CORE WERE BATTERY, BECAUSE IF IT IS NOT, YOU END UP WITH CASES LIKE BROWN FROM THE FIRST DCA, DECIDED JUST THIS LAST MARCH, SAYING THAT ATTEMPTED MURDER AND CAUSING BODILY INJURY IN THE COURSE OF A FELONY AREN'T THE SAME OFFENSE, BECAUSE IN A SECOND FOOTNOTE, THE COURT SAYS ATTEMPTED MURDER IS JUST AN ASSAULT.

BUT WITH THAT NOTE, GETTING BACK TO WHAT JUSTICE ANSTEAD WAS ASKING, THOUGH, WE NOTE THAT WITH ATTEMPTED FIRST-DEGREE MURDER THAT WHAT IS BEING ATTEMPTED TO BE PUNISHED IS THE ATTEMPT TO KILL SOMEBODY, WHEREAS WITH TWO AND THREE, YOU ARE FOCUSING ON WHETHER SOMEONE HAS ACTUALLY BEEN HARMED, SO WHY ISN'T THAT, WHETHER WHATEVER, UNDER WHICHEVER LEVEL OF DOUBLE JEOPARDY ANALYSIS WE ARE LOOKING AT, WHY SHOULDN'T THAT BE SEPARATELY PUNISHED CRIME?

YOU CAN. YOU CAN TREAT THEM SEPARATELY. THE LEGISLATURE MAY HAVE INTENDED FOR YOU TO TREAT THEM SEPARATELY. I AM SUGGESTING, THAT IN ADDITION TO DROPPING OUT THE AGGRAVATED BATTERY IN THIS CASE, ONE OF THE OFFENSES SHOULD BE DROPPED OUT, BECAUSE THE LEGISLATURE HAD JUST CREATED SO MANY CRIMES, BASED ON SO MANY CRIMES, OF WHICH A DEFENDANT CAN BE CONVICTED, BASED ON THE SINGLE ACT OF HARMING OR TRYING TO HARM ANOTHER PERSON. I SUBMIT THEY HAVE THE SAME CORE.

ONE OF THE THINGS THAT ALWAYS CONCERNED ME IS ONE THING TO GET CONVICTED OF MULTIPLE OFFENSES ARISING FROM A SINGLE ACT. IT IS THE SECOND THING TO HAVE CONSECUTIVE SENTENCING IMPOSED. AS I UNDERSTAND IT, THE JUDGE GAVE CONSECUTIVE SENTENCES ON COUNT ONE AND FOUR. UNDER THE FIFTH DISTRICT'S ANALYSIS, WOULD THERE BE CONSECUTIVE SENTENCES, ALSO, FOR THE COUNTS OF -- ON TWO AND THREE?

THERE CAN BE JUDGE. MR. GORDON IS SERVING LIFE ON ONE. I DO NOT KNOW WHETHER JUDGE KANEY INTENDS TO IMPOSE CONSECUTIVE SENTENCES.

THAT IS ARISING OUT OF A SINGLE GUNSHOT WOUND, CONSECUTIVE SENTENCES CAN BE IMPOSED.

CORRECT. CORRECT.

BUT WHAT IF THERE HAD BEEN FIRST-DEGREE MURDER AND HE HAD GOTTEN LIFE IN PRISON FOR IT, WITHOUT THE POSSIBILITY OF PAROLE, WOULD THE AGGRAVATED BATTERY AND CAUSING BODILY INJURY BE SUBSUMED UNDER OUR CASE LAW?

YES, JUDGE, THEY WOULD. THIS COURT HAS TREATED MURDER AS SUE A GENERIC, SAID THERE IS ONLY GOING TO BE ONE MURDER TYPE CONVICTION, IN BLOCK BERGER, A DEFENDANT SADDLED WITH A MURDER CONVICTION WAS, ALSO, INTENDED BY THE LEGISLATURE TO HAVE AGGRAVATED BATTERIES AND VEHICULAR HOMICIDES AND ANY OTHER POSSIBLE VALUATION. I SUBMIT THAT YOU TREAT AGGRAVATED BATTERY AND MURDERS AS THE SAME CORE. MY AMBER LIGHT HAS COME ON.

LET ME ASK YOU THIS, BEFORE YOU GET TOO FAR. ARE YOU REALLY SAYING THAT THE CORE OFFENSE, HERE, FOR ALL THREE OF THESE, IS THAT THERE WAS A BATTERY?

YES, JUDGE.

SO BECAUSE THERE WAS A BATTERY, NO MATTER HOW AGGRAVATED IT WAS, IT IS ALL ONE OFFENSE.

CORRECT, JUDGE.

IN ESSENCE THAT IS WHAT YOU ARE ARGUING.

YES, YES, JUDGE, THE THREE OFFENSES, INCLUDING ARMED ROBBERY. THAT IS OUR POSITION.

WHAT HAPPENED -- WHAT WOULD HAVE HAPPENED IF THERE HAD BEEN TWO GUNSHOTS? WOULD THERE HAVE BEEN SIX CRIMES OUT OF THIS?

WITH THIS PROSECUTOR, YES, JUDGE, ALMOST CERTAINLY.

UNDER THE LAW, WOULD THE LAW ALLOW THAT OF THE FIFTH DISTRICT?

YES, JUDGE. I BELIEVE IT WOULD. THE FIFTH DISTRICT IS VERY STRICT ABOUT DIVIDING UP INCIDENTS INTO SEPARATE ACTS, AND IMPOSING THE -- ALLOWING THE STATE TO SEEK AND OBTAIN THE MAXIMUM NUMBER OF CONVICTIONS AS TO EACH ACT.

WOULD YOU AGREE THAT IF, IN FACT, THE PUNCH THAT WAS LANDED ON THIS VICTIM HAD RESULTED IN A BROKEN NOSE, SAY, WOULD WE, THEN, HAVE A DIFFERENT SITUATION HERE?

I THINK SO, JUNK. I THINK SO. -- I THINK SO, JUDGE. I THINK SO. IN THAT SITUATION, ARGUABLY, YES, BUT THE STATE WOULD HAVE A BETTER ARGUMENT. I WOULD ARGUE THAT IT WAS A SINGLE INCIDENT INVOLVING ONE SINGLE PERSON BATTERING ONE SINGLE OTHER PERSON, AND YOU SHOULDN'T DIVIDE IT UP.

BECAUSE THERE WERE TWO INJURES THIS THAT SITUATION, WE WOULD NOT HAVE THIS SAME ARGUMENT.

BECAUSE THERE WERE TWO INJURES, THE STATE WOULD HAVE THE SAME ARGUMENT. I WOULD BE ARGUING THAT IT WAS ONE INCIDENT AND IT ALL JUST FLOWED FROM ONE INCIDENT INTO ANOTHER. THE FOURTH DCA TENDS TO TAKE IT THAT YOU DON'T FREEZE THE FRAME AND PUT THE MAXIMUM NUMBER OF CONVICTIONS ON EACH FRAME, BUT ISSUE IS, REALLY, NOT ADDRESSED MUCH BY THIS COURT'S CASE LAW, AND THAT IS SOMETHING WHERE YOU HAVE GOT A LOT OF VARIETY IN THE DISTRICTS, BUT IT DOESN'T REALLY COME UP IN THIS CASE.

VARIETY BY CONFLICT? WHEN YOU SAY VARIETY, IT SEEMS LIKE THERE SHOULD HAVE TO BE ONE WAY THAT THIS IS ANALYZED AROUND THE STATE. WHERE IS THE CONFLICT BETWEEN THE FOURTH AND THE FIFTH?

JUDGE, IT DOESN'T ARE A RISE ON THIS CASE BECAUSE THERE IS A SINGLE GUNSHOT. HAD THERE BEEN TWO, I THINK YOU WOULD SEE THE FIFTH DCA SAYING ONE WAS ONE ACT AND ONE WAS ANOTHER ACT, EVEN THOUGH THEY WERE JUST LIKE, THIS AND MY IMPRESSION OF THE FOURTH DISTRICT'S OPINIONS IS THAT THEY ARE INCLINED MORE TO AGREE WITH DEFENSE COUNSEL THAT WE ARE NOT GOING TO DIVIDE THIS UP INTO TWO ACTS. IT WAS A SINGLE INCIDENT.

IF YOU WISH TO SAVE SOME OF YOUR TIME, YOU MAY.

I AM JUST ABOUT OUT. THANK YOU, JUDGE.

THANK YOU. MR. CORRENTE.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM CARMEN CORRENTE, REPRESENTING THE STATE IN THIS CASE. I THINK THE DISTINGUISHING FACTOR, HERE, THAT WE HAVE FROM ALL OF THE OTHER CASES THAT WE HAVE DISCUSSED, IS THAT THE APPELLANT IN THIS CASE COMMITTED TWO CLEARLY SEPARATE CRIMES. HE COMMITTED AN ARMED ROBBERY, AND HE ATTEMPTED TO KILL. MOST OF THESE OTHER CASES WHERE WE ARE DISCUSSING DOUBLE JEOPARDY AND ONE IS SUBSUMED INTO ANOTHER, HE COMMITTED THIS ONE OFFENSE, A CORE OFFENSE THAT WAS, REALLY, JUST DEGREES. I THINK THE FACT THAT WE HAVE THE ARMED ROBBERY AND THE FIFTH DCA CERTIFIED QUESTION, CREATES A PROBLEM, BECAUSE IT LEAVES OUT THE ARMED ROBBERY. THE ARMED ROBBERY --

YOU CONCEDED THE ARMED ROBBERY SEPARATE, SO YOU HAVE WON ON THAT.

I HAVE WON ON THAT BE, BUT THE FELONY BODILY INJURY GOES WITH THE ARMED ROBBERY ENTIRELY. IF THERE WERE NO ARMED ROBBERY, WE COULDN'T HAVE THE FELONY BODILY INJURY, BECAUSE NO QUALIFYING FELONY EXISTS. I THINK IT IS WRONG TO SEPARATE THEM OUT IN THAT REGARD. WHAT THE LEGISLATURE INTENDED, CLEARLY WITHIN THE STATUTE, THAT THEY WANTED SEPARATE --

SO ATTEMPTED MURDER DOES NOT QUALIFY AS THE FELONY FOR THE CAUSING BODILY INJURY DURING A FELONY.

CORRECT. IT DOES NOT. NEITHER DOES THE AGGRAVATED BATTERY. WHAT WE HAVE, HERE, IS A STRICT, CLEAR LEGISLATIVE INTENT THAT, IF YOU TRY TO ROB SOMEBODY AND YOU INJURY THEM, YOU ARE GOING TO GET PUNISHED. YOU COMMITTED TWO CRIMES. YOU ARE GOING TO GET PUNISHED TWICE.

HOW CAN YOU GET PUNISHED TWICE FOR CAUSING ONE BODILY INJURY?

YOU ARE TALKING ABOUT THE AGGRAVATED BATTERY, NOW, IN ADDITION.

YES.

WELL, HE, ALSO, ATTEMPTED TO MURDER.

YOU AGREE THAT IT IS THE SAME BATTERY, BODILY INJURY.

YES, ALTHOUGH THE PUNCH, I BELIEVE, DID KNOCK HIM TO HIS KNEES, AND I DON'T KNOW IF THE GUN SHOT WAS FIRED DOWN THERE OR NOT, BUT THAT WASN'T DISCUSSED BELOW.

HELP ME. IT ASSUMES, IF YOU LOOK AT THIS LOGICALLY THAT, THOSE TWO ARE THE TWO THAT PROBABLY WILL GIVE US THE MOST TROUBLE. THAT IS THAT YOU SAY HE HAS GOT ONE BODILY INJURY.

CORRECT.

AND, OF COURSE, THAT IS AN AGGRAVATED BATTERY, BECAUSE THAT IS THE GUN WOUND. RIGHT?

WELL, YES.

SO HOW CAN YOU PUNISH HIM AND SAY I AM GOING TO PUNISH YOU FOR CAUSING BODILY INJURY, AND I AM HIM GOING TO PUNISH YOU FOR AN AGGRAVATED BATTERY. NOW, IT IS THE SAME. IT IS THE GUN SHOT WOUND. NOW, HOW CAN YOU PUNISH HIM TWICE FOR THE ONE GUNSHOT WOUND?

BECAUSE FORTUNATELY OR UNFORTUNATELY, DEPENDING ON WHICH SIDE YOU ARE ON, THE LEGISLATURE AND THE COURT HAS DETERMINED THAT YOU LOOK NOT AT THE ACT. YOU LOOK AT THE STATUTORY ELEMENTS. AND YOU LOOK ONLY -- YOU DON'T LOOK AT THE PLEADINGS. YOU DON'T LOOK AT THE ACTS. YOU DON'T LOOK AT THE PROOF AT TRIAL. YOU HAVE TO LOOK AT THE STATUTORY ELEMENTS. NOW, FELONY BODILY INJURY REQUIRES ONLY SLIGHT INJURY. A STRONG ARM, WHERE YOU RIP A PERSON'S SHOULDER, AND THEY FALL AND SCRAPE THEIR ELBOW, COULD BE SUFFICIENT.

LET ME JUST ASK YOU THIS. IF YOU LOOK AT THE STATUTORY ELEMENTS, HOW DO YOU EVER GET TO THE EXCEPTIONS THAT ARE LISTED IN 775.021?

WELL, THE ELEMENTS --

I MEAN, BECAUSE MS. RYAN SAID THAT, IF YOU LOOK AT BLOCK BERGER, WHICH IS THE FIRST PART OF THAT STATUTE, YOU HAVE GOT FOUR SEPARATE CRIMES HERE, NO DOUBT.

CORRECT.

OKAY. SO WHAT IS THE POINT OF THE THREE EXCEPTIONS THAT ARE LISTED, IF YOU NEVER LOOK AT THE STATUTE, YOU NEVER LOOK AT THE PROOF OR AT WHAT WAS ALLEGED?

WELL, I THINK YOU HAVE CERTAIN CIRCUMSTANCES, WHERE THE LEGISLATURE, IT IS -- BLOCK BERGER IS A RULE OF STATUTORY CONSTRUCTION, AND THEY TELL YOU HOW -- IF YOU DON'T HAVE ENOUGH STATUTORY AUTHORITY, I MEAN, IT IS JUST -- WHAT IT DID WAS IT CODDIFIED BLOCK BERGER'S CAROWIN AND BLOCK BERGER'S ANALYSIS.

I UNDERSTAND, BUT IF THE POINT IS IF WE ARE GOING TO STOP THERE, THEN WE HAVE MADE THE REST OF THE STATUTE, IT MAY AS WELL NOT EXIST.

WELL, IT WAS EXPLAINED BY ONE CONCURRENCE, AND I FORGET WHICH CASE THAT WAS, THAT, FOR INSTANCE, THE OFFENSES WHICH REQUIRE IDENTICAL ELEMENTS OF PROOF DEAL WITH NECESSARY LESSER-INCLUDED OFFENSES, SO IF IT IS A NECESSARILY LESSER-INCLUDED OFFENSE --

ISN'T THAT THE SAME AS THREE, WHICH IS OFFENSES WHICH ARE LESSER OFFENSES?

WELL, IT WAS SUBSUMED BY THE GREATER, WHICH MEANS ONE HAS TO BE REMOVED, AND THAT WAS EXPLAINED IN THE SAME CONCURRENCE AS PERMISSIVE LESSER-INCLUDED OFFENSES MAY QUALIFY UNDER THAT, AND SO -- AND THEN, OF COURSE, YOU HAVE GOT DEGREES OF THE SAME OFFENSE, WHICH IS BEING ARGUED BY APPELLANT.

I GUESS I HAVE ALWAYS LOOKED AT DEGREES OF THE SAME OFFENSE AS THINGS LIKE MURDER, WHICH IS OBVIOUSLY SEPARATED INTO FIRST-DEGREE MURDER, SECOND-DEGREE MURDER, THIRD-DEGREE. THEN YOU HAVE GRAND THEFT, I THINK, HAS SOME DEGREES OF GRAND THEFT.

SEVERAL DEGREES, ALSO.

I AGGRESSIVE -- I GUESS I HAVE ALWAYS LOOKED AT THAT AS THE ARGUMENTS HEARSAY THAT THAT MEANS SOMETHING MORE THAN THAT.

THAT WAS MY INITIAL REACTION, AS WELL, AS FAR AS LOOKING AT THE DEGREES, BUT YOU HAVE TO LOOK AT AS WAS DONE IN SERMANS, THE SAME OFFENSE BUT AGGRAVATED.

DO YOU AGREE WITH JUSTICE COGIN'S CONCURRENCE THAT THAT IS HOW THE EXCEPTIONS ARE TO BE APPLIED?

IT WAS JUSTICE COGIN. I DISAGREE WITH THE CORE OFFENSE ANALYSIS OVERALL, BECAUSE I THINK THAT IS THE ONLY PLACE THAT COMES FROM, AND THANK IS A MISS NONLER -- A MISS HOME TOER -- A MISNOMER AND SHOULDN'T BE APPLIED AT ALL OUT THERE, BUT HIS EXCEPTIONS OF WHERE THEY WERE FOUND WAS TO ASSIST SOMEONE IN TRYING TO UNDERSTAND THAT.

DO YOU AGREE THAT THE LESSER-INCLUDED OFFENSES?

BUT THEN IF YOU CONCEDE THAT, THEN YOU HAVE TO CONCEDE THAT YOU HAVE TO LOOK AT THE ALLEGATION AND THE PROOFS, IN ORDER TO GET TO A PERMISSIVE LESSER-INCLUDED OFFENSE, DON'T YOU?

WELL, YES, YOU DO. I WILL AGREE WITH THAT. I THINK THAT, WHAT I WAS SPEAKING OF EARLIER, IS WHERE YOU DON'T HAVE TO GO DOWN THAT FAR. YOU STOP AT BLOCK BERGER. YOU STOP AT THE VERY -- IN THIS CASE, UNDER THESE FACTS, YOU HAVE GOT CLEAR LEGISLATIVE INTENT. YOU DON'T REALLY HAVE TO GO FURTHER THAN THE FIRST STEP. IF YOU DO GO DOWN, THE STATE'S POSITION IS THAT THEY WENT, ANYWAY, AND IF YOU WANT TO LOOK AT THAT ONE ACT AND IF YOU WANT ME TO PROCEED, WE HAVE GOT AGGRAVATED BATTERY REQUIRES, IN THIS CASE, IT WAS CHARGED AS PERMANENT DISFIGUREMENT. IT WAS GREAT BODILY HARM. IT WAS A SERIOUS INJURY. HE WOULD BE SCARRED FOR LIFE BECAUSE IT WAS TRANSVERSE SHOT, I THINK, THROUGH THE CHEST AND THE BACKBONE.

BUT IT WAS WITH A FIREARM.

WITH A FIREARM. CORRECT.

IT WASN'T FOR THE BROKEN NOSE OR --

OR THE FALLING DOWN. NO. THAT IS WHAT WAS REQUIRED, ALONG WITH AN INTENT TO DO THAT. NOW, FELONY BODILY INJURY, MY PROBLEM IS THAT IT REQUIRES ONLY SLIGHT INJURY, AND THAT IS FINE, BUT YOU WON'T HAVE IT IN EVERY CASE YOU HAVE GREAT BODILY HARM, BECAUSE IT REQUIRES A SEPARATE ENUMERATED FELONY, AS ONE OF ITS ELEMENTS, AND I THINK THAT IS WHAT SEPARATES IT OUT. CLEARLY YOU CAN'T -- HE COULDN'T HAVE BEEN CHARGED WITH FELONY BODILY INJURY, IF HE HAD NOT COMMITTED THE ARMED ROBBERY AS WELL.

ISN'T IT BETTER, FOR EASE OF THIS ALL, IF THE LEGISLATURE THINKS, AND THEY DID THIS, CERTAINLY, WITH 10-20-LIFE, AND I DON'T KNOW HOW 10-20-LIFE AN AFFECTS ALL THIS, BUT THAT YOU ARE TALKING ABOUT IT IS WORSE IF YOU DO A ROBBERY WITH A FIREARM, AND IT IS EVEN WORSE IF YOU DO A ROBBERY WITH A FIREARM AND SOMEONE IS INJURED AND EVEN WORSE IF SOMEONE IS INJURED SEVERELY, AND SO WHAT YOU DO IS SAY THOSE ARE THINGS THAT GO TO THE SENTENCING PHASE TO GO AND SAY THIS IS THE SENTENCE WE WANT TO GIVE, BECAUSE THAT IS REALLY WHAT WE ARE CONCERNED WITH, THAT SOMEBODY SERVES A LONG SENTENCE FOR DOING SOMETHING LIKE THIS. I THINK MY CONCERN IS THAT, BY PUTTING THIS INTO THERE IS ONE GUN SHOT WOUND AND WE -- GUNSHOT WOUND AND WE ARE GOING TO HAVE FOUR DIFFERENT OFFENSES, THAT WE ARE GOING TO PUT THE WHOLE THING, WE HAVE MUDDIED IT UP, BECAUSE IT DEPENDS, IF IT IS ONLY BLOCK BERGER, THEN WE STOP, AND THE REST OF THE EXCEPTIONS, AS JUSTICE QUINCE SAYS, IS IRRELEVANT, BUT I DON'T KNOW HOW, BASED ON ALL OF THE CASE LAW, WE CAN STOP JUST AT BLOCK BERGER, UNLESS YOU ARE SAYING IT IS BASED ON BLOCK BERGER PLUS IF THE LEGISLATURE SAYS WE WILL PUNISH THESE FOUR CRIMES, IT STOPS AT THAT. IS THAT WHAT YOU ARE SAYING ESSENTIALLY OCCURRED HERE?

THAT IS CORRECT. AND I THINK THAT YOU SHOULD LOOK AT THE OTHER ALTERNATIVE.

THE LEGISLATURE SAID, LISTEN, EVEN IF THE GUY WAS KILLED, WHICH AT THIS POINT WOULD PUTTING A VATED BATTERY AND CAUSING BODILY INJURY WOULD BE SUBSUMED INTO IT, THE

LEGISLATURE SAYS, LOOK, IF YOU SHOOT THE PERSON TWO TIMES BEFORE, WE WANT THOSE COUNTED AS BAT LIST -- BATTERIES BEFORE THE DEATH, THAT WOULD BE OKAY, UNDER DOUBLE JEOPARDY ANALYSIS?

NO. I THINK YOU ARE CORRECT. THE AGGRAVATED BATTERY WOULD BE SUBSUMED INTO THE FIRST-DEGREE MURDER. I WOULDN'T AGREE AS TO THE FELONY BODILY HARM.

WHAT ABOUT AT THE TIME THAT YOU DID THE FIRST SHOT YOU WEREN'T INTENDING TO KILL THE PERSON. YOU JUST WANT 20D HARM HIM. BUT -- YOU JUST WANTED TO HARM HIM, BUT BY THE TIME YOU GOT TO THE THIRD SHOT, YOU HAD ATTEMPTED FELONY MURDER.

IT WOULD BE THE JURY WHO WOULD DETERMINE WHETHER OR NOT HE ABORTED HIS ATTEMPT, BUT I THINK WE, ALSO, HAVE TO LOOK AT THE ALTERNATIVE. CAROWIN, WHICH, CLEARLY, HAS BEEN OVERRIDDEN. YOU HAVE GOT EVERYTHING. STATE VERSUS SMITH, I THINK IT WAS, SEVERAL ACKNOWLEDGMENTS THAT THE CASE IS NO LONGER VIABLE, BECAUSE OF WHAT THE LEGISLATURE DID. WELL, CAROWIN WAS ATTEMPTED MANSLAUGHTER AND AGGRAVATED BATTERY. UNDER THE FACTS OF THIS CASE, THE ATTEMPTED FIRST-DEGREE MURDER AND THE AGGRAVATED BATTERY, IF YOU RULE, AS IN CAROWIN, WE WILL BE BACK TO SQUARE ONE. I THINK WE HAVE EVOLVED, AND I THINK THE FIFTH DISTRICT COURT OF APPEAL'S ANALYSIS WAS AN EXCELLENT ANALYSIS. I THINK THEY WENT THROUGH IT STEP-BY-STEP, AND I THINK THE REASON WHY WE HAVE, NOW WE HAVE FOUR CHARGES, NEXT TIME WE MIGHT HAVE FIVE OR SIX, I THINK THAT IS ALL GUIDELINES. PREGUIDELINES THAT WOULDN'T HAVE HAPPENED. A JUDGE COULD LOOK AT THE FACT, IN THIS CASE, THAT THE GUY WAS GIVING UP HIS WALLET. THERE WAS NO NEED TO SHOOT HIM. IT WAS A COMPLETELY -- HE SAID I AM GIVING UP MY WALLET. HERE. YOU CAN HAVE IT. HE SHOT HIM ANYWAY. A JUDGE WOULD LOOK AT THAT AND SAY CONSECUTIVE, MAXIMUM, AND WOULD BE ABLE TO HAVE SOME FLEXIBILITY THERE. NOW PROSECUTORS ARE FACED WITH THE FACT THAT IT IS SIMPLY A SCORE, AND TO GET WHAT WE WANT OUT OF THE GUIDELINES SCORE SHEET, WELL WILL HAVE TO CHARGE IT, AS BEST WE CAN, WITH AS MANY OFFENSES THAT ARE LEGAL AND VIABLE, SO THAT WE CAN GET TO WHERE WE THINK IT SHOULD BE. AND THAT IS PROSECUTOR DISCRETION. THAT IS A FACTOR OF THE GUIDELINES, BECAUSE IT IS A PLUG IN AND SCORE, AND A JUDGE CAN'T DEPART THE GUIDELINES, JUST BECAUSE THE GUY SHOT HIM UNNECESSARY EARL. THE ATTEMPTED MURDER, THE SHOOTING, THE INJURY, ALL OF THAT WAS UNNECESSARY IN THIS CASE, BECAUSE HE SAID I AM GIVING UP MY WALLET. I AM GIVING IT UP.

THE EFFECT OF THE THIRD DISTRICT CASE IS HE HAS, NOW, BEEN SENTENCED TO 276 MONTHS WITH A MINIMUM MANDATORY OF THREE YEARS AND ANOTHER 360 MONTHS WITH A CONSECUTIVE MANDATORY MINIMUM. WOULD THE EFFECT OF THE FIFTH DISTRICT'S OPINION BE TO HAVE SENTENCED HIM, ALSO, ON TWO AND THREE CONSECUTIVELY? THAT CAN'T HAPPEN. CAN THAT HAPPEN? IS THAT WHAT IS GOING TO HAPPEN NOW?

I DON'T KNOW WHAT WILL HAPPEN. I AM NOT SURE. BUT THE JUDGE WAS RECEIPTIES -- WAS RECEIPTIESENT IN THE FIRST PLACE. IT WAS THE -- WAS RETISCENT. IT WAS THE FIRST JUDGE --

HE CAN DO THAT LEGALLY, CONSECUTIVE SENTENCING ON ALL FOUR OF THESE.

THAT'S CORRECT.

DO YOU AGREE WITH THE CASE LAW OUT OF THIS COURT THAT SAYS YOU CAN ONLY HAVE ONE MANSLAUGHTER CONVICTION OUT OF A SINGLE DEATH?

YES. YES, I DO. BUT I, ALSO, THINK THAT, IN THIS CASE, HE COMMITTED, AGAIN, HE COMMITTED THOSE TWO OFFENSES. IF HE HAD JUST DONE AN ARMED ROBBERY AND COMMITTED GREAT BODILY HARM, OR IF HE HAD JUST COMMITTED THE ATTEMPTED MURDER OF THE AGGRAVATED BATTERY, IT WOULD BE GONE. THERE WOULD BE NO ARMED ROBBERY. THERE WOULD BE NO

AGGRAVATED BATTERY, BUT THE FELONY BODILY INJURY TRAVELS ONLY WITH THE ARMED ROBBERY.

I AM SEEING THREE. I AM JUST STILL HAVING TROUBLE SEEING FOUR, FROM WHAT YOU ARE SAYING THERE, BUT I GUESS YOU ARE DOING IT BY, AGAIN, TAKING TWO AND PUTTING IT WITHIN A VARIANT OF FOUR.

IT IS, BECAUSE THE LEGISLATURE SPECIFICALLY SAID IF YOU COMMIT, IN THIS CASE, A ROBBERY AND YOU HURT THEM, YOU ARE GOING TO GET A SEPARATE FIRST-DEGREE FELONY. IT WILL BE SEPARATELY VICTIM POINTS WILL SEPARATELY BE ASSESSED.

THAT IS WHY, I GUESS, WHY ISN'T AGGRAVATED BATTERY CAUSING RAPE, BODILY INJURY WITH A FIREARM, WHY ISN'T THAT PART OF THE BODILY INJURY A FELONY?

BODILY INJURY IS A STRICT CONSTRUCTION OF THE LEGISLATURE. IF IT IS THERE AND AN ATTEMPT, YOU GET PUNISHED FOR THE ROBBERY, SO NOW I THINK YOU HAVE TO TAKE THEM OUT OF THE PICTURE AND COMPARE THEM ONLY TO WHAT YOU HAVE LEFT, ATTEMPTED FIRST-DEGREE MURDER AND AGGRAVATED BATTERY. THEY AREN'T IN THE SAME STATUTE. THEY AREN'T FIXTURES OF EACH OTHER. ONE IS FOUND IN A HOMICIDE FELONY AND THE ATTEMPTED FIRST-DEGREE MURDER, I THINK, IS FOUND WITHIN THAT, BECAUSE THEY USE THE FELONY STATUTE FOR THE ATTEMPTED ENUMERATED FELONIES, BUT THAT IS WHERE IT IS FOUND, AND WITH ATTEMPTED FIRST-DEGREE MURDER, IF YOU WANT TO DO THE ELEMENTS, I CAN SHOOT AT ANY ONE AND MISS, WELL, THE LEGISLATURE WANTS ME TO BE PUNISHED FOR THE HARM I CAUSED BY NOT MISSING. THAT IS ANOTHER OFFENSE. THAT IS AGGRAVATED BATTERY. I WILL AGREE -- I DO HAVE A FEW MORE MINUTES AND I CAN'T COME BACK UP HERE. THE AGGRAVATED BATTERY IS THE MOST SUSCEPTIBLE OF THEM ALL TO BE SUBSUMED SOMEWHERE, BUT THIS COURT HAS REPEATEDLY HELD, IN STATE VERSUS BOIVIN, WHICH IS AN INTERESTING CASE THAT IS CITED IN THE BRIEFS, ATTEMPTED FIRST-DEGREE MURDER, AGGRAVATED BATTERY. THIS COURT HELD, AS IT HAS IN SEVERAL CASES, EACH REQUIRES PROOF OF AT LEAST ONE FACT THAT THE OTHERS DO NOT, BUT IN THIS CASE, YOU SENT IT BACK AND SAID WE DON'T -- WE HAVE NO LEGISLATIVE INTENT OR RECOGNITION THAT THEY WANT MULTIPLE PUNISHMENTS. TWO YEARS AFTER THAT, THE LEGISLATURE SPOKE.

AND THE JURY -- THE STANDARD JURY INSTRUCTIONS, AGGRAVATED BATTERY IS A CATEGORY TWO LESSER-INCLUDED OFFENSE OF ATTEMPTED FIRST-DEGREE MURDER. CORRECT?

CORRECT.

AND SO WOULDN'T, UNDER THE ANALYSIS AND JUSTICE COGIN'S CONCURRENCE AND CER -- SERMANS, WOULDN'T THAT MAKE AGGRAVATED BATTERY AND ATTEMPTED FIRST-DEGREE MURDER, WOULDN'T THEY BE DEGREES OF THE SAME CORE OFFENSE?

IT IS THE CLOSEST OF THE TWO, BUT THE PROSECUTOR, AND, I THINK, INTENTIONALLY, IN THIS CASE, CHARGED PERMANENT DISFIGUREMENT -- DISFIGUREMENT, GREAT BODILY HARM AND AGGRAVATED BATTERY. IT TAKES IT OUT OF THE REALM. THEY ARE REMOTELY THE SAME, BECAUSE YOU DON'T NEED AN INJURY. ALL YOU HAVE TO DO IS FIRE AT SOMEONE AND MISS. AGGRAVATED BATTERY, YOU HAVE GOT TO INTEND AND, IN THIS CASE, CAUSE GREAT BODILY HARM, SO A BATTERY ELEMENT IS NOT INVOLVED IN THE ATTEMPTED FIRST-DEGREE MURDER, AND IRONICALLY IT IS INVOLVED, OF COURSE, IN MURDER, AND AGGRAVATED BATTERY WOULD GO AWAY, IF THIS HAD BEEN A MURDER, IF HE HAD DIED, SO HE IS SUBJECT TO LESS -- SUBJECT TO MORE FOR DOING LESS, SO TO SPEAK, MORE OFFENSES, BUT IT IS PERMITTED BY STATUTE, THE LEGISLATURE'S INTENT IS CLEAR THAT WE WANT TO PUNISH FOR AS MUCH AS WE CAN. I THINK THAT IS A BYPRODUCT OF THE GUIDELINES, AND THEY -- I DON'T THINK THERE IS ANY QUESTION THAT CAROWIN HAS BEEN OVERRULED AND THE ELEMENTS TEST IN THIS CASE WILL SUPPORT THE FIFTH DCA'S OPINION, WHICH WAS WELL DONE. THANK YOU.

THANK YOU. REBUTTAL.

JUDGES, I HAVE ONE MINUTE, AND I APOLOGIZE FOR NOT MAKING THE LARGER ISSUES CLEARER IN MY FIRST 19 MINUTES. I HAVE GOT THREE SMALL ISSUES WHICH I BELIEVE I CAN MAKE CLEAR IN THIS LAST MINUTE. FIRST, I DO NOT HAVE THE INFORMATION WITH ME, BUT ALL OF MY NOTES INDICATE THAT THIS AGO BATTERY WAS NOT CHARGED -- THAT THIS AG BATTERY WAS NOT CHARGED AS PERMANENT DISFIGUREMENT BUT GREAT BODILY HARM. THE SECOND IS THE LANGUAGE I WAS QUOTING FROM THE FIFTH DCA APPEARS IN THE FIRST PARAGRAPH OF -- PARAGRAPH OF THE OPINION. THEY SAID THERE WAS NO EVIDENT INJURY FROM THE PUNCH. SO WE ARE TALKING ABOUT THE GUN SHOT AS THE BASIS FOR ALL OF THE OFFENSES HERE, AND, ALSO, THE JUSTICES, TODAY, HAVE BEEN REFERRING TO JUSTICE COGIN'S CONCURRING OPINION IN SERMANS, AS THE BASIS FOR THE CORE OFFENSE. I WOULD LIKE TO REFER THE COURT TO STATE VERSUS ANDERSON, A 1997 OPINION FROM THIS COURT, WHICH IS CITED IN THE PETITIONER'S BRIEFS, AND WHICH THE ENTIRE COURT DID ADOPT THE CORE OFFENSE TEST.

THANK YOU VERY MUCH. WE WILL BE IN RECESS FOR 15 MINUTES.