

>> HEAR YE, HEAR YE, HEAR YE,

SUPREME COURT OF FLORIDA

IS NOW IN SESSION.

ALL WHO HAVE CAUSE TO PLEAD,

DRAW NEAR, GIVE ATTENTION, YOU

SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,

THE GREAT STATE OF FLORIDA

AND THIS HONORABLE COURT.

[BACKGROUND SOUNDS]

>> LADIES AND GENTLEMEN, THE

SUPREME COURT OF FLORIDA.

PLEASE BE SEATED.

>> GOOD MORNING.

WELCOME TO THE FLORIDA SUPREME

COURT.

THE FIRST CASE IS ROUGHTON V.

STATE.

>> GOOD MORNING.

MAY IT PLEASE THE COURT, MY NAME

IS ED WEISS, I'M HERE ON BEHALF

OF THE PETITIONER, JAMES

ROUGHTON.

>> ROUGHTON.

>> I PRONOUNCE IT ROUGHTON, I

REALLY DON'T KNOW THE CORRECT
PRONUNCIATION.

MR. ROUGHTON WAS CHARGED WITH
THREE COUNTS-- OR, ACTUALLY,
FOUR COUNTS, WITH ONE COUNT OF
SEXUAL BATTERY AND THREE COUNTS
OF LEWD AND LASCIVIOUS
MOLESTATION.

ONE COUNT WAS DISMISSED AT THE
TIME OF ACQUITTAL.

COUNTS ONE AND TWO WERE BASED ON
THE EXACT SAME ALLEGATION UPON
LOOKING AT THE INFORMATION, THE
EXACT VERBIAGE IS THE SAME.

THAT JAMES HOUSTON ROUGHTON HAD,
WITH HIS MOUTH, HAD UNION WITH
THE PENIS OF THE VICTIM.

THE FACTS WERE HE KISSED IT.

SO THIS IS NOT A SITUATION WHERE
WE HAVE DISTINCT ACTS, THIS IS
ONE SINGLE ACT BETWEEN SEXUAL
BATTERY AND LEWD AND LASCIVIOUS
MOLESTATION.

>> NOW, THE OTHER LASCIVIOUS
MOLESTATION WAS WITH THE HAND?

>> CORRECT.

IT WAS WITH THE HANDS GOING UNDER FIRST, I BELIEVE, TOUCHING OVER THE UNDERWEAR, THEN UNDER THE UNDERWEAR AND PULLING THE UNDERWEAR DOWN.

>> OKAY.

>> MR. ROUGHTON, AFTER TRIAL, WAS CONVICTED AT SENTENCING. THE STATE CONCEDED BELOW THAT HE COULD NOT BE SENTENCED ON THE LEWD AND LASCIVIOUS MOLESTATION IN COUNT TWO BECAUSE IT WAS SUBSUMED IN COUNT ONE AND SAID JUST ADJUDICATE, DON'T IMPOSE SENTENCE JUST IN CASE SOMETHING COMES BACK ON APPEAL.

ON APPEAL THE FIFTH--

>> COULD IT REALLY MEAN SUBSUMED WITHIN COUNT ONE SINCE IN ORDER TO PROVE A LEWD OR LASCIVIOUS MOLESTATION CHARGE YOU HAVE TO PROVE A CERTAIN INTENT?

>> CORRECT.

I DON'T THINK SUBMITTED WAS

THE APPROPRIATE WAY-- I THINK
IT'S DOUBLE JEOPARDY.

I DON'T THINK IT'S SO MUCH
SUBSUMED, AND I'LL ADDRESS THAT.

I THINK THE DIFFERENCE IS, IF
ANYTHING, THE SEXUAL BATTERY WAS
SUBSUMED WITHIN THE LEWD AND
LASCIVIOUS MOLESTATION BECAUSE
THE LEWD AND LASCIVIOUS
MOLESTATION HAD THE ADDITIONAL
ELEMENT THAT THE SEXUAL BATTERY
DOESN'T WHICH IS THE INTENT WITH
LEWD AND LASCIVIOUS TO TOUCH.

ON APPEAL MR. ROUGHTON ARGUED
THAT THERE WAS DOUBLE JEOPARDY.

THE FIFTH DISTRICT COURT OF
APPEAL AFFIRMED THE CONVICTION
AND REMANDED FOR SENTENCING
SAYING YOU CAN'T LET IT OUT,
JUST HANG OUT THERE AND FOUND
THAT IT WAS NOT DOUBLE JEOPARDY
BECAUSE THEY HAD DIFFERING
ELEMENTS.

THE PROBLEM WITH THE FIFTH'S
OPINION IS THEY LOOKED AT THE

STATUTE AS A WHOLE AND NOT THE
ACTUAL CHARGE.

AND THAT IS WHAT--

>> WELL, LET'S EXPLORE THAT.

UNDER 775 THERE'S A PORTION OF
THE STATUTE THAT TALKS ABOUT
LOOKING AT THESE SITUATIONS,
LOOKING FOR THE EXACT LANGUAGE.
BUT IT SAYS SOMETHING TO THE
EFFECT WITHOUT REGARD TO THE
ACCUSING DOCUMENT OR THE FACTS
DEDUCED AT TRIAL.

>> AND I COULD SEE THAT IS IN
THE STATUTE.

HOWEVER, THIS COURT IN GIBBS V.
STATE WHICH WAS A TRAFFICKING
CASE CLEARLY HAD TO HAVE LOOKED
AT THE CHARGING DOCUMENT TO FIND
WHAT IT DID BECAUSE OTHERWISE
GIBBS WOULDN'T EXIST.

GIBBS WAS TRAFFICKING BASED ON
POSSESSION AND IT'S SIMPLE
POSSESSION.

>> YOU'RE RIGHT.

BUT IN GIBBS DID WE-- AND MAY

I?

IT LOOKS LIKE TO ME IN GIBBS WE
CITE THAT SECTION IN A FOOTNOTE.
BUT THE COURT NEVER EXPLAINS HOW
WHAT IT IS DOING THERE CAN BE
RECONCILED WITH THE PLAIN
LANGUAGE OF THE STATUTE WHICH
JUSTICE QUINCE REFERRED TO WHICH
SAYS WITHOUT REGARD TO THE
ACCUSATORY PLEADING OR THE PROOF
DEDUCED AT TRIAL.

I'M JUST STRUGGLING TO SEE HOW
WE GET FROM THAT LANGUAGE IN THE
STATUTE TO THE RESULT THAT
YOU'RE ADVOCATING HERE AND WHICH
IS SUPPORTED BY GIBBS.

>> AND I UNDERSTAND.

AND I THINK GIBBS GETS ITS
FOUNDATION FROM BLOCKBERGER
ITSELF SAYING LOOK AT THE
ELEMENTS OF THE OFFENSE.

>> WELL, BUT WE HAVE A STATUTORY
RULE HERE.

AND THAT'S, THAT'S WHAT WE'RE
OPERATING UNDER.

THE GOVERNING LAW, THE
UNDERLYING GOVERNING LAW HERE IS
THIS STATUTE, ISN'T THAT RIGHT?

>> I WOULD CONCEDE THAT IS THE
GOVERNING LAW, IS THE STATUTE.
BUT THE STATUTE ALSO SAYS IF SUN
WITH SUBSUMED-- SUBSUMED WITHIN
THE OTHER, THEY ALL HAVE THE MR.
PRESIDENTS.

>> BUT YOU SAID THAT WASN'T WHAT
YOU WERE TALKING ABOUT.

>> THE ELEMENTS IN THIS CASE ARE
DETERMINED BASED UPON THE
CHARGING DOCUMENT, SO I THINK
YOU CAN LOOK AT THE CHARGING
DOCUMENT.

THE STATUTE ALLOWS THAT WHEN YOU
BREAK IT DOWN BETWEEN THE A, B
AND C, HOW ELSE CAN YOU
DETERMINE THE ELEMENTS WITHOUT
LOOKING AT THE WAY IT'S
CHANGED WHEN YOU HAVE A
CHARGE THAT HAS ALTERNATIVE
METHODS IN WHICH THAT OFFENSE
CAN BE COMMITTED?

>> EXCEPT THAT LOGIC TELLS ME THAT YOU'RE RIGHT, BUT I'M SURPRISED GIBBS IS OUT THERE, FRANKLY, BECAUSE I REALLY THOUGHT THE LAW WAS WHAT IS IN THE STATUTE WHICH IS THAT YOU DON'T LOOK AT THE CHARGING DOCUMENT WHICH, AGAIN, DOES IT-- WE'RE NOT DOING-- THIS ISN'T CONSTITUTIONAL DOUBLE JEOPARDY, CORRECT.

>> CORRECT.

>> THIS IS REALLY WHERE THE LEGISLATURE INTENDS TO HAVE TWO SEPARATE PUNISHMENTS FOR A SINGLE ACT.

AND THAT'S NOT OUR PREROGATIVE, TO SAY THIS DOESN'T SEEM FAIR. I MEAN, THIS SEEMS, YOU KNOW, AGAIN, THESE CASES WHERE YOU CAN HAVE KISSED HIM, YOU KNOW, THREE TIMES AND THERE'S THREE ACTS, AND THAT'S THE A DIFFERENT SITUATION.

SO WHERE IS IT?

AND REALIZING GIBBS IS
SUPPORTIVE, BUT IN RECENT
JURISPRUDENCE FROM THIS COURT
INTERPRETING THE STATUTE
STRICTLY THAT YOU LOOK TO THE
CHARGING DOCUMENTS AS OPPOSED TO
THE ELEMENTS OF THE OFFENSE.

>> I HONESTLY DON'T THINK THIS
COURT HAS REALLY READDRESSSED
THAT SINCE GIBBS.

I CAN SAY TO THE COURT THAT THE
GIBBS APPROACH OF ADDRESSING IT
BASED UPON THE CHARGES APPLIED
IN OTHER CHARGES AS WELL,
BURGLARY-- ARMED BURGLARY WITH
A BATTERY AND AGGRAVATED BATTERY
WHEN IT'S BASED ON A FIREARM HAS
BEEN FOUND TO BE DOUBLE
JEOPARDY.

BATTERY BY STRANGULATION AND
FELONY BATTERY BASED ON A PRIOR
IS FOUND TO BE DOUBLE JEOPARDY.
SO I THINK IT HAS ITS PLACE.
TO IGNORE THAT WE APPLY JUST IN
GENERAL THE STATUTORY LANGUAGE

THAT I CALL INTO QUESTION THE
DECISION IN-- AND I DON'T KNOW
IF I'M PRONOUNCING THIS
CORRECTLY--

>> MESCHLE V. STATE BECAUSE
THERE YOU HAVE THE EXACT SAME
CHARGE IN EACH COUNT, AND THIS
COURT SAID IT'S BASED ON
DISTINCT ACTS, AND I WOULD MAKE
THE ARGUMENT THAT THE DISTINCT
ACT IS THE DIFFERING WAY WHICH
IT COULD HAVE BEEN CHARGED.

>> SO COULD I ASK YOU A QUESTION
ABOUT WHAT'S THE RELIEF YOU'RE
ASKING FOR HERE?

>> I'M ASKING FOR COUNT TWO TO
BE DISMISSED.

>> OKAY.

SO THIS REALLY IS A MATTER OF
ACADEMIC INTEREST TO YOUR
CLIENT.

>> ABSOLUTELY.

>> OKAY.

>> HE GOT LIFE IN PRISON ON
COUNT ONE, I BELIEVE HE GOT LIFE

IN PRISON ON COUNT THREE.

IT'S-- ON A LOT OF THESE

SITUATIONS--

>> IS HE ENTITLED TO ANY
PAROLE-- NOT PAROLES, WE DON'T
HAVE PAROLE ANYMORE, BUT
CONDITIONAL RELEASE ON THOSE
KINDS OF OFFENSES?

>> IT'S A CAPITAL SEXUAL
BATTERY, IT IS MANDATORY LIFE
UNLESS OUR LEGISLATURE CHANGES
THE SENTENCE SOMETIME DOWN THE
ROAD AND DECIDES TO MET HIM OUT.
EVEN-- TO LET HIM OUT.
EVEN IF THAT WERE, HE WOULD BE
SUBJECT TO JIMMY RYCE.

>> WHAT DID HE GET ON THE LEWD
AND LASCIVIOUS?

>> I BELIEVE HE GOT LIFE ON THAT
AS WELL.

>> BUT THAT IS NOT-- CAN.

>> THAT'S NOT MANDATORY.

>> DO YOU LOOK AT CONDITIONAL
RELEASE ON THAT PARTICULAR ONE?

I MEAN, ASSUMING THE SEXUAL

BATTERY WAS NOT THERE, WOULD

THAT ONE COUNT FOR--

>> I DON'T BELIEVE SO.

>> OKAY.

>> A LIFE SENTENCE IS LIFE.

I MEAN, IT'S NOT TECHNICALLY
MANDATORY, BUT I DON'T SEE HOW
YOU CAN GRANT CONDITIONAL RELIEF
IF SOMEONE'S SENTENCED TO LIFE.

>> I THOUGHT THERE WAS THE 85%
OR SOMETHING.

[LAUGHTER]

>> I GENUINELY DON'T THINK YOU
CAN DO THAT ON A LIFE SENTENCE.

I DON'T KNOW THE ANSWER
COMPLETELY THOUGH ON THAT.

BUT IF YOU LOOK, AND IT'S BEEN
APPLIED IN OTHER CRIMES, IT
MAKES-- AND AS JUSTICE PARIENTE
SAID, IT MAKES LOGICAL SENSE.

IF YOU LOOK AT THE STATUTE, IT
SAYS THE ELEMENTS.

THE ELEMENTS ARE DETERMINED BY
THE CHARGING DOCUMENT IN A
CHARGE THAT CAN HAVE, BE PROVEN

BY MULTIPLE METHODS.

>> SO IF WE, HOWEVER, SAY THAT THESE ARE TWO SEPARATE OFFENSES, I WAS TRYING TO THINK OF THE SITUATION WHERE YOU WOULD, IT SEEMS TO ME THAT IF YOU LOOK AT THE WHOLE STATUTE AS POSED TO-- OPPOSED TO THAT PART OF AN ALTERNATIVE STATUTE THAT IS THE SAME AS THE OTHER OFFENSE-- NOT THE SAME BUT, YOU KNOW, THE TOUCHING VERSUS THE PENETRATION WHICH ARE THE TWO ELEMENTS OF SEXUAL BATTERY-- IF YOU LOOK AT ALL OF IT, BOTH THE TOUCHING AND THE PENETRATION, AND SAY THAT BECAUSE THERE ARE ALTERNATIVES THAT THEY'RE DIFFERENT OFFENSES, YOU WOULD ALWAYS, MORE THAN LIKELY, NEVER BE ABLE TO SAY THESE ARE TWO SEPARATE OFFENSES, WOULD YOU?

>> UM, I WANT TO MAKE SURE I GOT THE QUESTION RIGHT--

>> WOULD YOU EVER HAVE A SEXUAL

BATTERY THAT WAS NOT A LEWD AND
LASCIVIOUS MOLESTATION?

>> I DON'T THINK YOU COULD EVER
HAVE THAT BECAUSE ALTHOUGH
SEXUAL BATTERY DOESN'T REQUIRE
LEWD AND LASCIVIOUS INTENT, I
CAN'T IMAGINE A SITUATION WHERE
SOMEONE PENETRATES SOMEONE ELSE
CONSIDERING THE DEFINITION OF
WHAT LEWD AND LASCIVIOUS IS IN A
NONWICKED MANNER.

I CAN'T IMAGINE A JURY WOULD
EVER THINK A PENETRATION WAS NOT
DONE IN AN UNCHASTE OR WICKED
MATTER.

SO I THINK IN EVERY CASE YOU
WOULD HAVE A LEWD AND
LASCIVIOUS.

ANOTHER ANALOGY WOULD BE CREATED
BY GREAT BODILY HARM, PERMANENT
DISABILITY OR WITH THE USE OF A
DEADLY WEAPON.

IF SOMEONE GOES OUT AND SHOOTS
SOMEONE, IF WE APPLY STRICTLY
WHAT'S STOPPING THE STATE FROM

CHARGING THEM WITH AGGRAVATED
BATTERY WITH A FIREARM AND A
SEPARATE COUNT OF GREAT BODILY
HARM.

THEY HAVE DIFFERENT ELEMENTS.

IT'S-- AND FOR THE SINGLE
GUNSHOT.

I MEAN, THAT'S THE PROBLEM, AND
THAT'S WHY THIS IS DOUBLE
JEOPARDY.

YOU HAVE TO LOOK AT THE STATUTE
AS A WHOLE.

THEY DO HAVE THE SAME ELEMENTS.

WHEN YOU LOOK AT THE WAY IT'S
CHARGED, THE ONLY DIFFERING
ELEMENT IS THE THIRD ELEMENT AS
I CALL IT WHICH IS IN SEXUAL
BATTERY HE HAD UNION WITH THE
PENIS, AND IN LEWD AND
LASCIVIOUS MOLESTATION, HE
TOUCHED IT IN A LEWD AND
LASCIVIOUS MANNER.

BASICALLY, THEY'RE BOTH TOUCHING
OF THE PENIS.

THAT IS DOUBLE JEOPARDY.

IT IS THE EXACT-- THE SEXUAL BATTERY ELEMENT OF UNION IS THE SAME IS, IS THE SAME AS THE LEWD AND LASCIVIOUS MOLESTATION, AND THAT'S WHAT RENDERS IT DOUBLE JEOPARDY.

>> DO WE HAVE ANY CASES SINCE THE GIBBS CASE THAT WE'VE CITED TO GIBBS?

>> I'M NOT AWARE OF THAT.

I CAN TELL YOU THAT IRONICALLY A MONTH AFTER THE FIFTH ISSUED ROUGHTON, A DIFFERENT PANEL OF THE FIFTH ISSUED GRAVES UTILIZING GIBBS AND FINDING ALMOST IN AN EXACT SAME SITUATION THAT IT WAS DOUBLE JEOPARDY.

AND THE IRONY OF THE OPINION IS THEY CITE TO ROUGHTON AND SAYS THE ANALYSIS IN ROUGHTON APPLIES IN THIS CASE AND THEN PROCEEDED FORWARD TO REVERSE THE CONVICTION FOR LEWD AND LASCIVIOUS MOLESTATION FINDING

DOUBLE JEOPARDY.

>> THAT'S EMBARRASSING.

FOR THE FIFTH.

[LAUGHTER]

>> AND WHAT'S MORE IRONIC IS
THEY DIDN'T CERTIFY CONFLICT IN
THAT CASE.

>> THEY CAN'T CERTIFY CONFLICT
WITH THEMSELVES.

THEY'D HAVE TO--

>> BUT THEY COULD CERTIFY
CONFLICT WITH SOME OF THE OTHER
DISTRICTS--

>> THESE THINGS CAN HAPPEN.

>> BUT IT'S LITERALLY ONE MONTH
LATER THE FIFTH WITH A DIFFERENT
PANEL RULES THE EXACT OPPOSITE,
AND REALLY THE FACTS OF THAT
CASE AREN'T AS IDENTICAL.

I MEAN, HERE WE HAVE A CHARGING
DOCUMENT THAT THE CHARGING
LANGUAGE IS EXACTLY THE SAME.

>> SO YOU'RE, I MEAN, THE ISSUE
TODAY REALLY IS DOES GIBBS
COMPEL THE OPPOSITE RESULT FROM

THIS CASE BECAUSE IT'S LOGICAL,
OR DOES OUR OTHER JURISPRUDENCE
REQUIRE US TO PROCEED FROM
GIBBS, RIGHT?

>> I WOULD AGREE WITH THAT.

I THINK GIBBS HAS TO APPLY.

YOU HAVE TO LOOK AT THAT STATUTE
AS A TOTALITY.

>> SO IF HE, THE IF MR. ROUGHTON
HAD BEEN CHARGED WITH SEXUAL
BATTERY JUST BY THE LANGUAGE OF
THE STATUTE AND NOT BEING
SPECIFIC, IF THE CHARGING
DOCUMENT HAD SAID BY EITHER
PENETRATION OR UNION WITH AND
THEN THE MOLESTATION CHARGE WAS
ALSO THERE, WOULD WE HAVE THE
SAME ISSUE?

>> WELL, I THINK IN THAT
SITUATION I THINK THAT'S AN
ANALOGY THAT REALLY HAS MORE
MEAT TO IT BECAUSE I THINK AS A
TRIAL COUNSEL WITH THE EVIDENCE
THAT WAS E DEUCED, YOU WOULDN'T
BE DOING YOUR JOB IF YOU DIDN'T

ASK TO SEE FOR THE PENETRATION
WHEN NO PENETRATION EXISTED.
I THINK YOU WOULD HAVE GROUNDS
TO DISMISS PART OF THE
INFORMATION, THUS LEAVING YOU
WITH THE EXACT SCENARIO WE HAVE
HERE.

I THINK YOU WOULD BE ENTITLED TO
DISMISS PART OF IT SINCE THERE'S
NO EVIDENCE OF PENETRATION.

>> THE WHOLE THING COMES DOWN TO
WHAT DO WE DO ABOUT THE LANGUAGE
OF THE STATUTE THAT SAYS WITHOUT
CONSIDERATION OF A CHARGING
DOCUMENT OR THE PROOF DEDUCED AT
TRIAL.

>> I THINK WHEN YOU LOOK AT THE
STATUTE AS A WHOLE AND THEY SAY
THE ELEMENTS, YOU HAVE TO LOOK
AT THE TOTALITY OF THE STATUTE
ALONG WITH THE FACT THAT THE
STATUTE SAYS WE'RE FOLLOWING
BLOCKBERGER, AND THAT IS THE
ANALYSIS, THE ELEMENTS OF THE
OFFENSE.

>> HOW LONG HAS THAT LANGUAGE
BEEN IN 175-- 775?

>> AS FAR AS I CAN REMEMBER,
I'VE BEEN PRACTICING FOR 15
YEARS, IT'S BEEN THERE FOR QUITE
SOME TIME. I

KNOW IT WAS THERE WHEN GIBBS
WAS ISSUED AND THAT WAS,
I BELIEVE IN '99.

UNLESS THE COURT--

>> I THINK IT WAS '97.

>> '97.

UNLESS THE COURT HAS ANY FURTHER
QUESTIONS, I RESERVE THE
REMAINING TIME FOR MY REBUTTAL.

>> MAY IT PLEASE THE COURT, DAWN
TIFFIN REPRESENTING THE STATE OF
FLORIDA.

THIS CASE PRESENTS A RELATIVELY
SIMPLE QUESTION, AND THAT IS
DOES SEXUAL BATTERY CONTAIN ANY
ELEMENTS NOT FOUND IN LEWD AND
LASCIVIOUS MOLESTATION AND VICE
VERSA.

AS SEVERAL MEMBERS OF THIS COURT

HAVE CLEARLY INDICATED, THE TEST FOR DETERMINING THAT IS FOUND IN 775.021.

TO THE EXTENT THAT GIBBS FURTHER BROKE DOWN THE ELEMENTS OF THE STATUTES AT ISSUE IN THAT CASE TO DO THAT COMPARISON, IT WAS INCORRECTLY DECIDED BECAUSE IT IS CONTRARY TO THE VERY CLEAR AND PLAIN LANGUAGE THAT STATUTORY DIRECTIVE FOUND IN 775.021.

FOR PURPOSES OF DOUBLE JEOPARDY, THAT STATUTE IS CLEAR THAT OFFENSES ARE SEPARATE IF THEY EACH CONTAIN AN ELEMENT THAT THE OTHER DOES NOT.

SO THE FIFTH DCA IN ROUGHTON GOT IT EXACTLY RIGHT.

WHAT THEY DID IS THEY TOOK THE TWO STATUTES AND COMPARED THEM SIDE BY SIDE AND EASILY CONCLUDED EACH CONTAINED AN ELEMENT THAT THE OTHER DID NOT.

SO THE QUESTION HAS COME UP

SHOULD THIS COURT RECEDE FROM
GIBBS AND HOW CAN IT BE
RECONCILED WITH 775.

THIS COURT SHOULD RECEDE FROM
GIBBS BECAUSE IT CANNOT BE
RECONCILED WITH SECTION 775.021.

I DO WANT TO NOTE SOMETHING OF
INTEREST, HOWEVER, THAT--

>> HAS THAT SECTION CHANGED
SINCE THE GIBBS DECISION?

WAS THAT SECTION IN EFFECT WHEN
THE GIBBS DECISION WAS DECIDED?

>> IT WAS, IN FACT.

IT HAS NOT CHANGED.

AND I BELIEVE IT TOOK EFFECT
SOMETIME IN THE LATE '80s.

SO IT HAS BEEN AROUND FOR QUITE
A WHILE, AND THE LANGUAGE HAS
NOT CHANGED DURING THAT TIME.

IT'S A CODIFICATION OF THE
BLOCKBERGER TEST OF THE SAME
ELEMENTS.

>> DID THE COURT CITE TO THAT
LANGUAGE AT ALL, OR DID THEY--

>> THE COURT DID, BUT AS I

BELIEVE JUSTICE CANADY

EXPRESSED, IT WAS UNCLEAR HOW
THE COURT WENT FROM-- DEVIATED
FROM THAT LANGUAGE.

WHEN THE LANGUAGE, FRANKLY, IS
SO CLEAR, PERHAPS IT WAS DEEMED
TO BE A MORE DESIRABLE RESULT,
PERHAPS MORE LOGICAL BY BREAKING
DOWN THE ELEMENTS BASED UPON THE
SPECIFIC CONDUCT CHARGE.

BUT, AGAIN, THAT'S NOT THE TEST.

>> HAVE WE SINCE GIBBS HELD
DIFFERENTLY?

SO WE'RE INCONSISTENT?

OR IS-- BECAUSE, AGAIN, MY
RECOLLECTION IS THAT I WOULD
HAVE AGREED WITH WHAT YOU SAID
WHICH IS THAT YOU LOOK AT THE
ACTUAL ELEMENTS IN THE STATUTE
AS OPPOSED TO THE ELEMENTS OF
HOW IT'S BEEN CHARGED WHICH
NEVER, AGAIN, SEEMS APPROPRIATE
TO ME, BUT IT SEEMED LIKE IT WAS
THE LAW.

SO HAVE WE, THE SUPREME COURT,

HELD THAT SUBSEQUENT TO GIBBS?

ARE WE INCONSISTENT?

>> NOT TO MY KNOWLEDGE.

IT DOES APPEAR THAT GIBBS IS
SORT OF LINGERING OUT THERE FOR
SOME YEARS NOW WITH THIS ISSUE
APPARENTLY NOT HAVING ARISEN
WHERE THE COURT IS FACED WITH
THE ENTIRE-- AN ALTERNATIVE
CONDUCT STATUTE.

>> WELL, LET ME ASK YOU THIS
QUESTION BECAUSE SINCE IT'S BEEN
THERE SINCE 1997, IT DOES SEEM
LIKE A FAIRER WAY.

I MEAN, AGAIN, HERE YOU'VE GOT A
SINGLE ACT OF A DEFENDANT WHO'S,
AGAIN, HE'S GETTING LIFE KISSING
A PENIS, RIGHT?

THAT'S THE ACT.

>> CORRECT.

>> CHARGED MULTIPLE CRIMES FOR
THAT SINGLE ACT, YOU KNOW, IS
THAT WHAT THE LEGISLATURE
INTENDED?

IF GIBBS SAYS, NO, YOU LOOK--

CAN LOOK AT THE CHARGING DOCUMENT, IS THERE ANYTHING TO BE SAID ABOUT SINCE 1997 TO THE PRESENT THAT THE LEGISLATURE HASN'T CHANGED THE STATUTE?

>> WELL, I THINK THERE-- I THINK IF WHAT YOUR HONOR IS ASKING, WHETHER GIBBS, EXCUSE ME, DID NOT RESULT IN ANY ACTION BY THE LEGISLATURE IN TERMS OF THE LANGUAGE CHANGE FOR THAT SECTION?

>> YES.

>> OKAY.

WELL, IT OBVIOUSLY DID NOT, BUT I DON'T-- I CAN'T SPEAK TO WHY OR WHY NOT.

BUT I THINK THAT THE OVERHAUL AT LEAST OF THE SEXUAL OFFENSE STATUTES IN 1999 WHERE THE LANGUAGE WAS REMOVED REGARDING THE RELATIONSHIP BETWEEN LEWD OR LASCIVIOUS --

>> WELL, I THINK PROBABLY THE OTHER ANSWER WAS SINCE WE WERE

NOT INTERPRETING THE STATUTE,
THERE WOULD BE NO CAUSE FOR THE
LEGISLATURE TO BE LOOKING AT
THAT PARTICULAR CASE.

IT'S JUST THAT NOW WE HAVE--
YOU AGREE THAT WE HAVE TO RECEDE
FROM GIBBS IN ORDER TO APPROVE
THE FIFTH DISTRICT?

>> YES.

BUT ALSO MORE IMPORTANTLY, IN
ORDER TO BE COMPLIANT WITH THIS
STATUTE IN 775.021.

RECEDING FROM GIBBS WOULD BE
REQUIRED.

AND, AGAIN, THE LANGUAGE IS VERY
PLAIN THAT WHEN WE'RE TALKING
ABOUT DOUBLE JEOPARDY, WE'RE
TALKING ABOUT THE LEGISLATURE'S
INTENT TO IMPOSE SENTENCING FOR
BOTH OF THE OFFENSES OR EVEN
MORE THAN THAT IF MORE THAN THAT
ARE AT ISSUE.

AND THIS IS THE TEST THAT
THEY'VE GIVEN US TO INTERPRET
THEIR INTENT.

SO WHEN WE FOLLOW THAT TEST IN THIS CASE AND IN MANY OTHERS, WE FIND THAT THERE'S NO DOUBLE JEOPARDY VIOLATION BECAUSE EACH OFFENSE CONTAINS AN ELEMENT THAT THE OTHER DOES NOT.

SO THIS COURT SHOULD COMPLY WITH 775.021 AND LOOK AT THE ENTIRE RANGE OF CONDUCT; THAT IS, A SIDE-BY-SIDE COMPARISON OF BOTH THE SEXUAL BATTERY STATUTE AND THE LAW LEWD OR LASCIVIOUS MOLESTATION STATUTE.

AND THAT'S EXACTLY WHAT THE FIFTH DISTRICT DID, AND THAT'S WHAT THIS COURT SHOULD DO AS WELL.

>> IS HE RIGHT, THAT THE FIFTH DISTRICT SUBSEQUENTLY DID IT DIFFERENTLY A MONTH LATER?

>> THAT IS CORRECT.

IT WAS A DIFFERENT PANEL THAT SEEMED TO UTILIZE THE TEST WHICH WAS ALSO UTILIZED IN GIBBS, WHICH IS TO

BREAK DOWN THE ELEMENT
COMPARISON, EXCUSE ME, BASED
UPON THE SPECIFIC CONDUCT THAT
WAS ALLEGED IN THE INFORMATION.
>> WELL, IT'S MORE, IT SEEMS TO
ME THAT WHAT YOU'RE REALLY
COMPARING IS WHEN YOU'RE LOOKING
AT AN ALTERNATIVE STATUTE, YOU
ARE COMPARING THE ALTERNATIVE IN
THAT STATUTE TO THE OTHER
STATUTE THAT THE PERSON IS BEING
CHARGED UNDER.
BECAUSE WHAT WE HAVE HERE REALLY
IS THAT HE WAS CHARGED WITH
SEXUAL BATTERY WHICH CAN BE DONE
ALTERNATIVELY, EITHER BY THE
TOUCHING OR BY THE PENETRATION.
AND THEN YOU ARE COMPARING THAT
TO A STATUTE WHICH ONLY HAS
TOUCHING.
AND SO WHAT THEY, WHAT THE COURT
DID WAS TAKE THE TOUCHING FROM
THE SEXUAL BATTERY STATUTE AND
THE TOUCHING FROM THE LEWD AND
LASCIVIOUS STATUTE AND COMPARED

THOSE.

THAT'S WHAT HAPPENED, RIGHT?

>> IN THE FIFTH DISTRICT?

>> YES.

>> NO.

THAT'S NOT WHAT HAPPENED.

>> WHAT DID THEY DO?

>> THEY LOOKED AT ALL OF THE
ELEMENTS OF SEXUAL BATTERY AND
ALL OF THE ELEMENTS OF LEWD OR
LASCIVIOUS REGARDLESS OF WHAT--

>> I'M NOT TALKING ABOUT THE NEW
FIFTH DISTRICT.

>> OH THE-- YES.

>> I'M TALKING ABOUT THE CASE
BEFORE--

>> GRAVES.

>> RIGHT.

>> THAT'S CORRECT, YES.

CITING TO GIBBS.

>> SO THE GENERIC MOLESTATION
STATUTE IS A TOUCHING STATUTE,
CORRECT?

>> CORRECT.

>> AND THE GENERIC SEXUAL

BATTERY STATUTE IS A TOUCHING OR
PENETRATION STATUTE?

>> CORRECT.

>> OKAY.

>> BUT WHAT'S REALLY INTERESTING
IN THIS CASE IS THAT EVEN IF A
COURT UNDERTOOK A, AN
ALTERNATIVE CONDUCT ANALYSIS,
THERE WOULD STILL BE NO DOUBLE
JEOPARDY VIOLATION IN THIS CASE.
PETITIONER HAS ACKNOWLEDGED THAT
LEWD OR LASCIVIOUS MOLESTATION
CONTAINS THE LEWD OR LASCIVIOUS
MANNER OF TOUCHING, AND THAT'S
AN ELEMENT THAT'S NOT FOUND IN
SEXUAL BATTERY.

BUT PETITIONER FAILS TO
ACKNOWLEDGE THAT THE BREAKDOWN
OF THE SEXUAL BATTERY STATUTE
WOULD RESULT IN A TOUCHING THAT
HAS TO BE ORAL IN THIS CASE.
THE BODY PARTS THAT HAVE TO
TOUCH THE OTHER BODY PARTS IN
THE SEXUAL BATTERY STATUTE ARE
VERY SPECIFIC.

THEY CAN ONLY BE DONE WITH
CERTAIN PARTS OF THE BODY OF THE
DEFENDANT.

THE LEWD OR LASCIVIOUS HAS NO
REQUIREMENT.

IT CAN BE DONE WITH AN ELBOW, A
PINKY TOE, FRANKLY, ANYTHING IN
BETWEEN.

AND THAT FURTHER DIFFERENTIATES
THOSE TWO STATUTES.

SO, AGAIN, EVEN IF A COURT, AND
GRAVES DECISION IS WRONG FOR
THAT REASON ALSO.

BECAUSE WHEN A COURT CHOOSES TO
LOOK AT THE STATUTES WITH
MODIFIED ELEMENTS BASED ON THE
SPECIFIC CONDUCT CHARGE, THEY'RE
STILL SEPARATE ELEMENTS BECAUSE
THE TOUCHING IN THIS CASE HAD TO
BE ORAL IN SEXUAL BATTERY.

THE UNION WITH HAD TO BE ORAL.
THAT IS AN ELEMENT THAT IS NOT
FOUND IN LEWD OR LASCIVIOUS
MOLESTATION.

SO THE RESULT WOULD BE THE SAME

UNDER EITHER TEST.

BUT THE APPROPRIATE TEST IS ONE THAT IS IN FULL COMPLIANCE WITH 775.021.

AND THAT IS TO CONSIDER THE FULL RANGE OF CONDUCT, A SIDE-BY-SIDE COMPARISON OF ALL OF THE ELEMENTS OF EACH OFFENSE REGARDLESS OF WHAT WAS ALLEGED IN THE CASE.

SO IF THERE ARE NO FURTHER QUESTIONS, I WILL ASK THIS COURT TO AFFIRM THE FIFTH DCA.

THANK YOU.

>> I WANT TO GO BACK TO YOU ASKED IF THERE WAS ANY INCONSISTENCY OF HOW YOU APPLY THE STATUTE, AND I WOULD SAY, YES, AND IT'S THIS COURT'S IN MESHLE, OR MICHELE.

>> WHAT ABOUT HER LAST COMMENT, BASICALLY, THAT EVEN IF YOU TAKE THE TOUCHING PART OF THE SEXUAL BATTERY STATUTE AND COMPARE IT TO THE TOUCHING OF THE--

REQUIREMENT IN THE MOLESTATION
STATUTE, THAT YOU STILL HAVE
DIFFERENT CAN ELEMENTS?

>> AND I WOULD DISAGREE WITH
THAT.

THEY'RE STILL BOTH TOUCHING.
JUST BECAUSE ONE HAS IT MORE
SPECIFIC THAN THE OTHER DOESN'T
MEAN IT'S NOT THE SAME ELEMENT.
IT'S A TOUCHING OF THE OTHER
INDIVIDUAL.

AND ONE, YES, SEXUAL BATTERY
REQUIRES IT TO BE ORAL.

THE LEWD AND LASCIVIOUS BATTERY
DOES NOT.

BUT STILL A TOUCHING.

JUST BECAUSE IT DOESN'T SPECIFY
IT HAS TO BE WITH--

[INAUDIBLE]

IT STILL HAS TO BE TOUCHING AND,
THEREFORE, THE SAME ELEMENT.

BUT TO GO BACK TO WHAT I WAS
GOING TO SAY, 775-- YOU SAY
WE'RE CONTROLLED BY 775.

IF YOU APPLY IT WHERE IT'S NOT

DOUBLE JEOPARDY HERE AND IT'S
NOT CHARGING THE DOCUMENT OR THE
FACTS OF CASE, YOU CANNOT
CORRESPOND WITH THIS COURT'S
DECISION IN MESCHLE WHEN 775
SAYS YOU CAN'T LOOK AT THE FACTS
AND IT COMMITS ACTS OR AN ACT OR
ACTS WITHIN ONE OR MORE SEPARATE
CRIMINAL TO FENS.

IF SOMEONE COMMITS AN
PENETRATION FOLLOWED BY VAGINAL
PENETRATION ALL WITHIN A MATTER
OF 20 SECONDS IN ONE LOCATION,
THAT'S ONE CRIMINAL EPISODE.
THE ONLY WAY TO THEN JUSTIFY
MESCHLE WHICH THIS COURT ISSUED
UNDER THE--

>> WHEN WAS THAT CASE?

WHEN WAS THAT CASE?

>> I BELIEVE IT WAS 2009.

SO, AND ALSO NOTABLY IN GRAVES
THE FIFTH NOT ONLY CITED TO
GIBBS, BUT IT ALSO CITED THAT
ANALYSIS FROM THIS COURT'S
DECISION IN MICHEL.

YOU CANNOT JUSTIFY THIS COURT'S
HOLDING OF DISTINCT ACTS ON
THESE SEXUAL CASES WITHOUT
LOOKING BEYOND THE STATUTES.
AND IF THIS COURT WERE TO NOT
FIND THAT GIBBS APPLIES, THEN
THIS COURT NOT ONLY HAS TO
RECEDE FROM GIBBS, BUT I WOULD
ARGUE IT HAS TO RECEDE FROM ALL
OF ITS DECISIONS SINCE MICHEL
ARGUING DISTINCT ACTS BECAUSE
YOU CAN'T DECIDE DISTINCT ACTS
WITHOUT LOOKING AT THE FACTS OF
THE CASE.

>> ISN'T THIS REALLY-- I'M
TRYING TO REFRESH MYSELF ON
MICHEL HERE, BUT IT SEEMS LIKE
THERE WE'RE LOOKING AT WHETHER
PARTICULAR ACTS WERE, COULD--
WERE DISTINCT ACTS OR ONE ACT.
I MEAN, THAT'S THE QUESTION
THERE.

>> ABSOLUTELY, I AGREE WITH
THAT.

>> IT'S NOT SO MUCH THE ISSUE

HERE WE'VE GOT WHETHER-- IF YOU
AGREE IT'S THE SAME ACT, OKAY?
BUT WHETHER THE LEGISLATURE HAS
CHOSEN TO IMPOSE TWO DISTINCT
PUNISHMENTS FOR THE SAME ACT.

>> I WOULD AGREE WITH THAT, YOUR
HONOR.

BUT THE DIFFERENCE, I WAS ASKED
WHY SHOULDN'T 775 APPLY, AND
HAVE YOU BEEN CONSISTENT.

AND IF YOU READ 775, IT SAYS
COMMIT AN ACT OR ACTS WHICH
CONSTITUTE ONE OR MORE SEPARATE
CRIMINAL OFFENSES AND ONE
CRIMINAL TRANSACTION OR EPISODE.

SO IF YOU TAKE THE FACTS OF
MICHEL WHICH WAS A LEWD AND
LASCIVIOUS BATTERY ON THE
BUTTOCK TOES AND VAGINA, THEY
ALL OCCURRED IN ONE CRIMINAL
EPISODE.

THE ONLY WAY TO JUSTIFY THAT
DECISION THEN WOULD BE TO SAY
YOU LOOKED AT THE FACTS TO
DETERMINE THAT THEY WERE

DISTINCT ACTS.

YOU CANNOT JUSTIFY THIS COURT'S
DECISION IN MICHEL--

>> THAT'S A DIFFERENT--

>> THAT'S TOTALLY DIFFERENT.

>> YEAH.

THAT'S ABOUT WHETHER HE KISSED
ANOTHER, KISSED MULTIPLE TIMES
ON THE PENIS THAT THEY'RE THE
SAME CRIMINAL EPISODE BUT
THEY'RE DIFFERENT ACTS, THAT'S
NOT THE SAME ACT IN CHARGING TWO
SEPARATE CRIMES ON THE EXACT
ACT.

>> I DON'T--

>> WELL, I THINK THAT'S WHAT
WHATEVER OR THAT CASE--

>>-- DISAGREE BECAUSE THE FIRST
SENTENCE SAYS WHOEVER IN THE
COURSE OF ONE CRIMINAL
TRANSACTION OR EPISODE COMMITS
AN ACT OR ACTS WHICH CONSTITUTE
ONE OR MORE SEPARATE CRIMINAL
OFFENSES, THAT'S THE LANGUAGE
THAT YOU'RE QUOTING AT THE

BEGINNING OF THE PARAGRAPH OF
775.0214A WHERE YOU'RE QUOTING
TO THE END THAT SAYS "WITHOUT
REGARD TO THE ACCUSATORY
PLEADING OR PROOF EDUCED AT
TRIAL.

IT MAKES NO SENSE TO SAY THE
BOTTOM APPLIES NOW BUT DIDN'T
APPLY IN MICHEL BECAUSE IT'S ONE
CONTINUING CRIMINAL TRANSACTION
OR EPISODE.

TO GET TO THE DISTINCT ACT, YOU
HAD TO GO BEYOND THE CRIMINAL
TRANSACTION OR EPISODE.

AND THAT'S WHY IF THIS COURT
RECEDES FROM IMIBS, I WOULD
ARGUE IT HAS HALLS TO RECEDE
FROM MICHEL BECAUSE THAT WAS TWO
OF THE SAME EXACT CHARGES.

AND UNLESS THE COURT HAS ANY
FURTHER QUESTIONS, I WOULD ASK
THIS COURT REVERSE THE APPEAL IN
ROUGHTON AND ODDER THAT
MR. ROUGHTON'S COUNT TWO BE
DISMISSED.

THANK YOU.

>> THANK YOU FOR YOUR ARGUMENTS.