

the language. There are many times that we will put clarifying language into the statute and in a way you could say there is no operative effect from the language because it does not change the nature of the offense. It's designed to clarify what constitutes the offense. In this instance, if an attempt is made to create two offenses out of one, a court will not allow it. This language gives direction and guidance to prosecutors and everybody else. People are saying, with reference to the malice element of second degree murder, why didn't judges catch it sooner? Why didn't the Supreme Court say something about it sooner? All of those questions are irrelevant when it comes to the way the issue has been decided by the Supreme Court. At this point, the court has said malice should always have been included. It was not. When instructions were given to juries, this element was not included. The jury did not consider it. You've got to give a new trial because that is an error sufficient to justify a new trial. I hope the members of the Legislature, including my good friend, Senator Abboud, do not think that if we fail to put this clarifying language in, we enable prosecutors to do something which they cannot do under the law or under the Constitution. You cannot create an offense out of whole cloth. You cannot...there was a case just the other day, Senator Abboud, that was handed down by, I think, the appellate court and some guy was charged with recklessly doing something in a car and they made it an intentional act and what the court said, you cannot take an act which by definition is unintentional and treat it as an intentional act. An intentional act cannot be committed with an unintentional state of mind. So regardless of what they want to say the language of the statute allows, that cannot be done and they threw out the conviction. It does not make any difference whether the body thinks they can get two for one, meaning that you can get two offenses out of one set of elements. You can't do it. We both know, Senator Abboud, that in a plea bargain a lower offense can be charged in exchange for a plea, but the elements are not what created that lower charge. It's the fact that the prosecutor would not charge the offense that was justified based on the elements present. So if the gun itself is an element of the offense, you cannot make the gun in that set of circumstances a second offense. You cannot do it. It's like saying, Senator Abboud, that I set a house on fire and I'm charged with arson. I think we would both agree with that, but you cannot charge me with a separate offense by saying he used fire to commit arson. You cannot have arson without fire. You cannot. So regardless of how much you may hate fire, you hate pyromaniacs, the fact is