

>> ALL RISE.

HEAR YE, HEAR YE, HEAR YE,
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.

ALL WHO HAVE CAUSE TO PLEA, DRAW
NEAR, GIVE ATTENTION, YOU SHALL
BE HEARD.

GOD SAVE THESE UNITED STATES,
GREAT STATE OF FLORIDA, THIS
HONORABLE COURT.

>> LADIES AND GENTLEMEN, SUPREME
COURT OF FLORIDA.

PLEASE BE SEATED.

>> GOOD MORNING, WELCOME TO THE
FLORIDA SUPREME COURT.

THE FIRST CASE ON THE DOCKET
THIS MORNING IS STATE OF FLORIDA
VERSUS JIMMY MOORE.

WHENEVER YOU'RE READY.

>> MAY IT PLEASE THE COURT,
KATHRYN LANE FOR THE STATE.

IN THIS CASE THE FIRST DISTRICT
HAS CERTIFIED TWO QUESTIONS OF
GREAT PUBLIC IMPORTANCE, BOTH
RELATING TO THE ERRONEOUS
OMISSION OF JUSTIFIABLE AND
EXCUSABLE HOMICIDE FROM THE
MANSLAUGHTER DEFINITION.

THE FIRST RELATES TO
REQUIREMENTS FOR WAIVING A
FUNDAMENTAL ERROR; SPECIFICALLY,
WHETHER THIS COURT HAS SAID
MERELY AN AFFIRMATIVE AGREEMENT
TO THAT ERROR IS NECESSARY OR
MUST THERE BE SOME RECORD
EVIDENCE THAT A LITIGANT IS
SPECIFICALLY AWARE THAT WHAT
THEY ARE AGREEING TO IS
ERRONEOUS.

NOW, AS THIS COURT HAS SAID MANY
TIMES, IT HAS PHRASED THE RULE
AS EITHER AN AFFIRMATIVE
AGREEMENT OR AN AFFIRMATIVE
REQUEST WAIVES FUNDAMENTAL ERROR
AND THAT'S BASED ON THE INVITED
ERROR DOCTRINE.

THE LITIGANT HAS A HAND IN
MAKING OR INTRODUCING AN ERROR
AND THEY DON'T GET TO TURN
AROUND ON APPEAL AND TAKE

ADVANTAGE OF IT.

>> IS IT YOUR POSITION IN THIS CASE THAT COUNSEL FOR THE DEFENDANT WAS NOT AWARE THAT THE STATUTE WAS IN ERROR?

>> NO.

THAT IS NOT OUR POSITION, AND IN FACT THERE IS A GOOD REASON TO BELIEVE THAT THERE IS A STRATEGY BEHIND THAT.

CERTAINLY FOR A CRIME SUCH AS THIS, WHERE THE VICTIM WAS BOUND WITH DUCT TAPE AND BEATEN TO DEATH AND ON THE WALL AFTER THE MURDER POLICE FOUND WRITTEN IN BLOOD NEVER YOUR OWN BLOOD, THERE WAS ABSOLUTELY NO POSSIBLE WAY THAT ANY OF IT COULD HAVE BEEN JUSTIFIED.

AND FOR THE JURY TO HAVE TO CONSIDER AS PART OF ITS DELIBERATIONS WHETHER IT WAS JUSTIFIED WOULD ONLY PASS LIGHT ON HOW HORRIBLE THE CRIME WAS. ANY DEFENSE ATTORNEY WOULD BE WELL WITHIN THEIR RIGHTS IN NOT WANTING THE JURY TO FOCUS ON THAT, SPECIFICALLY WHEN THEIR DEFENSE HAS ABSOLUTELY NOTHING TO DO WITH THAT, IN THIS CASE ALIBI.

>> WAS THE JUDGE AWARE OF THIS ERRONEOUS INSTRUCTION?

>> THEY WERE AWARE OF --

>> THE JUDGE.

>> THE JUDGE WAS AWARE OF WHAT WAS EVENTUALLY READ, BUT THERE IS NO RECORD EVIDENCE THAT THE JUDGE WAS OR WAS NOT AWARE THAT JUSTIFIABLE AND EXCUSABLE HOMICIDE WAS ERRONEOUSLY ADMITTED.

>> AN INTENTIONAL ACT?

>> I'M SORRY?

>> THE ERRONEOUS PORTION WAS THAT IT WAS AN INTENTIONAL ACT?

>> NO.

THAT WOULD BE -- THERE WERE TWO ERRORS IN THIS PARTICULAR MANSLAUGHTER INSTRUCTION.

>> THAT WOULD BE ON THE
MANSLAUGHTER.

OKAY.

>> YES.

>> I JUST WANT TO MAKE SURE.
YOU'RE STARTING WITH THE SECOND
ISSUE, WHICH IS WHEN THE --
BECAUSE THERE WAS NOTHING
AFFIRMATIVE ON THE ISSUE OF
INSTRUCTING ON JUSTIFIABLE OR
EXCUSABLE HOMICIDE, WAS THERE?
IT WAS JUST -- HOW DID IT NOT
GET -- ISN'T IT JUST PART OF THE
STANDARD INSTRUCTIONS?
DID THE DEFENSE LAWYER SAY I
DON'T WANT IT READ?

>> NO.

THERE WERE EXTENSIVE DISCUSSIONS
ABOUT THE JURY INSTRUCTIONS.

>> I KNOW, BUT, YOU KNOW, THE
FIRST ISSUE IS THE INTENT TO
KILL ON THE MANSLAUGHTER.
BUT ON THE RESIDUAL, WAS THERE
ANY DISCUSSION ABOUT WHETHER THE
RESIDUAL INSTRUCTION SHOULD BE
READ OR NOT?

>> NO SPECIFIC INSTRUCTION, BUT
I SHOULD MENTION --

>> DISCUSSION, YOU MEAN.

>> DISCUSSION, YES.

I SHOULD MENTION THAT BOTH
CERTIFIED QUESTIONS RELATE TO
THE OMISSION OF JUSTIFIABLE AND
EXCUSABLE HOMICIDE, NOT TO THE
ERROR AS TO THE INTENT PORTION
OF THE MANSLAUGHTER INSTRUCTION.

>> SO IS IT YOUR POSITION THEN
THAT WHENEVER YOU GIVE A
MANSLAUGHTER INSTRUCTION, YOU
HAVE TO GIVE JUSTIFIABLE AND
EXCUSABLE HOMICIDE?

>> FOR IT TO BE CORRECT, THAT
HAS BEEN THIS COURT'S PRECEDENT.

>> AND DID YOU SAY YOU'RE NOT
ARGUING THE ERRONEOUS MONTGOMERY
ISSUE?

>> THAT WAS NOT PART OF THE
FIRST DISTRICT CERTIFIED
QUESTION.

>> YOU'RE REPRESENTING THE STATE

OF FLORIDA, SO --

>> CORRECT.

>> THE IDEA IS THE FIRST DISTRICT SAID IT NEEDED TO BE GIVEN, JUST TO MAKE SURE THE POSTURE OF THIS CASE -- WHY ARE YOU THE PETITIONER?

>> WE ARE THE PETITIONER BECAUSE THE FIRST DISTRICT HAS AUTHORITY THAT ADDS REQUIREMENTS TO ESTABLISHING WAIVERS.

>> ON THE JUSTIFIABLE OR EXCUSABLE IT'S BEEN THE LAW SINCE LUCAS.

THAT'S BEEN HOW LONG?

>> SINCE THE MID-'90s.

>> SO YOU'RE ASKING US TO RECEDE FROM LUCAS.

>> THAT WAS ULTIMATELY ON THE SECOND ISSUE, WHAT THE FIRST DISTRICT ASKED THIS COURT TO DO.

>> LET ME ASK YOU THIS ON THAT POINT.

IN THIS PARTICULAR CASE, MY UNDERSTANDING IS THAT THE DEFENSE WAS ALIBI.

>> THAT'S CORRECT.

>> HE WASN'T EVEN THERE, ALTHOUGH THERE WAS SOME DNA EVIDENCE THAT PUT HIM AT THE SCENE.

BUT HIS DEFENSE WAS, NO, I DIDN'T DO IT, I WAS SOMEPLACE ELSE.

>> CORRECT.

>> SO WHAT RELEVANCE, GOING BACK TO THE WHOLE LUCAS THING AND THE NECESSITY TO INSTRUCT ON THESE EXCUSABLE HOMICIDE AND JUSTIFIABLE HOMICIDE IN EVERY CASE, EVEN IF IT'S NOT APPLICABLE, WHY HAVE THAT REQUIREMENT IN A CASE WHERE IT'S NOT EVEN AN ISSUE?

>> REGARDING THE SECOND CERTIFIED QUESTION, THAT'S AN EXCELLENT POINT.

THERE IS NO REASON TO ADD IT IN WHEN IT'S NOT RELEVANT AT ALL TO THE DISCUSSION.

AND PENA IS A GOOD EXAMPLE.
IN THAT CASE THERE WAS MURDER BY
DRUG DISTRIBUTION, SOMETHING
THAT JUSTIFIABLE AND EXCUSABLE
HOMICIDE HAS NO RELATION TO.
AND IN THAT CASE IN THE
MANSLAUGHTER DEFINITION THAT
PHRASE WAS LEFT OUT AS IT WAS
HERE.

AND THIS COURT HELD THAT BECAUSE
THAT IS DIFFERENT FROM A
STANDARD HOMICIDE IN THAT IT HAS
NO RELATIONSHIP TO THE CRIME,
IT'S NOT GOING TO BE IN DISPUTE.
THEREFORE, IT'S NOT FUNDAMENTAL
ERROR.

>> SO YOU'RE ASKING US TO RECEDE
FROM LUCAS TO THE EXTENT THAT IF
THE RESIDUAL IS NOT GIVEN --

>> CORRECT.

>> -- THAT WE LOOK TO SEE, ONE,
WAS IT BECAUSE THE DEFENSE
LAWYER AFFIRMATIVELY DIDN'T WANT
IT, WHICH IS NOT -- IS NOT
INDICATED HERE, OR BECAUSE EVEN
THOUGH WE'RE SAYING IT'S
FUNDAMENTAL, IF IT HAD NOTHING
TO DO WITH -- EVEN IF IT'S ONE
STEP REMOVED, WITH THE ULTIMATE
CASE, THE FACTS OF THE CASE,
THAT WE SHOULD NOT CONTINUE TO
HOLD AS FUNDAMENTAL ERROR.

IS THAT CORRECT?

JUST TRYING TO -- AGAIN, I DON'T
KNOW WHY -- THIS SEEMS MORE
CONFUSING THAN IT NEEDS TO BE.

>> YES.

>> SO MAYBE YOU COULD JUST
ARTICULATE THE STATE'S POSITION
AS TO BOTH CERTIFIED QUESTIONS
AND WE CAN GET BACK ON TRACK.

>> CORRECT.

OUR POSITION AS TO THE FIRST
CERTIFIED QUESTION IS THAT THIS
COURT SHOULD MAINTAIN ITS
AUTHORITY, THAT WAIVER IS
ESTABLISHED BY AFFIRMATIVE
AGREEMENT OR AFFIRMATIVE REQUEST
WITH NO ADDITIONAL QUALIFIERS.
AS TO THE SECOND CERTIFIED

QUESTION, OUR POSITION IS THAT
IF AN ELEMENT IS NOT IN DISPUTE,
IT CANNOT BE FUNDAMENTAL ERROR.
THAT IS NOT NEW CASE LAW.
HOWEVER, THE APPLICATION OF
LUCAS INVOLVES A PER SE
FUNDAMENTAL ERROR STANDARD.
AND THIS COURT HAS NOT
EXPLICITLY OVERRULED LUCAS, BUT
IT HAS CERTAINLY DEPARTED FROM
THAT LINE OF THINKING.
SO REALLY DEPARTING FROM LUCAS,
IT'S MERELY AN AFFIRMATIVE
STATEMENT OF WHERE THIS COURT
HAS ALREADY BEEN.

>> BUT BEYOND THAT, IN THIS CASE
-- AND THIS GOES BACK TO WHETHER
THERE WAS SOME GAME-PLAYING, I
MEAN, THE JUDGE BRINGS THE FACT
WITH THE INTENT ISSUE TO
EVERYBODY'S ATTENTION, RIGHT?

>> CORRECT.

>> SO I THINK THAT WAS JUSTICE
PERRY'S PRIOR QUESTION, WHICH IS
IT LOOKED LIKE MAYBE THE JUDGE
MIGHT HAVE BEEN AWARE THAT THERE
WAS CHANGING JURY INSTRUCTIONS
ON THIS.

I MEAN, BUT SPECIFICALLY SAID,
WELL, DO YOU WANT -- WHAT -- I
MEAN, THERE WAS A SPECIFIC
QUESTION TO THE DEFENSE LAWYER.

>> THE ISSUE OF A POSSIBLE ERROR
IN THE INTENT PORTION OF THE
INSTRUCTION WAS RAISED.
THERE WAS AN EXTENSIVE
DISCUSSION ABOUT THE ENTIRE
ERROR.

IT WAS NOT ENTIRELY CLEAR FROM
THE DISCUSSION THAT THE DEFENSE
WAS ULTIMATELY AWARE THAT WHAT
THEY WERE AGREEING TO WAS AN
ERROR, BUT THEY WERE CERTAINLY
CALLING ATTENTION TO THAT
PORTION OF THE INSTRUCTION.

>> THERE COULD HAVE BEEN A
STRATEGIC REASON BECAUSE OF NOT
WANTING THE JURY -- I DON'T KNOW
WHAT THEY WOULD BE THINKING.
THEY MIGHT HAVE GOTTEN A NOT

GUILTY OR SOMETHING.

SO, I MEAN, IF ANYTHING, THIS GOES TO MAYBE POST-CONVICTION AS TO WHETHER THE DEFENSE LAWYER WAS INEFFECTIVE AND THEN THEY HAVE TO PROVE PREJUDICE, WHICH WOULD MEAN THAT THEY HAVE TO PROVE THAT IT WOULD HAVE MADE A DIFFERENCE.

>> IF ANYTHING SHOULD HAPPEN, IT SHOULD HAPPEN IN POST-CONVICTION, YES.

WE NEED TO KNOW -- AND THAT IS THE ONLY FORUM IN WHICH WE CAN FIND OUT WHETHER THE DEFENSE ATTORNEY HAD A STRATEGIC REASON.

WE KNOW THERE'S POSSIBLE STRATEGIC REASONS AND WE DON'T ALLOW FUNDAMENTAL ERROR WHEN IT COULD BE A CONSCIOUS CHOICE OF COUNSEL, BECAUSE THAT --

>> TO BE CLEAR, SO WE DON'T -- IN THIS PARTICULAR INSTANCE, THIS WAS THE STANDARD INSTRUCTIONS IN EVERYBODY'S BOOK AT THE TIME, JURY INSTRUCTION BOOK.

>> FOR THE INTENT ERROR.

>> RIGHT.

>> I BELIEVE IT HAD ACTUALLY BEEN -- THIS TRIAL OCCURRED POST-MONTGOMERY.

>> THE STATE ATTORNEY -- I'M SORRY.

THE PROSECUTOR IN THIS CASE IS THE ONE THAT PRETTY MUCH REQUESTED THE INSTRUCTION.

>> CORRECT.

>> AND THEN THE DEFENSE -- THEN THE QUESTIONING WENT ON WITH THE JUDGE, AND THE DEFENSE ATTORNEY SAYS I AGREE WITH THAT INSTRUCTION.

>> YES.

>> THE JUDGE RAISED SOME QUESTIONS ABOUT IT.

NO, THAT'S OKAY, I AGREE WITH THAT INSTRUCTION.

>> WELL, SPECIFICALLY, WHAT WAS ULTIMATELY DISCUSSED AT THE VERY

END, AFTER EVERYTHING HAD BEEN
HASHED OUT ABOUT THIS
INSTRUCTION, WAS THE STATE TOOK
THE OPPORTUNITY TO PAUSE THE
PROCEEDINGS AND SAY, LOOK, WE
WANT TO MAKE SURE THIS IS
EXACTLY THE WAY THE DEFENSE
WANTS IT, THAT THE WORDING IS
CORRECT.

AND THEY READ OUT THE
INSTRUCTION VERBATIM.
NO MENTION OF JUSTIFIABLE AND
EXCUSABLE HOMICIDE.
THE COURT TURNED TO DEFENSE
COUNSEL AND SAID, DO YOU AGREE
WITH THAT?

YES.

DO YOU WANT ANYTHING ELSE?

NO.

THAT IS BY DEFINITION AN
AFFIRMATIVE AGREEMENT, AN
EXPRESS STATEMENT.

>> WELL, THERE'S TWO PARTS.

OKAY.

WHEN THE STANDARD INSTRUCTION
INCLUDES JUSTIFIABLE OR
EXCUSABLE HOMICIDE, RIGHT?

>> CORRECT.

>> OKAY.

HOW DOES THAT GET -- IF IT'S
PART OF THE STANDARD
INSTRUCTIONS AND NOBODY SAYS
THEY DON'T WANT THAT PART READ,
HOW DOES IT NOT GET READ?
IS THERE ANY INDICATION IN THE
RECORD?

I MEAN, YOU GOT THE BOOK IN
FRONT OF YOU.

IT'S --

>> IT'S NOT INDICATED
SPECIFICALLY.

>> SO A NON-ISSUE.

BUT FOR LUCAS, IT'S NOT AN ISSUE
OF AN AFFIRMATIVE AGREEMENT,
BECAUSE NOBODY BROUGHT IT TO
ANYONE'S ATTENTION THAT WAS OUT
THERE, BUT THERE MAY HAVE BEEN A
STRATEGIC REASON.

ON THAT ONE.

ON THE INTENT ONE, I THOUGHT YOU

JUST SAID IT WAS
POST-MONTGOMERY.

>> THE TRIAL OCCURRED AFTER --
THEY SHOULD HAVE HAD A CORRECT
VERSION.

>> BUT THEY DIDN'T HAVE A
CORRECT VERSION.

>> OR THEY DID NOT ULTIMATELY
USE ONE.

>> THERE WAS NO MENTION OF THE
POST-MONTGOMERY INSTRUCTION, WAS
THERE?

>> THAT'S WHAT THE TRIAL COURT
WAS REFERRING TO WHEN IT BROUGHT
UP THE POSSIBLE ERROR IN THE
INTENT INSTRUCTION.

IT WAS NOT DISCUSSED THAT WHAT
THE DEFENSE ULTIMATELY AGREED TO
THAT THEY WERE AWARE IT WAS AN
ERROR, BUT THE SPECIFIC PORTION
THAT WAS ERRONEOUS WAS DISCUSSED
AT LENGTH AS A POSSIBLE ERROR.
AND SOMETHING YOU MENTIONED
BEFORE, OUR POSITION IS THAT AS
TO JUSTIFIABLE AND EXCUSABLE
HOMICIDE, IT WAS AN AFFIRMATIVE
AGREEMENT.

AND SPECIFICALLY, AFFIRMATIVE
AGREEMENT IS ESTABLISHED BASED
ON THE INVITED ERROR DOCTRINE.
WE'RE NOT GOING TO REWARD
SOMEONE WHEN THEY HAVE A HAND IN
MAKING OR INTRODUCING AN ERROR.
WHEN A TRIAL COURT ASKS COUNSEL,
DO YOU AGREE WITH THIS AND THEY
SAY --

>> YOU SAID IT WAS WRITTEN?
IT WAS A WRITTEN INSTRUCTION
THAT WAS GIVEN TO ALL OF THEM?

>> WELL, SPECIFICALLY THIS
PORTION.

WE DON'T KNOW SPECIFICALLY
WHETHER THERE WERE WRITTEN
VERSIONS HANDED OUT, BUT WE KNOW
THE PROSECUTOR WAS READING FROM
WHAT THEY HAD WRITTEN DOWN AS TO
WHAT THE DEFENSE AGREED TO, AND
THEY READ IT VERBATIM.

>> READ THE MANSLAUGHTER PORTION
VERBATIM.

>> CORRECT.
>> WITHOUT LEAVING THE
JUSTIFIABLE AND EXCUSABLE.
>> CORRECT.
>> I GUESS ON THAT ONE, IF IT
WEREN'T FOR THE FACT THAT IT
SEEMS, AS YOU SAID, THAT
JUSTIFIABLE, EXCUSABLE WOULD
JUST HAVE NOTHING TO DO WITH
THEIR DEFENSE IN THIS CASE, IT
JUST SEEMS THAT IN OTHER CASES
WHERE IT MIGHT, THE FACT THAT --
WE DON'T KNOW IF IT WAS
INADVERTENTLY LEFT OUT BECAUSE
THERE WAS NO DISCUSSION ABOUT
THAT PART.
WASN'T ALL THE DISCUSSION ABOUT
THE INTENT?
>> THAT IS CORRECT.
>> OKAY.
SO THAT'S MY PROBLEM.
AND YOU'RE SAYING THERE WAS AN
AFFIRMATIVE AGREEMENT.
YOU KNOW, UNFORTUNATELY, IN THE
THROES OF TRIAL, YOU KNOW, I
DON'T KNOW HOW IT GOES.
I DON'T KNOW HOW MANY TIMES, 100
CRIMINAL TRIALS, HOW MANY TIMES
THE RESIDUAL, THAT LAST PART, IS
NOT READ.
BUT IT DOESN'T SEEM LIKE THERE
WAS ANY DISCUSSION OF THAT PART
OF THE INSTRUCTION.
IS THAT CORRECT?
>> NO SPECIFIC INSTRUCTION -- OR
DISCUSSION RATHER.
>> CAN I ASK YOU A QUESTION
ABOUT AFFIRMATIVE AGREEMENT?
>> YES.
>> NOW, WE SAID THAT -- OR IT
WAS INDICATED HERE THAT IF THE
TRIAL COURT ASKS DO YOU AGREE
WITH THIS AND THERE'S AN
AFFIRMATIVE RESPONSE, THAT'S
AFFIRMATIVE AGREEMENT.
WHAT IF THE TRIAL COURT SAYS, DO
YOU OBJECT TO THIS AND THERE'S A
NEGATIVE RESPONSE?
IS THAT DIFFERENT?
>> THAT IS A CLOSER QUESTION

FACTUALLY.

POTENTIALLY THERE ARE FACTUAL SITUATIONS WHERE, DEPENDING ON WHAT OCCURRED BEFORE, IT MAY STILL CONSTITUTE AN AFFIRMATIVE AGREEMENT BASED ON WHAT YOU CAN UNDERSTAND IT TO MEAN, JUST BASED ON THOSE FACTS.

IT IS A CLOSER QUESTION, THOUGH. TO SAY THAT YOU HAVE -- WHEN THE COURT ASKS DO YOU HAVE AN OBJECTION, NO, THAT COULD BE IN CONTEXT UNDERSTOOD AS AN AGREEMENT OR IT COULD BE UNDERSTOOD AS SIMPLY TAKING NO POSITION.

>> I GUESS MY PROBLEM WOULD BE IF YOU JUST TOOK THAT GENERAL RULE, SAY THERE'S THREE ELEMENTS TO A CRIME, FOR SOME REASON THE PAGE -- SOMETHING -- ONE OF THE ELEMENTS THAT IS -- GOT ON ANOTHER PAGE, JUST DIDN'T GET IN THE INSTRUCTION.

THE STATE SUBMITTED IT, OR THE STANDARD, AND IT WASN'T ON THEIR PAGE.

AND THERE'S NO DISCUSSION ABOUT IT.

AND YOU AGREE TO THE INSTRUCTIONS.

THE DEFENSE LAWYER'S THINKING, WELL, THEY'RE READING THE STANDARD INSTRUCTIONS, WHY WOULD I DISAGREE.

SO I THINK WE GOT TO BE MORE SPECIFIC AS TO THIS CASE, WHERE IT SEEMS THERE WAS AN AFFIRMATIVE AGREEMENT FOR READING THE INTENT PART.

SO THAT TAKES CARE OF -- IT COULD TAKE CARE OF THE MONTGOMERY ISSUE, CORRECT? THAT'S NUMBER ONE.

AND THEN, TWO, ASSUMING THERE'S NO DISCUSSION OF THE RESIDUAL, DOES THERE STILL HAVE TO BE SOME -- THAT LUCAS MAYBE IS TOO HARD FAST A RULE.

SO DON'T WE HAVE TO LOOK

DIFFERENTLY AS TO THOSE TWO
CERTIFIED QUESTIONS?

>> WELL, AGAIN, THE CERTIFIED
QUESTION, THE FIRST ONE DOES NOT
RELATE AT ALL TO THE INTENT
ERROR.

IT ONLY RELATES TO JUSTIFIABLE
AND EXCUSABLE HOMICIDE.
HOWEVER, I SHOULD POINT OUT THAT
THE PORTION OF THE DEFENSE
ARGUMENT THAT BEGINS WITH --

>> BUT I THOUGHT THE DISCUSSION
WAS ON INTENT.

THE ONLY DISCUSSION THAT I
RECALL THAT THE JUDGE HAD WAS DO
YOU AGREE WITH THE INTENT.

>> WELL, THE ENDING DISCUSSION
WAS DO YOU AGREE WITH WHAT'S
BEEN READ, AND THE DEFENSE SAID
YES, WE AGREE TO THAT.

WE DON'T WANT ANYTHING ELSE.
NOW, THE IDEA OF THE DEFENSE'S
POSITION SEEMS TO BE THAT WE
SHOULD PRESUME THAT COUNSEL IS
SO UNWITTING THAT THEY DON'T
KNOW WHAT THEY'RE AGREEING TO
WHEN IT'S READ RIGHT TO THEM.
THAT IS NOT A PRESUMPTION THAT
DOES A GOOD SERVICE, I THINK, TO
THE BAR.

I THINK THAT IF WE'RE GOING TO
BEGIN FROM ANY POSITION, IT IS
THAT COUNSEL, WHEN THEY ARE
PRESENTED WITH SPECIFIC LANGUAGE
AND THEY SAY THEY AGREE, WE
ASSUME THEY KNOW WHAT THEY'RE
TALKING ABOUT UNLESS WE GET TO
POST-CONVICTION AND FIND OUT
OTHERWISE.

RESERVE THE REMAINDER OF MY TIME
FOR REBUTTAL.

THANK YOU.

>> MAY IT PLEASE THE COURT,
KATHLEEN STOVER.

I'M REPRESENTING JIMMY MOORE IN
THIS CASE.

>> I'M A LITTLE CONCERNED ABOUT
-- YOUR OPPONENT SAYS THAT THE
FIRST CERTIFIED QUESTION IS ONLY
INVOLVED WITH THE RESIDUAL OF

JUSTIFIABLE AND EXCUSABLE
HOMICIDE.

I GUESS I WAS UNDER THE
ERRONEOUS IMPRESSION THAT IT WAS
ABOUT THE INTENT ELEMENT OF
MANSLAUGHTER.

>> AS WAS I.

I DIDN'T REALIZE IT COULD EVEN
BE READ -- THE FIRST CERTIFIED
QUESTION COULD BE READ AS
PERTAINING TO THE EXCUSABLE AND
JUSTIFIABLE ERROR UNTIL I
RECEIVED THE STATE REPLY BRIEF.
AND I WOULD SAY THAT, HAVING
READ IT SEVERAL TIMES IN LIGHT
OF THAT, I THINK IT'S ULTIMATELY
AMBIGUOUS BECAUSE THEY'RE
TALKING ABOUT WHAT CONSTITUTES
WAIVER.

I THOUGHT THAT PERTAINED TO THE
CASE IN WHICH THEY FOUND WAIVER,
AS OPPOSED TO THE FAILURE TO
INSTRUCT ON JUSTIFIABLE AND
EXCUSABLE, HARMLESS ERROR.

SO I ALSO MISREAD IT.

YOU KNOW, I DON'T CLAIM TO KNOW
THE MIND OF THE FIRST DCA, BUT I
THINK THEY WROTE THE QUESTION IN
A WAY THEY WANTED A REALLY
FAR-REACHING RULE AS TO WHETHER
ACQUIESCENCE CONSTITUTED
AFFIRMATIVE WAIVER AND IT'S SO
UNSPECIFIC THAT THEY DON'T EVEN
MENTION WHAT IS THE SPECIFIC
ERROR IN THIS CASE.

>> WELL, THE ARGUMENT THAT WAS
MADE AT THE DISTRICT COURT OF
APPEAL LEVEL WAS ABOUT THE
MONTGOMERY ERROR, WASN'T IT?

>> YES.

>> THAT WAS AN ISSUE --

>> YES.

>> THAT YOU RAISED --

>> YES.

IT WAS AN ISSUE THAT WAS RAISED
AND THE COURT FOUND THAT IT WAS
AFFIRMATIVELY WAIVED IN THIS
CASE, BUT NOT BY REQUEST, BUT BY
ACQUIESCENCE.

>> BUT MORE THAN THAT, AGAIN, ON

THAT ISSUE, WHICH I THOUGHT WAS THE FIRST ISSUE, THEY SPECIFICALLY TALKED -- THE JUDGE READ THE PART ABOUT INTENT.

DO YOU AGREE WITH THIS?

I DON'T THINK THAT'S -- AGAIN, I THINK THAT'S DIFFERENT THAN IF SOMETHING IS LEFT OUT OR YOU DON'T KNOW.

APPARENTLY THIS WAS IN A POST-MONTGOMERY SITUATION.

SO I DON'T -- I'M HAVING TROUBLE, AGAIN -- I MEAN, AGAIN, WE'RE TRYING TO SORT SOMETHING OUT.

MAYBE LET'S NOT WORRY ABOUT WHAT THEY MIGHT HAVE CERTIFIED.

LET'S TALK ABOUT WHAT'S IMPORTANT ABOUT WHY THEY DID, WHICH IS WHEN A LAWYER SAYS THEY'VE READ -- THEY'RE READ AN INSTRUCTION AND THEY SAY I AFFIRMATIVELY AGREE AND MORE THAN THAT, BECAUSE THERE WERE MANY PRE-MONTGOMERY CASES WHERE EVERYBODY JUST ACQUIESCED TO THE STANDARD, BUT THEY'RE READ THE PART ABOUT INTENT AND THERE'S SOME CONCERN ABOUT IT AND THEY SAY, NO, THAT'S FINE.

SO THAT'S POINTED OUT TO THEM. IT'S NOT LIKE IT'S JUST READ AGAIN, THE DIFFERENCE BETWEEN AGREEING AND THEN JUST SAYING I HAVE NO OBJECTION TO THE STANDARD INSTRUCTION.

WHY SHOULDN'T THAT BE A WAIVER?

>> I HAVE TO DEAL WITH THE EFFECT OF THIS CASE, AND I WANT TO TAKE THE COURT BACK.

THIS IS AN OLD CASE.

IT'S BEEN PENDING -- I THINK THE CASE NUMBER IN THE FIRST DCA IS FROM 2010.

AND AT THE TIME OF THE TRIAL IN THIS CASE MONTGOMERY HAD BEEN DECIDED TWO MONTHS AGO, AND I BELIEVE THAT REHEARING WAS DENIED ON MONTGOMERY ON THE VERY DAY THAT TRIAL BEGAN IN THIS

CASE.
NOBODY MENTIONS MONTGOMERY.
AND MY READING OF THIS IS THAT
THEY WERE ALL UNAWARE OF IT.
SO THE JUDGE WAS AWARE THAT
SOMETHING WAS IN FLUX, BUT THE
JUDGE NEVER SAID THE FLORIDA
SUPREME COURT HAS JUST DECIDED
MONTGOMERY, ARE THESE CORRECT.
BUT THEY HAD A DISCUSSION, AND
THE ORIGINAL DISCUSSION AT THE
CHARGE CONFERENCE COULD BE READ
AS THE DEFENSE ATTORNEY
REQUESTED AN INCORRECT
INSTRUCTION.
BUT THE JUDGE SAID, RESEARCH IT,
THINK ABOUT IT OVERNIGHT, WE'RE
GOING TO COME BACK THE NEXT DAY.
NEXT DAY, THE STATE ATTORNEY
SAID I HAVE THE ANSWER.
THE ANSWER IS THE CORRECT
STANDARD JURY INSTRUCTION IS THE
2008, THE INTERIM INSTRUCTION,
WHICH WAS ALSO HELD TO BE WRONG
IN DANIELS.
AND SO, YES, THE JUDGE SAID WHAT
ABOUT THIS INSTRUCTION ON
INTENT.
BUT THE JURY INSTRUCTION AND THE
CASE LAW WERE IN FLUX, AND THE
ATTORNEY BELIEVED HE WAS
AGREEING TO THE STANDARD JURY
INSTRUCTION.
AND THAT DID NOT ORIGINATE WITH
HIM.
IF HE HAD ORIGINATED WITH THE
DEFENSE ATTORNEY, IT WOULD
PROBABLY BE WAIVER.
BUT IT ORIGINATED WITH THE
STATE, WHO CONVINCED THE DEFENSE
ATTORNEY AND THE JUDGE THAT THIS
WAS THE CORRECT JURY INSTRUCTION
AND HE WAS WRONG.
>> LET'S LOOK AT THE
PRESERVATION, SO TO SPEAK, FROM
THREE DIFFERENT POINTS.
SITUATION NUMBER ONE, THERE'S
ABSOLUTELY NO OBJECTION.
THE STATE PRESENTS THE JURY
INSTRUCTION, THE JUDGE SAYS, IS

THIS OKAY, NO OBJECTION.
THEN THE SECOND SITUATION,
WHERE, AGAIN, THE SAME
INSTRUCTION AND THE DEFENDANT IS
SILENT ABOUT IT.

THEN THE THIRD SITUATION, WHERE
THE -- AS IN THIS CASE, COUNSEL
SAYS IT'S OKAY WITH ME, THAT
INSTRUCTION'S FINE.

NOW, HAVING SAID THAT, HOW CAN
WE TURN AROUND NOW AND SAY IT'S
FUNDAMENTAL ERROR BECAUSE IT WAS
A BAD INSTRUCTION?

I MEAN, AGAIN, I MEAN, WE NEED
-- COUNSEL SAID, WE NEED TO
ASSUME THAT LAWYERS KNOW THE LAW
AND HE READ THIS INSTRUCTION AND
HE PROBABLY DIDN'T REALIZE IT
WAS NOT THE RIGHT ONE, BUT IT
WAS A GOOD FIT AT THIS TIME FOR
WHATEVER STRATEGY HE HAD IN
MIND.

SO DID DIDN'T WORK.

NOW WE'RE GOING TO COME BACK AND
SAY IT'S FUNDAMENTAL ERROR?
HOW DOES THAT HELP THE
SITUATION?

IF WE'RE TO ASSUME THAT LAWYERS
KNOW THE LAW AND JURY
INSTRUCTIONS IS A MAJOR
COMPONENT OF A TRIAL, I WOULD
THINK IT'S THE FIRST THING
LAWYERS LOOK AT IN PREPARING FOR
CLOSING ARGUMENT, ANYTHING ELSE.
IF WE'RE TO ASSUME THAT, THEN
WHAT ELSE COULD IT HAVE BEEN
OTHER THAN SOME KIND OF
STRATEGY?

>> I THINK THAT WHAT MAKES THIS
CASE DIFFERENT IS THAT THE LAW
WAS IN FLUX.

MONTGOMERY HAD JUST BEEN
DECIDED.

I DON'T THINK THERE WAS A
STANDARD JURY INSTRUCTION AT
THAT TIME THAT INCORPORATED
MONTGOMERY.

SO WHEN THE PROSECUTOR WHEN
LOOKING FOR A STANDARD JURY
INSTRUCTION, WHAT HE FOUND WAS

THE INTERIM JURY INSTRUCTION,
WHICH WAS ALSO WRONG.

I THINK THAT THIS MAKES IT
DIFFERENT FROM OTHER CASES IN
WHICH, YES, YOU WOULD PRESUME
THAT THE ATTORNEY KNOWS WHAT THE
LAW IS.

AND I KNOW -- OF COURSE I
UNDERSTAND THE SYSTEM IN WHICH
WE WORK, BUT AS THIS CASE NEEDED
A TRIAL JUDGE, WHICH THE TRIAL
JUDGE MIGHT HAVE KNOWN ABOUT
MONTGOMERY.

I'D LIKE TO THINK IF THE TRIAL
JUDGE HAD BEEN AWARE OF
MONTGOMERY HE WOULD HAVE SAID IS
THIS CORRECT UNDER MONTGOMERY.
BUT THE PROSECUTOR ALSO SEEMED
TO BE UNAWARE OF MONTGOMERY.

>> SO IN LIGHT OF THAT, IS THIS
CASE REALLY ADDRESSED TO THE
PIPELINE CASES OF MONTGOMERY?
IS THIS REALLY A CASE THAT NEEDS
TO BE DECIDED GOING FORWARD?
OR WOULD YOU BE HAPPY
DISCHARGING THIS CASE?

>> OR WOULD I BE HAPPY -- EXCUSE
ME?

>> DISCHARGING THIS CASE.

>> I WOULD BE CONTENT TO
DISCHARGE THIS CASE, BUT I THINK
THE QUESTIONS WILL RECUR.

>> OKAY.

IN LIGHT OF THE PROCEDURAL
POSTURE, A LOT OF YOUR
DISCUSSION SEEM TO INDICATE TO
ME AT LEAST IT WAS JUST PIPELINE
CASES AFTER MONTGOMERY, THAT
AFTER THOSE CLEAR OUT, SO TO
SPEAK, THEN IT PERHAPS WILL NOT
REOCCUR.

SO WHAT ISSUES HERE IN THIS CASE
NEED TO BE DECIDED THAT WILL BE
RECURRING ON AN ONGOING BASIS?

>> I THINK THE RECURRING ISSUE,
BUT THE COURT ALSO ONLY DECIDES
THE CASES BEFORE IT AT THE TIME.
BUT WHAT CONSTITUTES AFFIRMATIVE
WAIVER.

YES, IF THE ATTORNEY REQUESTS

THE INSTRUCTION, EVEN IF THEY ARE COMPLETELY WRONG, THAT WILL BE A WAIVED ERROR.

THE ATTORNEY MAY LATER BE FOUND TO BE INEFFECTIVE, BUT THAT'S WAIVED.

WHEN THEY'RE ACQUIESCING TO THE STATE, WHEN THE STATE HAS PROPOSED THAT THIS IS THE CORRECT STANDARD JURY INSTRUCTION -- SEE, I THINK THAT THIS IS ANOTHER PROBLEM WITH IT. IS IT REALLY FAIR TO FIND THE ERROR NOT TO BE FUNDAMENTAL WHEN THE ATTORNEY THINKS HE'S AGREEING TO THE STANDARD JURY INSTRUCTION?

>> WE REALLY DON'T KNOW THAT. THE PROBLEM I HAVE -- AND GOING BACK TO WHY THIS IS COMPLICATED, IF WE LEFT IT AS IT IS, IF THE ATTORNEY DIDN'T REALLY MEAN TO AGREE TO IT AND SOMEONE CAN ESTABLISH PREJUDICE, WHICH IS IT COULD POSSIBLY HAVE MADE A DIFFERENCE IN A CASE INVOLVING ALIBI AND THIS WHAT SEEMS TO BE NOT AN ACCIDENTAL MURDER, BUT -- THEN WE COULD FLESH THAT OUT. BUT THE LUCAS ISSUE, WHICH IS SEPARATE, WHICH IS THE SECOND CERTIFIED QUESTION, IS HOW OFTEN DOES IT HAPPEN THAT THE -- THAT THAT -- THAT THE RESIDUAL INSTRUCTION IS LEFT OUT. I MEAN, THAT HASN'T CHANGED IN THE STANDARD JURY INSTRUCTIONS FOREVER.

SO HOW IS -- SINCE YOU'RE TALKING ABOUT WHAT IS ON THE GROUND ISSUES, WHAT ARE THE POSSIBLE REASONS THAT WAS EXCLUDED?

I MEAN, THE IMPLICATION IS IT WAS INTENTIONAL ON THE PART OF THE DEFENSE LAWYER, BUT THERE'S NO DISCUSSION ABOUT THAT PART.

>> BUT, AGAIN, AS THE COURT SAYS -- AND LUCAS DID NOT INVENT THIS ISSUE.

LUCAS WAS BASED -- IT WAS AT LEAST TEN YEARS BEFORE THAT.

>> I KNOW.

BUT IF IT DOESN'T MAKE A CONCEIVABLE DIFFERENCE IN A CASE, WHY SHOULD IT BE FUNDAMENTAL ERROR?

>> BUT IT DOES MAKE A CONCEIVABLE DIFFERENCE IN THE CASE BECAUSE THE STATE DID HAVE THE CONDITION OF THE BODY WHEN IT WAS FOUND AND THEY HAD A THEORY.

JUSTICE LABARGA MENTIONED THERE WAS DNA PLACING THE DEFENDANT AT THE SCENE.

THAT'S TRUE.

BUT HE WAS A FRIEND AND HE HAD BEEN THERE MANY TIMES BEFORE.

>> BUT IF ALIBI IS A DEFENSE, THEN WHAT IS JUSTIFIABLE OR EXCUSABLE HOMICIDE HAVE TO DO WITH IT?

>> THAT GOES TO THE POINT THIS COURT MADE IN GRIFFIN, WHICH IS, YES, THE JURY INSTRUCTIONS HAVE TO BE FAIR TO THE DEFENDANT'S THEORY OF THE CASE, BUT THEY ALSO HAVE TO BE FAIR TO THE DEFENDANT BASED ON THE STATE'S THEORY OF THE CASE.

SO JUST LIKE -- YOU KNOW, THIS COURT IDENTIFIED A MISIDENTIFICATION CASE IN GRIFFIN, WHERE THE DEFENDANT SAID THAT HE WAS AT THE SCENE OF A SHOOTING, BUT THAT HE DID NOT DO THE SHOOTING.

SO HIS DEFENSE WAS MISIDENTIFICATION.

SO THIS WAS THE POSITION OF THE DISTRICT COURT OF APPEAL, THAT HE HAD CONCEDED ALL THE OTHER ELEMENTS.

JUST AS THE DEFENDANT IN GRIFFIN DID NOT CONCEDE ALL THE OTHER ELEMENTS, NEITHER DID MR. MOORE. AND A POSSIBLE EXPLANATION FOR THIS IS THERE WERE SEVERAL ASPECTS OF THE STATE'S CASE THAT

DID NOT REALLY ADD UP TO ONE PERSON DOING THIS. AND SO THE JURY COULD HAVE FOUND THAT TWO PEOPLE COMMITTED THIS CRIME TOGETHER.

>> AND HOW IS THAT STILL JUSTIFIABLE OR EXCUSABLE?

>> IT WOULD MEAN THAT THE STATE HAD FAILED TO PROVE -- THE STATE HAD FAILED TO PROVE SECOND-DEGREE MURDER.

>> WELL, THEN THEY'D FIND NOT GUILTY.

IN OTHER WORDS, IF HE DIDN'T DO IT -- AND, AGAIN, NOT HAVING PRACTICED CRIMINAL LAW, I'M ASSUMING JUSTIFIABLE OR EXCUSABLE MEANS WHAT IT SAYS, WHICH IS THAT YOU DID IT, BUT IT WAS ACCIDENTAL, YOU DIDN'T MEAN TO DO IT, OR YOU WERE JUSTIFIED IN DOING IT.

>> THE JURY ALREADY FOUND MR. MOORE -- HE WAS CHARGED --

>> IS THAT CORRECT, WHAT WE'RE TALKING ABOUT WITH THE RESIDUAL? AM I RIGHT?

>> THAT'S CORRECT.

BUT IF THE COURT IS SAYING THAT THAT WOULD MAKE IT NOT FUNDAMENTAL ERROR, YOU WOULD BE RECEDING FROM LUCAS.

>> GOING BACK, STICK WITH LUCAS, AS TO WHETHER WE SHOULD REQUIRE THIS EXCUSABLE HOMICIDE IN EVERY CASE, WHETHER IT'S APPLICABLE OR NOT, I THINK THE RATIONALE MAY BE THAT JUST BECAUSE THE DEFENSE HAS A DEFENSE THAT IS INCONSISTENT WITH THAT ALIBI, THAT KIND OF THING, I DIDN'T DO IT, SOMEBODY ELSE DID, THAT THAT DEFENSE ALONE SHOULD NOT EXCUSE THE STATE FROM ITS RESPONSIBILITY TO PROVE THAT IT WASN'T EXCUSABLE OR JUSTIFIABLE. I THINK THAT MAY BE THE REASON FOR THAT.

THAT'S JUST A LONG SHOT THINKING.

I DON'T KNOW.

>> RIGHT, THAT YOU CANNOT SAY IF THE JURY INSTRUCTIONS ARE WRONG -- NOW, IN GRIFFIN THE ERROR WAS INTENT, WHICH OF COURSE THIS CASE HAS THAT SAME ERROR IN IT. IT WAS ACTUALLY THE INTENT FOR MANSLAUGHTER.

BUT THAT IS THE PROBLEM, IS THE JURY MAY REJECT THE DEFENSE, BUT THAT DOES NOT RELIEVE THE STATE OF THE BURDEN TO PROVE EVERY ELEMENT BEYOND A REASONABLE DOUBT.

>> I THINK -- LET'S JUST -- ASSUMING ALL OF THAT, HOW -- MY INITIAL SORT OF QUESTION FROM YOU IS BEING AN ASSISTANT PUBLIC DEFENDER, SEEING THESE CASES, IS HOW DOES IT HAPPEN -- BECAUSE WE'RE TALKING ABOUT A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE -- THAT THAT RESIDUAL INSTRUCTION IS NOT READ? THAT THERE'S NO DISCUSSION ABOUT IT.

LET'S JUST ASSUME THE STATE DID NOT TRY TO GAME THE SYSTEM, EITHER, BY TRYING TO RELIEVE ITSELF OF A BURDEN. THEY JUST -- IT JUST GOT LEFT OUT.

>> I'M HAPPY TO ASSUME THAT.

>> AND THERE WAS NO DISCUSSION ABOUT IT.

>> AND THE JUDGE DIDN'T NOTICE IT WAS MISSING EITHER.

>> SO WE GOT EVERYONE NOT NOTICING IT, WHICH IS -- I GUESS DO WE HAVE TO PUT IT AT THE BEGINNING OF THE INSTRUCTIONS, ALWAYS INSTRUCT ON THIS UNLESS YOU AFFIRMATIVELY, YOU KNOW, AGREE NOT TO.

BUT SO HOW DOES THAT HAPPEN? DOES IT HAPPEN OFTEN?

>> NO.

NO.

>> SO WHY IS THIS SUCH A QUESTION OF GREAT PUBLIC

IMPORTANCE?

MAYBE THIS GOES BACK TO WHAT JUSTICE POLSTON WAS ASKING.

>> YOU KNOW, IT DOESN'T OCCUR VERY OFTEN.

AND IF YOU WANT A REPEATING ISSUE, THEN MAYBE IT'S NOT A QUESTION OF GREAT PUBLIC IMPORTANCE.

>> IT WOULD BE REALLY IMPORTANT IF THEY LEFT OUT INADVERTENTLY AN ELEMENT OF A CRIME THAT WAS AT ISSUE.

I MEAN, NOBODY WOULD BE HERE ARGUING THAT WASN'T FUNDAMENTAL ERROR.

AND I THINK THAT JUST, AGAIN, ON THIS ISSUE THAT IF SOMEONE READ WHAT THEY THOUGHT WAS THE STANDARD JURY INSTRUCTIONS THAT THE STATE HAD JUST INADVERTENTLY LEFT IT OUT, A DEFENSE LAWYER SAYING I HAVE NO OBJECTION IN MY BOOK WOULD NOT BE A WAIVER BECAUSE NOBODY BRINGS THAT TO THEIR ATTENTION THAT SOMEBODY'S JUST ALTERED THE STANDARD INSTRUCTIONS.

BUT THIS DOESN'T SEEM LIKE THAT SITUATION.

>> I'M SORRY.

I LOST TRACK.

IT DOESN'T SEEM LIKE WHAT SITUATION?

>> THE SITUATION OF THERE BEING AN ESSENTIAL ELEMENT LEFT OUT THAT WAS MATERIAL TO THE CASE AND THAT, ON THE OTHER HAND, THAT ANYONE ACTUALLY AFFIRMATIVELY AGREED TO THE STANDARD JURY INSTRUCTIONS WITHOUT THE ELEMENT BEING LEFT OUT JUST BY SAYING I AGREE TO THIS.

>> IF THE COURT COULD FIND THIS TO BE HARMLESS ERROR, YOU WOULD BE RECEDING FROM THE PRINCIPLE THAT THE DEFINITION OF MANSLAUGHTER IS NOT COMPLETE UNLESS YOU HAVE EXPLAINED

JUSTIFIABLE AND EXCUSABLE.
AND I DON'T THINK THERE'S ANY
REASON TO DO IT.
AND THE FACT THAT THIS IS A RARE
CASE MIGHT CONCEIVABLY MAKE IT
-- MIGHT MAKE IT NOT AN
IMPORTANT QUESTION, BUT --
>> YEAH.

WITH THAT ARGUMENT, IT GOES BACK
TO MAYBE THIS CASE IS NOT A CASE
WE SHOULD BE LOOKING AT THIS
ISSUE.

AND IN YOUR -- AND FOR YOUR
CLIENT, OF COURSE, HE GOT THE
RELIEF THAT HE WAS ASKING FOR,
DIDN'T HE?

>> YES.

>> THEY REVERSED THE
SECOND-DEGREE MURDER CONVICTION,
CORRECT?

>> YES.

>> AND HE GETS TO HAVE A NEW
TRIAL ON THAT.

>> YES.

SO MAYBE THIS IS FOR ANOTHER
TIME.

>> SO THE NEW TRIAL WILL
PRESUMABLY HAVE THE RIGHT
INSTRUCTIONS.

>> I PRESUME THEY WOULD.

AND I WOULD SAY -- YOU KNOW, I
DIDN'T ACTUALLY TRY TO ANSWER
THE QUESTION OF HOW OFTEN THE
TRIAL COURT FAILS TO GIVE THESE
INSTRUCTIONS, BUT MY FEELING IS
THAT IT'S RARE.

AND LUCAS WAS ACTUALLY MY CASE,
SO I KNOW IT TO BE 20 YEARS OLD,
AND IT'S NOT THAT IT'S NEVER
HAPPENED IN BETWEEN THEN, BUT
--

>> SO HOW DID YOU CONVINCING THIS
ENTIRE COURT IN 1994 THAT JUST
NOT -- WHAT WAS THE ARGUMENT,
WHAT JUSTICE LABARGA SAID, WHICH
IS THAT IT CAN'T BE COMPLETE
WITHOUT THAT PART?

>> NO.

>> WHEN I LOOKED, I SAID, DID I
AGREE TO THAT?

IT WAS BEFORE.

>> WE WERE NOT HERE.

>> I DIDN'T REREAD LUCAS, BUT AT THAT TIME LUCAS WAS FOLLOWING ROHAS AND NUMEROUS OTHER CASES WHERE THE COURT DECIDED THE INSTRUCTION IS NOT COMPLETE WITHOUT RESIDUAL AND WITHOUT EXCUSABLE AND JUSTIFIABLE. AND THE REASON FOR THAT IS, LIKE IN HERE, THIS IS NOT COMPLETELY DIVORCEABLE FROM THE FACT THAT THE JURY CONVICTED MR. MOORE. HE WAS CHARGED WITH FIRST-DEGREE MURDER, BUT THEY FOUND HIM GUILTY OF SECOND-DEGREE MURDER, MEANING THEY HAD ALREADY CONVICTED HIM OF A CRIME WHICH THAT HE DID NOT INTEND TO KILL. SO MAYBE THEY HAVE REJECTED HIS INTENT OF MISIDENTIFICATION. BUT THE QUESTION OF WHAT HIS INTENT WAS WAS STILL ON THE TABLE.

>> WELL, NOW WE'RE GOING BACK TO THE MONTGOMERY ISSUE.

>> YEAH, BUT I DON'T SEE THOSE AS SO EASILY DIVORCED.

>> IT SEEMS TO ME IF YOU'RE SAYING INTENT IS A BIG DEAL AND THEY LEAVE IT IN INTENT, THEY COULD CONCEIVABLY HAVE FOUND MANSLAUGHTER BY ACT IF THE INTENT WASN'T IN THERE. SO TO ME IT SEEMS LIKE A BIG DEAL?

AM I MISSING SOMETHING?
AS OPPOSED TO THAT IT WAS A HOMICIDE THAT WAS JUSTIFIABLE OR EXCUSABLE.

>> WELL, JUSTIFIABLE/EXCUSABLE ARE PART OF THE MANSLAUGHTER INSTRUCTION.

SO IF THE MANSLAUGHTER INSTRUCTION IS NOT COMPLETE, BEGGING THE QUESTION OF THE FACT THAT THE MANSLAUGHTER INSTRUCTION WAS WRONG FOR A DIFFERENT REASON AS WELL IN THIS CASE.

BUT I THINK THAT THE FAIR THING TO DO IS TO FIND THAT -- TO, YOU KNOW, STICK WITH THE COURT'S PRECEDENT THAT IT'S NOT COMPLETE WITHOUT INSTRUCTION ON JUSTIFIABLE AND EXCUSABLE.

AND --

>> LET ME ASK YOU THIS QUESTION. I'M JUST CURIOUS.

DOES EVERYBODY OUT THERE IN THE CRIMINAL DEFENSE AND PROSECUTION WORLD KNOW BY NOW ABOUT MONTGOMERY SO WE DON'T HAVE TO KEEP DOING THIS?

>> AGAIN, I WANT TO SAY -- I DIDN'T MAKE A NOTE OF EXACTLY WHEN THE TRIAL TOOK PLACE IN THIS, BUT THE TRIAL TOOK PLACE TWO MONTHS AFTER MONTGOMERY WAS DECIDED.

I BELIEVE THEY DO.

I BELIEVE THEY ARE AWARE OF MONTGOMERY.

>> SO WE'RE NOT GOING TO HAVE TO BE DEALING WITH THIS --

>> FOREVER.

>> -- FROM A FUNDAMENTAL PERSPECTIVE ANYMORE.

>> BECAUSE NOW THE STANDARD JURY INSTRUCTION IS CORRECT.

YOU SAID, JUSTICE LABARGA, YOU SAID SOMETHING LIKE THEY LOOKED IN THE BOOK AND THEY HAD THE STANDARD JURY INSTRUCTION.

NO, THEY DID NOT HAVE A MONTGOMERY INSTRUCTION.

IF THEY DID SOME RESEARCH, THEY MIGHT HAVE FOUND THE INTERIM INSTRUCTION, WHICH WAS ALSO WRONG.

BUT THOSE DAYS ARE GONE.

>> THERE ARE CRIMINAL WORK -- WELL, CRIMINAL DEFENSE.

MY WORK WAS NOT CRIMINAL.

I DID A LOT OF CRIMINAL WORK.

I WAS ASTONISHED ONCE I WENT INTO CIVIL HOW THE JURY INSTRUCTIONS WERE REQUIRED TO BE PREPARED BEFORE YOU WENT TO TRIAL.

IT WAS PART OF THE PRETRIAL
STIPULATION.

YOU HAD TO HAVE JURY
INSTRUCTIONS AND EXCHANGE THEM
WITH PEOPLE BEFORE YOU STARTED
THE TRIAL.

AND IN CRIMINAL CASES, I'M
PRESIDING OVER CRIMINAL CASES,
AND WE'RE HAVING A CHARGE
CONFERENCE AND THERE'S A
PROSECUTOR DIGGING THEM OUT.
IT'S LIKE THEY DID NOT EVEN LOOK
AT THEM UNTIL THAT MOMENT.
THE CRIMINAL INSTRUCTIONS IS THE
LAW OF THE LAND.

YOU WOULD THINK THAT WOULD BE
THE ROADMAP TO EITHER THE
PROSECUTION STRATEGY OR THE
DEFENSE STRATEGY.

IT'S THE LAW.

>> NOW, I THINK THAT IS
SOMETHING WORTH CONSIDERING.
MY EXPERIENCE WITH THE TRIAL
ATTORNEYS THAT I KNOW IS THEY GO
BOTH WAYS.

SOME OF THEM PREPARE THE
INSTRUCTIONS PRETTY CAREFULLY
BEFOREHAND, AND OTHERS IT SEEMED
TO BE A VERY AD HOC PROCESS,
THAT YOU'RE BASICALLY
DOWNLOADING SOMETHING FROM THE
SUPREME COURT'S WEB SITE IN THE
COURTROOM BECAUSE YOU CAN DO
THAT NOW BECAUSE THEY HAVE
i-PADS OR WHATEVER IN THE
COURTROOM.

YES.

I THINK IF MORE THOUGHT WAS
GIVEN TO THE INSTRUCTIONS
BEFOREHAND, THAT MAYBE YOU WOULD
HAVE FEWER ERRORS.

BUT ANOTHER THING THAT WORKS
AGAINST THAT IS THAT NOBODY
REALLY KNOWS WHAT'S GOING TO
HAPPEN AT THE TRIAL UNTIL IT HAS
HAPPENED, SO YOU COULD
ANTICIPATE CERTAIN INSTRUCTIONS,
BUT THAT MAY CHANGE IN LIGHT OF
WHAT ACTUALLY HAPPENS.

>> THANK YOU.

>> THANK YOU.
>> IF WE READ THE FIRST DISTRICT'S OPINION, IT IS ABUNDANTLY CLEAR THAT THEY HAD ZERO QUESTIONS ABOUT THE INTENT ERROR.
THAT WAS A SLAM DUNK WAIVER ISSUE.
THEY HAD NO CONCERNS ABOUT IT WHATSOEVER.
BUT THEY SPENT AN EXTENSIVE AMOUNT OF TIME DISCUSSING WHETHER THE JUSTIFIABLE AND EXCUSABLE HOMICIDE ERROR WAS OR WAS NOT WAIVED.
THEY LOOKED TO IT AND FOUND WE SHOULD FIND A WAIVER HERE.
UNDER THEIR OWN PRECEDENT, HOWEVER, THEY FELT CONSTRAINED TO FIND THERE WAS NOT A WAIVER BECAUSE THEIR PRECEDENT HAS ADDITIONAL REQUIREMENTS.
WE ARE ONLY ASKING THIS COURT ON THE FIRST CERTIFIED QUESTION TO MAINTAIN ITS AUTHORITY.
THAT'S AN AFFIRMATIVE AGREEMENT IS WHAT IS NECESSARY.
>> AGAIN, JUST TO MAKE SURE, BECAUSE I REREAD THE FIRST DISTRICT OPINION, IN MY VIEW THERE'S NO DOUBT THAT ON THE INTENT PART, IT WAS READ, IT WAS DISCUSSED AND THERE SEEMED TO BE AFFIRMATIVE AGREEMENT, ALTHOUGH, AS IS POINTED OUT, THE JURY DID FIND SECOND-DEGREE, WHICH MEANT NO INTENT.
SO IT REALLY MIGHT HAVE BEEN A PROBLEM AND MAYBE THE DEFENSE LAWYER WAS CONFUSED JUST LIKE, FRANKLY, THIS COURT, ME, WHATEVER, HAS BEEN -- YOU KNOW, WE'VE CONTRIBUTED TO THE CONFUSION, UNFORTUNATELY, INADVERTENTLY.
NOT AFFIRMATIVELY.
BUT ON THE SECOND ONE, THE OMISSION OF WHAT SOUNDS LIKE IT WAS NOBODY SAYING, OKAY, WE'RE GOING TO TAKE THIS, WE'RE

STRIKING THROUGH THIS IN THE STANDARD INSTRUCTION, THE RESIDUAL, IS THAT OKAY WITH EVERYBODY, THAT THERE'S -- WHERE -- I JUST DON'T SEE THE AFFIRMATIVE WAIVER UNLESS YOU'RE SAYING THAT THE -- THAT BY SAYING NO OBJECTION TO THE STANDARD INSTRUCTION SOMEBODY WAIVES WHAT'S A FUNDAMENTAL ERROR IN THE INSTRUCTIONS. SO I THINK THIS IS -- YOU KNOW, I THINK WE WOULD BE DOING MISCHIEF IN A WHOLE VARIETY OF WAYS IN THIS CASE BY SAYING WHEN THE STATE PROPOSES SOMETHING, LEAVES OUT AN ESSENTIAL PART AND THEN THE DEFENSE DOESN'T -- THERE'S NO DISCUSSION ABOUT IT AND THE DEFENSE SAYS I HAVE NO OBJECTION TO THE STANDARD INSTRUCTION, THAT THAT'S AN AFFIRMATIVE WAIVER.

>> THE ANSWER TO THAT QUESTION, WE HAVE TO GO BACK TO WHY WE WAIVE FUNDAMENTAL ERROR AT ALL. WE DON'T WHY ASK SOMEONE'S AGREEING.

>> INVITED ERROR.

WHO PROPOSED THE INSTRUCTION?
WHO GAVE THE INSTRUCTION TO THE JUDGE THAT LEFT OUT THE RESIDUAL?

WAS IT THE STATE OR THE DEFENDANT?

>> TO BE SURE, OVER THE COURSE

--

>> COULD YOU JUST ANSWER THAT?

>> YES.

I BELIEVE IT WAS THE STATE.

>> OKAY.

SO NOW -- THE STATE.

YESTERDAY SOMEBODY WAS REPRESENTING THE UNITED STATES OF AMERICA.

REPRESENTING THE STATE OF FLORIDA, PROSECUTOR CHARGED WITH JUSTICE COULD GO AHEAD AND GIVE THE JUDGE AN INSTRUCTION THAT EXCLUDES SOMETHING THAT EVERYONE

KNOWS HAS TO BE GIVEN AND NOW
WE'RE GOING TO SAY THE DEFENSE
IS -- THAT'S INVITED?

>> UNDER THIS COURT'S PRECEDENT,
IT'S NOT JUST AN AFFIRMATIVE
REQUEST, IT'S NOT JUST THE PARTY
THAT REQUESTS AN INSTRUCTION.
THIS COURT HAS SPECIFICALLY
INCLUDED AN AFFIRMATIVE
AGREEMENT AND AN AFFIRMATIVE
REQUEST.

AND THERE MUST BE A REASON FOR
THAT.

AND IT'S THAT THE PARTY THAT THE
REQUESTS THE INSTRUCTION THAT'S
NOT THE ONLY WAY TO WAIVE IT.
AND I'LL POINT OUT THE COURT DID
ACTUALLY HAVE PRETRIAL PREPARED
INSTRUCTIONS THAT THE DEFENSE
HAD NO OBJECTION TO.

THANK YOU.

>> COULD I ASK YOU ONE FINAL
QUESTION?

FROM THE STATE'S PERSPECTIVE, IF
WE ANSWERED THE SECOND QUESTION
IN THE NEGATIVE, INSOFAR AS THIS
CASE IS CONCERNED, WOULD IT MAKE
ANY DIFFERENCE WHETHER WE
ANSWERED THE FIRST QUESTION OR
NOT?

>> THE CASE COULD BE DECIDED ON
ONE QUESTION OR THE OTHER.
WE BELIEVE THIS COURT SHOULD
ANSWER BOTH QUESTIONS BECAUSE IT
WILL BE HELPFUL TO BENCH AND
BAR, BUT CORRECT.

THE CASE CAN BE RESOLVED ON ONE
QUESTION OR THE OTHER.

WE BELIEVE IT WAS BOTH WAIVED
AND NOT FUNDAMENTAL ERROR.

>> THANK YOU FOR YOUR ARGUMENTS.
YOU LEFT MY HEAD SPINNING.