

>> THE NEXT CASE IS STATE OF
FLORIDA VERSUS FLOYD.
>> TAKE YOUR TIME.
TAKE YOUR TIME.
>> THANK YOU, YOUR HONOR.
>> WHENEVER YOU'RE READY.
>> GOOD MORNING.
MAY IT PLEASE THE COURT,
ASSISTANT ATTORNEY GENERAL
CHARMAINE MILLSAPS REPRESENTING
THE STATE.
THE ISSUE IN THIS CASE IS
WHETHER THERE WAS FUNDAMENTAL
ERROR IN THE JURY INSTRUCTION,
THE SELF-DEFENSE/STAND YOUR
GROUND JURY INSTRUCTION.
THE STATE'S POSITION, AS SEVERAL
OF THE OTHER DCAS HAVE FOUND, IS
THERE WAS NO ERROR AT ALL, MUCH
LESS FUNDAMENTAL ERROR, IN THESE
JURY INSTRUCTIONS.
THESE JURY INSTRUCTIONS
ACCURATELY REFLECT THE LAW OF
FLORIDA.
>> CAN I ASK YOU THIS.
DID THE DISTRICT COURT EVER
EXPLAIN HOW THE INSTRUCTION WAS
INCONSISTENT WITH THE LAW?
>> NO.
IT'S INTERNALLY INCONSISTENT,
WAS THEIR PROBLEM.
BUT IT'S NOT THAT, EITHER.
>> DID THEY DISCUSS WHAT THE
UNDERLYING LAW IS THAT GOVERNS
THIS?
>> NO.
THEY NEVER DISCUSSED THE
STATUTES.
AND THAT'S WHERE THEY WENT
WRONG, YOUR HONOR, BECAUSE
BEFORE YOU DECIDE A JURY
INSTRUCTION IS WRONG, YOU NEED
TO READ THE APPLICABLE STATUTES.
>> WHAT IS THE STATUTE?
THE LAW IS THAT [INAUDIBLE]
UNLESS YOU [INAUDIBLE].
>> YES, YOUR HONOR.
AND THEN A DUTY ARISES.
SO DO YOU SEE WHY YOU HAVE TO
EXPLAIN TO THE JURY THE GENERAL

RULE, NO DUTY, UNLESS THERE'S CERTAIN CIRCUMSTANCES, SUCH AS YOU BEING THE INITIAL AGGRESSOR, IN WHICH CASE A DUTY ARISES, SO YOU DO, DEPENDING ON THAT TOGGLE, WHICH THE JURY MUST FIND, YOU MUST TELL THE JURY BOTH THINGS BECAUSE THAT IS THE LAW OF FLORIDA.

THERE'S NO DUTY UNLESS YOU'RE THE INITIAL AGGRESSOR OR ENGAGED IN UNLAWFUL ACTIVITY OR THINGS LIKE THAT.

BUT DEPENDING ON THESE FACTUAL FINDINGS THAT THE JURY MUST MAKE, THERE IS-- IF THEY FIND THOSE FACTS, SUCH AS YOU WERE THE INITIAL AGGRESSOR, WHICH WAS THE BIG DISPUTE IN THIS CASE, THERE DOES ARISE A DUTY.

SO THE GENERAL RULE IS NO DUTY, BUT UNDER CERTAIN CIRCUMSTANCES WHICH THE JURY MUST FIND, A DUTY MUST ARISE.

AND WHEN THE FIRST DCA WENT WRONG, BUT WHERE THE THIRD AND FOURTH HAVE GOTTEN IT CORRECT, IS THEY WENT AND LOOKED -- THE THIRD AND FOURTH WENT AND LOOKED AT THE ACTUAL STATUTES.

>> NOW, JUDGE WELLS IN THE THIRD DISTRICT SAYS THERE COULD BE CONFUSION.

IT COULD BE THAT THE ORDER OF THE INSTRUCTIONS COULD BE BETTER.

BUT -- AND ASSUME THAT'S CORRECT.

AND THIS IS A FRIENDLY QUESTION. THAT DOESN'T -- THE DEFENSE LAWYER WAS ASKED ABOUT THREE DIFFERENT TIMES IS THIS -- ARE YOU OKAY WITH THIS.

AND THREE DIFFERENT TIMES OR MORE, I MEAN, IT WAS AN ONGOING DISCUSSION.

SO THIS ISN'T EVEN -- IF IT'S CONFUSION, THAT'S CERTAINLY NOT FUNDAMENTAL ERROR, CORRECT?

>> ABSOLUTELY, YOUR HONOR.

AND, YOUR HONOR, BY ALL MEANS --
AND I UNDERSTAND THE JURY
COMMITTEE PROPOSAL BEFORE YOU
ALSO REORDERS THIS INSTRUCTION.
IT REORDERS IT.

AND WHAT JUDGE WELLS SAID IS IT
WOULD MAKE MORE SENSE TO EXPLAIN
THE GENERAL RULE FIRST.

>> IS THAT WHAT THE PROPOSAL
DOES?

DOES THE PROPOSAL DO THAT?

>> YES.

AS I UNDERSTAND IT, THE PROPOSAL
DOES DO THAT.

AND WE WOULD AGREE WITH, THAT
YOUR HONOR.

BUT, REMEMBER, THAT'S NOT EVEN
REALLY CONFUSION.

THAT'S JUST IT MAKES MORE
LOGICAL SENSE.

THERE WAS -- AND THE OTHER
THING, IN THIS PARTICULAR CASE
THAT WAS NOT THE FIGHT.

NOBODY ARGUED THAT ANYBODY HAD A
DUTY TO RETREAT HERE.

THAT WAS NOT -- WE WERE ARGUING
ABOUT WHO WAS THE INITIAL
AGGRESSOR.

SO UNDERSTAND EVEN IF YOU THINK
THEY WERE -- AND THEY'RE NOT
CONTRADICTIONARY.

BUT EVEN IF SOMEHOW YOU COULD
GET TO CONTRADICTIONARY, IN THIS
CASE THIS ERROR DIDN'T MATTER.
BUT THE STATE'S POSITION IS
THERE IS NO ERROR.

>> BUT I THOUGHT IF HE'S THE
INITIAL AGGRESSOR, THEN HE
DOESN'T GET THE BENEFIT OF STAND
YOUR GROUND.

ISN'T THAT WHAT THE STATUTE
SAYS, BASICALLY?

IF YOU'RE THE INITIAL AGGRESSOR,
THEN THE IMMUNITY SOMEONE ELSE
WOULD GET TO BE ABLE TO STAND
THEIR GROUND AND SHOOT, THEY
DON'T GET THAT BENEFIT.

>> I AGREE WITH THAT, BUT, YOUR
HONOR, THERE IS ONE TWIST HERE.
REMEMBER, THIS WAS HIS OWN LAND.

THE STATE NEVER ARGUED TO THIS JURY.

AND --

>> THEY NEVER ARGUED WHAT?

>> THAT HE HAD A DUTY TO RETREAT.

WE VERY MUCH ARGUED AND OUR CASE WAS AND THE JUDGE FOUND -- BOTH THE JURY AND THE JUDGE ENDED UP FINDING THAT FLOYD SHOT FIRST. THAT'S WHAT WE WERE ARGUING. WHAT HE COULD DO WITH HIS HANDS, NOT WHAT HE COULD DO WITH HIS FEET.

WE WERE NOT SAYING THAT HE HAD TO GO INSIDE HIS HOUSE.

>> SO THE INITIAL AGGRESSOR ISSUE DIDN'T HAVE ANYTHING TO DO WITH THE CASE THEN?

>> ABSOLUTELY.

DON'T CONFUSE INITIAL AGGRESSOR WITH DUTY TO RETREAT.

WE WERE NOT EVEN GOING TO THE SECOND STEP.

WE WERE JUST SAYING HE COULDN'T SHOOT HIS GUN.

THAT'S T. THAT'S WHAT WE ARGUED TO THIS JURY.

HE SHOT FIRST AND HE SHOULDN'T HAVE DONE IT AND THEN HE SHOT FOUR MORE TIMES WITH A PUMP ACTION RIFLE, OKAY?

WE WERE ARGUING ABOUT WHAT HE WAS DOING WITH HIS HANDS.

WE WEREN'T TELLING THIS JURY --

>> I THOUGHT HE HAD A RIGHT TO STAND HIS GROUND.

>> I'M NOT SAYING, YOUR HONOR. THIS WAS HIS OWN PROPERTY.

HE DOESN'T HAVE TO GO IN HIS HOUSE.

HE JUST CAN'T SHOOT HIS GUN.

WE NEVER ARGUED THAT HE HAD TO GO SOMEWHERE ON HIS OWN PROPERTY.

IN THIS PARTICULAR CASE WHAT WE WERE ARGUING WAS HE WAS THE INITIAL AGGRESSOR AND THEREFORE GUILTY OF STARTING THIS, OKAY? AND THE CAR WAS DRIVING AWAY

WHEN THE VICTIM, WHO
INCIDENTALLY WAS NEVER THE
AGGRESSOR HERE, EVEN UNDER THE
DEFENSE THEORY, OKAY?

BUT --

>> LET ME ASK YOU ABOUT -- YOU
SAID HE WAS DRIVING AWAY.
IS THERE SOME DISPUTE AS TO --
WAS THERE ANY CONTRADICTORY
EVIDENCE AS TO WHETHER THE CAR
WAS DRIVING AWAY OR NOT DRIVING
AWAY?

AND DOES THAT MAKE A DIFFERENCE?

>> EVERYBODY AGREED THEY WERE IN
THE CAR.

YOUR HONOR, I'M GOING TO --
THERE WERE 50 PEOPLE AT THIS
PARTY AND HALF OF THEM
TESTIFIED.

THERE WAS -- MOST OF THE
EVIDENCE WAS IT WAS A LONG, DIRT
PATH.

YOU CAN'T EVEN CALL THIS A DIRT
ROAD ON THIS PROPERTY.

AND THEY WERE HEADING TOWARD THE
HIGHWAY TO GO TO -- THEY WERE
LEAVING.

THE DRIVER -- THERE WERE FOUR
PEOPLE IN THE CAR.

IT WAS A WHITE DODGE AVENGER.
AND THEY WERE LEAVING.

SOME PEOPLE DID TESTIFY THAT
THEY WERE SLOWING DOWN.

I THINK ONE PERSON EVEN
TESTIFIED STOPPED.

THERE'S NO DISPUTE THAT THEY
WERE HEADING DOWN THE DIRT PATH
TRYING TO DRIVE AWAY.

HOW FAST THEY WERE DRIVING AWAY
WAS WHAT MOST OF THE WITNESSES
-- THERE WAS A DISPUTE ABOUT,
ALTHOUGH THE DEFENDANT HIMSELF
TESTIFIED THAT THEY WERE DRIVING
AWAY AT THE TIME.

>> WHAT WAS -- WAS HIS -- WAS
HIS DEFENSE THAT HE SHOT IN
SELF-DEFENSE?

>> YES.

HE CLAIMED THAT THE DRIVER --
NOT THE VICTIM.

REMEMBER, THE VICTIM'S IN THE
BACK SEAT.

HE CLAIMED THAT THE DRIVER SHOT
A PISTOL AT HIM.

HE HAD GONE AND GOTTEN HIS
RIFLE.

AND HE CLAIMED THAT THE DRIVER
SHOT HIS .38 REVOLVER FIRST AND
HE SHOT BACK AT -- HE CLAIMED HE
WAS BEING SHOT AT.

>> NOW, WHO HAD -- BUT UNDER
THIS SCENARIO, BECAUSE THIS IS
ALWAYS -- WE HAVE A CHANCE IN
THIS CASE TO UNDERSTAND THE
INTERACTION BETWEEN THE COMMON
LAW DUTY TO RETREAT, WHICH
YOU'RE NOT -- WHICH HAS NOTHING
TO DO WITH THIS CASE, RIGHT?

>> NO.

YOU DON'T HAVE A DUTY TO RETREAT
WHEN YOU'RE ON YOUR OWN LAND.

>> HE'S ARGUING SELF-DEFENSE.

>> THAT'S WHAT -- YES.

>> IN THIS CASE WAS THE JURY
INSTRUCTED ON WHO HAD THE BURDEN
OF ESTABLISHING -- DID HE HAVE
THE BURDEN TO PROVE HE WAS
ACTING IN SELF-DEFENSE OR DID
THE STATE HAVE THE BURDEN TO
DISPROVE IT UNDER STAND YOUR
GROUND?

>> YOUR HONOR, THEY TALKED ABOUT
--

>> TO ME THAT'S THE MORE -- THAT
MAY NOT BE WHAT THIS CASE IS
ABOUT, BUT I'M WONDERING HOW
THAT WORKS WITH -- BECAUSE ONE'S
AN IMMUNITY AND THE OTHER IS A
-- AS A DEFENSE.

>> OKAY.

WHAT THE JURY INSTRUCTION IN
THIS CASE SAID, IN CONSIDERATION
OF YOUR ISSUE, IF YOU HAVE A
REASONABLE DOUBT ON THE QUESTION
OF WHETHER THE DEFENDANT WAS
JUSTIFIED IN THE USE OF DEADLY
FORCE, YOU SHOULD FIND THE
DEFENDANT NOT GUILTY.

I TAKE THAT LANGUAGE TO BE THAT
THE BURDEN WAS MORE ON THE

STATE.

THAT'S THE LANGUAGE FROM THE
JURY INSTRUCTIONS.

I DON'T THINK THEY SPECIFICALLY
GOT INTO THE BURDEN.

>> IF I WAS THE JURY, I'D BE A
BIT CONFUSED AS TO WHERE THE
AGGRESSOR.

I UNDERSTAND -- MY UNDERSTANDING
OF THE FACTS IS THAT FLOYD THREW
A PARTY AT HIS PARENTS' HOUSE.

>> FLOYD -- HE WAS ON HIS OWN
LAND.

>> AND ABOUT 50 PEOPLE THERE.
AND THEN BANTON WITH HIS FRIENDS
AND SOMETHING HAPPENED THERE.
BANTON SHOWED A GUN.

FLOYD SAYS HE'S GOT A BEGUN.

FLOYD RUNS FOR THE TRUCK.

BANTON'S GOING AWAY IN HIS CAR.
THAT'S WHEN THE SHOOTING TOOK
PLACE.

WHO'S THE AGGRESSOR HERE.

SEEMS TO ME BANTON IS THE
AGGRESSOR.

HE SHOWED UP WITH A GUN AT THE
PARTY.

>> NO.

YOU'RE MISSING A BIG STEP HERE.
REMEMBER, THIS IS AN ISSUE ABOUT
JURY INSTRUCTIONS, NOT -- AND
THE JURY RESOLVED THIS.

AND THE JUDGE FOUND THAT FLOYD
SHOT FIRST, TOO.

BUT UNDERSTAND BEFORE BANTON
SHOWS THAT GUN, THEY HAD --

THESE WERE TWO AFRICAN-AMERICAN
MALES AT AN ALL-WHITE PARTY.

AND ONE OF THE -- NOT FLOYD, BUT
A MAN NAMED CASSIDY HAD
CONFRONTED THESE TWO.

THEY WERE DOING NOTHING.

AND SAID MFs, I GIVE YOU TEN
SECONDS TO GET OUT OF HERE, EVEN
THOUGH IT WASN'T HIS LAND AND
STARTED COUNTING DOWN.

AND PEOPLE GATHERED AROUND,
INCLUDING WHAT WAS DESCRIBED IN
THE RECORD AS SIX TO EIGHT BIG
COUNTRY BOYS, WHO WERE MUCH

BIGGER THAN THE TWO OF THEM.
AND THAT'S WHEN HE JUST SHOWED
HIS GUN.
HE DID NOT POINT IT.
>> WHEN DID THE SHOVE COME?
WAS THE SHOVE BEFORE OR AFTER
THE DISPLAY OF THE WEAPON?
>> FLOYD SHOVED HIM BEFORE THE
DISPLAY OF THE WEAPON.
AND IT WAS DESCRIBED AS A
DISPLAY.
MAKES IT SOUND LIKE HE PULLED IT
UP.
THE WITNESSES SAY AGAINST HIS
CHEST.
AND THIS WAS A GUN THAT HE HAD
AN ALABAMA CARRY PERMIT FOR.
SO REALLY, YOUR HONOR, OBVIOUSLY
ONE OF THE REASONS WHY YOU HAVE
TO HAVE A JURY INSTRUCTION LIKE
THIS IS WHAT YOU WERE JUST
SAYING, IS WHAT DEFENSE COUNSEL
WAS SAYING.
BUT THAT'S NOT THE STATE'S
THEORY.
AND JURY INSTRUCTIONS HAVE TO
TELL JURORS HERE'S THE BIG
FACTUAL DISPUTE.
WHO WAS THE INITIAL AGGRESSOR
AND WHY.
AND THAT WE HAVE TWO DIFFERENT
THEORIES ABOUT WHO THE INITIAL
AGGRESSOR WAS AND WHY.
AND, INCIDENTALLY, THEN THE
BURDEN TO RETREAT WOULD BE
BANTON'S UNDER THAT THEORY.
BUT HE WAS RETREATING.
HE IS LEAVING.
SO EVEN -- THAT'S THE OTHER
PROBLEM HERE.
WE DID NEED THE DUTY TO RETREAT
PART BECAUSE UNDER THE DEFENSE
VERSION, BANTON HAD A DUTY TO
RETREAT, WHICH HE WAS FULFILLING
BY LEAVING.
SO, YOUR HONOR, --
>> I THOUGHT HE HAD NO DUTY TO
RETREAT BECAUSE IT WAS HIS
HOUSE.
>> BECAUSE IT WAS HIS PROPERTY.

ABSOLUTELY.
BUT NOBODY EVER ARGUED TO THIS
JURY THAT FLOYD HAD A DUTY TO
RETREAT.
THAT'S THE OTHER THING.
IN JURY INSTRUCTIONS YOU ALSO
NEED TO LOOK AT THE ARGUMENTS OF
COUNSEL.
DUTY TO RETREAT AS FAR AS IT
AFFECTED FLOYD WAS NEVER IN
DISPUTE, OKAY?
>> I'M CONFUSED BY YOUR ARGUMENT
ON THAT POINT BECAUSE THE
INSTRUCTION RELATES TO THE
JUSTIFICATION THAT IS AVAILABLE
TO THE DEFENDANT POTENTIALLY,
DOESN'T IT?
>> THIS IS A DEFENSE
INSTRUCTION, YES.
BUT WE NEVER ARGUED HE HAD A
DUTY TO RETREAT.
WE SAID HE COULDN'T SHOOT.
AND OUR THEORY --
>> BUT OKAY.
IF THAT'S THE CASE, WHAT DOES
THE INSTRUCTION HAVE TO DO WITH
THE CASE?
>> BECAUSE IT'S -- 3.6F IS THE
JUSTIFIABLE USE OF SELF-DEFENSE.
FLOYD'S DEFENSE WAS THAT BANTON,
THE DRIVER OF THE CAR, SHOT HIS
.38 REVOLVER AT HIM FIRST AS HE
WAS LEAVING IN THE CAR.
IN OTHER WORDS -- NOW, THIS IS
FLOYD'S VERSION, NOT THE
STATE'S.
BUT JURY INSTRUCTIONS HAVE TO
ACCOUNT FOR BOTH THE STATE'S
THEORY OF THE CASE AND THE
DEFENSE THEORY.
AND HIS ARGUMENT WAS I WAS
ACTING IN SELF-DEFENSE.
AND I WAS NOT THE INITIAL
AGGRESSOR.
I WAS ACTING IN SELF-DEFENSE.
AND THE DRIVER OF THE CAR,
BANTON, AFTER HE SHOWED HIS GUN,
THEY GOT IN THE CAR AND WERE
GOING AWAY DOWN A DIRT PATH, A
200-YARD DIRT PATH TO GET TO THE

HIGHWAY.

FLOYD SAID HE WAS JUSTIFIED IN SHOOTING BECAUSE BANTON SHOT AT ME FIRST.

THE STATE'S THEORY AND WHAT THE JUDGE FOUND AND ARGUED AND OBVIOUSLY THE JURY AS WELL WAS THAT FLOYD SHOT FIRST.

SO THIS WAS REALLY A FIGHT ABOUT WHO SHOT FIRST.

THEREFORE, WHO BECAME THE INITIAL AGGRESSOR.

BECAUSE IF HE IS THE INITIAL AGGRESSOR, HE LOSES THE RIGHT TO STAND YOUR GROUND IN THIS SENSE, NOT IN THE RETREAT SENSE.

YOU HAVE THE RIGHT TO STAND YOUR GROUND AND SHOOT.

AND WE WERE ARGUING BECAUSE HE WAS NOT THE INITIAL AGGRESSOR, HE COULDN'T -- BECAUSE HE WAS THE INITIAL AGGRESSOR, HE COULD NOT SHOOT.

THE STATE'S THEORY, WHY WE WERE FIGHTING ABOUT -- WELL, FIRST OF ALL, WE GAVE THEM THE JURY INSTRUCTION BECAUSE DEFENSE COUNSEL WANTED THE JURY INSTRUCTION.

BUT WE WERE FOLLOWING THE JURY INSTRUCTION IN THIS SENSE: WHO HAD THE RIGHT TO SHOOT?

AND WE WERE SAYING BECAUSE FLOYD SHOT FIRST AT A RETREATING VEHICLE AND THE BULLET THAT KILLED GUS BENJAMIN WENT THROUGH THE TRUNK, THROUGH A SPEAKER, THROUGH THE BACK OF THE CAR, THROUGH GUS'S BACK AND INTO HIS HEART.

AND WE WERE SAYING WHEN SOMEBODY'S LEAVING, YOU MAY NOT SHOOT THEM, OKAY?

SO DO YOU -- WE WERE -- WE WERE ARGUING BASED ON THE JURY INSTRUCTION THAT HE DIDN'T HAVE STAND YOUR GROUND RIGHT TO SHOOT, NOT -- WE NEVER -- THE RETREAT PART WAS NEVER PART OF IT.

WE WERE TALKING ABOUT WHETHER HE
COULD DO THIS WITH THIS
REMINGTON PUMP ACTION RIFLE.
AND WE WERE SAYING HE COULD NOT
SHOOT ANYBODY.

NOW, YOUR HONOR, HE HAD EVERY
RIGHT TO BE ON THAT PROPERTY.
HE EVEN HAD A RIGHT -- YOU CAN
CARRY YOUR OWN RIFLE ON YOUR OWN
PROPERTY.

WE WEREN'T ARGUING HE HAD TO GO
SOMEWHERE OR WASN'T EVEN ALLOWED
TO GET HIS RIFLE.

WE WERE ARGUING THEY WERE
LEAVING, YOU'RE NOT ALLOWED TO
SHOOT AT THEM.

STAND YOUR GROUND IS STAND YOUR
GROUND.

IT'S NOT SHOOT AT WILL.

AND THAT WAS OUR ARGUMENT.

BUT THE REASON THE JURY
INSTRUCTION WAS GIVEN WAS THAT
FLOYD WANTED TO SAY THAT BANTON,
THE DRIVER OF THE CAR, AS HE WAS
LEAVING, WAS SHOOTING AT HIM AND
THEREFORE HE HAD A RIGHT TO
SHOOT BACK.

AND SO THE HUGE DISPUTE WAS NOT
ABOUT RETREATING.

FIRST OF ALL, WE NEVER SAID
FLOYD HAD TO RETREAT.

THAT WAS NEVER THE STATE'S
THEORY.

AND BANTON WAS RETREATING IN THE
SENSE THAT HE WAS DRIVING OFF.

SO THE RETREAT PART OF THIS IS
JUST -- THE JURY DIDN'T EVEN
WORRY ABOUT THAT.

WHAT THE JURY WAS WORRIED ABOUT
WAS WHO SHOT FIRST AND IF FLOYD
SHOT FIRST, THAT MADE HIM AN
INITIAL AGGRESSOR AND THAT MEANT
HE WAS NOT THE JUSTIFIABLE USE
OF FORCE.

IN OTHER WORDS, HE DID NOT HAVE
A RIGHT TO ENGAGE IN
SELF-DEFENSE BECAUSE HE WASN'T
DEFENDING HIMSELF.

HE WAS BEING THE AGGRESSOR.

THAT'S -- AND THAT WAS THE HUGE

DISPUTE HERE.

>> SO WHAT YOU'RE SAYING, THE DUTY TO RETREAT ASPECT OF THE ARGUMENT IS JUST A RED HERRING?

>> YES.

TOTALLY.

AND THAT'S WHY IN THIS CASE THERE SHOULD ABSOLUTELY NOT BE FUNDAMENTAL ERROR.

NOW, THAT'S A CASE-SPECIFIC ARGUMENT.

MY BIGGER MEGA ARGUMENT IS THAT THE THIRD AND FOURTH GOT THE LAW RIGHT, WHICH IS THERE IS BOTH -- THERE IS NO DUTY TO RETREAT UNLESS CERTAIN CIRCUMSTANCES ARE PRESENT, SUCH AS BEING THE INITIAL AGGRESSOR.

AND THEN A DUTY ARISES.

AND THAT THESE JURY INSTRUCTIONS ACCURATELY TRACK THE STATUTES AND THERE SIMPLY CANNOT BE FUNDAMENTAL ERROR IN JURY INSTRUCTIONS THAT ACCURATELY TRACK THE STATUTES.

THESE ARE CORRECT STATEMENTS OF THE LAW.

THERE IS NO ERROR.

AND I'M GOING TO TAKE --

>> YOU'RE IN YOUR -- BUT REALLY THE BOTTOM LINE IS, JUST WITH THE LAST THING YOU SAID, IF THE JURY INSTRUCTIONS TRACK THE STATUTE, THEN -- AND THE STATUTE IS -- IF IT IS CONFUSING, WHICH I'M NOT SURE IT IS, IT CAN'T BE, AND THAT'S YOUR POSITION, WHICH I THINK WE'RE AGREEING WITH IS

--

>> YES.

WHEN YOU READ THE STATUTE, IN EFFECT WHAT THIS JUDGE DID IS READ THE STATUTES TO THE JURY. AND WHEN YOU DO THAT, THERE IS NO FUNDAMENTAL ERROR.

AND I'LL SAVE MY REMAINING TWO MINUTES.

THANK YOU FOR YOUR TIME.

>> THANK YOU.

COUNSEL?

>> MAY IT PLEASE THE COURT,
MICHAEL UFFERMAN.
I DISAGREE WITH WHAT THE
ARGUMENT OF THE STATE WAS IN
THIS CASE.
I'LL REFER TO PAGE 1707 AND 1708
OF THE TRANSCRIPT.
THIS IS THE PROSECUTOR'S CLOSING
ARGUMENT.
QUOTE, IF HE STARTS IT, HE CAN'T
USE DEADLY FORCE UNLESS HE
REASONABLY HAS EXHAUSTED EVERY
REASONABLE MEANS TO ESCAPE THE
DANGER.
DID HE?
DID HE EXHAUST ANYTHING?
NO.
WHAT THAT MEANS IS HE HAS GOT TO
EXHAUST EVERY REASONABLE MEANS
OTHER THAN DEADLY FORCE.
IN OTHER WORDS, HE HAS TO BACK
UP.
THIS CASE IS ALL ABOUT DUTY TO
RETREAT.
I HEARD OPPOSING COUNSEL SAY AT
LEAST FIVE DIFFERENT TIMES THAT
THE STATE DIDN'T ARGUE THAT?
THEY ARGUED IT.
THAT'S THE ISSUE IN THIS CASE.
THE JURY WAS TOLD THAT MR. FLOYD
HAD TO BACK UP.
HE COULDN'T STAND THERE AND
DEFEND OTHERS ON HIS PROPERTY.
THAT'S WHY THERE'S A PROBLEM IN
THIS CASE.
>> WELL, BUT OKAY.
SO WHAT'S THE PROBLEM?
>> THE PROBLEM IS --
>> CAN YOU POINT US TO ANYTHING
IN THE INSTRUCTIONS THAT DOES
NOT ACCURATELY TRACK WHAT IS IN
THE STATUTES?
>> THE PROBLEM IS --
>> I'M TALKING ABOUT THE
STATUTES THAT WERE IN EFFECT AT
THAT TIME, NOT SOME SUBSEQUENT
STATUTE, BUT THE STATUTE IN
EFFECT AT THE TIME.
>> SURE.
THE PROBLEM IS THESE

INSTRUCTIONS ARE CONFUSING.
AND OBVIOUSLY I WOULD RELY UPON
EVERYTHING THAT JUDGE --

>> OKAY.

BY THE WAY YOU'RE STARTING THE
ANSWER, AM I TO ASSUME THAT YOU
CANNOT POINT TO ANYTHING --

>> YES.

I APOLOGIZE, YOUR HONOR.
THE DEFINITIVE ANSWER TO YOUR
QUESTION IS THESE INSTRUCTIONS
DO NOT IN ANY WAY INSTRUCT THE
JURY AS TO WHAT IT MEANS TO BE
SOMEONE WHO IS THE AGGRESSOR OR
THE PERSON WHO --

>> WELL, THAT'S AN ADDITIONAL
INSTRUCTION, THOUGH.

THAT'S NOT SAYING THAT THESE ARE
WRONG.

YOU'RE SUGGESTING THAT THE COURT
NEEDS TO HAVE SOME OTHER FURTHER
INSTRUCTION AS TO WHAT AN
AGGRESSOR IS OR IS NOT.

>> CORRECT.

NO DOUBT THAT IS WHAT I'M
SAYING.

THESE INSTRUCTIONS --

>> WAS THAT REQUESTED HERE BY
THE DEFENSE LAWYER?

>> THIS IS A FUNDAMENTAL ERROR
CASE.

>> WELL, I UNDERSTAND, BUT THE
LAWYER NOT ONLY -- I HAVEN'T
SEEN MANY CASES WHERE A LAWYER
HAS BEEN IN MORE AGREEMENT WITH
THE INSTRUCTIONS, I THINK.

I DON'T SEE THAT THERE'S ANY
OBJECTION TO WHAT'S GOING ON
HERE AT ALL.

>> AND I DON'T WANT TO TURN THIS
CASE INTO THAT CASE.

YOU HAD THAT CASE LAST MONTH,
THIS IDEA OF WHEN IS -- WHEN CAN
A DEFENDANT RAISE FUNDAMENTAL
ERROR RELATING TO JURY
INSTRUCTIONS.

I WOULD SUGGEST TO YOU -- AND I
DON'T KNOW WHAT YOU'RE GOING TO
DO WITH THAT CASE -- IS IT STILL
CAN BE CONSIDERED AS FUNDAMENTAL

ERROR UNLESS THE DEFENSE
ATTORNEY IS THE ONE THAT INVITED
THE ERROR.

AND WHAT I WOULD RESPOND TO --
>> IT JUST CAN'T BE THIS -- IN
THIS WAY.

DO YOU AGREE THAT WHETHER
CONFUSING OR NOT, THAT THE JURY
INSTRUCTIONS AS GIVEN AND AS
AGREED TO SEVERAL TIMES BY THE
DEFENSE LAWYER --

>> NOT OBJECTED TO OR AGREED TO,
BUT CERTAINLY NOT REQUESTED BY
DEFENSE COUNSEL.

>> WELL, THAT THEY TRACKED THE
STATUTE?

>> BUT --

>> PLEASE.

>> THE STATUTORY SCHEME IS
CONFUSING WITHOUT TELLING THE
JURY WHAT IT MEANS TO BE AN
AGGRESSOR.

>> BUT HOW CAN THERE BE ERROR IF
IT TRACKS THE STATUTE AND WHAT
YOU'RE REALLY -- AND THE DEFENSE
LAWYER, WHO KNOWS WHAT HIS OR
HER CASE IS, DOESN'T SAY, BUT,
JUDGE, I WOULD LIKE ADDITIONAL
INSTRUCTIONS THAT ARE
NONSTANDARD BECAUSE THEY DON'T
REALLY DEAL WITH THIS ISSUE.
YOU'RE SAYING IT'S FUNDAMENTAL
ERROR.

THE JUDGE FUNDAMENTALLY ERRED?

>> THE INSTRUCTIONS ARE
FUNDAMENTALLY ERRONEOUS.

>> SO WHAT ADDITIONAL --

>> YES, YOUR HONOR.

LET'S GET TO THAT.

THE ADDITIONAL INSTRUCTION THAT
WOULD NEED TO BE GIVEN ARE WHAT
IT MEANS TO BE A PROVOKER OR
INITIAL AGGRESSOR.

>> DID YOU ARGUE THAT IN YOUR
BRIEF?

>> YES.

I'VE ARGUED THAT THE INSTRUCTION
THAT SHOULD BE GIVEN IS THE
GIBBS INSTRUCTION.

I'VE RELIED UPON THE FOURTH

DCA'S CASE IN GIBBS.

>> BUT THERE IS A SPECIAL INSTRUCTION.

WE DO HAVE MANY -- WE'VE GOT CASES THAT SAY A DEFENDANT IS ENTITLED TO BE INSTRUCTED ON THE THEORY OF HIS CASE.

NOW, YOU MAY HAVE -- YOU MAY THINK YOU HAVE A GOOD POSTCONVICTION CASE AGAINST THE DEFENSE ATTORNEY IF THERE IS AN INSTRUCTION -- A NONSTANDARD INSTRUCTION THAT SHOULD HAVE BEEN REQUESTED OR IF IN SOME FUTURE TIME WE AMEND THE STATUTE -- I MEAN -- AMEND THE STATUTE -- IN THE INSTRUCTION TO ADD SOMETHING.

BUT WHERE IS A CASE OUT OF THIS COURT THAT EVEN REMOTELY WOULD SAY THAT WHERE IT'S A SPECIAL INSTRUCTION NOT REQUESTED, THAT -- ON A THEORY OF THEIR DEFENSE, THAT THAT'S FUNDAMENTAL ERROR?

>> YOUR HONOR, I CAN GO BACK TO JUDGE WELLS' QUOTING OF THIS COURT IN PERRYMAN, THAT JURY INSTRUCTIONS WERE DESIGNED ABOVE ALL TO BE ACCURATE AND CLEAR WITH THE PURPOSE OF ELIMINATING OR MINIMIZING JUROR CONFUSING CONCERNING THE APPLICABLE LAW IN CRIMINAL CASES.

>> BUT NOW YOU'RE SAYING -- YOU JUST WENT BEYOND CONFUSING TO SAYING THEY'RE NOT COMPLETE.

>> LET ME EXPLAIN A LITTLE BIT.

>> ARE THOSE TWO DIFFERENT THINGS?

>> WELL, NO.

I THINK THEY'RE CONFUSING BECAUSE THEY'RE NOT COMPLETE, AT LEAST IN A SITUATION LIKE THIS. THIS IS PRETTY SIMPLE STUFF. IT SHOULD BE.

THE JURY INSTRUCTIONS CERTAINLY ARE NOT.

AND I THINK SEVERAL JUDGES IN THE STATE HAVE SAID THAT.

AND I DON'T ENVY THE JURY

INSTRUCTION COMMITTEE, BUT
NEVERTHELESS WE CAN DO A BETTER
JOB WITH THIS.

THE ISSUE IS, OKAY, YOU ARE
ASSERTING SELF-DEFENSE.

THE QUESTION BECOMES DO YOU HAVE
A RIGHT TO STAND YOUR GROUND AND
HAVE NO DUTY TO RETREAT, OR DO
YOU HAVE TO RETREAT?

AN ISSUE IN DECIDING WHETHER OR
NOT THE DEFENDANT HAS TO RETREAT
IS WHETHER OR NOT THE DEFENDANT
WAS THE PROVOKER OR INITIAL
AGGRESSOR.

BUT IN THIS CASE, WITHOUT
QUESTION, WHAT THE STATE WAS
ASSERTING WAS THE ACT THAT MADE
MY CLIENT THE INITIAL PROVOKER
WAS MERELY PUSHING MR. BANTON.
IN RESPONSE TO THAT MR. BANTON
PULLED OUT A DEADLY WEAPON.
SO NOW, AFTER MR. BANTON HAD
ELEVATED THE LEVEL OF FORCE FROM
NONDEADLY TO DEADLY, DOES THAT
ALL OF A SUDDEN ERASE
MR. FLOYD'S ABILITY TO RESPOND
TO THAT FORCE AND PROTECT THE
OTHERS AT HIS PROPERTY?
THE STATE ARGUED -- THE
PROSECUTOR ARGUED DURING THE
TRIAL, YES.

HE HAD TO EXHAUST EVERY
REASONABLE MEANS TO ESCAPE IN
THIS CASE.

AND I SUBMIT THAT'S NOT THE
SITUATION WHEN HERE THE INITIAL
FORCE THAT WAS USED WAS
NONDEADLY AND THE OTHER
PERSON ELEVATES IT TO DEADLY
FORCE.

GIBBS INVOLVED TWO WOMEN WHO GOT
INTO A VERBAL ALTERCATION THAT
AROSE TO A PHYSICAL ALTERCATION
WITH NONDEADLY FORCE.

BUT THE TRIAL COURT GAVE THE
INITIAL PROVOKER INSTRUCTION
AND, YES, I ACKNOWLEDGE IT WAS A
REQUEST IN THAT CASE.

NEVERTHELESS, THE DEFENSE IN
THAT CASE SAID, LOOK, THIS IS

WAY TOO CONFUSING TO THE JURY
BECAUSE THEY'RE GOING TO BE TOLD
JUST CALLING SOMEONE A NAME IS
GOING TO MAKE YOU THE INITIAL
PROVOKER.

>> I ASSUME YOU OBVIOUSLY DON'T
AGREE WITH THE FACT THAT THESE
PEOPLE WERE DRIVING AWAY AND
THAT YOUR CLIENT STARTED
ACTUALLY FIRING HIS WEAPON.
SO HOW DOES THAT PLAY INTO ALL
OF THIS?

IT SEEMS TO ME THAT MAKES THE --
HIM AT LEAST THE AGGRESSOR AT
THAT POINT, DOESN'T IT?

>> NO.

I APPRECIATE -- I THINK OPPOSING
COUNSEL ACKNOWLEDGED THE DEFENSE
THEORY IN THIS CASE WAS, YES,
THEY WERE IN THEIR CAR DRIVING
AWAY AND AT THAT POINT ONE OF
THE PEOPLE IN THAT CAR STUCK OUT
THEIR ARM AND STARTED FIRING ON
THE CROWD.

>> BUT THE EVIDENCE ON THAT IS
IN CONFLICT AS TO WHO SHOT
FIRST.

>> OF COURSE.
YES.

>> SO DOESN'T THAT SIMPLY BECOME
A JURY QUESTION ABOUT WHO WAS
THE AGGRESSOR AT THAT POINT?

>> EXCEPT THAT MY CLIENT WASN'T
EVEN ALLOWED TO ASSERT HIS
DEFENSE BECAUSE HE WAS TOLD IF
HE WAS THE ONE THAT INITIALLY
PROVOKED THIS, THEN HE'S OUT OF
LUCK.

BECAUSE THERE'S NO ARGUMENT THAT
MY CLIENT RETREATED.

HE DIDN'T ESCAPE, JUST AS THE
PROSECUTOR SAID.

BUT THE PROSECUTOR SAID BY NOT
ESCAPING HE LOSES ALL RIGHTS IN
THIS CASE.

HIS THEORY OF SELF-DEFENSE IS
OVER.

>> THE CERTIFIED BEFORE IS
WHETHER THIS INSTRUCTION 3.6M IS
CONFUSING.

>> OR CONFLICTING.
>> THAT'S WHAT WE NEED TO
DECIDE.
IN YOUR CASE YOU'RE TELLING US
THAT THE PROSECUTOR
MISREPRESENTED THE LAW.
>> NO.
I'M NOT SAYING THAT.
>> WELL, WHAT ARE YOU SAYING?
>> THE PROSECUTOR RELIED UPON
THIS INITIAL PROVOKER PROVISION
TO SAY THAT THAT'S THE END OF
THIS CASE AND MR. FLOYD HAD NO
RIGHT TO DEFEND THE OTHERS ON
HIS PROPERTY.
>> WHY DIDN'T THE DEFENSE
COUNSEL GET UP IN ARGUMENT AND
SAY THAT'S NOT TRUE.
HERE IT IS -- I MEAN, THOSE ARE
FACTUAL FINDINGS.
>> I CAN'T ARGUE THAT DEFENSE
COUNSEL DID ANYTHING IN THIS
CASE.
WHAT I AM SAYING, THOUGH, IS TO
MAKE THESE INSTRUCTIONS CLEAR
THERE MUST BE SOME GUIDANCE
GIVEN TO THE JURY AS TO HOW ARE
THEY SUPPOSED TO DECIDE WHETHER
OR NOT A DEFENDANT IN THIS
SITUATION IS THE PROVOKER.
THE OTHER EXAMPLE I WOULD TURN
TO --
>> AFTER 45 YEARS OF DOING THIS
STUFF, I MEAN, EVERY JURY
INSTRUCTION, I MEAN
THEORETICALLY, COULD BE MASSAGED
SO THAT IT MAKES BLAME A LITTLE
BETTER.
WE'RE NOT HERE BECAUSE OF JUST
CONFUSION OR COMPLEXITY.
I MEAN, CERTAINLY ALL OF THIS
AREA OF THE LAW IS SOMEWHAT
COMPLEX.
BUT THAT DOESN'T MEAN WHEN AN
INSTRUCTION THAT FOLLOWS IT IS
REVERSIBLY --
>> WELL, THE ISSUE IS --
>> -- MISLEADING.
>> TO BE FUNDAMENTAL ERROR IT
WOULD HAVE TO RISE TO THAT LEVEL

AND I'M ARGUING THAT IT DID.
BECAUSE BY NOT --

>> I UNDERSTAND, BUT YOU'RE
ARGUING BECAUSE OF THE
CONFUSION, COMPLEXITY OF WHAT'S
READ.

THIS AREA OF THE LAW, I MEAN,
YOU STOOD UP AND SAID THIS IS
JUST SO CRYSTAL CLEAR THAT --

>> BUT THEY'RE NOT CLEAR.

>> WELL, YOU'RE SAYING THIS AREA
OF THE LAW IS SO WONDERFULLY
CLEAR THAT EVERYBODY KNOWS
EXACTLY WHAT IT IS.

AND I'M SUGGESTING THAT THIS
AREA OF THE LAW, WHEN YOU'VE GOT
DISPUTES, WITH REGARD TO THESE
DIFFERENT FACTORS, YOU'VE GOT
AGGRESSOR ISSUES, YOU'VE GOT HOW
MUCH FORCE WAS USED, CAN YOU USE
-- I MEAN, YOU'VE GOT A LOT OF
FACTUAL ISSUES IN THIS FACTUAL
SCENARIO.

AND SO OUR QUESTION REALLY ISN'T
-- AND AS THE CHIEF HAS STATED,
THE ISSUE CERTIFIED TO US IS NOT
WHETHER THERE COULD BE SOME MORE
INSTRUCTIONS GIVEN, BUT WHETHER
THIS INSTRUCTION IS REVERSIBLY
AND FUNDAMENTALLY --

>> CORRECT.

>> -- CONFUSING.

>> YES.

AND I SUBMIT IT IS BECAUSE IT
NEGATED MY CLIENT'S ONLY THEORY
OF DEFENSE.

>> WELL, THAT'S NOT WHAT YOU'VE
BEEN ARGUING THIS MORNING.

YOU'VE BEEN ARGUING YOU HAVE TO
ADD THIS, YOU HAVE TO ADD THAT.

>> AND THAT'S WHY, YOUR HONOR.
LET ME TRY TO SUM IT UP.

IT'S FUNDAMENTAL ERROR BECAUSE
MY CLIENT'S THEORY OF DEFENSE IS
HE HAD NO DUTY TO RETREAT AND
HAD A RIGHT TO DEFEND OTHERS ON
HIS PROPERTY.

THIS INSTRUCTION SAID WITHOUT
ANY DIRECTIONS AS TO HOW THEY'RE
TO FIND HE'S THE PROVOKER --

>> AND HE COULD USE DEADLY FORCE WITHOUT REGARD TO THE NATURE OF WHAT THE OTHER PERSON DID.

>> IF HE WAS THE PROVOKER, HE HAD TO RETREAT.

THAT'S WHAT THIS INSTRUCTION TOLD THE JURY.

>> THAT'S NOT WHAT I ASKED YOU.

>> FROM A FORMER TRIAL JUDGE'S PERSPECTIVE, BECAUSE THIS HAPPENS ALL THE TIME IN COURT, THEY SAY WHEN THE PROSECUTOR ARGUED THAT IN CLOSING ARGUMENT, TOLD THE JURY HE HAD TO BACK YOU HAVE FIRST, RETREAT.

>> YES.

>> AND THAT IN YOUR VIEW WAS A MISREPRESENTATION OF THE LAW.

>> WELL, NO.

>> HANG ON.

>> THE LAW MAY BE CORRECT IN THAT REGARD.

>> STAY WITH ME.

WHAT WAS THE JUDGE -- LET'S ASSUME THE DEFENSE COUNSEL OBJECTED AT THAT POINT IN TIME.

WHAT WAS THE JUDGE TO DO?

INSTRUCT THE JURY AT THAT MOMENT ON WHAT THE LAW IS?

WHY CAN'T DEFENSE COUNSEL CORRECT THAT?

I MEAN, LAWYERS DO THAT.

THEY STRETCH THE INSTRUCTIONS TO THE JURY.

IT'S UP TO OPPOSING COUNSEL TO COME UP, THAT'S NOT WHAT THE JURY INSTRUCTION SAYS.

HERE IT IS.

YOU'RE ASKING US TO MAKE A LEGAL RULING BASED ON THE FACT THAT AN ARGUMENT WASN'T MADE.

>> I GUESS THE BEST ANALOGY I CAN DRAW IS MONTGOMERY.

THERE WASN'T A SINGLE DEFENSE ATTORNEY PRIOR TO THE ARGUMENT BEING RAISED IN THE FIRST DCA

--

>> DON'T OPEN UP MONTGOMERY.

>> WELL, BUT --

>> MONTGOMERY'S A DIFFERENT AREA

OF THE LAW, TALKING ABOUT INTENT TO COMMIT A NEGLIGENT ACT AND THOSE KINDS OF THINGS.

I MEAN, THAT'S FAR DIFFERENT THAN WHAT WE'RE TALKING ABOUT HERE.

>> THE PURPOSE OF THE ANALOGY WOULD NOT BE THE SUBSTANCE. IT WOULD BE WHAT IS A DEFENSE ATTORNEY SUPPOSED TO STAND UP AND SAY SOMETHING OR IS A JUDGE SUPPOSED TO STEP IN AND DO SOMETHING?

>> IT'S THE SAME THING WHEN YOU HEAR A CLOSING ARGUMENT. OBJECTION, YOUR HONOR. FACTS NOT IN EVIDENCE. WHAT IS THE JUDGE SUPPOSED TO DO?

LADIES AND GENTLEMEN OF THE JURY, THOSE FACTS WERE NOT PRESENTED.

IS THE JUDGE NOT COMMENTING ON WHAT THE LAW IS?

IT'S UP TO COUNSEL TO STRAIGHTEN THE JURY OUT AND LET THE JURY DECIDE BASED ON THE EVIDENCE.

>> I WANT TO TRY TO MAKE TWO OTHER POINTS QUICKLY.

THE ROSS CASE ALSO DEMONSTRATES WHY JURORS BEING GIVEN THESE INSTRUCTIONS NEED MORE GUIDANCE AS TO WHO THE PROVOKER IS.

THE DEFENDANT CAME HOME, FOUND HIS HOUSE HAD BEEN BURGLARIZED. HE'S TOLD THERE'S A TRUCK DRIVING OUT IN FRONT.

HE RUNS OUT INTO THE STREET TO TRY TO FLAG DOWN THE TRUCK. THE PERSON IN THE TRUCK SPEEDS UP AND ALMOST RUNS HIM OVER AND ROSS TURNS AROUND AND FIRES HIS GUN.

THE JUDGE IN THAT CASE GIVES WITHOUT OBJECTION THE INITIAL PROVOKER INSTRUCTION, WHICH BASICALLY TELLS ROSS COULDN'T FIRE HIS GUN IF HIS ACT OF RUNNING OUT TO THE CAR OR TRUCK TO TRY TO FLAG IT DOWN INITIALLY

PROVOKED.

HOW IS A JURY -- IF THE THIRD DCA, THREE JUDGES CONCURRING WITH JUDGE WELLS, IF THESE JUDGES CAN'T UNDERSTAND THIS, HOW ARE PEOPLE ON THE JURY TO UNDERSTAND WHAT DOES IT MEAN IF HE'S THE INITIAL PROVOKER? AND IF HE'S THE INITIAL PROVOKER, THAT MEANS HE HAS TO RETREAT.

THERE MUST BE SOME GUIDANCE GIVEN.

WHAT I SUGGEST IS THE GUIDANCE MUST BE THE SAME LEVEL OF FORCE. SO IN THIS SITUATION MR. FLOYD USED NONDEADLY FORCE IN PUSHING MR. BANTON.

BUT THE MOMENT THAT THAT FORCE ROSE TO A DIFFERENT LEVEL OF PULLING OUT THE FIREARM, THE RESET BUTTON WAS HIT AND MR. FLOYD AT THAT POINT STILL

--

>> WHERE IS IT ESTABLISHED THAT THAT IS AT A DIFFERENT LEVEL? WHEN YOU ARE ATTACKED BY SOMEONE WHO PUSHES YOU -- AND IS IT TRUE THAT HE'S A LARGER PERSON?

>> THE FACTS DEMONSTRATE THE SIZE OF FLOYD AND BANTON -- I'M NOT SURE.

I CAN'T ANSWER THAT, YOUR HONOR.

>> WELL, WHEN SOMEONE IS ATTACKED BY BEING PUSHED IN A CROWD THAT CAN BE PERCEIVED TO BE THREATENING THEM, NOT JUST THE PUSH, BUT THE WHOLE ENVIRONMENT IS THREATENING, THEN HE DISPLAYS THE WEAPON.

I'M NOT SUGGESTING THAT THAT NECESSARILY IS A SMART THING TO DO.

BUT THERE'S NO SUGGESTION THAT HE POINTED THE WEAPON AT ANYONE.

>> CORRECT.

>> THAT'S UNDISPUTED.

>> CORRECT.

>> WELL, I MEAN, THESE ARE COMPLICATED QUESTIONS ABOUT THE

WAY THE JURY MIGHT EVALUATE WHETHER THAT IS AN ESCALATION OR THAT'S AN ATTEMPT TO STOP THIS VIOLENT -- THIS VIOLENCE THAT HAS STARTED AGAINST THE GENTLEMAN WHO WAS PUSHED.

>> BUT THE JURY NEEDS TO BE GIVEN SOME INSTRUCTION IN THAT REGARD.

THEY NEED TO BE TOLD IF YOU FIND THAT ALL MR. FLOYD DID WAS USE NONDEADLY FORCE, THEN THAT DOES NOT PROHIBIT HIM FROM USING DEADLY FORCE IN RESPONSE TO MR. BANTON'S DEADLY FORCE.

AT LEAST YOU HAVE SOME IDEA AS TO --

>> HAVE YOU ARGUED THAT IN YOUR BRIEF?

>> YES, YOUR HONOR.

>> WHERE IS THAT?

>> IF YOU LOOK -- MY BRIEF CITES TO THE GIBBS CASE, AND THAT'S EXACTLY THE ARGUMENT THAT'S BEING MADE.

THE EXPLAINING TO THE AGGRESSOR INITIALLY APPROACHED LANGUAGE SHOULD BE LIMITED TO SITUATIONS WHERE THE FORCE USED BY THE ALLEGED VICTIM IS THE SAME LEVEL OF FORCE USED BY THE DEFENDANT.

PAGE 35.

THAT'S THE ARGUMENT HERE.

THERE MUST BE SOME EXPLANATION TO -- AND I GO AND EXPLAIN ROSS. ROSS, HOW IS THE JURY SUPPOSED TO DECIDE --

>> AND THIS WOULD ALL BE AN EXCELLENT ARGUMENT IF YOU HAD BEEN THE TRIAL LAWYER AND YOU HAD REQUESTED THE GIBBS INSTRUCTION.

I MEAN, THAT -- YOU KNOW, I KNOW -- YOU ARE AN EXPERIENCED APPELLATE ADVOCATE AND I THINK YOU UNDERSTAND WHAT YOUR HURDLE IS HERE AND I DON'T KNOW THAT JUST WHAT EVERYBODY'S BEEN SAYING, BUT I JUST WANT TO REITERATE THAT SOUNDS LIKE YOU

HAVE A DECENT POINT THAT THERE OUGHT TO BE A SPECIAL INSTRUCTION ADDED AS TO WHAT AGGRESSOR MEANS, BUT IT EITHER HAS TO BE REQUESTED OR SOMEBODY HAS TO SUGGEST IT BE ADDED TO THE STANDARD JURY INSTRUCTIONS.
>> YOUR HONOR, I UNDERSTAND YOUR POINT.

OBVIOUSLY I STAND BEFORE THE COURT ARGUING FUNDAMENTAL ERROR. THAT'S ALL I CAN DO.

I WANT TO MAKE ONE LAST POINT. THIS IS PAGE 7 OF THE STATE'S ANSWER BRIEF.

THE JURY COULD HAVE FOUND THAT HIS, MR. FLOYD'S, USE OF DEADLY FORCE WAS JUSTIFIED -- I SAID ANSWER BRIEF.

THIS IS THE REPLY BRIEF.

THE JURY COULD HAVE FOUND THAT FLOYD'S USE OF DEADLY FORCE WAS JUSTIFIED AND HE HAD NO DUTY TO RETREAT BECAUSE RETREATING WOULD BE FUTILE GIVEN THE IMMINENCE OF THE DANGER HE FACED.

I READ THAT AND I THOUGHT, WHERE IN THIS CASE WAS THE JURY EVER TOLD THAT HE DIDN'T HAVE TO RETREAT IF IT WOULD BE FUTILE GIVEN THE IMMINENCE OF THE DANGER?

IT'S NOT GIVEN IN THIS CASE.

THEY CITED TO THE GARRETT CASE FOR THAT PROPOSITION.

IF YOU LOOK AT THE GARRETT CASE, THAT INSTRUCTION WAS GIVEN.

THAT'S THE PRE-2005 INSTRUCTION THAT COMES FROM COMMON LAW, THAT EVEN WHEN YOU HAD A DUTY TO RETREAT, IF RETREATING WOULD CAUSE YOU TO PUT YOURSELF IN IMMINENT DANGER, YOU STILL COULD USE DEADLY FORCE TO DEFEND YOURSELF.

IN THE FIRST DCA CASE IN THIS CASE, MR. FLOYD'S CASE, HE ARGUED NOT ONLY ARE THESE INSTRUCTIONS CONFLICTING IN NATURE, BUT ALTERNATIVELY THAT

SAME INSTRUCTION SHOULD HAVE BEEN GIVEN BECAUSE AT LEAST I WOULD HAVE HAD THE OPPORTUNITY TO ARGUE TO THE JURY THAT I HAD NO DUTY TO RETREAT GIVEN THE IMMINENCE OF THE DANGER IT WOULD HAVE BEEN FUTILE.

THE FIRST DCA GRANTED RELIEF ON THE FIRST OPTION.

BUT NOW WHEN THE STATE CITES TO THAT AND ARGUES THAT SOMEHOW THE JURY COULD HAVE FOUND THAT IN THIS CASE, THEY COULD NOT HAVE.

BUT HAD THIS INSTRUCTION BEEN GIVEN, THEN THERE WOULDN'T HAVE BEEN IMPROPER IN THIS CASE.

I ALSO SUGGEST THAT THAT COMMON LAW INSTRUCTION SHOULD CARRY OVER TO THE STAND YOUR GROUND INSTRUCTION.

EVEN IF THEY HAVE A DUTY TO RETREAT, WHETHER THEY'RE THE INITIAL PROVOKER, IF IN THEIR MINDS -- AND IF A JURY WERE TO FIND AS A MATTER OF FACT THAT THE IMMINENCE OF DANGER WERE SO GREAT, THEY STILL HAVE A RIGHT TO DEFEND THEMSELVES.

THAT'S LACKING IN THIS CASE AS WELL.

SO FOR ALL THE REASONS JUDGE WELLS CITED IN HER OPINION, THREE JUDGES HAVE SAID THAT THESE INSTRUCTIONS ARE A CONFUSING, REPETITIVE MORASS. WE CAN DO BETTER.

JUDGES AROUND THE STATE HAVE HAD CONCERNS WITH THESE INSTRUCTIONS, INITIAL PROVOKER AND UNLAWFUL -- HOW ARE JURORS SUPPOSED TO WEED THROUGH THIS AND FIGURE OUT WHO HAD THE DUTY TO RETREAT?

THE REASON IT MATTERS BECAUSE THIS DID TOTALLY NEGATE MY CLIENT'S THEORY OF DEFENSE.

I DIDN'T HAVE TO RETREAT WHEN I PERCEIVED THE OTHER PEOPLE USING DEADLY FORCE.

BUT THE PROSECUTOR AS I READ AT

THE BEGINNING TOLD THE JURY
THAT'S WRONG AND HE HAD TO
ESCAPE.
HE HAD TO BACK UP.
IF HE FAILED TO, FIND HIM
GUILTY.
THANK YOU.
>> THANK YOU.
MISS MILLSHAP?
>> MAY IT PLEASE THE COURT?
YOUR HONOR, I'D LIKE TO -- I
STILL DISAGREE.
RETREAT WAS LITERALLY NEVER
ARGUED.
I'D LIKE TO QUOTE FROM THE SAME
PAGE.
I'M ON 1708 OF THE PROSECUTOR'S
CLOSING.
YES, HE SAYS, IN OTHER WORDS, HE
HAD TO BACK UP, MEANING FLOYD.
LISTEN TO WHAT HE DESCRIBES BACK
UP MEAN.
OKAY.
I STARTED THIS.
AND NOW I DON'T WANT TO DO IT
ANYMORE.
LET'S ALL BACK UP AND LET'S ALL
GET ALONG.
HE MEANS WITHDRAW FROM THE
CONFRONTATION.
HE DOESN'T MEAN RETREAT IN THE
PHYSICAL SENSE OF GOING IN HIS
HOUSE.
I MEANS YOU STARTED IT, SO YOU
HAVE TO STOP IT, MEANING DON'T
PULL THE TRIGGER.
WE NEVER ARGUED -- I REPEAT.
WE NEVER ARGUED THAT FLOYD HAD
TO RETREAT IN THE SENSE OF GO
AWAY AND INTO HIS HOUSE.
OUR ARGUMENT WAS HE DIDN'T GET
TO SHOOT FIRST AND HE DID SHOOT
FIRST.
THAT WAS OUR ARGUMENT AND OUR
CASE.
NOW, YOUR HONOR, OPPOSING
COUNSEL BASICALLY WANTS YOU TO
FIND FUNDAMENTAL ERROR BECAUSE A
SPECIAL JURY INSTRUCTION THAT
WAS NEVER ASKED FOR WAS NOT

GIVEN.

WE DON'T DO FUNDAMENTAL ERROR ON ALTERNATIVES.

WE DO ON WHAT WAS PUT BEFORE THE JURY.

THE ERROR MUST BE IN THE JURY INSTRUCTIONS, NOT SOME SPECIAL JURY INSTRUCTION THAT WAS NEVER ASKED.

WHAT'S MORE, YOUR HONOR, HIS SOLUTION TO THE CONFUSION WOULD BE TO ADD YET MORE LANGUAGE TO IT.

HE WANTS THIS JURY INSTRUCTION TO BE YET MORE COMPLICATED.

HE WANTS TO ADD AN ADDITIONAL EXPLANATION TO 3.6F.

AND IF YOU THINK IT WILL HELP, FINE, BUT THAT'S NOT GOING TO MAKE THINGS SIMPLER.

BUT THE MAIN ARGUMENT HERE IS, YOUR HONOR, THERE CANNOT BE FUNDAMENTAL ERROR WHEN THE JURY INSTRUCTIONS TRACK THE STATUTE. THERE IS NO ERROR IN THIS JURY INSTRUCTION, MUCH LESS FUNDAMENTAL ERROR.

IF YOU'D LIKE TO REORDER IT, BY ALL MEANS DO SO, BUT THERE IS NO FUNDAMENTAL ERROR IN THIS CASE.

THANK YOU VERY MUCH FOR YOUR TIME.

>> OKAY.

THE COURT'S IN RECESS FOR TEN MINUTES.

>> ALL RISE.