

>> ALL RISE.

HEAR YE, HEAR YE, HEAR YE, THE
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 AND THIS
HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.

PLEASE BE SEATED.

>> GOOD MORNING.

WELCOME TO THE FLORIDA SUPREME
COURT.

THE FIRST CASE ON THE DOCKET IS
DAUGHERTY VERSUS STATE.

COUNSEL, WHENEVER YOU'RE READY.

>> GOOD MORNING.

MAY IT PLEASE THE COURT, MY NAME
IS STEVEN SELIGER, WITH DONNA
DUNCAN.

WE REPRESENT MR. DAUGHERTY IN
THIS CASE.

THIS IS A REVIEW OF THE FOURTH
DISTRICT DECISION THAT DECLINED
TO FIND A MONTGOMERY ERROR
BECAUSE PRIMARILY THE JURY WAS
INSTRUCTED ON A CRIME THAT WAS
TOO -- THAT INTERVENED BETWEEN
THE SECOND-DEGREE MURDER AND THE
MANSLAUGHTER INSTRUCTION.

WHAT WE'RE GOING TO ASK YOU TO
DO TODAY IS JETTISON THIS ONE
STEP REMOVED RULE IN HOMICIDE
CASES BECAUSE IT'S INCONSISTENT
WITH THIS COURT'S PRONOUNCEMENT
IN HAYGOOD, DANIELS AND
GRIFFITH.

THE IMPORTANT FUNCTION A JURY
PLAYS IN A HOMICIDE CASE IS
DETERMINING THE DEGREE OF
INTENT.

AND GRIFFITH EXPLICITLY TALKS
ABOUT THAT.

SO WHEN A JURY HAS CHOICES IN A
HOMICIDE CASE, THEY'RE LOOKING
AT WHAT IS THE INTENTION THAT
RESULTED IN THE MURDER.

THAT'S THE CHOICE THE JURY
MAKES.

SO SINCE WE DELEGATE TO THE JURY
THE DECISION TO MAKE THAT CALL,
AN INCREDIBLY SIGNIFICANT

COMPONENT OF THAT IS TO TELL
THAT JURY ACCURATELY HOW THEY
DECIDE THE CASE.
>> BUT WHAT YOU'RE ASKING US TO
DO OR WHAT YOU WILL BE ASKING
THE TRIAL JUDGES TO DO WILL BE
TO MAKE A FACTUAL DETERMINATION
AS TO WHETHER THE REQUESTED
LESSER HAS BEEN PROVEN, WHICH IS
-- WE DO THAT TODAY, DON'T WE?
>> YOU DO THAT.
TRIAL JUDGES DO THAT.
>> OKAY.
>> IN EVERY CASE YOU'RE SUPPOSED
TO LOOK AT THE EVIDENCE, AND IF
FROM A DEFENSE PERSPECTIVE, IF
THERE'S ANY EVIDENCE THAT
SUPPORTS GIVING THAT
INSTRUCTION, YOU'RE SUPPOSED TO
GIVE THAT INSTRUCTION.
>> COULD YOU ENVISION A FACTUAL
SITUATION WHERE YOU WOULD HAVE
MANSLAUGHTER BY CULPABLE
NEGLIGENCE APPLICABLE BASED ON
THE FACTS AND ALSO MANSLAUGHTER
BY ACT?
>> I'M SURE THERE IS.
>> THE JUDGE WOULD HAVE TO --
BASED ON THE FACTS WOULD HAVE TO
GIVE BOTH AND THEY SEEM TO BE
INCONSISTENT.
ONE REQUIRES INTENT AND THE
OTHER IS A CULPABLE ACT.
>> MANSLAUGHTER IS AN INTENT TO
COMMIT THE ACT THAT RESULTS IN
THE DEATH.
>> BUT THE PROBLEMATIC PART IS
CULPABLE NEGLIGENCE.
THAT DOESN'T REQUIRE INTENT.
>> RIGHT.
IT DOES NOT REQUIRE THAT BECAUSE
IT'S A HEIGHTENED FORM OF
NEGLIGENCE.
>> HAVING BEEN A TRIAL JUDGE,
IT'S SIMPLE FOR THE TRIAL JUDGE.
IT'S EASIER FOR TRIAL JUDGES TO
JUST HAVE WHAT THE FOURTH DCA
SUGGESTED, WHICH IS BASICALLY GO
DOWN THE CHRONOLOGICAL SCHEDULE
OF OFFENSES.
AND OBVIOUSLY HOMICIDE WOULD
ALWAYS COME FIRST, SO YOU HAVE
SECOND, ATTEMPT AND THEN YOU
HAVE THIRD-DEGREE MURDER.
AND ONCE YOU DO THAT,

MANSLAUGHTER WOULD NEVER HAVE A CHANCE, I GUESS.

BUT IT'S SIMPLISTIC THAT WAY, ISN'T IT?

>> WELL, IT'S SIMPLISTIC, BUT IT'S NOT THE CORRECT WAY TO DO IT BECAUSE WHAT WE TELL THE JURY TO DO IS USE THE LAW WE'RE GIVING YOU.

THEY HAVE TO ASSUME THE LAW THEY'RE BEING TOLD IS AN ACCURATE WAY FOR THEM TO DECIDE THE CASE.

>> WHAT'S THE EVIDENCE IN THIS CASE THAT WOULD SUPPORT A RATIONAL JURY CONCLUDING THAT THERE WAS MANSLAUGHTER BY ACT? WHAT EVIDENCE SUPPORTS THAT?

>> UNDER THE INCORRECT INSTRUCTION OR THE CORRECT INSTRUCTION?

>> I'M TALKING ABOUT UNDER THE CORRECT LAW.

>> UNDER THE CORRECT LAW, IT WOULD BE THAT HE, MR. DAUGHERTY, SWUNG THE BAT THAT HIT THE GUY THAT RESULTED IN THE DEATH.

NO MORE THAN THAT.

I MEAN, THAT'S THE MANSLAUGHTER BY ACT.

HE COMMITTED AN INTENTIONAL ACT, COMMITTED AN ACT THAT RESULTED IN THE DEATH.

AND HIS SWINGING THE BAT WAS INTENTIONAL, NOT NEGLIGENT.

I MEAN, OUR ARGUMENT -- PART OF OUR ARGUMENT IS THAT THERE'S NO EVIDENCE OF CULPABLE NEGLIGENCE IN THIS CASE.

>> LET ME ASK YOU, WHY WOULD JETTISONING THE ONE STEP REMOVED ANALYSIS THAT WE'VE USED FOR A NUMBER OF YEARS, HOW WOULD THAT HELP AT ALL IN YOUR CLIENT'S SITUATION?

IT SEEMS TO ME THAT THE ONE STEP REMOVED, HE GETS AT LEAST PROPER -- HOPEFULLY PROPER INSTRUCTIONS ON THE MANSLAUGHTER AND THE THIRD-DEGREE MURDER.

>> WELL, ANOTHER PART OF OUR ARGUMENT IS THAT THERE'S NO EVIDENCE IN THIS CASE THAT SUPPORTS A THIRD-DEGREE FELONY MURDER INSTRUCTION EITHER.

THAT SHOULDN'T HAVE BEEN GIVEN AS WELL.

>> SO YOUR ARGUMENT REALLY IS THAT WE SHOULD BE JETTISONING THE RIGHT FOR A POSSIBLE JURY PARDON.

>> WELL, RIGHT.

I MEAN, THIS COURT WITH ABERO STARTED THE JURY PARDON CONCEPT. IT JUST DOESN'T MAKE SENSE TO ASSIMILATE, WHICH IS ESSENTIALLY AN EXECUTIVE BRANCH FUNCTION. I MEAN, THAT'S WHAT GOVERNORS AND PRESIDENTS DO. THEY PARDON.

IT'S NOT A USUAL FUNCTION TO PARDON BECAUSE PARDON IS ESSENTIALLY SAYING YOU'RE GUILTY, BUT WE'RE GOING TO IGNORE THAT AND WE'RE GOING TO TAKE AWAY ANY RESPONSIBILITY YOU MIGHT HAVE FOR THIS CRIME.

>> PUBLIC DEFENDERS MIGHT NOT LIKE THAT.

>> WHAT YOU REPLACE IT WITH IS ACCURATELY TELLING THE JURY HOW THEY DECIDE THE CASE.

READ THE INSTRUCTION THAT WE GIVE TO THE JURY AT THE END OF THE CASE.

>> I'VE READ IT MANY TIMES.

>> RIGHT.

SO THEY TELL THE JURY, HERE'S THE LAW.

THIS IS THE ONLY LAW YOU HAVE. EVEN IF YOU DON'T LIKE THIS LAW, THIS IS THE LAW YOU HAVE TO USE. SO KIND OF INCORPORATING THIS CONCEPT OF, WELL, A JURY CAN DO ANYTHING THEY WANT, WHICH THEY CAN BECAUSE IT'S THE JURORS' VIEW OF THE EVIDENCE, NOT MINE OR THE PROSECUTOR'S OR GENERALLY THE JUDGE.

>> GOING BACK TO THIRD-DEGREE MURDER, THE UNDERLYING FELONY IN THE THIRD-DEGREE MURDER CHARGE WAS AGGRAVATED BATTERY.

>> YES, SIR.

>> AT THE TIME OF THIS CRIME -- AT THE TIME OF THIS TRIAL, WOULD YOU AGREE THAT THE INSTRUCTION ON THIRD-DEGREE MURDER WAS FAULTY IN THAT IT REQUIRED THAT THE DEATH HAD TO HAVE BEEN

CAUSED AT THE TIME OF THE CRIME.
IN THIS INSTANCE, THESE THREE
FOLKS, THOSE THREE YOUNG PEOPLE
WENT AROUND SUPPOSEDLY BEATING
UP HOMELESS PEOPLE.

THEY BEAT THIS GUY BADLY WITH A
BASEBALL BAT, BUT HE DIED LATER.

>> HE DIDN'T DIE MUCH LATER.

>> COUPLE HOURS, AT THE
HOSPITAL.

>> RIGHT.

>> BUT THE INSTRUCTION HAS BEEN
CHANGED NOW TO TAKE THAT OUT.

BUT DO YOU AGREE THAT THE
THIRD-DEGREE MURDER WAS FAULTY
AT THE TIME?

>> IT WAS JUSTICE LABARGA, BUT
ARGUMENT IS STILL THAT MR.
GAYNOR DIED SO SOON AFTER HE
GOT BEAT UP THAT AG BATTERY
SIMPLY SHOULD NOT HAVE BEEN
CONSIDERED AS THE UNDERLYING
FELONY.

THERE JUST WASN'T EVIDENCE.
THAT THE AG BATTERY WAS A
SEPARATE CRIME AND THEN THAT
RESULTS IN THE DEATH.

>> SO YOU'RE SAYING THAT AG
BATTERY WAS NOT THE PROPER
UNDERLYING FELONY?

>> WELL, IT CAN BE BECAUSE
THIRD-DEGREE MURDER IS EVERY
UNENUMERATED CRIME THAT'S NOT IN
FELONY FIRST-DEGREE MURDER.
IT JUST DOESN'T FIT THE FACTS OF
THIS CASE.

THAT'S MY POINT.

>> SO WHAT IS YOUR POSITION?
WHAT SHOULD THE JURY HAVE BEEN
INSTRUCTED ON.

>> IN THIS CASE, FIRST, SECOND,
MANSLAUGHTER BY ACT.

THOSE WERE THE THREE
INSTRUCTIONS THAT SHOULD HAVE
BEEN GIVEN IN THE HOMICIDE
REALM.

>> WHAT DID THE DEFENDANT
REQUEST?

>> IT'S NOT REALLY CLEAR FROM
THIS RECORD, JUSTICE PARIENTE.

>> AND, AGAIN, I APPRECIATE WHAT
YOU'RE SAYING ABOUT THAT THIS
CASE SEEMS MORE -- IF IT'S GOING
TO BE ANY LESSER OTHER THAN THE
SECOND-DEGREE MURDER, IT WOULD

BE MANSLAUGHTER BY ACT IF
CORRECTLY INSTRUCTED RATHER THAN
CULPABLE NEGLIGENCE, BUT -- AND
I UNDERSTAND WE APPLY
FUNDAMENTAL ERROR.
BUT AT SOME POINT YOU SAY THE
JUDGE SHOULDN'T HAVE INSTRUCTED
ON CULPABLE NEGLIGENCE.
DID THE DEFENSE LAWYER EITHER
ASK FOR IT OR OBJECT TO THE
CULPABLE NEGLIGENCE INSTRUCTION?
>> I CAN TELL YOU THERE'S NO
OBJECTION TO IT, JUSTICE.
>> THAT'S WHEN THEY'RE LOOKING
AT THE JURY INSTRUCTIONS AND THE
-- WHAT ELSE WOULD THEY HAVE
WHERE THEY'RE LOOKING AT THIS,
HOW IT'S PLACED ON THE VERDICT?
>> YOU HAVE THE SCHEDULE OF
LESSER OFFENSES.
>> RIGHT.
THE SCHEDULE.
RIGHT.
>> AND ATTEMPTS.
>> AND ATTEMPTS.
>> RIGHT.
>> WELL, THE ATTEMPTS DON'T
REALLY MATTER WHEN THEY'RE --
>> BUT YOU'RE NOT SAYING THERE'S
REVERSIBLE FUNDAMENTAL ERROR BY
INSTRUCTING ON CULPABLE
NEGLIGENCE.
>> THERE IS.
THAT'S THE HAYGOOD ARGUMENT.
THIS COURT SAID IF THERE'S AN
IMPROPER INSTRUCTION ON THE
MANSLAUGHTER BY ACT AND THERE'S
NO EVIDENCE OF THE CULPABLE
NEGLIGENCE, THAT MAKES IT --
>> I UNDERSTAND THAT PART, BUT
AS FAR AS ACTUALLY INSTRUCTING
ON IT VERSUS WHETHER IT'S
FUNDAMENTAL ERROR.
>> OH, NO, RIGHT.
RIGHT.
THERE'S NO OBJECTION TO IT.
AND I CAN TELL YOU FROM TRYING
CASES FOR CLOSE TO THREE
DECADES, DEFENSE LAWYERS
GENERALLY WANT AS MANY LESSERS
AS WE CAN GET.
>> RIGHT.
JUST SO WE'RE CLEAR, SO IT'S NOT
-- THE ERROR ISN'T INSTRUCTING
ON CULPABLE NEGLIGENCE.

THE ERROR IS ASSUME THAT ANY
ERROR IN THE MANSLAUGHTER BY ACT
INSTRUCTION WAS CURED BY GIVING
THE CULPABLE NEGLIGENCE, WHERE
THERE'S NO EVIDENCE OF CULPABLE
NEGLIGENCE.

>> THAT'S EXACTLY WHAT HAYGOOD
HELD.

YOU HAVE TO REMEMBER, THE
PROCEDURE OF THIS CASE IS THAT
HAYGOOD HAD NOT BEEN DECIDED
WHEN THE FOURTH DISTRICT ISSUED
THEIR OPINION.

>> LET ME ASK YOU THIS.

IS IT YOUR OPINION THAT A
RATIONAL JURY COULD HAVE
CONVICTED, PROPERLY INSTRUCTED,
COULD HAVE CONVICTED OF
MANSLAUGHTER BY ACT AS OPPOSED
TO SECOND-DEGREE MURDER?

>> YES, SIR.

>> I STRUGGLE WITH THAT GIVEN
THE FACTUAL CONTEXT HERE, WHERE
THESE PEOPLE WENT OUT WITH THE
OBJECT OF BEATING SOMEONE IN THE
HEAD WITH A BASEBALL BAT.

I STRUGGLE WITH THAT.

HOW ANY RATIONAL JUROR COULD
DECIDE THAT IS NOT A DEPRAVED
MIND I COULD NOT SEE.

>> I UNDERSTAND.

FROM THAT PERSPECTIVE AND FROM
BEING A JUDGE LOOKING AT THIS
CASE ON A RECORD, THAT CAN BE A
RATIONAL CONCLUSION.

BUT IT'S NOT OUR PERSPECTIVE
THAT'S IMPORTANT.

IT'S THE JUROR'S PERCEPTION
THAT'S IMPORTANT.

AND SO, YOU KNOW, THAT'S --

>> BUT THIS IS A QUESTION OF
FUNDAMENTAL ERROR.

THIS IS NOT A QUESTION OF
SOMEONE WHO REQUESTED AN
INSTRUCTION AND OBJECTED TO THE
IMPROPER INSTRUCTION.

IT'S A QUESTION OF FUNDAMENTAL
ERROR.

AND WHEN WE GET OVER INTO THERE
AND WE LOOK AT WHAT FUNDAMENTAL
ERROR INVOLVES, I JUST DON'T --
AGAIN, MY VIEWS ARE IN THE
MINORITY OR HAVE BEEN ON THE
MINORITY ON THIS COURT, BUT I
STRUGGLE WITH SEEING HOW THERE

IS A FUNDAMENTAL ERROR IN A CASE LIKE THIS, WHERE IT'S FANCIFUL TO THINK THAT A RATIONAL JURY COULD CONVICT OF MANSLAUGHTER BY ACT.

THIS COULD BE A FIRST-DEGREE MURDER CASE FOR SURE.

>> AGAIN, JUSTICE KENNEDY, I DON'T DISAGREE, BUT AGAIN IT'S NOT MY PERCEPTION OF WHAT THE EVIDENCE IS.

IT WAS THE JURY'S PERCEPTION. AND I THINK AT LEAST IN ONE OF THE CASES THAT YOU DISAGREED IN, MAYBE IT WAS GRIFFITH, I'M NOT EXACTLY SURE, YOU WERE GLAD THAT THE COURT -- OR YOU WERE TAKEN WITH THE IDEA THAT PARDON POWER SHOULD NOT PLAY A ROLE IN THIS. WHAT WE'RE LOOKING FOR IS THE DANIELS AND GRIFFITH RULE, WHICH IS IF THERE IS AN IMPROPER INSTRUCTION ON A RELEVANT AND MATERIAL ELEMENT OF THE OFFENSE, WHERE THE FACTS ARE IN DISPUTE. AND SO, JUSTICE KENNEDY, IF YOU READ THE CLOSING ARGUMENT OF THE PROSECUTOR, THAT WAS HIS POINT EXACTLY.

THIS WAS FIRST-DEGREE MURDER. THAT'S WHAT THEY INDICTED HIM FOR.

THAT'S WHAT HE WAS SEEKING.

A JURY MAY HAVE HAD THE ABILITY TO COME BACK WITH A FIRST-DEGREE MURDER VERDICT ON THE EVIDENCE. BUT THE JURY DIDN'T SEE IT THAT WAY, JUSTICE KENNEDY.

WE KNOW THAT.

BECAUSE THEY EXPLICITLY REJECTED THAT VIEW OF THE CASE.

AND IN PART I THINK BECAUSE THE FACTS WHEN THESE KIDS GOT TOGETHER, BEFORE ALL THIS HAPPENED AND THEY WERE TALKING ABOUT WHAT THEY DID, THE EVIDENCE WAS TOTALLY CONSISTENT THAT THE NOTION WAS WE'RE NOT GOING OUT TO KILL ANYBODY. WE'RE GOING OUT JUST TO BEAT UP SOME PEOPLE.

>> WELL, AND I THINK THAT EXPLAINS WHY THE JURY COULD RATIONALLY COME BACK WITH THE SECOND-DEGREE MURDER CONVICTION.

BUT HOW YOU SUBTRACT THE
DEPRAVED MIND INTENT FROM THE
CLEARLY-ESTABLISHED, REALLY
UNDISPUTED FACTS ABOUT WHAT
HAPPENED HERE, THAT'S WHAT
ESCAPES ME.

BUT, AGAIN, I WON'T BELABOR THAT
ANYMORE.

>> THE CONCERN I HAVE IS THAT
THE JURY COULD HAVE FOUND THIS
YOUNG MAN GUILTY OF FIRST-DEGREE
MURDER, BUT THEY DIDN'T.
THEY FOUND HIM GUILTY OF
SECOND-DEGREE MURDER, WHICH
PROVIDES FOR A DIFFERENT TYPE OF
INTENT THAN DOES FIRST-DEGREE
MURDER.

SO IT'S CLEAR TO ME -- PERHAPS
CLEAR IS TOO STRONG A WORD --
THAT THE JURY STRUGGLED WITH THE
ISSUE OF INTENT.

AND MANSLAUGHTER BY ACT PROVIDES
YET A DIFFERENT TYPE OF INTENT,
THE INTENT TO COMMIT THE ACT
THAT LED TO DEATH WITHOUT HAVING
THE INTENT TO ACTUALLY KILL,
WHICH IS CLOSE TO SECOND-DEGREE
MURDER, WHICH IS DEPRAVED MIND.
SO IT APPEARS TO ME THAT THE
JURY STRUGGLED WITH THE WHOLE
ISSUE OF INTENT.

>> I AGREE.

THAT'S ABSOLUTELY RIGHT.

THAT'S WHAT MAKES THE WRONG
INSTRUCTION OF MANSLAUGHTER BY
ACT HARMFUL.

LET'S NOT CONFUSE, JUSTICE
KENNEDY, FUNDAMENTAL ERROR AND
HARMFUL ERROR.

FUNDAMENTAL ERROR IS A STANDARD
OF REVIEW WE USE WHEN THERE'S NO
CONTEMPORANEOUS OBJECTION.

BUT I WILL SAY BY DEFINITION IF
IT'S FUNDAMENTAL ERROR, IT HAS
TO BE HARMFUL.

I MEAN, HARMFUL IS A SUBSET OF
FUNDAMENTAL ERROR.

SO WHEN YOU HAVE A DISPUTED
ISSUE OF FACT OVER A CRITICAL
ELEMENT IN THIS CASE, THAT'S
WHAT THE JURY STRUGGLED WITH.
THE JURY STRUGGLES WITH INTENT
IN EVERY HOMICIDE CASE BECAUSE
THAT'S HOW THEY MAKE THEIR
DISTINCTION.

>> MAY I ASK YOU THIS?
WAS THE JURY INSTRUCTED ON THE
OTHER TWO CHARGES, THE OTHER TWO
VICTIMS IN THIS CASE?
IT WAS THREE HOMELESS PEOPLE
THAT WERE BEATEN.
>> YES.
>> WAS THE JURY CHARGED,
INSTRUCTION ON THE OTHER TWO?
>> WAS THERE A WILLIAMS
INSTRUCTION IN THE CASE?
>> YES.
WAS THE JURY TOLD THEY ALSO TOLD
THEY DID BEATINGS TO OTHERS.
>> YES.
THE CASES WERE TRIED TOGETHER.
>> YOU'VE GOT THE SECOND-DEGREE
MURDER AND TWO ATTEMPTED.
IS THIS ISSUE THE SAME ON THE
ATTEMPTS?
>> YES.
WELL, BUT IT'S THE WILLIAMS
CASE, NOT MONTGOMERY.
BUT IT'S THE SAME WRONG
INSTRUCTION.
>> BUT WE'RE LOOKING AT ALL
THREE CONVICTIONS?
>> YES, MA'AM.
WE'RE LOOKING AT ALL THREE
CONVICTIONS.
THE DISCRIMINATING FACT IN THE
INTENT IS THERE'S NO INTERVENING
THIRD-DEGREE MURDER.
IT IS THE ONE STEP REMOVED IN
THE INTENT.
>> YOU'RE INTO YOUR REBUTTAL.
>> YES, SIR.
THANK YOU.
>> MAY IT PLEASE THE COURT, MY
NAME IS CHRIS DAVENPORT AND I
REPRESENT THE STATE OF FLORIDA.
FIRST OF ALL, IF THIS COURT IS
INCLINED TO THROW OUT THE JURY
PARDON, THE STATE IS ALL FOR
THAT.
IT CERTAINLY DOESN'T RESULT IN
ANY LESSER INCLUDED OFFENSE, ANY
ERROR IN THAT, GETTING THE
DEFENDANT A NEW TRIAL, BUT WE'RE
NOT A FAN OF THE JURY PARDON
EITHER.
SO THAT WOULD BE FINE.
>> IN THIS CASE -- AND MAYBE I
HAVE -- I'M NOT INTIMATELY
FAMILIAR WITH THE FACTS, BUT IT

SEEMS THAT, WHAT JUSTICE LABARGA WAS SAYING, STRUGGLING WITH THE ISSUE OF INTENT, COULD HAVE BEEN A FIRST-DEGREE MURDER CASE. IF YOU'RE LOOKING AND THEY'RE RULING OUT FIRST-DEGREE MURDER BECAUSE THEY DON'T FIND AN INTENT TO KILL --

>> WELL, THEY DON'T FIND PREMEDITATION.

>> WELL, WE DON'T KNOW WHAT THEY FIND.

>> RIGHT.

>> BUT IF THEY'RE LOOKING AND LET'S JUST ASSUME THEY DON'T FIND INTENT TO KILL, BUT THEY FIND NOT JUST A DEPRAVED MIND, BUT AN INTENT. MANSLAUGHTER BY ACT, THE WAY IT WAS INSTRUCTED ON, WOULD HAVE REQUIRED THEM TO FIND THAT HE INTENDED TO KILL.

SO I DON'T -- IN THIS CASE -- AND OTHER CASES TO ME MAYBE ARE LESS CLEAR.

I'M NOT SURE I UNDERSTAND WHY THAT ERRONEOUS INSTRUCTION DOES NOT ENTITLE THE -- AND, AGAIN, UNFORTUNATELY IT WAS THIS COURT'S RESPONSIBILITY WITH HELP FROM THE BAR, THE STATE, TO GET CORRECT INSTRUCTIONS TO THE JUDGE, WHY THAT DOESN'T RESULT, BASED ON OUR PRECEDENT, A REVERSAL.

>> WELL, FIRST OF ALL, IT'S BECAUSE OF THE TWO-STEP RULE. THIS COURT HAS NEVER REVERSED MONTGOMERY IN A FIRST-DEGREE MURDER CASE.

IT'S ALWAYS BEEN SECOND-DEGREE MURDER AND THEN MANSLAUGHTER.

>> OKAY.

SO WHAT'S THE -- THEY CONVICTED OF SECOND-DEGREE MURDER.

>> RIGHT.

>> AND THEN WHAT'S THE NEXT DOWN?

>> THIRD-DEGREE MURDER.

>> BUT THE ARGUMENT HERE ISN'T THIRD-DEGREE MURDER AS MANSLAUGHTER BY ACT BOTH SECOND-DEGREE FELONIES?

>> THEY'RE BOTH SECOND DEGREE FELONIES.

>> WHY IS IT THAT THIRD-DEGREE
FELONY MURDER GOES BEFORE
MANSLAUGHTER BY ACT?

THEY COULD HAVE JUST FLIPPED IT.
>> THEY COULD HAVE, BUT THEY
DIDN'T.

WHAT WE'RE LOOKING AT IS IS THE
JURY SPECIFICALLY TOLD YOU START
AT THE TOP AND YOU WORK YOUR WAY
DOWN.

SO WE START WITH FIRST-DEGREE
MURDER, THEN SECOND-DEGREE
MURDER, FROM THERE WE GO TO
THIRD-DEGREE MURDER, AND UNDER
THAT WAS MANSLAUGHTER.

THE VERDICT FORM IS IN THAT
ORDER.

SO BETWEEN SECOND DEGREE MURDER
AND MANSLAUGHTER THERE'S
THIRD-DEGREE MURDER.

WHILE THE DEFENSE SAYS THAT
DIDN'T APPLY -- THAT IS EXACTLY
WHAT THEY ARGUED, WAS FIND THIS
GUY GUILTY OF AGGRAVATED BATTERY
BECAUSE THAT'S WHAT HE DID.

HE DIDN'T INTEND TO KILL.

HE INTENDED TO HIT THE GUY AND
IT WAS AGGRAVATED BATTERY.

CAUSED GREAT BODILY HARM.

THERE WAS NO DISPUTE ABOUT THAT.

THAT'S WHAT DEFENSE COUNSEL
ARGUED.

SO IN --

>> BUT IF -- ARE YOU SAYING THEN
THAT BECAUSE OF THE MANSLAUGHTER
WAS AFTER THE THIRD-DEGREE
MURDER, IT'S TWO STEPS REMOVED.

>> YES.

>> SO IF FOR WHATEVER REASON THE
MANSLAUGHTER BY ACT CAME AFTER
THE SECOND-DEGREE MURDER AND
THEN THE THIRD-DEGREE MURDER WAS
AFTER THAT, IT WOULD BE ONE STEP
REMOVED.

>> YES.

>> SO IT WOULD JUST BE
FORTUITOUS HOW YOU DID YOUR JURY
INSTRUCTION, HOW YOU DID THE
VERDICT FORM.

>> YOU CAN CALL IT GRATUITOUS OR
YOU CAN LOOK AT WHAT HAPPENED AT
THE TRIAL.

I MEAN, A LOT OF THINGS ARE
FORTUITOUS.

MAYBE SOMEBODY COULD HAVE

NOTICED THIS ERROR AND
FORTUITOUSLY NOT INSTRUCTED
INCORRECTLY TO BEGIN WITH.
YOU HAVE TO LOOK AT WHAT
HAPPENED AT THE TRIAL AND WHAT
THE JURY WAS TOLD.
>> SO I JUST WANT TO MAKE SURE I
UNDERSTAND.
WHAT YOU'RE SAYING IS IT DOESN'T
MATTER WHAT THE DEGREE OF THE
CRIME IS.
IT'S HOW IT'S PLACED ON THE JURY
FORM.
>> YES.
AND THE REASON FOR THAT IS WE'RE
NOT LOOKING AT THE LESSERS FROM
A LEGAL STANDPOINT OF THE
SENTENCES OR WHAT YOU'RE EXPOSED
TO.
YOU'RE LOOKING AT THE LESSERS
FROM THE STANDPOINT OF WHAT THE
JURY EVALUATED.
THAT'S HOW THIS COURT FIND IT IN
ABREAU.
THEY SAID IT'S TWO STEPS
REMOVED.
IF THEY WENT FROM A TO C AND
THEY SKIPPED B, IT'S NOT
REALISTIC TO THINK THAT THEY
WOULD HAVE FOUND C IF THEY
WOULDN'T FIND B.
IT'S ALL ABOUT WHAT THE JURY IS
TOLD AND HOW THE JURY IS TOLD TO
EVALUATE TOP TO BOTTOM.
SO YES.
IF THEY HAD INCORRECTLY SWITCHED
THEM AROUND, THEN WE WOULDN'T
HAVE A TWO-STEP REMOVED
ARGUMENT.
THERE'S NO OTHER WAY TO LOOK AT
IT.
YOU HAVE TO LOOK AT WHAT THE
JURY IS TOLD.
WE KNOW THEY'RE BOTH
SECOND-DEGREE FELONIES.
BUT THE JURY DOESN'T KNOW THAT.
THE JURY'S TOLD START WITH
FIRST-DEGREE, THEN LOOK AT
SECOND-DEGREE, THEN LOOK AT
THIRD-DEGREE AND THEN LOOK AT
MANSLAUGHTER.
WE CAN'T ASSUME THE JURY JUST
IGNORES THAT INSTRUCTION.
SO THAT'S HOW THEY DID IT.
THEY LOOKED AT SECOND-DEGREE,

SAID, YEAH, WE GOT HIM THERE.
THIRD-DEGREE WAS AGGRAVATED
BATTERY.

THEY SAID, NO, THAT'S NOT IT.
NOW, FOR FUNDAMENTAL ERROR WE
HAVE TO SAY NOT ONLY DID THEY
NOT FIND AGGRAVATED BATTERY,
THEY ACTUALLY WENT DOWN BELOW
THAT, IGNORING THEIR
INSTRUCTIONS, DIDN'T FIND
THIRD-DEGREE, WENT TO ANOTHER
OFFENSE LOWER, SAID, OH, THAT'S
NOT GOING TO WORK AND THEN WENT
BACK UP TWO STEPS.

THIS COURT HAS HELD SINCE 1978
THAT WE'RE NOT GOING TO ASSUME
THE JURY JUMPS AROUND LIKE THAT.
THEY'RE SPECIFICALLY TOLD NOT
TO.

THIS TWO-STEP RULE HAS BEEN
AROUND FOR A LONG TIME, AND IT
MAKES A LOT OF SENSE, BECAUSE AT
SOME POINT THE LESSERS BECOME SO
FAR REMOVED FROM WHAT THE
DEFENDANT WAS CONVICTED OF IT
MAKES NO SENSE TO SAY THAT HE
DIDN'T GET A FAIR TRIAL.

FOR EXAMPLE, SAY THERE WAS AN
ERROR IN THE BATTERY
INSTRUCTION, BECAUSE THERE WAS
ANOTHER LESSER UNDERNEATH THAT.
ARE WE GOING TO REVERSE WHEN
THEY FOUND HIM GUILTY OF
SECOND-DEGREE MURDER?

WE'RE NOT GOING TO UNDER THAT
TWO-STEP RULE.

>> IS THERE ANY PROBLEM WITH THE
THIRD-DEGREE FELONY INSTRUCTION?
IT SAID AT THE TIME THAT IF HE
DIED -- DOES IT SUGGEST THAT HE
-- THAT THE DEATH HAD TO OCCUR
DURING THE CRIME?

BECAUSE THE INSTRUCTION'S
CHANGED NOW.

IT SAYS THE DEATHS OCCURRED AS A
CONSEQUENCE AND WHILE THOMAS
DAUGHERTY WAS ENGAGED IN THE
COMMISSION OF AGGRAVATED
BATTERY.

IT NOW SAYS WHILE ENGAGED IN THE
COMMISSION OF A FELONY, THE
DEFENDANT CAUSED THE DEATH OF
THE VICTIM.

IT SEEMS LIKE THERE IS A PROBLEM
WITH THAT THIRD-DEGREE FELONY

MURDER INSTRUCTION.

>> SOUNDS MORE CLEAR.

LET ME SAY THAT NOBODY OBJECTED TO THE THIRD-DEGREE MURDER INSTRUCTION, NOR WAS IT INVOLVED AS AN ISSUE ON APPEAL, SO AS FAR AS WHETHER OR NOT THAT'S FUNDAMENTAL ERROR AS WELL, I WOULD SUBMIT THAT IT'S NOT, THAT IT'S -- YOU KNOW, ESPECIALLY WHEN YOU LOOK AT HOW THIS WAS ALL ARGUED.

>> I GUESS THE PROBLEM I HAVE IS IF WE AFFIRM BASED ON YOUR THEORY, WE'VE GOT TO SAY THAT THE THIRD-DEGREE FELONY MURDER INSTRUCTION, WHICH YOU'RE SAYING GETS THIS OUT OF THE FUNDAMENTAL ERROR, THEY WERE CORRECTLY INSTRUCTED ON IT.

AND SO IT'S THIS COURT REALLY PUTTING ITS STAMP OF APPROVAL ON SOMETHING THAT WE'VE NOW CHANGED.

>> WELL, I THINK WHAT YOU NEED TO SAY IS THERE WAS AN OFFENSE INSTRUCTED ON THERE WAS DIRECTLY APPLICABLE BETWEEN MANSLAUGHTER AND THE VERDICT THAT THEY REACHED AND THEREFORE IT'S NOT FUNDAMENTAL ERROR IN THE SENSE THAT THE JURY COULD NOT HAVE REACHED ITS VERDICT WITHOUT THE ASSISTANCE OF THE MONTGOMERY ERROR.

BECAUSE WE'RE HERE DISCUSSING THE MONTGOMERY ERROR AND NOT AN ERROR IN THE THIRD-DEGREE FELONY MURDER.

I MEAN, THAT'S NEVER BEEN BRIEFED.

THAT'S NEVER BEEN BROUGHT UP.

I HONESTLY DON'T KNOW WHAT THE LAW IS ON THAT BECAUSE IT WAS NEVER RAISED BEFORE.

SO IF THIS COURT IS GOING TO FIND THAT ERROR, TOO, I DON'T THINK THAT'S FAIR.

NOBODY HAS RAISED IT.

SO THE WAY THAT THE TWO STEPS WORKS IS WHAT DID THE JURY LOOK AT.

ARE WE GETTING SO FAR OFF FROM WHAT THE VERDICT IS THAT IT'S NOT SOMETHING THAT'S MATERIAL TO

WHAT THE JURY DECIDED TO
CONVICT.
AND THIS TWO-STEP RULE HAS BEEN
AROUND FOREVER.
AND IF THE TWO-STEP RULE DOESN'T
APPLY IN THIS CONTEXT, THEN
FIRST-DEGREE MURDER CASES SHOULD
BE REVERSED UNDER MONTGOMERY,
TOO.
AND THIS COURT HAS NEVER DONE
THAT.
AND AT SOME POINT IT BECOMES SO
FAR REMOVED FROM THE ACTUAL
VERDICT ITSELF THAT IT DOESN'T
MAKE SENSE TO FIND THAT IT'S
FUNDAMENTAL ERROR.
LET ME REITERATE, THIS IS
FUNDAMENTAL ERROR.
THERE WAS NO OBJECTION BELOW.
THIS COULD HAVE BEEN FIXED BELOW
IF THERE HAD BEEN A REJECTION.
THIS IS FUNDAMENTAL ERROR.
THE DEFENDANT HAS TO SHOW THAT
THE JURY COULD NOT HAVE REACHED
ITS VERDICT WITHOUT THE
ASSISTANCE OF THIS ERROR.
THEY COULD NOT HAVE FOUND HIM
GUILTY OF SECOND-DEGREE MURDER
WITHOUT THIS ERRONEOUS
MANSLAUGHTER INSTRUCTION.
>> NO ONE'S ARGUING THERE'S NOT
ENOUGH EVIDENCE OF SECOND-DEGREE
MURDER.
YOU KNOW, AGAIN, SOME JURY MIGHT
HAVE FOUND HIM GUILTY OF
FIRST-DEGREE MURDER.
SO THAT CAN'T BE THE EXACT
DEFINITION OF FUNDAMENTAL ERROR
IN THE CONTEXT -- THE JURY
INSTRUCTION CASES ARE VERY
DIFFERENT, IT STRIKES ME, THAN
NOT OBJECTING DURING CLOSING
ARGUMENT OR, YOU KNOW, LETTING
THE PROSECUTION PUTTING IN
EVIDENCE THAT SHOULDN'T BE PUT
IN BECAUSE OF WHAT MR. SELIGER
SAID, WHICH IS THAT THE JURY
DEPENDS SOLELY ON THE JUDGE FOR
THE INSTRUCTIONS.
SO IF THE INSTRUCTIONS ON THE
LAW ARE INCORRECT AND COULD HAVE
MISLED THE JURY, THAT IS
SIGNIFICANT ENOUGH THAT WE LOOK
NOT WHETHER THEY COULD HAVE
STILL CONVICTED OF SECOND-DEGREE

MURDER?

DO YOU AGREE WITH THAT?

THE FUNDAMENTAL ERROR
INSTRUCTIONS HAVE BEEN A LITTLE
LESS OF WHAT YOU'RE SAYING?

>> NO, I DON'T AGREE WITH THAT.

>> THEN WE COULDN'T HAVE DECIDED
ALL THESE CASES BECAUSE THERE'S
ALWAYS ENOUGH EVIDENCE OF THE
PRIMARY CRIME.

HERE THE SECOND-DEGREE MURDER.

>> RIGHT.

AND I'M NOT SAYING THAT ALL YOU
HAVE TO LOOK AT IS SAY CLEARLY
THIS WAS A SECOND-DEGREE MURDER
CASE.

IT WAS ACTUALLY PROBABLY A
FIRST-DEGREE MURDER CASE.
I'M NOT SAYING THAT AT ALL.
I'M NOT SAYING THAT'S THE
HARMLESS ERROR ANALYSIS, IS
THERE SUFFICIENT EVIDENCE TO
CONVICT.

IF YOU GET RID OF THE JURY
PARDON, I THINK YOU MIGHT HAVE
AN ARGUMENT THAT'S ALL YOU LOOK
AT.

BUT WE'RE NOT TALKING ABOUT
THAT.

>> THE STATEMENT YOU MADE
EARLIER ABOUT STRETCHING IT OUT
DOWN TO BATTERY, HOW FAR ARE WE
GOING TO GO, AND I CAN
UNDERSTAND THE ARGUMENT BEING
MADE ABOUT SIMPLE BATTERY.
SOMEBODY'S CHARGED WITH
FIRST-DEGREE MURDER BY BEATING
SOMEBODY WITH A BASEBALL BAT TO
DEATH, AND NOW YOU'RE SAYING
REVERSE THE CASE BECAUSE BATTERY
OR SIMPLE ASSAULT WAS NOT
PROPERLY CHARGED.

BUT MANSLAUGHTER IS ALWAYS
WITHIN THE REALM OF POSSIBILITY
OF HOMICIDES.

WHEN YOU TRY A FIRST-DEGREE
MURDER CASE, JURIES COME BACK
WITH A LESSER OF MANSLAUGHTER.
IT HAPPENS ALL THE TIME.

IN FACT, IN SOME INSTANCES
LAWYERS SHOOT FOR THAT.

THAT'S ALL THEY HAVE, A LESSER
CHARGE.

BUT MANSLAUGHTER IS NOT THAT FAR
REMOVED.

AND IN THIS INSTANCE ALL THREE WERE TRIED AT THE SAME TIME, SO THE JURY HEARD ABOUT HOW ALL THREE OF THESE VICTIMS WERE BEATEN.

TWO OF THEM SURVIVED AND ONE DIED AND HE'S THE ONE THAT WAS BEATEN OVER THE HEAD WITH A BASEBALL BAT.

SO IT IS THE REALM OF POSSIBILITY IN THIS INSTANCE THAT A JURY COULD SAY IF IT HAD MANSLAUGHTER BY ACT PROPERLY CHARGED, THAT THE JURY COULD HAVE DETERMINED THEY INTENDED TO BEAT THESE PEOPLE UP, BUT NOT TO KILL THEM.

AND THE ACT OF BEATING THEM UP IS WHAT LED TO THE DEATH.

AND THEREFORE IT SHOULD BE MANSLAUGHTER BY ACT.

THAT'S WHAT OCCURRED IN THE OTHER TWO INSTANCES THAT THE JURY HEARD.

BUT IN THIS PARTICULAR CASE SOMEBODY WENT TOO FAR.

SO IT IS WITHIN REALM OF POSSIBILITY GIVEN THE FACTS IN THIS CASE THAT A JURY COULD HAVE -- AND OBVIOUSLY MAYBE NOT AGREE ON THAT, BUT A JURY COULD HAVE DETERMINED THAT IT WAS MANSLAUGHTER BY ACT IF IT HAD BEEN PROPERLY CHARGED ON THE INTENT ISSUE.

>> I WOULD SUBMIT, YOUR HONOR, THAT IF WE CHANGE FROM THE TWO-STEP RULE TO THE REALM OF POSSIBILITY RULE, WE'RE GOING TO BE SECOND-GUESSING THE JURY AND WE'RE GOING TO HAVE CASES THAT ARE ALL OVER THE PLACE.

THE TWO-STEP RULE IS VERY USEFUL IN A SENSE THAT IT'S A RULE AND IT'S EASY TO APPLY.

IS THERE SOMETHING IN BETWEEN THE INCORRECT LESSER AND THE OFFENSE CONVICTED OF.

THAT'S VERY SIMPLE.

AND IT'S LOGICAL.

BECAUSE AS THIS COURT HAS EXPLAINED, IF WE GO FROM A TO B TO C, IF THEY DIDN'T FIND B, THEY AREN'T GOING TO FIND C BECAUSE C IS EVEN LESS AND THEY

HAVE TO GO FROM TOP TO BOTTOM.
AND I THINK THE COURT IS --
>> ISN'T THAT THE PROBLEM, IS
NOT THAT NECESSARILY --
NECESSARILY THAT MANSLAUGHTER BY
ACT, WHICH HAS AN INTENTIONAL
ELEMENT, IS LESSER IN ANY WAY
THAN THIRD-DEGREE FELONY MURDER.
I MEAN, THAT'S WHERE I -- IF
YOU'RE GOING ON INTENT, THEN IT
SEEMS TO ME THAT GOING FROM
FIRST, SECOND AND THEN
MANSLAUGHTER BY ACT WOULD BE THE
LOGICAL WAY TO GO IN THIS CASE.
SO I JUST DON'T -- I CAN SEE AND
WHAT JUSTICE LABARGA IS SAYING,
NO, YOU WOULDN'T GO TO A SIMPLE
BATTERY.
YOU GOT TO LOOK AT THE FACTS
ALSO OF THE CASE TO SEE WHETHER
IN THIS CASE IT WOULD BE
FUNDAMENTAL ERROR IF THE JURY IS
MISLED BY AN ERRONEOUS
INSTRUCTION.
>> OKAY.
I HAVE TWO ANSWERS TO THAT.
FIRST OF ALL, FACTUALLY
THIRD-DEGREE MURDER WITH THE
UNDERLYING FELONY OF AGGRAVATED
BATTERY IS EXACTLY WHAT DEFENSE
COUNSEL ASKED FOR.
HE SAID, YEP, WE COMMITTED AN
AGGRAVATED BATTERY.
WE HAD NO INTENT TO KILL.
UNDER THE INSTRUCTIONS AS GIVEN,
YOU FIND HIM GUILTY OF
AGGRAVATED BATTERY.
AND, YOU KNOW, HE SAID HE WASN'T
INVOLVED IN THE ONE THAT WAS
ACTUALLY DEAD.
BUT IF IT WAS, IT WAS AGGRAVATED
BATTERY.
SO FACTUALLY THE THIRD-DEGREE
MURDER FITS A WHOLE LOT BETTER
THAN MANSLAUGHTER.
LEGALLY, THE JURY IS TOLD HERE'S
WHAT THE LESSERS ARE, FIRST,
SECOND, THIRD, MANSLAUGHTER.
AND I WOULD SUBMIT THAT TO A LAY
PERSON ON THE STREET, IT SEEMS
WORSE TO COMMIT THIRD-DEGREE
MURDER THAN IT DOES TO COMMIT
MANSLAUGHTER.
MANSLAUGHTER IS JUST SOMEBODY
GOT KILLED.

THIRD-DEGREE MURDER, GEE, THAT SOUNDS MORE SERIOUS.

SO FROM A COMMON SENSE STANDPOINT, IT SEEMS MORE SERIOUS.

BUT, MORE IMPORTANTLY, THE JURY IS TOLD HERE'S WHAT THE LAW IS. AND THE LAW IS YOU START FROM THE TOP AND YOU WORK TO THE BOTTOM AND THE TOP IS FIRST-DEGREE, THEN COMES SECOND-DEGREE, THEN COMES THIRD-DEGREE, THEN COMES MANSLAUGHTER.

AND I WOULD HOPE THAT THE JURY WOULDN'T GO BACK THERE AND SAY, GEE, THIS DOESN'T SEEM RIGHT, THAT MANSLAUGHTER SEEMS MORE SERIOUS THAN THIRD-DEGREE MURDER.

THAT ASSUMES THE JURY IS COMPLETELY IGNORING ITS INSTRUCTIONS.

I DON'T THINK THAT THIS COURT WANTS TO GO DOWN THAT ROAD. SO THE JURY WHO WAS INSTRUCTED SPECIFICALLY.

NOW, WHETHER WE LOOK AT IT AND SAY MANSLAUGHTER SHOULD HAVE BEEN ABOVE THIRD-DEGREE MURDER, I THINK THERE'S DEBATE ABOUT THAT.

IT SEEMS MORE LOGICAL TO ME TO GO ONE, TWO, THREE, MANSLAUGHTER.

BUT REGARDLESS THAT WASN'T OBJECTED TO, IT'S NOT AN ISSUE ON APPEAL, AND YOU HAVE TO LOOK AT WHAT THIS JURY WAS TOLD. WE CAN'T LOOK AT THIS IN THE VACUUM THEY WERE TOLD INCORRECT STUFF.

THE INCORRECT THING WAS ON MANSLAUGHTER.

AND THIS COURT HAS CONSISTENTLY APPLIED THAT TWO-STEP RULE. THIS COURT HAS NEVER APPLIED THE MONTGOMERY TO FIRST-DEGREE MURDER.

AND IF YOU GET RID OF THE TWO-STEP RULE, THEN THAT'S THE NEXT CASE YOU'RE GOING TO GET. AND I DON'T SEE HOW LOGICALLY YOU CAN SAY THAT IT DOESN'T APPLY IN THAT CASE.

>> WHAT ABOUT WANT INCORRECT
INSTRUCTION, AT LEAST THE
ARGUMENT THE INCORRECT
INSTRUCTION OF AGGRAVATED
BATTERY AS THE UNDERLYING FELONY
IN THIRD-DEGREE MURDER?

>> THAT IT WAS AN INCORRECT
INSTRUCTION?

I DON'T KNOW THAT NECESSARILY --
AGAIN, FUNDAMENTAL ERROR.

>> RIGHT.

THAT'S WHAT WE DEEMED IT.

>> RIGHT.

SO NOW WE HAVE FUNDAMENTAL ERROR
IN THE MANSLAUGHTER INSTRUCTION
AND FUNDAMENTAL ERROR IN THE
THIRD-DEGREE MURDER INSTRUCTION.
THAT WAS NEVER RAISED ON APPEAL
AND ISN'T PROPERLY BEFORE THIS
COURT.

I THINK THE COURT HAS TO LOOK AT
IS THERE TWO STEPS.

AND THERE IS TWO STEPS HERE.

THERE'S NO OTHER WAY TO ANALYZE
IT.

IF WE ANALYZE IT BY DEGREES OF
FELONY, THEN YOU HAVE TO TELL
THE JURY WHAT THE DEGREES OF
FELONY ARE.

THEN WE HAVE CONCERNS ABOUT
THEY'RE GOING TO FIGURE OUT WHAT
THE PENALTIES ARE AND THEY'RE
GOING TO CONCERN THEMSELVES WITH
SENTENCING AND THAT OPENS A CAN
OF WORMS I DON'T THINK WE WANT
TO OPEN.

SO YOU HAVE TO LOOK AT HOW IT
WAS LISTED ON THE VERDICT FORM
BECAUSE THAT'S WHAT THEY'RE TOLD
TO FOLLOW.

WHEN IT'S LISTED ON THE VERDICT
FORM THIS WAY, IT'S TWO STEPS.
WE HAVE ALWAYS APPLIED THIS
TWO-STEP RULE.

IT'S CLEAN, IT'S LOGICAL, IT'S
FAIR.

THE DEFENDANT IS NOT ENTITLED TO
A PERFECT TRIAL.

HE'S ENTITLED TO A FAIR TRIAL.

I WOULD SUBMIT THE DEFENDANT IN
THIS CASE GOT A FAIR TRIAL.

LET ME TURN TO THE ATTEMPTED
DEGREE MURDER COUNTS BECAUSE
THEY'RE A LITTLE DIFFERENT HERE
BECAUSE THERE WAS NO ATTEMPTED

THIRD-DEGREE MURDER INSTRUCTION.
THERE IS NO TWO STEPS REMOVED
ARGUMENT AS TO COUNTS TWO AND
THREE HERE.

OUR ARGUMENT IS THE WAY THAT
THIS COURT HAS LOOKED AT THESE
MONTGOMERY ISSUES IS WAS THERE A
VIABLE ALTERNATIVE.

SO WE WOULD SUBMIT THAT THE WAY
THIS CASE WAS ARGUED AND
INSTRUCTED ON, DEFENSE COUNSEL
ASKED FOR AGGRAVATED BATTERY.
THAT'S WHAT THEY WANTED HIM TO
BE CONVICTED OF FOR THESE TWO
VICTIMS WHO DIDN'T DIE.

WHEN YOU LOOK AT THE AGGRAVATED
BATTERY INSTRUCTION HERE, IT'S
REALLY A CORRECT MANSLAUGHTER
INSTRUCTION.

SO IF THEY -- UNLIKE THE OTHER
CASES WHERE THIS COURT HAS
REVERSED, IN THIS CASE ONCE THEY
FOUND NO INTENT TO KILL, THEY
ELIMINATED MANSLAUGHTER, BUT
THEY HAD AGGRAVATED BATTERY.

SO IF THEY FOUND HE INTENDED TO
DO THE ACT, HE INTENDED TO DO
THE ACT, EVERYBODY CONCEDED
THERE WAS GREAT BODILY HARM, IF
THAT'S WHAT THE JURY FOUND HERE,
THEY COULD HAVE FOUND HIM GUILTY
OF AGGRAVATED BATTERY.

THEY DIDN'T DO THAT.

THEY FOUND DEPRAVED MIND.

BUT THEY HAD THE OPTION TO DO
THAT.

SO THEY HAD THE OPTION TO FIND
MANSLAUGHTER CORRECTLY
INSTRUCTED UPON THROUGH THIS
AGGRAVATED BATTERY INSTRUCTION.
AND SO WE WOULD SUBMIT THAT THAT
IS NOT FUNDAMENTAL ERROR ON
COUNTS TWO AND THREE AND WE
WOULD ASK YOU TO AFFIRM THE
DECISION OF THE FOURTH DCA.
THANK YOU.

>> THANK YOU.

>> LET ME CLARIFY A COUPLE OF
THINGS I THINK ARE
MISCONCEPTIONS.

ONE IS THE DEFENSE DID NOT ASK
FOR AGGRAVATED BATTERY ON THE
MURDER CHARGE.

THERE WAS ON THE ATTEMPTS THE
LESSERS OF AG BATTERY AND

BATTERY.

BUT IN THE MURDER CHARGE, THE
LAST CHOICE FOR THE JURY WAS AG
BATTERY.

BUT UNDERSTAND MY ARGUMENT.

I'M ONLY ASKING THAT THE
TWO-STEP RULE BE REMOVED IN THE
HOMICIDE REALM, NOT -- I'M NOT
TALKING ABOUT GOING ANYTHING
BELOW THE HOMICIDE REALM,
PRECISELY BECAUSE INTENT IS THE
CRITICAL ISSUE FOR THE JURY TO
DECIDE.

SECOND IS THERE'S NOTHING IN ANY
JURY INSTRUCTION THAT I'VE EVER
HAD -- AND CERTAINLY NOT IN THIS
CASE -- THAT TELLS THE JURY TO
START FROM TOP TO BOTTOM.

WE CAN SPECULATE ALL WE WANT
WHAT JURIES DO.

BUT IF A JURY WANTS TO GO INTO
THE JURY ROOM AND DELIBERATE AND
SAY, WELL, WE DON'T THINK THEY
PROVED ANY CRIME AT ALL, THEY
CHECK THE NOT GUILTY VERDICT AND
THAT'S IT.

THERE'S NO RULE THAT SAYS YOU
START AT THE TOP AND YOU WORK
YOUR WAY DOWN.

WHO KNOWS WHAT JURIES DO?

IT'S THE SAME QUESTION THAT WAS
ARGUED IN MONTGOMERY.

WE CAN SPECULATE ALL WE WANT.

BUT WE KNOW IN THIS CASE THE
JURY HAD THE CHOICE OF
FIRST-DEGREE MURDER AND REJECTED
IT.

THEY HAD A CHOICE OF
SECOND-DEGREE MURDER AND CHOSE
IT.

THEY HAD A CHOICE OF
MANSLAUGHTER BY ACT WITH THE
WRONG INSTRUCTION.

AND THAT'S THE ERROR IN THIS
CASE THAT IS NOT CURED BY ANY
OTHER ACT.

>> WHAT ABOUT HER ARGUMENT THAT
THIRD-DEGREE MURDER WAS A
PERFECT FIT AS A LESSER?

>> IT WASN'T.

THAT'S -- MY ARGUMENT IS IT'S
NOT A PERFECT FIT BECAUSE
THERE'S -- THE RULE SHOULD HAVE
BEEN, SINCE THERE WAS NO
EVIDENCE TO SUPPORT GIVING THAT

INSTRUCTION, IT SHOULDN'T BE GIVEN.

AND THIS GOES BACK TO JUSTICE QUINCE'S POINT.

WHERE SOMETHING'S LISTED ON A VERDICT IS TOTALLY CAPRICIOUS. HOW DO WE RELY ON A RULE OF LAW WHERE -- WE HAD THE EXACT SAME FACTS AND THE LAWYERS -- THE PROSECUTOR PREPARED THE JURY VERDICT AND PUT FIRST, SECOND, MANSLAUGHTER AND THEN THIRD-DEGREE MURDER?

WOULD THERE BE A RULE OF LAW THAT SAID WE SHOULD TREAT THAT CASE DIFFERENT WITH THE EXACT SAME SET OF FACTS THAT IF IT WAS LIKE IN THIS CASE?

THERE ARE -- YOU SEE CASES WHERE THE VERDICT IS LISTED WHERE MANSLAUGHTER COMES BEFORE THIRD-DEGREE MURDER.

>> YOU SAID THAT THIS DOESN'T FIT INTO THIRD-DEGREE FELONY MURDER WITH AGGRAVATED BATTERY AS THE UNDERLYING FELONY. MISS DAVENPORT SAID THAT'S EXACTLY WHAT THE DEFENSE LAWYER ARGUED FOR.

>> THAT'S NOT CORRECT. YOU CAN READ -- ACTUALLY, WHAT THE LAWYER ARGUED ABOUT, AG BATTERY, WAS THE ATTEMPTS. THAT WAS HIS ARGUMENT RELATED TO THIS CASE.

HAD NOTHING TO DO WITH THE MURDER CASE.

ACTUALLY, WHEN YOU READ HIS CLOSING ARGUMENT IN THE MURDER PART OF THE CASE, ALL HE TELLS THE JURY IS REPEATING THE EVIDENCE, THERE WAS NO INTENT TO KILL.

HE DOESN'T EVER SUGGEST THE VERDICT THAT THE JURY SHOULD RETURN ON THE MURDER COUNT. THAT'S THE DISTINCTION BETWEEN THE MURDER COUNT AND THE ATTEMPT TO MURDER, WHERE HE DOES EXPLICITLY SAY FIND MY CLIENT

>> ARE YOU ASKING FOR REVERSAL ON THE ATTEMPTED SECOND-DEGREE MURDER?

>> YES, AND EVERY COUNT. AND WE THINK WILLIAMS IS A

GIVEN.

AG BATTERY DOESN'T CONTROL THAT.
WILLIAMS EXPLICITLY -- LET ME
BACK UP.

IT DOESN'T EXPLICITLY ADDRESS
THIS ISSUE, BUT IF YOU READ THE
FOURTH DISTRICT OPINION, IT DOES
ADDRESS THIS OPINION.

THANK YOU.

>> THANK YOU FOR YOUR ARGUMENTS.