Loretta Reed v. State of Florida

MR. CHIEF JUSTICE

GOOD MORNING AND WELCOME TO THE ORAL ARGUMENT CALENDAR OF THE FLORIDA SUPREME COURT. WE REGRET BEING A LITTLE BIT LATE GETTING STARTED THIS MORNING, BUT THE COURT HAD AN EMERGENCY MATTER THAT IT HAD TO DEAL WITH, AND I, ALSO, WOULD STATE THAT I THINK IT IS REGRETABLE THAT THIS IS THE LAST DAY OF ORAL ARGUMENT THIS WEEK, BECAUSE BY TOMORROW, THE MARSHAL WILL BE BACK IN FULL VOICE. SO THE FIRST CASE ON THE ORAL ARGUMENT CALENDAR IS REED VERSUS STATE. MR. SPIVEY.

MAY IT PLEASE THE COURT. COUNSEL FOR THE STATE. MY NAME IS JAMIE SPIVEY. I AM A LAWYER WITH THE PUBLIC DEFENDER'S OFFICE, AND IT IS MY PRIVILEGE THIS MORNING TO REPRESENT THE PETITIONER IN THIS CASE, LORETTA READ. IT IS A -- LORETTA REED. IT IS A CASE FROM THE FIRST DISTRICT, ASKING THE CERTIFIED QUESTION AS FOLLOWS, IS THE GIVING OF A STANDARD JURY INSTRUCTION WHICH DEFINES A DISPUTEDEMET OF CRIME FUNDAMENTAL IN ALL CASES, EVEN WHEN THE EVIDENCE IS OVERWHELMING OF GUILT AND THE PROSECUTOR HAS NOT MADE IT A FEATURE OF HIS ARGUMENT. WE SAY IT IS FUNDAMENTAL ERROR FOR THE FOLLOWING REASONS. TO START WITH, THE STATE HAD TO PROVE THE CORRECT INSTRUCTION FOR THIS CASE FOR THIS CHARGE OF AGGRAVATED CHILD ABUSE. THE STATE HAD TO PROVE THAT THE ACCUSED ACTUALLY HASHORD ILL WILL -- ACTUALLY HARBORED ILL WILL, INTENT, SPITE. MR. CHIEF JUSTICE

TO HOLD THAT THIS FUNDAL ERROR WOULD SERIOUSLY EXPAND THE CONCEPT OF FUNDAMENTAL ERROR, WOULD IT NOT? IN THAT, WHENEVER THERE WOULD BE A DEFINITION THAT WAS BEGIN IN A JURY INSTRUCTION, THAT DIFFERS FROM A RULE OR A DEFINITION THAT IS STATED IN A CASE OUT OF THIS COURT, THEN THE PROPOSITION WOULD BE THAT, REGARDLESS OF OBJECTION, THAT THERE WOULD BE AN ABILTY TO RAISE THAT ERROR ON APPEAL AND, BASICALLY, WOULD THERE BE ANY TIME LIMIT ON WHEN IT COULD BE RAISED?

WELL, WE ARE NOT TALKING ABOUT THOSE MATTERS, YOUR HONOR. WE ARE TALKING ABOUT ESSENTIAL ELEMENTS OF THE CHARGE. THIS IS AN ESSENTIAL ELEMENT OF THE CHARGE, AND THAT IS WHY IT IS FUNDAMENTAL ERROR. THE STATE HAD TO PROVE THAT THE DEFENDANT ACTED WITH ILL WILL, HATRED, SPITE OR AN EVIL INTENT, AND ALL WE HAVE TO KNOW WHETHER OR NOT THEY ACCOMPLISHED THAT OBJECTIVE IS THE JURY'S VERDICT. WE DON'T KNOW FROM THAT VERDICT. IF I MAY, YOUR HONOR, WE DON'T KNOW FROM THAT VERDICT, IF HE ACTED THAT WAY, AND WHY NOT? BECAUSE THAT QUESTION WAS NOT POSED. SO WE DON'T KNOW, FROM THIS VERDICT, IF THEY PROVED THAT OR NOT. MR. CHIEF JUSTICE

JUSTICE PARIENTE.

YES, MA'AM.

HE WAS CHARGED WITH WILLFUL TORTURE, AGGRAVATED BATTERY, AND/OR MALICIOUS PUNISHMENT. WERE THERE SEPARATE CHARGES GIVEN FOR AGGRAVATED BATTERY AND WILLFUL TORTURE?

WHAT YOU HAVE JUST TALKED ABOUT IS WHAT IS COMMONLY REFERRED TO AS TECHNICAL MALICE. THE IDEA THAT SOMEBODY COULD COMMIT THESE ACTS, COULD HAVE PUNISHED HER

CHILD BY HAVING --

NO, THAT IS NOT WHAT -- I THOUGHT -- THE MALICIOUS PART GOES TO MALICIOUS PUNISHMENT. CORRECT?

YES, MA'AM.

BUT WASN'T HE, ALSO, OR SHE, ALSO, CHARGED WITH AGGRAVATED BATTERY?

AGGRAVATED CHILD ABUSE.

AGGRAVATED CHILD ABUSE.

YES, MA'AM.

NOW, IS THAT, IS THE MALICE DEFINITION PART OF AGGRAVATED CHILD ABUSE?

THE CORRECT DEFINITION IS THAT THE ACCUSED HARBORED ILL WILL, HATRED, SPITE OR AN EVIL INTENT. THEY HAVE TO CONCLUDE THAT. THAT IS THE LAW. THERE IS NO DISPUTE. THAT IS IN THE CASE OF YOUNG. THEY HAVE TO PROVE THAT, RATHER THAN DEFINE MALICE, MALICE AS WHAT IS DEFINED AS TECHNICAL MALICE.

THE WILLFUL TORTURE ASPECT OF AGGRAVATED CHILD ABUSE, THAT MALICE, ALSO, IS A DEFINITION PART OF THAT CRIME?

IT HAS TO BE INCLUDED, YOUR HONOR. I AM NOT SURE WHAT OU ARE GETTING AT, BUT THIS MUST BE INCLUDED.

THERE WERE THREE SEPARATE CHARGES AND THERE WAS ONE GENERAL VERDI. WHAT I AM ASKING IS WHTHER THE MALICE DEFINITION IS PART OF THE OTHER TWO OF THE THREE CHARGES, IN WHICH THE JURY RENDERED A GENERAL VERDICT.

OKAY. NO, MA'AM.

OKAY. SO WHY, IN THAT SITUATION, BECAUSE THERE IS CERTAINLY MORE THAN ENOUGH IN THE INSTRUCTIONS, WHICH ARE ACCURATE AS TO TWO OF THE OTHER THREE CHARGES AND THERE WAS JUST ONE GENERAL VERDICT. WHY, UNDER THAT LIMITED CIRCUMSTANCE, ISN'T THIS HARMLESS BEYOND A REASONABLE DOUBT?

THAT IS WHAT I WAS GETTING TO WHE I INITIALLY STARTED ANSWERING YOUR QUESTION, YOUR HONOR, IS THAT IF YOU ALLOW THAT THEN YOU ARE ACTUALLY ALOWING A VERDICT BASED ON TECHNICAL MALICE AND NOT MALICE IN FACT, IF YOU DO NOT, ALSO, INCLUDE THE DEFINITION OF HASHORD -- HARBORED ILL WILL, HATRED, SPITE OR EVIL INTENT. WHEN YOU COME BACK WITH A JURY VERDICT THAT SAYS YOU KNOW WHAT? SHE WENT TOO FAR. SHE SHOULDN'T HAVE DONE WHAT SHE DID, AND SHE BROKE THE LAW IN DOING WITH SHE DID. -- IN DOING WHAT SHE DID. WE MAY HAVE CHILD ABUSE HERE, BUT THEY DO NOT COME BACK. THAT VERDICT DOES NOT SAY THAT SHE ACTED WITH ILL WILL, HATRED, SPITE OR AN EVIL INTENT, MALL NIECE FACT.

WHAT WAS THE VERDICT IN THIS CASE?

THAT SHE DID NOT ACT WITH ILL IL, PIE,HREDR EVIL INENT. THE QUESTIOIS WTER O NT IT IS CLD ABE.

SO THEERDICT LACKED THE EVIL INTENT.

YES, MA'AM.

JUST ILL WILL OR -- THEY USED IT -- BECAUSE THE FOURTH DISTRICT SAYS THAT THE STATE DID NOT USE THE ERRONEOUS JURY INSTRUCTION, IN TERMS OF TRYING TO PROFITS CASE. COULD YOU CLUE ME IN.

THIS IS OUR POINT, YOUR HONOR. THEY DID USE THE ERRONEOUS INSTRUCTION, BECAUSE THE CASE OF YOUNG SAYS THEY HAVE TO INCLUDE, IN THE DEFINITION, THAT THE ACCUSED, WHEN THE JUDGE DEFINES MALICE, HE HAS TO SAY IT MEANS THAT THE ACCUSED ACTUALLY HARBORED ILL WILL, HATRED, SPITE OR EVIL INTENT.

BUT WE ARE NOT DEALING, HERE, WITH THE QUESTION OF YOUNG. WE ARE DEALING, HERE, WITH GAYLORD OUT OF THIS COURT, WHICH CAME OUT BEFORE THE STANDARD JURY INSTRUCTIONS. GAYLORD CAME OUT IN 1979 OR '80. THE STANDARD JURY INSTRUCTIONS CAME OUT IN 1981.

THANK YOU, YOUR HONOR.

AND GAYLORD DOESN'T SAY ANYTHING ABOUT ACTUAL MALICE, WHAT JUDGE WEBSTER'S OPINION IN YOUNG WAS DIFFERENTIATING BETWEEN THE TWO TYPES OF MALICE. IT DOES DEAL WITH THE FACT THAT THERE HAS TO BE A FINITE DEFINITION OF MALICE, IN ORDER TO MEET AN ATTACK AGAINST THE CONSTITUTIONAL VAGUENESS. AND THAT IS WHAT GAYLORD IS ALL ABOUT, AND IT GIVES THIS DEFINITION. BUT SINCE 1981, THE, THE STANDARD JURY INSTRUCTION HAS BEEN USING THIS OTHER DEFINITION. CORRECT?

YES, SIR, BUT --

AND YOUR CLIENT DIDN'T, AND COUNSEL FOR YOUR CLIENT, DIDN'T OFFER, TO THIS TRIAL COURT, ANY OTHER DEFINITION, OTHER THAN THE STANDARD JURY INSTRUCTION. ISN'T THAT RIGHT?

YES, SIR.

THAT DIFFERS FROM YOUNG. WHERE YOUNG OFFERED A DIFFERENT INSTRUCTION, ISN'T THAT CORRECT?

YES. IN YOUNG, THE, IN YOUNG, THE DEFENDANT DID ASK FOR THAT INSTRUCTION, BUT WE ARE SAYING THAT, THE CORRECT INSTRUCTION MUST INCLUDE THIS DEFINITION. AND IT SHOULD HAVE BEEN IN THE STANDARD JURY INSTRUCTIONS. AND IT IS THE JUDGE'S DUTY TO, IT IS THE JUDGE'S DUTY TO MAKE SURE THAT THE COURT IS PROPERLY INSTRUCTED. THE STATE CITED, IN ITS NOTICE OF SUPPLEMENTAL AUTHORITY, SCOTT V STATE, A CASE THAT YOU ALL JUST DECIDED LAST WEEK, AND IT IS VERY GOOD LANGUAGE IN IT, WHICH I WOULD LIKE TO REITERATE HERE. THE BOTTOM OF PAGE 3 SAYS THE JURY IS ENTITLED TO BE INSTRUCTED ON THE ELEMENTS OF THE OFFENSE, AND IT QUOTES GURDS V STATE, A CASE FROM 1953. THIS IS IMPORTANT. IT IS ENHANCED IN THE FAIR AND IMPARTIAL TRIAL AND THE PROTECTION OF OUR FEDERAL AND STATE CONSTITUTION THAT IT CONTAIN A DUE PROCESS OF LAW PROCESS AND THAT THE DEFENDANT BE ALLOWED TO HAVE THE JURY INSTRUCTED ACCORDINGLY ON THE MATERIAL CHARGES AND THAT THE STATE PROVE THAT EVIDENCE. SINCE THE DEFENDANT HAS THE RIGHT TO BE INSTRUCTED ON THAT, IT CAN'T BE HARMLESS ERROR TO DO SO. IT WAS THE JUDGE'S ABILITY TO GIVE THE PROPER INSTRUCTION.

LET ME ASK YOU ABOUT, THIS IS A CHARGE UNDER 827.032-B, CORRECT? AND B SAYS, THIS IS BACK TO JUSTICE PARIENTE'S QUESTION, AND I AM NOT SURE I UNDERSTOOD HOW YOU ANSWERED THAT. "B" SAYS WILLFULLY TORTUROUS, MALICIOUSLY PUNISHES, OR WILLFULLY AND UNLAWFULLY CAGES A CHILD. THOSE ARE THE THREE WAYS YOU CAN PROVE THIS AGGRAVATED CHILD ABUSE. CORREC?

YES, MA'AM.

OKAY.

AND WOULD THE EVIDENCE SUPPORT, IN THIS CASE, THAT THE DEFENDANT WILLFULLY TORTURED THIS CHILD?

I DON'T THINK IT WOULD FIND THAT SHE WILLFULLY TORTURED, BECAUSE, AGAIN, THE IDEA OF TORTURE HAS --

THAT IS WHAT THE JURY WAS INSTRUCTED ON, RIGHT? THEY WERE GIVEN THIS ENTIRE JURY INSTRUCTION.

AND THEY SHOULD HAVE ALSO BEEN GIVEN THE INSTRUCTION THAT MALICE MEANS HARBORED ILL WILL, SPITE, HATRED OR EVIL INTENT, AND WITHOUT THAT, WE CAN'T KNOW WHAT THE JURY'S VERDICT REPRESENTS. WILLFULLY TORTURED. WHAT DOES TORTURED MEAN?

YOU WOULD AGREE THAT WILLFULLY TORTURED, IF THE EVIDENCE SUPPORTS WILLFULLY TORTURED, THAT IS NOT THE PART OF THIS INSTRUCTION THAT REQUIRES MALICE. CORRECT?

YES, MA'AM.

AND, ALSO, NOW THAT WE ARE BACK ON THAT, WASN'T SHE,, CHARGED WITH "A", WHICH IS AGGRAVATED BATTERY ON A CHILD?

SHE WAS ONLY CONVICTED ON THIS ONE CHARGE, AGGRAVATED CHILD ABUSE.

SO SHE WAS ONLY CONVICTED UNDER B?

YES, MA'AM.

WOULD YOUR ARGUMENT BE THE SAME, IF THE JUDGE HAD GIVEN NO DEFINITION OF WHAT MALICE WAS? IS IT BECAUSE THE DEFINITION THAT THEY GAVE IS, SORT OF SETS FORTH A LESSER STANDARDTHAN WHAT YOU SAY THE LAW REQUIRES?

THAT IS THE ARGUMENT IN A NUTSHELL, YOUR HONOR. THE STANDARD INSTRUCTION GIVEN SETS A LOWER STANDARD.

COULD YOU EXPLAIN, THOUGH, HOWTE TATE, THEN, USED THAT, IN ITS ARGUMENT, TO OBTAIN A CONVICTION?

WELL, I AM NOT SAYING THEY USED IT IN THE FEATURE OF THEIR ARGUMENT. THE PROSECUTOR USED IT AS A FEATURE OF HIS ARGUMENT, BUT --

THE REASON I AM ASKING THAT, BECAUSE WE HAVE CASES FROM THIS COURT THAT HAVE HELD THAT, WHEE THE ELEMENT RELATES TO AN ELEMENT OF THE CRIME THAT WASN'T IN DISPUTE, IT MAY NOT BE FUNDAMENTAL ERROR. THERE ARE SOME EXCEPTIONS TO THIS BLACK LETTER RULE THAT YOU HAVE SET FORTH THAT CERTAINLY APPEARS IN MANY OF THE CASES, BUT THERE ARSEVERAL CASES, INCLUDING ARCHER AND -- WHERE WE HAVE EXPLAINED, CARVED OUT EXCEPTIONS, AND I WANT TO UNDERSTAND, BECAUSE AS JUSTICE WELLS SAID, SOMETHING THAT THIS ERROR IN GIVING THE INSTRUCTION, WHICH HAS BEEN AN INSTRUCTION FOR 20 YEARS, WASN'T TOLD BY ANYBODY TO GIVE SOMETHING ADDITIONAL, AND YET WE ARE GOING TO BE REVERSING FOR A NEW TRIAL, BASED ON FAILURE TO INCLUDE A DEFINITION THAT HAS BEEN WITHIN THE LAW FOR 21 YEARS BUT NOT WITHIN THE STANDARD JURY INSTRUCTIONS. THOSE ARE PRETTY SERIOUS CONCERNS OF THE ADMINISTRATION OF JUSTICE, TO DO SOMETHING LIKE THAT, SO I WOULD LIKE TO HAVE A LITTLE BIT MORE KNOWLEDGE ABOUT HOW IT IMPACTED THIS CASE, IF YOU COULD HELP ME ON THAT.

WELL, SHE, THEY DID NOT PROVE THE STANDARD IS TOO LOW. THE STANDARD S OO LOW. I JST HAVE TOEEP COMING BACK O SATHAT THEY COULD HAVE PROVEN THE INSTRUCTIONS THEY GAVE, WITHOUT PROVING THAT, YOU KNOW, SHE COULD HAVE ONE WHAT SHE DID AND BELIEVED THAT SHE WAS PROPERLY DISCIPLINING HER CHILD, BELIEVED THAT SHE WAS PROPERLY TEACHING HER CHILD A LESSON, BELIEVED THAT SHE WAS PROPERLY --

WAS THERE -- WHAT WERE THE INJURIES? IS THAT WHAT SHE SAID, THAT THAT WAS HER DEFENSE? DID SHE TESTIFY?

WELL, HER DEFENSE WAS THAT SHE DID NOT MEAN TO INJURY THE CHILD. I BELIEVE THAT SHE ADMTTED THAT SHE DID STRIKE THE CHILD AND THAT SHE DID SO IN ANGER. AND THIS IS THE EVIDENCEHAT THE STATE KEEPS COMING BACK, SAYING, NOW, THIS IS OVERWHELMING EVIDENCE, BUT I THINK IT IS A FAR CRY FROM -- I THINK IT IS A FAR CRY FROM, YOU KNOW, YOU COULD STRIKE A CHILD, AND YOU COULD EVEN STRIKE A CHILD IN ANGER BUT NOT NECESSARILY HAVE EVIL INTENT.

DOES SHE -- WAS SHE ASKED AT ALL ABOUT THE MULTIPLE INJURIES? AS I UNDERSTAND THIS RECORD, THERE WERE, LIKE, 100 OF THESE C-SHAPED OR MARKS ON THE KID'S BACK, SO WAS SHE QUESTIONED AT ALL ABOUT HOW SO MANY INJURIES OCCURRED TO THE CHILD?

THAT WAS ALL PART OF THE CASE. YOU KNOW. I MEAN I AM NOT GOING -- I WILL LET THE STATE GET UP HERE AND HAMMER THAT PART HOME FOR YOU, THAT THERE WERE MULTIPLE INJURIES, BUT, AGAIN, A PERSON COULD -- A PERSON COULD STRIKE A CHILD AND THINK THAT THEY ARE DOING -- THINK THAT THEY ARE DISCIPLINING THE CHILD, AND IT IS STILL AGAINST THE LAW. THEY WENT OUTSIDE THE LAW, AND WHEN IT IS FOUND THAT THEY DID THAT, THEY WERE PUNISHED FOR IT, BUT THEY DID NOT PROVE MALICIOUSNESS. THEY DID NOT PROVE TORTURE. UNLESS YOU INCLUDE THIS DEFINITION, HARBORED ILL WILL, HATRED, SPITE OR EVIL INTENT.

BUT WOULD YOU GIVE US A LITTLE MORE HELP, REALIZING THAT YOU HAVE AN ADVERSARY THAT WILL, ALSO, ADDRESS THIS, BUT WHAT WAS THE THEORY OF DEFENSE HERE, AND WHAT WAS STATED TO THE JURY, EITHER IN OPENING STATEMENT OR, MORE IMPORTANTLY, WHAT THEORY OF DEFENSE WAS PRESENTED TO THE JURY DURING THE FINAL ARGUMENT OF THE DEFENSE LAWYER?

THE DEFENSE WAS THAT THESE INJURIES WERE NOT SO SEVERE AS TO WARRANT A CHARGE OF AGGRAVATED BATTERY. IT WASN'T SO MUCH THAT SHE DIDN'T DO THESE THINGS BUT THAT THEY WERE NOT SO SEVERE. YOU MAY REMEMBER, IN MY OTHER ISSUE I ARGUED, WHICH I DON'T THINK THIS COURT IS GOING TO ADDRESS, BUT THERE IS ANOTHER ISSUE I ARGUED BELOW ABOUT THE FACT THAT WE WERE NOT ALLOWED TO DISROBE THE CHILD AND TAKE A PICTURE AND SHOW THE JURY. WELL, LOOK AT THESE PICTURES. IF THEY HAVE HEALED, THEN THEY ARE NOT PERMANENT INJURY AND THAT SHOULD NOT BE THE FOCUS OF AGGRAVATED CHILD ABUSE.

SO THAT WAS THE DEFENSE, WAS THAT THE INJURIES WERE NOT THAT SERIOUS?

YES, YOUR HONOR, NOT THAT SERIOUS AND IT WAS NOT DONE WITH AN EVIL INTENT.

THAT WAS ARGUED --

WE CAN'T GET AWAY FROM THE INTENT.

I AM ASKING WHETHER, AND IT IS ONE THING, YOU KNOW, FOR YOU TO ARGUE HERE THAT THE JURY, UNDER THESE INSTRUCTIONS -- BUT WAS THAT WHAT WAS ARGUED TO THE JURY?

I BELIEVE BOTH THOSE THINGS WERE ARGUED. THAT THE INJURIES WERE NOT THAT SEVERE, AND

THAT SHE DIDNOT HAVE THE REQUISITE INTENT TO BE CONVICTED OF THIS CHARG. AND E CAN'T ALLOW A CONVICTION -- I AM SORRY, YOUR HONOR. DID YOU WANT TO SAY SOMETHING? I SEE I AM RUNNING OUT OF TIME HERE.

I WANT TO CALL TO YOUR ATTENTION A CASE THAT APPARENTLY WAS NOT ARGUED BUT THAT I WOULD LIKE SOME SUPPLEMENTAL AUTHORITY AND I ASKED THE STATE, ALSO, A SUPPLEMENTAL BRIEFING ON, AND THAT IS MORRIS VERSUS STATE, WHICH CAME OUT OF THIS COURT IN 1990, THAT WHAT IS ON AGGRAVATED -- THAT WAS ON AGGRAVATED CHILD ABUSE, AND IT WAS A MURDER BY AGRAVATED CHILD ABUSE AND IT APPEARS TO ME, FROM READING THIS CASE, THAT THE STANDARD URY INSTRUCTION ERRONEOUSLY INFORMED THE JURY THAT IT COULD FIND MORRIS GUILTY OF FIRST-DEGREE MURDER BY AGGRAVATED CHILD ABUSE IF IT FOUND AN UNDERLYING OFFENSE BY SIMPLE BATTERY. THEY GAVE THE STANDARD JURY INSTRUCTION ONINTENT, AS IT IS IN THE BOOK, AND MORRIS FAILED TO OBJECT AND NOW CONTENDS THE ERROR WAS FUNDAMENTAL. WE DISAGREED.

WOW. I AM SORRY I MISSED THAT, YOUR HONOR. DID THE COURT SAY IT WOULD LIKE TO HAVE A SUPPLEMENTAL BRIEF ON THAT?

I WOULD LIKE TO HAVE SOME SUPPLEMENTAL ANSWER FROM BOTH SIDES ABOUT THAT CASE.

THANK YOU, YOUR HONOR. MR. CHIEF JUSTICE

OKAY. YOU ARE IN YOUR REBUTTAL.

OKAY. I THINK I WILL STOP AND RESERVE THE REST OF MY TIME FOR REBUTTAL.

MAY IT PLEASTHE COURT. MY NAME IS SHERRI ROLLISON ON BEHALF OF THE STATE. THE STATE CONTENDS THAT YOUR JURY INSTRUCTION FROM 1981 WAS CORRECT, AND THE REASON IS THAT, IF YOU LOOK BACK AT GAYLORD, AS JUSTICE WELLS POINTED OUT, IT WAS ABOUT WHETHER OR NOT THE ELEMENT MALICE, INTENT, WAS UNCONSTITUTIONAL, AND THAT IT WAS VAGUE AND OVERBROAD. THEY GRABBED LANGUAGE, AT THAT TIME, IN GAYLORD, AS REFERRED IN YOUNG, FROM A CASE CALLED HUNTLEY, WHICH, AGAIN, REFERRED TO A CASE CALLED RAMSEY, WHICH WERE BOTH ABOUT A DEPRAVED MIND. MALICE IN TERS OF SECOND-DEGREE MURDER. AND ITIS OUR CONTENION THAT, IN 81, AS YOU KNOW, THERE WRE GUOF JUDSND LWYERS AND THE FLORIDA BOARD, WHOALL GOT TOGETHER TO PUT THESE JURY INSTRUCTIONS, THE STANDARD JURY INSTRTIONS TOGETHER, AND THEY BELABORED, AND THEY EVEN PUT A LITTLE CLAUSE IN THERE THAT, TO THE BEST OF ALL OF THEIR UNIFIED ABILITY TO COME UP WITH THE BEST EXPLANATIONS OF THE LAW, THE STANDARD JURY INSTRUCTIONS.

WASHERE ANY DISCUSSION BY THAT GROUP OR INDICATION BY THAT GROUP THAT THEYCONIDERED THE COURT'S OPINION IN GAYLORD?

NO, BUT I WANT TO, NOT FROM WHAT I COULD FIND, BUT I ASSERT TO YOU THAT, IF, THATTY CAN'T POSSIBLY HAVE WANTED THE LEGISLATURE, WHEN YOU GET TO LEGISLATIVE ITEN, THEY COULDN'T POSSIBLY HAVE WANTED HATRED AND EVIL INTENT, BECAUSE WHEN YOU THINK ABOUT IN TERMS OF AGGRAVATED CHILD ABUSE, WHEN YOU THINK ABOUT THIS CRIME, VERY FEW PEOPLE, PARENTS, DO THESE THINGS OUT OF HATRED OR EVIL INTENT. THE SHAKING OF A BABY ISN'T OUT OF HATRED FOR THAT BABY. WHEN YOU SHAKE IT AND HURT IT AND IT IS AGGRAVATED CHILD ABUSE BECAUSE THE BRAINS ARE DISLODGED DISLODGED. ANY CHILD ABUE CASE, WHEN YOU THINK ABOUT IT, IT WOULD BE AN ABSURD RESULT TO TRY TO SAY THAT YOU HAD TO PROVE HATRED OR EVIL INTENT, BECAUSE IT IS ANGER AND IT IS A LOSS OF CONTROL. IT IS WRONGFUL, AND THERE IS NO LEGAL JUSTIFICATION OR EXCUSE. THAT IS WHAT IT IS. IT IS WRONGFUL TO SHAKE A BABY, AND THERE IS NO LEGL JUSTIFICATION IN THAT IT IS BEYOND WHAT IS PERMITTED PARENTS FOR CORPORAL PUNISHMENT.

BUT UNDER "B", SO IF I AM UNDERSTANDING WHAT YOU ARE SAYING, IS THE STATE'S POSITION NOW, AND I DIDN'T UNDERSTAND THAT WAS A POINT THAT WAS BEING MADE ON APPEAL, BUT IS THAT YOUNG IS IMPROPERLY DECIDED?

YES, BECAUSE THIS --

SO THAT WE WOULDN'T -- IF THAT IS CORRECT, THEN THE ISSUE AS TO IF THE CERTIFIED QUESTION WOULD BE NOT THE QUESTION WE WOULD BE ANSWERING. WE WOULD BE SAYING THAT YOUNG WAS IMPROPERLY DECIDED. IS THAT WHAT YOUR POSITION IS?

YES. THE CERTIFIED QUESTION IS BASED ON A FAULTY PREMISE.

AND WAS THAT ARGUED IN, TO THE FIRST DISTRICT, THAT THEY SHOULD RECEDE FROM KRUNING?

NO. IT -- FROM YOUNG?

NO, IT WAS NOT.

THE STATE CONCEDED THAT NOT ONLY WAS THE JURY INSTRUCTION ERRONEOUS BUT THAT IT WS FUNDAMENTAL ERROR. I UNDERSTAND --

NO, THE STATE DID NOT CONCEDE THAT IT WAS FUNDAENTAL ERROR. THE STATE ONLY CONCEDED THAT, GIVEN YOUNG AND GIVEN THE QUESTION AS IT WAS PUT TO THE STATE, THE QUESTION, AS PUT TO THE STATE ASSUMED THAT THERE WAS A FAILURE TO INSTRUCT ON A DISPUTED ELEMENT OF THE CRIME. HOWEVER, THEN THE DECISION, FIRST DCA, IN REED, REEXTRACTED THAT AND SAID, WELL, WAIT A MINUTE. IT WASN'T THAT THERE WAS A FAILURE TO INSTRUCT ON THE ELEMENT. IT WAS THAT THE INSTRUCTION WAS TOO INCLUSIVE. THAT IT WAS MAYBE AN ERRONEOUS INSTRUCTION, IN THAT IT DIDN'T INCLUDE EVERYTHING IT SHOULD HAVE, BUT IT WAS NOT A FAILURE TO INSTRUCT ON THE ELEMENT. HOWEVER, THE QUESTION AS PUT TO ME WAS THAT, GIVEN, IF YOU ARE GIVEN THE FACT THATTHERE WAS A FAILURE TO INSTRUCT ON AN ELEMENT, AND THE STATE ONLY CONCEDED THAT THERE WAS ERROR. HOWEVER, THIS COURT IS NOT REQUIRED, AS YOU KNOW, FROM BOYETTE, TO ACCEPT.

MY CONCERN IS THIS, IS THAT UNDER AGGRAVAED CLD ABUSE, UNDER SUBSECTION C, YOU HAVE KNOWING OR WILLFULLY ABUSES A CHILD AND CAUSES HARM, DISABILITY OR PERMANENT DISFIGUREMENT, AND THAT IS OT WHAT WE ARE TALKING ABOUT AND THAT IS KNOWINGLY OR WILLFULLY.

RIGHT.

THE LEGISLATURE, IN "B", TALKS ABOUT WILLFULLY TORTURING, BUT WHEN GETTING TO PUNISH, BECAUSE THAT IS NOT REQUIRING AN INJURY, SAYS MALICIOUSLY, SO BECAUSE ARE SAYING IS THAT WE SHOULD JUST SAY MALICIOUSLY WOULD BE INTENTIONALLY PUNISHES?

NO. WRONGFULLY -- NOT INTENTIONAL PUNISHMENT BUT WITHOUT JUSTIFICATION OR EXCUSE. THE STANDARD JURY INSTRUCTION IS CORRECT, AND IT IS WRONGFULLY, BECAUSE THERE IS A POINT, LEGAL JUSTIFICATION IS THAT IT IS REASONABLE PARENTAL DISCIPLINE. OKAY. AND PARENTS ARE ALLOWED CORPORAL PUNISHMENT WHERE IT IS REASONABLE, BUT WHEN YOUET TO THE POINT WHERE YOU HAVE 100 C-SHAPED LASHES, WE ARE NOT SAYING IN VERY FEW CASES YOU HAVE, WHETHER IT BE ANY KIND OF DOMESTIC ABUSE, IT IS NOT ALWAYS DONE ON A HATRED OR AN EVIL INTENT. IT IS DONE OUT OF ANGER AND A LOSS OF CONTROL, AND YOU CAN SEVERELY HARM SOMEONE, AND THEY CAN GO THROUGH GREAT BODILY HARM. THIS CHILD --

BUT "B" DOESN'T REQUIRE GREAT BODILY HARM.

BUT IT DOESN'T --

THAT IS MY PROBLEM, IS THAT IF YOU, IF YOU ACCEPT WHAT THE STATE IS NOW SAYING, THEN, IF THERE IS A SITUATION WHERE SOMEBODY WRONGFULLY PUNISH ES A CHILD, YOU ARE SAYING THAT WOULD BE A CRIME, UNDER 827, WITHOUT ANYTHING MORE.

NO, BECAUSE YOU HAVE "A" AND "B" THERE TOGETHER. YOU HAVE TO READ THEM TOGETHER, SO YOU ARE LOOKING.

I THOUGHT IT WAS IN THE ALTERNATIVE, A, B OR C.

I BELIEVE IN THIS CASE THEY USED, THE FIRST DISTRICT COURT SAID THEY REFERRED TO A AND B BUT NOT KRE.

WAS SHE CONVICTED OF "A", WHICH WAS JUST AGGRAVATED BATTERY ON A CHILD?

WELL, AGGRAVATED BATTERY IS, AND INCLUDED IN THIS IS FOR AGGRAVATED CHILD ABUSE, YOU HAVE THE AGGRAVATED BATTERY PLUS "B". OKAY. AND IN THIS CASE --

WELL, IT SEEMS TO ME THAT THIS ISSUE, REALLY, REVOLVES AROUND WHETHER THE COURT, THE TRIAL COURT, HAS TO GIVE A DEFINITION WHICH IS AS COMPLETE AS THE DEFINITION GIVEN IN GAYLORD, IN ORDER FOR THE JURY TO MAKE A DETERMINATION AS TO WHETHER THERE IS THE REQUISITE MALICE, BECAUSE THAT IS THE STANDARD WHICH ALLOWS THIS STATUTE TO BE CONSTITUTIONAL, UNDER GAYLORD. I MEAN, THAT, THEREIN LIES THE PUZZLE, IS THAT DOES THAT DEFINITION, IS IT REQUIRED TO BE GIVEN TO THE JURY, IN ORDER FOR THE STATUTE TO BE CONSTITUTIONAL CONSTITUTIONAL?

WELL, AS I READ GAYLORD, NO. IN FACT, THEY, IN GAYLORD, THEY SPECIFICALLY SAID THAT IT IS A CONDUCT MALICIOUS DOES, QUOTE, MALICIOUS DOES PROVIDE A DEFINITE STANDARD OF CONDUCT, UNDERSTANDABLE BY A PERSON OF ORDINARY INTELLIGENCE. AND THEN THEY CITE HUNTLEY, AND HUNTLEY SAYS MALICE IS IN THE POPULAR OR COMMONLY UNDERSTOOD SENSE, SO WHAT THEY ARE SAYING IS THAT IT IS NOT VAGUE AND IT IS NOT OVERBROAD, AND PRETTY MUCH THAT THERE DOESN'T REQUIRE A DEFINITION, BECAUSE IT IS A COMMON UNDERSTOOD TERM. FOR THAT MATTER, YOU COULD SAY, WELL, HOW DO YOU DEFINE EVIL, IF YOU ARE GOING TO USE EVIL INTENT. PEOPLE MIGHT HAVE DIFFERENT DEFINITIONS. AT WHAT POINT DO YOU DRAW THE LINE THAT YOU DON'T NECESSARILY NEED A DEFINITION.

BUT IF THEY NECESSARILY SAID YOU HAVE GOT TO FIND MALICIOUS PUNISHMENT AND EVERY MALICE, AGAIN, CONE NOTES SOMETHING THAT IS MORE THAN JUST INTENTIONAL, BUT BY GIVING THIS INSTRUCTION THAT JUST TALKS ABOUT INTENTIONAL AND WILLFUL, IT IS REALLY MAKING MALICE SOUND LIKE IT IS LESS,HAT IT IS NOT IN OUR ORDINARY SENSE OF THE WORD, SUCH AS EVIL, BUT IT IS SOMETHING, WHAT IS THE STANDARD?

IT SAID WRONGFULLY, AND THEN IT, ALSO, SAID, AND, BUT NOT JUST BY ITSELF. WRONGFULLY, INTENTIONALLY, AND THERE IS NO LEGAL JUSTIFICATION OR EXCUSE.

BUT IS THAT, REALLY, WHAT, NOW, TO ME MALICE MEANS, REALLY, SOMETHING ELSE, OTHER THAN WITHOUT LEGAL EXCUSE.

I DON'T THINK YOU CAN TAKE IT SO FAR AS TO SAY THAT YOU HAVE TO PROVE HATRED IN EVERY AGGRAVATED CHILD ABUSE CASE. I THINK THAT WOULD BE VERY DIFFICULT, BECAUSE YOU CAN HAVE CHILD ABUSE AND YOU CAN HAVE AGGRAVATED CHILD ABUSE, AND YOU CAN HAVE IT WITHOUT HATRED, AND YOU CAN HAVE IT WITHOUT EVIL INTENT. YOU HAVE IT WITH A LOSS OF CONTROL.

BUT ISN'T, AGAIN, AND THAT IS WHERE MAYBE I HAVE TO GET BACK. I AGREE, IT SEEMS TO ME THAT WHEN YOU HAVE AN INJURY TO THE CHILD, YOU CAN KNOWINGLY OR WILLFULLY ABUSE A CHILD, AND THERE IS NO MALICE PUT UNDER "C" BECAUSE THEN YOU HAVE GOT THE GREAT BODILY HARM, SO YOU HAVE GOT A STATUTE THAT YOU KNOW IF YOU PUNISH A CHILD, HIT A CHILD, AND THERE IS RESULTING HARM, AND THIS WOULD HAVE SEEMED TO HAVE FIT UNDER C, THAT YOU WILL HAVE A, THAT THAT IS PUNISH BE ABLE -- THAT THAT IS PUNISHABLE. HOWEVER, MALICIOUSLY PUNISHING DOESN'T REQUIRE THAT THERE BE RESULTING GREAT BODILY INJURY, PERMANENT DISABILITY. THAT IS, THERE LIES THE PROBLEM WITH HOW DO YOU, THEN, NARROW THE CLASS OF INDIVIDUALS THAT, WITHOUT A KID WAS BAD AND YOU SENT HIM TO BED WITHOUT DINNER AND THERE WAS NO JUSTIFICATION FOR THAT. WELL, WHAT DOES THAT MEAN? THAT COULD BE CHILD ABUSE, UNDER THIS DEFINITION.

NO. THERE IS LEGAL JUSTIFICATION FOR THAT, BECAUSE THE STATE AND COURTS HAVE SAID THAT THE PARENTS HAVE A RIGHT TO REASONABLE CORPORAL DISCIPLINE. AND TO PUNISH A CHILD. SO THERE IS GL JUSTIFICATION FOR THAT. THIS IS ONLY WHERE YOU HAVE NO LEGAL JUSTIFICATION, BECAUSE IN FLORIDA PARENTS DO HAVE A RIGHT TO DISCIPLINE. THEY HAVE A RIGHT TO CORPORAL PUNISHMENT, BUT THERE IS A POINT WHERE YOU HAVE, AND WHAT WAS GIVEN I IS CASE IS THAT YOU HAVE TO FIND TWO ELEMENTS. NE, THAT THE DEFENDANT WILLFULLY TORTURED OR MALICIOUSLY PUNISHED THE VICTIM, THE I. TWO, THAT THE VICTIM, THE CHILES WAS UNDER AGE -- THE CHILD WAS UNDER AGE 18, AND THEN TORTURE BY NEGLECT OR UNNECESSARY OR UNJUSTIFIABLE PAIN OR SUFFERING WAS CAUSED, WILLFULLY MEANS KNOWINGLY, INTENTIONALLY AND PURPOSE USFULLY, AND MALICIOUSLY MEANS WRONGFULLY AND --

BUT YOU ARE JUSTIFYING, IF I UNDERSTAND IT CORRECTLY FROM THE OUTSET, THAT GAYLORD WAS WRONGFULLY DECIDED. ISN'T THAT YOUR INITIAL --

THAT WAS--

ARE YOU SAYING THAT GAYLORD WAS WRONGFULLY --

NO. I THREW IN THAT WHEN IT WAS ILL WILL, SPITE -- THAT IT THREW IN THE DEFINITION, BUT BASICALLY GAYLORD, THEY WEREN'T DECIDING THE JURY INSTRUCTION. IT DIDN'T EXIST AT THE TIME. THEY WERE DECIDING THAT MALICIOUS INTENT WAS NOT VAGUE AND OVERBROAD AND THAT IT WAS A COMMONLY-UNDERSTOOD TERM, AND THEN AT SOME POINT, THEY THREW IN THERE ILL WILL, SPITE, FROM THE RAMSEY CASE.

BUT YOU ARE SAYING THEY THREW IN THERE. THAT WAS THE CHIEF QUESTION TO YOU BEFORE, WAS THAT, GIVEN WHAT THIS COURT HAS SAID IS THAT, WITH USE OF THE WORD "MALICE", WE ARE GOING TO FIND THAT THAT IS NOT UNCONSTITUTIONALLY VAGUE, BECAUSE WE ARE GOING TO DEFINE IT IN THIS CERTAIN WAY, AND THE WAY THAT WE DEFINED IT WAS WITH THE HATRED, ILL WILL OR WHATEVER.

I THINK IT WAS DEFINED.

SO LET ME BE CLEAR. ARE YOU CLAIMING THAT GAYLORD WAS WRONGLY DECIDED? THAT IS THAT --

YES. THAT IS AN INCORRECT DEFINITION. THAT IS WHAT WE ARE SAYING.

BUT NOW, AND WE WILL OBVIOUSLY CONSIDER. THAT WE NEED TO LOOK AT THAT. THE MORRIS CASE AND SOME OTHER CASES. BT VEN THAT WE DID DIDE IT THAT WAY, AND GIVEN THAT WE, IN ESSENCE, HELD, THEN, IN ORDER FOR THIS, THE USE OF THE WORD MALICE, IN THIS PARTICULAR CRIMINAL STATUTE, TO BE CONSTITUTIONAL, IT HAS TO HAVE THIS MEANING.

BUT THEN YOU WENT AHEAD, THREE YEARS LATER, THIS IS, GAYLORD WAS 1978. IN 1981, THIS COURT APPROVED AND PROMULGATED THE STANDARD JURY INSTRUCTIONS, WHICH GAVE A DIFFERENT DEFINITION.

BUT WE ALWAYS SAY, WHEN WE PROMULGATE STANDARD JURY INSTRUCTIONS, THAT WE RECOGNIZE THAT THE COMMITTEES ARE DOING THEIR BEST TO RESTATE FLORIDA LAW FOR US, AND THAT THIS DOESN'T RELIEF THE COURTS OR THE LAWYERS OF CORRECTLY LOOKING UP THE LAW AND GETTING IT RIGHT. SO I AM AFRAID THAT REALLY IS NOT, THAT IS NOT GOING TO WIN THE DAY, THE FACT THAT WE HAVE ADOPTED OR READOPTED STANDARD JURY INSTRUCTIONS.

I UNDERSTAND THAT.

BUT I AM MORE INTERESTED, AT LEAST RIGHT NOW, IN WHETHER OR NOT IF WE UTILIZE A HARMLESS-ERROR ANALYSIS, WHICH IS SORT OF THE OTHER SIDE OF FUNDAMENTAL ERROR.

OKAY.

THAT, CAN YOU SHED SOME LIGHT ON, REALLY, WHAT WAS IN ISSUE IN THIS CASE, AND WHAT WAS THE, WHAT WAS THE DEFENSE AND HOW WAS THE DEFENSE PRESENTED? WAS IT PRESENTED AND THAT THERE WAS NO MALICE HERE AND NO --

NO. THAT WASN'T ARGUED AT ALL, AS A MATTER OF FACT, DURING CLOSING ARGUMENTS. MALICE WAS ONLY MENTIONED ONES, AND THAT WAS DURING -- ONCE, AND THAT WAS DURING CROSS-EXAMINATION OF ONE OF THE STATE'S WITNESSES. IN THIS CASE --

SO THERE WAS NO ARGUMENT BY THE DEFENSE HERE TO THE JURY, THAT THE STATE'S CASE FAILED BECAUSE MY CLIENT HAD NO MALICE, AND THE STATE WASNOT ABLE TO PROVE MALICE AGAINST MY CLIENT. SO THAT WAS NOT ARGUED.

NO. THERE WAS NOTHING LIKE THAT. AS FAR AS THE PERMANENT INJURY GOES OR THE SEVERITY OF THE INJURY, THE STATE ACTUALLY ABANDONED THE ARGUMENT THAT IT WAS PERMANENT INJURY, BECAUSE IT WAS THE STATE'S WITNESS, AND THERE WAS, ALSO, A DISCUSSION IN FRONT OF THE COURT ON THIS MATTER, THAT THE STATE'S WITNESS SAID THE MARKS HAVE ALMOST COMPLETELY FADED, SO BEFORE CLOSING ARGUMENT, THEY STOOD BEFORE THE COURT, AND THE PROSECUTOR SAID, LOOK, I AM NOT GOING -- THE EVIDENCE, THERE IS NO EVIDENCE TO SAY THAT THERE WERE ANY PERMANENT INJURIES, AND I, DON'T WORRY, I AM NOT GOING TO GET UP THERE AND SAY THAT, AND SO THAT WAS ALL IN PART OF THE DISCUSSION, AND WHETHER OR NOT THE DEFENSE SHOULD BE ABLE TO PRESENT EVIDENCE OF THE CHILD'S BACK TWO YEARS LATER, AND THEY SAID, NO, THE EVIDENCE WAS THAT SHE WAS SEVERELY INJURED. THERE WERE BETWEEN 50 AND 100, MORE THAN 50 AND LESS THAN 100 OF THESE C-SHAPED MARKS. SOME OF THEM WERE SCABBING OVER THE NEW MARKS.

THE STATE FOCUSED, I ASSUME, THAT THIS IS WAY BEYOND ANY BOUNDS OF REASONABLE DISCIPLINE BY A PARENT TO A CHILD.

EXACTLY. EXACTLY.

BUT THE DEFENSE DID NOT SAY, WELL, WAIT A MINUTE, THE STATUTE REQUIRES THIS TO BE DONE MALICIOUSLY.

NOT AT ALL.

AND THE STATE HASN'T PROVED MALICE.

NOT AT ALL. SO THE STATE WOULD CONTEND THAT, FIRST OF ALL YOUNG CAME OUT AFTER THE

JURY INSTRUCTIONS WERE BEGIN IN THIS CASE, THAT THIS ISSUE WAS NEVER PRESENTED TO THE TRIAL COURT, IN ANY WAY, SHAPE OR FORM. THE DEFENSE COMPLETELY AGO NEED WITH THE -- AGREED WITH THE JURY INSTRUCTIONS THAT WERE GIVEN. THIS WAS NOT PRESERVED, AND EVEN IN THE SCOTT OPINION, REVERSIBLE ERROR, JUSTICE QUINCE, THE QUOTE IS THAT THE DENIAL, BECAUSE THERE WAS A REQUEST IN THAT CASE WAS REVERSIBLE ERROR, AND NOT, SHE DOESN'T SAY, PER SE, IN THERE, THAT IT WAS THE LACK OF GIVING TE INSTRUCTION, BUT IT SEEMS TO REVOVE AROUND THE FAT THAT THERE WAS A REQUEST FOR IT, AND SHE SPECIFICALLY SAYS THE DENIAL WAS REVERSIBLE ERROR, AND AS JUSTICE HARDING POINTED OUT, THAT IF YOU WANT A SPECIAL JURY INSTRUCTION, IT NEEDS TO BE IN WRITING, AND IN THIS CASE THERE WAS NO ORAL REQUEST, AS THERE WAS IN SCOTT, AND THERE WAS NO WRITTEN REQUEST, AND OTHER CASES IN THIS COURT, ARCHER, WALLS, AS WE POINTED OUT, AND EVEN THE UNITED STATES SUPREME COURT, IN NEDER, WHICH I CAN SUPPLEMENT LATER, A 1999 CASE, THE NEDER CASE, SAYS, LOOK, EVEN IF AN INSTRUCTION MISSED GIVING AN ELEMENT OF THE CRIME, IT IS NOT NECESSARILY REVERSIBLE ERROR, AND THE HARMLESS-ERROR ANALYSIS SHOULD APPLY.

BEFORE YOU SIT DOWN, WHAT WOULD BE THE RAMIFICATIONS OF US FINDING THAT THIS IS, IN FACT, FUNDAL ERROR?

TWO WAYS -- -- FUNDAMENTAL ERROR?

TWO WAYS --

IF IT IS FUNDAMENTAL ERROR, WOULD THE DEFENSE BE ABLE TO RAISE IT AT ANY TIME?

YES. IF IT IS FUNDAMENTAL RAISEABLE ERROR, THEN IT WOULDN'T MATTER AT THIS POINT.

YOU ARE SAYING ON APPEAL.

ON APPEAL, YES. THEY WOULDN'T HAVE TO PRESERVE IT IN THE TRIAL COURT. HOWEVER, I DON'T BELIEVE THIS COURT HAS EVER FOUND THAT A NONPRESERVED ERROR WAS NOT, THAT THE HARMLESS-ERROR ANALYSIS DIDN'T APPLY, EVEN IN THE LARA CASE, IN 1989, THIS COURT FOUND THERE WAS ERROR, AND THEY WENT ON TO SAY, THOUGH, THAT THEY HAD TO DO THE HARMLESS-ERROR ANALYSIS. NOW, THEY DID FIND IT WAS HARMFUL, BUT THE POINT IS YOU STILL DID THE HARMLESS-ERROR ANALYSIS, EVEN AFTER YOU FOUND ERROR.

I THOUGHT THAT CASES, I THINK IT COMES UP A LOT WHERE THERE IS DIFFERENT FORMS OF HOMICIDE, AND A LOT OF TIMES THEUDGES EITHER NEGLECT TO READ THEM, THAT THERE ARE A SERIES OF CASES THAT SAY THAT THATIS FUNDAMENTAL ERROR, AND THIS COURT, BACK IN 1945, IN MOTLEY V STATE, SAID EXACTLY THAT, THAT IS IF THERE IS, YOU KNOW, IT IS NOT A QUESTION, IT IS ONE THING, IF IT IS NOT INSTRUCTING ON SOME PHASE OF THE EVIDENCE, T WHEN WE GET TO THE ESSENTIAL ELEMENTS OF THE CRIME, THE FAILURE TO INSTRUCT ON AN ESSENTIAL ELEMENT IS FUNDAMENTAL ERROR. THE QUESTION, THEN, BECES, WHEN A JURY INSTRUCTION IS NOT, AND THIS IS WHERE, I GUESS, WE GET BACK TO THE REAL ISSUE HERE, IF YOUNG IS CORRECT, BASED ON GAYLORD, THEN MY CONCERN IS THAT IT IS NOT JUST THAT IT IS AN INCOMPLETE DEFINITION. IT IS A MISLEADING DEFINITION.

WELL, THE STATE, ALSO, ASSERTS, OKAY, THAT THIS IS NOT A CASE WHERE THERE WAS NO INSTRUCTION GIVEN. THERE WAS -- DEFINITELY WAS AN INSTRUCTION GIVEN ON MALICIOUS INTENT, SO YOU DON'T HAVE IT WHERE YOU HAVE A COMPLETE FAILURE, AND AS THE FIRST DCA DID NOT FIND THAT IT WAS MISLEADING, THE FIRST DCA FOUND THAT IT WAS JUST TOO INCLUSIVE, AND THAT THE MORE ACCURATE INSTRUCTION, IN THEIR VIEW, WOULD HAVE BEEN THAT FOUND IN YOUNG. MR. CHIEF JUSTICE

THANK YOU. YOUR TIME IS UP.

THANK YOU VERY MUCH. MR. CHIEF JUSTICE

REBUTTAL.

THANK YOU. YOUR HONORS, LET ME EXPLAIN QUICKLY THAT THIS WAS ADOPTED CHILD. THIS WAS NOT THE MOTHER'S OWN CHILD. THE CHILD WAS ALREADY FIVE OR SIX YEARS OLD WHEN SHE ADOPTED IT. IT WAS A SPECIAL NEEDS CHILD THAT HAD EMOTIONAL PROBLEMS.

WOULD YOU LIFT THAT UP? WE CONSISTENTLY HAVE TROUBLE WITH THAT. THANK YOU VERY MUCH.

IT WAS A CHILD WITH PROBLEMS, A SPECIAL NEEDS CHILD WHICH THIS MOTHER TOOK ON, AND I AM NOT SAYING THAT EXCUSES IT, BUT GETTING BACK TO YOUR POINT, IF THIS WAS JUST SIMPLE CHILD ABUSE WE WOULDN'T BE HERE TODAY. I WOULDN'T VE AN ARGUMENT, AND I AM SAYING MAYBE THAT IS WHAT THIS WAS IS SIMPLE CHILD ABUSE, AND WITHOUT THIS INSTRUCTION, WE DON'T KNOW IF IT WAS AGGRAVATED CHILDABUSE. I SPECIFICALY ISPUTE THE STATE'S ARGUMENT O YOUR QUESTIO, SICE WELLS, THAT WE DID NOT ARGUE THAT THERE WAS NO MALICE IN THIS CASE, BECAUSE WITH THE ADVANTAGE OF THE TRIAL LAWYER HERE, I KNOW THAT HE HAD, HE ARGUED SPECIFICALLY THAT SHE LOVED THE CHILD IN CLOSING ARGUMENT. NOW, THAT IS THE OPPOSITE OF MALICE. SO MALICE WAS ADDRESSED IN THAT SENSE.

ARE YOU REPRESENTING TO US THAT SPECIFICALLY THE ARGUMENT WAS MADE TO THE JURY THAT THERE WAS NO MALICE IN THIS CASE, AND THE STATE HAS NOT PROVEN MALICE?

WHEN YOU ARGUE THAT MY CLIENT LOVED THIS CHILD AND LOVES THIS CHILD THAT, IS SAYING THAT THERE IS NO MALICE.

WHAT YOU ARE SAYING ABOUT THAT, I AM ASKING YOU A DIFFERENT QUESTION, AND, REALLY, IT IS PRETTY SPECIFIC, AS FAR AS THE USE OF THE WORD "MALICE", AS USED IN THE STATUTE. WAS THE ARGUMENT MADE, TO THE JURY, THAT, UNDER THE STATUTE, AND ITS REQUIREMENT OF MALICE, THAT THERE WAS NO MALICE PROVEN IN THIS CASE?

NOT IN THOSE WORDS, YOUR HONOR. BUT WECONTEND THAT GAYLORD WAS CORRECTLY DECIDED, THAT THE INSTRUCTION AS TO BE, THERE HAS TO BE AN EVIL INTENT. AGAIN, SHE WAS GUILTY OFSIMPLE CHILD ABUSE. FINE. WE ARE NOT ARGUING ABOUT THAT, AND THAT MAY BE WHAT THERY FOUND, THAT THIS WAS SIMPLE CHILD ABUSE. YOU KNOW, SHE WENT TOO FAR. SHE BROKE T LA. SHE DID WRONG, AND SHE HAS GOT TO BE PUNISHED, BUT WITHOUT THIS INSTRUCTION, WE DON'T KNOW THAT THEY WOULD HAVE SAID, WELL, YEAH WAIT A MINUTE. EVEN THOUGH SHE BROKE THE LAW AND WENT TOO FAR AND SHE SHOULD BE FUN SHE SHOULD BE PUNISHED, WE DON'T KNOW THAT SHE HAD AN EVIL INTENT THAT, SHE HATED THIS CHILD. BUT THIS CHILD WAS SUCH A, I DON'T WANT TO SAY PROBLEM, BUT WAS SO EMOTIONALLY UPSET ALL THE TIME THAT IT STRAINED AND TAXED THE MOTHER'S ABILITIES.

WAS THE JURY INSTRUCTED ON THE LESSER CHARGE OF SIMPLE CHILD ABUSE?

NO, YOUR HONOR. THEY WERE NOT INSTRUCTED ON THAT. BUT AS A PARENT, YOU CANNOT BE CONVICTED OF SIMPLE CHILD ABUSE AS A PARENT, SO THAT INSTRUCTION WOULD NOT HAVE BEEN PROPER. BUT, AGAIN, HAD THE JURY FOUND THAT THIS WAS WRONG, YOU KNOW, THAT THEY HAD DONE WRONG, THAT SHE HAD DONE WRONG, THEY STILL NEED TO COME BACK WITH A VERDICT THAT MEETS THE LAW, AND THE LAW IN THIS CASE, AS I SAID AS WAS DECIDEDED IN GAYLORD, THERE MUST BE ILL WILL, AND, YES, IT IS FUNDAMENTAL ERROR. JUST LIKE KAN, YOU MUST HAVE SUBSTANTIAL COMPETENT EVIDENCE OF EVERY ELEMENT OF THE CHARGE, AND WITHOUT THE PROPER INSTRUCTION, THE JURY'S VERDICT IS VIRBIATED ON THAT ELEMENT. WE CANNOT COUNT ON IT. THAT WOULD BE FUNDAMENTAL ERROR. YOUR HONOR, WE WILL PROVIDE YOU WITH SUPPLEMENTAL BRIEFS. MR. CHIEF JUSTICE

PLEASE DO. IT DOESN'T DEAL DIRECTLY WITH THIS DEFINITION, BUT IT IS PRETTY CLOSE TO IT, AND IF YOU WOULD FILE, SIMULTANEOUSLY, BOTH SIDES, ON THAT, WITHIN TEN DAYS. THANK YOU, COUNSEL.