Travis Welsh v. State of Florida

NEXT CASE ON THE COURT'S DOCKET IS WELCH VERSUS STATE. -- IS WELSH VERSUS STATE. FOR THE BENEFIT OF THE LAWYERS OUT THERE ON THE LAST CASE, THE COURT WILL BE TAKING ITS REGULAR 15-MINUTE MORNING RECESS AFTER THE ARGUMENT IN WELSH ALL RIGHT. WELSH VERSUS STATE. COUNSEL IS READY TO PROCEED. YOU MAY PROCEED. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS RICHARD SUMMA. I REPRESENT THE PETITIONER TRAVIS WELSH, WHO WAS CONVICTED OF ONE COUNT OF CAPITAL SEXUAL BATTERY AND ONE COUNT OF LEWD AND LASCIVIOUS CONDUCT, AND OF COURSE THE MANDATORY TERM FOR CAPITAL SEXUAL BATTERY IS LIFE WITHOUT PAROLE.

DID WE HAVE THE ALLEGED CONCERN FOR --

YES. THE ALLEGED VICTIM DID PRESENT HER TESTIMONY, EVIDENCE OF THE CONVICTION OF CAPITAL SEXUAL BATTERY AND ADDITIONAL EVIDENCE OF INSTANCES OF MANUAL CONTACT, WHICH WOULD GO AS TO LEWD AND LASCIVIOUS.

IN YOUR ARGUMENT, WHETHER WE WOULD AGREE WITH YOU WHETHER WE WOULD TO HAVE RECEDE FROM HIGHTOWER AND ALSO WHETHER, UNDER THE 1999 AMENDMENTS, WHETHER IT IS NOW MORE OR LESS CLEAR THAT, AS FOR VICTIMS UNDER TWELVE YEARS OLD, THAT LEWD AND LASCIVIOUS WOULD BE A LESSER LESSER-INCLUDED, LEWD AND LASCIVIOUS MOLESTATION, AS IT IS NOW DEFINED, WOULD BE BOTH A NECESSARILY AND/OR A PERMISSIVE LESSER-INCLUDED OFFENSE.

YES. I DON'T BELIEVE THAT IT IS ABSOLUTELY NECESSARY TO RECEDE FROM THE HIGHTOWER OPINION. OF COURSE, HIGHTOWER DOES HOLD THAT LEWD AND LASCIVIOUS CANNOT BE NECESSARILY AN INCLUDED OFFENSE.

THEY SAY IT IS MUTUALLY EXCLUSIVE, SO IF IT IS, I MEAN, BASICALLY, WITHOUT GETTING INTO ALL, WHATEVER THOSE TWO TERMS USUALLY MEAN, IF TWO CRIMES ARE NUMBERLY EXCLUSIVE, THEN -- ARE MUTUALLY EXCLUSIVE, THEN HOW CAN ONE BE INCLUDED WITHIN THE OTHER?

WELL, I UNDERSTOOD THE MUTUALLY EXCLUSIVE LANGUAGE IN HIGHTOWER TO BE REALLY A MATTER OF DOUBLE JEOPARDY LANGUAGE, SO TECHNICALLY SPEAKING, I BELIEVE THAT THE CONDUCT COULD FALL WITHIN THE SCOPE OF BOTH STATUTES, BUT THIS COURT HAS SAID THAT THE LEGISLATURE DID NOT INTEND MUTUAL, DUAL CONVICTIONS, SO THEY ARE MUTUALLY EXCLUSIVE, IN THE SENSE THAT YOU CAN HAVE A CONVICTION FOR ONE OR THE OTHER BUT NOT BOTH. THERE IS SOME AMBIGUITY IN WHAT THE COURT MEANT BY MUTUALLY EXCLUSIVE, BUT THAT IS MY INTERPRETATION OF IT.

I THOUGHT THAT IS WHAT JUSTICE SHAW SAID IN HIS DISSENT, THAT THAT IS WHAT WAS MEANT.

YES, AND JUSTICE SHAW ALSO SAID THAT HE THOUGHT THAT THE LEWD AND LASCIVIOUS CHARGE WAS A NECESSARILY-INCLUDED OFFENSE TO THE CAPITAL SEXUAL BATTERY.

IT IS A NECESSARILY INCLUDED OFFENSE, AND AND WHETHER IT IS DOUBLE JEOPARDY FOLLOWS, BECAUSE IF ALL OF THE ELEMENTS OF ONE ARE SUBSUMED IN THE OTHER, THEN THAT MEANS THAT THERE IS NO ADDITIONAL ELEMENT THAT IS NECESSARY TO BE PROVED, SO YOU HAVE GOT,

AREN'T THE TWO, DON'T THEY GO HAND-IN-HAND?

I AGREE WITH THAT, AND I PERSONALLY HAVE MISGIVINGS AS TO WHETHER THE HOLDING THAT IT IS NOT A NECESSARILY-INCLUDED OFFENSE IS CORRECT. I DID THROW A FOOTNOTE IN MY BRIEF SUGGESTING THAT THE COURT SHOULD REVISIT THAT ISSUE, BUT NONETHELESS --.

WHAT ELEMENT, IF IT IS TO BE PERMISSIVE, IF WE SAY IT IS NOT NECESSARY, WHAT ELEMENT OF LEWD AND LASCIVIOUS IS THERE THAT IS NOT IN A SEXUAL BATTERY?

I DON'T THINK THERE IS ANY ELEMENT THERE, BUT IF I AM RELEGATED TO THE COURT'S HOLDING THAT IT IS NOT A NECESSARILY-INCLUDED OFFENSE, AND IF I APPLY THE STRICT TEST AS TO WHAT CONSTITUTES A PERFORM I HAVE OFFENSE, I -- A PERMISSIVE OFFENSE, I FEEL THAT, BY APPLICATION OF THE PERMISSIVE TEST, THE CONDITIONS ARE SATISFIED, SO IT SHOULD BE CONSIDERED PERMISSIVE, IF IT IS NOT --

HOW ARE YOU THE CONDITIONS SATISFIED?

THE CONDITIONS ARE, FOR PER MISS I HAVE OFFENSE -- FOR PERMISSIVE OFFENSE, ONE, IT MUST ALLEGE ALL OF THE ELEMENTS OF THE LESSER OFFENSE AND, TWO, THE EVIDENCE PRESENTED AT TRIAL WOULD SUPPORT A CONVICTION FOR THE LESSER OVEN OFFENSE. THE INFORMATION IN THIS CASE HAD -- A LESSER OFFENSE. THE INFORMATION IN THIS CASE HAD A SPECIFIC ALONG ACE OF ORAL VAGINAL UNION, AND THIS ALLEGES THE ELEMENTS OF LEWD AND LASCIVIOUS CONDUCT IN TWO SEPARATE WAYS, ONE UNDER THE FIRST PARAGRAPH OF THE LEWD AND LASCIVIOUS STATUTE, ORAL/VAGINAL UNION OF A CHILD UNDER TWELVE ALSO CONSTITUTES LEWD AND LASCIVIOUS HANDLING OR FONDLING OF A CHILD UNDER 16.

BUT WAIT A MINUTE. BEFORE YOU GO FURTHER, YOU CAN'T LOOK AT SUBSECTION ONE OR ANY OTHER SUBSECTION, WITHOUT, ALSO, LOOKING AT THE FOLLOWING LANGUAGE, WHICH SAYS WITHOUT KMIINGT THE CRIME SEXUAL BATTERY.

RIGHT. AND -- WITHOUT COMMITTING THE CRIME OF SEXUAL BATTERY.

RIGHT, AND IN THAT CONTEXT WE LOOK AT SUBSECTION TWO, WHICH INCLUDES ACTS DEFINED AS SEXUAL BATTERY. NOW, THE KEY TO UNDERSTANDING THE PROPER SCOPE OF THE STATUTE, IS TWOFOLD. ONE, BY THE STATUTORY INTERPRETATION, AND ONE, AND, ALSO, BY DISTINGUISHING THE TERMS USED IN THE STATUTE, BETWEEN ACT, ACTS DEFINED AS SEXUAL BATTERY AND THE CRIME OF SEXUAL BATTERY. NOW, THE LEGISLATURE CLEARLY MUST HAVE INTENDED SOMETHING DIFFERENT, BY REFERRING TO THE ACT AS OPPOSED TO THE CRIME. NOW, THE --

BUT UNDER YOUR THEORY, IF SOMEBODY COMMENTS, UNDER SUBSECTION ONE, HANDLES, FONDLES OR ASSAULTS ANY CHILD UNDER 16 YEARS OF AGE, AND IT HAPPENS TO BE A VIOLATION OF 794, IN THAT IT IS THE CRIME OF SEXUAL BATTERY, THEN BY DEFINITION, IT IS NOT A LEWD AND LASCIVIOUS CRIME, UNDER 800.04.

NO.

ISN'T THAT CORRECT?

NO, JUSTICE CANTERO. BECAUSE YOU HAVE TO LOOK AT WHAT THE PURPOSE OF THE LEGISLATURE WAS INCLUDING THAT LANGUAGE, WITHOUT --

BEFORE WE GET TO THE PURPOSE, LET'S GET TO THE LANGUAGE.

YES.

AND THE LANGUAGE SAYS THAT YOU HANDLE OR FONDLE OR ASSAULT ANY CHILD, AND THEN YOU GO FURTHER AND IT SAYS, WITHOUT KMIINGT THE CRIME OF SEX EW BATTERY -- WITHOUT COMMITTING THE CRIME OF SEXUAL BATTERY, SO IF YOU HAVE HANDLED OR FOND AN ASSAULT ON ANY CHILD AND YOU HAVEN'T COMMITTED SEXUAL BATTERY, THEN THAT FALLS UNDER 400.04S. THAT IS THE WAY I UNDERSTAND THAT LANGUAGE.

NO. THE LANGUAGE HAS TO BE USED IN ALL OF THE TYPES OF SEXUAL BATTERIES THAT ARE AVAILABLE UNDER CHAPTER 794. NOW, IF YOU WOULD LOOK AT PARAGRAPH 3, 4 AND 5, YOU WOULD FIND THAT I AM REFERRING TO, IN CHAPTER 794 NOW, YOU WOULD FIND THAT THERE ARE NUMEROUS SEXUAL BATTERY OFFENSES, AN ELEMENT OF WHICH IS LACK OF CONSENT. SO BY INCLUDING THIS LANGUAGE WITHOUT KMIINGT A CRIME OF SEXUAL BATTERY, WHAT THE LEGISLATURE MEANT WAS THAT YOU CAN COMMIT THESE, AN ACT DEFINED AS SEXUAL BATTERY, WITHOUT COMMITTING THE CRIME SEXUAL BATTERY, IF AN ELEMENT OF THE CRIME IS LACK OF CONSENT, AND IF, IN YOUR PARTICULAR CASE, THERE WAS CONSENT.

YOU ARE TALKING ABOUT SUBSECTION TWO NOW, WHICH SAYS IF YOU COMMIT AN ACTUAL, OR ACTUALLY SUBSECTION 3, WHICH SAYS COMMENCE AN ACT DEFINED AS SEXUAL BATTERY, BUT THEN WITHOUT COMMITTING THE CRIME OF SEXUAL BATTERY, SO UNDER SUBSECTION 3, IF YOU COMMIT A SEXUAL BATTERY UNDER, AS DEFINED IN 794.011-H, WHICH DOESN'T TALK ABOUT CONSENT, OKAY, AND AS YOU SAY, RIGHT, AND YOU DO IT WITH CONSENT, THEN IT IS NOT A CRIME.

IT IS NOT THE CRIME OF SEXUAL BATTERY UNDER SECTION 794.

RIGHT. BUT NOW YOU ARE TALKING ABOUT SUBSECTION 3. WHAT ABOUT SUBSECTION ONE AND SUBSECTION TWO? THOSE ALSO HAVE THE LIMITING LANGUAGE, WITHOUT COMMITTING THE CRIME OF SEXUAL BATTERY.

WELL, MY INTERPRETATION OF THE STATUTE THERE IS THAT, WHEN THE LEGISLATURE PASSED THESE AMENDMENTS IN 1984, THEY DID SO WITH THE EXPRESS PURPOSE OF SUPERSEDING A HOLDING IN THE DCA LANIER CASE, AND THAT LANGUAGE IS LIMITED TO THOSE SITUATIONS. IN THE LAP EAR CASE, THEY SAID YOU COULD HAVE SEXUAL INTERCOURSE WITH A CHILD BETWEEN TWELVE AND FOURTEEN, AND THERE WAS NO, IT WAS NOT UNLAWFUL.

BUT AREN'T WE STUCK AT THE OUTSET --

IF IT IS CONSENT.

-- WITH THE WORDS THAT THE LEGISLATURE USED, AND THAT IS THAT, UNLESS WE FIND THAT THERE IS SOME AMBIGUITY THERE, THAT WE DON'T GO, EVEN THOUGH WE KNOW, AS A MATTER OF FACT, YOU KNOW, BY READING THE CASE, READING THE LEGISLATIVE HISTORY, AND SEEING THE, SO, BUT DON'T WE HAVE TO START WITH AND, IN MOST INSTANCES, STOP WITH THE ACTUAL LANGUAGE THAT IS USED? SO WOULD YOU GO BACK AND I WOULD LIKE TO FURTHER, LET'S ASSUME, NOW, THAT WE DON'T KNOW ANY OF THAT STUFF ABOUT WHY THE LEGISLATURE DID IT AND WHATEVER, AND WE HAVE JUST THOSE WORDS, OKAY, NOW, WOULDN'T JUST A STRAIGHTFORWARD APPLICATION OF THOSE WORDS MEAN THAT THESE OFFENSES ARE MUTUALLY EXCLUSIVE?

I UNDERSTAND THE RULE, JUSTICE ANSTEAD, AND IT IS ENTIRELY CORRECT. WITH, YOU KNOW, IF THE STATUTE IS PLAIN ON ITS FACE, YOU APPLY THE LANGUAGE, AND THAT IS THE END OF THE ANALYSIS. BUT THERE IS SOME SUGGESTION, EVEN IN THE COURT'S OWN OPINIONS IN LANIER AND HIGHTOWER, I ASSUME THAT THE COURT RESORTED TO THE STATEMENT OF LEGISLATIVE INTENT FOR A PURPOSE. IN LANIER AND HIGHTOWER. THE COURT NOTED THAT THE LEGISLATIVE INTENT OF THE STATUTE, EVEN BEFORE AND AFTER THE 1984 AMENDMENTS, WAS TO PROHIBIT LEWD AND LASCIVIOUS ACTS UPON CHILDREN, INCLUDING SEXUAL INTERCOURSE AND OTHER ACTS DEFINED

AS SEXUAL BATTERY, WITHOUT REGARD TO EITHER THE VICTIM'S CONSENT OR THE VICTIM'S PRIOR CHASTITY. NOW, I THOUGHT THAT THAT LEGISLATIVE INTENT WAS ESSENTIAL TO THE COURT'S REASONING IN THOSE TWO OPINIONS, AND THE FACT THAT THE DISTRICT COURTS ARE IN TOTAL DISAR RAY ON THIS QUESTION SUGGESTS TO ME, VERY RESPECTFULLY, THAT THERE IS SOME AMBIGUITY IN THE STATUTE.

DO WE HAVE A SITUATION WHERE, IF THE VICTIM IS BETWEEN TWELVE AND 16, THEN YOU HAVE, THE STATE HAS TO PROVE FOR SEXUAL BATTERY. THEY HAVE GOT TO PROVE LACK OF CONSENT.

YES.

CORRECT? SO IT, REALLY IN HIGHTOWER, WHAT THEY WERE TRYING, THE STATE REALLY WANTED LEWD AND LASCIVIOUS IN, AS A LESSER-INCLUDED, BECAUSE IF CONSENT WAS IN DISPUTE, AND THEY COULDN'T, ALSO, CHARGE AS WITH LEWD AND LASCIVIOUS, THEN THEY WERE, REALLY, IN A SITUATION WHERE THEY WOULD HAVE NO CONVICTION FOR ANYTHING, IF THE JURY DIDN'T FIND, FOUND THERE WAS CONSENT, CORRECT?

UM-HUM. THAT'S CORRECT.

BUT WE HAVE, HERE, A CHILD THAT IS TWELVE AND UNDER, AND SO WHAT, WHICH IS REALLY WAS NOT THE SITUATION HIGHTOWER OR IN LANIER.

RIGHT.

SO NOW WE ARE IN A SITUATION, THAT IS WHY I ASKED WHETHER, AND I GUESS IT IS REALLY GOING TO BE UP TO US TO DECIDE IF THERE IS AMBIGUITY, BECAUSE IF THE LATER STATUTE, THE 1999 STATUTE NO LONGER REFERENCES 794, AND I WAS WONDERING IF YOU FOUND ANY ASSISTANCE IN THE NEWER STATUTE, AS FAR AS CLARIFYING WHAT WOULD HAPPEN UNDER THIS STATUTE TODAY, WHETHER IT, LEWD AND LASCIVIOUS FOR CHILDREN, YOU KNOW, IF TWELVE AND UNDER, LEWD AND LASCIVIOUS MOLESTATION WOULD OR WOULDN'T BE A LESSER-INCLUDED OFFENSE. HAVE YOU LOOKED AT THAT?

I ACTUALLY HAVE LOOKED AT THE 1999 STATUTE, AND I FEEL THAT THE RESULT WOULD ACTUALLY BE THE SAME, BECAUSE THE 1999 STATUTE CHANGED SOME TERMS FORM THEY PROVIDED THE DEFINITION OF SEXUAL ACTIVITY RATHER THAN SEXUAL BATTERY.

WELL, THEY DON'T, DON'T THEY DO THE THING, THEY DON'T SAY THIS LANGUAGE, WITHOUT COMMITTING THE CRIME OF SEXUAL BATTERY ANYMORE. THEY DON'T REFERENCE IT.

THEY DON'T SAY THAT, BUT THEY SAY, UNDER 4-B, ENCOURAGE FORCES THAT ENTICES A PERSON LESS THAN 16 TO ENGAGE IN ACTS OR OTHER ACTS INVOLVING SEXUAL ACTIVITY, AND THE DEFINITION OF SEXUAL ACTIVITY IS THE SAME AS THE 794 DEFINITION OF SEXUAL BATTERY, SO THEY SAY COMMITS A LEWD AND LASCIVIOUS BATTERY, SO THE SAME CONDUCT, IN MY ESTIMATION, UNDER THE 1999 STATUTE, WOULD ALSO VIOLATE 1999 STATUTE UNDER 4-B. THE OTHER POINT TO MAKE IS THAT, WITH RESPECT TO THIS LANGUAGE WITHOUT COMMITTING TO THE CRIME OF SEXUAL BATTERY, THAT LANGUAGE WAS PERTINENT TO, LIKE I SAID IN THOSE INSTANCES WHERE CONSENT COULD BE A DEFENSE, IN THE CASE AFTER CHILD UNDER TWELVE, WHERE CONSENT NEVER WAS A MATERIAL FACTOR, IF YOU LOOK AT THE LEGISLATIVE INTENT UNDER THE CLEAR LEGISLATIVE INTENT, THAT INCLUDES REFERENCE TO A CHILD UNDER TWELVE, BECAUSE IT DOESN'T HAVE ANY LIMITING LANGUAGE. IT SAYS THE INTENT OF CHAPTER 800 WAS AND REMAINS TO PROHIBIT LEWD AND LASCIVIOUS ACTS UPON CHILDREN, INCLUDING SEXUAL INTERCOURSE, ACTS DEFINED AS SEXUAL BATTERY WITHOUT REGARD TO CONSENT, SO CLEARLY RIGHT THERE, THAT ALONE MEANS THAT A LEWD AND LASCIVIOUS, MEANS THAT AN ACT DEFINED AS SEXUAL BATTERY FALLS WITHIN THE SCOPE OR AT LEAST THE LEGISLATURE'S INTENDED SCOPE, OF CHAPTER 800.

I THINK, ARE YOU SAYING THAT SEXUAL ACTIVITY WITH A CHILD UNDER TWELVE IS A PERMISSIVE LESSER INCLUDED OR IT IS, IS THAT WHAT --

MY PERSONAL VIEW IS THAT IT IS A NECESSARILY LETTERS LESSER-INCLUDED OFFENSE, BUT THE ISSUE WAS RAISED AS A PERMISSIVE CLAIM WAS RAISED AS A PERMISSIVE OFFENSE, UNDER THE THEORY THAT HIGHTOWER IS HAS ALREADY -- HAS ALREADY FORECLOSED THE POSSIBILITY OF THE COURT FINDING IT NECESSARILY A CATEGORY ONE OFFENSE, AND SO WE ARE TRYING TO SAY --

IF IT IS A NECESSARILY, YOU HAVE A HE EVEN STRORNING CASE.

YES, BUT ACCEPTING HIGHTOWER FOR WHAT IT IS, WE LOSE, SO WE ARE TRYING TO SAY IF WE APPLY THE TEST FOR PERMISSIVE --

SAYING AT LEAST A PERMISSIVE.

YEAH. YOU MIGHT WIN, AND WE SAY THAT HIGHTOWER LEFT OPEN THE POSSIBILITY THAT IT COULD BE PERMISSIVE, BECAUSE THE PARTIES AGREED.

IF IT IS PERMISSIVE, WOULDN'T YOU HAVE TO HAVE HIM AN ELEMENT OF LEWD AND LASCIVIOUS THAT IS DIFFERENT FROM THE ELEMENTS OF THE SEXUAL BATTERY, ITSELF, CORRECT? IF A PERMISSIVE LESSER-INCLUDED OFFENSE. OTHERWISE, IF ALL OF THE ELEMENTS OF THE LEWD AND LASCIVIOUS IS THERE, IT BECOMINGS -- IT BECOMES A NECESSARY LESSER-INCLUDED OFFENSE, DOESN'T IT?

YES, BUT I THINK THAT THE ELEMENT WE ARE TALKING ABOUT IN OUR INFORMATION IN THIS CASE --

THAT'S RIGHT. I WANTED TO GET TO THIS --

-- IS A SPECIFIC ALLEGATION OF ORAL/VAGINAL UNION,, WHICH IN OTHER WORDS UNDER SEXUAL BATTERY, THERE ARE DIFFERENT THEORIES OF PROSECUTION, SO ORAL, PUTTING IT THAT WAY, ORAL/VAGINAL UNION IS NOT A NECESSARY ELEMENT OF SEXUAL BATTERY, BECAUSE IT CAN BE COMMITTED IN VARIOUS WAYS, SO IT IS NOT ESSENTIAL TO THAT CRIME.

THIS INFORMATION, THAT IS WHAT IS BEING ALLEGED, SO THAT IS WHAT THE STATE WOULD HAVE TO PROVE.

YES.

SO WHAT ELEMENT OF LEWD AND LASCIVIOUS IS NOT COVERED BY THIS, THE INFORMATION THAT WE ARE TALKING ABOUT IN YOUR, IN THIS CASE, WHAT ELEMENT OF LEWD AND LASCIVIOUS IS NOT INCLUDED IN THIS INFORMATION?

I AM NOT AWARE OF, I CAN'T, I DON'T THINK THERE IS ONE.

HOW MANY STATES JOIN FLORIDA IN THIS NOTION OF A PERMISSIVE LESSER-INCLUDED?

I AM SORRY. I DON'T KNOW THE ANSWER TO THAT. JUSTICE SHAW, I ONLY NOTED IN YOUR DISSENTING OPINION IN HIGHTOWER THAT YOU SAID FLORIDA WAS UNIQUE IN THAT ASPECT, BUT I DID NOT RESEARCH THAT. I AM SORRY.

CHIEF JUSTICE: WE HAVE REACHED THE TIME THAT YOU WANTED TO RESERVE FOR REBUDGET.

THANK YOU. -- FOR REBUTTAL.

THANK YOU.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS ANN TULIN ON BEHALF THE STATE TODAY. SEATED WITH ME AT THE TABLE TODAY IS CO-COUNSEL.

YOU ARE, YOUR POSITION IS THIS IS NOT AN INCLUDED OFFENSE, SEXUAL BATTERY.

YES, MA'AM.

SO IN THIS PARTICULAR CASE WHY WOULDN'T THIS INFORMATION, ALSO, SUPPORT A CHARGE OF LEWD AND LASCIVIOUS?

WELL, THIS INFORMATION CHARGED CAPITAL SEXUAL BATTERY BY COMMITTING THE CRIME ORAL/VAGINAL UNION UPON A VICTIM LESS THAN TWELVE YEARS OF AGE. UNDER HIGHTOWER, THAT NECESSARILY CONSTITUTES THE CRIME OF SEXUAL BATTERY. BY OPERATION OF LAW, THE INFORMATION WHICH CHARGED CAPITAL SEXUAL BATTERY AND CHARGED THE DEFENDANT WITH NO OTHER CONDUCT ACCEPT CAPITAL SEXUAL -- CONDUCT EXCEPT CAPITAL SEXUAL BATTERY DOES NOT MEET THE ELEMENTS OF SEXUAL MISCONDUCT.

YOU ARE BASING THAT ON WHAT?

ON THE LANGUAGE IN THE LEWD AND LASCIVIOUS STATUTE, WITHOUT KMIINGT THE CRIME OF SEXUAL BATTERY. IMPLICITLY WHAT THE LEGISLATURE DID THERE WAS MAKE AN ELEMENT OF THAT OFFENSE, THE STATE HAS TO PROVE, I MEAN, IT HAS TO BE PROVEN THAT THE CRIME OF SEXUAL BATTERY WAS NOT COMMITTED.

WHICH WOULD BE, SO, DO YOU SEE A DISTINCTION BETWEEN WHETHER YOU HAVE A VICTIM BETWEEN TWELVE AND 16 AND UNDER TWELVE? IN OTHER WORDS, THAT, BECAUSE LACK OF, WHEN YOU HAVE GOT LACK OF CONSENT, THAT IS NOT A DEFENSE TO CAPITAL SEXUAL BATTERY. SO THE STATE, IN THIS CASE, DOES, PROVES OR ANY SEXUAL BATTERY FOR A CHILD UNDER TWELVE, I MEAN, IT IS JUST THAT IS NOT, IT IS CALLED CAPITAL SEXUAL BATTERY, BUT WHEN YOU HAVE GOT, AND IF YOU HAVE A CHILD OVER TWELVE CONSENT, IS A DEFENSE, AND ISN'T THE LEWD AND LASCIVIOUS STATUTE, AS WRITTEN THEN, AS WRITTEN NOW, AS WRITTEN BEFORE, INTENDED TO MAKE SURE THAT, AS TO THOSE VICTIMS BETWEEN THE AGE OF TWELVE AND 16, IF THE STATE CAN'T PROVE LACK OF CONSENT, THAT A PERPETRATOR IS STILL CONVICTED OF SOME CRIME, SPECIFICALLY LEWD AND LASCIVIOUS?

ABSOLUTELY. THAT WAS THE PRECISE MEANING BEHIND THE CREATION --

ISN'T THAT COMPLETELY MADE CLEAR IN THE 1999 AMENDMENTS? WHICH NO LONGER REFER TO THIS VERY AWKWARD LANGUAGE OF, YOU KNOW, COMMITS AN ACT WITHOUT COMMITTING THE CRIME, AND MAKES IT VERY CLEAR THAT, IF THE CHILD IS BETWEEN TWELVE AND 16 AND ENGAGES, AND THERE IS ENGAGEMENT IN SEXUAL ACTIVITY, WHICH IS DEFINED SPECIFICALLY WITHOUT REFERENCE, THAT THEY ARE CONVICTED, CAN BE CONVICTED OF LEWD AND LASCIVIOUS BATTERY, BUT THAT IF THEY ARE, WITHOUT REGARD TO AGE, THEY CAN, AND THEY ENGAGE IN INTENTIONALLY TOUCHING, THEY CAN BE CONVICTED OF LEWD AND LASCIVIOUS MOLESTATION, SO NOW, IT WOULD BE COMPLETELY CLEAR THAT, UNDER 800.045-A, THAT THAT IS A NECESSARILY LESSER-INCLUDED OFFENSE, AS, OF CAPITAL, OF SEXUAL BATTERY, CORRECT? I MEAN, WE WOULDN'T, I GUESS I AM TRYING TO SEE HOW LIMITED THIS IS. IT LOOKS LIKE NOW THAT FOR WHATEVER REASON THE LEGISLATURE HAS NOW REWRITTEN IT, WHETHER THEY FEEL CLARIFIED IT, THERE IS NO QUESTION BUT THAT THESE ARE NOT MUTUALLY EXCLUSIVE CRIMES, THAT IS LEWD AND LASCIVIOUS, BUT THEY ARE ONES THAT ARE NECESSARILY A LESSER-

INCLUDED OFFENSE. DO YOU AGREE WITH THAT?

I THINK THAT, IF THERE WAS ANY CONFUSION BEFORE, WITH REGARD TO WHETHER LEWD AND LASCIVIOUS IS EITHER A NECESSARY OR A PERFORM I HAVE LESSER, THAT CON -- A PERMISSIVE LESSER, THAT CONFUSION HAS BEEN CLEARED UP BY THE 1999 AMENDMENT, BECAUSE THE 1999 VERSION DELETES THE LANGUAGE WITHOUT COMMITTING THE CRIME OF SEXUAL BATTERY, AND LIMITS THE METHOD OF COMMITTING LEWD AND LASCIVIOUS, BY ENGAGING IN SEXUAL ACTIVITY WITH VICTIMS TO BETWEEN THE AGE OF TWELVE AND 16. IT NO LONGER APPLIES TO VICTIMS UNDER THE AGE OF TWELVE.

IT NOW SAYS A PERSON WHO INTENTIONALLY TOUCHNESS A LEWD AND LASCIVIOUS MANNER, THE BREAST, GENITALS, GENITAL AREA, OR HAS THE PERSON TOUCH THE PERPETRATOR, IS GUILTY OF THAT, AND THAT IS EXACTLY WHAT HAPPENED IN THIS CASE.

I DON'T THINK, I DON'T THINK THE MOLESTATION, THE DEFINITION OF MOLESTATION FALLS WITHIN THE SAME DEFINITION OF COMMITTING SEXUAL ACTIVITY UNDER 794 --

WHAT ELEMENT OF LEWD AND LASCIVIOUS MOLESTATION IS INCLUDED THAT ISN'T INCLUDED IN SEXUAL BATTERY?

SEXUAL MOLESTATION SAYS A PERSON WHO INTENTIONALLY TOUCHES, IN ALLUDE OR LASCIVIOUS MANNER, THE BREASTS, GENITALS, GENITAL AREA, THAT WAS --

OR FORCES OR ENTICES A PERSON UNDER 16 TO SO TOUCH THE PERPETRATOR. ISN'T THAT WHAT HAPPENED HERE?

WHAT HAPPENED HERE WAS THE DEFENDANT PLACED HIS MOUTH ON THE VAGINA OF THE VICTIM, AND I THINK THAT NECESSARILY FALLS WITHIN THE DEFINITION OF SEXUAL BATTERY.

THAT IT DOESN'T -- WOULDN'T READ LEWD AND LASCIVIOUS AS IT IS NOW SPECIFICALLY DEFINED, AS IT WAS, THAT HANDLES, FONDLES OR ASSAULT ANY CHILD OR HERE INTENTIONALLY TOUCHES, IN ALLUDE OR LASCIVIOUS MANNER, THE BREAST, GENITALS OR GENITAL AREA?

I THINK THAT WAS TO IMPLY WITH THE HAND, ANY TOUCHING THAT HAS TO DO WITH THE HAND AS OPPOSED TO WITH THE MOUTH. I THINK, IF THERE WAS TOUCHING, IF THERE WAS ORAL UNION, THAT FELL UNDER EITHER SUBSECTION 4 UNDER THE NEW STATUTE, OR SUBSECTION 3 UNDER THE STATUTE THAT WAS IN EFFECT AT THE TIME THAT THE DEFENDANT COMMITTED THE CRIMES.

WHAT ABOUT SUBSECTION 6 OF THE NEW STATUTE? LEWD AND LASCIVIOUS CONDUCT.

A PERSON WHO --

INTENTIONALLY TOUCHES A PERSON UNDER 16 YEARS OF AGE IN A LEWD AND LASCIVIOUS MANNER. WOULDN'T THAT FALL INTO THE SAME CATEGORY? WOULDN'T THAT BE INCLUDED IN THE KIND OF INFORMATION WE HAVE HERE? ISN'T THE TOUCHING OF THE VICTIM'S VAGINA WITH THE MOUTH AND SHE IS UNDER 16, ISN'T THAT AN INTENTIONAL TOUCHING IN A LEWD AND LASCIVIOUS MANNER?

I WOULD SAY THAT IT IS THE STATE'S POSITION THAT THAT ACTIVITY FALLS UNDER LEWD AND LASCIVIOUS BATTERY, UNDER SUBSECTION 4, AND IT CANNOT, ALSO, FALL UNDER EITHER LEWD AND LASCIVIOUS MOLESTATION OR LEWD AND LASCIVIOUS CONDUCT.

WHY WOULDN'T IT FALL UNDER SUBSECTION 6?

BECAUSE BY DEFINITION BY OPERATION OF LAW, IT FALLS UNDER THE DEFINITION OF SEXUAL

ACTIVITY.

WHY COULDN'T IT, I MEAN, IT ALSO SEEMS TO, IN MY MIND, HE TOUCHES HER. IT DOESN'T SAY YOU HAVE TO TOUCH WITH THE HANDS. IT SAYS TOUCH THE PERSON IN A LEWD AND LASCIVIOUS MANNER. WHY WOULDN'T THAT -- WHAT IS MISSING THAT WOULD TAKE THAT OUT OF SUBSECTION OF?

-- OF SUBSECTION 6?

I THINK IT IS A DIFFERENTIATION BETWEEN TOUCHING WITH THE MOUTH AND TOUCHING WITH THE HAND.

AND WHERE DO WE GET THAT?

I --

HOW DO WE MAKE THAT DIFFERENTIATION?

BY THE FACT THAT THE DEFINITION OF SEXUAL ACTIVITY INCLUDES ORAL UNION, AND WHY WOULD, WHY WOULD THE LEGISLATURE HAVE INCLUDED THAT SAME ACTIVITY IN THREE SEPARATE SUBSECTIONS?

I THOUGHT, WELL, WHAT LESSER-INCLUDEDS WERE ACTUALLY INSTRUCTED ON IN THIS CASE?

THE LESSER-INCLUDED WERE THE ONE-STEP LESSER REMOVED OF ATTEMPTED SEXUAL BATTERY UPON A VICTIM UNDER TWELVE AND ALSO MISDEMEANOR BATTERY AND MISDEMEANOR ASSAULT.

SO WHAT IS A MISDEMEANOR BATTERY?

-- BATTERY? I MEAN WHAT ARE THE ELEMENTS OF THAT?

I BELIEVE THE ELEMENTS ARE ACTUALLY A SECTIONALLY TOUCHING OR STRIKE A PERSON AGAINST THE WILL OF ANOTHER OR INTENTIONALLY CAUSING BODILY HARM TO ANOTHER PERSON.

I GUESS, AND I AM STILL, THIS IS WHY I AM HAVING TROUBLE, UNLESS WE, IF WE BUY THE NOTION THAT SOMEHOW WE READ 800.04 AS MEANING THAT THE TWO CRIMES, 794 AND 800.04 WERE INTENDED TO BE MUTUALLY EXCLUSIVE, WHATEVER THAT MEANS, WHICH IS IT CAN EITHER HAVE ONE OR EITHER CHARGE ONE OR THE OTHER. YOU CAN'T HAVE BOTH, AND THAT WAS THE CLEAR INTENT OF THAT. OTHER THAN THAT, I HAVE GOT REAL PROBLEMS WITH HOW LEWD AND LASCIVIOUS IS NOT A LESSER-INCLUDED OFFENSE, WHETHER WE CALL IT A PERMISSIVE OR NECESSARILY. WE HAVE TOLL BUY THAT FIRST, CORRECT? THAT THAT WAS, THAT THE STATUTE CLEARLY AND UNAMBIGUOUSLY SAYS THEY ARE MUTUALLY EXCLUSIVE.

YES.

OKAY. I MEAN, THAT IS MAYBE THE BOTTOM LINE ON THAT.

AND I THINK EVEN THOUGH THE STATUTE DOES NOT NOW SAY, WITHOUT COMMITTING THE CRIME OF SEXUAL BATTERY, BY LIMITING THE ACTIVITY, THE SEXUAL ACTIVITY TO THE AGES OF BETWEEN TWELVE AND 16, IT JUST MADE CRYSTAL CLEAR THAT ANY ACTIVITY COMMITTED UPON, ANY ACTIVITY DEFINED AS SEXUAL BATTERY OR SEXUAL ACTIVITY, WHICH ARE THE SAME, COMMITTED UPON A VICTIM UNDER THE AGE OF TWELVE, CONSTITUTES CAPITAL SEXUAL BATTERY.

YOU DON'T THINK THE STATE WOULD HAVE A VERY GOOD ARGUMENT NOW, IF THEY WANTED TO INCLUDE A NECESSARILY LESSER INCLUDED CHARGE OR OFFENSE, WHEN IT WAS A CHILD UNDER 16, THAT THEY COULD ASK FOR AN INSTRUCTION ON LEWD AND LASCIVIOUS BATTERY?

I THINK WHAT THE COURT SAID IN HIGHTOWER, IN FOOTNOTE 4, IS THE CORRECT SOLUTION TO WHEN THE STATE IS UNSURE OF WHAT THE PROOF WILL BE, WITH REGARD TO THE EVIDENCE, THAT IT SHOULD CHARGE ALTERNATIVE COUNTS AS OPPOSED TO REQUESTING A LESSER INSTRUCTION, AND THEN LET THE JURY DECIDE THAT WAY AND COME BACK WITH ONE OF THE COUNTS, IF THEY HAVE TO COME BACK WITH A VERDICT ON BOTH. DOES THAT ANSWER YOUR QUESTION?

JUST GO AHEAD.

OKAY. A COUPLE OF POINTS THAT I WANTED TO MAKE, BACKTRACKING TO EVEN BEFORE REACHING THE MERITS, I WANTED TO VERY BRIEFLY ARGUE AS REITERATED ARE AND AS I WOULD LIKE TO REITERATE, IN THE STATE SET OUT IN THE ANSWER BRIEF, THAT THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION OF THE DISTRICT COURT IN THIS CASE AND --

YOU DON'T NEED AN EXPRESS AND DIRECT CONFLICT, DO WE, BECAUSE WE HAVE A CERTIFIED CONFLICTFLICT, SO WE HAVE -- CONFLICT, SO WE HAVE THE JURISDICTION UNDER THAT PROVISION, DON'T WE?

I DON'T BELIEVE YOU DO, BUT AT THE SAME TIME YOU CAN ANALYZE THE CASES THAT ARE CERTIFIED IN CONFLICT AND REVIEW AND PROVIDENT, AND THE COURT HAS DONE THAT, I BELIEVE, IN THE PAST BEFORE.

SO THE QUESTION IS NOT WHETHER OR NOT WE HAVE JURISDICTION AND WE DO BUT WHETHER WE SHOULD EXERCISE IT?

CORRECT.

BUT ONCE YOU HAVE A CONFLICT THAT IS CERTIFIED, ISN'T THERE AN APPARENT CONFLICT THERE THAT NEEDS TO BE RESOLVED, IF A DISTRICT COURT OF APPEAL BELIEVES THERE IS A CONFLICT, AND NOW IT IS TELLING THE STATE OF FLORIDA AND THE LAWYERS AND JUDGES THAT THERE IS A CONFLICT, SHOULDN'T WE RESOLVE IT JUST ON THAT BASIS?

WELL, I THINK, IN ORDER TO HAVE CONFLICT, UFING TO HAVE IN DISTINGUISHABLE FACTS -- YOU HAVE GOT TO HAVE IN DISTINGUISHABLE FACTS, AND BOTH OF THE CASES THAT WERE RELIED UPON BY THE FIRST DCA AND CERTIFYING CONFLICT, THERE IS NOT THAT SITUATION. YOU HAVE GOT TO HAVE DECISIONS WHICH INTERPRET THE SAME PRINCIPLES OF LAW UPON IN DISTINGUISHABLE FACTS, AND FOR EXAMPLE IN VALUE AS QUEST, YOU HAD THE COURT IN A FOOTNOTE IN DICTA, SAYING THAT PERHAPS ON REMAND, IF THERE IS EVIDENCE TO SUPPORT A PERMISSIVE LESSER INSTRUCTION, THEN THAT INSTRUCTION SHOULD BE GIVEN. I MEAN, THAT WAS NOT NECESSARY TO THE HOLDING OF THAT CASE AT ALL. I DON'T THINK YOU SHOULD BASE CONFLICT ON PURE DICTA. ALSO AS ASSERTED IN THE STATE'S ANSWER BRIEF, THREE OF THE FIVE ISSUES THAT WERE RAISED ON APPEAL WERE NOT PRESERVED BELOW, AND I THINK THAT IS AN ADDITIONAL GROUND FOR THIS COURT TO EITHER DECLINE TO REVIEW THE CASE OR TO APPROVE THE DECISION OF THE FIRST DISTRICT COURT.

WHAT WAS THE, ON THE LAST ISSUE, THAT IS WHETHER, THIS DEFENDANT GETS A MANDATORY LIFE SENTENCE FOR THIS CRIME, AND WAS THAT PRESERVED? WAS THAT CHALLENGE MADE, THAT THIS THIS IS THE, WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT?

THAT CHAEJ WAS NOT MADE BY DEFENSE COUNSEL. HOWEVER, THE DEFENDANT, HIMSELF, WAS

ALLOWED TO SPEAK, AND -- THAT CHALLENGE WAS NOT MADE BY DEFENSE COUNSEL. HOWEVER, THE DEFENDANT, HIMSELF, WAS ALLOWED TO SPEAK, AND HE SPECIFICALLY MADE THAT CHALLENGE, HIMSELF.

I KNOW JUDGE ALTENBURN SPECIFICALLY TALKED ABOUT A CASE WHERE THERE WAS INTERCOURSE AND QUESTIONING THE ISSUE OF CRUEL AND UNUSUAL PUNISHMENT AND TALKING ABOUT SOME OF OUR SURROUNDING STATES. HAVE THE STATE, ARE WE THE ONLY STATE THAT HAS A MANDATORY LIFE SENTENCE FOR THE CRIME OF SEXUAL BATTERY, WHERE THERE IS AN UNION BUT NOT A, BUT NOT PENETRATION?

I HAVE NOT DONE RESEARCH ON THAT PARTICULAR ISSUE. THERE HAS BEEP RESEARCH DONE BY OUR OFFICE AS TO HOW MANY STATES DO, IN FACT, IMPOSE THE PENALTY OF LIFE WITHOUT PAROLE, AND I BELIEVE THERE ARE 18 FOUGHT OFFENS OF CAPITAL -- FOR THE OFFENSE OF CAPITAL SEXUAL BATTERY, AND I COULD PRESENT SUPPLEMENTAL AUTHORITY ON THAT, IF YOU WOULD LIKE ME TO.

IS THERE A, DO THEY DIFFERENTIATE BETWEEN THE PENETRATION AND THE UNION?

I COULD SUBMIT SUPPLEMENTAL AUTHORITY BUT I CAN'T ANSWER THAT. THE PETITIONER IN HIS ARGUMENT, DIDN'T REALLY GET INTO THE ISSUE OF WHETHER THE EVIDENCE AT TRIAL SUPPORTED A PERMISSIVE LESSER, AND THE EVIDENCE DOES HAVE TO SUPPORT A PERMISSIVE LESSER, IN ORDER FOR ONE TO BE GRANTED. HERE THERE WAS A TOTAL LACK OF EVIDENCE AT TRIAL THAT LEWD AND LASCIVIOUS OCCURRED WITH REGARD TO COUNT ONE OF THE -- COUNT ONE. THE VICTIM TESTIFIED THAT THE DEFENDANT USED HIS MOUTH ON HER VAGINA. THE PROSECUTOR DID NOT COMINGLE THIS TESTIMONY WITH ANY OF THE FACTS THAT SUPPORTED THE LEWD AND LASCIVIOUS CONVICTION ON COUNT TWO. THE JURY WAS NOT ASKED TO CONSIDER THE TESTIMONY ON COUNT TWO, IN ORDER TO RETURN A CONVICTION ON COUNT ONE. THE DEFENDANT EITHER COMMITTED THE ACT OF SEXUAL BATTERY AS CHARGED OR HE DID NOT, AND THERE WAS NO ROOM FOR A FINDING THAT HE COMMITTED A LEWD AND LASCIVIOUS ACT WITH REGARD TO COUNT ONE. AS NOTED BY -- WOULD YOU AGREE THAT, IF IT MEETS THE DEFINITION OF THE LESSER-INCLUDED OFFENSE, THE FACT THAT THE GREATER OFFENSE IS, IS PROVEN, DOES NOT PREVENT THE JURY FROM RETURNING A VERDICT ON THE LESSER OFFENSE, IF IT IS, THEY ARE IN INSTRUCTED ON IT.

ARE YOU SPEAKING TO WHETHER IT IS UNNECESSARY OR PERMISSIVE?

THAT THE IDEA, WHAT YOU ARE SAYING IS YOU ABSOLUTELY PROVE SEXUAL BATTERY. I AM SAYING IS THAT IT DOES NOT IN ITSELF ANSWER THE QUESTION AS TO WHETHER AN INSTRUCTION ON A LESSER-INCLUDED OFFENSE IS PROPER OR NOT.

NO. CORRECT. I WOULD LIKE TO MAKE A VERY BRIEF HARMLESS ERROR ARGUMENT, AND I HAVE ALREADY REACHED THIS WITH YOUR QUESTION, JUSTICE PARIENTE. EVEN IF IT WAS ERROR, NOT TO INSTRUCT ON LEWD AND LASCIVIOUS, THE JURY WAS NOT DEPRIVED OF ITS PARDON POWER IN THIS CASE. THE COURT DID INSTRUCT ON THE REQUESTED LESSER OFFENSES OF ATTEMPTED SEXUAL BATTERY, WHICH IS A ONE-STEP LESSER-REMOVED OFFENSE. ALSO WITH REGARD TO MISDEMEANOR BATTERY AND MISDEMEANOR ASSAULT, IT HAS BEEN HELD IN FLORIDA THAT, WHERE AN AMENDED INSTRUCTION RELATES TO AN OFFENSE THAT IS TWO STEPS REMOVED, THE ERROR IS HARMLESS, SO LONG AS THE JURY IS INSTRUCTED ON THE ONE-STEP-REMOVED OFFENSE, AND THAT IS WHAT WE HAVE HERE. AND IT IS, ALSO, WORTH POINTING OUT THAT THE DEFENSE, THEORY OF DEFENSE HERE WAS THAT HE DID NOT COMMIT OFFENSES CHARGED. HE WAS THE DISCIPLINE IN THE FAMILY. THE THREE GIRLS WANTED HIM OUT OF THE HOUSE BECAUSE HE WAS, HE WAS TOO STRICT. IT WAS NEVER URGED TO THE JURY, BY DEFENSE COUNSEL, THAT IF HE, IN FACT, DID COMMIT ANY OF THE ALLEGED OFFENSES, THE JURY SHOULD FIND THAT HE PERHAPS COMMITTED A LESSER OFFENSE. THEREFORE HIS THEORY OF DEFENSE,

LEWD AND LASCIVIOUS, WOULD NOT HAVE SUPPORTED HIS THEORY OF DEFENSE. I THINK, UNDER THE CURRENT STATUTORY SCHEME, PROVIDES THAT IF SEXUAL ACTIVITY IS PERPETRATED UPON A VICTIM LESS THAN TWELVE, THE CRIME IS CAPITAL SEXUAL BATTERY. IF SEXUAL ACTIVITY IS PERPETRATED UPON A VICTIM GREATER THAN TWELVE, WITHOUT CONSENT, THE CRIME IS SEXUAL BATTERY, AND IF SEXUAL ACTIVITY IS PERPETRATED UPON A VICTIM GREATER THAN TWELVE WITH CONSENT, THEN THAT ACT IS LEWD AND LASCIVIOUS.

DOES THE STATE AGREE THAT THERE IS SUCH A THING AS A PERMISSIVE-INCLUDED, LESSER-INCLUDED OFFENSE IN FLORIDA?

THE STATE TAKES THE POSITION THAT JUSTICE SHAW'S DISSENTING AND CONCURING OPINIONS IN THE VARIOUS CASES ASSERTING THE POSITION THAT THERE SHOULD NOT BE PERMISSIVE LESSER OFFENSES IS LOGICAL. HOWEVER, THIS HAS NOT BEEN ADOPTED BY THE SUPREME COURT TO DATE, BY THE FACT THAT THERE STILL EXIST PERMISSIVE LESSER OFFENSES IN THE SCHEDULE OF LESSER-INCLUDED JURY OFFENSES.

SO IN FLORIDA NOW, AS THE LAW STANDS ON THE HIGHTOWER, THERE SHOULD BE AN INSTRUCTION, SHOULDN'T THERE? ON THE LESSER-INCLUDED. ON LEWD AND LASCIVIOUS.

AS THE LAW STANDS UNDER HIGHTOWER?

RIGHT.

THERE SHOULD, I DON'T THINK THERE SHOULD HAVE BEEN AN INSTRUCTION, EITHER AS A NECESSARY OR A PERMISSIVE, UNDER HIGHTOWER, AS THE LOSS STANDS, AND JUSTICE PARIENTE ASKED WHETHER THERE WAS, IT WAS NECESSARY TO RECEDE FROM HIGHTOWER, AND MY ANSWER TO THAT WOULD BE, NO. ASIDE FROM THE FACT THAT IT WAS CORRECTLY DECIDED, IT WAS BASED ON A 198VERSION OF THE -- 1983 VERSION OF THE STATUTE, AND THE 199 HAS VIRTUALLY REMOVED HA -- A 1999 HAS VIRTUALLY REMOVED THAT ISSUE. I SEE MY TIME HAS RUN OUT. I ASK THE COURT TO AFFIRM THE JUDGMENT AND SENTENCE. THANK YOU.

CHIEF JUSTICE: COUNSEL, REBUTTAL.

CAN I ASK ONE MORE QUESTION THOUGH?

SURE.

IF FLORIDA HAS A PERMISSIVE LESSER-INCLUDED OFFENSE, WHY DOESN'T THE STATE, WHY ISN'T THE DEFENDANT ENTITLED TO AN INSTRUCTION ON LEWD AND LASCIVIOUS, ON THE LESSER? SO THAT THE JURY IS GIVEN A CHOICE OF CONVICTING HIM OF THE MORE SERIOUS CRIME OR THIS PERMISSIVE LESSER CRIME?

AND YOU ARE MAKING THE POINT AS TO WHETHER IT IS NECESSARY OR PERMISSIVE?

WHY ISN'T HE ENTITLED TO AN INSTRUCTION?

BECAUSE THE LEGISLATURE, IN WORDING, SECTION 800.04, HAS MADE THESE CRIMES MUTUALLY EXCLUSIVE. I THINK, BY THE VERY LANGUAGE, IT WANTED TO RULE OUT THE POSSIBILITY THAT THE JURY WOULD COME BACK WITH A PARDON, IF THE EVIDENCE IS PROVEN ON THE GREATER OFFENSE. IT MADE THAT VERY CLEAR, BY THE LANGUAGE, WITHOUT COMMITTING THE CRIME OF SEXUAL BATTERY. IT RULED OUT THE POSSIBILITY THAT IT BE A NECESSARY OR A PERMISSIVE LESSER.

IF THEY REALLY WERE INTENDING TO DO THAT, THEN WHY WOULD WE BE INSTRUCTING ON THE MISDEMEANOR BATTERY AND ALL OF THESE OTHER LESSERS THAT THE, I MEAN, IF THAT WAS

THE LEGISLATURE'S INTENT, THEY SHOULD HAVE SAID AND THERE SHALL BE NO INSTRUCTION ON ANY LESSER-INCLUDED OFFENSE. AS YOU SAY, I MEAN, THAT DOESN'T REALLY MAKE SENSE. I KNOW THAT HAS BEEN SAID, BUT THAT REALLY DOESN'T MAKE ANY SENSE, DOES IT?

I UNDERSTAND WHAT YOU ARE SAYING. I UNDERSTAND. THANK YOU VERY MUCH.

A QUICK NOTE. ON THE HARMLESS-ERROR ANALYSIS, AN ATTEMPT DEFENSE IS A CREATURE OF AN ENTIRELY DIFFERENT ILK. AN ATTEMPT DEFENSE IS NOT A ONE-STEP-REMOVED OFFENSE, WITHIN THE MEANING OF THE ABRO CASE, AND THE AUTHORITY FROM THIS COURT ON THAT IS STATE VBRUINS, 429 SO.2D 307. MORE IMPORTANTLY, HOWEVER, THE DENIAL OF THIS INSTRUCTION IN A CASE WHICH IS ENTIRELY DEPENDENT UPON THE CREDIBILITY OF THE ALLEGED VICTIM, REALLY CONSTITUTES AN INVASION OF THE FACT FINDING PROVINCE OF THE JURY. LET ME GIVE YOU AN EXAMPLE. SUPPOSE WE HAVE AN ARMED ROBBERY CASE. THE VICTIM SAYS THE DEFENDANT APPROACHED ME ON THE STREET. HE POINTED A GUN IN MY FACE AND HE STOLE MY PURSE. RIGHT? UNDER THAT CASE, PETTY THEFT IS A -- PETITE THEFT IS A NECESSARILY INCLUDED OFFENSE. THE JURY COULD RETURN A FINDING OF PETIT THEFT. TO DO THAT, THE JURY WOULD HAVE TO FIND THAT THEY DIDN'T BELIEVE OR WERE NOT CONVINCED ABOUT THE TESTIMONY ABOUT THE GUN. IN THE PRESENT CASE, YOU HAVE BATTERY AS A NECESSARY NECESSARY-INCLUDED OFFENSE. THE JURY IS ENTITLED TO BELIEVE PART OF THE VICTIM'S TESTIMONY. THE VICTIM SAID THERE WAS ORAL/VAGINAL UNION. THE JURY COULD FIND I BELIEVE SOMETHING HAPPENED BUT WE ARE NOT ENTIRELY SURE WHEN ORAL/VAGINAL UNION, BUT GIVEN THE CHOICES BETWEEN ORAL/VAGINAL UNION OR SEXUAL BATTERY AND MISDEMEANOR BATTERY, WHICH IS NIGHT SEXUAL OFFENSE, WELL, UNDER THE PRESSURE OF LIMITED CHOICES, THE JURY MAY RETURN A VERDICT FOR A GREATER OFFENSE.

ISN'T THAT AN ARGUMENT FOR CHANGING THE STATUTE AND THE STATUTE HAS BEEN CHANGED?

I DON'T KNOW IF THAT IS AN ARGUMENT FOR CHANGING THE STATUTE. I THINK IT IS ARGUMENT FOR PRESERVING THE FACT FINDING PROVINCE OF THE JURY.

WE STILL HAVE TO READ THE STATUTE WE HAVE, RIGHT?

YES, SIR.

AND I THINK, WHEN YOU FIRST GOT UP, YOU SAID THAT YOU, THERE WAS, IT WAS NOT A NECESSARILY-INCLUDED OFFENSE TO SEXUAL BATTERY, NOT JUST BECAUSE OF HIGHTOWER BUT BECAUSE OF THE PLAIN LANGUAGE OF THE STATUTE.

NO. MY PERSONAL OPINION IS THAT IT IS A NECESSARILY-INCLUDED OFFENSE, BUT THAT SEEMS TO BE FORECLOSED BY HIGHTOWER, UNLESS THE COURT CHOOSES TO REVISIT IT.

WELL, IF IT IS NOT A NECESSARILY-INCLUDED OFFENSE, IN WHAT WAY UNDER THE STATUTE, IS IT A PER MISERABLY-INCLUDED OFFENSE? WHAT OTHER ELEMENTS DOES LASCIVIOUS CONDUCT INCLUDE THAT ARE NOT INCLUDED WITHIN SEXUAL BATTERY?

IN MY OPINION, BECAUSE OF THE STATEMENT OF LEGISLATIVE INTENT, IT IS NOT CLUEDED, WHICH SAYS THAT ACTS DEFINED AS SEXUAL BATTERY COME WITHIN THE SKOCH THE STATUTE, AND THAT IS MY PRINCIPLE RESPONSE TO THAT AND I SEE THAT I AM OUT OF TIME. I THANK YOU.

CHIEF JUSTICE: WE HOPE THAT THE DRAFTERS OF THE NEXT LAW EXAMINATION HAVE BEEN LISTENING IN ON THIS ORAL ARGUMENTMENT YOU ALL HAVE ASSISTED US GREATLY AND WE APPRECIATE YOUR COOPERATION AND EXCHANGE HERE. THANK YOU VERY, VERY MUCH. THE COURT WILL NOW TAKE ITS MORNING 15-MINUTE RECESS BEFORE HEARING THE LAST CASE.

MARSHAL: PLEASE RISE.