

>> NEXT CASE, LAST CASE ON THE COURT'S AGENDA TODAY IS STATE VERSUS RILEY.

MR. KENNETT.

>> MAY IT PLEASE THE COURT.

MICHAEL KENNETT, STATE OF FLORIDA, THE PETITIONER IN THIS CASE.

IN THIS CASE --

>> COULD I HAVE A QUESTION AT THE OUTSET?

>> YES, SIR.

>> THIS IS CERTIFIED QUESTION, CORRECT?

>> YES, SIR.

>> DO YOU AGREE THAT FOR US TO HAVE JURISDICTION OF A CERTIFIED QUESTION, THAT THE LOWER COURT MUST RULE ON THAT CERTIFIED QUESTION?

>> YES, SIR.

>> DID THE DISTRICT COURT BELOW IN THIS CASE RULE ON THAT CERTIFIED QUESTION?

>> YES.

>> IT DID? HOW?

WOULD YOU READ TO ME FROM THE OPINION BELOW WHERE THEY RULED ON THAT ISSUE.

I WENT THROUGH IT TRYING TO FIND IT AND I COULDN'T FIND IT.

I WOULD APPRECIATE IF YOU COULD HELP ME.

>> FELT CONSTRAINED TO RULE AS IT DID BY THIS COURT --

>> NOT WHAT I ASKED.

WILL YOU TELL ME WHERE IT
RULED.

THAT'S ALL I'M ASKING.

>> SIR, I THINK IT IS IMPLICIT
IN THE QUESTION.

>> I'M SORRY?

>> IT IS IMPLICIT IN THE
QUESTION, BASED ON REASONING
OF GALINDEZ.

THAT IS THE STATE'S POINT.

UNDER GALINDEZ CASE THE USED
HARMLESS OR HARMLESSNESS
PRESUMPTION OF RATIONAL JURY.

THAT IS FOUND IN STRICKLAND.

IN ABREAU, THE HARMFULNESS IS
NOT A PROCESS OF A RATIONAL JURY.

>> I THOUGHT GALINDEZ IS
COMPLETELY DIFFERENT CASE.

SO WHAT YOU'RE SAYING IS
THE CERTIFIED QUESTION IS NOT
BASED ON GALINDEZ, YOU WOULD
HAVE US, WE WOULD HAVE TO
RECERTIFY, WOULD THE COURT HAVE
TO RECEDE FROM ABREAU.

THEY CERTAINLY DIDN'T IN
GALINDEZ AND THAT ABREU
IS NOT GOOD LAW.

THEY'RE ASKING IN LIGHT OF
GALINDEZ, IS ABREU STILL GOOD
LAW?

THE TWO CASES ARE PRETTY,
TOTALLY DIFFERENT.

>> I UNDERSTAND GALINDEZ DEALS
WITH A -- THE FACT OF ISSUE IN
GALINDEZ WAS ENHANCING
FACTOR IN THE SENTENCE.

>> ISN'T IT THE CASE THAT
MAJORITY OPINION IN THIS CASE
DID NOT DISCUSS GALINDEZ?

>> THEY, NOT, NOT THAT FACTS
WITH REGARD TO SENTENCING
ENHANCEMENTS.

WHAT IS AT ISSUE IN GALINDEZ,
THIS COURT HELD THAT THE
RECORD IN GALINDEZ WAS HARMLESS
BECAUSE THERE IS NO WAY GIVEN
THE EVIDENCE OF THAT CASE THAT
A RATIONAL JURY WOULD NOT HAVE
FOUND --

>> BUT, CORRECT ME, IF I'M
WRONG, BUT IS IT TRUE THAT THE
FIRST REFERENCE IN THE MAJORITY
OPINION IN THE DISTRICT COURT
TO THE GALINDEZ DECISION IS IN
THE CERTIFIED QUESTION?

>> YES, SIR.

BUT WHAT THE COURT HAS ASKED --

>> SO I'M CORRECT ABOUT THAT?
SO THEY, THE ONLY DISCUSSION OF
GALINDEZ IS IN THE CERTIFIED
QUESTION.

LET ME, OKAY.

THE, PUT THAT ASIDE.

DID THE COURT PASS ON THE
QUESTION OF WHETHER, THIS
QUESTION, MAY A COURT FIND THAT
THE FAILURE TO INSTRUCT THE
JURY ON THE NEXT LESSER
INCLUDED OFFENSE CONSTITUTES
HARMLESS ERROR?

WHICH IS THE PART OF THE PHRASE
IN THE CERTIFIED QUESTION AFTER

THE PHRASE THAT REFERS TO
GALINDEZ?

>> YES.

>> IT DID PASS ON THAT?

>> YES, SIR.

THE PHRASE THAT ARE BASED ON
REASONING OF GALINDEZ, THAT
BEGS THE QUESTION WHAT IS THE
REASONING OF GALINDEZ.

THAT IS WHAT I WAS TRYING TO
ARTICULATE.

THE REASONING OF GALINDEZ
IS THE BAROMETER WHICH YOU
JUDGE WHETHER OR NOT A ERROR
OCCURRED UNDER GALINDEZ IS
PRESUMPTION OF A RATIONAL JURY.

A JURY FOLLOWS ITS
INSTRUCTIONS.

BUT THE PRESUMPTION IN ABREAU
IS AN IRRATIONAL JURY.

THE ASSUMPTION OF ABREAU IS
IRRATIONAL JURY.

THINK CAN'T, THE STATE CAN'T
PROVE --

>> I UNDERSTAND WHAT YOU'RE
SAYING.

WE'VE GOT TO THRESHOLD ISSUE
WHETHER WE OUGHT TO BE EVEN
CONSIDERING THIS CASE.

ABREAU, THE ONLY WAY YOU SUPPORT THE
CONCLUSION AND WE CONSIDER THE CASE
IF YOU IGNORE THE FIRST PHRASE
IN THE CERTIFIED QUESTION.

GALINDEZ IS NOTHING THAT THE
COURT BELOW DISCUSSED AND
PASSED ON THE REASONING.

SO, THAT'S, I MEAN, JUST THE WAY THAT IS PHRASED, CREATES A PROBLEM FOR OUR JURISDICTION, WHICH REQUIRES THAT THE COURT, THAT WE ONLY CONSIDER CERTIFIED QUESTIONS OF WHICH, THE APPELLATE COURT HAS PASSED.

>> I UNDERSTAND, SIR.

BUT GALINDEZ ISN'T ONLY DECISION THAT IS RECENT FROM THIS COURT THAT SHOWS A TREND TO MOVE AWAY FROM PER SE REVERSEABLE ERROR.

>> ARE YOU, ASSUME WE GOT TO THE MERITS, YOU'RE ASKING US TO RECEDE FROM ABREAU.

IS THE STATE'S POSITION, THERE WAS SOME ARGUMENT ABOUT THIS IN A CASE YESTERDAY, THAT THE ONLY PER SE REVERSIBLE ERROR YOU WOULD ASK US TO RECEDE WOULD BE A JUDGE BASED ON THE EVIDENCE FAILS TO INSTRUCT THE JURY ON THE NEXT IMMEDIATE LESSER INCLUDED OFFENSE?

>> IF THAT'S PRESERVED BELOW.

>> IF, WELL, WE'VE TALKED ABOUT IT BEING, IT'S NOT A FUNDAMENTAL ERROR ISSUE? YESTERDAY WE WERE TALKING ABOUT THE, WHERE THE INSTRUCTION IS ERRONEOUS OR INCOMPLETE, DOES THE STATE SAY EVEN IN THOSE CASES THERE SHOULD BE HARMLESS ERROR ANALYSIS IN ALL THESE LESSER INCLUDED OFFENSE CASES?

>> YES. BUT FIRST I WOULD DRAW A DISTINCTION, MA'AM, BETWEEN HARMLESS ERROR CASES AND FUNDAMENTAL ERROR CASES. THIS COURT SAID BACK IN THE JONES CASE, FAILURE TO INSTRUCT ON NEXT LESSE INCLUDED OFFENSE ONCE REMOVED CAN NOT CONSTITUTE FUNDAMENTAL ERROR.

>> CASES WE REFERRED TO YESTERDAY WHERE THERE WAS ERRONEOUS INSTRUCTION. SO THAT'S, THAT WOULDN'T, I'M THINKING HOW BROADLY YOU'RE ASKING US TO LOOK AT THIS. AND, SO, IT WOULDN'T, IT WOULD HAVE NOTHING TO DO WITH THE CASES WHERE THERE IS AN ERRONEOUS INSTRUCTION.

>> WELL, IT WOULD, MA'AM. EVEN LUCAS IS BASED UPON ABREAU.

GO TO LUCAS, ROJAS, MILLER, GO BACK TO ABREAU, SOMEWHERE ALONG THE LINE COURT TOOK IMPLIED ERROR IN ABREAU AND APPLIED REASONING TO UNPRESERVED CLAIMS.

>> YOU'RE REALLY ASKING US TO NOT ONLY UPEND 30 PLUS YEARS OF ABREAU AND ALL THE CASES THAT FOLLOW IT BUT YOU'RE ACTUALLY ASKING US TO COMPLETELY REWRITE ALL OF OUR JURISPRUDENCE WE AFFIRMED CONTINUOUSLY ON ANYTHING ABOUT NEXT IMMEDIATE

LESSER INCLUDED OFFENSES.

>> NOT NECESSARILY, MA'AM.

NO COURT HAS HELD THAT LUCAS,
NO COURT HAS HELD THAT THE
REASONING OF LUCAS APPLIES
OUTSIDE THE CONTEXT OF THE
EXCUSABLE AND JUSTIFIABLE
HOMICIDE CONTEXT.

SO THAT'S HOW, AND IF YOU LOOK
AT LUCAS DECISION, JUDGE
WEBSTER IN THE FIRST DCA
DECISION SAID HE WAS CONFUSED.
YOU HAVE REED OR VAN DELVAN AND
REED SAYING FUNDAMENTAL ERROR
MUST BE CRIME OF CONVICTION AND
ELEMENT IN DISPUTE BUT MILLER
AND ROJAS.

THIS COURT CAN CLARIFY WITHOUT
OVERRULING 30 YEARS OF
JURISPRUDENCE.

THE COURT CAN CLARIFY THE ERROR
IN LUCAS ONLY APPLIES TO
INEXCUSABLE --

>> IF WE WERE GOING TO DO
ANYTHING, SEEMS TO ME YOU MADE
THE ALTERNATIVE ARGUMENT THAT
THE ERROR WAS IN CALLING, YOU
KNOW TALKING ABOUT THE NEXT
IMMEDIATE LESSER INCLUDED
OFFENSE NOT INCLUDED ATTEMPTS,
AS, ONE OF THE STEPS.

THAT WAS IN BURNS OR BRUNS.

>> YES, MA'AM.

>> IS THAT A DIFFERENT ISSUE
AND THAT'S A MUCH NARROWER
QUESTION WHETHER THIS WAS A

NEXT IMMEDIATE LESSER INCLUDED
OFFENSE.

>> THAT IS ANOTHER WAY THE
COURT COULD AFFORD RELIEF.
ONE WAY TO OVERRULE ABREAU.

>> WHY WOULD WE WANT TO DO
THAT?

OF ALL THE JURISPRUDENCE, I
UNDERSTOOD WHY I SIGNED ON TO
GALINDEZ, TO ME IT WAS VERY
DIFFERENT.

NO QUESTION, IT WAS VICTIM
INJURY POINTS THAT THERE WAS NO
FACTUAL DISPUTE EVEN ABOUT.
THIS IDEA OF BEING ABLE TO GO
DOWN TO THE NEXT IMMEDIATE
LESSER INCLUDED OFFENSE, JUST
DON'T HAVE TO DO WITH JURY PARDONS
HAS TO DO WITH NECESSARILY
INCLUDED LESSER OFFENSES.

>> YES, MA'AM. WE CAN STILL
PROTECT THE RIGHTS OF
DEFENDANTS.

IF THE BAROMETER IS NOT,
IRRATIONAL JURY AND JURY
PARDONS.

IF THE BAROMETER IS
OVERCONVICTION CONCERNS.

IF WE USE A, B, C, ANALOGY,
FAILURE TO NOT INSTRUCT
ON B MAY NOT BE ERROR.

SAY CASE OF CHARGED OFFENSE IS
ROBBERY WITH A FIREARM.

B WOULD BE ROBBERY WITH A
WEAPON AND C WOULD BE ROBBERY.

IF THE COURT FAILS TO INSTRUCT

WITH ROBBERY WITH A WEAPON, IT
MAY BE REVERSIBLE ERROR.

IT MAY NOT WE NEED TO LOOK AT
RECORD.

IF THERE IS NO DISPUTE THE
PERSON COMMITTED THE ROBBERY
HAD A FIREARM, IF THE OFFENSE
AT TRIAL WAS IDENTITY THERE
WAS NO HARM TO THAT DEFENDANT
IN THE FACT THAT THE TRIAL
COURT FAILED TO INSTRUCT ON
ROBBERY WITH A WEAPON BECAUSE
HIS ENTIRE DEFENSE IT WASN'T
ME. LACK OF IDENTITY.

IF HOWEVER, THE NATURE OF THE
WEAPON IS AT ISSUE, YES. THE
DEFENDANT COULD SURELY SHOW ON
APPEAL THAT IN THAT CASE A
TRIAL COURT COMMITTED
REVERSIBLE ERROR FAILING TO
INSTRUCT ON ROBBERY WITH A
WEAPON BECAUSE THE NATURE OF
THE WEAPON WAS IN DISPUTE.

THAT'S WHY IT TALKS ABOUT
CHANGING BAROMETER OF PROSPECT
OF IRRATIONAL JURY MIGHT RENDER
A VERDICT BASED UPON MERCY AND
SHIFT SO WHAT IT IS UNDER
TRICKS LAND AND ALL THE OTHER
HARMLESS CASES OF THIS COURT.

>> YOU DO HAVE, YOU WOULD
AGREE, AS LATE AS AND I WAS
TRYING TO FIND THE CASE OTHER
THAN GALINDEZ, IT WAS A CASE ON
POST-CONVICTION WHERE WE
CHANGED THE STANDARD FOR

POST-CONVICTION BUT WE
REAFFIRMED WITHIN THE LAST
THREE YEARS THE IMPORTANCE OF
THE ABREAU LINE OF CASES.

>> IN PENA, YES, MA'AM.

AND I THINK 2006 CASE, WHICH
TALKED --

>> THERE WAS ALSO A CASE ABOUT
POST-CONVICTION.

>> YES. SANDERS SAID THAT --

>> WE AFFIRMED.

SAID WE'LL DO SOMETHING
DIFFERENT FOR POST-CONVICTION
BECAUSE THE PREJUDICE IS
DIFFERENT BUT WE'RE REAFFIRMING
WHAT WE SAID IN THE LAST 30
YEARS.

>> YES, BUT THIS PARTICULAR
ARGUMENT WAS NOT RAISED IN
SANDERS.

SANDERS REASONED UPON LANGUAGE
IN STRICKLAND REVIEWING COURTS
MUST PRESUME THAT THE JURY
ACTED IRRATIONALLY.

THE REVIEWING COURTS CAN'T
PRESUME THAT THE JURY ACT OUT
OF LENIENCY OR HARSHNESS.
SO THAT TAKES JURY PARDON OUT
OF THE EQUATION.

JURY PARDON CLAIM CAN NOT
SATISFY THE PREJUDICE PRONG OF
STRICKLAND BUT MAY SATISFY THE
SUFFICIENCY PRONG.

THIS ISSUE NOT SQUARELY BEFORE
THE COURT IN SANDERS.

SO THE COURT CAN ADDRESS THE

ISSUE WHICH IT DID, WHICH IS FINE.

>> WAS THERE ANY ARGUMENT MADE BELOW BATTERY WAS NOT A ONE STEP REMOVED CRIME FROM, WHAT WAS THIS, CAPITAL SEXUAL BATTERY?

>> CAPITAL SEXUAL BATTERY, YES, MA'AM.

THE TRIAL COURT REASONED BEFORE THIS COURT ISSUED ITS DECISION, HOPE I PRONOUNCE THIS CORRECTLY. CANTELLATE.

DICTA OUT OF FIFTH DCA DECISION, THIS COURT SAID BASED UPON THE LEGAL PRESUMPTION SOMEONE UNDER 12 CAN NOT CONSENT, CONSENT IS STILL ELEMENT.

THEREFORE, SIMPLE BATTERY IS LESSER INCLUDED OFFENSE OF CAPITAL SEXAL BATTERY.

>> I ASSUME BATTERY IS, BUT, IS IT ONE STEP REMOVED, THAT'S MY QUESTION TO YOU?

WAS THERE ANY ARGUMENT MADE THAT THIS WAS NOT BUT ONE STEP REMOVED OFFENSE?

>> I'M NOT QUITE SURE WHAT YOU REFER TO MA'AM, WHEN YOU SAY ARGUMENT.

THIS IS CASE HAS UNIQUE PROCEDURAL POSTURE.

THERE WAS INITIALLY ANDREWS BRIEF SUBMITTED BY APPELLATE COUNSEL.

FIRST DISTRICT COURT OF APPEAL
ISSUED FIRST DCA OPINION.

>> WAS IT ISSUE IN THE DISTRICT
COURT OF APPEAL?

THAT'S ALL I'M ASKING YOU.

>> ALL WE'RE LEFT WITH IS THE
FIRST DCA'S DECISION BELOW,
MA'AM. THEY --

>> OKAY.

>> THEY CITE TO CANTILLET,
THE DEFENSE ASKED FOR A
INSTRUCTION ON SIMPLE BATTERY.
AND CANTILLET WAS --

>> THE REASON THE JUDGE DIDN'T
INSTRUCT ON LESSER INCLUDED IS NOT
THAT HE OR SHE WAS CONFUSED
WHAT THE NEXT LESSER INCLUDED
WAS. IT WAS BASED ON WHAT HE OR SHE
SAID WAS LACK OF EVIDENCE.

>> TRIAL COURT REASONING THAT
CONSENT ISN'T AN ELEMENT TO
CAPITAL SEXUAL BATTERY.

>> YOU AGREE, YOU'RE NOT
ARGUING UNDER OUR LAW THAT
BATTERY WAS THE NECESSARILY
LESSER INCLUDED OFFENSE OF THE
CRIME THAT WAS CHARGED?

>> I'M NOT ARGUING THAT IT
ISN'T, NO.

>> AND I THOUGHT MAYBE THAT WAS
WHAT JUSTICE QUINCE WAS TRYING
ASKING YOU ABOUT, THAT THAT
WASN'T AN ISSUE.

>> YES, I AGREE ON THIS COURT'S
CASE THAT SIMPLE BATTERY IS
LESSER INCLUDED OFFENSE OF

CAPITAL SEXUAL BATTERY IF

THAT'S THE QUESTION.

>> THAT'S FINE.

>> MA'AM, I WANT TO GET TO YOUR
POINT ABOUT BRUNS.

THERE IS SEVERAL WAYS FOR THE COURT
TO AFFORD RELIEF.

ONE TO OVERTURN ABREAU, I KNOW
THE STATE SHOULD BE GIVEN
OPPORTUNITY IN THESE CASES TO
DEMONSTRATE HARMLESS ERROR
USING ROBBERY EXAMPLE.

INSTEAD OF OVERTURNING ABREAU
COMPLETELY WE'LL OVERTURN
BRUNS.

BECAUSE IT AFFORDS THE JURY TO
RENDER VERDICT BASED ON MERCY
SATISFIES THE ABREAU TEST.

THAT IS ULTIMATE WAY TO
AFFORD THE COURT RELIEF.

IT IS LESSER, SATISFY THE
ABREAU.

AND STATE TRIED TO POINT OUT IN
ITS INITIAL BRIEF THAT THE
REASONING OF BRUNS IS FAULTY.

BRUNS STARTS ON PREMISE
BECAUSE AN ATTEMPT IS NOT
TECHNICALLY A LESSER INCLUDED
OFFENSE OF THE CHARGED OFFENSE,
IT THEREFORE CAN'T SATISFY
ABREAU.

THAT MAKES NO SENSE IF THE JURY
IN ORDER TO AWARD A PARDON MUST
DISREGARD ABREAU IN ITS
INSTRUCTIONS.

WHAT DOES A JURY CARE WHETHER

OR NOT A ATTEMPT IS LESSER INCLUDED OFFENSE OF THE CRIME CHARGED IF IT IS GOING TO DISREGARD THE INSTRUCTIONS ANY WAY.

>> LET ME ASK YOU IF IT IS YOUR VIEW THAT OUR LAW IN THIS CONTEXT ON PER SE REVERSIBLE ERROR IS CONSISTENT WITH SECTION 9248.051, SUBSECTION 3, WHICH LEGISLATURE PASSED I THINK BACK IN 1996 WHERE IT SAYS, AN APPEAL MAY NOT BE TAKEN BUT A JUDGEMENT ORDER OF THE TRIAL COURT UNLESS PREJUDICIAL ERROR IS ALLEGED AND PROPERLY PRESERVED.

GOES ON TO SAY, TAKES INTO ACCOUNT FUNDAMENTAL ERROR BUT IT SAYS, A JUDGEMENT OR SENTENCE MAY BE REVERSED ON APPEAL ONLY WHEN AN APPELLATE COURT DETERMINES AFTER REVIEW OF THE COMPLETE RECORD THAT PREJUDICIAL ERROR OCCUR AND PROPERLY PRESERVED IN THE TRIAL COURT OR IF NOT PROPERLY PRESERVED WOULD CONSTITUTE FUNDAMENTAL ERROR.

>> YES, SIR.

>> I DON'T THINK YOU CITED THAT IN YOUR BRIEF, DID YOU?

>> I THINK CRIMINAL FORMAT YOU'RE REFERING TO, SIR.

>> 924.051.

>> I KNOW THE STATE IS NOT.

THAT WOULD SUPPORT THE STATE'S
CONTENTION THAT THE LAW HAS
CHANGED.

THAT ABREAU IS AN OUTLYER DECISION.
CHAPMAN VERSUS CALIFORNIA CAME
UP IN U.S. SUPREME COURT IN 1960s.
THIS COURT APPLIED THAT TO
BRIGLIO.

ABREAU WAS A OUTLYER AND BATES
IS OUTLIER IN THE STRICKLAND
CONTEXT.

THERE ARE CHANGES IN THE LAW.
THEY HAVE STEPPED BACKS FROM
PER SE RULES OF REVERSAL.

LEGISLATURE SAID YOU HAVE TO
CONDUCT EXAMINATION OF THE
RECORD.

GIVE THE STATE OPPORTUNITY TO
SHOW BEYOND A REASONABLE DOUBT
THAT THE ERROR DID NOT
CONTRIBUTE TO THE CONVICTION
AND IN THIS CASE THE STATE CAN
CLEARLY DO THAT THE FACT THAT
THE TRIAL COURT DID NOT GIVE
INSTRUCTION ON SIMPLE BATTERY
IN NO WAY CONTRIBUTED TO THE
CONVICTION FOR CAPITAL SEXUAL
BATTERY.

AS CLASSIFIED BY JUDGE WOLF IN
HIS CONCURRING OPINION THE
DEFENSE IN THIS CASE WAS A
NAME.

I RESERVE REST OF MY TIME FOR
REBUTTAL UNLESS THERE ARE
QUESTIONS.

>> MR.^SPECTOR.

>> MAY IT PLEASE THE COURT.
MY NAME IS JOSHUA SPECTOR.
I'M JOINED BY VIVIAN WHITE,
CERTIFIED LEGAL
INTERN FROM THE UNIVERSITY OF
MIAMI.
YOUR HONORS THE QUESTION BEFORE
THE COURT IS THE QUESTION
CERTIFIED BY MAJORITY OF FIRST
DISTRICT COURT OF APPEAL AND
THAT QUESTION SHOULD BE
ANSWERED IN THE NEGATIVE FOR
REASONS SET FORTH IN OUR BRIEF
WHICH I LIKE TO FOCUS ON JUST
THREE TODAY.
>> SO YOU CONCEDE WE SHOULD
HAVE THIS CASE?
>> NO, YOUR HONOR.
IN FACT WE MAKE THE ARGUMENT IN
THE BRIEF THIS --.
>> YOU SAID ANSWERED IN THE
NEGATIVE.
SO YOU'RE KIND OF JUMPING TO AN
ANSWER.
IF WE DON'T HAVE JURISDICTION
WE WOULDN'T ANSWER IT.
>> THAT'S CORRECT, YOUR HONOR.
THERE IS THRESHOLD ISSUE AS THE
COURT HAS POINTED OUT AND IT
WOULD BE MORE APPROPRIATE TO
DISCUSS THAT FIRST.
BEFORE WE REACH THE ANSWER TO
THE QUESTION.
BUT THE ARGUMENT IS MADE IN
OUR BRIEF AND BE HAPPY TO
DISCUSS IT IN GREATER DETAIL

THAT THIS COURT SHOULD DENY
JURISDICTION OVER THIS MATTER
SIMPLY BECAUSE AS THE COURT
SEEMED TO INDICATE IN ITS
QUESTIONING, GALINDEZ WAS NOT
DISCUSSED BY THE MAJORITY
BELOW.

IT WASN'T A FACTOR IN MAKING
THE DECISION.

AND THERE'S NO OTHER DISTRICT
COURT OPINION.

THIS DOESN'T COME UP AS A
MATTER OF CONFLICT.

IT'S A CERTIFIED QUESTION.

SO THERE HASN'T BEEN AN
APPLICATION OF GALINDEZ FOR THE
APPLICATION POSITED IN THE
CERTIFIED QUESTION.

SO --

>> DISCUSSION OF HARMLESS
ERROR?

>> I'M SORRY, YOUR HONOR?

>> WAS THERE ANY DISCUSSION OF
HARMLESS ERROR IN THE OPINION
BY THE DISTRICT COURT?

>> I DON'T BELIEVE THERE WAS,
YOUR HONOR.

I JUST DON'T THINK IT WAS AN
ISSUE THAT THE COURT DEALT WITH
AT ALL.

AND AS THE, AS THIS COURT
POINTED OUT IN 1995 IN THE
SEIDMAN DECISION CITED IN OUR
BRIEF, IF THIS QUESTION --

>> THE COURT CLEARLY DEALT WITH
THE CONCEPT OF PER SE

REVERSIBLE ERROR, WHICH MEANS
ERROR THAT IS CONCLUSIVELY
DEEMED, I MEAN IT IS NOT
SUBJECT TO HARMLESS ERROR
ANALYSIS.

THAT IS CLEARLY PART OF THE
COURT'S ANALYSIS, RIGHT?

>> IT FACTORED IN, YOUR HONOR,
BUT THERE WAS NO DISCUSSION OF
GALINDEZ OR FACTS OR LEGAL
RATIONALE OF GALINDEZ.

AND, SO TO THE EXTENT THIS
COURT EVEN DEEMS IT HAS
JURISDICTION OVER THIS MATTER,
WHICH WE ARGUE THAT THE COURT
DOES NOT OR SHOULD NOT EXERCISE
JURISDICTION OVER THIS
CERTIFIED QUESTION.

>> ACTUALLY THIS CASE IS AN
UNUSUAL POSTURE.

WERE YOU APPOINTED BY THE COURT
TO REPRESENT --

>> YES, YOUR HONOR.

>> YOU'RE HERE AS PRO BONO
COUNSEL?

>> YES, YOUR HONOR.

>> MR. ^REILLY APPEARED PRO SE
AND I ASSUME THERE WAS NO ORAL
ARGUMENT OR HE'S THE ONE
REALIZED, HIS LAWYER DIDN'T,
THERE HAD BEEN AN ABREAU ERROR
AT TRIAL.

IS THAT WHAT HAPPENED?

>> WELL THE, I BELIEVE THAT'S
CLERK, YOUR HONOR.

I'M NOT SURE THERE WAS ANY ORAL

ARGUMENT.

>> IT SAID HE WAS PRO SE
BELOW.

>> YES, YES.

>> I'M ASSUMING HE IS IN
PRISON FOR CAPITAL SEXUAL
BATTERY.

>> YES, THAT'S RIGHT, YOUR
HONOR. BUT THE ISSUE HERE IS THAT,
RATHER THE CIRCUMSTANCES HERE
ARE UNIQUE WHEN IT COMES TO THE
APPELLATE PROCEEDINGS, HOWEVER,
BELOW A REQUEST WAS MADE FOR
AN INSTRUCTION ON THE NEXT
LESSER INCLUDED OFFENSE.
SO WITH RESPECT TO WHETHER
THIS IS FUNDAMENTAL ERROR OR
NOT.

I UNDERSTAND THAT THERE IS
AUTHORITY THAT WOULD RUN
CONTRARY BUT THE ERROR WAS
PRESERVED BELOW BECAUSE THE
INSTRUCTION WAS REQUESTED AND
IT WAS DENIED.

>> WOULD YOU, SO I GUESS THE
ISSUE WOULD BE, AND WHAT
JUSTICE QUINCE WAS ASKING, THEY
REALLY ARE PUTTING THE
QUESTIONS, ASSUMING THERE'S
HARMLESS ERROR, SO FORTH.
NOW YOU'RE NOT MAKING HERE,
JUDGE WOLF TALKED IN HIS
DISSENT OR HIS CONCURRENCE, WHY
IT IS HARMLESS.
THAT ISSUE ISN'T, WASN'T BEFORE
THE APPELLATE COURT.

AND IT DIDN'T RULE ON THE ISSUE OF HARMLESS ERROR.

>> CORRECT, YOUR HONOR.

>> TO ME, SO THERE IS SORT OF A TWO-STEP, THERE'S SEVERAL STEP PROCESS WHY WE PROBABLY WOULDN'T WANT TO BE RECEDING FROM ABREAU IN THIS CASE GIVEN ITS PROCEDURAL HISTORY AND WE WOULD BE FOR THE FIRST TIME TALKING ABOUT WHETHER IT MIGHT, OR WOULD WE SAY, YEAH, WE'RE RECEDING FROM ABREAU AND YOU, TRIAL COURT, I MEAN APPELLATE COURT CAN CONSIDER HARMLESS ERROR?

IS THAT WHAT --

>> THAT'S RIGHT, YOUR HONOR, WOULD NOT ONLY BE DEPARTURE FROM ABREAU AND LINE OF AUTHORITY THAT FORMS IT GOING BACK TO KILLEN v. STATE.

50 YEARS.

APPROXIMATELY, DECISION IN ABREAU, 31 YEARS, MAGNITUDE OF 190 DECISIONS IN FLORIDA HAVE RELIED UPON ABREAU.

SO, IT'S, IT IS NOT ONLY A DEPARTURE FROM THAT LINE OF PRECEDENT AND WE DISCUSS A LITTLE FURTHER THIS COURT'S THREE-PRONG TEST LOOKING AS PRECEDENT AND WHETHER THE CIRCUMSTANCES ARE SUFFICIENT TO STEP AWAY FROM IT, BUT BEFORE I DO THAT I WANT TO NOTE PART OF

OUR ARGUMENT ABOUT GALINDEZ.
BECAUSE THE QUESTION HERE IS
ABOUT GALINDEZ AND HOW GALINDEZ
APPLIES OR SHOULD APPLY.

THIS ISN'T ENGAGED BY THE FIRST
DISTRICT COURT OF APPEALS BUT I
THINK IT BEARS MENTION HERE
THAT GALINDEZ IS FACTUALLY AND
LEGAL RATIONALE IS
DISTINGUISHABLE.

ON ITS FACTS GALINDEZ DOES
PRESENT THE SORT OF CASE WHERE
HARMLESS ERROR IS EFFECTIVE AND
USEFUL FORM OF ANALYSIS.

WHY IS THAT?

BECAUSE WE HAD AN UNDISPUTED
COURSE OF CONDUCT BETWEEN THE
DEFENDANT AND THE VICTIM.

THEY HAD SEXUAL INTERCOURSE
FOR MONTHS.

THE DEFENDANT HAD ADMITTED AND
JURY HAD FOUND ON THE COUNT OF
CHILD ABUSE IMPREGNATING HIS
VICTIM THAT THE DEFENDANT HAD
IMPREGNATED THE VICTIM.

SO HARMLESS ERROR RATIONNALE WAS
APPLIED TO DETERMINE WHETHER
THERE WAS SEXUAL PENETRATION.
THE APPLICATION OF THE ANALYSIS
WAS AS TO AN ELEMENT FOR
SENTENCING.

NEVER FOR PURPOSE OF
DETERMINING GUILT OR INNOCENCE
ON A PARTICULAR CHARGE, WHETHER
THE EVIDENCE WOULD SUPPORT
THAT.

AND THAT'S WHAT WE'RE REALLY TALKING ABOUT HERE, YOUR HONORS, IS THE APPLICATION OF HARMLESS ERROR ANALYSIS TO DISCUSS GUILT OR INNOCENCE. NOW THERE'S CHAPMAN AND THERE'S --

>> YOU'RE NOT TRYING TO ARGUE THAT IF WE APPLIED A HARMLESS ERROR IT WOULDN'T BE HARMLESS, ARE YOU?

IS THAT WHAT YOU'RE ARGUING?

>> WELL, IT WOULD BE ALWAYS HARMFUL, YOUR HONOR, TO APPLY THE HARMLESS ERROR ANALYSIS FOR THIS VERY NARROW SET OF CIRCUMSTANCES.

>> YOU'RE SAYING WE SHOULD ALWAYS BE FUNDAMENTAL? THAT'S YOUR ARGUMENT, RIGHT? YOU'RE NOT SUGGESTING ON THE MERITS IF WE SOMEHOW DECIDED THAT WE WOULD APPLY A HARMLESS ERROR ANALYSIS, THAT IT WOULDN'T BE HARMLESS?

>> WHAT I'M SUGGESTING, YOUR HONOR, IT WOULD ALWAYS BE HARMFUL TO APPLY THE HARMFUL ANALYSIS HERE BECAUSE IN THIS NARROW SET OF CIRCUMSTANCE WEST HAVE A CRIMINAL DEFENDANT THAT HAS REQUESTED JURY INSTRUCTION ON LESSER INCLUDED OFFENSE AND TRIAL COURT DID NOT GIVE THAT INSTRUCTION.

THE CASES WHERE IN HARMLESS

ERROR ANALYSIS ARE APPLIED ARE
CASES THAT REGARDED UNDISPUTED
ELEMENTS OR FACTS.

IT HAS BEEN APPLIED TO
DETERMINE --

>> BUT, ISN'T THE QUESTION OF
WHETHER WE COULD DECIDE, BASED
ON A FULL REVIEW OF THE RECORD
THAT NO RATIONAL JURY COULD
HAVE CONVICTED OF A, THIS
LESSER OFFENSE AS OPPOSED TO
THE OFFENSE FOR WHICH HE, THE
CONVICTION WAS RENDERED, BEYOND
A REASONABLE DOUBT?

AND I MEAN IF, JUDGE WOLF SEEMS
TO BELIEVE THAT THAT WOULD BE
THE WAY THE ANALYSIS WOULD GO.
ARE YOU CONTEND, YOU CONTEND
FACTUALLY THAT'S NOT RIGHT?
THAT WE COULD NOT, THE COURT
COULD NOT CONCLUDE THAT BEYOND
A REASONABLE DOUBT BASED ON THE
FACTS OF THIS CASE?

>> THAT'S CORRECT, YOUR HONOR.
THE REASON FOR THAT IS MATTER
OF POLICY THAT THIS COURT HAS
BE A SERVED NOT ONLY IN ABREAU
DECISIONS, OUT DECISIONS THAT
INFORM IT, KILLEN V. STATE,
LOMAX v. STATE.
THE COURT LOOKED AT DECISIONS
ONE CASE OVERWHELMING EVIDENCE
SUFFICIENT TO CONVICT OF THE
GREATER OFFENSE BUT THIS COURT
DEEMED IT NECESSARY TO RESTRAIN
FROM STEPPING INTO THAT

HARMLESS, HARMLESS ERROR
ANALYSIS BECAUSE IT DIDN'T WANT
TO INVADE THE PROVINCE OF
THE JURY.

DETERMINING AN UNDISPUTED FACT
OR ELEMENT WITH HARMLESS ERROR
ANALYSIS IS ONE THING. WHEN YOU
USE THAT ANALYSIS TO MAKE A
DECISION WHAT THIS --

>> HARMLESS ERROR ANALYSIS IS
APPLIED IN CIRCUMSTANCES
CERTAINLY SOME CIRCUMSTANCES
WHERE THERE ARE DISPUTES.
IT IS NOT THAT IT HAS TO BE A
ISSUE THAT IS ABSOLUTELY
CONCEDED.

>> THAT'S RIGHT, YOUR HONOR,
BUT --

>> IT IS NOT LIMITED.

IT IS A HIGH STANDARD.

DON'T GET ME WRONG.

I UNDERSTAND IT IS A HIGH
STANDARD TO MEET.

HAS TO BE ESTABLISHED BEYOND A
REASONABLE DOUBT.

BUT THAT'S BASICALLY WHAT
YOU'RE RELYING ON HERE IS THE
POTENTIAL FOR, THERE IS NO WAY
THAT YOU COULD EVER
CONCLUDE BEYOND A REASONABLE DOUBT
THAT IT COULDN'T BE JURY
PARDON.

>> NO, YOUR HONOR, WHAT I HOPE
WE ARGUED IN THE BRIEF FOR THE
COURT TO SUBSTITUTE ITS
JUDGEMENT EVEN WITH THIS HIGH

STANDARD, AND HIGH BURDEN FOR THE STATE, THE COURT IS THEN, AT LEAST IN THE CIRCUMSTANCES OF THIS CASE, AND IN THE CIRCUMSTANCES OF ABREAU, AND THAT NARROW LINE OF CASES, THE COURT WOULD BE SUBSTITUTING ITS JUDGMENT ON A MATTER OF GUILT OR INNOCENCE.

AND THAT'S, THAT'S A STEP BEYOND --

>> THE JURY ALREADY DETERMINED THE MATTER OF GUILT.

>> THE JURY HAS DETERMINE THE IT IN A TRIAL UNDER THE CURRENT LAW WAS STRUCTURALLY FLAWED BECAUSE OF THE ERROR GIVING THE INSTRUCTION ON THE LESSER INCLUDED OFFENSE.

THERE IS THE NO DOUBT IN A NEW TRIAL THE STATE MAY VERY WELL HAVE A FORMIDABLE CASE AND, THERE'S JUST NO CONTENDING WITH THAT.

BUT BECAUSE OF THE GRAVITY OF THIS CASE, BECAUSE THIS IS A CAPITAL CASE, THIS COURT HAS OVER 50 PLUS YEARS RECOGNIZED THAT DESPITE THE QUALITY OR QUANTITY OF EVIDENCE AND THE COURT'S REVIEW THAT EVIDENCE ON APPEAL FROM THE COLD RECORD, TAKING THAT STEP AND DETERMINING GUILT OR INNOCENCE, WHICH THIS COURT WOULD EFFECTIVELY BE DOING OR A TRIAL

COURT COULD BE DOING IN MAKING THAT DETERMINATION AT THAT LEVEL, THE TRIAL JUDGE, RATHER, NOT THE COURT, OPEN A DANGEROUS DOOR BECAUSE --

>> WE DO.

WE HAVE MADE CERTAIN JUDGMENTS. BECAUSE WE'VE SAID IF IT IS TWO STEPS REMOVED FROM THE OFFENSE, AND IT'S NOT, BEEN INSTRUCTED ON OR THAT IT HARMLESS, THAT THIS PER SE RULE DOESN'T APPLY.

SO WE'VE MADE A VERY LIMITED POLICY STATEMENT AND WHETHER WE USED THE WORD JURY PARDON, WHAT WE'RE REALLY, SEEMS TO ME, IT IS A HARD THING WITHOUT LOOKING AT THIS WHOLE RECORD, IF YOU TAKE AWAY ISSUE THE CONSENT WOULD BE A STEP DOWN, BUT CONSENT ISN'T AN ISSUE EITHER IN THE FIRST TWO, THAT COULD A, BASED ON THIS, THESE FACTS THERE IS NO WAY IF A JURY FOUND THIS DEFENDANT GUILTY OF BATTERY, THAT ANYTHING UNDER THE LAW WOULD ALLOW THIS COURT OR ANYONE TO TAKE AWAY THAT VERDICT FOR BATTERY, CORRECT?

>> YES, I UNDERSTAND.

>> AND I'M JUST TRYING TO GET AT, WITHOUT THIS ISSUE, SOMEHOW LIKE SAYING ONLY AN IRRATIONAL JURY COULD FIND UNDER THESE FACTS THAT IT WAS BATTERY

RATHER THAN CAPITAL SEXUAL BATTERY. AND THIS NOTION THAT THERE'S IRRATIONAL AND RATIONAL JURIES SOMEHOW CONCERN ME. IT'S A RIGHT THE DEFENDANT HAS THAT WE HAVE ESTABLISHED THAT THEY HAVE A RIGHT TO BE, THAT THE JURY IS INSTRUCTED ON THE NEXT LESSER INCLUDED OFFENSE. AND IT HAS TO BE A ACCURATE INSTRUCTION.

ISN'T THAT WHAT WE'RE TALKING ABOUT?

>> YES, WE ARE, YOUR HONOR, AND DECISIONS OF THIS COURT HAVE NARROWED THE CIRCUMSTANCES SUCH THIS ISN'T A FUNDAMENTAL ERROR IN THE SENSE THAT IT'S ALWAYS PRESERVED IF THE CIRCUMSTANCES AREN'T RIGHT.

I THINK, ARGUABLY --

>> YOU HAVE TO REQUEST IT?

>> YOU HAVE TO REQUEST IT.

BUT THAT'S, THAT'S FRANKLY IT'S NOT A ISSUE OF FACT HERE.

THE INSTRUCTION WAS REQUESTED AND IT WAS MORE THE FACTS OF THIS CASE ARE FORMATIVE FOR FRAMING THE DISCUSSION BUT AT THE END OF THE DAY THE ONLY ISSUE BEFORE THIS COURT, IF THIS COURT EVEN DECIDES THAT THERE'S AN ISSUE BEFORE IT AND EXERCISES JURISDICTION IS THE CERTIFIED QUESTION AND THAT'S THE LEGAL QUESTION OF HOW OR IF

GALINDEZ CONSTRUCTIVELY
OVERRULES STATE v. ABREAU.
>> BUT SHORT OF THE JURY
PARDON SITUATION, AND I HATE TO
GET INTO THE FACTS HERE, BUT
JUDGE WOLF GOES ON AT SOME
LENGTH, WHETHER HE CALLED IT,
WHATEVER HE SAID ABOUT IT, HE
SAID YOU KNOW, YOU'D HAVE TO BE
IN ANOTHER, YOU'D HAVE TO BE
INCOMPETENT AS A JURY TO FIND
THIS DEFENDANT GUILTY OF
ANYTHING OTHER THAN CAPITAL
SEXUAL BATTERY.

IS THERE ANYTHING IN THE RECORD
THAT WOULD SUPPORT THAT, EVEN
THOUGH SHE WAS UNDER 12 IT WAS
CONSENSUAL?

>> WELL, YOUR HONOR, I DON'T
KNOW HOW TO ANSWER THAT
QUESTION.

I WASN'T TRIAL COUNSEL AND I
THINK MY FAMILIARITY WITH THE
RECORD IS HOPEFULLY STRONG BUT
NOT SO STRONG THAT I CAN MAKE
THAT SORT OF ARGUMENT.

>> DOES THE RECORD SUPPORT THE
STATEMENT THAT THE APPELLANT
GAVE A VERSION OF EVENTS, I
WILL LEAVE OUT THE DESCRIPTION
OF THE VERSION, THAT JUDGE WOLF
USED, SAYING THAT HE WAS
INSPECTING THE GIRL'S BREASTS
AND VAGINA FOR BREAST CANCER
AND TO DETERMINE IF THEY WERE
VERY BEGINS?

APPELLANT SAYS HE CONDUCTED
NUMEROUS INSPECTIONS.
MOTHER TESTIFIED SHE NEVER GAVE
THE APPELLANT RIGHT TO CONDUCT
THESE INSPECTIONS.

THE CONCLUSION, JUDGE WOLF
REACHED NO REASONABLE JURY
WOULD ISSUE A JURY PARDON IN
THIS CASE AND CHARGED SIMPLE
BATTERY.

IN FACTUALLY THAT WAS THE
DEFENSE WAS?

>> I THINK THAT IS FAIR --

>> IT WOULDN'T BE YOUR TYPICAL
HARMLESS ERROR ANALYSIS.

NOW WE HAVE TO SAY AND ENGAGE
NO REASONABLE URY COULD
HAVE ISSUED A JURY PARDON.

THE NOTION OF A JURY PARDON
THEY'RE ALLOWED THAT OPTION OF
GOING TO THAT NEXT LESSER
INCLUDED OFFENSE.

I THINK THAT MAY BE WHY THERE
IS FURTHER PROBLEM HOW YOU
WOULD EVEN PHRASE WHAT, NEW
TEST WOULD BE.

>> YOUR HONOR, DIFFICULT FACTS
LIKE THESE ARE THE REASON THAT
WE HAVE PER SE REVERSIBLE
ERROR.

IT IS NOT A MATTER OF THE FACTS
WHETHER THEY'RE STRONG OR NOT.

I HAVE ACKNOWLEDGING THAT
THEY'RE DIFFICULT FACTS BUT WE
HAVE A STRUCTURAL PROBLEM WITH
THE TRIAL THAT OCCURRED BELOW.

TO EXTEND HARMLESS ERROR ANALYSIS AND, LET'S UNDERSTAND THAT WHAT THE STATE IS ASKING THE COURT TO DO IS TO EXTEND HARMLESS ERROR ANALYSIS.

ULTIMATELY WHAT WE'RE TALKING ABOUT IS MAKING A HARMLESS ERROR ANALYSIS AND CREATING A REASONABLE OR AN OBJECTIVE STANDARD FOR A JURY DECIDING GUILT OR INNOCENCE.

AND THAT'S A BOLD EXPANSION AND, AS THE COURT, JUSTICE PARIENTE, AS YOU NOTED THIS WOULD REWRITE JURISPRUDENCE. GALINDEZ SIMPLY DOESN'T YIELD CONDITIONS FOR RECEDING FROM STARE DECISIS.

WITH THE LIMITED TIME I HAVE REMAINING ADDRESS THE COURT TO THE THREE-PRONG TEST INCLUDING STRAND OPINION AND NORTH FLORIDA WOMEN'S HEALTH COUNSELING OPINION IN 2003.

FIRST PRONG OF THE TEST WHETHER THE PRIOR DECISION, DUE TO RELIANCE ON IMPRACTICABLE LEGAL FICTION.

BY WAY CONTRAST THIS COURT EARLIER IN THE YEAR IN THE VALDEZ OPINION LOOKED AT PRIMARY EVIL TEST FOUND SURVEY OF DISTRICT COURTS FOUND IT WAS UNWORKABLE FICTION.

THAT CONTRIBUTED TO RECEDING FROM PRECEDENT.

IN THIS CASE, THERE IS NO SUCH
LEGAL FICTION PROVEN
IMPRACTICAL.

THE STATE HASN'T DEMONSTRATED
THAT.

THE SECOND PRONG, ASKS THIS
COURT TO CONSIDER WHETHER THE
DECISION CAN BE REVERSED
WITHOUT SERIOUS INJUSTICE TO
THOSE WHO HAVE RELIED ON IT
WITHOUT SERIOUS DISRUPTION IN
THE FACILITY OF THE LAW.

I THINK THE COURT ALREADY
INDICATED HOW DEEPLY INGRAINED
ABREAU PRECEDENTS IT IS FOUNDED
IS INGRAINED IN LAW.

AND JUST AS A MATTER OF POLICY,
OBVIOUSLY THERE WOULD BE
CONFUSION AT THE TRIAL COURT
LEVEL, PERHAPS AT THE DISTRICT
COURT LEVEL WITH ANSWERING THE
CERTIFIED QUESTION IN THE
AFFIRMATIVE.

BUT, WHAT'S MORE I THINK WHAT
THIS COURT NEEDS TO BE
CONCERNED WITH WAS A MATTER OF
POLICY GOING FORWARD IF THE
COURT WERE TO ANSWER THIS
QUESTION IN THE AFFIRMATIVE NOT
ONLY WOULD YOU OPEN THE DOOR
FOR TRIAL JUDGES TO MAKE
DETERMINATIONS ON THEIR OWN AS
TO WHETHER THE EVIDENCE
SUPPORTS PARTICULAR COUNTS, AND
THEY'RE IN EFFECT GIVE THE
TRIAL JUDGE THE OPPORTUNITY TO

MAKE DETERMINATIONS THAT SHOULD BE WITHIN THE PROVINCE OF THE JURY BUT WE WOULD SEE CONDITIONS SUCH THAT THIS COURT AND THE DISTRICT COURTS WOULD SEE A NUMBER OF APPEALS FROM CRIMINAL DEFENDANTS WHO WOULD ARGUE THAT THEIR RIGHT TO A TRIAL BY JURY UNDER THE SIXTH AMENDMENT HAVE BEEN VIOLATED BY THE TRIAL COURT'S DETERMINATION AS TO WHAT INSTRUCTIONS SHOULD BE GIVEN IF THE LESSER INCLUDED INSTRUCTION IS NOT GIVEN.

SO THESE ARE JUST SOME OF THE CONCERNS THAT WOULD FACE THE STATE IN RECEDING FROM PRECEDENT HERE.

TURNING IT BACK TO THE QUESTION, TO CLOSE THE MATTER UP, THE QUESTION ASKS WHETHER GALINDEZ PROVIDES THE BASIS TO EFFECTIVELY AND SUB JUDICE STATE v. ABREAU.

IT DOES NOT.

ITS FACTS ARE BRIEF AND SET APART AND OSTRACIZE IT AND CAUTION THE COURT TO ABILITY TO EXPORT ITS HOLDING OF AND LEGAL HOLDING IN GALINDEZ HAS NOTHING TO DO WITH THE LESSER INCLUDED OFFENSE.

IT IS UNDISPUTED FACT THAT THE JURY DID DETERMINE.

IT WAS PROPER HARMLESS ERROR ANALYSIS.

FOR ALL THESE FACTS AND
ARGUEMENTS SET FORTH IN THE
BRIEF.

IN THE COURT RETAINS THE
CERTIFY QUESTION IT SHOULD BE
ANSWERED IN THE NEGATIVE FOR
THE REASONS WE ARGUE THIS COURT
SHOULD DECLINE THIS
JURISDICTION AND DISCHARGE THIS
MATTER, THANK YOU.

>> I WANT TO MAKE CLEAR THAT A
DEFENDANT DOES NOT HAVE A
CONSTITUTIONAL RIGHT TO AN
IRRATIONAL JURY.

THERE ARE NO CONSTITUTIONAL
IMPLICATIONS IN THIS CASE
WHATSOEVER.

NOW, JUSTICE POLSTON, TO YOUR
POINT, IT IS CLEAR THAT IF THE
COURT WOULD CONDUCT HARMLESS
ERROR ANALYSIS THE ERROR IN
THIS CASE WOULD CLEARLY BE
HARMLESS.

NO RATIONAL JURY, ONLY AN
IRRATIONAL JURY WOULD HAVE
FOUND THIS PARTICULAR DEFENDANT
GUILTY OF SIMPLE BATTERY
UNDER THESE FACTS.

SO THAT BEGS THE QUESTION,
POSED BY THE STATE IN ITS ENDS
ANSWER FOR YOU.

>> HOW ABOUT THE JURY PARDON
ISSUE WAS BASED ON THIS NOTION
THAT YOU AND I MIGHT NOT LOOK
AT IT AND THINK, THAT THERE
COULD HAVE BEEN CONVICTION ON

LESSER INCLUDED OFFENSE.

THE JURY NOT ALWAYS A PRETTY PICTURE IN THERE BUT MAYBE ENDS UP BEING A WHETHER JURY PARDON OR SOMEBODY IS HOLDING OUT ON THE GREATER CHARGE.

AND THEY END UP ON THE LESSER CHARGE.

AND THAT IS I THINK MORE OF THE PROBLEM IN THESE KINDS OF THINGS WHERE IT IS ONE STEP DOWN, WHICH IS, WE DON'T KNOW WHAT, YOU KNOW, THIS IDEA THAT IRRATIONAL JURY OR NOT, THAT THERE IS NUANCES TO JURY DELIBERATION.

SO WHAT YOU'RE REALLY ASKING WOULD BE A TEST THAT WOULD ONLY APPLY HERE WOULDN'T BE REALLY HARMLESS ERROR BE BEYOND A REASONABLE DOUBT IN THE NORMAL SENSE.

IS IT HARMLESS ERROR BEYOND A REASONABLE DOUBT, CAN THE STATE SHOW FOR SURE THAT NO REASONABLE JURY WOULD EXERCISE ITS PARDON POWER?

HOW DO WE KNOW THAT THE?

THAT'S REALLY, HOW DO YOU ENGAGE IN THAT ANALYSIS?

IT IS NOT AN EVIDENCE THING, LIKE THEY PUT IN THE WRONG EVIDENCE.

AND I SEE THAT AS BEING A GREATER PROBLEM AS TO HOW YOU WOULD EVEN PHRASE THIS HARMLESS

ERROR ANALYSIS IN THE CONTEXT
OF THE ONE STEP REMOVED TYPE OF
SITUATION.

>> YOU HAVE MANY POINTS THERE.
I WILL TRY TO ADDRESS THEM BEST
I CAN.

I AGREE WITH YOU, WE HAVE NO
IDEA WHY A JURY ACTS A CERTAIN
WAY.

ALL WE HAVE IS A CHECK IN THE BOX,
GUILTY OR NOT GUILTY AS TO
PARTICULAR OFFENSE.

BUT THAT REINFORCES THAT,
ABREAU IS BASED UPON LEGAL
FICTION BY CONSIDERING THE
PROSPECT OF IRRATIONAL JURY.

WE NEED TO CHANGE THE BAROMETER
AND HAVE IT BE ACTIONS OF A
RATIONAL JURY.

THAT'S WHAT STRICKLAND DOES.

THERE IS REASON FOR THAT.

IF WE CAN NEVER KNOW WHY A JURY
DOES WHAT IT DOES, WE CAN AT
LEAST LOOK TO THE, IF THERE IS
A QUESTION AS TO SUFFICIENCY OF
THE EVIDENCE, WE LOOK AT THE
EVIDENCE AND WE COMPARE THE
EVIDENCE TO THE JURY'S VERDICT.

THERE IS NO RIGHT TO HAVE A
JURY PARDON SOMEBODY DOWN.

REMEMBER WHAT A JURY PARDON IS.

THIS COURT SAYS IT IS AN
IRRATIONAL ACT.

NOT FOLLOWING INSTRUCTIONS.

FINDING GUILTY OF LESSER
OFFENSE EVEN THOUGH A STATE

PROVED BEYOND A REASONABLE
DOUBT WAS GUILTY OF A HIGHER
OFFENSE.

>> THAT HAPPENS ALL THE TIME.

>> BATTERIES OF LAW ENFORCEMENT
OFFICER, FULLY DRESSED POLICE
OFFICER WITH A BADGE ON WHERE
THE DEFENDANT KICKED THE
OFFICER IN THE FACE AND BROKE
HIS NOSE FOR NO REASON, AND HE
IS CHARGED WITH BATTERY ON A
POLICE OFFICER, AND THE JURY
COMES BACK AND WITH SIMPLE
ASSAULT.

THERE IS NO RATIONAL REASON FOR
THAT, BUT THEY DO IT.

>> I AGREE WITH YOU.

WE'RE NOT ASKING, THE STATE IS
NOT ASKING THIS COURT TO DO
AWAY WITH JURY PARDONS.

THAT'S NOT WHAT WE'RE ASKING AT
ALL. AS THIS COURT SAID IN SANDERS
THAT IS AN ACCEPTED PART OF
AMERICAN JURISPRUDENCE.

YES, THAT HAPPENS ALL THE TIME
BUT WHAT WE SHOULDN'T DO IS
GAUGE WHETHER OR NOT THERE IS
AN ERROR TO OMIT A LESSER
INSTRUCTION ON THE PROSPECT
THAT A JURY MIGHT HAVE ACTED
IRRATIONALLY.

I GO BACK.

>> HARMFUL ERROR.

>> I'M SORRY, YES.

I'LL GO BACK TO THE ROBBERY
EXAMPLE.

FIREARM, WEAPON, SIMPLE
ROBBERY.

IF THERE IS NO DISPUTE AS TO
WHETHER OR NOT THE INDIVIDUAL
USED A FIREARM, IF ONLY DISPUTE
IS IDENTITY WHAT'S THE HARM?
I GO BACK TO THE QUESTION POSED
IN ANSWER BRIEF.

WHAT IS THE HARM IN THE
HARMLESS ERROR ANALYSIS TEST?
THERE IS NO HARM.

IF, AN ERROR IS TRULY HARMFUL,
IT WILL GO THROUGH THAT
ANALYSIS.

IT WILL GO THROUGH THAT TEST
AND COME OUT THE OTHER SIDE
HARMFUL.

THERE IS NO, WHAT IS THE
HARMLESS ERROR TEST AVOID?
THREE THINGS.

ONE AVOIDS UNNECESSARY
RETRAUMATIZING OF VICTIMS.
VICTIMS OF CAPITAL SEXUAL
BATTERY.

AVOIDS UNNECESSARY EXPENDITURE
OF PRECIOUS RESOURCES OF
JUDICIARY.

AND THIRD, IT AVOIDS THE
PUBLIC'S, EROSION OF PUBLIC
CONFIDENCE IN THE LEGAL SYSTEM.

THAT IS WHY THE U.S. SUPREME
COURT IN CHAPMAN VERSUS
CALIFORNIA EMBRACED HARMLESS
ERROR ANALYSIS TO AVOID
TECHNICAL REVERSEALS THAT HAVE
NO BASIS IN THE FACTS OF THE

CASE.

>> WITH THAT, YOU HAVE EXCEEDED
YOUR TIME.

THANK YOU VERY MUCH.

THANK YOU ALL FOR YOUR
ARGUMENT.

AND THE COURT WILL NOW BE IN
RECESS.

>> PLEASE RISE.

SUPREME COURT IS NOW ADJOURNED.