>> THE NEXT CASE ON THE DOCKET IS GARRETT VERSUS STATE OF FLORIDA.
>> WHENEVER YOU'RE READY.
>> MAY IT PLEASE THE COURT, MY NAME IS MEGAN LONG WITH THE PUBLIC DEFENDER'S OFFICE OF THE SECOND JUDICIAL CIRCUIT.
GLEN GIFFORD IS AT COUNSEL TABLE.
WE REPRESENT ANTONIO GARRETT AND I WOULD LIKE TO RESERVE FIVE MINUTES FOR REBUTTAL, PLEASE.
THIS CASE IS BEFORE THE COURT TODAY BECAUSE IT CONFLICTS WITH TWO DECISIONS, RIOS AND DORSEY.
WE AGREE WITH THE FIRST DISTRICT COURT OF APPEAL THAT THE SELF-DEFENSE JURY INSTRUCTION GIVEN IN MR. GARRETT'S CASE WAS LEGAL ERROR BECAUSE IT IMPOSED A DUTY TO RETREAT BECAUSE HE WAS ENGAGED -- IT TOLD THE JURY HE WAS ENGAGED IN UNLAWFUL ACTIVITY.
WE DISAGREE THAT THIS ERROR WAS NOT FUNDAMENTAL.
RIOS AND DORSEY RECEIVED NEW TRIALS UNDER THE SAME JURY INSTRUCTIONS AND THE COURT FOUND IT WAS FUNDAMENTAL ERROR BECAUSE IN ALL OF THESE CASES THE QUESTION BEFORE THE JURY, THE ISSUE, THE ONE THING IN DISPUTE, WAS WHETHER THE SHOOTING WAS JUSTIFIABLE USE OF DEADLY FORCE.
AS WE KNOW, UNDER THE PRE 2014 AMENDMENT IT DID NOT INCLUDE A DUTY TO RETREAT.
MR. GARRETT HAD THE RIGHT TO STAND HIS GROUND EVEN THOUGH HE WAS A FELON IN POSSESSION OF A FIREARM.
>> DOESN'T THE SUPPLEMENTAL RECORD HERE INDICATE THAT DEFENSE COUNSEL ACTUALLY PROPOSED THE JURY INSTRUCTION THAT YOU'RE NOW COMPLAINING ABOUT?
>> THAT'S CORRECT, YOUR HONOR.

>> SO WHY IS THAT NOT THEN
INVITED ERROR?
>> OUR FIRST ARGUMENT IS THAT
THIS COURT -- YOU'LL SEE FROM
THE RECORD THAT WE OPPOSED THE
SUPPLEMENTATION OF THE RECORD.
OUR ARGUMENT IS THIS COURT
SHOULD NOT RELY ON IT.
SECOND --
>> DID THE STATE --
SPECIFICALLY, WAS THE ARGUMENT
MADE BY THE STATE THAT THERE WAS
INVITED ERROR?
>> YES.
YES, MA'AM.
>> AND SO THE RECORD WAS BEFORE
THE FIRST DISTRICT?
>> WELL, IT WAS, BUT THE JURY
INSTRUCTION, ACTUAL, PHYSICAL
COPY OF THE JURY INSTRUCTION,
THAT WAS ONLY SUPPLEMENTED WHEN
IT CAME TO THIS COURT, YOUR
HONOR.
TO GET BACK TO JUSTICE POLSTON'S
POINT, I THINK IN TERMS OF
WAIVER AND INVITED ERROR, WHEN
WE LOOK AT THIS COURT'S RECENT
DECISION IN FLOYD, WHAT WAS
EVERYONE TALKING ABOUT AT THE
CHARGE CONFERENCE?
AND I THINK YOU'LL SEE FROM THE
RECORD THAT ONLY 776.013 IS THE
ONLY THING THAT WE'RE TALKING
ABOUT HERE.
NOT THE TRIAL COURT, NOT THE
DEFENSE ATTORNEY, NOT THE
PROSECUTOR IS AWARE THAT THESE
TWO PROVISIONS OPERATED
INDEPENDENTLY OF EACH OTHER.
>> THEN.
NOW -- THIS IS REALLY A CASE
THAT IS IN A WINDOW.
>> YES, MA'AM.
2005 TO 2014.
>> BUT ANY OF THOSE CASES -- I
MEAN, PRESUMABLY THOSE CASES
HAVE EITHER BEEN ADJUDICATED --
IF THE DEFENDANT'S LAWYER USED
THAT JURY INSTRUCTION,
MISUNDERSTOOD THAT THERE WERE

THESE TWO DIFFERENT STATUTES,
BASED ON THE RECENT DECISION OF
THE SECOND DISTRICT, WOULD YOU
SAY THERE IS INEFFECTIVE
ASSISTANCE OF COUNSEL ON THE
FACE OF THE RECORD?
>> YES, YOUR HONOR.
BUT -- AND ALTHOUGH THAT COULD
HAVE BEEN A POST-CONVICTION
REMEDY FOR MR. GARRETT, HE DOES
NOT GET COUNSEL ON
POSTCONVICTION.
SO HE WOULD HAVE TO BE WRITING
IT HIMSELF.
THERE'S NO GUARANTEE HE'D GET
IT.
THIS IS THE KIND OF ERROR WE CAN
FIX BECAUSE THIS WAS PERTINENT
AND MATERIAL TO WHAT THE JURY
NEEDED TO CONVICT.
GOING BACK TO JUSTICE POLSTON'S
QUESTION, WHAT WERE THEY TALKING
ABOUT AT THIS CHARGE CONFERENCE?
IT APPEARS NO ONE IS AWARE THESE
TWO STATUTES OPERATED
INDEPENDENTLY.
AND I THINK WHEN WE LOOK AT THIS
COURT'S RECENT DECISION IN
FLOYD, THIS COURT LOOKED AT WHAT
THE TRIAL ATTORNEY SAID.
THEY PROPOSED THE INSTRUCTION.
THE COURT WENT THROUGH IT.
AND THE TRIAL ATTORNEY SAID,
YES, YOUR HONOR, I AGREE WITH
THAT, I THINK THREE TIMES.
THE COURT SAID LOOK AT IT
OVERNIGHT.
TAKE IT HOME.
THEY TALK ABOUT IT THE NEXT DAY.
TRIAL COUNSEL ACTUALLY ARGUED IN
CLOSING EVEN THOUGH THESE ARE
THE INITIAL AGGRESSOR LANGUAGE
IN CONFUSING, THIS ONLY APPLIES
IF YOU FIND THAT OUR CLIENT WAS
THE INITIAL AGGRESSOR.
>> HOW DID THE JURY INSTRUCTION
READ AT THE TIME?
>> READ AT THE TIME?
>> DID THE JURY INSTRUCTIONS
MAKE THE DISTINCTION BETWEEN

776.013 AND 012?
>> HE HAD THE CORRECT JURY INSTRUCTION AT THE BEGINNING WHERE IMMINENT DEATH OR GREAT BODILY HARM TO HIMSELF OR ANOTHER OR MURDER IN THE SECOND-DEGREE OR AGGRAVATED BATTERY.
SO THEY DID HAVE THAT CORRECT PART OF THE INSTRUCTION.
THEN THEY GO INTO THE UNLAWFUL ACTIVITY PRE-2005 DUTY TO RETREAT.
SO BOTH OF THOSE WERE IN THERE.
YES, COUNSEL REQUESTED, THE STATE REQUESTED.
BUT, REMEMBER, THE JURY INSTRUCTION THAT WAS READ TO THE JURY WAS NOT THE SPECIFIC ONE THAT WAS REQUESTED BY COUNSEL BECAUSE OVER OBJECTION THE STATE, BASED ON DORSEY I, SAID WE'RE GOING TO ADD THE POSSESSION OR THAT ANTONIO GARRETT WAS ENGAGED IN UNLAWFUL ACTIVITY.
>> BUT YOU'RE NOT RAISING THAT AS A POINT, THAT THAT SHOULD NOT HAVE BEEN CONSIDERED UNLAWFUL ACTIVITY.
>> THAT'S CORRECT, YOUR HONOR.
>> OKAY.
SO I'M STILL -- HERE'S WHAT -- WHAT I'M ASKING WAS DID OUR JURY INSTRUCTIONS DISTINGUISH BETWEEN .013 AND .012 AT THE TIME OR ARE WE IN A MONTGOMERY SITUATION, WHERE EVERYONE WAS OPERATING ON THE ASSUMPTION THAT THERE WAS THIS ONE STATUTE?
I MEAN, THAT'S AN EASY -- IF YOU DON'T KNOW -- WE CAN LOOK IT UP.
SO I'M ASKING YOU IS THAT PART OF THE STANDARD JURY INSTRUCTION?
>> YES.
THIS WAS THE STANDARD INSTRUCTION.
BUT WHAT WAS GIVEN HERE WENT BEYOND THE STANDARD INSTRUCTION.

>> BECAUSE OF WHAT YOU'RE SAYING ABOUT THE POSSESSION OF THE FIREARM.
>> RIGHT.
THAT WAS ONLY ADDED AFTER THE STATE SAID, WELL, BASED ON DORSEY I, WE WANT TO INSTRUCT THEM ON THIS.
COUNSEL OBJECTED, BUT IT WAS GIVEN OVER COUNSEL'S OBJECTION.
>> BUT IF YOU'RE NOT SAYING THAT WAS WRONG, WHAT DOES THAT MATTER?
THIS IS SORT OF A FRIENDLY QUESTION.
IF EVERYONE IS USING THE STANDARD JURY INSTRUCTION, BUT IT IS WRONG, SUPPOSEDLY, BECAUSE THERE'S ANOTHER STATUTE, THAT REALLY HELPS YOUR -- YOU KNOW, THAT HELPS YOUR SITUATION.
>> YES, YOUR HONOR.
>> IT MAKES IT UNDERSTANDABLE WHY THE DEFENSE LAWYER WOULD HAVE -- BUT NOW MY QUESTION IS WHY DID THE -- DO WE KNOW ANY REASON?
WHAT IS THE DIFFERENCE BETWEEN THOSE TWO STATUTES THAT DEAL WITH THE EXACT SAME SITUATION?
WHY DID THE LEGISLATURE HAVE THOSE BEING -- HAVING DIFFERENT LANGUAGE, WHICH THEY NOW APPARENTLY HAVE CORRECTED?
>> WELL, AS IT WAS THEN, YOUR HONOR, 776.012(1), ANYONE COULD USE.
YOU DON'T HAVE A DUTY TO RETREAT IF YOU'RE FACING IMMINENT DEATH OR GREAT BODILY HARM OR IMMINENT COMMISSION OF A FORCIBLE FELONY.
.03 DIDN'T HAVE THE WORDS IMMINENT AND YOU HAVE TO BE -- CAN'T BE ENGAGED IN UNLAWFUL ACTIVITY.
ANYWHERE OUTSIDE OF YOUR CASTLE YOU CAN STAND YOUR GROUND AS LONG AS YOU'RE NOT ENGAGED IN THAT.

FIRST IS ANYONE CAN USE
REGARDLESS OF THEIR STATUS, BUT
THE DANGER OR GREAT BODILY HARM
OR IMMINENT COMMISSION OF THE
FORCIBLE FELONY HAS TO BE
IMMINENT.
.13 WAS IT'S ONLY FOR PEOPLE NOT
ENGAGED IN UNLAWFUL ACTIVITY AND
THE IMMINENT IS NOT IN THERE.
SO IT'S DEATH, GREAT BODILY
HARM, COMMISSION OF A FORCIBLE
FELONY.
>> BEFORE ALL THESE STAND YOUR
GROUND STATUTES, WOULD YOUR
CLIENT HAVE HAD A DUTY TO
RETREAT?
>> YES.
THERE IS A DUTY TO RETREAT TO
THE LAW.
>> SO HE SHOULD HAVE JUST LEFT.
>> YES, YOUR HONOR.
AND 776.12 AT THAT TIME WAS
CLEAR THERE'S NO DUTY TO
RETREAT, EVEN IF YOU'RE ENGAGED
IN ILLEGAL ACTIVITY.
IF YOU ARE FACING DEATH OR GREAT
BODILY HARM, AND THAT IS HIS
SOLE DEFENSE HERE, THAT
MR. GARRETT WAS COCKING HIS
RIFLE, HE WAS GOING TO GET SHOT,
HE HAD NO DUTY TO RETREAT AT
THAT TIME.
THIS JURY INSTRUCTION TOLD THE
JURY --
>> I'M CONFUSED ABOUT THE FACTS
BECAUSE IT SEEMS TO ME THAT
MR. GARRETT HAD IN FACT LEFT AND
THEN HE CHOSE TO COME BACK TO
THE SCENE.
>> YES, YOUR HONOR.
>> SO -- IS THAT CORRECT?
>> YES, YOUR HONOR.
HE'D BEEN BACK AND FORTH ALL
DAY.
THE RECORD SHOWS --
>> AND HE FINALLY LEFT AND WENT
AND GOT A GUN.
>> YES.
THE RECORD SHOWS, THOUGH, THAT
HE LIVED IN THE AREA.

HE WAS HOMELESS AT THE TIME, BUT
HE WAS STAYING IN ONE OF THE
VACANT DUPLEXES AND MULTIPLE
PEOPLE ARE GOING BACK AND FORTH
FROM THIS PARTY THEY WERE HAVING
THAT DAY FOR ANTHONY KIMBALL.
THEY'RE ENGAGED IN A VERBAL
ALTERCATION AND GARRETT SPITS
AND PUSHES MY CLIENT.
HE DOES LEAVE.
BUT AT SOME POINT HE DOES--
>> I GUESS I'M A LITTLE CONFUSED
ABOUT WHAT STAND YOUR GROUND,
THAT WHOLE STATUTE ACTUALLY
MEANS, BECAUSE IN THIS SITUATION
HERE IS A MAN, HE'S AT SOMEONE
ELSE'S HOUSE.
SO STAND YOUR GROUND IS
APPLICABLE EVEN WHEN IT'S NOT
YOUR OWN HOME.
>> ANYWHERE OUTSIDE OF YOUR
CASTLE, AS LONG AS YOU ARE IN A
PLACE AND SOMEONE IS FACING --
OR YOU ARE FACING IMMINENT
DEATH.
>> SO HE WAS IN SOMEBODY ELSE'S
PLACE, LEFT, WENT AND GOT A GUN
AND CAME BACK AND HE STILL HAS A
RIGHT TO STAND HIS GROUND.
>> YES, YOUR HONOR.
UNDER 776.012, THE STATUTE IN
EFFECT AT THAT TIME, HE HAD THE
RIGHT TO STAND THERE AND NOT BE
SHOT IF FORD WAS GETTING READY
TO SHOOT HIM WITH HIS GUN.
SO WHAT THE JURY --
>> WAS IT CLEAR THAT HE WAS ON
THE OTHER GUY'S PROPERTY?
>> HE WAS ON THE SIDEWALK AND IN
HIS POLICE INTERVIEW IT'S IN
FRONT OF A DUPLEX.
HALF IS VACANT.
HE'S IN FRONT OF THE DUPLEX THAT
FORD IS COMING OUT.
HE SAYS FORD COMES OUT OF HIS
CHAIR, COMES DOWN, WALKS TOWARD
HIM, THEY'RE VERY CLOSE
TOGETHER, AND THEN FORD BACKS UP
AND HE'S TURNING AND HE'S
COCKING HIS RIFLE.

BUT HE WAS OUT ON THE SIDEWALK AREA.
HE WAS NOT IN THE HOUSE.
>> THIS CASE WOULD MAKE A LOT MORE SENSE IF IT WAS THE VICTIM THAT WAS THE DEFENDANT, FRANKLY. I MEAN, FROM WHAT JUSTICE QUINCE IS SAYING.
BUT THIS IS WHAT THE LAW IS AND WAS AT THE TIME, YOU KNOW, WHETHER IT'S GOOD POLICY --
>> THAT'S WHY THE LEGISLATURE CHANGED IT LATER, MAYBE IN RESPONSE TO SOME OF THESE SITUATIONS.
BUT THE LAW AT THE TIME WAS HE'S WALKING, HE IS ARMED.
IF HE'S FACING IMMINENT -- AND I BELIEVE THE TWO FORCIBLE FELONIES HERE WERE SECOND-DEGREE MURDER AND AGGRAVATED BATTERY.
>> UNLAWFUL ACTIVITY, THERE'S NO ISSUE THAT POSSESSION OF A FIREARM BY A FELON WHO MIGHT BE ON PROBATION -- YOU KNOW, I ALWAYS THOUGHT THE ACTIVITY WAS YOUR SELF WAS ROBBING A STORE OR WHATEVER IT WAS.
BUT NOBODY'S CONTESTING -- AT LEAST FELONS I GUESS DON'T HAVE THE RIGHT -- THAT'S WHAT IT AMOUNTS TO.
IF YOU'RE A FELON AND YOU CAN'T POSSESS YOUR FIREARM, YOU DON'T GET THE BENEFIT OF THE STAND YOUR GROUND LAW.
>> UNDER 13.
UNDER 12 YOU WOULD.
I THINK IT WAS THE HILL CASE.
BUT THE LOWER COURTS HAVE DECIDED POSSESSION OF FIREARM BY A CONVICTED FELON IS UNLAWFUL ACTIVITY FOR THE PURPOSE OF THIS STATUTE.
THAT'S WHY --
>> BUT WE HAVE NOT DECIDED THAT ISSUE.
>> NO, MA'AM.
BUT --
>> I'D LIKE TO GO BACK AND ASK

YOU ABOUT THIS ISSUE OF INVITED ERROR AND GET A BETTER UNDERSTANDING OF THE SUPPLEMENTATION OF THE RECORD.
NOW, WE'RE TALKING ABOUT THE SUPPLEMENTATION OF OUR RECORD.
WE'RE TALKING ABOUT SUPPLEMENTATION WITH SOMETHING THAT WAS NOT BEFORE THE DISTRICT COURT.
IS THAT CORRECT?
>> YES, YOUR HONOR.
I BELIEVE IT IS THE ORIGINAL JURY INSTRUCTION THAT WAS REQUESTED BY DEFENSE COUNSEL OUT OF THE FILE.
AND THAT'S WHERE IT CAME FROM.
>> WHICH WAS NOT BEFORE THE DISTRICT COURT.
>> YES, SIR.
>> IS THERE ANYTHING ELSE THAT WAS IN THE RECORD BEFORE THE DISTRICT COURT THAT WOULD SUPPORT THE STATE'S -- AND I KNOW THE STATE MAY BE BETTER AT ANSWERING THIS, BUT FROM YOUR PERSPECTIVE, IS THERE ANYTHING THAT WAS IN THE RECORD BEFORE THE DISTRICT COURT THAT WOULD SUPPORT THE STATE'S ARGUMENT ABOUT INVITED ERROR?
>> NO, YOUR HONOR.
AND I WOULD REFER YOUR HONOR BACK TO THE CHARGE CONFERENCE.
THEY GET TO THE SELF-DEFENSE INSTRUCTION, AND BOTH OF THEIRS MATCH, THE STATE AND THE DEFENSE'S MATCH.
THEY'RE LOOKING THROUGH THEM.
AND THEN THE STATE GOES, WELL, BASED ON DORSEY I, WE WANT TO ADD THIS EXTRA LANGUAGE, THAT HE'S ENGAGED IN UNLAWFUL ACTIVITY.
AND TRIAL COUNSEL, HER ONLY OBJECTION TO THAT POINT IS, WELL, DORSEY I DOESN'T SAY THAT YOU'RE ENTITLED TO A SPECIAL JURY INSTRUCTION.
BUT SHE CONCEDES THAT, YES, --

>> THAT IS THE LAW.
>> THAT'S THE LAW AND I UNDERSTAND YOU'RE GOING TO PUT IT IN THERE, BUT SHE DOES OBJECT TO THE ADDITION OF THAT LANGUAGE.
SO I THINK GOING BACK TO THIS COURT'S ANALYSIS OF HOW DO YOU AFFIRMATIVELY WAIVE A JURY INSTRUCTION.
I THINK FLOYD WAS ON POINT WITH THAT BECAUSE EVERYONE HAD TO KNOW WHAT THEY WERE TALKING ABOUT.
AND HERE IT'S CLEAR THE TRIAL COURT DOESN'T GET THE DISTINCTION BETWEEN THE TWO STATUTES.
TRIAL COUNSEL AND THE STATE NEVER BRING IT UP.
SO THERE'S NO SPECIFIC IN THIS RECORD, SPECIFIC POINT WHERE WE CAN SAY, TRIAL COUNSEL WAS AWARE THAT WE'RE TALKING ABOUT 776.012.
THEY'RE ONLY TALKING ABOUT 13.
SO I THINK UNDER THESE FACTS AND MORE --
>> BUT YOU CAN REACH THAT CONCLUSION BASED ON THE SUPPLEMENT.
>> I WOULD STILL DISAGREE, YOUR HONOR.
BECAUSE THAT --
>> IT'S CLOSER.
>> IT MAY BE CLOSER, BUT I WOULD STILL ARGUE THAT JURY INSTRUCTION -- AND I THINK WE ARGUED THIS IN OUR REPLY BRIEF.
COUNSEL STILL COULD HAVE ARGUED, WELL, YOU KNOW, THIS DOESN'T REALLY APPLY.
BECAUSE, REMEMBER, THE STIPULATION THAT MR. GARRETT WAS A CONVICTED FELON, THAT ONLY CAME IN AS IMPEACHMENT EVIDENCE.
IT CAME IN AFTER DETECTIVE HILL'S TESTIMONY.
AND IT WAS PUT THERE OVER DEFENSE OBJECTION.

AND IT WAS ONLY THERE BECAUSE
EXCULPATORY STATEMENTS AND HIS
POLICE INTERVIEW WERE INTRODUCED
BY THE STATE.
SO HAD THAT EXTRA PORTION OUT OF
DORSEY NOT BEEN ADDED, I THINK
IT'S REASONABLE TO ASSUME THAT
THE JURY STILL COULD HAVE LOOKED
AT THAT INSTRUCTION AND THEY
WOULDN'T HAVE BEEN TOLD THIS
DOESN'T APPLY BASED ON HIS
UNLAWFUL ACTIVITY.
SO I THINK IT'S IMPORTANT TO
DISTINGUISH HERE THAT IT ONLY
CAME IN AS IMPEACHMENT.
SO -- AND I THINK THE FIRST
DISTRICT, TOO, IN ITS OPINION
RELIES ON THE HARDISON CASE.
HE TOOK THE STAND AND ADMITTED
TO BEING A FELON IN POSSESSION
OF A FIREARM.
THE FIRST DCA SPECIFICALLY FOUND
THAT FUNDAMENTAL ERROR DIDN'T
HAPPEN BECAUSE IT WAS NEGATED BY
THE SPECIAL INSTRUCTION.
WE DON'T HAVE A SPECIAL
INSTRUCTION HERE.
THE SPECIAL INSTRUCTION CLEARLY
INFORMED IF YOU'RE A FELON
ENGAGED IN UNLAWFUL ACTIVITY,
BUT YOU'RE FACING THIS IMMINENT
THREAT, YOU DON'T HAVE A DUTY TO
RETREAT.
I WILL RESERVE THE REMAINDER OF
MY TIME FOR REBUTTAL.
>> MAY IT PLEASE THE COURT,
KATHRYN LANE FOR THE STATE.
TO ANSWER YOUR HONOR'S QUESTION,
YES, THE RECORD BEFORE THE FIRST
DISTRICT COURT OF APPEAL
ABSOLUTELY INFORMED THEM THAT
THE DEFENSE REQUESTED THAT THE
JURY BE INSTRUCTED AS TO
UNLAWFUL ACTIVITY.
IN FACT, I WILL TELL YOU, I DID
NOT BRIEF THE CASE IN THE FIRST
DISTRICT.
I ONLY REALIZED THAT THE DEFENSE
HAD REQUESTED THAT SPECIFIC
LANGUAGE AFFIRMATIVELY IN

WRITING BY READING THE CHARGE
CONFERENCE, BECAUSE THEY COMPARE
WHAT'S DIFFERENT AND WHAT'S THE
SAME IN THE DEFENSE AND STATE
INSTRUCTIONS AND THAT WAS NOT
PART OF WHAT'S DIFFERENT.
THAT WAS PART OF WHAT'S THE
SAME.
THE FINAL VERSION THAT CONTAINED
UNLAWFUL ACTIVITY LANGUAGE WAS
THE SAME AS THAT SPECIFICALLY
REQUESTED IN WRITING.
>> SO WHAT YOU'RE SAYING ON THE
-- IS THAT THE SUPPLEMENTATION
OF THE RECORD IS JUST TO KIND OF
SHOW -- TO ILLUSTRATE WHAT WAS
ALREADY SHOWN IN THE CHARGE
CONFERENCE.
>> IT MAKES IT CRYSTAL CLEAR.
IF THERE COULD BE ANY
MISUNDERSTANDING, THERE CAN BE
NONE NOW.
AND TO BE SURE, I THINK THE
DEFENSE CAN'T REALLY COME BACK
NOW AND SAY THAT, WELL, YEAH, WE
PROPOSED AN INSTRUCTION, BUT YOU
DIDN'T CATCH IT, SO YOU DIDN'T
GET TO MAKE THAT ARGUMENT, EVEN
THOUGH IT'S A MASSIVE PROCEDURAL
BAR, EVEN THOUGH WE'RE INVITING
THE ERROR THAT YOU'RE
COMPLAINING -- THAT WE'RE
COMPLAINING ABOUT NOW.
YOU CAN'T DO THAT.
JUST BECAUSE --
>> DO YOU AGREE WITH THE FIRST
DISTRICT THAT IT WAS AN IMPROPER
INSTRUCTION?
>> NO.
ULTIMATELY, IT WAS A CORRECT
INSTRUCTION.
BUT I THINK WE DON'T EVEN NEED
TO REACH THAT --
>> I THINK WE DO NEED TO REACH
IT BECAUSE IF IT'S A MASSIVE
CONFUSION, IT'S THE DEFENDANT
THAT GETS THE -- IS THE VICTIM,
SO TO SPEAK, OF THE CONFUSION IN
THE LAW.
SO IS THERE UNDER THE STATUTE AT

THE TIME A DISTINCTION BETWEEN
013 AND 0121?
>> WHAT THE FLORIDA LEGISLATURE
HAS CALLED IT IS AN
INCONSISTENCY.
AND THAT'S HOW THEY LABELED IT
WHEN TALKING ABOUT LITTLE V
STATE, WHICH IS THE FIRST CASE
--
>> AGAIN, I GUESS YOU DON'T
AGREE WITH THE FIRST DISTRICT
THAT THIS WAS AN IMPROPER
INSTRUCTION.
>> CORRECT.
THE FLORIDA LEGISLATURE IN A
VERY SHORT AMOUNT OF TIME AFTER
THE LITTLE CASE CAME OUT--
WHICH IS THE FIRST CASE IN ALL
THE DCAS THAT HELD THAT THE
UNLAWFUL ACTIVITY LANGUAGE IS
NOT A PART OF WHAT THE JURY
SHOULD BE CONSIDERING.
AND THEY DID NOT DISTINGUISH
BETWEEN 012 AND 013.
JUST IT'S A 013, SO WE'RE GOING
TO CUT IT OUT ALL THE
INSTRUCTIONS.
IN A VERY SHORT AMOUNT OF TIME
AFTER, THAT THE FLORIDA
LEGISLATURE CAME IN AND AMENDED
THE STATUTE AND EXPLICITLY
STATED, YOU KNOW, WE'RE FIXING
THESE INCONSISTENCIES.
I DON'T THINK ANYONE CAN ARGUE
THAT THE FLORIDA LEGISLATURE
EVER INTENDED UNLAWFUL ACTIVITY
--
>> BUT THAT KIND OF ARGUMENT
SEEMS TO ME TO RUN UP AGAINST
THE RULE OF LENITY, BECAUSE TO
THE EXTENT IT WAS NOT CLEAR, AND
THE LEGISLATURE WAS COMPELLED TO
CLARIFY IT, THEN BEFORE IT WAS
CLARIFIED, THE DEFENDANT'S GOING
TO GET THE BENEFIT OF THE
AMBIGUITY.
ISN'T THAT CORRECT?
>> WELL, AS WE ALL KNOW THE RULE
OF LENITY IS THE CANON OF LAST
RESORT.

WE CANNOT GO THERE UNLESS THERE IS NO OTHER WAY TO INTERPRET A STATUTE.
THE FLORIDA LEGISLATURE ONLY HAD TO CLARIFY THE LAW BECAUSE LITTLE CAME OUT AND ALL THE DCAS FELL IN LINE BEHIND IT.
THAT DOESN'T MEAN THE LEGISLATURE FELT IT WAS AMBIGUOUS.
THAT MEANS LITTLE WAS INCORRECT BECAUSE IT DID NOT READ THE STATUTE AND IT CAME TO AN ABSURD RESULT.
NO MATTER HOW HYPER TECHNICAL YOUR READING IS, IF THE RESULT YOU GET IS ABSURD AND CONTRARY TO LEGISLATIVE INTENT, IT IS NOT THE CORRECT READING.
AND PARI MATERIA GIVES US THE CORRECT READING.
THE LEGISLATURE HAD TO FIX THE ERROR OF LITTLE.
AS TO JURISDICTION, I DON'T EVEN BELIEVE THIS COURT HAS AN EXPRESS AND DIRECT CONFLICT HERE.
THE CITED CASES, RIOS AND DORSEY, OPERATE ON A DIFFERENT SET OF FACTS.
THE FIRST DISTRICT'S DECISION HERE TURNED ON WHETHER OR NOT THE JURY WAS ULTIMATELY PREVENTED FROM CONSIDERING THE DEFENSE OF JUSTIFIABLE USE OF FORCE BECAUSE IF THEY BELIEVED HIS BEST VERSION OF EVENTS AND HE GAVE SEVERAL PERMUTATIONS TO POLICE AND THEN IT WAS CONTRADICTED BY ALL THE STATE'S EVIDENCE, BUT EVEN IF THEY BELIEVED HIS BEST VERSION OF EVENTS, THE JURY WOULD NECESSARILY HAVE FOUND HE HAD NO OPPORTUNITY TO RETREAT, SO ENGAGED IN UNLAWFUL ACTIVITY OR NOT, HE NEVER WOULD HAVE BEEN REQUIRED TO, BECAUSE THEN HE COULD HAVE BEEN SHOT IN THE FACT, WHICH IS EXACTLY WHAT HE

DID TO THE VICTIM.
THE VICTIM WASN'T MERELY BACKING UP.
THE VICTIM HAD TURNED AROUND AND WAS RUNNING AWAY INTO HIS OWN HOME.
>> DOES THE RECORD SHOW WHERE THE VICTIM WAS SHOT?
>> IN THE BACK.
>> WERE ALL THE SHOTS IN THE BACK?
>> YES.
THEY WERE SHOT AND THE FORENSIC EVIDENCE INDICATED THAT IT WAS CONSISTENT WITH HIM TRYING TO GET UP OUT OF HIS CHAIR ON THE FRONT PORCH AND TO SAFETY.
THE DEFENDANT --
>> THAT CONFUSES ME.
YOU'RE SAYING ALL THE SHOTS ARE IN THE BACK?
IS THAT CORRECT?
>> AT THE BACK, BUT THEY CAME IN AT AN ANGLE.
AND BASED ON THE ANGLE, THE MEDICAL EXAMINER WAS ABLE TO SAY THIS IS CONSISTENT WITH THE VICTIM GETTING UP OUT OF HIS CHAIR, CONSISTENT WITH THE STATE'S VERSION OF EVENTS, AND TRYING TO GET AWAY TO SAFETY.
NOW, THE DEFENDANT SIMPLY HAD THE VICTIM FLEEING.
AND AS HE'S TRYING TO GET INTO HIS HOUSE, THE DEFENDANT WAITS UNTIL HE GETS TO THE TOP STEP OF HIS OWN FRONT PORCH AND THEN HE OPENS FIRE.
NOW, THE DEFENDANT HAD BEEN SAYING UP UNTIL THEN, WELL, VICTIM HAD A GUN AND HE WAS TRYING TO COCK IT AS HE RAN.
VICTIM DROPPED THE GUN.
HE STILL CONTINUES FIRING SEVEN OR EIGHT TIMES.
THE VAST MAJORITY OF ALL THE BULLETS CAME AFTER THE VICTIM WAS DISARMED AND ABOUT TO GET INTO THE THRESHOLD OF HIS OWN HOME.

THAT SAYS VOLUMES ABOUT WHETHER
THIS CASE TURNED ON PART OF THE
JURY INSTRUCTION CONCERNING DUTY
TO RETREAT.
THIS TURNED ON WHETHER OR NOT HE
WAS FACING AN IMMINENT THREAT,
ON WHETHER OR NOT THE JURY
REALLY BOUGHT HIS BELIEF.
BUT EVEN IF THEY DID BUY IT, HE
WAS IN A POSITION THAT IF HE
TURNED AROUND AND RAN AWAY, HE
WOULD EXPOSE HIMSELF TO MORE
DANGER.
UNDER THOSE CIRCUMSTANCES, THE
JURY WOULD NOT HAVE BEEN
PREVENTED FROM CONSIDERING HIS
DEFENSE AS A WHOLE.
AND SO NO FUNDAMENTAL ERROR
COULD HAVE OCCURRED.
ULTIMATELY, THE STATE ASKS THIS
COURT TO DISCHARGE JURISDICTION.
IF THIS COURT MAINTAINS
JURISDICTION, THE STATE ASKS
THIS COURT TO HOLD THAT LITTLE
AND ITS PROGENY IS INCORRECT AND
THE STAND YOUR GROUND STATUTE
HAS ALWAYS MEANT THAT A PERSON
ENGAGED IN UNLAWFUL ACTIVITY
CANNOT CLAIM ITS PROTECTIONS.
THANK YOU.
>> I'D LIKE TO BRIEFLY ADDRESS
TWO POINTS.
JUSTICE CANADY, IF THE DCA--
WHEN THE FIRST DISTRICT WROTE
ITS OPINION, IT DIDN'T FIND THAT
THE ERROR WAS INVITED.
IT AGREED THAT THE JURY
INSTRUCTION WAS ERROR AND THEN
IT WENT INTO ITS FUNDAMENTAL
ERROR ANALYSIS.
SO I THINK ALL WE HAVE FROM THE
RECORD SUPPLEMENTATION IS THAT
COUNSEL REQUESTED A STANDARD
JURY INSTRUCTION, BUT AT THE
CHARGE CONFERENCE OBJECTED TO
THE ADDITIONAL LANGUAGE.
I'D LIKE TO ALSO ADDRESS
OPPOSING COUNSEL'S NARRATION OF
THE FACTS ABOUT THE
CONFRONTATION.

I THINK IT'S IMPORTANT TO NOTE
HERE IN RIOS AND DORSEY, THERE'S
NO EVIDENCE THAT ANY OF THE
ALLEGED VICTIMS WERE ARMED.
HERE WE HAVE EVIDENCE OF THE
VERY GUN --
>> DO YOU CONTEST WHAT THE STATE
HAS SAID ABOUT WHAT THE RECORD
SHOWS REGARDING THE WOUNDS BEING
IN THE BACK OF --
>> WELL, ONE WAS IN HIS TORSO.
I BELIEVE ONE WAS IN HIS REAR.
THEY WERE ALL IN THE BACK OF HIS
BODY, BUT THEY WERE NOT --
>> WELL, SOMEBODY BEING SHOT IN
THE BACK SEEMS TO BE A PRETTY
SIGNIFICANT THING.
>> AND THE JURY MAY HAVE TAKEN
YOUR HONOR'S VIEWPOINT.
>> WELL, WHO WOULDN'T?
I MEAN, WHO WOULDN'T TAKE THAT
VIEWPOINT?
>> WE CAN'T SPECULATE WHAT THE
JURY MAY HAVE DELIBERATED ON.
AND THEY MAY HAVE SEEN, WELL, HE
HAS A BOLT ACTION RIFLE.
HE HAS A PISTOL.
THIS IS NECESSARILY A
CONFRONTATION THAT MUST HAPPEN
REALLY FAST.
AND SO --
>> WELL, BUT IT KEPT GOING AFTER
YOUR CLIENT ADMITS THE VICTIM
HAD DROPPED THE WEAPON.
SHOTS CONTINUED TO BE FIRED.
>> AND I THINK WE'VE ADDRESSED
THIS IN OUR REPLY BRIEF.
THE JURY -- I MEAN, WE'RE
ASSUMING THAT THE JURY IS
THINKING THAT, WELL, AFTER THE
VICTIM IS DISARMED AND THE
SHOTGUN'S LYING ON THE GROUND,
HE'S STILL FIRING.
BUT BECAUSE THIS COULD HAVE
HAPPENED EXTREMELY FAST, THOSE
BULLETS COULD HAVE BEEN FIRED AS
THE GUN WAS DROPPING.
THOSE OTHER FOUR BULLETS MAY NOT
HAVE BEEN DESIGNED TO HIT THE
VICTIM.

SO --
>> LET ME ASK YOU, AS WE'RE TALKING ABOUT THIS, THIS KIND OF GOES TO THE QUESTION ABOUT JURISDICTION.
AND CASES OF FUNDAMENTAL ERROR ARE VERY MUCH CONTEXT-DEPENDENT AND LOOKING AT ALL THE EVIDENCE.
AND WHY DOESN'T THE FACT THAT WE'RE -- YOU KNOW, WE'RE COMPARING FUNDAMENTAL ERROR IN ONE CASE AND FUNDAMENTAL ERROR IN ANOTHER CASE WHERE THERE ARE DIFFERENT FACTUAL PATTERNS, WHY DOESN'T THAT CUT AGAINST THERE BEING JURISDICTION HERE?
>> I THINK THE FUNDAMENTAL ERROR ON THE JURISDICTION ISSUE, WHAT DOES THE JURY HAVE TO CONSIDER IN ALL THESE CASES?
NO MATTER WHAT THE SPECIFIC FACTS WERE, THERE WAS A POINT WHERE THERE WAS A CONFRONTATION.
THE SOLE ISSUE, THE ONE THAT'S IN CONTEST, THE ONLY THING THAT THE JURY HAS TO DECIDE IS WERE THEY FACING IMMINENT DEATH, GREAT BODILY HARM, COMMISSION OF A FORCIBLE FELONY.
AND IT'S AT THAT POINT THAT EVEN IF THE FACTS ARE SLIGHTLY DIFFERENT, THEY'RE STILL GIVEN A JURY INSTRUCTION THAT INFORMED THE JURY THAT HE HAD A DUTY TO RETREAT AND HE DID NOT HAVE A DUTY TO RETREAT.
IN RIOS AND DORSEY, THE FACTS ARE NO WORSE THAN IN THIS CASE AND IN FACT I WOULD ARGUE HERE WE HAVE EVIDENCE THAT THE ALLEGED VICTIM WAS ARMED.
WE DON'T EVEN HAVE THAT IN RIOS AND DORSEY.
SO THE FACT THAT MAYBE THERE ARE SOME DIFFERENT FACTUAL SCENARIOS THERE, BUT THE BOTTOM LINE IS THERE'S ONLY ONE SOLE AFFIRMATIVE DEFENSE.
THIS JURY INSTRUCTION WAS PERTINENT AND MATERIAL TO WHAT

THE JURY NEEDED TO CONVICT.
THERE'S ONLY ONE ISSUE FOR THE JURY TO DECIDE.
THE VICTIM WAS SHOT.
WE'RE ADMITTING THAT OUR CLIENT DISCHARGED THE WEAPON AND HE WAS STRAIGHTFORWARD IN HIS POLICE INFORMATION.
ALL THE JURY HAS TO FIGURE OUT IS WAS IT IMMINENT.
HERE THE JURY WAS TOLD EVEN IF YOU BELIEVE THE THREAT WAS IMMINENT, YOU STILL HAD TO BACK AWAY.
YOU COULD HAVE BACKED AWAY.
I THINK THAT PREVENTED HIM FROM HAVING A FAIR TRIAL ON HIS SOLE AFFIRMATIVE DEFENSE.
SO I WOULD ASK THAT THIS COURT AFFIRM THE DECISIONS IN RIOS AND DORSEY AND QUASH THE FIRST DISTRICT'S CASE.
THANK YOU.
>> THANK YOU FOR YOUR ARGUMENTS.
COURT IS IN RECESS FOR TEN MINUTES.
>> ALL RISE.