

>>> THE NEXT CASE ON THE DOCKET
WILL BE WONG V. STATE OF
FLORIDA.

>> WHENEVER YOU'RE READY.

>> MAY IT PLEASE THE COURT, MY
NAME IS DANE CHASE, AND I'M HERE
ON BEHALF OF THE PETITIONER,
FRANCIS WONG.

THIS CASE IS BEFORE THE COURT
BECAUSE IT CONFLICTS WITH THIS
COURT'S ADMISSION STATE V.
HEATHCOTE BY REQUIRING A
DEFENDANT TO OBTAIN A SPECIFIC
RULING ON A LESSER INCLUDED
OFFENSE FOR APPELLATE REVIEW.
THE SECOND DISTRICT COURT OF
APPEAL'S OPINION IMPARTED A
PREVIOUSLY NONEXISTENT EXPLICIT
DENIAL REQUIREMENT FOR PURPOSES
OF PRESERVATION.

NOWHERE IN THIS COURT'S
PRECEDENT HAS THIS COURT
REQUIRED AN EXPLICIT DENIAL.
IN FACT, THIS COURT'S PRECEDENT
REFLECTS A RULING ON A REQUEST
IS NOT REQUIRED AT ALL.
INSTEAD, A CLOSE READING OF THIS
COURT'S PRECEDENT REVEALS THAT
PRESERVATION IS PERFECTED BY
DEFENSE COUNSEL SIMPLY PROVIDING
THE TRIAL COURT WITH THE
OPPORTUNITY TO RULE UPON A
REQUEST.

>> WAS THE INSTRUCTION
PROVIDED-- WAS THERE A WRITTEN
INSTRUCTION PROVIDED TO THE
COURT?

>> NO, THERE WAS NOT.
IT WAS JUST ORALLY REQUESTED BY
DEFENSE COUNSEL.

>> JUST ONE TIME?

>> HE REQUESTED--

>> I MEAN, I JUST WANT TO-- IT
MAY NOT MATTER, I JUST WANT TO
UNDERSTAND--

>> RIGHT.

HE REQUESTED THE INSTRUCTION, HE
RECEIVED A RESPONSE FROM THE
COURT THAT THE COURT DID NOT
HAVE TO GIVE THE INSTRUCTION OR
WAS NOT REQUIRED TO DO SO, AND
THEN HE LITERALLY PLEADED WITH
THE COURT, AND I DO MEAN
LITERALLY, TO GIVE THE

INSTRUCTION.
DIDN'T RECEIVE A RESPONSE.
THE COURT MOVED ON FROM THERE.
>> DIDN'T CITE ANY CASE LAW--
>> NO, HE DID NOT PRESENT ANY
KIND OF CASE LAW.
ALL HE DID WAS MAKE THE REQUEST
FOR THE INSTRUCTION.
HE MADE AN ARGUMENT THAT THE
INFORMATION AND EVIDENCE COVERED
THE INSTRUCTION AND BECAUSE OF
THAT IT SHOULD BE GIVEN.
>> THIS WOULD BE A PERMISSIVE--
>> THIS WOULD BE A-- YES,
CATEGORY TWO.
>> SO WAS THE STATE'S ARGUMENT,
I MEAN, AGAIN, THEY CONCEDED
BELOW IF IT WAS PRESERVED, THERE
WOULD BE ERROR, NOW THEY'RE
SAYING NOT.
WAS THE STATE'S ARGUMENT THAT
THE FACTS DIDN'T JUSTIFY THE
PERMISSIVE LESSER?
>> THAT WAS NOT THEIR
CONTENTION--
>>, NO I'M SAYING BEFORE THE
TRIAL JUDGE.
>> NO.
IN FACT, THERE WASN'T REALLY A
RESPONSE GIVEN.
IT WAS JUST THE DEFENSE COUNSEL
MAKING THE REQUEST, TRIAL COURT
MAKING A RESPONSE THEY DIDN'T
HAVE TO GIVE THE INSTRUCTION,
AND THAT WAS PRETTY MUCH WHERE
IT WAS LEFT.
>> BUT THAT'S NOT-- SO THE
ISSUE IS, THERE'S NO DISCRETION
UNDER A PERMISSIVE IF THE
ELEMENTS ARE THERE AND THE FACTS
JUSTIFY IT.
>> THAT'S CORRECT.
THERE IS NO DISCRETION FOR THE
COURT IF THE INFORMATION CHARGES
IT, IF THE FACTS INTRODUCED AT
TRIAL COVER IT, THERE IS NO
DISCRETION.
>> WAS THAT POINTED OUT TO THE
TRIAL COURT?
>> IT WAS NOT, BUT--
>> ISN'T THAT A PROBLEM?
>> I DON'T BELIEVE SO.
>> AT THE OUTSET IN MAKING AN
OBJECTION THAT IS WHERE THE

GROUNDS FOR THE OBJECTION ARE
 SUFFICIENTLY PRECISE FOR THE
 TRIAL COURT TO UNDERSTAND WHAT
 THE TRIAL COURT IS REQUIRED TO
 DO.

THEY WERE.

>> THEY WERE SUFFICIENTLY
 PRECISE, AND I SAY THAT FOR A
 COME REASONS.

NUMBER ONE, TRIAL COURTS ARE
 PRESUMED TO UNDERSTAND THE
 LAW--

>> BUT THE WHOLE PURPOSE OF
 OBJECTION IS FOR THE TRIAL COURT
 TO BE, TO HAVE BROUGHT TO ITS
 ATTENTION WHAT THE REQUIREMENTS
 OF THE LAW ARE, ISN'T THAT
 CORRECT?

>> THAT WOULD BE CORRECT, BUT A
 REQUEST LIKE THIS IS ACTUALLY
 TWOFOLD.

THERE'S TWO CONSIDERATIONS.
 FIRST BEING WHETHER OR NOT THE
 INFORMATION COVERS THE
 INSTRUCTION AND WHETHER--
 THAT'S, ACTUALLY--

[INAUDIBLE]

I GUESS THE INFORMATION IF IT
 COVERS THE INSTRUCTION OR THE
 ELEMENTS OF THE OFFENSE AND,
 TWO, WHETHER THE EVIDENCE
 INTRODUCED AT TRIAL COVERS THAT.
 AND IF THOSE TWO THINGS ARE MET,
 IT'S NO LONGER ANY DISCRETION,
 THE COURT'S REQUIRED TO GIVE IT.
 SO--

>> YOU SAYING THAT THE DEFENSE
 ATTORNEY DID NOT POINT OUT THOSE
 TWO ELEMENTS TO THE COURT?

>> NO.

THE DEFENSE ATTORNEY POINTED OUT
 THE FIRST TWO ELEMENTS, BUT HE
 DIDN'T GET TO THE THIRD ELEMENT
 BECAUSE HE COULDN'T GET AN
 EXPLICIT RULING FROM THE COURT
 THAT THE EVIDENCE INTRODUCED AT
 TRIAL SUPPORTED THAT
 INSTRUCTION.

SO HE HAD NO REASON FOR POINTING
 THAT THAT OUT, BECAUSE HE DIDN'T
 EVEN GET TO THAT POINT--

>> BUT I THOUGHT HE DID.

MAYBE I'M READING THIS
 INCORRECTLY, BUT I THOUGHT HE

DID POINT OUT TO THE COURT THAT THE CHARGE INCLUDED THAT OFFENSE, THAT THE EVIDENCE INTRODUCED AT TRIAL WOULD SUPPORT IT, AND THAT'S WHY HE WAS ASKING MORE IT. HE DIDN'T SAY THAT.

>>, NO I AGREE WITH THAT. THAT IS CORRECT.

THAT IS EXACTLY WHAT HE DID. >> SO WHAT ARE YOU SAYING IS MISSING?

I GUESS I'M MISSING YOUR ARGUMENT HERE.

>> WELL, MY UNDERSTANDING IS THAT JUSTICE CANADY IS INQUIRING AS TO WHY WASN'T THE DEFENSE COUNSEL GOING FURTHER WITH THIS AND SPECIFICALLY INFORMING THE TRIAL COURT THAT HE HAD NO DISCRETION BUT TO GIVE THIS OFFENSE.

AND MY POINT IS, IS THAT HE DIDN'T GET TO THAT POINT BECAUSE THE RULING THAT WAS MADE CUT HIM OFF BEFORE HE EVEN GOT THERE. IT WAS KIND OF A CART BEFORE THE HORSE--

>> THE JUDGE REALLY ONLY SAID I'M NOT REQUIRED TO GIVE A LESSER, HE SAID, BUT I'M ASKING YOU TO-- I'M PLEASED THAT YOU DO IT.

THEN THE TRIAL JUDGE SAYS SOMETHING ELSE, TOTALLY DIFFERENT FROM THIS DISCUSSION. YOU DON'T THINK IT WAS INCUMBENT UPON YOUR, THE DEFENSE ATTORNEY TO SAY, JUDGE, YES, THOSE WITNESSES ARE COMING LATER, BUT ARE YOU GOING TO GIVE THIS INSTRUCTION?

>> NO, YOUR HONOR, FOR TWO REASONS.

ONE, LIKE I SAID, PRESUMABLY THE COURT UNDERSTOOD THAT IF THE INFORMATION AND THE EVIDENCE INTRODUCED AT TRIAL SUPPORTED THAT INSTRUCTION, THEN PRESUMABLY THE COURT WAS AWARE OF THAT AND THERE WAS NO REASON TO POINT IT OUT TO THE COURT, BUT MORE IMPORTANT-- I'M SORRY. >> SEEMS TO ME LIKE IN GOING

THROUGH THE TRANSCRIPT HERE THAT
THE CHARGE CONFERENCE WAS GOING,
WAS MOVING VERY RAPIDLY.

A LOT OF STANDARD JURY
INSTRUCTIONS, AND THE JUDGE WAS
MOVING VERY RAPIDLY THROUGH IT.
>> THAT'S CORRECT.

>> BUT IN ONE INSTANCE, AND
I'M READING FROM-- IT SAYS,
YOUR HONOR, I DON'T KNOW IF THE
STATE IS IN AGREEMENT WITH ME ON
THIS, CATEGORY TWO OR LESSER IS
COMMITTING NATURAL, UNNATURAL
AND LASCIVIOUS ACT.

I THINK THE EVIDENCE DOES
SUPPORT A LESSER OF THIS
CHARGER.

DEFENDANT IS CHARGED, THE ACT
WAS UNNATURAL AND LASCIVIOUS,
AND UNNATURAL MEANS NOT IN
ACCORDANCE WITH NATURE OR WITH
NORMAL FEELINGS OR BEHAVIOR.
AND LASCIVIOUS, WE GOT THE SAME
AS LASCIVIOUS.

I MEAN, I THINK WE-- WOULD YOU
NOT AGREE, AND THIS IS ABOUT AS
FRIENDLY A QUESTION AS IT
GETS-- THAT THAT SUFFICIENTLY
PLACES THE JUDGE ON NOTICE
THAT--

>> YES, I WOULD.

>>-- THE CHARGE WAS SUPPORTED
BY THE EVIDENCE AND EVEN THOUGH
IT MAY NOT BE A CATEGORY TWO--

>> YES, I WOULD.

I MEAN, THAT IS THE ENTIRE
POINT, IS THAT HE PUT BEFORE THE
COURT THE INFORMATION SUPPORTS
THIS, THE EVIDENCE INTRODUCED AT
TRIAL SUPPORTS IT, WE'RE
REQUESTING IT.

AND FROM THERE, THAT'S ALL HE
HAD TO DO AT THAT POINT WAS MAKE
THE REQUEST FOR THE INSTRUCTION.
AND THEN AT THAT POINT THE COURT
HAS TO MAKE A DECISION WHETHER
IT WAS SUPPORTED, AND IF IT WAS,
GIVE THE INSTRUCTION.

THE COURT APPARENTLY, ITS
COMMENT THAT IT DIDN'T HAVE TO
GIVE THE INSTRUCTION AND
REDIRECTION OF THE CONVERSATION
TO OTHER MATTERS MADE THE
DECISION IT WASN'T SUPPORTED BY

THE EVIDENCE AND THAT HE,
THEREFORE, WAS NOT REQUIRED TO
GIVE THE INSTRUCTION.
>> YEAH, BUT THAT'S, THAT SEEMS
TO ME TO BE A LITTLE CREATIVE
WITH WHAT HAPPENED HERE.
IT SEEMED LIKE TO ME THE MOST
NATURAL WAY TO UNDERSTAND WHAT
THE JUDGE SAID WAS THAT THE
JUDGE THOUGHT THAT HE HAD
DISCRETION IN THE CIRCUMSTANCES
THAT HAD BEEN DESCRIBED.
>> WELL, HE DID--
>> NOT THAT HE MADE A PARTICULAR
FINDING ABOUT THE EVIDENCE AND
THE ALLEGATIONS IN THE
INDICTMENT.
>> WELL, HE DID HAVE THE
DISCRETION TO MAKE A
DETERMINATION WHEN THE
INFORMATION AND THE EVIDENCE
SUPPORTED TO OFFENSE.
>> WELL--
>> SO IT WASN'T A MISSTATEMENT
OF THE LAW, AND THERE WASN'T
ANYTHING FOR DEFENSE COUNSEL--
>> BUT HE DIDN'T REFER TO-- IN
THE STATEMENT AS I RECALL IT, HE
WASN'T REFERRING BACK TO WHAT
COUNSEL HAD SAID, BUT HE WAS
MAKING A CATEGORICAL STATEMENT
ABOUT THAT SORT OF, THAT
CATEGORY OF FENCES.
OF TO FENCES.
WHAT DID HE SAY?
WHAT DID THE JUDGE SAY?
IT'S A ONE-LINER, COULD YOU
QUOTE IT FOR ME?
>> HE LEGITIMATELY SAYS, I DON'T
HAVE THE EXACT COAT, BUT HE
LITERALLY SAYS I DON'T HAVE TO
GIVE THE-- I'M SORRY, I DON'T
HAVE TO GIVE AN INSTRUCTION ON
CATEGORY TWO OFFENSES, I
BELIEVE, IS WHAT HE SAYS.
>> OKAY.
SO HE'S MAKING A CATEGORICAL
STATEMENT ABOUT THAT TYPE OF
OFFENSE--
>> RIGHT.
>> CATEGORY TWO OFFENSE.
HE'S NOT REFERRING BACK TO WHAT
HAD BEEN SAID.
YOU KNOW, I THINK THIS COULD

HAVE BEEN VERY EASILY RESOLVED
IF COUNSEL HAD SAID, OH, YES,
BUT YOU DO, YOUR HONOR.

THIS IS NOT DISCRETIONARY, IT IS
MANDATORY TO GIVE AN INSTRUCTION
IN THE CIRCUMSTANCES HERE.

>> YES, YOUR HONOR?

>> I'M GOING TO ASK THIS-- GO
AHEAD AND ANSWER THIS QUESTION.

>> I'M GOING TO GO BACK TO MY
COMMENT, WHAT I KEEP SAYING, IS
THAT TRIAL COUNSEL VERY WELL
COULD HAVE AND VERY WELL
PROBABLY WOULD HAVE DONE SO IF
THE COURT WOULD HAVE
SPECIFICALLY DENIED-- OR HAD
THE COURT MADE A PRELIMINARY
RULING ON WHETHER OR NOT THE
EVIDENCE SUPPORTED THE CHARGE.
HAD HE MADE THAT RULING,
EXPLICITLY MADE THAT RULING,
WHICH I WOULD CONTEND HE DID AND
DENIED IT SO THAT CUT OFF
FURTHER DISCUSSION, BUT ASSUMING
HE HAD MADE THE DECISION THAT IT
WAS SUPPORTED BY THE EVIDENCE--

>> THAT IT WAS OR IT WASN'T?

>> THAT IT WAS, HAD HE MADE A
FINDING THAT IT WAS, THEN I
WOULD AGREE THAT COUNSEL THEN
SHOULD HAVE FURTHER OBJECTED AND
SAID IT WAS REQUIRED TO BE
GIVEN.

BUT THE PROBLEM IS HE CUTS HIM
OFF FROM THE OUTSET AND,
ESSENTIALLY, MAKES A FINDING
THIS ISN'T-- I DON'T HAVE TO
GIVE THIS INSTRUCTION BECAUSE--
>> SO WAS IT REALLY SUPPORTED--
DID THE TRIAL JUDGE, IN FACT, IN
THIS INSTANCE HAVE TO GIVE THE
INSTRUCTION?

>> YES, HE DID.

YES, HE DID.

>> SO IS A PART OF YOUR ARGUMENT
THAT EVERY LEWD, LASCIVIOUS
MOLESTATION OR BATTERY OF A
CHILD IS AN UNNATURAL ACT?

>> I WOULD SAY SO, YES, YOUR
HONOR.

>> AND IS THAT CONTESTED IN ANY
OF THE DISTRICT COURTS OF
APPEAL?

ARE ALL OF THE DISTRICT COURTS

OF APPEAL IN AGREEMENT ON THAT PARTICULAR--

>> I WOULD SAY THAT THEY ARE, YOUR HONOR.

I DON'T, I DON'T SEE AN OPINION OUT THERE WHERE IT'S BEEN HELD THAT ADULT SEXUAL CONTACT WITH A MINOR VICTIM IS CONSIDERED ANYTHING BUT UNNATURAL AND LASCIVIOUS.

>> YOU DON'T KNOW-- NO DISTRICT COURT HAS SAID IT IS NOT AN UNNATURAL ACT?

>> AS FAR AS I'M AWARE OF, I DO RECALL THAT THERE IS A CASE FROM THE SECOND DCA THAT TALKS ABOUT, YOU KNOW, ADULT CONTACT WITH AN ADULT, NONCONSENSUAL CONTACT THERE, BUT I'M NOT AWARE OF ANY CASE THAT FROM A DCA THAT A SAYS ADULT CONTACT WITH A MINOR VICTIM IS EVER SEEN AS NATURAL AND I DON'T SEE HOW YOU COULD MAKE THAT CONCLUSION, QUITE FRANKLY.

>> SO IF THAT IS THE CASE, THEN YOUR PROPOSITION IS EVERY LEWD AND LASCIVIOUS MOLESTATION, EVERY LEWD AND LASCIVIOUS BATTERY OF A CHILD IS ALSO, WHAT'S THE OTHER ONE?

UNNATURAL AND LASCIVIOUS ACT.

>> THAT'S CORRECT.

AND I BELIEVE THAT THE COMMITTEE UNDER STANDARD JURY INSTRUCTIONS IS IN AGREEMENT WITH THAT PROPOSITION AS I BELIEVE THEY HAVE SUBMITTED A BRIEF OR A PETITION TO THIS COURT SUGGESTING THAT IT BE MOVES TO A CATEGORY I LESSER INCLUDED OFFENSE--

>> THAT'S WHAT I WAS JUST THINKING, IF IT WAS, THEN IT WOULD BE MADE MANDATORY.

>> THAT'S CORRECT.

>> GOING BACK TO, I GUESS, WHAT WE'RE HERE ON IS THE STATEMENT IN THE SECOND DISTRICT OPINION THAT SAYS THERE HAS TO BE EXPLICIT DENIAL.

AND I KNOW AS WE'RE JUDGES, TRIAL LAWYERS THAT WE ALWAYS WOULD RATHER THAT EVERYTHING BE

MADE VERY CLEAR TO THE JUDGE.
I GUESS WE COULD SAY HERE THE
STATE SHOULD HAVE MADE SURE THAT
THE--

>> YES.

>>-- JUDGE DID WHAT NEEDED TO
BE DONE TO AVOID A RETRIAL.

>> RIGHT.

>> SO WE'RE NOW BACK TO, THOUGH,
IT LOOKS LIKE A LONG LINE OF
CASES EVEN OUT OF THIS COURT
THAT HAVE SAID EVEN IN MUCH MORE
MURKY CIRCUMSTANCES THAT AS LONG
AS THE REQUEST IS MADE--

>> CORRECT.

>>-- IT'S NOT THE OBLIGATION OF
THE DEFENSE LAWYER TO FURTHER
EXPLAIN TO THE JUDGE WHY THE
JUDGE IS RIGHT OR WRONG.

>> THAT'S CORRECT.

>> AND THAT'S UNFORTUNATELY.

I MEAN-- UNFORTUNATE.

IN A WAY WITH IF AS A JUDGE
YOU'D SAY FOR EACH INSTRUCTION,
THIS GUY'S NOW IN LIFE, LIFE IN
PRISON FOR THIS, HERE'S THE
WRITTEN INSTRUCTION, ARGUE
WHY/WHY NOT AND REQUEST OR DENY.
I MEAN, THAT'S HOW I'D RATHER IT
GO.

>> RIGHT.

>> THIS SEEMS SOMEWHAT INFORMAL
CONSIDER WHAT'S AT STAKE.

IS IN THE PRACTICE?

IS THIS-- I MEAN, AND MAYBE
THAT'S BEYOND WHAT THIS CASE
ABOUT, BUT IT SEEMS THAT FOR THE
BENEFIT OF THE JUDGE AND A AVOID
HEARING RETRIALS, WE SHOULD GET
THIS RIGHT.

>> RIGHT.

NO, I--

>> GO AHEAD, PLEASE.

>> CAN I HAVE AN ANSWER TO THAT,
PLEASE?

>> NO, I AGREE WITH WHAT YOU'RE
STANDING, BUT I THINK THAT FALLS
TO THE TRIAL JUDGE.

THAT'S THE TRIAL JUDGE'S
RESPONSIBILITY TO MAKE A RULING.
COME, ALL HE CAN DO IS--
COUNSEL, ALL HE CAN DO IS PUT
THE REQUEST BEFORE THE COURT, HE
CAN'T COMPEL A RULING.

HE'S WITHOUT POWER TO MAKE THE JUDGE USE THE MAGIC WORDS, EXPLICITLY DENY.
AND, PRESUMABLY, IF THE COURT DIDN'T UNDERSTAND THE REQUEST OR OBJECTION, ONE WOULD THINK HE WOULD HAVE INQUIRED FURTHER.
>> BUT EVEN AFTER THE JUDGE INDICATED THAT I DON'T HAVE TO GIVE A LESSER FOR CATEGORY II, DEFENSE COUNSEL SAID I UNDERSTAND, I'M ASKING YOU, I'M PLEADING, AND THE JUDGE JUST CHANGED THE SUBJECT, SAID I'M GOING TO GIVE YOU--
[INAUDIBLE]
I'VE BEEN WAITING AROUND FOR 25 MINUTES NOW.
SO HE DID TRY TO-- HE CAN'T FORCE THE JUDGE.
>> THAT'S EXACTLY MY POINT.
>> BUT HE DID ATTEMPT TO.
>> HE DID EVERYTHING WITHIN HIS POWER TO GET A RULING FROM THE JUDGE.
>> WELL, THAT'S NOT-- LET'S JUST BE PERFECTLY FAIR.
I'M A JUDGE AND I FOR SOME REASON HAVE HAD A LAPSE IN WHAT THE LAW WOULD BE, YOU KNOW, WHAT WE'D HOPE FOR ADVOCATES TO DO IS SAYING, WELL, JUDGE, THIS IS A PERMISSIVE CATEGORY II, BUT IT'S REQUIRED IN THIS CASE BECAUSE THE FACTS SHOW IT, AND HE'S THE CASE LAW-- HERE'S THE CASE LAW. THAT WOULD BE IDEAL.
YOU CAN'T COMPEL A RULING--
>> RIGHT.
>>-- BUT SAYING I'M PLEADING WITH YOU ISN'T REALLY HELPING THE JUDGE ALONG.
SO, AGAIN, DIFFERENT BETWEEN, YES, THE JUDGE KNEW THE REQUEST, BUT I THINK WHAT JUSTICE CANADY WAS SAYING AND I UNDERSTAND IT IS IT WOULD BE MORE HELPFUL IF BOTH SIDES WHEN THEY GET TO JURY INSTRUCTIONS WERE PREPARED WITH THE LAW AS TO THESE CRITICAL ISSUES.
>> I DON'T DISAGREE WITH THAT. IT CERTAINLY WOULD BE WITH, BUT I THINK CASE LAW SUPPORTS

THE FACT THAT ALL THAT IS
REQUIRED IS THAT THE REQUEST BE
MADE, AND BE I JUST WANT TO
POINT TO ONE QUICK PORTION OF
THE HEATHCOTE DECISION.

>> IT SEEMS TO ME THE DEFENSE
ATTORNEY SAYS, JUDGE, I AGREE
WITH YOU.

HE SAID, I UNDERSTAND.
HE UNDERSTANDS THAT THE JUDGE
DOES NOT HAVE TO GIVE A
PERMISSIVE CATEGORY TWO LESSER
INCLUDED DEFENSE.

>> CORRECT, AND THAT'S--
>> AND INSTEAD OF SAYING IN
THESE CIRCUMSTANCES YOU MUST
BECAUSE THE LAW AND THE EVIDENCE
SUPPORTS IT, HE SAYS BUT I'M
ASKING YOU TO DO IT ANYWAY,
BASICALLY, I'M PLEADING WITH YOU
TO DO IT ANYWAY.

>> WELL, HE'S ASKING, WHAT HE'S
DOING IS HE'S REALLY REQUESTING
A JUDGMENT ON THE FIRST PART OF
THE ANALYSIS.

THE JUDGE IS ESSENTIALLY STATING
I HAVE THE DISCRETION TO DENY
THIS, AND I KNOW HE DOESN'T
EXPLICITLY SAY THIS, BUT IT'S
CLEAR FROM WHAT HE'S SAYING THAT
HE DOESN'T BELIEVE THAT THE
INFORMATION AND THE EVIDENCE
INTRODUCED AT TRIAL SUPPORT
GIVING THE INSTRUCTION AND
DIDN'T GIVE IT ON THAT BASIS.

>> THERE IS THAT SECOND ISSUE
ABOUT WHETHER IT WAS REALLY
APPROPRIATE TO GIVE IT IN THIS
CIRCUMSTANCE OTHER THAN THE FACT
THAT IT WAS AN ADULT AND A CHILD
LEWD AND LASCIVIOUS CASE.

IS THERE ANY OTHER EVIDENCE THAT
YOU WANT TO POINT TO THAT WOULD
SUPPORT THE GIVING OF IT?

>> WELL, I THINK THE EVIDENCE IS
CLEAR, YOU KNOW?

YOU HAVE TOUCHING BY THE ADULT,
THE ADULT PERPETRATOR ON THE
VICTIM.

I THINK THAT PART'S PRETTY
SELF-EVIDENT.

THE BIGGER QUESTION AND I'M SURE
WHAT COME'S GOING TO ADDRESS IS
WHETHER THE PROCEEDINGS

THEMSELVES SUFFICIENTLY PLED.
I BELIEVE THEY DID.
NUMBER ONE, I BELIEVE BY
CHARGING LASCIVIOUS, THEY'RE
INHERENTLY CHARGING AN UNNATURAL
ACT.

THE REASON I SAY THAT IS BECAUSE
LASCIVIOUS PER THE STANDARD JURY
INSTRUCTIONS IS TO FIND IN A
MULTITUDE OF WAYS, ONE OF WHICH
IS BY BEING LIE SENSUOUS, AND IF
YOU LOOK IT UP, IT SIMPLY SAYS
LACKING MORAL OR LEGAL
CONSTRAINTS, ESPECIALLY SEXUAL
CONSTRAINTS CONCERN.

>> WHY IS THE IT UNNATURAL AND
LASCIVIOUS ACT?

WHAT IS THE DIFFERENCE BETWEEN A
LASCIVIOUS ACT AND AN--

>> I DON'T BELIEVE, QUITE
FRANKLY, THERE IS ANY.

THE INSTRUCTIONS SIMPLY SAY
THESE THINGS MEAN THE SAME
THING, AND I BELIEVE THE SAME IS
TRUE HERE, THAT UNNATURAL AND
LASCIVIOUS ESSENTIALLY MEAN THE
SAME THING.

>> THE SAME CRIME, I MEAN, ARE
THEY THE SAME CRIME?

>> NO, I DON'T BELIEVE THEY ARE
BECAUSE I THINK THERE ARE THINGS
THAT COULD BE UNNATURAL AND
LASCIVIOUS THAT WOULDN'T QUALIFY
AS A LEWD OR LASCIVIOUS--

>> THEN IT'S NOT LESSER BE ALL
THE-- I THOUGHT IT HAS TO BE
THE SAME ELEMENTS TO BE A PART
OF EITHER--

>> WELL, IT IS THE SAME
ELEMENTS, BUT I'M SAYING THERE
ARE THINGS THAT WOULD CONSTITUTE
AN UNNATURAL AND LASCIVIOUS--

>> THEN IT WOULD GO BACK TO IT'S
PERMISSIVE--

>> NO, I DON'T BELIEVE SO.
I DON'T BELIEVE SO.

>> YOU'VE GOT TWO MINUTES LEFT
FOR REBUTTAL.

>> OKAY.

JUST ONE THING THAT I WANT TO
STATE AND I'LL SIT DOWN IS I DO
WANT TO DIRECT THIS COURT'S
ATTENTION TO THE FACT THAT IN
STATE V. HEATHCOTE, THE DECISION

OF THE FIRST DISTRICT IN HUBBARD
V. STATE IS CORRECT AND SAYS ALL
THAT IS REQUIRED FOR
PRESERVATION IS THAT A CLEAR
OPPORTUNITY BE GIVEN TO THE
TRIAL COURT TO RULE ON THE
REQUEST.

I'LL SIT DOWN.

THANK YOU.

>> COULD I ASK YOU A QUESTION
ABOUT WHAT CLEAR OPPORTUNITY
MEANS?

WHAT'S YOUR UNDERSTANDING OF
WHAT THEY MEAN BY THAT?

>> IT MEANS THAT I STATE MY
GROUNDS, I STATE THAT I'M
REQUESTING AN INSTRUCTION, NOW
IT'S ON YOU, YOU HAVE THE
OPPORTUNITY AT THAT POINT TO--

>> IT'S REALLY BASED ON THE
PROPER STATEMENT OF THE
OBJECTION.

OPPORTUNITY COMES FROM IT BEING
PROPERLY PRESENTED TO THE COURT
SO THE COURT CAN UNDERSTAND WHAT
IS BEING PRESENTED.

>> I WOULD AGREE WITH THAT, YES.

>> THANK YOU.

>> MAY IT PLEASE THE COURT,
BRANDON CHRISTIAN FOR THE STATE
OF FLORIDA.

THE PRIMARY ISSUE TO BE DECIDED
IN THIS CASE IS WHETHER THE
TRIAL COURT'S STATEMENT I DON'T
HAVE TO GIVE A LESSER FOR
CATEGORY II, WHETHER THAT
STATEMENT REPRESENTS A RULING ON
DEFENSE COUNSEL'S REQUEST FOR
THE LESSER INSTRUCTION ON
UNNATURAL AND LASCIVIOUS ACT.

>> LET ME ASK YOU THIS QUESTION,
I MEAN, TRIALS OF ALL TYPES,
CIVIL AND CRIMINAL, ARE FLOWING
PROCEEDINGS.

I HAVE YET TO SEE ONE THAT'S
PERFECT.

BUT WHEN A JUDGE RESPONDS, WHEN
A LAWYER ASKS A JUDGE I WANT
THIS JURY INSTRUCTION AND THE
WORDS FROM THE JUDGE'S MOUTH ARE
I DON'T HAVE TO GIVE THAT ONE,
WHY IS THAT NOT-- DO JUDGES
JUST MAKE STATEMENTS THAT ARE
UNRESPONSIVE TO REQUESTS FROM

LAWYERS?

TO ME, IT'S A DIRECT RESPONSE TO WHAT THAT LAWYER SAID.

NOW, COULD IT HAVE BEEN MORE PERFECT?

WELL, YEAH, PROBABLY.

COULD THE JUDGE HAVE MORE ELOQUENTLY DENIED IT?

PROBABLY.

BUT TO SUGGEST THAT THAT'S NOT A DENIAL, TO ME, THAT JUDGES JUST TALK AND THEY DON'T RESPOND TO WHAT THE LAWYER SAYS.

>> HERE THERE ARE A FEW THINGS THAT ARE IMPORTANT ABOUT THE TRIAL COURT'S STATEMENT AND ALSO TAKEN IN THE CONTEXT OF THIS JURY CHARGE CONFERENCE.

SO HERE THE STATEMENT IS I DON'T HAVE TO GIVE A LESSER FOR CATEGORY II, AND AS A GENERAL PROPOSITION, THAT IS, THAT'S CORRECT.

THE COURT DOESN'T HAVE TO GIVE AN INSTRUCTION ON A LESSER OFFENSE SIMPLY BECAUSE IT'S BEEN LISTED IN THE SCHEDULE OF PROPOSED CATEGORY II OFFENSES. THESE ARE SCHEDULES THAT ARE PROPOSING OFFENSES THAT MAY BE SUPPORTED DEPENDING UPON THE ACCUSATORY PLEADING AND THE EVIDENCE AT TRIAL.

SO THE TRIAL COURT MAKES THIS GENERALIZED STATEMENT, AND THEN DEFENSE COUNSEL'S RESPONSE IS TO INSTEAD OF OBJECTING, IS TO BASICALLY ACQUIESCE--

>> WELL, I MEAN, WHAT YOU'RE SAYING THEN IS LAWYERS ARE SUPPOSED TO RETORT WHEN A JUDGE DECIDES WHAT HE OR SHE IS GOING TO DO, THAT THE LAWYER SHOULD ARGUE AGAINST THEM.

I MEAN, I HAVE PRACTICED LAW BEFORE WITH JUDGES THAT IF YOU START TO ARGUE WITH WHAT THEIR RULING IS, YOU REALLY HAVE PROBLEMS.

>> SURE, AND I UNDERSTAND THAT CONCERN.

BUT I WOULD INTERPRET WHAT THE TRIAL COURT OR SAID HERE AS INVITING A FURTHER EXPLANATION

ABOUT WHY THE INSTRUCTION COULD
BE REQUIRED IN THIS CASE--
>> DO-- WHERE DO YOU, I'M
SORRY.

I MEAN, I REALIZE THE ENGLISH
LANGUAGE, WE CAN BE CREATIVE
WITH IT, BUT WHERE DOES HE CAN
THAT LAWYER TO RESPOND TO?

>> HE SAYS I DON'T HAVE TO GIVE
AN INSTRUCTION--
>> RIGHT.

>>-- FOR CATEGORY TWO.

>> I DON'T HAVE TO GIVE AN
INSTRUCTION.

HE DOESN'T SAY DO I HAVE TO GIVE
AN INSTRUCTION OR WHY DO I HAVE
TO GIVE AN INSTRUCTION.

HE SAYS I DON'T HAVE TO GIVE AN
INSTRUCTION, AND THEN HE GOES
ON.

THIS, TO ME, SEEMS LIKE A VERY
HASTILY-CONDUCTED PROCEEDING AND
THAT THE JUDGE, THERE'S SEVERAL
THINGS IN HERE THAT JUST ARE
TRYING TO PUSH THIS THING
THROUGH.

>> THAT'S TRUE.

>> DON'T YOU AGREE THIS IS WHAT
IS GETTING TO US?

>> THE PARTIES WERE CONCERNED
ABOUT THE ARRIVAL OF A
WITNESS--

>> [INAUDIBLE]

>> THERE WEREN'T ANY WRITTEN
INSTRUCTIONS FILED, SO TO THE
DEFENSE AS WELL AS THE--

>> WELL, DIDN'T THE STATE AGREE,
SAID, YES, THERE ARE TWO
LESSERS, BUT I DON'T HAVE MY
BOOK IN FRONT OF ME FOR WHAT
THEY ARE.

I MEAN, EARLIER ON IN THE
DISCUSSION THE STATE MADE THAT
STATEMENT, THAT CONCESSION.

>> AS TO THIS LESSER, I DON'T
BELIEVE THE STATE WAS PROVIDED
WITH AN OPPORTUNITY TO RESPOND
BE ABOUT WHETHER THIS WOULD HAVE
BEEN AN APPROPRIATE LESSER UNDER
THE INFORMATION AND THE EVIDENCE
THAT WAS PRESENTED IN THIS CASE.
AND THEN, I MEAN, RETURNING TO
THE TRIAL COURT'S STATEMENT, I
DON'T HAVE TO GIVE A LESSER, THE

TRIAL COURT'S STATING A GENERAL POSITION THAT I DON'T HAVE TO GIVE THIS OFFENSE AS A LESSER. IT WOULD BE SIMILAR TO SAYING, WELL, I DON'T HAVE TO ALLOW THE JURY TO HEAR HEARSAY TESTIMONY--

>> WELL, THAT'S NOT WHAT HE SAID THOUGH.

I MEAN, YOU HAVE TO PLACE THE RESPONSE IN CONNECTION WITH WHAT WAS SAID BEFORE IT.

AGREE IF THE JUDGE HAD SAID THIS TEN MINUTES HATER IN RESPONSE TO NOTHING, IT WAS JUST A STATEMENT THE JUDGE MADE, BUT THIS APPEARS-- DOES IT NOT APPEAR ON IN RESPONSE TO WHAT THE LAWYER HAS JUST SAID TO THE JUDGE? THE VERY NEXT WORDS.

>> THE LAWYER'S SUGGESTING THAT THE INFORMATION AND THE EVIDENCE PRESENTED AT TRIAL APPEAR TO SUPPORT UNNATURAL AND LASCIVIOUS ACT AS A LESSER--

>> HE DIDN'T, DID HE NOT REQUEST THE INSTRUCTION?

>> I WOULD AGREE THAT HE WEAKLY REQUESTED IT IS HOW THE--

>> WEAKLY-- OKAY.

>> RIGHT.

>> SEE, IN EVERY OTHER-- THIS IS WHAT IS THE PROBLEM.

WE HAVE PUT SO MANY RESTRICTIONS, LIKE IF THERE'S A JURY AND, YOU KNOW, A JUROR SITTING AND THEY'VE GOT TO RENEW IT, A DEFENSE LAWYER, BEFORE THE JURY'S SEATED, OTHERWISE IT'S WAIVED, THE OBJECTION CAN'T BE, HAS TO BE, YOU KNOW, MUST BE SPECIFIC, AND THE JUDGE NEEDS TO RULE.

BUT IN THE AREA OF JURY INSTRUCTIONS, THE LAW HAS APPEARED TO BE UNIFORMLY THAT ALL THAT IS REQUIRED TO PRESERVE THE ERROR IS A REQUEST FOR THE INSTRUCTION.

NOW, I DON'T-- AND THEN JUDGE WALLACE IN HIS DISSENT GOES THROUGH IT IN SOME DETAIL. SO I THINK WHAT I'M HAVING TROUBLE WITH IS, AND IT GOES

BACK TO WHAT JUSTICE LEWIS IS TALKING ABOUT, WE WOULD RATHER HAVE IT BETTER FOR THE JUDGE. WE DON'T WANT THE JUDGE TO ERR, BUT IN THIS SITUATION WE'VE NEVER REQUIRED MORE THAN IT WAS REQUESTED AND THEN NOT GIVEN.

>> THIS COURT AS IT STATED IN HEATHCOTE IS THE MOST POINTED ISSUE ON THIS STATEMENT, AND THE OBJECTIVES OF THE CONTEMPORANEOUS OBJECTION RULE ARE SATISFIED WHERE THE RECORD CLEARLY AND UNAMBIGUOUSLY SHOWED THAT DEFENSE COUNSEL REQUESTED THE INSTRUCTION AND THAT THE TRIAL COURT JUST AS CLEARLY UNDERSTOOD THEIR REQUEST AND CLEARLY DENIED IT.

AND THAT'S WHAT'S BEEN IMPLICIT IN ALL OF THESE CASES, IS THAT THE TRIAL COURT DID AT SOME POINT DENY THE REQUEST AND THEN A FURTHER OBJECTION WASN'T NECESSARY FROM DEFENSE COUNSEL ONCE THE TRIAL COURT HAD DENIED THE REQUEST.

>> SOFA FAILURE TO GIVE IT, A PART OF HIS DENIAL?

IT'S CLEAR FROM THE RECORD THAT THE TRIAL JUDGE DID NOT GIVE THE INSTRUCTION ON UNNATURAL AND LASCIVIOUS ACT, CORRECT?

>> CORRECT.

>> SO HIS FAILURE TO GIVE IT IS FURTHER EVIDENCE OF HIS DENIAL OF THE REQUEST FOR THAT INSTRUCTION, ISN'T IT?

>> DEFENSE COUNSEL DIDN'T INFORM THE TRIAL COURT THAT THE TRIAL COURT WAS REQUIRED TO GIVE THE INSTRUCTION IN THIS CASE, SO THEN THE TRIAL COURT FAILS--

>> DID HE GIVE HIM THE INSTRUCTION?

>> NO.

THERE WAS NO WRITTEN INSTRUCTION THAT WAS FILED.

AND THEN--

>> THERE'S ONE IN THE RECORD. WHERE DID THAT COME FROM?

>> IF THERE'S A WRITTEN INSTRUCTION ON UNNATURAL AND

LASCIVIOUS ACT THAT'S IN THE RECORD, IT MAY BE AS PART OF THE APPELLATE PROCEEDINGS THAT SOMEONE'S QUOTED--

>> SO AT NO POINT DID THE DEFENSE ATTORNEY GIVE THE TRIAL JUDGE THE RECORD-- I MEAN, A COPY OF THE INSTRUCTION THAT HE WAS REQUESTING?

>> THERE WAS NO WRITTEN PROPOSED INSTRUCTIONS THAT WERE FILED IN THE SECOND DCA.

>> THAT WASN'T UNUSUAL, BECAUSE THE STATE DIDN'T GIVE THEM ANY INSTRUCTIONS--

>> BE CORRECT.

>> OKAY.

>> THIS WASN'T A POTENTIAL--

>> RIGHT.

>> THIS WAS NOT ONE OF THESE CASES WHERE IF YOU'RE GOING TO ASK AROUND-- ASK FOR A SPECIAL INSTRUCTION, IT NEEDS TO BE AN ACCURATE STATEMENT OF RAW--

>> THAT'S CORRECT.

>> THIS ONE IS PART OF THE STANDARD JURY INSTRUCTION.

>> RIGHT.

IT'S PROPOSED AS A CATEGORY TWO LESSER INSTRUCTION.

AND I ALSO BRIEFLY--

>> SO IS A PART OF YOUR ARGUMENT AT THE TIME THAT HE GAVE IT, I MEAN, OR FAILED TO GIVE IT THAT SOMETHING SHOULD HAVE BEEN SAID TOO?

IS THAT PART OF YOUR PRESERVATION ARGUMENT?

>> OUR, THE STATE'S POSITION IS THAT THE TRIAL COURT DIDN'T CLEARLY RULE ON THE REQUEST. THE TRIAL COURT SIMPLY OFFERS A GENERAL STATEMENT, WELL, I DON'T HAVE TO GIVE THAT INSTRUCTION, AND--

>> BUT THAT WAS IN RESPONSE TO THE LAST SENTENCE, I WOULD ASK FOR THIS INSTRUCTION ALSO TO BE GIVEN AS A LESSER, AND THE COURT SAYS MARY HAD A LITTLE LAMB, THE TRIAL JUDGE SAID I DON'T HAVE TO GIVE A LESSER FOR CATEGORY II.

>> RIGHT.

AND, AGAIN, THAT'S, THAT IS A RU

STATEMENT SIMPLY BECAUSE
SOMETHING IS LISTED UNDER
CATEGORY II--

>> SO THE JUDGE JUST PULLED ET
OUT OF THE AIR TO SAY THAT AND
DID NOT, DIDN'T LISTEN TO WHAT
THE LAWYER SAID, I WANT THIS
INSTRUCTION, AND THAT'S NO
RULING ON IT AT ALL?

>> NO.

I BELIEVE THE TRIAL COURT
MISUNDERSTOOD MANNER IN WHICH
AND THE REASON FOR WHICH THE
INSTRUCTION WAS PROPOSED.
THE TRIAL COURT CLEARLY DIDN'T
UNDERSTAND IN THIS CASE THAT
THIS INSTRUCTION WAS BEING
PROPOSED AS REQUIRED.

THE ANALYSIS SHOULD HAVE BEEN
THAT THE TRIAL COURT OR
EXERCISES ITS DISCRETION TO
DETERMINE WHETHER THE
INFORMATION AND THE EVIDENCE
PRESENTED AT TRIAL SUPPORT THE
LESSER, AND THEN AT THAT POINT
THE INSTRUCTION WOULD BE
REQUIRED.

>> AND WHAT DID THE STATE DO
WITH ALL THIS?

WE ALWAYS-- AND I UNDERSTAND WE
PUT, YOU KNOW, WE'VE GOT THE
STATE BEARING THE BURDEN OF
PROOF.

WE'VE GOT THE DEFENDANT WHOSE
LAWYER, YOU KNOW, BECAUSE IF
THIS SITUATION ISN'T ENOUGH,
IT'S A POST-CONVICTION 3.850
BECAUSE IT WASN'T CLEARLY
REQUESTED.

DOESN'T THE STATE BEAR SOME
RESPONSIBILITY TO HELP THE JUDGE
THEN TO SAY THIS IS, IT'S A
PERMISSIVE, BUT WE AGREE THE
EVIDENCE SUPPORTS IT?

LIKE, THEY CONCEDED IN THE
SECOND DISTRICT?

YOU KNOW, AGAIN, AND I
APPRECIATE-- BECAUSE WE'RE
TALKING ABOUT A NEW TRIAL, AND
IT JUST SEEMS THAT IF WE'RE
GOING TO KEEP ON SAYING, WELL,
THIS CONFIDENT SHOULD HAVE SAID
MORE-- DEFENDANT SHOULD HAVE
SAID MORE, WHY AREN'T WE SAYING

THE STATE SHOULD HAVE HELPED THE JUDGE TO GET IT RIGHT?

>> FROM THE RECORD I JUST DON'T BELIEVE THAT THE STATE HAD MUCH OF AN OPPORTUNITY TO TAKE ANY POSITION--

>> YOU SEE, BECAUSE THAT'S THE WHOLE THING OF WHAT JUSTICE LEWIS IS SAYING, OF WHAT PEOPLE IN COURTROOMS WITH JUDGES THAT MAY BE MOVING THINGS ALONG IS THAT WE WANT IT TO BE ORDERLY, WE WANT IT TO BE LIKE WHEN I, YOU KNOW, LIKE FEDERAL COURT AND EVERYBODY HAS TO GIVE WRITTEN INSTRUCTIONS, YOU CAN'T DO IT ORALLY.

AND WE WANT THERE TO BE INSTRUCTION ONE, GRANT/DENY, INSTRUCTION TWO AND A RULING. THAT'S WHAT WE WOULD PREFER BUT THAT WAS, APPARENTLY, NOT WHAT WAS GOING ON IN THIS TRIAL, AND THERE'S NOTHING THAT SAYS IN OUR RULES THAT A REQUEST FOR A JURY INSTRUCTION HAS TO BE IN WRITING, IS THERE?

>> CORRECT.

AND IS SO ASSUMING, TURNING TO THE OTHER POINT THAT'S AT A ARAB SHOE IN THIS-- AT ISSUE IN THE CASE, ASSUMING THAT THE ISSUE WERE PRESERVED AND THE COURT FOUND THIS WERE A RULING ARK SECOND PROBLEM WITH THIS ISSUE IS THAT THE EVIDENCE, THE INFORMATION THAT WAS FILED IN THIS CASE DIDN'T EXPRESSLY CHARGE THAT THE OFFENSE WAS AN UNNATURAL AND LASCIVIOUS ACT. THE INFORMATION CHARGED A LEWD OR LASCIVIOUS ACT.

AND SO UNNATURAL AND LASCIVIOUS ACT IS A SEPARATE OFFENSE THAT'S CONTAINED UNDER SECTION 800.02, IT CONTAINS THE LANGUAGE UNNATURAL.

THIS DEFENDANT WAS CHARGED UNDER SECTIONING 00.04 WITH TWO LIFE FELONIES AND TWO--

>> AND WAS IN THE ARGUMENT TO THE SECOND DISTRICT?

WHAT WAS THE STATE'S POSITION THERE?

>> THE STATE'S POSITION IN THE SECOND DISTRICT BASED ON SCHEER AND WILLIAMS AND HONOR, THOSE ARE THREE CASES OUT OF THE FIRST DCA, I DID NOT DISPUTE THAT IT APPEARS THIS WOULD BE A PROPER LESSER INCLUDED OFFENSE.

AFTER LOOKING AT THIS FURTHER AND BASICALLY MORE RECENT DECISIONS HAVE COME OUT ON THIS, THERE'S A CASE OUT OF FIFTH DCA'S FUNICELLO AND A MORE RECENT CASE IN THIS COURT CALLED KNIGHTON, IT APPEARS THE DISTRICT COURTS ARE ASSUMING ONCE AN OFFENSE IS COMMITTED UNDER SECTION 800.04, THAT THAT NECESSARILY MEANS THAT THE OFFENSE WAS ALSO AN UNNATURAL ACT.

AND SO THE COURTS ARE ALMOST TREATING UNNATURAL AND THAT SIEVE YOURS ACT AS THOUGH IT'S A NECESSARY LESSER INCLUDED OFFENSE.

>> BUT YOU AGREE THAT IT WAS BELOW THE SECOND DCA, WHOEVER IT WAS, AND THIS IS NOT A NASTY QUESTION--

>> RIGHT.

>> JUST TO GET THE PROCEDURE HERE, THE STATE WAS OF THE VIEW THAT THAT' NOT AN ISSUE.

>> BASED ON THE CASE LAW OUT OF THE FIRST DCA.

>> RIGHT, OKAY.

>> HOWEVER, MY POSITION AT THIS POINT IS THAT THAT CASE LAW IS IN CONFLICT WITH THIS COURT'S PRECEDENT--

>> BUT THAT WASN'T THE POSITION YOU TOOK IN THE--

>> NO.

>> THAT'S WHAT HER QUESTION WAS, WHAT POSITION DID THE STATE TAKE IN THE SECOND?

>> AND THE DCA DIDN'T REACH THE MERITS OF THE ISSUE, BECAUSE THEY FOUND THE ISSUE WASN'T PRESERVED.

ASSUMING THAT THIS COURT FOUND THAT THE ISSUE WAS PRESERVED, THE STATE WOULD ASK THE SECOND DCA TO ALLOW SUPPLEMENTAL

BRIEFING IF THE CASE WERE
REMANDED TO THE SECOND DCA.
AND, I MEAN, AGAIN, IT'S A
PROBLEM UNDER THIS COURT'S CASE
LAW THAT THE INFORMATION IN THIS
CASE AND IN A NUMBER OF OTHER
CASES THAT HAVE CHARGED LEWD OR
LASCIVIOUS MOLESTATION, THAT THE
INFORMATIONS ARE NOT ALLEGING AN
UNNATURAL ACT.

AND SO THE COURTS, THE DISTRICT
COURTS ARE NOW SAYING, WELL,
IT'S STILL--

>> I GUESS I UNDERSTOOD A PART
OF THE ARGUMENT IS, NOW, THE
INFORMATION DOES ALLEGE THE AGE
OF THE PERPETRATOR AND THE AGE
OF THE VICTIM, CORRECT?

>> CORRECT.

>> AND SO AS A PART OF THE
ARGUMENT IS THAT THE AGE OF THE
DEFENDANT WHICH WAS AN ADULT AGE
AND THE AGE OF THE CHILD WHICH
WAS A UNDERAGE, A CHILD I SHOULD
SAY, IS ENOUGH TO ALLEGE AN
UNNATURAL ACT BECAUSE A LEWD AND
LASCIVIOUS ACT OF AN ADULT
AGAINST A CHILD IS AN UNNATURAL
ACT.

>> THAT'S WHAT DISTRICT COURTS
HAVE SAID.

I BELIEVE THAT THAT'S ERROR
BECAUSE THIS COURT HAS HELD THAT
IN ORDER TO BE A PERMISSIVE
LESSER INCLUDED OFFENSE, THE
INFORMATION MUST SPECIFICALLY
CHARGE EACH ELEMENT OF THE
LESSER OFFENSE.

THE INFORMATION IN THIS CASE DID
NOT CHARGE AN UNNATURAL ACT, AND
THAT'S ALSO TRUE OF SOME OF THE
CASES THAT HAVE BEEN RELIED
ON--

>> BUT THE INFORMATION DOES NOT
SAY AN UNNATURAL ACT.
BUT IF FACTS THAT ARE ALLEGED IN
THE INFORMATION WHICH IS THE
ADULT PERPETRATOR AND THE CHILD
VICTIM IS AN UNNATURAL ACT, THEN
YOU DON'T HAVE TO USE THE TERM
UP NATURAL ACT, DO YOU?
UNNATURAL ACT, DO YOU?

>> YES.
THE DEFENDANT STILL NEEDS TO BE

CHARGED WITH AN UNNATURAL ACT A
BECAUSE IT'S A SEPARATE OFFENSE.
IF THE JURY IS INSTRUCTED ON
THAT AND THE JURY ENDS UP
FINDING THE DEFENDANT GUILTY OF
THAT LESSER OFFENSE, THEN THE
DEFENDANT'S GOING TO ARGUE THAT
THIS IS A DUE PROCESS VIOLATION
BECAUSE HE'S BEEN CONVICTED OF
UNNATURAL AND LASCIVIOUS ACT
WHICH HE WASN'T CHARGED IS WITH,
AND THERE'S AN ELEMENT THERE
THAT SIMPLY IS NOT PRESENT.

>> LET ME JUST UNDERSTAND.
THERE WERE NO LESSER INCLUDED
OFFENSES INSTRUCTED ON IN THIS
CASE.

>> CORRECT.

SOME OF THESE CASES AN
INSTRUCTION IS AGAIN ON BATTERY.
SOME OF THEM, YOU KNOW, THE
INSTRUCTION IS GIVEN ON
UNNATURAL AND LASCIVIOUS ACT.
THOSE ARE THE TWO CATEGORY II
LESSERS THAT CAN BE GIVEN.
BUT THOSE ARE BOTH PERMISSIVE
LESSER AND INCLUDED OFFENSES, SO
IT DEPENDS ON WHETHER THE
INFORMATION AND THE EVIDENCE
PRESENTED AT TRIAL.

AND I WOULD ALSO EMPHASIZE THAT
THERE ARE INSTANCES, I THINK
MR. CHASE HAS SUGGESTED THAT,
ESSENTIALLY, THAT UNNATURAL AND
LASCIVIOUS ACT IS A NECESSARY
LESSER INCLUDED OFFENSE OF LEWD
OR LASCIVIOUS MOLESTATION.
THERE'S ONE CASE THAT DISAGREES
WITH THAT.

THE SECOND DCA MANY HARRIS SAID
THAT AS-- IN HARRIS SAID THAT
AS TO AN ORDINARY COUNT OF
SEXUAL INTERCOURSE BETWEEN A, IT
WAS A MAN AND I BELIEVE IT WAS A
15-YEAR-OLD GIRL, THAT THAT
DOESN'T MEET THE DEFINITION OF
AN UNNATURAL AND LASCIVIOUS ACT.
SO I WOULD SUGGEST THAT THERE
ARE CIRCUMSTANCES WHERE AN
OFFENSE UNDER SECTION 800.04
DOESN'T NECESSARILY ALSO
CONSTITUTE AN TO OFFENSE
UNDER--

>> WHICH MEANS THAT YOUR

ARGUMENT IS THAT THE SEXUAL
ACTIVITY OF AN ADULT WITH A
CHILD IS NOT NECESSARILY
UNNATURAL.

>> A JURY WOULDN'T MESSILY FIND
THAT TO BE-- NECESSARILY FIND
THAT TO BE THE CASE.

FOR INSTANCE, IF YOU HAVE A
ROMEO AND JULIET TYPE OF
SCENARIO, IF IT'S A 19-YEAR-OLD
DEFENDANT AND A 16-YEAR-OLD
VICTIM, A JURY COULD FIND THAT
THAT'S LEWD OR LASCIVIOUS WHICH
WOULD PROBABLY BE THE CHARGED
OFFENSE BE, BUT THE JURY
WOULDN'T NECESSARILY FIND THAT
THAT'S UNNATURAL AND LASCIVIOUS.

>> BUT THAT'S NOT THE FACTS OF
THIS CASE.

>> CORRECT.

THAT'S NOT THE FACTS OF THIS
CASE.

>> SO THE ARGUMENT TO BE MADE IS
THAT INTERCOURSE IS A NATURAL
PHENOMENAL, BUT THE ACTS HERE
ARE NOT.

>> THAT'S CORRECT.

AND THAT'S CONSISTENT WITH THE
DCA'S, THE SECOND DCA'S DECISION
IN HARRIS WHERE THEY AFFIRMED
GIVING THE INSTRUCTION ON
UNNATURAL AND LASCIVIOUS ACT AS
TO THE VARIOUS COUNTS OF LEWD OR
LASCIVIOUS MOLESTATION, AND THEN
THEY ALSO AFFIRMED NOT GIVING
IT TO A COUNT OF SEXUAL BATTERY
THAT INVOLVED PENETRATION.

>> THERE WAS A MENTION THAT THE
STANDARD JURY INSTRUCTION
COMMITTEE IS LOOKING AT THIS TO
BE, ACTUALLY, A MANDATORY--

>> CATEGORY--

>> CATEGORY SR. I?

>> CORRECT.

>> WHAT'S THE STATUS OF THAT?
BECAUSE WE WANT TO BE
CONSISTENT.

>> RIGHT.

THAT COMMENT, I BELIEVE THEY'VE
SUBMITTED A COMMENT OR PROPOSAL
FOR CONSIDERATION TO THE COURT.

>> SEPARATELY, IN A SEPARATE
CASE.

>> SEPARATELY, BUT THEY FILED A

NOTICE OF RELATED CASE AS TO THIS CASE AND ALSO TO KNIGHTON WHICH WAS A 2016 DECISION OUT OF THE FOURTH DCA THAT'S PENDING ON JURISDICTION IN THIS CASE.

THE STATE'S POSITION ON THAT IS, AGAIN, UNNATURAL AND LASCIVIOUS ACT IS, IN CERTAIN CASES, A PERMISSIVE LESSER INCLUDED, BUT IT'S NOT A NECESSARILY LESSER INCLUDED OFFENSE OF LEWD OR LASCIVIOUS MOLESTATION OR A OFFENSE CHARGED UNDER 800.04.

IT HAS AN ELEMENT THAT'S NOT PRESENT IN 800.04--

>> SO YOU WOULD ARGUE IT COULD NEVER BE A LESSER INCLUDED OFFENSE?

>> IF THE STATE, IF THE STATE CHARGES THAT IT'S AN UNNATURAL ACT.

SO, FOR INSTANCE, IF IN THIS CASE THE INFORMATION ALLEGED THAT THE ACTS WERE COMMIT INSIDE A WAY THAT WERE UNNATURAL OR ALSO CONSTITUTED LEWD OR LASCIVIOUS--

>> HOW OLD WERE THE VICTIMS IN THIS CASE?

>> THE VICTIMS WERE, THE VICTIMS WERE BETWEEN-- WELL, AS TO TWO OF THE COUNTS THEY WERE UNDER THE ANAL OF 12--

>> AND HOW OLD WAS THE DEFENDANT?

>> THE DEFENDANT'S MIDDLE-AGED.

>> AND THE OTHER ONES WERE VICTIMS WHO WERE OVER 12 BUT UNDER 16.

>> I'M SORRY?

>> THE OTHER VICTIMS IN THE CASE--

>> CORRECT.

THEY ARE BETWEEN 12-16.

>> OVER 12 BUT UNDER 16.

>> RIGHT.

ONE OF THE COUNTS INVOLVED THE SAME VICTIM.

SO IT'S THREE VICTIMS THAT TESTIFIED AT TRIAL, THREE WILLIAMS RULE VICTIMS WHO TESTIFIED.

BUT AGAIN, THE INFORMATION DID NOT CHARGE THESE WERE UNNATURAL

ACTS, SO THE COURT WOULD HAVE TO
INFER THAT THE ELEMENT UNNATURAL
HAS BEEN SUFFICIENTLY CHARGED
JUST FROM LOOKING AT THE
INFORMATION.

THIS COURT IN ITS PRECEDENT HAS
SAID THAT EACH ELEMENT OF THE
OFFENSE NEEDS TO BE SPECIFICALLY
CHARGED, AND THAT'S NOT WHAT
OCCURRED AS TO THIS LESSER
OFFENSE.

>> AND YOUR TIME IS UP.

>> SURE.

THANK YOU.

>> JUST REAL BRIEFLY WITH
RESPECT TO THIS ISSUE OF WHETHER
AN UNNATURAL ACT WAS CHARGED,
I'D LIKE TO DRAW A COMPARISON TO
THE 10-20-LIFE STATUTE--

>> COULD YOU SPEAK UP?

>> I'M SORRY, UNDER THAT STATUTE
TO GET A 20-YEAR MANDATORY
MINIMUM FOR THE DISCHARGE OF A
FIREARM, THERE HAS TO BE A
DISCHARGE OF A FIREARM.

THE COURTS HAVE SAID AN
ALLEGATION OF SHOOTING
INHERENTLY ENCOMPASSES THE ACT
OF DISCHARGE, IS SO YOU DON'T
HAVE TO SPECIFICALLY USE THE
WORD DISCHARGE, YOU CAN SAY
SHOOT.

SAME THING HERE.

MAYBE THE INFORMATION DOESN'T
SPECIFICALLY USE THE WORD
UNNATURAL, BUT THE CIRCUMSTANCES
OF THE OFFENSE THAT ARE CHARGED
SUGGEST THAT IT'S INHERENT IN
THE CHARGE.

SO WE WOULD SUBMIT IT IS A
SUFFICIENT CHARGE, IT HAS BEEN
SUFFICIENTLY CHARGED TO GIVE
THAT INSTRUCTION.

AND THE OTHER THING THAT I WOULD
LIKE TO QUICKLY POINT OUT IS
THAT THE COURT IN STATE V.

HEATHCOTE, WHILE IT DID SAY THE
ERROR WAS PRESERVED FOR REVIEW
IN THAT CASE BECAUSE THERE WAS A
CLEAR DENIAL, IT DID NOT SATE
THAT WAS THE ONLY CIRCUMSTANCE
THE ERROR WOULD BE PRESERVED,
AND I JUST WANT TO GO BACK AND
AGAIN SAY IT SPECIFICALLY STATES

THAT THE DECISION IN HUBBARD V.
STATE WAS CORRECT AND ALL THAT
IS REQUIRED IS THAT THE COURT BE
GIVEN A CLEAR OPPORTUNITY TO
RULE.

THANK YOU.

>> THANK YOU FOR YOUR ARGUMENTS.