

>> ALL RISE.

HEAR YE, HEAR YE, THE SUPREME COURT OF FLORIDA IS NOW IN SESSION.

ALL WHO HAVE CAUSE TO PLEAD, DRAW NEAR, GIVE ATTENTION, YOU SHALL BE HEARD.

GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA, AND THIS HONORABLE COURT.

LADIES AND GENTLEMEN, THE SUPREME COURT OF FLORIDA.

PLEASE BE SEATED.

>> GOOD MORNING.

WELCOME TO THE FLORIDA SUPREME COURT.

THE FIRST CASE ON THE DOCKET IS STEVENS VERSUS STATE OF FLORIDA. WHENEVER YOU'RE READY, COUNSEL.

>> THANK YOU, YOUR HONOR.

GOOD MORNING, YOUR HONORS, I'M STEVE GROGOZA.

I'M SPECIAL ASSISTANT PUBLIC DEFENDER FOR THE MR. STEVENS.

THE ISSUE IN THIS APPEAL IS THE SECOND DISTRICT COURT'S OPINION OF THE SECOND DEGREE ARSON PHRASE, ANY PERSON WHO DAMAGES ANY STRUCTURE UNDER ANY CIRCUMSTANCES NOT REFERRED TO IN SUBSECTION ONE.

SO BASICALLY COMES DOWN TO WHAT UNDER ANY CIRCUMSTANCES NOT REFERRED TO IN SUBSECTION ONE MEAN.

SUBSECTION 1 IS FIRST-DEGREE ARSON.

THE SECOND DISTRICT INTERPRETED THIS PHRASE TO MEAN, THAT BY STATUTORY EXEMPTION, STATUTORY DESIGNATION, ACTIONS OF FIRST-DEGREE ARSON CAN NOT BE SECOND-DEGREE ARSON.

THEY'RE SPECIFICALLY EXCLUDED. AND IN RULING IN THIS THE SECOND DISTRICT CERTIFIED CONFLICT WITH THE FOURTH DISTRICT'S OPINION IN MOORE.

AND IN MOORE THE FOURTH DISTRICT RULED IN SITUATION WHERE MOORE

BURNED DOWN HIS TRAILER AND CHARGED WITH FIRST-DEGREE ARSON THE SECOND DISTRICT, THE FOURTH DISTRICT RULED THAT SECOND-DEGREE ARSON SHOULD HAVE BEEN GIVEN LESSER PERMISSIVE CATEGORY OFFENSE FOR FIRST-DEGREE ARSON.

MOORE RELIED ON THIS COURT'S OPINION IN HIGGINS. HIGGINS WAS A PRISONER IN A CELL.

HIGGINS BURNED THE CONTENTS OF HIS CELL BUT NOT THE STRUCTURE. HIGGINS' COURT MADE TWO RULINGS. SECOND-DEGREE ARSON MAY BE PERMISSIVE LESSER INCLUDED OFFENSE OF FIRST-DEGREE ARSON. SECOND HIGGINS RULED THAT IF HIGGINS HAD BURNED THE STRUCTURE ITSELF, SECOND-DEGREE ARSON SHOULD HAVE BEEN GIVEN.

>> IS THAT A RULING OR DICTUM?

>> IS THAT A RULING OR WHAT, JUDGE?

>> DICTA.

>> WELL, I UNDERSTAND.

>> CIRCUMSTANCE DID NOT REVEAL IN THE CASE WOULDN'T THAT BE DICTA?

>> THE SECOND DISTRICT SAYS IT IS DICTUM.

>> TELL ME WHY IT'S NOT.

>> I'M NOT SAYING IT'S NOT, BUT I'M SAYING THAT IS WHAT THE FOURTH DISTRICT RELIED ON COMING TO ITS CONCLUSION THAT--

>> OUR DICTA IS VERY WEIGHTY. I THINK IN ONE CASE WE'VE SAID THAT YOU CAN'T EVEN, NOTHING WE SAY IS DICTA, BUT I'M NOT SURE THAT'S RIGHT.

>> SO THIS IS WHAT THE FOURTH DISTRICT RELIED ON IN MOORE. THE SECOND DISTRICT HELD THAT MOORE WAS ERROR BECAUSE MOORE IN RULING THAT SECOND-DEGREE ARSON IS A LESSER PERMISSIVE OFFENSE THAN FIRST-DEGREE ARSON IN THAT SITUATION, THE SECOND DEGREE

SAID THAT THE FOURTH DISTRICT AVOIDED OR IGNORED THAT NARROW CATEGORY OF CASES IN HIGGINS WHICH WAS BASICALLY THAT THE CONTENTS OF THE CELL WERE BURNED COMPARED TO THE STRUCTURE.

AND IN DOING THIS THE SECOND DISTRICT SAID THAT THEY BELIEVED THAT THE RULING IN MOORE ACTUALLY MADE SECOND-DEGREE ARSON A NECESSARY OFFENSE WHICH IS CONTRARY TO HIGGINS.

NOW I SUGGEST THAT THE SECOND DISTRICT GOT IT WRONG AND THE FOURTH DISTRICT GOT IT RIGHT FOR A COUPLE OF REASONS.

FIRST OF ALL, THE FOURTH DISTRICT RELIED ON THIS COURT'S OPINION IN HIGGINS TO DETERMINE THAT SECOND-DEGREE ARSON CAN BE A PERMISSIVE LESSER INCLUDED OFFENSE OF FIRST-DEGREE ARSON. THAT IS THE FIRST RULING.

THE CIRCUMSTANCE IN HIGGINS OF BURNING THE STRUCTURE OR THE DWELLING WAS WHAT THE FOURTH DISTRICT RELIED ON IN MOORE, THAT, NOT ONLY WAS, THAT THE STRUCTURE WAS ALSO BURNED WHICH MEANS THAT SECOND-DEGREE ARSON IS A LESSER PERMISSIVE INCLUDED OFFENSE.

>> LET ME ASK YOU THIS, IF IT'S TRUE, THAT IT IS A SECOND-- IT'S A PERMISSIVE LESSER-INCLUDED OFFENSE, THEN IN ORDER TO BE ENTITLED TO A JURY INSTRUCTION ON IT, YOU WOULD HAVE TO HAVE BOTH THE ALLEGATION AND THE PROOF IN ORDER TO GET THAT INSTRUCTION, CORRECT?

>> THAT'S CORRECT.

>> AND SO WHY UNDER THESE CIRCUMSTANCES WOULD YOU HAVE BEEN ENTITLED TO THAT INSTRUCTION WHEN IT'S CLEAR THAT THIS WAS IN FACT A DWELLING AND, YOU KNOW, THE BODY WAS BURNED IN THIS FIRE?

>> WELL, FOR A COUPLE OF

REASONS, YOUR HONOR.
FIRST OF ALL THE INFORMATION DID
CHARGE THAT A STRUCTURE WAS
BURNED.

THE INFORMATION SPECIFICALLY
SAYS, YOU'RE TALKING ABOUT
STEVENS I'M ASSUMING, IS THAT
CORRECT?

>> YES, TALKING ABOUT THE CASE
BEFORE US.

>> THE INFORMATION SPECIFICALLY
STATES THAT A STRUCTURE TO WIT,
A DWELLING WAS BURNED.

SO IT IS SPECIFICALLY IN THE
INFORMATION.

SECONDLY, ACCORDING TO THE
DEFINITION IN ARSON, A STRUCTURE
IS A BUILDING OF ANY KIND.

>> WELL YOU KNOW THIS SEEMS TO
BE, I MEAN THE REAL CRUX, THIS
IS THE ESSENCE OF IT.

YOU DON'T WANT TO TALK ABOUT A
DWELLING AND THE SECOND
PROVISION OF THAT STATUTE
EXCLUDES ANYTHING THAT'S WITHIN
THE FIRST AND THE FIRST IS A
DWELLING.

SO THAT'S WHERE I THINK WE'RE
HAVING PROBLEMS WITH YOUR
STATEMENT THAT IT, THAT IT IS
ALLEGED BY SAYING THAT A
STRUCTURE SPECIFICALLY, A
DWELLING, TO MY MIND DOES NOT
ALLEGE THE SECOND DEGREE.

>> THE DEFINITION IN ARSON,
JUDGE, SUBSECTION THREE SAYS A
STRUCTURE IS DWELLING OF ANY
KIND.

A STRUCTURE IS A BUILDING OF ANY
KIND.

>> THAT IS NOT THE ISSUE.

>> I AGREE BUT THE ISSUE COMES
DOWN TO DOES THE NOT REFERRED TO
ANY CIRCUMSTANCES NOT IN
SUBSECTION 1, DID THE SECOND
DISTRICT GET IT RIGHT THAT IT
MEANS THAT FIRST-DEGREE ARSON,
ELEMENTS OF FIRST-DEGREE ARSON
CAN NOT BE WITHIN THE SCOPE OF
SECOND-DEGREE ARSON.

>> THAT IS WHAT THE DEFINITIONS SEEM TO LEAD.

EVERYBODY AGREED, THERE WAS NO DISPUTE, THERE IS NO EVIDENCE THAT THIS THING THAT WAS BURNED WAS ANYTHING OTHER THAN A DWELLING.

>> I'M NOT DISPUTING THAT, JUDGE.

BUT WHAT THE QUESTION COMES DOWN TO, IF YOU LOOK AT MOORE, MOORE IS DEALING WITH THE SAME TYPE OF SITUATION AND MOORE--

>> DON'T YOU NEED A CIRCUMSTANCE, JUST IN ANYTHING, BEFORE YOU GET INTO LESSER OFFENSES, IS THAT THE EVIDENCE, THE FACTS AND THE LAW WOULD SUPPORT A CONVICTION OF THAT? JUST, LET'S GO WALK THROUGH THIS.

ISN'T THAT THE, I MEAN THE FUNDAMENTAL UNDERPINNING OF LESSER INCLUDES?

>> I WOULD GENERALLY AGREE WITH THAT.

>> IF THE EVIDENCE AND THE FACTS BRING IT TOTALLY WITHIN A SUBSECTION THAT IS NOT, THAT IS SPECIFICALLY EXCLUDED FROM SECOND DEGREE, HOW CAN YOU HAVE THE LESSER-INCLUDED BE ERROR IN ANY EVENT FOR A COURT NOT TO INCLUDE IT?

>> I THINK THAT'S WHAT THE COURT HAS TO DETERMINE, WHAT DOES THAT PHRASE, UNDER ANY CIRCUMSTANCE NOT REFERRED TO IN SUBSECTION 1. THE SECOND DISTRICT IS SAYING THAT SECOND-DEGREE ARSON CAN NEVER BE A PERMISSIVE LESSER-INCLUDED OFFENSE OF FIRST DEGREE ARSON.

>> BECAUSE OF THE A DWELLING. BECAUSE OF A DWELLING.

>> I AGREE.

SO IF THE COURT AGREES THAT SECOND-DEGREE ARSON UNDER THIS PHRASE WHICH HAS NEVER BEEN INTERPRETED BEFORE, SPECIFICALLY

MEANS THAT, WELL THEN THAT'S
WHAT IT MEANS.

THE COURT WOULD HAVE TO THEN
OVERRIDE HIGGINS.

>> A DISPUTE IN CASE WHETHER
IT'S A DWELLING, NOT A DWELLING.
WE'VE SEEN CASES LIKE THAT.
IS IT ABANDONED, NOT ABANDONED,
SO ARE PEOPLE LIVING THERE OR
NOT LIVING THERE.

THERE COULD BE CASES WHERE A
JURY COULD BASED ON THE FACT AND
THE EVIDENCE THAT'S PRESENTED
HAVE A JUSTIFIABLE ISSUE WITH
REGARD TO THE CRIME THAT'S
INVOLVED.

I'M STILL, I'M TRYING REAL HARD
TO GET TO WHERE YOU'RE SAYING
BECAUSE YOU WOULD THINK
LOGICALLY, IT MAKES SENSE
FIRST-DEGREE, SECOND-DEGREE, BUT
THIS DOESN'T SEEM TO DO THAT.

>> THERE ARE TWO THINGS.
ONE IS, IF THE APPLY THE SECOND
DISTRICT'S LOGIC, THAT MEANS
THAT SECOND-DEGREE ARSON CAN BE
NEVER PERMISSIVE LESSER-INCLUDED
OFFENSE OF FIRST-DEGREE ARSON,
NEVER.

>> WELL, LET ME ASK YOU THIS.
>> IF THE EVIDENCE IS UNDISPUTED
THAT MAY BE THE CASE BUT IT CAN
BE CHARGED IF THERE IS A DISPUTE
IN THE EVIDENCE OR THE FACTS ARE
NOT CLEAR, I MEAN IF CAN BE
GIVEN ON SOME OCCASIONS IT WOULD
SEEM.

>> YOU ABOUT THEN I THINK THE
COURT HAS TO ALSO CONSIDER THE
DEFINITION OF A STRUCTURE.
STRUCTURE IS A BUILDING OF ANY
KIND IN ARSON.

>> GOING BACK TO YOUR POINT
ABOUT THE, WHAT THE SECOND
DISTRICT SAID, ISN'T IT CLEAR
THAT IT IS CENTRAL TO THEIR
REASONING THAT THE UNDISPUTED
TRIAL EVIDENCE DEMONSTRATE THAT
THE SUBJECT OF THE ARSON CHARGE
WAS USED EXCLUSIVELY AS A

DWELLING?

AND THAT'S CENTRAL TO THEIR REASONING.

SO I DON'T UNDERSTAND YOUR POINT THAT IT COULD NEVER, THAT THE INSTRUCTION COULD NEVER BE GIVEN.

THEY'RE DEFINING ON THE LESSER, THEY'RE DEFINING A PARTICULAR CIRCUMSTANCE WHERE IT CAN NOT BE GIVEN BECAUSE OF A LACK OF DISPUTE ABOUT THAT QUESTION. ISN'T THAT CORRECT?

>> WELL, I DON'T KNOW IF I NECESSARILY AGREE WITH THAT, JUDGE, BECAUSE I THINK OVERALL, WHEN A CONSIDER CONSIDERS THE IMPACT OF THE SECOND DISTRICT COURT, WHAT THEY'RE SAYING IS, UNDER WHAT CIRCUMSTANCES THEN CAN SECOND-DEGREE ARSON CAN BE A LESSER OF FIRST-DEGREE ARSON, IF THE, THE ACTS OF FIRST-DEGREE ARSON ARE NOT WITHIN THE SCOPE OF SECOND-DEGREE ARSON.

I SUGGEST IT WILL NEVER APPLY.

>> SURE IT WILL, ON CASES WHERE THERE IS A DISPUTE WITH REGARD TO THE NATURE OF THE STRUCTURE.

>> RIGHT.

BUT IF-- THAT'S NOT-- FACT SPECIFIC.

JUSTICE CANADY--

>> I SUGGEST THAT THAT IS IN NOT THE CASE HERE, ARSON OF A STRUCTURE, TO WIT A DWELLING.

>> THAT DOESN'T DO IT?

IS THAT WHAT YOU'RE SAYING, THAT DOESN'T CHARGE THAT THE STRUCTURE'S A DWELLING?

>> WHAT I'M SAYING IT IS CHARGED IN THE INFORMATION.

THE NEXT ISSUE, WAS THERE ANY EVIDENCE AT TRIAL TO DEMONSTRATE THAT THIS, THE, THAT THE STRUCTURE WAS SOMETHING THAT CAN BE UNDER SECOND-DEGREE ARSON.

>> RIGHT.

>> I SUGGEST WHEN YOU PUT THE INTERPRETATION OR THE DEFINITION

OF STRUCTURE AS BEING A BUILDING
OF ANY KIND THAT WOULD ENCOMPASS
A DWELLING.

AND I THINK ONE OF THE ISSUES
HERE IS THAT THE SECOND DISTRICT
EVEN APPLY THAT ISSUE AS TO THAT
DEFINITION.

THEY JUST--

>> YOU DON'T DISPUTE THAT THIS
STRUCTURE WAS A DWELLING, DO
YOU?

>> NO, I DON'T.

>> I GUESS IT SEEMS TO ME THAT
WHAT YOU'RE SAYING IS THAT
BECAUSE A DWELLING IS A
STRUCTURE, THEN IT JUST FOLLOWS
THAT SECOND-DEGREE ARSON SHOULD
BE A LESSER-INCLUDED OFFENSE, IS
THAT CORRECT?

>> YES, YOUR HONOR.

BUT YOU HAVE TO DEAL WITH, AND I
TOTALLY AGREE.

A DWELLING IS IN FACT A
STRUCTURE, SO IT SEEMS TO ME
SECOND-DEGREE ARSON WOULD BE
SUBSUMED UNDER THE FIRST-DEGREE
UNDER THOSE CIRCUMSTANCES BUT
WHAT DO YOU DO WITH THE LANGUAGE
IN THAT SECTION THAT SAYS ABOUT,
BUT IT CAN'T APPLY TO
CIRCUMSTANCES UNDER SUBSECTION
1?

>> WELL, I THINK WHEN YOU READ
THE STATUTE, LET ME TAKE THE
STATUTE AND LET ME TAKE IT RID
OF SUPERFLUOUS PHRASES AND READ
WHAT THE STATUTE ACTUALLY SAYS.
IT IS ONLY 23 WORDS LONG.
IT SAYS ANY PERSON WHO DAMAGES
ANY STRUCTURE UNDER ANY
CIRCUMSTANCES NOT REFERRED TO IN
SUBSECTION 1 IS GUILTY OF ARSON
IN THE SECOND DEGREE.
SO DOES UNDER ANY CIRCUMSTANCES,
IS THAT MODIFYING THE VERB, OR
IS THAT MODIFYING THE STRUCTURE?
I SUGGEST IT'S MODIFYING THE
VERB DAMAGES.
ANY PERSON WHO DAMAGES UNDER ANY
CIRCUMSTANCES.

THAT IS WHAT MAKES SENSE T
WOULDN'T MAKE SENSE TO SAY, ANY
PERSON WHO DAMAGES ANY STRUCTURE
UNDER ANY CIRCUMSTANCES
BECAUSE--

>> WHAT ARE YOU-- I'M HAVING A
HARD TIME FOLLOWING THAT
BECAUSE, UNDER EITHER OF THESE
CIRCUMSTANCES YOU'RE TALKING
ABOUT SETTING A FIRE TO, WHETHER
YOU CALL IT A DWELLING OR A
STRUCTURE, RIGHT?

THAT IS THE CIRCUMSTANCES,
HAVING SET FIRE TO EITHER THE
DWELLING OR THE STRUCTURE.
SO WHY WOULD YOU JUST LIMIT THAT
TO DAMAGE?

>> I WOULD SUGGEST THAT THE
LEGISLATURE WAS REFERRING TO A
STRUCTURE, YOU DON'T EVEN NEED
THE PHRASE, UNDER ANY
CIRCUMSTANCES.

>> RIGHT.

>> THE PHRASE WOULD SAY--

>> SO IF THE LANGUAGE IN
SUBSECTION 2 UNDER ANY
CIRCUMSTANCES NOT REFERRED, DID
NOT EXIST AT ALL, THEN WHAT
YOU'RE SAYING WOULD BE
ABSOLUTELY CORRECT.

I MEAN THEY DON'T NEED IT UNLESS
THEY WANT TO EXCLUDE EVERYTHING
IN SUBSECTION 1.

>> NO, I UNDERSTAND, BUT ALSO I
THINK THE PHRASE--

>> YOU WANT US TO READ IT AS IF
THAT LANGUAGE DOESN'T THERE AT
ALL REALLY, RIGHT?

>> BUT IS THAT PHRASE, IS THAT
PHRASE MODIFYING A STRUCTURE OR
IS IT MODIFYING THE VERB?

I SUGGEST IT'S MODIFYING THE
OBJECT OF THE VERB, I MEAN, IT
IS NOT MODIFYING THE OBJECT OF
THE VERB, IT IS MODIFYING THE
VERB.

FOR EXAMPLE, IF THEY WERE
SAYING, IT WAS, TO MODIFY, THE
STRUCTURE WOULD SAY ANY PERSON
WHO DAMAGES ANY STRUCTURE NOT

REFERRED TO IN SUBSECTION 1.
THEY DON'T EVEN NEED THAT
PHRASE, UNDER ANY CIRCUMSTANCES.
I SUGGEST THE FACT THEY PUT IN
UNDER ANY CIRCUMSTANCES THEY'RE
REFERRING TO THE VERB DAMAGES.
AND I SUGGEST THAT WHEN YOU TAKE
THIS INTO CONSIDERATION, WHEN
YOU'RE DEALING WITH A STRUCTURE,
THEN YOU'RE DEALING WITH ALSO
THE DEFINITIONAL PHRASE,
STRUCTURE MEANS ANY BUILDING OF
ANY KIND.

>> SO, UNDER THAT CONSTRUCTION
THEN, IT SEEMS TO ME WHAT YOU'RE
SAYING IS THAT ANYONE WHO
COMMITS ARSON BUT IS NOT DONE
DURING THE COURSE OF A FELONY,
THEN THAT'S WHAT THAT PHRASE
WOULD REFER TO?

>> WELL I'M NOT SAYING-- I
DON'T THINK THAT PHRASE IS VERY
CLEAR.

I THINK IT'S AN OBSCURE PHRASE
AND REALLY DOESN'T MAKE A LOT OF
SENSE, AND I THINK THAT'S
SOMETHING THIS COURT HAS TO
INTERPRET MAKE A DECISION, WHAT
EXACTLY DOES IT MEAN.
IT HAS NEVER BEEN INTERPRETED
SINCE 1979.

>> WHAT DO YOU SAY IT MEANS?

>> I, MY OPINION IS THAT IT'S
CONFUSING.

>> WELL, OKAY, I UNDERSTAND THAT
BUT THERE HAS GOT TO BE SOME
RANGE OF MEANING.

MAYBE THERE'S, IF IT IS
CONFUSING THAT MEANS MIGHT MEAN,
X, Y, OR Z OR SOMETHING ELSE BUT
GIVE ME SOMETHING OTHER THAN
WHAT SEEMS TO BE WHAT WE'RE, THE
PLAIN MEANING OF IT IS.

>> WEALTH ISSUE IS, WHAT IS IT
MODIFYING, IS IT MODIFYING
STRUCTURE OR ACTION?

I SUGGEST IT IS MODIFYING THE
ACTION, NOT THE STRUCTURE WHICH
MEANS THAT THE SECOND DISTRICT'S
INTERPRETATION TO SAY THAT THIS

PHRASE EXCLUDES SECOND DEGREE FROM FIRST-DEGREE, I DON'T SEE IT THERE.

I THINK IT COULD BE INTERPRETED THAT WAY.

I DON'T THINK THERE IS ONLY ONE INTERPRETATION TO THIS AND WHEN--

>> IT SOUND LIKE, I'M STILL NOT FOLLOWING HOW YOU SAY WE SHOULD READ IT BUT SOUNDS LIKE YOU'RE SAYING THERE IS A WAY TO READ THIS SO IT MEANS NOTHING, SO THAT IT IS SUPERFLUOUS.

SO THERE IS SOME AMBIGUITY.

ONE WAY YOU COULD READ IT, TO GIVE IT SOME MEANING AND ANOTHER WAY IS TO GIVE IT NO MEANING.

>> WELL I'M SAYING THAT THERE IS A WAY TO READ THIS ALSO WHERE IT SAYS THAT IT'S NOT MODIFYING THE STRUCTURE.

IT'S MODIFYING THE ACTION.

>> YOU'RE INTO YOUR REBUTTAL TIME.

YOU'RE WELCOME TO CONTINUE.

>> THAT'S IT.

THANK YOU VERY MUCH.

>> MAY IT PLEASE THE COURT.

GOOD MORNING.

MY NAME IS DONNA KOCH.

I'M HERE TODAY ON BEHALF--

>> YOU NEED, YOU NEED TO SPEAK INTO THE MICROPHONE.

HARD TO HEAR UP HERE.

>> DONNA KOCH, STATE OF FLORIDA. THE ANSWER TO THE CONFLICT ISSUE BEFORE THIS COURT IS FOUND IN THE PLAIN LANGUAGE OF THE ARSON STATUTE.

THE SECOND DISTRICT COURT OF APPEAL LOOKED AT THE PLAIN LANGUAGE OF THE ARSON STATUTE IN CONCLUDING THAT THE TRIAL COURT HERE WAS INDEED CORRECT IN DENYING MR. STEVENS' REQUEST FOR A JURY INSTRUCTION ON SECOND-DEGREE ARSON BECAUSE THE EVIDENCE IN THIS CASE DID NOT FIT IT.

THERE WAS NO QUESTION THAT THE MOBILE HOME AT ISSUE HERE THAT MR. STEVENS AND HIS CODEFENDANT WENT BACK AND SET ON FIRE WAS INDEED A DWELLING.

IN FACT MR. STEVENS ADMITTED THAT HE KNEW IT WAS A DWELLING. SO--

>> LET ME ASK YOU THIS.

>> YES, JUSTICE QUINCE.

>> IF THAT LANGUAGE WAS NOT THERE, WOULD YOU AGREE THAT SECOND-DEGREE ARSON WOULD BE SUBSUMED AND UNDER FIRST-DEGREE-- YOU WOULD HAVE ALL OF THE ELEMENT OF SECOND-DEGREE ARSON.

>> YES.

>> WOULD BE A PART OF FIRST-DEGREE ARSON BUT FOR THAT LANGUAGE IN THE STATUTE.

>> YES.

THAT LANGUAGE IS VERY SIGNIFICANT AND THAT'S WHAT THE SECOND DISTRICT COURT OF APPEAL LOOKED AT.

WHEN THEY CONCLUDED BE NO, THESE TWO PROVISIONS, SUBSECTION 1 DEALING WITH FIRST-DEGREE ARSON IS INDEED WHOLLY SEPARATE FROM SECOND-DEGREE ARSON.

THEIR DECISION WASN'T SOLELY DERIVED FROM THE PLAIN LANGUAGE OF THE STATUTE WHERE WE ALREADY, WHERE WE ORIGINALLY LOOK, WHEN WE'RE DETERMINING WHAT A STATUTE MEANS, BUT ABSOLUTELY LOOKED AT THIS COURT'S DECISION IN HIGGINS, AND THIS COURT IN HIGGINS ADOPTING OR QUOTING THE PASSAGE FROM THE FIRST DCA'S DECISION DID CONSTRUE OR LOOK AT THAT PARTICULAR PROVISION, THE, UNDER ANY CIRCUMSTANCES NOT REFERRED TO IN SUBSECTION 1. THAT'S WHY THIS COURT IN HIGGINS DETERMINED THAT SECOND DEGREE ARSON CAN NOT BE A NECESSARILY LESSER-INCLUDED OFFENSE TO FIRST-DEGREE ARSON BECAUSE OF

THAT PARTICULAR LANGUAGE
PROVISION.

YES, THIS COURT BACK IN 1990
ABSOLUTELY LOOKED AT THAT
SPECIFIC PROVISION AND
DETERMINED, YES, AS A MATTER OF
FACT, WE NEED TO AMEND THE
SCHEDULE OF LESSER INCLUDED
OFFENSES.

>> LET ME ASK YOU THIS.

>> YES, YOUR HONOR.

>> IF THAT IS THE CASE, ONES THE
EVIDENCE AT TRIAL DEMONSTRATES
IT WAS A ACTUALLY--

>> YES.

>>-- THERE'S NO OTHER
LESSER-INCLUDED OFFENSE OF FIRST
FREE ARSON?

>> IF THERE IS NO NECESSARY
LESSER-INCLUDED OFFENSE.

>> HOW ABOUT, IF THAT IS THE
CASE, WOULD NOT EVEN BE A
SECOND, WHAT IS THE OTHER ONE
AFTER--

>> PERMISSIVE.

>> PERMISSIVE LESSER-INCLUDED
OFFENSE.

>> THAT IS WHAT IS VERY
INTERESTING ABOUT HIGGINS.
WHAT HIGGINS INSTRUCTS, AND THE
SECOND DISTRICT COURT OF APPEAL
ACTUALLY TALKS ABOUT THIS,
HIKING BEGINS SAYS IT IS NOT A
NECESSARY LESSER-INCLUDED
OFFENSE BUT UNDER CERTAIN
CIRCUMSTANCES AND YOU EVIDENCE
IT CAN BE A PERMISSIVE
LESSER-INCLUDED OFFENSE.
THEY LEFT OPEN THE POSSIBILITY.
JUSTICE LEWIS, YOU POINTED OUT A
FEW POSSIBILITIES WHERE PERHAPS
THERE WAS A QUESTION WHETHER THE
DWELLING OR OTHER OCCUPIED
STRUCTURE IN QUESTION HAD LOST
THE CHARACTERISTICS OF BEING
THAT.

SO THEN THERE IS A JURY QUESTION
THAT PERHAPS THERE IS EVIDENCE
TO SUPPORT THE GIVING OF A
PERMISSIVE LESSER ON

SECOND-DEGREE ARSON.

>> ONCE IT IS DETERMINE AD
DWELLING IT IS, NOT PERMISSIVE
OR A NECESSARY?

>> EXACTLY AND THAT'S WHY THE
SECOND DISTRICT COURT OF APPEAL
CAME IN AND SAID, WHAT WAS THE
EVIDENCE?

THE EVIDENCE IT WAS UNDISPUTED,
IT WAS A EVIDENCE, ALL RIGHT.
IF IT IS A ACTUAL LYING AND
CHARGED IN FIRST-DEGREE ARSON,
WHICH IT WAS, LOOK AT THAT, LOOK
AT THAT PROVISION IN SUBSECTION
2.

THEY RELIED ON THAT PROVISION
AND THIS COURT'S DECISION IN
HIGGINS TO GO IN THIS PARTICULAR
CASE WHERE THE EVIDENCE IS
UNDISPUTED THE TRIAL COURT
INDEED PROPERLY DENIED THAT
REQUEST FOR A SECOND-DEGREE
ARSON INSTRUCTION.

NOW, THE REASON THE SECOND
DISTRICT COURT OF APPEAL ALSO
CAME IN AND CERTIFIED CONFLICT
FOR THIS COURT TO RESOLVE IS THE
REASONING OF THE FOURTH DCA.
THE FOURTH DCA, THE FACTS ARE
VERY, VERY SIMILAR TO THIS CASE
IN THAT MR. MOORE, HE BURNED
DOWN HIS TRAILER HOME AND THE
EVIDENCE, AND EVEN THE COURT,
THE FOURTH DCA NOTES, YES, IT
WAS HIS DWELLING.

IT IS UNDISPUTED IT WAS HIS
DWELLING.

IT WAS A MOBILE HOME BUT, WHAT
THE FOURTH DCA DID IS THEY
LOOKED ONLY AT THE DEFINITION OF
STRUCTURE, WHICH IS A BROAD
DEFINITION.

OF COURSE IT WOULD INCLUDE A
DWELLING BUT THEY BASED THEIR
REASONING ON WHY A SECOND-DEGREE
ARSON INSTRUCTION SHOULD BE
GIVEN ON THIS DEFINITION BECAUSE
THAT STRUCTURE IS A VERY BROAD
DEFINITION AND DWELLINGS ARE
CLEARLY INCLUDED WITHIN THE

DEFINITION OF STRUCTURE, THEN OF COURSE THE SECOND-DEGREE ARSON INSTRUCTION WHICH INCLUDES STRUCTURES SHOULD BE READ IN A FIRST-DEGREE CASE.

HOWEVER WHAT THAT REASONING DOES THAT IS A DEFINITIONAL REASONING, WHAT DOES IT DO? NUMBER ONE, IT IGNORES THE PLAIN LANGUAGE OF THE ARSON STATUTE THAT SECOND-DEGREE ARSON IS ONLY COMMITTED UNDER CIRCUMSTANCES NOT REFERRED TO IN SUBSECTION 1 BUT JUST AS IMPORTANT, WHAT THAT DEFINITIONAL REASONING DOES, IT IGNORES THIS COURT'S HOLDING IN HIGGINS, RIGHT?

THIS COURT SAID IN HIGGINS THAT IT'S NOT A NECESSARY LESSER-INCLUDED OFFENSE BUT THE EFFECTIVE HOLDING IN MOORE IS, IF YOU REQUIRE A SECOND-DEGREE ARSON INSTRUCTION READ IN EVERY CASE WITH A DWELLING AND OCCUPIED STRUCTURES, BUT WHAT THE MOORE COURT DID, IT MADE SECOND-DEGREE ARSON AN EFFECTIVE NECESSARILY LESSER-INCLUDED OFFENSE, IF IT MUST BE READ EVERY TIME WITHOUT REGARD WITHOUT REGARD TO THE EVIDENCE, THAT IT WAS CLEARLY A DWELLING.

THE SECOND DISTRICT COURT OF APPEAL LOOKED AT DEFINITIONAL REASONING, SAID WE ARE IN CONFLICT, NOT BECAUSE OF THE FACTS BUT BECAUSE OF THE REASONING.

THE REASONING IS IN CONFLICT WITH NOT ONLY THIS COURT'S HIGGINS' DECISION BUT THE PLAIN LANGUAGE OF THE ARSON STATUTE AND THAT'S REALLY WHY, WHY WE ARE HERE TODAY.

IT IS FOR THE COURT TO TAKE A LOOK AT THE REASONING FOURTH DCA DIVISION AND DETERMINE WHERE THE CONFLICT CAN BE RESOLVED AND THE OF COURSE THE STATE SUBMITS THAT

THE 2 DCA, THE SECOND DISTRICT DECISION IS DIRECT BASED ON HIGGINS AND THE PLAIN LANG-- HIGGINS AND THE PLAIN LANGUAGE OF THE STATUTE.

THERE IS ONE EXTRA ISSUE I WOULD LIKE TO DISCUSS WITH THE COURT. WHEN YOU LOOK AT THE HIGGINS DECISION, AND I DON'T WANT TO LEAD THE COURT ASTRAY ON THE ACTUAL LANGUAGE AND IT HAS TO DO WITH THE DICTA.

THE DICTA I HAVE COME TO THINK MIGHT BE CONFUSING, BECAUSE WHAT THIS COURT SAYS IN THE DICTA, YOU KNOW, HIGGINS WAS ONLY A CONTENTS CASE, RIGHT?

HE BURNED HIS MATTRESS.

IT DIDN'T BURN THE PRISON CELL, DIDN'T BURN WITH ANYTHING ELSE. BUT WHEN THE COURT COMES IN AND ACTUALLY SAYS, WHEN THEY'RE SAYING, OKAY, SECOND DEGREE ARSON CAN BE READ, GIVEN IN CERTAIN CASES WHERE THE CIRCUMSTANCES AND EVIDENCE SUPPORT IT.

BUT THIS IS THE SENTENCE THAT MIGHT BE CONCLUSIONING.

IT SAYS, FOR INSTANCE, AT THE CHARGE IN PROOF BEEN THAT HIGGINS SET FIRE TO A BUILDING NORMALLY OCCUPIED BY A LARGE NUMBER OF PEOPLE, THEN A SECOND DEGREE CHARGE SHOULD BE GIVEN. THE DIFFICULTY, WHY THAT IS SLIGHTLY CONFUSING IS WHEN YOU LOOK AT THE ARSON STATUTE FIRST-DEGREE, IT ACTUALLY TALKS ABOUT UNDER SUBSECTION B, ANY STRUCTURE OR CONTENTS THEREOF WHERE PERSONS ARE NORMALLY PRESENT, AND THEN IT GIVES EXAMPLES.

JAILS, PRISONS, NURSING HOMES DETENTION CENTERS, THOSE ARE NORMALLY OCCUPIED 24/7 FOR INSTANCE, BUT IT ALSO COMES IN AND TALKS ABOUT DEPARTMENT STORES, OTHER BUILDINGS THAT

REALLY HAVE HOURS OF OPERATION THAT THEY ARE GOING TO BE OCCUPIED BUT BECAUSE OF HOW BROADLY THE DICTA IS READ, IT SEEMS TO BE IN CONFLICT A LITTLE BIT WITH WHAT WOULD BE ENCOMPASSED IN FIRST-DEGREE AND, AND PERHAPS IF THE DICTA HAD CONTINUED ON AND SAID THAT NORMALLY OCCUPIED BY A LARGE NUMBER OF PEOPLE BUT OUTSIDE NORMAL HOURS OF OPERATION, IT WOULD BE A LITTLE CLEARER BECAUSE WHEN YOU TALK ABOUT AN OCCUPIED DWELLING, THAT'S THE DISTINCTION, RIGHT, BETWEEN FIRST DEGREE AND SECOND DEGREE IS THE ISSUE OF HUMAN OCCUPANCY. SOLVE IT WOULD SEEM THE DICTA IS A BIT CONFUSING AS LONG AS THE COURT IS GOING TO STRAIGHTEN OUT THE LAW IN THE STATE, I JUST SUPPOSE THAT.

SO, IF THIS COURT DOESN'T HAVE ANY ADDITIONAL QUESTIONS, WE ASK THIS COURT TO PLEASE AFFIRM THE HOLDING OF THE SECOND DISTRICT COURT OF APPEAL AND QUASH THE FOURTH DCA'S MOORE DECISION.

THANK YOU VERY MUCH.

>> I WOULD LIKE TO JUST MAKE TWO POINT.

ONE IS THAT, THE SECOND DISTRICT IS SAYING THAT, MOORE MADE, IS BASICALLY MAKING THE SECOND-DEGREE ARSON A NECESSARY LESSER-INCLUDED OFFENSE BECAUSE OF THE NARROW CATEGORY OF CASES WHERE CONTENTS OF A STRUCTURE OR DWELLING ARE BURNED.

WELL, I SUGGEST THAT'S NOT CORRECT.

THAT IS AN ISSUE, THAT'S NOT CORRECT BECAUSE THAT'S WHAT DISTINGUISHES A PERMISSIVE FROM A NECESSARY LESSER-INCLUDED OFFENSE WHERE THERE IS SOMETHING SEPARATE, NOT INCLUDED IN THERE. AND I SUGGEST BECAUSE THERE IS CONTENT, IF IT WASN'T A CONTENT,

IT WOULD BE BUT I'M SAYING
BECAUSE YOU HAVE THE CONTENT,
THAT IS WHAT SEPARATES AND
DISTINGUISHES SECOND-DEGREE
ARSON AS A PERMISSIVE
LESSER-INCLUDE OF THE OFFENSE.
>> THE CONTENTS OF THE STRUCTURE
OR DWELLING YOU THINK IS WHAT
DISTINGUISHES FIRST-DEGREE FROM
SECOND DEGREE?

>> WHAT I'M SAYING IS, WHEN A
COURT IS LOOKING AT MOORE AND
THE SECOND DISTRICT'S RULING
THAT MOORE IS EFFECTIVELY RULING
THAT SECOND-DEGREE ARSON IS
NECESSARILY LESSER
INCLUDED OFFENSE

RATHER THAN PERMISSIVE, I'M
SAYING BECAUSE THERE STILL--
>> THAT WOULDN'T BE THE CASE BUT
FOR THE LANGUAGE IN THE STATUTE
THAT SAYS BUT FOR SUBSECTION--
YOU COULD IT IF IT'S A PART OF
SUBSECTION 1.

>> RIGHT.
I'M SAYING, I SUGGEST THAT IT IS
STILL A PERMISSIVE AND IT IS NOT
A LESSER BUT WHAT THE COURT
READS THE SECOND DISTRICT'S
OPINION WHERE IT'S SAYING THAT
THERE IS A, DIFFERENTIATION
BETWEEN FIRST-DEGREE ARSON AND
SECOND-DEGREE ARSON CAN NOT BE
FIRST-DEGREE ARSON WHAT I'M
SAYING THERE IS, UNDER THOSE
CIRCUMSTANCES IF THE COURT
APPLIES THE LOGIC AND LAW OF THE
SECOND DISTRICT AND STEVENS, IT
IS SAYING THAT BASICALLY
SECOND-DEGREE ARSON CAN NEVER BE
A PERMISSIVE LESSER-INCLUDED
OFFENSE OF SECOND-DEGREE ARSON.
THE SECOND DOESN'T EVEN GIVE AN
OPINION WHEN COULD IT BE UNDER
ITS OWN LOGIC.

>> YOU WOULDN'T EXPECT THAT.
THAT WOULD BE DICTA BECAUSE THEY
WERE DECIDING AN ISSUE IN THIS
CASE.

>> BUT POINT IS, IF THE COURT

SAYS, WE'RE GOING WITH THE
SECOND DISTRICT I THINK THE
ISSUE THEN COMES DOWN TO CAN
SECOND DEGREE ARSON EVER BE A
LESSER INCLUDED OFFENSE OF
FIRST-DEGREE ARSON?
UNDER STEVENS IT MAKES IT
QUESTIONABLE IT COULD NEVER BE
BECAUSE THE DIFFERENTIATION THE
SECOND DISTRICT MAKES BETWEEN
FIRST AND SECOND-DEGREE ARSON.
THANK YOU VERY MUCH.