WE WILL NOW MOVE TO THE SECOND CASE ON THE DOCKET, ARNOLD JEROME KNIGHT VERSUS THE STATE OF FLORIDA.
>> MAY IT PLEASE THE COURT.
>> LET THE COURT GET A LITTLE QUIETER HERE.
PLEASE PROCEED.
SPECIES MAY IT PLEASE THE COURT.
MY NAME IS GLEN GIFFORD WITH THE SECOND CIRCUIT PUBLIC OFFENDERS REPRESENTING ARNOLD JEROME KNIGHT.
THE COURT IS ON TWO ISSUES, ONE IS A CERTIFIED QUESTION ON WAIVER OF ERROR UNDER THE COURT'S DECISION IN WILLIAMS.
THE SECOND IS CERTIFIED CONFLICT ON THE HARMLESSNESS OF THE ERROR.
I WILL SPEND MORE TIME WITH THE COURT'S INDULGENCE ON THE SECOND ISSUE BECAUSE IT IS MORE CONSEQUENTIAL.
IMMEDIATELY WE CONFRONT THE QUESTION OF PARDON POWER.
THIS IS NOT A PARDON POWER CASE.
PARDON POWER CASE, AN EXAMPLE WOULD BE A CHARGE OF ROBBERY WITH A FIREARM.
UNDER OUR LAWS, UNDERSTAND JURY INSTRUCTIONS EVEN IF THE ONLY EVIDENCE IS THE DEFENDANT POSSESSED A FIREARM THE JURY IS INSTRUCTED ON STRONG ARM ROBBERY SO THE JURY CAN EXERCISE ITS BARGAINING POWER AND FIND THE DEFENDANT GUILTY OF A LESSER DEFENSE.
CONCRETE FACTS LIKE WHETHER THE DEFENDANT HAD A FIREARM, WHETHER IT IS A DWELLING OR STRUCTURE, WE INSTRUCT ON LESSERS THAT THE JURY CAN HAVE THE OPPORTUNITY TO PARTIALLY PARDON THE DEFENDANT BY FINDING HIM GUILTY OF A LESSER OFFENSE.
THIS IS NOT THAT KIND OF CASE.

THE HOMICIDE STATUTE IS NOT
THAT KIND OF STATUTE.
THE JURY HAS FOR IT
FIRST-DEGREE MURDER, ATTEMPTED
SECOND-DEGREE MURDER AND
ATTEMPTED MANSLAUGHTER.
>> I WANT TO HEAR THIS BUT I
WANT TO INTERRUPT TO ASK, YOU
DO RECOGNIZE YOUR THEORY IS
CONTRARY TO MONTGOMERY, THE
REASONING OF ALL THE CASES THAT
SAY THIS KIND OF ERROR IS
FUNDAMENTAL.
>> I DON'T THINK IT IS.
IN MONTGOMERY THE COURSE THAT
THE RATIONALE FOR INSTRUCTING
WAS ON THE PARDON POWER BUT IN
SUBSEQUENT CASES AND THIS COURT
HAS HAD PLENTY OF THEM.
>> CAN YOU NAME ONE?
>> A GOOD, GRIFFIN, WILLIAMS.
>> THOSE CASES, THE FACE OF
WHAT THE COURT SAID TIME AFTER
TIME AFTER TIME IN EARLIER
CASES.
>> EXCUSE ME?
>> THE COURT HAS SAID THERE WAS
A RATIONAL BASIS FOR THE
INSTRUCTED JURY TO FIND A
DEFENDANT GUILTY OF
MANSLAUGHTER OR ATTEMPTED
MANSLAUGHTER INCLUDING INTEND,
SABOTAGED, UNDERMINED THE
JURY'S CHOICE BETWEEN
SECOND-DEGREE MURDER,
MANSLAUGHTER OR ATTEMPT IN THIS
CASE, THE COURT SAID THAT TIME
AND AGAIN AND THERE IS A
RATIONAL BASIS FOR THE JURY
ONCE IT REJECTED ATTENDED
PREMEDITATED MURDER, FOR
ATTEMPTED MANSLAUGHTER.
>> IF THE EVIDENCE IS
SUFFICIENT TO SUPPORT A
CONVICTION OF SECOND-DEGREE
MURDER.
WHETHER IT IS NOT A JURY PARDON
ISSUE, JERRY IS TOLD TO RETURN
A VERDICT FOR THE HIGHEST CRIME
FOR WHICH THE STATE HAS PROVEN

EVERY ELEMENT BEYOND REASONABLE DOUBT.
IN ALMOST EVERY CASE THE REAL DEBATE IS FIRST-DEGREE PREMEDITATED MURDER OR 2ND ∞ MURDER, AND THAT IS WHAT IS BEING ARGUED ABOUT, AND SUPPORTED BY THE RECORD, HOW IS THAT NOT A PARDON POWER CASE.
>> IT IS NOT WHETHER THE RECORD SUPPORTS THE CRIME OF CONVICTION THE WEATHER CORRECTLY INSTRUCTED JURY COULD FIND THE DEFENDANT GUILTY OF LESSER INCLUDED DEFENSE.
AFTER REJECTING ATTEMPTED FIRST-DEGREE PREMEDITATED MURDER, A BIGGER DIFFERENCE BETWEEN ATTENDED PREMEDITATED MURDER AND ATTEMPTED SECOND-DEGREE MURDER THAN BETWEEN ATTEMPTED SECOND-DEGREE MURDER AND ATTEMPTED MANSLAUGHTER.
>> THE LESSER OFFENSE HERE, THE JERRY HAD TO GO THROUGH THE PROCESS OF DECIDING THE DEFENDANT DID NOT HAVE A DEPRAVED MIND, RIGHT?
>> REASONABLE.
>> HOW ON THESE FACTS COULD ANY RATIONAL JERRY MAKE THAT?
>> IT WAS NOT DESIGNED AS A WEAPON.
IT WAS NOT A KNIFE OR A FIREARM.
ONCE THE JURY --
>> PRETTY USEFUL TO DO A LOT OF DAMAGE.
>> ONCE THE JURY DETERMINED THE DEFENDANT DID NOT HAVE PREMEDITATED INTENT TO KILL, A HAIR'S BREADTH BETWEEN THAT AND DETERMINING THE JURY, THE DEFENDANT HAD NO INTENT TO KILL WHATSOEVER WHICH THE ATTEMPTED MANSLAUGHTER SABOTAGED BY INCLUDING INTEND AND THAT IS WHY THIS COURT --
>> BACK TO MY QUESTION ABOUT

DEPRAVED MIND.
GIVEN THE FACT HERE IN THIS VICIOUS ATTACK WHICH THERE IS NO OTHER WAY TO DESCRIBE IT, THE RECORD FULLY SUPPORTS, HOW CAN A RATIONAL JUROR LOOK AT THAT AND DECIDE THE FACTS RELATED TO THAT ATTACK ARE NOT INDISPUTABLE EVIDENCE OF A DEPRAVED MIND?
>> NONLETHAL FORCE WAS USED, QUOTE BETWEEN ATTEMPTED 2ND ∞ MURDER AND ATTEMPTED MANSLAUGHTER.
THE JURY COULD CONCLUDE DEATH COULD HAVE BUT DID NOT RESULT.
THE DEFENDANT BECAUSE HE DID NOT USE LETHAL FORCE, BECAUSE HE DID NOT USE A KNIFE OR A GUN, DID NOT HAVE RECKLESS INDIFFERENCE TO HUMAN LIFE.
>> WASN'T THE UNDISPUTED MEDICAL TESTIMONY THAT THE PIPE WOULD HAVE TO HAVE BEEN USED HARD ENOUGH TO HAVE INJURED THEM TO THE POINT OF DEATH, IT WAS USED HARD ENOUGH IT WOULD HAVE CAUSED DEATH?
>> THESE WERE NOT LETHAL INJURIES.
>> DID THE DOCTOR TESTIFY TO THAT?
THAT THE PIPE WAS USED WITH SUCH FORCE, YOU HIT HER WITH THE PIPE SUCH THAT IT BROKE THE INTERNAL I AND TO DO THAT YOU WOULD HAVE TO DO SO WITH A DEPRAVED MIND --
>> IT IS IN A DISPUTED FACT.
IF THAT IS UNDISPUTED, I HAVE THE SAME QUESTION, PROPERLY INSTRUCTED JURY FOUND ANYTHING OTHER THAN DEPRAVED MIND.
>> THIS COURT REACHED THAT CONCLUSION WITH SIMILAR FACTS.
WILLIAMS WAS A STABBING CASE.
THIS WAS A UNDERSTANDING CASE, KNIFE WAS NOT USED.
>> DOESN'T THAT MEAN IT IS THE PARDON POWER?

THE JURY IS SAYING DESPITE THAT EVIDENCE WE BELIEVE FOR SOME OTHER FUNDAMENT A REASON NOT EVIDENCE-BASED, WE HAVE A LESSER INCLUDED DEFENSE?
>> THAT JURY COULD HAVE FOUND THE DEFENDANT WAS NOT RECKLESSLY INDIFFERENT OF HUMAN LIFE.
AND ATTEMPT CASE --
>> FOR THE VICTIM IN THIS CASE?
>> THERE WAS EVIDENCE THE LAY IN WAIT AND THAT THE JURY COULD HAVE CONCLUDED HE DIDN'T LAY IN WAIT.
>> IS THERE EVIDENCE NOT ONLY DID HE LAY IN WAIT BUT VIOLATED A COURT ORDER SINCE HE HAD AN INJUNCTION BASED AGAINST AMIR HOURS BEFORE.
>> THE JURY FOUND THE DEFENDANT NOT GUILTY OF ATTEMPTED PREMEDITATED MURDER.
>> HE BEAT HER IN THE HEAD WITH A MEDICAL OBJECT WITH GREAT FORCE.
>> IS IN MANY OF THESE --
>> ISN'T THAT IN DIFFERENCE TO HUMAN LIFE?
YOU ARE REPRESENTING YOUR CLIENT AND HAVE THE FACTS YOU HAVE GOT BUT I'M STRUGGLING TO UNDERSTAND HOW A RATIONAL PERSON CAN LOOK AT IT IN THAT WAY.
>> TO REACH YOUR POINT WE WOULD HAVE TO FIND, THE JURY HAS NOT, IF HE WANTED TO KILL HER HE WOULD HAVE.
THAT IS THE BOTTOM LINE.
THAT IS BASICALLY WHAT THE JURY WOULD HAVE TO THINK BUT I DON'T KNOW IF FACTS SUPPORT THAT IN THIS PARTICULAR CASE.
>> HE WAS STOPPED.
SOMEBODY SHOWED UP, THE VICTIM'S UNSTOPPED THE ATTACK AND HE RAN AWAY.
FOR THE VICTIM'S SON APPEARING, THE VICTIM YELLED OUT TO HIM

THERE IS NO EVIDENCE TO SUGGEST
HE WOULD HAVE DONE THAT.
>> MORE STRENGTH TO KILL HER.
>> I UNDERSTAND IF THE COURT
WERE THE JURY THE COURT WOULD
HAVE FOUND THE DEFENDANT GUILTY
OF SECOND-DEGREE MURDER BUT
THAT IS NOT A TEST.
THE TEST IS WHETHER A RATIONAL
JURY HAVING -- COULD HAVE FOUND
THE DEFENDANT GUILTY OF
ATTENDED MANSLAUGHTER IF
CORRECTLY INSTRUCTED AND THIS
IS NOT A NEW FACT SCENARIO.
THIS IS A CASE IN WHICH THE
COURT UNDER SIMILAR FACT
SCENARIOS HAS CONCLUDED THE
JURY WAS DEPRIVED OF CHOICE.
ONCE THE JURY FOUND NOT GUILTY
OF PREMEDITATED MURDER THE
INSTRUCTION DEPRIVED THE JURY
OF RATIONAL CHOICE BETWEEN
ATTEMPTED SECOND-DEGREE MURDER
AND ATTEMPTED MANSLAUGHTER.
ATTEMPTED SECOND-DEGREE MURDER
IS A BIT OF AN ANOMALY IN
FLORIDA LAW.
I'VE BEEN DOING THIS LONG
ENOUGH TO REMEMBER WHEN IT WAS
AN OPEN QUESTION WHETHER IT
EXISTED AS AN OFFENSE AT ALL.
THAT WAS RESOLVED IN 2000, 4-3
IN FAVOR OF ITS EXISTENCE BUT
IT IS AN ODDITY IN THAT IT
INVOLVES INTENT TO COMMIT A
RECKLESS ACT.
THERE IS VERY LITTLE DIFFERENCE
BETWEEN ATTEMPTED SECOND-DEGREE
MURDER AND ATTENDED
MANSLAUGHTER IF DIRECTLY
INSTRUCTED.
IT IS A DEPRAVED MIND AND A
RATIONAL JURY AS THIS COURT
FOUND IN DOHERTY, WILLIAMS AND
OTHER CASES, COULD HAVE FOUND
THE DEFENDANT, BECAUSE
NONLETHAL FORCE WAS USED,
BECAUSE THE WEAPON USED WAS NOT
DESIGNED TO BE USED AS A
WEAPON, COULD HAVE FOUND THIS

WAS NOT AN ATTEMPTED 2ND ∞
MURDER, THERE WAS NO RECKLESS
IN DIFFERENCE TO HUMAN LIFE AND
FOUND ATTEMPTED MANSLAUGHTER.
THE REASON THIS COURT HAS SEEN
SO MANY OF THESE CASES IS THE
MANSLAUGHTER INSTRUCTION AND
ATTEMPTED MANSLAUGHTER
INSTRUCTION SENDS THE JURY UP
TO SECOND-DEGREE MURDER AND
ATTEMPTED SECOND-DEGREE MURDER.
IT IS VERY RARE WHERE THE
MONTGOMERY MURDER AGREED WHERE
THE DEFENDANT WAS GUILTY OF
ATTENDED MANSLAUGHTER BY INTENT
CAUSE DEATH.
UNDER THIS COURT'S PRESIDENT,
FROM MONTGOMERY WHICH WAS
UNANIMOUS ON THROUGH RECENT
DECISIONS.
>> YOU AGREE THE FOUNDATION FOR
MONTGOMERY AND ALL THOSE
DECISIONS WAS THE DEFENDANT HAS
A RIGHT TO A JURY PARDON.
>> NO, I DON'T.
>> THAT IS WHAT MONTGOMERY SAYS
AND THAT IS THE FOUNDATION.
>> LOOK AT THE CASES SUBSEQUENT
TO MONTGOMERY AND IN MANY OF
THE CASES, IN THE MAJORITY
OPINIONS AND CONCURRENCES
JUSTICES SAID THIS IS NOT A
PARDON POWER CASE, THIS IS CASE
IN WHICH A JURY OF CORRECTLY
INSTRUCTED COULD RATIONALLY
FIND THE DEFENDANT GUILTY OF
MANSLAUGHTER OR TEMPTED
MANSLAUGHTER.
THIS IS NO DIFFERENT FROM THOSE
CASES.
I WOULD LIKE TO MOVE ON TO THE
SECOND ISSUE WHICH IS WAIVER.
THIS COURT HAD THE SAME
QUESTION BEFORE THE ORAL
ARGUMENT DISCHARGE REVIEW.
IT ILLUSTRATES THE APPROPRIATE
TEST FOR WAIVER BECAUSE THERE
WERE TWO ERRORS IN MORE.
THE FIRST WAS THE MONTGOMERY
AREA, THE COURT CALLED

ATTENTION TO THE MANSLAUGHTER
INSTRUCTION REQUIRING INTENT TO
CAUSE DEATH AND OFFERED TO
STRIKE IT.
COUNSEL SAID IT WAS OKAY.
IT CAME UP SEVERAL TIMES.
OPPORTUNITY WAS GIVEN, THERE
WAS AN INTENTIONAL LANGUISH
MEANT BECAUSE COUNSEL SAID YES.
INSTRUCTED THIS JURY,
MANSLAUGHTER INCLUDES ATTEMPT.
THIS COURT SAID THAT WAS WAIVER
BUT THE JURY WAS NOT INSTRUCTED
ON JUSTIFIABLE AND EXCUSABLE
HOMICIDE AS PART OF
MANSLAUGHTER INSTRUCTION, NO
DISCUSSION OF THAT AND THAT WAS
NOT WAIVED AND THEY REVERSED ON
THAT BASIS.
MISTER MOORE GOT A NEW TRIAL.
IF THE ERROR IS FUNDAMENTAL AS
IT HAS ALWAYS BEEN UNDER
MONTGOMERY AND WILLIAMS, WAIVER
IS REQUIRED AND IT DOESN'T RELY
ON THESE FACTS.
>> THERE HAS BEEN DISCUSSION IN
THE BRIEFS AND THE FIRST DCA
OPINION WHETHER THERE WAS
INCENTIVE TO LET THE JURY HEAR
THE ERRONEOUS INSTRUCTION THAT
CONFLICTS WITH THE DEFENSE
THEORY OF INTENT TO KILL, THE
REASON DEFENSE COUNSEL WOULD
HAVE ALLOWED THE JURY TO
CONCLUDE THE DEFENDANT INTENDED
TO CAUSE THE DEATH AND FOUND
HIM GUILTY OF ATTEMPTED
MANSLAUGHTER.
THE FIRST --
>> YOUR POSITION WOULD BE TRIAL
COUNSEL WAS INEFFECTIVE FOR
FAILING TO NOTE THE ERRONEOUS
JURY INSTRUCTION?
>> YES, WE DIDN'T RAISE
INEFFECTIVENESS BECAUSE CASE LAW
SAID THIS WAS FUNDAMENTAL ERROR
BUT THIS WILL BE EFFECTIVE
ASSISTANCE AT TRIAL COUNSEL AS
IT HAS BEEN IN OTHER CASES.
>> WOULD YOU AGREE UNDER

SANDERS AND THAT LINE OF CASES
THE DEFENDANT IS NOT ENTITLED
TO RELIEF?
>> KNOW.
BECAUSE THE PREJUDICE WOULD BE
THE SAME AS THE PREJUDICE I'M
ASSERTING HERE WHICH IS A
RATIONAL JURY COULD HAVE FOUND
HIM GUILTY.
OF ATTEMPTED MANSLAUGHTER.
>> JUSTICE CAN TERRA WROTE THEY
CANNOT SUPPORT A FINDING OF
PREJUDICE.
ISN'T THAT CORRECT?
>> YES, YOUR HONOR.
HERE WE ARE IN DIRECT APPEAL ON
DISCRETIONARY REVIEW FROM
DIRECT APPEAL.
THE REASON YOU WANT TO DIRECT
THIS ON DIRECT APPEAL IS NUMBER
ONE, THAT RESOLVES THE ERROR AS
SOON AS IT IS BROUGHT TO LIGHT
AND YOU WAIT UNTIL 3850
PROCEEDINGS, WITNESSES MEMORIES
HAVE FAILED.
IF YOU WAIT UNTIL 3850
DEFENDANT DOES NOT HAVE A RIGHT
TO APPOINTED COUNSEL.
A LOT OF THESE ARE BORDERLINE
COMPETENT, ILLITERATE, WILL NOT
FILE A VIABLE 3850 MOTION.
>> IF YOU WERE TO LOSE FROM THE
FIRST ISSUE BUT IF YOU WERE TO
LOSE ON THE FIRST ISSUE THAT
WOULD BE A END TO THIS, THERE
WOULD BE NO 3850 ON THIS.
>> I NEED TO WIN ON BOTH
ISSUES.
CONSISTENT WITH THIS COURT'S
CASE LAW BOTH ON THE WAIVER AND
THE PREJUDICE.
THIS DEFENDANT IS ENTITLED TO A
NEW TRIAL.
AND THE WAIVER DID NOT OCCUR
HERE AND THIS IS PREJUDICIAL
AND HARMFUL BECAUSE RATIONAL
JURY COULD HAVE FOUND THE
DEFENDANT GUILTY OF ATTENDED
MANSLAUGHTER.
I SAVE THE REMAINDER OF MY TIME.

>> GOOD MORNING, MAY IT PLEASE THE COURT.
KAITLIN WEISS ON OFFICE FROM THE ATTORNEY GENERAL ON BEHALF OF THE STATE OF FLORIDA.
YOUR HONORS THIS IS CASE WITH THREE INTERLINKED ISSUE, ISSUE OF WAIVER, ISSUE OF FUNDAMENTAL WAIVER AND PARDON POWER.
WE REACHED THIS POINT WITH THE WAIVER AND FUNDAMENTAL ERROR BECAUSE OF EXPANSION AND PARDON POWER DOCTRINE.
ONE OF THE ISSUES IN THIS CASE WAS CERTIFIED CONFLICT WITH CAN RUTTERS THIS ON THE MEANING OF DEAN.
IT IS STATE'S POSITION THAT DEAN ADVOCATED PARDON DOCTRINE WHICH RESOLVES THE OTHER TWO ISSUES IN THIS CASE, ISSUE WAIVER AND ISSUE OF APPLICATION OF FUNDAMENTAL ERROR DOCTRINE.
SO IT IS THE STATE'S POSITION THAT IN DEAN THREE JUSTICES, JUSTICE LEWIS, CANADY AND LAWSON, FOUND THAT MANSLAUGHTER WAS A CATEGORY ONE LESSER INCLUDED OFFENSE OF SECOND-DEGREE FELONY MURDER AND AFFIRMED EXPLICITLY INCORPORATING JUSTICE POLSTON'S CONCLUSION THE PARDON DOCTRINE WOULD BE USED TO AFFIRM THE DECISION.
WITH THE ABROGATION OF THE PARDON DOCTRINE YOU'RE LEFT IN THIS CASE THE ERROR IN THE LESSER IS NO LONGER FUNDAMENTAL AND THAT THE VERDICT OF GUILT OWN THE HIGHER OFFENSE WHICH WAS STRONGLY SUPPORTED BY THE EVIDENCE RENDERS THE ERROR IRRELEVANT BECAUSE THE JURY FOUND BEYOND A REASONABLE DOUBT THOSE OFFENSES IN THE HIGHER.
THIS RESOLVES A KEY ISSUE IN THE CURRENT CASE LAW WITH THE WAIVER.
THE FACT THAT THE STATE OF THE

LAW WITH WAIVER DOES NOT TAKE
INTO ACCOUNT THE DOCTRINE OF
INVITED ERROR.
AS THE LAW STANDS NOW, THIS IS A
CASE WHERE A DEFENSE ATTORNEY
WAS GIVEN A COPY OF THE JURY
INSTRUCTIONS ON THE FIRST DAY OF
TRIAL.
WHERE HE REVIEWED THEM, CAME TO
COURT THE NEXT DAY AND SAID THAT
HE HAD NO OBJECTION, JUDGE, I
DID READ THROUGH THESE LAST
NIGHT AND I DIDN'T REALLY HAVE A
PROBLEM WITH ANY OF THE
INSTRUCTIONS.
THE INSTRUCTIONS WERE THEN
DISCUSSED FOUR TIMES OVER THE
COURSE OF THE DAY WITH THE
DEFENSE ATTORNEY CONSULTING WITH
HIS KLEIN AND MAKING SUBSTANTIAL
ALTERATIONS TO THOSE
INSTRUCTIONS.
SO IT IS REALLY THE STATE'S
POSITION THAT THE ISSUES IN THIS
CASE CAN BE APPROACHED A NUMBER
OF WAYS.
>> LEAVING ASIDE THE DEAN ISSUE
FOR A MOMENT, IF THERE WAS PLEA
COLLOQUY, ONE HAS NUMBER OF
RIGHTS BEFORE THEY WAIVE A PLEA.
IF THE PLEA COLLOQUY, JUDGE I
WAIVED ALL MY RIGHTS AND NO
DISCUSSION OF WHAT ALL THE
RIGHTS WERE, WOULD THAT BE
SUFFICIENT THAT THE DEFENDANT
WAS NOT ADVISED OF CERTAIN
SPECIFIC RIGHTS?
>> I DON'T THINK THAT WOULD BE
SUFFICIENT.
>> RIGHT.
ISN'T THAT LARGELY BECAUSE IT
HAS TO BE A KNOWING, INTELLIGENT
AND VOLUNTARY WAIVER OF ONE'S
RIGHTS AND FOR THAT TO BE THE
CASE ONE HAS TO KNOW WHAT THOSE
RIGHTS ARE?
ISN'T THAT THE BASIS WHY IT'S
NOT SUFFICIENT?
>> THAT IS, BUT IF YOU APPLIED,
THE WAY THAT DEFINITION HAS BEEN

APPLIED TO WAIVER, SO YOU'RE
APPLYING THAT DEFINITION TO A
DEFENDANT BEING QUESTIONED ABOUT
HIS RIGHTS.
>> I AM.
>> IN THIS SITUATION, IN WAIVER
YOU'RE APPLYING THAT TO A
DEFENSE ATTORNEY AND YOU'RE
ASSUMING THAT THEY'RE IGNORANT
OF THE LAW.
>> IT LOOKED A LOT LIKE EVERYONE
IN THE ROOM WAS IGNORANT OF THE
LAW.
AND BY THE WAY, I WANT TO BE
CLEAR, ALTHOUGH I WAS NOT ON THE
TRIAL BENCH AFTERWARDS, MANY,
MANY GOOD TRIAL JUDGES WHO I
KNOW OF MADE THE SAME ERROR
BECAUSE THE STANDARD
INSTRUCTIONS THIS COURT
SPECIFICALLY BLESSED IS A WHOLE
SEPARATE PROBLEM, ALLOWED THIS
TO HAPPEN.
I DON'T--
>> THAT WAS MUCH DIFFERENT
COURT.
[LAUGHTER].
>> YOU GOT THAT RIGHT.
>> I CAN ASSURE YOU THAT WON'T
HAPPEN ANYMORE.
BUT NO, THESE THINGS, IT
HAPPENED AND MY POINT IS, HOW
CAN WE SAY WITHOUT A SPECIFIC
DISCUSSION OF THE EXACT ISSUE
THAT IT WAS KNOWING INTELLIGENT,
A VOLUNTARY WAIVER WHICH ONE HAS
TO BE IN ORDER TO BE A, AN
ACTUAL RECOGNIZED WAIVER?
>> I THINK THEN YOU APPLY THE
TEST PROPOSED BY THE FIRST
DISTRICT IN THE KNIGHT OPINION.
YOU DON'T ASSUME THAT DEFENSE
COUNSEL IS IGNORANT OF THE LAW
BECAUSE THAT FLIES IN THE
FACE--
>> BUT THEN YOU'RE PUTTING AN
EXTRA BURDEN ON DEFENSE COUNSEL
WHEN THE ULTIMATE PERSON WHO IS
RESPONSIBLE FOR CHARGING THE
JURY CORRECTLY ON THE LAW IS THE

TRIAL COURT, CORRECT?
>> BUT ON THE CONTRARY, IF YOU ASSUME THAT A DEFENSE ATTORNEY IS IGNORANT OF THE LAW, THEN YOU HAVE PUT AN EXTRA BURDEN ON THE STATE TO PROVE EVERY TIME THE DEFENSE ATTORNEY SAYS, YEAH, I'M OKAY WITH THESE JURY INSTRUCTIONS YOU ALMOST HAVE TO FORCE THE STATE TO CONDUCT A MINI FARETTA INQUIRY OF A DEFENSE ATTORNEY, HEY, ARE YOU SURE?
DID YOU REALLY READ THEM?
DO YOU KNOW THE LAW?
AND NOT A RATIONAL RESULT.
>> IN THIS CASE THE STATE ATTORNEY IN THIS CASE WAS ALSO IGNORANT OF THE LAW.
EVERYONE WAS IGNORANT OF THE LAW.
>> EXACTLY.
>> BUT THE LAW JUST CHANGED EVEN IN TERMS OF STANDARD JURY INSTRUCTION, JUST BEEN REVISED A MONTH PRIOR TO THIS ACTUAL--
TRIAL.
>> THE INSTRUCTION WAS NEW, THE RULE WAS NOT.
THIS WAS PUBLIC ISSUE FOR YEARS BEFORE THIS TRIAL.
>> I UNDERSTAND.
THE REALITY IS TRIAL COURT JUDGES ARE GOING TO BE VERY WARY OF DOING ANYTHING UNDER A STANDARD JURY INSTRUCTION AND UP UNTIL A MONTH PRIOR TO THIS TRIAL THE STANDARD JURY INSTRUCTION ON THIS CHARGE WAS STILL THE ONE THAT THEY GAVE.
SO NO TRIAL COURT JUDGE IS GOING TO DEVIATE FROM A STANDARD JURY INSTRUCTION.
>> I THINK THAT THERE IS NO DOUBT IN THIS CASE THAT SOMEBODY, THAT EVERYBODY MADE A MISTAKE ABOUT WHAT INSTRUCTION WAS USED BUT I THINK YOU HAVE TO LOOK AT THE--
>> WHAT ABOUT KNOWING WAIVER

WHEN THERE IS NO DISCUSSION AND
ON JUDGE, OR THE TRIAL COURT
THEMSELF SAYING, MAYBE THIS IS,
I UNDERSTAND THIS IS A STANDARD
JURY INSTRUCTION BUT I READ THE
CASES AND THIS IS NOT CORRECT?
I THINK THAT WE SHOULD REVISE
THE STANDARD JURY INSTRUCTIONS
TO REFLECT WHAT I BELIEVE IS A
CORRECT AND ACCURATE READING OF
THE LAW?
>> THERE IS TWO ANSWERS TO THAT
QUESTION.
THE FIRST IS THAT THIS COURT HAS
TO RECOGNIZE THAT THE ONLY
PERSON IN THAT COURTROOM THAT
BENEFITS FROM AN ERROR OF THIS
NATURE IS THE DEFENSE AND WHILE
IT'S UNDOUBTED THAT EVERYBODY IN
THE COURTROOM MADE A MISTAKE THE
PERSON THAT BENEFITS FROM IT IS
THE DEFENSE.
>> THAT IS NOT REALLY TRUE,
RIGHT?
>> ABSOLUTELY IT'S TRUE.
>> STATE BENEFITS FROM IT BY
HAVING HIGHER BURDEN ON LESSER
INCLUDED OFFENSE SO IT FALLS
SOMEWHERE ELSE, DOESN'T IT?
>> UNDER THE STATE OF THE LAW--
>> AM I RIGHT?
>> I DON'T THINK SO BECAUSE IT
IS ERROR BUILT IN.
>> SAME INTENT IN VOLUNTARY
WHICH IS THE THIRD ON THE CHART
IS THE SAME AS THE FIRST ON
CHART, THEN YOU GET THE MIDDLE,
RIGHT?
ISN'T THAT-- THAT EXACTLY WHAT
THE DEFENSE IS SAYING HAPPENED
HERE?
>> BUT WHEN YOU--
>> AM I RIGHT?
>> YOU'RE CORRECT.
>> OKAY.
>> SO THE STATE BENEFITS FROM
IT, DOESN'T IT?
>> I DON'T I THAT THE STATE DOES
BECAUSE WHEN AN ERROR OF THAT
NATURE IS POINTED OUT ON APPLE

UNDER CURRENT CASE LAW AND IT IS
FUNDAMENTAL ESSENTIALLY ENTITLES
THE DEFENDANT WITH A NEW TRIAL,
THE STATE IS FACED WITH THE HER
COO CUE LIEN TASK, REASSEMBLING
ALL THE WITNESSES PARTICULARLY
IN DOMESTIC VIOLENCE CASE THAT
IS NOT EASY AND BRINGING THEM
BACK AND RETRY THE CASE.
>> UNDER THE RULE YOU'RE
PROPOSING THAT THE STATE--
>> IF YOU ADVOCATE THE PARDON
DOCTRINE THE STATE WOULD BENEFIT
IN THIS CASE, YES.
AND FRANKLY IT WOULD BE
APPROPRIATE--
>> I'M TALKING ABOUT UNDER THE
RULE YOU'RE ADVOCATING ABOUT
WAIVER.
>> ABOUT WAIVER.
>> ABOUT WAIVER, IF WE ADOPTED
THAT, THEN THE STATE ACTUALLY
COULD BENEFIT?
>> NOT NECESSARILY.
>> IF YOU GO BACK TO MY
HYPOTHETICAL FOR A MOMENT, SO
IMAGINE AN DEFENDANT, HE IS
ACTIVE, THIS IS HIS FOURTH PLEA
COLLOQUY, THE OTHER THREE HE IS
WELL-ADVISED OF HIS RIGHTS, HE
HAS KNOWINGLY WAIVED THEM, IN
FACT HE REPRESENTED HIMSELF
AFTER FARETTA AT THE LAST GO
ROUND, HE IS THAT GOOD, HE IS
HERE FOR ROUND NUMBER FOUR AND
THE PLEA COLLOQUY, YOU
UNDERSTAND YOUR RIGHTS?
I'VE BEEN HERE BEFORE, JUDGE.
I WAIVE ALL OF THEM, THAT'S IT?
>> THAT IS NOT SUFFICIENT
BECAUSE--
>> WHY?
>> YOU'RE TALKING TO A
DEFENDANT.
>> SOMEONE CLEARLY KNOWS THE
RIGHTS.
ACTED AS THEIR ATTORNEY THE LAST
GO ROUND.
>> WE TREAT-- SO UNDER YOUR
HYPOTHETICAL WE TREAT DEFENSE

ATTORNEYS THE SAME AS DEFENDANTS
AND--
>> ISN'T A DEFENSE ATTORNEY A
SPOKESMAN FOR A DEFENDANT
ESPECIALLY IN THE CONTEXT OF
WAIVING ONES'S RIGHTS?
>> BUT THE DEFENSE ATTORNEY GONE
TO LAW SCHOOL, PASSED THE BAR
AND BEEN PRACTICING LAW AS
GOVERNED BY THE RULES OF BAR,
THAT FORCE HIM TO HAVE A
KNOWLEDGE OF THE LAW.
YOU WANT TO APPLY THE SAME RULES
TO, TO A DEFENSE ATTORNEY FOR A
DEFENDANT AND I CAN THINK OF SO
MANY WAYS THAT WOULD RICOCHET
THROUGH THE TRIAL PROCESS.
THE SYSTEM PROPOSED--
>> I STILL HAVE A PROBLEM
BECAUSE AGAIN, YOU'RE PUTTING A
HIGHER BURDEN ON DEFENSE COUNSEL
THAN YOU ARE ON THE STATE AND
THERE IS NO REASON.
THEY'RE BOTH OFFICERS OF THE
COURT, CORRECT?
SO THEY'RE BOTH INTERESTED.
IF YOU HAVE A CASE THAT IS
OPPOSITE OR HARMFUL TO YOUR
POSITION, IT IS YOUR OBLIGATION
TO BRING IT TO THE COURT'S
ATTENTION.
SO YOU KNOW, THAT GOES BOTH
WAYS.
SO TO ME THIS CONCEPT THAT
DEFENSE ATTORNEYS HAVE SOME
HIGHER BURDEN THAT THEY HAVE TO
BE ALL KNOWLEDGEABLE WHEN THE
STANDARD JURY INSTRUCTION WAS,
UNTIL A MONTH PRIOR TO THAT, THE
STANDARD JURY INSTRUCTION THAT
WAS ACTUALLY GIVEN IS SORT OF
PERPLEXING TO ME.
IN ADDITION TO THAT THIS WHOLE
CONCEPT OF THE FIRST DCA THAT,
YOU KNOW, THERE IS SOME
STRATEGIC REASON FOR DEFENSE
COUNSEL TO DO THIS IS, YOU KNOW,
I MEAN I KNOW A LOT OF DEFENSE
ATTORNEYS IN MIAMI AND THAT'S
NOT WHAT THEY DO.

I MEAN THEY WANT TO HAVE A GOOD TRIAL AND THEY WANT TO GET IT DONE RIGHT AND THAT IS NOT, THAT IS NOT WHAT THEY DO.
>> I DON'T ASSUME THAT EVERY DEFENSE ATTORNEY DOES.
I WAS ALSO A TRIAL ATTORNEY IN MIAMI AND, THIS COURT HAS A DOCTRINE OF INVITED ERROR.
IT WAS RECOGNIZED IN THE DISTANT PAST.
>> HOW IS THIS INVITED ERROR? HOW COULD IT POSSIBLY BE INVITED ERROR?
>> IT IS SAME CONCEPT-- CONCEPT OF SANDBAGGING ESSENTIALLY STEMS FROM THE CONCEPT OF INVITED ERROR.
>> AS THE JUSTICE POINTED OUT EARLIER DOESN'T INVITED ERROR DOCTRINE REQUIRE RELINQUISHMENT OF A KNOWN RIGHT?
>> YES.
>> HOW CAN YOU SAY THIS WAS A KNOWN RIGHT WITH WE TALKED ABOUT THE FACT THAT APPEARS NO ONE IN THE ROOM THIS WAS A PROBLEMATIC INSTRUCTION?
>> I THINK WHAT THE FIRST DCA'S ANALYSIS ON THIS POINT DOES, IS INTERJECTS A SERIES OF FACTORS TO LOOK AT TO DETERMINE IF THE RIGHT WAS KNOWN.
IT CHANGES THE ANALYSIS ON THAT POINT.
AND THAT STANDARD OF ANALYSIS TAKES INTO ACCOUNT THE POSSIBILITY OF SANDBAGGING.
THE, YOU KNOW, HOW LONG THE INSTRUCTION WAS IN PLACE.
THE STATE IS NOT TRYING TO PREVENT-- YOU KNOW THE STATE IS TRYING TO EQUALIZE THE SYSTEM AND ALLOW WAIVER TO BE FOUND WHEN THE CIRCUMSTANCES SUPPORT IT.
THE INSTRUCTIONS WERE DISCUSSED OVER DAYS, FOUR TIMES.
THE DEFENSE ATTORNEY READ THEM OVERNIGHT.

>> FOUR TIMES THE TRIAL COURT
AND THE PROSECUTOR READ IT AND
NOBODY FOUND A PROBLEM.
>> I AGREE.
>> WHY DIDN'T THE STATE CORRECT
IT?
>> BECAUSE OBVIOUSLY EVERYBODY
IN THIS ROOM MADE A MISTAKE.
>> WAS THE STATE TRYING TO
SANDBAG?
I MEAN--
>> THE STATE HAS NO INTEREST.
>> SEEMS PART OF THE ANALYSIS
HERE TO INPUT THIS SANDBAGGING
MOTIVE BASED ON KNOWLEDGE TO, TO
THE DEFENSE BUT YET THE STATE IS
THERE CLUELESS AND, WHY, IF THE
STATE CAN BE INNOCENTLY CLUELESS
WHY CAN'T THE DEFENSE BE
INNOCENTLY CLUELESS?
>> THEY CERTAINLY CAN AND IN
THAT CASE THESE FACTORS WOULD
HOPEFULLY SORT OUT WHO WAS
INNOCENTLY CLUELESS AND WHO WAS
DOING IT PURPOSEFULLY AND I
THINK THAT, YOU HAVE TO
ACKNOWLEDGE IN A SITUATION WITH
WAIVER LIKE THIS, THAT THE
PERSON THAT BENEFITS FROM THIS
MISTAKE IS THE DEFENSE.
THAT IS WHY THIS WAIVER ANALYSIS
IS NECESSARY.
HOWEVER, I WILL POINT OUT THAT
THIS COURT AGAIN DOES NOT HAVE
TO REACH THIS ISSUE OF WAIVER,
IF YOU ADDRESS EITHER THE
APPLICATION OF FUNDAMENTAL ERROR
OR THE ISSUE WITH THE PARDON
DOCTRINE IN THIS CASE.
>> IF YOU HAD TO PICK, IF YOU
HAD TO PICK, SO LET'S SAY THERE
ARE TWO THINGS WRONG HERE.
THERE IS HOW WE READ FUNDAMENTAL
ERROR, IN THIS CONTEXT,
DIFFERENT THAN ANY OTHER CONTEXT
WE'VE READ FUNDAMENTAL ERROR,
OR, GETTING RID OF THE PARDON
POWER ALL TOGETHER AND ASSUMING
YOUR OPPOSING COUNSEL IS RIGHT,
DEAN DIDN'T DO THAT ALREADY,

WHICH ONE WOULD YOU PICK?
>> ERADICATING PARDON POWER
TAKES CARE OF FUNDAMENTAL ERROR
IN THIS ISSUE AND WAIVER.
IF YOU ABROGATE THE PARDON POWER
WHAT YOU'RE LEFT WITH IS THE
FACT THAT THE JURY IS INSTRUCTED
ASSUMING IN THIS CASE THERE IS
AN ERROR AND LESSER BUT
CONVICTION ON THE HIGHER.
ANY ISSUE WITH THE LESSER MUST
BE PRESERVED, WOULD GO BACK TO
BEING SUBJECT TO THE
CONTEMPORANEOUS OBJECTION RULE
AND COULD BE CHALLENGED ON
DIRECT APPEAL AND THE VERDICT OF
GUILT ON--
>> DOESN'T CHANGING THE
FUNDAMENTAL ERROR ISSUE TAKE
CARE OF THAT?
IN OTHER WORDS, THE STANDARD
RULE IS UNLESS IT VISCIATES THE
TRIAL, I THINK YOU BOTH DO A
GOOD JOB OF THAT IN YOUR BRIEF
DISCUSSING THE NORMAL STANDARD.
FOR SOME REASON ESSENTIALLY DOWN
THE LINE WE SAID THIS IS
REVERSIBLE PER SE WHICH IS NOT
THE CONCEPT OF FUNDAMENTAL
ERROR.
SO HERE AS WE TALKED ABOUT THE
FACTS DON'T SEEM TO SUPPORT
ANYTHING OTHER THAN OR REALLY
HARD FOR THEM TO FIND SUCH THAT
IT WOULD BE HARD TO SAY IS
VISCIATES THE TRIAL THAT THERE
WAS A MISTAKE SOMEWHERE DOWN THE
LINE FOR EVIDENCE THAT DOESN'T
SEEM TO SUPPORT THAT.
WOULDN'T THAT BE AN EASIER WAY
TO TAKE CARE OF THIS PROBLEM AND
RESERVE FOR LATER THE MUCH
HARDER DISCUSSION OF WHETHER TO
DO AWAY WITH THE RIGHT THAT MAY
BE IMPLICIT WITHIN THE RIGHT TO
A JURY TRIAL?
>> I AGREE.
I THINK THERE ARE SEVERAL LEVELS
OF SOLUTION TO THIS CASE.
I THINK THAT IS KIND OF A MIDDLE

LEVEL, WHERE IT IS ABROGATION
LIGHT OF THE PARDON POWER WHERE
YOU SAY THAT THE ISSUE WITH THE
LESSER STILL MUST BE PRESERVED
BUT A NON-PRESERVED ERROR IN A
LESSER IS NOT THIS HYBRID PER SE
REVERSIBLE FUNDAMENTAL BUT THE
BURDEN IS ON THE DEFENSE TO SHOW
IT GENUINELY VISCIATES THE
TRIAL.
>> WHICH IS TRUE FOR ANY ERROR
UNDER CRIMINAL JURISPRUDENCE,
RIGHT?
>> THE MERGING WITH PER SE
HAPPENED WITH ABRAY WHICH IS
PRESERVED, WE APPLIED THE
PRESERVED STATUS TO UNPRESERVED
ERRORS.
THAT IS A POTENTIAL SOLUTION
HOWEVER I THINK THAT, THE LEAVES
IN PLACE THE PROBLEMS WITH THE
PARDON DOCTRINE WHICH IS NOT
BASED IN ANYTHING BUT CASE LAW
AND HAS REALLY BALLOONED AND
BEEN EXPANDED TO PROVIDE
PROTECTIONS.
>> LET ME ASK YOU ANOTHER
QUESTION.
YOU MENTIONED PER SE REVERSAL
RULES WHICH ARE VERY DIFFERENT
FROM FUNDAMENTAL ERROR.
>> VERY, YES.
>> SO A PER SE REVERSAL RULE
WOULD APPLY IF THE COURT SAID IT
APPLIED SO THAT IF THE DEFENSE
COUNSEL DID OBJECT AND SAY, THIS
REQUIRES INTENT AND IT SHOULD
NOT REQUIRE INTENT, WE HAVE A
RIGHT TO BE INSTRUCTED ON ALL
NECESSARILY INCLUDED, LESSER
OFFENSES CORRECTLY, SO SAY THAT
THE DEFENSE COUNSEL HAD WAIVED
THE OBJECTION, WOULD YOU SAY THE
PER SE REVERSAL RULE SHOULD
APPLY OR THE NORMAL HARMLESS
ERROR TEST?
>> THAT DEPENDS WHAT YOU DO WITH
THE PARDON DOCTRINE.
>> ASSUMING WE GET RID OF THE
PARDON DOCTRINE.

>> ASSUMING THAT YOU GET RID OF THE PARDON DOCTRINE.
THE BASIS FOR PER SE REVERSAL IS ABREU BASED ON THE PARDON DOCTRINE.
SAY THE PARDON DOCTRINE IS IT UNDER THAT CIRCUMSTANCE IT REVERSES TO HARMLESS AIR ANALYSIS.
>> IF WE DO THE HARMLESS ERROR ANALYSIS, DO AWAY WITH THE PARDON DOCTRINE, THEN THERE IS PARDON OBJECTION.
>> IF YOU APPLY THE HARMLESS ERROR PROPERLY THE HARMLESS ERROR BURDEN WOULD FALL TO THE STATE TO PROVE THAT THE ERROR WAS HARMLESS.
SO--
>> HOW WOULD THEY DO THAT IF WE SAY YOU CAN'T GET A REVERSAL ON THE TEARY YOU MIGHT HAVE GOTTEN A PARDON TO THE LESSER OFFENSE?
>> I THINK IT IS INFINITELY HARDER.
>> IMPOSSIBLE I WOULD SAY.
>> I THINK THAT IS THOUGH WHY IT WOULD CURE THE ISSUE OF INVITED ERROR.
DEFENSE COUNCIL WOULD HAVE TO OBJECT TO REALLY PRESERVE THE ISSUE OR MAKE IT APPEALABLE, BUT, YES, IT WOULD MAKE IT HARDER, BUT THAT--
>> ISN'T THAT THE VERY PURPOSE OF A PER SE REVERSAL RULE?
SO THAT IF KNOWLEDGEABLE DEFENSE COUNSEL DOES PROPERLY OBJECT AND THERE IS NO WAY TO SHOW PREJUDICE BUT THE TRIAL JUDGE GETS IT WRONG ANYWAY THAT THE DEFENDANT CAN GET A NEW TRIAL IF THERE IS AN OBJECTION WHERE YOU CANNOT SHOW PREJUDICE?
THERE ARE JUST SOME CIRCUMSTANCES WHERE YOU CANNOT SHOW PREJUDICE.
I WOULD THINK IF WE DID AWAY WITH THE JURY PARDON DOCTRINE YOU COULD NOT SHOW PREJUDICE

HERE AS BASIS FOR--
>> THAT IS THE WHOLE POINT OF THE PARDON DOCTRINE.
THE BASIS OF THE PARDON DOCTRINE, WHEN YOU FIND GUILT ON A HIGHER OFFENSE, YOU DON'T HAVE, YOU ASSUME THAT THE JURY, BASED ON, YOU KNOW, THAT CONVICTION IS BASED ON SUBSTANTIAL EVIDENCE, YOU KNOW THAT THE JURY FOUND BEYOND A REASONABLE DOUBT THE ELEMENTS OF THE CRIME.
AND GIVING THE JURY THE POWER, YOU KNOW, TO PRESUME THAT THE JURY WOULD HAVE FOUND SOMETHING ELSE, THAT'S, I MEAN THAT IS THE FUNDAMENTAL PRINCIPLE OF THE PARDON DOCTRINE.
SO WHEN YOU ERADICATE THE PARDON DOCTRINE, YOU ERADICATE THAT SPECULATION.
>> COUNSEL, ISN'T PART OF THE ANSWER THAT IT DEPENDS ON THE EVIDENCE.
IF IT'S A CASE, A CASE WHERE THE EVIDENCE IS STRONG FOR ONE AND VERY WEAK IF NONEXISTENT TO THE OTHER, IT IS VERY EASY TO OVERCOME THE HARMLESS ERROR STANDARD, ASSUMING THERE IS PRESERVED OBJECTION, IN THE CASE WHERE IT FLIPPED, EVIDENCE IS REALLY STRONG FOR LESSER AND VERY, VERY SLIGHT ALTHOUGH JURY FOUND IT FOR THE HIGHER THAT COULD BE SEEN AS PREJUDICIAL THAT FAILED TO INCLUDE LESSER INCLUDE, WOULD IT NOT.
>> I COMPLETE HAY AGREE.
INSTEAD OF STANDING OVER HER WITH A PIPE BEATING HER REPEATEDLY, HE RAN AWAY.
>> SHE IS EGGSHELL VICTIM FOR WHATEVER REASON.
THE JURY FOR WHATEVER REASON FOUND DEPRAVED MIND BASED ON SOME OF THE CIRCUMSTANCES OF THE CASE?
>> I THINK THAT IS AN EXCELLENT

POINT.
>> THERE IS RULE FOR HARMLESS IF WE ADOPT A HARMLESS ERROR STANDARD?
>> IF WE ABDICATE THE PARDON DOCTRINE.
WE ASK YOU PROPERLY APPLY FUNDAMENTAL, MAKE THE STATE PROVE THE CASE, SAME AS FUNDAMENTAL MAKE THE DEFENSE PROVE IT VISCIATES?
>> IT FACT INTENSIVE.
>> YES.
THAT IS THE WHOLE PROBLEM WITH THIS CASE AND THESE DOCTRINES WE MOVED INTO PER SE DECISIONS WITHOUT ANALYZING THE FACTS AND, YOU KNOW, AT ITS CORE THERE ARE A NUMBER ABOUT OF WAYS YOU CAN RESOLVE THIS WHETHER LOOKING AT WAIVER OR FUNDAMENTAL ERROR OR THE PARDON DOCTRINE IT REALLY MOVED AWAY FROM CONSIDERING, DID THE ERROR VICIATE THE TRIAL?
IS THIS SO SERIOUS HE SHOULD RECEIVE A SECOND TRIAL?
IN THIS CASE UNDER ANY THEORY THE ANSWER IS NO.
SO IF THERE ARE NO FURTHER QUESTIONS, THE STATE ASKS THAT THIS COURT AFFIRM THE FIRST DISTRICT COURT OF APPEALS.
THANK YOU.
>> COUNSEL, IF YOU COULD ANSWER A QUESTION FOR ME.
WHAT DOES IT MEAN IN DEAN WHEN THE PLURALITY MAJORITY OPINION SAYS WE APPROVE, QUOTE FOR THE REASONS EXPRESSED IN JUSTICE POLSTON'S CONCURRING OPINION?
>> WHAT DOES THAT MEAN?
>> ISN'T THERE AN AND?
>> I'M ASKING ABOUT THAT PORTION OF IT.
WHAT DOES THAT MEAN?
>> THAT MEANS ONE OF THE TWO BASES FOR THE MAJORITY DECISION IS THE RATIONAL.
>> AND MEANS BOTH, DOESN'T IT?
>> AND MEANS BOTH.

>> DIDN'T THREE JUDGES AGREE TO
JUSTICE POLSTON'S AND THREE
AGREE TO JUSTICE QUINCE'S?
>> THAT MAY BE THE BREAKDOWN.
I'M NOT CERTAIN.
>> THREE IN THE MAJORITY PLUS
JUSTICE POLSTON.
>> THAT COULD BE YOUR HONOR.
>> I COUNT, ONE, TWO, THREE,
PLUS ONE IS FOUR, RIGHT?
>> I COUNT, I COUNT THREE FOR
ABROGATION OF THE JURY PARDON
DOCTRINE AND ONE WHOSE RATIONAL
YOU CAN'T REALLY DETERMINE.
I DON'T THINK IT REALLY MATTERS
AT THIS POINT IF THE ISSUE IS
BEFORE THE COURT TODAY AS TO
WHAT THE COURT DID IN DEAN
BECAUSE IT WAS MAJORITY OPINION
IN DEAN.
>> IF FOUR JUSTICES AGREE TO THE
RATIONAL FOR AFFIRMING IN THE
CASE, IT GOES TO THE REMEDY WHAT
HAPPENS THERE?
>> I SIMPLY DON'T BELIEVE FOUR
JUSTICE DID AGREE.
>> HOW AM I TO READ FOR THE
REASONS EXPRESSED, WE APPROVE
FOR THE REASONS EXPRESSED IN
JUSTICE POLSTON'S CONCURRING
OPINION WHICH IS JOINED BY THREE
JUDGES IN THE PLURALITY, JUSTICE
POLSTON AND HIS CONCURRING
OPINION?
>> BECAUSE JUSTICE LEWIS SIGNED
ON.
HE DIDN'T SIGN ON TO THE
CONCURRENCE.
YOU HAVE THE ADDITIONAL AND,
WHICH IS REASONS--
>> HE SAID HE WOULD AFFIRM FOR
BOTH REASONS IN JUSTICE QUINCE'S
AND JUSTICE POLSTON'S OPINIONS,
RIGHT?
>> I DON'T DISCERN FROM THAT A
MAJORITY OF THIS COURT FOR
ABROGATION OF THE JURY PARDON
DOCTRINE.
ABROGATED OR NOT, IT DOESN'T
MATTER IN THIS CASE.

IT DOESN'T MATTER IN THIS CASE
BECAUSE A RATIONAL JURY COULD
HAVE FOUND THE DEFENDANT GUILTY
OF ATTEMPTED MANSLAUGHTER IF
CORRECTLY INSTRUCTED.
I UNDERSTAND THERE HAS BEEN A
SPLIT OF OPINION ON THIS COURT
AS TO SIMILAR FACTS BUT
UNDER SIMILAR FACTS THIS COURT
HAS SAID THAT THE ERROR WAS
FUNDAMENTAL AND REVERSIBLE.
AND, THOSE DECISIONS ARE
ENTITLED TO THE WEIGHT OF
PRECEDENT.
UNLESS THIS COURT, EXPLAINS WHY
THAT DECISION WAS EITHER UNSOUND
IN PRINCIPLE OR UNWORKABLE IN
PRACTICE.
I HAVE GOOD NEWS FOR THE COURT
WHICH I DON'T THINK YOU WILL SEE
ANYMORE MONTGOMERY CASES AT LONG
LAST.
I THINK IT WILL BE PARTICULARLY
GOOD NEWS FOR JUSTICE LABARGA.
I THINK ALL THE CASES WORKED
THEIR WAY THROUGH THE SYSTEM AND
YOU'RE NOT GOING TO SEE ANYMORE.
THIS IS A THING OF THE PAST.
>> IF WE GET ONE, CAN WE COME
LOOKING FOR YOU?
>> YOU CAN, YOUR HONOR.
I PROMISE YOU CAN.
>> IF WE GET ONE I WILL COME TO
YOU.
[LAUGHTER].
>> WORKED THEIR WAY THROUGH THE
SYSTEM BECAUSE THIS TRIAL WAS IN
FEBRUARY OF 2014.
THE PARDON POWER IS VERY OLD
VINTAGE.
I DON'T THINK YOU NEED TO REACH
IT IN THIS CASE BUT IF YOU DO I
WOULD HOPE THAT YOU WOULD
EXPLAIN TO THE PEOPLE OF FLORIDA
WHY IT IS NO LONGER VALID.
BRIEFLY I WOULD LIKE TO DISCUSS
THE TWO CASES, TWO OUT-OF-STATE
CASES I SUBMITTED AS
SUPPLEMENTAL AUTHORITY.
ONE IS FLORES.

THIS IS HAWAII CASE.
THIS ILLUSTRATES OTHER CASES ARE
APPLYING RATIONAL BASIS FOR A
JURY BY CORRECTLY INSTRUCTED
JURY TEST AND IS NOT PECULIAR TO
THIS COURT AND THESE DECISIONS
AFTER MONTGOMERY.
ALSO THE CALIFORNIA CASE,
VAZQUEZ WHICH SHOWS WHY UNDER A
SIMILAR FACT SCENARIO THE ERROR
WOULD BE HARMFUL IN THIS CASE.
UNLESS THERE ARE ADDITIONAL
QUESTIONS I WILL CONCLUDE.
>> ALL RIGHT.
WELL WE THANK YOU BOTH FOR YOUR
ARGUMENTS TODAY, AND THE COURT
WILL STAND IN RECESS FOR ABOUT
TEN MINUTES.
>> THANK YOU.