

>> WE WILL NOW TAKE UP CASE  
21-904, KEVIN TOMLINSON VERSUS  
STATE OF FLORIDA.

>> I REPRESENT KEVIN TOMLINSON.  
THIS MIGHT SEEM A SIMPLE  
STATUTORY INTERPRETATION CASE,  
THIS IS A FREE-SPEECH CASE.  
ANYONE WHO WANTS TO SPEAK OUT IN  
THIS COUNTRY AT LEAST IN THE  
STATE, FOR OR AGAINST ANY PUBLIC  
OR PRIVATE FIGURE WILL BE  
AFFECTED BY THIS DECISION.  
YOU CANNOT COMMIT THE CRIME OF  
EXTORTION WITHOUT SPEAKING TO  
SOMEBODY, WITHOUT COMMUNICATING  
THE SUPPOSED THREATS.  
THIS COUNTRY HAS ALWAYS AFFORDED  
PEOPLE THE RIGHT TO COMMUNICATE,  
TO SPEAK.

OUR FOUNDING FATHERS ENSHRINED  
THAT RIGHT IN THE FIRST  
AMENDMENT TO THE CONSTITUTION.

THIS IS THE CASE DESPITE THE  
FACT THAT BY DEFINITION SPEECH  
THE GOVERNMENT SEEKS TO  
PROSECUTE HIS SPEECH THE  
GOVERNMENT DOES NOT LIKE.

>> WHY DON'T YOU CITE THE FIRST  
AMENDMENT?

>> THE BRIEF DOES TALK ABOUT THE  
SPEECH ISSUES AND THE ENTIRE  
VAGUENESS.

>> I'M LOOKING AT THE TABLE OF  
CONTENTS.

DON'T SEE A CITATION.

>> I DID NOT PERSONALLY WRITE  
THE CASE BUT THE CASE FROM THIS  
COURT THIS CASE STEMS FROM IS A  
CASE WHERE THERE WAS A  
CHALLENGE.

IN THE BRIEFS --

>> HERE'S WHAT WE SAID, THE  
DEFENDANT'S CONTENTION THAT IT  
IS BIG BY VIRTUE OF THE TERM  
MALICIOUS, REPEATEDLY UPHELD THE  
TERM ANALYSIS AGAINST THE  
VAGUENESS CHALLENGE.  
IT IS A VAGUENESS CASE.

>> THE VAGUENESS CHALLENGE IS  
ULTIMATELY A SPEECH, FIRST  
AMENDMENT.

>> WHAT MALICIOUSLY IMBALANCED  
MEANS IN THE CONTEST OF CRIMINAL

STATUTE AND WHETHER MALICE IN THE LEGAL SENSE, YOU AND YOUR OPPONENT, IN TERMS OF INTENTIONAL ACTION, OR HATRED, BEFORE THE NOTICE YOU FILE THIS MORNING, EVERYTHING YOUR READING IS ABOUT THAT QUESTION SO I AM INTERESTED IN THAT ONE BEFORE WE TALK ABOUT THE FIRST AMENDMENT.

>> THEY ARE RELATED QUESTIONS.

IF THE COURT LOOKS AT THE STATUTORY INTERPRETATION, WHAT DOES MALICIOUSLY MEAN IN THIS STATUTE.

IT'S NOT DEFINED IN THE STATUTE.

CITED, THE DECISION AND GAVELORD, THE LANGUAGE THAT WAS NOT DEFINED AT THAT TIME TO MEAN ACTUAL MALICE AND LEGISLATURE CAME IN AND SAID NO.

FOR CHILD ABUSE AND THEY PUT IN THE STATUTE FOR CHILD ABUSE, MALICIOUSLY, AND EXTORTION.

THE DIFFERENCE BETWEEN CHILD ABUSE IS CONSTITUTIONAL AMENDMENT, IMPLICATED, TO ABUSE YOUR CHILD, YOU HAVE A RIGHT TO SPEAK.

THE FIRST AMENDMENT COMES INTO PLAY.

THE EXTORTION STATUTE.

IT WAS OVERBROAD AND VAGUE.

WITHOUT --

>> I'M STRUGGLING TO UNDERSTAND HOW THE FIRST AMENDMENT ISSUE RELATES TO THE QUESTION PRESENTED HERE ABOUT WHETHER MALICE MEANS ACTUAL MALICE OR LEGAL MALICE.

>> THE WAY THAT IT RELATES IS ACTUAL MALICE PROTECT THE STATUTE FROM BEING UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

SETS THE FIRST AMENDMENT HAS THE WHOLE TRUE THREATS THING.

>> YOU ARGUED THIS IN YOUR BRIEF.

YOU ARGUED THE STATUTE WAS UNCONSTITUTIONAL IN VIOLATION OF THE FIRST AMENDMENT.

>> DON'T THINK IT IS A VIOLATION.

>> IF WE INTERPRET IT THE WAY

YOU THINK WE SHOULD INTERPRET IT.

>> I DO NOT THINK THE STATUTE IS UNCONSTITUTIONAL.

IT HAS ACTUAL MALICE COMPONENT AND IT HAS BEEN LONG HELD YOU CAN CRIMINALIZE SPEECH THAT HAS ACTUAL MALICE TO IT.

>> WHAT WE ARE GETTING IS A LOT OF THE CASES YOU DO IN FACT CITE THE GOVERNMENT HAS JOINT ISSUE WITH, THERE IS DUE PROCESS CASES.

VAGUENESS ABOUT WHEN BECAUSE AN ACT, LEGISLATIVE ACT SPEAKS ON

-- WITH UNCONSTITUTIONAL BREADTH, IT CRIMINALIZES CONDUCT WITHOUT NOTICE TO ME THAT CRIMINAL CONDUCT AS UNDERSTOOD, THE GUIDE OF BEHAVIOR.

THAT TO DO PROCESS QUESTION.

I WAS HOPING WHAT WE SAW TIME TO ENGAGE IN IS DISCUSSION ABOUT WHAT TO DO, THE QUESTION PRESENTED, WHETHER THERE IS SUFFICIENT GUIDE IF WE SAY THE STATUTE CRIMINALIZES MALICE IN THE LEGAL SENSE TO PEOPLE'S BEHAVIOR SO THE PROSECUTION CAN HAPPEN, THAT'S WHAT THE ISSUE IS.

>> AS TO THAT ISSUE WITH THE STATUTE NOT TELLING PEOPLE THE STANDARD.

>> YOU EXPECT COMMON-LAW EXTORTION CALLING LEGAL MALICE?

>> I ACCEPT --

>> IF YOU ACCEPT THAT PREMISE THE CONSTITUTIONAL STUFF GOES OUT THE WINDOW AND WHAT YOU ARE LEFT WITH IS WHAT DOES THE LEGISLATURE DO WHEN THEY USE THE WORDS THEY USE, DOES THE WORD THEY USE MEAN LEGAL MALICE OR ACTUAL MALICE?

YOU STARTED OFF WITH STATUTORY INTERPRETATION CASE AND YOUR STRONGEST CASE IS STATUTORY INTERPRETATION.

THE QUESTION IS WHY GIVEN THE TOOLS WE NORMALLY APPLY TO UNDERSTAND WORDS IN STATUTES, WHY SHOULD WE READ THE WORD MALICIOUSLY HERE TO MEAN ACTUAL

MALICE?

>> I'M GOING TO JUMP ON THAT.  
COMMON-LAW UNDERSTANDING OF  
MALICE, HISTORICALLY BEEN LEGAL  
MALICE DO YOU AGREE WITH THAT?

>> I WOULD NOT.

WHAT I WAS AGREEING WITH?  
YOU DON'T AGREE WITH THAT SO  
COMMON-LAW UNDERSTANDING OF  
MALICE, DON'T AGREE IT WAS LEGAL  
MALICE BUT ACTUAL MALICE.  
HISTORICALLY.

>> THAT ISSUE WAS NOT BRIEFED  
EITHER.

WHAT I WAS TALKING ABOUT --  
>> THIS IS MY QUESTION, WOULD  
YOU AGREE WITH THAT?

>> I'VE NOT RESEARCHED  
COMMON-LAW.

>> COMMON-LAW HAS TREATED MALICE  
THAT WAY AND WHEN WE USE WORDS  
IN A STATUTE IT IS PRESUMED WE  
USE THE MEANING GIVEN IN  
COMMON-LAW UNLESS LEGISLATURE  
SAYS ADOPTING A DIFFERENT  
MEANING SO IF THAT IS ALL TRUE,  
WHY SHOULD WE INTERPRET IN THIS  
STATUTORY CONTEXT THE WORD  
MALICE TO BE ACTUAL MALICE?

>> THE PREMISE YOUR HONOR IS  
COMING FROM, IF YOU LOOK AT THE  
COMMON SENSE, WHAT YOU  
UNDERSTAND IT IS NOT JUST  
INTENTIONAL.

WHEN YOU TALK ABOUT GIVING  
NOTICE TO PEOPLE WHAT IS  
PROHIBITED OR NOT PROHIBITED  
WHEN SOMEONE IS TALKING TO  
ANOTHER PERSON ON THE STREET OR  
SOMEONE IS ACTING MALICIOUSLY  
THEY DON'T MEAN THEY DID  
SOMETHING INTENTIONAL BUT THEY  
DID SOMETHING EVIL.

>> THE DICTIONARY INTERPRETATION  
OF MALICE, YOU LOOK AT ALL OF  
THE MERRIAM-WEBSTER, IN THE  
LEGAL CONTEXT, THE DEFINITIONS  
THEY LAY OUT OUR LEGAL  
DEFINITIONS OF MALICE.

THERE IS ONLY ONE LEGAL  
DICTIONARY, ACTUAL MALICE BUT  
DOESN'T LEAD OFF OF THAT.

>> THE DEFINITION, I DON'T AGREE  
WITH THE PREMISE THAT EVERY

DICTIONARY TALKS ABOUT LEGAL MALICE.

ACTUAL MALICE IS COMMON SENSE UNDERSTANDING.

WHEN THE CRIMINAL STATUTE GIVES PEOPLE NOTICE OF WHAT IS ALLOWED OR NOT ALLOWED, THE COURT NEEDS -- WHAT THEY SHOULD LOOK AT, WHAT ARE WE NOTIFYING PEOPLE OF? IF THE LEGISLATURE SAID WHAT WE MEAN BY MALICE IS JUST INTENT, WE HAVE A DIFFERENT ISSUE AND SOMEONE WILL CHALLENGE ON THE GROUNDS I WAS TALKING ABOUT BEFORE BUT SINCE THEY HAVEN'T SAID THAT THE DEFAULT SHOULD BE A COMMON SENSE UNDERSTANDING OF THE STATUTE.

SO CAN YOU REPEAT?

I GOT LOST WHEN I ASKED ANOTHER QUESTION.

>> IT IS WHAT YOU ARE TALKING ABOUT WHICH IS USING THE NORMAL TOOLS OF STATUTORY INTERPRETATION.

WE HAVE THE COMMON-LAW MEANING.

ARE YOU SAYING WE SHOULD BASICALLY BECAUSE OF THE NOTICE ISSUE GO WITH THE ORDINARY OR COMMON-LAW UNDERSTANDING?

>> THANK YOU FOR REFRESHING MY MEMORY.

THAT IS PART OF IT BUT IF YOU LOOK AT THE ACTUAL LANGUAGE EVERYBODY AGREES THE STARTING POINT FOR STATUTORY INTERPRETATION, IT HAS TWO SEPARATE LIMITING CLAUSES, ONE OF THEM IS FOR THE EXTORTION THAT IT HAS TO BE MALICIOUS. THE OTHER ONE SPECIFICALLY SAYS IN THE STATUTE HAS TO BE DONE WITH INTENT TO INTENTIONALLY DO WRONG.

SO THE GOVERNMENT, THE STATE IS EQUATING THOSE THINGS.

IF THE COURT SAID, THE WORD MALICIOUSLY, THE STATUTE, THE LEGISLATURE DOES NOT PRESUME LEGISLATURES PUT WORDS SUPER LADY INTO STATUTES.

THE FACT THEY WROTE, THE LIMITING FACTOR, AND THE INTENT LANGUAGE IN THE STATUTE TELLS

THE COURT THE LEGISLATURE BEFORE  
THEY PUNISH FLORIDIANS FOR  
SPEECH.

>> IF WE CONCENTRATE ON  
MALICIOUS, IT SEEMS TO ME  
WITHOUT LOOKING AT ANYTHING  
ELSE, THE ORDINARY MEANING OF  
THE WORD MALICIOUS WOULD  
INCLUDE, WICKEDNESS, JUST DOING  
IT, THE WORD MALICIOUS CEASED TO  
HAVE THAT COMPONENT.  
SOMETHING WICKED COMES WHEN I DO  
THIS.

THAT SEEMS TO BE THE STRONGEST  
ARGUMENT.

>> I THINK YOU ARE RIGHT.  
ANY TWO COME TOGETHER, SOMEONE  
DID SOMETHING MALICIOUS THAT IS  
WHAT THEY MEAN.  
IF THAT WORD IS IN THE STATUTE  
ABSENT FURTHER GUIDANCE FROM THE  
LEGISLATURE.

>> INTERPRETED THAT WAY.

>> YOU MEAN XYZ.

>> DID THAT IN THE CONTEXT WITH  
CHILD ABUSE STATUTE AFTER THIS  
COURT RULED IN GAYLORD AND IN  
READ.

>> WHAT WILL THE JURY BE  
INSTRUCTED, WHAT WOULD THE JURY  
HAVE TO DO?

>> YOU MUST FIND THE DEFENDANT,  
IN THE CURRENT ONE, THE CURRENT  
JURY, UNDERSTAND WHY THE COURT  
TOOK THIS CASE BECAUSE IT  
DOESN'T MAKE SENSE TO HAVE  
STANDARD JURY INSTRUCTION TO  
TELL THE TRIAL JUDGE TO CHOOSE  
ONE OR THE OTHER BUT THAT IS IN  
THERE RIGHT NOW.

THEY ACTED WITH BILL WILL,  
HATRED, EVIL INTENT, THERE ARE  
FOUR WORDS, FOUR PHRASES.  
THAT IS WHAT IT SHOULD BE.  
THAT WAS ARGUED AT TRIAL AND THE  
DEFENDANT SHOULD DETERMINE  
BEYOND REASONABLE DOUBT, IN THIS  
CASE.

TO REVERSE THE DEMAND AND HOLD  
THE EXTORTION REQUIREMENT.

>> GOOD MORNING, MAY IT PLEASE  
THE COURT, MY NAME IS KSENIYA  
SMYCHKOUSKAYA ON BEHALF OF THE  
STATE OF FLORIDA.

LEGAL MALICE IS THE PROPER STANDARD FOR EXTORTION. EXTORTION IS ABOUT GREED, NOT HATRED.

THE PURPOSE IS TO PREVENT ONE PERSON BY THREATENING ANOTHER'S PERSON, PROPERTY OR REPUTATION. DOES NOT STATE THE COMMON-LAW CONDUCT, MOTIVATED BY ILL WILL, HATRED OR EVIL INTENT.

INSTEAD, IT REQUIRES THE OFFENSE WAS COMMITTED.

>> YOU WOULD CONCEDE THAT ORDINARILY WHEN INTERPRETING -- WE FIRST LOOK TO THE COMMON SENSE OF THE WORDS BEING USED.

>> YOUR HONOR, WE DO LOOK AT THE TEXT FIRST, CORRECT --

>> PARDON?

>> WE DO LOOK AT THE TEXT --

>> I UNDERSTAND, BUT WE LOOK AT THE WORDS AND THE COMMON SENSE OF THE WORDS BEING USED, IS THAT CORRECT?

>> CORRECT, YOUR HONOR.

>> AND YOU WOULD FURTHER CONCEDE AT THAT THE SENSE THAT YOU ARE ADVOCATING FOR HERE OF LEGAL MALICE IS NOT THE COMMON SENSE OF THE TERM MALICIOUS, RIGHT?

>> YOUR HONOR, I WOULD DISAGREE BECAUSE IF WE LOOK AT THE TERM MALICIOUSLY IN THE CONTEXT OF THE STATUTE, IT WOULD MEAN INTENTIONAL AND UNLAWFUL.

WE NO LONGER LOOK AT THE TERM IN THE ISOLATION WHEN WE LOOK AT THE STATUTE.

WE LOOK AT THE SPECIFIC CONTEXT THAT THAT TERM IS USED.

AND THE PLAIN --

>> SO YOU'RE SAYING THE CONTEXT HERE WOULD POINT AWAY FROM THE COMMON SENSE OF THE TERM TO A TECHNICAL SENSE, WHICH IS LEGAL MALICE, RIGHT?

>> CORRECT, YOUR HONOR.

BUT I WOULD STILL ARGUE THAT COMMON SENSE IS WRONGFUL MORE THAN WITH EVIL INTENT.

>> SO IF I UNDERSTAND YOUR POSITION, IS THAT THIS IS -- THIS WORD JUST HAS TWO MEANINGS, RIGHT?

AND BOTH OF THOSE MEANINGS ARE PRETTY OLD.

AND ONE OF THEM IS PERHAPS MORE COMMON IN COLLOQUIAL USAGE.

BUT THERE'S ANOTHER PERFECTLY GOOD MEANING TO THIS WORD, AND IT'S AN OLD USAGE, AND IT MEANS WITH AN ILLEGAL INTENT.

IS THAT A FAIR REPHRASING OF YOUR ARGUMENT?

>> YES, YOUR HONOR.

BUT ALSO THE RESPONDENT'S ARGUING TODAY THAT BASED ON THE CONTEXT OF THIS STATUTE AND THE MENS REA PROVISION INCLUDED IN THE STATUTE, IT GIVES DIFFERENT MEANING TO LEGAL MALICE.

>> BECAUSE THIS APPEARS IN A STATUTORY TEXT ABOUT EXTORTION, WE HAVE A TEXTUAL CLUE ABOUT WHICH OF THESE WORDS WILL RECOGNIZE MEANINGS TO USE, AND THAT IS THE ONE THAT MEANS WITH AN IMPERMISSIBLE, ILL WILL KIND OF INTENT.

AND THE STATUTE GOES ONE STEP FURTHER AND SAYS, BY THE WAY, BECAUSE THE ELEMENT OF THE CRIME IS -- THAT'S MORE EVIDENCE WE SHOULD USE THE OTHER MEANING OF THE WORD MALICE HERE, RIGHT?

>> CORRECT, YOUR HONOR.

BECAUSE WE MUST EXHAUST ALL THE TEXTUAL CLUES WHEN WE --

>> [INAUDIBLE]

INTENTIONALLY THAT REMAINS ILLEGAL, I DON'T GET THAT FROM THE ORDINARY SENSE OF THE WORLD.

IF YOU WANT TO CHANGE THE MEANING OF THE WORD, THAT'S FINE --

[INAUDIBLE]

>> WELL, YOUR HONOR, INTERPRETING THE TERM MALICIOUSLY IN THE CONTEXT OF EXTORTION WOULD LEAD TO --

[INAUDIBLE]

BECAUSE IT WAS PROHIBITING PENALIZING THE EXTORTION OF STRANGERS OR THE VICTIMS WITH WHOM THE DEFENDANT APPEARS TO HAVE POSITIVE RELATIONSHIP WITH. IT WOULD ALSO LEAD TO OR EVEN ENCOURAGE DEFENSE SYSTEM

ARGUMENT BASED ON SUBJECTIVE  
FEELINGS OF A DEFENDANT INSTEAD  
OF A PECUNIARY INTEREST.  
IT'S DRIVEN BY GREED, BY DESIRE  
TO TAKE ADVANTAGE.  
IT'S NOT A PERSONAL CRIME.  
IT'S NOT ABOUT HATRED.  
IN FACT, NEARLY EVERY  
DISTRICT --

[INAUDIBLE]

THE LEGAL MALICE IS THE PROPER  
STANDARD FOR EXTORTION.

>> LET ME ASK YOU THIS, AND THIS  
HAS TO DO WITH THE QUESTION OF  
EXACTLY WHAT ACTUAL MALICE  
MEANS.

DOES IT NECESSARILY REQUIRE  
HATRED, OR CAN IT JUST BE SOME  
OTHER, OBVIOUSLY, HATRED  
INVOLVED AT EVIL PURPOSE, BUT  
CAN IT ALSO INVOLVE A DIFFERENT  
SORT OF EVIL INTENT?

>> ACTUAL MALICE IS DEFINED AS  
EVIL INTENT --

[INAUDIBLE]

>> BUT THOSE ARE ALTERNATIVES.  
IT COVERS KIND OF A RANGE OF  
THINGS THAT INCLUDE EVIL INTENT  
AS ONE OF THE THINGS IN THEIR  
RANGE OF WHAT IT SIGNIFIES.

>> INCLUDING THE JURY  
INSTRUCTION MIGHT CAUSE MORE  
CONFUSION, WHAT IS EVIL --

[INAUDIBLE]

HOW EVIL IS THE INTENT IN THE  
CONTEXT OF THE CRIME OF  
EXTORTION?

[INAUDIBLE CONVERSATIONS]

>> YEAH.

I MEAN, SO -- GO AHEAD.

>> [INAUDIBLE]

ANOTHER TO DISGRACE, BASICALLY  
TO -- OR LACK OF CHASTITY TO  
ANOTHER --

[INAUDIBLE]

IN ALL THOSE CRIMES SEEM TO HAVE  
SOME KIND OF COMPONENT OF EVIL  
INTENT.

AND ME THREATENING TO EXPOSE  
PERSON --

[INAUDIBLE]

THROUGH THE LACK OF CHARACTER OR  
SOMETHING LIKE THAT, THAT SEEMS  
TO ME A COMMON SENSE APPROACH TO

IT.

>> -- THE DEFENDANT'S OR  
PERPETRATOR'S BEHAVIOR, THAT  
TYPE OF HEARING NEEDS TO BE  
UNLAWFUL.

NOT JUST FULL OF HATE, NOT OF  
SPITE.

THE EXTORTION HAS A LAWFUL RIGHT  
WHAT HE'S DEMANDING OR WHAT HE'S  
CLAIMING.

I THINK IT IS REALLY IMPORTANT  
THAT THERE IS A MENS REA  
PROVISION THAT GUIDES THIS  
COURT, THAT THE INTENT IS TO  
EXTORT AND GET MONEY.

>> HOW DO YOU, HOW DO YOU ANSWER  
COUNSEL'S ARGUMENT THAT, BASED  
ON WHAT ELSE IS IN THE STATUTE,  
THAT UNDER YOUR INTERPRETATION  
OR THE INTERPRETATION YOU URGE,  
THAT MALICE ISN'T REALLY DOING  
ANY WORK BECAUSE IT'S ALREADY IN  
THERE?

WHAT LEGAL MALICE WOULD SIGNIFY  
IS ALREADY EMBEDDED IN THE OTHER  
PROVISIONS OF THE STATUTE.

I THINK THAT'S COUNSEL'S  
ARGUMENT, RIGHT?

[LAUGHTER]

>> WELL, NOT NECESSARILY BECAUSE  
IN THE MENS REA PROVISION IT'S  
THE INTENT OF MONEY, BUT IT  
NEEDS TO BE AN UNLAWFUL ACT,  
UNLAWFUL THREAT.

SOMEONE SHOULD HAVE NO LEGAL  
RIGHT TO DEMAND MONEY.

SO I DO NOT NECESSARILY AGREE  
WITH THE COUNSEL'S POINT.

AND BESIDES, THE COMMON LAW, THE  
CRIME OF EXTORTION NEVER  
REQUIRED ACTUAL MALICE.

>> SO IF IN THIS CASE THE  
DEFENDANT HAD BEEN PROMISED SOME  
CONTRACTUAL PERCENTAGE OF A  
LISTING AND HE HAD SAID I AM  
GOING TO GO PUBLIC WITH THE FACT  
THAT YOU BREACHED THIS CONTRACT,  
THEN HE COULD NOT BE PROSECUTED  
FOR EXTORTION, RIGHT?

BECAUSE HE WOULD HAVE A LEGAL  
RIGHT TO RECEIVE WHAT HE WAS  
DEMANDING.

IS THAT FAIR?

>> HE WOULD HAVE A LEGAL RIGHT

TO OBTAIN THE MONEY.

>> SO THE WORK THAT THE WORD  
MALICIOUSLY DOES IS IT EXCLUDES  
THAT CASE FROM PROSECUTION,  
RIGHT?

AM I UNDERSTANDING YOU  
CORRECTLY?

>> CORRECT, YOUR HONOR.

>> OKAY.

>> IT SEEMS LIKE YOUR CASE, IF  
WE HAVE THIS LENITY ISSUE THAT'S  
HOVERING IN THE BACKGROUND, WE  
KNOW THAT IT COMES IN KIND OF AT  
THE END OF THE INTERPRETIVE  
PROCESS.

BUT IT SEEMS LIKE YOU'RE PUTTING  
A LOT OF, YOU'RE ASKING US TO  
PUT A LOT OF WEIGHT IN THIS  
COMMON LAW CANON AS A TRUMP OF  
THE ORDINARY MEANING CANON.  
BECAUSE IF THEY WERE KIND OF  
EQUALLY PLAUSIBLE UNDERSTANDINGS  
OF THE TERM, EITHER SIDE COULD  
POINT TO A CANON.

THEN YOU WOULD THINK THAT -- IT  
REQUIRES TO SIDE WITH THE  
DEFENDANT.

WHY IS THAT WRONG?

>> NO, YOUR HONOR.

RESPONDENT URGES THIS COURT TO  
LOOK AT THE TEXT AND EXHAUST  
FIRST IF ALL TEXTUAL CLUES AND  
BY LOOKING AT THE TEXT WE SEE  
THE MENS REA PROVISION.

THE FOCUS ON THE INTENT TO  
EXTORT --

>> YOU KEEP ASSUMING WHAT THE  
WHOLE CASE IS ABOUT.

UNLESS YOU SAY, TO SAY THAT THE  
RELEVANT CONTEXT IS THAT IT'S A  
CRIMINAL STATUTE, BASICALLY  
YOU'RE SAYING THAT ANYTIME  
YOU'RE DEALING WITH A CRIMINAL  
STATUTE AND THERE'S AN  
ESTABLISHED COMMON LAW  
UNDERSTANDING THAT THAT  
BASICALLY BECOMES THE CLEAR  
MEANING OF THE TERM.

IT SOUNDS LIKE THAT'S REALLY  
WHAT YOU'RE WANTING US TO SAY.

>> IT'S ONE OF THE ARGUMENTS,  
YOUR HONOR.

HOWEVER, ALSO THE CANON OF  
INTERPRETATION OF THE STATUTES

TO MAKE SURE THEY DON'T LEAD TO ACTUAL RESULTS THE RESPONDENT SUGGESTED AS WELL.

BECAUSE IT WOULD EVENTUALLY ALLOW EXTORTION OF STRANGERS OR THE VICTIMS THAT DEFENDANT NEVER MET IN PERSON, DOESN'T HAVE ANY SUBJECTIVE FEELING --

>> I DON'T UNDERSTAND HOW THAT IS CONSISTENT WITH THE ELEMENT OF IN THE DEFINITION ACTUAL MALICE THAT REQUIRES EVIL INTENT.

YOU DON'T HAVE EVIL INTENT WITH RESPECT TO STRANGERS.

>> WELL, YOUR HONOR, I THINK IT WOULD HAVE A SUBJECTIVE COMPONENT TO IT.

VERY STRAIGHTFORWARD, INTENTIONAL AND UNLAWFUL OF THREAT WITH THE INTENT TO EXTORT MONEY.

AND AS JUSTICE MUNIZ POINTED OUT, THE RULE OF LENITY COMES TO PLAY ONLY AFTER ALL THE INTERPRETIVE TOOLS HAVE BEEN USED AND EXHAUSTED.

AND I DON'T THINK THIS IS THE CASE WHERE WE NEED TO EVEN GO THERE JUST BASED ON ALL THE CREWS ARE GIVEN BY LEGISLATURE IN THE STATUTE AND THE --

>> BUT YOU DO HAVE THIS ISSUE THAT THIS IS NOT -- MAY BE SUPPORTED BY THE COMMON LAW, BUT IT IS CONTRARY TO THE COMMON SENSE OF THE TERM, WHICH IS WHERE WE START.

SO THIS IS AN INTERESTING CASE, I MEAN, BECAUSE YOU'VE GOT THESE DIFFERENT THINGS THAT PLAY INTO THE INTERPRETIVE QUESTION, BUT WE HAVE THIS STATUTORY DIRECTIVE FROM THE LEGISLATURE TO APPLY RULE OF LENITY.

SO THAT'S --

>> AND, YOU KNOW, AND REALLY, I MEAN, CRIMINAL STATUTES ARE AN AREA WHERE, YOU KNOW, ARGUABLY YOU WOULD BE DISINCLINED TO KIND OF GO WITH SORT OF A TECHNICAL/EXPERT UNDERSTANDING AND MAYBE SHADE THINGS MORE TOWARDS THE PERSON IN THE STREET

WHO'S, YOU KNOW, THE AVERAGE PERSON RUNNING AROUND DOESN'T HAVE ANY CLUE WHAT THE COMMON LAW UNDERSTANDING OF WHAT MALICE WAS.

>> YOUR HONOR, GOING BACK TO THE RULE OF LENITY, RESPONDENT DOESN'T BELIEVE THAT --

[INAUDIBLE]

IS IN PETITIONER'S FAVOR.

FIRST, UNDER THE CASE OF, FACTS OF THIS CASE, ACTUALLY BOTH.

SO THE FACTS OF THIS CASE ARE BOTH OF THE DIFFERENT ISSUES WOULD HAVE RESULTED IN THE CONVICTION.

AND THERE COULD BE SCENARIOS WHERE, ACTUALLY, THE PROSECUTION WOULD BE IN POSITION WHERE IT WOULD BE EASIER TO PROVE HATRED INSTEAD OF LEGAL MALICE.

SO NOT NECESSARILY THE RULE OF LENITY WOULD RESULT IN WHAT THE PETITIONER IS ASKING HERE TODAY.

>> BUT YOU CERTAINLY THINK THAT THE OTHER STANDARD WOULD BE MORE FAVORABLE, THE ACTUAL MALICE STANDARD IN THIS CASE WOULD BE MORE FAVORABLE, RIGHT?

IN GENERAL, WOULDN'T IT BE MORE FAVORABLE TO THE DEFENSE?

>> I THINK IT'S VERY CASE SPECIFIC, YOUR HONOR.

IT'S VERY CASE SPECIFIC.

AND APPLICABLE TO THIS CASE, I THINK, THE ACTS OF PETITIONER AND THE THREATS MADE IN THIS CASE, THERE'S ACTUAL MALICE AND LEGAL MALICE WOULD ACTUALLY JUSTIFY THE CONVICTION IN THIS CASE.

LEGAL MALICE IS A SUBSET.

WOULDN'T EVERY CASE -- ALSO SATISFY LEGAL MALICE BUT NOT THE OTHER WAY AROUND?

>> YOUR HONOR, THERE COULD BE SCENARIOS, AGAIN, WHERE THERE ARE THREATS FULL OF HATE TO EXTORT MONEY AND WHERE THE STATE WOULD BE ABLE TO PROVE HATRED, BUT THOSE COMMUNICATION WOULD BE --

[INAUDIBLE]

THAT THE OTHER PARTY WOULD BE

ENTITLED TO DEMAND WHETHER IT'S  
A CONTRACTUAL OBLIGATION, I HATE  
YOU, I WILL SUE YOU, RIGHT?  
BUT IF THERE'S A CONTRACTUAL  
OBLIGATION IF ONE HATES THE  
OTHER PERSON, IT'S STILL  
ENTITLED LEGALLY TO THAT MONEY  
BUT IS FULL OF HATE, THAT THEY  
CAN ESTABLISH HATE, DOES THIS  
COMMUNICATION CONTAIN HATEFUL  
THREATS, LAWFUL -- WELL, THAT  
PERSON IS ENTITLED TO MONEY  
OWED.

SO I THINK IT'S VERY FACT  
FACTUALLY-DRIVEN.

SO NOT NECESSARILY THE RULE OF  
LENITY --

>> COULD YOU ADDRESS THE ISSUES,  
SAY WE DISAGREE WITH YOU.

I DON'T KNOW THAT WE WILL, I  
DON'T KNOW THAT I WILL, BUT SAY  
THAT THAT HAPPENS.

THEN WE GET INTO THE QUESTION  
WHETHER THE IMPACT THAT THIS HAD  
IN THIS CASE, WE EXPLAIN WHY  
EVEN IF THE INSTRUCTION WAS  
WRONG THAT HERE THERE SHOULDN'T  
BE A REVERSAL.

>> SHOULD BE OR SHOULDN'T BE?

>> SHOULDN'T BE.

YOU DON'T WANT A REVERSAL.  
RIGHT?

>> I DON'T WANT A REVERSAL.

THE THIRD DISTRICT ABSOLUTELY IS  
CORRECT.

IN THIS PARTICULAR CASE, AGAIN,  
THE FACTS OF THIS CASE IS THAT  
PETITIONER ACTED BOTH WITH LEGAL  
MALICE AND WITH ACTUAL MALICE.  
HE ACTED OUT OF HATE AND SPITE  
AND JEALOUSY, AND HIS THREATS  
FOR INTENTIONAL AND UNLAWFUL.

SO BASED ON THAT, HIS  
CONVICTIONS SHOULD BE AFFIRMED.

>> [INAUDIBLE]

THAT THE JURY WOULD CONVICT --

>> THAT'S CORRECT, YOUR HONOR.

>> [INAUDIBLE]

>> ABSOLUTELY, YOUR HONOR.

AND IF THIS COURT DOESN'T HAVE  
ANY FURTHER QUESTION, RESPONDENT  
RESPECTFULLY ASKS THIS COURT  
APPROVE THE THIRD DISTRICT'S  
DECISION.

>> OKAY.

SO FIRST OF ALL, AS TO THE COMMON LAW ISSUE OF WHAT DID EXTORTION MEAN IN COMMON LAW, YOU KNOW, I GUESS I LEARNED SOMETHING BY READING THE STATE'S BRIEF, BUT I DON'T THINK THAT HAS ANYTHING TO DO WITH THIS CASE BECAUSE THE EXTORTION CRIME IN COMMON LAW WAS A COMPLETELY DIFFERENT CRIME HAVING TO DO WITH PUBLIC OFFICIALS SEEKING BENEFITS OR SOMETHING.

SO IT DOESN'T MEAN ANYTHING ABOUT WHAT THE COMMON LAW UNDERSTANDING OF THIS CRIME WE'RE TALKING ABOUT IS.

SO I'D SAY THAT.

AS TO THE IDEA THAT THERE'S GOING TO BE -- THE STATE TALKED ABOUT ALL THE, YOU KNOW, SOME LOWER COURTS SAID, WELL, THIS IS NOT A CRIME ABOUT HATRED, THIS IS A CRIME ABOUT GREED.

A FINDING THAT THEY HAVE TO, THAT THE STATE HAS TO PROVE ACTUAL MALICE IS NOT INCONSISTENT WITH THIS.

IT IS NOT MY ARGUMENT THAT EVERYBODY WHO IS GUILTY OF EXTORTION MUST, YOU KNOW, HATE THEIR VICTIM.

IF SOMEONE, YOU KNOW, YOU HAVE THE PROTOTYPICAL SCAMMER THAT, YOU KNOW, MAY BE A STOCK GUY THAT'S GETTING ON THE PHONE AND WORKING IN A BOILER ROOM OR WHATEVER AND HE'S TRYING TO GET, YOU KNOW, HE'S JUST TRYING TO GET MONEY PUTTING PEOPLE INTO TERRIBLE INVESTMENTS, HE DOESN'T HATE THOSE PEOPLE, BUT HE'S ACTING WITH AN EVIL INTENT.

HE KNOWS THAT WHAT HE'S DOING IS NOT WHAT HE'S SAYING TO THOSE PEOPLE.

HE WOULD HAVE ACTUAL MALICE. BUT THE STATE, YOU KNOW, THAT'S AN ELEMENT OF THE CRIME.

>> HOW DO YOU RESPOND TO THE ISSUE OF, THAT THE STATE IN THIS CASE PROVED MALICIOUS --

[INAUDIBLE]

AND THE JURY WOULD HAVE

CONVICTED THEM ANYWAY?

>> WELL, THAT'S JUST NOT THE WAY  
THE LAW WORKS.

IF THE JURY -- YOU KNOW, IF THE  
COURT GETS AN ELEMENT, IF THE  
TRIAL COURT GETS AN ELEMENT OF  
THE CRIME WRONG, THEN, YOU KNOW,  
IT'S THE STATE'S BURDEN.

IT'S FUNDAMENTAL ERROR.

AND IF THAT ELEMENT WAS DISPUTED  
AT TRIAL, THEN IT'S, YOU KNOW,  
REVERSIBLE.

THE ONLY TIME IT'S NOT IS IF THE  
ELEMENT IS DISPUTED.

IN THIS CASE THERE WAS NO DOUBT  
ABOUT WHAT HAPPENED.

HIS WHOLE ARGUMENT WAS BASICALLY  
THAT, YOU KNOW, I WAS TRYING TO  
ENGAGE -- I WAS BASICALLY ACTING  
LIKE A CIVIL LAWYER BEFORE I GOT  
A CIVIL LAWYER.

I WAS TRYING TO, LIKE, SETTLE  
THIS REAL ESTATE COMPLAINT VIA,  
YOU KNOW, VIA THIS PROPOSAL THAT  
THEY PAY ME AND I GO AND DROP  
THE COMPLAINT.

SO HIS WHOLE ARGUMENT WAS I  
WASN'T ACTING WITH, YOU KNOW,  
EVIL INTENT.

NOW, YOU KNOW, WHAT DID THE JURY  
FIND?

I DON'T KNOW.

BUT THAT'S WHAT WE NEED TO FIND  
OUT.

WE CANNOT JUST ASSUME THAT, YOU  
KNOW, HE'S GUILTY BECAUSE THE  
JURY FOUND THAT HE HAD INTENT,  
THE WRONG STANDARD.

THAT'S WHAT THE CASE IS SAYING.

IF THE ELEMENT IS WRONG AND  
IT'S -- IF DISPUTED, IT'S  
REVERSIBLE.

THE OTHER THING I WOULD SAY  
ABOUT THE ABSURD RESULTS  
ARGUMENT THE STATE'S MAKING,  
LOOK, I KNOW THE COURT DOESN'T  
OBVIOUSLY LOVE MY FIRST  
AMENDMENT ISSUE ARGUMENT, BUT  
IF, IF THE COURT MAKES THIS  
STANDARD LEGAL MALICE, THERE ARE  
GOING -- THIS IS ABOUT SPEECH.  
EXTORTION IS ABOUT SPEECH.  
THERE ARE GOING TO BE CHALLENGES  
BASED ON THE FIRST AMENDMENT

LIKE THERE WAS IN --

[INAUDIBLE]

WHICH DOES CITE THE FIRST  
AMENDMENT.

AND, YOU KNOW, THAT WOULD BE AN  
ABSURD RESULT IF THEN, YOU KNOW,  
THE WHOLE EXTORTION WHETHER IT'S  
LEGIT EXTORTION OR NOT LEGIT  
EXTORTION GETS FOUND TO BE  
UNCONSTITUTIONAL BY SOME FEDERAL  
COURT COULD BE THE ROAD.

SO I DO THINK THAT'S SOMETHING  
THE COURT SHOULD KEEP IN MIND.

SO ULTIMATELY, THE COURT SHOULD  
SETTLE THIS SPLIT, THE COURT  
SHOULD GIVE TRIAL COURTS  
GUIDANCE AND FOLLOW THE COMMON  
SENSE DEFINITION OF WHAT PEOPLE  
MEAN WHEN THEY SAY MALICE AND  
HOLD THAT THE CORRECT STANDARD  
IS ACTUAL MALICE AND SHOULD  
REVERSE AND REMAND.

>> THANK YOU.

WE'LL NOW STAND IN RECESS FOR 10  
MINUTES.

>> ALL RISE.