

>> THE COURT WILL TAKE UP THE
CASE OF FRED SOMERS
VERSUS THE UNITED STATES OF
AMERICA.

>> THANK YOU, MR.
CHIEF JUSTICE.

MAY IT PLEASE THE COURT, MY NAME
IS MEGAN SAILLANT FROM THE
NORTHERN DISTRICT OF FLORIDA.

I REPRESENT MR.

SUMMERS IN THE COURT OF APPEALS.
THE 11TH CIRCUIT CERTIFIED TWO
QUESTIONS TO THIS COURT
REGARDING SIMPLE ASSAULT
STATUTE.

AS TO THE FIRST QUESTION,
WHETHER THE FIRST ELEMENT
REQUIRES A SPECIFIC INTENT ALL
THE PARTIES ARE IN AGREEMENT IT
DOES NOT.

THE STATUTE CREATES GENERAL
INTENT CRIME.

THE ONLY ISSUE THAT REMAINS IN
CONTENTION IS WHAT MENS REA IS
REQUIRED FOR THE FIRST
QUALIFICATION OF SIMPLE ASSAULT,
THE FIRST ELEMENT OF SUPPLE
ASSAULT STATUTE REQUIRES
VOLUNTARY ACT WHERE THE ACTOR
CONSCIOUSLY DISREGARDS A
SUBSTANTIAL CERTAINTY THAT THE
VICTIM MAY FEEL THREATENED.

A FLORIDA -- IN FLORIDA
RECKLESSNESS IS REFERRED TO AS
CULPABLE NEGLIGENCE OR RECKLESS
DISREGARD OF HUMAN LIFE FOR THE
SAFETY OF OTHERS.

RECKLESS BEHAVIOR UNDER FLORIDA
LAW IS NOT VOLUNTARY BEHAVIOR.
IT CONTAINS A COMPONENT OF
KNOWLEDGE, NOT THE HEIGHTENED
KNOWLEDGE NEEDED FOR THE HIGHER
CULPABILITY STANDARDS OF
KNOWLEDGE.

>> I WOULD LIKE YOU TO FOCUS ON
THE TEXT OF THE ASSAULT STATUTE.
WHICH REQUIRES AN INTENTIONAL,
UNLAWFUL THREAT BY WORD OR ACT
TO DO VIOLENCE TO THE PERSON OF
ANOTHER.

WHAT DOES THREAT MEAN?

>> THREAT HAS NOT BEEN DEFINED.

>> WHAT IS THE COMMON

UNDERSTANDING OF THE WORD
THREAT?

>> --

>> THAT IS SOMETHING YOU MADE
UP.

IF YOU LOOK UP IN THE
DICTIONARY, IT SAYS SOMETHING
RATHER DIFFERENT.

COMMUNICATED INTENT TO INFLICT
HARM.

THAT IS ONE DICTIONARY.

DECLARATION OF AN INTENTION TO
TAKE HOSTILE ACTION ESPECIALLY

DECLARATION OF INTENTION TO
INFLICT PAIN INJURY DAMAGE.

BUILT INTO THE WORD THREAT,
THERE IS THIS NOTION OF INTENT.

>> THAT NOTION OF INTENT IS NOT
AS HIGH AS KNOWING OR PURPOSEFUL
STANDARDS OF CULPABILITY.

THE DEFINITION OF THREAT
ACCORDING TO THE SUPREME COURT
DOES NOT EXCLUDE RECKLESSNESS.

>> IT IS NOT A GRADIENT
QUESTION.

IT IS A ROUND PEG'S KIND OF
THING.

IT SEEMS DIFFERENT IN KIND NOT
FROM MAKING AN INTENTIONAL
COMMUNICATION.

MENS REA OPERATES, THE CHIEFS
QUESTION IS IT IS HARD TO SEE
HOW RECKLESSNESS, THE THREAT, TO
A COMMUNICATION OF SOME KIND.
IT IS CAVALIER ON THE FACE OF A
RISK.

AND THE COMMUNICATION RECKLESSLY
WHICH DOESN'T SEEM TO FIT.

HELP ME UNDERSTAND, WHAT AM I
MISSING?

>> THE EXAMPLE I HAVE FOUND, THE
EVENT ENDS, AND DISREGARDS THE
FACT THE FIT IS A CROWDED
PARKING LOT, INSTEAD, SCREECHES
OUT OF THEIR PARKING SPACE AND
PUTS ALL THOSE PEOPLE, AFFECT
ALL THE PEOPLE IN THE PARKING
LOT, ALL THE PEDESTRIANS.

THAT PERSON IS PUTTING THOSE
PEOPLE IN FEAR.

WHEN YOU READ THE STATUTE AS A
WHOLE TOGETHER WITH THE THIRD
ELEMENT --

>> WHAT WAS THE THREAT?

>> THAT THEY WOULD GET HIT BY THE CAR.

>> WHAT THREAT TO THE DEFENDANT? I UNDERSTAND BUT TO PUSH BACK A LITTLE BIT, HELP ME UNDERSTAND HOW THAT CONDUCT IS SIMILAR TO THE CONDUCT IN THIS CASE IN THAT THE DEFENDANT ENGAGED IN THREATENING BEHAVIOR.

I'M NOT SURE WHAT WE ARE TALKING ABOUT IS WHAT I WOULD CHARGE OR THEY WOULD CHARGE AS AGGRAVATED ASSAULT.

>> IN MY CASE, WE ARE NOT LOOKING AT THE FACTS OF FRED SOMERS'S STATUTORY ASSAULT.

>> I'M RESPONDING TO WHAT YOU ARE GIVING ME AS SOMETHING THAT MAKES YOUR DEFINITION THREAT WORK AND MY RESPONSE IS I DON'T THINK IT WORKS.

>> I BELIEVE WHEN YOU READ THE STATUTE AS A WHOLE AND REALIZE THERE'S A STRONG VICTIM COMPONENT IN THE THIRD ELEMENT

--

>> THAT IS A SEPARATE ELEMENT. IT IS TRUE THAT IS THERE BUT THAT IS A SEPARATE ELEMENT THAT HAS TO BE SATISFIED IN ADDITION TO THE THREAT ELEMENT.

>> OUR ARGUMENT IS THE THREAT HAS TO BE AN INTENTIONAL ACT THAT WOULD PUT THE VICTIM IN FEAR.

>> UNDER YOUR THEORY HERE, FOLLOWING UP ON THE HYPO, IF SOMEONE WAS DRIVING RECKLESSLY AND THERE WAS NO DOUBT IT WAS RECKLESS DRIVING, WHICH IS A CRIME, SOMEONE WAS IN FEAR THAT THEY WERE GOING TO BE HARMED THROUGH THAT RECKLESS DRIVING COULD THAT PERSON BE CHARGED WITH AGGRAVATED ASSAULT WITH A DEADLY WEAPON?

>> YES.

>> OKAY.

I ALSO THINK --

>> WE HAVE A STATUTORY RULE IN OUR CRIMINAL CODE, ARE STRICTLY CONSTRUED, IT IS MOST FAVORABLY TO THE ACCUSED.

A ROLE REVERSAL, THE PERSPECTIVE

OF PROSECUTION FOR THIS DEFENSE.
IT IS NOT AN INTERPRETATION,
REASONABLE INTERPRETATION ON
THAT OFFENSE WHICH IS GOING TO
REQUIRE A DIRECTION OF A THREAT
OF A PARTICULAR PERSON.
THE BOARD DIDN'T TALK ABOUT
THAT, SPECIFIC INTENT.
WHAT ARE YOU LOOKING FOR?
WHAT CAN WE MEAN UNDER BORDEN?
>> YOU DON'T MEAN ANYTHING UNDER
BORDEN, THE POINT IS FOR YOU TO
DECIDE WHAT THE FLORIDA LAW, HOW
TO FLORIDA LAW -
>> HOW DOES THAT FIT IN THE
BORDEN FRAMEWORK?
THAT IS THE QUESTION THE 11TH
CIRCUIT WANTS US TO ADDRESS.
PARTICULAR TERMINOLOGY WE USE IN
FLORIDA LAW, IN THIS CONTEXT
THESE TERMS ARE USED IN
DIFFERENT WAYS IN DIFFERENT
PLACES AND IS A QUAGMIRE.
HOW ARE OUR STATUTE FIT IN THE
FRAMEWORK UNDER BORDEN.
>> TO IDENTIFY, WHAT MENS REA IS
FOR, THE STATUTE WHAT THAT WAS
UNDER FEDERAL LAW --
>> A QUESTION OF STATE LAW BUT
HOW THE STATE LAW OFFICE, AND --
>> UNDER BORDEN, WHETHER THIS IS
AN OFFENSE COMMITTED RECKLESSLY.
THE LANGUAGE IT WAS USED, THE
RULE THAT BORDEN ESTABLISHED.
>> THIS COURT HAS SAID AGAIN AND
AGAIN A RECKLESS VIOLATION OF
ANOTHER'S RIGHTS, IS AN
INTENTIONAL VIOLATION.
PRESTON, SAVAGE, THERE'S A
NUMBER OF CASES WHERE THEY HELP
OUT AND WHAT THEY ARE PROTECTING
AGAINST WHAT SEEMS TO BE
PROTECTING AGAINST WITH THE
STATUTE IS THE PUBLIC'S RIGHT TO
NOT BE IN FEAR, NOT TO BE
WORRIED SOMEONE IS GOING TO POP
OFF WITH A GUN OR BACK INTO THE
WITH THEIR CAR OR SOMETHING LIKE
THAT.
A RECKLESS VIOLATION, THE
ASSAULT STATUTE IS A RECKLESS
STATUTE.
>> SOMETHING I OBSERVED A LONG
TIME AGO AS A PROSECUTOR.

ARMED ROBBERY WHEN THEY USE A FIREARM, 357 MAGNUM, REQUIRES MY HAND TO PICK UP.

PEOPLE ARE PISTOL WHIPPED AND SO ON.

THE PROSECUTOR IN CLOSING ARGUMENTS PICKS UP THE GUN, WALKED UP TO THE JURY, POINTED AT THE JURY, SAY THIS IS WHAT IT FEELS LIKE TO HAVE A GUN POINTED AT YOU.

WOULD THAT QUALIFY ON YOUR HYPOTHETICAL, WITH THE INTENT. WOULD THAT BE RECKLESS ON THE PART OF THE PROSECUTOR OR QUALIFY AS AN ANCHOR DEAL?

>> THAT COMES DOWN TO A QUESTION FOR THE JURY, WHETHER THAT WAS A REASONABLE ACTION.

I WOULD HAVE BEEN TERRIFIED.

>> THE JURY WAS BUT IN THIS INSTANCE IN MENS REA, HE DID NOT INTEND TO FRIGHTEN THEM OBVIOUSLY BUT WHAT IS REQUIRED FOR A CRIME.

THEY WERE THERE.

>> WHETHER THAT WAS ACTUALLY A THREAT, DOESN'T SEEM REASONABLE TO ME.

>> IT DIDN'T WORK.

THE GUY WAS ACQUITTED.

>> THEY WERE MAD AT THE PROSECUTOR.

THE DCA CASES IN FLORIDA HERE HAVE DISCUSSED SIMPLE ASSAULT, ACTUAL INTENT AND WHAT THE SOLICITOR GENERAL IS, WHAT THAT ACTUAL INTENT IS.

IT IS A DEGREE OF AWARENESS BUT THE ACTUAL INTENT IS A DEGREE LESSER THAN PURPOSEFUL REQUIREMENT WHICH MAKES IT RECKLESSNESS.

AS I SAID --

>> TO AGREE WITH YOU, WE WOULD HAVE TO DECIDE THE ORDINARY DEFINITION OF A COMMUNICATED ATTEMPT TO INFLICT HARM --

>> FLORIDA WOULD HAVE TO RECOGNIZE THE OUTLIER.

IN THE ASSAULT STATUTE.

>> WE WOULD HAVE TO REJECT THAT DEFINITION.

>> WE WOULD HAVE TO HAVE THE

ELEMENT, THE WORD ACTUALLY
DEFINED BY THE COURT IN THIS
STATUTE IS USED IN THE STATUTE
WHICH WE DON'T HAVE?

>> WE GET IT DEFINED IN MULTIPLE
DICTIONARIES.

MY QUESTION IS WE WOULD HAVE TO
REJECT, TO ACCEPT YOUR VIEW WE
HAVE TO REJECT THE DEFINITION
THAT APPEARS IN MULTIPLE
DICTIONARIES.

>> YOU DON'T NECESSARILY HAVE TO
REJECT IT, THERE HAS TO BE AN
UNDERSTANDING THAT THE INTENT IS
NOT ONE OF THE HIGHER LEVELS OF
INTENT.

IN THAT DEFINITION.

IN THAT DEFINITION.

IT IS NOT THE MOST CULPABLE
ELEMENT.

IT IS NOT THE MOST CULPABLE MENS
REA.

IT IS ONE BELOW THAT.

I WILL SAVE THE REST OF MY TIME
FOR REBUTTAL.

THANK YOU.

>> GOOD MORNING.

MAY IT PLEASE THE COURT, I'M A
UNITED STATES ATTORNEY IN THE
SURFACE OF FLORIDA AND I'M HERE
ON BEHALF OF THE UNITED STATES.
WE ASK THE COURT TO HOLD THE
FIRST ELEMENT OF SIMPLE ASSAULT
IN FLORIDA REQUIRES A
PURPOSEFUL, UNKNOWING THREAT OF
VIOLENCE AGAINST ANOTHER PERSON
AND A RECKLESS THREAT IS
INSUFFICIENT TO TRIGGER
CULPABILITY UNDER THE ASSAULT
STATUTE.

>> THAT MAKE SENSE TO ME WHEN
TALKING ABOUT A VERBAL THREAT.
I DON'T SEE HOW IT WOULD BE
DIRECTED AT THE STATUTE.
BUT WHAT ABOUT THREAT BY ACTION?
THERE ARE PLENTY OF CASES IN
FLORIDA WHERE A SUSPECT IS
FLEEING LAW ENFORCEMENT IN THE
VEHICLE, IN A VEHICLE OR
STANDING IN THE WAY AND JUMP OUT
OF THE WAY, IF THE STATE
BELIEVES IT COULD BE PROVEN,
CHARGE ATTEMPTED MURDER, WITH A
DEADLY WEAPON CHARGE THE VEHICLE

BEING A DEADLY WEAPON WOULD BE
LESSER INCLUDED OFFENSE.
THEY WOULD CHARGE IT BASED ON
WHAT I WOULD THINK WOULD BE
RECKLESS CONDUCT, AGGRAVATED
ASSAULT WITH A DEADLY WEAPON.
HOW IS YOUR STATEMENT TRUE WHEN
THE THREAT IS BY ACT?
ISN'T IT POSSIBLE THAT IS
RECKLESS?

>> THE ANSWER IS NO.

IF IT IS A RECKLESS THREAT IT
DOESN'T QUALIFY AS A THREAT
UNDER THE STATUTE.

YOUR QUESTION IS FOCUSED, IT
WILL TURN ON WHETHER OR NOT THE
DEFENDANT IS SUBSTANTIALLY
CERTAIN THAT HIS ACTIONS WOULD
BE PERCEIVED AS THREAT OF
VIOLENCE.

WE SEE THIS IN SWIFT AND
PINCKNEY, SIMILAR FACTUAL
CIRCUMSTANCES.

SWIFT REVERSED IN AGGRAVATED
ASSAULT BECAUSE THERE IS
INSUFFICIENT EVIDENCE THE
DEFENDANT HAD SUFFICIENT --
INSUFFICIENT EVIDENCE THE
DEFENDANT COULD BE CERTAIN THAT
HIS ACTION WOULD BE PERCEIVED IN
A THREATENING MANNER BECAUSE HE
DIDN'T REALIZE THE OFFICER WAS
UNDER THIS PATH WHEN HE WAS
REVERSING THE VEHICLE SO IT IS
GOING TO TURN ON WHAT
CIRCUMSTANCES DO WE KNOW THE
DEFENDANT IS AWARE OF AND
WHETHER THE DEFENDANT IS
SUBSTANTIALLY CERTAIN HIS
ACTIONS WILL BE PERCEIVED AS A
THREAT AND THAT IS ANALOGOUS TO
KNOWLEDGE UNDER THE MODEL PENAL
CODE.

>> THE INTENT TO DIRECT THE
ACTION AS A SPECIFIC PERSON.
THE HYPO THAT I WAS USING WITH
THE CAR, POSSIBLE TO MEET THE --
AGGRAVATED BATTERY OR ASSAULT
WITH A DEADLY WEAPON WITHOUT
INTENDING TO DIRECT TO THAT AT
THE SPECIFIC PERSON.

>> OUR ANSWER WOULD BE NO.
IF THERE IS NOT SUFFICIENT
EVIDENCE A DEFENDANT

SUBSTANTIALLY CERTAIN THAT HIS ACTION IS GOING TO BE PERCEIVED BY ANOTHER PERSON AS A THREAT THAN THAT IS INSUFFICIENT EVIDENCE OF MENS REA UNDER THE STATUTE AND THAT IS WHAT HAPPENED IN SWIFT, INSUFFICIENT EVIDENCE OF KNOWLEDGE SO THEY REVERSED AGGRAVATED ASSAULT CONVICTION.

>> MY EXAMPLE WAS DEFINITELY RECKLESS, 357 MAGNUM, THREE FEET AWAY FROM THEM BUT HE INTENDED TO SCARE THEM SO WHERE DOES THAT FALL?

>> IF HE IS ACTING WITH PURPOSE, THAT QUALIFIES.

>> WOULD HAVE BEEN CHARGED WITH SEGREGATED -- AGGRAVATED ASSAULT.

MANDATORY MINIMUM EACH.

>> YES BUT IF YOU APPLY KNOWLEDGE STANDARD TO THAT YOU IF YOU POINT A GUN AT SOMEBODY, YOU CAN BE SUBSTANTIALLY CERTAIN THAT THE PERSON ON THE RECEIVING END OF THAT GUN IS GOING TO INTERPRET THAT ACTION AS A THREAT.

AND THAT'S ALL WE'RE SAYING THE STATUTE REQUIRES.

>> SO SAY I PICK UP, SAY I HAVE A GUN HERE AND I PICK IT UP, I JUST RECKLESSLY SWING IT AROUND AND I SEE EVERYBODY OUT THERE JUST IS BENDING OVER.

DOES THAT MEAN I JUST COMMITTED AGGRAVATED ASSAULT ON EVERYONE?

>> I THINK THAT'S UP TO QUESTIONING.

I THINK UNDER THE REASONING, YES, THAT COULD BE CHARGED AS AN AGGRAVATED ASSAULT, AND IT WOULD JUST BE A JURY QUESTION OF WHETHER OR NOT YOU WERE CERTAIN BASED ON YOUR ACTIONS AND THE CIRCUMSTANCES IN WHICH IT OCCURRED WAS REASONABLY LIKELY TO CONSTITUTE, TO BE PERCEIVED AS A THREAT.

AND THAT'S ALL WE'RE SAYING THE STANDARD IS.

CERTAINLY, IT MEANS THE STANDARD OF RECKLESS, YOU KNOW?

I COULD SEE ARGUMENT BOTH WAYS,
AND IT'LL COME DOWN TO A FACTUAL
JURY QUESTION, BUT WE DO THINK
THE PLAIN LANGUAGE OF THE
STATUTE COMPELS AT LEAST A
MINIMUM STANDARD OF KNOWLEDGE.
AND THAT COMES FROM THE WORD
INTENTIONAL.

UNDER FLORIDA LAW, INTENTIONAL
MEANS SUBSTANTIALLY CERTAIN.
YOU ACT WITH, YOU ACT -- WHEN
YOU ACT, YOU ARE SUBSTANTIALLY
CERTAIN THAT THE CRIMINAL RESULT
WILL BE ACHIEVED.

AND SO THAT'S A KNOWLEDGE
STANDARD.

IT'S ANALOGOUS TO KNOWLEDGE IN
THE MODEL PENAL CODE.

AND WE PAIR THAT WITH THREAT,
THE ONLY POSSIBLE INTERPRETATION
IS THAT YOU'RE ACTING WITH
SUBSTANTIAL THE CERTAINTY THAT
YOUR ACTION, WHATEVER IT IS, IS
GOING TO BE PERCEIVED BY A
PERSON AS A THREAT.

AND WE THINK THAT'S THE ONLY
INTERPRETATION THAT IS
CONSISTENT WITH THE PLAIN
LANGUAGE OF THE STATUTE.

IF THE FLORIDA LEGISLATURE
WANTED TO HAVE A RECKLESSNESS
STANDARD AND THE ASSAULT
STATUTE, THEY COULD DO THAT IF
THEY WANTED TO.

GEORGIA HAS DONE IT.

THEY WOULDN'T USE THE WORD
INTENTIONAL.

THEY CERTAINLY WOULD NOT SAY
INTENTIONAL THREAT.

THEY WOULD SAY EITHER RECKLESS
WHICH APPEARS IN OTHER FLORIDA
CRIMINAL STATUTES, OR THEY WOULD
USE THE CULPABLE NEGLIGENCE
STANDARD, AND IT'S JUST NOT WHAT
THEY'VE DONE HERE.

SO WE REALLY DO THINK THIS CASE
SHOULD BEGIN AND END WITH THE
PLAIN LANGUAGE OF THE STATUTE.
WE THINK THAT THE FIRST ELEMENT
IS CLEAR, YOU KNOW?

IF IT'S AT LEAST THE KNOWLEDGE.
SO WE SAY PURPOSE OR KNOWLEDGE
IS WHAT WE'RE ASKING THE COURT
TO HOLD.

AND THAT'S JUST BECAUSE THE HIGHER MENS REA PURPOSE INCLUDES IF YOU ACT KNOWINGLY -- EXCUSE ME, IF YOU ACT PURPOSEFULLY, THEN YOU'VE ALSO SATISFIED THE ACT OF KNOWING UNDER SETTLED PRINCIPLES OF CRIMINAL LAW. SO, AND I SHOULD ADD THAT EVERY DISTRICT COURT THAT HAS ACTUALLY FOCUSED ON THE LANGUAGE OF THE FIRST ELEMENT OF FLORIDA ASSAULT HAS AGREED WITH THIS INTERPRETATION. THEY'VE APPLIED A STANDARD THAT'S ANALOGOUS TO KNOWLEDGE. AND THEY'VE LOOKED TO SEE WHETHER OR NOT THE DEFENDANT ACT AD WITH SUBSTANTIAL CERTAINTY THAT HIS ACTION WAS TO ELICIT FEAR OR BE PERCEIVED AS A THREAT, AND WHERE THEY'VE FOUND THAT LACKING THEY'VE REVERSED WITHOUT HESITATION.

>> LET ME GO TO THE NONVERBAL EXAMPLE THAT JUSTICE LAWSON WAS TALKING ABOUT. WHAT ABOUT YOU CUT SOMEBODY OFF IN TRAFFIC, YOU KNOW, ONE CAR REALLY CUTS SOMEBODY OFF IN A VERY ABRUPT, THREATENING SORT OF WAY, AND THE DRIVER WHO HAS BEEN CUT OFF FEELS THREATENED BY THAT. IS THAT ENOUGH?

>> NO, BECAUSE THAT'S FOCUSING ON THE VICTIM'S PERSPECTIVE. THE FIRST ELEMENT OF ASSAULT FOCUSES ON THE DEFENDANT'S INTENT AND WHETHER OR NOT HE WAS SUBSTANTIALLY CERTAIN THAT HIS ACTION WOULD BE PERCEIVED AS A THREAT. I THINK THERE, TOO, IF YOU'RE JUST DEALING WITH, YOU KNOW, SORT OF AGGRESSIVE DRIVING, YOU MIGHT ALSO RUN INTO ISSUES ABOUT WHETHER OR NOT THAT EVEN MEETS THE DEFINITION OF A THREAT. IT'S THE DEFINITION OF --

>> WHAT DOES THE DEFENDANT HAVE TO DO TO -- FLIP 'EM OFF? IS THAT ENOUGH? THEY FLIP 'EM OFF AND THEN CUT THEM OFF?

>> NO.

THE STATE WOULD HAVE TO POINT TO
EXAMPLES THAT HIS ACTIONS WERE
GOING TO BE PERCEIVED
SPECIFICALLY AS A THREAT.

>> SO THAT WOULD BE ENOUGH?

>> I DON'T THINK THAT WOULD BE
ENOUGH.

I MEAN, IT'S GOING TO DEPEND ON
WHETHER OR NOT THERE'S
SUFFICIENT INFERENCE.

I DON'T THINK AGGRESSIVE DRIVING
WOULD BE ENOUGH, YOU KNOW?
DIFFERENT CASES WILL PRESENT
DIFFERENT CIRCUMSTANCES, AND
THERE WILL BE THINGS YOU COULD
POINT OUT, BUT I THINK YOU'RE
GOING TO APPLY THE KNOWLEDGE
STANDARD, AND IT'S GOING TO
DEPEND ON THE DEFENDANT'S
KNOWLEDGE.

>> WHEN WAS THE LAST TIME YOU
DROVE ON THE FLORIDA TURNPIKE?

[LAUGHTER]

>> IT'S BEEN A WHILE.

[LAUGHTER]

IT'S BEEN A WHILE.

BUT WE DO THINK A KNOWLEDGE
STANDARD CAN BE IMPARTED
MEANINGFULLY TO THE STATUTE.
AND LIKE I SAID, EVEN IF THIS
COURT THINKS IT WOULD RESULT IN
APPLICATIONS BASED ON THINGS
THAT HAPPEN IN TRAFFIC, YOU'RE
STILL OBLIGATED TO THE FIGHT THE
PLAIN LANGUAGE OF THE STATUTE.
WE THINK IT'S ABUNDANTLY CLEAR.
THE ONLY THING THAT'S TRUE TO
THE WORDS THE LEGISLATURE PASSED
IS THAT IT'S AN INTENTIONAL
THREAT.

SO THAT'S AT LEAST A KNOWING
THREAT.

IF THERE'S INSUFFICIENT EVIDENCE
OF KNOWLEDGE, THEN YOU
HAVEN'T -- AND THE GOVERNMENT
CAN'T PROVE IT, THEN YOU HAVEN'T
COMMITTED AN ASSAULT UNDER
FLORIDA LAW.

I'M SURE THERE'S OTHER THINGS
THAT COULD FILL THAT VOID, BUT
IT'S NOT AN ASSAULT.

AND SO UNLESS THE COURT HAS ANY
OTHER QUESTIONS, AGAIN, WE'RE

ASKING SIMPLY FOR THE COURT TO HOLD THAT THE AN ASSAULT IN FLORIDA REQUIRES AT LEAST A KNOWING OR PERMISSIBLE THREAT OF VIOLENCE DIRECTED AT A PERSON, BECAUSE THAT'S WHAT BORDEN AND THE 11TH CIRCUIT CARES ABOUT. WE THINK THAT'S PLAIN FROM THE LANGUAGE OF THE FIRST ELEMENT IN THE STATUTE AND SIMPLY A THREAT COMMITTED RECKLESSLY IS JUST INSUFFICIENT AS PROOF FOR CULPABILITY UNDER STATUTE. THANK YOU.

>> MR. CHIEF JUSTICE AND MAY IT PLEASE THE COURT, IF THE COURT HAS NO QUESTIONS ON THE FIRST CERTIFIED QUESTION, I THINK WHAT THE CASE THEN COMES DOWN TO IS THIS A PURPOSE CRIME OR A PURPOSE AND KNOWING CRIME. AND IN THE STATE'S VIEW, IT'S THE LATTER.

THE WORD INTENTIONAL, WHEN THE LEGISLATURE USED THAT PRAISE IN 1974 ACCORDING TO PROFESSOR LEFEVRE, WAS WELL ACCEPTED TO MEAN BOTH THE PURPOSE TO ACCOMPLISH THE ACT AS WELL AS THE KNOWLEDGE THAT THE RESULT WOULD BE SUBSTANTIALLY CERTAIN TO RESULT.

AND SO WE THINK AS THE LEGISLATURE USED THAT TERM IN THE MID '70s, IT ENCOMPASSED BOTH OF THOSE CONCEPTS. IT DID NOT ENCOMPASS RECKLESSNESS.

SO FURTHER SUPPORT FOR THAT IDEA COMES FROM THE U.S. SUPREME COURT'S -- OBJECTIVE TO ACHIEVE A PROHIBITED RESULT, OR YOU SIMPLY KNOW THAT IT'S A SUBSTANTIAL CERTAINTY THAT THE RESULT WILL OCCUR, YOU'VE ACTED WRONGFULLY IN THE EYES OF THE LAW, AND SO IT'S FAIR TO PENALIZE THAT INDIVIDUAL.

>> THE PURPOSE YOU TALKED ABOUT, THE PURPOSE IS TO PLACE A PERSON IN FEAR.

THE PURPOSE OF THE ACT.

>> THE -- I'M NOT SURE THAT WOULD BE THE PURPOSE.

THE PURPOSE WOULD BE TO CONVEY A THREAT, WHICH AS THE CHIEF JUSTICE POINTED OUT, COMMUNICATED INTENT TO THREATEN. BUT I'M NOT SURE YOU ACTUALLY HAVE ANY KIND OF SPECIFIC INTENT TO PUT THE PERSON IN FEAR. IT WOULD BE ENOUGH IF YOU HAD AS YOUR OBJECTIVE THE PURPOSE TO MAKE A THREAT. I THINK THERE IS A DISTINCTION THERE.

>> [INAUDIBLE]
CAN BE PUTTING SOMEBODY -- YOU MAY THINK YOU'RE JOKING, BUT -- [INAUDIBLE]
DOESN'T THINK YOU'RE JOKING. WHERE IS THE PURPOSE THERE?

>> SO THE PURPOSE THERE IS THE COMMUNICATION OF THE INTENT TO THREATEN.

AND I THINK THAT'S, I THINK THAT'S WHAT'S REQUIRED. IN ANY EVENT, THOUGH, UNDER OUR VIEW OF THE MENS REA HERE, THAT KIND OF THREAT WOULD BE COVERED BECAUSE EITHER IT WAS YOUR PURPOSE TO COMMUNICATE THE THREAT TO DO VIOLENCE, OR YOU KNEW THAT IT WAS SUBSTANTIALLY CERTAIN TO RESULT.

NOW, IN YOUR EXAMPLE EARLIER WITH THE PROSECUTOR IN FRONT OF THE JURY WITH THE FIREARM, THE ANSWER THERE MIGHT BE THAT THERE IS NO ULTIMATE LIABILITY EITHER BECAUSE THERE'S NOT A WELL-FOUNDED FEAR OR BECAUSE --

>> SPOKEN LIKE A TRUE PROSECUTOR.

[LAUGHTER]

>> WELL, IT MAY BE IN THE CONFINES OF A COURTROOM IT'S NOT WELL FOUNDED FOR MEMBERS OF THE JURY TO BELIEVE THAT'S A COMMUNICATED INTENT TO THREATEN. THAT MAY BE THE ANSWER TO THE HYPOTHETICAL.

BUT IN ANY EVENT, WE DON'T BELIEVE RECKLESSNESS RISES TO THE LEVEL HERE.

AND I WOULD POINT THE COURT TO PAGES 10-13 OF MR. SOMERS' REPLY BRIEF BECAUSE THE WAY IN WHICH

HE ARTICULATES THE MENS REA THAT HE THINKS APPLIES TO THE INTENTIONAL THREAT PRONG, WE JUST VIEW THAT AS BEING KNOWLEDGE AT LEAST AS ARTICULATE BY FLORIDA LAW IN THE MODEL PENAL CODE.

SO WHEN YOU TALK ABOUT THE SUBSTANTIAL UNJUSTIFIED RISK, ALL THE COMMENTATORS IN COURT SAY THAT'S A RECKLESSNESS STANDARD, OKAY?

IT'S A RISK.

BUT WHEN YOU TALK ABOUT CERTAINTY, WHICH IS THE WAY THAT MR. SOMERS HIMSELF DEFINES THE MENS REA HERE, A SUBSTANTIAL CERTAINTY OR PRACTICAL CERTAINTY, WHEN YOU TALK ABOUT CERTAINTY, THAT'S A KNOWLEDGE STANDARD.

HAVING ANSWERED ANY ADDITIONAL QUESTIONS THE COURT MAY HAVE, THANKS FOR YOUR TIME.

>> REBUTTAL.

>> ALL RIGHT.

SO JUST TO RESPOND, JUST TO RESPOND TO A FEW OF THE POINTS MADE BY EACH OF THE GOVERNMENTS, I THINK ONE THING THAT SEEMS CONFUSING IS THE DEFINITION THAT THE CHIEF JUSTICE IDENTIFIED HAS THE WORD INTENT IN IT, AND THEN THE STATUTE ALSO HAS THE WORD INTENT IN IT.

OR HAS THE WORD INTENTIONAL. AND I JUST WANT TO MAKE CLEAR THAT THAT WORD, INTENTIONAL, IN THE STATUTE AS THE COURTS HAVE IDENTIFIED DOES NOT MAKE IT, DOES NOT LINK TO THE WORD INTENT IN THE THREAT DEFINITION AS THE CHIEF JUSTICE READ.

THAT JUST DETERMINES THAT IT IS A VOLUNTARY ACT, ONE THAT HAS BEEN DONE DELIBERATELY.

IT DISTINGUISHES IT FROM, AS MANY OF THE CASES HAVE SAID, IT DISTINGUISHES IT FROM BEING STRICT LIABILITY OR SOMETHING THAT SOMEBODY DOES INVOLUNTARILY.

ALSO TO POINT OUT, I JUST WANT TO POINT OUT IN BORDEN IT WAS

ONLY THE PLURALITY THAT SAID
THAT THE THREAT WAS A USE OF
PHYSICAL FORCE AGAINST ANOTHER,
IT WASN'T THE MAJORITY.

JUSTICE THOMAS DISSENTED ON THAT
POINT, AND HIS ACTUALLY, HIS
ANALYSIS -- HE DID JOIN THE
PLURALITY, BUT HE DID NOT JOIN
THE MAJORITY.

HE SAID HE WAS FOCUSING ON
WHETHER OR NOT THE USE OF
PHYSICAL FORCE -- I'M SORRY, HAS
A WELL UNDERSTAND MEANING OF
APPLYING, EXCUSE ME, TO THE
INTENTIONAL ACTS DESIGNED TO
CAUSE HARM.

SO HE WAS NOT SAYING, HE DID NOT
AGREE THAT THE DEFINITION OF
THREAT AGREED THAT IT HAD ON
PURPOSELY TARGETED TOWARDS
ANOTHER PERSON.

I THINK IT'S IMPORTANT TO NOTE
THE ELEMENTS OF SIMPLE ASSAULT
HAVE NOT CHANGED OVER TIME.

THEY WERE -- THE COURT
IDENTIFIED THEM AS THE SAME
BEFORE CODIFICATION AND AFTER
CODIFICATION.

AND AS OLD AS THE PETERSON CASE
FROM 1889, THIS COURT IDENTIFIED
THAT IT WAS, THAT THE AGGRAVATED
ASSAULT COULD BE, CONVICTION
COULD BE CAN UPHELD BECAUSE
THERE WAS CLEAR EVIDENCE THAT
THE DEFENDANT ACTED DELIBERATELY
AND RECKLESSLY.

SO THAT DEFINITION HAS CARRIED
ON.

AND IF THERE ARE NO OTHER
QUESTIONS, THAT'S ALL I HAVE.

THANK YOU.

>> ALL RIGHT.

WE THANK ALL THREE OF YOU FOR
YOUR ARGUMENTS IN THIS VERY
INTERESTING CASE.

AND THE COURT WILL NOW BE IN
RECESS FOR ABOUT 10 MINUTES
BEFORE WE TAKE UP THE LAST CASE
ON TODAY'S DOCKET.

>> ALL RISE.