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Jose Pena v. State of Florida

21

PENA VERSUS STATE. 22

GOOD MORNING. 23

TAKE A MINUTE THERE. 24 ALL RIGHT. 25

YOU MAY PROCEED. 26

YOUR HONORS MAY IT PLEASE THE COURT I'M TERRANCE 82 1 KEHOE APPEARING AS SPECIAL ASSISTANT PUBLIC DEFENDER ON 2 BEHALF OF THE PETITIONER JOSE PENA. 3 MR. PENA WAS CONVICTED OF MURDER IN THE FIRST DEGREE BY 4 DELIVERY OF DRUGS AND SENTENCED TO LIFE IN PRISON. 5 HIS CONVICTION WAS AFFIRMED BY THE SECOND DISTRICT, 6 WHICH CERTIFIED TWO QUESTIONS OF GREAT PUBLIC IMPORTANCE 7 TO THIS COURT. 8 FIRST ISSUE I'M GOING TO ADDRESS IS THE FIRST CERTIFIED 9 QUESTION WHETHER OR NOT IT WAS FUNDAMENTAL ERROR IN THIS 10 CASE TO PERMIT THE CON VISION WHERE THE INDICTMENT IN 11 THE CASE FAILED TO ALLEGE THAT MR. PENA WAS 18 YEARS OF 12 AGE OR OLDER AND WHEN THE JURY WAS NOT INSTRUCTED ON 13 THAT ISSUE OF MR. PENA'S AGE, WHERE SECOND DISTRICT 14 STATED IT WAS UNDISPUTED THAT MR. PENA WAS OVER 18 YEARS 15 OF AGE. 16

IT'S ALSO UNDISPUTED THAT THERE WAS NO ATTACK ON THAT 17 CHARGING DOCUMENT, IS THAT CORRECT? 18

THERE WAS NO MOTION TO DISMISS. 19

THERE HAS BEEN NO ATTACK ON IT OF ANY KIND, WAS 20 THERE? 21 TRIAL COURT? 22

NO, NO THIS. ISSUE -- THE ISSUE OF AGE SEEMS TO HAVE 23 PASSED EVERYBODY BY IN THIS CASE. 24

THE FACTUAL RECORD SHOWS IN FACT THAT MR. PENA IS HOW 25 OLD AT THE TIME OF THE OFFENSE? 26

28. 83 1 THERE WAS A STATEMENT THAT HE GAVE TO THE POLICE 2 OFFICERS AT THE TIME OF ARREST, VERY FIRST QUESTION IS 3 WHAT, STATE YOUR NAME AND DATE OF BIRTH OR SOMETHING 4 LIKE THAT. 5 HE SAID HE WAS BORN IN 1971, MADE HIM 28 YEARS. 6 THIS IS NOT SUFFICIENCY OF THE EVIDENCE QUESTION. 7 THIS IS INADEQUACY OF THE CHARGE. 8 ADEQUACY OF THE JURY INSTRUCTIONS. 9

THERE IS AN OPPORTUNITY OF COURSE PRE-TRIAL FOR A 10 LAWYER TO EXAMINE THE CHARGING DOCUMENT AND TO HAVE THE 11 OPPORTUNITY, IF THERE ARE ANY DEFICIENCIES IN THE 12 CHARGING DOCUMENT. 13

IS THAT CORRECT? 14

THERE IS NO QUESTION THE DEFENSE ATTORNEY CAN HAVE, 15 CAN MOVE FOR DISMISSAL. 16 BUT DEFENSE ATTORNEY IS UNDER NO OBLIGATION TO MOVE TO 17 DISMISS CHARGING DOCUMENT

THAT FAILS TO ALLEGE AN 18 ELEMENT. 19 IN OTHER WORDS, AND THERE IS CASES, IF THE CHARGE IS 20 FELONY PETTY THEFT AND THEY DON'T ALLEGE WHAT'S REQUIRED 21 FOR THE FELONY, IN OTHER WORDS, PRIOR PETTY THEFTS, THEN 22 DEFENSE ATTORNEY UNDER NO OBLIGATION TO MOVE TO DISMISS. 23 IT CAN GO TO TRIAL, HE CAN HAVE TEN PRIOR PETTY THEFTS. 24 AND YET HE CAN NEVER BE CONVICTED OR SENTENCED FOR 25 FELONY PETTY THEFT. 26 OFTEN COMES UP IN GRAND THEFT CASES, IF THE ALLEGATION 84 1 IS THAT I STOLE MONEY FROM SOMEBODY, BUT THE CHARGING 2 DOCUMENT DOES NOT SAY THAT I STOLE AMOUNT OF MONEY OF 3 THREE HUNDRED DOLLARS OR MORE. 4 EVIDENCE AT TRIAL COULD BE THAT I STOLE A MILLION 5 DOLLARS. 6 AND YET THAT CHARGE CANNOT SUPPORT A CONVICTION FOR 7 FELONY GRAND THEFT. 8 THAT'S ALL THERE IS TO IT. 9 THAT'S A PETTY THEFT CASE. 10

THE DISTRICT COURT CONCLUDED IT WAS NOT FUNDAMENTAL 11 ERROR. 12 UNDER THESE CIRCUMSTANCES WHERE THERE WAS NO ATTACK, AND 13 WHERE THE FACTUAL RECORD REFLECTED NO DISPUTE ABOUT THE 14 AGE, WHAT WAS THE LEGAL BASIS OF THE DISTRICT COURT'S 15 DECISION? 16 AND WHERE WERE THEY WRONG? 17

WELL, THE LEGAL BASIS, ESSENTIALLY IS BECAUSE THE 18 DEFENDANT FAILED TO FILE MOTION TO DISMISS, AND BECAUSE 19 IT'S NOT IN ISSUE, WE ARE NOT GOING TO FIND FUNDAMENTAL 20 ERROR. 21 WHERE THEY ARE WRONG IS THEY MISSED THE WHOLE LINE OF 22 CASES IN RAY OUT OF THIS COURT IS ONE OF THEM, PETTY 23 THEFT AND GRAND THEFT CASES I HAVE TALKED ABOUT THAT 24 STATE THAT. 25 IF AN ESSENTIAL FACT OF THE INDICTMENT OR INFORMATION -- 26 THIS IS A MURDER ONE CASE HERE, CAPITAL MURDER IS NOT 85 1 ALLEGED IN THE INDICTMENT, THEN THE DEFENDANT, AND IF 2 THE CHARGE WHOLLY FAILS TO MAKE THAT OFFENSE OUT, THEN 3 THE DEFENDANT CANNOT BE CONVICTED OF THAT OFFENSE. 4 THEY DON'T LOOK AT THAT. 5 THEY DON'T LOOK -- I THINK BECAUSE THEY DODGE THE ISSUE 6 OF WHETHER OR NOT AGE IS AN ELEMENT. 7 THEY SAID WE ARE NOT GOING TO DETERMINE WHETHER AGE IS 8 AN ELEMENT IN THIS CASE BECAUSE WE JUST FIND IT'S A 9 NON-ISSUE. 10 WELL THAT IS NOT ENOUGH BECAUSE WHEN YOU'RE DEALING WITH 11 SUFFICIENCY OF THE INDICTMENT, YOU HAVE TO MAKE THE 12 DECISION WHETHER OR NOT AGE IS THE ELEMENT. 13 IF AGE IS AN ESSENTIAL ELEMENT AND I SUBMIT IT IS 14 BECAUSE DEFENSE IN THIS CASE, ABSOLUTE DEFENSE WOULD BE 15 I'M NOT 18. 16 IF I'M NOT 18 IS AN ABSOLUTE DEFENSE, 18 OR OLDER HAS TO 17 BE AN ELEMENT OF THE CRIME. 18

COUNSEL, -- COUNSEL. 19

THEY HAVE TO DECIDE WHETHER OR NOT AGE WAS AN 20 ELEMENT. 21

JUSTICE CANTERO HAS A QUESTION. 22

I'M SORRY. 23

ARE YOU FAMILIAR WITH OUR RECENT CASE OF FB VERSUS 24 STATE WHICH WE DECIDED IN JULY? 25

YES. 26 I UNDERSTAND. 86 1

WHY IS THIS CASE -- HOW IS THIS CASE DISTINGUISHABLE 2 FROM FB VERSUS STATE? 3

BECAUSE QUITE SIMPLY FB IS A SUFFICIENCY OF THE 4 EVIDENCE CASE, IT IS NOT SUCH SITUATE OF THE CHARGING 5 DOCUMENT OR JURY INSTRUCTIONS. 6 FB SAID THAT IF, IN FB THE CHARGE IS ADEQUATE. 7 SO WE ARE NOT DEALING WITH THIS ISSUE. 8

NOT DEALING WITH THAT ISSUE HERE EITHER, RIGHT? 9

NO, THIS IS A, THIS IS ADEQUACY OF THE INDICTMENT. 10 THIS IS NOT SUCH SITUATE OF THE EVIDENCE CASE. 11

BUT YOU DIDN'T MOVE TO DISMISS ON A INADEQUACY OF THE 12 INDICTMENT. YOU'RE ARGUING JURY INSTRUCTION. 13

BUT DEFENSE COUNSEL DOESN'T HAVE A DUTY TO TELL THE 14 STATE, LOOK YOU HAVE MESSED UP THAT JURY INSTRUCTION. 15 EXCUSE ME, YOU HAVE MESSED UP THAT INDICTMENT. 16 THE PIECE OF PAPER THAT YOU CALL AN INDICTMENT DOESN'T 17 STATE A CRIME AGAINST THE STATE, AGAINST THIS DEFENDANT. 18 IT DOESN'T STATE MURDER IN THE FIRST DEGREE BY DRUGS 19 UNDER THE LAW OF FLORIDA BECAUSE THE STATUTE MURDER IN 20 THE FIRST DEGREE BY DRUGS REQUIRES THAT A DEFENDANT BE 21 18, THAT THE DISTRIBUTOR OF THE DRUGS BE 18 YEARS OF AGE 22 OR OLDER. 23

WAIT A SECOND. 24 THAT WASN'T A CERTIFIED QUESTION WAS IT? 25 CERTIFIED QUESTION WAS ON JURY INSTRUCTION ISSUE. 26

THE FIRST PART OF THE CERTIFIED QUESTION IS, WHETHER 87 1 -- WELL, CERTIFIED QUESTION IS, IS IT FAILURE TO AMEND 2 AN INSTRUCTION? 3 OF THE AGE ELEMENT. 4 OKAY? 5

SO HOW DO YOU DISTINGUISH FAILING TO INSTRUCT THE 6 JURY ON THE AGE ELEMENT AND THE SUCH SITUATE OF THE 7 EVIDENCE OF VALUE -- SUFFICIENCY OF EVIDENCE OF VALUE 8 WHICH WE DISCUSSED IN FB AND HELD THAT WAS NOT 9 FUNDAMENTAL ERROR WHERE THERE WAS NO DISPUTE AS TO THE 10 VALUE OF THE GOODS STOLEN? 11

WELL, AGAIN, FB -- IF I READ FB CORRECTLY, IT IS NOT 12 THAT THE JURY WAS INCORRECTLY INSTRUMENTED ON THE 13 ELEMENTS OF GRAND THEFT. 14 IT'S THAT THE DEFENSE COUNSEL AT THE TRIAL DIDN'T MAKE A 15 JUDGMENT OF ACQUITTAL ARGUMENT THAT THE EVIDENCE FAILED 16 TO SHOW GRAND THEFT IN THE THIRD DEGREE. 17 SO IT'S A SUFFICIENCY OF THE EVIDENCE, FAILURE TO MAKE 18 MJOA ARGUMENT, OR SUFFICIENCY OF JURY INSTRUCTION. 19

WE DID DEAL STRAIGHT UP WITH THE ISSUE OF WHETHER A 20 JURY INSTRUCTION WHICH INCORRECTLY STATES THE DEFINITION 21 OF AN ELEMENT OF A CRIME IS FUNDAMENTAL ERROR. 22 IN CASE CALLED REED VERSUS STATE. 23 ARE YOU FAMILIAR WITH THAT? 24

YES, JUDGE. 25

AND WE IN REED VERSUS STATE, REITERATED THIS COURT'S 26 RULE IN STATE VERSUS DELVA, CORRECT? 88 1

RIGHT. 2

AND STATE VERSUS DELVA HOLDS WHERE THERE IS AN 3 ELEMENT WHICH IS EITHER OMITTED OR MISDEFINED, IN AN 4 INSTRUCTION IS ONLY FUNDAMENTAL ERROR IF IT IS DISPUTED 5 ELEMENT. 6 CORRECT? 7

RIGHT. 8

DOESN'T THAT CONTROL THIS CASE? 9

I SUBMIT IT DOESN'T BECAUSE I SUBMIT THAT -- FIRST OF 10 ALL, THAT'S WHAT REED SAYS. 11 NUMBER ONE, IT'S GOT TO BE DISPUTED. 12 AND GOT TO BE AN ERROR IN INSTRUCTION. 13 SO FIRST STEP IS, IS THERE AN ERROR IN INSTRUCTION? 14 HERE WE HAVE NOT JUST AN ERROR IN THE DEFINITION OF 15 MALICE. 16 WE HAVE AN ABSOLUTE FAILURE TO TELL THE JURY THAT ONE OF 17 THE ESSENTIAL ELEMENTS OF THIS CRIME IS THE DEFENDANT 18 MUST BE FOUND TO BE 18 YEARS OF AGE OR OLDER. 19 THIS IS AN ESSENTIAL FACT TO SUPPORT A MURDER BY FIRST 20 DEGREE BY DRUGS. 21 WITHOUT 18 YEARS OF AGE OR OLDER, THERE IS NO MURDER IN 22 THE FIRST DEGREE BY DRUGS. 23 CRIME DOESN'T EXIST FOR 17-YEAR-OLD. 24

WHEN WE'RE DEALING WITH THE SUFFICIENCY OF AN 25 INDICTMENT OR INFORMATION, THERE IS A WHOLE LINE OF 26 CASES THAT TALK ABOUT, FIRST OF ALL, WHAT THE PURPOSE OF 89 1 AN INDICTMENT OR INFORMATION IS. 2 AND THAT IS TO INFORM THE DEFENDANT OF THE CHARGES 3 AGAINST HIM AND TO BE ABLE TO PREPARE A DEFENSE OR 4 DOUBLE JEOPARDY PURPOSES, CORRECT? 5

RIGHT. 6

AND WHAT ABOUT THIS INDICTMENT? 7 DOES THAT INDICTMENT -- DOES THIS INDICTMENT TAKE CARE 8 OF THOSE THINGS? 9 DOES THE DEFENDANT ADEQUATELY INFORMED OF THE CHARGES 10 AGAINST HIM IN THIS CASE? 11

NO, BECAUSE IT DOES NOT STATE THE AGE ELEMENT. 12 I WANT TO CLEARLY UNDISPUTED. 13 NUMBER TWO, ITS CITATION IS JUST 708204. 14

BUT ALSO THIS IS AN INDICTMENT AND IT SAYS FIRST 15 DEGREE MURDER CAPITAL FELONY, CORRECT? 16 SO THAT WOULD BE UNDER WHAT PART OF THE MURDER STATUTE? 17 EVEN THOUGH IT JUST SAYS 782.04, I BELIEVE, CORRECT? 18

RIGHT. 19

IT DOES SAY FIRST DEGREE MURDER. 20 THERE IS ONLY ONE LIKE THREE THINGS UNDER FIRST DEGREE 21 MURDER, YOU HAVE PREMEDITATED -- PREMEDITATED. 22 FELONY MURDER AND THIS SECTION OF THAT STATUTE, CORRECT, 23 THAT TALKS ABOUT MURDER FROM HAVING DISTRIBUTED THESE 24 CONTROLLED SUBSTANCES. 25 THOSE ARE THE THREE WAYS YOU CAN COMMIT FIRST DEGREE 26 MURDER? 90 1

I AGREE WITH YOU. 2 THE FACE OF THE INDICTMENT DOESN'T SAY FIRST DEGREE 3 MURDER. 4 IT CHARGES A CRIME. 5

ON THE SECOND PAGE, DOESN'T SAY THAT IT SAYS THIS IS 6 FIRST DEGREE MURDER AND, ON THE INDICTMENT? 7

I DON'T BELIEVE THAT'S ACCURATE. 8 I DON'T HAVE THAT SECOND PAGE IN FRONT OF ME, I'LL BE 9 HONEST WITH YOU. 10

INDICTMENT IN THE MURDER IN FIRST DEGREE, CAPITAL 11 FELONY. 12

BUT THAT'S A CAP HUNDRED -- CAPTION OF THE CRIME. 13 YOU CAN STYLE SOMETHING GRAND THEFT IN THE FIRST DEGREE 14 BUT UNLESS YOU PUT THE ELEMENTS IN THE CHARGE, AND YES, 15 ASSUMING THAT THAT SAYS SECOND PAGE SAYS MURDER IN THE 16 FIRST DEGREE, THE BOTTOM LINE IS THAT THE CHARGE STILL 17 HAS TO SAY IT. 18 7204. 19

IS THIS A CERTIFIED QUESTION THE DISTRICT COURT HAS 20 CERTIFIED TO US OR ARE YOU ADDRESSING A DIFFERENT ISSUE? 21

PARDON ME? 22

WOULD YOU READ AGAIN THE CERTIFIED QUESTION THAT 23 YOU'RE ADDRESSING NOW? 24

IS IT FUNDAMENTAL ERROR FOR A TRIAL COURT TO AMEND AN 25 INSTRUCTION THAT THE DEFENDANT MUST BE 18 YEARS OF AGE 26 OR OLDER TO COMMIT DRUG DISTRIBUTION FIRST DEGREE MURDER 91 1 UNDER SECTION 78204 FLORIDA STATUTES 199 WHEN IT IS 2 UNDISPUTED THE DEFENDANT IS OVER 18. 3

WHAT I AM TRYING TO SAY IS GOING BACK TO JUSTICE 4 CANTERO'S QUESTION, YOU ARE ARGUING THE SUFFICIENCY OF 5 THE CHARGING DOCUMENT. 6 THE CERTIFIED QUESTION DOES NOT DEAL WITH THE 7 SUFFICIENCY OF THE CHARGING DOCUMENT, DOES IT? 8

WELL, IT DOESN'T BECAUSE IT SKIPS THAT STEP. 9

I'M JUST -- IT DOESN'T DEAL WITH THAT. 10 AS A MATTER OF FACT, I SUPPOSE YOU COULD SAY BY 11 IMPLICATION IT ASSUMES SUFFICIENT CHARGING DOUBT. 12 AND IT ONLY DEALS WITH THE SUFFICIENCY OF THE 13 INSTRUCTIONS GIVEN TO THE JURY, IS THAT CORRECT? 14

THE QUESTION DOES. 15 BUT TO GET TO THIS QUESTION, THE COURT CONSIDERED THE 16 ISSUE OF WHETHER OR NOT THE -- IT STATES THAT THE 17 INDICTMENT DIDN'T ALLEGE THE ELEMENT. 18

WELL I'M JUST TRYING TO DETERMINE WHETHER OR NOT YOUR 19 ARGUMENT IS WITHIN THE BOUNDS OF THE CERTIFIED 20 QUESTIONS. 21 CLEARLY THE OTHER CERTIFIED QUESTION DOES NOT RELATE TO 22 THE SUFFICIENCY OF THE CHARGES. 23

TO ANSWER THIS QUESTION CORRECTLY, YOU HAVE TO 24 UNDERSTAND, AND DECIDE WHETHER OR NOT AGE IS AN ELEMENT. 25 IF AGE IS AN ELEMENT THEN AGE NEEDED TO BE, TO UPHOLD AN 26 CON VISION, AGE NEEDED NOT ONLY TO BE INSTRUCTED IN THE 92 1 INSTRUCTIONS SUBMITTED TO THE JURY, IT HAD TO BE CHARGED 2 IN THE INDICTMENT IN THIS CASE. 3 TO ANSWER THE QUESTION ABOUT WHETHER THE JURY 4 INSTRUCTIONS ADEQUATE, YOU HAVE TO GO BACK TO THE 5 INDICTMENT. 6

LET'S ASSUME THAT THE CHARGING DOCUMENT WAS 7 SUFFICIENT. 8

WAS SUFFICIENT? 9

YEAH, WAS SUFFICIENT. 10 YOU WOULD STILL HAVE THE SAME CERTIFIED QUESTION, WOULD 11 YOU NOT? 12

RIGHT. 13

AND DOESN'T OUR CASE LAW INDICATE THAT AS FAR AS THE 14 ANSWER TO THAT CERTIFIED QUESTION IS CONCERNED WITH 15 REFERENCE TO THE JURY INSTRUCTION, THAT IT IS NOT 16 FUNDAMENTAL ERROR? 17 THAT IS, THAT THE DISTRICT COURT, TAKING AWAY THE ISSUE 18 OF THE SUFFICIENCY OF THE CHARGING DOCUMENT, WOULDN'T 19 THEIR RESOLUTION BE CORRECT UNDER OUR CASE LAW? 20

I SUBMIT IT'S NOT BECAUSE AGE IS IN DISPUTE. 21 WHEN YOU ENTER A NOT GUILTY PLEA TO MURDER IN THE FIRST 22 DEGREE BY DISTRIBUTION OF DRUGS, YOU ARE DENYING ALL 23 ELEMENTS OF THAT CRIME. 24 ONE OF THE ELEMENTS IS AGE. 25 THAT A NOT GUILTY PLEA PUTS THE BURDEN OF PROOF ON THE 26 STATE TO PROVE EVERY ELEMENT. 93 1 IT PUTS A DUTY ON THE TRIAL COURT AND A DUTY ON THE 2 PROSECUTOR TO SEE THAT THE TRIAL COURT INSTRUMENTS THE 3 JURY ON ALL ESSENTIAL ELEMENTS. 4

SO IT WOULD ALWAYS BE FUNDAMENTAL ERROR TO OMIT ONE 5 OF THOSE ELEMENTS IN THE CHARGE TO THE JURY? 6

WHAT MAKES THIS A LITTLE BIT DIFFERENT IS THIS IS A 7 MURDER CASE THAT THE ONLY WAY THIS IS FIRST DEGREE 8 MURDER IS IF THE DEFENDANT IS 18. 9 THIS CANNOT -- DISTRIBUTION OF DRUGS AND KILL SOMEBODY 10 IS NOT FIRST DEGREE MURDER UNLESS THE DEFENDANT IS 18 11 YEARS OF AGE OR OLDER. 12 THIS IS A CAPITAL CASE. 13 THIS DEFENDANT FACED THE POSSIBLE DEATH PENALTY. 14 AND THEY HAVE GOT TO ALLEGE AND THE JURY HAS GOT TO FIND 15 THAT THE DEFENDANT WAS 18 YEARS OF AGE. 16 IT IMPLY INDICATES APPRENDI BECAUSE THIS IS

CLEARLY A 17 FACT-THAT RAISES DEATH PENALTY CONSIDERATION. 18

DID THE DEFENSE COUNSEL FILE ANY KIND OF MOTION FOR 19 JUDGMENT OF ACQUITTAL IN THIS CASE? 20

NO. 21 WELL JUDGMENT OF ACQUITTAL. 22

OR THAT THEY DIDN'T PROVE A PRIMA FACIE CASE OR 23 HOWEVER YOU WANT TO TERM IT? 24 WAS ANY OF THAT KIND OF MOTION MADE AT THE CONCLUSION OF 25 THE CASE HERE? 26

IF IT WAS MADE, IT DIDN'T MENTION AGE. 94 1 OKAY? 2 I MEAN THIS WAS NOT -- AGE IS NOT DISCUSSED IN THESE 3 TRANSCRIPTS. 4 BY THE JUDGE, BY THE PROSECUTOR, BY THE DEFENSE COUNSEL, 5 THAT I SEE EVER. 6 IT IS LIKE THEY DIDN'T READ THE STATUTE. 7 TO ME THIS IS AN ELEMENT IN THE STATUTE, PROSECUTOR 8 WROTE IT, DIDN'T UNDERSTAND THAT. 9 THE INDICTMENT ITSELF SEEMS LIKE --. 10

MARSHAL HAS REMINDED YOU YOU'RE IN REBUTTAL TIME. 11

I DIDN'T GET A CHANCE TO DISCUSS THE JUSTIFIABLE AND 12 EXCUSABLE HOMICIDE AND I WANT TO ADDRESS THAT. 13 I WOULD TELL THE STATE I AM GOING TO ADDRESS THAT IN THE 14 REBUTTAL TIME. 15

YOU HAVE ADDRESSED THAT IN YOUR BRIEF. 16

I DID. 17

THANK YOU GOOD MORNING. 18 MY NAME IS ERICA RAFEL, ASSISTANT ATTORNEY GENERAL HERE 19 ON BEHALF OF THE RESPONDENT IN THIS CAUSE. 20 I WILL CUT TO THE CHASE AND ADDRESS ONLY THE TWO 21 CERTIFIED QUESTIONS AND --. 22

LET ME ASK YOU THIS BEFORE YOU GET TO THE CERTIFIED 23 QUESTION. 24 YOUR OPPONENT MR. KEHOE SAYS YOU CAN'T GET TO THE FIRST 25 CERTIFIED QUESTION UNLESS YOU DETERMINE WHETHER OR NOT 26 AGE IS IN FACT AN ELEMENT OF THE CRIME OF FIRST DEGREE 95 1 MURDER BY DISTRIBUTION OF NARCOTICS. 2 IS AGE IN FACT AN ELEMENT OF THAT CRIME? 3

THE STATE WOULD SUBMIT IT IS STATUTORY REQUIREMENT OF 4 SORTS BUT IT IS NOT AN ELEMENT OF THE CRIME. 5 IF I COULD HAVE JUST A MOMENT TO EXPLAIN. 6 FIRST OF ALL THE PURPOSE OF CHARGING DOCUMENT AS YOUR 7 HONOR POINTED OUT IS TO PUT A DEFENDANT ON NOTICE SO HE 8 CAN PREPARE A DEFENSE AND NOT BE JEOPARDIZED BY FACING 9 POSSIBLE DOUBLE JEOPARDY FOR A LATER PROSECUTION. 10 THIS PARTICULAR INDICTMENT TRACKED THE PRECISE DRUGS TO 11 HERNANDEZ. 12 THEREFORE THERE WAS NO JEOPARDY -- NO PREJUDICE TO 13 MR. PENA IN HIS PREPARATION OF DEFENSE AND THE RULES OF 14 CRIMINAL PROCEDURE CLEARLY PROVIDED -- PROVIDE A VEHICLE 15 FOR MOTION TO HAVE BEEN MADE AT OR UPON ARRAIGNMENT OR 16 SHOULD TIME BE RESERVED AT ARRAIGNMENT FOR ATTACKING THE 17 CHARGING DOCUMENT AND THE FLORIDA RULES OF CRIMINAL 18 PROCEDURE ALSO STATE QUITE CLEARLY THAT ONCE A PLEA IS 19 ENTERED WITHOUT RESERVATION TO ATTACK-IT IS WAIVED. 20

BUT IF WE FIND THIS IS IN FACT AN ELEMENT OF THIS 21 CASE, WHY SHOULD THE DEFENDANT HAVE TO BE THE ONE TO 22 RAISE THIS ISSUE BEFORE THE COURT WHEN IT'S UP TO THE 23 PROSECUTOR, IT IS THE PROSECUTOR'S OBLIGATION TO 24 ADEQUATELY CHARGE THE CRIME? 25

I AGREE WITH YOU ON THE POINT THAT IT IS UP TO THE 26 STATE TO ADEQUATELY CHARGE. 96 1 HOWEVER, IF WE TAKE THAT ONE STEP FURTHER AND GO ALONG 2 AND SAY THAT IT IS NOT THE OBLIGATION OF A DEFENSE 3 ATTORNEY TO MAKE AN OBJECTION OR A MOTION FOR MORE 4 DEFINITE STATEMENT OR A MOTION TO STRIKE THE CHARGING 5 DOCUMENT, THEN ANY

DOCUMENT THAT IS WANTING IN SOME 6 REGARD IS A BUILT IN AMBUSH AT THE CONCLUSION OF THE 7 TRIAL SHOULD THE DEFENDANT BE CONVICTED. 8 SINCE THE VERY PURPOSE OF THIS IS TO PUT HIM ON NOTICE 9 AND BECAUSE HE WAS 28 YEARS OLD, AND THERE WAS NO ISSUE 10 AS TO HIS AGE. 11

WHAT ABOUT THE SITUATION THOUGH WHERE HERE, YOU LOOK 12 AT THE RECORD, YOU SAY WELL HE'S GOT A CONFESSION IN 13 THERE. 14 LET'S TAKE ANOTHER CASE WHERE YOU DON'T HAVE A RECORD 15 THAT AFFIRMATIVELY SHOWS THAT. 16 AND EVERYBODY, -- AND NOBODY KNOWS. 17 AND SO ARE WE GOING TO HAVE ONE RULE WHERE THE RECORD 18 CONTAINS THE CONFESSION AND THE BIRTH DATE AND A 19 DIFFERENT RULE? 20 AND WHEN IT DOESN'T CONTAIN THAT? 21

I THINK THIS GOES BACK TO YOUR HONOR'S POINTING OUT 22 STATE VERSUS DELL VIRGINIA, THE TRIAL COURT FAILED TO 23 INSTRUCT THE TRIAL COURT KNEW OF ILLICIT NATURE OF THE 24 DRUGS. 25 AND THE COURT HELD IT IS NOT FUNDAMENTAL ERROR TO FAIL 26 TO INSTRUCT ON AN ELEMENT IF THE RECORD SHOWS THERE IS 97 1 NO DISPUTE AS TO THAT ELEMENT. 2 NOW, I UNDERSTAND THAT THERE CAN BE OTHER SCENARIOS 3 PLAYED OUT BEFORE THIS COURT. 4 BUT THIS IS A CERTIFIED QUESTION ON THIS RECORD WITH 5 THESE FACTS, WHICH ARE VERY UNIQUE. 6 AND I THINK THAT THIS COURT CAN EASILY LEAVE THE OPINION 7 OF THE SECOND DISTRICT COURT OF APPEAL INTACT. 8

WELL WE HAVE TO DECIDE, DON'T WE, BECAUSE THERE DOES 9 SEEM TO BE A CONFLICT AT LEAST IN THE DISTRICT COURTS, 10 WHETHER IT IS AN ESSENTIAL ELEMENT OF THE CRIME OR YOU 11 SAID SOMETHING ELSE. 12 I DON'T KNOW WHAT SOMETHING ELSE IS. 13 DON'T WE HAVE -- IT SEEMS LIKE YOU'RE AGREEING IT IS AN 14 ESSENTIAL ELEMENT OF THIS PARTICULAR CRIME. 15

I THINK I CALLED IT A STATUTORY REQUIREMENT TO BE 16 FULFILLED. 17 THAT IF AN INDIVIDUAL IS --. 18

WHAT DOES THAT MAKE IT? 19 SOUNDS TO ME, STATUTORY REQUIREMENT BE FULL TILT, THAT 20 IS ON AN ELEMENT OF THE CRIME. 21 WELL,. 22

I'M STILL SAYING IT STILL COULD BE UNDER REED, IT MAY 23 NOT BE FUNDAMENTAL ERROR, BUT I THINK DON'T WE HAVE TO 24 MAKE, SECOND DISTRICT SAID THEY'RE NOT GOING TO GET INTO 25 THAT. 26 DON'T WE NEED TO DO THAT FOR THIS OPINION? 98 1

I'M NOT SURE, I'M NOT SURE THAT YOU HAVE AN -- YOU 2 HAVEN'T ALREADY DONE IT. 3 IN 1978 THE THIRD DISTRICT COURT OF APPEAL CAME OUT WITH 4 A CASE CALLED JOHNSON. 5 AGE OF THE VICTIM IN A SEXUAL BATTERY CASE WHERE IT WAS 6 REQUIRED FOR HER TO BE UNDER 11 YEARS OF AGE WAS QUOTED 7 BY THE THIRD DCA TO BE A MISSING TECHNICAL ELEMENT AND 8 OBJECTION WAS REQUIRED. 9 FD, WHICH WAS ISSUED BY THIS COURT LAST MONTH AS JUSTICE 10 CANTERO POINTED OUT, RELIED ON JOHNSON IN ITS 11 DETERMINATION TO FIND THAT AN OBJECTION TO THE FAILURE 12 TO PROVE VALUE IN A DEATH CASE WAS REQUIRED. 13

I GUESS, MAYBE SOMETHING JUST MORE BASIC. 14 DO YOU AGREE, WHETHER IT CAN BE JURY INSTRUCTION 15 ADMITTING IT IS FUNDAMENTAL ERROR IS DIFFERENT FROM, IS 16 THE AGE IN THIS CASE AN ESSENTIAL ELEMENT OF THE CRIME 17 OF DRUG DEATH? 18

I UNDERSTAND. 19 AGAIN, AN ELEMENT OF THE CRIME WOULD BE SOMETHING MORE 20 TANTAMOUNT TO ALLEGING IN THE FEAR OF A VICTIM IN 21 AGGRAVATED ASSAULT. 22

YOU'RE DANCING AROUND SOMETHING THAT'S JUST OBVIOUS. 23 IF THE STATUTE SAYS THAT'S PART OF WHAT YOU HAVE TO 24 DEMONSTRATE IN ORDER TO CONVICT A PERSON, OF THIS 25 PARTICULAR STATUTE, WHETHER YOU WANT TO CALL IT AN 26 INGREDIENT OR AN ELEMENT OR WHATEVER, IT'S PART OF THE 99 1 STATUTORY REQUIREMENT, IS IT NOT? 2

THERE IS NO QUESTION. 3

IF THIS -- OKAY. 4

THERE IS NO QUESTION. 5 IF HE WAS 17 YEARS OLD, HE COULD HAVE EASILY MOVED TO 6 DISMISS AND THE COURT, THE TRIAL COURT WOULD HAVE TO 7 HAVE GRANT IT SO ON THAT BASIS WE CAN CERTAINLY STATE IT 8 IS AN ELEMENT OF THE CRIME THAT HAS TO BE ESTABLISHED. 9

AND IF WE FOUND OUT ON APPEAL HE WAS 17, WOULD WE BE 10 ARGUING THIS. 11

CERTAINLY WOULDN'T BE STANDING HERE MAKING THESE 12 ARGUMENTS. 13

YOU WOULD NOT BE. 14 SAYING HE COULDN'T BE CONVICTED OF THAT CRIME? 15

IF I FOUND OUT THAT HE WAS 17 YEARS OF AGE AFTER A 16 TRIAL, I DON'T KNOW WHAT THE VEHICLE THAT I WOULD HAVE 17 USED BUT THERE WOULD HAVE BEEN AN ERROR. 18 HE CANNOT BE CONVICTED OF THIS CRIME IF HE IS UNDER THE 19 AGE OF 18. 20

ISN'T THIS SORT OF THE PROBLEM, THAT IS, THAT IF WE 21 HAVE A SILENT RECORD, IS THE STATE GOING TO MAKE THE 22 ARGUMENT THAT THEREFORE THERE IS A WAIVER OF THAT ISSUE 23 BY NOT MAKING A MOTION FOR A DIRECTED VERDICT OR ASKING 24 FOR A JURY INSTRUCTION? 25 WHATEVER. 26 IN OTHER WORDS, ARE ALL PROSECUTORS GOING TO BE AS 100 1 ETHICAL AS YOU ARE IN TERMS OF ADDRESSING THIS AND AS 2 CONSCIENTIOUS OR ARE WE GOING TO HAVE SITUATIONS WHERE 3 IF SOMEBODY SAYS, WELL THAT'S TOUGH, YOU SHOULD'VE 4 BROUGHT THAT UP AT TRIAL? 5 WELL, YOU KNOW, THE FLIP SIDE OF THAT IS COUNSEL HAS 6 PROPOSED THAT THERE IS NO OBLIGATION ON THE PART OF THE 7 DEFENSE TO MAKE AN OBJECTION TO AN INDICTMENT WHEN IT'S 8 WANTING. 9 NOW, IN THE BEST OF ALL POSSIBLE WORLDS, THIS INDICTMENT 10 WOULD HAVE ALLEGED THE AGE AND THE JUDGE WOULD HAVE 11 INSTRUCTED ON AGE. 12

WHAT DOES OUR CASE LAW SAY BY THE WAY WITH REFERENCE 13 TO, IF THE INDICTMENT DOES NOT CONTAIN AN ELEMENT AND IT 14 IS NOT ATTACKED IN THE WAY THAT IS PROVIDED FOR BY THE 15 RULES, BUT IS THEN LATER ATTACKED, EITHER COLLATORALLY 16 OR ON APPEAL, DO WE HAVE A SPECIFIC CASE LAW OUT OF THIS 17 COURT THAT ADDRESSES THAT? 18

I AM SURE AND I AM APOLOGETIC I DO NOT HAVE IT. 19 I DON'T HAVE ANY CITATION FOR YOU. 20 I DON'T THINK THIS IS THE FIRST TIME A SCENARIO HAS 21 OCCURRED. 22

SO YOU ARE NOT FAMILIAR WITH CASE LAW ON THAT? 23

I AM NOT. 24

. 25

I GUESS IT IS IN FACT, IF IT IS IN FACT A NONEXISTENT 26 CRIME, I MEAN WE WOULDN'T JUST SAY OKAY, DIRECT APPEAL 101 1 IS OVER, NOTHING CAN BE DONE ABOUT IT, WOULD WE? 2

I DON'T UNDERSTAND. 3

WELL FOR PURPOSES OF A 17-YEAR-OLD, THIS IS A 4 NONEXISTENT CRIME. 5

THAT'S CORRECT. 6

SO WOULD WE, JUST BECAUSE HE WAS CONVICTED ON SOME 7 KIND OF POST-CONVICTION SAY, TOO BAD? 8

ABSOLUTELY NOT. 9 AND CLEARLY NOT. 10 THE POINT IS TO HAVE AN OUT COME THAT IS BASED ON THE 11 LAW. 12 HOWEVER, IN THIS CASE, THERE WAS NO DISPUTE AS TO HIS 13 AGE. 14 AND THAT'S WHY THERE WAS NO MOTION TO DISMISS OR I WOULD 15 CERTAINLY PUT THAT FORTH. 16 I MEAN, COUNSEL FOR APPELLATE HAS SUGGESTED MAYBE THE 17 TRIAL ATTORNEY DIDN'T READ THE INDICTMENT. 18 I CAN HARDLY BELIEVE THAT THAT WOULD BE TRUE. 19 OBVIOUSLY A DEFENSE WAS MOUNTED IN THIS CASE AND THE MAN 20 WAS 28 YEARS OLD AND THERE WAS NO OBJECTION AT TRIAL ON 21 PAGE 270 OF THE RECORD WHERE HE ADMITTED OR HE STATED 22 THAT HE WAS BORN ON JUNE 25, 1971. 23 IF I COULD JUST -- WELL, WITH THE COURT'S PERMISSION, 24 COULD I MOVE ON AS FAR AS THE INSTRUCTION OF THE 25 CERTIFIED QUESTION REGARDING THE INSTRUCTION ON AGE? 26 IN GLOVER VERSUS STATE OUT OF THE FIFTH DCA, THERE WAS A 102 1 CAPITAL SEX BATTERY AND INSTRUCTION THAT FAILED TO LIST 2 THE DEFENDANT'S AGE AS AN ELEMENT AND THE COURT FOUND IT 3 WAS HARMLESS BECAUSE THERE WAS NO JURY REASONABLE JURY 4 WHO COULD HAVE FOUND THAT INDIVIDUAL UNDER THE AGE OF 5 18. 6 AND I WANT TO DRAW DISTINCTION BETWEEN THE BATTERY 7 STATUTE AND CAPITAL SEX BATTERY IS UNIQUE BECAUSE IT IS 8 A SENTENCING FACTOR BECAUSE OVER 18 WITH A VICTIM UNDER 9 THE AGE OF 12, IS A CAPITAL FELONY. 10 AND UNDER 18 AND UNDER 12 IS A LIFE FELONY. 11

IF THAT IS A FACT, EVEN IN THE CAPITAL SEXUAL BATTERY 12 SITUATION, IF AGE IS IN FACT AN ELEMENT OF THE CRIME, 13 DID THE FIFTH DISTRICT SAY IT WAS AN ELEMENT OF THE 14 CRIME IN THE GLOVER CASE THAT YOU'RE CITING? 15 DIDN'T THE FIFTH DISTRICT SAY IT WAS AN ELEMENT? 16

THEY DID LIST IT AS ELEMENT IN THE CAPITAL SEX 17 BATTERY ARENA. 18

SO YOUR ARGUMENT WOULD STILL BE THE SAME THEN, THAT 19 YOU CAN, EVEN THOUGH THE INSTRUCTION WAS NOT GIVEN, IT 20 WAS HARMLESS UNDER THE CIRCUMSTANCES? 21

UNDER THE VERY UNIQUE FACT SPECIFIC CIRCUMSTANCES OF 22 THAT CASE AND THIS CASE. 23

HOW IS BAKER V STATE, WHICH IS PUT AS A CF TO GLOVER, 24 THE THIRD DISTRICT HELD IT WAS FUNDAMENTAL ERROR TO 25 CONVICT OF CAPITAL SEXUAL BATTERY NEEDED THE 26 INFORMATION, THE VERDICT MAKES REFERENCE TO THE FACT THE 103 1 OFFENDER IS 18 YEARS OF AGE OR OLD SENATOR. 2

THAT IS CITED IN THE SECOND DISTRICT COURT OF 3 APPEAL'S OPINION AND IT DOES STATE THAT. BUT GLOVER IS 4 A LATER CASE. 5

BUT ONE'S FROM THE THIRD AND ONE'S FROM THE FIFTH. 6

THAT'S CORRECT. 7 AND WE HAVE ONE, I SUPPLIED AUTHORITY THIS MORNING TO 8 COUNSEL ON FILE WITH THIS COURT, DADE'S BANK OUT OF THE 9 FOURTH DCA, LEWD AND LASCIVIOUS AND THE FOURTH DISTRICT 10 LIKE KENNEDY IT TO CAPITAL SEX BATTERY. 11 THERE WAS UNCONTESTED EVIDENCE OF THE DEFENDANT'S AGE. 12 AND THE FAILURE TO INSTRUCT ON THE AGE ISSUE WAS NOT, 13 WAS HELD NOT TO BE FUNDAMENTAL ERROR. 14

FOURTH DISTRICT, I AM JUST READING FROM THE CASES 15 THAT JUDGE ALTONBERG DESCRIBES. 16 FOURTH DISTRICT SAYS AGE WASN'T AN ELEMENT BUT 17 SENTENCING ELEMENT. 18

THAT WOULD BE TRUE IN CAPITAL SEX BATTERY. 19 I THINK IT CAN BE CONSTRUED AS SUCH BECAUSE YOU HAVE 20 OVER 18. 21 IT'S A CAPITAL FELONY. 22 UNDER 18 IT'S A LIFE FELONY IN THE CAPITAL SEX BATTERY 23 ARENA. 24

IN THE BAKER CASE, BACK TO THE BAKER CASE WHERE THEY 25 SAID WAS FUNDAMENTAL ERROR, WAS THE ISSUE OF AGE A 26 CONTESTED ISSUE IN THE BAKER CASE? 104 1

WELL THE VERDICT MADE REFERENCE IN BAKER THAT HE WAS 2 18 OR OLDER -- NO, I'M SORRY. 3 NEITHER THE INFORMATION NOR THE VERDICT MADE REFERENCE 4 TO THE FACT THAT HE WAS 18 YEARS OF AGE OR OVER. 5 AND I'M GOING TO BE FRANK WITH THE COURT. 6 I DON'T RECALL SPECIFICALLY. 7

ALL RIGHT. 8 HOW ABOUT ADDRESSING THE OTHER CERTIFIED QUESTION? 9

I WOULD LIKE TO VERY MUCH. 10 THE OTHER CERTIFIED QUESTION IS THE FAILURE TO INSTRUCT 11 THE JURY ON JUSTIFIABLE AND EXCUSABLE HOMICIDE. 12 SMITH VERSUS STATE WAS CITED BY THE SECOND DISTRICT 13 COURT OF APPEAL BUT SMITH RELIED ON THIS COURT'S OPINION 14 FROM 1994 IN LUCAS VERSUS STATE, WHERE THIS COURT HELD 15 THE FAILURE TO INSTRUCT ON JUSTIFIABLE AND EXCUSABLE 16 HOMICIDE IS FUNDAMENTAL ERROR, WHERE THE DEFENDANT IS 17 CONVICTED OF MANSLAUGHTER OR OFFENSE NOT GREATER THAN 18 ONE STEP REMOVED. 19 NOW AGAIN, THERE WAS SOME THINGS THAT ARE TRANSPIRED 20 FROM THE CHARGING DOCUMENT ON THROUGH THIS TRIAL THAT IN 21 THE BEST OF ALL POSSIBILITY WORLDS HAD IT BEEN 22 DIFFERENT. 23 HOWEVER, WE NEED TO LOOK BEFORE WE GET FURTHER INTO THE 24 CASE LAW ON THIS AT THE FACTUAL BACKDROP OF THIS. 25 THE PROSECUTOR CAME OUT DURING THE INITIAL CHARGING 26 CONFERENCE AND SAID I DON'T THINK THE INTRODUCTION TO 105 1 HOMICIDE IS APPLICABLE IN THIS CASE, YOUR HONOR. 2

DON'T WE HAVE A CASE -- ISN'T THERE SOME CASE LAW OUT 3 THERE THAT SAYS THAT THOSE INTRODUCTORY INSTRUCTIONS ARE 4 APPLICABLE TO ALL HOMICIDE CASES? 5

YES, YOUR HONOR, THAT'S CORRECT. 6

ANOTHER SMITH VERSUS STATE OR STATE VERSUS SMITH. 7

THERE ARE SEVERAL THAT DO. 8 AND HILL IS ANOTHER ONE THAT INDICATES THAT THAT 9 INSTRUCTION SHOULD BE GIVEN. 10 HOWEVER --. 11

HOW DO WE GET AROUND THAT LANGUAGE THAT SAYS IT 12 SHOULD BE GIVEN IN EVERY HOMICIDE CASE? 13

WELL I THINK THOSE WERE BROAD STROKE CASES WITH FIRST 14 DEGREE PREMEDITATED MURDER CASES. 15 IN THIS PARTICULAR SITUATION, THE JURY WAS INSTRUCTED ON 16 FIRST DEGREE MURDER, SECOND DEGREE MURDER, THIRD DEGREE 17 MURDER, MANSLAUGHTER, DELIVERY AND POSSESSION. 18 AND I THINK THAT THERE IS A LOT OF SUPPORTING CASE LAW 19 OUT THERE THAT BASICALLY SAYS THIS WOULD BE REVERSIBLE 20 ERROR WHEN THE COURT FAILS TO INSTRUCT ON THE LESSER, 21 THAT IS ONE STEP REMOVED FROM WHAT THE DEFENDANT WAS 22 CONVICTED OF. 23 AGAIN, IF MR. PENA HAD BEEN CONVICTED OF SECOND DEGREE 24 MURDER I COULD NOT STAND HERE AND MAKE THIS ARGUMENT 25 BECAUSE MANSLAUGHTER IS ONE STEP REMOVED FROM SECOND 26 DEGREE, AND REQUIRES THAT INSTRUCTION. 106 1 BUT I'D ALSO LIKE TO REMIND THE COURT IN THE FACE OF 2 OPPOSITION IN GIVING THIS INSTRUCTION BECAUSE THE 3 INSTRUCTION SHOULD GUIDE THE JURY, NOT CONFUSE OR 4 CONFOUND THEM. 5 AND FINDING, WE ALL KNOW WHAT THE SUBSTANCE IS OF THE 6 JUSTIFIABLE AND EXCUSABLE HOMICIDE INSTRUCTION. 7 APPLYING THEM TO THESE FACTS WOULD ABSOLUTELY CONFUSE A 8 JURY FOR THEIR CONSIDERATION. 9 AND I THINK THAT IS SOMETHING THE TDCA APPOINTED OUT IN 10 THIS UNIQUE FACTUAL BACKGROUND. 11 BUT IN THE FACE OF OPPOSITION FROM THE PROSECUTOR, THE 12 DEFENSE ATTORNEY'S RESPONSE WAS I WANT ALL THE LESSERS 13 AND THE TRIAL COURT TOLD THE PROSECUTOR TO GET WITH 14 DEFENSE COUNSEL ON THE LESSERS. 15 NOW WE ARE NOT PRIVY TO WHATEVER CONVERSATION THEY HAD 16 REGARDING ANY OF THIS. 17 ALTHOUGH ALL THE LESSERS WERE DEFINITELY GIVEN. 18 AND I THINK THAT KIND OF SILENCE IS TANTAMOUNT TO 19 ACQUIESCENCE IN THE FACE OF OPPOSITION BY THE STATE. 20

THANK YOU VERY MUCH. 21

THANK YOU. 22 STATE THANKS THE COURT FOR ITS TIME. 23

MR. MARSHAL HOW MUCH TIME LEFT? 24

FOUR MINUTES. 25

YOU MENTIONED THE BAKER CASE. 26 I WANT TO READ THE HOLDING. 107 1 IT'S A CAPITAL SEXUAL BATTERY CASE THAT SAYS WE HOLD IN 2 THE ABSENCE OF SPECIFIC ALLEGATION IN THE CHARGING 3 DOCUMENT OR A FINDING BY THE JURY THAT THE DEFENDANT IS 4 18 YEARS OF AGE OR OLDER, A CON VISION FOR CAPITAL 5 SEXUAL BATTERY CANNOT STAND. 6 IT WAS FUNDAMENTAL ERROR. 7 IT IS FUNDAMENTAL ERROR IN THIS CASE. 8 CON VISION FOR MURDER IN THE FIRST DEGREE BY DELIVERY OF 9 DRUGS CANNOT STAND ABSENT AN ALLEGATION THE DEFENDANT IS 10 18 YEARS OF AGE OR OLDER ON FINDING BY THE JURY THAT THE 11 DEFENDANT IS 18 YEARS OF AGE OR OLDER, NEAT WHICH 12 OCCURRED. 13 POINT OUT THE COURT'S CASE IN GRAY, WHICH IS 1983 CASE, 14 TALKS ABOUT AN INDICTMENT THAT FAILED. 15 THAT FULLY OMITTS AN ELEMENT ESSENTIAL ELEMENT OF THE 16 CHARGE THAT A CON VISION CANNOT STAND IN ITS ARGUABLE 17 EVEN ON APPEAL IN THIS MATTER. 18 ON THE EXCUSABLE AND JUSTIFY FINAL HOMICIDE, SECOND 19 DISTRICT SEEMS TO BE SAYING WE ARE GOING TO TREAT FIRST 20 DEGREE MURDER DIFFERENT FROM MANSLAUGHTER. 21 AND THE NOTE TO THE JUDGE SAYS TO GIVE IT IN ALL CASES. 22 CASE LAW OUT OF THIS COURT, SMITH SAYS THIS INSTRUCTION 23 IS TO BE GIVEN THE IN ALL MURDER CASE. 24

HOW WOULD THIS INSTRUCTION HELPED THE JURY IN THIS 25 CASE DETERMINE WHETHER, TALKING ABOUT ELEMENTS OF THE 26 CRIME, WHETHER THE ELEMENTS OF THIS PARTICULAR MURDER 108 1 STATUTE WERE, EXISTED? 2

WELL I COULD EASILY SEE A DEFENSE ATTORNEY ARGUING 3 THAT THIS DISTRIBUTION OF DRUGS IS EITHER BY ACCIDENT OR 4 MISFORTUNE. 5

HOW IS THAT JUSTIFIABLE-FINAL HOMICIDE? 6 THAT'S A DEFENSE TO THE HOMICIDE PERIOD. 7 IT IS NOT SAYING IT WAS JUSTIFIED. 8

EXCUSABLE, EXCUSABLE INSTRUCTION TALKS IN TERMS ABOUT 9 WHETHER IT'S AN ACCIDENT, WHETHER IT'S MISFORTUNE, 10 WHETHER THERE WAS UNLAWFUL INTENT. 11 A LOT OF OTHER LANGUAGE. 12 BUT IN A SITUATION WHERE AN ADULT VOLUNTARILY GIVES A 13 DRUG TO ANOTHER ADULT WHO DIES OF IT, THERE IS NO 14 FORCED. 15

THERE IS NO INTENT REQUIREMENT IN THE STATUTE TO 16 BEGIN WITH. 17

THERE IS NO INTENT A. 18

AND THESE DEFENSES OF EXCUSABLE AND JUSTIFY FINAL GO 19 TO ELIMINATE THE INTENT OF THE HOMICIDE, CORRECT? 20

I DISAGREE. 21 THIS COURT HAS SAID, THIS IS NECESSARY TO DEFINE LAWFUL 22 VERSUS UNLAWFUL. 23 NOT INTENTIONAL VERSUS UNINTENTIONAL HOMICIDE. 24 AND IN BLANDON, FIFTH DCA SAID JURORS NEED TO KNOW WHAT 25 CONSTITUTES A CRIMINAL ACT SO THEY DIFFERENTIATE BETWEEN 26 CRIMINAL AND NON-CRIMINAL ACT. 109 1 INSTRUCTION MUST BE READ EVEN IF THERE IS NO BASIS IN 2 FACT FOR THE CHARGE. 3 THE INSTRUCTION IS ESSENTIAL TO UNDERSTAND THE OTHER 4 CRIMES CHARGED AND THE FAILURE TO GIVE THIS INSTRUCTION 5 EXCUSABLE AND JUSTIFY FINAL IS FUNDAMENTAL ERROR AND IT 6 CITES ROJAS. 7 I WANT TO TALK ABOUT THE CASE SHE CITE ADD MINUTE AGO, 8 GLOVER. 9

LET'S GO THROUGH THE ELEMENTS OF THE EXCUSABLE 10 HOMICIDE, WHICH YOU SAY WOULD APPLY. 11 AND YOU CAN TELL ME WHICH ONE YOU THINK APPLIES HERE. 12 NUMBER ONE IS WHEN THE KILLING IS COMMITTED BY ACCIDENT 13 OR MISFORTUNE IN THE DOING OF ANY LAWFUL ACT. 14 BY LAWFUL MEANS WITH USUAL ORDINARY CAUTION. 15 NUMBER TWO, WHEN THE KILLING OCCURS BY ACCIDENT OR 16 MISFORTUNE IN THE HEAT OF PASSION. 17 NUMBER THREE, WHEN THE KILLING IS COMMITTED BY ACTS OR 18 MISFORTUNE RESULTING FROM SUDDEN COME PAT. 19 -- COMBAT. 20 WHICH OF THESE WOULD YOU SAY WOULD APPLY SO THE JURY 21 SHOULD HAVE BEEN INSTRUCTED ON IT? 22

I WOULD SAY NUMBER ONE IS ARGUABLE. 23 I AM NOT SAYING --. 24

NUMBER ONE SAYS IT HAS TO BE A LAWFUL ACT. 25 WHAT LAWFUL ACT WAS INVOLVED HERE THAT CONSTITUTED THE 26 JUSTIFIABLE HOMICIDE? 110 1

THE DEFENSE ARGUMENT IS GOING TO SAY THIS CASE WAS 2 ACCIDENT. 3 MISFORTUNE. 4 WE DIDN'T GIVE THESE DRUGS TO HER WITH THE IDEA THAT 5 SHE'S GOING TO DIE FROM THEM. 6

WAS IT ADMITTED THAT THE DEFENDANT PROVIDED UNLAWFUL 7 ILLEGAL DRUGS TO THE VICTIM? 8 WAS THAT ADMITTED? 9

IT IS NOT ADMITTED. 10 THAT'S EVIDENCE. 11

IT WAS PROVEN. 12

NOT SUFFICIENT EVIDENCE. 13

WAS IT A DEFENSE THAT THE DEFENDANT WAS PROVIDING 14 ASPIRIN TO THE DEFENDANT AND DIDN'T KNOW THESE WERE 15 ILLEGAL DRUGS AND USED ORDINARY CAUTION, DID NOT 16 UNLAWFULLY INTEND TO GIVE THEM ILLEGAL DRUGS? 17

IT WAS THE DEFENDANT THEY DIDN'T PROVE BEYOND A 18 REASONABLE DOUBT THESE WERE WHO ARE RHINE OR MDA. 19 IT WAS NOT A DEFENSE HE GAVE ASPIRIN OR SOMETHING LIKE 20 THAT. 21

WE ARE GOING TO HAVE TO CLOSE. 22

THANK YOU FOR YOUR TIME.