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Russell Owen Insko v. State of Florida

SC06-1619

>>> THE NEXT CASE ON THE CALL
WILLING LENDER IS -- CALENDAR
IS INSKO VERSUS THE STATE OF
FLORIDA.

>>> THEY WILL HAVE TO BE GIVEN
TO THE JURY, PROVEN BY A
REASONABLE DOUBT.

>> I AGREE, THAT IS CORRECT.

>> THERE ARE ALSO THE
IMPLICATIONS ARE ONE IS
ELEMENT VERSUS A SENTENCING
FACTOR, YOU GOT TO BE CHARGED
ON THE DIME.

>> CORRECT.

>> AND THEN YOUR ARGUMENT,
WELL I GUESS IS SIGNIFICANT IN
THIS CASE, IT COULD HAVE
DOUBLE JEOPARDY IMPLICATION
WHICH IT WOULDN'T HAVE.

>> RIGHT.

>> DO YOU SEE -- IS THERE A
DIFFERENCE -- WE GOT ELEMENTS
OF THE CRIME AND SENTENCING

FACTORS, BUT WHAT ARE
RECLASSIFICATION CRIMES WE
HAVE BEEN SOMETHING
TRADITIONAL EVEN BEFORE HAVING
A GUN, YOU KNOW, THERE ARE
MANY OF THESE CRIMES THAT DO
INCREASE THE PENALTY BUT THEY

ARE, YOU KNOW, IS WHERE THE
LINE BETWEEN ON THOSE
SENTENCING FACTORS VERSUS
ELEMENTS?

A RECLASSIFICATION AND WHERE
DOES THAT FIT IN?

>> WELL, MR. INSKO IS IN A
STRANGE POSITION BECAUSE -- IF
YOU WERE TO BE CONVICTED UNDER
A BLANKET, A BLANKET CHARGE,
WHICH COULD VERY WELL HAPPEN
BECAUSE LOOKING AT HIM, HE
LOOKS OLDER.

IT IS NOT PUTTING THE AGE OUT,
IT IS BEHIND THE BALL FOR ONE
THING FROM THE JURY, BUT AS
FAR AS RECLASSIFYING, I THINK
HE -- EVEN IF HE IS CONVICTED,
THEY WERE NOT GOING TO

SENTENCE HIM TO 15 YEARS
SECOND-DEGREE FELONY.
THEY WOOK ACKNOWLEDGE HE
COULDN'T GO ANY HIGHER THAN
WHAT HE RECEIVED WHICH WAS
THIRD-DEGREE FELONY BY A
PERSON UNDER 18.

>> WELL, FIRST OF ALL, BY
SAYING WHO WAS HIGHER YOU?
ACTUALLY GO TO THE SECOND
ASPECT OF THIS CASE THAT, TO
ME, I DON'T, I AM CONCERNED
THAT THERE WAS APPARENTLY A
LESSER INCLUDED ERRONEOUS
CHARGE BECAUSE IT IS
IMPOSSIBILITY IF HE IS IN FACT
33 FOR HIM TO BE UNDERAGE 18.

>> RIGHT.

>> NOT ONLY THE DEFENDANT
AGREED TO IT.

>> HE DIDN'T OBJECT.

>> WELL, HE DIDN'T OBJECT TO
IT.

THE JURY FOUND IT.

THERE WAS NEVER ANYTHING
RAISED BY IT.

I JUST -- WHY ISN'T THE

POSITION OF THE CONCURRENCE IN
THIS CASE ON THAT ISSUE -- I
DON'T KNOW WHAT YOU CALLED IT.
THERE WAS SOME OTHER THEORY
THEY HAD.
WAIVER.

>> WELL, WITH RESPECT TO
ESTOPPLE, INCONSISTENT
POSITIONS DURING THE COURSE OF
LITIGATION, I SUBMIT THIS
LITIGATION HAD ENDED AT THE
END OF APPEAL.
WHEN WENT BACK, HE STARTED OUT
FRESH WITH A NEW TRIAL, SO
EVERYTHING IS NEW WITH A NEW
TRIAL, BUT THE NEGOTIATIONS
ARE OPEN, I MEAN, ALSO, IF HE
HAD WAIVED IT EARLIER, IT IS A
CATCH-22 BECAUSE THAT WOULD
HAVE NEVER WOULD HAVE
SUCCEEDED ON DIRECT APPEAL
BECAUSE THEY CAN GET THE
LESSER INCLUDE.
AND TO BE FAIR, I DON'T THINK
THE STATE ACTUALLY PROVED THE
UNREASONABLE DOUBT THAT HE WAS

18, OVER 18, ALT THE ORIGINAL
TRIAL.

> LET ME GO BACK TO THE FIRST
ISSUE.

WITHOUT LOOK AT GLOVER FOR A
SECOND, IF YOU LOOK AT THE

STATUTE ITSELF, IT SEEMS TO
DEFINE LEWD LASCIVIOUS
CONDUCT, A PERSON WHO
INTENTIONALLY TOUCH AS PERSON
UNDER 16 YEARS OF AGE IN LEWD
OR LASCIVIOUS MANNER OR
SOLICITED A PERSON COMMITS
LEWD OR LASCIVIOUS CONDUCT
THAT SEEMS TO ME TO PREISN'T
THE ELEMENTS OF THE OFFENSE.

IF YOU LOOK AT THE INDICTMENT,
THE INDICTMENT SAYS RUSSELL
OWEN INSKO DID SOLICIT J. S.
TO COMMIT A LEWD OR LA SIVEEAS
ACT IF YOU LOOK AT THE JURY
INSTRUCTION, THE JURY
INSTRUCTIONS SAY TO PROVE THE
CRIME OF LEWD OR LASCIVIOUS
CONDUCT THE STATE MUST PROVE
THE FOLLOWING ELEMENTS BEYOND
A REASONABLE DOUBT, J. S. WAS

UNDER 16 YEARS AN RUSSELL

OWEN INSKO SOLICITED TO

COMMIT A LEWD OR LA SIVE

LASCIVIOUS ACT.

WHY ARE THOSE THE TWO ELEMENTS

OF THE CRIME OR LEWD AND

LASCIVIOUS CONDUCT AND THEN

THE AGE OF THE DEFENDANT NOT

SIMPLY A SENTENCING FACTOR TO

DETERMINE WHETHER IT IS

SECOND-DEGREE OR A

THIRD-DEGREE FELONY?

>> WELL, THE FIRST REASON I

THINK IS IT COULD HAVE BEEN

LIKE THAT AT THE RAILROAD

ORIGINAL TRIAL THEY WOULD HAVE

LEFT THE AGE OUT ALL TOGETHER

THE STATE WANTED THE BENEFIT

OF TRYING TO PROVE HE WAS

GUILTY OF A GREATER OFFENSE.

IT WAS IN THE VERDICT FORM.

>> THE VERDICT FORM PROVIDED

ALSO THE PUNISHMENT PROVIDED

BY LAW FOR THE CRIME OF LEWD

AND LASCIVIOUS MISCONDUCT IS

GREATER DEPENDING IN THE EDGE

OF THE DEFENDANT.

THE JURY WAS INSTRUCTED THAT
WAY.

>> YES.

>> IT SEEMS LIKE THEY WERE

CONSISTENT THAT THESE ARE THE
TWO ELEMENTS OF THE CRIME,
THEN, THE PUNISHMENT IS GOING
TO DEPEND ON THE AGE OF THE
DEFENDANT.

>> RIGHT.

THE OTHER REASON IS VIRTUALLY
SOMEWHERE, VIRTUALLY IDENTICAL
TO THE SEXUAL BATTERY STATUTE
AND THAT IS --

>> RIGHT.

>> THAT IS WHAT I AM SAYING.

PUTTING ASIDE GLOVER, WITHOUT
LOOKING AT THE CASE FOR THE
MOMENT, JUST LOOKING AT THE
STATUTE, THE INDICTMENT, AND
THE JURY INSTRUCTIONS, THEY
SEEM TO PROVIDE THE ELEMENTS
OF THE OFFENSE DO NOT INCLUDE
THE AGE OF THE DEFENDANT.

>> IT ALSO GOES BACK TO THE
JURY KIND OF BEING HELD INTO

THE DARK.

DIFFERENCE BETWEEN JUROR
COMING INTO A JURY TRIAL AND
HEARING WHAT THE PERSON IS

CHARGED WITH LEWD AND
LASCIVIOUS ACTS UNDER 18,
EITHER A CHILD SOLICITING A
CHILD VERSUS A AN ADULT
SOLICITING A CHILD.

ANY JUROR SITTING ON THE
TRIAL, I THINK, AUTOMATICALLY
MAKES THAT DISTINCTION WHEN
THEY SIT DOWN, IF YOU HEAR
THAT, IF JUST THROW IT OUT
THERE --

>> ISN'T THERE A QUESTION AS
JUSTICE CANTERO, THAT IS, IS
IT YOUR POSITION THAT IF THERE
IS A QUOTE RECLASSIFICATION TO
A DIFFERENT LEF LEVEL OF
FELONY, FOR INSTANCE, THAT
THEN, THAT CONSTITUTES A
SEPARATE OFFENSE?

>> YES.

>> SO IT IS YOUR POSITION THAT
IN EFFECT RECLASSIFICATION

ENDS UP BEING SEPARATE CRIME?

>> RIGHT.

>> AND THAT THIS IS WHERE --

RIGHT.

>> WITH REFERENCE TO UNDERAGE
18 OR OVER 18.

>> WELL I AM ASSUMING THAT WE
MUST HAVE GOTTEN THERE IN THE
BACK DOOR FOR YEARS BECAUSE IF
YOU LOOK AT, IN A THINK WHAT
JUSTICE CANTERO IS SAYING, I
SORT OF MAKING SENSE, THAT IS
WHY I WAS ASKING WHETHER THERE
WAS ELEMENT SENTENCING FACTOR,
WHERE DOES RECLASSIFICATION
CRIMES COME IN, A SEXUAL
BATTERY JUSTIFYING THE CRIME
AS ANAL, OR VAGINAL
PENETRATION BY SEXUAL ORGAN OF
ANOTHER DOESN'T EVEN, AND THAT
ONLY GETS TO THE AGE OF THE
DEFENDANT AND THE AGE OF THE
VICTIM IN SUBSECTION 2 AND I
GUESS IN GLOVER, WITH HEING AT
IT, SINCE THEY ARE BOTH IN THE
SAME SECTION AND THE AGE OF
THE VICTIM HAS ALWAYS BEEN AN

ELEMENT OF THE CRIME OF SEXUAL
BATTERY, IT HAD TO FOLLOW IN
THAT CASE.

>> RIGHT.

>> SO NOW WE GO BACK TO THIS
ONE, THE DIFFERENCE IN THIS
STATUTE THAT IS THE AGE OF THE
PERSON IS PART OF THE FIRST
SUBSECTION A IS PART OF THE
ELEMENT.

>> RIGHT.

>> WHETHER THAT MAKES IT -- I
DON'T KNOW WHERE THAT GETS IT
TO, AS FAR AS, I THOUGHT WHAT
JUSTICE CANTERO DID, SINCE
THEY GOT TO BE PROVEN BEYOND A
REASONABLE DOUBT FOR MOST
INTENTIVE PURPOSE, IT IS NOT
GOING MATTER.

IT IS MATTERING IN THIS VERY
LIMITED ISSUE FOR YOU AND YOUR
CLIENT AS FAR AS WHETHER IT IS
DOUBLE JEOPARDY OR ISSUES AND
THAT MAY BE AN ISSUE ABOUT
WHAT NEEDS TO BE SET FORTH IN
THE INDICTMENT, BUT I AM NOT

SURE, YOU KNOW, AND SO YOU
HAVE LOOKED AT THAT TO ANALYZE
IF BECAUSE THE SEXUAL BATTERY

STATUTE HAS EACH BOTH THE AGE
OF THE DEFENDANT AND THE AGE
OF THE VICTIM IN ONE SECTION
THAT THAT IS AND WE RECOGNIZE
ONE IS THE ELEMENT.

WE HAD TO RECOGNIZE THE OTHER
WHEREAS HERE THERE IS
ABSOLUTELY A SEPARATION
BETWEEN AGE OF THE DEFENDANT
AND AGE OF THE VICTIM.

DO YOU SEE THAT AS BEING A
MEANINGFUL DISTINCTION?

>> NO.

I ACTUALLY THINK THEY ARE
SIMILAR.

THE LEWD LASCIVIOUS CONDUCT,
IT STATES THE CRIME AND
SPECIFIES THE AGES.

I THINK IN THE SEXUAL BATTERY
STATUTE, IT -- IT MENTIONS THE
CRIME, BUT WITHIN THE AGE OF
THE DEFENDANT AS WELL AS THE
AGE OF THE VICTIM.

I THINK IT IS ALL -- THEN THEY

SEPARATE THE TWO, BETWEEN THE
TWO OVER 18 AND UNDER 18 ALSO.

SO I WOULD LIKE TO POINT OUT,
I THINK THE CAPITAL SEXUAL
BATTERY STATUTE AND THE LEWD
AND LASCIVIOUS ARE VIRTUALLY
SIMILAR.

THIS COURT IS RULING THAT THE
AGE OF THE DEFENDANT IS IN THE
SEXUAL BATTERY CASES LOGICALLY
WOULD STATE THAT THE AGE OF
THE DEFENDANT AND THE LEWD
LASCIVIOUS CONDUCT CASES IS AN
ELEMENT ALSO.

>> I AM NOT CERTAIN I
UNDERSTAND TO YOUR RESPONSE TO
JUSTICE PARIENTE'S QUESTION
ABOUT WHY THE CONCURRING
OPINIONS ON THE DISTRICT COURT
ARE NOT CORRECT.

WELL, I THINK, ONE OF THE
REASONS, THE ESTOPPLE, I THINK
THAT THIS IS A SEPARATE
LITIGATION, IT DOESN'T HAVE
INCONSIST TINT -- INCONSIST
EBT POSITION DURING THE SAME

LITIGATION, HE HAD THIS TRIAL,
HE WAS CONVICTED, HE DID A

DIRECT APPEAL.

HE ACTUALLY WON.

SO IT COMES CAN BACK DOWN FOR
A NEW TRIAL, FOR A NEW SET OF
OPTIONS, PLEASE, WHAT NOT,
WHICH GETS ME TO THE SECOND
POINT THAT JUSTICE WELLS SAID
AN DCA CONKURG OPINION THAT
THEY HAD NOT FOLLOWED, THEY
HAD NOT FOLLOWED THROUGH WITH
A RILE.

>> THE DEFENDANT TAKING
INCONSISTENT POSITIONS AT THE
OUTSET BY FIRST GETTING THE
INSTRUCTION ON "LETTERS
INCLUDED OFFENSE."

ALL RIGHT.

AS A RESULT OF THAT ACTUALLY
HAVING THE JURY THEN CONVICT
HIM ON THAT LESSER INCLUDED
OFFENSE, BUT THEN INCONSISTENT
ILY ARGUING THAT ALTHOUGH I
ASKED FOR THAT LETTERS INCLUDE
AND THAT THE EVIDENCE WOULD
SUPPORT A JURY, YOU KNOW,

FINDING IN THESE RANGE OF

THINGS HERE, NOW, I AM

ASSERTING THAT THE JURY

COOPERATE CONVICT ME OF THAT

LESSER INCLUDE OFFENSE WHICH

AT THE TIME I WANTED SO WE END

UP WITH THE DEFENDANT SORT OF

HAVING IT BOTH WAYS.

FIRST, I WANT TO SEE IF I CAN

GET THE JURY TO GO FO THAT,

THEN, IF I GET HIM TO GO FOR

THAT.

THEN, I AM GOING TO COME

FORWARD AND SAY, WELL, WAIT A

MINUTE.

I AM REALLY OVER THAT AGE, BUT

THE DEFENDANT DIDN'T TRY TO

VACATE THAT CONVICTION.

>> NO.

>> I THINK IF HE HAD TRIED TO

AT THAT POINT, THE POINT WOULD

BE WELL-TAKEN.

IT WOULD BE SIMILAR TO CASES

WHERE, YOU KNOW, PEOPLE MAKE A

GREAT PLEA DEAL, THEN, THEY

VIOLATE, AND THEN THEY ATTACK

THE ORIGINAL PLEA, THAT IS ALL

ONE CONTINUOUS LITIGATION, YOU
KNOW, ASKING FOR A JURY
INSTRUCTION, THEN, RECEIVING
IT AND GETTING CONVICTED ON
THE LESSER, AUN THEN ARGUING
THAT IT IS FUNDAMENTAL ERROR
ON THE DIRECT APPEAL.

>> BUT THIS CASE IS ALL ONE
CONTINUOUS LITIGATION.

THAT IS, THIS IS STILL THE
SAME CASE THAT WAS BROUGHT BY
THE STATE AND TRIED BEFORE
EVEN THOUGH IT IS HERE IN THIS
FORUM AND YOU HAVE BEEN UP AND
DOWN A COUPLE OF TIMES, SO WE
ARE REALLY TALKING ABOUT THE
SAME PROSECUTION.

I AM HAVING DIFFICULTY WITH
YOUR EXPLANATION.

>> WELL, I THINK THE STATE,
THIS IS ONE CONTINUOUS
LITIGATION, AND I THINK THE
STATE IS ALSO RECEIVING THE
BENEFIT OF HAVING THE CHARGE
OVER 18 SPECIFICALLY OVER 18
AND ESPECIALLY IN THE CASE

ALONG THIS WAY, NOW COMING
BACK, OH, NO, WE DON'T WANT
THE AGE IN THERE.

>> I MEAN, THEY LOST ON
BECAUSE IT IS SOMETHING THAT
OCCURRED TO YOUR BENEFIT, YOUR
CLIENT'S BENEFIT WHICH IS,
EVEN THOUGH IT IS CLEARLY OVER
18 THEY FIND THEM UNDER 18 TO
THE STATE UNDERSTANDS BASED ON
WHAT I ALWAYS CONSIDER DOUBLE
JEOPARDY PRINCIPALS, BECAUSE
IT IS SENTENCING FACTOR, THEY
CAN GO BACK, YOU KNOW, I THINK
THEY COULD TRY THEM ON THE
GREATER OFFENSE, SO IT IS NOT
LIKE IT IS TO THEIR ADVANTAGE
THEY GOT, I GUESS, OR THE
PEOPLE, IF WE LOOKED AT THE
PEOPLE OF THE STATE THAT THE
PERSON IS CLEARLY 33 IS
GETTING POTENTIAL ADVANTAGE OF
MUCH LIGHTER SENTENCE.
RIGHT.

>> THAT IS WRITTEN IN STONE.
YOU CAN'T GO ANY HIGHER THAN

THE 5-YEAR SENTENCE.

>> THEN THAT GOES TO THE FACT

IT IS NOT A DIFFERENT CASE,

THIS IS THE SAME CASE BECAUSE

OTHERWISE THE STATE WOULD BE

ABLE TO PUT ON THE VERDICT

FORM THE DEFENDANT WAS OVER

THE AGE OF 18.

>> WELL, DOUBLE JEOPARDY.

>> EXACTLY.

>> THAT IS WHY THE SAME CASE.

THAT IS WHY YOU ARE TAKING

INCONSISTENT POSITIONS.

NOT A DIFFERENT CASE.

THERE IS VERY MUCH A

RAMIFICATION FROM THE FIRST

TRIAL.

>> RIGHT.

>> I MEAN, WHEN IT COMES BACK

DOWN FOR A NEW TRIAL.

OPEN UP POTENTIALLY IN OTHER

CASE SOMETHING IS BEING

DROPPED DIFFERENT TYPES OF

MOTIONS ARE BEING FILED.

DIFFERENT TYPES OF PLEA DEALS.

>> BUT YOU ARE STILL BOUND BY

THE JURY'S DETERMINATION.

>> THAT IS CORRECT.

>> YOU ARE INTO YOUR REBUTTAL.

>> THIS IS JUST FALLBACK

POSITION OF THE STATE, IS IT

NOT?

THE STATE IS URGING US TO

UPHOLD?

>> WELL, YES.

>> IT IS JUST A FALLBACK?

YES.

>> ALL RIGHT.

THANK YOU.

>> THANK YOU.

>>> MAY IT PLEASE THE COURT I

AM SUSAN DUNLEVY WITH THE

ATTORNEY GENERAL'S OFFICE IN

TAMPA.

I REPRESENT THE STATE IN THE

CASE.

>> WHAT DOES THE INFORMATION

ACTUALLY CHARGE?

DOES THE INFORMATION TRACK THE

LANGUAGE OF THE STATUTE THAT

SAYS THAT THE DEFENDANT, THE

VICTIM HAS TO BE UNDER 16, AND

THAT LEWD AND LASCIVIOUS ACTS,
IT DID GO ON AND I INCLUDE THE
AGE OF --

>> YES, JUSTICE.

I INCLUDED ALL OF THOSE
THINGS.

>> SO IF IT -- SO IF THE
INDICTMENT OR INFORMATION
ACTUALLY INCLUDE THE AGE OF
THE PERPETRATOR, IS THAT AN
INDICATION OF THAT THE STATE
THE ONE WHO SAW THIS WAS AN
ELEMENT OF LEWD AND
LASCIVIOUS.

I DON'T THINK SO, YOUR HONOR.
THE INCLUSION MUCH THE AGE
OVER 18 WAS NECESSARY BECAUSE

--

>> THAT IS NOT TRUE.

>> WE HAVE SAID THAT THERE
DOESN'T HAVE TO BE NOTICE IN
THE INDICTMENT OF SENTENCING
FACTORS UNDER A TREND.

>> WELL, IT WOULDN'T
NECESSARILY BE.

>> NO.

>> BUT LET ME GET TO THAT I
WANT TO MAKE SURE I UNDERSTAND
BASE THINK READING SOME OF THE
DECISIONS OF THE APPELLATE
COURTS OUT THERE, I THINK
THERE IS CONFUSION.

I DON'T THINK THE STATE EVER
THOUGHT THAT AGE OF THE
DEFENDANT, AGE OF THE VICTIMS,
WHETHER SOMEBODY HAD A GUN,
SO-CALLED RECLASSIFICATION
OFFENSES EVER THOUGHT THAT
THIS DIDN'T HAVE TO BE
PRESENTED TO THE JURY AND
FOUND BEYOND A REASONABLE
DOUBT.

>> RIGHT.

>> AND SO WHAT I AM CONCERNED
ABOUT BECAUSE AGAIN, THESE ARE
ALL, I WILL CALL THEM
RECLASSIFICATION OFFENSES,
WHETHER YOU CALL THEM ELEMENTS
OR SOMETHING THAT THE STATE
HAS ALWAYS PROVEN BEYOND A
REASONABLE DOUBT.
AREN'T THOSE DIFFERENT THAN

THE SENTENCING FACTORS THAT
APPRENDI AND RING HAVE TALKED
ABOUT AND I WOULD THINK THINKS
LIKE THE VULNERABILITY OF THE
VICTIM AS OPPOSED TO AGE, SOME
OF THE OTHER, WHETHER SOMEONE
IS A CONVICTED FELON, THAT
TAKES A CRIME, THE SAME CRIME
AND NOW INSTEAD OF IT BEING,
YOU KNOW, A THIRD-DEGREE
FELONY, IT IS SECOND DEGREE OR
A FIRST DEGREE, DO YOU SEE
THAT APPRENDI, THOSE THINGS WE
HAVE BEEN PART OF A LAW, OR
THESE OTHER ISSUES THAT COULD
TAKE SOMETHING -- ISSUES AND
COULD TAKE SOMETHING AND
INCREASE THE SENTENCE BEYOND
THE STATUTORY MAXIMUM OR
BEYOND WHATEVER THEY SAID?
DO YOU UNDERSTAND WHAT I AM
GETTING AT?
IN OTHER WORDS, WHETHER AS AN
ELEMENT OR A SENTENCING
FACTOR, DOESN'T IT REALLY GO
BACK TO RECLASSIFICATION

CRIMES WHATEVER YOU CALL THEM,

HAVE ALWAYS, HAVE ALWAYS BEEN,
YOU KNOW, SUBJECT TO DOUBLE
JEOPARDY, PROOF BEYOND A
REASONABLE DOUBT, FINDINGS BY
THE JURY?

>> ALL RIGHT.

I WOULD CALL IT A DEGREE
CRIME, BECAUSE WE HAVE, IF THE
DEFENDANT IS OVER 18, THE
OFFENSE IS SECOND-DEGREE
FELONY.

IF HE IS UNDER 18, IT IS
THIRD-DEGREE FELONY.

THOSE ARE THE TWO CHOICES YOU
HAVE WITH LEWD AN LASCIVIOUS
CONDUCT.

>> AS YOU SAID, FOR APPRENI,II,
THE STATE WOULD NEVER ARGUE
THAT IS SOMETHING THE JUDGE
COULD FIND BY PREPONDERANCE OF
THE EVIDENCE.

THAT IS WHY?

LET'S MAKE IT MORE COMPLICATED
BY THIRD CATEGORY.

AND SAY THAT IS GOING TO BE

SUBJECT TO A DIFFERENT SET OF

RULES, AREN'T WEER OFF JUST
KEEPING THESE AS ELEMENTS OF
THE CRIME HAVING BEEN PROVED,
YOU KNOW, AND ESTABLISHED BY
THE JURY BEYOND A REASONABLE
DOUBT AND CHARGED WHATEVER
ELSE GOES ALONG WITH ELEMENTS.

>> I WOULD DISAGREE IN THE
SENSE THAT IF IT IS AN AMOUNT
OF THE CRIME, AND YOU DON'T
HAVE THAT ELEMENT, THEN IT IS
EITHER SOME OTHER CRIME, OR IT
IS NO CRIME AT ALL.

>> SO INFORMATION ONLY CHARGED
THOSE PORTIONS OF THE STATUTE
THAT SAYS THAT THIS VICTIM WAS
16, UNDER 16, AND THAT A LEWD
AND LASCIVIOUS ACT WAS
COMMITTED.

THAT IS WHAT THE INFORMATION
SAYS.

WHAT THEN IS THE DEFENDANT, IF
THE DEFENDANT IS FOUND GUILTY
OF THAT.

>> RIGHT.

>> WHAT CAN YOU THEN DO?

>> IN THAT SITUATION, BECAUSE

THE STATE DID NOT ALLEGE OR
PROVE THAT THE DEFENDANT'S AGE
WAS GREATER THAN 18, IT COULD,
HE WOULD BE GUILTY OF THE
THIRD-DEGREE FELONY, WHICH HAS
LOWER SENTENCE.

>> EVEN THOUGH HE MAY BE A
40-YEAR-OLD PERSON?

>> RIGHT.

>> THAT SOUNDS LIKE AN
ELEMENT.

YOU KNOW, THAT IS THE PROBLEM
I CAN THINK OF AS THE LAW HAS,
YOU KNOW ALLEGED ASSAULT
-- AGGRAVATED ASSAULT ON A
POLICE OFFICER, THERE ARE ALL
THESE THINGS THAT CHANGE
WHETHER IT IS GOING TO BE ONE
CRIME OR, YOU KNOW, AGAIN, A
DIFFERENT DEGREE CRIME, AND
ALL OF THOSE CRIMES ARE
SUBJECT TO THE STATE'S BURDEN
OF PROOF BEYOND A REASONABLE
DOUBT.

>> RIGHT.

IT IS LIKE IF YOU LOOK AT THE

CRIME OF THEFT, THE ONLY
ELEMENT OF THEFT ARE THAT YOU
KNOWINGLY TAKE PROPERTY THAT
YOU KNOW BELONGS TO SOMEBODY
ELSE, NUMBER ONE, AND NUMBER
TWO, DO YOU SO WITH THE
INTENT TO DEPRIVE THE OWNER OF
THE USE OF THE PROPERTY OR TO
GIVE THE PROPERTY TO SOMEONE
ELSE.

>> GOOD EXAMPLE.

SO THE AMOUNT IS GOING
DETERMINE THE DEGREE?

>> CORRECT.

>> AND SO IS THAT -- ARE YOU
GOING TO SAY NOW THOSE ARE
SENTENCING FACTORS?

>> I THINK SO.

WHEN YOU ARE TALKING ABOUT THE
VALUE.

>> HOW CAN THAT BE?

IF SOMEBODY HAS BEEN CONVICTED
OF A FIRST-DEGREE FELONY, FOR
INSTANCE, THAT IS A CONVICTION

FOR FIRST-DEGREE FELONY.

>> RIGHT.

>> THAT IS HOW THAT -- THAT IS

A DIFFERENT CRIME THAN IF THEY
HAD BEEN CONVICTED OF A
THIRD-DEGREE FELONY.

AND SO, WHAT YOU END UP WITH
WITH THESE RECLASSIFICATIONS
IS DIFFERENT CRIMES.

DO YOU NOT?

THEY HAVE DIFFERENT ELEMENTS.

THEY ARE UNDERAGE OR OVER 18,

AND THEY HAVE BEEN

RECLASSIFIED, IF YOU WANT TO

CONTINUE TO THUSE WORD, TO A

DIFFERENT CRIME.

PEOPLE DON'T TALK ABOUT, WELL

I WAS SENTENCED FOR A

THIRD-DEGREE CRIME.

THEY WERE CONVICTED A

THIRD-DEGREE FELONY.

OR THEY WERE CONVICTED.

AND OF COURSE, THOSE

CONVICTIONS HAVE IMPORTANT

CONSEQUENCE DOWN THE ROAD,

TOO.

YOU KNOW?

SO I DON'T -- HOW CAN THE

STATE SAY YOU, NO, THEY WERE

JUST SENTENCED AS FIRST-DEGREE
FELONY OR SENTENCED AS
THIRD-DEGREE FELON.

THESE ARE CONVICTIONS ARE THEY
NOT?

ONCE YOU CHANGE IT FROM A
THIRD DEGREE TO A FIRST SEE
DEGREE THAT IS A DIFFERENT
CRIME, IS IT NOT?

OBVIOUSLY THE SERIOUSNESS OF
THAT CRIME IS REPRESENTED BY
THAT.

I AM HAVING TROUBLE WITH THE
STATE SAYING, NO, THE
CONVICTION FOR A FIRST-DEGREE
FELONY IS THE SAME AS A
CONVICTION FOR A THIRD-DEGREE
FELONY BUT WE HAVE BROADER
SENTENCING AUTHORITY.

>> WITH WE, WE LABEL THINGS
FIRST-DEGREE FELONY,
SECOND-DEGREE FELONY,
THIRD-DEGREE FELONY, SO WE

KNOW WHAT SENTENCE IS
PERMISSIBLE.

NOT ONLY WE KNOW WHAT
SENTENCE, IF SOMEBODY HAS GOT

A RECORD THEN AND LATER ON
SOMETHING ELSE HAPPENS AND A
PRIOR CONVICTION FOR A
FIRST-DEGREE FELONY CAN ALLOW
THAT LATER TO BE PUNISHED BY
MORE SEVERE PENALTY, THAT
CONVICTION FOR A FIRST-DEGREE
FELONY IS CRITICALLY
IMPORTANT, IS IT NOT?
NOT JUST WHAT THE SENTENCE WAS
FOR IT.

IT IS THE FACT THAT THERE IS A
CONVICTION FOR THAT LEVEL, SO
I THINK WE CARRIED ALL OF THE
SYMANTEC STUFF ABOUT AS FAR AS
WE CAN TAKE IT ABOUT
RECLASSIFICATIONS AN
SENTENCING AND ELEMENTS,
APPRENDHI AND THESE OTHER
THINGS HAVE DEALT WITH THESE
ASPECTS BUT I AM HAVING
DIFFICULTY WITH THE STATE'S

POSITION THAT A CONVICTION FOR
A FIRST-DEGREE FELONY IS IN
THE SAME AS A CONVICTION FOR A
THIRD-DEGREE FELONY.

>> I AM NOT SAYING THAT, YOUR HONOR.

FIRST OF ALL, I HAVE NEVER ARGUED THAT THIS IS A RECLASSIFICATION.

1:00

>> WELL HOW ABOUT OUR CASE ON SEXUAL BATTERY AND WHY THAT DOESN'T CONTROL?

YOU GOT THE VERY EXACT SAME STRUCTURE OF THESE STATUTES, DO YOU NOT, IN THAT CASE?

>> NO, I DON'T THINK SO, YOUR HONOR.

>> WELL TELL ME THE DIFFERENCE BETWEEN THE STRUCTURE OF THOSE STATUTES.

>> THE DIFFERENCE OF THE STRUCTURE OF THOSE TWO STATUTES IS THAT IN THE SEXUAL, SEXUAL BATTERY ON A CHILD UNDER 12, THERE ARE TWO,

YOU HAVE TO HAVE SEXUAL BATTERY YOU, WHICH AS -- WHICH IS DEFINED IN THE DEFINITION SECTION OF THE STATUTE AND SEXUAL BATTERY, AS DEFINED IN

THE STATUTE ITSELF ALONE IS
NOT A CRIME.

YOU HAVE TO ADD VICTIM UNDER
12 IN THIS INSTANCE.

>> WAIT A MINUTE.

IT SEEMS TO ME THAT SECTION
794011 H DEFINES THE CRIME OF
SEXUAL BATTERY AS ORAL, ANAL
OR VAGINA PENETRATION BY OR
REUNION WITH THE SEXUAL ORGAN
OF ANOTHER OR ANAL OR VAGINA
PENETRATION OF ANOTHER BY ANY
OTHER OBJECT, THAT DEFINE
THESE CRIME, AND THEN OTHER
SUBSECTIONS DEPENDING ON THE
AGE OF BOTH THE VICTIM AND THE
DEFENDANT DEFINE AS A CAPITAL
FELONY OR A LIFE FELONY, SO
WHY ISN'T THAT THE SAME KIND
OF STRUCTURE AS WE HAVE HERE?

>> OKAY, IT IS NOT THE SAME

BECAUSE FIRST OF ALL, THIS
DOESN'T SAY SEXUAL BATTERY
DEFINES THE CRIME.

IT IS PURELY A DEFINITION OF
SEXUAL BATTERY AND IF YOU LOOK

AT THAT DEFINITION, IF THESE
ACTIONS OCCUR BETWEEN TWO
CONSENSING ADULTS, IT IS NOT A
CRIME.

IT IS ONLY BECOME AS CRIME
WHEN YOU, WHEN YOU ADD AT
LEAST ONE ADDITIONAL ELEMENT
WHICH THE SEXUAL BATTERY
STATUTE IS MUCH MORE
COMPLICATED THAN THE LEWD AND
LASCIVIOUS CONDUCT STATUTE,
BUT IF YOU LOOK AT THE -- AND
SEXUAL BATTERIES NOT A WORD
USED IN THE STATUTE ITSELF.
THAT IS WHAT WE CALL IT FOR
SHORT.

BUT THE OFFENSE IS SEXUAL
BATTERY ON A CHILD UNDER 12
AND THEN YOU HAVE THE TWO
SUBSECTIONS THAT SAY IF A
PERSON UNDER 18 COMMITS THIS,

IT IS A LIFE FELONY, WHEREAS A
PERSON OVER 18 IS PERPETRATOR,
IT IS CAPITAL FELON.

IN CONTRAST AS I THINK BOTH
JUSTICE PARIENTE AND JUSTICE
ANSTEAD WERE SAYING, THE LEWD

AN LASCIVIOUS CONDUCT STATUTE
THE FIRST SUBSECTION DEFINES
THE CRIME AS CONDUCT WITH
SOLICITATION WITH A VICTIM
UNDER AGE 16, THEN YOU HAVE
TWO SUBSECTIONS THE FIRST ONE
SAYS IF THE PERPETRATOR IS 18
OR OLDER, IT IS SECOND-DEGREE
FELONY, IF THE PERPETRATOR --
THEN THE NEXT SUBSECTION IS IF
THE PERPETRATOR IS UNDER 18,
IT IS SECOND-DEGREE FELONY.
SO THE AGE OF THE DEFENDANT
DOES NOT DETERMINE WHETHER OR
NOT THERE IS A CRIME, IF
ANYBODY COMMITS LEWD AND
LASCIVIOUS MISCONDUCT ON A
VICTIM WHO IS UNDER 16, THEN
THEY COMMITTED LEWD AND
LASCIVIOUS MISCONDUCT.

BECAUSE YOU ARE EITHER OVER 18
OR YOU ARE UNDER 18.
THROWS THE ONLY TWO CHOICES
YOU HAVE HAVE HERE.

WE DON'T, WITH THE VICTIM, IF
THE VICTIM IS OVER 16, WE

DON'T HAVE A CRIME.

>> SO YOU ARE SAYING -- AGAIN,

MAYBE THERE IS A SLIGHT

DIFFERENCE IN THE STRUCTURE.

I THINK THAT FOR THE REAL

PRACTICALITY, LET'S GO BACK TO

THAT, WHICH IS A APPRENDHI HAD

NOT HAPPENED.

THE STATE AGAIN HAS ALWAYS

CHARGED THESE FACTORS,

ELEMENTS, THINGS, YOU KNOW, IN

THE INDICTMENT OR INFORMATION,

THEY HAVE ALWAYS, THE JURY HAS

ALWAYS BEEN INSTRUCTED ON

FINDING OR NOT FINDING THE

QUESTION IS TO WHETHER

SOMEBODY IS CONVICTED OF A

FIRST-DEGREE, SECOND-DEGREE

FELONY DEPEND OS THAN FINDING

AND THERE IS DOUBLE JEOPARDY

UMPLICATIONS TO WHAT THE JURY

ENDS UP FINDING IF THERE IS A

RETRIAL, RATHER THAN TRY TO

DISCERN, WELL, THIS STRICTURE

OR THAT STRUCTURE, ISN'T IT

JUST CLEANER TO SAY THAT WHEN

THESE ARE CLASSIFICATION,

WHATEVER WE WANT TO SAY,
DEGREE CRIMES, THAT THOSE ARE
ELEMENTS THE SAME AS ANY OTHER
ELEMENT AND THEY ARE TREATED
THE SAME, AND IN THIS CASE,
AGAIN, AND THIS MAY BE THE
DEFENDANT DOESN'T WANT TO HEAR
ABOUT IT, BUT GETS DISPOSED OF
BY THE FACT THAT, YOU KNOW,
WHAT THE CONCURRENCES HAVE
SAID, WHICH IS THAT THERE IS A
WAIVER IN THIS CASE, BUT FOR
THE FUTURE, I MEAN, I AM JUST
CONCERNED THAT WE ARE GOING TO
START HAVING DISTRICT COURT
LOOKING AT THE STRUCTURE OF,
YOU KNOW, THE CONVICTED
FELLOW, YOU KNOW, THE GUN, THE
MONEY AND STUFF TO COME UP

WITH A WHOLE AREA OF
JURISPRUDENCE THAT HAS BEEN
VERY WELL-DEFINED AND NOT
SUBJECT TO DEBATE ALL OF THESE
YEARS, SO TELL ME, AGAIN, FROM
A POINT OF VIEW, IN SOME TERM,
WE GOT TO SAY APPRENDHI HAS

DONE A LOT TO CONFUSE THE
RULE.

LET'S NOT ADD TO CONFUSION.

LET'S TAKE THIS PRE-APPRHENDHI

NOTHING HAS CHANGED BECAUSE,

OF IT, THESE HAVE TO BE

CHARGED IN THE INDICTMENT,

FOUND BY REASONABLE, BEYOND A

REASONABLE DOUBT AN EVERYTHING

ELSE THAT GOES ALONG WITH

ELEMENTS ARE A PART OF THESE

TYPES OF FACTORS.

WHY ISN'T THAT PET BETTER

JURISPRUDENCE?

>> WELL THE PROBLEM ARISES IN

A SITUATION LIKE THE CASE OF

DA WHICH CURRENTLY PENDING IN

THE COURT THAT THE OPPOSING

COUNSEL MENTIONED.

IN THAT CASE HAVE CHARGING

LANGUAGE WAS CORRECT BUT THE

WRONG SUBSECTION OF THE

STATUTE WAS LISTED AND THIS, I

THINK, IN THAT CASE, THE

DEFENDANT WAS CHARGED WITH

LEWD AND LASCIVIOUS

MOLESTATION, I THINK.

HE WAS UNDER 18 BUT THE WRONG
STATUTORY SUBSECTION DIDN'T
DISCOVER IT UNTIL AFTER TRIAL
PERIOD HAD RUN TO THE
RECAPTURE PERIOD.

>> WELL, THE FACT IS, THAT
COULD HAPPEN WHETHER YOU ARE
TALKING ABOUT A QUANTITY OF
DRUGS, AMOUNT OF MONEY, I
MEAN, THE STATE SOMETIMES
MAKES ERRORS.

BUT THAT -- THAT IS NOT A GOOD
REASON TO TAKE SOMETHING THAT
HAS ALWAYS BEEN CONSIDERED TO
BE AN ELEMENT AND NOW
TRANSFORM IT INTO A SENTENCING
FACTOR GIVING IT SOME LESSER
CONSTITUTIONAL SIGNIFICANCE.

>> WELL, YOUR HONOR, I
DISAGREE, IT HAS ALWAYS BEEN
CONSIDERED AN ELEMENT.
IN FACT, IF YOU LOOK AT THE
JURY INSTRUCTIONS ON SEXUAL
BATTERY ON A CHILD UNDER 12
WHICH HAVE NOT BEEN REVISED
SINCE 1995, IT INDICATES JUST

EXACTLY THAT THE AGE OF THE
VICTIM AND THE CONDUCT ARE THE
TWO ELEMENTS AND THAT THEN THE
SENTENCE DEPENDS ON --

>> LET ME \$PIE THAT.

-- LET ME CLARIFY THAT.

THE AGE OF THE DEFENDANT IS AN
ELEMENT OF THE CRIME, DID WE
NOT?

>> YES, YOUR HONOR.

THE OPINION WAS VERY BRIEF.
AND BASED ON THE ANALYSIS
CONTAINING, IN THE COURT'S
OPINION.

>> SO BASICALLY THE ADOPTION
OF THE ANALYSIS IN THE -- IT
SAID IF THE VICTIM'S AGE IS AN
ELEMENT THEN THE DEFENDANT'S

AGE MUST ALSO BE AND WE KNOW
THAT THE VICTIM'S AGE IS AN
ELEMENT BASED ON THE STANDARD
JURY INSTRUCTION.

AND IT DOESN'T MENTION THE
FACT THAT THE STANDARD JURY
INSTRUCTION GOES ON TO
INDICATE THE TWO ELEMENTS AND
TO THEM IT SAYS IT IS

SENTENCING THAT THE

DEFENDANT'S AGE GOES TO.

>> WHEN YOU ARE TALKING ABOUT

THE JURY INSTRUCTION, ARE YOU

TALKING ABOUT SEXUAL BATTERY

INSTRUCTION?

OR THE LEWD AND LASCIVIOUS?

>> SEXUAL BATTERY.

THE SPECIFIC ONE ON SEXUAL

BATTERY VICTIM LESS THAN 12

YEARS OF AGE.

IT SAYS THE STATE MUST PROVE

THE FOLLOWING TWO ELEMENTS

BEYOND A REASONABLE COUT.

ONE VICTIM IS LESS THAN 12.

TWO, THEN, THERE IS VARIOUS

DESCRIPTIONS OF CONDUCT.

THEN IT GUESS ON TO SAY, THE

PUNISHMENT PROVIDED BY LAW FOR

SEXUAL BATTERY ON A PERSON

LESS THAN 12 IS GREATER

DEPENDING ON THE AGE OF THE

DEFENDANT.

THEREFORE, AS YOU FIND HIM

GUILTY OF SEXUAL BATTERY ON A

CHILD LESS THAN 12, YOU

FURTHER FIND HE WAS 18 OR
OLDER YOU, SHOULD FIND HIM OR
HER GUILTY OF SEXUAL BATTERY
ON A PERSON LESS THAN 12 BUY A
PERSON OF 18 OR OVER.

>> THE SAME WAY THE LEWD AND
LASCIVIOUS INSTRUCTION IS?

THEY TALK ABOUT WHAT THEY
CONSIDER TO BE ELEMENTS AND
THEN HOW YOU SENTENCE.

>> YES, YOUR HONOR.

>> AND IN THE TWO INSTRUCTIONS
ARE SIMILAR IN THAT REGARD AND
NEITHER ONE OF THEM HAS BEEN
CHANGED SINCE 1995.

SO IF GO BACK TO WHAT IT WAS
ORIGINALLY, IT WAS A

SENTENCING, THE DEFENDANT'S
AGE IN SEXUAL BATTERY ON A
CHILD UNDER 12 WAS CONSIDERED
TO BE A SENTENCING
CONSIDERATION AND NOT AN
ELEMENT.

>> BUT IT HAD TO BE DETERMINED
BY THE JURY AND PROVEN BY THE
STATE BEYOND A REASONABLE
DOUBT.

>> UNLIKE OTHER SENTENCING FACTORS.

>> IT STILL HAS TO BE PROVEN.

>> WITH OUR ASSISTANCE, YOU HAVE EXHAUSTED ALL OF YOUR TIME WITH OUR QUESTIONS.

WE THANK YOU VERY MUCH.

>> THANK YOU, YOUR HONOR.

>> REBUTTAL.

>> JUST A QUICK ONE.

I DID WANT TO SUBMIT THAT THE SEXUAL BATTERY STATUTE, THE VICTIM'S AGE, THE DEFENDANT'S AGE, I THINK THE STATUTE, BOTH STATUTES, THE LEWD AND LASCIVIOUS CONDUCT ARE

STRUCTURALLY SIMILAR.

>> THEY REALLY DO HAVE DIFFERENCE, THAT IF WE ARE GOING TO TRY TO FIGURE OUT STRUCTURE, THINK THE STATE IS CORRECT THAT THERE IS JUST THE DEFINITION OF SEXUAL BATTERY DOESN'T SET FORTH A CRIME AND TO GET TO THE AGE OF THE VICTIM AND THE AGE OF THE

DEFENDANT AND SO WHETHER THAT
IS DISTINCTION THAT IS
MEANINGFUL FOR WHETHER THINGS
ARE ELEMENTS SENTENCING FACTOR
OR SOMETHING ELSE IS, I
GUESS, WE'LL JUST HAVE TO DEAL
WITH.

>> WELL, I DID WANT TO POINT
OUT, THERE WERE VIRTUALLY
SIMILAR, VIRTUALLY IDENTICAL,
THEY THOUGHT THEY WERE
STRUCTURALED SIMILARLY.

I THINK THAT WAS THE QUOTE.
AND THE SECOND SAID IT WAS NOT
AN ELEMENT BUT THEY DIDN'T
REALLY, YOU KNOW, REASON

EXCEPT, WELL, THEY GAVE TWO
QUICK REASON, ONE IS, YOU
DIDN'T ADDRESS THE CASE WHICH
JUST BEEN DECIDED AND YOU
DIDN'T ADDRESS THAT WHICH I
DON'T BELIEVE YOU WOULD HAVE
BECAUSE IT WAS NOT REALLY
RIGHT, BUT THAT POINT BUT THE
OTHER REASON I THEY BASICALLY
SAID, WELL, THIS IS
DIFFERENT STATUTE.

THEY RESTED THAT WITH NO
EXPLANATION AT ALL.

>> GOING BACK TO THE WAIVER
ISSUE, THERE WAS NO MOTION FOR
JNOB IN THE CASE, IS THAT
CORRECT?

>> THAT IS TRUE.

>> IF THERE HAD BEEN A MOTION
FOR JNOB, WHAT WOULD THE TRIAL
JUDGE HAVE SAID TO THE
DEFENDANT'S LAWYER?

>> I AM SURE IT WOULDN'T HAVE
BEEN GRANTED.

I AM SURE.

HE AGREES HE WAS 18.

THEY DIDN'T OBJECT.

HE WENT ALONG WITH IT.

>> I AM THINKING, AGAIN, TAKE
A SITUATION WHERE IT IS
UNCONTROVERTED THAT SOMEONE
STOLE \$1 MILLION AND THE JURY
FINDS THAT THEY STOLE \$1,000.

I MEAN, I DON'T KNOW HOW YOU
GET AROUND SAYING, YOU GOT THE
BENEFIT OF THAT LESSER
CONVICTION OF A CRIME.

YOU CAN'T NOW SAY THAT CRIME
DIDN'T EXIST?

>> RIGHT.

IF YOU USED IT AT ELEMENT IN
THE FIRST.

WOULD YOU HAVE TO USE IT IN
THE FIRST TRIAL.

I MEAN, WE DON'T, WE DON'T
CHARGE WITH SOMEONE WITH GRAND
THEFT AND GO TO TRIAL TO SEE
WHAT THE STATE CAN PROVE OH IF
IT IS OVER \$5,000, THEN WE'LL
SENTENCE HIM THIS WAY.
THEY BREAK IT DOWN.
THEY HOPE FOR THE BEST.

THE STATE HOPE FOR THE
HIGHEST.

THEY HOPE THEY CAN PROVE THE
HIGHEST FELONY EXCEPT THAT YOU
KNOW SO I WHEN IT WOULD COME
BACK, IT WOULD BE MORE, THEY
WOULD HAVE TO AGAIN SHOW THE
ELEMENTS.

>> AND YOUR ARGUMENT, YOU
COULD NEVER BE, UNLESS YOU ARE
CHARGED WITH THE DEFENDANT
BEING OVER 18.

THERE IS NO LESSER OFFENSE OF
THE DEFENDANT BEING UNDER 18.

>> WELL, YOU ARE EITHER 18 OR
YOU ARE NOT.

>> ARGUMENT ACTUALLY BREAKS
DOWN, CORRECT?

>> SORT OF.

SORT OF.

>> UNDERER THAT ARGUMENT, IF
YOU HAD REQUESTED THE VERDICT
FORM TO INCLUDE THE DEFENDANT
UNDER THE AGE OF 18, CUE NOT
BE GRANTED THAT -- YOU COULD
NOT BE GRANTED THAT

INSTRUCTION.

>> THE CURRENT CHARGE?

OR THE ORIGINAL?

>> IN THE CASE, IT WAS THE
STATE THAT REQUESTED THE
VERDICT FORM.

IF YOU HAD REQUESTED A VERDICT
FORM THAT SAID THE DEFENDANT
UNDERAGE 18, YOU WOULDN'T HAVE
GOTTEN BECAUSE THE DEFENDANT
WAS NOT UNDER 18 SO IT WOULD
ARE BEEN A DIFFERENT CRIME

ACCORDING TO YOU.

>> ALREADY ACQUITTED OF THAT
CRIME.

>> I AM SAYING IN THE FIRST
TRIAL.

>> OH.

IN THE FIRST TRIAL.

>> WELL, HE MAY HAVE GOTTEN IT
IF HE REQUESTED IT.

IF THERE IS SOME, I MEAN, HE
COULD REQUEST A LESSER AND
MOST POSSIBLY GET A LESSER
VERDICT FORM.

>> THAT IS NOT LESSER INCLUDE.

>> I THINK IT IS.

UNDER 18 A LESSER INCLUDED OF
OVER 18?

>> I THINK THAT IS WHAT IT
WAS.

I MAY BE WRONG.

>> THAT IS WHOLE OTHER AREA.

>> THANK YOU.

>> THANK YOU.

>> WE THANK YOU FOR THE
ARGUMENTS WE'LL TAKE THE CASE
UNDER ADVISEMENT.

THE COURT STANS IN RECESS

UNTIL 9:00 TOMORROW MORNING.

>> PLEASE RISE.