

>> THE CONSIDERATION OF THE
THIRD CASE ON TODAY'S DOCKET,
ALLEN V. THE STATE.
COUNSEL?

>> MAY IT PLEASE THE COURT, MY
NAME IS VICTOR HOLDER.
I REPRESENT THE PETITIONER,
REGGIE EUGENE ALLEN.
THIS CASE IS HERE BECAUSE THE
FIRST DISTRICT CERTIFIED A
QUESTION AS TO WHETHER SEXUAL
BATTERY ON A CHILD 12 OR OLDER
BUT LESS THAN 18 YEARS OF AGE IS
A CATEGORY I LESSER OFFENSE OF
CAPITAL SEXUAL BATTERY.
DUE TO THE-- AS I EXPLAINED IN
THE BRIEF, DUE TO THE VERSION OF
THE STATUTE IN EFFECT AT THE
TIME OF THE OFFENSE, THE PROPER
CHARGE TO BE CONSIDERED IS
SEXUAL BATTERY OF A PERSON 12 OR
OLDER WITH NO UPPER AGE
LIMITATION.

PETITIONER TAKES THE POSITION
THAT REGARDLESS OF WHETHER THE
COURT FINDS THAT IT IS A
CATEGORY I LESSER OR INCLUDED
OFFENSE, A CATEGORY II LESSER
INCLUDED OFFENSE OR SIMPLY A
LESSER OFFENSE OF THE CHARGED
CRIME OF CAPITAL SEXUAL BATTERY,
PETITIONER WAS ENTITLED TO THE
JURY INSTRUCTION BECAUSE THE
EVIDENCE IN THE CASE SUPPORTED
THE INSTRUCTION.

IN SHORT, THIS IS NOT A
JURY-PARDONED CASE WHERE THE
DEFENDANT SAW A LESSER THAT WAS
UNSUPPORTED BY ANY EVIDENCE AT
ALL IN THE TRIAL IN THE HOPES
THAT THE JURY WOULD SIMPLY
PARDON HIM.

HERE THERE WAS A LEGITIMATE
DISPUTE OVER THE AGE ELEMENT.

>> COUNSEL, LET ME ASK YOU HERE,
WAS THE ARGUMENT BELOW FOCUSED
ON BOTH IN THE TRIAL COURT AND
IN THE DISTRICT COURT ON WHETHER
THIS WAS A NECESSARILY LESSER
INCLUDED OFFENSE?

>> YES.

AT TRIAL THE DEFENSE ATTORNEY
POINTED TO THE SCHEDULED LESSER

PROMULGATED BY THE SUPREME COURT
AND STATED THIS IS A CATEGORY I
OFFENSE.

WE'RE ENTITLED TO THE
INSTRUCTION REGARDLESS OF THE
EVIDENCE.

>> SO BEYOND THAT, THIS REALLY
HASN'T BEEN TEED UP FOR US TO
CONSIDER THE OTHER THINGS YOU
TALKED ABOUT, HAS IT?

>> WELL, I WOULD SAY THAT THE--
GIVEN THAT THIS COURT HAS ALWAYS
HELD ITS REVERSIBLE, PREVIOUSLY
HELD THAT IT IS PER SE
REVERSIBLE ERROR TO DENY A
LESSER INCLUDED WHETHER IT'S A
CATEGORY I, CATEGORY 2 OR A
LESSER DEGREE OFFENSE WHERE IT'S
REQUESTED AND IT'S, AND THERE'S
EVIDENCE TO SUPPORT THE DEFENSE,
THAT IS PER SE REVERSIBLE ERROR.
WE HAVE A REQUEST FOR THE
INSTRUCTION AT THE TRIAL LEVEL,
AND THE TRIAL COURT
DETERMINES-- ERRONEOUSLY, IN
OUR OPINION-- THAT THERE WAS NO
EVIDENCE TO SUPPORT THE GIVING
OF A LESSER INSTRUCTION.

SO EVEN IF HE HAD SAID
SPECIFICALLY UNDER THE THEORY
IT'S A CAT I, A CAT II OR A
LESSER, THE JUDGE WOULD HAVE
DENIED, IT WOULD HAVE BEEN
FUTILE EITHER WAY BECAUSE THE
JUDGE FOUND THERE WAS NO
EVIDENCE TO SUPPORT THE LESSER
OFFENSE.

AND AS WE KNOW BASED ON RULE
3.510 AND 3.490 FLORIDA RULES OF
CRIMINAL PROCEDURE, EVIDENCE IS
REQUIRED.

YOU CAN'T HAVE AN INSTRUCTION ON
THOSE OFFENSES WITHOUT EVIDENCE
SUPPORTING THEM.

>> WHAT EVIDENCE IS THERE IN THE
RECORD THAT ANY OF THE CRIMINAL
CONDUCT ALLEGED HAPPENED AFTER
THE DATE ON WHICH THE VICTIM
TURNED 12?

>> IF I MAY, I HAVE SOME NOTES
HERE, AND I HAVE THE CITATIONS
TO THE TRANSCRIPT OF THE TRIAL
AS WELL.

SO THE VICTIM COULD NOT TESTIFY

TO ANY SPECIFIC DAYS, YEARS OR MONTHS IN WHICH EACH OF THE THREE CHARGED SEXUAL BATTERIES OCCURRED.

AND THAT'S TRIAL TRANSCRIPT PAGE 60-62.

SHE TESTIFIED SHE WAS BORN IN 2001.

THAT'S ON TRIAL TRANSCRIPT PAGE 42.

SHE TESTIFIED TO THE LOCATION AND THE DETAILS OF EACH OFFENSE AND HOW OLD SHE BELIEVED SHE WAS AT THE TIME OF EACH OFFENSE.

SHE TESTIFIED--

>> I'M NOT SURE I'M HEARING AN ANSWER TO MY QUESTION THERE. WHAT IS THE EVIDENCE THAT ANY OF THE CHARGED CONDUCT HAPPENED AFTER THE DATE SHE TURNED 12? IT'S NOT EVEN IN THE INDICTMENT, IS IT?

>> WELL, THE EVIDENCE IS AT TRIAL IN THE FORM OF THE MOTHER'S TESTIMONY.

SO THE DAUGHTER, THE VICTIM TESTIFIES THAT THE FIRST INCIDENT OF SEXUAL ABUSE IN COUNT I OCCURS AT THE WILLIAMS' RESIDENCE AT NIGHT IN THE LIVING ROOM WHILE SHE AND THE DEFENDANT ARE WATCHING "LAW AND ORDER" ON TV.

PAGE 45.

SHE TESTIFIED SHE'S 9 YEARS OLD AT THE TIME.

THE VICTIM'S MOTHER TESTIFIED THAT AT THE WILLIAMS' RESIDENCE THEY MOVED TO THE RESIDENCE IN 2014 WHICH WOULD PUT-- GIVEN WHAT THE VICTIM TESTIFIED AS TO HER DATE OF BIRTH, THAT WOULD PUT HER AGE AT EITHER 12 OR 13 WHEN THEY LIVED AT THE WILLIAMS' RESIDENCE.

SO RIGHT THERE, THERE'S A CONFLICT IN THE EVIDENCE AS TO THE AGE OF THE VICTIM AT THE WILLIAMS' RESIDENCE WHERE SHE SAYS THE OFFENSE IN COUNT I OCCURRED.

NEXT, THERE'S THE DEFENDANT WHO TESTIFIED THAT NEITHER THE WILLIAMS' RESIDENCE NOR THE

AZTECS' RESIDENCE HAD A TV IN THE LIVING ROOM, AND HE ONLY STARTED WATCHING THE SHOW "LAW AND ORDER" ONCE HE LIVED AT THE SIMMS' RESIDENCE AND THAT HE NEVER WATCHED IT AT THE WILLIAMS' RESIDENCE.

149-150 IN THE RECORD.

SO ONCE AGAIN, THAT PLACES THE POSSIBLE COMMISSION OF THE CRIME NOT JUST AT THE WILLIAMS' RESIDENCE, BUT AT THE SIMMS' RESIDENCE WHERE THE DETAILS OF THE CRIME FIT ACCORDING TO THE DEFENDANT'S TESTIMONY.

AND THE VICTIM'S MOTHER TESTIFIED THAT THEY MOVED TO SIMMS' IN 2015.

THAT'S PAGE 107 ON THE RECORD. SO, AGAIN, BASED ON THE VICTIM'S DATE OF BIRTH OF 2001, THAT WOULD MAKE HER EITHER 13 OR 14 AT THE SIMMS' RESIDENCE.

THE VICTIM HERSELF TESTIFIED THAT SHE WAS 13 AT THE SIMMS' RESIDENCE, AND THAT'S PAGE 50.

AND BOTH THE VICTIM'S MOTHER AND THE DEFENDANT TESTIFIED THAT THE VICTIM ACCUSED HIM OF SEXUAL ABUSE AT THE SIMMS' RESIDENCE, PAGE 108, 151 AND 168.

THE VICTIM'S MOTHER TESTIFIED THAT THE ALLEGATIONS WERE MADE IN 2014 OR 2015 WHILE THE VICTIM WAS EITHER 13 OR 14.

AND THAT'S 108-109.

AND THIS WAS A DISPUTED ELEMENT IN THE TRIAL BECAUSE THE DEFENDANT, EXCUSE ME, THE DEFENSE ATTORNEY ARGUED THESE DISCREPANCIES IN CLOSING ARGUMENT AND ASKED FOR THE JURY TO RETURN ACQUITTAL BASED ON REASONABLE DOUBT.

SO GIVEN THAT THERE WAS EVIDENCE TO SUPPORT THE INSTRUCTION WHETHER IT'S, WHETHER WE DECIDE IT'S A CAPITAL I-- EXCUSE ME, A CATEGORY I LESSER, A CATEGORY II LESSER OR A LESSER DEGREE OFFENSE, BECAUSE THERE WAS AN EVIDENTIARY BASIS IN THE RECORD AT THE TRIAL THAT THE AGE WAS IN DISPUTE AND COULD HAVE SUPPORTED

A LESSER CONVICTION, IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY THAT REQUESTED LESSER.

>> MAYBE I'M JUST NOT FOLLOWING YOUR EXACT ARGUMENT AS TO-- LET'S JUST TALK ABOUT COUNT I. SO COUNT I HAD A VERY SPECIFIED DATE, CORRECT?

>> YES.

>> OKAY.

AND WAS THE CHILD UNDER 12 FOR AN ENTIRE--

[INAUDIBLE]

>> IF WE ACCEPT THE VICTIM'S TESTIMONY THAT SHE WAS BORN IN 2001, THEN YES.

DURING THE FULL TIME OF COUNT I THAT'S CHARGED IN THE INFORMATION, SHE WOULD HAVE BEEN UNDER THE AGE OF 12, YES.

>> BUT WOULD IT HAVE BEEN IMPOSSIBLE FOR THE JURY TO HAVE FOUND THAT SHE WAS OVER THE AGE OF 12 DURING THAT PARTICULAR TIME FRAME FOR THAT PARTICULAR COUNT?

>> ONLY IF THEY IGNORED THE EVIDENCE THAT WAS TESTIFIED TO AT TRIAL WHICH WAS THAT THE, SHE WAS NOT THAT AGE AT THE LOCATIONS WHERE SHE SAID SHE TESTIFIED.

YES, I UNDERSTAND THAT IN THE INFORMATION IT LIMITS IT TO A SPECIFIC DATE RANGE.

BUT IN GENERAL, THE STATE THE ALWAYS HAS THE OPTION TO AMEND AS LONG AS IT'S NOT GOING TO CAUSE UNDUE PREJUDICE.

HAD THEY TESTIFIED, OH, IT HAPPENED A DAY LATER, THE STATE COULD HAVE EASILY MOVED TO AMEND, AND WE'D BE IN THE SAME POSITION WE ARE.

SO UNDER THIS COURT'S PRECEDENT, IT'S ALWAYS BEEN REVERSIBLE ERROR TO FAIL TO INSTRUCT ON A REQUESTED LESSER WHEN THERE'S EVIDENCE TO SUPPORT.

GIVEN THAT THERE'S EVIDENCE TO SUPPORT HERE, WE FIND-- WE ARE DEFENDING THAT IT WAS REVERSIBLE ERROR.

NOW, THIS IS NOT A FUNDAMENTAL ERROR CASE LIKE KNIGHT WHERE WE HAVE TO SHOW THAT THE FAILURE TO GIVE THE LESSER VITIATED THE FAIRNESS OF THE TRIAL OR WHETHER THE TRIAL WAS FUNDAMENTALLY FRAUD.

THIS IS NOT AN INEFFECTIVE ASSISTANCE CASE LIKE UNDER SANDERS WHERE WE'RE ALLEGING THAT HE, THAT DUE TO THE FAILURE TO REQUEST THE LESSER, HE WAS DEPRIVED OF A FAIR TRIAL.

THIS WAS A PRESERVED, REQUESTED ERROR.

SUBJECT COMPLIED WITH CONTEMPORANEOUS OBJECTION RULE SO THAT--

>> MR. HOLDER, I HAVE A QUESTION.

I RECALL WHEN I SAT IN TRIAL COURT IN CRIMINAL, WE TRIED A LOT OF THESE CASES.

A LOT OF THESE.

THE CHARGING DOCUMENT-- BECAUSE CHILDREN OBVIOUSLY ARE NOT TAKING NOTES AS TO WHEN, THE DATE THAT THESE THINGS OCCURRED ESPECIALLY WHEN YOU'RE 9 YEARS OLD OR 8 YEARS OLD-- THE CHARGING DOCUMENTS STRETCH OUT A PERIOD AS FAR AS THEY CAN.

IT HAPPENED BETWEEN ACTUALLY SIX, SEVEN MONTHS AT A TIME.

AND IN MOST CASES, MOTIONS WERE BILL OF PARTICULARS REQUIRING THE STATE TO NARROW DOWN THE TIME SO THEY CAN PROPERLY DEFEND THE DEFENDANT, DENIED BASICALLY BECAUSE CHILDREN CAN'T REMEMBER.

SO IF YOU HAVE A SITUATION, AND I'VE HAD THE SITUATION WHERE THE DIFFERENCE IN DATE BETWEEN 11 AND 12 BIRTHDAY WHERE THAT MAKES A BIG DIFFERENCE IN THE SENTENCING, IF THAT FALLS IN THE MIDDLE OF THAT PERIOD IN THE CHARGING DOCUMENT AND THE STATE PRESENTS EVIDENCE THAT, NO, IT MUST HAVE BEEN BEFORE YOUR 12TH BIRTHDAY AND THE DEFENSE SAYS, NO, IT MUST HAVE BEEN AFTER YOUR BIRTHDAY, WOULD THAT CONFLICT OF EVIDENCE-- GIVEN THE LESSER

CHARGE THAT SOMEONE COULD BE CONVICTED OVER 12, I MEAN?

>> ABSOLUTELY.

IF THERE'S EVIDENCE PRESENTED THAT THE CHILD WAS OVER 12 OR EVEN IF THE EVIDENCE THAT SHE WAS UNDER 12 IS WEAK OR SUBJECT TO CREDIBILITY PROBLEMS, THEN THE ABSOLUTELY THAT WOULD JUSTIFY THE GIVING OF THE LESSER.

>> SEE, BECAUSE WHAT I'M GETTING HERE IS JUST BECAUSE THE STATE CHARGES IT AND THE YOUNG VICTIM COMES IN AND GIVES THE BEST SHOT SHE CAN AND REGARDLESS OF THE FACT THAT MOM COMES IN AND SAYS IT COULDN'T HAVE BEEN WHEN 9, SHE WAS, LIKE, 12 YEARS OLD AT THE TIME, THAT CONFLICT THERE DOESN'T JUSTIFY A LESSER.

>> WELL, SEE WE WOULD ARGUE THAT CONFLICT DOES JUSTIFY LESSER, AND ESPECIALLY IN A CASE WHERE AS THE VICTIM TESTIFIED THERE IS ONGOING ABUSE OVER A SERIES OF A LONG PERIOD OF TIME.

SHE TESTIFIED IN THE TRIAL THAT MR. ALLEN HAD SEXUALLY ABUSED HER OVER 20 TIMES OVER A LONG PERIOD OF TIME.

SO VERY DIFFICULT TO SAY IN A SITUATION LIKE THIS, THIS HAPPENED BETWEEN THIS DAY AND THIS DAY LISTING A PERIOD OF YEARS BUT NOT ALSO ACKNOWLEDGE THE POSSIBILITY THAT IT COULD HAVE HAPPENED JUST OUTSIDE OF THAT PERIOD OF TIME.

>> I JUST, I THINK IT'S, THE CERTIFIED QUESTION AS TO WHETHER OR NOT THIS LESSER IS A NECESSARILY LESSER OFFENSE. THAT'S THE ISSUE.

AND I DON'T KNOW THAT IT IS. I MEAN, I THINK IT SHOULD BE GIVEN IN THESE FACTUAL SITUATIONS I JUST TALKED ABOUT AND BOTH SIDES ARE PRESENTING EVIDENCE TO BE DECIDED BY THE JURY ON THE ISSUE OF THE AGE OF THE VICTIM, BUT I DON'T THINK IT'S REQUIRED JUST BECAUSE YOU HAPPEN TO BE CHARGED WITH THE

OFFENSE THAT YOU HAVE TO GET THAT LESSER OFFENSE.

>> I AGREE.

I AGREE THAT THERE IS-- UNDER THE SANDERS DEFINITION FOR SUBSUMING ELEMENTS OF A NECESSARILY INCLUDED OFFENSE, IT'S DIFFICULT TO MAKE THE, TO SAY THAT THIS OFFENSE, EXCUSE ME, SEXUAL BATTERY OF A CHILD 12 OR OLDER IS A NECESSARY LESSER INCLUDED OFFENSE BECAUSE OF THE BINARY NATURE OF THE AGE REQUIREMENT.

BECAUSE THE AGE IS NOT ALWAYS SUBSUMED BECAUSE OF THE NUMERIC, THE NUMERIC VALUE OF THE OFFENSE.

THE AGE IS NOT ALWAYS SUBSUMED IN THE GREATER OFFENSE OF CAPITAL SEXUAL BATTERY.

I ACKNOWLEDGE THAT UNDER SANDERS.

>> OKAY.

>> HOWEVER--

>> ISN'T IT, HAVING ESTABLISHED THAT-- WHICH I THANK YOU FOR CLARIFYING-- ISN'T IT TRUE THAT THIS CASE DIFFERENT FROM, SAY, A NECESSARY LESSER INCLUDED OFFENSE INVOLVING A QUANTITY OF DRUGS, SAY, WHERE IT'S SORT OF A ONE-WAY RATCHET, AND AS YOU GO UP, YOU KNOW, YOU WIND UP HAVING GREATER OFFENSE.

ISN'T AGE DIFFERENT?

ISN'T THE RIGHT WAY TO LOOK AT THIS CASE, HAVING ESTABLISHED THAT IT'S SORT OF A BINARY THING, YOU'RE UNDER 12 OR OVER, ISN'T THIS MORE ABOUT A SPECIAL CLASS OF VICTIMS?

ISN'T THAT THE RIGHT WAY TO LOOK AT THIS CASE?

EITHER WE FIND THE DEFENDANT IN THIS CASE WAS A MEMBER OF A SPECIAL CATEGORY THAT THE STATUTE PROTECTS, OR WAS IT AT THE TIME OF THE OFFENSE?

IT SEEMS TO ME THIS ISN'T AT ALL ABOUT, YOU KNOW, AN INCREASING QUANTUM OF SOMETHING, BUT THAT AGE DOESN'T WORK LIKE GRAMS, LIKE MASS.

EITHER YOU'RE A MEMBER OF THIS CLASS OR YOU'RE NOT. IS THAT THE RIGHT WAY TO LOOK AT THIS CASE?

>> I DISAGREE BECAUSE AS GRAMS DO INCREASE, SO TOO DOES AGE--

>> WELL, YEAH.

BUT-- SO LET'S RUN THAT ARGUMENT NOW.

IF, IN FACT, IT WAS A ONE-WAY RATCHET, RIGHT?

AND WE SAID, WELL, THEN THE OLDER YOU ARE THE LESS GUILTY YOU OUGHT TO BE.

THE STATUTE DOESN'T REALLY HOLD THAT, RIGHT?

IF THERE WAS A SEXUAL BATTERY OF AN 85-YEAR-OLD OR 90-YEAR-OLD, THE STATUTE ACTUALLY WOULD TREAT THAT DIFFERENTLY, RIGHT?

IT'S DIFFERENT FROM KILOGRAMS OF NARCOTICS, WOULDN'T YOU AGREE?

>> WELL, NO, BECAUSE THEY'RE SETTING OUT STATUTORY ELEMENTS THAT ARE BASED ON A NUMERIC AMOUNT JUST LIKE POSSESSION OF MORE THAN 20 GRAMS OF MARIJUANA VERSUS POSSESSION OF LESS THAN 20 GRAMS OF MARIJUANA.

OR MAYBE PERHAPS A MORE PLEASING ANALOGY WOULD BE THAT IF YOU'RE, IF YOU ARE ACCUSED OF

STEALING-- I BELIEVE I REFERENCED IN THE BRIEFS--

ACCUSED OF STEALING AN-- OF SOME SORT THAT'S WORTH OVER THE THRESHOLD OF GRAND THEFT, THAT'S A SUBJECTIVE VALUE AMOUNT.

THERE'S NO, LIKE, LESSER INCLUDED INCREMENTAL AMOUNTS.

>> IS IT YOUR POSITION, MR. HOLDER, THAT THE OLDER THE VICTIM THE LESS CULPABLE THE PERSON IS UNDER FLORIDA STATUTE ALL THE WAY, LIKE, YOU KNOW, AS SOMEONE GETS OLDER AND OLDER AND OLDER, IT'S JUST, THE CHUTE GIVES LESS CULPABILITY TO THAT? DOESN'T THE STATUTE CATEGORIZE THE AGED INFIRM AS WELL AS CHILDREN AND SPECIAL VICTIMS FOR SEXUAL BATTERY OR OTHER PURPOSES?

>> WELL, OF COURSE IF THIS CASE

INVOLVED AN OLDER PERSON, THAT
STATUTE WOULD APPLY.
BUT I DON'T SEE HOW THAT
PARTICULAR STATUTE WOULD APPLY
HERE.

THIS IS A QUESTION OF WHETHER OR
NOT THE VICTIM IN THIS CASE WAS
12 OR OLDER OR WHETHER THERE WAS
EVIDENCE--

>> I'M NOT TALKING ABOUT THE
STATUTE.

I'M TALKING ABOUT THE PRINCIPLE.
THE PRINCIPLE IS IF WE ACCEPT
YOUR ANALOGY THAT AGE IS LIKE
MASS AND THAT THE MORE OF IT
THERE IS, THE LESS CULPABLE
SOMEONE IS AND THAT'S THE
STATUTORY DESIGN HERE.

IT WOULD SEEM, TO ME, VERY HARD,
IT WOULD BE VERY HARD TO SQUARE
YOUR ANALOGY WITH THE REALITY OF
WHAT FLORIDA LAW IS.

THIS SEEMS TO ME MORE LIKE A
CLEAR EFFORT IN THE STRUCTURE
AND TEXT OF THE STATUTE TO
PROTECT A CLASS OF VICTIMS.
NAMELY CHILDREN UNDER 12.

>> YES BUT THE STATUTE HAS
ASSIGNED A DIFFERENT PUNISHMENT,
A DIFFERENT DEGREE OF
CULPABILITY BASED ON THE AGE OF
THE VICTIM SO IT IS A PUNISHABLE
OFFENSE BY AUTOMATIC LIFE IF
YOU'RE UNDER 12 AND BEFORE 2014
IT WAS A SECOND-DEGREE FELONY
ABOVE 12.

AT SOME POINT THERE IS AN AGE
RANGE, PERHAPS 65 OR SOMETHING.
DON'T KNOW THE ANSWER OFF THE
TOP OF MY HEAD WITH THE UPPER
AGE RANGE WOULD BE BUT I DON'T
SEE HOW IT APPLIES HERE.

>> YOU ARE WILLING TO YOUR
REBUTTAL WITH OUR ASSISTANCE
AGAIN.

I WILL GIVE YOU TWO ADDITIONAL
MINUTES FOR REBUTTAL BUT YOU
NEED TO DECIDE WHETHER YOU ARE
GOING TO KEEP GOING OR NOT.

I'M NOT GOING TO GIVE YOU
ANYMORE.

>> I WILL RESERVE THE REST FOR
REBUTTAL.

>> ALL RIGHT.

COUNCIL.

>> THANK YOU, GOOD MORNING.
MAY IT PLEASE THE COURT.
MY NAME IS YOU DAVID WELCH, I
WOULD LIKE TO ADDRESS THE FIRST
DCA OF SEXUAL BATTERY AS A
NECESSARY DEFENSE OF CAPITAL AS
WE LAY OUT OUR BRIEF, AND IT IS
NOT A NECESSARY OFFENSE AS
MISTER HOLDER WAS SPEAKING ABOUT
EARLIER.

WITH SEXUAL BATTERY YOU HAVE A
MUTUALLY EXCLUSIVE AGE
REQUIREMENT AS THE COURT HAS
BEEN SPEAKING OF.

YOU ARE OVER 12 OR UNDER 12, YOU
CAN'T BE BOTH AND ADDITIONALLY
USING THE STATUTE AS IT EXISTED
IN 2011 FOR SEXUAL BATTERY OVER
12 YOU WOULD HAVE AN ADDITIONAL
ELEMENT OF CONSENT WHICH IS NOT
PRESENT FOR THE CAPITAL SEXUAL
BATTERY.

>> SO WE COULD BE ON THE SAME
PAGE, IF IT IS PROVEN, THAT THE
YOUNG VICTIM IS UNDER 12.
THEY CONTRADICTED THAT ANYWHERE
AND THE JUDGE DOES NOT HAVE TO
GIVE LESS ORDINANCE.

>> WHAT IF THERE IS CONFLICTING
EVIDENCE IF THE MOM COMES IN AND
SAYS SHE WASN'T 9, SHE WAS 12.

>> YOU HAVE A PERMISSIBLE LESSER
INCLUDED OFFENSE AND COUNT 3 OF
THE PRESENT CASES ARE
COUNTEREXAMPLE WHEREAS THE
CHARGE WAS MARCH 20 FIFTH 2010,
TO 202012, THE LAST DAY WAS THE
LAST DAY THE VICTIM WAS 10 YEARS
OLD, PICKS UP THE NEXT DAY AND
CONTINUES THROUGH MARCH OF 2014,
SHE WAS OVER 12 AND IN COUNT 3
THE JUDGE DID AGREE THAT IT IS A
LESSER INCLUDED OFFENSE BECAUSE
YOU HAD A DAY RANGE THAT COVERED
FROM WHEN THE VICTIM WAS UNDER
122 WHEN SHE WAS 13 IN THIS
CASE.

THAT IS A GOOD COUNTER --
>> TO HAVE THE JURY INSTRUCTED
ON A PERMISSIVE OFFENSE, TWO
THINGS HAVE TO BE IN A WAY THAT
SUPPORT EACH ELEMENT, THE
CHARGING DOCUMENT ALSO HAD TO

CHARGE EACH ELEMENT OF THE OFFENSE.

THAT WAS THE POINT I WAS MAKING EARLIER UNDER THE 2011 STATUTE THAT SEXUAL BATTERY OVER 12 WOULD INCLUDE THE ADDITIONAL ELEMENT OF CONSENT OR NOT AND THAT WAS NOT CHARGED.

>> IN THIS CASE THIS SHOULD NOT HAVE BEEN GIVEN FOR THE REASON THE CHARGING DOCUMENT DID NOT ALLEGE THE AGE OF THE VICTIM OVER 12 WHAT THE EVIDENCE SHOWED.

>> THE COURT WAS OPERATED IN THE UP-TO-DATE STATUTE, 2011 STATUTE, TO ADDRESS THE SUPREME COURT HAS SAID YOU ARE ENTITLED TO ANY LESSER INCLUDED OFFENSE IN WHICH THE EVIDENCE SUPPORTS. HERE YOU HAD THE VICTIM TESTIFIES SHE WAS BORN MARCH 20 FIFTH 2001 AND NO EVIDENCE TO CONTRADICT WHEN SHE WAS BORN, SHE TESTIFIED SHE WAS 17 YEARS OLD, THERE WAS NOT A LOT OF EVIDENCE YEAR HE VALUE TO JUDGE HER AGE BASED ON WHEN SHE IS TESTIFYING, THE QUESTION AND THE EVIDENCE HOW OLD SHE WAS WHEN SHE LIVED WHERE WOULD HAVE GONE TOWARDS GUILT OR INNOCENCE ON COUNT ONE, NOT UNDER 12, SHE COULD NOT HAVE BEEN UNDER 12 YEARS OLD AND THEY POINT THIS COURT TO AN EARLIER DECISION FOR THE SUPREME COURT DECISION 1974 IN WHICH IT TALKS ABOUT INSTRUCTION INDICATING THE JURY COULD CONVICT APPELLATE FOR COMMITTING THE CRIMES EVEN IF THEY FOUND THE CRIMES OCCURRED AT A TIME OUTSIDE THE STATEMENT IN PARTICULAR INVITE A JURY TO TREAD ON IMPERMISSIBLE TERRITORY AND BASED ON THE APPELLATE'S THEORY IF YOU GIVE SEXUAL BATTERY INSTRUCTION FOR COUNT ONE IT WOULD NECESSARILY IMPLY THE OFFENSE WOULD HAVE OCCURRED OUTSIDE THE DATES CHARGED IN THIS ACCOUNT BECAUSE IT WAS IMPOSSIBLE FOR HER TO BE OVER 12 THE DAY CHARGED AND THE PURPOSE

OF JURY INSTRUCTIONS IS TO HELP THE JURY COME TO A CONCLUSION IN THE CASE NOT TO CONFUSE THE ISSUES BY INSTRUCTING THEM ON AN OFFENSE THAT WAS FACTUALLY IMPOSSIBLE FOR THE APPELLATE TO COMMIT BASED ON THE CHARGING DOCUMENT SO HERE AS I STATED EARLIER THE STATE'S POSITION IS THE FIRST DCA WAS CORRECT, SEXUAL BATTERY IS NOT A NECESSARY LESSER INCLUDED OFFENSE OF CAPITAL SEXUAL BATTERY BECAUSE OF THE MUTUALLY EXCLUSIVE AGE ELEMENTS, A PERMISSIVE LESSER INCLUDED OFFENSE DEMONSTRATED BY COUNSEL THAT YOU HAVE A SITUATION THAT COVERED BOTH WHEN THE VICTIM WAS UNDER 12 AND OVER 12 AS WE MENTIONED EARLIER BECAUSE OF CHILD TESTIMONY UNLESS THEY ARE KEEPING A JOURNAL, ESTIMATED RANGE SO YOU HAVE CASES WHERE POTENTIAL YOU COVER BOTH UNDER AND OVER WHERE THE STATUTE FALLS AND SHE WAS 10 WHEN THE COUNT ENDS.

IT IS NOT POSSIBLE FOR THE APPELLATE TO HAVE COMMITTED SEXUAL BATTERY IN COUNT ONE.
>> LET ME ASK YOU A QUESTION, WHAT WOULD BE WRONG WITH A FULL THAT SAYS IF THERE IS EVIDENCE TO SUPPORT A PARTICULAR OFFENSE THAT OCCURRED THAT THE JURY WOULD BE INSTRUCTED ON IT, THE CONFLICT AND EVIDENCE UNDER COUNT ONE, THE UNDERLYING CONDUCT, THE OFFENSE THAT OCCURRED, THERE IS EVIDENCE, DISPUTING THE EVIDENCE, POTENTIALLY THINKING, WE ARE NOT SURE WHEN HE DID IT BECAUSE OF THIS BUT ONLY ONE CHOICE, WE WILL GO WITH THE CHOICE WE HAVE GOT, NOT SURE WHEN HE DID IT AND GO WITH THAT IN A MORE LENIENT CHOICE BECAUSE OF THE DOUBT THAT IT OCCURRED.

>> THERE IS SO MUCH EVIDENCE TO SUPPORT A LESSER INCLUDED OFFENSE AND THERE WASN'T. THERE IS A DISPUTE HERE OF HOW

OLD THE VICTIM WAS AT SPECIFIC HOUSES, THE COUNT HAD A SPECIFIC DATE RANGE AND HER DATE OF BIRTH WAS NOT.

>> UNDERSTAND THAT BUT WHEN YOU SAY THERE IS A DISPUTE IN THE EVIDENCE ABOUT HOW OLD SHE WAS WHEN SHE LIVED AT THE PLACE WHERE SHE CLAIMED THIS PARTICULAR ACT HAD OCCURRED, CORRECT?

>> YES.

>> THE ANSWER IS DUE PROCESS CONCERNS, PROHIBITS A CONVICTION FOR AN UNCHARGED CRIME.

IF THAT IS MUTUALLY EXCLUSIVE CRIMES, THE STATE WOULD HAVE TO SUCCESSFULLY AMEND THE INFORMATION IN ORDER TO GET A JURY INSTRUCTION, IT WAS A SEPARATE CRIME BASED ON THE DEFENDANT'S AGE.

>> FOR EXAMPLE, A CAPITAL SEXUAL BATTERY CHARGE WITHOUT A DATE RANGE, REQUESTED A BILL OF PARTICULARS, THE STATE WOULD BE LOGGED INTO WHERE THE CRIME WOULD OCCUR WITH THE DATE RANGE. BECAUSE YOU HAVE COUNT ONE WITH A SPECIFIC DATE RANGE AND COUNT 3 THAT PICKED UP, THAT IS WHERE THERE IS DISPUTE EVIDENCE OF WHEN THE CRIME OCCURRED AND WHERE IT OCCURRED.

WHAT THEY BELIEVE OCCURRED BEYOND REASONABLE DOUBT AND BASED ON THE EVIDENCE THAT IT OCCURRED, TESTIFYING WHEN SHE WORKS STILL UNDER 12 YEARS OLD THEIR DUTY WOULD HAVE BEEN TO ACQUIT ON COUNT ONE AND POTENTIALLY CONVICT ON COUNT 3 IF THAT IS WHAT THEY BELIEVED EVIDENCE SHOWED THE CONDUCT OCCURRED.

IT GOT TO THE POINT THEY THREW THEIR HANDS UP AND DON'T KNOW WHERE THIS HAPPENED.

>> IF THERE WAS A REASONABLE AMOUNT BASED ON ALL THE EVIDENCE AS TO HER AGE AT THE TIME THEY SHOULD HAVE COME BACK WITH A NOT GUILTY.

>> COMPLAINING ABOUT TWO

DIFFERENT THINGS, WHAT YOU SAY
AND JUSTICE LAWSON MENTIONED,
THE INDICTMENT LOCKS IN THE DATE
MEANING SHE COULD NOT HAVE BEEN
12 AT THE TIME OF THE
INDICTMENT.

DESPITE THE FACT, THEY MAY HAVE
BEEN OVER 12.

THE ONLY THING LEFT IS THEY
ARGUED THE JURY, IN 11.

THEY IGNORED THE FACT, THERE IS
CONFLICTING EVIDENCE, THE
INVESTMENT CHARGE, COULD DECENT
-- THE DEFENSE COULD SAY NOT
GUILTY OF THIS ONE.

INSTEAD OF THAT ONE.

I IN ALL OR NOTHING SITUATION, I
AM SURE EVIDENCE AS TO WHAT
HAPPENED TO A SMALL CHILD AND
THAT IS NOT GOING TO WORK.

>> I AGREE WITH THAT, THE LYNCH
VERSUS STATE CASE, IN A
SITUATION TELLING THE JURY THEY
CAN CONVICT THE DEFENDANT FOR A
CRIME OUTSIDE THE CHARGE TIME
FRAME.

>> YOU ARE GIVING THIS MUDDLED
ANSWER TO JUSTICE LAWSON, ABSENT
AN AMENDMENT TO THE INDICTMENT
IT IS NOT A PERMISSIVE
INSTRUCTION IN THIS CONTEXT
BECAUSE YOU WOULD BE INSTRUCTING
THE JURY TO CONVICT SOMEONE OF
SOMETHING THAT IS NOT CHARGED,
FOR SOMEONE 12 OR OLDER.

>> THAT IS CORRECT AND I
APOLOGIZE JUMPING BETWEEN COUNT
ONE AND COUNT 3 WHERE YOU HAVE
TWO SEPARATE SITUATIONS.
HERE -- IT WOULD BE ALL OR
NOTHING.

>> UNLESS THERE IS THE RIGHT
THING.

GOT TO FIND THEM NOT GUILTY.

>> THE ELEMENT IS THE VICTIM WAS
UNDER 12 YEARS OLD THE STATE HAS
TO PROVE BEYOND REASONABLE DOUBT
THE VICTIM WAS UNDER 12 YEARS
OLD.

IF THEY DON'T DO THAT, TO ACQUIT
ON THAT CHARGE.

UNLESS ANY OF YOU LADIES OR
GENTLEMEN HAVE ANY QUESTIONS FOR
ME I DON'T HAVE ANYTHING ELSE TO

OFFER AT THIS POINT AND ASK THE COURT FIND THE FIRST DCA, THE CERTIFIED QUESTION IS SEXUAL BATTERY IS NOT A NECESSARY LESSER INCLUDED OFFENSE OF CAPITAL SEXUAL BATTERY.

>> REBUTTAL ARGUMENT.

>> HE IS.

QUICKLY TO JUSTICE LAWSON'S QUESTION PUTTING ASIDE, LESSER AND HER CAT ONE A CAT 2 YOU CAN HAVE LESSER AS A LESSER DEGREE OFFENSE TO THE OFFENSE THAT WAS CHARGED SO EVEN THOUGH THEY CHARGED CAPITAL SEXUAL BATTERY YOU ARE ENTITLED TO HAVE THE LESSER UNDER 4.90 BECAUSE IT IS LESSER DEGREE OF THE OFFENSE AND CASE LOSSES WHEN THE DEFENDANT IS CHARGED WITH MURDER ONE HE IS ON NOTICE HE IS ALSO CHARGED WITH POSSIBILITY OF MURDER TOO, MASS SLAUGHTER ETC..

THAT IS HOW YOU GET THE OFFENSE INSTRUCTED UPON EVEN WHEN IT IS NOT SPECIFICALLY, MAY NOT BE CAT ONE 2 LESSER IT IS STILL A LESSER DEGREE OF THE FELONY.

JUSTICE CANADDY'S POINT, A JURY GIVEN NO LESSER, EXTREME DANGER THEY ARE GOING TO CONVICT BECAUSE THEY BELIEVE THE DEFENDANT HAS COMMITTED SEXUAL BATTERY OF A CHILD THEY ARE NOT GOING TO ACQUIT BECAUSE THEY ARE NOT SURE IF THE CHILD IS 11 OR 12 AND ARE NOT GOING TO ACQUIT BECAUSE THE CHARGE RANGE DEBATE RANGE, WHEN THEY ARE SURE BEYOND REASONABLE DOUBT AS THEY WERE HERE THAT THE DEFENDANTS RAPED A CHILD, DON'T THINK IT IS REALISTIC AND IS A DANGER THAT IS SPOKEN TO BY THE US SUPREME COURT, BY THIS COURT, BY FEDERAL COURTS, THIS COURT IN JUSTICE SHAH'S DISSENT SAYS A LESSER INSTRUCTION IS A LEGITIMATE PURPOSE TO PROTECT THE DEFENDANT'S RIGHTS TO BE FREE FROM MISCARRIAGE OF JUSTICE GIVES THE JURY THE TRUE VERDICT CHOICE.

JUSTICE CANNADY ECHOED JUSTICE

SHAH'S RECOGNITION OF THE
PURPOSE OF THE LESSER TO PREVENT
THAT MISCARRIAGE OF JUSTICE.
IT ALLOWS THE JURY TO MAINTAIN
ITS ROLE AS THE ULTIMATE
FACTFINDER.

THE JURY IS THE ONE WHO DECIDES
WHAT EVIDENCE IS RELIABLE AND
WHAT EVIDENCE IS NOT, WHO IS
CREDIBLE AND WHO IS NOT.

EVIDENCE ON ONE PARTICULAR
CHARGE DEFEAT A LESSER INCLUDED
REQUEST IS INVALID UNDER THE
SPORT'S PRECEDENT.

THE STATE BROUGHT --

>> YOU HAVE EXHAUSTED YOUR TIME.
30 SECONDS.

>> REGARDLESS OF WHETHER SEXUAL
BATTERY, CATEGORY 2 LESSER OR
LESSER DEGREE OF DEFENSE IN THE
CRIME CHARGED, ENTITLED TO THE
JURY INSTRUCTION ON THE OFFENSE
UNDER THE COURT'S CASE LAW
BECAUSE THERE WAS EVIDENCE OF
THE OFFENSE AND REQUESTED TIMELY
AT THE TRIAL.

WE ASK THE COURT REVERSED TO
ORDER A NEW TRIAL.

>> WE THANK YOU BOTH FOR YOUR
ARGUMENT IN THIS CASE TODAY.