

IN THE SUPREME COURT OF FLORIDA

ALBERTO CARTAGENA,
PETITIONER

V.

STATE OF FLORIDA,
RESPONDENT.

CASE NO:



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PETITIONER'S JURISDICTIONAL BRIEF

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

BASED UPON A DNA MATCH IN 2008, THE STATE PROSECUTED PETITIONER FOR AN ARMED SEXUAL BATTERY, AND ARMED BURGLARY, WHICH OCCURRED IN 1996. AS NOTED IN THE MAJORITY OPINION, THE STATE PROSECUTED PETITIONER FOR AN ARMED SEXUAL BATTERY, AND ARMED BURGLARY, WHICH OCCURRED IN 1996. THE STATUTE OF LIMITATIONS BARRED THE BURGLARY CONVICTION BUT PETITIONER WAS CONVICTED OF ARMED SEXUAL BATTERY. ON APPEAL, PETITIONER ARGUED, INTER ALIA, THAT THE TRIAL COURT ERRED IN REFUSING TO ALLOW HIM TO WAIVE HIS STATUTE OF LIMITATIONS DEFENSE AS TO THE LESSER-INCLUDED OFFENSES FOR ARMED SEXUAL BATTERY. HAD THE TRIAL COURT ACCEPTED THE DEFENDANT'S WAIVER, THE JURY COULD HAVE BEEN INSTRUCTED ON THE LESSER-INCLUDED OFFENSES OF SEXUAL BATTERY, ATTEMPTED SEXUAL BATTERY, AGGRAVATED ASSAULT AND BATTERY. NOTWITHSTANDING THIS, THE MAJORITY AGREED WITH THE TRIAL COURT THAT PETITIONER COULD NOT WAIVE HIS STATUTE OF LIMITATIONS DEFENSE AS TO THE CHARGES ARISING OUT OF THE CRIMINAL EPISODE IN THIS CASE. STEVENSON, J. DISAGREE WITH THE MAJORITY IN A THOUGHTFUL, WELL-CRAFTED DISSENT.

SUMMARY OF THE ARGUMENT

AS DETAILED THEREIN, BOTH THE UNITED STATES SUPREME COURT AND THE SUPREME COURT OF FLORIDA HAVE RIGHTLY CONCLUDED THAT THE FAILURE TO INSTRUCT THE JURY ON A LESSER-INCLUDED OFFENSE FORCES THE JURY TO CHOOSE BETWEEN CONVICTION FOR THE GREATER CRIME AND AN OUTRIGHT ACQUITTAL, AND CREATES AN ENHANCED RISK OF CONVICTION. SEE BECK V. ALABAMA, 447 U.S. 625, 633-34 (1980); SEE ALSO

EADDY V. STATE, 638 So. 2d 22 CFIA. 1994). AS THE DISSENT POINTS OUT, THE MERE FACT THIS IS NOT A CAPITAL CASE, LIKE BECK OR EADDY, DOES NOTHING TO DIMINISH THE ENHANCED RISK OF CONVICTION.

JURISDICTIONAL STATEMENT

THIS COURT HAS JURISDICTION UNDER ART. IV, § 3 (b) (3) FIA. CONST. AND FIA. R. APP. P. 9.030 (a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT EADDY V. STATE, 638 So. 2d. 22 CFIA. 1994), AND STATE V. HEATHCOAT, 442 So. 2d 955 CFIA. 1983).

THE MAJORITY HAS RULED THAT THE MERE FACT THIS IS NOT A CAPITAL CASE, LIKE BECK OR EADDY, DOES NOTHING TO DIMINISH THE ENHANCED RISK OF CONVICTION. CONTRARY TO THE MAJORITY DECISION THIS HONORABLE COURT COULD DISAGREE WITH THE MAJORITY DECISION. MOREOVER, THE MAJORITY APPEARS TO HAVE OVERLOOKED AND/OR MISAPPREHENDED THE FACT THAT THE STATE BEARS RESPONSIBILITY FOR THE STATUTE OF LIMITATIONS ISSUE IN THIS CASE.

ARGUABLY, THE MAJORITY'S OPINION WAS IN EXPRESS AND

DIRECT CONFLICT WITH ONE OR MORE PRIOR RULINGS OF THE FLORIDA SUPREME COURT, SUCH AS EADY OR STATE V. HENTHOAT, 442 So.2d 955 (Fla. 1983), (HOLDING THAT DEFENDANT DID NOT WAIVE OBJECTION TO COURT'S RULING REFUSING TO GIVE INTOXICATION JURY INSTRUCTION BY FAILING TO RENEW OBJECTION WHERE JUDGE HAD MADE IT CLEAR HE WOULD NOT GIVE THE INSTRUCTION AND FURTHER OBJECTION WOULD HAVE BEEN POINTLESS).

WHETHER THE STATE'S DECISION TO CHARGE AN OFFENSE WELL-BEYOND THE RUNNING OF THE STATUTE OF LIMITATIONS SHOULD BE ALLOWED TO PRECLUDE INSTRUCTION OF THE JURY RE: A LESSER-INCLUDED OFFENSE IN A NON-CAPITAL CASE LIKE THIS ONE, THUS FORCING THE JURY TO CHOOSE BETWEEN CONVICTION FOR A GREATER CRIME AND AN OUTRIGHT ACQUITTAL AND CREATING AN ENHANCED RISK OF CONVICTION FOR THE OVER-CHARGED CRIMINAL DEFENDANT. SEE STATE V. WIMBERLY, 498 So.2d 929, 932 (Fla. 1986).

CONCLUSION

THIS COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION BELOW, AND THE COURT SHOULD EXERCISE THAT JURISDICTION TO CONSIDER THE MERITS OF THE PETITIONER'S ARGUMENT.

RESPECTFULLY SUBMITTED
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF
THE FOREGOING HAS BEEN FURNISHED BY U.S. MAIL TO:
MITCHELL A. EGBER AAG FLA. BAR NO. 35619 1515 NORTH
FLAGLER DRIVE 9TH FLOOR WEST PALM BEACH, FLA
33401 ON THIS 9 DAY OF July 2013.

Cartagena Alberto
PETITIONER