

1 MR. EIDE: I WOULDN'T WANT THEM TO BE INFORMED
2 THAT THEY WILL BE ABLE TO MAKE THEIR VERDICT AT THEIR
3 LEISURE, OR "WE'LL LET YOU GO HOME TONIGHT AND THEN
4 COME BACK."

5 THE COURT: WELL, I'M HESITANT TO RELEASE THEM
6 AND DO THE CLOSING ARGUMENTS AND INSTRUCTIONS TODAY
7 AND HAVE THEM GO HOME AT 3:30 AND COME BACK AT NINE
8 O'CLOCK IN THE MORNING AND BEGIN THEIR DELIBERATIONS.

9 THOSE INSTRUCTIONS, IF ANYTHING, ARE GOING
10 TO BE RATHER LENGTHY AND IN SOME INSTANCES PROBABLY
11 SOMEWHAT CONVOLUTED.

12 AND I WOULD ASSUME YOU ALL WOULD PREFER TO
13 HAVE THE JURY GOING IN AND DELIBERATING RIGHT AFTER YOU
14 HAVE DONE YOUR CLOSING ARGUMENTS, AS WELL AS CLOSING
15 INSTRUCTIONS.

16 WELL, LET'S GO AHEAD AND PROCEED, WITH THE
17 HOPE THAT THEY WILL EITHER REACH A VERDICT OR ADVISE
18 US THAT THEY CANNOT REACH A VERDICT BEFORE THEY HAVE
19 TO BE SEQUESTERED TONIGHT.

20 CERTAINLY, IF THEY WERE GOING OUT AT FIVE
21 O'CLOCK TONIGHT, WE'D JUST COME BACK TOMORROW AND TAKE
22 IT BACK UP. MAYBE, WE'LL HAVE ENOUGH TIME FOR THEM TO
23 REACH A VERDICT. I CERTAINLY HOPE SO.

24 AS FAR AS INSTRUCTIONS, MR. EIDE, YOU HAD
25 SOME ADDITIONAL INSTRUCTIONS YOU WERE REQUESTING?

1 MR. EIDE: YES, YOUR HONOR. DURING BREAK AT
2 LUNCH I WENT BACK AND WAS REVIEWING THE TESTIMONY OF
3 THE WITNESSES.

4 UPON REVIEWING THE TESTIMONY OF ANGELA [REDACTED],
5 THE ALLEGED VICTIM IN COUNT ONE OF THE CHARGES AGAINST
6 MR. MERSON, I FOUND THAT THE TESTIMONY ACCORDING TO MY
7 NOTES WAS THAT SHE SAID SCOTTY LICKED HER IN HER
8 PRIVATES. AND THEN STATED TO MR. BENDER'S QUESTION:
9 "WHERE ARE YOUR PRIVATES?" AND SHE POINTED.

10 I DON'T REMEMBER ANYTHING AFTER THAT. I
11 THINK THAT BASED ON THAT, THAT THERE WOULD BE NO OTHER
12 FURTHER EXPLANATION, THAT THERE'S A POSSIBILITY THE
13 JURY COULD BELIEVE THAT THE CONTACT WAS NOT MADE TO
14 THE VAGINA BUT RATHER WAS MADE TO AN AREA AROUND THE
15 VAGINA. BASED UPON THAT, THAT WOULD BE A LEWD AND
16 LASCIVIOUS ACT, NOT NECESSARILY A SEXUAL BATTERY.

17 THE CASE THAT I FOUND THAT I CAN PRESENT
18 TO THE COURT AT THIS TIME IS STONE VERSUS STATE, CITED
19 AT 547 SO.2D 657, A SECOND APPELLATE DECISION FROM '89.
20 IT WAS SHEPARDIZED.

21 IN THIS CASE, YOUR HONOR, THE YOUNG VICTIM
22 WHO ALSO WAS ABOUT EIGHT-YEARS-OLD, STATED THAT SHE
23 COULD NOT -- IN THIS CASE IT SAID SHE COULD NOT DEFINE
24 THE WORD "PRIVATE". IN THIS CASE SHE WAS UNCERTAIN
25 WHETHER IT WAS ABOVE OR BELOW HER WAIST. BUT IN THIS

1 CASE THE MOTHER WAS ABLE TO TESTIFY.

2 THE COURT: ABOVE OR BELOW HER WAIST? ARE YOU
3 TALKING ABOUT IN THE STONE CASE?

4 MR. EIDE: IN THE STONE CASE THAT WAS THE FACTS.
5 BUT IN THE STONE CASE THEY ALLOWED IT TO GO TO A SEXUAL
6 BATTERY DETERMINATION AND NOT LEWD AND LASCIVIOUS, AND
7 IT WAS AFFIRMED.

8 BUT THEY POINTED TO THE STATEMENT THAT THE
9 VICTIM'S MOTHER, HOWEVER, TESTIFIED THAT SHE HAD TAUGHT
10 THE WORD TO THE CHILD TO MEAN HER GENITAL AREA IN
11 REGARDS TO THE WORD "PRIVATE".

12 IN THIS CASE WE HAD NO SUCH TESTIMONY. IN
13 STONE, LIKE IN THIS CASE, THE YOUNG CHILD REPEATEDLY
14 TESTIFIED THAT THE DEFENDANT HAD LICKED HER PRIVATE,
15 AND THAT WAS IT.

16 WE THINK THAT HAD STONE NOT HAD THE ONE
17 PIECE OF EVIDENCE WHERE THE MOTHER TESTIFIED THAT SHE
18 HAD TAUGHT THE WORD "PRIVATE" MEANT GENITAL AREA, THAT
19 THE APPELLATE COURT IN THE SECOND DISTRICT WOULD HAVE
20 REVERSED JUDGE THOMAS PENICK, IN PINELLAS COUNTY, AT
21 THE TRIAL COURT LEVEL.

22 SO THE STATUTE REQUIRES THAT THERE BE UNION
23 WITH, OR PENETRATION. AND IN OUR CASE UNION WITH IS
24 THE ONLY PORTION. UNION WITH THE SEXUAL ORGAN OF THE
25 OTHER; THAT WOULD HAVE TO BE THE VAGINA.

1 IF THERE WAS UNION WITH AN AREA ANYWHERE
2 ELSE, NO MATTER HOW CLOSE IT WAS TO THE VAGINA, IT
3 WOULD NOT BE A SEXUAL BATTERY. RATHER, IT WOULD BE
4 POSSIBLY A LEWD AND LASCIVIOUS ACT.

5 THE GENERAL DESCRIPTION, "MY PRIVATES ARE
6 HERE," (INDICATING), DOES NOT SPECIFICALLY DESCRIBE
7 THE VAGINA AREA. IT DESCRIBES A MUCH LARGER AREA.

8 BASED UPON THIS, AND WE THINK, THE EVIDENCE
9 IN THE TESTIMONY, WE BELIEVE THERE SHOULD BE AN
10 ADDITIONAL INSTRUCTION AS TO LEWD AND LASCIVIOUS ACT.

11 THE COURT: DOES THE STATE WISH TO BE HEARD?

12 MR. BENDER: YOUR HONOR, ONE OF THE QUESTIONS THAT
13 I ASKED ANGELA ABOUT HER PRIVATES IS WHERE DID SHE GO
14 TO THE BATHROOM. AND SHE STATED THAT SHE WENT TO THE
15 BATHROOM IN HER PRIVATES.

16 I ALSO ASKED HER DID THE DEFENDANT PLACE
17 HIS TONGUE ON HER PRIVATES. AS YOU KNOW, THE URETHRA
18 IS INSIDE THE VAGINA OPENING. THE DEFINITION OF A
19 VAGINA IN MOST MEDICAL JOURNALS IS ABOUT THREE PAGES
20 LONG.

21 CLEARLY, IN THE CASE OF STONE, ON LESS
22 TESTIMONY BY THE CHILD, AFFIRMED THE CONVICTION FOR
23 SEXUAL BATTERY. AND I FIND THAT THE VICTIM'S TESTIMONY
24 HERE IN THIS CASE WENT FAR BEYOND WHAT THEY AFFIRMED
25 IN STONE. SHE WAS QUITE CLEAR AS TO WHERE THE TONGUE

1 WENT.

2 WE DON'T HAVE A CHILD DEMONSTRATING FOR
3 THE JURY OR SHOWING THE JURY WHERE HER PRIVATE IS BY
4 DISPLAYING IT. I THINK HER DESCRIPTION, HER POINTING
5 TO IT AND DESCRIBING WHAT THE DEFENDANT DID WERE
6 SUFFICIENT TO SHOW THAT THERE WAS UNION WITH HIS MOUTH
7 OR TONGUE TO HER VAGINA.

8 THE COURT: THE COURT AGREES. THE REQUEST TO
9 GIVE LEWD ACT IN THE PRESENCE OF A CHILD WILL BE DENIED.

10 ANYTHING ELSE?

11 MR. EIDE: YOUR HONOR, AT THIS TIME WE WOULD LIKE
12 ARGUMENT ON THE JUDGMENT OF ACQUITTAL MOTION.

13 THE COURT: ALL RIGHT. THE DEFENSE HAD PREVIOUSLY
14 RESERVED THIS RIGHT TO MAKE ARGUMENT AT THE CLOSE OF
15 THE DEFENSE'S CASE.

16 MR. EIDE: YOUR HONOR, AT THIS TIME I WOULD RENEW
17 OUR MOTION FOR JUDGMENT OF ACQUITTAL. WE THINK THAT,
18 EVEN AFTER ALL THE EVIDENCE IS IN, THE STATE HAS FAILED
19 TO PROVIDE AND PROVE A PRIMA FACIE CASE, LET ALONE A
20 CASE BEYOND A REASONABLE DOUBT.

21 WE STILL QUESTION THE TESTIMONY BY THE TWO
22 CHILDREN. NO TESTIMONY AT ALL CAME OUT AS TO THE
23 PROPER IDENTIFICATION. THERE WAS NO IDENTIFICATION AS
24 TO CLOTHING OR ANY RECOGNITION OF THE VOICE OR ANYTHING
25 ELSE BUT, MERELY, THAT WAS SCOTTY BECAUSE THE LIGHTS