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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 44

CARISSA HEMINGWAY,

Appellant.

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20 Eagle Street  
Albany, New York  
April 8, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

MARK SCHNEIDER  
LAW OFFICE OF MARK SCHNEIDER  
Attorney for Appellant  
57 Court Street  
Plattsburgh, NY 12901

JAIME A. DOUTHAT  
CLINTON COUNTY DISTRICT ATTORNEY  
Attorney for Respondent  
137 Margaret Street  
Suite 201  
Plattsburgh, NY 12901

Brandon Deshawn  
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 People v. Hemingway.

3 MR. SCHNEIDER: Good afternoon. My name is Mark  
4 Schneider. I represent Carissa Hemingway. In this case,  
5 the law is clear and unambiguous. Criminal Procedure Law  
6 200.50, Section 7 requires an indictment, quote, "contain a  
7 plain and concise factual statement in each count, which -  
8 - -"

9 JUDGE RIVERA: So let's assume - - - counsel,  
10 over here. Let's assume for one moment that it is a  
11 typographical error, right? It should have - - - it should  
12 have cited a different provision, okay?

13 MR. SCHNEIDER: I understand.

14 JUDGE RIVERA: That - - - does that fall under  
15 subparagraph 1 or 2?

16 MR. SCHNEIDER: If it's a typographical error,  
17 that is not - - -

18 JUDGE RIVERA: Everything else stays the same of  
19 what happened here.

20 MR. SCHNEIDER: I'm sorry?

21 JUDGE RIVERA: Everything else stays the same as  
22 what happened here.

23 MR. SCHNEIDER: Yeah.

24 JUDGE RIVERA: Right? The ADA is arguing or  
25 presenting to the grand jury their case based on drugs, not

1 alcohol. There's no dispute about that. The - - - a  
2 typographical error regarding which statute you referring  
3 to, does that fit under subparagraph 1 or 2?

4 MR. SCHNEIDER: It depends what the error is to.  
5 If it's a name or place or a time - - -

6 JUDGE RIVERA: The number of the statute.

7 MR. SCHNEIDER: Number of the statute - - -  
8 there's never been a case where the number of the statute  
9 has been found to not be substantive because - - -

10 JUDGE RIVERA: It's always para - - -  
11 subparagraph 2?

12 MR. SCHNEIDER: It's always 2. And in this case,  
13 perhaps, if Count I had said intoxicated by drugs and then  
14 cited the wrong statute, perhaps that would have met  
15 muster.

16 JUDGE GARCIA: But the - - -

17 MR. SCHNEIDER: But - - -

18 JUDGE GARCIA: Counsel, the language of the  
19 actual statute that's being violated is accurate, right?  
20 Aggravated driving while intoxicated with a child is the  
21 language right out of 1192(2-a)(b), right?

22 MR. SCHNEIDER: Yes.

23 JUDGE GARCIA: So that's correct?

24 MR. SCHNEIDER: Well, intoxicated, though,  
25 normally means alcohol - - -

1 JUDGE GARCIA: But that is the title of the  
2 statute that they're charging. I looked at it.

3 MR. SCHNEIDER: Yes.

4 JUDGE GARCIA: 1192(2-a) - - -

5 MR. SCHNEIDER: Yes.

6 JUDGE GARCIA: - - - sub b is titled in its  
7 entirety even though it applies to different subdivisions,  
8 aggravated driving while intoxicated with a child  
9 passenger.

10 MR. SCHNEIDER: Yes.

11 JUDGE GARCIA: So that's accurate?

12 MR. SCHNEIDER: Yes.

13 JUDGE GARCIA: What is not accurate is the  
14 committed as follows paragraph where they cite subdivision  
15 2 twice, right?

16 MR. SCHNEIDER: Yes.

17 JUDGE GARCIA: In the cases I've seen, and maybe  
18 there are others you could point me to where it's a  
19 subdivision error, where it's a number error, I think you  
20 would just discussing with Judge Rivera, it seemed like  
21 there was descriptive words around that number. So if, in  
22 this case, it would have said driving while in - - - in  
23 violation of driving while intoxicated under subdivision 2  
24 of 1192, I think that's very clear that's wrong, right?  
25 Like - - - but here, there's no description in that part.

1 There's no description of driving while intoxicated or  
2 driving under the influence. There's just a number, which  
3 makes this a little bit different than the cases that I've  
4 seen where you cite a wrong statute, but the language  
5 surrounding the cite is also wrong. And here, you don't  
6 have that.

7 MR. SCHNEIDER: Well, but here - - - again, let  
8 me finish what I was - - - I started out saying, 200.57  
9 requires an indictment have a plain and concise factual  
10 statement in each count which asserts facts supporting  
11 every element of the offense charged and then defendant - -  
12 - against the defendant. In this case, if it had said  
13 drugs, but it's - - - it's interesting here - - -

14 JUDGE GARCIA: But it doesn't say anything. It  
15 just has a number.

16 MR. SCHNEIDER: Right.

17 JUDGE GARCIA: So it's not that it's an  
18 affirmative error saying under the influence of alcohol,  
19 subsection 2. It says nothing. It just says subsection 2.

20 MR. SCHNEIDER: Right.

21 JUDGE GARCIA: And doesn't that make it more - -  
22 - a better argument, at least, that it's a typographical  
23 error in the number than it's a mischarge?

24 MR. SCHNEIDER: But the - - - it doesn't make a  
25 difference whether it's a typographical error or not. If

1 it does - - - that does - - - there are no facts to support  
2 Count I.

3 JUDGE TROUTMAN: What about the facts given to  
4 the grand jury if they were given to the grand jury - - -

5 MR. SCHNEIDER: Well - - -

6 JUDGE TROUTMAN: - - - does that matter?

7 MR. SCHNEIDER: Actually, yes, it supports my  
8 client's claim because the grand jury was not charged  
9 within Count I. The ADA charged him saying drugs and then  
10 - - -

11 JUDGE SINGAS: Because the theory of the case was  
12 drugs, and the grand jury was charged that way.

13 MR. SCHNEIDER: Right.

14 JUDGE SINGAS: But the indictment does not  
15 reflect the true bill voted - - -

16 MR. SCHNEIDER: Correct.

17 JUDGE SINGAS: - - - by the grand jury.

18 MR. SCHNEIDER: That's correct.

19 JUDGE SINGAS: So why can't the People conform to  
20 what the grand jury actually voted by changing the 2 to the  
21 4?

22 MR. SCHNEIDER: Because - - -

23 JUDGE SINGAS: And it doesn't - - - I don't think  
24 you're alleging that there's any prejudice to your client.

25 MR. SCHNEIDER: We're not saying there was

1 prejudice. And we're not saying there was a change in  
2 theory.

3 JUDGE SINGAS: Right.

4 MR. SCHNEIDER: We're saying the law is the law.  
5 And section 272 says an indictment may - - -

6 JUDGE TROUTMAN: So you say that there is no - -  
7 -

8 MR. SCHNEIDER: - - - not be chan - - - not be  
9 amended - - -

10 JUDGE TROUTMAN: Errors cannot be corrected. Is  
11 that your claim?

12 MR. SCHNEIDER: Yes.

13 JUDGE SINGAS: But that's not what 270 says,  
14 right? They said, you can amend as to errors of form and  
15 the like. Why isn't this either form or the like?

16 MR. SCHNEIDER: Because it's not. Because there  
17 are no facts alleged - - -

18 CHIEF JUDGE WILSON: What would an error - - -  
19 what would an error of form be? Can you give me - - -

20 MR. SCHNEIDER: An error - - -

21 CHIEF JUDGE WILSON: - - - an example?

22 MR. SCHNEIDER: An error of form in this case  
23 would have been, instead of saying my client was driving a  
24 Mercury Mountaineer, that they were driving a Ford  
25 Mountaineer.

1 CHIEF JUDGE WILSON: Why is that form?

2 MR. SCHNEIDER: Well, it's the wrong name of the  
3 vehi - - - it's something that's nonsubstantive, but the  
4 actual statue itself that is being charged is substantive.

5 CHIEF JUDGE WILSON: Well, time could be  
6 substantive.

7 MR. SCHNEIDER: Time can be substantive.

8 CHIEF JUDGE WILSON: Yet amendments for time are  
9 allowed.

10 MR. SCHNEIDER: No, they're not. No. Under Van  
11 Every, if you - - - and under Perez, if you have a time in  
12 the future that was specifically referenced by this court  
13 in Perez, that you cannot amend to change if the time is  
14 wrong.

15 JUDGE SINGAS: Well, that was because it was a  
16 future crime.

17 MR. SCHNEIDER: Right.

18 JUDGE SINGAS: And they're saying that you - - -  
19 you can't say something is going to happen in the future -  
20 - -

21 MR. SCHNEIDER: Yeah.

22 JUDGE SINGAS: - - - if it hasn't happened. But  
23 there can be amendments to time - - -

24 MR. SCHNEIDER: Sure.

25 JUDGE SINGAS: - - - as long as there's no

1 prejudice - - -

2 MR. SCHNEIDER: The - - -

3 JUDGE SINGAS: - - - that might impact an alibi  
4 or something like that.

5 MR. SCHNEIDER: But prejudice or changing the  
6 theory is not relevant or material under subsection 2 of  
7 270. And the grand juror actually said that, oh, well, is  
8 intoxication mean drugs? And the ADA said, well, isn't  
9 that in there? And he said - - - she - - - the grand juror  
10 said, no. And he said, I'll change it, and I will initial  
11 it, and we'll change it. And they did not change it. And  
12 we have to follow Perez. We have to follow the laws as  
13 it's written.

14 JUDGE RIVERA: So are you saying this is 2-a or  
15 2-b or both?

16 MR. SCHNEIDER: 2-b.

17 JUDGE RIVERA: Legal insufficiency of the factual  
18 allegations?

19 MR. SCHNEIDER: Right. I mean, yes, under  
20 1292(2), that states a claim, but there are no facts to  
21 support it. That claim would be driving while intoxicated  
22 by alcohol.

23 JUDGE GARCIA: So let's say they had put in the  
24 indictment in violation of subdivision 2, driving while  
25 under the influence of drugs or whatever the language in

1           there is, let's say, hypothetical, instead of this  
2           language, which just says, operate a motor vehicle in  
3           violation of subdivision 2, you had the same thing, but  
4           they said, in violation of subdivision 2 under the undue  
5           influence of drugs. They used the language from the right  
6           statute - - - subdivision.

7                       MR. SCHNEIDER: Are we talking about 1292 or  
8           200.70?

9                       JUDGE GARCIA: Looking at Count I, right?

10                      MR. SCHNEIDER: I'm sorry?

11                      JUDGE GARCIA: And the error - - - Count I, the  
12           error is - - -

13                      MR. SCHNEIDER: Yes.

14                      JUDGE GARCIA: - - - they say a motor vehicle in  
15           violation of subdivision 2 of 1192 - - -

16                      MR. SCHNEIDER: Yes.

17                      JUDGE GARCIA: - - - which is driving while  
18           intoxicated.

19                      MR. SCHNEIDER: Right.

20                      JUDGE GARCIA: And what should be there is  
21           driving while ability impaired, right? By - - -

22                      MR. SCHNEIDER: Number 4.

23                      JUDGE GARCIA: Right.

24                      MR. SCHNEIDER: That's correct.

25                      JUDGE GARCIA: So what if it said a violation of

1 subdivision 2, driving while ability impaired by drugs?

2 MR. SCHNEIDER: I think that could have passed  
3 muster because then it says drugs, and then it's clearly a  
4 typo. But again, if we go back to the requirement, a plain  
5 and concise factual statement, but looking at it as was  
6 written, we're not - - -

7 JUDGE RIVERA: Then let me just - - -

8 MR. SCHNEIDER: - - - talking policy - - -

9 JUDGE RIVERA: Can I just clarify that - - -  
10 okay. So Count I says aggravated driving while intoxicated  
11 with a child passenger. And then in describing how that  
12 is, it refers to subdivision 2 of Section 1192. Are you  
13 saying that if the first paragraph says intoxicated with a  
14 child passenger, but the second paragraph had the correct  
15 reference, that is to say, now you've got an internal  
16 inconsistency - - -

17 MR. SCHNEIDER: No. You - - -

18 JUDGE RIVERA: - - - that would just be an error  
19 that could be corrected?

20 MR. SCHNEIDER: No. You can't bootstrap the  
21 second misdemeanor count into Count I.

22 JUDGE RIVERA: No. No. I'm still on Count I.  
23 I'm not looking at the second count.

24 MR. SCHNEIDER: Yeah. count - - - okay. So  
25 we're looking at Count I. And what - - - what's your

1 hypothetical?

2 JUDGE RIVERA: If it has language that says  
3 driving while intoxicated, but also has a correct reference  
4 to ability impaired and - - -

5 MR. SCHNEIDER: By drugs.

6 JUDGE RIVERA: - - - may even say that or say  
7 drugs. So you have this tension, right? This  
8 inconsistency. One is saying it's about intoxication based  
9 on alcohol and the other one is referring to drugs. If  
10 you've got both working in the same count, would you say  
11 that's an error that could be corrected?

12 MR. SCHNEIDER: If it said drugs - - -

13 JUDGE RIVERA: Yes.

14 MR. SCHNEIDER: - - - impaired by drugs then that  
15 would be fine.

16 JUDGE RIVERA: Even if it also incorrectly  
17 mentioned alcohol.

18 MR. SCHNEIDER: If it said both, as long as it  
19 said drugs - - -

20 JUDGE RIVERA: Both at least.

21 MR. SCHNEIDER: - - - and impairment by drugs - -  
22 -

23 JUDGE RIVERA: Okay.

24 MR. SCHNEIDER: - - - and if it - - - even if it  
25 left out 1292(4) - - -



1 JUDGE RIVERA: Okay.

2 MR. SCHNEIDER: - - - it - - - the indictment  
3 doesn't have to have the section, it has to contain the  
4 facts.

5 JUDGE RIVERA: Okay.

6 MR. SCHNEIDER: And the facts here - - - there is  
7 no fact that my client was intoxicated or impaired by  
8 drugs. And we're not talking about policy. I - - - this  
9 court discussed that in Perez. We - - - under the common  
10 law, you cannot amend an indictment for any reason. And  
11 then for nonsubstantive reasons, which doesn't change the  
12 facts, like if it had the wrong date that she was stopped,  
13 that would be nonsubstantive. If it had the age of the  
14 child as being a year instead of six months, that would be  
15 nonsubstantive. If it had - - - instead of Clinton County,  
16 if it said Essex or Franklin County, that would have been  
17 nonsubstantive. But here, adding the fact of drugs as a  
18 matter of law is error, and you should reverse and dismiss.  
19 And ADAs and district attorneys have to follow the law, and  
20 the law is clear here. They need to get the indictment  
21 right and state all the facts. And it's not a matter of  
22 policy. There are many things that are strict, that may  
23 not seem fair, statute of limitations, a thirty-day appeal  
24 period, and people miss them, and it may not be perfect,  
25 but that's the law. And I think in this case, you have to

1 follow Perez, which said that the grand jury here knew  
2 about the drugs - - -

3 JUDGE SINGAS: Yeah.

4 MR. SCHNEIDER: - - - but the - - -

5 JUDGE SINGAS: But Perez was actually adding  
6 another different count. The CPW count wasn't there, and  
7 then they amended to add that. And we said, you can't add  
8 a whole other count, which is very different, I think, than  
9 the situation here.

10 MR. SCHNEIDER: I - - - you - - - under - - - I  
11 disagree. Under 200.70, you cannot amend an indictment to  
12 correct a fact. Thank you.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. SCHNEIDER: Oh, did I reserve time?

15 CHIEF JUDGE WILSON: No. But you haven't used  
16 all your time, so we'll give you a minute.

17 MR. SCHNEIDER: Well, I would like a few. Yeah.  
18 I would reserve some time on rebuttal. Thank you.

19 MS. DOUTHAT: May it please the court. Jaime  
20 Douthat, for the People of the State of New York. Your  
21 Honors, the trial court properly permitted a simple  
22 conforming amendment to an obvious typographical error,  
23 which in no way prejudiced the defendant. It merely  
24 provided the correct subdivision that was reflected in  
25 Count II of the indictment. Thus - - -

1 JUDGE RIVERA: But Count I is all about  
2 intoxication, not - - - not ability impaired by drugs,  
3 right?

4 MS. DOUTHAT: Yes. But that is how the statute  
5 reads as was pointed out.

6 JUDGE RIVERA: Yes. But that provision is about  
7 alcohol. It's not about drugs.

8 MS. DOUTHAT: I - - -

9 JUDGE RIVERA: You cannot violate that provision  
10 based on drugs. Have I misread it? You can correct me if  
11 I'm wrong.

12 MS. DOUTHAT: So the - - - as charged under the  
13 law, Vehicle and Traffic Law Section 1192(2-a)(b) - - -

14 JUDGE RIVERA: Yes.

15 MS. DOUTHAT: - - - is titled aggravated driving  
16 while intoxicated with a child passenger.

17 JUDGE RIVERA: Right.

18 MS. DOUTHAT: But under that law, a violation of  
19 1192(2), 3, 4, or 4-a, all of those violates the law. It  
20 doesn't matter which one you violate, whether it's alcohol  
21 or drugs, as long as you have a child under the age of  
22 fifteen in the car, then you're guilty of the offense. But  
23 it is titled intoxicated. It doesn't have - - - it doesn't  
24 differentiate in the title of the statute whether it's  
25 alcohol or drugs.

1 JUDGE HALLIGAN: So why do - - -

2 MS. DOUTHAT: It's - - -

3 JUDGE HALLIGAN: - - - we measure what the  
4 relevant offense is, as you're suggesting, as opposed to  
5 what the specific subsection is that is being referenced?  
6 In other words, I take it you're saying what we should look  
7 at as - - - well, let me ask the question. What's the  
8 relevant offense here?

9 MS. DOUTHAT: The relevant offense here is  
10 driving while under the influence of drugs with a child  
11 under the age of fifteen in the car.

12 JUDGE HALLIGAN: Okay.

13 MS. DOUTHAT: And what we have here is a mere  
14 typographical error as to which subdivision of the statute  
15 it's actually violating.

16 JUDGE HALLIGAN: Yes. And so my question is - -  
17 - your position, I think, is that the specific subdivision  
18 is not - - - you don't differentiate one offense from the  
19 other subdivision by subdivision, right? That it's all the  
20 same offense.

21 MS. DOUTHAT: Correct.

22 JUDGE HALLIGAN: Why is that the case?

23 MS. DOUTHAT: Why is that the case?

24 JUDGE HALLIGAN: Yeah.

25 MS. DOUTHAT: Because I think the - - - well, I

1 think the state is saying that, if you violate any of the  
2 sections of the Vehicle and Traffic Law and you have a  
3 child in the car, you're taking it from a - - - a  
4 misdemeanor to an elevated level of crime - - -

5 JUDGE HALLIGAN: So even though it's different  
6 conduct, it would be the same offense, is your view?

7 MS. DOUTHAT: Yes.

8 JUDGE GARCIA: So that would go to your  
9 adversary's point, I think, that it's the factual part of  
10 your indictment that's lacking because the only - - - the  
11 way he's - - - the defendant is supposed to have violated,  
12 which I agree with you, is aggravated driving while  
13 intoxicated with a child. But the only factual way he's  
14 alleged to have done that is by being under the influence -  
15 - - she's alleged to have done it - - - as being under the  
16 influence of drugs, right? And there's no reference to  
17 that in your committed as follows section. So it's really  
18 more of a factual problem you've had.

19 MS. DOUTHAT: So I think, though, that, as this  
20 court found in Iannone that a factual issue can be cured by  
21 a bill of particulars. And in this case, no bill of  
22 particulars was actually - - - motion for bill particulars  
23 was made. So I don't think any sort of - - - it's not a  
24 jurisdictional defect to not have the - - - allege all the  
25 facts. So I don't think that that is, you know, what we're

1 looking at here.

2 JUDGE GARCIA: Counsel, I'd like to go to  
3 something I think your adversary steered clear of, but is  
4 policy here. And here we are arguing about whether or not  
5 you meant 4 and you said 2, and whether that - - - why  
6 isn't a better rule, like, proof the indictment and then we  
7 wouldn't be here?

8 MS. DOUTHAT: Well, then, I mean - - - so as  
9 counsel stated, I mean, under the common law, we couldn't  
10 amend the indictment at all. However, the legislature did  
11 - - -

12 JUDGE GARCIA: I'm saying, before you return it -  
13 - - I mean, it's a pretty big process, right? It's a  
14 felony indictment. You have a grand jury. Why isn't the  
15 better policy just make sure it's right?

16 MS. DOUTHAT: Sure. But I think people make  
17 mistakes, and that's what happened here. And there is a  
18 CPL section that allows us to - - -

19 JUDGE GARCIA: I agree. But are they less likely  
20 to make a mistake if the consequences are, you can't amend  
21 it?

22 MS. DOUTHAT: But the law allows us to amend  
23 indictments.

24 JUDGE GARCIA: Right.

25 MS. DOUTHAT: I understand.



1 JUDGE RIVERA: That's what we're going to decide  
2 about whether or not you could amend this one. You're  
3 right about the amendments. That is true. But let me just  
4 go back to where I started, if you don't mind, because I  
5 think now I understand the point you were making about  
6 Count I. You are correct, of course, that it refers to  
7 1192(2-a)(b), and that that particular section doesn't say  
8 drugs or alcohol. But it does say that you have to fit  
9 under subdivision 2, 3, or 4, or 4-a. And the only one  
10 that's referenced in the rest of Count I is 2. That's, of  
11 course, what you - - - you say is the typographical error,  
12 but that's exactly what the count says. So the count is  
13 about alcohol. It's not about anything else.

14 MS. DOUTHAT: So yes, but - - - but it - - - as I  
15 stated, it is a typographical error, which I believe that  
16 we are allowed to amend. And if there had been a - - -

17 JUDGE RIVERA: So which category under  
18 subparagraph 1 does it fit? Is it form, or is it the like?

19 MS. DOUTHAT: I would say it's the like.

20 CHIEF JUDGE WILSON: So how do we put - - - how  
21 do we understand what the like means? How do we define  
22 that? I mean, that's what's hard about this case, I think.

23 MS. DOUTHAT: So I think because the law is  
24 divided into subdivisions, that any of those subdivisions  
25 can violate the felony offense, I think that that allows it

1 - - - the amendment to be made in this case.

2 CHIEF JUDGE WILSON: So if the statutory scheme  
3 had been just structured differently - - - it had the same  
4 content, but instead of subdivisions that were pulled into  
5 a different section of the VTL, you had these all in  
6 separately numbered, completely different sections of the  
7 VTL, and you cited the wrong one. Otherwise, everything  
8 else is the same. Would that still fit in in the like or -  
9 - -

10 MS. DOUTHAT: So I don't - - - I believe that  
11 that's more problematic than the situation that we have  
12 here.

13 CHIEF JUDGE WILSON: Yeah.

14 MS. DOUTHAT: But I still think that if it's a  
15 VTL Section 1192, you know, 2, that you're changing to a 3  
16 or to a 4, I think that that will be okay. I think it  
17 would be - - - really problematic if we were adding a new  
18 charge or offense. For instance, you know, we had a DWI  
19 count, and then we're doing something completely different,  
20 that - - -

21 JUDGE CANNATARO: And those wouldn't be all new  
22 charges if you change 2 to 3 or 4 or something like that?

23 MS. DOUTHAT: I don't believe so. No. Because I  
24 think that there - - -

25 JUDGE CANNATARO: The - - - the - - - never mind.

1 JUDGE HALLIGAN: Well, why is that? Suppose the  
2 statute were structured differently, as the Chief  
3 suggested, and you had different offenses, aggravated  
4 driving while intoxicated with a child passenger, and it  
5 was 2-a, and then the second one - - - the second statutory  
6 provision, different provision of the VTL, was 2-b, why is  
7 the fact that it's in a subdivision dispositive of the  
8 analysis?

9 MS. DOUTHAT: Well, because I think, as I stated  
10 that - - - because by violating any of those subdivisions,  
11 you violate the law. So I think that that shows that it's  
12 clearly just a typographical error that we made.

13 JUDGE HALLIGAN: They're completely different  
14 ways of violating the law, right?

15 MS. DOUTHAT: Sure. One is alcohol, one's drugs,  
16 and one is a combined influence of alcohol and drugs, but I  
17 still believe that - - -

18 CHIEF JUDGE WILSON: Would an indictment be  
19 sufficient if it said, you violated the VTL by violating 1  
20 of 2, 3, 4, or 4-b without specifying which one?

21 MS. DOUTHAT: Yes. I believe that'd be fine.  
22 And then you'd - - - there'd be a bill of particulars that  
23 are correct and factual.

24 JUDGE RIVERA: If there was only one count, only  
25 the first count, does that make a difference? I thought

1           you were arguing, in part, the fact that all the other  
2           counts were about drugs made it obvious that it was a  
3           typographical error.

4                   MS. DOUTHAT: I don't think that that would make  
5           a difference because it wouldn't change the theory of the  
6           case, and it wouldn't prejudice the defendant whether or  
7           not we had actually charged. I mean, the other offenses  
8           were all misdemeanors. We could have made the choice to  
9           just charge the felony and go with that. We don't have to  
10          put all the counts in the indictment. So I don't think  
11          that would make a difference at all whatsoever because  
12          there's - - - the theory is the same, and there's no  
13          prejudice to the defendant.

14                   CHIEF JUDGE WILSON: Are there some amendments to  
15          an indictment that would not be allowable even if they  
16          didn't prejudice the defendant and they didn't change the  
17          theory of the case?

18                   MS. DOUTHAT: Oh, absolutely. That's where - - -

19                   CHIEF JUDGE WILSON: Yeah.

20                   MS. DOUTHAT: - - - 200.70(2-a) and b come in.  
21          If it fails - - - a failure thereof to charge or state an  
22          offense like in Perez, where we add a count or the legal  
23          insufficiency of the factual allegations. If we do one of  
24          those two things with our amendment, then we're - - - then  
25          we have a problem, absolutely. So if there aren't any more

1 questions, I would just like to state that this is the kind  
2 of minor typographical error that's subject to correction.  
3 The defendant had no surprise or prejudice. There was no  
4 lack of notice of the charges. It was clearly all along  
5 VTL 1192(a) (b) as charged in drugs under the second count.  
6 We merely corrected the subdivision contained within the  
7 statute itself as a typographical error. Thank you.

8 MR. SCHNEIDER: I don't think it was a typo. I  
9 think it was a mistake or an error. A typo is where you,  
10 you know, hit zero, 0 instead of A. And we know, from  
11 looking at the grand jury minutes - - -

12 CHIEF JUDGE WILSON: Well, but putting - - - but  
13 putting in Mercury instead of Ford is not exactly a typo  
14 either. But that, you - - - I thought you said would be  
15 okay. Changing the car from a Ford to a Mercury is not a  
16 typo.

17 MR. SCHNEIDER: But that's nonsubstantive. This  
18 is substantive. The substance is, you have to say what the  
19 facts are. And by adding - - - changing the fact is  
20 substantive, clearly. The other kind of errors, if we look  
21 at cases before this court or other courts, you know,  
22 calling somebody Bobby instead of Robert or having a wrong  
23 date or a wrong county. And in Perez, the court noted that  
24 a clerical error in an indictment with the wrong date was  
25 reversed because it was not one of form. It was one of

1 substance. Substance means it makes a difference to the  
2 outcome. So a different name of a car, calling it a Ford  
3 Mountaineer instead of a Mercury, or a date, that's  
4 nonsubstantive. The law is the law here. If there is a  
5 policy issue here, that can be dealt with by the  
6 legislature. Perez has been the law of this state pursuant  
7 to this court's decision for over thirty years. And - - -

8 CHIEF JUDGE WILSON: So if, instead of saying  
9 subdivision 2, it said subdivision 13, and there's no  
10 subdivision 13, is that a typo, or it doesn't matter  
11 because it's still substantive?

12 MR. SCHNEIDER: Well, no. Under the time, place,  
13 and form, it doesn't say stating the wrong statute or  
14 subdivision. That is not the kind of nonsubstantive change  
15 that the legislature considered. It's - - - I can't find  
16 any case where citing the wrong subdivision has ever been  
17 allowed as a nonsubstantive change. Thank you.

18 CHIEF JUDGE WILSON: Thank you.

19 (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Carissa Hemingway, No. 44 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Brandon Deshawn*

Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 7227 North 16th Street  
Suite 207  
Phoenix, AZ 85020

Date: April 17, 2025

