

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

State of Florida v. James E. Brake, Jr.

MR. CHIEF JUSTICE: NEXT CASE ON THE COURT'S CALENDAR IS STATE VERSUS BRAKE. MS. BOCK.

GOOD MORNING, YOUR HONORS. I AM DIANA BOCK, AND WE FIND STATUTE 787.025 UNCONSTITUTIONAL FOR VAGUENESS. THE FACTS IN THE CASE ARE THESE. UNDER THE STATUTE, IT IS ILLEGAL FOR A PRIOR CONVICTED CHILD MOLESTER TO LURE OR ENTICE A CHILD INTO A STRUCTURE -- TO LURE OR ENTICE A CHILD INTO A STRUCTURE INTO A STRUCTURE. AND A CONVICTED CHILD MOLESTER USED A STUFFED ANIMAL TO LURE A CHILD FROM HER FRONT BEYOND A REASONABLE DOUBT, AND TOOK HER INTO HIS HOME, AND IN THE PRIVACY OF HIS HOME HUGGED, KISSED AND TOUCHED HER INAPPROPRIATELY. THOSE ARE THE FACTS OF OUR CASE. WHAT HAPPENED, AT THE COURT OF APPEAL, JUDGE DENY PROVIDED THAT IT UNLAWFUL PURPOSE DEFINITION IS VAGUE.

WHERE WOULD YOU LOOK TO TO FIND ANOTHER DEFINITION?

I BELIEVE TO LOOK TO OTHER CASE LAW THAT WE HAVE CITED IN OUR BRIEF. YOU HAVE HANKIN AND KUDA, WHICH WE CITED, AND YOU HAVE, ALSO, BASICALLY COMING DOWN TO THIS, COMMON UNDERSTANDING AND APPLICATION IN THE CONTEXT OF WHERE THE LANGUAGE IS FOUND. COMMON UNDERSTANDING, NOT FOR LAWFULLY, UNLAWFUL, THEY BREACHED A CRIMINAL LAW.

AND WHAT WAS THERE AGAINST THE LAW THAT THIS MAN DID?

HE INAPPROPRIATELY TOUCHED THIS CHILD.

BUT WHAT STATUTE DID HE VIOLATE?

WHEN YOU SAY WHAT STATUTE DID HE VIOLATE --

WHAT LAW DID HE VIOLATE?

I COULD ARGUE THAT HE BREACHED THE LEWD AND LASCIVIOUS LAW, BUT THE STATUTE HE VIOLATED WAS 787.024, LURING AND ENTICING THIS CHILD. THAT WAS A CRIMINAL ACT.

OTHER THAN A LAWFUL PURPOSE, AND WHAT WAS THE LAWFULLY -- YOU KNOW, IT IS VERY OFFENSIVE, WHAT HE DID, AND IT MIGHT BE MORALLY REPREHENSIBLE, BUT WHAT IS -- HOW WOULD YOU DEFINE, OTHER THAN A LAWFUL ACT, AS TO WHAT HE DID? THAT HE KISSED HER?

HE KISSED HER. HE HUGGED HER. HE TOUCHED HER IN HER THIGH.

COULD HE HAVE BEEN CHARGED WITH THAT?

I THINK THAT END HAVE. HE WAS NOT. BUT I THINK THAT HE COULD HAVE BEEN, UNDER THOSE CIRCUMSTANCES. BUT THE POINT, HERE, IS THAT HE DID THESE THINGS IN VIOLATION OF THIS STATUTE, AND ONE OF THE THINGS THAT WE ARE GOING TO HAVE A PROBLEM WITH ON FACTS, IS THAT THERE WAS A PRIMA FACIE FINDING OF UNLAWFUL PURPOSE IN OUR CASE.

DID THEY CHARGE HIM IN THE INTIMATION -- IN THE INFORMATION, WITH COMMITTING LEWD AND LASCIVIOUS CONDUCT UPON --

NO, YOUR HONOR, THEY DID NOT.

WHAT DID THEY CHARGE HIM WITH DOING?

THEY CHARGED HIM WITH A VIOLATION OF 87.025, LURING AND ENTICING A CHILD.

AND WHAT -- OF 78.025, LURING AND ENTICING A CHILD.

WHAT DID THEY SAY WAS IN THE INFORMATION, OTHER THAN FOR A LAWFUL PURPOSE.

JUST AS WITH A BURGLARY, YOU DON'T SPECIFY THE UNDERLYING FELONY, NECESSARILY.

WOULD -- I JUST WONDER WHY THEY, IF HE WAS GUILTY OF COMMITTING ALLUDE AND LASCIVIOUS ACT, THEY DID NOT CHARGE THAT.

I DON'T THINK IT IS NECESSARY FOR THEM TO CHARGE THAT. THEY MUST PROVE IT AT TRIAL, BUT IT IS A SECONDARY CRIME THAT DOES NOT HAVE TO BE CHARGED. THE UNLAWFUL PURPOSE WHICH COULD HAVE BEEN SHOWN AT TRIAL, UNDER THE FACTS WE HAVE, COULD HAVE VIOLATED LEWD AND LASCIVIOUS, COULD HAVE VIOLATED OTHER LAWS. WE DIDN'T GET TO THE POINT OF PROVING THAT, AND IN OUR CASE, WE HAVE A PRIM FARB FINDING, BECAUSE IT WAS -- A PRIMA FACIE YEAH FINDING -- A PRIMA FACIE BLINDING, BECAUSE THERE WAS A PLEA -- FINDING, BECAUSE THERE WAS A PLEA, AND SO WE HAVE NO LUXURY OF A CRIME AS TO WHAT WOULD HAVE BEEN FOUND, UNDER UNLAWFUL PURPOSE.

THIS MAN WOULD HAVE NOT MET THE DEFINITION OF KIDNAPPING, WOULD HE?

POSSIBLY. I THINK HE POSSIBLY COULD HAVE. I DO NOT KNOW THAT. THOSE AREN'T THE FACTS THAT WE ARE FACED WITH.

THE STATE WOULDN'T NEED THE STATUTE, IF LEWD AND LASCIVIOUS CONDUCT HAD BEEN COMMITTED, BECAUSE THAT IS WHAT THEY WOULD HAVE CHARGED. IF THERE IS A BATTERY, I MEAN, THAT IS GOING TO BE SORT OF THE -- ISN'T THIS STATUTE, REALLY, THE WAY I SAW IT, WAS ANALOGOUS TO A FELON NOT BEING ABLE TO CARRY A FIREARM. WHAT THIS STATUTE IS AIMED AT IS TRYING TO PREVENT AN ACT BEFORE IT OCCURS, NOT WAITING UNTIL IT OCCURS AND THEN SAYING, WELL, NOW WE ARE GOING TO CHARGE THIS OTHER CLIMB, AND SO -- CRIME, ON -- AND SO WHAT I WOULD LIKE YOU TO ADDRESS IS, THE END OF THE OPINION, THE SECOND DISTRICT SAYS THE LEGISLATURE COULD CURE THE PROBLEM BY JUST LEAVING OUT THE OFFENDING LANGUAGE AND JUST -- THAT IS UNLAWFUL PURPOSE, AND JUST MAKING IT ILLEGAL FOR A CONVICTED SEX OFFENDER, OVER THE AGE OF 18, TO LURE OR ENTICE A CHILD UNDER 12 INTO A STRUCTURE, AND THEN LET THE AFFIRMATIVE DEFENSES BE THERE WAS SOME PURPOSE, AND WOULD THE STATE, DOES THE STATE THINK THAT THAT COULD CURE IT? THAT IS THAT THEY DON'T NEED TO WORRY ABOUT IT BEING FOR A LAWFUL PURPOSE? IT JUST WOULD BE A CRIME TO ENTICE A CHILD, UNDER TWELVE, INTO A RESIDENCE, ALONE, WITHOUT THE PARENTAL CONSENT?

YES.

SO, THEN, THE IDEA, CAN WE SAVE THIS STATUTE, ASSUMING THAT WE FIND THAT OTHER THAN A LAWFUL PURPOSE IS JUST VERY VAGUE, BECAUSE IT DOESN'T -- IT CAN'T BE JUST LIMITED TO VIOLATING THE LAW, BECAUSE THEN YOU COULD CHARGE THE UNDERLYING CRIME. CAN WE SAVE THE STATUTE, BY JUST EXCLUDING THAT LANGUAGE FROM IT, OR WOULD WE HAVE ON TO DECLARE IT UNCONSTITUTIONAL, IF WE FIND THE TERM, OTHER THAN A LAWFUL PURPOSE, VOID FOR VAGUENESS?

I THINK THAT THIS COURT COULD, IN FACT, CARVE OUT AND SAVE THE STATUTE, IF THAT IS WHAT THE COURT CHOSE TO GO. HOWEVER, I DO NOT THINK -- TO DO. HOWEVER, I DO NOT THINK

IT IS NECESSARY TO DO SO, AND THE REASON I DO NOT THINK IT IS NECESSARY TO DO SO IS, BECAUSE IN THE CONTEXT USED, AN UNLAWFUL PURPOSE IS STILL AN ELEMENT THAT HAS TO BE PROVEN -- PROVEN BY THE STATE. IT DOESN'T HAVE TO BE CHARGED AS A SEPARATE CRIME, BUT IT NEVERTHELESS LEAVES IT IS BURDEN OF THE STATE TO PROVE THE INTENT THAT THIS UNLAWFUL CRIME WAS FOR THE VIOLATIVE PURPOSE.

YOU ARE GOING TO ACKNOWLEDGE, FOR THE BURGLARY STATUTE, THAT THERE HAD TO BE AN INTENT, TO VIOLATE A LAW.

ANOTHER FELONY, YES.

AND HOW WOULD THE STATE BE INTENDING TO PROVE, IN A CASE WHERE NOTHING HAPPENED, THAT THAT WAS THE PURPOSE?

I CAN'T SPEAK AS TO HOW A PROSECUTOR WOULD ACTUALLY PROVE UP HIS CASE.

BUT THEY GAVE IT A PER SE. ISN'T THAT THE CASE WITH THE STATUTE, A MANDATORY REBUTTABLE PRESUMPTION?

A MANDATORY PRESUMPTION. IT IS A PERMISSIBLE PRESUMPTION, AND I THINK IF YOU LOOK CAREFULLY, HE RECITES AS TO MARCOLLINI, AND IN FACT IN MARCOLINI, THIS COURT FOUND THAT IT SHALL BE PERMISSIBLE, NOT MANDATORY. WHAT THE JUDGE HAS DONE IS HE CITED SPECIFICALLY TO THE PURPOSE IN MARCOLLONI IN THE DISSENTS.

I AM HAVING SOME DIFFICULTY WITH THE INTENT, IN RESPONSE TO JUSTICE PARIENTE'S QUESTION. INITIALLY IT LOOKED, TO ME, THAT THE LEGISLATURE VERY LEGITIMATELY WAS SAYING THAT WE RECOGNIZE THERE MAY AND CLASS OF PEOPLE OUT THERE THAT HAVE ALREADY BEEN CONVICTED. OKAY. OF OFFENSES IN THIS AREA.

THAT'S CORRECT.

AND WE WANT TO ADD ANOTHER STATUTE, TO BE SURE THEY HAVE NO FURTHER CONTACT WITH THE CHILDREN, WITHOUT THEIR PARENTS' CONSENT, SO THEY WRITE THIS STATUTE THAT TALKS ABOUT LURING A CHILD, IF YOU ARE A PREVIOUSLY CONVICTED OF THIS. YOU SEEM TO BE SAYING IF THERE WAS A LAWFUL PURPOSE IN LURING THE CHILD INTO THE HOUSE. LET'S SAY THAT THE SAME CIRCUMSTANCES WE HAVE, HERE, AND THE PURPOSE OF LURING THE CHILD INTO THE HOUSE WAS TO GIVE THE CHILD A BOX OF CANDY THAT IF THAT WAS THE CASE, THAT THERE WOULD BE NO VIOLATION OF THIS STATUTE. UND THE STATUTE AS IT IS, YOU ARE CORRECT.

SO YOU HAVE TO PROVE AN UNLAWFUL PURPOSE.

YOU HAVE TO PROVE AN UNLAWFUL PURPOSE.

SO YOU HAVE TO PROVE THAT THE DEFENDANT INTENDED TO COMMIT SOME OTHER CRIME, ONCE THE CHILD WAS IN THE HOUSE. IS THAT --

YES. WE WOULD HAVE HAD TO PROVE AN UNLAWFUL PURPOSE.

AND WAS THERE AN ALLEGATION, IN THIS COUNT, THIS INFORMATION, OF THIS OTHER CRIME? IN OTHER WORDS WAS THERE --

NO. JUST THAT IT WAS FOR AN UNLAWFUL PURPOSE.

SO THERE WAS NO SPECIFIC ALLEGATION OF WHAT THAT UNLAWFUL PURPOSE WAS.

NO. OTHER THAN THE INAPPROPRIATE TOUCHING AND KISSING AND HUGGING.

BUT IS THE LEGISLATURE SENDING OUT, THEN, SORT OF MIXED SIGNALS, WITH THIS?

I DON'T BELIEVE SO, YOUR HONOR. I UNDERSTAND YOUR CONCERN. I HAD THE SAME CONCERN, PREPARING FOR THIS ARGUMENT, AND THAT IS IT ACTUALLY SEEMS TO BENEFIT THE STATE, TO CARVE OUT THAT LANGUAGE, AS JUSTICE PARIENTE SUGGESTS. IT LESSONS THE -- LESSENS THE STATE'S BURDEN TO PROFITS CASE. IT GIVES US A MUCH STRICTER STANDARD TO LOOK AT, TO GAUGE THE CONDUCT OF THIS INDIVIDUAL, BUT BE AWARE THIS STATUTE HAS TWO SAFETY MAKE NISMS, THE FIRST BEING IT MUST BE TRIGGERED BY A PREEXISTING CONVICTION OF A SEX OFFENSE, IN THIS CASE A 11-YEAR-OLD CHILD OUT OF TEXAS. SO THIS DEFENDANT, MR. BRAKE, HAD THAT PRIOR CONVICTION. OHIO HAS A SIMILAR STATUTE, AS DOES, I BELIEVE, I AM TRYING TO THINK OF THE OTHER STATE THAT HAS ONE. THERE ARE TWO STATES. BOTH OF THOSE STATUTES DON'T REQUIRE A PRIOR CONVICTION. THEY APPLY TO EVERY SINGLE CITIZEN OF THE STATE.

DO THEY HAVE AN UNLAWFUL PURPOSE?

SEE, THAT IS THE SECOND SAFETY VALVE, JUSTICE HARDING, AND THEY DON'T HAVE IT.

HAVE THEY BEEN TESTED OR IS THERE ANY ARGUMENT, INDICATING THAT THOSE STATUTES MAY BE UNCONSTITUTIONAL, ON THE GROUNDS THAT THEY ARE RESTRICTING ONE'S FREEDOM OF ASSOCIATION, AND THAT, BY NOT HAVING ANY LIMITING LANGUAGE, THAT IT IS NOT THE LEAST RESTRICTIVE MEANS TO ACCOMPLISH THE PURPOSE, THAT THE STATUTE IS INTENDED TO ACCOMPLISH?

THERE HAVE BEEN CHALLENGES TO THE STATUTE, YOUR HONOR, AND IN OHIO VERSUS BERKE, WHICH IS THE OHIO STATUTE BEING CHALLENGED, THEY FOUND THAT THERE IS NO CONSTITUTIONAL VIOLATION OF ANY NATURE, AND ONE THING THAT BRINGS UP, ALSO, THAT I WANTED TO MAKE SURE WE ADDRESSED, WAS THE FACT THAT THIS CANNOT BE AN OVERBREADTH APPLICATION ANALYSIS. THIS SHOULD BE AN APPLICATION AS APPLIED TO MR. BRAKE'S CIRCUMSTANCES. THAT SEEMS TO BE ANOTHER FLAW, IN THE SECOND DISTRICT COURT'S RULING. IT SEEMS THAT THEY HAVE DONE AN OVERBREADTH ANALYSIS, WHICH IS NOT AVAILABLE HERE. THERE IS NO CONSTITUTIONAL RIGHT TO LURE OR ENTICE A CHILD. WE DO NOT HAVE A FIRST AMENDMENT VIOLATION, AND IT WAS, NEVER, RAISED BELOW.

WHAT WAS THE LAW -- LET'S GO THROUGH, BECAUSE YOU ARE, NOW, CONCEDED THAT THE STATE HAS TO PROVE AN UNLAWFUL PURPOSE.

AN INTENT FOR AN UNLAWFUL PURPOSE.

AN INTENT FOR AN UNLAWFUL PURPOSE. IF MR. BRAKE'S INTENT WAS TO KISS THE CHILD ON THE CHEEK, IS THAT AN UNLAWFUL PURPOSE?

I THINK THAT IT CAN BE CONSTRUED AS SUCH. AND I WILL TELL YOU WHY. HE WAS ON PROBATION. HE WAS ON PROBATION AS A CHILD MOLESTER. HE KNEW HE WAS NOT TO BE ALONE WITH A CHILD. HE NOT ONLY SET UP THOSE CIRCUMSTANCES, HE, THEN, TOOK ADVANTAGE OF THEM.

WHY DIDN'T THEY JUST VIOLATE HIS PROBATION THEN?

I CANNOT ANSWER THAT, JUSTICE PARIENTE.

IF AN 18 YEAR-OLD SEX OFFENDER ENTICES A CHILD INTO HIS HOME, AND LET'S SAY HE IS ARRESTED AT THAT POINT, AND CHARGEDS ARE -- AND CHARGES ARE BROUGHT AGAINST HIM,

THEN IS THE BURDEN SHIFTED TO HIM, AT THAT POINT, TO SHOW, THROUGH THE MEANS OF THE STATUTE, THAT HE INVITED THE PERSON IN FOR A LAWFUL PURPOSE?

ABSOLUTELY NOT, YOUR HONOR.

IS THAT THE IMPACT OF IT?

NO, IT IS NOT, YOUR HONOR. THE IMPACT IS THAT, IF IT WAS WITHOUT PARENTAL CONSENT, WE HAVE A PRIMA FACIE PRESUMPTION THAT IT WAS FOR OTHER THAN LAWFULLY PURPOSES, BUT --

THERE IS NO NOT A PRIME FAIR? -- PRIMA FACIE?

IT IS PRIMA FACIE. IT WAS WITHOUT PARENTAL CONSENT.

HE FACES THIS, AND NOW HE MUST SHOW THAT HE HAS A LAWFUL PURPOSE.

NO, YOUR HONOR, HE DOES NOT, NOT UNTIL THE STATE PROVES, BEYOND A REASONABLE DOUBT, THAT HIS INTENT WAS UNLAWFUL. THE FACT THAT THERE WAS -- IS A PRIMA FACIE PRESUMPTION AVAILABLE DOES NOT REQUIRE THE TRYER OF FACT TO ASSUME THAT PRIMA FACIE PIECE OF EVIDENCE.

IF HE DOES NOTHING, THEN WOULDN'T HE STAND CONVICTED, IF HE SAYS NOTHING?

NOT IF THE STATE CANNOT PROVE THE ELEMENTS OF THIS CRIME, HE DOES NOT, NO.

IS THE JURY INSTRUCTED, ACCORDING TO THAT PRESUMPTION? TELL ME WHY IT IS NOT, TOAL EVENLY THE UNLAWFUL CHARGE AGAINST THIS PERSON, SO THAT HE WOULD KNOW WHAT HE IS BEING CHARGED WITH?

I DON'T THINK THAT IT IS INAPPROPRIATE TO DO IT. I SIMPLY THINK IT IS NOT FATALLY FLAWED TO ON NOT DO IT. -- TO NOT DO IT. I THINK THAT IT COULD HAVE BEEN CHARGED THAT WAY.

BUT HOW WOULD HE KNOW, FROM THE ALLEGATIONS OF THE INFORMATION, WHAT THE UNLAWFUL PURPOSE WAS? IN ORDER TO KNOW WHAT THE PROOF IS GOING -- THAT IT COULD BE REQUIRED BY THE STATE?

WELL, FIRST OF ALL, I THINK THAT HE WAS GIVEN THE SPECIFICS OF WHAT ACTIVITY WE WERE TALKING ABOUT. I DON'T THINK HE HAS TO BE GIVEN THE EXACT NATURE OF WHAT CRIMINAL ACT THEY WILL SHOW, TO SHOW THE INTENT OF UNLAWFUL PURPOSE.

BUT YOU DID INDICATE THAT IT HAD TO BE AN UNLAWFUL OR A CRIMINAL ACT.

YES, YOUR HONOR. WE HAVE TO PROVE. THAT AS THE STATE, WE NEVER LOSE THAT BURDEN. THAT IS WHY IT DOES NOT BECOME A MANDATORY PRESUMPTION. IT STAYS AS PERMISSIVE PRESUMPTION, AND THAT IS WHY THERE IS NO BURDEN SHIFTING, AND WE DO NOT GET TO AN OVERBREADTH ANALYSIS.

WHAT IS A JURY TO DO, THOUGH, IF THIS PRESUMPTION IS GIVEN TO THEM IN A CHARGE, THEN THEY -- A JUDGE, IN OTHER WORDS, SAYS THIS STATUTE PROVIDES THAT THERE SHALL BE A PRUPINGS OF AN UNLAWFUL -- PRESUMPTION OF AN UNLAWFUL PURPOSE, IF THE OFFENDER DID NOT HAVE THE PERMISSION OF THE PARENTS, AND THE JURY IS READ THAT, AND THAT IS IT. ISN'T THE JURY GOING TO SAY, WELL, WE HEARD NO PROOF HERE THAT HE HAD THE PERMISSION OF THE PARENTS. AS A MATTER OF FACT, THE STATE ESTABLISHED THAT HE DIDN'T HAVE THE PERMISSION OF THE PARENTS, AND SO WE KNOW THAT HE WAS WITH THE CHILD. WE KNOW HE DIDN'T HAVE THE PERMISSION OF THE PARENTS, AND IT SEEMS TO ME THAT, UNDER, GIVING HIM

AN INSTRUCTION ON THAT PRESUMPTION, IT WOULD BE LIKE TWO PLUS TWO EQUALS FOUR.

I THINK YOU HAVE TO LOOK AT THE INSTRUCTIONS. WE DON'T HAVE THEM IN THIS CASE, AND I KNOW THAT THAT WAS AN ISSUE IN MARCOLLINI, WHAT THE JURY INSTRUCTIONS ACTUALLY WERE. WE DIDN'T GET THAT FAR IN THIS CASE.

IF YOU JUST READ THE STATUTE TO THE JURY HERE.

WE DON'T KNOW THAT THAT WOULD HAPPEN. IN FACT, DURING THE CONFERENCE, DURING THE ACTUAL HEARING TO DETERMINE THE CONSTITUTIONALITY OF THE STATUTE, THAT WAS RAISED, AND IT WAS DISCUSSED BY THE COUNSEL AND THE JUDGE, DURING THAT HEARING, AND WHAT WAS SAID WAS THAT JURY INSTRUCTIONS WILL HAVE TO BE CRAFTED ON A CASE-BY-CASE BASIS, DEPENDING ON THE UNDERLYING UNLAWFUL OFFENSE, AND THAT WHAT THEY WOULD DO, THEN, IS, WITHIN THOSE JURY INSTRUCTIONS, EXPLAIN THE PRIMA FACIE DETERMINATION, BASED ON, WITHOUT THE PARENTAL CONSENT, BUT THAT DOES NOT RELIEF THE INTENT TO LURE AND ENTICE, WHICH INTENTIONALLY COMES IN THE STATUTE BEFORE THOSE WORDS, INTENTIONALLY LURE OR ENTICE THE SCHILED FOR -- CHILD FOR OTHER THAN A LAWFUL PURPOSE. THE ONLY PRIMA FACIE FINDING GOES TO OTHER THAN A LAWFUL PURPOSE.

SO YOU ARE SAYING THAT, IF THE STATE DID NOT FACTUALLY PROVE UP THE UNLAWFUL PURPOSE, OKAY, THAT THE DEFENDANT WOULD BE ENTITLED TO A DIRECTED VERDICT OF ACQUITTAL?

I BELIEVE THAT THAT WOULD BE POSSIBLE.

POSSIBLE IS NOT --

POSSIBLE.

IN OTHER WORDS -- I DON'T KNOW. YOU ARE SAYING AS A HYPOTHETICAL.

I AM GIVING THE ASSUMPTION THAT THE STATE HAS TO THE PROVED ANYTHING MORE THAN THE LURING AND THE PREVIOUS CONVICTION AND THE LACK OF PARENTAL CONSENT. UNDER THOSE CIRCUMSTANCES, YOU ARE SAY THE DEFENDANT -- SAYING THE DEFENDANT WOULD BE ENTITLED TO A DIRECTED JUDGMENT OF ACQUITTAL?

YES, YOUR HONOR, I AM. I THINK THAT IS THE SAFETY VALVE WE HAVE IN THIS STATUTE. THE ACTUAL LANGUAGE THAT WE ARE, NOW, DISCUSSING, IS LANGUAGE THAT GIVES ATITIONAL PROTECTION TO THE DEFENDANT. IT DOES NOT -- ADDITIONAL PROTECTION TO THE DEFENDANT T DOES NOT DEPRIVE HIM OF CONSTITUTIONAL RIGHTS. IT OPENS A WINDOW FOR HIM, A DOOR, IF YOU WILL, TO ALLOW HIM TO COME IN AND SHOW THAT WE HAVE ONE MORE STEP THAT WE HAVE TO PROVE, AS THE STATE, AND HE HAS ONE MORE OPPORTUNITY TO PROVE THAT WE CAN NOT MEET THOSE ELEMENTS.

WHAT IS THE PURPOSE OF PRESUMPTION, IF IT IS NOT TO AID THE STATE. IF THE STATE HAS TO PUT ON SOMETHING MORE THAN JUST THAT THE CHILD WAS ENTICED INTO THE HOUSE, WHAT IS THE PURPOSE OF THE PRESUMPTION?

I CAN'T SPEAK TO WHY THE LEGISLATURE DID. THAT IN THE TWO OTHER STATUTES THAT I HAVE COMPARED, THE OHIO STATUTE AND THE WASHINGTON STATE STATUTE, THERE IS NO SEPARATE PRESUMPTION. THAT IS PART OF THE VIOLATION, AUTOMATICALLY, WITHOUT PARENTAL CONSENT. I BELIEVE WHAT THE LEGISLATURE WAS TRYING TO DO WAS SIMPLY LEAVE ROOM THAT, IF THERE WERE CIRCUMSTANCES THAT PRESENTED THEMSELVES, WHERE THERE WAS A PERSON WITH A PRIOR CONVICTION OF SOME MOLEST TICKSTATION CHARGE OR SEXUAL -- MOLESTATION CHARGE OR SEXUAL OFFENSE CHARGE, AND HE COULD HAVE BEEN CHARGED

WITH LURING, NOT NECESSARILY ENTICING, ACTUALLY, I THINK THAT WOULD GO TO THE AFFIRMATIVE DEFENSE. IT WOULD TIE IN AUTOMATICALLY.

IF I UNDERSTAND, YOU WOULD HAVE US READ OUT THE PRESUMPTION, IF YOU ARE SAYING THAT THE STATE WOULD BE REQUIRED TO PUT SOMETHING MORE ON THAN THAT THE CHILD WAS ENTICED INTO THE HOUSE.

NOT TO READ IT OUT BUT TO SHOW THAT IT IS SIMPLY PERMISSIVE. IT IS NOT MANDATORY. IT, STILL, HAS GOT TO BE PROVEN THAT, EVEN THOUGH THE CHILD WAS TAKEN WITHOUT THE CONSENT OF THE PARENTS, AT THAT POINT, THERE WAS SOMETHING ELSE THAT HAD TO HAPPEN INSIDE THE HOUSE, IN OUR CASE, INSIDE THE HOUSE. AND WE HAVE THAT.

YOU ARE IN YOUR REBUTTAL TIME.

THANK YOU.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM PETER BRAN WIZ, AND I REPRESENT -- BARANOWICZ, AND I REPRESENT JAMES BRAKE. THERE IS NO SIMPLE ANSWER TO THE QUESTION WHY WAS HE NEVER VIOLATED ON PROBATION? THE SENTENCING GUIDELINES IN THIS CASE, WHERE ONE WOULD NORMALLY EXPECT TO SEE A NOTATION OF HIM HAVING BEEN ON PROBATION, DO NOT CONTAIN THAT INFORMATION.

BUT JUST SO -- I MEAN HYPOTHETICALLY, IN TERMS OF WHAT AN UNLAWFUL PURPOSE IS, IS, IF HE WERE ON PROBATION AND PROHIBITED FROM HAVING CONTACT WITH CHILDREN, WOULD THAT SUPPLY ENOUGH TO SHOW THAT HE WAS -- HAD ENTICED HER IN FOR AN UNLAWFUL PURPOSE?

WELL, THE LURING AND ENTICING ARE SEPARATE MATTERS, BUT IN MATERIALS OF THE RATIONALE OR THE REASON FOR THE STATUTE, FOR OTHER THAN A LAWFUL PURPOSE, WELL, YOU WOULD HAVE TO, FIRST, IF YOU WERE MR. BRAKE, TRYING TO UNDERSTAND WHAT DO I NEED TO DO, OTHER THAN AVOID ANY CONTACT WITH ANY MINOR, UNDER ANY CIRCUMSTANCES, THAT BY MY WORDS OR CONDUCT COULD LEAD TO THAT CHILD ENTERING A STRUCTURE ONE CONVEYANCE, AND THAT IS, I THINK, THE CRITICAL DUE PROCESS CONCERN HERE, AND THAT IS WHAT WOULD EVIDENCE TO HAVE DONE AND WHAT WOULD AN INDIVIDUAL IN HIS POSITION HAVE TO DO, TO AVOID BEING CHARGED, NOT GOING TO TRIAL, AND THEN HAVING AN OPPORTUNITY OF PROVING UP AN AFFIRMATIVE DEFENSE.

DON'T LURE CHILDREN INTO THE HOUSE.

ANY HOUSE. ANY STRUCTURE. THE STATUTE DOESN'T SAY INTO A STRUCTURE WITH HIM, INTO IS A STRUCTURE, AND I USE THE MALE TERM IN THIS, BECAUSE OF THE GENERAL CHARACTERIZATION, AND THE NUMBERS ON THESE CASES.

ISN'T THAT RATHER SHOCKING, THAT THERE APPEARS TO BE NO STATUTE THAT MAKES IT UNLAWFUL FOR AN ADULT, WHO IS UNCONNECTED TO A FAMILY, TO BE ABLE TO LURE A CHILD INTO A VEHICLE OR INTO A HOUSE? I MEAN, ISN'T THAT RATHER STUNNING? THAT THAT CAN BE LAWFULLY ACTIVITY?

NOT IF YOU ARE LIVING IN WASHINGTON STATE OR OHIO, WHERE THEIR LEGISLATURE HAS SOUGHT FIT TO CREATE A SPECIFIC CRIME. YOUR HONORS, I CITED, IN MY BRIEF, STATE VERSUS DANA, FROM AN INTERMEDIATE WASHINGTON APPELLATE COURT, AND AN UNREPORTED DECISION, STATE VERSUS BERTKE, FROM, ALSO, AN INTERMEDIATE OHIO APPELLATE COURT. THOSE WERE THE ONLY TWO DECISIONS I COULD FIND, ON A NATIONAL SEARCH, THAT DEALT, SPECIFICALLY, WITH ADDRESSING THE CONSTITUTIONALITY OF, EITHER, LUREING OR ENTICING A CHILD STATUTES, AND IN THE OPINION FROM THIS -- FROM WASHINGTON, THE CRIME OF LURING IS DEFINED AS ORDERING OR LURING OR ATTEMPTING TO DO SO, EITHER A DISABLED PERSON ON

OR A MINOR, INTO A STRUCTURE THAT IS OBSCURED FROM OR INACCESSIBLE TO THE PUBLIC OR INTO IS A MOTOR VEHICLE. AND THEN THEY PUT, IN THERE, DOES NOT HAVE THE CONSENT OF THE PARENT.

FLORIDA HAS NO PARALLEL STATUTE DO, THEY?

NO. AND WHEN THEY -- LET'S SAY WE DELETE LAWFUL PURPOSE. OKAY. CAN YOU STILL CURE THE STATUTE? NO. BECAUSE IF YOU DELETE LAWFUL, OTHER THAN FOR A LAWFUL PURPOSE, WHAT YOU HAVE BASICALLY SET UP WITH IS A STATUTE THAT SAYS OH, SEX OFFENDER, NOT NECESSARILY, BY THE WAY, A CHILD MOLESTER, BECAUSE 94 INCLUDES ADULT UPON ADULT CONTACT, BUT A SEX ON OFFENDER CAN HAVE NO CONTACT WITH A CHILD, SUCH THAT THAT CHILD COULD BE LURED, WHICH HAS A SPECIFIC MEANING OF MORE THAN AN INVITATION, OR ENTICED INTO A STRUCTURE OR A VEHICLE, AND ENTICE IS SIMPLY SYNONYMOUS WITH SOLICIT.

IN THIS CASE, WOULD YOU PLEASE ADDRESS THE STANDING, TO EVEN GET INTO THIS VAGUENESS SITUATION, BECAUSE I HAVE GREAT CONCERNS THAT, HERE, ACCORDING TO THE FACTS THAT WE ARE GOING TO BE DEALING WITH, WE HAVE THE OFFER OF TOYS. WE HAVE THE ENTICEMENT. WE HAVE THE TOUCHING. WE HAVE THE KISSING. WE HAVE ALL OF THESE OTHER KINDS OF THINGS GOING ON. WE DON'T HAVE SOMEONE WALKING DOWN THE STREET AND ASKING A CHILD IF THEY WANT A GLASS OF MILK, AND SO HOW DO WE GET BEYOND AND HOW DO YOU HAVE STANDING TO MAKE THIS BROAD AT AC -- ATTACK TO A VAGUENESS KIND OF SITUATION, WHERE YOU HAVE ALL OF THESE OTHER POSSIBILITIES IN THE ENTIRE WORLD AND ALL OF THE EVILS, WHEN WE ARE LOOKING AT THIS CASE AND DEALING WITH IT AT THIS TIME?

STANDING COMES FROM AN OVERBREADTH ARGUMENT THAT WE HAVE PUT FORWARD ON OUR APPEAL, AND SPECIFICALLY, THE AREAS THAT ARE IMPACTED BY OVERBREADTH ARE FREEDOM OF ASSOCIATION, AND, ALSO, FREEDOM OF SPEECH. UNDER THE UNITED STATES CONSTITUTION, FIRST AMENDMENT, AND ARTICLE I, SECTION V OF OUR STATE CONSTITUTION. THE SECOND CASE THAT I WOULD WANT THE COURT TO CONSIDER IS A 4-TO-3 DECISION, BACK FROM 1993, WYCHE VERSUS STATE, IN WYCHE, I HOPE I AM PRONOUNCING THE NAME CORRECTLY, THIS COURT STRUCK DOWN TAMPA'S LOITERING FOR PROSTITUTION STATUTE, AND THAT, ALSO, DEALT WITH AN INDIVIDUAL WHO HAD PREVIOUSLY BEEN CONVICTED OF A CRIME, IN THAT CASE PROSTITUTION. IN OURS, SEX OFFENSE, WHO WOULD HAVE CONVERSATIONS WITH ANY INDIVIDUAL IN A VEHICLE, AND AMONGST NUMBER OF GROUNDS THAT THE COURT SAW THAT WAS WRONG WITH THAT STATUTE, TAMPA STATUTE, AND THERE WERE NUMEROUS IN THAT OPINION, AMONGST FIRST WAS OVERBREADTH, THAT IT DIRECTLY IMPACTED UPON ASSOCIATION OF THIS CONVICTED PROSTITUTE.

BUT DON'T YOU HAVE A DIFFERENT PURPOSE FOR THIS STATUTE THAN YOU DO FOR THE LOITERING FOR PROSTITUTION STATUTE THAT WAS AT ISSUE IN WYCHE? I MEAN, HERE I WOULD ASSUME ONE OF THE PURPOSES IS, YOU KNOW, THE PROTECTION OF CHILDREN FROM PEOPLE WHO ARE KNOWN TO BE SEX OFFENDERS, AND SO SHOULDN'T THERE BE SOME DIFFERENT STANDARD HERE, BECAUSE WE ARE TALKING ABOUT A STATUTE THAT IS -- THAT THE STATE HAS AN INTEREST IN PROTECTING THE CHILDREN?

IN TERMS OF SPECIFICITY, AND DEFINING THE OFF INSIDE, I DON'T THINK -- THE OFFENSE, I DON'T THINK THAT WOULD MAKE A DIFFERENCE, MA'AM.

SO WHAT ARE YOU SAYING SHOULD BE MORE SPECIFIC IN THIS STATUTE?

YES, AND I THINK THAT IS THE CRITICAL FLAW.

BUT WHAT? WHAT SPECIFIC -- WHAT ARE YOU SAYING SHOULD BE SPECIFIC? WHAT ISN'T SPECIFIC?

OTHER THAN A LAWFUL PURPOSE. FIRST ONE WOULD HAVE TO DEFINE WHAT EVERY LAWFUL PURPOSE IS. THEN TAKE A LOOK AT THOSE THAT ARE UNLAWFUL.

BUT SHE SAYS THAT IT IS A VIOLATION OF A STATUTE, AND THAT, IN ORDER FOR THE STATE TO PREVAIL, THERE WOULD HAVE TO BE PROOF THAT THERE WAS A VIOLATION OF A STATUTE, AND THAT, IN THIS CASE, WOULD POSSIBLY BE, ALTHOUGH NOTAL END, LEWD AND LASCIVIOUS CONDUCT.

I DON'T THINK THAT THE CONDUCT THAT IS ALLEGED, HERE, COULD EVEN COME IN ON A LEGAL SUFFICIENCY GROUND.

WELL, MAYBE NOT, BUT SHE IS SAYING THAT, BEFORE HE CAN BE CONVICTED, THE STATE MUST PROVE A VIOLATION OF A STATUTE OR THAT THERE WAS THE INTENT TO VIOLATE A STATUTE.

WELL, YOUR HONOR, THE STATE, THROUGH ITS LEGISLATURE, DIDN'T DEFINE THE OFFENSE AS INTENT TO COMMIT A CRIME WITH THAT CHILD, WHICH IT COULD HAVE. THEY COULD HAVE DEFINED IT, IN TERMS OF LURING OR ENTICING, FOR PURPOSES OF ASSIGNATION, PROSTITUTION, LASCIVIOUS CONDUCT.

WHAT ELSE WOULD BE, OTHER THAN FOR A LAWFUL PURPOSE, IF NOT AN UNLAWFUL PURPOSE?

WELL --

ISN'T THAT THE REVERSE SIDE OF THE COIN? IF IT IS NOT FOR A LAWFUL PURPOSE, THEN PRESUMABLY WE ARE TALKING ABOUT AN UNLAWFUL PURPOSE. WHY ISN'T THIS JUST ANALOGOUS TO THE BURGLARY STATUTE, WHERE YOU BREAK AND ENTER, WITH THE INTENT TO COMMIT A CRIME THERE IN? AND A CRIME THERE IN, HERE, IS OTHER THAN FOR A LAWFUL PURPOSE?

SIR, ILLEGAL AND LEGAL ARE FLIP SIDES OF THE SAME COIN. LAWFUL AND UNLAWFUL, ACCORDING TO BLACK'S LAW DICTIONARY, THE DIFFERENCE BETWEEN LAWFULLY AND ILLEGAL, IS ILLEGAL IS THAT WHICH IS PROSCRIBED BY POSITIVE LAW. THE UNLAWFUL, ALSO, INCLUDES MORAYS OF THE COMMUNITY, AND THAT IS ONE OF THE REASONS WHY THE COURT FELT, ESPECIALLY BASED UPON THIS COURT'S POSITION IN CUNA, WAS THAT THERE WAS AN UNLAWFUL DEFINITION TO COURTS AND JURIES, TO DEFINE WHAT IS IN CONTRAST TO --

BUT IF WE CONSTRUE THIS, REQUIRE IT TO BE CONSTRUED AS MEANING UNLAWFUL, THAT IS AGAINST THE LAW, VIOLATIVE OF SOME CRIMINAL STATUTE, WOULDN'T THAT CURE THAT PROBLEM? ASSUMING WE HAVE THE AUTHORITY TO DO THAT, BUT I AM SAYING HYPOTHETICALLY, IF WE DID THAT, WOULDN'T THAT MAKE THIS JUST LIKE THE BURGLARY STATUTE?

NO. BECAUSE BURGLARY SPECIFICALLY SAYS WITH INTENT TO COMMIT A CRIME, NOT WITH INTENT ON TO ENGAGE IN CREEPY CONDUCT.

WELL, THAT IS WHY -- WELL.

IN RESPECT TO YOUR OVERBREADTH ARGUMENT, GOING BACK TO THAT, IS THAT DEPENDENT ON THIS COURT EQUATEING LURING AND ENTICING TO FREEDOM OF ASSOCIATION?

FREEDOM OF ASSOCIATION DEALS WITH ANY INDIVIDUAL, EVEN A CONVICTED SEX OFFENDER.

BUT DOES IT DEAL WITH LURING AND -- OR ENTICING?

FREEDOM OF SPEECH DEALS WITH LURING OR ENTICING.

OKAY.

AS FAR AS GOING BACK TO JUSTICE ANSTEAD'S ARGUMENT, IF WE DECIDE THAT UNLAWFUL PURPOSE, SINCE IT IS NOT DEFINED IN THE STATUTE, IS AMBIGUOUS, PRINCIPLES OF STATUTORY CONSTRUCTION REQUIRE THAT WE COUP WITH A DEFINITION THAT FAVORS THE DEFENDANT, IF -- WHAT IS WRONG WITH A CONSTRUCTION THAT SAYS UNLAWFUL -- IT IS BROADER THAN THE BURGLARY STATUTE BUT NOT AS BROAD AS ANY -- AS YOU CALL IT CREEPY CONDUCT, THAT THERE HAS GOT TO BE A PURPOSE OF VIOLATING THE LAW, MEANING COMMITTEEING A CRIME. IF WE INTERPRET IT THAT WAY, SINCE THE LEGISLATURE HAS NOT INTERPRETED IT, AND IT SOUNDS LIKE THE STATE IS CONCEDED THERE HAS GOT TO BE AN UNLAWFUL PURPOSE, WHY DOESN'T THAT SAVE THE STATUTE?

ONCE WE DELETE THAT, THOUGH, WHAT ARE WE LEFT WITH?

I DIDN'T DELETE T NOW I AM SAYING DEFINE IT AS DELETE WAS WHAT I ASKED ABOUT EARLIER. COULD IT BE DELETED, AS JUDGE DANAHE HAD SUGGESTED THAT THE LEGISLATURE COULD HAVE DELETED IT AND IT COULD WITHSTAND CONSTITUTIONAL MUSTER. I AM ASKING, SINCE IT IS A TERM THAT IS AMBIGUOUS, WHY, AND YET IT HAS A MEANING THAT WE CAN CONSTRUE, IN THE LIGHT MOST FAVORABLE TO THE DEFENDANT, BEING THAT IT IS NOT JUST FOR GIVING A CHILD CANDY, ALTHOUGH I DON'T KNOW WHY THE LEGISLATURE COULDN'T COME UP WITH A LAW THAT WOULD PROHIBIT SUCH CONDUCT, BUT THE WAY THIS STATUTE IS WRITTEN, IT IS FOR AN UNLAWFUL -- THAT IT HAD TO BE FOR AN UNLAWFUL PURPOSE, MEANING VIOLATING THE LAW, SUCH AS UNLAWFUL TOUCHING OR SOME OTHER CONTEMPLATION OF A SEXUAL ACT. WHY WOULDN'T THAT SAVE IT FROM CONSTITUTIONAL ATTACK? WE DEFINE THE TERM NARROWLY. IT IS NOT AS IF --

IS THAT NECESSARILY, THOUGH, WHAT THE LEGISLATURE INTENDED, THAT IT BE AN ILLEGAL ACT?

WELL, IS THERE ANY LEGISLATIVE HISTORY ON THE SUBJECT?

NO, MA'AM. I AM NOT AWARE OF ANY.

SO WE, UNDER RULES OF STATUTORY CONSTRUCTION, WHEN A TERM IS AMBIGUOUS, WE HAVE THE -- IT IS OUR RESPONSIBILITY TO NOT ONLY TO DEFINE THE TERMS BUT DEFINE THEM IN THE LIGHT MOST FAVORABLE TO THE DEFENDANT, AND, ALSO, TO SAVE STATUTES FROM -- THAT CAN BE SAVED FROM CONSTITUTIONAL ATTACK, SAVE THEM AND DEFINING THEM THAT WAY. WHAT IS INAPPROPRIATE ABOUT THIS COURT DOING THAT?

AND STILL KEEPING THAT STATUTE, I THINK A WHAT THE COURT WOULD HAVE TO DO -- I THINK WHAT THE COURT WOULD HAVE TO DO IS TO EXPRESSLY INTERPRET IT AS HAVING BEEN WITH INTENT TO COMMIT A CRIME, WHETHER IT WOULD BE ANY CRIME OR ONLY CERTAIN SEX OFFENSES.

NO. IF WE START TO DO THAT, THEN WE WOULD BE REWRITING THE LAW, BUT IF WE INTERPRET IT AS MEANING TO VIOLATE THE LAW BY COMMITTING A CRIME, THAT IS WHAT THE DEFINITION OF UNLAWFUL IS. IT DIDN'T MEAN MORALLY REPREHENSIBLE. IT MEANT TO VIOLATE -- TO COMMIT A CRIME.

WELL, IF WE DO THAT, LET'S LOOK AT HOW THAT STILL IMPACTS UPON MR. BRAKE.

WE DON'T KNOW THAT YET. RIGHT? WE ARE JUST TALKING ABOUT A FACIAL ATTACK HERE, AM I CORRECT?

YES, MA'AM.

SO HOW WOULD WE KNOW HOW IT WOULD IMPACT MR. BRAKE, BECAUSE THE ALLEGATION IS THAT HE UNLAWFULLY TOUCHED HER. AND IN AN INAPPROPRIATE PLACE.

WELL, WHAT WE KNOW IS THAT THE SECOND DCA SAID, AND I DON'T KNOW -- IT WASN'T ORALLY ARGUED. I WASN'T COUNSEL AT THE DCA LEVEL -- IF WE INTERPRET IT AS BEING WITH INTENT TO COMMIT A CRIME, THE SECOND DCA SAID THIS WAS CONSENTUAL CONTACT THAT DOESN'T ARISE TO THE LEVEL OF A BATTERY. THERE --

IT CAN'T BE -- THAT IS -- UNDER THE -- YOU CAN'T HAVE CONSENTUAL CONTACT WITH A CHILD UNDER TWELVE. IMPROPER TOUCHING OF A CHILD'S INNER THIGH. TAKE IS -- THAT IS -- IF THAT IS WHAT THE SECOND DISTRICT SAID, I WOULD RESPECTFULLY DISAGREE.

THE DEFENDANT, FELT OF THE PLEA, WASN'T ALLOCATED, BUT IN THE RECORD, IT STATES THAT THE PROSECUTOR, ON DECEMBER 26, THE DEFENDANT DID INTENTIONALLY LURE OR ENTICE Mc, A CHILD UNDER THE AGE OF TWELVE, INTO A STRUCTURE FOR OTHER THAN A LAWFUL PURPOSE, SPECIFICALLY THE DEFENDANT DID PICK UP Mc ON HIS BICYCLE AND TAKE HER BACK TO HIS, WHERE HE WAS LIVING, AND HE DID SO WITHOUT THE PERMISSION OF THE VICTIM'S PARENTS IN THIS CASE, AND, ALSO, HAVING BEEN CONVICTED OF A PRIOR VIOLATION OF 800.04. SO WHAT THEY WERE GOING ON, UNDER THE FACTUALAL KIINGS, OR --AL CUTION, OR WHAT THE STATE SAID THEY WOULD PROVE UP, IS SPECIFICALLY LACK OF PARENTAL CONSENT, AND THERE ARE STATES THAT HAVE ADOPTED A STATUTE FOR LURING AND ENTICING THAT INVOLVES LACK OF PARENTAL CONSENT.

BUT THE STATE SAYS, IF THAT IS, IN FACT, THE STATE OF THE EVIDENCE, THAT HE WOULD BE ENTITLED TO A DIRECTED VERDICT OF ACQUITTAL.

BUT, FIRST, HAVING BEEN CHARGED AND INCARCERATED AND/OR GOING THROUGH, ON A NOTICE. IF IT IS INTERPRETED AS BEING WITH, ONLY, INTENT TO THE COMMIT A CRIME THERE IN, I AM SORRY, JUSTICE.

OKAY.

YOUR HONORS, IN TERMS OF THE CUDA DECISION AND WHAT, ULTIMATELY, MAY BE THE CORRECTIVE ACTION TAKEN HERE, BEAR IN MIND THAT THE SUBDIVISION THAT SAYS -- ELEMENT THAT SAYS FOR OTHER THAN A LAWFUL PURPOSE, ALSO, PROVIDES AN AFFIRMATIVE DEFENSE, PLACING IT ON THE DEFENDANT TO PROVE UP A LAWFUL PURPOSE. I BELIEVE THAT THAT TYPE OF INTERPRETATION, WITH, WELL, INTENT TO COMMIT A CRIME, AND THEN THERE WOULD AND AFFIRMATIVE DEFENSE TO THE DEFENDANT, IN THE SAME STATUTORY SCREAM, TO PROVE UP THAT HE -- SCHEME, TO PROVE THAT HE DIDN'T INTEND TO COMMIT A CRIME, I, STILL, THINK THAT WOULD BE BURDEN SHIFTING, BY PLACING ON THE DEFENDANT, A SPECIFIC ELEMENT OF THE CRIME TO DISPROVE.

THE PORTION OF THE STATUTE THAT WILL YOU JUST MENTIONED, ABOUT THE REBUTTABLE PRESUMPTION, COULD THAT BE SEVERED FROM THE REST OF THE STATUTE?

I THINK I HAVE HEARD CASES OF WHERE THE COURT HAS DONE AS MANY AS SEVEN CHANGE TO SAY A STATUTE TO KEEP IT ALIVE, BUT ESSENTIALLY, I THINK THAT MIGHT GET TO SUCH A POINT THAT, IN REWRITING THE STATUTE, THAT THIS COURT WILL HAVE NO IDEA AS TO WHETHER OR NOT THE LEGISLATURE WOULD OR EVEN WOULDN'T HAVE ADOPTED IT. TO REBUT OR TO SAY, THEN, THAT THE DEFENDANT DOESN'T HAVE THAT AFFIRMATIVE DEFENSE.

WHAT DO YOU SEE AS THE ELEMENT THAT THE STATE WOULD HAVE TO PROVE, ACCORDING TO THE CHARGING INSTRUMENT THAT YOU JUST READ? WHAT WOULD BE THE JUDGE'S INSTRUCTION, AS TO THE STATE'S PROOF?

JUDGE BENNETT ASKED THAT SPECIFIC QUESTION, BECAUSE IT IS A BRAND NEW STATUTE, DURING THAT COLLOQUY, AFTER THE ARGUMENT TOOK PLACE ON THE MOTION TO DISMISS. AND I DON'T SEE WHAT JURY INSTRUCTIONS COULD COME UP WITH THAT, TO, IF WE DELETE LAWFUL PURPOSE, PUT IN INTENT TO COMMIT A CRIME THERE IN, I AM NOT, REALLY, SURE, SIR, WHAT COULD POSSIBLY HAVE PUT MR. BRAKE ON NOTICE TO BE CHARGED IN THE MANNER IN WHICH HE IS, AND YOU ARE, ALSO, DEALING WITH LURING OR ENTICING, WHICH ARE SPECIFIC INTENT, YOU KNOW, WORDS, TO EITHER, BY INVITATION, TO LURE, TO ENTICE, OR TO, BY MORE THAN INVITATION, TO LURE, TO OFFER SOME INDUCEMENT FOR A PERSON TO GO IN THERE. THAT IS SPECIFIC INTENT, WITH AN UNLAWFUL PURPOSE, WITH INTENT TO COMMIT A CRIME. THAT IS A SECONDARY INTENT, THAT I AM NOT SO SURE THAT THE COURT CAN WRITE INTO THIS. JUSTICE ANSTEAD, YOU HAVEN'T SAID ONE THING -- YOU HAD SAID ONE THING. WHAT ABOUT IF HE HAD HAD OR WHAT IF THEY PROVE UP JUST THAT YOU DON'T HAVE PARENTAL PERMISSION. THERE ARE STATES THAT HAVE CHOSEN TO MAKE IT A CRIME FOR ANY INDIVIDUAL TO COME UP AND LURE OR ENTICE MINOR INTO A VEHICLE, STRUCTURE OR CON VANKS, WITHOUT -- CONVEYANCE, WITHOUT PARENTAL PERMISSION. THOSE ARE THOSE LEGISLATURE'S JUDGMENT CALLS. WOULD OUR LEGISLATURE HAVE ADOPT ADD SIMILAR STATUTE? WELL, THEY HAVEN'T. MAY I CONCLUDE, YOUR HONORS?

PLEASE.

IF THEY HAD, STILL, THOUGH, HAD PERMISSION OF THE PARENTS, THAT WOULDN'T NECESSARILY NEGATE THE STATE'S ABILITY TO CHARGE THIS OFFENSE, NOR WOULD IT ESTABLISH ANY AFFIRMATIVE DEFENSE, AND IN TERMS OF TRYING TO CRAFT A STATUTE, THE ONES WHO SHOULD DO SO AND SHOULD HAVE DONE SO, IN THE FIRST PLACE, ARE THE STATE'S LEGISLATURE. THANK YOU, YOUR HONORS.

MS. BOCK.

I HAVE NO FURTHER REBUTTAL.

WELL, LET ME ASK YOU THE SAME QUESTION THAT I ASKED OPPOSING COUNSEL. WHAT WOULD BE A PROPER INSTRUCTION, CONSIDERING THE CHARGING DOCUMENT HERE?

WHEN YOU SAY THE CHARGING DOCUMENT, DO YOU MEAN WHEN THEY ACTUALLY DID THE PLEA AND HE PLED TO SPECIFIC FACTS SET FORTH? IS THAT WHAT YOU ARE ASKING ME?

YES.

OKAY. I THINK WHAT THEY WOULD HAVE TO HAVE PROVEN UP WAS THAT HE HAD A PRIOR CONVICTION, UNDER -- WELL, IN THIS CASE, UNDER 800.04 OR A SIMILAR STATUTE, WHICH WAS THE TEXAS STATUTE, THAT HE, IN FACT, DID LURE OR ENTICE, IN OTHER WORDS USE BAIT TO INDUCE THIS CHILD, TO GO WITH HIM, INTO HIS STRUCTURE, A STRUCTURE, HIS STRUCTURE, HIS HOME, AND THAT, WHILE IN THE STRUCTURE, TO SHOW THAT -- OBVIOUSLY WITHOUT THE PARENTAL CONSENT, THAT, TOO, WAS SOMETHING THAT WE WOULD PROVE UP, THEN THAT, IN FACT, THE INTENDED ACT OCCURRED, THE INTENDED ACT BEING LEWD AND LASCIVIOUS CONDUCT OF SOME NATURE, AND I CAN'T TELL YOU WHAT, EXACTLY, THE JURY INSTRUCTION WOULD SAY, BUT IT WOULD PUT THE JURY ON NOTICE TO BE PROPER, THAT THE STATE MUST PROVE ALL OF THOSE ELEMENTS BEYOND A REASONABLE DOUBT.

CONSTRUCTION WOULD HAVE TO POINT TO A SPECIFIC CRIME.

I THINK THAT IT WOULD, AND I THINK THAT IT COULD.

THANK YOU VERY MUCH.

THANK YOU, YOUR HONORS.

THANK YOU, COUNSEL.