Richard Bryant Weddell v. State of Florida

NEXT CASE ON THE ORAL ARGUMENT CALENDAR IS WEDDELL VERSUS STATE. MR. SUMMA.

MAY IT PLEASE THE COURT. I REPRESENT THE PETITIONER RICHARD WEDDELL. MR. WEDDELL WAS TRIED AND CONVICTED OF THE OFFENSE OF DEALING IN STOLEN PROPERTY, AN ELECTRIC GRINDING TOOL, THE PROPERTY OF EASTERN SHIPBUILDING SHIPBUILDING. AT TRIAL THE ONLY DISPUTED ELEMENT OF THE OFFENSE WAS WHETHER MR. WEDDELL KNEW THE GRINDER WAS STOLEN. THE CASE IS BEFORE THE COURT BECAUSE THE FIRST DCA OPINED THAT THE STANDARD JURY INSTRUCTION REGARDING THE INCIDENT ARISING FROM RECENTLY STOLEN PROPERTY IS AN IMPROPER COMMENT ON THE EVIDENCE, SIMILAR TO THE FLIGHT INSTRUCTION ABANDONED BY THIS COURT IN THE PHENALON CASE.

REFRESH US WITH THE TIME LINE HERE, IN TERMS OF THE DISAPPEARANCE OF THE PROPERTY AND THEN YOUR CLIENT'S POSSESSION OF IT.

YES, SIR. YES, SIR. THE FACTS OF THE CASE IN THE NUTSHELL ARE AS FOLLOWS. THE GRINDER WAS STOLEN ON JULY 20 OR 21 OF 1998. MR. WEDDELL COULD NOT HAVE STOLEN THE GRINDER, BECAUSE HE HAD NO ACCESS TO THE SHIPBUILDING FACILITY, UNTIL AUGUST 3, WHEN HE BECAME EMPLOYED THERE BY A SUBCONTRACTOR. ON AUGUST 5, JUST TWO DAYS LATER MR. WEDDELL SOLD THE GRINDER TO A LOCAL PAWNSHOP, BUT WE SUGGEST THAT THE EVIDENCE IS THAT TWO WEEKS HAD ELAPSED BETWEEN THE PROBABLE DATE OF THE THEFT AND THE DATE THAT MR. WEDDELL ACQUIRED THE GRINDER. WHEN MR. WEDDELL SOLD THE GRINDER AT A PAWNSHOP, HE PRODUCED HIS FLORIDA DRIVER'S LICENSE FOR IDENTIFICATION AND, ALSO, LEFT THE THUMB PRINT FOR IDENTIFICATION. THE PAWNSHOP EMPLOYEE TESTIFIED THAT THE GRINDER WAS OBVIOUSLY USED AND THAT THERE WAS NOTHING ABOT IS APPEARANCE TO SUGGEST THAT IT WAS STOLEN. THE MANUFACTURER SERIAL NUMBER ON THE GRINDER REMAINED INTACT, ALTHOUGH THERE WAS EVIDENCE THAT THE EASTERN SHIPBUILDING COMPANY HAD ENGRAVED ITS INITIALS, ESG, AND A NUMBER OF 155, PRESUMABLY AN INVENTORY NUMBER, ON THE GRINDER, AND THAT THOSE ENGRAVINGS HAD BEEN GROUND OFF OR SCRATCHED OFF OF THE TOOL. MR. WEDDELL TESTIFIED,AND HE GAVE HIS VERSION OF EVENTS. HE SAID THAT HE PURCHASED THE GRINDER FOR $50 SOMEWHERE OUTSIDE THE GATE OF THE FACILITY FOR $50, BEFORE HE REPORTED TO WORK. AND HE SAID THAT, AS A PRECAUTION, HE OBTAINED A RECEIPT. AND HE INTRODUCED A RECEIPT INTO EVIDENCE. THE RECEIPT CONTAINED HIS NAME, THE NAME OF THE SELLER, THE PURCHASE PRICE AND THE SERIAL NUMBER OF THE GRINDER TOOL. HE PRODUCED A HANDWRITING EXPERT THAT SAID HIS SIGNATURE, THE NAME ON THE RECEIPT WAS WRITTEN BY HIM AND THE OTHER WRITING ON THE RECEIPT WAS WRITTEN BY SOMEONE ELSE. NOW, WITH RESPECT TO THE COMMENT ON THE EVIDENCE, THE GROVAMEN OF THE ARGUMENT IS THAT THIS JURY INSTRUCTION DIRECTS THE FOCUS TO THE JURY TO ONE PARTICULAR ASPECT OF THE EVIDENCE THAT WAS INTRODUCED AND THE HARMFUL ASPECT OF THE EVIDENCE. AT THE SAME TIME, THE JURY INSTRUCTION DIVERTS THE FOCUS OF THE JURY AWAY FROM THE OTHER ASPECTS OF THE CASE THAT WERE FAVORABLE. THE REASONABLE INFERENCE IS THAT WERE FAVORABLE TO MR. WEDDELL, AND THERE ARE A NUMBER OF THEM. ONE THAT HE PRODUCED HIS FLORIDA DRIVER'S LICENSE ACID FIX. TWO, THAT HE PRODUCED A THUMB PRINT. THREE, THAT THE --

DOESN'T THIS INSTRUCTION INCLUDE SOME LANGUAGE ABOUT SATISFACTORILY EXPLAINED?

YES, YOUR HONOR, IT DOES.

AND SO AREN'T THOSE ELEMENTS THAT YOU ARE TALKING ABOUT, YOU SAY THIS INSTRUCTION FOCUSES AWAY FROM, ACTUALLY SUPPORTS WHETHER OR NOT THERE WAS A SATISFACTORY EXPLANATION FOR HIS POSSESSION?

IN THE GENERAL SENSE, THE JURY COULD GRASP THAT LANGUAGE, UNSATIES FACTRIALLY EXPLAINED AND SAY, OKAY, HERE ARE FACTORS WHICH ARGUABLY EXPLAIN INNOCENT POSSESSION, BUT THAT DOES NOT BALANCE THE PLAYING FIELD, BECAUSE THAT REQUIRES AFFIRMATIVE ACTION ON THE JURY'S PART. WHEREAS, IF THE DG HD INSTRUCTED --

I AM NOT SURE I UNDERSTAND WHAT THAT MEANS.

WELL, THAT INVOLVES A CONCLUSION OR N INFERENCE BY THE JURY, WITHOUT ASSISTANCE FROM AN INSTRUCTION TO THAT PARTICULAR --

WAS THERE AN ARGUMENT THAT THIS INFERENCE DOES NOT APPLY, BECAUSE THERE WAS, IN FACT, A SATISFACTORY EXPLANATION FOR HIS POSSESSION?

CERTAINLY THE TRIAL ATTORNEY DID ARGUE THAT THESE WERE FACTORS THAT THE JURY SHOULD CONSIDER. OF COURSE, HE ARGUED THAT WITHOUT THE BENEFIT OF, WITHOUT THE BENEFIT OF A SUPPORTING INSTRUCTION BY THE TRIAL COURT.

DID HE ASK FOR ONE?

WHICH THE STATE HAD THE BENEFIT OF BOLSTERING, LET'S PUT IT THAT WAY, THE STATE HAD THE BENEFIT OF A BOLSTERING INSTRUCTION, AS TO THE HARMFUL ASPECTS OR THE HARMFUL INFERENCE OF THE EVIDENCE, BUT THE DEFENDANT DID NOT HAVE BENEFIT --

THE DEFENSE COUNSEL ASKED THE COURT TO GIVE ANY INSTRUCTION ABOUT WE HAVE SAID X, Y, Z, AND THAT TAKES CARE OF THE SATIES FACT -- SATISFACTORY EXPLANATION?

NO, YOUR HONOR, THE DEFENSE COUNSEL DID NOT ASK FOR THAT CORRESPONDING INSTRUCTION, AND THAT LEADS TO MY FURTHER ARGUMENT. THERE IS A GOOD REASON WHY DEFENSE COUNSEL DID NOT ASK FOR THOSE TYPES OF INSTRUCTIONS. FOR INSTANCE, MR. WEDDELL LEFT A THUMB PRINT. OKAY. COULD THE DEFENSE COUNSEL HAVE ASKED FOR AN INSTRUCTION THAT THE PRODUCTION OF A THUMB PRINT GIVES RISE TO AN INFERENCE THAT MR. WEDDELL ACQUIRED THE PROPERTY WITHOUT KNOWLEDGE OF ITS STOLEN CHARACTER? NO, HE COULD NOT ASK FOR THAT INSTRUCTION, BECAUSE OF THIS COURT'S OPINION IN THE WHITFIELD CASE. NOW, THE WHITFIELD, IN WHITFIELD THIS COURT ABANDONED AN INSTRUCTION REGARDING AN INFERENCE ARISING FROM REFUSAL TO SUBMIT TO FINGERPRINTING. THAT IS WHY WE HAVEAL UNLEVEL PLAYING FIELD. THE WHITFIELD COURT SAID THAT TYPE OF INSTRUCTION IS AN IMPROPER COMMENT ON THE EVIDENCE. SO IF IT IS AN IMPROPER COMMENT ON THE EVIDENCE, FOR THE DEFENSE COUNSEL TO GET THE BENEFIT OF THAT TYPE OF INSTRUCTION, THE FLIP SIDE OF THE COIN IS IT IS AN IMPROPER COMMENT ON THE EVIDENCE, FOR THE STATE TO GET THE BENEFIT OF THE HARMFUL INFERENCE THAT MAY ARISE FROM POSSESSION OF RECENTLY STOLEN PROPERTY, AND THIS IS THE ESSENTIAL POINT, THE ESSENTIAL PRINCIPLE THAT I THINK IS EXPRESSED IN THAT THE VENERABLE CASE THAT I CITE FROM THIS COURT GUNN V STATE FROM 1919, WHICH IS STILL GOOD LAW, THE POINT THAT WE ARE TRYING TO EXTRACT FROM THAT GUNN CASE, IS IT SAYS THAT, IF, THERE WERE TWO PRESUMPTIONS OF FACT WHICH ARGUABLY WERE AT ISSUE IN THE GUNN ONE IS THAT STOLEN PROPERY GIVES RISE TO HARMFUL INFERENCE. THE OPPOSITE, EQUALLY VALID PRESUMPTION, IS THAT AN OPEN TAKING OF PROPERTY NOT AMOUNTING TO ROBBERY,IVES RISE TO AN INFERENCE OF INNOCENT INTENT, AND THE COURT, LONG AGO, SAID IF BOTH INFERENCES ARE VALID, IT IS SIMPLY NOT FAIR TO GIVE ONE WITHOUT GIVING THE OTHER ONE. IT IS AN IMPROPER COMMENT IN THE EVIDENCE, AND THOSE DAYS OF THE PHRASEOLOGY WAS THE ISSUE SHOULD BE SUBMITTED TO

THE TRIER OF FACT WITHOUT ANY INTIMATION AS TO THE PROBATIVE VALUE OF FORCE OF THE EVIDENCE. THAT IS THE ESSENTIAL PRINCIPLE THAT WE EXTRACT FROM THE GUNN CASE, WHICH IS FLICKABLE -- WHICH IS APPLICABLE HERE. WHY IS IT NOT, AND ACCORDINGLY, IN A MORE FAIR SYSTEM, I WOULD SAY DEFENSE COUNSEL SHOULD HAVE ASKED FOR AN INSTRUCTION SAYING THE PRODUCTION OF HIS DRER'S LICENSE GIVES RISE TO AN INFERENCE OF LACK OF GUILTY KNOWLEDGE. SUCH AN INSTRUCTION COULD HAVE RATIONALLY BEEN DERIVED FROM THE CASE OF VALDEZ V STATE, WHICH WE CITED, WHICH SAYS THAT PRODUCTION OF A DRIVER'S LICENSE OR CORRECT IDENTIFICATION, GIVES RISE TO A PRESUMES OF INNOCENT, -- A PRESUMPTION OF INNOCENT -- OR IS A STRONG INDICIA OF LACK OF GUILTY KNOWLEDGE, BUT GETTING BACK TO THE TREND OF THE CASES, SUCH AS PHENALON ANN WHITFIELD, EVEN THE FAVORABLE INSTRUCTION THAT THE DEFENSE COUNSEL MIGHT HAVE BEEN AN IMPROPER COMMENT ON THE EVIDENCE, SO THAT YOU HAVE A BALANCED PLAYING FIELD. I NOTE THAT THERE IS, AS OF THIS DATE, A STANDARD JURY INSTRUCTION PERTAINING TO THE RENTAL OF PERSONAL PROPERTY. IT SAYS, IF I MAY PARAPHRASE, THE PRODUCTION OF FALSE IDENTIFICATION IN CONNECTION WITH THE RENTAL OF PERSONAL PROPERTY, GIVES RISE TO AN INFERENCE THAT THE RENTER, RENTED WITH INTENT TO COMMIT A THEFT. NOW, HOW CAN IT BE THAT THERE IS A JURY INSTRUCTION, A NEGATIVE JURY INSTRUCTION, A JURY INSTRUCTION HARMFUL TO THE DEFENDANT, REGARDING PRODUCTION OF FALSE IDENTIFICATION, BUT THERE IS NO OBSIT JURY INSTRUCTION, SAYING THAT, WELL, IF THE DEFENDANT PRODUCES CORRECT IDENTIFICATION, IT GIVES RISE TO AN INFERENCE OF LACK OF GUILTY KNOWLEDGE.

HOW DOES THE STATUTORY, THE CODIFICAITON OF THOSE PRINCIPLES HOW DOES THAT FIT INTO YOUR EQUATION? BECAUSE SOME OF THOSE CASES DIDN'T DEAL WITH IT YOU HAVE BEEN RELYING UPON, A STATUTORY PROVISION, SUCH AS WE ARE DEALING WITH HERE, FROM WHICH THE JURY INSTRUCTION HAS BEEN TAKEN. HOW DOES THAT IMPACT YOUR VIEW OF WHAT OCCURS? IT IS OF NO MOMENT WHATSOEVER?

WELL, IF I UNDERSTAND YOUR QUESTION, JUSTICE LEWIS, YOU ARE SAYING THAT, IF THE LANGUAGE OF THE INSTRUCTION IS DERIVED FROM THE STATUTE, DOES THAT HAVE A SPECIFIC EFFECT ON THE VALIDITY OF THE INSTRUCTION? AND MY ANSWER IS THAT THE PRINCIPLE THAT WE ARE TALKING ABOUT HERE, IS ONE OF CONSTITUTIONAL DIMENSION. IT MAY BE THAT THE INSTRUCTION IS A VALID LEGAL PRINCIPLE, BUT THAT DOES NOT NECESSARILY EXTEND TO SAY THAT IT SHOULD BE INCORPORATED IN A JURY INSTRUCTION, AND MOREOVER, IF THE INSTRUCTION, ITSELF, IS AN IMPROPER COMMENT ON THE EVIDENCE THAT MERELY BEGS THE QUESTION OF WHETHER THE STATUTE IS CONSTITUTIONAL, AND THAT IS WHY I CITED THIS COURT'S FAIRLY RECENT OPINION IN STATE V BRAKE, OR BRAKE V STATE, WHERE THIS COURT HELD THAT A JURY INUCTION DERIVED SPECIFICALLY FROM A STATUTE, REGARDING LURING OF A CHILD, THIS COURT HELD THAT THE INSTRUCTION DERIVED FROM THAT STATUTE WAS UNCONSTITUTIONAL, AS A MANDATORY PRESUMPTION, SO, YES, THERE MAY BE SOME FIELD OF OPERATION FOR THE LANGUAGE OF THE STATUTE, BUT THAT, REALLY, IS SUBSERVEIENT TO A CONSTITUTIONAL QUESTION OF WHETHER THE INSTRUCTION CONSTITUTES A COMMENT ON THE EVIDENCE. IN ADDITION, WE, ALSO, RAISE THE WE, ALSO, RAISE THE ARGUMENT THAT THE INSTRUCTION CONSTITUTES A MANDATORY REBUTTABLE PRESUMPTION, AND WE BRIEF THAT QUESTION IN THE CONTEXT OF FUNDAMENTAL ERROR, BUT UPON FURTHER REFLECTION, I SUBMIT THAT, TO THE COURT THAT, THAT QUESTION WAS ACTUALLY PRESERVED FOR REVIEW, ON THE THEORY THAT A MANDATORY REBUTTABLE PRESUMPTION IS A SPECIES OF A COMMENT ON THE EVIDENCE, SO THIS INSTRUCTION, OR THIS ARGUMENT IS A FURTHER EXTRAPOLATION OF THE ARGUMENT THAT IS A COMMENT ON THE EVIDENCE. A MANDATORY REBUTTABLE PRESUMPTION REQUIRES THE JURY TO FIND A SPECIFIC FACT, SO IT IS A QUESTION OF THE TRIAL COURT COMMENTING TO THE WEIGHT OF THE EVIDENCE, BY TELLING THE JURY THAT IT MUST REQUIRE THAT, IT REQUIRES THE JURY TO FIND A SPECIFIC FACT, UNLESS OTHERWISE EXPLAINED.

IN THIS CASE, THE DEFENSE LAWYER REQUESTED THE INSTRUCTION NOT BE GIVEN. IS THAT CORRECT?

CORRECT.

DID THEY REQUEST A SUBSTITUTE INSTRUCTION?

NO.

AND THAT, WAS THAT POINT, THAT IS THAT IT WAS ERROR TO GIVE THE INSTRUCTION, WAS THAT RAISED IN THE APPELLATE COURT? AS A POINT ON APPEAL?

YES, AS TO THE INSTRUCTION, WE RAISED TWO ISSUES. WE SD GIVING OF THE INSTRUCTION WAS AN IMPROPER COMMENT ON THE EVIDENCE, WHICH E COURT CERTIFIED THE QUESTION. THAT IS HOW --

THEY DIDN'T REALLY DISCUSS, IN THE OPINION --

THEY DIDN'T --

WHAT THEIR FEELINGS WERE ON THE INSTRUCTION. I GUESS THEY FELT COMPELLED TO, BASED ON PRIOR CASE LAW, TO --

ACTUALLY, ALTHOUGH IT IS A VERY BRIEF OPINION CERTIFYING A QUESTION, THE COURT DID RULE, DID PASS ON THE QUESTION, AND I WOULD SUGGEST, THEN, IN THE LANGUAGE, THEY SAY WE FIND NO VALID POLICY REASON WHY THIS INSTRUCTION SHOULD BE TREATED DIFFERENTLY FROM THE INSTRUCTION IN PHENALON. I THINK THE COURT DID EXPRESSLY RULE THAT THEY FIND THIS INSTRUCTION TO BE AN ERRONEOUS COMMENT ON THE EVIDENCE.

BUT THEY AFFIRMED.

YES.

AND SO WHY SHOULD WE TAKE THIS CASE?

WELL, OF COURSE THIS IS A CASE OF WIDE-RANGING APPLICABILITY, YOUR HONOR, SO THERE IS AN ISSUE, BUT NONETHELESS, THIS COURT, IF THE COURT AGREES THAT THIS IS AN ERRONEOUS COMMENT ON THE EVIDENCE, I WOULD DISPUTE, WELL, FIRST OF ALL, I DON'T EXACTLY CONCEDE THAT THERE IS A IMPLICIT FINDING OF HAM LESS ERROR BY THE FIRST DCA. I THINK THEY MORE OR LESS PUNTED THE BALL TO THIS COURT, SO TO SPEAK.

IS THAT THE PROPER WAY THAT WE SHOULD RECEIVE THESE CASES ON A PUNT?

WELL, THERE IS A LEGITIMATE INTEREST HERE IN THIS COURT, AND CERTAINLY PETITIONER HAS LEGITIMATE INTERESTS. I MEAN, IF THE COURT DETERMINES THAT THE FIRST DCA THOUGHT THE ERROR WAS HARMLESS, THIS COURT IS CERTAINLY NOT BOUND BY THAT CONCLUSION.

WE DON'T KNOW WHAT THEY THOUGHT. THEY AFFIRMED THE, THEY AFFIRMED THE CONVICTION.

WELL, REGARDLESS --

THEY AFFIRMED THE GIVING OF THE INSTRUCTION.

NO. I AM SORRY, YOUR HONOR. I WOULD DISAGREE WITH THE CTENTION THAT THEY AIRED THE GIVING OF THE INSTRUCTION. I THINK THEY SAID THE INSTRUCTION WAS ERROR, SO THEY COULD NOT HAVE AFFIRMED THE GIVING OF THE INSTRUCTION, AND SO WE ARE HERE.

HELP. I AM HAVING DIFFICULTY WITH YOU SAYING THEY AFFIRMED THE CASE, RIGHT?

YES, YOUR HONOR.

AND THE ISSUE THAT YOU RAISED WAS THAT IT WAS ERROR FOR THE TRIAL COURT TO GIVE THAT INSTRUCTION.

RIGHT, AND I BELIEVE --

IS THAT RIGHT?

RIGHT, AND I BELIEVE THEIR OPINION --

THEY REJECT HAS HAD THAT ARGUMENT THAT IT WAS ERROR.

NO.

WELL, I --

NO, SORRY, YOUR HONOR, JUSTICE ANSTEAD, I DO DISAGREE WITH THAT. I THINK THEY SAID, AT THE MOST DISADVANTAGED VIEW TO PETITIONER I THINK THEY SAID IT WAS ERROR TO GIVE THIS INSTRUCTION, BUT WE THINK IT IS HARMLESS. THAT IS THE MOST DISADVANTAGED INTERPRETATION OF THE FIRST DCA DCA'S BRIEF OPINION.

I THOUGHT, ISN'T, DON'T YOU ACKNOWLEDGE THAT THE STATE OF THE LAW RIGHT NOW, IS THAT IT IS PERFECTLY ALL RIGHT TO GIVE THAT INSTRUCTION?

WELL, I THINK AS TO THE ARGUMENT THAT IT IS AN IMPROPER COMMENT ON THE EVIDENCE, I BELIEVE THAT IS A QUESTION OF FIRST IMPRESSION, SO YES, IT MAY BE THE STATE OF THE LAW --

ARE YOU SAYING THERE IS NO CASES OUT THERE NOW THAT UPHOLD THE GIVING OF THAT INSTRUCTION?

NOT ON THAT GROUND. THE ONLY CASES OUT THERE THAT UPHOLD THE GIVING OF THE, THIS INSTRUCTION, THE PRINCIPLE CASES FROM THIS COURT ARE EDWARDS AND YOUNG, AND THEY HOLD THAT IT IS NOT A COMMENT ON THE RIGHT TO REMAIN SILENT, AND IT IS NOT VIOLATIVE DUE PROCESS, BECAUSE THE FACT INFERRED IS RATIONALLY RELATED TO THE FACT PROVEN, BUT THEY DO NOT RENDER AN OPINION ON WHETHER IT IS AN IMPROPER COMMENT ON THE EVIDENCE, AND I AM IN MY REBUTTAL TIME, AND I THINK I WILL TAKE A SEAT. THANK YOU. MR. CHIEF JUSTICE

THANK YOU. MR. DUFFY.

GOOD MORNING, MAY IT PLEASE THE COURT. TOM DUFFY ON BEHALF OF THE STATE. I WILL GIVE YOU A PRE SE ON OUR MAIN POINTS. ONE, IT DOES NOT COMMENT ON THE EVIDENCE. TWO, PHENALON IS A DIFFERENT KIND OF INSTRUCTION, AND IT SHOULD KNOTTED -- AND IT SHOULD NOT BEEAD THAT ANY JURY INSTRUCTION ON THE EVIDENE IS AN INVALID COMMENT ON THE EVIDENCE. THREE, THESE INSTRUCTIONS E IMPORTANT IN OUR JURISPRUDENCE, BECAUSE THEY HELP THE JURIES UNDERSTAND WHAT THEY CAN AND CAN'T DO. FOURTH, IF, AS PETITIONER IMPLICITLY ASKS, THESE ARE ALL CHUCKED OUT, IT IS GOING TO BRING ABOUT SOME CONFUSION. I THINK IT WOULD BE BAD POLICY. TO GET TO ONE OF THE FACTS ISSUES, FROM YOUR QUESTION, JUSTICE ANSTEAD, WE DISPUTE, AND IT IS IN OUR BRIEF, THAT THERE, THAT THE TESTIMONY ESTABLISHING A TWO-MONTH PERIOD BETWEEN THE TIME THE GRINDER WAS LOST AND THE TIME THE GRINDER WAS FOUND AGAIN, WAS PARTICULARLY EXPLICIT TESTIMONY. THE FELLOW WHO TESTIFIED WAS A SHIPBUILDING EMPLOYEE, AND HIS TESTIMONY WAS PRETTY VAGUE. WE HAVE ARGUED THAT IN OUR BRIEF.

TWO MONTHS OR TWO WEEKS?

HE SAID, UNDER CROSS-EXAMINATION, ONE MONTH, MAYBE TWO. AND WORDS WERE SORT OF PUT IN HIS MOUTH. IT COULD ONLY HAVE BARREL BEEN TWO MONTHS. THE THING WENT INTO SERVICE. THEY BOUGHT IT IN JULY, AND IT WAS FOUND IN SEPTEMBER, AND I BELIEVE IT COULD HAVE JUST BARELY BEEN TWO MONTHS.

AS FAR AS THE DEFENDANT'S CONNECTION WITH IT, IF I UNDERSTOOD YOUR OPPONENT'S ANSWERTO MY QUESTION, WAS THAT IT WAS LATE IN JULY THAT IT WAS MISSING, AND THAT IT WAS EARLY IN AUGUST THAT HE TOOK IT TO THE PAWNSHOP.

THAT IS OUR POINT. OUR POINT IS I DON'T THINK A FIRM DATE CAN BE ESTABLISHED FOR WHEN IT WAS CHECKED OUT. THE GUY CHECKED IT OUT. HE CHECKED IT OUT, AND IT WENT MISSING THE NEXT DAY, WHEN HE CAME BACK TO WORK IT WAS GONE. HE HAD PUT IT DOWN UNDERNEATH THE BOW OF A BOAT THAT HE WAS GRINDING THE SEEMS ON, AND -- THE SEAMS ON, AND THE NEXT DAY IT WAS GONE, AND THAT WAS PART OF THE STATE'S CASE. THIS JURY INSTRUCTION IS NOT A COMMENT ON THE EVIDENCE, BECAUSE IT DOESN'T SUGGEST AN OUTCOME. IT DOESN'T ADDRESS CREDIBILITY, AND IT DOESN'T TELL THE JURY TO FOCUS ON SOME EVIDENCE AT THE EXPENSE OF OTHER EVIDENCE. IT IS STATUTORILY BASED. THE STATUTE SAYS THAT THE STATE IS ENTITLED TO THIS PRESUMPTION. THE PRESUMPTION BEING THAT, IF YOU HAVE GOT STOLEN PROPERTY, THAT HAS BEEN STOLEN RECENTLY, THEN YOU HAVE, AN INFERENCE ARISES THAT YOU RECEIVED IT KNOWING THAT IT WAS STOLE HE, AND THE REASON FOR THAT IS THAT PEOPLE -- THAT IT WAS STOLEN, AND THE REASON FOR THAT IS THAT PEOPLE WHO STEAL GOODS TYPICALLY SELL THEM SOON. THEY -- THAT IS THE WAY TO GET MONEY OUT OF THEM, AND IN THIS CASE THAT IS WHAT WE CONTEND HAPPENED, WAS THAT SOMEBODY STOLE IT AND SOLD IT SHORTLY AFTER RECEIVING IT.

DOESN'T THE INSTRUCTION, THOUGH, AT LEAST START IN THE DIRECTION OF SORT OF SHIFTING THE BURDEN, WHICH IS OBVIOUSLY OF CONSTITUTIONAL DIMENSION, AND THAT IS THAT IT, NOW, REALLY, SAYS, IF IT CAN BE DEMONSTRATED YOU HAVE POSSESSION OF THE PROPERTY, THAT EVERYBODY AGREES WAS STOLEN, THAT NOW IT IS YOUR BURDEN TO DEMONSTRATE THAT YOU DIDN'T STEAL IT. ISN'T THAT, REALLY, THE ESSENCE OF THE INSTRUCTION?

ACTUALLY BARNES VERSUS UNITED STATES IS THE SAME CASE AS THIS, ESSENTIALLY THE SAME CASE INVOLVING THE SAME INSTRUCTION, AND IT WAS HELD THAT IT WAS NOT BURDEN SHIFTING. IT DID NOT VIOLATE SANDS VERSUS MONDAY TAN A WE WOULD RELY 'THAT.

BUT I AM ASKING YOU, IF A COMMONSENSE WAY, THAT IF YOU TELL THE JURY THAT IT IS DEMONSTRATE HAS HAD THAT THIS PERSON HAD POSSESSION OF PROPERTY THAT WAS RECENTLY STOLEN, THEN YOU CAN INFER, UNLESS THERE IS A GOOD EXPLANATION GIVEN, THAT HE STOLE IT, AND ISN'T THAT --

YOU CAN INFER THAT HE STOLE IT. YOU CAN INFER THAT HE KNEW IT WAS STOLEN. THERE IS SEVERAL INFERENCES. THERE IS A NUMBER OF INSTRUCTIONS ACTUALLY.

WHY ISN'T THAT TANTAMOUNT IN SAYING THAT, UNDER THAT INSTRUCTION THE DEFENDANT, NOW, WHO HAS BEEN SHOWN TO HAVE POSSESSION OF THIS, IS THE ONE THAT HAS THE BURDEN OF CONVINCING YOU THAT HE DIDN'T STEAL IT?

WELL, AGAIN, WE WOULD RELY ON BARNES. WHY DO I THINK IT IS NOT?

THAT IS REALLY WHAT I AM, RIGHT, I AM ASKING YOU, AS OPPOSED TO OBVIOUSLY WE HAVE GOT TO RECONCILE, THE SAME ARGUMENT CAN BE MADE IN A CASE LIKE PHENALON, THAT SOMEBODY, BUT, TO YOU, RIGHT, THAT IS WHAT I AM ASKING YOU TO HELP ME CROSS THAT THAT.

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ALL IT SDW IS RAISE A -- ALL IT DOES IS RAISE AN INFERENCE THAT CAN BE ARGUED THAT THE JURY CAN FIND THAT THIS PERSON KNEW OR SHOULD HAVE KNOWN THE PROPERTY WAS STOLEN. THAT IS NO DIFFERENT FROM THE STATE PROVING SEVERAL OTHER ELEMENTS, THAT MORE OR LESS CONVICT THE DEFENDANT. THE DEFENDANT, IN THOSE INSTANCES, HAS A CONSTITUTIONAL RIGHT TO REMAIN SILENT, BUT DOES SO AT HIS ORER PERIL. AND THIS DOESN'T SMITH THE BURDEN TO COME-- THIS DOESN'T SHIFT THE BURDEN TO COME FORWARD NECESSARILY, BECAUSE YOU CAN ALWAYS ATTACK THE EVIDENCE OF INTENT, WITHOUT THE DEFENDANT'S TESTIMONY. YOU CAN EXPLAIN THAT ANY NUMBER OF WAYS, SO IT DOESN'T, IT IS NOT, AS THIS COURT HELD IN STATE VERSUS YOUNG, IT IS NOT A COMMENT UPON THE DEFENDANT'S SILENCE, AND I THINK THAT IS PART AND PARCEL WITH SHIFTING THE BURDEN.

BUYU AGREE THAT IT IS THE DEFENSE, NOW, THAT HAS TO COME UP THTHEXPLANATIN.

SOME EXPLANATION HAS TO BE MADE OR YOU CAN RELY ON WHETHER OR NOT THE STATE PROVED THE OTHER ELEMENTS OF THE CA. BUT SOMEONE IN POSSESSION OF PROPERTY MORE OR LESS, YOU KNOW, THE BURDEN DOESN'T NECESSARILY LEGALLY FALL ON YOU, BUT IT DOES FROM A FACUL AND PRACTICAL STANDPOINT. >WELL, THE STATE, IN A CASE LIKE THIS, IN HE -- IN ESSENCE AN PROV THAT THE DEFENDANT HAD POSSESSION OF THE PROPERTY A COUPLE MONTHS LATER OR WHATEVER, AND, REALLY, REST ITS CASE, CAN IT NOT?

AND DID. THEY PROVED, ALSO, MEANS AND OPPORTUNITY FOR HIM TO HAVE ACTUALLY STOLEN IT, AND THE PROSECUTOR ARGUED --

WITH HELP THAT THIS INSTRUCTION, IN ESSENCE THE STATE CAN SAY WE HAVE PROOF THAT HE HAD POSSESSION OF IT AND YOU ARE GOING TO GET AN INSTRUCTION UP TO THE -- AN INSTRUCTION FROM THE JUDGE, AND THAT IS ALL WE HAVE TO DO.

IT IS GOOD POLICY WEISS. OTHERWISE IT IS TOO EASY, AND THAT IS WHY WE DISAGREE WITH THE PETITIONER'S READING OF GUNN AND LONG. IT IS TOO EASY TO JUST SAY, WELL YOU KNOW, I HAD IT, BUT GEEZ, I DIDN'T KNOW IT WAS STOLEN, AND DEFEAT THE PURPOSES OF THE ANTI-FENCING STATUTE, WHICH IS WHAT THIS IS CALLED. IT INVOLVES SELLING, STEALING PROPERTY AND DEALING IN STOLEN PROPERTY. FENCE BEING KIND OF A TERM OF ART FROM CRIMINAL PRACTICE, THAT THESE ARE PEOPLE WHO ARE IN BUSINESS TO RECEIVE AND TURN OVER STOLEN PROPERTY. THAT IS THE PURPOSE OF IT, AND --

YEAH, BUT CAN'T WE EX-TEND, THIS -- EXTEND THIS, IN OTHER WORDS, KIND OF LIKE ALL CRIMES, IT IS A CRIME TO HIT SOMEBODY, SO THE STATE PUTS ON A CASE AND SAYS ALL WE HAVE TOLL PROVE IS THAT HE HIT SOMEBODY, AND THE JUDGE IS GOING TO GIVE YOU AN INSTRUCTION THAT, ONCE IT IS DEMONSTRATED THAT A PERSON HIT SOMEBODY, THAT NOW THE BURDEN IS ON THEEON HAT HIT THEM TO EXPLAIN TO YOU THAT THE HIT WAS LEGAL. AND --

YOU ARE TALKING ABOUT AN IMAGINARY SCENARIO HERE, WHERE INTENT IS NOT THAT.

YES.

IF THERE WERE WONDERFUL DEFENSES, IF PEOPLE COULD EASILY SLIP AWAY FROM BATTERY CONVICTIONS, BECAUSE OF SOME CUT OUT BETWEEN THEMSELVES AND THEIR INTENT, THEN, YEAH, AS A MATTER OF POLICY, I THINK THE LEGISLATURE COULD DO THAT. COULD MAKE IT MOREZ I. THE PROBLEM OF DEALING IN STOLEN PROPERTY, THEY ARE NUMEROUS. OBVIOUSLY IT ENCOURAGES THEFT. IT REDUCES THE CHANCES OF PEOPLE GETTING TEIR PROPERTY RETURNED. IF YOU CAN'T GO AFTER FENCES IN A SITUATION LIKE THIS, AND THAT PRESUMPTION GETS THE STATE AROUND, THE CIRCUMSTANTIAL EVIDENCE RULE, AROUND, INVOLVED WITH WHAT THE DEFENDANT KNEW AND WHEN THE DEFENDANT KNEW IT. IF YOU HAVE GOT THE STOLEN

PROPERTY, THE PRESUMPTION ARISES THAT YOU KNEW IT WAS STOLEN OR THAT YOU STOLE IT OR, AS MR. SUMMA CITED, THE RATHER WORDY THING ABOUT RETURN OF RENTAL PROPERTY. THERE IS ANOTHER PRESUMPTION ON STEALTHY ENTRY, THAT IS STATUTORY, AND IS IN THE STANDARD JURY INSTRUCTIONS AS WELL. THAT IF YOU STEALTHLY ENTER, YOU ARE PRESUMED TO BE INTENDING TO COMMIT A CRIME.

SO YOU ARE SAYING THERE ARE SOME CIRCUMSTANCES THAT ARE SO STRONG, IN TERMS OF THE INFERENCE TO BE DRAWN FROM THOSE THAT THEY CAN BE SAFELY GIVEN TO A JURY.

YES. AND THAT THEY HAVE SERVED A GOOD FUNCTION, A GOOD PUBLIC PURPOSE, AND THAT THAT IS WHY WE OPPOSE THIS, SO STRONGLY. GETTING BACK TO THE CONSTITUTIONAL CLAIM, JUST MAKE THIS POINT AND THEN MOVE ON. NO CASE IN THE UNITED STATES SUPREME COURT, HAS DIRECTLY OR BY IMPLICATION OVERRULED THE LONG STANDING DECISION THAT THE JURY INSTRUCTION HERE IS CONSTITUTIONAL, AND AS TO THE CONSTITUTIONAL CLAIM, WE WOULD RELY ON THAT. I WANT TO FOCUS ON --

ONE THING, JUST ON THE STATUTE, IF THE JURY INSTRUCTION WAS IMPROPER, UNDER PHENALON, THN COLD THE REASON THAT IT IMPROPERLY SHIFTED THE BURDEN OF PROOF, THEN THE STATUTE CREATING THE EVIDENTIARY PRESUMPTION, WOULD BE UNCONSTITUTIONAL.

YOU COULD FIND THAT. YES. PARDON ME.

IT WOULD SEEM LIKE WE WOULD HAVE TO FIND THAT, BECAUSE OTHERWISE WHAT COULD WOULD IT DO THE STATE TO HAVE THE STATUTE? THE STATUTE IS OUT THERE.

IT WOULD SORT OF DISAPPEAR. ITS UTILITY WOULD DISAPPEAR, IF THAT WERE FOUND. GETTING BACK TO THIS INSTRUCTION WE SAY IT IS NOT A CONSTITUTIONAL ISSUE. COMMENT ON THE EVIDENCE IS PERMITTED IN FEDERAL COURT, TO A LIMITED EXTENT. IT WAS PERMITTED AT MMON LAW. IF RUMPLE, BAILEY ON, TV IS ANY PROOF, IT IS COMMON INENGLAND. STATES MAY PERMIT IT. FLORIDA DOES NOT, AND IT DOESN'T IN SECTION 9106. IT IS A MATTER OF STATUTE, WHETHER A JUDGE CAN COMMENT ON THE EVIDENCE, AND THE LEGISLATURE COULD, WITHOUT VIOLATING ANY PRINCIPLE OF THE CONSTITUTION, CHANGE THAT AND PERMIT COMMENTARY ON THE EVIDENCE. THE JURY INSTRUCTION HERE IS AN ACCURATE STATEMENT OF THE LAW. IT COMES, THAT SECTION IS FOUND IN 812.022, ALMOST IDENTICAL LANGUAGE. IT IS LEGISLATIVELY APPROVED, AND THAT IS IMPORTANT. THE LEGISLATURE, ALSO, APPROVED THCOMMENT ONHE EVIDENCE STATUTE, AND THE LEGISLATURE IS SUPPOSED, IS PRESUMED TO KNOW ABOUT ALL ITS STATUTES. I THINK IT IS, ALSO, A FAIR INFERENCE TO DRAW THAT THE EGISLATUREKNS THAT COURTS INSTRUCT THE JURIES, BASED ON STATUTES. MOST OF THE STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, ON SUBSTANTIVE CRIMES, COME RIGHT OUT OF THE STATUTES, AND THEY KNOW THAT, AND I THINK YOU CAN IMPLICITLY OR TACITLY, THIS IS A TACIT LEGISLATIVE STATEMENT THAT THIS IS NOT A COMMENT ON THE EVIDENCE. PHENALON IS WHAT THE PETITIONER RELIES ON HERE. OUR POSITION IS THAT PHENALON DID NOT MEAN THAT EVERY INSTRUCTION THAT INFORMS A JURY THAT IT CAN DRAW AN INFERENCE IS A COMMENT ON THE EVIDENCE. IN PHENALON, YOU HAD THE FLIGHT INSTRUCTION, WHICH WAS NOT STATUTORLY MANDATED AND WAS NOT A STANDARD JURY INSTRUCTION. IT WAS GIVEN. SOMETIMES IT WASN'T GIVEN. OTHER TIMES, MOST OF THE OPINION IS DEVOTED TO THE PROBLEMS THAT AROSE FROM IT, AND I INTERPRET TEN ALONE AS BEING JUST A THROWING UP OF THE HANDS AND SAYING CHUCK IT OUT. YOU CAN ARGUE IT, BUT WE ARE NOT GOING TO INSTRUCT THE JURY, BECAUSE WE ARE CREATING TOO MUCH ERROR. THERE IS LANGUAGE THAT SAYS THE FLIGHT INSTRUCTION, HOWEVER, TREATS THAT EVIDENCE DIFFERENTLY FROM ANY OTHER EVIDENCE. IT PROVIDES AN EXCEPTION TO THE RULE THAT JUDGES, THAT THE JUDGE SHOULD NOT INVADE THE PROVINCE OF THE JURY, BY COMMENTING ON THE EVIDENCE OR INDICATING WHAT INFERENCES MAY BE DRAWN FROM IT. NOW, IT GOES ON TO SAY THAT WE CAN THINK OF NO VALID POLICY REASON WHY A TRIAL JUDGE SHOULD BE PERMITTED TO COMMENT

ON EVIDENCE OF FLIGHT, AS OPPOSED TO OTHER EVIDENCE ADDUCED AT TRIAL. WELL, AT THAT TIME, AS TODAY, INFERENCE INSTRUCTIONS WERE COMMON. THERE IS SEVERAL. AS I NOTED. SO EITHER THE PHENALON COURT BELIEVED THAT THE FLIGHT INSTRUCTION STOOD APART FROM THOSE STATUTORY-BASED INSTRUCTIONS, OR IT WAS JUST SO MISINFORMED THAT THAT RATIONALE, THE RATIONALE OF COMMENT ON THE EVIDENCE, REALLY, CAN'T STAND. AND IT IS, REALLY, TELLING JURORS THAT THEY CAN DEDUCE ONE FACT OM ANOTHER. IT IS NOT COMMENTARY ON THE EVIDENCE. AND THE STEALTHY ENTRY IS A GOOD EXAMPLE OF THAT. HE SNUCK IN TO -- SORRY. SNEAKED INTO A WAREHOUSE, AND YOU CAN INFER FROM THAT, AS ANYBODY COULD LOGICALLY INFER, THAT, BY DOING SO, THE STEALTHY ENTRY SHOWED THAT HE HAD AN EVIL INTENT OR AN INTENT TO DO SOMETHING WRONG IN THERE. FLIGHT INSTRUCTION IS NOT LIKE THE PROOF OF POSSESSION OF PROPERTY RECENTLY STOLEN INSTRUCTION. IN SEVERAL WS,TFIGHT INSTRUCTION THAT WAS DISAPPEAR PROVED SAID, IN ITS PERTINENT PART, AND THE RULE IS, WHEN A SUSPECTED PERSON IN ANY MANNER, ENDEAVORS TO ESCAPE OR, BY THREATENED PROSECUTION, ATTEMPTS BY FLIGHT OR CONCEALMENT, SUCH MAY BE ONE OF A SERIES OF CIRCUMSTANCES FROM WHICH GUILT MAY BE INFERRED. TWO BIG DIFFERENCES JUMP OUT THERE. FIRST, YOU ARE EITHER IN FLIGHT, THEY WERE TELLING THE JURY THEY COULD INFER GUILT. HERE, THERE IS A CUT OUT BETWEEN GUILT AND WHAT THEY CAN, WHAT INFERENCE THEY CAN DRAW. ALSO THE PHRASE --

LET ME ASK YOU ABOUT THAT. THE ONLY ELEMENT, AS FAR AS POSSESSION OF RECENTLY STOLEN PROPERTY, IS YOU HAVE STOLEN PROPERTY AND THAT NEW R SHOULD HAVE KNOWN.

KNOWN IT WAS STOLEN.

SO IF YOU HAVE GOT IT AND YOU ARE ABLE, THE JURY IS ABLE TO INFER FROM YOU POSSESSING IT, THAT YOU KNEW OR SHOULD HAVE KNOWN, I MEAN, BASICALLY ISN'T, THAT IS REALLY SAYING IF YOU POSSESS IT, YOU ARE GUILTY, ABSENT THE DEFENDANT TRYING TO COME UP WITH A REASON TO -- AND THIS IS THE OTHER PART OF THE QUESTION. I WANTED TO ASK YOU, UNLESS SATISFACTORY EXPLAINED, IS WHAT THE STATUTE SAYS. WHOSE BURDEN, IS IT THE STATE TO SAY, IS ITHEIURDEN TO SHOW THERE IS NO TFACTORY EXPLANATION?

I DON'T KNOW HOW THEY COUL. I DON'T KNOW HOW YOU COULD PROFFER --

SO THAT SHIFTS HEURDENO THE DEFENDANT TOATICS FACT -- TO SATURDAYS FACTUALLYEXPLAN -- TO SISFTLYPLAIN IT?

I WOULD REFER YOU TO STATE VERSUS YOUNG, WHERE IT SAID THAT THIS WAS NOT A COMMENT ON SILENCE. A 1968 DECISION OF THIS COURT, SPECIFICALLY ON THAT POINT.

BUT ESSENTIALLY, IF THE STATE PUTS ON YOU HAVE POSSESSED IT, AND THE DEFENDANT DOESN'T PUT ON ANY EVIDENCE, THE DEFENDANT LOSES.

LOGICAL. LOGICALLY, THEY OHT TO LOSE IN THAT SITUATION. YEAH. YOU CAN'T EVER TELL. I MEAN, YOU MIGHT HAVE A SILVER SILVER-TONGUED ADVOCATE THAT CAN PULL A RABBIT OUT OF THE HAT, BUT, YEAH.

SO IF SOMEBODY GOES ALONG THE STREETS OF NEW YORK, WHERE THEY PICK UP ALL THE JEWELRY AND POCKETBOOKS AND YOU ARE IN POSSESSION OF IT, AND THE STATE SHOWS IT WAS RECENTLY STOLEN, YOU COULD BE FOUND --

YOU COULD BE, BUT IF YOUR DEFENSE WAS, LOOK, I BOUGHT 24 THIS FROM SOMEONE WHO HAD ALL THE INDICIA -- I BOUGHT THIS FROM SOMEONE WHO HAD ALL THE INDICIA OF BEING A HONEST BUSINESSMAN. LET'S TURN THAT AROUND. LET'S SAY YOU WENT TO SEARS, AND THERE AREOME USED LAWN MOWERS, THERE, IN SEARS'S STOE,AND YOU SAY, GEE, YOU KNOW, THIS IS A GOOD DEAL HERE. THIS LAWNWERIS HALF THE PRICE AFTER REGULAR LAWN MOWER, AND YOU

BUY IT, AND LATER IT IS DETERMINED THAT THAT WAS ACTUALLY STOLEN, OKAY, WELL, TECHNICALLY, YEAH, YOU COULD BE FOUND GUILTY OF DEALING IN STOLEN PROPERTY, BECAUSE YOU WERE IN POSSESSION OF PROPERTY RECENTLY STOLEN, BUT YOUR EXPLANATION --

BUT THE POINT IS YOU WOULD HAVE TO --

YOU WOULD HAVE TO EXPLAIN YOURSELF.

YOU WOULD HAVE TO TESTIFY TO IT.

WELL, YOU WOULDN'T HAVE TO TESTIFY IF THE POLICE WERE DOING IT RIGHT, WHICH WOULD BE, WELL, THIS GUY BOUGHT IT FROM WHAT IS OBVIOUSLY A LEGITIMATE BUSINESS, AND WE ARE NOT --

YOU HAVE GOT TO RELY THAT THE STATE IS NOT GOING TO BRG THESE CHARGES. IS THAT RIGHT?

THAT IS WHERE YOU HOPE THAT, IN THOSE CIRCUMSTANCES, THEY WOULDN'T DO THAT. THEY DON'T GO AFTER THE MARKET. MOSTLY THEY GO AFTER THE SELLERS IN THESE SORTS OF THINGS. AND, ALSO, THE TERM OF THE RULE IS, THE JUDGE IS AN AUTHORITY FIGURE, AND IF THE JUDGE SAYS THE RULE IS GUILT MAY BE IN FERD THAT IS STRONGER THAN THIS. AGAIN, IT WAS NO LONG AREA STATUTORY, NO LONGER A STANDARD JURY INSTRUCTION, DIFFERENT FROM HERE. THIS COURT IS TWELVE TIMES, AND I UNDERSTAND YOUR POINT FROM THE OTHER CASE, JUDGE ANSTEAD, THAT THERE IS A CAVEAT TO THAT, THAT TWELVE TIMES APPROVED THIS JURY INSTRUCTION SINCE PHENALON. OUR LAST POINT, AND I AM ALMOST OUT OF TIME, I SEE HERE, BUT OUR LAST POINT WOULD BE THAT, IN ANY EVENT, IF IT WERE ERROR, AND I THINK YOU CAN FAIRLY ASSUME THAT THE COURT BELOW AFFIRMED THE CONVICTION, AFFIRMED THE LOWER COURT, THE TRIAL COURT, IF IT WERE ERROR, I THINK IT WAS HARMLESS BEYOND A REASONABLE DOUBT, AND THAT IS ADDRESSED IN OUR ARGUMENT ON THE FIRST TWO ISSUES. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. REBUTTAL?

IF I AMIS ANYTING ON REBUTTAL, I THINK THE COURT MUST GET A GOOD GRASP OF THE FACTS AND THE TESTIMONY, WITH RESPECT TO THE DATE OF THE THEFT. THE FORM SAID THE TOOL WAS PLACED -- THE FOREMAN SAID THE TOOL WAS PLACED IN SERVICE ON JULY 20. THE EMPLOYEE WHO USED IT SAID THAT HE FOUND IT IN A PAWNSHOP ON SEPTEMBER 21, AND WHEN ASKED HOW LONG PRIOR TO THAT HAD YOU LAST USED IT, HE, FIRST, SAID IT HAS BEEN AT LEAST SEVERAL MONTHS MONTHS. THEN PRESSED WITH, UPON FURTHER INQUIRY, HE SAID IT HAS BEEN AT LEAST TWO MONTHS. NOW, AT LEAST TWO MONTHS HAS A MEANING. THAT WOULD TAKE IT BACK TO JULY 21. AND TO SPECULATE, WHICH ISL IT IS, THAT THE THEFT COULD HAVE BEEN SOMEWHAT LATER, SUCH KIND OF A FINDING OF FACT ON THE DATE OF THE THEFT WOULD NOT BE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE. THIS IS MERE SPECULON.

BUT WAIT A MINUTE. IT WAS FOUND IN THE PAWNSHOP IN SEPTEMBER, BUT WHAT WAS THE DATE THAT IT WAS PAWNED? I THOUGHT IT WAS PAWNED SOMETIME IN EARLY AUGUST.

IT WAS PAWNED AUGUST A 5. IT WAS -- IT WAS PAWNED AUGUST 5. IT WAS DISCOVERED IN THE PAWNSHOP ON SEPTEMBER 21.

I GUESS I AM MISSING YOUR POINT HERE. WHAT DIFFERENCE DOES IT MAKE, IF IT WAS FOUND IN SEPTEMBER, WHEN IT WAS ACTUALLY PAWNED IN AUGUST?

WE ARE TRYING TO ESTABLISH THE DATE THEFT, WHICH IS ESSENTIAL TO DETERMINE WHETHER THE POSSESSION WAS RECENT TO THE DATE OF THE THEFT.

WHICH WOULD BE, SO THAT TIME PERIOD IS, REALLY, JULY 21 THROUGH AUGUST 5.

THE, WHAT PETITIONER IS SAYING IS THAT THE ONLY EVIDENCE ON THE DATE OF THE THEFT IS JULY 20 OR 21, AND HE COULD NOT HAVE STOLEN IT. THAT IS A POINT OF THE EVIDENCE THAT --

WHAT WAS HE CONVICTED OF?

DEALING IN STOLEN PROPERTY.

NOT THEFT OF THE PROPERTY.

BUT THE STATE, AT TRIAL, DID ARGUE, NONETHELESS, THAT HE KNEW IT WAS STOLEN, BECAUSE HE STOLE IT. THAT IS NOT RIGHT. THAT IS NOT FAIR. THAT IS NOT SUPPORTED BY THE EVIDENCE. IT IS REFUTED BY THE EVIDENCE. THE OTHER POINT I NEED TO MAKE IS THAT THE INSTRUCTION ON BARNES V UNITED STATES, THE UNITED STATES OPINION, IS VASTLY DIFFERENT FROM THE INSTRUCTION USED IN THIS CASE. THAT INSTRUCTION IS SO LONG AND DETAILED, THAT I CANNOT READ IT TO YOU AND DON'T HAVE TIME. BUT IT IS EXPRESSLY, IT IS MOST DEFINITELY PERMISSIVE INNATE. THE ONLY- IN NATURE. THE ONLY CASE WHICH I WAS ABLE TO FIND WHICH ACTUALLY RENDERS AN OPINION ON THE NATURE OF THIS LANGUAGE, GIVES RISE TO I SUPPLIED SUPPLEMENTAL AUTHORITY, AN ARIZONA COURT, WHICH SAYS THAT IS A MANDATORY DIRECTIVE. I AM OUT OF TIME, AND PETITIONER REALLY THANKS THE COURT FOR TE TIME THAT IT HAS ALLOTTED O HIS CASE. THANK YOU. MR. CHIEF JUSTICE

THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE. THE COURT WILL BE IN RECESS FOR 15 MINUTES.