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03-1555

[TECHNICAL DIFFICULTIES]

... THAT YOU KNOW WHAT IS HAPPENING. WHY SHOULD NOT BE A DISTINCTION OR A SEPARATE APPROACH, WHEN YOU ARE DEALING WITH A STATUTORILY-BASED INFERENCE OR PRESUMPTION?

RIGHT. RIGHT. WELL, TWO REASONS I THINK OF AT THE MOMENT. ONE IS THAT THERE IS ALSO A STATUTE THAT SAYS THAT A JUDGE IS NOT PERMITTED TO COMMENT ON THE EVIDENCE. THAT IS 9106. BUT I WOULD ALSO JUST SAY, YES, IT IS PART OF THE STATUTE. BUT SAYING THAT IT CAN'T BE USED AS PART OF AN INSTRUCTION, DOESN'T MAKE IT COMPLETELY USELESS. COUNSEL CAN STILL ARGUE BASED ON THE STATUTE BUT MORE AS MATTER OF LOGIC, I WOULD SAY, TO THE JURY.

DOESN'T THAT ADDRESS, REALLY, WHAT THE U.S. SUPREME COURT HAS BEEN ADDRESSING WITH THE FEDERAL RULE ADDRESSES AND THE JUDGE REALLY IMPOSES HIMSELF AS A FACT FINDER, ALMOST, AND SAYS I REALLY DON'T BELIEVE WHAT THE PLAINTIFF OR THE DEFENDANT IS SAYING AND THAT KIND OF THING. ISN'T THAT WHAT THE EVIDENCE CODE IS DESIGNED TO PROTECT AGAINST?

I DON'T THINK I WOULD AGREE WITH THAT. FOR ONE THING, IT, 9106 AND PROFESSOR EARHART COMMENTS ON IT. HE TALKS ABOUT COMMENTS BEING A PROBLEM BECAUSE THE TRIAL JUDGE HAD SO MUCH AUTHORITY WITH THE JURY, AND THAT THAT IS WHAT MAKES IT A PROBLEM, SO I DON'T THINK IT IS NECESSARILY TIED TO WHAT THE FEDERAL COURTS HAVE TO SAY.

SO WOULD YOU, IN THAT CONTEXT, THEN, YOU ARE SAYING THAT, ANY TIME THERE IS A JURY INSTRUCTION CONCERNING AN INFERENCE OR PRESUMPTION THAT, THAT IS AN IN PERMISSIBLE COMMENT ON THE EVIDENCE.

I DON'T KNOW.

THE STATUTORY PRESUMPTIONS AND I AM THINKING IN PARTICULAR, ABOUT BLOOD ALCOHOL, AND THAT IS COMMONLY USED THAT, IF YOU FIND THAT THERE IS A .08 OR MORE, BLOOD ALCOHOL, THAT YOU MAY USE THAT, AND I DON'T KNOW THE EXACT STATEMENT, BUT YOU KNOW THAT IS COMMONLY USED TO SHOW THAT --

RIGHT.

-- A PERSON WAS INTOXICATED.

RIGHT.

NOW, IF THERE FOR THAT IS A STATUTORY, AS I AM RECALLING IT, PRESUMPTION, THIS IS AN ISSUE ABOUT WHETHER THAT THE JURY IS ENTITLED TO INFER IT OR NOT INFER IT FROM ANY FACT, AND IS THAT, AND I DON'T KNOW THE ANSWER. YOU CAN'T SAY THAT ALL STATUTORY PRESUMPTIONS ARE COMMENTS IN THE EVIDENCE, BECAUSE THE LAST STATUTORY PRESUMPTION.

RIGHT. RIGHT. NOW, THE QUESTION IS --

NOW, THE QUESTION IS, ARE INFERENCES TREATED DIFFERENTLY, AND SPECIFICALLY I THINK MY CONCERN HERE IS THAT THE YOUNG CASE DEALT WITH AN UNEXPLAINED POSSESSION OF RECENTLY STOLEN PROPERTY. BUT JUDGE IRVIN GOES ON IN SEVERAL, IN A DISSENT IN THE FIRST DISTRICT IN SEVERAL CASES, TALK ABOUT WHEN HAVE AN EXPLANATION, WHO IS TO DECIDE WHETHER THIS IS REASONABLE ENOUGH EXPLANATION TO NOT ALLOW ANYTHING. HOW IS THAT, COULD YOU SORT OF RESPECT FIRST OF ALL, DO YOU AGREE THAT A PRESUMPTION, A STATUTORY PRESUMPTION WILL BE TREATED DIFFERENTLY THAN A STATUTORY DISCUSSION, THAT THERE SHOULD BE AN INFERENCE, OR DO YOU THINK THEY {TR} ALL IN THE SAME CATEGORY?

NO, I DON'T, AND I THINK ONE OF THE REASONS IS, IN FACT, PROBABLY, BEST ADDRESSED BY ONE OF THE CASES WHICH SUPPLIED A SUPPLEMENTAL AUTHORITY, WHICH TALKS ABOUT ISSUES THAT ARE IN THE CURRENT EXPERIENCE OF THE JURY AND ISSUES THAT ARE NOT, WHICH BLOOD ALCOHOL LEVEL OR SOMETHING WHICH IT WOULD BE, WOULD BE USEFUL FOR THEM TO HAVE MORE INFORMATION, AND FOR THAT REASON IT MIGHT NOT FALL INTO THE CATEGORY OF BEING A COMMENT. AND WHAT WAS THE OTHER? ANOTHER OTHER WAS HOW, BECAUSE HERE WE HAVE, IN YOUNG, IT WAS UNEXPLAINED, AND NOW WHAT WE HAVE IN THESE JURY INSTRUCTIONS IS AN ISSUE AS TO WHETHER THE JURY INSTRUCTIONS WERE SATISFACTORY OR NOT, AND I AM MORE CONCERNED THAT THE JURY INSTRUCTION DOESN'T SPECIFICALLY SAY IT IS UP TO THE JURY TO DECIDE WHETHER THE EXPLANATION IS SATISFACTORY OR NOT.

RIGHT.

WHICH, ALTHOUGH THIS ISN'T RAISED AS A CONSTITUTIONAL ISSUE, CERTAINLY PUTS THE BURDEN ON THE DEFENDANT, HAS TO EITHER EXPLAIN IT SATISFACTORILY OR BE CHARGED WITH THIS INFERENCE.

I THINK IT, DOES AND I THINK, I MEAN, THERE IS A PARALLEL IN THE PHENALON CASE, WITH THE AMBIGUITY ABOUT WHAT DETERMINES FLIGHT. I THINK IN THE YOUNG CASE, IT IS A 36-YEAR-OLD CASE.

AND CERTAINLY I KNOW THAT I WROTE IN A DECISION THAT THIS OUGHT TO BE, I DIDN'T SEE, THEN, ANY REASON THAT IT SHOULD BE TREATED DIFFERENTLY, BUT IN THINKING ABOUT AND REFLECTING ON IT FURTHER, NOT ONLY IS THIS A STATUTE, WHEREAS FLIGHT WAS NEVER IN A STATUTE.

TRUE.

BUT, ALSO, FLIGHT COULD BE, THERE COULD BE MANY, MANY CIRCUMSTANCES WHERE FLIGHT COULD HAVE OCCURRED, AND I THINK THE COURT WAS STRUGGLING WITH WHAT, YOU KNOW,, WHEN REALLY, WOULD YOU USE IT OR NOT, WHEREAS, FROM THE COMMON LAW ON, IF YOU ARE IN POSSESSION OF RECENTLY STOLEN PROPERTY, THAT IS JUST OF A DIFFERENT QUALITY. YOU NOW ARE IN POSSESSION OF ONE OF SORT OF IT GOES ALMOST TO ONE OF THE ELEMENTS OF THE CRIME, WHICH IS KNOWLEDGE, NOT YOU KNOW, FLIGHT IS CONSCIOUSNESS OF GUILT, BUT POSSESSION OF THE PROPERTY IS USED TO INFER THE KNOWLEDGE, SO THAT IT REALLY IS, IT IS A DIFFERENT QUALITATIVE TYPE OF EVIDENCE, AND SO COULD YOU HELP ME ON THAT ONE. THAT IS THAT IT IS DIFFERENT FROM FLIGHT.

THAT IS TRUE, BUT THE PROBLEM STILL IS THAT THE TRIAL JUDGE, BY GIVING AN INSTRUCTION, GIVES PARTICULAR EMPHASIS TO THAT FACT, AS OPPOSED TO ALL OF THE OTHER FACTS IN THIS CASE THAT MIGHT BE IN DISPUTE.

IT, ALSO, THAT INSTRUCTION DOESN'T JUST END WITH SAYING THAT YOU MAY CONSIDER THE UNEXPLAINED POSSESSION OF PROPERTY. DOESN'T THE INSTRUCTION GO ON TO SAY THAT THIS, YOU CONSIDERED THIS WITH THE OTHER CIRCUMSTANCES, THAT INDICATE THAT THERE WAS A

BURGLARY COMMITTED, WHICH INCLUDES THE POSSESSION OF THE PROPERTY, SO WE ARE NOT JUST SAYING, AND THE TRIAL JUDGE IS NOT JUST TELLING A DEFENDANT, THAT THAT FACT AND THAT FACT ALONE, IS SUFFICIENT, IS HE?

HE IS NOT TELLING HIM THAT THAT IS SUFFICIENT. IT IS TRUE. IT IS IN THE CONTEXT OF ALL OF THE OTHER EVIDENCE, BUT THE ONLY PIECE OF EVIDENCE THAT HE IS MENTIONING SPECIFICALLY, IS THE POSSESSION OF THE RECENTLY STOLEN PROPERTY.

BUT IS THAT REALLY COMMENTING ON THE EVIDENCE, OR IS IT REALLY JUST INSTRUCTING THE JURY ON HOW THEY SHOULD PROCESS THE INFORMATION? AS AN INFERENCE.

YEAH. I THINK BECAUSE OF THE WAY THE COURTS HAVE LOOKED AT WHAT CONSTITUTES A COMMENT ON THE EVIDENCE, WHICH IS YOU KNOW, THE COURT GIVING PARTICULAR WEIGHT TO A FACT AND PUTTING ALL OF THE WEIGHT OF ITS AUTHORITY BEHIND IT, THAT IT DOES CONSTITUTE A COMMENT. THERE WAS ONE THING I WANTED TO ACTUALLY SAY, IN ANSWER TO JUSTICE LEWIS'S QUESTION, AND THAT IS THE FIRST DCA IN A CASE, I BELIEVE IT WAS POST PHENALON, CALLED BARFIELD VERSUS STATE, USING THE SAME RATIONALE, SAYS WE ARE NOT GOING TO ALLOW THIS INSTRUCTION ON, IT WAS ABOUT THE POSSESSION OF SOMETHING ABOUT SALE SUBSTANTIALLY BELOW THE FAIR MARKET VALUE OF PROPERTY. THEY GOT RID OF THAT AS A COMMENT ON THE EVIDENCE, AND THAT WAS ALSO BASED ON STATUTE. IN FACT, THE SAME 812.022 STATUTE.

BUT WE HAVE NEVER ACTUALLY SAID THAT THAT IS THE CASE, HAVE WE, I MEAN, THAT WAS -- THAT WAS THE FIRST DCA.

A DISTRICT COURT OPINION THAT WE HAVE NOT ACTUAL LAY SAID THAT THAT WAS A CORRECT INTERPRETATION, HAVE WE?

RIGHT. NO. NO.

I AM NOT SURE I ACTUALLY UNDERSTOOD YOUR EXPLANATION OR IF YOU INTENDED TO EXPLAIN THE DIFFERENCES BETWEEN INFERENCES AND PRESUMPTIONS THAT ONE FALLS INTO ONE CATEGORY.

NO, NOT NECESSARILY THAT THEY FALL INTO DIFFERENT CATEGORIES, BUT THERE ARE DIFFERENT REASONS WHY IT MAY MAKE MORE SENSE TO TELL THE JURY ABOUT HOW TO DEAL WITH BLOOD ALCOHOL LEVEL OR HOW TO DEAL WITH, IN THE SUPPLEMENTAL CASE, ON THE USE OF CONDOMS IN A SEXUAL BATTERY CASE, BECAUSE IT IS NOT WITHIN THEIR EXPERIENCE. IT IS NOT SORT OF A BASIC POINT OF LOGIC, AND I THINK THAT SOMETHING LIKE THE COMMENT HERE, IS MORE, IT IS MORE COMMONLY UNDERSTOOD, I THINK, BY JURORS, AND SO THERE IS A DIFFERENCE THERE.

IF YOU THINK A JURY WOULD UNDERSTAND AND KNOW THAT, IF YOU HAVE RECENTLY STOLEN PROPERTY, THAT YOU COULD USE THAT IN DETERMINING WHETHER OR NOT THE PERSON HAS COMMITTED A BURGLARY?

I THINK AS A MATTER OF LOGIC, THEY WOULD BE MORE LIKE TO MAKE THE STEP THEMSELVES, BUT, ALSO, LIKE, AS I SAID BEFORE, COUNSEL ARE NOT PRECLUDED FROM ARGUING ABOUT IT. THE PROBLEM THAT, WHERE ARGUING COMES UP HERE, IS THAT WHEN THE TRIAL JUDGE SAYS, YOU KNOW, LOOK AT THIS IN PARTICULAR.

SO IF IT IS SOMETHING THAT YOU THINK A JURY, LIKE THE BLOOD ALCOHOL LEVEL, YOU THINK THAT THAT IS SOMETHING COMMONLY IS UNDERSTOOD, SO THAT IS OKAY. BUT A PRESUMPTION, WHAT ABOUT A PRESUMPTION SUCH AS THE ONE WHERE YOU HAVE A DEVICE THAT COULD

ALTER THE READING OF A METER. AND YOU CAN, THERE IS A PRESUMPTION THAT, IF YOU HAVE THAT DEVICE IN YOUR POSSESSION, THAT THAT IS WHAT IT IS USED FOR. IS THAT SOMETHING THAT IS OR IS NOT COMMONLY UNDERSTOOD?

THAT I AM NOT SURE. I CAN SPEAK TO.

ISN'T COMMONLY UNDERSTOOD, ISN'T THAT, ISN'T THAT THE BASIS BY WHICH WE ALLOW WHETHER THERE IS EXPERT TESTIMONY OR NOT?

WELL THAT, IS TRUE.

BUT THAT IS NOT REALLY THE BASIS BY WHICH WE DECIDE WHETHER JURY INSTRUCTIONS ARE PROPER OR NOT.

IT IS NOT THE ONLY BASIS, BUT I THINK --

YOU WOULDN'T WANT, IF THE ISSUE IS THAT A POLICE OFFICER KNOWS CERTAIN THINGS ABOUT PROFILES OF DEFENDANTS, I MEAN, A JUDGE WITH YOU, YOU WOULDN'T WANT THE JUDGE SAYING THAT IS NOT COMMONLY KNOWN. I AM GOING TO DEVISE A JURY INSTRUCTION, TO COME UP WITH THIS. COULD YOU COMPARE WITH THE INSTRUCTIONS THAT WERE HELD TO BE IMPROPER IN PHENALON AND IN THE OTHER CASES FROM THIS COURT, AND THIS INSTRUCTION, NOT AS TO WHETHER IT IS IN THE STATUTE OR NOT, BUT AS TO WHETHER THIS IS BETTER, WHEN I SAY BETTER, YOU KNOW, LESS LIKELY FOR THE JURY TO HAVE TO DECIDE THAT, IF THERE IS PROOF OF STOLEN, THAT THEY POSSESSED STOLEN PROPERTY, THAT YOU CAN INFER KNOWLEDGE, IS IT BETTER OR WORSE THAN THE ONE THAT WAS GIVEN ON FLIGHT, OR ARE THEY ALL JUST SAME, BECAUSE I AM TRYING TO COMPARE WHY IF ONE IS NOT A COMMENT ON THE EVIDENCE BUT THE OTHER IS, OR I THINK THE STATE SUGGESTS THAT WE WERE WRONG IN PHENALON AND EVEN THAT FLIGHT INSTRUCTION WAS NOT A COMMENT ON THE EVIDENCE.

RIGHT. RIGHT WELL, PHENALON WAS THE INSTRUCTION. THERE WAS THE WHITFIELD CASE.

WAS THE FLIGHT INSTRUCTION DIFFERENT, IN TERMS OF WHAT ELEMENT OF THE CRIME WAS FLIGHT BEING USED TO SHOW?

YOU KNOW, I DON'T HAVE IT. LET ME.

WASN'T IT, REALLY, THAT FROM FLIGHT ALONE OR FLIGHT WITH OTHER CIRCUMSTANCES, YOU COULD INFER THE GUILT OF THE DEFENDANT, SO THEY WERE HIGHLIGHTING A PARTICULAR ACTION.

RIGHT.

TO FOCUS ON GUILT, WHEREAS HERE, AND THIS IS WHERE I WOULD LIKE YOU, AGAIN, TO GO BACK, THEY ARE DEALING SPECIFICALLY WITH AIDING THE JURY IN DETERMINING HOW YOU WOULD DECIDE THE ELEMENT OF KNOWLEDGE. THAT IS THAT YOU ARE INFERRING FROM THE POSSESSION OF THE PROPERTY, THAT YOU KNEW OR SHOULD HAVE KNOWN THE PROPERTY WAS STOLEN, WHICH IS NOT GUILT OF THE WHOLE CRIME. I MEAN, I DON'T KNOW WHAT OTHER ELEMENTS ARE THERE, BUT IT IS ONLY THAT ELEMENT OF KNOWLEDGE, WHICH SEEMS SIMILAR TO SOME OF THE THINGS WE HAVE DONE WITH OR NOT DONE WITH THE POSSESSION OF YOU KNOW, DRUGS AND WHETHER YOU CAN INFER FROM THAT, THAT THE PERSON KNEW THAT THEY WERE A PROHIBITED SUBSTANCE, AND I AM MORE CONCERNED THAT I THINK THAT THAT IS AN IMPORTANT, MAY BE AN IMPORTANT DISTINCTION. HAVE YOU THOUGHT ABOUT THAT? CAN YOU HELP ME ON THAT?

YOU KNOW, I HAVEN'T REALLY GIVEN THAT A LOT OF THOUGHT AHEAD OF TIME. THE WHITFIELD

CASE, WHICH IS ANOTHER CASE FROM THIS COURT, DEALT WITH AN INSTRUCTION ON DRAWING AN INFERENCE FROM THE REFUSAL TO SUBMIT TO FINGERPRINTING. BUT I GUESS THAT WOULD ALSO HAVE BEEN GENERALLY CONSCIOUSNESS OF GUILT.

RIGHT. BUT I GUESS I AM MORE CONCERNED THAT THAT --

RIGHT. BUT THEN --

THE ELEMENT OF THE CRIME IS SOMETHING THAT WE DO ALLOW INSTRUCTIONS ON.

RIGHT. BUT THEN, WELL, THE FIRST DCA CASE, THE BARFIELD CASE, ALTHOUGH IT HASN'T COME UP HERE AND I DON'T GUESS IT WILL BE, BECAUSE IT IS A FAIRLY OLD CASE, BUT THAT WAS, AGAIN, ON THE, IT WAS MORE SIMILAR TO THIS CASE.

CHIEF JUSTICE: OKAY. THE MARCH HALL HAS REMINDED -- THE MARSHAL HAS REMINDED YOU, PURSUANT TO REQUEST, THAT YOU ARE IN YOUR REBUTTAL TIME. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM KAREN HOLLAND, HERE ON BEHALF THE STATE. TO MY RIGHT IS ROB WHEELER, OUR BUREAU CHIEF. I THINK IT IS IMPORTANT TO, YES, FOCUS ON WHAT THE DEFINITION OF THE COMMENT, AND IT IS STRICTLY ARISING OUT OF THE STATUTE, AND I THINK THE DCA BELOW, IT IS IMPORTANT THEY GOT CONFUSED AND IT IS IMPORTANT TO DISTINGUISH THAT THERE IS A DIFFERENCE BETWEEN WHETHER THE INSTRUCTION IS A COMMENT ON THE EVIDENCE UNDER FLORIDA STATUTE AND WHETHER WE ARE MAKING A CONSTITUTIONAL CHALLENGE, WHETHER THIS INSTRUCTION IS A CONSTITUTIONAL IMPLICATION THAT IS NOT BEFORE THE COURT, THAN ISSUE HAS BEEN RESOLVED ALREADY, BY THE U.S. SUPREME COURT AND ALSO BY THIS COURT IN YOUNG AND MORE RECENTLY, IN EDWARDS.

WHAT ABOUT THE ISSUE OF THE JURY INSTRUCTION? DO WE DECIDE THIS IN CON SALVO OR DID WE SAY SOMETHING IN DICTA THAT THESE WERE ADEQUATE?

IN CON SALVO, YOU DIDN'T ADDRESS IT AS A COMMENT ON EVIDENCE. YOU STRICTLY LOOKED AT WHAT WOULD BE A SUFFICIENT FACTUAL BASIS FOR GIVING THE INSTRUCTION, AND YOU SET FORTH TWO QUALIFICATIONS.

WHAT I AM CONCERNED ABOUT HERE, IS I AGREE THAT IT IS THERE IN THE STATUTE, AND I KNOW THAT JUDGES ALL THE TIME, WHETHER BEFORE OR AFTER THE STATUTE, THAT WE ARE NOW LOOKING FOR THE SUFFICIENCY OF THE EVIDENCE, A MOVE FOR, YOU KNOW, A JUDGMENT OF ACQUITTAL, SAYING THERE IS NO EVIDENCE THAT HE KNEW THIS WAS STOLEN, AND YOU SAY, BUT, JUDGE, THERE IS A STATUTE THAT SAYS, THAT IS UNEXPLAINED OR NOT SATISFACTORILY EXPLAINED POSSESSION, ALLOWS IT TO GO TO THE JURY ON THE ISSUE OF KNOWLEDGE, AND THE JUDGE WOULD SAY, OH, THAT'S RIGHT. I FORGOT ABOUT THAT STATUTE. THERE IS ENOUGH TO GO TO THE JURY. THE QUESTION COMES BETWEEN NOT EVERY STATUTE IS INSTRUCTED ON BY JUDGES. JUST BECAUSE IT IS IN STATUTE DOESN'T MAKE IT AN INSTRUCTION, SO CAN YOU TELL ME WHY THIS, WHY IT IS APPROPRIATE TO SINGLE IT OUT AS AN INSTRUCTION AND IS MY DISTINCTION, ALTHOUGH YOU WANT TO SAY PHENALON IS ALSO A PROPER INSTRUCTION, IS THE DISTINCTION BETWEEN INSTRUCTIONS THAT SORT OF SAY, HEY, YOU CANNOT ANSWER QUESTIONS OR BE INCONSISTENT IN ADVANCE, OR YOU CAN FIND THAT EVIDENCE IS GUILTY OR FLIGHT THAT HE IS GUILTY, OR REFUSAL TO SUBMIT TO THE FINGERPRINTING, HE IS GUILTY, AND HERE, FOCUSING ON A PARTICULAR ELEMENT OF THE CRIME, WHICH THE STATE MIGHT OTHERWISE HAVE DIFFICULTY ESTABLISHING.

OKAY. YES. FIRST, I WOULD STRESS THAT THE INFERENCE IN THIS CASE ARISES FROM POSSESSION, NOT FROM HIS EXPLANATION. IN FACT, BARNES SPECIFICALLY SAID SO, IF YOU LOOK AT FOOTNOTE NINE. THE EXPLANATION GOES TO THE WEIGHT OF THE INFERENCE, SO THAT IS FOR A

JURY TO DECIDE. THE DEFENDANT HAS NO DUTY TO COME FORTH AND EXPLAIN, AND THE JURY DOESN'T HAVE TO BELIEVE IT. THAT IS WHY WE GIVE THE INSTRUCTION. WE DON'T KNOW WHAT THEY ARE GOING TO THINK.

ISN'T THAT AN AWFULLY COMPLICATED SCENARIO, THOUGH, THAT IF YOU ARE MAKING THE ASSUMPTION THAT THE JURY KNOWS ALL OF THAT, BECAUSE THEY ARE NOT TOLD WHAT YOU JUST SAID, ARE THEY? ALL THEY ARE TOLD IS ABOUT THE INFERENCE THAT THEY MAY DRAW FROM THE POSSESSION, THE UNEXPLAINED POSSESSION, IS THAT CORRECT?

YES. YOUR CONCERN IS THE INSTRUCTION IS NOT CLEAR?

NO. ACTUALLY I GUESS MY CONCERN IS THAT WE ALL, TRAINED IN THE LAW, MAY TAKE THIS ONE WAY, AND SAY, WELL, WE STILL RETAIN THE BURDEN OF PROOF ON THE STATE, THEY MUST PROVE THE CASE YOU KNOW, BEYOND A REASONABLE DOUBT, OR WHATEVER. WE WOULD IMPOSE THOSE SAFEGUARDS. BUT CAN THE SAME BE SAID FOR A JURY, WHO IS HEARING FROM THE JUDGE'S MOUTH, THAT YOU HAVE HEARD EVIDENCE THAT THE DEFENDANT POSSESSED THIS PROPERTY, AND YOU MAY DRAW AN INFERENCE FROM THAT, THAT HE IS GUILTY. THAT IS REALLY WHAT THE, AND SO THAT IS A PRETTY POWERFUL TOOL FOR THE STATE TO HAVE HERE. LET ME ASK YOU A BROADER QUESTION AND HELP ME, BECAUSE WE ALL RECOGNIZE THAT ALL KINDS OF OFFENSES MAY BE PROVEN BY CIRCUMSTANTIAL EVIDENCE, RIGHT?

RIGHT. AND THIS IS A RULE OF CIRCUMSTANTIAL EVIDENCE.

AND, BUT, WE DON'T SINGLE OUT ALL THE PIECES OF CIRCUMSTANTIAL EVIDENCE AND TELL THE JURY INFERENCES, EVEN THOUGH WE KNOW THEY MAY PROPERLY DRAW THOSE INFERENCES.

RIGHT.

IF THE DEFENDANT'S FINGERPRINTS ARE IN THE PREMISES, WE KNOW THE JURY MAY DRAW THE INFERENCE THAT HE WAS IN THERE, AND IN FACT, HE WAS IN THERE YOU KNOW, WHEN THE CRIME OCCURRED. AND THERE IS ALL YOU KNOW, KIND OF OTHER THINGS. IN THE LAST CASE WE HAD, THERE WAS A FOOTPRINT, AND CIGARETTE ASHES AND, OF COURSE, THERE WAS A DNA, TOO, BUT WE DON'T TELL THE JURY, WE DON'T SINGLE OUT PARTICULAR PIECES OF THIS EVIDENCE, CIRCUMSTANTIAL EVIDENCE, TO TELL THEM THEY MAY DRAW INFERENCE FROM THAT OF THIS AND SO, SO WOULDN'T IT BE A BETTER POLICY, TO LEAVE THAT ALONE, AND LET THE JURY, AS THEY DO WITH CIRCUMSTANTIAL EVIDENCE CASES, TO DRAW THEIR OWN CONCLUSIONS ON THE WEIGHT OF THAT, THAT IS IF SOMEBODY IS CAUGHT RED-HANDED, WITH THE PROPERTY, RIGHT OUTSIDE THE STORE DOOR, AND THAT IS WHEN THEY ARE ARRESTED, THAT IS WHAT WE CALL BEING CAUGHT RED-HANDED, YOU KNOW, THAT THE JURY IS OBVIOUSLY GOING TO DRAW THE CONCLUSION, WE THINK, YOU KNOW. IF THE PROPERTY NOW HAS BEEN TAKEN TO SOMEPLACE ELSE, YOU KNOW, AND FOUND IN A RESIDENCE OR SOMETHING, YOU KNOW, THAT IS A LITTLE FURTHER AWAY FROM THE RED-HANDED. WHY SHOULD WE SINGLE OUT THIS PARTICULAR PIECE OF CIRCUMSTANTIAL EVIDENCE, AND GIVE THIS, AND NOT GIVE IT IN THE OTHER CASES?

WELL, AS THE COURT IN YOUNG DID NOTE THAT THEY HAD A CONCERN WITH PHENALON AND FLIGHT VERSUS POSSESSION, BUT THE COURT IN FACT, SAID THAT THE INFERENCE ARISING FROM POSSESSION IS SO STRONG, THAT IT DOES WARRANT AN INFERENCE OF GUILT. IF YOU LOOK AT THAT OPINION. YOU ARE ASKING ME WHY SHOULD WE ALLOW THIS? NUMBER ONE, IS THE STANDARD --

WHY SHOULD WE SINGLE IT OUT? IN OTHER WORDS, WHY SHOULD WE SINGLE OUT THIS PIECE OF CIRCUMSTANTIAL EVIDENCE AND GIVE AN INSTRUCTION ON IT ON-.

IT IS THE STATE'S POSITION THAT IT IS NOT SINGLING OUT, BECAUSE THE INFERENCE ARISES FROM THE POSSESSION, BUT IF I COULD GO BACK, THIS IS A STANDARD JURY INSTRUCTION, WHICH IS A

GENERIC STATEMENT OF THE LAW, SO IT IS NOT A CASE-SPECIFIC COMMENT ON THE FACTS OR ON THE EVIDENCE OR ON A SPECIFIC ELEMENT.

WHAT IS THAT, THIS IS WHERE, AND IF WE CAN GO BACK TO THE QUESTION I HAD, IS DO YOU SEE A DISTINCTION?

YES.

BETWEEN THE FACT THAT THIS IS AN INFERENCE REGARDING AN ELEMENT OF THE CRIME SPECIFICALLY KNOWLEDGE, THAN THE FACT THAT GENERALLY WE ARE GOING TO SAY FOOTPRINTS OR FINGERPRINTS OR NOT GIVING FINGERPRINTS MAY BE EVIDENCE OF GUILT.

RIGHT.

IF YOU SEE THAT AS BEING A IMPORTANT DISTINCTION OR NOT.

YES. IN PHENALON ANN WHITFIELD, NO PROBLEM, THEY AREN'T STANDARD JURY INSTRUCTIONS, BUT THEY WERE TRIGGERED BY THE UNIQUE FACTS OF THOSE CASES. IN PHENALON, IT WAS TRIGGERED BY EVIDENCE OF FLIGHT. AND FROM THAT, THEY INFERRED GUILT. IN THIS CASE, THE DISCUSSION WAS TRIGGERED BY THE FACT THAT THE DEFENDANT WAS CHARGED WITH BURGLARY.

ISN'T IT TRIGGERED BY THE FACT THAT THE DEFENDANT IS IN POSSESSION OF THE RECENTLY-STOLEN PROPERTY?

NO. IT IS TRIGGERED BY THE FACT THAT HE IS CHARGED WITH BURGLAR I.

WELL, YOU WOULDN'T GIVE IT UNLESS, HE COULD BE CHARGED WITH BURGLARY, BUT UNLESS HE IS IN POSSESSION OF RECENTLY-STOLEN PROPERTY --

BUT DOESN'T THAT STATUTE CONSTITUTE A COMMENT ON THE EVIDENCE UNDER THE STATUTE, NO. IS THE JUDGE GIVING HIS COMMENT ON THE EVIDENCE OF POSSESSION? IS HE WEIGHING ANY CREDIBILITY THERE?

HE OR SHE IS TELLING THE JURY THAT, IF THE DEFENDANT IS IN POSSESSION OF RECENTLY STOLEN PROPERTY, UNLESS IT IS SATICSIST FACTRIALLY EX -- SATISFACTORILY EXPLAINED AWAY, IT GIVES RISE TO THE FACT THAT THE PERSON IN POSSESSION KNEW OR SHOULD HAVE KNOWN THAT THE PROPERTY HAD BEEN STOLEN. I RESUME THAT THAT IS AN ELEMENT OF THE CRIME, OR ELSE IT WOULD BE, OKAY, SO THAT IS NOT, YOU DON'T HAVE TO LINK IT WITH BURGLARY.

ARE YOU QUOTING THE INFERENCE UNDER THAT STATUTE OR UNDER THE BURGLARY, THE INSTRUCTION?

I AM QUOTING WHAT THE STATE'S STATEMENT OF IT IS AND WHAT THE RECORD REPRESENTS, AND WHAT IS BEST IN -- WHAT IS RESTS IN DEALING WITH STOLEN PROPERTY.

IT IS A COMMON LAW INFERENCE, CORRECT, AND IT IS CODIFIED IN THAT STATUTE, AND BASED ON THAT STATUTE, WE HAVE TWO INSTRUCTIONS. WE HAVE AN INSTRUCTION WE GIVE WHEN THERE IS THEFT AND WE HAVE AN INSTRUCTION WE GIVE WHEN THERE IS BURGLARY.

THE FACT THAT IT IS CODIFIED IN THE STATUTE MEANS THAT IT IS THE LAW. CORRECT?

YES.

AND SO ARE WE REALLY, THEN, HERE, TALKING ABOUT WHETHER OR NOT THE TRIAL JUDGE IS

REALLY EXPLAINING THE LAW TO THE JURY OR WHERE DO YOU FALL ON THAT?

YEAH. THAT IS OUR POSITION, THAT HE IS JUST READING THE LAW. THERE WAS SOME CONFUSION. IF YOU LOOK BELOW, THE DCA CERTIFIED THE QUESTION AND THEY SIDE WITH BELL, WHICH IS THE BEST INSTRUCTION, BUT IN THIS CASE WE ARE DEALING WITH AN INSTRUCTION ON BURGLARY, BUT THE INFERENCES OVERLAP, WHICH THE COURT ACKNOWLEDGED IN FRANCIS, SO I WOULD LIKE TO FOCUS ON THE LANGUAGE OF THE INSTRUCTION, AND WHAT IT SAYS IS, IT IS TELLING THE JURY THAT THERE IS LAW AND EVIDENCE THAT PERMITS AN INFERENCE IN CERTAIN CIRCUMSTANCES, BUT IT IS NOT SAYING THAT THE JURY CAN CONVICT MERELY ON POSSESSION, AND I THINK IN FACT IT PREVENTS THIS, AND ACKNOWLEDGES THE FACT THAT ASSUMPTION OF GUILT ARISES. WE SEE KNOWLEDGE OF POSSESSION OF STOLEN GOODS, MOST ARE GOING TO THINK HE HAD KNOWLEDGE OF IT AND PERHAPS TOOK IT, BUT WHAT THE STATUTE GOES ON TO SAY.

YOU ARE SAYING IT IS A COMMON SENSE, SO THE DISTINCTION --

YES. YES.

-- THAT WE ARE TRYING TO MAKE BETWEEN SOMETHING THAT IS COMMON SENSE AND NOT COMMON SENSE, IS SOMETHING WE SHOULD BE LOOKING AT. DO YOU AGREE WITH THAT?

YES.

SO THE FACT THAT SOMEONE HAS POSSESSION OF SOMETHING THAT HAS JUST BEEN STOLEN, THEY BETTER COME UP WITH AN EXPLANATION OR YOU ARE GOING TO ASSUME THAT THEY HAD SOMETHING TO DO WITH IT.

WHAT IS OF RECENT NOTE? COULD YOU DEFINE THAT FOR US?

NO. THAT IS SOMETHING FOR THE JURY TO DECIDE.

WOULD THAT BE A WEEK LATER, DO YOU THINK?

NO. THAT WOULD HAVE TO DO WITH BURGLARY AND POSSESSION. THAT IS WHY I WANTED TO GO BACK TO THE LANGUAGE OF INSTRUCTION.

HOW BROAD IS THE LAW, WHAT ABOUT SIX MONTHS?

COULD BE, UNDER THE CERTAIN CIRCUMSTANCES OF THE CASE.

IT COULD BE.

YES. WHAT THE INSTRUCTION SAYS IS, ONCE THAT INFERENCE ARISES, OKAY, THEN IT SAYS THE INFERENCE IS OKAY, AND A CONVICTION MAY BE JUSTIFIED, BUT IF, IT SAYS IF, LOOKING AT THE CIRCUMSTANCES OF THE BURGLARY, AND THE POSSESSION, AND IN LIGHT OF ALL OF THE EVIDENCE, YOU ARE CONVINCED BEYOND A REASONABLE DOUBT, SO IT IS NOT TELLING THEM JUST BECAUSE THERE IS EVIDENCE OF POSSESSION THAT YOU FEEL UNSATISFACTORILY EXPLAINED, THAT IS IT, IT SUPPORTS A CONVICTION, IT SAYS IF YOU LOOK AT THE CIRCUMSTANCES, ALL OF THE CIRCUMSTANCES OF THE BURGLARY, OF THE POSSESSION, IN LIGHT OF ALL THE EVIDENCE. I WOULD, LET ME GO BACK TO PHENALON ANN WHITFIELD FOR A MINUTE.

PHENALON WAS TRIGGERED BY FLIGHT. WHITFIELD WAS TRIGGERED BY THE INSTANCES AT THE TIME. AGAIN, IT WAS THE FACT OF THE BURGLARY.

BURGLARY IS DEFINED BY THE LEGISLATURE.

RIGHT.

WHAT STATUTE GOVERNS THE STANDARD JURY INSTRUCTION THAT WAS GIVEN? YOU SAID IT WAS NOT 812. WHAT IS IT?

THERE IS NOT A SPECIFIC STATUTE.

WHEN I WAS TALKING ABOUT ELEMENT, THE FACT THAT IT IS USED FOR BURGLARY IS NOT GOING A SPECIFIC ELEMENT, IS THAT CORRECT?

CORRECT.

SO THERE IS EXTRAPOLATION FROM DEALING WITH STATUTE AND THE THEFT OF PROPERTY, THE BURGLARY, NOW, WHERE DID THAT EXTRAPOLATION COME FROM?

WELL, IN FRANCIS, YOU NOTED WHEN BURGLARY IS JOINED IN THEFT, BECAUSE IN THIS CASE HE WAS CHARGED WITH BURGLAR TOY BURGLARY WITH INTENT TO COMMIT THEFT, SO THE INSTANCES OVERLAP THERE. IS NO SPECIFIC WORDING IN THE BURGLARY STATUTE THAT IS TIED TO THIS JURY INSTRUCTION.

THAT MAY BE THE PROBLEM. IN THIS CASE, I AM GOING TO TELL YOU FLAT-OUT, THAT I DON'T SEE WHERE IT WAS HARMFUL, BECAUSE HIS EXPLAINUATION WAS NOT CREDIBLE. IT WAS INCULPATORY. BUT WE ARE LOOKING TO THE FUTURE, AT LEAST I AM, AS TO WHETHER THERE MAY BE A PROBLEM IN THE WAY THAT THE CURRENT INSTRUCTION IS PHRASED, BECAUSE, AGAIN, YOU HAVE GOT PROOF OF UNEXPLAINED POSSESSION, IS WHAT IS GIVEN. WELL, THIS IS EXPLAINED POSSESSION, SO IF NOT, WHERE IS THE PART WHERE YOU INSTRUCT JURY, IF IT IS EXPLAINED OR SATISFACTORY EXPLANATION? IS THAT ANY PART IN WHAT WAS GIVEN IN THIS CASE?

THE JURY WAS INSTRUCTED ON THE BURGLARY INSTRUCTION.

SO IT IS NOT REALLY EVEN APPLICABLE TO THIS CASE, BECAUSE IT WAS EXPLAINED POSSESSION.

IT IS APPLICABLE. WHETHER HE EXPLAINS OR NOT, DOESN'T BAR THE INSTRUCTION.

THE SPECIFIC LANGUAGE IS GIVEN, IS DIFFERENT, AS YOU SAID, FROM THE 812.022, WHICH SAYS PROOF OF POSSESSION OF RECENTLY STOLEN PROPERTY, UNLESS SATISFACTORILY EXPLAINED, GIVES RISE TO THE PRESUMPTION, SO THAT WOULD GIVE RISE TO THE JURY TO DECIDE WHETHER THAT WAS A SATISFACTORY EXPLANATION OR NOT. WHERE IS IT STATED THAT IT IS CUSTOMARY FOR THE JURY NOT TO GET EXPLAINED THE PRODUCTION, WHERE DO YOU GET THE LANGUAGE THAT THAT IS FROM?

IT SAYS IT MAY JUSTIFY A CONVICTION, IF THE CIRCUMSTANCES OF BURGLARY AND POSSESSION, IN LIGHT OF, AND LOOKED AT IN LIGHT OF ALL OF THE EVIDENCE, CONVINCING YOU BEYOND A REASONABLE DOUBT.

SO, REALLY, THERE IS, I SEE A PROBLEM IN HOW, AND I REALIZE IT IS A STANDARD INSTRUCTION, THAT WE HAVE AN INSTRUCTION THAT DOESN'T DEAL WITH AN ELEMENT OF THE CRIME, WHEN IT WAS INTENDED BY THE LEGISLATURE IN THE STATUTE, TO DEAL WITH A DIFFERENT STATUTE THAN BURGLARY, AND WE HAVE GOT AN INSTRUCTION THAT DEALS WITH UNEXPLAINED POSSESSION, WHEN USED IN CASES WHERE THE POSSESSION IS EXPLAINED. HOW, SO ISN'T THAT DESIGNED TO CONFUSE OR MISLEAD THE JURY, WITHOUT IT BEING CHANGED FOR WHEN THE, FOR THE FACTS OF A PARTICULAR CASE.

I AM NOT REALLY SURE I UNDERSTAND YOUR QUESTION.

PROOF OF UNEXPLAINED POSSESSION BY AN ACCUSED OF PROPERTY RECENTLY STOLEN.

MAY JUSTIFY.

IN THIS CASE, THE POSSESSION WAS EXPLAINED, SO HOW WOULD THE JURY TAKE THAT INSTRUCTION AND KNOW HOW TO APPLY IT TO THIS CASE, AS TO ANY OF THE ELEMENTS OF THE CASE?

IT IS UNEXPLAINED POSSESSION BY THEIR STANDARD, SO ONLY ONE, IF THEY DECIDE IN THEIR MIND THAT IT IS EXPLAINED, AND THEY BELIEVE THE EXPLANATION, THEN THE INFERENCE GOES AWAY.

WHERE ARE THEY TOLD THAT?

IN THE INSTRUCTION ITSELF. PROOF UNEXPLAINED POSSESSION. AND IT MAY, WHICH IS PERMISSIVE. SO IF --

I HAVE GOT TO ESPECIALLY TELL YOU THAT, IF I WAS A JUROR LISTENING TO THIS INSTRUCTION, I WOULDN'T REALLY KNOW HOW I WOULD BE ABLE TO EVALUATE THAT.

I MEAN, IT HAS A "IF" IN THERE, IF THE CIRCUMSTANCES OF THE BURGLARY AND THE POSSESSION CONVINCED YOU BEYOND A REASONABLE DOUBT, THAT HE COMMITTED THE BURGLARY, SO IT IS FURTHER INSTRUCTED.

DO YOU KNOW FROM THIS RECORD, WHAT OTHER INSTRUCTIONS WERE ACTUALLY GIVEN TO THE JURY, THAT MAY HAVE BEEN IN COMBINATION WITH THIS PARTICULAR INSTRUCTION?

STRICTLY THE BURGLARY INSTRUCTION WAS GIVEN.

WELL, STRICTLY THE BURGLARY INSTRUCTION. ARE YOU SAYING THE ENTIRE BURGLARY INSTRUCTION?

UM-HUM. FOR THE INFERENCE. THE INFERENCE, WE ARE TALKING ABOUT.

YOU SAID THE ENTIRE JURY INSTRUCTION, SO WHAT OTHER PORTIONS OF THAT INSTRUCTION WERE GIVEN, AS A PART OF THIS CRIME?

THE STANDARD INSTRUCTION ON ALL THE ELEMENTS OF BURGLARY WERE GIVEN.

ALL RIGHT. SO THE FACT THAT WE WOULD MAKE A DISTINCTION BECAUSE THERE IS A STATUTORY INFERENCE, WHEN THIS CASE DOESN'T DEAL WITH THE STATUTORY INFERENCE, IS, PUTS THIS, WHY DOESN'T THIS PUT THIS, THEN, CLOSER TO PHENALON AND ALL OF THE OTHER CASES, WHERE WE HAVE SAID THAT PERSPECTIVELY WE DO NOT THINK THAT SUCH INSTRUCTIONS ARE WARRANTED?

OKAY. WELL, WE DO THINK IS A STATUTORY INFERENCE. THEY ARE OVERLAPPED.

BUT YOU AGREE THAT THERE IS NO STATUTORY INFERENCE SPECIFICALLY DEALING WITH THE BURGLARITY.

THERE IS NO LANGUAGE IN THE BURGLARY STATUTE.

AND YOU AGO GEE THAT THE INFERENCE IN THE THEFT OF RECENTLY STOLEN PROPERTY DEALS WITH, POSSESSION, UNLESS SATISFACTORILY EXPLAINED, AND THAT IS NOT CONTAINED IN THIS INSTRUCTION.

THE WORDING IS DIFFERENT, BECAUSE THE BEST INFERENCE, OR INSTRUCTION GOES TO AN INFERENCE OF KNOWLEDGE, AND THEY GET IN THE BURGLARY --

INFERENCE OF A CRIME.

THAT'S RIGHT. IT GOES TO AN INFERENCE OF GUILT.

SO WHY ISN'T THAT MORE LIKE PHENALON?

WELL, PHENALON DECIDES, IF YOU LOOK AT THE HOLDING OF PHENALON, ITSELF, YOU DIDN'T COMMENT IT WAS A HOLDING ON EVIDENCE. THE PROBLEM WITH PHENALON IS THAT THE FLIGHT INSTRUCTION WAS REMOVED FROM THE STANDARD JURY INSTRUCTIONS, AND IN THE INSTANT CASE IT HASN'T, POSSESSION HASN'T BEEN REMOVED FROM THE STANDARD.

WE ARE THE ONES THAT EITHER PUT IN THE INSTRUCTIONS OR NOT, AND THERE, I DON'T SEE HOW THAT IS A DISTINCTION. WE, ALL THE TIME, DISAPPROVE OF THINGS THAT ARE IN THE STANDARD JURY INSTRUCTIONS, IF THEY DON'T ACCURATELY REFLECT LAW.

RIGHT. THAT WAS THE REASONING IN PHENALON. PHENALON, AGAIN, WAS TRIGGERED BY THE FACTS. THERE HAS TO BE SOME EVIDENCE OF FLIGHT.

THERE WAS EVIDENCE OF FLIGHT. WE JUST SAID THAT THERE WERE TOO MANY VARIABLES.

RIGHT.

TO MAKE THIS ANYTHING OTHER THAN A COMMENT ON THE EVIDENCE, AND WE THOUGHT IT WOULD BE BETTER LEFT TO THE LAWYERS, TO ARGUE THAT THE FLIGHT WAS INDICATIVE OF GUILT OR NOT, RATHER THAN THE -- THE JUDGE SINGLING OUT SOMETHING THAT NOW MAY OR MAY NOT BE APPLICABLE IN A GIVEN CASE.

RIGHT, BUT, SO THE INSTRUCTION IN THIS CASE IS TRIGGERED BY THE FACT THAT HE COMMITTED BURGLARY. NOT TRIGGERED GIVENING THE INSTRUCTION. NO DETERMINATION ON THE FACTS BY THE JUDGE IN PHENALON OR WHITFIELD.

THIS WAS A BURGLARY WITH THE INTENT TO DO WHAT?

COMMIT THEFT.

SO IF THE BURGLARY WAS WITH AN INTENT TO COMMIT THEFT, DOES THAT MAKE IT MORE REGULAR VANITY THAN IF IT WAS A BURGLARY, SAY, TO COMMIT MURDER?

MORE RELEVANT TO WHAT?

THE GIVING OF AN INSTRUCTION ABOUT POSSESSION OF STOLEN PROPERTY.

WELL, YES, IF THAT IS WHAT WE WERE SAYING, THE INFERENCES OVERLAP, AND THAT IS WHY I SUPPLEMENTED WITH FRANCIS, BECAUSE IT KIND OF EXPLAINS THAT, AND THE REASONING THAT YOU ARE GOING TO HOLD THIS THIS CASE IS GOING TO IMPACT ON HOW THE COURT ARE GOING TO HOLD IN THESE PARTICULAR INSTANCES AND THE INSTRUCTION. I KNOW YOU DIDN'T RULE ON THE INSTRUCTION, BUT THEY DO OVERLAP, AND GIVEN THE EFFECT, AS CERTIFIED BELOW, THIS QUESTION WAS EXTREMELY BROAD, AND I WOULD SUGGEST WE DON'T EVEN KNOW WHAT ISSUE WE ARE TALKING ABOUT TODAY.

CHIEF JUSTICE: ALL RIGHT. UNFORTUNATELY WITH THE HELP OF ALL OF OUR QUESTIONS, WE HAVE CONSUMED ALL OF YOUR TIME, SO THANK YOU VERY MUCH. MR. MARSHAL, HOW MUCH

TIME LEFT? OKAY. COUNSEL.

I THINK THERE IS --

IF WE RULE IN YOUR FAVOR, DO WE, NOW, HAVE TO QUESTION WHETHER WE CAN USE THE JURY, THE STANDARD JURY INSTRUCTION ON THE CREDIBILITY AND DemeanOR OF WITNESSES, IS THAT NOW GOING TO BE A COMMENT ON THE EVIDENCE?

I WOULD SAY, NO, JUST THINKING ABOUT IT BRIEFLY.

HOW ABOUT IF --

BECAUSE IT IS NOT DRAWING ATTENTION TO A PARTICULAR FACT AMONG MANY FACTS.

WHAT ABOUT IF THE DEFENDANT TESTIFIES IN A CASE, AND THE JUDGE GIVES THE STANDARD JURY INSTRUCTION ON CREDIBILITY AND DemeanOR, IS THAT NOW A COMMENT ON THE DEFENDANT'S TESTIMONY?

I DON'T THINK SO. I DON'T THINK THAT THAT IS --

WHY IS IT ANY DIFFERENT IN FLIGHT OR THIS OR THE OTHER JURY INSTRUCTIONS?

WELL, AS I SAID, BECAUSE THE FLIGHT AND THIS INSTRUCTION, HAVE TO DO WITH A PARTICULAR PIECE OF EVIDENCE AND DRAWING ATTENTION TO IT.

WELL, THE CREDIBILITY INSTRUCTION WOULD HAVE TO DO WITH THE DEFENDANT'S TESTIMONY IN THE CASE.

AND EVERY OTHER WITNESS AS WELL.

UM-HUM.

WHAT IS THE, WOULD YOU HELP ME OUT WITH, AND IT MAY NOT BE PARTICULARLY HELPFUL OR IT MAY BE, FOR YOUR CASE, BUT BETWEEN, WHEN I WAS ASKING QUESTIONS ON DIRECT, I WAS ASSUMING THAT YOUR ARGUMENT, THAT WE WERE DEALING WITH, AT BEST, A STOLEN PROPERTY, WHICH GOES SPECIFICALLY TO THE ELEMENT OF KNOWLEDGE. HERE, WE, AND IT IS TALKING ABOUT SATISFACTORILY EXPLAINED, SO HERE WE HAVE A QUESTION AS TO HOW THIS IS APPLICABLE TO BE GIVEN IN A CASE WHERE THE POSSESSION IS EXPLAINED, BUT SECOND OF ALL, IF IT WAS BEING USED AND CUSTOMIZED TO TALK ABOUT INTENT TO STEAL, THEN I WOULD SAY YOU CAN CONSIDER THAT AS PROOF THAT HE HAD INTENT TO STEAL, NOT GENERALLY USE POSSESSION OF RECENTLY STOLEN PROPERTY, TO SHOW THAT YOU COMMITTED BURGLARY. DO YOU SEE A PROBLEM, NOT YOU KNOW, THAT IT MIGHT BE APPROPRIATE TO GIVE IT, BUT NOT THE WAY IT IS CURRENTLY IN THE STANDARD JURY INSTRUCTION? IN OTHER WORDS IF YOU ACCEPT MY PREMISE THAT DISCUSSING SOMETHING TO DO WITH A SPECIFIC ELEMENT OF THE CRIME, THAT IS IN THE STATUTE, IS AND MAY BE APPROPRIATE, LIKE JUST LIKE BLOOD ALCOHOL, NOT BASED ON WHETHER IT IS COMMONLY KNOWN OR NOT BUT IT IS THE STATUTORY INFERENCE, BUT THAT THIS INSTRUCTION IS WAY TOO BROAD TO ACCOMPLISH THAT PARTICULAR GOAL. YOU UNDERSTAND WHAT I AM ASKING?

I AM NOT SURE. I KNOW THAT BASICALLY THE STATUTE PERTAINS TO THEFT, AND THE CASE LAW IS WHAT SAID IT IS APPROPRIATE TO, ORIGINALLY.

THIS CASE DEALT WITH THEFT.

WELL, THIS CASE WAS A BURGLARY.

THE UNDERLYING FELONY THAT, UPON WHICH THE BURGLARY CHARGE WAS BASED, WAS THEFT. THAT'S CORRECT, ALTHOUGH THE CHARGE IS ONLY BURGLARY.

SO IT DEALT WITH THEFT. I MEAN, CORRECT?

YES. THE CHARGE WAS BURGLARY AND THE UNDERLYING --

SO YOU DON'T SEE A DIFFERENCE, IF THE INSTRUCTION GIVEN IN THIS CASE WAS THE STANDARD INSTRUCTION FOR THE THEFT OF RECENTLY, OF PROPERTY, WHICH WOULD BE PROOF OF POSSESSION OF RECENTLY STOLEN PROPERTY, UNLESS SATISFACTORILY EXPLAINED, GIVES RISE TO THE INFERENCE THAT THE PERSON IN POSSESSION OF THE PROPERTY, OR THE PERSON SHOULD HAVE KNOWN THAT THE PROPERTY WAS STOLEN, AND THE BURGLARY INSTRUCTION WHICH SAYS PROOF OF UNEXPLAINED POSSESSION, GOES TO WHETHER THE PERSON COMMITTED A BURGLAR I.

THERE IS A STEP THERE. IS ALMOST A PYRAMIDING OF INFERENCES THERE. THERE IS A STEP THAT IS KIND OF ALMOST ASSUMED, I GUESS, BECAUSE THE CASE LAW ALLOWS THE THEFT TO BE USED IN THE BURGLARY SITUATION AS WELL.

ISN'T THAT WHAT YOU ARE ASKING? ISN'T THAT WHAT JUDGE IRVIN TALKED ABOUT IN DISSENT MANY YEARS AGO, THAT THE WHOLESALE USE OF THIS INSTRUCTION WHERE THERE IS EXPLAINED POSSESSION, IS YOU KNOW, THAT IT SHOULDN'T BE GIVEN IN EVERY CASE.

WELL, I CERTAINLY AGREE THAT IT SHOULDN'T. AND I THINK MAYBE THIS, I DON'T KNOW IF THIS SPEAKS TO YOUR QUESTION, TOO, BUT IN PHENALON, PART OF THE PROBLEM WAS, AND IN JUDGE IRVIN'S DISSENT, WAS THE SORT OF BROAD AMORPHOUS DEFINITION THAT YOU ARE DEALING WITH, AND IN PHENALON, I THINK IT WAS FLIGHT. I THINK HERE, IF RECENTLY COULD MEAN SIX MONTHS OR WHATEVER WE WANTED IT TO MEAN HAD, THERE IS ALSO A PROBLEM WITH AMBIGUITY IN THE EXPLANATION PART OF THE INSTRUCTION AS WELL.

AND WAS THAT A PART OF THIS WHOLE SCENARIO THAT WAS ARGUED TO THE COURT, WHY THIS INSTRUCTION SHOULD NOT HAVE BEEN GIVEN, THAT RECENTLY WAS TOO AMORPHOUS OR AMBIGUOUS?

I DON'T BELIEVE SPECIFICALLY THAT THAT WAS PART OF THE PROBLEM. IT WAS BASICALLY THE TRIAL COUNSEL BROUGHT UP THE WADDELL DECISION, WHICH HADN'T QUITE MADE IT UP TO THIS COURT YET.

BUT QUESTIONED THE PROPRIETY OF THE INSTRUCTION AT ALL.

AS WITH YOUR COLLEAGUE, WE THANK YOU VERY MUCH FOR RESPONDING TO OUR QUESTIONS.