

>> SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
PLEASE BE SEATED.
>> WE NOW TAKE UP THE CASE OF
STATLER V. THE STATE OF FLORIDA.
COUNSEL?

>> GOOD MORNING AND MAY IT
PLEASE THE COURT, MY NAME IS
MEGAN LONG.
I'M WITH THE PUBLIC DEFENDER'S
OFFICE, AND I REPRESENT THE
PETITIONER, MR. STATLER.
YOUR HONOR, I WOULD LIKE TO
RESERVE 5 MINUTES FOR REBUTTAL,
PLEASE.

THANK YOU.
YOUR HONORS, MY CLIENT -- WHO
WAS A COLLEGE STUDENT AT THE
TIME -- WAS CONVICTED BY A JURY
OF SEXUAL BATTERY ON A PERSON
OVER AGE 18 YEARS.
HE CHALLENGED THAT STATUTE IN
THE FIRST DISTRICT COURT OF
APPEAL IN A FACIAL
CONSTITUTIONAL CHALLENGE BECAUSE
IT DOES NOT CONTAIN AN ELEMENT
OF MENS REA.

THE FIRST DISTRICT COURT OF
APPEAL EXPRESSLY HELD THAT THE
STATUTE IS VALID.

TODAY WE ARE ASKING THIS COURT
TO FIND THE STATUTE
UNCONSTITUTIONAL BECAUSE IT
VIOLATES DUE PROCESS WITHOUT A
CRIMINAL INTENT ELEMENT OR READ
THAT INTO THE STATUTE.

AND FOR MY CLIENT, WE'RE ASKING
THIS CLIENT REMAND TO THE LOWER
COURT AND DISCHARGE HIS JUDGMENT
AND SENTENCE OR, IF THIS COURT
THINKS THERE WAS A JURY
QUESTION, REMAND BACK TO THE
TRIAL COURT FOR A NEW TRIAL.

>> SORRY FOR INTERRUPTING YOU.
SO I UNDERSTAND THAT IT
WOULDN'T NECESSARILY TAKE CARE
OF THIS ORDER OF STATUTORY
INTERPRETATION QUESTIONS KIND OF
AT THE FRONT END OF THE STATUTE,
BUT IF WE WERE TO AGREE WITH THE
STATE THAT CONSENT, YOU KNOW, IS
AN OBJECTIVE CONCEPT AND THAT
THE ABSENCE OF CONSENT TO BE

MANIFESTED IN ORDER FOR THE STATE TO MEET ITS BURDEN, DOES THAT TAKE CARE OF THE CONSTITUTIONAL PART OF YOUR ARGUMENT?

WE THEN -- WOULD THAT SOLVE THE DUE PROCESS PROBLEM?

>> NO, YOUR HONOR.

>> AND WHY IS THAT?

>> WHEN WE LOOK AT THE EVIDENCE HERE, AND I'M REFERRING TO THE BRIEFS ON THE OBJECTIVE CONSENT STANDARD, THE ALLEGED VICTIM ACTIONS, WORDS, THE OTHER EVIDENCE AS TO CONSENT, THAT COULD BE OBJECTIVELY MET.

MY CLIENT COULD STILL HAVE NO CRIMINAL INTENT, AND IT'S STILL UNCONSTITUTIONAL.

AND THAT'S WHY IF THE STATE IS NOT PROVING THAT MY CLIENT HAD CRIMINAL INTENT DURING THE ACT, IT DOESN'T CURE THAT CONSTITUTIONAL DEFECT.

>> BUT ISN'T THAT TANTAMOUNT TO SORT OF A NEGLIGENCE-BASED MENS REA FUNCTIONALLY?

I MEAN, AND OBVIOUSLY, YOU KNOW, THERE'S NO LAW, THERE'S NO PRECEDENT SAYING THAT NEGLIGENCE-BASED CRIMINAL STATUTES ARE UNCONSTITUTIONAL AS DUE PROCESS VIOLATIONS.

>> IS, IT IS MY ARGUMENT THAT IT SHOULD BE --

>> WELL, I'M SAYING THAT IF YOU ACCEPT WHAT THEY'RE SAYING ABOUT THE CONSENT HAVING TO BE OBJECTIVE, YOU KNOW, ONE WAY OF REACHING THAT RESULT WOULD BE TO SORT OF BOLD IT INTO THE DEFINITION OF THE MENS REA ON THE FRONT END.

OR IF YOU JUST REALLY CREATE THE CONSENT ELEMENT AS A SEPARATE THING AND LOOK AT IT OBJECTIVELY, YOU ARGUABLY END UP AT THE SAME PLACE.

AND SO WHY WOULDN'T THAT -- I UNDERSTAND IT STILL DOESN'T TELL YOU IF THAT'S THE RIGHT WAY TO INTERPRET THE STATUTE, WHETHER IT'S ON THE FRONT END OR THE BACK END, BUT DOESN'T THAT SOLVE

THE CONSTITUTIONAL PROBLEM?

>> I RESPECTFULLY DISAGREE, YOUR HONOR.

SO CONSENT IS FINDING THE STATUTE KNOWINGLY, INTELLIGENTLY, VOLUNTARILY. THERE IS EVIDENCE THAT THE ALLEGED VICTIM UNDER AN OBJECTIVE STANDARD WAS SHOWING CONSENT OR LACK OF CONSENT. THERE'S THE STILL ABSOLUTELY NOTHING THAT REQUIRES THE STATE TO PROVE BEYOND A REASONABLE DOUBT, MY CLIENT OR ANY CRIMINAL DEFENDANTS, WHAT THEIR INTENT WAS.

AND HERE THIS IS A CASE, AND I WON'T GO INTO THE SPECIFIC DETAILS.

THEY'RE COVERED EXTENSIVELY IN THE BRIEF WHERE THE DEFENSE COULD HAVE ARGUED IF THE JURY LOOKS AT THIS AND UNDER AN OBJECTIVE STANDARD FINDS SHE DIDN'T CONSENT, THEY COULD STILL BELIEVE MY CLIENT IF THE STATE HAD TO PROVE INTENT BEYOND A REASONABLE DOUBT.

SO NOT ONLY COULD MY CLIENT'S THEORY OF DEFENSE BEEN SOMETHING THAT THE JURY COULD CONSIDER AND FIND VALID, BUT ALSO THAT SHE DID NOT REASONABLY CONSENT. THAT'S TAKEN AWAY FROM THE JURY HERE, AND THAT'S WHY WITHOUT THE SPECIFIC ELEMENT OF MENS REA FOR A CRIME THAT -- THIS IS A SERIOUS CONSEQUENCE.

THIS IS A SECOND-DEGREE FELONY, AND MY CLIENT WENT TO PRISON. HE COULD NOT BE HERE TODAY BECAUSE HE'S STILL ON PROBATION, AND HE COULDN'T COME UP HERE AND ATTEND THIS COURT ARGUMENT AND LIFETIME SEX OFFENDER REGISTRY. IF YOU'RE SUBJECT TO THOSE RESTRICTIONS AND YOU DON'T DO IT, IT'S A FELONY --

>> LET ME ASK YOU THIS, THE VICTIM OBVIOUSLY TESTIFIED DURING THIS TRIAL.

DID SHE TESTIFY THAT IT WAS NOT CONSENSUAL, THAT SHE CONSENTED TO MR. TATE BUT NOT THIS SECOND

GUY?

>> THAT WAS HER TESTIMONY, YOUR HONOR, THAT SHE CONSENTED TO SEXUAL INTERCOURSE WITH MR. TATE AND ONLY LATER REALIZED THAT MY CLIENT WAS NOT MR. TATE.

>> WAS IT NOT THEN A JURY QUESTION --

>> CONSENT?

OR HER LACK OF CONSENT?

THE ELEMENT NUMBER TWO, WE WOULD ARGUE THAT THE TRIAL COURT GOT THE JUDGMENT, MOTION FOR JUDGMENT ACQUITTAL WRONG. WE THINK THERE'S ENOUGH EVIDENCE OF THERE THAT SHOWS SHE DID CONSENT.

BUT IF THIS COURT THINKS IT IS A JURY QUESTION AND IT PROPERLY WENT TO THE JURY, THE JURY WASN'T ALLOWED TO CONSIDER HIS MENTAL STATE AT ALL.

AND THAT'S WHY THAT RULING WAS THERE IN THE JOA.

AND I WOULD NOTE THAT'S WHAT THE PROSECUTOR FOCUSED ON IN THIS CASE.

THE PROSECUTOR SAID IN CLOSING ARGUMENT THE MOST IMPORTANT THING FOR YOU TO FOCUS ON, OF COURSE WHAT THE PROSECUTOR SAYS ISN'T EVIDENCE, BUT IT'S MEANT TO GUIDE THE JURY.

WHAT YOU NEED TO FOCUS ON IN THIS CASE IS THAT CONSENT IS ONLY FROM HER PERSPECTIVE.

YOU CAN'T CONSIDER WHAT MR. STATLER THINKS.

THAT'S WHAT THE STATE WANTED THE JURY TO FOCUS ON.

>> SO YOUR POSITION, YOUR DEFENSE WAS THAT FROM HIS PERSPECTIVE, HE WAS UNDER THE IMPRESSION THAT IT WAS OKAY WITH HER?

>> YES, YOUR HONOR.

>> HOW DID YOU GO ABOUT PROVING THAT?

DID HE TESTIFY?

>> AGAIN, THE DEFENSE DOESN'T HAVE TO PUT ON THE EVIDENCE, WE DON'T HAVE TO PROVE ANYTHING --

>> I UNDERSTAND THAT, BUT HOW WOULD YOU EVER DRIVE THAT POINT

HOME TO THE JURY?

>> WELL, FOR ONE, IF THE COURT HAD ALLOWED OR THAT GRANTED THE DEFENSE ATTORNEY'S REQUEST FOR INTENT TO BE AN ELEMENT, I'M SURE THE CLOSING ARGUMENT WOULD HAVE CHANGED IN THIS CASE. AND OPENING STATEMENTS AS WELL.

WHERE SAY THE JURY IF YOU BELIEVE THE ALLEGED VICTIM AND SHE, YOU FIND HER TESTIMONY TO BE THE CREDIBLE, YOU FIND THAT 911 CALL TO BE THE CREDIBLE, YOU CAN STILL BELIEVE MY CLIENT'S THEORY OF DEFENSE, THAT HE WHEN HE WENT INTO THAT BEDROOM DIDN'T KNOW THAT HE DID NOT HAVE CONSENT.

BOTH OF THOSE COULD BE TRUE.

AND, AGAIN, THAT'S WHAT THE PROSECUTOR FOCUSED ON.

AND WITH THE TRIAL COURT TOO FOR MARK AT SENTENCING.

SO THIS WOULDN'T BE A CRIME IN OTHER JURISDICTIONS.

AND, OF COURSE, GAVE MY CLIENT A BELOW-THE-GUIDELINE SENTENCE.

SO IN TERMS OF EVIDENCE, WE DON'T HAVE TO PROVIDE ANYTHING, BUT I DO THINK THE TRIAL COUNSEL'S ARGUMENT WOULD HAVE BEEN DIFFERENT.

AND CERTAINLY, IF THAT ELEMENT WERE IN THERE, MR. STATLER COMMITTED THE ACT WITHOUT THE CONSENT OF THE ALLEGED VICTIM AND KNEW SHE DID NOT CONSENT, THAT'S WHAT THE DEFENSE WOULD HAVE FOCUSED ON HERE.

AND MAYBE HAMMERED THAT POINT MORE ON CROSS-EXAMINATION OF THE ALLEGED VICTIM, AND CERTAINLY THE DEFENSE DID PRESENT SOME EVIDENCE AND THE WITNESSES IN THE PARKING LOT THAT SHOWED HIS BELIEF AS TO HER CONSENT.

AND THE INTERACTION IN THE PARKING LOT, THE INTERACTION IN THE APARTMENT, CERTAINLY DURING THE SEXUAL INTERCOURSE AND RIGHT AFTER.

>> CAN WE JUST GO TO THE STATUTE FOR A MINUTE?

>> YES, SIR.

>> WHAT'S YOUR BEST EVIDENCE
LOOKING AT THE PLAIN LANGUAGE OF
SECTION 5B THAT THE EITHER
PERSON, THE DEFENDANT OR THE
VICTIM'S, STATE OF MIND IS
ITSELF AN ELEMENT, AND WHAT KIND
OF ELEMENT IT IS.

CAN WE JUST ENGAGE WITH THE
STATUTE FOR A MOMENT AND TELL ME
WHAT YOUR BEST EVIDENCE IS.

>> YES, SIR.

SO WHEN I LOOK AT THAT STATUTE,
IT'S WITHOUT THE CONSENT OF THE
VICTIM.

SETS ASIDE KNOWING, INTELLIGENCE
AND VOLUNTARY.

THERE'S ABSOLUTELY NOTHING AS TO
THE DEFENDANT'S MENTAL STATE.

>> OKAY.

SO CAN WE AGREE THEN ON THE FACE
OF THE STATUTE WHAT IS AT ISSUE
IS AN OBJECTIVELY KNOWABLE JURY
QUESTION, DOES CONSENT EXIST OR
NOT.

THAT'S REALLY THE --

[INAUDIBLE]

THE ELEMENT, RIGHT?

>> ELEMENT NUMBER TWO?

YES, YOUR HONOR.

>> OKAY.

SO FOLLOWING THROUGH THAT, IN
THIS CASE AS IN MANY OTHERS, THE
JURY WILL ALWAYS BE PRESENTED
WITH FACTS THAT THEY NEED TO
DECIDE, YOU KNOW, WHETHER THEY
SUPPORT A FINDING OF CONSENT.
AND HERE YOUR CLIENT COULD HAVE
SAID HEY WHEN HE WALKED INTO THE
ROOM, RIGHT?

DIDN'T.

COULD HAVE SAID WHAT HIS NAME
WAS, COULD HAVE IDENTIFIED
HIMSELF AND INSTEAD THIS JURY
MADE THE VERY PERMISSIBLE
FINDING IT WAS TRYING TO PULL A
FAST ONE.

I MEAN, ISN'T THAT JUST A CLEAR
APPLICATION OF THE MECHANICS OF
THE STATUTE TO THE FACTS AT
ISSUE?

AND WHAT AM I MISSING HERE IN
ISN'T THAT EXACTLY THE
ELEMENTARY SORT OF SORTING THAT

A JURY IS SUPPOSED TO MAKE AND ALLOWED TO MAKE?

>> I HAVE A COUPLE OF RESPONSES, YOUR HONOR.

THE FIRST ONE IS, IS THE JURY UNDER THIS STATUTE CONSIDERING THE CONSENT OF THE VICTIM OR ALLEGED VICTIM?

YES.

>> THEY'RE JUST DETERMINING WHETHER OR NOT CONSENT EXISTED. IT'S A PLAIN FACT UNDER THE TERMS OF SECTION 5B, RIGHT?

>> YES, THAT'S A FACT.

BUT THERE'S NOTHING ABOUT MY CLIENT'S --

>> IS THAT IN THE STATUTE? IT'S NOT THERE, RIGHT?

>> IT'S NOT, YOUR HONOR.

WHAT I'M ASKING IS FOR THIS COURT TO READ IT IN AS IN GEORGE WITH JETTY OR MA CONE, AND I WOULD SAY THIS COURT HAS THE INHERENT POWER TO DO THAT, ARTICLE V, SECTION ONE.

AND I WOULD MORE RECENTLY --

>> NO, GO AHEAD.

>> I WOULD MORE RECENTLY ARGUE TO IN THIS COURT'S OPINION IN GAYMAN.

I WILL SUPPLEMENT THE AUTHORITY AFTER THIS ARGUMENT.

SO IF THERE'S NOT NOTING SOMETHING IN THE STATUTE -- NOT SOMETHING IN THE STATUTE, IT'S UNCONSTITUTIONAL, THAT'S --

>> I'M GLAD YOU RAISED GIORGETTI.

LET'S SAY WE AGREE THAT IT'S, YOU KNOW, SORT OF REQUIRES US TO SEE A MENS REA UNLESS THERE IS, AND WE CAN PUT THIS IN A SEPARATE BOX, A SPECIFIC -- I'M SORRY, A STRICT LIABILITY SORT OF TREATMENT, RIGHT?

SO IF WE AGREE WITH YOU THAT GIORGETTI REQUIRES US TO FIND THE EXISTENCE OF SOME MENS REA, WHY DOES IT HAVE TO BE THE SPECIFIC INTENT OR, INDEED, ANYTHING OTHER THAN JUST TREAT THING IT LIKE A GENERAL INTENT CRIME?

BECAUSE IT SOUNDS TO ME LIKE IN

ORDER FOR YOU TO WIN, WE NEED TO SORT OF GIORGETTI OUR WAY INTO AN INTENTIONAL CRIME, BEFORE BUT ALSO A SPECIFIC STATE OF MIND ON THE PART OF THE DEFENDANT.

>> WE ARE ASKING FOR A SUBJECTIVE STANDARD.

BUT EVEN UNDER AN OBJECTIVE STANDARD, SO ADDING AN ELEMENT THAT THE CONFIDENT KNEW OR REASONABLY KNEW THAT THE ALLEGED VICTIM DID NOT CONSENT, THAT WOULD CURE THE CONSTITUTIONAL INFIRMITY.

AND I THINK IN JUSTICE LAWSON'S OPINION IN GAYMAN, THAT SHOULD BE USED FOR SPARINGLY.

BUT THIS COURT ALSO HAS A DUTY TO UPHOLD THE STATUTES THAT THE LEGISLATURE PASSES IF THERE CAN BE A CONSTITUTIONAL WAY TO SAVE IT.

AND AS IN GAYMAN, I THINK THAT APPLIES HERE TODAY WHERE CLEARLY THE LEGISLATURE WANTED MONOCONSENSUAL RELATIONS IN PEOPLE OVER 18 WHEN EVERYONE IS CAPABLE OF GIVING CONSENT TO BE A CRIME.

SO OUR FIRST ARGUMENT IS YOU SHOULD STRIKE IT IF YOU DON'T THINK INTENT ELEMENT CAN BE PUT IN THERE.

BUT I WOULD SAY UNDER GAYMAN, EVERYONE CAN WIN HERE.

THE STATUTE IS UPHELD, THIS COURT CAN MAKE IT CONSTITUTIONAL, BUT IT CAN ALSO PROTECT DUE PROCESS RIGHTS OF DEFENDANTS BECAUSE FOR PEOPLE, FOR DEFENDANTS IN THIS POSITION, THEY BELIEVE THEY HAVE CONSENT, THERE'S EVIDENCE THAT THE ALLEGED VICTIM CONSENTS, THEY DON'T HAVE A DEFENSE.

THERE'S NO MENS REA, THERE'S NOTHING IN THERE, AND THEY'RE NOT ABLE TO PRESENT THAT TO THE JURY AND HAVE -- AND, AGAIN, THE QUESTION'S NOT WAS MY CLIENT OR ANY DEFENDANT IN SITUATION, WERE THEY MAKING WISE CHOICES, THESE COLLEGE STUDENTS THAT NIGHT. IT'S THE DID HE ACT WITH

CRIMINAL INTENT.
IS THIS A FELONY?
AND THE JURY DOESN'T GET TO
CONSIDER WHAT HIS MENTAL STATE
WAS.
THAT'S WHY WE'RE ARGUING THIS
WOULD CURE THAT CONSTITUTIONAL
INFIRMITY.
KEEP THE STATUTE AS WRITTEN BY
THE LEGISLATURE UNDER THE INTENT
BUT ALSO MAKE THIS COURT COMPORT
WITH DUE PROCESS.
>> YOU'RE CHANGING THE FACTS.
I THINK THE FIRST GUY TOLD YOUR
CLIENT, GO ON IN, RIGHT?
>> YES, SIR.
>> WHAT IF THE FIRST GUY HAD
SAID GO ON IN, SHE SAID IT WAS
OKAY AND WAS A LITTLE MORE CLEAR
ABOUT THAT.
DOES THAT, UNDER THE STATUTE,
SHE STILL WOULD NOT HAVE GIVEN
CONSENT, THEREFORE, HE'S GUILTY,
RIGHT?
>> YOU'RE SAYING IF SHE HAD
TOLD --
>> IF THE FIRST GUY SAID GO ON
IN, SHE SAID IT WAS OKAY, WHEN
IN FACT SHE DIDN'T.
SHE DIDN'T.
>> SHE CAN'T GIVE -- MR. TATE
CAN'T TELL MY CLIENT THAT SHE
GAVE CONSENT.
IS WHAT YOUR HONOR IS GETTING
AT?
>> SAY IT AGAIN?
>> MR. TATE, MR. TATE CAN'T GO
OUT AND TELL MY CLIENT IN THE
ALLEGED VICTIM GAVE ME CONSENT
TO TELL YOU, IF THAT'S YOUR
HONOR'S --
>> I THINK HE'S ASKING IF THAT
HAD HAPPENED --
>> IF THAT HAD HAPPENED --
>> YEAH.
>> IF HE HAD, NOTHING CHANGES ON
HER PART, BUT NOW THIS MESSAGE
HAS BEEN CONVEYED TO HIM.
WHAT HAPPENS IN THAT SITUATION.
>> YOUR HONOR --
>> THANK YOU.
[LAUGHTER]
>> YOUR HONOR, IN LOOKING AT
THESE FACTS, I SUBMIT THAT

ALREADY HAPPENED HERE.
HE, MY CLIENT WHEN MR. TATE CAME
OUT -- REGARDLESS OF WHETHER HE
DIDN'T, HE CAN'T SAY WHAT
JUSTICE POLSTON SAID -- MY
CLIENT BELIEVED HE HAD CONSENT
BASED ON WHAT MR. TATE DID SAY
AND BASED ON THE PRIOR
INTERACTION IN THE PARKING LOT.
WHAT JUSTICE POLSTON SAID IF HE
HAD COME OUT AND SAID THAT, MY
CLIENT WOULD BE IN THE EXACT
SAME POSITION BECAUSE HE
BELIEVES -- AND, AGAIN, THIS
ISN'T ABOUT WHETHER ANY OF THIS
WAS A GOOD IDEA -- HE BELIEVES
HE HAS CONSENT.

AND CERTAINLY --

>> WELL, FOR PURPOSES OF
UNDERSTANDING HOW THIS STATUTE
WORKS AND WHETHER IT'S
CONSTITUTIONAL OR NOT, IF YOU
MADE THE FACTS A LITTLE MORE
EXTREME WHERE HE WAS
SPECIFICALLY TOLD, YEAH, SHE
SAID IT WAS THE OKAY WHEN, IN
FACT, SHE DIDN'T, THEN UNDER THE
STATUTE HE'S GUILTY, RIGHT?

>> THE STATUTE.

BUT EVEN UNDER YOUR HONOR'S --

>> IS THAT RIGHT?

UNDER MY FACTS HE WOULD STILL BE
GUILTY EVEN THOUGH HE BELIEVED
BASED ON WHAT THE FIRST GUY SAID
THAT HE'D BEEN GIVEN CONSENT.
WHEN, IN FACT, SHE HADN'T.

>> BUT UNDER THE STATUTE -- IT'S
A QUESTION FOR THE JURY, AND THE
JURY WOULDN'T BE ABLE TO, IS NOT
THE ABLE TO ANALYZE IT.

SO DIFFERENT FACTS, SAME
STATUTE.

THERE'S NO MENS REA ELEMENT.
SO FOR PEOPLE IN MY CLIENT'S
POSITION RAISING THIS ARGUMENT,
NO MATTER WHAT THE FACTS ARE
HERE THIS IS A VERY UNIQUE SET
OF FACTS.

MAYBE NOT ALL CASES ARE, WOULD
HAVE THE JURY STRUGGLING WITH
INTENT AND CONSENT IN THE WAY
THAT THE JURY MAY HAVE HERE.
BUT NO MATTER WHAT THE FACTS
WERE EVEN IF THERE WERE WORDS TO

THE CLIENT, THAT STATUTE DOESN'T HAVE ANY MENS REA DESPITE IT BEING A SERIOUS STATUTE, AND SO WE ARE ASKING THIS COURT TO EXERCISE ITS INHERENT POWER, ADD IT IN THERE AND MAKE IT CONSTITUTIONAL.

>> DOESN'T EVERYBODY AGREE THOUGH THAT THERE'S A MENS REA IN THE SENSE THAT AT LEAST AS TO WHAT YOU'RE CALLING THE FIRST ELEMENT, THE COMMITTING SEXUAL BATTERY, THAT THAT HAS TO BE INTENTIONAL, RIGHT?

>> YES.

>> OKAY.

>> THE ACT OF UNION OR PENETRATION.

BUT IN THESE -- IN A CASE LIKE THIS --

>> SO, I MEAN, I CAN KIND OF, JUST THIS MIGHT HELP YOU.

I MEAN, SO WHY, WHY WOULD -- SO AND THE WORD INTENT ISN'T IN THE STATUTE THERE, RIGHT?

THAT'S JUST SORT OF A BACKGROUND KIND OF UNDERSTANDING THAT IT'S A CRIMINAL LAW, THERE'S NO SORT OF EVIDENCE THAT IT'S MEANT TO BE STRICT LIABILITY.

THERE'S AN INTENT FOR THAT A PART.

SO WHY WOULD YOU ARTIFICIALLY STOP THERE AND NOT INCLUDE WITHIN WHAT WOULD HAVE TO BE THE INTENTIONAL HAVING THE, QUOTE-UNQUOTE, SEXUAL BATTERY WITHOUT THE PERSON'S CONSENT? WHY WOULDN'T THAT -- ISN'T THAT, ISN'T THAT SORT OF YOUR BEST KIND OF TEXTUAL ARGUMENT?

>> THIS COURT SHOULD ADD ANY AND ALL WORDS TO THE STATUTE TO KNOWINGLY --

>> I WOULDN'T CHARACTERIZE IT AS ADDING WORDS TO THE STATUTE.

>> ADDING ANY WORDS THAT WOULD EVENTUALLY IN BE IN A JURY INSTRUCTION.

IN THESE CASES, SO ELEMENT ONE WHERE IDENTITY'S NOT A DEFENSE, MY CLIENT'S NOT DISPUTING THAT THERE WAS THE SEXUAL UNION PENETRATION.

IT GOES THEN TO ELEMENT TWO
CONSENT, AND WHAT WE'RE ASKING
FOR IS KNOWINGLY AND IF THIS
COURT SEES FIT TO ADD ANY MORE
REQUIREMENT THAT WOULD WIND UP
IN A JURY INSTRUCTION, BUT AS IT
IS THERE'S JUST NO DEFENSE FOR
ADULTS UNDER THIS STATUTE.

IT EFFECTIVELY REQUIRES
AFFIRMATIVE CONSENT TO ENGAGE IN
SEXUAL INTERCOURSE WITH ANOTHER
ADULT AND IN THE PRIVACY OF THE
HOME.

>> WELL, I MEAN, I THINK THAT
GOES BACK THOUGH TO THE, THIS
QUESTION ABOUT CONSENT AND
WHETHER YOU JUST LOOK FOR
OBJECTIVE MANIFESTATIONS THAT A
REASONABLE PERSON WOULD CONSTRUE
AS CONSENT.

I DON'T THINK YOU NEED TO GO AS
FAR AS REQUIRING, QUOTE-UNQUOTE,
AFFIRMATIVE CONSENT TO GET TO
THAT DEFINITION THE STATE IS
PROPOSING FOR THAT.

>> WELL, I WOULD SAY UNDER THE
FACTS HERE MY CLIENT HAD THE
EVIDENCE HERE, AND THIS RECORD
SHOWS THAT HE, THE ALLEGED
VICTIM, THERE WERE ACT AS AND
WORDS THAT SHOWED AFFIRMATIVE
THE CONSENT.

OF COURSE, THAT CHANGED AT
TRIAL, AND THE JURY BELIEVED HER
TESTIMONY.

BUT AGAIN, AS THE PROSECUTOR --

>> THIS WOULD BE AN ENTIRELY
DIFFERENT CASE IF WHEN YOUR
CLIENT WENT INTO THE BEDROOM,
THE VICTIM TURNED AROUND AND
SAID COME ON OVER.

WOULDN'T THAT BE AN ENTIRELY
DIFFERENT CASE?

BECAUSE THAT WOULD BE AN
OBJECTIVE MANIFESTATION GIVEN
ALL THE INTENDED CIRCUMSTANCES,
AN OBJECTIVE MANIFESTATION THAT
SHE CONSENTED TO HAVING SEX WITH
HIM.

>> YES, SIR.

>> BUT THAT'S NOT WHAT HAPPENED.

>> CORRECT.

>> THAT IS NOT AT ALL WHAT
HAPPENED.

AND SO THERE'S NO, THERE IS NO
OBJECTIVE MANIFESTATION THAT THE
VICTIM HERE CONSENTED TO SEX
WITH THE DEFENDANT.
HE TRIES TO TALK ABOUT THINGS IN
THE CONTEXT WHICH SHE REFUTES.
SO IT'S JUST A TOTALLY -- IT
WOULD BE A TOTALLY DIFFERENT
SITUATION IF HE HAD SPOKEN TO
HER AND GOTTEN HER ATTENTION AND
THEN SHE HAD INVITED HIM TO
COME, TO COME ON IN THE ROOM.
BUT THAT'S NOT WHAT HAPPENED.
>> THAT'S CORRECT, YOUR HONOR.
BUT WHAT I WOULD SAY IS THIS:
UNDER THESE FACTS AND
CIRCUMSTANCES, IT'S JURY'S
OPINION THAT COUNTS, AND THE
JURY DIDN'T GET TO MAKE THAT
CALL IN THIS CASE ABOUT WHETHER
HE HAD CRIMINAL INTENT WHEN HE
WENT IN THERE.
AND, OF COURSE, I WOULD ALSO SAY
THIS, HE DIDN'T TURN THE OFF THE
LIGHT.
HE DIDN'T CONCEAL HIMSELF IN ANY
WAY.
THE LIGHT WAS ON.
IF HE KNEW -- IF HE WERE GOING
IN THERE TO COMMIT A CRIME, THIS
WAS A COLLEGE STUDENT, THIS WAS
A YOUNG MAN WITH NO CRIMINAL
RECORD, I SUBMIT THE FACTS WOULD
HAVE BEEN DIFFERENT WHEN HE WENT
IN THERE, BUT HE BELIEVED --
>> YOU HAVE EXHAUSTED ALL YOUR
TIME.
I WILL GIVE YOU 3 MINUTES --
>> THANK YOU, CHIEF JUSTICE
CANADY.
>> MR. CHIEF JUSTICE AND MAY IT
PLEASE THE COURT, IN OUR VIEW,
KNOWLEDGE IS NOT REQUIRE HERE,
AND THAT'S PLAIN FROM THE TEXT
AND CONTEXT OF THIS LAW,
LONGSTANDING FLORIDA CASE LAW
AND COMMON LAW TRADITION, ALL OF
WHICH SHOW THE UNIQUE CONTEXT OF
RAPE.
FLORIDA LAW HAS ALWAYS DISPENSED
WITH KNOWLEDGE REQUIREMENTS.
AND SO THIS IS NOT AT ALL
UNUSUAL.
I'D LIKE TO START BY ANSWERING

ONE OF JUSTICE MUNIZ'S QUESTIONS ABOUT HOW IS IT FAIR TO HAVE READ INTO THE STATUTE A VOLUNTARY ACT REQUIREMENT, AN INTENT REQUIREMENT TO COMMIT THE SEXUAL BATTERY BUT NOT A KNOWLEDGE REQUIREMENT AS TO DETERMINE CIRCUMSTANCES OF CONSENT.

WE THINK THE EXPLANATION IS A HISTORICAL ONE N. COMMON LAW IT WAS ALWAYS THE CASE THAT IF YOU DID NOT ACT VOLUNTARILY, YOU DID NOT ACT AT ALL.

THAT WAS SOMETHING ENTIRELY DIFFERENT.

AND SO WE'RE NOT DISPUTING THAT THAT'S BEEN CARRIED OVER INTO THE STATUTORY VERSION OF THIS OFFENSE.

SO IT'S FAIR TO READ THAT IN BECAUSE THAT'S INHERENT IN THE COMMON LAW.

IT'S NOT FAIR, HOWEVER, TO READ IN KNOWLEDGE REQUIREMENTS BASED ON ALL OF THE ARGUMENTS WE'VE BROUGHT TO THE BEAR.

SO IF I COULD GO TO TEXT AND CONTEXT, MANY OF THE CASES THAT MY FRIEND RELIES ON ARE CASES WHERE ALL THE GOVERNMENT OR THE STATE HAD TO GO BY TO SUPPORT ITS CLAIM THAT KNOWLEDGE WAS NOT A REQUIREMENT WAS THE STATUTE'S SILENCE.

THERE SIMPLY WAS NO STATED MENS REA, AND THE COURT SAID FOR VARIOUS REASONS WE'LL READ ONE IN.

THIS IS NOT THAT CASE BECAUSE IT'S NOT JUST THE STATUTE DOESN'T EXPLICITLY REQUIRE KNOWLEDGE, IT'S THAT THERE ARE SO MANY OTHER TEXTUAL INDICATIONS INCLUDING IN THIS VERY STATUTE IN SUBSECTION 4 THAT SHOW WHEN THE LEGISLATURE WANTED TO REQUIRE MENS REA HERE, IT JUST WENT AHEAD AND SAID SO.

>> BUT CAN I ASK YOU ABOUT THAT? SO YOU AGREE THAT THE FIRST -- IF WE'RE LOOKING, IF WE START WITH 5B, WITH REGARD TO THE SEXUAL BATTERY PART, THAT THAT

THE HAS TO BE THE INTENTIONAL,
RIGHT?

>> IT HAS TO BE A VOLUNTARY ACT,
RIGHT.

>> OKAY.

SO WHY DO YOU -- SO THE ACT, SO
THE STATUTE, AS YOU KNOW,
DEFINES SEXUAL BATTERY TO JUST
MEAN THE --

>> RIGHT.

>> SO EVERY ACT OF CONSENSUAL
SEX MEETS THAT DEFINITION,
RIGHT?

>> RIGHT.

>> AND WHAT BRINGS IT OVER TO
THE CULPABLE CRIMINAL REALM IS
WITHOUT CONSENT.

SO WHY IS THE ACT, YOU KNOW, NOT
CONTACT WITHOUT CONSENT PART?
WHY IS IT RIGHT TO SEPARATE
THOSE TWO THINGS INSTEAD OF VIEW
IT AS ONE, BECAUSE YOU'RE
CALLING THE CONSENT PART,
QUOTE-UNQUOTE --

[INAUDIBLE]

CIRCUMSTANCE.

WHICH I THINK IS TEXTUAL IN
CONNECTION WITH 4 BECAUSE 4
TALKS ABOUT THE CONTACT WITHOUT
CONSENT.

AND THEN IT SAYS IN THE
FOLLOWING CIRCUMSTANCES.

SO IT SEEMS AT LEAST TEXTUALLY
THEY DON'T, THE LEGISLATURE
ISN'T VIEWING CONSENT AS IN THE
BASKET OF INTENDED
CIRCUMSTANCES.

IT'S ARGUABLY THE ACT ITSELF.

SO WHY THE VOLUNTARINESS
TRANSFERRED INTO HAVING SEX
WITHOUT SOMEONE'S CONSENT?

AS OPPOSED TO JUST HAVING SEX?

>> SO I THINK THE ANSWER IS JUST
IN TERMS OF HOW THE CRIMINAL LAW
ORDINARILY CATEGORIZES ELEMENTS.
THERE ARE FOUR TYPES OF ELEMENTS
THAT WE TALK ABOUT IN CRIMINAL
LAW, THERE'S THE MENS REA,
THERE'S CAUSATION OR RESULT AND
THEN THERE ARE TENDANT
CIRCUMSTANCES WHICH ARE FACTS
THAT SURROUND THE CIRCUMSTANCES
OF THE CRIME THAT MAKE IT, THAT
MAKE IT CRIMINAL.

>> SO BUT IS IT MORAL FOR THE ACT TO BE SOMETHING THAT'S JUST COMPLETELY MORALLY SORT OF NEUTRAL?

YOU'RE SAYING THE CRIMINAL ACT IS JUST THE SEX, RIGHT?

AND THE LACK OF CONSENT IS JUST SORT OF AN ADD-ON -- IT'S LIKE HAVING A GUN WITHIN 1,000 FEET OF A SCHOOL.

YOU'RE COMPARING THE CONSENT TO, LIKE, WHETHER YOU'RE NEAR A SCHOOL OR NOT.

>> EXACTLY.

I THINK THAT'S A USEFUL EXAMPLE.

SAY, TAKE FELONY POSSESSION.

IT'S ORDINARILY NOT CRIMINAL TO TAKE THE ACTUS REUS, POSSESSING A FIREARM.

THAT'S THE ACTUS REUS.

IT ONLY BECOMES A CRIMINAL ACT WHEN THE ATTENDANT CIRCUMSTANCE OF BEING A FELON IS ALSO PRESENT.

BUT WE WOULD NOT SAY, I THINK, THAT THE ACTUS REUS THERE IS BEING A FELONY POSSESSION.

WE WOULD SAY IT IS THE POSSESSION OF A FIREARM.

>> WELL, LET'S TRY SOMETHING A LITTLE CLOSER IN THE TEXT OF THE STATUTE.

SO STATUTORY RAPE, I THINK YOU WOULD AGREE BUT TELL ME IF YOU WOULDN'T, CAN BE COMMITTED UNWITTINGLY, RIGHT?

>> RIGHT.

>> OKAY.

CAN THIS CRIME BE COMMITTED UNWITTINGLY?

>> YES, IN THE SAME WAY.

>> HELP ME UNDERSTAND.

>> SO, SO IN BOTH IT'S NOT UNWITTINGLY IN THE SENSE THAT YOU CAN'T REALIZE YOU'RE TAKING THE ACT OF SEXUAL INTERCOURSE, BUT IT'S UNWITTING IN THE SENSE THAT THE ATTENDANT CIRCUMSTANCE WHICH MAKES THAT SEXUAL INTERCOURSE UNLAWFUL YOU DO NOT NEED TO KNOW OF.

SO I THINK THAT'S ANOTHER GOOD COMPARISON.

THE LAW HAS ALWAYS SAID THAT IF

YOU ENGAGE IN SEXUAL INTERCOURSE AND YOU SIMPLY DON'T KNOW THAT YOUR PARTNER WAS UNDERAGE, WE'RE GOING TO HOLD YOU LIABLE FOR THAT.

I THINK THIS IS A PARTICULARLY GOOD EXAMPLE BECAUSE THE REASON THAT WE HAVE STATUTORY RAPE LAWS REFLECTS A SOCIETAL JUDGMENT AND THE LEGISLATURE'S JUDGMENT THAT SOME PEOPLE ARE TOO YOUNG TO FORM VALID CONSENT.

SO IN THE STATUTORY RAPE CONTEXT, AGE IS REALLY JUST BEING USED AS A PROXY FOR IS THERE CONSENT.

AND THE LEGISLATURE DECIDES HAS A MATTER OF LAW IF YOU'RE 15, YOU CANNOT CONFORM CONSENT.

SO THE POINT IS, THE POINT IS WE'VE NEVER REQUIRED KNOWLEDGE AS TO AGE WHICH IS THE SAME AS SAYING WE'VE NEVER REQUIRED KNOWLEDGE AS TO CONSENT.

>> WELL, BUT, I MEAN, SEE, THAT'S WHERE I THINK HISTORICAL STUFF ISN'T AS MUCH OF A HELP TO YOU AS YOU MAKE IT OUT TO BE IN THE BRIEFS BECAUSE WE OBVIOUSLY HAVE THIS LONG TRADITION OF KIND OF SPECIAL PROTECTION FOR CHILDREN.

WE HAVE THE TRADITIONAL DEFINITION OF RAPE WHICH REQUIRED FORCE WHICH SIGNALS TO A PERSON THAT YOU'RE HAVING TO USE FORCE AND OVERCOME SOMEONE, YOU DON'T HAVE CONSENT.

SO NOW YOU'VE BASICALLY TURNED YOUR INTERPRETATION OF SORT OF MINIMAL SORT OF LOWEST LEVEL RAPE STATUTE IN FLORIDA, YOU'VE TURNED EVERYTHING INTO STATUTORY THE RAPE.

YOU DO IT AT YOUR OWN PERIL IF DOWN THE LINE OBJECTIVELY SOMEONE DECIDES THERE WAS AN ABSENCE OF CONSENT JUST LIKE OBJECTIVELY IT TURNS OUT THE PERSON WHO YOU SLEPT WITH WAS YOUNGER THAN, YOU KNOW, YOU THOUGHT THEY WERE IF YOU CARED.

>> WELL, I THINK AS IT TURNS OUT THE HARSH, THE POTENTIALLY HARSH

RESULTS AS TO AGE FOR THE REASON THAT YOU'VE ALREADY EXPLAINED IN YOUR QUESTIONING DOESN'T APPLY WITH THE SAME FULL FORCE HERE BECAUSE IN STATLER'S POSITION GETS THE BENEFIT OF THE OBJECTIVE NATURE OF CONSENT. EVEN IF HE DID NOT KNOW, HE CERTAINLY SHOULD HAVE KNOWN UNLESS HIS CONDUCT IS NOT -- NOW, IF YOU GO TO THE STATUTORY RAPE CONTEXT, THERE IF YOU HAVE A 16 OR 17-YEAR-OLD BOY OR GIRL WITH A FAKE ID WHO MISREPRESENTS HIS OR HER AGE, THAT'S A FAR HARSHER RESULT. AGAIN, THIS IS NOT A CASE WHERE IT'S JUST A QUESTION OF STATUTORY SILENCE. AND THE REASON I THINK THAT SUBSECTIONS 4E, 4 AND 5 ARE HELPFUL IS BECAUSE THEY ARE AGGRAVATING CIRCUMSTANCES WHERE THE LEGISLATURE SAID IF THIS IS GOING TO BE AGGRAVATED FROM A SECOND-DEGREE FELONY TO A FIRST-DEGREE FELONY PUNISHABLE BY 30 YEARS, WE'RE GOING TO REQUIRE ADDITIONAL KNOWLEDGE AS TO AN ATTENDANT CIRCUMSTANCE. SO WHEN THE LEGISLATURE WANTED TO ACKNOWLEDGE, IT SIMPLY SAID SO, AND THAT'S TRUE OF OTHER PROVISIONS AS WELL. >> I ASK YOU, I THINK IT'S GOING TO BE VERY IMPORTANT WHATEVER THE COURT DECIDES HERE IN TERMS OF, YOU KNOW, ESPECIALLY IF THE COURT DECIDES TO GO DOWN THE PATH OF DESCRIBING -- AS AN OBJECTIVE THING, IT'S OBVIOUSLY GOING TO BE THE VERY IMPORTANT HOW THAT'S DESCRIBED. AND IT SEEMS LIKE IN YOUR BRIEF YOU OFFERED A COUPLE OF DIFFERENT FORMULATIONS. AND IN ONE FORMULATION YOU TALK ABOUT SORT OF THIS OBLIGATION THAT THE PERSON AND THAT THE DEFENDANT WOULD HAVE HAD TO, QUOTE-UNQUOTE, OBTAIN CONSENT. AND THEN IN OUR FORMULATIONS YOU TALK ABOUT LOOKING AT ALL OF THE CIRCUMSTANCES OBJECTIVELY COULD,

YOU KNOW, COULD ANY IF
REASONABLE PERSON HAVE BELIEVED
THAT THERE WERE MANIFESTATIONS
OF CONSENT.

AND IT SEEMS LIKE THERE'S
CERTAINLY AT LEAST IN THE REAL
WORLD, I MEAN, THE FORMER SOUNDS
LIKE A KIND OF CAMPUS CODE OF,
YOU KNOW, ASKING, YOU KNOW,
GETTING PERMISSION FOR EACH
THING.

THE LATTER SOUNDS MORE WHAT I
THINK WOULD BE CONSISTENT WITH
SORT OF A MORE KIND OF PERSON IN
THE STREET SORT OF COMMON SENSE
WAY OF UNDERSTANDING IT.

WHICH ONE ARE YOU ARGUING FOR?
>> SO WE THINK IT'S THE LATTER.
IT'S THE OBJECTIVELY REASONABLE
PERSON KNOWING ALL THE
CIRCUMSTANCES.

I THINK THAT HAS TO BE THE TRUE
BECAUSE THERE IS NOT CONSENT IN
JUSTICE POLSTON'S HYPOTHETICAL
WHERE A THIRD PARTY RELAYS TO
SOMEONE LIKE MR. STATLER THE
VICTIM IS WILLING.

SO WE THINK THERE'S LIABILITY
THERE.

BUT THERE WAS --

>> STILL --

>> YOU WOULD CERTAINLY --

[INAUDIBLE]

CORRECT?

>> THERE IS CERTAINLY LIABILITY
THERE.

>> EVEN THOUGH IT MIGHT BE
UNINTENDED CIRCUMSTANCE?

>> RIGHT.

YEAH, THAT'S OUR VIEW OF HOW
THAT WOULD WORK.

SO IT'S NOT THE REASONABLE
PERSON IN THE DEFENDANT'S SHOES,
IT'S THE REASONABLE PERSON --
HOPEFULLY, THAT'S HELPFUL IN
DRAFTING THE OPINION.

WE STILL GET ALL THE BENEFITS,
FOR THE MOST PART, 99-- ADD A
WHOLE LOT OF 9s, THAT PERCENT
OF THE TIME THAT DEFENDANT WOULD
STILL REASONABLY HAVE KNOWN
BECAUSE HE WAS GOING TO BE AWARE
IN ALMOST ALL THE CIRCUMSTANCES.

>> SO DO YOU AGREE, ONE OF THE

CASES YOU RELY ON IS OUT OF NEBRASKA, AND THEY CITE FAVORABLY FROM THE NEW HAMPSHIRE CASE WHERE IT SAYS THAT THE VICTIM MUST MANIFEST HER UNWILLINGNESS OBJECTIVELY. AND THEN IT TALKS ABOUT VICTIM OBJECTIVELY COMMUNICATES LACK OF CONSENT.

WOULD IT BE A MISTAKE FOR US TO CHARACTERIZE IT THAT WAY?

>> WE DISAGREE WITH THOSE STATEMENTS BECAUSE WHAT'S REQUIRED FOR THE ELEMENT OF NONCONSENT IS SIMPLY THAT THERE NOT BE CONSENT.

SO YOU DO NOT HAVE TO RESIST, YOU DON'T HAVE TO SAY NO, YOU SIMPLY HAVE TO NOT CONSENT.

>> THERE JUST CAN'T BE CONSENT, IF I COULD EDITORIALIZE WHAT YOU JUST SAID.

>> THAT'S FAIR.

>> WOULD THE JURY BE PROVED THAT THE PROSECUTION HAS TO PROVE BEYOND A REASONABLE DOUBT THAT NO REASONABLE PERSON VIEWING THIS CONSTELLATION OF CIRCUMSTANCES WOULD BELIEVE THAT THERE WAS CONSENT?

>> WELL, THAT -- I DON'T THINK IT NECESSARILY NEEDS TO BE PART OF THE STANDARD JURY INSTRUCTIONS.

>> NO, BUT I MEAN, IF THAT'S WHAT -- I MEAN, BECAUSE YOU WANT THE JURY TO KNOW LOOKING ASIDE WHETHER IT SHOWS UP IN THE BOOK OR WHATEVER --

>> SURE.

>> BUT IF SOMEONE ASKS FOR AN EXPLANATION OF IT, IS THAT WHAT THE EXPLANATION WOULD BE?

>> I WOULD PHRASE IT A LITTLE BIT DIFFERENTLY.

I DON'T THINK IT WOULD BE NO REASONABLE PERSON.

I THINK JUDGES WOULD PROPERLY INSTRUCT JURIES THAT CONSENT IS PRESENT WHEN A REASONABLE OBSERVER KNOWING ALL OF THE FACTS WOULD CONCLUDE THAT THE VICTIM HAD EXHIBITED A WILLINGNESS TO HAVE SEX.

>> WELL, BUT THAT'S -- I MEAN,
I'M TRYING TO FIGURE OUT SORT OF
THE OVERLAY OF THE BEYOND A
REASONABLE DOUBT STANDARD ON,
ONTO THAT.

I MEAN, YOU KNOW WHAT I'M
SAYING?

>> JUST TACK IT ON THE FRONT.
A JURY WOULD HAVE TO FIND BEYOND
A REASONABLE DOUBT THAT NO
REASONABLE OBSERVER KNOWING ALL
THE FACTS WOULD HAVE FOUND THAT
THERE WAS CONSENT.

>> OKAY.

>> YOU KNOW, AT END OF THE DAY
HERE I THINK WHAT'S ANIMATING A
LOT OF MR. STATLER'S CONCERNS IS
THE IDEA THAT WE'RE GOING TO BE
CRIMINALIZING, YOU KNOW,
INNOCENT CONDUCT.
BUT THE LEGISLATURE HERE
REASONABLY MADE THE POLICY
JUDGMENT THAT THERE WAS NOTHING
INNOCENT ABOUT HAVING SEX WITH A
PERSON WHERE YOU HAVEN'T HAD A
MODICUM OF CONCERN ABOUT WHETHER
THEY, IN FACT, CONSENTED.
AND SO THE INCENTIVE STRUCTURE
THAT THE LEGISLATURE CREATED
HERE MAKES A LOT OF SENSE
BECAUSE THE LEAST A PERSON CAN
BE EXPECTED TO DO WHEN THEY
ENGAGE IN THE ENORMOUSLY
CONSEQUENTIAL ACT OF SEXUAL
INTERCOURSE IS TO CONFIRM THAT
THEY, IN FACT, HAVE A WILLING
PARTNER.

>> YOU SAY THAT THROUGHOUT THE
BRIEF, BUT IT'S KIND OF A
QUESTIONING THING.

I MEAN, IT SOUNDS LIKE WHAT YOU
JUST ARTICULATED WOULD ARGUE FOR
WHATEVER RECKLESSNESS, THAT
WOULD MAKE IT A MENS REA
RECKLESSNESS.

I MEAN, OBVIOUSLY, POINT IS THIS
WHOLE CASE IS ABOUT HOW WOULD
YOU PROVE THAT THERE WAS AN
ABSENCE OF CONSENT.

NOBODY DISAGREES THAT THAT'S
RELEVANT AND IMMORAL, TO HAVE
SEX WITHOUT SOMEONE'S CONSENT.
IT'S A QUESTION ABOUT HOW DO YOU
PROVE THAT.

>> I THINK IT'S EVIDENCE OF WHAT THE LEGISLATURE DID HERE, AND IT'S AN EXPLANATION FOR WHY THE LEGISLATURE INTENTIONALLY DID NOT REQUIRE A KNOWLEDGE REQUIREMENT OR A RECKLESSNESS REQUIREMENT EVEN.

CAN I ADDRESS ANY OTHER QUESTIONS FROM THE COURT?
THANK YOU FOR YOUR TIME.

>> REBUTTAL.
>> THANK YOU.

I WOULD LIKE TO RESPOND BRIEFLY TO A FEW OF MY COLLEAGUES POINTS.

THE FIRST IS THE LEGISLATURE, DIDN'T PUT ANYTHING IN THE STATUTE THAT SAYS MENS REA IS NOT AN ELEMENT.

THE SECOND POINT I WOULD LIKE TO MAKE HIS SEX CRIMES INVOLVING MINORS IS IRRELEVANT TO THE COURT'S ANALYSIS.

THE THIRD ONE IS GOING BACK TO THE QUESTION OF CAN A PERSON COMMIT SEXUAL BATTERY UNDER THE STATUTE UNWITTINGLY?

YES THE WAY IT IS WRITTEN.

THAT IS WHAT HAPPENS WITH MY CLIENT.

WHAT WE ARE DEALING WITH, I USE THESE TERMS BECAUSE THIS IS WHAT THE LEGISLATURE SET SAID IN 794.005, THE BASIC SEXUAL BATTERY STATUTE, BE SERIOUS, THAT'S HOW THE LEGISLATURE DEFINED IT AND FOR DEFENDANTS AND MY CLIENT'S POSITION AND OTHERS THERE IS NO DEFENSE.

>> LET'S PLAY THAT OUT.

THE STATUTE OR A RAPE LAWS WHICH ALLOW CONVICTIONS OF SOMEBODY WHO IS ENGAGED IN UNWITTINGLY ENGAGED IN SEX WITH A MINOR, THOSE SURVIVED CONSTITUTIONAL CHALLENGE.

WHAT MAKES THIS HAPPEN?

>> DEALING WITH ADULTS.

THERE IS NOT GOING TO BE --

>> HELP ME UNDERSTAND HOW THAT CHANGES THE CONSTITUTIONAL ANALYSIS FROM WHETHER MENS REA IS REQUIRED AS A MATTER OF DUE PROCESS.

>> WE ARE TALKING ABOUT A VICTIM WHO SOCIETY SAYS CANNOT CONSENT, A MINOR CHILD. WE HAVE AN ADULT WHO IS NOT PHYSICALLY INCAPACITATED. ANY OF THOSE OF YOUR THINGS IN THE STATUTE WHEN TALKING ABOUT TWO ADULTS OVER 18 WHO CAN'T CONSENT THIS CAN CRIMINALIZE THIS CONDUCT SO THAT IS THE DIFFERENCE AND THAT IS WHY A JURY NEEDS TO MAKE THAT CALL. A JURY MAY LOOK AT THE FACTS OF THIS CASE IF IT WERE REMANDED AND FINED FOR THE STATE BUT THEY MIGHT NOT AND DON'T MAKE THE CALL HERE.

>> HOW DO YOU ENTER THE STATE THAT IT ISN'T INNOCENT CONDUCT BECAUSE OF THE ABSENCE OF CONSENT MUCH LIKE IT ISN'T INNOCENT CONDUCT FOR THE FELON TO BE POSSESSION OF THE FIREARM UNDER 9202G BECAUSE WE HAVE SAID THIS CONDITION IS PRESENT, WHAT IS YOUR ANSWER TO THAT?

>> WE ARE TALKING ABOUT ADULTS, A CLIENT WITH NO CONNELL HISTORY, ADULTS WHO HAVE THE CAPACITY TO CONSENT, ENGAGING IN PRIVATE SEXUAL ACTIVITY IN A HOME UNDER THIS STATUTE, SOMEONE BELIEVE THEY HAVE CONSENT, THE JURY DOESN'T MAKE THAT CALL, THAT IS A DUE PROCESS VIOLATION AND WE DO SUBMIT VIOLATING MY CLIENT'S DUE PROCESS RIGHTS, IF THERE ARE NO PHOTO QUESTIONS I CAN ANSWER, I WOULD CONCLUDE BY ASKING THE COURT TO FIND THE STATUTE OR REQUIRE MENS REA ELEMENT AND MY CLIENT IS SEEKING A NEW TRIAL IF THIS COURT THINKS IT PROPERLY WENT TO THE JURY ON JOA.

>> THANK YOU BOTH FOR ARGUMENTS IN THIS CASE. THE COURT WILL BE ADJOURNED FOR THE DAY.