State of Florida vs Charles Hogan

NEXT CASE IS STATE OF FLORIDA VERSUS HOGUE AND. -- VERSUS HOG AND. -- VERSUS HOGAN

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS AUGUST BONAVITA, ASSISTANT ATTORNEY GENERAL, ON BEHALF OF THE PETITIONER, THE STATE OF FLORIDA. MAY IT PLEASE THE COURT. COUNSEL. WE ARE HERE ON THE STATE OF FLORIDA VERSUS CHARLES HOGAN. BY WAY OF SOME BACKGROUND FOR THE COURT, MR. HOKE HOGAN WAS TRIED AND CONVICT -- MR. HOGAN WAS TRIED AND CONVICTED, AFTER A JURY TRIAL, ON TWO COUNTS OF BURGLARY OF A DWELLING. DURING THE TRIAL, AT THE TRIAL, FOR THE FIRST TIME, MR. HOGAN TESTIFIED ON HIS OWN BEHALF AND ASSERTED A DEFENSE THAT HE HAD PERMISSION TO BE IN THE DWELLING. PERMISSION TO BE IN THE DWELLING WAS GIVEN TO HIM BY AN INDIVIDUAL BY THE NAME OFTED HANSON. IT WAS AT THIS TIME, THIS WAS THE FIRST TIME THAT THIS HAD COME OUT, REGARDING MR. HANSON HANSON'S NAME. THE TRIAL WAS THE FIRST TIME THAT IT HAD ACTUALLY COME OUT.

IT HAD COME OUT, BEFORE, THOUGH, IF I UNDERSTAND IT CORRECTLY, THAT THE INITIAL POLICE OFFICER THAT INVESTIGATED THIS WAS INFORMED THAT SOMEBODY ELSE GAVE HIM PERMISSION TO BE IN THE HOUSE. IS THAT CORRECT?

TO SOME DEGREE, JUSTICE ANSTEAD, THAT IS CORRECT. HOWEVER, I WOULD POINT OUT, AND THE STATE WOULD LIKE TO POINT OUT, THAT, WHEN MR. HOGAN WAS ARRESTED, INITIALLY HIS FIRST STATEMENT TO THE OFFICER, HIS FIRST RESPONSE WAS AWE-, THE POLICE ARE HERE, AND -- WAS AH-OH, THE POLICE ARE HERE, AND THEN, WHEN THE POLICE PULLED HIM OUT OF THE HOUSE, HE TOLD THE OFFICERS THAT HE HAD PERMISSION, BY THE OWNER, TO BE THERE. THAT CAME OUT AT TRIAL. HOWEVER, THE OWNER, MR. FERRIS, HAD SPOKEN TO THE OFFICER THE DAY BEFORE, FILING THE INCIDENT, AND SO THE OFFICER WAS AWARE OF WHO THE OWNER WAS AND THE OWNER'S PERMISSION, REGARDING CONSENT, BECAUSE THAT HE KNEW WHO MR. HOGAN WAS, BUT HE DID NOT KNOW THE OFFICER'S NAME.

WHAT ABOUT HIS CLAIM THAT SOMEBODY GAVE HIM PERMISSION TO BE THERE?

THAT RECORD IS NOT CLEAR, AND I THINK, JUSTICE ANSTEAD, IS NOT THE PROBLEM HERE. THE PRETRIAL DISCOVERY, THE PRETRIAL DEPOSITION THAT WAS ALLUDED TO AT TRIAL, ONLY INDICATES WHAT I JUST SAID TO YOU, THAT MR. HOGAN MENTIONED TO THE ARRESTING OFFICER THAT HE HAD PERMISSION FROM THE OWNER TO BE THERE. THAT WAS IT. THERE WAS NOTHING THAT THE STATE, THAT I COULD SEE, THAT WAS IN THE RECORD THAT, SUGGESTED THAT IT WASTED HANSON OR ANYBODY ELSE, FOR THAT MATTER. THERE WAS, AS FAR AS I COULD SEE, NO DISCOVERY. NO WITNESS LIST WAS PROVIDED BY THE DEFENSE TO THE STATE THAT THIS MR. HANSON WOULD BE CALLED. IT WAS NOT UNTIL THE TRIAL, WHEN MR. HOGAN, ACTUALLY IT WAS IN THE OPENING ARGUMENT BY DEFENSE COUNSEL, MENTIONEDTED HANSEN'S NAME FOR THE FIRST TIME, AND THAT, AS FAR AS I CAN GLEAN FROM THE RECORD, IS ALL THAT IS MENTIONED, REGARDINGTED HANSON, AND PERMISSION TO BE IN THERE, AND, OF COURSE, MR. HOGAN, HIMSELF, TESTIFIED THAT HE HAD PERMISSION TO BE THERE, AND THEN HE SAID THATTED HANSON HAD GIVEN -- AND THEN HE SAID THAT TED HANSON HAD GIVEN HIM THAT CONSENT.

THIS GOES TO THE CONSENT. AM I CORRECT?

THAT'S CORRECT, JUSTICE PARIENTE.

IN LOOKING AT THE RULES AND THE NARROW OF JACKSON, IT SPEAKS TO AN EXCEPTION, WHERE THETATE STATE WITH COMMENT ON THE FAILURE TO PRODUCE A WITNESS, ONLY IN A CIRCUMSTANCE WHERE THE DEFENDANT VOLUNTARILY ASSUMES SOME BURDEN OF PROOF BIAS EARTHING CERTAIN -- BY ASSERTING CERTAIN DEFENSES, AND ONE OF THE DEFENSES IS, I GUESS, IN THE CASE OF ALIBI, THERE HAS GOT TO BE A NOTICE FILED PRIOR TO TRIAL. WITH THESE OTHER DEFENSES, THAT WOULD BE DEFENSES WHERE THE DEFENDANT ASSUMES THE BURDEN, I GUESS, IN THEIR AFFIRMATIVE DEFENSES, THERE IS NO PRETRIAL REQUIREMENT FOR -- TO ASSERT THAT YOU ARE GOING TO BE RELYING ON THE DEFENSE OF SELF-DEFENSE OR CONSENT. IS THAT CORRECT?

THAT IS ABSOLUTELY CORRECT, JUSTICE PARIENTE, BUT IN THIS PARTICULAR CASE, AND JACKSON CASE, BY THE WAY, IS THE MAIN CASE THAT THE FOURTH DISTRICT RELIED ON, IN REVERSING. THEY FOUND THAT THEY APPLY THE JACKSON TEST, FIRST OF ALL, FINDING THAT THIS WAS AN AFFIRMATIVE DEFENSE. ACTUALLY THE COURT DIDN'T, EVEN, REALLY, SAY IT WAS AN AFFIRMATIVE DEFENSE. I THINK THE COURT CONSTRUED THE CONSENT ISSUE AS BEING THE STATE HAD THE BURDEN TO PROVE. THAT.

WHAT IS THE STATE OF THE LAW ON THAT? IS CONSENT AN AFFIRMATIVE DEFENSE THAT THE DEFENDANT, ONCE THEY RAISE IT, THEY HAVE GOT THE BURDEN TO PROVE THAT, OR IS IT AN ELEMENT OF THE CRIME THAT THE STATE HAS TO PROVE, AND IS THAT A VERY CRITICAL DIFFERENCE FOR WHAT WE ARE SPEAKING ABOUT, AS FAR AS WHETHER THE STATE CAN COMMENT OR NOT COMMENT?

WELL, IT, TO ANSWER YOUR QUESTION, IT IS A VERY IMPORTANT FACTOR TO CONSIDER, AND I WOULD DIRECT YOUR ATTENTION, AND THIS COURT'S ATTENTION, TO ITS RECENT CASE IN THE DELGADO DECISION, WHICH CITES HICKS AND MICHAELS, FOR THE PROPOSITION THAT CONSENT IS, IN FACT, AN AFFIRMATIVE DEFENSE, AND IN DELGADO, WHICH I PROVIDED TO COUNSEL AND TO THE COURT, THROUGH SUPPLEMENTAL AUTHORITY, SPECIFICALLY SAYS THAT CONSENT TO BURGLARY IS AN AFFIRMATIVE DEFENSE. THE DEFENDANT HAS TO COME FORWARD WITH SOME EVIDENCE. THE BURDEN IS ON THE DEFENDANT TO COME FORD WITH THE -- COME FORWARD WITH THE EVIDENCE. NOW, IN THIS CASE, THIS IS WHAT MR. HOGAN ELECTED TO DO. HE CAME INTO COURT, ON THE DAY OF TRIAL, AND I MIGHT ADD, THAT, UNLIKE THE FACTS IN JACKSON, JACKSON, THERE WAS NO AFFIRMATIVE DEFENSE. THE DEFENDANT NEVER EVEN TESTIFIED IN JACKSON, AND THIS IS NOT A CASE WHERE THE STATE BRINGS UP A DEFENSE AND THEN KNOCKS IT DOWN SUBSEQUENTLY. THIS WAS A CASE WHERE MR. HOGAN VOLUNTARILY TOOK THE STAND, BECAME A WITNESS SUBJECT TO CROSS-EXAMINE, LIKE ANY OTHER WITNESS, ASSERTS A DEFENSE THAT ONLY MR. HANSON KNEW ABOUT. ONLY MR. HANSON. MR. HANSON WAS HIS ENTIRE DEFENSE, BECAUSE HIS CONSENT CAME FROM MR. HANSON.

NOW, HOW WOULD YOU DEFINE, THEN, IF THE FIRST PRONG IS MET BY THIS BEING A DEFENSE THAT HAS BEEN VOLUNTARILY ASSUMED BY THE DEFENDANT? HOW WOULD YOU, THEN, INTERPRET THE SECOND PART, THAT IT HAS TO DO WITH FACTS THAT ONLY CAN BE ELICITED BY A WITNESS, AND THEN, I GUESS, THIS IS THE CRITICAL THING THAT IS NOT EQUALLY AVAILABLE TO THE STATE. FIRST OF ALL, IS THERE AN ASSUMPTION THAT THE DEFENDANT HAS SOME ABILITY TO BRING THAT PERSON INTO COURT, AND HOW WOULD YOU DEFINE, EQUALLY, NOT EQUALLY AVAILABLE?

JUSTICE PARIENTE, I THINK THE ISSUE, REALLY, THIS IS, REALLY, WHERE WE GET TO THE NUB OF THE WHOLE CASE. THE EQUAL AVAILABILITY, AND, I THINK, I WOULD DIRECT THIS COURT'S ATTENTION TO A LAWYER CASE OUT OF THE FOURTH DISTRICT AND THE DISSENTING OPINION IN THAT CASE, WHICH SAYS THAT, IN A SITUATION SUCH AS IN HOGAN, WHERE A DEFENDANT COMES IN, ON THE DAY OF TRIAL, AND ASSERTS, FOR THE FIRST TIME, THAT THIS WITNESS GAVE HIM

CONSENT, AND THAT IS HIS DEFENSE, WELL, THEN, IN THAT SITUATION, CERTAINLY, THE STATE WOULD ARGUE THAT THAT WITNESS IS NOT EQUALLY AVAILABLE TO THE STATE. I MEAN, IT IS COMING IN ON THE FIRST -- THERE IS NO OPPORTUNITY FOR THE STATE TO EVEN HAVE FOUND THIS WITNESS PRETRIAL, BECAUSE IT WAS NOT PROVIDED TO THE STATE, SO I THINK THE ARGUMENT WOULD BE THAT IT IS CLEARLY -- IT IS NOT EQUALLY AVAILABLE TO THE STATE, UNDER THE FACTS AND CIRCUMSTANCES OF THIS PARTICULAR CASE.

BUT ISN'T THAT, REALLY, A SEPARATE GROUND THAN THE CASE LAW HAS TALKED ABOUT? YOU ARE, REALLY, TALKING ABOUT SOMETHING LIKE SURPRISE. THAT IS THAT NOW WE DON'T HAVE TIME TO GO OUT AND SEE IF SUCH A PERSON EXISTS OR INVESTIGATE THAT OR WHATEVER, AS OPPOSED TO IT BEING A RELATIVE OR THIS SPECIAL RELATIONSHIP LANGUAGE THAT IS USED. ISN'T THAT, REALLY, A SEPARATE -- IT IS, ALMOST, LIKE A RICHARDSON VIOLATION? THAT YOU HAVE, REALLY, COME UP WITH SOMETHING THAT WE SHOULD HAVE KNOWN ABOUT, IF WE ARE GOING TO HAVE AN OPPORTUNITY TO COUNTER, IT AND ESPECIALLY IF CONSENT IS AN AFFIRMATIVE DEFENSE.

ABSOLUTELY, JUSTICE ANSTEAD. TO ANSWER YOUR QUESTION, I THINK, AGAIN, AND WE HAVE TO BEAR IN MIND, IN THIS CASE WE ARE DEALING WITH A BURDEN THAT IS ON THE DEFENDANT TO COME FORWARD WITH EVIDENCE.

LET ME ASK YOU A SEPARATE QUESTION, WHICH I WONDERED IF YOU HAVE ANY VIEWS ON, AND THAT IS WAS THERE ANY OBJECTION TO THIS TESTIMONY, BY THE STATE, THAT THIS WOULD CONSTITUTE LEGAL HEARSAY? THAT IS THAT HE IS OFFERING THE STATEMENT OF A PERSON, AN OUT-OF-COURT STATEMENT, AND HE IS SEEKING TO HAVE THE FACT-FINDER ACCEPTED AS TRUE, THAT HE WAS GIVEN PERMISSION TO BE IN THIS HOUSE. WAS THERE ANY OBJECTION, HERE, AND WHAT WOULD BE YOUR VIEW, AS TO WHETHER OR NOT THIS TESTIMONY WOULD BE SUBJECT TO HEARSAY OBJECTION OR WHETHER IT MEETS THE REQUIREMENTS OF SOME EXCEPTION? DO YOU HAVE ANY THOUGHTS ON THAT? I REALIZE THAT I AM SORT OF -- BUT I WOULD LIKE TO GIVE YOU THE OPPORTUNITY TO COMMENT ABOUT THAT.

THANK YOU, JUSTICE ANSTEAD. TO ANSWER YOUR QUESTION, ON THE RECORD, THERE, AS FAR AS I CAN GLEAN FROM THE RECORD, THERE WAS NO OBJECTION LODGED, REGARDING A HEARSAY ISSUE BY THE STATE. HOWEVER, I WOULD SUBMIT TO THE COURT THAT IT WOULD MOST LIKELY GO TO A STATE OF MIND EXCEPTION, SIMPLY BECAUSE THE, IF I UNDERSTAND THE NUB OF THE DEFENSE, WAS THAT MR. HOGAN WAS RAISING, THAT HE WAS GOING ON WHAT HIS BELIEF WAS. IN FACT, THERE WAS A SPECIAL INSTRUCTION THAT HE REQUESTED THAT WAS READ, THAT THE GOOD FAITH BELIEF THAT HE HAD CONSENT TO BE INSIDE, SO IT WOULD REALLY GO TO WHAT A REASONABLE PERSON, IN HIS MIND, WOULD UNDERSTAND THAT TO MEAN, SO, REALLY, TO ANSWER YOUR QUESTION,, AGAIN, TO THE DEFENDANT'S BENEFIT, IT IS NOT BEING INTRODUCED FOR THE TRUTH OF THE MATTER, MORE OR LESS, BUT JUST TO PUT ON THE NOTICE WHAT THE DEFENDANT HEARD AND WHAT THE DEFENDANT PERCEIVED FROM THOSE WORDS.

WELL, MY QUESTION TO YOU, THEN, IS ARE WE, REALLY, THEN, TALKING ABOUT CONSENT, IN THE SENSE THAT THE PERSON THAT HAS AUTHORITY TO GIVE CONSENT FOR YOU TO BE IN A PLACE LEGALLY, HAS GIVEN YOU CONSENT. ARE WE TALKING ABOUT SOME OTHER DEFENSE, AND THAT IS, YOU KNOW, A GOOD FAITH BELIEF THAT YOU HAD A RIGHT TO BE THERE OR SOMETHING LIKE THAT? AND IS THAT A DEFENSE, THEN, TO A BURGLARY CHARGE?

JUSTICE ANSTEAD, TO ANSWER YOUR QUESTION, REGARDING THE GOOD FAITH DEFENSE, AS FAR AS I WAS ABLE TO RESEARCH, I COULDN'T FIND A CASE THAT, REALLY, TALKED ABOUT A GOOD FAITH DEFENSE. I FOUND SOME -- A CASE IN THE SECOND AND, I BELIEVE, THE FOURTH DISTRICT, BUT I THINK, CERTAINLY, WE KNOW CONSENT BY THE OWNER WOULD BE A DEFENSE, UNDER DELGADO.

IT IS UNDISPUTED IN THIS CASE, ALL RIGHT, ON THIS RECORD, THAT THE TRUE OWNER OR ANYBODY REPRESENTING THE TRUE OWNER, DID NOT GIVE ANY CONSENT, SO THERE WAS NO ACTUAL LEGAL COBB CONSENT, HERE, IN THE -- CONSENT, HERE, IN THE WAY THAT WE ORDINARILY ALL THINK OF IT, SO THIS HAS TO BE SOMETHING OTHER THAN, YOU KNOW, LEGAL CONSENT, DOES IT NOT?

THAT WOULD BE CORRECT. IT WOULD HAVE TO BE JUST AS THE SPECIAL INSTRUCTION, THAT THE JUDGE READ, WOULD BE, THAT IT WOULD HAVE TO HAVE A GOOD FAITH BELIEF.

SO DOES STATE AGREE THAT THAT WOULD BE A DEFENSE?

AS TO ALL TYPES OF CRIMES, BECAUSE LOOKING AT THE CASES THAT THE TRIAL COUNSEL PROVIDED --

IF THE STATE, IF THIS HAD BEEN DISCLOSED, IN OTHER WORDS, LET'S TAKE THE STATEMENT OF THE DEFENDANT, AND IT WAS A LITTLE MORE EXPLICIT, IN TERMS OF IT ACTUALLY GAVE THE NAME OF THIS PERSON AND SAID THAT IS, YOU KNOW, WHY I WAS IN THERE, IS BECAUSE THIS PERSON TOLD ME IT WAS ALL RIGHT, AND HE GAVE THE NAME, AND NOW WE HAVE THE SAME FACTS, THAT IS THAT THAT TRIAL, THEN, HE TESTIFIED TO THAT. WOULD THE STATE HAVE THE SAME POSITION, THEN?

ARE YOU SAYING, IF I UNDERSTAND --

ABOUT THIS, THAT WE CAN COMMENT, THEN, ON THE FAILURE OF THE DEFENDANT TO CALL THAT PERSON, BECAUSE THE DEFENDANT HAS SPECIAL ACCESS OR CONTROL OR WHATEVER. IN OTHER WORDS, IF THIS HAD COME OUT, WHEN THE POLICE INITIALLY MADE THE ARREST, THEY HAVE GOT, YOU KNOW, THE NAME FROM THE DEFENDANT. THE DEFENDANT SAID THAT HANSON OR DANSON --

OKAY. TED HANSON.

WE HAVE TO GO TO "CHEERS" HERE, AND HAD THE NAME, BUT THE DEFENDANT GOT UP AND TESTIFIED THE SAME WAY, BUT WOULD THE STATE, STILL, BE IN A POSITION TO SAY WE CAN COMMENT ON THE STATE'S FAILURE TO CALL THAT WITNESS, BECAUSE THERE IS A SPECIAL RELATIONSHIP OR SPECIAL ACCESS OR SOMETHING, IF THE NAME HAD BEEN KNOWN TO THE STATE BEFORE THE TRIAL?

WELL, CERTAINLY I WOULD SUBMIT THAT, UNDER THOSE FACTS. HAD THE NAME BEEN -- HAD THE NAME BEEN DISCLOSED PRETRIAL, THEN, PERHAPS, THE SCALES WOULD TIP A LITTLE MORE, IN THE -- THAT THE STATE WOULD HAVE MORE EQUAL ACCESS, BUT IN THIS PARTICULAR CASE, THAT JUST WAS NOT DONE. I MEAN, THERE WAS NOTHING IN THE RECORD.

BUT DOESN'T THAT, AGAIN, SHOW THAT WE ARE, REALLY, NOT TALKING ABOUT A SPECIAL RELATIONSHIP. THAT IS THAT THIS ISN'T A RELATIVE, OBVIOUSLY, OF THE DEFENDANT'S. I TAKE IT HE SAID I DON'T KNOW WHERE --

THAT'S CORRECT. AND THAT IS ONE OF THE -- WHAT THE STATE SUBMITS IS ONE OF THE FALL ASSIST OF THE FOURTH DISTRICT, IS THAT THEY HAVE BEEN -- THEY HAVE APPLIED THIS SPECIAL RELATIONSHIP OR THE EQUAL AVAILABILITY LANGUAGE IN JACKSON, AS CONSTRUING THAT THERE BE SOME, ALMOST LIKE A FAMILIAL TYPE OF RELATIONSHIP, AND CLEARLY IN THIS PARTICULAR CASE THERE IS NONE, BUT THE OUTCOME OF THE, OF THIS CASE, UNDER THE FOURTH INTERPRETATION, WAS THAT THE WITNESS WAS, STILL, EQUALLY AVAILABLE TO THE STATE, WHEN, IN REALITY, THEY, REALLY, WERE NOT.

MAYBE WE ARE REALLY, NOW THAT JUSTICE ANSTEAD HAS ASKED YOU SOME QUESTIONS ABOUT

THAT THIS WASN'T HEARSAY, BECAUSE IT WENT TO THE STATE OF MIND, NOW I AM WONDERING WHETHER WHAT WE ARE, REALLY, TALKING ABOUT, HERE, IS SIMPLY A QUESTION OF WHETHER IT WAS AN ELEMENT OF BURGLARY THAT HE HAD TO HAVE INTENDED TO BE SOMEPLACE THAT HE DIDN'T HAVE PERMISSION FOR. IT IS NOT, REALLY, A LEGAL AFFIRMATIVE DEFENSE, BUT IT IS, JUST A GENERAL DEFENSE TO THE CRIME, AND THAT JACKSON WOULDN'T EVEN COME INTO PLAY, BECAUSE IT IS NOT -- HE IS NOT OFFERING IT FOR THE TRUTH OF THE MATTER. HE IS OFFERING IT, BECAUSE, HEY, THIS GUY TOLD ME. WOULDN'T EVEN HAVE TO GIVE THE NAME. SOMEBODY I MET TOLD ME I COULD BE IN THERE. IT WOULDN'T MATTER, IF IT WASTED HANSON OR DANCE ONE OR -- IF IT WAS TED HANSEN OR DANSON OR WHATEVER.

NONETHELESS, IT IS STILL CONSENT BY THE OWNER ISSUE, AND AT LEAST PRETRIAL THAT, IS HOW IT WAS COMMUNICATED, THROUGH THE DEPOSITION OF THE OFFICER. AND CERTAINLY THE STATE WOULD SUBMIT THAT THE DEFENDANT WOULD HAVE TO COME FORWARD WITH SOME DEGREE, SOME QUANTUM OF EVIDENCE, EVEN IF IT IS A GOOD FAITH DEFENSE, TO SHOW THAT HE HAD THE CONSENT, AND NOT THAT THE STATE SHOULD HAVE TO REFUTE THAT AS BEING AN ELEMENT.

ISN'T, TRULY, NONCONSENT, AN ELEMENT OF A BURGLARY? BECAUSE YOU HAVE TO ENTER WITHOUT CONSENT. CORRECT? I MEAN, SO NONCONSENT, NOT CONSENT BUT NONCONSENT WOULD BE AN ELEMENT OF THE CRIME OF BURGLARY.

WELL, JUSTICE QUINCE, I THINK, UNDER DELGADO, UNLESS I AM MISREADING DELGADO, DELGADO MADE IT VERY CLEAR THAT CONSENT IS AN AFFIRMATIVE DEFENSE, AND THAT THE DEFENDANT DOES --

WHICH IS WHAT I AM GETTING TO, IF NONCONSENT IS A PART OF BURGLARY, THEN, CERTAINLY, BY NEGATING ONE OF THE ELEMENTS OF BURGLARY, YOU ARE COMING FORWARD WITH AN AFFIRMATIVE DEFENSE. CAN IT BE READ THAT WAY?

I SUPPOSE YOU COULD READ IT AS THAT WAY AS WELL. SURE.

AND I WOULD LIKE TO GET BACK TO ONE OF THE QUESTIONS THAT JUSTICE ANSTEAD ASKED, IS WHAT IS THE STATE'S OBLIGATION? I MEAN, IT SEEMS TO ME THAT WHAT WE HAVE BEEN SAYING, HERE, IS THAT THE STATE, IF THEY KNOW WHO THE -- WHO THIS PERSON ALLEGES GAVE THEM CONSENT, THAT THERE IS SOME OBLIGATION ON THE PART OF THE STATE TO COME FORWARD WITH THAT WITNESS. IS THAT CORRECT?

I AM NOT SURE I UNDERSTAND.

WELL --

WE HAVE BEEN TALKING ABOUT AVAILABILITY -- NOT BEING EQUALLY AVAILABLE TO THE STATE AND THE DEFENSE OR BEING EQUALLY AVAILABLE TO THE STATE AND THE DEFENSE, SO, IF THAT PERSON IS, IN ORDER FOR THE STATE TO COMMENT ON THE PERSON'S ABSENCE, ARE YOU SAYING THAT THE STATE -- ARE WE SAYING, IN OUR CASE LAW, THAT THE STATE WOULD HAVE TO BRING THAT PERSON FORWARD? THAT SEEMS TO BE WHERE THIS IS ALL LEADING, TO ME.

I WOULD THINK THAT, FROM THE CASE LAW, THE CASE, FROM JACKSON AND ITS PROGENY, THE ORIGINAL CASES, THAT THE SHOWING IS THAT SIMPLY THAT THE WITNESS IS NOT EQUALLY AVAILABLE TO THE OTHER PARTY, BEFORE IT COULD COMMENT, SO THAT WOULD BE --

WHAT IS THE PURPOSE OF THAT THEN? WHAT IS THE RATIONALE BEHIND THE PERSON HAS TO BE NOT EQUALLY AVAILABLE TO BOTH PARTIES?

I WOULD THINK THAT THE RATIONALE BEHIND IT IS THAT, FOR FUNDAMENTAL PURPOSES, NO

PARTY SHOULD EVER COMMENT, IN A CRIMINAL CASE, ON THE OTHER PARTY'S FAILURE TO CALL A WITNESS, ESPECIALLY IF THAT WITNESS IS IN A POSITION THAT COULD, THAT PARTY MAKING THE COMMENT COULD HAVE EQUAL ACCESS TO, SO IT WOULD SEEM TO ME THAT THE EQUALLY-AVAILABLE LANGUAGE GOES TO WHETHER OR NOT THE PARTY FAILING THE CALL HAS SOME SUPERIOR ABILITY TO CALL THAT PERSON OR THAT PERSON IS MORE LIKELY THAN NOT, GOING TO GIVE FAVORABLE TESTIMONY, AND THAT, TO ME, IS HOW THE WHOLE BASIS BEHIND THE EQUAL AVAILABILITY RUE.

YOU ARE INTO YOUR REBUTTAL TIME. IF YOU WOULD LIKE TO SAVE SOME.

I WILL RESERVE. THANK YOU.

GOOD MORNING. MAY IT PLEASE THE COURT.

MS. WILLIAMS.

MY NAME IS MAXINE WILLIAMS, AND I REPRESENT THE RESPONDENT IN THIS CASE, MR. CHARLES HOGAN. MR. HOGAN, AS YOU HAVE ALREADY HEARD, HAS BEEN FOUND GUILTY OF TWO COUNTS OF BURGLARY, AND THAT HAPPENED ON FEBRUARY 28 AND MARCH 1 OF 1998. THE FOURTH DISTRICT COURT OF APPEAL, RELYING ON JACKSON AND BUCKRAM AND MICHAELS, CORRECTLY RULED THAT THE TRIAL PROSECUTOR IMPROPERLY COMMENTED ON THE DEFENDANT'S FAILURE TO CALL TED HANSON AS A WITNESS, BECAUSE IT WAS NOT SHOWN THAT TED HANSON WAS IN A SPECIAL RELATIONSHIP WITH MR. HOGAN.

PULL THE MICROPHONE TO YOU JUST A LITTLE BIT.

OKAY. TED HANSON WAS NOT IN A SPECIAL RELATIONSHIP WITH THE DEFENDANT, MR. HOGAN.

IS THIS A SPECIAL SITUATION, LIKE IN JACKSON, THAT THIS WAS A SPECIAL BURDEN THAT HAS BEEN ASSUMED BY THE DEFENDANT, OR IS THIS JUST COME INTO TRIAL, A GOOD FAITH STATE OF MIND IDEA THAT HE DIDN'T FEEL THAT HE COMMITTED BURGLARY, BECAUSE HE THOUGHT HE HAD PERMISSION?

I DON'T THINK IT WAS A STRAIGHT CONSENT CASE. IT WAS, REALLY, MORE OF A HYBRID, BECAUSE HE WAS, REALLY, SAYING I REALIZE I DON'T HAVE PERMISSION FROM THE OWNER, BECAUSE BY THE TIME HE GOT TO TRIAL, HE KNEW THE OWNER WAS SAYING, LOOK, I DIDN'T GIVE THIS GUY, TED HANSON, PERMISSION TO BE IN MY HOUSE, SO THEREFORE HE COULDN'T GIVE PERMISSION FROM ME TO GIVE YOU PERMISSION TO BE THERE, SO THEREFORE HE HAD A GOOD FAITH BELIEF THAT HE HAD A RIGHT TO BE IN THIS HOUSE AND THAT IT WAS OKAY FOR HIM TO BE THERE.

SO THE DEFENDANT, YOU ARE SAYING, DIDN'T VOLUNTARILY ASSUME A BURDEN OF PROOF, AND THAT IS, REALLY, A FRIENDLY QUESTION, TO UNDERSTAND THAT, IF THE STATE DIDN'T OBJECT TO THE TESTIMONY, IT WAS, REALLY, THEN, THEY WERE IMPLICITLY AGREEING THAT IT WASN'T COMING IN FOR THE TRUTH OF THE MATTER, BUT, AS A STATE OF MIND EXCEPTION.

RIGHT, AND I WOULD, ALSO, POINT OUT ABOUT THE STATE, IN ITS OPENING, EVEN BEFORE THE DEFENDANT TESTIFIED, TESTIFIED ABOUT THE STATEMENT THAT THE DEFENDANT MADE TO THE OFFICER, SO THE STATE'S POSITION, HERE, IS THAT THIS WAS THE FIRST TIME YOU RAISED THIS DEFENSE, IS SIMPLY BE LIED BY -- NOT BELIED BY THE RECORD, BECAUSE IN CROSS-EXAMINATION OF THE OFFICER, WHEN HE FIRST TESTIFIES, HE SAID HE GOT PERMISSION FROM THE OWNER. NOW, THE DEFENSE ATTORNEY CROSS-EXAMINED HIM. HE ADMITTED THAT, IN DEPOSITION, HE SAID -- HE TOLD ME HE HAD PERMISSION FROM THE PERSON WHO LIVED THERE.

SO, THEN, IF THAT IS THE CASE, IF WE ARE NOT TALKING ABOUT CONSENT AND AN AFFIRMATIVE

DEFENSE AND ALL OF THAT, THEN DO WE, REALLY, HAVE CONFLICT HERE? IS THIS TRULY A CASE OF CONFLICT, WITH HIGHSMITH AND THE OTHER CASE THAT IS CITED, TO BE IN CONFLICT?

I AM NOT SURE THAT WE DO, ON THE BASIS THAT THOSE CASES REALLY DON'T EVEN DISCUSS A SPECIAL RELATIONSHIP PORTION OF THIS CASE. THEY, REALLY, DEAL WITH DIFFERENT PARTS. THEY DEAL WITH THEIR REPLY, OR THEY DEAL WITH, YOU KNOW, OTHER ISSUES THAT ARE NOT RILT RELTED HERE, IN THIS CASE -- THAT ARE NOT RELATED HERE, IN THIS CASE, SO BASED ON WHAT I SAID IN MY BRIEF, I DON'T THINK WE REALLY HAVE A TRUE CONFLICT HERE, IN THIS CASE, BECAUSE THEY ARE, REALLY, DEALING WITH DIFFERENT ISSUES.

IN A CASE WHERE SOMEONE ASSERTS A DEFENSE OF ALIBI, AND THEN COMES IN A TRIAL AND SAYS THAT I WAS AT, YOU KNOW, MY MOTHER-IN-LAW'S HOUSE IN SEBRING, YOU HAVE GOT, I MEAN, TO ME, THAT IS A WHOLE DIFFERENT BALL OF WAX THAN THIS SITUATION.

RIGHT, AND THIS IS, ALSO, NOT THE FIRST TIME HE BRINGS IT THIS INFORMATION UP, AND FOR THE STATE TO SAY THAT THIS IS THE FIRST TIME THEY WERE HEARING ABOUT IT IS SIMPLY NOT TRUE. THE INFORMATION WAS GIVEN TO THE OFFICER. THAT INFORMATION IS IMPUTED TO THE STATE, AND THEY SIMPLY COSE TO IGNORE -- CHOSE TO IGNORE IT.

SO WHAT DO YOU CONSENT -- CONTEND, THEN, IS THE STATE'S OBLIGATION, IF HE HAD SAID TED HANSON, WHOM I KNOW FROM X-Y-Z PLACE, WHERE I MET HIM, GAVE ME PERMISSION TO BE HERE. WHAT DO YOU CONTEND IS THE STATE'S OBLIGATION, GIVEN THIS INFORMATION?

GIVEN THAT INFORMATION, THE STATE WOULD HAVE MADE AN ATTEMPT TO HAVE FOUND HIM, AND IF HE WERE NOT TO BE FOUND, THEN THERE WOULD BE NO COMMENT.

ASSUMING HE COULDN'T FIND HIM, THEN WHAT NEXT? WHAT IS THE STATE OBLIGATED TO DO WITH HIM?

I DON'T KNOW IF THE STATE HAS AN OBLIGATION TO DO ANYTHING. I THINK THEY WOULD HAVE AN OBLIGATION TO INVESTIGATE, MAYBE, AND SPEAK WITH HIM, AND SEE WHAT HE HAS TO SAY, IF IT IS GOING TO BE RELEVANT TO THE CASE, AND BRING HIM IN, IF HE IS GOING TO HAVE IMPORTANT INFORMATION TO GIVE.

SUPPOSE THE STATE FOUND HIM. HE, IN FACT, SAID, YEAH, I TOLD OUR DEFENDANT, HERE, THAT HE COULD GO INTO THAT HOUSE. BUT KEEPING IN MIND THAT THE STATE, ALREADY, HAS THE OWNER OF THE HOUSE, WHO SAYS I DIDN'T GIVE ANYONE PERMISSION TO BE IN THERE, TO GO IN THERE AND CLEAN IT, TO DO ANYTHING.

RIGHT.

AND SO WHAT, THEN, DOES THE STATE DO WITH MR. HANSON, EVEN IF HE CORROBORATES WHAT THE DEFENDANT SAYS?

I THINK THAT WOULD GO TO WHETHER OR NOT THEY WOULD EVEN PROCEED WITH THE CASE, BECAUSE THEY WOULD GO TO MR. HANSON'S STATE OF MIND, AS TO WHETHER OR NOT HE TRULY COMMITTED A BURGLARY OF THIS HOUSE. IF HE HAD THE INTENT TO DO THAT, SO I AM NOT SURE, YOU KNOW, WHAT, IF THE STATE WOULD BRING HIM IN, BECAUSE THAT WOULD, CERTAINLY, HURT THEIR CHANCES.

WHAT INTENT ARE WE TALKING ABOUT, BECAUSE WHAT ARE THE ELEMENTS OF BURGLARY? WHAT KIND OF INTENT DO YOU HAVE TO HAVE, TO HAVE A BURGLARY? ANOTHER INTENT TO ENTER TO COMMIT AN OFFENSE, AND THERE, ALSO, THE INTENT TO ENTER TO COMMIT SOME CRIME IN THE HOUSE.

HE ENTERED WITHOUT CONSENT.

AND THEN THE INTENT --

EXCUSE ME?

GO AHEAD. I AM SORRY.

IT IS THE INTENT TO ENTER WITHOUT CONSENT. THAT IS ONE. AND THEN THE INTENT TO ENTER TO COMMIT SOME OFFENSE.

DID THE JURY GET A SPECIAL INSTRUCTION IN THIS CASE, AS YOUR OPPONENT INDICATED, GOING THE STATE OF MIND OR WHATEVER?

YES. IT DID GET A SPECIAL INSTRUCTION.

WHAT DID THAT SAY, BY THE WAY?

THAT INSTRUCTION WAS, I THINK IT WAS SOMETHING LIKE, IF HE HAD A GOOD FAITH BELIEF THAT HE HAD PERMISSION TO ENTER THIS HOUSE.

WAS THERE ANY OBJECTION TO THAT INSTRUCTION?

I DON'T REMEMBER THERE BEING AN OBJECTION BY THE STATE, BELOW, TO THIS INSTRUCTION.

WAS THERE ANYTHING ABOUT THE BURDEN OF PROOF, IN THE INSTRUCTIONS, THAT THE -- WHAT -- THAT THE DEFENDANT HAD THE BURDEN TO PROVE SOMETHING?

I DON'T RECALL IF THERE WAS OR NOT.

BUT ISN'T THAT IMPORTANT, BECAUSE THE WHOLE IDEA OF WHY IT IS WRONG FOR THE STATE TO ORDINARILY COMMENT ON THE FAILURE OF A DEFENDANT TO CALL A WITNESS IS BECAUSE THE STATE HAS THE BURDEN OF PROOF. ONCE WE GET INTO CERTAIN DEFENSES, THAT THE DEFENDANT, ONCE THEY ASSUME AND HAVE A THE BURDEN OF PROOF, THAT SAME CONSTITUTIONAL PROBLEM IS LESS END, AND SO, AGAIN, IN AN ALIBI SITUATION, IT IS FAR DIFFERENT THAN IF THEY JUST SAY, IF WE ARE TALKING ABOUT WITNESSES TO A MURDER, AND IT IS THE STATE'S OBLIGATION, SO ISN'T -- I GUESS, TRYING TO UNDERSTAND WHETHER -- WHAT KIND OF ANIMAL THIS SITUATION WAS, SEEMS TO ME CRITICAL AS TO WHETHER YOUR CLIENT, YOUR DEFENDANT, IS HARMED IN A CONSTITUTIONAL SENSOR NOT, BY THOSE PRINCIPLES.

I THINK, IF IT IS A TRUE CONSENT CASE, HE DOES HAVE THE BURDEN OF COMING FORWARD WITH SOME EVIDENCE OF THIS CONSENT. HE DID THAT. HE BROUGHT FORTH HIS OWN TESTIMONY. HE BROUGHT FORWARD -- THERE WAS, CERTAINLY, ALSO, CIRCUMSTANTIAL EVIDENCE THAT THIS CONSENT WAS GIVEN. IF YOU LOOK AT THE CONDITION OF THE HOUSE, IT LOOKED LIKE IT HAD BEEN LIVED IN FOR SOME TIME. THERE WERE PRINTS IN THE HOUSE THAT BELONGED TO PEOPLE THAT WAS NOT MR. HOGAN'S PRINTS, SO THERE WERE, CERTAINLY, EVIDENCE THERE THAT HE BROUGHT FORTH, ABOUT --

YOU ALL HAVE KIND OF BAFFLED ME, BY GETTING INTO THE -- THIS BUSINESS OF CONSENT, BECAUSE IT SEEMS TO ME WHAT YOU ARE, REALLY, TALKING ABOUT IS THE INTENT FACTOR FOR THE BREAKING AND ENTERING, RATHER THAN ANY TYPE OF CONSENT OR NONCONSENT, REGARDLESS OF WHO HAS GOT THE BURDEN THERE. I MEAN, WHAT I UNDERSTAND IS THAT THIS INSTRUCTION WENT TO THE BASIS UPON WHICH HE WAS IN THE HOUSE AND WHETHER OR NOT WHETHER HE -- AND WHETHER HE HAD A GOOD FAITH BELIEF THAT HE COULD GO IN THE HOUSE AND THEREFORE THAT WOULD DESTRUCT THE INTENT. ISN'T THAT WHERE WE ARE HERE?

YES. YES. YES. THAT'S RIGHT.

AND THAT HE WAS SAYING THAT HIS -- AND WHAT HE TEST TIED TO -- TESTIFIED TO WAS THAT THE BASIS OF HIS GOOD FAITH, AND THEREFORE HIS LACK OF INTENT, WAS ON THE -- WHAT MR. HANSON HAD TOLD HIM.

RIGHT.

THAT IS WHERE WE ARE.

RIGHT.

AND SO, REALLY, WE ON DO HAVE -- AND SO, REALLY, WE DO HAVE THIS, WRAPPED AROUND AN ELEMENT, FROM THE STANDPOINT OF THE FACTOR OF WHETHER THERE IS AN INTENTIONAL BREAKING.

THAT'S TRUE, AND I GUESS BECAUSE THEY ARE SORT OF INTERRELATED, IT IS SORT OF DIFFICULT TO, YOU KNOW, SORT OF GO STRAIGHT AND SAY IS THIS REALLY A CONSENT, OR IS THIS, REALLY, AN INTENT ISSUE, AND SO THERE IS A LITTLE BIT OF CONFUSION THERE, BUT IT, REALLY, DID GO TO HIS GOOD FAITH BELIEF, AND THAT SORT OF GETS US OUT OF ALL OF THE JACKSON ELEMENTS ABOUT WHETHER OR NOT IT IS AN AFFIRMATIVE DEFENSE AND THEN, WHETHER OR NOT IS THIS WITNESS AVAILABLE, AND THIS WITNESS IS SOMEBODY WHO IS IN A POSITION TO BE CALLED IN.

WAS THERE AN OPENING STATEMENT GIVEN BY THE DEFENDANT'S LAWYER HERE?

YES. THERE WAS AN OPENING STATEMENT.

WAS IT GIVEN AT THE BEGINNING, BEFORE THE RECEIPT OF ANY EVIDENCE?

YES, THERE WAS.

AND WAS THIS ALLUDED TO IN THE OPENING STATEMENT?

YES. HE MENTIONED THIS INFORMATION TO THE JURY, AND I DON'T BELIEVE THERE WAS ANY OBJECTION AT THAT TIME, EITHER, FROM THE STATE'S SIDE.

HE MENTIONED THE NAME?

HE MENTIONS THE NAME TED HANSON. BUT, ALSO, YOU WANT TO REMEMBER THAT THE DEFENDANT MENTIONS THE NAME, TOO, TO THE OFFICER, AND THE OFFICER CHOSE TO NOT WRITE IT DOWN, BECAUSE ONCE HE HEARD THE NAME AND IT DIDN'T MATCH WITH THE OWNER'S NAME, BECAUSE HE KNEW THE OWNER, HE JUST SIMPLY CHOSE NOT TO WRITE IT DOWN.

SO THE OFFICER SAID THAT HE WAS GIVEN A NAME THAT DIDN'T MATCH WITH THE OWNER?

BASICALLY, YES, BECAUSE --

YOU SAID BASICALLY. LET'S NOT SAY BASICALLY.

RIGHT.

LET'S SEE WHETHER HE DID OR NOT. DID THE OFFICER SAY, YES, HE MENTIONED A NAME, BUT IT WASN'T THE NAME THAT I KNEW TO BE THE OWNER, AND THAT IS WHY I DIDN'T WRITE IT DOWN, OR WHAT?

JUST GIVE ME ONE MOMENT, PLEASE. YOU ARE ASKING ME FOR... HERE IT IS. HERE IT, ON PAGE 218.

HE SAYS -- I ASKED THE QUESTION. I ASKED HIM WHO IT WAS, AND HE GAVE ME A NAME WHICH I DON'T REMEMBER, AND IT COULD HAVE BEEN TED HANSON OR ANYBODY ELSE, SO HE WAS GIVEN A NAME, AND HE KNEW THE OWNER, AND IT WASN'T THE OWNER'S NAME, AND HE SAID THAT EARLIER, TOO, ON HIS DIRECT.

LET ME COME BACK TO THE OPENING STATEMENT. YOU SAY THAT THE DEFENSE LAWYER DID GIVE THE NAME TED HANSON, IN THE OPENING STATEMENT?

YES. HE GAVE A NAME. I WOULD, ALSO, LIKE TO ADD THAT THE STATE CITED TO A NUMBER OF CASES ABOUT WHEN THE COMMENT SHOULD BE PERMITTED, AND WHETHER OR NOT THEY SHOULD PERMIT IT, UNLESS IT IS A COMMENT ON SILENCE, AND ALL OF THOSE CASES, WHEN YOU LOOK AT THOSE CASES, ALSO, REQUIRE SOME KIND OF SPECIAL RELATIONSHIP OR SOME KIND OF RELATION TO THE DEFENDANT, BEFORE THE COMMENT CAN BE ALLOWED, SO THOSE CASES THAT THEY CITE TO AREN'T, REALLY, DIFFERENT FROM WHAT THE RULE IS IN FLORIDA, AND SO, REALLY DON'T HELP THE STATE, AND IT IS -- IT IS DISCUSSIONS HERE TODAY. IF THERE ARE NO OTHER QUESTIONS --

SO ARE YOU -- YOU AGREE, OR IT IS YOUR POSITION THAT EQUALLY AVAILABLE OR NOT EQUALLY AVAILABLE IS THE SAME AS HAVING A SPECIAL RELATIONSHIP, AND THAT MAKES THE WITNESS NOT EQUALLY AVAILABLE?

YEAH. I THINK THAT IS WHAT THE JACKSON CASE SAYS, AND THE LAWYER CASE. THEY, BASICALLY, TALK ABOUT EQUALLY AVAILABLE AND SPECIAL RELATIONSHIP, BEING, BASICALLY, THE SAME THING.

SO THERE IS NO OTHER CIRCUMSTANCE, WHERE A WITNESS COULD BE NOT EQUALLY AVAILABLE.

YOU MEAN NO OTHER CIRCUMSTANCE. IT HAS TO BE A FAMILIAL RELATIONSHIP, YOU MEAN?

YEAH. YOU HAVE TO HAVE A SPECIAL RELATIONSHIP, IN ORDER TO QUALIFY AS BEING NOT EQUALLY AVAILABLE.

I DON'T THINK I AM RULING OUT ANY OTHER KIND OF RELATIONSHIP, BUT I THINK THERE HAS TO BE SOME KIND OF CLOSE RELATIONSHIP OR A RELATIONSHIP WHERE THE WITNESS IS --

I WASN'T JUST TALKING ABOUT FAMILIAL RELATIONSHIP.

OKAY.

BUT SOME SPECIAL, SEE, RELATIONSHIP. YOU CAN NEVER HAVE A WITNESS WHO IS NOT EQUALLY AVAILABLE, UNLESS THE WITNESS HAS SOME SPECIAL RELATIONSHIP TO THE DEFENDANT.

YEAH. THAT IS TRUE. AND, ALSO, THE WITNESS NEEDS TO BE AVAILABLE, AND IN THIS CASE, WE HAVE A WITNESS WHO IS NOT AROUND AND WHO THE DEFENDANT HAS TESTIFIED --

HOW DO WE KNOW THAT?

WELL, THE DEFENDANT HAS TOLD US HE DOESN'T KNOW WHERE HE IS AND CAN'T FIND HIM, AND THIS GUY, PRESUMABLY, IS A HOMELESS GUY, WHO --

DID HE SAY HE COULDN'T FIND HIM? THERE IS EVIDENCE IN THIS RECORD THAT HE ATTEMPTED TO FIND HIM?

THERE IS NO EVIDENCE IN THE RECORD THAT HE ATTEMPTED TO FIND HIM, BUT HE DOESN'T KNOW WHERE HE IS, AND HE HASN'T SEEN HIM SINCE THE DAY THIS HAPPENED, AND, ALSO, THIS

TED HANSON IS, PRESUMABLY, A HOMELESS PERSON, AS WELL AS THE DEFENDANT WAS, BECAUSE THEY, BOTH, TOOK THEIR MEALS AT A PLACE WHERE HOMELESS PEOPLE TAKE THEIR MEALS, AT A CHAPEL THERE, IN SAINT LAWRENCE, CHAPEL, SO THIS IS A WITNESS WHO IS, BASICALLY, UNAVAILABLE TO EVERYONE, INCLUDING THE STATE, AND THE COMMENT SHOULD HAVE BEEN PERMITTED.

DO YOU AGREE THAT, WHEN THE DEFENDANT TESTIFIES, AS THE DEFENDANT TESTIFIED HERE, THAT OUR CONCERN, WHICH IS THAT THIS COULD BE CONSTRUED AS A COMMENT ON THE FAILURE TO TESTIFY OR ON HIS RIGHT TO REMAIN SILENT, IS ELIMINATED, SO WE ARE, THEN, JUST, REALLY, FOCUSING ON HOW DOES THIS IMPACT ON THE STATE'S REQUIREMENT THAT THEY BEAR THE BURDEN OF PROOF.

RIGHT.

AND THEREFORE, AND I GUESS HE GETS I GET BACK TO THE ORIGINAL THING, TO ME THE FIRST INQUIRY THAT HAS TO BE ANSWERED IS, IS THIS GOING TO THE STATE'S CASE, AS INTENT ELEMENT, OR IS THIS, REALLY, GOING TO ONE OF THESE AFFIRMATIVE DEFENSES, AND BECAUSE ONCE IT IS TO SOMETHING THAT THE DEFENDANT HAS TO PROVE, WE KNOW LONGER HAVE THAT OTHER -- WE NO LONGER HAVE THAT OTHER PROBLEM THAT IS AN IMPERMISSIBLE COMMENT AND IT IS BURDEN SHIFTING, BECAUSE THE BURDEN SHIFTS, AT A MATTER OF -- AS MATTER OF LAW.

I THINK -- LET ME JUST TRY TO ANSWER IT THIS WAY. I THINK THIS, REALLY, GOES TO THE INTENT, AND BECAUSE YOU HAVE THE WORD" CONSENT" IN THERE, IT MAKES IT REALLY FUZZY AS TO WHAT IS, REALLY, HAPPENING, BUT I THINK IT REALLY GOES TO THE INTENT OF THE DEFENDANT AND GOING --

SO THIS DOESN'T EVEN GET PAST THE FIRST PRONG OF JACKSON, AND WE WOULDN'T REACH THE ISSUE, THEN, OF THE EQUALLY AVAILABLE, IF IT DOESN'T GET TO THE FIRST PRONG.

THAT'S TRUE, BUT BECAUSE IT IS SORT OF A HYBRID, IT IS IMPORTANT TO MENTION THE OTHER FACTORS, TOO, BECAUSE IT, REALLY, ISN'T THAT CRYSTAL CLEAR. WHEN YOU TALK ABOUT THE WORD -- WHEN THE WORD "CONSENT" COMES IN THERE, AND THE WAY IT WAS HANDLED AT TRIAL AND THE WAY THE JUDGE RULED, BUT IT, REALLY, DOES GO TO THE INTENT OF THE DEFENDANT, IN ENTERING THAT HOUSE AND WHAT HE WAS THINKING, WHEN HE WENT IN, AND STAYED THERE FOR A COUPLE OF DAYS. IF THERE ARE NO OTHER QUESTIONS, I WILL JUST REST ON MY ARGUMENTS AND THE BRIEF, AND I WOULD ASK YOU TO AFFIRM.

MR. BONAVITA, WHAT ABOUT THIS PROPOSITION THAT THIS, REALLY, BOYS DOWN TO HAVING GONE TO THE INTENT ELEMENT?

I SEE WHERE THE COURT IS GOING WITH THIS. MY RESPONSE IS THAT, WHETHER IT IS -- WE WANT TO REGARD IT AS BEING A TRUE AFFIRMATIVE DEFENSE OR A NEGATION OF AN ELEMENT OR, PERHAPS, EVEN A HYBRID SOMEWHERE IN BETWEEN, I THINK FUNDAMENTALLY, IN A SITUATION LIKE THIS, THE DEFENDANT ALLUDES TO IT, AND IF ANYTHING, GIVES THE JURY THE IMPRESSION THAT THIS PERSON DID, IN FACT, GIVE HIM PERMISSION TO BE THERE, BECAUSE THAT IS WHAT HE TESTIFIED TO, THAT I DID HAVE PERMISSION TO BE THERE. I WAS GIVEN PERMISSION BY TED HANSON, AND, NOW, NOT PERMITTING THE STATE TO MAKE ANY REFERENCE TO --

WHAT ABOUT THE STATEMENT IN JACKSON THAT SAYS THE STATE CANNOT COMMENT ON DEFENDANT'S FAILURE TO PRODUCE EVIDENCE TO REFUTE AN ELEMENT OF THE CRIME? AND SO, IF WHAT WAS NOT PRODUCED THROUGH MR. HANSON WAS TESTIMONY WHICH WOULD REFUTE THE ELEMENT OF INTENT?

I -- MY ANSWER TO YOUR QUESTION IS I THINK THAT, AGAIN, THIS IS NOT TRULY GOING TO A

NEGATION OF AN ELEMENT, SO TO SPEAK. I BELIEVE THE STATE WOULD SUBMIT THAT THIS -- HE WAS TESTIFYING THAT HE HAD PERMISSION TO BE THERE. NOW, THE DEFENDANT'S JURY INSTRUCTION MIGHT TEND TO REGARD IT AS BEING A STATE OF MIND, BUT, CERTAINLY, HIS BASIS, HIS DEFENSE, AS HE TESTIFIED TO IT, AND AS IT WAS ARGUED, IN BOTH OPENING AND CLOSING, WAS THAT HE HAD THE PERMISSION, THE CONSENT TO BE THERE.

I TAKE IT THE TRIAL COURT, THOUGH, DID NOT INSTRUCT THE JURY THAT THE DEFENDANT HAD THE BURDEN OF PROOF THAT HE RECEIVED CONSENT.

NO, JUSTICE ANSTEAD. AS FAR AS I CAN SEE FROM --

SO THERE WAS NO AFFIRMATIVE DEFENSE INSTRUCTION?

CORRECT. AS FAR AS I CAN SEE.

THIS CASE IS, REALLY, A LITTLE DIFFERENT THAN THE OTHER SETTINGS THAT WE HAVE LOOKED AT THIS ISSUE IN. IS THAT -- WOULD YOU AGREE?

I WOULD AGREE TO SOME EXTENT, YES, BECAUSE THE CONSENT ISSUE WAS NOT, IN FACT, READ TO THE JURY. RATHER THE CONSENT INSTRUCTION WAS NOT READ TO THE JURY. JUSTICE PARIENTE, LISTENING TO YOUR QUESTIONS, I THINK YOU ARE TOUCHING A LITTLE BIT ON THE ISSUE AND ON THE ISSUE OF WHETHER OR NOT WHAT ERROR, IF ANY, THIS MAY HAVE CREATED, WHETHER IT WAS A HARMLESS ERROR OR NOT. YOU DIDN'TAL LEWD TO IT DIRECTLY, BUT I WOULD LIKE TO JUST QUICKLY SAY THAT, EVEN ASSUMING THAT THERE WAS AN AREA HERE, BY THE STATE'S REFERENCE, THE STATE SUBMITS THAT, IN LIGHT OF THE ENTIRE RECORD, IT IS A HARMLESS ERROR, AND THAT IS SIMPLY BECAUSE THAT, IF YOU LOOK AT THE WHOLE DANGER THAT YOU ARE TRYING TO PREVENT HERE, THAT IS GIVING THE JURY THE FALSE IMPRESSION THAT THE DEFENDANT HAS TO NEGATE THEIR GUILT, CLEARLY IN THIS PARTICULAR CASE, THAT THAT IMPRESSION IS NOT MADE.

I THINK YOUR TIME IS UP, MR. BONAVITA.

THANK YOU.

THANK YOU, COUNSEL. APPRECIATE USUAL ASSISTANCE ON THIS CASE. WE WILL BE IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE RISE.