ORAL ARGUMENT — 9/8/99
98-0582
THE STATE OF TEXAS V. US CURRENCY

JOHNSTON: I am assistant AG for the State of Texas. Petitioners have been looking forward to this opportunity to come before this court, to ask this court to reinstate a judgment on a trial. I tried this case in the TC. I know what this trial consisted of. The facts of the case, the facts of the evidence are set out in my brief. The trial consisted of overwhelming evidence that the money in this case, the subject of this lawsuit, was dope money. I am going to use that term "dope money" because it's a lot easier and shorter than saying the elicit proceeds of illegal narcotic's transactions. Also, because it's the term used by Mr. Overra himself, he's the respondent in this case, when he described the money to the police on April 3, 1994 when the money was discovered.

The evidence in this case was so overwhelming that Mr. Overra chose to assert his 5th amendment privilege when deposed in this matter to any questions of substance concerning that money. It also was so overwhelming, Mr. Overra chose not to appear and testify at this trial or even to appear in the courthouse or even at his home so he could be subpoenaed by the State to the trial.

O'NEILL: We are not as concerned are we with the evidence of the connection between the defendant and the drug money as we are about the consent issue, is that correct?

JOHNSTON: Yes, that is correct. The three issues that we have briefed, the first two, the first being that of the consent; the first two are independent of each other but they dovetail. They do concern the legality of the search.

HANKINSON: What is the standard of review that we should apply in reviewing the consent issue?

JOHNSTON: I believe that what the court should be looking for is the totality of circumstances regarding the voluntariness of the consent that Mr. Overra gave.

HANKINSON: And in reviewing the totality of the circumstances what standard should we use?

JOHNSTON: Well there's a standard that is put forth in the appeal's court opinion, which I believe is an incorrect standard that they use. They throw that in after conducting an erroneous analysis of proof of the poisonous tree doctrine. They've apparently used a reasonable doubt standard employing a standard of review for criminal cases. They put that in writing in their opinion. I believe that to be incorrect.

HANKINSON: Well the totality of the circumstances does arise from the criminal law.

JOHNSTON: Yes, it does. In the criminal law that would apply to this case, and understandably this is a civil proceeding, a a civil trial drawing out of a criminal law enforcement event, the seizure of the money, I think the case law both in the US SC and the case law that Texas has followed, the cases cited in our brief, which would be the totality of circumstances to look at all - the appeals court apparently decided...

HANKINSON: But how much deference is the appellate court required to give to the trial court's determination on consent?

JOHNSTON: The consent's been determined in Texas to be a question of fact. I think that you give great deference to the TC's finding.

HANKINSON: Well how do we deal then with the Texas Court of Criminal Appeal's decision in *Guzman* where they have stated that the standard, as I understand it, is just a continuum along the way and if there are not factual determinations that underpin the evaluation of totality of circumstances, then the review is de novo, which would mean no deference to the TC's determination?

JOHNSTON: I understand that *Guzman* still gives the TC great deference as far as judging the credibility of witnesses. Here the only witnesses that testified was our state trooper, and of course we also had the videotape of the entire event offered by the state. I think the TC would have been in the best position and should be given great deference for its determination and its findings of fact and the issue of credibility of that testifying police officer and what the court saw in the videotape and made its own determination.

HANKINSON: What standard do the federal appellate courts use in reviewing civil forfeiture determinations when a consent issue or voluntariness arises in the context?

JOHNSTON: It would be for the totality of the circumstances.

HANKINSON: No, I understand that you've looked at the totality circumstances, but I'm talking about how much deference is given. Is it an abuse of discretion review? Is it a de novo review? Is it something in between? What standard did the federal courts use?

JOHNSTON: I'm here to submit to this court that it should be a deference to the TC because it hinges on the credibility of the witnesses that the TC is able to see.

HANKINSON: Is that what the federal courts do?

JOHNSTON: Yes.

HANKINSON: Do you have any citations to federal authority?

JOHNSTON: I'm not a great person at reciting citations. I will rely on what's cited in my brief. I believe that the *Schnelkloff* _____ case is one that should be dispositive of this.

O'NEILL: Can you point to any evidence in the TC you refer to the officer's testimony of the _____? We've got the videotape here as part of the record so we could just review that de novo. But the TC would be in no better position to determine credibility from the videotape. But as far as the officer's testimony in the TC what evidence or testimony can you point to that would involve the TC's determination of the officer's credibility?

JOHNSTON: Well the officer testified on direct and was cross-examined extensively about exactly what happened in the conversation with Mr. Overra standing there behind his truck. That is also the exact same conversation that's captured on the videotape.

O'NEILL: And so none of that's disputed. The facts are not in dispute?

JOHNSTON: It is not disputed. There is no uncontroverted facts that were brought out in this trial.

O'NEILL: So if the facts are undisputed, we're not really talking about judging credibility of the witness. We're talking about pure application of law to undisputed facts?

JOHNSTON: Well in a way. But I think in a way that's almost - it would disadvantage the plaintiff in this case with Mr. Overra not coming to court and testifying to say, "I really didn't consent. I didn't mean to consent when I said I guess so to Trooper Morris." In a way I'm put at a disadvantage by not having him come to court because the CA I guess has gone inside his head to assume that he didn't understand the question or he was not consenting. The testimony at TC was Trooper Moore testifying to the judge that "I asked the man the question, I heard his response, I understood that to be an affirmative response." And then we rely on his credibility and the court issuing a finding of fact that he found Trooper Moore along with the other state's witness to be credible.

Also Trooper Moore was cross-examined about a statement he later makes which is on the videotape when the dog handler arrives and that's set out in our brief as well. When the dog handler arrives, Trooper Moore ways something to the effect, "This man doesn't want his truck searched." And Trooper Moore testified that what he meant there was he has given me affirmative consent to search the truck, but he's not enjoying this. He doesn't want this to happen but he has given me affirmative consent to search his truck.

O'NEILL: Is that testimony in the record, or is that the inference that you're saying the state is capable of...

JOHNSTON: No, as Trooper Morris explained in that statement during trial, both on direct and cross-examination. Because that is a statement that might lead you to believe that Trooper Moore really doesn't think he's been given affirmative consent. But he explained that statement meaning "No, I was given affirmative consent when I asked Mr. Overra can I have your permission to search the trailer and the cab." That's the front part of the truck. Mr. Overra says, "I guess so." "I understood that to be an affirmative consent that he gave me."

Later on that off-hand remark that I make to the dog handler didn't mean I had changed my mind that I didn't believe that. It just means that Mr. Overra wishes he was probably somewhere else because he knows that I've got a chance of finding this dope money that's hidden in his truck.

O'NEILL: Do you agree that we apply the _____ _____ standard ____ review the evidence of consent?

JOHNSTON: I think the reasonable doubt standard that's put out in the opinion right now I think is just clearly wrong. I would think a clear and convincing standard based on the totality of the circumstances, I think that is the important thing rather than to zero in on one circumstance...

O'NEILL: But you would agree based on the totality of the circumstances there must be clear and convincing proof that it was voluntary?

JOHNSTON: Yes.

PHILLIPS: Would you talk for a minute about your second point, probably cause for the search even if there's no consent to clearly address the credibility of whom owed the dog?

JOHNSTON: The only evidence put forward by the respondent in this case was to bring in an expert who had never seen the dog, worked with the dog, or handled the dog himself. He was able to get on the witness stand and give opinions. Tactically, we did not even cross examine this person because he had no direct facts of anything and never on the record ever said that this dog was not alerting to the odor of marijuana on April 3, 1994. He never testified to that because I'm going to assume because that is true. And as Justice Seerden pointed out in his dissent, the 13th CA, in this case the dog was right. There was traces of marijuana found in that truck as a result of the search. There was also $217,590.00 of dope money which could have also have been tainted for the odor of marijuana. We of course know that now. But no one ever said that the dog was wrong in this case. In fact we know from the facts, the dog was in fact right. Now it is Texas law following US SC law that the alert of a trained detection dog will establish probable cause to search a vehicle and the vehicle may be moved to a location such as a police station to complete that search absent the obtaining of a search warrant.

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RESPONDENT

GARZA: The review of the findings of fact in this case which we contend is a civil quasi criminal case is not and should not be the traditional civil case restricted standard of don't overturn the verdict, the jury finding or the judge finding unless those findings were so against the great weight and preponderance of the evidence as to be clearly unjust. This is not a, as your honor has pointed out, a disputed evidence case. This is not a some evidence verses no evidence type of review case. This case is not like a negligence case where you may have to challenge or there's brought to court specific acts of negligence or whether there was sufficient evidence to support that finding or other types of items of findings such as damages, etc. The issue in this case is whether the respondent gave legally effective consent to search.

ABBOTT: But what burden of proof did the CA establish?

GARZA: The CA I believe accepted the burden of proof under a de novo review that the evidence should be positive and unequivocal, first of all, and that it should be done by clear and convincing evidence.

ABBOTT: Didn't the CA use a criminal burden of proof as opposed to a civil burden of proof?

GARZA: It has to be a criminal CA's I submit...

ABBOTT: What's your legal basis of that?

GARZA: One, the statute itself. Article 59.03 talks about the legality of warrants, the legality of consent, the legality of searches put forth under the criminal jurisprudence. That's the only area of law that brings those issues into sharp focus. And, therefore, we have the situation here where yes the case is prosecuted civilly, but it's full of criminal law implications by necessity. That has to be full of criminal law implications. And that's what's wrong with the state's position in this case.

O'NEILL: Let's talk about the statute. Article 59.03(b)(1) says that owner of the property must knowingly consent. Now I believe that the TC and the CA spoke in terms of voluntary consent when the statute says knowingly. Is there a difference?

GARZA: I think they did not find that Mr. Overra had voluntarily consented or knowingly consented. But rather that his consent was not shown by clear and convincing evidence to have been positive and unequivocal.

O'NEILL: The CA's opinion seemed to speak in terms of there are criminal cases that deal with voluntary consent. And they use the voluntary term that is typical for criminal cases.

GARZA: Those terms I find are interchangeably used in many opinions.

O'NEILL: Right. And is there any significance for the fact that the statute speaks in terms of knowingly as opposed to voluntary?

GARZA: I would submit that the significance is that it still must be the equivalent of legally effective consent. Knowingly consent, although it doesn't say the individual must give legally effective consent. That's what it must mean.

O'NEILL: So you believe that knowingly and voluntarily are similar?

GARZA: To a large degree, yes.

GONZALES: What makes this consent not knowing consent or voluntary consent?

GARZA: Because it wasn't legally effective. The issue here is not whether Mr. Overra said, I guess so. That's a conceded point. Obviously he said, I guess so. The issue is not is there evidence to support the proposition that Trooper Moore believed that he was obtaining consent. The issue is, upon examination of the totality of the circumstances as a mixed question of law and fact, was there a proper showing by clear and convincing proof of positive unequivocally consent.

GONZALES: What would that look like?

GARZA: That would have to look like a lot better than what it looks like in this case. Every case turns on its facts expressly in this area of search and seizure. And that's why the court very much has to employ a totality of the circumstances, de novo review, unless there is precisely disputed factual issues, which again they are not involved here.

HANKINSON: The state argues that the CA and you just did in your argument as well focuses too much on one aspect, and that is trying to infer or interpret his statement "I guess so," and in doing so, it did not look to the totality of the circumstances. Would you respond to that argument.

GARZA: I disagree that the court did not take into account the totality...

HANKINSON: You agree though that the CA's decision turns on interpreting that one statement?

GARZA: It placed emphasis on, but he also laid on his various footnotes, the various factors that the court apparently was recognizing that the court should consider, and I would submit did consider in makings its conclusion based on a de novo review. Yes.

HANKINSON: Do you disagree with the authority cited by the state in its brief citing to Texas

cases that lists the various factors that go into the evaluation of the totality of circumstances?

GARZA: No, I think we agree on that. In fact one of the things I had written here was that the state seems to recognize these authorities but doesn't accept them. They don't want to accept their applicability in the case at hand.

HANKINSON: And I understand your view is that the TC is entitled to no deference in its determination _____?

GARZA: In this situation deference but under a de novo review. In other words, I don't think it's entitled to the deference that the cases speak of when the determination turns on credibility, turns on an observation of demeanor.

HANKINSON: Isn't that part of what's at issue here if it is necessary for the fact finder to look at the videotape in this instance of your client saying, "I guess so" to the trooper at the scene where the trooper is searching the truck? Isn't that a credibility determination or isn't that part of what a fact finder has to do is to infer from the totality of those circumstances what he meant?

GARZA: I agree that it's part, but I think in this case the CA de novo determination is correct, that the TC erred in deeming that under the totality of circumstances for the state to have met its burden by showing by clear and convincing proof that the consent was positive and unequivocal. That's what the state refuses to face in this case. It won't talk too much about meeting the burden of establishing the consent by positive and clear evidence and that the consent was positive and unequivocal.

ABBOTT: Other than Mr. Overra not knowing that he did not have to give consent, what other factors lead to the conclusion that his consent was not voluntary?

GARZA: Prolonged detention by the trooper.

ABBOTT: How long?

GARZA: I think it was something in the order initially 20 minutes, and then another 15 minutes or so as I recall.

GONZALES: Was he detained?

GARZA: Yes, he was absolutely detained. He was not free to leave.

HECHT: Why is that prolonged? He was inspecting the truck, which the trooper had the right to do.

GARZA: He had satisfactorily completed the initial search of the safety features of the vehicle and then still persisted. He wanted to see if he could get the consent. That's a ply that's always used nowadays by law enforcement officers to see if we can get consent. That erases all other illegalities we may do.

ABBOTT: But didn't he get the consent before he inspected the truck for those 20 minutes? He got the consent before he began inspecting the truck did he not?

GARZA: No. Our position is he was inspecting from the very get go. Ostensibly, initially for just this vehicle safety inspection purpose, which is legitimate. But he admits and it's in the record that he was there for drug intervention purposes. That was the foremost thing in his mind - drug intervention purposes. He just uses the ploy - a legal ploy - of if there's a basis for it. Here there was a missing mud flap. He was proper to pull over. We never disputed that. But then the officer continues to exploit that.

O'NEILL: But now the detention, he knew he could leave correct?

GARZA: Mr. Overra didn't know he could leave.

O'NEILL: But officer Moore testified that he was free to leave.

GARZA: Yes.

O'NEILL: And if you are to give that testimony credibility as you say why can't we assume that he was free to leave?

GARZA: Yes, you may give that credibility but it still doesn't take the spade off the hook.

O'NEILL: But it does away with the delay argument and the detention?

GARZA: No, it's still part of the picture. We say that it is still part of the picture in terms of the totality of the circumstances that finally the Corpus Christi court said, the state didn't meet its burden. They didn't use written forms for consent like he had. He admitted, I didn't use them. That's another ploy.

OWEN: What would be the difference if your client had signed the forms?

GARZA: I think on behalf of the respondent we would be harder pressed to say, Well we weren't really - we really didn't mean to sign that...

OWEN: How would that change the totality of the circumstances an oral consent as

opposed to signing your name on a form?

GARZA: Obviously if he signs something, he hopefully would have read it maybe more deliberately, more than just acquiescence to the request for search we say here it was a mere acquiescence to his request. I think when somebody has to sign something presumably they will read it, that would have been on the tape. And then maybe we would in a worse position to argue the not giving a valid consent in this case.

ABBOTT: When weighing the totality of circumstances, do you agree that we can consider Mr. Overra's absence in the courtroom, his failure to come in and dispute and testify against anything that the state would present?

GARZA: No, I don't agree with that. I think the state's burden is to _____ in this case.

ABBOTT: You agree, he doesn't have any 5th amendment rights seeking a search in a civil matter, right?

GARZA: No, not necessarily.

ABBOTT: Do you agree that inferences can be drawn from his asserting 5th amendment rights...

GARZA: Yes, in certain contexts. I agree though that yes adverse inferences can be drawn from that in the proper context.

As to issue No. 2. On behalf of the respondent, we welcome I think the opportunity that this honorable court may take to write on the issue of dog works and their required reliability to provide a basis for probable cause to search. In other words, as stated in our brief, we are willing to throw the gauntlet of what appears to be a case of first impression to this court to establish and declare what the test should be as to the reliability of dog works in the context of this quasi criminal forfeiture case. By joining the state and asking this court to examine the issue of whether the TC erred in holding that there was a reliable dog work in this case which provided the basis or could provide the basis for probable cause to continue searching the respondent's vehicle.

As we point out in our brief, the issue of the reliability of the so called drug detecting dogs is becoming increasingly questioned throughout the US in both federal and the state courts.

The *Rodriguez* case cited in our brief is the only case I was able to find that somewhat lays out some of the conditions that should be met in order for probable cause to be established on the basis of a dog alert. The dog trainer team involved in this case, the case at bar, was as our expert witness testified "very grossly unreliable." It had an 82 plus percent false response

rate. Which conversely meant it had best a 17-18% success or accuracy rate.

We, the respondent, made the trial record on this because the state didn't even want to touch the issue after we took depositions and made discovery of the dog's utilization records, which incidentally also was shown to have been omitted 25% of the time.

Surely this honorable court will not give a blind carte blanche to the use of so-called "drug detector" dogs. That is, surely the court will require acceptable minimum training and demonstration of current competence through proper periodic proficiency training and other criteria all of which would be subject to scrutiny and examination by adversely affected parties, the respondent in this case.

We did indeed make an extensive use of discovery in the deposition practice in defending this case. And we made, I submit, a convincing and irrefutable case of this dog handler team's total unacceptable reliability.

BAKER: While that's important if the issue is consent to search and an officer has already partially searched the vehicle in the first place, and what the dog does is give him an incentive to be a little more detailed in the search.

GARZA: I'm not understanding the question.

BAKER: If the issue here is the consent to search and that's what we are to decide, what difference does it make how far or how near the search was and what the dog did or didn't do on the issue in this case?

GARZA: I wish the TC had broached that issue because we developed that extensively, but it chose not to do so. So that's why only the issue of consent is in front of this court because that's what the CA focused its review on the consent issue and then...

BAKER: I guess the point being if we decided that we agree with you that there was no consent, that's the end of the whole case and we don't have to talk about the dog.

GARZA: At this point except the state is asking you and we will join the state if the court sees fit to examine the dog issue because I think that's real important for the jurisprudence of this state. Admittedly though it hasn't been as well-developed in the courts below as one would like for this court ultimately then to pass adequate and important review of those issues.

HANKINSON: If we were to agree with the state in this case on the consent issue, then is this case over or are there any issues that need to further be considered by the CA?

GARZA: I would hope that maybe that will - if you were to reverse the CA in Corpus

Christi probably we would lose because the dog issue was not raised. Although maybe not. In thinking about that and I hadn't thought about that frankly. I hope we still have preserved the dog issue.

HANKINSON: The CA mentions some issues that it were not decided and my question to you is, is the consent issue in this case dispositive so that no other issues need be considered?

GARZA: I don't know. I just haven't thought of the implications of that. A very interesting question.

With respect to the third ground of error that the state has brought, the Corpus Christi's use of 44.2 as a standard of review under the rules of appellate procedure in the finding of reversible error, I submit that it used the criminal law standard of 44.2 because it was dealing with constitutional error. And that's what 44.2 first of all addresses is that if constitutional error is found that it's subject to harmless error rule analysis then the court must reverse unless the court determines beyond a reasonable doubt that the error did not contribute to, as the rule leads to the conviction or punishment, in this case as the court said to the rendition of an improper judgment. That's one of the anomalies here that perhaps this court can address as to how the proper alleged error should be evaluated by the courts in these quasi criminal civil forfeiture cases.

ENOCH: Was this gentleman ever charged and tried and convicted of the transportation of drugs and money in this case?

GARZA: I don't believe so. I know he was never tried for such a case. He may have been initially filed against, but not indicted. I can tell he was not indicted. But I don't recall and I was the trial law, I don't recall whether he was ever at least initially charged with the crime by complaint. And maybe he wasn't even that.

ENOCH: So there's no criminal conviction underlying this forfeiture?

GARZA: That's correct.

ENOCH: He was found in the possession of this money and the state has brought a claim to that money that he has not - other than filing an answer to apparently didn't come to trial to contest?

GARZA: He wasn't physically present, but I was there very moment for him. And of course, he submitted to deposition. He was not there physically during the trial. He was amenable to process. The state never compelled his appearance. The evidence was fully developed. The record is voluminous. I think the issues were all very well raised and erred.

GONZALES: But its the state's right to forfeiture affected any way by the fact that there is

no criminal conviction?

GARZA: No. In fact, the statute itself says criminal conviction is not necessary in order for a proper forfeiture to take place.

ENOCH: Does it raise the question on what standard to apply to the burden of proof where the government is taking personal property?

GARZA: I don't think so. I think the constitutional issues of the search and seizure involved relate to whether it's going to ultimately affect personal freedom or the deprivation of property. I think they are both constitutionally significant and entitled to the full constitutional protections afford by not only the federal but of course the state constitution as well as article 38.23 of the Code of Criminal Procedure. Which is another item that the state complains about, that the Corpus Christi court utilized 38.23 that provides statutorily that any illegal evidence obtained shall not be used against a person in a criminal case. I submit that because this is quasi criminal, that was properly employed. Another interesting issue for the court to ponder.

ENOCH: In your research have you come across any cases that talk about that issue in a forfeiture context of what the standard in a civil forfeiture ought to be with respect to the nature of the government taking the property?

GARZA: *Votta v. Sharp*, 880 S.W.2d 844, is a tax collection matter, tax on dope that's under the tax statutes of Texas. And the issue there dealt with the 4th amendment exclusionary rule and Justice Kidd of the Austin court writes what I think is a very well drafted, well presented opinion discussing all the features starting with the history of the exclusionary rule, and then the exclusionary rule in civil proceedings. Essentially the court concludes that the court should has suppressed the evidence because of the factors that it implied.

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REBUTTAL

ENOCH: In trying to decide whether a civil standard or a criminal standard applies to the evidence that's before the court, should the court take into consideration the nature of what gives the government the right to take this property? I mean if a policeman stopped the van for a missing mud flap, would the state even if they had a statute have the right to take the property in a civil proceeding not criminal and just only have to produce a preponderance of the evidence?

JOHNSTON: Yes. To answer your earlier question, ch. 59 of the Code of Criminal Procedure, the statute that controls here that our petition is based on, establishes probable cause as the standard that's the state's burden to prove that the property - there's probable cause that the property is contraband as defined in that chapter. It is statutorily set out as a standard of probable cause in our chapter 59.

ENOCH: _____ under a criminal burden of proof for probable cause wouldn't it?

JOHNSTON: Yes. I would not argue with that. The 4th amendment of the US Constitution and the exclusionary rule of the 4th amendment applies to these cases. And I think also statutorily chapter 59 states that evidence obtained illegally shall not be used in this kind of a trial.

ENOCH: So if you move to the knowing consent or voluntariness of a consent which is another aspect of that perhaps that requires a higher burden, clear and convincing standard maybe under the criminal view of the totality of the circumstances under the same rationale before the government can take the property?

JOHNSTON: I don't think there's any greater burden than what is set out in the cases that Texas criminal courts follow on any issue of consent or any case where there's an issue of consent. I think the burden is always going to be the same. I don't think there's any difference to this being a civil asset forfeiture trial than there would be if it was a criminal trial and the defendant were personally on trial, indicated, and the issue was consent. I think the burden should be the same in both of those cases.

O'NEILL: I believe that the US SC has said there is a difference between knowingly and voluntarily consenting. And that knowing consent is a higher standard than voluntary consent. Do you think there's any significance to the fact that the legislature chose to put knowingly for consent rather than voluntary under a civil statute? Did they intend a higher level?

JOHNSTON: I'm not aware of any interpretation of that part of ch. 59.

ABBOTT: You want us to say that the CA was wrong in its reevaluation of the evidence concerning voluntary consent?

JOHNSTON: I believe and this goes back to the earlier question about the *Guzman* case...

ABBOTT: You want us to hold the CA was wrong in its reanalysis of the evidence concluding that there was no voluntary consent, correct?

JOHNSTON: Yes.

ABBOTT: What kind of rule do you want us to establish? We can't just say, Okay the CA was wrong. We have to establish a rule that would apply not only in this case, but in all cases with regard to appellate court review of the TC's findings with regard to voluntary consent. What rule do we establish that shows the CA's violated in this case?

JOHNSTON: I think the rule to follow is one that's already been clearly established, is not to disturb the findings of fact at the TC without - unless they are against the great weight and

preponderance of the evidence as to be performing an injustice. I know I am not stating that rule very well, but I think that's the rule to follow. That's what we're arguing here. Even not specific to this case, I think that's the greater issue here, is whether or not the appeal's court should come in and absent any evidence to the contrary, come in and disturb the findings of fact based upon plaintiff's evidence unless they are against the great weight of preponderance of the evidence as to do an injustice. And I think if you look at this case specifically there is no injustice to be done. And there is no great weight and preponderance other than plaintiff's evidence that was put on which the court found to be credible.

OWEN: But you're arguing a factual sufficiency standard essentially.

JOHNSTON: I think we're very factually sufficient.

OWEN: How does this court have jurisdiction to review what the CA did if the standard is factually sufficiency?

JOHNSTON: I'm afraid I don't know how to answer that question.

O'NEILL: I understand you're attacking the CA's opinion that they failed to look at the totality of the circumstances, they only looked at this one issue on consent. If we were to agree with you on that, do we then look at the totality of the circumstances or do we remand to the CA to review the totality of the circumstances considering all of the other elements?

JOHNSTON: That's a very good question for me to try to answer. I'm afraid I don't know how to answer that either. I think on remand - I'm not sure - from their opinion it appears they were focusing and they were putting great weight on that one issue. Whether or not to remand to them I'm not sure would do any good. I think all the circumstances should have been weighed equally.

I do want to respond to - there was certainly an earlier question about the issue of consent. I think if this court were to find that the TC's rulings - findings of fact - that it was affirmative and voluntary consent, I think that does end this case.

I would like to address the 3rd issue. I think the erroneous analysis of the fruit of the poisonous tree. As set out in my brief, I believe what was done was a crude but for test, and that is but for this event happening if this event had not happened all of these other events would not have happened. That's a but for test. I would ask y'all to - based on all the cases that are cited they all stress: Do not do that kind of analysis. It's more of a proximate cause analysis. If this first event happened, did it cause the second event? The first event being the finding of the money; the second event that we're talking about in this case being the statements that Mr. Overra made to Det. Berk several hours later that day. Now it's easy to see that the money could have been found and Mr. Overra not made those statements to Det. Berk. He could have refused to answer them. He could have given different statements. He could have told Det. Berk he was blissfully ignorant of the

money. So looking at it as a causal nature, which is what the proper analysis to prove the poisonous tree. Those statements should have been admissible and they should have been treated as statements against interests by a party. They would have been clearly admissible at this trial as they were that the trial judge heard them. And they are obviously dispositive of the case as Mr. Overra admitted that it was dope money and what he was doing with it. And I ask this court to see the error in that type of analysis.