

THE COURT: Yes, you may.

(Thereupon Counsel and the Court conferred at the Court's bench out of the hearing of the jury panel, as follows:)

MR. SPELLACY: It is an incorrect statement of the law. He is talking about the entire defense. You don't instruct as to the absence of any testimony, not the absence of any testimony, the absence of any evidence by the defense. You only instruct as to the testimony of the defendant.

MR. BAILEY: I will ask for an instruction from the Court, if the defense presents absolutely no evidence, that the fact that the defense did not present any evidence, that is no basis for any inference against the defendant, that the defense has no burden to come forward with any evidence, no obligation to, and their silence cannot be counted against them.

You say that is not the law?

MR. SPELLACY: The silence of the defendant, yes.

MR. BAILEY: The silence of the defense generally. If we don't present any

evidence, do you think you can comment on it?

THE COURT: Let me hear the question.

(Following question was read by the reporter:)

"Now, supposing that in addition to the silence of the defendant himself there is no evidence at all presented by the defense, that no effort is made whatsoever by the defense counsel to produce evidence to explain, mitigate, or contradict something that has been proven to your satisfaction by the State, would this total silence on the part of the defense generally, if you were instructed by the Court, that it was meaningless, as to the merits of the case, would you be able to disregard that silence and not count it as a factor against the defendant?"

THE COURT: John, do you wish to speak further?

MR. CORRIGAN: Certainly if the defense puts on no defense, then the State's side of the case is unrefuted, as a matter of law, and we have a right to argue that it is unrefuted, and they accept it because it is not a disputed fact.

MR. BAILEY: That is true, but --

MR.. CORRIGAN: If it measures up to the quality of proper evidence.

MR. BAILEY: No question, but you cannot argue that because we put on no evidence it is an indication that Sam is guilty.

THE COURT: John, the objection is overruled.

(Thereupon proceedings were resumed within the hearing of the jury panel, as follows:)

THE COURT: The Court's ruling is that the objection is overruled.

Do you want the question restated by the court reporter, or do you want to restate the question, Counselor?

MR. BAILEY: I will rephrase the question.

Q Do you remember the question that was before you, Mr. Ainsley?

A The question was whether I would --

Q Just do you remember? If you don't --

A Yes, I do.

Q If you don't, I will be glad to put it again.

A Yes, I do.

Q Now, can you answer it? If you would like me to have it put again, just say so. There has been an interval here.