James Armando Card v. State of Florida

NEXT CASE ON THE COURT'S CALENDAR IS CARD VERSUS STATE.

THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS STEVEN SELL I GETTING. I AM HERE ON -- SELIGER. I AM HERE ON BEHALF OF MR. CARD. THIS IS A CASE THAT COMES TO THE COURT AFTER RESENTENCING THAT WAS ORDERED BY THE TRIAL COURT, AFTER THIS COURT REMANDED FOR A HEARING ON AN ISSUE THAT IS UNRELATED TO THIS APPEAL. ULTIMATELY MR. CARD GOT A NEW SENTENCING HEARING, AND A NEW SENTENCING TRIAL, AND THIS IS THE DIRECT APPEAL. FROM THAT RESENTENCING HEARING. WE HAVE RAISED A NUMBER OF ISSUES IN THE BRIEF, BUT I WOULD LIKE TO TALK, SPECIFICALLY, ABOUT TWO THIS THE FIRST IS WHETHER THE JUDGE SHOULD HAVE HEARD THIS CASE AT ALL, AND THE SECOND IS AS TO THE APPROPRIATE OF THE CLOSING ARGUE -- AS TO THE PROPOSE RIGHT OF THE CLOSING ARGUMENT.

-- AS TO THE PROPOSE RIGHT OF THE CLOSING ARGUMENT.

WOULD YOU TRY TO LIST THAT.

I WILL DO MY BEST TO START WITH. THAT THERE ARE ANY NUMBER OF ARGUMENTS THAT WE BELIEVE WE HAVE IDENTIFIED AS IMPROPER IN THIS CASE, MADE BY PROSECUTOR. FOR INSTANCE, LET'S START WITH THE FIRST ONE THAT WE RAISED, WHERE MR. POPP ARGUES THAT, IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS, THEN IT, THE JUROR, MUST RECOMMEND DEATH. ARGUMENT NUMBER ONE WAS NOT OBJECTED TO. AT THE HEARING.

BUT DIDN'T YOU GO BACK THROUGH AND DISCUSS THIS WHOLE WAYNE THING? IT IS ALMOST LIKE THAT IS ONE SENTENCE, BECAUSE I WENT BACK, AND I READ THE CLOSING ARGUMENT, AND HE, REALLY, GOES INTO THE WEIGHING AND DISCUSSING IT AND THAT YOU HAVE TO WEIGH THEM AND YOU HAVE TO WEIGH THE MITIGATORS. IS IT JUST ONE SENTENCE OR? I AM HAVING DIFFICULTY WITH THAT ONE.

WELL, WHAT I AM TRYING TO DO IS IDENTIFY THOSE PARTICULAR COMMENTS THE PROSECUTOR MADE, AND I DON'T WANT TO VIEW THEM IN ISOLATION, JUSTICE LEWIS. I DO WANT YOU TO LOOK AT EACH ONE WE HAVE IDENTIFIED, IN THE CONTEXT OF THE ARGUMENT OF WHAT HE DOES IS ALMOST A NUMBERICAL THING. HE SAYS -- A NUMERICAL THING. HE SAYS TAKE THE ARGUMENT AND GIVE IT ONE POINT, AND LIKE. THAT HE SAID THAT, IF YOU QUANTIFY THE AGGRAVATORS AND MITIGATORS AND YOU ADD UP THE NUMBERS AND MORE NUMBERS COME UP FOR AGGRAVATORS THAN MITIGATORS, THEN YOU MUST RECOMMEND DEATH, WHICH IS IMPROPER ARGUMENT, NOT OBJECTED TO, JUSTICE SHAW. THE NEXT ARGUMENT THAT WE IDENTIFY WAS THAT MR. POCK SAYS A VOTE FOR LIFE, BY A JUROR, IS NOT TAKING YOUR JOB SERIOUSLY. IF YOU ARE GOING TO LET SOMEBODY ELSE DO THE HARD WORK. LET THE JUDGE DO THE HARD WORK, ABOUT IMPOSING DEATH OR MAKING THE RECOMMENDATION FOR DEATH. THAT IS AN IMPROPER ARGUMENT, JUSTICE SHAW, NOT OBJECTED TO BY THE DEFENSE LAWYER. CONTEMPORANEOUSLY, LET ME SAY THAT. THE THIRD ARGUMENT THAT WE IDENTIFY THAT WE BELIEVE IS IMPROPER, IS MR. POT'S DISCUSSION OF THE USE OF VICTIM IMPACT IN THIS CASE. HE SPECIFICALLY SAYS YOU CAN USE IT TO SUPPORT AN AGGRAVATOR. YOU CAN USE IT TO SUPPORT A DEATH RECOMMENDATION. AND THEN HE SAYS, WELL, I AM NOT SURE HOW YOU USE IT, BECAUSE YOU ARE NOT SUPPOSED TO WEIGH IT, BUT THEN HE SAYS YOU CAN WEIGH IT.

WHAT IS THE PROPER ARGUMENT, CONCERNING VICTIM IMPACT?

WE HAVE STRUGGLED WITH THAT, JUSTICE QUINCE. A PROPER ARGUMENT IS CONSISTENT WITH THE NOTION OF WHAT THE EVIDENCE IS INTRODUCED FOR, IS THAT TO IDENTIFY HOW THIS PERSON HAD SOME UNIQUE CHARACTERISTIC IN HER FAMILY AND IN HER COMMUNITY.

AND THEN YOU DO WHAT WITH THAT?

WELL, THE CASES SAY YOU ARE ALLOWED TO TALK ABOUT IT, BUT THE CASES ARE VERY SPECIFIC, THAT IT IS NOT TO BE USED AS PART OF THE WEIGHING PROCESS. YOU CAN'T DISCRIMINATE ABOUT WHO SHOULD GET DEATH, JUST BECAUSE OF WHO THE PERSON WAS WHO WAS KILLED. YOU CAN'T MAKE THAT ARGUMENT, THAT THIS PERSON HAS SUCH QUALITIES THAT YOU, AS A JUROR, SHOULD RECOMMEND DEATH, JUST BECAUSE OF THE PERSON.

I GUESS I AM HAVING A HARD TIME TRYING TO FIGURE OUT WHAT IT IS YOU ARE CONSIDERING THEN.

WELL, THAT IS A GOOD QUESTION. I MEAN, YOU KNOW, YOU ARE THE COURT THAT PERMITTED VICTIM IMPACT TO BE INTRODUCED INTO EVIDENCE, BASED ON THE STATUTE THAT THE LEGISLATURE PASSED. IT IS VERY CONFUSING FOR TRIAL LAWYERS ABOUT THE SCOPE IN WHICH YOU COULD INTRODUCE EVIDENCE, AND THEN HOW YOU CAN USE IT IN TERMS OF ARGUING TO A JURY, BUT IT IS ALMOST LIKE REASONABLE DOUBT. YOU KNOW, WE DESCRIBE REASONABLE DOUBT NOT AS TO WHAT IT IS, BUT WHAT IT ISN'T. AND IT IS KIND OF THE SAME THING. WE TALK ABOUT NOT SO MUCH HOW YOU CAN USE IT BUT HOW CAN'T YOU USE IT. AND IT IS CLEAR YOU CANNOT USE IT AS A BASIS, IN THE WEIGHING PROCESS, BECAUSE IT CANNOT INDEPENDENTLY SUPPORT AN AGGRAVATOR. IS THAT A FAIR -- IS THAT, REALLY, A FAIR COMMENT, THOUGH, ANALYSIS OF THIS? BECAUSE I LOOKED THROUGH, WHEN THAT DISCUSSION IS GOING ON, AND THE STATE IS SAYING I AM REALLY NOT SURE, JUDGE, HOW YOU CAN USE IT. IT COMES INTO EVIDENCE. YOU CAN TALK ABOUT THE EVIDENCE, AND THEN HE SEEMS TO ENGAGE IN THAT DISCUSSION WITH THE JURORS, THAT IT IS ON. IT IS PERMISSIBLE TO COME IN, BUT I AM JUST NOT SURE HOW YOU WANT TO CONSIDER IT, BUT THEN IT GOES ON TO TALK ABOUT WHAT THIS LADY HAD DONE, THE -- WORKING WITH CHILDREN AND ALL OF THOSE KINDS OF THINGS.

THAT IS PART OF THE PROBLEM, IS THAT THE PROSECUTOR'S ARGUMENT WAS SO CONFUSING, BECAUSE HE WASN'T SURE ABOUT WHAT HE COULD DO WITH IT. YOU KNOW, IF YOU LOOK AT THE RECORD, HE FIRST SAYS YOU WEIGH THEM, THEN HE SAYS YOU CAN'T WEIGH THEM. I MEAN, HE IS ALL OVER THE FIELD ABOUT HOW A JURY SHOULD USE THIS INFORMATION.

SOME JUDGES GIVE AN INSTRUCTION THAT AT LEAST SAYS YOU CAN'T USE IT IN AGGRAVATION. THIS -- WAS THERE ONE REQUESTED IN THIS CASE, BY THE DEFENSE LAWYER, AND IS THERE A STANDARD INSTRUCTION TO GIVE, AND SHOULDN'T WE HAVE ONE TO GIVE?

THERE WAS NO A REQUEST BY THE DEFENSE LAWYER IN THIS CASE, JUSTICE PARIENTE. THERE IS NOT A STANDARD JURY INSTRUCTION ABOUT VICTIM IMPACT. THERE ARE CASES WHERE, EITHER REQUEST OF THE LAWYERS OR THE JUDGE ON THEIR OWN, HAS SET OUT A STANDARD, AND THIS COURT HAD ACTUALLY APPROVED ONE IN A CASE.

I GUESS WHAT I AM SEEING HERE, AND I REALIZE, AGAIN, THIS IS -- CLOSING ARGUMENTS COME VERY QUICKLY, BUT THIS JUDGE DID A PRETTY GOOD JOB, EACH TIME THERE WAS AN OBJECTION RAISED, OF ADDRESSING THAT OBJECTION, AND THEN EITHER INSERT SITUATIONS, THAT SHE EVEN GAVE A VERY SPECIFIC CURETIVE INSTRUCTION, SO AS TO THIS TROUBLING AREA OF VICTIM IMPACT EVIDENCE, HE SEEMS TO RECOGNIZE THAT HE SHOULDN'T BE GOING THERE, AS FAR AS THE WEIGHING PROCESS, BUT THEN THERE WAS NO FURTHER REQUEST TO DO SOMETHING ELSE WITH WHATEVER THE PROSECUTOR HAD SAID, SUCH AS GIVE AN INSTRUCTION, SO HOW CAN YOU, REALLY, YOU KNOW, SO IN THAT SITUATION, SHE REALLY DID TELL HIM STOP GOING WHERE YOU ARE GOING, BUT THERE WAS NO FURTHER REQUESTS FOR A CURETIVE INSTRUCTION.

WELL, SHE KEEPS TEM TELING HIM STOP WHERE YOU ARE GOING, AND HE KEEPS GOING THERE. THAT IS PART OF THE PROBLEM, JUSTICE PARIENTE, AND THE NEXT ONE I AM READY TO TALK ABOUT IS A PERFECT EXAMPLE OF THAT, WHERE, BEFORE TRIAL IN THIS CASE, THERE WAS AN AGREEMENT --

BEFORE YOU MOVE ON TO THAT ONE, ON THIS PARTICULAR ONE.

SURE.

DID THE DEFENSE DISCUSS VICTIM IMPACT EVIDENCE IN THEIR FINAL ARGUMENT?

DID THE DEFENSE DO IT?

UM-HUM.

I DON'T REMEMBER IF THE DEFENSE ARGUED IT OR NOT, JUSTICE QUINCE. THE NEXT ONE THAT WE IDENTIFY IS BEFORE TRIAL IN THIS CASE, MR. CARD, WITH THE AGREEMENT OF THE STATE, SAID I WILL AGREE THAT THE ONLY ALTERNATIVE SENTENCE IS LIFE WITHOUT PAROLE. EVEN THOUGH IN 1982, UNDER WHEN THIS CRIME WAS COMMITTED, LIFE WITH PAROLE WAS A POSSIBILITY, AND EVEN THOUGH SUBSEQUENTLY THIS COURT HAS SAID YOU CAN'T DO THAT, BUT AT THAT TIME, THERE WAS AN AGREEMENT BY THE PARTIES THAT THE ONLY TWO SENTENCES WERE GOING TO BE A RECOMMENDATION OF DEATH OR LIFE WITHOUT PAROLE. AND YET MR. POPP GOES IN THERE AND ARGUES, REPEATEDLY, THAT NO ONE IS GOING TO GUARANTEE WHAT HAPPENS, IF YOU VOTE --

HAS THAT, ALSO, BEEN RECOMMENDED THAT, EVEN IF YOU ENTER INTO THIS AGREEMENT WITH THE COURT IS NOT GOING TO UPHOLD IT?

THE TRIAL JUDGE SAID THAT IS THE AGREEMENT, AND YOU ALL STICK TO IT. NOW, IF THAT IS THE CASE, THEN THE AGREEMENT MEANS NOTHING, JUSTICE QUINCE. THE PROSECUTOR CAN SAY HERE IS WHAT THE RULES ARE BUT WE ARE NOT GOING TO ABIDE BY THE RULES, THEN THAT IS WRONG.

ARE YOU ARGUING THAT ANY OF THESE ERRORS ARE FUNDAMENTAL, AND FOR APPELLATE REVIEW PURPOSES, IF NONE OF THEM ARE FUNDAMENTAL AND HALF OF THEM ARE WEIGHED OR SOME OF THEM ARE -- ARE WEIGHED OR SOME OF THEM ARE NOT WEIGHED BUT OBJECTED TO AND OTHERS ARE NOT OBJECTED TO, THEN WHAT IS THE REVIEW CRITERIA AT THAT POINT? IS THE DEFENDANT IS DENIED A FAIR TRIAL? IS THAT A FAIR STANDARD OF REVIEW?

THIS COURT IS DENIED A FAIR STANDARD OF REVIEW.

WE PUT THAT IN, WHEN THEY ARE PART OF THE ERRORS THAT ARE OBJECTED TO?

THIS COURT SPECIFICALLY ADDRESSED THAT IN URBAN. YOU SAY THAT BOTH THE OBJECTED TO AND UNOBJECTED TO ARGUMENTS, YOU ADD, AND SEE IF CUMULATIVELY IT HAS DENIED THE DEFENDANT A FAIR TRIAL. THAT IS THE STANDARD THIS COURT USES, AND IT IS USED CONSISTENTLY, WHEN YOU HAVE, BOTH, OBJECTED TO AND UNOBJECTED TO COMMENTS, IN A CLOSING ARGUMENT IN A DEATH CASE. I THINK THIS COURT HAS SET THAT STANDARD. AND THERE IS A RECENT CASE THIS YEAR, WHERE THE COURT HAS READOPTED THAT STANDARD, WHEN THERE ARE OBJECTED TO AND UNOBJECTED TO COMMENTS. YOU DON'T JUST LOOK AT THE OBJECTED TO COMMENTS. YOU DON'T JUST LOOK AT THE UNOBJECTED TO COMMENTS. YOU COMBINE THEM, TO MAKE THAT DETERMINATION.

AFT JUDGE ON THIS ONE, ABOUT LIFE MEANS LIFE AND LEAVING ASIDE THE BASE ISSUE AS TO WHETHER THIS COULD HAVE BEEN DONE AT ALL, AFTER THE JUDGE AS OBTAINS THE OBJECTION

TO, TWICE, GIVE A VERY, VERY SPECIFIC INSTRUCTION THAT SAYS THIS MEANS THAT NO PAROLE, NOTHING, THEN THE PROSECUTOR GOES INTO SAYING, WELL, YOU KNOW, THINGS ARE GETTING BETTER IN CORRECTIONAL INSIDE TUGSS -- INSTITUTIONS, SO THE ARGUMENT REALLY ISN'T THAT HE IS GOING TO GET OUT, BUT SINCE HE HAS BEEN DOING ALL OF THIS ART IN PRISON AND DEVELOPING HIMSELF, THAT THERE IS THE IMPLICATION THAT THIS IS TOO EASY A LIFE FOR SOMEONE IN PRISON AND WHY SHOULD YOU GIVE HIM THIS OPTION. THAT IS DIFFERENT THAN WHETHER HE IS GOING TO GET OUT OF PRISON. ISN'T IT I AM PERMISSIBLE ARGUMENT TO SAY THAT THE APPROPRIATE SENTENCE IS DEATH, NOT LIFE, YOU KNOW, THAT THINGS ARE DIFFERENT?

I THINK THAT WOULD BE WHAT YOUR LIFE IN PRISON, IS IT GOING TO BE TOO GOOD, SO THAT THE ONLY POSSIBLE PENALTY IS GOING TO BE DEATH, I THINK THAT WOULD BE INAPPROPRIATE.

BUT THAT IS A DIFFERENT ARGUMENT.

YES. I THINK THAT IS A QUALITATIVELY DIFFERENT ARGUMENT THAN THIS ONE, AND YOU ARE RIGHT. THIS IS WHERE JUDGE COSTELLO HAS TO, TWICE, TELL MR. POPP, YOU AGREED THAT THIS WAS GOING TO BE THE RIGHT CHOICE. THAT THE JURY WOULD HAVE. SO WHY ARE YOU ARGUING SOMETHING DIFFERENT THAN THAT, AND I WILL TELL YOU THE REASON HE ARGUES SOMETHING DIFFERENT THAN THAT, THIS IS A 1982 CASE THAT IS BEING ARGUED IN 1999. SEVENEEN YEARS HAVE GONE BY, AND IT IS HIS WAY OF INJECTING FEAR INTO A JURY, BY SAYING THIS GUY HAS BEEN IN PRISON FOR A LONG TIME, AND HE IS COULD GET OUT PRISON SOON, IF YOU MAKE A RECOMMENDATION FOR LIFE. THAT IS THE SOLE PURPOSE OF WHY HE WOULD DO THAT.

UNDER THE LAW THAT YOU SAY IS SO CLEAR, AM I TO UNDERSTAND THAT A NONOBJECTED TO, NONFUNDAL ERROR CAN BE CONSIDERED, IF -- FUNDAMENTAL ERROR CAN BE CONSIDERED, WHERE ORDINARILY IT WOULD NOT BE CONSIDERED. AN APPELLATE COURT WOULD CONSIDER IT WEIGHED. BUT IF YOU SAY, ON A CUMULATIVE BASIS, THIS IS DENIED TO A DEFENDANT'S FAIR TRIAL, THEN THE NONFUNDAMENTAL, NONOBJECTED TO ERROR CAN BE CONSIDERED? IS THAT BECAUSE ARE SAYING?

WELL, I MEAN WHAT I THINK YOU HAVE TO DO IS CATEGORIZE THE ARGUMENTS, AND WHEN YOU SAY "FUNDAMENTAL", WHAT YOU ARE REALLY TALKING ABOUT IS THE EQUIVALENT OF NOT BEING OBJECTED TO, BECAUSE IF IT WAS OBJECTED TO, THEN YOU WOULDN'T REACH WHETHER IT WAS FUNDAMENTAL OR NOT, RIGHT? SO THE QUESTION IS, SIMPLY, WAS THE OBJECTED TO AND THE UNOBJECTED TO ERRORS CUMULATIVELY AFFECT THE FAIRNESS OF THE PROCEEDING. AND YOU GET -- YOU ONLY GET THE FUNDAMENTAL, IN AN INSTANCE WHERE THE IF YOU ARE LOOKING AT AN ARGUMENT, NO CONTEMPORANEOUS OBJECTION, AND THE ARGUMENT THAT THE CLIENT WAS MAKING ON APPEAL, AND THAT WAS UNDENIED. THE ONLY WAY WE CAN REACH IT, SINCE IT IS NOT PROPERLY PRESERVED BY CONTEMPORANEOUS OBJECTION, IS TO CATEGORIZE IT AS FUNDAMENTAL. DOES THAT ANSWER YOUR QUESTION? NO?

I AM NOT TOO SURE THAT I AGREE WITH IT. IT ANSWERS IT.

LET ME ASK YOU SORT OF A FLIP SIDE OF THIS. ARE THERE ANY OF THE ERRORS THAT WERE MADE TO WHICH AN OBJECTION WAS MADE, THAT WAS EITHER OVERRULED, SO THAT WE WOULD BE APPLYING A HARMLESS ERROR TEST? I WANT TO SAY YES, JUSTICE PARIENTE, AND I THINK IT IS IN THE CATEGORY OF, AND I KNOW I AM ON MY REBUTTAL TIMING, JUSTICE WELLS. I WILL SIT DOWN, WHEN I ANSWER THE QUESTION. WAS WHEN MR. POPP ASKED QUESTIONS THAT HE WAS -- HE WOULD HAVE LIKED TO HAVE ASKED WITNESSES, AND HE IS ASKING THE JURY TO SPECULATE ABOUT WHAT THE ANSWER WOULD HAVE BEEN, IF HE WAS ASKED, AND THE DEFENSE LAWYER OBJECTS TO THAT, AND JUDGE COSTELLO OVERRULED THAT OBJECTION.

BUT WEREN'T THOSE REALLY RHETORICAL QUESTIONS? THE CALIFORNIA EXPERT, TO COME AND TELL US WHAT HAS HAPPENED HERE?

THAT WAS A DIFFERENT AREA, THE CALIFORNIA EXPERT. THESE WERE QUESTIONS ABOUT I WOULD HAVE ASKED THIS QUESTION AND HERE IS THE ANSWER THAT WAS FAVORABLE TO ME AND HERE IS WHAT THE ANSWER WOULD HAVE BEEN. THAT WASN'T AN ANSWER TO A SPECIFIC QUESTION, JUDGE. THAT WAS AN ANSWER THAT HE POSED TO THE JURY.

MAY IT PLEASE THE COURT. I AM CHARMAINE MILLSAPS REPRESENTING THE STATE. MAY IT PLEASE THE COURT. FIRST OF ALL, THE STATE IS GOING TO REST ON ITS BRIEF AS TO JUDGE COMES TOLL TEL-, BECAUSE -- COSTELLO, BECAUSE WE DIDN'T TALK ABOUT THAT, BUT IF YOU HAVE ANY QUESTIONS, I WOULD BE HAPPY TO ANSWER THEM.

THE QUESTION THAT I HAVE, WAS IT BROUGHT TO JUDGE COSTELLO'S ATTENTION THAT, REALLY, IT WOULD NOT BE APPROPRIATE TO USE THE SUCCESSOR-JUDGE STANDARD IN RULING ON THIS?

NO, AND SHE WRITES, IN HER ORDER, I AM THE SUCCESSOR JUDGE, AND THE FIRST ONE WAS DISQUALIFIED. SHE CLEARLY THINKS SHE IS JUDGE NUMBER TWO.

IF SHE IS JUDGE NUMBER ONE, WERE THERE ALLEGATIONS IN THE MOTION THAT WOULD BE SUFFICIENT TO REQUIRE HER RECUSAL?

NO, THEY WEREN'T EFFICIENT, BECAUSE THERE WAS ACTUALLY A CONSULTATION. THE CLAIM WAS THAT, WHEN JUDGE COSTELLO WAS IN PRIVATE PRACTICE, SHE CONSULTED WITH THIS WITNESS ABOUT A DIVORCE FROM THE DEFENDANT, BUT SHE DIDN'T REPRESENT HIM. AT LEAST THAT IS HOW IT SOUNDS FROM -- THIS IS A VERY ABBREVIATED MOTION, SO, NO, I DON'T THINK THAT IS LEGALLY SUFFICIENT. MOREOVER IT IS HARMLESS, BECAUSE SHE DIDN'T TESTIFY. THIS WITNESS, THIS APPEARANCE OF IMPROPRIETY WENT AWAY COMPLETELY.

OKAY. UNDER THAT, IF SOMEBODY, A JUDGE DOES NOT PROPERLY RECUSE HIMSELF OR HERSELF, WHERE THE ALLEGATIONS ARE WHATEVER THEY ARE, WOULDN'T EVERYTHING BE HARMLESS UNDER THAT?

NO. NO. I AM NOT TRYING TO SAY. THAT I AM SAYING THIS RECORD CONCLUSIVELY REFUTES THAT ALLEGATION. NORMALLY YOU ARE NOT GOING TO HAVE. THAT NORMALLY YOU ARE NOT GOING TO HAVE A RECORD THAT CONCLUSIVELY REFUTES AN ALLEGATION. THE ALLEGATION IS GOING TO STAY, AND YOU ARE GOING TO HAVE TO WONDER ABOUT IT, AND NORMALLY IT PROPERLY WOULD NOT BE PROPER TO DO A HARMLESS ERROR ON THAT TYPE OF.

WHAT DO YOU MEAN, WHEN YOU SAY "CONCLUSIVELY REFUTES"?

BECAUSE DEBRA KING. THAT IS THE WIFE THAT WE ARE TALKING ABOUT, DID NOT TESTIFY. THAT IS WHAT THEIR CLAIM WAS, THAT DEBRA KING THAT, JUDGE COSTELLO WOULD BE PUT IN A POSITION OF HAVING TO JUDGE THE CREDIBILITY OF A FORMER CLIENT OF HERS.

BUT WHAT IF THE DECISION WAS MADE NOT TO CALL THAT WITNESS, JUST BECAUSE THEY WERE CONCERNED ABOUT WHAT DETERMINATION OF CREDIBILITY THE JUDGE WOULD MAKE, HAVING KNOWN THE PERSON BEFORE.

YOU MEAN BY THE DEFENSE? THE ALLEGATION WAS THAT SHE WAS A POTENTIAL STATE WITNESS. SO YOU MEAN WE DIDN'T CALL HER, JUST TO KEEP JUDGE COSTELLO AS THE JUDGE?

I AM QUESTIONING WHETHER OR NOT THIS CONCLUSIVELY REFUTES THE PROBLEM THAT MAY ARE A RISE, WHEN SOMEBODY SEEKS THE DISQUALIFICATION -- IN OTHER WORDS FOR INSTANCE, HERE, IF THERE HAD BEEN MORE DETAILED ALLEGATIONS ABOUT THE RELYING SHIP BETWEEN THE -- RELATIONSHIP BETWEEN THE JUDGE AND THE WITNESS.

OKAY. BUT IN THIS CASE, SHE WAS SUPPOSEDLY A POTENTIAL STATE WITNESS, AND THEY DIDN'T EVEN CLAIM. THAT AS A MATTER OF FACT, THEY OBJECTED, AT ONE POINT, TO OUR EVEN REFERRING TO THE WIFE IN PANAMA CITY THAT GETS REFERRED TO, IN CLOSING, AND THEY SAY DON'T REFER TO HER. THE DEFENSE COUNSEL OBJECTS TO THAT BASIS, SO -- ON THAT BASIS, SO THIS RECORD CLEARLY REFUTES. THAT THEY SAID WE DON'T WANT TO CALL HER, AND THE ONLY REASON WE ARE NOT CALLING HER IS BECAUSE JUDGE COSTELLO PRESIDES IN THIS CASE. YOU COULD DO THAT IN ONE SENTENCE. SHE WAS A POTENTIAL STATE WITNESS.

ISN'T THERE A LITTLE MORE TO THIS? EVEN IN A CONSULTATION, COULD THE DEFENSE BE CONCERNED ABOUT INFORMATION ABOUT THE DEFENDANT THAT MAY NOT COME OUT AT THIS HEARING, THAT THE JUDGE MAY BE PRIVY TO BECAUSE OF THAT CONSULTATION?

YOUR HONOR, IF YOU LOOK AT HER AS A FIRST JUDGE AND DEBRA KING HAD TESTIFIED, THEN I WOULD AGREE WITH YOU. GOING TO HARMLESS, THEN THE ALLEGATIONS WOULD STAND UNDER HARMLESS, BUT DEBRA KING DOES NOT TESTIFY. IT IS VERY CLEAR HOW THIS CANNOT BE PREJUDICIAL. PER SE HARMLESS.

BUT THE JUDGE HAD WHATEVER KNOWLEDGE THE JUDGE WOULD HAVE GOTTEN FROM THIS CONSULTATION, WHETHER MS. KING IS ON THE STAND OR NOT.

WELL --

IF THAT IS THE CONCERN, THAT THE JUDGE HAS INFORMATION ABOUT THIS DEFENDANT THAT THE JUDGE WOULD NOT OTHERWISE HAVE, WOULDN'T THAT STILL BE TRUE, WHETHER MS. KING TESTIFIES OR NOT?

IF SHE HAD THE INFORMATION, YES. IF JUDGE COSTELLO HAD THAT INFORMATION BUT JUDGE COSTELLO, REALLY, SAYS I DON'T EVEN REMEMBER THIS PERSON.

BUT WE DON'T HAVE LITTLE MINITRIALS TO RESOLVE THOSE THINGS, DO WE? THAT IS FOLLOWING UP ON JUSTICE QUINCE'S QUESTION, SUPPOSE THE WITNESS WAS -- WHAT WAS THE WITNESS THE FORMER WIFE?

THAT IS WHAT, YES. THAT IS WHAT IT SEEMS TO BE. SHE WAS THE WIFE.

LET'S SUPPOSE THE WIFE HAD KNOWLEDGE THAT DEFENDANT WAS A WIFE BEATER. OKAY. AND THE DEFENDANT, BECAUSE THE JUDGE CONSULTED WITH HER, HAS A FEAR THAT THE JUDGE, NOW, IS GOING TO HAVE EXPARTE INFORMATION THAT HE ABUSED THIS WIFE, NONE OF THAT IS LAID OUT IN THIS MOTION, IS THAT CORRECT?

NO. NONE OF THAT. NO. NO.

BUT IN TERMS OF THE ISSUE BECOMING MOOT, OR REFUTED BY THE RECORD, THAT CONCERN WOULD STILL BE THERE, WOULD IT NOT?

IF SHE DID HAVE THAT, I THINK IT WOULD BE A PROBLEM, IF SHE HAD ACTUALLY REPRESENTED THIS WOMAN, BUT THE ALLEGATION, EVEN, WAS JUST CONSULTED, AS I UNDERSTOOD THE ALLEGATION. THE JUDGE NEVER --

IT WAS CONSULTED, THOUGH, WITH REFERENCE TO A MARITAL DISPUTE.

RIGHT. IT WAS CONSULTED WITH, AS TO A MARITAL DISPUTE. NOW, YOUR HONOR, THIS IS A VERY FEW LINES MOTION FORM THE ALLEGATIONS PART OF THIS, I THINK, TAKE UP TWO SENTENCES.

WAS THERE ANY TIME, EVER, ON THIS RECORD, THAT IT WAS CALLED TO THE COURT'S ATTENTION

THAT, NO, THE PRIOR JUDGE DID NOT RULE ON THE BASIS OF THIS. WAS THAT EVER A PART OF THAT?

YES, IT WAS, BUT WAY -- IT WAS AT THE MOTION FOR A NEW TRIAL STAGE, AND THAT IS PART OF MY ABSOLUTELY NOT PRESERVED. SHE DID NOT KNOW, AND WHEN SHE RULED, AND THEY HAD HER RULING RIGHT IN FRONT. THIS IS A WRITTEN RULING.

IT WAS AN EXPRESS RULING, THAT SHE CONSIDERED HERSELF TO BE THE SECOND JUDGE.

SHE IS SAYING I AM THE SUCCESSOR JUDGE. THEREFORE I GET TO REACH THE MERITS, SO TO SPEAK, WHETHER OR NOT THERE IS ACTUAL BIAS. IT IS VERY CLEAR FROM HER WRITTEN ORDER DEBING THIS, THAT SHE -- DENYING THIS, THAT SHE CONSIDERED HERSELF JUDGE NUMBER TWO, FOR THE PURPOSES OF THIS, AND WHAT THEY WROTE IN THEIR MOTION FOR A NEW TRIAL, THEY SHOULD HAVE, THEN, IMMEDIATELY UPON THAT ORDER, SAID OH, NO, JUDGE COSTELLO, YOU ARE NUMBER ONE, FOR PURPOSES OF THIS MO.THS ZOO SO YOU ARE SAYING THE -- FOR PURPOSES OF THIS MOTION.

SO YOU ARE SAYING THAT THIS OBJECTION IS WAIVED, BECAUSE FOR THIS SPECIFIC ARGUMENT TO HAVE BEEN MADE, IT SHOULD HAVE BEEN MADE, SO THAT JUDGE COSTELLO COULD HAVE RECUSED HERSELF, AND WE WOULDN'T BE IN THIS SITUATION.

EXACTLY. IT IS NOT PRESERVED, BECAUSE THEY NEEDED TO DEVELOP THE FACTS. THEY NEEDED TO TELL JUDGE COSTELLO -- REMEMBER WHAT JUDGE COSTELLO GETS. SHE GETS AN ORDER GRANTING RECUSAL FROM JUDGE HEF. THAT IS WHAT THE TITLE OF THE ORDER SAYS. SHE IS NOT GOING TO GO IN AND READ THE REASON JUDGE HESS RECUSED HIMSELF. SHE GETS THIS CASE, AND ON THE TOP OF IT, IT LITERALLY SAYS "ORDER GRANTING DISQUALIFICATION." THAT IS WHAT JUDGE HESS FINDS. HE DOES IT FOR A DIFFERENT REASON. IT IS VERY CLEAR THAT SHE THOUGHT THAT SHE WAS THE SUCCESSOR JUDGE, AND ANY JUDGE IN HER POSITION WOULD HAVE THOUGHT THAT.

DO YOU AGREE THAT IT IS THE PROPER POSITION, IF THE REASON THE FIRST TIME IS FOR SUA SPONTE, THEN THE SECOND JUDGE SHOULD BE STILL TREATED AS IF THEY WERE THE FIRST JUDGE, TO RECUSE?

YES, IF THERE WERE NO MOTION, IF THE JUDGE, SUA SPONTE, RECOGNIZES THE DEFENDANT AND SAYS I RECOGNIZED YOU, JUDGE HESS, REALLY, RECUSED HIMSELF, BECAUSE HE WAS A PROSECUTOR FORM WHAT IF HE HAD PROSECUTED THIS DEFENDANT BEFORE OR, WORSE, HAD BEEN INVOLVED IN THE FIRST TIME TRIAL OF THIS. I RECOGNIZE YOU. I HERE BY RECUSE MYSELF. NO MOTION MADE. YES, SHE WOULD, THEN, BE PURPOSES. BUT SHE, ALSO, WOULDN'T HAVE BEEN WAYLAID, SO TO SPEAK, BY THE FACTS. YOU KNOW, SHE GETS A MOTION GRANTING RECUSAL, WHEN THIS CASE IS REASSIGNED TO HER DIVISION, SO I WOULD AGREE SUA SPONTE, BUT THAT IS NOT WHAT WE HAVE HERE. WE HAVE A MOTION BY THE DEFENDANT, AN ORDER GRANTING THAT MOTION, JUST ON THE DIFFERENT BASIS THAN THE ONE THEY RAISED. THEY RAISED EXPARTE. HE RECUSED HIMSELF, BECAUSE HE, IN FACT, THE JUDGE HESS HAD BEEN AND PROSECUTOR, AT THE TIME OF THIS ORIGINAL PROSECUTION.

FOR YOUR ARGUMENT, SHE IS A SUCCESSOR JUDGE THEN. IS IT YOUR ARGUMENT --

NO. NO. NO. I AM NOT SAYING IT IS SUA SPONTE. THEY DID, IN FACT, MAKE A MOTION. I THINK SHALL HE IS -- I THINK SHE IS JUDGE NUMBER TWO, BECAUSE SHE DID THEDZ MAKE A MOTION. THIS IS -- THEY DID MAKE A MOTION. IF SHE HAD BEEN SUA SPONTE, SHE WOULD BE JUDGE NUMBER ONE. IT WAS ON THE MOTION.

WOULD YOU MOVE TO THE SECOND.

OKAY. NUMBER ONE, ON THE ARGUMENT THAT YOU MUST RECOMMEND DEATH, IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS. THERE WAS NO OBJECTION TO. THAT SECONDLY, YOUR HONOR, THE PROSECUTOR THEN CLARIFIES THAT HE, THEN, USES THE WORD, A FEW PAGES LATER, TRULY AT THE END OF HIS CLOSING, THAT YOU SHOULD RECOMMEND, IF AGGRAVATORS OUTWEIGH MITIGATORS, AND THAT IS, IN FACT, A PROPER STATEMENT OF THE LAW. JURIES SHOULD NOT USE JUST UNBRIDLED SYMPATHY OR MERCY OR NOTHING, UNLESS IT IS RELATED TO A MITIGATEOR. THEY SHOULD IMPOSE THE DEATH PENALTY. SO HE CORRECTS HIMSELF, SO TO SPEAK, AND THERE IS NO OBJECTION TO THIS ANYWAY. OKAY. NOW, I DIDN'T EVEN SEE THE COMMENT A VOTE FOR LIFE ISN'T TAKING YOUR JOB SERIOUSLY. THAT IS NOT A DIRECT QUOTE OF ANYTHING I SAW IN THE CLOSING.

WELL, BUT THERE IS A STATEMENT IN THERE ABOUT YOU SHOULDN'T TAKE THE EASY WAY OUT AND VOTE FOR LIFE.

YES.

I ASSUME THAT IS WHAT HE WAS REFERRING TO.

I ASSUME, TOO, BUT THOSE ARE VERY DIFFERENT KINDS OF STATEMENTS. IT IS ONE THING TO SAY YOUR DUTY IS TO DO "X", LIKE IMPOSE LIFE OR DEATH, AND ANOTHER TO JUST TELL THEM TO DO THEIR DUTY. THOSE ARE VERY DIFFERENT KINDS OF THINGS MUCH HE IS NOT SAYING A VOTE FOR LIFE IS IRRESPONSIBLE. THAT IS NOT THE IMPLICATION OF THE PROSECUTOR'S COMMENTS HERE. HE IS JUST SAYING YOU SHOULD DO YOUR DUTY, WEIGH THE MITIGATORS AND AGGRAVATORS, AND DON'T RECOMMEND LIFE SOLELY BECAUSE IT IS EASIER TO DO THAN RECOMMENDING DEATH, AND ALL THOSE ARE PROPER.

A WOULD YOU SPEAK TO CUMULATIVE ERROR, RELATIVE TO THE OBJECTED TO AND NOT OBJECTED TO?

I DO AGREE. ONE OF THE CASES THAT HE CITES IS MARTINEZ, AND WHAT HAPPENS IN MARTINEZ IS EVIDENCE IS IMPROPERLY INTRODUCED AND THERE WAS AN OBJECTION TO THAT EVIDENCE, AND THEN HAD, IN THE HARMLESS ERROR PART OF THE ANALYSIS, DECIDING WHETHER THAT PRESERVED ERROR AS TO ADMISSIBILITY OF THAT EVIDENCE, WAS HARMLESS OR NOT, YOU LOOK TO HAVE THE PROSECUTOR USE IT IN CLOSING, AND SAID, LOOK, HE USED THAT IMPROPERLY-ADMITTED EVIDENCE IMPROPERLY, ALSO, AND SO YOU USE THAT AS PART OF THE HARMLESS ERROR ANALYSIS, AND SO THE HARMLESS ERROR ANALYSIS OF MARTINEZ IS PERFECTLY PROPER, BUT YOU DO NOT THROW UNOBJECTED TO COMMENTS AND OBJETHED TO COMMENTS IN THE MIX AND THEN DO A HARMLESS ERROR ON ALL OF THEM. THAT WOULD BREAK THE CONTEMPORANEOUS OBJECTION RULE. YOU NEED TO LOOK AT WHICH ONES ARE PRESERVED AND DO HARMLESS ERROR ONLY ON THE PRESERVED ONES.

WHAT ABOUT, FIRST OF ALL, HOW ABOUT THE BROOKS CASE? WHAT DOES THAT SAY ABOUT CLOSING ARGUMENTS?

NOW, BROOKS DOES HAVE THAT LINE IN THAT, BUT YOU ALL HAVE NEVER DIRECTLY HELD THAT THAT IS THE PROPER WAY TO DO HARMLESS ERROR, AND YOU SHOULDN'T HOLD THAT WAY, BECAUSE THAT WOULD -- WHAT YOU WOULD ENCOURAGE SOMEBODY TO DO IS MAKE ONE OBJECTION IN CLOSING, NOT EVEN NECESSARILY TO AN IMPROPER COMMENT. JUST MAKE ONE AND PRESERVE ALL OTHER ERRORS, AND THEN YOU WOULD HAVE TO --

WAS THERE AN ARGUMENT TAKEN AS A WHOLE, UNDERMINES THE FAIRNESS OF A CASE, WOULDN'T YOU WANT US, RATHER THAN FOCUS ON ONE PARTICULAR ARGUMENT, TO LOOK AND SAY, AGAIN, THERE IS A DIFFERENCE BETWEEN A PROSECUTOR THAT MIGHT MAKE ONE IMPROPER ARGUMENT, AND THE REST OF THE ARGUMENT IS APPROPRIATE, VERSUS EVERY OTHER PAGE, YOU HAVE GOT OBJECTIONS. THEY ARE SUSTAINED. THEY ARE TELLING THE PROSECUTOR DON'T

DO IT. THEY GO BACK. I MEAN, DON'T WE HAVE TO, REALLY, LOOK AT THE ARGUMENT AS A WHOLE, TO SEE IF THE ARGUMENT, AS A WHOLE, UNDERMINED THE BASIC FAIRNESS OF THE TRIAL?

SURE, BUT BECAUSE ARE DOING, WHEN YOU ARE LOOKING AT UNDERMINING THE BASIC FAIRNESS, YOU ARE LOOKING AT WHETHER IT IS FUNDAMENTAL ERROR, AND I DO BELIEVE THAT IS PROPER. FOR INSTANCE, IF YOU HAVE FOUR CLAIMS OF FUNDAMENTAL ERROR, OKAY, TO LOOK THE AN ALL OF THEM TOGETHER, TO SEE WHETHER OR NOT THEY EVISCERATE THE ENTIRE TRIAL, I DO SEE THAT, BUT THAT IS NOT HARMLESS, AND THAT IS NOT -- REMEMBER TRUE FUNDAMENTAL ERROR WOULDN'T EVEN BE SUBJECT TO A HARMLESS ERROR ANALYSIS, AND YOU DON'T JUST DON'T THROW THEM ALL IN THE MIX AND MATCH, BECAUSE THAT -- AND THERE IS SOMETHING EVEN WORSE ABOUT LOOK AT WHAT THIS TRIAL JUDGE DID, WHEN SHE WAS -- WHEN YOU OBJECTED. SHE STEPPED IMMEDIATELY IN AND CORRECTED THEM. YOU ARE, ALSO, GOING TO TAKE AWAY THE POWER, IF YOU DON'T REQUIRE THEM TO PRESERVE OBJECTIONS, YOU ARE GOING TO TAKE AWAY THE MOST CRITICAL POWER, WHICH IS THE POWER OF THE TRIAL COURT TO STEP IN AND CORRECT THOSE ERRORS. IT IS VERY IMPORTANT THAT, NOW, FOR INSTANCE, ON THE PAROLE ONE, I MIGHT AS WE WILL TALK ABOUT THE PAROLE ONE, BECAUSE THIS HIGHLIGHTS WHAT I AM SAYING. NOW, REMEMBER THIS WAS PROBABLY NOT EVEN PROPER. REALLY THIS DEFENDANT COULD HAVE BEEN PAROLED. OKAY. UNDER THE CURRENT CASE LAW. AT THE TIME HE COMMITTED THE CRIME, PAROLE WAS A POSSIBLE SENTENCE. AND THAT IS A POSSIBLE SENTENCE FOR HIM. BUT THEY DID WEIGH, AND IT WAS BEFORE YOUR BAITS CASE, SO NOBODY WAS -- YOUR BATHES CASE, SO NOBODY WAS AWARE THAT -- YOUR BATES CASE, SO NOBODY REALLY COULD WEIGH, AND SO WHAT HAPPENED HERE IS THEY REALLY DID THINK THERE WERE TWO OPTIONS HERE, DEATH OR LIFE WITHOUT PAROLE, AND THAT IS NOT REALLY TRUE, WITH THE FACTS OF THIS CASE, SO SHE TURNS TO THE JURY AND SAYS LIFE MEANS LIFE WITHOUT PAROLE, AND THEN, IN CASE SOMEBODY MISSES THAT, SHE SAYS "NO PAROLE". THERE IS NO WAY THAT A JR., GIVEN THIS KIND OF CURETIVE INSTRUCTION, WOULD BE, IN ANY WAY, MISLED AND NOT KNOW THAT PAROLE IS JUST NOT AN OPTION HERE. THEY WOULD THINK --

WOULD THAT MAKE A DIFFERENCE, IF THE PROSECUTOR TURNS RIGHT AROUND AND CONTINUES TO MAKE WHAT WOULD BE, UNDER THE FACTS OF THIS CASE, AN IMPROPER, REPEATS THE IMPROPER ARGUMENT?

BUT HE DIDN'T REPEAT THE IMPROPER ARGUMENT. AND REMEMBER, IT ISN'T IMPROPER. IT TURNS OUT THAT THIS GUY COULD -- HE IS ELIGIBLE FOR PAROLE, BECAUSE IN 1981, WHEN HE COMMITTED THIS CRIME, LIFE WITH PAROLE WAS AN OPTION, SO THE ERROR THAT HAPPENED HERE OVERWHELMINGLY HELPED THE DEFENDANT. THIS JURY WAS INSTRUCTED THAT THIS GUY WILL NEVER GET PAROLE, WHEN, IN FACT, HE COULD HAVE GOTTEN PAROLE. NOBODY IN THE COURTROOM KNEW THAT, BUT THAT IS, IN FACT, THAT THE OTHER THING YOU NEED TO LOOK AT IN THIS CASE. THE PAROLE COMMENT, THE END RUL RESULT, HOW IT ALL CAME OUT -- THE END RESULT, HOW IT ALL CAME OUT IN THE WASH, HELPED THIS DEFENDANT OVERWHELMINGLY, BECAUSE THIS JURY THOUGHT HE COULD NOT BE PAR ROLLED, WHEN, IN FACT, HE COULD BE PAROLED.

ARE THERE ANY ARGUMENTS THAT WERE OVERRULED, THAT WERE MADE WHERE THEY WERE IMPROPERLY OVERRULED?

I DON'T REMEMBER WHAT OPPOSING COUNSEL SAID ABOUT THAT, ABOUT THAT BEING THE WAY IT PLAYED OUT, BUT I THINK THE CONSCIOUS OF THE COMMUNITY WAS ONE, WHERE THE PROSECUTOR SAID YOU ARE THE CONSCIOUS OF THE COMMUNITY. THERE IS AN IMMEDIATE OBJECTION, AND THEN THE TRIAL COURT RULES THAT THERE WAS REALLY NOTHING OBJECTIONABLE ABOUT THAT, THAT THE OBJECTIONABLE KIND OF PROSECUTORIAL COMMENTS ARE TO SEND A MESSAGE TO THE COMMUNITY, AND THIS WAS NOT A "SEND THE MESSAGE TO THE COMMUNITY".

DO YOU AGREE WITH THAT, THAT -- DO YOU AGREE THAT IT IS A PROPER ARGUMENT?

YES, YOUR HONOR.

THIS COURT HAS REPEATEDLY HELD AND REPEATEDLY PRESERVED DEATH VERSUS LIFE RECOMMENDATIONS, AS YOU DID IN KING AND HAVE DONE REPEATEDLY. WHAT IS WRONG WITH INFORM AGO JURY EXACTLY HOW THIS COURT IS GOING TO VIEW THEIR LIFE AND DEATH RECOMMENDATION. THAT IS JUST TELLING THEM THE TRUTH.

WHETHER IT IS IN THE GUILT PHASE OR THE PENALTY PHASE? IS IT MORE PROPER BECAUSE IT IS THE SENTENCING PHASE, OR DOES IT MATTER?

WELL, YEAH, I DO THAT IS THE PENALTY PHASE. THAT IS ALL WE HAVE HAD HERE, AND, REALLY, YOU SAID THAT AS TO THE PENALTY PHASE. YOU SAID THAT SPECIFICALLY AS TO THE JURY'S RECOMMENDATION AS TO LIFE VERSUS DEATH, AND THAT IS REALLY NOT AT ISSUE IN THE GUILT PHASE, SO YOU HAVEN'T REALLY SAID THAT, AS TO GUILT, AS TO A GUILT VERDICT. SO I THINK IT WOULD BE -- IT WAS, IN FACT, LIMITED TO THE PENALTY PHASE, BECAUSE THERE WAS ONLY A PENALTY PHASE THERE.

WE HAVE GOT THREE SEPARATE KINDS OF THINGS HERE. WE HAVE GOT UNOBJECTED TO ARGUMENTS AND WE LOOK TO WHETHER IT IS FUNDAMENTAL ERROR. WE HAVE GOT OBJECTED TO ARGUMENTS, WHERE THEY WERE SUSTAINED, AND THEN THERE WAS A MOTION FOR MISS TRAIL A -- MISTRIAL. NOW, WHEN WE LOOK AT THAT AND THEN WE REVIEW WHETHER THE JUDGE ABUSED HER DISCRETION IN NOT GRANT AGO MISTRIAL, IS THAT THE TOTALITY OF LOOKING AT THE CLOSING ARGUMENT, OR DO WE JUST LOOK AT THE PARTICULAR ARGUMENT AND DECIDE WHETHER, BASED ON THAT ARGUMENT ALONE, THERE SHOULD HAVE BEEN A MISTRIAL?

OKAY. NOW, WELL, MY POSITION IS THAT SHE WAS CORRECT IN HER RULING, SO OBVIOUSLY SHE DIDN'T ABUSE HER DISCRETION SO WE DON'T REALLY GET TO LOOKING TO EVERYTHING, BUT.

I AM TALKING ABOUT THE ONE WHERE THE OBJECTION WAS SUSTAINED, THEN THERE WAS A GRANTING OF A MOTION FOR MISTRIAL.

THE ONLY ONE WHERE THE OBJECTION WAS SUSTAINED THAT I HIM AWARE OF, WAS HE SAYS ONE OF THE JURORS THAT WAS NOT ALLOWED TO SIT ON THE CASE, SAID, YES, THEY WOULD NOT GIVE IT A WHOLE BUNCH OF WEIGHT. THEY WERE TALKING ABOUT THE DEFENDANT'S CHILDHOOD. OKAY. BUT THEY DIDN'T RAISE THAT OBJECTION ON THE MOTION FOR MISTRIAL, AND THEY DIDN'T RAISE THAT ON APPEAL, YOUR HONOR. WE DON'T HAVE ONE THAT WOULD FIT INTO YOUR SLOT.

SOMETHING LIKE, MAYBE, IF THERE WAS A COMMENT ON THE RIGHT TO REMAIN SILENT, AND THAT WAS --

BUT THAT WAS NOT OBJECTED TO.

I AM SAYING THAT WOULD BE THE KIND OF THING THAT, IF -- THAT MAY BE QUESTIONABLE AS TO WHETHER YOU COULD HAVE CURED CERTAIN THINGS LIKE THAT?

YES, AND THEN YOU WOULD, ALSO, HAVE TO LOOK AT THE CURETIVE. THAT IS WHAT IS SO NICE ABOUT THE CURETIVE HERE. IT IS LITERALLY, IT IS NOT ONE OF THOSE VACK VAIING, YOU KNOW, IGNORE -- ONE OF THOSE VAGUE, YOU KNOW, IGNORE THE PROSECUTOR'S KIND OF COMMENTS, SORT OF THING, BUT THERE WASN'T AN OBJECTION TO IGNORE THE PROSECUTOR'S COMMENTS TORE A CURETIVE TO IGNORE THAT. THERE WASN'T AN OBJECTION AS TO THE RIGHT TO REMAIN SILENT.

YOUR TIME HAS EXPIRED.

THANK YOU.

REBUTTAL.

THANK YOU, JUDGE. I DIDN'T GET A CHANCE, TO BUT I WOULD LIKE TO BRIEFLY TALK ABOUT THE JUDICIAL QUALIFICATION. THERE WAS A FIRST MOTION MADE, TO JUDGE HESS. JUDGE HESS SPECIFICALLY SAYS, IN HIS FINDING, I FIND THE MOTION TO BE LEGALLY INSUFFICIENT. THAT IS WHAT THE RULE PROVIDES. THE ONLY OTHER WAY HE CAN DENY THAT MOTION IS, IF HE FINDS SOME PROCEDURAL FLAW IN THE MOTION. BUT HE DIDN'T. HE, ON ITS FACE, WRORTION I FIND THE MOTION LEGALLY INSUFFICIENT. THEN HE GOES ON TO SAY, ON MY OWN MOTION, I AM GOING TO REMOVE MYSELF FROM THE CASE. THAT MEANS JUDGE COSTELLO IS A FIRST JUDGE, FOR PURPOSES OF THIS MOTION. THERE CAN'T BE ANY DISPUTE ABOUT THAT T.

WHAT DOES -- ABOUT THAT.

WHAT DOES THE ORER ON THE MOTION TO -- THE ORDER ON THE MOTION TO DISQUALIFY SAY?

IT GIVES THE REASONS WHY THE JUDGE HAS TO DISQUALIFY HIMSELF. ALL YOU HAD TO DO WAS READ THE ORDER, TO SEE THAT I AM FINDING THAT THE MOTION FILED BY THE DEFENDANT, IN THIS CASE, IS LEGALLY INSUFFICIENT, BUT NOW I AM GOING TO, FOR OTHER REASONS, THAT HAVE NOTHING TO DO WITH THE RULE, WHICH, IF THE DEFENDANT HAD MADE A REQUEST TO RECUSE JUDGE HESS, BASED ON THOSE REASONS, WOULD HAVE BEEN LEGALLY INSUFFICIENT.

WHY WOULD IT BE WRONG TO VIEW THIS, HOWEVER, LOOKING AT THIS FROM A JUDGE'S PERSPECTIVE, I GET A MOTION IN FROM A DEFENDANT THAT SAYS, LOOK, YOU HAVE HAD EXPARTE COMMUNICATIONS WITH THESE FOLKS, WITH THE PROSECUTOR, WITH THE STATE, AND THAT RAISES, IN THE JUDGE'S MIND, WELL, NOW, I HAVEN'T HAD AN IMPROPER CONVERSATION, BUT I WAS PART OF THE PROSECUTORIAL TEAM, SO TO SPEAK, AND I WORK FOR THE STATE, SO ANYTHING THAT THEY MAY THINK THAT I MAY HAVE GAINED FROM THAT POSITION, IT IS BEST I GET OFF THE CASE. IF I LOOK AT IT IN THAT LIGHT, IS THAT STILL A SUA SPONTE?

NO, SIR, BECAUSE THEN THE JUDGE WOULD HAVE FOUND THAT THE DEFENDANT'S PERCEPTION ABOUT WHETHER HE WAS GOING TO RECEIVE A FAIR TRIAL WAS LEGAL HADLY SUFFICIENT -- WAS LEGALLY SUFFICIENT. UNDER YOUR HYPOTHETICAL, SURE, IF I AM A JUDGE AND I HAVE THESE QUALMS, THAT, THEN, GIVES RISE TO THE FACT THAT THE DEFENDANT'S PERCEPTION, WHICH IS HOW YOU VIEW A FIRST MOTION, IS LEGALLY SUFFICIENT, BECAUSE IT PUTS IN A -- IN DISPUTE WHETHER HE COULD REASONABLY RECEIVE A FAIR TRIAL. SO I THINK, UNDER THAT SCENARIO, IT WOULD BE CONSIDERED LEGALLY SUFFICIENT. THIS WAS A FIRST MOTION THAT JUDGE COSTELLO, ALL YOU HAD TO DO IS READ -- YOU DON'T READ THE TITLE TO THE ORDER, BECAUSE THE TITLE WOULD HAVE BEEN OF COURSE IS HE GRANTING THE MOTION, BUT HE IS DOING IT FOR REASONS THAT HE WANTED TO DO, NOT BECAUSE OF WHAT THE DEFENDANT SAID. ONCE THAT HAPPENS, JUDGE COSTELLO IS THE FIRST JUDGE, AND SHE CAN, THEN, NOT DISPUTE THE ALLEGATION THAT SHE WAS INSULTED BY THE WIFE OF THE -- CONSULTED BY THE WIFE THE DEFENDANT FOR DIVORCE PURPOSES.

WHY WOULDN'T THE DEFENSE ATTORNEY HAVE AN OBLIGATION TO BRING THAT TO HER ATTENTION, SO THAT IT COULD BE -- SHE COULD USE THE PROPER STANDARD AND MAKE A DECISION? MAYBE, OKAY, I WILL RECUSE MYSELF AND AVOID THE POSTURE THAT WE ARE IN RIGHT NOW.

WELL, I THINK -- I MEAN I DON'T KNOW HOW TO PUT MY HEAD INSIDE WHAT A DEFENSE LAWYER DID, BUT I THINK THE DEFENSE LAWYER REASONABLY WOULD ASSUME THAT MY MOTION RELATING TO JUDGE HESS WAS DENIED. SO ALL I AM DOING, NOW, IS FILING A MOTION THAT

COMPLIES WITH THE RULE. THAT IS WHAT HE DID. HE FILED A MOTION THAT COMPLIED WITH THE RULE. STATING WITH SPECIFICITY WHAT THE REASONABLY WELL-FOUNDED FEAR WAS, IN THIS INSTANCE, SIGNED IT UNDER OATH, COMPLIED WITH THE PROCEDURAL ALASPECTS OF THE -- PROCEDURAL ASPECTS OF THE RULE. THAT IS WHAT YOU WOULD DO. THE RULE DOESN'T REQUIRE TO YOU IDENTIFY WHAT THE FIRST JUDGE DID, BECAUSE THERE IS A ORDER THAT SAYS WHAT THE FIRST JUDGE DID. YOU DON'T HAVE TO SPECULATE WHAT THE FIRST JUDGE DID. IT IS THERE IN WRITING.

BUT AFTER YOU GET AN ORDER FROM THE SUBSEQUENT JUDGE THAT EXPLICITLY SAYS I AM TREATING THAT THIS WAY, WHY ISN'T THERE AN OBLIGATION TO COME FORWARD AND SAY, NO, JUDGE, YOU DON'T UNDERSTAND.

THAT WOULD HAVE BEEN THE BETTER WAY. I CAN'T ARGUE WITH THAT, THAT MAYBE THERE SHOULD BE AN OBLIGATION, BUT IT IS NOT ONE THE RULE IMPOSES. THE RULE IMPOSES THAT YOU FILE A MOTION THAT COMPLY WITH THE PROCEDURAL ASPECTS OF THE RULE.

THANK, COUNSEL. THE COURT WILL TAKE A FIVE-MINUTE RECESS AND THEN HEAR ITS FINAL CASE FOR THIS MORNING. THE MARSHAL: PLEASE RISE.