Howard S. Ault v. State of Florida

MARSHAL: PLEASE RISE.

CHIEF JUSTICE: GOOD MORNING. PLEASE BE SEATED.

CHIEF JUSTICE: ALL RIGHT. LOOKS LIKE YOU ARE READY ON THE NEXT CASE, AND THAT IS AULT VERSUS STATE. IF YOU ARE READY, YOU MAY PROCEED.

THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS JEFFREY ANDERSON. I REPRESENT THE APPELLANT, MR. HOWARD AULT. THIS IS DIRECT APPEAL OF HIS CONVICTIONS, WHICH INCLUDE FIRST-DEGREE MURDER, AND HIS SENTENCES WHICH INCLUDE THE DEATH PENALTY. THE FIRST ISSUE I WOULD LIKE TO ADDRESS IS THE FIRST ISSUE IN THE BRIEFS, AND THAT INVOLVES THE CONFESSION OR NONSUPPRESSION OF THE CONFESSION. MR. AULT HAD AN IMAGE STRAIGHT'S HEARING, ALSO KNOWN AS FIRST APPEARANCE HEARING IN A SEXUAL BATTERY CASE, WHICH IS NOT PART OF THE CASES THAT HE IS APPEALING TODAY. AND AT THAT HEARING INVOKED HIS FIFTH AND SIXTH AMENDMENT RIGHTS TO COUNSEL, AND HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT. THE TRIAL JUDGE ENTERED AN ORDER RECOGNIZING THE DEFENSE MOTION, AND ORDERING THAT LAW ENFORCEMENT NOT SPEAK TO MR. AULT, UNLESS COUNSEL IS PRESENT.

AND IS YOUR ARGUMENT, THEN, THAT THAT INVOCATION OF RIGHTS WOULD APPLY TO ANY CRIME THAT THE POLICE MIGHT WANT TO QUESTION PLE AULT ABOUT?

NOT THE SIXTH AMENDMENT, BECAUSE THAT HIS CASE SPECIFIC, BUT, YES, THE FIFTH AMENDMENT RIGHT TO COUNSEL.

IS THERE ANY EVIDENCE THAT OFFICER RHODES KNEW ABOUT THAT INVOCATION, AT THE TIME THAT HE WENT TO ENTER RUE HIM?

-- WENT TO INTERVIEW HIM?

NOT, I THINK HE SAID HE, NO. I DON'T THINK SO. NOT IN THE RECORD.

SO IF WE HOLD THE WAY YOU WOULD WANT US TO, THEN WE ARE ESSENTIALLY PUTTING LAW ENFORCEMENT IN A DILEMMA OR A CATCH-22, BECAUSE THEY ARE NEVER GOING TO KNOW IF SOMEBODY HAS INVOKED HIS RIGHTS.

THAT HAPPENS, REGARDLESS, AND IN CASES WHERE CONFESSIONS ARE SUPPRESSED. THAT IS ALREADY PART AND PARCEL OF THE LAW. SAY ON THE SEXUAL BATTERY CASE, IF OTHER OFFICERS INVOLVED IN THE CASE HAD INTERVIEWED HIM, NOT KNOWING WHAT IS GOING ON, AS FAR AS THE INVOCATION OF RIGHTS, THE SUPPRESSION ON THAT CASE WOULD HAVE BEEN SUPPRESSED, IF A CONFESSION HAD BEEN MADE AFTERWARD, AFTER POLICE INITIATED CONTACT, AND SECONDLY, I WOULD POINT OUT THAT OFFICER RHODES DID KNOW THAT MR. AULT WAS INTERESTED IN SPEAKING TO COUNSEL, BECAUSE THE LAST INTERVIEW HE HAD WITH HIM PRIOR TO THE MAGISTRATE'S HEARING, APPELLANT TOLD OFFICER RHODES THAT HE WANTED TO TALK TO AN ATTORNEY ABOUT THE POSSIBILITY OF TAKING A POLYGRAPH, AND THAT IS 372-THROUGH-374 OF THE RECORD, WHERE OFFICER RHODES TESTIFIES TO THAT.

BUT AS SOON AS HE FIRST STARTED QUESTIONING, HE DID FIRST ADMINISTER THE MIRANDA

WARNINGS, CORRECT?

CORRECT.

WHICH INCLUDEDED THAT HE HAD A RIGHT TO REMAIN SILENT AND TO CONSULT WITH HIS ATTORNEY.

CORRECT O.

SO THE ISSUE, REALLY, OF WHETHER, WHAT OFFICER RHODES KNEW ABOUT IF HE HADN'T ALREADY INVOKED HIS RIGHT TO AN ATTORNEY THROUGH THIS OTHER CASE, THEN THE FACT THAT THOSE, WOULDN'T THE MIRANDA WARNINGS'S ADMINISTRATION AT THE BEGINNING OF THE QUESTION, HAVE GIVEN MR. AULT THE OPPORTUNITY TO SAY, WELL, YES, I DO WANT AN ATTORNEY. THAT IS ALL HE HAD TO SAY.

BUT THE CASE LAW IS REALLY CLEAR, WHEN YOU INVOKE ANY RIGHT TO COUNSEL, FIFTH OR SIXTH AMENDMENT RIGHT, POLICE CANNOT INITIATE CONTACT WITH YOU. YOU HAVE TO, THE DEFENDANT HAS TO BE THE ONE TO INITIATE IT.

I UNDERSTAND THAT, BUT NOW WE ARE GOING TO YOU ARE SAYING THAT THAT WAS INVOKED IN THE OTHER CHARGE, CORRECT?

AT THE MAGISTRATE HEARING ON THE OTHER CHARGE, CORRECT.

NOT ON THIS CHARGE.

WELL, THERE, THE DEFENSE COUNSEL DID MAKE THE ARGUMENT THAT THE ARREST NUMBER WAS FOR BOTH CHARGES, BUT I AM ARGUING FOR THE PURPOSES OF THIS, BASICALLY, ABOUT THIS COURT'S DECISION IN SAP, WHICH -- IN ZAP, WHICH INVOLVES HE IS -- IN SAP, WHICH INVOLVES A SITUATION LIKE THIS, NOT A HEARING LIKE SAP, WHERE THE INVOKEATION WAS INVOKED BEFORE.

ISN'T THAT SAYING THAT THERE IS NO SIXTH AMENDMENT RIGHT FOR THAT RELATED CHARGE?

IT SAYS YOU CAN'T INVOKE A FIFTH AMENDMENT RIGHT TO COUNSEL, UNLESS INTERROGATION IS GOING OR INTERROGATION IS I AMNENT -- IS I AM IN THE MEANTIME, AND THE ARGUMENT BELOW AT THE SUPPRESSION HEARING DISTINGUISHED BETWEEN THIS CASE AND SAP. AND ONE OF THE KEY FACTS THAT WAS ARGUED WAS THAT INTERROGATION WAS IMMINENT. IN FACT, IT WAS ARGUED INTERROGATION HAD ALREADY BEGUN, HAD BEEN INITIATED, AND IT WASN'T A SIING SITUATION THAT SAP IS ADDRESS -- IT WASN'T A SITUATION THAT SAP WAS ADDRESSING, WHERE IN SAP YOU ANTS TORL INVOKE YOUR -- PANTS PENNSYLVANIATORYLY INVOKE YOUR -- ANTICIPATORYLY INVOKE YOUR RIGHTS, BECAUSE MR. SAP WASN'T ANTICIPATING.

AREN'T WE TALKING ABOUT THE FACT THAT THE INTERROGATION ACTUALLY TOOK PLACE SOME HOURS AFTER HE HAD INVOKED HIS RIGHTS UNDER THE CASE FOR WHICH HE MADE HIS FIRST APPEARANCE, AND DON'T WE HAVE THAT SAME SITUATION IN THIS CASE?

I THINK SAP, IT WAS A WEEK AFTER THE INVOKEATION THAT, THE INTERVIEW OR INTERROGATION OCCURRED. I THINK --

SO THAT GETS ME BACK TO STILL WHAT DOES IMMINENT MEAN? I MEAN, ARE YOU GOING TO WALK OUT OF THE COURTROOM, WHERE YOU HAVE INVOKED YOUR RIGHTS AND IMMEDIATELY BE QUESTIONED ABOUT SOME OTHER CASE, OR I MEAN, ADOPT WE HAVE TO CONSIDER THE FACT THAT THERE WAS, IN FACT, SEVERAL HOURS THAT PASSED, BEFORE THE DEFENDANT WAS ACTUALLY QUESTIONED ON THAT, ON THIS CASE THAT WE ARE HERE ON?

TIME MIGHT AND FACTOR, BUT I DON'T KNOW IF THERE IS A BRIGHT-LINE TEST. THIS IS THE CLOSEST OF ALL OF THE CASES CITED TO THIS COURT, LIKE GUTHRIE. THIS IS THE CLOSEST IN TIME, TO THE INVOKEATION OF THE RIGHTS, WHERE YOU HAVE THE INTERROGATION. AND I THINK THE STATE BELOW FILED A MEMO SAY AGO THAT IMMINENT MEANT -- SAYING THAT IMMINENT MEANT YOU HAD TO BE ACROSS THE INTERROGATION TABLE OR IN THE INTERROGATION ROOM. YOU CAN HAVE INTERROGATIONS WHERE THERE ISN'T AN INTERROGATION TABLE. I HAVE HAD CASES WHERE THE OFFICER AND DEFENDANT ARE 20 MILES APART. THE DEFENDANT IS IN JAIL AND THE OFFICER IS INTERROGATING HIM OVER THE PHONE. IT IS A CONTEST WHETHER IT IS IMMINENT.

NOT TO BE QUESTIONED, WHEN THIS RIGHT, WAS INVOKED THAT, IT CONTEMPLATED QUESTIONING ON THE CHARGE THAT WAS PENDING, THAT IS THAT THAT IS WHAT IT WAS RELEVANT TO AT THE TIME, AND HASN'T, REALLY, THE CASE LAW, INCLUDING THE CASE LAW SAP, THE CASE LAW FROM THIS COURT, REALLY, PERMITTED, THEN, THE POLICE TO QUESTION AN INCARCERATED DEFENDANT ON OTHER CHARGES, AND ESPECIALLY IN THE CONTEXT WHERE THEY ARE QUESTIONING THAT PERSON AND THEY NOTIFY HIM OF HIS RIGHTS TO DECLINE TO DO SO. ISN'T THAT ABOUT WHERE THE LAW IS NOW AND WHERE WE ARE ON THIS?

YOONK THE LAW HAS ADDRESSED THE -- I DON'T THINK THE LAW HAS ADDRESSED THE FACTS OF THIS SITUATION, WHERE HE HAS ALREADY BEEN INTERROGATED ON THE HOMICIDES. ALL OF THOSE OTHER CASE, SAP DON'T INVOLVE THAT THE. THERE IS NOT, INTERROGATION HADN'T GUN ON THAT, AND HERE IT HAPPENED TWICE.

WOULDN'T THE SITUATION IN

IN HESS, I KNOW THE POLICE WERE COMING BACK TO TALK TO HIM. BUT THE POLICE WEREN'T INITIATING CONTACT AFTER THE INVOKEATION. HESS WAS INITIATING THE CONTACT WITH POLICE.

THEY HAD COME BACK --

THAT LEVELS EVERYTHING. YOU KNOW, THAT WIPES IT OUT. IF THE DEFENDANT THEN WANTS TO COME AND TALK TO THE PLIRTION YOU KNOW, HIS EARLIER INVOKEATION OF THE FIFTH AMENDMENT RIGHT TO COUNSEL IS NOT GOING TO PREVENT THAT. YOU KNOW THAT, IS A SITUATION LIKE WHAT ARE THE POLICE TO DO, IF THE DEFENDANT IS TRYING TO TALK TO THEM? THEY JUST CAN'T TURN THEIR BACKS OR SHOULDN'T HAVE TO TURN THEIR BACKS IN THAT TYPE OF SITUATION. THAT IS WHY, I THINK, HESS IS NOT APPLICABLE TO THIS CASE.

SO YOUR ARGUMENT, REALLY, BREAKS DOWN TO THE FACT THAT, BECAUSE THEY HAD QUESTIONED HIM EARLIER, THEN THAT IS EVIDENCE THAT ANOTHER QUESTIONING WAS IMMINENT.

WELL, YOU LOOK AT IT IN THE DEFENDANT'S MIND, HE HAS BEEN QUESTIONED TWICE EARLIER, ABOUT THE HOMICIDES, AND HE, AND THEN HE EVEN BREAKS OFF A THIRD DIFFERENCE. TWICE ABOUT THE HOMICIDE AND THEN ONCE ABOUT THE SEXUAL BATTERY CHARGE, AND THEN AT THE END OF THAT HE INVOKES A FIFTH AMENDMENT RIGHT TO REMAIN SILENT, AND THEN HE IS AT THE MAGISTRATE HEARING, AND THE NEXT WE HEAR FROM HIM, HE IS INVOKING FIFTH AND SIXTH AMENDMENT RIGHTS. I THINK, UNDER THOSE CIRCUMSTANCES, YOU HAVE A SITUATION WHERE THE DEFENDANT DOESN'T WANT TO TALK WITHOUT COUNSEL, BUT WHAT HAPPENS AFTER, ESPECIALLY AFTER TRIAL COURT ENTERS AN ORDER RECOGNIZING THIS RIGHT, GIVING A ORDER THAT POLICE NOT CONTACT HIM, AND HE IS CONTACTED BY POLICE. THE DANGER IN THAT SITUATION, AND I THINK EDWARDS TALKS ABOUT THIS, IS THAT AN ACCUSED WILL BREAKS DOWN AFTER SOME PERIOD OF TIME WHEN THEY ARE INVOKEING THEIR RIGHTS AND THEY HAVE BEEN RECOGNIZED BUT THE POLICE ARE IGNORING HIM.

LET'S GO BACK TO LOOK AT THE TOTALITY OF THE CIRCUMSTANCES AND SEE AS TO WHETHER THE CONFESSION WAS INVOLUNTARY BECAUSE OF ALL THAT OCCURRED, BUT YOU ARE ASKING THIS COURT TO SAY AS A MATTER OF LAW, THAT BECAUSE HE HAD BEEN QUESTIONED ON THE OTHER CHARGE, NOT ARRESTED BUT HAD BEEN QUESTIONED THAT, YOU NOW HAVE ANOTHER CHARGE THAT COMES IN THAT IS NOT DEEMED TO BE PROTECTURAL BY THE CIRCUMSTANCES, AND THEN THEY QUESTION HIM ON THE OTHER CHARGES THE NEXT DAY, THAT, AS A MATTER OF LAW, THAT THEY SHOULDN'T HAVE BEEN ABLE TO DO THAT, AND I GUESS WHAT I AM ASKING YOU IS, ARE THERE ANY OTHER CIRCUMSTANCES IN THIS CASE TO SHOW THAT, IN FACT, WHEN THE OFFICER CAME AGAIN AND STARTED TO QUESTION HIM, THAT HE, IT WAS NOT VOLUNTARY, AND THAT IS WHY I THINK IT IS IMPORTANT THAT THE MIRANDA WARNINGS WERE GIVEN, AND THERE IS NO OCCASION IN WHAT HE SUBSEQUENTLY SAYS, TO INDICATE -- THERE IS NO INDINDICATION IN WHAT HE SUBSEQUENTLY SAYS, TO INDICATE THAT HE IS HESITATING IN TALKING WITH THE OFFICER.

WELL, I HAVE TO GO BACK TO THE FIFTH AMENDMENT RIGHT TO COUNSEL AND THE PRO FILL ACTIC PART OF THAT, IN THAT WE DON'T LOOK AT THE FACT THAT THEY ARE GIVEN A FRESH SET OF MIRANDA WARNINGS AND HE IS INFORMED OF THOSE RIGHTS. IT IS JUST, ONCE YOU INVOKE THE TRITE COUNSEL --

AGAIN, WE GOT BACK TO WHAT SAP HAS ALREADY SAID. YOU CAN'T HAVE A GENERIC INVOKEATION. THAT IS REALLY WHAT THAT SAP STANDS FOR, CORRECT?

UNLESS INTERROGATION, WELL, IT RECOGNIZES THE FIFTH AMENDMENT RIGHT TO COUNSEL INVOKEATION AT INTERROGATION AND, A LARGE PART OF MY ARGUMENT IS WHERE INTERROGATION IS IMMINENT, AND THAT IS WHAT I AM ARGUING UNDER THE FACTS OF THIS CASE. YOU HAVE INTERROGATION IS IMMINENT, AND, OF COURSE, I AM ARGUING, ALSO, ADDING TO THIS IS THE TRIAL COURT'S ORDER, WHICH SEEMS LIKE A DEFENDANT OR ACCUSED COULD RELY UPON, TO PROTECT HIM, AND THAT DIDN'T HAPPEN IN THIS CASE. I THINK I HAVE BASICALLY COVERED MOST OF THE BASES OF POINT ONE. UNLESS THERE IS ANY QERTION ILL GO ON TO POINT -- ANY QUESTIONS, I WILL GO ON TO POINT TWO. POINT TWO IS A PENALTY ISSUE, WHERE THE STATE QUESTIONED THE JUROR FOR CAUSE DUE TO THE DEATH PENALTY, JUROR REYNOLDS, AND SAID THAT SHE COULD NOT BE FAIR AND IMPARTIAL DUE TO THAT, AND THE JUDGE GRANTED THE CHALLENGE OVER THE DEFENSE OBJECTION. THE DEFENSE POINTED OUT THAT SHE SAID SHE COULD BE FAIR AND IMPARTIAL AND FOLLOW THE LAW, AND THE RECORD SUPPORTS THE DEFENSE IN THIS CASE. AT 1868 OF THE TRANSCRIPT, THE JUROR RENDZ IS ASKED, A -- THE JUROR REYNOLDS IS ASKED, A GROUP OF JURORS IS ASKED, NOW IS THE TIME TO COME CLEAN, IF YOUR FEELINGS IN ANY WAY WOULD CAUSE YOU NOT TO BE FAIR AND IMPARTIAL AND CAN LAY THOSE FEELINGS ASIDE? TWO JURORS SAID YES AND TWO SAID NO, AND THEN THEY KAE TO JUROR REYNOLDS, WHO WAS THE MOST -- AND THEN THEY CAME TO JUROR RENDZ, WHO WAS THE MOST EMP-- TO JUROR REYNOLDS, WHO WAS THE MOST EMPHATIC AND SAID, YES, I CAN LAY THOSE FEELINGS ASIDE, AND THEN LATER ON THE DEFENSE COUNSEL BRINGS UP, JUROR REYNOLDS, ARE YOU OPPOSED TO THE DEATH PENALTY, AND THEN --.

WHEN HE ASKS CAN YOU PUT YOUR FEELINGS ASIDE AND THEN HE ASKS ANOTHER QUESTION THAT SHE SAYS YES TO, WHICH BASICALLY SAYS THE SAME THING. ARE YOU ARGUING, THEN THAT, THAT IS THE SAME AS THE STANDARD THAT IS ARTICULATED UNDER LUTZ, THAT YOU HAVE TO SAY THAT YOU CAN BE FAIR AND IMPARTIAL AND THAT YOU CAN FOLLOW THE LAW?

I THINK THAT IS BASICALLY WHAT SHE IS SAYING IN THIS CASE, AND I DON'T THINK THERE IS ANYTHING CONTRARY TO THAT IN THIS CASE, AND THAT IS WHY I THINK IT IS REVERSIBLE ERROR UNDER THIS COURT'S DECISION INS CHANDLER AND FARINA, TO EXCLUDE THIS JUROR, BECAUSE OF HER OPPOSITION OF THE DEATH PENALTY.

TELL US HOW THE INQUIRY WENT, CHRONOLOGICALLY. IN OTHER WORDS DO WE HAVE FIRST

JUROR ANNOUNCING THAT SHE IS OPPOSED TO DEATH PENALTY, AND THEN THE QUESTIONING CONTINUES, BUILT AROUND THAT, OR JUST HELP US AND PERHAPS A LITTLE BIT MORE DETAILS, OUTLINE OF WHAT OCCURRED HERE CHRONOLOGICALLY.

OKAY. THAT IS ONE OF THE, IT IS ONE OF THE EARLIER QUESTIONS COUNSEL TRIES TO IDENTIFY THE JURORS THAT ARE OPPOSED TO THE DEATH PENALTY, AND THEN, FROM THAT, LATER ON, THESE QUESTIONS COME UP ABOUT CAN YOU LAY ASIDE YOUR FEELINGS ABOUT THE DEATH PENALTY AND BE FAIR AND IMPARTIAL? THAT IS BASICALLY THE SEQUENCE. JUST SIMPLY PRESENTED. IT IS NOT --

OKAY. SO ONE TIME SHE SAYS, I AM OPPOSED TO THIS. IS THAT WHAT SHE SAYS? I AM --

I THINK IT WAS IN RESPONSE TO A GENERAL QUESTION OF THE JURORS, WHO, OKAY, WHO HERE IS OPPOSED TO THE DEATH PENALTY, AND I AM PRETTY SURE IT IS A GENERAL QUESTION, AND YOU KNOW, SEVERAL JURORS RAISED THEIR HAND. I THINK THAT IS THE WAY IT COMES UP. IT DOESN'T COME UP IN AN INDIVIDUAL CONTEXT.

IF THAT WAS THE ONLY QUESTION ASKED OF MS. REYNOLDS BY ANYONE, DO YOU OPPOSE THE DEATH PENALTY, AND THE STATE, THEN, MOVED TO STRIKE HER FOR CAUSE, WHAT IS THE LAW ABOUT WHO IS OBLIGATED, YOU USUALLY HAVE IT THE OTHER WAY AROUND, WHO IS GOING REHABILITATE, WHEN SOMEONE SAYS -- WHAT IS THE LAW WHEN SOMEONE ASKS FURTHER QUESTIONS, BECAUSE CERTAINLY BEING OPPOSED TO THE DEATH PENTA LON, IS NOT DISQUALIFYING TO -- DEATH PENALTY, ALONE, IS NOT DISQUALIFYING TO SET. WHOSE RESPONSIBILITY IS IT, THE STATE OR THE JIM, TO ASK FURTHER QUESTIONS?

I DON'T KNOW IF THERE IS A CASE THAT DILL ENYATES WHO HAS GOT THE RESPONSIBILITY. -- THAT DELINEATES WHO HAS GOT THE RESPONSIBILITY. I DO KNOW IF THERE IS A SHOWING THAT SUBSTANCE YATES THE REASON THAT SHE SOMEHOW CAN'T BE FAIR AND IMPARTIAL, I THINK IN CHANDLER, FOR EXAMPLE CHANDLER AND FARINA, THERE WERE SOME EQUIVOCAL ANSWERS AS TO WHETHER A PERSON COULD FOLLOW THE LAW, BUT THEY WEREN'T OF SUCH A NATURE THAT THE PERSON COULDN'T FOLLOW THE LAW, IN THIS CASE THE DEATH PENALTY.

IF THE PERSON WAS ASKED AND SHE ONLY SAID SHE WAS OPPOSED TO THE DEATH PENALTY, AND THE STATE WANTED TO EXERCISE THIS CHALLENGE FOR CAUSE, WOULDN'T THE BURDEN, THEN, BE ON THE STATE TO DEMONSTRATE SOMETHING BEYOND THE MERE FACT THAT SHE WAS OPPOSED TO THE DEATH PENALTY?

YEAH. I THINK THAT DEVELOPS FROM THE CASE LAW, THAT THERE HAS GOT TO BE SOMETHING SUPPORTING IT.

SO IN THIS CASE, SHE ANSWERED A GENERAL QUESTION THAT SHE, WITH A FEW OTHERS, THAT SHE WAS OPPOSED TO THE DEATH PENALTY, AND THEN SHE HAS ASKED THE QUESTION IF YOU FIND THEM GUILTY, COULD YOU PUT YOUR FEELINGS ASIDE, AND YOU HAVE LEGITIMATE FEELINGS, AND BE FAIR AND IMPARTIAL. AND WHO IS MS. SMITH, THE DEFENSE PERSON ATTORNEY OR THE PROSECUTOR?

THE DEFENSE -- DEFENSE ATTORNEY OR THE PROSECUTOR?

DEFENSE ATTORNEY.

SO SHE GOES YOU CAN PUT ALL YOUR FEELINGS ASIDE FOR MR. REYNOLDS? AND SHE GOES, YES, I WOULD PUT ALL OF THE FEELINGS ASIDE, AND THERE IS NO OTHER QUESTION, THAT IS THE END, ABOUT HER BEING EQUIVOCAL.

THERE IS NOTHING ABOUT HER BEING EQUIVOCAL ABOUT HER OPPOSITION TO THE DEATH

PENALTY AFFECTING HER IN THIS CASE.

HOW MUCH DEFERENCE SHOULD WE GIVE TO THE TRIAL JUDGE, WHO WAS THERE AT THE TIME AND CAN SEE NOT ONLY THE ANSWERS THAT WE SEE ON THE PAPER BUT THE DEMEANOR OF THE JUROR AND THE SLUGS OR FACES, FACIAL -- THE SHRUGS OR THE FACIAL ANSWER SHE MAY GIVE TO THE QUESTIONS. YOU CAN SAY, YES, I CAN SET ASIDE MY FEELINGS OR YOU CAN SAY YES, I CAN SET ASIDE MY FEELINGS, AND IT COMES OUT THE SAME ON PAPER BUT LOOSE A LOT DIFFERENT TO THE TRIAL JUDGE.

IT WOULD DEPEND ON THE JUDGE, HOW HE IS RULING. IF HE IS GOING SHE SAID SHE COULD FOLLOW THE LAW BUT SHE WAS GIVING FACIAL EXPRESSIONS AND SLUGGING HER SHOULDERS, AND -- AND SHRUGGING HER SHOULDERS, AND I THINK THERE WOULD BE SOME DUTY TO FOLLOW-UP ON IT, BUT IF THE JUDGE STILL FEELS, AND THERE IS A BASIS FOR SUPPORTING HIM IN THAT WAY, YOU KNOW, I THINK THE MORE DISCRETION YOU HAVE TO GIVE MORE DISCRETION AS HE FIELDS OUT WHY HE IS GRANTING THE CAUSE CHALLENGE. I MEAN, BUT, IF THERE IS NOTHING INDICATING THAT, I THINK HE HAS GOT VERY NARROW DISCRETION TO THIS TYPE OF ISSUE. THERE HAS GOT TO BE THE SUPPORT IN THE RECORD THAT THE PERSON CAN'T FOLLOW THE LAW.

IF WE HOLD IN YOUR FAVOR ON THIS ISSUE, WHAT IS THE REMEDY? IS IT A NEW PENALTY PHASE TRIAL, OR IS IT A NEW GUILT AND PENALTY PHASE TRIAL?

THE CASE LAW IS CLEAR. JUST NEW PENALTY, NOT NEW GUILT AND PENALTY, JUST NEW PENALTY. BASICALLY THE STATE'S ARGUED HERE A LOT, QUITE A BIT, THAT THE ERROR CAN BE CONSIDERED HARMLESS, BECAUSE THE STATE ATTORNEY BELOW HAD EXTRA PREEMPT OTHERS AND WOULD HAVE EXCUSED THE -- PREEMPTORYS AND WOULD HAVE EXCUSED THE JUROR WITH PREEMPTORY, IF THIS CAUSE CHALLENGE HADN'T BEEN USED, AND THE SAME OCCURRED IN CHANDLER, THE SAME SITUATION OCCURRED AND YOU REJECTED THAT ARGUMENT, SAYING IT IS PER SE REVERSIBLE ERROR, SAYING, A LOT, BECAUSE OF THE U.S. SUPREME COURT CASES GRAY AND DAVIS.

I DON'T UNDERSTAND WHY. I HAVE GOT TO LOOK BACK AT THOSE CASES. WHY ISN'T IT SUBJECT TO A HARMLESS-ERROR ANALYSIS, IF THERE WAS ONE MORE PREEMPTORY REMAIN SOMETHING WHAT IS THE RATIONALE FOR THAT?

BECAUSE, I, ONE OF THE COURTS SAY BECAUSE YOU DON'T KNOW, WITH ABSOLUTE CERTAINTY, WHETHER THAT WOULD HAVE BEEN EXERCISED. IT IS NOT A SITUATION WHERE YOU HAVE THE REVERSE, WHERE A JUROR GETS ON, WHO IS AUTOMATICALLY, OPPOSES THE DEATH PENALTY, AND A PREEMPTORY IS USED TO GET THEM OFF. YOU KNOW WITH ABSOLUTE CERTAINTY THAT THE PREEMPTORY HAS BEEN USED. BUT HERE YOU DON'T. I SEE I AM INTO MY TIME FOR REBUTTAL. I WOULD RESERVE THE REST OF MY TIME. THANK YOU.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MELANIE DALE, FROM THE ATTORNEY GENERALS OFFICE, ON BEHALF OF THE STATE. INITIALLY, I WOULD POINT OUT, WITH RESPECT TO THE MOTION TO SUPPRESS, IT IS VERY IMPORTANT TO LOOK AT THE EXACT FACTS OF THIS CASE. THIS CASE, FROM THE TIME THAT THE GIRLS FIRST WENT MISSING, FOR TWO DAYS AFTER, UNTIL THE DEFENDANT CONFESSED, THE GIRLS WENT MISSING ON NOVEMBER 4. THE POLICE WENT TO THE DEFENDANT'S HOUSE, BECAUSE THE GIRLS.

MOTHER SAID THE LAST TIME SHE SAW HER GIRLS, THEY WERE WITH THE DEFENDANT, WHICH WAS A FEW DAYS BEFORE, BUT HE WAS THE LAST PERSON SHE HAD SEEN THEM TALK TO. WHEN THE GIRLS.

MOTHER WENT TO THE DEFENDANT'S HOME, HE SAID DON'T GO TO THE POLICE BECAUSE I HAVE

HAD PROBLEMS WITH THEM. THE VICTIMS.

MOTHER WENT TO THE POLICE AND TOLD THEM THEY IS WHAT HAPPENED. THE POLICE WENT TO MR. AULT'S HOME THAT EVENING. THEY LET HIM, MR. AULT LET THE POLICE COME IN AND LOOK AROUND. THE NEXT DAY, MR. AULT VOLUNTARILY WENT TO THE POLICE STATION WITH HIS WIFE AND SAID I DON'T KNOW WHERE THESE GIRLS ARE. I HAVE ONLY MET THEM ONCE AND THEY HAVE NEVER BEEN IN MY CAR.

WHEN YOU SAY HE VOLUNTARILY WENT TO THE POLICE STATION. DID THE POLICE ASK HIM TO COME TO THE POLICE STATION?

THEY ASKED HIM TO GIVE A STATEMENT, BECAUSE HE SAID I HAVE NEVER SEEN THE GIRLS. I ONLY MET THEM ONCE. THEY HAVE NEVER BEEN IN MY CAR. WELL, AFTER MR. AULT AND HIS WIFE GAVE THE SAME STORY OF THE TIME WHEN THEY MET THE GIRLS AT EASTER LAND PARK, WHEN THEY MET THE GIRLS.

MOTHER, DETECTIVE RHODES LEFT. AT THAT POINT, ANOTHER DETECTIVE CAME, QUESTIONED MR. AULT REGARDING A 1995 SEXUAL BATTERY CASE, WHICH IS COMPLETELY UNRELATED TO THIS CASE, AND THEN ARRESTED HIM ON THAT CASE. WELL, FROM THE TIME OF THE ARREST TO THE TIME OF MR. AULT GOING TO HIS FIRST APPEARANCE ON THE 1995 CHARGE, DETECTIVE RHODES FOUND OUT SOME MORE INFORMATION ABOUT THE DEFENDANT AND THE GIRLS. DETECTIVE RHODES WENT TO THE COUNTY JAIL. MR. AULT SAID I WAS GOING TO CALL YOU ANYWAY. AND TOLD DETECTIVE RHODES, I WILL TAKE YOU TO WHERE THE BODIES ARE. TOOK THEM TO --

WAS THERE, LET'S JUST GO BACK. MR. ANDERSON SAID THAT THERE WAS SOME INDICATION THAT MR. RHODES KNEW THAT MR. AULT WAS INTERESTED IN SPEAKING WITH AN ATTORNEY.

I AM NOT SURE WHERE, IN THE RECORD THAT, IS EXACTLY REPRESENTED. I DO KNOW THAT MR. AULT, ON THE FIFTH, WHEN HE FIRST TALKED TO DETECTIVE ROADS, VOLUME UN-- TO DETECTIVE RHODES, VOLUNTARILY SAID I DON'T KNOW WHERE HE IS, AND THEN MR. AULT WAS ARRESTED WITHIN AN HOUR THEREAFTER ON, A SEPARATE CHARGE, BY DETECTIVE COX.

NOW, THIS WAS SORT OF A ONE-TWO MOVE. THIS ARREST ON THIS OTHER CHARGE WAS SOMETHING WHERE A COMPLAINT HAD BEEN MADE ALMOST NINE MONTHS BEFORE, ABOUT ANOTHER SEXUAL, SOME SEXUAL ACT. IS THAT CORRECT?

I BELIEVE SO, FROM THIS RECORD, WHAT I KNOW, IS THAT DETECTIVE COX HAD BEEN INVESTIGATING THIS CRIME, KNEW THAT MR. AULT MIGHT HAVE BEEN INVOLVED, GOT A PHONE CALL THAT HE WAS AT THE POLICE STATION. SHE WENT TO QUESTION HIM AN ARRESTTED HIM.

NOW, THERE WAS SOMETHING MADE IN THE RECORD ABOUT OFFICER RHODES NOT KNOWING THAT HE HAD BEEN ARRESTED FOR THIS CHARGE AND HAD ALREADY INVOKED, WAS APPOINTED AN ATTORNEY, HAD INVOKED HIS RIGHT TO AN ATTORNEY. IS THAT THE STATUS --

DETECTIVE RHODES DID NOT KNOW, UNTIL HOURS AFTER THE ARREST HAD OCCURRED, THAT IT HAD EVEN HAPPENED, AND DETECTIVE RHODES DID NOT KNOW THAT MR. AULT WENT TO A FIRST APPEARANCE THAT MORNING, AND THAT IS CLEAR IN THE MOTION TO SUPPRESS TESTIMONY.

HE KNEW THAT HE WAS, THAT HE HAD HE BEEN ARRESTED AND HE WAS IN THE COUNTY JAIL.

YES.

ON THAT OTHER CHARGE.

ON A SEPARATE CHARGE. MR. AULT, THEN, INFORMED DETECTIVE RHODES, I WAS GOING TO CALL YOU BECAUSE I WANTED TO TALK TO YOU ABOUT THIS CASE. HE WAS READ MIRANDA AND WAIVED -- EXCUSE ME?

HE INFORMED HIM OF THIS AFTER, AT THE TIME, AFTER HE HAD INVOKED HIS RIGHTS ON THE SEPARATE CASE.

WHICH IS NOT A SIXTH AMENDMENT VIOLATION. THE CASE LAW IS VERY CLEAR, PURSUANT TO TRAILER AND McNEIL, IT IS CHARGE-SPECIFIC, SO THE SIXTH AMENDMENT RIGHT DOES NOT EXTEND TO THE MURDER INVESTIGATION, AND TURNING TO THE FIFTH AMENDMENT RIGHT, IT IS CLEAR, AND I WOULD CITE AGAIN TO HESS AND SAP, THE CAPITAL MURDER DEFENDANT'S WRITTEN INVOKEATION OF RIGHTS ON THE OTHER CHARGE DID NOT INVOKE HIS RIGHTS ON THIS CHARGE, AND REALLY, MR. AULT WAS GOING TO CALL. HE DIDN'T KNOW WHETHER OR NOT QUESTIONING WAS IMMINENT ON THE MURDER CHARGE. BECAUSE, AS FAR AS HE KNEW, HE HAD TOLD THE POLICE HE HAD ONLY SEEN THE GIRLS ONCE AND HE DIDN'T KNOW WHERE THEY WERE. IT WASN'T UNTIL AFTER INVESTIGATION BY DETECTIVE RHODES, WHERE HE WENT AND SPOKE TO MILDRED MANNING, JAMES MARAZZO, LARRY JOE JACKSON AND DELOIS SKEET AND THE VICTIM'S MOTHER, THAT HE FOUND OUT THE DEFENDANT WAS LYING.

AND THEN HE GOES TO THE COUNTY JAIL, AND BEFORE THE MIRANDA RIGHTS ARE INVOKED, I MEAN ARE READ, MR. AULT SAYS I AM GLAD YOU ARE HERE. I WAS GOING TO CALL YOU ANYWAY?

I CAN DOUBLECHECK THAT EXACTLY IN THE RECORD, BUT I BELIEVE IT WENT, IT IS ABOUT PAGE 21-TO-26. DETECTIVE RHODES WENT TO THE JAIL WITH ANOTHER OFFICER, PATTY GEYER, AND ASKED AULT CAN I INTERVIEW YOU, AND AULT TOLD HIM, I WAS GOING TO CALL ANYWAY, AND THEN MIRANDA WAS GIVEN, BECAUSE MR. AULT DID NOT WANT PATTY GEYER IN THE ROOM. HE ONLY WANTED TO SPEAK TO DETECTIVE RHODES, SO MIRANDA WAS GIVEN AND MIRANDA WAS WAIVED, AND I POINT TO THE MOTION TO SUPPRESS HEARING, AND 21-THROUGH-26, WHERE A NUMBER OF EXCHANGES WENT ON, BUT I WOULD SPECIFICALLY ASK YOU TO LOOK AT PAGES 21-TO-22.

WAS MR. AULT A WITNESS TO THAT REPRESENTATION BY THE DEFENDANT?

IT DOESN'T INDICATE HERE.

MR. AULT MADE SOME REFERENCE TO THE DEFENDANT HAVING BROKEN OFF AN EARLIER INTERROGATION, SAYING THAT HE DIDN'T WANT TO CONTINUE TALKING ABOUT THE CASE OR SOMETHING.

I DON'T THINK THAT IS REFLECTED IN THIS RECORD. I THINK THIS RECORD CLEARLY REFLECTS THAT THE POLICE WENT TO MR. AULT'S HOME. HE SAID I HAVEN'T SEEN THE GIRLS TODAY. THEY WEREN'T IN MY CAR. THEY AREN'T AT MY HOUSE. AND THEN, ON NOVEMBER 5, WHEN HE AND HIS WIFE VOLUNTARILY WENT TO THE POLICE STATION, WHICH IS ALSO REFLECTED AT THE MOTION TO SUPPRESS HEARING, MR. AULT AND HIS WIFE SAID WE HAVE MET THE GIRLS ONCE. WE HAVEN'T SEEN THEM. SO THERE WAS NO BREAKING OFF OF THE CONVERSATION. IT WAS A DENIAL.

THAT JUST TOOK ITS NATURAL ENDING, BUT WHILE HE WAS STILL THERE AT THE POLICE STATION, HE WAS ARRESTED ON A SEPARATE --

ON A SEPARATE CHARGE. AS FAR AS DETECTIVE RHODES KNEW, MR. AULT WAS FREE TO LEAVE. IT WASN'T UNTIL DETECTIVE COX CAME ON A SEPARATE CHARGE THAT WAS UNRELATED TO THIS CASE, THAT SHE WAS INVESTIGATING, WHICH WAS A 1995 SEXUAL ASSAULT CASE, THAT MR. AULT WAS ARRESTED. HE WAS NOT BEING ARRESTED ON THE MURDER CHARGE, A AND DETECTIVE

RHODES HAD NO INTENTION OF DOING THAT THAT DAY.

AND IT IS THE STATE'S POSITION THAT, INSOFAR AS THE COURT'S ORDER OR WHAT HAPPENED AT THE FIRST APPEARANCE ABOUT NO FURTHER QUESTIONING OF THE DEFENDANT, THAT THAT WAS SPECIFIC TO THAT CHARGE.

I THINK IT IS CLEAR FROM THE RECORD THAT IT IS SPECIFIC TO THAT CHARGE. YOU CAN COMPARE THE CASE NUMBERS ON THE ORDER, AND THAT WAS THE ONLY CASE THAT MR. AULT WAS APPEARING BEFORE THAT JUDGE ON.

WAS THE ATTORNEY THAT WAS APPOINTED, WAS THERE ANY TESTIMONY FROM THAT ATTORNEY?

ON THE SEXUAL BATTERY CASE?

YES.

NOT IN THIS RECORD. IF THERE ARE NO FURTHER QUESTIONS ON THAT ISSUE, I AM GOING TO TURN TO THE SECOND ISSUE, WHICH DEALS WITH THE CAUSE CHALLENGE. I THINK IT IS IMPORTANT TO, AGAIN, READ THE RECORD EXACTLY AS IT STATES. THE STATE BEGAN QUESTIONING, FOUND OUT THAT JUROR RENDZ WAS OPPOSED TO THE DEATH -- JUROR REYNOLDS WAS OPPOSED TO THE DEATH PENALTY.

LET'S JUST GO OVER, BECAUSE I WANT TO MAKE SURE WE HAVE THE RIGHT PART OF THE RECORD. I SEE THE GENERAL QUESTION, NOW, HOW MANY PEOPLE ARE OPPOSED TO THE DEATH PENALTY?

THAT WAS PAGES 575-TO-574. I WOULD THEN POINT TO PAGE 850, WHERE THE ATTORNEY WAS ASKING ABOUT JURORS EXPERIENCES WITH DEATH IN YOUR LIFE AND HOW THAT WOULD AFFECT YOU IN FINDING GUILT OR INNOCENCE AND A PROPER PENALTY, AND WHEN ASKED HOW MANY AREN'T SURE HOW IT WOULD AFFECT YOU, MRS. REYNOLDS WAS ONE OF THE JURORS WHO ANSWERED THAT QUESTION I WOULD THEN POINT TO THE NEXT QUESTION AT PAGE 866, WITH RESPECT TO THE GUILT PHASE. DEFENSE COUNSEL ASKED IF YOU FIND, INSTEAD OF JUST EXPLAINING OR TELLING --

SO WAS THERE ANY FOLLOW-UP ON, SHE IS ASKED INITIALLY IF SHE IS OPPOSED TO THE DEATH PENALTY THERE. IS NO NOLLE ---FOLLOW-UP -- THERE IS NO FOLLOW-UP AT THAT TIME. THAT IS JUST A QUESTION.

LATER ON IN THE STATE'S GENERAL QUESTIONING OF THE JOORTION THE STATE ASKED THE QUESTION ABOUT HOW MANY ARE UNSURE OF IT AND JUROR RENDZ WAS ONE THAT ANSWERED.

THAT IS NOT AN UNUSUAL THING THAT, WHEN SOMEONE SITS ON THEIR FIRST DEATH-PENALTY CASE, I WANT TO UNDERSTAND THE CONTEXT, PEOPLE SAY I AM NOT SURE HOW IT WILL AFFECT YOU. SHE SAID THAT AND WHAT FOLLOW-UP QUESTIONING WAS THERE?

AFTER THAT WE THEN GO TO DEFENSE COUNSEL'S QUESTIONS OF THE JUROR.

SO THE PROSECUTOR AT THAT POINT, DID NOT, AFTER SHE SAID SHE WASN'T SURE, DIDN'T FOLLOW-UP TO ASK MORE SPECIFIC?

NO. BUT I THINK WHAT IS IMPORTANT IN THIS CASE --

I JUST WANT TO KNOW THE ANSWER.

NO. THERE IS NO OTHER QUESTIONS BY THE PROSECUTOR, AND THEN WE GO TO PAGE 866, WHICH

DEFENSE COUNSEL CITED TO AS WHERE THE JUROR SAID SHE COULD PUT HER FEELINGS ASIDE. JUROR REYNOLDS SAID SHE COULD PUT HER FEELINGS ASIDE WITH RESPECT TO GUILT IN THAT SITUATION. SHE DID SAY, ON PAGE 895, THAT SHE COULD BE FAIR AND IMPARTIAL, I THINK FROM THIS RECORD IT IS CLEAR THAT, BASED ON THE ANSWERS GIVEN ON THE FEW QUESTIONS THAT WERE ASKED, THIS JUROR IS EQUIVOCAL. SHE WAS UNSURE. AND IT IS IMPORTANT TO LOOK AT THE ACTUAL CHALLENGES THAT WERE MADE. THE PROSECUTOR STOOD UP --

WHAT WAS THE ACTUALLY, DIDN'T SHE ACTUALLY SAY, WHEN YOU GET TO 895, DIDN'T SHE SAY THE GUILT AND PENALTY

THAT IS FAIR AND IMPARTIAL, BUT I THINK IT IS IMPORTANT TO LOOK AT THE CASE AS A WHOLE AND WHERE THE CHALLENGE OCCURRED, AT PAGE 895-TO-890, THIS IS WHERE THE JUROR STOOD UP AND SAID SHE COULDN'T IMPOSE THE DEATH PENALTY. DEFENSE COUNSEL --

EVEN IF THE MITIGATING CIRCCIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

YES.

BUT FROM WHAT WE HAVE JUST READ, THERE WAS NOTHING ABOUT AGGRAVATING AND MITIGATING, WAS THERE?

NO. THAT IS NOT WHAT IS BEING ARGUED NOW. THE JUROR SAID SHE WAS NOT OPPOSED TO THAT. THAT IS NOT WHAT IS BEING ARGUED NOW. THE JUROR IS EQUIVOCAL. THERE WERE FOUR QUESTIONS ASKED OF THIS JUROR, AND THE JUDGE STATED, WHEN HE STRUCK THE JUROR FOR CAUSE, I TAKE COPIOUS NOTES. HE SAID, THE STATE SAYS THIS. I AM GOING TO GRANT THE CHALLENGE FOR CAUSE, AND I TAKE COPIOUS NOTES.

WHERE DID HE SAY THAT?

WHERE IS THAT ON THE RECORD?

I THINK IT IS ABOUT PAGE 929-TO-930. IT IS WITHIN THE CAUSE CHALLENGES GOING ON.

ARE YOU CLAIMING THAT THERE IS SOMETHING THAT OCCURRED, THAT THE JUDGE TOOK A NOTE "B" THAT ISN'T ON THE RECORD?

WHAT I AM SAYING IS WE HAVE TO GIVE THE JUDGE SOME KIND OF DISCRETION IN MAKING THIS DECISION.

BUT ISN'T THE JUDGE JUST INDICATING, IN "I TAKE COPIOUS NOTES", THAT IS THAT I AM TAKING A NOTE AS TO HER EARLIER SPON OR WHATEVER?

I DON'T THINK WE CAN READ EXACTLY INTO THAT. I THINK WE NEED TO TAKE THE RECORD EXACTLY AS IT IS.

YOU ARE COVERING A LOT OF FACTUAL INFORMATION IN A HURRY, AND I THINK THAT IS GIVING US A PROBLEM. WOULD YOU FOCUS ON THE ACTUAL RESPONSES OF THIS JUROR, AND TELL US WHAT SHE SAID THAT YOU FEEL IS THE STRONGEST POSITION IN SUPPORT OF THE TRIAL JUDGE'S DECISION, HOLD ON, OKAY, YOU ARE GOING TO BE ABLE TO DO IT, THE JUDGE'S DECISION TO STRIKE HER FOR CAUSE, IN OTHER WORDS WHAT DID THIS JUROR SAY OR DO, FOR THAT MATTER, IF IT IS ON THE RECORD, WHAT DID THIS JUROR SAY THAT YOU FEEL WAS THE MOST CRITICAL STATEMENT THAT SHE MADE THAT CAUSED THE TRIAL COURT TO GRANT THE STATE'S EXCUSE FOR CAUSE?

WELL, I MEAN, FROM THE RECORD, WE KNOW WHEN THE STATE ASKS THE QUESTION WHO IS

OPPOSED TO DEATH PENALTY, THIS JUROR RAISED A HER HAND AFFIRMATIVELY THAT SHE IS OPPOSED TO THE DEATH PENALTY. WE ALSO KNOW THAT, WHEN THE STATE ASKED THE QUESTION WHO IS UNSURE ABOUT HOW EXPERIENCES IN THEIR LIFE WILL AFFECT THEM IN BEING FAIR AND IMPARTIAL IN MAKING THIS DECISION THAT, JUROR REYNOLDS RAISED HER HAND IN AFFIRMATIVELY ANSWERING THAT QUESTION. THOSE ARE PAGES 573-TO-574 AND PAGES WILL -- PAGES 849-TO-850, AND I THINK IF YOU LOOK AT THE MORRISON DECISION, IT IS PROPER TO CHALLENGE A JUROR FOR CAUSE, WHO EXPRESSES UNCERTAINTY ABOUT IMPOSING THE DEATH PENALTY, AND I THINK EVEN IF WE GET TO THAT POINT WHERE THE JUROR SHOULDN'T HAVE BEEN CHALLENGED FOR CAUSE OR SHOULDN'T HAVE BEEN DISCHARGED FOR CAUSE, I THINK LOOKING AT GRAY, FARINA AND CHANDLER, IN LIGHT OF SOME MORE RECENT DECISIONS OUT OF THE U.S. SUPREME COURT, I SUPPLEMENTED WITH ROSS V OKLAHOMA, THAT CASE SPECIFICALLY SAYS THE U.S. SUPREME COURT STATES THAT GRAY SHOULD NOT BE EXTENDED BEYOND ITS CONTEXT, AND THE RELEVANT INQUIRY IS WHETHER THE COMPOSITION OF THE JURY PANEL AS A WHOLE COULD POSSIBLY HAVE BEEN AFFECTED BY THE TRIAL COURT'S ORDER.

WOULD IS THE JUDGE HAVE ABUSE -- WOULD THE JUDGE HAVE ABUSED HIS DISCRETION IF HE HAD DENIED THE MOTION TO STRIKE FOR CAUSE?

I THINK IN THIS CASE, BASED ON THE RECORD, THE JUROR WAS EQUIVOCAL. I THINK IT WOULD HAVE BEEN AN ABUSE OF DISCRETION. HOWEVER --

SO IN OTHER WORDS IF WE WERE TO SET FORTH THIS COLLOQUY, WHAT WE WOULD REALLY BE SAYING IS THAT ALL THE STATE HAS TO DO IS ASK WHO IS OPPOSED TO THE DEATH PENALTY, AND WITHOUT ANYTHING MORE THAN THAT, THAT A JUDGE SHOULD STRIKE THE JUROR FOR CAUSE.

NO. I DON'T THINK THAT IS THE POSITION. I THINK THE POSITION IS THE JUROR ANSWERED THAT SHE IS OPPOSED TO THE DEATH PENALTY AND THEN IS UNSURE HOW SHE IS GOING TO FEEL, HAVING TO IMPOSE THE DEATH PENALTY.

YOU ARE FORGETTING ABOUT THE QUESTION THAT WAS ASKED WHERE SHE WOULD SAY COULD YOU PUT, YOU HAVE LEGITIMATE FEELINGS IN BEING FAIR AND IMPARTIAL. NOW IS THE TIME TO COME CLEAN. CAN YOU PUT ALL OF YOUR FEELINGS ASIDE? SHE ANSWERED YES. I CAN'T IMAGINE ANYTHING LESS EQUIVOCAL THAN YES. I DON'T KNOW. POSSIBLY. MAYBE. YES!

I WOULD POINT TO THE FERNANDEZ DECISION. IN THAT CASE, JURORS WERE OPPOSED TO THE DEATH PENALTY AND THEN SAID THEY COULD FOLLOW THE LAW, AND IN THAT CASE, IT WAS 730 SOD 277, WHERE THE COURT FOUND THAT THE TRIAL COURT PROPERLY GRANTED FOR CAUSE BECAUSE THEY GAVE EQUIVOCAL ANSWERS. THEY SAID THAT THEY WERE OPPOSED TO THE DEATH PENALTY BUT THEY COULD FOLLOW THE LAW.

ISN'T IT WILL TRUE IN THIS CASE THAT NEITHER THE STATE OR THE DEFENSE COUNSEL OR THE COURT EVER INQUIRED OF THIS JUROR, ONCE SHE MADE THAT BLANKET STATEMENT OF MORAL OPPOSITION TO THE DEATH PENALTY, BASICALLY? SHE NEVER SAID I CAN OR CANNOT FOLLOW THE LAW. IT WAS NEVER ASKED OF HER. THE DEFENSE COUNSEL ASKED FOR THE OPPORTUNITY TO ASK MORE QUESTIONS, AND THE JUDGE DENIED THAT.

AFTER THERE HAD BEEN EXTENSIVE VOIR DIRE, THE JUDGE FOUND THAT HE WAS NOT GOING TO ALLOW NIL MORE QUESTIONS.

EXTENSIVE VOIR DIRE OF MS. REYNOLDS? THE VENIRE PANEL AS WHOLE.

YES.

SO THERE WAS NO INDIVIDUAL VOIR DIRE OF THIS JURY MEMBER, THOUGH IT WAS REQUESTED

BY DEFENSE COUNSEL, THE COURT DECLINED.

IN THIS CASE, YES.

> OKAY.

SO BASICALLY, YOU ARE ASKING US TO, IN THIS CASE, AGREE THAT A JUROR CAN BE STRUCK FOR CAUSE, BECAUSE THAT JUROR IS OPPOSED TO THE DEATH PENALTY.

AND THAT JUROR IS UNSURE HOW SHE IS GOING TO DEAL WITH VOTING FOR OR AGAINST THE DEATH PENALTY.

AND WHERE DOES SHE SAY THAT?

WELL, I THINK IT IS THE ANSWER TO THE QUESTION, WHO IS UNSURE ABOUT HOW, WHO IS UNSURE, IT IS AT PAGE --

ABOUT HOW DEATH OR LIFE WOULD AFFECT.

IS GOING TO AFFECT. YES. I THINK THAT IS THE UNCERTAINTY. AND, AGAIN, I MEAN, I WOULD EVEN LOOK AT FARINA AND CHANDLER. IN FARINA, WHILE THIS COURT FOUND THAT IT COULDN'T BE HARMLESS, IT WAS RELYING ON GRAY AND DAVIS, BUT SINCE THAT TIME THERE HAS BEEN OTHER CASE LAW. IN ROSS V OKLAHOMA, SPECIFICALLY SAYS GRAY NEEDS TO BE READ IN CONTEXT. IT HAS TO BE LOOKED AT AS A WHOLE, AND THE STANDARD IS WHETHER THE COMPOSITION OF THE JURY PANEL AS WHOLE, COULD POSSIBLY HAVE BEEN AFFECTED BY THE ORDER. WE DON'T KNOW THAT IN THIS CASE. IT HAS NOT BEEN ARGUED, AND IT IS NOT APPARENT FROM THIS RECORD, SO I THINK THAT THAT IS WHAT NEEDS TO BE LOOKED AT. IF WE GET TO THE HARMLESS ERROR, HOWEVER, THIS JUROR CLEARLY WAS OPPOSED TO THE DEATH PENALTY AND UNSURE HOW HER FEELINGS WERE GOING TO AFFECT HER. ANOTHER QUESTION, IN ALL DUE RESPECT, BECAUSE I HAVE NEVER SEEN SAUCH CURSORY TYPE OF EXAM -- SUCH A CURSE OTHER TYPE OF EXAMINATION THAT HAS RESULTED IN A CAUSE CHALLENGE. WE HAVE THESE CASES AND I HAVE SEEN THEM OVER THE YEARS. SHE IS ASKED, I WANT YOU TO TELL US HOW ANY EXPERIENCE IN DEATH IN YOUR LIFE, I THING YOU KNOW FORTUNATELY MOST OF US HAVE HAD EXPERIENCE OF HAVING DEATH IN OUR LIFE, MIGHT AFFECT YOU WITH FINDING EITHER GUILT OR INNOCENCE OR AIM -- INNOCENCE OR A PROPER PENALTY, AS AFFECTS MR. AULT. DEATH OR LIFE. LET ME ASK YOU THIS. HOW MANY IN THE FIRST ROW ARE UNSURE HOW IT WILL AFFECT YOU? WHAT? I MEAN, THAT IS IT. MS. REYNOLDS IS NOT EVEN ASKED ANYTHING. SHE MUST HAVE RAISED HER HAND.

I THINK FROM THIS RECORD, THOUGH, WHAT WE KNOW IS THE JURORS MADE TWO DIFFERENT STATEMENTS. THE JURORS SAID I AM OPPOSED, NOT SURE, AND I COULD DO IT.

WE HAD NO IDEA WHY, WHAT, WHETHER IT WAS DEATH? WAS IT A MURDER OF SOME, I MEAN, BECAUSE THAT IS WHERE IT GIVES CONTEXT, WHERE YOU HAVE TO LOOK, AND IF MS. REYNOLDS HAD SAID, YOU KNOW, I HAD A MURDER, MY, A CLOSE FRIEND WHO WAS MURDERED AND THIS HAPPENED, AND I SAW THE DEATH PENALTY, AND I FOUND OUT THAT THE PERSON WAS INNOCENT, AND SO NOW I AM OPPOSED -- AND I SOUGHT THE DEATH PENALTY, AND I FOUND OUT THAT THE PERSON WAS INNOCENT SO NOW I AM OPPOSED TO IT, SOMETHING THAT UNDERSTOOD THAT THIS IS WHAT HAPPENED, BUT WITHOUT ANYTHING OTHER THAN JUST A GENERAL QUESTION, HOW DO YOU KNOW WHETHER THE PERSON IS GOING TO REALLY BE ABLE TO BE FAIR AND IMPARTIAL?

I THINK THAT IS WHERE THE DEFERENCE OF THE TRIAL COURT, WHO IS THERE WATCHING THE ANSWERS AND THE RESPONSES AND WHAT HAPPENS DURING JURY SELECTION.

I DON'T THINK WE HAVE EVER SAID THE DEFERENCE WOULD APPLY TO WHERE THERE IS NOTHING IN THE RECORD TO WHERE WE CAN EVEN, HOW, SOMETHING SUBSTANTIVE IS ASKED, BUT IN THIS THERE IS NOTHING SUBSTANTIVE.

THE JUDGE IN THIS CASE WOULD HAVE TO BE CLAIRVOYANT. SHE SAYS SHE IS OPPOSED TO THE DEATH PENALTY. SHE NEVER SAYS THAT VIEWPOINT WOULD KEEP ME FROM BEING FAIR AND IMPARTIAL. SHE SAYS, YES, I HAVE EXPERIENCED DEATH, BUT WE DON'T KNOW IF IT WAS MURDER. IT COULD HAVE BEEN A PARENT THAT DIED, WHICH EVERYONE EXPERIENCES, AND IT MIGHT, BUT SHE CONCLUDES BY SAYING TO THE GENERAL QUESTION, I CAN SET IT ASIDE BY BEING FAIR AND IMPARTIAL, AND IT IS NOT EXPLORED BY THE STATE OR THE COURT.

I THINK THE RECORD IS UNCLEAR AS TO THE SPARRING THAT HAPPENED HERE, BUT THAT DIRECTLY SUPPORTS THE POSITION. THE JUROR MADE TWO DIFFERENT STATEMENTS WHICH IS EQUIVOCINDICATION, AND EVEN IF WE FIND THAT THE JUROR SHOULD NOT -- EQUIVOCATION, AND EVEN IF WE FIND THAT THE JUROR SHOULD NOT HAVE -- THERE WERE TWO PREEMPTORY CHALLENGES LEFT, AND SINCE GRAY WAS DECIDED AND CHANDLER AND FARINA WERE DECIDED, THE U.S. SUPREME COURT SAID NOT TO OVEREXTEND GRAY. THE QUESTION IS WHETHER OR NOT THE JURY PANEL WAS AFFECTED.

YOU ARE ASKING US TO RECEDE FROM FARINA, YOU SAID, RECEDE FROM PRIOR CASE LAW.

FROM PRIOR CASE LAW WITH RESPECT TO THE HARM LAST LESS ERROR ANALYSIS. I THINK IN CASE LIKE THIS, WHERE A JUROR IS CHALLENGED FOR BEING OPPOSED TO THE DEATH PENALTY, WHICH IS A PROPER PREEMPTORY CHALLENGE, FROM THIS COURT'S OPINION IN MORRISON, I THINK WE CAN LOOK AT THE CASE AS WHOLE AS MANDATED, OR AS EXPLAINED OR INQUIRED IN, IN ROSS V OKLAHOMA, A WE CAN LOOK AT THE ENTIRE JURY PANEL. DON'T JUST TAKE GRAY AND SPECIFICALLY APPLY IT TO EVERY CASE. EVERY CASE NEEDS TO BE LOOKED AT AS A WHOLE, AND I DON'T THINK THAT IT IS A PER SE RULE THAT IT CAN NEVER BE HARMLESS. I THINK ROSS ALLOWS THIS COURT TO REVISIT THAT ISSUE AND SAY THE STATE HAD PREEMPTORY CHALLENGES. IF THE JUDGE HAD DENIED THE CHALLENGE FOR CAUSE, THE STATE HAD TWO PREEMPT OTHERS AT THE END OF VOIR DIRE. THIS JUROR NEVER WOULD HAVE SAT ON THIS JURY.

BUT DOESN'T GRAY SPECIFICALLY HOLD THAT THE EXCLUSION OF A JUROR FOR CAUSE IS NOT SUBJECT TO HARMLESS-ERROR ANALYSIS, EVEN WHERE THE STATE HAS AN UNEXERCISED PREEMPTORY CHALLENGE, AND IS THERE ANYTHING IN ROSS AND SUBSEQUENT UNITED STATES SUPREME COURT CASES, THAT RECEDES FROM THAT SPECIFIC HOLDING?

I THINK WHAT ROSS DID WAS NOT RECEDE FROM THE HOLDING, BUT WHEN TALKING ABOUT A DEFENDANT'S, THIS CASE WAS A LITTLE BIT DIFFERENT, BUT IN TALKING ABOUT THE HARMLESS-ERROR ANALYSIS IN THAT CONTEXT, ROSS FOUND THAT THERE IS NO CONSTITUTIONAL VIOLATION WHERE A DEFENDANT IS UNABLE TO SHOW THAT THE JURY WAS IMPARTIAL, AND SPECIFICALLY STATED GRAY SHOULD NOT BE EXTENDED BEYOND ITS CONTEXT.

HOW DO YOU SHOW THAT, THOUGH? HOW DO SHOW THAT THE JURY WAS PARTIAL?

YOU CAN ARGUE THAT AN IMPROPER JUROR SAT.

WELL, THAT IS WHAT THEY ARE ARGUING HERE THAT, AN IMPROPER JUROR SAT.

WELL, BUT, SEE, HERE, THIS JUROR WOULD HAVE BEEN STRUCK ANYWAY. THAT IS THE DIFFERENCE. SHE DIDN'T SIT.

DOESN'T GRAY SAY WE CAN'T CONSIDER THAT?

I AM SORRY?

DOESN'T GRAY SAY WE CAN'T CONSIDER THAT?

I THINK, WHEN YOU READ GRAY IN LIGHT OF ROSS, YOU CAN CONSIDER THAT. IN LOOKING AT THE JURY AS A WHOLE HERE, THIS JUROR WAS NOT GOING TO SIT ON THIS JURY. WHICH IS DIFFERENT THAN A JUROR WHO IMPROPERLY SAT. WE HAVE NO ALLEGATION IN THIS CASE THAT AN IMPROPER JUROR SAT. WE HAVE AN ALLEGATION THAT THE JUROR WAS TAKEN OFF THE JURY. THE JUROR WOULD HAVE BEEN STRUCK ANYWAY.

WERE ALL OF THE OTHER JURORS THAT RAISED THEIR HANDS IN OPPOSITION TO THE DEATH PENALTY CHALLENGED FOR CAUSE?

I WOULD HAVE TO LOOK, BUT I BELIEVE SO. I BELIEVE THERE WAS A JUROR --

IT WAS GRANTED?

I DON'T THINK IN EVERY SINGLE CASE, BASED ON THE TOTALITY OF THE RECORD ON EACH JUROR, BUT THERE HAS BEEN NO ALLEGATION FROM THIS RECORD AND IN REVIEWING THE RECORD, THERE IS NO JUROR THAT SAT, THAT CAN BE DEEMED AS A PARTIAL JUROR SIT OTH JURY.

YOU SAID THEY RAISED THEIR HANDS THAT THEY OPPOSED THE DEATH PENALTY. AND THEY WERE ALL CHALLENGED FOR CAUSE AND GRANTED?

I CAN'T SAY THAT EVERY SINGLE ONE WAS CHALLENGED FOR CAUSE. I CAN CHECK, BUT I BELIEVE THAT MOST OF THE JURORS THAT SAID THEY WERE OPPOSED TO THE DEATH PENALTY, AFTER FURTHER EXAMINATIONS BY BOTH SIDES, I WOULD TO HAVE GO THROUGH EVERY SINGLE CHALLENGE THAT WAS RAISED.

WHAT WAS IT ABOUT ANY OF THOSE OTHER CHALLENGES THAT SOMEBODY, THEN, ANSWERED AND STAYED ON THE JURY, AND IN OTHER WORDS WASN'T CHALLENGED FOR CAUSE?

I DON'T THINK THAT THAT IS REFLECTED IN THIS RECORD THAT, ANY JUROR IMPROPERLY SAT. I THINK THAT --

I AM NOT TALKING ABOUT WHETHER A JUROR PROPERLY SAT OR DIDN'T PROPERLY SIT. I AM TALKING ABOUT DISTINGUISHING AMONGST THOSE JURORS, APPARENTLY WE ARE TALKING ABOUT A GROUP OF JURORS THAT, WHEN SOMEBODY ASKED ABOUT THEIR FEEL TO GET DEATH PENALTY THAT, SOME OF THEM ROSE THEIR HANDS IN ANSWER TO THE QUESTION ABOUT THE DEATH PENALTY. WERE CHALLENGES FOR CAUSE ANSWERED AMONGST ALL OF THEM?

I CAN'T REMEMBER, BUT I BELIEVE THERE WERE TWO.

SOME OF THOSE PEOPLE, THE STATE DID NOT CHALLENGE FOR CAUSE. IS THAT CORRECT?

I CAN'T SAY FOR SURE. I CAN'T SAY POSITIVELY, FROM THE RECORD, SO I DON'T WANT TO PUT MYSELF IN THAT CORNER, BUT WHAT I CAN SAY IS IT IS APPARENT THAT THE STATE CHALLENGED THE JUROR FOR CAUSE AND STATED BECAUSE SHE SAID SHE COULD NOT FOLLOW THE LAW, AND THAT WAS THE CHALLENGE THAT WAS MADE WITH RESPECT TO THE JURORS WHO THE STATE BELIEVED --

I AM SORRY. THE STATE SAID THAT SHE COULD NOT FOLLOW THE LAW.

SHE SAID SHE COULDN'T, AND DEFENSE COUNSEL --

WAIT A MINUTE. DID THIS JUROR STATE ON THE RECORD THAT SHE COULD NOT FOLLOW THE LAW?

I AM NOT SAYING THAT SHE DID. NO. SHE DIDN'T. BUT WHAT I AM SAYING IS WHAT HAPPENED AT TRIAL WAS THE STATE MADE THIS CHALLENGE, AND DEFENSE COUNSEL THEN COUNTERED AND SAID, YES, SHE DIDN'T SAY, SHE DID ACT THAT WAY. SHE COULDN'T FOLLOW THE LAW. BUT THEN LATER ON SHE SAID SHE COULD, SO I THINK THERE WAS A MISUNDERSTANDING AS WITH RESPECT TO THAT PART OF THE RECORD, BUT BASED ON WHAT THIS JUROR SAID, IT IS CLEAR THERE WERE TWO DIFFERENT STATEMENTS MADE, AND EQUIVOCINDICATION WITH RESPECT TO THE QUESTIONS.

BUT YOU AGREED THAT SHE NEVER SAID SHE COULDN'T FOLLOW THE LAW. THAT WAS A MISSTATEMENT BY THE STATE.

BELOW IT WAS A MISSTATEMENT, BUT I MEAN NOW, THE STATE'S ARGUMENT IS THAT IT WAS NEVER EVEN ESTABLISHED THAT SHE COULD FOLLOW THE LAW. IT WAS ESTABLISHED --

WE HAVE TO FOCUS ON ONE THING AT A TIME.

OKAY.

SO IF THERE WAS A STATEMENT MADE BY THE PROSECUTOR BELOW, TO THE JUDGE, THAT JUDGE, SHE SAID SHE COULDN'T FOLLOW THE LAW, YOU AGREE THAT SHE NEVER SAID THAT.

BASED ON THIS RECORD, YES.

THANK YOU FOR YOUR CANDOR.

HOWEVER, IT IS THE POSITION THAT IT IS EQUIVOCATION ON THIS RECORD. THAT IS WHAT HAS BEEN ARGUED ON APPEAL.

WHERE DOES THE QIFB INDICATION COME IN ZOO THAT -- WHERE DOES THE EQUIVOCATION COME IN?

THAT I AM HAVING TROUBLE WITH DEATH.

THAT IS WHERE I AM HAVING TROUBLE WITH THE UNCERTAINTY, READ BY JUSTICE PARIENTE, IT DIDN'T SEEM TO HAVE ANYTHING TO DO WITH UNCERTAIN ABOUT THE APPLICATION OF THE DEATH PENALTY. IT SEEMED TO BE UNCERTAIN ABOUT SOME DEATH IN HER FAMILY BACKGROUND OR HISTORY, AND AM I, AM I MISS HEARING THAT?

I THINK IF WE LOOK FROM PAGES 849-TO-850, IT IS AN EXTENSIVE QUESTION THAT BEGINS WITH RELATIVES AND HOW PEOPLE HAVE SUFFERED SOME EXPERIENCE. GOES ON TO TALK ABOUT WHETHER OR NOT YOU COULD BE, THE JUROR COULD BE FAIR AND IMPARTIAL WITH RESPECT TO THE GUILT OR INNOCENCE, AND GENERAL FEELINGS ABOUT DEATH IN THEIR LIFE, HOW IT WOULD AFFECT THEM WITH MAKING, WITH FINDINGS OFES GUILT OR INNOCENCE -- FINDINGS OF EITHER GUILT OR INNOCENCE AND THE QUESTION WOULD BE PROPER AND GOING BACK TO WOULD IT AFFECT YOU IN THIS CASE. I UNDERSTAND THIS IS A LONG QUESTION AND IT FLOATS AROUND O.

WHAT WOULD AFFECT YOU IS THE DEATH IN THE FAMILY. THAT, IN THE BACKGROUND, ISN'T IT? THAT IS THE QUESTION.

THAT IS PART OF THE QUESTION, YES. I AM NOT SURE IT IS CLEAR IN THE QUESTION.

THE PROSECUTOR, MOVING TO STRIKE THE JUROR FOR CAUSE, SAID SHE INDICATED SHE IS OPPOSED TO THE DEATH PENALTY. NO QUESTION ABOUT THAT, AND THAT, AND THIS IS THE CRITICAL THING, THAT SHE COULD NOT CONSIDER BOTH SENTENCES AND COULD NOT MAKE A RECOMMENDATION OF DEATH, EVEN IF THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE

MITIGATING CIRCUMSTANCES. THAT IS WHAT WAS REPED. AND THEN THE -- WAS REPRESENTED. AND THEN THE DEFENSE LAWYER SAID THAT IS NOT WHAT HAPPENED, AND SHE SAID SHE COULD FOLLOW THE INSTRUCTIONS. OKAY, AND THEN I AGREE WITH THE STATE. DOESN'T SAY ANYTHING ABOUT I TOOK COPIOUS NOTES OR WITHOUT ANY REFERENCE, AND I AGREE WITH THE STATE AND I WILL GRANT THAT ONE. WE OBJECT, SO NOTED. AND THEN YOUR HONOR, I WOULD AGAIN STATE THAT WE BE ABLE TO BRING HER BACK IF THE STATE IS GOING TO STRIKE HER FOR CAUSE, SO THAT WE CAN ATTEMPT TO REHABILITATE HER. I AM NOT GOING TO ALLOW. THAT I BELIEVE THERE WAS ADEQUATE INQUIRY EXTENSIVELY ON BOTH SIDES. NOW, IT IF THE STATE THINKS THAT THEY ARE CONCERNED ABOUT A JUROR, THEY HAVE GOT TO DO MORE THAN JUST WHAT WAS DONE IN THIS CASE. DON'T YOU THINK?

I THINK BASED ON THE RECORD, THIS COURT COULD FIND THAT THIS JUROR WAS EQUIVOCAL. HOWEVER, IF THE JUROR WAS IMPROPERLY STRUCK FOR CAUSE, THE STATE, AGAIN, WOULD ASK TO LOOK AT THE HARMLESS-ERROR ANALYSIS. IF THERE ARE NO FURTHER QUESTIONS ON THE ISSUE, I WOULD REST ON MY BRIEF AND ASK THIS COURT TO AFFIRM THE CONVICTION AND SENTENCE.

CHIEF JUSTICE: THANK YOU VERY MUCH.

COUNSEL, WHAT IS THE STRONGEST ANSWER OF THIS JUROR, FROM YOUR STANDPOINT, IN FAVOR OF DENYING THE CHALLENGE FOR CAUSE? IN OTHER WORDS WHAT, WHAT DOES SHE SAY, IN ANSWER TO QUESTIONS THAT SHE COULD SET HER FEELINGS ABOUT THE DEATH PENALTY ASIDE AND BE FAIR OR WHATEVER? WHAT IS THE STRONGEST STATEMENT THAT IS MADE ON THE RECORD THERE, DURING THE COLLOQUY, THAT WOULD SUPPORT A DENIAL OF THE CHALLENGE FOR CAUSE?

WELL, I THINK THERE SULACTUALLY, I WILL PICK OUT TWO. THERE IS ONE AT 866, WHERE DEFENSE COUNSEL IS SAYING NOW IS THE TIME TO COME CLEAN, IF YOU HAVE FEELINGS THAT WOULD AFFECT YOUR FAIRNESS AND PARSIALITY, COME CLEAN WITH IT, AND IT IS, TWO JURORS ARE SAYING THEY HAVE THESE FEELINGS THEY CAN'T SET ASIDE, AND SHE IS UNEQUIVOCAL THAT SHE CAN, AND SHE SAYS I WOULD PUT MY FEELINGS ASIDE. THAT IS ONE THING.

SHE ACTUALLY IS THE ONLY, YOU CAN PUT ALL YOUR FEELINGS ASIDE. A COUPLE SAY NO, AND SHE DOESN'T JUST SAY YES. SHE SAYS, YES, I WOULD PUT MY FEELINGS ASIDE.

SHE COMES FORWARD AND MAKES SURE THERE IS NO UNCERTAINTY AS TO THAT. AND THEN LATER ON, IT SAID, 895, DEFENSE COUNSEL, AGAIN, SAYS MS. REYNOLDS, YOU OPPOSE THE DEATH PENALTY, AND SHE ADMITS, YES, I DO, AND THEN HE GOES AFTER EVERYTHING THAT HAS BEEN DISCUSSED IN THIS ROOM, IN THIS COURTROOM,, IT GOES ON BASICALLY, CAN YOU BE FAIR AND IMPARTIAL IN THE GUILT PHASE AND THE PENALTY PHASE OF THIS TRIAL, AND IT IS YES, I CAN.

IN OUR RECORD, IT HAS THAT MS. REYNOLDS ASKS THIS QUESTION. IS THAT WHAT YOUR TRANSCRIPT SAYS? IT IS OBVIOUSLY NOT, MUST BE MS. SMITH.

IT IS MS. SMITH. THAT IS --

EVERYONE AGREES THAT --

YES.

NOW, THE OTHER TWO JURORS, CHALLENGE FOR CAUSE THAT ANSWERED, NEW YORK CITY THEY COULDN'T PUT THEIR FEELINGS ASIDE -- THAT ANSWERED, NO, THEY COULDN'T PUT THEIR FEELINGS ASIDE, DO YOU KNOW?

I DON'T KNOW SPECIFICALLY. I KNOW THERE WAS ONE JUROR, I THINK IT IS SIMMONS, WHO SAID

THAT THEY WERE, OPPOSE THE DEATH PENALTY, AND THE STATE'S MOVE TO STRIKE THEM FOR BASICALLY THE SAME REASON, AND THAT CAUSE CHALLENGE WAS DENIED BY THE JUDGE.

WHAT WAS THE, WHAT SPECIFICALLY DID DEFENSE COUNSEL ARGUE TO THE TRIAL JUDGE, WHEN THE TRIAL JUDGE INDICATED THAT HE WAS GOING TO GRANT THIS FOR CAUSE?

IT WAS BASICALLY, IF YOU ARE GOING TO GRANT THIS CAUSE CHALLENGE, I NEED TO TALK TO YOU, GET THE JUROR UP THERE MORE AND TALK AND LAY THIS, CLEAR THIS OUT COMPLETELY.

LET ME AMEND MY QUESTION AND SAY WHAT WAS THE DEFENSE ARGUMENT AT THE TIME THAT THE CAUSE CHALLENGE WAS MADE?

IT WAS THAT THE STATE WAS WRONG THAT SHE SAID SHE COULD BE FAIR AND IMPARTIAL AND FOLLOW INSTRUCTIONS IN THE LAW.

THAT WAS A VERY LIMITED ARGUMENT.

RIGHT. IT WAS THAT THE GROUNDS THAT THE STATE IS GIVING AREN'T TRUE, BASICALLY. IT AMOUNTS TO THAT. THEY THOUGHT IT WAS FACTUALLY INCORRECT.

THEN THE JUDGE GRANTED THE CAUSE AND THE DEFENSE LAWYER SAYS LET ME BRING THIS JUROR BACK AND ASK HER MORE AND THE JUDGE SAYS LET'S MOVE ON THE.

RIGHT. THANK IS THE CONTEXT OF IT, THAT IF YOU ARE GOING TO STRIKE THIS, I NEED TO HAVE THIS PERSON IN FRONT OF YOU AGAIN. IT WAS REALLY CLEAR.

WAS THIS FOLLOWING JUSTICE ANSTEAD'S QUESTION, I MEAN, WAS THIS IN LINE WITH A SERIES OF CAUSE CHALLENGES THAT WERE GRANTED, OR --

I HANSLY DON'T REMEMBER THAT.

OKAY.

THE QUESTION, WAS THE QUESTION ASKED, BECAUSE WE HAVE BEEN REFERRING TO DIFFERENT PAGES OF THE COLLOQUY, BUT WAS THE QUESTION ASKED GENERALLY, OF THE JURORS, WHETHER THEY COULD CONSIDER SENTENCES AND MAKE A RECOMMENDATION, EVEN IF THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING. WAS THAT GENERAL QUESTION EVER ASKED IN THIS VOIR DIRE?

I DON'T REMEMBER, BECAUSE I DIDN'T TAKE NOTE OF THAT, BECAUSE I DIDN'T GET RESPONSES.

THERE MAY HAVE BEEN SOME OTHER PLACES WHERE THEY WERE GENERALLY ASKED THE QUESTION AND JUST DOESN'T INDICATE WHETHER THERE WAS AN INDIVIDUAL RESPONSES?

RIGHT, AND NO ONE FOLLOWS UP LIKE THERE WAS INDIVIDUAL RESPONSES OR SAYS, YOU KNOW, LIKE, IDENTIFIES A JUROR AS MAKING A RESPONSE. IF THERE IS A RESPONSE, IT IS ALL, YOU CAN FOLLOW THE LAW.

USUALLY DEFENSE LAWYERS GO IN EXTENSIVELY ABOUT THERE IS GOING TO BE AGGRAVATING AND MITIGATING AND THE JURORS, THEY DON'T KNOW WHAT, THEY ARE USUALLY GOING, WELL, I DON'T KNOW. I AGREE WITH THE DEATH, IT IS USUALLY GOING WHERE THEY ARE SAYING, NO, WE WOULD IMPOSE THE DEATH PENALTY NO MATTER WHAT AND SOMEONE IS TRYING TO EXPLAIN WHAT THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, DID THAT OCCUR, A THAT KIND OF COLLOQUY OCCUR IN THIS --

I THINK IT WAS EARLY O I DON'T HAVE ANY RECORD CITES FOR THAT TYPE OF THING. ONE THING I

WOULD MENTION, THE STATE MENTIONED ROSS COMING OUT OF THE UNITED STATES SUPREME COURT. THAT WAS A 1988 CASE, AND FARINA, I KNOW FARINA WAS SUBSEQUENT TO THAT, WHERE THIS COURT REVIEWED THAT ISSUE ABOUT PER SE REVERSIBLE ERROR, AND IN ROSS, IN FACT, THE U.S. SUPREME COURT, I THINK THEY BASICALLY AFFIRMED THE HOLDING IN GRAY, JUST SAYING AND RECOGNIZING IN THAT CONTEXT, WHICH IS THIS CONTEXT, THE IMPROPER EXCLUSION OF A JUROR BECAUSE OF OPPOSITION TO THE DEATH PENALTY, AND --

WOULD THIS JUROR, THOUGH, WOULD THE STATE HAVE BEEN ABLE TO PROPERLY STRIKE THIS JUROR BY PREEMPTORILY BY SAYING, WELL, EVEN THOUGH SHE WASN'T A CHALLENGE FOR CAUSE, THAT SHE DID EQUIVOCATE AND I AM STRIKING HER BECAUSE SHE IS OPPOSED TO THE DEATH PENALTY. CAN THEY DO THAT?

I THINK THE STATE SHOULD BE ABLE TO STRIKE A JUROR WITH A PREEMPTORY CHALLENGE, BECAUSE OF OPPOSITION TO THE DEATH PENALTY.

THEY CAN ACTUALLY TAKE EVERYONE OFF A JURY THAT IS AGAINST THE DEATH PENALTY.

WELL, THEY WILL BE USING UP THEIR PREEMPT OTHERS AND STUFF, BUT IT IS -- THEY WILL BE USING UP THEIR PREEMPTORYS AND STUFF, BUT I DON'T THINK IT IS PREVENTED CONSTITUTIONALLY IN ANY WAY. IT IS NOT DISCRIMINATORY, IN THE WAY THAT A RACE CHALLENGE IS.

THE DEFENSE CAN DO THE SAME THING WITH PROSPECTIVE JURORS THAT SAY I SUPPORT THE DEATH PENALTY.

EXACTLY.

SO I GUESS, AND I WILL LOOK BACK AT THESE CASES, AND I MAY BE STILL HAVING TROUBLE WITH WHY THERE REALLY ISN'T A HARMLESS-ERROR ANALYSIS, WHERE YOU ARE TALKING ABOUT SOMEBODY THAT WOULDN'T HAVE SAT, ANYWAY, IF THERE IS TWO PREEMPTORY CHALLENGES REMAINING, AND IT WAS TO BE A PROPER BASIS FOR STRIKING THE JUROR.

WELL, PART OF THE ROSS DISCUSSION ABOUT THAT, IN THE CONTEXT OF, THAT ROSS WAS THE CONTEXT, DIFFERENT CONTEXT, WHERE JURORS WHO AUTOMATICALLY WOULD IMPOSE DEATH, GOT ON THE JURY, AND THE DEFENSE HAD TO USE PREEMPTORYS TO GET THEM OFF, AND THE COURT SAID THERE IS ABSOLUTELY NO DOUBT, ABSOLUTE CERTAINTY, THAT A PREEMPTORY WOULD BE USED, BECAUSE IT WAS USED, BUT THERE IS NO, AND UNDER THOSE CIRCUMSTANCES, PREEMPTORY IS NOT A CONSTITUTIONAL MAGNITUDE, BUT WE ARE NOT GOING TO CREATE, EXTEND GRAY TO THIS TYPE OF SITUATION, BECAUSE THERE IS NO CONSTITUTIONAL VIOLATION. PREEMPTORY IS NOT CONSTITUTIONAL INNATE, BUT THEY DID AFFIRM, BASICALLY, GRAY -- IN NATURE, BUT THEY DID AFFIRM, BASICALLY, GRAY, IN THIS CONTEXT, AND SAID, AND THEY HAD A CHANCE, TO YOU KNOW, DISCARD IT RIGHT THERE, BECAUSE IT WAS REAL CLOSE IN TIME, IN FACT. NOW WE HAVE GONE THROUGH A LOT OF YEARS, WITH A PER SE RULE THAT IS SISTER I DECIS OCH-THAT IS ST. E -- THAT IS STERIDECISIS, AND THIS COURT UPHELD IT, WHERE THERE IS ADDITIONAL PREEMPTORY, AND IT HAS BEEN BEATEN TO DEATH.

THAT WAS IN FARINA?

FARINA.

WELL, THERE IS NO CLAIM HERE, THOUGH, THAT THERE WAS ANY IMPROPRIETY OR UNFAIRNESS, WITH REFERENCE TO THE JURY THAT ACTUALLY SAT, THERE? THERE IS NO CHALLENGE TO THE JURY THAT ACTUALLY SET?

NO. IT IS NO CHALLENGE THAT THE JUROR TO GET ON THE JURY. IT WAS THAT THE JUROR WAS

IMPROPERLY EXCLUDED VIA A CAUSE CHALLENGE. I WOULD LIKE TO GIVE A COUPLE OF RECORD CITES IN RELATIONSHIP TO POINT ONE, INVOLVING THE, FIRST OF ALL, INVOLVING THE SEXUAL BATTERY, WHERE OFFICER COX INTERVIEWED MR. AULT. AT PAGE 71, IT TALKS ABOUT HIS INVOKEATION OF HIS RIGHT TO REMAIN SILENT.

THAT IS AS TO THE QUESTIONS ABOUT THE SEXUAL BATTERY. IS THAT CORRECT? THE OTHER CHARGE.

IT WAS A PRETTY GENERAL THING, SAYING THAT I DON'T WANT TO SPEAK ABOUT ANYTHING ELSE.

BUT I MEAN, OFFICER COX WAS NOT QUESTIONING HIM ABOUT THE MISSING GIRLS.

RIGHT. THAT IS TRUE. THAT IS TRUE.

AND THEY ARE FROM DIFFERENT JURISDICTIONS. COX WAS FROM THE SHERIFFS DEPARTMENT AND THE INVESTIGATION OF THE HOMICIDE WAS FROM A SEPARATE POLICE DEPARTMENT?

CORRECT. THEY WERE KIND OF, BUT THEY WERE KIND OF WORKING TOGETHER, BECAUSE IT IS INTERESTING THAT THE INTERVIEW ON THE HOMICIDES WAS BEING DONE, AND THE OAKLAND PARK POLICE DEPARTMENT CALLED BROWARD COUNTY SHERIFFS OFFICE, SAYING WE HAVE MR. AULT DOWN HERE. YOU MIGHT WANT TO TALK TO HIM. AND THERE WAS A MARTAL RELATIONSHIP BETWEEN TWO OF THE -- A MARITAL RELATIONSHIP BETWEEN TWO OF THE OFFICERS.

YOU HAVE THOSE RECORD CITES IN YOUR BRIEF, DO YOU NOT SNIM NOT SUMPLT 1731 AND 1734 -- DO YOU NOT?

I AM NOT SURE. 1731 AND 1734 IS WHERE RHODES WANTS TO TALK TO THE ATTORNEY ABOUT THE POLYGRAPH. THAT IS WHERE RHODES WANTS TO TALK TO HIM.

CHIEF JUSTICE: THANK YOU VERY MUCH, BOTH, IN RESPONDING TO OUR QUESTIONS.