# Ray Lamar Johnston v. State of Florida

CHIEF JUSTICE: NEXT CASE ON THE ORAL ARGUMENT CALENDAR IS JOHNSTON VERSUS STATE. MR. BOLOTIN.

IF THE PLEAS THE COURT, I AM STEVE BOLOTIN, THE ASSISTANT PUBLIC DEFENDER FROM BARTOW AND I REPRESENT THE APPELLANT RAY LAMAR JOHNSTON. RECENTLY IN THE CASE OF TEJEDA, THIS COURT SAID WE MUST NEVER FEAR RECONSIDERATION, WHEN THE INTEGRITY OF THE JURY PROCESS, ITSELF, IS SUBJECT TO SERIOUS QUESTION. IN THIS CASE, ON BOTH OF THE MAIN CONVICTION ISSUES, SHOW THAT THE INTEGRITY OF THE JURY PROCESS WAS SUBJECT TO SERIOUS QUESTION, AND IN THE APPROPRIATE INQUIRIES IN BOTH INSTANCES WERE NOT DONE. REGARDING THE FOREPERSON OF THE JURY, TRACY ROBINSON, IN ALL OF THE CASED, AS I CITED IN THE BRIEF, IN ALL OF THE CASES THAT I HAVE SEEN, I HAVE NEVER SEEN ONE WHERE THERE WAS A SINGLE JUROR WITH MORE SERIOUS PROBLEMS MORE OVERT ACTS OF MISCONDUCT OR FACTORS CALLING HER SERVICE INTO QUESTION.

HOW WERE THESE ISSUES RAISED AT THE TRIAL COURT LEVEL?

EXCUSE ME?

HOW WERE THESE ISSUES RAISED AT THE TRIAL COURT LEVEL AND WHAT WAS --

THE FACTS ABOUT TRACE ROBINSON SORT OF UNFOLDED -- ABOUT TRACY ROBINSON SORT OF UNFOLDED BIT BY BIT. WHAT OCCURRED WAS, THE QUESTIONS DURING VOIR DIRE AND DURING THAT PERIOD OF TIME, SHE WAS ASKED THE SAME QUESTION THE OTHER JURORS WERE ASKED, BOTH ON THE QUESTIONNAIRE AND THE VOIR DIRE, WHETHER SHE OR ANY RELATIVE OR CLOSE FRIEND HAD EVER BEEN ACCUSED OF A CRIME. SHE CHECKED THE QUESTION YES, AS TO WHETHER SHE OR ANY CLOSE FRIEND OR RELATIVE, AND WHEN THE PROSECUTOR WAS QUESTIONING THE JURORS ON THAT AND MADE IT VERY CLEAR, SAID I WANT TO KNOW WHO THAT PERSON WAS, WHETHER IT WAS YOU, WHETHER IT WAS A RELATIVE, WHETHER IT WAS A FRIEND. TRACY ROBINSON'S ANSWER WAS IT WAS HER SON'S FATHER AND HE HAD BEEN CHARGED WITH A CRIME AND SHE THOUGHT HE HAD BEEN TREATED FAIRLY AND IT WOULDN'T AFFECT HER ABILITY TO SIT ON THE CASE OR WHATEVER.

NO MENTION ABOUT HER OWN SITUATION?

NO MENTION WHATSOEVER ABOUT HER OWN SITUATION, WHICH GETS COMPLICATED LATER.

UP AND THROUGH THE TIME THAT THAT QUESTION WAS ASKED, WHAT SHE HAD BEEN CONVICTED OF WAS A MISDEMEANOR, CORRECT? OR HAD SHE BEEN CONVICTED?

TO THE BEST OF MY KNOWLEDGE FROM THIS RECORD, SHE HAD BEEN CONVICTED OF THE MISDEMEANOR OF OBSTRUCTING OR OPPOSING AN OFFICER WITHOUT VIOLENCE. THERE ARE, ALSO, INDICATIONS THAT SHOWED UP LATER, WHEN THE PROSECUTOR WAS INTRODUCING DOCUMENTS, WHERE HE INITIALLY INTRODUCED THE WRONG DOCUMENTS, WHICH INDICATE THAT TRACY ROBINSON ALSO HAD AT LEAST ONE OTHER MISDEMEANOR CONVICTION, POSSIBLY OUT OF EASTERN HILLSBOROUGH COUNTY, PLANT CITY AREA.

WASN'T THE QUESTION WAS HAVE YOU OR ANY MEMBER OF YOUR FAMILY BEEN ACCUSED AFTER

CRIME? AND NOT A CONVICTION. WASN'T THAT THE QUESTION?

ACCUSED IS A LESSER THAN --

WASN'T THE QUESTION WAS WHETHER SHE OR A MEMBER OF HER FAMILY HAD BEEN ACCUSED, WHEN HER ANSWER TO THAT WAS THE FATHER OF MY CHILD. THAT WAS HER RESPONSE TO THAT.

THAT'S CORRECT. THAT'S CORRECT.

AS I READ THIS, HOWEVER, IT SEEMS TO ME THAT THE PROSECUTOR GOT SEVERAL QUESTIONS MIXED UP HERE, THAT HE STARTED OUT WITH THAT, AND THEN HE SAID, BUT BEFORE I GET TO THAT, DID I MISS ANYONE WHO, ANSWERING THE QUESTION ABOUT PRIOR JURY SERVICE, AND THEN THAT IS WHEN MRS. ROBINSON SAYS SOMETHING ABOUT HER SON'S FATHER. THAT IS THE WAY I KIND OF READ --

NO. LET ME GO FIND IT IN HERE, BUT I DON'T BELIEVE THAT THAT IS THE WAY IT WENT.

MAYBE I HAVE AN ERROR HERE, BUT THAT IS WHAT I THOUGHT. HE STARTED OFF TALKING ABOUT I AM GOING TO ASK YOU ALL ABOUT HOW YOU, IF YOU HAD DONE IT, IF YOU HAD BEEN FAIRLY TREATED, BUT THEN HE SAYS, BEFORE I MOVE ON, DID I MISS ANYONE ELSE ABOUT PRIOR JURY SERVICE, THOUGH, AND THEN MRS. ROBINSON TALKS ABOUT MY FATHER, MY SON'S FATHER.

OKAY. NOW, WHAT WE HAVE GOT HERE, THE PROSECUTOR ASKED THIS. THESE JURY FORMS ASK VERY BROAD QUESTIONS, AND OF COURSE THIS IS WHERE WE ARE GETTING INTO THAT AREA WHERE I AM NOT TRYING TO EMBARRASS ANYONE OR INTIMIDATE ANYONE, BUT IT ASKS HAVE YOU OR ANY MEMBER OF YOUR FAMILY OR CLOSE FRIENDS BEEN ACCUSED OF A CRIME? I WANT TO GO INTO THAT NOW. I WANT TO ASK WHO THAT PERSON AND WHAT THE RELATIONSHIP WAS TO YOU, AND WHETHER YOU FEEL THAT THAT PERSON, WHETHER IT WAS YOU OR SOMEONE ELSE, WAS TREATED FAIRLY IN THE PROCESS, AND WHETHER YOU THINK THAT INCIDENT OR EXPERIENCE WOULD PREVENT YOU FROM BEING A FAIR OR IMPARTIAL JUROR, AND BEFORE I MOVE OUT, DID I ASK ANYBODY ABOUT JURY SERVICE AND THE JURORS ANSWERED NEGATIVELY AND THE PRR OR, MR. DIAZ, ASKED ABOUT THAT, AND IT WAS POSITIVELY REFERRED TO. WHAT DIAZ INDICATED EARLIER WAS THAT HE WAS A DEFENDANT IN A JURY TRIAL IN HILLSBOROUGH COUNTY SIX YEARS BEFORE THE. THE PROSECUTOR THEN TURNED TO TRACY ROBINSON AND SAID WHO WAS THAT PERSON? "MY SON'S FATHER." AND WE KNOW SHE WASN'T TALK ABOUT PRIOR JURY SERVICE AND THE PROSECUTOR CONTINUES ALONG WITH DID YOU FOLLOW ALONG AND KEEP UP WITH THAT IN THE CRIMINAL JUSTICE SYSTEM, WAS THAT THE CASE? SHE ANSWERED UM-HUM.

WERE THEY FINISHED WITH THE PRIOR JURY SERVICE, THEN, WITH THIS SERIES OF QUESTIONS.

IT WAS ABSOLUTELY CLEAR THAT TRACY ROBINSON KNEW ABOUT WHEN ASKED IF YOU OR ANY PERSON CLOSE TO YOU HAVE BEEN INVOLVED IN THE CRIMINAL JUSTICE SYSTEM. YOU CAN SEE BY HER ANSWERS THAT SHE DOESN'T THINK THEY ARE TALKING ABOUT PRIOR JURY SERVICE.

AND SHE SERVED ON THE JURY THROUGH THE GUILT PHASE BUT THEN EVENTUALLY --

I WANT TO GO BACK TO THE QUESTION BEFORE, BECAUSE, YES, SHE SERVED ON THE JURY THROUGH THE GUILT PHASE, PRESENTATION OF EVIDENCE, ARGUMENTS, INSTRUCTIONS. SHE IS ON THE JURY THROUGH DELIBERATIONS AND THEY FIND MR. JOHNSTON GUILTY. THAT OCCURRED, THE GUILTY VERDICT WAS RETURNED ON FRIDAY, THE 11th OF JUNE. FIVE DAYS LATER, THE 16th OF JUNE IS THE FIRST DAY OF PENALTY PHASE, IN WHICH 16 WITNESSES WERE PRESENTED. THAT EVENING, TRACY ROBINSON IS ARRESTED FOR POSSESSION OF CRACK COCAINE, POSSESSION OF MARIJUANA AND AN ILLEGAL FIREARM. AT THAT POINT, THE JUDGE SAYS, WELL, I AM GOING TO REMOVE HER FROM THE JURY AND REPLACE HER WITH THEALITY MATT THE. --

WITH THE ALTERNATE. THE DEFENSE COUNSEL HAS ALREADY EXPRESSED AND MOVE TO CHALLENGE FOR CAUSE, BOTH ALTERNATES BECAUSE OF THE CONTACT THAT THE ALTERNATES HAD WITH THE VICTIM'S FATHER. THAT WAS PREVIOUSLY DENIED, BECAUSE THE JUDGE, I GUESS, DIDN'T FEEL THE CONTACT WAS SUFFICIENT AND LEFT THE ALTERNATES, BUT THE DEFENSE COUNSEL CLEARLY HAD A PROBLEM WITH BOTH ALTERNATES, SO HE OBJECTED AT THAT POINT. THE FIRST QUESTION WITH REGARD TO TRACY ROBINSON WAS WHETHER SHE WAS USING CRACK COAND I AND WHETHER SHE WAS -- COCAINE AND WHETHER SHE WAS USING MARIJUANA DURING THE PENALTY PHASE OF THIS TRIAL, WHEN DEFENSE COUNSEL SAID YOUR HONOR, AT YOUR CONVENIENCE, WE NEED TO BRING THIS JUROR FORD AND INQUIRE ABOUT THE CIRCUMSTANCES OF THE DRUG USE. AND THE JUDGE SAID, I AM NOT GOING TO DO. THAT FILE A MOTION.

WAS SHE ARRESTED FOR THE USE OF CRACK COCAINE OR POSSESSION?

I WILL TELL YOU EVERYTHING I KNOW ABOUT THAT FROM THIS RECORD. THE ARREST WAS FOR POSSESSION OF CRACK COCAINE, POSSESSION OF MARIJUANA, AND AN ILLEGAL FIREARM. I CAN TELL YOU THAT THE ILLEGAL FIREARM WAS SUBSEQUENTLY, IT WAS NEVER CHARGED, BUT THERE WAS ANOTHER CHARGE OF POSSESSION OF PARAPHERNALIA THAT WAS CHARGED. OKAY. THERE, THE, WHAT WE KNOW OF, I GUESS, THE PROBABLE CAUSE AFFIDAVIT OR THE ARREST WARRANT OR SOMETHING, IS A POLICE OFFICER NAMED LEWIS PATENZIANO HAD ARRESTED HER FOR POSSESSION OF THESE SUBSTANCES SAID THAT HE SMELLED MARIJUANA WAFTING THROUGH THE APARTMENT AT THE TIME OF THE ARREST, THAT SHE HAD CLAIMED THAT THE MARIJUANA BELONGED TO HER BOYFRIEND BUT THAT HER BOYFRIEND WAS IN PRISON AT THE TIME AND HAD BEEN FOR SEVERAL WEEKS, SO WHAT WE HAVE GOT IS SHE WAS ARRESTED FOR POSSESSION, BUT WE HAVE GOT CERTAIN INDICATIONS OF USE, AT LEAST AS TO THE MARIJUANA. AS TO THE CRACK COCAINE, WE KNOW HOW ADDICT OF THAT IS.

SHE WAS ARRESTED FOR POSSESSION WHEN?

SHE WAS ARRESTED FOR THE POSSESSION OF THE EVENING OF THE FIRST DAY OF THE PENALTY PHASE.

IF YOU WOULD GO BACK ONE MOMENT, TO THE STATE OF THE SITUATION, WHEN SHE WAS ASKED THIS QUESTION IN THE VOIR DIRE EXAMINATION, ABOUT THE CRIME. WHAT DOES THE RECORD REFLECT THAT SHE WAS ACTUALLY ARRESTED FOR AND CHARGED WITH AND CONVICTED OF THAT, THE CONNECTION WITH THE FAILURE TO RESIST WITHOUT VIOLENCE? AND WHEN DID THAT OCCUR?

I AM NOT SURE WHEN THAT OCCURRED OR EVEN IF THAT OCCURRED. WHAT I CAN TELL IS WHEN THAT STARTED TO UNFOLD, WHEN DEFENSE COUNSEL BECAME AWARE OF THE EXISTENCE OF ANY OF THIS AND SAID WAIT A MINUTE HERE. UNDER LOWRY AND REECE, WE HAVE TO HAVE A NEW TRIAL, BECAUSE SHE WAS UNDER PROSECUTION FOR A CRIMINAL OFFENSE. ALL I CAN TELL YOU ABOUT THAT IS THE CASE PROGRESS SHE INDICATES, THE ONE INTRODUCED BY THE PROSECUTOR UNDER THE SPENCER HEARING, THE MOTION FOR NEW TRIAL, UNDER THAT LEVEL, LET ME SEE IF I CAN GET THIS STRAIGHT. SHE HAD PLED TO THE MISDEMEANOR CHARGE OF OBSTRUCTING AND COURT COSTS OF, I BELIEVE, $121 WERE ASSESSED. THE PAPERWORK MAKES IT VERY CLEAR THAT YOU WILL PAY THESE COURT COSTS BY SEPTEMBER 24 OR, IF YOU DON'T, YOU WILL SHOW UP IN THE COURTROOM OF JUDGE MARTINEZ, I BELIEVE IT WAS, ON SEPTEMBER 25, AND EXPLAIN WHY. SHE, THE PAPERWORK, ALSO, SAYS IF YOU DON'T DO THAT, A WARRANT WILL BE ISSUED FOR YOUR ARREST. THE CASE PROGRESS INDICATES THAT SHE DIDN'T SHOW UP ON SEPTEMBER 25. IT SUGGESTS THAT THE MATTER WAS PUT OFF AND PUT OFF A COUPLE OF TIMES, AND SHE STILL DIDN'T SHOW UP, AND IN JANUARY OF '99 IS WHEN THE CAPEAS WAS REQUESTED AND THEN ISSUED, STATING THAT, YOU KNOW, ASKING TO ALL OF THE SHERIFFS IN THE STATE OF FLORIDA IF THIS PERSON, TRACY ROBINSON, IS FOUND WITHIN YOUR JURISDICTION, TO ARREST HER ON, TO ANSWER COMPLAINT BY THE STATE ATTORNEY OF HILLSBOROUGH COUNTY. THIS

WAS IN JANUARY OF '99. IN JUNE OF '99, WHEN SHE IS SITTING ON THIS JURY AND IS ARRESTED FOR THE DRUG CHARGES, THE CAPEAS WAS BASICALLY CANCELLED. I ASSUME BECAUSE SHE HAD ALREAY BEEN ARRESTED ON THE DRUG CHARGES.

WAS ANYTHING EVER SERVED ON HER CONCERNING THE CAPEAS?

I CAN'T TELL FROM THIS RECORD IF ANYTHING WAS EVER SERVED. I CAN TELL THAT SHE DID RECEIVE PAPERWORK. SHE WAS GIVEN PAPERWORK THAT MADE IT CLEAR TO HER THAT, IF YOU DON'T PAY THESE COSTS OR SHOW UP, AN ARREST WARRANT WILL BE ISSUED FOR YOU.

WHAT WAS IN THE MOTION FOR NEW TRIAL, ABOUT HER NOT DISCLOSING BEING ACCUSED OF CRIMINAL ACTS?

NOTHING.

WHAT WAS IN THE MOTION FOR NEW TRIAL?

NOTHING WAS IN THE MOTION FOR NEW TRIAL ON THAT.

SO THIS ISSUE WASN'T RAISED IN THE MOTION FOR NEW TRIAL?

THIS, AS FAR AS I CAN TELL, NOBODY EVER PICKED UP ON THAT PARTICULAR ASPECT OF THE PROBLEM. OKAY. MOST OF WHAT IS GOING ON HERE IS VERY STRONGLY BEING ARGUED BY COUNSEL FOR BOTH SIDES BY THE JUDGE. THE MATTERS ABOUT THE DRUG USE, POSSESSION, AND TO INTERVIEW THE JUROR. THE MATTERS ABOUT THE CAPEAS AND THE REECE/LOWRY ISSUE. THE JUDGE HAD THE WRONG IDEA THAT THE REECE LOWRY ISSUE TURNED ON THE KNOWLEDGE OF HER CAPEAS, WHICH I WILL GET TO IN A MINUTE, BUT AS FAR AS HER NONDISCLOSURE, APPARENTLY NOBODY PICKED UP ON THE FACT THAT --

HOW DO WE GET TO THAT ISSUE?

I THINK YOU YOU GET TO THAT ISSUE BIO -- ISSUE, BY THE FACT THAT IT IS INTERTWINED WITH OTHER ISSUES. THERE ARE A LOT OF INTERTWINED ISSUES, AND THAT ONE PARTICULAR ASPECT OF IT, LACK OF KNOWLEDGE, I THINK, IS WELL-PRESERVED. THE DEFENSE COUNSEL DIDN'T HAVE THE LUXURY OF TRANSFER AT JURY SELECTION. I DON'T THINK HE PICKED UP ON THE FACT AND ONCE IT CAME OUT THAT SHE HAD THIS PRIOR CONVICTION AND MAYBE SOME OTHERS BECAUSE THE WRONG PAPERWORK WAS INTRODUCED BY THE STATE.

HOW MUCH OF AN INQUIRY WAS DONE BY THE TRIAL COURT, THEN --

NONE WHATSOEVER.

TELL ME ABOUT THAT. WHAT INQUIRY WAS ASKED FOR AND WHAT INQUIRY WAS DONE?

NO INQUIRY WAS DONE ON ANYTHING AT ANY TIME. THAT IS EASY. WHAT INQUIRY WAS ASKED FOR? THERE WAS INQUIRY ASKED FOR, BOTH IN WRITING AND ORALLY, ON NUMEROUS OCCASIONS, TO INTERVIEW THE JUROR, TO FIND OUT, TO ASCERTAIN WHETHER SHE WAS USING COCAINE AND MARIJUANA DURING APPELLANT'S GUILT PHASE TRIAL. ON THE QUESTION, AND THIS GETS KIND OF COMPLICATED, BUT ON THE ISSUE OF THE CAPEAS OF THE ARREST WARRANT, THE JUDGE HAD IT IN HIS MIND THAT THIS TURNED ON WHETHER THE JUROR WOULD BE AWARE OF THE EXISTENCE OF THE CAPEAS. NOW, INITIALLY, THE JUDGE STARTED SAYING IT WASN'T CLEAR WHETHER SHE WAS ON PROBATION AND THE COSTS WERE A CONDITION OF PROBATION OR WHETHER THE COSTS WERE JUST, YOU KNOW, COMES THAT WERE AWARDED IN CONJUNCTION WITH A SENTENCE, WITHOUT PROBATION. THE JUDGE INITIALLY CORRECTLY SPEC DATE LATED THAT, IF THIS WAS NOT A PROBATION CASE -- SPECULATED THAT, IF THIS WAS NOT A PROBATION

CASE, THE DEFENDANT WOULD KNOW THAT IN COURT.

IS THIS CLEAR WAS IT A CONDITION OF PROBATION OR WE DON'T KNOW?

THE BEST I CAN TELL IS IT APPEARS NOT TO HAVE BEEN. IT APPEARS TO BE IN THE NATURE OF A FIND.

SO THEREFORE THE DISTINCTION WOULD BE THAT, IF SHE WERE TO BE ARRESTED IN HELD IN CIVIL CONTEMPT FOR NOT PAYING THIS FINE, IF SHE THE ABILITY TO PAY.

I BELIEVE THAT IS CORRECT, YEAH. AND, AGAIN, THERE IS LANGUAGE I SAID IN MY REPLY BRIEF TO THE EFFECT THAT FAILURE TO PAY COSTS IS NOT A MINOR THING. IT IS A SENTENCE UNSERVED. THE PUN I SHOULD, GOING UNPUN PUN I SHOULD, A -- THE PUN ISSUED GOING UNPUNISHED AND THE COURT'S ORDER BEING IGNORED.

DO YOU HAVE IN THE RECORD THAT SHE RECEIVED WRITTEN NOTIFICATION?

YES, WE HAVE IN THE RECORD THAT SHE RECEIVED WRITTEN NOTIFICATION, NOT THAT A CAPEAS WAS ISSUED BUT THAT A CAPEAS WOULD BE ISSUED, IF SHE DIDN'T SHOW UP.

DO WE KNOW WHAT THE CONTENTS OF THOSE WERE? ARE THERE COPIES OF THOSE IN THE RECORD?

YES.

WHAT DO THOSE SAY AND HOW MANY OF THOSE WERE SENT?

AT LEAST ONE WAS APPARENTLY GIVEN TO HER. WHETHER OTHERS WERE SENT AS FOLLOW-UP, WHEN SHE DIDN'T SHOW UP THE FIRST OR THE SECOND TIME, THAT I CAN'T SAY. LET ME FOLLOW-UP ON, THIS BECAUSE THIS IS KIND OF IMPORTANT, --

WE DON'T KNOW ON THIS RECORD, FOR INSTANCE THAT, EVERY 30 DAYS, A NOTICE WAS SENT TO HER RETURN RECEIPT REQUESTED.

NO, WE DON'T KNOW THAT. WHAT WE DO KNOW IS THAT DOCUMENTS INTRODUCED BY THE STATE INDICATED THAT, ON JULY 22 '98, TRACY ROBINSON PLED NOLO TO CHARGES OF OBSTRUCTING OR OPPOSING AN OFFICER WITHOUT VIOLENCE AND WAS NOTIFIED TO PAY THE COST. SHE WAS NOTIFIED IN WRITING THAT SHE HAD UNTIL SEPTEMBER 28 TO PAY THE COSTS, 1998, AND IF SHE COULDN'T PAY, TO APPEAR BEFORE JUDGE MARTINEZ ON SEPTEMBER 25 AT 9:00 A.M.. IT STATES IN LARGE LETTERS THAT FAILURE TO PAY OR SHOW UP IN COURT WOULD VIOLATE, IN THE RECORD ON PAGE 7 -- 89. IT APPEARS THAT THE COURT DATE WAS RESET ON MORE THAN ONE OCCASIONS, PRIOR TO THE CAPEAS BEING ISSUED. WE DON'T HAVE THOSE NOTICES IN THE RECORD.

ARE YOU SAYING WHY IT IS THAT THE RESOLUTION OF THE REECE LOWRY ISSUE, WHICH IS NOT THE NONDISCLOSURE ISSUE, DOES NOT TURN ON WHAT MS. ROBINSON THOUGHT ABOUT WHAT WOULD HAPPEN TO HER?

I DON'T THINK IT TURNS ON THAT, BUT THE PROBLEM IS THE TRIAL JUDGE THOUGHT IT TURNED ON THAT, WHICH IS WHY DEFENSE COUNSEL KEPT SAYING IF YOU THINK IT TURNS ON THAT, LET'S BRING HER IN HERE AND FIND OUT, BUT WHAT HAPPENED WAS IS THE JUDGE INITIALLY CORRECTLY PRESUMED THAT, IF THIS WAS FINE IN THE NATURE OF A FINE, SHE WOULD HAVE BEEN NOTIFIED. THEN IT GETS CONFUSING --

WHAT DOES -- I GUESS, IN TERMS OF THE REECE LOWRY ISSUE, WHAT I AM UNDERSTANDING IS THAT THE REASON THAT THAT IS AN AUTOMATIC DISQUALIFICATION IS BECAUSE THE

DEFENDANT OR A PROSPECTIVE JUROR WOULD THINK THAT, IF THEY DO SOMETHING FAVORABLE TO THE STATE, THAT SOMEHOW THEIR TROUBLE WITH THE LAW WILL BE ELIMINATED, CORRECT? SO WHY DOESN'T IT TURN ON WHAT SHE KNEW ABOUT THE CONSEQUENCES OF NOT PAYING A FINE?

WELL, IF IT DOES TURN ON WHAT SHE KNEW ABOUT THE CONSEQUENCES OF NOT PAYING THE FINE, THE FACT IS THAT SHE DID KNOW THAT THE CONSEQUENCE WOULD BE THAT SHE WOULD BE ARRESTED, AND I THINK THAT IS WHY THESE ISSUES INTERTWINE. THAT IS REMOTE. THAT IS THE REASON WHY, IF SHE KNEW LIKELY THERE WAS A WARRANT OUT FOR HER ARREST, AS SHE APPARENTLY DID, THAT WOULD EXPLAIN THE CONCEALMENT OF THE CHARGES AGAINST HER. NOW, THE PROBLEM IS THAT THE JUDGE INITIALLY RECOGNIZED THAT SHE PROBABLY WOULD KNOW ABOUT THE CAPEAS, BUT THEN THE STATE INTRODUCED THE WRONG DOCUMENTS, AND THE JUDGE ASKED THE STATE DOES THIS SAY ANYTHING ABOUT, YOU KNOW, DOES THIS WARRANT OR DOES THIS SAY ANYTHING ABOUT WHETHER AN ARREST WARRANT WILL BE ISSUED, AND THE PROSECUTOR SAID IT DOESN'T APPEAR, TO AND THEN SUBSEQUENTLY THE DEFENSE LAWYER IS ALL CONFUSED AND SAYS THE DATES ON THESE DOCUMENTS AREN'T EVEN RIGHT. WHAT IS GOING ON HERE. YOU NEED TO INTERVIEW THIS JUROR TO FIND OUT WHAT IS GOING ON. THE PROSECUTOR THEN FINDS THE CORRECT DOULTS. THE JUDGE NEVER REASKS THE QUESTION DO THESE DOCUMENTS SHOW THAT SHE KNOWS ABOUT THE ARREST WARRANT, WHICH THEY DO. THE JUDGE JUST BE RATES DEFENSE COUNSEL AND -- THE JUDGE BERATES DEFENSE COUNSEL AND SAID IF SHE KNEW ABOUT THEM --

DID THE JUDGE GIVE DEFENSE COUNSEL A CORRECT COPY OF THE DOCUMENTS?

HE SUBMITTED THEM TO THE COURT. I ASSUME THAT DEFENSE COUNSEL HAD AN OPPORTUNITY TO SEE THEM, ALTHOUGH I DON'T KNOW THAT FOR A FACT. ACTUALLY I NEED TO GET FAIRLY QUICKLY ON HERE TO THE ISSUE DEALING WITH THE DRUG USE PARTICULARLY WITH TANNER VERSUS UNITED STATES. A LARGE PART, IT HAS BEEN FLORIDA LAW, THAT THERE CAN BE JUROR INQUIRY INTO OVERT ACTS OF MISCONDUCT, AND I DON'T KNOW WHAT COULD BE A MORE OVERT ACT OF MISCONDUCT THAN USING MARIJUANA OR CRACK COCAINE WHILE YOU ARE SERVING ON A CAPITAL JURY. FLORIDA LAW ALSO MAKES A DISTINCTION THAT DURING TRIAL, SUCH AS THE DAVONEY CASE, SUCH AS DISCUSSING A SPEEDING TICKET, AND FROM OUTSIDE THE TRIAL PROCESS. DAVONEY CITES A CONFLICT AS BEING A CLEAR CONFLICT. CLEARLY IF THAT IS A CONFLICT FROM OUTSIDE THE TRIAL AFFECTING THE PROCESS, A JUROR USING CRACK COAND I OR MARIJUANA -- COCAINE OR MARIJUANA CERTAINLY FALLS INTO THAT CATEGORY. THIS IS A PROPER INQUIRY AND THE CASE THAT WE CITED, GOING BACK TO LANGSTON AND ALL SUPPORT THE NOTION THAT DRUG USE CAN RULE MISCONDUCT, IF THE USAGE FALSE ON THE OTHER SIDE OF THE STATE TO SHOW THAT THE USAGE WAS SO MINOR REMOTE IN TIME THAT IT COULDN'T AFFECT THE PROCEEDINGS. NOW, I THINK THE STATE IS GOING TO RELY VERY HEAVILY ON THE TANNER DECISION AGAINST THE UNITED STATES, AND I THINK IT IS CRUCIAL TO SHOW WHY TANNER DOES NOT OVERRIDE OR SUPERSEDE FLORIDA LAW ON THAT SUBJECT. TANNER WAS A 4-TO-5 DECISION. I THINK IF YOU READ THE OPINION AND THE DISSENTING OPINION, EACH WITH REASONING TO ADOPT, I THINK THE DISSENTING OPINION MORE REASONED NOT TO CONFLICT WITH FLORIDA LAW. TANNER DEALS WITH FLORIDA FEDERAL RULE OF EVIDENCE 606-B, WHICH HAS NO FLORIDA COUNTERPART AND TANNER IS ALMOST ENTIRELY BASED ON THE COURT'S INTERPRETATION OF THE LEGISLATIVE HISTORY OF 606-B, IN WHICH IT IS EMPHASIZED IN TANNER THAT AN ALTERNATIVE VERSION OF THE BILL WAS IN CONGRESS, WHICH WOULD HAVE ALLOWED FEDERAL JUDGES TO ALLOW JURY INQUIRY ON SUBJECTS SUCH AS DRUG USE OR ALCOHOL USE AND THAT CONGRESS SPECIFICALLY REJECTED THAT VERSION. FLORIDA IS VERY DIFFERENT. FLORIDA, AS I SAID PRECODE LAW, PREEXISTING LAW, MAKES IT CLEAR THAT JURY INQUIRY ON THAT SUBJECT IS PERMITTED, AND THAT IT IS AN OVERT ACT THAT CAN IN INQUIRED INTO. EARHART, PROFESSOR EARHART MAKES IT CLEAR THAT, WHILE MUCH OF FLORIDA'S EVIDENCE CODE IS INTENDED TO TRACK THE FEDERAL RULES OF EVIDENCE, THAT 96072-B OR B-2 IS EXPRESSLY NOT ONE OF THOSE. THAT IT WAS REJECTED TO ADOPT, TO TRACK OR ADOPT THE

FEDERAL RULE AND INSTEAD CHOSE TO GO WITH PRECODE FLORIDA LAW. NOW, IT IS IMPORTANT TO ALSO NOTE THAT BOTH THE DISSENTERS AND THE MAJORITY OPINION IN THE 5-4 DECISION IN TANNER AGREE ON A LOT OF IMPORTANT STUFF. THEY BOTH AGREE THAT IN GORDON VERSUS MASSACHUSETTS, THE DEFENDANT HAS A DUE PROCESS RIGHT TO AN UNIMPAIRED JURY. THEY BOTH AGREE THAT JURY DRUG USE OR JUROR USE OF IN TOX WANTS CAN AFFECT THE RESULTS OF A TRIAL AND YOU CAN IMPEACH A JURY VERDICT BY SHOWING THIS. THE ONLY QUESTION THAT THEY PARTED COMPANY ON IS WHETHER JUROR INQUIRY ONTO THIS SUBJECT IS PERMITTED UNDER THE FEDERAL RULE. THIS COURT, IN DAVONEY VERSUS STATE, IS THE ONLY CASE WHERE TANNER IS CITED AND QUOTED. THAT IS ABSOLUTE DICTA. THAT WAS NOT BEFORE THE COURT. WHETHER OR NOT TANNER SUPERSEDED FLORIDA LAW OR ANYTHING ABOUT JUROR DRUG USE OR INTOXICATION WAS NOT BEFORE THIS COURT IN DAVONEY. THE ISSUE IN DAVONEY WAS WHETHER OR NOT THERE WAS JUROR MISCONDUCT THAT WOULD RESULT IN REVERSAL THAT THE JURORS DISCUSSED THE DEFENDANT'S PRIOR SPEEDING TICKET, AND THAT CLEARLY IS A MATTER GOING TO THE JUROR'S THOUGHT PROCESSES AND MISTAKEN NOTIONS OF LAW, ALL OF WHICH, UNDER THE FLORIDA RULE, IS PROHIBITED, BUT, AGAIN, THE TWO FACTORS UNDER FLORIDA LAW THAT ARE CRUCIAL HERE IS OVERT ACT OF MISCONDUCT CAN BE INQUIRED INTO AND IN SOME CASES MUST BE INQUIRED INTO. JURORS' THOUGHT PROCESSES CANNOT BE INQUIRED INTO. IS IT SOMETHING THAT ARISES FROM THE PROCESS OF TRIAL, ITSELF, SUCH AS MISUNDERSTANDING OR DISREGARDING INSTRUCTIONS? NOT A PROPER SUBJECT OF INQUIRY UNDER DAVONEY. BAERMD DAVONEY, ITSELF, WAS A SPLIT 4-3 DECISION. IF THE JURY CARRIES THE GERM FROM OUTSIDE THE PROCESS AND AFFECTS THE TRIAL, UNDER FLORIDA LAW THAT IS SOMETHING THAT CAN AND SHOULD BE LOOKED INTO.

YOU SAY THE QUESTION, THE ONLY QUESTION THAT WOULD BE APPROPRIATE, GIVEN THE TIMING OF THE ARREST, DID THE PENALTY PHASE IMMEDIATELY FOLLOW THE GUILT PHASE, OR WAS THERE A PERIOD --

A FIVE-DAY GAP.

AND THE GUILT PHASE HAS GONE ON FOR HOW LONG?

THE GUILT PHASE HAS GONE ON FOR HOW LONG? ABOUT A WEEK PROBABLY.

SO THE ONLY QUESTION THAT THE DEFENSE LAWYER SOUGHT TO ASK WOULD BE MS. JOHNSTON, DURING THE TIME OF THE GUILT PHASE, WERE YOU USING MARIJUANA OR CRACK COCAINE? THAT WAS THE SOLE QUESTION ABOUT THE DRUG USE.

I AM NOT SURE NECESSARILY WHETHER IT WOULD HAVE BEEN. I MEAN, WERE YOU USING? HOW MUCH WERE YOU USING? WHEN WERE YOU USING? AND ALSO --

IF SHE SAID NO, THOUGH, THAT SHE WASN'T USING --

I THINK IF I HAD BEEN DEFENSE COUNSEL, I WOULD HAVE CALLED LIEUTENANT POTENZIANO. THE INTENT MAKES IT CLEAR THAT TO ESTABLISH JUROR DRUG USE, YOU CAN CALL OTHER WITNESSES. THAT IS CLEAR UNDER THE FLORIDA RULE NOT JUST FEDERAL RULE.

TECHNICALLY WHAT WOULD HE HAVE SAID?

I THINK IT WOULD HAVE BEEN VERY INSTRUCTIVE TO FIND THE REASONING SHE WAS ARRESTED FOR --

HOW WOULD THAT BE RELEVANT, IF SHE HAD SAID NO, TO THE QUESTION OF WHETHER YOU WERE USING IT DURING THE GUILT PHASE OF THE TRIAL?

WHETHER SOMEBODY SHE WAS USING IT WITH HAD COME FORWARD AND RATED ON HER. I MEAN,

THERE -- AND RATTED ON HER. THERE IS ALL KINDS OF -- SHE MIGHT HAVE SAID, YES, I WAS USING. SHE MIGHT HAVE DENIED IT. IF SHE HAD DENIED IT, SHE COULD HAVE BEEN IMPEACHED BY OTHER EVIDENCE. EVEN TANNER WOULD HAVE ALLOWED. THAT I AM RUNNING OUT OF TIME AND HAVEN'T EVEN TOUCHED THE VOIR DIRE ISSUE. I WANT TO POINT OUT THIS THAT WAS NOT A FISHING EXPEDITION THAT SOMETHING DEFENSE COUNSEL OR AN INVESTIGATOR WENT OUT AND GOT. OR EVEN THE OTHER JURORS CAME FORWARD WITH. THIS WAS SOMETHING THAT OCCURRED DURING THE TRIAL, AND IN CASES LIKE THIS WHEN THE FINALITY OF THE OPINION IS MORE IMPORTANT THAN THE FINALITY OF THE VERDICT THIS IS NOT GOING TO OPEN ANY KIND OF FLOODGATES HERE. THIS IS SOMETHING, AGAIN, THAT CAME TO LIGHT BECAUSE AN ARREST MADE PIE LAW ENFORCEMENT, THEY OBVIOUSLY HAD A REASON TO BELIEVE THAT, DOES HER ARREST CONCLUSIVELY SHOW THAT SHE WAS USING COCAINE OR MARIJUANA DURING THE TRIAL? NO, IT DOESN'T CONCLUSIVELY SHOW THAT, AND CASE LAW THAT I CITED IN THE BRIEF SAYS THAT IS THE PURPOSE OF THE INQUIRY. I WILL RESERVE THE REST OF MY TIME FOR REBUTTAL, AND IF I DON'T GET TO TALK ABOUT THE PRETRIAL PUBLICITY ISSUE, I WILL RELY ON MY BRIEF AS TO THAT ISSUE, WHICH IS EQUALLY IMPORTANT TO THE ONE I HAVE SPENT MY TIME ON.

CHIEF JUSTICE: THANK YOU. RESPONSE?

MAY IT PLEASE THE COURT. MY NAME IS KIM HOPKINS REPRESENTING THE STATE. YIRBLLY WITH RESPECT TO MS. ROBINSON'S SERVICE ON THE JURY, THERE WERE THREE QUESTIONS RAISED BY THE DEFENSE. FIRST THAT SHE WAS UNDER PROSECUTION FOR THE CAPEAS, NOT FOR THE OBSTRUCTION CHARGE, WHICH OBVIOUSLY HAD BEEN COMPLETED AT THAT TIME. THE OBSTRUCTION WAS A MISDEMEANOR FOR WHICH SHE WAS NOT CONVICTED BUT FOR WHICH ADJUDICATION WAS WITHHELD, AND THE ONLY PENALTY IMPOSED WAS COURT COSTS.

DO YOU AGREE THAT, IF SHE HAD BEEN ARRESTED FOR THE OBSTRUCTING A POLICE OFFICER WITHOUT VIOLENCE, AND THAT CASE IS STILL GOING ON, THAT THAT, WOULD THAT FIT UNDER THE LOWRY LOWRY/REECE, THAT SHE WOULD BE UNDER PROSECUTION?

YES. SHE WOULD BE UNDER PROSECUTION. THERE IS A DISTINCTION BETWEEN CRIMINAL HISTORY, HOWEVER, AND BEING UNDER INGS FROM.

I AM CONCERNED, BECAUSE WE ARE LOOKING AT THESE -- AND BEING UNDER PROSECUTION.

I AM CONCERNED, BECAUSE WE ARE LOOKING AT THESE CASES FOR ALL TIME, THESE LAWYERS AND JUDGES MAKING SURE THAT WE DON'T HAVE A JUROR SITTING AND ASKED IF YOU HAVE BEEN ACCUSED OF A CRIME, BUT IS THERE A QUESTION THAT ASKS ARE YOU CURRENTLY BEING PROSECUTED OR --

CERTAINLY THAT QUESTION COULD HAVE BEEN ASKED. IT WASN'T.

AND IN THE JURY QUESTIONNAIRE.

SHOULD IT BE ALTERED? ARE YOU ASKING TO INCLUDE THAT? I THINK THAT IT NEEDS TO BE AS BROAD AS IT IS, BECAUSE THE PURPOSE OF THE VOIR DIRE IS TO UNCOVER ANY PREJUDICES THAT THE POTENTIAL JUROR WOULD HAVE, AND SO IT IS UP TO THE ATTORNEYS, THEN, TO HONE IN ON WHAT THEY CONSIDER TO BE IMPORTANT AND MORE DETAILED FACTS FROM THE JURORS.

THESE PEOPLE SHOULDN'T EVEN BE CALLED. SHE SHOULD BE TRUCK BEFORE THEY ARE EVEN IN THE POOL, CORRECT?

IF THEY ARE UNDER PROSECUTION? CORRECT.

AND THERE IS NO QUESTION THAT IT IS ASKED IN THAT CIRCUIT, THAT --

IT WOULD AND BASIS FOR A CHALLENGE FOR CAUSE AT THAT POINT. I SUPPOSE, IF THE ATTORNEYS ALL AGREE THAT THEY WANTED TO HAVE THAT PERSON THERE, THAT THEY COULD CONTINUE TO HAVE --

IT IS NOT AN AUTOMATIC DISQUALIFICATION.

THERE ISN'T A STATUTORY REASON FOR CHALLENGE FOR CAUSE, AND I CAN'T IMAGINE WHO WOULD ACCEPT A JUROR UNDER THOSE CIRCUMSTANCES.

IS IT YOUR POSITION THAT THE INQUIRY WAS INSUFFICIENT IN THIS CASE?

THE INQUIRY DID NOT EXIST IN THIS CASE, PERIOD, ON THE PART OF DEFENSE ATTORNEYS. THEY ASKED NO JUROR ANY QUESTION AT ALL REGARDING CRIMINAL HISTORY OR PRIOR LITIGATION HISTORY OF ANY JUROR OF THEMSELVES, OF SOMEONE THEY KNEW.

THE PROSECUTOR.

THE PROSECUTOR, AS WAS APPOINTED OUT BY JUSTICE QUINCE AND OPPOSING COUNSEL, REGARDING WE ASKED YOU THIS GENERAL QUESTION, AND WITHIN THAT QUESTION IT ASKS WHETHER YOU KNOW ANYONE OR WHETHER YOU, YOURSELF, OR WHETHER A FRIEND OR RELATION WERE ACCUSED AFTER CRIME. HE ASKED THIS COMPOUND QUESTION, WHICH, THEN, GOES ON TO WHETHER, IF THAT IS THE CASE, DO YOU BELIEVE THAT THEY WERE TREATED FAIRLY AND COULD YOU BE IMPARTIAL, GIVEN YOUR KNOWLEDGE OF THAT SITUATION? AND IF YOU LOOK IN THE CONTEXT OF HOW THAT WAS SKLD ASKED, OBVIOUSLY -- OF HOW THAT WAS ASKED, OBVIOUSLY HIS FOCUS IS ON THAT, WHETHER YOU FEEL THAT YOU COULD BE IMPARTIAL AND FAIR, DESPITE THIS OCCURRENCE.

WAS THE ANSWER CLEAR AND STRAIGHTFORWARD?

YES, IT WAS, CONSIDERING HOW THEY PROCEEDED WITH THE REST OF THE QUESTION. IT IS ANALOGOUS TO CASES THAT HAVE BEEN DECIDED, WHERE A JUROR PROVIDES THE BACKGROUND LITIGATION OF ONE CASE BUT OMITS ANOTHER LITIGATION HISTORY. THERE IS NO DIFFERENCE THERE, IF YOU DON'T ASK A FOLLOW-UP QUESTION TO GARNER THAT INFORMATION, BECAUSE I THINK THAT NO ONE THERE, IN THE PANEL, WAS VOLUNTEERING INFORMATION, WITHOUT BEING ASKED A DIRECT QUESTION. AND ALSO, MORE IMPORTANTLY, THOUGH, REGARDLESS OF WHAT YOU THINK OF THAT QUESTION BY THE PROSECUTOR, A DEFENSE ATTORNEY NEVER ASKS A QUESTION, SO IF YOU EVEN GET TO THE CONCEALMENT ISSUE, SUBSTANTIVELY HE HAS NOT MET ONE OF THE PRONGS OF DELLA ROSA.

IF SOMEONE SAYS HAVE YOU OR ANYONE IN YOUR FAMILY BEEN INVOLVED IN, ACCUSED OF A CRIME, AND, YES, TELL ME ABOUT IT. THE FATHER OF MY SON WAS INVOLVED. WHY WOULD A DEFENSE ATTORNEY SAY, WELL, ARE YOU SURE THERE IS NOT ANYONE ELSE? YOURSELF?

IF IT WAS SOMETHING THAT THEY WERE, THAT THEY FELT WAS IMPORTANT IN THEIR DECISION AS TO WHETHER THIS PERSON WOULD REMAIN ON THE PANEL, IT IS INCOME BEBT PEN THEM TO -- INCUMBENT UPON THEM TO ASK THE QUESTION. YOU CANNOT SIT BACK AND THEN LATER COMPLAIN ABOUT SOMETHING THAT NEVER HAPPENED, AND I WOULD POINT OUT TO THE COURT THAT, WHEN THEY GET THROUGH THIS SELECTION, DURING THE VOIR DIRE, ANOTHER JUROR, SANTONE ADMITS TO BEING ACCUSED OF A CRIME. HE ADMITS. THE DEFENSE ATTORNEY NEVER ASKED ABOUT THAT, WHAT HAPPENED, NO PARTY DOES. ULTIMATELY HE SITS ON PART OF THE CASE AND THE DEFENSE HAD A REMAINING PREEMPTORY THAT THEY COULD HAVE EXERCISED AGAINST HIM IF THEY CONSIDERED THAT TYPE OF INFORMATION TO BE OBJECTIONABLE, AND THEY DID NOT DO THAT IN THIS CASE.

WHAT WAS THE STATUS OF DID THE DEFENSE ATTORNEYS AND THE PROSECUTOR HAVE THIS JURY QUESTIONNAIRE THAT WE ARE TALKING ABOUT THAT ASKS THIS QUESTION ABOUT BEING ACCUSED OF A CRIME? BECAUSE ON THAT, MRS. ROBINSON DID, IN FACT, ANSWER YES. CORRECT?

YES. SHE ANSWERED YES TO THE QUESTION.

AND SO ALL THE PARTIES HAD ACCESS TO THAT JURY QUESTIONNAIRE OR DID THEY NOT?

I DON'T KNOW SPECIFICALLY IN THIS CASE IF THEY HAD IT. MY UNDERSTANDING IS THAT IS SOMETHING THAT THEY WOULD HAVE IN FRONT OF THEM.

BUT ASSUMING THAT THE DEFENSE ATTORNEY DID NOT HAVE IT, THEN, WHEN SHE SHE ANSWERS THIS QUESTION ABOUT YOU OR -- WHEN SHE ANSWER THIS IS QUESTION ABOUT YOU OR MEMBERS OF YOUR FAMILY EVER BEING ACCUSED AFTER CRIME, AND THEN IF SHE HAD ANSWERED IT BY TALKING ABOUT HER SON'S FATHER, THEN THE DEFENSE ATTORNEY WOULDN'T HAVE ANY REASON TO GO BEYOND THAT ANSWER, WOULD HE OR SHE?

WELL, YOU LOOK AT THE NATURE OF THE CASE, I MEAN THE QUESTION BY THE STATE ATTORNEY SAYS WHO WAS THAT PERSON, AS IF IT WAS NOT HER, AND THEN IMMEDIATELY HE IS HAPPY WITH WHAT HE HEARS, BECAUSE SHE TELLING HIM, DESPITE THIS KNOWLEDGE, I CAN BE FAIR AND IMPARTIAL, AND THAT IS WHAT HE IS GOING ON FOR IN THE -- GOING FOR IN THE QUESTION, BUT ULTIMATELY IT DOES NOT MATTER WHETHER OR NOT SHE CONCEALED IT, BECAUSE THIS ISSUE WAS NOT PRESERVED. IT WAS NEVER ARGUED --.

YOU ARE SAYING THE JURISPRUDENCE IN THE STATE OF FLORIDA WOULD BE THAT A JUROR CAN CONCEAL BEING ACCUSED AND CHARGED WITH SOME CRIMINAL ACTIVITY AND CONCEAL THAT, AND IT SHOULD BE OUR JURISPRUDENCE THAT THAT IS REALLY OKAY. JUST DON'T WORRY ABOUT T.

CERTAINLY NOT. RATHER THAN YOU WOULD APPLY THE TEST OF DELLA ROSA, WHICH THE STATE SUBMITS SUBSTANTIVELY DOES NOT --

LET'S GO BACK TO THE POINT THAT YOU HAVE BEEN ARGUING ALL MORNING THAT THAT HAS NOTHING TO DO WITH THIS CASE.

THAT WHAT HAS NOTHING TO DO?

THAT THE FAILURE TO DISCLOSE THAT THE INDIVIDUAL JUROR, HERSELF, WAS INVOLVED IN A CRIMINAL MATTER. THAT IS WHAT YOU HAVE BEEN SAYING.

ALL OF THESE FACTS THAT THE DEFENSE ATTORNEYS EXERCISED DILIGENCE IN TRYING TO FIND OUT THIS INFORMATION.

WHAT MORE SHOULD A TRIAL LAWYER ASK THAN WHO IS THE PERSON THAT YOU ARE REFERRING TO THAT WAS INVOLVED WITH A CRIMINAL JUSTICE SYSTEM? WHAT OTHER QUESTIONS SHOULD A LAWYER ASK?

WAS THERE ANYONE ELSE? WHO ELSE? I MEAN, IT IS THE SAME AS ASKING IN CIVIL SUITS, HAVE YOU EVER HAD ANY PRIOR LITIGATION EXPERIENCE, AND THERE ARE CASES OUT THERE WHERE A JUROR HAS REVEALED ONE SUIT BUT NOT ANOTHER SUIT, AND THERE IS NO PREJUDICE THERE BECAUSE THEY DIDN'T ASK THE FOLLOW-UP QUESTION. THERE NEEDS TO BE SOME KIND OF BURDEN ON THE DEFENSE, IF THEY ARE GOING TO LATER CHALLENGE THIS. OTHERWISE WHY ASK ANY QUESTIONS. BUT MORE IMPORTANTLYLY IN THIS PARTICULAR CASE, YOU DIDN'T GET THERE, BECAUSE THEY DIDN'T ARGUE CONCEALMENT EVER AT ANY POINT TO THE TRIAL COURT, AND THE REASON THEY DIDN'T IS BECAUSE THEY WANTED THIS JUROR ON THE PANEL. WHEN SHE WAS

ARRESTED, IT WAS THE NIGHT OF THE FIRST, THE FENL PENALTY -- THE PENALTY PHASE WAS A TWO-DAY EVENT. SHE WAS ARRESTED THE EVENING AFTER THE FIRST DAY. WHEN THEY COME IN FOR THE SECOND DAY, THERE WAS IN INFORMATION THAT SHE HAD BEEN ARRESTED, AND THE DEFENSE ATTORNEY OBJECTED TO HER RECUSAL. HE WANTED HER ON THE PANEL, AND THEY WILL SAY THAT IT IS BECAUSE THEY WANTED HER THERE -- AND THEY WILL SAY THAT IT WASN'T BECAUSE THEY WANTED HER THERE. WE WOULD BE BEFORE THE COURT SAYING THERE WAS AN ERROR BECAUSE THEY RECUSED HER, IF THEY HAD OBJECTED TO IT. THEY HAD NO PROBLEM WITH THIS JUROR. THEY HAD NO PROBLEM IN THE TRIAL OR THE MOTION FOR NEW TRIAL WITH REGARD TO DRUG USE OR ANY OF THE SUBISSUES THAT WERE RAISED AND THEY WANTED TO KEEP HER THERE, AND IN THE MOTION FOR NEW TRIAL, TEN DAYS LATER THEY ASKED, URGED ERROR, BASED ON THE FACT THAT SHE WAS NOT RECUSED. IT IS NOT UNTIL 18 DAYS AFTER THE VERDICT THAT THEY ASKED FOR A DIRECTED VERDICT REGARDING THE DRUG USE. BUT IT BASICALLY GOES BACK TO THE THREE SUBISSUES. FIRST OF ALL, SHE WAS NOT UNDER PROSECUTION. IT WAS A SIMPLE CAPEAS ISSUE.

IS IT SO CLEAR? WHAT WE ARE TRYING TO DO WITH THAT STATUTE IS MAKE SURE THAT INDIVIDUALS THAT HAVE ONGOING INTERACTION WITH THE STATE, THAT THAT IS KNOWN, SO THAT THAT IS THE BASIS FOR DISQUALIFICATION. AS FAR AS THIS DISTINCTION THAT THIS IS GOING TO BE SOMETHING THAT SHE WOULD BE HELD IN CIVIL CONTEMPT, THAT SHE WOULD STILL BE IN CIVIL CONTEMPT, SHE WOULD STILL BE JAILED AND STILL SHE PAID THE FINE, SO ARE WE REALLY, IS THAT, SOMEHOW BECAUSE SHE COULDN'T BE JAILED, FOR THE VIOLATION, BUT SHE COULD BE JAILED FOR THE CIVIL CONTEMPT, THAT THAT IS NOT REALLY THE SAME THING, FOR THE STATUTORY PURPOSE?

I THINK IT IS A PERSONAL DISTINCTION, BASED ON THE REASONING OF LOWRY. THE REASON THAT YOU WOULD NOT ALLOW A JUROR, UNDER PROSECUTION TO SIT, IS BECAUE THEY MAY TRY TO CAN CURRIE FAVOR WITH THE STATE ATTORNEYS OFFICE, WHO HAS THE DISCRETION TO PROSECUTE SOMEONE. THERE IS NO DISCRETION ON THE PART OF THE STATE ATTORNEYS OFFICE, WHEN THERE IS A CONTEMPT ISSUE. THEY DO NOT HAVE A DECISION TO PROSECUTE ONE WAY OR THE OTHER, BECAUSE IT IS NOT A CRIME. THEY COULDN'T PROSECUTE.

THEY COULDN'T AGREE TO A LESSER FINE? THEY WOULD HAVE NO DISCRETION ONCE SHE CAME AND SHOWED UP. WHO WOULD -- HOW MUCH WAS THE FINE? EYE BELIEVE IT WAS $150.

WHAT IF SHE SAID I CAN PAY $50 OR WHATEVER, THE STATE HAS NOTHING TO DO WITH WHETHER --

I DON'T REALLY KNOW THE ANSWER TO THAT QUESTION, BUT MY UNDERSTANDING WOULD BE THAT IT WOULD BE UP TO THE JUDGE, BECAUSE THE JUDGE IS THE ONE THAT IMPOSEED THAT, NOT THE STATE ATTORNEY, AND UNDER NO CIRCUMSTANCES WOULD YOU BE ABLE TO ACTUALLY PROSECUTE SOMEONE, AND THERE IS A DISTINCTION THERE BECAUSE THERE IS NO FEAR THAT THEY ARE GOING TO GET SOMETHING OUT OF THE DEAL.

BUT ISN'T THAT, THEN, THE THING THAT THEY SAID, WELL, LISTEN, IF YOU DON'T BUY THAT THIS IS AUTOMATIC AND WE OUGHT TO BE ABLE TO QUESTION HER AS TO WHAT SHE THOUGHT ABOUT WHAT HER SITUATION WAS, BECAUSE IT DOES SAY YOU WILL BE ARRESTED, IF YOU DON'T PAY.

BUT LOWRY DOESN'T SAY THAT. IT SAYS -- I UNDERSTAND WHAT THE NOTICE SAYS, BUT I WOULD SAY THAT THIS COURT HAD THE ABILITY, IN LOWRY, TO SAY IF THERE WAS ANY POSITION FOR ANYTHING, IF SHE HAD A CAPEAS OUTSTANDING, THAT THAT WAS A PROSECUTION. THAT IS NOT WHAT ENCOMPASSES A PROSECUTION. THE STATE DOES NOT ANTICIPATE THIS TYPE OF SITUATION. IT SIMPLY DOES NOT DEAL WITH CIVIL CONTEMPT. WE ARE DEALING WITH A CRIME TO PROSECUTE. THERE WOULDN'T BE ANYTHING TO PROSECUTE BY THE STATE ATTORNEYS OFFICE. THEN, GOING ON TO THE PRIOR CONVICTION. THE FACT OF HER PRIOR CONVICTION IS

SEPARATE FROM WHETHER OR NOT SHE WAS UNDER PROSECUTION, BECAUSE THAT HAD BEEN COMPLETED. ADJUDICATION WAS WITHHELD, AS I SAID, AND THE FINE WAS IMPOSED, BUT THEN YOU MUST DECIDE WHETHER THAT IS SOMETHING BEFORE THIS COURT. I HAVE ALREADY POINTED OUT THAT THAT WAS NOT PRESERVED AT ANY POINT IN THE PROCEEDINGS, NEVER UNTIL THIS BRIEF WAS FILED, DID ANYONE HEAR ANYTHING ABOUT THE FACT THAT SHE MAY HAVE CONCEALED A PRIOR CONVICTION.

IS IT YOUR POSITION THAT, BECAUSE THEY DID NOT RAISE THIS ISSUE UNTIL AFTER THEY INTERVIEWED THIS JUROR, THAT IT IS TOO LATE OR THAT THEY HAVE WAIVED IT OR --

BECAUSE THEY NEVER, AT ANY POINT, ASKED A TRIAL JUDGE TO LOOK AT THAT ISSUE, I THINK THAT IT IS NOT PRESERVED.

IT IS YOUR POSITION THAT THEY HAVE WAIVED IT OR THAT THEY CANNOT BRING IT UP AFTER THE INQUIRY? I AM NOT SURE I UNDERSTAND.

I DON'T SEE HOW THEY COULD BRING IT UP. IT IS LIKE ANY OTHER THING. IT IS NOT FUNDAMENTAL ERROR, AND SO FOR THAT PURPOSE IT IS WAIVED FOR APPELLATE REVIEW. THEY DID, AND THE REASON IS CLEAR. IT IS NOT EVEN A MATTER OF WHETHER IT WAS PRESERVED OR NOT PRESERVED AS A MISTAKE ON THEIR PART, BECAUSE THEY DIDN'T DO IT BECAUSE THEY WANTED HER, SO THEY WEREN'T LOOKING AT WAYS TO GET HER OFF THE JURAT THAT POINT, UNTIL LATER ON WHEN -- THE JURY, AT THAT POINT, UNTIL LATER ON, WHEN THEY FILED THE MOTION FOR UNTIMELY INTERVIEW.

DID THEY HAVE THE INFORMATION AT THAT POINT?

THEY KNEW ABOUT THE CAPEAS STATUS, BY THE TIME THEY FILED A MOTION FOR NEW TRIAL.

DID THEY HAVE ADDITIONAL INFORMATION FROM THE JUROR INTERVIEW OR FROM THE SUBSEQUENT INVESTIGATION?

THERE WAS NEVER A JUROR INTERVIEW.

DID THEY HAVE ANY ADDITIONAL INFORMATION?

NO. THERE WAS NOTHING NEW THAT CAME TO LIGHT THAT THEY DIDN'T KNOW AT THE TIME, OTHER THAN THEY DID NOT KNOW, AS THE TRIAL PROCEEDED ABOUT THE CAPEAS STATUS, UNTIL THEY FILED AN AMENDED MOTION FOR NEW TRIAL, AND THAT WAS TIMELY, BUT THEY ARE NOT ASKING TO INTERVIEW HER ABOUT THAT. THEY WERE ASKING TO INTERVIEW HER ABOUT HER POTENTIAL DRUG USE WHICH IS A SEPARATE ISSUE, BUT EVEN IF YOU CONSIDER IT TO BE PRESERVED, THE STATE WOULD ARGUE THAT DELLA ROSA WOULD CASE THAT THE TEST IT IS AS SET FORTH IN -- THE TESTS AS SET FORTH IN DELLA ROSA PRECLUDE ANY SUBSTANTIVE ISSUE HERE.

HOW IS IT CLEAR THAT JUROR ROBINSON? HOW DID IT COME THAT SHE WAS REMOVED? THE JUDGE SAID "I AM REMOVING HER"?

YES.

AFTER WHO HAD BROUGHT TO LIGHT THAT SHE HAD BEEN ARRESTED ARRESTED?

I DON'T KNOW WHO STATED IT ON THE RECORD, YOUR HONOR, BUT THEY COME TO COURT THE MORNING OF THE PENALTY PHASE, AND OBVIOUSLY I THINK DISCUSSIONS WERE HELD OFF-THE-RECORD ABOUT THIS, AND THE JUDGE COMES ON THE FIRST PART OF THE SECOND DAY OF THE PENALTY AND SAYS IT HAS COME TO LIGHT THAT THIS JUROR WAS ARRESTED, AND I AM GOING

TO RECUSE HER AND SUBSTITUTE THE ALTERNATE AND MOVE ON.

WASN'T THE DEFENSE COUNSEL'S OBJECTION TO SEATING THE ALTERNATE JUROR BECAUSE THE JUROR HAD SHAKEN HANDS WITH THE FAMILY AND GIVEN HIS CONDOLENCES? WASN'T THAT WHAT HE WAS CONCERNED ABOUT?

YES BUT THEY SPECIFICALLY ASKED, ALSO, WHY YOU CANNOT BRING HER OVER HERE AND GET HER DRESSED OUT. SHE IS IN JAIL RIGHT HERE BY THE COURTHOUSE. YES, FACTUALLY SPEAKING, THEY VOICED AN OBJECTION TO THE ALTERNATE, BECAUSE THAT WOULD -- BUT THAT WOULD HAVE BEEN NO DIFFERENT, THAT DOESN'T IMPACT HER SERVICE, WHERE THEY WOULD HAVE HAD THAT ALTERNATE, REGARDLESS OF THE REASON FOR THE RECUSAL. FOR INSTANCE IF A JUROR HAD BECOME SICK OR SOMETHING LIKE THAT, THAT ALTERNATE WOULD STILL BE THE ALTERNATE THERE FOR THEM, AND FROM THE TIME THAT THEY FIRST BECAME, THEY NEVER VOICE VOICED ANY OBJECTION TO THIS -- THEY NEVER VOICED ANY OBJECTION TO THIS HAPPENING WITH THE ALTERNATE UNTIL THE SEATING OF THE ALTERNATE, WHICH HAD HAPPENED, OBVIOUSLY, PRIOR TO THAT MOMENT, SO IF THEY HAD AN OBJECTION TO RAISE ABOUT THE ALTERNATE, THEY SHOULD HAVE DONE THAT WHEN THAT OCCURRED.

IF SHE HAD --

SO THEN THEY ARE STUCK WITH THE ALTERNATE.

IF SHE HAD BEEN ARRESTED ON THE CAPE KBRAS DURING THE COURSE OF THE -- THE CAPEAS, DURING THE COURSE OF THE TRIAL, WOULD THAT HAVE BEEN AUTOMATIC REMOVAL, AS THE JUDGE DID FOR THIS OTHER ARREST?

I WOULD ARGUE SIMPLY NO, BECAUSE IT WAS CIVIL CONTEMPT, STILL.

I UNDERSTAND, BUT IF THEY ARRESTED HER AND TOOK HER TO JAIL AND PUT HER IN JAIL, AND NOW THE COURT KNEW THAT SHE HAD BEEN ARRESTED AND JAILED --.

UNDER THOSE SPECIFIC FACTUAL CIRCUMSTANCES, I WOULD IMAGINE THAT IS WHAT THE TRIAL JUDGE WOULD HAVE DONE. HE WOULD PROBABLY NOT HAVE SAT THAT JUROR. SHE WOULD HAVE PUT THE ALTERNATE ON, BUT GIVEN THE FACT THAT YOU WOULD DEAL, THIS COURT WOULD DEAL WITH THESE TYPE OF ISSUES ON A CASE BY CASE BASIS, I THINK THAT REALLY DOESN'T PLAY INTO THAT.

I AM TRYING TO DETERMINE THE BASIS, OKAY, SHE HAS BEEN ACCUSED OF DRUG POSSESSION OR WHATEVER AND OBVIOUSLY HASN'T BEEN, SO WHAT WAS THE BASIS OF THE JUDGE DISQUALIFYING HER, WHEN SHE WAS ARRESTED?

THE JUDGE DOESN'T, FROM MY RECOLLECTION, GO INTO ANY SPECIFIC REASONING ON THE RECORD. IT JUST SAYS I AM NOT GOING TO HAVE HER, AND I WOULD SUBMIT THAT IT WAS BECAUSE SHE WAS UNDER ARE AES FOR A FELONY.

WHAT WAS THE CASE FOR KNOCKING HER OFF THE JURY, ESPECIALLY IF THE DEFENDANT OBJECTED?

I WOULD SAY BECAUSE SHE WAS ARRESTED FOR A FELONY THAT COULD BE PROSECUTED, SO IT IS DISTINGUISHABLE FROM THE FACT OF AN ARREST ON A CIVIL CONTEMPT WOULD HAVE NO POSSIBILITY OF PROSECUTION BY ANY PARTY.

AND IS THAT WHAT THE JUDGE --

THE JUDGE DOES NOT MAKE THAT DISTINCTION. FROM MY UNDERSTANDING, THE JUDGE SAID, I

THINK THE JUDGE SAID THERE IS NOTHING THAT REQUIRES ME TO DRESS OUT A JUROR AND BRING THEM OVER HERE, AND I AM NOT GOING TO DO IT. THERE WASN'T A REASONING GIVEN.

SO THE JUDGE JUST DID IT BECAUSE SHE WAS ARRESTED.

YES. WHEN YOU GO, THEN, WELL, SUBSTANTIVELY, I WOULD SAY IT DOES NOT MEET DELLA ROSA, BECAUSE EVEN IF YOU LOOKED AT THIS PRIOR OFFENSE, IT WAS CERTAINLY NOT MATERIAL TO WHAT WAS GOING ON. DEALING WITH A MISDEMEANOR FOR WHICH ADJUDICATION WAS WITHHELD AND COURT FINES WERE IMPOSED, I WOULD SAY, ALSO, THAT THAT MIGHT GO TO THE QUESTION OF WHAT SHE UNDERSTOOD THE QUESTION TO BE ASKED OF HER AT THE TIME. FOR CONCEALING, I DO NOT BELIEVE THAT SHE CONCEALED IT, WHICH WAS THE SECOND PRONG OF DELLA ROSA, BECAUSE OF THE NATURE OF THE QUESTION AND THE FACT THAT THE DEFENSE DIDN'T ASK ANY FOLLOW-UP QUESTIONS, WHICH GOES INTO WHETHER OR NOT THEY WERE DILIGENT OR NOT, AND I WOULD POINT OUT TO THE COURT IN OUR BRIEF THE CASE OF DeMARIO, NO QUESTION WAS ASKED ON THE TOPIC OF PRIOR LITIGATION HISTORY, AND SO THEY DID NOT PRESERVE THAT ISSUE. GOING ON, THEN, IT TO THE DENIAL OF THE MOTION TO INTERVIEW, THE DISTINCTION HAS BEEN MADE WHETHER OR NOT WE MUST LOOK AT WHETHER OVERT MISCONDUCT OCCURRED DURING TRIAL OR --

ONE THING. YOU SAID THAT ANOTHER JUROR HAD ANSWERED, YES, THEY HAD BEEN ARE AESTED PREVIOUSLY. -- ARRESTED PREVIOUSLY.

ACCUSED OF A CRIME.

SO THERE IS NO QUESTION OF WHETHER MS. ROBINSON WOULD HAVE MISUNDERSTOOD THE QUESTIONNAIRE OR THE QUESTIONS THAT WERE BEING ASKED IN THIS CASE.

THAT IS ARGUABLY TRUE. HOWEVER, I WOULD SAY THAT DOESN'T NEGATE THE FACT THAT THE DEFENSE NEVER ASKED ANY FOLLOW-UP QUESTIONS ON THIS, AND I DON'T SEE HOW THIS COURT COULD ALLOW A CHALLENGE TO A FINDING OF GUILT, BASED UPON SOMETHING WHERE THEY COULD SIT BACK AND TAKE WHATEVER ANSWERS COME AND DON'T DEAF FURTHER INTO THE QUESTIONS. THEY -- AND DON'T DELVE FURTHER INTO THE QUESTIONS. THEY ARGUE IN THEIR BRIEF THAT THERE WERE NO FURTHER QUESTIONS, BUT FOR A PANEL ON A JURY THAT, IS A RISK THAT YOU HAVE TO TAKE.

WHY DIDN'T THEY ASK A FOLLOW-UP QUESTION? THE STATE DIDN'T ASK ANY FOLLOW-UP QUESTIONS, AND HERE WE HAVE A CASE WHERE SOMEBODY, HERSELF, DID HAVE THIS PREVIOUS INVOLVEMENT WITH THE LAW, SO I ASSUME THAT, AND OF COURSE THE STATE DOESN'T GET TO TAKE AN APPEAL LATER.

CERTAINLY.

BUT IF THE STATE FOUND OUT LATER THAT THERE WAS A JUROR THAT THEY HAD QUESTIONED IN THIS MANNER, THAT, INDEED, HAD HAD A CRIMINAL RECORD THAT HAD NOT BEEN DISCLOSED TO THE STATE DURING THAT QUESTIONING, DON'T YOU THINK THE STATE WOULD HAVE BEEN VERY DISTRESSED AND UPSET IN MAKING THE OPPOSITE OF THE ARGUMENT THAT YOU ARE MAKINGW AND THAT IS MAKING THE ARGUMENT THAT, JUDGE, WE ASKED HER SPECIFICALLY IF SHE HAD BEEN ACCUSED AFTER CRIME, AND FURTHERMORE SHE HEARD ANOTHER JUROR DISCUSS THE FACT THAT HE HAD BEEN ACCUSED, AND HE BROUGHT THAT ALL OUT, AND ALL SHE DISCLOSED TO US, IN ANSWER TO THAT, WAS THE FATHER OF HER CHILD. DON'T YOU THINK THE STATE, IF IT COULD BE IN THAT POSITION, SURELY WOULD HAVE SAID THAT WAS A SUFFICIENT QUESTION, AND THAT WE HAVE BEEN PREJUDICED BY HER FAILURE TO DISCLOSE?

I AM NOT SURE THAT THAT IS TRUE, BASED UPON I THINK THE FOCUS OF HIS QUESTION, FIRST OF ALL, WAS FAIRNESS AND I AM PARS JALT -- AND IMPARTIALITY, DESPITE THIS KNOWLEDGE, BUT

THE SECOND JUROR THERE WAS FOR FOLLOW-UP TO THE CRIME.

WHAT CRIME HAD HE BEEN ACCUSED OF?

NO PARTY FURTHER ELABORATED ON THE NATURE OF THAT CIRCUMSTANCE, BUT AS I SAID, THEY DID NOT MOVE TO STRIKE. SINCE THE STATE DIDN'T MOVE TO STRIKE HIM AND NEITHER DID THE DEFENSE, SO I DON'T THINK THAT ARGUMENT WOULD APPLY.

ISN'T THERE AN INFERENCE THERE THAT THE PROSECUTOR THOUGHT THAT THE QUESTION HAD BEEN ASKED SUFFICIENTLY, BECAUSE THE PROSECUTOR ACCEPTED THAT RESPONSE AND APPARENTLY WENT ON --

I THINK IT WENT BACK TO WHETHER SHE WAS VOICING A FAIRNESS, A BELIEF IN THE SYSTEM. THAT IS WHAT HE WAS GOING FOR, WITH ALL OF THESE PEOPLE, AND WHETHER OR NOT, AS YOU SAY, THE STATE WOULD NOT HAVE AN OPPORTUNITY TO APPEAL SUCH AN ISSUE, SO -- THE STATE'S POSITION DOESN'T REALLY MATTER.

AREN'T YOU SAYING, THOUGH, THAT HERE, THAT THIS OTHER, THIS HER BEING ACCUSED OR CONVICTED OR SOMETHING, MAY HAVE BEEN OUT THERE, AND THE STATE OBVIOUSLY WOULD ORDINARILY HAVE AN INTEREST IN THAT. THAT IS WHY THE STATE WAS ADDRESSING THAT, AND YET YOU ARE SAYINGAT THE PROSECUTOR, AFTER SHE DISCLOSED THAT IT WAS THE FATHER OF HER CHILD, EVEN THOUGH POTENTIALLY, NOW, THE PROSECUTOR WOULD KNOW, WELL, I HAVE TO ASK HER SPECIFICALLY ABOUT WHETHER SHE HAS BEEN ACCUSED OF A CRIME OR CONVICTED OF A CRIME, BECAUSE THAT IS MY OBLIGATION. THE STATE OBVIOUSLY HAS AN INTEREST IN DOING THAT, AND SO YOU ARE SAYING THIS PROSECUTOR, EVEN THOUGH HAS A SPECIFIC INTEREST IN DOING THAT, HAS ASKED THIS QUESTION ABOUT IT, THE STATE SHOULDN'T HAVE BEEN SATISFIED WITH THE ANSWER THAT THEY RECEIVED AND SHOULD HAVE, REALLY, THAT THIS WAS A NEGLIGENT PROSECUTOR ASKING THIS QUESTION HERE?

CERTAINLY NOT, BECAUSE OBVIOUSLY IT IS NOT CONCERNING HIM TO THE EXTENT THAT HE WOULD ASK IS THERE ANYONE ELSE OUT THERE? BECAUSE BU HE HAVE TEN IT WERE, IF -- BUT EVEN IF IT WERE, EVEN IF THAT WAS THE PROBLEM AND SHE ACTIVELY CONCEALED THIS, THAT IS NOT THE ONLY THING THIS COURT WOULD LOOK AT UNDER DELLA ROSA.

THAT IS IN ASKING ABOUT THIS ISSUE HERE, BECAUSE I FIND A GREAT DEAL OF DIFFICULTY THAT YOU ARE SAYING THE DEFENDANT LAWYER SHOULD NOW COULD NOT ASK SPECIFICALLY, AND YET THE PROSECUTOR, WHO POTENTIALLY HAS A GREATER INTEREST IN SOMEBODY HAVING A CRIMINAL RECORD THAT, IF YOU HAVE GOT A CRIMINAL RECORD, ORDINARILY YOU WILL SAY THERE WILL BE SYMPATHY FOR THE DEFENDANT HERE, AND YET THIS PROSECUTOR DID NOT ASK THE SPECIFIC FOLLOW-UP THAT YOU ARE SAYING THE DEFENSE LAWYER SHOULD HAVE ASKED.

WELL, I UNDERSTAND COMPLETELY WHAT YOU ARE SAYING. I THINK IT IS TRUE THAT NORMALLY THE STATE IS THE PARTY THAT WOULD OBJECT TO A PRIOR CRIMINAL HISTORY AND THE DEFENSE WOULD BE HAPPY TO HAVE SOMEONE OF THAT NATURE, BASED UPON THE POSSIBILITY THAT THEY WILL SYMPATHIZE WITH THEIR DEFENDANT ON THE PANEL. BUT THAT IS NOT WHAT HAPPENED IN THIS CASE, AND THIS COURT IS THE ONE THAT ANNOUNCED THE THREE-PRONGED RULE OF DELLA ROSA, WHICH REQUIRED SOME DILIGENCE ON THE PARTY INVOLVED THAT IS MAKING THE COMPLAINT, AND SO UNDER THOSE CIRCUMSTANCES IT HAS GOT TO BE APPLIED TO OTHER TYPES OF QUESTIONS OF JURORS AND NOT JUST THIS QUESTION. WHETHER OR NOT A JUROR CONCEALED INFORMATION, NOT JUST WHETHER OR NOT A JUROR CONCEALED A PRIOR OFFENSE, AND IF YOU ARE GOING TO HAVE CASE LAW WHICH REQUIRES SOME PART OF DILIGENCE, THEN IT IS GOING TO BE ILLOGICAL TO THINK THE DEFENDANT CAN SIT BACK AND NOT ASK ANY QUESTIONS AND THEN COME BACK LATER FIRST TO ANOTHER TRIAL COURT AND THEN TO THIS COURT, AND SAY THEY WERE HURT BECAUSE THIS QUESTION WAS NEVER ASKED.

SO AFTER THEY ASK ABOUT HER BEING ACCUSED, THEY HAVE TO ASK HOW ABOUT YOUR BROTHER?

SPECIFICALLY NOT WHAT NEEDS TO BE ASKED BY ANY PARTY, BUT CERTAINLY THAT WOULD HAVE BEEN A BETTER, IT WOULD HAVE BEEN AN IDEAL SITUATION, THAT THEY WOULD HAVE ASKED ANOTHER QUESTION, BUT I STILL BELIEVE THAT IT IS NOT POSSIBLE TO CHALLENGE A VERDICT ON THAT BASIS, AND WHAT I WOULD SUBMIT TO THIS COURT IS THAT DILIGENCE REQUIREMENT IS THERE FOR A REASON, AND EVEN IF SHE HAD ACTIVELY CONCEALED IT, THERE HAS TO BE SOME RESPONSIBILITY ON THE PART OF THE COMPLAINING PARTY, TO RECTIFY THE SITUATION, WHILE THEY HAVE AN OPPORTUNITY TO DO SO.

CHIEF JUSTICE: BEFORE YOUR TIME IS UP, DO YOU WANT TO MOVE TO THE SECOND ISSUE THAT MR. BOLTON RAISED, -- MR. BOLOTIN RAISED CONCERNING WITH THE JUROR'S USE OF CRACK COAND I.

-- CRACK COCAINE.

YES. IT WAS UNTIMELY AND FILED WITH THE MOTION FOR NEW TRIAL, BECAUSE IT WAS A COMPLETELY OPPOSITE VIEW FROM WHAT THEY HAD BEEN TAKING, FROM THE MOMENT THAT THEY FOUND OUT ABOUT THIS ARREST. THEY INITIALLY OBJECTED TO THE RECUSAL OF HER AT TRIAL. THEY OBJECTED IN THEIR MOTION FOR NEW TRIAL TO THE RECUSAL OF HER, AND IT IS NOT UNTIL THEY FILED AN UNTIMELY MOTION THAT THEY TAKE A COMPLETELY OPPOSITE VIEW AND ASK THAT IT WAS ERROR THAT SHE, AND ASKED FOR AN INTERVIEW, TO TRY TO SHOW THAT IT WAS AN ERROR, THAT SHE MAY HAVE USED DRUGS. THE FIRST IS WHETHER OR NOT YOU LOOK AT IT UNDER A FLORIDA STANDARD OF JUROR MISCONDUCT, OR WHETHER YOU LOOK AT TANNER'S DISCUSSION OF INTERNAL VERSUS EXTERNAL, ON THE JURY. THE STATE TALKS ABOUT HOW TANNER WOULD ANALYZE THIS TYPE OF SITUATION AND SO THAT IT DOESN'T APPLY, AND INTOXICATION OF A JUROR WOULD BE THE TYPE OF EBBS TERNL INFLUENCE THAT WOULD NOT MERIT A NEW TRIAL. MORE IMPORTANTLY THAN THAT, FACTUALLY THERE IS ABSOLUTELY NO EVIDENCE --

CAN I JUST, ARE YOU SAYING IF A JUROR WAS DRUNK DURING TRIAL, THAT THAT WOULD NOT REQUIRE A NEW TRIAL?

THAT IS WHAT TANNER SAYS, THAT JUROR INTOXICATION IS NO DIFFERENT THAN INSANITY OR IF A JUROR WAS SLEEPY OR ANY OF THOSE TYPES OF THINGS THAT WOULD BE INHERENT WITHIN THEM IN AFFECTING THEIR DELIBERATIONS. I THINK THE DISTINCTION CAN BE MADE, WITH THE FLORIDA CASES THAT HAD HE THEY CITE IN OVERT MISCONDUCT -- THAT THEY CITE IN OVERT MISCONDUCT, WHERE YOU HAVE AN AFFECTED JUROR, AND THAT IS IN THE INITIAL BRIEF, WHERE THERE IS A WAVING OF HANDS OR SOME TYPE OF ACTIVITY, OR IT IS BROUGHT TO THE ATTENTION OF THE COURT THAT THE JUROR USED ALCOHOL DURING THE COURSE OF THE PROCEEDINGS.

HERE IS A POTENTIAL DIFFERENCE BETWEEN A JUROR THAT FALLS OVER, BECAUSE THEY ARE SO INCAPACITATED THAT THEY CAN'T HEAR IT OR ONE THAT IS ABLE TO REMAIN UP RIGHT IN A CHAIR BUT IS SO INCAPACITATED THAT THEY HAVE NO IDEA WHAT IS GOING ON. I AM NOT SURE I UNDERSTAND THE DISTINCTION YOU ARE MAKING.

THE DISTINCTION COMES FROM THE CASE LAW, ITSELF. IF THERE IS OVERT MISCONDUCT, IF SOMETHING IS GOING ON WITHIN THE MIND OR BODY OF A JUROR AND THERE IS NO EVIDENCE OF THAT TO ANYONE, BE IT JUDGE OR OTHER ATTORNEYS OR ANYONE IN THE COURTROOM WHO MAY BE PAYING ATTENTION, THEN THERE IS NO MISCONDUCT AND YOU HAVE TO HAVE A DISTINCTION, AND THAT IS WHY YOU ARE OPENING THE DOOR TO THING THAT IS IMPAIR A VERDICT, AND I WOULD POINT OUTTHAT FACTUALLY THAT NOT ONLY DID NO ONE BRING THAT OUT DURING THE COURSE OF TRIAL, BUT THIS JUROR WAS ELECTED FOREPERSON, SO THERE WAS

NO EVIDENCE OBVIOUSLY AMONG THE OTHER JURORS, THAT SHE WAS INCAPACITATED IN ANY WAY, AND THE FACT OF HER ARREST ABSOLUTELY PROVIDES NOTHING BUT SPECULATION AS TO WHAT SHE MIGHT HAVE BEEN DOING DURING THE COURSE OF TRIAL OR DELIBERATION.

I REALIZE THAT YOU ARE HERE AS A REPRESENTTY OF THE STATE, URGING THAT WE AFFIRM THIS DEATH PENALTY CONVICTION, AND THIS, WE HAVE A TERRIBLE CRIME HERE OF A DEFENDANT WHO HAD PRIOR ACTS OF TERRIBLE VIOLENCE. MY CONCERN IS, AND I JUST WANT TO UNDERSTAND WHETHER YOU SHARE ANY OF THIS CONCERN, IS THAT THE VERY FACT THAT THIS IS A JUROR WHO, TEN MONTHS BEFORE THIS PARTICULAR JURY SELECTION, WAS ARRESTED, CHARGED, AND CONVICTED OF OBSTRUCTING A POLICE OFFICER WITHOUT VIOLENCE, WAS SUPPOSED TO PAY A FINE, DOESN'T PAY THE FINE, IS, KNOWS THAT SHE IS GOING TO BE ARRESTED, AND THEN ON TOP OF THIS, DOES NOT DISCLOSE IT TO THE JUDGE OR TO THE DEFENSE LAWYER OR TO THE PROSECUTOR, AND THEN ON TOP OF IT, IS ELECTED JURY FOREPERSON, AND THEN ON TOP OFS IT, THE DAY AFTER THE -- AND THEN ON TOP OF IT, THE DAY AFT PENALTY PHASE BEGINS, SHE ARRESTED ON -- ON THE DAY AFTER THE PENALTY PHASE BEGINS, SHE IS ARRESTED ON TWO DRUG CHARGES AND THEN ANOTHER. AS FAR AS WE ARE HERE, NOW, IN THE FIRST DIRECT APPEAL, WHY ISN'T IT BETTER, GIVEN THESE, THE COMPILATION OF THESE KINDS OF THINGS, WITH A PERSON BEING A JURY FOREPERSON, TO HAVE A NEW TRIAL AND A CLEAN TRIAL, AS OPPOSED TO SPENDING THE NEXT TEN TO 15 YEARS FIGURING OUT WHETHER DEFENSE COUNSEL WAS INEFFECTIVE IN NOT INDIVIDUALLY VOIR DIRING THESE JURORS WHEN THERE WAS PUBLICITY THE DAY BEFORE, WHETHER AS INEFFECTIVE BECAUSE HE SHOULD HAVE FOLLOWED UP ON THE QUESTIONING. WHY ISN'T THAT BETTER?

I THINK IT WOULD BE A CLASSIC CASE OF ZERO PLUS ZERO PLUS ZERO EQUALS ZERO. THERE IS NO INDIVIDUAL ERROR HERE, AND TO THE EXTENT THAT ANY ERROR MIGHT BE ALLEGED, I THINK THAT IT IS NOT PRESERVED, AND WHILE I DIDN'T GET TO ARGUE THE ISSUE TWO, THERE IS NO ERROR WITH RESPECT TO ANY PRETRIAL PUBLICITY IN THIS CASE, THAN IS ARGUED EXTENSIVELY IN OUR BRIEF AND THEY MADE NO OBJECTION TO THE PANEL THAT WAS SEATED ON THAT BASIS, SO GIVEN THE FACTS -- MR. CHIEF JUSTICE

YOUR TIME IS UP.

-- THAT MY TIME IS OVER, BUT I WOULD JUST CONCLUDE WITH THE FACT THAT THIS WAS A HEINOUS CRIME AND THE DEFENDANT TOOKE STAND AND ADMITTED THIS CRIME. HE CONFESSED TO IT, AND UNDER THE CIRCUMSTANCES AND ARGUMENTS THAT I HAVE RAISED TODAY HERE AND IN THE BRIEF, WE WOULD ASK THAT YOU AFFIRM THE JUDGMENT.

CHIEF JUSTICE: THANK YOU, COUNSEL. MR. BOLOTIN.

ON THE SUBJECT --

WHAT IS YOUR ANSWER TO THE WAIVER ARGUMENT THAT THE STATE MADE HERE? WHAT IS YOUR SHORT ANSWER TO THAT?

THE WAIVER AS TO THE CONCEALMENT?

RIGHT.

OKAY. MY SHORT ANSWER TO THAT WOULD BE NUMBER ONE, THAT, THAT WERE THE ONLY ISSUE, IN ISOLATION, THEN I THINK THAT THEY MIGHT BE RIGHT. I THINK THE COMBINATION OF ALL OF THE THINGS GOING ON HERE WITH JUROR ROBINSON, MOST OF WHICH WERE PRESERVED AND MOST, I MEAN, WHAT YOU NEED TO UNDERSTAND HERE IS THAT SHE, MY OPPONENT SAYS THAT WE WANTED JUROR ROBINSON ON THE JURY. SURE, WE WANTED HER ON THE JUROR DURING VOIR DIRE BECAUSE WE DIDN'T KNOW ANY REASON NOT TO WANT HER ON THE JURAT THAT POINT. WE ASKED TO INTERVIEW JUROR ROBINSON --

YOU OBJECTED AS PART OF A MOTION FOR NEW TRIAL, THE FACT THAT SHE HAD BEEN DISCHARGED.

BUT WE ALSO, THE REASON DEFENSE COUNSEL DIDN'T WANT HER DISCHARGED IS BECAUSE HAD HE A BIG PROBLEM WITH BOTH OF THE ALTERNATES. CONTRARY TO WHAT COUNSEL SAID, THERE WAS A MOTION TO EXCUSE BOTH OF THE ALTERNATES BECAUSE OF THE I AM PROP PROPER CONTACT WITH -- BECAUSE OF THE IMPROPER CONTACT WITH THE VICTIM'S FATHER AND THEDGE HAD DENIED THAT. THAT WAS BEFORE.

WAS THERE A PREEMPTORY CHALLENGE AVAILABLE AS SHE INDICATED?

NO. THE PROBLEM WITH SANTONE, THERE WAS A PREEMPTORY CHALLENGE AVAILABLE NOT TO THE REGULAR JURORS. THE DEFENSE EXHAUSTED THEIR CHALLENGES FOR THE REGULAR JURORS. THERE WAS A PREEMPTORY CHALLENGE FOR ALTERNATES AT THE JURY SELECTION PROCEEDING BUT THE PROBLEM WITH THE ALTERNATES DIDN'T OCCUR UNTIL THE PENALTY PHASE.

YOU SAID THAT SHE BEEN ARE A RESTED FOR THE A -- ARRESTED FOR A CRIME.

THERE WAS ACTUALLY TWO.

AND DIAZ WAS NOT STRUCK.

I DON'T KNOW WHAT HAPPENED TO DIAZ. SANTONE WAS NOT STRUCK AND SANTONE DID EXPLAIN THAT THERE WAS NO EXPLANATION TO THE ARREST AND IN FACT THERE WAS AT VOLUME 7, PAGE 1223,.

WHAT DID HE SAY -- PAGE 123.

WHAT DID HE SAY?

HE SAID WOULD YOU TELL US THAT RELATIONSHIP OR WHO THAT PERSON WAS. > MR. SANTONE SAID THAT IT WAS RELATED TO MY SISTER-IN-LAW'S DIVORCE. SHE HAD BEEN ACCUSED AND MY BROTHER HAD BEEN ACCUSED AND THEN THEY DROPPED IT. THE PROSECUTOR SAID IT SOUNDED LIKE A BLOODY MESS. OTHER THAN THAT, MY WIFE HAS TWO BROTHERS AND THEY ARE IN JAIL. AND THE PROSECUTOR SAID THAT IS FINE. I WANT TO MAKE SURE THAT ON THE FOLLOW-UP QUESTION, THIS IS NOT ON JUROR ROBINSON. WE DIDN'T SUSPECT JUROR ROBINSON OF LYING OR WITHHOLDING INFORMATION. EVERY SINGLE JUROR WOULD HAVE BEEN ASKED ARE YOU SURE YOU AREN'T WITHHOLDING INFORMATION? ARE YOU SURE IT WASN'T YOU CHARGED WITH A CRIME? WE WOULD HAVE ENDLESS VOIR DIRES IF THAT WERE TO OCCUR. I WISH I HAD MORE TIME BUT I DON'T. THANK YOU FOR YOUR TIME.

CHIEF JUSTICE: THANK YOU, FOR YOUR TIME. THE COURT WILL BE IN RECESS. THANK BOTH COUNSEL FOR YOUR ASSISTANCE IN THIS MATTER.