State of Florida v. Adolphus Merricks

WE ARE HERE, TODAY, ON A CERTIFIED QUESTION OUT OF THE SECOND DISTRICT. AN OFF-THE-RECORD ANSWER TO A JURY OR'S QUESTION, UNDER HARMLESS ERROR UNDER DeJULIO. THE FACTS ARE THAT THE DEFENDANT WAS CONVICTED OF SEXUAL BATTERY OF A 12-YEAR-OLD GIRL AND ALSO CONVICTED AFTER LESSER-INCLUDED ATTEMPTED SEXUAL BATTERY. AFTER THE JURY RETIRED TO DELIBERATE IN THIS CASE, A JUROR STUCK HIS HEAD OUT OF THEYROODE BAILIFF IF THEY COULD HAVE SOME TESTIMONY READ BACK.

WHAT RECORD, ON THAT, DO WE HAVE AS TO WHAT THF TOD THE JUROR OR WHAT TE JUROR ASKED THE BAILIFF, OTHER THAN WHAT THE JUDGE TALKED ABOUT?

WE ONLY HAVE WHAT THE JUDGE SAID THE BAILIFF TOLD HIM AND WHAT THER, BECAUSE THE JUDGE DID SUBSEQUENTLY TALK TO THE JURY FOREMAN, AND WE HAVE WHAT THE JURY FOREPERSON SAID AT THAT POINT, TOO. THAT IS ALL WE HAVE. THE BAILIFF DID NOT TESTIFY AT A HEARING.

WAS THERE A REQUEST THAT THE BAILIFF TESTIFY, OR EITHER THE STATE OR THE DEFENSE?

THE DEFENSE DID NOT REQUEST ANYTHING. THE DEFENSE JUST MOVED FOR MISTRIAL AND REQUESTED NOTHING. AT ONE POINT, THE JUDGE DID OFFER, IF YOU WE MO DO SOMETHING FURTHER, AND THE DEFENSE SAID NO.

THAT WAS AFTER THE JURY Y REACHED THEIR VERDICT.

BUT THE VERDICTNOT RENDERED YET. THE JUDGE DID NOT RECEIVE THE VERDICT YET.

COUNSEL, I NOTICE THAT, ON THE RECORD, THE PROSECUTING ATTORNEY ASKED THE COURT TO QUESTION THE JURY, IN ORDER TO DETERMINE WHOSE TESTIMONY OR WHAT TESTIMONY OR EVIDENCE IT WAS --

CORRECT.

-- THAT WAS TO BE READ BACK. PHRASE THAT, IN TERMS OF SAYING THAT I DON'T BELIEVE THAT YOU CAN DETERMINE WHETHER OR NOT IT IS HARMLESS ERROR, UNLESS WE KNOW WHAT IT WAS THE JURY WANTED AND WAS THAT EVER DONE?

THAT WAS NOT DONE. ACTUALLY THE JUDGE DID ASK THE JUROR FOREPERSON, THE JUDGE DID ASK, WELL, I KNOW THERE WAS SOME QUESTION ABOUT TESTIMONY READ BACK, AND WHAT TESTIMONY DID YOU WANT READ BACK, AND THE JUROR RESPONDED OH, WE JUST WANTED TO KNOW HOW EASY IT WOULD BE TO GET THE TESTIMONY READ BACK. WHEN WE WERE TOLD IT IS NOT THAT EASY, WE WENT BACKD DELIBERATED AND WERE COMFORTABLE WITH OUR VERDICT, SO THIS RECORD DOESN'T SHOW WHAT THE TESTIMONY WAS AND WE WOULD BE SPECULATING. IN THIS CASE THERE WERE ONLY FOUR WITNESSSTIFIED, SO THE SPECULATION ISN'T GOING TO BE THAT EXTENSIVE, BUT WE WERE STILL SPECULATING ON WHAT TESTIMONY WERE GOING TO BE READ BACK.

I TAKETE FOUR WITNESSES WERE ALL PROSECUTION WITNESSES.

SO THERE WERE NO WITNESSES PUT ON BY THE DEFENSE.

THE DEFENSE DID NOT PUT ON A CASE.

BUT I TAKE IT THAT THERE WAS CROSS-EXAMINATION.

YES. THERE WAS CROSS-EXAMINATION.

AND --

YES. AND THE ONLY WITNESS OF ANY SUBSTANCE WAS THE VICTIM, HERSELF, BECAUSE IN THIS MATTER THE DOCTOR TESTIFIED. HIS TESTIMONY COULD HAVE GONE EITHER WAY. THE VICTIM'S MOTHER TESTIFIED, AND SHE TESTIFIED AS TO POSSIBLE BIAS, WHY THESE ALLEGATIONS, WELL, WE WOULD BE SPECULATING ON ALL OF THAT.

WELL, ASSUMING THAT YOU DO A HARMLESS-ERROR ANALYSIS, WHAT DO YOU SAY ABOUT YOUR OWN COLLEAGUE COLLEAGUES' STATEMENT HERE, WHICH IN ESSENCE IS, JUDGE, I DON'T SEE HOW YOU CAN DO A HARMLESS-ERROR ANALYSIS, UNTIL YOU KNOW WHOSE TESTIMONY IT WAS THAT THE JURY WANTED READ BACK. IT WOULD ONLY BE AFTER KNOWING THAT, THAT YOU COULD EVEN DO, AND SINCE THAT WASN'T DONE, HOW COULD AN ADEQUATE HARMLESS-ERROR ANALYSIS BE DONE? THIS IS YOUR, OF COURSE, YOUR, THE TRIAL PROSECUTOR, I REALIZEH CORRECTINISE,THE DID HIS HARMLESS-ERROR ANALYSIS, BASED ON I WOULD HAVE INSTRUCTED THE JURY THE SAME .HERE WOULD NOT HAVE BEEN ANY TESTIMONY READ BACK.

BUT THE JUDGE DID NOT DO IT, KNOWING WHOSE TESTIMONY IT WAS THAT THE JURY WANTED READ BACK. IS THAT CORRECT?

CORRECT. THAT'S CORRECT. BUT HE DID ASK THE JURY THE QUESTION, AND IN A PERFECT WORLD THIS JUDGE WOULD HAVE HAD A FULL-BLOWN HEARING, BUT THE RECORD IS WHAT THE RECORD , AND IN THIS CASE THE JUDGE DETERT IAVE INSTRUCTED THEM THE SAMES THE BAILIFF DID.

HOW DO WE KNOW THAT, THOUGH? IN OTHER WORDS, HOW, IT IS ALISON THING TO SAY AFTERWARDS, WELL, THAT IS PROBABLY WHAT I WOULD HAVE DONE, TOO, BUT THAT THE JURY COMES BACK AND SAYS, FOR INSTANCE, YOU KNOW, THERE WAS THE LAST FIVE MINUTES OF TESTIMONY OR TOWARDS THE END, AND THERE WERE JUST A COUPLE OF QUESTIONS THERE,T WE ARE DEBATING THE ANSWER TO, IN THEJU, AND IT IS VERY IMPORTANT TO OUR DECISION, AND COULD WE JUST HAVE THAT LIMITED READ BACK, AND IN A SETTING, OBVIOUSLY JUDGES HAVE DISCRETION TO DETERMINE WHAT THEY WOULD DO, SO HOW CAN YOU REALLY MAKE A DETERMINATION AFTER THE FACT?

THE FACT THAT THE JURY ONLY TOOK ONE MINUTE, OPPOSING COUNSEL MAKES A GREAT DEAL OVER THE ONE MINUTE CONTRIBUTING TO AN ERROR, AND I WOULD SUBMIT THAT THE ONE MINUTE IT TOOK THE JURY TO COME BACK, AFTER THEY WERE TOLD RELY ON YOUR MEMORY, WHICH THE JUDGE WOULD HAVE INSTRUCTED, THAT SHOWS THAT THIS ERROR WAS HARMLESS.

BUT I AM HAVING DIFFICULTY WITH THAT, BECAUSE WE DON'T KNOW THE DYNAMICS OF THAT, EITHER. IN OTHER WORDS IF THERE WAS AN INDIVIDUAL JUROR, FOR INSTANCE, THAT WANTED TO HEAR THIS, OR, AND THEN WE HAVE THE FORM COME BACK AND SAY, SEE, I TOLD YOU SO YOU KNOW --

THIS RECORD DOES NOT ESTABLISH THAT, BUT -- WE HAVE THE FOREMAN COME BACK AND SAY SEE, I TOLD YOU SO --

THIS RECORD DOES NOT ESTABLISH THAT, BUT I THINK WE ARE GETTING AHEAD OF OURSELVES BY TALKING ABOUT THE HARMLESS ERROR. I WOULD SUBMIT THAT THIS COURT'S HOLDING IN

IVORY, BY EVEN SUBJECTING THE BAILIFF'S COMMENT TO REVERSIBLE ERROR, AND WE HAVE TWO QUESTIONS HERE.

ARE YOU SAYING THAT, IN THIS SAME CASE, THAT INSTEAD OF THE BAILIFF TELLING THE JURY SOMETHING SUBSTANTIVE, WHICH IS THAT THEY COULDN'T HAVE A READ BACK OF THE TESTIMONY, WHICH IS NOT TRUE.

IT IS PROCEDURAL.

IT IS A DISCRETIONARY, AND IT IS IMPORTANT THAT BOTH SIDES BE PRESENT, SO THAT ALL OF THE QUESTIONS THAT THEY ARE NOW ASKING COULD BE INQUIRED INTO, AND ARE YOU SAYING THAT, IF THE JUDGE, IN THE SAME SITUATION, HAD TOLD THE JURY, NO, YOU ARE NOT GOING TO GET A READ BACK OUTSIDE THE PRESENCE OF THE TWO ATTORNEYS, THAT THERE, UNDER IVORY, THERE WOULD BE A PER SE REVERSAL, BUT BECAUSE THE BAILIFF, WHO IS THE ARM OF THE D LY HIBITED FROM DOING WHAT WAS DONE IN THIS CASE, DID IT, THAT THERE IS SOMEY REASONY THE SAME RULE OF IVORY SHOULDN'T APPLY FOR WHAT WOULD BE IDENTICAL ACTIONS BY A BAILIFF?

THIS COURT, IN McKINNEY, HAD A SIMILAR ISSUE.

McKINNEY WAS A POSTCONVICTION WASN'T IT? I MEAN, McKINNEY, THERE WAS NO, NOTHING WAS, THERE WAS NO OBJECTION.

McKINNEY IS STILL VALID, AND IT STILL APPLIES TO THIS. THERE HAS NOT BEEN A CASE OUT OF THIS COURT OR OUT OF ANY COURT IN THIS STATE, THAT I KNOW OF, THAT APPLIES THE PER SE REVERSIBLE ERROR STAOA BAILIFF'S COMMENTS. THEY HAVE ALWAYS BEEN SUBJECTED TO HARMLESS ERROR.

ISN'T THE McKINNEY CASE, REALLY, A DIFFERENT CASE FROM THIS? I MEAN, FIRST OF ALL, YOU HAVE WHAT WENT ON WITH THE BAILIFF AND THE JURORS HAPPENED PRIOR TO ANY VERDICT, AND THE JUDGE ACTUALLY REINSTRUCTED THEM, DIDN'T HE, BEFORE JURY ACTUALLY READS THE VERDICT. DOESN'T THAT MAKE THIS A COMPLETELY DIFFERENT CASE FROM McKINY?

NO, BECAUSE THE JUDGE IN THIS CASE, ALSO DID REIN INSTRUCT THE -- DID REINSTRUCT THE JURORS. THE VERDICT WAS NOT READ YET. EVEN THE DISSENT POINTS OUT --

HOW HE DID THAT POINTS OUT THE CHANGE, THE VERDICT, IN FACT THERE WAS A PAPER THAT HAD BEEN GIVEN TO THE BAILIFF THAT HAD THE VERDICT ON IT. GO BACK AND DO ANY KIND OF DELIBERATIONS, ONCE THE JUDGE TALKED TO THEM AGAIN.

BUT THE JUDGE COULD HAVE ORDERED THAT AND THE DEFENSE COULD HAVE REQUESTED THAT. THE DEFENSE DID NOT IN THIS INSTANCE. ANOTHER POINT THAT I AM MAKING IS CAN'T YOU SEE THAT THERE IS SOME DISTINCTION HERE, BECAUSE THE VERDICT IN THIS CASE WAS RENDERED PRIOR TO OR THEY REACHED IT PRIOR TO THE JUDGE SAYING ANYTHING TO THEM, WHEREAS IN McKENNY,4) IT WAS A COMPLETELY DIFFERENT SITUATION.

IN THIS CASE, THE JUDGE COULD HAVE, JUST AS EASILY AS THE OULDE REQUESTED IT, THE JUDGE COULD HAVE SENT THEM BACK FOR ADDITIONAL DELIBERATIONS.

AND IF THE JUDGE DIDN'TOSHOULD BEAR THE BURDEN F T?

WE ARE NOT SAYING THAT THIS IS REVEE . E ARE SAYING THAT IVORY DOES NOT APPLY, SECTION 1607 APPLIES AND IT IS --

TO GET BACK TO JUSTICE ANSTEAD'S QUESTION, WHICH IS HOW DO WE DETERMINE IF THIS WAS

HARMLESS OR NOT, IF WE DON'T HAVE, WE DON'T HALVES, YOU KNOW, THESE THINGS TO TELL US WHAT PERSON'S TESTIMONY THEY WANTED READ BACK OR WHAT PORTION OF IT OR ANYTHING.

WELL, THERE ARE TWO ISSUES DEALING WITH HERE, AND THE SECOND DISTRICT MISS APPLIED IVORY BY SAYING PER SE REVERSIBLE. IF YOU LET TRIAL COURT AND APPELLATE COURT GET INTO THE HARMLESS ERROR, THEN THERE IS OBVIOUSLY NO PER SE REVERSIBLE ERROR HERE. IF YOU HAVE THE STATE MEET THE HEAVY HARMLESS ERROR BURDEN AT THIS POINT, THAT IS A QUESTION THAT THIS JURY IS -- THAT THIS REVERSAL IS WRONG BECAUSE IT APPLIES McKINNEY TO THE BAILIFF.

WE ARE QUESTIONING WHETHER IT WAS FUNDAMENTAL ERROR WITH THE BAILIFF. HERE THERE IS NO OBJECTION. SPECIFICALLY DEFENSE COUNSEL NEITHER OBJECTED NOR MOVED FOR A MISTRIAL. UNDER BOTH THOMAS AND THIS CASE, THIS WAS PRESERVED BY THE DEFENSE COUNSEL OBJECTING AND MOVING FOR A MISTRIAL.

I WOULD SAY ARGUABLY, UNDER THOMAS, THAT THE PER SAIL REVERSIBLE ERROR IS -- THE PER SE REVERSIBLE ERROR IS NOT, BECAUSE THERE WAS NO MOVING OR OBJECTION. CLEARLY IT WAS A MISTRIAL, BECARIAL JUDGE ON THE RECORD DECIDED THAT HE HAD CURED THIS ERROR. AT THAT POINT IT IS THE DEFENDANT'S BURDEN TO COME BACK AND SAY I HAVE PREJUDICIAL ERROR. HE DID NOT ASK FOR AREE IN. HE DID NOT ASK FOR A REINSTRUCTION.

DO YOU AGREE, THOUGH, THAT McKINNEY, I JUST WANT TO GO BACK INVOLVED A SITUATION WHERE THERE WAS NOTHING. THAT AFTER THE BAILIFF REPORTED THE EXCHANGE TO THE JUDGE, THE JUDGE SUMMONED THE, BOTH DEFENSE AND THE PROSECUTION, AND THEY, THERE WAS NO OBJECTION, AND NO MOTION FOR A MISTRIAL, AND WHAT WAS CLAIMED IN McKINNEY IS THAT THIS WAS FUNDAMENTAL ERROR.

McKINNEY STILL, McKINNEY STILL PROVIDED A HARMLESS-ERROR ANALYSIS, AND McKINNEY FOUND THE ERROR TO BE HARMLESS.

IT IS ONE OF THOSE THINGS WHERE, IF IT IS NOT, I MEAN, THE PER SE REVERSAL WHICH IS REQUIRED UNDER IVORY, THAT STILL DOESN'T MEAN THAT IT WOULD NOT BE, IF IT WASN'T PRESERVED, THAT IT WOULD BE FUNDAMENTAL ERROR. WOULD YOU AGREE WITH THAT? THE TWO DIFFERENT NOTIONS.

CORRECT, BUT MORE SIGNIFICANTLY, AS THIS CASE AFFECTS THE CONDUCT OF BAILIFFS, IS THE SECOND DISTRICT'S HOLDING THAT PER SE WAS APPLIED HERE. GETTING --

WHAT IS THE POLICY REASON WHY WE WOULDN'T WANT TO APPLY IVORY TO A BAILIFF, GIVEN THE STATUTE, GIVEN THE FACT THAT A BAILIFF, WHO WAS IN A POSITION TO BE COMMUNICATING BACK AND FORTH WITH JURORS, HAS THE POTENTIAL TO, REALLY, UNDERMINE THE RULE, AND THIS IS NOT, YOU KNOW, UNFORTUNATELY, I HAVE SEEN, AND WHEN I WAS AT THE APPELLATE COURT, THIS IS, THIS HAPPENS FROM TIME TO TIME, AND I AM NOT SURE WHAT BAILIFFS ARE TOLD OR NOT TOLD, BUT THE DANGER IS REALLY SUBSTANTIAL. AND MAYBE EVEN GREATER DANGER THAN A JUDGE'S EXPARTE COMMUNICATION.

I WOULDEH IT A GREATER DANGER. I THINK IVORYVEN -- IVORY KS TEREASONS BEHIND THE PER SE REVERSIBLE ERROR, AND THEY SAY THE MAIN REASON FOR PER SE IS THE DUE PROCESS REQUIREMENT. OPPORTUNITY TO ARGUE. WELL, THE DUE PROCESS, THE NOTICE REQUIREMENTS OF 3.410 WERE MET HERE, BY THE TRIAL JUDGE, AS SOON AS HE WAS AWARE OF THE ERROR, NOTIFYING THE PARTIES AND GIVING THEM A CHANCE AND ALBEIT IN THIS CASE, AN UNUSUAL CIRCUMSTANCE. THE JURY RETURNED WITH THEIR VERDICT IN ONE MINUTE.

THE DUE PROCESS THEY ARE TALKING ABOUT IN IVORY IS THE DUE PROCESS AFTER THE JURY HAS THE QUESTION AND BEFORE THE JUDGE RESPONDS TO IT.

CORRECT.

SO HERE THE ANALOGY IS, AFTER THEY HAVE ASKED THE QUESTION AND THE BAILIFF RESPONDS TO IT, AND THERE WAS NO DUE PROCESS IN BETWEEN THERE. THE BAILIFF WENT AHEAD AND RESPONDED, WITHOUT THE NOTIFICATION TO THE PARTIES, AND SO I AM HAVING DIFFICULTY WITH YOUR ANALOGY THAT DUE PROCESS WAS APPLIED HERE, WHEREAS IT WAS LACKING IN IVORY.

DUE PROCESS WAS APPLIED. THE CASES SAY THAT --

YOU ARE TALKING ABOUT AFTER THE FACT, AFTER THE DEED WAS DONE BY THE BAILIFF.

THIS COURT, IN CULL BERT, DID SAY THAT THE JUDGE COULD CORRECT AN ERROR, AFTER, AFTER THE FACT. CULL BERT AND, I BELIEVE MILLS CITED CULBERT, AND THEY SAID THAT AFTER THE FACT, AND AGAIN THIS CASE IS UNUSUAL IN THE FACT THAT THE JURY DID COME BACK WITH THE VERDICT IN THE MEANTIME.

WHAT WAS THE HOLDING IN IVORY?

THE HOLDING IN IVORY WAS THE JUDGE'S CONTACT WITH THE JURY, OUTSIDE OF THE NOTICE REQUIREMENTS, IS PER SE REVERSIBLE.

HOW DO YOU DISTINGUISH A BAILIFF'S CONTACT WITH THE JURY AND THE BAILIFF GIVES THE JURY INSTRUCTION ON THE LAW, AS HAPPENED HERE? WHAT IS DISTINGUISHABLE?

A BAILIFF IS ALWAYS GOING TO HAVE CONTACT WITH THE JURY. THAT --

A JUDGE IS ALWAYS GOING TO HAVE CONTACT WITH THE JURY.

A JUDGE IS ALWAYS GOING TO HAVE CONTACT WITH THE JURY WITH PARTIES PRESENT. THE BAILIFF IS ALWAYS GOING TO HAVE CONTACT WITH THE JURY, WHEN PARTIES ARE NOT GOING TO BE PRESENT.

SO WHY SHOULDN'T WE HAVE A GREATER SAFEGUARD, WITH REFERENCE TO THE BAILIFF, THAN WE WOULD WITH THE JUDGE? YOU ARE ASKING FOR A LESSER STANDARD FOR COMMUNICATIONS BETWEEN THE BAILIFF.

A HARMLESS ERROR STANDARD.

THAT IS OBVIOUSLY A LESSER STANDARD.

WE ARE ASKING FOR THE BAILIFF E APPLIED TO A HARMLESS ERROR STANDARD, A HARMLESS-ERROR ANALYSIS, AND IN JULIO, THIS COURT DOES DISTINGUISH BETWEEN HAD -- BETWEEN WHEN AN ERROR IS ND AN ERROR IS HARMLESS, AND THE TEST IS A HARMLESS-ERROR TEST.

WOULD YOU REQUIRE, THEN THAT, THERE BE A RECORD, THAT ONCE THE JUDGE FINDS OUT ABOUT THE BAILIFF, THAT IN ORDER TO REALLY ADEQUATELY DO A HARMLESS-ERROR ANALYSIS, THAT WE WOULD HAVE TO GET THE BAILIFF IN AND PUT THE BAILIFF UNDER OATH?

SURE. IN A PERFECT WORLD, AN EVIDENTIARY HEARING WOULD BE HELD. THE BAILIFF WOULD BE COMING ON TO TESTIFY. THE JUDGE COULD HAVE POLLED THE INDIVIDUAL JURORS. IN CULBERT, THE JUDGE POLLED THE INDIVIDUAL JURORS, AND HE DECLINED THAT, AND IN THIS CASE -- MR. CHIEF JUSTICE

YOU ARE IN YOUR REBUTTAL TIME.

I WOULD LIKE TO RESERVE, YES.

CHIEF JUSTICE: THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS BRAD PERMAR. I AM REPRESENTING THE RESPONDENT MR. MERRICKS. I THINK THERE ARE SOME MISCONCEPTIONS. ONE THING I WAS READING THE PRESS RELEASE, AND THE PRESS RELEASE SAID THAT, PRIOR TO THE JURY RETURNING A VERDICT. WHAT ACTUALLY HAPPENED WAS THE VERDICT HAD BEEN DECIDED. IT JUST HADN'T BEEN ACCEPTED, SO AS HAS BEEN SAID --

HAD IT BEEN PUBLISHED?

IT HAD, THE JURY HAD DECIDED THE CASE.

THEY HAD THE PIECE OF PAPER, OR DID THE JUDGE HAVE THE PIECE OF PAPER?

IT HADN'T BEEN ACCEPTED YET, SO APPARENTLY THE PIECE OF PAPER HADN'T BEEN TRANSFERRED FROM --

-- THE JURY.

-- THE JURY TO THE JUDGE.

SO WHAT HAPPENED THEN?

WELL, THE JURY HAD DECIDED WHAT IT WAS GOING TO DO.

BUT WHAT, TELL US YOUR UNDERSTANDING OF THE SEQUENCE OF EVENTS HERE, THAT --

WELL, I CAN ONLY GO BY WHAT THE RECORD AND WHAT WAS RECONSTRUCTED AFTER THE FACT, ON PAGE, RECORD PAGE 227, THAN IS JUDGE SHAMS SAYING THT OF THE STORY IS THAT, AFTER I SENT THE BAILIFF OUT OF MY CHAMBERS GARYBODY, HE RETURNED A MINUTE LATER AND SAID THAT THE JURY NOTIFIED THE BAILIFFS THAT THEY HAD A VERDICT. WHAT HAPPENED AFTER THAT WAS, AND THERE WAS A DISCUSSION ABOUT THE DEFENSE ATTORNEY REFUSING ANY CURETIVE INSTRUCTION OR WHATEVER. ON RECORD PAGE 228, 227-228, HE OBJECTED. THE DEFENSE ATTORNEY D WE FEEL THAT IT WOULD BE PREJUDICIAL TO MR. MERRICKS, AND THE NEXT COMMENT HE MAKES, YES, YOUR HONOR, I WOULD MOVE FOR A MISTRIAL. AND THE NEXT PAGE OR SOME PAGES LATER, THE TRIAL JUDGE SAID BASICALLY, WHAT HAPPENED WAS THE TRIAL ATTORNEY, THE DEFENSE ATTORNEY SAID, WELL, I REALLY DON'T THINK WE SHOULD HAVE ANY, OR WHATEVER. AND THE JUDGE SAID ARE YOU SURE I CAN DO SOMETHING LIKE THAT, I CAN OFFER A CURETIVE INSTRUCTION INSTRUCTION? THEN THE STATE ATTORNEY SAID, WELL, JUDGE, I THINK YOU SHOULD CONDUCT THE COLLOQUY OR THE INQUIRY ANYWAY, AND THE DEFENSE ATTORNEY WENT ALONG WITH THAT, WHICH IS A LITTLE BIT DIFFERENT THAN JUST FLAT-OUT REFUSING TO HAVE ANY CURETIVE INSTRUCTION.

WHAT IF THERE IS A SITUATION WHERE HYPOTHETICALLY, IN THE MIDDLE OF A TRIAL, THE, THERE IS A REQUEST FOR THE READ BACK, AND THE BAILIFF SAYS YOU CAN'T HAVE A READ BACK. THE BAILIFF TELLS THE JUDGE THAT THAT IS WHAT HE OR SHE SAID. THE JUDGE SAYS WHAT DID YOU DO? AND DOES BRING BACK THE JURY, INTO THE JURY, INTO THE COURTROOM, SAYS, YOU KNOW, I UNDERSTAND MR. OR MISS SO-AND-SO TOLD YOU THIS, BUT THAT IS NOT CORRECT. PLEASE, NOW, LET ME KNOW WHAT IT IS THAT YOU WOULD LIKE TO HAVE READ BACK. THAT IS THE INPUT FROM THE DEFENSE AND THE PROSECUTION AND THEN DOES READ BACK THE TESTIMONY THAT WASREQUESTED.

IN THAT SITUATION, THE JURY WOULD NOT HAVE DECIDED WHAT IT WAS GOING TO. > BUT WHAT

WE ARE BEING ASKED, THE QUESTION WE ARE ASKED, IS THERE EVER A POSSIBILITY OF A HARMLESS-ERROR ANALYSIS, WHEN THERE IS IMPROPER COMMUNICATION, AND IT IS, SO THE IDEA, IF THE JUDGE HAD THE IMPROPER COMMUNICATION, NOBODY MIGHT KNOW ABOUT IT, BUTEN MY HYPOTHETICAL, WOULDN'T THE IMPROPERCONTT BE TOTALLY CURDY THAT, ALL ON THE RECORD?

THEORETICALLY, YES, IF, PRIMARILY IT WOULD HAVE BEEN HARMLESS ERROR, IF POSSIBLE.

BUT --

BECAUSE --

YOU ARE ASKING US OR THE QUESTION IS CAN HARMLESS-ERROR ANALYSIS EVER BE APPLIED, WHEN A BAILIFF HAS AN IMPROPER COMMUNICATION?

I WOULD SAY NO. I MEAN, THE RULE IS --

IN MY SITUATION, IT WOULD HAVE REQUIRED A MISTRIAL.

THAT IS AN EXTREMEON, BUT THE RULE IS SO SIMPLE, AND AS YOU SAID IN YOUR DISSENTING OPINION IN THOMAS, THE RULE COULDN'T BE CLEARER. THE RULE 3.410, GIVES THE, MANDATES A DUTY TO THE BAILIFF, IF THERE IS ANY QUESTION. IF THE JURY HAS ANY QUESTION, TAKE THE JURY BACK IN FRONT OF THE JUDGE. THAT SEEMS PRETTY SIMPLE TO ME. I MEAN --

WELL, BUT THAT IS A VERY IMPRACTICAL THING, ISN'T IT? AS YOUR OPPONENT SAYS, THE BAILIFF, UNLIKE THE JUDGE, IS SITTING OUTSIDE THE JURY ROOM. THE JURY KNOCKS ON THE DOOR. SAYS CAN WE HAVE SOME WATER. NOW, WE WOULDN'T EXPECT THERE TO BE A MISTRIAL, BECAUSE THE JUROR THE BAILIFF SAID YES OR NO TO THAT QUESTION, WOULDN'T HE?

I WOULD SAY THAT WOULD BE AN EXTREME EXPANSION OF THE RULE 3.410. I MEAN, THIS WASN'T THAT CASE. THEY WEREN'T ASKING FOR WATER. THEY WERE ASKING FOR TESTIMONY --

BUT THE QUESTION, BUT IT IS THE QUESTION, IS THE BAILIFF IN A DIFFERENT ROLEME JUDGE, INSOFAR AS THERE BEING THE ABILITY TO REVIEW THE RECORD AND MAKE A DETERMINATION AS TO WHETHER THE CONTACT BETWEEN THE BAILIFF AND THE JURY WAS HARMLESS BEYOND A REASONABLE DOUBT. I MEAN, THAT IS, AND THAT IS THE QUESTION THAT IS POSED.

WELL, WHAT I WOULD SAY IS THAT A BAILIFF IS AN EXTENSION OF THE JUDGE. A BAILIFF IS AN OFFICER OF THE COURT. THE DUTIES, WITH ALL DUE RESPECT AREN'T THAT DIFFICULT TO UNDERSTAND. I MEAN, RULE 3.410IS VERY CLEAR. IT, BEFORE THE JUDGE CAN EXERCISE HIS DISCRETION ON WHETHER OR NOT TO HAVE THE TESTIMONY READ BACK FOR EXAMPLE, THE BAILIFF HAS TO BRING THE JURY BACK. THE BAILIFF HAS NO BUSINESS TELLING, INSTRUCTING THE JURY ON A MATTER OF LAW.

SO YOU ARE AGREEING, THEN, THAT IF, IN THIS CASE, THE BAILIFF HAD DONE WHAT HE SAID, THE JURY HADN'T REACHED A VERDICT, AND THE JUDGE THEN BROUGHT THEM BACK IN, GAVE THEM THE SAME INSTRUCTION THAT THE BAILIFF HAD GIVEN THEM, THAT WE WOULD BE IN A HARMLESS ERROR SITUATION? IS THAT WHAT YOU ARE TELLING US?

WHAT I AM SAYING IS THAT, EVEN IF YOU APPLIED THE HARMLESS ERROR STANDARD, THIS CASE DOESN'T MEAN, MEET THAT STANDARD BECAUSE --

I AM SAYING UNDER MY HYPOTHETICAL, AND THAT IS THE JURY HAS NOT REACHED A VERDICT. THEY COME BACK IN, AND THE JUDGE IN FACT, TELLS THE JURY, YOU KNOW, I WANT YOU TO RELY ON YOUR COLLECTIVE MEMORIES IN THIS PARTICULAR SITUATION. I AM NOT GOING TO BE

READING BACK. WOULD THAT BE HARMLESS ERROR THEN?

DEPENDS ON WHAT THE DEFENSE ATTORNEY DID. AS HAPPENED IN THOMAS, THEN IT COULD BE A NOT PER SE REVERSIBLE ERROR, BUT HE WOULD AT LEAST HAVE THE OPPORTUNITY.

EVEN IF THE DEFENSE ATTORNEY OBJECTED BUT THE JUDGE DID, IN FACT, BRING THEM BACK IN PRIOR TO THE VERDICT, WENTGH DT BE EVEN SUBJECT TO HARMLESS-ERROR ANALYSIS?

UNDER THIS COURT'S DECISION IN THOMAS, BOTH THE MAJORITY DECISION AND THE JUDGE PARIENTE PARIENTE'S DISSENT, I WOULD SAY NO. I MEAN, I THINK THAT ANY REASONABLE --

SO ONCE, ARE YOU TELLING US THAT, THEN, ONCE A BAILIFF MAKES A STATEMENT TO A JURY THAT, THAT IS IT. THERE IS NO WAY TO CURE IT.

WE ARE NOT FACED WITH THAT SITUATION. HYPOTHETICALS ARE ALWAYS DIFFICULT.

THAT IS THE ANSWER TO THE QUESTION WHEN I ASKED YOU IF THE JUDGE BROUGHT THEM BACK IN AND GAVE THEM THE SAME INSTRUCTION, PRIOR TO THEM REACH ANYTHING KIND OF VERDICT.

WELL, YOU COULD ARGUE THAT IS STILL, WHY NOT APPLY THE PER SE REVERSIBLE ERROR RULE TO BAILIFFS? I MEAN, IGNORANCE OF THE LAW IS NOT EXCUSED FOR ME AND IT IS NOT AN EXCUSE FOR YOU. IT IS NOT AN EXCUSE FOR THESE PEOPLE OUT HERE. WHY WOULD IGNORANCE OF THE LAW BE AN EXCUSE FOR A BAILIFF?

WHY WOULD YOU SUGGEST THAT ANY COMMUNICATION BETWEEN A BAILIFF AND A JURY BE IN WRITING?

THAT WOULD HELP. THAT WOULD AT LEAST GIVE US SOME BASIS, YOU KNOW, AT LEAST WE WOULD HAVE SOME KIND OF RECORD INSTEAD OF AN AFTER-THE-FACT PIECING TOGETHER, WHICH IS WHAT THE JUDGE TRIED TO DO.

SO A BAILIFF COULD NOT TELL THE JURY THAT THEY ARE TO BE BACK AT 12:30. THAT WOULD HAVE TO BE COMMUNICATED IN WRITING?

IT WOULD CERTAINLY PREVENT ANY POSSIBILITY OF HARMFUL ERROR. I MEAN, THE BAILIFF WAS UNSUPERVISED, BUT IS HE AN OFFICER OF THE COURT, AND WE ARE NOT TALKING ABOUT THE GLASS OF WATER. I MEAN, WE ARE TALKING ABOUT AN INSTRUCTION OF LAW. WHICH IS ANR POINT. THE BAILIFF MISCONSTRUED THE LAW LAW THE GO AHEAD.

IT IS ALL A MATTER OF DEGREES HERE, UNLESS WE HAVE WHAT, AS I UNDERSTAND REQUEST YOU ARE ADVOCATE -- AS I UD YOU ARE ADVOCATING A PER SE RULE. OBVIOUSLY IT COUE COULD BE NO COMMUNICATT N WRITING. IT SEEMS TO ME WE WOULD SOON HAVE A PROBLEM WITH. THAT WE COULD REQUIRE COUNSEL FOR BOTH SIDES SIT THERE WITH THE BAILIFF, SO THAT THERE AREN'T ANY COMMUNICATIONS OUTSIDE COUNSEL NOW THAT, IS NOT GOING TO WORK.

OBVIOUSLY NOT, BUT THE LAW WORKS BEST WHEN IT IS CERTAIN, AND AGAIN, I SAY THAT ANY REASONABLE ATTORNEY WHO READ BOTH THE MAJORITY DECISIONS AND THE DISSENTING DECISION IN THOMAS, WOULD SAY YOU KNOW, THIS IS PRETTY CLEAR. IF WE HAVE AN OBJECTION, THIS IS PER SE REVERSIBLE ERROR. NOW, IF --

OUR PER SE RULES -- MR. CHIEF JUSTICE

JUSTICE SHAW.

WOULD IT BE FUNDAMENTAL ERROR FOR THE BAILIFF TO SAY I CAN'T ASK YOU A QUESTION. I HAVE GOT TO GO GET THE JUDGE?

I THINK THAT WOULD BE THE BEST RESPONSE.

I BEG YOUR PARDON?

I THINK THAT WOULD BE THE BEST -- I MEAN, HE CAN ANSWER THE QUESTION. I MEAN, IF IT IS QUESTION --

THAT WOULD NOT BE PER SE ERROR.

IF, IN THIS CASE --

NOT IN THIS CASE, IF THAT IS HIS RESPONSE.

WELL, IF HE HAD THEN TAKEN THE JURY IN FRONT OF THE JUDGE.

SO YOU ARE TAKING AN ABSOLUTE ABSOLUTEIES POSITION. THAT IS WHY YOU ARE CATCHING YOURSELF.

HA HA! AGAIN, I AM SAYING THAT WE LIVE IN A VERY UNCERTAIN --

YOU REACH A LUDICROUS POINT ALMOST, DON'T YOU?

ANY POSITION CAN BE STRETCHED OUT OF PROPORTION.

WELL, WHAT WOULD BE YOUR ANSWER TO MY QUESTION, THEN, IF THE BAILIFF SAYS I CAN'T TALK TO YOU. I CAN'T ANSWER YOUR QUESTION. I HAVE GOT TO GO GET THE JUDGE. PER SE ERROR.

NO. I WOULD SAY NO. THAT IS NOT, THAT WOULD NOT, THAT WOULD BE A PROPER RESPONSE. THAT WOULD BE THE BAILIFF ADMITTING I CAN'TTAEY RISK OF TAINTING YOU PEOPLE. I DON'T THINK --

THAT IS THE LEGAL QUESTION, YOU SEE, THAT HAS BEEN POSED IF FOR US, AND DON'T YOU GENERALLY FIND ABSOLUTE RULES, PER SE RULES, UNWORKABLE? THAT IS THAT THEY, THAT CLEARLY, AS YOU HAVE SEEN WITH THE QUESTIONS THAT YOU HAVE RECEIVED FROM UP HERE, THE PANEL IS -- THE PANEL HAS POSED, TO YOU, HYPOTHETICAL SITUATIONS THAT CLEARLY COULD APPEAR THAT A PER SE RULE IS UNREASONABLE.

CORRECT.

SO I AM HAVING DIFULTIMATE I, WHEREAS WITH -- DIFFICULTY, WHEREAS WITH A JUDGE, IT WOULD BE A DIFFERENT SITUATION, SO ISN'T IT JUST IMPRACTICAL TO HAVE AN ABSOLUTE RULE, WHEN WE ARE TALKING ABOUT SOMEBODY BESIDES THE JUDGE IN THE CASE?

AGAIN, WE ARE NOT TALKING ABOUT, YOU KNOW, TALKING AND GOING OFF. WE ARE TALKING ABOUT A VERY CONCRETE SITUATION WHERE THERE WAS A VIOLATION.

BUT SEE, WE ARE NOT TALKING ABOUT A CON WREATH KROOET SITUATION WHERE -- A CONCRETE SITUATION WHERE THERE WAS A VIOLATION. YOU ALL ARE OBVIOUSLY VERY INTERESTED IN THIS CASE. WE ARE TALKING ABOUT THE LEGAL RULE THAT COMES OUT OF THIS PER SE CASE. WE HAVE COME OUT WITH LEGAL RULES BEFORE, AND ALONG WITH THE REST OF THE PANEL, IT SEEMS IMPRACTICAL. IF YOU ARE SAYING THAT, LET'S SAY THAT ONE OF THE ATTORNEYS OVERHEARD THE BAILIFF TALKING TO THE JURY. AND HE TALKED TO THE JURY FOR

ALMOST FIVE MINUTES. AND THEN THE LAWYER WENT INTO THE COURTROOM AND SAID, JUDGE, WE, I AM REALLY DISTRESSED, BECAUSE THE BAILIFF HAS BEEN TALKING TO THE JURY, AND NOW WE GET THE BAILIFF IN THE COURTROOM AND THEY QUESTION HIM AND ALL, AND THEY SAY, YOU KNOW, MR. BAILIFF, THE LAWYER HEARD YOU. HE COULDN'T HEAR EXACTLY WHAT YOU WERE SAYING, BUT HE COULD HEAR YOU, AND YOU TALKED A LONG TIME, AND WHING? ANDLIFWELL, JUDGE, THEY WERE ASKING ME ABOUT THE BASKETBALL PLAY-OFFS, AND WHO WON AND WHAT THE SCORE WAS AND WHO WON IN THE OTHER GAME AND WHAT THE SCORE WAS, AND I KNEW IT, BECAUSE I HAD BEEN IN THE COFFEE ROOM AND SAW THE TELEVISION, AND I TOLD THEM, YOU KNOW, WHAT THAT WAS, AND THEY THANKED ME, AND EVERYBODY AGREED THAT THAT IS WHAT THE COMMUNICATION WAS. NOW, IS THERE ANY POSSIBILITY, IN A COURTROOM SOMEWHERE HERE, IN FLORIDA, THAT THE JUDGE WOULD THEN DECLARE A MISTRIAL AFTER THAT CIRCUMSTANCE?

IT WOULD DEPEND ON IF THEY RETURN THE VERDICT OR IF THE ERROR WAS NOTED, AFTER THE JURY HAD DECIDED ITS VERDICT. AGAIN, IT IS ANOTHER EXTREME SITUATION.

ISN'T, IN THE SECOND DISTRICT'S OPINION, AND THE CASES THAT HAVE COME, IS THAT IT HAS TO BE THE COMMUNICATION HAS TO BE ABOUT A SUBSTANTIVE MATTER REGARDING THE LAW.

EXACTLY. RIGHT.

I MEAN, YOU ARE NOT REALLY SUGGESTING THAT, IF THERE IS CONVERSATION, ANY CONVERSATION BETWEEN THE BAILIFF AND THE JURY IT IS EVEN GOING TO START TO EVEN --

NO. NO. NO. NO. I AM JUST SAYING --

SO WE ARE REALLY TALKING, ALTHOUGH THE SECOND DISTRICT'S OPINION IS THE JURY'S OFF-THE OFF-THE-RECORD QUESTION AND THE BAILIFF'S RESPONSE IN A PER SE REVERSAL, IF THE BAILIFF'S ANSWER OFF-THE-RECORD, ANSWER TO A JURY SUBSTANTIVE QUESTION, BECAUSE IT IS THE BAILIFF THAT IS THE PERSON THAT IS, TELLS THE JUDGE IF THE JURY HAS RETURNED A VERDICT, BUT IF THEY ASK FOR EVIDENCE, THE JUDGE ISN'T, I MEAN, THE BAILIFF ISN'T SUPPOSED TO SAY, NO, YOU CAN'T HAVE THE EVIDENCE. THAT HAS GOT TO BE COMMUNICATED. IF THEY HAVE GOT A QUESTION, AND THE JUDGE INSTRUCTS THE JURY, THE QUESTIONS ARE TO BE IN WRITING, ABOUT THE CASE, SO WE HAVE GOT PROCEDURES.

EXACTLY.

IN PLACE. SO YOU ARE NOT SUGGESTING THAT THIS BE A -- O. ING TF IT FITS WITHIN THE PARAMETERS OF RULE 3.410, WH, AGAIN, AS YOU SAID IT IS WITH A SUBSTANTIVE ISSUE WITH LAW. IN THIS CASE, IT WAS A QUESTION, THE JURY WANTED SOME TESTIMONY READ BACK. THE RULE SAYS THE JUDGE HAS THE DISCRETION TO ALLOW THAT. THE BAILIFF GAVE AN IMPROPER INSTRUCTION.

DO YOU THINK THAT THAT SQUARES WITH IVORY? > I AM -- I MISSED YOUR POINT.

DOES THAT SQUARE WITH IVORY, YOUR ANSWER TOSTICE PARIENTE'S QUESTION THAT THERE ARE SOME QUESTIONS THAT CAN BE --

NOT AS IT HASEEN EXPANDED ON BY F THE HYPOTHETICALS HERE, BUT IF IT FITS WITHIN THE RULE, THEAMETERS OFLE D THE JURY HAS A QUESTION ABOUT A MATTER OF TESTIMONY OR A QUESTION OF LAW, THE BAILIFFS' RESPONSIBILITY IS MANDATORY AND SIMPLE. BRING THE JURY BACK.

SO THE RULE, SO WE MAKE SURE WE UNDERSTAND THIS, THE RULE SAYS, IF THEY REQUEST ADDITIONAL INSTRUCTIONS OR TO ASK TO HAVE ANY TESTIMONY READ BACK, THAT IS THE TWO

ASPECTS THAT WE ARE TALKING ABOUT.

CORRECT.

NOT EXPANDING IT TO ANY OTHER TYPES OF QUESTIONS BETWEEN A, THAT A JURY MIGHT HAVE.

REGARDING A BASKETBALL GAME OR A GLASS OF WATER.

SO WE NEED TO MODIFY THE QUESTION TO JUST SPECIFICALLY REFER TO WHAT 3.140 REFERS TO.

RIGHT. I WOULD, ALSO, ADD THAT IT IS PRECISELY BECAUSE A CONVERSATION WAS OFF-THE-RECORD, THAT IT POSES THE GREATEST DANGER. I MEAN, WE DON'T HAVE A RECORD TO CONDUCT, TO CONDUCT A HARMLESS-ERROR ANALYSIS, YOU HAVE TO HAVE A RECORD, AND WE DIDN'T HAVE THAT IN THIS CASE.

BY THE WAY, THE JUDGE SAID AFTERWARDS, WELL, I WOULD HAVE DENIED IT, BUT IN FACT, THE LAW REQUIRES THAT THERE BE AN EXERCISE OF DISCRETION WHICH MEANS THAT THERE, THE JUDGE SHOULD CONSIDER WHETHER TO READ BACK, AND WE ENCOURAGE JUDGES TO --

ANDD HEITN T OF THE DEFENSE ATTORNEY. > -- JESO MAKE THAT AVAILABLE, IF THERE IS A REASONABLE REQUEST FOR A READ BACK.

NOT TO HAVE IT READ BACK BUT WHAT HIS COMMON PRACTICE WOULD HAVE BEEN, IF HE HAD HAD INPUT FROM A DEFENSE ATTORNEY.

YOU MIGHT HAVE RAISED THE JUDGE'S DISCRETION IF HE HAD NOT HAD THE DISCRETION TO READ BACK THE SPECIFIC TESTIMONY.

THAT IS PRECISELY WHAT I AM TALKING B IF THERE ARE NO MORE QUESTIONS, I WOULD ASK THIS COURT TO, BECAUSE THERE WAS A OBJECTION BEFORE MISTRIAL, THAT THIS COURT SHOULD AFFIRM THE SECOND DISTRICT COURT'S DECISION AND REDFOR RETRIAL.

REBUTTAL.

I THINK IT IS IMPORTANT TO TRY TO ADDRESS TWO QUESTIONS IN THIS MATTER. FIRST, PRIMARILY, IS THE BAILIFF'S ERROR SUBJECT TO HARMLESS ERROR? FROM THE QUESTIONS FROM THIS COURT, I WOULD ASSUME THAT IT CAN SOMETIMES, THIS COURT WOULD AGREE THAT IT CAN STIPULATIONS BE SUBJECT TO HARMLESS ERROR.

BUT SOME OF THOSE QUESTIONS WERE ADDRESSED TO HYPOTHAMS ALWAYS THAT OCCURRED DURING THE -- HYPOTHETICALS THAT OCCURRED DURING THE TRIAL, BEFORE IT RETIRED TO CONSIDER ITS VERDICT. HAVEN'T WE ALWAYS TREATED THE CIRCUMSTANCES, ONCE THE JURY RETIRED TO CONSIDER ITS VERDICT, A SPECIAL OPPORTUNITY.

SURE.

SO THE HYPOTHETICAL ABOUT THINGS DURING THE TRIAL, THAT DOESN'T REALLY ANSWER WHAT WE ARE TALKING ABOUT TODAY, DOES IT?

WELL, THE CASE LAW STILL ESTABLISHES THAT, EVEN AFTER THE JURY RETIRES, THE JUDGE CAN STILL CURE AN ERROR, JUST BY REINSTRUCTING, CURETIVE INSTRUCTIONS. THE JUDGE CAN CURE THAT ERROR, SO WE JUST ASK YOU TO FIND THE POSSIBILITY THAT THE ERROR COULD BE HARMLESS. EVEN IN LIGHT OF --

COULD THAT BE DONE, EVEN AFTER A VERDICT HAS ALREADY BEEN REACH BY A JURY? YOU TELL THEM TO UNREACHOUR VERDICT. K HAD THE PSED THEMIN E ROOM AND SAY IN LIGHT OF

ME WAS GOING TO INSTRUCT YOU THE SAME WAYU GO BACK IN THERE. HAD HE THE AUTHORITY TO DO THAT. I THINK, UNDER 3.420, HE HAD THE AUTHORITY TO DO THAT. THE DEFENSE DID NOT REQUEST THAT. I WOULD SUBMIT THAT, ONCE THE JUDGE DETERMINED IT WAS HARMLESS IT WAS INCUMBENT ON THE DEFENSE AT THAT TIME TO SHOW PREJUDICIAL ERROR. ONCE THE JUDGE SAID THIS IS NOT REVERSIBLE. YOU NEED SHOW ME SOME PREJUDICE. THE DEFENSE SAT THERE. DID NOT RENEW HIS OBJECTION. DID NOT ASK FOR A CURETIVE. HE JUST SAT THERE --

HOW ABOUT IF WE AGREE WITH THE DEFENSE ASSERTION THAT, AT THE TIME IT WAS PRESENTED, THAT THERE WAS SOMETHING HARMFUL PRESENTED?

SURE. I WOULD AGREE WITH THAT.

YOU CAN'T DECIDE THE HARMLESS ERROR ANALYSIS AND THEN DO IT IN REVERSE, CAN YOU?

THE JUDGE CURED THAT HARM.

W WOULD THE JUDGE DO THAT?

THE JUDGE CURED THAT HARM BY INSTRUCTING THE JURY I WOULD HAVE ADVISED YOU THE SAME WAY N A PERFECT WORLD HE WOULD HAVE SENT THEM BACK. TO HAVE NEW DELIBERATIONS. HE WOULD HAVE HAD A HEARING. WHAT WE ARE STUCK WITH, WHAT WE HAVE --

IS THAT NOT THE LAW? THE JUDGE, WHEN THERE IS A REQUEST FOR A READ BACK, THE JUDGES CAN HAVE A PER SE RULE, THEMSELVES, THAT SAYS HEY LISTEN I AM NOT EVER READING TESTIMONY BACK.

IT IS DISCRETIONARY.

WOULDN'T THAT BE, IF IT WAS A RULE THAT SAYS NO MATTER WHAT HAPPENS, I AM NOT READING TESTIMONY BACK, THAT WOULDN'T BE EXERCISE DISCRETION. THAT WOULD BE NOT EXERCISING DISCRETION.

THAT IS A HARD STANDARD TO PROVE, ABUSE OF DISCRETION. THIS IS CLEARLY DISCRETIONARY HERE, AND THIS JUDGE MAY HAVE A POLICY OF NEVER READING TESTIMONY BACK, AND MANY JUDGES DO HAVE THAT POLICY, BECAUSE YOU ARE STRESSING TOO MUCH -- WHAT IF THE JURY HAD ASKED FOR SPECIFIC TESTIMONY. MANY JUDGES HAVE A POLICY OF REQUIRING ALL THE TESTIMONY TO BE READ BACK. THAT IS NOT THE CASE HERE. WE ARE ASKING YOU TO ALLOW THE HARMLESS ERROR TEST TO BE APPLIED HERE, AND THEN AS PER THE DISSENT, THE DISSENT JUDGE ALTENBURN FINDS THAT STA MET THE BURDEN OF SHOWING THAT THE ERROR DID NOT CONTRIBUTE TO THE VERDICT, AND THAT IS A HEAVY BURDEN FOR THE STATE TO MEET HERE, BUT AS DeJULIO SAID, JUSTTY SHAW IN DeJULIO SAID, THE HARMLESS ERROR TEST IS THE TEST FOR REVERSIBLE ERROR, AND EVEN IF ONE TIME THE STATE CAN SHOW THAT IT DID NOT CONTRIBUTE TO THE VERDICT, IT CANNOT PER SE BE A REVERSIBLE ERROR.

CHIEF JUSTICE: THANK YOU, COUNSEL. WE APPRECIATE YOUR ASSISTANCE IN THIS CASE. THAT CONCLUDES THE ORAL ARGUMENT FOR JUDGE 4, AND THE COURT WILL NOW BE IN RECESS.