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02-1364

MARSHAL: PLEASE RISE. HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. PLAEGE, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING. I WANT TO FIRST EXPRESS OUR APPRECIATION TO COUNSEL FOR AGREEING TO CARRY THIS CASE OVER TO THIS MORNING, SO THAT WE COULD ATTEND JUDGE MINER'S SERVICES YESTERDAY. THANK YOU VERY MUCH, AND THANK YOU FOR BEING READY TO GO THIS MORNING ON BUSBY VERSUS STATE. IF YOU ARE READY, YOU MAY PROCEED.

THANK YOU, YOUR HONOR. MY NAME IS DAVE DAVIS, REPRESENTING MR. ANDREW BUSBY IN THIS CAPITAL CASE. I WANT TO POINT OUT THAT MR. CHARLES GLOBE HAS ALREADY BEEN ARGUED BEFORE THIS COURT A COUPLE OF MONTHS AGO. FIRST OFF, THIS CASE BRIEFLY INVOLVES ANDREW BUSBY, IN PRISON FOR TWO CONSECUTIVE LIFE SENTENCES FOR HAVING COMMITTED TWO FIRST-DEGREE MURDERS AND HOUSED AT COLUMBIA CORRECTIONAL INSTITUTION, AND BECAUSE HE WAS A VERY YOUNG WHITE MALE, HE BECAME THE SEXUAL OBJECT OF MANY OF THE PRISONERS IN THERE. HE HAD SEVERAL THREATS MADE THAT HE WAS GOING TO BE RAPED, GANG RAPED POSSIBLY, AND THE THREATS WERE INCREASING, OVER THE MONTHS THAT HE SPENT AT COLUMBIA --

THERE WAS SOME PHYSICAL DESCRIPTION OF THE DEFENDANT IN THE RECORD, BUT I WASN'T SURE HOW DATED THAT WAS. IS THERE A PHYSICAL DESCRIPTION AS OF THE TIME OF THAT EPISODE?

YES. CHARLES KINESTSKI DESCRIBED BUSBY AS LOOKING VERY YOUNG, LIKE HE WAS NINE YEARS OLD.

AND THAT WAS CONTEMPORARY?

YES. HE WAS CALLED TO TESTIFY ABOUT THE HARASSMENT THAT WENT ON WITH MR. BUSBY.

HOW OLD WAS HE?

I BELIEVE 21 OR 22 YEARS OLD. I THINK HE WAS IN HIS EARLY TWENTIES.

OTHER THAN THAT TESTIMONY, WHAT RECORD EVIDENCE IS THERE OF THIS HARASSMENT?

HE ALSO HAD IT FROM THE CODEFENDANT CHARLES GLOBE AND ALSO KINETSKI TALKING ABOUT IT.

ARE THERE ANY D.O.C. RECORDS?

NO. THAT BECOMES PART OF THE FACTS, THAT BUSBY HAD GONE TO THE DEPARTMENT AND MADE COMPLAINTS. IN FACT, INVESTIGATE OR SHANK ADMITTED THAT BUSBY HAD COME TO THEM AND HAD MADE COMPLAINTS AND THEY HAD NOT DONE ANYTHING ABOUT THEM, MONTHS AFTER HE HAD MADE THESE COMPLAINTS.

TO THE INVESTIGATOR.

YES. HE ADMITTED THAT BUSBY HAD MADE COMPLAINTS TO THEM ABOUT SEXUAL HARASSMENT?

ANY RELATED TO --

WHAT HAPPENS IS BUSBY AND GLOBE GET TOGETHER. BUSBY FEELS LIKE HE IS IN A CORNER BECAUSE THE OFFICIALS WON'T HELP HIM AND THERE ARE EVIDENCE THAT VICTIMS MADE SOME THREATS TO HIM AS WELL, AND I THINK HE MAY HAVE ATTACKED HIM AT ONE POINT, ALTHOUGH I AM A LITTLE BIT UNCERTAIN ABOUT THAT. IN ANY EVENT, ARD WAS --

ARD WAS ON THE RECORD.

I THINK I MAY HAVE CITED, BUT THERE WAS AT LEAST SOME EVIDENCE THAT ARD HAD MADE SOME VERBAL THREATS TOWARDS BUSBY ABOUT MAKING HIM HIS BOY OR SOMETHING LIKE THAT.

IS IT CLEAR ON THE RECORD THAT, ON THE DAY SOMEWHERE CLOSE TO THIS INCIDENT THAT, ARD HAD REFUSED TO PARTICIPATE IN ANY KIND OF ORAL ACTIVITY WITH BUSBY?

YOU MEAN ARD. NO, I DON'T THINK SO. THAT BECOMES PART OF THE ISSUE ON ISSUE TWO, DEALING WITH POST-TRAUMATIC STRESS, WHY THAT BECAME RELEVANT. IF YOU WANT, I WILL GO INTO THAT RIGHT NOW AND TALK ABOUT THAT DEFENSE.

WHY DON'T YOU TELL US WHICH ISSUES YOU WANT TO ADDRESS. EYE ONLY WANT TO TALK ABOUT THE POST-TRAUMATIC ONE BUT I WOULD FIRST LIKE TO TALK ABOUT THE JURY ISSUE WITH KIM LAPIN, AND THEN I CAN BLEED, NOT BLEED BUT TRANSITION INTO THE --

WHAT WAS THE OBJECTION TO THAT JUROR BY TRIAL COUNSEL?

KIM LAPIN WAS CALLED AND DURING VOIR DIRE IT TURNED OUT HE HAD BEEN A GUARD AT FLORIDA STATE PRISON, NOT ONLY A GUARD THERE BUT A GUARD ON DEATH ROW AT FLORIDA STATE PRISON FOR TWELVE YEARS. DURING THIS TIME, HE HAD BEEN ASSAULTED BY INMATES. HE HAD FRIENDS WHO HAD BEEN INVOLVED IN THE MURDER OF FRANK VALDEZ, WHO HAD, A DEATH-ROW INMATE KILLED BY SOME OF THE GUARDS THERE. HE WAS ON DEATH ROW.

WHAT WAS HIS STATUS AS A FORMER CORRECTIONAL OFFICER DISQUALIFY HIM?

YES. I THINK IN THIS CASE, YES, AND THE REASON I SAY THAT IS BECAUSE THIS IS, FIRST OF ALL, A PRISON MURDER, IN WHICH THE GUARDS ARE INVOLVED, EITHER AS WITNESSES OR HAD BEEN THE OBJECT OF, MAYBE, PERHAPS, BUSBY'S THREATS TO KILL PEOPLE, AND LAP I KNOW, WHO HAD -- AND LAPIN, WHO HAD BEEN A GUARD FOR EIGHT YEARS AND HAD BEEN ASSAULTED BY INMATES, IT WOULD HAVE BEEN HARD OR POSSIBLY IMPOSSIBLE FOR HIM TO SET ASIDE HIS EIGHT YEARS OF EXPERIENCE AND HAVE JUDGED THIS CASE IMPARTIALLY. I AM NOT SAYING HE IS A BAD MAN OR ANYTHING. JUST --

WHY WOULD JUST MERE SERVICE AS A CORRECTIONAL OFFICER, EVEN THOUGH HE SERVED PARTLY ON DEATH ROW, DISQUALIFY AN OTHERWISE-QUALIFIED PERSON, AND, OF COURSE, IT SEEMS TO ME THAT ONE OF THE HUMAN CULTURAL THING THAT IS YOU SEE IS INDEED IN MANY INSTANCES, IT IS CORRECTIONAL OFFICERS THAT BECOME VERY SYMPATHETIC.

NOT IN THIS CASE. I MEAN, LAPIN SAID THAT HE WAS IN FAVOR OF THE DEATH PENALTY BECAUSE OF HIS EIGHT YEARS OF EXPERIENCE DEALING WITH IT.

HELP ME WITH THE FIRST PROPOSITION. IT APPEARS THAT COUNSEL ONLY OBJECTED ON THE BASE THAT HE HAD BEEN A -- ON THE BASIS THAT HE HAD BEEN A CORRECTIONAL OFFICER, THAT HE DID NOT, IN HIS CHALLENGE FOR CAUSE, THAT HE DID NOT CITE THE EXTENSIVE ARGUMENT THAT YOU HAVE MADE, NOW, ON APPEAL.

WELL, IT WAS CERTAINLY OF EVIDENCE TO THE JUDGE. I MEAN, THE JUDGE HEARD THE SAME RESPONSES THAT THE DEFENSE COUNSEL DID, THAT HE HAD BEEN A GUARD FOR EIGHT YEARS. I THINK HIS ARGUMENT WAS SIMPLY THIS WAS PART OF THE WHOLE, KIND OF A SUMMARY ARGUMENT.

SO YOUR VIEW IS THAT HIS OBJECTION WAS MUCH BROADER THAN JUST THAT HE HAD BEEN A CORRECTIONAL OFFICER.

RIGHT. I MEAN, WELL, I HAVE BEEN -- -- WELL, CORRECTIONAL OFFICER AND ALSO HAD HEARD THE RESPONSES THAT LAPIN HAD MADE. HE WAS ASKED, BASED ON YOUR EXPERIENCE AS A CORRECTIONAL OFFICER, IF I TOLD YOU THAT YOU COULD LEARN ABOUT THE HOMICIDE THAT OCCURRED IN PRISON, DO YOU THINK THAT WOULD AFFECT YOUR ABILITY TO SET AS A JUROR? HIS ANSWER WAS POSSIBLY, NOT NO OR I COULD SET IT ASIDE BUT POSSIBLY. WE EXPECT MORE POSITIVE RESPONSES. POSSIBLY, NO, THAT IS NOT GOOD ENOUGH.

DID HE SAY SEVERAL TIMES THAT, HE COULD DO WHAT THE JUDGE ASKED HIM TO DO, AND FOLLOW WHATEVER SCHEME THE JUDGE SET OUT FOR HIM TO APPLY?

I DON'T THINK IT WAS SEVERAL TIMES. WHAT HE SAID AT ONE TIME, HE SAYS, HE SAID I WOULD LIKE TO THINK I COULD BE OPEN-MINDED ENOUGH. HE SAID, AND THAT, HE SAID THAT, ALSO. AND THERE IS, YOU KNOW, HE COULD, BUT, BEGIN, IT IS THAT VAGUENESS. WE EXPECT MORE. YES, I CAN BE FAIR AND I AM SPAR SHALLOW-AND IMPARTIAL. YES -- YES, I CAN BE FAIR AND IMPARTIAL AND SET THIS ASIDE, BUT WHEN HE OPENS THE PHRASE UP WITH CAN YOU BE FAIR AND IMPARTIAL, AS TO WHETHER OR NOT HIS EXPERIENCE WOULD AFFECT THE VOTE ON THE DEATH PENALTY, HE SAID, YEAH, THAT COULD POSSIBLY HAVE AN IMPACT, SO HE, HIMSELF, IS SAYING MY EXPERIENCES POSSIBLY COULD HAVE AN IMPACT, THAT, TO ME, IS AN INDICATION THAT HE CANNOT BE FAIR AND IMPARTIAL. AND SO I THINK --

WHAT IS THE STANDARD THAT WE SHOULD APPLY, IN REVIEWING THE TRIAL COURT'S CONSIDERATION OF THIS?

NORMALLY IT IS AN ABUSE OF DISCRETION STANDARD.

WHAT STANDARD WAS THE TRIAL JUDGE BOUND TO APPLY?

HE ASKED IF THERE IS ANY REASONABLE DOUBT THIS JUROR COULD NOT BE FAIR AND IMPARTIAL, HE SHOULD HAVE EXCUSED HIM FOR CAUSE. THERE IS EVIDENCE HERE, WHAT I HAVE JUST TOLD YOU, CERTAINLY RAISES A REASONABLE DOUBT AS TO HIS ABILITY TO BE FAIR AND IMPARTIAL.

NOW, WHAT DOES THE RECORD SHOW AFTER THIS, AS TO HE DID NOT SERVE?

HE DID NOT SERVE. HE PRESERVED THE ISSUE, IN THE SENSE THAT HE EXHAUSTED HIS PREEMPT OTHERS AND EXHAUSTED -- AND ASKED FOR MORE AND SPECIFICALLY SAID WHO HE WOULD USE IT ON.

WAS HE DENIED?

YES. HE SATISFIED THE TRIAL REQUIREMENTS THERE, IS NO DOUBT IN MY MIND THAT, HE SATISFIED THAT. SO THE QUESTION BECOMES WAS, DID THE JUDGE HAVE CAUSE TO EXCUSE HIM,

AND THERE IS REASONABLE DOUBT. AND EVEN THOUGH IT IS DISCRETIONARY ON THIS COURT, THE ANSWERS, THEMSELVES, SHOW THAT LAPIN DID NOT HAVE THAT IMPARTIALITY THAT WE DEMAND OF A JUROR, NOW, AND SO --

YOU THINK IT IS SIGNIFICANT, WE SHOULD LOOK AT THIS, NOT, YOU KNOW, THERE IS A LOT OF TIMES THAT THERE ARE JURORS THAT ARE QUESTIONED, WHO SAY THEY ARE IN FAVOR OF THE DEATH PENALTY, AND YOU KNOW, THEIR ABUSE MIGHT POSSIBLY AFFECT THEM, THAT WE HAVE TO LOOK AT THIS IN VIEW OF THE FACT THAT HE WAS A PRISON GUARD.

DEATH ROW FOR -- A PRISON GUARD ON DEATH ROW FOR YEARS.

IF HE WAS SIMPLY A GUARD AND THIS WAS A RUN-OF-THE-MILL, SUWANNEE SWIFTY SHOOTING KILLING, THEN NO, BUT HERE THE GUARDS WERE POSSIBLE SUBJECTS OF BUSBY'S LIST. LAPIN HAD BEEN ASSAULTED BY INMATES IN A PRISON, SO YOU START ADDING THINGS UP, AND PRETTY SOON YOU GET THE PICTURE THAT THIS GUY JUST CAN'T SET ASIDE HIS EIGHT YEARS OF PRISON EXPERIENCE.

IF WE AGREE WITH YOU, DOES THIS AFFECT BOTH GUILT AND THE PENALTY PHASE OR JUST PENALTY?

YES. I WANT TO SAY IT DOES. BECAUSE THE ANSWER HE GAVE, THE QUESTION I JUST READ YOU, SAID THAT IF I TOLD YOU ABOUT A HOMICIDE THAT OCCURRED IN PRISON, DO YOU THINK IT WOULD AFFECT YOUR ABILITY TO SET ON THE JURY? AND HE SAID POSSIBLY THERE, ALSO, BUT I THINK IT GOES AS WELL, TO THE GUILT PHASE AS WELL.

WHAT IS THE STATUS OF THE TWO JURORS YOU INDICATE THAT COUNSEL POINTED TO, THAT HE WOULD HAVE USED PREEMPTORY CHALLENGES ON? THOSE TWO PEOPLE SERVE ON THE JURY?

I BELIEVE WINSTON DID. I AM PRETTY SURE WINSTON DID. WINSTON LIEBEL. AT LEAST WINSTON D IN FACT, I AM PRETTY SURE THEY DID.

THAT IS A NECESSARY --

YES. I WILL BE HONEST WITH YOU, I DIDN'T ANTICIPATE THAT QUESTION, BUT I AM SURE THEY SERVED ON THE JURY. OTHERWISE THIS WHOLE ISSUE WOULD BECOME MOOT, IF THEY DIDN'T SERVE.

WASN'T AT LEAST ONE OF THEM REMOVED FROM THE JURAT ONE POINT?

I DON'T THINK, THEY HAD A SLEEPING JUROR.

THAT WAS NOT ONE OF THE PERSONS THAT WAS POINTED OUT AS --

I DON'T BELIEVE, YOU KNOW I DON'T RECALL. I KNOW THEY EXCUSED ONE OF THE JURORS, BECAUSE THE JUDGE DIDN'T EVEN WANT TO DEAL WITH THAT ISSUE ON APPEAL OR HAVE ME RAISE THAT ISSUE ON APPEAL, SO I THINK HE EXCUSED HER, I THINK IT WAS, BUT I DON'T RECALL IF IT WAS EITHER ONE OF THOSE.

IT WAS LIEBEL, WASN'T IT?

WHETHER IT IS OR NOT, I FRANKLY DON'T RECALL. BUT I THINK LAPIN HAS OTHER PROBLEMS AS WELL, BESIDES HIS PARSIALITY AND THAT IS SIMPLY HIS EXPERIENCE AS BEING A MAXIMUM SECURITY GUARD AT A PRISON IN FLORIDA STATE.

LET ME WORK THAT WITH YOU A LITTLE BIT. LET'S SAY YOU HAVE A MEDICAL MALPRACTICE

CLAIM, AND YOU HAVE A PHYSICIAN AS A JUROR. DOES THE MERE FACT THAT MEDICAL MALPRACTICE CLAIM AND THAT A JUROR IS A PHYSICIAN, PRECLUDE THAT PERSON FROM SERVING, BECAUSE OF THEIR EXPERIENCE?

AS A MATTER OF LAW. NO.

AND SO RELATE THAT WITH SOMEBODY WHO HAPPENS TO WORK IN A PRISON FACILITY.

WELL, BECAUSE OF THE NATURE, NOW, NOT PER SE, BUT WHEN YOU START ADDING UP THE OTHER FACTORS. IF THE MALL PRACCITIES CLAIM INVOLVED THE SAME SORT OF PRACTICE THIS DOCTOR ENGAGED IN, YOU START ADDING THINGS UP AS A DEFENSE LAWYER, YOU BECOME MORE QUEASY THAT THIS GUY MAY KNOW ENOUGH ABOUT WHAT SORT OF CASE THIS IS, THAT HIS EXPERIENCES THAT ARE OUTSIDE OF WHAT COMES IN OVER THE WITNESSES AND THROUGH EVIDENCE, CAN, THE JURORS, HE MAY RELY UPON IT, HIMSELF, AS WELL AS --

HOW DID THIS DEFENSE COUNSEL FLESH THAT OUT IN THE --

WELL, HE DIDN'T REALLY. WHAT HE DID IS HE MADE THE OBJECTION TO THE TRIAL JUDGE, JUST AS A ROUTINE SORT OF MATTER. WE OBTO LAPIN -- WE OBJECT TO LAPIN, BECAUSE OF HIS EXPERIENCE BEING A GUARD ON DEATH ROW AND THINGS LIKE. THAT THERE CERTAINLY WASN'T A DISCUSSION AS LONG AS WHAT WE ARE DOING RIGHT NOW, BUT CERTAINLY THE JUDGE WAS ON NOTICE THAT THIS WAS A PROBLEM, WHEN YOU HAVE GOT A JUDGE, WHEN YOU HAVE GOT AN INMATE, WHO, NOT, YOU HAVE GOT A PERSON ON THE VENIRE WHOSE EXPERIENCES REASONABLY MAY EXPECT TO BECOME PART OF THE JURY DELIBERATIONS, BECAUSE YOU JUST CAN'T DIVORCE EIGHT YEARS OF EXPERIENCE, SO PERSONALLY HE COULD USE IT OR THE JURORS, WHEN THEY GOT BACK IN THE JUROR ROOM -- IN THE JURY ROOM, MAY HAVE ASKED HIM ABOUT PRISON CONDITIONS, SO HIS OTHER OWN EXPERIENCE WITH LIFE IN CORRECTIONAL INSTITUTIONS, WOULD HAVE MADE HIM AN UNSUITABLE JUROR. NOW, I HAVE ALSO RAISED THAT, MR. BUSBY WANTED TO RAISE AS DEFENSE, THAT, A DEFENSE OF SELF-DEFENSE, AND SPECIFICALLY YOU WANT TO PRESENT THE TESTIMONY OF THE SOCIAL WORKER ANN JOHNSON, WHO HAD TREATED HIM FOR HIS CHILD ABUSE. HE WAS A VERY BADLY ABUSED CHILD UNTIL ABOUT THE AGE OF ELEVEN, AND DURING THE TIME THAT MS. JOBSON SAW HIM, SHE DETERMINED THAT HE SUFFERED FROM POST-TRAUMATIC STRESS DISORDER AND AT TRIAL, BUSBY WANTED TO PRESENT HER TESTIMONY, TO SHOW THAT HE HAD A REASONABLE FEAR OF AN IMMINENT ATTACK FROM THE OTHER INMATES.

BUT ISN'T THAT, AS I READ THE STATEMENTS THAT WERE GIVEN LATER THAT EVENING, WHERE BOTH OF THEM WERE TOGETHER, AND IT SEEMS TO ME THAT REFUTES A SELF-DEFENSE KIND OF APPROACH IN THIS CASE AT ALL.

THIS IS WITHOUT DOUBT, A COLD, CALCULATED MURDER. THEY HAD PLANNED TO KILL, YES. HOW DO YOU EXPLAIN THAT? HOW DO I STAND HERE AND SAY GEE WHIZ, HE HAS GOT A SELF-DEFENSE CLAIM, AND THAT IS THE PROBLEM THAT THE TRIAL HAD, THEY STRIKE HIM AND THAT IS PRETTY COLD AND THEY DID THAT, BUT EVEN WITH THE STATEMENTS OF THE DEFENSE COUNSEL DOWN BELOW --

BUT EVEN THE STATEMENTS THAT EVENING DIDN'T SEEM TO INDICATE ANY KIND OF SELF-DEFENSE TYPE OF THING, AS I READ THE STATEMENTS, YES.

STATEMENTS DIDN'T NECESSARILY HAVE TO BE COMPLETE OR WHOLE OR ENCOMPASSING. BY THE TIME HE GOT TO TRIAL, HE DECIDED THAT HE DID HAVE A LEGITIMATE SELF-DEFENSE CLAIM, BECAUSE HE EXPLAINED THESE THINGS HIS LAWYER, THE LAWYER REALIZES WHAT THE SITUATION WAS IN THE PRISON, AND THE SITUATION IS SIMPLY THAT BUSBY WAS IN AN UNTENABLE, NO-WIN SITUATION. THE PRISON REFUSED TO HELP HIM. HE WAS UNDER ASSAULT BY HIS INMATES. HE WAS A YOUNG, VIRTUALLY DEFENSELESS WHITE MALE IN THIS PRISON, WHAT IS

HE TO DO?

WHAT DOES THE RECORD SHOW US ABOUT WHETHER HE WAS UNDER ASSAULT OR SOME HISTORY OF THIS VICTIM HAVING, IN OTHER WORDS, WHAT IS THE ACTUALLY, THAT OBVIOUSLY IS A CRITICAL PART OF YOUR THEORY HERE, SO TELL US WHAT THE RECORD SHOWS.

THE RECORD SHOWS THAT ARD MAY HAVE MADE SOME THREATS.

LET'S NOT TALK ABOUT MAY HAVE. TELL ME WHAT THE RECORD SHOWS, IN TERMS OF WAS THERE SOMEBODY HERE THAT TESTIFIED THEY WERE PART OF THE INMATE POPULATION OR THEY WERE A GUARD OR WHATEVER.

CHARLES KINESKY.

> AND THAT THEY HAD A PATTERN OF ARD ATTACKING --

NOT ARD.

FIRST OF ALL, WHAT IS THE HARD EVIDENCE THAT WE HAVE IN THIS RECORD OF ARD PREVIOUSLY ABUSING THIS DEFENDANT IN ANY WAY.

WHAT I RECALL FROM THE RECORD IS THAT BUSBY SAID THAT ARD HAD MADE SOME THREATS TO HIM, NOT ON THE DAY OF THE MURDER.

WHEN DID HE DO IT? DID HE DO IT IN A STATEMENT? DID HE DO IT WHEN HE TESTIFIED? IN OTHER WORDS, WHERE IS IT THAT HE NAMED --

IT WAS DURING HIS CONFESSION.

DURING HIS CONFESSION HE SAID WHAT?

HE SAID THAT ARD HAD MADE SOME THREATS TO HIM AT SOME UNSPECIFIED EARLIER TIME.

AND THAT IS IF.

THAT IS PRETTY MUCH -- THAT IS IT?

THAT IS PRETTY MUCH IT. BUT THAT GOES BACK TO WHY THIS POST-TRAUMATIC STRESS DISORDER BECAME RELEVANT, BECAUSE WHAT PEOPLE WHEN THEY SUFFER FROM THIS DISORDER, THEY HAVE A GNAWING FEAR OF LACK OF SAFETY THAT, WHEREVER THEY ARE, HYPER VISUAL, ALWAYS AT UNDER TO THE NUANCES -- TO THE NUANCES AROUND THEM, BECAUSE THEY ARE ALWAYS FEELING THAT THEY ARE GOING TO BE ATTACKED.

YOU ARE STRETCHING, BECAUSE YOU ARE BASICALLY TALKING ABOUT ANY OTHER INMATE THAT IS THERE, AND A MINUTE AGO, YOU SAID AND THE RECORD APPEARS TO DEMONSTRATE THAT, THIS IS ABSOLUTELY A CCP CASE, AND SO WE HAVE AN ABSOLUTELY A CCP CASE, AND YET WE HAVE A THEORY WHERE ANY OTHER INMATE THERE, THAT THIS DEFENDANT COULD GO WITH HIS CODEFENDANT, AND KILL, AND YET YOU ARE SAYING, WELL, WITH ANY OTHER DEFENDANT, HE HAD THIS SYNDROME THAT HE WAS SO FEARFUL OF ALL OF THE OTHER INMATES, BECAUSE OF HIS HISTORY.

RIGHT.

THAT REALLY AMOUNTS TO BATTERED WOMEN SYNDROME.

THAT IS EXACTLY IT. IT IS A BATTERED WOMEN SYNDROME TYPE OF DEFENSE.

BATTERED WOMEN DON'T GO OUT AND KILL JUST ANYBODY THAT HAPPENS TO BE WORKING IN THE SAME OFFICE WITH THEM OR ANY MALES, WHATEVER, SO THAT IS WHY I SAY THAT I AM HAVING DIFFICULTY SEEING THIS APPLIED IN THE CONTEXT OF WHAT ACTUALLY HAPPENED HERE.

OKAY. THE REASON IS, IS, IT IS LIKE A BATTERED SPOUSE SYNDROME BUT IT IS ALSO DIFFERENT, IN THE SENSE THAT THIS IS, YOU HAVE GOT TO, YOU CANNOT DIVORCE THIS MURDER FROM THE PRISON SITUATION, WHERE HE HAS THE POPULATION AT LARGE IS MAKING THESE THREATS AGAINST HIM, AND THAT IS WHAT CHARLES KINESKY, WHAT HIS TESTIMONY WAS THAT HE HAD HEARD THESE THREATS, NOT JUST FROM ONE MAN, FROM ARD, BUT VIRTUALLY THE ENTIRE PRISON POPULATION WAS MAKING THIS THREAT.

SO THE THEORY IS THAT HE, ONE BY ONE, GOING TO GO AND KILL EACH OF --

NO. WHAT HIS THEORY IS HE SAID I HAVE GOT TO SEND A MESSAGE TO THE PRISON, TO THE ADMINISTRATION, YOU HAVE GOT TO LEAVE ME ALONE. THERE IS SOME EVIDENCE THAT HE JUST WANTED TO BEAT ARD, BUT APPARENTLY ACTUALLY BECAME, ACTUALLY KILLED HIM. BUT HE SAID WE HAVE GOT TO SEND A MESSAGE TO THE PRISON THAT YOU HAVE GOT TO LEAVE ME ALONE, SO THEY PICKED SOMEBODY, PICKED ANYBODY, AND THEY NARROWED IT DOWN TO ARD.

SO THERE WAS A PROFFER OF THE TESTIMONY OF THIS WOMAN?

YES.

AND TELL US WHAT THE PROFFER SAID, AS FAR AS THE COURT.

THE TESTIMONY WAS THAT HE SUFFERED FROM POST-TRAUMATIC STRESS DISORDER, AMONG OTHER DISORDERS.

FROM PREVIOUS ASSAULTS.

FROM 11 YEARS HE HAD BEEN SEXUALLY ABUSED BY HIS MOTHER, PARENTS, STEP BROTHERS AND STEP SISTERS. HE HAD BEEN SEVERELY ABUSED AS A CHILD, AND SHE SAID THAT, WHEN SHE SAW HIM, THAT SHE DETERMINED HE HAD NEVER FELT SAFE, AND THAT BECAUSE OF THAT, HE, WELL NOT, THAT WAS PART OF THE WHOLE POST-TRAUMATIC STRESS.

DID SHE TALK ABOUT A TRIGGER?

YES. SHE TALKED ABOUT --

WHAT WAS THE TRIGGER CIRCUMSTANCES THAT WOULD CAUSE HIM TO ACT UNDER THIS SYNDROME?

THE PRISON ENVIRONMENT.

JUST BEING IN THE PRISON ENVIRONMENT.

WELL, AGAIN, THIS IS A PRISON ENVIRONMENT. THE PRISON LIVES UNDER DIFFERENT RULES THAN YOU AND I LIVE ON.

I KNOW THAT, BUT I AM TRYING TO, AGAIN, IS SHE TESTIFYING THAT, NOW WITH THIS HISTORY OF ABUSE, THAT HIM JUST BEING IN THIS PRISON ENVIRONMENT, WOULD CAUSE HIM TO ATTACK AT RANDOM, ANY OTHER INMATE?

THE PRISON ENVIRONMENT, WHERE THE THREATS ARE BEING MADE, OF SEXUAL ASSAULT

AGAINST HIM, THE PRISON ADMINISTRATION BEING IN DIFFERENT TOWARDS HIS THREATS.

BUT THAT HE WOULD ATTACK ANOTHER IN MATE, REGARDLESS OF WHETHER THAT INMATE ACTUALLY ACTUALLY THREATENED -- INMATE ACTUALLY THREATENED HIM?

I BELIEVE THAT WAS WHAT WAS SAID AND I BELIEVE ARD WAS ON HIS SHORT LIST BECAUSE HE HAD MADE SOME THREATS AGAINST HIM.

ARE THERE ANY CASES WHERE A CASE LIKE THIS HAS OCCURRED BEFORE?

NO. THE BATTERED SPOUSE.

ABOUT AS CLOSE AS YOU CAN COME.

THAT IS AS CLOSE AS I CAN GET, BUT, AGAIN, AND YOU HAVE GOT TO REALIZE, IT IS IMPORTANT THAT THIS IS A PRISON, AND PRISONS ARE NOT DOWNTOWN TALLAHASSEE.

IS THE STATEMENT THAT HE GAVE, THE EVENING OF THIS EVENT, DOES IT PORTRAY THREATS? AS I WAS READING IT, IT SEEMED AS THOUGH HE DIDN'T LIKE BEING CALLED A PUNK.

YES.

THAT IS REALLY WHAT IT SEEMS LIKE THE WHOLE DISCUSSION WAS ABOUT, BECAUSE HE WAS SMALL AND THEY KEPT CALLING HIM PUNK, AND THAT IS WHAT SEEMED TO, I DIDN'T, IS THERE SOMETHING IN THERE THAT I MISSED?

NO. BUT THAT BEING CALLED A PUNK HAS TREMENDOUS CONNOTATIONS WITHIN THE PRISON ENVIRONMENT, BECAUSE ONCE YOU ARE CALLED A PUNK, THAT MEANS YOU ARE THE HOMOSEXUAL OBJECT OF SOMEBODY, AND I MEAN, WE CAN TALK ABOUT, ANYWAY, THAT --

IS THAT CLEARLY EXPLAINED IN THE RECORD?

YEAH. HE TALKS ABOUT, DURING THE TRIAL ITSELF, THEY TALK ABOUT THE IMPLICATIONS OF BECOMING A HOMOSEXUAL OBJECT, AND THAT IS WHAT HE WAS AFRAID OF.

CHIEF JUSTICE: THE MARSHAL HAS REMINDED US --

RIGHT. I HAVE GOT A COUPLE OF MINUTES HERE. JUST I WANT TO TALK THE CCP ALONG THE SAME LINES, THIS OBVIOUSLY WAS A COLD CALCULATED, BUT THERE WAS A PRETENSE OF LEGAL JUSTIFICATION SELF-DEFENSE, AND I WANT TO MAKE YOU AWARE THAT THAT IS A LEGITIMATE ARGUMENT, THE COURT FINDING THAT AGGRAVATING FACTOR, THAT BECAUSE OF THE THINGS AT LEAST THAF TRIED TO TALK TO THE COURT ABOUT THIS MORNING, THAT BUSBY HAD A --, THAT BUSBY HAD A LEGITIMATE FEAR FOR HIS LIFE, MAYBE NOT RAISED IN THE GUILT PHASE BUT AT LEAST AT PRETENSE OF LEGAL JUSTIFICATION. THANK YOU.

GOOD MORNING YOUR HONOR. MAY IT PLEASE THE COURT. CASSANDRA DOLGIN, ON BEHALF OF THE ATTORNEY GENERAL OF THE STATE OF FLORIDA. THERE ARE A FEW FACTS THAT I WANT TO CLEAR UP FOR THE COURT. COUNSEL SAID THERE WERE SEVERAL THREATS, INCLUDING THE THREAT THAT MR. BUSBY WOULD BE GANG RAPED. IN MY REVIEW OF THE RECORD, I DON'T SEE ANY RECORD OF ANY THREATS THAT WERE MADE TO MR. BUSBY PERSONALLY, NOR ANY --

BY ANYBODY.

BY ANYONE. I MEAN, THERE WAS REFERENCES TO HARASSMENT, AND THE ONLY REFERENCE TO WHAT MIGHT BE INTERPRETED AS A THREAT, IS, AND DURING BUSBY'S STATEMENT, THE JULY 3 STATEMENT, HE REFERENCES BEING HARASSED. IN FACT, THE JULY 3 STATEMENT, HE IS ASKED,

PLANNING TO KILL WHAT, ELTON ARD? AND IT IS ANSWERED ANYBODY. ARD JUST HAPPENED TO COME ALONG. LATER ON, WELL, WELL, SEE, ORIGINALLY IT WAS SOMEBODY ELSE, AND HE IS ASKED, BUSBY AND GLOBE ARE ASKED, WELL, WHO WERE YOU PLANNING ON KILLING, AND THEN GLOBE SAYS A LITTLE SPANISH DUDE THAT USED TO TRY TO PLAY SEX GAMES WITH HIM ALL THE TIME AND GRABBED HIM. SO THERE IS NO MENTION, IN GOING THROUGH THIS JULY 3 STATEMENT THERE, IS NO MENTION THAT ARD DID ANYTHING OTHER THAN HARASS BUSBY, AND THERE IS A REFERENCE TO --

WHAT ABOUT THIS OTHER WITNESS, THE, YOUR OPPONENT HAS ALLUDED TO A WITNESS THAT THIS DESCRIBED -- THAT DESCRIBED THIS DEFENDANT, FOR INSTANCE, PHYSICALLY, YOU KNOW, AS LOOKING LIKE, WHAT, A NINE-YEAR-OLD OR ELEVEN -- I FORGET.

HIS DESCRIPTION WAS THAT HE LOOKED 110 POUNDS, LIKE A NINE-YEAR-OLD, BUT THERE WAS NO EVIDENCE AS TO WHAT BUSBY'S ACTUAL WEIGHT WAS. I MEAN, THAT IS JUST HIS DESCRIPTION.

DID THAT WITNESS TESTIFY THAT BUSBY HAD BEEN THE SUBJECT OF SEXUAL ASSAULTS AND HARASSMENT?

HE TESTIFIED THAT BUSBY HAD BEEN SEXUALLY HARASSED. HE DIDN'T TESTIFY THAT HE HAD BEEN ASSAULTED, AND HE CERTAINLY DIDN'T TESTIFY TO ANY CONDUCT ON THE PART OF ELTON ARD, AS TO BUSBY.

WAS HE, WHEN WE SAY SEXUALLY HARASSED, OF COURSE, THAT CAN HAVE A BROAD --

IT COULD HAVE DIFFERENT MEANINGS.

THAT IS WHAT I, DID THE WITNESS CLARIFY THAT? IN OTHER WORDS, WAS HE QUESTIONED, YOU KNOW, WHAT DO YOU MEAN BY SEXUAL HARASSMENT?

I DON'T REMEMBER THAT HE WAS QUESTIONED.

BUT YOU THINK THAT, IN THE CONTEXT OF THE WAY THE RECORD PRESENTS THAT, THAT IT WAS JUST VERBAL ABUSE.

EXACTLY, YOUR HONOR, AND THERE WERE NO RECORDS PRESENTED, DEPARTMENT OF CORRECTION RECORDS PRESENTED, TO ESTABLISH THAT MR. BUSBY WAS, IN FACT, ASSAULT THEED -- ASSAULTED. NOW, THERE WAS -- MY OPPONENT, ALSO, SAYS THAT --

BEFORE YOU MOVE TOO FAR, WHAT WAS THE NATURE, THEN, OF THE OFFICERS' TESTIMONY, CONCERNING WHAT BUSBY HAD REPORTED TO THEM?

YOUR OPPONENT SAYS THAT ONE OF THE OFFICERS TESTIFIED THAT BUSBY HAD REPORTED SOME KIND OF HARASSMENT OR --

THAT IS WHAT I WAS GOING TO ADDRESS. THAT IS WHAT HE SAYS. I DON'T RECALL THAT OFFICER ACTUALLY, HE WAS WITH THE DEPARTMENT OF CORRECTIONS. MR. SHANK HAD TESTIFIED THAT THERE HAD BEEN COMPLAINTS, AND IT IS ALSO NOT ACCURATE TO SAY THAT HE DID NOT INVESTIGATE. ON JULY 12, MR. SHANK HAD TRAVELED TO THE INSTITUTION THAT MR. BUSBY HAD BEEN COMMITTED TO AND ASKED QUESTIONS ON WHAT LED UP TO THE ASSAULT ON THE MURDER OF ELTON ARD, AND WHILE THAT TRANSCRIPT WAS NOT MADE AN ARE THE -- NOT MADE A PART OF THE TRIAL COURT RECORD --

WE ARE TALKING ABOUT PRETHIS MURDER. WHAT, IF ANYTHING, WAS TOLD TO OFFICIALS, CONCERNING A HARASSMENT OR ASSAULT, SEXUAL ASSAULT?

ALL WE HAVE, YOUR HONOR, IS THE JULY 3 TRANSCRIPT, WHICH REFLECTS MR. GLOBE, AND MR. BUSBY IS TELLING THE OFFICIALS, WELL, I HAD BEEN HARASSED BEFORE AND I MADE COMPLAINTS, AND I HAD GONE TO OTHER CORRECTIONAL OFFICERS AND HAD COMPLAINED. THERE IS NO REFERENCE IN THIS JULY 3 STATEMENT, THAT MR. BUSBY WAS IN FACT THREATENED WITH BEING SEXUALLY ASSAULTED, AND THERE IS NO REFERENCE THAT HE WAS IN FACT, SEXUALLY ASSAULTED.

DID THIS LATER INVESTIGATION, BY THE DOC OFFICIAL, TURN UP ANY, IN OTHER WORDS, WHAT WAS THE OUTCOME OF THAT? I REALIZE IT WAS AFTER THE MURDER AND AFTER HE WAS TRANSFERRED TO ANOTHER INSTITUTION.

I --

DID THAT OFFICIAL INVESTIGATE INTO WHETHER OR NOT HE HAD MADE PREVIOUS COMPLAINTS OR BEEN SEXUALLY ASSAULTED BEFORE?

I AM NOT SURE WHAT OTHER ACTION HE TOOK, BESIDES INTERVIEWING MR. BUSBY ON JULY 12, BUT HE DID INVESTIGATE AND DID GO BACK AND TALK TO MR. BUSBY AS TO WHAT HIS COMPLAINTS HAD BEEN. THE RECORD DOES NOT INDICATE, AND, OF COURSE, THIS DIDN'T COME IN AT TRIAL, DOESN'T INDICATE WHAT THE FINAL INVESTIGATION HAD TURNED UP, AND LIKE I SAID, NO DEPARTMENT OF CORRECTIONS WERE, DEPARTMENT OF CORRECTION RECORDS WERE SUBMITTED DURING TRIAL, TO ESTABLISH ANY ASSAULTS.

HOW LONG --

DID THE RECORDS SHOW, AS FAR AS ANY THREATS OR ACTIONS BY THE VICTIM AGAINST THIS DEFENDANT OR HIS CODEFENDANT?

WELL, THE RECORD DOESN'T. THE ONLY THING THE RECORD SHOWS, WELL, WE HAVE THE JULY 3 STATEMENT, WHERE ALL BUSBY AND GLOBE ARE TALKING ABOUT ARE HARASSMENT, THEN THERE WAS A LATER THAT WAS ADMITTED AT TRIAL THAT MR. BUSBY HAD WRITTEN, AFTER HE WAS TFERD AND -- TRANSFERRED AND WHILE HE WAS STILL INCARCERATED, THAN IS BEFORE TRIAL, WHERE HEAL YOU DID OR WRITES THAT HE HAD -- WHERE HE ALLUDES OR OVERHEARD THAT MR. ARD WAS GOING TO FORCE BUSBY TO SUBMIT TO HIM, SO IT WAS CERTAINLY NOT A DIRECT THREAT MADE TO MR. BUSBY. EVEN IF IT IS A THREAT, I THINK IT IS IMPORTANT FOR THE COURT TO KEEP IN MIND THE SEQUENCE OF EVENTS. MR. ARD WAS TRANSFERRED TO MR. BUSBY'S CELL ON A FRIDAY. ON THAT FRIDAY, GLOBE AND BUSBY WANTED TO TRY AND KILL HIM THEN, BUT ARD HAD TO GO TO A DIFFERENT WING OR SOMETHING, TO GET HIS PROPERTY. ARD DOESN'T TRY TO AT O'CLOCK HIM ON FRIDAY NIGHT. SATURDAY, IS HE STILL IN THE CELL WITH BUSBY, THEN HE HAS TO GO SOMEWHERE TO GET SOMETHING. THEY HAD WANTED TO KILL HIM ON SATURDAY AS WELL BUT THE PLAN FELL THROUGH, BECAUSE ARD WASN'T IN THE CELL DURING THE BREAKFAST TIME.

REFRESH US AGAIN, ABOUT THE ORIGINAL PLAN INVOLVING TWO OTHER POTENTIAL VICTIMS, AND HOW IT ENDED UP, ACCORDING TO THEIR STATEMENTS, WITH ARD.

THE ORIGINAL PLAN, AS DISCUSSED IN THE JULY 3 STATEMENT, WAS BUSBY FIRST WANTED TO, THE PLAN CAME ABOUT, THE PLAN WAS TWO MONTHS PRIOR TO ACTUALLY COMMITTING THE MURDER, BUSBY WANTED TO KILL, HIS LAST NAME WAS, ROBERTO ROSA TORONTO, AND BUSBY WANTED TO KILL HIM, BECAUSE HE BELIEVED THAT HE HAD GIVEN UM-HUM IV. HE -- HAD GIVEN UM-HUM IV. HE HAD ATTACKED HIM -- HAD GIVEN HIM HIV. HE HAD ATTACKED HIM SOMEWHERE OUT IN THE YARD OR SOMEWHERE, AND GLOBE PULLED HIM OFF AND SAID NOT HERE.

DID HE HAVE A RELATIONSHIP?

HE HAD A CONSENTUAL RELATIONSHIP WITH TOLEDO AND THEN WAS UP SAID, BECAUSE TOLEDO SAID TO HIM I AM HIV POSITIVE, AND BUSBY BELIEVED THAT HE HAD --

SO THAT WAS A VOLUNTARY RELATIONSHIP.

YES. BASED UPON THE JULY 3 STATEMENT.

BUT IT WAS THIS STATEMENT ABOUT HAVING HIV AND THE FEAR THAT -- AND THE FEAR THAT HE HAD CONTRACTED.

BUSBY WAS VERY ANGRY WITH TOLEDO, KNOWING THAT HE HAD ALONGLY BEEN -- ALLEGEDLY BEEN GIVEN HIV FROM MR. TOLEDO. SO HE ATTACKED AND GLOBE PULLED HIM OFF AND SAID NO, NOT HERE. THEY TRIED TO LURE HIM TO BUSBY'S CELL TO KILL HIM, BUT HE WOULDN'T HAVE ANY PART OF THAT.

THAT WAS THE FIRST INTENDED VICTIM.

THAT WAS THE FIRST INTENDED VICTIM. THEN ARNOLD PALMER --

LET ME STOP YOU THERE. AS FAR AS THIS FIRST INTENDED VICTIM WAS CONCERNED, THAT WAS A VERY SPECIFIC SITUATION, AS FAR AS THE MOTIVATION FOR THAT, THAT BUSBY ATTRIBUTED. THAT WAS VERY SPECIFIC TO THE HIV SITUATION. IS THAT CORRECT?

THAT'S CORRECT.

OKAY. NOT JUST A GENERAL THING OF BEING HARASSED OR YOU KNOW, PICKED ON.

YES. THAT'S CORRECT, YOUR HONOR.

NOW, WHAT ABOUT THE POTENTIAL SECOND VICTIM?

THEN THE SECOND PERSON WAS PALMER. AND I BELIEVE THAT, AND THIS COMES OUT, I THINK, MORE SO IN THE JULY 7 STATEMENT, WHERE APPARENTLY THIS PERSON HAD MADE A MOVE ON MR. BUSBY, AND ON THAT BASIS, BUSBY AND GLOBE WERE GOING TO TRY TO LURE PALMTORY THEIR CELL, BUT THEY COULDN'T. HE DIDN'T -- PALMER TO THEIR CELL, BUT THEY COULDN'T. HE WASN'T BITING.

SO THIS VICTIM HAD ATTEMPTED TO HAVE SEXUAL RELATIONS WITH BUSBY?

I BELIEVE THE STATEMENT WITHIN THE, WITHIN HIS STATEMENT, HE HAD GRABBED HIM BY THE BEHIND. AND I THINK THAT IS THE EXTENT OF THE STATEMENT, AS TO THE HARASSMENT. IN FACT, WITHIN THE STATEMENT, BUSBY MAKES IT PERFECTLY CLEAR THAT, WHEN HE WAS GRABBED, YOU KNOW, HE GOT OUT OF IT. HE WAS ABLE TO PHYSICALLY HANDLE THE SITUATION HIMSELF, AND HE DIDN'T, AT LEAST IN THE STATEMENT, HE DOESN'T INDICATE THAT HE WENT TO THE CORRECTION OFFICERS AND SAID, HEY, I NEED HELP, THAT HE WAS ABLE TO HANDLE THE SITUATION HIMSELF.

WHAT WAS THE EXPLANATION, THEN, AS TO WHY ARD WAS PICKED, THEN, AS THE THIRD CHOICE OF VICTIMS?

I THINK AT THAT POINT, AND THIS COMES OUT MORE SO IN THE JULY 7 STATEMENT, BUSBY SAYS THAT HE WAS GETTING TIRED OF NOT BEING ABLE TO GET SOMEONE, AND YOU KNOW, THEIR THINKING IN THIS PLAN WAS THEY WANTED TO SEND A MESSAGE. IT WASN'T ABOUT SELF-DEFENSE. IT WAS A PREMEDITATED, CALCULATED PLAN. BUSBY SAYS --

WHAT MESSAGE, DID THEY INDICATE THAT, YOU KNOW, THE MESSAGE WAS --

STOP HARASSING ME.

OKAY. STOP HARASSING ME. NOW, WAS THIS HOW THE EXPERT, THEN, THAT WAS PROPOSED TO TESTIFY, BY THE DEFENDANT, TIED THIS THING IN TO A SYNDROME? IS THAT WHAT, IN OTHER WORDS, THAT BECAUSE HE HAD BEEN SEXUALLY ABUSED FOR SUCH A LENGTH OF TIME STARTING IN HIS CHILDHOOD, AND NOW CONTINUING IN THE PRISON SETTING, THAT HE WAS A SET UP FOR STRIKING PREEMPTORILY?

I THINK IT WAS GENERAL BECAUSE OF HIS BACKGROUND, BECAUSE OF THE GENERAL PREVALENT NATURE OF PRISONS, THAT HIS CONDUCT, ON THE PART OF ANYONE, WOULD SET HIM OFF. THAT IS THE SENSE I GET, AND WHEN THE PROSECUTOR ASKED THE EXPERT DURING CROSS-EXAMINATION, DURING THE PROFFER, ASKED HER THAT, IF SOMEONE WERE TO HAVE, IF BUSBY WERE, YOU KNOW, IN THIS LOCKED PRISON, AND SOMEONE SAYS TO ARD, HEY, YOU KNOW, GO AHEAD AND HAVE ORAL SEX WITH BUSBY, AND THAT PERSON, AND ARD SAYS, NO, I AM GOING TO GO TO SLEEP INSTEAD, THE PROSECUTOR SAYS, WELL, WOULD THAT TRIGGER HIM, AND SHE SAYS NO. NOW, MY OPPONENT SAYS, NO, THE REAL QUESTION TO HAVE ASKED IS THAT, IF SOMEONE HAD DEMANDED THAT THE DEFENDANT THAT BUSBY, PERFORM ORAL SEX ON ARD, WOULD THAT HAVE TRIGGERED HIM, BUT THERE IS NO EVIDENCE THAT THAT WAS DEMANDED OF BUSBY. THAT IS NOT THE FACTS THAT WERE --

THAT HAD HAPPENED WITH THE ACTUAL VICTIM. THERE IS NO EVIDENCE THAT ARD DEMANDED --

THERE IS ABSOLUTELY NO EVIDENCE TO THAT, AND TO THE CONTRARY WHEN HE IS OFFERED THE OPPORTUNITY TO PERFORM ORAL SEX ON BUSBY, HE DECLINES, AND AT THAT TIME, BUSBY OR ARD STARTS WALKING AWAY, AND THAT IS WHEN GLOBE AND BUSBY ATTACK HIM.

SO THE EXPERT HAS NOT REALLY TIED THIS PARTICULAR EPISODE INTO HER THEORY OF THE CONDITION THAT BUSBY HAD. IS THAT THE STATE'S VIEW?

THAT IS A FAIR STATEMENT, AND SHE HASN'T TIED IT IN AT ALL.

WAS THAT THE BASIS OF THE TRIAL COURT'S RULING EXCLUDING THAT?

I AM NOT SURE THAT THE TRIAL COURT, ACTUALLY, YOU KNOW, THE STATE HAD ARGUED THAT THERE WAS, THAT THE EVIDENCE WASN'T RELEVANT, BECAUSE HE DOESN'T ESTABLISH THAT THERE WAS THIS OVERT ACT IN WHICH HE HAD REASONABLE BELIEF TO RESPOND IN SELF-DEFENSE, AND I THINK, BASED UPON THAT BEING THE STATE'S OBJECTION AND THE PROFFER PARTICULARLY, WHERE THE EXPERT TESTIFIES, WELL, BASED UPON THE FACTS THAT WERE PRESENT, THAT WOULDN'T HAVE TRIGGERED HIM. I DO BELIEVE THAT THAT IS THE BASIS THAT THE COURT EXCLUDED THE EVIDENCE.

IT ENDS UP ARD.

CAN I ASK YOU TWO QUESTIONS. HELP ME GIVE THE CONTEXT OF THE LENGTH OF THE RELATIONSHIP BETWEEN GLOBE AND BUSBY, HOW LONG THEY HAD BEEN KNOWN IN THE PRISON CIRCLES, AND SECONDLY, THE COURT'S ORDER, HE DOES, SAYS THIS DEFENDANT BEING PRESENT WITH THE PERSON LARGER THAN THE TWO OTHER PERSONS AND THE TWO PERSONS PRESENT, SO THE INDICATION IS, THE ORDER IS THAT GLOBE WAS MUCH LARGER, SO THERE WOULD BE LESS CONCERN ABOUT IMMEDIATE HARM.

THAT'S CORRECT, YOUR HONOR, AND IN ANSWER TO YOUR FIRST QUESTION, GLOBE AND BUSBY HAD MET IN AUGUST OF THE YEAR PRIOR, AND THEY FORMED THEIR RELATIONSHIP OR BECAME A COUPLE IN JANUARY, AND THEN THE MURDER OCCURRED IN JULY. SO THEY HAD BEEN TOGETHER FOR AT LEAST SEVEN MONTHS, AND YOU ARE CORRECT.

THIS WOULD HAVE BEEN KNOWN IN THE PRISON ENVIRONMENT.

ABSOLUTELY.

THE LETTER THAT WAS --

THE LETTER INDICATES THAT THEY CARRIED ON TOGETHER AND THUS HOW BUSBY HELD HIMSELF OUT, IT IS NOT SURPRISING THAT HE DID RECEIVE HARASSMENT, BECAUSE IT CERTAINLY WOULD HAVE BEEN COMMON KNOWLEDGE THAT THEY WERE A COUPLE, AND HE ENGAGED IN A HOMOSEXUAL RELATIONSHIP.

WHAT WAS THE SIZE RELATIONSHIP BETWEEN GLOBE AND ARD AND BUSBY?

WELL, GLOBE DEFINITELY, AS THE COURT HAD INDICATED, GLOBE WAS LARGER, AND I BELIEVE, MUSCULAR, AND, PLUS THERE WAS, AND THAT WAS ONE OF THE BASIS FOR THE COURT'S RULING, THAT THERE WAS NO REASON FOR BUSBY TO, REALLY, HAVE A FEAR AND NEED TO DEFEND HIMSELF, BECAUSE GLOBE WAS LARGER. I DON'T KNOW THAT THERE WAS EVIDENCE AS TO ARD'S SIZE.

COULD YOU MOVE ON TO THE JUROR ISSUE AND START WITH, ISN'T THERE JUST SOMETHING THAT ALMOST A GUT REACTION, OF HAVING A FORMER GUARD ON DEATH ROW, SET IN JUDGMENT AFTER DEFENDANT ACCUSED, ESPECIALLY ACCUSED OF, YOU KNOW, IN A CORRECTIONAL SETTING, ISN'T THERE, THAT IS ALMOST LIKE HAVING A MEMBER OF THE SAME POLICE DEPARTMENT, YOU KNOW, THAT CONDUCTED THE INVESTIGATION OR A LAWYER FROM THE SAME PROSECUTOR'S OFFICE, THAT IS DOING THIS. I AM JUST, YOU KNOW, STARTING FROM THAT, AND THEN WHEN YOU COMBINE THAT WITH SOME OF THE ANSWERS TO THE QUESTIONS, WHERE THIS PERSON CLEARLY WAS IN FAVOR OF THE DEATH PENALTY, BUT I, ALSO, I AM CONCERNED ABOUT SOME OF THE QUESTIONS AND ANSWERS, AND I REALIZE IN SOME INSTANCES, THEY GO BOTH WAYS, BUT ONE OF THEM IS THAT HE HAS ASKED, DO YOU BELIEVE THAT LIFE IN PRISON IS SEVERE ENOUGH PUNISHMENT FOR SOMEONE WHO IS FOUND GUILTY OF PREMEDITATED MURDER, AND HE ANSWERS NO. AND OF COURSE, YOUR OPPONENT HAS POINTED OUT OTHER QUESTIONS AND ANSWERS HERE, WHERE HE REALLY SAYS, WELL, I JUST, I DON'T KNOW, AND IN ONE OF THOSE, IT IS WHEN HE IS ASKED IF HE THINKS THAT HIS SERVICE AS A, WOULD AFFECT HIS DECISION, AND HE JUST SAYS SOMETHING LIKE I CAN'T SAY, AND IS THAT, WHEN, IF TRULY THE STANDARD IS WHETHER THERE WAS A REASONABLE DOUBT, I MEAN, MY GOSH, A CORRECTIONAL OFFICER ON DEATH ROW AND WOULDN'T THAT, ALL BY ITSELF, RAISE A REASONABLE DOUBT AS TO WHETHER HE COULD FAIRLY SIT IN JUDGMENT OF SOMEBODY THAT IS, FIRST OF ALL ACCUSED OF MURDER, AND MURDER, IN THE CONTEXT, AND SO I APOLOGIZE FOR THAT LENGTHY PREDICATE TO THAT. WOULD YOU HELP US.

LET ME BEGIN BY FIRST POINTING OUT, THERE IS REALLY TWO ISSUES PRESENTED BY THIS, A MATTER OF FEDERAL LAW AND A MATTER OF STATE LAW. WE KNOW AS A MATTER OF FEDERAL LAW, ROSS VERSUS OKLAHOMA, THAT IF THE DEFENDANT HAS A CHALLENGE FOR CAUSE AND THAT PERSON ISN'T STRUCK, AND THE DEFENDANT, THEN, EXERCISES A PREEMPTORY CHALLENGE, THAT THERE IS NO CONSTITUTIONAL ERROR. YOU KNOW, UNLESS THE DEFENDANT CAN, THEN, POINT TO SOMEONE THAT ACTUALLY SAT ON THE JURY WHO WAS BIASED --

THAT IS NOT OUR RULE IN FLORIDA.

THAT'S CORRECT. SO TURNING ASIDE FROM THE FEDERAL RULE TO THE STATE RULE, AND I THINK THERE IS SOME --

ARE YOU GOING TO PRESERVATION? IS THAT WHAT, RATHER THAN ANSWERING, YOU ARE SAYING THAT IS NOT PRESERVED. IS THAT WHAT YOU ARE RESPONDING TO?

NO. ACTUALLY WHAT I AM GOING TO RESPOND TO IS THERE IS ACTUALLY, AND FLORIDA LAW IS, THERE IS SOME OPINIONS OUT THERE THAT TALK ABOUT PRESERVATION OF THE FLORIDA RULE, AND THERE IS A DIFFERENCE, A DISTINCTION BETWEEN THE PRESERVATION AND THE ACTUAL MERITS DECISION. NOW, THE PRESERVATION, AS THE COURT KNOWS, THE DEFENDANT HAS TO, FIRST, SAY I WANT TO STRIKE FOR CAUSE THIS PARTICULAR VENIRE PERSON. THE COURT, THEN, DOES NOT. THE DEFENDANT HAS TO EXERCISE HIS PREEMPTORY CHALLENGE, AND USE ALL HIS PREEMPTORYS AND THEN REQUEST ADDITIONAL PREEMPTORY CHALLENGES, POINTING SPECIFICALLY TO A VENIRE PERSON THAT HE WAS EXERCISE THE ADDITIONAL PREEMPTORY, AND THAT THE COURT DOES NOT GRANT THAT TOM. THAT IS THE PRESERVATION.

DID THAT HAPPEN HERE?

THAT DID NOT HAPPEN HERE, BUT THE DEFENDANT'S PRESERVATION --

LET'S STOP FOR A MINUTE HERE. YOU AGREE THAT, IN TERMS OF PRESERVATION, THE ISSUE HAS BEEN PRESERVED.

I AGREE THAT IT HAS BEEN PRESERVED. I DON'T AGREE THAT MR. LAPIN WAS SUBJECT TO A FOR-CAUSE --

NO. NO. NO. BUT TURN TO GET MERITS NOW.

AS TO THE MERITS, HE STILL HAS TO ESTABLISH THAT THE VENIRE PEOPLE THAT HE WOULD HAVE REMOVED, USING THE ADDITIONAL PREEMPT OTHERS, WERE BIASED, AND THIS COURT HAS SAID THAT, IN CASTRO VERSUS STATE, AND I APOLOGIZE FOR THE COURT. I DIDN'T FIND THAT UNTIL I --

DON'T WE HAVE A NUMBER OF CASES THAT SUGGEST TO THE CONTRARY, AND THAT IS THAT, ALL YOU HAVE TO DO IS IDENTIFY THOSE JURORS, BECAUSE BY THE CHALLENGE FOR CAUSE NOT BEING GRANTED, THEORETICALLY, IF IT SHOULD HAVE BEEN, YOU HAVE LOST A POTENTIAL PREEMPTORY THAT YOU HAD TO USE.

I WOULD DISAGREE. ANOTHER PREEMPTORY, THEN, THAT YOU LOST, IS THE ONE THAT YOU WOULD HAVE USED ON JOE BLOW OR YOU KNOW, THE NAME. I THOUGHT THAT THAT WAS --

IN THOSE OPINIONS WHERE THE COURT HAS VERY GENERALLY USED THAT LANGUAGE, THAT ALL YOU HAVE TO DO IS POINT TO AN OBJECTIONABLE JUROR, AND THAT IS THE LANGUAGE THE COURT USES, WHEN YOU LOOK AT THOSE OPINIONS, THOSE ARE PRESERVATION CASES. THOSE ARE CASES WHERE THE DEFENDANT DID NOT SPECIFICALLY IDENTIFY --

BUT ISN'T THAT THE THEORY, THAT IS THE THEORY BEING THAT I WOULD HAVE HAD A PREEMPTORY, WHICH I DON'T HAVE TO SHOW A CAUSE, REASON, YOU KNOW, IN EXERCISING A PREEMPTORY ON THAT JUROR THAT I WOULD HAVE IDENTIFY. THE COURT ERRED IN DENYING MY CHALPHONING CAUSE, SO I AM HAVING TROUBLE WITH --

MAYBE THAT WAS THE THEORY PRIOR TO ROSS, BUT THIS COURT, IN CASTRO VERSUS STATE, AND I WILL FILE A SUPPLEMENTAL AUTHORITY, BUT THAT IS 446 SO.2D 1038, WITH WHERE THE COURT ACKNOWLEDGED.

YOU ARE SAYING OUR RULE, NOW, IS THAT THERE ACTUALLY HAS TO BE A SHOWING OF A CHALLENGE GROUNDS FOR CAUSE.

YES. AND --

WITH THE IDENTIFIED ADDITIONAL JURORS THAT THE DEFENDANT WOULD HAVE STRUCK.

THAT THOSE ADDITIONAL JURORS THAT THE DEFENDANT WOULD HAVE EXERCISED THE PREEMPTORY CHALLENGE, THAT THEY WERE NOT QUALIFIED, THAT THEY WERE TRULY OBJECTIONABLE.

RIGHT.

NOT THAT JUST DEFENDANT WANTED THEM OFF.

BUT THEY WOULD HAVE BEEN SUBJECT TO CHALLENGE FOR CAUSE.

EXACTLY. AND IN THE ASTRO CASE, WHAT THIS COURT -- IN THE CASTRO CASE, WHAT THIS COURT TALKED ABOUT HE HAD PRESERVED. HE POINTED OUT, STRIKE FOR CAUSE, IT WASN'T GRANTED. HE POINTED OUT THE VENIRE PEOPLE HE WOULD HAVE REMOVED PREEMPTORILY AND THE COURT DIDN'T GIVE HIM THE ADDITIONAL PREEMPT OTHERS, AND THE REASON HE WANTED TO REMOVE THAT JUROR WAS BECAUSE HE HAD READ A NEWSPAPER, A PRETRIAL PUBLICITY CLAIM, AND HE CLAIMED THAT THAT INDIVIDUAL SHOULD HAVE BEEN, THAT HE WAS ENTITLED TO THE ADDITIONAL PREEMPTORY, BECAUSE THAT VENIRE PERSON, AND THE COURT LOOKED AT THAT.

THERE IS NO SHOWING IN THIS RECORD THAT THE IDENTIFIED PEOPLE WOULD HAVE BEEN SUBJECT TO CHALLENGE FOR CAUSE.

NO. IN FACT --

HELP US WITH ASSUMING THAT WE APPLY THE OTHER RULE, AND THAT IS THAT YOU DON'T HAVE TO MAKE A SHOWING FOR CHALLENGE FOR CAUSE, THAT YOU JUST HAVE TO IDENTIFY THOSE PERSONS THAT YOU WOULD HAVE PREEMPTORILY STRUCK. WOULD YOU GO BACK AND ADDRESS, THEN, THE CHALLENGE FOR CAUSE AS TO THE DEATH ROW CORRECTIONAL OFFICER?

OKAY. HE WANTED TO STRIKE MR. LAPIN, BECAUSE HE HAD, HAD HE SERVED AS A CORRECTIONAL OFFICER, AND THIS, THIS COURT, WELL, ACTUALLY, I BELIEVE MAYBE IT IS A DISTRICT COURT OF APPEAL CASE IN THE LUSK, ACTUALLY I GUESS THE LUSK CASE, THE COURT HAD SAID THAT A CORRECTIONAL OFFICER PER SE, IS NOT SUBJECT TO A STRIKE FOR CALL.

WELL, CAN YOU, LET ME -- FOR CAUSE.

WELL, CAN YOU, LET ME ASK YOU THIS QUESTION. THE LAST THING THAT HAPPENED BEFORE STRIKE FOR CAUSE WAS MADE, WAS THE DEFENSE LAWYER ASKED, ON PAGE 389, WHILE YOU WERE AT FSP, WERE YOU EVER THE VICTIM OF ANY ASSAULTS? YES. THEN HE SAID DO YOU THINK THAT THERE IS SOMETHING IN YOUR OWN MIND THAT IF THIS HAD TAKEN PLACE IN A CORRECTIONAL INSTITUTE, WOULD FACTOR IN, REGARDLESS OF WHAT THE JUDGE SAID, AS FAR AS AFFECTING YOUR MIND? AND THEN THE COURT SAYS YOU CAN ANSWER THAT, IF THIS IS GOING TO AFFECT YOUR DECISION, AND THE PROSPECTIVE JUROR, I DON'T KNOW. NOW, THE I DON'T KNOW, WOULD YOU AGREE THAT IS A EQUIVOCAL RESPONSE? I DON'T KNOW?

WELL, I THINK HE IS TALKING VERY GENERALLY.

YOU MAY THINK THAT BUT IT JUST FOLLOWED, I READ THAT, WHEN BEFORE HE WAS ASKED WHETHER HE WAS A VICTIM OF ANY ASSAULTS, SO AT THAT POINT THERE, IS NO, I DON'T HAVE MR. DOSS, I DON'T HAVE ANY OTHER QUESTIONS, AND MR. PROSECUTOR DOESN'T GET UP, TO TRY TO REHABILITATE HIM, AND THE JUDGE DOESN'T, AND SO AT THAT POINT THE NEXT QUESTION IS STRIKE BASED ON HIS EXPERIENCE AS A CORRECTIONAL OFFICER AT FSP, SO IT ISN'T JUST THAT HE IS SAYING THAT BECAUSE HE IS A PRISON GUARD, I WANT HIM OFF. HE IS JUST PAGE BEFORE -- HE HAS JUST, THE PAGE BEFORE, SAID THAT HE IS THE VICTIM OF ASSAULT. WE KNOW THAT THIS IS A CASE INVOLVING ASSAULTS, AND PRECEDING THAT, ARE MANY OTHER PAGES, SOME OF THAT JUSTTIS ANSTEAD READ AND SOME THAT I SEE HERE, OF HIM TALKING ABOUT HIS FIRM VIEWS

ABOUT THE DEATH PENALTY, IN LIGHT OF HIS EXPERIENCE AT THE PRISON, SO MOST OF THE CASES THAT WE HAVE, THERE IS SOMETHING, EVEN AFTER SOMEONE SAID THESE KINDS OF THINGS, THERE IS ATTEMPTS --

ACTUALLY WE DO HAVE THREE ATTEMPTS HERE.

WHERE IS THAT?

RIGHT AFTER WHERE YOU WERE READING, MR. DAWSON, HIMSELF, REHABILITATES HIM. HE SAYS IF THE JUDGE INSTRUCTS YOU TO SET YOUR PERSONAL FEELINGS ASIDE, WOULD THAT BE SOMETHING YOU CAN OR CAN'T SET ASIDE, AND MR. LAPIN SAYS I BELIEVE I CAN.

AND THAT IS IT FOR REHABILITATION?

I BE IT IS, AS -- I BELIEVE IT IS, AS TO THAT SPECIFIC QUESTION. EARLIER DURING HIS QUESTIONING --

THERE IS NOTHING AFTER THAT, AND I GUESS WHAT, MAYBE WE ALL HAVE THE SAME RECORD HERE, YOU ARE SAYING, AND I AGREE WITH YOU, THERE, THERE IS NOT A PER SE RULE THAT SOMEBODY IS A PRISON GUARD OR SOMETHING THAT CAN'T SET ON A CASE, BUT IF WE ALL EVER THOUGHT OF A CASE WHERE A PRISON GUARD SHOULDN'T BE SETTING ON, IT IS A CASE INVOLVING A PRISON SETTING ON DEATH ROW, WHERE THIS GUY WORKED FOR EIGHT YEARS, PLUS IS HE A VICTIM OF ASSAULTS, SO YOU KNOW, EVEN IF HE DIDN'T MAKE ALL THESE OTHER STATEMENTS, I THINK, DO YOU NOT THINK THAT A REASONABLE, THAT THE QUESTION WOULD BE DO WE HAVE A REASONABLE DOUBT THAT THIS PERSON COULD SET AND PUT HIS PERSONAL FEELINGS ASIDE AND SIT AS A FAIR AND IMPARTIAL JUROR?

I THINK ACTUALLY THE STANDARD IS ABUSE OF DISCRETION AND THE REASON WE HAVE THAT AND I THINK WHAT MR. BUSBY IS ASKING THE COURT TO DO IS BASICALLY DE NOVO REVIEW, PUT YOURSELF IN THE PLACE OF THE TRIAL JUDGE, AND THE TRIAL JUDGE WAS IN THE BEST POSITION, BASED UPON HIS OBSERVATIONS, THE Demeanor OF MR. LAPIN. EARLIER IN THE INQUIRY HE IS ASKED, DO YOU THINK THAT, BASED ON YOUR EXPERIENCES AS CORRECTIONAL OFFICER THAT WORKED ON DEATH ROW THAT, THERE MIGHT BE THINGS IN YOUR MIND THAT ARE AGGRAVATING CIRCUMSTANCES, THAT YOU WOULD CONSIDER OUTSIDE THOSE THAT THE JUDGE READ YOU, PARTICULARLY ONCE YOU LEARN THAT THIS IS A HOMICIDE, AND HIS ANSWER IS, NO, I DON'T THINK SO. I THINK I CAN DETERMINE WHAT THE JUDGE WANTS AND GO BY WHAT THEY FEEL ARE THE PARAMETERS WE ARE SUPPOSED TO STAY WITHIN. I THINK, THROUGHOUT HIS, THE INQUIRY, YES, HE BRINGS HIS EXPERIENCE WITH HIM, BUT HE TELLS THE JUDGE I CAN FOLLOW YOUR INSTRUCTIONS. THE ONE QUESTION THAT JUSTICE PARIENTE, YOU HAD READ, AND POINTED OUT, I BELIEVE THAT WAS A GENHIGHESTED -- GENERALIZED AND WITHOUT THE BENEFIT OF WHAT THIS COURT LOOKED AT, AFTER THE VENIRE PERSON SAYS I AM GOING TO BRING IN ALL OF MY PERSONAL BELIEFS AND THEN THEY ARE INSTRUCTED, CAN YOU FOLLOW THE COURT'S INSTRUCTIONS, THEN THAT IS WHAT THEY LOOK TO.

WHERE DID THAT HAPPEN?

PAR ONE?

-- PARDON?

THERE ARE GENERAL QUESTIONS BY THE JUDGE, WHERE HE SAYS YES, SIR, YES, SIR, YES, SIR, AND THEN THERE IS VOIR DIRE, AND AFTER HE MAKES THOSE STATEMENTS, THERE IS NO ATTEMPT TO GO BACK AND, QUOTE, REHABILITATE THIS JUROR. YOU ARE SAYING THERE DIDN'T NEED TO BE, BECAUSE HE DIDN'T EXPRESS DOUBTS ABOUT WHETHER HE COULD SET THIS ASIDE.

I AM ACTUALLY SAYING THAT IT OCCURRED. I THINK THE FACT WHERE MR. DOSS ASKED, IF THE JUDGE, AND THIS COMES RIGHT AFTER THE QUESTION THAT, DO YOU THINK, SOMETHING IN YOUR OWN MIND, THAT YOU LEARN THAT THIS HAS TAKEN PLACE IN A CORRECTIONAL INSTITUTION, WOULD FACTOR IN, REGARDLESS OF WHAT THE JUDGE SAID, AND HE SAYS ION. AND EVEN IF THAT IS EQUIVOCAL, THEN HE IS ASKED IF THE JUDGE INSTRUCTS YOU TO SET YOUR PERSONAL FEELINGS ASIDE, WOULD THAT BE SOMETHING YOU CAN OR CAN'T SET ASIDE, HE SAYS I CAN. I BELIEVE I CAN.

HE DOESN'T SAY I CAN.

I BELIEVE I CAN.

DID YOU AGREE THAT, WHEN WE ARE LOOKING AT ANSWERS, AND I KNOW WE HAD A CASE LAST MONTH, WHERE THERE WAS A DEFENSE ATTORNEY, AND THEY WERE SAYING WHAT ARE YOUR VIEWS ABOUT THE DEATH PENALTY AND SORT OF ASKING THESE GENERAL QUESTIONS AND THEY ARE GOING I DON'T KNOW, THAT IT IS DIFFERENT, WHEN YOU ARE TALKING ABOUT SOMEONE WHO HAS HAD% AL -- WHO HAS HAD PERSONAL EXPERIENCE OF THE EXACT SAME TYPE THAT THE CASE IS GOING TO BE, THAT IS DIFFERENT, AS TO HOW THE COURT OR THE TRIAL JUDGE HAS TO LOOK AT IT, IS DIFFERENT, THAT IF THE PERSON ANSWERS AS TO WHAT THE PERSONAL EXPERIENCES HAVE BEEN IN THEIR LIFE.

NO. THE QUESTION IS CAN THEY SET THEIR PERSONAL EXPERIENCES ASIDE.

SO YOU DON'T THINK THE FACT THAT, WHEN WE ARE LOOKING AT THIS, THAT THE ANSWER, IF THE JUDGE INSTRUCTS YOU TO SET YOUR PERSONAL FEELINGS ASIDE, WOULD THAT BE SOMETHING YOU CAN OR CAN'T DO, THAT IT WOULDN'T MATTER, IN TERMS OF WHAT PRECEDED IT, WHETHER IT WAS JUST A JOE CITIZEN, WHO HAS JUST SORT OF HAD, WATCHED MOVIES AND HAS HAD NOBODY IN THEIR FAMILY THAT HAS BEEN A VICTIM OF A CRIME, WHETHER THEY HAVE BEEN A POLICE OFFICER THAT SEES PEOPLE MURDERED ALL THE TIME, THAT THAT DOESN'T MATTER, IN TERMS OF HOW YOU EVALUATE THAT ULTIMATE RESPONSE?

I THINK THE STANDARD IS CAN YOU SET ASIDE YOUR PERSONAL FEELINGS, AND --

AS LONG AS A PERSON SAYS THAT THEY COULD, ASSUMING THEY SAID THAT, THAT THAT OBVIATES ANYTHING ELSE ABOUT -- OBVIATES ANYTHING ELSE ABOUT WHAT A JUROR, IN THEIR -- A JUROR, IN THEIR PERSPECTIVE, WOULD TRULY AFFECT THERE BEING IMPARTIAL?

I THINK THE JUDGE IS GOING TO LOOK AT THAT.

I MEAN THEIR EXPERIENCE, WHETHER A POLICE OFFICER, WHETHER A GUARD ON DEATH ROW, WHETHER THEY HAVE HAD FAMILY MEMBERS THAT HAVE BEEN VICTIMS OF CRIME. AS LONG AS A JUROR CAN SAY THEY CAN SET THEIR FEELINGS AS AID, THAT SHOULD BE ENOUGH TO SATISFY.

IF THE COURT DETERMINES THAT THEY, IN FACT, CAN SET THEIR FEELINGS ASIDE, THEN, YES, I DON'T THINK THERE IS A SPECIAL STANDARD FOR -- SPECIAL STANDARD FOR A VENIRE PERSON, BASED UPON THEIR EXPERIENCES. I WANT TO POINT OUT, DID THE DEFENDANT GET A FAIR, UNBIASED JURY. I SEE MY TIME IS OUT. I RESPECTFULLY REQUEST THAT THE COURT AFFIRM THE JUDGMENT OF THE TRIAL COURT.

ALL RIGHT. THE QUESTION WE HAVE, REALLY, AS TO FAIR AND IMPARTIAL JURY, WHEN THE DEFENDANT IS FORCED TO USE A PREEMPTORY CHALLENGE ON A PERSON HE SHOULD NOT HAVE HAD TO AND EXHAUSTS AND REQUESTS MORE THAN AND HE SPECIFICALLY IDENTIFIES PEOPLE HE WOULD NOT, HE WOULD HAVE USED THAT PREEMPTORY ON, THEN HE IS NOT --

SHE SAYS OUR LAW HAS CHANGED ON THAT.

I AM NOT AWARE OF ITS CHANGING. TROTTER, AS FAR AS I AM CONCERNED, IS STILL GOOD LAW AND IN FACT ROSS VERSUS OKLAHOMA FOLLOWS ALONG WITH WHAT THIS COURT HAS SAID IN TROTTER. NOW, THE MORE DIFFICULT QUESTION FOR ME IS OBVIOUSLY THAT SECOND ISSUE. YOU ARE HAVING PROBLEMS WITH IT AND I CAN UNDERSTAND IT, AND IT IS A DIFFICULT ISSUE FOR ME TO RAISE, BUT WE HAVE TO LOOK AT THE PRISON SETTING. YOU ASKED ABOUT BUSBY'S COMPLAINTS TO THE PRISON. VOLUME 78 RECORD 1086-TO-87, INVESTIGATOR SHANK AT TRIAL, CANDIDLY ADMITTED THAT THEY HAD NOT INVESTIGATED THE CLAIMS THAT BUSBY HAD MADE.

WHAT QUESTION WAS SPECIFICALLY ASKED AND WHAT WAS HIS SPECIFIC ANSWER?

WELL, THIS COMES ON, OUT OF MY ARGUMENT, BUT THIS IS THE SENSE. THEY HAD DONE NOTHING ABOUT, AS FAR AS 18 MONTHS, I WILL JUST READ THIS SENTENCE. HE COMPLAINED ABOUT THE THREATS BUT AFTER 18 MONTHS, THEY HAD DONE NOTHING ABOUT THEM, AS PRISON INVESTIGATOR SHANK CANDIDLY ADMITTED AT TRIAL. THAT WAS HIS TRIAL TESTIMONY, THAT BUSBY APPARENTLY HAD MADE COMPLAINTS TO THE PRISON AND THEY HAD DONE NOTHING ABOUT THEM.

IS THAT HIS REPORT OF WHAT BUSBY SAID TO HIM, OR IS THAT HIS REPORT OF HIM CHECKING, AS TO WHETHER ANYTHING HAD BEEN DONE?

ION IF SHANK HAD PERSONALLY INVESTIGATED THIS.

HE HAD TALKED TO BUSBY, OBVIOUSLY, AND IN ANSWER TO THAT QUESTION THAT YOU ARE READING, WASN'T HE JUST REFERRING TO WHAT BUSBY WAS SAYING, THAT IS THAT BUSBY WAS SAYING TO HIM, THAT HE HAD MADE THESE COMPLAINTS, AND THAT IN 18 MONTHS, THE AUTHORITIES HAD DONE NOTHING ABOUT IT.

YES.

AND YOU ARE SAYING THAT IS THE CLEAR STATEMENT ON THE RECORD, THAT WE HAVE ABOUT THAT.

THAT, WELL, THAT THE, FROM SOMEBODY OTHER THAN BUSBY, THAT, AND OF COURSE YOU HAVE GOT KINESKY, WHO IS CONFIRMING.

WHAT WAS THE RECORD CITE?

1086 TO 1087.

YOU ARE TALK ABOUT BUSBY.

YES.

WHAT IS THE DIFFERENCE BETWEEN HARASSMENT AND THREATS AND, AGAIN, GOING BACK TO JUSTICE LEWIS'S QUESTION EARLIER, ABOUT HIS STATEMENT ON JANUARY 3 AND JANUARY 7, IT SEEMS IT IS PRETTY CLEAR THAT WHAT BUSBY WAS SAYING IS THAT OTHER PEOPLE WERE HARASSING HIM, BECAUSE OF HIS RELATIONSHIP WITH GLOBE, NOT THAT THEY WERE THREATENING TO DO ANYTHING TO HIM. AND THAT HE WAS TIRED OF GETTING HARASSED AND BEING TREATED BADLY, AND THEREFORE HE WAS GOING TO DO SOMETHING ABOUT IT.

I WILL BE HONEST, I CAN'T RECALL IT BEING THAT NARROW AS TO SAYING, AS REFERRING TO JUST GLOBE.

CAN YOU POINT TO ANYWHERE IN HIS STATEMENTS, WHERE HE TALKS ABOUT BEING THREATENED, AS OPPOSED TO BEING HARASSED OR BOTHERED OR INSULTED?

NO, I CAN'T, AND I GUESS THE PROBLEM I AM HAVING IS I AM FAILING TO MAKE A DISTINCTION BETWEEN THE TWO, BECAUSE YOU ARE IN A PRISON ENVIRONMENT, WHERE IN BEING HARASSED IS ALMOST TANTAMOUNT TO BEING THREATENED, AND I MENTIONED THAT, AND, SEE, AGAIN, YOU HAVE TO REALIZE THIS IS A PRISON, A CLOSED ENVIRONMENT, WHERE HE CAN'T RUN AWAY. THERE IS NOBODY TO HELP HIM. I MEAN, THERE IS A PRISON PHRASE CALLED DOING YOUR OWN TIME, WHERE AN INMATE HAS TO GO IN THERE. IT IS PART OF THE INMATE CODE. THEY ARE NOT SUPPOSED TO GO TO THE PRISON. THEY ARE SUPPOSED TO SOLVE THEIR OWN PROBLEMS. IF I GET YOU IN TROUBLE AND YOU CONSULT ME, I CAN CALL 911. THERE IS NO 911 IN PRISON. YOU HAVE TO SOLVE YOUR OWN PROBLEMS, SO HARASS OR THREATEN IS THE SAME THING.

WHAT ABOUT THE STATE'S POSITION THAT THE EXPERT, HERSELF, TESTIFIED THAT IT WOULD TAKE SOME KIND OF A DEMAND FOR SEX OR SOMETHING LIKE THAT, TO TRIGGER THIS SYNDROME, AND THAT IT WOULD NOT, THAT SHE ANSWERED THAT IT WOULD NOT, JUST A DISCUSSION OR REQUEST OR WHATEVER, YOU KNOW, WOULD NOT DO THIS, AND THEREFORE THAT THE FACTS OF THIS CASE DO NOT CREATE A SUFFICIENT PREDICATE FOR --

OKAY. AGAIN, THERE IS A LONG DISCUSSION IN THE, THAT SHE HAS WITH, AT TRIAL. LET ME GIVE YOU THE PAGE CITES AND MAYBE I WILL EXPLAIN WHAT IS GOING ON HERE. VOLUME 78 PAGES 1105-TO-1106 AND PAGE 10 OF MY PREPLY BRIEF, AND HE SAYS -- REPLY BRIEF, AND HE SAYS, AND LET ME QUOTE HERE FOR SOMEONE WHO HAS SAFETY AS ISSUE AND HAS SUFFERED SEXUAL ABUSE AS A CHILD AND CONSTANTLY HAVING HARASSMENT AND BEING TOLD OF BEING RAPED OR BEING FORCED TO SUBMIT, COULD THAT BE A TRIGGER? YES, SHE SAYS, AND IF SOMEONE WAS TRIGGERED IN THAT MATTER, WOULD THEY INTERPRET THAT AS POSSIBLY IN THAT MANNER? YES, SIR. EVEN THOUGH POST DSE, HE MIGHT POSSIBLY INTERPRET THE SAME WAY? YES. THAT'S CORRECT. SO THE PROBLEM, AND I THINK YOU MAY BE HAVING THE SAME PROBLEM THE TRIAL JUDGE HAD, AND THAT IS SAYING THERE WAS NO IMMEDIATE THREAT, AND THAT IS WHAT THE LAW SAYS HAS TO BE IMMINENT. IMMEDIATE DOESN'T HAVE TO BE IMMINENT. A CONSTANT PERVASIVE THREAT THAT, IS A THREAT IN, AS SUCH. IT DOESN'T HAVE TO BE IMMINENT.

WHAT WAS SAID AT THE TIME THAT HE SUFFERED FROM PTSD, BECAUSE THE SUFFERING FROM PTSD AND THE IMPACT OF IT KIND OF WAIVES, FROM MY UNDERSTANDING OF THIS. IS THERE ANY EVIDENCE THAT HE WAS SUFFERING FROM DELUSIONAL, NOT DELUSIONAL, I FORGOT THE PHRASE, BUT THE REAL IMPACT OF THE --

SHE HAD NOT, SHE, NO, SHE DIDN'T, SHE HAS MADE THE DIAGNOSIS THAT, HE WAS SUFFERING FROM PTSD, AND THERE WAS NO TESTIMONY THAT YOU ARE CURED FROM THAT OR IT WANES AND WAXES AND WAXES AND WANES, BUT HE WAS SAYING THAT, BECAUSE HE SUFFERED -- BUT SHE WAS SAYING THAT BECAUSE HE SUFFERED FROM PTSD AND HAD NEVER FELT SAFE IN HIS LIFE, THAT BASED UPON THAT DIAGNOSIS AT THIS TIME, HE WAS UNDER IMMEDIATE, HE FELT, HE HAD A SUBJECTIVE BELIEF THAT HE WAS UNDER IMMEDIATE THREAT.

BUT SHE HAD NOT, HAS SHE EXAMINED HIM SINCE OR SPOKEN WITH HIM SINCE 1996?

I DON'T BELIEVE SO. I THINK THERE HAD BEEN SEVERAL YEARS THAT SHE HAD NOT SEEN HIM. BASED UPON THOSE REASONS, I THINK IT IS A DIFFICULT QUESTION. I HATE TO SAY I SHARE YOUR UNDERSTANDING BUT IT IS DIFFICULT. IT IS THE PRISON ENVIRONMENT, AND WHO BUSBY IS, AND WHEN YOU MIX THOSE TWO TOGETHER, A DISASTER RESULTED. FOR THOSE REASONS I ASK THE COURT TO REVERSE FOR A NEW TRIAL. THANK YOU.

CHIEF JUSTICE: THANK YOU, BOTH, AGAIN. THE COURT NOW WILL STAND IN RECESS.