Oscar Ray Bolin, Jr. v. State of Florida

GOOD MORNING EVERYONE. JUSTICE QUINCE IS RECUSED ON THE FIRST CASE. AFTER WE HAVE ARGUMENT ON THAT FIRST CASE, HOWEVER, SHE WILL RETURN TO THE BENCH AND, FOR THE BENEFIT OF THOSE ON THE SECOND CASE, WE WILL GO RIGHT TO THAT CASE AFTER THE CONCLUSION OF THIS FIRST CASE. FIRST CASE IS BOLIN VERSUS STATE OF FLORIDA. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. I AM DOUG CONNOR, REPRESENTING THE APPELLANT IN THIS CASE, OSCAR RAY BOLIN. THIS IS A DIRECT APPEAL FROM A CONVICTION FOR FIRST-DEGREE MURDER AND A SENTENCE OF DEATH. ON DECEMBER 5, 1986, THE BODY OF TERRY MATTHEWS WAS FOUND 20 FEET OFF A RURAL ROAD IN PASCO COUNTY. SHE HAD APPARENTLY BEEN ABDUCTED FROM THE LOCAL POST OFFICE AROUND 2:45 A.M. THAT SAME MORNING, KILLED BY A COMBINATION OF BLUNT TRAUMA AND STAB WOUNDS. NOW, THERE IS NO LEAD IN THE INVESTIGATION UNTIL JULY 1990, WHEN DETECTIVES TALKED TO CHERYL COLBY, THAT WAS BOLIN'S EX-WIFE, IN INDIANA, AND SHE REFERRED THEM TO PHILLIP BOLIN, THE APPELLANT'S STEP BROTHER, WHO WAS ALSO LIVING NEARBY IN INDIANA AT THAT TIME. PHILLIP TOLD LAW ENFORCEMENT THAT HE WAS AN EYEWITNESS TO APPELLANT BEATING A WOMAN TO DEATH, A WOMAN WHO WAS WRAPPED IN A SHEET. PHILLIP HAS SINCE RECANTED HIS TESTIMONY SEVERAL TIMES AND THEN REAFFIRMED IT, WHEN PRODDED BY LAW ENFORCEMENT.

HE TESTIFIED AT THIS TRIAL, THAT CORRECT?

HE DID, YES.

HE TESTIFIED THAT HE DID WITNESSED TEST TEST TEST TEST TEST TEST TEST TEST TEST TEST TEST TEST TEST TEST TEST TEST I DIDN'T SEE THAT. IS THAT IN THIS TYPE OF RECORD, THE FOLLOW-UP?

NO. THAT IS ONE OF THE BIG PROBLEMS WITH THE SITUATION, IS THE FACT THAT, YOU KNOW, CLEARLY YOU KNOW, THE PROSECUTOR COULD HAVE GOTTEN UP AND ASKED FURTHER QUESTIONS OF THESE PROSPECTIVE JURORS. THE COURT COULD HAVE AND OFTEN DOES, IN THIS KIND OF CIRCUMSTANCE, WHEN IT APPEARS THAT THE, YOU KNOW, THE JURY GIVES ANSWER -- THE JURY GIVES ANSWERS THAT HE IS NOT GOING TO REQUIRE, HE IS NOT GOING -- THE JURAT IS NOT GOING TO GIVE THE DEFENDANT HIS --

IS THAT A FAIR CHARACTERIZATION, I THINK, IS THE ISSUE HERE, WHEN WE EXAMINE THIS COLLOQUY. THAT IS THAT WE ALL KNOW, IF YOU ASK JURORS JUST OPEN ENDED QUESTIONS LIKE, YOU KNOW, WOULD YOU LIKE TO HEAR THE DEFENDANT GIVE HIS SIDE OF THE STORY? I THINK MOST JURORS ARE GOING TO, AND I REALIZE THAT MAY NOT BE THE EXACT QUESTION THAT DEFENSE COUNSEL ASKED, OR YOU KNOW, WOULD YOU LIKE THE DEFENDANT TO PRESENT EVIDENCE? WHAT DO YOU THINK I HAVE AN OBLIGATION TO DO, AS THE DEFENSE ATTORNEY. MOST JURORS COME TO THAT BOX COMPLETELY UNFAMILIAR WITH OUR ADVERSARIAL SYSTEM, AND I AM CONCERNED, TOO, ABOUT THE CONTEXT HERE, OF THE WAY THESE QUESTIONS WERE ASKED, AND THEN USING THE JURORS' OR PROSPECTIVE JURORS' RESPONSES, YES, WE WOULD LIKE TO HEAR WHAT THE DEFENDANT HAS TO SAY, OR I THINK YOU SHOULD PUT ON A CASE FOR THE DEFENDANT. USING THOSE, AFTER THEY HAVE BEEN ASKED IN THAT SORT OF OPEN ENDED WAY, HELP ME WITH THAT.

WELL, I THINK THE RESPONSE IS REALLY BEYOND THAT. THEY WEREN'T JUST SAYING WE WOULD LIKE TO HEAR. IT WAS SAYING YOU ARE JEOPARDIZING YOUR CLIENT. YES, WE WOULD REALLY, IF YOU, IF WE WANT TO HEAR BOTH SIDES OF THE STORY, IF YOU DON'T PUT ON A CASE, YOU ARE DEFAULTING THE CASE.

ISN'T THERE SOME OBLIGATION AT SOME POINT, THOUGH, TO SAY, UNDER OUR SYSTEM, THE STATE HAS THE COMPLETE BURDEN. THE LAW IS THE DEFENDANT DOES NOT HAVE ANY BURDEN. STAY MUTE AND PUT THE CASE, YOU KNOW, AND IF THE JUDGE TELLS YOU THAT IS WHAT THE LAW IS, DO YOU UNDERSTAND AND WILL YOU FOLLOW THAT LAW? WAS ANY OF THAT DONE IN THIS CASE?

WELL, NO. THERE WASN'T. YOU KNOW --

YOU WEREN'T THE TRIAL LAWYER. EYE WASN'T, NO.

IT SEEMED LIKE THE --.

I WASN'T, NO.

IT SEEMED LIKE THE LAWYER ENGAGED IN AN AWFUL LOT -- I AM NOT SURE WHAT THE BEST APPROACH TO EXAMINATION OF PROSPECTIVE JURORS IS FROM THE DEFENSE STANDPOINT, BUT IT SEEMED LIKE, READING THIS, HE ENGAGED IN A GREAT DEAL OF THESE QUESTIONS THAT WOULD NATURALLY ELICIT RESPONSES. SURE, I WOULD LIKE TO HEAR FROM THE DEFENDANT. YEAH, I EXPECT YOU TO PUT ON A CASE FOR YOUR SIDE, AND THAT KIND OF THING, WITHOUT FOLLOWING UP WITH REFERENCE TO WHAT THE LEGAL RULES ARE IN A TRIAL LIKE THIS.

WELL, AGAIN, IT IS THE BURDEN, IS IT REALLY ON THE DEFENSE COUNSEL TO DO THAT?

WELL, TELL ME WHAT YOU, AS THE MOST EGREGIOUS EXCHANGE, PICK OUT ONE OF THE JURORS THAT YOU FEEL IS THE MOST SIGNIFICANT. THERE IS ONE JUROR IN PARTICULAR, THAT SEEMED TO BE QUITE WILLING TO ENGAGE DEFENSE COUNSEL. IT WAS QUITE A LIVE EXCHANGE, ON -- A LIVELY EXCHANGE, BUT PICK OUT ONE THAT YOU THINK IS THE STRONGEST, AS FAR AS THE QUESTIONS ASKED AND THE RESPONSES BY THE JUROR, THAT INDICATE PRECONCEIVED OR BIAS OR REQUIREMENTS OF THE DEFENSE, TO PROVE THE CASE. HELP US.

OKAY. WELL, CLEARLY, TWO JURORS IN THE SAME POSITION, GLASS AND GALE, WHERE THEY DIDN'T REALLY SAY ANYTHING. IT WAS JUST BY SHOW OF HANDS, SO THEY DON'T HAVE EXACTLY WHAT YOU WANT, IN TERMS OF A LIVELY EXCHANGE WITH DEFENSE COUNSEL AT ALL. IT IS JUST A SHOW OF HANDS-ON THAT. SO, REALLY, IT IS JUROR OLMOS, WHO IS THE ONE THAT HAD THE EXCHANGE WITH DEFENSE COUNSEL, AND DEFENSE LAWYER SAYS, WELL, HOW MANY OF YOU FEEL THAT, ONCE THE STATE HAS PRESENTED THEIR CASE, YOU STILL WANT TO HEAR MORE? PROSPECTIVE JUROR OLMOS, OF COURSE, I WANT AS MUCH FACTS AS I CAN RECEIVE.

THAT IS A PRETTY REASONABLE ANSWER.

I AGREE. THAT'S FINE. NOTHING WRONG THERE. I AM JUST GOING THROUGH THE WHOLE THING.

SEE IF YOU CAN PICK OUT WHAT YOU CONSIDER TO BE THE MOST SERIOUS?

OKAY. WELL, LAWYER FOLLOWS UP, WOULD I HAVE TO DO SOMETHING? PROSPECTIVE JUROR OLMOS. PRESENT EVIDENCE. YOU WOULD HAVE TO PRESENT WITNESSES. LAWYER, WHAT IF I DIDN'T? PROSPECTIVE JUROR, THAT WEAKENS YOUR CASE BASICALLY. THEN HE SAYS HOW MANY HERE WOULD WANT TO HEAR WHAT MR. BOLIN HAD TO SAY? RAISE YOUR HANDS.

THAT IS WHERE I AM GOING. ISN'T THAT SORT OF AN UNFAIR QUESTION? I MEAN, IF YOU ASK THE

GENERAL PUBLIC WOULD YOU LIKE TO HEAR FROM THE DEFENDANT OR WOULD YOU LIKE TO HEAR WHAT HE HAD TO SAY, WE WOULD SAY YES. AGAIN, WE ARE TRYING TO ESTABLISH WHETHER HE WAS, YOU KNOW, HAD A STATE OF MIND THAT WOULD MAKE HIM BIASED, UNFAIR, PARTIAL?

I THINK IN THE FOLLOW-UP, BECAUSE HE SAYS, AND YOU WOULD REQUIRE ME TO PUT ON BOTH SIDES OR I WOULDN'T BE DOING MY JOB, YOU KNOW, AND THEN THE PROSPECTIVE JUROR OLMOS SAYS THAT'S TRUE, AND --

HELP ME PLACE THIS ISN'T CONTEXT. TYPICALLY WHEN THIS IS DONE, THE JUDGE IS GIVEN SOME INSTRUCTION. THE PROSECUTOR HAS GOTTEN UP AND IS TRYING TO MINIMIZE THE DEFENSE EMPHASIS. WE WILL SAY I BEAR THE BURDEN OF PROOF. THE STATE BEARS THE BURDEN OF PROOF. WE HAVE GOT TO PROVE IT BEYOND A REASONABLE DOUBT AND THEN GOES ON FOR A WHILE, AND THEN WHEN DEFENSE COUNSEL STANDS UP, THEY GO THROUGH, AGAIN, THE DIFFERENT STANDARDS OF PROOF IN DIFFERENT CASES IN CRIMINAL CASES. PRIOR TO THIS DIALOGUE WITH JUROR OLMOS OR ANY OF THE OTHER JURORS, WHAT HAPPENED TO INSTRUCT THIS JURY AS TO THE DIFFERENCE IN THE BURDENS OF PROOF?

THE JUDGE, WHEN THE JURORS FIRST CAME INTO THE COURTROOM, THE JUDGE SAID TO THEM, FIRST CONCEPT IS THAT EVERY CITIZEN THAT IS ACCUSED OF A CRIME IS PRESUMED INNOCENT. DO YOU EACH UNDERSTAND THAT CONCEPT AND AGREE TO ABIDE TO IT? PROSPECTIVE JURORS, YES. ALL RIGHT. SECOND CONCEPT IS THE BURDEN OF PROOF LIES SOLELY UPON THE PROSECUTING AUTHORITY. DEFENDANT HAS NO BURDEN AND NEEDS TO PROVE NOTHING. DO YOU EACH UNDERSTAND THAT CONCEPT AND AGREE TO ABIDE BY IT? PROSPECTIVE JURORS, YES.

IS THAT IT? DID THE STATE TALK ABOUT IT? DID THE DEFENSE COUNSEL, WHEN HE GOT UP PRIOR TO THIS DIALOGUE WITH THE JURORS, REEMPHASIZE OR CLARIFY? THAT IS THE NORM.

WELL, IN THIS CASE, IT WAS THE DEFENSE THAT ACTUALLY WENT LAST.

RIGHT. THAT IS NORM.

THE JUDGE WAS FIRST.

RIGHT.

AND THEN THE PROSECUTOR DID SAY SOMETHING ON THIS, BUT THIS DEFENDANT, AS THE JUDGE TOLD YOU, UNDER THE LAW IS PRESUMED INNOCENT, AND THE STATE HAS THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT.

DID ANYBODY DISCUSS, THOUGH, THAT THE DEFENDANT BEARS NO BURDEN OF PROOF, HAS NO OBLIGATION UNDER OUR CONSTITUTION, TO TESTIFY, IN THOSE MATTERS THAT ARE TYPICALLY DISCUSSED, FROM MY EXPERIENCE? I AM JUST ASKING.

I DON'T THINK THE ACTUAL MENTION OF THE DEFENDANT TESTIFYING WAS MADE BY EITHER THE JUDGE OR THE, YOU KNOW, PROSECUTOR. IT WAS ONLY DEFENSE COUNSEL WHO MENTIONED WOULD THE DEFENDANT BE REQUIRED TO TESTIFY.

WAS THE JURY EVER INSTRUCTED THAT, UNDER OUR FEDERAL AND STATE CONSTITUTION, THE DEFENDANT DOES NOT HAVE TO TESTIFY?

NO. NO. THAT IS THE POINT, IS THAT, AFTER THIS, THESE EXCHANGES WITH THE JURORS TOOK PLACE, YOU KNOW, THE JUDGE DIDN'T INTERJECT HIMSELF AND SAY --

YOU SAY IT IS THE POINT, AND I AM VERY SENSITIVE TO CHALLENGES FOR CAUSE, BUT I THINK

THAT, WHEN A JUROR IS ASKED COMMON SENSE QUESTIONS AND GIVES COMMON SENSE ANSWERS AND THE DEFENSE ATTORNEY KNOWS BETTER, KNOWS WHAT THE LAW IS, THAT IT IS, IT IS EVERYONE'S OBLIGATION, INCLUDING THE DEFENSE ATTORNEY'S, BUT TO SAY THAT, DO YOU UNDERSTAND AS THE JUDGE SAID INITIALLY, IS THE PRESUMPTION OF INNOCENCE. THAT DIDN'T HAPPEN HERE, AND I DON'T KNOW THAT THOSE ARE THE TYPES OF BIASED ANSWERS THAT WOULD PREVENT THIS JUROR FROM BEING FAIR AND IMPARTIAL, AND THAT YOU KNOW, WHEN JUSTICE ANSTEAD ASKED YOU WHAT IS THE MOST EGREGIOUS THING HE SAID, HAVE YOU FINISHED WHERE THE EXCHANGE WAS, IS THERE ANYTHING WORSE THAT OLMOS SAID ABOUT THAT, OR THE QUESTION OF THE PREMONITION AND THE NAME "BOLIN" WAS THE SECOND PART OF WHAT I WAS ASKING YOU ABOUT.

RIGHT. WELL, I GUESS THE JUDGE QUESTIONED IF YOU DON'T PUT HIM ON. YOU KNOW, HE SAID HE WOULD WEIGH THE EVIDENCE, WHO PUTS ON ONE SIDE AS PRO AND ONE IS CON. WHOEVER PUTS ON THE MOST. THAT IS HOW HE WOULD DECIDE THE CASE. HE SAID THAT. AND THEN HE SAID I SEEMED TO RECOGNIZE THE NAME AT FIRST AND ASSOCIATED IT WITH DISASTER AND IT WAS A MURDER OR SOMETHING LIKE. THAT I KNOW IT HAPPENED A WHILE AGO.

AT THAT POINT, THEN THERE, IS NO FOLLOW-UP.

WELL, DEFENSE COUNSEL SAYS YOU HAD A PRECONCEIVED NOTION WHEN YOU CAME IN, AND THE PROSPECTIVE JUROR OLMOS SAID PREMONITION, RATHER THAN PRECONCEIVED.

NOW, HE WAS STRUCK STRUCK, CORRECT? YOU EXERCISED PREEMPTORY.

YES, MA'AM.

DO YOU GO INTO WHERE THE JUDGE, WELL, ASSUMING HE SHOULD HAVE BEEN STRUCK, THEN HE GOES THROUGH THE TWO OTHER JURORS THAT DEFENSE ATTORNEY WANTED TO STRIKE, AND THEY BOTH DIDN'T END UP SITTING ON THE JURY, BY THE TIME THE JURY DELIBERATED, COX AND BRADLEY. DOESN'T THAT, WHETHER IT IS A WAIVER OR, DOESN'T THAT EFFECT THE ISSUE AS TO WHETHER THERE WAS REVERSIBLE ERROR IN ASSUMING OLMOS SHOULD HAVE BEEN EXCHANGED -- EXCUSEED FOR CAUSE, ISN'T THE FACT THAT THE TWO JURORS WANTED TO STRIKE OR DID NOT SERVE, COX AND BRADLEY.

IT IS NOT TRUE THAT THEY DIDN'T SERVE. I THOUGHT THEY DIDN'T, I THOUGHT THEY BOTH DID NOT DELIBERATE IN THE FINAL --

COX DIDN'T TESTIFY, DIDN'T SERVE, BUT BRADLEY DID, BECAUSE THE DEFENDANT SPECIFICALLY WAIVED THE OBJECTION TO BRADLEY AND SAID HE WANTED TO KEEP HIM ON THERE, RIGHT?

AT THE END OF, THE CONCLUSION OF THE TRIAL.

AS TO BRADLEY, HOW CAN THERE NOT BE A WAIVER, WHEN THE DEFENDANT HAD THE SPECIFIC OPPORTUNITY TO REMOVE HIM AND TO SPECIFICALLY SAID HE WANTED HIM ON --

I THINK IT IS A VERY DIFFERENT THING, YOU KNOW, THE POINT IS WHEN, DURING THE JURY SELECTION, I, YOU KNOW, HE ASKED FOR ADDITIONAL PREEMPT OTHERS, AND YOU KNOW, THEN ONCE YOU HAVE BEEN GOING THROUGH A TRIAL, OBVIOUSLY YOU KNOW, ALL THE TIME YOU KNOW, DEFENDANTS, DEFENSE COUNSEL'S MIND WILL CHANGE ABOUT WHETHER SOMEONE IS A GOOD JUROR FOR THE DEFENSE OR NOT A GOOD JUROR. BUT YOU KNOW, THE POINT IS, AS THE ERROR WAS COMMITTED WHEN THE CHALLENGE FOR CAUSE WAS DENIED, AND AN ADDITIONAL PREEMPTORY STRIKE. NOW, IF THE DEFENSE COWIN COUNSEL WAS GOING TO -- IF DEFENSE COUNSEL WAS GOING TO WASTE IT ON SOMEONE THAT HE HAD LATER ON, THAT REALLY, I DON'T THINK, A QUESTION THAT COMES IN.

YOU ARE SAYING FOR EXAMPLE, EVEN WITH OLMOS, SAY OLMOS SAT AND THEN AT THE END, AT SOME POINT THE JUDGE GAVE HIM ANOTHER OPPORTUNITY TO STRIKE ALMAS, AND THE JUDGE SAID, NO, I HAVE CHANGED MY MIND, I DON'T WANT TO STRIKE HIM, THAT WE WOULD FIND THAT THERE IS A WAIVER THERE? HOW WOULD THAT BE REVERSIBLE ERROR IN THAT CASE?

IN THAT CASE I THINK IT WOULD BE REVERSEIBLE ERROR. THAT IS A DIFFERENT CASE THAN WHAT WE HAVE HERE. HERE WE HAVE BASICALLY A PRESERVATION OF THE FAILURE TO GRANT THE CHALLENGE FOR CAUSE, AND REQUEST FOR ADDITIONAL PREEMPTORY, AND IT DOESN'T REALLY MATTER WHETHER IT TURNS OUT TO BE THAT THE DEFENSE COUNSEL WOULD HAVE USED IT ON A JUROR THAT HE WOULD HAVE LATER, YOU KNOW, SAY WELL, YOU KNOW, SHE IS NOT SUCH A BAD JUROR AFTER ALL. IT JUST --

WHAT DO YOU HAVE TO DO, IN ORDER TO COMPLY ? YOU HAVE GOT TO ASK FOR ADDITIONAL PREEMPT OTHERS.

YES.

AND -- ADDITIONAL PREEMPTORYS.

YES.

AND IDENTIFY A JUROR.

YES.

SO HE IDENTIFIED COX AND BRADLEY.

YES.

AND AS JUSTICE CANTERO SAID TO ME, HE GAVE HIM AN OPPORTUNITY AND HE SAID, NO, I WANT BRADLEY. COX, I GUESS, IS A SEPARATE POINT, BUT ACTUALLY COX, WHO HE DIDN'T WANT TO HAVE SIT, HE THEN FOR THE THAT HE WANTED HER TO SIT.

WHEN --

OR HIM TO SIT.

WHEN HE DIDN'T SHOW UP FOR COURT AND CALLED IN.

YOU ARE SAYING WE WANT TO REVERSE A WHOLE MURDER CONVICTION ON SOMETHING THAT, AGAIN, WE WANT TO MAKE SURE WE HAVE A FAIR AND IMPARTIAL JURY, BUT IN TERMS OF, AND WE CAN'T EVER SO -- WE CAN'T EVER SHOW PREJUDICE OF SOMEONE WHO IS IMPARTIAL, BUT NOBODY IDENTIFIED WAS OF CONCERN THAT ACTUALLY ENDED UP DELIBERATING IN THIS CASE.

ACTUALLY THERE WAS JUROR GALE, WHO WAS ONE OF THOSE CHALLENGED FOR CAUSE ON THIS POINT, AND THEN ACTUALLY SAT ON THE JURY AND DELIBERATED.

HE DIDN'T EXERCISE A PREEMPTORY OR ASK FOR A PREEMPTORY AS TO THAT JUROR?

NO. HE HAD RUN OUT OF PREENT OTHERS, AND HE -- PREEMPTORYS, AND HE REQUESTED ADDITIONAL PREEMPTORYS, HE IDENTIFIED THIS GALE PERSON AS THE PERSON HE WANTED TO STRIKE, HE -- YOU HAVE GOT A NUMBER OF OTHER ISSUES AND THE CLOCK IS TICKING.

OKAY. I WOULD LIKE TO BRIEFLY TOUCH ON ISSUE TWO, WHICH IS THE REPLACEMENT OF JUROR COX BY AN ALTERNATE WHICH WAS BASED ON JUROR COX CALLED IN WITH BREATHING PROBLEMS AND WAS GOING TO GO TO HIS DOCTOR OR AN EMERGENCY ROOM, HE CAULKED TO

THE ASSISTANT AND THE JURY MANAGER AND THE JUDGE BASICALLY SAID HE SOUNDED REAL BAD, DIDN'T SOUND LIKE HE WOULD BE ABLE TO SHOW UP FOR COURT OR NOT, AND THE DEFENDANT OBJECTED TO HIM BEING REPLACED BY ALTERNATE WITHOUT SOME SORT OF SHOWING THAT HE WOULDN'T BE ABLE TO YOU KNOW, REJOIN THE JURY IN THE AFTERNOON.

WHAT DO WE KNOW ABOUT THAT JUROR, BASED ON THE RECORD? DO WE KNOW IF IT WAS AGE OR PRIOR INDICATION AFTER HEALTH ISSUE OR DO WE KNOW?

THERE WAS. HE IS IN HIS SIXTIES AND APPARENTLY HE HAD A PROBLEM WITH EMPHYSEMA AND THAT HE OFTEN USED, YOU KNOW, CARRIED OXYGEN WITH HIM WHEN HE WENT PLACES, BUT HE HADN'T HAD OXYGEN WHEN HE WAS SITTING ON THIS TRIAL.

BUT THE RECORD DOES ESTABLISH THOSE FACTORS. IS THAT CORRECT? SO THAT THIS IS NOT OUT OF THE BLUE IN THE SENSE OF IT IS CONSISTENT WITH WHAT WAS ON THE RECORD, EVEN BEFORE THAT PHONE CALL WAS MADE, THAT RIGHT?

YES. THE QUESTION IS REALLY JUST WHETHER HE WOULD HAVE AND WANTED TO OR WOULD HAVE BEEN ABLE TO RETURN TO THE AND TO SERVE LATER IN THE DAY. AND IT IS JUST BASED ON SPECULATION. WE, YOU KNOW, ALL WE ASKED IS THAT SOME INQUIRY BE MADE, BEFORE JUST YOU KNOW, REPLACING HIM WITH AN ALTERNATE.

ISN'T THAT THE KIND OF IN-TRIAL DECISION IN WHICH WE GIVE THE TRIAL COURT THE MOST DISCRETION OF ANY KIND OF DECISION? THESE KINDS OF THINGS WHERE THE JUROR IS SICK. YOU DON'T KNOW WHEN THE JUROR IS GOING TO BE ABLE TO COME BACK, AND THE DEFENSE HAD OBJECTED TO THIS JUROR ANYWAY, AND WHY SHOULDN'T WE GIVE THE TRIAL COURT WIDE LATITUDE IN THAT KIND OF SITUATION, TO MAKE THAT DECISION WHETHER TO EXCUSE THE JUROR OR NOT FOR ILLNESS.

WELL, WE SHOULD GIVE WILL HIM YOU KNOW, BROAD DISCRETION BUT ONLY WHEN IT IS BASED ON SOME SORT OF FACTUAL BASIS, NOT JUST BASED ON --

THERE WAS A TACTULE BASIS HERE. -- A FACTUAL BASIS HERE. HE WENT TO THE EMERGENCY ROOM, DIDN'T HE?

WE DON'T KNOW WHETHER HE WENT TO THE EMERGENCYRY ROOM OR TO HIS DOCTOR. WE KNOW HE DID SEEK MEDICAL ATTENTION BUT WE DON'T KNOW WHETHER HE WAS RELEASED OR WOULD HAVE BEEN BACK.

BUT HE DIDN'T SLEEP THE PREVIOUS NIGHT, RIGHT?

HE HAD SOME TROUBLE SLEEPING.

HE HAD FACTS IN ORDER TO MAKE A DECISION, SO NOW THAT HE HAD FACTS, WHY SHOULDN'T WE GIVE HIM WIDE LATITUDE IN DETERMINING UNDER THOSE FACTS, HE SHOULD EXCUSE THE JUROR FOR ILL INES?

I THINK HE NEEDED A -- ILLNESS?

I THINK HE NEEDED A PRESENT CONDITION OF THE JUROR, WHETHER THE JUROR WAS SO SICK, WASN'T JUST SICK IN THE MORNING WHEN HE CALLED IN BUT WOULD NOT BE ABLE TO SERVE ON THE JURY THAT DAY. AT SOME POINT IN THE AFTERNOON. I AM SAYING THAT THE TRIAL JUDGE ABUSES HIS DISCRETION IF HE JUST REPLACES THE SITTING JUROR WITH AN ALTERNATE IN THE, WHEN THERE IS NO SHOWING WHEN THE JUROR CAN RETURN.

YOU ARE DISPUTING THE ADEQUACY OF THE INQUIRY.

CORRECT.

YOU SAID YOU WANTED TO JUST TOUCH THAT ISSUE BRIEFLY.

I WANT TO GO ON TO ISSUE THREE, WHICH IS REGARDING THE DNA TESTIMONY BY DAVID WALSH, AND THIS, HE WAS PERMITTED TO TESTIFY THAT THE DNA SAMPLE IN DNA SAMPLE AND BOLIN'S WERE A MATCH. THIS SITUATION, I THINK WHAT IS MOST STRIKING ABOUT IT IS THAT THE PROSECUTOR ADMITTED THAT THIS WAS IMPROPER, UNDER THE NATIONAL RESEARCH COUNCIL GUIDELINES, THAT HE KNEW THAT THE PERSON SHOULDN'T TESTIFY THAT IT IS A MATCH, BECAUSE IT IS NOT PROPER TO SAY WHEN THERE WAS FIVE BANDS OF THE SAMPLE, WHICH MATCHED FIVE BANDS OF BOLIN'S BUT THE SIXTH BAND OF BOLIN'S, WE DON'T KNOW WITH THE SAMPLE WHETHER IT WAS TOO SMALL, WHICH THEY SPECULATED IT MIGHT HAVE BEEN, OR WHETHER THERE WASN'T A BAND THERE, IN WHICH CASE BOLIN SHOULD BE EXCUSED, EXCLUDED.

BUT THAT ALL CAME OUT, DID IT NOT, WHAT YOU JUST STATED, IN OTHER WORDS, THE EXPERT'S TESTIMONY ABOUT FA THAT THERE WAS, HE WAS ABLE -- ABOUT THAT THERE WERE, HE WAS ABLE TO IDENTIFY A MATCH OF FIVE OF THE SIX RELEVANT BANDS.

HE WAS ALLOWED TO TESTIFY THAT THIS WAS A MATCH, AND PROSECUTOR --

I AM ASKING WHETHER OR NOT HE TESTIFIED THAT THERE WAS A MATCH THE FIVE OF THE SIX. HE DIDN'T TESTIFY THAT THERE WAS A MATCH OF THE SIX OF THE SIX RELEVANT BANDS. HE TESTIFIED THAT HE COULD ONLY IDENTIFY A MATCH OF FIVE, IS THAT CORRECT?

WELL, IT WASN'T QUITE THAT WAY, BECAUSE WHAT THE PROSECUTOR FIRST ASKED, IN YOUR OPINION WAS A MATCH TO THE BANDS AND THE SEMEN SAMPLE, COMPARED TO THE BANDS IN OSCAR RAY BOLIN'S BLOOD? SUGGESTION. THEY WENT THROUGH THAT. THE JUDGE RULED IT WAS LAW OF THE CASE. AND SO THEN, I JUST WANT TO QUALIFY MY LAST QUESTION, ASK HIM WITH A REASONABLE DEGREE OF CERTAINTY, IS THERE A MATCH. SO IT WAS --

THERE WAS NO OBJECTION TO THAT LAST QUESTION, WAS THERE?

I --

YOU ARE QUOTING FROM PAGE 1165-66.

YES.

AND THERE WAS NO QUESTION, WAS THERE?

THE JUDGE HAD ALREADY RULED. DEFENSE COUNSEL COULDN'T. THE DEFENSE COUNSEL HAD SPENT THREE PAGES ARGUING AGAINST ALLOWING HIM TO DO IT AND THE JUDGE RULED AGAINST HIM AND HE COULDN'T OBJECT AT THAT POINT, BECAUSE THE JUDGE HAD ALREADY SAID GO AHEAD AND ASK IT. AND YOU KNOW, BOTH PROSECUTOR AND THE COURTS SAY, WELL, YOU SHOULD HAVE ASKED FOR A FRYE HEARING. THE FACT OF THE MATTER IS THE LAUST CASE DOESN'T APPLY WITH DNA EVIDENCE. THIS -- THE LAW OF THE CASE DOESN'T APPLY WITH DNA EVIDENCE. THIS RULING IN THE PRIOR TRIAL WAS BASED ON BRIM VERSUS STATE, A SECOND DCA DECISION WHICH THIS COURT OVERRULED LATER ON, SAYING THAT YOU DANTE JUST INTRODUCE OPINIONS -- YOU CAN'T JUST INTRODUCE OPINIONS BY PEOPLE, UNLESS THERE IS A BASIS THAT THAT IS APPROVED IN SCIENTIFIC RESEARCH.

WAS THERE CROSS-EXAMINATION OF THE DNA EXPERT?

WAS THERE A CROSS-EXAMINATION?

YES. YES, THERE WAS.

IN THAT CROSS-EXAMINATION, WAS THE ATTORNEY ALLOWED TO GO THROUGH WITH THE EXPERT, DETERMINING WHETHER, WHAT HE MEANT BY MATCH, AND THAT MATCH REALLY HE MEANT FIVE THE SIX AND NOT SIX OF THE SIX?

CORRECT.

SO, THEN, AT THAT POINT, WHAT IS, WHAT WAS THE REMAINING HARM, WHEN THE DEFINITION OF MATCH, AS THE EXPERT USED IT ON DIRECT, HAS BEEN CLARIFIED?

BECAUSE THE JURY MAY HAVE TAKEN THE, YOU KNOW, HE WAS STILL SAYING HE COULD CALL IT A MATCH, AND THE JURY MAY SAY, WELL, YOU KNOW, AN EXPERT CAN CALL IT A MATCH, BECAUSE THERE ARE FIVE OUT OF SIX THAT ARE THERE, THAT WOULD MAYBE DISCREDIT ILLUSTRATE THE -- DISCREDIT THE DEFENSE WITNESS, AND THE NATIONAL RESEARCH, TOO, SAYS THAT YOU CAN'T CALL IT A MATCH.

CHIEF JUSTICE: IF YOU WANT TO PAUSE AT THIS TIME, THE MARSHAL TELLS US THAT YOU ARE IN YOUR REBUTTAL TYPE.

IN THIS KIND OF SITUATION, JUST BECAUSE THERE WAS A CROSS-EXAMINATION AND THERE WAS, IN FACT, HIS SUPERVISOR, SHE, ALSO, TESTIFIED FOR THE STATE, WHEN SHE SAID, NO, YOU CAN'T CALL FIVE OUT OF SIX A MATCH. SHE CAN SAY THAT FIVE BANDS MATCH FIVE IN THE SAMPLE, BUT YOU KNOW, JUST LIKE WHEN YOU HAVE A LOTTO TICKET, YOU KNOW, IF THERE IS SUPPOSED TO BE SIX NUMBERS AND FIVE NUMBERS ARE THE SAME AS THE WINNING NUMBER BUT THE SIXTH ONE IS BLANK. YOU KNOW, YOU CAN'T SAY THAT THAT IS A WINNING TICKET.

IF SOMEBODY SAYS THAT HE HAS A WINNING TICKET AND THEY SAY, AND HE GETS ASKED, WELL, YOU MEAN SIX OUT OF THE SIX NUMBERS MATCHED? AND YOU SAY, WELL, NO, IT IS ONLY FIVE OF THE SIX NUMBERS. AT THAT POINT, THE QUESTIONER KNOWS THERE REALLY ISN'T A MATCH. IT WAS A FIVE OUT OF SIX MATCH, SO WHAT IS AFTER THAT CONVERSATION IS COMPLETED, WHAT IS THE REMAINING HARM TO THE QUESTIONER?

IT IS JUST THAT YOU KNOW, THE JURY IS OBVIOUSLY FREE TO BELIEVE OR DISBELIEF -- DISBELIEVE WHICHEVER OF THE EXPERTS THEY WANT, AND IF THEY BELIEVE THE EXPERT WHO IS GIVING AN OPINION WHICH IS CONTRARY TO ESTABLISH SCIENCE IN THIS FIELD, I MEAN, THEY ARE FREE TO DO IT. THERE IS NO WAY, THEY ARE NOT REALLY KNOWING WHETHER THE DEFENSE COUNSEL IS REALLY GIVING THEM THE STRAIGHT TRUTH OR WHETHER THIS, YOU KNOW, THE EXPERT IS. SO WHEN A JUROR, WHEN THEY ARE FREE TO BELIEVE ANY OF THE EXPERTS, THEY CAN MISUSE THE TESTIMONY AND WE CAN'T FIND HARMLESS ERROR HERE. THAT IS MY POSITION. I WOULD LIKE TO RESERVE THE BALANCE OF MY TIME.

MAY IT PLEASE THE COWER. MY NAME IS BOB LANDRY REPRESENTING THE STATE IN THIS APPEAL. WITH RESPECT TO THE FIRST ISSUE ON JUROR ALMAS, I WOULD LIKE TO POINT OUT THAT, DURING THE INQUIRY OF ALMAS, I THINK DEFENSE COUNSEL WAS ASKING A GROUP OF JURORS, AND THE QUESTION WAS CAN YOU ALL FOCUS ON WHETHER THE STATE HAS PROVEN HIM GUILTY BEYOND A REASONABLE DOUBT, AND ALL OF THE JURORS, INCLUDING ALMAS, WAS IN THAT GROUP, ANSWERED YES, AND THAT IS AT PAGE 187-188 OF THE RECORD. WITH REGARD TO ALMAS, WE SUBMIT THAT, AGAIN, THERE WAS A, SIMPLY A NUMBER OF COMMON SENSE QUESTIONS PROPOSED BY DEFENSE COUNSEL, AND JUROR ALMA SRTION S, LIKE A LOT OF -- ALMAS, LIKE A LOT OF OTHER JURORS THAT APPEAR FOR THE FIRST TIME IN A COURTROOM SETTING, WAS GIVING COMMON SENSE ANSWERS. IT IS INTERESTING TO NOTE THAT, WHEN ALMAS WAS FINISHED WITH HIS INQUIRY, WITH HIS COLLOQUY, THE TRIAL JUDGE THEN INQUIRED OF THE DEFENSE WHETHER OR NOT THEY WANTED TO SUBMIT ANY OFFERS FOR CHALLENGE AT THAT

TIME, AND THAT IS, I THINK, AT PAGE 197 OF THE RECORD, AND DEFENSE DIDN'T TAKE THAT OPPORTUNITY AT THAT TIME. THEY DIDN'T SEEM TO INDICATE THAT THERE WAS A PROBLEM AT THAT TIME. SUBSEQUENTLY, AFTER THERE WAS MORE INQUIRY BY, REGARDING OTHER JURORS,, THE DEFENSE MOVED TO CHALLENGE ALMAS AND GLASS FOR CAUSE.

WAS THAT AFTER, HAD ALMAS, WHAT ABOUT THE COMMENT ABOUT THE PREMONITION AND YOU KNOW, AGAIN, TRYING TO SAY HERE IS THE STATE OF THE RECORD, WHICH LEAVES SOME QUESTION AS TO WHAT HE MEANT, AND TRYING TO FIND CASE LAW TO SAY, WELL, WHO IS RESPONSIBLE, THEN, TO FOLLOW-UP, TO MAKE SURE WE UNDERSTAND. WHAT IS THE PREMONITION? HE HAD A DREAM? THIS GUY WAS A MURDERER? YOU HEARD ABOUT IT? AND NORMALLY WE HAVE SOMETHING THAT IS IN FOLLOW-UP, SO I GUESS THE FIRST QUESTION IS DO WE HAVE ANY CASE LAW THAT SAYS, WHEN IT IS, THE ANSWER IS LEFT KIND OF HANGING LIKE THAT, WHETHER YOU KNOW, WHOSE DUTY OR RESPONSIBILITY IS IT TO CLARIFY THE RECORD, AND SECOND, YOU KNOW, WHAT, SHOULD THAT BE A CONCERN HERE, THAT THAT QUESTION WAS JUST KIND OF LEFT OR THAT ANSWER WAS JUST KIND OF LEFT --

I DON'T THINK, TO ANSWER THE LAST PART OF THE QUESTION FIRST, I DON'T THINK IT IS A CONCERN HERE THAT THERE IS SOMETHING THAT SHOULD LEAD TO REVERSIBLE ERROR. I THINK THERE WAS A QUESTION THAT PRECEDED THAT, ALONG THE LINES OF HAS ANYONE HEARD ANYTHING ABOUT THE CASE OR READ ANYTHING ABOUT THE CASE OR SOMETHING OF THAT NATURE, AND I THINKAL MASS IS SAYING SOMETHING -- AND I THINK ALMAS IS SAYING SOMETHING LIKE THE NAME SOUNDS FAMILIAR. I THINK I HAVE HEARD THE NAME BEFORE, AND INDEED THERE WERE NUMBER OF JURORS WHO HAD INDICATED THAT PREVIOUSLY THEY HAD STORIES IN THE PAST OR UP IN ACCOUNTS IN THE PAST REGARDING BOLIN, BUT THEY COULD PUT ALL OF THAT ASIDE. NOW, I THINK WHAT ALMAS IS SAYING IS SOMETHING ALONG THE LINES, I SOMEHOW ASSOCIATE THE NAME BOLIN WITH A DISASTER OR SOMETHING OF THAT NATURE.

HE IS MORE LIKE A STAGE HAND, SORT OF MORE THEATRICAL IN THE WAY, THAT IS YOUR INTERPRETATION. WE ARE LOOKING AT A COLD RECORD, BUT YOU ARE SAYING IT IS REALLY I HAVE HEARD THAT NAME AND IT SOUNDED, I ASSOCIATE IT WITH --

I ASSOCIATE IT WITH SOME KIND OF A DISASTER OR SOMETHING, AND YOU KNOW, I READ INTO THAT, MAYBE IT IS MY INTERPRETATION, THAT HE WAS SIMPLY SAYING THAT I SIMPLY RECALL HAVING READ SOMETHING ABOUT THE CASE OR SOMETHING OF THAT NATURE, AND THAT IS WHY, BUT I MEAN, THE RECORD CERTAINLY STOPS AT THAT POINT, IN TERMS OF FURTHER INQUIRY ABOUT IT.

THAT IS MY QUESTION. WHEN IT STOPS LIKE THAT, WHERE IS, SHOULDN'T SOMEBODY IN THE COURTROOM TRY TO GET IT CLARIFIED?

YOU KNOW, IN HINDSIGHT IT IS 20/20. OBVIOUSLY EVERYTHING COULD HAVE BEEN, PERHAPS, DONE DIFFERENTLY OR OTHERWISE. I THINK THE STATE HAD ALREADY MADE ITS INQUIRE OF THE GROUP OF JURORS THAT ALMAS WAS A PART OF. I SUPPOSE THAT, IF THAT HAD REGISTERED WITH PEOPLE, THEY COULD HAVE PURSUED THAT MORE.

LET ME ASK YOU THAT QUESTION, BECAUSE YOU SAID HE WAITED TO CHALLENGE. AFTER, WHEN HE ASKED TO CHALLENGE ALMAS FOR CAUSE --

RIGHT.

-- DID HE STATE THE REASONS THAT WAS THE ANSWERS ABOUT BOLIN AND THE PREMONITION?

I DON'T KNOW THAT HE IS TALK ABOUT PREMONITION. I THINK HE IS TALKING ABOUT THAT CERTAINLY IN GLASS, GLASS'S CASE, I THINK HE IS TALKING ABOUT THAT THESE JURORS WOULD REQUIRE ME TO PUT ON TESTIMONY BUT THE PROSECUTOR?

BOTH THE PROSECUTOR AND THE DEFENSE ATTORNEY DID NOT INDICATE THAT ANYTHING WITH THEM WAS A PROBLEM, AND THE TRIAL COURT IS BASICALLY SAYING THAT, HEY, THESE JURORS SAY THAT THEY CAN FOLLOW THE LAW AND THAT IS NOT REALLY A PROBLEM. I WOULD LIKE TO MENTION FOR A COUPLE OF MINUTES, ON THE GALE AND GLASS PROBLEM, WHICH, I GUESS, IS A SECOND ASPECT OF THE JUROR CHALLENGE MADE IN THIS COURT. THE, I THINK THE RECORD REFLECTS THAT THERE WERE A NUMBER OF CONFUSING AND COMPOUND QUESTIONS THAT WERE BEING PRESENTED TO THE JURORS. FOR EXAMPLE, THE DEFENSE WOULD SAY WHO WOULD WANT TO HEAR FROM BOLIN, AND THEN ATTACHED TO THE REST OF THE SENTENCE, AND WHO WOULD WANT ME TO PUT HIM ON? THINGS OF THAT NATURE. NOW, INTERESTING, THE COMPLAINT THAT IS BEING MADE HERE AND BELOW, WAS THAT GALE AND GLASS HAD DEMONSTRATED THAT THEY WOULD REQUIRE AFFIRMATIVELY, THAT THE DEFENDANT PUT ON TESTIMONY, AND THAT IS, THE RECORD DOESN'T REFLECT THAT. WHAT HAPPENS, WHAT THE RECORD REFLECTS IS THE DEFENSE IS ASKING THESE QUESTIONS, AND THEN SAYING, WHO, AND HE IS APPARENTLY GETTING BACK THE PHYSICAL INTERPRETATION THAT IS IT INCLUDES GALE AND GLASS. NOW, FURTHER MORE, I WOULD SUBMIT THAT, ON PAGE 292 OF THE RECORD, THE INDICATION IS QUITE TO THE CONTRARY, BECAUSE THE DEFENSE ATTORNEY IS FOLLOWING UP HIS QUESTION. HE SAYS, HE INDICATES THAT GALE AND GLASS ARE TAKING A POSITION THAT, QUOTE, THEY WOULDN'T WANT TO HEAR OR REQUIRE ME TO PUT MR. BOLIN ON THE STAND. ANYBODY? GLASS, GALE, STRAQUIDINE, ANYBODY ELSE, MARSHAL? SO HE IS INDICATING THAT GLASS AND GALE ARE NOT REQUIRING ME TO DO. THAT SO I SUBMIT THAT THE RECORD REFLECTS THAT, WHATEVER MISPERCEPTION OR MISCONCEPTION THAT THE DEFENSE HAD, WAS RESOLVED. AND ONE OF THE JURORS, I THINK IT WAS, I FORGET THE JUROR'S NAME NOW, BUT DURING THAT SAME INQUIRY, ONE OF THE JURORS IS TELLING THE DEFENSE ATTORNEY I DON'T UNDERSTAND YOUR QUESTION. YOUR QUESTION IS CONFUSING, SO AFTER IT WAS CLARIFIED, GALE AND GLASS ARE NO LONGER A PROBLEM. AS A MATTER OF FACT, THE ONLY TWO JURORS, DURING THIS COLLOQUY, WHO CONTINUE TO INSIST, WHO CONTINUE TO INSIST THAT THE DEFENSE IS REQUIRED TO TAKE THE STAND, ARE BILBY AND PRUITT, AND THE STATE MOVED TO DISQUALIFY THEM FOR CAUSE, BECAUSE THEY COULDN'T BE IMPARTIAL, AND THE COURT GRANTED THAT OVER DEFENSE COUNSEL'S OBJECTION. AND THAT IS, I BELIEVE, AT PAGE 292 AND PAGE 313 OF THE RECORD, SO THE ONLY PROBLEM JURORS, IN THAT EXCHANGE, WERE BILBY AND PRUITT, AND THEY WERE REMOVED BY CAUSE FOR THE STATE, OVER DEFENSE COUNSEL'S OBJECTION. NOW, AS HAS BEEN POINTED ON THE, THE DEFENSE EXERCISED PREEMPTORY IN GLASS. GALE DID SIT, BUT GALE AS I POINTED OUT IN THE BRIEF AND IN THE RECORD, GALE IS NOT A PROBLEM. SUBSEQUENTLY, WE GET THE LAST CHALLENGES, I GUESS THAT ARE BEING MADE, THE LAST ARGUMENT THAT IS BEING MADE, AND THAT IS TO BRADLEY AND COX, AND COX BECAME SICK. COX WAS INITIALLY, THE DEFENSE COMPLAINED THAT COX WOULD REQUIRE US TO PUT ON EVIDENCE, AND THAT IS NOT WHAT COX SAYS. COX SAYS INITIALLY THAT HE WOULD LIKE TO HEAR IT, AND THEN, WHEN THE FOLLOW-UP QUESTION WAS GIVEN TO COX, WHAT IF THE JUDGE INSTRUCTS YOU THAT THE LAW DOES NOT REQUIRE THAT, THEN WILL YOU REQUIRE HIM TO TESTIFY? AND HE SAYS NO. AND BRADLEY IS THE SAME WAY IN THAT REGARD. BRADLEY GIVES SIMILAR ANSWER TO THAT KIND OF INQUIRY. NOW, COX SUBSEQUENTLY BECOMES SICK, BECOMES ILL, HAS BREATHING PROBLEMS, HE HAS EMPHYSEMA. HE IS 60 YEARS OLD. HE THOUGHT HE COULDN'T BRING HIS OXYGEN TANK TO THE COURTHOUSE AFTER 9/11, THINGS OF THAT NATURE, AND I THINK THE TRIAL COURT REALLY WANT W WENT OUT OF ITS WAY TO -- REALLY WENT OUT OF ITS WAY TO TRY AND RESOLVE THIS AND TO TRY TO LET ANYBODY VOICE AN OPINION AS TO HOW TO HANDLE IT, AND IT BECAME QUITE CLEAR THAT MR. COX WAS NOT GOING TO BE ABLE TO MAKE IT TO COURT. I THINK THERE HIS CASE LAW THAT WE HAVE CITED IN OUR BRIEF OUT OF THE DCA'S, IN WHICH A JUROR WHO SHOWS UP LATE CAN BE REPLACED BY ALTERNATE. AND LET THERE BE NO MISTAKE ABOUT IT. THERE IS NO PROBLEM WITH THE ALTERNATE. JUDGE, JUROR TUTTLE, THERE IS NO PROBLEM VOICED ANYWHERE IN THE RECORD ABOUT EITHER OF THE TWO ALTERNATES THAT HAD BEEN SELECTED. NOW, BRADLEY IS ANOTHER CASE, INSTANCE IN WHICH THE DEFENSE IS COMPLAINING HERE, AND WITH BRADLEY, SOME TIME DURING THE MIDDLE OF THE TRIAL, BRADLEY ANNOUNCES OR TELLS A BAILIFF THAT I JUST REALIZE THAT I RECOGNIZED A WITNESS,

WHO IS A CUSTOMER OF MINE AT THE HOME DEPOT WHERE I WORK, AND I DON'T KNOW IF THAT IS IMPORTANT FOR ANYONE TO KNOW OR NOT KNOW. SO THE COURT HEARS THIS, AND THEY BRING BRADLEY IN TO BE INQUIRED OF, AND BRADLEY SAYS NOT A PROBLEM FOR ME. I CAN DECIDE THIS CASE BASED ON THE EVIDENCE, AND I JUST THOUGHT SOMEONE SHOULD KNOW ABOUT IT, SO DEFENSE COUNSEL IS GIVEN THE OPPORTUNITY TO INQUIRE ABOUT IT. THE COURT, AT THAT POINT, THE DEFENSE INDICATES, WELL, WE WOULD LIKE TO CHANGE BRADLEY. WE WOULD LIKE TO REMOVE BRADLEY, AND THE COURT SAYS, WELL, I AM NOT GOING TO DO IT AT THIS TIME. BRING IT UP LATER AT ANOTHER TIME, BECAUSE WE WANT TO PROCEED WITH THE TESTIMONY AT THIS TIME, SO AT THE END OF THE TESTIMONY, THE ENTIRE TESTIMONY, THE PROSECUTOR, MR. HALL KETIS, SAYS WHAT ARE WE GOING TO DO ABOUT BRADLEY? HAVE WE DECIDED WHAT WE ARE GOING TO DO ABOUT BRADLEY, AND THE JUDGE SAYS THAT'S RIGHT. SO HE CALLS THE DEFENSE COUNSEL UP AND S SAID WHAT IS YOUR THOUGHT ON BRADLEY? AND THE DEFENSE SAYS WE HAVE CHANGED OUR MIND. WE WITHDRAW OUR OBJECTION, AND THE COURT SAYS HAVE YOU CONFERRED WITH MR. BOLIN ABOUT THAT? SO HE GOES BACK AND CONFERS WITH MR. BOLIN, AND THEY BOTH COME UP AND THEY SAY,IA, WE WANT TO KEEP BRADLEY ON. SO THE JUDGE SAYS, OKAY, KEEP BRADLEY ON. AND THE JUDGE ANNOUNCES THAT IF YOU REALLY WANTED BRADLEY IN EXCHANGE FOR THE OTHER ALTERNATE, I WOULD HAVE GRANTED IT, SO WE SUBMIT THAT HE WAS GIVEN EVERYTHING AND ANYTHING THAT THE LAW REQUIRES IN TERMS OF THE JURY. THERE WERE NO IMPROPER JURORS WHO SAT IN THIS CASE, WHO COULD NOT DECIDE THE CASE, BASED MERELY ON THE EVIDENCE THAT WAS PRESENTED, AND WE WOULD ASK THE COURT TO REJECT THE DEFENSE COUNSEL'S ARGUMENT ON THAT. WITH REGARD TO JUROR COX, AS HAS ALREADY BEEN POINTED OUT, HE WAS, HE BECAME SICK, AND HE JUST COULDN'T, HE COULDN'T PROCEED. TRIAL COURT MADE INQUIRY. THE TRIAL COURT HAD TOOK THE INPUT OF EVERYBODY INVOLVED, AS TO WHAT SHOULD BE DONE FACTUALLY. THE COURT ENTERTAINED A LEGAL RESEARCH BEING DONE ON IT. THE PROSECUTOR SAID WE HAVE THIS DCA CASE, THIS AND RAID CASE, WE WOULD -- THIS ANDRADE CASE THAT WE WANT THE COURT TO TAKE A LOOK AT, AND THE PROSECUTION SAID WE HAVE MADE OUR POSITION CLEAR, SO IT CERTAINLY CANNOT BE SAID THAT THE JUDGE ABUSED HIS DISCRETION AND NO REASONABLE JUROR OR JURIST OR REASONABLE PERSON IN GENERAL WOULD NOT HAVE TAKEN THE POSITION THAT THIS TRIAL JUDGE DID IN THIS INSTANCE. NOW, GETTING ON TO THE THIRD ISSUE OF THE --

BEFORE YOU GET TO THAT, I HAVE ONE QUESTION ON THE PREEMPTORY AND FOR-CAUSE OBJECTIONS. BEFORE THE JURY WAS IMPANELED, DID THE DEFENSE COUNSEL HAVE AN OPPORTUNITY TO RENEW THE OBJECTIONS, TO RENEW THE OBJECTIONS OR WAIVE THOSE ISSUES?

I THINK HE DID, AND WHAT HAPPENS IN ESSENCE, AT PAGE 450 OR 460 OF THE RECORD OR THEREABOUTS, THEY GET CONFIRMATION FROM BOLIN THAT HE HAS PARTICIPATED AND IS AWARE OF WHAT DEFENSE COUNSEL HAS DONE AND BASICALLY GIVING HIS APPROVAL TO WHAT HAS HAPPENED. NOW, SUBSEQUENTLY, JUST BEFORE THE TESTIMONY STARTS, IS WHEN THE DEFENSE RENEWS THE CHALLENGE AND RENEWS THE REQUEST THAT THEY WANTED AITIONAL PREEMPT OTHERS, SO THAT THEY COULD HAVE GONE AFTER BRADLEY AND COX, AND THE COURT SAYS, WELL, IT IS NOTED FOR THE RECORD AND THAT KIND OF THING. BUT I THINK, TO ANSWER YOUR QUESTION, I THINK THAT THERE IS A BURDEN AND THERE IS A REQUIREMENT THAT THE DEFENDANT CERTAINLY POINT OUT, SO THAT THE RECORD IS CLEAR WHAT THEIR COMPLAINT IS AS TO WHAT PARTICULAR JURORS. AS TO THE DNA TESTIMONY, YOU KNOW, THIS IS KIND OF AMAZING THAT IT, I SUBMIT THAT THE QUESTION THAT IS BEING PRESENTED ON APPEAL HERE, THAT THE TRIAL JUDGE REASONABLY RULED ON THE BASE OF THE LAW OF THE CASE, IS NOT WHAT HAPPENED, AND THIS IS LIKE THE CABALLERO CASE, WHERE THIS COURT DECIDED A COUPLE OF WEEKS AGO, THAT THERE BASICALLY IS NO RULING, ERRONEOUS RULING OR RULING OF ANY KIND BY THE TRIAL COURT THAT HAS TO BE REVIEWED BY THIS COURT. WHAT HAPPENED WAS BEFORE THE BEGINNING OF TESTIMONY, THE DEFENSE SAYS, ASKED THE JUDGE TO HAVE THE RECORD REFLECT THAT THE PRIOR DNA FRYE RULING IN 1996 BY JUDGE WEB, BE MADE A PART OF -- BY JUDGE WEBB, BE MADE A PART OF THE APPELLATE RECORD. THEY HAD NOT

COMPLAINED AT THAT TIME THAT THERE HAD BEEN AN ERRONEOUS RULING ON THE FRYE ISSUE AND NOT IN EVIDENCE. THEY JUST WANTED THE JUDGE TO REFLECT THE PRIOR RULING. SO I THINK THE JUDGE IS UNDER THE IMPRESSION THAT, OKAY, FINE, WE HAVE GOT PRIOR RULINGS AND IT MAY BE SOMETHING OF THAT NATURE. WHEN THE TESTIMONY COMES OUT IN WHICH MR. WALSH IS TESTIFYING, THE DEFENSE COMPLAINS THAT WE DON'T LIKE THE FORM LAFINGS QUESTION BY THE PROSECUTOR -- THE FORMLATION OF THE QUESTION BY THE PROSECUTOR, BECAUSE HE USED THE WORD "MATCH". THE JUDGE INITIALLY IS INDICATED THAT DO YOU WANT A NEW FRYE HEARING IN THE MIDDLE OF THE TRIAL OR SOMETHING OF THAT NATURE? AND THE DEFENSE COUNSEL SAYS NO, WE ARE NOT TALKING ABOUT FRYE HEARING. WE ARE NOT TALKING ABOUT ADMISSIBILITY. IT JUST THAT WE OBJECT TO THE FORM OF THE QUESTION, SO THE JUDGE ASKED THE PROSECUTOR CAN YOU REPHRASE THE QUESTION, AND THE COURT IS SAYING WHAT IS IT IS YOUR PROBLEM? DO YOU WANT SOME QUESTION ALONG THE LINES OF MR. EXPERT, CAN YOU DECIDE WITHIN A REASONABLE DEGREE OF CERTAINTY, IS THAT THE KIND OF FORMULATION? HE SAYS, YEAH, THAT IS PART OF IT. THAT IS KIND OF WHAT I AM GETTING AT, SO YOU KNOW, THE PROSECUTOR REPHRASES HIS QUESTION. THE DEFENSE DOES NOT FURTHER OBJECT TO THE QUESTIONING THAT GOES ON. THE DEFENSE, THEN, CROSS-EXAMINATIONS THAT WITNESS, AND STARTS INQUIRING OF HIM, YOU KNOW, WHAT HE KNOWS ABOUT THE STATISTICAL BASIS OF DNA. AND MR. WALSH SAYS, WELL, I AM A BIOLOGIST. I DON'T DO THE STATISTICS PART OF IT, SO I REALLY DON'T HAVE ANY OPINION ALONG THOSE LINES. THE DEFENSE MOVES IN TO STRIKE HIS ENTIRE TESTIMONY AND THE COURT SAYS, WELL, I AM NOT GOING TO STRIKE HIS ENTIRE TESTIMONY, AND WHAT ULTIMATELY HAPPENS IS THAT THE STATE, THEN, PUTS ON THE STTITION, DR. BAST -- THE STATISTICIAN, DR. BASTION, AND THIS HAS HAPPENED IN OTHER CASES, WHERE YOU HAVE TWO EXPERTS TALKING ABOUT TWO DIFFERENT THINGS, SO THERE REALLY IS NO ISSUE BEFORE THIS COURT AS TO WHETHER OR NOT THE TRIAL COURT ERRED IN ADMITTING DNA EVIDENCE BECAUSE OF AN ERRONEOUS LAW OF THE CASE RULING. THAT WAS AN INITIAL COMMENT MADE BY THE COURT, BUT NEITHER THE DEFENSE WAS SEEKING FRYE HEARINGS OR REVISITING THE PRIOR RULING OF THE JUDGE. HE SIMPLY SAID I OBJECT TO THE FORM OF THE QUESTION AND THE FORM OF THE QUESTION WAS APPARENTLY STRAIGHTENED OUT AND THEN ALL OF THE WITNESSES WHO HAD QUESTIONS OR KNOWLEDGE ABOUT EITHER THE STATUS OF THE DN A OR THE STATISTICIAN, AND THEY TESTIFIED TO THE JURY AS TO WHAT IT ALL MEANT. SO I SUBMIT THAT, UNDER CABALLERO, THAT THAT REALLY ISN'T THE QUESTION. UNDER THE TERMS OF THIS COURT, I WOULD SAY HE IS CHANGING THE BASIS OF HIS OBJECTION AS TO WHAT WAS RAISED BELOW AND HE CAN'T REALLY DO THAT, SO WE WOULD ASK THE COURT TO, I DON'T KNOW IF THE COURT HAS ANY QUESTIONS ABOUT THE REMAIN ISSUES, BUT WE WOULD ASK THE COURT TO AFFIRM THE JUDGMENT AND SENTENCE, BECAUSE IT IS QUITE OBVIOUS THAT JUDGE VOLANTE DID AN EXCELLENT JOB IN HIS SENTENCING ORDER, AND AN EXCELLENT JOB IN HIS SENTENCING ORDER AND PROPERLY CONCLUDED THAT DEATH WAS THE APPROPRIATE PENALTY IN THE INSTANT CASE. IF THE COURT HAS NO FURTHER QUESTIONS, I ASK THE COURT TO AFFIRM.

CHIEF JUSTICE: ALL RIGHT. REBUTTAL? MR. MARSHAL, HOW MUCH TIME IS LEFT?

I WOULD LIKE TO GO BACK TO THE FIRST ISSUE.

DID THE COUNSEL NOT RAISE THE OBJECTION AT THE TIME THE JURY WAS I AM PEN ALLEGED?

-- WAS IMPANELED.

NO. I THINK THAT THE ARGUMENT THAT HAS BEEN MADE BY THE STATE HERE, WHEN THE JUDGE ASKED THE DEFENDANT PERSONALLY, TO SAY THAT HE HAD PARTICIPATED IN JURY SELECTION AND THAT THE COUNSEL HAD FOLLOWED HIS, THAT THEY HAD AGREED ON WHICH JURORS, HOW IT PROCEEDED. NOW, I DON'T SEE HOW THAT IS A WAIVER. I REALLY DON'T SEE THAT THERE IS A WAIVER INVOLVED.

I AM NOT REALLY GETTING TO THAT PART OF T. I AM JUST WONDERING -- THAT PART OF IT. I AM

JUST WONDERING DOES THE DEFENSE COUNSEL HAVE AN OBLIGATION, AFTER YOU HAVE RAISED PREEMPTORY CHALLENGES, FOR-CAUSE CHALLENGES, AND THE JUDGE SAYS DOES THE DEFENSE ACCEPT THIS JURY, DOES COUNSEL THEN HAVE AN OBLIGATION TO SAY SUBJECT TO THE FOR-CAUSE CHALLENGES THAT WE HAVE MADE FOR JUROR X, Y AND Z, AND THE PREEMPTORY CHALLENGES?

NO. THERE HAS NEVER BEEN A REQUIREMENT LIKE THAT AND THERE IS NO REASON TO MAKE A REQUIREMENT LIKE THAT, BECAUSE HE HAS ALREADY RENEWED HIS MOTION FOR ADDITIONAL PREEMPT OTHERS, BASED ON THE FACT THAT HE HAD TO USE HIS PREEMPTORY CHALLENGES TO EXCUSE JURORS WHO SHOULD HAVE BEEN EXCUSED FOR CAUSE, THAN IS SUFFICIENT. I DON'T THINK YOU HAVE TO GO THROUGH AND SAY THIS JUROR SHOULD HAVE BEEN EXCUSED FOR CAUSE FOR THIS AND THIS ONE SHOULD HAVE FOR THAT. THAT HAS NEVER BEEN, THAT HAS NEVER BEEN A PART OF THE LAW, AND IT REALLY SHOULDN'T BE.

AT THE END OF YOUR PRIOR ARGUMENT, YOU WERE TALK ABOUT JUROR GALE AND THAT JUROR GALE SAT ON THE PANEL AND EVERYTHING.

THAT'S CORRECT.

WHAT, SPECIFICALLY, DO YOU OBJECT TO JUROR GALE'S SITTING ON THE JURY?

WELL, JUROR GALE WAS PART OF THE, WHERE DEFENSE COUNSEL WAS ASKING FOR A SHOW OF HANDS, ALL RIGHT, WOULD ANYONE HERE REQUIRE ME TO PROVE HIS INNOCENCE, INDICATING, MR. FLOWERS, WOULD YOU EXPECT ME TO PROVE HIS INNOCENCE? PROSPECT I HAVE JUROR -- PROSPECTIVE JUROR SAYS YES. ALL RIGHT. WE HAVE MR. McMICHAELS, MR. GALE, MR. GLASS, HOW MANY DO WE HAVE? I WOULD ASSUME THAT THE REST OF YOU WOULD NOT REQUIRE ME TO PROVE HIS INNOCENCE. OKAY. THEN HE GOES ON AND SAYS WHO HERE WOULD PUT ME TO THE TASK, IF I DIDN'T PUT MR. BOLIN ON THE WITNESS STAND? WHO, THE TRANSCRIPT SAYS WOULDN'T BUT THE CONTEXT DEFINITELY INDICATES THAT HE IS SAYING WOULD WANT TO, HERE REQUIRE ME -- WANT TO HEAR OR WOULD REQUIRE KNEE PUT MR. BOLIN ON THE WITNESS STAND? ANYBODY? MR. GLASS, MR. GALE, TWO OTHERS. NOW, THE STATE HAS NOTED THAT THERE WERE TWO PROSPECTIVE JURORS WHO HAD SAID THAT, YOU KNOW, THAT THEY WOULD REQUIRE THIS, AND THAT THE STATE EXCUSED THEM FOR CAUSE. WELL, THE REASON THAT THE STATE EXCUSED THEM FOR CAUSE WAS BECAUSE OF THEIR VIEWS ON THE DEATH PENALTY, NOT BECAUSE OF THIS. AND THAT IS, SO MR. GALE IS ONE OF THOSE WHO HAS SAID THAT HE WOULD REQUIRE THE DEFENDANT TO TESTIFY.

CHIEF JUSTICE: ALL RIGHT. WE ARE GOING TO HAVE TO END ON THAT NOTE BECAUSE OF THE TIME. WE THANK YOU BOTH VERY MUCH.