Costa T. Vathis v. State of Florida

THANK YOU, YOUR HONOR. MY NAME IS MICHAEL ROBERT UFFERMAN.

WOULD YOU ALLEGE THE GROUNDS FOR CONFLICT.

YES, YOUR HONOR. A LOT OF THIS WILL GET TO THE GROUNDS AS WELL. A LOT OF THE CASES FOR CONFLICT, I BELIEVE THE DISTRICT COURT, I WILL ACTUALLY QUOTE FROM THE DISTRICT COURT. THE DEFENDANT HAS NOT ALLEGED THAT, WHILE NOT NECESSARY, IT WOULD HAVE BEEN WEISS AND THE JURORS MIGHT HAVE SEEN THE EMOTIONAL DISPLAY PANDERING FOR WHAT IT IS, THEN THAT WOULD BE OUT OF PLACE. AND IT WAS NOTED THAT IN ESSENCE, THE MAJORITY, IN MAKING THIS OBSERVATION, REASONS THAT LACK OF JUDGMENT WAS A MATTER OF TRIAL TACTIC, AND OF COURSE JUDGE ERVIN POINTED OUT IN THIS AND EVERY OTHER COURT, WHEN A RULING WAS RELIED AS NOT PROPER, IT CANNOT RELY ON PANDERING TACTICS.

ISN'T IT ALMOST JUDICIAL NOTICE THAT YOU DON'T NEED AN EVIDENTIARY HEARING. THIS MORNING YOU WERE HERE. WE WERE TALKING ABOUT INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. TYPICALLY, WE MAKE A DECISION WHETHER, WITHOUT HAVING AN EVIDENTIARY HEARING, WHETHER COUNSEL SHOULD HAVE RAISED OR NOT, SO ISN'T THIS REALLY IN THE CLASS OF CASES THAT DON'T, I MEAN, ISN'T IT THE ARGUMENT THAT REALLY DOESN'T CONFLICT WITH THE TRIAL TACTIC CASES, TALKING ABOUT WHETHER YOU ARE GOING TO CALL A WITNESS OR SOMETHING, BUT THIS IDEA OF NOT OBJECTING TO SOMETHING, WHY CAN'T THE COURT TAKE ITS OWN EXPERIENCE INTO ACCOUNT, FOR SOMETHING THAT IS LIKE THIS, YOU KNOW, NOT, AGAIN, A FAILURE TO CALL A WITNESS, BUT SOMETHING THAT IS MUCH MORE BASIC.

WELL, I THINK THE DECISION AS TO WHETHER OR NOT AN EVIDENTIARY HEARING IS REQUIRED, HINGES ON WHAT IS IN THE RECORD, AND IN A CASE LIKE, THIS WE HAVE NOTHING IN THE RECORD FOR THIS COURT'S ABILITY TO ASSESS WHETHER OR NOT THE ALLEGED ERROR WAS AN ERROR OR IT WAS PREJUDICIAL.

SO IT IS YOUR POSITION THAT THE ALLEGATION IS THERE IS NO RECORD EVIDENCE THAT, ANY TIME THERE IS A MOTION FILED FOR NONRECORD ACTIVITY THAT OCCURRED IN THE COURTROOM, THAT THERE HAS TO BE AN EVIDENTIARY HEARING?

WELL, I AM REFERRING TO THE STANDARDS SET FORTH IN THE RULE ITSELF, AND THE STANDARD IS VERY STRICT. BASICALLY INSUFFICIENT OR CONCLUSIVELY REFUTED BY THE RECORD, AN EVIDENTIARY HEARING MUST BE HELD.

IN WHAT CASE ARE YOU SAYING THE FIRST DISTRICT RULED?

AS FAR AS TRIAL TACTICS ARE CONCERNED, THE DECISION IN REAVES, THIS COURT SAID THAT A CLAIM WAS BASED ON SOME TYPE OF TRAGEDY WITHOUT FIRST HOLDING A EVIDENTIARY HEARING. WE WOULD ALSO RELY ON --

ISN'T YOUR ARGUMENT, ALSO, REALLY BASED ON WHAT THE DISSENT IS SAYING, AND --

SOME JURORS MIGHT SEE AN EMOTIONAL PLAY FOR WHAT IT AND IT WOULD BE OUT OF PLACE. THE DISTRICT COURT CONCLUDED THAT IT WAS NOT A STRATEGY AND IT WOULD BE OUT OF PLACE.

THE DISTRICT COURT IS ACTUALLY MAKING A COMMENT THERE. IT IS NOT MAKING A HOLDING IN THAT RESPECT, IS IT?

WELL, YES, BECAUSE THERE IS NOTHING IN THE RECORD CONCLUSIVELY REVIEWING WHY THIS WAS NOT OBJECTED TO, AND THAT IS A VERY STRICT STANDARD IN THE POSTURE WE ARE IN, SUMMARY DENIAL.

JUSTICE PARIENTE'S QUESTION, I MEAN, IS THE STATE OF THE LAW THAT, IF A DISTRICT COURT MAKES A DETERMINATION THAT THIS WAS ALLEGED IN THIS MOTION, SO OBVIOUSLY IT IS NOT NEVADA HE CAN'T I HAVE ASSISTANCE OF COUNSEL, THAT THAT DESERVES AN EVIDENTIARY HEARING, EVERY TIME?

I GUESS THAT IS MAINLY WHAT THE DISTRICT COURT IS SAYING, THAT A CLAIM OF AN EMOTIONAL PERSON IN THE COURTROOM IS ALWAYS INEFFECTIVENESS AS A MATTER OF LAW, THAT THERE CAN BE NO EMOTIONAL OUTBURST IN THE COURTROOM THAT WOULD RENDER COUNSEL'S FAILURE TO OBJECT TO THAT INEFFECTIVE AND WE SUGGEST THAT IS SIMPLY NOT TRUE.

WITH REGARD TO INEFFECTIVENESS, THERE ARE TWO PRONGS.

YES.

YOU HAVE ALLEGED THE FIRST, IN THE MOTION. SPEAK TO THAT. WHERE HAVE YOU ALLEGED ON THE FACE OF THE PLEADING, THE I HAVE TO GO THROUGH THE WHOLE TRIAL IN THE MOTION, BUT SUFFICIENCY OF THE PLEADING AS TO THE JUDICIAL PRONG.

PAGE 7 OF THE RECORD. AND IT IMMEDIATELY INSTRUCTED THE JURY TO FOCUS ONLY UPON THE EVIDENCE, NO CURETIVE INSTRUCTION IN THIS CASE AND MOTION FOR MISTRIAL. CERTAINLY A MOTION FOR MISTRIAL WOULD HAVE BEEN GRANTED AND THE PREJUDICE THAT OCCURRED HERE WOULD NOT HAVE AFFECTED THE JURY'S VERDICT.

DON'T WE ASSUME THAT, IF COUNSEL HAD OBJECTED AND THE JUDGE OVERRULED IT AND SAID THIS IS JUST PARENT COMING UP TO BRING THEIR CHILD BACK TO THE OR ESCORT THE CHILD OUT OF THE COURTROOM, ON AN APPEAL, WE WOULD HAVE TO DECIDE WHETHER, ASSUMING IT WAS ERROR FOR THE COURT TO HAVE RULED THAT WAY, WHETHER THAT ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

CORRECT.

CORRECT. SO I GUESS IN THE CONTEXT OF THIS WHOLE THING, AND MAYBE IT IS JUST I AM COMING TO THIS IDEA THAT, HOW BAD COULD THIS HAVE BEEN.

LET'S GO OVER THAT EXAMPLE, BECAUSE ASSUMING THAT COUNSEL OBJECTED, WHAT WOULD HAPPEN IS COUNSEL WOULD GO PROBABLY TO SIDE BAR FOR OBJECTION AND GO TO SIDE BAR AND SAY WE JUST WITNESSED THE PARENTS RUSH TO THE SIDE --

I THINK WE WOULD REALLY WANT THE TRIAL LAWYER TO LOOK AT THAT AND SEEING I OBJECT TO THE PARENT COMING IN DURING THE TRIAL, IT WOULD SEEM TO ME LIKE THAT WOULD REALLY MAKE A DEFENSE LAWYER LOOK LIKE A REAL --

PRESUMABLY THE TRIAL JUDGE, AT SIDE BAR, CERTAINLY, IN BETWEEN WITNESSES, THAT AN ATTORNEY COULD HAVE ASKED TO GO TO SIDE BAR, AND SAY IN LIGHT OF WHAT HAPPENED I WOULD ASK FOR A CURETIVE INSTRUCTION RIGHT NOW. WE CAN'T WAIT UNTIL THE END OF TRIAL. WE NEED TO TELL THE JURY RIGHT NOW THAT WHAT THEY WITNESSED WASN'T

APPROPRIATE T AFFECT MADE CLIENT'S RIGHT TO A FAIR TRIAL, BECAUSE AS WE CITED IN THE BRIEF, DEMEANOR EVIDENCE IS IMPORTANT, UNDER THE COMPETITION CLAUSE.

AREN'T YOU SUGGESTING AND, AGAIN, GOING BACK TO WHAT JUSTICE BELL SAID, YOU NEED THE EVIDENTIARY HEARING, BECAUSE WE DON'T KNOW WHAT THIS SCENARIO WAS.

WE RELIED ON THE BEASLEY CASE. AND THE BURNS CASE. AND IN THE BURNS CASE, A DIFFERENT ONE REFERRED TO, THE COURT, IN REVIEWING A CLAIM WHETHER OR NOT, WHERE IT WAS PRESERVED IN BURNS, THERE WAS AN EMOTIONAL OUTBURST THAT OCCURRED. TRIAL COUNSEL OBJECTED AND ASKED FOR THE COURT TO DO A NUMBER OF THINGS, AND THIS COURT SAID, BASED ON OUR REVIEW OF THE RECORD, IT REVEALS NO PREJUDICE. OF COURSE THIS COURT HAD TO REVIEW THE RECORD, TO DETERMINE EXTENT OF THE PREJUDICE. WE DON'T HAVE A RECORD IN THIS CASE.

BUT YOU HAVE ARGUED THAT THIS WAS AN EMOTIONAL OUTBURST, BUT AS I UNDERSTAND IT, WHAT IN THE RECORD DEMONSTRATES THIS WAS AN EMOTIONAL OUTBURST, JUST MERE FACT OF GOING UP THERE, YOU ARE SAYING, IS AN EMOTIONAL OUTBURST.

WE DON'T HAVE A RECORD. WE ARE CLAIMING THAT THERE WAS AN EMOTIONAL OUTBURST.

YOUR CLAIM HAS TO BE BASED ON SOMETHING. SO WHAT IS THE SOMETHING THAT OUR CLAIM IS BASED ON? YOUR CLAIM IS BASED ON A COLD RECORD, ALSO, I ASSUME, OR NOT.

THIS WAS IN THE RECORD, AND, AGAIN, WE CITED IN OUR REPLY BRIEF AND THIS ONE OF THE FIRST DISTRICT, THE COURT WAS UNDER NO OBLIGATION TO RECORD WHAT HAPPENED.

SO PRESUMABLY, BECAUSE THE CLIENT, I DON'T KNOW IF YOU WERE APPOINTED OR IS THIS RETAINED?

WE WERE RETAINED. [TECHNICAL DIFFICULTIES] CERTAINLY THE COURT HAS HELD, REGARDLESS OF AN EMOTIONAL OUTBURST, THAT OUTBURST OF A NONWITNESS AT THE WITNESS STAND, CERTAINLY AFFECTS THE CREDIBILITY.

BUT COUNSEL KNOWING WHETHER NO FLORIDA COURT HAS HELD THAT, IN FAILING TO OBJECT AT THAT MOMENT.

BUT BEASLEY AND BURNS CERTAINLY DO HOLD THAT, IF THERE IS A EMOTIONAL OUTBURST, IT IS THE TRIAL ATTORNEYS OR TRIAL COURT THAT NEEDS TO BRING THAT TO THE COURT'S ATTENTION AND THAT THE COURT HAS THE ABILITY TO REGULATE THE EMOTIONAL OUTBURST, EITHER THROUGH A CURETIVE INSTRUCTION OR MISTRIAL, AND THAT WAS NOT DONE HERE, YOUR HONOR.

CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL.

GOOD MORNING. MAY IT PLEASE THE COURT. SHERRI ROLLER SON ON BEHALF OF THE STATE. WELL, FIRST OF ALL THERE IS NO JURISDICTION. BEASLEY WASN'T ABOUT AN INEFFECTIVE ASSISTANCE CLAIM. IT WAS ABOUT A SEQUESTRATION CLAIM THAT, THEY WANTED THE PARENTS NOT TO BE ABLE TO SIT IN THE COURTROOM BUT THEY T WAS SAID THAT THE JUDGE ABUSED -- THE JUDGE DID NOT ABUSE HIS DISCRETION BECAUSE HE SET SAFEGUARDS, AND I BELIEVE THAT WHAT JUDGE CANTERO WAS GETTING AT, BASED ON WHAT, JUDGE PARIENTE, YOUR HYPOTHETICAL, JURORS WERE CRYING, THAT THERE WAS SOME TYPE OF EMOTIONAL OUTBURST, IF THERE WAS MORE TO IT, THEN THE DEFENDANT WAS THERE. HE COULD HAVE ALLEGED IT IN THE FACT. IF THERE WAS CRYING, IF THERE WAS SOMETHING ELSE MORE PREJUDICIAL AND HE WAS THERE, YOU DON'T NEED AN EVIDENTIARY HEARING, TO ASCERTAIN WHAT HE COULD HAVE PUT IN HIS OWN MOTION.

IS THAT THE BASIS FOR THE DISTRICT COURT'S RULING.

NO, IT IS NOT.

SO IT IS NOT. HOW DO WE KNOW HERE, FOR INSTANCE, WITHOUT HAVING SOME KIND OF A HEARING, YOU COULD HAVE PERFECTLY INNOCUOUS SITUATION, WHERE A PARENT BROUGHT A CHILD UP TO THE WITNESS STAND TO BEGIN WITH, AND LEFT THEM THERE, AND THEN WENT BACK OUT IN THE AUDIENCE, QUIET, NO EMOTIONAL DEMEANOR AT ALL, AND THEN WHEN THE CHILD WAS FINISHED WITH THE TESTIMONY, QUIETLY CAME BACK UP, AND THERE WAS NO OUTBURST AT ALL, AND PROBABLY KNOW REASONABLE PERSON WOULD HAVE SAID THERE WAS ANY CONDUCT THAT MIGHT HAVE AFFECTED THE JURY. ON THE OTHER HAND, WE CAN IMAGINE A SCENARIO, CAN WE NOT.

YES.

WHERE THE WHOLE FAMILY, AFTER THE CHILD TESTIFIES, THEY HAVE ALL BEEN IN THE COURTROOM, AND YOU KNOW, FOR THEIR CHILD, AND THE CHILD SAT WITH THEM, UNTIL THE CHILD WENT ON THE WITNESS STAND, AND THE PARENTS HUGGED AND KISSED THE CHILD AND CRIED WHEN THE CHILD WENT ON THE WITNESS STAND, AS A FAMILY WOULD DO, BUT THEN, AT THE END WHEN THE CHILD WAS FINISHED, THAT THEY ALL RAISED UP THERE AND THEY WERE ALL CRYING AND LOOKING AT THE JURY AND SAYING I AM SORRY, YOU KNOW, WHATEVER, AND THEN HUSTLED THE CHILD OUT OF THE COURTROOM, AND THAT WOULD BE A DIFFERENT SCENARIO, WOULD IT NOT?

YES, YOUR HONOR. FIRST OF ALL, IT WOULD PROBABLY BE ON THE RECORD, BECAUSE THE COURT REPORTER WOULD, EVEN IN THIS CASE, WOULD HAVE HAD ANY AUDIBLE WEEPING OR ANYTHING LIKE THAT.

HOW DO WE KNOW HERE, WE ARE WITHOUT SOME KIND OF EITHER A RECORD WHICH WOULD HAVE TAKEN CARE OF IT, OR AN EVIDENTIARY HEARING, WHERE ON THE SPECTRUM, THIS PARTICULAR QUOTE, EMOTIONAL OUTBURST, FALLS, WHETHER IT FALLS AS INNOCUOUS OR THIS ONE HERE, WHICH WAS TRAUMATIC AND WOULD HAVE AFFECTED THE JURY'S DISPOSITION IN THE CASE, HOW DO WE KNOW?

THAT IS THE POINT, YOUR HONOR, THAT STRICKLAND HAS SAID AND THIS COURT IN JACOBS HAS SAID THAT YOU HAVE TO HAVE A FACIALLY SUFFICIENT CASE THERE, IS A PRESUMPTION THAT YOU START OUT WITH, AND YOU START OUT WITH THE PRESUMPTION THAT THE DEFENSE COUNSEL IS GIVING ADEQUATE PROFESSIONAL STANDARDS PERFORMANCE, AND THEN THE DEFENDANT HAS TO ALLEGE DETAILED FACTS THAT SHOWS THAT HE HAS GOT SOMETHING OTHER THAN THE REASONABLE STANDARD OF CARE THAT HE IS DUE IN AN ATTORNEY'S PERFORMANCE, IN HIS DEFENSE COUNSEL'S PERFORMANCE. HE HASN'T ALLEGED, AND THAT IS WHAT THE DISTRICT COURT IS SAYING --

SO YOU ARE SAYING THAT, FOR AN EMOTIONAL ALLEGATION, THAT COUNSEL WOULD HAVE HAD TO HAVE SAID THAT THE MOTHER WAS CRYING. SHE HAD TEARS RUN DOWN HER FACE OR SHE WAS WEEPING TERRIBLY. IS THAT WHAT YOU ARE SAYING --

I AM SAYING THE MOTION WOULD HAVE TO HAVE ALLEGED, FOR INSTANCE WHEN HE USES REAVES, IT GETS YOU OVER THE PRESUMPTION, AND THIS IS A GOOD EXAMPLE, THAT, DEFENDANT REAVES SAYS I WAS ALL CHOKED UP AT THE TIME, AND IT WAS PRIOR TO 2000, THE INVOLUNTARY INTOXICATION DEFENSE, WHICH WAS AVAILABLE AT THE TIME, NOW, RIGHT THEN AND THERE YOU GET ABOVE THE PRESUMPTION, BECAUSE YOU LOOK AT THOSE TWO THINGS THAT WERE ALLEGED, AND THEN SAY, OKAY, THERE WAS AN OMISSION HERE, AND NOW IT LOOKS LIKE AN OMISSION.

THE EMOTIONAL OF WHAT WE ARE TRYING TO PROBE FOR, WOULD YOU HELP US UNDERSTAND WHAT IS REQUIRED AS A MATTER OF LAW, THE STATE, AN INAPPROPRIATE EMOTIONAL OUTBURST IN A COURTROOM. THAT IS WHAT WE ARE TALKING --

YOU CAN'T JUST CHARACTERIZE SOMETHING AS AN EMOTIONAL OUTBURST. THAT IS NOT --

WHAT WOULD HE HAVE NEEDED TO SAY.

HE WOULD HAVE NEEDED TO SAY HOW IT WAS PREJUDICIAL. THEY CALM AND THEY WERE BEING SYMPATHETIC. IF I MAY, I THINK I CAN HELP YOU OUT HERE, ON THE VERY CASE THAT JUDGE ERVIN USED AND THAT THEY CITED TO IN THEIR, IN THE DISSENT, IT ACTUALLY EXPLAINS IT, AND THAT IS IN ZAKU. THAT IS THE ONLY ONE ACTUALLY WHERE THEY SAID IT WASN'T RIGHT, BECAUSE THIS WAS SOMEBODY WHO REPRESENTED AN AGENCY AND CAME FORWARD AND ACTUALLY STOOD AT THE STAND AND HELD ON TO HER AS SHE TESTIFIED, AND EVEN IN THAT CASE, THEY SAID THE PROBLEM, THE PREJUDICE CAME FROM THE FACT THAT IT WAS THE PERSON FROM THIS AGENCY, VICTIMS' ADVOCATE, AND HE SAID IN A FOOTNOTE, FOOTNOTE ONE IN THAT CASE, BUT WE KNOW THAT, IT HAD BEEN THE PARENT OR OTHER CLOSE RELATIVE, IT WOULD NOT HAVE BEEN PREJUDICIAL, BECAUSE IT WOULD BE MORE LIKELY TO BE SEEN AS FAMILY SUPPORT, RATHER THAN VOUCHING FOR THE WITNESS'S CREDIBILITY, SO IN THE VERY CASE THAT THEY ARE CITING, THAT IS NOT WHAT IT STANDS FOR, EXACTLY WHAT THAT LITTLE PARENTHETICAL.

COULD YOU HELP US UNDERSTAND WHAT IS NECESSARY, THIS MAY NOT BE THE CASE BUT WHAT IS NECESSARY. THEY HAVE ALLEGED EMOTIONAL OUTBURST, NOT SOMEONE WALKING TO THE WITNESS. WHAT IS NECESSARY TO ALLEGE. YOU ARE SAYING YOU HAVE TO PRESENT THE FULL TESTIMONY IN YOUR MOTION, WHAT YOU ARE SAYING.

WHAT IT IS SAYING IS THERE IS NO CASE THAT SAYS A FAMILY MEMBER CAN'T WALK SOMEBODY TO THE STAND OR BACK FROM THE STAND. THERE IS NOTHING OUT THERE THAT SAYS THAT CAN'T HAPPEN. THE OTHER, PEOPLE VERSUS ADAMS, WAS ABOUT A CONSTITUTIONAL AMENDMENT THAT ALLOWED IT, AND THEY WERE ALLOWED TO PICK TWO PEOPLE TO STAND DURING THE TESTIMONY. THERE IS NO CASE THAT SAYS THAT YOU, A PARENT CAN'T ACCOMPANY A CHILD AWAY FROM THE WITNESS STAND, NOT EVEN DURING THE TESTIMONY.

WHAT WERE THE SPECIFIC ALLEGATIONS IN THIS RECORD AS TO WHAT OCCURRED.

THEY SAID THE PARENT RUSHED UP AND ESCORTED THE CHILD AWAY. THERE WERE NO DETAILED SPECIFICS OF WHAT CONSTITUTED AN EMOTIONAL OUTBURST.

I THOUGHT, AND MAYBE THIS IS WHERE, WE ARE TALKING ABOUT GROUNDS FOR THE CONFLICT, THE FIRST DISTRICT AND THE TRIAL COURT, SEEM TO SAY THAT THERE WAS NOT A FACIALLY SUFFICIENT CLAIM.

RIGHT.

SO FACIAL INSUFFICIENCY, VERSUS WHETHER THE CLAIM, AS STATED IS FACIALLY SUFFICIENT, BUT IT IS CONCLUSIVELY REFUTED, EITHER BY THE RECORD OR BY CASE LAW. DO YOU SEE THIS AS BEING A FACIALLY INSUFFICIENT PLEADING?

YES. BECAUSE IT DOES NOT SHOW THAT THE ATTORNEY HAD A DUTY TO OBJECT. IT DOESN'T SHOW THAT A REASONABLE OBJECTIVE ATTORNEY, UNDER THE CIRCUMSTANCES, AS DETAILED HERE, AND THAT IS THE ONLY THING WE KNOW, IF THERE WAS MORE THEY SHOULD HAVE SAID MORE.

IT HASN'T BEEN FLESHED OUT ENOUGH, YOU ARE SAYING?

YES.

IF THAT IS THE CASE, THEN SHOULDN'T THEY BE GIVEN LEAVE TO AMEND IT AND BE TOLD THAT YOU CAN'T JUST USE THESE ADJECTIVES AND THESE WORDS, LIKE EMOTIONAL OUTBURST. YOU HAVE GOT TO ACTUALLY DESCRIBE IN YOUR MOTION, THE DETAILS OF WHAT OCCURRED THAT YOU CLAIM, OKAY, WAS SO PREJUDICIAL THAT THE LAWYER SHOULD HAVE OBJECTED TO.

AND THERE YOU ARE TALKING, I BELIEVE IT IS ABOUT, AS IN NELSON, ONE OF THE CASES I REMEMBER, WHERE JUDGE WELLS SAID THAT THERE SHOULD BELIEVE TO AMEND, BUT THAT IS IF YOU DON'T HAVE, AND WE ARE NOT SAYING THAT THERE ARE FACTS. THAT IS IF YOU DON'T SAY THAT THE ALIBI WITNESS WAS AVAILABLE. MAYBE THEY LEFT THAT OUT AND THEY COULD COME BACK AND SAY IT WAS AVAILABLE. WE ARE CONTENDING THAT THAT, THEY HAVE ALLEGED ALL OF THE FACTS THAT THERE REALLY ARE TO ALLEGE IN THIS CASE, AND THAT THOSE FACTS ARE NOT LEGALLY SUFFICIENT, BECAUSE THEY DO NOT SHOW, UNDER THE LEGAL SUFFICIENCY, PART OF THE FACIALLY-SUFFICIENT, THAT ANY OBJECTIONABLE LAWYER IN THE CIRCUMSTANCES, WOULD HAVE A DUTY TO OBJECT, AND THAT IS WHAT THE FIRST DISTRICT COURT MEANT, THAT WOULD EVEN BE WISE, LET ALONE THEY DON'T HAVE A DUTY. THAT IS ALL THERE IS, AND IF YOU LOOK AT THE RECORD --

ARE YOU SAYING THAT THE WAY IT IS ALLEGED SO FAR, THAT IT WOULD BE TAKEN TOWARDS THIS END OF THE SPECTRUM THAT I DESCRIBED OF JUST A PARENT COMING UP AND ESCORTING A CHILD, THAT THAT IS REALLY THE PRESUMPTION UNDER THE ALLEGATIONS THEY HAVE IN THIS MOTION.

AND THE REASON I SAY THAT --

IS THAT WHAT YOU ARE SAYING?

YES, AND THE RECORD SUPPORTS IT. THE ATTACHED RECORD. ON PAGE 118 OF THE RECORD HERE. NOW WE ARE SAYING THAT THAT IS SUFFICIENT.

ARE YOU SAYING THAT THE FACIAL SUFFICIENCY, WHICH JUST PUTS IT IN THE CATEGORY OF, REALLY, NO EMOTIONAL OUTBURST AND SECONDLY THAT THE RECORD DIRECTLY REFUTES THE CLAIM THAT THERE WAS AN EMOTIONAL OUTBURST.

AND TO BE HONEST, IN PEOPLE VERSUS ADAMS, THE OTHER CASES THEY USE, IT SAYS THAT NOT ALL EMOTIONAL OR SYMPATHETIC DISPLAYS ARE IMPERMISSIBLE, UNDER THE SIXTH AMENDMENT.

DOESN'T THAT WHERE WE COME BACK? WE NEED TO KNOW WHAT THE FACTS ARE. THE COURTROOM HAD BEEN FILLED WITH POLICE OFFICERS, FOR INSTANCE, AND RIGHT AFTER THE WIDOW OF THE POLICE VICTIM TESTIFIED, THEY ALL STOOD UP AND CHEERED IN THE TRIAL COURTROOM.

BUT WASN'T THAT ALLEGED?

IT MIGHT NOT BE IN THE RECORD BUT ILL BET IT WAS ALLEGED IN THE MOTION OR YOU WOULDN'T KNOW, IT AND THAT IS THE POINT. IF IT WASN'T ALLEGED, THEN YOU WOULDN'T HAVE GOTTEN THERE, AND YOU CAN'T GET TO, THERE ARE SOME STEPS YOU HAVE TO GET TO, BEFORE YOU CAN GET TO AN EVIDENTIARY HEARING. OTHERWISE YOU ARE OPENING ALL TRIAL COURTS UP TO HAVE EVIDENTIARY HEARINGS, ANY TIME SOMEBODY ALLEGES SOMETHING THAT IS NOT IN THE RECORD.

YOU WERE STARTING TO SAY THAT SOMETHING IS IN THE RECORD. WHAT IS IN THE RECORD?

WHAT IS IN THE RECORD, IS THAT, RIGHT AFTER, IT DOESN'T SHOW, IF YOU LOOK AT THE RECORD, IT DOESN'T SHOW SHE WAS EMOTIONAL. IT DOESN'T SHOW SHE WAS CRYING, AND IT SHOWS THAT THE PARENTS WERE OBVIOUSLY ALLOWED IN THE COURTROOM. NOW, YOU HAVE TO LOOK AT THIS SCENARIO THEY ALWAYS SAY, UNDER ALL THE CIRCUMSTANCES, AND THIS CONCLUSIVELY REFUTES THAT THERE IS ANYTHING ELSE TO PUT IN THERE.

WHAT IS IT?

IT JUST SAYS THAT, SHOWS THAT THE WITNESS WAS EXCUSED, STATE CALLED JAMES McCRAIG, AND THE BAILIFF IS STANDING RIGHT THERE. HE HAD TO WALK DOWN THE HALL. HE WAS AFTER. IT DOESN'T SHOW ANY CONFUSION GOING ON. IT DOESN'T SHOW --

IT JUST SHOWS THAT THE PARENTS CAME UP?

NO. THAT IS IT. THEY WERE WAITING FOR THE NEXT WITNESS. BUT THERE IS NOTHING WRONG WITH THE PARENTS COMING UP.

THERE IS NOTHING IN THE RECORD BECAUSE COUNSDEL NOT OBJECT. THE COUNSEL SHOULD HAVE OBJECTED AND PUT IT ON THE RECORD, LOOK, THERE IS AN OUTBURST GOING ON HERE AND I WANT TO OBJECT TO X, Y AND Z, FOR THE RECORD. SO WE HAVE TO GO ON THE FACE OF THE ALLEGATIONS, AND YOU ARE SAYING THE ALLEGATIONS, THEMSELVES, THEY DON'T ALLEGE ANY SUCH OUTBURSTS. IS THAT WHAT YOU ARE SAYING?

YES, AND WHY DO YOU NEED AN EVIDENTIARY HEARING IN THIS CASE, TO SAY WHAT THE DEFENDANT SHOULD HAVE ALLEGED. HE ALREADY KNEW. YOU NEED IN THE REAVES CASE, WHERE YOU HAVE AN INTOXICATION DEFENSE BUT EVIDENCE IN THE RECORD TO EXPLAIN WHY THERE WASN'T ONE.

WHAT IS IN THE RECORDT? PARENTS RUSHED UP?

AND ESCORTED THEIR DAUGHTER.

AND THEY WERE EMOTIONAL?

THAT IN ITSELF, IS WHAT THEY CONSTITUTE AS AN EMOTIONAL PLAY.

THERE IS NOTHING OTHER THAN SAYING THEY RUSHED UP.

RIGHT. THEY ARE SAYING THEY RUSHED UP AND ESCORTED THEIR DAUGHTER BACK TO THE GALLERY AND THAT WAS THE EMOTIONAL DISPLAY. OKAY. THEY ARE NOT SAYING ANYTHING ELSE HAPPENED BUT THAT WAS THE EMOTIONAL DISPLAY, AND IF THERE WAS MORE, THEY SHOULD HAVE SAID IT, BECAUSE THEY WERE THERE, AND IT IS NOT ONE OF THESE THINGS WHERE THEY WANT TO FIND OUT WHY THE ATTORNEY DIDN'T DO THIS OR THAT. IT IS THEY WERE THERE. THEY COULD HAVE SAID IT, IF ANYTHING ELSE HAPPENED, AND THEY DIDN'T, SO THEREFORE NOTHING ELSE HAPPENED. THEY ARE CHARACTERIZING THAT AS AN EMOTIONAL DISPLAY, AND EVERY TIME SOMEBODY TAKES AN ACTION OR IN ACTION AND TRIES TO CHARACTERIZE IT AS AN EMOTIONAL DISPLAY OR BOLSTERING, THEN YOU ARE GOING TO HAVE TO HAVE AN EVIDENTIARY HEARING, EVERY TIME THERE IS ANYTHING THAT ANYBODY WANTS TO ALLEGE, EMOTIONAL DISPLAY THAT IS NOT ON THE RECORD, AND I THINK IT IS GOING TO BE A BIG WASTE OF TIME, ESPECIALLY IF THE MAIN POINT IS YOU HAD THE DEFENDANT SITTING THERE. IF THERE WAS ANYTHING ELSE, THEN IT SHOULD BE IN THAT MOTION.

EVEN THOUGH THAT IS NOT THE CONFLICT ISSUE THAT IS ALLEGED, WHY, WHY ISN'T IT INEFFECTIVE ASSISTANCE, WHEN WE KNOW THAT THE RESULTS OF A POLYGRAPH GENERALLY ARE NOT ADMISSIBLE INTO EVIDENCE, YET THIS ATTORNEY STIPULATES, LET'S HIS CLIENT TAKE A

POLYGRAPH, STIPULATES THAT IT IS GOING TO BE ADMISSIBLE INTO EVIDENCE, AND THE POLYGRAPH EXAMINER SAYS THERE WAS DECEPTION HERE. THAT CERTAINLY SEEMS PRETTY PREJUDICIAL TO ME.

WELL, FIRST OF ALL, WHEN YOU AGREE TO TAKE A POLYGRAPH AND YOU HAVE HAD CASES THAT WERE, WHERE THIS COURT EVEN ADMITS THEM, HAS SAID WHERE A DEFENDANT ACQUIESCES INTO AN ACTION, HE ACTUALLY WENT ON HIS OWN, TO THIS FACILITY, AND ALL OF THIS IS IN THE RECORD, ATTACHED TO THE COURT'S DECISION, THE TRIAL COURT'S DECISION, SO IT IS CLEARLY REFUTED BY THE RECORD THAT HE DIDN'T KNOW WHAT HE WAS DOING, AND THEY SHOWED THAT HE RAN A BUSINESS.

HIS ATTORNEY WAS THERE?

PATH PARDON ME?

HIS ATTORNEY WAS THERE?

HE WENT ON HIS OWN TO THIS FACILITY AND MAYBE MET HIS ATTORNEY, BUT THE FACT IS THAT HE WENT THERE VOLUNTARILY {TAERL} AND WANTED -- VOLUNTARILY, AND WANTED TO TAKE THIS, BECAUSE HE HAD A STAKE THAT, IF HE COULD FOOL THE POLYGRAPH OR TAKE THIS TEST AND IT CAME OUT THAT HE WASN'T DECEPTIVE, AS YOU KNOW A LOT OF TRIAL LAWYERS, PROSECUTORS WILL DISMISS THE CHARGES, IF THEY PASS A POLYGRAPH. THAT IS STANDARD PRACTICE, SO THEREFORE HE HAS GOT A LOT TO RIDE --

IS IT STANDARD PRACTICE TO, ALSO, AGREE TO THEIR ADMISSIBILITY INTO EVIDENCE?

YES, IT IS FREQUENTLY DONE. IT IS NOT DONE IN EVERY CASE, BUT HE KNEW UP FRONT WHAT THE STAKES WERE, AND HE CAN'T --.

WHEN YOU SAY HE, WHO ARE YOU REFERRING TO?

THE ATTORNEY.

WE ARE TALKING ABOUT THE ATTORNEY, AND THE ATTORNEY ISN'T EFFECTIVE FOR ALLOWING HIM TO TAKE THE POLYGRAPH AND FOR ALLOWING THE RESULTS OF THE POLYGRAPH INTO EVIDENCE.

BUT THAT IS WHAT I AM TALKING ABOUT. THIS COURT HAS SAID WHERE THE DEFENDANT, HIMSELF, ACQUIESCES INTO THIS DECISION, IT WAS THIS DEFENDANT WHO AGREED WITH IT AND TESTIFIED ON THE STAND, AND, YES, HE KNEW THE STAKES. HE JUST DOESN'T LIKE THE RESULTS. SO YOU CAN'T TURN AROUND WHEN YOU DON'T LIKE THE RESULTS, AND BLAME YOUR ATTORNEY, NUMBER ONE, IF YOU, YOU ARE ADAMANT, AND HE WAS ADAMANT THAT HE DIDN'T DO, IT AND IF YOUR ATTORNEY BELIEVES YOU AND IS TRYING TO GET YOUR CHARGES DISMISSED, [TECHNICAL DIFFICULTIES] WE DON'T NEED TO RECREATE THE RECORD. WHICH IS THAT THE PARENTS RUSHED OFF SPONTANEOUSLY AND THEN ESCORTED THE CHILD FROM THE COURTROOM. FOR THAT TO BE TREATED AS IF THAT, IN FACT, WERE SHOWN IN THE RECORD AND THEN DETERMINE WHETHER THAT IS FACIALLY SUFFICIENT TO ALLEGE INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT OBJECTING, OR THAT IS, IT IS FACIALLY SUFFICIENT BUT WE DETERMINE THAT THE SECOND PRONG CANNOT BE MET, WHICH IS THAT IT DOESN'T UNDERMINE CONFIDENCE IN THE OUTCOME OF THIS PROCEEDING.

I WOULD SAY, EVEN, PERHAPS THE THIRD STEP, YOUR HONOR, THAT, 3.850 EVOLVED FROM RULE ONE, AS THIS COURT HAS WELL GONE OVER IN WEEKS IN ROY, WITH AN IDEA THAT THIS IS SUPPOSED TO BE AN EXPEDITIOUS, SIMPLIFIED PROCEDURE THAT ORIGINALLY WAS SO --

WE UNDERSTAND THAT, BUT HERE AGAIN, WE ARE NOT TALKING ABOUT THINGS THAT ARE FAILURE TO INVESTIGATOR FAILURE TO CALL WITNESSES. WE ARE TALK ABOUT A VERY DISCREET ISSUE ON WHICH THERE IS NOT VERY PRECISE LAW, ON WHICH YOU WOULD HAVE TO JUMP THROUGH THE FOLLOWING, THAT THIS IS WHAT OCCURRED, AND APPARENTLY THE STATE IS SAYING, OKAY, WE ARE GOING TO AGREE, THAT IS WHAT OCCURRED, BUT THERE IS NO RULE OF LAW THAT WOULD SAY THAT THAT, ITSELF, WOULD CONSTITUTE ERROR THAT WOULD REQUIRE THE TRIAL COURT TO SUSTAIN AN OBJECTION AND GRANT A MISTRIAL.

YOUR HONOR, ALL OF THE CASES THAT PERTAIN TO EMOTIONAL OUTBURSTS, HAVE OBJECTIONS AND MOTIONS FOR MISTRIAL. MY COMPLAINT ABOUT THIS CASE IS THE LANGUAGE USED BY THE DISTRICT COURT OF APPEAL BELOW, WHICH SAID THAT THE DEFENDANTS HAVE TO KNOW ALLEGE THAT THERE WAS A REASON FOR THE OBJECTION AND THAT THE DEFENDANT HAS NOT ALLEGED AN OBJECTION WAS NECESSARY OR IT WOULD HAVE BEEN WEISS, THAN IS WHAT THIS CASE IS BEING CITED FOR AROUND THE STATE. THAT IS NOT THE LAW.

YOU ARE THINKING IF THOSE COMMENTS, EVEN IF WE MIGHT REACH THE SAME RESULT, THAT THAT ALONE, HAS CHANGED THE 3.850 LAW.

IT CERTAINLY HAS, YOUR HONOR, AND IT HAS CHANGED ROY. IT HAS CHANGED WEEKS, AND IT HAS CHANGED OTHER OPINIONS OUT OF THIS COURT. BAKER.

FIRST OF ALL, REALLY, BEASLEY ISN'T A BASIS FOR CONFLICT JURISDICTION HERE. BEASLEY WASN'T EVEN A 3.850 MOTION, IN TERMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, WAS IT?

I THINK THAT IS CORRECT, YOUR HONOR, BUT WE STILL SUBMIT THAT THIS CASE BELONGS HERE ON CONFLICT JURISDICTION.

DON'T WE START FROM THE PREMISE THAT THE DISTRICT COURT DID, AND THAT IS THAT THERE IS A PRESUMPTION THAT DEFENSE COUNSEL CARRIED OUT THE RESPONSIBILITIES OF DEFENSE COUNSEL, WITHIN THE STANDARD OF STRICKLAND. CAN WE START FROM THAT BASIS?

YES, SIR.

AND THEN THE DISTRICT COURT IS SAYING THAT, UNDER THIS ALLEGATION, THAT THE PARENTS SPONTANEOUSLY CAME UP AND THEN ESCORTED THE CHILD BACK, THAT THAT IS NOT SUFFICIENT TO OVERCOME THE LATITUDE THAT WE GIVE COUNSEL, AS FAR AS COUNSEL PERFORMING IN ACCORDANCE WITH THE STRICKLAND STANDARD. ISN'T THAT WHAT THE DISTRICT COURT SAID?

YOUR HONOR, I DON'T READ THE OPINION THAT WAY, AND I CERTAINLY DON'T THINK THAT CONDUCT AND THAT SHOULD BE INDULGED. I THINK THE LAWYER HAS AN OBLIGATION TO SAY, I OBJECT TO THAT COMING UP AND CONSOLING THE WITNESS OR COMING UP AND TALKING TO THE WITNESS.

LET ME JUST ASK ONE QUESTION, IS THERE ANYTHING IN THE RECORD THAT WE HAVE, THAT SHOWS THAT THERE WAS ANY NEED TO CONSOLE THIS, MY READING OF THE VICTIM, ALLEGED VICTIM'S TESTIMONY IN THIS IS FAIRLY CALM. THERE ARE NO BREAKS BECAUSE SHE IS SOBBING OR ANYTHING ELSE. CAN WE CONTINUE. YOU NEED TO TAKE A BREAK? THAT OFTEN HAPPENS IN THESE SEXUAL CASES LIKE THIS.

THERE IS NOTHING IN THE RECORD.

IT IS FAIRLY CALM, COOL AND COLLECTED, FROM MY READING OF IT.

YES, SIR. THERE IS NOTHING LIKE THAT IN THIS RECORD.

SO THERE IS NOTHING TO SUPPORT OR ANYTHING THAT THESE PARENTS NEEDED TO COME UP AND EMOTIONALLY SUPPORT THEIR VICTIMIZED LITTLE DAUGHTER.

THAT'S CORRECT.

JUSTICE ANSTEAD HAS ONE QUESTION OR MAYBE TWO.

IN ANSWER TO JUSTICE CANTERO'S QUESTION, IT SEEMS TO ME THAT YOU HAVE CONCEDED THAT THE ONLY, QUOTE, EMOTIONAL OUTBURST, IS CONTAINED IN THAT FIRST SENTENCE, AND THAT IS SIMPLY THE FACT OF THE PARENT COMING UP AND ACCOMPANYING THE CHILD AWAY FROM THE WITNESS STAND. WE WERE HAVING A DEBATE, YOU KNOW, BOTH WITH YOUR OTHER COUNSEL AND WITH THE STATE EARLIER, ABOUT WHAT AN EVIDENTIARY HEARING MIGHT SHOW. IT SEEMS TO ME THAT YOU HAVE VIRTUALLY CONCEDED THAT YOU ARE NOT MAKING A CLAIM HERE, THAT THERE WAS SOME OUTBURST OR CONDUCTOR MISCONDUCT, FOR THAT MATTER, BEYOND THE FACT OF THE PARENTS SPONTANEOUSLY ACCOMPANYING, AND SO I AM HAVING SOME DIFFICULTY WITH YOU HAVING ADEQUATELY STATED A CLAIM THAT WOULD REQUIRE AN EVIDENTIARY HEARING, IF YOU ARE NOW CONCEDING THAT THAT FIRST SENTENCE OF THE MERE FACT OF, AS OPPOSED TO THE SPECTOR HERE, OF THE PARENTS COMING UP AND CRYING OR WHATEVER, AND THE CHILD COMING UP AND CRYING, OR THE JURY BEING DISTRESSED OR ANYTHING LIKE THAT GOING ON, YOU MADE NO ALLEGATIONS, AND SO I AM CONCERNED ABOUT THE WAY THAT YOU HAVE, AND WE WANT YOU TO BE CANDID, OBVIOUSLY.

YES, SIR.

OF WHETHER OR NOT YOU ACTUALLY HAVE STATED A MOTION THERE THAT WOULD WITHSTAND A FACIAL EXAMINATION AND THE ABILITY OF A TRIAL COURT, IN OTHER WORDS THE BOTTOM LINE I AM COMING TO HERE IS THAT A TRIAL COURT SAYING, WELL, ALL YOU ARE ALLEGING IS THE PARENT CAME UP AND ACCOMPANIED THE CHILD FROM THE WITNESS STAND, AND I THINK, AS A MATTER OF LAW, I CAN DETERMINE THAT THAT WASN'T SUFFICIENT TO RARE OBJECTION BY THE LAWYER. DO YOU UNDERSTAND WHAT I AM SAYING?

YES, SIR, I SURE DO.

AND IT SEEMS TO ME IN ANSWER TO OUR QUESTIONS, THAT IS ESSENTIALLY WHAT YOU HAVE SAID HERE.

WELL, YOUR HONOR, THAT IS WHAT I WAS TRYING TO SAY, THE EMOTIONAL DISPLAY, THE EMOTIONAL OUTBURST WE ALLEGE HERE IN THIS PARAGRAPH OF THE PLEADING, IS A WORD OF ART, AND WE WOULD SUBMIT THAT THE WORST CASE SCENARIO, WE SHOULD BE GRANTED LEAVE TO AMEND, JUST AS THIS COURT AUTHORIZED IN 1964, IN WEEKS, WHEN THESE CLAIMS ARE MARGINAL LIKE THIS. THIS RECORD NEEDS TO BE DEVELOPED.

WHAT WOULD YOU AMEND IT TO INCLUDE?

I THINK THEIR INITIAL, THERE ARE ADDITIONAL DETAILS AS WE ARE TALKING ABOUT. WHAT ACCOMPANIED THE EMOTIONAL OUTBURST? WHAT WAS SAID? WAS IT A GUILT QUESTION THAT SOMEBODY SAID TO THE DEFENDANT? WHAT WAS EMOTIONAL? WHAT MADE IT AN EMOTIONAL DISPLAY?

I THOUGHT YOU ANSWERED IN REGARD TO MY EARLIER QUESTION, IS THAT THAT THIS IS ALL YOU CAN ALLEGE, THE RUSHING UP AND LEAVING.

I WASN'T TRYING TO LEAVE THAT IMPRESSION.

WHERE IS THERE ANYWHERE IN THIS RECORD THAT WE CAN SEE THAT YOU TOLD THE TRIAL

COURT OR THE APPELLATE COURT, FOR THAT MATTER, THAT THERE WAS MORE, THAT IS THAT YOU REALLY WERE JUST USING THIS AS A VEHICLE, IN ORDER TO GET FURTHER DETAILS OUT THAT THERE REALLY WAS SERIOUS EMOTIONAL OUTBURST THAT MAY WELL HAVE AFFECTED THE JUDGMENT OF THE JURY IN THIS CASE?

YOUR HONOR, I THINK IF YOU READ, I CAN ONLY SAY IS THERE A SENTENCE OR A WORD THERE, I THINK WHEN WE SAY, IN TERMS OF, THAT WE DID, VOUCHING, BOLSTERING ASPECT THAT WENT WITH THIS, THAT THOSE MATTERS, EVEN THOUGH THEY MAY BE CONCLUSORY IN NATURE, SHOULD BE ACCEPTED AS BEING WHAT THEY WERE, AS BEING WHAT THEY ARE, AND WHAT HAPPENED WITH THE DISTRICT COURT --

CHIEF JUSTICE: I THINK THAT ANSWERS YOUR QUESTION. OKAY. YOUR TIME IS UP, AND THANK YOU BOTH, FOR RESPONDING TO OUR QUESTIONS.