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Richard Allen Johnson v. State of Florida

SC04-1972

GOOD MORNING GOOD MORNING,
JOHNSON VERSUS STATE OF
FLORIDA, MR. CALDWELL.

.
-- I APOLOGIZE --

THAT IS ALL RIGHT.

ALL RIGHT.

MY NAME AS GARY CALDWELL, I'M
HERE TODAY ON BEHALF OF
MR. RICHARD ALLEN JOHNSON, ON
HIS APPEAL FOR HIS FROM HIS
CONVICTION FOR MURDER AND
OTHER OFFENSES -- I'D LIKE TO
DISCUSS THE FIRST TWO ISSUES
RAISED IN THE BRIEF TODAY.

FIRST ISSUE HAS TO DO WITH
JURY SELECTION, THE LAW IN
FLORIDA REQUIRES IMPARTIALITY
OF JURORS IT DOES NOT REQUIRE
COMFORT.

DOES NOT REQUIRE THAT THEY
NEED TO BE COMFORTABLE WITH
THE DEATH PENALTY AND ONLY
REQUIRES THAT THEY FOLLOW THE
LAW.

WHAT HAPPENED IN THIS CASE
WAS THERE WAS A JUROR NAMED
MISS MONFORD, THE STATE
SOUGHT TO CHALLENGE HER FOR
CAUSE, BECAUSE OF A QUESTION
HE HAD ASKED HER ABOUT
WHETHER HER FEELINGS ABOUT
THE DEATH PENALTY WOULD
SUBSTANTIALLY IMPAIR HER
ABILITY TO FOLLOW THE LAW.

SHE RESPONDED TO THE
PROSECUTOR I WOULD DEFINITELY
FOLLOW THE LAW.

THAT WAS NOT SOMETHING THAT
SHE WOULD LIKE TO DO SHE
WOULD NOT LIKE TO NOT HAVE TO
DO THAT -- BUT SHE WOULD LIKE
TO FOLLOW THE LAW, SO THE
HER ANSWER WAS SHE WOULD
DEFINITELY FOLLOW THE LAW.

PROSECUTOR SAID TO THE JUDGE
AND YOU WILL SPREE WHAT I
JUST SAID THE RECORD DOES --
SUPPORT WHAT THE PROSECUTOR
SAID HE SAID HE ASKED HER IF
SHE COULD THERE BE
SUBSTANNINGSHAL IMPAIRMENT OF
HER ABILITY TO FOLLOW THE
LAW, AND SHE HAD SAID, AND
MORE SHE SAID THAT IT WOULD
IMPAIR HER ABILITY TO FOLLOW
THE LAW.

WHICH IS NOT CORRECT.
SO THE RECORD DOES NOT
SUPPORT THE PROSECUTORS
ASSERTION WHAT THE JUROR SAID
IN HER RESPONSE TO HIS
QUESTION ABOUT THAT.

WHICH PAGE OF THE RECORD
ARE YOU REFERRING TO --
WHAT PROSECUTOR SAID TO
THE JUDGE -- OR.

WHATEVER YOU JUST.

HE WITH THE PROSECUTOR
SAID TO THE JUDGE THAT IS
PAGE 1261 --

HOW ABOUT, THOUGH, THE
MR. SEYMOUR SAYS ARE YOU
DOUBTING YOUR ABILITY TO VOTE
FOR THE DEATH PENALTY SHE
ANSWERS YES I'M DOUBTING MY
ABILITY THAT I COULD.

I DON'T BELIEVE IN IT.

COULD I BRING MYSELF TO NOT
VOTE FOR IT?

NO IF IT NEEDED TO BE THAT
WAY, YES I COULD.

I DON'T LIKE IT I DON'T AGREE
WITH IT.

AND THEN AT THE END SHE GOES
I DON'T KNOW.

I CAN'T GIVE YOU A YES OR NO
ANSWER.

SO IT SEEMS TO ME THAT THE
STANDARD IS SHE HE KWIFB CAL
ABOUT HER EQUIVOCAL ABOUT HER
ABILITY TO SET ASIDE HER
FEELINGS AND IT LOOKS TO ME
LIKE SHE IS -- SHE IS CLEARLY
EQUIVOCAL.

IN ABOUT HER ABILITY TO
RECOMMEND DEATH.

ALL RIGHT.

THAT IS EARLIER IN THE

QUESTIONING, I BELIEVE THAT IS PAGE 1125. IF YOU LOOK AT THE QUESTION THAT THE PROSECUTOR SAID TO THE JURY -- THE THING THAT TOOK SEVERAL SENTENCES A COMBINATION OF NOT VERY ACCURATE STATEMENT OF LAW GOVERNING SENTENCES\$!!ING PROCEEDINGS, IN WHICH PROSECUTOR SEEMED TO ASSUME THAT THERE IS SITUATIONS IN WHICH THE LAW REQUIRES DEATH SENTENCE, AND THAT PUT ESTABLISHMENT OF AGGRAVATING CIRCUMSTANCE IS SUFFICIENT TO REQUIRE A DEATH PENALTY -- WHERE IN FACT THE STATE HAS TO ESTABLISH SUFFICIENT AGGRAVATING CIRCUMSTANCES AND THEN THE DEFENSE PUTS FORWARD MITIGATING SISHGS, KNOWS THE PREDICATE TO THE QUESTION WAS TO -- DISCOURSE, HIS QUESTION SIMPLY DID NOT ALLOW OF A YES OR NO ANSWER.

AND SHE SAID I CAN'T GIVE A YES OR IN ANSWER WHICH WAS INARGUABLY THE CORRECT ANSWER THAT ONE THE ONLY LOGICAL AN THAT ONE COULD GIVE TO THE QUESTION, BECAUSE HIS QUESTION WAS AND I APOLOGIZE FOR READING FROM THIS BUT IT I THINK WILL ESTABLISH HOW HER QUESTION DID NOT HER ANSWER DID NOT DISQUALIFY HER.

THE SPECIFIC QUESTION WAS YOU MAY SIT THERE AND SAY THE LAW SAYS I SHOULD VOTE FOR THIS, BUT I JUST DON'T LIKE IT, AND I DON'T WANT TO DO IT IN THIS CASE AND THIS IS NOT ONE OF THE CASES I WOULD DEFINE AS CALLING FOR THE DEATH PENALTY, COULD YOU SUBORDINATE YOUR FEELINGS AND VOTE FOR THE DEATH PENALTY IN THIS CASE?

OR ARE YOUR PERSONAL FEELINGS SO STRONG YOU WOULDN'T BE ABLE TO -- WON'T BE ABLE TO? THAT WAS A VERY CONFUSE

QUESTIONING TO NOT ALLOW A YES OR NO ANSWER, AND IT ASSUMED THAT THERE SITUATIONS IN WHICH DEATH PENALTY IS REQUIRED.

WHICH IS NOT CORRECT.

SUBSEQUENTLY THE PROSECUTOR ASKED HER THE CORRECT QUESTION, WHICH WAS WHETHER THESE FEELINGS WOULD SUBSTANTIALLY IMPAIR WITH HER ABILITY TO IMPOSE THE DEATH -- TO VOTE FOR THE DEATH SENTENCE SHE SAID SHE WOULD DEFINITELY FOLLOW THE LAW THAT WAS WHAT THE PROSECUTOR RELIED ON, THE PROSECUTOR DIDN'T RELY.

HE WHAT IF SHE SAID I ENEMY AT ONE POINT I THINK YOU ARE REFERRING TO PAGE 1258 AND 1259.

YES, SIR.

SHE SAYS I WOULD DEFINITELY FOLLOW THE LAW IF ASKED TO BUT IT IS NOT SOMETHING LIKE TO DO KCHLT I WOULD NOT I WOULD LIKE TO FOLLOW THE LAW, I WOULD NOT LIKE TO GIVE THAT DECISION.

UM-HMM.

SO SEEMS AGAIN SHE IS BEING EQUIVAMERICA SHE SAYS I WOULD FOLLOW THE LAW BUT, AIS, WOULDN'T LIKE TO GIVE THAT DECISION.

WELL THAT DOESN'T DISQUALIFY SOMEONE NOT WANTING TO BE GIVEN THAT DECISION.

MAYBE NOT ALONE BUT COMBINED WITH HER PRIOR STATEMENTS IS, DON'T HAVE A YES OR NO ANSWER, AND NO I COULDN'T FOLLOW IT.

-- YOU CAN'T READ THAT ONE SENTENCE IN ISOLATION YOU'VE GOT TO READ IT IN COMBINATION WITH EVERYTHING ELSE, YL DOESN'T THAT MAKE IT EQUIVOCAL.

EQUIVOCAL.

SHE SAID I WOULD

DEFINITELY FOLLOW THE LAW.

SO THAT -- SO THERE IS NO BASIS FOR DISQUALIFICATION -- DISQUALIFICATION IN HER RESPONSE TO QUESTION THAT, IT IS WELL ESTABLISHED THAT THE QUESTION IS WHETHER THE JURORS FEELINGS WOULD SUBSTANTIALLY IMPAIR HER ABILITY TO FOLLOW THE LAW OR REACH A VERDICT BASED ON THE FACTS OF THE CASE, AND SHE SAID I WOULD DEFINITELY FOLLOW THE LAW.

I JUST DON'T WANT TO.

I DON'T WANT TO BE IN THAT POSITION.

SO THAT DOES NOT DISQUALIFY HER, NOW, AGAIN, HER EARLIER QUESTION WHICH THE JUDGE THE EARLIER QUESTION WHICH THE JUDGE HAD RELIED ON WAS ONE IN WHICH -- IN WHICH THERE WAS NO ANSWER THAT ONE COULD GIVE TO THE PROSECUTOR'S QUESTION WHICH WAS BASED ONNEA -- AN ERRONEOUS STATEMENT OF THE LAW GOVERNING CAPITAL PROCEEDINGS, AFTER WHICH DEFENSE COUNSEL SAID TO HER, ACCURATELY STATED THAT THE STATE WAS FOR THE AGGRAVATING CIRCUMSTANCES AND THEN THE DEFENSE -- THE MITIGATING CIRCUMSTANCES, WHICH -- WAS SHE ABLE TO WEIGH THOSE CIRCUMSTANCE -- THOSE FACTORS, SHE SAID YES, THAT SHE WOULD.

SO AS THE CASE AS THE QUESTIONING PROCEEDED AND AS THE PROCEDURE WAS EXPLAINED TO HER MORE ACCURATELY SHE BECAME FIRMER IN HER STATEMENT THAT SHE WOULD FOLLOW THAT LAW.

THE \$PROSECUTOR'S EARLIER QUESTION THE ONE THAT JUSTICE PARIENTE HAD MENTIONED WHICH WAS BASICALLY SORT OF AN OUT STRIKE KIND OF THING, AND AGAIN IT WAS NOT ACCURATE. BUT AS IT WAS EXPLAINED TO HER BY THE DEFENSE ATTORNEY

SHE SAID THAT SHE WOULD BE
ABLE TO DO THAT, AND THAT
IN --
YOUR ARGUMENT REALLY IS AS
LONG AS YOU MAKE THAT
STATEMENT NO MATTER WHAT ELSE
HAS GONE ON IN THE VOIR DIRE
NO MATTER HOW EQUIVOCAL
EQUIVOCAL JUROR HAS BEEN OVER
MULTIPLE TIMES BEING ASKED
THAT AS LONG AS THE JUROR AT
SOME POINT MAKES A STATEMENT
THAT I WILL FOLLOW THE LAW,
BUT THAT IS SUFFICIENT.
I BELIEVE THAT THE ANSWER
IS THAT UNDER ALL -- ALL YOU
LOOK TO WHETHER THE RECORD
SUPPORTS THE GROUND ASSERTED
BY THE PROSECUTOR WHICH I'M
SUBMIT TO YOU THE RECORD DOES
NOT.
SUPPORT IT.
AND DEFENSE ATTORNEY POINTED
THAT OUT.
DEFENSE ATTORNEY SAID NO, AS
I DISAGREE WITH HER THE
PROSECUTOR'S CHARACTERIZATION
OF THIS, AND YOU LOOK TO WHAT
THE JUDGE RELIED UPON AND THE
JUDGE RELIED UPON THAT
EARLIER QUESTION WHICH I
QUOTED, IN HER RESPONSE TO
THAT THAT SHE DID NOT HAVE A
YES OR NO ANSWER.
TO THAT QUESTION.
BUT I GUESS THE PROBLEM
AND IT HAPPENS IN OTHER
CONTEXT, IS THIS: AND THIS IS
WHERE ALTHOUGH FOR CAUSE
CHALLENGES ARE DIFFERENT
SOMETHING ABOUT DEMEANOR
PLAYS INTO IT WHICH IS THAT
IT IS OFTENTIMES SKILLFUL
ATTORNEY CAN GET A JUROR
AFTER THEY HAVE EQUIVOCATED
TO SAY O YEAS BUT I WILL DO
THIS AND SO IT IS THE
TOTALITY OF THE QUESTIONING
THAT GIVES RISE TO WHETHER
THERE'S REASONABLE DOUBT.
WOULD YOU AGREE?
IN OTHER WORDS YOU CAN'T JUST
YOU ARE SAYING WELL YOU CAN'T
LOOK AT THE FIRST ANSWER.

AND SAY, THAT SHE
EQUIVOCATED.

BUT YOU ALSO AGREE YOU CAN'T
LOOK AT THE LAST ANSWER, AND
SAY THAT SHE DIDN'T
EQUIVOCATE.

DO YOU AGREE WITH THAT.
IT IS NOT EITHER ONE OR IN
OTHER WORDS, OR NOT THAT YOU
COULD -- LAST ANSWER SAID SHE
WAS FIRM SHE SAID I COULD DO
IT.

YOU'VE GOT TO AND PARTICULAR
WE MAKE ON THE CASES THERE
WILL BE SOMETIMES, COURT WILL
ASK A JUROR QUESTIONS AND ALL
OF THE SUDDEN THERE WILL BE
-- BECOME FIRM ABOUT
SOMETHING EQUIVOCATING ABOUT,
IT IS LOOKING AT THE TOTALITY
OF THE QUESTIONING TO SEE
WHETHER THAT JUROR EXPRESSED
A DOUBT ABOUT BEING ABLE TO
IMPOSE THE DEATH PENALTY IF
IT WERE CALLED FOR IN THIS
CASE, BECAUSE OF HER BELIEF
AGAINST THE DEATH PENALTY.
PARTICULAR THAT IS
STANDARD --
RIGHT.

WELL, THE -- TRIAL JUDGE WELL
YOU ARE REVIEWING THE
DECISION OF THE TRIAL JUDGE.
AND THE FURTHER IN THE TRIAL
JUDGE SO FAR IS TRIAL JUDGE
-- BASES DECISION ON MATTERS
NOT EASILY DISCERNED FROM THE
RECORD THAT IS WHAT ALTON
SAYS HERE THE JUDGE RELIED ON
WHAT 3R0RS SAID YOU SA AGREED
WITH PROSECUTOR AS I SAID
WHAT THE PROFESSIONOR SAID
WAS NOT ACCURATE
KAUSHGIZATION.

THE JUDGE SPECIFICALLY
REFERRED TO THAT EARLIER
QUESTION, WHICH WAS THE ONE
THAT I READ WHICH WAS SO IT
WAS THE QUESTION WAS
CONFUSING.

IT DIDN'T SHOW KONS FUSION BY
THE JUROR, IT SHOWED
CONFUSION IT WAS JUST THE
QUESTION CONFUSING SHE

COULDN'T ANSWER THAT, SAID I DON'T HAVE A YES OR NO ANSWER AND THE PROSECUTOR SAID FAIR ENOUGH AND TURNED TO ANOTHER JUROR.

SO, IF YOU LOOK AT THE TOTALITY OF THE CIRCUMSTANCES WHEN THE ISSUE WAS BROUGHT BEFORE HER, AS TO THIS IS THE PROCESS WILL YOU WEIGH THE CIRCUMSTANCES, SHE SAID YES, AND IF YOU LOOK AT WHAT SHE WAS ASKED SUBSEQUENTLY IT WAS NOT SOME LEADING QUESTION BY ONE PARTY OR THE OTHER TO GET HER TO AGREE WITH WHAT THAT PERSON WAS SAYING.

SHE PROSECUTOR OBVIOUSLY WAS HOPING SHE WOULD SAY IT DOES SUBSTANTIALLY IMPAIR BUT SHE REPLIED I DEFINITELY WOULD FOLLOW THE LAW.

NOW THERE'S A QUESTION IN THIS CASE AS TO WHETHER THIS ISSUE WAS PRESERVED WOULD -- WHAT HAPPENED WHEN THE DEFENSE ATTORNEY MADE THIS WHEN THE DEFENSE ATTORNEY ARGUED THIS ISSUE OBJECTED TO THE CHAMPION THE JUDGE -- TO THE CHALLENGE THE JUDGE SAID OF YOU A CONTINUING OBJECTION I'M NOT THE MOST EXPERIENCED LAWYER IN THE WORLD, BUT, TO ME WHEN A JUDGE SAYS OF YOU A CONTINUING OBJECTION, THAT MEANS I DON'T WANT TO HEAR ANYTHING MORE ABOUT IT.

SO THE DEFENSE ATTORNEY DID NOT LATER RENEW THE OBJECTION AT THE TIME THAT THE JURY WAS SWORN, SUBSEQUENTLY, THERE WAS ANOTHER CAUSE CHALLENGE TO A JUROR, AT WHICH POINT AGAIN THE JUDGE SAID YOU DON'T OF YOU A CONTINUING OBJECTION, THE ISSUE IS PRESERVED FOR APPEAL.

SO THE CONTEXT OF THE WHOLE THING IS THE DEFENSE ATTORNEY WAS HEARING FROM THE JUDGE, ONCE I SAY OF YOU A CONTINUING OBJECTION, MATTER IS SETTLED DOUNT HAVE TO

RERAISE IT SUBSEQUENTLY WHEN THEY WERE GOING THROUGH THE PEREMPTORY CHALLENGES AT VARIOUS STAGES THE DEFEND -- DEFENSE ATTORNEY WOULD SAY WE ACCEPT, THE JUDGE WOULD SAY DO YOU HAVE ANY PREMENTRY CHALLENGE AT THIS POINT THE DEFENSE ATTORNEY WOULD SAY ACCEPT.

BUT EVEN AFTER THAT HE ASKED FOR ADDITIONAL PREMENTRY CHALLENGES THE LAST TIME -- HE ASKED FOR ADDITIONAL PEREMPTORY CHALLENGES, AND THERE WAS A FEEL THAT SLAPY ISSUE WHERE AGAIN THE JUDGE SAID OF YOU A STANDING OBJECTION YOU DON'T NEED TO RAISE THIS AGAIN, SO FROM THIS IS THE CIRCUMSTANCES THERE WAS NO REASON FOR THE DEFENSE ATTORNEY TO RENEW THE OBJECTION AT THE TIME THE JURY WAS SWORN HE WAS TOLD THERE WAS A STANDING OBJECTION.

YOU ARE GOING TO GO INTO YOUR OTHER ISSUE ABOUT THE WHAT IS -- BEEN FOUND AT LEAST BY THE TRIAL JUDGE TO BE -- THE EXCITED UT RANSZ THE -- UTTERANCE THE ISSUE WITH THE THE VICTIM SAID TO THE DEFENDANT WHILE HE WAS CHOKING HER.

YES, MA'AM, JUST BEFORE I DO THAT LET ME SAY ONE OTHER THING ABOUT THAT FIRST ISSUE WHICH IS THAT WE ARE ASKING FOR A NEW TRIAL.

ENTIRELY AND NOT SIMPLY A NEW PENALTY PHASE, BECAUSE OUR CONTENTION IS THAT OUR MY CONTENTION IS THAT UNDER BOT. SO IN USED TO BE CALLED GUILT PHASE IS ALSO DEATH QUALIFICATION PHASE THE DECISION SAYS CONVICTION OF FIRST-DEGREE MURDER ALONE IS SUFFICIENT TO QUALIFY SOMEONE FOR THE DEATH PENALTY SO THAT IS THE FWAIP USED TO BE CALLED TRIAL FOR GUILT I

GUESS SHOULD BE SOME OTHER FORMULATION OF IT NOW IT IS ALSO DEATH QUALIFICATION PERIOD THE ONLY PERIOD CONSTITUTIONALLY REQUIRED FOR THE JURY PROCEEDING UNDER RING THAT IS THE FIRST THING LEADING UP TO THE VERDICT THE FIRST THREE -- MURDER SO FOR MA REASON I CONTEND THAT ENTITLED TO A NEW TRIAL ON BECAUSE OF THE DENIAL OF THE CAUSE CHALLENGE.

BUT --

--

TYPICALLY, ACROSS THE COUNTRY THAT -- RING KIND OF ISSUE THAT REQUIRES A NEW TRIAL ON ALL OF THE GUILS ISSUES AS WELL AS ANY PENALTY PHASE UNDER A SYSTEM OF SUCH AS OURS WE HAVE A DUAL TRIAL. WELL IS, THINK I THINK THAT THE THING IN WITH RING THAT IS THE JURY HAS NOT MADE THE FINDING DEATH QUALIFICATION THE DEFENDANT CANNOT BE SENTENCED TO DEATH.

-- THE DEATH QUALIFICATION IS A 6TH AMENDMENT NECESSARY ELEMENT.

SO UNDER THE IN ORDER SYSTEM AS INTERPRETED BY BOTISON THASHGS DEATH PENALTY ISSUE BECAUSE CONSTITUTIONAL DEATH PENALTY ISSUE IS DECIDE BIRD THE GUILT VERDICT WASN'T LAW PRIOR TO BOTISON.

BOTISON PLURALITY PIN POST CONVICTION CASE BE THAT AS IT MAY --

I THINK THAT IS WHERE FLORIDA LAW IS NOW THIS COURT HAS --

ALL RIGHT, DON'T WANT TO OVERCHARACTERIZE IT HEAT OF THE DISCUSSION BUT I BELIEVE THE COURT HAS SAID BASICALLY RING DMROOINTS FLORIDA.

-- DOESN'T APPLY TO FLORIDA OR HAS COME CLOSE TO THAT SO THAT IS OUR POSITION IN THAT REGARD.

THE SECOND ISSUE HAS TO DO

WITH THIS STATEMENT OF THE VICTIM WHICH WAS BROUGHT OUT ON THE RE-REDIRECT EXAMINATION VERY UNUSUAL PROCEDURAL POSTURE FOR SOMETHING LIKE THIS TO COME UP.

THAT THE WOMAN MISS TAMMY HAD SAID THAT SHE WANTED TO SEE HER CHILDREN.

THE DEFENSE OBJECTED, MADE SEVERAL OBJECTIONS TO THIS IS, BELIEVE FIRST OBJECTION WAS THAT THE PREJUDICE OUTWEIGHED FLEE SEED REALLY A VALUE.

AND THIS -- OUTWEIGHED PROCEDURAL VALUE THE COURT STAEBZ FOUR PART ANALYSIS FOR DETERMINATION OF THAT ISSUE I SUBMIT UNDER ALL FOUR PRONGS OF THAT ANALYSIS THIS STATEMENT WAS NOTED A MISSIBLE

WHAT WAS IT IT WAS ADMITTED AND PROBATIVE OF WHAT JOHNSON THOUGHT AT THE TIME THAT -- THAT THE VICTIM MADE THIS REMARK TO HIM.

WASN'T THAT IN OTHER WORDS, IT'S -- WHETHER IT IS SAYING I HAVE A PLEASE, PLEASE DON'T DO THIS, I'VE GOT A -- YOU KNOW, A CHILD WHO IS DYING, I HAVE A SICK WHATEVER, JOHNSON BELIEVED THAT TO BE THE CASE, AND THEREFORE AND CONTINUES TO PROCEED WITH THE MURDER. THAT IS WHAT THEY WERE WEREN'T THEY SEEKING TO ADMIT IT OR AS PROBATIVE OF JOHNSON'S STATE OF MIND? NO.

THE STATE AND THE PENALTY PHASE AND IN THE SENTENCING ORDER IT WAS SPECIFIC FIND WAS MADE THIS IS WITH THE HER LAST THOUGHT WAS.

THAT SHE WANTED TO SEE HER. HE HOW IS THAT IT CAME IN FOR THE GUILT PHASE TOO. RIGHT.

WITH THE THAT POINT THE

JUDGE SAID THIS IS ADMISSIBLE TO SHOW HER THOUGHT THAT SHE IS DYING AND SHE WANTS TO MAKE THIS STATEMENT -- WHAT I'M ASKING YOU SO WHAT -- WOULD YOU SAY WHAT IS THE RELEVANT IN GUILT PHASE AS TO WHAT SHE IS THINK SNOOGUM-HMM.

CORRECT.

WITH THE I'M SAYING IS IT IS RELEVANT IN THE GUILT PHASE AS TO WHAT JOHNSON THOUGHT WAS GOING ON TO SHOW PREMEDITATION.

IN THAT CASE IT WOULDN'T HAVE BEEN ADMITTED FOR THE TRUTH OF THE MATTER ASSERTED. WHICH BUT IN THIS CASE IT WAS ADMITTED FOR THE TRUTH OF THE MATTER --

THAT CAN'T BE WHY IT WAS BEING ADMITTED IT WAS BEING ADMITTED, FOR THE TRUTH OF THE MATTER ASSERTED, HER DESIRE TO SEE HER CHILDREN.

SO STATE NEVER ARGUED THAT THIS SHOULD BE ADMISSIBLE NONHEARSAY TO REFLECT JOHNSON'S STATE OF MIND THAT WAS NEVER ARGUED BELOW? NO.

BUT THE STATE SAID WAS IT IS NOT HEARSAY BECAUSE IT IS IN THE COAST'S STATEMENT BUT THE JUDGE POINTED OUT --

DEFENDANT'S STATEMENT BUT THE JUDGE POINTED OUT IN THE DEFENDANT'S STATEMENT BUT KEYNES HER HEARSAY STATEMENT, THE STATE SAID YES BUT IT IS AN EXCITED UTTERANCE.

SO IT WAS AN EXCITED UTTERANCE OF COURSE IS ADMITTED AS AN EXCEPTION TO HEARSAY TO ADMIT THE STATEMENT, OR THE -- TRUTH OF THE MATTER ASSERTED.

IF THE JUROR HOW WAS IT ARGUED TO THE JURY IN THE GUILT PHASE.

IT WAS NOT ARGUE TO THE THE JURY IN THE GUILT PHASE AT ALL WAS NOT MENTIONED TO

THEM, AND THE ARGUMENT.
IN THE JURORY.

-- JURORY.

BUT, AS AGAIN AS I SAY IT WAS
ADMITTED WITH A TRUTH OF AS
TO HER WHAT WAS IN HER MIND
AS SHE WAS DYING.

WHICH WOULD BE PROBATIVE
IN THE PENALTY PHASE, OF A --
HAC.

THAT WAS HOW IT WAS USED
YES, MA'AM, NOW AGAIN, THE
TAYLOR CASE SO ITS A FOUR
PART ANALYSIS FOR THIS, THE
FIRST OF WHICH PERTAINS TO
WHAT YOU ARE TALKING ABOUT,
MOVE THELESS THE NEED OF THE
OF THE TESTIMONI, OBVIOUSLY
THE STATE HAD NO NEED OF IT
BECAUSE THEY HAD PRESENTED
HIS ENTIRE DIRECT EXAMINATION
MOST OF THEIR CASE IN WHICH
THE DEFENDANT HAD SAID THAT
HE HAD BROKEN HER NECK, THAT
HE HAD CHOKED HER I CAN'T
REMEMBER THE EXACT -- EXACT
WORDING BUT IT WAS TO THE
EFFECT THAT HE HAD BROKEN HER
NECK HE HAD KILLED HER.

THE COMMENT CAME IN, THAT
HE MADE THE HAGGAN WHICH IS I
DIDN'T KNOW SOMETHING TO THE
EFFECT I DIDN'T KNOW -- TAKES
SO LONG TO BREAK SOMEONE'S
NECK THAT CAME IN --

I BROKE HER NECK CAME IN
ON THE DIRECT EXAMINATION,
RIGHT.

IT WAS COVERED ON THE
CROSS-EXAMINATION.

YOU DON'T SAY THAT SHOULD
HAVE BEEN EXCLUDED.

YOU AGREE THAT THAT --

NO THAT IS THE DEFENDANT'S
STATEMENT I BROKE HER NECK.
RIGHT.

THAT IS WHAT YOU ARE
ARGUING ON THIS THAT IT
ADMISSIBLE BUT YOU FEEL THAT
THE PROBATIVE THAT
PREJUDICIAL VALUE IS
OUTWEIGHED BY THE PROBATIVE
VALUE THAT IS WHAT I THOUGHT
YOU WERE GETTING A THE AT.

NO.

I APOLOGIZE IF I MISLED THE COURT.

YOUR ARGUMENT IS THAT IT IS NOT AN EXCITED UTTERANCE?

MY ARGUMENT WITH RESPECT TO THE THIS STATEMENT RAISED

ON REDIRECT EXAMINATION

RE-REDIRECT EXAMINATION I'M

SORRY THE STATEMENT RAISED ON

RE-REDIRECT EXAMINATION THE

STATE SAID DID HE SAY WHAT

WAS THE LAST THING THAT THE

DEFENDANT SAY WHAT WAS THE

LAST THING SHE SAID?

AND THE DEFENSE OBJECTED TO

THAVMENT THAT IS TO THACHLT

THAT IS THE STATEMENT WHICH

IS BEFORE THIS COURT.

HER STATEMENT.

THAT SHE WANTED TO SEE HER

CHILDREN, AND AGAIN THE STATE

OBVIOUSLY DID NOT NEED THIS

STATEMENT BECAUSE THEY

PRESENTED THEIR CASE WITHOUT

IT.

THERE WAS NO NEED FOR IT, IT

WAS NOT A FACT THAT THEY HAD

TO PROVE.

THE SECOND PART OF THE TAYLOR

ANALYSIS IS DOES IT SAY DOES

IT TENDENCY TO SUGGEST AND

THE WORDS "TENDENCIOII TO

SUGGEST EMOTIONAL BASIS FOR

IMPROPER EMOTIONAL BASIS FOR

THE VERDICT.

OBVIOUSLY IT DOES.

YOU TELL SOMEBODY THAT SHE

WANTS TO SEE HER CHILDREN SHE

WAS BEING STRANGLLED TO DEATH.

IT IS OBVIOUSLY HAS A VERY

STRONG EMOTIONAL IMPACT.

SNOOM -- WELL INTO REBUTTAL

IF YOU --

OKAY I WILL WRAP THIS UP.

YOUR CHOICE.

I UNDERSTAND THAT I

APPRECIATE THAT.

THE THIRD PART OF THE

ANALYSIS IS THE CHAIN OF

INFERENS, TO BE REACHED FROM

THE STATEMENT TO THE MATERIAL

FACT, AND HERE THERE REALLY

IS NO MATERIAL FACT.

BECAUSE HER STATE OF MIND IS NOT A MATERIAL FACT IN ISSUE IN THE CASE, AND IN ANY EVENT THIS STATE PRESENTS THIS AS A MENTAL -- HYPOTHESIZED MENTAL PROCESS ON HER PART, AND THE LAST PART OF THE ANALYSIS IS THE EFFECTIVENESS OF LIMITING INSTRUCTION THERE WAS NO LIMITING INSTRUCTION BECAUSE THE STATEMENT WAS ADMITTED FOR THE TRUTH OF THE MATTER ASSERTED.

SO WE WOULD ASK THE COURT TO REVERSE THE CONVICTION AND CITIZEN TEN IN THIS CASE -- AND SENTENCE IN THIS CASE, THANK YOU.

MISS CAMPBELL.

GOOD MORNING MAY IT PLEASE THE COURT LESLIE CAMPBELL ATTORNEY GENERAL'S OFFICE ON BEHALF OF THE STATE TIE WILL START WITH TWO FIRST.

I THINK THAT IS WHERE WE ENDED.

IN THIS CASE, IT -- WHILE THE TRIAL COURT FOUND THAT IT WAS HEARSAY IT REALLY IS NOT HEARSAY IT WAS NOT THE STATEMENT OF TAUNY WAS NOT COMING IN FOR THE TRUTH OF THE MATTER ASSERTED.

WHAT IT WAS COMING IN TO SHOW WAS THAT MR. JOHNSON HAD HEARD TAMMY SAID SHE WANTED TO SEE HER CHILDREN AS SHE IS BEING CHOKED, AND -- MISS CAMPBELL.

YES?

OKAY WHICH IS WHAT I ASKED MR. CALLED BELL -- CALDWELL IS THAT AN ISSUE YOU RAISED IN YOUR BRIEF THAT THIS IS NOT HEARSAY BUT THAT IT WAS COMING IN FOR JOHNSON'S STATE OF MIND?

WE SAY -- THE -- THE PROSECUTOR SAID IT WAS -- IT WAS -- NOT HEARSAY.

AND I -- AT TRIAL.

AT TRIAL YES.

I THOUGHT THAT WAS BECAUSE THE PROSECUTOR SAID WELL, HE

IS SAYING IT, AND THEN THEY SAID YEAH BUT HE IS SAYING WHAT SHE SAID SO IT IS REALLY DOUBLE HEARSAY DID THEY EVER ARGUE THAT IT WAS PROBATIVE WHICH IS WHAT I WOULD THINK WOULD BE AN ARGUMENT, I JUST WANT TO MAKE SURE I UNDERSTAND WHICH -- THAT IT WAS COMING IN TO PROVE WHAT JOHNSON THOUGHT NOT WHAT THE VICTIM THOUGHT WAS HAPPENING TO HER.

I THINK THE INITIAL COMMENT THAT IT WAS NOT HEARSAY COVERED THAT, HOWEVER.

--

DO YOU THAT ARING IN YOUR BELIEF NOO NO I DID NOT.

-- I MISSED THAT.

HOWEVER, THE INITIAL ARGUMENT THAT IT WAS NOT HEARSAY I THINK COVERS IT.

YOU LIKE MY -- HYPOTHESIS HERE IT IS NOT HEARSAY THAT IT ACTUALLY WAS COMING INTO SHOW JOHNSON'S STATE OF MIND. ABSOLUTELY.

BUT THAT WAS NOT ARGUED THAT WASN'T BE AIS THE TRIAL JUDGE ADMITTED IT.

NO WHEN TRIAL JUDGE SAID YOU KNOW, MORE OR LESS FORCED THE ISSUE THAT IT COULD BE DOUBLE HEARSAY THEN THE COMMENT THEN THE OTHER ARGUMENT IS THAT IT WAS -- EXCITED UTTERANCE.

WELL THIS IS PRETTY ODD TO ME IN THIS TODAY I ENEMY I WOULD ACCEPT THAT IF IT WAS GOING TO BE COMING IN TO SO SHOW SHAUN JON'S STATE OF MIND IN THE GUILT FACE THAT THAT WHO IS IT SHOULD HAVE BEEN ARGUED.

IT COMES IN, IN

RE-RE-RE-RE-DIRECT, AND NOT EVEN ARGUED IN CLOSING ARGUMENT IN THE GUILT PHASE, WHAT A WAS IT -- YOU KNOW, PRIVY -- YOU WEREN'T THERE. WHAT IS STATE THINKING IF IT

WAS AN IMPORTANT PART OF THEIR CASE, WHAT ARE THEY DOING BRINGING IT IN A RE-RE-REDIRECT AND WHY THEN DON'T THEY ARGUE IT IN THE CLOSING ARGUMENT? IT SEEMS LIKE IT IS ALMOST LIKE THIS GRATUITOUS THING IS JUST THROWN OUT THERE, WHICH HAS PRETTY EMOTIONAL COMPONENT TO IT AND THEN IT IS JUST LEFT THERE IT IS NOT EVEN USED IN ANY WAY. I COULD SPECULATE THAT -- NO, I DON'T WANT YOU TO SPEK A LITTLE YOU WERE A -- WANT -- WHAT DOES THE RECORD SHOW AS TO WHAT WHY IT WOULD BE ELICITED ON A THE FOURTH REDIRECT? AND THEN NOT USED IN ANY WAY TO SHOW ANY ELEMENT OF MR. JOHNSON'S GULTLICHLTT IN THE LGUILT PHASE. OTHER THAN OVERSIGHT THE PROSECUTOR MAYBE FOUND THAT ADDITIONAL STATEMENT, OR FELT THAT THE THAT HE OR SHE HAD ENOUGH INFORMATION TO GO FORWARD WITH -- WITHOUT THAT PARTICULAR. WAS THEREFORE OBJECTION MADE AT THE TIME THAT WHAT WAS BEING BROUGHT OUT ON RE-RE-REDIRECT WAS OUTSIDE THE SCOPE OF KRORS THE ORIGINAL DIRECT. YES, THAT OBJECTION WAS MADE HOWEVER THE TRIAL COURT SAID -- WELL THE STAY -- STATE COULD AT THAT POINT, TAKE THE WITNESS OFF THE STAND AND BRING THE WITNESS BACK. SO THEY DEALT WITH IT AS A BASIS OF REOPENING THE ORIGINAL DIRECT SNOOVMENT YES. -- YES. AND THEN WAS DEFENDANT ALLOWED TO CROSS? OR DID -- DID THE DEFENDANT CROSS ON THAT? WELL, IT WASN'T REALLY --

IT -- IT CAME IN AS
RE-REDIRECT IT WASN'T IT
WASN'T
RIGHT.

-- AN ACTUALLY TAKE
HERROFF THE STAND YOU KNOW.
I UNDERSTAND THAT, THEN
WAS THERE FURTHER
CROSS-EXAMINATION?
I BELIEVE THIS WAS FURTHER
CROSS-EXAMINATION OR AT LEAST
THERE WAS AN OPPORTUNITY I
BELIEVE AFTER THAT.

HOW WOULD YOU -- IF YOU
WERE US AFFIRMING THIS CASE,
HOW WOULD YOU WRITE THE
PRINCIPALS OF LAW --
PRINCIPLES OF LAW THAT WOULD
EMERGE, IN OTHER WORDS, WE
END UP SAYING DO WE SAY HER
STATEMENT WASN'T ADMITTED AS
HEARSAY WHEN I ENEMY, WAS NOT
HEARSAY BECAUSE IT WASN'T
ADMITTED FOR THE TRUTH WHEN
WE KNOW IT WAS AD MITTED FOR
THE TRUTH.

AND WHEN WE PERFORM AND LOOK
AT THE ANALYSIS OF WHETHER
THE PROBATIVE VALUE WITHOUT!!\$\$!!!!!!!!!!!!!!

WITHOUTWISE PREJUDICE WHAT DO
WE SAY STATE WANTED IT FOR
I'M A LITTLE CONCERNED ABOUT
YOU KNOWY APPRECIATE YOUR
CANDOR,I THINK THAT I COULD
MAKE ABE PESH GOOD CASE FOR
WHY -- PESH GOOD CASE WHY
SHOULD SHOULD COME IN
THINKING IN TERMS WHAT RUE --
ROOM OF LAW IS THAT IT DOES
SEEM THAT -- RULE OF LAW
SEEMS AN AFTER THOUGHT MAYBE
THEY COULD HAVE RECALLED THE
WITNESS IF THEY WANTED THE
STATEMENT IN, BUT THEN THEY
DON'T USE IT FOR ANYTHING,
AND THAT IS NOT ALONE A
PROBLEM, BUT WHEN YOU ARE
TRYING TO DO WHETHER
PROBATIVE VALUE OUTWEIGHED BY
ANY PREJUDICIAL IMPACT YOU'VE
GOT KNOW WITH THE PROBATIVE
VALUE IS THAT THE STATED A
ADVANCED AT THE TIME THAT IT
WAS THOUGHT BE ADMITTED.

I THINK THAT THIS COURT
COULD MAKE A RULING SAYING
THAT IT IS NOT HEARSAY THAT
THERE ARE MULTIPLE GROUNDS
FOR ADMISSION OF THIS TYPE OF
EVIDENCE, AND THAT WHILE THE
TRIAL COURT MADE INITIAL
FINDING THAT IT WAS HEARSAY
IT COMES IN UNDER AN EXCITED
UTTERANCE WE HAVE A TIPSY
COACHMAN ROLL AND THIS COURT
CAN FIND THAT THERE ARE OTHER
GROUNDS FOR ADMISSION AND AS
FAR AS THE PROBATIVE VERSUS
THE PREJUDICIAL, IT DOES
SPEAK TO THE SEXUAL BATTERY
IT SPEAKS TO THE
PREMEDITATION, IT SPEAKS TO
MR. JOHNSON'S LACK OF
ACCIDENT, CLEARLY, THAT IF
THIS IS BEING SAID AND
MR. JOHNSON'S HEARING THIS,
AT THE TIME THAT HE IS
SUPPOSEDLY HAVING CONSENSUAL
SEX WITH THIS VICTIM, AND
THEN SHE EVENTUALLY DIES IF
HE HAS HIS HANDS AROUND HER
THROAT, IT GOES TO BOTH OF
THOSE CHARGED EVENTS, THE
PREMEDITATED MURDER, WHETHER
IT BE UNDER A PREMEDITATION
STANDARD OR UNDER FELONY
MURDER STANDARD AND IT IS
ALSO SPEAKS TO SEXUAL
BATTERY.

SO I THINK THE \$\$\$STATE'S
POSSIBLE OVERSIGHT FOR NOT
ACTUALLY BRINGING IT UP IN
CLOSING ARGUMENT WHEN THERE
WERE MANY OTHER FACTORS THAT
WERE BROUGHT UP ADDRESSED IN
CLOSING ARGUMENT SHOULD NOT
BE HELD AGAINST THE STATE.
THERE WAS SUFFICIENT EVIDENCE
TO PROVE THIS CASE WITHOUT
THIS PARTICULAR PIECE OF
EVIDENCE HOWEVER IT WAS
BEFORE THE JURY, AND THE JURY
SERM COULD HAVE TAKEN IT INTO
CONSIDERATION,IN MAKING THOSE
FINDINGS!!\$\$!!!!!!!!!!!!!!
FINDINGS, BOTH PREMEDITATION
FELONY MURDERER AND SEXUAL
BATTERY.

THERE ARE NO OTHER QUESTIONS I WILL MOVE ON TO ISSUE ONE.
INNISH ONE WE ARE MAKING A PRESERVATION ARGUMENT WHILE WE RECOGNIZE THE TRIAL COURT HAS MADE CERTAIN STATEMENTS -- MADE A STATEMENT THAT THIS ISSUE WAS -- FORTE THAT,S THERE WAS STANDING OBJECTION, UNDER JOINER THAT IS NOT THE BEST POSSIBLE POLICY TO HAVE. BECAUSE --
I'M -- I CAN'T SEE PUTTING THE ANY COUNSEL IN A POSITION WHERE A TRIAL JUDGE SAYS YOU HAVE A STAND OAK -- OBJECTION WHICH ESSENTIALLY MEANS DOUNT NEED TO OBJECT ANY FURTHER THEN LATER SAYING, YOU HAD TO OBJECT ANYWAY.
HAS ANY COURT EVERY SAID THAT WHEN A JUDGE GRANTS SOMEBODY A STANDING OBJECTION THAT THERE WAS A FAILURE TO PRESERVE WHERE THE COUNSEL DIDN'T OBJECT ANYWAY.
LET MES ANSWER THAT IN TWO I WAS, NUMBER ONE, WHILE HE SAID A SEASONED STAND OK JEBBINGION THE COURT STAYED -- SAID STANDING OBJECTION COURT DIDN'T SAY DID NOT HAVE TO PRESERVE THIS LATER ON YOU DIDN'T HAVE TO RERAISE IT IN OBJECT WHEN THE PANEL IS SWORN.
WHEN CONTEXT IN THIS CONTEXT, WHALES COULD IT MEWHAT ELSE COULD IT ENEMY -- MEAN COULDN'T ENEMY STAND OK EJECTION TO GOOD CAUSE CHALLENGE IT WILL HAS TO ENEMY OF YOU STAND OK JEBBING STHOUN THIS PARTICULAR JUROR?

PARTICULAR JUROR?
I UNDERSTAND THE COURT'S POSITION.
AND, MAYBE IN THIS PARTICULAR CASE, GIVEN THE STATEMENTS THAT WERE SAID, THIS COURT, MIGHT FIND THAT IT IS PRESERVED.

HOWEVER, UNDER JOYNER AND, THE TRIAL COURT AND DEFENSE COUNSEL SHOULD HAVE BEEN WELL AWARE OF JOYNER, THERE IS NECESSITY OF OBJECTING TO THE JURORS, OR RERAISING ALL OF THE OBJECTS THAT HAD GONE BEFORE IN ORDER TO MAKE SURE THAT THE DEFENSE COUNSEL STILL HAD THOSE OBJECTIONS AND WAS NOT, HIS OPINION WASN'T CHANGED, GIVEN THE NEW COMPOSITION OF THE PANEL.

AS JOYNER IS CONCERNED WITH, YOU DON'T WANT THE DEFENSE OR, WHO IS EVER MAKING THESE OBJECTIONS TO, YOU KNOW, A, ERROR IN HIS POCKET, SHOULD HE HAVE CHANGED HIS MIND GONE THROUGH THE ENTIRE JURY SELECTION PROCESS?

MAYBE THAT WOULD LEAD US TO CONCLUDE A TRIAL JUDGE SHOULD NOT GRANT STANDING OBJECTIONS ONCE A TRIAL JUDGE DOES --

AS I SAY MAYBE NRT THIS CASE, GIVEN THE WAY THAT IT HAS BEEN PRESENTED THIS COULD BE FOUND PRESERVED BY THIS COURT.

BUT AT MINIMUM I FEEL THIS COURT SHOULD MAKE A STATEMENT, SAYING STANDING OBJECTIONS, ARE NOT, THE APPROPRIATE THING, TO DO, DURING, A, JURY SELECTION. BECAUSE, IT COMPLETELY AND TOTALLY EVOICE RATES JOYNER. IT I WAS ABOUT THE DEFENSE, OR GIVES WHOEVER IS MAKING THE OBJECTION, TO JURORS A SECOND BITE THE AT APPLE. THAT'S CERTAINLY UNFAIR AND, SHOULDN'T CONTINUE.

IF THE, THE DEFENSE WANTS TO, CONTINUE TO OBJECT, TO THE JUROR THAT WAS, PREEMTORI STRICKEN FOR CAUSE THAT OBJECTION CAN BE RAISED AGAIN, DURING THE FINAL SELECTION PROCESS JUST BEFORE THE JUR A'S SWORN.

TO ALLOW A STANDING
OBJECTION TO OCCUR AFTER THE,
PANEL IS COMPLETELY
DIFFERENT, IT PUTS THE, PUTS
THE WHOLE CASE IN A
DIFFERENT POSTURE.

I HAVE TWO QUESTIONS ON
THAT.

ONE I ASKED IN THE PRIOR
CASE, EVEN THOUGH WE'VE GOT
THIS BLANKET RULE OR HAVE
HAD IT, THAT YOU NEED TO,
REOBJECT AT THE TIME THAT
THE JURY IS ACCEPTED WHEN
YOU'RE REALLY FEELING HERE
THE JUROR WAS STRICKEN FOR
CAUSE, SHE'S GONE.

SO THE HARM IS ALREADY TAKEN
PLACE.

THE RATIONALE OF SAYING THAT
YOU NEED TO OBJECT AGAIN, I
ALWAYS THOUGHT WAS, LIKE ANY
OTHER OBJECTION, TO GIVE THE
TRIAL COURT A CHANCE TO, HE
RELOOK AT, THAT, OBJECTION.
HOW IS THE PURPOSE THAT WE,
HAVE PREVIOUSLY STATED, OR,
HAVING TO RENEW YOUR
OBJECTION BEFORE A JURY IS
ACCEPTED, HOW IS IT SERVED
WHEN YOU'RE DEALING WITH,
SOMETHING LIKE THIS WHERE
THE JUROR IS ALREADY
STRICKEN?

WELL, IT SERVES TWO
PURPOSES.

ONE, THE, AS I WAS SAYING
THE DEFENSE AND IT'S
MENTIONED IN JOYNER OR THE
PERSON MAKING THE OBJECTION,
MIGHT HAVE CHANGED HIS MIND
AND IS NOW COMFORTABLE WITH
THE JURY.

SO, HE MAY HAVE, SILENTLY
WITHDRAWN THE OBJECTION,
UNLESS HE, HE RERAISES IT
THIS COURT WOULD NEVER KNOW.
OKAY.

BUT ON THAT, THE, LET'S GO
TO THE SECOND AND YOUR
SECOND REASON IS?
RIGHT.

THE SECOND REASON IS IF THE
TRIAL COURTS LOOKS AT IT

AGAIN AT THE TIME OF THE JURY SELECTION, WE CERTAINLY WOULD SAVE A WHOLE HECK OF A LOT OF TIME AND JUDICIAL RESOURCES, IF, THE COURT AT THAT TIME, SAID OH, YES THAT WAS A MISTAKE AND LET'S START OVER.

LET'S CALL A MISTRIAL RIGHT NOW AND RE, AND REDO THE JURY SELECTION.

YOU WOULDN'T HAVE THE WHOLE TRIAL.

YOU WOULDN'T HAVE THE WHOLE APPELLATE PROCESS.

YOU THINK THAT -- I

ALWAYS THOUGHT THE PURPOSE WAS LET THE JUDGE LOOK AGAIN AT THE JURY PANEL, MAYBE GIVE AN ADDITIONAL PREEMTORI WHERE IT CAN BE CORRECTED.

THAT'S WHERE IN THIS CASE, THE FACT THAT HE WAS, DISSATISFIED WITH THE, JUROR BEING STRICKEN FOR CAUSE, HE GOES, I'VE GOT, YOU KNOW, I'LL GRANT YOU, A CONTINUING OBJECTION.

WHAT ELSE INTO THAT SITUATION WOULD HE NEED TO SAY TO THE, JUDGE?

DID YOUR CONTINUING OBJECTION STOP NOW AT THE TIME THAT, WE'RE, INCLUDING WITH JURY SELECTION?

I GO BACK TO JOYNER WHICH REQUIRES THE ADDITIONAL OBJECTION.

AND YES MAYBE IN THIS CASE THE COURT MISLED DEFENSE COUNSEL.

HOWEVER, HE DIDN'T, HE DIDN'T SAY THAT IT WAS PRESERVED FOR APPEAL.

THE TRIAL COURT DIDN'T SAY THAT ISSUE WAS PRESERVED FOR APPEAL AS HE DID HE FOR THE OTHER TWO JURORS WHICH CAME AFTERWARDS.

I KNOW YOU AS A GOOD, ASSISTANT ATTORNEY GENERAL, WE DON'T WANT, A SITUATION WHERE SOMEONE, MISLEADS, TRIAL COUNSEL AND THEN SAY

IT'S GOTCHA.

DO WE REALLY WANT THAT IN THIS CASE?

NO WE DO NOT.

THAT'S MY POINT, MAYBE, YOU KNOW, WE'VE RAISED THE PRESERVATION ISSUE.

WE'VE POINTED OUT WHERE THERE ARE DIFFERENCES IN THE WAY THE STANDING OBJECTION AND THIS IS PRESERVED FOR APPEAL.

HAD THE TRIAL COURT WORDED IT DIFFERENTLY.

AND, THE THRUST OF THIS, REALLY, IS THAT, THE STANDING OBJECTIONS, SHOULD NOT BE GRANTED IN VOIR DIRE.

MY OTHER QUESTION, THE LEGISLATURE, I THINK IT WAS LAST SESSION, SAID, YOU DON'T NEED TO, IF YOU'VE PRESERVED IT ONCE YOU DON'T NEED TO, RENEW IT, HOW WILL, DO YOU HAVE ANY, THOUGHTS AS TO HOW, FOR SINCE YOU'RE ASKING US TO DO SOMETHING FOR THE FUTURE HOW THAT ADDITION BY THE LEGISLATURE, REALLY WOULD CHANGE, FOR THE FUTURE, JOYNER PRINCIPLE?

IT'S MY UNDERSTANDING THAT WAS GOING MORE TOWARDS THE SUPPRESSION ISSUE WHERE THIS COURT , HAD SAID YOU HAVE A SUPPRESSION HEARING AND YOU HAVE TO RERAISE IT OR IF YOU HAVE AN OBJECTION TO CERTAIN EVIDENCE COMING IN YOU NEED TO RERAISE IT BEFORE IT COMES IN.

THAT IS, I WOULD THINK A LITTLE DIFFERENT.

AND, IT GOES BACK TO THE JOYNER ISSUE WHICH IS, THE, COMPOSITION OF THE JURY, MAY HAVE CHANGED TO SUCH A POINT, THAT THE, DEFENSE IS NOW, HAPPY WITH THE JURY AS, AS NOW CHOSEN.

SEE I THINK THAT THE STATUTE IS MUCH BROADER THAN JUST DEALING WITH SUPPRESSION.

BUT WE'LL NEED TO LOOK AT THAT IN LIGHT -- YOU DON'T HAVE A VIEW THEN AT THIS POINT?

I'M SAYING IT HAS MORE TO DO WITH EVIDENCE, COMING IN, VERSUS, JURY SELECTION.

THAT'S MY UNDERSTANDING. YOU KNOW, I COULD STAND TO BE CORRECTED.

WITH REGARD TO THE ACTUAL MERITS, MS. MONFFTE WAS QIF CALL ALL THE WAY THROUGH. HER FIRST STATEMENT, ON THIS ISSUE CAME IN RESPONSE TO, PROSECUTOR ASKED SEVERAL QUESTIONS AND HAD HEARD FROM, JUROR ATKINS.

AND, IMMEDIATELY AFTER, JUROR ATKINS TOLD THE COURT HE COULD NOT VOTE FOR THE DEATH PENALTY NO MATTER WHAT THE ACTS ARE NO MATTER WHAT THE JUDGE TELLS YOU THE FACTS ARE, IN RESPONSE TO THIS STATE'S QUESTION, ANYONE ELSE FEEL THAT WAY? SHE WAS THE FIRST, FIRST PERSON QUESTIONED.

SO, FROM THE OUTSET SHE WAS TOTALLY AGAINST THE DEATH PENALTY AT THAT POINT.

AND THEN, IT GOES ON FROM THERE AND SHE'S EQUIVOCAL AS TO WHETHER OR NOT SHE WANTS TO IMPOSE IT.

SHE CAN'T GIVE A YES OR NO ANSWER.

WHEN THE DEFENSE TRIED TO REHABILITATE THIS JUROR, SHE, SHE WAS ASKED WHETHER OR NOT SHE COULD HE WITH THE AGGRAVATE TORES AND WEIGH THE MITIGATE TORES AND VOTE FOR LIFE.

THAT'S COMPLETELY DIFFERENT QUESTION WHETHER SHE FOLLOW THE LAW AND EITHER VOTE FOR LIVE LIFE OR DEATH.

IF SHE IS MERELY VOTING FOR LIFE THAT PLAYS INTO HER INITIAL COMMENT SHE WOULD NOT VOTE, SHE COULDN'T VOTE FOR THE DEATH PENALTY, SHE

WOULDN'T IMPOSE THAT.
WHILE AT THE END, SHE DOES
SAY SHE COULD FOLLOW THE LAW
AS JUSTICE QUINTERO POINTED
OUT IT WASN'T SOMETHING SHE
WANTED TO DO.

IT WASN'T, DEATH PENALTY WAS
NOT A DECISION WE SHE WOULD
CAN'T TO MAKE.

IF YOU LOOK AT TOTALITY,
THERE IS REASONABLE DOUBT AS
TO WHETHER OR NOT THIS JUROR,
COULD SUBORDINATE HER
FEELINGS ON THE ISSUE AND,
FOLLOW THE LAW AND THAT'S,
THAT'S THE STANDARD THAT WE
HAVE TO FOLLOW UNDER ALT.

AND, UNLESS THERE ARE OTHER
QUESTIONS I ASK THAT THIS
COURT, -- ONE OTHER ISSUE.
ON ALT,ALITY WAS DECIDED
AFTER, RING AND APRENDI.
IN ALT SHOULD YOU DECIDE TO
REVERSE ON THE JUROR ISSUE
IT SHOULD ONLY GO DOWN FOR A
NEW PENALTY PHASE AS WAS
DECIDED IN ALT.

ON THAT I ASK THE COURT
AFFIRM THE CONVICTION AND
SENTENCE AND, UNLESS THERE
ARE ANY OTHER QUESTIONS?
THANK YOU VERY MUCH.

THANK YOU.

MR. CALDWELL?

YES.

AS TO THE, EVIDENTIARY ISSUE,
STATE ASKS THE COURT TO
REVIEW A DECISION THAT THE
TRIAL JUDGE NEVER MADE.
THE, DEFENSE ATTORNEY ARGUED
TO THE TRIAL JUDGE THAT THIS
STATEMENT HAD FROM PROBATIVE
VALUE.

IT GOES, IT SHOWS NOTHING
THAT THE DEFENDANT DID.
IT SHOWS, ADDS NOTHING TO
THE FACTS OF THE CASE, TO
THE CAUSE OF DEATH, THE
MANNER IN WHICH THE DEFENSE
WAS INFLICTED.

THE JUDGE'S RESPONSE TO THAT
WAS, THE STATEMENT WAS
ADMISSIBLE FOR THE TRUTH OF
THE MATTER ASSERTED.

THE JUDGE SAID, CERTAINLY
WOULD YIELD AN INFERENCE OF
PREMEDITATION, IF SHE'S
MAKING STATEMENTS WHICH
WOULD INDICATE THAT SHE
THOUGHT, SO THE JUDGE SAYS
THIS IS PROBATIVE BECAUSE
IT'S ADMITTED TO SHOW SHE
THOUGHT --

DON'T --.

SHE IS MAKING --

IN OUR CASE LAW, SUCH
THAT THE JUDGE, THE DECISION
THE JUDGE WAS MADE, WAS TO
ADMIT THE EVIDENCE.

CORRECT?

I, AS TO THE WEIGHING OF
THE, PROBATIVE VERSUS
PREJUDICIAL VALUE YOU DEFER
TO THE JUDGE.

BUT THE JUDGE SAID THERE WAS
EXTREMELY DAMAGING EVIDENCE
AS PART OF HIS ANALYSIS.

HE SAID IT IS BEING ADMITTED
TO SHOW THE TRUTH.

THAT'S 9 PROBATIVE VALUE.

YOUR ARGUMENT HERE IS A
403 ARGUMENT AS TOE POSED TO
WHETHER IT'S ADMISSIBLE OR
NOT ADMISSIBLE?

THE JUDGE WAS MAKING 403
ANALYSIS AT THIS POINT.

WHICH IS ADMISSIBILITY.

THE DEFENSE ATTORNEY SAID
THE PREJUDICE OUTWEIGHS THE
PROBATIVE VALUE.

IT HAS NO PROBATIVE VALUE.

THE JUDGE SAID IT HAS
PROBATIVE VALUE TO SHOW HER
MENTAL PROCESSES.

THE JUDGE SAID IT'S
EXTREMELY DAMAGING.

I THOUGHT YOU JUST SAID
THE LEAD-IN TO THAT AS YOU
READ IT ESTABLISHING THE
PREMEDITATION WHICH IS
EXACTLY WHAT JUST AT THIS
PARIENTE ASKED HER.

THAT IS PREMEDITATION, IF,
IF, SHE IS MAKING, THIS IS
WHAT THE JUDGE SAID, WOULD
YIELD AN INFERENCE OF
PREMEDITATION, IF, SHE'S
MAKING STATEMENTS WHICH

WOULD INDICATE SHE THOUGHT SHE WAS DYING.
AND SHE'S MAKING THIS REQUEST.
SO THE JUDGE --
DOESN'T THAT GO TO CONSENSUAL -- I MEAN THAT'S THE WHOLE PICTURE.
CONSENSUAL ENCOUNTER VERSUS THIS IS NOT JUST AN ACCIDENT.
THIS IS WHAT IS HAPPENING.
I'M A LITTLE TROUBLED BY THAT.
THE JUDGE IS MAKING A DELICATE BALANCING.
THESE THINGS ARE ALWAYS -- DEFER TO WHAT THE COURT SAYS AND WHAT THE JUDGE RULES.
THE JUDGE SAYS, THIS IS ADMITTED TO SHOW HER MENTAL PROCESSES.
THEN HE SAYS, THIS IS EXTREMELY DAMAGING BUT I'M GOING TO ADMIT IT BECAUSE OF THAT PROBATIVE VALUE.
BUT MR. CALDWELL, LET'S GO BACK TO THE FACT, AND I DID REVIEW WHAT THE TRIAL JUDGE SAID.
WHETHER THE TRIAL JUDGE EARER ROHN NEWSLY, TO MEER ROHN NEWSLY SAID IT GOES TO HER STATE OF MIND BECAUSE IN THE GUILT PHASE IT'S HIS STATE OF MIND THAT IS GOING TO WHAT HE THOUGHT ABOUT WHAT SHE WAS DOING AND WHAT IMPORTANTLY WHAT THE JUDGE SAYS IT GOES TO PREMEDITATION AND ABSENCE OF MISTAKE.
NOW THAT MEANS, THAT ALTHOUGH HE MAY BE SAYING IT IN A CERTAIN WAY, SAYING IT'S GOING TO WHAT, HE, THAT, HE HEARD, HER SAY THIS.
SHE COULDN'T HAVE, BEEN, ENGAGED IN EITHER CONSENSUAL SEX FOR THE SEXUAL BATTERY AND HE THOUGHT, THAT, THIS IS, WHAT WAS GOING ON.
THAT IS THAT SHE WAS BEGGING TO, YOU KNOW, SEE HER

CHILDREN BEFORE SHE DIED.
AND IT GOES TO PREMEDITATION
AND ABSENCE OF MISTAKE,
WHICH IS WHAT THE JUDGE
RULED.

THE STATE HAD ALREADY PUT
FORWARD ITS EVIDENCE OF
PREMEDITATION.

THE DEFENSE ATTORNEY SAYS,
THE JUDGE, THIS HAS NO
PROBATIVE VALUE BECAUSE IT
DOESN'T ESTABLISH ANYTHING
THAT HE DID, ANY OF THE
FACTS OF THE CASE.

MEANING THE MATERIAL FACTS
OF THE CASE.

BUT THE JUDGE SAYS, IT'S,
PROBATIVE OR PREMEDITATION,
IF IT ESTABLISHES HER STATE
OF MIND.

WHICH IS NOT -- YOU'RE
TRYING TO SUBSTITUTE YOUR
JUDGMENT FOR THE JUDGE ON A
UNIQUELY JUDGE-BASED,
JUDGE-FOCUSED RULING WHICH
IS THE PREJUDICE VERSUS THE
PROBATIVE VALUE.

BECAUSE THE JUDGE'S
PREJUDICE VERSUS PROBATIVE
VALUE MIGHT HAVE BEEN
TOTALLY DIFFERENT.

THE JUDGE COULD HAVE GIVEN
THE JURY LIMITING
INSTRUCTION IF THIS WAS NOT
BEING ADMITTED TO PROVE HER
THOUGHT PROCESS.

THE DEFENSE COULD HAVE ASKED
FOR A LIMITING INSTRUCTION
SAID, THIS, WHAT WAS
ACTUALLY IN HER MIND IS
IRRELEVANT CONSIDERATION.
SOME SORT OF LIMITING
INSTRUCTION.

THAT IS NOT THE CASE.

THE STATE WAS ADMITTING IT
AS A EXCITED UTTERANCE TO
SHOW HER STATE OF MIND.

THE JUDGE SAID IT WAS
PROBATIVE FOR THAT PURPOSE
IF IT ESTABLISHES HER STATE
OF MIND.

THAT'S HOW THE JUDGE
UNDERWENT THIS PROCESS.
HE GUESS WHAT I'M ASKING

YOU AS A, EXPERIENCED LAWYER
IS, UNDERSTAND WHAT THE
JUDGE SAID.

IF THE JUDGE SAID I'M
ALLOWING IT IF THEY FOR
PREMEDITATION AND ABSENCE OF
MISTAKE, HOW DOES THE,
VICTIM'S STATE OF MIND,
ESTABLISH PREMEDITATION IN
ABSENCE OF MISTAKE?

I AGREE, IT DOES NOT.
THE STATE OF MIND DOES NOT
ESTABLISH PREMEDITATION.
DID THE DEFENSE LAWYER
ARGUE THAT?

YEAH THE DEFENSE
ATTORNEY --
THEREFORE YOU WOULD THINK
THAT THE YOUR ARGUMENT WOULD
BE, IT'S NOT PROBATIVE OF
ANYTHING BECAUSE HER STATE
OF MIND IS NOT PROBATIVE
OF --

THAT'S WHAT THE DEFENSE
ATTORNEY SAID.

HE SAID, THE DEFENSE
ATTORNEY SAID --

THAT'S NOT WHAT YOU'RE
ARGUMENT IS HERE.

I ALSO ARGUE IT'S NOT
PROBATIVE AT ALL.

ONCE YOU'RE GETTING IN
403 YOU'RE ASSUMING IT HAS
SOME PROBATIVE VALUE.

I AGREE WITH THAT.

BUT THE DEFENSE ATTORNEY
SAID IT HAD NO PROBATIVE
VALUE.

IN MY BRIEF I ARGUE IT HAS
NO PROBATIVE VALUE.

THE STATE SAYS, WELL, IT HAS
PROBATIVE VALUE BECAUSE SHE
WENT THROUGH THIS MENTAL
PROCESS WHERE SHE'S THINKING
HE IS GOING TO KILL ME,
THEREFORE I HAVE TO SAY
THIS, WHY IS WHY IT'S NOT
ADMISSIBLE AS AN EXCITED
UTTERANCE.

THAT IS SOMETHING IN THE
BRIEFS WHICH WE HAVEN'T
TALKED ABOUT TODAY.
THE DEFENSE ATTORNEY
SPECIFICALLY SAYS IT HAS NO

PROBATIVE VALUE.
HE SAYS, PAGES 16935.
SO, AND, THAT WAS THE RULING
THAT THE JUDGE -- 1695.
THAT WAS THE RULING THE
JUDGE MADE WHICH YOU ARE TO
CONSIDER.
THE JUDGE UNDERTOOK THIS
ANALYSIS BASED ON HIS
UNDERSTANDING THE STATE WAS
ADMITTING THIS TO PROVE HER
MENTAL PROCESSES WHICH IS,
NOT, NOT AT ALL, UNDER THE
FOUR PART ANALYSIS OF TAYLOR,
A, COUNTS AGAINST THE STATE
ON EACH OF THE FOUR POINTS
OF ANALYSIS.
SO BASED UPON THAT WE'RE
ASKING THE COURT TO REVERSE
THE CONVICTION AND SENTENCE
IN THIS CASE.
THANK YOU.
THANK YOU BOTH FOR YOUR
ARGUMENTS.
WE'LL TAKE THE CASE UNDER
CONSIDERATION.
THE COURT WILL STAND IN
RECESS UNTIL 9:00 TOMORROW
MORNING.
PLEASE RISE.....