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Steven Edward Stein v. State of Florida

SC06-1505

NEXT CASE ON THE CALENDAR
THIS MORNING IS STEIN VERSUS
STATE OF FLORIDA.,,

>> GOOD MORNING, YOUR HONOR.

>> YOUR HONOR.

>> WE REPRESENT STEVEN STEIN,
THE DEFENDANT IN THIS MATTER.
AND AFTER AN EVIDENTIARY
HEARING, HEARINGS IN
JACKSONVILLE THAT BROUGHT AN
APPEAL OF THE HEARING COURTS
ORDER DENYING OUR CLAIMS.
INITIALLY, WE ALLEGE THAT THE
HEARING JUDGE SHOULD HAVE
RECUSED HIMSELF UPON TESTIFYING
IN THIS MATTER AND DID NOT.
THIS CASE SHOULD GO BACK FOR A
HARING ON THAT BEFORE A
DIFFERENT JUDGE.

>> IS THERE A LINE IN THESE
CASES, HERE WE ARE TALKING
ABOUT ALLEGATIONS THAT THE
STATE HAS PREPARED, THE
JUDGMENT AND WE LOOK ACROSS THE
SPECTRUM OF KINDS OF CASES,
WHERE A JUDGE HAS TO RESPOND TO
CERTAIN FLOW OF PAPER OR THOSE
KINDS OF THINGS.

ARE THERE LINES TO BE DRAWN AND
IF SO, WHERE ARE THEY AND HELP
US OUT WITH THAT ANALYSIS.

WHAT IS THIS PROPER ANALYSIS.

>> THERE ARE A -- THERE ARE
LINES TO BE DRAWN AND I BELIEVE,
FOR INSTANCE, IF THE JUDGE
SIMPLY INDICATED FROM THE BENCH,
LOOK, I DID NOT WRITE THIS
ORDER, THAT WOULD HAVE BEEN
SUFFICIENT.

HE COULD HAVE CONTINUED.

>> YOU MEAN THE ORDER THEY
FOUND.

>> RIGHT.

RHYME NOT GOING TO GIVE YOU A

HEARING ON THIS.

THE COURT DIDN'T WRITE THE ORDER.

SOMETHING THAT --

>> WELL, IT WOULD BE IN VIOLATION OF A NUMBER OF OUR CASES.

THE COURT CANNOT RESPOND TO ANY FACTUAL ALLEGATION.

OF A MOTION TO RECUSE.

WE HAVE BEEN DOWN THAT PATH SEVERAL TIMES.

AND SO, THE ONLY RECOURSE THE JUDGE HAS IS TO -- WHEN SOMETHING IS ALLEGED AND THERE IS ALLEGED TO BE A FACTUAL MATTER, IS TO DO ESSENTIALLY WHAT JUDGE WIGGINS DID.

>> WELL, YOUR HONOR, THIS WOULD BE BEFORE -- NO MOTION TO RECUSE WAS FILED.

WE FILED AN ALLEGATION.

WE HAD AN UNSIGNED COPY OF THE ORDER IN OUR FILE.

WE FOUND AN UNSIGNED COPY OF THE SENTENCING ORDER IN THE TRIAL ATTORNEY -- IN THE STATE ATTORNEY'S FILE.

WE WEREN'T -- DID NOT KNOW WHY THEY WOULD HAVE IT.

>> DID YOU HAVE ANY MORE -- ANYTHING OTHER THAN THAT.

>> NO, WE JUST HAD THAT FOR A PRIMA FACIE CASE, MADE THE ALLEGATIONS.

>> AFTER THE MADE THE ALLEGATION DID YOU TALK TO THE STATE ATTORNEY, THE JUDGE'S JA OR DO ANYTHING PRIOR TO THAT -- SO THAT YOU HAD A REASONABLE SUSPICION?

IN OTHER WORDS, WERE THERE NOTES GOING BACK AND FORTH BETWEEN THE JUDGE OR ANY COPIES OF THE -- ANYTHING ELSE OTHER THAN AN UNSIGNED COPY OF THE SENTENCING ORDER THAT WAS ACTUALLY ENTERED IN THIS CASE.

>> NO, WE DID NOT AND I AGREE, WE JUST DID NOT HAVE THAT LAITON RELATIONSHIP WITH THE STATE ATTORNEY IN THIS CASE. THAT WOULD HAVE BEEN THE DESIROUS THING TO DOCUMENT I

AGREE WITH YOUR HONOR AND WE PROBABLY SHOULD HAVE. NORMALLY WOULD HAVE. WE JUST DIDN'T HAVE THAT KIND OF RELATIONSHIP IN THIS CASE. BUT WE CERTAINLY WOULD NOT -- WHAT HAPPENED IS THE STATE THEN CONCEDED THE HEARING ON THE ISSUE IN THEIR RESPONSE AND THEY CONCEDE, WE WERE ENTITLED TO AN EVIDENTIARY HEARING IN THEIR ANSWER AND AT THAT POINT WE THOUGHT WELL, MAYBE THERE IS SOMETHING TO THIS.

BECAUSE THE STATE IS DREEING WE'RE ENTITLED TO A HEARING.

>> I DIDN'T UNDERSTAND YOUR EARLIER COMMENT WHICH -- IN RESPONSE TO JUSTICE LEWIS AND JUSTICE WELLS AND YOU SAID IT WOULD HAVE BEEN PERFECTLY ALL RIGHT FOR THE JUDGE TO HAVE SAID FROM THE BENCH, I DID NOT DRAFT THE ORDER.

DID YOU MEAN TO SAY I DID GRAFT DRAFT THE ORDER?

I'M NOT SURE.

>> I PROBABLY WAS SPEAKING WAY TOO LOOSELY WHEN I SAID THAT.

>> TELL ME, JUST TELL ME AGAIN WHAT YOU SAID.

AND THEN WHAT YOU SNEENT OKAY. IFT TRYING TO COMMUNICATE IF WE WERE AT THE HUFF HEARING, WE HAD A HUFF HEARING, WE WERE ARGUING WE SHOULD BE ENTITLED TO A HEARING AND THE JUDGE JUST COMMENTED AT THE HEARING, PERHAPS IT WOULDN'T BE PROPER, COMMENTED, I'M NOT GOING -- AND I'VE HAD IT HAPPEN, I WILL NOT GIVE YOU A HEARING ON THIS, THE COURT VERY WELL KNOWS THAT IT WROTE THE ORDER.

OR SOMETHING TO THAT EFFECT.

>> BUT IF THE JUDGE DID THAT, THEN THAT IS --

>> RIGHT.

>> THAT WOULD BE THE END OF THE

--

>> RIGHT.

>> BUT THE STATE STIPULATED TO A HEARING.

IT DIDN'T EVEN -- WE DIDN'T

REALLY IMPRESS IT IN A NORMAL FORM WE WOULD HAVE IN A HUFF HEARING.

>> I WANT TO BE SURE -- SO YOU DIDN'T IN THIS CASE SAY JUDGE, HAVE THE STATE PREPARE THE SENTENCING ORDER AND THEREFORE WE NEED AN EVIDENTIARY HEARING AND BECAUSE THE JUDGE WOULD BE AN ESSENTIAL WITNESS WE ARE MOVING TO RECUSE THE JUDGE. THAT DID NOT HAPPEN.

>> WE WERE NOT TRYING TO RECUSE THE JUDGE.

THIS A TRAP TO RECUSE HIM.

WE FOUND THE UNSIGNED ORDER.

AT THAT TIME, WE HAD HAD SEVERAL CASES WHERE IN FACT THE STATE DID WRITE THE ORDER.

>> AND THEN WHAT HAPPENS IS YOU GET THE EVIDENTIARY HEARING. AT THAT POINT THEN MOVE TO RECUSE THE JUDGE.

>> FROM THE FURTHER CASE, YES, YOUR HONOR.

>> AND THE JUDGE GRANTS IT AND IT IS REALLY -- I'LL ASK THE STATE TO COMMENT, THE JUDGE GRANTS IT AS TO THAT ONE ISSUE, BUT SAYS I'LL STAY IN THE REST AND THAT IS WHERE YOU CLAIM THERE IS ERROR AS A MATTER OF LAW.

THERE CAN'T BE THIS HYBRID RECUSE.

>> THAT IS CORRECT, YOUR HONOR.

>> YOU WERE TRYING TO GET TO THE BOTTOM OF WHERE DID THAT -- COPY OF THE UNSIGNED ORDER COME FROM.

>> THAT IS CORRECT.

>> AND WHY WAS -- AND SO -- TELL ME WHAT CHANGED AS FAR AS THE FACT THAT IN ESSENCE THE TRIAL JUDGE AFTER THE TESTIMONY OF THE OTHER STATE ATTORNEY OR THE -- WHOEVER, THAT SAID, NO, THEY DIDN'T HAVE ANYTHING TO DO WITH THE DRAFTING OF ANY ORDER, FOR THE JUDGE JUST TO CONFIRM HIS PROCEDURE WHICH APPEARS TO BE TOTALLY INNOCENT PROCEDURE, AND THEN WHY SHOULD THE FACT THAT THE JUDGE AS OPPOSED TO

SAYING IT AT A HUFF HEARING,
LOOK, YOU KNOW, I DO MY OWN
ORDERS, WHATEVER, NOW, HE SET
IT AT A HEARING.

SO WE HAVE EVEN MORE INSULATION
AGAINST A -- WHY SHOULD THE
JUDGE BE DISQUALIFIED THEN TO
PRESIDE OVER THE FURTHER
PROCEEDINGS IF THIS COURT IS
GENERALLY INDICATING IT SHOULD
BE THE CASE?

>> BECAUSE, YOUR HONOR, I HAD
TO CRASS EXAMINE THE THE JUDGE
AT THAT POINT.

THE JUDGE DID NOT EXACTLY
CONFIRM THIS, ACTUALLY AT THE
HEARING DID NOT CONFIRM THE
STATE ATTORNEY'S TESTIMONY.
AS TO WHAT HAPPENED PRECISELY.
HE DID NOT EXTENT THAT HE SAID
I DIDN'T -- THE STATE ATTORNEY
SAID THAT THE STATE ATTORNEY
DID NOT DRAFT THE ORDER AND THE
JUDGE SAID THAT HE DIDN'T DRAFT
IT.

BUT THERE WAS CONFLICT IN THEIR
TESTIMONY AND THERE WAS --
[INAUDIBLE] CROSS-EXAMINATION
UNDER OATH WITH THE JUDGE BEING
CALLED TO THE STAND BEFORE
ANOTHER JUDGE.

>> SO PUTTING THE JUDGE IN SORT
OF THE ADVERSARIAL SITUATION,
IS THAT WHAT YOU ARE SAYING?

>> YES, YOUR HONOR, I BELIEVE
SO, WHERE HE IS CALLED TO BE
CROSS EXAMINED AND WHERE HIS
CREDIBILITY IN FACT IS
CONSIDERED BY ANOTHER JUDGE.

>> WOULD -- IF THAT HAPPENED IN
ANY OF THESE CASES WE WOULDN'T
HAVE A HYBRID SITUATION IN ANY
OF OUR CASES, FOR EXAMPLE, IF
SOMEONE, A DEFENDANT SAYS THESE
DOCUMENTS WERE GIVEN TO THIS
CIRCUIT JUDGE.

AND THAT CIRCUIT JUDGE NEEDS TO
RESPOND TO THAT AT SOME TIME.
BY THE WAY, THE PROCEDURES FLOW
AND THAT JUDGE STANDS -- GETS
ON A WITNESS STAND AND SAYS
WHAT HAPPENS TO THE FLOW OF
PAPERS AND THEN YOU CROSS
EXAMINE AND THAT JUDGE UNDER

THE THEORY WOULD ALSO BE LESS QUALIFIED BECAUSE IT IS THE CROSS-EXAMINATION ASPECT THAT CREATES, AS I UNDERSTAND, WHAT YOU ARE SAYING, THE BASIS FOR IT.

OR IS THERE A TIME WHEN YOU CAN HAVE A HYBRID?

THAT IS WHAT WE'RE TRYING TO UNDERSTAND, IS THERE -- IS THERE A LINE, THE CROSS-EXAMINATION, IS IT THE ALLEGATION?

IS IT THE HEARING? WHAT IS IT.

>> I THINK, CERTAINLY, IN THIS CASE WE HAVE A HEARING WITH CROSS-EXAMINATION WHERE THE CREDIBILITY IS AN ISSUE OF THE WITNESS, THAT IN THIS CASE CERTAINLY THE JUDGE SHOULD RECUSE HIMSELF FROM HEARING ANY FURTHER MATTERS.

>> HAVEN'T WE ALREADY CROSSED THAT?

WASN'T THERE A CASE INVOLVING A JUDGE CARNEY DOWN IN DADE COUNTY AND IT WAS THE FLOW OF DOCUMENTS AND THE JUDGE WAS CALLED TO THE STAND AND ANOTHER JUDGE HEARD THE CASE, AND HEARD WHAT WAS SAID ABOUT IT AND THEY DISCUSSED HOW THESE DOCUMENTS WOULD FLOW, AND DIDN'T WE SAY THAT THE HYBRID APPROACH WAS ACCEPTABLE?

>> AT LEAST APPROVED.

>> YES.
YES.

YOUR HONOR, I THINK -- AND THAT HAPPENS IN THESE CASES.

SOMETIMES WE APPROACH THIS POINT IN VARIOUS MATTERS.

BUT I THINK WE HAVE A WHOLE SEPARATE HEARING, BEFORE ANOTHER JUDGE THAT WE ENTER INTO THE CASE, IT WAS CONTEMPLATED BY THE GEORGIA SUPREME COURT IN THE CASE THAT WE CITED.

ALMOST IDENTICAL TO THIS, WHERE THE GEORGIA SUPREME COURT SAID SHOULD RECUSE THE JUDGE, SHOULD RECUSE HIMSELF FROM HEARING

ANYTHING FURTHER.

>> DID YOU -- WHAT I WOULD LIKE TO KNOW, IS -- OKAY THE FIRST TIME YOU FILED THE MOTION TO RECUSE WAS BEFORE -- AFTER THE EVIDENTIARY HEARING WAS AGREED TO ON THIS ISSUE, FILED A MOTION TO RECUSE, BECAUSE YOU SAID HE HAD TO BE A WITNESS.

>> RIGHT, BEFORE WE HAD ANOTHER HEARING, SO...

>> NOW, DID YOU THEN AFTER THE HEARING BECAUSE OF HAVING TO CROSS-EXAMINATION AND THE ISSUES WITH CREDIBILITY THAT IT WASN'T JUST A SIMPLE LT -- THE JUDGE JUST SAYING A LINE OR TWO, DID YOU RENEW OR FILE A SEPARATE MOTION TO RECUSE ALLEGING NOW BASED ON THE TESTIMONY A REASONABLE PERSON WOULD BE IN FEAR OF THE JUDGE BEING ABLE TO IM PARTIALLY WEIGH THE OTHER ISSUES.

>> DO YOU UNDERSTAND WHAT I'M SAYING.

>> THE ONE IS -- ALL OR NOTHING AND I'M NOT SURE THE COURT THOUGH WE MAY HAVE GONE THERE ON ROBINS VERSUS STATE WHERE WE SAID THE MOTION TO DISQUALIFY WAS LEGALLY SUFFICIENT BUT BEYOND THAT IS THERE A POINT THERE SHOULD BE A SEPARATE MOTION FILED AFTER THE HEARING TO SAY NOW WE DO HAVE A REASONABLE FEAR BECAUSE THE JUDGE REALLY BECAME -- PLACED IN AN ADVERSARIAL POSITION.

>> I SHOULD POINT OUT WE FILED A MOTION, A WRIT OF PROHIBITION WITH THE COURT.

THE COURT DENIED IT.

A PROHIBITION FROM THE JUDGE PRESIDING OVER ANY FURTHER --

>> WHERE WE HAD TO FILE THE MOTION TO RECUSE FIRST.

>> AND THEN A --

>> WAS THIS ONLY ONE MOTION TO REFUSE -- RECUSE.

NOW DO YOU THINK IN TERMS OF LOOKING AT COMPANY, SOMEBODY THAT DOES A LOT OF THESE CASES THAT THAT PROCEDURE WOULD HAVE

PUT YOU IN A DIFFERENT
SITUATION AND THE JUDGE IS
LOOKING AT IT GAIN AND SAYING,
YOU KNOW WHAT?

NOW I CAN SEE A REASONABLE
PERSON WOULD FEAR THAT I HAVE
BECOME AN ADVOCATE.

I OUGHT TO RECUSE MYSELF.

>> I UNDERSTAND WHAT YOUR HONOR
IS SAYING AND TO SOME EXTENT
AND THIS CASE ABSOLUTELY WOULD
NOT HAVE MATTERED AND IN FACT
WOULD HAVE ENCOURAGED THE --
INCURRED THE WRATH AND WOULDN'T
HAVE BEEN WOULD HAVE BEEN IF WE
WERE FILING TO MUCH AND
UNDERSTOOD THE JUDGE WOULD
REMAIN ON THE CASE.

>> WHAT I'M HAVING DIFFICULTY
WITH IS AS JUSTICE ANSTEAD
FOLLOWED UP, YOU SAID -- THE
JUDGE HAD SAID, YOU KNOW, I
DIDN'T DO IT AT THE HUFF
HEARING AND HERE YOU HAVE AN
EVIDENTIARY HEARING AND IT'S
NOT THAT YOU ARE RAISING ANY
ISSUE AS TO WHAT THE JUDGE DID
SOMETHING WRONG AND THIS ORDER,
NOW, IT IS THAT YOU HAVE -- YOU
CONFIRM AND SO THE DECISION IS,
LET'S MOVE ON AND AFTER ALL THE
CASE HAS BEEN IN POSTCONVICTION
SINCE 1991 AND SPEAKING ON
BEHALF OF OUR CLIENT.

I DON'T HAVE A PROBLEM WITH THE
JUDGE WIGGINS IS A JUDGE --

>> I'M TALK ABOUT AT THE
PROCEDURE.

TO BE THE ONLY WAY THE CASE
WOULD MOVE FORWARD IN ANY KIND
OF SENSIBLE WAY.

>> NOT OWE THEN WAY, YOUR HONOR,
BUT CERTAINLY ANOTHER JUDGE
COULD HAVE TAKEN THE CASE AND
HANDLED IT.

>> OUR CLIENT IS SITTING IN THE
CHAIR AND HIS REAR EXCEPTION, A
REASONABLE CLIENT.

I DARE SAY ANY CLIENT I HAVE
EVER HAD WOULD SAY IF HE WANTS
THE JUDGE TO GET UP AND TESTIFY
AND THEN GET BACK ON THE BENCH
AND DECIDE ISSUES HE WOULD SAY
THE JUDGE IS NOT GOING TO BE

UNBIASED.

>> AND THE ANSWER, JUSTICE
PARIENTE YOU DIDN'T FILE
ANOTHER MOTION AFTER THAT.
THAT IS IRRELEVANT BECAUSE YOU
DIDN'T FILE ANOTHER MOTION.

>> RIGHT.

WE DID NOT FILE ANOTHER MOTION
TO RECUSE.

>> SO WHETHER A DEFENDANT WOULD
FEEL REASONABLE GROUNDS --
REASONABLE FEAR THAT THE JUDGE
WOULD BE BIASED BECAUSE HE HAD
ALREADY TESTIFIED, IS
IRRELEVANT IN THIS CASE,
BECAUSE THAT IS NOT THE ISSUE
YOU RAISED.

>> WELL, THAT IS A STANDARD
THAT YOU ALWAYS APPLY.

>> THAT IS NOT THE ISSUE THAT
YOU RAISED.

YOU DIDN'T RAISE THAT.

>> YOU DIDN'T FILE A MOTION
AFTER HE TESTIFIED SAYING YOUR
CLIENT HAD A REASONABLE FEAR
THE JUDGE WOULD BE BIASED.

>> NO, WE DID NOT FILE ANOTHER
MOTION, ALTHOUGH WE PUT IT OUT
CLEARLY IN SEVERAL MOTIONS BUT
DIDN'T FILE ANOTHER MOTION.

>> WHAT WAS THE DISPUTED ISSUE
OF FACT ONCE YOU GOT TO THE
HEARING OFFICE HAD DONE TO YOUR
DISCOVERY AND TALKED TO THE
STATE ATTORNEY AND THE
SECRETARY AND THE JA AND
WHOEVER ELSE MAY HAVE HAD
KNOWLEDGE ABOUT THE UNSIGNED
DOCUMENT, AT THE TIME YOU GOT
TO THE HEARING, WHAT WAS THE
DISPUTED ISSUE OF FACT?

>> THE JUDGE TESTIFIED AS TO
WHAT HE DID WITH THE ORDERS AND
HOW HE EXECUTED THEM AND WHEN
HE SIGNED THEM.

>> AND WAS THERE ANY CONTRARY
EVIDENCE TO WHAT THE JUDGE SAID,
THAT THE DEFENSE COUNSEL
DISPUTED, THE STATE ATTORNEY
DISPUTED, DID ANYBODY DISPUTE
WHAT THE THE JUDGE SAID?

>> NO, YOUR HONOR, WE ASKED
ABOUT THE UNSIGNED ORDER.
THAT IS ALL WE HAD SO I'M NOT

ARGUING WITH THE WISDOM OF WHETHER WE SHOULD HAVE BEEN GRANTED A HEARING.
>> LET ME ASK YOU A QUESTION. WHAT MADE THIS JUDGE A WITNESS.
>> THE JUDGE.
>> WHO MADE THE JUDGE A WITNESS.
>> WE FILED -- WE TALKED TO --
>> YOU MADE HIM AS A WITNESS.
>> YES.
>> WHY WAS HE A NECESSARY WITNESS IF YOU HAD THE STATE ATTORNEY AND ALL THESE OTHER AVAILABLE WITNESSES?
>> BECAUSE THE STATE TERENCE -- HE DENIED DOING IT AND UNDER -- I MEAN, WE COULD HAVE NOT NOT CALLED HIM I SUPPOSE BUT I BELIEVE WE HAD TO, WE COULD CALL AND ASK HIM WHETHER HE WROTE THE ORDER.
>> YOU HAVE SEVERAL OTHER ISSUES AND YOU REALLY ARE GOING -- MAKE SURE YOU HAVE A CHANCE.
>> [INAUDIBLE] THE IAC ISSUE IS IMPORTANT IN THIS CASE.
WE HAVE AN ISSUE ON BOTH THE GUILT PHASE, THE STRATEGY OF THE TRIAL ATTORNEY WAS TO HAVE A JURY NULLIFICATION.
>> HIS TESTIMONY WAS THAT THE STRATEGY WAS AGREED TO.
>> AND THE DEFENDANT AGREED TO IT, AT LEAST WAS AWARE OF IT --
>> WELL, HIS TESTIMONY, WAS THAT IT WAS AGREED TO, NOT THAT HE WAS AWARE OF IT BUT THAT HE AGREED TO IT.
>> YES.
>> HOW IS THAT A DEFICIENT PERFORMANCE IF HE CONSULTED WITH HIS CLIENT AND HIS TESTIMONY WAS THAT I THINK THERE WAS A CONFESSION IN THIS CASE.
>> THERE WAS.
>> AND HIS TESTIMONY WAS THAT HIGH THOUGHT THE ONLY REASONABLE WAY TO BE HONEST WITH THE JURY AND TO INGRATIATE HIMSELF FOR THE PENALTY PHASE PURPOSES WAS TO ADMIT THE ROBBERY.

WHY IS THAT DEFICIENT
PERFORMANCE?

HAVEN'T WE IN SEVERAL CASES
SAID THAT THAT IS A REASONABLE
STRATEGIC DECISION.

>> YES, YOU HAVE, YOUR HONOR,
IN TERMS OF THE CONCESSION
ISSUE.

BUT IN THIS CASE, JURY NULL FIX
IS ACTUALLY AN IMPROPER
PROCEDURE AND SHOULDN'T BE USED,
THE COURT CONDEMNED USING IT AS
A STRATEGY.

THAT WAS NOT MADE CLEAR TO THE
CLIENT.

HE WAS -- THE ATTORNEY
REPRESENTING -- THAT IS WHAT HE
WAS GOING TO DO AND HE THOUGHT
THAT WAS THE BEST STRATEGY.
BUT IS NOT A PROPER -- IT HAS
BEEN CONDEMNED IN BOTH -- BY
THIS -- IN THE FLORIDA COURTS
AND FEDERAL COURTS AS A TAX --
TACTIC.

NOW IT IS -- IT IS PARTICULARLY
AGGRAVATED IN THIS CASE WHERE
THE TRIAL ATTORNEY ALSO FOUND
-- DIDN'T DO ANYTHING TO
PRESENT HIS CLIENT AS A PERSON.
PRESENT ANY PENALTY PHASE
MITIGATION.

>> IN THE NIXON CASE DIDN'T THE
DEFENSE ATTORNEY CONCEDE THAT
THE MURDER HAD OCCURRED AND WAS
JUST PLEADING FOR THE
DEFENDANT'S LIFE?

YEARLY IF THAT WAS EXACTLY --

>> YES.
YES.

>> AND WE SAID THAT THAT WAS --
WELL, THE SUPREME COURT SAID
THAT WAS JUDGE TO STRICKLAND
ANALYSIS AND WE, ON REMAND I
BELIEVE SAID UNDER STRICKLAND
IT DIDN'T PASS THE STRICKLAND
TEST.

>> RIGHT.

>> SO IF THE CONCESSION TO THE
MURDER ITSELF IS NOT
INEFFECTIVE ASSISTANCE OF
COUNSEL, HOW WOULD THE
CONCESSION AGREED TO BY THE
DEFENDANT, NONETHELESS, HOW
WOULD THAT INEFFECTIVE

ASSISTANCE OF COUNSEL.

>> WELL, BECAUSE, COUNSEL DID NOTHING TO EVEN MAKE IT POSSIBLE.

A JURY NULLIFICATION POSSIBLE. IN ORDER TO DO THAT WE'D HAVE TO PRESENT EVIDENCE WHICH HUMANIZED HIS CLIENT TO THE JURY SO THEY WOULD BE --

>> THAT IS A TOTALLY CRATE ARGUMENT AS TO WHETHER HE PRESENTED MITIGATION ARGUMENT.

A TOTALLY DIFFERENT ISSUE.

>> BUT HE'S GOING SAY I'LL TRY AND GET THE JURY TO VOTE AGAINST IT.

YOU STILL HAVE SOME STRATEGY AND SOME REASON FOR THE JURIES TO DO THAT.

YOU CAN SAY THAT IS WHAT I'M GOING TO DO BUT HE DIDN'T DO ANYTHING TO BRING IT ABOUT. DIDN'T PRESENT ANY HUMANNIZING EVIDENCE.

>> I'M NOT CLEAR, I DON'T THINK I GOT AN ANSWER TO MY QUESTION.

>> I GUESS I'M TRYING TO --

>> NIXON WE SAID IT IS NOT INEFFECTIVE ASSISTANCE OF COUNSEL TO CONCEDE TO THE MURDER, HOW IS IT INEFFECTIVE ASSISTANCE OF COUNSEL TO CONCEDE TO THE ROBBERY?

>> IN THIS CASE, THE TRIAL ATTORNEY SAID, I HAVE THIS STRATEGY BUT DID NOTHING TO IMPLEMENT THE STRATEGY. THAT IS THE PART OF HIS ACTIONS.

I AM MAINTAINING NOW WHICH ARE NOT DEFENSIBLE.

BECAUSE THERE WAS A LOT OF AVAILABLE MITIGATION TO MAKE HER STEIN, THE HUMAN BEING, AS MR. CHRISTMAS'S ATTORNEYS DID WITH HIM.

THE CO-DEFENDANT WHO IS SERVING A LIFE SENTENCE.

IF I COULD BRIEFLY MOVE --

>> YOU HAVE USED ALL YOUR TIME, YOUR FINAL -- DO YOUR FINAL ARGUMENT.

>> BRIEFLY ON THE CULL BA -- CULPABILITY ISSUE THERE IS

NOTHING TO DIFFERENTIATE
BETWEEN MR. CHRISTMAS AND
MR. STEIN.

>> WASN'T MR. STEIN THE
SHOOTER?

>> PERHAPS, MR. CHRISTMAS SAYS
NOW HE IS.

MR. CHRISTMAS SAID SEVERAL
TIMES.

THAT IS NOT THE DEPOSIT TIFF
ISSUE IN THIS CASE AND THERE
WAS EVIDENCE AT THE TRIAL THAT
HE WAS THE SHOOTER.

MR. CHRISTMAS'S TRIAL, THE
COURT HAD KNOWN THAT ANY WAY,
UP TO THE --

>> ARE YOU SAYING THEN IF YOU
ARE THE SHOOTER THAT YOU ARE
NOT -- THAT EVEN IF YOU ARE NOT
THE SHOOTER YOU ARE EQUAL
CULPABLE AND THEREFORE, ALL OF
THE SENTENCES HAVE TO BE THE
SAME.

>> THE JUDGE THAT HEARD BOTH
THESE CASES FOUND MR. CHRISTMAS
WAS MORE CULPABLE AND THERE WAS
EVIDENCE AT THAT TIME, WHEN HE
MADE THOSE REMARKS AND THOSE
FINDINGS IN THE SENTENCING
ORDER.

THERE WAS EVIDENCE AT THAT TIME
THAT MR. STEIN MIGHT BE THE
SHOOTER.

THE BAILIFF TESTIFIED THAT
MR. CHRISTMAS SAID AT HIS TRIAL
THAT MR. CHRISTMAS TOLD THE
BAILIFF THAT MR. STEIN WAS THE
SHOOTER.

BUT MR. CHRISTMAS SAID, I WOULD
HAVE SHOT HIM ANY WAY.

MR. CHRISTMAS WAS THE OLDER MAN,
HE WAS THE CONVICT.

THIS WAS HIS PLAN, BY EVERY
STANDARD HE WAS THE, QUOTE,
MASTERMIND, AS THE COURT HAS
SAID IN THE --

>> BUT, MR. STEIN, IT WAS
MR. STEIN'S GUN?

AND MR. STEIN WAS THE ONE WHO
WENT OUT TO THE CAR AND GOT THE
GUN?

SO...

>> MR. CHRISTMAS HAD A GUN AS
WELL AND COULD HAVE --

>> ANOTHER GUN BUT NOT THE GUN
THAT WAS THE MURDER WEAPON.

>> RIGHT.

RIGHT.

THE RIFLE.

MR. --

>> ANY OTHER --

>> THAT IS CORRECT.

>> ANY OTHER POINTS.

>> WHEN YOU CONSIDER WITH THE
MITIGATION, THERE IS NO
DIFFERENCE BETWEEN THESE TWO.
THANK YOU.

>> MS. MILSAPS.

>> GOOD MORNING, CHIEF JUSTICE
LOSE --

LEWIS, I WILL DISCUSS THE SAME
THREE ISSUES BUT IN A REVERSE
ORDER, FIRST I WILL TALK ABOUT
THE RELATIVE CULPABILITY.
IN BOTH TRIALS, THERE TRIALS THERE IS NO
INCONSISTENCY.

IN BOTH TRIALS STEIN IS THE
TRIGGER MAN, OKAY?

MOREOVER, MR. CHRISTMAS IS NOT
THE OLDER DEFENDANT.

>> THE JUDGE IN THIS CASE, DID
HE ACTUALLY FIND THAT MR. STEIN
WAS THE TRIGGER PERSON?

>> YES, IN BOTH CASES, YOUR
HONOR.

STEIN IS THE TRIGGER MAN.

>> THERE IS NO DISPUTE ANYWHERE.

STEIN'S CASE, CHRISTMAS'S CASE
UP ON APPEAL OF BOTH CASES.

EVERYBODY AGREES STEIN IS THE
TRIGGER MAN.

IN BOTH THE CHRISTMAS APPEAL AND
THE STEIN APPEAL.

YOU'VE ALSO FOUND HIM TO BE THE
TRIGGER MAN.

THERE'S JUST SIMPLY NO DISPUTE
ANYWHERE EITHER BASICALLY AT
TRIAL -- NONE OF THE EVIDENCE
HAS MR. CHRISTMAS AS THE TRIGGER
MAN, OKAY?

IT WAS STEIN'S RIFLE THAT WAS
THE MURDER WEAPON.

BOTH VICTIMS WERE SHOT, ONE
VICTIM FIVE TIMES, THE OTHER
VICTIM FOUR TIMES WITH A .22
RIFLE.

THAT WAS MR. STEIN'S RIFLE.

THERE IS NO MASTER MIND HERE

EITHER.

THIS WAS A CONSPIRACY TO COMMIT FIRST-DEGREE MURDER, BUT IT WAS AN AGREEMENT.

THEY WERE BOTH IN AGREEMENT.

AS A MATTER OF FACT, CHRISTMAS, IN HIS PENALTY PHASE, PRESENTS EVIDENCE THROUGH HIS

PSYCHOLOGIST THAT HE IS A DEPENDENT PERSONALITY WHICH THERE'S NO FINDING OF

MR. CHRISTMAS BEING THE MASTER MIND.

AS TO THE JURY PARDON ISSUE, WHAT I TAKE HIS ARGUMENT TO BE IS THIS: COUNSEL WAS INEFFECTIVE BECAUSE WHILE HE HAD THIS STRATEGY OF JURY PARDON, HE HAD NO WAY, HE DID NOT PROCEED TO IMPLEMENT IT, FOR INSTANCE, BY MAKING AN ARGUMENT FOR JURY NULLIFICATION TO THE JURY OR FOR ASKING FOR JURY INSTRUCTION FOR JURY NULLIFICATION.

THE REASON HE DIDN'T DO THAT, HE'S NOT ALLOWED --

>> NO, HE SAID THIS IS DIFFERENT THAN NIXON BECAUSE IN NIXON THERE WAS AN ADMISSION OF WHAT HAD OCCURRED, BUT THEN THE LAWYER WENT ON THROUGH ARGUMENT AND PUT ON MITIGATION AND PUT ON A CASE TO HUMANIZE THE PERSON. HE'S ARGUING THAT THERE'S A DISTINCTION IN THIS CASE BECAUSE THERE WAS AN ADMISSION, BUT DID NOT GO FURTHER AND TO PRESENT ED SO -- EVIDENCE SO A JURY COULD FIND DIFFERENTLY.

THAT'S WHAT HIS ARGUMENT IS.

>> OKAY, WELL, NOW REMEMBER WHERE A JURY PARDON IS GOING TO MATTER, OKAY?

>> IT MAY SPARE HIS LIFE.

THE QUESTION IS CAN YOU MAINTAIN CREDIBILITY THROUGH ADMISSION OF CONDUCT OR THINGS THAT ARE GOING TO COME OUT, A CONFESSION'S GOING TO COME IN, BUT THEN PUT ON ENOUGH MITIGATION TO STILL SPARE THE FELLOW'S LIFE, THAT'S THE ARGUMENT HE WAS MAKING.

>> THAT HAS TO DO WITH GUILT OR INNOCENCE, NOT PENALTY PHASE.

I AGREE WITH YOU, ONE OF THE REASONS YOU DO THIS IS TO KEEP YOUR CREDIBILITY.

>> AND THAT'S WHAT HE'S SAYING.

>> THERE'S NO WAY HE LOST HIS CREDIBILITY.

AS A MATTER OF FACT, LET ME TELL YOU WHAT HAPPENED --

>> PLEASE ADDRESS, YOU'RE GOING THROUGH YOUR TIME.

HIS ARGUMENT IS THAT HE DID NOT, THEN, FOLLOW UP WITH EVIDENCE OF MITIGATION, OF REASONS TO GIVE THE JURY A REASON TO SPARE HIS LIFE.

THAT'S HIS ARGUMENT.

>> OH, BUT, YES HE DID.

HE MADE A PLEA FOR LIFE.

>> OKAY.

>> BUT I DON'T AGREE THAT YOU CAN MIX THEM TOGETHER THE WAY HE'S DOING.

>> DIDN'T HE ACTUALLY, I MEAN, IT WASN'T THAT HE -- HE CONCEDED THE ARMED ROBBERY, BUT HE DID ARGUE HIS CLIENT WASN'T THE SHOOTER OR THE MASTERMIND. IT'S NOT LIKE HE JUST LAID DOWN IN THE GUILT PHASE OF THIS CASE.

>> NO, YOUR HONOR, HE BASICALLY -- HIS ARGUMENT --

>> WHY DON'T YOU FOCUS -- HE SAID, WELL, I HAD TO CONCEDE ARMED ROBBERY BECAUSE AFTER THE CONFESSION WASN'T SUPPRESSED. DID HE ATTEMPT TO SUPPRESS THE --

>> HE MOST CERTAINLY DID. STEIN ADMITS THAT THIS IS A ROBBERY GONE BAD.

LITERALLY THOSE ARE HIS WORDS IN THE CONFESSION.

THE MINUTE THE DEFENDANT SAYS THAT, WHAT A DEFENDANT IS ADMITTING TO IS NOT ONLY ROBBERY BUT FELONY MURDER.

AND, YES, HE TRY TODAY TAP DANCE AROUND THAT, AND WHAT HE DID WAS HE ADMITTED TO THE ROBBERY, RIGHT?

BUT THEN ARGUED FOR SECOND DEGREE AND MANSLAUGHTER.

SO HE DID MAKE AN ARGUMENT THAT I PROPERLY SEE IS A JURY

NULLIFICATION.

>> SO HE DID MORE THAN THE
DEFENSE LAWYER NIXON --

>> SAID CHECK THE BOX, YES, BUT
THE BOX HE WANTED HIM TO CHECK
WAS THE ROBBERY BOX, NOT THE
FIRST-DEGREE MURDER BOX.

REMEMBER WHAT HAPPENED IN NIXON.
THE LAWYER SAID CHECK THE FIRST
DEGREE.

THAT IS NOT WHAT JEFF MORROW
SAID HERE.

HE SAID CHECK THE ROBBERY BOX,
AND THEN LET'S TALK.

WHAT HE WAS TRYING TO DO WAS GET
THEM DOWN TO SECOND DEGREE
AND/OR MANSLAUGHTER.

HE CANNOT DIRECTLY ASK FOR A
JURY NULLIFICATION.

YOU'RE NOT ALLOWED TO DO THAT.
OKAY?

SO, NOW, AS TO THE -- OH.

THEY NOT ONLY HAD A CONFESSION
HERE, THIS WAS AN EXTREMELY
STRONG CASE.

WE HAD THE ROOMMATE HAD
OVERHEARD AND BECAME PART OF WHO
TESTIFIED AT TRIAL, KYLE WHITE,
THAT THIS WAS ABOUT TWO WEEKS
BEFORE THIS CRIME THAT THEY WERE
TALKING ABOUT HOW TO GET INTO
THE VARIOUS PIZZA HUTS IN
JACKSONVILLE.

THERE WAS ONE ON TURNER THAT HAD
A MOTION DETECTOR, AND THEY WERE
SAYING THAT ONE WASN'T GOING TO
WORK WHICH IS WHY THEY TARGETED
THE EDGEWOOD PIZZA HUT WHERE
MR. CHRISTMAS HAD WORKED
PREVIOUSLY AND WAS IDENTIFIED BY
ONE OF THESE TWO VICTIMS, BOBBY
HOOD.

ONE OF THESE VICTIMS KNEW HIM.
THE COOK AT THE PIZZA HUT
TESTIFIED THAT BEFORE HE LEFT
THEY WERE HAVING A CONVERSATION
LIKE PEOPLE WHO KNEW EACH OTHER,
OKAY?

SO THERE WAS AN AGREEMENT TWO
WEEKS BEFORE THIS, NOT ONLY TO
ROB, BUT TO MURDER.
TO WITNESS ELIMINATION BECAUSE
THEY KNEW THAT THEY WOULD KNOW
THEM.

>> SO WHY AREN'T THEY EQUALLY
CULPABLE?

>> BECAUSE HE'S NOT THE TRIGGER
MAN.

THERE'S NO DISPUTE HERE ANYWHERE
AT ANY STAGE, TRIAL LEVEL IN
EITHER TRIAL THAT STEIN WAS THE
ACTUAL TRIGGER MAN.
HE KILLED BOTH PEOPLE.

>> AND ONE OTHER THING THAT YOU
HAD SAID THAT THIS DEFENDANT WAS
OLDER THAN THE OTHER DEFENDANT.
BUT ISN'T IT TRUE THIS
DEFENDANT, IN FACT, THEY FOUND
AS A MITT GATOR, NO SIGNIFICANT
CRIMINAL HISTORY WHEREAS THE
CO-DEFENDANT HAS A CONVICTION OF
VIOLENT FELONY, MANY OF THEM.

>> NOT VIOLENT FELONIES.
THE PRIOR VIOLENT FELONY HERE IS
ONLY ON THE CONTEMPORANEOUS
MURDER.

YES, CHRISTMAS HAS A RECORD, BUT
IT'S THIS FOR THINGS LIKE GRAND
THEFT AND BURGLARY.

HE DID NOT HAVE A PRIOR VIOLENT
FELONY AS AN AGGRAVATOR OTHER
THAN THE CONTEMPORANEOUS MURDER.

>> BUT YOU THINK OUR CASE LAW,
AS LONG AS IT IS ESTABLISHED
THAT THIS ONE IS THE SHOOTER,
THAT MAKES HIM MORE CULPABLE NO
MATTER WHAT?

>> AS A GENERAL RULE, YES.
IT DOESN'T MEAN A TRUE MASTER
MIENLD -- BUT IN GENERAL, YOUR
BEING THE TRIGGER MAN DOES NOT
MAKE YOU AS CULPABLE AS THE
PERSON WHO WAS NOT THE TRIGGER
MAN.

OKAY.
AS TO THE MOTION TO DISQUALIFY
JUDGE WIGGINS, WHAT WE DID WAS
BIFURCATE THIS.

WE HELD ONE -- ON THE PATTERSON
CLAIM WHERE JUDGE WIGGINS
TESTIFIED WITH ANOTHER JUDGE,
JUDGE MORAN FOR MAKING THOSE
HEARINGS, AND THEN JUDGE
WIGGINS --

>> OKAY, I'D LIKE YOU TO
DISTINGUISH, IF YOU CAN, ROBERTS
V. STATE WHERE WE SAID A MOTION
TO DISQUALIFY WAS LEGALLY

SUFFICIENT BECAUSE THE JUDGE HAD ASKED THE STATE TO DRAFT THE SENTENCING ORDER.

NOW, I DON'T KNOW IF THAT WAS IN THAT CASE BECAUSE I DIDN'T GO BACK TO SEE WHETHER IT WAS ESTABLISHED WHETHER HE HAD DRAFTED OR THAT WAS THE ALLEGATION.

BUT HOW WOULD YOU DISTINGUISH ROBERTS V. STATE?

>> WELL, I JUST THINK RODRIGUEZ IS THE MORE RECENT CASE.

>> THE PROBLEM WITH THAT, THOUGH, IS ON REMAND, THE CASE WAS REASSIGN TODAY ANOTHER JUDGE.

AND WHAT WE SAID WAS FROM THE TIME THE COURT REMANDED THE CASE, JUDGE CARNEY STEPPED ASIDE AND JUDGE -- ISSUED ALL THE COURT'S RULINGS INCLUDING DENYING RELEASE ON THE SENTENCING ORDER.

>> YES.

BUT, YOUR HONOR, REMEMBER WHAT HE'S SAYING HERE.

HE'S SAYING IF JUDGE WIGGINS HAD ANNOUNCED FROM THE BENCH I DID NOT WRITE THIS ORDER, WE WOULD HAVE MOVED MERRILY ALONG.

>> I'M ASKING YOU, THOUGH, HOW DO YOU IN TERMS OF BOTH RODRIGUEZ AND ROBERTS, IT LOOKS TO ME THAT IF THERE IS A DISPUTED ISSUE ABOUT THE SENTENCING ORDER, AND HERE THE STATE CONCEDED THE NEED FOR AN EVIDENTIARY HEARING, THAT YOU CAN'T HAVE THIS HYBRID SITUATION.

YOU KNOW, I AGREE THIS IS A FRUSTRATION IN TERMS OF IF THIS IS THE CASE, BUT WE'VE GOT TO PROTECT WHAT RECUSALS ARE ALL ABOUT.

I DIDN'T KNOW THERE WAS SUCH A THING AS A HYBRID RECUSAL THAT COULD OCCUR.

SO, PLEASE, AGAIN TELL ME HOW RODRIGUEZ REALLY SUPPORTS YOU WHEN IN RODRIGUEZ JUDGE CARNEY DID STEP ASIDE FOR THE REMAINDER OF THE EVIDENTIARY HEARING?

>> OKAY, BUT IN ROBERTS I DON'T THINK THAT YOU HELD A BIFURCATED PROCEEDING IS IMPROPER. I DON'T THINK IT CAME UP. I DON'T THINK THAT'S THE DIRECT HOLDING OF ROBERTS. I CERTAINLY DID NOT FIND A CASE WHERE THIS COURT HAD TO DIRECTLY ADDRESS THE BIFURCATION ISSUE.

>> YOU THINK IT WOULD BE DIFFERENT IF A SECOND MOTION TO DISQUALIFY HAD BEEN FILED AFTER THE EVIDENTIARY HEARING? BECAUSE NOW WE'VE GOT A JUDGE THAT'S BEEN CROSS EXAMINED, AND NOW WE HAVE SOME CONCERN ABOUT THE REST OF THE ISSUES, WOULD THAT BE DIFFERENT?

>> YOUR HONOR, I DON'T SEE THIS AS ANY DIFFERENT FROM A JUDGE WHO WAS REVERSED ON APPEAL AND THE CASE GOES BACK AND IT'S TRIED RIGHT IN FRONT OF HIM. WHAT HAPPENS THERE IS HIS CONDUCT IS ATTACKED. HE ADMITTED SOMETHING HE SHOULDN'T OF OR SOMETHING LIKE THAT. AN APPELLATE COURT SAYS, YOU'RE RIGHT, YOU SHOULDN'T HAVE DONE THAT. YOU GO TRY THAT CASE AGAIN.

>> BUT IN THOSE CASES YOU DON'T HAVE THE JUDGE BEING A WITNESS AND ON THE WITNESS STAND AND BEING EXAMINED BY ONE OF THE ATTORNEYS. IT'S A LITTLE DIFFERENT.

>> I AGREE HE'S NOT A WITNESS, BUT THE LEGAL ERROR PART OF THIS, YOU KNOW, IN TERMS OF THE --

>> WELL, JUDGES DON'T RECUSE FOR LEGAL ERROR, THEY RECUSE FOR OTHER REASONS.

>> RIGHT. BUT HE'S TRYING TO MAKE BOTH. YOU'RE RIGHT, THEY'RE NOT RECUSED FOR LEGAL ERROR, BUT HIS BEING A WITNESS, THAT DOES NOT MATTER. HE HAD HIS DAY IN COURT AS TO JUDGE WIGGINS WITH A SECOND JUDGE PRESIDING.

>> BUT YOU WOULDN'T CONCEDE THAT IF THERE WAS A SERIOUS DISPUTED ISSUE ABOUT WHETHER THERE WAS COLLABORATION BETWEEN THE STATE AND THE TRIAL JUDGE IN THIS CASE, AND THAT MATTER WAS HEARD AND THERE WAS VIGOROUS CROSS-EXAMINATION OF THE TRIAL JUDGE, WOULDN'T YOU CONCEDE THAT ANY REASONABLE DEFENDANT WOULD BE TROUBLED IF THAT TRIAL JUDGE HAD BEEN MADE A WITNESS AND THEN SEVERELY CROSS EXAMINED BY THE DEFENDANT'S ATTORNEY, THAT THAT TRIAL JUDGE IS NOW HEARING THE REST OF THE ISSUES?

>> NO, I DON'T CONCEDE THAT. I JUST DON'T SEE THIS AS A REASONABLE GROUND. YOU HAD YOUR DAY IN COURT IN FRONT OF A NEUTRAL JUDGE. HE TESTIFIED, THAT IS NO DIFFERENT IN GOING UP ON AN APPEAL.

THAT IS NO DIFFERENT.

>> SO YOU'RE REALLY SAYING A JUDGE CAN BE A WITNESS IN A CASE ON ONE ISSUE IN A CASE, AND THEN HEAR THE REST OF IT NO MATTER WHAT THAT ISSUE MAY HAVE BEEN, THE JUDGE CAN THEN HEAR THIS CASE?

>> BECAUSE IN THE STATUTE --
>> AND A DEFENDANT DOESN'T -- YOU DON'T BELIEVE THAT WHEN A JUDGE IS A DEFENDANT OR A WITNESS IN A CASE THAT A DEFENDANT WOULD NOT HAVE A REASONABLE FEAR THAT THE JUDGE MAY NOT BE IMPARTIAL ON ALL THE OTHER ISSUES THAT ARE PRESENTED IN THE SAME CASE?

>> NO. I THINK JUDGES CAN RISE ABOVE THE FACT THAT THEY WERE, THAT SOMEBODY SAID YOU WROTE THE ORDER, AND I SAID, NO, I WROTE THE ORDER MYSELF. I DIDN'T HAVE THE PROSECUTOR DO IT.

>> BUT THE ISSUE IS NOT WHETHER THE JUDGE CAN -- I MEAN, REALLY THAT THAT'S NOT THE STANDARD THAT A JUDGE COULD RISE ABOVE IT.

WE WOULD HOPE THAT ALL JUDGES
COULD RISE ABOVE SOMETHING LIKE
THAT.

IT REALLY IS THE PERCEPTION OF A
JUSTICE, ISN'T THAT THE BASIS ON
THE RECUSAL RATHER THAN WE TRUST
OUR JUDGES?

>> OKAY, BUT I WOULD NOT
DISQUALIFY A CAPITAL CASE.
I THINK THIS IS A REASONABLE
BALANCE BASED ON A POLICY
ARGUMENT.

THESE JUDGES ARE UNIQUE.
REMEMBER, ONE OF THE OTHER
CLAIMS WAS RELATIVE CULPABILITY
OF THE JUDGE'S OWN FINDING --
OWN FINDING.

JUDGE WIGGINS KNOWS A GREAT DEAL
ABOUT THOSE TWO CASES.

IT WOULD BE AN IMMENSE BURDEN TO
TRANSFER TWO CAPITAL CASES
BECAUSE CHRISTMAS HAS TO GO
ALONG WITH STEIN BECAUSE YOU
NEED TO HAVE THEM --

>> WHY?

WAS THERE AN ALLEGATION ABOUT
THE STATE DOING THE CHRISTMAS
ORDER?

>> THAT WAS ONE OF THE THINGS WE
EXPLORED IN THIS ONE, YES.

AT THE HEARING THAT DID COME UP,
AT THE LITTLE EVIDENTIARY
HEARING.

>> BUT SUPPOSE JUDGE WIGGINS
DIED?

YOU WOULD HAVE TO HAVE THE CASE
HEARD BY ANOTHER JUDGE UNDER
THOSE CIRCUMSTANCES.

>> SURE.

BUT THE JUDGE HASN'T DIED.
HE IS A UNIQUELY VALUABLE TO US,
AND WE WOULD LIKE TO KEEP HIM,
AND THIS IS A NICE, REASONABLE
BALANCE.

HE HAS HIS DAY IN COURT, RIGHT?
WHICH IS MORE THAN HE SAYS, HE'D
BE HAPPY IF JUDGE WIGGINS
ANNOUNCED --

>> WE DON'T HAVE TO ACCEPT THAT
WHAT THE DEFENSE ATTORNEY SAYS.
I MEAN, WE'RE TALKING ABOUT
WHETHER OR NOT THERE IS EVEN
APPEARANCE HERE OF IMPARTIALITY
OR THE LACK THEREOF, IF A JUDGE

IS A WITNESS IN A CASE.

>> OKAY.

BUT I THINK THIS IS A REASONABLE
BALANCE AS A POLICY MATTER.
HE HAD HIS DAY IN COURT WITH
ANOTHER JUDGE HEARING THEM,
OKAY?

AND THEN WE HAVE A JUDGE WHO
KNOWS A LOT ABOUT THIS CASE, AND
WE ARE NOT IMPOSING AN IMMENSE
BURDEN, TRANSFERRING CAPITAL
CASES IS AN IMMENSE BURDEN.

>> BUT YOU CAN'T REALLY SAY THAT
A DEFENDANT -- MY CONCERN IS I
DON'T THINK THERE'S A REASONABLE
BASIS TO BELIEVE THAT THERE WAS
SOME COLLUSION OR WORKING WITH
THIS ORDER BETWEEN THE STATE.

I DON'T THINK THERE WAS A
REASONABLE BASIS FOR THAT.
BUT ASSUMING THERE WAS A
REASONABLE BASIS FOR THIS
DEFENDANT TO BELIEVE THAT THERE
WAS SOME COMMUNICATION BETWEEN
THE STATE AND THE DEFENDANT IN
THE PREPARATION OF THIS
SENTENCING ORDER, THAT ISSUE'S
RAISED, AND THAT TRIAL JUDGE IS
MADE A WITNESS, THAT THAT
DOESN'T THE EFFECT THE
NEUTRALITY OF THAT JUDGE?

>> NOT ON THE WITNESS PART, ON
THE EX PARTE, I WILL GIVE YOU
THAT.

IF THERE IS SOME EVIDENCE THAT
THE JUDGE IS TALKING TO THE
PROSECUTOR AND THE PROSECUTOR
ONLY, I CAN SEE WANTING TO
DISQUALIFY A JUDGE BASED ON HIS
EX PARTE COMMUNICATION.

>> BUT IF THE HEARING SAYS THERE
WAS NO EX PARTE COMMUNICATION,
THAT WOULD BE FINE.

HE COULD STILL GO ON AND THEY
ARE REST OF THE CASE?

>> WHICH IS EXACTLY WHAT
HAPPENED HERE.

YES.

>> DO YOU AGREE THAT THE JUDGE
HAD TO, QUOTE, PARTIALLY RECUSE
HIMSELF FOR THE PURPOSE OF THIS
CLAIM?

OR COULD THE JUDGE HAVE HEARD
HIMSELF ON THIS ISSUE?

>> HEARD HIMSELF?

SEE, THAT'S --

>> YEAH.

>> I'M MORE TROUBLED BY THAT THAN I AM BY WHAT HAPPENED HERE, THAT THE IDEA THAT THE JUDGE JUST MAKES A FACTUAL FINDING HIMSELF FROM THE BENCH.

THAT'S, IN EFFECT, JUDGING YOUR OWN CREDIBILITY.

THAT STRIKES ME AS MUCH MORE TROUBLESOME THAN WHAT WE DID HERE.

SEEMS TO ME WE GAVE HIM DUE PROCESS COMPARE TODAY THAT.

>> SO THE RULE OF LAW, THEN, IS IF THERE WAS A DISPUTED ISSUE, WHICH THERE WAS CONCEDED TO BE ONE HERE ABOUT WHETHER THE JUDGE DRAFTED HIS OWN SENTENCING ORDER, THEN ANOTHER JUDGE MUST HEAR THAT PART OF THE CLAIM.

AND THEN WHAT'S THE NEXT -- BUT DOES NOT NEED TO RECUSE FOR THE REMAINDER UNLESS WHAT?

>> UNLESS THERE IS AN ALLEGATION OF EX PARTE.

I SEE THAT AS COMPLETELY DIFFERENT BECAUSE --

>> ISN'T THAT WHAT FINDING THESE ORDERS, I MEAN, THAT'S WHAT HAPPENED IN THESE CASES.

THAT'S THE ESSENCE OF THEM, THAT THE JUDGE IS GETTING THESE ORDERS FROM THE STATE.

I MEAN, THIS IS WHAT IS THE FOUNDATION OF THOSE KINDS OF CASES.

>> OKAY.

BUT IF YOU'RE ARGUING QUESTION NO, IN SOME OF THEM HE GETS AN ORDER AND LITERALLY SIGNS THEM.

I'VE SEEN THEM DO IT BOTH WAYS.

BUT YOUR HONOR, AN EX PARTE DOES RAISE THE FOLLOWING CONCERN, THAT A JUDGE DID TALK TO ONE PARTY AND ONE PARTY ONLY AND DIDN'T GET THE OTHER SIDE.

SO ON THAT BASIS, YES, I DO SEE THAT AS MORE PROBLEMATIC.

THE REASON YOU GET INTO EX PARTE, I START THINKING

REASONABLE FEAR THAT YOU WERE MORE CONCERNED ABOUT ONE PARTY,

DIDN'T EVEN GET MY INPUT INTO THE ISSUE.

>> WHAT HAPPENED IN THIS CASE AS FAR AS ANY ULTIMATE EXPLANATION OF HOW AN UNSIGNED ORDER GOT INTO THE PROSECUTOR'S FILE IN THIS CASE?

>> THANK YOU FOR ASKING ME THAT BECAUSE THAT'S MORE WHAT WAS DISPUTED THAN WHETHER THEY WROTE IT.

EVERYBODY COULD REMEMBER, THE PROSECUTORS COULD REMEMBER, NO, I DIDN'T WRITE THIS, BUT THEY COULDN'T REALLY REMEMBER, AT FIRST, COULDN'T REMEMBER HOW IT GOT INTO -- WHY THERE WAS AN UNSIGNED ORDER.

THE JUDGE AT THE BEGINNING OF THIS HEARING CLEARED IT UP FOR US, AND THEN JUDGE WIGGINS TESTIFIED.

HE SAID IT WAS STANDARD PRACTICE IN THAT CIRCUIT TO BRING UP COPY BUT ONLY SIGN ONE AND SIGN THAT IN OPEN COURT.

THAT DOES SEEM TO HAVE BEEN STANDARD PRACTICE IN THIS.

>> BUT WAS THERE AN UNSIGNED ORDER IN DEFENSE COUNSEL'S FILE?

>> THERE WAS -- NO.

>> WELL, THAT'S WHAT I'M TRYING --

>> THERE WAS AN UNSIGNED ORDER --

>> WHAT WAS THE ULTIMATE EXPLANATION OF WHY THERE WAS ONLY AN UNSIGNED COPY IN THE PROSECUTOR'S FILE, BUT THERE WAS NO UNSIGNED COPY IN THE DEFENSE COUNSEL'S FILE?

>> THAT WAS EXPLORED AT THIS LITTLE HEARING, AND BASICALLY WE COULDN'T REALLY GET TO THE BOTTOM OF THAT.

BUT IT DOES SEEM THAT THE, THAT HE WAS GIVEN A COPY, THAT DEFENSE COUNSEL WAS GIVEN A COPY --

>> BUT DIDN'T MR. PATE SAY YOU NORMALLY WOULD GET A COPY OF THE ORDER FROM THE JUDGE'S JUDICIAL ASSISTANT?

>> HE WOULD WALK UP THERE, YES.

BOTH PROSECUTORS TESTIFIED,
FIRST ONE TESTIFIED SAID I DON'T
KNOW HOW THE UNSIGNED ORDER, BUT
I DID NOT WRITE THIS.

>> DID DEFENSE COUNSEL TESTIFY
AT THIS BIFURCATED HEARING?

>> NO, DEFENSE COUNSEL, JEFF
MORROW, DID NOT TESTIFY.
HE WAS EXCUSEED, HE WAS NOT
CALLED.

THE TWO PROSECUTORS, JUDGE
WIGGINS, AND HIS JA, NINA HUBER,
AND THAT'S WHO TESTIFIED.

NO.

BUT, YOUR HONOR, JUST READING
BETWEEN THE LEANS WHEN WE GOT TO
THAT -- LINES WHEN WE GOT TO
THAT, THEY DIDN'T PUSH THAT
HARD, AND IT'S PRETTY MUCH THEY
JUST DIDN'T GET A COMPLETE FILE
OR THEY JUST COULDN'T FIND IT IN
THERE.

AND THEY DIDN'T KNOW WHEN THEY
HAD THE RECORDS AT FIRST THAT
THERE SEEMS TO HAVE BEEN A GAP
BETWEEN WHEN DEFENSE COUNSEL'S
FILES GOT OVER THERE AND WHEN
OPPOSING COUNSEL GOT THEM.

THERE SEEMS TO HAVE BEEN SOME
GAP BETWEEN THAT.

SO IT MAY HAVE BEEN THERE
ORIGINALLY.

>> THANK YOU.

WITH OUR HELP, YOU'VE EXHAUSTED
YOUR TIME.

>> OKAY.

ASK YOU TO AFFIRM THE TRIAL
COURT'S DENIAL OF
POSTCONVICTION.

>> WE'LL GIVE YOU ONE MINUTE.

>> WE DO NOT BELIEVE, YOUR
HONOR, THAT THERE'S ANY CASE LAW
THAT SAYS A SHOOTER IS MORE
CULPABLE OR AN AGGRAVATOR IN ANY
KIND OF AUTOMATIC WAY.

I DON'T BELIEVE THAT'S THE CASE
AND I DON'T KNOW WHAT --

>> YOU'RE SAYING THERE'S NO CASE
LAW THAT SAYS THAT IT MIGHT BE
MORE AGGRAVATING IF SOMEBODY IS
THE ACTUAL SHOOTER?

>> WELL, I MEAN, IN A PARTICULAR
CASE THEY MIGHT FIND IT
AGGRAVATING, BUT I DON'T THINK

AS ANY MATTER OF PRINCIPLE OR
LAW THAT SAID THE SHOOTER IS
NECESSARILY MORE CULPABLE.
THERE'S NO LINE OF CASES WHERE
BEING THE SHOOTER MAKES YOU MORE
CULPABLE.

OBVIOUSLY, IN A CONTRACT KILLING
THAT WOULDN'T BE THE CASE, I
THINK.

>> WELL, THIS ISN'T A CONTRACT
KILLING.

>> THAT'S RIGHT, YOUR HONOR.

>> WHY WOULDN'T IT BE A RATIONAL
FACTOR?

>> IT IS A FACTOR.

I'M NOT SAYING IT'S NOT A
FACTOR.

>> WELL, IT'S A FACTOR, THOUGH,
THAT WEIGHS ONE WAY OR THE
OTHER.

THAT FACTOR IS MORE DAMAGING TO
YOUR CLIENT THAN IF HE WASN'T
THE SHOOTER, IS THAT CORRECT?

>> YES, YOUR HONOR, I BELIEVE
SO.

>> AND WITH THAT, YOU'VE
UTILIZED YOUR ADDITIONAL TIME AS
WELL.

>> THANK YOU.

>> THANK YOU SO MUCH.

THE COURT WILL TAKE ITS MORNING
RECESS