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Willie H. Nowell v. State of Florida

SC06-276

THE NEXT CASE ON THE CALENDAR THIS MORNING IS NOWELL VERSUS STATE OF FLORIDA. MAY IT PLEASE THE COURT. GOOD MORNING. MY NAME IS ROBERT BARRY, I'M A PARTNER IN THE LAW FIRM OF EISENMENGER, BERRY, AND PETERS OUT OF BREVARD COUNTY AND WE HAVE THE PRIVILEGE OF REPRESENTING MR. NOWELL BEFORE THIS COURT THIS MORNING. MR. NOWELL IS CURRENTLY INCARCERATED UNDER A SENTENCE OF DEATH IMPOSED BY JUDGE RAINWATER DOWN IN BREVARD COUNTY ABOUT THIS TIME A COUPLE YEARS AGO. I REALLY HOPE TO SPEND MOST OF MY TIME THIS MORNING ADDRESSING THE FIRST ISSUE I RAISED IN MY APPEAL, WHICH IS THIS ISSUE OF THE PREEMPTORY CHALLENGE EXERCISED BY THE STATE OVER THE DEFENSE OBJECTION TO THE PROSPECTIVE JUROR, MR. ORTAIGA. THERE ARE REALLY THREE PEOPLE IN THESE PROCEEDINGS THAT ARE IMPORTANT. MR. NOWELL AN AFRICAN-AMERICAN MALE THE DEFENDANT IN THIS CASE. MR. ORTAIGA A MAN OF HISPANIC DESCENT WHO IS A JUROR, BRXLY THE SAME AGE --

CAN I JUST, YOU HAVE GOT, IS THIS A 30-MINUTE CASE.

ALL RIGHT, SO THE TIME IS.

I ASKED FOR 20?

20 FOR YOUR FIRST PART.

OKAY MAYBE, THEN MAYBE THAT'S CORRECT.

MR. ORTEGA, A SIMILAR AGE TO THE DEFENDANT AND OF HISPANIC DESCENT AND A MR. COLLINS, A MAN ALSO UNCONTROVERTED ON THE RECORD OF SIMILAR AGE TO THE DEFENDANT, SIMILAR AGE TO MR. ORTEGA, BUT A WHITE MALE. THE STATE EXERCISED A CHALLENGE OR SOUGHT TO EXERCISE A CHALLENGE AGAINST MR. ORTEGA AND AT THAT POINT, THE DEFENSE COUNSEL APPROPRIATELY RAISED THE OBJECTION AND REQUESTED THE INQUIRY UNDER NEAL AND FLAPPY AND THE MELBOURNE CASE AND THE VARIOUS NUMEROUS CASES THAT DEAL WITH THESE ISSUES IN THE COURT ATTEMPTED TO HOLD THAT TYPE OF HEARING.

WELL, I MEAN, THERE IS NOT AN ISSUE AS TO WHETHER THE PROPER PROCEDURES WERE FOLLOWED.

I THINK RIGHT UP TO THIS POINT EVERYBODY'S INTO AGREEMENT AND NOW TO THE POINT WHERE WE DISAGREE, THE STATE AND I WILL DISAGREE.

YOUR POINT IS THAT IT DIDN'T SATISFY EACH OF THOSE ELEMENTS, NOT IN ELEMENTS WERE NOT FOLLOWED.

CORRECT. CORRECT.

OKAY.

THE STATE WAS ASKED TO OFFER REASONS FOR THIS CHALLENGE AND ULTIMATELY, THEY OFFER FOUR. THEY OFFER THREE AT THE DISCUSSION IMMEDIATELY FOLLOWING THE BEGINNING OF THE INQUIRY. AND THEY COME BACK THE NEXT DAY WITH A NEW REASON THEY WANTED TO OFFER TO THE COURT AND I WILL DISCUSS THAT AS WELL. THE FIRST REASON, AND MR. , I'M SORRY, THE ASSISTANT STATE ATTORNEY SAYS THAT HIS PRIMARY REASON FOR THE STRIKE IS HE BELIEVE BELIEVES THAT MR. ORTEGA, THE HISPANIC MALE, A GENTLEMAN WHO WORKS AS MANAGER OF 7-ELEVEN THE BIGGEST DECISION IN HIS LIFE WAS EVER WHETHER TO TAKE A MANAGERIAL POSITION AT 7-ELEVEN BECAUSE HE WASN'T SURE HE WAS QUITE UP TO IT HAD BEEN I THINK THE VICTIM OF A CRIMES CRIMES ON A COUPLE OF OCCASIONS IN HIS JOB CAPACITY BUT NO CRIMINAL RECORD OF HIS OWN. THE STATE ASSERTED TO THE TRIAL COURT THAT THEY WERE CONCERNED THAT MR. ORTEGA WOULD LOOK AT THE DEFENDANT AND, AND, AND THINK TO HIMSELF, THAT COULD BE ME.

WHEN YOU FIRST SAID, HIS AGE?

HIS AGE.

HE SAID, AGE.

BECAUSE OF HIS AGE HE WOULD LOOK AT THIS DEFENDANT AND THINK, THAT COULD BE ME. WHAT'S THE STANDARD THAT, THAT WE NEED TO USE IN, IN REVIEWING THE TRIAL COURT'S DECISION? DON'T WE HAVE TO RESPECT THE TRIAL DETERMINING THE CREDIBILITY OF THE STATE'S RESPONSE AND REASON FOR THE PREEMPTORY CHALLENGE AND WE ALL AGREE THAT THE STATE CAN ASSERT JUST ABOUT ANY GROUND EXCEPT A RACIALLY DISCRIMINATORY GROUND FOR PREEMPTORY CHALLENGE. IT COULD BE NONSENSICAL. IT COULD BE HE WARES A PURPLE SHIRT AND I DON'T LIKE PURPLE SHIRTS. I JUST DON'T WANT TO SEE THAT THROUGHOUT THE TRIAL. AND AS LONG AS THE RESPONSE IS GENUINE, THEN IT'S OKAY. NOW THE TRIAL COURT FOUND, DID HE NOT, THAT THE RESPONSE WAS GENUINE ON REVIEW OF THAT DECISION, AREN'T WE THEN REVIEW AGTRIAL COURT'S CREDIBILITY DETERMINATION?

WELL, THE STANDARD IS WHETHER OR NOT THE TRIAL COURT'S DECISION WAS CLEARLY ERRONEOUS, AND THE CASE LAW FROM THIS COURT HAS BEEN THAT THE WAY YOU GET AT THAT ISSUE IS YOU LOOK AT THE RECORDS TO SEE IF YOU ASSERTED REASONS FOR ASUPPORTED IN THE RECORD. THE TRIAL COURT'S RULING, I MAY BE A SEMANTIC POINT BUT I THINK IT BEARS MENTIONING, THE COURT REALLY RULED ON THIS ISSUE TWICE AND THE FIRST TIME THEY RULED ON IT, THE PHRASE, THE COURT PHRASED ON SHE WAS GOING TO EXERCISE HER DISCRETION. AND THERE IS NO DISCRETION IN THIS SITUATION. THERE IS -- AS YOU POINTED OUT, A REQUIREMENT THAT THE, THE PROPONENT OF THE, OF THE CHALLENGE PUT FORTH A RACE NEUTRAL REASON -- WELL CAN I ASK --

AND THE COURT PASSES ON THE GENUINENESS.

YOU WERE SAY THAT ALL 3, AND THIS GOES BACK TO JUSTICE CANTERO'S QUESTION. STEP 2 IS THE PROSECUTOR OR OPPONENT OF THE STRIKE OFFER A RACE NEUTRAL REASON.

CORRECT.

THAT, THE QUESTION OF WHETHER THAT IS, IT'S A RACE NEUTRAL REASON IS, IS PROBABLY MORE OF A QUESTION OF LAW AS TO WHETHER IT'S RACE NEUTRAL AND THEN THE THIRD STEP WHICH JUSTICE CANTERO WAS REFERING TO IS WHETHER ASSUMING IT SOUNDS LIKE UNLESS THE PURPLE SHIRT KIND OF REASON, WHETHER THAT'S A GENUINE REASON AND THEN NOW YOU ARE LOOKING AT MOTIVES. YOU ARE LOOKING AT WHAT ELSE, WHO ELSE HAS BEEN STRUCK. IS THAT HOW YOU UNDERSTAND THE SECOND AND THIRD STEPS OF MELBOURNE?

YEAH, IN ALL CANDOR AS I READ THAT DECISION, I'VE READ IT OVER AND OVER AND I HAVE READ THE CASES SINCE THEN, MY, MY READING IT IS THAT THERE IS ACTUALLY A SPILLOVER FROM --

BUT WE DON'T KNOW.

FROM STEPTWO TO STEP THIRTY-TWO.

DO WE KNOW IF JUDGE RAINWATER DECIDED THIS BASED ON STEP TWO OR WENT ON AND EVALUATED STEP THREE, THAT IS THE GENUINENESS OF WHAT WAS BEING OFFERED? CAN WE TELL ON THIS RECORD?

IT'S DIFFICULT TO TELL BECAUSE SHE DOESN'T ENGAGE IN ANY ANALYSIS, AND THERE WAS A CONTESTING OF, OF THESE REASONS OFFERED BY THE STATE.

SO NOW WHEN, YOU WERE SAYING WHAT THE REASONS WERE AND YOU WERE TALKING ABOUT HE SAID THAT I DON'T, HE'S GOING TO SAY THAT COULD BE ME, WHAT I WANT -- AND, AND THAT'S WHEN THE QUESTION WAS ASKED ABOUT WHETHER THIS WAS A GENWS REASON. ARE YOU SAYING THAT AGE -- GENUINE REASON. ARE YOU SAYING THAT AGE COULD NOT BE A RACE NEUTRAL REASON FOR A STRIKE?

NO, I THINK THERE IS A CASE THAT ACTUALLY TALKS ABOUT THE ISSUE OF AGE BEING A RACE NEUTRAL REASON, AND AN ACCEPTABLE REASON. THE PROBLEM HERE IS, IS WHAT THE, THE DEFENSE COUNSEL FOR MR. NOWELL POINTED OUT TO THE JUDGE PRIOR TO HER RULING WHICH IS THIS GENTLEMAN MR. COLLINS THE WHITE MALE. OF SIMILAR AGE TO MR. NOWELL, OF SIMILAR AGE TO MR. ORTAG OFF. THESE ARE ALL THREE GYM OF SIMILAR AGE AND THERE ARE NO OTHER DISTINGUISHING FACTORS TO DISTINGUISH MR. ORTEGA FROM MR. CALL SNOONS YOU ARE CLAIMING HERE I TAKE IT THAT THERE WAS ANOTHER JUROR WITH A PURPLE SHIRT ON? EXACTLY. ANOTHER PERSON OF SIMILAR AGE.

THAT WASN'T CHALLENGED BY THE STATE AND THAT THAT UNDERMINES THE STATE'S CLAIM THAT THIS WAS A RACE NEUTRAL REASON.

EXACTLY.

WELL THE MOST IMPORTANT THING IS THAT THE FACTS ARE CORRECT. NOW WASN'T THERE ALSO AN ADDITIONAL REASON THAT WAS STATED FOR HIS ANSWERS IN RESPONSE TO THE QUESTIONS ON THE DEATH PENALTY? WAS THAT NOT ALSO PART OF THE FACTER?

GETTING TO, DIDN'T THE STATE REALLY GIVE THREE REASONS HERE, THAT IS THAT TALKED ABOUT THE AGE AND IT TALKED ABOUT THE FACT THAT HIS WIFE WORKED FOR THE DEV ROW CORPORATION, WHICH IS AN INSTITUTE THAT TREATS YOUNG PEOPLE WITH SOCIAL AAND SAYMENT ISSUES. ADJUSTMENT ISSUES AND THE STATE ENDED UP SAYING THE FACT OF THE MATTER IS THAT I JUST DON'T LIKE THIS JUROR. DOES THAT -- IS THAT CORRECT.

THERE'S A FOURTH REASON THEY OFFER THE NEXT DAY, AND IT SORT OF TIES BACK INTO THE, THE SECOND REASON THAT'S OFFERED. FIRST OF ALL, THERE'S NO SUPPORT FOR THE, FOR THE FOR THESERTION THAT HIS WORK WORKED AT DEV ROW OR SOMETHING IN THE BUT WHAT HAPPENED, AND THE COURT SAID THE DISCUSSION, OF THAT REASON THE JUDGE TURNS TO THE, THE THE ASSISTANT STATE AND ATTORNEY ASKED WHAT SUPPORT IS THERE IN THE RECORD FOR THIS STATEMENT THAT HIS VIEWED ON THE DEATH PENALTY ARE AFFECT BIDE THIS? AND MR. PARKER INDICATED THAT HE COULD NOT OFFER ANY REASONS IN THE RECORD. SUPPORTED BY THE DEVEREUAX ROW CONNECTION.

SO THE PROSECUTOR JUST ENDED UP SAYING I DON'T LIKE THIS JUROR, IS THAT CORRECT OR NOT?

THAT'S EXACTLY CORRECT.

MY QUESTION TO YOU IS THEN UNDER THE CASE LAW AND EVERYTHING IS THE FACT THAT THE CASE LAWYER DOESN'T LIKE THE JUROR IS ENOUGH -- IS THAT A RACE NEUTRAL SUFFICIENT REASON UNDER,ED THE UNDER THE LAW, IN OTHER WORDS, IN THE OLD DAYS, THAT CLEARLY WOULD'VE BEEN A SUFFICIENT REASON? IN ESSENCE, WHAT LAWYERS WERE DOING. IS TRYING TO SAY WELL I THINK THIS MIGHT BE THE KIND OF JUROR THAT I WOULD LIKE TO HAVE ON THE JURY BASED ON THE POSITION THAT I HAVE AND HOW I EVALUATE THIS JUROR IN EVALUATING THESE CLAIMS. IS THAT ABOUT, CAN A LAWYER FOR OR PROSECUTOR CHALLENGE A JUROR AND, AND, THEN IN TERMS OF THIS RACE ANALYSIS, IS THAT, IS THAT SUFFICIENT INSTANT.

NO, IT IS NOT.

IS THERE ANY CASE THAT SAYS THAT IS NOT SUFFICIENT?

I GO BACK TO MELBOURNE, BUT I READ A CASE AND I AM HESITANT TO SAY. I'M COGNIZANT OF THE LAW THAT DOESN'T ALLOW ME TO TALK ABOUT CASES I DIDN'T CITE IN MY BRIEF. THERE IS A DORCY CASE, IN.

DID YOU RETURN THAT ISSUE SINCE THE, THE -- RESEARCH THAT ISSUE SINCE THE PROSECUTOR SAYS SO STRONGLY BOTTOM LINE JUDGE JO LIKE THIS JUROR. THERE'S A REQUIREMENT OF SPECIFICITY.

WHAT SPECIFIC THING DID THE JUDGE FIND IF THE JUDGE DID AS YOU ARE SAYING DISPUTING WHETHER THE JUDGE DID GO THROUGH THE PROPER ANALS WHICH SPECIFIC REASON THAT THE PROSECUTOR GAVE DID THE JUDGE FIND WAS AN APPROPRIATE RACE NEUTRAL REASON? SHE DOESN'T SAY., ROW SHE DOESN'T SAY AT L. IN THE SECOND AANNOUNCEMENT OF HER RULING SHE IS GOING TO EXERCISE. SHE SAID I FIND THE EXPLANATION IS FACIALLY RACE NEUTRAL AND UNDER THOSE CIRCUMSTANCES FIND IT IS NOT A PRETEXT. 681 AND 2. WHEN YOU LOOK AT DETERMINATION SHE MADE IN THIS IT SEEMS TO ME SHE MAKES SOME STATEMENT WHICH IS REALLY IS KIND OF AMOR-FACE HERE AND SAYS IN THEIR MIND, AT LEAST IN THE STATE'S MIND THIS REASON SEEMS TO BE REASONABLE SO I AM GOING TO LET THEM HAVE IT, BASICALLY.

THAT'S ABOUT ALL SHE SAYS.

SO IS THAT, IS THAT ENOUGH TO SAY THAT THIS IS A GEN-- GENUINE RACE NEUTRAL REASON FOR THIS STRIKE? RACE-NEUTRAL REASON FOR THIS STRIKE?

I DON'T KNOW OF ANY RULINGS BY THIS COURT THAT SAY IT IS TRIAL COURT HAS TO MAKE THEIR RULING ANY SPECIFIC WAY. IT WAS A PREFERABLE PRACTICE AND THE PRACTICE MOST JUDGES ENGAGE IN IS THEY DO MAKE SPECIFIC FINDINGS AS TO WHY THE STRIKE IS NOT

ALLOWED. FOR EXAMPLE, IF I WERE TO WANT TO STRIKE A MINORITY JUROR AND WAS ASKED FOR REASON, AND I WOULD SAY, WELL, THIS PERSON OPPOSES THE DEATH PENALTY.

WELL, WHAT DID THIS COURT --

AND THE OTHER SIDE CHALLENGES ME ON THAT AND SAYS, NO, ACTUALLY THEY DIDN'T SAY THAT, WE THEN CAN GO BACK TO THE RECORD AND FIND OUT WHETHER I WAS RIGHT OR WRONG ABOUT IT, AND THEN THE COURT CAN MAKE AN INFORMED DECISION OR I CAN WITHDRAW MY CHALLENGE. THE TRIAL JUDGE IN THIS CASE DOESN'T DO ANY OF THAT. WHAT THE END RESULT OF THAT IS THAT WE, YOU KNOW, THIS COURT STILL HAS TO GO THROUGH THE ANALYSIS AND SEE IF THERE'S ANY SUPPORT FOR ANY OF THE ALLEGATIONS.

WHAT IF WE DO -- WHAT DID WE SAY IN MELBOURNE AS TO THE ROLE OF THE APPELLATE COURT? JUSTICE CAN TEARROW ASKED YOU ABOUT OUR STANDARD REVIEW. WE MADE A VERY SPECIFIC STATEMENT IN MELBOURNE ABOUT THE DEFERENCE THAT THE APPELLATE COURT WAS TO SHOW IN REVEALING THESE MATTERS, DID WE NOT? WELL, WHAT IS THE STATEMENT WE MADE IN MELBOURNE?

THE STANDARD IS TO DETERMINE WHETHER THE TRIAL COURT'S DECISION WAS CLEARLY ERRONEOUS.

WHAT DID WE --

THERE IS A PRESUMPTION THAT CHALLENGES -- AT AUTOLEVELS THERE'S A PRESUMPTION THAT CHALLENGES NON-RACIALLY DISCRIMINATING REASONS.

YOU SAID SOMETHING --

SO TELL US VERY DIRECTLY WHY YOU BELIEVE THE TRIAL COURT'S RULING WAS CLEARLY ERRONEOUS?

REASON NUMBER ONE IS THERE'S NO, THE CONFLICT BETWEEN THE STATE'S ASSERTED POSITION WITH REGARD TO MR. ORTEGA BEING OF THE SAME AGE AND SEEING HIMSELF SITTING AT THAT DEFENSE TABLE BEING CHARGED WITH A MURDER AND VARIOUS OTHER CRIMES. MR. COLLINS, I'M SORRY, MR. ORTEGA, AS A HISPANIC BEING ABLE TO IDENTIFY, THE WHITE GENTLEMAN OF THE SAME AGE GROUP NOT HAVING THAT KIND OF PROBLEM, THE STATE NEVER ADDRESSES WHY, HOW THEY DRAW THE DISTINCTION BETWEEN MR. COLLINS AND MR. ORTEGA AS TO THE PRIMARY REASON OFFERED BY THE STATE. THE SECOND ONE IS THE REASON ABOUT THE INABILITY TO FOLLOW THE LAW. THERE IS NO SUPPORT IN THE RECORD WITH REGARDS TO MR. ORTEGA'S ANSWERS THAT WOULD SUPPORT THE NOTION THAT HE HAD ANY PROBLEM FOLLOWING THE LAW OR FOLLOWING THE DEATH PENALTY OR ADMINISTERING THE DEATH PENALTY. GO THROUGH THESE ONE BY ONE.

THAT ONE, I KNOW YOU CAN GET BACK TO THE THIRD ONE, BUT THE SECOND ONE, WHERE IS IT DEVELOPED IN THE RECORD THAT THE STATE EVEN ARGUED THAT MR. ORTEGA HAD SOME PROBLEM WITH THE DEATH PENALTY AND THAT WAS THE REASON THEY WERE EXERCISING THE CHALLENGE?

THEY CAN'T POINT TO ANY REASON ANYWHERE IN THE RECORD BECAUSE THE JUDGE ASKS THIS PROSECUTE IMMEDIATELY AFTER HE SAYS WHERE --

I'M TALKING WHERE HE ACTUALLY EVEN SAYS IT. BECAUSE AS I READ THE STATEMENT -- ARE YOU REFERRING TO THE STATEMENT HE MAKES WHEN HE SAY IT IS FAMILY, THE WIFE WORKS AT A PARTICULAR PLACE AND THE FAMILY PHILOSOPHIES AND THAT KIND OF THING? WAS THAT REALLY A CHALLENGE BASED ON HIS VIEWS OF THE DEATH PENALTY? I DIDN'T READ THAT THAT WAY, BUT IF --

AS TO THAT PART OF IT, THERE'S NO SUPPORT IN THE RECORD FOR -- AND THAT'S WHAT I UNDERSTAND THE APPELLATE COURT'S ROLE IS TO LOOK THROUGH THE RECORD AND SEE IF THERE'S STATEMENTS ASSERTED BY THE STATE. THE STATEMENT THAT THERE IS SOME PHILOSOPHY AT DEVEREAUX THAT WOULD CAUSE A HUSBAND TO CHANGE HIS VIEWS ABOUT THE DEATH PENALTY IN DIRECT OPPOSITION TO THE ANSWERS HE GAVE TO THE QUESTIONS OFFERED OR PROFFERED DURING THE JURY SELECTION PROCEDURE --

I JUST NEEDED TO CLARIFY ONE THING. THE SECOND HE GAVE THE REASON I WOULD THINK THAT MR. ORTEGA WOULD RELATE TO THE DEFENDANT BASED ON AGE. YOU'VE COUNTERED THAT, YOU'RE ALLEGING IT BECAUSE MR. COLLINS, SAME AGE. OKAY, SECOND OF ALL, I NOTED THAT HIS WIFE WORKS FOR DEVEREAUX WHICH IS A CHILD CARE NURTURING FACILITY. ARE YOU

SAYING THERE'S NO EVIDENCE IN THIS RECORD THAT THE WIFE WORKED FOR A CHILD CARE NURTURING FACILITY?

I DIDN'T SEE IT IN THE RECORD.

I MEAN, IT'S EITHER IN THERE OR NOT. AND I GUESS I'LL ASK MS. MILLSAPS IF IT'S IN THERE. SO HE JUST MADE THAT UP?

I DON'T KNOW WHAT HIS SOURCE --

ALL RIGHT, BUT IT'S NOT -- IF WE GO THROUGH -- CARDS, BACKGROUND CARDS?

AND IT MIGHT BE --

ACTUALLY, IN FAIRNESS I THINK THE TRIAL JUDGE, I THINK SHE MADE SOME REFERENCE TO SOMETHING LIKE THAT. I REMEMBER HER SAYING SOMETHING ABOUT THE ATTORNEYS HAD IT, BUT I DON'T HAVE IT.

WELL, OKAY. SO IT COULD BE THERE, OKAY. BUT THEN AND NOW, THAT'S WHAT I WANTED TO ASK YOU WHEN YOU SAID THERE WAS NO SUPPORT FOR THE WIFE WORKING AT A CHILD CARE NURTURING FACILITY, THERE, IN FACT, MAY BE SUPPORTED. WHETHER IT'S IN OUR RECORD OR NOT WHETHER THAT'S THE CASE. OKAY, SO PLEASE CONTINUE ON, AND THEN THAT'S WHEN HE SAID I'M CONCERNED BASED ON PHILOSOPHIES IN THE FAMILY HE MAY NOT BE ABLE TO FOLLOW THE LAW, AND THAT'S WHEN THE COURT ASKS WHAT SPECIFIC ANSWERS DOES HE GIVE THAT WOULD WARRANT THAT CONCERN, I DON'T RECALL ANY SPECIFIC ANSWERS. SO BACK TO THE QUESTION, THERE'S NOTHING WHERE THEY SPECIFICALLY SAY THAT WE'RE CONCERNED BECAUSE HIS ANSWERS ON THE DEATH PENALTY INDICATED SOME EQUIVOCATION?

THERE'S NOTHING TO SUPPORT THAT STATEMENT. AND, IN FACT, I GUESS I'M SKIPPING TO THE FOURTH REASON WHICH WAS OFFERED THE NEXT DAY BY THE ASSISTANT STATE ATTORNEY OFFERS AN ASSERTION MR. ORTEGA HAD PROBLEMS JUDGING PEOPLE ALTHOUGH HE SAYS HE COULD FOLLOW THE LAW. RECORD DOESN'T SUPPORT THAT, AND YOU CAN FIND THAT QUESTION AND ANSWER REGARDING THAT AT VOLUME 19, PAGES 300- 500-501. I THINK THE OTHER POINT WITH REGARD TO THE ALLEGED EQUIVOCATION ON THE DEATH PENALTY IS TO LOOK AT OTHER ANSWERS OF JURORS IN THAT SITUATION, AND IN FACT, THE MOST PASS FASCINATING ONE IS AN INTERESTING ANSWER IN SOL VOLUME 17, PAGE 95 WHERE SHE'S ASKED, WHITE FEMALE, I'M NOT SPECIFICALLY FOR THE DEATH PENALTY, AND I HAVE A REASONABLE DOUBT UPON WHETHER I CAN APPLY AGGRAVATING AND MITIGATING FACTORS NO MATTER WHAT THE SENTENCE. THEY LEFT HER ON THE JURY. SHE MADE THE MOST DRAMATIC STATEMENT ABOUT DOUBTS REGARDING THE DEATH PENALTY, WHITE FEMALE, WAS LEFT ON THE JURY.

YOU'RE ALL THE WAY DOWN INTO YOUR REBUTTAL, IS THIS THE ONLY ISSUE YOU'RE GOING TO ADDRESS?

IT'S THE ONE LOOKING AT THIS THAT I THINK NEEDS TO BE FLUSHED OUT --

YES, STAY ON THE TOPIC.

I THINK WE NEED TO, THE CASE IS TAKEN IN THE CONTEXT OF ALL THE CHALLENGES THAT WERE RAISED. DID THE STATE CHALLENGE ANY OTHER EITHER BLACK OR HISPANIC JUROR?

ONE WAS STRUCK FOR CAUSE BY AGREEMENT OF THE PARTIES.

PREEMPTORILY?

NO, AND I BELIEVE BY THE TIME THEY GOT TO HIM, NO ONE WAS LEFT, BUT I -- MY RECOLLECTION OF THE DISCUSSION REGARDING PATTERNS AND THINGS LIKE THAT WAS THAT THE OTHER HISPANICS, THEY WERE AWARE OF THE STRUCTURED CAUSE.

HOW MANY BLACKS OR HISPANICS SAT ON THIS JURY?

I DON'T BELIEVE ANY BLACKS DID, AND I DON'T BELIEVE ANY HISPANICS DID.

THAT'S A PRETTY -- I MEAN, IN TERMS OF WHAT WE'RE TRYING TO PREVENT HERE BY MELBOURNE AND ALL THESE CASES IS DISCRIMINATION AGAINST PROTECTED CLASSES. I WOULD HOPE YOU WOULD KNOW WHETHER THIS JURY HAD -- NOT THAT THAT'S THE SOLE GUIDE TO LOOK AT -- HAD BLACKS AND HISPANICS ON THIS JURY. BUT YOU'RE NOT SURE NOW, AND I DON'T WANT TO -- I'M CONFIDENT IN MY ANSWER, BUT I DIDN'T REALLY LOOK AT BLACKS -- WASN'T DISCUSSED BY ANYBODY OPENLY ON THE RECORD, AND THERE'S NO -- ACTUALLY, ESSENTIALLY, I'M TRYING TO REMEMBER BACK TO THE JURY QUESTIONNAIRE USED TO HAND OUT DOWN THERE. I CAN'T REMEMBER IF THAT WAS ON THE QUESTIONNAIRE.

WASN'T THERE A DISCUSSION ON THE RECORD DURING THIS WHOLE THING ABOUT THE FACT THAT THERE WERE REALLY ONLY FOUR MINORITIES THAT WERE IN THIS WHOLE JURY POOL TO BEGIN WITH AND THAT WE END UP WITH REALLY THE HISPANIC -- I DON'T BELIEVE THERE WAS A BLACK, THE HISPANIC PERSONS WERE OFF AND THERE WAS ONE MAYBE INDIAN PERSON THAT ACTUALLY SERVED ON THE JURY?

DON'T REMEMBER THE INDIAN PERSON BUT WOULDN'T DISPUTE THAT. THANK YOU.

MR. MILLSAPS?

MAY IT PLEASE THE COURT, CHARMAINE MILLSAPS PRESENTING THE STATE, I WANT TO ANSWER ABOUT THE INDIAN PERSON. THERE WERE FOUR PEOPLE OF COLOR HERE.

THAT DOESN'T NEGATE THE FACT THAT THE STATE COULD, IN FACT, BE USING THEIR PREEMPTORY CHALLENGES DISCRIMINATORILY. THAT DOESN'T NEGATE THAT FACT, DOES IT?

YES, IT DOES, NOT COMPLETELY.

THE MOORE FACT THAT SOMEONE OF COLOR SERVED ON THE JURY WOULD NEGATE THE FACT THAT THE STATE COULD HAVE BEEN USING THEIR CHALLENGES IN A DISCRIMINATORY MANNER? IT IS EVIDENCE GOING TO GENUINENESS.

I ASKED YOU DOESN'T THAT NEGATE?

IT DOES NOT PER SE NEGATE, BUT IT IS ONE OF THE ISSUES BEFORE THIS JUDGE. THEY SAID THERE WERE FOUR PEOPLE OF COLOR DURING JURY SELECTION.

WAS THAT ONE OF THE FACTOR THAT IS A JUDGE WOULD TAKE INTO ACCOUNT IN DETERMINING THE GENUINENESS OF --

ABSOLUTELY, YOUR HONOR. WHAT THEY'RE DOING IS A COMPARATIVE JURY ANALYSIS WHAT THE STATE'S SAYING HERE IS IT WORKS BOTH WAYS, OKAY? MR. COLLINS WAS OF THE SAME AGE, BUT THEN THERE WERE PEOPLE OF COLOR WHO DID NOT GIVE --

THE SAME AGE, WAS HE --

NO, NO.

SO HOW DO WE DEAL WITH THE FACT THAT THERE WAS NO CHALLENGE MADE OF MR. COLLINS, YET MR. COLLINS FIT INTO THE SAME BASIC CATEGORY. HE WAS OF THE SAME AGE AND MAYBE COULD RELATE TO THE DEFENDANT. THAT WAS THE STATE'S BASIC PREMISE FOR CHALLENGING MR. ORTEGA, AND IF MR. COLLINS FITS INTO THAT SAME GENERAL CATEGORY, HOW DO WE SAY THAT THIS WAS A GENUINE REASON WHEN HE DID AN EXERCISE HIS CHALLENGE THE SAME WAY ON SOMEONE SIMPLY SITUATED?

WELL, FIRST OF ALL, I DON'T AGREE THAT'S THE BASIC REASON, BUT --

WELL, WHAT IS THE BASIC REASON?

BOTH HIS VIEWS OF THE DEATH PENALTY AND HIS INABILITY TO JUDGE.

WHERE IN THE TRANSCRIPT DOES DOES -- THE STATE MAKE THE ARGUMENT THAT MR. ORTEGA'S VIEWS ON THE DEATH PENALTY ARE THE REASON WHY THEY ARE MAKING THIS CHALLENGE? YOUR HONOR, YOU HAVE TO PUT IT IN CONTEXT, AND ON THE THING YOU SAID BEFORE ABOUT THE DEVEREAUX CENTER ON PAGE 643, THE PROSECUTOR EXPRESSES HIS CONCERN THAT MR. ORTEGA CANNOT FOLLOW THE LAW. SO YOU GO THROUGH THE JURY SELECTION AT EVERY TIME WHERE THE PROSECUTOR ASKS HIM COULD YOU FOLLOW THE LAW? AND WHAT YOU FIND OUT THERE ARE TWO MAIN PURPOSES WHERE MR. ORTEGA WAFFLED. ONE OF THEM IS WHEN ONE OF THE OTHER JURORS, MR. BROOKS WHO ENDS UP BEING STRICKEN FOR CAUSE, STARTS TALKING ABOUT INNOCENT PEOPLE.

OKAY.

AND THEN AFTER HE'S STRICKEN, THEY TALK TO MR. ORTEGA, AND MR. ORTEGA SAYS LIKE SOME OTHER PEOPLE SAID, AND HE'S REFERRING TO BROOKS HAVING JUST SAID THAT, THERE HAVE BEEN SOME PEOPLE THAT HAVE BEEN SENTENCED AND LATER ON FOUND THEM INNOCENT OF THE CRIME. ABOUT THE JUDGING OF THE PERSON. MR. ORR TODAY QA E GA SAID IT'S A HEAVY BURDEN. SINCE MONDAY IT WAS HARD TO THINK ABOUT. AND ON PAGE 502, THE PROSECUTOR -- EXCUSE ME.

WAIT, WAIT, WAIT.

BUT DOESN'T IT GO ON FROM THERE, AND THEY SPECIFICALLY ASK HIM, AND HE SAYS HE CAN, IN FACT, FOLLOW THE LAW.

IT WOULD BE TOUGH, BUT I WILL FOLLOW THE LAW ON AGE 502.

SHE ASKED YOU FIRST, AND I'M HAVING DIFFICULTY WITH THIS, TOO, AND THAT IS JUST NOT THERE, FOR YOU TO POINT OUT WHERE THE PROSECUTOR STATES ON THE RECORD THAT I HAVE DIFFICULTY WITH THIS JUROR'S VIEWS ON THE DEATH PENALTY? DOES THE PROSECUTOR EVER SAY THAT?

NO, HE DOES NOT DIRECTLY SAY THAT. WHAT HE SAYS IS I HAVE TROUBLE, I DON'T BELIEVE HIM WHEN HE SAYS HE'S GOING TO FOLLOW THE LAW, OR --

WAIT, WAIT, WAIT. EXCUSE ME, MS. MILLSAPS. THE JUDGE ASKED SPECIFICALLY A QUESTION. IF YOU COULD CALM DOWN AND RESPOND TO HIS QUESTION.

DO YOU AGREE THE PROSECUTOR NEVER SAID TO THE JUDGE I HAVE TROUBLE WITH THIS PERSPECTIVE JUROR'S VIEWS ON THE DEATH PENALTY?

THAT IS CORRECT.

LET'S LET THE JUSTICE FINISH WITH HER QUESTIONS TOO.

WELL, JUST GO ON.

WELL, LET ME ASK YOU WHAT WERE YOU TALKING ABOUT IN CONTEXT ABOUT HIM BEING ABLE TO FOLLOW THE LAW?

OKAY. HE SAID, LET ME QUOTE HIM EXACTLY. HE MAY NOT BE ABLE TO FOLLOW THE LAW.

WHAT PAGE ARE YOU ON?

SO THEN I WENT AND LOOKED THROUGH THE TRANSCRIPT EVERY PLACE WHERE THE PROSECUTOR ASKED A QUESTION TO MR. ORTEGA ABILITY CAN YOU FOLLOW THE LAW? MR. ORTEGA WOULD EXPRESS CONCERN ABOUT SOMETHING, AND THE PROSECUTOR WOULD ASK HIM, COULD YOU FOLLOW THE LAW? AND WHEN YOU GET ANSWERS IT WOULD BE TOUGH BUT I COULD FOLLOW THE LAW ABOUT JUDGING, YOUR HONOR, A PROSPECTIVE JUROR EXPRESSING CONCERNS ABOUT IT BEING TOUGH TO FOLLOW THE LAW IS A RACE-NEUTRAL REASON --

WELL, LET ME ASK YOU A QUESTION. WE HAVE A COLD TRANSCRIPT, AND SO THE JUDGE AT THE TIME THAT'S TRYING TO EVALUATE THE GENUINENESS. SO THE WAY I UNDERSTAND THIS UNDER MELBOURNE, TWO DIFFERENT PROSECUTORS COULD SAY I AM GOING TO STRIKE THIS JUROR WHO'S A BLACK JUROR, HISPANIC JUROR AND A BLACK DEFENDANT BECAUSE OF THE PURPLE SHIRT, BUT BECAUSE OF THE OVERALL CIRCUMSTANCES, THE JUDGE MAY NOT FIND PROSECUTOR A TO REALLY BE THAT THAT'S REALLY GENUINE, THAT IT'S A PRETEXT. WHEREAS SOMEONE ELSE BASED ON THE WHOLE PATTERN THEY MAY SAY, LISTEN, I ALWAYS SAY THIS GUY IS ALWAYS STRIKING PEOPLE WITH PURPLE SHIRTS. I FIND THAT TO BE GENUINE. DO YOU AGREE THAT IN TERMS OF A RACE-NEUTRAL REASON, THE GENUINENESS HAS TO BE ON THE GROUND AT THE TIME LOOK AND THAT'S WHY WE DEFER TO THE TRIAL JUDGE?

YES. WE DEFER TO THE TRIAL JUDGE.

ALL RIGHT. THIS IS MY REAL CONCERN IN THIS CASE OF THIS PROSECUTOR. HE'S ASKED AFTER HE SAYS I DON'T CONCERN BASED ON PHILOSOPHIES THAT HE MIGHT NOT BE ABLE TO FOLLOW THE LAW, THE JUDGE GIVES HIM A CHANCE TO SAY WHAT SPECIFIC ANSWERS DID HE GIVE? I DON'T RECALL ANY SPECIFIC ANSWERS THAT WOULD RAISE CONCERN, AND MR. PARKER SAYS COULD WE READ BACK, THERE'S NO SPECIFIC ANSWER LS. BUT FOLLOWING THE LAW IT ARGUES THAT'S WHAT WE USE TO DETERMINE WHETHER OR NOT A CAUSE CHALLENGE IS GIVEN. THEN MY FURTHER CONCERN IS AFTER THEY, AFTER THE DEFENSE VERY ARTICULATELY SHOWS THAT THIS IS REALLY NOT A DEFENDANT, THIS WOULD NORMALLY BE A STATE'S JUROR BECAUSE HE'S GOT A SISTER IN LAW ENFORCEMENT, MR. PARKER SAYS THIS, AND THIS IS MY CONCERN: WELL, THAT'S WHY BECAUSE WE HAVE PREEVERYONE PREEMPTORY CHALLENGES, IT'S NOT LIKE SOMEBODY'S FACE. YOU CAN'T STRIKE ANYONE FROM NOW ON BECAUSE OF RACE. ALL MINORITIES HAVE A RIGHT TO SIT, CAN'T STRIKE THEM. MY REASON FOR STRIKING HIM IS THAT HE'S YOUNG, AND HE APPEARS TO BE THE SAME AGE AS THE DEFENDANT. THAT'S MY FIRST REASON. I THINK THAT'S SUFFICIENT. I THINK HE WOULD ASSOCIATE WITH THE DEFENDANT BECAUSE OF HIS AGE. I THINK HE SAYS, YOU KNOW, THAT COULD BE ME. NOW, THAT'S MY MOST CONCERN WITH THE WORDS THAT CAME OUT OF THE PROSECUTOR'S MOUTH BECAUSE WHAT HE WAS REALLY SAYING, AND THIS IS WHAT MR. BERRY SEEMS TO HAVE BEEN FOCUSED ON, IS THAT WHEN IT ALL CAME DOWN TO IT, WHAT HE WAS REALLY SAYING WAS THIS GUY, THIS YOUNG HISPANIC GUY, YOU KNOW, THAT COULD BE ME. AND IT SOUNDS OTHERWISE PREPOSTEROUS. PLUS, THE STATEMENT THAT IS THIS PROSECUTOR MAKES INDICATE A FRUSTRATION WITH THIS IDEA THAT YOU CAN'T JUST SAY,

LISTEN, I'M STRIKING HIM BECAUSE HE'S HISPANIC, AND HE'S GOING TO BE, AS A MINORITY, HE'LL BE MORE LIKELY TO IDENTIFY WITH THE DEFENDANT. AND THAT'S WHAT HE WISHED HE COULD SAY, BUT HE KNOWS HE CAN'T. NOW, WHY IN TERMS OF LOOKING AT THIS WHOLE RECORD SINCE THERE'S NO BASIS FOR THE REASONS OFFERED, AND THE ONE REASON, AGE, WOULD WEAPON FIND THAT THERE IS, THAT THIS IS A GENUINE REASON BASED ON THIS RECORD?

WE ALSO NEED TO GET TO THE OTHER REASON OFFERED THE NEXT DAY. REMEMBER WHAT THE TRIAL JUDGE DOES HERE.

ON THAT RECORD, DOES THAT TROUBLE YOU AT ALL, WHAT THAT PROSECUTOR SAID?

NO, YOUR HONOR. AGE IS A TRADITIONAL REASON PROSECUTORS DON'T LIKE PEOPLE, AND EVERYBODY ELSE ON THE JURY AS WAS NOTED, WAS HOLD R OLDER. THAT'S NOT HARD TO BELIEVE.

EXCEPT FOR MR. COLLINS.

EXCEPT FOR MR. COLLINS. THIS WAS NOTED ON THE RECORD, AND THAT'S VERY TRUE.

INCIDENTALLY -- HIMSELF HAS TO DEAL WITH -- E WORKING WITH YOUNG CHILDREN IS ALSO A VERY TRADITIONAL REASON PROSECUTORS DON'T LIKE, THEY DON'T WANT JURORS. WE'RE, YOU KNOW, WE'RE MORE -- WE DON'T LIKE THE TOUCHY-FEELLY CROWD. THEY TYPICALLY STRIKE THOSE PEOPLE.

BUT ISN'T THE DIFFICULTY, IT GIVES THE APPEARANCE THAT, BELL WELL, IF HE'S YOUNG AND HISPANIC OR YOUNG AND BLACK, THEN I DON'T LIKE HIM BECAUSE HE MAY WELL IDENTIFY WITH THE YOUNG, BLACK DEFENDANT. BUT IF HE'S YOUNG AND WHITE AS MR. COLLINS WAS, THEN I DON'T HAVE ANY PROBLEM WITH HIM BECAUSE I DON'T REALLY THINK HE WILL IDENTIFY WITH THIS YOUNG BLACK DEFENDANT. ISN'T THAT, IN ESSENCE, WHAT YOUR OPPONENT IS ARGUING TO US HERE? AND AREN'T YOU CONCEDING THAT THERE'S THAT APPEARANCE ON THIS RECORD?

NO, I'M NOT CONCEDING THERE'S APPEARANCE.

WELL, WHAT OTHER APPEARANCE IS THERE IF WE HAVE A YOUNG WHITE JUROR THAT IS YOUNG, AND YOU KEEP SAYING THAT, WELL, PROSECUTORS DON'T LIKE YOUNG PEOPLE, BUT HE'S LEFT ON THE JURY.

AND AN OLDER PERSON OF COLOR IS AS WELL. IT WORKS BOTH WAYS.

A YOUNG HISPANIC IS TAKEN OFF THE JURY. SO WHY, WHAT IS THE --

A YOUNG HISPANIC WHO SAID THINGS -- YOUR HONOR, THIS IS TYPICAL STUFF THAT A PROSECUTOR WOULD STRIKE FOR, A CONCERN ABOUT PEOPLE WHO HAVE BEEN WRONG THRILL CONVICTED AND A CONCERN ABOUT HOW HARD IT IS TO JUDGE PEOPLE, A HEAVY BURDEN? WHERE DOES THE PROSECUTOR ARTICULATE THAT REASON? YOU'RE GIVING YOUR REASONS NOW, AND YOU'RE SAYING NOW THAT I'VE LOOKED AT ALL THIS EXCHANGE, I CAN GIVE YOU SOME REASONS WHYIT'D BE A GOOD REASON TO DO THIS, BUT FOR RIGHT NOW LET'S ASSUME THE ONLY THING IN THERE IS ABOUT THE AGE, OKAY? IS IT YOUR POSITION THAT THE AGE IS SUFFICIENT ON THIS RECORD TO JUSTIFY THE PREEMPTORY STRIKE?

WHEN YOU HAVE AN OLDER PERSON OF COLOR WHO'S LEFT ON THE JURY, AND THE FOREMAN OF THIS JURY, THEN, YES, THOSE WORK EQUALLY. SIMILARLY SITUATED OR COMPARED TO JUROR ANALYSIS WORKS BOTH WAYS. AN OLDER PERSON OF COLOR WAS LEFT ON THIS JURY.

WAIT. I JUST WANT TO MAKE SURE BECAUSE I'M NOT, I WANT TO BE RACIALLY AND ETHNICALLY SENSITIVE, AND I KNOW THAT MELBOURNE PROTECTS EVERYONE, WHITES, BLACKS, WHATEVER. BUT WE'RE NOT REALLY SERIOUSLY CONTENDING THAT A -- THIS IS A GENTLEMAN FROM INDIA, IS THAT WHAT YOU'RE SAYING? IS PUT INTO THE SAME CATEGORY AT AFRICAN-AMERICANS AND HISPANICS IN TERMS OF SAYING AS LONG AS HE HAD SOMEBODY WHO'S DARK KIND, SOMEONE FROM MAYBE LEBANON OR THE MIDDLE EAST THAT THAT SORT OF DIFFUSES THE WHOLE THING? WELL, THEY DOWN BELOW ANALYZE IT AS FOUR PEOPLE OF COLOR WERE AVAILABLE. MR. MARTINEZ AND MR. WERE ALSO HISPANIC, BUT THEY WERE STRICKEN FOR CAUSE. THEY WERE NOT LEGALLY AVAILABLE, THERE WERE ONLY TWO LEGALLY AVAILABLE PEOPLE OF COLOR. ONE OF THEM WAS INDIAN, AND ONE WAS HISPANIC. ONE OF THEM WAS STRICKEN, ONE OF THEM WAS KEPT. THAT'S 50/50. I DON'T THINK THAT -- THIS IS JUST A VERY TRADITIONAL REASON THAT PROSECUTORS DON'T -- IT'S VERY BELIEVABLE THAT THEY DON'T LIKE PEOPLE THAT ARE YOUNG. THEY TRADITIONALLY GET RID OF PEOPLE THAT ARE YOUNG.

I HAVE TO GO BACK TO THE FACT THAT IF THAT IS THE PROSECUTOR'S REASON, THEN HIS NEXT

STRIKE OUGHT TO HAVE BEEN MR. COLLINS WHO WAS ALSO YOUNG AND SIMILARLY SITUATED. BUT WE KNOW THAT THAT WAS NOT THE CASE, AND 34R- COLLINS -- MR. COLLINS ACTUALLY SERVED ON THIS JURY. SO IF WE GO BEYOND THAT, WHAT WAS THE RACE-NEUTRAL REASON FOR STRIKING MR. ORTEGA?

AND THERE WERE MULL PL --

NOT THE ONES THAT YOU CAN READ IN THE RECORD BUT WHAT THE PROSECUTOR ARTICULATED AT THIS HEARING, THE REASONS BEYOND THE AGE --

JUDGE, WHEN THEY CAME BACK WHAT HAPPENED HERE WAS THE TRIAL JUDGE WAS VERY CAREFUL ABOUT THIS. AND WHILE THE FINAL JURY HAD BEEN SELECTED AND SHE HAD ALLOWED THE PREEMPTORY WHAT SHE SAID IS I NEED TO DO SOME MORE RESEARCH, SO OOH WHAT I'M GOING TO DO IS TAKE A BREAK FOR THE NIGHT, AND I'M GOING TO HAVE THE JURY, PLUS MR. ORTEGA COME BACK TOMORROW, AND WE'RE GOING TO EXPLORE THIS SOME MORE TOMORROW AFTER I CAN RESEARCH BECAUSE THEY HAD A VERY OLD SELECTION MANUAL, JURY SELECTION MANUAL. SHE WANTED NEWER CASE LAW. THEY CAME BACK ON THE RECORD THE NEXT DAY. THE NEXT DAY THE PROSECUTOR SAID THINGS LIKE MY MAIN REASON IS HIS TROUBLE JUDGING. I REVIEWED MY NOTES ON WHY I DID NOT LIKE THIS JUROR, AND MY MAIN REASON, THE PRIMARY REASON IS THAT HE HAS SO MUCH TROUBLE JUDGING. SO --

AND WHERE IN THE RECORD DO WE HAVE THAT?

THE NEXT DAY --

NO, NOT WHEN HE SAID THAT BUT WHERE THE RECORD SUPPORTS THAT?

WELL, OKAY. WHERE THE PROSECUTOR SAID IT IS --

NO, NOT WHERE THE PROSECUTOR SAID IT BUT WHERE IT IS REFLECTED IN THE JURY VOIR DIRE THAT --

THAT'S WHAT I WAS QUOTING TO YOU ABOUT SINCE MONDAY. THAT'S IN VOLUME 19, PAGE 500-501, AND THEN ON PAGE 502 BECAUSE THE PROSECUTOR IS SO CONCERNED ABOUT HIS HAVING SO MUCH TROUBLE JUDGING. HE ASKS HIM, FOLLOW UP, CAN YOU FOLLOW THE LAW? AND THAT'S ON PAGE 502, ALL RIGHT? HE SAYS IT WOULD BE TOUGH, BUT I CAN FOLLOW THE LAW. TOUGH. AND YOU DON'T LIKE IT. AND SAYS EVEN IF YOU DON'T LIKE IT? AND HE SAYS, YES, EVEN IF I DON'T LIKE IT.

IT WOULD BE TOUGH, BUT I WOULD FOLLOW THE LAW.

YES.

AND THAT'S VOLUME 19, AND THAT WHOLE EXCHANGE OCCURS FROM PAGE 500-502, AND YOU CAN SEE THAT. SO THAT'S ANOTHER RACE-NEUTRAL REASON GIVEN HERE.

OKAY. NOW, HAVE YOU OUTLINED ALL OF THEM? YOU'VE MENTIONED THE AGE, YOU'VE MENTIONED THE SCHOOL, AND YOU'VE MENTIONED THE JUDGMENT. NOW, HAVE YOU ANSWERED ALL OF JUSTICE QUINCE'S QUESTIONS ON ANY OTHERS THAT WERE ARTICULATED BY STATE OF THE ASSISTANT STATE ATTORNEY IN THE COURTROOM AS AN ANNOUNCED REASON FOR IT, NOT WHAT YOU HAVE FOUND, BUT THE ANNOUNCED REASON?

NO, THOSE WERE THE ANNOUNCED REASONS, ALL RIGHT?

OKAY. AND SO YOU DO AGREE THAT THE THINGS YOU'VE SUGGESTED WITH REGARD TO TROUBLE WITH THE DEATH PENALTY, THAT KIND OF THING, UNLESS IT'S INCORPORATED INTO JUDGMENT, WAS NOT REALLY ARTICULATED?

NO. I THINK YOU HAVE TO READ IT IN CONTEXT WHEN HE SAYS I'M NOT SURE HE CAN FOLLOW THE LAW. WHAT YOU HAVE TO DO IS GO BACK AND READ EVERY TIME MR. ORTEGA OR THE PROSECUTOR ASKS HIM CAN YOU FOLLOW THE LAW? IN OTHER WORDS THE PROSECUTOR EXPRESSED CONCERN ON THE RECORD MUCH EARLIER WHEN HE WAS TALKING TO MR. ORTEGA ABOUT WHETHER HE COULD FOLLOW THE LAW. AND INCIDENTALLY, THE OTHER JUROR THAT HAD THESE KINDS OF CONCERNS, MR. BROOKS, WAS, IN FACT, STRICKEN BY THE PROSECUTOR FOR CAUSE.

HOW ABOUT MR. SANFORD? WASN'T HE ONE OF THOSE JURORS THAT SERVED AND HE HAD SOME PROBLEMS ALONG THIS LINE TOO?

MR. STANFORD DID SERVE. I DON'T SEE HIM HAVING THE SAME PROBLEMS. NO, IT WAS MR. BROOKS WHO WAS REFERRING TO --

AT SOME OTHER POINT IN THE TRANSCRIPT DIDN'T MR. SAN NORD EXPRESS THESE KINDS OF, YOU

KNOW, I WOULDN'T PARTICULARLY LIKE TO, BUT I WILL IF THE EVIDENCE SUPPORTS IT, THAT KIND OF THING? THE SAME SORT OF THINGS YOU'RE NOW POINTING TO CONCERNING MR. ORTEGA?

MY NOTES ON MR. SANFORD ARE AROUND PAGE 525, AND I DON'T HAVE THAT THEY WERE ANYWHERE NEAR THIS. BUT MY NOTES, BECAUSE HE WAS NOT BROUGHT UP, AND HE WASN'T ONE OF THE FOUR, PERSON OF COLOR WHO WAS THE FOREMAN, IT SEEMS LIKE IF YOU GO OVER 55 MILES AN HOUR, WHO ARE YOU GOING TO BLAME? TURN ONE DRIVING. AND HE DID NOT HAVE ANY OF THOSE KIND OF CONCERNS. SO, BUT, NO, YOUR HONOR, I DID NOT FOCUS ON MR. STANFORD, BUT MY NOTES, MY NOTES REALLY SAY THINGS LIKE HE WENT TO COLLEGE IN GAINESVILLE AND THINGS LIKE THAT. SO I DO NOT HAVE MR. STANFORD -- SANFORD IN THE SAME CATEGORY.

WHAT DID THE JUDGE SAY, JUDGE RAINWATER SAY WHEN SHE CAME BACK AFTER HAVING LOOKED AT IT OVERNIGHT?

SHE ASKED THE PROSECUTOR, WELL, SHE ASKED IS THERE FURTHER ARGUMENT? THAT'S WHEN THE PROSECUTOR SAID HE HAD THE PROBLEM, THAT'S WHEN THE WHOLE JUDGING CAME UP AND WHERE THE PROSECUTOR QUOTED FROM HIS NOTES. HE WANTED SO THAT THIS WASN'T SOME SORT OF AFTERTHOUGHT, HE WANTED TO GIVE THE JUDGE HIS HANDWRITTEN NOTES ON THIS JUROR, BUT THEN THERE WAS A JOKE ON THE RECORD ABOUT I DON'T THINK YOU'RE GOING TO BE ABLE TO READ MY NOTES. SO THE PROSECUTOR WAS SAYING, LOOK, THE OTHER REASON I HAVE -- BIG PROBLEM I HAD HERE WAS THIS JUROR'S CONCERN ABOUT JUDGING. AND HE WANTED TO SHOW HIS HAND-WRITTEN NOTES WHERE HE HAD NOTED THOSE CONCERNS. AND THEN AFTER THERE IS THIS ADDITIONAL EXPLANATION FOR STRIKING MR. ORTEGA GIVEN. SHE BASICALLY SAYS I FIND THAT HAVING RESEARCHED IT, HAVING THOUGHT ABOUT IT OVER THE NIGHT, HAVING LISTENED TO ALL THE REASONS, THEN SHE SAYS, YES, I WILL PERMIT THIS STRIKE. BUT REMEMBER, I'VE NEVER SEEN A JUDGE HAVE THE PREEVERYONE WAS DOING THAT.

DID SHE SAY THE REASON THAT SHE HAD REACHED THE CONCLUSION OTHER THAN THE FACT SHE THOUGHT ABOUT IT OVERNIGHT AND -- MAKE A STATEMENT AS TO -- THE WHETHER THIS WAS A RACE NEUTRAL CHALLENGE OR --

SHE JUST SAID SHE WAS GOING TO PERMIT THE STRIKE HAVING LISTEN TO DO THE PROSECUTOR!!\$!!!!!!!!!!!!!!!!!!!!!! PROSECUTOR'S CONCERN ABOUT JUDGING AS WELL. SO THERE -- THERE -- I MEAN HE CONTRADICTION, THERE ARE NO DETAILED STEP-BY-STEP MELANDRI OWN EVERY MELANDRI ON ALL THREE STEPS BUT THAT IS NOT REQUIRED BY THIS \$ COURT'S THIS COURT HAS NEVER SAID, WE REQUIRED DETAIL FINDINGS ON EVERY STEP, TO BE ENTERED INTO THE RECORD, THIS JUDGE DID A VERY THOROUGH JOB OF GOING TO RESEARCH, OVERNIGHT, BRINGING!!\$!!!!!!!!!!!!!!!!!!!!!! BRINGING, THE CHALLENGED JUROR BACK, SO THAT WHAT SHE COULD HAVE DONE, WAS -- IF SHE HAD -- WHY SHE DID THAT IF SHE WAS GOING TO CHANGE HER RULE, SHE WAS GOING TO LET THIS JUROR COME BACK ON. SO, THE STATE ASKED YOU TO AFFIRM -- DO YOU HAVE ADDITIONAL TIME, THE CLOCK IS INCORRECT!!\$!!!!!!!!!!!!!!!!!!!!!! INCORRECT, SO IF YOU WANT TO IF THERE IS ANYTHING FURTHER, YOU ARE ONLY GIVEN 20 MINUTES, ON THE CLOCK. SO DO YOU HAVE -- ARE YOU IF YOU ARE FINISHED THAT IS FINE.

I'M THROUGH.

OKAY THAT IS FINE. MAY IT PLEASE THE COURT NO I NOTE WITH REGARD TO MR. STANFORD WHO DID SOIPT THE JURY THERE IS A DISCUSSION -- SIT ON THE JURY THERE IS DISCUSSION RELEVANT IN COMPAREING TO MR. ORTEGA'S SITUATION --

IN FAIRNESS THE DEFENSE ATTORNEY DIDN'T BRING THAT TO THE \$JUDGE'S ATTENTION AT THE SECOND PORTION OF THIS, DID HE --

I DON'T -- I DON'T BELIEVE HE MENTIONED MR. SANFORD BY NAME, MY RECOLLECTION IS THAT THE -- THE THE DEFENSE ATTORNEY DISPUTED MR. PARKER'S CLAIMS ABOUT WHAT WAS SAID, AND SAID OTHER JURORS HAD SIMILAR ISSUES, I DON'T -- I THINK YOU ARE CORRECT HE DID NOT MENTION MR. SANFORD BY NAME TO THE JUDGE.

ESSENTIALLY IT WILL SEEMS WHAT YOU ARE ASKING US TO DO IS TO REVIEW THE TRIAL \$ JUDGE'S CREDIBILITY DETERMINATION IN FINDING THAT THE STATE ATTORNEY'S RACE NEUTRAL REASON OR GENUINE -- WE WOULD HAVE TO THE REALLY PLACE OURSELVESES IN THE CONTEXT OF THE COURT, IN THE CONTEXT NOT ONLY OF WHAT THE STATE ATTORNEY SAYS, BUT THE

DEMEANOR OF THE STATE ATTORNEY, AND DETERMINE IN ORDER TO REVERSE THAT THAT CREDIBILITY DETERMINATION WAS ERRONEOUS.

NO, SIR, I -- I THINK IF I WAS DOING -- IN HEARING WHAT I'M ASKING I SUPPOSE COULD YOU LOOK IT THAT WAY BUT REALLY THE PROPER ANALYTICAL CONSTRUCT IS TO LOOK AND SEE IF THERE IS ANYTHING IN THE THE RECORD THAT SUPPORTS THE FINDING OF THE JUDGE.

WELL -- THERE IS SOMETHING IN THE RECORD THAT SUPPORTS WHAT THE STATE ATTORNEY IS SAYING. WHETHER THAT IS ENOUGH, IS REALLY THE ISSUE, BUT THERE IS POINTS IN THE RECORD WHERE MR. ORTEGA SAYS WOULD IT BE TOUGH TO FOLLOW THE LAW THAT MAY NOT BE ENOUGH FOR A CAUSE CHALLENGE BUT IT CERTAINLY SEEMS TO BE ENOUGH FOR A PERMANENTTORY CHALLENGE IF -- PEREMPTORY CHALLENGE IF NOT A MAJORITY JUROR IF NOT A MELANDRI ISSUE DONATES WANT SOCK ON THE JURY TOUGH TO FOLLOW THE LAW SEEMS ON THE RECORD THAT THIS PERSON WORKED FOR CHILD CARE FACILITY AT LEAST DEFENSE ATTORNEY DIDN'T SAY HE DONATES WORK AT CHILD CARE FACILITY.

HE DIDN'T SAY PROSPECTIVE JUROR WORNL M\$\$O WORKED IN CHILD CARE NAFLT THE PROJECT!!\$\$!!!!!!!!!!!!!! PROJECTIVE \$\$JUROR'S WIFE WORKED IN --

DIDN'T SAY THAT IS NOT TRUE THERE IS NOTHING IN THE RECORD THAT WOULD SUPPORT THAT WE ARE DOWN TO WHEN THE STATE ATTORNEYS, REASONS, ARE GENUINE, ARE BELIEVABLE AND THE JUDGE SEEMED TO FIND THAT THEY WERE BELIEVABLE. IF THE JUDGE HAD FOUND THEY WEREN'T BELIEVABLE, MAYBE WE WOULD BE ON THE OTHER END SAYING WE DON'T THINK THE JUDGE ABUSED THE DISCRETION BECAUSE THE JUDGE SAW DEMEANOR OF THE STATE ATTORNEY AND FOUND THE REASONS NOT BELIEVABLE. BUT ON THE OTHER HAND, WHAT A JUDGE FOUND REASONS BELIEVABLE!!\$\$!!!!!!!!!!!!!! BELIEVABLE, HOW CAN WE THEN SAY THE JUDGE WAS WRONG IN THAT FINDING.

THE ONLY SITUATIONS YOU ARE GOING TO FIND, COME BEFORE YOU, ARE SITUATIONS, WHERE THE CAUSE CHALLENGE IS DENIED!!\$\$!!!!!!!!!! DENIED, SO IF IND THAT.

-- GET TO APPEAL THOSE KIND OF DECISIONS -- NEVER HAVE THAT SITUATION --

THE COURT HAS INDICATED IN NUMEROUS DECISIONS THAT IT HAS SOME ROLE TO PLAY.

WE SEE THEM WHEN THE CAUSE -- WHEN THE PEREMPTORY IS GRANTED, BECAUSE OF THE FACT THAT SOMEBODY DIDN'T GET TO SIT ON THE JURY, THAT SHOULD HAVE BEEN ABLE TO SIT SO WE SEE THEM COMING FROM BOTH DIRECTIONS, GRANTING AND THE DENIAL, AND --

THINK I SUPPOSE COULD IT -- DEFENSE COUNSEL.

RIGHT.

--

I TAKE THAT -- COMMENT -- IT DOES, ALL THAT.

HOLLIDAY OUT OF THE THIRD DISTRICT WAS EXACTLY THAT CASE SO THAT POINT WELL TAKEN I WITHDRAW THE COMMENT.

THE SITUATION HERE WHAT I HEARD YOU SAY EARLIER WAS THAT JUDGE RAINWATER MADE A STATEMENT THAT SHE FOUND THAT THAT THIS WAS NOT THAT THAT CHALLENGE WAS MADE ON A RACE NEUTRAL BASIS, AND THAT THERE WAS IT WAS NOT PRETEXT!!\$\$!!!!!!!!!!!!!! PRETEXTUAL. THAT IS HER -- ANNOUNCEMENT ON THE SECOND --

AND REALLY, WE ARE -- WHAT THE WAY THAT I UNDERSTOOD MELBOURNE WHEN HERE HE WE WE DECIDED MELBOURNE WE WERE TRYING TO RECOGNIZE THE TRIAL JUDGE THERE IS IN THE COURTROOM, WHEN THIS IS DEVELOPING, IN FRONT OF THE TRIAL JUDGE. AND HAS TO MAKE A CALL ON WHETHER WHAT THE PROSECUTOR IS SIRING WHOEVER IS MAKING THE CHALLENGE IS SAYING IS MADE GENUINE BASIS OR IS MADE PRETEXTUALLY, IN ORDER TO -- GET -- SOMEONE WHO IS IN -- A CLASS THAT SHOULD BE PROTECTED PROTECTED. AND THAT THIS IS A CREDIBILITY CALL AND THAT IS THE REASON WE SAID YOU KNOW, UNLESS IT IS CLEARLY SHOWN THAT THE TRIAL JUDGE MADE A ERROR THERE, WE ARE NOT GOING TO GET THE APPELLATE COURTS INVOLVED IN IT THAT WHAT I'M LOOKING FOR HERE IS I SEE THAT JUDGE RAINWATER MADE THAT KIND OF CALL DID SHE NOT?

AN ELEMENT OF THE MELBOURNE ANALYSIS THERE IS SOME CREDIBILITY DETERMINATION WHAT THE CASE LAW TALKS ABOUT MELBOURNE AND SUBSEQUENT TO THAT IS DEFINING!!\$\$!!!!!!!!!!!!!! DEFINING, WHAT ROLE THIS COURT PLAYS IN THIS KIND OF ANALYSIS!!\$\$!!!!!!!!!!!!!! ANALYSIS, AND THE ROLE IT PLAYS IS TO LOOK AND SEE IF THE RECORD SUPPORTS THE FINDING. MY POINT

IS THE RECORD IN NO WAY SUPPORTS THE FINDING, AND IN FACT, SUPPORTS A CONCLUSION MUCH DIFFERENT THAN THE ONE THE JUDGE RAISED!!\$\$!!!!!!!!!! RAISED, IF IT WAS SIMPLY, THIS COURT'S DOESN'T GET INVOLVED DOESN'T REVIEW ANYTHING WITH REGARD TO CREDIBILITY DETERMINATION, THERE IS NO REASON FOR ANY APPELLATE COURT TO EVERY REVIEW ANY CAUSE CHALLENGE THAT IS ACCRUED BY A TRIAL COURT OVER OBJECTION BECAUSE YOU CAN ALWAYS SAY IT IS A CREDIBILITY DETERMINATION.

BUT THAT IS NOT TRUE BECAUSE THERE ARE SEVERAL CASES WE HAVE HAD HERE WHERE THE JUDGE DOESN'T FOLLOW PROPER STEPS GET TO THAT STATE EITHER STEP ONE OR TWO OR THREE THEREFORE AS MATTER OF LAW, WE HAVE REVERSE ORDINARY AFFIRMED REVAERLS, BECAUSE -- REVAERLS BECAUSE THOSE STEPS WEREN'T FOLLOWED ONCE YOU GET TO STEP THREE, AND THE JUDGE FOLLOWS STEP THREE THAT IS WHERE THE CREDIBILITY DETERMINATION COMES IN.

I GUESS I GO TO DORSEY, WHERE -- THIS COURT SAYS ITS ROLE IS TO REVIEW THE RECORD TO SEE IF IT SUPPORTS THE FINDING AND THAT IS THE ROLE OF THE COURT IN THIS PROCESS.

YOUR BASIC ARGUMENT IS DESPITE WHAT THE JUDGE SAID THAT THE RECORD DOES NOT SUPPORT THAT THESE WERE WHETHER IN COMBINATION OR INDIVIDUALLY THESE WERE GENUINE, REASONS FOR THE EXERCISE OF THIS CHALLENGE.

CORRECT THERE IS NO RECORD SUPPORT ARE TO EFFORT DECISION OF THE TRIAL COURT THAT IS MY ARGUMENT SO IF ON THE GENUINENESS.

ON THE ISSUE OF GENUINENESS!!\$\$!!!!!!!!!!!!!!!!!!!!!! GENUINENESS.

THANK YOU, GO AHEAD.

I'M SORRY, I'M DONE, BUT OTHER THAN TO LEAVE YOU WITH ONE THOUGHT AND IS THAT THERE REALLY ARE TWO PEOPLE PROTECTED UNDER THIS THEORY OF LAW ONE MRS. NOWEL WHO IS MY CLIENT, THE OTHER ONE IS MR. ORTEGA, WHO I THINK WOULD BE QUITE FRANKLY SHOCKED TO HEAR WHAT THE STATE SAID WERE IT REASONS FOR STRIKING HIM AS A JUROR IT WAS HIS RIGHTS ALSO VIOLATEED IN THIS PROCESS THANK YOU.

THANK YOU VERY MUCH WE'LL TAKE THE CASE UNDER ADVISE!!\$\$!!!!!!!!!!!!!! ADVISEMENT THE COURT WILL TAKE ITS MORNING RECESS