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Melvin B. Thompson v. State of Florida

SC07-489

THE NEXT CASE ON OUR CALENDAR
THIS MORNING IS THOMPSON VERSUS
STATE.,,,,,,
> > MAY IT PLEASE THIS COURT,
I'M PHIL PATTERSONS, I
REPRESENT THE PETITIONER,
MELVIN THOMPSON.
THERE ARE TWO ISSUES THAT WE
BROUGHT BEFORE THE COURT THIS
MORNING.
AND I WILL SPEAK TO THE FIRST
ONE, UNLESS THE COURT HAS
QUESTIONS ABOUT THE SECOND.
'S -- IT'S OUR CONTENTIOUS THE
DISTRICT COURT AIRED THEY THERE
WAS A REASONABLE PROBABLY
ABILITY THE OUTCOME WOULD HAVE
BEEN DIFFERENT IN COUNSEL
RECUSED THE PRESIDING JUDGE,
BEING TRIED BY A JUDGE WHO
PREJUDGED A CASE AS A
STRUCTURAL DEFECT FOR WHICH
ACTUAL PREJUDICE NOT REQUIRED
TO BE SHOWN.
> > WHY ISN'T IT THE SAME KIND
OF SITUATION AS WE HAD IN
CARATELI, INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM AND
A DECISION MAKER NOT A JUDGE
BUT THE JUROR IS GOING TO BE
PART OF THE DECISION-MAKING
PROCESS.
AND IN THAT CASE WE HELD THAT
ON POST-CONVICTION AS OPPOSED
TO ON DIRECT APPEAL, YOU HAVE
TO SHOW THAT THE JUROR WAS
ACTUALLY BIASED.
WHY SHOULDN'T IT BE THE SAME
KIND OF RULE WITH A JUDGE?
> > BECAUSE IT IS MATERIAL ALLEY
DIFFERENT WHEN A JUDGE IS
BIASED THAN A JUROR.
A JUROR IS ONE/SIXTH OF THE
DECISION MAKING BODY AND A
JUDGE, AS THE COURT HELD 90

YEARS AGO, IN HOWELL VERSUS STATE, THAT THE JUDICIAL BIAS CAN BE DISCREET AND SUBTLE AND EFFECT THE JUDGE'S DEMEANOR AND TEMPERAMENT AND APPEAR IN A JUDGE'S GLANCE AND TONE OF VOICE AND HIDDEN IN DISCRETIONARY RULINGS AND IN JUDICIAL BIAS AND WORK EVIL WITHOUT THE REALIZATION OF THE OFFENDING JUDGE WITHOUT A WORD BEING SPOKEN, JUDICIAL BIAS CAN SEND A POWERFUL MESSAGE TO THE JURY --

> > BUT THE PROBLEM IS THERE ARE MANY REASONS THAT MOTIONS TO RECUSE OR DISQUALIFY ARE FILED WHERE SOMEBODY MIGHT -- A JUDGE MIGHT KNOW A WITNESS.

AND I DON'T -- YOU KNOW, THE IDEA THAT A DISQUALIFICATION MOTION MAYBE COULD HAVE BEEN FILED BUT IT WASN'T AND THERE WASN'T A STRATEGIC REASON WHICH MAY GIVE DEFICIENCY AND I DON'T SEE TO SAY THAT JUST BECAUSE THAT MOTION WOULD HAVE BEEN GRANTED IF IT HAD BEEN FILED SHOULD GIVE RELIEF BUT I THINK YOU HAVE IN THIS CASE FRANKLY, A MUCH STRONGER ARGUMENT ON THE PREJUDICE.

I MEAN, THE FIRST DISTRICT OPINION SAID THAT WHEN -- AT THE POINT WHEN THEY WERE TALKING ABOUT REPRESENTING THOMPSON BECAUSE THE STATEMENTS THAT HE THREATENED TO KILL HIS COUNSEL AND THE JUDGE, THE COURT RESPONDED DEFENSE COUNSEL NEED NOT FEAR HIS THREATS BECAUSE THE COURT INTENDED TO SENTENCE HIM TO LIFE IN PRISON.

THE COMMENT INDICATED THE JUDGE DETERMINED THE SENTENCE TO BE IMPOSED.

I DON'T KNOW WHY -- I MEAN, IT SEEMS TO ME UNDER UNDERMINING CONFIDENCE IN THE OUTCOME WHICH IS THE STRICKLAND STANDARD, AND THAT IS -- DOESN'T MEAN THE OUTCOME HAD TO BE DIFFERENT, IF IT HAD -- UNDERMINES CONFIDENCE, DID YOU MAKE THAT ARGUMENT?

UNDER EITHER STANDARD THAT THIS WOULD BE A -- YOU KNOW, A -- OF THE GREAT CONCERN.
> > THERE IS PREJUDICE DISHES EITHER UNDER STRICKLAND OR AT THE STRUCTURAL DEFECT.
> > AND THEN THE QUESTION I HAVE AND I GUESS NO ONE RAISED IT IS THE COUNSEL WHO WAS SO FEARFUL HE WANTED TO GET OFF THE CASE, JUST HAPPENS TO WAIT UNTIL THE TIME IS EXPIRED TO FILE A -- FILED THE MOTION, BELATEDLY AND HAS NO, NO EXCUSE FOR NOT FILING IT WITH IN TEN DAYS, OR WHATEVER THE --
> > RIGHT.
IN I THINK -- THE COURT NEEDS TO CONSIDER THE OVERALL PROCEDURAL BACKGROUND OF THE CASE BECAUSE THE MOTION WAS FILED, BUT IT WAS NOT TIMELY FILED BE A IT WAS DENIED AS BEING LEGALLY IN SUFFICIENT.
I BRIEFED HIS DIRECT APPEAL TO THE FIRST DCA AND ARGUED THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL ON THE FACE OF THE RECORD BECAUSE TRIAL COUNSEL DID NOT TIMELY FILE THE MOTION OR PUT ON THE RECORD A REASON FOR NOT TIMING -- TIMELY FILING AND THE ALTERNATIVE THE TEN DAY RULE REQUIRING THE FILE A MOTION TO RECUSE WITHIN TEN DAYS OF THE OFFENDING EVENT WAS NOT A BRIGHT-LINE TEST AND THAT IT SHOULD HAVE BEEN GRANTED REGARDLESS OF THE FACT --
> > WE ARE NOT GOING TO ARGUE THAT.
I MEAN, WE ARE BEYOND THAT.
BUT I GUESS --
> > WELL, WHAT I AM GETTING TO IS THE DCA ED YOU ARE RIGHT.
THE REASON WAS GOOD, IF YOU FILE' 3800-A MOTION A DIFFERENT JUDGE HAS TO PRESIDE BUT IS BETTER DECIDED AFTER AN EVIDENTIARY HEARING AND IT GOES BACK TO THE DCA AND THEY SAY THIS TIME YOU DIDN'T PROVE ACTUAL PREJUDICE AND QUITE FRANKLY THE BLACK'S LAW

DICTIONARY DEFINES PREJUDICE AS A FOR JUDGMENT, BIASED, PRECONCEIVED OPINION, A LEANING TOWARDS ONE SIDE OF A CAUSE FOR SOME REASON OTHER THAN THE CONVICTION --
> > BUT NOW, LET ME -- YOUR ARGUMENT IS THAT ACTUAL PREJUDICE IS NOT THE CORRECT TEST HERE.
ISN'T THAT CORRECT.
> > I THINK AS A GENERAL RULE, ACTUAL PREJUDICE SHOULD NOT BE REQUIRED PROVIDED THE REASON GIVEN FOR RECUSAL --
> > MY CONCERN IS THAT WE HAVE A RULE WHICH SAYS THAT YOU HAVE TO FILE WITHIN A CERTAIN PERIOD OF TIME.
AND THEN -- AND THAT'S NOT DONE, UNDER THE TEST THAT IF YOU FILED IT, UNDER THE RIGHT TIME IT WOULD BE AN APPEARANCE OF PREJUDICE.
BUT WE'RE CONFRONTED WITH THE FACT THAT THEN IF YOU DON'T FILE IT, THEN WHAT YOU HAVE DONE IS THAT YOU HAVE DEPOSITED A -- SOMETHING THAT IS GOING TO HELP YOU POST-CONVICTION.
BECAUSE YOU CAN GO TO THE -- YOU CAN GO TO THE HARDER TEST THEN.
> > RIGHT.
> > THAT WOULD REQUIRE COUNSEL TO PERJURE HIMSELF AT A\\$$ POST-CONVICTION HEARING AND SAY WELL, I DIDN'T DO THAT AS A TACTICAL --
> > I'M CONCERNED ABOUT WHAT THE PREJUDICE -- HOW A REVIEWING COURT LOOKS AT THE PREJUDICE PROBLEM, NOT SOMETHING THAT IS AMOUR FIRST, ABOUT WHETHER IT UNDERMINES THE OUTCOME OR NOT, BUT AS IN THE MART HAVING TO DO WITH THE JUROR, SHOULDN'T THE TEST BE THAT YOU'VE GOT TO HAVE THIS OTHER CRITERIA OF DEMONSTRATING THAT THE JUDGE WAS ACTUALLY PREJUDICED BECAUSE THAT DIFFERENTIATES A TIMELY MOTION AND AN UNTIMELY MOTION.
> > IN THIS CASE THE JUDGE WAS

ACTUALLY PREJUDICED.
HIS STATEMENT EVINCES ACTUAL PREJUDICE, HE DETERMINED WHAT THE SENTENCE WAS BEFORE HE HEARD ANY EVIDENCE FROM THE STATE, OR ANY MITIGATION FROM THE DEFENDANT AND AFTER THE TRIAL --
> > ANOTHER WAY TO INTERPRET THAT COLLOQUY THAT SEEMS TO BE THAT THE PROSECUTOR SAID THIS IS A LIFE FELONY AND SO, WITHOUT CONSIDERING THE SENTENCING ISSUES AGGRAVATING AND MITIGATING CIRCUMSTANCES THE JUDGE IS SAYING, HE'S GOING TO SPEND THE REST OF HIS LIFE IN JAIL SO IT DOESN'T MATTER AND SEEMS YOU CAN READ IT THAT WAY AS WELL AND NOT NECESSARILY THAT HE WAS PREJUDGING IT THE FACT THAT IT WAS A LIFE FELONY.
> > NO, I THINK THAT IS A TRAINED READING OF THE RECORD AND A NARROW ONE AS WELL.
YOU HAVE TO LOOK AT THE TOTALITY OF THE CIRCUMSTANCES AND HE SAID DON'T WORRY, JACK, IF HE'S CONVICTED I'LL GIVE HIM LIFE AND MR. THOMPSON SCORED 205 MONTHS IN PRISON AFTER THE TRIAL THE JUDGE FORMULATED REASONS OF HIS OWN WITHOUT SETTING UP --
> > THAT SENTENCE -- LET ME ASK YOU ABOUT THIS:
IF YOU ARE CORRECT, ON THAT ISSUE, IT WOULD SEEM TO UNDERMINE CONFIDENCE IN THE SENTENCING BUT NOT IN THE GUILT.
IT WOULD NOT -- THAT WOULD NOT SEEM TO GIVE YOU A NEW TRIAL, ONLY A NEW SENTENCING.
> > UNDER THE COURT'S UPHOLDING IN HOWELL, THE JUDICIAL PREJUDICE PERMEATED THE ENTIRE TRIAL, AND I -- THE QUOTE I READ A MOMENT AGO ABOUT A JUDGE'S BIAS CAN IN FACT INFILTRATE THE ENTIRE --
> > HERE'S MY QUESTION ON THAT.
IT IS NOT A CASE HERE WHERE THE JUDGE SAYS THAT PREJUDGED THE

DEFENDANT'S GUILT OR INNOCENCE,
IS THAT CORRECT.
> > NO, HE DID NOT.
HE SAID IF HE WAS CONVICTED, I
WILL SENTENCE HIM TO LIFE.
> > AND THERE IS NO OTHER
EVIDENCE FROM THE PROCEEDING
BELOW THAT THERE WAS ANYTHING
DONE DURING THE TRIAL THAT
WOULD INDICATE ANY PREJUDICE OR
BIAS AS TO HIS DPILT OR
INNOCENCE?
> > NO, BUT, AGAIN, IT GOES BACK
TO THOSE SUBTLE THINGS THAT
DON'T REFLECT IT IN THE RECORD.
THE GLANCE, TONE OF VOICE,
ROLLING EYES, HAND GESTURES.
> > SO WHAT WE HAVE HERE IS A
DEFENDANT WHO HAS A VIOLATION
OF PROBATION, WHILE OUT ON --
> > NO.
THIS WAS A NEW OFFENSE.
> > I'M LOOKING AT THE COLLOQUY
AND SAYS WHAT IS THE CHARGE --
THE HEARING HERE IS THE DEFENSE
COUNSEL APPOINTED COUNSEL IS
SEEKING TO WITHDRAW BECAUSE HE
CLAIMS THAT THE DEFENDANT IS --
THREATENED HIM, HIS FAMILY, THE
JUDGE AND ANYBODY ON THIS CASE
IF HE IS CONVICTED.
THAT HE IS GOING TO MAKE SURE
WHEN HE GETS OUT HE'S GOING TO
KILL EVERYBODY.
> > THAT THIS IS ALLEGATION.
> > ISN'T THAT THE ALLEGATION?
AND THEN THE COURT ASKED, WHAT
IS HIS CHARGE WITH --
> > AND THE ATTORNEY SAYS IN ONE
CASE, 932445 IS A VIOLATION OF
PROBATION.
AND HE SAYS THE SECOND CASE,
953034 IS A CHARGE FOR GRANT
THEFT OF A MOTOR VEHICLE.
> > I STAND CORRECTED.
> > AND THE THIRD CHARGE -- SO
YOU HAVE A DEFENDANT WHO WAS
OUT ON PROBATION, HAD
OUTSTANDING WARRANT FOR A
VIOLATION OF PROBATION, HAD
OUTSTANDING CHARGE FOR A NEW
"GRAND THEFT AUTO" AND NOW HAS
TWO LIFE FELONIES AND TWO OTHER
CHARGES BEFORE HIM, HE'S

THREATENING HIS ATTORNEY, FAMILY, JUDGE AND EVERYBODY WITH LIFE, AND -- AND THE ATTORNEY IS SEEKING -- SECOND ATTORNEY IS SEEKING TO WITHDRAW BECAUSE HE IS SQUARED SCARED.
> > THERE NEVERS WAS AN EVIDENTIARY HEARING ON THE ALLEGATIONS HE THREATENED ANYBODY --
> > I'M TRYING TO GET A CONTEXT ON THE STATEMENT AND THE BIAS AND THE PREJUDICE.
IT REALLY GOES TO THE SENTENCE, THE CIRCUMSTANCE, THE JUDGE IS LOOKING AT THE ATTORNEY, ATTEMPTING TO WITHDRAW BECAUSE OF THE THREATS ON EVERYBODY, HOW IS HE GOING TO ASSESS I THAT IS THE CONTEXT IN WHICH THIS STATEMENT WAS MADE, CORRECT?
> > YES.
> > AND NEUTRAL AND DETACHED MAGISTRATE IS NOT GOING TO ANNOUNCE THE SENTENCE HE IS GOING TO IMPOSE BEFORE HE'S HEARD ANY EVIDENCE.
> > LET ME -- I WANT TO GO BACK TO, THOUGH, THE ISSUE, HOW MUCH I AM HAVING TROUBLE WITH -- TO ME, YOU KNOW, I THINK THE FIRST DISTRICT IN THE FIRST OPINION ACTUALLY ESTABLISHED ACTUAL PREJUDICE.
THE LAW OF THE CASE HERE.
BUT ON THE QUESTION OF WHETHER THE ISSUE SHOULD BE WHETHER THE MOTION FOR DIS QUALIFICATION WOULD HAVE BEEN GRANTED, AS THE REASON, WE KNOW BECAUSE WE DO WANT TO MAKE SURE THAT JUDGES ARE ON THE SIDE OF DIS QUALIFICATION ESPECIALLY AS TO THE FIRST ONE, THAT A DEFENDANT CAN JUST ABOUT SAY ANYTHING AND IT IS STATED THAT THEY MIGHT BE ABLE TO GET DISQUALIFICATIONS.
YOU KNOW, A PARTY.
IN THE CASE OF COX, WHICH IS WHERE THE SECOND DISTRICT HAS SAID THE PERSON WOULD GET RELIEF, THERE IT WAS THEY DIDN'T DISCOVER -- THERE WAS

SOME RELATIONSHIP AND THIS PREVIOUS STATE ATTORNEY RELATIONSHIP, WHICH MAY HAVE BEEN ENOUGH TO DISQUALIFY THE JUDGE BUT I REALLY SEE -- THIS GOES BACK TO WHAT WE HAVE SAID, YOU KNOW, IN PORTER WHERE WE TALK ABOUT ACTUAL BIAS, THAT WE ARE REALLY SETTING OURSELVES UP IF WE ALLOW SOMETHING THAT CAN'T BE RAISED ON DIRECT APPEAL, BECAUSE IT IS NOT FUNDAMENTAL ERROR BECAUSE IT DOESN'T APPEAR ON THE FACE, WHICH WOULD BE A MOTION FOR BIAS, TO THEN BE A BASIS FOR POSTCONVICTION RELIEF.
NOW I'M NOT SUGGESTING GAMESMANSHIP.
I JUST AS A POLICY MATTER, WITH FINALITY, YOU KNOW, YOU HAVE A SITUATION HERE -- IN YOUR CASE, WHERE IT APPEARS ON THE FACE OF THE RECORD THAT THERE IS ACTUAL BIAS, THERE IS NO REASON FOR THIS DEFENSE LAWYER NOT TO HAVE FILED THIS TIMELY.
HE THOUGHT HE DID.
SO --
AND YOU'VE GOT SOMETHING WHICH IS YOU AKIN TO ACTUAL PREJUDICE, BUT I SEE THE OTHER CASES LIKE COX AS BEING IN A DIFFERENT CATEGORY WHERE YOU LOOK AFTER THE FACT AND SAY, OH, WELL, I HAVE DISCOVERED SOMETHING ABOUT THIS JUDGE THAT THAT -- THAT SHOULD HAVE BEEN GIVEN RISE TO A MOTION TO DISQUALIFY.
DON'T YOU SEE QUALITATIVELY, BECAUSE AGAIN, THERE ARE SO MANY CREATIVE WAYS TO FILE MOTIONS TO DISQUALIFY THAT YOU HAVE GOT A DIFFERENT SET OF VALUES IN TERMS OF POSTCONVICTION.
THAT PUTS THIS CASE IN A DIFFERENT CATEGORY THAN COX OR THE OTHER CASES THAT ARE ALLEGED TO BE IN CONFLICT WITH THOMPSON.
> > WELL, I GUESS THERE ARE ISSUES OF FINALITY INVOLVED IN -- AND DIFFERENT FROM COX IN

THIS CASE BUT PERHAPS THE BIGGEST LOSER HERE, MELVIN THOMPSON SITS IN PRISON THIS MORNING WITH A LIFE SENTENCE, THE BIGGER LOSER MAY IN FACT BE THE JUDICIAL SYSTEM IN THE STATE OF FLORIDA.
I THINK THE -- THIS IS ANALOGOUS TO A BASEBALL GAME WHERE THE YANKEES GO TO FENWAY PARK TO PLAY THE RED SOX AND THE UMPIRES BEHIND THE PLATES ARE WEARING YANKEES T-SHIRTS AND THE UMPIRE MAY IN FACT CALL A PERFECT GAME --
> > BUT THAT IS WHERE YOU'VE GOT -- WHY I SAY YOUR CASE IS DIFFERENT THAN COX, I REALIZE YOU ARE HERE TO ARGUE CONFLICT AND HAVE THIS MORE LIBERAL RULE BUT THERE THE YANKEE T-SHIRT IS APPARENT TO EVERYBODY.
SO IT INFILTRATES AN APPEARANCE JUST LIKE HERE THE JUDGE HAS MADE STATEMENTS THAT HE WAS THREATENED, HE WAS THREATENED AS WELL AS THE DEFENSE LAWYER AND SAID YOU DON'T HAVE TO WORRY, THIS GUY IS GOING TO BE IN PRISON FOREVER AND HARD TO BELIEVE THAT A JUDGE WHO IS -- NO MATTER HOW HARD HE'LL TRY KNOWS HE HAS BEEN THREATEN WILL NOT HAVE THAT IN HIS MINE, THAT IS WHY THE FIRST DISTRICT GAVE THE PIRS OPINION BUT ON THE OTHER HAND SOMEBODY THAT MAY HAVE HAD A RELATIONSHIP IN THE PAST THAT MAY HAVE GIVEN RISE TO A MOTION TO DISQUALIFY, I DON'T SEE THAT IN THE SAME CATEGORY.
THAT MAY BE THE -- THAT THE REFEREE TEN YEARS AGO WAS A YANKEE FAN.
I MEAN, THAT IS NOT THE SAME LEVEL OF UNDERMINE!!ING FAIRNESS AND FUNDAMENTAL FAIRNESS IN FLOWS.
> > I WISH I COULD OFFER THE COURT GUIDANCE AS TO HOW TO DEAL WITH ANY CONCEIVABLE CIRCUMSTANCE WHERE DISQUALITY FIX MIGHT ARISE.

BUT I AM JUST -- ADDRESSING
MR. THOMPSON'S SITUATION AND IN
THIS CASE IT'S OBVIOUS AND
APPARENTLY PARENT THIS JUDGE
PREJUDGED THE CASE AND SHOULD
NOT HAVE BEEN ON IT IT AND
MR. THOMPSON I DON'T BELIEVE
GOT A FAIR TRIAL OR SENTENCING.
> > A LOT OF TIMES DURING TRIAL
WHEN IT IS APPARENT THEY JUDGE
HAS PRETTY -- PREJUDGED A CASE
AND IS BIASED, IT HAPPENS
THROUGHOUT THE TRIAL, THAT THAT
CIRCUMSTANCES COME UP WHERE
COUNSEL REPEATS THE SMOKES TO
DZ DISDISQUALIFY BECAUSE THERE
ARE ADDITIONAL GROUNDS BECAUSE
THE JUDGE IS DAISED AND LIKE
YOU SAID ROLLING HIS EYES IN
FRONT OF THE JURY OR BE RATING
COUNSEL IN FRONT OF THE JURY,
SOMETHING LIKE THAT, THAT GIVES
ADDITIONAL GROUNDS FOR A MOTION
TO DISQUALIFY I DON'T SEE
ANYTHING IN THIS RECORD AND YOU
HAVEN'T ALLEGED ANYTHING WHERE
ANYTHING HAPPENED THROUGHOUT
THE TRIAL UP UNTIL SENTENCING,
THAT WOULD PROVIDE ADDITIONAL
GROUNDS FOR A MOTION TO
DISQUALIFY AND THAT WOULD
SUPPORT YOUR ALLEGATION THAT
THIS JUDGE WAS JUST -- UNTIL
THE SENTENCING AND APART FROM
THE ONE STATEMENT, THIS JUDGE
WAS BIASED THROUGHOUT THE TRIAL
AND FOR THE WHOLE PROCEEDING.
> > THE RECORD DOESN'T REFLECT
THAT BUT AS THIS COURT
RECOGNIZED IN HOWELL, THOSE ARE
OFTENTIMES THINGS THAT DON'T GO
REPORTED.
> > SO IT SEEMS LIKE IN YOUR
ANALOGY, THIS IS LIKE GOING TO
YANKEE STADIUM AND HAVING A --
THE REFEREE THERE WITH THE
YANKEES, IF THAT REFEREE
THROUGHOUT THE ENTIRE GAME
CALLS ALL THE BALLS AND STRIKES
THE WAY HE'S SUPPOSED TO AND
THE RED SOX MANAGER DOESN'T
COME OUT AND KICK DUST IN HIS
-- ON HIS SHOES IT SEEMS LIKE
THERE WAS THE APPEARANCE OF

BIAS BUT NEVER ACTUAL BIAS.
AND IT SEEMS LIKE IF WE APPLY AN ACTUAL BIAS STANDARD, AND AGAIN, APART FROM -- TALKING APART FROM THE ONE -- THAT ONE COLLOQUY ABOUT SENTENCING, BUT AS FAR AS GUILT, IT SEEMS LIKE THERE MAY HAVE BEEN APPEARANCE OF IT, BUT I DON'T SEE THE ACTUAL BIAS.
> > WELL, THE ACTUAL BIAS, THE PROOF IS IN THE PUDDING.
THE YOUNG SAID HE WAS GOING TO GIVE HIM -- GIVE HIM LIFE AFTER TRIAL AND SCORED 205 MONTHS --
> > THAT IS THE SENTENCING -- SENTENCING PHASE AND I'M A LITTLE BIT WITH JUSTICE CANTERO ON THIS ABOUT WHY -- NECESSARILY PRAE JUDGED IN MY VIEW, WHAT HE WAS GOING TO GIVE -- YOU KNOW, IT IS -- TO ME IT IS CLEAR BUT I DON'T SEE WHERE THAT MEANS NECESSARILY THAT HE THEN WAS ACTUALLY BIASED FOR THE GUILT PHASE WHICH IF WE'RE GOING TO GAIN LOOK AT A\\$$ POST-CONVICTION SITUATION THAT SHOULD -- CAN WE MAKE THAT DECISION AND SAY, AFFECTED SENTENCING BUT NO EVIDENCE IT AFFECTED THE WAY HE WAS LOOKING AT GUILT.
> > WELL, I THINK YOU HAVE TO KEEP IN MIND ALSO THE APPEARANCE TO THE GENERAL PUBLIC OF HOW THE COURT SYSTEM ITSELF IS WORKING, WHEN THE JUDGE ANNOUNCES A SENTENCE BEFORE HE HEARS THE EVIDENCE, PEOPLE'S CONFIDENCE IN THE COURT IS GREATLY DIMINISHED.
> > ONE IMPORTANT THING SIMPLY WE FAITHFULLY APPLY THE STRICKLAND STANDARD.
THAT IS TO ASK THE QUESTION OF WHETHER OR NOT CONFIDENCE IN THE PROCEEDINGS AND THE OUTCOME --
> > FUNDAMENTALLY UNFAIR --
> > IN OTHER WORDS THAT THAT REALLY IS -- AS OPPOSED, THOUGH, YOU SEE, WHAT -- WHAT WE ARE TRYING TO MAKE CLEAR IS THAT

THE STRICKLAND STANDARD IS
DIFFERENT THAN IF YOU HAD
TECHNICALLY FILED A MOTION
MAYBE ON THE APPEARANCE OF
IMPROPRIETY BECAUSE A COUSIN OF
THE JUDGE, YOU KNOW, WAS
INVOLVED IN THE CASE OR
SOMETHING, AND THEN, THAT WENT
UP ON APPEAL AFTER BEING DENIED
AND THE COURT SAID, YES, YOU
KNOW, THAT IS A STRAIGHTFORWARD
-- STRICKLAND STANDARD IS
DIFFERENT.
AND SO THERE IS A -- SO SO LONG
AS WE APPLY, YOU KNOW, THAT
STANDARD, I WOULD ASSUME THAT
YOU WOULD BE SATISFIED.
> > YES.
> > CONFIDENT.
WHERE THERE ARE --
> > RIGHT.
RIGHT.
> > AND THE OUTCOME IS UNDERZZ""$$
UNDERMINED.
> > I DON'T MEAN TO ABANDON MY
CLIENT FOR ONE SECOND BUT AS I
SAID PROBABLY THE BIGGER LOSER
IS THE COURT SYSTEM ITSELF AND
THAT IS VITALLY IMPORTANT TO
THE COUNTRY.
> > YOU ARE WELL INTO YOUR
REBUTTAL TIME.
I'LL GIVE YOU A LITTLE EXTRA
TIME FOR THAT.
> > THANK YOU.
> > MS. GUARD?
> > MAY IT PLEASE THIS COURT,
CHRISTINE GUARD ON BEHALF OF
STATE OF FLORIDA.
IT APPEARS WE ARE -- ALL SEEM
TO BE IN THE SAME BOAT TODAY
AND THAT IS STRICKLAND HAS
APPLIED AND -- AND LOCKHART DID
NOT ALTER THE STRICKLAND
STANDARD.
> > WHY WASN'T THERE ACTUAL BIAS
HERE AT LEAST AS TO THE
SENTENCING AND CAN YOU SEPARATE
THE GUILT OUT FROM THE
SENTENCING IN THIS KIND OF
PROCEEDING.
> > ON THE GUILT PHASE PREEFL IF
THE CASE WENT BACK FOR THE
TRIAL THE STATE'S EVIDENCE IS

MORE POWERFUL AND NOW WE HAVE A DNA MATCH TO THE DEFENDANT AND IF WE RETRIED THE CASE THE GUILT OUTCOME ASSUMING A LAWFUL DECISIONMAKER FOLLOWING THE LAW, WE WOULD HAVE EVEN BETTER EVIDENCE THAN WE DID AT THE FIRST TRIAL.
> > I UNDERSTAND YOU ARE COUGH DENTS IN YOUR CHANCES ON RETRIAL BUT MY QUESTION IS, WERE THE JUDGE'S COMMENTS SUFFICIENT TO ESTABLISH PREJUDICE IN THAT IT WOULD UNDERMINE OUR CONFIDENCE IN THE OUTCOME OF THE GUILT PHASE OF TRIAL?
> > NO.
IN FACT, REVIEWING THE RECORD, FOUND NONE OF THE TYPES OF ERRORS YOU LOOK FOR RULING IN FAVOR OF STATE OVER THE DEFENSE OR ANYTHING LIKE THAT, NONE OF THOSE ERRORS OR THAT TYPE OF ERROR WERE ALLEGED OR SHOWED AT THE EVIDENT SHARE HEARING.
> > TO MAKE SURE I UNDERSTAND THEN, YOUR VIEW, THE DEFINITIONAL SENSE OF SATISFYING ACTUAL PREJUDICE WOULD BE ADDITIONAL ERRONEOUS RULINGS BY A JUDGE, IS THAT HOW YOU WOULD EVALUATE.
> > RESPECTFULLY, JUSTICE I WOULD ASSERT THAT WHAT HAPPENED HERE IS YOU HAVE A PRETRIAL HEARING.
THERE IS A COLLOQUY GOING ON ABOUT A THREAT --
> > I'M JUST ASKING ABOUT YOUR -- HOW DO YOU SHOW ACTUAL PREJUDICE.
> > I THINK YOU HAVE TO SHOW ACTUAL PREJUDICE --
> > WHAT -- YOU CANNOT DE-- DENINE TERM BY SAYING THE WORD.
> > I UNDERSTAND.
> > HOW DOES ONE SHOW ACTUAL PREJUDICE.
THAT'S ALL.
> > CERTAINLY I THINK YOU WOULD HAVE TO SHOW THE TRIAL JUDGE PREJUDGED THE CASE, THE TRIAL JUDGE PROCEEDED WITH BIAS, THE

TRIAL JUDGE TREATED THE
DEFENDANT --
> > WHAT THEY'RE FACTS.
> > WHAT THEIR FACTS YOU HAVE TO
SHOW.
> > YOUR HONOR IT WOULD BE A
VERY CASE-SPECIFIC TYPE OF
THING.
IN THIS CASE I WOULD SUGGEST
YOU WOULD HAVE TO HAVE RULINGS
FROM THE COURT THAT SHOW THAT
THE COURT WAS TREATING HIM GIN
APROIPTLY.
> > ADDITIONAL ERROR.
> > RIGHT.
ADDITIONAL ERRORS.
OR THAT WHEN HE WENT TO
SENTENCING HE SAID SOMETHING
LIKE, YOU KNOW, I PROMISED YOU
WAY BACK WHEN I WAS GOING TO
SNUTS TO LIFE IF YOU GOT
CONVICTED --
> > SEE YOU HAVE TO DO THE SAME
THING TWICE AND THEN THAT WOULD
ESTABLISH THE ACTUAL PREJUDICE
BUT IF YOU DO IT ONCE, IT WOULD
NOT?
> > WELL, I THINK THERE
CERTAINLY -- IN THIS CASE, YES.
BECAUSE OF THE WAY THE KOL KEY
OCCUR, -- COLLOQUY OCCURS AND
THE JUDGE GOES THROUGH THE
LITANY OF CHANCE PENDING
AGAINST THE DEFENDANT AND
BEGINS TO STATE THE STATUTORY
MAXIMUMS FOR EACH AND FIRST
VIOLATION OF PROBATION AND
SUBJECT TO A FIVE-YEAR MAXIMUM
AND THE SECOND ONE BEING THE
"GRAND THEFT AUTO", AGAIN,
THIRD DEGREE FELONY, FIVE YEAR
MAXIMUM AND THE NEXT TWO
CHARGES AND LUMPED IN TOGETHER
AND THE BURGLARY AND THE SEXUAL
BATTERY.
-- BATTERY AND THE SEXUAL
BATTERY A LIFE CASE AN BURGLARY
FIRST DEGREE FELONY PUNISHABLE
BY LIFE AND AFTER THAT THE
JUDGE SAYS, OFF HIS CUFF, SAYS,
WELL, THEN HE'D BE -- LIFE
MEANS LIFE KIND OF STATEMENT --
> > THE PROBLEM IS, ISN'T THE
CONTEXT -- LET'S GO BACK TO

THIS.
A JUDGE WHO IS MAYBE IN A COLLOQUY ABOUT WHETHER THEY ARE GOING TO NEGOTIATE A PLEA AGREEMENT TALKS ABOUT, WELL, LET'S SEE, HE MIGHT BE QUALIFIED FOR THIS AND WILL PROBABLY GET LIFE OR -- YOU KNOW, YOU HAVE THOSE SERIES OF CASES.
THAT IS ONE SITUATION.
HERE, THOUGH, YOU'VE GOT A SITUATION WHERE THE DEFENSE LAWYER WHO WAS -- HAD BEEN -- WAS -- I THINK HE WAS SECOND COUNSEL, IS ASKING TO GET OFF THE CASE BECAUSE THE CLIENT THREATENED HIM AND THE JUDGE WITH KILLING THEM.
KILLING THEM.
AND THE DEFENSE LAWYER SAYS, I CAN'T BE ON THIS CASE WITH A CLIENT WHO SAYS HE'S GOING TO KILL ME AND YOU.
AND THE JUDGE SAYS, ESSENTIALLY, DON'T WORRY, BECAUSE PERHAPS IT IS -- IF THAT IS WHAT THE GUIDELINES CALL FOR, THE JUDGE SAYS, WITH A FIRST DEGREE, I DON'T THINK WE NEED TO BE WORRYING ABOUT THE GUIDELINES, SO THE THREAT IS WHEN HE GETS OUT OF PRISON HE'LL MAKE YOU PAY FOR IT AND KILL YOU AND KILL ME AND WE DON'T HAVE TO WORRY ABOUT THAT.
I DON'T KNOW, AGAIN, BECAUSE WE CAN'T BE TALKING THEORETICALLY.
HOW THAT IS NOT AS MUCH AS IN PORTER WHERE WE FOUND THAT THE JUDGE HAD MADE COMMENTS LIKE THIS GUY IS GOING TO GET THE DEATH PENALTY.
THAT THAT IS ACTUAL PREJUDICE.
AND I WOULD THINK THAT THE STATE IN THE SITUATION LIKE THIS WOULD HAVE ALMOST SAID, LISTEN IT'S BETTER, LET'S GET ANOTHER SENTENCING HEARING TO MAKE SURE THAT IT IS FAIR AND THAT WE ARE NOT -- DON'T HAVE THE VERY STRONG STATEMENT BEING SORT OF INFECTING THE PROCEEDINGS.

DO YOU NOT SEE A QUALITATIVE DIFFERENCE BETWEEN THE CONTEXT IN WHICH HE MADE THIS STATEMENT IN THIS CASE, THAT IS, THAT HE WAS BEING THREATENED AND SAID, DON'T WORRY, HE'S NEVER GETTING OUT, BEING DIFFERENT THAN JUST TALKING ABOUT, WELL, LET'S SEE, LET'S SEE WHAT THE POSSIBLE SENTENCE MIGHT BE IN THIS CASE.
> > AS -- I MEAN, THAT -- THE QUALITATIVE DIFFERENCE OF A JUDGE TALKING PRETRIAL, ABOUT WHAT A SENTENCE MIGHT BE IN THE ABSTRACT BASED ON WHAT THE CRIME IS, VERSUS RESPONDING TO A LAWYER THAT WANTS TO GET OFF, BECAUSE HIS CLIENT WANTS TO KILL HIM AND THE JUDGE.
> > KUWAIT FRANKLY, YOUR HONOR, IF THERE WERE FACTS OTHER THAN THE FACTS IN THIS CASE I CAN UNDERSTAND WHERE ARE COMING FROM AND THE FACTS IN THIS CASE INVOLVE AN EXCEPTIONALLY EXPERIENCED PROSECUTOR, WHO IS VERY USED TO HEARING THESE THREATS DAY IN AND DAY OUT AN EXCEPTIONALLY EXPERIENCED JUDGE WHO IS USED TO HEARING THE THREATS DAY IN AND DAY OUT AND THE DEFENDANT DENIED MAKING THE THREATS ON THE RECORD AT THAT PARTICULAR HEARING, SO NONE OF THOSE THREATS ACCORDING TO THE DEFENDANT IN THIS CASE ACTUALLY OCCURRED.
NOW, I ALSO WANT TO POINT OUT COUNSEL WAS REPLACED BY PRIVATELY OBTAINED COUNSEL, THIS WAS -- THE PUBLIC DEFENDER CONFLICTED AND PRIVATE COUNSEL WAS APPOINTED AND RETAINED PRIVATE COUNSEL AND PRIVATE COUNSEL TRIED THE CASE, SO ANY MORE OR ANYTHING PREJUDICIAL OR ALONG THOSE LINES IF IT HAD OCCURRED YOU DIDN'T ACTUALLY HAVE THIS COUNSEL TO MAKE THAT MOTION TO DISQUALIFY.
> > SO THE COUNSEL THAT WE ARE TALKING ABOUT, WHO FILED A MOTION TO WITHDRAW WAS NOT THE ATTORNEY WHO TRIED THIS CASE.

> > NO, HE WAS NOT.
> > OKAY.
> > HE WAS NOT THE COUNSEL THAT TRIED THE CASE MORE WAS HE COUNSEL AT SENTENCING AND IT WAS SOMEPLACE BETWEEN -- 23, STICKS IN MY MIND, 23 AND 40 SOME-ODD DAYS LATER THIS COUNSEL WITH GREW BECAUSE PRIVATE COUNSEL WAS RETAINED.
> > BACK TO THE PREJUDICE PROBLEM HERE.
WHAT -- WERE THERE ANY OTHER ISSUES RAISED ON THE DIRECT APPEAL?
I KNOW HE TRIED TO RAISE AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON DIRECT APPEAL.
WERE THERE ANY EVIDENTIARY HULTION OR ANYTHING LIKE THAT, THAT WERE RAISED ON HIS DIRECT APPEAL?
> > YOUR HONOR I'M DRAWING A BLANK AT THIS MOMENT.
--
> > WELL, I'M -- I AM THINKING ABOUT THE -- WHAT THE REMEDY WOULD BE IF IN FACT WE FOUND THAT THE TRIAL JUDGE -- THERE WAS ACTUAL PREJUDICE IN THIS CASE.
YOUR OPPONENTS WANTS TO HAVE A NEW TRIAL AND I'M TRYING TO GET FROM YOU WHETHER OR NOT THERE WERE ANY ISSUES RAISED ABOUT EVIDENTIARY RULINGS THAT WE COULD LOOK AT TO SEE IF IT WOULD DEMONSTRATE ANY PRESENTLY DIGS -- PREJUDICE BY THE TRIAL JUDGE IN THE ACTUAL TRIAL PORTION OF THE CASE.
> > I CAN UNTIL IN THOMPSON ONE THE COURT SAID WE AFFIRM ALL ISSUES AS WELL BUT WITHOUT PREJUDICE TO OPPONENT'S MOTION TO DISQUALIFY THE JUDGE AND ONLY DISCUSSED HIS QUALIFICATION AT THE FIRST ECA.
> > BUT THERE IS AN INDICATION THERE WERE ISSUES.
> > IT APPEARS THAT WAY AND I FOR SOME REASON RECALL THERE MIGHT HAVE BEEN -- I'M JUST APOLOGY JAYS TO THE COURT BUT

I'M DRAWING A BLANK.
> > I WANT TO -- POINTED OUT A -- ANOTHER ALLEGED IMPROPER QUESTION BY THE JUDGE DURING THE COURSE OF THE TRIAL.
THAT MIGHT POTENTIALLY BE BIAS, ARE YOU FAMILIAR WITH THAT WHERE THE JUDGE APPARENTLY ASKED THE VICTIM AN IMPROPER QUESTION?
> > CONCERNING HER --
> > CONCERNING --ED.
> > HER VIRGINITY OR WHETHER OR NOT THIS WAS THE WAY SHE WANTED TO LOSE HER VIRGINITY?
> > I REMEMBER THAT QUESTION BEING ASKED AT THE TRIAL.
I DON'T REMEMBER --.
> > CAN YOU TELL US, WAS THAT RAISED ON APPEAL?
AGAIN, YOUR HONOR, I --
> > TELL US WHY -- ONE OF THE PROBLEMS I'M HAVING HERE IS THE APPEARANCE OF THE DISTRICT COURT, IF I UNDERSTAND IT CORRECTLY, HAS ORDERED A DIFFERENT JUDGE PRESIDE OVER FURTHER PROCEEDINGS IN THE CASE.
IS THAT CORRECT.
> > WELL, CERTAINLY, IT WOULD HAVE HAD TO BECAUSE OF THE NATURE OF THE 3850 COMPLAINT.
WOULD HAVE BEEN INVOLVING JUDGE SMITH, THROUGH JUDGE SMITH -- THOUGH JUDGE SMITH SHOULD NOT BE PRESIDING OVER A CASE IN WHICH --
> > WHY NOT.
> > JUDGE SMITH WAS ALLEGED TO HAVE COMMITTED THE ALLEGED PREJUDICIAL ACT.
HE WAS THE JUDGE ACCUSED OF THE BIAS AND AT THE VERY LEAST WOULD HAVE HAD TO UNDER THE CANON OF JUDICIAL ETHICS --
> > ISN'T THAT A CONTRADICTION THEN, THAT IS, IF HE IS BEING ORDERED OFF THE CASE, THEN I ASSUME HE'S BEING ORDERED OFF THE CASE BECAUSE THE COURT THINKS THAT -- THAT THAT APPEARANCE IS STRONG ENOUGH THAT HE SHOULDN'T BE PRESIDING

OVER THE CASE.
> > THE APPEARANCE IS DIFFERENT WHEN HE GOES BACK FOR A 3850 HEARING, AND THERE ARE MULTIPLE ALLEGATIONS BUT THE MAIN ALLEGATION IS THAT JUDGE SMITH ACTED IN A MANNER THAT WAS NOT -- WASN'T APPROPRIATE AND THAT IS THE BASIS OF THE MOTION TO DISQUALIFY AND JUDGE CAN'T BE JUDGING WHETHER OR NOT IN OUR SYSTEM, UNDER OUR SYSTEM OF YOU.
> > DISTINGUISHABLE ADMINISTRATION AND CANONS OF ETHICS SHOULD NOT BE JUDGING WHETHER OR NOT HE JUDGED --
> > BECAUSE THEY FOUND THAT HE SHOULD HAVE DISQUALIFIED HIMSELF.
> > HAD IT BEEN PROPERLY PRESERVED AND RAISED HE SHOULD HAVE DISQUALIFIED HIMSELF.
> > LET ME ASK THE QUESTION WHEN NEW DEFENSE COUNSEL CAME DID THAT COUNSEL SEEK TO DISQUALIFY OR WAS THERE ANY EVIDENCE AT THE EVIDENTIARY HEARING FROM THAN NEW COUNSEL THAT DEFENDANT EXPRESSED A CONTINUING CONCERN ABOUT THIS PARTICULAR JUDGE PRESIDING OVER THIS -- OVER THE CASE.
> > I DON'T RECALL ANY TESTIMONY IN THE EVIDENTIARY HEARING REGARDING THAT MATTER, INDICATING HE DID HAVE A CONTINUING CONCERN.
THE DEFENDANT DENIED MAKING THOSE ALLEGATIONS, ON THE RECORD.
AND PROBLEMATIC BUT THERE IS NO FURTHER MOTION TO DIS--
> > WELL, THE MATTER IS, IT IS TOO LATE.
> > IF ANYTHING ELSE THAT HAPPENS --
> > TOO LATE.
> > CORRECT.
> > I GUESS, I GUESS --
> > IS THE JUDGE OBVIOUSLY COULD HAVE RECONSIDERED THE RULING AND DECIDED AT SOME OTHER TIME THAT HE SHOULD -- USING THE

CANONS OF ETHICS, I.E. THAT I
AM PREJUDICE ORDER HAVE GIVEN
THE APPEARANCE THAT I AM
PREJUDICED THEN DISQUALIFIED
HIMSELF.
> > I THOUGHT THE WHOLE PROMISE
WAS THAT IT WAS TOO LATE SENATE
THE REASON THE TRIAL JUDGE
DENIED THE INITIAL MOTION WAS
THAT IT WAS TOO LATE.
THE COURT IS STILL BOUND --
> > AND SO THEN LATER YOU ARE
SAYING THAT EVEN THOUGH HE'S
RULED IT IS TOO LATE.
LATER HE CAN RULE OTHERWISE.
> > WELL, REC FULLY, YOUR HONOR,
THE CANONS OF JUDICIAL ETHICS
DIDN'T GET THROWN OUT WITH THE
DENIAL OF THE MOTION TO
DISQUALIFY IS UNTIMELY.
HE STILL HAD THE OBLIGATION IF
HE WAS INDEED BIAS TO AGAIN
RECUSE HIMSELF UNDER THE CANONS
OF ETHICS.
> > LET ME ASK YOU ABOUT THE
DISTRICT COURT'S OPINION.
THE DISTRICT COURT FOUND THAT
THE STRICKLAND ACTUAL PREJUDICE
OF STRICKLAND APPLIED LIKE ANY
OTHER CASE AND THE DEFENDANT
WOULD HAVE TO DEMONSTRATE
ACTUAL BIAS OF THE JUDGE.
I DON'T SEE MUCH OF AN
ARTICULATION ABOUT WHETHER THE
JUDGE WAS ACTUALLY BIASED, ONLY
A DISCUSSION OF WHETHER -- WELL,
IF THE JUDGE WAS REALLY BIASED
HE WOULD HAVE RECUSED HIMSELF
UNDER THE CANONS BUT THAT SEEMS
TO -- DOESN'T SEEM TO ME A VERY
STRONG ARGUMENT FOR THE FACT
THAT HE WASN'T ACTUALLY BIASED.
YOU FIND JUDGES ON OCCASION IN
THE STATE WHO ARE BIASED AND DO
NOT RECUSE THEMSELVES AND MAKE
-- GET IN TROUBLE FOR IT EITHER
ON APPEAL OR BEFORE THE
JUDICIAL QUALIFICATIONS
COMMISSION AND DOESN'T SEEM TO
ME A JUSTIFICATION FOR A PROOF
THAT HE WAS NOT BIASED BY
SAYING HE DIDN'T RECUSE
HIMSELF.
> > CERTAINLY IN THIS CASE,

DECKER TOOK A RAW OF THE RECORD FOLLOWING ALLEGATIONS OF THE --
> > I'M SORRY, WHO.
> > JUDGE DECKER WAS THE JUDGE APPOINTED WHEN THE FIRST EPA SUGGESTED ANOTHER JUDGE HEAR THE MATTER.
JUDGE DECKER TOOK A FULL REVIEW OF THE RECORD AND ALSO THE TESTIMONY WHICH AMOUNTED TO A TOTAL OF ABOUT 50 PAGES AT THE EVIDENTIARY HEARING AND REVIEWED THE ENTIRE TRANSCRIPT AND ALSO THE -- THE TRIAL TRANSCRIPT AND IN THIS CASE, YOU HAVE TO -- WHAT THE COURT NEEDS TO LOOK AT IS THERE ARE THREE AGGRAVATORS.
THREE REASONS TO THE -- TO DEPART FROM THAT GUIDELINE SENTENCE RANGE.
THE FIRST ONE BEING A RECIDIVIST BASED SENTENCING ISSUE THAT HE HAD GONE TO -- FROM COMMITTING MISDEMEANORS TO FELONY AND PROPERTY CRIMES TO CRIMES AGAINST PERSONS AND THE OTHER TWO INVOLVE THE EXTREME EMOTIONAL TRAUMA --
> > LET ME ASK YOU ABOUT THOSE AL VARIETY AND I AGREE THERE WERE SEVERAL.
IF THE JUDGE FINDS THAT THOSE AGGRAVATORS EXIST, DOES THE LAW REQUIRE THE JUDGE TO HAVE AN UPWARD DEPARTURE OR IS IT WITHIN THE JUDGE'S DISCRETION.
> > IT PERMITS THE DEPARTURE --
> > IF A JUDGE IS BIASED, WOULD IT NOT UNDERMINE CONFIDENCE IN THE OUTCOME THAT THE JUDGE EXERCISE DISCRETION AGAINST THE DEFENDANT AS OPPOSED TO A SITUATION WHERE HE WAS JUST APPLYING THE LAW, HE HAD NO CHOICE?
> > IN AN ESOTERIC WAY YES, IT COULD BUT IN THIS CASE AND THE FACTS OF THIS CASE WHICH IS WHAT WE LOOK AT, IS THIS TRIAL, NOT TRIALS IN GENERAL, BUT IN THIS TRIAL JUDGE DECKER EVEN WENT AS FAR AS SAYING IN HER ORDER ON THE 3850 THERE IS NOT

A JUDGE IN THE CIRCUIT THAT
WOULD HAVE SENTENCED ANYTHING
OTHER THAN LIFE GIVEN THE AC
VARIETIES IN PLACE THAT WERE
FOUND IN THIS CASE AND THE
TESTIMONY OF THE CASE.
THIS WAS A HEINOUS SEXUAL
BATTERY CASE.
> > SHE PUT THAT IN THE ORDER.
> > I BELIEVE ACTUALLY IT IS IN
THE ORDER AND IF NOT IN THE
FACE OF THE ORDER IT APPEARS IN
HER DISCUSSION IN THE
EVIDENTIARY HEARING BUT I
BELIEVE IT IS IN HER ORDER.
> > I INTERRUPTED YOU.
> > THE PROBLEM WITH THAT, IN MY
MIND IT DOES NOT KNEE GAIT THE
FACT, WHETHER JUDGE DECKER
WOULD HAVE GIVEN HIM THE
SENTENCE OR NOT.
IT DOESN'T NEGATE THE FACT THAT
FROM WHAT THE JUDGE SAID, IT
CERTAINLY SEEMS LIKE THIS JUDGE
WAS BOUND AND DETERMINED TO
GIVE THIS SENTENCE WITHOUT EVEN
KNOWING ALL OF THESE FACTS.
AT THE POINT HE MADE THE
STATEMENT, DENYING THE MOTION
TO RECUSE, HE DIDN'T KNOW ALL
OF THESE FACT, DID HE?
> > NO, AND IN FACT THE
INFORMATION IN THE CASE IS A
VERY --
> > SO THE FACT THAT THERE ARE
THESE AGGRAVATING CIRCUMSTANCES
WE'RE -- WERE NOT KNOWN THEN
HEALTH YET HE SAYS IN ESSENCE
I'M GOING TO GIVE HIM A LIFE
SENTENCE.
> > REC FULLY, I DISAGREE AND I
THINK --
> > AND DIDN'T HE ALSO SAY
SOMETHING TO THE EFFECT OF,
DON'T EVEN WORRY ABOUT THE
GUIDELINES OR WE'RE NOT EVEN
GOING TO LOOK AT THE
GUIDELINES?
> > NO, THAT IS NOT WHAT HE SAY.
WHAT HE SAID WAS SPECIFICALLY
HE THINK --
> > I DON'T THINK WE NEED TO BE
WORRYING ABOUT THE GUIDELINES.
> > RIGHT.

BECAUSE HE'S UNDER THE MISTAKEN IMPRESSION BECAUSE THIS IS NIGHT FIRST DEGREE PUNISHABLE LIFE, BUT A LIFE CASE, LIFE MEANS LIFE AND IF THE COURT LOOKS AT THE STATUTORY SITUATION UNDER 775 AT THE TIME, THERE IS ACTUALLY THREE PROVISIONS IN THE -- SEPARATE PROVISIONS IN THE STATUTE DEALING WITH LIFE FELONIES. COMMITTED BEFORE 83 AND AFTER '83, AND THEN THE MORE RECENT CASES.
SOMETIME THE '90s.
SO, THE STATUTE ITSELF HAS MULTIPLE SUBPARTS AND ITS HERE -- THE JUDGE IN THIS CASE BELIEVES IF YOU HAVE A LIFE CASE IT WAS A LIFE SENTENCE, ELIGIBLE.
AND HE --
> > IT COULD HAVE BEEN THAT HE WAS SAYING NOT THAT I DON'T CARE WHAT THE DPLIN SAYS, HE IS GOING TO GET LIFE AND IT COULD HAVE BEEN SAYING THE GUIDELINES DO NOT APPLY IF IT IS A LIFE FELONY.
> > YES.
AND -- AND THAT'S WHAT I BELIEVE JUDGE DECKER WAS INTIMATING IN HER ORDER WAS HE WAS UNDER THE MISTAKEN IMPRESSION LIFE MEANT LIFE.
> > BUT THE SENTENCE BEFORE THAT IS, WITH A FIRST DEGREE FELONY, PUNISHABLE BY LIFE.
NOT LIFE -- HE SAYS WITH A FIRST DEGREE PUNISHABLE BY LIFE, I DON'T THINK WE NEED TO BE WORRYING ABOUT THE GUIDELINES.
> > I THINK HE'S REFERENCING THE SEXUAL BATTERY AND NOT REFERENCING THE BURGLARY OR MAYBE -- MAYBE HE IS.
BUT WHAT THE -- THE POINT IS THAT UNDER THIS COURT'S DECISION YOU HAVE TO DEMONSTRATE ACTUAL PREJUDICE AND IN THIS CASE THERE IS NO TESTIMONY, JUDGE SMITH DID NOT TESTIFY AT THE EVIDENTIARY HEARING AND THERE IS NO

TESTIMONY --
> > THE ONLY WAY THEN THAT YOU CAN SHOW ACTUAL PREJUDICE IS IF THE JUDGE COMES BACK IN AND SAYS YOU BETCHA, I WAS PREJUDICE?
> > I DON'T THINK THAT IS THE ONLY WAY BUT I THINK THAT IF YOU HAD EITHER THE JUDGE COMING IN AND EXPLAINING WHAT HE MEANT BY THAT, WHETHER A MISTAKE OF LAW OR NOT A MISTAKE OF LAW LAW AND WHETHER THE JUDGE WAS ATTEMPTING TO ASSUAGE COUNSEL'S FEARS WHICH WAS THE LIKELY -- LIKELY WHAT WAS GOING ON HERE SO HE DIDN'T HAVE TO APPOINT YET ANOTHER COUNSEL BECAUSE OBVIOUSLY THIS COUNSEL FOR WHATEVER REASON TOOK HIS CLIENT'S THREATS SERIOUSLY.
> > RIGHT.
LET'S GET BACK TO IT.
THIS COUNSEL DOESN'T HAVE TO WORRY BECAUSE THIS DEFENDANT -- DON'T HAVE TO GET THEY'VE CASE BECAUSE THIS DEFENDANT IS NEVER GOING TO SEE THE LIGHT OF DAY.
AND I DON'T SOMETIMES WE LOOK AT CASES AND SAY, YOU KNOW, -- I CAN SEE AGAIN THE FOURTH DISTRICT, SECOND DISTRICT MAY HAVE GONE TOO FAR BY SAYING THAT IF YOU -- JUST -- THE STANDARDS, YOU HAVE TO DISQUALIFY YOURSELF BUT HERE, I DON'T KNOW HOW YOU CAN SAY THAT THERE WOULD HAVE TO BE SOMETHING MORE THAN JUDGE SMITH HAD -- HIS BAILIFF WOULD HAVE SAID WHEN HE WALKED OUT, HE GOES, THAT GUY IS DEFINITELY GOING TO BE GETTING LIFE, WOULD THAT HAVE BEEN ENOUGH, IF HE TOLD SOMEBODY ELSE THAT CONFIRMED IT WHEN HE WALKED OUT OF THE COURTROOM?
THAT WE DON'T HAVE TO WORRY ABOUT MR. JONES BECAUSE HE'S GOING TO BE PUT AWAY?
OR... WOULD THAT HAVE BEEN ENOUGH?
> > WOULD CERTAINLY BOLSTER HIS POSITION YOU HAVE ONE COMMENT

MADE ONE TIME IN ONE POINT OF
THE RECORD AND THERE IS NOTHING
ELSE ACROSS THE BOARD.
THE -- ON VEILS HE DIDN'T KNOW
ABOUT THE AGGRAVATING FACTORS.
HE CONSIDERED THE GUIDELINES
SENTENCE AND THEN AGGRAVATED
FROM THERE.
HE DIDN'T OUT OF HAND AT THE
SENTENCING HEARING REJECT THE
GUIDELINES AND SAY, THAT
DOESN'T APPLY AND I'LL DEPART.
HE WENT THROUGH AND HEARD THE
TESTIMONY --
> > YOU THINK BIASED IS -- ISN'T
THE WHOLE PROBLEM THAT BIAS IS
THAT IT CAN HAVE SUBTLE EFFECTS
AND THAT IS WHERE AGAIN THE
HARM TO MR. PATTER TON --
TALKING ABOUT TO THE SYSTEM AT
LARGE THAT IS, THAT WE DON'T --
YOU KNOW, JUDGES HAVE TO BE
VERY CAREFUL WHAT THEY SAY, AND
THEN IF SOMEONE IS ACTUALLY
BIASED, UNFORTUNATELY THEY
DON'T ALWAYS DO THE RIGHT THING
AND THAT IS WHERE THE JUDICIAL
-- THE SYSTEM HAS TO STEP IN
AND CORRECT THOSE --
FUNDAMENTAL FAIRNESS THAT COMES
FROM HAVING AND ACTUALLY BIASED
DECISIONMAKER.
> > YOUR HONOR, MY TIME IS TO
EXPIRE BUT IF I MAY ANSWER YOUR
QUESTION.
> > FINISH THAT AND THEN YOU CAN
BRING YOUR ARGUMENT TO A
CONCLUSION AFTER THAT.
> > THANK YOU, JUSTICE.
WE'RE HERE ON A 3850 MOTION.
HE MUST SHOW ACTUAL BIAS AND
DID NOT SHOW ACTUAL BIAS AND
DIDN'T BRING IN ANYONE TO
TESTIFY AND DIDN'T ASK ANY
QUESTIONS OF COUNSEL TO
DEMONSTRATE ACTUAL BIAS.
WE HAVE STRONG AGGRAVATORS IN
THIS CASE.
THAT THE TRIAL JUDGE DID NOT
KNOW ABOUT AT THE TIME OF THE
HEARING.
WE HAVE THE SEPARATE COUNSEL
ACTUALLY TRYING THE CASE.
HE HAD THE OPPORTUNITY TO FIND

ANY OF THESE SMALLER ERRORS,
ANY OF THOSE SUBTLE TYPE OF
ERRORS AND POINT THEM OUT AND
GET THE COURT TO RECUSE ITSELF.
AND THAT DIDN'T HAPPEN HERE.
AT THE -- AS THIS CONSEQUENCE
THE STATE WOULD ASK THAT YOU
AFFIRM.
> > YOU'RE ABOUT OUT OF TIME.
I GIVE YOU A COUPLE OF MINUTES
TO BRING IT TOGETHER.
> > TO ADDRESS JUSTICE QUINCE'S
QUESTION, YES, DURING THE TRIAL,
OVER OBJECTION, WHICH THE TRIAL
COURT DENIED, THE PROSECUTOR
WAS ASKED OR ALLOWED TO ASK
SEVERAL TIMES WHETHER THE
VICTIM IN VISIONED GIVING
HERSELF TO A MAN FOR THE FIRST
TIME IN THIS WAY AND YES.
THAT WAS RAISED ON DIRECT
APPEAL.
> > WAS THAT IN FRONT OF THE
JURY.
> > YES, IT WAS.
> > I'M ASKING.
> > YES, SIR.
SURE WAS.
> > AND THE OTHER EVIDENTIARY
HOMEBUILDER ---TYPE ISSUES
RAISE ON DIRECT APPEAL?
> > I DON'T RECALL OFF THE TOP
OF MY HEAD, I'M SORRY AND I DID
THE DIRECT APPEAL.
I APOLOGIZE BUT I DON'T RECALL.
> > IF THIS CASE WAS PUBLISHED
IN THE ST. PETE TIMES AND READ
THROUGHOUT THE STATE, THE
PUBLIC IN THIS STATE WOULD BE
AGHAST TO KNOW THAT IT WAS
ALLOWED BY THIS COURT FOR THIS
SITUATION TO EXIST.
THIS IS A CASE THAT CRIES OUT
FOR RELIEF WHETHER A NEW TRIAL
OR NEW SENTENCING HEARING.
THIS IS CASE THAT DOES CRY OUT
FOR RELIEF --
> > IS IT SOMETHING INHERENT IN
TRYING TO ESTABLISH PARAMETERS
FOR ACTUAL BIAS?
I MEAN, IS THAT A -- A NEBULOUS
CONCEPT, ALOSERY IN NATURE?
I'M TRYING TO UNDERSTAND, HOW
IS THAT --

> > I THINK IT CAN BE SULTED AS JUSTICE PARIENTE SUGGESTED OR -- SUBTLE AS JUSTICE PARIENTE OR FLAGRANT AND THIS CASE I BELIEVE IS AS CLOSE TO FLAGRANT AS WE'LL FIND.
> > AGAIN WE ARE TALKING ABOUT THE STATEMENT WAS MADE AND AFTER THE STATEMENT WAS MADE, THE ANALOGY WAS USED, DOES IT MACK A DIFFERENCE, NOT MAKE A DIFFERENCE, DOES IT COME INTO -- FLORIDA I WOULD CONTEND IT WAS NOT A PERFECT GAME CALLED AND POINT BACK TO THE QUESTION, ALLOWED TO BE ASKED THAT WERE IRRELEVANT AND IMMATERIAL AND ET CETERA AND SECOND, THOUGH, AND AGAIN AS WE DISCUSSED EARLIER, IT IS THE DAMAGE TO THE SYSTEM ITSELF EQUALLY AS IMPORTANT AS MELVIN THOMPSON'S LIFE SENTENCE.
> > EVEN IF THIS WERE OTHER THAN THE STATEMENT, WERE A -- JUST A -- AS PERFECT AS THE TRIAL CAN BE AND WE KNOW THERE ARE NO SUCH THINGS BUT AS CLOSE AS WE CAN GET TO THAT THEN YOU ARE SAYING THIS ONE STATEMENT IS ENOUGH TO ESTABLISH WHATEVER ACTUAL TO``%%--ESTABLISH WHATEVER ACTUAL``%%--PREJUDICE MEANS.``
> > I WOULD STATE, WOULD TAKE IT``%%--ONE STEP FURTHER AND SAY TO SHOW``%%--THE JUDGMENT WHAT HE SAID, HE``%%--CARRIED IT OUT AND HE HAD TO GO``%%--TO --.``
> > THE SAME AS WITH THE LAW,``%%--THAT IS NOT SOMETHING THAT IS``%%--APPARENT BEHAVIOR, THIS WAS``%%--WITHIN THE BOUNDS OF THE LAW AND``%%--SHE IS SAYING THE JUDGE WILL``%%--LOOK AT THIS AND THERE'S NO``%%--JUDGE ANYWHERE THAT WOULD NOT``%%--COME UP WITH THIS THE ULTIMATE``%%--RESULT.``%%--I THINK THAT'S IS BEING KIND``%%--ABOUT IT.``%%--IT IS EITHER THERE OR NOT THERE.``%%--THAT IS MY QUESTION.``%%--IF THAT IS THE CASE, WHAT IS THE``%%--RESULT?``
> > I THINK BECAUSE, BECAUSE IT``%%--LOOKS SO BAD TO HAVE TO STAND``%%--TRIAL ON THE A -- PUBLICLY``%%--ANNOUNCED BECAUSE THE THIS IS``%%--ACTUAL BIAS, WHAT IT LOOKS LIKE? ``%%--OR IS ACTUAL BIAS?``
> > I THINK THIS IS ACTUAL BIAS.``
> > ISM BEVERLY ENAPPEARANCE OF``%%--IMPROPRIETY OF STANDARD WHICH``%%--YOU WOULD USED ORIGINALLY TO``%%--DISQUALIFY THE JUDGE WHEN HE WAS``%%--USE DIRECT REPEALED BUT UNDER``%%--CARATELLI IT IS NOT THE SAME``%%--STANDARD WE WOULD USE ON'S``%%--CONVICTION.``
> > EDEL THINK SACCHARIC --``%%--CARATELLI CASE SHOULD.``
> > ASSUMING WE DISAGREE WITH``%%--YOU, THEN DO YOU AGREE THAT THE``%%--ACTUAL BY STANDARD IS DIFFERENT``%%--FROM WHAT YOU WOULD USE ON A``%%--DIRECT APPEAL?``
> > YES IT IS AND IT IS A TOUGHER``%%--STANDARD BUT I THINK IN THIS``%%--CASE WE HAVE ACTUAL BIAS.``%%--WE HAVE A STRUCTURAL DEFECT, AND``%%--WE OF A SITUATION THAT SHOULD``%%--NOT BE PERMITTED BY THIS COURT.``

> > SHOULD BE CORRECTED BY SIMPLY``%%--REMANDING FOR RESENTENCING SO``%%--YOU HAVE A NON-BIASED JUDGE``%%--DURING THE RECENT SENSE?``%%-->> OBVIOUSLY WE WOULD PREFER A``%%--NEW TRIAL, BUT BECAUSE, WHEN YOU``%%--ARE BIASED TOWARD THE END RESULT``%%--THAT PIUS LAST AND IN DOORS``%%--THROUGHOUT THE TRIAL AND IT``%%--MANIFEST --.``
> > HE SAID IF CONVICTED, SO NOW``%%--THAT WE HAVE A CONVENTION, THE``%%--BIAS ARISES, IF I'M GUILTY THIS``%%--JUDGE RT HAS PREJUDGE WHAT THE``%%--SENTENCE IS GOING TO BE.``%%--IF YOU HAVE A NEUTRAL NEW JUDGE``%%--REDETERMINING THE SENTENCING,``%%--THIS NUT THAT ANSWER YOUR``%%--CONCERN OF ITS PRECEPTION AT``%%--ETC.?``
> > NOWLIN ACTUALLY DOZEN.``%%--IT WOULD HELP ALLEVIATE IT BUT I``%%--DON'T THINK IT GOES FAR ENOUGH.``%%--IT IS JUST SOMETHING THAT SHOULD``%%--NOT BE TOLERATED.``%%--IT WOULD HELP IF YOU BRING YOUR``%%--REMARKS TO THE CONCLUSION``%%--PLEASE.``
> > IN THE THOMPSON TRIAL, IT WAS``%%--SOUTH -- HE SHOULD GIVE BOTH THE``%%--NEW TRIAL AND A NEW SENTENCING``%%--HEARING IF HE IS COMMITTED A``%%--SECOND TIME.``
> > THANK YOU BUFFERIN LIGHTNING``%%--US ON THIS CASE.``%%--THE COURT WILL STAND IN RECESS.``%%--ALL RISE