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Jason Andrew Simpson v. State of Florida

SC07-798

>> PLEASE RISE.

HEAR YE, HEAR YE, HEAR YE.

THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.

ALL WHO HAVE CAUSE TO PLEA,
DRAW NEAR, GIVE ATTENTION, AND
YOU SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,
THIS GREAT STATE OF FLORIDA,
AND THIS HONORABLE COURT.

LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING AND WELCOME TO
THIS SESSION OF THE SUPREME
COURT'S ORAL ARGUMENTS.

THE FIRST CASE ON AGENDA IS
SIMPSON v. STATE.

ARE THE PARTIES READY TO
PROCEED?

>> MAY IT PLEASE IT COURT.

GOOD MORNING, JUSTICES.

I AM ATTORNEY RICK SICHTA TO
MY RIGHT IS FRANK TASSONE AND
TOGETHER WE REPRESENT MR. JASON
SIMPSON I WOULD LIKE TO TAKE
THE MAJORITY OF TIME THE FIRST
THREE ISSUES I ALLEGED IN THE
INITIAL BRIEF DEALING WITH
JUROR CODY AND HER RECANTATION
OF HER VERDICT BEFORE EVIDENCE
WAS PRESENTED IN THE PENALTY
PHASE.

>> SO ARE THE TWO OF YOU
SPLITTING THE ARGUMENT?
ARE YOU DOING TEN MINUTES AND
THE OTHER ATTORNEY DOING 20
MINUTES?

>> I WOULD DO 20, JUDGE.

>> YOU'RE DOING 20 AND YOU'RE
DOING 10 MINUTES?

OKAY.

>> REALLY THE FIRST FOUR ISSUES
ALL RESOLVE AROUND THIS ONE --
RE -- AROUND THIS ONE

PARTICULAR ISSUE -- REVOLVE AROUND THIS ONE PARTICULAR ISSUE ON THE JURY, AND WHAT WOULD YOU SAY WOULD BE THE PIVOTAL LEGAL ISSUE THAT WE HAVE TO FIRST DECIDE? BECAUSE WE KNOW THAT THE JURY WAS PULLED, AND ALSO THE VERDICT OF GUILT WAS RECORDED.

CORRECT?

>> CORRECT.

>> AND THEREFORE, MY CONCERN IS THAT THE CASE LAW THAT YOU RELY ON INVOLVED CASES WHERE ANY, IF IT'S, ASSUMING THIS IS A RECANTATION, AT LEAST IT'S SOME QUESTIONING OF THE VERDICT OCCURRED PRIOR TO THAT TIME. SO TELL US WHAT WOULD BE, IF, IF YOU HAD TO ANNOUNCE A RULE OF LAW, FIRST COMING OUT OF THIS CASE, WHAT WOULD THE RULE OF LAW BE ABOUT A JUROR IF THE JUROR RECANTS OR, YOU KNOW, A QUESTION HIS OR HER -- BEFORE WHAT, THEN WHAT -- HER VERDICT, BEFORE WHAT, THEN WHAT?

>> OKAY I WILL TRY TO ANSWER THAT AS BEST AS I CAN, JUSTICE PARIENTE.

>> WELL IT'S REALLY THE CRUX OF MOST OF YOUR ISSUES ON APPEAL.

>> MY ANSWER WOULD BE A VERDICT IS NOT FINAL UNTIL THE JURY IS DISCHARGED.

>> AND AS YOU KNOW THIS IS A CASE THAT IS NOT CONCLUSIVELY DECIDED BY THIS COURT. I WOULD ARGUE THAT A JURY IS NOT DISCHARGED IN A GUILT PHASE UNTIL THE PRESENTATION OF EVIDENCE IS HEARD IN THE PENALTY PHASE.

>> NOW WOULD YOU -- THE RULE 3.45 OH, WHICH ADDRESSES POLLING OF THE JURY, SAYS EITHER THE JURY IS DISCHARGED OR THE VERDICT IS RECORDED. SO ARE YOU IN TERMS OF THIS PRINCIPLE OF LAW, ARE YOU RELYING ON, YOU KNOW, THE RULE

THEN WOULD SAY YOU WOULD AGREE
HERE THE VERDICT OF GUILT WAS
RECORDED?

>> YES.

I WOULD AGREE.

>> SO WHAT, IF THE RULE DOESN'T
PROVIDE YOU WITH A, AN AVENUE,
FOR RELIEF, WHAT OTHER, THERE'S
NOT A STATUTE THAT DEALS WITH
IT.

WHAT ELSE IN EITHER CASE LAW OR
PRINCIPLES OF DUE PROCESS OR
FAIRNESS WOULD, WOULD REQUIRE,
REALLY, AND THEN I GUESS THE
NEXT QUESTION WOULD BE WHAT,
YOU KNOW, ASSUMING THIS, WHAT
WOULD BE, WHAT WOULD YOU HAVE
HAD THE JUDGE DO, BUT I FIRST
WOULD WANT YOU TO TELL ME WHERE
WOULD THE AUTHORITY COME FROM
THEN BECAUSE THE JURY HASN'T
BEEN DISCHARGED.

EVEN THOUGH THE VERDICT'S BEEN
RECORDED AND THEY ARE NOW GOING
TO DELIBERATE ON, IN THE
PENALTY PHASE, THAT A JUDGE
WOULD BE ABLE TO DO WHAT OR
SHOULD, OR SHOULD BE REQUIRED
TO, I GUESS IS WHAT YOU'RE
SAYING.

SO TELL ME WHERE THAT AUTHORITY
COME FROM?

>> THE AUTHORITY IN MY OPINION
COMES FROM THE CASE THAT WAS
DISCUSSED DOWN BELOW, THE CHUNG
CASE AND THE BROWN CASE FROM
THE THIRD DISTRICT COURT OF
APPEALS, AND ACTUALLY BROWN,
THE FACTS WERE THE JURY
WAS DONE DELIBERATED
WAS POLLED.

THEY WERE ACTUALLY SHAKING
HANDS WITH THE JUDGES, AND ONE
OF THE JURORS CAME BACK AND
SAID YOU KNOW WHAT, I DON'T
KNOW IF I UNDERSTOOD THE JURY
INSTRUCTIONS AND IN THAT CASE
THEY ACTUALLY CITED RULE 3.440
AND 3.445 THAT TALKED ABOUT
REPUDIATION FROM ONE OF THE
JURORS AND WHETHER THAT
VERDICT COULD THEN BE RECANTED
AND ACTUALLY OVERTURNED BEFORE
THE JURY WAS DISCHARGED.

AND THE IN CHUNG, ABYESLY THE
MOMENT THAT THE JURY WAS
DISCHARGED WAS MUCH SOONER
AFTER THE VERDICT WAS READ AND
POLLED AS THIS CASE, IT WAS
JANUARY 29th WHEN IT WAS POLLED
AND IT WAS FEBRUARY 6TH WHEN IT
WAS RECAPPED.

I BELIEVE THOSE -- RECANTED.
I BELIEVE THOSE TWO CASES TALK
ABOUT RULE 3.440 AND RULE 3.450
AND MAKE THE VERDICT AND
DISCHARGE CONJUNCTIVE AND
RUNNING TOGETHER MEANING YOU
CANNOT HAVE A FINAL VERDICT
WITHOUT A DISCHARGE IN REGARD

--

>> WELL, AS YOU POINT OUT, YOU
KNOW.

>> YES, SIR.

>> YOU'RE TALKING ABOUT WHAT, A
WEEK LATER?

AFTER THE VERDICT HAS BEEN
RECEIVED.

>> IT WAS.

>> THE AND THE JURY'S BEEN
POLLED.

NOW ARE YOU MAKING ANY CLAIM OF
JURY OR JUROR MISCONDUCT?

>> YOU KNOW, JUDGE, {J} THOUGHT
LONG AND HARD ABOUT THAT.

I THINK I KNOW WHAT YOUR
QUESTION IS.

I DON'T BELIEVE THAT IS AN
ISSUE IN THIS CASE.

IF THE DELIBERATIONS WERE
INHERENT IN THE VERDICT AND
WHETHER THERE WAS MISCONDUCT
BECAUSE IF THERE WAS NOT A
VERDICT THEY CAN STILL
REPUDIATE THAT VERDICT
REGARDLESS OF MISCONDUCT OR
REGARDLESS OF WHETHER THE, THE
JURY DELIBERATIONS WAS INHERENT
IN THE VERDICT AND A PART OF
THE DELIBERATIONS.

>> SO IN A CAPITAL CASE
A VERDICT WOULD ALWAYS NOT BE
RENDERED UNTIL SUCH TIME AS THE
PENALTY PHASE BEGINS?

>> CORRECT.

EVIDENCE IS INTRODUCED IN THE
PENALTY PHASE.

>> SO IF, IF THERE IS SOME

WRITTEN DOCUMENT ENTERED, WHAT DOES THAT MEAN?

>> IN REGARDS TO THE JURY --

>> IN REGARDS TO WHAT THE, THE JURY VERDICT WILL FOR WANT OF A BETTER WORD, WAS?

IF THERE WAS SOMETHING THAT IS ACTUALLY FILED, WHAT DOES THAT MEAN?

>> IT MEANS THAT IT'S FILED BUT NOT FINALIZED UNTIL THE JURY IS ACTUALLY DISPERSED AND -- ALLOWED NOT TO PERFORM THEIR FUNCTIONS AS AN OFFICIAL JUROR IN THE COURTROOM.

>> DOESN'T THAT SEEM CONTRARY TO ALL OF OUR CASE LAW THAT TALKS ABOUT SOMETHING BEING RENDERED ONCE IT'S ACTUALLY WRITTEN AND FILED?

>> THE RULE OF FINALITY, JUDGE?

I BELIEVE THE CASES THAT WERE DISCUSSED IN THE LOWER COURT AND THE CASES THAT WERE DISCUSSED BY THE APPELLEE MITCHELL JOHNSON AND THE RELATED CASES DEAL WITH CASES THAT WERE NONPENALTY PHASE, NONCAPITAL CASES, AND CASES THAT ACTUALLY, THE PENALTY PHASE LAZ STARTED OR CASES LIKE SONGER THAT THAT THERE WAS AN AFT FILED IN THE 3850 IN A POST-CONVICTION MATTER SO THIS SPECIFIC ISSUE HAS NEVER BEEN ADDRESSED IN MY OPINION TO THIS COURT.

>>IAN IT'S NEVER BEEN ADDRESSED BUT WHAT WE'RE TRYING TO GET AT IS WHY ONCE THE VERDICT WAS ACTUALLY ENTERED WE WOULD NOW SAY THAT THAT, THAT, THAT PHASE THE GUILT PHASE IS NOT OVER. WHAT COMPELLING REASON WOULD WE HAVE TO SAY THAT?

>> THE GUILT PHASE IS NOT OVER, THE JURY HAS NOT -- I KNOW I GO BACK TO THE DISCHARGE PART BUT THE JURY STILL MAINTAINS THEIR -- AS A GUILT --.

>> I THINK WE GO BACK TO THIS ISSUE, AND LET ME SEE IF I CAN HELP YOU OUT.

YOU KNOW, IF THE RULE ITSELF SAID THAT A JURY CAN BE POLLED OR UNTIL THE JURY IS DISCHARGED, FOR EXAMPLE. YOU WOULD HAVE A SORT OF A HOOK IN THIS CASE, BUT I THINK MAYBE WE OUGHT TO GO TO THE NEXT QUESTION, WHICH IS THAT THERE COULD BE AN ARGUMENT THAT THE JUDGE MIGHT HAVE HAD DISCRETION TO DO SOMETHING BUT WHAT THE THE JUDGE DID DO IS QUESTION THIS JUROR ABOUT WHAT IT WAS THAT WAS HER CONCERN. AND GOING BACK TO WHAT JUSTICE ANSTEAD SAID AND THEN IN ALL OF THE COLLOQUY BOTH BEFORE THE PENALTY PHASE AND THEN AFTER THE PENALTY PHASE, IT SOUNDED TO ME THAT REALLY ALL THIS WAS WAS A JUROR WHO WAS BEING, WHERE OTHER JURORS WERE EXPLAINING THAT LISTEN THE PHYSICAL EVIDENCE IS REALLY THE IMPORTANT PART IN THIS CASE, AND NOT TO TELLING THEM TO DISREGARD OTHER EVIDENCE BUT EVEN IF THERE WAS SOME SUGGESTION THAT SHE DIDN'T UNDERSTAND AS CLEARLY THE JURY INSTRUCTIONS AS OTHERS, THERE'S NOTHING ABOUT WHAT SHE REVEALED THAT IS OTHER THAN INFERRING IN THE VERDICT. AND SO I, YOU KNOW, IF SOMETHING HAD BEEN BROUGHT TO THE JUDGE'S ATTENTION, BEFORE THE PENALTY PHASE BEGAN ABOUT SOME MISCONDUCT, THAT OCCURRED DURING THE GUILT PHASE, I THINK THEN WE'D BE LOOKING AT A WHOLE DIFFERENT ISSUE ABOUT INTERVIEWING JURORS AND THE INTEGRITY OF THE PROCESS. BUT HERE WE'RE TRYING TO GET TO A SITUATION WHERE EVEN AFTER -PENALTY PHASE -- AFTER THE PENALTY PHASE, SHE WAS POLLED AFTER THE PENALTY PHASE. SHE SAID IT WAS HER VERDICT IN THE PENALTY PHASE SO TO ME THAT'S WHY WHAT PRINCIPLE OF THE LAW AFTER LOOKING AT BOTH THE RULE THE ORDERLY MANAGEMENT

OF CAPITAL CASES, AND
PRINCIPLES OF FAIRNESS AND DUE
PROCESS.

I DON'T SEE WHERE THE ERROR
OCCURRED IN THIS CASE.

AND THAT'S WHY I ASK YOU AGAIN
ABOUT THE PRINCIPLE OF LAW AND
I'M NOT SURE YOU'VE CLEARLY --
IF YOU'VE SAID, IF YOU SAID THE
PRINCIPLE OF LAW IS JURORS
OUGHT TO BE ABLE TO BE POLLED
UP UNTIL WHEN THE CONCLUSION OF
THE PENALTY PHASE ABOUT THEIR
GUILT PHASE VERDICT, THAT
WOULDN'T BE VERY ORDERLY.

SO YOU RECENTLY HAVEN'T
ARTICULATED A RULE OF LAW THAT
COULD BE SOMETHING THAT WE
COULD APPLY TO OTHER CASES THAT
WOULD GIVE JUDGES GUIDANCE AS
TO HOW TO, TO CONDUCT A TRIAL,
YOU KNOW, WHICH HAS BOTH THE
GUILT AND A PENALTY PHASE.

SO AGAIN, TRY TO HELP ME WITH
WHAT IS THE, THE ERROR THAT THE
TRIAL JUDGE COMMITTED IN THIS
CASE IF WE ASSUME, NOW, BECAUSE
I, I WOULD AGREE THAT IF THE
POLLING TOOK PLACE AFTER THE
PENALTY PHASE, AND THERE, YOU
KNOW, THERE WAS SOMETHING THERE
THAT IF THERE WAS AN ERROR, IT
SHOULD'VE BEEN, IT SHOULD'VE
BEEN TAKEN CARE OF BEFORE THE
PENALTY PHASE BEGAN.

BUT ASSUMING THERE'S NO ERROR
IN NOT REPOLLING THE JURY, OR
SENDING THE JURY BACK TO
DELIBERATE, WHICH IS, THAT'S
WHY I ASKED YOU, THAT'S WHAT
THE RULE SAYS, IF THERE'S
SOMEBODY QUESTIONS WHAT THEIR
RULE, WHAT THEIR VERDICT IS,
THE JUDGE SAYS WELL YOU GO BACK
IN AND DELIBERATE AND THAT WILL
--, SO ARE YOU SAYING THAT'S
WHAT THE JUDGE SHOULD'VE DONE?

SO AGAIN, PLEASE TRY TO HELP US
TO SAY HERE'S THE RULE, HERE'S
WHY, HERE'S WHAT WENT WRONG,
AND HERE IS THE FUNDAMENT {8}
-- FUNDAMENTAL UNFAIRNESS TO
MR. SIMPSON IN THIS CASE.

>> OKAY.

I'LL DO IT AS BEST I CAN,
JUDGE.

THE RULE SHOULD'VE BEEN ONCE
THE JURY RECANTED HER VERDICT
AND SHE DID -- WAS QUESTIONED
BY THE JUDGE SHE SAID IS THIS
YOUR INDIVIDUAL VERDICT, SHE
SAID NO.

THIS WAS BEFORE THE PENALTY
PHASE BEGAN.

AND OBVIOUSLY PENALTY PHASE
BEGAN IN MY WORDS, BEFORE
EVIDENCE WAS INTRODUCED OR
BEFORE ORAL ARGUMENT.

THE JUDGE SHOULD'VE EITHER SENT
THEM BACK TO REDELIBERATE OR
SHOULD'VE GRANTED A MISTRIAL.

AND AS TO YOUR FIRST ISSUE, OF
THE JUROR CODY SAYING AT THE
END OF THE PENALTY PHASE WHEN
IT WAS CONCLUDED YES THAT
INDEED WAS MY VERDICT --

>> WHERE DID SHE SAY CLEARLY
THAT IT WAS NOT HER VERDICT?
YOU KNOW, I KNOW THERE'S A LOT
OF COLLOQUY, BUT SHE JUST SAID
I WANTED YOU TO KNOW THERE'S
SOME QUESTIONS THAT WERE
UNANSWERED AND THEN SHE, DID
SHE ACTUALLY IN THIS COLLOQUY
SAY NO, THIS WAS NOT MY
VERDICT?

>> I'M TRYING TO TO QUOTE AS IT
BEST I CAN.

>> WELL IT'S A FAIRLY LONG
COLLOQUY.

IF SHE SAID CLEARLY SAID THIS
WAS NOT MY VERDICT I WAS
PRESSURED INTO T. I THINK AGAIN
YOU WOULD HAVE SOMETHING WHERE
MAYBE THE PRINCIPLE OF LAW
WOULD TAKE PRECEDENCE OVER A
RULE BUT I DON'T THINK -- I
DON'T SEE THAT SHE SAID NO, IT
WASN'T HER VERDICT.

>> JUDGE ARNOLD, THE TRIAL
JUDGE ASKED HER BASED ON ARE
THE EVIDENCE YOU HEARD IS THIS
YOUR INDIVIDUAL VERDICT AND SHE
ANSWERS, QUOTE, NO.

AND IT'S RIGHT -- I'M SORRY I
CAN'T QUOTE THE PAGE IT'S RIGHT
AROUND 1828 ON THE RECORD ON

APPEAL.

AFTER MR. ELER THE TRIAL
COUNSEL ASKED FOR A MISTRIAL
AND SHE DOES NOT BELIEVE THEY
CAN PROCEED TO THE PENALTY
PHASE BASED ON JUROR --
>> THEN AFTER SHE SAYS THAT,
DOESN'T THE COURT THEN SAY THEN
WHEN WE POLLED YOU YOU SAID
THAT THAT WAS YOUR VERDICT SO
WHY DID YOU TELL US IT WAS IF
IT WASN'T?
AND THEN DOESN'T SHE THEN GET
INTO A WHOLE THING THE
PHYSICAL EVIDENCE -- -- ABOUT
THE EVIDENCE EVIDENCE AND THEY
WANTED TO LOOK AT THE PHYSICAL
EVIDENCE WAS REALLY MORE
IMPORTANT THAN THE LIVE
WITNESSES AND ALL OF THAT.
SO SHE'S EXPLAINING WHY SHE
THOUGHT THAT, SHE'S SAYING THAT
WASN'T HER VERDICT.
BECAUSE SHE DIDN'T UNDERSTAND
WHAT SHE SHOULD'VE BEEN DOING.

BASICALLY.

>> CHIEF JUSTICE CONVINCED, YOU
ARE TALKING ABOUT AFTER THE
PENALTY PHASE, CORRECT.

>> NO, I'M TALKING ABOUT --
DIDN'T SHE SAY NO DURING THE
ORIGINAL ONE?

THAT WHERE YOU'RE SAYING
SHE SAID NO.

>> YES.

THEY TALKED TO HER TWICE.
THE FIRST TIME BEFORE THE
PENALTY PHASE SHE BROUGHT UP
THERE WAS A DISPUTE WHETHER
THEY SHOULD CONSIDER THE
PHYSICAL EVIDENCE OR THE
WITNESSES PRESENTED.

>> SO SHE IS EXPLAINING TO THE
JUDGE WHY SHE IS SAYING THAT
THAT IS NOT HER VERDICT.

>> YES.

AND AS JUSTICE ANSTEAD POINTED
OUT, THAT IS CANDIDLY MATTERS
INHERENT IN THE VERDICT, THOSE,
THOSE PARTICULAR QUESTIONS
SHE'S SAYING.

SHE'S SAYING YOU KNOW, THE
JUDGE, VIA THE JURORS I KIND OF

FELT LIKE I HAD TO REND
ARGUILTY VERDICT BECAUSE THEY
TOLD ME NOT TO LOOK AT ANY
OTHER EVIDENCE EXCEPT THE
PHYSICAL EVIDENCE, THE DNA
EVIDENCE.

>> SO THIS IS SOMETHING, YOU
CONCEDE, ADHERES IN THE
VERDICT, SO YOU KNOW, I'M STILL
STRUGGLING HERE WITH WHAT IS IT
THEN WE'RE SUPPOSED TO DO?
BECAUSE ALL THE CASE LAW TALKS
ABOUT, YOU KNOW, WHEN THESE ARE
ISSUES THAT ADHERE TO THE
VERDICT, IT'S REALLY BASICALLY
NOTHING WE SHOULD DO ABOUT IT.

>> WELL, THE CASE LAW SAYS YOU
CANNOT REPUDIATE A VERDICT ONCE
IT ACTUALLY IS A VERDICT.
IN THE ALL THE CASES CITED THE
VERDICT HAS BEEN FINALIZED.
THE JURY HAS BEEN DISCHARGED.

>> LET ME GO BACK TO THE
QUESTION THAT JUSTICE PARIENTE
AND ASK IT IN A DIFFERENT WAY
AND THAT IS, WHAT DID THE TRIAL
JUDGE DO WRONG HERE?
THAT IS, WHAT, BECAUSE, I HAVE
TO TELL YOU THAT IN READING
THIS WHOLE THING, IT SEEMS TO
ME THAT THE TRIAL JUDGE BENT
OVER BACKWARDS AND WAS JUST
SUPER CAUTIOUS ABOUT DOING THE
RIGHT THING, AND IT ENDED UP,
YOU KNOW, -- IT ENDED UP, YOU
KNOW, AS I THINK YOU WOULD
CONCEDE THAT IF WE JUST HAD A
SITUATION WHERE AFTER A VERDICT
IS RENDERED AND A WEEK LATE
A JUROR COMES FORWARD AND SAYS
-- LATER A JUROR COMES FORWARD
AND SAYS I'VE CHANGED MY MIND
YOU WOULD SAY NO, THEY CAN'T DO
THAT, BECAUSE THE VERDICT HAS
BEEN RECEIVED.
THEY CAN'T JUST CHANGE THEIR
MIND OR WHATEVER.
WE'RE ONLY INTO THIS SITUATION
BECAUSE WE DO HAVE IN CAPITAL
CASES, YOU KNOW, THESE TWO
PARTS.
WE'RE TALKING ABOUT A WEEK
AFTER THE VERDICT HAS BEEN

RECEIVED.

A WEEK AFTER THE JURY HAS BEEN POLLED.

AND THEN THIS INDIVIDUAL JUROR HAS BEEN POLLED.

AND HAS AFFIRMED THAT THAT'S HER VERDICT.

BUT THEN IN AN ABUNDANCE OF CAUTION -- CAUTION WHEN THIS JUROR HAS A QUESTION AND WE HAVE TOLD TRIAL JUDGES THAT IF THERE'S SOME EVIDENCE OF MISCONDUCT, OR SOMETHING, THEY SHOULD MAKE A LIMITED INQUIRY.

OKAY?

BUT VERY LIMITED INQUIRY.

REALLY SHOULDN'T GET INTO THAT PART.

ABOUT REALLY WHAT THE DELIBERATIONS WERE FOR WHATEVER.

IT SEEMS TO ME THE JUDGE DID THAT HERE.

AND ENDED UP FINDING OUT THAT REALLY WHAT THEY WERE TALKING ABOUT WAS THE IMPORTANCE OF THE PHYSICAL EVIDENCE COMPARED TO THE LIVE TESTIMONY.

AND, YOU KNOW, THAT THAT, SO WHAT IS IT THAT YOU'RE -- WHERE DID THE JUDGE GO WRONG HERE? WHAT, WHAT DID THE JUDGE DO WRONG?

>> IN A CAPITAL CASE SUCH AS THIS, JUDGE, HE SHOULD'VE HAD THE JURORS REDELIBERATE AFTER ONE JUROR SAID THIS IS NOT MY VERDICT.

>> SO A WEEK AFTER THE VERDICT IS RENDERED, YOU'RE SAYING IF SOME JUROR CHANGES THEIR MIND, THAT THEY HAVE TO START ALL OVER?

>> IN CAPITAL CASES, YES.

AND THERE IS SUPPORT IN THAT --

>> WHY NOT EXTEND THAT TO OTHER CASES?

>> BECAUSE IN, IN NONCAPITAL CASES, JUDGE, THE JURY IS DISCHARGED AFTER --

>> WELL, I MEAN WHY, WHY REST ON THE TECHNICALITY OF THAT?

>> OF A CAPITAL CASE IN THE --
>> WHAT'S THE DIFFERENCE IF
IT'S A WEEK LATER, AND THE
VERDICT HAS BEEN RENDERED AND
THE JURY POLLED, NOW, IF THE
JUROR COMES BACK A WEEK LATER
CERTAINLY IT'S JUST AS
IMPORTANT TO A DEFENDANT THAT
THEY'VE GOT A LIFE SENTENCE IN
AN ARMED ROBBERY CASE OR
WHATEVER, JURORS CHANGE THEIR
MIND.

SO, YOU KNOW, YOU'RE JUST
CALLING FOR A RULE THAT WOULD
LIMIT IT TO CAPITAL CASES?

>> YES, AND, IF I CAN BRIEFLY
EXPLAIN, JUDGE.

>> OKAY.

>> IN NONCAPITAL CASES, THE
JURY IS FREE TO GO ABOUT THEIR
OWN TALK, READ THE PAPER, SO ON
AND SO FORTH WHEN THEY CHANGE
THEIR MIND.

THEY'RE ACTUALLY INFLUENCED BY
EXTERNAL SOURCES OR INFLUENCES.

IN THIS CASE, THEY HAVE THEIR
CODE OF A JURY.

THEY ARE UNDER CONTROL OF THE
TRIAL COURT.

THEY EVEN WERE BROUGHT -- THEY
WERE ALLOWED TO KEEP THEIR
BUTTONS IN THIS CASE.

THEY HAD ALL THE
CHARACTERISTICS OF A JURY THAT
WAS STILL IN A TRIAL.

WHEN SHE REPUDIATED AND
RECATED HER VERDICT.

THE DIFFERENCE IS --

>> DID THEY GO HOME EVERY DAY.

>> THEY DID GO HOME.

>> THEY WERE HOME FOR A WEEK?

>> YES, MA'AM.

THE JUDGE EVEN, JUDGE ARNOLD
EVEN SAID YOU KNOW I CAN KEEP
YOU HERE FOR A WEEK BUT I AM
NOT GOING TO DO THAT AND
RIGHTFULLY SO.

>> SO THEY WOULDN'T BE
INFLUENCED BY THESE KINDS OF
THINGS THAT A JURY THAT
ACTUALLY HAS GONE HOME AND
SAID, YOU KNOW, YOU DON'T HAVE

TO COME BACK WITH THE
INFLUENCE?

>> THEY WERE ACTUALLY
ADMONISHED BY THE TRIAL COURT
TO NOT READ --

>> LET ME ASK YOU A QUESTION.
YOU SAID THAT THERE WOULD BE
TWO POSSIBILITIES, AND, YOU
KNOW, I'M GOING TO ASK
MR. WHITE SOME QUESTIONS TOO
ABOUT WHAT IF IT WAS, YOU
KNOW, THE VERDICT WAS RENDERED,
RECORDED, BUT, YOU KNOW, THEY
HADN'T LEFT THE COURTHOUSE, BUT
THE TWO -- YOU SAID THE JUDGE
COULD'VE EITHER GRANTED A
MOTION FOR MISTRIAL, WHICH YOU,
YOU KNOW, WOULD BE A, YOU KNOW,
I GUESS IT WOULD MAYBE HAVE
THAT DISCRETION, BUT DID YOUR,
DID THE LAWYER ACTUALLY SAY OR
WE WOULD LIKE TO ASK THAT THE
JURY CONTINUE TO DELIBERATE?

>> HE DID NOT SAY THAT.

>> SO IN TERMS OF, I'M NOT, YOU
KNOW, AGAIN, I'M JUST THINKING
WHAT, WHAT JUDGE ARNOLD WAS
REALLY PRESENTED WITH WHAT OZ--
WITH WAS AN ALL OR NOTHING
SITUATION, IS I COULD SEE A
CIRCUMSTANCE WITH A CAPITAL
CASE AND THE VERDICT'S BEEN
RECORDED, BUT, YOU KNOW, THE
NEXT DAY THE JURY COMES BACK
AND SOMEONE HAS A QUESTION, AND
AT THAT POINT MAYBE THEY WOULD
EXPLORE SENDING THE JURY BACK
FOR FURTHER DELIBERATION, BUT
THAT WASN'T WHAT WAS PRESENTED
AS A REQUEST TO JUDGE ARNOLD.
IT WAS AN ALL OR NOTHING.

YOU OUGHT TO WIPE OUT THIS
GUILTY VERDICT AND REALLY START
OVER AGAIN.

BUT YOU NOW ON APPEAL ARE
SAYING, WELL, OF COURSE, IT'S
EASY NOW BECAUSE WE'RE ON
APPEAL TO SAY OH, NO, REALLY
WHAT HE COULD'VE DONE IS
ANOTHER ALTERNATIVE IS TO BRING
THIS JURORS BACK AND JUST THINK
ABOUT WHAT WOULD JUDGE ARNOLD
SAY TO THE 11 OTHER JURORS.
ONE OF THE JURORS NOW HAS A

QUESTION AND SHE ADMITS SHE
WASN'T -- YOU KNOW,
INTIMIDATED.
MAYBE SHE DIDN'T UNDERSTAND THE
INSTRUCTIONS.

I'M GOING TO REINSTRUCT YOU AND
JUST YOU ALL GO BACK AND MAKE
SURE THIS IS YOUR VERDICT.
HOW WOULD THAT GO?
WHAT WOULD JUDGE ARNOLD?
WHAT WOULD WE TELL JUDGE ARNOLD
WHAT HE SHOULD'VE DONE.

>> FIRST OF ALL, JUDGE, THE
RULES WE CITED BEFORE, THE
FLORIDA RULES OF CAPITAL
PROCEDURE, 3.440 AND 3.450.
SPECIFICALLY I DON'T RECALL IF
IT'S SHALL OR MUST BUT IT
DIRECTS THE JUDGE IF THERE IS A
DISAGREEMENT BEFORE THE JURORS,
BEFORE THE VERDICT IS RENDERED
AND DISCHARGED, LIKE WE TALKED
ABOUT BEFORE --

>> AGAIN, THAT'S PRETTY
IMPORTANT AGAIN BECAUSE IF THE
JUDGE IS GOING TO RELY ON A
RULE, THE RULE WASN'T, WAS, WAS
NOT DID NOT COME INTO PLAY
ABOUT POLLING BECAUSE THE
VERDICT WAS RECORDED.

CORRECT?

>> CORRECT.

>> OKAY.

SO WE NOW GO BACK TO THAT WE
START TO MAKE IT UP AS WE GO
ALONG, WHICH IS ALWAYS A
PROBLEM WHEN WE'RE TRYING TO
HAVE SOME CLEAR RULES TO HELP
JUDGES AND LITIGANTS GO THROUGH
THESE DIFFICULT CASES.

SO YOU'RE SAYING WELL, YEAH, HE
COULD HAVE DONE THAT BUT THAT'S
NOT WHAT HE WAS ASKED TO DO.
HE WAS ASKED TO GRANT A
MISTRIAL.

AND THE STANDARD ON MISTRIAL IS
WHETHER JUDGE ARNOLD ABUSED HIS
DISCRETION, AND UNDER ALL THESE
CIRCUMSTANCES, I'M HAVING A
HARD TIME SEEING HOW JUDGE
HARNLED ABUSED HIS DISCRETION
-- ARNOLD ABUSED HIS DISCRETION
IN NOT GRANT A MISTRIAL WHEN A
WEEK AFTER A GUILT VERDICT

COMES IN WHERE ALL THE JURORS HAD AGREED ON, AND THEN A JUROR SAYS THAT THE JUROR'S GOT AN -- SOME ISSUES WITH WHETHER THE EVIDENCE WAS -- SHE WAS RELYING TOO MUCH ON PHYSICAL EVIDENCE, HE DECIDES NOT TO GRANT A MISTRIAL.

>> IF YOU COULD ANSWER JUSTICE PARIENTE'S QUESTION, YOU ARE INTO THE TIME FOR YOUR CO-COUNSEL.

>> WELL, THEY BOTH ARGUING ON?

>> YEAH, HE HAS THE TEN MINUTES AND HE'S INTO HIS, THE OTHER --

>> OH, I THOUGHT THAT WAS REBUTTAL TIME.

>> NO, I'M SORRY JUSTICE.

>> IS THAT -- ARE YOU DOING REBUT OR ARE YOU DOING -- REBUTTAL OR ARE YOU DOING SUBSTANTIAL ARGUMENT? THAT'S WHAT I THOUGHT YOU --.

>> OH.

>> WELL, YOU'RE WELL INTO HIS REBUTTAL TIME THEN.

[LAUGHTER]

>> MAY I ANSWER -- CAN YOU REPEAT THE QUESTION, JUDGE.

>> YOU KNOW, I, I THINK THAT WE'VE SORT OF BATTERED THIS AROUND.

I JUST WAS ASKING YOU ABOUT THE MISTRIAL STANDARD, AND HOW WE CAN REALLY SAY JUDGE ARNOLD ABUSED HIS DISCRETION IN THIS CASE.

>> CAN I ANSWER THAT REALLY QUICK?

I'M SORRY.

>> YEAH, OF COURSE, YOU CAN ANSWER IT.

>> OKAY I'M JUST TAKING ISSUE WITH THE CASE LAW THAT HE HAD BEFORE HIM.

FIRST OF ALL, I DON'T SEE ANY CASE LAW OR ANY SUPPORTIVE LAW LAW THAT SAYS THERE'S A PRELIM BOW BETWEEN THE GUILT AND PENALTY PHASE.

THERE'S A FREE STANDING AREA. ONE HAS TO END BEFORE THE OTHER

ONE BEGINS.

IN AN ABUSE OF DISCRETION,
STANDARD, JUDGE, HE HAD A JUROR
WHO SAID THIS IS NOT HER
VERDICT.

HE THAT TO DO SOMETHING.

I BELIEVE THE CASE LAW THAT I
HAVE CITED IN HIGH BRIEFS
SUPPORT THE FACT THAT BECAUSE
THIS JURY HAD NOT PROCEEDED TO
THE PENALTY PHASE, WAS STILL IN
THE GUILT PHASE AND THEREFORE I
KNOW IT'S A WEEK LATER.

BUT ACCORDING TO WHAT THE RULES
I HAVE BEEN CITING IS HE HAS TO
MAKE A DECISION.

HE HAS TO DELIBERATE AGAIN
BEFORE THE PENALTY PHASE COMES
ON.

THERE'S TWO WAYS TO SOLVE THIS
PROBLEM AND THIS IS NOT IN MY
BRIEF JUDGE BUT YOU HAVE TO
HAVE A SEPARATE JUROR FOR
PENALTY PHASE.

I KNOW IT'S BEEN DISCUSSED
SEVERAL TIMES BEFORE THIS
COURT.

-- NUMEROUS TIMES BEFORE THIS
COURT.

FOR THE RULE IN 3.440 COULD
HAVE A SPECIFIC DELINEATION
THE VERDICT IS FINAL BEFORE
IS RECORDED.

DISCHARGE IS IRRELEVANT BUT IT
SIMPLY DOES NOT SAY THAT.
THANK YOU.

-- SIMPLY DOES NOT SAY THAT.
THANK YOU.

>> MR. WHITE.

>> THANK YOU.

STEPHEN WHITE.

THE GUILT PHASE WAS TOTALLY
COMPLETED THERE WAS NOTHING
LEFT TO DO ON THE GUILT PHASE.

>> WOULD HE HAVE, WOULD JUDGE
ARNOLD HAVE ON BASED ON THIS
RECORD A WEEK LATER HAD DECIDED
THAT THE JURY SHOULD GO BACK
FOR REDELIBERATION, WOULD THAT
HAVE BEEN A VIOLATION OF ANY
RULE OR PRINCIPLE OF LAW?
IN OTHER WORDS, IF HE HAD
EXERCISED HIS DISCRETION TO SAY

HERE IS A JUROR AT SOME POINT
NO IT IS NOT MY VERDICT.
IN THE -- AND THE PENALTY PHASE
HASN'T BEGUN BECAUSE I THINK
ONCE THE PENALTY PHASE BEGINS
YOU REALLY HAVE A SITUATION
WHERE YOU CAN'T GO BACK, WOULD
JUDGE ARNOLD HAVE ABUSED HIS
DISCRETION.

>> I WOULD THINK SO, YOUR
HONOR, BECAUSE NUMBER ONE,
AGAIN, THE GUILT PHASE WAS
TOTALLY COMPLETED.
THE VERDICT WAS ANNOUNCED THE
JURY WAS POLLED THE VERDICT
WAS FILED A WEEK HAD PASTED
AND IN FACT IN THE INTERIM HAD
DISCUSSED SOME PENALTY PHASE
THINGS AT SOME HEARINGS.
THE GUILT PHASE WAS TOTALLY
OVER.

SO IF HE HAD TOLD THEM TO GO
BACK AND REDELIBERATE, BY THE
WAY, WHICH OF COURSE, AS THE
COURT'S ALREADY POINTED OUT, IS
NOT PRESERVED ABSOLUTELY NOT
PRESERVED.

HE WOULD'VE ERRED.
PLUS HE WOULD'VE ERRED IN
RELYING UPON JUROR CODY'S
COMMENTS THAT CLEARLY ADHERED
IN THE VERDICT, THE GUILT PHASE
VERDICT.

>> WELL, YOU WOULD AGREE THAT
IF HER SAME COMMENTS OCCURRED
AT THE TIME OF POLLING, WE
DON'T HAVE IN THE CONCEPT OF
INHERING IN THE VERDICT, IF
IT'S BEFORE THE JURY HAS BEEN
DISCHARGED IN A CRIMINAL CASE,
WOULD YOU YOU AGREE WITH THAT?
IN OTHER WORDS, IN BRIDE OF
INHERING IN THE VERDICT HAS TO
DO WITH WHETHER YOU'RE GOING TO
BE ABLE TO IMPEACH A VERDICT
AFTER A TRIAL.

>> THE THE BLACK LETTER LAW IS
INHERING IN THE VERDICT HOWEVER
AN UNDERLYING POLICY BEHIND
THAT INHERENCE DOCTRINE IS THE
CONFIDENTIALITY OF THE JURY
DELIBERATIONS MITCHAL AND
DEVONEZY SPOKE OF --

>>

[INAUDIBLE]

>> A NEW TRIAL.

>>

[INAUDIBLE]

POLLING AND THE JUROR SAYS NO, THAT'S NOT MY VERDICT, WELL, I MEAN YOU DON'T EVEN GET INTO THE ISSUE OF WHETHER IT'S INHERENT SO --

>> I HAVE TO AGREE WITH THAT, YES, SIR.

>> AND IT SEEMS TO ME THAT THE PROBLEM IS HERE IS THAT THIS DOESN'T FIT INTO A NICE LITTLE PIGEON HOLE THAT WE AS LAWYERS HAVE BEEN ACCUSTOMED TO, A PRACTICE WHERE YOU HAVE THE TRIAL, YOU HAVE A VERDICT RETURNED, AND YOU HAVE THE JURORS DISCHARGED.

AND ALL THE CASE LAW SORT OF TALKS IN THAT CONTEXT, AND SO WHEN YOU GET INTO THE BIFURCATION THROWS ANOTHER LITTLE TWIST INTO IT.

AND THAT SEEMS TO ME WHAT THE PROBLEM IS HERE.

AND TALKING ABOUT DISCHARGE -- THE JURORS HAD NOT BEEN DISCHARGED.

>> THEY HAD ACTUALLY BEEN DISMISSED.

>> BUT NOT DISCHARGED.

>> BUT NOT DISCHARGED.

>> BECAUSE THAT'S SORT OF A --

>> SENT HOME.

>> THAT'S VERY KEY WORD ISN'T IT IN CONNECTION WITH WHEN JURORS CAN DO SOMETHING SO I THINK THIS IS REALLY AS UNIQUE TO THIS KIND OF CASE.

>> WELL, FOR PURPOSES OF THE GUILT PHASE, IN FACT, THEY HAD BEEN SENT HOME --

>> GUILT PHASE OVER.

>> WELL, THEY MAY HAVE BEEN SENT HOME EVERY NIGHT DURING THE TRIAL SO GOING HOME IS NOT THE KEY.

THE KEY IS THE DISCHARGE.

>> WELL, THEY HAD BEEN SENT HOME AFTER THE VERDICT HAD BEEN RECORDED, FILED, ANNOUNCED, AND POLLED.

>> AND YOU HAVE THE RULE AND IT IS, IT PROVIDES FOR A HOOK HERE.

THAT'S WHY I SAY BECAUSE IT SAYS NO MOTION TO POLL THE JURY SHALL BE ENTERTAINED AFTER THE JURY IS DISCHARGED OR THE VERDICT IS RECORDED.

NOW, I DON'T THINK THERE'S ANY -- THIS VERDICT WAS RECORDED.

>> YES, MA'AM.

>> THE VERDICT WAS GUILT.

>> ON JANUARY 29th AND THIS ALL CAME ABOUT ON FEBRUARY THE 6th, EIGHT DAYS LATER.

AND IN THE INTERIM, THERE WERE A COUPLE OF {FLT} PHASE HEARINGS.

IN FACT THERE WAS A STIPULATION REGARDING THE PENALTY PHASE.

>> MY ONLY DISAGREEMENT -- I MEAN I WOULD JUST SAY AS A MATTER OF COURSE THOUGH, I THINK THAT JUDGE ARNOLD MIGHT'VE HAD THE DISCRETION DEPENDING ON WHAT JUROR CODY SAID, TO DECIDE THAT IT MIGHT BE REQUIRE FURTHER DELIBERATION BUT I DO, AM STRUCK BY THE FACT THAT THEY DIDN'T SEEK THAT REMEDY.

THEY ONLY SOUGHT THE REMEDY OF A MISTRIAL.

>> DEFENSE COUNSEL WANTING A REDO.

HE WANTED TO START THIS WEEK-LONG TRIAL ALL OVER AGAIN WITH COUNTLESS EXPERTS, DNA EXPERTS, AND SO ON.

MISTRIAL, MISTRIAL, THAT ISSUE'S CLEARLY PRESERVED.

I MEAN, THAT'S ALL HE WANTED WAS A MISTRIAL.

AND HE WANTED LATER ON HE WANTED TO TALK TO THE JURORS SOME MORE TO FISH FOR MORE GROUNDS FOR A MISTRIAL BUT HERE ALL WE HAVE IS A JUROR WHO SAYS THAT I LISTENED TO OTHER JURORS AND WAS PERSUADED TO JUST RELY ON THE PHYSICAL EVIDENCE.

THERE IS NO JURY MISCONDUCT, LET ALONE, WELL, CLEARLY IT

INHERES IN THE VERDICT.

>> I DON'T THINK HE IS AGAIN
LET'S JUST MAKE SURE WE HAVE A,
AS JUSTICE LEWIS IS SAYING,
WE'VE GOT A DIFFERENT FISH
HERE, A DIFFERENT ANIMAL OR
WHATEVER BECAUSE WE DO HAVE,
AND WE'VE GOT CASES THAT ARE
BIFURCATED OTHER THAN
CAPITAL CASES BUT WE ARE
TALKING ABOUT A DEATH CASE AND
SO YOU KNOW WHERE THERE'S A --
WE GOT DIFFERENT NUMBER OF
JURORS WE HAVE GOT DIFFERENT
CONSIDERATIONS THAT WE WANT TO
MAKE SURE THAT THE INTEGRITY OF
THE PROCESS IS PRESERVED.

AND SO I DON'T THINK THAT TO
SAY THAT IT WAS, THE JURY --
YOU KNOW, THAT I AGREE THAT
THIS DOESN'T LOOK LIKE
SOMETHING THAT YOU SHOULD'VE
RESULTED IN A MISTRIAL BUT WHEN
YOU TALK ABOUT MISCONDUCT,
AGAIN, YOU WOULD AGREE THAT
THOSE CASES THAT TALK ABOUT
MISCONDUCT OCCUR AFTER THE JURY
IS DISCHARGED AND SOMEONE IS
TRYING TO GET A NEW -- TRYING
TO GET A NEW TRIAL BECAUSE IT
IS SOMETHING THAT HAPPENED IN
THE JURY ROOM, CORRECT?

>> YES, MA'AM, AND SOME OF THE
MISCONDUCT INHERES AND SOME OIT
DOESN'T.

>> RIGHT BUT SO WHEN WE WERE
TALKING ABOUT POLLING A JURY,
OR, AND WE ARE NOT TALKING
ABOUT, WE ARE INCLUDING MATTERS
THAT COULD INHERE IN THE
VERDICT, THINGS THAT HAPPENED
DURING THE DELIBERATION.

>> HERE --, AND I BELIEVE YOUR
HONOR HAS ALREADY POINTED THIS
OUT, THIS IS FUNCTIONALLY
IDENTICAL TO AN ARMED ROBBERY
CASE, THE JURY RETURNS A
VERDICT S POLLED, IT'S FILED,
AND THEY'RE TOLD TO GO HOME.
IT'S EXACTLY WHAT HAPPENED
HERE.

>> WELL, DON'T YOU -- LET ME
AGAIN, AND I DON'T WANT TO
BECAUSE I'M BASICALLY ON YOUR

SIDE ON THIS ONE, SO, BUT I
WANT TO MAKE SURE THAT WE'VE
GOT A CLEAR RULE --
>> I DON'T WANT TO DISSUADE
YOU, YOUR HONOR.
[LAUGHTER]
>> IS THAT IT'S NOT THE SAME
BECAUSE THEY'RE NOT
DISCHARGED.
THEY ARE TOLD THEY ARE GIVEN
INSTRUCTIONS ABOUT WHAT TO DO.

I THINK IT DOES MAKE A
DIFFERENT IF THE JUDGE, SAY
AGAIN, IT'S THAT THE NEXT
MORNING AND THE JUDGE SAYS YOU
KNOW I SAID THIS BUT MY
CONSCIOUS IS IS TELLING ME THAT
-- CONSCIENCE IS TELLING ME
THAT TERRIBLY SOMETHING WENT
WRONG IN THERE I THINK WE ARE
GOING TO LOOK AT IT DIFFERENTLY
THAN IF THE JURY HAD BEEN
DISCHARGED AND NOTHING ELSE WAS
LEFT TO FOR THEM TO DO BUT I
DON'T KNOW THAT WE HAVE TO
REACH THAT --

>> AND OF COURSE IT IS ONE OF
THE STATE'S MAIN THAT
IT WAS NOTHING LEFT TO DO IN
THE -- MAIN ARGUMENTS THAT
THERE WAS NOTHING LEFT TO DO IN
THE GUILT PHASE, NOTHING
WHATSOEVER.

IT WAS DONE HENCE THE VERDICT
WAS RENDERED.

>> IF THAT'S THE CASE, COULD
THE DEFENDANT HAVE AT THAT
POINT FILED ANY KIND OF MOTION
CONCERNING THE GUILT PHASE?
COULD THE DEFENDANT AT THAT
POINT HAVE FILED A MOTION FOR
NEW TRIAL OR --

>> IN FACT THEY DID LATER ON.
>> THINGS THAT HINDERED DURING
THE COURSE OF THE GUILT PHASE
OR DID THE DEFENDANT HAVE TO
WAIT UNTIL THE PENALTY PHASE
WAS FILED BEFORE HE
COULD FILE SUCH A MOTION.

>> WELL, I, I WOULD THINK HE
COULD FILE -- IF JUROR
MISCONDUCT, SAY, EXTERNAL
MISCONDUCT, --

>> NO, I'M NOT TALKING ABOUT ANY MOTION BASED ON JUROR MISCONDUCT.

I AM TALKING ABOUT A MOTION FOR NEW TRIAL BECAUSE SOMETHING THE PROSECUTOR DID WAS IMPROPER AND THEREFORE THE DEFENDANT -- IS ENTITLED TO A NEW TRIAL.

>> I WOULD HAVE TO LOOK AT THE NEW TRIAL RULE.

>> WE CHANGED THAT RULE RECENTLY.

[LAUGHTER]

>> I WOULD HAVE TO LOOK AT THE RULE AND TO BE HONEST WITH YOU.

>> IF YOU ARE SAYING THE GUILT PHASE IS OVER AND IT'S DONE WITH, THEN, --

>> THEN I WOULD THINK THAT THERE COULD BE SOME MOTIONS FILED.

BUT I'M TALKING OFF-THE-CUFF IN THAT REGARD.

SO I HONESTLY DON'T KNOW THE ANSWER TO THAT BUT I WOULD THINK SINCE THE GUILT PHASE IS OVER THERE COULD BE MOTIONS TO ATTACK THE GUILT PHASE. FILED.

BUT AGAIN THERE WAS NOTHING LEFT TO DO IN THE GUILT PHASE AND OF COURSE AS A MAJOR AND PROCEDURE AND JUDICIAL ECONOMY THEY WAIT UNTIL THE WHOLE TRIAL IS OVER AND THEY CONSOLIDATE IT INTO ONE MOTION AFTER THE TRIAL.

>> CAN I ASK YOU A QUESTION IF YOU KNOW?

OFTEN WE HAVE THE SAME JURY HEARING THE PENALTY PHASE AS WE DO THE GUILT PHASE.

AND SOMETIMES IT MAY BE MORE THAN A WEEK.

BEFORE PENALTY PHASE ACTUALLY STARTS AND IN MOST OF THOSE SITUATIONS THE JURY IS JUST DISMISSED AND TOLD TO GO HOME AND NOT LOOK AT TV AND NOT READ THE NEWSPAPERS AND ALL THAT BEFORE THEY COME BACK.

>> YES, MA'AM.

>> THAT'S HOW IT'S NORMALLY

DONE.

>> YES, MA'AM.

I THINK I MEAN I'M NOT SAYING
THEY'RE NOT EVER SEQUESTERED
AND I DON'T KNOW THE STATISTICS
ON THAT BUT IN THIS PARTICULAR
CASE THEY WERE SENT HOME THEY
WERE ALLOWED TO TAKE THEIR
JUROR BUTTONS AND THEY WERE
TOLD NOT TO TALK ANYBODY OR
WATCH TV.

IF YOU READ THE NEWSPAPER MAKE
SURE YOU CUT OUT THE ARTICLES,
SO ON.

THE CAUTIONARY INSTRUCTIONS BUT
SO AGAIN EVERYTHING WAS DONE,
COMPLETED AS TO THE GUILT
PHASE.

THERE WAS NOTHING LEFT TO DO.
AND THAT'S IN FACT WHAT
TRIGGERED THE PENALTY PHASE TO
BEGIN.

THE TEST I HAVEN'T SEEN ANY OR
ANY POLICY THAT SUGGESTS WE
HAVE TO WAIT UNTIL THE PENALTY
PHASE EVIDENCE STARTS AS
OPPOSING COUNSEL ARGUES TO ME.

THAT'S COMPLETELY DIVORCED FROM

--

>> SO THE JURY REALLY HAVE BEEN
BROUGHT BACK TO BEGIN THE
PENALTY PHASE WHEN THIS JUROR
CAME IN --

>> EIGHT DAYS LATER, YES, SIR.

>> TO SAY I HAVE SOME PROBLEM
AND I WANT TO SEE THE JUDGE.

>> YES, MA'AM.

EIGHT DAYS LATER.

AND THEN IN THE INTERIM THERE
WERE A COUPLE OF PENALTY PHASE
HEARINGS AT WHICH STIPULATION
-- AT LEAST ONE STIPULATION WAS
ENTERED INTO BY THE PARTIES
REGARDING THE PENALTY PHASE, SO
PENALTY PHASE WAS, WAS, I MEAN,
THERE WASN'T ANY EVIDENCE
PRODUCED BEFORE JUROR CODEY
CAME -- CODY CAME FORWARD BUT
PENALTY PHASE PROCEEDINGS HAD
BEGUN.

GUILT PHASE WAS DONE.

>> I DON'T THINK YOU WANT A

RULE OF LAW THAT'S GOING TO SAY, YOU KNOW, WHAT WAS GOING ON IN THAT WEEK BECAUSE IF THE NEXT MORNING --

>> THAT'S TRUE.

>> -- THEY BROUGHT UP SOMETHING TO DO WITH THE GUILT ISSUE, THE JUDGE WOULD'VE SAID, AS JUSTICE -- PROBABLY, GOING TO WAIT FOR -- THAT'S GOING TO WAIT FOR THE END OF THE PENALTY PHASE.

>> ABSOLUTELY.

THE STATE'S POSITION IS ONCE THAT VERDICT WAS FILED, RENDERED, AS YOUR HONORS ALREADY POINTED OUT, THE GUILT PHASE WAS OVER.

>> I THINK WHAT WEAL REALLY -- YOU KNOW, I THINK THE -- BUT IT'S NOT REALLY THE QUESTION OF THE GUILT PHASE IS OVER.

IT IS WHETHER BECAUSE IT IS WHETHER THE RIGHT TO POLL A JURY OR FOR A JUROR TO RECEDE FROM THE VERDICT.

CAN OCCUR AFTER THE VERDICT IS RECORDED AND THE JURY IS DISCHARGED.

THE RULE ITSELF IS DERIVED FROM A COMMON LAW RIGHT.

AND SO THAT IS WHAT I THINK, I THINK IT IS PROBABLY NOT THE FACT OF THE GUILT PHASE BEING, QUOTE, OVER.

IT'S WHAT THE RULE DEFINES WHICH IS BASED ON THE COMMON LAW ABOUT WHAT THE JURORS AND THE DEFENDANT'S RIGHT IS.

THAT IS THE DEFENDANT'S RIGHT TO POLL THE JURY AND THE JUROR'S RIGHT TO RECAN THE VERDICT FOR MATTERS THAT MIGHT INHERE IN THE VERDICT.

ISN'T THAT WHAT WE'RE REALLY TALKING ABOUT.

>> YES, MA'AM, AND I THINK WE NEED TO ALSO LOOK AT, WELL, HERE WE HAD A WEEK GAP. WHAT ABOUT A MONTH GAP? SO YOU SEND THE JURORS HOME, AND YOU, YOU TRY TO KEEP THEM FROM BEING CONTAMINATED BUT HERE THEY ARE AT HOME

RETHINKING EVERYTHING THAT HAPPENED, BEING CONCERNED ABOUT THE PENALTY PHASE THAT'S COMING UP.

BEING VERY WORRIED ABOUT HAVING TO SIT ON THE PENALTY PHASE.

THE CONSCIENTIOUS JURORS.

AND WE'RE GOING TO ESTABLISH A

RULE OF LAW THAT SAYS, HEY,

BRING UP ANYTHING,

ANYTHING -- IF YOU BRING UP

ANYTHING, ANYTHING THAT EVEN

PROPER IN THE DELIBERATIONS

WHERE YOU HAVE SECOND THOUGHTS,

-- EVEN IS PROPER IN THE

DELIBERATIONS WE'RE GOING TO

REVISIT EVERYTHING.

THE ONLY THING PRESERVATIVE

MISTRIAL.

WE'RE GOING TO GRANT A MISTRIAL

IF YOU COME BACK AND SAY, HEY,

THAT'S NOT MY VERDICT.

I CHANGE MY MIND.

HERE IT WAS ONLY A WEEK BUT AS

YOUR HONORS POINTED OUT,

SOMETIMES SEVERAL WEEKS.

THAT WILL OPEN UP I WILL SUBMIT

YOUR HONOR A CAN OF WORMS.

>> REALLY WHAT YOU ARE SAYING

IS THE ONLY WAY THIS IS

WORKABLE IS THAT IF YOU HAVE

THE BRIGHT LINE RULE THAT ONCE

THE VERDICT IS, IS RETURNED,

THAT THE VERDICT IS NO LONGER

IN THE HANDS OF A JURY TO

IMPEACH OR TO DO ANYTHING WITH,

AND THEN THE NEXT STEP IS WHAT

HAPPENS, IT BECOMES THE RULE,

THE RULE OF LAW IS IT'S TREATED

FOR A MOTION FOR A NEW TRIAL OR

REHEARING IN SOME FASHION.

>> AND THEN --

>> AND IT GOES FROM THERE.

>> THEY HAVE TO BRING UP

MISCONDUCT TO THE LEVEL OF

EXTERNAL FORCES.

>> IT SEEMS TO BE ONLY UNDER

THESE RULES IT SEEMS TO BE THE

ONLY WORKABLE RULE I'VE HEARD

THIS MORNING THAT BECAUSE IF

NOT, IT JUST, IT DOES HANG --

AND THAT GOES BACK TO THE

COMMON LAW TRADITION OF IT'S NO

LONGER IN THE HANDS OF THE JURY

ONCE THEY GIVE IT TO THE COURT.

>> EXACTLY, YOUR HONOR.

>> THAT'S REALLY --.

>> ONCE THAT WORTH IS --
VERDICT IS FILED ON JANUARY
29th, EIGHT DAYS BEFORE JURY
CODY -- JUROR CODY CAME
FORWARD.

>> YES, SIR, IF THERE ARE NO
OTHER QUESTIONS, THANK YOU AND
PLEASE AFFIRM THE TRIAL COURT,
THE TRIAL COURT DID THE RIGHT
THING.

BENT OVER BACKWARDS.
EXERCISES ABUNDANT CAUTION AND
MERITS AFFIRMANCE.
THANK YOU.

>> THANK YOU.

MR. TASSONE.

>> MAY IT PLEASE THE COURT.
I WOULD FIRST LIKE TO REPLY TO
JUSTICE ANSTEAD'S QUESTION, I
THINK IT WAS JUSTICE ANSTEAD
WHO SAID WHAT DID THE COURT DO
WRONG?

I THINK WHAT JUDGE ARNOLD DID
WRONG WAS CONTINUE THE INQUIRY
TO THE PENALTY PHASE.

SO HE QUESTIONS JUROR CODY
AFTER THE GUILT PHASE AND THEN
COUNSEL FOR MR. SIMPSON
TO INTERVIEW JURORS.

THE JUDGE DENIES THAT.
HE TAKES THE MOTION FOR
MISTRIAL.

I THINK UNDER ADVISEMENT AND
THEN THERE'S MORE QUESTIONS OF
CODY JUROR AFTER THE PENALTY
PHASE.

>> WAS THERE AN OBJECTION TO
THAT?

>> I DON'T RECALL THAT,
JUSTICE CONVINCED.

I DON'T RECALL WHETHER THERE
WAS AN -- JUSTICE QUINCE.

I DON'T RECALL WHETHER THERE
WAS --

>> WOULDN'T THAT BE IMPORTANT
WHETHER THERE WAS SOME ERROR IF
DEFENSE COUNSEL SAT THERE AND
ALLOWED THE QUESTIONING OF THE
JUROR TO TAKE PLACE, THEN WHAT
ERROR IS THERE AND HOW COULD

THE TRIAL JUDGE HAVE CORRECTED
THAT IF THERE WAS NO OBJECTION?

>> WELL, I, YOU KNOW, I'VE BEEN
ON BOTH SIDES OF THE TRIAL
BENCH AND THE APPELLATE BENCH.

I'M A BETTER TRIAL LAWYER AS AN
APPELLATE LAWYER THAN VICE
VERSA AND CLEARLY I THINK
THERE'D SHOULD'VE BEEN SOME
TYPE OF MOTION BY -- THERE
SHOULD'VE BEEN SOME TYPE OF
MOTION BY THE COUNSEL FOR
DEFENDANT, BUT FOR A COURT TO
SIT THERE AND HOLD THIS OPTION
OPEN, WHETHER IS THIS YOUR
VERDICT OR NOT, THE COURT
SHOULD'VE RULED AFTER THE
INQUIRY.

THE COURT DIDN'T RULE.

THEN COMES BACK.

WE HAVE THE PENALTY PHASE,
WHERE WE HEAR ABOUT THE
SPECIFICS OF THE EIGHT FELONY
CONVICTIONS OF MR. SIMPSON AND
THEN THE COURT SAYS WELL,
MRS. CODY, IS THIS, IS THIS NOW
YOUR VERDICT?

OH, OF COURSE IT IS.

THAT'S THE PROBLEM WITH THIS
CASE.

>> WAIT A MINUTE.

IT SEEMS TO ME WE HAVE TO
ANSWER THAT THRESHOLD QUESTION.

IS IT STILL OPEN?

OPEN FOR QUESTION BY A JUROR
AFTER THE JURY HAS RETURNED,
THEY HAVE BEEN POLLED, AND THE
VERDICT HAS BEEN RECORDED SO I
MEAN THAT'S REALLY THE
THRESHOLD ISSUE BECAUSE IF THIS
ALL OCCURS BEFORE THAT HAPPENS,
THEN IT SEEMS TO ME YOU'RE
CORRECT.

>> BUT YOUR ARE BUND {YA} THAT.

-- BUT YOU'RE BEYOND THAT.

>> RESPECTFULLY, JUSTICE LEWIS,
THERE IS NO, IT DOESN'T FIT
INTO THAT NEAT PIGEONHOLE.

>> WHY IS NOT NOT?

THAT'S WHAT I WANT TO KNOW.

>> BUT THE COURT ITSELF KEPT THIS ISSUE OPEN, SO IF THE -->> BUT YOU MAY BE MISPLACING SOME OF OUR COMMENTS HERE FOR QUESTIONS.

I THINK YOU CAN SEE BY OUR QUESTIONS THAT WE'RE NOT RELYING ON AFTER THE FACT, AFTER THE PENALTY PHASE IS OVER AFFIRMATION BY THIS JUROR THAT THIS -- IT'S A FEMALE JUROR, IS THAT CORRECT.

>> YES, YOUR HONOR.

>> THAT THIS IS HER VERDICT. THAT IS WHAT YOU'RE TALKING ABOUT WITH THE TRIAL JUDGE WAITING TO RULE ON -- WHAT WE'RE SEARCHING FOR IS RULE TO COME OUT OF, OF THIS CIRCUMSTANCE THAT WE CAN APPLY RATIONALLY THEN OF ALL SITUATION -- IN THE FUTURE AND THAT'S, WE'RE STRUGGLING, YOU KNOW, WITH THIS, SO REALLY THAT'S IN THE LIMITED AMOUNT OF TIME THAT YOU HAVE LEFT, HOW ABOUT HELPING US WITH THAT? THAT IS WHAT, WHAT, WHAT RULE WOULD YOU LIKE TO SEE COME OUT OF THIS OBVIOUSLY YOU REPRESENT A CLIENT HERE.

BUT THE, THAT WOULD FIT, THAT IS BECAUSE YOU'VE HEARD A LOT OF DISCUSSION ABOUT THE FACT THAT ORDINARILY WHEN THE VERDICT IS RECEIVED NOW WE'RE TALKING ABOUT THE WEEK PORE TWO WEEKS OR WHENEVER THE -- WEEK OR TWO WEEKS OR WHENEVER, ARE WE GOING TO LEAVE THIS THING OPEN.

TO A JUROR COMING BACK WHAT RULE WOULD YOU LIKE TO SEE COME OUT OF THIS CASE BASED ON WHAT HAPPENED HERE?

>> I WOULD LIKE TO SEE THE BRIGHT LINE RULE THAT THAT VERDICT BECOMES FINAL WHEN IT'S REPORTED -- RECORDED OR AFTER THE POLLING AND IT'S HANDED TO THE CLERK FOR RECORDING.

>> SO YOUR RULE WOULD BE THAT THE, UNTIL THE PENALTY PHASE IS COMPLETED?

EY, NO SIR.

>> OH, NO, SIR.

>> THAT'S WHAT HAPPENED HERE,
WASN'T IT.

>> NO BUT THERE ARE TWO VERDICT
FORMS IN THIS CASE.

IN ANY CAPITAL CASE, ONE AS TO
THE FINDING OF GUILT OR
INNOCENCE.

>> RIGHT AND THAT WAS RECORDED.

>> AND THAT'S WHAT I MEAN.
IF I HAD TO SEE A BRIGHT LINE
RULE, THEN I WOULD SUGGEST THAT
IT BE THAT THAT VERDICT AS TO
THE GUILT PHASE IS FINAL, WHEN
IT'S RECORDED BY THE CLERK.

>> AND THAT WAS DONE HERE.

>> THAT WAS DONE BUT IT WAS NOT
DONE IN OUR OPINION ACCORDING
TO THE RULE BUT THERE IS IS NO
RULE AS TO WHEN THAT VERDICT
BECOMES FINAL IN A DEATH
PENALTY CASE AND I SUGGEST THAT
IF THERE IS A --

>> WAIT A MINUTE.

I DON'T UNDERSTAND THE ARGUMENT
SO PLEASE YOU SEEM TO BE MAKING
AN IMPORTANT POINT AND I DON'T
UNDERSTAND IT.

>> WHAT I'M -- YOU KNOW, WE'VE
ALWAYS KNOW THAT DEATH IS
DIFFERENT.

THERE ARE TWO VERDICTS RENDERED
IN A DEATH PENALTY CASE.

I'M NOT SUGGESTING TO YOU THAT
THE GUILT PHASE VERDICT BECOME
FINAL UPON THE SUBMISSION AND
RENDERING OF THE PENALTY PHASE
RECOMMENDATION.

I'M SUGGESTING TO YOU THAT THE
GUILT PHASE VERDICT BECOME
FINAL UPON BEING RENDERED BY
THE JURY AND --

>> ISN'T THAT WHAT HAPPENED
HERE.

>> THAT IS WHAT HAPPENED HERE,
HOWEVER THE COURT SAID, THE
COURT SAID AND THE PROBLEM THAT
I HAVE IS THAT I THINK THAT
WHAT I'M CONCERNED ABOUT IS THE
ABIDING CONVICTION OF GUILT AND
THE COURT'S ERROR IN, I SUGGEST
TO YOU IN KEEPING THE ISSUE

OPEN, UNTIL AFTER THE PENALTY PHASE.

>> BUT DID THE COURT REALLY -- HOW CAN THE COURT, IF WE ACCEPT YOUR PROPOSITION THAT THE GUILT PHASE WAS FINAL AT THE RECORDING OF THE VERDICT THEN HOW CAN THE COURT EVEN KEEP IT OPEN UNTIL IT'S FINAL?

>> IT SEEMS TO ME YOUR ARGUMENT IS THE SAME AS THE STATE'S ARGUMENT.

THIS WAS A FINAL VERDICT. AT THE TIME JUROR CODY CAME FORWARD.

>> EXCEPT THAT THAT WAS NOT THE RULE AT THE TIME.

AND WHAT I'M PROPOSING THAT THIS BRIGHT LINE IS NOT, WAS NOT THE RULE AT THE TIME.

>> OH, I SEE.

>> YOU DON'T THINK THE RULE THAT TALKS IN TERMS AND WE HAVE BEEN DISCUSSING THIS MORNING SPEAKS IN TERMS UP UNTIL THE VERDICT -- UNTIL THE TIME THE VERDICT WAS RECORDED.

>> NO, SIR.

THEY USE DIFFERENT WORDS. THEY USE RENDERED, THEY USE ENTERED AND THEY USED DISCHARGED.

>> ISN'T RENDERED REDUCED TO WRITING AND FILED?

>> WELL, I VIEW THAT AS REDUCED TO WRITING.

I DON'T KNOW ABOUT IT MEANING FILED.

>> WELL, WHAT IS THE MEANING OF THE TERM-ROUNDERED?

>> THAT THEY HAVE -- I VIEW IT AS RETURN A VERDICT.

THAT'S MY DEFINITION OF RENDERED.

>> WELL, IN THIS CASE, THEN IT HAPPENED.

>> AND I AGREE BUT THAT IS NOT WHAT THEY HAVE IN RULE 3.440 AND 3.450.

IT IS A CONJUNCTIVE TERM RATHER THAN A

DISJUNCTIVE TERM SO IT WAS ENTERED AND DISCHARGED.

>> SO IT'S THE DISCHARGE PART?

IS THAT WHAT YOU'RE TALKING ABOUT.

>> YES, SIR.

>> SO AGAIN IT COMES BACK TO THE JURY BEING DISCHARGED.

>> YES, SIR.

>> OKAY AND THEN YOU WOULD SAY THE JURY'S NOT DISCHARGED UNTIL AFTER THE PENALTY PHASE UNDER THE CURRENT RULE?

>> CORRECT.

>> OKAY.

>> SO YOU'RE -- SO

YOU'RE -- LET ME SEE IF I

UNDERSTAND YOU AGAIN.

YOU'RE SAYING THIS RULE SHOULD SAY INSTEAD OF EVEN TALKING ABOUT DISCHARGE, IT SHOULD SIMPLY SAY THAT ONCE THE VERDICT IS RENDERED THAT THAT'S WHEN THE GUILT PHASE IS FINAL?

>> YES.

I BELIEVE, I BELIEVE THAT THAT'S WHAT THE RULE SHOULD SAY.

BUT DID NOT SAY AT THE TIME OF MR. SIMPSON'S TRIAL?

>> AND YOU BELIEVE THAT THE RULE SAYS NOW THAT THE WAY IT IS AT THE TIME OF MR. SIMPSON'S TRIAL WAS THAT IT HAD TO BE DISCHARGED IN ORDER TO BE FINAL?

>> YES.

>> IS THAT --

>> YES.

>> MAYBE WE'RE LOOKING AT A DIFFERENT RULE.

I JUST WANT TO MAKE SURE.

MY RULE SAYS IF THE JURY'S DISCHARGED OR THE VERDICT'S RECORDED?

DOES YOURS SAY THE VERDICT IS DISCHARGED AND THE VERDICT RECORDED.

>> THERE IS PROVISION OF 3.440.

NO JURY VERDICT MAY BE RENDERED UNTIL ALL JURORS AGREE WITH IT AND I BELIEVE THAT'S PART OF 3.440.

AND I GUESS THE QUESTION IS,

AND IT GOES BACK TO JUDGE
LEWIS, AT WHAT POINT DOES THE
QUESTIONING STOP?

I SAID TO YOU THAT IF I HAD
TO CREATE A RULE AFTER LOOKING
AT THIS SITUATION, IT WOULD BE
AT THE TIME THAT VERDICT IS
RECORDED --

>> BUT WE NEED TO WORK WITH THE
RULE, AS YOU SAID, IN EFFECT AT
THIS TIME.

>> THAT'S CORRECT.

>> BUT THAT DID NOT HAPPEN IN
THIS CASE.

>> WE THANK YOU VERY MUCH FOR
YOUR ARGUMENT.

>> BOTH OF YOU.

>> THANK YOU.