THE NEXT CASE ON OUR DOCKET
IS COMPANIONI VS. THE CITY
OF ATLANTA.
>> GOOD MORNING MAY IS LASE
THE COURT, I AM JOEL EATON,
THIS IS WHO REPRESENTED
MR. COMPANIONI IN THE
DISTRICT COURT.
HE WAS INJURED IN A
MOTORCYCLE WITH A CITY OF
TAMPA WATER TRUCK.
DURING THE COURSE OF THE
TRIAL, CITY'S COUNSEL
COMPLAINED THE PLAINTIFF'S
COUNSEL MISCONDUCT IN
SEVERAL RESPECTS.
THEY OBJECTED, THE TRIAL
JUDGE SUSTAINED THE
OBJECTIONS, NO MOTIONS FOR
MISTRIAL MADE.
THE TRIAL JUDGE ALL BUT
INVITED COUNSEL FOR THE CITY
TO MAKE A MOTION FOR
MISTRIAL ON FOUR SEPARATE
OCCASIONS, COUNSEL FOR THE
CITY DECLINED TO DO SO, HE
CHOOSE TO WAIT AND SEE WHAT
RESULT IN THE CASE WOULD BE
CONFIDENT THAT HE WAS GOING
TO WIN BASED ON THE
EVIDENCE, BUT HE LOST.
AND THE JURY RETURNED A
VERDICT FAVORABLE TO
MR. COMPANIONI, THE CITY
MOVED FOR A NEW TRIAL, THE
TRIAL JUDGE WROTE AN ORDER
IN WHICH HE SAID COUNSEL FOR
TRIAL DID ENGAGE IN
MISCONDUCTS.
THE CITY WAS DEPRIVED OF A
FAIR TRIAL, BUT THE

COMPLAINTS WERE NOT FOR
REVIEW BECAUSE THERE WAS NO
MOTIONS FOR MISTRIAL MADE,
AND DO I NOT FIND THAT
PLAINTIFF'S COUNSEL
MISCONDUCT AMOUNTED TO
FUNDAMENTAL ERROR, IT DID
NOT SO UNDER MINE THE
CONFIDENCE IN THE JUDICIAL
SYSTEM, THE FUNDAMENTAL
ERROR AND I DENY THE MOTION
FOR NEW TRIAL.
>> THE POINT IS THEY WAIVED
ANY ABILITY TO GET A NEW
TRIAL BASED ON THE LESSER
STANDARD BY NOT MOVING FOR A
MISTRIAL BEFORE.
WHAT WOULD BE THE STANDARD
IF THEY MOVED FOR A
MISTRIAL, WHAT'S THE
STANDARD FOR DURING THE
TRIAL FOR THIS MISTRIAL TO
BE GRANTED?
IS IT WHAT THE JUDGE SAID
THAT IS, THAT HE DENIED THE
RIGHT TO A FAIRER TRIAL?
>> YOU'RE NOT READY TO
ANSWER THAT?
>> I SMILE BECAUSE YOU USED
WORD FOR STANDARD, IT'S A
DIGRESSIONARY RULING, AND
IT'S HARD TO SAY WHAT THE
STANDARD IS.
>> THE STANDARD OF REVIEW IS
DISCRETION, BUT I THINK WE
HAVE USED WORDS ABOUT WHAT
HAS TO BE TO GRANT EVEN A --
>> THIS IS NOT SOMETHING
THAT I BRIEF, BUT FROM MY
RECOLLECTION.
>> WELL THEN DON'T.
>> A MISTRIAL IS SOMETHING

THAT HAS TO BE INCURABLE, CANNOT BE CURED WITH INSTRUCTION AND SO HARMED THE INTEGRITY OF THE TRIAL THAT IT HAS TO BE STOPPED IN IT'S TRACKS.
THE COURT LAID OUT RECENTLY IN THE MURPHY VS. --
>> THE ERROR IS SO PREJUDICIAL THAT THE PARTY IS DENIED A RIGHT TO A FAIR TRIAL.
THE JUDGE FOUND IN THIS CASE FOR A MOTION FOR NEW TRIAL, THAT THE DEFENDANT HAD MET THAT STANDARD.
AND WHEN I READ THAT STANDARD, THAT SOUNDS REMARKABLY LIKE, AT LEAST IN A CRIMINAL CASE, THE STANDARD WE USE FOR FUNDAMENTAL ERROR, THAT IT'S SO PERVASIVE AND PREJUDICIAL THAT THE INJURED PARTY IS DENIED A RIGHT TO A FAIR TRIAL.
I'M WORRIED WE'RE MIXING CIVIL AND CRIMINAL AND WHAT WE'RE SAYING CONSTITUTES FUNDAMENTAL ERROR WHERE SOMEONE GETS A NEW TRIAL.
>> IN THE 35 YEARS THAT I'VE BEEN PRACTICING, THE TERM FUNDAMENTAL ERROR IS WHAT THEY TAUGHT US IN HAD LAW SCHOOL WAS THE LENGTH A TRANSFER IS PUT.
THEY RESOLVED THE CONCEPT OF FUNDAMENTAL ERROR IN THE MURPHY CASE.
IT NOW HAS A STANDARD, IT'S NOT HOW LONG IS THE

CHANCELLOR'S FOOT, IT'S NOT
HOW AGGRAVATED THE COURT IS.
IN ORDER TO MOVE ERROR AFTER
MURPHY, YOU HAVE TO PROVE
FOUR THINGS TO THE
SATISFACTION OF THE TRIAL
JUDGE.
THAT THE CONDUCT WAS
IMPROPER, HARMFUL,
INCURABLE, AND IT SO
DAMAGE'S THE TRIAL THAT THE
PUBLICS CONFIDENCE IN THE
JUDICIAL SYSTEM IT CHANGED.
>> THAT'S NOT WHAT I RECALL
TO BE THE STANDARD IN A
CRIMINAL CASE.
THERE HAS TO BE WHAT THE
PUBLIC'S CONFIDENCE IS
IMPAIRED.
WE'RE LOOKING AT WHETHER THE
DEFENDANT IN A CRIMINAL
CASE, THE DEFENDANT'S RIGHT
TO A FAIR TRIAL HAS BEEN
COMPROMISED.
>> WELL YOU KNOW ME, JUDGE,
I'VE BEEN HERE SO MANY
TIMES, YOU KNOW I DON'T KNOW
A THING ABOUT THE CRIMINAL
LAW.
>> BUT YOUR POINT HERE IS
THAT WE HAVE TO TREAT THIS
CASE AS IF THEY HAD NOT MADE
--
AS IF ANY FURTHER OBJECTION
WAS MADE.
BECAUSE AFTER EACH
OBJECTION, WHICH WAS
SUSTAINED, THEY HAD AN
OPPORTUNITY TO MOVE FOR A
MISTRIAL, AND IN FACT, AS
YOU PUT IN YOUR BRIEF, THE
JUDGE NOT ONLY ASKED THEM,

BUT THEY SAID NO, I DON'T
THINK I'VE BEEN SO PREJUDICE
THAT CAN'T BY REMEDIES SO
THEY WAIVED A RIGHT FOR A
MISTRIAL.
>> WHAT JUDGE SAID IN
ESSENCE, NOT EXACTLY HIS
WORDS, BUT BASED ON A NORMAL
STANDARD OF REVIEW, IF IT
HAS BEEN PRESERVED --
>> THE STANDARD MOTION FOR
MISTRIAL WOULD BE THE SAME
BEFORE, AS AFTER.
BECAUSE IN CASE WHERE'S THEY
CAN RESERVE, BASED ON THE ED
RICKS CASE, THE JUDGE
USUALLY WOULD SAY, MOTION
FOR MISTRIAL I'LL RESERVE,
AND I THINK IT WOULD BE THAT
STANDARD THAT THE JUVENILE
WOULD APPLY IN DECIDING
WHETHER TO GRANT A MISTRIAL
OR A NEW TRIAL.
>> THERE IS NO APPELLANT
REVIEW.
THERE AREN'T ANY CASES
INVOLVING, AND THIS TRIAL
WAS GRANTED DURING TRIAL.
ALL THE CASES DEALING WITH
MISTRIALS ARE CASES WHERE
JUDGES DENIED MOTIONS FOR
MISTRIAL AND THEY COME TO AN
APPELLANT COURT AND THERE IS
NO USE OF DISCRETION.
SO THAT'S A FUZZY AREA IN
THE RAW.
>> IT'S NOT THAT FUZZY
BECAUSE WE REFER TO HAGAN
IT'S SO PREJUDICE --
>> FOR PRESERVED ERRORS.
>> THAT WOULD SEEM TO ME,
I'M SORRY TO USE MORE OF

YOUR TIME.
THAT WOULD SEE TO ME TO BE
THE STANDARD OF MOTION FOR
MISTRIAL IF IT WAS
PRESERVED.
>> CAN WE GO TO WHAT REALLY
APPEARS TO BE THE HEART OF
THE DISPUTE HERE.
>> WE GO TO THE HEART OF
WHERE THE DISPUTE IS, AND
THAT IS THE CASES SEEM TO BE
LEGION.
THAT TO BE ABLE TO TAKE THIS
MUCH ON APPEAL, YOU DO HAVE
TO MOVE FOR A MISTRIAL.
DO YOU GREEN WITH THAT?
>> THAT'S SETTLED.
>> SO THE QUESTION IS THERE
A DIFFERENT RULE WITH A
REGARD TO A NEW TRIAL?
SHOULD THERE WILL BE?
WHY SHOULD THERE NOT BE.
THAT'S REALLY WHERE WE ARE
HERE, THAT'S THE GRAY AREA
IS SEEMS TO ME.
IS IT A DIFFERENT STANDARD?
IS IT THE SAME?
WHAT IS IT WHEN IT'S AT THE
NEW TRIAL STAGE, MOTION FOR
NEW TRIAL, AS OPPOSED TO
APPEAL.
WE KNOW THE APPEAL SETTLED
PRETTY CLEARLY.
>> WHAT THE SECOND DISTRICT
HELD IN THIS CASE, BECAUSE
THE ERRORS WERE NOT
PRESERVED DURING TRIAL, HAD
THE JUDGE --
AN APPELLANT COURT COULD NOT
REVERSE.
BUT WE CAN ORDERED A
REVERSAL BECAUSE EVEN THOUGH

THE ISSUES WERE NOT
PRESERVED THE TRIAL JUDGE
HAD THE AUTHORITY TO REVERSE
--
>> THAT SEEMS TO BE WHAT
WE'RE TALKING ABOUT HERE.
THAT'S WHERE THE IT DISPUTE
LIES.
>> WHY SHOULD WE NOT ALLOW A
TRIAL JUDGE, IN YOUR VIEW TO
HAVE THAT POWER?
BECAUSE THIS CONDUCT IS
GOING ON IN THE PRESENCE OF
THAT TRIAL JUDGE.
>> I CITED INDICATIONS FROM
THE VARIOUS COURTS IN THIS
STATE, WHICH SAY THAT A
TRIAL JUDGE HAS TO GREATER
AUTHORITY THAN AN APPELLANT
COURT.
>> THAT'S THE FUNDAMENTAL
PRINCIPAL THAT UNDERSTOOD
MINES ALL THIS --
>> THERE IS AT PRESENT 4
OUTLYING CASES THAT HOLD TO
THE CONTRARY.
>> LET ME ASK YOU THIS.
THE TRIAL JUDGE, IS IN FACT,
THE PERSON WHO SITS THERE
WHEN THE PARTIES MAKE THEIR
OBJECTION THE FIRST TIME HE
HEARD IT, HE HEARD ALL THE
OBJECTIONS THAT WAS MADE --
THAT WERE MADE, AND THE
TRIAL JUDGE WAS THERE TO
SORT OF SEE THE IMPACT OF
HOW ALL OF THIS PLAYED OUT.
SO WHY SHOULDN'T THE TRIAL
JUDGE, WHO INFORMS THAT KIND
OF POSITION, HAVE THE
AUTHORITY AT THE END OF THE
DAY TO SAY LOOK, I HAVE

WATCHED ALL OF THIS.
AND REALLY, THIS --
THIS EVERYTHING THAT WENT ON CUMULATIVELY HAS DENIED THIS DEFENDANT, OR PLAINTIFF, OR WHAT EVERY SIDE IT MIGHT BE A FAIR TRIAL IN THIS CASE.
>> IF A TRIAL JUDGE WAS TO REACH THAT CONCLUSION, THEY WOULD HAVE REACHED THE CONCLUSION THAT FUNDAMENTAL ERROR OCCURRED.
IT MOTIVATES TO --
>> IT'S DISTURBING BECAUSE THE TRIAL JUDGE GETS TO THE POINT OF SAYING ALL THIS MISCONDUCT DID DEPRIVE THE CITY OF A FAIR TRIAL, SO WHY NOT?
>> THE TRIAL JUDGE >> --
THE TRIAL JUDGE TO MAKE THIS RULING.
>> THE TRIAL JUDGE IN THIS CASE SAID THAT I DON'T FIND THAT FUNDAMENTAL ERROR WAS CREATED AND BECAUSE IT WAS NOT CREATED AND A MOTION FOR MISTRIAL, I CAN'T GRANT A NEW TRIAL UNLESS I FIND FUNDAMENTAL ERROR, AND I DON'T FIND IT.
>> IT SEEMS TO ME THAT WHAT HE SAYS IS PRETTY CLOSE TO A FINDING.
>> IT IS BUT THE POINT IS HAD IT GONE TO THE SECOND DISTRICT ON THE GRANT OF A NEW TRIAL IT WOULD HAVE BEEN REVERSED BECAUSE IT WASN'T RESERVED FOR REVIEW.
>> IT'S SO DIFFERENT TO ME WHEN NOBODY OBJECTS AT ALL

VS.ES WHEN THEY OBJECTED AND
THEN SUSTAINED THE
OBJECTION.
YOU WOULD AGREE THAT A TRIAL
LAWYER, AND THIS CASE IS
IMPORTANT TO PLAINTIFF'S OR
DEFENDANTS, IT MAY HELP OR
HURT THIS IN THIS CASE, BUT
A LOT OF TIMES THEY'RE
LOOKING FOR RELIEF AFTER A
VERDICT GOES AGAINST THEM.
AND I'M CONSIDER CONCERNED,
AND THAT'S ASKED YOU
EARLIER, ABOUT THE STANDARDS
TO EQUATE.
THE STANDARD FOR THE JUDGE
IN GRANTING A NEW TRIAL
AFTER THERE HAD BEEN
REPEATED OBJECTIONS AND THEY
WERE SUSTAINED, TO THE MERCY
STANDARD FOR GRANTING A NEW
TRIAL ON FUNDAMENTAL ERROR.
THERE SEEMS TO BE THAT THEIR
--
THE JUDGE, IS SAYING, THE
REASON WE GAVE THE JUDGE
EVEN THAT AUTHORITY IN
MURPHY, IS BECAUSE THE JUDGE
WAS THERE.
THERE'S SO MANY CASES THEY
TALK ABOUT WHY THEY HAVE
GREATER DISCRETION FOR A NEW
TRIAL OR A MISTRIAL.
SO WHAT IS THE POLICY FOR
WHY WE SHOULD TREAT MOTIONS
WHERE THE JUDGE'S SUSTAIN
THE OBJECTION, AND THERE HAS
BEEN NO MOTION FOR NEW TRIAL
EXACTLY THE SAME AS IF NO
OBJECTION HAD BEEN MADE
DURING THE ENTIRE TRIAL?
>> THE REASON FOR BOTH THE

CONTEMPORARY THERE --
IF YOU DON'T GET, IF YOU GOT THE RELIEF YOU ASKED FOR WHEN YOU OBJECTED, IS THAT YOU GOT TO GET AN ADVERSE RULING FROM THE TRIAL JUDGE BEFORE YOU GOT ANYTHING TO COMPLAIN ABOUT.
NOTHING HAPPENED FOR THE CITY IN THIS CASE BECAUSE THEY DIDN'T MOVE FOR A MISTRIAL.
WE'RE CONTENT TO GO TO THE JURY ON THIS RECORD, DESPITE ALL OF OUR OBJECTIONS, WE'RE GOING TO WAIT AND SEE WHAT HAPPENS AND IF WE GET A VERDICT --
>> THE RICKI CASE, THEY COULD HAVE MOVED FOR A MISTRIAL EVEN ASKED FOR A RULING ON THAT.
THEN THE TRIAL JUDGE WOULD HAVE BEEN IN A POSITION TO DECIDE HOW TO HANDLE THAT, BUT THEY COULD HAVE GOTTEN THE BENEFIT OF MOVING FOR MISTRIAL, AND LETTING THE JURY RULE WITH THE ABILITY OF THE TRIAL JUDGE TO COME BACK.
>> THAT'S A GOOD POINT, AND I ARGUED THAT IT'S INCONSISTENT WITH THE SECOND DISTRICT DECISION IN THIS CASE.
>> THE BOTTOM LINE IS THAT YOU --
WE HAVE TO ASSUME THAT EVEN THOUGH THERE WERE OBJECTIONS TO SUSTAIN, THAT ESSENTIALLY THIS WAS AN ERROR FREE TRIAL

BECAUSE THE JUDGE CURED
THROUGH THE OBJECTION THEY
MADE, AND SUSTAINING THE
OBJECTION, CURED ANY
PROBLEM, AND IF THERE HAD
BEEN AN ADDITIONAL PROBLEM,
THE PARTY NEEDS TO BRING IT
TO THE JUDGES ATTENTION
BEFORE THE VERDICT.
>> YES, BUT THE REASON WHY
AN APPELLANT COURT CAN'T
REVERSE IS THE SAME REASON
THAT SPORTS THE RULE THAT A
TRIAL JUDGE CAN'T ORDER WHEN
A NEW ONE IS PRESERVED AND
THAT IS EXPRESSED IN THE
CASES THAT COUNSEL CAN'T
ALLOW TO WAIT AND SEE WHAT
THE RESULT IS AND IF HE WINS
HE SAYS NOTHING AND IF HE
LOSES HE SPRINGS ON THE
OTHER SIDE AND HE SANDBAGS
THE COURT AND THE OPPOSING
SIDE AFTER THE RESULT IS IN.
ON PAGES 9, 10, AND 11, I
COLLECTED A DOZEN CASES THAT
SAY YOU CANNOT BE ABLE TO
PROVIDE CODE ON A HEADS I
WIN TAILS YOU LOSE BASIS.
THEY GO ON AND ON AND ON.
YOU'RE NOT INTO YOUR
REBUTTAL, YOU CAN CONTINUE
IF YOU LIKE
--
>> LET ME JUST REFER THE COURT
TO -- I THOUGHT THIS QUESTION
WAS PUT TO REST ABOUT 27 YEARS
AGO IN LATE JUDGE DANIEL
PEARSON'S OPINION IN SEARS
ROEBUCK AND CO. V. JACKSON.
>> DIDN'T WE DISAPPROVE OF THAT
IN MURPHY, AND DOESN'T IT HAVE

TO DO WITH AN ERA THAT WAS NEVER OBJECTED TO?
>> THE DISAPPROVAL IN MURPHY WAS LIMITED TO SEARS' HOLDINGS.
THAT REVIEW WAS DE NOVO.
MURPHY SAYS NO REVIEW OF A NEW TRIAL FOR FUNDAMENTAL ERROR IS DISCRETIONARY.
THERE'S NOTHING IN MURPHY THAT TOUCHES ON THE HOLDING OF SEARS ROEBUCK AND CO. V. JACKSON WHICH IS THERE IS NO ORDER FOR AN APPELLATE COURT TO ORDER A NEW TRIAL, AND THERE'S AT LEAST 50 CASES CITED IN MY BRIEF THAT SAY THE SAME THING.
IN THE FOURTH DISTRICT, JUDGE KLEIN WROTE, IT'S CALLED NIGRO V. BRADY.
IT WAS FOLLOWED IN THE SECOND DISTRICT AND ROBINSON V. STATE, IT WAS FOLLOWED IN THIS CASE, AND IT WAS FOLLOWED IN A SUBSEQUENT CASE THAT WAS SENT UP HERE IN A NOTICE OF SUBSEQUENT AUTHORITY.
ONLY FOUR CASES IN THIS STATE OUT OF TWO DISTRICTS THAT HAVE EVER HELD WHAT THESE OTHER 50-PLUS CASES HAVE NOT, AND I'D LIKE TO SAVE MY REMAINING MINUTES.
>> MR. EATON, COULD I ASK YOU ONE QUESTION, AND THAT IS THE SECOND DCA FOUND THAT THE TRIAL COURT WAS WRONG, SO THEY SAID PRESERVATION OCCURRED WHERE THE TRIAL COURT DID NOT.
THE SECOND DCA NEVER GOT TO EVALUATING WHETHER THE TRIAL COURT WAS WRONG IN ITS ANALYSIS, RIGHT?

>> THAT'S CORRECT.
>> WOULDN'T WE HAVE TO REMAND IT BACK TO THE SECOND DCA FOR THEM TO FURTHER EVALUATE WHETHER IT WAS PROPER OR NOT BY THE TRIAL COURT?
>> I'M RELUCTANT TO SUGGEST THAT'S AN APPROPRIATE COURSE BECAUSE WHAT THE CITY ARGUED ON APPEAL WAS THAT THEY HAD TO PROVE FUNDAMENTAL ERROR.
THEY ARGUED FUNDAMENTAL ERROR.
THE DISTRICT COURT DID NOT FIND FUNDAMENTAL ERROR.
THE ONLY THING IT FOUND WAS THE TRIAL JUDGE APPLIED TO WRONG STANDARD, AND IT SENT IT BACK.
BUT THEY'VE ARGUED FUNDAMENTAL ERROR HERE AS A RIGHT FOR THE WRONG REASON RULE.
YOU CAN READ THE SIX THINGS THEY'RE COMPLAINING ABOUT.
TO ME --
>> ISN'T THERE OTHER GROUNDS THAT THE SECOND DISTRICT NEVER REACHED LIKE MANIFEST WEIGHT OF THE EVIDENCE?
I MEAN, WE'RE STILL IN THIS CASE, STILL ON THE QUESTION OF WHETHER A NEW TRIAL SHOULD BE GRANTED.
HAS THERE EVEN BEEN THE FIRST APPEAL OF THE ACTUAL VERDICT OR ARE WE STILL ON POST-TRIAL MOTION IN THIS CASE?
>> I'M SORRY --
>> I MEAN, ISN'T THERE OTHER, WEREN'T THERE OTHER BASES THAT THEY ARGUED THEIR MOTION FOR NEW TRIAL SUCH AS IT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND OTHER GROUNDS?

>> YES, YES, THERE WERE.
>> AND THOSE HAVEN'T BEEN RESOLVED.
>> YOU DON'T HAVE TO SEND EVERY CASE BACK WHEN IT'S DECIDED ON ONE ISSUE.
IN MY JUDGMENT, THEY'RE FRIVOLOUS.
LET'S GET THIS CASE OVER WITH.
MR. COMPANIONI'S BEEN WAITING AN AWFUL LONG TIME FOR JUSTICE IN THIS CASE, AND I'M ABOUT TO RUN OUT OF TIME.
THANK YOU.
>> MAY IT PLEASE THE COURT, RICHARD ZABAK APPEARING FOR THE RESPONDENT.
>> YET THEY MUST NOT HAVE FELT THAT, OR THEY WOULDN'T HAVE TALKED ABOUT JUST THE MOTION FOR NEW TRIAL, WOULD THEY?
>> I DON'T KNOW.
>> I MEAN --
[INAUDIBLE]
>> WELL, INTERESTINGLY, YOUR HONOR, IT'S THE SAME SORT OF THING THAT HAPPENED AT THE TRIAL COURT LEVEL.
IN FACT, THIS CASE HAS BEEN UP AND DOWN TWICE BECAUSE AT THE TRIAL COURT LEVEL INITIALLY THE TRIAL JUDGE -- WE RAISED, I THINK, IT WAS INITIALLY FIVE GROUNDS FOR A NEW TRIAL.
THE TRIAL COURT ONLY ADDRESSED ONE, AND THEN WE WENT BACK AND THE SECOND DCA REMANDED INITIALLY FOR CONSIDERATION OF THE OTHER FOUR.
AND THAT'S HOW THIS CASE COMES TO THIS COURT.
>> I UNDERSTAND.

BUT, AGAIN, AND LET'S BREAK THIS DOWN.
IF THERE HAD BEEN, IF THIS IS TOTALLY AGAINST THE EVIDENCE IN THIS CASE, YOU'RE ENTITLED TO A JUDGMENT, WHY IN THE WORLD WOULD THE SECOND DISTRICT IF THEY THOUGHT THAT THEY HAD THE ISSUE THERE, HAVE SENT IT BACK SAYING YOU'RE ENTITLED TO A NEW TRIAL?
I MEAN, THIS IS JUST, TO ME, IT'S JUST CRAZY.
>> I UNDERSTAND WHAT YOUR HONOR IS SAYING, BUT IN POINT OF FACT THE OPINION IS SILENT ON THE OTHER GROUNDS.
>> WELL, MANY TIMES THEY FOUND IT WITHOUT MERIT, AND THEY JUST DON'T ADDRESS THEM.
I MEAN, I'VE BEEN DOING THIS FOR 35 YEARS, AND THEY DON'T ADDRESS POINTS THAT ARE WITHOUT MERIT.
REALLY, IF YOU'RE ENTITLED TO IT, WE'RE JUST SPINNING JUDICIAL WHEELS.
THAT'S WHAT YOU'RE SAYING, SECOND DISTRICT'S GOING TO RETRY EVEN THOUGH THERE'S NO EVIDENCE.
>> AND I GUESS, JUDGE, WHAT I'M SAYING, UNFORTUNATELY, SOMETIMES THAT OCCURS.
BUT I WILL SAY THIS ON THE SUFFICIENCY OF THE EVIDENCE, THAT ACTUALLY TIES IN REGARDLESS OF WHETHER THIS COURT WANTED TO REVIEW IT AS AN INDEPENDENT GROUND, IT TIES INTO THE GROUND THAT THE SECOND DCA RULED ON.
BECAUSE IF YOU LOOK AT THE ORDER THAT JUDGE BAUMANN ENTERED, THE TRIAL JUDGE, IF YOU LOOK AT THE ORDER THAT HE ENTERED ON WHY HE

FOUND THERE WAS NO -- THE LAST
PRONG IN THE MURPHY CASE.
THE ONLY REASON HE SAID IT
DIDN'T REACH THAT LEVEL WAS
BECAUSE THERE WAS SUFFICIENT
EVIDENCE.
AND, YOUR HONOR, WE ARGUE IN OUR
BRIEF THAT, CLEARLY, THERE IS
NOT SUFFICIENT EVIDENCE HERE.
AND I DON'T WANT TO GET
SIDETRACKED, BUT THERE'S NOT A
SCINTILLA OF EVIDENCE.
THERE'S NO SHOWING WHATSOEVER OF
A SUDDEN AND UNEXPECTED LANE
CHANGE WHICH IS WHAT IS
REQUIRED.
IN FACT, THE EVIDENCE SHOWS HE
GOT SOME SLOW TRUCKS ON THE
HIGHWAY.
>> HAVE YOU -- DID YOU -- HAVE
YOU ALREADY, LIKE, HAS THERE
BEEN AN APPEAL FROM JUST WHETHER
THERE WERE ERRORS DURING THE
TRIAL, OR WAS THAT ALL PART OF
WHAT YOUR APPEAL TO THE SECOND
DISTRICT WAS?
>> NO.
THE FIRST APPEAL HAD TO DO WITH
A TOTALLY INDEPENDENT ISSUE, AND
THAT WAS THAT THERE WERE TWO
JURORS ON THE, THERE WERE TWO
JURORS THAT SAT ON THIS CASE
THAT WERE CONVICTED FELONS THAT
DIDN'T DISCLOSE THEIR FELONIES.
AND THE TRIAL COURT GRANTED A
NEW TRIAL ON THAT GROUND, BUT
THE SECOND DCA DIDN'T FIND A
LINK BETWEEN THOSE TWO JURORS
AND THE RESULTS.
>> GETTING TO THE ISSUE IN THIS
CASE, I MIGHT BE SOMEWHAT
CONVINCED ABOUT THE QUESTION OF

WHEN SOMEONE MOVES FOR A MISTRIAL DURING A TRIAL.
YOU KNOW, YOU'VE GOT A SITUATION WHERE IT'S OPENING STATEMENT THERE'S SOME PROBLEMS AND GO ALONG AND GET WHAT THE JUDGE -- YOU KEEP ON OBJECTING.
THERE COMES A POINT WHEN YOU SEE AS A TRIAL LAWYER THAT WHAT IS HAPPENING NOW IS UNDERMINING THE FAIRNESS OF THE TRIAL, AND THAT'S A, IT'S A STANDARD, BUT IT'S ALSO, IT BECOMES, IT'S A CUMULATIVE ISSUE.
AND, OF COURSE, IN CRIMINAL CASES ALMOST ALL DEFENSE LAWYERS KNOW YOU'VE GOT TO -- WHEN YOU OBJECT AND THAT OBJECTION IS SUSTAINED, YOU THEN MOVE FOR A MISTRIAL.
IT'S, AGAIN, OBJECTION, BUT, YOU KNOW, IT'S OVERRULED, YOU DON'T HAVE TO.
HERE IN PAGE 3 OF THE BRIEF, AND I'M SURE IT'S IN THE RECORD, HE WANTED TO HEAR THE JUDGE -- WHETHER YOU WERE MOVING FOR A MISTRIAL.
AND THE LAWYER SPECIFICALLY SAID, "I'M NOT MOVING FOR A MISTRIAL AT THIS TIME BECAUSE I DON'T THINK MY CLIENT'S BEEN SO PREJUDICED THIS CANNOT BE REMEDIED."
AND THE WHOLE IDEA OF A MISTRIAL IS THAT THE LAWYER BRINGING THIS TO THE JUDGE'S ATTENTION IS SAYING, NOW, I THINK THAT THE CONDUCT OR THE PROBLEMS HAVE BECOME SO PERVASIVE AND WHAT YOU'VE DONE BY SUSTAINING THE OBJECTION CAN NO LONGER BE

REMEDIED, AND NOW I HAVE TO MOVE FOR A MISTRIAL.
AND THEN THE JUDGE DECIDES, WOW, YEAH.
YOU ARE CORRECT.
WHAT HAS HAPPENED HAS UNDERMINED THE FAIRNESS OF THIS TRIAL.
I'M EITHER GOING TO GRANT IT, OR IF IT GETS CLOSE TO CLOSING ARGUMENT -- BUT DOESN'T THIS ALSO DEPEND ON THE FIRST, THE TRIAL LAWYER PROVIDING THE JUDGE WITH THAT OPPORTUNITY BY PRESERVING WHAT THEY SAY IS AN UNFAIR TRIAL AND NOT BEING ABLE TO WAIT UNTIL AFTER A VERDICT COMES BACK?
>> YES, YOUR HONOR, WITH THIS CAVEAT: THE RECORD CITATION THAT YOU MENTIONED, I BELIEVE THAT HAPPENED ON THE SECOND MORNING OF THE TRIAL, RELATIVELY EARLY ON.
IF YOU LOOK AT MR. TERRY'S COMMENTS LATER ON DURING THE COURSE OF THE TRIAL, BECAUSE IT PERSISTED.
THAT'S THE PROBLEM WITH THIS CASE, YOU DON'T HAVE ONE SINGLE --
>> NO.
BUT THEN HE ASKED LATER ON, "IT'S GETTING CUMULATIVE, AND I WANT IT ON THE RECORD."
THE COURT SAYS, "WELL, I SUSTAINED IT."
"DO YOU HAVE ANY OTHER MOTIONS?"
IT'S ALMOST LIKE THE JUDGE IS WAITING, MR. TERRY, DO YOU WANT A MISTRIAL?
AND THAT MAY BE WHAT HAPPENED, THAT THE JUDGE FELT THINGS WERE

GETTING SO UNFAIR THAT HE WAS
GOING TO GRANT IT, AND MR. TERRY
DIDN'T WANT TO DO THAT.
SO I DON'T SEE HOW IT'S
PRESERVED.
I MEAN, INITIALLY I WAS SORT OF
SYMPATHETIC TO YOUR POSITION,
BUT AS I LOOK AT IT, IT SEEMS TO
ME THAT THIS IS A DECISION THE
TRIAL LAWYER MAKES THAT WHAT HAS
HAPPENED BY WHAT THE JUDGE DID
REMEDIED AN ERROR.
AND IF THEY THOUGHT ANY OTHER
RELIEF WAS REQUIRED, THEY HAVE
TO MAKE A FURTHER MOTION.
>> WELL, LATER ON IN THE TRIAL,
LET ME JUST POINT OUT BECAUSE IT
TIES IN WITH THE ED RICKE CASE
AND THE CONSIDERATIONS THIS
COURT ENUNCIATED THERE.
LATER ON IN THE TRIAL THE REASON
MR. TERRY GAVE FOR NOT MOVING TO
MISTRIAL AT THAT TIME WAS THAT
BECAUSE OF THE EXPENSE THAT HIS
CLIENT HAD INCURRED.
>> BUT RICKE TELLS YOU HOW TO DO
IT.
IT GIVES YOU JUST AN ABSOLUTE
OUT.
>> IT DOES, JUDGE.
IT TELLS YOU HOW TO DO THAT.
>> I'VE SPENT ALL THIS MONEY, I
WANT A NEW -- I WANT A MISTRIAL,
BUT YOU'VE SEEN HOW MUCH MONEY
I'VE SPENT, AND I WANT YOU
HOLDING IT IN RESERVE RULING ON
IT.
IT'S A GREAT BENEFIT TO THE
PARTY.
>> IN A SENSE IT WOULD, PERHAPS,
HAVE BEEN PREFERABLE TO DO THAT,
BUT IT'S ALMOST ELEVATING FORM

OVER SUBSTANCE BECAUSE BY
OBJECTING, WHICH TRIAL COUNSEL
DID, HE SATISFIED THE FOUR
CONSIDERATIONS THAT ED RICKE
TALKED ABOUT.
AND THAT IS OBJECTIONS CAN DEFER
OPPOSING COUNSEL CONDUCT.
OBJECTIONS PREVENT COUNSEL FROM
ENGAGING IN SANDBAGGING TACTICS.
OBJECTIONS PROVIDE THE TRIAL
JUDGE WITH THE OPTIMAL
OPPORTUNITY TO STOP IT, AND
OBJECTIONS HELP PREVENT
CONFUSION THAT CAN STEM FROM
APPELLATE COURT MAKING COLD
RECORD DECISIONS.
BUT THEIR ARGUMENT AND WHAT YOUR
HONOR JUST ALLUDED TO AS WELL,
IT'S A WAIT-AND-SEE ATTITUDE.
SO I GUESS THE ISSUE IS IN THIS
CIRCUMSTANCE, WHO SHOULD BE
ENTITLED TO THE BENEFIT OF A
WAIT-AND-SEE APPROACH?
AND WE WOULD SUBMIT IT'S THE
AGGRIEVED PARTY.
>> BUT ISN'T IT REALLY, TO PUT
THE ED RICKE CASE PUTS THEN THE
DECISION -- AND I THINK JUSTICE
CANADY SAID EARLIER AND I JUST
WANT TO ASK YOU YOUR REVIEW ON
IT -- IN THE DISCRETION OF THE
JUDGE SO THAT THE JUDGE GOES,
YOU KNOW WHAT?
NO.
I THINK THIS IS NOT A CASE THAT
CAN BE FAIRLY SUBMITTED TO THE
JURY.
IT'S GOING TO, IT JUST HAS BEEN
CORRUPTED BY THE CONDUCT.
>> RIGHT.
>> AND I RESPECT WHAT YOU'RE
SAYING, BUT IN MY VIEW THIS HAS

NOW REACHED THE POINT THAT IT
CANNOT BE REMEDIED.
SO THE JUDGE THEN MAKES THAT
DECISION.
THE DEFENSE OR THE PLAINTIFF
THEN CAN'T JUST BE SILENT ON IT
OR ELSE THE ED RICKE THING MEANS
NOTHING.
>> WELL, FIRST OF ALL, IF THE
COURT REACHES A POINT WHERE THE
TRIAL JUDGE IS SAYING TO HIMSELF
OR HERSELF, WELL, YOU KNOW, THIS
IS A WASTE OF TIME FROM NOW ON
IN, AND IF IT'S A CIRCUMSTANCE
WHERE HE WOULDN'T RESERVE
RULING, A TRIAL JUDGE COULD
ALWAYS MISTRY THE CASE.
BUT THE INTERESTING THING THAT I
WANTED TO POINT OUT ABOUT ED
RICKE, BECAUSE IT SORT OF TALKS
ABOUT THIS CASE.
GRANTED, THAT PROCEDURE WAS NOT
FOLLOWED HERE.
THE RECORD'S CLEAR ON THAT.
THE MOVING FOR MISTRIAL AND
ASKING FOR, ASKING THE COURT TO
RESERVE WAS NOT FILED HERE.
BUT AS THIS COURT NOTED THAT
THERE'S ALWAYS A CHANCE THE
JUDGE WOULD SAY I'M NOT GOING TO
RESERVE, I'M GOING TO GRANT IT.
AND THEN YOU HAVE THE PROBLEM
THAT THE ED RICKE COURT POINTED
OUT, AND IT SAYS IF THE MISTRIAL
WAS GRANTED, THE AGGRIEVED PARTY
WOULD HAVE LITTLE SOLACE BUT
TRYING THE CASE ALL OVER AGAIN.
SO AGAIN, I THINK THE QUESTION
COMES DOWN TO GIVEN THAT COUNSEL
DID OBJECT, THE ISSUE IS DO YOU
HOLD THAT LAWYER TO THE SAME
STANDARD AS IN THE MURPHY CASE

TO A LAWYER WHO SAID NOTHING AT THE MOTION FOR MISTRIAL --
>> ALL RIGHT.
NOW, I WOULD LIKE FOR YOU TO ADDRESS IT BECAUSE THAT'S WHAT I WAS ASKING MR. EATON.
SEEMS TO ME THAT, AGAIN, I WANT TO BE CAREFUL THAT WE DON'T ONLY USE FUNDAMENTAL ERROR, THAT WE DON'T HARM THE LAW AS IT RESULTS, RELATES TO A DEFENDANT AND HIS OR HER DUE PROCESS RIGHTS BECAUSE WE DO USE THE STANDARD THAT IT'S CUMULATIVE, SO PERVASIVE THAT THEIR RIGHT TO A FAIR TRIAL WAS IMPAIRED.
THAT REALLY IS THE STANDARD, AND IT REACHES DOWN TO THE VALIDITY OF THE VERDICT FOR FUNDAMENTAL ERROR IN A CRIMINAL CASE.
>> RIGHT.
>> MURPHY TOOK AND AS WAS MENTIONED THE FOUR PRONGS, AND THE FOURTH PRONG WAS, IS THAT IT HAD THE EFFECT OF UNDERMINING THE PUBLIC'S CONFIDENCE IN THE JUDICIAL SYSTEM.
NOW, SO YOU -- SO MY QUESTION TO YOU IS, IF WE AGREE THAT THIS IS DIFFERENT THAN MURPHY IN TERMS OF FUNDAMENTAL ERROR BECAUSE OBJECTIONS WERE MADE AND SUSTAINED, BUT IT'S NOT -- YOU SHOULDN'T GET THE BENEFIT OF IT BEING JUST THE SAME AS A NEW TRIAL.
HAVE YOU CONSIDERED WHETHER THERE IS IN THESE SITUATIONS SOME OTHER STANDARD THAT A TRIAL JUDGE COULD FOLLOW IN GRANTING A TRIAL KNOWING THE TREMENDOUS LEEWAY THEY HAVE IN SO MANY

OTHER SITUATIONS FOR GRANTING A NEW TRIAL?
HAVE YOU -- BECAUSE I'M AT A LOSS TO SAY, YOU KNOW, THAT'S FUNDAMENTAL ERROR SAYING IT'S PERVASIVE AND IT UNDERMINES THEIR RIGHT TO A FAIR TRIAL.
I KNOW WHY MURPHY DID WHAT IT DID, BECAUSE SOMEBODY JUST CAN'T SIT BY FOR THE WHOLE TRIAL AND NOT OBJECT.
SO NOW YOU HAVE YOUR SITUATION, SAY, WELL, WE DID OBJECT.
WHAT'S THE REASON FOR NOT -- YOU'RE SAYING IT SHOULD BE TREATED JUST THE SAME AS IF THEY HAD MOVED FOR A MISTRIAL.
I THINK THAT'S A HARD SELL.
SO IS THERE ANOTHER STANDARD THAT WOULD RECOGNIZE A JUDGE'S GREATER DISCRETION THAN A APPELLATE COURT WHEN THESE SITUATIONS OCCUR BUT NOT THE SAME AS MURPHY?
AND I DON'T KNOW WHAT IT WOULD BE, BUT NO ONE'S PROPOSED IT AND SO MAYBE HAVEN'T THOUGHT ABOUT IT.
>> I HAVE THOUGHT ABOUT THAT, JUDGE, AND THAT'S DEPRIVATION STANDARD.
>> BUT THAT'S THE STANDARD FOR A MISTRIAL.
>> JUDGE, I'M NOT SURE ABOUT THAT -- OR, JUSTICE, I'M SORRY.
I'M NOT SURE ABOUT THAT BECAUSE IF YOU LOOK AT THE CASE LAW, THERE'S ALL KINDS OF DIFFERENT PERMUTATIONS.
YOU DON'T KNOW WHETHER A FAIR TRIAL'S GOING TO BE DEPRIVED OR NOT BECAUSE YOU HAVEN'T GOTTEN

FAR ALONG ENOUGH.
CERTAIN COMMENTS ARE PREJUDICIAL AND INFLAMMATORY.
IN OTHER WORDS, I THINK A JUDGE ON A MOTION FOR MISTRIAL WOULD PROBABLY HAVE GREATER LATITUDE AT DETERMINING WHETHER THERE'S BEEN A DEPRIVATION OF FAIR TRIAL BECAUSE A LOT OF TIMES YOU'RE NOT GOING TO BE ABLE TO TELL WHETHER THE FAIR TRIAL'S BEEN DEPRIVED OR NOT.
IN FACT, THAT'S THE WHOLE PROBLEM WITH THIS CASE.
YOU'RE DEALING WITH A SITUATION WITH CUMULATIVE MISCONDUCT.
SO IT SEEMS TO ME THAT ONCE YOU REACH WHAT USED TO BE BEFORE MURPHY A DEFINITION OF FUNDAMENTAL ERROR, AND THAT IS IF YOU WERE DEPRIVED OF A FAIR TRIAL, IT SEEMS TO ME THAT, CERTAINLY, IF COUNSEL IS DILIGENT AT LEAST IN OBJECTING AND AT LEAST GIVING THE TRIAL JUDGE A CHANCE TO DO WHAT HE NEEDS TO DO IN THAT INSTANCE, THAT TO BE HELD TO A HIGHER STANDARD THAT PUTS SOMETHING ABOVE DEPRIVATION OF FAIR TRIAL, IT JUST DOESN'T SEEM TO BE CONSISTENT WITH WHAT'S TRYING TO BE ACHIEVED.
AND LET ME SAY THIS -- AND I KNOW OPPOSING COUNSEL'S TAKEN UMBRAGE AT SOME OF THE THINGS THAT ARE IN THE RECORD, BUT THEY'RE THERE.
AND EVEN IF THEY WEREN'T ADMITTED INTO EVIDENCE, THEY'RE A MATTER OF PUBLIC RECORD.
IT'S DIFFICULT TO IMAGINE A

CIRCUMSTANCE GETTING TO THE ISSUE ABOUT UNDERMINING THE CONFIDENCE IN THE JUDICIARY WHERE YOU ALREADY HAVE A FINDING THAT THE CITY WAS DEPRIVED OF A FAIR TRIAL, WHERE THE CITY IS EXPOSED TO A JUDGMENT IN EXCESS OF $17 MILLION IF -- AND ACTUALLY HAVING TO PAY THAT IF THERE'S A CLAIMS BILL THAT'S PASSED, AND YOU HAVE THE OTHER FACTORS REGARDING THE LEGAL PROBLEMS WITH COUNSEL.

YOU HAVE, YOU HAVE MR. COMPANIONI'S TRIAL COUNSEL ENTERED -- EXCUSE ME, SECOND DCA COUNSEL INTERJECTED HIMSELF INTO THE MOTION FOR NEW TRIAL PROCEEDINGS.

IN FACT, ONE JUROR SAID, "I WANTED TO GIVE 50 MILLION, BUT I THOUGHT THE JUDGE WOULD REDUCE IT."

YOU HAVE ALL THESE FACTORS SHOWING THAT THIS VERDICT WAS A RESULT OF ANYTHING BUT AN IMPASSIONED CONSIDERATION OF THE EVIDENCE.

IT'S DIFFICULT TO ENVISION IF YOU'RE GOING TO HAVE THIS OTHER STANDARD, THIS STANDARD ABOUT UNDERMINING CONFIDENCE IN THE JUDICIARY WHERE YOU HAVE A PUBLIC DEFENDANT, IT'S DIFFICULT TO ENVISION A CIRCUMSTANCE WHERE THAT WOULD BE MORE IN PLAY THAN HERE.

SO AND, YOU KNOW, THE SECOND DCA DIDN'T EXPRESSLY DEAL WITH THAT BECAUSE IT BELIEVED IT DIDN'T NEED TO BECAUSE IT FELT THE OBJECTIONS, AS A RESULT OF THE

OBJECTIONS THE DEPRIVATION OF
FAIR TRIAL DID IT ALONE.
BUT WE WOULD SUBMIT THAT EVEN IF
THAT STANDARD APPLIES, THAT THE
RECORD HERE SHOWS THAT THAT
STANDARD WAS MET.
UNDER EITHER A DE NOVO OR ABUSE
OF DISCRETION STANDARD.
AND, AGAIN, I REMIND THE COURT,
RESPECTFULLY, THAT THE ONLY
BASIS THAT JUDGE BAUMANN GAVE
FOR THAT STANDARD NOT BEING MET
IS HIS FEELING THAT THE EVIDENCE
WAS SUFFICIENT.
AND I WOULD SUBMIT THAT THAT IS
NOT LOGICALLY COHERENT BECAUSE
IF YOU HAVE TO FIND -- IN ORDER
TO GET TO THAT STANDARD, IF YOU
HAVE TO FIND THAT WAS
INSUFFICIENT EVIDENCE, WELL,
THAT'S AN INDEPENDENT BASIS FOR
A NEW TRIAL ANYHOW, AND YOU
WOULD HAVE NO NEED FOR THAT
STANDARD.
>> I'M HAVING TROUBLE
CONCEPTUALIZING SOME OF THIS
BECAUSE IT JUST SEEMS TO ME IF
THE PUBLIC KNOWS THAT THINGS
HAVE HAPPENED IN A TRIAL THAT
HAVE IMPAIRED OR DEPRIVED A
LITIGANT IN THE TRIAL A RIGHT TO
A FAIR TRIAL, THAT THAT ALMOST
BY DEFINITION UNDERMINES THEIR
CONFIDENCE IN THE SYSTEM BECAUSE
THAT SHOULDN'T HAPPEN.
>> YES, SIR.
>> I'M HAVING TROUBLE
UNDERSTANDING THIS DISTINCTION.
>> YOUR HONOR, I AGREE WITH YOU
A THOUSAND PERCENT, BUT THAT'S,
I MEAN, THAT'S THE STANDARD THAT
WAS ARTICULATED IN MURPHY.

THE DISTINCTION.
I AGREE THAT ONCE YOU HAVE --
AND HERE, OF COURSE, NOT ONLY DO YOU HAVE AN ORDER OF RECORD THAT SAYS THAT IT'S DIFFICULT TO IMAGINE WHAT MORE YOU NEED TO REPAIR THE CONFIDENCE IN THE JUDICIARY THAN ALLOWING A VERDICT TO STAND WHERE A PARTY WAS DEPRIVED OF A FAIR TRIAL.
AND NOBODY'S DISPUTING THAT.
THE PETITIONER HASN'T TAKEN ISSUE WITH THAT FINDING OF THIS PROCEEDING.
SO, YOUR HONOR, I WOULD AGREE WITH THAT.
>> MURPHY TELLS YOU WHAT THOSE ARE; RACIAL SUGGESTIONS, RELIGIOUS SUGGESTIONS.
IT TELLS YOU, DOESN'T IT --
>> IT GIVES YOU SOME EXAMPLE.
YES, SIR.
>> IT'S NOT JUST QUESTIONS OF SUFFICIENCY OF EVIDENCE.
THAT'S A DIFFERENT QUESTION.
>> THAT'S TRUE, JUDGE.
>> AND THAT'S WHAT MURPHY SAYS.
>> THE ONLY BASIS JUDGE BAUMANN GAVE HERE WAS HE FELT IT DIDN'T UNDERMINE THE SUFFICIENCY BECAUSE THERE WAS SUFFICIENT EVIDENCE.
HE LINKS THOSE TWO TOGETHER.
>> WELL, AGAIN, THAT'S WHAT I'M SAYING.
IF THERE'S EVIDENCE, IT'S THESE THINGS THAT CREATE THE EMOTION.
AND WE DON'T HAVE -- I MEAN, TELL ME IF WE DO -- DO WE HAVE THINGS SUCH AS RACIAL THINGS, GENDER THINGS, THINGS THAT ARE REPUGNANT TO OUR SYSTEM OF

CONSTITUTIONAL DEMOCRACY?
>> WE DON'T HAVE THOSE THINGS IN THE COMMENTS THEMSELVES, BUT WE HAVE -- AND I BELIEVE THAT YOU WOULD LOOK AT THE CONTEXT OF THE WHOLE CASE, ALTHOUGH MURPHY IS NOT EXPLICIT ON THAT -- BUT YOU HAVE ALL THESE OTHER THINGS THAT HAPPENED.
YOU HAVE THE ASSERTION ABOUT ONE OF THE JURORS SAID, YOU HAD THE FACT THAT IT'S IN THE RECORD, THAT DESPITE WHAT MR. COMPANIONI TESTIFIED TO, HE HAD A CHECKERED DRIVING HISTORY.
>> THESE AREN'T THE KINDS OF THINGS THAT'S REFERRING TO. MURPHY SAYS THAT.
>> I'M SAYING IF YOU COMPILE ALL OF THEM TOGETHER, JUDGE -- YOUR HONOR -- THAT THAT --
>> WHAT I WOULD LIKE YOU TO DO IS TO HAVE THE OPPORTUNITY TO EXPLAIN TO US, AS WE GAVE TO YOUR OPPOSITION, THE ANALYSIS WITH REGARD TO HAVING A TRIAL JUDGE ON A MOTION FOR A NEW TRIAL HAVING MORE POWER THAN THE APPELLATE COURT.
>> YES, SIR.
>> BECAUSE I'M NOT SURE YOU'VE ADDRESSED THAT SPECIFIC.
>> NO, I HAVEN'T, YOUR HONOR --
>> AND HOW DOES THIS FIT INTO OUR SYSTEM OF JURISPRUDENCE?
>> IT FITS IN EXACTLY BECAUSE MURPHY DID THAT.
MURPHY DID EXACTLY THAT.
MURPHY GAVE THE TRIAL JUDGE GREATER AUTHORITY.
IT SAID, IF THERE ARE NO OBJECTIONS WHATSOEVER, THE TRIAL

COURT COULD STILL REVIEW THE MISCONDUCT ON A MOTION FOR NEW TRIAL ON THIS HEIGHTENED FUNDAMENTAL ERROR STANDARD.
BUT THE APPELLATE COURT CANNOT DO SO, CANNOT BE THE FIRST TO DO SO.
AND, YOUR HONOR, IT SOUNDS NICE WHEN OPPOSING COUNSEL SAYS IT, BUT IF YOU LOOK AT IT, THAT'S BEEN LONG ESTABLISHED IT'S NOT A MATTER OF ANY DISPARAGEMENT OF THE HIGHER COURT.
IT'S A MATTER OF THE FACT THAT THE TRIAL JUDGE IS IN A POSITION TO LOOK AT THE CONDUCT AND WEIGH IT IN THE FIRST INSTANCE.
>> YOUR TIME HAS EXPIRED.
GO AHEAD FOR ANOTHER 30 SECONDS.
WANT TO DO THAT?
>> YES, YOUR HONOR.
I MEAN, THAT'S THE POINT, I THINK, THAT MURPHY ITSELF RECOGNIZES AND OTHER CASES DO AS WELL, BUT THIS COURT RECOGNIZED THAT IN INSTANCES INVOLVING THE TRIAL COURT EXERCISING HIS OBSERVATION OF THE TRIAL THAT, IN FACT, THE TRIAL COURT DOES HAVE SOME BROADER AUTHORITY.
>> THANK YOU.
>> THANK YOU.
>> AN APELLATE COURT HAS ALWAYS HAD THE ABILITY TO REVERSE FOR FUNDAMENTAL ERROR.
STILL DOES.
THE ONLY THING THAT MURPHY DID WAS SAY AS A PREREQUISITE TO AN APPELLATE COURT MAKING A FUNDAMENTAL ERROR DETERMINATION THE TRIAL JUDGE HAS TO ENTERTAIN

A MOTION FOR NEW TRIAL ASSERTING FUNDAMENTAL ERROR.
PRESERVE THE ISSUE THAT WAY.
THAT'S ALL.
MURPHY DOES NOT GIVE TRIAL COURTS GREATER AUTHORITY THAN AN APPELLATE COURT HAS TO GRANT A NEW TRIAL FOR FUNDAMENTAL ERROR.
IT SIMPLY DOESN'T.
>> ORDINARILY, FUNDAMENTAL ERROR IS SOMETHING THAT CAN BE RAISED ON APPEAL WITHOUT HAVING BEEN RAISED IN THE TRIAL COURT, CORRECT?
>> IT ALWAYS WAS BEFORE MURPHY.
I'M NOT SURE THAT'S TRUE AFTER MURPHY.
MURPHY SAYS AS A CONDITION --
>> WELL, AGAIN, LET'S MAKE SURE IN A CIVIL CASE, BECAUSE WE CERTAINLY DON'T WANT --
>> IN A CIVIL CASE.
>> -- DON'T WANT TO PUT THE TWO STANDARDS WITH DIFFERENT VALUES AND CONSIDERATION.
>> ALTHOUGH I SUSPECT THE CASE WILL COME ALONG IN WHICH THE COURT IS SUFFICIENTLY AGGRAVATED IN WHAT HAPPENED IN A CIVIL CASE THAT IT WILL FIND FUNDAMENTAL ERROR WITHOUT A MOTION FOR A NEW TRIAL HAVING BEEN FILED BEFORE THE TRIAL COURT, BUT THAT'S KIND OF AN UNANSWERED QUESTION TO THIS POINT.
THE ANSWER TO YOUR QUESTION, CHIEF JUSTICE CANADY, IF A LITIGANT IS REQUIRED FOR A NEW TRIAL BECAUSE OF REVERSIBLE ERROR, HE GETS A NEW TRIAL.
BUT IT'S AN ALTOGETHER DIFFERENT STANDARD THAN FUNDAMENTAL ERROR

THAN SIMPLY HAVING COMMITTED A
REVERSIBLE ERROR.
THE BOTTOM LINE HERE --
>> YOUR TIME IS NOW UP TOO.
YOU CAN HAVE ANOTHER 30 SECONDS.
>> THE BOTTOM LINE IS COUNSEL
DID NOT WANT A MOTION FOR
MISTRIAL.
HE SAID, "I'M CONTENT TO GO TO
THE JURY ON THIS RECORD," AND
THEN HE LOST.
AND HE SAID, OH, BY THE WAY, I
WANT A MISTRIAL.
YOU CAN'T PERMIT THAT.
THE CASES DON'T PERMIT THAT, THE
DISTRICT COURT'S OPINION IS
SIMPLY WRONG, AND WE
RESPECTFULLY REQUEST THAT THIS
JUDGMENT BE REINSTATED ON
REMAND.
THANK YOU.
>> THANK YOU VERY MUCH.
COURT WILL NOW TAKE ITS MORNING
RECESS FOR TEN MINUTES.
>> PLEASE RISE.
>> SUPREME COURT'S NOW IN
RECESS.