

>> 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, 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  
THE FLORIDA SUPREME COURT, THIS  
MORNING, THE FIRST CASE ON OUR  
DOCKET IS JOHNSTON VERSUS STATE  
OF FLORIDA.

>> GOOD MORNING.

PLEASE THE COURT, DAVID HENDRY,  
AND I, ALONG WITH JAMES  
DRISKELL, IN THE... REPRESENT  
THE APPELLANT, IN THIS MATTER,  
ACTUALLY TWO MATTERS ON THE  
DOCKET TODAY.

JOHNSTON IN THE FIRST CASE  
SP-09780, WHICH IS -- REFERS  
TO... [INAUDIBLE].

WHAT I'D LIKE TO START WITH  
FIRST THIS IS DIRECT APPEAL  
OPINION THE COURT SAID JOHNSTON  
ASSERTS HE'S ENTITLED TO A NEW  
TRIAL BECAUSE JUROR ROBINSON  
DELIBERATELY FAILED TO DISCLOSE  
THAT SHE PLED NOLO CONTENDERE IN  
A MISDEMEANOR CHARGE AND  
APPELLATE COUNSEL CONCEDES  
DEFENSE COUNSEL FAILED TO RAISE

THE CLAIM WITH THE TRIAL COURT AS A SPECIFIC GROUNDS FOR NEW TRIAL WAS NOT RAISED WITH THE LOWER COURT AND WILL NOT BE CONSIDERED ON APPEAL AND TO THE EXTENT JOHNSTON CLAIMS COUNSEL WAS IN EFFECTIVE AND FIND THE ISSUE SHOULD BE ADDRESSED IN A MOTION, AND NOW ON DIRECT APPEAL AND WE DID, ADDRESS THAT, AT THE EVIDENTIARY HEARING AT THE -- EXTENSIVE, EVIDENTIARY HEARING, AND, THE ANSWERS PROVIDED AS TO WHY... SPECIFIC ISSUE OF JURY NONDISCLOSURE WAS NOT RAISED IN THE MOTION FOR NEW TRIAL AT THE LOWER LEVEL, WAS WHAT YOU GET IS AN ANSWER THAT IS -- WOULD ACTUALLY HAVE HAPPENED AND THEN YOU GET RATIONALIZATIONS AND I WILL TALK FIRST ABOUT WHAT ACTUALLY HAPPENED, AND... WHY THE SPECIFIC ISSUE OF JURY NONDISCLOSURE WAS NOT RAISED. ONE OF THE TRIAL ATTORNEYS, WENT TO --

>> LET ME INTERRUPT, ON THE NONDISCLOSURE ARE WE TALKING ABOUT THE MISDEMEANOR, NONDISCLOSURE OF THE MISDEMEANOR?

>> THAT'S CORRECT.

TRACY ROBINSON, IT WAS ACTUALLY ABOUT A YEAR BEFORE VOIR DIRE SHE HAD BEEN ARRESTED ON A MISDEMEANOR DISCHARGE OF

OBSTRUCTING... [INAUDIBLE] AND SHE CHECKED THE BOX, THE BOX ON THE JURY QUESTIONNAIRE FORM THAT SAID SHE OR SOMEONE CLOSER, A FAMILY MEMBER, HAD BEEN ARRESTED OR ACCUSED IN THE PAST AND WHEN QUESTIONED DIRECTLY AT TRIAL, SHE ONLY DISCLOSED THAT FOR HER CHILD'S -- HER CHILD'S FATHER, HAD BEEN ARRESTED AND THEN, SHE WAS ASKED, DO YOU FEEL HE RECEIVED A FAIR SHAKE AND SHE SAID YES, SHE FAILED TO DISCLOSE HER OWN ARREST RECORD AND ACTUALLY PLED TO THIS CASE, ABOUT 6 MONTHS PRIOR TO VOIR DIRE AND THIS CASE HAD TO HAVE BEEN FRESH IN HER MIND AND ONE THING THAT COMES TO MIND IS, WHAT HAD TO HAVE BEEN GOING THROUGH THE JUROR'S HEAD AT THE TIME SHE WAS BEING ASKED QUESTIONS ABOUT HER OWN CRIMINAL ARREST HISTORY.

HERE'S THE DANGER.

WHEN PEOPLE DON'T PAY THEIR BILLS, ELECTRIC BILL, WHAT HAPPENS?

IT GETS CUT OFF, AND, WELL, JUROR ROBINSON WAS THERE IN VOIR DIRE AND WHAT IS SHE THINKING ABOUT, WHAT WILL HAPPEN IF I DIDN'T PAY MY COURT COSTS, BECAUSE SHE WAS TOLD AT THE TIME SHE PLED NO CONTEST TO THE CRIMINAL CHARGE, YOU MUST PAY

YOUR COURT COSTS AND THERE WAS AN ACTUAL CAPIAS OUT FOR HER ARREST.

>> I APPRECIATE THAT WE MAY HAVE A SITUATION OF NONDISCLOSURE. BUT, LET'S ASSUME IT SHOULD HAVE BEEN RAISED IN MOTION FOR NEW TRIAL.

YOU FIRST HAVE -- DON'T YOU HAVE TO SHOW THAT IT WAS -- WOULD HAVE BEEN SUCCESSFUL, WOULD HAVE BEEN A SUCCESSFUL MOTION FOR NEW TRIAL?

OR DO YOU HAVE TO SHOW UNDER CARATELLI, SHE WAS A BIASED JUROR -- LET'S ASSUME DEFICIENT PERFORMANCE.

WHAT I WANT TO HAVE YOU GET TO IS, THE PREJUDICE.

WOULD THERE HAVE BEEN A NEW TRIAL, IS THAT WHAT WE LOOK AT? AND, WHY WOULD THERE HAVE BEEN A NEW TRIAL UNDER THE STANDARDS WE HAVE SET FORTH?

FOR -- JUROR NONDISCLOSURE.

>> CARATELLI, THE HOLDING IS LIMITED TO THE FOLLOWING, CARATELLI SAYS AND THIS IS WHY CARATELLI IS AN APPLICABLE -- INAPPLICABLE TO THE CASE AT BAR, POSTCONVICTION MOTION ALLEGED TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OR PRESERVE A CAUSE CHALLENGE, THE DEFENDANT MUST DEMONSTRATE A JUROR WAS ACTUALLY BIASED, THE CARATELLI

CASE DEALS WITH THE SITUATION  
THAT THE ONLY ALLEGATION THE  
TRIAL COUNSEL WAS INEFFECTIVE  
FOR FAILING TO... A JUROR.

>> YOU HAVE TO SHOW --

YOU HAVE TO SHOW THAT THE MOTION  
FOR NEW TRIAL WOULD HAVE BEEN  
GRANTED OR WE WOULD HAVE  
REVERSED ON APPEAL.

>> THAT'S CORRECT, YOUR HONOR.

>> CAN YOU SHOW THAT HERE?

>> YES, WE CAN.

CARATELLI INAPPLICABLE.

THE CASE THAT IS APPLICABLE IS,  
FIRST CASE IS DELLA ROSA  
VERSUS... AND THERE ARE THREE  
THINGS, ACTUALLY, TWO THINGS,  
BECAUSE [INAUDIBLE] EITHER.

YOU HAVE TO SHOW THAT THERE WAS  
MATERIAL INFORMATION WHICH WAS  
CONCEALED BY A JUROR AT TRIAL  
AND THAT IS EXACTLY WHAT WE HAVE  
HERE AND THE JOHNSTON CASE.

WE'RE NOT ALLEGING THE TRIAL  
COUNSEL WAS INEFFECTIVE, REALLY,  
FOR FAILING TO STRIKE THE JUROR  
BECAUSE THE JUROR CONCEALED THE  
MATERIAL, RELEVANT INFORMATION  
WHICH WOULD HAVE ALLOWED COUNSEL  
TO HAVE AN INTELLIGENT BASIS TO  
HAVE REASON TO THINK WHY HE MAY  
OR MAY NOT WANT TO STRIKE THE  
JUROR.

>> DO WE LOOK ONLY TO THAT  
MATERIAL MISREPRESENTATION THAT  
YOU ARE ASSERTING?

OR DO WE LOOK AT THE TOTALITY  
WITH REGARD TO THE JUROR AND THE  
DEMOGRAPHICS OF THOSE KINDS OF  
THINGS, THAT RELATE TO THIS  
PARTICULAR JUROR?

WHAT IS THE STANDARD WE SHOULD  
LOOK TO?

BECAUSE, CERTAINLY, THERE ARE  
THINGS EVEN IF DISCLOSED, JUROR  
MAY STILL FIT.

THE IDEAL JUROR.

THE LAWYER MAY WANT.

WHERE DO WE GO?

A PER SE KIND OF THING OR DO YOU  
LOOK AT THE TOTALITY?

>> YOU LOOK AT THE TOTALITY.

THIS IS A PER SE RULE AND --

>> THOSE TWO SEEM TO BE IN  
CONFLICT WHEN YOU SAY WE MUST  
CONSIDER THE TOTALITY, YET IT IS  
A PER SE RULE.

>> A PER SE RULE, MY

UNDERSTANDING OF DELLA ROSA...

AND ROBERTS VERSUS TEJADA AND  
MASSEY FROM THE COURT OF APPEALS

AND THIS COURT, THE KELLY VERSUS  
COMMUNITY HOSPITAL CASE, WHERE,  
IF A LITIGANT SHOWS, PARTY SHOWS

THERE WAS A MATERIAL

REPRESENTATION BY A JUROR,

DURING VOIR DIRE, THEN,

AUTOMATIC NEW TRIAL AND IT

DOESN'T HAPPEN --

>> OKAY, YOUR POSITION IS, IS

THAT THE COURT SHOULD NOT LOOK  
TO THE TOTALITY, BACKGROUND OF

THE JUROR, ISN'T THE JUROR IN THIS CASE THE DEFENSE LAWYER SAID WAS THE IDEAL DEMOGRAPHIC PERSON, THE TYPE, THE AGE GROUP, THE WHOLE PACKAGE, MAYBE OTHER THAN THIS ONE THING THE LAWYER WANTED AND ISN'T THAT WHAT THE CASE ALSO INVOLVES.

>> THAT WAS A SECONDARY OR MAYBE EVEN FURTHER FROM SECONDARY CONSIDERATION OF THE TRIAL COURT, BECAUSE...

>> I'M ASKING THE QUESTION. DOES IT OR DOES IT NOT PLAY A PART IN OUR EVALUATION OF HOW WE LOOK AT THINGS?

>> WELL, I DON'T THINK THAT YOU CAN REALLY GO THAT FAR.

I THINK THAT CONSIDERATION IS ACTUALLY IRRELEVANT TO THE ISSUES AT HAND, BECAUSE THE ISSUES AT HAND ARE, IN THIS CASE -- THIS ISSUE WAS REFERRED AT THE POINT A MOTION FOR NEW TRIAL WAS FILED BY TRIAL COUNSEL. WHY TRIAL COUNSEL DID NOT RAISE THAT SPECIFIC ISSUE, OF JUROR NONDISCLOSURE, BECAUSE THE GUIDELINES SAY THERE IS A DUTY TO RAISE ALL ISSUES.

>> [INAUDIBLE] MY UNDERSTANDING IS THAT THERE WAS A...

[INAUDIBLE] AND THE EXPERT... SEEMED TO PRETTY MUCH A PROFILE OF THE TYPE OF JUROR YOU WANTED IN THIS PARTICULAR CASE AND

THIS... [INAUDIBLE] MET THE PROFILE AND GOING BACK TO THE QUESTION, REGARDING OF THE CRIMINAL RECORD THIS JUROR MAY HAVE BEEN THE JUROR THE LAWYER WANTED FOR HIS CASE, IS IT NOT A STRATEGIC DECISION.

>> TRIAL COUNSEL DID NOT HAVE THE KNOWLEDGE AT THE TIME OF VOIR DIRE AND THE KNOWLEDGE THE JUROR FAILED TO DISCLOSE AN ARREST THAT HAPPENED PRIOR AND WAS -- WAS A CAPIAS FOR HER ARREST AND SHE SWORE TO TELL THE TRUTH AND THE PURPOSE OF VOIR DIRE IS TO TELL THE TRUTH AND HE VIOLATED, THE PURPOSE OF VOIR DIRE, BUT, IF I CAN ANSWER YOUR QUESTION, SPECIFICALLY, THIS WAS THE -- THE MOCK TRIAL WAS, I BELIEVE THERE WAS ONE AFRICAN-AMERICAN JUROR ON THE MOCK TRIAL AND THEY CAME BACK WITH A LESSER, NOT A COMPLETE NOT GUILTY BUT A LESSER CHARGE AND TRIAL COUNSEL, AT THE EVIDENTIARY HEARING TALKED ABOUT, WANTED TO... MINORITY, BUT, THIS TRACY ROBINSON, I BELIEVE WAS IN HER 20s AND THE MOCK JUROR WAS IN HER 40s. BUT, AGAIN, THAT ANALYSIS, THAT STRATEGIC ANALYSIS, IS -- WASN'T CONDUCTED HERE DURING THE VOIR DIRE BECAUSE, THEY DIDN'T HAVE THE INFORMATION.

HARVEY MOORE WAS THE PERSON  
THERE... [INAUDIBLE] RAN THE  
MOCK TRIAL AND NEVER TOLD TRIAL  
COUNSEL YOU WANT TO HAVE  
NONDISCLOSING JURORS WHO HAVE A  
CAPIAS OUT FOR THEIR ARREST AND  
DON'T REVEAL THAT INFORMATION  
AND YOU CANNOT LOOK BACK AT WHAT  
HAPPENED DURING VOIR DIRE,  
STRATEGIC CONSIDERATION OF YOU A  
JUROR OR -- GOOD OR BAD JUROR,  
YOU CAN'T DO THAT.

THE RELEVANT INJURY IS WHY WAS  
THE JUROR NONDISCLOSURE ISSUE  
RAISED AND THAT IS BECAUSE THE  
TRIAL ATTORNEY, I WENT TO TRY  
THE CASE AND WENT BACK TO TO  
WEST PALM BEACH.

>> YOU SAY THERE IS NO STRATEGIC  
REASON FOR NOT RAISING IT AT THE  
TIME OF THE MOTION FOR NEW  
TRIAL.

>> YES.

>> NOT -- NOW THEY'VE LOST THE  
CASE, SO, NOW THEY WANT TO DO  
WHATEVER THEY CAN, PRESUMABLY,  
TO SEE IF THEY CAN GET A NEW  
TRIAL, SO, LET'S ASSUME IT  
SHOULD HAVE BEEN RAISED.

NOW, LET'S GET TO THE FIRST --  
YOU SAID THAT THE CASE WAS...

[INAUDIBLE] THE COMPLAINING  
PARTY HAD TO ESTABLISH THE  
INFORMATION WAS RELEVANT AND  
MATERIAL, TO THE JURY'S SERVICE  
IN THIS CASE AND IT SEEMS TO ME

FROM WHAT WE ARE SAYING IS MAYBE IT MIGHT HAVE BEEN RELEVANT, AND MATERIAL, TO THE STATE, THEY MIGHT NOT HAVE WANTED THAT JUROR TO SERVE, BUT, WHY WOULD IT BE RELEVANT AND MATERIAL, PRESUMABLY, MEANING THEY WOULDN'T HAVE HAD THE JUROR SERVED, TO THE DEFENDANT? AND IS THAT AN OBJECTIVE TEST, YOU LOOK AT THE CIRCUMSTANCES OF THIS PARTICULAR CASE, HOW WOULD THIS -- WE HAVE TO GO BACK AND SAY, HOW WOULD THAT BE ESTABLISHED, AND LET'S ASSUME IT HAD BEEN RAISED, NOW UP HERE, ON DIRECT APPEAL, AND, THE JUDGE ERRED IN NOT GRANTING THE NEW TRIAL AND WE'RE HAVING THE SAME DISCUSSION, WHAT DO YOU ARGUE, TO SAY, NO, IT IS MATERIAL AND RELEVANT?

>> WELL, THERE IS -- ARE SEVERAL CASE THAT'S COME TO MIND. ONE IS THE MASSEY CASE OUT OF 3RD DISTRICT OF APPEAL AND I WANT TO MENTION THE CASE, HERE'S THE SITUATION IN MASSEY.

WE HAD A SITUATION WHERE A JUROR FAILED TO DISCLOSE AN ARREST THAT HAPPENED FOUR YEARS PRIOR AND ENTER AID PCI PROGRAM AND HAD THE CASE -- ENTER AID PCI PROGRAM AND HAD THE CASE DISMISSED... [INAUDIBLE] PROGRAM AND IN THIS CASE WE HAD A JUROR

WHO DIDN'T COMPLETE THE PCI CASE  
AND HAD THE -- IT LOOKED LIKE  
SHE WAS SMOKING CRACK DURING THE  
TRIAL AND SHE WAS ARRESTED  
DURING THE PENALTY PHASE AND I  
WANT TO TALK ABOUT [INAUDIBLE]  
THE COURT RULED THAT THIS JUROR  
WAS NOT UNDER PROSECUTION AT THE  
TIME OF THE TRIAL, SHE PLED AND  
THIS IS ONLY A CIVIL MATTER,  
BECAUSE, SHE HAD TO PAY COURT  
COSTS BUT UNDER THE REASONING  
OF... [INAUDIBLE] THEY SAID  
PREJUDICE IS INHERENT, AND IN  
OTHER WORDS, EVEN IF THE DEFENSE  
ATTORNEY WANTS TO KEEP A JUROR  
UNDER PROSECUTION, WE DON'T LET  
THEM DO THAT AND DON'T LET THE  
JURORS, THEY ARE --

>> YOU SAY, IT IS SOMETHING THAT  
AFFECTS THE INTEGRITY OF THE  
TRIAL.

THEN, I -- I THINK YOU HAVE MADE  
INTERESTING AND GOOD LEGAL  
POINTS ON THIS, BUT, SECOND, THE  
TEST REQUIRES THE JUROR CONCEAL  
THE INFORMATION DURING  
QUESTIONING, AND THE TRIAL JUDGE  
FOUND THAT ROBINSON HAD NOT  
DELIBERATELY LIED TO THE  
PROSECUTOR.

ISN'T THAT A FINDING OF FACT,  
AND WHAT DO WE DO WITH THAT  
FINDING.

>> THAT WAS ONE FINDING AND THE  
LOWER COURT ORDERED THAT -- I

WAS WONDERING WHY THE COURT MADE THE FINDING.

I MEAN, THIS COURT, ON -- THIS COURT, ON DIRECT APPEAL, SAID THAT THIS -- WELL, THE STANDARD DEATH THE STANDARD IN FLORIDA, UNDER ROBERTS VERSUS TEJADA IS THAT THE CONCEALMENT NEED TO THE BE INTENTIONAL.

SO, IT WAS STRANGE IN THE LOWER COURT'S ORDER --

THESE WERE THE FIRST TWO FINDINGS THE LOWER COURT MADE.

>> YOUR CLIENT MADE A STATEMENT. DID YOU SAY THE JUROR WAS AUTOMATICALLY DISQUALIFIED BASED UPON THIS -- EXISTENCE OF THE MISDEMEANOR.

>> NO.

I SAID THAT HAD THE JUROR -- HAD IT BEEN RULED THE JUROR WAS UNDER PROSECUTION AT THE TIME, SHE WOULD HAVE BEEN STATUTORILY DISQUALIFIED.

>> WAS HE UNDER PROSECUTION AT THE TIME OF THE TRIAL.

>> NO, THE COURT RULED SHE WAS NOT UNDER PROSECUTION.

>> SHE WAS NOT AUTOMATICALLY DISQUALIFIED.

>> OKAY.

BUT I'LL TELL YOU WHY TRIAL COUNSEL WAS INEFFECTIVE, THEY FAILED TO RAISE THE SPECIFIC ISSUE OF JUROR NONDISCLOSURE.

>> I THOUGHT WE PASSED OVER THAT

AND WE ARE ASSUMING THERE IS --  
WE ARE LOOKING AT THE  
PREJUDICIAL ASPECT AND THE  
CONSEQUENCES OF ALL OF THIS.  
>> I KNOW REECE AND LOWRY, ARE  
THE "UNDER PROSECUTION" CASES  
AND DELLA ROSA AND TEJADA CASES,  
THERE APPEARS TO BE A PER SE  
RULE, THE JURORS SHOULD BE  
DISQUALIFIED FROM SERVICE, IF  
THEY FAILED TO REVEAL MATERIAL  
INFORMATION AND IT DOESN'T GET  
MORE MATERIAL THAN THIS, AND, IN  
THE COURT'S OPINION IN THE KELLY  
VERSUS COMMUNITY HOSPITAL CASE,  
THIS COURT SAID THAT IT IS  
DIFFICULT TO EVEN ENVISION A  
MORE EGREGIOUS CONCEALMENT AND  
ACT OF MISREPRESENTATION THAN  
OCCURRED HERE.

I WOULD SAY THAT THIS IS THAT  
CASE, THAT IS MORE EGREGIOUS,  
THERE WAS A MORE ACTIVE  
MISREPRESENTATION THAT OCCURRED  
IN THIS CASE, BECAUSE, IN THIS  
KELLY VERSUS COMMUNITY HOSPITAL  
CASE, THIS JUROR WHO FAILED TO  
DISCLOSE INFORMATION DIDN'T HAVE  
A CAPIAS OUT FOR HIS ARREST AND  
THIS JUROR --

>> THE HOSPITAL CASE, WHAT WAS  
THE DEFECT THERE?

>> I BELIEVE IT WAS THAT  
PARTICULAR JUROR, THAT JUROR,  
THIS COURT COMMENTED THAT THAT  
JUROR HAD GIVEN A DEPOSITION

LESS THAN 6 MONTHS PRIOR TO VOIR  
DIRE AND THE COURT WAS SAYING,  
WELL, OBVIOUSLY, IF THIS  
PARTICULAR JUROR WAS GIVING A  
DEPOSITION IN A CIVIL MATTER SIX  
MONTHS PRIOR TO THE VOIR DIRE  
OBVIOUSLY IS NOT --

>> A CIVIL MATTER, IT WAS NOT  
SUBJECT TO SOME KIND OF CRIMINAL  
KIND OF CASE.

>> THAT'S CORRECT.

>> A CIVIL MATTER THAT HAD  
SOMETHING TO DO WITH THE MATTER  
THAT WAS GOING TO BE TRIED.

>> YES.

>> IS THAT A FAR DIFFERENT  
SITUATION THAN TALKING ABOUT  
SOMEONE WHO HAS AN INDEPENDENT  
-- HAS NOTHING DO WITH THIS  
CASE, OR WITH THE FACTS OF THIS  
CASE, OR WITH THE CHARGES IN  
THIS CASE.

AND THAT IS -- ISN'T THAT A  
SIGNIFICANT DIFFERENCE?

>> I BELIEVE THAT THIS  
PARTICULAR JUROR, IT WAS -- WAS  
IN DIVORCE LITIGATION AND THEY  
GAVE A DEPOSITION IN THE DIVORCE  
PROCEEDING SIX MONTHS PRIOR TO  
THE CASE AND THE KELLY CASE WAS  
A CIVIL ACTION, AND, WITH  
MALPRACTICE AND... ISSUES ABROAD  
AND SUCH, BUT, THE CASE LAW  
DOESN'T SAY THAT WE CONCEAL  
LITIGATION AND LITIGATION, AS IT  
DIRECTLY RELATES TO THE CAUSE AT

HAND BUT, IN THIS PARTICULAR CASE, WE HAVE A CRIMINAL JUSTICE SYSTEM AND A WOMAN WHO HAS FAILED TO DISCLOSE HER OWN ARREST AND IS SITTING THERE IN A FIRST DEGREE MURDER CASE AND, AGAIN, THIS COURT SHOULD BE WONDERING WHAT WAS GOING THROUGH THE WOMAN'S MIND, AT THE TIME, I MEAN, SHE CHECKED THE BOX AND KNOWS SHE HAS BEEN ARRESTED, AND, PLED TO THE CASE LESS THAN 6 MONTHS PRIOR AND ORDERED TO PAY COURT COSTS, JUST LIKE.

>> YOU ARE INTO YOUR REBUTTAL. WAS HE... [INAUDIBLE].

>> WE FILED A MOTION, TO INTERVIEW THE JUROR AND THAT WAS DENIED.

>> AND, SO THE ISSUE OF WHETHER... THE ISSUE CENTERED ON, THE ISSUE WITH CRACK COCAINE, NINE DAYS OF THE TIME OF THE JURY SELECTION, NEVER [INAUDIBLE] TIED INTO THIS AND YOU WERE NEVER ABLE TO TIE IT IN.

>> DUE TO THE LACK OF THE... [INAUDIBLE].

I'M IN REBUTTAL, AND, THANK YOU.

>> MAY IT PLEASE THIS COURT, I'M KATHERINE BLANCO WITH THE ATTORNEY GENERAL'S OFFICE AND WE'RE IN POSTCONVICTION, AND THAT MEANS THE ISSUE BEFORE THE COURT, IS THE CLAIM OF

INEFFECTIVE OF COUNSEL UNDER  
STRICKLAND AND EVERY CASE...  
FOUR CASES THAT HE ARGUED THIS  
MORNING WERE THE IDENTICAL  
CASES, THEY ARGUED ON DIRECT  
APPEAL, TO THE COURT, AND --

>> WAIT, DIDN'T WE.

>> [INAUDIBLE] ISN'T THE FACT  
THAT WE COULDN'T CONSIDER  
WHETHER IT SHOULD HAVE BEEN  
RAISED IN A MOTION FOR NEW TRIAL  
BECAUSE IT WASN'T INCLUDED IN  
THERE.

WHAT REASON, ESPECIALLY WHEN THE  
JUROR HAS THEN BEEN ARRESTED BY  
THE TIME THEY SAW THE MOTION FOR  
NEW TRIAL I ASSUMED THE JUROR,  
THE FOREWOMAN OF THE JURY, WHICH  
IS SOMETHING TO... WAS ALREADY  
HAD BEEN ARRESTED AND WAS  
REMOVED FROM THE PENALTY PHASE,  
WHAT EARTHLY REASON COULD THERE  
BE FOR A COMPETENT DEFENSE  
LAWYER NOT TO FILE A MOTION FOR  
NEW TRIAL BASED ON THE  
NONDISCLOSURE.

>> BECAUSE THEY WANTED TO KEEP  
THE JUROR ON --

>> I UNDERSTAND IF THEY KNEW IT.  
WE HAVE TO LOOK AT TWO POINTS,  
SOUNDS LIKE THEY DROPPED THE  
ISSUE ABOUT WHETHER THEY SHOULD  
HAVE FURTHER QUESTIONED THE  
JUROR AND NOW THEY'VE LOST THE  
CASE AND DEATH PENALTY HAS BEEN  
IMPOSED.

>> I DON'T THINK NOT YET, YOUR HONOR.

>> THE MOTION FOR --

>> PENALTY PHASE, WAS IT ALREADY FINISHED?

>> AT THE TIME, THAT THE DEFENSE WANTED TO KEEP JUROR TRACY ROBINSON, ON THE PANEL, IT WAS THE FIRST NIGHT OF THE PENALTY PHASE, YOUR HONOR, THE SECOND MORNING OF PENALTY PHASE AND THE DEATH PENALTY HAD NOT BEEN IMPOSED WHEN THE DEFENSE, THE ATTORNEY IS OBJECTING TO THE REMOVAL OF JUROR TRACY ROBINSON.

>> I'M ASKING WHEN WAS THE MOTION FOR NEW TRIAL FILED.

>> AFTER THAT, THERE WAS A MOTION FOR NEW TRIAL AND AMENDED

--

>> IS THIS A HARD QUESTION.

>> NO, YOUR HONOR.

>> AFTER THE PENALTY PHASE?

THE MOTION --

>> MOTION FOR NEW TRIAL.

>> NOW THERE HAS BEEN A FINDING OF GUILT, AND, THERE IS A PENALTY PHASE WHERE THE JURY RECOMMENDED THE DEATH PENALTY. WHAT REASON, AT THAT POINT, WOULD THERE BE FOR THE DEFENDANT, NOT TO FILE A MOTION FOR NEW TRIAL BASED ON THE NONDISCLOSURE.

>> THE GROUNDS ASSERTED AT THE TIME WERE THE GROUNDS THE

DEFENSE FELT WERE THE MOST VIABLE FOR THEM. AND, THAT INCLUDED -- IT DOES NOT INCLUDE THE DELIBERATE FAILURE TO DISCLOSE BUT THAT ISSUE WAS ADDRESSED IN POSTCONVICTION AND COUNSEL WAS ASKED, IF A CLAIM OF DELIBERATE FAILURE TO DISCLOSE WAS NOT INCLUDED, WOULD YOU HAVE ASKED FOR A NEW TRIAL, BASED ON JUROR TRACY ROBINSON'S DELIBERATE FAILURE TO DISCLOSE HER OBSTRUCTING AN OPPOSING CHARGE, MISDEMEANOR CHARGE THE YEAR BEFORE, AND, COUNSEL, DEFENSE COUNSEL, AT THE GUILT PHASE, SAID NO, IT WOULD NOT HAVE CONSTITUTED A BASIS.

>> WAIT A MINUTE.

I THOUGHT IN THIS CASE, THAT THERE WAS -- SOME OTHER -- DID SOME OTHER ATTORNEY ACTUALLY FILE THE MOTION FOR NEW TRIAL, WHO WAS NOT FAMILIAR WITH THE FACT THAT THIS JUROR HAD NOT DISCLOSED SOMETHING? WASN'T THERE A PROBLEM WITH WHO WAS FILING THIS AND HAVING ALL OF THE INFORMATION THAT WAS NECESSARY TO FILE THE MOTION FOR NEW TRIAL?

>> YOU HAD A MOTION FOR NEW TRIAL AND AMENDED MOTION, JUSTICE QUINCE AND MULTIPLE ATTORNEYS, KEN LITMAN, WHO WAS

GUILT PHASE COUNSEL AND HE AT THAT TIME WAS WORKING IN PALM BEACH COUNTY AND CAME BACK TO TRY THE CASE BECAUSE HE WAS THE MOST FAMILIAR.

THE PENALTY PHASE ATTORNEY WAS JOE R -- REGISTRATO AND ANOTHER WAS BROUGHT IN AND HE WAS ASKED, WHY DID THE ATTORNEY ON THE -- AMENDED MOTION FOR NEW TRIAL AND BY THAT TIME, ATTORNEY LITMAN WAS BACK IN PALM BEACH COUNTY AND ATTORNEY REGISTRATO HAD GONE THE PRESIDENT PHASE AND THERE WERE MULTIPLE ATTORNEYS INVOLVED.

AS TO THE PENALTY PHASE.

>> IF THIS IS AN ATTORNEY NOT FAMILIAR WITH THE CASE WOULDN'T THE OTHERS -- AND IT SEEMS APPROPRIATE THEY WOULD HAVE READ THE MOTION AND GONE OVER THIS.

>> CERTAINLY, YOUR HONOR AND THE GROUNDS THEY RAISED WERE THE GROUNDS THEY FELT WERE BEST FOR THEM AT THE TIME.

AND, AGAIN --

>> WAS THE... RAISED AS AN ISSUE ON APPEAL.

>> DELIBERATE FAILURE TO DISCLOSE.

>> DID HE SAY -- IS HE AN EXPERIENCED APPELLATE ATTORNEY AND IT WOULD BE A POSSIBLE WINNABLE --

>> YOU ADDRESSED IT IN ORAL

ARGUMENT AND IN PROCEDURE, AND  
THE STATE ALSO ADDRESSED IT IN  
THE BRIEF AND ADDRESSED THE  
DELLA ROSA STANDARDS AND I  
DIRECT THE COURT'S ATTENTION  
BECAUSE WE HAVE BRIEFED THE CASE  
ON IN INEFFECTIVE --

>> HUMOR ME.

LET'S ASSUME IT WAS RAISED,  
HUMOR ME ABOUT WHY IT --

>> THE DELLA ROSA, IT DOESN'T  
FOR THREE REASONS, ONE FACTOR IN  
DETERMINING WHETHER THE  
INFORMATION WAS SUFFICIENTLY  
MATERIAL IS WHETHER THE DEFENSE  
WOULD HAVE EXERCISED A  
PEREMPTORY CHALLENGE.

AND THE DEFENSE HAD FOUR  
CHALLENGES REMAINING AND  
POSTCONVICTION, WE NOW KNOW,  
THAT THE DEFENSE WANTED TO KEEP  
THAT JUROR, WE KNOW AT THE TIME  
OF TRIAL, THE CONTEMPORANEOUS  
STATEMENTS WHEN THEY FOUND OUT  
THAT SHE HAD BEEN ARRESTED AND  
THEY HAD THE MISDEMEANOR, THEY  
STILL WANTED TO KEEP JUROR TRACY  
ROBINSON, WHY?

BECAUSE THEY HAD DONE A WHOLE  
MOCK TRIAL, HAD A DEFENSE JURY  
EXPERT, WHO RECOMMENDED, A YOUNG  
MINORITY, AND TRACY ROBINSON,  
YOUNG, FEMALE, AFRICAN-AMERICAN  
AND THEY WANTED TO KEEP HER ON  
THE JURY INTO YOUR OPPOSITION  
SAYS YOU CANNOT LOOK TO THAT.

AND THEY SUGGEST AN ARGUMENT THAT THE LEGAL STANDARD IS THE MATERIALITY IS, IS NOT WHAT THAT SUBJECTIVE LOOK MAY BE LATER. WHAT DO YOU SAY TO THAT ARGUMENT.

>> YOUR HONOR IT IS NOT A POST RATIONALIZATION, IT IS CONTEMPORANEOUS AT THE TIME OF TRIAL AND THE ANNOUNCEMENT ON RECORD AT THE TIME OF TRIAL WAS OBJECTING TO THE JUDGE REMOVING THE JUROR, SO --

>> YOU SAY THAT IS A DIFFERENT --

>> IN POSTCONVICTION -- I'M SORRY.

>> YOU SUGGEST IT THROWS IT INTO A DIFFERENT CATEGORY, BUT THIS DID COME UP, TOWARDS THE END OF TRIAL, AND, THAT IS WHAT YOU BASE IT ON, NOT SOME SUBJECTIVE ARGUMENT LATER ON?

>> WELL, I THINK BOTH ARE PERMISSIBLE, WHEN WE LOOK AT INEFFECTIVE ASSISTANCE OF COUNSEL, ESPECIALLY WHERE THERE IS AN ALLEGATION, A POST-HOC RATIONALIZATION AND DEFENSE COUNSEL IS ASKED SPECIFICALLY ON THE STAND, FROM CCR AS, PERSPECTIVE YOU WOULDN'T HAVE WANTED THE JUROR, WHY DON'T YOU DO EVERYTHING IN YOUR POWER TO GET HER OFF, NO, YOU DON'T UNDERSTAND, THE DEFENSE WANTED

TO KEEP HER AND THEY ARE MADE  
CONTEMPORANEOUS AND AT THE TIME  
OF TRIAL THE DEFENSE IS NOT  
DIVULGING THEY HAD A MOCK TRIAL  
AND WANT TO KEEP HER BUT  
CERTAINLY THAT IS A  
CONTEMPORANEOUS FINDING AND BACK  
TO JUSTICE PARIENTE'S INQUIRY  
WITH REGARD TO DELLA ROSA, YOU  
SAY BASED UPON THE FACT THAT THE  
DEFENSE CHALLENGED THE REMOVAL  
OF THE JUROR AT THE TIME OF  
TRIAL, THEY DO NOT NOW ARGUE  
THAT, WELL, THE DEFENSE WOULD  
HAVE EXERCISED A PEREMPTORY.  
THAT IT WOULD HAVE BEEN USED  
AGAINST JUROR ROBINSON AND,  
AGAIN IT WAS ARGUED, EXTENSIVELY  
ON DIRECT APPEAL BUT I'M  
ATTEMPTING TO ANSWER JUSTICE  
PARIENTE'S INQUIRY AND THE  
JUROR'S ANSWER CANNOT CONSTITUTE  
DELIBERATE CONCEALMENT WHERE  
THERE IS NO FURTHER INQUIRY TO  
CLARIFY AMBIGUITY AND THE WAY  
THE JURY SELECTION WAS CONDUCTED  
THE PROSECUTOR AND DEFENSE  
COUNSEL WERE MOVING ON, AND,  
THEY DID NOT CLARIFY ANY PRIOR  
QUESTIONS.

>> IT SEEMS TO ME, ON THAT  
PARTICULAR POINT, WE CAN'T --  
[INAUDIBLE] THERE DOESN'T APPEAR  
TO BE ANYTHING IN THE RECORD  
THAT WOULD JUSTIFY A JUROR WHO  
WAS ASKED SPECIFICALLY IF YOU OR

ANYONE IN YOUR FAMILY OR -- HAS BEEN ARRESTED, A JUROR WHO DOES NOT SAY, YES, I HAVE BEEN ARRESTED, THAT IS DELIBERATE. AND, IF IT HAPPENED 30 YEARS AGO AND IT WAS SOME MINOR INCIDENT, I MIGHT BE ABLE TO RATIONALIZE THAT BUT, SOMETHING THAT HAPPENED A YEAR AGO, YOU WERE ARRESTED, WASN'T IT A NONVIOLENT --

>> IT WAS A... A MISDEMEANOR OFFENSE.

>> BUT IT WAS STILL SOMETHING, WAS SHE ARRESTED WHEN THAT TOOK PLACE.

>> HER -- HER ANSWER ON THE JURY QUESTIONNAIRE, HAVE YOU EVER BEEN ACCUSED OF A CRIME AND THE ANSWER IS YES.

AND, THEN, WHEN THEY -- THERE ARE DISCUSSIONS, AFTER THE TRIAL, THEY HAVE THE MISDEMEANOR PLEA --

>> WHAT OTHER RATIONALE COULD THERE BE BUT DELIBERATE CONCEALMENT.

>> OF THE EBB AND FLOW OF QUESTIONS, IT WAS DURING THE PROSECUTOR'S QUESTIONS, HE'S MOVING ON, HE'S MOVING LEFT, HE'S MOVING RIGHT AND DOESN'T COME BACK TO SOME OF THE JURORS AND IT WANT A FOCUS ON THIS PARTICULAR JUROR, SHE ANSWERS, AND, ESSENTIALLY, SEGUED INTO

ANOTHER JUROR AT THAT POINT IN TIME AND NO JUROR STOOD UP AND SAID, WAIT, WAIT, I HAVE MORE TO SAY.

THEY DID NOT INTERRUPT THE PROSECUTOR DURING THE DELIBERATION.

AND, ALSO, DURING VOIR DIRE, THE DEFENSE DID NOT ASK ANY OF THE JURORS ANY QUESTIONS, REGARDING THEIR LITIGATION HISTORY AND YOU SAY, GOODNESS, IT MUST BE A TERRIBLE THING, THEY DIDN'T GO BACK AND FOLLOW-UP ON CRIMINAL LITIGATION HISTORY, WHEN IT IS CLEAR IN HER QUESTIONNAIRE, SHE HAS SAID YES.

AND WHEN THE PROSECUTOR COVERED IT.

BUT, IN LOOKING THE AT THE CLAIM, UNDER STRICKLAND AS WE MUST, YOU HAVE TO LOOK AT WHETHER THERE IS A DEFICIENCY OF COUNSEL, AND, RESULTING PREJUDICE AND THEY CANNOT SHOW ANY DEFICIENCY OF COUNSEL WHERE YOU HAVE A STRATEGIC DECISION, AT THE TIME OF TRIAL, WANTING TO KEEP THIS PARTICULAR JUROR ON THE JUROR, A VERY GOOD REASON FOR IT, THEY HAVE A MOCK JURY AND A JURY CONSULTANT THAT HAS RECOMMENDED IT, YOU ALSO HAVE AN ATTORNEY, WHO IS A GUILT PHASE ATTORNEY, KEN LITMAN, WHO HAS OVER -- AT THE TIME, HE WAS --

GRADUATED FROM NYU AND, IN THE '70s AND HAD A JD AND LLM AND, TESTIFIED HE TRIED OVER 100 MURDER CASES WHEN HE CAME TO FLORIDA, TRIED OVER 45 CASES AND HAS AN EXTENSIVE EXPERIENCE AND CAN MAKE A DECISION WHETHER OR NOT HE'S SATISFIED WITH THE JUROR OR NOT.

>> YOU THINK THE MOST TELLING THING, AND I THINK THERE IS -- I WANT TO HEAR A RESPONSE ON THIS, IS THAT WHEN THERE WERE EFFORTS -- WHEN SHE WAS ARRESTED, AND THEN AT THAT POINT, THAT WAS FOR THE CRACK COCAINE, AT THAT POINT, THEN, THEY KNEW ABOUT THE... AND THE MISDEMEANORS.

>> THEY KNEW ABOUT THE ARREST.

-- ABOUT THE ARREST.

FOR THE DRUG CHARGES.

AND, SUBSEQUENTLY, THEN, IT CAME OUT, SAID, WAIT, THERE IS A CAPIAS AND ALL OF THAT WAS KNOWN AT THE POINT THEY SAID WE DON'T WANT HER REMOVED.

>> YES.

AND --

>> WHAT WAS THE RATIONALE FOR NOT WANTING HER?

SOMEONE WHO IS JUST BEEN ARRESTED ON A DRUG CHARGE, WHAT WAS THEIR RATIONAL FOR NOT WANTING HER REMOVED.

>> THEY SAID IT WOULD NOT HAVE KEPT THEM FROM WANTING TO KEEP

HER ON THE PENALTY PHASE CHARGE.  
AND THE RATIONALE, THEY  
DISCUSSED THIS OPTIONS AND  
WANTED TO KEEP HER, WERE NOT  
HAPPY WITH ONE OF THE ALTERNATES  
THAT WAS GOING TO GO IN HER  
PLACE AND OBJECTED TO JUDGE  
DIANA --

>> AND THEY WERE THIS ONES  
PUSHING TO HAVE HER REMOVED OR  
--

>> NO, JUDGE DIANA ALLEN WAS.  
THE JUDGE SAID I'M BUMPING HER  
FROM THE JURY.  
AT THAT POINT SHE WAS ARRESTED.

>> SHE HAD BEEN ARRESTED .

>> FOR CRACK COCAINE AND  
MARIJUANA.

YOU KNOW...

>> SOMEONE ELSE.

>> SHE WAS IN JAIL, YOUR HONOR.

>> THIS IS THE PART THAT  
CONCERNS ME.

DEFENSE COUNSEL MAY HAVE MADE AT  
THAT POINT, THE PENALTY PHASE, A  
STRATEGIC DECISION AND MAYBE IT  
GOES -- STRATEGIC DECISION AND  
WHERE I FELT IT MAY HAVE NEEDED  
FURTHER INVESTIGATION AND A  
JUROR AS JUSTICE QUINCE SAYS  
THEY HAVE AN OUTSTANDING CAPIAS  
AND AN ARREST AND A -- A  
CONVICTION?

A CONVICTION FOR A --

>> I BELIEVE IT WAS A --

WITHHELD ADJUDICATION, YOUR

HONOR.

>> THAT IS NOT DISCLOSED.

DON'T WE HAVE AN ISSUE FOR THE  
-- YOU KNOW, OUR SYSTEM OF  
CRIMINAL JUSTICE, THIS IS A --  
NOT ONLY IS IT A CRIMINAL CASE  
BUT A DEATH PENALTY CASE, AND,  
SOMEBODY WHO IS A -- SITTING AS  
THE FOREPERSON OF THE JURY, DO  
WE NOT HAVE A PROBLEM WITH A  
QUESTION OF THE INTEGRITY OF THE  
SYSTEM, IN THAT SITUATION?

>> YOUR HONOR, I DO NOT DISPUTE  
YOUR CONCERNS.

JUROR ROBINSON HAS NOTHING TO DO  
WITH THE PENALTY PHASE, BECAUSE  
JUDGE DIANA ALLEN, TOOK HER OFF  
THE JURY AND IT AFFECTS THE  
GUILT PHASE ONLY AND AS TO THE  
INEFFECTIVE ASSISTANCE OF  
COUNSEL CLAIM WITH RESPECT TO  
THE GUILT PHASE, DEFENSE COUNSEL  
DID NOT WANT TO EXERCISE THE  
PEREMPTORY TO HER, THEY STILL  
HAD FOUR PEREMPTORIES REMAINING  
AND WERE SATISFIED WITH THE JURY

--

>> SOMEONE HAS TO -- I'M SAYING,  
IF THE COURT, IF -- ISN'T THIS  
INFORMATION THAT, DO YOU AGREE  
IT SHOULD BE DISCLOSED?

WE DON'T HAVE A QUESTION IT  
NEEDED TO BE DISCLOSED, DO WE?

>> WELL, I THINK THAT THERE IS  
NO DELIBERATE FAILURE TO  
DISCLOSE IN THIS CASE, I THINK,

WHAT YOU HAVE --

>> HOW DO WE KNOW THAT?

HOW DO WE KNOW THAT SHE AN  
OUTSTANDING CAPIAS, WHERE, AS  
DEFENSE COUNSEL SAID, SHE'S  
THERE FOR -- WITH COURT COSTS,  
YOU KNOW, I THINK THAT NINE DAYS  
AFTER JURY SELECTION, SHE'S IN  
JAIL, FOR CRACK COCAINE AND  
MARIJUANA AND SOME OTHER DRUGS,  
I DON'T THINK IT TAKES A STRETCH  
OF THE IMAGINATION, TO KNOW THAT  
PROBABLY, ALTHOUGH MAYBE WE --  
YOU KNOW, WE ARE NOT  
ESTABLISHING IN THIS CASE THAT  
SHE WAS, YOU KNOW, A CRACK  
ADDICT.

>> YOUR HONOR, I THINK THAT YOUR  
OPINION ON DIRECT APPEAL, THE  
ISSUES THAT WERE ADDRESSED AND  
WERE NOT BEING PROCEDURALLY  
BARRED ALREADY ADDRESSED THIS,  
JUROR ROBINSON WAS NOT  
STATUTORILY DISQUALIFIED FROM  
SERVICE, NUMBER ONE AND NUMBER  
2, THE DELIBERATE FAILURE TO  
DISCLOSE AND WHY COUNSEL DIDN'T  
RAISE THAT IS RAISED IN  
POSTCONVICTION AS INEFFECTIVE  
ASSISTANCE OF COUNSEL CLAIM, AND  
IS ADDRESSED IN A 15 PAGES OF  
THE TRIAL COURT'S ORDER --

>> HER OTHER CHARGE WAS A LOADED  
FIREARM, THAT WAS THE THIRD.

>> AT THE PENALTY PHASE.

AND, THE THIRD THING IS THE

JUROR INTERVIEW CLAIM, AND, THE COURT DENIED -- AFFIRMED THE TRIAL COURT'S DENIAL OF THE REQUEST FOR JUROR, INTERVIEW. WHEN THE CASE WENT BACK TO POSTCONVICTION, CCR RESURRECTED THE REQUEST FOR A JUROR INTERVIEW AND, THE JUDGE ADDRESSED THE COURT'S OPINION AND ALSO REVIEWED JUDGE DIANA ALLEN'S RULING ON THE RECORD AND FOUND NOTHING WAS RAISED TO WARRANT A JUROR INTERVIEW AND MOST CONVICTION AND, CCR RELIED ON A NEW RULE OF CRIMINAL PROCEDURE WHICH HAS NOT BEEN RETROACTIVE, AND IS A RULE THAT SPECIFICALLY APPLIES TO TRIALS BUT DOES NOT SHOW ANY BASIS TO RELITIGATE THE CLAIM THAT IS ESSENTIALLY, BARRED BY LAW, THE CASE RES JUDICATA AND SUCCESSIVE PETITION AND AS TO THE ADDITIONAL PRONG OF THE TRIAL COURT FOUND NO DEFICIENT PERFORMANCE, BECAUSE OF THE STRATEGIC DECISION OF COUNSEL AND ALSO, NO PREJUDICE AND THERE HAS BEEN NO SHOWING A JUROR WHO IS ACTUALLY BIAS AND THE UNANIMOUS VERDICT WOULD HAVE BEEN DIFFERENT AND THE CASES WE RELIED ON AT BARNHILL AND COX -- >> NOW, I BELIEVE THAT THERE -- THE OPPONENT WAS SAYING WE DON'T LOOK AT THIS CARATELLI STANDARD

BUT WHETHER OR NOT A MOTION FOR A NEW TRIAL WOULD HAVE BEEN GRANTED, SO, UNDER THE -- IF YOU LOOK AT THAT ASPECT OF IT, ON WHY WOULDN'T A MOTION FOR NEW TRIAL HAVE BEEN GRANTED HERE.

>> THERE WAS NO BASIS FOR A NEW TRIAL UNDER THE DELLA ROSA STANDARD IS WHAT HE WANTS TO GO BACK TO, I BELIEVE AND I BELIEVE WE HAVE ADDRESSED -- AGAIN, WHO ADDRESS, THE COURT'S ATTENTION TO THE BRIEF UNDER...

[INAUDIBLE] AND CASE NUMBER SP-00979, WITH RESPECT TO THE STATE'S MORE DETAILED ARGUMENTS THAN I HAVE MADE THIS MORNING BECAUSE I BRIEFED THE ISSUE, CERTAINLY ON AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BUT AS TO WHY HE WOULDN'T BE ENTITLED TO A NEW TRIAL ON THE FAILURE OF THE ALLEGATIONS ON A MERE --

>> WASN'T THERE -- WHAT ACTIONS

--

>> INEFFECTIVE ASSISTANCE WAS, COUNSEL FAILED TO INCLUDE THAT. HER NONDISCLOSURE IN THE MOTION FOR NEW TRIAL.

>> THAT'S TRUE.

ONE OF THE DEFENSE ATTORNEYS, SAYS, I THOUGHT IT WAS RAISED THE WAY WE RAISED THE MOTION AND THOUGHT PERHAPS IT WAS PRESENTED.

BUT TO THE EXTENT IT WAS NOT PRESENTED, AS A SEPARATED SUBHEADING, DELIBERATE FAILURE TO DISCLOSE, THEN DEFENSE COUNSEL WAS ASKED, COUNSEL WAS ASKED, WOULD YOU HAVE WANTED TO EXCUSE THE JUROR ON THE BASIS OF THE DELIBERATE FAILURE TO DISCLOSE AND HE SAID I WOULD NOT HAVE WANTED TO HAVE EXCUSED THIS JUROR, NO, NOT ON THAT BASIS AND ON THE OTHER BASIS, THE FACT THAT SHE HAD, WAS NOT STATUTORILY DISQUALIFIED AND FAILED TO TAKE HER COSTS AND FINES IN ASSOCIATION WITH A PRIOR WITHHELD ADJUDICATION OF THE OBSTRUCTING AND IMPOSING CHARGE.

AND IF THERE ARE NO FURTHER QUESTION I WOULD RELY ON THE ANSWER BRIEF AND WOULD ASK TO AFFIRM THE TRIAL COURT'S DETAILED ORDER, [INAUDIBLE] AND I BELIEVE IN BOTH CASES JUDGE BARBAS PRESIDED AND, THE OTHER JUDGE PASSED AWAY, THE ORDER IS FACT-SPECIFIC AND IT GOES -- PAINSTAKINGLY THROUGH EACH OF THE ALLEGATION AND RESPECT FULLY ASK THE COURT TO AFFIRM THE TRIAL COURT... [INAUDIBLE] DENYING POSTCONVICTION RELEASE, THANK YOU, YOUR HONORS.

>> BRIEFLY, JUDGE BARBAS'S ORDER, BLAMES THE DEFENDANT FOR

FAILING TO RAISE THIS ISSUE, OF  
JURY NONDISCLOSURE, TAKE ISSUE  
WITH THAT.

AND THE LOWER COURT'S ORDER,  
ALSO, SAID THAT THIS WAS A --  
NOT INTENTIONAL NONDISCLOSURE  
AND AGAIN, UNDER THE CASE LAW WE  
DON'T HAVE TO SHOW THAT.

ONE THING I'M --

>> HOW, I MEAN, SINCE SHE WASN'T  
QUESTIONED, HOW WOULD WE -- NOT  
EVEN A FINDING OF FACT, IS IT?

I MEAN, HOW -- HOW DO WE KNOW?

>> I MEAN, I THINK IT IS  
OBVIOUS, SHE WAS  
INTENTIONALLY... BECAUSE OF THE  
RECENT --

>> EITHER WAY IT IS A QUESTION  
WE CAN REVIEW DE NOVO, CORRECT?  
AS TO WHETHER IT REACHES THAT  
STANDARD?

BUT, HAVE YOU RAISED THE -- ON  
POSTCONVICTION, THIS JUDGE ERRED  
IN NOT ALLOWING YOU TO INTERVIEW  
JUROR ROBINSON, DID YOU READ  
THAT --

>> YES.

I WANTED --

>> THE FACTS OF DELIBERATE  
CONCEALMENT, THAT IS ONE ASPECT  
OF THE STANDARD, IF WE ASSUME  
THAT SHE DELIBERATELY CONCEALED  
IT, ARE YOU SAYING, BECAUSE OF  
JUST THAT ONE FACTOR, YOU WOULD  
BE ENTITLED TO RELIEF.

>> I'M SAYING IT WAS INEFFECTIVE

FOR TRIAL COUNSEL NOT TO RAISE  
IT IN A MOTION FOR NEW TRIAL AND  
HAD IT BEEN RAISED IT SHOULD  
HAVE BEEN GRANTED ON DIRECT  
APPEAL AND I TOOK ISSUE WITH THE  
DIRECT APPEAL ATTORNEY WHO  
FAILED TO RAISE THAT AS  
FUNDAMENTAL ERROR AND, THE KELLY  
CASE, CAME OUT MAYBE TEN DAYS  
AFTER THE ORAL ARGUMENT AND --  
IN THIS CASE AND, IT WAS  
INEFFECTIVE FOR THE DIRECTS  
APPEAL ATTORNEY, WHO FAILED TO  
SAY, WHOA, THIS IS A CASE I CAN  
USE, A FUNDAMENTAL RIGHT TO THE  
A PROPER JUROR AND THAT IS  
LANGUAGE FROM THE KELLY CASE AND  
LIKE IN THE CIVIL WORLD THE  
BURDEN OF PROOF, IS A  
PREPONDERANCE OF THE EVIDENCE  
AND THE CRIMINAL SETTING,  
LIBERTY IS AT STAKE IS GREATER  
IF YOU HAVE A REASONABLE DOUBT  
AND IF SOMEONE WANT DEBT RELIEF  
FROM AN ADVERSE -- CAN GET  
RELIEF FROM AN ADVERSE SITUATION  
IN A CIVIL SETTING... A PERSON  
WHOSE VERY LIFE IS AT STAKE  
LEAVE SHOULD BE GRANTED LIKE IT  
WAS AT KELLY, I THINK MY TIME IS  
UP AND IF THERE ARE NOT ANY MORE  
QUESTIONS, I WILL...  
>> THANK YOU.  
NEXT CASE.