

>> THE NEXT CASE ON THE DOCKET
IS ERIC KURT PATRICK V. STATE OF
FLORIDA.

>> WHENEVER YOU ARE READY.

>> MAY IT PLEASE THE COURT,
SUZANNE KEFFER ON BEHALF OF ERIC
PATRICK WAS WE ARE AFTER A
SUMMARY DENIAL ON HIS INITIAL
3.851 MOTION AND EVIDENTIARY
HEARING ON SOME OF THOSE CLAIMS
AS WELL.

>> ONE QUESTION.

ON THE ISSUE OF JUROR MARTIN,
THE CHALLENGE OF COST OR LACK
THEREOF.

A LITTLE CONFUSED WAS YOUR
MARTIN ON THE JURY PANEL IN THIS
CASE?

>> YES.

>> HE SERVED ON THE PANEL AND
THE PENALTY PHASE.

>> THAT IS MY UNDERSTANDING.

>> SPECIFICALLY WITH RESPECT TO
JURY MARTIN, HE EXPRESSED ON THE
RECORD HE HAD A BIAS TOWARD
HOMOSEXUALS.

>> ON EITHER SIDE THE PROSECUTOR
NOR THE DEFENSE ATTORNEY
CHALLENGED HIM FOR CAUSE.

>> NO.

>> THIS WOULD BE HELPED.

YOU ARE NOT SAYING SHOULD
REVERSE AS A MATTER OF LAW.
WE NEEDED EVIDENTIARY HEARING TO
SEE IF THE DEFENSE ATTORNEY HAD
A STRATEGIC REASON FOR KEEPING
HIM ON THE JURY BECAUSE
APPARENTLY THIS COULD HAVE BEEN
A SITUATION, ONE OF THE MORE
DISGUSTING COMMENTS YOU COULD
HAVE BEING SAID, THEY MADE, EACH
SIDE MADE A CALCULATED DECISION
MIGHT BE HELPFUL TO THEIR SIDE
BECAUSE WE DON'T KNOW WHY.

>> WE WERE NOT GRANTED AND
EVIDENTIARY HEARING ON THAT
CLAIM.

WHAT THE STATE AND THE COURT
SITE IS OTHER COMMENTS IN THE
RECORD BUT I THINK THE COMMENT
ABOUT HOMOSEXUALITY GIVEN THE
CONTEXT OF THIS CASE WAS SO

PREJUDICIAL AND SHOWED ACTUAL BIAS, THERE SHOULD HAVE BEEN IN EVIDENTIARY HEARING TO SEE IF TRIAL COUNSEL EVEN WENT THROUGH A THOUGHT PROCESS COMPARING THAT OUTRAGEOUS STATEMENT.

>> WHAT THE STATE IS SAYING IS HE EXPRESSED VIEWS ABOUT THE DEATH PENALTY THAT WERE MORE HELPFUL TO THE DEFENSE, AND THE DEFENSE ATTORNEY COULD HAVE THOUGHT THAT BECAUSE THE VICTIM WAS HOMOSEXUAL, THAT THEY WOULD BE NOT AS SYMPATHETIC EVEN THOUGH THE DEFENDANT WAS ENGAGED IN HOMOSEXUAL ACTS BUT WE DON'T KNOW.

>> THAT IS SPECULATION ON THE PART OF THE STATE.

WE HAD NO DECLARATION OR TESTIMONY FROM TRIAL COUNSEL THAT THEY WENT THROUGH THE PROCESS OF CONSIDERING OTHER STATEMENTS AND WAVED THAT AGAINST THE BIAS THAT WAS EXPRESSED.

>> DID MR. MARTIN SPECIALIZE IN THE PENALTY PHASE?

>> DID MR. MARTIN --

>> DID YOUR DEFENDANT?

>> HE TESTIFIED IN THE PENALTY PHASE.

>> MR. MARTIN WAS PART OF THE JURY?

>> YES.

>> WHAT I AM CURIOUS ABOUT AGAIN, IF YOU LOOK AT THESE THINGS, JUST TO PARAPHRASE, THE LAST PART OF IT MR. MARTIN SAYS PUT IT THIS WAY.

IF I FELT THE PERSON WAS A HOMOSEXUAL, I PERSONALLY BELIEVE THE PERSON IS MORALLY DEPRAVED ENOUGH THAT HE MIGHT LIE, STEAL OR KILL.

THE PROSECUTOR, PROSECUTOR THEN ASKED, SO YOUR BIASES MAY AFFECT YOUR DELIBERATIONS?

THE JURY SAYS YES.

WHAT CONCEIVABLE STRATEGY COULD A DEFENSE LAWYER HAVE FOR SPEAKING ON THIS PANEL, IF YOU

KNEW YOU WERE GOING TO PUT ON A CLIENT IS A WITNESS.

>> ANY ANSWER I WOULD GIVE, SPECULATION THE LOWER COURT IS ENGAGING IN.

I THINK IT IS PRETTY OUTRAGEOUS AND SHOWS ACTUAL BIAS ON THE PART OF THAT JUROR.

>> AT THE TIME THAT STATEMENT WAS MADE THE TRIAL JUDGE, OPERATING UNDER THE CARE ABILITY STANDARD THERE WAS NO OBJECTION, NO MOTION TO DISMISS THE JURY, THE TRIAL JUDGE HAD TO SEE THIS AS SO PREJUDICIAL THAT HE SHOULD HAVE INTERVENED IN THE ABSENCE OF OBJECTION, THE STANDARD WE ARE LOOKING AT.

>> THE CONTEXT OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, IT IS ALLEGED COUNSEL DIDN'T RAISE A CAUSE CHALLENGE.

WHAT I WOULD SAY IS IT HAS TO BE THAT THERE WAS ACTUAL BIAS ON THE RECORD.

I DON'T THINK IT SPEAKS THAT THE JUDGE SHOULD HAVE INTERVENED, JUST TALKS ABOUT ACTUAL BIAS ON THE FACE OF THE RECORD.

>> IF IT WERE THAT LOOKING AT DIRECT APPEAL AS REVERSAL BECAUSE THE TRIAL JUDGE DIDN'T AUTOMATICALLY EXCUSE THE JURY.

>> ARE YOU CONCEDED THAT IS UNNECESSARY AND WE SHOULD GO BACK FOR EVIDENTIARY HEARING ON THIS ISSUE?

>> THE ISSUE OF SPECULATION ON PART OF THE STATE AND LOWER COURT, COULD POTENTIALLY BE RESOLVED BY TRIAL COUNSEL BUT I DO THINK THE STATEMENTS WITH RESPECT TO HOMOSEXUALITY AND HE WAS DEFINITIVE THAT IT WOULD AFFECT HIS DELIBERATIONS LUCY DIDN'T WAVER ON THAT.

IN THAT REGARD THAT IS ACTUAL BIAS ON THE RECORD, THAT IT WOULD WARRANT A NEW TRIAL ABSENT -- DON'T KNOW IF THERE CAN BE A REASONABLE STRATEGY ON BEHALF OF TRIAL COUNSEL.

THE ACTUAL BIAS ON THE RECORD IS ENOUGH TO WARRANT A NEW TRIAL AND SHOWS INEFFECTIVE ASSISTANCE OF COUNSEL BUT IF THIS COURT FEEL THAT ADDITIONAL INFORMATION IS NEEDED ABOUT STRATEGY OF COUNSEL AND EVIDENTIARY AIR REHEARING WOULD BE -

>> IS PART OF YOUR ARGUMENT THAT STATEMENTS MADE BY JURY MARTIN AFFECTED OTHER MEMBERS OF THE JURY PANEL?

>> THAT WOULD BE SPECULATION. I DON'T KNOW WHAT WENT ON BEHIND CLOSED DOORS BUT IF SOMEBODY SO EXPRESSES THOSE VIEWS.

>> IN THE CONTEXT THIS WAS NOT A ONE ON ONE EXAMINATION OF JUROR MARTIN, THIS WAS IN THE CONTEXT OF QUESTIONING.

>> EVERYBODY HEARD JURY MARTIN'S COMMENTS AND THE FACT THAT IT WOULD AFFECT HIS DELIBERATIONS AND IN THE CASE OF THIS CASE, NOT JUST THAT THE VICTIM WAS HOMOSEXUAL BUT IT WAS VERY CLEAR TO THE JURY THAT MR. PATRICK WAS ALSO ENGAGING IN HOMOSEXUAL ACTS.

>> LET ME READ THIS, JURY SELECTION EVER JUSTIFYING CLOSE CONVICTION RELIEF IS SO FUNDAMENTAL AND GLARING IT SHOULD HAVE ALERTED TRIAL JUDGE TO INTERVENE IN THE ABSENCE OF A PROPER OBJECTION TO PREVENTIVE -- PREVENTING A BYSTANDER FROM SERVING ON THE JURY.

>> I DON'T DISPUTE THAT. THIS COMMENT WOULD RISE TO THAT LEVEL.

>> YOU LOOK AT THE ENTIRE CONTEXT?

>> OF THE COMMENT?

>> IN WHICH THE COMMENT WAS MADE.

AT THAT TIME, THE JUDGE HEARD THE CONFESSION, THE STATEMENT OF MR. PATRICK IN WHICH HE CLAIMED HE WAS NOT HOMOSEXUAL, AND HE REACTED THE WAY HE DID AND ASSAULTED THE VICTIM RESULTING

IN HIS DEATH BECAUSE THE
HOMOSEXUAL VICTIM CAME ON TO
HIM.

WASN'T THAT THE ESSENCE?

>> IF YOU LOOK AT THE FACT THE
COURT HAD SEEN MR. PATRICK'S
STATEMENT THERE IS A LOT OF
OTHER COMMENTS WITHIN THAT
STATEMENT.

THAT WAS VERY EVIDENT AND HAD
THE POTENTIAL, THE WHOLE CONTEXT
OF THE CRIME WAS MR. PATRICK WAS
ENGAGING IN HOMOSEXUAL ACTIVITY.

>> WHO HAD THESE VIEWS WHICH
OBVIOUSLY WERE INAPPROPRIATE.
IS AN OBJECTIVELY REASONABLE TO
THINK THEY MIGHT BE MORE
SYMPATHETIC ON THE PENALTY PHASE
TO MR. PATRICK'S EXPLANATION THE
TRIAL COURT HEARD?

>> THAT IS SPECULATION IN THE
ABSENCE OF AN EVIDENTIARY
HEARING.

>> CAN YOU LOOK AT THE CONTEXT
AND MAKE SOME REASONABLE
OBJECTIVE DETERMINATIONS IN SOME
CASES?

>> THAT IS WHERE I SAY AS MUCH
AS IT MIGHT SWING THAT WAY IT
SWINGS THE OTHER WAY AS WELL.
MR. PATRICK'S STATEMENT AND THE
FACTS OF THIS CASE, THERE WAS A
SEXUAL RELATIONSHIP, AND
AFFECTIONATE RELATIONSHIP
BETWEEN MR. PATRICK AND THE
VICTIM IN THIS CASE.

THOSE FACTS CAME OUT NOT ONLY IN
A STATEMENT BUT AT TRIAL.

IN HIS STATEMENT AS WELL WHICH
SHOULD HAVE ALERTED THE TRIAL
JUDGE TO THIS FACT, MR. PATRICK
TALKED ABOUT ENGAGING IN OTHER
HOMOSEXUAL ACTIVITIES.

THIS WAS PREVALENT IN THIS CASE.
I DON'T THINK IT IS SUFFICIENT
TO SAYS THIS COULD HAVE BEEN
BIASED AGAINST THE VICTIM AND
HELPED MR. PATRICK.

REGARDLESS OF THE FACT--

>> THAT IS WHERE WE GO BACK.
I'M NOT SURE WHERE I WOULD BE ON
THIS BUT IT SEEMS TO ME THAT AN

EVIDENTIARY HEARING IS NEEDED
BECAUSE WE'RE NOW TALKING ABOUT
SEVERAL YEARS POST-TRIAL,
SOMETHING THAT MAYBE THEN SHOULD
BE CONSIDERED FUNDAMENTALLY
ERROR BROUGHT UP ON DIRECT
APPEAL THAT THE TRIAL COURT
SHOULD HAVE EXCUSED THIS JUROR.
BUT IF BOTH THE DEFENSE AND THE
STATE DECIDE THEY'RE GOING TO
ROLL THE DICE WHEN THE APPROVAL
OF THEIR CLIENT WELL THEN THERE
MAY NOT BE ANY DEFICIENCY.
SO WOULD YOU AGREE THAT AN
EVIDENTIARY HEARING SHOULD BE
HELD OR THAT WE'RE GOING TO COME
UP WITH SOME PER SE RULE THAT
ALLOWS THIS EVEN THOUGH IT
WASN'T RAISED ON DIRECT APPEAL
TO JUST BE A REVERSAL?

>> I DON'T DISAGREE THAT AN
EVIDENTIARY HEARING IS PROBABLY
A SOUND WAY TO GO.
I CERTAINLY, IN OTHER CASES
ADDRESSING SIMILAR ISSUES WITH
RESPECT TO THE CARTELLI
PREJUDICE AND WHAT YOU'RE
LOOKING AT IN CHALLENGING FOR
CAUSE THERE HAS BEEN EVIDENTIARY
HEARINGS.

>> AS APPELLATE JUDGE GIVEN THE
FACTS OF THIS CASE AND THE
STATEMENTS THAT WERE GOING TO
COME IN AND ALL THE OTHER
EVIDENCE DO I NEED TO HEAR FROM
TRIAL COUNSEL TO DETERMINE THAT
AN EFFECTIVE LAWYER UNDER THESE
CIRCUMSTANCES IS GOING TO BE
LOOKING AT THIS AS A PENALTY
PHASE CASE?

I MEAN DO I NEED TO HEAR FROM
HIM THAT IS IN FACT WHAT HE WAS
THINKING AND STRATEGICALLY HE
WAS MORE CONCERNED ABOUT JURORS
AND HOW THEY WERE GOING TO DEAL
WITH PENALTY PHASE ISSUES
BECAUSE HE WAS PRETTY DARN
CERTAIN HIS CLIENT WAS GOING TO
BE CONVICTED?

IS THAT--

>> I WILL BE CANDID.

THE LEAD TRIAL COUNSEL SAID IN

OUR EVIDENTIARY HEARING HE SAW THIS AS A PENALTY PHASE CASE BUT THAT ASPECT IS ON THE RECORD BUT I STILL DON'T KNOW-- I THINK JUROR MARTIN'S ANSWER WITH RESPECT TO--

>> WHY CAN'T WE LOOK THEN AT THE TOTAL, EVERYTHING THIS JUROR SAID AND DETERMINE IT IS JUST OBJECTIVE REASONABLE IF THAT IS GOOD STRATEGY TO OVERLOOK THAT COMMENT AND ACCEPT A JUROR WHO SAID, I'M SO UNCOMFORTABLE WITH THE DEATH PENALTY I WOULD FOLLOW WHATEVER THE DEFENDANT SAID HE WANTED, BASICALLY?

WHY ISN'T THAT JUST SOMETHING OBJECTIVE I CAN SAY, WELL, IF IT IS CLEARLY A PENALTY PHASE CASE WHY DO I NEED TO SEND IT BACK TO HERE?

AN EFFECTIVE LAWYER IS GOING TO MAKE THAT CALL EVERY TIME?

>> I DON'T KNOW WHAT WENT THROUGH TRIAL COUNSEL'S MIND.

MYSELF, I THINK IT IS UNREASONABLE, THESE OUTRAGEOUS STATEMENTS EVEN IN THE CONTEXT. WHEN WE LOOK AT THIS FROM THE STANDPOINT OF REASONABLE COUNSEL EVEN IN THE CONTEXT OF THOSE OTHER STATEMENTS AND HOW IT AFFECTED THE GUILT PHASE.

IN THE GUILT PHASE TRIAL COUNSEL WAS GOING FOR A LESSER DEGREE OF MURDER AND SO CERTAINLY WHILE THEIR FOCUS WAS THE PENALTY PHASE THEY WERE LOOKING FOR A LESSER CHARGE, A LESSER CONVICTION.

AND SO THOSE STATEMENTS CERTAINLY WOULD HAVE IMPACTED THE GUILT PHASE.

THAT WOULD NOT JUST BE ABOUT SENTENCING, AND SO I THINK THAT IT WOULD BE A MATTER OF WHETHER TRIAL COUNSEL WEIGHED THE COMMENTS ABOUT HIS PREDISPOSITION TO POSSIBLY LIFE VERSUS THE OUTRAGEOUS COMMENTS ABOUT HOMOSEXUALS AND YOU KNOW, ALSO THERE WAS THE IMPACT OF,

WHICH I THINK IS A LITTLE BIT
UNCLEAR, IS THE IMPACT THAT
SOMEBODY WHO IS USING DRUGS
WOULD HAVE ON THAT JUROR.
THAT WAS ALSO AN ASPECT OF JUROR
MARTIN'S STATEMENTS.

SO I THINK CERTAINLY THAT WE
CAN'T JUST SAY THIS WOULD HAVE
AFFECTED THE PENALTY PHASE.
THAT THIS IS SOMETHING THAT
WOULD HAVE AFFECTED THE GUILT
PHASE AS WELL WHERE COUNSEL IS
GOING IN AND LOOKING FOR A
LESSER CONVICTION.

>> BECAUSE I MEAN AGAIN I AM
AGREEING WITH YOU.

THOSE STATEMENTS AND WHAT CAME
OUT IN THE CONFESSION ABOUT WHAT
WAS GOING ON, I MEAN, PATRICK
SAYS HE WASN'T HOMOSEXUAL BUT
IT'S LIKE, WHAT HE WAS DOING WAS
HOMOSEXUAL ACTIVITY SO YOU KNOW,
IT WOULD BE INCONCEIVABLE WHY HE
WOULD KEEP HIM ON THE JURY I
WOULD THINK THE SAME THING FOR
THE STATE BUT THEY BOTH HAD
THEIR MOTIVES MAYBE AND MAYBE
WE'LL FIND OUT, MAYBE WE WON'T.

>> AM I CORRECT THAT THE OBVIOUS
ARGUMENT FOR A HEAT OF PASSION
OR SECOND-DEGREE MURDER VERDICT
WOULD BE THAT WHAT HE SAID AS
CONFESSION, THAT I WAS SO
DISGUSTED BY WHAT THIS MAN WAS
TRYING TO DO TO ME THAT IN THIS
HEAT OF PASSION IN MY OUTRAGE I
REACTED THE WAY I DID AND WHAT
HAPPENED HAPPENED?

ISN'T THAT THE JURY ARGUMENT FOR
HEAT OF PASSION SECOND-DEGREE
MURDER?

>> I THINK HEAT OF PASSION I
THINK IN MR. PATRICK'S CASE IT
GOES BEYOND, AND I'M NOT SO
SURE, I KNOW HE SAID HE WAS
DISGUSTED IN THE STATEMENT AND
THAT IS PART OF IT BUT ALSO PART
OF IT WAS HIS POST TRAUMATIC
STRESS DISORDER FROM PREVIOUS
INCIDENTS SO I DON'T THINK, THE
FACT OF THE MATTER HE WAS
ENGAGING IN HOMOSEXUAL ACTIVITY

AND FRANKLY JUROR MARTIN SAID IF
SOMEBODY A HOMOSEXUAL THEY WOULD
BE MORE INCLINED TO KILL.
SO WHETHER HE IS EXPRESSING
DISGUST OR NOT, THIS IS WHAT WAS
GOING ON.
I HAVE, I THINK I'M INTO MY
REBUTTAL TIME, SO I THINK HE
WILL RESERVE.
THANK YOU.

>> GOOD MORNING, YOUR HONORS.
IF IT PLEASES THE COURT, MY NAME
IS ILANA MITZNER REPRESENT THE
STATE AND ATTORNEY GENERAL'S
OFFICE.

JUMP RIGHT INTO JUROR MARTIN AND
WAS SAID ABOUT THE STRATEGIC
REASON FOR KEEPING HIM ON THE
CASE.

THERE WAS ONE.
THE STRATEGY WITH MR. RERAS
DISCUSSED AT EVIDENTIARY HEARING
THEY WERE GOING FOR THE
SECOND-DEGREE MURDER CHARGE TO
SAY IT WAS IN THE HEAT OF
PASSION AND THE, EXCUSE ME, LOST
TRAIN OF THOUGHT.

SO JUROR MARTIN, ALL THE
EVIDENCE CAME OUT WAS THAT
MR. SCHUMACHER THE VICTIM, WAS A
HOMOSEXUAL AND THAT DURING HIS
CONFESSION, MR. PATRICK
REPEATEDLY SAID, I AM NOT GAY.
I AM NOT GAY AND THAT MR.
SCHUMACHER WAS PUSHING UP
AGAINST HIM, HE TOLD HIM ONCE
TO STOP, TOLD HIM AGAIN TO STOP
AND WHEN HE DIDN'T--

>> HERE IS THE THING I'M TRYING
TO UNDERSTAND FOR 20 YEARS ON
THE COURT WE HAVE SORT OF
ENCOURAGED, ALMOST, IF YOU HAVE
AN EVIDENTIARY HEARING HAVE AN
EVIDENTIARY HEARING.
SEEMS TO ME THIS WOULD HAVE BEEN
SOLVED BY, IF YOU SAID THE
DEFENSE LAWYER TESTIFIED FOR NOT
HAVING A SUMMARY DENIAL, THE
STATE SAY, LISTEN, WE HAVE HIM
ON, THIS IS SORT, AN, I THINK WE
WOULD ALL AGREE THIS IS ON
OUTRAGEOUS COMMENT AND I STILL

WONDER HOW THE STATE WOULD HAVE KEPT HIM ON BUT TO ASK THE QUESTIONS, AT A POST-CONVICTION HEARING.

WHY WOULDN'T THAT BE THE WAY TO GO?

>> BECAUSE IT HAD ALREADY BEEN SUMMARILY DENIED THE ISSUE WAS--

>> THE STATE ARGUED IT SHOULD BE SUMMARILY DENIED.

IF WE DECIDED THIS NEED TO GO BACK, WE HAD TIME EXPENDED AND ENERGY EXPENDED AND--

>> GOING BACK TO THE QUESTION ABOUT THE PROSECUTOR, I MEAN YOU HAVE A CASE HERE WHERE THIS DEFENDANT GAVE A FULL CONFESSION.

I MEAN THE JURY IS GOING TO HEAR HIM CONFESS TO KILLING THIS GUY?

>> YES, YOUR HONOR.

>> WHY WOULD A PROSECUTOR KEEP A JUROR THAT IS GOING TO BE PROBLEMATIC TO HIS CONVICTION?

>> BECAUSE--

>> IF THERE IS EVER INEFFECTIVE ASSISTANCE OF COUNSEL ON THE PART OF PROSECUTORS THAT WOULD BE A CASE FOR IT.

>> BECAUSE, YOUR HONOR, THE PORTION OF THE CONFESSION THAT RELATES TO HIM ENGAGING IN OTHER HOMOSEXUAL ACTS, THE DEFENDANT, WAS ACTUALLY TAKEN OUT OF THE CONFESSION BECAUSE IT WAS RELATED TO PREVIOUS CONVICTIONS THAT HE HAD HAD.

SO THE JURY NEVER ACTUALLY HEARD ANY, ABOUT ANY OF MR. PATRICK'S PREVIOUS HOMOSEXUAL ACTS.

>> WAIT A MINUTE.

LET'S LOOK AT THIS.

YOU GOT A JUROR WHO IS SAYING LOOK, I HATE HOMOSEXUALS.

I DON'T BELIEVE A THING THEY SAY, I THINK THEY'RE IMMORAL, I DON'T BELIEVE ANYTHING THEY SAY. HE FEELS THAT STRONGLY ABOUT IT. NOW HERE IS WHAT YOU HAVE IN THE CONFESSION THE NIGHT OF THE MURDER, PATRICK AND SCHUMACHER,

THE VICTIM, DRANK BEERS AND WENT TO BED.

PATRICK GAVE SCHUMACHER A MASSAGE.

THEY LAY IN BED NAKED.

DURING THAT ENCOUNTER, SUPPOSEDLY SCHUMACHER GAVE GESTURES OR MOVEMENTS HE DIDN'T LIKE, THAT IS WHEN HE ATTACKED.

I MEAN AT THAT POINT IN TIME YOU HAVE TWO GUYS LAYING IN BED NAKED, MASSAGES EACH OTHER OR GETTING A MASSAGE, THIS JUROR OBVIOUSLY WILL THINK THEY'RE BOTH GAY, THEY'RE BOTH HOMOSEXUALS.

WHY WOULD YOU KEEP A JUROR ON THAT ON A PANEL?

WHY WOULD A PROSECUTOR ALLOW SOMEONE LIKE THAT STAY ON A PANEL KNOWING GOOD AND WELL THE SUPREME COURT WOULD ASK THAT?

>> I DON'T KNOW WHAT THE PROSECUTION WAS THINKING AT THE TIME BUT AS FAR AS THE DEFENSE ATTORNEY KEEPING IT ON, THAT WAS A STRATEGIC DECISION ON HIS PART, NOT JUST BECAUSE HE PLAYS INTO THE THEME, HE CAME ON TO MAE, HE PUSHED UP AGAINST ME AND, AS THE DEFENDANT SAID, HE LOST IT.

HE--

>> WHEN HAVE WE EVER SAID WE COULD DECIDE SOMETHING IS STRATEGIC DECISION WITHOUT AN EVIDENTIARY HEARING?

ISN'T IT JUST SPECULATION?

JUST LIKE YOU SAID, SOMEHOW YOU SAID WE COULDN'T SPECULATE ON THE PROSECUTOR BUT WE CAN SPECULATE FOR THE DEFENSE ATTORNEY?

>> YOUR HONOR, THERE WAS ALSO OTHER EVIDENCE BESIDES THE CONFESSION AND WHATEVER HOMOSEXUAL ACTS THE DEFENDANT ALLEGEDLY ENGAGED OR DID NOT ENGAGE IN.

SO EVEN WITHOUT THIS CONFESSION OR HIM BEING A HOMOSEXUAL YOU HAVE THE TESTIMONY OF MR. DIETZ

WHO SAID THAT HE PLANNED THIS
WHOLE THING OUT.

>> LET ME GIVE YOU ANOTHER, LIKE
A HYPOTHETICAL.

A JUROR SAYS I JUST HAD A, MY
BROTHER MURDERED IN THE SAME WAY
AS YOU JUST DESCRIBED.

I COULD NOT BE FAIR.

AND THAT JUROR, NEITHER SIDE
OBJECTS.

JUDGE DOESN'T SAY ANYTHING.
NOW WE'RE HERE TRYING TO, AND
THERE'S A CONVICTION AND WE'RE
NOW TRYING TO FIGURE OUT WHAT
WOULD HAVE, WHY, HOW DO WE HAVE
SOMEBODY THAT IS CLEARLY BIASED
SITTING ON A JURY ON THE MOST
IMPORTANT, SOMEONE'S GUILT AND
INNOCENCE AND LIFE AND DEATH?
THIS IS, YOU KNOW, IT WOULD BE
AS IF WE WERE SITTING HERE AND
THE CAUSE CHALLENGE WAS MADE AND
THE STATE WAS UP THERE ARGUING,
WELL, I DON'T THINK THEY SHOULD
HAVE BEEN EXCUSED FOR CAUSE.
YOU DO AGREE WITH THAT, RIGHT?
IF THERE HAD BEEN, EITHER SIDE,
IF THE DEFENDANT ASKED THIS
JUROR BE STRUCK FOR CAUSE THAT
THE, AND THE JUDGE DIDN'T DO IT,
IT WOULD HAVE BEEN REVERSIBLE,
DO YOU AGREE WITH THAT?

>> IN THAT CIRCUMSTANCE, YES.
JUROR MARTIN NEVER SAID HE WOULD
BE UNFAIR.

>> I'M ASKING IN THIS CASE.

>> OH.

>> IF THE DEFENDANT HAD MOVED TO
STRIKE JUROR MARTIN FOR CAUSE
AND THE JUDGE HAD NOT, THIS CAME
UP ON APPEAL, WOULD THE STATE BE
ARGUING THAT IT WAS APPROPRIATE
NOT TO STRIKE THIS JUROR FOR
CAUSE?

>> YES, YOUR HONOR.

IT WOULD, THE ARGUMENT WOULD BE
THE SAME.

THE ARGUMENT WOULD BE THE SAME
THAT THE CONFESSION, ANYTHING
ABOUT MR. PATRICK'S--

>> I THINK YOU AND I HAVE
DIFFERENT IDEAS ABOUT WHAT CAUSE

MEANS AND WHAT BIAS MEANS AND,
IN OUR JURY SYSTEM.

I'M JUST HERE THAT YOU WOULD SAY
NO, THIS WOULD NOT HAVE BEEN A
VALID CAUSE CHALLENGE IS
SOMEWHAT DISCONCERTING TO HEAR.

>> WELL I APPRECIATE THAT, YOUR
HONOR, BUT I'M SAYING IN THIS
CIRCUMSTANCE YOU HAVE TO LOOK AT
THE TOTALITY OF CIRCUMSTANCES.
ANY REFERENCE TO MR. PATRICK
BEING GAY WAS TAKEN OUT OF THE
CONFESSION.

HE REPEATEDLY SAID, I AM NOT
GAY.

I AM NOT GAY.

AND HIS REASON FOR--

>> OKAY, WE HAVE THESE
ACTIVITIES THAT ARE GOING ON.
I'M PUZZLED BY YOUR COMMENT THAT
MR. MARTIN NEVER SAID THAT HE
WOULD BE UNFAIR.

HE DID SAY HE WAS BIASED.

>> YES, YOUR HONOR.

>> HE SAID THAT IF HE THOUGHT
THE DEFENDANT WERE HOMOSEXUAL HE
WOULD BE, HE WOULD THINK THAT
THAT PERSON WAS MORE LIKELY, I'M
PARAPHRASING, BUT I THINK THIS
IS THE IMPORT OF WHAT HE SAID,
MORE LIKELY TO BE A LIAR AND A
MURDER, RIGHT?

>> YES.

>> THAT SEEMS TO BE ME PRETTY
BIASED.

THEN YOU HAVE THESE ACTIVITIES,
PEOPLE SAY ALL KIND OF THINGS
AND THESE ACTIVITIES ARE
HAPPENING.

SO I'M PUZZLED HOW YOU GET
MR. MARTIN AS A FAIR JUROR IN A
CONTEXT LIKE THIS?

>> AGAIN, YOUR HONOR, MY
ARGUMENT IS THAT WHEN YOU LOOK
AT THE TOTALITY OF THE
CIRCUMSTANCES AND TAKE HIS
CONFESSION INTO ACCOUNT AND THE
FACT THAT HE, ANY REFERENCE TO
HIM AND HIS HOMOSEXUAL, HIS
PREVIOUS HOMOSEXUAL ACTS
ESPECIALLY IN REFERENCE TO THE
FACT HE WAS USING THEM TO PREY

ON OTHER HOMOSEXUALS, TO ROB THEM, ASK THEM FOR MONEY OR TO STEAL THEIR CAR BECAUSE--

>> YOU'RE TALKING ABOUT WHAT IS NOT THERE, OKAY?

I'M TALKING ABOUT WHAT MR. MARTIN WOULD HAVE HEARD AND HE WOULD HAVE HEARD ABOUT THESE ACTS THAT THE CIRCUMSTANCES RELATED TO THE ENCOUNTER WITH THE VICTIM.

>> YES, SIR, YOUR HONOR.

>> HE HEARD THAT.

>> YES BUT HE ALSO--

>> FOCUS ON WHAT HE DIDN'T HEAR, I MEAN, WELL, I THINK WE HAVE TO BE MORE CONCERNED ABOUT WHAT HE DID HEAR AND WHETHER THAT IS GOING TO BE TRIGGERING HIS EXPRESSED AND UNEQUIVOCAL EXPRESSION OF BIAS.

>> BUT HE ALSO HEARD ABOUT MR. PATRICK'S REACTION TO IT. HOW HE, HIS REACTION OR ALLEGED REACTION TO THIS WAS TO BEAT MR. SCHUMACHER TO DEATH. HE WAS SO DISGUSTED BY IT, HE TOLD HIM ONCE, HE TOLD HIM TWICE, HE WOULDN'T STOP, HE COMPLETELY LOST IT AND HE BEAT HIM TO DEATH.

SO THAT WHAT HE ALSO HEARD.

>> WHICH SOMEBODY MIGHT THINK IS A SELF-SERVING STATEMENT. WHAT, IN THE CONTEXT OF ALL OF THIS A RATIONAL JUROR COULD VIEW THAT ASPECT OF THE TESTIMONY AS A PURELY SELF-SERVING CHARACTERIZATION OF WHAT WAS HAPPENING, COULDN'T A RATIONAL JUROR?

>> YES, YOUR HONOR.

>> AND IN THAT SAME VEIN, DIDN'T THE JURORS ALSO HEAR ABOUT DRUG USE BY MR. PATRICK?

>> YES, YOUR HONOR.

>> AND, DIDN'T THE SAME JUROR, TALK ABOUT, DRUGS AND DRUGS AND BIASED AGAINST PEOPLE THAT USE ILLEGAL DRUGS.

SEEMS YOU HAVE HIM BIASED AGAINST HOMOSEXUALITY.

HE IS BIASED AGAINST ILLEGAL
DRUG USE.

YOU HAVE A RECORD THAT SHOWS THE
DEFENDANT PARTICIPATING TO SOME
EXTENT, TO HOMOSEXUAL ACTIVITY.
A DEFENDANT ALSO PARTICIPATING
TO SOME EXTENT TO ILLEGAL DRUG
USE.

SO YOU COMBINE THOSE TWO, I
DON'T SEE HOW YOU CAN GET AROUND
THE FACT THAT THIS WAS A BIASED
JUROR THAT COUNSEL SHOULD HAVE,
AT LEAST IN MY ESTIMATION SAID
SOMETHING ABOUT HIM.

>> YOUR HONOR, IN REFERENCE TO
THE DRUG ABUSE MR. MARTIN WAS
MERELY STATING WHAT IS THE LAW
ABOUT CREDIBILITY.

THAT HE, IF IT CAME OUT THAT
THIS PERSON WAS ABUSING DRUGS AT
THE TIME OF THE CRIME WHETHER IT
WAS A WITNESS OR DEFENDANT HE
WOULD TAKE INTO ACCOUNT WHETHER
OR NOT HIS, YOU KNOW, HIS POINT
OF VIEW WAS SKEWED BECAUSE OF
THE DRUGS.

>> COULD THAT BE TAKEN INTO
ACCOUNT ALSO THE FACT HE MIGHT
HAVE BEEN LYING WHETHER HE WAS
HOMOSEXUAL?

>> THE DRUGS, YOUR HONOR OH, YOU
MEAN ABOUT WHETHER HE WAS
HOMOSEXUAL?
DRUG USER, HE.

>> HE MIGHT HAVE BEEN LYING
ABOUT WHETHER OR NOT HE WAS A
HOMOSEXUAL.

>> HE REPEATEDLY SAID HE WAS NOT
A HOMOSEXUAL.

>> I KNOW THAT IS WHAT HE
REPEATEDLY SAID, BECAUSE OF
ILLEGAL DRUG USE, LOOK AT HIS,
YOU KNOW, DIMINISH HIS
TESTIMONY, IT COULD HAVE
DIMINISHED HIS TESTIMONY THAT HE
WAS NOT A HOMOSEXUAL.

>> YOUR HONOR, DURING THE
PENALTY PHASE, THERE WAS NO
QUESTION, THERE WAS NO QUESTIONS
REGARDING WHETHER OR NOT HE WAS
HOMOSEXUAL.

THE QUESTIONS WERE REGARDING HOW

HE FELT ABOUT IT, HIS REMORSE,
WHETHER OR NOT HE WAS UNDER THE
INFLUENCE AT THE TIME OF HIS
CONFESSION.

THERE WAS VERY LITTLE EVIDENCE
PRESENTED REGARDING
MR. PATRICK'S, ALLEGED
HOMOSEXUAL ACTIVITIES WHETHER HE
ENGAGED IN THEM OR NOT.

SO, YOUR HONOR--

>> I MEAN, THIS CLEARLY WAS A
BIASED JUROR AND IF THERE HAD
BEEN A CAUSE CHALLENGE ON EITHER
SIDE I THINK IT'S, I AGREE, I
CAN'T SEE HOW YOU WOULD SAY THAT
IT SHOULDN'T HAVE BEEN GRANTED
BUT THAT IS NOT THE QUESTION
WE'RE ADDRESSING, IS IT?

I MEAN LOOKING AT THE STRICKLAND
STANDARD?

>> YES, YOUR HONOR.

>> AND I, ALSO HAVE A HARD TIME
UNDERSTANDING HOW THE STATE
DIDN'T OBJECT TO THIS JUROR
BECAUSE I CAN'T THINK OF ANY
OBJECTIVELY REASONABLE REASON
FOR WHY THE STATE WOULD THINK
THIS JUROR WAS GOOD FOR THEIR
CASE.

THAT IS NOT WHAT WE'RE LOOKING
AT EITHER, IS IT?

>> NO, YOUR HONOR.

>> OKAY.

I GUESS MY QUESTION IS, DOESN'T
THERE HAVE TO BE AN OBJECTIVE
PORTION OF STRICKLAND?
EVEN WHEN YOU'RE TALKING ABOUT
STRATEGY, IF YOU HAVE A BIAS, A
JUROR CLEARLY BIASED IN A MANNER
THAT YOU WOULD RATIONALLY THINK
WOULD HELP MAKE THE BEST
ARGUMENT YOU CAN MAKE GIVEN THE
STATE OF YOUR CASE, EVEN THOUGH
THE JUROR MAY QUESTION IT, I
MEAN, THAT'S, THE BEST ARGUMENT
THAT YOU MADE FOR HEAT OF
PASSION, THIS JUROR'S BIAS IS
GOING TO, IT LOOKS LIKE THERE IS
A GOOD WAY IN YOUR FAVOR, EVEN
IF THE LAWYER SAID, WELL, I
DIDN'T THINK ABOUT THAT.
I MEAN ARE WE GOING TO--

OBVIOUSLY IF THE LAWYER SAYS
THAT'S WHAT I'M THINKING WE
WOULD AFFIRM WITHOUT A
HEARTBEAT.

IF THERE WAS EVIDENTIARY
HEARING, LAWYER EXPLAIN WHY THIS
BIAS WOULD WORK IN THEIR FAVOR,
NO WE WOULD BE AFFIRMING BUT CAN
A LAWYER JUST, I MEAN IF THE
LAWYER SAID I DIDN'T THINK ABOUT
THAT, IS THERE SOME OBJECTIVE
COMPONENT OF STRICKLAND I GUESS
IS WHAT I'M ASKING?

CAN WE DETERMINE THAT WITHOUT AN
EVIDENTIARY HEARING BECAUSE THAT
IS REALLY THE ISSUE I THINK?

>> THERE IS NO PREJUDICE IN THIS
CASE BECAUSE YOU KNOW, THE, THE
ISSUE WAS ALSO--

>> WHEN YOU'RE TALKING ABOUT
ACTUALLY BIASED JUROR PREJUDICE
IS PRESUMED, ISN'T IT?

>> THAT'S IF YOU CAN DETERMINE
THAT THE JUROR WAS ACTUALLY
BIASED ON THE RECORD PER
CARATELLI.

>> YEAH.

>> I MEAN I UNDERSTAND THIS
COURT HAS, SEEMS--

>> YOU DON'T HAVE TO GO BEFORE
PREJUDICE TO DEFICIENCY AND CAN
WE DETERMINE ON THE FACE OF THE
RECORD THAT AS AN OBJECTIVE
MATTER, BASED ON THE OTHER
COMMENTS THE JUROR HAD MADE,
THAT THERE WAS NOT DEFICIENCY
HERE?

>> THERE WAS NOT DEFICIENCY
BECAUSE HE ALSO MADE THE COMMENT
THAT HE WAS KIND OF AGAINST THE
DEATH PENALTY AND HE WOULD HAVE
TO THINK--

>> LET ME ASK YOU THIS.

ARE THERE CASES WHERE WE HAVE
DONE THAT WHERE WE HAVE DECIDED
THAT SOMETHING, THAT, WOULD BE
PREJUDICIAL WAS NOT, DID NOT
INVOLVE DEFICIENT PERFORMANCE OF
COUNSEL WITHOUT AN EVIDENTIARY
HEARING SIMPLY BASED ON THINGS
WE LOOK AT IN THE RECORD?

>> I DON'T KNOW.

>> WHERE WE SAY, YOU KNOW, IF WE WERE, ESSENTIALLY WE GOT TO SAY, A REASONABLE LAWYER IN THAT LAWYER'S POSITION WOULD HAVE MADE THE STRATEGIC CHOICE TO DO THIS?

>> I DON'T KNOW OF ANY CASES, YOUR HONOR.

JUST, MISS KEFFER TOUCHED ON POSTTRAUMATIC STRESS DISORDER IN THE LAST FEW MINUTES I HAVE. THE ATTORNEYS WANTED TO PRESENT MITIGATION ABOUT POSTTRAUMATIC STRESS DISORDER AND WHATEVER PREVIOUS SEXUAL ABUSE THAT MR. PATRICK SUFFERED AS A RUNAWAY TEEN AT AGE OF 12. HE ABSOLUTELY REFUSED TO ALLOW THEM TO DO THAT.

ANY POSTTRAUMATIC STRESS DISORDER ARGUMENT WAS WAVED, HE DIDN'T ALLOW THEM.

>> WE DIDN'T REALLY DISCUSS THIS, YOU DON'T, YOU AGREE THIS NEEDS TO BE REVERSED FOR NEW PENALTY PHASE, 7-5 JURY RECOMMENDATION?

>> I WILL AGREE THAT HAS BEEN THE COURT'S RULINGS IN THOSE SITUATIONS, IN THOSE CASES WHERE YOU HAVE, IT IS POST-RING, NOT UNANIMOUS AND NEEDS TO GO BACK FOR A NEW PENALTY PHASE.

>> SO WE DON'T REALLY NEED TO ADDRESS THE DEFICIENCY IN THE PENALTY PHASE, DO WE?

>> NO, YOUR HONOR.

I WAS JUST TOUCHING ON THE POSTTRAUMATIC STRESS DISORDER THERE CAN NOT BE AN ARGUMENT MADE BECAUSE HE WOULDN'T ALLOW IT.

AT THIS POINT, YOUR HONOR, IF THERE ARE NO FURTHER QUESTIONS I JUST ASK THAT THE COURT AFFIRM THE LOWER COURT'S DECISION. THANK YOU.

>> SO IN TERMS, THIS QUESTION SEEMS TO BE WHETHER THIS COURT CAN DETERMINE DEFICIENCY, THAT THERE WAS NO DEFICIENCY BASED ON THE RECORD.

>> I'M ALMOST, ALMOST THINKING
ON THE FACE OF THIS RECORD WE
SHOULD DECIDE THERE IS
DEFICIENCY AS A MATTER OF LAW
BUT I DON'T THINK I'M QUITE
THERE BUT YOU KNOW, WE CAN NOT
CONDONE THIS KIND OF JUROR
SITTING IN A CRIMINAL TRIAL.
IN MY VIEW.
THIS IS, AND AGAIN, WHETHER WE
SHOULD HAVE A JUDGE IN THE
FUTURE, SHOULD BE FACED WITH
THIS, COULD HAVE ASKED BOTH
SIDES TO COME UP AND ASK WHY ARE
WE KEEPING, WHY IS NOBODY MAKING
A CAUSE CHALLENGE?
I WONDER IF JUSTICE LABARGA
MIGHT HAVE DONE THAT, AS A TRIAL
JUDGE.
BECAUSE IT IS SO OBVIOUS.
WE WOULD HAVE KNOWN RIGHT THEN,
NO, WE WANT THIS JUROR, THIS IS
OUR STRATEGY THAT WOULD BE THE
END OF IT.
>> I HAVE HAD SITUATIONS WHERE A
JUROR-- ASKED TO APPROACH THE
BENCH.
[INAUDIBLE].
GOT THERE, SHE SAID, I NOTICED
THE DEFENDANT IN THIS CASE IS
BLACK.
I WOULD NOT BELIEVE ANYTHING--
[INAUDIBLE]
LOOKED AT THE PROSECUTOR FIRST
AND HE OBJECTED TO THE CHALLENGE
FOR CAUSE.
THE DEFENSE WAS MOVING FOR CAUSE
WHICH WAS GRANTED IMMEDIATELY
BUT, ISN'T THAT THE SAME HERE?
I MEAN HOMOSEXUAL, RACE, GENDER,
ETHNICITY, WOULDN'T BE THE SAME
PRINCIPLE IN ALL THOSE CASES?
WHAT IF HE SAID I DON'T, I
BELIEVE ALL HISPANICS ARE
MURDERERS LIARS, SO ON, I
NEGATIVE BELIEVE A WORD THEY
SAID OR AFRICAN-AMERICANS OR
WOMEN OR MEN OR WHATEVER?
>> I CERTAINLY AGREE THAT IS THE
EXTENT OF THIS BIASED COMMENT.
I DO AGREE WITH THAT AND I WOULD
SAY THAT THE RECORD HERE, AGAIN

THE COMMENTS ABOUT THE DRUG USE,
THE COMMENTS ABOUT DRUG USE CUT
AGAINST.

HE SAID HE WOULD FIND THE
PERSON, HE WOULD VIEW THEIR
STATEMENTS IN A DIFFERENT LIGHT.
HE WOULD FIND THEM NOT CREDIBLE,
LESS BELIEVABLE.

I THINK JUSTICE QUINCE'S
COMMENTS ABOUT JUROR MARTIN NOT
ONLY WAS BIASED AGAINST
HOMOSEXUALS BUT ALSO, COULD VERY
WELL LOOKED AT ERIC PATRICK'S
STATEMENTS AND THOUGHT HE WAS
LYING.

>> WAS THERE INEFFECTIVE
ASSISTANCE OF APPELLATE COUNSEL
CLAIM THAT THE APPELLATE COUNSEL
SO CLEAR SHOULD HAVE BROUGHT
THIS UP ON DIRECT APPEAL?
THAT IT SHOULD HAVE BEEN A
REVERSAL DESPITE WHATEVER
BECAUSE OF OUTRAGEOUS AND BIASED
NATURE OF THESE COMMENTS?
HE DIDN'T RAISE THAT?

>> I WAS NOT INVOLVED IN THE
INITIAL BRIEFING.
I WAS NOT ON THE CASE AT THAT
TIME.

>> WAS THERE INEFFECTIVE
ASSISTANCE--

>> THE STATE HABEAS WAS ONLY THE
HURST ISSUE.

>> YOU DIDN'T BRING AN
INEFFECTIVE ASSISTANCE OF
APPELLATE COUNSEL IN THE HABEAS?
>> IT WAS NOT RAISED.

I SEE THAT I HAVE JUST A LITTLE
BIT OF TIME LEFT AND I DO JUST
WANT TO AS THE COURT POINTED
OUT, MAKE IT CLEAR THAT
MR. PATRICK DID RAISE THE HURST
ISSUE IN HIS STATE HABEAS
PETITION.

THAT IT IS A 7-5.

AFTER THE ISSUANCE OF RING AND
CERTAINLY BASED ON THIS COURT'S
PRECEDENT AND AT MINIMUM HE IS
ENTITLED TO RESENTENCING.

I WOULD ASK THE COURT TO
CONSIDER THE MOST RECENT CASE
FROM THIS COURT, RODERICK

WILLIAMS.

IN THAT CASE THE ISSUES ARE
SIMILAR AND IN THAT CASE,
MR. WILLIAMS IS BEING SENT BACK
FOR IMPOSITION OF THE LESSER
SENTENCE.

SO I WOULD ASK THIS COURT,
SUPPLEMENTAL AUTHORITY AND I CAN
FILE THAT WITH THE COURT BUT IT
CONSIDER THOSE CIRCUMSTANCES IN
CONJUNCTION WITH MR. PATRICK'S
CASE.

THANK YOU.

>> THANK YOU FOR YOUR ARGUMENTS.
COURT IS NOW IN RECESS.