

>> THE COURT WILL NOW CONSIDER  
THE CASE OF SMITH V. THE STATE  
OF FLORIDA.

COUNSEL FOR THE APPELLANT IS  
RECOGNIZED.

>> RICHARD KURITZ ON BEHALF OF  
DONALD SMITH.

>> THANK YOU, COUNSELOR.  
PLEASE PROCEED.

>> THANK YOU SO MUCH, YOUR  
HONOR.

UNLIKE THE PREVIOUS CASES, I  
WISH I WAS HANDLING MORTGAGES  
AND THE SUZUKI CAUSE, BUT I'M  
HANDLING A VERY HORRIBLE SET OF  
FACTS AND THAT I WOULD LIKE TO  
SUBMIT TO THE COURT.

SO I WOULD LIKE TO DISCUSS WITH  
THE COURT THE INFLAMMATORY  
NATURE OF THIS PROSECUTION WITH  
THE PRETRIAL MEDIA, WITH THE  
COMMENTS MADE BY THE PROSECUTION  
AS WELL AS THE MEDICAL EXAMINER  
CRYING ON HER TESTIMONY WHEN HE  
IS THE CHIEF MEDICAL EXAMINER  
WHO HAD A THOUSAND MEDICAL-- OR  
AUTOPSIES UNDER HER BELT AND THE  
CLOSING ARGUMENTS.

SO MY MAJOR ARGUMENT TO THE  
COURT IS GOING TO ULTIMATELY END  
WITH THAT.

WHILE EITHER OF THESE ITEMS WERE  
NOT REVERSIBLE ON THEMSELVES,  
IT'S THE CUMULATIVE EFFECT.

AND SO THAT'S WHERE I'M GOING TO  
BE GOING WITH THIS CONVERSATION.

>> COUNSELOR, I WOULD ASK AS  
YOU'RE GOING THROUGH, I'M REALLY  
INTERESTED WITH EACH OF THESE  
POINTS WHERE THE PREJUDICE  
PARTICULARLY LIES BASED ON THE  
EVIDENCE THAT WAS PRESENTED IN  
THIS CASE.

SO WHEN YOU ADDRESS THOSE POINTS  
[INAUDIBLE]

VITIATE THE ENTIRE TRIAL AND NOT  
SIMPLY A HARMLESS ERROR ON  
ASSUMING THE ISSUES WERE AT  
ERROR.

>> THANK YOU FOR ASKING THE

QUESTION, BECAUSE THAT'S ONE OF THE ISSUES THAT I'VE BEEN PAYING ATTENTION TO, IS ERROR, PREJUDICIAL ERROR.

WHAT MY SUGGESTION WOULD BE TO THE COURT IS THESE COMMENTS THAT I'M MAKING TO YOU WERE SO INFLAMMATORY THAT THEY CULMINATE INTO PREJUDICIAL ERROR.

AND WHEN YOU DEAL WITH A DEATH PENALTY CASE, WHILE SOME OF MY ISSUES MAY BE WEAK, AND I'LL JUST SAY IT, SOME OF MY ISSUES MAY BE WEAK, BUT THEY CULMINATE. AND IF YOU HANDLE ENOUGH DEATH PENALTY CASES AS I-- AND I'VE BEEN IN FRONT OF THIS SUPREME COURT MANY, MANY TIMES, AND THE PANEL.

I'VE HANDLED PROBABLY 30 DEATH PENALTY CASES AND PROBABLY WELL OVER 50 HOMICIDE CASES, THE CULMINATION OF THE EFFECT CAUSES A, YOU KNOW, A PREJUDICIAL ISSUE.

AND SO I WAS COURT-APPOINTED TO HANDLE THIS CASE, SO I'M DOING EVERYTHING I CAN TO REPRESENT MY CLIENT THE BEST WAY THAT I CAN. SO THAT'S WHERE I'M AT WITH IT, AND I'M HAPPY TO TAKE HARD QUESTIONS, AND THANK YOU FOR BEING THE FIRST ONE TO ASK ME.

[LAUGHTER]

I EXPECTED JUSTICE CANADY TO BUST MY CHOPS FIRST, BUT THANK YOU SO MUCH.

BUT I'M HAPPY TO DISCUSS ANYTHING I CAN WITH YOU.

BUT I BELIEVE THE CULMINATION OF EVERYTHING, WITH-- LET ME JUST-- HERE'S MY BREAKDOWN OF IT.

AND I WAS WATCHING EVERYTHING ELSE THAT WAS TRANSPIRING AND WISHING I HAD A DIFFERENT CAREER CHOICE INSTEAD OF HANDLING HOMICIDES AND DEATH PENALTY CASES.

THE ISSUE BEGINS WITH THE FACT

THAT THERE WAS SO MUCH PRETRIAL PUBLICITY AND THE CASE WAS NOT MOOT.

AND THEN WHEN WE GET TO ORAL ARGUMENTS OR OPENING STATEMENTS, EXCUSE ME, AND THEN WE LED INTO HAVING THE MEDICAL EXAMINER CRYING ON THE STAND, AND WE HAD TOO MANY--

>> DID THE JURY, IN FACT, EVER SEE THE MEDICAL EXAMINER CRY? I WATCHED THE VIDEO.

IT SEEMED LIKE SHE PAUSED, AND THE JURY WAS ASKED TO LEAVE THE ROOM.

WHY DO YOU KEEP REPEATING THAT SHE CRIED IN FRONT OF THE JURY?

>> I DON'T KNOW THAT I'M-- AND THANK YOU SO MUCH FOR ASKING. I DON'T KNOW THAT I'M REPEATING, BUT I THINK IT WAS CLEAR ON THE RECORD AND ACKNOWLEDGED BY THE COURT AS WELL AS THE STATE THAT SHE TEARED UP AND THE JURY TEARED UP, AND THEN SHE ASKED FOR A FIVE MINUTE BREAK.

>> ARE YOU SUGGESTING THAT THE JURY TEARS UP, THEN WE HAVE INFLAMMATORY SITUATIONS THAT REQUIRE REVERSAL?

>> YES, SIR.

>> ANYTIME A JUROR TEARS UP, THAT'S THE RULE YOU'D HAVE US ADOPT?

>> I'VE HANDLED SO MANY HOMICIDES, THANK YOU FOR ASKING THIS QUESTION BECAUSE IT LEADS INTO THE ANSWER THAT I'M GOING TO HAVE IS THIS MEDICAL EXAMINER HAS DONE-- SHE'S THE CHIEF MEDICAL EXAMINER.

SHE'S HANDLED 1,000 AUTOPSIES OR MORE.

THEY DID A PRETRIAL MOTION TO EXCLUDE ALL OF THESE PHOTOGRAPHS, AND SHE DID NOT CRY AT ANY POINT OR TEAR UP AT ANY POINT.

THE ONLY TIME SHE TEARED UP OR NEEDED A BREAK WAS WHEN SHE WAS

IN FRONT OF THE JURY.

>> ARE YOU, COUNSELOR, ARE YOU SUGGESTING THAT WAS CONTRIVED?

>> NO.

I KNOW THE PROSECUTOR'S INVOLVED IN THIS, AND I KNOW THEM BOTH PERSONALLY.

NO, I AM NEVER GOING TO SUGGEST THAT WAS CONTRIVED, YOUR HONOR.

>> IS THERE SOME SUGGESTION IN THE RECORD THAT THERE'S SOMETHING GOING ON WITH THE JURY, AND IT MIGHT BE HER RESPONSE TO WHAT SHE'S SAYING IN THE JURY, OR IS THAT NOT SUPPORTED BY THE RECORD?

>> JUSTICE CANADY, I AM NOT BY ANY MEANS SUGGESTING THAT ANYBODY DID ANYTHING IMPROPER, LIKE, BEHIND THE SCENES.

BY NO MEANS.

I KNOW THESE PROSECUTORS, I KNOW THESE DEFENSE LAWYERS.

I'M JUST SAYING THIS HAPPENED, AND WE KNOW IT HAPPENED, SO WE HAVE TO ADDRESS IT, AND THAT'S WHY WE COME TO YOU, IS BECAUSE IT DID HAPPEN.

>> WELL, THE POINT I STRUGGLE WITH AND, YOU KNOW, I UNDERSTAND YOU'RE DOING-- YOU'RE HERE REPRESENTING YOUR CLIENT, AND YOU'RE GOING TO DO THAT ZEALOUSLY, AND THAT'S YOUR JOB. THAT'S THE WAY THINGS WORK.

BUT THIS IS, AS YOU ACKNOWLEDGED, A TOUGH CASE. AND THERE JUST-- WHEN YOU'VE GOT A CASE LIKE THIS, SOME OF THESE, SOME OF THESE THINGS THAT YOU'RE POINTING TO ARE JUST ALMOST INHERENT IN THE CASE. IT'S JUST THE NATURE-- WHEN YOU HAVE AN ABDUCTION, RAPE AND MURDER OF A YOUNG CHILD, THAT'S AN EMOTIONAL THING.

I MEAN, AND IT'S-- PEOPLE MAY RESPOND WITH SOME EMOTION AS THAT IS BEING EXPLAINED TO THEM. SO IT'S JUST, IT SEEMS THAT TO

SOME EXTENT MAYBE YOU'RE  
REQUIRING US TO TREAT THIS LIKE  
THAT'S NOT THE UNDERLYING FACTS.  
SO I DON'T KNOW THAT, WHAT YOU  
COULD SAY IN RESPONSE TO THAT,  
BUT I THINK THAT'S-- TO PUT IN  
THIS IN CONTEXT, I THINK THAT  
GOES BACK TO THE QUESTION THAT  
WAS ASKED AT THE OUTSET BY  
JUSTICE GROSSHANS.

IF YOU LOOK AT YOUR ISSUES  
INDIVIDUALLY, FOR INSTANCE, THE  
VENUE ISSUE.

ON THIS TRIAL, AM I NOT CORRECT  
THAT THIS TRIAL TOOK PLACE A  
NUMBER OF YEARS AFTER THE CRIME  
HAD BEEN COMMITTED, AND  
FURTHERMORE, IT'S IN A LARGE  
METROPOLITAN AREA.

JACKSONVILLE.

AND THERE'S, YOU KNOW, THE JURY  
WAS PICKED, AND YOU DON'T HAVE  
ANY CHALLENGES TO ANY OF THE  
JURORS.

YOU WERE ABLE TO GET A JURY.

SO I'M JUST, I'M-- I CANNOT SEE  
HOW YOU CAN PIECE THESE  
INADEQUATE THINGS TOGETHER AND  
COME UP WITH SOMETHING THAT  
MATTERS.

>> AND I APPRECIATE EVERYTHING  
YOU JUST SAID, AND I CANNOT  
CONCEDE MY CLIENT'S CONVICTION.  
BUT, YES, IT IS AN AUTOMATIC  
APPEAL TO YOU, AND I HAVE A JOB  
TO DO, AND I GREATLY APPRECIATE  
YOU RECOGNIZING THAT THAT.  
BUT I ALSO HAVE AN  
OBLIGATION TO REPRESENT MY  
CLIENT.

AND I DO BELIEVE THERE ARE  
ISSUES THAT INDIVIDUALLY WILL  
NOT AMOUNT-- I'LL JUST SAY IT  
OUT LOUD, I DO NOT BELIEVE THE  
INDIVIDUAL ISSUES WILL AMOUNT TO  
A REVERSIBLE ERROR.

I DO BELIEVE THAT IN MY ARGUMENT  
TO THIS COURT IS THAT IF YOU  
TAKE THEM ALTOGETHER, THEN WE  
HAVE A CUMULATIVE ERROR THAT

WOULD SUBSTANTIATE A REVERSAL.  
THAT'S WHERE I'M AT WITH  
IT.

AND I'M HAPPY TO DISCUSS EACH  
ONE OF THEM.

YES, THERE WAS OVERWHELMING  
WEIGHT OF EVIDENCE.

I WAS NOT THE TRIAL LAWYER,  
WHICH I AM TYPICALLY THE TRIAL  
LAWYER, NOT THE APPELLATE  
LAWYER.

BUT HERE I AM TRYING TO DO MY  
DUTY ETHICALLY AND FOR THE BAR.  
SO I AM TRYING TO DEFEND MY  
CLIENT.

AND YOU MAKE VERY GOOD POINTS,  
AND I'M HAPPY TO TAKE, YOU KNOW,  
IT'S ONE OF THOSE THINGS, JUDGE.  
AT SOME POINT YOU'VE JUST GOT TO  
TAKE THE HARD SHOTS.

SO GIVE 'EM TO ME, AND I'LL TRY  
THE ANSWER THEM THE BEST WAY I  
CAN.

>> COUNSELOR, I THINK, YOU KNOW,  
WE'RE REQUIRED TO LOOK TO SEE IF  
ANY ERRORS CAN BE DEEMED  
HARMLESS.

THE STATE HAS MADE THAT  
ARGUMENT, AND WE ARE LOOKING AT  
THAT.

SO HOW-- WHAT IS YOUR BEST  
ARGUMENT FOR THIS CUMULATIVE  
EFFECT OF ALL OF THESE  
INDIVIDUAL THINGS THAT YOU'VE  
SAID HAPPEN, EVEN IF EVERY  
SINGLE ONE OF THEM WE DEEM WAS  
HERE.

YOU SAID THERE WAS AN  
OVERWHELMING AMOUNT OF EVIDENCE  
IN THIS CASE, AND SO HOW DO WE  
GET PAST THAT HARMLESS ERROR  
ANALYSIS.

>> VERY GOOD QUESTION, AND I WAS  
UP AT 1:00 IN THE MORNING TRYING  
TO THINK ABOUT HOW I WOULD  
ANSWER THIS QUESTION TO YOU.

FIRST, THE JURY SHOULD HAVE  
BEEN-- THE CHANGE OF VENUE  
SHOULD HAVE BEEN DONE.

AND I'M LOOKING AT MY NOTES, SO

IF I LOOK AWAY, I APOLOGIZE.  
THE AUTOPSY PHOTOGRAPHS, THE  
COMMENTS BY THE PROSECUTOR IN  
OPENING STATEMENT, THE CRYING ON  
THE STAND AND THE CLOSING  
ARGUMENT WHERE THE VICTIM WAS  
CRYING OUT, THAT'S REALLY  
PROBABLY MY BEST ARGUMENT, IS  
WHERE THE GOLDEN RULE VIOLATION  
WHERE THE PROSECUTOR SAYS, AND  
I'LL JUST QUOTE IT AND IF THANK  
YOU FOR ASKING, IT'S IN  
VOLUME-- AND I HATE DOING  
THIS-- 1436.

AND FROM THE GRAVE SHE IS CRYING  
OUT TO YOU.

AND SHE'S TALKING TO THE JURY.  
AND THAT, TO ME PERSONALLY, IS A  
GOLDEN RULE VIOLATION.

AND SHE'S CRYING OUT FROM THE  
GRAVE TO YOU, DONALD SMITH RAPED  
ME, DONALD SMITH SODOMIZED ME,  
DONALD SMITH STRANGLED ME UNTIL  
MY LAST BREATH IN MY BODY.

IF YOU TAKE ALL OF THOSE FOUR OR  
FIVE THINGS I JUST RATTLED OFF  
TO YOU, I TEND TO THINK IN MY  
EXPERIENCE THAT THE CUMULATIVE  
ERROR OF ALL OF THOSE COMMENTS  
BY THE PROSECUTION AND THE-- I  
THINK THEY'RE LEGITIMATE--

>> HELP US UNDERSTAND WHY YOU  
THINK THAT'S A GOLDEN RULE  
VIOLATION.

IF SHE, IF THE PROSECUTOR HAD  
INSTEAD SAID AND ARE CRYING OUT  
TO YOU, COMMA, THE FINDER OF  
FACT, COMMA, WOULD IT NO LONGER  
BE A GOLDEN RULE VIOLATION?  
BECAUSE AS I UNDERSTAND THE  
GOLDEN RULE, THE IDEA TO PREVENT  
THE JURY FROM PUTTING ITSELF IN  
THE SHOES OF THE VICTIM OR THE  
PROSECUTOR OR ANYONE OTHER THAN  
THE FINDER OF FACT.

WHAT IS IT ABOUT THIS STATEMENT  
THAT MAKES IT A GOLDEN RULE  
VIOLATION?

>> TO ME, IT'S ONE WORD, THE  
WORD "YOU."

IF SHE SAID THE VICTIM WAS  
CRYING OUT, THAT WOULD BE OKAY.  
BUT WHEN THEY SAY CRYING OUT TO  
YOU, THE JURY, WHEN THE VICTIM  
IS CRYING OUT TO YOU THE JURY,  
THAT'S WHEN I PERSONALLY HAVE A  
PROBLEM.

>> WHAT'S YOUR BEST CASE FOR  
THAT BEING A GOLDEN RULE  
VIOLATION?

>> I MEAN, ANYTIME-- I DON'T  
HAVE THAT IN FRONT OF ME, BUT  
ANYTIME A WITNESS IS PUTTING THE  
JUROR IN THE PLACE OF A VICTIM,  
TO ME, THAT'S GOLDEN RULE.  
I DON'T UNDERSTAND.

>> WELL, I GUESS MY QUESTION IS  
IT DOESN'T SEEM TO ME LIKE  
THAT'S WHAT THE PROSECUTOR DID  
AT ALL.

IT SEEMS LIKE WHAT THE  
PROSECUTOR WAS DOING WAS, IN  
FACT, TALKING TO JURY AS A JURY,  
CRYING OUT TO YOU.

I GUESS MY STRUGGLE IS I DON'T  
UNDERSTAND HOW THAT'S ANYTHING  
OTHER THAN AN APPEAL TO THE JURY  
AS A JURY AS OPPOSED TO SAYING  
IMAGINE YOU ARE CHERISH  
PERRYWINKLE WHICH WOULD BE A  
GOLDEN RULE VIOLATION.

>> EXACTLY.

I MEAN, I THINK YOU JUST MADE MY  
POINT, YOUR HONOR.

THAT'S WHAT SHE WAS DOING.

SHE WAS APPEALING TO THE JURY  
AND PUTTING THEM IN THE PLACE OF  
THE VICTIM, AND SHE IS CRYING  
OUT TO YOU THAT HE STRANGLERD ME,  
RAPED ME AND SODOMIZED ME.

I THINK, YOUR HONOR, I THINK YOU  
JUST MADE MY POINT.

ANYWAY, THE OTHER ISSUES WERE  
THE PHOTOGRAPHS.

AND WHAT THE STATE HAS ARGUED  
AND WHAT THE DEFENSE DID WAS  
THAT THEY INDICATED THAT THEY  
HAD FILED A MOTION TO PRECLUDE  
ALL PHOTOGRAPHS FROM THERE.

BUT IN THEIR BRIEF, THEY

INDICATED THE EVIDENCE WAS SO OVERWHELMING THAT BASICALLY THEY DIDN'T NEED THE PHOTOGRAPHS, BUT THE PHOTOGRAPHS WERE WHAT CAUSED THE MEDICAL EXAMINER TO CRY AND THE JURY TO CRY.

TO ME, THAT WAS ADDITIONAL ERROR.

AND SO THAT'S WHY I'M SITTING HERE HAVING THIS DISCUSSION WITH THE COURT.

THE OTHER THING WOULD BE THE IMPROPER COMMENTS DURING THE OPENING STATEMENT AND THE CLOSING STATEMENT BY THE PROSECUTION.

AM I FROZEN, OR CAN ANYBODY--  
>> OH, NO, WE'RE JUST-- KEEP GOING.

WE'LL INTERRUPT YOU IF WE HAVE QUESTIONS.

WE'RE NOT SHY.

KEEP GOING.

>> I KNOW THAT ABOUT YOU, JUSTICE CANADY.

[LAUGHTER]

I APPRECIATE IT.

NO, THOSE ARE MY ARGUMENTS. AND NORMALLY MY WIFE TELLS ME I TALK TOO LONG AND TALK TOO MUCH, BUT THIS IS PROBABLY MY SHORTEST CLOSING ARGUMENT OR ARGUMENT TO THE FLORIDA SUPREME COURT THAT I'VE EVER HAD.

SO I CAN DEFER AT THIS POINT.

>> ALL RIGHT.

THANK YOU, COUNSEL.

COUNSEL FOR THE STATE.

>> GOOD MORNING, YOUR HONOR. CHIEF JUSTICE CANADY, MAY IT PLEASE THE COURT, ASSISTANT ATTORNEY GENERAL CHARMAINE MILLSAPS REPRESENTING THE STATE. I TAKE COUNSEL'S ARGUMENT TO REALLY BE THE CUMULATIVE ERROR, AND THEN HE RELIES ON ALL THE OTHER ERRORS TO FOLD INTO THE CUMULATIVE.

OF THE ISSUES THAT HE'S REALLY TALKING ABOUT, ONLY TWO OF THEM

WERE PRESERVED.

THE PRETRIAL PUBLICITY, THE PRESUMED PREJUDICE CLAIM BASED ON PRETRIAL PUBLICITY, THEY HAVE NEVER-- THEY DID NOT RENEW THE MOTION FOR CHANGE OF VENUE.

WHAT HAPPENED THERE WAS THEY MADE A MOTION TO CHANGE VENUE YEARS PRIOR TO THE TRIAL.

THEY MADE A MOTION TO CHANGE VENUE AND BEFORE, BEFORE THE TRIAL IN 2014.

AND THERE WAS A HEARING ON THAT MOTION IN NOVEMBER OF 2015.

AND AT THE END OF THE HEARING, THE JUDGE SAID UNDER FLORIDA LAW, RULING CORRECTLY, CORRECTLY RULED THAT I SHOULD RESERVE RULING UNTIL WE SEE IF WE CAN SELECT A JURY IN THIS, IN JACKSONVILLE, IN DUVAL COUNTY WHICH AS YOUR HONORS HAVE POINTED OUT IS A LARGE METRO POLL TAN AREA THAT IS VERY DIVERSE.

SO THE TRIAL JUDGE, SHE RULED THAT SHE WAS GOING TO RESERVE RULING UNTIL THEY ACTUALLY TRIED TO PICK A JURY SELECTION.

AND THEN FEBRUARY 5TH THROUGH FEBRUARY 9TH OF 2018 THE TRIAL COURT HERE HELD A WEEKLONG JURY SELECTION INVOLVING QUESTIONNAIRES, INDIVIDUAL VOIR DIRE.

AND AT THE BEGINNING OF THAT JURY SELECTION-- AND REMEMBER WHAT THE RULING WAS.

THE RULING WAS I'M GOING TO RESERVE RULING ON YOUR MOTION FOR CHANGE OF VENUE UNTIL THE END OF JURY SELECTION TO SEE IF WE COULD PICK A JURY.

YES, THEY RENEWED, THE DEFENSE RENEWED THE MOTION FOR CHANGE OF VENUE AT THE START OF JURY SELECTION, BUT THEY DID NOT-- RENEW THE MOTION AT THE END OF JURY SELECTION.

THEY DID NOT NEXT DAY WHEN THE

JURY WAS SWORN, OR WHEN THE JURY STARTED.

THAT WAS FEBRUARY 12TH WHEN THE TRIAL ACTUALLY STARTED.

SO THERE IS NO RULING FROM THE TRIAL COURT ON THE MOTION.

SO THAT IS NOT PRESERVED.

THAT IS BEING RAISED AS THE CLAIM OF FUNDAMENTAL ERROR.

THE PROSECUTOR'S COMMENT ABOUT CRYING OUT TO THE, FROM THE GRAVE WAS ALSO NOT OBJECTED TO, AND THAT'S NOT PRESERVED.

AND THAT WOULD ALSO HAVE TO AMOUNT TO FUNDAMENTAL ERROR.

NOW, REGARDING CUMULATIVE ERROR, CUMULATIVE ERROR IS REALLY THE CLAIM THAT TWO OR MORE ERRORS WHICH ARE SUBJECT TO HARMLESS ARE ERROR, WHILE HARMLESS INDIVIDUALLY, ARE NOT HARMLESS TOGETHER.

FIRST OF ALL, ON THIS EVIDENCE WE HAVE BOTH DNA FROM THE VICTIM'S NECK, DNA FROM THE VICTIM'S VAGINA, DNA FROM THE VICTIM'S ANUS, ALL OF WHICH MATCHED THE DEFENDANT AT EXTRAORDINARY NUMBERS.

THE, WE ALSO HAVE A VIDEOTAPE OF THE BEGINNING OF THE KIDNAPPING.

THE WALMART SECURITY CAMERAS SHOW DONALD SMITH LEAVING WALMART AFTER HE TOLD CHERISH'S MOTHER THAT HE WAS GOING TO GO TO THE McDONALD'S INSIDE THE WALMART AND BUY THEM ALL HAMBURGERS BECAUSE THEY HADN'T HAD DINNER.

BUT THE SURVEILLANCE CAMERA SHOWS HIM LEAVING THE WALMART AT 10:44.

SO THE, THE PRETRIAL-- THE PROSECUTOR'S COMMENT, THIS, YOU CANNOT CONSIDER EITHER THE PRETRIAL OR THE PROSECUTOR'S COMMENT AS PART OF THE CUMULATIVE ERROR.

FUNDAMENTAL ERROR CANNOT BE CUMULATIVE.

FILTER RECORD IS A CUMULATIVE HARMLESS ERROR ANALYSIS, SO YOU WOULD ONLY DO THE ISSUES THAT WERE PRESERVED IN IT, AND THOSE TWO ARE THE PHOTOGRAPHS AND THE MEDICAL EXAMINER. IS SO I'D LIKE TO TALK ABOUT THOSE TWO, BECAUSE THOSE ARE THE ONLY ONES THAT CAN POSSIBLY BE PART OF THE CUMULATIVE ERROR ANALYSIS.

A MOTION FOR MISTRIAL, WHEN THE MEDICAL EXAMINER WHO INCIDENTALLY DID TESTIFY AT THE MOTION TO EXCLUDE THE PHOTOGRAPHS AND HAD NO TROUBLE GOING THROUGH ALL OF THE PHOTOGRAPHS, THE PROSECUTOR AFTER THE MEDICAL EXAMINER HESITATES AND ASKS FOR A RECESS, SHE JUST SAYS I NEED A BREAK. SHE IS NOT AUDIBLY OR VISIBLY CRYING.

BUT ONCE THE TRIAL COURT GRANTS THE MEDICAL EXAMINER A RECESS, WE'RE ALL GOING TO TAKE A RECESS FOR TEN MINUTES, THE JURY LEAVES.

AND AFTER THE JURY LEAVES, THERE'S A DISCUSSION BETWEEN DEFENSE COUNSEL AND THE PROSECUTOR.

THE PROSECUTOR EXPLAINS DURING THAT DISCUSSION THAT SOME OF THE JURORS WHO WERE LOOKING AT THE AUTOPSY PHOTOGRAPHS BECAME EMOTIONAL, AND SOME OF THE JURORS LOOKING AT THE AUTOPSY PHOTOGRAPHS WERE TEARING UP. THAT'S FROM THE PROSECUTOR'S EXPLANATION IN RESPONSE, IN HIS ARGUMENT IN RESPONSE TO WHY THE MOTION FOR MISTRIAL SHOULD BE DENIED.

>> MS. MILLSAPS, DID THE DEFENSE SEEK CURATIVE INSTRUCTION?

>> THEY SPECIFICALLY DECLINED. THEY SAID NO CURATIVE WOULD CURE THIS.

THEY KEPT INSISTING SHE WAS

CRYING.

THAT'S JUST NOT IN THE RECORD,  
YOUR HONOR.

BUT THE, THE TRIAL COURT IS IN  
THE BEST POSITION TO UNDERSTAND  
WHAT IS GOING ON, BECAUSE THE  
TRIAL COURT IS SEEING THE JURY  
AS WELL AS THE MEDICAL EXAMINER.  
THE TRIAL JUDGE, SHE IS CLOSEST  
TO THE MEDICAL EXAMINER, CAN SEE  
IN MUCH MORE DETAIL THAN WE CAN  
FROM THE VIDEO.

SO YOU SHOULD DEFER TO THE TRIAL  
COURT.

THE TRIAL COURT DID NOT MAKE A  
FINDING THAT SHE WAS CRYING.  
THE TRIAL COURT JUST GRANTED THE  
RECESS.

AND THEN DEFENSE COUNSEL KEEP  
SAYING THAT.

THE PROSECUTOR DISPUTED IT.  
EXPLAINED REALLY THE ONLY  
TEARING UP THAT WAS HAPPENING  
WAS IN THE JURY BOX.

YOUR HONOR, AND THE STATE OPENLY  
ADMITS THAT THESE AUTOPSY  
PHOTOGRAPHS OF A HEINOUS, A  
ATROCIOUS AND CRUEL MURDER ARE  
HEINOUS.

THEY ARE HARD TO LOOK AT.  
AND THEY'RE HARD TO LOOK AT FOR  
PEOPLE WHO ARE LAWYERS WHO HAVE  
TRUED THESE KINDS OF CASES  
BEFORE.

REMEMBER, MANY OF THESE JURORS  
LOOKING AT THESE AUTOPSY  
PHOTOGRAPHS OF A 8-YEAR-OLD  
CHILD HAVE NEVER SEEN ANYTHING  
LIKE THIS BEFORE.

SO-- BUT, YOUR HONOR, THE JUDGE  
THAT WAS THERE WHO COULD REALLY  
SEE THE ENTIRE COURTROOM AND HAD  
A BETTER VIEW DENIED THIS  
MISTRIAL.

AND REALLY ON THE, ON THE-- THE  
ONLY THING ON THE RECORD WAS THE  
M.E. ASKING FOR A BREAK.

SO THE STATE'S POSITION IS THE  
GRANTING OF THE MOTION FOR  
MISTRIAL WAS NOT ERROR AT ALL.

YOU HAVE TO-- WHILE HARMLESS INDIVIDUALLY ARE NOT HARMLESS TOGETHER.

SO THE MEDICAL, SO DENYING THE MOTION FOR MISTRIAL IS NOT ERROR AT ALL.

IT CERTAINLY DID NOT VITIATE THE ENTIRE TRIAL.

TAKING A TEN MINUTE RECESS FOR THE M.E. TO COMPOSE HERSELF IS NOT ERROR, MUCH LESS VITIATE--

>> MS. MILLSAPS, LET ME JUST BRING UP A POINT.

I'VE BEEN BRINGING THIS POINT UP TO CASES LIKE THIS SINCE I STARTED ON THE COURT 12 YEARS AGO, AND IT SEEMS LIKE THEY DON'T SEEM TO END.

AND, YOU KNOW, AND I UNDERSTAND YOUR POSITION, I UNDERSTAND THE HARMLESS ERROR RULE, I UNDERSTAND ALL THAT, I UNDERSTAND THE ARGUMENTS.

BUT AGAIN, THIS SORT OF-- THESE SORT OF THINGS KEEP HAPPENING. WE HAVE OPENING STATEMENTS, THE LAW IS CLEAR.

OPENING STATEMENTS, THE PURPOSE IS TO BASICALLY GIVE THE JURY A PREVIEW OF WHAT THE EVIDENCE IS GOING TO SHOW.

THE EVIDENCE IS GOING TO SHOW THIS, THE EVIDENCE IS GOING TO SHOW THAT.

YET DURING OPENING STATEMENTS THE PROSECUTOR INJECTS EVERY MOTHER'S DARKEST NIGHTMARE BECAME REALITY.

I GUESS ONE COULD ARGUE THAT'S WHAT THE EVIDENCE IS GOING TO SHOW.

BUT THAT'S NOT WHAT IT'S INTENDED FOR.

I UNDERSTAND THE HARMLESS ERROR RULE, AND I UNDERSTAND IT WASN'T OBJECTED TO.

NEVERTHELESS, IT'S THERE.

AND IT SEEMS TO ME, IT SEEMS TO ME THAT THESE TYPE OF STATEMENTS, THESE TYPE OF

REMARKS, THEY ARE NOT PROPER,  
ARE BEING MADE IN CASES WHERE  
THE EVIDENCE IS LOCKED.

YOU KNOW?

I MEAN, HERE CLEARLY THE  
EVIDENCE IS SUBSTANTIAL, SO WHY  
INJECT THESE THINGS INTO THE  
RECORD?

WHY ARE WE HERE TODAY HAVING TO  
DEAL WITH THESE ISSUES?

AND I RAISE THIS ISSUE WITH  
OTHER ATTORNEY GENERALS BEFORE  
IN THE HOPES THAT PROSECUTORS  
OUT THERE JUST STOP DOING THIS  
AND CONCENTRATE ON THE EVIDENCE.  
YET HERE WE ARE AGAIN IN A CASE  
AS SERIOUS AS THIS, INJECTING  
THESE TYPES OF THINGS INTO THE  
RECORD.

AND I UNDERSTAND THIS IS NOT  
MUCH YOU CAN DO ABOUT IT.

I GUESS YOU CAN CALL OUT THIS  
PROSECUTOR AND SAY PLEASE DON'T  
DO THAT AGAIN, I DON'T WANT TO  
DEAL WITH THIS, AND YET YOU  
HAVEN'T.

I GUESS I'M JUST MAKING A  
STATEMENT, I'M NOT ASKING A  
QUESTION, BECAUSE I SEE THESE  
ALL THE TIME.

WHAT DO YOU THINK?

>> WELL, YOUR HONOR--

[LAUGHTER]

I MIGHT UNDERSTAND THAT.

YOUR HONOR--

[LAUGHTER]

THE PROSECUTOR SAID THAT EVERY  
MOTHER'S DARKEST NIGHTMARE  
BECAME THE MOTHER OF THE  
VICTIM'S REALITY.

THAT'S THE REALITY OF THIS CASE.

THAT IS WHAT-- SHE WAS  
DESCRIBING, THE PROSECUTOR WAS  
DESCRIBING THE VICTIM, THE  
MOTHER'S REACTION ABOUT FINDING  
HER CHILD WAS MISSING FROM THE  
STORE AND THE PERSON WHO MOST  
LIKELY TOOK HER HE HAD JUST MET  
A FEW HOURS AGO AT ANOTHER  
STORE.

>> YES.  
AND HAD SHE MADE THAT STATEMENT  
IN CLOSING ARGUMENT AS WITH ALL  
THE EVIDENCE THAT HAD COME IN,  
THEN, YES, I AGREE.  
IT WOULD NOT HAVE BEEN ALL THAT  
IMPROPER.  
BUT THIS IS DURING OPENING  
STATEMENTS WHEN YOU'RE TELLING  
THE JURY WHAT THE EVIDENCE IS  
GOING TO SHOW.

>> AND--

>> AGAIN, IT'S JUST A MINOR  
POINT, BUT THEY KEEP COMING.  
I JUST, I GUESS WHEN I TRIED  
CASES I WAS SO CAREFUL ABOUT THE  
RECORD THAT I DID NOT WANT TO  
INJECT ANYTHING IN ANY WAY THAT  
WOULD BRING ANY ATTENTION TO THE  
RECORD, ESPECIALLY WHEN I HAD A  
LOCKED CASE.

>> WELL, YOUR HONOR, I'M NOT  
TRYING TO-- I DON'T SEE  
ANYTHING WRONG WITH THIS FIRST  
COMMENT DURING OPENING  
STATEMENT, I REALLY DON'T.  
AND INCIDENTALLY, NEITHER DID  
DEFENSE COUNSEL BECAUSE AT THE  
START OF THE PENALTY PHASE  
DEFENSE COUNSEL THEMSELVES  
DESCRIBE THIS CRIME AS EVERY  
PARENT'S WORST NIGHTMARE.  
THERE WAS NO DISPUTE THAT HAVING  
A CHILD MISSING KNOWING THAT  
THAT CHILD HAS BEEN TAKEN BY  
SOMEBODY TO YOU JUST MET, THAT'S  
JUST A DESCRIPTION OF THIS  
MOTHER'S REACTION WHEN SHE  
DESCRIBES AND WHY SHE CALLS 911.  
AND THEN THEY HEAR THE TAPE.  
SO I THINK THAT'S JUST THE  
REALITY.  
I THINK EVERY, EVERYBODY KNOWS  
THAT REALITY.  
SO I UNDERSTAND THAT SOMETIMES  
PROSECUTORS CROSS THE LINE, BUT  
I DON'T THINK THAT COMMENT  
CROSSED THE LINE.  
THAT'S, THAT'S JUST, SHE'S JUST  
DESCRIBING WHY THE MOTHER IS

CALLING 911, AND THE 911 CALL IS BEING PLAYED, WAS PLAYED FOR THE JURY, AND IT IS, IT IS EVERY MOTHER'S DARKEST NIGHTMARE.

SO I UNDERSTAND SOMETIMES PROSECUTORS CROSS THE LINE AND GIVEN THE EVIDENCE IN THE CASE IT DOESN'T SEEM NECESSARY, BUT THIS JUST STRIKES ME-- I DON'T SEE THAT AS ERROR.

SO REGARDING THE DARKEST NIGHTMARE, I DON'T SEE THAT AS ERROR MUCH LESS, YOU KNOW, THE BASIS OF THE OBJECTION TO THAT COMMENT WAS ARGUMENTATIVE.

THEY ARE NOW ARGUING THAT IT'S EXPLOSIVE AND SHOULDN'T BE SAID.

SO THAT'S NOT EVEN THE SAME OBJECTION THAT THAT THEY MADE BELOW.

SO I DON'T, I DON'T SEE-- IF YOU GO DOWN THEM, THE PRETRIAL WASN'T PRESERVED.

THAT'S FUNDAMENTAL ERROR, YOU DON'T CONSIDER IT IN CUMULATIVE ERROR.

THE M.E. WAS NOT CRYING AUDIBLY OR VISIBLY, AND SHE DID THE APPROPRIATE THING WHICH WAS TO ASK FOR A RECESS.

AND THE PHOTOGRAPHS, THE MEDICAL EXAMINER TOOK 74 PHOTOGRAPHS.

THE STATE WAS ONLY SEEKING TO INTRODUCE 30, AND, IN FACT, WE ONLY INTRODUCED 28.

SO THERE IS NO ERROR IN THE ADMISSION OF THESE PHOTOGRAPHS. I'D LIKE TO REMIND THE COURT THE STATE HAS BEYOND A REASONABLE DOUBT STANDARD OF PROOF.

>> INDEED, MS. MILLSAPS, ISN'T IT ARGUABLE FOR THE HAC AGGRAVATOR, THE PHOTOGRAPHS WERE RELEVANT TO THE CONSIDERATION OF THAT AS WELL?

>> ABSOLUTELY, YOUR HONOR. THEY WERE-- AND THE STATE REALLY ONLY CALLED ONE ADDITIONAL WITNESS AT THE PENALTY PHASE.

IS SO WE WERE USING THIS EVIDENCE TO ESTABLISH OUR HAC AGGRAVATOR.

SO, YOUR HONOR, WHEN YOU HAVE A BEYOND A REASONABLE DOUBT STANDARD OF PROOF AND NOTHING CAN CONVEY INFORMATION LIKE A PHOTOGRAPH.

MATTER OF FACT, CIS JURORS ARE GOING TO SAW TO THEMSELVES WHERE'S THE PHOTOGRAPH?

SO, YOUR HONOR, IT'S JUST INEVITABLE WHEN YOU HAVE A HEINOUS CRIME, THAT THE PHOTOGRAPHS OF THAT CRIME ARE GOING TO BE HEINOUS.

BUT WE NEED THOSE HEINOUS PHOTOGRAPHS TO PROVE OUR HAC AGGRAVATOR WHICH WAS FOUND BY THE JURY AS WELL AS THE TRIAL COURT.

AND GIVEN GREAT WEIGHT BY THE TRIAL COURT.

SO, YES, YOUR HONOR, THAT IS, INDEED, THE STATE'S POSITION, AND THAT'S ONE OF THE ARGUMENTS I MADE IN THE BRIEF.

ALL RIGHT.

SO THAT'S-- AND THEN WE'VE ALSO TALKED ABOUT THE PROSECUTOR'S COMMENT.

SO THERE'S NO ERROR TO ACCUMULATE, AND EVEN IF THERE WAS, IF YOU DO FIND TWO THINGS THAT YOU THINK ARE ERROR, REMEMBER BOTH THE DNA EVIDENCE AND THE VIDEOTAPE OF THE BEGINNING OF THIS KIDNAPPING. SO THE CUMULATIVE ERROR CLAIM SHOULD BE DENIED BECAUSE THIS IS HARMLESS.

IF YOU COULD FIND TWO ERRORS, EVEN THOSE TWO ERRORS TOGETHER WOULD BE WITH HARMLESS IN LIGHT OF THE EVIDENCE IN THIS CASE. AND THE STATE ASKS YOU TO CONFIRM THE CONVICTION AND SENTENCE, AND THAT IS THE CONCLUSION OF THE STATE'S PRESENTATION.

>> THANK YOU, COUNSEL.

NOW FOR REBUTTAL.

>> THANK YOU, YOUR HONOR.

IT WAS INTERESTING LISTENING TO THE STATE GIVING BASICALLY A CRIMINAL DEFENSE LAWYER ARGUMENT STARTING BACKWARDS THAT THE PHOTOS WERE THE MOST POWERFUL. THOSE WERE THE ONES THAT WERE ACTUALLY OBJECTED TO AND WERE-- [INAUDIBLE]

BUT THEN THE STATE ARGUES THAT, YOU KNOW, THE DNA AND THE VIDEO AND EVERYTHING ELSE WAS SO POWERFUL THAT THEY REALLY DIDN'T NEED THE VIDEOS OR THE PICTURES, EXCUSE ME.

BUT THEY STILL MOVED THEM IN OVER OBJECTION.

AND THOSE ARE THE ONES--

>> WELL, BUT, COUNSEL, WE DO KNOW THAT ALTHOUGH WE'VE GOT THIS, THERE'S LAW ABOUT UNDULY INFLAMMATORY, BUT WE ALSO IS HAVE THE BASIC RULE THAT IT'S A RULE OF RELEVANCE, NOT OF NECESSITY.

>> YES.

>> SO THE STATE'S NOT LIMITED TO WHAT THEY ABSOLUTELY MUST HAVE, ISN'T THAT CORRECT?

>> YES, SIR.

I CONCEDE.

DID I LOSE YOU?

>> NO, NO, I'M JUST--

[LAUGHTER]

>> HEY, LOOK, I HAVE TO ADMIT WHAT I HAVE TO ADMIT, OKAY?

SO, NO, I AGREE WITH YOU.

I HAVE TO CONCEDE WHAT I HAVE TO CONCEDE.

IT'S NOT MY FIRST RODEO.

YES, THE PICTURES UNDER THE CASE LAW IS INDICATING THAT THEY'RE ENTITLED TO INTRODUCE THOSE, AND THEN THE QUESTION BECOMES IS IT TOO INFLAMMATORY, IS IT A 403 VIOLATION OR IS IT, YOU KNOW, TOO CUMULATIVE.

I 100% AGREE WITH YOU.

BUT SINCE THE STATE ARGUED THAT THERE WERE NOT TWO OR MORE ISSUES THAT ADDRESSED CUMULATIVE ERROR, IT'S MY JOB AS COURT-APPOINTED COUNSEL TO MAKE SURE THAT I ADDRESS THESE WITH YOU.

AND THAT'S ONE OF THE ONES, AND YOU JUST ASKED ME THAT QUESTION. NEXT, THE STATE CONCEDES THAT THE JURY WAS TEARING UP, OKAY? THE VIDEO, WHETHER YOU CAN SEE IT OR NOT, I BELIEVE THE STATE WILL CONCEDE THAT THE MEDICAL EXAMINER WAS TEARING UP.

BEYOND A REASONABLE DOUBT AND THE HAC AGGRAVATOR IS NOT APPLICABLE IN THE GUILT PHASE. THAT WOULD BE 100% APPLICABLE AFTER THEY FOUND HIM GUILTY IF THEY DID FIND HIM GUILTY, BUT IT WAS AFTER-- BUT IT WAS DURING THE GUILT PHASE.

AND THERE'S SOME LEVEL WHERE YOU HAVE TO PROVE THAT IT WAS HEINOUS, ATROCIOUS AND CRUEL. BUT IN THIS SITUATION, MY ARGUMENT WOULD BE TO YOUR HONOR, JUSTICE CANADY, IS THAT THAT WAS IMPROPER DURING THE GUILT PHASE. WE-- I SIT HERE ACKNOWLEDGING THE OVERWHELMING WEIGHT.

IT'S NOT ABOUT DID HE GET A PERFECT TRIAL, BUT DID HE GET A FAIR TRIAL.

AND THAT'S WHERE I HAVE TO SIT HERE AND HAVE THIS CONVERSATION WITH YOU, JUSTICE CANADY.

>> WELL, IF THERE ARE NO QUESTIONS AND YOU HAVE NOTHING LEFT--

>> I'M LOOKING AT MY NOTES, YOUR HONOR.

NO, YOUR HONOR.

THANK YOU SO MUCH.

IT WAS GOOD TO SEE YOU AGAIN.

>> THANK YOU, COUNSEL.

WE THANK BOTH OF YOU FOR YOUR ARGUMENTS IN THIS CASE BEFORE THE COURT TODAY.

AND THE COURT NOW WILL PREPARE  
TO MOVE ON TO THE FINAL CASE ON  
TODAY'S DOCKET.  
>> THANK YOU.