

THE COURT WILL PROCEED TO OUR
NEXT CASE THE CASE OF GRANVILLE
RITCHIE.

>> GOOD MORNING.

MISTER CHIEF JUSTICE, MAY IT
PLEASE THE COURT, THE PENALTY
PHASE CLOSING ARGUMENT IN THIS
CASE SHOULD MAKE CONSCIENTIOUS
PROSECUTORS CRINGE.

PROSECUTOR CARMEN ATTACKED
GRANVILLE RITCHIE FOR EXERCISING
HIS CONSTITUTIONAL RIGHTS AND
THEN INTIMATED THAT BECAUSE HE
WAS A NONCITIZEN HE DID NOT
DESERVE THEM.

HE VIOLATED THE GOLDEN RULE AND
VITIATED THE JURY'S ABILITY TO
EXTEND MERCY.

PROSECUTOR HARMON'S HUNGER FOR A
WIN INFLAMED BOTH THE PASSIONS
AND PREJUDICES OF THIS JURY AND
INFECTED GRANVILLE RITCHIE'S
ENTIRE PENALTY PHASE TRIAL WITH
CONSTITUTIONAL ERROR.

TODAY I'M GOING TO FOCUS ON SOME
OF THE MOST EGREGIOUS INSTANCES
OF THAT CLOSING ARGUMENT AND THE
MOTHER'S VICTIM IMPACT TESTIMONY
WHERE SHE MADE HER DIRECTLY TO
THE JURY THAT THEY IMPOSE A
DEATH VERDICT.

>> IS YOUR ARGUMENT THE
STATEMENTS IN THEIR ENTIRETY?

I WONDER IF BEFORE WE GET TO
THAT WE MIGHT -- HAVE WE EVER
REVERSED ON THE BASIS OF THE
SAME MERCY ARGUMENT ALONE?

HAVE YOU EVER FOUND STANDING
ALONE THE SAME MERCY ARGUMENT
ENCLOSING A REVERSIBLE ERROR?

>> I DO NOT BELIEVE SO BUT IT IS
NOT STANDING ALONE.

>> I AGREE BUT I WANT TO MAKE
SURE I UNDERSTAND THE COMPONENT
PARTS.

CERTAINLY A GOLDEN RULE
VIOLATION HELD AND CONSTITUTES
REVERSAL.

WHAT ABOUT THE IMMIGRATION
COMMENTARY?

>> NOT THAT I KNOW OF BUT IT MAY
NOT BE A COMMON ARGUMENT.

THAT MIGHT BE WHY WE DON'T HAVE

AN OPINION ON IT.

>> YOUR THEORY TO PREVAIL, WE SHOULD'N'T BE LOOKING TO THE SAME MERCY ALONE.

IT IS ONE OF CUMULATIVE PREJUDICE.

>> ABSOLUTELY.

I WANT TO SAY SOMETHING ABOUT PREJUDICE THAT APPLIES WITH YOU ARE DOING HARMLESS SCRUTINY OR FUNDAMENTAL SCRUTINY.

THE IMPACT OF PREJUDICE LOOMS SO MUCH LARGER IN THE PENALTY PHASE THAN IT DOES IN ANY OTHER PROCEEDING IN AMERICA AND THE REASON FOR THAT IS NOT JUST BECAUSE EACH INDIVIDUAL OF THOSE 12 JURORS HAS VETO POWER OVER A DEATH VERDICT BUT BECAUSE UNLIKE GUILT PHASE DETERMINATION A CONVICTION TO GENERATIONS THE TURN LARGELY ON EVALUATION OF OBJECTIVE FACTS, WHETHER OR NOT TO KILL SOMEONE IS AN INHERENTLY MORAL DETERMINATION AND EACH INDIVIDUAL OF THOSE 12 JURORS BRINGS WITH THEM TO DEATH AND LIFE DELIBERATIONS UNKNOWABLE RANGES OF HUMAN EXPERIENCE, UNKNOWABLE RANGES OF REACTIONS TO THE SAME TYPES OF EVIDENCE, AND IT IS BECAUSE OF THAT THAT THEIR COLLECTIVE JUDGMENT ABOUT WHO SHOULD LIVE AND WHO SHOULD DIE IS MARKED BY AN INHERENT LACK OF PREDICTABILITY.

I TO TALK ABOUT THE MOST --

>> WHERE DOES THAT LEAVE YOU? ARE YOU SAYING ANY ERROR IN THE PENALTY PHASE IS A PER SE ERROR?

>> ABSOLUTELY NOT.

>> WHAT DOES IT MEAN?

IT SOUNDS LIKE YOU ARE TRYING TO CHANGE THE STANDARD WE WOULD USE FOR DETERMINING HARM VERSUS ERROR, RIGHT?

YOU ARE SAYING THAT HAS GOT 3 DIFFERENT.

>> NO.

I'M SAYING WHAT THE JURY DOES IS DIFFERENT SO THIS IDEA, FOR INSTANCE WHEN YOU HAVE A TRIAL IS THERE ENOUGH EVIDENCE TO CONVICT IS NOT THE ONLY QUESTION

YOU ASK YOURSELF WHEN GOING TO HARMLESS ERROR ANALYSIS BUT IS A BIG PART OF IT.

IS THERE SUFFICIENT EVIDENCE TO CONVICT BUT FOR THE HARMLESS OR PREJUDICIAL ARGUMENTS?

FOR EXAMPLE I THINK SOMETHING IN THE PENALTY PHASE CLOSING IN THE CAPITAL TRIAL THAT THE

PROSECUTOR SAYS IT IS IMPROPER ABOUT AN AGGRAVATED THAT THE JURY ALTERNATELY DOESN'T FIND, THAT THEY REJECT, THAT WOULD BE VERY HARD FOR ME TO COME HERE AND ARGUE PREJUDICE IF THAT HAPPENED BUT THAT'S NOT WHAT WE HAVE HERE.

>> WHAT YOU HAVE IS AN AGGRAVATED ARE, WHAT YOU DO HAVE IS A PRESENCE OF AN HVAC AGGRAVATED.

>> ABSOLUTELY.

>> TO THE CHIEF'S QUESTION IT CAN'T BE PER SE ERROR FOR THERE TO BE A COMMENT THAT WE FOR EXAMPLE HAVE NEVER FOUND TO CONSTITUTE STANDING ALONE ERROR, WHEN THERE'S AN ACTIVATOR IN THE RECORD YOU WOULD AGREE THAT AGAIN WE ARE NOT, YOU'RE NOT ASKING US TO HANG EVERYTHING ON THAT.

YOU ARE MAKING A CUMULATIVE ERROR.

>> ABSOLUTELY BUT I WENT TO DISTINGUISH SOME ARGUMENTS WERE WORSE THAN OTHERS.

THE WORST I THINK OF THE ENTIRE PENALTY PHASE WAS OBVIOUSLY THE COMMENT ON TRIAL RIGHTS INTERTWINED WITH THIS HE WOULDN'T HAVE HAD ACCESS TO ANY OF THESE RIGHTS IN JAMAICA REFRAIN.

THE WHOLE POINT OF PATRIOTISM FRANKLY IS THAT YOU OWE MORE TO YOUR BRETHREN THEN YOU OWE TO OUTSIDERS.

REMARKS ON THE EXERCISE OF TRIAL RIGHTS WOULD BE EGREGIOUS IN ANY CASE BECAUSE THE STATE'S BURDEN TO MOUNT ITS CASE PRESUPPOSES ACCOUNTABLE ON THE JURY TO SIT THROUGH IT BUT ESPECIALLY

EGREGIOUS TO TELL THE JURY WE
GAVE THIS MAN BECAUSE OUR
COUNTRY IS SO GREAT A WE GAVE
HIM ALL THESE RIGHTS AND HE
WOULDN'T HAVE HAD THEM HAD HE
BEEN TRIED --

>> IS THAT IN THE RECORD?

AS I RECALL THE RECORD IT WAS
THE DEFENSE THAT PUT BEFORE THE
JURY THE IDEA HE HAD GROWN UP
UNDER PRIVILEGED CIRCUMSTANCES
IN JAMAICA AND THE STATE
RESPONDED ON THAT BASIS.

CAN YOU GIVE US THE ACTUAL
STATEMENT IN THE RECORD?

I DON'T RECALL IT BEING WHAT YOU
ARE SAYING.

>> Reporter: IMMIGRATED HERE TO
THIS COUNTRY YEARS AGO AND AS HE
LIVES HERE HE ENJOYED THE
BENEFITS OF THIS COUNTRY WE LIVE
IN, WE LIVE IN THE GREATEST
COUNTRY IN THE FACE OF THE
EARTH, ENJOY THE DUE PROCESS
RIGHTS, HE ENJOYED THE FACT THAT
WE CARRY THE BURDEN OF PROOF OF
HIS GUILT AND HE IS PRESUMED
EVIDENCE BUT HE'S ENTITLED TO
JURY OF HIS PEERS NOT JUST TO
DETERMINE WHETHER HE IS GUILTY
BUT A JURY OF HIS PEERS TO
DETERMINE APPROPRIATE SENTENCE.
BECAUSE THIS ISN'T JAMAICA OR
SOME OTHER COUNTRY.

THIS IS THE UNITED STATES WHERE
THE DEFENDANT GETS TO HAVE YOU
DETERMINE HIS SENTENCE, NOT SOME
BUREAUCRAT, NOT SOME SINGLE
JUDGE, NOT A STAR CHAMBER, BUT
YOU, HIS FELLOW CITIZENS, ENJOY
THE BENEFIT OF A NEUTRAL AND
UNBIASED JUDGE, THE BENEFIT A
VERY COMPETENT DEFENSE COUNSEL.
YOU THINK THAT WOULD HAVE
HAPPENED IN JAMAICA?

I DON'T SEE HOW THAT IS
RESPONSIVE AT ALL TO A CLAIM OF
UNDERPRIVILEGED OR TERRIBLE
CHILDHOOD.

OR MIDDLE LITIGATION.

IF THERE WAS SOME EVIDENCE
RITCHIE HAD GONE THROUGH A LONG
AND ARDUOUS LABYRINTHINE
IMMIGRATION PROCESS, THE

PROSECUTOR COULD HAVE EASILY SAID WHAT FOOL COULD HAVE FIGURED THAT OUT? HE HAS SOME TENACITY BUT THAT IS NOT WHAT HAPPENED AND HE COULD HAVE EASILY SAID HIS FATHER SOUNDS LIKE A TERRIBLE GUY BUT HE'S NOT THAT LITTLE BOY ANYMORE.

HE'S A GROWN MAN WHO DID A TERRIBLE THING BUT ALSO THAT IS NOT WHAT HE SAID.

HE WENT THROUGH A LITANY OF TRIAL RIGHTS WHICH THIS COURT SAYS THERE IS NO LEGITIMATE PURPOSE AND INTERTWINED THAT REFRAIN WITH REMINDERS TO THE JURY THAT HE'S NOT FROM HERE AND THE ONLY LOGICAL CONCLUSION THAT A JURY CAN TAKE FROM THAT IS I SHOULD BE DUBIOUS.

>> LET ME ASK A QUESTION, WHERE DID THIS TRIAL TAKE PLACE?

WHAT WAS THE DATE?

>> SEPTEMBER OF 2019.

>> WHAT YEAR?

>> THE CRIME WAS IN 14.

>> THE WAY YOU ARE ARGUING THIS AND PRESENTED IT IS A LITTLE CONFUSING TO ME.

ON THE SAME MERCY COMMENTS YOU HAVE CASE LAW, IT IS IMPERMISSIBLE LIKE THAT.

IT IS PRESERVED ERROR, THAT MEANS THE STATE HAS TO SHOW BEYOND REASONABLE DOUBT CONTRIBUTING TO THE OUTCOME.

YOU SEEM TO BE CONCEDED, YOU ARE ARGUING WE SHOULD REVERSE BASED ON THAT ALONE.

YOU SHOULD ACCUMULATE WITH OTHER ERRORS THAT ARE NOT PRESERVED BUT THE DIFFERENT STANDARD IS DIFFICULT TO MEET.

>> THE STATE HAS BURDEN OF PROOF, USING REASONABLE DOUBT, THE SAME MERCY COMMENT DID NOT ATTEMPT THE VERDICT WITH THIS CLOSING ARGUMENTS WAS SO TERRIBLE THE SAME MERCY ARGUMENT WAS COMPOUNDED BY OTHER ERROR.

>> IF THE STATE DIDN'T DEMONSTRATE BEYOND REASONABLE DOUBT THAT ARE ALONE DID NOT

CONTRIBUTE TO THE VERDICT THEN
IT DOESN'T MATTER.

IT IS REVERSAL.

>> THAT IS TRUE.

>> WHY ISN'T THE ARGUMENT TO
CONVINCE US THE STATE HAS NOT
BEEN A REASONABLE DOUBT.

>> IT IS IMPOSSIBLE TO PROVE
THAT TO YOU.

TO LOOK TO THE PENALTY PHASE THE
LIBERATION AS IF IT IS A LAB
EXPERIMENT TO REPLICATE AND
RELIABLY GET THE SAME EXACT
RESULTS NO MATTER HOW MANY TIMES
YOU DID IT BUT THINKING OF
PENALTY PHASE DELIBERATIONS IS
WILLFULLY MISGUIDED.

THE PENALTY PHASE LIKE THAT.

>> A CLASSICAL GOLDEN RULING
ARGUMENT IS TO THE EFFECT OF PUT
YOURSELF IN THE SHOES OF THE
VICTIM.

IS A CLASSIC ARGUMENT.

>> THAT DID HAPPEN HERE.

>> YOUR ARGUMENT WAS CAN YOU
IMAGINE THE DREAD OF KNOWING
YOUR LIFE IS ENDING AND THE BODY
AS HE IS BLEEDING INTERNALLY, IS
ON AND ON.

QUOTE IS PUTTING YOURSELF IN THE
SHOES OF THE VICTIM, PRETTY
CLOSE TO IT.

HOW IS IT THIS ARGUMENT BEING
COMBINED WITH H A C, THAT
AGGRAVATE HER.

IT WAS NOT PERMISSIBLE TO PROVE
HVAC.

IT WASN'T INTRODUCED ON ITS OWN.

>> IT IS ABSOLUTELY PERMISSIBLE
FOR A PROSECUTOR TO SAY, TO
DESCRIBE THE PAIN, RIPPING AND
TEARING OF TISSUE LIKE HE DID IN
THIS CASE, HOW ENERVATING THOSE
AREAS ARE.

TO IMAGINE THE MURDER, THAT THE
DEBT IS PERSONAL TO THEM.

>> THE PROPER WAY TO SAVE -- TO
HAVE SAID THAT WOULD BE
SOMETHING TO THE EFFECT THAT YOU
MAY CONSIDER.

>> IMAGINE YOU.

IMAGINE YOU IS NOT SIGN.

>> THE SUFFERING OF THIS PERSON,
IMAGINE THE PAIN, IT IS DIRECTLY

INVITING A PERSONAL EXPERIENCE,
TO CALL IT TO MIND.

IT MIGHT BE IN HER OWN
EXPERIENCE.

WHY AREN'T YOU ARGUING, PERSONAL
CONTACT WITH THE EXPERIENCE
SHOULD BE VIOLATION OF THE
GOLDEN RULE.

>> YOU CANNOT SEPARATE IT FROM
PERSONAL IMAGINING OR CONTACT.
THE MURDER WAS PITILESS AND IT
IS HARDER TO IMAGINE GIVING
MERCY TO A MERCILESS KILLER WHEN
IMAGINING THEM MURDERING ME
VERSUS IMAGINING THEM MURDERING
SOMEONE ELSE EVEN AS THE VICTIM
IS SYMPATHETIC FOR SOME REASON.
THERE IS A HUGE DIFFERENCE
THERE.

>> I TO TOUCH ON THE VICTIM
IMPACT BEFORE I RESERVE TIME FOR
REBUTTAL.

THE VICTIM'S MOTHER IN THIS CASE
READ FROM THE BIBLE TO THE JURY.
IF ANYONE CAUSES THESE WHO
BELIEVE IN ME TO BE STUMBLE IT
WOULD BE BETTER FOR THEM TO HAVE
A MILLSTONE HUNG AROUND THEIR
NECK AND BE THROWN INTO THE SEA.
THIS DEMAND DIRECTLY TO THE JURY
FOR THE DEATH PENALTY IS JUST'S
GOD IS ON THE SIDE OF A DEATH
VERDICT AND THAT IS A PERVERSION
OF FLORIDA LAW.

IT TOUCHES ON THE LEAST
CONTROVERSIAL ASPECT OF THE PAIN
DECISION.

I'M REFERRING TO PAIN'S
CONDEMNATION OF SURVIVOR OPINION
ON THE DEFENDANT, THE CRIME OR
THE APPROPRIATE PUNISHMENT.

WE CITE A LOT OF CASES IN THE
BRIEF ON VICTIM IMPACT AND WE
THINK UNLESS YOU ARE COMBINING
IT IN YOUR CONSIDERATION OF THE
SAME MERCY ARGUMENTS WHICH YOU
CAN.

AND OTHER HARMLESS ERROR
ANALYSIS.

THERE WAS NO OBJECTION HERE.
I NEED TO ADDRESS WHAT IT TAKES
FOR VICTIM IMPACT TO RISE TO THE
LEVEL OF FUNDAMENTAL ERROR.
MY READING OF THE FLORIDA CASE

LAW I BELIEVE MAKES TWO
REQUIREMENTS.

IT HAS TO VIOLATE THAT PAIN
CONDEMNATION.

IT IS A DIRECT REQUEST TO IMPOSE
A DEATH SENTENCE, THEY SAY YOU
DON'T REACH THE FOUNDATION OF
THE PENALTY PHASE UNTIL YOU DO
THAT.

YOU CAN MAKE THAT ERROR EVEN IF
IT IS PLAIN AND OBVIOUS AND
THERE IS NO QUESTION.

UNLESS YOU DO IT IN FRONT OF THE
JURY IT DOESN'T WARRANT A NEW
PENALTY PHASE.

I GET THAT FROM PIECES LIKE
CARD.

ANY QUESTIONS ON VICTIM IMPACT?
>> CAN YOU ELABORATE ON THIS
ISSUE?

I TO MAKE SURE WE ARE CLEAR
AS FAR AS ANALYTICALLY WHAT WE
ARE SUPPOSED TO BE ASKING
OURSELVES.

GIVE ME ONE WAY OF LOOKING AT
IT, YOU HAVE THIS OBJECTIVE
JURY, ASKING WHETHER OBJECTIVELY
SPEAKING IN THE CONTEXT OF THIS
CASE, THE SAME MERCY COMMENT, A
RATIONAL JEWELRY COULD HAVE
DECIDED BECAUSE OF THAT COMMENT.
I UNDERSTAND.

IT IS HARD TO IMAGINE DIFFERENT
RECOMMENDATION FROM THE JURY
THEN THIS CASE.

IT SEEMS HARD TO BELIEVE.
YOU ARE MAKING YOUR CUMULATIVE
POINT, IT WAS OBJECTED TO THAT
WE NEED TO DO HARMLESS ERROR BUT
IT SEEMS IT IS HARD TO IMAGINE
THE COMMENT IN ISOLATION, YOU
AFFECT WITH THE ULTIMATE
RECOMMENDATION WAS.

>> I WILL SAY THREE THINGS.
THE DANGER WITH THIS ARGUMENT IS
NOT ONLY WILL THE JURY
PERMISSIBLY USE ARGUMENTS ABOUT
HOW THE MURDER WAS PITILESS WHEN
THEY FIND HACKS SUFFICIENT OR
NOT BUT WILL USE IT WHEN THEY GO
TO THE ULTIMATE LAST QUESTION,
WILL I EXTEND UNCONDITIONAL
MERCY, THEY WILL USE IT THEN
TOO.

THAT IS WHAT IS SO DANGEROUS.
THE BRIEFS THAT YOU SHOULD, YOU
DON'T HAVE TO DO IT ALONE, SO
MANY MORE IMPROPRIETIES, THIS IS
PENALTY PHASE WHETHER HE LIVES
OR DIES.

YOU CAN BUT DON'T HAVE TO.
IF YOU FIND YOURSELF HAVING
TROUBLE, HOW MUCH TO LOOK AT THE
ENTIRE PROPRIETY AS A WHOLE.
YOUR COMMENT ABOUT IT BEING HARD
TO IMAGINE.

SOME CAPITAL DEFENDANTS GET 11-1
AND 10-2.

IT IS UNFATHOMABLE HOW IT
HAPPENS BUT IT HAPPENS.

WHEN YOU ARE AT THE POINT YOU
ARE IN YOUR MIND SAYING IF YOU
DO THIS OVER, ARE THEY GOING TO
VOTE DEATH AGAIN IT IS HIGHLY
SPECULATIVE FOR YOU TO SAY FOR
SURE, IT IS QUITE COMMON THAT
YOU ARE NOT SURE THAT THAT WOULD
HAPPEN.

IT IS SPECULATIVELY IS TOO
SPECULATIVE FOR HARMLESS ERROR
ANALYSIS.

I WOULD LIKE TO RESERVE THE REST
OF MY TIME.

MAY I?

>> YOU MAY.

>> THANK YOU, MISTER CHIEF
JUSTICE, MAY IT PLEASE THE
COURT.

MY NAME IS RICK BUCKWALTER AND I
REPRESENT THE STATE OF FLORIDA.
TODAY GRANVILLE RITCHIE COMES
BEFORE THE COURT THAT ASKS THE
COURT TO REVERSE A DEFENDANT
IMPOSED FOR A NEW PENALTY PHASE
BECAUSE HE CONTENDS THERE WAS
IMPROPER COMMENTS MADE BY THE
ASSISTANT STATE ATTORNEY DURING
HIS PENALTY PHASE, THERE WERE
IMPROPER VICTIM IMPACT TESTIMONY
THAT WAS SUBMITTED INTO
EVIDENCE, THE REDACTIONS THAT
WERE MADE TO A VIDEO THEY CLAIM
WERE IMPROPER, THAT THE JUDICIAL
MITIGATION AND THAT THE COURT
PERMITTED REBUTTAL FROM A
WITNESS THAT GRANVILLE RITCHIE
CONSIDERS AND COMPETENT TO
TESTIFY ABOUT.

HOWEVER, BECAUSE THE JURY'S RECOMMENDATION THAT GRANVILLE RITCHIE BE SENTENCED TO DEATH IS BASED ON HIGHLY AGGREGATED FACTS, GRANVILLE RITCHIE RAPED AND STRANGLERED TO DEATH A 9-YEAR-OLD CHILD, THE RECOMMENDATION ANY REASONABLE JURY WOULD HAVE MADE, THERE'S RELATIVELY LIMITED MITIGATION EVIDENCE IN THIS CASE THERE IS NO REVERSIBLE ERROR.

THEREFORE WE ARE GOING TO REQUEST TO AFFIRM THE SENTENCE OF DEATH IMPOSED BY THE TRIAL COURT.

THERE WERE SEVERAL BATTERS BROUGHT UP BY DEFENSE COUNSEL. I WILL LIMIT MY RESPONSE TO THOSE REMARKS UNLESS THE COURT HAS FOR THE QUESTIONS OF ME. WITH REGARD TO THE SAME MERCY ARGUMENT, THE COURT SHOULD BE AWARE THAT IN RHODES V. STATE, WHICH IS ONE OF THE CASES CITED BY DEFENDANT-- EXCUSE ME, BY COUNSEL IN THIS CASE, THIS COURT FOUND THAT A SAME MERCY ARGUMENT ALONE WAS HARMLESS ERROR.

WE'VE CONTESTED WHETHER OR NOT IT'S THE SAME MERCY ARGUMENT WHETHER OR NOT IT WAS, IN FACT, PRESERVED.

BUT TO GET DOWN TO BRASS TAXES--

>> CAN WE TALK ABOUT PRESERVATION FOR ONE SECOND? WHAT WOULD HAVE PROPERLY PRESERVED THE SAME MERCY OBJECTION?

I SEE THE COLLOQUY AS BEING PRETTY CLEAR.

THERE'S AN OBJECTION, THERE'S A MOTION FOR MISTRIAL, AND THE COURT ESSENTIALLY SAYS, ALL RIGHT, THANK YOU.

DON'T RELATE IT TO ANY MERCY THE JURY MAY OR MAY NOT SHOW THE DEFENDANT.

OKAY.

IS IT THE STATE'S POSITION THAT THE COURT DIDN'T RULE--

>> THAT'S CORRECT.

THAT IS THE STATE'S POSITION.

BUT AGAIN, I THINK IT'S EVEN
THOUGH THAT'S THE STATE'S
POSITION AND IF IT'S NOT
PRESERVED, IT'S A DIFFERENT
ANALYSIS THIS COURT WOULD USE IN
REVIEWING THE REMARK.

I THINK THE BOTTOM LINE IS THAT
EVEN IF IT HAD BEEN PRESERVED,
THIS COURT SAID THAT THOSE
ARGUMENTS, IT'S A HARMLESS
ERROR.

>> NO, I FOLLOW.

I JUST WANT TO MAKE SURE I
UNDERSTAND THE STATE'S POSITION
ABOUT WHAT CONSTITUTES A RULING
SUFFICIENT TO RESERVE AN
OBJECTION.

AND IT SOUNDS LIKE THE STATE'S
POSITION IS YOU NEED AN ACTUAL
STATEMENT SAYING OVERRULED OR--
IS THE STATE'S POSITION THAT
NOTHING SHORT OF THAT WILL
PRESERVE THE ERROR?

>> I DON'T THINK THAT TRIAL
COUNSEL CAN REQUIRE THE COURT TO
MAKE A RULING.

I DO THINK THAT TRIAL COUNSEL
CAN BRING IT TO THE COURT'S
ATTENTION THAT THERE HASN'T BEEN
A RULING AND REQUEST A RULING.

>> THE JUDGE, HERE'S WHAT THE
JUDGE SAID, THAT I DON'T RECALL
HIM SAYING THAT BUT, OBVIOUSLY,
RELATE TO TERM MERCY, RELATED TO
THE CONTEXT OF HAC.

DON'T RELATE IT TO ANY MERCY THE
JURY MAY OR MAY NOT SHOW THE
DEFENDANT, OKAY?

THAT'S WHAT THE JUDGE SAID.

I MEAN, I GUESS HE COULD HAVE
SAID OVERRULED OR SUSTAINED, BUT
THAT'S WHAT SHE SAID.

IT'S EVEN MORE SPECIFIC.

HOW IS THAT NOT A RULING IN.

>> BECAUSE THERE HASN'T BEEN A
FORMAL RULING.

HOWEVER, NOW, THERE'S--

>> YOU WANT TO HEAR THE WORDS
DENIED, GRANTED, THAT KIND OF
THING?

>> I THINK THE COURT HAS TO MAKE
A RULING.

YES, YOUR HONOR.

>> HOW DOES A DEFENSE LAWYER,

WHO IS SAVVY ABOUT THESE THINGS,
GET A JUDGE TO DO THAT?

>> IF THE COURT WON'T MAKE A
RULING, THE COURT-- THE LAWYER
CAN POINT THAT OUT TO THE COURT
AND REQUEST A RULING.

IF THE COURT DOESN'T MAKE A
RULING AT THAT POINT, THERE'S
NOTHING COUNSEL CAN DO, AND I
WOULD SAY AT THAT POINT THEY'VE
PRESERVED THE RECORD BY BRINGING
NOTICE TO THE COURT AND POINTING
OUT THAT THERE HASN'T ACTUALLY
BEEN A RULING.

HOWEVER, IN THIS CASE AS I'M, AS
I'M POINTING OUT TO THE COURT,
EVEN IF THE COURT WERE TO FIND
IT'S THE SAME MERCY ARGUMENT AND
THAT IT WAS PRESERVED, IT CAUSES
HARMLESS ERROR, IT DOESN'T
MATTER WHETHER IT WAS PRESERVED
BECAUSE THIS COURT'S PREVIOUSLY
FOUND IN RHODES THAT IT IS
HARMLESS ERROR.

HE--

>> LET'S SET ASIDE THIS
PARTICULAR ISSUE FOR A MOMENT.
I THINK THE DEFENSE ARGUMENT IS
WE'VE GOT OTHER ERRORS THAT
WOULD BE CONSIDERED TO BE
FUNDAMENTAL, RIGHT?
BECAUSE THEY WERE UNOBJECTED TO.
SO IF YOU-- I'M TRYING TO
DETERMINE WHAT IS IT THAT WE CAN
AGGREGATE TOGETHER FOR
CUMULATIVE EFFECT PURPOSES?
CAN YOU LOOK AT THOSE OTHER
FUNDAMENTAL TYPE ERRORS EVEN
THOUGH INDIVIDUALLY THEY MAY NOT
BE REVERSIBLE ERROR RISING TO
THE LEVEL OF A FUNDAMENTAL
ERROR, CAN YOU AGGREGATE THOSE
TOGETHER IN THAT CLASS TOGETHER?
LET'S JUST STOP THERE FOR A
MOMENT.

CAN YOU DO THAT?

>> THE COURT HAS DONE THAT.
I QUESTIONED--

>> WE'VE GOT CASE LAW DOING
THAT.

>> I BELIEVE THE COURT HAS
DENIED-- I DO QUESTION WHETHER
THAT'S REASONABLE OR NOT
BECAUSE, FOR A NUMBER OF

REASONS.

>> NO.

BUT JUST STOP THERE FOR A
MOMENT.

WE DO HAVE CASE LAW SAYING, YES,
THAT'S APPROPRIATE AS A MATTER
OF LAW TO AGGREGATE THOSE.

>> THE COURT HAS COME OUT WITH A
STATEMENT SAYING AS A MATTER OF
LAW, THAT'S THE PROPER WAY TO DO
IT, TO GO ABOUT--

>> BUT WE'VE DONE--

>> WE'VE DONE IT.

>> THE COURT HAS DONE IT.

>> OKAY.

SO IF WE CAN DO THAT, THEN WE--
SHOULD WE COMBINE ALSO THEN THE
PREJUDICIAL EFFECT OF ONE THAT
IS PRESERVED, THIS PARTICULAR
MERCY ASPECT, AND CONSIDER THAT
IN A CUMULATIVE ERROR ANALYSIS
THIS ONE THAT IS PRESERVED
TOGETHER WITH ALL THE OTHERS
THAT ARE NOT?

IS THAT AN APPROPRIATE
AGGREGATION?

>> THE COURT HAS LOOKED AT BOTH
OBJECTED TO AND OBJECTED TO
COMMENTS AND TAKEN A LOOK AT
THEM.

HOWEVER, I DO QUESTION THE
RATIONALE IN DOING THAT FOR--

>> WHAT STANDARD?

>> SORRY?

>> AND THEN YOU USE THE
FUNDAMENTAL ERROR--

>> THE FUNDAMENTAL ERROR
STANDARD, THAT'S CORRECT.

FOR A COUPLE OF REASONS.
ONE IS WITH PRESERVED ERRORS
THERE'S A DIFFERENT STANDARD
THAN THERE IS WITH UNPRESERVED
ERRORS.

AND WITH PRESERVED ERRORS THE
BURDEN SHIFTS AS FROM ONE SIDE
TO THE OTHER AS OPPOSED TO
UNPRESERVED ERRORS.

BUT WHAT THE COURT SAID IS YOU
TAKE A LOOK AT THE TOTALITY OF
THE EVIDENCE INTRODUCED.

AND IN THIS CASE WHAT WE HAVE IS
A CASE WITH HIGHLY, HIGHLY
AGGRAVATED FACTS AND REALLY
RELATIVELY LITTLE IF NOT A

PAUCITY OF MITIGATION.

WHAT WE HAVE IS AN INDIVIDUAL WHO RAPED AND STRANGLERED TO DEATH A 9-YEAR-OLD CHILD.

AND THERE WAS GRAPHIC TESTIMONY FROM MEDICAL EXAMINER ABOUT THE STRANGULATION AND THE RESULTS.

WE'RE TALKING ABOUT--

>> WELL, COUNSEL, BUT ISN'T THE ARGUMENT HERE THAT YOU'RE MAKING REALLY THAT BECAUSE THIS IS SUCH AN AGGRAVATED, BAD CASE-- IT CRIES OUT TERRIBLE CASE-- THAT THE PROSECUTOR CAN BASICALLY SAY ANYTHING?

THEY CAN TRANSGRESS ALL SORTS OF RULES WHETHER IT'S OBJECTED TO OR NOT, THEY CAN MAKE COMMENTS, THE IMMIGRATION COMMENT.

WHAT THAT HAS TO DO WITH ANYTHING THAT IS RELEVANT IN THIS CASE, IT'S HARD FOR ME TO IMAGINE.

I MEAN, I CAN'T SEE IT.

COME UP WITH STATEMENTS LIKE THAT, AND THAT'S REALLY ALL OKAY BECAUSE IT'S SUCH A TERRIBLE CASE?

>> I DON'T THINK WE CAN SAY THAT THE PROSECUTOR CAN SAY ANYTHING IN A CASE.

I MEAN, AT SOME POINT WE'RE GOING TO GET TO A POINT WHERE REGARDLESS OF THE AGGRAVATION, THERE COULD BE SOME TYPE OF PREJUDICE WHERE WE WOULD SAY THAT A JURY WOULDN'T HAVE FOUND FOR THE DEATH PENALTY, WOULDN'T HAVE RECOMMENDED THE DEATH PENALTY.

BUT FOR THE STATEMENTS.

BUT THAT'S NOT THIS CASE.

THE FACTS IN THIS CASE ARE JUST SO HIGHLY AGGRAVATED--

>> I MEAN, GOING BACK TO THE SAME MERCY, AND IT IS QUESTIONABLE TO ME WHETHER IT IS PRESERVED BECAUSE THERE WASN'T A RULING SECURED.

BUT ASSUMING THAT IT'S PRESERVED ERROR, I'M STRUGGLING TO SEE HOW I CAN DETERMINE BEYOND A REASONABLE DOUBT AN ARGUMENT THAT WE SAID IS STRICTLY

PROHIBITED, IT'S ONE OF THE WORST ARGUMENTS THAT WE CAN MAKE.

THE PROSECUTOR CAN DO THAT, THERE CAN BE AN OBJECTION. IT CAN BE WRONGFULLY OVERRULED, AND THEN WE JUST SAY, WELL, LOOK, IT'S SO BAD THAT THERE'S NO WAY THAT IT EVEN CONTRIBUTED TO THE OUTCOME.

I MEAN, IF YOU TAKE MERCY COMPLETELY OFF THE TABLE WITH THE ARGUMENT IN THE JURY'S MIND, HOW CAN I SAY THAT THAT DIDN'T CONTRIBUTE TO THE VERDICT BEYOND A REASONABLE DOUBT THAT THAT DIDN'T CONTRIBUTE. YOU CAN MAKE PRETTY MUCH EVEN THE WORST ARGUMENT POSSIBLE AND STILL--

>> COURTS HAVE TO MAKE THOSE TYPE DECISIONS ALL THE TIME. THIS COURT HAS HAD TO MAKE THAT DECISION ON PREVIOUS CASES A LARGE NUMBER OF TIMES.

AND AS I SAID IN RHODES, IT WOULD REQUIRE A REVERSAL OF RHODES AS I READ RHODES FOR THIS COURT TO DETERMINE THAT IT SHOULD AT THIS POINT NOT BE HARMLESS ERROR.

BUT, YEAH, THE COURT ALWAYS-- OFTEN, I SHOULD SAY, FINDS ITSELF IN A POSITION WHERE IT HAS TO DO THAT SUBSEQUENT TO THE STATEMENTS THAT ARE MADE. IN THIS CASE, WHICH YOU HAVE TO TAKE A LOOK AT THE TOTALITY OF THE EVIDENCE THAT WAS INTRODUCED IN THE CASE.

>> THAT'S WHAT, THAT'S-- IT SEEMS LIKE THE STRONGER THE STATE'S CASE, THE MORE PROSECUTORS FEEL THEY CAN SAY. AND WE, THE I HAD A NICKEL EACH TIME WE HAD THIS CONVERSATION, AT LEAST I HAD THIS CONVERSATION HERE ON THE COURT WITH ATTORNEY GENERALS ABOUT THAT SITUATION, I'D BE A RICH GUY RIGHT NOW. THE IMMIGRATION ONE, THINK ABOUT IT, THAT'S WHY I ASKED THE QUESTION.

THIS TRIAL TOOK PLACE IN 2019.

THE WHOLE POLITICAL CLIMATE REGARDING IMMIGRATION AT THAT POINT IN TIME WAS VERY HOT IN THIS COUNTRY.

AND TO RAISE THAT ISSUE, THAT HAD NOTHING TO DO WITH ANYTHING IN THIS CASE.

OBVIOUSLY, IT WAS FOR OBVIOUS REASONS.

SO, AND WE CAN SAY, OKAY, YOU KNOW, THE EVIDENCE IS STRONG EVEN THOUGH HE SAID THAT THERE'S NO WAY A JURY WOULD HAVE FOUND HIM NOT GUILTY, YOU CAN SPECULATE ABOUT THAT.

OR LIKE SHE SAID EARLIER, WE-- BEFORE UNANIMITY IN JURY RECOMMENDATIONS WERE REQUIRED, WE FOUND, WE HAD JURY TRIALS AS HEINOUS, ATROCIOUS IF NOT MORE THAN THIS ONE, IF THAT'S POSSIBLE, WHERE JURORS CAME OUT WITH 10-2, 8-4, THINGS LIKE THAT.

SO SOME JURORS, APPARENTLY WHEN IT COMES TO THE PENALTY SIDE OF IT, THEY ARE VERY CAREFUL ABOUT THIS.

SO THAT'S MY CONCERN.

AND TO JUST SAY, YOU KNOW, IT'S HARMLESS ERROR, WE COULD SAY THIS IN EVERY CASE JUST ABOUT. BUT WHAT ABOUT THESE RULES?

>> AND I UNDERSTAND YOUR CONCERN, YOUR HONOR.

IT'S OBVIOUSLY A QUESTION THAT THIS COURT HAS WRESTLED WITH NUMEROUS TIMES IN VARIOUS CASES AS YOU'VE MENTIONED.

BUT IF WE'RE GOING TO TAKE A LOOK AT THE VARIOUS COMMENTS, AND I'M TAKING IT THAT YOU'RE TALKING ABOUT DIFFERENT COMMENTS BECAUSE YOU MENTIONED THE EXERCISE OF THE CONSTITUTIONAL RIGHTS AS OPPOSED TO SAME MERCY. AS LONG AS THE DETERMINATION, THE STANDARD OF REVIEW THAT THE COURT IS USING IS FUNDAMENTAL TELL ERROR, THAT'S THE ANALYSIS THAT WE HAVE TO USE.

AND IN THOSE CASES WHERE WE HAVE SUCH HIGHLY AGGRAVATED FACTS, THERE'S GOING TO BE THAT CHANCE

THAT, YES.

I MEAN, IN ANY CASE A PROSECUTOR CAN MAKE STATEMENTS THAT MAY NOT BE APPROPRIATE IF, IN FACT, THAT'S A STATEMENT THAT'S NOT. HOWEVER, THIS COURT HAS INDICATED IN THE PAST THAT IN CASES WHERE THERE'S SUBSTANTIALLY EGREGIOUS COMMENTS MADE BY THE ASSISTANT STATE ATTORNEY DURING THE CASE, AND I DON'T THINK THAT THIS IS ONE OF THOSE CASES, IT'S ACTUALLY STATED THAT IT WOULD ANTICIPATE THAT THE BAR MAY EVEN HAVE, SHOULD BE CONTACTED AND LOOKED INTO.

BUT WHAT THE COURT SHOULD NOT DO IS REVERSE THE CASE, EXCUSE ME, REVERSE THE SENTENCE AND REMAND IT SIMPLY TO SEND A MESSAGE TO PROSECUTORS UNLESS THERE IS A FUNDAMENTAL ERROR IN THE CASE. AND THAT'S NOT THE CASE HERE.

>> SO COULD WE GET YOUR POSITION THOUGH, I MEAN, OBVIOUSLY, PART OF WHAT WE HAVE TO DO IS SORT OF LIST OUT WHAT THE ARGUABLE, WHAT-- WE HAVE TO DECIDE WHAT WERE THE ERRORS AND THEN DECIDE WHETHER ONCE YOU'VE ADDED ALL THOSE UP WHATEVER THAT NUMBER MAY BE, WAS IT SO BAD THAT, ESSENTIALLY, THE DEFENDANT DIDN'T HAVE DUE PROCESS.

WHICH I THINK IS WHAT THE FUNDAMENTAL ERROR TEST SORT OF BOILS DOWN TO.

SO WHAT'S YOUR POSITION ON, AGAIN, WITHOUT GETTING INTO SORT OF THE CONSEQUENCES, BUT AS FAR AS WHETHER IT WAS ERROR AT ALL? I MEAN, IT SEEMS LIKE ON THE TABLE WE HAVE THE SAME MERCY ISSUE, THE IMMIGRATION ISSUE AND GOLDEN RULE.

SO WHICH OF THOSE THREE SHOULD WE EVEN CONSIDER TO HAVE BEEN ERRORS?

>> FRANKLY, I QUESTION WHETHER ANY OF THOSE THREE ARE ERRORS. AND--

>> AND TELL ME, SO START WITH THE MERCY THING.

WHY IN CONTEXT, YOU KNOW, I THINK THERE'S A SHARED UNDERSTANDING THAT EVEN THE OTHER SIDE ACKNOWLEDGED THAT IF YOU LIMIT IT TO THE HEINOUSNESS OF THE CRIME, IT'S OKAY TO TALK ABOUT MERCY, BUT IT'S NOT OKAY TO SAY DON'T EXTEND MERCY TO THE DEFENDANT BECAUSE HE DIDN'T EXTEND MERCY TO THE VICTIM.

>> YEAH, AGAIN, AND I THINK YOU'VE JUST TOUCHED ON THAT, IS THE FACT THAT THE PROSECUTOR WAS MAKING AN ARGUMENT ABOUT HAC AT THE TIME.

AND THE FACT THAT THIS DEFENDANT SHOWED NO MERCY TO THE VICTIM WHEN HE STRANGLES HER TO DEATH. AND THAT'S HOW IT CAME UP.

>> OKAY.

BUT HE DID, HE PREFACED IT BY SAYING SOMETHING LIKE WHEN YOU START THINKING ABOUT MERCY, CONSIDER THE MERCILESSNESS OF THE CRIME, RIGHT?

>> AND THEN I BELIEVE HE WENT ON TO START SAYING AND AN HAC, AND THAT'S WHEN THE OBJECTION ACTUALLY OCCURRED.

>> ALL RIGHT.

HOW ABOUT THE IMMIGRATION THING? IT SEEMS LIKE THE IMMIGRATION THING WAS AT BEST KIND OF A NON SEQUITUR, RIGHT?

I MEAN, CAN YOU GIVE US AN ARGUMENT OF WHETHER IT WAS SOME, YOU KNOW, HORRIFIC THING TO HAVE SAID?

THAT'S KIND OF A SEPARATE QUESTION, BUT EVEN IN TERMS OF UNDERSTANDING WHAT THIS HAD TO DO WITH ANYTHING, COULD YOU JUST KIND OF GIVE US AN ARGUMENT FOR WHY IT'S THE AFFIRMATIVELY OKAY FOR HIM TO HAVE SAID WHAT HE SAID?

>> SURE.

LET ME PREFACE MY RESPONSE BY POINTING OUT THERE WAS NO OBJECTION--

>> RIGHT.

>>-- AND THAT'S WHY OUR FUNDAMENTAL ANALYSIS ERROR ON THAT PARTICULAR POINT.

HOWEVER, THE DEFENDANT HAD BROUGHT UP AS A MITIGATING CIRCUMSTANCE IN THIS CASE THE FACT THAT HE WAS BORN IN A POVERTY-STRICKEN NEIGHBORHOOD IN JAMAICAN KINGSTON.

THERE WAS HORRIBLE CRIME, IT WAS A CRIME-INFESTED AREA AND THAT HE HIMSELF WAS SUBJECTED BY HIS FATHER TO PUNISHMENT THAT WAS SEVERE.

THE STATE WAS TRYING TO POINT OUT-- THE STATE'S ALLOWED TO ARGUE THE WEIGHT THAT SHOULD BE GIVEN ANY PARTICULAR MITIGATING CIRCUMSTANCE.

I BELIEVE THAT'S WHAT THE STATE WAS TRYING TO DO IN THIS SITUATION, POINT OUT, YOU KNOW, THIS IS SOMETHING, YOU KNOW, THAT HAPPENED APPROXIMATELY A DECADE AGO.

AND HE'S BEEN ABLE TO CHANGE HIS LIFE, PUT THAT BEHIND HIM.

AND THAT'S SOMETHING THIS COURT HAS RECOGNIZED BEFORE IN INDICATING WHETHER OR NOT THAT'S AN APPROPRIATE ARGUMENT.

AND IN THIS CASE, WE HAVE SOMEONE WHO'S MOVED TO THE UNITED STATES AND IN HIS INTERVIEW WITH DETECTIVES HE WAS DISCUSSING HOW HE WAS WORKING AS A CELL PHONE-- EXCUSE ME, CELL TOWER OPERATOR.

HE WAS MAKING WHAT HE CONSIDERED TO BE VERY GOOD MONEY.

HE SAID HE COULDN'T BELIEVE HOW MUCH THEY PAID HIM TO DO THIS.

AND I THINK THAT'S THE POINT THE PROSECUTOR'S TRYING TO MAKE AT THIS POINT IS, YOU KNOW, THAT HAPPENED TEN YEARS AGO, YOU KNOW, WHEN HE WAS THIS JAMAICA. HE'S THOUSAND IN THE UNITED STATES.

THINGS ARE VERY DIFFERENT HERE. AND HE'S HAD THE ADVANTAGE, FOR INSTANCE, OF HAVING COMPETENT COUNSEL APPOINTED.

THERE SHOULDN'T BE ANYTHING WRONG WITH AN ASSISTANT STATE ATTORNEY POINTING OUT OR ANYONE STATING IN CLOSING WHAT'S GREAT

ABOUT THIS COUNTRY.

THE COUNSEL MAKES IT OUT AS IF HE'S PREYING ON THE FACT THAT HE IS AN IMMIGRANT FROM A FOREIGN COUNTRY TO THE UNITED STATES.

I DON'T THINK THAT WAS THE ASSISTANT STATE ATTORNEY'S ARGUMENT AT ALL.

>> WELL, I, I GUESS I UNDERSTAND HOW ONE PART OF THE ARGUMENT IS THAT WAS THEN, THIS IS NOW.

BUT WHAT WAS HIS TRIAL RIGHTS AND HIS, YOU KNOW, THE BENEFITS OF HIM BEING IN THE UNITED STATES HAVE TO DO WITH HIS PERSONAL EVOLUTION?

BECAUSE I THINK IF YOU'RE GOING TO DEFEND THIS COMMENT AS NOT ERRONEOUS, I NEED TO UNDERSTAND HOW ALL THIS IS THE RESPONSIVE TO THE ARGUMENT.

AND IT DOESN'T SEEM LIKE ALL OF IT IS.

IT SEEMS LIKE MAYBE SOME OF IT IS.

YOU WANT TO SAY, OKAY, IN YOUR PAST THINGS WERE TOUGH, BUT NOW YOU'RE GAINFULLY EMPLOYED, YOU'VE BEEN ABLE TO METABOLIZE THE HARM YOU SUFFERED AS A YOUNG CHILD.

OKAY, I GOT YOU ON THAT. WHY DOES HE HAVE TO REFERENCE JAMAICA, YOU KNOW IN.

>> WELL, HE REFERENCED JAMAICA BECAUSE THAT'S WHAT THE MITIGATING CIRCUMSTANCES OF THE EVIDENCE THAT WAS INTRODUCED DISCUSSED.

THERE WAS A WHOLE VIDEO INTRODUCED IN THIS CASE OF STATEMENTS TAKEN BY PEOPLE CURRENTLY LIVING IN JAMAICA WHO KNEW MR. RITCHIE AT THE TIME.

SO CLEARLY, IF WE'RE GOING TO TALK ABOUT HIS PAST AND WHETHER HE HAS MOVED ON FROM HIS PAST, WELL, WHAT IS HIS PAST?

HIS PAST IS JAMAICA.

IT'S NOT AS IF THE STATE THE INTRODUCED JAMAICA INTO EVIDENCE IN THIS CASE.

THE DEFENDANT DID.

THE--

>> GOLDEN RULE, I THINK.

>> THANK YOU.

THE GOLDEN RULE VIOLATION.
THE ASSISTANT STATE ATTORNEY
CLEARLY CAME UP TO THE LINE, I
WOULD SAY.

BUT THE POINT THAT THE ASSISTANT
STATE ATTORNEY WAS TRYING TO
MAKE AGAIN, I BELIEVE, AT THAT
POINT IS TALKING ABOUT-- GIVE
ME JUST A SECOND, PLEASE.

THANK YOU.

HE WAS TALKING ABOUT HAC AT THE
TIME.

HE WAS TRYING TO EXPLAIN TO THE
JURY THEY HAVE TO CONSIDER
WHETHER THIS WAS A HEINOUS,
ATROCIOUS AND CRUEL CRIME.
AND HE WAS DISCUSSING WHAT THE
VICTIM WENT THROUGH.

AND WHEN I SAY THAT THE
ASSISTANT STATE ATTORNEY WALKED
UP TO THE LINE, I'M NOT SAYING
THAT HE INTENTIONALLY DID THAT.
HE WAS TRYING TO EXPLAIN TO THE
JURY THAT THEY HAVE TO CONSIDER
THE FACT THAT THIS GIRL WENT
THROUGH WHAT IS A HORRIBLE
DEATH.

THAT THERE WAS A PERIOD OF
CONSCIOUSNESS WHERE SHE KNEW
WHAT WAS GOING ON.

NOT ONLY WAS SHE BEING STRANGLLED
TO DEATH, THAT SHE WAS BEING
RAPED BY THIS PERSON AS WELL.
SHE WAS 9 YEARS OLD.

AND TRYING TO CONVEY TO THE JURY
THE HAC ELEMENTS OR THE ARGUMENT
ON HAC.

AND THAT'S WHY I SAY I THINK
THAT IF YOU TAKE THE ARGUMENT IN
CONTEXT, YOU CAN SEE THAT THAT
WAS THE INTENTION OF THE
ASSISTANT STATE ATTORNEY.

IT WASN'T TO TRY TO PLAY ON THE,
NECESSARILY THE EMOTIONS OF THE
JURY, WHICH IS WHAT THE GOLDEN
RULE VIOLATION IS.

HE NEVER ACTUALLY SPECIFIED THAT
THE JURY PUT THEMSELVES IN THE
SHOES OF THE VICTIM, AND THAT'S,
I THINK, WHERE THE--
TECHNICALLY THE GOLDEN RULE
VIOLATION REQUIRES THAT.

I DON'T THINK THAT, IT MAY NOT EVEN BE A GOLDEN RULE VIOLATION, FRANKLY.

BUT CERTAINLY IN THE CONTEXT IN WHICH HE WAS ARGUING, IT EXPLAINS WHY THE ASSISTANT STATE ATTORNEY WAS MAKING THAT ARGUMENT.

WE NEED TO BEAR IN MIND IT'S NOT AS IF ASSISTANT STATE ATTORNEYS WHEN THEY'RE MAKING THEIR CLOSING ARGUMENTS HAVE, YOU KNOW, A SCRIPT THAT THEY'RE READING OFF OR CHOREOGRAPHED OR ANYTHING ALONG THOSE LINES.

A LOT OF THESE REMARKS ARE OFF THE TOP OF THEIR HEAD.

AND WHAT HE WAS TRYING TO EXPLAIN THE HAC, HE WAS MAKING THE HAC ARGUMENT.

AND HE WAS TALKING ABOUT WHAT THIS VICTIM WENT THROUGH, AND THAT'S HOW WE GOT INTO THAT SITUATION.

I THINK THE OTHER ISSUE WAS THE VICTIM IMPACT TESTIMONY FROM THE MOTHER IN THIS CASE.

NOW, WE'RE NOT ARGUING THAT THAT STATEMENT BY THE MOTHER'S A PROPER ARGUMENT-- A PROPER STATEMENT.

I DON'T THINK THAT ANYONE WOULD CONTEST THAT'S NOT A VIOLATION OF PAYNE.

IT CLEARLY IS.

WHAT'S IMPORTANT TO BEAR IN MIND IS THAT IN THIS PARTICULAR CASE, THERE WAS NO OBJECTION TO THAT.

AND SO THE PROPER ANALYSIS OF THAT ARGUMENT OR THAT STATEMENT IS WHETHER OR NOT IT'S FUNDAMENTAL, FUNDAMENTAL ERROR.

AND THAT'S, AGAIN, WHERE WE GET INTO TAKING A LOOK AT THE FACTS OF THE CASE, BOTH THE AGGRAVATION AND THE MITIGATION.

AND CLEARLY, AND I DON'T--

SORRY, I DON'T RECALL WHICH JUSTICE MENTIONED IT, BUT THIS

IS JUST THE TYPE OF CASE WHERE WE WOULD ANTICIPATE REASONABLE JURIES TO COME BACK WITH A RECOMMENDATION OF DEATH GIVEN THE SEVERITY OF THE AGGRAVATING

CIRCUMSTANCES.

WE'RE NOT JUST TALKING ABOUT STRANGULATION, MANUAL STRANGULATION OF A PERSON. AND IF I CLEARLY DON'T WANT-- WHEN I SAY "JUST," MAKE IT SOUND AS IF THAT'S NOT A SERIOUS MATTER.

OBVIOUSLY, IT IS REGARDLESS OF WHO IT IS.

IT'S A PAINFUL AND TORTUROUS DEATH.

THAT'S WHAT THE TESTIMONY OF THE MEDICAL EXAMINER WAS ABOUT.

WE'RE TALKING ABOUT A 9-YEAR-OLD CHILD ON TOP OF THAT.

THE JURY HAD ALREADY IN THEIR INITIAL CONVICTION OF THE DEFENDANT MADE A DETERMINATION THAT HE RAPED THIS CHILD.

THERE'S A CAPITAL SEXUAL BATTERY CONVICTION.

AND THE COURT NEEDS TO WEIGH THAT AGAINST WHAT LITTLE MITIGATION THERE IS IN THIS CASE.

AND THE COURT HAS SAID IN THE PAST, I BELIEVE IT'S IN AUSTIN V. STATE, THAT ONE OF THE THINGS THIS COURT FOCUSES ON IS THE ORDER, THE SENTENCING ORDER OF THE JUDGE WHERE WE HAVE THE JUDGE SAYING THAT SHE GIVES GREAT WEIGHT TO THE THREE AGGRAVATING CIRCUMSTANCES.

AND I THINK IT'S LITTLE AND MEDIUM WEIGHT, MODERATE. SHE GIVES MODERATE WEIGHT TO THE MITIGATOR, THAT THERE WAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

MODERATE WEIGHT TO THE FACT THAT HE SUFFERED MENTAL AND PHYSICAL ABUSE BY HIS FATHER, AND THE DEFENDANT WAS OFTEN ABSENT BECAUSE OF FOUR DIFFERENT FAMILIES AND LITTLE WEIGHT TO THE FACT THAT HE WAS RAISED IN POVERTY-STRICKEN AND VIOLENT NEIGHBORHOOD IN KINGSTON, JAMAICA.

LITTLE WEIGHT TO THE FACT THAT HE WAS THE OLDEST OF 18 SIBLINGS AND HELPED RAISE THEM.

LITTLE WEIGHT TO THE FACT THAT HE WAS GAINFULLY EMPLOYED AND LITTLE WEIGHT TO THE FACT THAT HE WAS KIND AND GENEROUS TO OTHERS.

SO DETERMINING WHETHER OR NOT THERE'S FUNDAMENTAL ERROR, WE COMPARE THAT MITIGATION WITH THE AGGRAVATION, AND THE SENTENCING COURT DID WHAT, I THINK, MOST REASONABLE COURTS WOULD DO. NOT MOST, WHAT ANY IF REASONABLE COURT WOULD DO JUST AS THIS JURY DID WHAT ANY REASONABLE JURY WOULD DO.

AND THAT IS RETURN A VERDICT RECOMMENDING A DEATH SENTENCE BASED ON THESE AGGRAVATING CIRCUMSTANCES AND THOSE MITIGATING CIRCUMSTANCES.

>> COUNSEL, BEFORE YOU END, I'D LIKE TO GO BACK A LITTLE BIT TO THAT GOLDEN RULE VIOLATION ARGUMENT.

I THINK YOU SAID IT WENT UP TO THE LINE BUT DIDN'T CROSS IT. SO I JUST WANT TO MAKE SURE I UNDERSTAND WHERE YOU THINK IT WOULD CROSS.

WHAT YOU SAID WAS CAN YOU IMAGINE THE DREAD OF KNOWING THAT A YOUR LIFE IS ENDING, AND YOU ARE FEELING PAIN ALL OVER YOUR BODY, AND THEN HE DESCRIBES THAT IN FAIRLY GRAPHIC DETAIL. AND THEN THE HE SAID THAT PAIN WOULD HAVE BEEN GREATER FOR A LITTLE GIRL.

SO I'M TRYING TO FIGURE OUT HOW THAT'S NOT A GOLDEN RULE VIOLATION.

BECAUSE, I MEAN, I KNOW YOU SAID THEY HAVE TO SAY PUT YOURSELF IN THE SHOES.

I DON'T KNOW HOW HE COULD HAVE SAID THAT ANY CLEARER.

>> AND I RECOGNIZE THAT IT'S AT VERY BEST A CLOSE CALL.

BUT AGAIN, THERE'S NO OBJECTION. AND THE QUESTION IS WHETHER OR NOT THERE WAS A FUNDAMENTAL ERROR IN THE CASE.

AND GIVEN THE FACTS OF THIS CASE, INCLUDING THE FACT THAT

THE JURY HAD ALREADY FOUND TWO OF THE AGGRAVATING FACTORS EXISTED THIS THEIR INITIAL CONVICTION, THEREFORE, FINDING THE DEFENDANT WAS ELIGIBLE FOR THE DEATH PENALTY PRIOR TO THE PENALTY PHASE ITSELF, THAT THAT'S NOT A FUNDAMENTAL ERROR. AND THAT'S REALLY THE BOTTOM LINE.

TRULY, THE BOTTOM LINE ARE OF THIS ENTIRE CASE.

IF YOU TAKE A LOOK AT THE CASE, WAS THERE FUNDAMENTAL ERROR IN THIS CASE?

AND WHEN YOU TAKE A LOOK, AND I FEEL LIKE I'M KICKING A DEAD HORSE HERE, BUT--

>> LET ME JUST ASK ONE MORE QUESTION.

THAT'S ABOUT ALL WE HAVE TIME FOR.

BUT-- SO BACK TO THE SAME MERCY PROBLEM, THE MERCK V. STATE OF FLORIDA PROBLEM.

THE ONLY CONTEMPORANEOUS OBJECTION WAS IN RESPONSE TO THIS.

PROSECUTOR SAYS I WANT YOU TO THINK ABOUT THIS AGAIN WHEN YOU'RE BACK THERE DELIBERATING, WHEN YOU'RE CONSIDERING WHETHER YOU SHOULD GIVE HIM LIFE AND WHETHER YOU SHOULD PERSONALLY EXTEND MERCY TO THIS DEFENDANT. DID HE EXTEND MERCY TO THIS LITTLE GIRL.

NOW, WOULD YOU CONCEDE THAT THAT IS AN IMPROPER PROSECUTORIAL ARGUMENT?

>> I THINK IF WE TAKE IN THE CONTEXT OF WHICH THE ARGUMENT WAS BEING MADE--

>> DOESN'T THAT DO EXACTLY WHAT THE CASE LAW SAYS YOU CAN'T DO? I MEAN, THE CONTEXT IS WHEN YOU'RE PERSONALLY DELIBERATING, WHEN YOU'RE PERSONALLY DECIDING WHETHER TO RECOMMEND LIFE OR DEATH, THINK ABOUT THIS: DID HE EXTEND MERCY TO HER.

THAT'S THE CONTEXT OF THAT STATEMENT.

>> RIGHT.

BUT YOU SAY THAT'S THE CONTEXT OF STATEMENT, BUT THAT'S NOT THE ENTIRE STATEMENT BEFORE THE OBJECTION.

THERE'S NOT MUCH MORE.

BUT WHAT HE THEN SAYS IS BECAUSE A HEINOUS, ATROCIOUS AND CRUEL INSTRUCTION, AND THAT'S WHEN THE OBJECTION COMES.

AND THAT'S WHY I KEEP HEARKENING BACK TO THE FACT THAT THE ASSISTANT STATE ATTORNEY IN THIS CASE WAS MAKING A HEINOUS, ATROCIOUS AND CRUEL ARGUMENT. AND THAT'S WHERE THE LANGUAGE SLIPPED IN.

>> COUNSEL, YOU'RE OVER TIME. SO IF YOU COULD SUM IT UP IN ABOUT 30 SECONDS.

>> I WILL.

THANK YOU VERY MUCH, MR. CHIEF JUSTICE.

FOR THE FORGOING REASONS, WE REQUEST THAT THIS COURT AFFIRM THE SENTENCE OF DEATH THAT WAS IMPOSED BY THE TRIAL COURT. THANK YOU VERY MUCH.

>> REBUTTAL.

>> COUNSEL, COULD YOU ARTICULATE FOR US, I'M TRYING-- I WANT TO MAKE SURE THAT WE UNDERSTAND YOUR POSITION ON THE FUNDAMENTAL ERROR --

>> YES.

>>-- ON THE TEST.

BECAUSE IT SEEMS, I'M TRYING TO, TO THE EXTENT THAT IT ULTIMATELY GOES TO DUE PROCESS, IT SEEMS LIKE THE DUE PROCESS RIGHT THAT'S AT STAKE HERE IS THE RIGHT TO HAVE THE JURY MAKE A DECISION ON THEIR RECOMMENDATION BASED ON REASON AND THEIR ASSESSMENT OF THESE ARGUMENTS, SOME OF WHICH ARE FACTUAL AND SOME OF WHICH ARE KIND OF MORAL, YOU KNOW, SUBJECTIVE, JUDGMENT TYPE ARGUMENT.

>> YES.

>> AND WE HAVE, WE HAVE ALL THESE KIND OF GUARDRAILS THIS OUR CASE LAW THAT SAY-- THAT SEEM TO BE ALL DIRECTED TO THE END OF KEEPING THIS A RATIONAL

PROCESS.

SO THAT'S WHY YOU DON'T DO THE
GOLDEN RULE.

THAT'S WHY YOU DON'T DO THE
MERCY THING.

IT'S NOT BECAUSE THERE'S
SOMETHING SORT OF INHERENTLY
FLAGRANTLY PROBLEMATIC ABOUT AN
ARGUMENT LIKE THAT, IT'S THAT IT
CAN ENCOURAGE THE JURY TO MAYBE
CROSS THE LINE INTO NOT HAVING
THIS BE A RATIONAL DECISION THAT
THEY'RE MAKING AND HAVING IT BE
MORE BASED ON SORT OF PASSION OR
EMOTION.

AND SO IS IT APPROPRIATE FOR US
TO READ THIS ENTIRE ARGUMENT AND
KIND OF ASK OURSELVES, YOU KNOW,
KEEPING IN MIND THE GUARDRAILS
THAT WE PUT UP AND WHETHER THE
PROSECUTOR STEPS OVER THE LINE
IN, YOU KNOW, ALL OF THESE CASES
OR SOME OF THEM, BUT ARE WE
ULTIMATELY, DO WE ULTIMATELY
NEED TO READ THE ENTIRE CLOSING
ARGUMENT AND ASK OURSELVES WAS
THIS, WERE THESE THINGS IN THEIR
CUMULATIVE EFFECT SORT OF SO FAR
OVER THE LINE THAT WE DON'T HAVE
CONFIDENCE THAT THIS JURY MADE A
RATIONAL, KIND OF REASON-BASED
AS OPPOSED TO PASSION-BASED
DECISION IN THIS CASE?

BECAUSE IT SEEMS LIKE IF THAT'S
THE TEST, I WOULD HAVE A HARD
TIME SAYING THAT THERE WAS
FUNDAMENTAL ERROR.

IF IT'S MORE A MATTER OF SORT OF
MECHANICALLY KIND OF ADDING UP
HOW MANY MISTAKES DID THE
PROSECUTOR MAKE, THEN MAYBE YOU
HAVE A STRONGER CASE.

COULD YOU KIND OF ADDRESS THAT?

>> SURE.

IF THE COURT IS APPLYING
FUNDAMENTAL ERROR, WHICH WE'RE
ARGUING THAT YOU SHOULD NOT, BUT
IF YOU ARE, I THINK THERE IS A
UNDENIABLE CONNECTION BETWEEN
EXCESS EMOTION, RIGHT?

BECAUSE YOU CANNOT COMPLETELY
DIVORCE THESE PROCEEDINGS-- I
WOULD NOT WISH BEING A CAPITAL
JUROR ON MY WORST ENEMY.

IT SEEMS WRENCHING.
YOU CANNOT COMPLETELY DIVORCE
THESE PROCEEDINGS FROM EMPATHY,
RAGE.
AND SO PROSECUTORS HAVE TO ASK
THEMSELF, AM I GOING TO CAP IT
AT THAT?
AM I GOING TO TRY TO KEEP IT
UNDER CONTROL, OR AM I GOING TO,
ESSENTIALLY, POUR GASOLINE ON
SOMETHING THAT IS ALREADY ON
FIRE?
AND WHEN THEY CHOOSE TO POUR
GASOLINE, WHAT THEY ARE DOING IS
THEY ARE IMPAIRING THE INTEGRITY
OF OUR STATE'S CAPITAL
SENTENCING SYSTEM, A SYSTEM THAT
THIS COURT SHOULD INSURE BY ALL
ITS MIGHT IS AS SOUND AS
POSSIBLE.
AND I THINK THERE'S A CONNECTION
BETWEEN THE EXCESS AND
FUNDAMENTAL ERROR.
RIGHT?
BECAUSE WHEN YOU ERR
FUNDAMENTALLY, WHAT YOU DO IS
YOU ERR SO EXTENSIVELY THAT YOU
IMPAIR THE JURY'S ABILITY TO AS
CALMLY, AS DISPASSIONATELY AS
POSSIBLE ARRIVE AT A FAIR
VERDICT.
AND IF THESE ARGUMENTS ARE
BANNED BECAUSE THEY WORK.
BECAUSE THEY CAUSE JURORS IN THE
CAPITAL CONTEXT TO IMPOSE A
HIGHER SENTENCE THAN THEY
OTHERWISE WOULD BECAUSE THEY
WHIP PEOPLE UP.
THAT'S WHY YOU'RE NOT SUPPOSED
TO SAY THEM.
SO THE QUESTION I THINK THE
YOU'RE APPLYING FUNDAMENTAL
ERROR ANALYSIS IS HOW MUCH DO WE
TOLERATE.
AND THIS IS BEYOND--
>> WELL, BUT I THINK THAT'S WHY
THOUGH, I MEAN, IF YOU READ THE
WHOLE ARGUMENT IN CONTEXT, YOU
KNOW, OBVIOUSLY I THINK, I MEAN,
IT SOUNDS LIKE FROM THE STATE'S
OWN ARGUMENT IT SOUNDS LIKE IN
HINDSIGHT THERE WERE SOME
COMMENTS THAT THE STATE WOULD
ACKNOWLEDGE MAYBE SHOULDN'T HAVE

BEEN MADE.

BUT IF I READ THE ENTIRE ARGUMENT, I DO SEE, YOU KNOW, A LOT OF SORT OF REASONED APPLICATION OF THE HAC, THE OTHER AGGRAVATORS PUTTING ALL OF IT IN CONTEXT, RESPONDING TO THE MITIGATION WHICH IS, YOU KNOW, OBVIOUSLY A DIFFICULT THING BECAUSE IT'S NOT JUST A SORT OF DISPROVING A FACT, IT'S TRYING TO MAKE INHERENTLY KIND OF MORAL ARGUMENTS TO THE JURY ABOUT, YOU KNOW, WHAT WEIGHT DO YOU GIVE THE BAD, YOU KNOW, VERSUS THE GOOD.

AND WHEN I READ THE WHOLE THING IN CONTEXT, IT DOESN'T READ AS AN ARGUMENT THAT WAS TRYING TO, YOU KNOW, WHERE SOMEONE, THE HEARER WOULD HAVE BEEN SO OVERWHELMED BY MOTION THAT THEY COULDN'T KIND OF RATIONALLY APPLY THE STANDARDS.

WHICH AT THE END OF THE DAY, I MEAN, THAT'S WHAT THIS WHOLE PROCESS IS ABOUT, RIGHT? GIVING EACH SIDE A KIND OF FAIR CHANCE TO MAKE THEIR ARGUMENTS ABOUT THE LEGAL STANDARDS THAT APPLY, THE FACTS AND HAVE THE JURY KIND OF MAKE THIS MORAL DECISION ABOUT WHAT THEIR RECOMMENDATION'S GOING TO BE. AND IT SEEMS LIKE IN CONTEXT THERE WAS AN OPPORTUNITY FOR THEM TO DELIBERATE THAT WAY. YOU DISAGREE WITH THAT?

>> I ABSOLUTELY DO.

THIS IDEA OF ANY REASONABLE JUROR WOULD VOTE FOR DEATH IN THIS CASE IS MISGUIDED.

>> WELL, AND JUST TO BE CLEAR, THAT'S NOT WHAT I'M SAYING.

WHAT I'M SAYING IS COULD-- I'M NOT SAYING WHAT THEIR ANSWER WAS.

I'M SAYING THE ENVIRONMENT, WERE THEY ABLE AFTER THIS ARGUMENT TO MAKE A REASONED SORT OF ASSESSMENT OF THE CASE THAT HAD BEEN PUT IN FRONT OF THEM. BECAUSE THAT'S ULTIMATELY THE

TEST, RIGHT?

I MEAN, IT'S TO PROTECT AGAINST
THE JURY BASING THEIR DECISION
ON CASHIN.

ISN'T THAT WHAT WE'RE, ISN'T
THAT-- ALL THESE RULES THAT WE
HAVE, THEY'RE ALL DIRECTED
TOWARD PRESERVING THAT, THAT
INTEREST--

>> YES.

AND I THINK SAME MERCY, AN
ATTACK ON THE IDEA OF
UNCONDITIONAL MERCY INFLAMES
YOUR PASSIONS.

I THINK AN ATTACK ON YOUR JURY
TRIAL RIGHTS, THE VERY
PROCEEDING THAT THE JURORS ARE
SITTING TO INFLAMES YOUR
PASSIONS.

I THINK ESPECIALLY AFTER THE
LAST ELECTION THESE
ANTI-IMMIGRANT SENTIMENTS
INFLAMES YOUR PASSION.

AND I THINK THE GOLDEN RULES
VIOLATION INFLAMES PASSION.

THAT'S THE WHOLE POINT OF THE
GOLDEN RULE VIOLATION IS TO
INFLAME YOUR PASSION.

I THINK ALL OF THOSE THINGS DO
EXACTLY YOU, FRANKLY, SEEM TO
DISAGREE WITH ME ABOUT.

I THINK THAT THEY'RE DESIGNED,
FIRST-- I MEAN, THAT'S, THAT'S
THE KEY HERE.

I HEARD MY OPPONENT SAY THAT
SOME OF THESE THINGS WERE JUST
OFF THE TOP OF HIS HEAD.

THERE IS NO WAY THAT IS TRUE.

MR. HARMON IS A VETERAN
PROSECUTOR, HAS BEEN PROSECUTING
HOMICIDES FOR 20 YEARS.

HE WROTE OUT THIS ARGUMENT, HE
GAVE IT TO COLLEAGUES, I
GUARANTEE YOU, AND TESTED IT.
THIS WAS DELIBERATE.

AND ANOTHER THING THAT HIS
WISDOM GIVES HIM FROM DOING THIS
FOR SO LONG IS THAT EVEN THE IF
I'VE GOT AGGRAVATORS ON LOCK, I
CAN STILL LOSE.

ESPECIALLY IN A CASE LIKE THIS
THAT IS NOT LIKE MY OPPONENT
SAID, ONE OF THE LEAST
MITIGATED.

YOU HAVE TWO OF THE MOST-- AND
IT DOESN'T HEART WHAT THE TRIAL
JUDGE'S ORDER SAID, IT MATTERS
WHAT THE JURY THOUGHT ABOUT THE
MITIGATION.

YOU HAVE TWO OF THE MOST
COMPELLING CATEGORIES OF
MITIGATION THAT EXIST, TRAUMATIC
CHILDHOOD PHYSICAL ABUSE AND
MENTAL MITIGATION.

THESE--

>> I'M SORRY.

COULD I CAN ASK YOU ABOUT
PRESERVATION ISSUE--

>> YES.

>>-- WITH THE MERCY THING?

ONE OF THE CONSEQUENCES OF NOT
GETTING A MORE CLEAR RULING FROM
THE COURT IS THAT THERE WAS NO
OPPORTUNITY TO SORT OF DISCUSS
WHETHER THERE COULD BE SOME KIND
OF CURATIVE INSTRUCTION ON THE
SPOT.

BECAUSE, I MEAN, ON YOUR THEORY,
AM I RIGHT TO UNDERSTAND YOU
SAYING AS SOON AS THE TWO
SENTENCES LEFT THE PROSECUTOR'S
MOUTH--

>> THE ERROR WAS COMPLETE.

>> THERE HAD TO BE A WHOLE, WHAT
IS IT, WHAT WOULD BE-- WHAT
SHOULD THE JUDGE HAVE DONE?

>> THE MISTRIAL SHOULD HAVE BEEN
GRANTED.

>> WHICH MEANS YOU WOULD DO
WHAT?

>> I ASSUME THAT THE PENALTY
PHASE WOULD START.

>> OKAY.

SO BECAUSE THERE WAS-- SO THERE
WAS NOTHING, THERE WAS NO
CURATIVE INSTRUCTION THAT COULD
HAVE BEEN GIVEN, THE COURT
COULDN'T HAVE SAID, LISTEN, I
KNOW THIS CAME UP IN THE CONTEXT
OF, YOU KNOW, IT MAY HAVE BEEN
AN IMPROPER MERCY THING, IT MAY
HAVE BEEN A PROPER HAC THING.
I WANT YOU, THE JURY, TO
UNDERSTAND THIS IS WHAT YOU CAN
UNDERSTAND YOU CANNOT CONSIDER
IT FOR SOMETHING ELSE.
YOU'RE SAYING THAT WOULD NOT
HAVE BEEN ACCEPTABLE, THAT

COULDN'T HAVE FIXED THE PROBLEM.

>> THERE'S A COUPLE SCHOOLS OF THOUGHTS ON CURATIVES AND WHETHER THEY HELP AT ALL OR WHETHER THEY HURT.

BUT I THINK WHAT'S IMPORTANT TO REMEMBER IN THIS CASE IS THE TRIAL JUDGE CLEARLY DIDN'T THINK AN ERROR OCCURRED.

SO AT THAT POINT, AND AS A FORMER TRIAL ATTORNEY THE, I'VE BEEN IN FRONT OF SOME JUDGES WHERE IF THEY MAKE THEIR OPINION CLEAR AND I ASK FOR A CURATIVE, I'M GOING TO GET LOOKED AT LIKE I'VE GOT THREE HEADS.

>> IT WASN'T BECAUSE THE COURT DISAGREED ABOUT WHETHER IT WOULD HAVE BEEN OKAY--

>> THAT'S RIGHT.

>>-- IT WAS WHETHER, IN FACT, THE LAWYER HAD ACTUALLY SAID IN TERMS OF HOW YOU HEARD IT.

SO THERE WAS A COMMON UNDERSTANDING THAT THIS TYPE OF ARGUMENT WAS OFF BASE.

AND SO THE DEFENSE COUNSEL HAD SAID, WELL, CAN WE JUST MAKE SURE THE JURY UNDERSTANDS X, Y AND Z, IT SEEMS LIKE THE JUDGE WOULD HAVE BEEN RECEPTIVE TO THAT BECAUSE THE JUDGE AGREED THAT THE COMMENT WOULD HAVE BEEN INAPPROPRIATE FOR THAT RATHER THAN FOR THE HAC YOU WERE. AND THAT WHOLE-- NONE OF THAT WAS ABLE TO HAPPEN BECAUSE OF-- YOU KNOW, AND I'M NOT SAYING THIS TO DEFAULT THE DEFENSE LAWYER.

>> SURE.

>> BECAUSE OF THE AMBIGUITY ABOUT THE RULING AND THE FAILURE TO FOLLOW UP, THERE WASN'T AN OPPORTUNITY FOR THAT TO HAPPEN.

>> THAT'S CORRECT.

BUT, I MEAN, IT'S OUR POSITION THAT THIS CLOSING ARGUMENT WENT ON TO BE, MAYBE IF YOU TAKE THAT, IT ADDED THAT SINGLE SIDEBAR CONTEXT WENT ON TO BE SO DEVASTATINGLY BAD THAT IT'S REVERSIBLE ANYWAY.

>> LET ME FOLLOW UP WITH THAT.

>> YES.
>> SO IF YOU READ, AGAIN, AT THE SAME POINT, THE SAME MERCY ARGUMENT--
>> OKAY.
>>-- THE OBJECTION, YOU'RE CORRECT, IT REALLY WASN'T A GENERAL OBJECTION. THE IT HAD BEEN, THEN THE JUDGE, I THINK, THE JUDGE WOULD HAVE SAID, SUSTAINED. YOU KNOW WHAT YOU CAN'T DO, DON'T DO THAT AGAIN, AND WE WOULD HAVE MOVED ON. AND ESSENTIALLY, THAT'S WHAT THE JUDGE DID. HE SAID, WELL, I DON'T THINK HE SAID THAT, BUT WE KNOW HE CONDITION, SO DON'T DO IT AGAIN. IF WE VIEW THAT GENERALLY, IT WAS HANDLED PROPERLY. THIS IS NOT THE KIND OF ARGUMENT YOU CAN MAKE.
>> BY "GENERAL," WHAT DO YOU MEAN?
>> OBJECTION, THIS IS AN IMPROPER ARGUMENT. THEN THE JUDGE WOULD SAY, SUSTAINED. YOU'RE RIGHT, IT WAS IMPROPER. DON'T DO THAT AGAIN. I MEAN, THAT, THAT WOULD HAVE BEEN IT. BUT IT WAS A MOTION FOR MISTRIAL. AND IT'S A TOUGH ROAD TO THINK THAT THAT SIMPLE CONTEXT COMMENT IN THE IF CONTEXT OF THE HAC ARGUMENT WAS, WOULD VITIATE THE FAIRNESS OF THE ENTIRE PROCEEDING. SO WHEN YOU LOOK AT THE HIS TRIAL STANDARD, I DON'T EVEN THINK YOU ARGUE THAT THE JUDGE, YOU KNOW, YOU DON'T MAKE THAT SEPARATE ARGUMENT, RIGHT? THAT THE JUDGE SHOULD HAVE GRANTED THE MISTRIAL?
>> WELL, I THINK THE MISTRIAL IN THIS PARTICULAR EXCHANGE IS SORT OF A RED HERRING.
>> THAT'S THE OBJECTION THAT WAS ACTUALLY MADE.
>> I UNDERSTAND.

I'M TALKING ABOUT THE FAILURE TO OBTAIN A RULING FOR THAT. I THINK IT'S A RED HERRING. BECAUSE ONCE THE JUDGE MAKES A CLEAR RULING ON AN OBJECTION ONCE YOU LOSE AN OBJECTION, YOU DON'T HAVE AN OBLIGATION TO MAKE OR RETAIN A RULING ON A MOTION FOR MISTRIAL.

>> COUNSEL, YOU'RE NOW OVER TIME, BUT I'LL GIVE YOU ANOTHER MINUTE.

>> THE STATE HAS SIMPLY NOT MET ITS BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT A SINGLE JUROR WAS NOT SWAYED BY ANY OF THESE PUTRID ARGUMENTS.

THE VAST--

[LAUGHTER]

AMOUNT OF IMPROPRIETIES IN THIS CASE HAVE BEEN DESCRIBED IN MANY CASES BY MANY COURTS IN A LOT OF WAYS.

THERE IS BUT ONE WORD THAT ADEQUATELY DESCRIBES THEM IN THIS CASE, REVERSAL.

THANK YOU.

>> THANK YOU.

WE THANK YOU BOTH FOR YOUR ARGUMENTS IN THIS CASE.

THAT IS THE FINAL CASE ON TODAY'S DOCKET, SO THE COURT WILL NOW STAND ADJOURNED.