Jermaine Lebron vs State of Florida

NEXT CASE ON THE COURT'S DOCKET IS LE BRON VERSUS STATE.

MR. NORGARD.

THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS BOB NORGARD ON BEHALF OF JERMAINE LE BRON. MR. LEBRON IS BEFORE THIS COURT ON A DEATH SENTENCE, BASED ON A CONVICTION FOR A ROBBERY AND FIRST-DEGREE MURDER. HE IS HERE AS THE RESULT OF A SECOND TRIAL. THE FIRST TRIAL HAVING BEEN MISTRIED BY THE TRIAL COURT, DESPITE THE REQUEST OF TRIAL COUNSEL FOR A CHARGE TO THE JURY TO BREAK THE DEADLOCK. IN THE SECOND TRIAL, THERE WERE JURY DETERMINATIONS MADE THAT MR. LEBRON WAS NOT THE PERSON WHO KILLED LARRY NEAL OLIVER. MR. LEBRON DID NOT POSSESS A FIREARM DURING THAT KILLING. AND A JURY FINDING THAT WAS NOT PREMEDITATED BUT WAS BASED ON FELONY MURDER. LOOKING AT THE FIRST ISSUE RAISED IN THE BRIEF, IT IS MY POSITION THAT, IN THIS IN STABS, THE RETRIAL -- IN THIS INSTANCE, THE RETRIAL OF MR. LEBRON THAT RESULTED IN HIS CONVICTION, IS BARRED BECAUSE OF DOUBLE JEOPARDY. THE FACTS OF WHAT OCCURRED IN THAT CASE IS THAT BEFORE THE JURY CAME BACK AND INDICATED THERE WAS A DEADLOCK, THEY HAD SENT OUT A QUESTION, BASICALLY ASKING, IN THIS CASE, IF THEY ACQUITTED MR. LEBRON, COULD FOUR OF THE TESTIFYING CODEFENDANTS STILL BE PROSECUTED FOR FIRST-DEGREE MURDER? THAT WAS A QUESTION THAT THE JURORS ASKED, PRIOR TO THEIR INDICATING THERE WAS A DEADLOCK. ANOTHER SIGNIFICANT EVENT THAT OCCURRED PRIOR TO THE JURY INDICATING THAT THEY WERE DEADLOCKED WAS THE TRIAL JUDGE, WITHOUT HAVING CONTACTED COUNSEL, WITHOUT HAVING NOTIFIED THE PARTIES, ONE OF THE JURORS INDICATED THAT THEY WANTED TO SPEAK TO THE COURT. AGAIN, WITHOUT NOTIFYING COUNSEL OF ANY INTENT TO TO -- TO DO SO, THE JUDGE BROUGHT THE JUROR BACK INTO CHAMBERS AND PROCEEDED TO COMMUNICATE WITH THE DELIBERATING JUROR. IT WAS AFTER THAT, THAT THE JURY INDICATED THAT THEY WERE POTENTIAL AMEND DEADLOCKED. IT -- THAT THEY WERE POTENTIALLY DEADLOCKED. IT WAS AT THAT TIME THAT THE TRIAL JUDGE INDICATED THAT HE HAD HAD THIS COMMUNICATION WITH THE JURY. AT THE TRIAL, DEFENSE COUNSEL REPEATEDLY REQUESTED THAT THE TRIAL COURT GAVE ALLEN CHARGE, STANDARD JURY INSTRUCTION, TO, PERHAPS, BREAK THE DEADLOCK OF THIS JURY. THE TRIAL JUDGE INDICATED THAT HE WAS NOT GOING TO GIVE THE BLOCKBUSTER ALLEN CHARGE, BUT THAT HE WAS GOING TO ASK THE JURORS IF THEY THOUGHT THEY COULD REACH A VERDICT. IF THEY INDICATED THAT THEY COULDN'T, HE WAS GOING TO DECLARE A MISTRIAL. AT NO POINT DID THE TRIAL COUNSEL EVER PROCEED FROM -- RECEDE FROM THEIR POSITION OR REQUEST THAT THE JURY BE INSTRUCTED PROPERLY, SO THAT THEY COULD GO BACK WITH THE APPROPRIATE INSTRUCTIONS, AND ATTEMPT TO REACH A VERDICT.

HOW LONG WAS THE JURY OUT, BY THE WAY, BEFORE THEY CAME BACK WITH THE NOTE ABOUT BEING DEADLOCKED?

I WAS THERE, SO I DON'T KNOW IF IT IS SPECIFICALLY MENTIONED IN THE RECORD, BUT 2 WAS A LENGTHY DELIBERATION. I THINK -- BUT IT WAS A LENGTHY DELIBERATION. IF I AM NOT MISTAKEN, I BELIEVE THERE WAS ARGUMENT, THEN THE JURY BROKE OVERNIGHT AND CAME BACK AND COMMENCEED DELIBERATIONS THE NEXT DAY, AND IF I AM NOT MISTAKEN, I BELIEVE IT WAS AT SOME POINT IN LATE AFTERNOON.

OF THE SECOND DAY OF DELIBERATIONS?

RIGHT. THERE HAD BEEN A SHORT PERIOD OF DELIBERATIONS THE FIRST DAY. THEN THE JURY WAS SEQUESTERED AND BROKE FOR THE EVENING AND CAME BACK.

THANK YOU.

THE IMPORTANT -- ONE OF THE REASONS WHY THIS IS SUCH AN IMPORTANT ISSUE IS THAT WE HAVE A SITUATION WHERE IT WAS NOT THE DEFENSE LOOKING AT THE NECESSITY AFTER TREMENDOUS TRIAL. SO WE HAVE A FLORIDA LAW NECESSITY. WE HAVE A SITUATION IN FLORIDA, WHERE WE HAVE ADOPTED A STANDARD JURY INSTRUCTION THAT IS DESIGNED TO ASSIST JURORS IN BREAKING THE DEADLOCK.

SHOULD WE HAVE SOME DIFFERENT APPROACH TO THAT, WHEN IT HAS BEEN CALLED TO THE ATTENTION OF THE JUDGE THAT THERE HAS BEEN SOME MISCONDUCT OR SOME IMPROPRIETY OR SOME QUESTIONABLE CONDUCT THAT A JUROR HAS NOT BEEN TRUTHFUL? DOES THAT MODIFY OUR LOOK AT THIS SITUATION OR DOES IT NOT, AND IF NOT, WHY NOT?

ESSENTIALLY WHAT WE HAVE HERE IS A SITUATION WHERE ONE OF THE JURORS HAD A PROBLEM WITH A JUROR, THE FORM, EXPRESSING SOME -- THE FOREMAN, EXPRESSING SOME FEELINGS ABOUT LAW ENFORCEMENT OFFICERS, BASED ON HIS PAST EXPERIENCES. IT WOULD BE MY POSITION, NUMBER ONE, THAT IF A COURT IS GOING TO GET INVOLVED IN SOMETHING LIKE THAT, IT WOULD BE THE DUTY OF THE COURT TO PROPERLY INSTRUCT THE JUROR AS TO THOSE ISSUES. IF THE COURT IS GOING TO GET INVOLVED, WHICH IT SHOULDN'T HAVE. THE DISCUSSION ON THE RECORD, ONCE IT WAS BROUGHT TO THE ATTENTION OF BOTH THE STATE AND THE DEFENSE, WAS THAT, IN FACT, THE JUROR HAD NEVER BEEN QUESTIONED, THE ONE WHO WAS -- THE ONE JUROR WAS QUESTIONING ABOUT THE PRIOR CONTACTS WITH THE POLICE THAT LEFT HIM WITH A BAD TASTE IN HIS MOUTH. THAT JUROR WAS NEVER SPECIFICALLY QUESTIONED ABOUT THAT, SO THERE WAS NO IMPROPRIETY BY THAT JUROR. WE BASICALLY BRING JURORS IN TO USE THEIR COMMON SENSE, TO DRAW ON THEIR LIFE EXPERIENCES, IN TERMS OF MAKING DECISIONS, AND ESSENTIALLY THERE WERE SOME QUESTIONS BY THIS LAW -- BY THIS JUROR, BECAUSE HE FELT THAT, YOU KNOW, LAW ENFORCEMENT OFFICERS MAY NOT NECESSARILY BE TRUTHFUL, WHICH IS CLEARLY WHAT THE JURY INSTRUCTIONS ENVISION. EVERY WITNESS IS TREATED THE SAME. EVERY WITNESS BRINGS FORT THE SAME WITNESS CREDIBILITY FACTORS THAT NEED TO BE CONSIDERED, AND THE FACT THAT HE WAS OPEN-MINDED TO THAT WAS NOT IMPROPER, SO THE CONCERNS THAT THE JUROR HAD, WHO ASKED TO BE QUESTIONED BY THE TRIAL JUDGE, THE CONCERNS HE HAD WERE ACTUALLY NONISSUEUOUS IN THE CASE AND WERE NOT THINGS THAT -- WERE NONISSUES IN THE CASE AND WERE NOT THING THAT IS THAT JUROR SHOULD HAVE CONCERNED HIMSELF WITH. THE WHOLE BEAUTY OF THE ALLEN CHARGE, WHICH IS SOMETHING THAT HAS BECOME A STANDARD JURY INSTRUCTION IN THE STATE OF FLORIDA, IS THAT IT GIVES DEADLOCKED JURORS MECHANISMS AND TOOLS FOR GETTING PAST THE THINGS THAT HAVE LED TO THEIR DEADLOCK, THE IDEA OF PEOPLE EXPRESSING WEAKNESSES, IN THEIR VIEWPOINT, LISTENING TO EACH AND EVERY OTHER JUROR. THIS JURY WAS NOT GIVEN THE BENEFIT OF THE WISDOM OF THAT JURY INSTRUCTION, IN ORDER TO TRY TO GO BACK AND REACH A DEADLOCK.

RESTATE, FOR US, IF YOU COULD, JUST BRIEFLY, THE SEQUENCE OF EVENTS HERE, IN THAT EARLIER TRIAL. THAT IS THE -- WHEN THE JUDGE MET WITH ONE OF THE JURORS WHO COMPLAINED ABOUT THE CONDUCT OF THE OTHER JUROR, YOU KNOW, WHEN DID THAT OCCUR, AND HOW LONG DID THAT LAST, AND THEN DID THE JUDGE COME BACK AND INFORM COUNSEL FOR BOTH SIDES OF HIS DISCUSSION WITH THE JURY?

THE SEQUENCE OF EVENTS WERE THAT COUNSEL WAS, FIRST, NOTIFIED THAT THE JURY HAD A QUESTION, AND THEN THE QUESTION RELATED TO IF MR. LEBRON IS ACQUITTED, CAN THE OTHER TESTIFYING CODEFENDANTS STILT BE TESTIFIED. THAT WAS THE FIRST THING THAT OCCURRED. THEN WHAT OCCURRED WAS THIS TRIAL JUDGE HAD THIS CONTACT WITH THE JURY.

HOW DID THAT COME ABOUT?

APPARENTLY THE JUROR NOTIFIED THE BAILIFF THAT HE WANTED TO TALK TO THE JUDGE.

WERE THEY DELIBERATING?

THEY WERE DELIBERATING. THE JUROR NOTIFIED THE JUDGE THAT HE WANTED TO TALK TO THE JUDGE. THE JUDGE, WITHOUT NOTIFYING COUNSHE WILL, BROUGHT THE JURY INTO -- COUNSEL, BROUGHT THE JUROR INTO CHAMBERS AND HAD COMMUNICATION WITH THE JUROR.

THERE WAS A COURT REPORTER THERE, WAS THERE?

THERE WAS A COURT REPORTER. THIS WAS, FIRST, BROUGHT TO THE ATTENTION OF THE STATE AND THE DEFENSE, WHEN THE JURY CAME BACK, AT A LATER POINT IN TIME, WITH THE NOTE, BASICALLY SAYING THAT THEY WERE DEADLOCKED.

WITH THE DEADLOCK. NOT BEFORE THAT?

NOT BEFORE THAT.

AND DO WE KNOW WHAT THE PASSAGE OF TIME WAS BEFORE THE JUDGE CONCLUDED HIS CONVERSATION WITH THE JUROR?

IT WAS RELATIVELY SHORT PERIOD OF TIME. HALF-HOUR OR HOUR, MAYBE. THERE WAS SOME CONTINUED DELIBERATIONS AFTER THAT.

ALL RIGHT. BUT THE COURT DID NOT INFORM THE PARTIES OF WHAT HAD HAPPENED THERE.

NO. THE WAY IT CAME UP, IS THAT WHEN THE NOTE WAS READ, AND IT WAS INDICATED THAT THE JURY WAS DEADLOCKED, I BELIEVE I WAS THE TRIAL COUNSEL WHO ACTUALLY REQUESTED THE ALLEN CHARGE AT THAT POINT. AND THE JUDGE BASICALLY SAID NORMALLY I WOULD GIVE IT, BUT I HAVEN'T TOLD YOU ABOUT THIS YET, BUT I TALKED TO ONE OF THE JURORS, AND BASICALLY PROFFERED A BRIEF SYNOPSIS OF WHAT THE JURORS HAD SAID TO HIM. IT WAS AT THAT POINT THAT WE, STILL, REQUESTED THAT AN ALLEN CHARGE BE GIVEN. THE STATE HAD EVEN OFFERED ANOTHER OPTION, WHICH, IN TERMS OF DEALING WITH ISSUES OF MANIFEST NECESSITY, YOU NEED TO EXPLORE ALL AVAILABLE OPTIONS, THE STATE OFFERED THE POSSIBILITY OF SUBSTITUTING THE -- ONE OF THE ALTERNATE JURORS. TAKING THE JUROR OFF THE CASE WHO HAD COMMUNICATED WITH THE JUDGE AND SUBSTITUTING -- ACTUALLY I AM NOT SURE, RIGHT NOW, IF THEY WERE SUGGESTING SUBSTITUTING -- I BELIEVE THEY WANTED TO SUBSTITUTE THE ALTERNATE FOR THE JUROR WHO HAD COMMUNICATED WITH THE JUDGE. WHICH WOULD HAVE BEEN A VIABLE ALTERNATIVE, AS WELL. APPARENTLY THAT PARTICULAR JUROR, FOR REASONS THAT WERE NOT MERITORIOUS, HAD A PROBLEM WITH THE CONDUCT OF ONE OF THE OTHER JURORS. HE COULD HAVE BEEN REPLACED BY ONE OF THE ALTERNATES. THAT WAS A VIABLE OPTION THAT DID NOT GET DEALT WITH OR EXPLORED, EITHER, BY THE TRIAL JUDGE. HE SIMPLY --

LET ME ASK THIS. GIVEN THAT THE STATE MADE -- THAT YOU REQUESTED THE ALLEN CHARGE, AND GIVEN THAT THE STATE SUGGESTED ANOTHER ALTERNATIVE, WHEN THE JUDGE FINALLY MADE THE DECISION THAT HE WAS GOING TO DECLARE A MISTRIAL, WAS THERE AN OBJECTION LODGED?

NOT AT THAT POINT. WHAT HAD HAPPENED IS THE TRIAL JUDGE HAD SAID "I AM GOING TO ASK THE JURORS IF THEY THINK FURTHER DELIBERATIONS WILL DO ANY GOOD. IF THEY INDICATE THAT IF WON'T, I WILL DECLARE A MISTRIAL." THAT IS THE TRIAL JUDGE'S ANNOUNCED POSITION. WE HAD MADE OUR POSITION VERY CLEAR, THAT WE WANTED AN ALLEN CHARGE, THAT WE

WERE NOT ACCEDING TO THE COURT'S DECISION ON THAT. THAT WAS THE COURT'S DECISION BEFORE WE BROKE TO HAVE HIM POLL THE JURORS, AND ESSENTIALLY WHAT HAPPENED IS THAT, DESPITE THE FACT THAT FOUR OF THE JURORS SAID WE THINK FURTHER DELIBERATIONS MIGHT DO SOME GOOD, I MEAN, BAM. I AM DECLARING A MISTRIAL.

WHEN WAS THE OBJECTION LODGED?

AT THE BENCH CONFERENCE, IN TALKING ABOUT HOW THE ISSUE OF THE DEADLOCK WAS GOING TO BE RESOLVED. THROUGHOUT THE COURSE OF THAT CONVERSATIONS WITH THE JUDGE, WE KEPT REQUESTED AN ALLEN CHARGE. WE KEPT SAYING, YOU KNOW, WE DON'T WANT A MISTRIAL. WE WANT AN ALLEN CHARGE. WE WANT THIS JURY TO TRY TO REACH A VERDICT, AND THE TRIAL JUDGE SAID HERE IS WHAT I AM DOING. I AM GOING TO POLL THEM, AND IF THEY SAY THEY CAN'T REACH A VERDICT, I AM DECLARING A MISTRIAL.

AND SO THE BASIS FOR, THEN, DECLARING THAT A NEW TRIAL WOULD BE INAPPROPRIATE, IS WHAT?

FIRST THERE WAS NO MANIFEST NECESSITY. THE COURT SHOULD HAVE EXPLORED OTHER OPTIONS, SHORT OF DECLARING A MISTRIAL AT THAT POINT. THE SECOND GROUND, BASED ON THE CASE LAW CITED IN THE BRIEF, IS THAT WE HAVE A SITUATION WHERE THERE WAS INTENTIONAL MISCONDUCT BY THE JUDGE. THE FACT THAT AN EXPERIENCED TRIAL JUDGE, WITH 20 YEARS OF CAPITAL EXPERIENCE AS A PROSECUTOR AND AS A TRIAL JUDGE, WOULD TALK TO A DELIBERATING JUROR, IS CLEARLY MISCONDUCT. YOU KNOW, CLEARLY THE JUDGE KNEW THAT HE NEEDED TO NOTIFY COUNSEL, WHEN THERE WERE QUESTIONS BY THE JURY. WHENEVER ANY OF THE OTHER NOTES CAME OUT, WITH RESPECT TO THE QUESTION ABOUT IF WE A QUIT HIM, WHAT HAPPENS TO THESE OTHER PEOPLE, YOU KNOW, WE HAVE GOT A DEADLOCK, BEFORE THE JUDGE DID ANYTHING, IN TERMS OF COMMUNICATING WITH THE JURY, HE NOTIFIED COUNSEL, MADE THEM AWARE OF WHAT THE JURORS WERE ASKING, AND DISCUSSED HOW TO DEAL WITH IT.

BUT ORDINARILY, THE BEST YOU COULD DO OUT OF A SITUATION LIKE THAT WOULD BE TO GET A NEW TRIAL, IF THAT WAS LATER DISCLOSED TO HAVE OCCURRED, BUT THE JURY HAD GONE ON AND DELIBERATED AND REACHED A VERDICT. ISN'T THAT RIGHT?

UNDER THE CASE LAW, WHERE CONDUCT IS INTENTIONAL, AND WHERE IT CLEARLY IS THWARTING A POTENTIAL ACQUITTAL, THEN DOUBLE JEOPARDY IS A BAR.

THAT IS NOT AS CLEAR, THOUGH, IN THIS RECORD, ABOUT THE POTENTIAL A QUITALLY, IN -- ACQUITTAL, IN TERMS OF THE GRANTING OF THE MISTRIAL. WHY SHOULDN'T WE PLACE MOST WEIGHT, HERE, WITH THE FACT THAT WE HAVE THE JURY UNANIMOUSLY SENDING A NOTE TO THE JUDGE, SAYING THAT WE ARE HOPELESSLY DEADLOCKED, AND THAT FURTHER DELIBERATIONS WOULD BE OF NO VALUE? THAT IS THE OBVIOUSLY -- WE ARE TRYING TO BALANCE THINGS ALL ALONG. THERE HAVE BEEN MANY OCCASIONS WHEN WE HAVE TOLD TRIAL JUDGES, DON'T FORCE JURORS TO CONTINUE, AFTER IT BECOMES CLEAR THAT THEY CAN'T RESOLVE THE CASE, AND THIS IS A VERY STRONG NOTE, IS IT NOT, BACK TO THE JUDGE? THE NOTE TO THE JUDGE IS A STRONG NOTE. YOU INDICATED THAT THEY HAVE BEEN DELIBERATING ALL DAY ONE DAY AND PART OF ANOTHER DAY. SO IT ISN'T AS IF THEY HAVE JUST GONE BACK AND, YOU KNOW, HAD A LITTLE BIT OF TIME WITH EACH OTHER. THEY HAVE BEEN DELIBERATING FOR, CERTAINLY, A REASONABLE PERIOD OF TIME. WHY SHOULDN'T WE PLACE GREAT DEFERENCE TO THAT NOTE BY THE JURY?

BECAUSE WE DON'T JUST HAVE THE NOTE, BUT WE HAVE THE FOLLOW-UP QUESTIONS ASKED BY THE COURT, IF THEY FELT DELIBERATIONS, FURTHER DELIBERATIONS WOULD DO ANY GOOD, AND FOUR OF THE JURORS INDICATING THAT IT WOULD, SO DESPITE --

EIGHT OF THEM INDICATING TO THE CONTRARY.

AND NOT HAVING BEEN INFORMED OF AN ALLEN INSTRUCTION, WHICH GIVES DEADLOCKED JURIES A MECHANISM, A TOOL, A METHOD FOR BREAKING A DEADLOCK.

IS OUR STANDARD OF REVIEW AT THIS POINT, OF WHETHER THE JUDGE ABUSED DISCRETION, IN DOING THAT?

THE ISSUE IS WHETHER OR NOT THERE WAS MANIFEST NECESSITY, IS ONE OF THE ISSUES. AND IT IS MY POSITION THAT THERE IS NOT. THE OTHER ISSUE IS WHETHER OR NOT THE TRIAL JUDGE'S CONDUCT, IN ACTING IMPROPERLY, WAS INTENTIONAL, WHICH I SAY IT IS, AND THEN SECONDLY, DID IT THWART A POTENTIAL ACQUITTAL, AND IN A SITUATION WHERE -- I MEAN, YOU KNOW, OBVIOUSLY IT IS RARE THAT YOU GET INTO THE MIND OF JURORS, WHAT THEY ARE THINKING, CLEARLY THAT JURY WAS CONTEMPLATING AN ACQUITTAL, WHEN THEY SET OUT THE NOTE, SAYING, ON FOUR DIFFERENT QUESTIONS, IF THEY A QUITO-IF WE A QUIT MR. LEBRON, CAN THIS PERSON BE PROSECUTED FOR MURDER. IF WE A QUIT MR. LEBRON, CAN THESE OTHER PEOPLE BE PROSECUTED? A CLEARLY THAT WAS THE -- CLEARLY THAT WAS THE DIRECTION THE JURY WAS GOING ON. THE PROBLEM, WITH THE JURY POTENTIALLY BEING DEADLOCKED, WE HAVE TO FACTOR, INTO THIS, THE FACT THAT THE TRIAL JUDGE HAD COMMUNICATIONS WITH THE JUROR, THAT HE BASED HIS DECISION ON, TO NOT GIVE AN ALLEN CHARGE. WE HAVE NO WAY OF KNOWING WHAT THAT JUROR WENT BACK THERE AND TOLD THOSE PEOPLE, HOW THAT AFFECTED THE POTENTIAL ISSUE OF A DEADLOCK, AND SO THE ISSUE OF THE JUDGE'S CONDUCT IS INTERMINGLED WITH OUR TRADITIONAL REVIEW OF JUST SIMPLY MANIFEST NECESSITY IN MOST CASES. I GO BACK TO WHAT IS A PIVOTAL FACT IN THIS CASE, IS THAT JUDGE PERRY, HIMSELF, INDICATED THAT NORMALLY IN THOSE SITUATIONS, HE WOULD GIVE AN ALLEN CHARGE, BECAUSE THEAL HE CHARGE IS EFFECTIVE. IT DOES BREAK DEAD LOCKS. WE WOULDN'T HAVE AN INSTRUCTION LIKE THAT, IF IT WASN'T SOMETHING THAT WAS EFFECTIVE AT THE TRIAL LEVEL. OTHERWISE, WHEN THE JUROR SENT OUT A -- WHEN THE JURORS SENT OUT A NOTE SAYING THAT WE WERE DEADLOCKED, WE WOULD SIMPLY DECLARE A MISTRIAL, AT THAT POINT, AND GO HOME. WE DON'T DO. THAT THAT IS WHY WE HAVE THE REQUIREMENT THAT OTHER AVENUES, SHORT OF DECLARING A MISTRIAL, BE EXPLORED, SUBSTITUTING THE JUROR. GIVEN THE ALLEN CHARGE. THOSE THINGS SIMPLY WERE NOT DONE.

WHAT IS THE DEFENSES DEFENSE'S RESPONSE TO THE STATE'S -- WHAT IS THE DEFENSE'S RESPONSE TO THE STATE'S SUGGESTION ABOUT INTRUDING, IF THERE WAS A RESPONSE?

I DON'T BELIEVE THERE WAS, AND I THINK HE IS ESSENTIALLY WHAT HAPPENED IS THAT THE JUDGE, I BELIEVE IT WAS AT THAT POINT THE JUDGE INDICATED THAT HE WAS NOT GOING TO CONTINUE THE TRIAL, BECAUSE OF THAT COMMUNICATION. IT NEVER WAS DISCUSSED. ESSENTIALLY BOTH SIDES WERE PRESENTING THEIR VIEWPOINTS OF HOW THIS EVENING THINGS SHOULD PROCEED. THE DEFENSE WAS REQUESTING AN ALLEN CHARGE. THE STATE WAS SUGGESTING THAT THE ALTERNATE BE SUBSTITUTED, AND THE JUDGE STEPPED IN AND SAID, NO, HERE IS WHAT I AM DOING, SO THAT NEVER BECAME AN ISSUE. CERTAINLY, UNDER THE CURRENT LAW, THAT WOULD BE APPROPRIATE. I MEAN, IT COULD BE DONE. IF THE DEFENSE OBJECTED TO THE SUBSTITUTION OF THE ALTERNATE, THEN IT COULDN'T BE DONE, BUT ABSENT -- IT IS NOT -- UNDER THE CURRENT LAW, IT IS NOT FUNDAMENTAL ERROR, SO IT IS NOT SOMETHING THAT COULD HAVE BEEN -- SO IT IS SOMETHING THAT COULD HAVE BEEN DONE, IF THE DEFENSE DID NOT OBTO IT. IT WAS A VIABLE OPTION IN THIS CASE.

DID I UNDERSTAND YOU TO SAY THAT THERE WAS A COURT REPORTER BACK IN THE CHAMBERS, WHEN THE JUROR WENT BACK THERE?

YES, SIR.

AND HOW SOON WAS THAT -- WAS THAT TRANSCRIPT READ TO DEFENSE COUNSEL?

THE JUDGE SIMPLY PARAPHRASEED THE DISCUSSION, SAYING I WAS CONTACTED BY THIS JUROR, AND BASICALLY PARAPHRASED WHAT THE COMMUNICATION WAS ABOUT.

THE DEFENSE COUNSEL -- DID DEFENSE COUNSEL ASK TO HAVE THE TRANSCRIPT TRANSCRIBED?

VERY HONESTLY, I ACCEPTED THE JUDGE'S REPRESENTATIONS OF WHAT OCCURRED BACK IN THE JURY ROOM. I HAD NO REASON TO QUESTION, YOU KNOW, WHAT HE WAS COMMUNICATING TO US.

BUT DID YOU ASK, AT THAT POINT, WAS THERE A MOTION FOR MISTRIAL MADE BY YOU?

AT NO POINT DID DEFENSE COUNSEL MOVE FOR MISTRIAL.

WELL, IF -- IF IT IS DISCOVERED, IN THE COURSE OF A DELIBERATING -- JURY DELIBERATING, THAT, SAY, THE STATE HAD FOUND OUT THAT THERE WAS SOMETHING THAT WAS MISREPRESENTED OR YOU HAD ABOUT A JUROR'S QUALIFICATIONS, IS THERE NO REMEDY -- THERE IS NO REMEDY DURING THE TRIAL? BECAUSE WE CERTAINLY HAVE CASES AFTER THE FACT THAT SAY THAT, IF THERE HAS BEEN A MISSTATEMENT, OR MATERIAL MISREPRESENTATION, THAT THERE HAS GOT TO BE A NEW TRIAL GIVEN, BECAUSE OF THAT. I AM TRYING TO FIGURE OUT HOW DOES THAT WORK, HERE, WHERE IT IS THE KNOWLEDGE OF IT THAT IS FOUND OUT WHILE THE JURY IS DELIBERATING. YOU GET THE REMEDY OF ANOTHER TRIAL. ISN'T THAT APPROPRIATE?

WELL, THE FIRST SIGNIFICANT POINT IS THAT THERE WAS, IN FACT, NO JUROR MISCONDUCT. BOTH THE STATE AND THE DEFENSE ACKNOWLEDGED THAT THE PROBLEM THAT THE ONE JUROR HAD WITH THE OTHER JUROR WASN'T A PROBLEM, IN THAT THERE HAD NOT BEEN MISREPRESENTATION BY THE JURY. THERE HAD NOT BEEN NONDISCLOSURE BY THE JURY. IT WAS NOTED THAT THAT JUROR WAS NEVER QUESTIONED ABOUT ANY PRIOR BAD EXPERIENCES WITH LAW ENFORCEMENT, AND SO THAT WAS PART OF THIS JUROR'S BACKGROUND, AND EXPERIENCE. HE WAS NEVER QUESTIONED ABOUT THAT, SO THERE WAS NO IMPROPRIETY, YOU KNOW, ON THE PART OF THAT JUROR, IN MAKING A MISREPRESENTATION OR NOT REVEALING SOMETHING. THE SECOND FACTOR IS THAT, OBVIOUSLY, THE REASON WE WERE REQUESTING THE ALLEN CHARGE, VERSUS A MISTRIAL, BASED ON THE JUDGE'S CONTACTING THAT JUROR, WHICH WOULD HAVE BEEN A SEPARATE BASIS FOR A MISTRIAL, THE FACT THAT THE TRIAL JUDGE AND THE COURT REPORTER WERE INVOLVED IN CONTACT WITH THE DELIBERATING JURY. WE DIDN'T WANT A MISTRIAL. WE WANTED THAT JURY TO MAKE A DECISION. AND ESSENTIALLY WANTED THAT JURY TO HEAR THE ALLEN CHARGE, TO SEE IF THAT WOULD BREAK THE DEADLOCK, AND YOU KNOW, WE CAN'T SAY THAT THAT JURY WAS HOPELESSLY DEADLOCKED, UNTIL YOU TRY SOMETHING LIKE AN ALLEN CHARGE, WHERE THEY GO BACK AND THEY TRY THESE TOOLS AND MECHANISMS, TO DISCUSS THE CASE MORE OPENLY AND FREE, TO BREAKDOWN SOME OF THEIR ENTRENCHED POSITIONS, WHICH ON RETHINKING, YOU KNOW, MAY NOT PROVE TO BE AS SUBSTANTIAL AS THEY THOUGHT, AND I MEAN, YOU KNOW, THE CASES YOU SEE, YOU DON'T SEE THE CASES WHERE THE ALLEN CHARGES WORK NECESSARILY. I MEAN YOU GET A SITUATION WHERE THE JURORS ARE TOLD GO BACK THERE AND DO THIS, AND THEN THEY REACH A VERDICT. YOU DON'T SEE THE ONES WHERE, YOU KNOW, IT ENDS UP WITH IN A MISTRIAL -- IT ENDS UP IN A MISTRIAL GENERALLY, BUT THE ALLEN CHARGES WORK. VERY FREQUENTLY JURORS ARE TOLD TO GO BACK AND DO THESE THINGS, AND THEY ARE ABLE TO GO BACK AND REACH A VERDICT, AND THAT IS WHAT THEY WERE ABLE TO DO IN THIS CASE.

COUNSEL, YOU HAVE OTHER ISSUES, PARTICULARLY DEALING WITH THE SPECIAL VERDICT FORMS AND HOW THAT CAME ABOUT. COULD YOU SPEND SOME TIME ADDRESSING THAT AND THAT RELATIONSHIP BETWEEN THOSE SPECIAL VERDICT FORMS AND THE JUDGE'S ROLE IN ACTUALLY GOING THROUGH AND ENTERING THE SENTENCING ORDER. COULD YOU ADDRESS SOME OF THOSE, PLEASE.

YES, SIR. BASICALLY, WE HAVE WHAT IS A RATHER UNIQUE ISSUE, IN THAT DURING THE COURSE OF THIS TRIAL, THE TRIAL ATTORNEY, WHO IS REPRESENTING MR. LEBRON IN THE GUILT PHASE OF THE TRIAL, WAS A NEW YORK ATTORNEY WHO HAD NEVER DONE A DEATH PENALTY CASE. ONE OF OUR ISSUES WAS THE MOTION FOR CONTINUANCE ISSUE, WHERE HE IS ESSENTIALLY I WAS IN ANOTHER CAPITAL TRIAL. THE JUDGE STARTED THE TRIAL WITHOUT MY BEING AVAILABLE, AND SO WHAT HAPPENED IS THAT THE AT THE CHARGE CONFERENCE, THE TRIAL JUDGE WAS THE ONE WHO ACTUALLY BROUGHT UP THESE SPECIAL FINDINGS OF FACT.

HIS REASON WAS, ESSENTIALLY, AS I CAN DETERMINE FROM THE TRANSCRIPT THAT, HE WANTED ANY APPELLATE COURT TO BE ABLE TO KNOW WHAT THE JURY REALLY DECIDED. IS THAT THE KIND OF REASONING THAT --

THE IDEA BEING THAT, YOU KNOW, BECAUSE WE ARE DEALING WITH THE CASE OF CODEFENDANTS, THE IN MAN TYSON ISSUES. -- THE INMAN-TYSON ISSUES, WAS HE THE SHOOTER, AND THE FINDINGS WENT TYPICALLY BEYOND THE FINDINGS WHICH ARE USUALLY GIVEN. IN SOME CASES THE JUDGE WILL USE THEIR DISCRETION IN DETERMINING WHETHER IT IS FELONY MURDER OR FIRST-DEGREE MURDER OR BOTH, BUT I HAVE NEVER FOUND A CASE AS TO WHETHER SOMEBODY WAS THE SHOOTER OR NOT THE SHOOTER, WHETHER OR NOT THE POSSESSION OF FIREARMS IS AN UNDERSTANDING BY THE JUROR, BUT IN THIS INSTANCE WE HAVE A CLEAR-CUT FINDING BY THE JURY THAT HE WAS NOT THE TRIGGER PERSON, THAT HE DID NOT POSSESS A FIREARM DURING THE MURDER, AND THAT IT WAS A FELONY AND NOT PREMEDITATED MURDER.

DID THE JURY HAVE THE OBJECTION OF FINDING ONE OR THE OTHER OR COULD THEY HAVE FOUND BOTH?

THEY COULD HAVE FOUND BOTH.

IN OTHER WORDS THE INSTRUCTIONS ALLOWED THEM TO FIND BOTH?

YES.

AND COUNT TWO, THAT HE HAD COMMIT ADD ROBBERY AND HAD USED A -- COMMITTED A ROBBERY AND HAD USED A FIREARM IN THE COMMISSION OF THE ROBBERY, CORRECT?

YES.

SO WE HAVE MULTIPLE FINDINGS.

WHAT HAPPENED AND I GUESS IT IS TOTALLY FLABER GASING IT AND AMAZING TO ME IS THAT THE SAME TRIAL JUDGE WHO REQUESTED THAT THESE FINDINGS BE PART OF THE VERDICT FORM, THEN, PROCEEDS TO IGNORE THEM, IN HIS SENTENCING ORDER. BASICALLY SAYS I AM NOT GOING TO LISTEN TO THE VERDICT DULY RENDERED BY THIS JURY, AND I AM GOING TO FIND THAT HE WAS ACTUALLY THE TRIGGER PERSON.

WELL, NOW, AS WE LOOK -- BUT HE, ALSO, WENT THROUGH AN EDMUND TYSON ANALYSIS, TO GET TO THE END RESULT, AS WELL. WOULD YOU AGREE WITH THAT?

I WOULD AGREE THAT HE PARAPHRASED SOME LANGUAGE FROM CASES, BUT AS FAR AS POINTING TO ANY SPECIFIC ACTS BY MR. LEBRON THAT WOULD BRING HIM WITHIN INMAN-TYSON, I DON'T FOOL THAT HE DID THAT.

THE EVIDENCE, REALLY, LOOKED AT THAT, AND WE ALL STAND BACK FROM THE TRANSCRIPT AND LOOK AT THE EVIDENCE AND CERTAINLY IF THE JURY BELIEVED ALL OF THE EVIDENCE THAT WAS PRESENTED, THEY WOULD THOUGH -- THAT WOULD NOT HAVE BEEN THE VERDICT.

YOU AGREE WITH THAT.

CORRECT.

THERE WAS NO EVIDENCE THAT SOMEONE ELSE WAS INVOLVED OR SOMEONE ELSE ACTUALLY COMMITTED THE SHOOTING. YOU DO AGREE WITH THAT.

WE DO HAVE, THROUGH MR. LEBRON'S TAPED STATEMENT THAT HE GAVE, HIS DENIAL THAT HE MURDERED THE YOUNG MAN, SO THERE WAS SOME OTHER EVIDENCE THAT HE DIDN'T KILL THE MAN, HIS DENIAL.

SO THAT JURY FORM REALLY DID NOT PROVE THAT HE DID IT, JUST THAT THERE WAS NO EVIDENCE OF SOMEONE ELSE HAVING DONE THAT, BECAUSE THERE WAS NO EVIDENCE OF SOMEONE ELSE BEING ACTUALLY THERE AND PULLING THE TRIGGER. THAT IS MY UNDERSTANDING, AND PLEASE CORRECT ME IF I AM WRONG IN THAT LOOK.

MY INTERPRETATION WOULD BE THAT THE STATE DID NOT HAVE A FINDING, SIMPLY BEYOND A REASONABLE DOUBT, THAT HE KILLED THE MAN. THE OTHER IMPLICATION IS THAT ONE OF THE OTHER PEOPLE DID, IN THEIR MINDS. THAT IS THE ONLY OTHER IMPLICATION.

MAYBE THAT THEY DID NOT PROVE THAT HE DID. -- THAT HE HAD. DIDN'T SAY SOMEONE ELSE DID THOUGH.

IF HE WASN'T THE SHOOTER, AND THE MAN WAS SHOT ONE TIME, SOMEONE DID, IT AND IT WASN'T HIM, ACCORDING TO THAT JURY, SO YOU KNOW, THE PROBLEM WE HAVE, IN TERMS OF THE GOVERNMENT, AND I SEE I AM GETTING INTO MY REBUTTAL TIME, AND I AM SAVE THIS FOR REBUTTAL. THANK YOU.

THANK, MR. NORGARD. MS. RUSH.

MAY IT PLEASE THE COURT. MY NAME IS JUDY TAYLOR RUSH. I AM ASSISTANT ATTORNEY GENERAL, REPRESENTING THE STATE OF FLORIDA IN THIS CASE. THE FIRST ISSUE WE TALKED ABOUT, HERE, WAS THE DOUBLE JEOPARDY CLAIM THAT ABOUT LEBRON HAS MADE IN THIS CASE FORM THE STATE WOULD LIKE TO POINT OUT THAT ITS POSITION IS THAT THIS CLAIM IS PROCEDURALLY BARRED, BECAUSE THERE WAS NO OBJECTION MADE AT THE RELEVANT TIME, AND THERE WAS, ALSO, NO OBJECTION MADE TO THE MISTRIAL, ITSELF. WHAT HAPPENED WAS THE --

HOW WOULD YOU SUGGEST THAT THAT OBJECTION BE MADE? THE JUDGE MAKES -- I HAVE BEEN A TRIAL JUDGE FOR MANY YEARS, AND I HEARD ONE SAY HE WANTED AN ALLEN CHARGE AND I HEARD THE OTHER ONE SAY HE WANTED TO SUBSTITUTE A JUROR, AND I SAY, WELL, I AM GOING TO DECLARE A MISTRIAL, AND HOW WOULD AN OBJECTION BE MADE APPROPRIATELY? TO THAT.

YOUR HONOR, I DON'T THINK THAT THE RECORD IS THAT CUT AND DRIED, AS TO HOW THAT ACTUALLY TRANSPIRED, IN THE LOWER COURT IN THIS CASE. THE WAY I READ THE RECORD, THE NOTE CAME OUT FROM THE JURY, WHICH VERY CLEARLY AND FORCEFULLY SAID, WE CANNOT AND WILL NOT BE ABLE TO REACH A VERDICT. P WE CONTINUE TO BE -- WE CONTINUE TO BE DIVIDED FROM THE BEGINNING TO THE END. THEY HAD DELIBERATED 12 HOURS, APPROXIMATELY, ACCORDING TO WHAT THE RECORD REPORTS. THE JUDGE SAID, TO THE ATTORNEYS, I USUALLY GIVE AN ALLEN CHARGE IN THIS SITUATION, BUT I REALLY DON'T THINK IT WOULD HELP THIS TIME, AND I WILL TELL YOU WHY, AND HE SAYS ONE OF THE JURORS, IN ADDITION TO THIS NOTE, WHICH IS A VERY CLEAR INDICATION, TO ME, AND THE FACT THAT THEY HAVE DELIBERATED FOR A DAY AND-A-HALF OVER A THREE AND-A-HALF-DAY-TOTAL GUILT-PHASE PROCEEDING, HAVEN'T BEEN ABLE TO MOVE FROM BEGINNING TO END, NO ONE HAS CHANGED THEIR MINDS. IN ADDITION TO THAT, THIS JUROR CAME AND TALKED TO ME, AND HE

TOLD ME THAT THIS JURY FOREMAN HAS A STRONG BIAS AGAINST THE POLICE, AND I THINK THAT YOU KNOW, THIS -- I DON'T THINK AN ALLEN CHARGE IS GOING TO HELP, AND SO I AM NOT PLANNING TO GIVE ONE. AND WHAT DO YOU THINK. I MEAN HE ASKED FOR ANY COMMENTS. THE JUDGE DID, AT THAT POINT, FROM THE PEOPLE PRESENT, THE ATTORNEYS PRESENT, AND THE DEFENSE SAID, WELL, WE WOULD STILL LIKE FOR YOU TO GO AHEAD AND READ THE ALLEN CHARGE. THE PROSECUTOR SAID SOMETHING ALONG THE LINES OF A POSSIBILITY WOULD BE TO CONSIDER REPLACING ONE OF THE JURORS WITH AN ALTERNATE. IT IS MY RECOLLECTION THAT THE JUROR THAT THE PROSECUTOR TALKED ABOUT POSSIBLY REPLACING, HOWEVER, WAS THE JURY FOREMAN AND NOT THE ONE THAT HAD THIS COMMUNICATION. I COULD BE WRONG ON THAT, BUT THAT IS THE WAY I REMEMBER THE PROSECUTOR'S SUGGESTION. SO THE JUDGE LISTENS TO THOSE COMMENTS, AND THEN HE SAYS, WELL, I WILL TELL YOU WHAT. I WOULD LIKE TO BRING THE JURY BACK IN HERE AND ASK THEM WHETHER THEY THINK SOME ADDITIONAL INSTRUCTION WOULD HELP THEM AND ASK THEM WHETHER, IF THEY WERE GIVEN SOME MORE DELIBERATION TIME, IF THIS EVENING THEY MIGHT BE ABLE TO MAKE SOME MOVEMENT AND REACH A VERDICT, BUT I AM TELLING YOU THAT, IF THE JURY TELLS ME NO, THEN I AM GOING TO GO AHEAD AND DECLARE A MISTRIAL. NEITHER ONE OF THE ATTORNEYS OBJECTED TO THAT PROCEDURE BEING FOLLOWED, AND SO THAT IS WHAT THE JUDGE DID. HE BROUGHT THEM BACK OUT. HE ASKED THEM. COLLECTIVELY THE RECORD REPORTS THAT THE JURY SAID, NO, IT WOULDN'T HELP, AND ONE OF THE JURORS ADDED IS HOPELESS. AND AFTER THAT, THE JUDGE, THEN, ASKED EACH OF THE JURORS IF THAT WAS THEIR FEELINGS ON THE MATTER. EIGHT OF THEM SAID THAT IS NOT GOING TO HELP. IT WON'T MAKE ANY DIFFERENCE, AND FOUR OF THEM INDICATED NOT, AS I BELIEVE IT WAS SAID HERE EARLIER, THAT IT WOULD DO GOOD. THEY SAID THEY WEREN'T SURE.

I THINK THE POINT I AM MAKING IS, IN THIS SCENARIO, NORMALLY YOU HAVE SOMEBODY MAKING A MOTION FOR A MISTRIAL, AND THEN THE OTHER PARTY OBJECTING TO THAT, AND THE JUDGE MAKING A DECISION. AND MY QUESTION TO YOU, TO THE JUDGE, TO THE JUDGE AND THE LAWYERS AND THE COURTROOM, IS IT APPROPRIATE FOR THE DEFENSE ATTORNEY TO SAY I OBJECT TO THAT RULING, SNURNS.

ABSOLUTELY APPROPRIATE. IT IS NOT ONLY APPROPRIATE. HE HAS TO, IF HE WANTS TO PRESERVE THE ISSUE FOR APPEAL LATER. HE DIDN'T INDICATE TO THE JUDGE HA HE HAD AN OBJECTION WITH HIS PLAN, HIS PROPOSAL OF HOW TO DISPOSE OF THIS MATTER. HE CERTAINLY DIDN'T INDICATE THAT HIS OBJECTION EXTENDED TO NOT GRANT AGO MISTRIAL IN THESE CIRCUMSTANCES.

NORMALLY AN OBJECTION TO A RULING LIKE THAT MAY BE IN THE FORM OF AN APPEAL.

I THINK THE OBJECTION HAS TO BE MADE TO THE TRIAL COURT, TO GIVE THE JUDGE AN OPPORTUNITY TO BE AND PRIZED OF THE SPECIFIC BASIS FOR IT. IF THEY HAD SAID, IN THE TRIAL COURT, YOUR HONOR, WE OBJECT TO A MISTRIAL, HERE, WE DON'T THINK THERE IS ANY MANIFEST NECESSITY HERE, AND THE REASON WE DON'T THINK THAT IS BECAUSE WE THINK YOU SHOULD SUBSTITUTE A JUROR, AN ALTERNATE FOR ONE OF THE JURORS OR BECAUSE WE THINK YOU SHOULD READ THE ALLEN CHARGE, ANYWAY, EVEN THOUGH YOU MAYBE THINK IT WOULD DO ANY GOOD, EVEN THOUGH THEY HAVE INDICATED IT WOULDN'T DO ANY GOOD, BUT THEY NEVER GAVE ANY INDICATION THAT THEY DISAGREED WITH, EITHER, THE JUDGE'S PROPOSAL, WHICH CAME AFTER THE INITIAL COMMENTS, OR WITH THE DECLARATION OF THE MISTRIAL.

BUT THE JUDGE'S COMMENTS, AFTER HIS INITIAL CONVERSATION, THE DID DEFENSE COUNSEL SAID "WE WOULD STILL LIKE THE ALLEN CHARGE."

THAT WAS THE EARLY, BEFORE THE JUDGE PROPOSED TO GO AHEAD AND BRING THE JURY IN HERE AND LET ME ASK THEM. IN A SENSE, WHAT HE ASKED THEM WAS A PART OF AN ALLEN CHARGE. HE SAYS DO YOU THINK, IF I CAN GIVE YOU SOME FURTHER INSTRUCTIONS THAT IT WILL

MAKE A DIFFERENCE? DO YOU THINK IF YOU HAVE MORE TIME TO DELIBERATE, IT WILL MAKE A DIFFERENCE, AND THE ANSWER IS NO, SO IT WASN'T THE EXACT LANGUAGE OF AN ALLEN CHARGE, BUT IT WAS IN THE NATURE AFTER ALLEN CHARGE, WHAT HE TALKED TO THE JURY ABOUT. AND THE FACT THAT THERE WAS NO OBJECTION FROM THE DEFENSE, AFTER THE JUDGE MADE THE PROPOSAL OR AFTER THE JUDGE HAD THAT COMMUNICATION WITH THE JURY OR AT THE POINT WHERE THE JUDGE DECLARED THE MISTRIAL, WOULD BE A PROCEDURAL BAR TO BRICK BRINGING THIS ISSUE AT THIS TIME. AT LEAST THAT IS THE STATE'S POSITION ON IT, AND I BELIEVE THAT THE CASE LAW IS WITH US ON IT. I REALIZE THAT LEBRON SAYS THIS IS A MATTER OF FUNDAMENTAL ERROR. AN OBJECTION WASN'T NECESSARY, BUT I BELIEVE THAT THE JOHNSON CASE, WHICH IS THE ONE THAT HE RELIES ON FOR THAT PROPINGS IS DISTINGUISHABLE FOR THAT -- FOR THAT PROPOSITION IS DISTINGUISHABLE FROM THIS ONE. IN THAT YOU HAD THE DEFENDANT'S PLEA TO A CRIME. IN OTHER WORDS THE CHARGE HAD BEEN DISPOSED OF, AND THEN DOWN THE ROAD, THE JUDGE WANTED TO VACATE THAT JUDGMENT AND GO AHEAD AND TRY THE DEFENDANT, AND THIS COURT SAYS, WELL, NO, YOU CAN'T DO THAT. AN OBJECTION IS NOT REQUIRED THERE, BECAUSE THAT IS A FUNDAMENTAL ERROR. FOLLOWING JOHNSON AND LIPPMAN, THIS COURT CONSIDERED A SIMILAR SITUATION, WITH A LITTLE DIFFERENT TWIST ON IT. THERE HE HAD PLED TO THE CHARGES AND GOTTEN A SPECIFIC SENTENCE. SOME THINGS TRANSPIRED AND THE COURT CHANGED THE SENTENCE AND ENHANCED IT AND MADE IT MORE ONEROUS ON THE DEFENDANT, AND THIS COURT SAID, WELL, YOU CAN'T DO THAT. THAT IS A DOUBLE JEOPARDY CLAIM, AND IT IS A FUNDAMENTAL ERROR, BUT THE STATE WOULD SUBMIT THAT, UNLESS YOU HAVE A CASE WHERE THE CHARGE HAS BEEN DISPOSED OF OR A SENTENCE HAS BEEN ENHANCED, AS IT WAS IN LIPPMAN AFTER THE FACT, AFTER IT HAS BEEN RESOLVED AND DISPOSED OF, CONTEMPORANEOUS OBJECTION IS REQUIRED AND SO WOULD OBJECTION TO MISTRIAL, AND WE HAVE CASE LAW ON. THAT I CITED SOME OF THAT IN THE BRIEF, AND SO WE WOULD SAY IT IS PROCEDURALLY BARRED. WE WOULD, ALSO, HOWEVER, SAY, THAT UNDER THE MERITS, UNDER THE RICHARDSON VERSUS UNITED STATES CASE THAT IS CITED IN THE BRIEF, THAT JEOPARDY DOES NOT TERMINATE WHEN THE JURY IS DISCHARGED, BECAUSE THEY ARE UNABLE TO AGREE ON A VERDICT, AND DEFENSE COUNSEL SLOVIS CONCEDED, AT THE HEARING ON THIS MOTION IN THE TRIAL COURT, THAT THE FIRST JURY WAS, QUOTE, UNQUESTIONABLY A HUNG JURY. SO UNDER THE RICHARDSON CASE, THE TRIAL COURT HAD THE RIGHT TO TERMINATE THAT PROCEEDING AND TO RETRY THE DEFENDANT, AND IT WAS NOT A DOUBLE JEOPARDY VIOLATION TO DO SO. THIS COURT, ALSO, IN ROSE VERSUS DUGGAR, CONSIDERED A SITUATION WHERE THE CONCLUSION WAS REACHED THAT A JUDGMENT OF ACQUITTAL HAD BEEN IMPROPERLY DENIED IN A FIRST TRIAL HOWEVER, THE CASE WAS RETRIED, AND THE DEFENDANT WAS TOLD THAT IT WASN'T A VIOLATION OF DOUBLE JEOPARDY FOR THEM TO RETRY HIM, EVEN THOUGH HE WAS IMPROPERLY DENIED THE JUDGMENT OF ACQUITTAL, AND EVEN THOUGH HE WOULD HAVE BUT DID NOT RECEIVE A FAVORABLE DISPOSITION OF THE CHARGES IN THAT EARLIER PROCEEDING. IN THIS CASE, WE DON'T EVEN GET THAT FAR. I REALIZE THEY HAVE MADE CLAIMS THAT, BECAUSE THE JURORS HAD ASKED QUESTIONS IF LE BRAWN IS NOT -- IF LEBRON IS NOT GUILTY OF SOME OF THESE CHARGES, CAN THE CODEFENDANTS BE CHARGED WITH THE CRIMES, BUT THAT IS NOT EVEN APPROACHING THE DETERMINATION THAT WAS MADE BY THIS COURT IN ROSE, WHICH WAS THAT THE JUDGMENT OF ACQUITTAL WAS IMPROPERLY GRANTED THE FIRST TIME AND, STILL, DOUBLE JEOPARDY DID NOT BAR THE RETRIAL, SO IN THIS CASE WE BELIEVE THAT THE LAW IS CLEAR THAT DOUBLE JEOPARDY DOES NOT BAR THE RETRIAL. IF THERE ARE NO OTHER QUESTIONS ON DOUBLE JEOPARDY, I WOULD LIKE TO MOVE ON TO SOME OF THE OTHER ISSUES. I WOULD LIKE TO POINT OUT THAT THE SECOND ISSUE IS THE MOTION FOR A CONTINUANCE, BASED ON THE UNAVAILABILITY OF COUNSEL NORGARD. THE SITUATION THERE, MR. NORGARD'S MOTHER HAD APPARENTLY DECEASED, AND THERE HAD BEEN SOME CONTINUATION OF A -- ANOTHER TRIAL THAT HE WAS INVOLVED IN. AS A RESULT OF THAT, AND THAT HAD PUSHED THAT TRIAL FURTHER INTO THE YEAR THAN HAD ORIGINALLY BEEN ANTICIPATED BY THE PARTIES, AND AS A RESULT, THIS LEBRON'S TRIAL WAS READY TO START, BEFORE HE HAD COMPLETED THAT ONE.

WOULD YOU E¤