

>> ORDER IN THE COURT.  
SUPREME COURT OF FLORIDA IS NOW  
IN SESSION, CHIEF JUSTICE  
CHARLES KENNEDY PRESIDING.  
>> WELCOME TO THE SESSION OF THE  
FLORIDA SUPREME COURT, THE FIRST  
CASE ON TODAY'S DOCKET IS  
WILEME BAPTISTE VERSUS THE  
STATE.  
COUNSEL FOR THE PETITION.  
>> MAY IT PLEASE THE COURT, MY  
NAME IS SHANNON HEMMENDINGER ON  
BEHALF OF WILEME BAPTISTE.  
5 MINUTES FOR REBUTTAL PLEASE.  
THE TRIAL JUDGE HAS A  
RESPONSIBILITY TO MAKE SURE JURY  
VERDICTS ARE NOT THE PRODUCT OF  
UNDUE COALITION.  
A COERCED VERDICT IS  
ANTITHETICAL TO THE CONSTITUTION  
AND HOW THE ADJUDICATORY SYSTEM  
IS SUPPOSED TO OPERATE.  
THE QUESTION IN THIS CASE IS  
WHETHER TRIAL COUNSEL COULD  
WAIVE JURY COERCION BY AGREEING  
THE JURY SHOULD BE ORDERED TO  
FILL OUT NEW VERDICT FORMS  
FOLLOWING NOT ONLY THAT PAUL BUT  
MULTIPLE PRIOR INDICATIONS.  
THIS COURT SHOULD CONCLUDE WHERE  
THE TOTALITY OF CIRCUMSTANCES  
DEMONSTRATE A JURY WAS COERCED  
INTO REACHING A VERDICT  
FUNDAMENTAL ERROR HAS OCCURRED  
AND DEFENSE COUNSEL CANNOT WAIVE  
THIS ERROR.  
DEFENSE COUNSEL SHOULD NOT HAVE  
THE POWER TO WAIVE AND ACCUSED  
RIGHT TO A COERCED VERDICT OR  
JURY'S RIGHT TO BE FREE FROM  
COERCION.  
UNDER THE UNIQUE AND HIGHLY  
COERCIVE CIRCUMSTANCES OF THIS  
CASE THE ONLY OPTION FOR THE  
TRIAL JUDGE UPON LEARNING THE  
INITIAL VERDICT WAS NOT  
UNANIMOUS WAS TO DECLARE A  
MISTRIAL.  
THERE WAS NO OTHER LAWFUL COURSE  
OF ACTION FOR THE COURT TO TAKE  
GIVEN EVERYTHING THAT PRECEDED  
THE NON UNANIMOUS VERDICT.  
>> IS THAT YOUR POSITION THAT

THE PROVISION OF RULE 3.450 REGARDING PULLING THE JURY AND THE PROVISION THAT SAYS IF A JUROR DISTANCE THE COURT MUST DIRECT THE JURY BE SENT BACK FOR FURTHER CONSIDERATION IS UNLAWFUL?

>> NOT ARGUING THAT PROVISION IS UNLAWFUL BUT THE PROVISION, THAT WILL MUST BE IN CONJUNCTION WITH CASES PROHIBITING THE VERDICT.

IF WE DO NOT HAVE ALL PRIOR NOTES INDICATING DEADLOCK AND TWO PRIOR CHARGES IN THIS CASE THEN I WOULD CONCEDE RULE 3.460 GOVERNANCE BUT WHEN YOU HAVE A SITUATION LIKE WE HAVE HERE WITH REPEATED NOTES OF DEADLOCK AND MULTIPLE ALAN CHARGES AT THAT POINT THE LAW REQUIRES THE JUDGE TO DECLARE A MISTRIAL AND THAT WAS RECOGNIZED BY THE FIRST DCA WE CITED IN THE REPLY BRIEF.

IN THAT CASE THE JURY RECEIVED ONE ALAN CHARGE, REVEALING ONE OF THE JURORS DID NOT AGREE WITH THE VERDICT AND THE FIRST DCA FIGHTING TO PULL 3.450 NOTED THE ONLY OPTION FOR THE JUDGE WAS TO DECLARE A MISTRIAL.

>> THIS SITUATION OCCURRED IN MY COURT ROOM A NUMBER OF TIMES SO I TRY TO SAY I PRESIDE OVER A 2-WEEK LONG HOMICIDE CASE OR ROBBERY OR BURGLARY OR WHATEVER IN THE JURY DELIBERATES AND NOTES SAY THEY ARE DEADLOCKED AND I READ THE CHARGE AND THEY GO BACK AND RETIRE TO THE JURY ROOM AND DELIBERATE LONGER AND I GET A NOTE THAT THEY HAVE A VERDICT AND I BRING THEM OUT AND THE VERDICT IS PUBLISHED AND I ASKED THE CLERK TO HOLD THE JURY.

3, YES, NO, 5 YES, 6 YES.

AT THAT TIME, ONLY ONE AMATEUR, SO IT DEPENDS ON WHAT I SAY AS A JUDGE AT THAT MOMENT AS TO THE SECOND ALAN CHARGE OR NOT.

WHAT IF I DO WHAT WAS DONE IN NAIROBI?

WHAT WAS DONE IN THIS CASE, A JUDGE BASICALLY SAID THERE ISN'T

A UNANIMOUS VERDICT, JURY RETURNED TO THE JURY ROOM AND CONTINUED DELIBERATIONS.

THE SECOND ALAN CHARGE?

>> WHAT THE JUDGE DID IN THIS CASE -

>> WHAT I JUST DID

HYPOTHETICALLY, LADIES AND GENTLEMEN, THERE IS UNANIMOUS VERDICT, PLEASE RETURN TO THE JURY ROOM AND CONTINUE JOE LIBERATIONS AND CONSIDER A NEW VERDICT FORM.

DO YOU REGARD THAT TO BE A SECOND OUT?

>> I WOULD BECAUSE OF YOUR REQUEST TO THE JURY TO CONTINUE DELIBERATING BUT EVEN WITHOUT THE LANGUAGE, I THINK WE COULD COME TO THE CONCLUSION THAT THAT WOULD BE A REQUEST FOR CONTINUED DELIBERATIONS, THE FACTS ARE SLIGHTLY DIFFERENT AND NOT AS COWORKERS OF AS THE FACTS OF THIS CASE AT A MUCH CLOSER CALL BUT IF YOUR HONOR PRESIDED OVER A TRIAL AND A JURY SENT A NOTE THAT THEY WERE DEADLOCKED AND THEY REVEALED THEY WERE NOT UNANIMOUS THAT WOULD REQUIRE A MISTRIAL AT THAT POINT.

>> ALL THE JUDGE DID IN THIS CASE WAS SAY TO THE JURY IF YOU SEND THEM BACK AND UNANIMOUS VERDICT, FILL OUT THE FORM, BRING IT RIGHT OUT.

>> YOU LOOK AT THE LANGUAGE OF THE FINAL CHARGE AND THE CONTEXT OF EVERYTHING THAT TOOK PLACE PRIOR AND EVERYTHING WITH THE RESPECT THAT IT HAD.

EVERYTHING THAT TOOK PLACE, THEY REACH THE UNANIMOUS VERDICT. THE HOLDOUT JUROR, ONE OF THE NOTES INDICATED THE JUROR HIMSELF WAS WILLING TO STEP ASIDE, RENDERING A 5 PERSON VERDICT.

EACH TIME THE JURY TOLD THE COURT THEY CANNOT REACH A VERDICT, THEY TRY AGAIN BY ASKING THEM TO CONTINUE --

>> ASK YOU A QUESTION, A VERY APPROPRIATE AND IN SOME CASES

REVIEWED AS TO WHETHER IT WAS A COERCIVE VERDICT BUT I'M GOING TO ASK YOU DIDN'T COUNSEL REQUEST AND AGREE TO THE INSTRUCTIONS THAT WAS GIVEN THAT YOU ARE OBJECTING TO?

>> HE DID.

>> FROM THIS COURT, FUNDAMENTAL ERROR IS WAIVED THE DEFENSE COUNSEL REQUESTS INSTRUCTION OR AFFIRMATIVELY AGREES TO IMPROPER INSTRUCTION AND MY QUESTION IS WHY WOULD WE ON APPEAL CONDUCT THAT FUNDAMENTAL ERROR TO DETERMINE WHETHER IT IS COERCED WHEN THE FUNDAMENTAL ERROR ANALYSIS WAS WAIVED BY COUNSEL'S ACTIONS.

>> YOUR HONOR'S REFERENCE THE UNIVERSAL CASE, ALL OF THOSE CASES IN THE ANSWER BRIEF THAT I AM AWARE OF, NORMAL INSTRUCTIONAL ERROR OR NORMAL EVIDENTIARY AREA EVER, THEY DON'T INVOLVE THIS TYPE OF ERROR INVOLVING A COERCED VERDICT, IT IS SO PERVERSE TO THE ADJUDICATORY SYSTEM THAT WE CANNOT ALLOW THEM TO STAND REGARDLESS WHAT EVERYBODY GET ASKS IN THE TRIAL COURT.

>> ARE YOU QUOTING FOR DO YOU HAVE A SITE FOR THE PROPOSITION THAT THERE IS NO POSSIBILITY OF WAIVER IN THIS CONTEXT?

>> NOT FROM THIS COURT BUT THE FOURTH DCA'S DECISION IN RUBY WHICH THE ONLY DIFFERENCE BETWEEN RUBY IN THIS CASE ARE THE FACTS OF THIS CASE ARE MORE THAN THEY WERE IN RUBY BUT DEFENSE COUNSEL DID ASK FOR THE ERRONEOUS CONSTRUCTION THAT IT SHOULD BE GIVEN AND THE FOURTH DCA RECOGNIZED CONSTITUTIONAL ERROR OF THIS TYPE RESULTING IN A COERCED VERDICT CANNOT STAND REGARDLESS OF COUNSEL'S REQUEST FOR THE INSTRUCTION.

RUBY IS THE ONLY CASE I'M AWARE OF THAT HOLDS BUT THE FACT THAT WE DON'T HAVE ANY CASE ON THIS DEMONSTRATES TWO THINGS, THIS DOESN'T OCCUR VERY OFTEN AND

WHEN IT DOES TRIAL JUDGES KNOW  
THEY ARE SUPPOSED TO WHEN  
CONFRONTED WITH A SITUATION LIKE  
THIS DEADLOCKED JURY THAT HAS  
ALREADY BEEN GIVEN MULTIPLE ALAN  
CHARGES AND STILL -

>> THE OPPORTUNITY FOR OPINION  
IN FLORIDA, HOW YOU CONCLUDE  
THIS IS A RARE INSTANCE.

IT COULD BE ALL THE OTHER  
APPELLATE COURTS APPLIED THE  
RULE THAT FUNDAMENTAL ERROR IS  
WAIVED ON APPEAL WHEN IT IS  
REQUESTED BY THE DEFENSE COUNSEL  
AND AGREED TO BY DEFENSE  
COUNSEL.

THERE COULD BE THOUSANDS OF  
CASES WHERE THE SAME AFFECT  
HAPPEN BUT IT WAS JUST AFFIRMED.

>> IT COULD BE BUT WE HAVE RUBY

-

>> YOU AGREE THE FOURTH  
DISTRICT, DID NOT FOLLOW OUR  
PRECEDENT OR INVITED ERROR IN  
THIS CONTEXT.

>> I AGREE, I WOULD AGREE THAT  
RUBY STANDS FOR THE PROPOSITION  
THAT DEFENSE COUNSEL, THE ALAN  
CHARGE --

>> TO EXPLAIN WHY THE INVITED  
ERROR DOCUMENT DOES NOT APPLY IN  
THIS CONTEXT.

>> THEY LAY OUT THE ISSUES AND  
EXPLAIN WHY THOSE VERDICTS ARE  
SO ANTITHETICAL TO THE JUSTICE  
SYSTEM AND AT THE END OF THAT  
THEY CONCLUDE THAT BECAUSE OF  
THOSE REASONS, DEFENSE COUNSEL  
CANNOT BE ALLOWED TO LEAVE THEM,  
IT HOLDS THE VERDICT, THE  
DEFENSE COUNSEL ASKS FOR IT, THE  
RULE WOULD BE DEFENSE COUNSEL  
CANNOT ASK A JUDGE TO COERCE THE  
JURY TO REACH THE VERDICT.

>> I WHY NOT HAVE THE COURAGE OF  
YOUR CONVICTIONS ON THAT AND  
REMOVE THE TOTALITY OF THE  
CIRCUMSTANCES QUALIFIER FROM  
YOUR ARGUMENT BECAUSE WHEN YOU  
STARTED, YOUR ARGUMENT WAS ON  
THESE VERY NARROW FACTS, ON  
THESE TOTAL CIRCUMSTANCES OF  
THIS COERCIVE FACT PATTERN YOU  
SHOULD HOLD THERE CANNOT BE

WAIVER BUT AS TODAY'S ARGUMENT UNFOLDED IT APPEARS YOU ARE PROPOSING A MUCH BRIGHTER AND MORE AGGRESSIVE LINE WHICH IS NO WAIVER UNDER THE CIRCUMSTANCES? WHY NOT JETTISON THE TOTALITY OF THE CIRCUMSTANCES ARGUMENT?

>> YOU HAVE TO ANALYZE THE TOTALITY OF THE CIRCUMSTANCES TO DETERMINE WHETHER THERE HAS BEEN A FORCED VERDICT AND AS IT DEMONSTRATES --

>> LET ME TEST YOU, WHAT IS THE ROLE OF THIS COURT, WHEN IS THERE A TOTALITY OF CIRCUMSTANCES THAT RENDERS REPRESENTATIVE PARTIES INTELLIGENT AND KNOWING WAIVER ON THE RECORD, TELL ME WHEN INTO GET THAT BUSINESS SUCCESSFULLY WHAT ARE WE SUPPOSED TO DO?

>> THIS COURT IS SUPPOSED TO. IN THIS CASE THE ISSUE IS CAN DEFENSE COUNSEL WAIVE THIS? WE HAVE A RECORD DEMONSTRATING THE JURY WAS COERCED INTO REACHING A VERDICT AT A THIRD DCA SETTLED THE QUESTION BELOW. THE SOUL QUESTION IS CAN DEFENSE COUNSEL WAIVE THAT AND THE ANSWER TO THE QUESTION MUST BE NO AND THIS IS BECAUSE THE INTEGRITY OF THE JUSTICE SYSTEM, OUR WHOLE ADJUDICATORY SYSTEM DEMANDS THAT A JURY BE ABLE TO REACH A VERDICT WITHOUT UNDUE PRESSURE OR COERCION FROM THE COURT.

THERE ARE COERCION INFECTS THE INTEGRITY OF THE FACT-FINDING PROCESS.

>> YOU WOULD CONCEDE THAT THIS WOULD BE A BETTER CASE FOR YOU IF COUNSEL HADN'T WAIVED, RIGHT?

>> ABSOLUTELY.

>> IF THAT IS TRUE, THE LOGICAL QUESTION BEFORE US IS WHAT IMPACT DOES THAT WAIVER HAVE? HOW WOULD YOUR CASE BE BETTER? CAN YOU EXPLAIN FOR US WHAT IMPACT WE ARE SUPPOSED TO GIVE TO A WAIVER BY TO REPRESENTATIVE PARTY.

>> COUNSEL OBJECTED FOLLOWING,

MOVED FOR A MISTRIAL, AND IN HIS DISCRETION TO DECLARE A MISTRIAL IN THIS CASE, HE WAS REQUIRED TO DECLARE A MISTRIAL REGARDLESS OF COUNSEL'S FAILURE TO ASK FOR ONE.

THE FACT THAT COUNSEL FAILED TO ASK FOR ONE SHOULD NOT PRECLUDE THIS COURT FROM ISSUING AN OPINION IN SHANNON HEMMENDINGER ON -- WILEME BAPTISTE'S FAVOR.

I DISSENT CONCERNED ABOUT INVITED HER AND WE ARE NOT ASKING TO RECEIVE FROM THE INVITED ERROR DOCTRINE BUT WHAT WE ARE ASKING THE COURT TO RECOGNIZE IS THIS PARTICULAR CLASS OF ERROR, A COERCED VERDICT BE SO EGREGIOUS AND CANNOT STAND NO MATTER WHAT ANYBODY CAN ASK FOR IN THE PARTY THIS GOES BEYOND COUNSEL AND TO THE JOB OF THE TRIAL JUDGE TO PREVENT THIS FROM HAPPENING.

I AGREE IT WOULD HAVE BEEN BETTER FOR COUNSEL TO OBJECT, COUNSEL SHOULD ABSOLUTELY BE ENCOURAGED TO OBJECT, THAT DOES NOT CHANGE THE ANALYSIS HERE BECAUSE DEFENSE COUNSEL CANNOT ASK A JUDGE TO DO WHAT THEY DID IN THIS CASE.

THE TRIAL JUDGE HAS AN ALLEGATION TO PREVENT ALL OF THIS FROM HAPPENING AND BECAUSE THE JUDGE FAILED TO DO THIS THIS COURT MUST CONCLUDE DESPITE THE REQUEST FOR THIS, THIS MANSLAUGHTER VERDICT WAS FUNDAMENTALLY ERRONEOUS AND I NOTE THE COURT'S OPINION IN THOMAS EVEN STATED JURY DELIBERATION --

>> I AM CURIOUS AS TO WHY A MISTRIAL MOTION IF ONE WAS MADE WOULD EVER BE PROPERLY GRANTED WHEN THE INFORMATION IF IT WAS EVIDENTIARY AREA, WHAT HAPPENED WHAT HAPPENED BECAUSE THE PARTY WHO WOULD MOVE FOR THE MISTRIAL INVITED IT TO HAPPEN.

IN OTHER WORDS, IF YOU WERE A DEFENSE LAWYER QUESTIONING YOUR CLIENT AND YOU ASK THEM HAVE YOU

EVER BEEN CONVICTED OF A CRIME,  
HOW MANY AND WHAT WERE THE  
NATURE OF THOSE CRIMES, EXACTLY  
THE SAME HE WAS CHARGED WITH SO  
EASIER FOR BURGLARY, HE FACES  
FELONY BURGLARY CHARGES.

COULD COUNSEL MOVE FOR MISTRIAL  
AND SAY IT IS FUNDAMENTAL, THERE  
IS NO WAY I COULD HAVE A FAIR  
TRIAL FOR MY CLIENT NOW BECAUSE  
THE LAW IS CLEAR THAT THE JURY  
CAN'T KNOW THE NATURE OF PRIOR  
CRIMES AND EVEN MORE PREJUDICIAL  
-- I AM STRUGGLING WITH THE  
NOTION THAT YOU CAN EVEN HAVE A  
PROPER MISTRIAL MOTION FOR  
SOMETHING YOU HAVE DONE AND  
INVITED KNOWINGLY AND  
INTELLIGENTLY.

>> THE MISTRIAL NOTION SHOWS UP  
IN THE REQUEST FOR THE FINAL  
CHARGE.

HAD THIS GONE AWAY, INTO  
REBUTTAL TIME, I WILL ANSWER  
YOUR HONOR'S QUESTION, HAD THIS  
GONE THE WAY IT WAS SUPPOSED TO,  
UPON THIS FINAL POLL ONE OF TWO  
THINGS THAT HAVE HAPPENED,  
DEFENSE COUNSEL SHOULD HAVE SAID  
I FOR MISTRIAL BECAUSE THIS JURY  
IS INCAPABLE OF REACHING A  
UNANIMOUS VERDICT OR THE JUDGE  
UPON HEARING DEFENSE COUNSEL'S  
REQUEST FOR CONTINUED IT  
LIBERATION SHOULD HAVE SAID NO,  
I CANNOT ALLOW THIS JURY TO  
CONTINUE DELIBERATING OF CANNOT  
ALLOW THIS JURY TO FILL OUT NEW  
VERDICT FORMS, BACK TO YOUR  
EARLIER QUESTION IT DOESN'T  
MATTER THAT THE JUDGE DID NOT  
GIVE THE FORMAL ALAN CHARGE OR  
ORDER THEM TO CONTINUE  
DELIBERATING.

WE KNOW THAT IS WHAT THEY DID  
BECAUSE AT LEAST FIVE OF THEM  
CHANGED THEIR VERDICT.  
THE ONLY THING THE JUDGE SHOULD  
HAVE SAID WAS MISTRIAL, PLEASE  
GO HOME.

>> I UNDERSTAND YOUR POSITION  
BECAUSE WHATEVER WAS IN THIS  
CASE IS INSTRUCTIVE TO TRIAL  
JUDGES WHO ARE FACED WITH THIS

AND DON'T KNOW WHAT TO DO ONCE  
YOU GET THAT ONE JUROR SAYING  
NO.

I AM CLEAR, YOUR POSITION IS  
ONCE A JUROR SAYS NO, IT IS NOT  
MY VERDICT.

THE ONLY OPTION THE JUDGE HAS AT  
THAT POINT IS TO DECLARE A  
MISTRIAL.

>> THE JUDGE HAS GIVEN ALAN  
CHARGE, APPEARS TO THE JUDGE  
THAT NO OTHER COURSE OF ACTION  
IS POSSIBLE, AT THAT POINT IT  
WOULD BE MANIFESTLY NECESSARY  
FOR A JUDGE TO DECLARE MISTRIAL.

>> WHAT WOULD HAVE PREVIOUSLY  
GIVEN ALAN CHARGE?

>> AFTER GIVING AND ALAN CHARGE  
AND HAVING A FAILED POLL THE  
LIKELIHOOD BECOMES ANY FURTHER  
DISCUSSION IS INHERENTLY  
COERCIVE AND WILL RESULT IN A  
COERCED VERDICT AND BECAUSE THAT  
HAPPENED IN THIS CASE THE ONLY  
OPTION FOR THE COURT UPON  
HEARING THAT AND EVERYTHING THAT  
PRECEDED IT, ALL THESE NOTES ARE  
DEADLOCKED.

SHOULD HAVE TOLD THIS COURT  
THERE WAS NOTHING HE COULD HAVE  
INSTRUCTED THEM THAT HELPS THEM  
REACH A UNANIMOUS DECISION.

IT WAS MANIFESTLY NECESSARY FOR  
THE JUDGE TO DECLARE MISTRIAL AT  
THAT POINT AND HIS FAILURE TO DO  
SO RESULTED IN AN

UNCONSTITUTIONALLY COERCED  
VERDICT AND I LIKE TO RESERVE  
THE REST OF MY TIME FOR  
REBUTTAL.

>> AS I AM THINKING HOW THIS  
WOULD HAVE PLAYED OUT IF THE  
JUDGE SAID OVER DEFENSE  
COUNSEL'S OBJECTION,  
INDIVIDUALLY PERSONALLY DECLARED  
A MISTRIAL, WHEN DEFENSE WAS  
ARGUING, I'M ABOUT TO GET A NOT  
GUILTY, WOULDN'T THE ARGUMENT  
HAVE BEEN ON APPEAL, THIS IS  
DOUBLE JEOPARDY.

THE JUDGE -- I HAD A RIGHT TO  
WAIVE THIS AND A JUDGE CAN'T  
DECLARE A MISTRIAL OVER MY  
OBJECTION WITHOUT -- THE STATE

CAN'T TRY ME AGAIN.  
WOULD THAT HAVE BEEN THE  
ARGUMENT?

>> I DON'T THINK ANYBODY COULD  
SUCCESSFULLY CLAIM A MISTRIAL  
WAS MANIFESTLY NECESSARY UNDER  
THE CIRCUMSTANCES.

I DON'T THINK IT WOULD PRECLUDE  
RETRIAL OR DOUBLE JEOPARDY WOULD  
PRECLUDE RETRIAL BECAUSE IT WAS  
OBVIOUS NO FURTHER INSTRUCTION  
WOULD HAVE RESULTED IN UNANIMOUS  
UNCOERCED VERDICT.

I DON'T THINK -- THE DEFENDANT  
COULD HAVE TRIED BUT WOULDN'T  
HAVE BEEN A SUCCESSFUL ARGUMENT  
IN THE TRIAL COURT ON RETRIAL OR  
ON APPEAL.

THANK YOU, YOUR HONORS.

>> I WILL GIVE YOU A TOTAL OF 3  
MINUTES FOR REBUTTAL.  
COUNSEL FOR THE STATE.

>> THANK YOU, MAY IT PLEASE THE  
COURT.

THERE PASSABLE  
THE VERDICT, THE FIRST IS THAT  
THERE IS NO ERROR IN CONTEXT OF  
THE NEUTRAL AND BALANCED CHARGE  
FOLLOWING FAILED POLL DID NOT  
CREATE A SERIOUS RISK OF  
COERCION.

THE SECOND IS TO HOLD THE  
PETITIONER'S COUNSEL INVITED ANY  
ERROR BY SUGGESTING AND TWICE  
AGREEING TO THE CHALLENGED  
CHARGE AND CONSISTENT TO 170  
YEARS OF PRECEDENT INCLUDING  
PRESIDENT FROM THIS COURT, TO  
MAKE THAT TACTICAL DECISION AND  
THE THIRD, IT WAS NOT  
FUNDAMENTAL.

THEY ALL LEAD TO THE SAME PLACE.

WILEME BAPTISTE'S CONVICTION  
SHOULD NOT BE DISTURBED.

THE CHARGE HERE WAS NOT  
COERCIVE, THE LEGAL TEST WHICH  
COMES FROM PROMISE, BOTH CASES  
ASKED WHETHER THE FACTS AND  
CIRCUMSTANCES SURROUNDING AN  
INDIVIDUAL CASE, A SERIOUS RISK  
OF COERCION.

THAT IS MY STANDARD, NOT ASKING  
IF THERE IS ANY RISK, A SERIOUS  
RISK, HIGH STANDARD, WHETHER THE

JURY WAS IN FACT COERCED.  
NOT YET TO BE IN THE JURY ROOM,  
AND SOMETHING IMPROPER HAPPENED.  
IT REFLECTS THE FACT THAT TRIAL  
COURTS ARE CLOSER TO THE FACT ON  
THESE ISSUES FOR COERCION, IT IS  
UNLIKELY THE VERDICT WAS  
COERCED, GRANTING RELIEF.  
WE DON'T THINK WILEME BAPTISTE  
CAN MAKE THE HIGH SHOWING OF A  
SERIOUS RISK OF COERCION AND LET  
ME EXPLAIN WHY IN THE FIRST PART  
OF THAT EXPLANATION COMES FROM  
THE FACT THAT THIS JURY WAS TOLD  
IT WAS PERMISSIBLE TO REACH A  
HUNG JURY TO BE GRANTED.  
IT MAKES MUCH OF THE FACT,  
REPEATEDLY DEADLOCKED BUT THE  
JUDGE PROPERLY RESPONDED TO THAT  
DEADLOCK BY MEETING AND ALAN  
CHARGE WHICH THE COURT HAS  
BLESSED AND IN THE ALAN CHARGE  
THE JUDGE SAID, I AM QUOTING  
FROM PAGE 22 OF THE TRANSCRIPT,  
SO WE CANNOT REACH A VERDICT,  
THEN RETURNED TO THE COURTROOM  
AND DECLARE THE CASE A MISTRIAL  
AND BE DISCHARGED WITH SINCERE  
APPRECIATION FOR YOUR SERVICES.  
THIS IS THE JURY --  
>> EVIDENCE THAT ALL THE OTHER  
STANDARD INSTRUCTIONS WERE GIVEN  
AND WE SHOULD PRESUME THE JURY  
HEARD AND UNDERSTOOD AND  
FOLLOWED THOSE FROM THE  
BEGINNING OF THE TRIAL WHAT JURY  
DELIBERATION WOULD ENTAIL?  
>> WE HAVE VERY LITTLE DOUBT  
THIS IS A JURY WHO PROPERLY  
UNDERSTOOD THEIR ROLE AND  
PROPERLY UNDERSTOOD A MISTRIAL  
WAS A PERMISSIBLE OUTCOME, THEN  
THE JURY WAS DISCHARGED  
FOLLOWING THE ALAN CHARGE AND  
DELIVERY FOR 2 HOURS, THAT  
DELIBERATION INDICATES THE  
JURY'S FUNCTIONAL RESPONDED TO  
THE ALAN CHARGE BY DELIVERY.  
THE JURY THEN ANNOUNCES A  
VERDICT BUT ONE JUROR DISSENTS  
FROM THE POLE AND THE PROPER  
FRAME OF ANALYSIS IS TO ASK IF  
THE JUDGE'S RESPONSE TO THE  
FIELD POLL WHICH DISABUSED THE

JURY OF INSTRUCTION GIVEN 2 HOURS BEFORE A DEADLOCK WAS PERMISSIBLE AND WE DON'T THINK IT DID.

IN OUR VIEW THE JUDGE'S RESPONSE TO THE FAILED POLL GAVE THE JURY THE CHANCE TO CLARIFY A FAILURE WHILE ALLOWING THE POSSIBILITY OF A MISTRIAL IF THE JURY REMAINS DEADLOCKED.

LET ME EXPLAIN WHY.

I DIDN'T HEAR A LOT OF DISCUSSION THIS MORNING THE FIRST POINT IS THE LANGUAGE OF THE CHARGE DID NOT DEMAND A VERDICT.

THE JUDGE SAID, THIS IS PAGE 2296 OF THE TRANSCRIPT, PLEASE FILL OUT THE VERDICT FORM. IF YOU HAVE A UNANIMOUS VERDICT PLEASE FILL OUT THE VERDICT ACCORDINGLY.

IF YOU DO NOT HAVE A UNANIMOUS VERDICT PLEASE KNOCK ON THE DOOR AND LET THE BAILIFF KNOW.

WE WILL BRING YOU OUT BACK HERE. TWO FEATURES OF THAT CHARGE COMMUNICATED TO THE JURY THAT A VERDICT WAS NOT REQUIRED.

FIRST AND MOST OBVIOUSLY THE JUDGE TOLD THE JURY THAT IF THEY DIDN'T HAVE A VERDICT THEY SHOULD KNOCK ON THE DOOR AND COME OUT FOR FURTHER INSTRUCTIONS, THE SECOND THING IS THE JUDGE USED CONDITIONAL LANGUAGE.

HE SAYS IF YOU HAVE A UNANIMOUS VERDICT WHICH IMPLIES THE POSSIBILITY THAT THE JURY DOES NOT.

COUNSEL FOR WILEME BAPTISTE SITES COGNITIVE AND SAYS THAT WOULD HAVE REQUIRED A MISTRIAL BUT I DON'T THINK THAT REQUIRES AS MUCH BECAUSE THE PROBLEM IN COGSAND AND IS FOLLOWING THE FAILED POLL THE JUDGE NEVER SET THE JURY BACK.

IF YOU LOOK AT THE END OF THE DECISION, WHAT IT SAID IS THE JUROR HAVING DISSENTED FROM THE VERDICT AND THEIR HAVING BEEN NO SUBSEQUENT UNANIMOUS VERDICT A

MISTRAL SHOULD HAVE BEEN  
DECLARED.

THE ERROR WAS NOT THAT THE JURY  
WAS SENT BACK WITH NEW VERDICT  
FORMS BUT THE JURY WAS NOT SENT  
BACK AT ALL UNLESS THERE WAS NO  
UNANIMOUS VERDICT SO I THINK ON  
THIS RECORD, THE WHAT THE JUDGE  
DID FOLLOWING THE FAILED POLL  
WAS ENTIRELY PROPER.

HE SAID WE KNOW THIS JURY  
ANNOUNCED A VERDICT.

I WANT TO GIVE THEM AN  
OPPORTUNITY TO EXPLAIN WHY THE  
POLL NONETHELESS FAILED.

WILEME BAPTISTE'S COUNSEL  
INSINUATES THERE SHOULD HAVE  
BEEN NO FURTHER DISCUSSION AT  
THAT POINT BECAUSE IN HER VIEW  
THE ONLY THING THE JURY  
COMMUNICATED WAS THEY COULD NOT  
POSSIBLY HAVE AGREED BUT WE DO  
NOT THINK THAT FOLLOWS FROM THE  
FAILED POLL.

>> I APOLOGIZE FOR INTERRUPTING  
YOU BUT CAN I JUST ASK YOU FROM  
BIG PICTURE PERSPECTIVE IN TERMS  
OF WHAT VALUE THE COURT COULD  
ADD TO THESE ISSUES, OBVIOUSLY  
IF THE COURT TAKES THE PATH OF  
SOLIDIFYING THE ORIGINAL AND  
APPLYING IT IN CRIMINAL CASES  
SAYING INVITED ERROR IS  
INELIGIBLE FOR GOING THROUGH THE  
FUNDAMENTAL ERROR ANALYSIS IT IS  
OBVIOUS THAT WOULD BE A VALUABLE  
PRECEDENT.

IT TRANSCENDS ISSUES IN THIS  
CASE, THE TYPE OF CLAIM OR  
WHATEVER.

IF THE COURT GOES DOWN THE PATH  
OF RULING IN YOUR FAVOR ON THE  
SUBSTANTIVE ISSUE PRESENTED HERE  
WHAT IS -- SEEMS LIKE THERE ARE  
SO MANY VARIABLES IN YOUR  
GETTING INTO THE PRECISE WORDING  
OF WHAT THE JUDGE SAID AND WHAT  
HAPPENED WITH THE JURY BEFORE, I  
WONDER WHAT KIND OF PRECEDENTIAL  
VALUE THIS WOULD HAVE 4 OTHER  
CASES.

IF THE COURT DOES GO DOWN THE  
MERITS PATH, WHAT IS THE LARGER  
PRINCIPLE THAT FROM THE STATE'S

PERSPECTIVE YOU WOULD LOOK TO HAVE ESTABLISHED?

>> THAT IS A GREAT QUESTION. LET ME GIVE A FEW PIECES THE PRECEDENT COULD ESTABLISH. THE FIRST IS WE THINK IT WOULD BE USEFUL TO GET AN OPINION CLARIFYING THE LEGAL STANDARD, NOTING THE HIGH STANDARD THAT NEEDS TO OCCUR BEFORE A JURY VERDICT IS REVERSED, THE SECOND THING IS THE COURTS ARE IN THE BRIEFS, THERE IS THE SPLIT GOING ON BETWEEN DISTRICT COURTS, WHETHER THERE IS A PER SE WILL THAT YOU COULD NEVER HAVE A SECOND ALAN CHARGE AND WE THINK THAT IS THE WRONG ANALYSIS. I THINK THE PETITIONER AGREES THAT IS THE WRONG ANALYSIS AND A DECISION FROM THIS COURT CLARIFYING THAT RULE WOULD ALSO BE HELPFUL.

I TO GET TO THE FIRST PREMISE OF YOUR QUESTION, WE ALSO AGREE THAT IT WOULD BE VERY USEFUL TO GET AN INVITED ERROR PRECEDENT BUT AS THE COURT RECENTLY IN THE DORTCH OPINION, THE COURT COULD SAY SOMETHING ABOUT THE MERITS STANDARD AND MOVE ON AND APPLY INVITED ERROR OR VICE VERSA AND WE WOULD WELCOME THE COURT'S CLARIFICATION OF THE STANDARD IN A COERCED VERDICT CASE AND WOULD BE HELPFUL TO THE COURT TO APPLY THAT STANDARD BECAUSE IT WOULD GIVE LOWER COURTS A CHANCE TO SEE HOW THE STANDARD WORKS IN ACTION.

>> CAN I ASK ABOUT FUNDAMENTAL ERROR?

IF YOU THINK ABOUT WHAT THE FUNDAMENTAL ERROR DOCTRINES ARE, I UNDERSTAND THAT IF WE ARE GOING TO DRAW SOME LINES THERE'S COMMON SENSE TO IT, DISTINCTION BETWEEN SORT OF COUNSEL PASSIVELY ALLOWING IT TO HAPPEN VERSUS COUNSEL ASKING FOR SOMETHING THAT IS ARGUABLY ERRONEOUS TO HAPPEN AND COMPLAINING ABOUT THAT. IF YOU THINK ABOUT WHAT THE

FUNDAMENTAL ERROR DOCTRINE DOES, SYSTEMICALLY, COUNSEL ON THE OTHER SIDE, SOME OF WHAT SHE WAS GETTING AT, WHY SHOULD THERE BE A DIFFERENCE BETWEEN PASSIVELY ALLOWING ERROR TO OCCUR VERSUS BEING WHY THE ERROR OCCURS.

>> FUNDAMENTAL ERROR IS GETTING AT THE IDEA IT'S NOT ABOUT THE DEFENDANT'S RIGHTS AND THERE ARE CERTAIN OVERALL SYSTEMIC VALUES WE CARE ENOUGH ABOUT THAT WE ARE WILLING TO ENTERTAIN REGARDLESS OF THE LAWYER NOT DOING HIS OR HER JOB AT THE TRIAL LEVEL.

>> TWO THINGS I WOULD SAY ON THAT, THE FIRST IS INHERENT IN THE INVITED ERROR DOCTRINE IS THE IDEA THAT THERE HAS BEEN SOME AFFIRMATIVE-ACTION AND THAT LINE DOES MATTER AND IT MATTERS BECAUSE WE TEND TO THINK THAT COUNSEL IS DOING A GOOD JOB DEFENDING THEIR CLIENTS AND ACTING EFFECTIVELY AND WHEN COUNSEL IS ASKING FOR A CHARGE WE THINK IT IS VERY UNLIKELY THAT CHARGE IS GOING TO IMPUGN THE JUDICIAL SYSTEM IN A SYSTEMIC LEVEL AND THE SECOND POINT, THIS IS THE POINT MADE BY THIS COURT REPEATEDLY INCLUDING IN WERE FULL, IT IS NOT ADMINISTRABLE IF COUNSEL CAN INTRODUCE ERRORS INTO PROCEEDINGS AND GET IT REVERSED NONETHELESS.

THIS WOULD BE A VERY GOOD EXAMPLE OF THAT.

IF COUNSEL COULD INTRODUCE THE ERA, COUNSEL WOULD KNOW ANY VERDICT WOULD BE REVERSED THERE IS NO INCENTIVE TO KEEP ASKING BECAUSE MAYBE HE GETS AN ACQUITTAL AND IF HE DOESN'T HE KNOWS THE VERDICT IS GOING TO BE REVERSED ON APPEAL.

THE COURT SAID, QUOTE, FUNDAMENTAL ERROR IS WAIVED INTO THE INVITED ERROR DOCTRINE BECAUSE THE PARTY MAY NOT MAKE OR INVITE ERROR AT TRIAL AND TAKE ADVANTAGE OF THE ERROR ON APPEAL.

WE WOULD SET UP A JUDICIAL SYSTEM OF CONGRESS -- OF COUNSEL COULD INTRODUCE ERRORS IN PROCEEDINGS AND NONETHELESS BENEFIT FROM THAT.

ATTORNEY INCENTIVES ON ITS HEAD AND ALLOW LAWYERS TO BENEFIT FROM THEIR OWN ERRORS WHICH WOULD INCENTIVIZE TRYING TO GET TRIAL JUDGES TO MAKE THOSE ERRORS.

>> WITH THIS BE A BETTER CASE FOR YOU IF THE COURT HAD COLIC WE'D WILEME BAPTISTE ON THE SUBJECT THAT IS AT ISSUE HERE?

>>> I THINK THERE WOULD BE NO DOUBT THE CASE WOULD BE BETTER FOR US.

THIS COURT HAS REPEATEDLY SAID EVEN WHEN IT DOESN'T REQUIRE PERSONAL COLLOQUY IS THAT TRIAL JUDGES ALWAYS HAVE DISCRETION TO HAVE A QUALITY AND IF YOU DO YOU ELIMINATE ANY CLAIM WHATSOEVER THAT THE WAIVER WAS NOT KNOWN AND INTENTIONAL.

I DON'T THINK IT REALLY MATTERS. IF YOU LOOK AT THE TRANSCRIPT IN THIS CASE WHAT YOU SEE IS COUNSEL IS ASKED HOW THEY SHOULD PROCEED.

COUNSEL CONSULTS WITH WILEME BAPTISTE AND PROPOSES A CHARGE THAT IS BEING CHALLENGED.

I DON'T THINK THERE'S ANY ARGUMENT THIS IS NOT A KNOWING AND INTENTIONAL WAIVER AND THAT LEAVES PETITIONER'S LEGAL CLAIM THAT THIS WAS A REQUIRED PERSONAL COLLOQUY AND I DON'T THINK THE COURT SHOULD ENDORSE THAT TYPE OF REASONING AS ANY JURISDICTION HAS EVER DONE SO AND THAT VIEW IS INCONSISTENT WITH THIS COURT'S PRECEDENT SO THIS COURT HAS ACCEPTED COUNSEL WAIVERS IN CASES LIKE THIS IN THE BRIAN CASE.

THE DEFENDANT ARGUED IT WAS ERROR TO YOU AND ALAN CHARGE UNDER THE CIRCUMSTANCES BUT NONETHELESS IN BRIAN THE COURT ASSUMED, PAGE 484, CHOICES OF TACTICS ARE FOR THE TRIAL

LAWYER, HE BECOMES BOUND BY WHAT HE SELECTS.

NO REASON BRIAN SHOULD'VE BEEN BOUND BY HIS LAWYER'S DECISION BUT WILEME BAPTISTE SHOULD NOT BE BOUND BY THE SAME DECISION. THAT WAS A LITTLE BIT OF A LONG WAY OF ANSWERING YOUR QUESTION BUT AT THE END OF THE DAY I DON'T SEE ANY WAY FOR THE COURT TO CONCLUDE THIS IS ONE OF THE VERY FEW PERSONAL WAIVER ONLY RIGHTS THAT WOULD HAVE REQUIRED WILEME BAPTISTE'S ASCENT.

AS WE CITE IN OUR BRIEF, EVERY COURT CONSIDERED THE QUESTION HAS COME OUT IN THE OPPOSITE. THE ONLY CASE THAT WILEME BAPTISTE SITES IS RUBY BUT I DON'T THINK RUBY GETS CLOSE TO DISCUSSING THE ISSUE, YOU CAN SEARCH UPSIDE DOWN AND BACKWARDS AT NOT FIND ANY DISCUSSION OF ANY INVITED ERROR OR PERSONAL COLLOQUY.

THE PROBLEM IN RUBY, PAGE 635 OF THE OPINION, RUBY TREATED IT AS A FAILURE TO OBJECT CASE.

THE RUBY COURT KNOWS THE DEFENSE LAWYER REQUESTED THE CHARGE BUT RUBY SAYS WE SEE NO REASON THE DEFENDANT SHOULD NOT BE BOUND BY FAILURE TO OBJECT.

THIS GOES TO YOUR QUESTION, RUBY DOES NOT CONSIDER AT ALL THE INVITED ERROR PRECEDENT.

UPHOLDING THE CONVICTIONS HERE, THERE IS NO COERCION ON THESE FACTS.

THE JUDGE GAVE A BALANCE CHARGE THAT ALLOW THE JURY TO CLARIFY ITS VERDICT AND IT WAS APPARENT THAT THE JURY WAS ENGAGING IN GOOD FAITH DELIBERATIONS AND TWO HOURS FOLLOWING THE ALAN CHARGE AND ANNOUNCED A VERDICT WHICH IS INCONSISTENT WITH THE DEADLOCKED JURY BUT IF THE DEADLOCKED DOESN'T WANT TO GO DOWN THAT ROUTE ANY ERROR WAS INVITED, WE DON'T THINK THEY SHOULD CARVE OUT A CONSTITUTIONAL THAT REQUIRES A COLLOQUY BEFORE THE PERSONAL WAIVER OF THIS TYPE.

AND WILEME BAPTISTE DID NOT ARGUE FOR ALONE.

IF THERE ARE NO FURTHER QUESTIONS I WILL YIELD THE BALANCE OF MY TIME.

>> REBUTTAL ARGUMENT.

>> THERE CAN BE NO QUESTION THE VERDICT WAS COERCED.

THREE TIMES, FOUR TIMES THE JURY TOLD THE COURT IT COULD NOT REACH A VERDICT WHICH IS YOUR NUMBER 5 WHO INITIALLY AGREED HE WOULD GO WITH SECOND-DEGREE MURDER WAS TAKEN OUT OF THAT ISOLATED JURY ROOM AND BROUGHT BACK TO THE SUPERVISED COURTROOM HE TOLD THE COURT THIS IS NOT MY VERDICT.

BY SENDING THE JURY BACK IN TO FILL ON NEW VERDICT FORMS WHICH I KNOW COUNSEL FOR THE STATE SAID WAS A FAIR AND BALANCED CHARGE, NOTHING THE COURT WAS GOING TO LEARN FROM HAVING THE JURY FILL OUT A NEW VERDICT FORM THAT IT HADN'T ALREADY JUST LEARNED, IT ALREADY KNEW THAT THIS JURY WAS NOT UNANIMOUS ANGELA NUMBER 5 DID NOT AGREE WITH THE POLE.

THE FACT THE JURY DELIBERATED FOR TWO HOURS AFTER THE ALAN CHARGE IS TAKEN OUT OF CONTEXT, CONSIDER THE FILE MANSLAUGHTER VERDICT WAS RENDERED JUST 10 MINUTES AFTER THE INSTRUCTION TO FILL OUR NEW VERDICT FORMS.

THE RECORD CLEARLY DEMONSTRATES, THE THIRD DCA AGREED BELOW THAT THIS FINAL INSTRUCTION WAS THE CAUSE OF THE MANSLAUGHTER VERDICT.

AS TO THE STATE'S POINT ABOUT INCENTIVIZING DEFENSE COUNSEL TO INJECT ERROR INTO THE TRIAL AND TAKE ADVANTAGE OF THAT ERROR ON APPEAL, THIS COMES BACK TO THE JOB OF THE TRIAL JUDGE.

HAVE A TRIAL JUDGE DONE WHAT THE LAW REQUIRED AND DECLARED A MISTRIAL FOLLOWING THIS FAILED BOWL THERE WOULD BE NO ERROR TO TAKE ADVANTAGE OF ON APPEAL. THIS RULE DOES NOT ENCOURAGE

GAMESMANSHIP, IT ENCOURAGES  
TRIAL JUDGES TO CONTINUE TO  
PROTECT THE JURY IN THE SYSTEM  
FROM COERCION.

THIS CASE GOES BEYOND AND ALAN  
CHARGE AND BEYOND MY CLIENT.

THIS CASE IS SYSTEMIC.

AFFECT OUR JURIES, IT AFFECTS  
OUR SYSTEM AS A WHOLE.

WE CANNOT ALLOW JURIES TO BE  
COERCED INTO REACHING A VERDICT.

IT IS THE SOLE OBLIGATION OF THE  
TRIAL JUDGE TO KEEP THAT FROM  
HAPPENING AND BECAUSE THE JUDGE

FAILED TO DO THAT IN THIS CASE  
MY CLIENT'S MANSLAUGHTER  
CONVICTION WAS

UNCONSTITUTIONALLY COERCED.

THE JURY WAS INVIOABLE RIGHT TO  
REMAIN FREE FROM COERCION WAS  
VIOLATED.

WE ASK THIS COURT QUASHED THE  
DECISION OF THE THIRD DCA,  
DEFENSE COUNSEL CANNOT ASK THE  
COURT TO COERCE A JURY INTO  
REACHING A VERDICT AND RULED  
THAT MY CLIENT BE GIVEN A NEW  
TRIAL.

THANK YOU.

>> THANK YOU.

WE THANK YOU BOTH FOR YOUR  
ARGUMENTS IN THIS CASE TODAY.