>> THE COURT WILL PREPARE TO
TAKE UP THE SECOND CASE ON
TODAY'S DOCKET.
>> THE COURT WILL PROCEED TO
HEAR THE CASE OF DAVIS VERSUS
THE STATE.
COUNSEL FOR THE PETITIONER IS
RECOGNIZED.
>> GOOD MORNING.
RACHEL ROEBUCK, THIS IS ABOUT
JOSHUA DAVIS, A MAN DEFENDANT
DEFENSE EXPERTS AGREE SUFFERED
A PSYCHOTIC BREAK FROM REALITY
BECAUSE HIS BRAIN TO GENUINELY
BELIEVE THAT HE HAD TO SHOOT
THREE PEOPLE IN ORDER TO SAVE
HIS DAUGHTER AT LIFE.
FINALLY, A TIMELY, LEGALLY
SUFFICIENT VERSION, IS DENIED.
THIS IS THE JUDGE'S ERROR, THE
STATE WAS AN ACCOMPLICE TO.
THE BLAME IN THIS CASE LIES
WITH THEM.
THE MOST IMPORTANT THING YOU
CAN DO TODAY IS DISABUSE THIS
COURT OF THE STATE'S
SANDBAGGING YOUR BACK POCKET
NARRATIVE BECAUSE THE IDEA THAT
YOU WOULD RETROACTIVELY PUNISH
DAVIS RESTS ON YOU BUY INTO
THAT NARRATIVE AND IT IS A
FALSE NARRATIVE.
WHAT THE DEFENSE DID IN THIS
CASE.
>> SORRY TO INTERRUPT.
CAN WE JUMP TO THE ISSUE THAT
IS INVOLVED HERE.
I KNOW YOU DISAGREE WITH THIS
BUT IF YOU ASSUME THAT OUR
COURT HAS NOT ADDRESSED THIS
ISSUE.
I UNDERSTAND WE HAVE THE CASES
YOU RELY ON THAT OBJECTIVELY ON
THE ONE HAND THEY ISSUED THE
JUDGMENTS THEY DID.
ON THE OTHER HAND 0 ANALYSIS, 0
DISCUSSION, 0 THOUGHT GIVEN TO
THIS SPECIFIC ISSUE THAT IS IN
THE CASE NOW.
IF WE VIEW THIS AS SOMETHING WE
NEED TO LOOK AT FRESH, HOW CAN
WE JUSTIFY ADOPTING -- WITHOUT
GETTING INTO WHETHER THERE WAS

HARMLESS ERROR IN THIS CASE,
AND HARMFUL ERROR.
AND THE RECORD OPINION, IF YOU
ASSUME YOU'RE LOOKING AT IT
FRESH, TELL US WHAT THE BEST
ARGUMENT WOULD BE FOR WHY
NOTWITHSTANDING THOSE OTHER
EXAMPLES WE WOULD ADOPT THE
REVERSAL.
>> THERE'S FIRST INDICATION IS
TO DISCUSS THE DIFFICULTIES
WHICH RISE TO THE POINT, THE
DEFENDANT IDENTIFY ONCE THE
TRIAL ONCE THE TRIAL HAS BEEN
CONDUCTED ANY SORT OF BIAS THAT
MANIFESTS.
THE CASE LAW SAYS I'M NOT
ALLOWED TO DO THAT BY
REFERENCING, SAY, FOR EXAMPLE,
INSTANCES WHERE THE ATTORNEY
FOR ME OR THE DEFENDANT HAS
ANIMOSITY, I'M NOT ALLOWED TO
DO IT BY MENTIONING EVEN A
PATTERN OF ADVERSE RULINGS IN
MORE FAVORABLE STATE RULINGS.
THAT IS MENDOZA.
MY REACTION IS IT IS ALMOST
IMPOSSIBLE FOR ME TO PROVE ONCE
A TRIAL HAS GONE ON WHETHER OR
NOT ACTUAL BIAS ACCORDING TO
CASE LAW, ACCORDING TO FLORIDA
CASE LAW, IS IMPOSSIBLE FOR ME
TO MEET THAT KIND OF BURDEN.
YOU ARE NOT TALKING ABOUT THIS
CASE SPECIFICALLY BUT I WOULD
BE REMISS, I FIRE BANDIT MISTER
DAVIS FOR ONE MOMENT.
IN THIS CASE IF THIS COURT IS
DECIDING WHETHER TO CLARIFY LAW
OR CREATE NEW LAW IT IS
ABSOLUTELY UNFAIR ON THE FACTS
AND IDEAS OF FUNDAMENTAL
FAIRNESS THAT YOU RETROACTIVELY
PUNISH HIM FOR WHAT DIDN'T
EXIST AT THE TIME.
>> IT IS NOT A MATTER OF
PUNISHING.
WHAT I SAID WAS IF WE WERE TO
SAY WE NEED TO ENGAGE IN A
HARMLESS ERROR ANALYSIS THEN
OBVIOUSLY WE WOULD HAVE TO SEE
WHAT THE SPECIFIC ALLEGED BIAS
WAS AND HOW IT MAY HAVE
AFFECTED WHAT HAPPENED HERE AND

ALL THAT.
BUT THERE ARE TWO EXAMPLES
WHERE THE BIAS, THE ALLEGED
BIAS COULD SOMEHOW GO TO SOME
BIAS -- POTENTIALLY CONTINUING
ISSUES, THERE ARE SOME EXAMPLES
GIVEN WHERE THE ALLEGED BIAS
RELATES TO THINGS THAT JUST
KIND OF OBJECTIVELY GO AWAY AND
BECOME IRRELEVANT.
IT WOULDN'T REALLY REQUIRE ANY
INQUIRY INTO DECISIONS THAT THE
JUDGE MADE OR DIDN'T MAKE
THROUGHOUT THE TRIAL SO I
APPRECIATE YOUR ANSWER TO THE
QUESTION AND DON'T WANT TO
INTERRUPT YOU FURTHER.
>> DID I ANSWER YOU?
>> GO AHEAD.
>> I WANT TO MAKE SURE I
DISABUSE THE COURT OF THE
SANDBAG ISSUE.
WHAT MISTER DAVIS ASKED TRIAL
ATTORNEYS HAD TO DO BEFORE THIS
TRIAL STARTED WAS CONVINCED THE
STATE EITHER TO OFFER HIM A
LIKELY AGREE TO LET THE TRIAL
PROCEED WITHOUT THE DEATH
PENALTY ON THE TABLE.
THE STATE WAIVED THE DEATH
PENALTY A WEEK BEFORE TRIAL IN
OCTOBER OF 2016 AND WHEN THEY
DO THAT THEY DO IT
CONDITIONALLY AND THE
SIGNIFICANCE OF THAT IS THIS.
THEY SAY WE ARE NOT TRYING THE
NOTICE AND WE ARE KEEPING IN
OUR BACK POCKET THE POSSIBILITY
OF YOU CAUSING ANY FURTHER
DELAY BEYOND THIS WEEK THAT WE
ARE GOING TO PUT DEATH PENALTY
BACK ON THE TABLE.
THAT TELLS YOU TWO THINGS.
ONE, MISTER DAVIS COULD NOT
HAVE POSSIBLY FILED A WRIT
BEYOND THAT POINT.
THEY WILL KILL HIM IF HE TRIES.
2, IT TELLS YOU SIGNIFICANT
INFORMATION ABOUT THE KINDS OF
PROSECUTORS MISTER DAVIS'S
ATTORNEYS HAVE BEEN DEALING
WITH.
THESE PROSECUTORS WOULD LET THE
DECISION OF WHETHER TO KILL A

MAN RESTS ON WHETHER WE GO TO
THE FIRST OR SECOND WEEK OF
OCTOBER.
THESE ARE PROSECUTORS THAT ARE
WORTHY OF FEAR AND WHEN YOU
CONSIDER THAT IT MAKES PERFECT
SENSE WHY MISTER DAVIS'S TEAM
MAY HAVE SAID WE PUSHED THIS
WRIT ISSUE AS FAR AS WE
POSSIBLY CAN WITHOUT RISKING
YOUR LIFE.
ONE MORE NOTE, YOUR QUESTION
BROUGHT IT UP, WE DO BELIEVE
THIS IS STRUCTURAL AND THE
REASON WE BELIEVE IT ASIDE FROM
FLORIDA PRECEDENT REQUIRES PER
SE IS WHEN YOU HAVE A JURY
TRIAL, ESPECIALLY ONE LIKE THIS
THAT IS THREE WEEKS LONG AND A
SUBSTANTIAL AMOUNT OF
DISCRETION AND THE ERROR ITSELF
IS WHO PRESIDED OVER THE TRIAL,
YOU HAVE TO IMAGINE A WHOLE NEW
TRIAL WITH A JUDGE WHOSE
IMPARTIALITY WAS NOT REASONABLY
QUESTIONED AND ONCE YOU DO
THAT, ANY TRIAL ATTORNEY WILL
TELL YOU THAT IF YOU HAVE TWO
DIFFERENT JUDGES YOUR CHARGES
COULD BE THE SAME, YOUR
DEFENDANT COULD BE THE SAME,
YOUR ATTORNEY COULD BE THE
SAME, YOU MAY HAVE
UNRECOGNIZABLE --
>> TO BE CLEAR, TO AGREE ON
THAT STRUCTURAL POINT WE WOULD
HAVE TO THINK THAT ALL
JURISPRUDENCE COMPLETELY MISSES
THE BOAT.
>> NO, BECAUSE THAT ALSO --
>> THEY ARE WORKING AT THE SAME
TYPE OF QUESTION.
THEY DON'T THINK IT IS
STRUCTURAL WHICH DOESN'T GO TO
THE ISSUE OF HOW HARD IT SHOULD
OR SHOULDN'T BE TO MEET THE
HARMLESS ERROR STANDARD
OBVIOUSLY.
WHAT IS -- WHAT IS WRONG ABOUT
THE FEDERAL APPROACH?
>> I DON'T KNOW THAT THERE IS
ANYTHING WRONG WITH IT.
THE SIGNIFICANT DIFFERENCE
BETWEEN US AND THE FENCE IS WE

HAVE A DIFFERENT HARMLESS ERROR
TEST.
I DON'T BELIEVE YOU HAVE TO GO
SO FAR AS TO SAY EVERY SINGLE
TIME THIS TYPE OF ERROR IS
GOING TO CAUSE HARM.
YOU CAN JUST SAY IT IS SIMPLY
INCOMPATIBLE WITH HOW YOU
ANALYZE HARM.
WE ANALYZE HARM DIFFERENTLY.
I DON'T KNOW THAT IT IS
NECESSARILY -- I AM GOING TO
TURN DIGITALLY NOW.
WE BELIEVE THIS IS STRUCTURAL
BUT IF THIS IS A SQUARE PEG
AROUND WHOLE SITUATION, WE HAVE
A TEST IN THIS STATE ABOUT HOW
WE ASSESS HARM, WHETHER IT IS
TRIAL HARM OR SOMETHING THAT
OCCURS PRIOR TO TRIAL.
IT REQUIRES THE STATE TO PROVE
BEYOND ALL REASONABLE DOUBT
THAT THE VERDICT IS ABSOLUTELY
UNTAINTED AND THEY CANNOT PASS
THAT TEST BY ANY STRETCH OF THE
IMAGINATION IN THIS CASE.
AGAIN, WHAT YOU HAVE TO DO IS
IMAGINE A SECOND TRIAL,
JACOBSON TRIAL.
WHAT IF HE STAYED ON THE CASE
AND RECUSED HIMSELF OR YOU
CONVINCED BEYOND A REASONABLE
DOUBT THAT WE WOULD HAVE HAD
THE SAME JURY, YOU SHOULDN'T
BE.
ALLOW THE STATE TO DISCUSS THE
VOLUNTARY STRAWMAN AT 1272.
BACK ON THE JACOBSON RULING,
SPECIFICALLY GRANTING THE
REQUEST TO INDIVIDUALS ON
MENTAL ILLNESS AND INSANITY, AT
7:40-7:43.
ARE YOU CONVINCED THAT THE
EXPERTS WOULD HAVE TESTIFIED
EXACTLY THE SAME WAY, YOU
SHOULDN'T BE.
EXPERT TESTIMONY WAS ALLOWED ON
THE EFFECTS OF MARIJUANA
WITHOUT ESTABLISHING WHETHER
DAVIS WAS INTOXICATED, THAT IS
AT 2900-3010.
HE ALLOWS STATE EXPERTS TO TALK
ABOUT HOW JOSHUA DAVIS PLAYED
FIRST-PERSON SHOOTER VIDEO

GAMES, 2994-3005.
HE ALLOWED HEARSAY TESTIMONY
ABOUT IF TLE BLOOD DRAW EVEN
THOUGH THERE WAS NO WITNESS
FROM FT ELLIOTT THE TRIAL,
3264, OR THE JURY HAD BEEN
EXPOSED TO THE SAME
INSTRUCTIONS AND THE SAME
ARGUMENTS.
ARE YOU CONVINCED BEYOND
REASONABLE DOUBT OF THAT?
YOU SHOULDN'T BE.
JUDGE HARVEST DENIED THE
VOLUNTARY DRUG INSTRUCTION THAT
ALLOWED THE STATE TO READ
VERBATIM AND NOT ONLY DO THEY
READ THE INSTRUCTION VERBATIM
BUT SUPPLANT DAVIS'S NAME AND
MARIJUANA AS IF IT IS A JURY
INSTRUCTION THEY WERE ENTITLED
TO AND ARGUE TO THE JURY THAT
HE IS ARGUING A ILLEGAL
DEFENSE, THAT IT IS INVALID FOR
HIM TO ARGUE, WHICH IS NOT,
THAT THE MARIJUANA CONSUMPTION
NEGATED HIS INSANITY, THAT IS
AT 3823-2836.
HE SCOLDS THE SMOKE AND MIRRORS
COMMENT WHICH IS EGREGIOUS
PROSECUTORIAL MISCONDUCT BUT
DOESN'T READ THE MOTION FOR
MISTRIAL.
HARV AGAIN --
>> EVERYTHING YOU ARE GOING
THROUGH I AM SURE YOU KNOW ARE
ALL ISSUES THAT COULD BE RAISED
>> THEY WERE.
>> SO WERE ALL THOSE ISSUES
APPEALED?
THIS.
>> ISSUE TWO BELOW WAS
EVERYTHING I JUST WENT THROUGH
FROM THE JURY INSTRUCTIONS TO
THE CLOSING ARGUMENTS.
YES.
>> WELL, AND WHAT WAS THE RESULT
OF THAT?
>> WE LOST.
BUT LET ME SAYING SOMETHING
ABOUT THAT.
I DON'T THINK THAT THE
DIFFERENCES-- WHEN THE ERROR
ITSELF IS WHO PRESIDED.
I DO NOT THINK THAT DiGUILIO

OR ANY OTHER LAW IN QUESTION
HERE TODAY EXCEPT ARGUABLY MAYBE
THE DCA TEST REQUIRES THAT AFTER
THAT ERROR I HAVE TO PROVE
ADDITIONAL ERROR.
I JUST HAVE TO PROVE THAT THERE
WAS AN IMPACT.
AND DiGUILIO ITSELF SAYS THE
IMPACT COULD BE SUBTLE.
SO ALL THESE DECISIONS THAT I
JUST WENT THROUGH, THAT'S NOT TO
SAY THAT THEY WERE REVERSIBLE
ERROR IN AND OF THEMSELVES, AND
I DON'T HAVE TO PROVE THAT FOR
THE STATE TO FAIL DIGUILIO.
I HAVE TO PROVE THAT THERE WAS
SOME REASONABLE BELIEF THAT THE
JURY WOULD HAVE BEEN IMPACTED BY
DIFFERENCES THAT ANOTHER JUDGE
COULD HAVE MADE FOR
DEFENSE-FRIENDLY RULINGS, AND
THAT COULD HAVE HAD AN EFFECT ON
WEIGHED ON THE JURY DURING THE
DELIBERATIONS.
IF THE COURT HAS NO OTHER
QUESTIONS AND THEY'RE
COMFORTABLE, I WOULD RATHER
RESERVE MORE TIME THAN I HAD
ORIGINALLY PLANNED ON FOR
REBUTTAL.
THANK YOU.
>> ALL RIGHT.
COUNSEL?
>> MR. CHIEF JUSTICE AND MAY IT
PLEASE THE COURT, SECTION 924.33
SAYS THAT NO CRIMINAL JUDGMENT
SHALL BE REVERSED UNLESS THE
DEFENDANT IS PREJUDICED BY SOME
SORT OF TRIAL COURT ERROR.
AND SO IN DiGUILIO AND
JOHNSON, THIS COURT EXPLAINED
THAT AN ERROR WILL BE STRUCTURAL
ONLY IF IT IS EITHER ALWAYS
HARMFUL IN EVERY POSSIBLE
ITERATION OF THE ERROR OR IF
EVERY SUCH ITERATION OF THAT
ERROR WILL BE UNKNOWABLE IN
TERMS OF ITS HARM.
YOU HAVE TO SPECULATE AS TO THE
HARM.
AND SO IN OTHER WORDS, YOUR
STANDARD FOR STRUCTURAL ERRORS
LOOKS A LOT LIKE THE SALERNO
TEST FOR FACIAL CHALLENGES TO A

STATUTE.
IF WE CAN POINT TO A SINGLE
HYPOTHETICAL INSTANCE IN WHICH
YOU WOULD LOOK AT A RULE 2.330
ERROR AND BE SATISFIED BEYOND A
REASONABLE DOUBT THAT IT IS
HARMLESS, THEN THIS ERROR AS A
CLASS CANNOT BE HARMLESS.
>> BUT SO, COUNSEL, YOU AGREE
THAT JURISPRUDENCE ALLOWS FOR
PER SE ERRORS, RIGHT?
>> YES.
>> SO WHY LIKE IN THIS CASE WHEN
YOU FIND A JUDGE SITTING ON A
CASE THAT SHOULDN'T BE BECAUSE
OF A PERCEIVED POSSIBLE CONFLICT
OR PREJUDICE, WHY ISN'T THAT A
PROBLEM THAT IS, GOES TO THE
VERY HEART OF GIVING A FAIR
TRIAL TO A DEFENDANT?
>> BECAUSE, JUSTICE POLSTON, NOT
ALL VIOLATIONS OF FLORIDA'S
PROPHYLACTIC DISQUALIFICATION
RULE WILL RISE TO THE LEVEL OF
ACTUAL PREJUDICE AND ACTUALLY
IMPLICATE THE FAIR TRIAL RIGHTS
OF A DEFENDANT.
NOW THE FEDERAL RULE, AND WE
DON'T QUIBBLE WITH THIS, IS IF
MR. DAVIS HAD ALLEGED AND HAD
SHOWN ACTUAL BIAS OR WHAT THE
U.S. SUPREME COURT HAS REFERRED
TO AS THE PROBABILITY OF ACTUAL
BIAS, THEN THAT ERROR WE CONCEDE
WOULD BE STRUCTURAL.
BUT RULE 2 330 VIOLATIONS DON'T
OVERLAP.
>> WE HAVE A LOT OF THINGS IN
OUR RULES THAT DEAL WITH NOT
JUST ACTUAL PREJUDICE OR ACTUAL
VIOLATIONS, BUT THE APPEARANCE
OF THINGS.
I MEAN, IT'S IMPORTANT IN OUR
JUDICIAL SYSTEM TO HAVE THE
EQUAL SCALES OF JUSTICE, RIGHT?
SO THAT YOU HAVE A PERCEPTION
NOT JUST ACTUAL FAIRNESS, BUT A
PERCEPTION OF FAIRNESS SO THAT
THE PUBLIC TRUST WILL BE IN OUR
JUDICIARY.
AND IT SEEMS LIKE IF WE HAVE
SOMEONE WHO HAS A BONA FIDE
ASSERTION THAT THEY BELIEVE THIS
JUDGE IS PREJUDICED IN SOME WAY

OR HAS A CONFLICT IN SOME WAY,
ISN'T IT THE BETTER RULE OR THE
CORRECT RULE THAT IT'S A PER SE
ERROR SO THAT PERCEPTION OF
JUSTICE IN OUR SYSTEM IS GOING
TO BE CARRIED OUT IN A BALANCED
SORT OF WAY?
>> SO, JUSTICE POLSTON, I'D LIKE
TO ANSWER YOU, FIRST, WITH A
HYPOTHETICAL THAT I THINK
ILLUSTRATES WHY THERE WILL BE
SOME 2.330 VIOLATIONS THAT NO
ONE COULD FAIRLY SAY IMPACTED
THE RESULT AND THAT THE PUBLIC
WOULD NOT THINK IMPACTED THE
RESULT.
SO IMAGINE THAT THERE WAS A
BORDERLINE BUT LEGALLY
SUFFICIENT CLAIM FOR
DISQUALIFICATION.
IT'S DENIED BY THE JUDGE, BUT IT
DOES NOT RISE TO LEVEL OF ACTUAL
BIAS.
THE JUDGE THEN PRESIDES OVER A
VERY SHORT, SAY A ONE-DAY, TRIAL
WITH OVERWHELMING EVIDENCE WHERE
THERE ARE VERY FEW RULINGS, BUT
THEY ALL GO IN THE DEFENDANT'S
FAVOR.
AT SENTENCING THE DEFENSE ASKS
FOR, SAY, A DOWNWARD DEPARTURE,
AND THE JUDGE SAYS, YES, I'M
GOING TO GIVE YOU THAT
DEPARTURE.
NO ONE COULD CLAIM THAT
ALLEGATION OF BIAS, THOUGH THE
JUDGE SHOULD HAVE RECUSED, HAD
ANY ROLE IN THE OUTCOME.
AT THAT POINT WE THINK THERE ARE
A COUPLE OF DIFFERENT AVENUES
DEFENDANTS CAN TRAVEL THROUGH.
THE FIRST, OF COURSE, IS
AVAILABILITY FOR PETITIONS OF
PROHIBITION.
SO IF PRETRIAL YOU BELIEVE THAT
THERE IS EVEN A RISK THAT THE
JUDGE WILL BE BIASED AGAINST
YOU, YOU CAN SIMPLY SEEK A WRIT
OF PROHIBITION AND GET THE JUDGE
OFF OF THE CASE IN THAT WAY.
THERE ARE A COUPLE OF ADVANTAGES
TO THAT.
THE FIRST IS THAT IT SAVES THE
NEED FOR COSTLY RETRIALS.

AND WE KNOW THIS CASE, FOR
INSTANCE, IS A GREAT EXAMPLE OF
THAT.
A THREE WEEK HOMICIDE TRIAL
COULD HAVE BEEN PREVENTED IF
ANYTIME IN THE LEAD-UP TO THOSE
15 MONTHS BEFORE TRIAL MR. DAVIS
HAD SIMPLY REQUESTED THAT THE
DISTRICT COURT ISSUE A WRIT OF
PROHIBITION.
IT ALSO MEANS THAT IF YOU SEEK
PROHIBITION, YOU'RE PREVENTING
ANY SORT OF DAMAGE TO PUBLIC
PERCEPTIONS OF A FAIR
JUDICIARY--
>> WELL, IT DOES SEEM LIKE IT
SHOULD BE INCUMBENT UPON A
DEFENDANT TO SEEK A WRIT OF
PROHIBITION TIMELY OR YOU WAIVE
IT, BUT THAT'S NOT THE CURRENT
STATE OF THE LAW AS IT SEEMS TO
ME, THAT YOU CAN HAVE A-- YOU
CAN SEEK A WRIT OF PROHIBITION
OR WAIT UNTIL THE END OF THE
FINAL JUDGMENT.
MAYBE THE LAW SHOULD BE CHANGED
BY RULE.
BUT IT SEEMS LIKE THAT'S THE LAW
OF THE MOMENT, IS IT NOT?
>> SO THAT IS THE LAW OF THE
MOMENT, JUSTICE POLSTON.
THE REASON THAT I RAISED THE
AVAILABILITY OF PROHIBITION IS
BECAUSE IT GIVES PRIVATE
LITIGANTS THE OPPORTUNITY TO
VINDICATE THE KIND OF SOCIETAL
INTERESTS THAT YOU'RE REFERRING
TO.
AND SO IF A LITIGANT ACTUALLY
BELIEVES THAT EITHER THERE'S
GOING TO BE THE APPEARANCE--
>> LET ME ASK YOU, IN THIS CASE
WAS THAT NOT PRACTICALLY
AVAILABLE FOR THE REASONS THAT
PETITIONER'S COUNSEL INDICATED?
>> SO I THINK MY FRIEND MAY BE
OVERSTATING THE CASE A LITTLE
BIT BECAUSE OF THE LARGE GAP IN
TIME BETWEEN THE RECUSAL RULING
AND WHEN THE TRIAL ACTUALLY
HAPPENS.
I BELIEVE SOMETHING LIKE 15
MONTHS.
AND SO AT ANY POINT DURING THAT

SPAN THEY CAN SEEK A PETITION
FOR PROHIBITION.
BUT, JUSTICE LAWSON, I THINK THE
BROADER POINT IS THE MORE
IMPORTANT ONE.
SETTING ASIDE CASE-SPECIFIC
CONSIDERATIONS BECAUSE EVERY
CASE WILL BE DIFFERENT, THERE IS
NOTHING THAT PREVENTS A DEFENSE
ATTORNEY OR PROSECUTOR FROM
SEEKING PROHIBITION IF THEY
ACTUALLY BELIEVE THAT THEIR
RIGHTS WILL BE PREJUDICED AT
TRIAL.
NOW, THE SECOND ONE--
>> LET ME ASK YOU ANOTHER
QUESTION, AND THAT IS WOULD YOU
AGREE THAT UNDER THE FLORIDA
HARMLESS ERROR STANDARD THAT WE
HAVE, THE KIND OF APPELLATE
ANALYSIS THAT YOU INDICATED
REALLY ISN'T POSSIBLE LIKE IT
WOULD BE UNDER THE FEDERAL
HARMLESS ERROR STANDARD, THE
THREE-PART STANDARD?
>> I DON'T AGREE, JUSTICE
LAWSON.
AND TAKING MY HYPOTHETICAL TO
JUSTICE POLSTON AS AN EXAMPLE,
THERE WOULD BE NO RULINGS IN
THAT CASE WHERE EVEN THE SPECTER
OF BIAS POSSIBLY COULD HAVE
INFECTED THE RESULT.
EVERY RULING GOES IN THE
DEFENDANT'S FAVOR.
HE GETS THE SENTENCE HE WANTS.
EVERYTHING ELSE IS UP TO THE
JURY BASED ON THE EVIDENCE--
>> I HAVEN'T SEEN MANY OF THOSE
CASES, SO LET'S TALK ABOUT THE
MAJORITY OF CASES.
AND THEN, AND THEN SO MOST CASES
WHERE THERE ARE RULINGS BOTH
WAYS OR SAY THE RULINGS ARE ALL
IN FAVOR OF THE STATE.
MAYBE THEY WERE PROPERLY IN
FAVOR OF THE STATE, WHO KNOWS?
BUT IN MOST CASES WITH THE
HARMLESS ERROR TEST THAT WE
HAVE, WOULD IT BE POSSIBLE TO BE
THAT DISCRIMINATING?
>> SO, JUSTICE LAWSON, FOR ONE
THING I'M NOT HERE TODAY TO TELL
YOU THAT WE'RE GOING TO PREVAIL

ON HARMLESS ERROR REVIEW IN
EVERY ONE OF THESE 2.330
VIOLATIONS.
THE BURDEN OF PROOF IS GOING TO
DRASTICALLY FAVOR APPELLANTS
BECAUSE WE WOULD HAVE TO SHOW
BEYOND A REASONABLE DOUBT THAT
THE ERROR WAS HARMLESS.
THERE WILL BE A SUBSET OF CASES,
I'M NOT SURE HOW LARGE.
MY POINT TO YOU IS YOU CAN'T SAY
100% OF THESE CASES WILL ALWAYS
BE UNKNOWABLE.
>> RELATED TO THAT, COUNSEL, LET
ME ASK YOU THIS.
AM I CORRECT IN UNDERSTANDING
THAT UNDER THIS RULE IT CAN BE
THE CASE THAT DISQUALIFICATION
IS REQUIRED EVEN THOUGH IT, THE
MOTION FOR DISQUALIFICATION IS
BASED ON FACTUAL ALLEGATIONS
THAT ARE DEMONSTRABLY FALSE?
>> YES.
THAT'S CORRECT BECAUSE OF THE
CURRENT NATURE OF THIS RULE.
THIS CASE MAY BE A GOOD EXAMPLE
OF THAT.
CERTAINLY, THERE WILL BE CASES
IN WHICH WERE THE JUDGE A
SUCCESSOR JUDGE NOT CONSTRAINED
BY THAT LIMITATION, IF A
SUCCESSOR JUDGE-- OR IF THE
JUDGE COULD SAY, LOOK, THAT'S
ACTUALLY WHAT HAPPENED HERE,
THEN WE WOULD ALL KNOW THERE'S
NOT EVEN THE SPECTER OF BIAS,
AND THE JUDGE COULD DEMONSTRABLY
PROVE IT.
WE HAVE THE PROSECUTOR'S
REPRESENTATIONS, AND I THINK WE
PRESUME AS AN OFFICER OF THE
COURT THOSE REPRESENTATIONS ARE
ACCURATE UNLESS REBUTTED BY
MR. DAVIS.
AND WHAT THE PROSECUTOR
REPRESENTED WAS THAT ALTHOUGH
THERE WERE ALLEGATIONS THAT THIS
SMALL CAPITAL PROSECUTING
ATTORNEY-- OR DIVISION OPERATED
AS A UNIT WITH EACH ATTORNEY
HAVING INPUT INTO EACH OTHER'S
CASES, THAT JUDGE HARP, IN FACT,
HAD NOT BEEN INVOLVED WITH ANY
OF THOSE COMMITTEE READINGS--

MEETINGS, AND IN HER WORDS, HAD
NOT TOUCHED THE FILE.
SO THE ONLY REASON THAT
DISQUALIFICATION WAS REQUIRED ON
THESE FACTS IS BECAUSE THE JUDGE
WAS POWERLESS TO CONTEST THOSE
FACTS.
I THINK WE KNOW IN A REAL WORLD
HE HADN'T ACTUALLY HAD ANY OF
THOSE CONVERSATIONS.
AND THERE WILL BE MANY INSTANCES
WHERE A JUDGE COULD QUITE EASILY
REBUT THE FACTUAL ALLEGATIONS.
I'D LIKE TO SPEND A MOMENT JUST
DISCUSSING WHY 2.330 VIOLATIONS
WON'T RISE TO THE LEVEL OF A
STRUCTURAL ERROR UNDER FEDERAL
LAW AND WHY WE THINK THAT THE
FEDERAL APPROACH, THIS TWO-PART
APPROACH, IF IT'S ACTUAL BIAS,
IT'S STRUCTURAL.
AND IF IT'S MERELY A 45A, A
VIOLATION, YOU DO HARMLESS ERROR
REVIEW, WHY THAT'S THE RIGHT
APPROACH.
THERE ARE TWO REASONS THAT OUR
RULE IS PROPHYLACTIC AND MUCH
BROADER IN TERMS OF PROTECTIONS
IT GIVES FLORIDA LITIGANTS.
THE FIRST IS THE SUBSTANTIVE
STANDARD THE ITSELF.
UNDER THE UNITED STATES SUPREME
COURT'S CASE LAW, TO SHOW A DUE
PROCESS VIOLATION YOU EITHER
NEED ACTUAL BIAS OR THAT
PROBABILITY OF ACTUAL BIAS.
OUR STANDARD, OF COURSE, IS MUCH
LOWER, THE APPEARANCE OF BIAS,
OR AS THIS COURT PUT IT IN REID,
A REASONABLE QUESTION ABOUT BIAS
IS ENOUGH.
AND SECONDLY--
>> I DON'T WANT TO THROW YOU OFF
TOO MUCH, BUT I THINK THAT THIS
GETS-- I THINK JUSTICE POLSTON
ASKED AN IMPORTANT QUESTION, BUT
I THINK THIS IS PART OF THE
ANSWER TO THAT, IS THAT UNDER
OUR HARMLESS ERROR STATUTE, WE
DON'T REALLY HAVE THE OPTION IF
WE'RE GOING TO FOLLOW THAT
STATUTE TO JUST SAY THAT SOME
SORT OF, YOU KNOW, OFFENSE
AGAINST THE APPEARANCE OF, YOU

KNOW, PERFECTLY, YOU KNOW,
UNBIASED JUDGE ABSENT SOME
ACTUAL PROBABILITY THAT THERE
WAS AN ACTUAL PROBLEM, THAT THAT
DOESN'T GO TO ANY VIOLATION OF
THE, QUOTE-UNQUOTE, SUBSTANTIAL
RIGHTS OF THE DEFENDANT.
WHAT'S THE ACTUAL LANGUAGE IN
THE HARMLESS ERROR STATUTE?
>> I DON'T HAVE THE LANGUAGE IN
FRONT OF ME, BUT IT REQUIRES
THAT THE APPELLANT'S SUBSTANTIAL
RIGHTS BE PREJUDICED.
>> SO THERE HAS TO BE-- THE
LEGISLATURE HAS REQUIRED US TO
DO A HARMLESS ERROR ANALYSIS
THAT ASKS QUESTIONS THAT GO TO
THAT, NOT SORT OF THIS ABSTRACT
THE KIND OF APPEARANCE OF
IMPROPRIETY.
>> YES.
AND SO I THINK THAT THIS IS THE
POINT THAT THE CONCURRING
OPINION IN DEVINEY IS MAKING--
>> IF THAT'S TRUE, WOULD THERE
BE A PER SE ERROR UNDER FLORIDA
LAW?
>> YES.
SO THE CRITICAL POINT, JUSTICE
POLSTON, IS THAT DiGUILIO SAYS
STRUCTURAL ERROR IS A RULE OF
JUDICIAL CONVENIENCE THAT CAN
ONLY BE APPLIED IF THERE ARE
CONSTITUTIONAL REASONS FOR
ADOPTING IT AND IF THE COURT
LOOKS CLASS-WIDE AND DECIDES
THERE'S NO REASON TO DO CASE BY
CASE HARM REVIEW.
BECAUSE EVERY INSTANCE OF THE
ERROR WILL BE HARMFUL.
YOU'LL ALWAYS REVERSE.
AND SO WHAT DiGUILIO SAYS
ABOUT STRUCTURAL ERROR IS JUST
SKIP TO THE END WITH A CERTAIN
CLASS OF ERRORS.
IT WILL ALWAYS CONCLUDE THAT
THE--
>> IS THERE ROOM FOR THAT
ANALYSIS IN OUR CASE LAW UNDER
THE STATUTE?
AS JUSTICE MUNIZ IS SUGGESTING?
>> SO, WELL, YEAH--
>>-- WOULD ALWAYS BE HARMFUL TO
THE DEFENDANT'S RIGHTS, YES.

I MEAN, THAT'S THE PROBLEM, IS
THAT HERE WE KNOW FOR A FACT
THAT THIS MOTION CAN ALLOW, YOU
KNOW, THINGS THAT AREN'T EVEN
TRUE TO BE A BASIS FOR RECUSAL.
AND SO THAT OBVIOUSLY CAN'T HAVE
ANYTHING TO DO WITH THE
DEFENDANT'S RIGHTS, SUBSTANTIAL
RIGHTS.
>> SO, JUSTICE POLSTON, THE ONLY
WAY THAT A COURT CAN GET AROUND
THE LEGISLATIVE MANDATE TO ONLY
REVERSE IF THERE'S PREJUDICE IS
WITH THE RULE OF JUDICIAL
CONVENIENCE.
YOU HAVE TO DECIDE AHEAD OF TIME
THAT, LOOK, WE'VE ALREADY
ASSESSED THIS, AND IT'S JUST
IMPOSSIBLE FOR THIS TYPE OF
ERROR TO EVER BE HARMLESS.
AND SO WE'RE NOT GOING TO PUT
DISTRICT COURTS THROUGH THE
EXERCISE OF DOING IT CASE BY
CASE BECAUSE WHAT'S THE POINT?
SO WHAT WE'VE SAID IS THAT IF
YOU CAN EVEN CONCEIVE OF AN
INSTANCE WHERE ONE OF THESE
VIOLATIONS CAN BE HARMLESS, AND
WE THINK YOU'VE GIVEN YOU A
NUMBER OF EXAMPLES, IT'S NOT
FAIR TO APPLY THE RULE OF
JUDICIAL CONVENIENCE, AND YOU'RE
STUCK WITH SECTION 924.33.
I DO WANT TO--
>> I GET THE LOGIC OF THAT.
I THINK WHERE I STRUGGLE WITH
YOUR HYPO AND THIS, YOU KNOW,
LOGICAL PROPOSITION IS WE DON'T
GET APPEALS UNLESS SOMEONE IS
AGGRIEVED.
WE'VE RECENTLY REAFFIRMED THAT.
AS A CLASS OF CASES BEFORE THIS
COURT, ONE MUST HAVE AN INJURY.
ONE MUST HAVE AN ISSUE.
AND IN THE HYPOTHETICAL YOU'VE
GIVEN US-- WHICH I THINK IS
FOOD FOR THOUGHT-- THERE WOULD
BE NO BASIS FOR APPEAL, RIGHT?
IT BECOMES A NULL SET OF CASES
WHERE THE DEFENDANT IS NOT
PREJUDICED IN ANY WAY, SHAPE OR
FORM AND, THEREFORE, HAS NO
BASIS FOR APPEAL, AND THIS RULE
OF JUDICIAL CONVENIENCE YOU'RE

TALKING ABOUT.
CAN YOU HELP ME UNDERSTAND
WHETHER I'VE MISAPPREHENDED
SOMETHING?
IF CAN YOU GIVE ME A HYPO THAT
ACTUALLY DOES RESULT IN APPEAL
GIVEN, YOU KNOW, NO COMPLAINTS,
LET'S SAY, FOR THE DEFENDANT OR
THE PETITIONER.
>> SO, YOUR HONOR, I WOULD SAY
TAKE MY HYPO AND TWEAK THE FACTS
SLIGHTLY SO THAT THERE'S A
MOTION FOR JUDGMENT OF ACQUITTAL
THAT IS OBVIOUSLY BASELESS.
HE SAID, LOOK, I COULDN'T BE
CONVICTED ON THESE FACTS AT ALL
AND, THUS, I AM AGGRIEVED.
IN THAT INSTANCE, WHAT THE
APPELLATE COULD WOULD DO WOULD
BE TO SAY, LOOKS I'M GOING TO
LOOK AT THE NATURE OF THE CLAIM
OF BIAS.
MAYBE THE PROSECUTOR REBUTTED
THAT CLAIM WITH COLD, HARD FACTS
THAT NO ONE DISPUTED, AND THEN
WE COULD LOOK DE NOVO AT THE
SUBSTANCE OF THE EVIDENCE.
AND IF IT WAS, INDEED, A
BASELESS CLAIM THAT NO JUDGE
WOULD HAVE RULED ON DIFFERENTLY,
THERE WOULD BE NO REASON TO
THINK THE SPECTER OF BIAS
INFECTED THE RESULT.
IF I COULD-- IT MIGHT HELP TO
TALK A LITTLE BIT ABOUT THE SOME
OF THE CLAIMS OF ERROR THAT
MR. DAVIS HAS BROUGHT TO BEAR
HERE.
MY FRIEND HAS DISCUSSED THE
NUMBER OF ALLEGED ERRORS IN THIS
ORAL ARGUMENT.
I'M NOT PREPARED TO RESPOND TO
THOSE, BECAUSE WE'VE ONLY BEEN
PUT ON NOTICE OF A COUPLE OF
THEM.
I'D LIKE TO TALK ABOUT THOSE.
THE FIRST IS BELOW MR. DAVIS
RAISED A SINGLE CLAIM OF ERROR
AFTER A THREE-WEEK-LONG TRIAL.
THAT WAS AN ALLEGED STRAWMAN
CALCULATION IN CLOSING ARGUMENT.
I THINK THAT THE CONTEXT OF THIS
IS SIGNIFICANT BECAUSE IF YOU
LOOK AT THE CONTEXT, I DON'T

THINK THAT THERE WAS A JUDGE WHO
WOULD HAVE VIEWED THIS ISSUE
DIFFERENTLY AND, IN FACT, IF
ANYTHING, HE PROBABLY GOT A
WINDFALL.
SO THE THEORY OF DEFENSE AT
TRIAL WAS SELF-DEFENSE, BUT THE
REAL THEORY WAS INSANITY, THAT
HE SUFFERED FROM A MENTAL
ILLNESS THAT CAUSED THE PARANOIA
AND THE PSYCHOTIC EPISODE.
THAT'S WHY HE SHOT THESE THREE
VICTIMS.
THE STATE REBUTTED THAT, THIS
WAS NOT INSANITY.
IT WAS INSTEAD BROUGHT ON BY
PARANOIA AS ADMITTED TO POLICE
FROM SMOKING MARIJUANA.
THAT'S THE THEORY OF
PROSECUTION.
NOW, TO MAKE THAT THEORY WORK,
WE HAD TO DO AN ADDITIONAL STEP.
WE HAD TO TELL THE JURY THAT
VOLUNTARY INTOXICATION IS NOT A
VALID DEFENSE UNDER FLORIDA LAW.
THAT WAS PART AND PARCEL OF OUR
THEORY.
THE JUDGE HIMSELF PROBABLY
SHOULD HAVE INSTRUCTED THE JURY
ON THAT THEORY, BUT IT CERTAINLY
WAS NOT ERROR TO ALLOW US TO DO
IT, BECAUSE IT WAS OUR THEORY OF
THE CASE.
WE WERE NOT ATTRIBUTING IT TO
MR. DAVIS.
WE WERE SAYING THIS IS OUR
THEORY OF PROSECUTION.
THE ONLY OTHER ERROR THAT
THEY'VE TALKED ABOUT IN THEIR
BRIEFS THAT THEY'VE SPECIFICALLY
IDENTIFIED, AND THE REASON I'M
TELLING YOU IS JUST TO SHOW HOW
BASELESS THESE CLAIMS WERE, AND
AN APPELLATE COURT COULD LOOK
AND FIND THAT NO JUDGE WOULD
HAVE COME OUT DIFFERENTLY.
SO THE OTHER CLAIM HE TALKS
ABOUT A SINGLE CLOSING ARGUMENT
COMMENT THAT, ADMITTEDLY, WAS
IMPROPER.
THE PROSECUTOR REFERRING TO THE
DEFENSE AS SMOKE AND MIRRORS.
HE OBJECTED.
THAT OBJECTION WAS SUSTAINED.

PRIVATELY, THE JUDGE CHASTISED
THE PROSECUTOR FOR DOING SO AND
READ A CURATIVE INSTRUCTION TO
THE JURY.
WHAT HE'S COMPLAINING ABOUT NOW
IS THAT HE DIDN'T GET A
MISTRIAL.
JUDGE HARP REFUSED TO MISTRY AND
DO A THREE WEEK TRIAL BASED ON
THAT ONE ALLEGED ERROR.
THE POINT IS IF THAT'S THE BEST
THAT HE CAN BRING TO BEAR, YOU
CAN LOOK AT THAT AND SAY, NUMBER
ONE, THE PROSECUTOR REBUTTED THE
FACTUALITY ISSUES IN THE MOTION
OF THE THEORY OF BIAS IN THE
FIRST PLACE.
AND SO WE LOOK AT WHAT ACTUALLY
HAPPENED.
CAN WE SAY BEYOND A REASONABLE
DOUBT THAT THE ERROR HERE WAS
HARMLESS?
I THINK WE MOST CERTAINLY CAN.
>> COUNSEL, I'M SORRY TO
INTERRUPT YOU, SO CAN YOU KIND
OF ARTICULATE, CAN YOU-- SINCE
WE OBVIOUSLY HAVE TO THINK ABOUT
THIS IN TERMS OF HOW THIS WOULD
APPLY IN ALL CASES, SO I THINK I
HEAR YOU SAYING THAT THE TEST IS
KIND OF-- I UNDERSTAND THAT YOU
ARGUE IN YOUR BRIEF TO SORT OF
DO WHAT THE SECOND DCA, BUT
LET'S ASSUME WE'RE GOING BACK TO
HARMLESS ERROR ANALYSIS AND WE
HAVE SOME MEAT ON THE BONE FOR
THIS CONTEXT WHAT THAT MEAN.
I THINK I HEAR YOU SAYING IT'S A
COMBINATION OF LOOKING AT WHAT
THE NATURE OF THE BIAS
ALLEGATIONS ARE IN THE FIRST
PLACE AND THEN DOING, WHAT, LOOK
THROUGH THE RECORD TO SEE--
BECAUSE THE BURDEN'S ON THE
STATE.
FOR THERE TO BE SOME SORT OF
BURDEN OF PREEMPTION TO IDENTIFY
THE ISSUES ON THE OTHER SIDE OF
IT, YOU GUYS HAVE THE BURDEN OF
PROOF ON THIS.
WHAT IS THE COURT SUPPOSED TO BE
LOOKING AT?
JUST WHETHER THERE ARE ISSUES
THAT COULD HAVE GONE EITHER WAY?

COULD YOU KIND OF ARTICULATE A
MORE GENERALIZED TEST THAT WE
COULD POTENTIALLY APPLY ACROSS
ALL CASES?
>> SO I'LL TRY TO GIVE YOU SOME
FACTORS THAT YOU MIGHT LOOK TO.
FACTOR ONE, AS I SAID, WOULD BE
THE NATURE OF THE ALLEGATIONS.
I DON'T THINK ALL CLAIMS OF BIAS
ARE CREATED EQUAL.
THERE WILL BE SOME THAT ARE
EGREGIOUS AND SOME THAT WILL BE
LEGALLY SUFFICIENT BUT
BORDERLINE WHERE NO ONE ACTUALLY
THINKS THERE GOING TO BE A REAL
IMPACT HERE.
>> FOR SOME REASON WE KNOW JUST
TURNED OUT.
>> YES.
>>-- NOT THROUGH ILL WILL, BUT
JUST BASED ON THE
MISUNDERSTANDING OF FACT THAT
KIND OF GOES AWAY, RIGHT?
>> YES--
>>-- THE BIAS THING AND THAT,
SO WHEN WE'RE LOOKING AT THE
ACTUAL PROCEEDINGS, WHAT SHOULD
WE BE LOOKING AT?
>> I YOU WOULD THEN DO A RUN OF
THE MILL HARMLESS ERROR REVIEW
OF THE CLAIMS OF ERROR THAT THE
DEFENDANT I SAYS I'VE BEEN
PREJUDICED BY THE BIAS BECAUSE
OF X, Y AND Z.
AND SOME OF THE CASES WILL
INVOLVE IN DISCRETIONARY RULINGS
THAT ARE CLOSE CALLS IF THERE IS
A PATTERN OR IF THERE ARE THESE
MANY CLOSE CALLS WHERE YOU'RE
JUST NOT CONVINCED THAT BIAS
PLAYED NO ROLE OR THAT ANOTHER
JUDGE MIGHT HAVE CHANGED THE
OUTCOME, THEN PERHAPS THAT WOULD
BE FERTILE GROUND FOR REVERSAL
ERROR.
HOWEVER, IN CASES WHERE THERE
ARE VERY FEW DISCRETIONARY
RULINGS OR THE RULINGS ARE NOT
CLOSE CALLS, YOU COULD BE MORE
SURE.
THE LAST THING I WANT TO SAY,
JUSTICE MUNIZ, WE'RE NOT
CLAIMING WE'LL WIN ALL OF THESE
CASES.

WE'RE JUST SAYING WE SHOULD BE
GIVEN THE OPPORTUNITY TO TRY TO
MAKE OUR CASE, AND THAT'S WHAT
THE STATUTE REQUIRES.
THANK YOU.
>> ALL RIGHT.
WE'LL HEAR REBUTTAL ARGUMENT
NOW.
>> I AGREE WITH MY FRIEND THAT
THEY WILL NOT WIN ALL CASES IF
THIS COURT HOLDS FIRM TO
DiGUILIO.
I DISAGREE THAT THIS IS A CASE
THAT THEY WOULD WIN.
I AGREE ALSO THAT ALL CALLS
DURING A TRIAL ARE NOT BINARY.
WE DON'T HAVE ONE OPTION THAT IS
A GOOD LEGAL CALL AND THE OTHER
OPTION IS REVERSIBLE ERROR.
BUT WHAT WE HAVE HERE ARE-- AND
LIVINGSTON, BY THE WAY, IS
DEPARTING FROM ONE SINGLE
INCIDENT FROM IMPARTIALITY IS
ENOUGH.
BUT ALL OF THESE ERRORS THAT
I'VE TALKED ABOUT TODAY THAT
WERE RAISED BELOW ARE ERRORS
WHERE, ARGUABLY, A JUDGE COULD
HAVE JUST GIVEN A SLIGHT OR MORE
OR MUCH MORE FAVORABLE RULING TO
THE DEFENSE, AND IT WOULD HAVE
IMPACTED THE JURY'S VERDICT.
AND WHY I SAY THAT IS THE
CLOSENESS OF THIS INSANITY CASE.
THE VAST MAJORITY OF THE TIME
WHEN A DEFENDANT RAISES
INSANITY, IT IS NOT A CLOSE
CASE.
THE EXPERTS DO NOT AGREE.
ALL THREE EXPERTS AND TWO-- NOT
ONE, BUT TWO-- AGREED ON THE
McNAUGHTON TESTS.
THE ONLY BONE OF CONTENTION WAS
WHAT CAUSED THE PSYCHOSIS.
AND THE STATE'S THEORY WAS
BUTTRESSED BY THEIR STRAWMAN
WITH THE VOLUNTARY-- BY THE
WAY, NOT SUPPOSED TO BE GIVEN
UNLESS THEY RAISED IT, AND
NOBODY RAISED IT.
WHAT THE STATE DID HERE WAS
POISON THE JURY TO THINK THAT
MR. DAVIS WAS RAISING AN ILLEGAL
DEFENSE WHEN HE WASN'T, AND ALL

OF THE CALLS THAT WE HAVE
REFERENCED HERE TODAY AND CITED
COULD HAVE TIPPED THE SCALES.
AND DiGUILIO ITSELF SAYS THAT
THE IMPACT CAN BE SUBTLE.
THAT THAT IS ENOUGH TO UNDERMINE
YOUR CONFIDENCE IN THE VERDICT.
AND AGAIN, THE STATE'S THEORY
BELOW IS THAT MR. DAVIS HAD NO
MENTAL HEALTH ISSUES AT ALL AND
THAT WHAT CAUSED HOMICIDAL
PSYCHOSIS WAS SHARING A THIRD OF
A BLUNT WITH TWO OTHER PEOPLE
WITH NO ADDITIVES WHATSOEVER,
JUST MARIJUANA.
I THINK THAT'S A PRETTY CLOSE
INSANITY CASE, AND I THINK THAT
THAT SHOULD WEIGH ON YOUR MINDS
HERE.
MY FRIEND ALSO SAID THAT I WAS
OVERSTATING THE FEAR, THAT I HAD
15 MONTHS AND PERHAPS IF I HAD
DONE IT AT MONTH 1, BY MONTH 15
IS WHAT I THINK HE WAS
ESSENTIALLY SAID THE ANGER THAT
I POKED THE BEAR WOULD HAVE
DISSIPATED.
NUMBER ONE, MY RESPONSE TO THAT
IS WE ALSO DIDN'T HAVE REID TO
RELY ON IN 2016 AND 2015.
SO IT WAS NOT A FOREGONE
CONCLUSION THAT EVEN IF WE FILED
THIS WRIT, THAT IT WAS GOING TO
BE GRANTED.
IT COULD HAVE BEEN DENIED, AND
IT COULD HAVE BEEN DENIED WITH
PREJUDICE, AND THE ISSUE WOULD
HAVE BEEN DEAD FOREVER.
BUT ALSO THEY WERE RIGHT.
THEY WERE RIGHT, AND WE KNOW
THAT BECAUSE ONLY A WEEK BEFORE
TRIAL IS WHEN THE STATE WAIVES
THE DEATH PENALTY.
AND I GUARANTEE YOU THAT THEY
DID NOT DO THAT OUT OF THE
GOODNESS OF THEIR HEART, AND
THEY DIDN'T DO IT RANDOMLY.
THEY DID IT BECAUSE THE DEFENSE
PLAYED THE CARDS RIGHT AND SAID
DON'T PUSH IN ANY FURTHER
BECAUSE WE'RE GOING TO RISK HIS
LIFE, AND THEY WERE RIGHT.
THEY GOT THEM TO WAIVE IT.
MY FRIEND ALSO MENTIONED, AND I

THINK THE COURT MENTIONED,
EITHER 900s OR THE 50s, THE
HARMLESS ERROR STATUTES.
CASES LIKE GOODSON SAY THAT THIS
COURT IS NOT RELIEVED OF ITS
RESPONSIBILITY TO APPLY THE
DiGUILIO STANDARD JUST BECAUSE
OF HARMLESS ERROR STATUTES.
THAT ISSUE HAS BEEN RAISED
BEFORE, AND IT'S SETTLED LAW.
I BRIEFLY WANT TO GO OVER THE
STATE'S HYPO ABOUT TRIALS WHERE
YOU HAVE NO OBJECTIONS, NO
DISAGREEMENTS ABOUT WHO SITS ON
THE JURY.
CANDIDLY, I HAVE DONE, I THINK
OFF THE TOP OF MY HEAD, OVER 40
JURY TRIALS.
I HAVE NEVER BEEN A PART OF A
TRIAL LIKE THAT.
BUT EVEN SO, I THINK THAT
ARGUABLY YOU COULD HAVE A
CHILLING EFFECT WITH THESE ROAN
YOUS DENIALS OF THESE MOTIONS
BECAUSE AT A CERTAIN POINT YOU
COULD SAY, WELL, IF MY ATTORNEY
FILED A MOTION AND IT WAS
DENIED, WAS MY ATTORNEY'S
PERFORMANCE ITSELF AFFECTED BY
THE FACT THAT THEY KNEW THE
DENIAL WAS WRONG AND THAT IT
CONFIRMED FOR THEM THEIR FEAR
THAT THIS JUDGE WAS EITHER
BIASED AGAINST THEM OR AGAINST
ME?
>> COUNSEL, CAN I INTERRUPT YOU?
DO YOU AGREE WITH OPPOSING
COUNSEL THAT THERE ARE SOME
SITUATIONS WHERE THERE WOULD NOT
BE HARM?
>> AGAIN, I CAN IMAGINE A
SCENARIO.
I HAVE NEVER IN REAL LIFE
EXPERIENCED THAT SCENARIO.
>> SO IN THEORY, THERE COULD BE
A HARMLESS ERROR FOUND EVEN IF
THE DISQUALIFICATION WAS NOT
GRANTED.
>> I AGREE.
BUT THE ONLY REASON I AGREE WITH
THAT IS THE STATUS OF THE CASE
LAW HAMSTRINGS ME BY FORECLOSING
CATEGORIES OF JUDICIAL BEHAVIOR
THAT I CAN'T PROVE THAT ACTUAL

BIAS MANIFESTED.
SO I DO AGREE BUT WITH THAT
CAVEAT.
>> AND DO YOU THINK THAT THE
LEGISLATURE DOES REQUIRE US TO
DO NOT ANALYSIS IN EVERY CASE,
THE HARMLESS ERROR ANALYSIS?
>> I THINK THOSE STATUTES ARE--
BUT THEY DO NOT, AGAIN, THEY DO
NOT TAKE AWAY THE COURT'S
ABILITY OR RESPONSIBILITY,
RATHER, TO APPLY DiGUILIO.
AND WHAT THEY DO NOT DO IS
DEFINE HARM.
THIS COURT HAS DONE THAT, AND
THIS COURT HAS HELD FIRM TO THAT
SEVERAL, SEVERAL TIMES IN
SEVERAL DECADES.
IF THERE ARE NO OTHER QUESTIONS,
I'LL CLOSE.
>> THANK YOU.
>> JOSHUA DAVIS--
>> GO AHEAD.
>> JOSHUA DAVIS' TRIAL CONCLUDED
ON OCTOBER 28, 2016.
MR. DAVIS HAS BEEN ENTITLED TO A
NEW TRIAL FOR FIVE YEARS.
IT IS HIGH TIME HE GOT ONE.
THANK YOU.
>> WE THANK YOU BOTH FOR YOUR
ARGUMENTS IN THIS CASE.
THE COURT WILL NOW STAND IN
RECESS FOR ABOUT TEN MINUTES
BEFORE WE TAKE UP THE THIRD CASE
ON TODAY'S DOCKET.