Timothy Lee Hurst v. State of Florida

THE NEXT CASE ON THERT'S DOCKET IS HURST. HURST V STATE. MR. McLAIN.

MAY IT PLEASE THE COURT. MY NAME IS WILLIAM McLAIN, REPRESENTING TIMOTHY HURST. MR. HURST WAS CONVICTED IN ESCAMBIA COUNTY, FOR FIRST-DEGREE MURDER AND ROBBERY, INVOLVING THE DEATH OF HIS SUPERVISOR AT THE POPEYE'S RESTAURANT WHERE HE WORKED. SHE WAS FOUND, LATER, HE WAS INVOLVED IN OPENING THE STORE WITH HER THAT MORNING O HE WAS SCHEDULED TO WORK OPENING THE STORE. SHE WAS LATER FOUND THAT MORNINGS BY OTHER EMPLOYEES. SHE HAD BEEN FOUND WITH NUMEROUS STAB AND INCISED WOUNDS, AND HER BODY WAS IN THE FREEHER. THE MONEY WAS MISSING FROM THE SAFE. THE JURY RECOMMENDED A DEATH SENTENCE. THE TRIAL COURT IMPOSED DEATH. AND I WOULD LIKE TO SPEND MY TIME THIS MORNING DISCUSSING THE PROBLEM AREAS IN THE JUDGE'S SENTENCING ORDER. I HAVE RAISED AN ISSUE, ONE, THE PROBLEMS WITH THE TRIAL JUDGE FINDING THE AVOIDING ARREST AGGRAVATING CIRCUMSTANCE. SPECIFICALLY, THE JUDGE FINDING THIS AGGRAVATING CIRCUMSTANCE, WITHOUT ANY NOTICE TO THE DEFENSE, THAT IT WAS EVEN UNDER CONSIDERATION IN THE CASE. E DASD FOR THIS AGGRAVATING CIRCUMSTANCE. THE STATE HAD NOT ARGUED THE CIRCUMSTANCE TO THE JURY OR ORNRU. THE STATE HAD NEVER ARGUED THE CIRCUMSTANCE TO THE JUDGE AT THE SPENCER HEARING.

DID IT COME UP WHERE THE STATE ACTUALLY SAIDE DECLINE TO PURSUE THE AVOID-ARREST AGGRAVATOR?

YES, YOUR HONOR, IT DID, AT THE VERY BEGINNING OF THE PENALTY PHASE,NE 961 OF THE PENALTY-PHASE RECORD, THE STATE ATTORNEY SPECIFICALLY SAID EVEN THOUGH THEY HAVE SUGGESTED THEY MIGHT HAVE HAD AN ARGUMENT AS TO THIS AGGRAVATING CIRCUMSTANCE, THEY DECLINED TO PURSUE IT.

DID THEY SAY WHY?

THEY JUST DECLINED TO PURSUE THE AGGRAVATING CIRCUMSTANCE OF AVOIDING ARREST, AND I THINK THAT THEY DECLINED TO PURSUE -- THEYD SUGGESTED THAT PERHAPS THEY WOULD HAVE AN ARGUMENT, BUT THEY DECLINED TO PURSUE IT, SO THE ENTIRE PENALTY PHASE OF THE CASE PROCEEDED AS IF THAT WERE NOT AN ISSUE.

SO THERE WAS NO INSTRUCTIONS TO THE JURY THAT, NO ARGUMENT TO THE JURY, SO THE JURY'S VERDICT IS NOT --

NO INSTRUCTION TO THE JURY.

-- A PROBLEM, AS FAR AS THIS AGGRAVATOR IS CONCERNED.

WELL, I THINK JURY VERDICT IS A PROBLEM, TOO, AND I WILL GET INTO THAT POINT. THE -- I THINK THE JURY OR THE DEFENDANT ACTUALLY IS ENTITLED TO HAVE A JURY FINDING, AS TO THE AGGRAVATING CIRCUMSTANCES. AND I HAVE ADDRESSED THAT.

THAT IS A SEPARATE POINT.

SEPARATE ISSUE. BUT AS FAR AS THIS PARTICULAR AGGRAVATOR IS CONCERNED --

WELL, THE POINT I WOULD LIKE TO MAKE HERE IS THERE IS REALLY A COUPLE OF ISSUES GOING ON HERE. THE -- FIRST OF ALL, THE DEFENSE WAS NEVER GIVEN ANY NOTICE THAT THIS WAS GOING TO BE AN ISSUE, EITHER WITH THE JURY OR THE JUDGE. THE FIRST TIME ANYONE KNEW THAT IT WAS UNDER CONSIDERATION WAS WHEN THE TRIAL JUDGE READ HIS SENTENCING ORDER INTO THE RECORD RECORD.

IS IT SUBJECT TO A HARMLESS ERROR TEST? > NUMBER ONE ON, I DON'T THINK --

IF IT IS ERROR.

-- I THINK IT TYPE AFTER DUEPRAE TE DEFENDANT WAS NOT AFFORDED THE OPPORTUNITY, AT ALL, TO EITHER THE JURY OR THE JUDGE, IN THE SENTENCING DECISION, TO PRESENT ARGUMENT, DEVELOP EVIDENCE, DINGELSSUE IN THE CASE, I THINK THAT CAN NEVER BE HARMLESS ERROR. HOWEVER, IF A HARMLESS ERROR ANALYSIS IS GOING TO BE DONE, IT CERTAINLY ISN'T HARMLESS. NUMBER ONE, WE --

LET ME JUST ASK, QUESTION BUT YOUR FIRST PROPOSITION. THIS COURT, ON MANY OCCASIONS, HAS ACTUALLY FOUND ERROR BY THE TRIAL COURT, IN FINDING AN AGGRAVATING CIRCUMSTANCE, AND YET HAS CONDUCTED A HARMLESS ERROR ANALYSIS AND FOUND THE AFFIRMATIVE FINDING OF AN AGGRAVATOR, TO BE HARMLESS, SO I AM HAVING DIFFICULTY WITH YOUR PROPOSITION THAT THIS FINDING BY THE TRIAL COURT CANNOT BE SUBJECT TO A HARMLESS ERROR. ISN'T THE CASE LAW OF THIS COURT TO THE CONTRARY, WHETHER IT IS HARMLESS IS A TOTALLY SEPARATE ISSUE, AND I REALIZE YOU ARE GOING TO ADDRESS THAT, BUT WOULDN'T YOU AGREE THAT THIS COURT, ON MANY OCCASIONS, HAS FOUND ERROR IN THE FINDING OF AN AGGRAVATOR BUT HAS, THEN, CONDUCTED A HARMLESS ERROR ANALYSIS AND, IN FACT, FOUND --

YES, YOUR HONOR.

OKAY. I WANTED TO BE SURE --

IT IS ACTUALLY A TWO-PART HARMLESS-ERROR QUESTION HERE.

BUT YOU AGREE. NOW, YOU ARE GOING TO DISCUSS WHETHER OR NOT, IN THIS CASE, IF IT WAS HARMLESS OR NOT.

CORRECT.

WOULD YOU PROCEED ON THAT.

SAFERS THE DUE PROCESS PROBLEM -- AS FAR AS THE DUE PROCESS PROBLEM, FINDING, BEING IN PLACE WITHOUT THE COUNSEL EVER HAVING THE OPPORTUNITY TO DEFEND, PRESENT EVIDENCE OR PRESENT ARGUMENT REGARDING THE AGGRAVATING CIRCUMSTANCE, I AM SAYING THAT CANNOT BE HARMLESS. THE AGGRAVATOR CANNOT STAND.

THAT GOES TO WHETHER IT WAS ERROR OR NOT.

YES, YOUR HONOR.

OKAY.

IF THE AGGRAVATOR CANNOT STAND --

IF I UNDERSTAND CORRECTLY HERE, THE JUDGE DIDN'T EVEN,N ANY DISCUSSION, SAY, AND I AM, ALSO, CONSIDERINGSAG,DO YOU THINK ABOUT THAT?

THAT DID NOT HAPPEN.

IT WAS, IT FIRST APPEARED IN THE WRITTEN ORDER. IS THAT CORRECT?

WELL, AS THE JUDGE READ HIS ORDER INTO THE RECORD, WOULD BE, PROBABLY, THE FIRST OPPORTUNITY WHERE COUNSEL WOULD HAVE RESPECT REALIZED THE JUDGE WAS, IN FACT -- WOULD HAVE REALIZED THE JUDGE WAS, IN FACT, CONSIDERING, EVEN THOUGH IT WAS BYPASSED BY THE STATE AS POSSIBLE ISSUE.

WAS THERE ANY OBJECTION AT THAT POINT, TO PUT ON EVIDENCE REGARDING THE HARMLESS ERROR?

NO.

I MEAN, A THAT IS DONE WHERE THE DEFENDANT IS PRESENT, CORRECT, UNDER SUSPENSER?

RIGHT. THAT WOULD BE THE ACTUAL IMPOSITION OF SENTENCING HEARING NOT THE SENTENCING HEARING. THERE WAS NO INDICATION, DURING THE SPENCER HEARING, THAT THE JUDGE WAS TAKING THIS AGGRAVATING CIRCUMSTANCE INTO CONSIDERATION. IT WAS ONLY --

IF WE JUST LOOK AT THE RECORD AND SAY, WELL, THIS RECORD DOES SUPPORT AVOID ARREST, THAT WOULD NOT BE FAIR TO THE DEFENDANT, BECAUSE THE DEFENDANT WOULD OR COULD HAVE PUT ON OTHER EVIDENCE TO SHOW THAT THE A ROAD-ARREST -- THE AVOID-ARREST AGGRAVATOR DID NOT APPLY.

COULD HAVE DEVELOPED OTHER EVIDENCE, COULD HAVE DEVELOPED OTHER EVIDENCE DIFFERENTLY IN THE RECORD, COULD HAVE PERSUADED THE JUDGE OR EVEN PURSE WADED THE JUDGE NOT TO FIND IT, SO EVEN THROW THOUGH THERE WAS SUBSTANTIAL -- SO EVEN THOUGH THERE WAS SUBSTANTIAL NEVED THE RECORD TO SUPPORT A FINDING OF CIRCUMSTANCE, IT DOES NOT RULE OUT THIS HARMLESS ERROR ARGUMENT MUCH WE DON'T KNOW WHAT THE JUDGE WOULD HAVE DONE, WITH OTHER ARGUMENT FROM COUNSEL. NOW, REGARDING THE AVOID-ARREST AGGRAVATOR, COULD IT BE HARMLESS AND THE ANSWER TO THAT IS NO. THE TRIAL JUDGE FOUND THREE AGGRAVATING CIRCUMSTANCES IN THIS CASE. THE ROBBERY, HEINOUS, ATROCIOUS AND CRUEL, AND THE AVOIDING AVOIDIN FACTOR. A DON'T WE START, THOUGH, WITH THE PROPOSITION THAT ONLY TWO AGGRAVATORS WERE PRESENTED TO THE JURY, AND WE HEAR -- WHAT WAS THE RECOMMENDATION OF THE JURY. I KNOW IT WAS FOR DEATH, BUT WAS IT AN UNANIMOUS RECOMMENDATION?

I THINK IT WAS 11-1.

OKAY. SO WE HAVE, JUST ON THE AGGRAVATION AS IT WAS ARGUED TO THE JURY BYET PARTIES, A STRONG RECOMMENDATION IN FAVOR OF DEATH. AND THEN WE HAVE SERIOUS, OBVIOUSLY, SERIOUS AGGRAVATION HERE, SO YOU GO AHEAD. YOU WERE GOING TO DO THE ANALYSIS.

WELL --

OF WHY IT WOULDN'T BE HARMLESS ERROR.

NUMBER ONE, THE TRIAL JUDGE RELIED ON ALL THREE AGGRAVATING CIRCUMSTANCES, IN MAKING A DECISION TO IMPOSE DEATH, AND SPECIFICALLY GAVE EACH ONE OF THEM THE SAME WEIGHT, GREAT WEIGHT, SO PRESUMABLY, THE AVOIDING-ARREST FACTOR WAS ONE-THIRD OF THE TRIAL JUDGE'S AGGRAVATION FINDING. THAT MAY HAVE MADE A DIFFERENCE IN HOW THE TRIAL JUDGE VIEWED THE CASE. THE OTHER THING, AND I WOULD DRAW THIS COURT'S ATTENTION, ACTUALLY, TO THE PROPORTIONALITY ARGUMENT THAT I PRESENTED, THIS ISN'T THE MOST AGGRAVATED AND LEAST MITIGATED OF CASES. THERE HAVE BEEN NUMEROUS CASES

WHERE THIS COURT HAS HELD, IN A ROBBERY SITUATION, WHERE THERE WAS THE ADDITION OF A SERIOUS AGGRAVATING CIRCUMSTANCE, SUCH AS HEINOUS, ATROCIOUS OR CRUEL OR COLD, CALCULATED, OR EVEN A PRIOR MURDER, THIS COURT HAS NEVERTHELESS REVERSED THE DEATH SENTENCE, SO IF THE ANALYSIS I HAVE MADE IN THE PROPORTIONALITY ARGUMENT IS PERTINENT TO THE HARMLESS ERROR ON THIS QUESTION AS WELL.

YOU MAYBE STARTED WITH THE FIRST THING FIRST, BUT IF YOU COULD, FOR US, TELL US A LITTLE BIT ABOUT THIS DEFENDANT, AT THE TIME OF THE CRIME. HE WAS, HIS AGE WAS? WHAT WE KNOW ABOUT HIS BACKGROUND, UP UNTIL THE DATE OF THIS CRIME, THAT WOULD BE, PUT THIS INTO SOME PERSPECTIVE AS TO HOW THIS CRIME OCCURRED AND AS TO HOW THE MITIGATION STEPPED INTO T.

WHAT WE KNOW FROM THIS RECORD IS THAT, AND I WOULD SAY THAT THE DEFENSE LAWYER PUT ON THREE FAMILY MEMBERS TO TESTIFY IN MITIGATION.

I MIGHT ASK, SO THERE IS, IN THIS RECORD, THERE ARE NO SCHOOL RECORDS, NO MENTAL EXAM, NO KNOWLEDGE OF HIS IQ.

NO, MA'AM.

AND A BALD STATEMENT BY THE MOTHER THAT HE WAS, SEEMED LIKE HE WAS SLOW.

THREE FAMILY MEMBERS TESTIFIED HE WOULD ALWAYS BE SLOW. HE WAS ALWAYS BEHIND IN SCHOOL. THE MOTHER SAID HE WAS I AM MATURE. WE DO -- HE WAS I AM MATURE. WE DO -- HE WAS IMMATURE. WE DO NOT HAVE ANY PSYCHOLOGICAL RECORDS FROM THE SCHOOL. I WOULD PRESUME, BASED UPON A PRETRIAL NOTATION IN THE RECORD, AND I HAVE A FOOTNOTE IN THE BRIEF WHERE THAT WOULD BE FOUND IN THE RECORD, SO WE ARE HERE WITH THE TESTIMONY FROM THE THREE FAMILY MEMBERS REGARDING HIS MENTAL IMPAIRMENTS, HIS SCHOOL HISTORY, THAT HE WAS ALWAYS BEHIND IN COOL. HE ACTED SLOW. HE WAS -- BEHIND IN SCHOOL. HE ACTED SLOW. HE WAS A FOLLOWER. HE TENDED TO BE DOMINATED BY OTHER PEOPLE, AND HE WAS, HE WAS 18 YEARS OLME.>FAR E, AD E AGE MITIGATOR, THE JUDGE GAVE IT LITTLE WEIGHT, BECAUSE HE WAS ALREADY OF LEGAL AGE. AND OUR CASE LAW SAYS THAT THAT WOULD BE -- IN ORDER TO GIVE IT GREATER WEIGHT, IT HAS TO BE THE AGE HAS TO BE LINKED TO SOME ASPECT OF THE CHARACTER OR CRIME TO SHOW THAT HE WAS, IN FACT, LOWER THAN HIS CHRONOLOGICAL AGE AND IS THERE UNCONTROVERTED EVIDENCE IN THIS RECORD, OR IS IT JUST NOT EXISTENT EVIDENCE?

WELL, WE HAVE THE TESTIMONY FROM THE RELATIVES THAT HE WAS SLOW. WE HAVE THE TESTIMONY FROM THE MOTHER, SAYING HE EMOTIONALLY BEHAVED AS IF HE WERE A 11 OR 12-YEAR-OLD.

AND DID THE JUDGE, IN REJECTING, GIVING THE 18-YEAR-OLD AGE MITIGATE OR, GREATER WEIGHT, REJECT THAT TESTIMONY AS NOT BEING CONSISTENT WITH THE NATURE OF THE CRIME, WITH OTHER EVIDENCE IN THE RECORD?

WELL, THE JUDGE'S ENTIRE FINDING, AND I WILL READS IT, BECAUSE I HAVE IT QUOTED HERE IN MY NOTES, THE DEFENDANT WAS 18 YEARS OF AGE WHEN HE MURDERED THE VICTIM. THE DEFENDANT WAS LEGALLY AN ADULT. HE WAS OVER 18. HE OWNED HIS OWN CAR, AND HE WAS EMPLOYED. UNDER THOSE CIRCUMSTANCES, THE JUDGE REJECTED THE AGE MITIGATING FACTOR. AGAIN, I WOULD ALSO NOTE IN THE ORER, IT IS UNCLEAR WHETHER THE FUDGE FOUND THE AGE MITIGATING FACTOR. -- THE JUDGE FOUND THE AGE MITIGATING FACTOR. HE APPEARED TO GIVE IT GREAT WEIGHT, BUT HE ALSO MADE THE DETERMINATION THAT AGE SHOULD NOT BE CONSIDERED A MITIGATING FACTOR. I HAVE RAISED THE CAMPBELL PROBLEM THERE.

YOU SAID HE GAEF IT GREAT WEIGHT.

I AM SORRY. GAVE IT LITTLE WEIGHT. I APOLOGIZE.

WAS THERE, ALSO, SOME TESTIMONY THAT HE DID ALL RIGHT IN SCHOOL, THAT IS THAT WHATEVER PROBLEMS THAT HE HAD DIDN'T INTERFERE WITH HIS SCHOOL? A WE HAD THE PARENT SAYING HE -- WE HAD THE PARENT SAYING HE MADE AVERAGE GRADES BUT HE WAS ALWAYS BEHIND THE OTHER STUDENTS.

I MEAN, THIS WAS A PRETTY THIN RECORD OF MITIGATION, WAS IT NOT, IN TERMS OF WHAT WE SEE IN MOST CASES, WITH THE PERSON THIS AGE OR PEOPLE SAYING THAT HE IS SLOW OR WHATEVER, THERE WAS REALLY NOT MUCH CORROBORATING EVIDENCE PRESENTED HERE, WAS THERE? AND I REALIZE THAT THAT IS A SEPARATE ISSUE ABOUT HOW COUNSEL PERFORMED HERE. BUT IT IS A PRETTY THIN RECORD, ISN'T IT?

WELL ONLY HAVE THE TESTIMONY OF THE THREE FAMILY MEMBERS HERE AT THIS POINT. AGAIN, IT WAS UNREFUTED. NO ONE CAME FORWARD AND SAID NO. THE STATE DIDN'T COME FORWARD TO REFUTE THAT HE WAS SLOW.

BUT COULDN'T THE TRIAL COURT INTERPRETATION OF THE TESTIMONY WAS THAT HE DID ALL RIGHT. HE GOT THROUGH IN SCHOOL. HE WASABLE TO GET A JOB AND DRIVE A CAR, JUST LIKE ANY OTHER 18-YEAR-OLD, SO TO SPEAK, AND I AM SAYING THAT YOU COULD GET THAT FROM THE TESTIMONY, TOO. HE HADN'T BEEN IN ANY TROUBLE BEFORE. IS THAT RIGHT?

HE HAD NO CRIMINAL HISTORY.

AND THE COURT FOUND THAT AS A STATUTORY MITIGATOR.

YES, YOUR HONOR.

AND DOESN'T THE SENTENCING ORDER, WHEN HE IS DISCUSSING THE STATUTORY MITIGATOR OF SUBSTANTIALNTEUAY GOES AND THE JUDGE DOES EVALUATE THE CREDIBILITY OF THE TESTIMONY OF THE MOTHER, WHO CLAIMED THE DEFENDANT WAS TEN YEARS OLD EMOTIONALLY, AND WENT THROUGH AND TALKED ABOUT HOW THE EVIDENCE IS REFUTED BY VARIOUS THINGS, THAT THDEFENDANT DID IN HIS LIFE, BUT, ALSO, SPECIFICALLY, HOWSE OCCURRED AND WHAT HE DID AFTER THE CRIME. SO HE, REALLY, ALTHOUGH HE DOESN'T EVALUATE THE AGE MITIGATOR IN THAT, IN THE PARAGRAPH ON THE AGE MITIGATOR, HE DOES EVALUATE THE CREDIBILITY OF THE FAMILY MEMBER'S TESTIMONY AND SO CAN'T WE -- ISN'T THAT APPROPRIATE FOR US, IN LOOKING AT THE SUFFICIENCY OF THE FINDING ON THE AGE MITIGAT, TO LOOK AT THE WHOLE SENTENCING ORDER AND HIS FINDINGS AS TO THATTAY MITIGATOR? IN OTHER WORDS WHAT I AM SAYING IS THAT IT APPEARS THAT THE JUDGE ACTUALLY DID EVALUATE AND DISCOUNT THE TESTIMONY OF THEAR,BESAT IS NOT IN KEEPING WITH OTHER EVIDENCE IN THE CASE.

IN THE CASE IN THE SENSE OF WHAT HE WAS DOING DURING THE CASE.

WELL, FOR THE AGE MITIGATOR TE GNATER WEIGHT, BECAUSE, AGAIN, IF YOU HAVE AN 18 YEAR-OLD AND HE ISEMOTIY AT A TEN-YEAR-OLD LEVEL, AND HE IS A SLOW LEARNER AND HE HAS GOT A LOW IQ, AND HE ORIN,U KNOW, THERE STARTS TO BE A CASE FOR MITIGATION OR SOME SUBSTANTIAL MITIGATION, AND INS SITUATION, UNLESS YOU CAN LINK THE AGE WITH SOME ASPECT OF THE CRIME, WHICH THE JUDGE SAID THIS IS A PRETTY SOPHISTICATED CRIME, THEN WHAT ELSE IS IT LINKED TO,OET ACT AS A STATUTORY MITIGATOR?

THAT WASN'T THE ANALYSIS OF THE COURT, THE COURT DID, REGARDING THE AGE MATE GAITING FACTOR -- MITIGATING FACTOR. AGAIN, IN SPITE OF WHAT HE, ACTIONS HE MAY HAVE DONE, THERE WAS STILL NOTHING TO REFUTE THE TESTIMONY OF THE MOTHER THAT HE HAD

BEEN SLOW ALL OF HIS LIFE.

BUT DID THE TESTIMOREAY ESTABLISH THAT THERE WAS Y HE? THAT IS THIS IS WHY I AM SAYING THAT THE TESTIMONY SEEMED TO BE RATHER AMBIGUOUS. WASN'T, DIDN'T THEY, ALSO, TEST MY THAT HE DID FINE IN SCHOOL -- TESTIFY THAT HE DID FINE IN SCHOOL, DIDN'T HAVE ANY PROBLEMS IN SCHOOL, I THOUGHT, SOMETHING LIKE THAT?>UR H. THAT'S CORRECT. THEY SAID HE MADE AVERAGE GRADES BUT HE WAS ALWAYS BEHIND. HE WAS ALWAYS BEHIND HIS PEERS.

AND THERE IS REALLY NO EXPLANATION IN THE RECORD, HERE, AS FAR AS WY THERE WERE NO MENTAL HEALTH EXPERTS CONSULTED OR --

NO, YOUR HONOR.

THE ONLY TIME THERE IS ANY RECORD REFERENCE TO THAT IS BEFORE THE GUILT-PHASE CRIME SHALL? EGUILT-PHASE TRIAL?

ASICALE THAT IN A BRIEF WITH THE RECORD REFERENCE.

THIS WAS PRIVATE COUNSELT REPRESENTED THIS DEFENDANT BELOW?

I THINK HE WAS APPOINTED COUNSEL, PRIVATE APPOINTED.

WAS THERE ONLY ON-WAS THERE ONE -- WAS THERE ONLY ONE -- WAS THERE ONE LAWYER OR TWO LAWYERS IN THE SDMAS.

AS I RECALL, ONE.

-- IN THIS CASE?

AS I RECALL, ONE.

THIS WAS IN THIS CASE?

I BELIEVE THE PUBLIC DEFENDER HAD A CONFLICT OF INTEREST IN ANOTHER CASE, I BELIEVE, WHEN HE WAS APPOINTED. THIS WAS IN ESCAMBIA COUNTY. EXCUSE ME A MOMENT. I KNOW WE SORT OF MOVEDAROUN ITSSI E TOKTO E OFSNE AVOIDING-ARRES. SPYE STATE HAS SUGGETS OKAY FOR THE TRIAL JUDGE TO MAKE THE FINDING, EVEN THOUGH IT DID NOT GO TO THE JURY. IT IS DECIDED BASED ON THE LOVE MAN CASE. THE STATE IS -- ON THE LOVE MAN CASE. -- ON THE HOF FMA N CASE. THE STATE ALSO ALLOWED IT TO STAND, BASED ON THIS COURT DID SOMETHING SIMILAR IN THE ECHOLS CASE. FIRST OF ALL, THIS IS NOT NEW INFORMATION. THERE IS INDICATION IN HOF FMA N THAT THE JUDGE DIDN'T HAVE NEW INFORMATION BEFORE HIS FINDINGS. AND FURTHER THIS COURT NOTED THE CIRCUMSTANCE, IN DETERMINING THAT THE OVERRIDE SHOULD BE AFFIRMED. I WOULD, ALSO, NOTE IN THE KENNEDY SAYS CASE AND IN THE HAMILTON CASE WHICH I CITED IN THE BRIEF, THIS COURT HAS RULED OTHERWISE, SAYING THAT IT IS A DUE PROCESS VIOLATION, SAYING THAT THE COURT SHOULD ALLOW AN AGO RIGHT ARE, WHEN IT HAS NOT BEEN -- AGGRAVATOR, WHEN IT WAS NOT PRESENTED TO THE SENTENCING JURY OR TO THE JUDGE. NOW, TET THAT HOFFMAN AND HAMILTON SUGGESTS THAT IT IS OKAY FOR THESE MATTERS NOT TO GO BEFORE THE JURY AND THE JUDGE, I WOULD ASK THIS COURT TO RECONSIDERE DECISIONS,NIE2SION FROMTHE US SUPREME COURTIN ESPINOSAND IN THETEREOF IERE SUPREME C HASE TT FLORIDA'S CAPNSCHEMETEAST AS ITIS UNDER ERAL CONSDUE REQUIREMENTS,A ENCING PS, WHERE BOTH THE JURY ANDE JUDG IN THE SENTENCIG PROCESS. ID SUBMITE LOVE MANCISES N MIGHT BERE, IN LIGHT OFHOEATERSI. ,O, RERAISED THE APRENDI QUESTION,ICHI KNOW THIS COURT HAS ADDRESSED IN MILLS, BUT I THINK THIS COMES INTO PLAY, AS TO THIS AVOID AVOID-ARREST FACTOR AS WELL, AND I WON'T BE LABT APRENDI

ARGUMENT HERE. -- I WON'T BELABOR THE APRENDI ARGUMENT HERE.

WITH REGARD TO THE HARMLESS ERROR NOLZ, -- ERROR ANALYSIS, IS THERE REASONABLE RELIABILITY THAT THE RESULTS WOULD HAVE DIFFERENT? IS THAT A PREJUDICE PROBLEM?

WHETHER IT CAN BE ESTABLISHED BEYOND A REASONABLE DOUBT THAT THE INCLUSION WOULD HAVE BEEN DIFFERENT OR THAT THE INCLUSION OF THAT, OR THE EXCLUSION OF THAT AGGRAVATOR WOULD HAVE MADE NO DIF.

RIGHT.

IT WOULD BE THE LEGAL STANDARD, TO BE EMPLOYED HERE.

BUT WITH A SLIGHT MITIGATION -- WELL, WITH MITIGATION HERE, AND THE SERIOUS AGGRAVATION, DOUBTFUL THAT YOU HAVE OVERCOME THAT PRONG?

YES, YOUR HONOR, I THINK WE DO, AND I THINK THE ANALYSIS SET UP MADE SPECIFICALLY IN THE PROPORTIONALITY ARGUMENT WHICH I HAVE RAISED, WHERE I DID THE ANALYSIS WITHOUT THE AVOIDING-ARREST FACTORS, IS PERTINENT HERE. I MEAN, THIS COURT, AGAIN, HAS REVERSED ON PROPORTIONALITY GROUNDS, WHERE THERE WERE CASES JUST AS MUCH, IF NOT MORE AGGRAVATED, THAN THE ONE HERE WITH THE ROBBERY AND THE HEINOUS ATROCIOUS AND CRUEL FINDING. THE MITIGATION, EVEN THOUGH THE TRIAL JUDGE, I THINK THIS COURT CAN LOOK AT THE ENTIRE RECORD REGARDING THE MITIGATION, I THINK THERE HAVE BEEN NUMEROUS CASES WHERE THERE HAVE BEEN TEENAGED DEFENDANTS, EVEN THOUGH THIS CLIENT WAS 18 YEARS OLD AT THE TIME, HE IS NEVERTHELESS THE TEENAGER AND STILL HAS ALL OF THE PERTINENT I AM MATT UNIVERSITIES OF A -- I AM TURTS OF A TEEN I THINK -- IMMATURITIES OF A TEENAGER AND HE CAN'T MAKE ANALYSIS OTHERWISE. I THINK WITH THE JUDGE'S FACT FINDERS AND THE JURY --

DID HE GRADUATE?

I BELIEVE THAT HE DID FORM.

WAS THIS A PART-TIME -- I BELIEVE THAT HE DID.

WAS THIS A PART-TIME JOB THAT HE HAD HERE?

I THINK IT WAS A PART-TIME JOB AT A FAST FOOD RESTAURANT.

AND WHAT ELSE -- WHAT ELSE DO WE KNOW ABOUT THIS DEFENDANT?

WELL, WE KNOW HE STILL LIVED AT HOME. HE STILL, I MEAN, HE WAS ABLE TO BUY A RALT RATR, APPARENT A A R, APPARENTLY, PROBLEM-PRONE AUTOMOBILE AND WAS DRIVING IT. THERE WAS STILL SOME TESTIMONY THAT HIS MOTHER OCCASIONALLY HAD TO WAKE HIM UP, TO BE SURE HE GOT TO WORK ON TIME. IS THIS HIS FIRST JOB?

HIS FRIENDS WERE 15 AND 16 YEARS OLD. THAT TENDED TO BE THE AGE OF HIS FRIEND. AND THIS WAS HIS FIRST JOB. I HAVE RAISED SOME OTHER ISSUES REGARDING ESSENTIALLY CAMPBELL-TYPE VIOLATION ON THE MITIGATION. I THINK I HAVE ADEQUATELY ADDRESSED THOSE IN THE BRIEF, SO I WILL JUST RELY ON THAT, THE COURT'S CONSIDERATION. THANK YOU. MR. CHIEF JUSTICE: THANK YOU. MR. FRENCH.

SE THE COUR I AM CURTSH, REPRESENTING THE STATE OF FLORIDA IN THIS CASE. I WOULD LIKE TO ADDRESS, FIRST, THES ELIMINATION, AGGRAVATING CIRCUMSTANCE. I ARGUED IN MY BRIEF, AND IT IS STILL THE STATE'S POSITION THAT, UNDER THE LAW OF THIS STATE, IT IS QUITE CLEAR

THAT THE TRIAL AY FIND AGGRAVATORS THAT ARE NOT SUBMITED TO THE JURY.

DOESN'T IT VIOLATE THE WHOLE CONCEPT OF HAVING AN Y TESTING EVERYTHING HERE, IF WE ALLOW THE TRIAL COURT TO NOT ONLY FIND SOMETHING THAT THE JURY WASN'T GIVEN BUT, ALSO, THAT THE STATE OPENLY SAID WE ARE NOT CLAIMING, THAT AGGRAVATOR. WHEN DOES THE DEFENDANT GET TO PARTICIPATE, THEN, IN THAT DECISION, AS TO WHETHER OR NOT THAT AGGRAVATOR EXISTS?

WELL, MY UNDERSTANDING OF THE FLORIDA LAW IS THAT THE DEFENDANT WILL GO INTO THE PENALTY PHASE BEFORE THE JURY AND THE STATE DOES NOT HAVE TO IDENTIFY THE AGGRAVATORS BEFORE THAT EVIDENCE IS PRESENTED, SO THE DEFENDANT GOES INTO THAT HEARING, KNOWING HERE THE STATUTORY AGGRAVATORS, HERE IS THE STATE'S EVIDENCE, AND THIS IS WHAT I HAVE GOT TO REBUT.

THE DEFENDANT HAS AN OPPORTUNITY, ONCEE STATE PUTS ON AND CLAIMS CERTAIN AGGRAVATORS, TO CROSS-EXAMINE OR PUT ON OTHER EVIDENCE OR TO REBUT THAT. CERTAINLY HERE IT IS A DONE DEAL SO WHERE DOES THE DEFENDANT GETY OPPORYE PROCESS WEISS, TO PARTICIPATE IN AN ADVERSARY PROCEEDING IN THE DECISION WHETHER OR NOT THIS AGGRAVATOR APPLIES?

THE STATE CERTAINLY, IN THIS CASE, PRESENTED EVIDENCE ESTABLISHING, I THINK, THE WITNESS ELIMINATION AGGRAVATOR. I DON'T KNOW WHY THE STATE DIDN'T ARGUE FOR IT. MAYBE THEY WERE OVERLY CAUTIOUS, BUT THE EVIDENCE CLEARLY ESTABLISHES THAT.

THIS ISN'T THE STATE JUST DIDN'T ARGUE IT.

THE STATE PRESENTED EVIDENCE.

THE STATE OPENLY SAID WE ARE NOT CLAIMING THAT AGGRAVATOR, DID THEY NOT?

I BELIEVE THAT'S CORRECT. THEY DID.

AND IT IS YOUR POSITION THAT THAT SHOULD BE APPROVED BY THIS COURT.

YES, SIR. AND I WOULD QUOTE FROM ECHOLS VERSUS THE STATE, WHICH THIS COURT DECIDED IN 1985. THIS COURT WAS REVIEWING THE EVIDENCE AND THE AGGRAVATORS FOUND BY THE JUDGE, AND SAID IN ITS OPINION, WE ADD THAT THE RECORD, ALSO, SHOWS A FOURTH AGGRAVATING FACTOR, THAT THE APPELLANT HAD BEEN PREVIOUSLY CONVICTED OF CERTAIN CRIMES. IT SAYS THIS COURT SAID WE CANNOT DETERMINE WHETHER THE TRIAL JUDGE OVERLOOKED THIS FOURTH AGGRAVATING FACTOR OR WAS UNCERTAIN AS TO WHETHER CONVICTIONS FOR CRIMES COMMITTED CONCURRENTLY WITH THE CAPITAL CRIME COULD BE USED IN AGGRAVATION. WE, HOWEVER, NOTE ITS PRESENCE IN ACCORDANCE WITH OUR RESPONSIBILITY TO REVIEW THE ENTIRE RECORD AND DEATH PENALTY CASES AND THE WELL-ESTABLISHED APPELLATE RULE THAT ALL EVIDENCE ANIMATERS APPEARING IN THE RECORD SHOULD BE CONSIDERED, WHICH SUPPORTS THE TRIAL COURT'S DECISION. AND I THINK THAT IS APPLICABLE HERE. I WOULD, ALSO, POINT OUT IN RESPONSE TO THE DUE PROCESS ARGUMENT, THAT THERE WAS NO OBJECTION TO THE TRIAL COURT'S ORDER OR AT LEAST NO DUE PROCESS OBJECTION WAS RAISD, AND I WOULD REFER TO THE RECORD AT PAGE --

WHEN WOULD THAT OBJECTION HAVE BEEN RAISED? WOULD THE DEFENDANT BE REQUIRED TO INTERRUPTE JUDGE IN THE SENTENCING?

HE COULD RAISE THAT OBJECTION AT THE CONCLUSION OF THE SENTENCING, AFT JUDGE READ HIS GR AFTER TE JUDGE READ HIS SENTENCING ORDER, AND I WOULD REFER TO PAGE 480F THE RECORD, AFTER THE JUDGE READ THAT AND ANNOUNCED WHAT HIS SENTENCE WAS. HE, THEN,

SAID ANYTHING FURTHER, AND THE STATE SAID, NO, YOUR HONOR. THE ONLY THING THE DEFENDANT SAID WAS, I WOULD LIKE TO HAVE A COPY OF THE WRITTEN ORDER, YOUR HONOR. NOTHING ELSE. HE DID NOT SAY, YOUR HONOR, YOU FOUND A NEW AGGRAVATOR THAT I WASN'T PREPARED FOR. HE DIDN'T SAY I WOULD LIKE A CHANCE TO OFFER ADDITIONAL EVIDENCE IN REBUTTAL OR ANY -- HE DIDN'T MOVE TO REOPEN THE EVIDENCE, AND I WOULD, ALSO, POINT OUT THAT HE FILED A MOTION FOR NEW TRIAL THEREAFTER, AND I WOULD REFER TO PAGE 497 AND8 OF THE RECORD, AND IN THAT MOTION FOR NEW TRIAL, HE, ALSO, DOES NOT RAISE ANY DUE PROCESS ISSUES OR ANY ISSUE RELATING TO THE COURT'S FINDING OF THE WITNESS ELIMINATION AVOID-ARREST AGGRAVATING CIRCUMSTANCE. IT WOULD BE OUR POSITION THAT THE DUE PROCESS ARGUMENT HAS NOT BEEN PRESERVED FOR APPEAL.

LET ME -- EXCUSE ME. I WAS GOING TO ASK, HE INDICATED THAT THERE HAVE BEEN A COUPLE OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES,ES PIN OWES, A I THINK, WAS ONE. -- ESPINOSA, I THINK, WAS ONE.

IF I UNDERSTAND HISSES PIN OWES AN ARGUMENT, HE IS -- UNDERSTAND HIS ESPINOSA ARGUMENT HE IS SAYING THE JURY, NUMBER ONE, WOULD RETURN ITS RECOMMENDATION THAT WOULD ELIMINATE ANY SPENCER HEARING, AND I THINK WE HAVE SPENCER HEARINGS, WITH WHERE THE PARTIES ARE GIVEN AN OPPORTUNITY TO PRESENT ADDITIONAL EVIDENCE, NOT ONLY IN MITIGATION BUT HAPPENING IN AGGRAVATION. I DON'T THINK I CRIED IT IN THIS CASE, BUT I AM CERTAINLY AWARE OF SOME CASES WHERE THAT HAS HAPPENED, WHERE THE STATE HAS PRESENTED ADDITIONAL AGGRAVATING CIRCUMSTANCES, AND PERHAPS I WILL FILE A NOTICE OF SUPPLEMENTAL AUTHORITY, BUT THAT HAS HAPPENED, AND THIS COURT HAS DONE THAT AND HAS APPROVED THAT.

WELL, MR. FRENCH, MY PROBLEM IS, I MEAN, WE LOOK AT THIS NARROW CASE AND MAY THINK THIS CASE SHOULD BE IN AFFIRMANCE AND MAYBE IT IS HARMLESS ERROR, BUT IN TERMS OF SETTING THE POLICY FOR WHAT IS AN APPROPRIATE AND FAIRWAY TO CONDUCT DEATH PENALTY CASES, IN LOOKING AT BOTH THE WAY THE UNITED STATES GOVERNMENT BY STATUTE AS WELL AS THE NEWLY-ENACTED LAWS OF THE ILLINOIS SUPREME COURT AND THE PENNSYLVANIA SUPREME COURT, ARE ALL TOWARDS REQUIRING THE STATE, AT AN EARLY STAGE, TO GIVE NOTICE, NOT ONLY OF THE DEATH PENALTY BUT OF THE AGGRAVATORS THAT WOULD SUPPORT THE IMPOSITION OF THE DEATH PENALTY. IF WE WERE TO APPROVE THIS, WHAT WE ARE REALLY SAYING IS THAT THE AGGRAVATORS WHICH ARE REQUIRED BY THE STATE TO BE PROVEN BEYOND A REASONABLE DOUBT, THEY ARE REALLY SOMETHING THAT THE JUDGE KS, AFTER THE FACT, FIGURE OUT WHAT THEY ARE, AND WE DON'T NEED ANY NOTIFICATION WHATSOEVER. DOES THAT -- I GUESS AS A POLICY QUESTION, WHATEVER THE OUTCOME OF THIS CASE, IS THAT REALLY SEEMING TO BE IN KEEPING WITH THE WAY THE JURISPRUDENCE IN THIS COUNTRY AND THE --

STATUTE SETS OUT WHAT THE AGGRAVATING CIRCUMSTANCES ARE, SO THE DEFENDANT IS ON NOTICE AS TO THAT CIRCUMSTANCE. THIS COURT HAS NEVER REQUIRED FURTHER NOTICE. IF YOU WANT TO CHANGE THE RULES, I DON'T KNOW THAT WE WOULD HAVE AN OBJECTION OF THAT, BUT IN THIS CASE --

YOU ARE ASKING US TO ACTUALLY GO FARTHER THAN WHAT THE RULES WOULD NOW ALLOW ANDLOWAUE TO SUA SPONTE, TO FIND AN AGGRAVATOR --

BASED ON THE EVIDENCE.

> AND HAVE BASIS FOR IMPOSITION OF THE DEATH PENALTY.

CORRECT. AND I THINK THE LAW IN THIS STATE IS UPORS. THAT ALTERNATIVELY, WE WOULD, ALSO -- SUPPORTS THAT. ALTERNATIVELY, WE WOULD, ALSO, ARGUE, IF IT IS HARMLESS ERROR, THAT IN THIS CASE THE JURY WAS NOT INSTRUCTED ON AGGRAVATING CIRCUMSTANCE.

RETURNED A SENTENCING RECOMMENDATION THAT WAS 11-TO-1 IN FAVOR OF DEATH. THE JUDGE WAS REQUIRED TO GIVE THAT RECOMMENDATION GREAT WEIGHT WEIGHT.

DID THE JUDGE GIVE THIS AGGRAVATOR GREAT WEIGHT? ' GAVE EACH THE THREE AGGRAVATORS GREAT WEIGHT.

CAN WE FIND IT HARMLESS ERROR THAT THE JUDGE IS GIVING IT GREAT WEIGHT?

THIS COURT HAS FOUND HARMLESS ERROR IN A NUMBER OF CASES, WHERE THE JUDGE HAS FOUND AN AGGRAVATOR AND THIS COURT HAS STRUCK, IT AND I BELIEVE IN JONES V STATE, WHICH I CITED IN MY BRIEF AT PAGE 28, WAS A CASE IN WHICH THE WITNESS ELIMINATION AGGRAVATOR WAS STRUCK ON APPEAL, AND THE DEATH PENALTY WAS UPHELD BASED UPON TWO OTHER STATUTORY AGGRAVATORS, SIMILAR TO WHAT WAS FOUND IN THIS CASE.

I REALIZE WE HAVE DONE THAT, AND IN AN EXCHANGE WITH YOUR COLLEAGUE THERE, WE DISCUSSED THAT, BUT WHEN A JUDGE GIVES A PARTICULAR AGGRAVATOR GREAT WEIGHT, CAN WE REALLY SAY THAT --

WE CAN IN THIS CASE, BECAUSE THERE IS MINIMAL MITIGATION. I MEAN, THERE -- EVEN IF WE STRIKE THE AGGRAVATOR, WE STILL HAVE TWO AGGRAVATORS TO WHICH THE JUDGE GAVE GREAT WEIGHT. WE HAVE BASICALLY MINIMUM MITIGATION. WE HAVE GOT THREE WITNESSES THAT TESTIFY THERE IS NO EXPERT MENTAL HEALTH TESTIMONY THERE. IS NO SCHOOL RECORDS IN THIS CASE. THERE IS SOME TESTIMONY THAT HE MADE AVERAGE GRADES BUT WE DON'T KNOW WHAT HIS SCHOOL RECORDS ARE. THERE ARE NO IQ TEST THE SCORES IN THE RECORD, AND THE TESTIMONY -- TEST SCORES IN THE RECORD, AND THE TESTIMONY OF THE THREE WITNESSES WHO DID TESTIFY DON'T ILLUMINATE HIS BACKGROUND AND CHARACTER AND SO FORTH TO A GT ET. BRI, DF GENEL ANSWERS, LIKE HE WAS A LITTLE SLOW, BUT THEY DON'T, ON CROSS-EXAMINATION, WELL, HE MADE AVERAGE GADZ -- AVERAGE GRADES IN SCHOOL AND APPARENTLY GRADUATED.

WAS THIS TESTIMONY PRETTY BRIEF OR CAN YOU TELL US?

IT WAS NOT REAL LENGTHY. I CANNOT TELL YOU HOW MANY PAGES IT WAS, BUT IT WAS NOT REAL LENGTHY.

DOES HE HAVE ANY JUVENILE HISTORY?

NOT THAT WE ARE AWARE OF. THIS IS AN 18-YEAR-OLD THAT COMMITS A HORRENDOUS CRIME AND WE KNOW NOTHING ABOUT HIM.

THAT'S CORRECT. IT IS THE DEFENDANT'S BURDEN TO PUT ON MITIGATING EVIDENCE. I DON'T KNOW IF HE OBTAINED A MENTAL HEALTH EXAMINATION OR LOOKED AT THE SCHOOL RECORDS AND DETERMINED THAT IT WAS NOT MITIGATING AND IT WOULD BE BETTER NOT TO PRESENT IT OR NOT. ALL I KNOW AND CAN TESTIFY AND ARGUE HERE IS ACTUALLY WHAT IS IN THE RECORD, AND WHAT IS IN THE RECORD DOES NOT ESTABLISH STRONG MITIGATION. THAT BEING THE CASE, IT SEEMS TO ME WHEN YOU HAVE TWO STRONG AGGRAVATORS, PARTICULARLY THE HEINOUS, AN ATROCIOUS AND CRUEL AGGRAVATOR IN THIS CASE, THIS WOMAN WAS CUT OVER 60 TIMES. YOU KNOW, HER TRACHEA WAS CUT, HER JUGULAR VEIN WAS CUT. HER ARTERY IN HER WRIST WAS CUT, NUMEROUS WOUNDS THAT WOULD HAVE INDIVIDUALLY BEEN FATAL AND CUMULATIVELY WERE OBVIOUSLY FATAL, ALTHOUGH NOT IMMEDIATELY. THE TESTIMONY OF THE MEDICAL EXAMINER WAS THAT SHE COULD HAVE LIGS15. SHTE DIED IMMEDIATELY, SO OF COURSE THAT WITNESS SUFFERED, AND THIS CRIME IS HEINOUS, AT ATROCIOUS AND CRUEL.

DO YOU HAVE TENSION HERE, BETWEEN, REALLY, DUE PROCESS AND THE THEORY OF HARMLESS ERROR. HERE, IT IS ALMOST TRIAL BY AMBUSH, WHERE THE DEFENDANT IS NOT GIVEN AN

OPPORTUNITY TO CROSS-EXAMINE, AS TO AN AGGRAVATOR, AND IT IS POPPED ON HIM AT THE LAST MOMENT BY THE JUDGE THIS WAY. IT SEEMS AS IF, AS IF WE ARE EVALUATING, IF WE ARE WEIGHING THESE TWO LEGAL PRINCIPLES, I THINK DUE PROCESS WOULD TRUMP HARMLESS ERROR, IF THAT IS WHAT WE ARE LOOKING AT.

AGAIN, MY ANSWER IS TO, FIRST OF ALL, CONSTITUTIONAL ERROR, INCLUDING DUE PROCESS ERROR CAN BE HARMLESS. SECONDLY, HE DIDN'T RAISE THAT ISSUE. HE NEVER ASKED FOR AN OPPORTUNITY TO PRESENT ANY ADDITIONAL EVIDENCE. HE HASN'T SAID, NOW, WHAT ADDITIONAL EVIDENCE HE COULD HAVE PRESENTED. FRANKLY I HAVE A HARD TIME IMAGINING WHAT KINDF ADDITIONALO SH CT, ION.

WELL, THAT IS NOT INDICIA OF WHAT HE WOULD HAVE PRESENTED. THE ISSUE IS WHETHER HE WAS GIVEN AN OPPORTUNITY TO PRESENT ANYTHING.

WELL, IF IS HE CLAIMING THAT HE WAS DENIED TO PRESENT EVIDENCE, THEN HE COULD MAKE A PROFFER OF WHAT THAT EVIDENCE WOULD HAVE BEEN, IF HE HAD BEEN GIVEN A CHANCE, AND WE HAVE THAT NOWHERE, AND HE DID HAVE THE OPPORTUNITY TO RAISE THAT ISSUE AT TRIAL. HE HAD THE OPPORTUNITY TO RAISE THAT ISSUE, WHEN THE JUDGE WAS DONE ANNOUNCING HIS SENTENCING ORDER AND, ALSO, IN THE MOTION FOR NEW TRIAL, AND INSTEAD WE HAVE GOT A DUE PROCESS ISSUE THAT IS RAISED FOR THE FIRST TIME ON APPEAL, AND, AGAIN, I THINK IT IS NOT PRESERVED, AND SECONDLY IN THIS CASE, IT IS JUST ABSOLUTELY CLEAR --

IS THAT THE PRINCIPLE THAT YOU SAY THE SUPREME COURT OF THE STATE OUGHT TO ADHERE TO, THAT YOU CAN HAVE A DUE PROCESS VIOLATION, THEN YOU CAN CURE IT, SOMEHOW, BY HARMLESS ERROR.

IT CAN BE HARMLESS, YES. I THINK THAT IS QUITE CLEAR.

BUT, COUNSEL, A SITUATION WHERE YOU WALK INTO THE FINAL STAGES OF THIS PROCEEDING, AND LET'S SAY, FOR EXAMPLE, THAT THE STATE HAS NOT REQUESTED A CCP OR A HAC, AND THE DEFENDANT AND COUNSEL GO INTO THAT FINAL ARGUMENT TO FINISH THE FINAL ARGUMENT AND THEY, THEN, MAKE WHATEVER PRESENTATION TO THE JUDGE, AND THEY ARE SETTING THERE AND READING THE FINAL ORDER, AND FIND THOSE TWO WHICH YOU MUST AGREE ARE THE ONES THAT LEAD, TO MOST OFTEN, THE IMPINGS OF -- THE IMPOSITION OF THE ULTIMATE PENALTY, AND THAT THAT COULD GO ON IN THE COURTS OF THIS STATE AND IT WOULD NOT BE HARMFUL ERROR?

IF I WERE DEFENSE COUNSEL AND SITING THERE AND THE JUDGE FOUND AN AGGRAVATOR THAT HADN'T BEEN ARGUED, I WOULD OBJECT, AND IT WOULD BE MY OBLIGATION TO OBJECT AND IF I HAD ADDITIONAL EVIDENCE THEN IT WOULD BE MY POSITION TO MAKE A PROFFER OF THAT ADDITIONAL EVIDENCE.

BUT THAT IS AFTER AND YOU SHOULD INTERRUPT THE JUDGE AT THAT STAGE OF THE PROCEEDINGS.

I AM NOT SAYING YOU SHOULD INTERRUPT THE JUDGE, BUT WHEN THE JUDGE PRESENTS THE ORDER AND SAYS IS THERE ANYTHG FURTHER, I DON'T KNOW WHY HE COULDN'T ARGUE TO THAT. AND IN THIS CASE IT IS NOT LIKE HE FOUND AN AGGRAVATOR THAT WAS NOT SUPPORTED BY THE EVIDENCE. IN THIS CASE IT IS QUITE CLEAR THAT IT WAS SUPPORTED BY THE EVIDENCE. THERE WAS NO REASONABLE EXPLANATION FOR WHY HE KILLED HER THAN TO AVOID ARREST, BECAUSE YOU HAVE A CASE IN WHICH THIS WITNESS WAS NEVER, EVER A THREAT TO THIS QI. THE VICTIM WAS, I BELIEVE, SOMETHING LIKE 86 POUNDS. SHE WAS 4 FOOT 8 AND-A-HALF INCHES TALL. THE DEFENDANT WAS, WEIGHED ALMOST 300 POUNDS.

BUT ISN'T, I MEAN, ON THE CONTRARY ARGUMENT, IT WOULD BE, I REALIZE SHE IS BOUND UP, IS

THAT THIS IS SUCH A VICIOUS CRIME THAT THERE WAS SOME TESTIMONY ABOUT WHETHER HE HAD GOTTEN AGGRAVATED OR MAD, THAT THIS IS ACTUALLY, THERE IS NO REASON TO DO THIS, OTHER THAN HE WANTED TO INFLICT A HIGH DEGREE OF PAIN ON HER, AND SEE HER DIE, AND I MEAN, THAT IS WHY YOU GET HAC, BECAUSE THAT HAPPENED, SO THERE IS A TENSION IN THIS BEING SAYING A WITNESS, I MEAN, THAT IS A ARGUMENT THAT COULD BE MADE AND THAT DIDN'T PLAY OUT BELOW, CORRECT?

WITNESS ELIMINATION HAS TO BE THE SOLE OR DOMINATE MOTIVE, AND IN THIS CASE, HE HAD A PLAN TO COMMIT A ROBBERY THAT HE ANNOUNCED THE DAY BEFORE HE ACTUALLY WENT IN THERE TO COMMIT THAT ROBBERY. ALL RIGHT. HAVING DECIDED TO COMMIT THAT ROBBERY, OF SOMEPLACE WHERE HE KNEW THE VICTIM, OKAY, AND AS A MATTER OF FACT THE FACT THAT HE KNEW HER IS HOW HE GOT INTO THE POPEYES IN THE FIRST PLACE. ONCE HE GOT IN THERE --

THE IDEA WOULD BE THAT THAT WAS PLANNED TO MURDER HER, BEFORE HE EVEN --

HE HAD TO. SHE PRESENT NOD IMPEDIMENT TO CARRYING OUT THAT ROBBERY. WHAT SHE DID --

WHY DON'T WE IMPOSE CCP?

WHY? THAT WASN'T ASKED, EITHER, AND THAT WASN'T FOUND, SO I AM NOT GOING TO ARGUE. THAT.

AREN'T YOU NOW JUST SAYING LET'S THROW IN CCP? WHAT YOU ARE SAYING IS AS GOOD AN ARR CCP.

I THINK WHAT IT IS AN ARGUMENT FOR IS WITNESS ELIMINATION. SHE PRESENTED NO IMPEDIMENT TO HIM COMMITTING THAT ROBBERY BUT SHE DID POSE AN IMPEDIMENT TO HIM GETTING AWAY WITH THAT ROBBERY IS BECAUSE SHE COULD TESTIFY. ESSENTIALLY HE WAS TO COMMIT THAT ROBBERY AND ELIMINATE A WITNESS, AND THAT IS WHAT HE DID.

IS THERE ANYONE ELSE PROSECUTED FOR THIS MURDER?

IN THE STATE SENTENCING MEMORANDUM, THERE IS A REFERENCEO LEILEI SMITH HAVING BEEN INDICTED FOR ACCESSORY AFTER THE FACT. THAT IS ALL I KNOW. OKAY. THE, OBVIOUSLY HE WENT TO LEILEI SMITH'S HOUSE AFTER THE ROBBERY, AND SOME OF THE MONEY WAS ACTUALLY FOUND IN LEILEI SMITH'S HOME. TO WHAT EXTENT HE PARTICIPATED, WELL --

DID THE DEFENDANT MAKE ANY KIND OF ARGUMENT HERE, POINTING THE FINGER AT LEILEI SMITH?

I THINK HIS ARGUMENT IN MITIGATION TO THE COURT, IN THE SENTENCING MEMORANDUM, WAS THE SUGGESTION TO THE FACT THAT THIS PERSON WASN'T THE ONLY PERSON THAT WAS INVOLVED, BUT AS WE STATE IN OUR BRIEF, HE MAY NOT HAVE BEEN THE ONLY PERSON, BUT HE WAS THE PRIME PERSON. HE WAS THE INSIDE GUY WHO GOT IN. HE WAS THE ONE WHO HAD THE MONEY AFTER THE CRIME WAS OVER. HIS FINGERPRINTS WERE ON THE DEPOSIT SLIP AND SO ON AND SO FORTH.

I GUESS AT LEAST TO THE QUESTION OF IF YOU THROW THAT INTO THE MIX HERE, AND YOU HAVE, IF WE HAVE AN AGGRAVATOR THAT SHOULD NOT HAVE BEEN FOUND BY THE COURT, DO WE NEED TO HAVE THE TRIAL JUDGE REEVALUATE WHETHER OR NOT HE WOULD IMPOSE THE DEATH PENALTY?

THERE WAS A MIX BEFORE. AGAIN, HE ADDRESSED, THERE WAS AN ALLEGATION THAT ONE OF HIS CLAIMS WAS THAT HE WAS UNDER THE SUBSTANTIAL DOMINATION OF LEILEI SMITH, AND THE JUDGE FULLY ANALYZED THAT AND DETERMINED IT WAS THE OTHER WAY AROUND, AND THAT

FINDING IS NOT EVEN ATTACKED ON APPEAL A THAT BEING THE CASE, AGAIN, THE MITIGATION STAYS THE SAME IN ITS TOTALITY. IT IS MINIMAL.

I WANT TO ASK A QUICK QUESTION ABOUT THE REMEDY. IF WE FIND THAT THE JUDGE ERRED IN FINDING THE AVOID-ARREST AGGRAVATOR THAT WASN'T ASKED FOR BY THE STATE, AND WE FIND THAT IT IS NOT, WE CAN'T TELL WHETHER IT IS HARMLESS BEYOND A REASONABLE DOUBT IN THIS SENTENCING ORDER, BECAUSE HE GAVE IT GREAT WEIGHT, IS THE REMEDY TO SEND THIS BACK TO THE TRIAL JUDGE TO REWEIGH THE AGGRAVATORS AND MITIGATORS, WITHOUT CONSIDERING AVOID ARREST OR TO HAVE A NEW PENALTY PHASE BEFORE THE, TO HAVE --

-- JURY.

IT WOULDN'T BE THE JURY BECAUSE IT WASN'T ASKED FOR. THE ONLY HARM COULD COME, I WOULD THINK, POST JURY IMPOSITION, AND THIS IS SIMPLY A RESENTENCING BEFORE THE JUDGE, OR CAN IT BE ACCOMPLISHED BY JUST JUDGE REEVALUATING THE EVIDENCE, WITHOUT REGARD TO AVOID ARREST?

WELL, CERTAINLY I AGREE WITH YOU THAT IT DOESN'T HAVE TO GO BACK BEFORE THE JURY. I HADN'T REALLY THOUGHT ABOUT TO WHAT EXTENT YOU WOULD DO BEFORE THE JUDGE, WHETHER OR NOT YOU WOULD WANT TO ALLOW THE PRESENTATION OF EVIDENCE, BUT IT JUST TO MESTW,HAT AT THAT PT, E ECOULD ARGUE THAT THE AVOID-ARREST AGGRAVATOR APPLIES AND PRESENT EVIDENCE AS TO THAT.

I MEAN, IT IS REALLY THE STATE'S, IF THE STATE WAIVED, IT THEN THE IDEA WOULD BE THAT THE JUDGE SHOULDN'T CONSIDER IT.

OF COURSE I THINK IF HE CONSIDERED IT WITHOUT THE AVOID-ARREST AGGRAVATOR, HE WOULD COME TO THE SAME CONCLUSION. THAT IS JUST WHY I THINK IT IS HARMLESS.

BUT WE WOULD DECIDE THAT, IF THERE IS AN ERROR. I MEAN I GUESS THAT IS A QUESTION. OKAY.

THANK YOU. MR. CHIEF JUSTICE: REBUTTAL?

COULD YOU RESPOND TO THAT LAST QUESTION, WHICH IS YOU CERTAINLY, ARE YOU ARGUING THIS ERROR WOULD ENTITLE YOU TO A NEW INTO ENTIRELY NEW SENTENCING PROCEEDING OR JUST A REEVALUATION BY THE JUDGE, WITHOUT CONSIDERING THE AVOID-ARREST AGGRAVATOR?

ACTUALLY, YOUR HONOR, OUR POSITION WOULD BE THAT THERE SHOULD BE AN ENTIRE NEW PROCEEDING, WITH A NEW JURY.

BUT HOW CAN YOU -- HOW CAN YOU ON --.

AGAIN, THAT IS BRINGING IN SOME OF THE ARGUMENTS FROM THE OTHER ISSUES IN THE SENTENCE. IT IS A MATTER OF DUE PROCESS THAT SHOULD BE PRESENTED WITH JURY FINDINGS, AND UNLESS THAT IS WEIGHED BY THE DEFENDANT, I THINK HE IS ENTITLED TO HAVE BOTH SENTENCEORS REVIEW ALL OF THE EVIDENCE THAT IS AVAILABLE. SPECIFICALLY TO YOUR QUESTION, I THINK THE, WHETHER IT GOES BACK FOR THE TRIAL JUDGE TO EXAMINE WHETHER THE AVOID -- THE RESENTENCING, WITH OR WITHOUT THE AVOIDING-ARREST FACTOR, I THINK IT STILL SHOULD BE AT LEAST A FULL-BLOWN SPENCER HEARING. THERE MAY BE A DETERMINATION -- THERE IS A POSITION HERE THAT THE STATE HAS ALREADY WAIVED PURSUING THE AVOIDING-ARREST AGGRAVATOR.

WELL, IF THAT IS SO, THEN, AGAIN, WHY, WHAT WOULD A NEW SENTING PROCEEDING

ACCOMPLISH?

-- SENTENCING PROCEEDING ACCOMPLISH?

I GUESS, YOUR HONOR, MY POSITION IS ANY TIME YOU ARE TALKING ABOUT A RESENTENCING TO DEATH, THAT BOTH THE PARTIES SHOULD HAVE AVAILABLE, TO THEM, TO PRESENT ADDITIONAL MITIGATING FACTORS THAT MAY HAVE EVEN ARISEN POST TRIAL, BEFORE --

THAT REALLY WOULD OPEN THE DOOR TO ALLOW THE STATE TO PUT ON THE AVOID-ARREST EVIDENCE, WOULDN'T IT?

AGAIN, I DON'T THINK SO. THEY HAVE ALREADY WAIVED IT. BY NOT PURSUING IT. SO I WOULD SAY THAT ANY RESENTENCING, I GUESS THAT IS MY OWN VIEW OF HOW THE PROCESS SHOULD WORK, THAT ANY RESENTENCING SHOULD INCLUDE AT LEAST AT FULL SPENCER HEARING. TO ENSURE THAT THE APPROPRIATE MATERIALS ARE BEFORE THE COURT, WHEN THEY ARE MAKING A LIFE OR DEATH DECISION.

IF E DEFENDANT GETS TO PUT ON SOME NEW MITIGATING, THAT YOU SAY MAY EVEN HAVE ARISEN SINCE -- ON THAT DOES HAPPEN.

--

THAT DOES HAPPEN.

WOULD THE STATE BE ABLE TO, SAY, JUST DISCUSSING THE CCP, DOES THAT MEAN THE STATE --

ACTUALLY IN THIS CASE --

ARGUE THAT, ALSO,? ALLTY WILL IN CASE, THE STATE, ALSO, SPECIFICALLY WAIVED THE CCP AGGRAVATING CIRCUMSTANCE.

OKAY. HOW ABOUT ANY OTHER CIRCUMSTANCE CIRCUMSTANCE? THAT THEY DIDN'T WAIVE?

I AM SORRY?

I IS HE, SOME CIRCUMSTANCE THAT THEY -- I SAID SOME CIRCUMSTANCE THAT THEY DIDN'T WAIVE, SO I GUESS YOU ARE TELLING US THAT, ANY TIME YOU HAVE A RESENTENCING, WE SHOULD AT LEAST OPEN IT UP TO THE SPENCER PORTION, SO THAT ADDITIONAL AGGRAVATORS OR MITIGATORS COULD BE DISCUSSED.

AGAIN, SETTING THIS CASE ASIDE ENTIRELY, JUST AS A RESENTENCING POLICY MATTER, I THINK AT A MINIMUM, A SPENCER HEARING OUGHT TO BE APPROPRIATE IN EVERY RESENTENCING CASE. THERE IS FREQUENTLY THINGS THAT WILL COME UP, AND I THINK WHEN THE STATE OF FLORIDA IS MAKING A LIFE OR DEATH DECISION ON A HUMAN BEING, THAT THERE SHOULD BE AN OPPORTUNITY FOR FULL INFORMATION TO COME BEFORE THE SENTENCER.

ANY TIME THAT OCCURS, THEN WHAT WE HAVE SAID IN PRESTON, THAT THE CLEAN SLATE RULE APPLIES, AND SO THE STATE WOULD HAVE THE SAME RIGHT AS THE DEFENDANT, TO HAVE A CLEAN SLATE IN A RESENTENCING, UNDER OUR CASE LAW.

IF IT WAS A CLEAN SLATE WITH A NEW JURY.

YOU THING THAT ONLY PERTAINS TO GOING BACK TO THE JURY? MY MEMORY IS THAT THIS COURT SAID THAT, IN RESPECT TO RESENTENCING BEFORE THE JUDGES.

I KNOW THIS COURT SPECIFICALLY, IN A CASE, I THINK CRAIG, WHERE THERE WAS --

THAT WAS FOR A JURY.

I AM SORRY?

THE JURY, THAT WAS NOT BEFORE THE JURY. THAT WAS ONLY BEFORE THE JUDGE. BECAUSE HE GOT THE BENEFIT --

-- OF THE JURY FINDING. CORRECT. CORRECT. I WOULD LIKE TO BRIEFLY COMMENT, JUST ONE BRIEF COMMENT ON THE, WHETHER THERE IS SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE AVOIDING-ARREST FACTOR. I WOULD DRAW THE COURT'S DECISION TO THE JERRY OLD DECISION, WHICH I HAVE -- THE JERLEDZ DECISION WHICH I HAVE CITED IN THE -- THE JERRY OLEDZ DECISION WHICH I HAVE -- THE JERRY OLED DECISION WHICH I HAVE CITED IN THE BRIEF, WHERE THE VICTIM WAS BOUND AND STABBED. I JUST DRAW THE COURT'S ATTENTION TO THAT CASE. THANK YOU. MR. CHIEF JUSTICE: THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE. THE COURT WILL BE IN RECESS.