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Anthony Spann v. State of Florida

CHIEF JUSTICE: GOOD MORNING, EVERYONE. IT LOOKS LIKE YOU ARE ALL READY TO GO IN THE FIRST CASE OF SPANN VERSUS STATE. IF COUNSEL IS READY, WE WILL PROCEED.

GOOD MORNING. COUNSEL. THE COURT. MY NAME IS BOB NORGARD. I AM ON BEHALF OF THE APPELLANT, ANTHONY SPANN IN THIS CASE. THE FACTS OF THIS CASE, IN A NUTSHELL, ARE THAT MR. SPANN AND A CODEFENDANT BY THE NAME OF PHIL MORE, NEEDED MONEY TO LEAVE THEIR AREA OF TOWN. THERE WAS A SITUATION WHERE THEY AND THIS IS PRIMARILY BASED ON THE TESTIMONY OF MR. PHIL MORE, ABDUCTED A YOUNG LADY, HER CAR WAS TAKEN, AND LATER MR. SPANN WAS APPREHENDED, WHEN HE WAS SEEN IN THAT CAR. THE FIRST ISSUE THAT I WOULD LIKE TO GET INTEREST IS STARTING RIGHT WITH THE PENALTY-PHASE ISSUES AND GETTING INTO THE ISSUE REGARDING THE WAIVER OF MITIGATION IN THIS CASE. AS I INDICATED IN MY BRIEF, THE COURT CERTAINLY ATTEMPTED TO FOLLOW THE REQUIREMENTS OF COON, THE PROCEDURAL REQUIREMENTS, WHEN COUNSEL IS IN A POSITION OF HAVING A CLIENT, DEFENSE COUNSEL IS IN A POSITION OF HAVING A CLIENT THAT'S WAIVING DEATH. THE DEFENSE COUNSEL IN THE CASE DID ADVISE THE COURT THAT HIS CLIENT WISHED TO WAIVE MITIGATION, THAT THE COURT MADE INQUIRIES REGARDING THAT WAIVER, AND I THINK THE ISSUE THAT THE COURT NEEDS TO TAKE A LOOK AT IN THIS SITUATION IS THE ADEQUACY OF THE ISSUE OF PROFFER BY DEFENSE COUNSEL. IN A SITUATION WHERE A CLIENT IS FACING THE DEATH PENALTY, IN A SITUATION WHERE THEY ARE WAIVING SOMETHING AS OF , I PUT COUNSEL, WAIVING A JURY TRIAL. IT IS PROBABLY ONE OF THE MOST SIGNIFICANT WAIVERS THAT COULD OCCUR IN THE CRIMINAL JUSTICE SYSTEM.

CHIEF JUSTICE: REFRESH US HERE. WHAT DID COUNSEL DO?

ESSENTIALLY WHAT COUNSEL DID WAS ADVISE THE COURT THAT ESSENTIALLY THERE WAS A SITUATION WHERE THE CLIENT WANTED TO WAIVE MITIGATION. HE ADVISED THE COURT THAT HE WENT OVER THAT ISSUE WITH HIS CLIENT AND THE COURT ASKED HIM TO PROFFER MITIGATION IN THIS CASE. ESSENTIALLY, WHEN ASKED ABOUT MITIGATION IN THIS CASE, WHAT THE ATTORNEY DID AT THE INITIAL PROFFER WAS INDICATE TO THE COURT THAT HE WAS SEEKING THE STATUTORY MITIGATING FACTOR OF AN ACCOMPLICE WITH A MINOR PARTICIPATION IN THE CRIME. HE INDICATED THAT MR. SPANN HAD BEEN A GOOD SON AND A GOOD BROTHER AND THAT HE WAS CAPABLE OF LIVING IN A PRISON ENVIRONMENT, WITHOUT BEING A THREAT TO OTHERS. THAT WAS ALL THAT WAS PROFFERED, AT THAT INITIAL INQUIRY, REGARDING THE WAIVER OF MITIGATION IN THIS CASE.

DO YOU HAVE ANY PROBLEM RELATIVE TO WHETHER THIS WAS A KNOWING WAIVER OR NOT?

WELL, I THINK WHAT THIS --

IS THAT AN ISSUE?

YES, SIR.

DO YOU KNOW WHAT HE WAS WAIVING?

THAT'S THE CRITICAL ISSUE. IF SOMEBODY IS WAIVING A JURY TRIAL, A JUDGE IS GOING TO MAKE

SURE THEY UNDERSTAND WHAT A JURY TRIAL IS, AND THAT IS THE RIGHT THAT THEY ARE GIVING UP, AND HOW IMPORTANT THAT RIGHT S IF SOMEBODY ENTERS A PLEA, THE COURT MAKES A DETAILED INQUIRY OF WHAT RIGHTS THEY ARE GIVING UP, THEIR RIGHT TO A JURY TRIAL, THEIR RIGHT TO TESTIFY IF THEY WANT TO, THEIR RIGHT TO NOT TESTIFY.

BUT DID THE COURT GO INTO THIS, THAT YOU ARE WAIVING MITIGATION, DO YOU KNOW WHAT YOU ARE WAIVING AND THIS TYPE OF THING?

THAT IS MY POINT, IS THAT MR. SPANN DID NOT KNOW WHAT HE WAS WAIVING. WHAT HAPPENS IS, IS COUNSEL GETS UP THERE, PROFFERS --

WHAT DID THE COURT ASK HIM? LET ME ASK IT THAT WAY THEN.

THE JUDGE ASKED HIM TO PROFFER WHAT MITIGATION HE WOULD INTEND TO PRESENT, IF MR. SPANN WAS NOT WAIVING MITIGATION. ON THE FIRST INQUIRY, THOSE LIMITED AREAS OF MITIGATION WERE ALL THAT HE INDICATED. WHEN THE SECOND PROFFER WAS MADE WHEN THE COURT FOLLOWED THIS UP WITH AN ADDITIONAL INQUIRY AT A LATER TIME, HE ADDED IN SOME ADDITIONAL MITIGATION THAT HAD NOT BEEN PART OF THE INITIAL INQUIRY.

WHAT ASPECT OF COON ARE YOU SAYING WAS DEFICIENT ON THIS RECORD?

WHAT I AM SAYING WAS DEFICIENT IS THERE WAS A PROFFER OF MITIGATION. MY POINT IS, IS THAT THE PROFFER WAS INADEQUATE. THERE WAS --

DOESN'T COON, THOUGH, PLACE GREAT RELIANCE ON RESPONSIBILITY OF THE LAWYER TO DO THAT BUT NOT ON THE COURT INDEPENDENTLY TO DO THAT? DIDN'T THE JUDGE DO WHAT COON REQUIRES, UNDER THESE CIRCUMSTANCES? IN OTHER WORDS, HELP US WITH WHAT PART OF COON ARE YOU FOCUSING ON, IN SAYING, IN THIS INSTANCE, THERE WAS NOT COMPLIANCE WITH COON, BECAUSE COON SAYS THUS AND SO, AND SOMETHING DIFFERENT HAPPENED HERE, VIOLATIVE OF THE COON --

LET ME USE AN EXAMPLE THAT I THINK GOES RIGHT TO THE POINT. HAD DEFENSE COUNSEL STOOD UP AND SAID THE ONLY MITIGATION IN THIS CASE IS THAT MR. SPANN IS A GOOD SON, AND THE COURT, THEN, PROCEEDED TO DO AN INQUIRY OF MR MR. SPANN, SAYING DO YOU WANT TO WAIVE THAT MITIGATION, THAT IS WHAT HE IS WAIVING, BUT IF THERE IS OTHER EVIDENCE OF OTHER MITIGATION, FOR EXAMPLE, RAISED IN THE PSI IN MR. SPANN'S CASE, WAS A VERY STRANGE AND PSYCHOLOGICALLY-SIGNIFICANT UNHEALTHY RELATIONSHIP THAT WAS NOTED WITH HIS MOTHER, IN THE PRESENTENCE INVESTIGATION. THE FACT THAT HIS FATHER HAD BEEN KILLED WHEN HE WAS RELATIVELY YOUNG. HIS FATHER HAD BEEN MURDERED WHEN HE WAS APPROXIMATELY THE AGES OF 2-TO-4, WAS BROUGHT OUT IN THE PSI. MY POINT THAT I AM MAKING IS THAT THE TRIAL COURT, THROUGH THE PRESENTENCE INVESTIGATION, WAS AWARE OF MITIGATION THAT DEFENSE COUNSEL HAD NOT PROFFERED.

BUT YOU SEEM TO BE SUGGESTING THAT NOW WE GO BEYOND COON AND THAT SOMEHOW THERE BE A COMPREHENSIVE EXAMINATION OR INVESTIGATION AS TO WHATEVER POTENTIAL MITIGATION EXISTS OUT THERE, AND THAT ALL THAT IS DONE FIRST, AND THEN THAT THE DEFENDANT BE TOLD, WELL, THEY HAVE FOUND EVIDENCE OF ALL OF THIS POTENTIAL MITIGATION, AND ARE YOU SURE YOU UNDERSTAND THAT IT IS THE PRESENTATION OF ALL OF THAT POTENTIAL MITIGATION THAT YOU ARE WAIVING NOW? COON DOESN'T MANDATE THAT, DOES IT?

WELL, WHAT COON DOES, IT DOES MANDATE, IS THAT THERE BE A PROFFER OF THE MITIGATION THAT DEFENSE COUNSEL HAS UNCOVERED. IF, WHAT I AM SUGGESTING IS THAT IF THERE IS NOT AN ADEQUATE PROFFER MADE BY DEFENSE COUNSEL, THAT WAIVER --

WHAT WOULD YOU CONSIDER TO BE AN ADEQUATE PROFFER? I MEAN, THE DEFENSE COUNSEL, IN THIS RECORD, PROFFERED FOUR OR FIVE DIFFERENT AREAS OF POSSIBLE MITIGATION. ARE YOU SAYING THAT THE DEFENSE ATTORNEY MUST DO AN IN-DEPTH PRESENTATION OF EACH OF THOSE POSSIBLE MITIGATIONS? IS THAT WHAT YOU MEAN, WHEN YOU SAY INADEQUATE?

WELL, FIRST OF ALL, I THINK THAT, IN THE CONTEXT OF THIS TYPE OF SITUATION, I THINK THE EXAMPLE YOU JUST GAVE IS PROBABLY, IN MY MIND, A LESSEE EGREGIOUS VIOLATION OF COON, IN TERMS OF THE ADEQUACY OF THE -- A LESS EGREGIOUS VIOLATION OF COON, IN THE TERMS OF THE ADEQUACY OF THE PROFFER. TO SAY WE ARE GOING TO PRESENT THAT HE IS A GOOD SON, THAT DOESN'T REALLY SAY VERY MUCH, IN TERMS OF WHAT MITIGATION THERE IS THERE, BUT UNDER COON, THEN HE IS REQUIRED --

LET'S STOP AT THAT ONE. WHAT WOULD YOU SAY WOULD BE PROPER, FOR A PROFFER CONCERNING HE IS A GOOD SON. WHAT SHOULD THE DEFENSE ATTORNEY HAVE SAID OR DONE?

I THINK HE COULD HAVE GIVEN SOME EXAMPLES OF HOW MR. SPANN WAS A GOOD SON, THINGS THAT WOULD DEMONSTRATE NOT ONLY THE EXISTENCE OF MITIGATING FACTOR BUT AND PRIZE THE COURT OF SOMETHING THAT WOULD -- BUT APPRISE THE COURT OF SOMETHING THAT WOULD GIVE MORE THAN THE BARE BONES OF SOME SUBSTANTIVE OUTLINE.

I THINK THERE ARE TWO THINGS, ONE IS THAT JUSTICE SHAW WAS ASKING YOU PREVIOUSLY, WAS THIS A KNOWING WAIVER BY MR. SPANN, OF HIS RIGHT TO PRESENT MITIGATION? AND THIS JUDGE WENT TO GREAT LENGTHS, TO TELL MR. SPANN AND GO OVER WHAT HIS RIGHTS WOULD BE AS FAR AS PRESENTING MITIGATION. THE PRONG OF COON THAT YOU ARE FOCUSING ON, WHICH IS THE TYPE OF PROFFER, REALLY IT WAS A REQUIREMENT IMPOSED, SO THAT WE COULD ATTEMPT TO AVOID POST POST-CONVICTION PROCEEDINGS, AS TO WHETHER THERE WAS MITIGATION OR NOT, AND ON THIS RECORD, THERE FOR AS TO THE REASON, WHAT WE WOULD BE REVERSING ON, WOULD BE WHAT? TO SAY THAT THE DEFENSE ATTORNEY DIDN'T DO ENOUGH TO TELL MR. SPANN WHAT HE COULD PRESENT? IS, AND WE WOULD GO BACK AND WHAT WOULD HAPPEN? I MEAN, MR. SPANN IS STILL, I ASSUME, INSISTING ON HIS RIGHT NOT TO PRESENT MITIGATION, SO COULD YOU HELP ME OUT WITH THAT, AS FAR AS IS THIS REALLY A QUESTION OF A KNOWING WAIVER, OR JUST SAYING THAT THE DEFENSE ATTORNEY, REALLY, DIDN'T DO ENOUGH TO EXPLAIN WHAT THE MITIGATION WAS, WHICH MIGHT GO TO AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

WELL, I THINK THAT THE TRIAL COURT HAS A DUTY TO MAKE SURE THAT, IN SITUATIONS WHERE SOMEBODY IS WAIVING A RIGHT, THAT THEY KNOW EXACTLY WHAT THEY ARE WAIVING.

WELL, THEN, WE WOULD BE, THEN THE PSI THAT WE HAVE SUGGESTED BE ORDERED, WHAT YOU WOULD BE, YOU WOULD TELL THE COURT THAT WE ARE REALLY HAVING IT ORDERED AT THE WRONG TIME. IT SHOULD BE ORDERED BEFORE THE WAIVER BEGINS, BECAUSE THAT IS EVEN UNDER THE MOHAMMED PERSPECTIVE PROCEEDING, THAT IS, THE PSI DOESN'T HAVE TO BE ORDERED, UNTIL AFTER THE WAIVER HAS BEEN COMPLETE AND THE DEFENSE SAYS THAT HE OR SHE DOESN'T WANT TO PRESENT MITIGATION, SO WE WOULD HAVE TO REDO OUR WHOLE PROCEDURES IN THIS AREA.

I THINK THE POINT YOU ARE MAKING CLEARLY SHOWS THE DIFFICULT POSTURE THAT BOTH THE DEFENSE, THE COURTS, THE GOVERNMENT, EVERYBODY IS PUT IN, WHEN A DEFENDANT WAIVES MITIGATION. I THINK THAT THIS COURT STRUGGLES WITH HOW DO WE DEAL WITH WAIVERS OF MITIGATION. THE SUGGESTION IN THE DISSENT IN THE CASE, THAT THERE BE APPOINTED COUNSEL WHO SIMPLY PRESENTS THE MITIGATION, WAS FLOATED OUT THERE AT ONE POINT. I THINK THIS COURT, ITSELF, HAS STRUGGLED WITH HOW DO WE DEAL WITH WAIVERS OF MITIGATION?

MR. SPANN, ARE YOU ERUPTING -- ARE YOU REPRESENTING TO THIS COURT THAT HE WANTS TO WITHDRAW HIS WAIVER AND WANTS TO GO TO A FULL PENALTY PHASE? IS THAT THE POSTURE HE

IS IN? IS THAT THE RELIEVE YOU ARE SEEKING ON MR. SPANN'S BEHALF?

YES, YOUR HONOR. PART OF MR. SPANN'S REASON FOR WAIVING, SPEAKING ON HIS BEHALF, WAS THAT HE DIDN'T FEEL HIS COUNSEL WAS EFFECTIVELY REPRESENTING HIM. HIS DEFENSE COUNSEL --

HOW WOULD YOU KNOW THAT? IS THAT A PART OF THIS RECORD?

HE DOESN'T WANT TO DIE. HE DOESN'T WANT TO BE BEFORE THIS COURT, WAIVING EVERYTHING. I AM JUST ANSWERING HER QUESTION.

IT SOUNDS LIKE THAT IS, THAT IS SOMETHING THAT WOULD HAVE TO BE ADDRESSED IN POSTCONVICTION.

NORMALLY, IT WOULD BE, BUT THE CRITICAL SITUATION IN THIS CASE IS THAT THERE WAS INFORMATION THAT THE TRIAL JUDGE HAD, THAT SHOULD HAVE TRIGGERED HER TO KNOW THAT THE PROFFER OF COUNSEL WAS INADEQUATE.

WHEN WAS THE PSI? WHEN WAS THE PSI ORDERED?

OBVIOUSLY DONE AFTER THE PENALTY PHASE.

AND BY THE WAY, WE DON'T HAVE IT, APPARENTLY, IN OUR RECORD, THE PSI. IS THAT SOMETHING THAT SHOULD HAVE BEEN FORWARDED UP HERE?

I KNOW. I RECEIVED A NOTICE THAT THE COURT REQUESTED IT, AND I WOULD ASSUME THAT THE CHREFERK WOULD HAVE -- THAT THE CLERK WOULD HAVE PROVIDED THE COURT WITH IT, BECAUSE THERE WAS A REQUEST FOR PSI INCLUDED IN THIS CASE, AS IN EVERY CASE WHERE IT IS NOT A PART OF THE RECORD, AND I QUOTED WELL, GO AHEAD WITH THE QUESTION.

YOU DON'T HAVE ANY PROBLEM WITH THE PROPOSITION, DO YOU, THAT, IF THE DEFENDANT KNOWS WHAT HE IS DOING, HE CAN WAIVE MITIGATION, ALTHOUGH, OUT THERE.

CERTAINLY. HE CAN WAIVE AN ATTORNEY. HE CAN WAIVE MITIGATION. WHAT I HAVE A PROBLEM WITH IS A RECORD WHERE, CLEARLY THE PROFFER IS BEING MADE BY A DEFENSE ATTORNEY AND WAS NOT COMPLETE. BY THE POINT OF THE SENTENCING MEMORANDUMS, AN ADDITIONAL MITIGATING FACTOR --

YOU ARE SAYING THE PROFFER WAS NOT COMPLETE, AND WHAT IS THE PROBLEM WITH THAT? THE JUDGE IS MISLED? HE DOESN'T KNOW? OR THE DEFENDANT IS MISLED, AT THAT POINT?

I THINK BOTH ARE BEING MISLED. IN OTHER WORDS THE DEFENDANT IS BEING PUT IN A POSITION OF WAIVING SOMETHING. HE IS TOLD HERE IS WHAT YOU ARE WAIVING, AB AND C, THEN DOWN THE ROAD YOU FIND OUT THAT THERE IS MITIGATION, POINT C, D, F AND G THAT WERE NOT PART OF THAT INQUIRY BY THE COURT, WITH RESPECT TO THE WAIVER THAT WAS MADE. YOU KNOW, THE DEFENSE ATTORNEY, IN HIS MEMORANDUM, HIS SENTENCING MEMORANDUM, INCLUDED IN THERE AS A MITIGATING FACTOR, THE FACT THAT MR. SPANN WAS NOT THE SHOOTER IN THE CASE. THAT WAS NEVER EVEN PROFFERED TO THE COURT AS A MITIGATING FACTOR AT THE TIME OF THE WAIVER. SO VERY HONESTLY, AT SOME POINT YOU ARE GOING TO BE DEALING WITH THIS CASE, WHETHER IT IS IN POSTCONVICTION. YOU ARE DEALING WITH IT NOW, BASED ON WHAT I AM PRESENTING. THERE HAS TO BE AN ADEQUATE PROFFER, IN ORDER --

YOU ARE ARGUING INEFFECTIVE COUNSEL. IS THAT WHAT YOU ARE ARGUING? THAT SEEMS TO BE WHERE YOU ARE HEADED.

IN THIS SENSE, WHAT I AM ARGUING IS THE TRIAL COURT'S ERROR IN NOT BEING AWARE OF THE FACT THAT THERE WAS MITIGATION THAT WAS IN THIS RECORD THAT, BY MY READING THE FOUR CORNERS OF THE RECORD, COULD SEE EXISTED IN THIS CASE, BUT AT THE TIME MR. SPANN MADE HIS WAIVER, NOT ALL OF THOSE MITIGATING FACTORS WERE NOT PROFFERED TO THE COURT, WHERE HE COULD SAY, YES, THAT IS THE MITIGATION I AM WAIVING.

BUT IT WAS THE INEFFECTIVE INEFFECTIVENESS OF COUNSEL THAT KEPT THE TRIAL COURT FROM KNOWING THAT. IS THAT YOUR POINT?

WELL, TO SOME EXTENT, YES, BUT WHEN THE TRIAL COURT, DURING THE COURSE OF THE TRIAL, NOT IN A POSTCONVICTION PROCEEDING, BUT DURING THE VERY COURSE OF THE CASE, ITSELF, FINDS OUT THE DEFENSE COUNSEL HAD NOT PROFFERED ALL OF THE AVAILABLE MITIGATION, I THINK THE TRIAL COURT HAS A DUTY TO REEXAMINE THE PROFFER THAT WAS MADE, AND I THINK THAT RAISES SERIOUS QUESTIONS ABOUT THE VALIDITY OF THE PROFFER, WHICH IS WHY WE ARE HERE TALKING ABOUT THIS TODAY.

AND WHAT CASE LAW DO YOU THINK TAKES YOU THERE? DOES COON TAKE YOU THERE?

I THINK A PLAIN READING OF COON IS THAT THE DEFENSE COUNSEL HAS THE DUTY TO INDICATE WHAT THEY HAVE INVESTIGATED, AND AS A RESULT OF THEIR INVESTIGATION, WHAT MITIGATION THEY FOUND. IF THERE WAS MITIGATION OUT THERE THAT WAS READILY AVAILABLE THAT THEY DIDN'T FIND, SUCH AS, I MEAN, ALL THE PSI DID IS THEY WENT TO THE GUY'S DSC RECORDS AND FOUND INFORMATION ABOUT A SITUATION --

NOW YOU ARE TRAILING OFF, YOU SEE, INTO SOMETHING ELSE. IT IS VERY EASY TO NOT FOCUS ON THE ISSUE THAT WE ARE ASKING YOU ABOUT, AND THAT IS, IS IT THE PART OF COON, REQUIREMENT ON COUNSEL, OKAY, TO MAKE A PROFFER PROFFER, THAT THE DEFICIENT PART THAT YOU SAY OCCURRED HERE? WHAT, IN OTHER WORDS, WHAT REQUIREMENT OF COON ARE YOU SAY SAYING ARE YOU SAYING WAS NOT COMPROET APPLIED WITH HERE?

THERE WAS -- WAS NOT COMPLIED WITH HERE?

THERE WAS A PROFFER OF MITIGATION. MY POINT WAS THAT I THINK COON, THERE HAS TO BE AN ADEQUATE PROFFER. I MEAN, WHEN THERE IS A WAIVER, THERE NEEDS TO BE A KNOWING AND INTELLIGENT WAIVER N THIS CASE, WHERE THERE IS A PROFFER --

WHERE DOES THERE SAY THERE HAS TO BE AN ADEQUATE PROFFER?

YOU GUYS COULD ISSUE AN OPINION THAT SAYS THE PROFFER REQUIREMENT IN COON, WHETHER IT'S ADEQUATE OR INADEQUATE, DOESN'T MATTER, AS LONG AS THERE WAS A PROFFER, AND I DON'T THINK THIS COURT WANTS TO STAND ON AN INADEQUATE PROFFER. IF THE DEFENSE LAWYER --

WE HAVE INADEQUACY OF COUNSEL CLAIMS PRESENTED ON VIRTUALLY WITH EVERY POST-CONVICTION RELIEF, THAT SAYS THAT THE LAWYER DIDN'T DO AN ADEQUATE JOB EVEN WHEN HE DID PRESENT A CASE FOR MITIGATION AND THERE WASN'T A WAIVER, DIDN'T DO AN ADEQUATE JOB OF DISCOVERING THE AVAILABLE MITIGATION THAT WAS OUT THERE. AND WHAT YOU ARE SAYING HERE SOUNDS A LOT LIKE THAT, THAT IS THAT THAT IS WHAT YOU KEEP REPEATING, IS THAT THE LAWYER DIDN'T DO AN ADEQUATE JOB OF PRESENTING, TO THE JUDGE, THE MITIGATION THAT WAS OUT THERE. AND THAT, UNLESS THE COURT FIRST KNOWS ALL THE AVAILABLE MITIGATION, THE COURT REALLY CAN'T SECURE A PROPER WAIVER OF MITIGATION FROM THE DEFENDANT. NOW, THAT IS REALLY GOING TO STAND COON ON ITS HEAD, IS IT NOT, IF, FIRST OF ALL, ALL THE POTENTIAL MITIGATION HAS TO BE DISCOVERED, AND THEN THE DEFENDANT, HIMSELF, HAS TO BE TOLD ABOUT ALL THE MITIGATION THAT MIGHT BE PRESENTED ON HIS BEHALF, BEFORE HE CAN WAIVE IT. I AM HAVING DIFFICULTY READING THAT COON HAD

ANY INTENT TO HAVE A PROCEDURE LIKE THAT.

FRANKLY, FROM MY STANDPOINT, I WISH YOU GUYS WOULD PUT STAN COON ON ITS HEAD, BECAUSE --

WE HAVE GRAPPLED WITH THAT AND THE MAJORITY HAS COME DOWN THE OTHER WAY, SO WE ARE ALL BOUND BY THAT DECISION, NOW, OF HOW IT EXISTS.

I UNDERSTAND. BUT OBVIOUSLY, LIKE, IN MOHAMMED THE DICTATES OF COON WERE EXPANDED. WHAT I AM SAYING, YOUR HONOR, IS THAT DEFENSE COUNSEL IN A CAPITAL CASE, IS EXPECTED TO EFFECTIVELY INVESTIGATE AND PRESENT MITIGATION. BASED ON THIS RECORD, WHERE DEFENSE COUNSEL MADE CERTAIN PROFFERS OF MITIGATION THEY HAD INVESTIGATED, YET WITHIN THE COURSE OF THESE VERY PROCEEDINGS WITHIN THE FOUR CORNERS OF THE PROCEEDINGS, THERE IS OTHER MITIGATION THAT CAME OUT. I MEAN --

SO ARE YOU SAYING THIS IS ONE OF THOSE CASES OF INEFFECTIVE INEFFECTIVENESS ON THE FACE OF THE RECORD? BECAUSE I HAVEN'T READ THE ARGUMENTS IN THE BRIEFS.

I THINK HE IS ESSENTIALLY, COON SHOULD STAND FOR THE PROPOSITION THAT THERE NEEDS TO BE AN ADEQUATE PRESENTATION BY DEFENSE COUNSEL. BY THE TIME THEY ARE STANDING UP THERE, GETTING READY TO START A PENALTY PHASE, THEY SHOULD HAVE DISCOVERED ALL THE MITIGATION IN THE CASE.

BUT IF THERE IS AN INADEQUATE ISN'T THAT RESERVED AS AN ISSUE FOR POST-CONVICTION RELIEF?

IF THE TRIAL JUDGE IS SITTING IN THE PROCEEDINGS, AND AN OBVIOUS ONE, THE FACT THAT MR. SPANN WAS NOT THE SHOOTER IN THIS CASE, IS A MITIGATING FACTOR. CLEARLY A MITIGATING FACTOR. THE TRIAL JUDGE DID NOT SIT THERE AND SAY, YOU KNOW, TO THE TRIAL ATTORNEY, WELL, WHAT ABOUT THE FACT THAT HE WASN'T A SHOOTER IN THIS CASE, THAT COMES FROM THE EVIDENCE PRESENTED IN THE GUILT PHASE OF THIS CASE? WHY AREN'T YOU PROFFERING THIS AS A MITIGATING FACTOR? THE TRIAL JUDGE IN THIS CASE, HAD THE TOOLS AVAILABLE TO SEE THAT THE PROFFER OF DEFENSE COUNSEL WAS NOT ADEQUATE, THAT THERE MAY BE, CERTAINLY, SOME QUESTIONS AS TO WHETHER COUNSEL FULLY AND PRIZED THE COURT OF MITIGATION -- A PRIZED THE COURT OF MITIGATION -- THE DEFENSE COUNSEL APPRISED THE DEFENSE COUNSEL OF MITIGATION. THE 3.850, THERE IS ABSOLUTELY NO OTHER MITIGATION THAT EXISTS, BECAUSE THE DEFENSE COUNSEL DID HIS JOB.

DO YOU HAVE SOME OTHER ISSUES? I DON'T KNOW IF YOU WANTED TO SPEND ALL YOUR TIME ON THIS, THAT IS FINE, BUT DID YOU HAVE OTHER ISSUES YOU WANTED TO TALK ABOUT?

YES, SIR. I THINK THIS WAS OBVIOUSLY A CRUCIAL ISSUE, ANY TIME THERE IS A WAIVER OF MITIGATION. IN THIS CASE, WE, ALSO, HAVE THE SITUATION WHERE THERE HAS BEEN A WAIVER OF THE PENALTY JURY. ONE OF THE ISSUES, I THINK IS IMPORTANT IN THIS SITUATION, IS THAT, BASED ON THE CASE LAW TAKE I PRESENTED IN -- THE CASE LAW THAT I PRESENTED IN MY BRIEF, THE TRIAL JUDGE HAS THE DUTY OF MAKING THE FINAL DECISION AS TO WHETHER TO WAIVE A PENALTY JURY OR NOT. THAT IS WITHIN THE CONTROL OF THE TRIAL JUDGE. THERE ARE CERTAIN THINGS THE DEFENDANT CAN WAIVE, AND IF THERE IS A KNOWING AND INTELLIGENT WAIVER, THE JUDGE HAS NO CHOICE BUT TO ALLOW THEM TO WAIVE IT. IN THIS INSTANCE, WITH THE JURY, HOWEVER, THE TRIAL COURT HOLDS THE ULTIMATE DISCRETION AS TO WHETHER TO REQUIRE A JURY TO BE I AM PANELED. A -- THE JURY TO BE EMPANELED. A CRITICAL POINT IN THIS CASE IS THE TRIAL JUDGE TREATED IT AS IF IT WAS THE DEFENDANT'S ABSOLUTE RIGHT TO WAIVE A PENALTY JURY IN THIS INSTANCE. ACCORDING TO THE COURT, EVEN IF THE PERSON WANTS TO WAIVE A JURY TRIAL, THE COURT IN ITS DISCRETION CAN STILL REQUIRE THAT THERE BE A PENALTY JURY. I FEEL IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO EXCUSE

THE JURY IN THIS CASE. THE TRIAL COURT, IN ITS INQUIRY OF MR. SPANN, WENT OVER, TIME AND TIME AGAIN, ABOUT HOW IMPORTANT A JURY WAS. THE TRIAL JUDGE, HOWEVER, JUST ACQUIESCED IN THE DEFENDANT'S REQUEST OF WAIVING A JURY. I THINK THE TRIAL COURT NEEDS TO UTILIZE ITS DISCRETION.

BUT THE TRIAL JUDGE IN THIS CASE, ON AT LEAST TWO OCCASIONS, THE 25th OF MAY AND THE 30th OF MAY, DISCUSSED THIS ISSUE WITH THE DEFENDANT. ISN'T THAT CORRECT?

YES.

AND THE TRIAL JUDGE TOLD THE JURY, TOLD THE DEFENDANT IN BOTH OF THOSE INSTANCES, THAT YOU KNOW, IT WOULD BE VERY DIFFICULT FOR HIM TO NOT FOLLOW THE JURY RECOMMENDATION, IF THE JURY RECOMMENDED LIFE, AND IT SEEMS THE TRIAL JUDGE WENT THROUGH SOME GREAT PAINS HERE, TO GET THAT POINT ACROSS TO THE DEFENDANT. WHAT MORE ARE YOU SAYING THE TRIAL JUDGE SHOULD HAVE DONE, IN ORDER TO DETERMINE THAT THIS IS WHAT THE DEFENDANT WANTED TO DO?

I THINK THE CRITICAL THING IS THAT WHAT IS REQUIRED IS A SEARCHING INQUIRY, TO TRULY DETERMINE IF THE WAIVER WAS KNOWING AND INTELLIGENT. THIS COLLOQUY, WITH MR. SPANN IN THIS INSTANCE, WAS 98 PERCENT LEADING QUESTIONS OF DO YOU KNOW THIS, DO YOU KNOW THIS, DO YOU KNOW THIS, DO YOU WANT TO DO THIS? I THINK, IN WAIVER SITUATIONS, THERE NEEDS TO BE, PARTICULARLY WAIVING SOMETHING AS SIGNIFICANT AS THIS, MORE OF AN INPUT, AS TO A SIMPLE QUESTION LIKE WHY DO YOU WANT TO WAIVE A JURY, AND THEN HAVE THE PERSON GIVE THEIR REASON, AND IF IT IS SOME MISCONCEPTION ON THEIR PART ABOUT HOW THE JURY WORKS THE JURY SYSTEM, OR SOMETHING THAT HIS ATTORNEY NEEDS TO JUST TALK TO HIM ABOUT IN PRIVATE, I THINK THAT IS WHAT IS PART OF A REQUIRED ADEQUATE INQUIRY. BUT MY POINT, AS FAR AS THE TRIAL COURT'S GOING ALONG WITH HIS WAIVER, IS THAT, WHEN YOU READ THE RECORD, THIS TRIAL JUDGE WAS TREATING HIS EXCUSAL OF THE PENALTY JURY AS SOMETHING THAT HE HAD AN ABSOLUTE RIGHT TO DO, AND THAT THE JUDGE DID NOT HAVE ANY DISCRETION AT ALL TO KEEP THE JURY. MY POINT IS, IF, 90 PERCENT OF THE QUEST JUNK ASKED MR. -- THE 90 PERCENT OF THE QUESTIONS THE JUDGE ASKED MR. SPANN WAS DO YOU KNOW HOW IMPORTANT IT IS TO HAVE A JURY? THE JUDGE SAID I UNDERSTAND YOUR POSITION, MR. SPANN.

WHAT BASIS WOULD THE TRIAL JUDGE HAVE SAID, NO, YOU CANNOT WAIVE THE JURY IN THIS INSTANCE? WHAT IN THIS RECORD, WOULD LEAD A TRIAL JUDGE TO SAY THAT?

I THINK CLEARLY, YOU KNOW, WE HAD SOMEBODY WHO WAIVED THE MITIGATION. WE HAD SOMEONE WHO WAS NOW WANTING TO WAIVE A JURY. I THINK THIS TRIAL COURT SHOULD HAVE STEPPED IN AND SAID, MR. SPANN, I THINK YOU NEED A JURY. I DISAGREE WITH YOU NOT WANTING TO HAVE A JURY IN THIS CASE. I AM GOING TO EMPANEL ONE, BECAUSE I WANT TO SEE WHAT THEY HAVE TO SAY ABOUT THIS.

LET'S ASSUME THAT THE JUDGE DID NOT ACCEPT THE WAIVER AND SAID WE ARE GOING TO HAVE A JURY TRIAL, AND THE JURY RECOMMENDED DEATH. YOU WOULD BE UP HEARSAYING THAT THE JUDGE -- YOU WOULD BE UP HERE, SAYING THAT THE JUDGE WAS, HAD ABUSED HIS OR HER DISCRETION BY NOT FOLLOWING WHAT MR. SPANN HAD SAID, WOULDN'T YOU? BECAUSE THAT IS WHERE WE HAVE GOTTEN THE FLIP SIDE IS THAT SORT OF YOU ARE DAMED IF YOU DO AND DAMED IF YOU DON'T -- YOU ARE DAMNED IF YOU DO, DAMNED IF YOU DON'T SITUATION, AND MOST OF THE TIME THE JUDGES DO FOLLOW THE REQUEST OF THE DEFENDANT AND DO NOT EMPANEL AN ADVISORY JURY, WHICH, WHERE THEY ARE NOT GOING TO HEAR MITIGATION IS, REALLY, PROBABLY PREFERABLE, BUT WE HAVE ALLOWED THAT, THE JUDGE, IF THE JUDGE WANTS TO, TO HEAR IT, BUT WOULDN'T YOU JUST BE ARGUING THE FLIP SIDE OF IT?

CHIEF JUSTICE: YOU NEED TO BE CAREFUL, BECAUSE YOU ARE INTO YOUR REBUTTAL TIME AND

YOU HAVE VERY LITTLE REBUTTAL TIME.

OKAY. VERY SUCCINCTLY, THIS TRIAL JUDGE WAS UNAWARE THAT SHE HAD THAT DISCRETION. HOW CAN A TRIAL JUDGE EXERCISE THEIR DISCRETION WHEN THIS EVENING THE DEFENDANT HAS THE ABSOLUTE RIGHT TO WAIVE THE JURY. THAT IS THE POINT. THANK YOU.

GOOD MORNING. I AM ANITA ALLEN ON BEHALF OF THE STATE. FROM THIS CASE IT IS ABSOLUTELY CLEAR THAT THIS JUDGE FOLLOWED THE MANDATES OF COON. HERE THE DEFENDANT KNEW HE HAD A RIGHT TO MITIGATION. HE WAS EXPLAINED THAT RIGHT BY THE JUDGE, AND HE ADMITTED DEFENSE COUNSEL EXPLAINED THAT RIGHT TO HIM. TRIAL COUNSEL, THEN, STOOD UP, TOLD THE JUDGE, I HAVE DONE THIS RESEARCH. I HAVE LOOKED INTO THIS MITIGATION. THIS IS WHAT WE WOULD PRESENT. THE DEFENDANT DOES NOT WANT US TO. THAT WAS DEFENSE COUNSEL LITTLE. WHEN DEFENSE COUNSEL LITTLE WAS THROUGH, DEFENSE COUNSEL UDELL ALSO STOOD UP AND SAID WE HAVE LOOKED AT SCHOOL RECORDS, SOCIAL RECORDS AND ADDITIONAL RECORDS FROM THE DEFENDANT'S PAST. WE HAVEN'T FOUND ANYTHING MITIGATING IN THOSE RECORDS. THEN THIS JUDGE WENT THROUGH A COLLOQUY WITH THIS DEFENDANT, NOT ONCE, ON MAY 25, BUT TWICE, AGAIN, ON MAY 30. THE JUDGE EXPLAINED HOW THE MITIGATION AND AGGRAVATION WORKS TO THIS DEFENDANT AND THE JUDGE ALSO PROFFERED THE AGGRAVATORS, SO THE DEFENDANT KNEW WHAT HE WAS FACING. THE DEFENDANT REPEATEDLY TOLD THE JUDGE I WANT TO WAIVE MITIGATION. SO IN THIS CASE COON WAS SATISFIED. THE COURT HAS SAID IN CHANDLER AND OTHERS, THAT THESE TYPES OF PROFFER BY DEFENSE COUNSEL IS PROPER. NEXT, WITH REGARD TO THE WAIVING OF THE JURY.

LET'S ALSO GO BACK TO THE MITIGATION. PART OF THE DEFENDANT'S ARGUMENT IN THE BRIEFS WAS THERE WAS A LOT OF OTHER MITIGATION THAT WAS APPARENT ON THE RECORD FROM THE PSI, THAT IT THE TRIAL JUDGE DOES NOT ADDRESS IN THE SENTENCING ORDER, SO WHAT DO WE DO ABOUT THAT SITUATION?

THAT SITUATION IS REALLY NOT A PART OF THIS APPEAL. THIS APPEAL HAS TO DO WITH WHETHER OR NOT COON WAS SATISFIED. THE DEFENSE COUNSEL HAS THE BURDEN OF PRESENTING THE MITIGATION THAT THEY WERE ABLE TO DISCOVER. THE JUDGE WAS, THEN, FOLLOWING HER DUTY, IN ASKING THE DEFENDANT IF HE UNDERSTOOD THAT THIS MITIGATION EXISTED, AND THAT DEFENSE COUNSEL WAS READY TO PRESENT IT. TO SAY THAT DEFENSE COUNSEL DIDN'T PROFFER ENOUGH THAT, IS NOT PROPER HERE. THAT WOULD BE PROPER ON A 3.850. THAT HASN'T BEEN PLED HERE. THERE IS ABSOLUTELY NO STRICKLAND ARGUMENT. IT HAS NOT BEEN ARGUED, AND THE BRIEF WAS NOT ARGUED AT ANY TIME DURING, IN THE REPLY BRIEF. THERE IS NO STRICKLAND VIOLATION ON THE FACE OF THIS RECORD, SO AS FAR AS THE CASE LAW IS CONCERNED, THE COON INQUIRY AND THE COON REQUIREMENTS WERE SATISFIED. DEFENSE COUNSEL DID THEIR JOB.

LET ME ASK JUST THIS ONE QUESTION. IT SEEMS TO BE THE SCOPE AND EXTENT OF THE STATEMENT AS PART OF A KNOWING WAIVER, SO LET'S TAKE JUST AN EXTREME HYPOTHETICAL, THAT YOU HAVE GOT AN INDIVIDUAL WITH BRAIN DAMAGE, RETARDED, ON DRUGS AT THE TIME OF THE EVENT, AND NONE OF THESE ARE MENTIONED DURING A PROFFER, BUT THERE IS THEN A WAIVER. DOES THAT SATISFY? THERE IS NO MENTION AT ALL. THE DEFENDANT DOESN'T KNOW THAT ANY OF THAT COULD BE MITIGATING IN NATURE. WOULD THAT SATISFY A COON APPROACH, WHERE YOU JUST SAID, WELL, THE MITIGATION IN THIS CASE IS THAT IT HAS A FEW PROBLEMS, NO MORE THAN THAT. HAD DIFFICULTY WITH HIS FAMILY. NO MORE THAN THAT. BUT THESE VERY SEVERE, HEAVY MITIGATORS DO, IN FACT, EXIST. WOULD THAT SATISFY?

IN THIS CASE, THAT TYPE OF CLAIM WOULD, AGAIN, BE PROPER ON A 3.850, SO IT MAY SATISFY IT, IF THE PROPER CLAIM IS MADE, BUT IN THIS CASE, WE DON'T HAVE ANY OF THAT. WE KNOW FROM THE PSI, THERE WAS NO BRAIN DAMAGE. THE PSI --

I UNDERSTAND THOSE, BUT TO SATISFY THE COON REQUIREMENT OF THE KNOWING WAIVER OF THE PRESENTATION OF MITIGATING-TYPE INFORMATION, BECAUSE THAT SEEMS TO BE YOU SEPARATE ALL THIS AWAY AND HE SAYS, LOOK, THERE WAS NOT A STATEMENT, SUFFICIENT STATEMENT IN THE RECORD THAT THIS DEFENDANT KNEW WHAT MITIGATION WAS REALLY ABOUT, BECAUSE THEY DIDN'T DISCLOSE WHAT THAT MITIGATION WAS.

IN THIS CASE THAT DOESN'T EXIST. HERE WE HAD A DEFENSE COUNSEL WHO DID THE RESEARCH. THE DEFENDANT WAS SITTING THERE WITH HIM. HE DIDN'T WANT TO PRESENT THE MITIGATION. THEY HAVE GONE AND TALKED TO FAMILY MEMBERS. THEY LOOKED AT HIS HISTORY. THEY LOOKED AT HIS PRIOR CRIMINAL RECORD, THEY DID THAT SORT OF THING. THE JUDGE LOOKED AT THE PSI, SATISFIED THE REQUIREMENTS OF MOHAMMED, ORDER THE PSI AND TOOK MITIGATION FROM IT, SO IN THIS CASE COON WAS SATISFIED, THE DEFENSE COUNSEL AND THE JUDGE DID HER JOB AND THE DEFENDANT CLEARLY WAIVED MITIGATION IN THIS CASE. HE EVEN SAID I HAVE BEEN THINK GOING THIS SINCE 1997, AND THE RECORD REFLECTS THE DEFENDANT WANTED THE JUDGE TO SENTENCE HIM ON THAT DAY, WHEN HE WAS WAIVING MITIGATION. HE KNEW WHAT HE WAS DOING. HE UNDERSTOOD WOULD COULD AND COULD NOT BE PRESENTED AND HE WAIVED IT. HE HAD THAT RIGHT TO DO IT, AND THE JUDGE GRANTED IT.

THERE IS SOMETHING IN THE RECORD TO SHOW THAT THE DEFENDANTS, REALLY, IN EFFECT SAY I WAIVE MITIGATION, NO MATTER WHAT IT IS, IS THAT WHAT HAPPENED HERE? THE DEFENDANT, I JUST DON'T WANT TO PUT ON MITIGATION, SO NO MATTER WHAT IT IS, I WAIVE IT.

THAT IS EXACTLY WHAT HAPPENED HERE. WHEN YOU LOOK AT THE COLLOQUY BETWEEN THIS DEFENDANT AND THIS JUDGE, THE JUDGE EXPLAINED. SHE COULD UNDERSTAND THAT HE WAS DISAPPOINTED IN THE VERDICT. SHE COULD UNDERSTAND WHY HE WOULD WANT TO WAIVE MITIGATION. SHE WANTED TO EXPLAIN THE IMPORTANCE OF MITIGATION, THE FACT THAT IT WOULD BE WEIGHED AGAINST THE AGGRAVATION, AND IF IT OUTWEIGHED THE AGGRAVATORS, THERE WOULD BE DIFFERENT ASPECTS THAT COULD HAVE CHANGED THE VERDICT. HOWEVER, THIS DEFENDANT --

BUT YOU WOULD AGREE, IF THERE IS RECORD MITIGATION, THE TRIAL COURT CANNOT IGNORE THAT, CAN IT?

IN THIS CASE? SHE CAN IGNORE -- SHE DIDN'T IGNORE IT. SHE DIDN'T IGNORE THE MITIGATION. SHE SEND THE PROFFER AS TRUE.

MY QUESTION IS, IF THERE IS RECORD MITIGATION, THE TRIAL COURT CANNOT IGNORE THAT MITIGATION. WOULD YOU AGREE WITH THAT?

EXACTLY. IN THIS RECORD, THIS TRIAL JUDGE WENT TO GREAT PAINS, TO GO THROUGH EVERYTHING. SHE SAID, ON THE RECORD AND IN HER ORDER, I LOOKED AT ALL THE MITIGATION PRESENT IN THE RECORD. I AM ACCEPTING THE PROFFER AS TRUE. SHE EVALUATED THE PSI, AND SHE PULLED MITIGATION FROM IT. THIS TRIAL JUDGE DID HER JOB. THERE WAS NO ABUSE OF DISCRETION AND THE PROFFER WAS NOT INADEQUATE.

WAS THE PSI ORDER BEFORE THE WAIVER?

NO. THE PSI WAS ORDER JUST AFTER THE WAIVER, I BELIEVE ON THE 30th, WHEN THEY WERE GETTING READY TO SET THE SPENCER HEARING.

SO, REALLY, THE PSI AND REALLY WHAT WAS LEARNED IN THE PSI, HAS MORE TO DO WITH THE PROPRIETY OF THE SENTENCING ORDER IN THIS CASE THAN IT DOES THE PROPRIETOR VALIDITY OF THE WAIVER.

I THINK THAT IT IS RELATED, BECAUSE THE PSI HAS TO DO WITH WHAT THE DEFENDANT SAYS,

AND THE DEFENDANT, HE KNEW THAT THIS STUFF EXISTED. HE COULD HAVE SAID TO DEFENSE COUNSEL THERE IS ALSO THIS BACKGROUND INFORMATION, BUT HE WAS CHOOSING TO WAIVE IT. DEFENSE COUNSEL HAS THE BURDEN OF FINDING OUT WHAT IT IS ABLE TO FIND OUT, AND THEY DID EXACTLY WHAT THEY COULD. THEY WENT TO FAMILY. THEY WENT TO FRIENDS. THEY LOOKED AT HIS PRIOR CRIMINAL HISTORY, AND THE PSI REFLECTS THAT. SO THERE WAS NOT MUCH DIFFERENT IN THE PSI THAT, EXCEPT FOR MAYBE THE FACT THAT THE DEFENDANT'S FATHER WAS SHOT, WHILE THE DEFENDANT WAS BETWEEN THE AGES OF 2 AND 4. THE PSI ALSO REFLECTS THAT THE DEFENDANT WAS UNCOOPERATIVE. THAT WAS NOTED IN THE PSI. IT IS ALSO REFLECTED BY THE FACT THAT THE DEFENSE COUNSEL DID ASK FOR AN EVALUATION OF THIS DEFENDANT. DR. PATRIAL-WENT TO MEET WITH HIM ONE -- DR. PETRILLO WENT TO MEET HIM ONE TIME AND WENT TO MEET WITH HIM A SECOND TIME. THE DEFENDANT DIDN'T WANT TO MEET WITH THIS PHYSICIAN. IT WAS CONSIDERED AND PROPERLY PROFFERED. THE WAIVER OF THE ADVISORY JURY ALSO HAPPENED AT THE SAME TIME. JUST AFTER DEFENDANT WAIVED MITIGATION, DEFENSE COUNSEL ALSO INFORMED THE TRIAL COURT THAT HE WISHED TO WAIVE THE JURY. THE TRIAL, IT IS INHERENT IN THE FACT THAT DEFENDANT HAS TO ASK THE TRIAL COURT TO WAIVE MITIGATION THAT, THE TRIAL COURT HAS DISCRETION AND IT IS INHERENT IN THAT FACT THAT THE DEFENDANT KNOWS THAT. IF HE KNOWS HE HAS GOT TO ASK THE TRIAL COURT TO WAIVE MITIGATION, SHE HAS THE POWER TO GRANT OR DENY HIS REQUEST, SO THE FACT THAT THIS TRIAL COURT ABUSED HER DISCRETION IN NOT REQUIRING THIS DEFENDANT TO HAVE A JURY, IT IS A CIRCULAR ARGUMENT. I MEAN THE FACT THAT HE HAS TO ASK, SHE CAN SAY YES OR NO, AND IT IS CLEAR FROM THIS COLLOQUY, WHETHER OR NOT THIS DEFENDANT GAVE LONG ANSWERS OR A SIMPLE YES, THE JUDGE HAD JUST COMPLETED THE MITIGATION WAIVER. THIS DEFENDANT UNDERSTOOD HOW MITIGATION AND AGGRAVATION WORKS. THE JUDGE, THEN, EXPLAINED, IN THE COLLOQUY THE ROLE OF THE JURY. SHE EXPLAINED TO THE DEFENDANT THAT ALL OF THE INFORMATION WOULD BE PLED TO THE JURY. IN RARE CIRCUMSTANCES, WOULD SHE EVER GO ABOVE THE JURY'S RECOMMENDATION. SHE UNDERSTOOD, AGAIN, SHE EXPLAINED, I UNDERSTAND YOU MAY BE UPSET WITH THE CONVICTION. HOWEVER, THERE WAS ABSOLUTELY NO REASON FOR THIS DEFENDANT, BESIDES HIS OWN FREE WILL, TO WAIVE THE JURY. HE SAID, I DON'T WANT A JURY. I WANT YOU TO SENTENCE ME TODAY. AND THE JUDGE SAID I CAN'T DO THAT. WE STILL HAVE TO HAVE THE SPENCER HEARING. SO THIS DEFENDANT CLEARLY UNDERSTOOD THAT HE HAD TO ASK THE JUDGE TO WAIVE THE JURY, AND WHETHER HE GAVE A LONG, DRAWN OUT ANSWER OR SIMPLY SAID YES, I UNDERSTAND THE QUESTION, IT STILL REFLECTS THAT THIS DEFENDANT UNDERSTOOD THAT HE WAS WAIVING THE JURY. MOREOVER, THE DEFENDANT CITED TO THE STATE V ARTHUR, WITH RESPECT TO THE SEARCHING, INTERROGATION, IN THAT CASE IT WAS SUBSEQUENTLY MODIFIED, AND THERE THE RULE IS YOU DON'T EVEN NEED TO ASK THE DEFENDANT. YOU CAN JUST ASK DEFENSE COUNSEL SO THAT CASE REALLY DOESN'T APPLY HERE, AND IF YOU LOOK AT THIS RECORD, THIS JUDGE DID A SEARCHING INTERROGATION. SHE WAS ASKING THE DEFENDANT IF HE UNDERSTOOD WHAT HE WAS WAIVING AND IF HE UNDERSTOOD THE CON QENZ OF WHAT HE WAS WAIVING -- THE CONSEQUENCES OF WHAT HE WAS WAIVING, AND HE SAID YES. AT POINT, -- AT THIS POINT, I WOULD ASK THAT THE COURTAR. CONVICTION AND SENTENCE.

CHIEF JUSTICE: HOW MUCH TIME DOES COUNSEL HAVE? REBUTTAL?

I CAN PUT IT AS SUCCINCTLY AS I CAN, WHAT TROUBLES ME ABOUT THIS CASE AS TO THE WAIVER OF MITIGATION, IS THAT, AT THE TIME OF THE INITIAL PROFFER, THE DEFENSE ATTORNEY PROFFERED THREE MITIGATING FACTORS OF A VERY BROAD NATURE. AT THE TIME OF THE NEXT PROFFER, HE PROFFERS, AT THE TIME OF THAT INITIAL PROFFER, HE PROFFERED THREE MITIGATING FACTORS. THE JUDGE WAS ASKING IS THAT ALL YOU FOUND? DID YOU FIND ANYTHING ELSE? WHAT ABOUT THIS? WHAT ABOUT THAT? AND HE IS GOING, NO, THAT IS THE MITIGATION IN THIS CASE. LESS THAN A DAY OR SO LATER, HE IS BEING ASKED AGAIN, WHAT IS THE MITIGATION YOU ARE PROFFERING? THREE ADDITIONAL MITIGATING FACTORS WERE BROUGHT TO THE ATTENTION OF COURT THAT HAD NOT BEEN BROUGHT TO THE ATTENTION OF COURT THE DAY BEFORE N THE SENTENCING MEMORANDUM, DEFENSE COUNSEL --

WHAT WERE THOSE?

ON THE FIRST DAY HE SAID WE ARE SEEKING HE WAS AN ACCOMPLICE WHAT MINOR ROLE, GOOD SON, GOOD BROTHER, CAPABLE OF LIVING IN A PRISON ENVIRONMENT. AT THE TIME OF THE SECOND PROFFER, HE ADDS TO THAT GOOD STUDENT UP TO A POINT, GOOD HUSBAND AND FATHER, AGE 23, I BELIEVE. THEN YOU GET TO HIS SENTENCING MEMORANDUM, AND ALL OF A SUDDEN ANOTHER MITIGATING FACTOR POPS UP, THAT HE WASN'T THE SHOOTER, AND AT THIS TIME IT WAS AGE 21, I THINK, AND POINTS OUT --

IS THAT THE SECOND PROFFER HEARING. THE DEFENDANT IS STILL GIVEN AN OPPORTUNITY, IS HE NOT, TO BACK OUT OF THIS WAIVER THAT HE HAS MADE ON THE 24th, 25th, SO EVEN AFTER WE ARE DISCUSSING THIS ADDITIONAL WHAT YOU CONSIDER TO BE ADDITIONAL MITIGATING EVIDENCE, THE DEFENDANT IS TOLD, BY THE TRIAL JUDGE, LOOK, YOU STILL HAVE AN OPPORTUNITY TO GET OUT OF THIS. I STILL HAVE THE JURY HERE. DOESN'T HE?

RIGHT. AT THAT POINT.

AND YOU CAN, IN FACT, GET OUT OF THIS WAIVER THAT YOU HAVE MADE OF MITIGATING CIRCUMSTANCES.

WHAT IS STILL DISTURBING IS, IN THE SENTENCING MEMO, THEY CAME UP WITH TWO ADDITIONAL MITIGATING FACTORS THAT WERE NEVER PROFFERED TO THE COURT IN THESE ADDITIONAL PROFFERS, AND WE FOUND ADDITIONAL FINISHING THINGS TO THE PSI.

THOSE WERE?

HIS AGE AT THE TIME OF THE FELONY OFFENSES AND THE FACT THAT HE WASN'T THE SHOOTER. THE --

IF I REMEMBER CORRECTLY, DIDN'T THE PROSECUTOR ACTUALLY TALK ABOUT THAT, AS BEING A NONSTATUTORY MITIGATING CIRCUMSTANCE? THE FACT THAT HE WASN'T THE SHOOTER.

IF THEY DID, I DON'T RECALL THAT. IT MAY HAVE BEEN THE PROSECUTOR WHO BROUGHT THAT UP, BUT THAT IS EVEN DISTURBING TO ME, IF IT IS THE PROSECUTION THAT IS BRINGING MITIGATION TO THE ATTENTION OF THE JUDGE. I THINK THE JUDGE --

DOES IT REALLY MATTER, SINCE THE TRIAL JUDGE HAS TO CONSIDER ANY MITIGATING THAT IS IN THE RECORD, AND IN THE RECORD, FROM JUST TRIAL, ITSELF, WE KNOW THAT FILLMORE WAS THE ACTUAL SHOOTER IN THIS CASE, DON'T WE?

WE KNOW THAT, BUT DID MR. SPANN SAY I AM GIVING UP THAT AS A MITIGATING FACTOR? I UNDERSTAND THAT IS A MITIGATING FACTOR AND WAIVING IT?

WAS HE AT THE TRIAL --

HOW DOES HE KNOW IS A MITIGATING FACTOR? LORD!

IF IT IS DISCUSSED AT THE HEARING AND MR. SPANN WAS AT THE HEARING, BECAUSE HE NOT PRESENT AT THIS HEARING?

I THINK WHAT HAPPENED WAS IT WAS DISCUSSED IN THE CONTEXT OF HIS BEING AN ACCOMPLICE WITH A RELATIVELY MINOR ROLL. NOT BEING A -- MINOR ROLE. NOT BEING A SHOOTER IS NONSTATUTORY, IF IT DOESN'T RISE TO THE LEVEL OF AN ACCOMPLICE WITH A MINOR ROLE. IT DOES NOT POINT OUT AS A DISCREET SEPARATE, MITIGATING FACTOR. YOU MAY BE CORRECT.

I THINK IF WE GO BACK, THE DEFENDANT WAS NOT THE SHOOTER WAS ACTUALLY DISCUSSED, AS A PART OF THE PROFFER THAT WAS GOING ON, SO I MEAN, THE DEFENDANT, REALLY, HEARD THAT, EVEN WHEN IT WAS BEING DISCUSSED AND STILL HAD AN OPPORTUNITY TO BACK OUT OF THIS.

BUT HE WASN'T GIVEN AN OPPORTUNITY AT THE SPENCER HEARING, WHEN ADDITIONAL MITIGATION WAS STILL CONTINUING TO SURFACE.

CHIEF JUSTICE: I AM AFRAID YOU HAVE TO END ON THAT NOTE.

THANK YOU. I HAVE TO END ON SOME NOTE. THANK YOU.

CHIEF JUSTICE: THANK YOU.