Ernest Charles Downs v. Michael Moore

THE NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS DOWNS VERSUS MOORE. MR. BRODY.

MAY IT PLEASE THE COURT. I AM HARRY BRODY WITH JEFF HASEN REPRESENTING ERNEST DOWNS ON HIS PETITION FOR WRIT OF HABEAS CORPUS. I KNOW THE COURT IS FAMILIAR WITH THE HISTORY OF THIS CASE, BUT BRIEFLY MR. DOWNS'S FIRST TRIAL AS IN 1977. AT THAT TRIAL, THE JURY PASSED A NOTE FORWARD, WHICH INDICATED IT WANTED TO KNOW WHETHER IT COULD CONVICT MR. DOWNS OF FIRST-DEGREE MURDER, IF HE WAS NOT THE TRIGGERMAN. THAT NOTE PLAYED PROMINENTLY IN THIS COURT'S STATE HABEAS OPINION, IN '87, WHEN IT GRANTED MR. DOWNS A RESENTENCING, BASED UPON HITCHCOCK ERROR, AND CITED THE JURY NOTE AS EVIDENCE OF, THAT THIS MAYBE MITIGATION. -- MAY BE MITIGATION. THE RESENTENCING OCCURRED IN 1989 AND WAS AFFIRMED, I BELIEVE IN 1992, AND THIS IS THE FIRST STAGE HABEAS PETITION FROM THE RESENTENCING. WE HAVE ASSERTED CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND THE STRICKLAND STANDARD, AS THIS COURT HAS HELD, IS APPLICABLE. I WOULD LIKE TO ADDRESS THE CLAIM TWO, AND DURING THAT, A COUPLE OF THE OTHER CLAIMS, REGARDING THE INSTRUCTIONS THAT WERE DENIED. IT IS MR. DOWNS'S CONTENTION THAT THE APPELLATE COUNSEL, THE PERFORMANCE OF APPELLATE COUNSEL WAS DEFICIENT, IN FAILING TO RAISE THE CLAIM THAT THE DENIAL OF HIS REQUEST FOR THE JURY INSTRUCTION, WHICH FOLLOWS, WAS ERROR. MR. DOWNS'S COUNSEL REQUESTED, IF YOU SEE FIT, AND REGARDLESS 6 YOUR FINDINGS ON THE OTHER ISSUES I HAVE SET OUT FOR YOU, YOU ARE ALWAYS FREE TO AFFORD ERNEST DOWNS MERCY IN THESE PROCEEDINGS AND RECOMMEND A LIFE SENTENCE, A LIFE SENTENCE, A SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR 25 YEARS. UNDER HITCHCOCK, OF COURSE THE KEY TO HITCHCOCK WAS THAT THE MITIGATING EVIDENCE, IT IS NOT ENOUGH TO PRESENT THE MITIGATING EVIDENCE, BUT THE JURY MUST, ALSO, NOT BE LED TO BELIEVE THAT THE EVIDENCE MAY NOT BE WEIGHED, AND IT IS OUR CONTENTION THAT MR MR. DOWNS'S JURY DID NOT HAVE INSTRUCTIONS SUFFICIENT TO KNOW WHAT TO DO WITH THE EVIDENCE THAT WAS PRESENTED. MR. DOWNS PRESENTED SUBSTANTIAL EVIDENCE THAT OTHER CONSPIRATORS THERE WERE AT LEAST SIX OR SEVEN OTHERS, THAT THE SENTENCES FOR THESE CO-CONSPIRATORS WERE VASTLY LIGHTER, TO THE EXTENT THERE WERE ANY SENTENCES AT ALL. THE TOP MAN, THE MAN WHO STOOD TO EARN $125,000 FROM THIS CONTRACT KILLING, HAS BEEN GIVEN A LIFE SENTENCE BY THIS COURT. THE JUDGE, AT THE, AT MR. BARFIELD'S TRIAL, GAVE HIM A DEATH SENTENCE. SHE IS THE SAME JUDGE THAT HAD SENTENCED MR. DOWNS, SO IT IS CLEAR THAT THE JUDGE CONSIDERED THE CULPABILITY OF MR. DOWNS, WHO WAS, BY ALL ACCOUNTS, AT THE VERY BOTTOM OF THE FOOD CHAIN OF THESE CONSPIRATORS. THAT SHE CONSIDERED MR. BARFIELD AT LEAST AS CULPABLE, IF NOT MORE CULPABLE, THAN MR. DOWNS. SO THESTANDARD INSTRUCTIONS THAT WERE GIVEN ARE VERY BARE BONES.

I AM NOT SURE THAT I UNDERSTAND THE STATEMENT THAT YOU JUST MADE ABOUT THAT MR. DOWNS, IS AT THE VERY BOTTOM OF THE FOOD CHAIN OF THE COCONSPIRATORS? IS THERE NOT EVIDENCE IN DOWNS'S CASE THAT HE WAS THE ACTUAL KILLER?

LARRY JOHNSON, WHO RECEIVED IMMUNITY, TESTIFIED THAT MR. DOWNS WAS THE TRIGGERMAN, AND MR MR. DOWNS TESTIFIED THAT LARRY JOHNSON WAS THE TRIGGERMAN. SO --

YOU AGREE THAT THERE IS EVIDENCE, THOUGH, THAT THE JUDGE AND THE JURY COULD HAVE CONCLUDED THAT YOUR CLIENT WAS THE ACTUAL TRIGGERMAN.

THERE IS EVIDENCE IN THE RECORD.

AND THAT THAT WOULD HAVE SOMETHING TO DO WITH THE RECOMMENDATION FOR THE DEATH PENALTY. WOULD YOU AGREE THAT, IF A JUDGE OR A JURY ACCEPTED THAT, THAT THAT WOULD NOT PLACE YOUR CLIENT AT THE BOTTOM OF THE FOOD CHAIN, AMONGST THE THE PEOPLE THAT WERE INVOLVED IN THIS CRIME?

I AM NOT SURE HOW I GOT TO THAT BOTTOM OF THE FOOD CHAIN.

SET THAT ASIDE. IS IT YOUR CONTENTION THAT IF HE WERE THE ACTUAL KILLER, THAT HE STILL WOULD BE THE LEAST CULPABLE OF ALL PEOPLE INVOLVED?

WELL, I THINK CERTAINLY MUCH LESS CULPABLE THAN MR. BARFIELD OR THE PERSON WHO IS MAKING, SETTING THE WHOLE THING IN MOTION, AND WHO IS MAKING ALL OF THE MONEY UNFORTUNATELY THERE ARE MANY POOR PEOPLE WHO ARE AVAILABLE.

BUT YOU AGREE THAT THERE IS EVIDENCE HERE, IN WHICH THE JUDGE AND THE JURY THAT SENTENCED YOUR CLIENT, COULD HAVE CONCLUDED THAT HE WAS THE ACTUAL KILLER.

WELL, CERTAINLY THE JURY COULD HAVE, BUT IT IS OUR CONTENTION, HERE, THAT THE JURY WAS NOT GIVEN PROPER INSTRUCTIONS. MR. DOWNS REQUESTED THAT THE JURY BE EXPLICITLY INSTRUCTED THAT THE SENTENCES OF THE COCONSPIRATORS CAN BE CONSIDERED AS MITIGATION, A VERY SIMPLE INSTRUCTION THAT HE REQUESTED THE COURT GIVE, AND THE COURT DECLINED. IT IS UNFORTUNATE.

WAS THAT IN THE DOWNS PHRASEOLOGY?

HE SAID YOU MAY CONSIDER THE COSPRRTORS. THE STATE ATTORNEY, ON THE OTHER HAND, AND I WILL GET TO HIS ARGUMENT IN A MINUTE, AND I THINK IT WAS A HIGHLY IMPROPER ARGUMENT, WHICH WAS THE BASIS FOR CLAIM TEN, AND WE CONTEND THAT APPELLATE COUNSEL SHOULD HAVE, ALSO, TAKEN THAT UP. AS AN ISSUE. THE STATE ATTORNEY BASICALLY TOLD THE JURY YOU DON'T HAVE TO WORRY ABOUT THE MITIGATING EVIDENCE. YOU DON'T HAVE TO WORRY ABOUT WHO THE TRIGGERMAN WAS. YOU CAN DISREGARD. THAT BOTH OF THEM SHOULD BE IN THE ELECTRIC CHAIR. ALL OF THESE PEOPLE SHOULD BE IN THE ELECTRIC CHAIR. THEY ARE ALL MURDER RICK THIEVES -- MURDERING THIEVES, UNLIKE THE PEOPLE ON THE JURY, SO IT WAS COMPOUNDED BY A VERY INFLAMMATORY JURY ARGUMENT. WE THINK THAT, AND I WOULD NOTE THAT THE CCP INSTRUCTION THAT WAS GIVEN IS UNCONSTITUTIONAL. IT MAY NOT HAVE BEEN PRESERVED AND ISN'T TO BE DEALT WITH TODAY BUT I AM SURE THE COURT WOULD CONCEDE THAT IT WAS INADEQUATE, UNDER JACKSON. SO, AND WE THINK THAT THE INSTRUCTIONS, AS A WHOLE, MADE THE -- DID NOT GIVE THE JURY A VEHICLE, WHICH IS WHAT THE PENURY CASE HAS TALKED ABOUT, A VEHICLE FOR KNOWING WHAT TO DO WITH THIS EVIDENCE. CLEARLY MR. DOWNS WAS INVOLVED, SOMEHOW, IN THIS CONSPIRACY. JOHN BARFIELD WAS TO BE PAID $25,000. HE GOT LIFE. DEWY PALMER WAS TO BE PAID $25,000. HE DIDN'T GET ANYTHING. MR. ZAP WAS TO GET $10 -- MR. SAPP WAS TO GET $10,000. HE GOT FOUR YEARS. SO THE SENTENCING JURY HAS TO MAKE A REASONED MORAL JUDGMENT ABOUT WHETHER THE PERSON SHOULD LIVE OR DIE, AND IN LIGHT OF THE VERY INFLAMMATORY CLOSING ARGUMENT, I DON'T THINK, OF THE STATE ATTORNEY, THEY COULDN'T DO. THAT THE STATE ATTORNEY SAID THE STATE DOESN'T HAVE DECENT CITIZENS SUCH AS YOURSELVES. WE DON'T HAVE HOUSEWIVES. WE DON'T HAVE BUSINESSMEN AND BUSINESS WOMEN. WE DON'T HAVE TEACHERS AND DECENT CITIZENS WATCHING THIS SORT OF CRIMINAL ACTIVITY OCCUR. DECENT PEOPLE DON'T APPLY TO THE SCHEME. THAT WAS HIS COMMENT ON WITNESSES. ON THE DEATH PENALTY, IF WE DON'T SANCTION PEOPLE WITH THE WORST PENALTY WE HAVE, WE ARE NOT GOING TO HAVE ANY PUBLIC ORDER WHATSOEVER. HE SAYS THERE IS NOT A CASE IN 50 YEARS WHERE WE DIDN'T HAVE TO IMMUNIZE WITNESSES. I WISH WE DIDN'T HAVE TO GIVE

THIEVES BREAKS SOMETIMES. I DON'T LIKE TO DO IT BUT FREQUENTLY WE DO IT, BECAUSE FREQUENTLY WE CANNOT MAKE CASES OF CONSPIRATORIAL NATURE WITHOUT THEM, AND OUR LEGISLATURE RECOGNIZES THIS, AND THAT IS WHY IT IS DONE, SO THE STATE ATTORNEY IS NOT ASKING FOR REASON-WEIGHING. WITHOUT AN ADEQUATE INSTRUCTION, AND BASED UPON THE ARGUMENT OF THE STATE ATTORNEY, WHICH IS WAY OUT OF LINE, THE, THE JURY COULD NOT HAVE CONDUCTED A REASONED WEIGHING, COULD NOT HAVE UNDERSTOOD OR KNOWN WHAT TO DO WITH THIS EVIDENCE. I RESERVE THE REMAINDER OF MY TIME. MR. CHIEF JUSTICE: MR. WHITE.

THANK YOU, YOUR HONOR. STEVE WHITE, ASSISTANT ATTORNEY GENERAL, REPRESENTING THE RESPONDENT. AS I UNDERSTAND IT, THE ORAL ARGUMENT OF COUNSEL PRIMARILY PERTAINS TO CLAIMS TWO AND FIVE. CLAIM TWO IS ACTUALLY THE CLAIM BASED ON THE DENIAL OF A SPECIAL JURY INSTRUCTION ON MERCY AND RELATED PROSECUTORIAL ARGUMENT. AS TO ALL THE CLAIMS PERTAINING TO SPECIAL JURY INSTRUCTIONS, APPELLATE COUNSEL, WHICH IS WHAT WE ARE HERE ON, THE REASONABLENESS OF APPELLATE COUNSEL, AND NOT PURSUING CERTAIN CLAIMS. TO PREVAIL ON APPEAL, ON DIRECT APPEAL, APPELLATE COUNSEL WOULD HAVE HAD TO HAVE ESTABLISHED THAT THE STANDARD JURY INSTRUCTION WAS FAULTY, DID NOT COVER THIS PARTICULAR DEFENSE. OF COURSE THIS COURT HAS UPHELD THE STANDARD INSTRUCTIONS IN THIS CASE TWICE, BOTH IN THE DIRECT APPEAL AND THE APPEAL OF THE 3.850, I BELIEVE IT IS FOOTNOTE 18, AND THE APPEAL OF THE 3.850. AND THE SECOND BURDEN THAT APPELLATE COUNSEL WOULD HAVE HAD TO MEET IS TO ESTABLISH THAT THE PROPOSED SPECIAL INSTRUCTION, IN FACT, WOULD NOT HAVE CONFUSED THE JURY, WHEREAS IT IS A TWO-PRONG TEST THAT APPELLATE COUNSEL WOULD HAVE HAD TO MEET, AND THE STATE'S POSITION IS AND THE POSITION THAT WE TOOK IN THE RESPONSE, WITH MORE ELABORATION, IS THAT NUMBER ONE, THE LAW OF THE CASE IS THAT THE STANDARD JURY INSTRUCTIONS WERE VALID AND COVERED THE DEFENSES THAT ARE RAISED, SUCH AS THE APPEAL TO MERCY. THE STANDARD INSTRUCTION SPECIFICALLY TOLD THE JURY THAT THEY COULD CONSIDER THE DEFENDANT'S CHARACTER OR RECORD OR OTHER CIRCUMSTANCES OF THE OFFENSE. THAT INCLUDES MERCY. AND, OF COURSE, THIS COURT, IN ADDITION TO THIS CASE UP OLD HOLDING -- UPHOLDING THE STANDARD INSTRUCTIONS, UPHELD, IN MENDICK, AT 545.846, A CLAIM ATTACKING THE STANDARD INSTRUCTION AS INADEQUATE TO COVER THE JURY'S PARDON POWER, WHICH IS BASICALLY WHAT CLAIM TWO IS. SO AN APPELLATE CLAIM WOULD HAVE FAILED, FOR THOSE TWO REASONS. ONE IS THE STANDARD JURY INSTRUCTION COVERED THIS PARTICULAR DEFENSE, AS WELL AS THE OTHER ONES, AND SECONDLY, THAT THE PROPOSED INSTRUCTION, IN THIS CASE, THAT YOU ARE ALWAYS FREE TO AFFORD THE JURY MERCY. I MEAN BASICALLY THE PROPOSED INSTRUCTION WOULD HAVE TOLD THE JURY THEY HAVE A CARTE BLANCHE, ABSOLUTE LICENSE, WITHOUT REGARD TO LAW OR FACTS, TO EXERCISE PARDON POWER. AND THAT KIND OF UNBRIDLED DISCRETION WOULD ACTUALLY GET US IN TROUBLE, IN TERMS OF THE DEATH PENALTY. IN OTHER WORDS THE PARDON POWER OF MERCY SHOULD BE BASED UPON THE LAW AND THE FACTS OF THE CASE. CONTRARY TO THAT PROPOSED INSTRUCTION, WHICH WOULD HAVE ACTUALLY NOT ONLY CONFUSED THE JURY BUT MISSTATED THE LAW. CLAIM FIVE, AS I UNDERSTAND PART OF COUNSEL'S ARGUMENT THAT THE TRIAL COURTERRED IN DENYING DOWNS'S PRO SE REQUEST FOR SOME SORT OF PRINCIPAL INSTRUCTION. AT THE OUTSET, I WENT BACK TO THE ORIGINAL TRIAL AND THIS JURY QUESTION THAT WAS POSED BY THE ORIGINAL GUILT-PHASE JURY. AND I LOOKED AT THE QUESTION, AND I LOOKED AT THE DISCUSSION AMONGST THE COUNSEL, AND I WOULD DISAGREE. THE STATE WOULD TAKE ISSUE THAT THE JURY WAS ACTUALLY ASKING ABOUT PRINCIPLES INVOLVING GUILT. IN FACT, COUNSEL FOR BOTH PARTIES AGREED THAT THE JURY WAS ASKING ABOUT PRINCIPLE THEORY REGARDING THE MINIMUM MANDATORY, NOT REGARD GUILT, AND IN FACT THE TRIAL COURT HAD THE JURY COME OUT AND SAID IS THIS WHAT YOU ARE ASKING US ABOUT, THE MINIMUM MANDATORY, A PRINCIPLE THEORY THAT WOULD HOLD THE DEFENDANT RESPONSIBLE FOR SOMEBODY ELSE CARRYING A GUN? AND THE JURY ANSWERED YES. THAT IS OUR QUESTION. NOT REGARDING GUILT OR INNOCENCE. BUT IN ANY EVENT, REGARDING THE PRINCIPLE THEORY REQUESTED JURY INSTRUCTION, FIRST OF ALL, LET ME CLARIFY THAT, IN MY RESPONSE, IN THE STATE'S RESPONSE,

IT INDICATED THAT HE HAD THE BURDEN OF ESTABLISHING THAT THE TRIAL COURT RULED ON THIS REQUESTED SPECIAL INSTRUCTION. WELL, IN PREP FOTH ORAL ARGUMENT I FOUND WHERE THE TRIAL COURT DID RULE ON IT. IT IS AT PAGE 641, BUT IN ANY EVENT, THAT ASIDE, STILL THE TRIAL COURT USES THE STANDARD JURY INSTRUCTION, THE STANDARD JURY INSTRUCTION HAS BEEN UPHELD HERE, THE STANDARD JURY INSTRUCTION INCLUDES CONSIDERING OTHER ASPECTS OF THIS CASE, THIS OFFENSE, WHICH WOULD INCLUDE WHO IS THE TRIGGERMAN, AND, OF COURSE, THAT WAS THE MAJOR FEATURE OF THE RESENTENCING. THAT IS WHAT THE PARTIES LITIGATED. THAT IS WHAT THEY ARGUED IN CLOSING ARGUMENT. SO IT WAS COVERED BY THE STANDARD INSTRUCTION AND, ALSO, THE PROPOSED SPECIAL INSTRUCTION IN FACT, WAS VERY CONFUSING. IT SAID SOMETHING ABOUT THE TRIAL COURT TAKING, THIS IS A PRO SE DOWNS REPRESENTED HIMSELF DURING MOST OF THE RESENTENCING PROCEEDINGS. IT SAID SOMETHING LIKE ASK THE COURT TO TAKE JUDICIAL NOTICE THAT THE JURY SHALL CONSIDER THE FOLLOWING INSTRUCTION. IT SOUNDS LIKE A DIRECTED VERDICT OF NOT DEATH, A DEATH RECOMMENDATION, BUT CERTAINLY IT WOULD HAVE BEEN CONFUSING TO THE JURY FAILING TO MEET SECOND PRONG OF THE TEST THAT APPELLATE COUNSEL WOULD HAVE HAD TO MEET. AS TO THE PROSECUTORIAL ARGUMENT, IT IS INTERESTING THAT AT THIS PARTICULAR PHASE, DOWNS WAS REPRESENTED BY COUNSEL, AND I DON'T BELIEVE THAT THE FAILURE OF DEFENSE COUNSEL TO OBJECT TO ANY OF THIS WAS RAISED IN THE 3.850, EITHER BELOW OR HERE. OF COURSE, THAT WOULD HAVE POSED SIGNIFICANT PROBLEMS FOR APPELLATE COUNSEL, IN TRYING TO ESTABLISH THAT ANY REASONABLE APPELLATE LAWYER WOULD HAVE RAISED THIS, BUT IN ANY EVENT, FOR THESE REASONS, AS WELL AS THE REASONS IN THE STATE'S RESPONSE, THE STATE WOULD REQUEST THAT THIS COURT DENY THE PETITION.

THANK YOU HAD, MR. WHITE. MR. BRODY. REBUTTAL?

WELL, BRIEFLY, MR. DOWNSWS NOT, THE INSTRUCTION DID NOT SEEK TO INVOKE THE PARDON POWER, BUT MERCY UNDER THE UNIQUE CIRCUMSTANCES OF HIS CASE, WITH SIX OR SEVEN OTHER CO-CONSPIRATORS, ALL OF WHOM STOOD TO MAKE MUCH MORE MONEY, WHO WERE INVOLVED FOR A MUCH LONGER TIME, AND WHO HAVE BEEN GIVEN MUCH, MUCH LOWER SENTENCES. MR. DOWNS IS THE ONLY ONE IN THIS CASE WHO HAS RECEIVED THE DEATH SENTENCE. THE STATE IS ASKING IS THE CATCHALL PROVISION OF THE INSTRUCTION TO SAY CARRY AN AWFUL LOT OF WATER. THE, THIS COURT SHOULD ASK WHETHER THE CATCHALL SUFFICIENTLY INSTRUCTS THE JURY ON WHAT IT IS TO DO WITH EVIDENCE, SUCH AS THE INVOLVEMENT OF THESE OTHER COCONSPIRATORS. ALL OF THE REQUESTED INSTRUCTIONS, THE ONE ON PRINCIPLES, THE INSTRUCTION ON LINGERING DOUBT ABOUT WHO WAS THE TRIGGERMAN, AND THE OTHER INSTRUCTIONS RAISED IN THIS PETITION, IS ONES PREVIOUSLY RAISED, GO TO THE FACT THAT MR. DOWNS WAS TRYING TO ASK THE COURT TO INSTRUCT THE JURY THAT, YES, HE HAD BEEN CONVICTED OF FIRST-DEGREE MURDER, BUT THE OTHER PEOPLE INVOLVED IN THIS CRIME HAD RECEIVED MUCH SOFTER, MUCH EASIER SENTENCES, TO THE EXTENT THEY HAD BEEN PROSECUTED AT ALL. I DON'T THINK THAT HIS INSTRUCTION, YOU MAY CONSIDER THE SENTENCES OF CO-CONSPIRATORS AS MITIGATION, IS CONFUSING TO THE JURY. I DON'T UNDERSTAND THAT. THE CLOSING ARGUMENT OF THE STATE WAS NOT OBJECTED TO, BUT WE WOULD CONTEND THAT IF THE COURT REVIEWS IT, THE, THERE ARE EGREGIOUS ERRORS IN IT THAT SHOULD BE ADDRESSED. THE STATE ATTORNEY MUST REFER TO HIMSELF AS THE STATE OF FLORIDA AND HIM AND THE JURORS AS THE STATE OF FLORIDA AT LEAST 15 TIMES IN THIS THING, AND IT DOES NOT GUIDE THE JURY IN ANY WAY, TOWARD A REASONED WEIGHING OF THE MITIGATION AND AGGRAVATION BUT, INSTEAD, COMPOUNDS THE PROBLEM WITH THE INSTRUCTIONS. THANK YOU. MR. CHIEF JUSTICE: THANK YOU, MR MR. BRODY. THANK YOU, COUNSEL.