Adam Davis v. State of Florida

MARCH PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING. THE NEXT CASE IS DAVIS VERSUS STATE, AND IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

GOOD MORNING, YOUR HONORS. MY NAME IS GUILLERMO GOMEZ, AND ALED LIKE TO RESERVE FIVE MINUTES FOR REBUTTAL. THIS IS A CASE WHERE MR. DAVIS WAS IN A RESTAURANT WITH HIS GIRLFRIEND, WHERE THEY WERE DRINKING ORANGE JUICE TO ENHANCE THE EFFECTS OF THE LSD THAT THEY HAD HE JUST CON SOUPED. DURING THIS LATE-NIGHT DINNER, THE CODEFENDANT MAKES THE ANNOUNCEMENT THAT "I WANT TO KILL MY MOTHER." BOTH WERE SHOCKED, HOWEVER THE DECISION WAS MADE AT THAT MOMENT TO INJECT HER-I KNOW INTO THE MOTHER, VICKI ROBINSON, TO MAKE IT LOOK LIKE A DRUG OVERDOSE.

WHAT HAPPENED WHEN THEY WERE BOTH SHOCKED? THEY SAID WE ARE NOW GOING TO GET --

THAT'S CORRECT.

SO IT WENT FROM SHOCK TO THIS IS --

WELL, THERE WAS CONVERSATION AT THE DEPP I'S RESTAURANT. HOWEVER -- AT THE DENNY'S RESTAURANT. HOWEVER, THE INITIAL REACTION WAS ONE OF SHOCK.

WE ARE ALL FAMILIAR WITH THE FACTS AND CIRCUMSTANCES HERE, AND NOT THAT I DON'T WANT YOU TO SET THE STAGE IN ANY WAY THAT YOU WANT TO, BUT IT IS IMPORTANT THAT, EVEN THOUGH YOU HAVE THE 30 MINUTES THAT, IS A VERY LIMITED AMOUNT AFTER TIME, SO IF YOU WOULD PROCEED RIGHT TO THE ISSUES THAT YOU WANT TO ADDRESS ON ORAL ARGUMENT, THAT WE WILL APPRECIATE THAT.

YES, YOUR HONOR, I WOULD LIKE TO ADDRESS FOUR ISSUES HERE, TODAY, A IN ORAL ARGUMENT. THE FIRST ISSUE IS THE ERROR OF THE COURT IN PROHIBITING THE INTRODUCTION OF THE CONFESSION OF THE CODEFENDANT ROBINSON. SECONDLY, IN REGARD TO THE APPLICATION OF THE DEATH PENALTY IN THE INSTANT MATTER, IN LIGHT OF THE RING DECISION. THIRD, THE TRIAL COURT'S ERROR, REFUSING THAT THE JURY CONSIDER, IN MITIGATION, THE FORM OF A JURY INSTRUCTION, THE DISPARATE SENTENCES IMPOSED, OR TO BE IMPOSED ON CODEFENDANT WHISPEL AND THE CODEFENDANT ROBINSON, AND FINALLY --

WHAT WERE THE AGES OF THE TWO CODEFENDANTS?

15 WAS AS TO THE DIRL FRIEND, VALESSA ROBINSON, AND 19 WAS AS TO JOHN WHISPELL.

YOU HAVE A MOTION TO SUPPRESS?

YES. DENIED THE MOTION TO SUPPRESS.

YOU ARE GOING TO ADDRESS THEM IN THAT ORDER?

YES, YOUR HONOR.

YOU MAY GO AHEAD.

THE COURT WRONGLY EXCLUDED THE STATEMENT OF VALUE ES A ROBINSON -- OF VALESSA ROBINSON, WHERE SHE ADMITTED TO THE MURDER OF HER OWN MOTHER. 90.806 ALLOWS FOR THE INTRODUCTION OF HEARSAY STATES, WHEN A HEARSAY STATEMENT HAS BEEN --' TELL US WHAT YOUR POSITION IS ON HOW THIS WAS PROFFERED.

YES, YOUR HONOR. IT WAS PROFFERED THROUGH THE ATTORNEY. AT THE TIME, THERE WAS A LONG BENCH CONFERENCE, IN WHICH TRIAL COUNSEL FOR ADAM DAVIS, WENT AND EXPLAINED TOTE COURT HIS INTENTION IN TRYING TO GET IN MADE BY VERY WELLACY ROBINSON. -- A STATEMENT MADE BY VALESSA ROBINSON. HOWEVER, THE COURT RULED AT THAT POINT THAT IT WAS HEARSAY. IT WAS PROFFERED ADEQUATELY THROUGH THE ATTORNEY AND EVERYONE KNEW WHAT IT WAS ABOUT.

WHO WAS ON THE STAND? DO WE KNOW WHO WAS ON THE STAND AT THE TIME?

YES. DETECTIVE IVERSON WAS ON THE STAND AT THE TIME. ALONG WITH DETECTIVE MARTIAN-, WHO THE STATEMENT WAS MADE TO.

DID YOU TRY TO INTRODUCE THAT STATEMENT IN THE PENALTY PHASE?

YOUR HONOR, THE PENALTY COUNSEL, WHICH OF HIS I WAS NOT INVOLVED -- WHICH I WAS NOT INVOLVED IN THE TRIAL LEVEL, DID NOT SEEK TO REINTRODUCE THAT STATEMENT AT THE PENALTY PHASE.

WOULD YOU AGREE THAT THERE WOULD BE A DIFFERENT RULE UNDER OUR GARCIA DECISION, POTENTIALLY, FOR WHETHER THAT MIGHT HAVE BEEN ADMISSIBLE IN THE PENALTY PHASE.

CORRECT, YOUR HONOR, AND I THINK THE STATE ADDRESSES A VERY IMPORTANT CONCERN IN THIS CASE, AND THAT ISSUE EW SHOULD HAVE BEEN ADDRESSED. I CANNOT TELL YOU WHY IT WAS NOT DONE BY COUNSEL AT THAT POINT.

HOW ABOUT PROCEEDING IN YOUR ARGUMENT, THEN, WITH HOW THIS WOULD NOT HAVE BEEN ADMISSIBLE AT THE TIME OF TRIAL. ANOTHER ALTERNATIVE WOULD BE 90.806, AT WHICH A STATEMENT OF A HEARSAY DECLARANT, SOMEBODY TESTIFIES REGARDING A HEARSAY STATEMENT, SOMEBODY ELSE, THAT THE PARTY CAME THEN ATTACK THAT HEARSAY STATEMENT AS IF THAT DECLARANT WAS TESTIFYING. THAT IS WHAT 90.806 ALLOWS TO BE DONE, BUT FIRST LET ME ADDRESS HOW IT MEETS ALL THE CRITERIA OF THIS STATEMENT AGAINST PENAL INTEREST. FIRST --

BUT FIRST GO BACK TO TELL ME, THIS, THE ARGUMENT THAT I HAVE SEEN THAT WAS MADE TO THE JUDGE, WAS ON THE BASIS THAT THERE WAS AN OPENING OF THE DOOR. THERE WASN'T ANY PROFFER AS TO THE RELIABILITY OF THIS STATEMENT. ISN'T THAT CORRECT?

THAT'S CORRECT.

ISN'T THAT THE, A CRUCIAL INGREDIENT OF THE ADMISSIBILITY OF THIS STATEMENT?

WELL, THAT'S CORRECT, THAT ONE OF THE PRONGS IS RELIABILITY. I DON'T THINK ANYONE CHALLENGED THE FACT THAT IT WASN'T RELIABLE. I THINK IN THIS CASE, WE HAD, IF THERE WAS, IN ESSENCE, EVERYBODY KIND OF UNDERSTOOD EVERYBODY ELSE AND DID NOT PRESENT THE ARGUMENTS AS EFFECTIVELY, WAS DIRECTLY AND AS CLEARLY AS COULD, BUT IN THIS CASE ALL UNDERSTOOD WHAT WAS BEING SOUGHT TO BE ADMITTED THROUGH DETECTIVE IVERSON.

BUT WAS THE ARGUMENT BEING MADE THAT IT MEANT THE CRITERIA -- THAT IT MET THE

CRITERIA OF THIS PARTICULAR RULE OF EVIDENCE, OR WAS THE ARGUMENT MADE AT THE TIME THAT, REALLY, THERE HAS BEEN A WAIVER BITE STATE, OF OBJECT -- OF A WAIVER BY THE STATE, OF OBJECTING TO HEARSAY EVIDENCE, BECAUSE THEY HAVE ALREADY BREACH THE SUBJECT BY QUESTIONING THE WITNESS IN THIS WAY. I THINK THAT IS WHAT JUSTICE WELLS IS ASKING TO YOU RESPOND TO. IS THAT THE ARGUMENT THAT YOU ADVANCED OR THAT WAS ADVANCED TO THE COURT AT THIS TIME, THAT, JUDGE, I WANT TO INQUIRE AT THIS TIME, AND THE STATE HAS WAIVED ANY OBJECTION THEY HAVE TO ME DOING THAT, OR WAS THE PROFFER MADE THAT, JUDGE, THERE IS A RULE OF EVIDENCE THAT ALLOWS THIS PARTICULAR STATEMENT TO BE INTRODUCED INTO EVIDENCE UNDER CERTAIN CIRCUMSTANCES, AND WE HAVE MET THOSE CIRCUMSTANCES, AND THEN --' AS FAR AS LAYING ALL THE PREDICATE OF FOUNDATION, YOUR HONOR, NO, THEY WERE NOT CLEARLY ARTICULATED IN THAT MANNER.

WHAT CLAIMS WERE MADE, IN TERMS OF ADMISSIBILITY OF THIS STATEMENT BY TRIAL COUNSEL?

TRIAL COUNSEL ARGUED THAT THE DOOR HAD BEEN OPENED.

THIS IS ESSENTIALLY A WAIVER ARGUMENT, IS IT NOT?

CORRECT. AND THAT THEY HAVE WAIVED THE ARGUMENT AT THAT POINT, INDICATING THAT THE STATE HAD WAIVED THIS ISSUE BY ALLOWING JOHN WHISPELL TO TESTIFY AS TO STATEMENTS MADE BY MISS VALESSA ROBINSON.

ARE YOU ASKING TO ALLOW THAT STATEMENT ON APPEAL OR OFFERING ANOTHER GROUND FOR ALLOWING THAT STATEMENT?

IN MY REPLY BRIEF ALTERNATIVELY, IN 90.806. I THINK THE FAIRNESS, CONSIDERING THE GRAVITY OF THE ISSUE, I THINK THAT EVERYONE UNDERSTANDS THE PENAL AIN'T REST WAS CLEAR IN THIS, BUT, HOWEVER, IN ALTERNATIVE GROUNDS, BASED UPON OPENING THE DOOR, BASED ON THAT SAME FACTOR, IS 90.806, WHICH IS A HEARSAY RULE OR EXCEPTION TO THE HEARSAY.

ARE YOU, CAN YOU ASSERT NOW, NOT HAVING ASSERTED TO THE TRIAL COURT JUDGE, ANOTHER BASIS FOR THIS , CAN YOU NOW CLAIM ERROR ON THE PART OF THE TRIAL COURT JUDGE, IF YOU DIDN'T PRESENT THIS SAME BASIS TO THE TRIAL COURT JUDGE FOR ADMITTING THE STATEMENT?

I THINK, AS TO 90.806, I THINK IT IS VERY CLEAR, BECAUSE --

YOU THINK IT IS VERY CLEAR THAT THE ARGUMENT WAS PRESENTED TO THE TRIAL COURT JUDGE?

AS TO 90.806, I THINK IT IS, YOUR HONOR.

GO AHEAD. WHAT WAS SAID TO THE TRIAL COURT JUDGE?

HE SAYS THE DOOR WAS OPENED, THE OPENING OF THE DOOR, SPECIFICALLY AS TO THE HEARSAY STATEMENTS, BECAUSE OF JOHN WHISPELL'S TESTIMONY. HE DIDN'T MENTION 90.806. HE BASICALLY LAID THE FOUNDATION THROUGH THE PREDICATE, AS TO THE ADMISSIBILITY OF 90.806, WHICH IS ESSENTIALLY MR. WHISPELL TESTIFIED TO THE HEARSAY OF VALESSA ROBINSON, SPECIFICALLY THAT SHE OBTAINED THE BLEACH. SHE ALSO TESTIFIED AS TO CONDUCT, HEARSAY CONDUCT, I WOULD ARGUE, WHICH IS IN DIRECT CONTRADICTION THAT SHE GAVE IN HER STATEMENT TO DETECTIVE IVERSON.

BUT HIS TESTIMONY DIDN'T ACTUALLY GO TO THIS VERY STATEMENT, AND IT SEEMS TO ME THAT 90.806 ACTUALLY SAYS THIS, ONCE YOU HAVE ADMITTED THAT HEARSAY STATEMENT, BUT AT

THAT POINT, THAT HEARSAY STATEMENT HAD NOT BEEN ADMITTED.

JOHN WHISPELL DID TESTIFY AS TO HEARSAY STATEMENTS BY VALESSA ROBINSON.

BUT THE COMMENT THAT YOU WOULD HAVE WANTED TO HAVE BEEN BROUGHT HAD NOT BEEN ADMITTED AT THAT POINT, SO WOULDN'T 90.806 HAVE BEEN APPLICABLE IF THAT PARTICULAR STATEMENT HAD ALREADY BEEN ADMIT INTERESTED EVIDENCE?

NO. THE WAY I UNDERSTOOD AND THE WAY 90.806 HAS BEEN USED AGAINST ME IN TRIAL AND THE WAY I HAVE USED IT AGAINST OTHERS, IS THAT A WITNESS IS TESTIFYING, A AND A WITNESS TESTIFIES AS TO --, AND A WITNESS TESTIFIES AS TO STATEMENTS MADE BY ANOTHER INDIVIDUAL, AND THERE IS NO OBJECTION AS TO THOSE HEARSAY STATES, THAT OPENS THE DOOR AND ALLOWS THE PARTY IN CROSS-EXAMINATION --

YOU ARE SAYING THAT OPENS THE DOOR AND ALLOWS EVERY OTHER HEARSAY STATEMENT THAT THIS PERSON MADE.

NO. THAT CONTRADICTS IT IN THE FORM OF IMPEACHMENT, THAT CONTRADICTS THAT HEARSAY STATEMENT, AND I THINK THIS IF CASE, SHE TESTIFIED -- I THINK IN THIS CASE, THAT JOHN WHISPEL TESTIFIED THAT WHAT VALESSA ROBINSON SAID WAS THAT SHE DID NOT COMMIT MURDER. SHE SIMPLY ASSISTED IN OBOBTAINING THE BLEACH AND SYRINGE -- IN OBTAINING THE BLEACH AND THE SYRINGE, AND SHE CONTRADICTS THAT AND SAYS, NO, SHE IS THE ONE THAT KILLED HER MOTHER, AND THE CONTRADICTORY STATEMENT OF JOHN WHISPEL REGARDING VALESSA ROBINSON, I THINK THE COURT WAS CLEAR IN SAYING THE DOOR HAD BEEN OPENED, LET'S GIVE A STATEMENT THAT SHE MADE, TAPED STATEMENT THAT SHE GAVE, POST MIRANDA, TO DETECTIVE IVERSON AND DETECTIVE GRACIANO. I WOULD LIKE TO MOVE ON TO THE TESTIMONY IN LIGHT OF RING. IN THIS CASE THE JURY CAME BACK WITH A 7-TO-5 VOTE FOR DEATH, A BARE MAJORITY, AND THAT WAS VOID OF ANY SPECIAL VERDICT.

WAS THERE A RING ISSUE RAISED IN THE TRIAL COURT?

YES, THERE WAS.

EXPLAIN THAT.

HE IDEA. THEY ASKED, THE COUNSEL DID ASK FOR A SPECIAL VERDICT AND ASKED FOR THE FACT THAT A SPECIAL VERDICT SHOULD BE ALLOWED IN THIS CASE, AND THAT BECAUSE OF THAT, THERE IS NOT AN ABILITY TO REVIEW THIS ON APPEAL, WHICH IS ONE OF THE ISSUES WE HAVE, ALSO, RAISED IN OUR BRIEF.

WHAT WAS THE ESSENCE OF THE SPECIAL VERDICT THAT WAS REQUESTED?

THAT THE PROBLEM WAS, WITH THE CONSTITUTIONALITY, IS THAT BECAUSE THERE IS NO SPECIAL VERDICT FORM IN FLORIDA, OR SPECIAL VERDICT AS TO THE AGGRAVATORS, THERE IS NO EFFECTIVE WAY TO CONDUCT A REVIEW OF THE AGGRAVATORS FOUND, AS OPPOSED, AND WEIGHING THEM AGAINST THE MITIGATORS, SO IN THAT REGARD, THAT WAS PRESERVED, AND HE DID HE, ALSO, OBJECT TO THE INSTRUCTS TO THE -- TO THE INSTRUCTION TO THE JURY, ISSUED AS TO AN ADVISORY, THAT THE ROLE WAS ADVISORY AT THAT TIME.

WHAT ABOUT, YOU HAVE GOT THE AGGRAVATORS FOUND IN THIS CASE WERE HAC, CCP. THERE WAS NO PRIOR VIOLENT FELONY AGGRAVATOR, BUT THERE WAS THE AGGRAVATOR OF ON-FELONY PROBATION.

THAT'S CORRECT.

SO WOULDN'T THAT, I MEAN, EVEN ASSUMING EVERYTHING THAT YOU ARE SAYING, WHY WOULDN'T THAT FALL INTO THE APRENDI/RING EXCEPTION OF BASICALLY THAT HE THERE IS A PRIOR CONVICTION THAT, REALLY, THE JURY DOESN'T HAVE TO FIND THAT.

THAT POINT IS INTEREST, BUT IN LOOKING AT APRENDI, APRENDI SAYS ANYTHING OTHER THAN A PRIOR CONVICTION HAS TO BE FOUND BY A JURY BEYOND A REASONABLE DOUBT. HOWEVER, IF THAT WAS, IF YOU APPLY THAT HARMLESS-ERROR ANALYSIS IN THIS CASE AND SAY THAT THE ONLY AGGRAVATOR THAT WAS FOUND WAS A FELONY PROBATION, THEN YOU HAVE TO REWEIGH OR LOOK AT THE WEIGHING THAT WAS DONE BY THE JUDGE, BECAUSE IF WE ARE ASSUMING, THIS IS AN ASSUMPTION THAT THE ONE THAT WE CAN SAY HARMLESSLY WAS FOUND WAS FELONY PROBATION, WEIGHED AGAINST THE MITIGATORS IN THIS CASE, WILL RENDER THIS DEATH SENTENCE DISPROPORTIONATE, BECAUSE ALL OF THE MITIGATORS, HE HAD NO PRIOR VIOLENT FELONIES. HE WAS 19 AT THE TIME OF THE OFFENSE. HE WAS HIGH ON DRUGS, AND HE HAD A BAD CHILDHOOD. SO WHEN YOU WEIGH THAT NOW, THEN YOU START LOOKING AT THIS IS A DISPROPORTIONATE SENTENCE, IF THAT IS THE ONLY AGGRAVATOR THAT YOU CAN RULE ON A HARMLESS ERROR BASIS, BUT THAT BRINGS UP ANOTHER POINT, THAT, WHILE APRENDI RULES THAT YOU DON'T HAVE TO FIND A PRIOR CONVICTION BY A JURY, FLORIDA, FOR CHARGES SUCH AS FELONY PETTY THEFT, FOURTH TIME DUI, REGARD A JURY TO DETERMINE THE PRIOR CONVICTION. SO IN ESSENCE, BY CARVING THIS APRENDI EXCEPTION IN THIS CASE, YOU ARE GIVING DEFENDANTS CHARGED WITH FELONY DUI AND FELONY PETTY THEFT, MORE OF A CONSTITUTIONAL RIGHT TO A JURY THAN YOU WOULD A CAPITAL DEFENDANT. AND THE OTHER FACTOR IN REGARDING THE ISSUE OF THE CONSTITUTIONALITY HERE, IN LIGHT OF RING, IS THAT THE JURY WAS ADVISED THAT THEIR ROLE WAS ADVISORY, AND THE ONE THING THAT WE CAN GET FROM RING IS THIS. THE ONE THING IS THAT RING SAYS, BEFORE YOU HAVE A DEATH PENALTY, BEFORE THERE IS EVEN THE CHANCE TO TAKE THIS TO DEATH, THE JURY HAS TO FIND AN AGGRAVATOR. YOU CAN'T GET PAST "GO", UNLESS YOU HAVE THAT, AND IN THIS CASE THE JURY SAID THAT WASN'T THE CASE. YOU CAN RECOMMEND A SENTENCE. SO THEY WERE NEVER TOLD THAT, BEFORE DEATH CAN EVEN BE CONSIDERED, YOU HAVE TO FIND AN AGGRAVATOR. THE SENTENCE IN THIS CASE WAS, ALSO, ONE OF 7-TO-5. 7-TO-5 BRINGS INTO QUESTION AS TO HOW APRENDI AND RING NOW APPLY WITH FLORIDA JURISPRUDENCE, REGARDING UNANIMOUS VERDICTS. IN FLORIDA, SINCE ESSENTIALLY 1838, ALL ELEMENTS OF A CRIME MUST BE FOUND UNANIMOUSLY BY A JURY.

WAS THERE ANY OBJECTION IN THE TRIAL COURT TO THAT PROCEDURE HERE?

I BELIEVE, YES, YOUR HONOR, THERE WAS. THERE WAS.

IN OTHER WORDS THERE WAS A REQUEST THAT THE COURT INSTRUCTED THE JURY THAT THEY MUST MAKE AN UNANIMOUS FINDING?

I THINK THERE WAS, AND I AM NOT GOING TO TELL THIS COURT THAT THERE WAS, BUT I KNOW THAT HE OBJECTED TO THE FACT THAT THE JURY HAD AN ADVISORY ROLE, AND THE JURY, WHETHER IT WAS UNANIMOUS OR NOT, I CANNOT RECALL AT THIS TIME, AND I APOLOGIZE TO THE COURT FOR THAT.

YOU MIGHT LOOK AT THAT DURING YOUR TIME BEFORE REBUTTAL.

EXACTLY. YOUR HONOR --

YOU HAVE A KUMMEL OF OTHER ISSUES.

YES, I DO. I WOULD LIKE TO GO OFF TO THOSE. NOW, AS TO -- YOU HAVE A COUPLE OF OTHER ISSUES.

YES, I DO. I WOULD LIKE TO GO OFF TO THOSE. NOW, AS TO THE JURY INSTRUCTION, THE

STATEMENT WAS NOT PROPERLY ADMITTED BY THE COURT, SUCH STATEMENT AS THAT COULD LEAD TO A DISPROPORTIONATE SENTENCE AND IT HAS IN THE PAST. IN FACT, IN THIS CASE THE COURT FOUND THAT VALESSA ROBINSON AND THE DEFENDANT WERE EQUALLY CULPABLE, WITHOUT CONSIDERING THAT STATEMENT IN ITS SENTENCING ORDER.

BUT, NOW, I MEERNKS YOU HAVE TO ACKNOWLEDGE THAT -- BUT, NOW, I MEAN, YOU HAVE TO ACKNOWLEDGE THAT VALESSA ROBINSON WAS NOT ELIGIBLE FOR THE DEATH PENALTY BECAUSE OF HER AGE, CORRECT?

THAT'S CORRECT. AND PURSUANT TO DECISIONS OF THIS COURT, THAT IS NOT A SUFFICIENT BASIS TO RENDER IT DISPROPORTIONATE, UNDER FARINA. AND ALSO THE FACT THAT JOHN WHISPELL RECEIVEDAL PLEA AGREEMENT FOR 25 YEARS IS NOT NECESSARILY A SUFFICIENT BASIS. WHAT YOU HAVE HERE IS A COMBINATION OF BOTH, AND EVERY CASE HAS TO BE SEEN ON ITS INDIVIDUAL CIRCUMSTANCES, A AND THAT IS WHAT --

HIS PLEA TO FIRST-DEGREE OR SECOND-DEGREE?

SECOND, YOUR HONOR.

SO DOESN'T THAT, IN LIGHT OF THIS COURT'S RECENT JURISPRUDENCE, TAKE THAT OUT OF A PROPORTIONALITY REVIEW?

YOU ARE RIGHT, AND THERE IS CASES THAT THE PLEA AGREEMENT, BUT YOU HAVE TO LOOK THAT THIS IS A MITIGATOR THAT CAN BE ARGUED TO THE JURY, AND IN THIS CASE, IT WAS NOT ARGCRUDE THROUGH THE FORM OF A JURY INSTRUCTION. -- ARGUED THROUGH THE FORM OF A JURY INSTRUCTION.

BUT THE DEFENSE WAS ALLOWED TO TELL THE JURY ABOUT IT AND ARGUE IT TO THE JURY, AND THE COURT DID INSTRUCT THE JURY THAT IT COULD CONSIDER ANY MITIGATING EVIDENCE.

THAT'S CORRECT, AND REGARDING THE ISSUE REGARDING THE FACT THAT THE STANDARD JURY INSTRUCTION CAN BE SUFFICIENT. BUT I HAVE TO TRY TO DISTINGUISH THIS CASE FROM OTHERS, BECAUSE WHEN THOSE OTHER CASES, YOU MAY HAVE ONLY HAD ONE FACTOR. CODEFENDANT IS GETTING LIFE SENTENCES BASED UPON PLEA DEALS OR THE FACT THAT AN EQUALLY CULPABLE MINOR WAS GETTING LIFE SENTENCE BECAUSE WAS NOT ELIGIBLE FOR THE DEATH PENALTY. IN THIS CASE, YOU HAVE A COMBINATION OF BOTH, AND IN THE ONE CASE WHICH IS FRANKIE, WHICH SAYS THAT YOU DON'T NEED THAT SPECIALIZED JURY INSTRUCTION, THE COURT, ALSO, GAVE A STIPULATION TO THE JURY, GIVING SOME WEIGHT OF THE COURT, REGARDING THE FACT THAT THIS IS SOMETHING THAT NEEDS TO BE ADDRESSED BY YOU, THE FACT THAT THOSE INDIVIDUALS IN FRANKIE, ST. MARTIN, I BELIEVE, THE CODEFENDANT, DID NOT RECEIVE A DEATH SENTENCE BUT A LIFE SENTENCE.

THIS INFORMATION WAS DISCLOSED TO THE JURY, IS THAT CORRECT?

YES, IT WAS.

AND COUNSEL DID ADVANCE IT IN ARGUMENT, IS THAT CORRECT?

ONE PARAGRAPH, YOUR HONOR.

BUT I MEAN THE TRIAL COURT --' YES, SIR.

-- AUTHORIZED THE LAWYER TO ADDRESS THIS ARGUMENT IN MITIGATION, IS THAT CORRECT?

THAT'S CORRECT.

SO IF WE ACCEPT YOUR ARGUMENT ON THIS PARTICULAR ISSUE THAT HE SHE HAVE BEEN GIVEN A SPECIAL INSTRUCTION ON DISPARATE TREATMENT, THEN HOW FAR DOES THIS GO HE? SHOULD YOU GET ONE -- HOW FAR DOES THIS GO? SHOULD YOU GET ONE IF HE HAD HE A BAD CHILDHOOD AND THOSE KINDS OF THINGS, THOSE OTHER KINDS OF NONSTATUTORY MITIGATING CIRCUMSTANCES THAT WE SEE ALL THE TIME?

IF YOU LOOK AT THE STANDARD JURY INSTRUCTION ON MITIGATION, IT SAYS ANY OTHER CIRCUMSTANCES INVOLVED IN THE CASE. SO THAT IS GENERAL AS TO CIRCUMSTANCES INVOLVING THE ACTUAL INDIVIDUAL. IT IS VAGUE AND OPEN ON THAT FRONT, BUT IT IS NOT VERY SPECIFIC AS TO THE ISSUE OF OTHER SENTENCES. AND I THINK WHERE THAT CAN COVER IT, THE BAD CHILDHOOD, I THINK THE STANDARD JURY INSTRUCTION CAN COVER THAT. I DON'T THINK THAT, IN THIS CASE PARTICULARLY THAT, THE JURY CAME BACK 7-TO-5. THEYER CLEARLY DIVIDED ON THE AGGRAVATORS AND MITIGATORS, ARE STRUGGLING WITH THIS ISSUE.

BUT THIS COURT HAS NEVER REQUIRED THERE TO BE A SPECIAL INSTRUCTION BY THE TRIAL COURT THAT SETS OUT CATEGORIES OF MITIGATION, NONSTATUTORY MITIGATION, THAT CORRECT?

IT IS NOT REQUIRED BUT THE BASIS OF REQUESTING, YOU KNOW, SPECIALIZED JURY INSTRUCTIONS IS DEPENDENT UPON THE CASE. NOT ALL CASES MAY REQUIRE IT AND NOT ALL CASES MAY DEMAND IT, BUT THERE ARE CLEARLY CASES THAT DO RISE TO THIS EXTENT, WHERE THE STANDARD JURY INSTRUCTION IS NOT GOING TO SUFFICIENTLY PRESENT THAT TO THE COURT. LOOKING AT FRANKIE, THIS COURT ALSO FOUND THAT ONE OF THE DISTINGUISHING CHARACTERISTICS THERE AND IN FINDING THAT THE STANDARD JURY INSTRUCTION WAS ADEQUATE, IS THAT THE COURT READ A STIPULATION TO THE JURY THAT THE OTHERS HAD RECEIVED A LIFE SENTENCE, WHILE, YES, IT HAD BEEN PRESENTED TO THE COURT IN THIS CASE, VIA COUNSEL DURING JURY SELECTION AND DURING ARGUMENT, THERE WAS NOTHING THAT CAME FROM THE COURT, AND THE JURORS DO LISTEN TO THOSE INSTRUCTIONS AS THE LAW TO APPLY IN THIS CASE. AT THIS TIME I WOULD LIKE TO MOVE ON TO MY NEXT ISSUE REGARDING THE MOTION TO SUPPRESS. IN THIS CASE, THE COURT DENIED THE MOTION TO SUPPRESS. TO UNDERSTAND THIS ISSUE AS TO WHY THE COURT ERRED, IT IS IMPORTANT TO LOOK AT THE FACTS, I EASTBOUND LEAVE. IN THIS CASE, THE --, I BELIEVE. IN THIS CASE, THE POLICE OFFICERS CAME TO TEXAS IN THE LATE EVENING. THEY FIRST GO TO VALESSA ROBINSON, WHERE SHE CALMLY AND COOLY ADMITS TO KILLERING HER MOTHER. -- TO KILLING HER MOTHER. THEN THEY GO TO JOHN WHISPEL AND HE ADMITS TO HIS ALLEGED VOFLT. THEN THEY GO TO ADAM DAVIS. AT THIS TIME IT IS FIVE O'CLOCK IN THE MORNING. ADAM DAVIS TESTIFIED, AT HIS OWN MOTION TO SUPPRESS, THAT AFTER THIS HIGH-SPEED CHASE WHERE THEY SHOT OUT HIS TIRES THAT THE TEXAS POLICE BEAT HIM UP. HE ALSO TESTIFIED THAT HE WAS UNDER THE INFLUENCE OF NARCOTICS. WHEN LAW ENFORCEMENT FROM TAMPA GETS OVER THERE --' HOW LONG A PERIOD OF TIME HAS PASSED SINCE HE WAS ACTUALLY APPREHENDED AND THE TAMPA POLICE INVESTIGATE HIM? THERE WAS A LONG PERIOD OF TIME.

OFF THE TOP OF MY HEAD, IT WAS FIVE-TO-10 HOURS T HAPPENED THAT EVENING -- 5-TO-10 HOURS. IT HAPPENED THAT EVENING AND THEY COME AT FIVE O'CLOCK IN THE MORNING, SO HE HAZY BEEN IN THE JAIL SINCE THEY APPREHENDED HIM THAT -- SO HE HAS BEEN IN THE JAIL SINCE THEY APPREHENDED HIM THAT --

15 HOURS?

15 HOURS OR SO.

SO DID THEY ADDRESS CONNALLY?

IN ADDRESSING CONNALLY AS TO TRICK OR DECEIT ON THE PART OF LAW ENFORCEMENT, WHEN

WE GET TO THE FACTS, THEY STATE, THEY ALREADY KNOW IT IS A MURDER CASE. YOU HAVE A CONFESSION AND YOU HAVE JOHN WHISPELL TESTIFYING THERE IS A MURDER. THEY COME TO MR. DAVIS, WHO HAS BEEN BEAT UP, WHO HAS BEEN TAKING DRUGS.

BEAT UP AND TAKING DRUGS, DID THE JUDGE FIND THAT THAT HAD HAPPENED?

NO.

NOW, WE CAN DO AN INDEPENDENT AND SHOULD DO AN INDEPENDENT REVIEW OF THE CONCLUSIONS OF LAW.

THAT'S CORRECT.

BUT THE FACTS AS TO WHAT HIS STATE WAS IS, REALLY, SOMETHING WE HAVE GOT TO DEFER TO THE TRIAL COURT, DON'T WE?

YES, BUT STATEMENT LOOK AT THE FACT THAT THE DETECTIVES IN THIS CASE, IVERSON AND MARTIAN-NEVER ASK THE DEFENDANT -- AND MARCIANO NEVER ASKED THE DEFENDANT WHAT HAPPENED OR WHAT HAPPENED TO HIM PRIOR --

YOU MADE A STATEMENT THAT HE WAS BEAT UP. THAT IS A VERY, THAT IS A STRONG STATEMENT. IF THERE IS NO FINDING ON THAT, WHERE, IF WE WERE TO WRITE AN OPINION, WHERE WOULD WE GET THAT FROM?

FROM HIS STATEMENTS. HE TESTIFIED TO THAT.

BUT THE TRIAL COURT IS THE ONE THAT HAS TO EVALUATE THOSE KINDS OF THINGS AND WHETHER OR NOT THEY RENDERED HIS STATEMENT INVOLUNTARY, AND YOU COME TO THIS COURT, NOW, WITH, REALLY, A PRESUMPTION THAT THE TRIAL COURT, ON THOSE FACTS HAS REALLY FOUND AGAINST YOU, AND HAS, AT A MINIMUM, FOUND THAT IF HE WAS BEAT UP, THAT IT WASN'T AFFECTING HIM AT THE TIME HE GAVE THE STATEMENT, AND SO WHAT --

IT IS CLOSE TO THE PRESUMPTION --' IF WE ACCEPT THAT THE TRIAL COURT --

IF WE ACCEPT THAT THE TRIAL COURT REALLY HAS RESOLVED ANY FACTS LIKE THAT AGAINST YOUR CLIENT, WHAT ARE YOU LEFT WITH, AS A MATTER OF LAW, WHERE THE TRIAL COURT WENT WRONG?

WE ARE LEFT WITH THE FACT THAT WHAT THE DETECTIVE ACTUALLY TESTIFIED TO, WHICH IS THAT WHEN THEY WENT OVER THERE, THEY TOLD HIM IT WAS A MISSING PERSONS INVESTIGATION.

SO DOES THAT RENDER, AS MATTER OF LAW, THE STATEMENT INVOLUNTARY?

IN COMBINATION WITH THE TOTALITY OF THE CIRCUMSTANCES, IT WILL, BECAUSE --' BUT WHAT CIRCUMSTANCES THAT HAD --

BUT WHAT CIRCUMSTANCES THAT HAD BEEN FOUND IN YOUR FAVOR, DO YOU COMBINE WITH THAT?

EXACTLY. THE FIRST ONE IS THAT THEY NEVER INFORMED HIM THAT IT WAS A MURDER. THEY, IN FACT, TOLD HIM THAT THEY WERE THERE SEARCHING FOR A MISSING PERSON. THAT WAS NOT TRUE.

I HAVE GOT TO REMIND YOU THAT THE MARSHAL HAS PUT ON THE LIGHT, YOU KNOW, FOR YOUR REBUTTAL TIME, SO WE DON'T WANT TO INTERFERE WITH THAT, BUT IT IS YOUR CALL, WHETHER

YOU WANT TO MOVE WITH THAT.

I WILL AT THIS TIME ADDRESS IT IN REBUTTAL. THANK YOU.

CHIEF JUSTICE: VERY GOOD. THANK YOU. COUNSEL. GOOD MORNING.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM CAROL DITTMAR FROM THE ATTORNEY GENRALS OFFICE, REPRESENTING THE APPELLEE, THE STATE OF FLORIDA. WITH REGARD TO THE ISSUE OF THE ADMISSION OF LESS ROBINSON -- OFLESS ROBINSON'S STATEMENTS, THIS -- OF LES ROBINSON'S STATEMENTS, THIS IS PRESENTED TO THIS COURT FOR NO REASON. FIRST OF ALL, THERE WAS NO RULING BY THE TRIAL COURT. THE BENCH COMMENTS WHERE IT WAS DISCUSSED IS QUOTED ENTIRELY IN MY BRIEF, FROM THE RECORD. THAT WAS THE TOTALITY OF THE DISCUSSION ABOUT WHAT THIS ISSUE IS ABOUT. AT THAT TIME, THE DEFENSE ATTORNEY SAID I WANT TO GET IN FROM THIS DETECTIVE, DETECTIVE IVERSON IS ON THE STAND, HE IS HE STARTING CROSS-EXAMINATION. HE SAYS I WANT TO GET IN THE FACT THAT VALESSA CONFESSED TO THIS CRIME, AND THE JUDGE SAID TO THE STATE WHAT IS THE RESPONSE? THE PROSECUTOR SAID THAT WOULD BE HEARSAY AND WE WOULD OBJECT, AND THE JUDGE SAID, DEFENSE, WHAT IS THE RESPONSE TO THAT? AND HE SAID THE STATE OPENED THE DOOR BY HAVING JOHN WHISPELL TESTIFY TO SOME OF VALESSA ROBINSON'S HEARSAY STATEMENTS, AND BASED ON THE FACT THAT JOHN WHISPELL SAID SOME OF THE THINGS THAT VALESSA HAD SAID, WE CAN NOW BRING OUT HER STATEMENTS TO THIS DETECTIVE.

WHISPELL TOOK THE STAND, AND HE SAID THAT VALESSA TOLD HIM WHAT, THAT SHE DIDN'T -- WHAT WAS --' WHEN HE WAS DESCRIBING THE PLANNING OF THE CRIME --.

WHEN HE WAS DESCRIBING THE PLANNING OF THE CRIME, THE COMMISSION OF THE CRIME, FOR EXAMPLE HE SAID WE WERE ALL SITTING AROUND AT DENNY'S DRINKING ORANGE JUICE AND ALL OF A SUDDEN VALESSA SAID "LET'S KILL MY MOM." AND THAT IS AN OUT-OF-COURT STATEMENT THAT VALESSA MADE. THERE WAS NO OBJECTION AT THAT TIME TO THE TESTIMONY, BUT THERE WERE TIMES WHEN HE WOULD SAY VALESSA SAID THIS OR DIFFERENT THING THAT IS THEY HAD DONE. THEY DISCUSSED THE -- HE DECIDED THE FACT THAT IN THE VAN, VALESSA AND DAVIS TALKED ABOUT COVERING UP FOR EACH OTHER, SO THEY RELATE TO DIFFERENT FACTS IN THE DAYS OF THE PLANNING AND THE DAYS AFTER THE CRIME. THERE WERE THING THAT IS VALESSA STATED THAT WHISPELL REPEATED FOR THE JURY.

SO WHAT HAPPENED AFTER THIS EXCHANGE?

AFTER THE EXCHANGE AND THE STATE OPENED THE DOOR, THE JUDGE SAID, ACTUALLY THAT IS NOT OPENING THE DOOR FOR WHAT YOU ARE TRYING TO GET OUT, SO THAT DOESN'T WORK, AND THE DEFENSE ATTORNEY AT THAT TIME SAID, WELL, HOW ABOUT IF I ASK THE DETECTIVE, IS THE STATEMENT THAT YOU TOOK FROM ADAM DAVIS CONSISTENT WITH THE OTHER EVIDENCE THAT YOU KNEW AT THE TIME, AND THESE OTHER STATEMENTS FROM THE CODEFENDANT. CAN I ASK THAT? AND THE JUDGE SAID, YOU KNOW, I CAN'T GIVE YOU AN ADVISORY OPINION. YOU ARE GOING TO HAVE TO ASK THE QUESTION. IF THE STATE WANTS TO OBJECT, THEN THEY CAN OBJECT AND I WILL MAKE MY RULING, BUT I CAN'T TELL YOU HOW TO ASK OR WHAT TO ASK. AT THAT TIME IT WAS NEVER BROACHED. THE DEFENSE NEVER ATTEMPTED TO BRING THIS IN AND THERE WAS NO RULING.

ASSUMING THAT WE CONSTRUE THE TRIAL COURT TO HAVE INITIALLY RULED THAT I AM GOING SUSTAIN THE STATE'S OBJECTION ON THE BASIS OF HEARSAY, WAS THERE A PROFFER MADE OF WHAT HER STATEMENT WAS OR WOULD BE AT THAT TIME?

NO. THERE WAS NO NOT, WHAT THE -- THERE WAS NOT, WHAT THE DEFENSE SE SAID WAS I WANT TO GET -- WHAT THE DEFENSE SAID WAS I WANT TO GET IN THE FACT OF WHAT VALUE ESZ A SAID TO THE DETECTIVE -- OF WHAT VALESSA SAID TO THE DETECTIVE, AND SHE HAD SOME OF THE

FACTS THAT SHE CONFESSED, BUT NO STATEMENTS AS TO WHAT SHE TALKED ABOUT THE DIRECT STATEMENTS THAT THEY ARE TRYING TO GET FROM VALESSA OR WHAT VALESSA MAY HAVE STATED TO THE OFFICER, THERE IS NO PROFFER AT ALL.

PLAYING IT THIS OUT IN, REALLY, SORT OF A HYPOTHETICAL FASHION, LET'S ASSUME THAT THE JUDGE SUSTAINED THE OBJECTION AND THAT, FROM THE RECORD HERE, AND THE REFERENCES OF THE PARTIES, THAT WE CAN DISCERN WHAT IT MEANT, WHEN HE SAID "THE CONFESSION" OR WHATEVER, AND THAT THAT IS THERE. WHY WOULDN'T, AS A MATTER OF FUNDAMENTAL FAIRNESS, THAT THIS STATEMENT BE ADMISSIBLE, AFTER THE STAY STATE HAS -- AFTER THE STATE HAS HAD SUBSTANTIAL HEARSAY STATEMENTS FROM THIS OTHER PERSON INVOLVED IN THE CRIME, DISCLOSED TO THE JURY. WHY WOULDN'T, AS A MATTER OF FUNDAMENTAL FAIRNESS, THE DEFENSE BE SBEELTHSED TO TELL, QUOTE, THE REST OF THE STORY, AND THAT -- DEFENSE BE ENTITLED TO TELL, QUOTE, THE REST OF THE STORY, AND THAT NOT BEING ABLE TO GIVE THAT PICTURE WASN'T FAIR TO A JURY WHO ONLY HEARD THE STATEMENTS THAT THE STATE WANTED TO BRING OUT ABOUT IT.

THE STATE TRIES CASES FOR RULES OF EVIDENCE, AND IT IS TRUE THAT, UNDER DUE PROCESS, IF THE RULES OF EVIDENCE ARE PRECLUDING SOMEONE FROM EXERCISING CONSTITUTIONAL RIGHTS, FAIRNESS MAY BE AN ISSUE.

WHY WASN'T THE STATE, ORDINARILY WE HAVE A PERSON HERE WHO, THERE WOULD BE HEARSAY STATEMENTS, AND THEY GO THROUGH, THERE AND IS TWELVE OF THEM, AND THEY GO THROUGH ELEVEN OF THEM, THAT THEY ALL CONSIDER THAT THIS HELPED SET UP OUR CASE AGAINST THIS DEFENDANT, AND OF COURSE, AT THE END OF IT, THAT WITNESS SAID SOMETHING THAT WASN'T HELPFUL TO THE STATE, AND INDEED WOULD BE HELPFUL TO THE DEFENDANT, WHY DIDN'T THE STATE WAIVE AN OBJECTION ON THE BASIS OF HEARSAY, BY BRINGING IN ELEVEN OF THEM?

WELL, BECAUSE THERE ARE MANY DIFFERENT STRATEGY REASONS FOR OBJECTING OR NOT OBJECTING TO HEARSAY TESTIMONY. FOR EXAMPLE, VALESSA, HERE, AS JOHN WHIZ PELL IS -- WHISPELL IS RELATING HER STATEMENTS, IT IS HELPFUL FOR THE DEFENSE TO MAKE VALESSA LOOK LIKE SHE IS MORE INVOLVED AND MORE THE INITIATOR OF EVERYTHING THAT IS HAPPENING, SO THEY ARE STRATEGICALLY NOT GOING TO OBJECT.

ISN'T IT A LITTLE LATE FOR THE STATE, THOUGH, AFTER SAYING I AM GOING TO HAVE THIS DETECTIVE TESTIFY ABOUT VARIOUS THINGS, YOU KNOW, THIS OTHER CODEFENDANT SAID, AS I SAY, THAT ARE HELPFUL TO THE STATE, AND JUST GOES AHEAD AND SAYS ALL OF THESE OTHER THING THAT IS SHE SAYS, BUT THEN WHEN THEY SAY WHAT IS THE REST, WHAT ELSE DID SHE SAY, AND THEY SAY, WELL, NO, THAT IS HEARSAY --' BUT IT WASN'T THE DETECTIVE THAT TESTIFIED ABOUT HER PRIOR STATEMENTS. THE DETECTIVE HAD NOT, IN HIS DIRECT EXAMINATION, HE HAD HE NOT BEEN ASKED ANYTHING, AND HE HAD NOT RESPONDED IN ANY WAY THAT VALESSA HAD TOLD HIM ANYTHING.

I AM, HELP ME, AGAIN, WITH THAT, AGAIN, BECAUSE THE WAY YOU RECOUNTED THIS, AS FAR AS WHAT VALESSA HAD DONE --' JOHN WHISPELL WAS THE THIRD DEFENDANT --

JOHN WHISPELL WAS THE THIRD DEFENDANT, AND IT WAS JOHN WHISPELL WHO DESCRIBED THE PLANNING AND ALL OF THE EVENTS AFTER THE CRIME.

THE DETECTIVE DID NOT TESTIFY, THEN, TO ANYTHING THAT SHE TOLD HIM?

THE ONLY THING THAT THE DETECTIVE TESTIFIED IS THAT HE HAD HE, AND TO BE HONEST, I AM NOT SURE IF THIS WAS EVEN AT TRIAL. I KNOW IN THE SUPPRESSION HEARING, HE TESTIFIED THAT THERE, WHEN THEY, THE HILLSBOROUGH DETECTIVES FLEW OUT TO TEXAS THAT, THEY HAD SPOKEN WITH VALESSA FIRST AND THEN THEY SPOKE WITH JOHN WHISPEL AND THEN THEY

SPOKE WITH ADAM DAVIS.

I THOUGHT THAT THEY DID SAY WHAT SHE SAID, AND THAT BECAUSE OF WHAT SHE SAID THAT, THEY KNEW, WHEN THEY WENT TO SEE THE DEFENDANT --' NO, YOUR HONOR. AND THE DEFENSE ATTORNEY --' NO, YOUR HONOR, AND THE DEFENSE ATTORNEY SAYING THAT THE STATE OPENED THE DOOR, IT WASN'T THROUGH THAT WITNESS. THEY ARE SAYING THE STATE HAD OPENED THE DOOR THROUGH JOHN WHISPELL WHO, HAD TESTIFIED PREVIOUSLY.

WHAT YOU ARE BASICALLY SAYING IS JOHN WHISPELL ADMITTED TO BE A COCONSPIRATOR, BASICALLY, AND VALESSA, IN THE PLANNING OF THE CRIME?

YES. IF YOU WANT TO PUT IT THAT WAY.

SO THERE WAS NO OBJECTION MADE BY THE DEFENSE, FIRST OF ALL --

YES. THAT'S CORRECT.

-- AND SECONDLY DID THE DEFENSE CALL WITNESSES TO TESTIFY?

NO.

DID THEY ATTEMPT TO BRING THE DETECTIVE AND OFFER THIS TESTIMONY IN THEIR CASE AT ALL?

NO.

SO THEY CHOSE TO PRESENT NO DEFENSE.

THAT'S CORRECT. THAT'S CORRECT. THE, IN ADDITION, OF COURSE, THIS LEGAL ARGUMENT WAS NOT MADE BELOW. FOR THIS TO COME IN UNDER THE HEARSAY EXCEPTION, FOR STATEMENTS AGAINST INTEREST, IT IS UP TO THE PERSON WANTING TO PRESENT THE EVIDENCE, TO LAY THE FOUNDATION, TO SHOW THAT THE DECLARE -- THAT HE THE DECLARANT IS UNAVAILABLE. THERE WAS NO SHOWING THAT VALESSA WAS UNAVAILABLE, AND THERE WAS NO SHOWING MADE THAT THERE WAS CORROBORATING CIRCUMSTANCES WHICH WOULD ESTABLISH THE RELIABILITY OF HER STATEMENTS.

AND THERE WAS NEVER A PROFFER.

NO, AND THERE WAS NEVER A PROFFER. THE 90.806 IS A MECHANISM TO IMPEACH AN OUT-OF-COURT DECLARANT WHOSE HEARSAY STATEMENTS HAVE BEEN ADMITTED. YOU CAN IMPEACH THEM FROM THAT STATEMENT AND ADMIT MORE HEARSAY, AND IT IS A METHOD OF IMPEACHMENT. IT IS NOT AN OPENING THE DOOR-TYPE STATUTE. IT IS A IMPEACHMENT OF DECLARANT, AS OPPOSED TO THE WITNESS.

THE PROBLEM, AND I SEE THERE IS A DISTINCTION, BUT IT IS A LITTLE BIT DIFFICULT, THAT YOU HAVE GOT THE JURY HEARING WHAT THE DEFENDANT, OR WHAT THIS CODEFENDANT HAS SAID, AND YOU, THEN, AGAIN, IN TERMS OF THE RULE OF COMPLETENESS, USED SOMETIMES THAT THAT WAY, WE DON'T WANT TO HAVE JUST PART OF SOMEBODY'S STATEMENT GIVEN, BUT IN THIS CASE, AGAIN, TO CLARIFY THIS, YOU HAVE GOT A, THE CODEFENDANT SAYING, DURING THE COMMISSION OF THIS OFFENSE, THESE ARE THE VARIOUS THINGS THAT SHE TOLD ME, WHICH IS --

YES.

-- IS UP SUBSTANTIALLY DIFFERENT THAN WHAT A STATEMENT MIGHT BE TO A POLICE OFFICER AFTER THE FACT.

RIGHT. THAT'S CORRECT. AND THE OTHER PROBLEM IS, OF COURSE, AS THEY INTERPRET HER CONFESSION OR HER STATEMENTS FROM HER OWN RECORD ON APPEAL, IT IS INCONSISTENT WITH JOHN WHISPELL'S TESTIMONY AND HIS DESCRIPTION OF THE EVENTS.

AGAIN, BECAUSE I WOULD WANT TO SAY THAT, IF SOMEONE GAVE MULTIPLE STATEMENTS TO DIFFERENT DETECTIVES --

YES.

---THAT IT WOULD MAYBE BE A DIFFERENT SITUATION FOR THE STATE TO PICK AND CHOOSE AND SAY I AM GOING TO USE THE STATEMENT THAT THIS PERSON GAVE ME ON THIS DATE BUT NOT THE ONE THEY GAVE AN HOUR LATER. THAT IS NOT THIS SITUATION.

NO. THAT IS NOT THE SITUATION.

AND IS THERE ANYTHING IN THIS RECORD WHERE WE WOULD KNOW THE SUBSTANCE OF VALESSA ROBINSON'S STATEMENT TO THE DETECTIVE, BECAUSE AS I UNDERSTAND THEIR ARGUMENT, THEY ARE SAYING THAT THIS STATEMENT SAYS THAT SHE AND ONLY SHE DID THIS, AND THAT THE OTHER PEOPLE WERE IN ANOTHER ROOM, AND DO WE HAVE THAT STATEMENT ACTUALLY IN THIS RECORD SOMEPLACE?

WE HAVE THAT IN THIS RECORD, ONLY BECAUSE THE RECORD IN THIS CASE ON APPEAL HAS BEEN SUPPLEMENTED WITH SEVERAL PAGES FROM VALESSA ROBINSON'S TRIAL RECORD. HER TRIAL, WHICH OCCURRED AFTER THE TRIAL THAT WAS HELD THEY THIS CASE. -- THAT WAS HELD IN THIS CASE. PART OF THE PAGES ARE SOME, AND THEY ARE NOT, IT IS NOT HER ENTIRE STATEMENT, AS IT WAS ADMITTED AT HER TRIAL. IT IS A PAGE, AND THEN, YOU KNOW, ANOTHER PAGE HERE, SO IN THE PAGES, SHE IS HE SAYING --

WE ALLOWED THE SUPPLEMENT.

YES, YOUR HONOR.

AND WHAT WAS THE ARGUMENT IN FAVOR OF SUPPLEMENTING A RECORD WAS SOMETHING THAT HAPPENED LATER?

WELL, THE ARGUMENT IN FAVOR OF SUPPLEMENTING IT WAS THAT THE TRIAL COURT HAD INDICATED, AT THE TIME OF TRIAL, THAT THE TRIAL COURT WAS FAMILIAR WITH THE FACT THAT VALESSA HAD CONFESSED, AND SO THERE WAS NO PROFFER, AND THIS IS GOING TO SHOW WHAT COULD HAVE BEEN PROFFERED BUT DIDN'T NEED TO BE PROFFERED, BECAUSE THE TRIAL COURT WAS INDICATING THAT THEY WERE FAMILIAR WITH THE FACTS.

AND THE TRIAL COURT DID MAKE THAT STATEMENT DURING DISCUSSION.

YES, YOUR HONOR.

OKAY.

MOVING ON TO THE RING ISSUE IN THIS CASE, THE, THERE WAS NO PRESERVATION, AGAIN, OF THAT ARGUMENT IN THE TRIAL RECORD. THERE WAS A, THERE WERE NUMEROUS OF THE STANDARD DEATH PENALTY MOTIONS THAT WERE FILED AND LITIGATED, AND THERE WAS A MOTION FOR SPRERBD I CAN'T, AND SPECIAL --

-- FOR SPECIAL VERDICT, AND SPECIAL --

WHAT WAS REQUESTED IN THAT? WHAT KIND OF SPECIAL VERDICT? DID THE DEFENSE WANT A

SPECIAL VERDICT FORM THAT HAD WHICH AGGRAVATORS WERE FOUND AND WHICH MITIGATORS WERE FOUND AND WHAT THEIR --

THEY WANTED, THEY ASKED FOR A NUMBER OF DIFFERENT SPECIAL VERDICTS. FIRST, WITH GUILT PHASE, THEY WANTED A SPECIAL VERDICT AS TO THE THEORY OF DEFENSE, I AM SORRY, THE THEORY OF PROSECUTION, FOR THE JURY TO DECIDE WHETHER PREMEDITATION HAD BEEN PROVEN, AND THIS WAS, AS THIS CASE WAS ORIGINALLY INDICTED, DAVIS WAS INDICTED FOR ROBBERY, ALONG WITH FIRST-DEGREE MURDER. THE STATE DID NOT SEEK A ROBBERY CONVICTION. THE STATE LOWERED THAT TO A GRAND THEFT CHARGE AFTER THE FACT, SO THERE WASN'T A FELONY MURDER ARGUMENT BEING MADE BY THE STATE, BUT THIS IS PRIOR TO TRIAL, SO IN THE PRETRIAL MOTIONS AT THAT TIME, THE DEFENSE IS CONSIDERING, WELL, THE JURY MAY TAKE IT AS A FELONY MURDER OR MAKE TAKE IT AS PREMEDITATED MURDER CASE, AND THEY WANTED A SPECIAL VERDICT ON THE THEORY OF GUILT PHASE. THEY, ALSO, WANTED SPECIAL VERDICTS WITH REGARD TO FINDINGS WITH AGGRAVATING CIRCUMSTANCES. I BELIEVE, AND ALSO MITIGATING.

WHY WOULDN'T THAT BE SUFFICIENT TO PRESERVE THE RING ISSUE?

WELL, THE REASON THEY WERE ARGUING THEY NEEDED SPECIAL VERDICT WAS TO AVOID A DOUBLE JEOPARDY PROBLEM, IF THE JURY ACQUITTED DAVIS AFTER PARTICULAR AGGRAVATING FACTOR. THEY WANTED TO BE ABLE TO ARGUE THE TRIAL JUDGE COULD NOT THEREAFTER FIND THE FACTOR. IN ORDER TO MAKE THAT ARGUMENT, THEY HAD TO HAVE A SPECIAL VERDICT, SO IT WAS TO PROTECT HIS RIGHT AGAINST DOUBLE JEOPARDY. THEY WERE NOT ARGUING IT AS A RIGHT TO A JURY TRIAL. IT WAS NOT A SIXTH AMENDMENT CLAIM, WHICH IS WHAT THE JURY TRIAL IS BASED UPON. THEY DIDN'T HAVE THE RIGHT TO MAKE THOSE DECISIONS. AT THE TIME THAT THIS CASE WAS TRIED IT WAS NOVEMBER 1999 AND APRENDI HADN'T EVEN BEEN DECIDED, SO THEY DIDN'T IS -- THEY DIDN'T HAVE A SIXTH AMENDMENT CLAIM TO MAKE, AND THERE WAS NO SIXTH AMENDMENT CLAIM MADE AT THE TRIAL.

IT WAS ARTICULATED AS DOUBLE JEOPARDY WE?

YES. IT WAS ARTICULATED AS DOUBLE JEOPARDY. THERE WAS ALSO THE BARE MAJORITY TO RECOMMEND A SENTENCE OF DEATH.

SO THERE WAS A BARE MAJORITY ARGUMENT.

YES. AND THAT WAS PRESERVED. THEY CITED JOHNSON V LAN AND MADE AN ARGUMENT -- JOHNSON V LOUISIANA, AND MADE AN ARGUMENT IN THAT CASE.

WAS THERE AN OBJECTION MADE TO INSTRUCTING THE JURY AS TO THE ADVISORY?

THERE WAS ACTUALLY, THERE WAS A GREAT DEAL OF THAT, BASED ON CALDWELL. THERE WAS A LOT OF ARGUMENT BASED ON CALDWELL, ABOUT WHAT YOU CAN AND CANNOT TELL THE JURY. THE JURY WAS, IN THIS CASE, INSTRUCTED THAT THEY DID HAVE TO FIND AN AGGRAVATING FACTOR. SO THAT, I MEAN, JUST PART OF THE STANDARD INSTRUCTIONS WHERE YOU SAY WHAT YOU ARE GOING TO DO IS, FIRST, CONSIDER WHETHER AN AGGRAVATING FACTOR HAS BEEN ESTABLISHED. THEN IF HE THERE ARE ANY MITIGATING FACTORS SUFFICIENT TO OUTWEIGH ANY AGGRAVATING FACTORS.

BUT IF RING, SINCE YOU HAVE ADMITTED OR AGREED THAT APRENDI HADN'T BEEN DECIDED, RING WASN'T DECIDED, THAT THE CASE LAW OUT OF THE SUPREME COURT HAD REJECTED SIXTH AMENDMENT CHAEGEES. IT LOOSE HERE THAT IF, COULD YOU ADDRESS THE SUBSTANCE AS TO WHETHER, IN LIGHT OF RING, AND THE REQUIREMENT THAT THE JURY BE THE FINDER OF FACT OF AGGRAVATING CIRCUMSTANCES, WHY, UNDER FLORIDA'S DEATH PENALTY LAW, A WHICH IS NOW PROBABLY UNIQUE IN THE COUNTRY, A 7-TO-5 BARE MAJORITY COULD, COULD WITHSTAND A

CONSTITUTIONAL ATTACK, BOTH UNDER THE FLORIDA CONSTITUTION, AS WELL AS THE UNITED STATES CONSTITUTION.

WELL, OF COURSE, RING DOESN'T EVEN ADDRESS UNANIMOUS JURY. IT DOESN'T HAVE ANYTHING TO DO WITH WHAT THE JURY, HOW THE JURY IS COMPRISED OR ANYTHING ABOUT THE MAKEUP OF THE JUMPLT THE ONLY THING RING DISCUSSES IS UNDER THE ARIZONA STATUTE, WHAT DOES A JURY HAVE TO FIND TO CONVICT A DEFENDANT OF A DEATH-ELIGIBILITY OFFENSE, AND WHAT THIS COURT HAS SAID IN MILLS AND HAS REAFFIRMED, IS THAT IN FLORIDA, ONCE THE JURY CONVICTED A DEFENDANT OF FIRST-DEGREE MURDER, THE DEFENDANT IS ELIGIBLE FOR THE DEATH PENALTY AT THAT POINT. THEY HAVE MADE ALL THE FINDINGS THAT RING REQUIRES THE JURY TO MAKE. NOW, AS TO THE EXISTENCE OF THE FELONY PROBATION AGGRAVATOR --

LET'S ASSUME THAT TO QUALIFY, THE JURY NEEDS TO BE THE FINDER OF FACT, WHAT IS THE ARGUMENT THAT CAN JUSTIFY THAT, IN EVERY OTHER TYPE OF CASE, WHERE YOU HAVE SOMETHING THAT PUTS, BUMPS SOMEBODY UP THAT, YOU HAVE A JAUR FINDING OF UNANIMITY, THAT IN -- A JURY FINDING OF UNANIMITY, THAT AT DEATH PENALTY FINDING WOULD BE CONSTITUTIONALLY PROPER, UNDER FLORIDA'S CONSTITUTION AS WELL AS THE UNITED STATES CONSTITUTION?

THE JURY RECOMMENDATION IS A RECOMMENDATION WHICH GOES SENTENCE. IT IS NOT A RECOMMENDATION WHICH FINDS THAT THE DEFENDANT HAS COMMITTED A CAPITAL OFFENSE OR A DEATH-ELIGIBLE OFFENSE.

THAT IS THE SAME AS THE STATEMENT, LET'S GET PAST THAT, BECAUSE THAT IS WHAT WAS MADE IN ARIZONA. THEY SAID THAT THEIR STATUTE DID THE SAME THING AND THE U.S. SUPREME COURT REJECTED THAT, SO LET'S JUST ASSUME --' ARIZONA DOESN'T HAVE A JURY MAKE ANY RECOMMENDATION. IN FLORIDA, THE JURY RECOMMENDATION IS A SENTENCING RECOMMENDATION, SO WHEN YOU GET TO THE QUESTION OF UNANIMOUS AND YOU ARE LOOKING AT THE ULTIMATE JURY RECOMMENDATION, THOSE ARE TWO COMPLETELY UNRELATED --' YOU SAID THAT IN FLORIDA, THE WAY SIMPLY FINDING A PERSON GUILTY OF MURDER IS ENOUGH, IN ANDERSON AND RING THAT, THE JUDGE COULD DO EVERYTHING. WE WOULDN'T EVEN NEED THE JURY.

YES, YOUR HONOR, AND ASSUMING THE FACT FINDING BY THE JURY, THE REASON I WANT TO TALK ABOUT THE FELONY FACTOR IN THIS CASE WOULD RENDER ANY POSSIBLE ERROR HARMLESS TARNKS IS NOT BECAUSE IT PROVES THAT THERE WAS -- HARMLESS, AND IT IS NOT BECAUSE IT PROVES THAT THERE WAS AN AGGRAVATING FACTOR. IN CASE LAW, IN WHICH APRENDI ACKNOWLEDGED AND RING ACKNOWLEDGED, AND THE PRIOR CONVICTION, AND IF YOU READ TORRES AND ALMANDERA, IT IS SAYING THAT THERE IS RECIDIVISM, NOT RECIDIVISM BUT A HISTORY OF PRIOR VIOLENT FELONY.

WHAT WAS THE ON-PROBATION FELONY FOR?

HE WAS ON FELONY PROBATION FOR BURGLARY, AND I KNOW THERE HAD BEEN SOME CAR THEFTS. HE, ALSO, HAD A CONVICTION PREVIOUSLY, FROM, HE HAD HE BEEN CONVICTED WITH HIS ACTIONS IN HELPING VALESSA RUN AWAY FROM HOME AND HAD, THEY WERE ALL NONVIOLENT CRIMES, BUT HE HAD A STRING OF --

HOW DOES THAT FIT WITH THE APPELLANT'S ARGUMENT HERE THAT THE AGGRAVATORS THAT REALLY MATTERED WERE THE OTHER AGGRAVATORS, THAT IS THE, WAS IT CCP AND HAC?

I THINK --' THOSE ARE THE AGGRAVATORS --EE.

FOR SENTENCING PURPOSES, THOSE WERE THE FELONY AGGRAVATORS.

YOU SAID BECAUSE OF THE RECIDIVISM ISSUE, HOW DOES THAT RENDER -- GO AHEAD.

WHAT APRENDI SAYS IS THAT THE TRIAL JUDGE HAS THE AUTHORITY, IF THERE IS A PRIOR CONVICTION, BASED ON THE HISTORY OF TRADITIONAL SAENTSING FACTORS, THE TRIAL JUDGE -- SENTENCING FACT ON, THE TRIAL JUDGE CAN EXCEED THE STATUTORY MAXIMUM, ON HIS OWN, BASED ON THIS PRIOR CONVICTION.

I AM SAYING GIVEN THAT, THOUGH, ISN'T THE REALITY OF THIS CASE, I MEAN, WOULDN'T WE BE IGNORING THE FACTS, IF WE DIDN'T AGREE, AS I THINK YOU AGREED A MINUTE AGO, THAT THE REAL AGGRAVATORS THAT RESULTED IN THE IMPOSITION OF DEATH IN THIS CASE, WAS NOT THAT HE WAS ON FELONY PROBATION BUT THAT THIS MURDER WAS COMMITTED IN SUCH A BRUTAL WAY, AND THAT IT WAS PLANNED, THAT IS THE CCP AND THE HAC. WOULDN'T WE ALL BE IGNORING THAT THAT IS, REALLY, WHAT INFLUENCED THE JURY TO RECOMMEND DEATH, AND THAT THAT IS WHAT CAUSED THE TRIAL COURT TO IMPOSE THE DEATH SENTENCE?

AS TO THE SENTENCE, BUT, AGAIN, WITH RING, THE CONCERN IS AT WHAT POINT IS THIS AN OFFENSE THAT QUALIFIES THE DEFENDANT FOR THE DEATH PENALTY. SO YOU HAVE TO FLUSH OUT THE SENTENCE FROM THE ACTUAL WHAT CONVICTION WE HAVE HERE, WHAT IS THE OFFENSE THAT IS BEING SENTENCED. SO TO SAY THAT, I MEAN, IT IS JUST TWO COMPLETELY DIFFERENT ISSUES, TO SAY THAT THE STUFF THAT IS MORE --.

I AM SAYING WHY WOULD YOU HAVE TO HAVE THAT, IF YOU ARE SAYING, AND HE IS ALREADY DEATH-ELIGIBLE.

YES.

THEN I WOULD ASSUME YOU WOULD BE SAYING UNDER OUR SCHEME, AS PERHAPS YOU DID, IN ANSWER TO JUSTICE PARIENTE'S QUESTION, THAT THERE REALLY IS NO NEED FOR THE JURY TO FIND ANY AGGRAVATORS, THAT IS THAT, UNDER OUR SCHEME, THAT HE BECAME DEATH -- IS THAT REALLY THE BOTTOM LINE THERE?

YES.

WHICH AGGRAVATORS --' I AM SORRY.

GO AHEAD, IF YOU WANT.

IF YOU WANT TO SAY THAT YOU NEED AN AGGRAVATING FACTOR TO MAKE THE DEFENDANT DEATH DEATH-ELIGIBLE, THEN YOU HAVE THE PROBATION AS AN AGGRAVATING FACTOR. WHEN YOU TALK ABOUT WHAT WAS PERSUASIVE TO THE JURY IN RECOMMENDING A SENTENCE OR WHAT FACTORS THE TRIAL JUDGE GAVE THE MOST WEIGHT, TO YOU ARE NOT LOOKING AT HOW DID HE GETS TO THE POINT OF CONSIDERING DEATH TO BEGIN, WITH AND IF ALL YOU NEED IS ONE AGGRAVATING FACTORS, IT DOESN'T MATTER IF IT IS THE MOST PERSUASIVE AGGRAVATING FACTOR, YOU ARE SAYING THAT DEATH-ELIGIBLE IN FLORIDA IS TO HAVE ONE AGGRAVATING FACTOR. YOU ARE NOT SAYING IT HAS TO BE A PERSUASIVE AGGRAVATING FACTOR. IF YOU NEED ONE AGGRAVATING FACTOR, HERE IS AN AGGRAVATING FACTOR. I DON'T THINK IT IS HOW MUCH WEIGHT WE WILL GIVE TO ONE OVER ANOTHER AND ONLY THE WEIGHT YES, SIR THE WILL -- ONLY THE WEIGHTYEST AGGRAVATOR IS GOING TO BE AN AGGRAVATING FACTOR?

YOU ARE NOT SAYING THAT THE COURT IS SAYING AN AGGRAVATING FACTOR USED AS A PREDICATE TO IMPOSE THE DEATH SENTENCE, MUST BE FOUND BY THE JURY, JUST LIKE AN ELEMENT OF THE OFFENSE, APPLIES TO THIS SITUATION.

I THINK YOU MAY HAVE LOST ME THERE. I DON'T THINK IT APPLIES UNDER FLORIDA LAW, BUT --

WHAT I AM SAYING IS THAT HERE, YOU, I HOPE YOU WOULD AGREE THAT IT CLEARLY APPEARS THAT IT IS THE PRESENCE OF THESE TWO AGGRAVATING FACTORS OF CCP AND HAC, WHICH IS HAS LED THE TRIAL COURT TO CONCLUDE THAT THE DEATH SENTENCE IS APPROPRIATE. WOULD YOU AGREE WITH THAT?

I THINK --

DO YOU REALLY BELIEVE --

I THINK IT IS REASONABLE TO SAY THAT, IF THE ONLY AGGRAVATING FACTOR HERE WAS FELONY PROBATION, MR. DAVIS WOULD NOT HAVE GOTTEN DEATH.

I APPRECIATE THAT CANDOR. SO HAVING STATED THAT, AND THE TRIAL COURT, WHEN THE SUPREME COURT IN RING, SAYS THAT, IN ORDER FOR AGGRAVATORS THAT ARE USED AGAINST THE DEFENDANT TO IMPOSE THE DEATH SENTENCE, MUBS FOUND BY THE JURY, THAT THEY DID NOT -- MUST BE FOUND BY THE JURY, THAT THEY DID NOT MEAN THAT THESE ONES THAT WERE FOUND HERE BY THE TRIAL COURT JUDGE HAD TO, ALSO, BE FOUND BY THE JURY.

WELL, I THINK YOU HAVE TO GO BACK TO LOOKING AT THE ARIZONA STATE COURT DECISION IN RING, AND THEM SAYING, UNDER OUR LAW IN ARIZONA, YOU MUST FIND ONE AGGRAVATING FACTOR, IN ORDER TO HAVE A DEFENDANT BE DECLARED ELIGIBLE FOR THE DEATH PENALTY.

CAN I CLARIFY THIS?

YES, YOUR HONOR.

IS THE DISTINCTION THAT AWE ARE MAKING IS WHETHER ONE, A DEFENDANT, AT WHAT POINT CAN HE BE HELD ELIGIBLE TO THE DEATH PENALTY, AS DISTINGUISHED FROM WHETHER THE DEATH PENALTY IS APPROPRIATE UNDER THE CIRCUMSTANCES.

YES, YOUR HONOR.

IS THAT THE DISTINCTION?

YES, YOUR HONOR.

SECONDLY, WHICH, WERE THERE ANY AGGRAVATORS NOT FOUND BY THE TRIAL JUDGE THAT WERE PRESENTED TO THE JURY?

NO.

WERE THESE THE ONLY THREE AGGRAVATORS SUBMITTED BY THE STATE?

THESE WERE THE ONLY THREE AGGRAVATORS SOUGHT, AND THE DEFENSE CONCEDED THE KPINS OF THE FELONY PROBATION AGGRAVATOR. THEY CONTESTED THE HAC AND CCP.

SO THERE WERE NO OTHER AGGRAVATORS ARGUED TO THE JURY.

THAT'S CORRECT. THAT'S CORRECT. AND, AGAIN, I THINK IT IS THE DIFFERENCE, BUT IF YOU WANT TO SAY THAT, UNDER FLORIDA, WHAT THIS COURT HAS SAID IS THAT, UNDER FLORIDA LAW, YOU DON'T NEED ANY AGGRAVATORS, BECAUSE DEATH IS THE STATUTORY MAXIMUM, AND I REALIZE THERE IS CONCERNS ABOUT THAT, AND THAT THERE ARE SOME MEMBERS OF THE COURT THAT BELIEVE THERE MUST BE AN AGGRAVATING FACTOR, BUT I THINK EVEN IF YOU SAY THERE MUST BE AN AGGRAVATING FACT ON, YOU ARE TAKING IT ANOTHER STEP, IF YOU SAY NOT ONLY DOES THERE HAVE TO AND AGGRAVATING FACTOR, BUT IT HAS TO BE THE AGGRAVATING FACTOR THAT IS GOING TO CONVINCE THE JURY TO SENTENCE THIS DEFENDANT TO DEATH, BECAUSE YOU

MAY HAVE AN AGGRAVATING FACTOR --

BUT THE JURY DOESN'T SENTENCE THE DEFENDANT IN FLORIDA.

NO. THE JURY IS A COSENTENCER.

THE JUDGE SENTENCES.

THAT'S CORRECT. AND UNDER THE ARGUMENT, WE WOULD SUBMIT THAT THE FELONY PROBATION, AGAIN, IS SUFFICIENT, UNDER AL MANDEREZ TORRES, TO HAVE CONCEDED THAT.

THE STATE CONCEDED THAT.

YES, YOUR HONOR.

THE MOTION TO SUPPRESS?

I THINK THE NEXT ISSUE WAS THE JURY INSTRUCTION ON MITIGATION, ON THE MITIGATION FOR THE TREATMENT OF THE CODEFENDANTS AND ON THAT, I THINK THIS COURT DID LOOK AT THE SAME SITUATION IN FRANKIE, AND THE REASON THIS COURT UPHELD THE TRIAL JUDGE'S DENIAL OF THAT QUAD INSTRUCTION IN FRANK' IS THAT IT IS COVERED BY THE STANDARD JURY INSTRUCTSS, AND THAT -- INSTRUCTIONS, AND THAT ARGUMENT WAS COVERED IN THIS CASE. THE ARGUMENT WAS COVERED BY THE STANDARD JURY INSTRUCTIONS. THE DEFENSE WAS NOT PRECLUDE AT ALL FROM MAKING THE ARGUMENT TO THE JURY TO CONSIDER.

AND THE TRIAL COURT ALLOWED THAT INFORMATION TO GO TO THE JURY AND ALLOWED COUNSEL, THEN, TO ARGUE THAT IN MITIGATION.

YES. THE ONLY THING THE JUDGE DID NOT DO IS GIVE THE SPECIAL SPECIALLY-REQUESTED INSTRUCTION.

DO YOU KNOW IF THAT IS UNDER CONSIDERATION BY ANY COMMITTEE? THAT IS I AM CONCERNED, BECAUSE I KNOW CERTAIN TRIAL JUDGES DO SPELL OUT THEORIES THE OTHER MITIGATING FACTORS THAT THE DEFENDANT IS CLAIMING, AND SOME DON'T, AND SHOULDN'T WE HAVE SOMETHING THAT IS STANDARDIZED? WE HAVE SAID IT IS NOT ERROR TO GIVE THE STANDARD, BUT WE HAVEN'T SAID IT IS ERROR TO LIST THEM ALL, AND SO IT IS, INSERT COURTS, THERE IS ALMOST LIKE A DISTINCTION BETWEEN THE STATUTORY AND NONSTATUTORY, BECAUSE, BUT IN OTHERS, THE JUDGES DO IT.

I DON'T KNOW THAT ANY COMMITTEE IS CURRENTLY LOOKING AT THAT FOR ANY REASON F THEY ARE, I AM NOT ON -- FOR ANY -- FOR ANY REASON. IF THEY ARE, I AM NOT IN, I AM NOT ON A COMMITTEE, BUT I HEAR THANKS DISCUSSED, AND I HAVE NOT HEARD ANY INDICATION THAT IS THE COMMITTEE IS CONSIDERING SUCH AN INSTRUCTION. I KNOW THAT MY EXPERIENCE WITH MY CASES IS I SEE THEY FREQUENTLY RAISED AS ISSUE ON APPEAL THAT, THERE WAS NO AN INSTRUCTION SPECIFICALLY ABOUT NONSTATUTORY MITIGATION. I HAVE NOT SEEP CASES WHERE TRIAL JUDGES HAVE -- HAVE NOT SEEN CASES WHERE TRIAL JUDGES HAVE GIVEN THE LIST. YOUR HONORS HAVE SEEN THOSE CASES. I HAVE NOT SEEN THOSE CASES. I DON'T KNOW HOW COMMON THAT PRACTICE IS OR IF THAT IS SOMETHING THAT DOES NEED TO BE ADDRESSED, BUT ON THE MOTION TO SUPPRESS, THE FACT THAT DAVIS VOLUNTEERED SOME STATEMENTS PRIOR TO MIRANDA BEING READ, IS NOT A REASON TO PRECLUDE THE STATEMENTS THAT HE VOLUNTARILY MADE AFTER HE HAD BEEN GIVEN HIS MIRANDA RIGHTS AND NOW HE VOLUNTARILY WAIVED HIS RIGHTS, WHICH IS WHAT THE TRIAL COURT FOUND BELOW. THE FACTUAL FINDING WAS THAT THE WAIVER OF MIRANDA RIGHTS WAS ENTIRELY VOLUNTARY AND KNOWING.

BUT IS THERE ANY COERCIVE ELEMENT TO THE FACT THAT THE POLICE DID TELL MR. DAVIS THAT WE ARE HERE INVESTIGATING A MISSING PERSONS, WITH FULL KNOWLEDGE THAT THE OTHER TWO PARTICIPANTS IN THIS CRIME HAD, IN FACT, CONFESSED AT LEAST PARTIALLY ON, TO THEIR PARTICIPATION IN A MURDER? SO ISN'T THERE SOMETHING KIND OF COERCIVE ABOUT LEADING THE DEFENDANT TO BELIEVE THAT THIS WAS JUST A MISSION PERSONS INVESTIGATION?

NO. ACTUAL -- A MISSING PERSONS INVESTIGATION?

NO. ACTUALLY WHAT COURTS HAVE HELD IS THAT THE LAWYER IS NOT PRECLUDED FROM TRYING TO OBTAIN THE FACTS MISSING FACTS, WHEN THEY ARE TRYING TO OBTAIN A STATEMENT.

USUALLY WHEN A GUY SUND ARREST, THEY DO THE MIRANDA WARNING FIRST, AND THEN WHAT THEY HAVE DONE IS LOOKED AT IN CONTEXT. I AM CONCERNED HERE THAT THERE ARE NOW CONFESSIONS FROM BROTH CODEFENDANTS, SO -- FREE BOTH CODEFENDANTS SOIRTION HIM -- FREE BOTH CODEFENDANTS, SO I AM ASSUMING THAT THEY NOW KNOW THIS GUY, DAVIS, IS PART OF THE THREE-PART CONSPIRACY, CORRECT, AND THEY DON'T GIVE HIM THE MIRANDA RIGHTS AND FIRST TRICK HIM AND LET HIM CONFESS AND THEN OH, NOW, WE ARE GOING TO GIVE YOU THE MIRANDA RIGHTS. DOESN'T THAT REMIND YOU OF MIRANDA?

THEY DIDN'T TRICK HIM. THEY TOLD HIM THAT THEY HAD ALREADY SPOKEN WITH VALESSA AND WITH JOHN, AND IT IS TRUE THAT AT THAT TIME, AS FAR AS THEY WERE CONCERNED, IT WAS A MISSING PERSONS CASE. I MEAN CERTAINLY THEY HAD TALKED TO THESE OTHER DEFENDANTS, BUT THEY HAD NOT FOUND THE BODY. THEY DIDN'T KNOW THAT SHE HAD BEEN KILLED, AND THEY GO IN THERE WITH THAT KNOWLEDGE.

I THOUGHT YOU SAID THEY HAD CONFESSED. THEY HADN'T CONFESSED TO KILLING HER?

NO. THEY CONFESSED TO KILLING HER, BUT I DON'T KNOW THAT THE POLICE HAVE TO ACCEPT THAT AND GO IN AND TALK TO SOMEBODY ELSE AND SAY WE ARE GOING TO ACCEPT THAT. I MEAN, THEY WERE THERE ON A MISSING PERSONS CASE, BUT THEY COULD MISREPRESENT THAT AND HAVE IT NOT BE THE COERCION THAT IS GOING TO PRECLUDE A VOLUNTARY WAIVER OF MIRANDA RIGHTS.

CHIEF JUSTICE: THANK YOU VERY MUCH.

I AM OUT OF TIME. THANK YOU.

CHIEF JUSTICE: MR. MARSHAL, HOW MUCH TIME LEFT FOR REBUTTAL?

FOUR MINUTES.

OKAY, COUNSEL, REBUTTAL.

BRIEFLY AS TO THE MOTION TO SPRERTION ALSO OTHER FACTORS THAT THE DETECTIVES ADMITTED TO, IS THAT THEY EVEN TOLD -- MOTION TO SUPPRESS, ALSO OTHER FACTORS THAT THE DETECTIVES ADMITTED TO IS THAT THEY HE EVEN TOLD HIM THAT IT WOULD BE WORSE FOR HIM IN TAMPA. THEY DID NOT ADMIT THE KNOWLEDGE OF ANYTHING OTHER THAN A MISSING PERSON, AND THEY DID NOT TELL HIM THAT IN FACT VALESSA ROBINSON HAD IN FACT, ADMITTED TO THE DEATH, AND THE STORY WAS A TUING OF WAR AND WHO -- A TUG OF WAR AND WHO LOVES WHO AND WHY WE ARE DOING IT FOR WHO, AND ONLY THEN DID THEY PROVIDE HIM WITH A WAIVER FORM DIRECTLY THEREAFTER, NO TIME FOR REFLECTION, HAVE HIM SIGN IT AND THEN GET THE TAPED STATEMENT.

WHAT IS THE LAW, WHEN A TRIAL COURT CONSIDERS A CLAIM LIKE THIS, WHAT DO YOU ARGUE

TO THE TRIAL COURT THAT THE U.S. SUPREME COURT HAS SAID, FOR INSTANCE, JUDGE, HERE IS WHAT YOU SHOULD CONSIDER, IF THEY INITIALLY DIDN'T GIVE HIM HIS MIRANDA WARNINGS, AND HE CONFESSES, AND THEN AFTER HE GIVES THAT CONFESSION, THEY GO ON AND GIVE HIM HIS MIRANDA WARNINGS, AND HE CONE FEZ AGAIN. WHAT DOES THE U -- AND HE CONFESSES AGAIN. WHAT DOES THE U.S. SUPREME COURT TELL US A TRIAL JUDGE SHOULD CONSIDER, IF DETERMINING WHETHER THE SECOND STATEMENT IS ADDMISSIBLE?

PURSUANT TO OREGON VELSTAT, YOU HAVE TO LOOK AT THE CIRCUMSTANCES -- OREGON V ELSTAT, YOU HAVE TO LOOK AT WHETHER TRICKLY OR -- TRICKERY OR DECEIT HAS BEEN USED. NONE OF THAT WAS DONE HERE. THEY HAVE LULLED HIM INTO A SENSE OF CONFIDENCE, A SAENS OF IT IS GOING TO BE BETTER FOR YOU -- A SENSE OF IT IS GOING TO BE BETTER FOR YOU. ADMIT IT. WE KNOW WHAT IS UP, AND IN OREGON V ELSTAT, THE CONNALLY WAS APPLIED, IN THAT THIS STATEMENT WAS NOT VOLUNTARY, BASED UPON THE TOTALITY OF THE CIRCUMSTANCES.

WHEN DID THEY GIVE THE MIRANDA WARNINGS TO THE CODEFENDANTS? DOES THE RECORD REFLECT WHETHER THEY HAD GIVEN THOSE AT THE OUTSET?

NEW YORK CITY YOUR HONOR. -- NO, YOUR HONOR. NOW, AS TO THE ISSUE REGARDING THE ELIGIBILITY, DEATH-ELIGIBLE, VERSUS AGGRAVATING FACTOR. WHAT THE STATE IS ATTEMPTING TO DO, I WOULD SUBMIT, IS THEY ARE TRYING TO RECAST AN AGGRAVATING FACTOR AS SAENTSING FACTOR AGAIN. THEY ARE -- AS A SENTENCING FACTOR AGAIN. THEY ARE TRYING TO SAY ALL THIS IS, BECAUSE YOU ARE CONVICTED OF FIRST-DEGREE MURDER IN FLORIDA. YOU ARE SET FOR DEATH. IT IS CAPITAL. AT THIS POINT ALL THE JUDGE DOES IS HE FINDS AN AGGRAVATING FACTOR. THAT IS ALL THAT NEEDS TO BE DONE. THAT PUTS IT ALL IN THE SITUATION OF FERMIN. IN -- OF FURMAN, AND IN FUR HAS NOT YOU HAVE TO -- IN FURMAN, YOU HAVE TO FIND AGGRAVATING FACTORS, AND THE DEATH PENALTY HAS TO BE FOUND TO AN EXCLUSION BEYOND A REASONABLE DOUBT.

EXCEPT FOR CERTAIN EXCEPTIONS, RIGHT, LIKE PRIOR CONVICTION?

PRIOR CONVICTION, AND, AGAIN, I JUST RELIED ON MY PREVIOUS ARGUMENTS REGARDING WHAT THAT IS GOING TO CREATE IN FLORIDA, BECAUSE YOU ARE SAYING THAT YOU CAN FIND, SENTENCE SOMEBODY TO DEATH ON A PRIOR CONVICTION, WHERE IF YOU HAVE A FOURTH DUI FELONY OR PETTY THEFT, THEY NEED A JURY, BECAUSE UNDER THE MATERIALITY TEST, THEY FOUND THAT TO BE AN ELEMENT.

DIDN'T THE COURT IN RING, MAKE CLEAR THAT IT IS STILL UP TO THE JUDGE TO SENTENCE, AND THAT THEY ARE NOT HOLDING THAT, NOW, THE JURY HAS TO SENTENCE TO LIFE OR DEATH?

THAT'S CORRECT. THEY DON'T MAKE THE STATEMENT THAT THE JURY HAS TO PERFORM THE SENTENCING FUNCTION, BUT THE THING HERE IS THAT THAT AGGRAVATING FACTOR HAS TO BE FOUND BEYOND A REASONABLE DOUBT BY THE JURY.

BUT WHAT YOUR OPPONENT IS SAYING IS THAT, BECAUSE THERE WAS A FELONY PROBATION HERE, THAT IS AKIN TO SAYING THAT THERE WAS A PRIOR FELONY CONVICTION, AND THEREFORE, UNDER RING, THAT NOW MAKES THE DEFENDANT DEATH ELIGIBLE. THAT IS THE ADDITIONAL FACTOR THAT IS IMPOSED, OVER AND ABOVE THE FACT THAT THERE WAS A FIRST-DEGREE MURDER, TO NOW RENDER THAT PERNELL VISIBLE FOR DEATH. HOWEVER, UNDER RING, THE JUDGE REMAINS THE PERSON WHO IS RESPONSIBLE FOR SENTENCING. AND THEREFORE WE NOW HAVE, UNDER RING, A VALID SENTENCE, BECAUSE THE FACT THAT YOU HAD A FELONY PROBATION REMOVES THAT ASPECT OF SENTENCING FROM THE JURY'S CONSIDERATION. YOU DON'T HAVE TO PROVE THAT BEYOND A REASONABLE DOUBT. HE IS HE NOW AUTOMATICALLY DEATH ELIGIBLE, AND THEREFORE THE JUDGE WAS WITHIN HIS RIGHT TO SENTENCE THE PERSON TO MURDER, TO DEATH.

THAT BRINGS THE ISSUE UP OF PROPORTIONALITY, THEN, BECAUSE THEN YOU ARE SAYING THAT THE ONLY SENTENCING FACTOR THAT COULD BE CONSIDERED BY THE JUDGE IN THIS CASE WOULD BE THE FELONY PROBATION.

THERE WAS A DIFFERENCE, NOW, BETWEEN THE SIXTH AMENDMENT AND THE EIGHTH AMENDMENT JURISPRUDENCE. TELL US HOW THAT APPLIES.

GO BACK TO THAT SAFE HARBOR OF HARMLESS ERROR ON THAT, BRINGS UP THE WHOLE EIGHTH AMENDMENT ISSUE. IT HAS BEEN SAID.

THERE IS ONE LAST QUESTION. I REALIZE YOUR TIME HAS EXPIRED, BUT YOU GO AHEAD AND ASK THAT.

MY ONLY QUESTION WAS BASICALLY WHAT JUSTICE CANTERO COVERED. DO YOU SEE ANY DISTINCTION BETWEEN WHAT RING TALKED ABOUT UNDER THE ARIZONA STATUTE, OF THE NECESSITY OF THE JURY MAKING A FINDING TO ALLOW ONE TO BE ELIGIBLE FOR A DEATH SENTENCE, AS OPPOSED TO WHETHER DEATH IS AN APPROPRIATE SENTENCE?

UNDERSTAND THIS IS FORM VERSUS FUNCTION. I THINK THE PRACTICAL EFFECT IS, AND I DON'T KNOW IF I AM ANSWERING THE COURT'S QUESTION, IS WITHOUT THAT AGGRAVATING FACTOR, YOU CANNOT EVEN CONSIDER DEATH, SO I GUESS IT IS TRUE TO THAT EXTENT, BUT THE JURY HAS TO FIND THAT AGGRAVATING FACTOR, AND IF THEY FIND THAT AGGRAVATING FACTOR, THEN YOU HAVE THE EIGHTH AMENDMENT ISSUES OF PROPORTIONALITY.

CHIEF JUSTICE: THANK YOU ALL VERY MUCH, FOR RESPONDING TO OUR QUESTIONS.