James Belcher v. State of Florida

MARSHAL: PLEASE BE SEATED.

CHIEF JUSTICE: IF COUNSKOUNS HE WILL IS READY IN BELCHER VERSUS STATE. IF COUNSEL IS READY, YOU MAY PROCEED.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. I AM REPRESENTING JAMES BELCHER THIS MORNING. BRIEFLY, HE WAS CONVICTED OF FELONY MURDER AND SEXUAL BATTERY IN JACKSONVILLE, FOR THE DEATH OF JENNIFER EMBRY, WHICH INJURED OCCURRED -- WHICH OCCURRED IN JANUARY 1996. PROSECUTION'S CASE BRIEFLY WAS THAT MS. EMBRY WAS FOUND IN THE BATHTUB OF HER HOME OF HIS THERE WAS EVIDENCE THAT SHE HAD BEEN STRANGLED AND DROWNED AND THERE WAS SEMEN FOUND ON VAGINAL SWABS TAKEN AT AUTOPSY AS WELL AS ON A SLIPPER ON THE BATHROOM FLOOR. DNA TESTING LINKED MR. BELCHER TO THE SEMEN STAINS THAT WERE RECOVERED. TWO WITNESSES IDENTIFIED MR. BELCHER AS HAVING BEEN SEEN WITH THE VICTIM, SO THAT, INDICATING THAT THEY WERE ACQUAINTED ON SOME BASIS. AT ONE TIME HE HAD HER CALLED OUT OF CLASS AT A JOKESAL SCHOOL WHERE SHE ATTENDED, TO TALK TO HER.

NO FINGERPRINTS OR FIBERS AND NO STATEMENT BY THE DEFENDANT?

NO FINGERPRINTS OR FIBERS. THE ONLY STATEMENT BY THE DEFENDANT, THE INVESTIGATION OF THIS CASE PROCEEDED OVER A PERIOD OF TIME. IN DECEMBER 19 -- IN DECEMBER, HE DENIED KNOWING MS. EMBRY AND DENIED HAVING ANY CONTACT WITH HER. THERE WAS NO PHYSICAL EVIDENCE IN THE APARTMENT OR IN THE TOWNHOUSE. ANOTHER DNA WAS THE IMPORTANT EVIDENCE IN THIS.

THE DNA WAS CRITICAL.

HE WAS ARRESTED A COUPLE OF YEARS AFTER THIS CRIME OCCURRED?

YES. THE DNA WAS CRITICAL TO THE STATE'S CASE.

BUT WE ARE ALL FAMILIAR, AS YOU KNOW, WITH THE FACTS AND CIRCUMSTANCES, AND HAVING READ THE BRIEFS, SO IF YOU WILL PROCEED INTO THE ISSUES YOU HAVE.

BRIEFLY, I WOULD LIKE TO ADDRESS ISSUE ONE THIS MORNING. IN FACT, THAT IS PROBABLY THE MAIN ISSUE I WOULD LIKE TO DISCUSS, AND THAT DEALS WITH THE PROSECUTOR IMPROPERLY INJECTING AN AGGRAVATING CIRCUMSTANCE INTO THE PENALTY PHASE OF THE TRIAL. THE PROSECUTOR IMPROPERLY SUGGESTED THAT MR. BELCHER KILLED TO ELIMINATE MS. EMBRY AS A WITNESS AND TO AVOID ARREST, EVEN THOUGH THAT AGGRAVATING FACTOR WAS NOT AN ISSUE.

BUT IT IS A PROPER AGGRAVATING FACTOR, UNDER THE PROPER CIRCUMSTANCES, THAT IS AN AGGRAVATING FACTOR.

IT IS A STATUTORY AGGRAVATING CIRCUMSTANCE, BUT IN THIS CASE IT WAS NOT AN ISSUE.

IS THERE A DIFFERENCE IN THERE BEING ANY ARGUMENT ON A STATUTORY AGGRAVATING

CIRCUMSTANCE, VERSUS ARGUMENT THAT COULD BE INTERPRETED AS AN ARGUMENT ON SOMETHING THAT IS NOT A STATUTORY AGGRAVATING FACTOR? IS THERE A DIFFERENCE BETWEEN THOSE TWO KINDS OF ARGUMENTS?

IN AN INDIVIDUAL CASE, THE PENALTY PHASE, I THINK, THERE IS NO DIFFERENCE, IF YOU ARE TALKING ABOUT AN INDIVIDUAL CASE, WHERE THE AGGRAVATING CIRCUMSTANCE IS NOT AN ISSUE. AND IT WAS NOT AN ISSUE IN THIS CASE. SO JUST LIKE A NONSTATUTORY AGGRAVATING FACTOR, THE FACT THAT IT HAPPENS TO ALSO BE A STATUTORY AGGRAVATING CIRCUMSTANCE IN THE RIGHT CASE WITH THE RIGHT FACTS, IN THIS CASE IT WAS NOT. THE PROSECUTOR NEVER ASSERTED IT, BECAUSE HE HAD NO EVIDENCE TO SUPPORT IT. OTHER THAN THE FACT OF THE DEATH OF MS. EMBRY.

COULD I ASK THIS QUESTION THOUGH. IF YOU GET INTO A CIRCUMSTANCE, WHERE A TRIAL LAWYER SEEKS TO PRESENT TO THE JURY THE WHY THIS OCCURRED AND THE REASONABLE INFERENCES TO BE DRAWN FROM THE EVIDENCE, IS THAT AN IMPERMISSIBLE ARGUMENT FOR A LAWYER TO PROVIDE THE JURY WITH, THE REASON, AND IN THIS CASE, YOU HAVE THE PRIOR PROBLEM THAT THIS DEFENDANT HAD, AND BY NOT ELIMINATING THAT WITNESS, APPARENTLY A CONVICTION FOR THEM, IS THAT CORRECT?

YES. I MEAN THE WAY I WILL SET THIS UP, I MEAN, WHAT HAPPENED WAS HE PRESENTED, THE PROSECUTOR PRESENTED THE TESTIMONY OF A VICTIM IN A BURGLARY, AGGRAVATED ASSAULT CASE, FOR WHICH MR. BELCHER WAS CONVICTED. IN THAT CASE THE VICTIM WAS ALSO ACQUAINTED WITH MR. BELCHER, AND EVEN THOUGH HE APPARENTLY WAS WEARING A MASK, SHE WAS ABLE TO IDENTIFY HIM BY HIS VOICE, AND THAT WAS PRESENTED APPROPRIATELY SO, BECAUSE IT WAS THE FACTUAL UNDERPINNINGS OF THE PRIOR VIOLENT FELONY, WHICH WAS AN AGGRAVATING CIRCUMSTANCE THAT WAS PRESENTED, WHERE THE PROSECUTOR OVERSTEPPED THE BOUNDS, HOWEVER, WAS BY SUGGESTING THAT THE FACTS OF THAT CASE, YOU COULD SPECULATE THAT IN THIS CASE, HE KILLED TO ELIMINATE A WITNESS. NOW, IF --

IF IT WERE A REASONABLE INFERENCE. I UNDERSTAND YOUR CHARACTERIZATION AS WE ARE SPECULATING, BUT IF IT IS A REASONABLE INFERENCE TO BE DRAWN FROM THE FACTORS, WOULD YOU SAY THAT IT IS AN INAPPROPRIATE ARGUMENT FOR A TRIAL LAWYER TO TRY TO PRESENT THE JURY WITH THE WHY THIS HAPPENED.

YES. IN THE PENALTY PHASE OF A CAPITAL TRIAL, YES. IF IT GOES TO AN AGGRAVATING CIRCUMSTANCE WHICH IS NOT SUPPORTED IN THE EVIDENCE, WHICH IT IS NOT IN THIS CASE, BAYSED ON THIS COURT'S DECISIONS -- BASED ON THIS COURT'S DECISION, AS IT WAS IN THIS CASE, THE PROSECUTOR AND THE EVIDENCE COULD NOT PROVE THAT IT WAS A SOLID DOMINANT MOTIVE FOR A HOMICIDE. THERE WAS A CURTAIN TORN DOWN IN THE BATHROOM AND A NEIGHBOR IN THE ADJACENT TOWN HOME HAD HEARD SOME BANKING AT SOME POINT -- SOME BANGING AT SOME POINT, SO THE PROSECUTOR KNEW THERE WAS A STRUGGLE. THEY DID NOT HAVE THE EVIDENCE THAT WAS SUFFICIENT TO SHOW IT A SOLE DOMINANT MOTIVE FOR THE HOMICIDE.

WAS THERE AN OBJECTION?

THERE WAS AN OBJECTION.

MOST OF THE CASES THAT YOU HAVE CITED IN SUPPORT OF YOUR ARGUMENT HERE, IT APPEARED TO ME, WERE CASES WHERE THE FACTS WERE INTERJECTED INTO THE CASE AS OPPOSED TO A LEGAL ARGUMENT OR AN ARGUMENT CONCERNING FACTS THAT WERE ALREADY PRESENT IN THE CASE, AND SO I WOULD LIKE YOU TO ADDRESS THE ISSUE OF WHY THIS WAS AN ABUSE OF DISCRETION BY THE TRIAL COURT JUDGE NOT TO GRANT A MISTRIAL UNDER THESE CIRCUMSTANCES. THAT IS THAT IS REALLY THE ISSUE THAT WE HAVE BEFORE US, IS IT NOT? THAT IS THAT IF YOU ARE GOING TO BE ENTITLED TO A NEW TRIAL, IT WOULD BE TANTAMOUNT

TO THE TRIAL COURT HAVING GRANTED A MISTRIAL, IN ORDER -- AND ORDERED A NEW TRIAL, SO WITH REFERENCE TO THESE TWO COMMENTS, AND THEM NOT BEING THE INTERJECTION OF NEW FACTS OR EVIDENCE INTO THE CASE, WHY WAS THERE AN ABUSE OF DISCRETION HERE?

WELL, THE CASES, I KNOW MOST OF THOSE CASES INVOLVED THE INTRODUCTION OF FACTS, AS WELL AS ARGUMENT BY THE PROSECUTOR, BUT HERE, THE MERE FACT THAT THE FACTS WERE ALREADY THERE AND THE FACTS, THESE FACTS, IT WAS NOT SELF-EVIDENT FROM THESE FACTS THAT YOU WOULD DRAW THE CONCLUSION THAT HE KILLED IN THIS CASE, IN ORDER TO AVOID ARREST, BUT THE PROSECUTOR CHOSE TO USE THE FACTS IN THAT IMPROPER MANNER AND RANGE THAT BELL FOR THE JURY.

WELL, I AM HAVING THE PROSECUTOR, ACTUALLY, SPECIFICALLY DISCLAIMED THAT. THE JURY WAS NOT INSTRUCTED ON THAT AGGRAVATOR, AND SO THE APPEARANCE IN THE RECORD RIGHT NOW, IS THAT THIS WAS NOT USED. IT IS A STATUTORY AGGRAVATOR AS YOU SAY, BUT YOU HAD BOTH A DISCLAIMER BY THE PROSECUTOR AND YOU DIDN'T HAVE THAT AGGRAVATOR SUBMITTED TO THE JURY, AND THE JURY WAS TOLD, I ASSUME, THAT THE ONLY AGGRAVATORS THAT THEY COULD CONSIDER WERE THE ONES THAT THE JUDGE SPECIFICALLY LISTED FOR THEM. IS THAT CORRECT?

YES, YOUR HONOR. THAT WAS THE INSTRUCTION. BUT --

SO I AM HAVING DIFFICULTY, IF YOUR CLAIM IS THAT THE PROSECUTION WAS ALLOWED TO USE AN UNCHARGED AND, IN ESSENCE, AGGRAVATOR STATUTORY AGGRAVATOR, AND UNDER THE CIRCUMSTANCES HERE, WERE NOT ONLY THE PROSECUTION BUT THE COURT'S INSTRUCTIONS DO NOT PERMIT THE JURY TO CONSIDER THAT AGGRAVATOR, THEN I AM STRUGGLING WITH WHY THIS WAS AN ABUSE OF DISCRETION. WHY THIS ENTIRE TRIAL, IN OTHER WORDS, SHOULD BE EVISCERATED, BECAUSE OF THESE COUPLE OF COMMENTS BY THE PROSECUTOR.

WELL, YOUR HONOR, FIRST OF ALL, I WOULD SUGGEST THAT IT REALLY WASN'T JUST, QUOTE, A COUPLE OF COMMENTS, BECAUSE THEY RANGE THE BELL OF AN AGGRAVATING CIRCUMSTANCE, WHICH WAS NOT PRESENT IN THE CASE. WHAT DID HE LEARN FROM MISS WHITE, THE PREVIOUS VICTIM? SHE WAS ABLE TO IDENTIFY HIM. MS. EMBRY WASN'T ABLE TO COME INTO THIS COURT AND IDENTIFY HIM. THERE WAS AN OBJECTION WHICH WAS OVERRULED. THE PROSECUTOR CONTINUED, AND JUST TO QUOTE A PORTION OF THAT STATEMENT, WHAT DOES THIS AGGRAVATOR PROVE THAT THE DEFENDANT WAS WILLING TO KILL TO COVER HIS TRACKS? IT WAS CLEAR THAT HE WAS HARPING ON THE THEME OF AVOIDING ARREST AND WITNESS ELIMINATION, NUMBER ONE.

THERE IS WHERE I AM, ARE YOU, IN OTHER WORDS IMAGINE, AND, OF COURSE, WE DON'T GO INTO THE JURY ROOM. IMAGINE THE JURORS SITTING THERE, DISCUSSING THE, NOT ONLY THE SEXUAL OFFENSES THAT TOOK PLACE HERE BUT, ALSO, THE FACT THAT THE VICTIM WAS KILLED BY THE DEFENDANT, AND THEY ARE WONDERING, AMONGST EACH OTHER, YOU KNOW, NOW, WHY DID HE KILL HER THEN, YOU KNOW? WHY DID HE GO THAT FAR OR WHATEVER? AND ANOTHER JUROR SAYS, WELL, YOU KNOW, HE RAPED SOMEBODY BEFORE, AND SHE LATER TESTIFIED AGAINST HIM. AND THE JOORX IN THEIR DISCUSSION AFTER CASE LIKE THIS, COULD DRAW INFERENCES LIKE THAT FROM THIS KIND OF EVIDENCE, COULD THEY NOT, AND DISCUSS THAT IN THE JURY ROOM?

WELL, YOUR HONOR, WE DON'T KNOW WHAT THE JURORS ARE GOING TO DISCUSS, AND HERE WE HAVE A PROSECUTOR, AN ARM OF THE STATE, SUGGESTING TO THE JURY THAT THEY CAN DRAW THAT INFERENCE, IMPROPERLY SUGGESTING THEY CAN DRAW THAT INFERENCE. COMPOUNDING THE PROBLEM WAS THE FACT THAT THE JUDGE DIDN'T STEP IN AND CHECK THE ARGUMENT. THE JUDGE OVERRULED THE OBJECTION, WHICH, IN FACT, GAVE SEEMINGLY JUDICIAL APPROVAL TO THE ARGUMENT. WHICH COMPOUNDED THE PROBLEM. THE FACT THAT THERE WAS NO --

ISN'T THERE A DIFFERENCE, THOUGH, IF, AGAIN I ALLUDE TO THE CASES THAT YOU HAVE CITED IN SUPPORT, BECAUSE IT APPEARS TO BE ME THAT THOSE CASES ARE CASES WHERE THEY BROUGHT IN SOME IMPROPER EVIDENCE OF AN UNCHARGED, AND SO YOU HAVE A MOLE WHOLE DIFFERENT SCENARIO, AS FAR AS -- A WHOLE DIFFERENT SCENARIO, AS FAR AS THIS ADDITIONAL PREJUDICIAL EVIDENCE THAT, THEN, MAY LATER BE ARGUED OR RELIED ON, BUT IT IS A WHOLE ADDITIONAL BAGGAGE, AND THIS DOESN'T APPEAR TO BE ADDITIONAL BAGGAGE IN THIS CASE, LIKE IN THOSE CASES. IT IS JUST WAY THE PROSECUTOR HAS CHOSEN TO ARGUE IT. SO YOU DON'T SEE A DIFFERENCE.

I DON'T SEE A DIFFERENCE, YOUR HONOR, BECAUSE THE FACT REMAINS THAT THE STATE OF FLORIDA HAS IMPROPERLY INJECTED AN AGGRAVATING CIRCUMSTANCE, AN IMPROPER AGGRAVATING CIRCUMSTANCE TO THE JURY AND SUGGESTED THAT IT COULD BE FOUND. NOW, THE FACT THAT THERE WAS NO INSTRUCTION ON THE AVOID ARREST AGGRAVATING CIRCUMSTANCE, I THINK, IN FACT, SHOWS AND SUPPORTS THE HARMFULNESS OF THE ERROR, BECAUSE THE JURY, THEY WERE SUGGESTED THAT THEY COULD CONSIDER THIS AGGRAVATING FACTOR OF AVOID ARREST BY THE PROSECUTOR, IMPROPERLY SO. THE JUDGE APPROVED, APPARENTLY APPROVED THE ARGUMENT, BECAUSE HE OVERRULED THE OBJECTIONS, AND THEN IN THE INSTRUCTION THEY ARE GIVEN NO GUIDANCE AS TO HOW TO DEAL WITH THAT, AND THE FACT THAT --

THE JURY IS NOT TOLD THAT THEY CANNOT CONSIDER ANY AGGRAVATORS OTHER THAN THOSE THAT ARE SPECIFICALLY INSTRUCTED ON BY THE JUDGE?

THEY ARE, YOUR HONOR, BUT THE FACT REMAY IT PLEASE THAT THEY HAVE HAD A SUGGESTION FROM THE PROSECUTOR THAT THEY, THAT THIS MAY BE VERY WELL THE REASON WHY THIS OCCURRED, THIS HOMICIDE OCCURRED, AND THEY DON'T HAVE THE BENEFIT OF AN INSTRUCTION ON THE INSTRUCTION ON THE AVOID ARREST AGGRAVATING CIRCUMSTANCE, SO THEY KNOW THE LEGAL PRINCIPLES THAT HAVE TO BE APPLIED, BEFORE IT IS AN APPROPRIATE CONSIDERATION.

OUR STANDARD TO LOOK AT THIS IS, ONE, WHETHER THE ARGUMENT BY THE PROSECUTOR WAS ERROR. THAT IS THE FIRST. IF WE GET PAST THAT AND FIND THAT IT WAS ERROR, IT WAS PROPERLY OBJECTED TO. IT WAS OVERRULED. THE JUDGE DID NOT GIVE A CURETIVE INSTRUCTION AT THAT POINT. SO IS IT YOUR POSITION THE STANDARD WOULD BE WHETHER IT IS HARMLESS ERROR BEYOND A REASONABLE DOUBT UNDER DEGILIO, IS THE STANDARD OF OUR REVIEW FOR THIS?

YES, YOUR HONOR.

AND NOW THE QUESTION, THEN, COMES TO, GIVEN EVERYTHING ELSE IN THIS CASE AND WHAT THE JUDGE DID INSTRUCT LATER, AND NO FURTHER EMPHASIS ON THIS, AND, WHY WOULDN'T IT BE HARMLESS ERROR BEYOND A REASONABLE DOUBT? EVEN IF IT IS NOT, DOESN'T AMOUNT TO FUNDAMENTAL ERROR.

AGAIN, I WILL GO BACK TO THE NATURE OF THE COMMENTS. I THINK IT WAS AT LEAST THREE DIFFERENT TIMES DURING THE PROSECUTOR'S ARGUMENT, WHERE HE SUGGESTED KILL TOLL AVOID, TO ELIMINATE, ESSENTIALLY KILL TO COVER HIS TRACKS. THE NATURE, AGAIN, IT WAS COMPOUNDED BY THE JUDGE'S SEEMINGLY TACIT APPROVAL OF THE ARGUMENT, BY OVERRULING THE OBJECTION. IT, ALSO, HAS A -- BY OVERRULING THE OBJECTION. IT, ALSO, HAS A, ALSO SUGGESTS ARGUMENT OF FUTURE DANGEROUSNESS, WHICH IS NOT A PROPER CIRCUMSTANCE UNDER OUR STATUTE. THERE WAS THE FACT THAT THERE WAS NO, NO CURETIVE INSTRUCTION. THERE WAS NO INDICATION BY THE JUDGE THAT THIS WAS AN IMPROPER ARGUMENT TO BE MADE. THERE WAS NO EFFORT AT ALL TO CHECK HIS ARGUMENT. THE FACT THAT, AGAIN, AS I HAVE MENTIONED BEFORE, THAT THIS, THE SPECULATION THAT HE KILLED TO

AVOID ARREST IS FLOATING AROUND OUT THERE, BUT YET THE JURY IS NEVER GIVEN AN INSTRUCTION ON THE AVOID ARREST AGGRAVATING CIRCUMSTANCE, SO THEY UNDERSTAND THE LEGAL PRINCIPLES INVOLVED BEFORE IT IS PERMITED TO BE USED AS AN AGGRAVATING CIRCUMSTANCE. ALL OF THAT WOULD HAVE IMPACTED, I THINK, HOW THE JURY RECEIVED IT.

DOES THE JUDGE ASK TO GIVE AN INSTRUCTION TO THE JURY THAT THIS AGGRAVATOR, NOT CHARGED AND THAT THE JURY SHOULD NOT CONSIDER THAT?

I DON'T RECALL THAT THERE WAS A REQUEST FOR THAT INSTRUCTION, BUT THE JUDGE HAD, AT THAT POINT, OVERRULED DEFENSE COUNSEL'S OBJECTION TWICE AND ALSO DENIED A MOTION FOR MISTRIAL. AGAIN, I WOULD, I SEE NO SIGNIFICANT DIFFERENCE BETWEEN THOSE CASES WHERE THERE HAS BEEN AN IMPROPER AGGRAVATING FACTOR INJECTED INTO THE PROCEEDINGS VIA THE INTRODUCTION OF ADDITIONAL EVIDENCE, AND THE INJECTION OF AN IMPROPER AGGRAVATING CIRCUMSTANCE IN THIS CASE, AS FOUNDED UPON THE EVIDENCE THAT WAS ALREADY THERE BUT AN IMPROPER USE OF THAT EVIDENCE.

WHAT OTHER AGGRAVATORS WERE FOUND? THE HAC?

HEINOUS ATROCIOUS AND CRUEL WAS FOUND. I HAVE RAISED AN ARGUMENT AS TO RAISING A QUESTION AS TO WHETHER THAT WAS APPROPRIATELY FOUND. BASED UPON THE MEDICAL EXAMINER'S TESTIMONY THAT UNCONSCIOUSNESS MAY HAVE OCCURRED IN THIS CASE, ANYWHERE FROM 30 SECONDS TO A MINUTE, AND THIS COURT'S CASE LAW --

OKAY --

GETTING BACK TO THE AGGRAVATORS FOUND. IT WAS HAC AND WHAT ELSE?

PRIOR VIOLENT FELONY. MR. BELCHER HAD BEEN CONVICTED AFTER ROBBERY WHEN HE WAS 15 YEARS OLD.

SO WE HAVE TWO OTHER AGGRAVATORS, CORRECT?

THERE IS --

TWO AGGRAVATORS.

THERE WAS, ALSO DURING THE COMMISSION OF A SEXUAL BATTERY. THERE WERE THREE AGGRAVATORS.

THREE AGGRAVATORS.

AND THEN THE JUDGE FOUND 15 NONSTATUTORY MITIGATING CIRCUMSTANCES. I MEAN, THE MITIGATION IN THIS CASE FROM --

MY QUESTION IS, GIVEN THE FACT THAT THERE WERE THREE AGGRAVATORS, LET'S ASSUME FOR THE MOMENT THAT THE JUDGE INSTRUCTED THE JURY ON THIS AVOID-ARREST AGGRAVATOR, AND THE JURY FOUND AVOID-ARREST AGGRAVATOR, AND THE JUDGE FOUND AVOID-ARREST AGGRAVATOR. AND YOU ARE ARGUING BEFORE US THAT THERE WAS NO EVIDENCE WHATSOEVER FOR THE AVOID-ARREST AGGRAVATOR, AND THAT SHOULD BE STRICKEN, AND LET'S SAY, FURTHER, THAT WE STRIKE THE AVOID-ARREST AGGRAVATOR, BASED ON THE FACT THAT IT WAS GIVEN, THERE WAS NO EVIDENCE FOR IT. CAN'T WE, THEN, SAY, BUT THERE WERE THREE OTHER AGGRAVATORS ANYWAY, AND THEREFORE IT WAS HARMLESS ERROR, AND BASED ON THE OTHER THREE AGGRAVATORS, WE AFFIRM THE SENTENCE?

THIS COURT CAN DO A HARMLESS-ERROR ANALYSIS WHEN AN IMPROPER AGGRAVATOR IS

REMOVED FROM THE CASE.

SO HOW DOES THAT, THEN SHOULDN'T WE DISCUSSING WHETHER IT WAS HARMLESS ERROR?

YES, YOUR HONOR, AND I THINK IT WAS NOT HARMLESS ERROR, BECAUSE EVEN THOUGH YOU HAD THREE AGGRAVATING CIRCUMSTANCES, ONE OF THEM I HAVE CALLED INTO QUESTION IN THE BRIEF. YOU, ALSO, HAD SIGNIFICANT MITIGATION IN THIS CASE. IT WAS FROM HIS FAMILY HISTORY. HIS FAMILY MEMBERS CAME IN AND DISCUSSED ABOUT HOW HE HAD BEEN A REALLY MENTOR IN HIS EXTENDED FAMILY IN A NUMBER OF CASES, SO HE HAD TESTIMONY FROM A CORRECTIONAL PERSONNEL, WHERE HE HAD BEEN INSTRUMENTAL IN HELPING WITH AN EDUCATIONAL PROGRAM AND A YOUTHFUL ORIENTED OFFENDER PRISON, WHERE HE WAS HOUSED, EVEN THOUGH HE WAS NOT ONE OF THE YOUTHFUL OFFENDERS AT THE TIME.

HOW OLD WAS THIS DEFENDANT?

WHEN -- THIS DEFENDANT, WHEN THIS CRIME WAS COMMITED?

WELL, LET'S SEE. AS I RECALL, HE WAS BORN IN 1959. THIS OCCURRED IN 1996.

AND HE HAD SPENT SEVERAL TERMS IN JAIL?

YES. HE WAS SPENT TO PRISON THE FIRST TIME WHEN HE WAS 15 YEARS OLD, FOR A ROBBERY THAT OCCURRED IN NEW YORK, WHERE HE WAS LIVING AT THE TIME, IN A HIGH CRIME AREA. THERE WAS AN ATTEMPTED ROBBERY, I THINK, WHEN HE WAS PROBABLY AROUND 20, EARLY TWENTIES. HE WAS SENT TO A SHORT PERIOD OF PRISON AGAIN, YES, AND THEN THE BURGLARY AND ASSAULT, EVEN WITH MRS. WHITE OR MISS WHITE WAS ANOTHER OFFENSE, YES.

I MEAN, THOSE, IN TERMS OF LOOKING AT THIS AND GOING BACK TO JUSTICE CANTERO'S QUESTION, WE HAVE PRIOR VIOLENT FELONIES AND WE HAVE PRIOR VIOLENT FELONIES. HERE WE HAVE GOT NOT ONLY THE, WE HAVE GOT SUBSTANTIAL PRIOR VIOLENT FELONIES IN THIS CASE, WITH THE DEFENDANT SERVED, AND YOU KNOW, WHEN WE LOOK AT SOMETIMES THE PRIOR VIOLENT FELONY IS A CONTEMPORANEOUS ONE. AND THIS, WE HAVE GOT A HISTORY STARTING AT AGE 15, OF ESCALATING CRIMINAL BEHAVIOR. I MEAN, PLUS I DO TAKE ISSUE WITH YOUR HAC ANALYSIS, BECAUSE THERE IS NOT ONLY THE STRANGULATION AND WE HAVE GOT, AT THE LEAST, 30 SECONDS IN THAT WAY, BUT THE PROCEEDING ACT OF SEXUAL BATTERY, ALL, YOU KNOWS, WITH THIS VICTIM, UNDER OUR CASE LAW, IT SEEMS THAT THERE IS, THAT HAC IS VERY STRONGLY ESTABLISHED IN THIS CASE, SO IF YOU COULD, ANYWAY, SO I GUESS I AM, IN TERMS OF THE STRENGTH OF THE AGGRAVATION, WITHOUT THIS QUESTION OF AVOID ARREST, IT SEEMS LIKE IT IS PRETTY SUBSTANTIAL AGGRAVATION. CAN YOU HELP ME ON THAT.

WELL, THIS COURT IS OBVIOUSLY GOING TO HAVE TO MAKE THAT JUDGMENT AS TO WHETHER THE AGGRAVATION, WHEN COMPARED AGAINST THE MITIGATION IN THIS CASE, BECAUSE THIS IS NOT THE MOST UNMITIGATED OF DEFENDANTS, BY ANY MEANS.

ARE YOU GOING TO ADDRESS THE RING ISSUE?

I HAD NOT INTENDED NECESSARILY TO ADDRESS IT THIS MORNING. I WOULD BE HAPPY TO TRY TO RESPOND, IF I --

WOULD YOU AT LEAST OUTLINE OR REFRESH OUR MEMORY AS TO HOW THIS WAS PRESERVED IN THE TRIAL COURT.

OKAY. I MAY I HAVE HAVE TO REVIEW THE RECORD.

WE HAVE YOUR BRIEF.

I DON'T RECALL WHETHER THERE WAS, I SEEM TO RECALL THERE WAS A MOTION IN THIS CASE, BUT WITHOUT LOOKING IT UP, I WOULD NOT BE ABLE TO TELL YOU THAT.

OKAY.

AS TO THE RING ISSUE, WE HAVE THE ADDITIONAL FINDING THAT HE HAS BEEN PREVIOUSLY CONVICTED AFTER FELONY, CORRECT?

YES, YOUR HONOR.

THANK YOU.

THANK YOU.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. CHIEF JUST ANSTEAD, CHARMAINE MILLSAPS. MAY IT PLEASE THE COURT. FIRST, I WANTED TO ANSWER YOUR QUESTION ABOUT WHETHER THE RING WAS PRESERVED. YES, HE DID FILE A MOTION. IN THAT MOTION, IT CITED APRENDI, NOT RING, BECAUSE APRENDI HAD BEEN DECIDED. HE ASKED FOR AN UNANIMITY, NOTICE OF AGGRAVATORS, AND WRITTEN FINDINGS BY THE JURY. OKAY. SO THAT HIS CLAIM IS PRESERVED. HOWEVER, BECAUSE THERE IS THE PRIOR VIOLENT FELONY, HE IS OUTSIDE THE SCOPE OF RING. THE HOLDING IN APRENDI IS OTHER THAN THE FACT OF PRIOR CONVICTIONS. WE HAVE, THIS IS, HE HAS PRIOR CONVICTIONS HERE. MOREOVER, THE JURY, IN COUNT TWO ON THE SEXUAL BATTERY, HE WAS CONVICTED BY THE JURY OF SEXUAL BATTERY, AND IN A FREE STANDING COUNT TWO.

SO TWO OUT OF THE THREE AGGRAVATORS WERE FOUND BY INDEPENDENT MEANS BY UNANIMOUS JURY, IS THAT CORRECT?

BEFORE HE EVEN GOT --

ONE BEFORE AND ONE BY THIS SAME JURY.

BEFORE WE EVEN GET TO THE PENALTY PHASE, WE HAVE JURY MAKING A FINDING OF AT LEAST ONE AGGRAVATOR.

WHAT ABOUT THE REQUIREMENT THAT IS SORT OF A HARMLESSNESS ARGUMENT, IS IT NOT? THAT IS WHAT ABOUT THE REQUIREMENT, IF THERE IS A REQUIREMENT BY THE U.S. SUPREME COURT, THAT THE JURIES ENGAGE IN FACT FINDING AS TO ANY AGGRAVATORS THAT ARE SUBMITTED TO THEM, THEN WHAT ABOUT THE REQUIREMENT AS TO HAC THEN, AND THERE BEING NO FINDING, FACTUAL FINDING BY THE JURY AS TO HAC?

WELL, FIRST, YOUR HONOR, I DON'T THINK PRIOR VIOLENT FELONY OR BEING COUNT TWO IS HARMLESS. WHAT WE ARE SAYING IS --

THE HARMLESSNESS THAT I AM TALKING ABOUT IS THAT YOU ARE SAYING SINCE TWO OUT OF THE THREE AGGRAVATORS WERE ESTABLISHED BY INDEPENDENT MEANS.

AND ONLY ONE HAS TO BE. REMEMBER, THAT IS GOING TO BE, EVEN IF YOU THINK THAT JURY FINDINGS HAVE TO BE MADE BY THE JURY, IT IS THE FINDING OF ONE AGGRAVATOR. ADDITIONAL AGGRAVATORS CAN BE FINED FOUND BY THE JUDGE.

WHERE DOES RING OR APRENDI SAY THAT ONLY ONE AGGRAVATOR HAS TO BE FOUND BY THE JURY? IN OTHER WORDS DOESN'T RING HOLD THAT ANY FINDINGS AS TO AGGRAVATORS HAVE TO BE FOUND BY THE JURY?

NO.

DOESN'T SAY THAT.

NO. AND IT IS MUCH CLEARER IN THE CONCURING OPINIONS, BOTH KENNEDY AND SCALIA, MAKE IT CLEAR. THEY LITERALLY SAY ONE IN IT, BUT EVEN IF YOU VIEW IT, AND NOW WE ARE TALKING ABOUT ERRORS ON THE STATUTE BECAUSE FLORIDA IS DIFFERENT, BUT EVEN IF YOU VIEW IT IN THOSE STATES WHERE ONLY A JUDGE SENTENCE OR DID BEFORE RING, IT WAS THAT FINDING OF THE ONE AGGRAVATOR THAT INCREASED THE PENALTY TO DEATH, SO IT IS A FINDING OF ONLY ONE AGGRAVATOR. THE MINUTE WE HAD, IN EFFECT, YOUR HONOR, CONSTITUTIONALLY, NO MATTER HOW YOU VIEW THIS, WE HAVE SATISFIED RING IN THE GUILT PHASE, BY THAT FINDING OF THAT ONE AGGRAVATOR BY THE JURY.

SO IT IS ALL RIGHT FOR A JUDGE, THEN, AFTER THAT, TO GO AHEAD AND BE THE ONE TO FIND THE OTHER AGGRAVATING CIRCUMSTANCES.

THAT IS HOW I READ RING, AND THAT IS EVEN IN, YOU KNOW, IN THE CASES, IN OTHER WORDS IF THE JURY HAD FOUND AN AGGRAVATOR IN THE GUILT PHASE IN THE RING CASE, THEY WOULD NOT HAVE DECIDED IT THAT WAY.

ALTHOUGH THERE WAS, IT IS A ROBBERY IN RING.

OKAY. AND I WILL USE IT AS AN EXAMPLE. ALABAMA HAS RECENTLY COME OUT WITH WHERE THEY AFFIRMED AN OVERRIDE. THE ALABAMA SUPREME COURT AFFIRMED AN OVERRIDE IN THE WAKE OF RING, BECAUSE THE JURY HAD MADE A CONTEMPORANEOUS FINDING OF ROBBERY.

COULD YOU ADDRESS ISSUE THREE ABOUT THE REFUSAL TO INSTRUCT ON SPECIFIC NONSTATUTORY MITIGATING CIRCUMSTANCES, AND I KNOW WE HAVE HAD THIS IN RECENT CASES, AND I, MY CONCERN IS THAT HERE, AGAIN, THERE IS, AT LEAST THE DEFENDANT SAYS THERE IS SUBSTANTIAL NONSTATUTORY MITIGATION, AND WE SEEM TO BE APPLYING AN ABUSE OF DISCRETION STANDARD TO WHETHER A JUDGE SHOULD GIVE THE, GIVE A CATCHALL, THE WAY THIS JUDGE DID, OR ENUMERATE THE CLAIMED MITIGATION, AND WHAT IS, IF WE SAY IT IS DISCRETION ARE WE REALLY SAYING THAT, IF A JUDGE REALLY, IT IS UP TO THE JUDGE IN ANY CASE? THEY CAN EITHER LIST ALL OF THEM, BECAUSE I KNOW WE HAVE ANOTHER CASE WHERE THAT HAPPENED, THIS WEEK, WHERE THE JUDGE DID LIST ALL THE NONSTATUTORY OR NOT, AND EITHER WAY, IT IS OKAY?

YES. I THINK THAT IS THE ABUSE OF DISCRETION STANDARD AND WHAT IT REALLY MEANS.

WHAT GUIDES IT THEN? IN OTHER WORDS, WHAT GUIDES WHETHER ONE, NONSTATUTORY MITIGATION WOULD BE PRETTY IMPORTANT, AND WHETHER ONE DEFENDANT FACED WITH THE DEATH PENALTY GETS THE JUDGE TO LIST ALL THE NONSTATUTORY MITIGATION, HE IS CLAIMING, AND ANOTHER DEFENDANT DOESN'T, JUST PERSONAL PHILOSOPHY OF THE JUDGE --

IN THIS CASE HE DIDN'T GIVE THE STANDARD. HE ADDED A LITTLE BIT OF LANGUAGE TO IT, SO --

I GUESS WHAT I AM GETTING AT, SHOULDN'T WE STANDARDIZE THIS INSOFAR AS IT IS GIVEN. I AM NOT SAYING THIS MIGHT BE ERROR NECESSARILY IN THIS CASE, BUT I AM CONCERNED IN THE FUTURE, THAT WE REALLY DON'T HAVE ANYTHING THAT IS GUIDING, THAT GUIDES THE JUDGES IN TELLING THEM WHEN THEY SHOULD LIST THE SEPARATE NONSTATUTORY MITIGATION AND WHEN THEY SHOULDN'T. DON'T YOU THINK THAT WOULD BE A GOOD IDEA?

WELL, IF YOU HAD -- NO, I DON'T THINK IT IS A GOOD IDEA, OTHER THAN TO TELL HIM JUST USE THE CATCHALL.

YOU WOULD RATHER THEY JUST USE THE CATCHALL. BUT RIGHT NOW WE ARE AFFIRMING, I MEAN, WE ARE NOT, NO ONE IS SAYING IT IS ERRONEOUS FOR THE JUDGE TO READ IT ALL, SO THE STATE'S POSITION WOULD BE THEY SHOULD NEVER DO IT.

RIGHT. THEY SHOULD USE THE CATCHALL, AND HERE IS Y THE JUDGE IN THIS CASE HAD A REASON FOR NOT DOING IT. HE DIDN'T JUST, AND THAT IS ONE, ON AN ABUSE OF DISKRERX SOMEBODY WHO MAKES A REASONED DECISION. HE WAS AFRAID THAT, IF YOU, IF HE GAVE SOME OF THESE STANDARD INSTRUCTIONS, OH, AND LET ME BACK UP, THESE WERE NOT PROPER INSTRUCTIONS. THESE WERE WORDED BY DEFENSE COUNSEL AS MANDATORY FACTUAL FINDINGS BY THE JURY. THE JURY WOULDN'T EVEN UNDERSTAND, WOULDN'T EVEN HAVE UNDERSTOOD THE WAY THESE WERE WORDED, THAT THEY WERE FREE TO REJECT THEM. THEY WOULD HAVE THOUGHT THESE LOOKED MORE LIKE MINIDIRECTED VERDICTS, SO ONE OF THE PROBLEMS WITH DOING CATCH ALLS IS HIGHLIGHTED VERY MUCH BY SOMETHING OTHER THAN THE CATCHALL, IS HIGHLIGHTED BY THIS. WE ARE GOING TO START ARGUING, AD INFINITUM ABOUT WHETHER THEY ARE PROPERLY WORDED OR NOT, BUT THEY ABSOLUTELY MUST BE WORDED AS PER MISS IFSES AND THEY WERE NOT -- PERMISSIVES AND THEY WERE NOT. THE JURY WOULD HAVE THOUGHT LITERALLY THAT THE JUDGE IS TELLING US THAT WE HAVE TO FIND THIS MITIGATOR, SO THAT IS ONE OF THE PROBLEMS WITH IT, BUT THE JUDGE HERE, WHY HE DIDN'T WANT TO GIVE THIS WAS HE WAS WORRIED THAT, IF I DON'T GIVE AN INSTRUCTION AND THE JURY, THEMSELVES, THINKS ABOUT SOMETHING ALL ON THEIR OWN THAT WASN'T INSTRUCTED TO THEM, THAT DEFENSE COUNSEL DIDN'T ARGUE TO THEM BUT JUST THAT THEY HAD GOTTEN SOME EVIDENCE OF, THROUGH EITHER PENALTY OR GUILT PHASE, THAT WHAT WOULD HAPPEN WAS THEY WOULD THINK OH, NO, THAT IS NOT ON THE LIST. MAYBE I HAD BETTER NOT CONSIDER IT.

WOULD YOU JUST CURE THAT BY SAYING INCLUDED BUT NOT LIMITED TO?

YOUR HONOR, I KNOW THAT IS A LEGAL TERM OF ART, AND WHAT IT MEANS TO LAWYERS IS YOU ARE NOT LIMITED TO THIS LIST, BUT I AM NOT REALLY SURE JURORS WOULD --

BUT YOU ARE SAYING IN THIS CASE THE INSTRUCTION THAT WAS SUBMITTED BY THE DEFENDANT WOULD HAVE BEEN MISLEADING.

WOULD HAVE BEEN MISLEADING, AND THE FIRST REQUIREMENT OF ANY JURY INSTRUCTION, SPECIAL OR OTHERWISE, IS THAT IT BE A CORRECT STATEMENT OF THE LAW, AND THESE WERE NOT CORRECT STATEMENTS OF THE LAW. THEY WERE MINIDIRECTED VERDICTS, IS THE BEST WAY I CAN THINK OF TO DESCRIBE THEM. ON THE FIRST ISSUE, ABOUT WHETHER OR NOT THE TRIAL COURT ANN ABUSED ITS DISCRETION -- TRIAL COURT ABUSED ITS DISCRETION AND THAT IS THE STANDING HERE, TWO COMMENTS BUT NO CURETIVE ASKED, THEY NEVER REQUESTED THAT THE JURY -- BUT THE STANDARD, THE OBJECTION WAS --

BUT THE STANDARD, THE OBJECTION WAS OVERRULED.

YES, BUT INJUSTICE ANSTEAD'S QUESTION, HE WANTED TO KNOW IF THEY EVER ASKED, LIKE TRULY IGNORE THAT OR THAT IS NOT PROPER IN THIS CASE. THE OTHER PROBLEM HERE, YOUR HONOR, IS YOUR HONOR, THIS IS ALMOST PERFECT. YOU WOULDN'T WANT A CURETIVE INSTRUCTION IN THIS CASE. YOU ALL KNOW THAT WITNESS ELIMINATION IS A STATUTORY AGGRAVATOR. JURORS DON'T KNOW THAT. THERE IS NO WAY THEY TOOK THIS COMMENT IN SUPPORT OF AN AGGRAVATOR. THEY DON'T EVEN KNOW EXIST AND HAD NO WAY OF KNOWING THAT EXISTS. THEY HAD TO USE THIS AS SUPPORT FOR THE PRIOR VIOLENT FELONY AGGRAVATOR, BECAUSE THAT WAS THE ONLY OPTION IN FRONT OF THEM.

WAS THE JURY INSTRUCTED THAT THE ONLY AGGRAVATING FACTORS THAT THEY COULD CONSIDER WERE THE ONES INSTRUCTED ON BY THE JUDGE?

YES, YOUR HONOR. SO, AND THEY WERE LIMITED. HERE THEY ARE. AND THIS ARGUMENT THAT

THEY ARE COMPLAINING ABOUT, THE PROSECUTOR LITERALLY STARTS IT, AND I QUOTED IT AT LENGTH, AND HE LITERALLY STARTS IT BY SAYING, FIRST, LET'S TALK ABOUT THE FIRST AGGRAVATOR, PRIOR VIOLENTS, AND THEN HE STARTS TALKING ABOUT THE CRIMES. YOUR HONOR, WHEN YOU PULL ONE LITTLE STATEMENT OUT OF ITS CONTEXT, SOMETIMES IT LOOKS LIKE SOMETHING OTHER THAN WHAT IT IS. THE JURIES --

YOU HAVE A DIFFICULT TIME, DO YOU NOT HERE, IT DOES APPEAR CLEARLY, THAT THE PROSECUTOR IS REFERRING TO THE FACT THAT HE HAD LEARNED SOMETHING FROM HIS PREVIOUS CRIMES. WHAT HE HAD LEARNED IS THAT, IF YOU LET THE VICTIM LIVE, THAT THE VICTIM IS GOING TO COME BACK AND TESTIFY AGAINST YOU.

BUT THAT IS STILL NOT WITNESS ELIMINATION TO A JURY THAT DOESN'T KNOW THE CONCEPT OF WITNESS ELIMINATION. MOREOVER, LET'S SAY YOU TAKE --

I AM HAVING DIFFICULTY WITH YOUR ARGUMENT THAT IT WASN'T ERROR. THAT IS THAT HE DIDN'T STRAY INTO WHAT WOULD CONSTITUTE AN IMPROPER AGGRAVATION.

BUT --

IT SAYS WHAT DID HE LEARN REGARDING MISS WHITE? SHE WAS ABLE TO IDENTIFY HIM. MISS EMBRY WASN'T ABLE TO COME INTO THIS COURT AND IDENTIFY HIM. NOW, THAT IS ABOUT AS DIRECT AS YOU CAN GET, IS IT NOT, IN ARGUING THAT HIS MOTIVATION FOR KILLING HER WAS WITNESS ELIMINATION. IS THAT NOT --

BUT MOTIVE AND MOTIVE WITNESS ELIMINATION, THEY ARE ONLY GOING TO KNOW THE FIRST. EVEN IF YOU LOOK AT THAT AS MOTIVE, THE JURY --

THAT GOES TO THE ARGUMENT ABOUT WHETHER OR NOT THERE WAS, IT IS HARMLESS ERROR OR DOES IT NOT, AS OPPOSED TO WHETHER OR NOT IT WAS PROPER. YOU ARE SAYING IT WAS PROPER FOR THE PROSECUTOR TO ARGUE THIS.

EVEN IF YOU LOOK AT IT AS MOTIVE, AND LET ME EXPLAIN WHY. MOTIVE IS FINE. BECAUSE ARE SAYING IS PROSECUTORS AREN'T ALLOWED TO DISCUSS MOTIVE IN THE PENALTY PHASE. WELL, OF COURSE THEY CAN'T. THAT IS ALL THIS IS. EVEN IF YOU LOOK AT THIS AS MOTIVE. PROSECUTORS ARE ALLOWED TO DISCUSS MOTIVE, AND AS A MATTER OF FACT, USUALLY MOTIVE TESTIMONY IS PRESENTED IN THE GUILT PHASE, AND THEY CAN ARGUE IT IN CLOSING.

ORDINARILY MOTIVE, THOUGH, IS NOT AGGRAVATION IN THE CASE. IN THIS CASE SPECIFICALLY WHAT THE PROSECUTOR HAD ARGUED, IS PROVIDED IN A STATUTE AS ADDITIONAL AGGRAVATION, IS IT NOT?

I STILL, BUT MOTIVE AND MOTIVE WITNESS ELIMINATION ARE DIFFERENT. THE JURY IS GOING TO JUST TAKE THIS AS AN EXPLANATION, MOTIVE FOR THE CRIME.

DID HE ARGUE THAT IN THE GUILT PHASE AS WELL?

I DON'T REMEMBER HIM ARGUING MOTIVE IN THE GUILT PHASE.

HE COULDN'T HAVE ARGUED MOTIVE IN THE GUILT PHASE. THE PRIOR VIOLENT FELONY WASN'T IN EVIDENCE, RIGHT?

RIGHT. THE WOMAN, HE IS REFERRING TO THE PRIOR. GOING TO CALL IT RAPE. IT WAS ACTUALLY A BURGLARY CONVICTION BUT IT HAD A SEXUAL ASPECT. THE CRIME WAS VERY SIMILAR. THE VICTIM WAS WANDA WRIGHT H THAT TESTIMONY WAS PRESENTED IN PENALTY. A HE, IN FACT, MOVED -- HE, IN FACT, MOVED HIS MOTIVE EXPLANATION TO THE PENALTY, BECAUSE HE GOT THE

EXPLANATION OUT OF WANDA WRIGHT'S TESTIMONY, WHICH WAS PRESENTED IN PENALTY NOT GUILT.

BUT EVEN WITH THAT OTHER EVIDENCE, THE PROSECUTOR COULD SAY THAT THE REASON HE KILLED THIS VICTIM WAS SO THIS VICTIM WOULDN'T TESTIFY AGAINST HIM.

NOT IN GUILT PHASE, HE DIDN'T SAY. THAT.

HE DIDN'T SAY THAT.

NO. IF I REMEMBER MOST OF HIS MOTIVE WAS JUST SEXUAL ASPECT OF IT. HE REALLY WAITED FOR MOTIVE TO PENALTY, TO THE EXTENT THAT YOU LOOK AT THIS AS MOTIVE.

I THINK WHAT JUSTICE CANTERO IS ASKING IS THAT, CAN A, IN ARGUING REASONABLE INFERENCES, IF THE QUESTION WAS WHY WOULD HE HAVE KILLED THIS PERSON, COULD THE PROSECUTOR PROPERLY ARGUE, COULD THEY, IN THE GUILT PHASE, NOT IN THE PENALTY PHASE, THAT THE, AND WHETHER IT WAS PREMEDITATED, SAYING IT WAS AN ISSUE ABOUT WHETHER IT WAS PREMEDITATED, WOULD SAY, WELL, THE MOTIVE WAS HE WANTED TO ELIMINATE THIS PERSON, CAN THEY SAY THAT IN THE GUILT PHASE, IF THERE IS NO OTHER EVIDENCE OF IT?

PROSECUTORS CAN ARGUE MOTIVE IN THE GUILT PHASE.

COULD THEY HAVE ARGUED IN THIS CASE, IN THE GUILT PHASE, WITHOUT ANYTHING MORE, WITH THE EVIDENCE THAT THE JURY HEARD, THAT WHY DID HE KILL HER? HE KILLED HER AFTER HE RAPED HER, BECAUSE HE DIDN'T WANT ANY WIT MESSES. IS THAT A PROPER -- ANY WITNESSES. IS THAT A PROPER ARGUMENT?

ONCE WANDA WRIGHT'S TESTIMONY IS INTRODUCED?

NO. WITHOUT WANDA WRIGHT'S.

I AM SORRY. WITHOUT HER TESTIMONY. I DON'T THINK YOU HAVE ANY EVIDENCE TO SUPPORT. THAT I THINK THAT WOULD BE ARGUMENT, THAT WOULD BE IMPROPER ARGUMENT, BECAUSE IT WOULD BE ARGUMENT NOT SUPPORTED BY THE CASE, BY THE FACTS OF THE CASE. YOU ARE NOT ALLOWED TO ARGUE THINGS NOT IN EVIDENCE. THAT WOULD BE NOT IN EVIDENCE. ONCE WANDA WRIGHT TESTIFIES, SHE IS IN EVIDENCE. SO REALLY WHAT, THERE, HE ARGUES, TO THE EXTENT YOU LOOK AT THIS, AS MOTIVE --

I GUESS TO ME THAT IS WHY THIS DOES SOUND, IF IT CAN'T COME IN IN THE GUILT PHASE, TO ARGUE MOTIVE, THEN TO, AND IF THE STATE IS PRECLUDE FROM ARGUING ANYTHING OTHER THAN STATUTORY AGGRAVATION IN AGGRAVATION OR FURTHER ELABORATING ON THE CRIME IN THE PENALTY PHASE, THEN WHY ISN'T IT IMPROPER, EVEN, YOU KNOW, AGAIN, WHETHER IT IS HARMLESS OR NOT, BUT REALLY JUST ON THIS QUESTION AS TO WHETHER IT IS IMPROPER ARGUMENT IN THE PENALTY PHASE, BECAUSE IT RELATES TO AN AVOID-ARREST AGGRAVATOR, WHICH WAS NOT BEING SOUGHT, AND WHICH IS NOT SUPPORTED.

OKAY. BUT PROSECUTORS DO ARGUE EW MOTIVE. THE ONLY REASON IT WOULD BE IMPROPER FOR HER, FOR THE PROSECUTOR TO ARGUE MOTIVE, IS BECAUSE WE WOULD NOT BE TRANSPORTED TO ALLOW, WANDA WRIGHT COULD NOT TESTIFY IN THE GUILT PHASE. SHE WASN'T COMING IN AS A WILLIAMS RULE EVIDENCE. LET'S SAY SHE HAD COME IN AS A WILLIAMS RULE EVIDENCE. THEN I WOULD SAY, YES, SHE COULD. OKAY. IT IS ONLY BECAUSE WHERE SHE TESTIFIED THAT THIS BECOME AS PROBLEM. IF SOMEHOW, IF SOMEHOW YOU WOULD HAVE HAD THE EQUIVALENT OF RHONDA WRIGHT'S -- WANDA WRIGHT'S TESTIMONY IN THE GUILT PHASE, THEN THE PROSECUTOR COULD HAVE ARGUED IT.

BUT THE QUESTION BECOMES, REALLY, HOW WAS IT RELEVANT IN THE PENALTY PHASE? EVEN IF YOU TALKED ABOUT IT IN THE GUILT PHASE, I MEAN, IF THE PENALTY PHASE IS REALLY JUST LIMITED TO DETERMINING WHETHER OR NOT THE AGGRAVATING CIRCUMSTANCES, THE JURY HAS ALREADY DECIDED FOR WHATEVER MOTIVE, THAT THIS DEFENDANT COMMITTED A CAPITAL FELONY, CORRECT?

YES.

AND SO IN THE PENALTY PHASE, WHAT WE ARE TRYING TO DECIDE IS DOES THIS CAPITAL FELONY REQUIRE THE DEATH PENALTY OR WHETHER OR NOT LIFE IN PRISON WOULD BE THE APPROPRIATE PENALTY? SO WHY WOULD MOTIVE COME INTO PLAY FOR THOSE QUESTIONS? I THINK THAT IS THE BOTTOM LINE OF WHAT WE ARE TRYING TO GET TO HER. -- TO HERE. WHY IS THE MOTIVE EVEN RELEVANT AT THAT STAGE?

WELL, IT IS IN THIS SENSE. REMEMBER, OUR MOTIVE, REALLY, AROSE OUT OF OUR PENALTY PHASE TESTIMONY F IT IS PROPER IN GUILT, WHY CAN THE PROSECUTOR NOT ARGUE IT IN PENALTY?

I GUESS THE ARGUMENT IS, THEN, THE WHOLE IDEA THAT WE WERE SAYING, LISTEN, YOU CAN ONLY ARGUE AVOID ARREST, CAN ONLY CHARGE IT IF THAT IS THE SOLE MOTIVE. IF YOU SAY, WELL, LISTEN, BUT YOU CAN ALSO JUST ARGUE, EVEN IF YOU CAN'T HAVE IT AS AN AGGRAVATOR, YOU CAN ALWAYS ARGUE THAT THAT WAS A MOTIVE, YOU WOULD HAVE, PROBABLY FOR THE DEFENDANT, THE WORST OF BOTH WORDS. YOU WOULD HAVE IT BEING, AND YOU WOULD SAY IT IS THE BEST OF BOTH WORLDS, BUT I THINK WE NEED TO CLARIFY WHETHER YOU CAN AND CAN'T DO IT, BECAUSE IT SEEMS THAT IT BLURS THE DISTINCTION THAT OTHER CASES HAVE MADE ABOUT NOT, THE STATE NOT BEING ABLE TO ARGUE UNCHARGED AGGRAVATION. AND THAT IS THE PROBLEM.

BUT I AM SEPARATING THEM OUT. SEE, I DON'T, IN ANY WAY, SEE THIS AS WITNESS ELIMINATION. I REALLY SEE IT AS STRAIGHT MOTIVE TESTIMONY. IF YOU LOOK AT --

WITNESS ELIMINATION. HE LEARNED, I THINK IT IS CIRCULAR REASONING, AND YOU MAY BE RIGHT, BUT I THINK THAT IT, THE ONLY RELEVANCE TO ME, HAS TO BE TO GO TO AVOID ARREST AGGRAVATOR, WHICH IS WHAT WITNESS ELIMINATION IS.

BOTTOM LINE THIS IS ALL HARMLESS, BECAUSE THE JURY IS JUST NOT GOING TO BE ABLE TO DO THAT WITH IT. SOME JURORS MIGHT NATURALLY KNOW ABOUT, THERE MIGHT BE SOME THAT ARE SO COMMON IN COMMON SENSE, BUT WITNESS ELIMINATION IS NOT ONE OF THEM. JURORS JUST STRAIGHT ARE NOT GOING TO KNOW. THEY CAN'T DO THIS BECAUSE THEY WON'T KNOW TO DO IT. THEY WON'T EVEN KNOW THAT IS AN AGGRAVATOR. OKAY. THEY ARE GOING TO TAKE THIS AS OKAY. I SEE WHY, EVEN IF YOU DON'T LOOK AT IT AS SUPPORT FOR PRIOR VIOLENT, EVEN IF YOU LOOK AT IT AS MOTIVE, THEY ARE GOING TO SAY OH, I SEE. THE PROSECUTOR IS TELLING ME WHY HE THINKS HE KILLED HER. ALL RIGHT.

BUT YOU WOULD AGREE WITH THIS. IF FUTURE DANGEROUSNESS, FOR EXAMPLE, IS NOT A PROPER AGGRAVATOR, AND IF WHAT THE DEFENDANT, WHAT THE STATE HAD DONE HERE WAS SAY LISTEN, HE DID THIS IN 1959, HE DID, I MEAN NOT IN 1959, 1981, HE GOT OUT ON THE STREET. HE DID THIS. THE ONLY WAY TO MAKE SURE HE IS FINALLY PUT AWAY IS TO GIVE HIM THE DEATH PENALTY, EVEN THOUGH THE FACT THAT HE HAD THESE OTHER CRIMES, I MEAN, THEY COULD DRAW THAT INFERENCE, THE PROSECUTOR COULDN'T ARGUE THAT.

COULDN'T ARGUE THAT THE. BUT, YOUR HONOR, I DO THINK PROBABLY FUTURE DANGEROUSNESS IS ONE OF THE ONES I WOULD BE MOST CONCERNED ABOUT, BECAUSE JURORS MIGHT HAVE A COMMONSENSE SENSE. THEY MIGHT TRULY USE THAT AS AGGRAVATION. I DON'T THINK THEY USED MOTIVE TESTIMONY AS AGGRAVATORS. OKAY. FUTURE DANGEROUSNESS IS ONE OF THE

ONES WHERE I THINK JURORS MIGHT HAVE A COMMONSENSE UNDERSTANDING THAT THAT SHOULD BE CONSIDERED IN DETERMINING THE PENALTY. I DON'T THINK THEY CONSIDER MOTIVE IN DETERMINING THE PENALTY. SO I WOULD BE MUCH MORE WORRIED ABOUT YOUR HYPOOF A FUTURE DANGEROUSNESS -- HYPO, OF A FUTURE DANGEROUSNESS ONE, TO USE IT THAT WAY. THEY CAN'T USE IT, BECAUSE THEY DON'T KNOW IT EXISTS. THANK YOU, YOUR HONOR. THE STATE ASKS YOU TO AFFIRM THE CONVICTION AND SENTENCE IN THIS CASE.

CHIEF JUSTICE: THANK YOU. REBUTTAL.

I HAVE NOTHING FURTHER TO ADD TO THE CASE.

CAN WE TEST THIS, I WOULD LIKE IT TO IF WE COULD, TEST THIS ARGUMENT ON THINGS BEING ARGUED TO THE JURY. LET'S ASSUME THAT CCP IS NOT GOING TO BE CHARGED TO A JURY AS AN AGGRAVATOR. A PREMEDITATION IS STILL AN ISSUE IN THE CASE, AND AS PART OF THAT PREMEDITATION, THE COUNSEL WANTS TO GO INTO PROCUREMENT OF THE DEVICE TO PRODUCE DEATH, THE STEPS THAT ONE MAY GO INTO, AND ARGUE THAT AS PREMEDITATION. WOULD YOUR ARGUMENT STILL BE THE SAME, THAT WE MUST REVERSE IT, BECAUSE THEY GOT INTO MATTERS THAT ALSO COULD QUALIFY AS CCP, AND PREMEDITATION WAS THE DEFENSE, SO THEREFORE WE HAVE TO REVERSE IN THOSE CASES AS WELL, THEN.

UNDER YOUR HYPOTHETICAL, ARE WE TALKING ABOUT PRESENTING THIS MATTER IN THE PENALTY PHASE?

YES. IN THE PENALTY PHASE, NO EVIDENCE, JUST ARGUMENT ABOUT THE ARGUMENT ABOUT PROCUREMENT, ARGUMENT THAT CERTAINLY THIS IS PREMEDITATED, BECAUSE IT WAS CALCULATED. TO TEST HYPOTHESIS WITH REGARD TO DOES THIS APPLY TO ARRIVE AGGRAVATOR, CAN YOU --

I THINK IF THE PROSECUTION STARTED DWELLING ON CALCULATION, WHERE, WHEN CCP WAS NOT GOING TO BE AN ISSUE IN THE PENALTY PHASE, I THINK THAT COULD BE A PROBLEM. I MEAN, IT WOULD DEPEND ON HOW FAR THE PROSECUTOR WENT, ALTHOUGH PREMEDITATION OBVIOUSLY IS AN ISSUE IN GUILT PHASE ALREADY, BUT TO FURTHER ASSERT IT.

YOU SAID THEY CAN'T PROVE THEIR CASE. JUST LIKE WE SAY THE DEFENDANT CAN'T, CAN THEY PUT ON EVIDENCE THAT IT REALLY WAS A SPUR OF THE MOMENT KIND OF THING, IN THE PENALTY PHASE?

I AM SORRY?

CAN THEY DO THAT? CAN THE DEFENDANT PUT ON THAT IT IS, YOU KNOW, THERE IS THE QUESTION OF THE DOUBT AS TO WHETHER THEY SHOULD HAVE BEEN CONVICTED OF FIRST-DEGREE MURDER IN THE PENALTY PHASE?

WELL, THIS COURT SAID DOUBT AS TO GUILT IS NOT A MITIGATING CIRCUMSTANCE. THAT CAN BE PURSUED BY THE DEFENSE.

BUT REALLY IT WOULD OPEN THE DOOR, IF YOU COULD LET THE STATE REARGUE MOTIVE AND PREMEDITATION TO THE DEFENDANT REARGUEING THAT THEY REALLY --

DOUBT AS TO THE PROPRIETY OF THE CONVICTION WOULD SEEM TO ME TO BE FAIR GAME.

BUT AREN'T YOU DEALING IN SEMANTICS, WITH WHEN YOU ARE TALKING ABOUT HOW HEIGHTENED THE PREMEDITATION IS? DON'T YOU GET INTO THOSE KINDS OF PROBLEMS?

WELL, AND THAT IS, AGAIN, PART OF THE PROBLEM. IF YOU ALLOW JUST ARGUMENT ON OR

PRESENTATION THAT THE, ABOUT THE CALCULATION OF THE MURDER DURING PENALTY PHASE, WHEN THE JURY IS NOT GOING TO BE INSTRUCTED ON THE VERY NARROW REQUIREMENTS FOR THERE TO BE A COLD, CALCULATED AND PREMEDITATED FINDING FOR PURPOSES OF THE AGGRAVATOR, THEN YOU HAVE, YOU ARE THROWING A WHOLE ELEMENT OF ARBITRARINESS INTO THE JURY CONSIDERATION, BECAUSE NOW YOU ARE ASKING TO CONSIDER FACTS AND CIRCUMSTANCES AND MAKING ARGUMENTS ABOUT AGGRAVATORS, BUT THEN YOU ARE NOT GIVING THEM LEGAL INSTRUCTION ON HOW TO DEAL WITH THOSE FACTS, AND IT IS ALMOST MAKING THE JURY DECISION-MAKING A WILD CARD WHEN YOU DO THAT, AND I THINK THERE IN WOULD FIND A PROBLEM.

DOES IT MAKE A DIFFERENCE WHETHER THE PROSECUTOR ARGUES THE ISSUE IN THE GUILT PHASE, SO THAT IF HE ARGUES IN THE PENALTY PHASE, EVEN IF IT IS NOT AN AGGRAVATOR, IT IS SOMETHING THE JURY HAD ALREADY HEARD IN THE GUILT PHASE, BUT IT HE HE -- BUT IF HE IS ARGUING SOMETHING THAT THE JURY NEVER HEARD BEFORE, THEN THE JURY IS GOING TO GET THE IMPRESSION THAT THIS IS SOMETHING THAT GOES TO THE PENALTY THAT DIDN'T GO TO THE GUILT PHASE.

I AM TRYING TO THINK OF A CIRCUMSTANCE WHERE --

WELL, INJUSTICE LEWIS'S EXAMPLE --

THE PREMEDITATION VERSUS --

THE PREMEDITATION, THE PROSECUTOR, I ASSUME, WOULD HAVE ARGUED PREMEDITATION IN THE GUILT PHASE, SO THE FACT --

YES.

-- THAT HE ARGUES IT IN THE PENALTY PHASE MAY NOT MAKE AS MUCH OF A DIFFERENCE TO THE JURY, WHO FIGURES HE IS JUST REARGUING THIS PART, BUT IN THIS CASE THE PROSECUTOR DID NOT ARGUE MOTOR ANY OF THE GUILT PHASE AND WAITED UNTIL THE PENALTY -- MOTIVE IN THE GUILT PHASE AND WAITED UNTIL THE PENALTY PHASE, SO THE JURY MAY BELIEVE HE IS ARGUING SOMETHING RELATIVE TO PENALTY.

TWO RESPONSES THERE. TO YOUR LAST QUESTION, THE FACT THAT THE MOTIVE WASN'T ARGUED HERE AND IT WAS RELATED TO PENALTY, THAT WOULD BE EVEN MORE COMPELLING TO A JURY THAT THIS IS SOMETHING WE CONSIDER NOW IN SENTENCING.

THAT IS WHAT I AM SAYING.

WHEN YOU ARE DEALING WITH A SITUATION, LIKE INJUSTICE LEWIS'S HYPOTHETICAL, WHERE YOU HAVE EVIDENCE OF PREMEDITATION DURING GUILT PHASE, IF THE PROSECUTOR, AND CCP IS NOT AN ISSUE BECAUSE THEY DON'T HAVE SUFFICIENT EVIDENCE TO PURSUE THAT AGGRAVATOR, IF THE PROSECUTOR NEVERTHELESS BEGINS TO MAKE PRESENTATIONS IN FURTHER ARGUMENT, ABOUT THE CALCULATION OF THE MURDER, I THINK THAT WOULD FALL INTO THE SAME CATEGORY THAT THAT IS IMPROPER, BECAUSE NOW IT IS SOMETHING THAT THE PROSECUTOR IS ASSERTING AT THE PENALTY PHASE OF THE CASE, WHERE THE ISSUES ARE DIFFERENT. AND WE WOULD RUN INTO THE SITUATION WHERE, YOU KNOW, THE JURY WOULDN'T BE INSTRUCTED ON HOW TO HANDLE THAT EVIDENCE IN THE CONTEXT OF THE PENALTY PHASE.

CHIEF JUSTICE: ALL RIGHT. THANK YOU BOTH VERY MUCH. THE COURT WILL NOW STAND IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING. IS

MARSHAL: PLEASE RISE.