John Blackwelder v. State of Florida

THE LAST CASE ON THE COURT'S DOCKET THIS MORNING BLACKWELDER VERSUS STATE.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS WILLIAM McCLAIN, COUNSEL FOR JOHN BLACKWELDER. MR. BLACKWELDER IS ASKING FOR ASSISTANCE FROM THE STATE OF FLORIDA TO SUICIDE. HE PLED GUILTY TO THE STRANGULATION MURDER OF WAYNE WRIGLEY, ANOTHER INMATE IN THE COLUMBIA CORRECTIONAL INSTITUTION. MR. BLACKWELDER HAS ACTIVELY BEEN SEEKING THE IMPOSITION OF THE DEATH PENALTY THROUGHOUT THE CASE. HE DID NOT WAIVE A PENALTY PHASE IN A PENALTY-PHASE JURY. THERE WAS A JURY EMPANELED. THEY PROCEEDED TO THE PENALTY PHASE. AGGRAVATING AND MITIGATING CIRCUMSTANCES WERE PRESENTED TO THE JURY AND THE JURY ENTERED A RECOMMENDATION.

WHAT STRUCK ME AS BEING DIFFERENT FROM MANY OTHER CASES, WHERE THE DEFENDANT SORT OF WAIVES OR SAYS I WANT TO DIE, IS THAT, IS IT CORRECT THAT HE TOLD HIS ATTORNEYS THAT HE WANTED THEM TO INVESTIGATE AND PRESENT ANYTHING THEY COULD FIND IN MITIGATION?

YES, YOUR HONOR. THAT'S CORRECT.

AND THAT THE TRIAL COURT, ALSO, NOT ONLY WAS THAT BEFORE THE TRIAL COURT BUT THAT THE TRIAL COURT ORDERED A PRESENTENCE INVESTIGATION AND A PSYCHOLOGICAL EXAMINATION, WHICH THE COURT HAD TO ASSESS IN MITIGATION?

THAT'S CORRECT.

OKAY. SO IT IS DIFFERENT FROM A LOT OF CASES WHERE THE DEFENDANT SAYS, YOU KNOW, NOT ONLY DO I WANT TO WAIVE, DO I WANT TO DIE, BUT I INSTRUCT MY ATTORNEYS TO DO NOTHING.

THAT'S CORRECT. IT IS DIFFERENT IN THAT RESPECT.

SO DOESN'T THAT MAKE THIS MORE, WHY IS THIS JUST AS RELIABLE A SENTENCING PROCEEDING, THEN, AS ANY OTHER CASE, WHERE THE DEFENSE ATTORNEYS VIGOROUSLY ARGUE THE MITIGATION?

WELL, I HAVE PRESENTED FOUR ISSUES THAT I THINK IMPACT THE RELIABILITY OF THE SENTENCING, AND I PRESENT THEM TO THIS COURT FOR CONSIDERATION. THE FIRST ONE HAS TO DO WITH JURY SELECTION. MR. BLACKWELDER WAS ALLOWED AND DID HE SAY ESSENTIALLY ORCHESTRATE THE SELECTION OF A JURY PRONE TO IMPOSE THE DEATH PENALTY. HE, ON THE RECORD, STOPPED HIS COUNSEL FROM CHALLENGING JURORS WHO WERE SUBJECT TO CAUSE OR PEREMPTORY CHALLENGES, BASED UPON THE VIEWS THAT THEY HAD REGARDING THE DEATH PENALTY. IN FACT, DURING THE SPENCER HEARING, HE, IN FACT, ADVISED THE COURT, HE SAID THERE WAS NOTHING IN THE LAW STOPPING ME FROM SELECTING A JURY PRONE TO GIVE ME THE DEATH PENALTY. SO IN THAT SENSE, WE HAVE A JURY THAT, ADDERS AIRLINE PROCESS IN -- ADVERSARIAL PROCESS IN JURY SELECTION HAS BEEN TURNED ON ITS HEAD AND WE HAVE DEATH PRONE, BOTH SIDES SELECT AGO DEATH-PRONE JURY OR ATTEMPTING TO, SO WE DON'T HAVE THE BENEFITS OF THE ADVERSARIAL PROCESS IN SELECTING A FAIR JURY. THAT, I THINK, IMPAIRS THE RELIABILITY OF THE JURY'S ULTIMATE SENTENCING RECOMMENDATION, BECAUSE THE FAIRNESS IN THE PROCESS HAS BEEN --

IS THERE, IN THIS INSTANCE, WERE THERE ANY CHALLENGES FOR CAUSE OR PEREMPTORY CHALLENGES EXERCISED BY THE DEFENSE?

I DON'T REMEMBER THERE BEING ANY, AND CERTAINLY THERE WERE NONE REGARDING THE DEATH PENALTY QUESTION.

AND AS TO THESE TWO PEOPLE THAT YOU HAVE --

FROM MAY HAVE BEEN SOME PEREMPTORY. I DON'T WANT TO MISS SPEAK THAT.

AS FOR THESE -- MISS SPEAK ON THAT.

AS TO THESE TWO PERSONS THAT YOU INDICATED SHOULD HAVE BEEN ELIMINATED FROM THE JURY FOR CAUSE, ISN'T THERE SOME EVIDENCE IN THE RECORD THAT THESE PEOPLE, ALTHOUGH IN FACT THEY INITIALLY DEMONSTRATED SOME HESITATION, DID, IN FACT, INDICATE THAT THEY COULD FOLLOW THE LAW AND INSTRUCTIONS AS GIVEN TO THEM BY THE TRIAL COURT?

THERE WAS SOME INDICATION OF THAT. IT IS MY POSITION THAT THEY WERE EXCLUDEABLE FOR CAUSE, BUT, ALSO, THEY WERE CERTAINLY WITHIN THE REALM OF BEING EXCLUDED USING A PEREMPTORY CHALLENGE BY THE DEFENSE, AND THE POINT HERE IS THAT WE DID NOT HAVE AN ADDERS AIRLINE PROCESS -- AN ADVERSARIAL PROCESS GOING ON IN THE SELECTION OF THE JURY, BECAUSE THE DEFENDANT, HIMSELF, WAS SEEKING A DEATH-PRONE JURY, JUST AS THE STATE MIGHT HAVE BEEN SEEKING A DEATH-PRONE JURY, AND THERE WAS NO INTERVENTION TO PREVENT THAT FROM HAPPENING. IN ALL OF THE CASES WHERE WE HAVE HAD --

SO YOUR ARGUMENT, REALLY, IS THAT IT WAS UP TO THE TRIAL JUDGE TO STEP IN AT THIS POINT, AND SAY ALTHOUGH YOU HAVE NOT EXERCISED A CHALLENGE FOR CAUSE OR A PEREMPTORY CHALLENGE, I AM GOING TO GET RID OF THESE TWO JURORS.

THAT IS NOT ENTIRELY MY ARGUMENT. THAT IS A POSITION. ALL OF THESE CASES WHERE WE HAVE HAD SOMEONE WHO IS SEEKING THE DEATH PENALTY, THERE HAS BEEN, ALL OF THE CASES, THERE HAS ALWAYS BEEN A PROCESS WHERE THE TRIAL COURT HAS TO INTERVENE AS A COUNTERBALANCE, IF YOU WILL. I MEAN, THE DEFENDANT IS TAKING AWAY THE BALANCE OF THE ADVERSARY PROCESS, AND THIS COURT HAS, ON NUMEROUS OCCASIONS, SAID, OKAY, COURT, WE HAVE GOT TO ACCOMMODATE THAT TO MAINTAIN THE RELIABILITY OF THE SYSTEM, SO THERE HAS TO BE A COUNTERBALANCE CREATED. IF THE COURT DID NOT, IF THE COURT DID NOT HERE, STEP IN AND CITE, WELL, LOOK, WE HAVE GOT TO HAVE AN ADVERSARIAL PROCESS GOING ON IN THE JURY SELECTION, BECAUSE HE DIDN'T DO THAT, AT THE VERY LEAST, THEN THE COURT HAS TO TAKE INTO ACCOUNT THAT SENTENCING RECOMMENDATION ISN'T AS RELIABLE AS IT MIGHT HAVE BEEN OTHERWISE IN THE SENTENCING PROCESS. I MEAN -- THERE HAS TO BE A COUNTERBALANCE SOMEWHERE.

IS THERE ANY OBJECTION AT ALL EXERCISED BY THE DEFENSE, HOW DO WE KNOW THAT THESE WERE NOT, IN FACT, EXERCISED FOR THE SAME REASON THAT YOU ARE TALKING ABOUT? I MEAN, WE WANT TO GET RID OF PEOPLE THAT YOU THOUGHT WERE NOT, WOULD NOT FOLLOW THE LAW AS OUTLINED TO THEM BY THE COURT. I MEAN, YOU SAID THAT YOU BELIEVE THAT THERE WERE SOME CHALLENGES EXERCISED, CORRECT?

I BELIEVE THERE WERE, BUT I DON'T RECALL THEM BEING REGARDING THE, YOU KNOW, REGARDING THE ISSUE OF THE IMPOSITION OF THE DEATH PENALTY, AND IN FACT, WE HAVE THE DEFENDANT, HIMSELF, SAYING I STOPPED MY LAWYERS FROM CHALLENGING ANYBODY WHO I THOUGHT WOULDN'T GIVE ME THE DEATH PENALTY, AND THERE WAS AN INSTANCE IN COURT, WHEN THE DEFENSE LAWYER STOOD UP TO MAKE A CHALLENGE, AND THE DEFENDANT CALLED HIM BACK AND THEY HAD APPARENTLY A CONFERENCE AT THE COUNSEL TABLE AND THE LAWYER STOOD UP AND SAID, WELL, MR. BLACKWELDER SAID THIS IS NOT A CHALLENGE, AND HE

SAT BACK DOWN, SO THERE IS EVIDENCE IN THE RECORD THAT THIS IS PRECISELY WHAT MR. BLACKWELDER WAS DOING WAS THWARTING THE ADVERSARIAL TESTING PROCESS TO REACH A FAIR JURY, AND MY POSITION IS WE HAVE GOT TO HAVE A COUNTERBALANCE. WHEN WE ALLOW THE DEFENDANT TO MAKE CHOICES THAT IS GOING TO UPSET THE BALANCE OF THE ADVERSARIAL PROCESS, THEN I THINK THE COURT HAS TO STEP FORWARD AND CREATE A PROCEDURE WHERE WE PUT THAT PLACE, THAT BALANCE BACK INTO EFFECT, TO ENSURE THE RELIABILITY OF THE SENTENCING PROCESS, SO HERE, WITHOUT THAT BALANCE IN PLACE, WE HAVE A JURY RECOMMENDATION THAT WE CAN'T BE, WE CAN'T HAVE CONFIDENCE IN IT THAT IT IS AS RELIABLE AS IT SHOULD HAVE BEEN.

WAS THERE ANY JUROR THAT STATED ON THE RECORD, THAT EVEN IF MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES, THEY COULD NOT RECOMMEND LIFE?

I DON'T, YOU KNOW, I WOULD HAVE TO REREAD THE RECORD. I DON'T RECALL THAT. THE TWO JURORS --

ISN'T THAT WHAT YOU WOULD HAVE TO SHOW, TO SAY THAT, TO PROVE THAT THE COURT FAILED TO COUNTERBALANCE, IF THERE WAS A JUROR THAT SAID, IF I SAW THE EVIDENCE, AND I SAW MORE MITIGATING THAN AGGRAVATING, I STILL COULD NOT RECOMMEND LIFE, BECAUSE I THINK ALL DEFENDANTS WHO COMMIT MURDER SHOULD BE PUT TO DEATH. DON'T YOU HAVE TO SHOW THAT, IN ORDER TO SAY THAT THE COURT REVERSEBLY ERRED IN FAILING TO COUNTERBALANCE WHAT THE DEFENDANT WAS TRYING TO DO? I DON'T THINK SO, YOUR HONOR. I THINK JERRY McALICETER CAME VERY CLOSE TO THAT POSITION. HE DID SIT ON THE JURY. HOWEVER, MY POSITION HERE IS THAT THEY DON'T HAVE TO MEET A CAUSE CHALLENGE CRITERIA ON FACTS OF THIS CASE.

NOW WHAT YOU ARE SAYING IS THE JUDGE HAS TO EXERCISE A PEREMPTORY CHALLENGE THAT THE JUDGE, IF YOU WERE COUNSEL, WOULD SAY, WELL, I REALLY DON'T WANT THIS PERSON SITTING AS A JURY IF I WERE A DEFENDANT AND THEREFORE I AM GOING TO EXERCISE THE DEFENDANT'S PEREMPTORY CHALLENGE FOR HIM. WOULDN'T WE BE GOING EVEN FURTHER THAN WE HAVE EVER GONE BEFORE, LIKE "STAR TREK", IF WE RULED THAT WAY?

I AM NOT SUGGESTING THAT THE COURT EXERCISE A PEREMPTORY CHALLENGE, BUT IN THIS RECORD ONCE IT BECAME APPARENT, WHICH IT DID VERY EARLY ON IN THE JURY SELECTION PROCESS, THAT MR. BLACKWELDER WAS THWARTING HIS DEFENSE COUNSEL, AND THAT WAS A PULL BACK FROM THE ADVERSARIAL PROCESS. THAT WAS A CHOICE THE DEFENDANT WAS MAKING THAT WAS GOING TO POTENTIALLY UPSET THE ADVERSARIAL BALANCE. ONCE THAT BECAME APPARENT, WHICH IT DID IN THIS CASE VERY EARLY, THEN THE COURT, AT THAT POINT, NEEDS TO FASHION A COUNTERBALANCE.

AND WHAT IS THE COUNTERBALANCE?

WELL, I THINK IN THAT INSTANCE, HE SHOULD HAVE SAID MR. BLACKWELDER, WE ARE GOING TO HAVE SOME ADVERSARIAL TESTING AS TO WHO THE APPROPRIATE JURORS ARE TO SIT ON THE CASE. IF WE ARE GOING TO HAVE A JURY, WE ARE NOT GOING TO ALLOW THE JURY TO BE SELECTED BY TWO PROSECUTORS, AS OPPOSED TO A PROSECUTOR AND DEFENSE, BECAUSE --

AND THEN AFTER HE TELLS MR. BLACKWELDER THAT, THEN WHAT DOES THE JUDGE DO?

AT THAT POINT --

WHAT DOES THE JUDGE HAVE TO DO?

AT THAT POINT, I THINK THE ATTORNEYS WOULD SELECT THE JURY.

WHICH THEY DID IN THIS CASE.

THEY DID SELECT THE JURY, BUT IT WAS APPARENT THAT THE ATTORNEYS WERE ALLOWING MR. BLACKWELDER TO COMPLETELY MAKE THE CALLS, AND HE WAS MAKING CALLS TO ENSURE DEATH-PRONE JURIES, WHICH IS UPSETTING THE FAIRNESS OF THE JURY SELECTION PROCESS.

IF WE ARE SAYING THE COURT HAS TO ALLOW THE DEFENSE ATTORNEY TO ACT AGAINST HIS CLIENT'S WISHES, WOULD HE NOT LATER HAVE AN INEFFECTIVE ASSISTANCE OF COUNSEL ARGUMENT, SAYING I SPECIFICALLY INSTRUCTED MY CLIENT TO DO THIS, AND HE REFUSED TO DO IT. MY COUNSEL. I AM SORRY. TO DO THIS AND HE REFUSED. HE DID NOT FOLLOW MY INSTRUCTIONS, AND I HAVE A CONSTITUTIONAL RIGHT TO GOVERN WHAT HAPPENS IN THIS TRIAL AND INSTRUCT MY DEFENSE COUNSEL WHAT TO DO.

AND THERE IN THAT CONSTITUTIONAL RIGHT VERSUS THE STATE'S INTEREST IN THE RELIABILITY OF THE DEATH SENTENCING PROCESS THERE, IS THE TENSION. THERE IS A RUB. THERE IS THE BALANCE POINT. I AM HERE TODAY AGAINST THE WISHES OF MY CLIENT. HE DIDN'T WANT THIS APPEAL. THIS COURT HAS SAID I, UNDER CLOCOT, THAT THERE IS AN AUTOMATIC APPEAL PROCESS, WHETHER YOU WANT IT OR NOT, AND YOU ARE GOING TO HAVE A LAWYER HERE CREATING THE RELIABILITY OF THE PROCESS, TO ENSURE THIS COURT OF THE REAL OF THE PROCESS -- THE RELIABILITY OF THE PROCESS. WE HAVE DONE THE SAME THING BELOW, WHERE WE HAVE REQUIRED THE JUDGES, WE HAVE ALLOWED, WE HAVE REQUIRED THE JUDGE TO SAY ORDER PRESENTENCE INVESTIGATIONS, HAVE PROFFERS OF MITIGATING FACTORS PRESENTED TO THEM TO ENSURE THE RELIABILITY OF IT, AGAINST DEFENDANT'S WISHES.

SO IT SEEMS TO ME THAT YOUR ARGUMENT LEADS US TO MAKING THE TRIAL JUDGE, IN ESSENCE, BE PART OF THE DEFENSE TEAM, AND AND I AM JUST NOT SURE THAT WE SHOULD BE TAKING THAT KIND OF STEP.

WELL, THE OTHER, I AM SUGGESTING ANOTHER REMEDY. IF THE JUDGE IS NOT GOING TO INTERVENE IN THE JURY SELECTION PROCESS TO SOME DEGREE, IF THE COUNTERBALANCE IS NOT GOING TO BE PLACED IN THE JURY SELECTION PROCESS, ITSELF, IN A CASE LIKE THIS, THEN, PERHAPS THE COUNTERBALANCE HAS TO COME WHEN THE JUDGE IS MAKING HIS SENTENCING ANALYSIS. HE HAS TO TAKE INTO ACCOUNT, RATHER THAN AUTOMATICALLY GIVING THIS JURY RECOMMENDATION GREAT WEIGHT, AS THE LAW ALLOWS HIM TO DO, HE HAS TO TAKE INTO ACCOUNT THE FACT AND THE MANNER IN WHICH THE JURY WAS SELECTED AND PERHAPS NOT, AND THAT NEEDS TO BE PART OF HIS ANALYSIS.

IS THERE ANY EVIDENCE IN THE RECORD THAT, ABSENT THE DEFENDANT'S INSTRUCTING, THE DEFENSE COUNSEL WOULD HAVE EXERCISED ANY PEREMPTORY CHALLENGES OR CHALLENGES FOR CAUSE THAT HE COULDN'T DO BECAUSE OF THE DEFENDANT'S INSTRUCTIONS?

WELL, I HAVE POINTED OUT IN THE BRIEF, WHERE COUNSEL STOOD UP TO MAKE A CHALLENGE, AND HE WAS STOPPED BY MR. BLACKWELDER, HAD A CONFERENCE WITH MR. BLACKWELDER AND THEN TOLD THE COURT THAT MR. BLACKWELDER TELLS ME THAT THIS IS NOT A CHALLENGE.

IS THAT A PEREMPTORY OR A FOR-CAUSE?

I THINK HE WAS ABOUT TO MAKE A CAUSE CHALLENGE, BUT THEN, OF COURSE, THE JUROR WOULD HAVE BEEN SUBJECT TO A PEREMPTORY, IF THE CAUSE CHALLENGE HAD BEEN DENIED, SINCE THOSE, THE VIEWS REGARDING THE DEATH PENALTY WOULD BE VALID FOR EITHER TYPE OF CHALLENGE, SO HE WAS, AND THEN MR. BLACKWELDER, HIMSELF, DURING THIS SPENCER HEARING, ADVISED THE COURT, WELL, THAT IS EXACTLY WHAT I DID. AND I HAVE QUOTED THAT PORTION IN THE ARGUMENT.

CHIEF JUSTICE: YOU HAVE GOT SOME OTHER ISSUES.

YES. I WILL MOVE ON QUICKLY TO THE TWO OTHER ISSUES. THE SECOND ISSUE DEALS WITH THE JUDGE'S SENTENCING ORDER. THE COURT, AFTER THE JURY RECOMMENDATION, THE JUDGE ASKED THE STATE AND THE DEFENSE TO SUBMIT PROPOSED SENTENCING ORDERS. THE PROSECUTOR SUGGESTED THAT SENTENCING IN RANDOM WOULD BE MORE APPROPRIATE AND HE SUBMITTED A SENTENCING IN RANDOM, AS DID THE DEFENSE. IF YOU WILL LOOK AT THE PROSECUTOR'S SENTENCING -- SENTENCING MEMORANDUM, AS DID THE DEFENSE, AND IF YOU WILL LOOK AT THE PROSECUTOR'S SENTENCING MEMORANDUM, YOU WILL FIND THEY ARE IDENTICAL WORDING.

YOU SAID THERE WERE THREE ISSUES THAT THE LEGISLATURE DIDN'T PROPOSE.

YES. AFTER THE SENTENCING MEMORANDUM, THEY CAME UP WITH A SENTENCE OF MORTON, WHICH SUGGESTS THAT ANTISOCIAL PERSONALITY DISORDER WAS, IN FACT, AN ADDITIONAL CIRCUMSTANCE. HE DID ADD IN SOME TESTIMONY OR SUMMARY OF TWO PSYCHOLOGISTS WHO EXAMINED MR. BLACKWELDER. IT WASN'T IDENTICAL IN EVERY RESPECT. THERE WERE SOME OTHER POSITIONS.

THE STATE ARGUED THAT, UNDER THE PRIOR FELONY AGGRAVATOR, WAS SUPPORTED BY A CAPITAL FELONY AND TEN OTHER FELONIES, WHEREAS THE JUDGE ONLY FOUND SEVEN OTHER FELONIES, RIGHT?

THAT MAY BE CORRECT, YES.

SO HE DIDN'T EXACTLY, YOU KNOW, COPY WORD FOR WORD, THE STATE'S MEMORANDUM.

IN ESSENCE, THERE WERE SOME ADDITIONS, AND THERE WERE SOME CHANGES. BUT THE BULK OF THE SENTENCING ANALYSIS IN THE ORDER IS A VERBATIM RECITATION OF THE PROSECUTOR'S SENTENCING MEMORANDUM. NOW, YOU KNOW, THE JUDGE'S SENTENCING ORDER, I MEAN, IS A FUNDAMENTAL AND STRUCTURAL PART OF THE WHOLE DEATH SENTENCING PROCESS, AND IT IS REALLY, I THINK, HAS THREE PURPOSES. I MEAN, ONE OF THEM IS TO DISCIPLINE THE JUDGE'S ANALYSIS DURING A DECISION-MAKING PROCESS. THE PROCESS OF WRITING TO DISCIPLINE HIS ANALYSIS IN MAKING THAT DECISION. SECOND WOULD BE THAT THE ORDER SHOULD, THEN, BE A REFLECTION OF WHAT THE JUDGE'S ANALYSIS AND INDEPENDENT ANALYSIS, TRULY IS, AND THEN THAT GIVES A FOUNDATION FOR THIS COURT TO REVIEW THE SENTENCE, AND FACILITATE --

WHAT IS WRONG WITH WHAT THE JUDGE DID HERE, SO LONG AS IT IS AN OPEN PROCESS, AND THE JUDGE, THEN, DOES SELECTIVELY USE, FOR INSTANCE, PARTS OF THE REASONING OF EITHER SIDE? IT WOULD BE, LIKE, IF THERE IS AN APPELLATE OPINION, WHERE ACTUALLY, THE APPELLATE COURT FEELS THAT THE EXPRESSION OF A VIEW IN ONE OF THE BRIEFS JUST REALLY GOT IT RIGHT, IN TERMS OF HOW THE COURT IS GOING TO INTERPRET THE LINE OF CASES OR WHATEVER, AND THEN SAYS THAT WE FEEL THAT THE APPELLANT'S BRIEF SETS IT OUT JUST AS IT IS, AND AS LONG AS THE COURT IS DOING THAT OPENLY AND ISN'T JUST A COMPLETE INC., WHAT IS WRONG WITH -- INCORPORATION, WHAT IS WRONG WITH THAT?

I THINK THAT IS NOT NATURE FAITHAL TO THE ORDER -- FATAL TO THE ORDER IN THOSE CASES, SELECTING SENTENCING MEMAND UPS. IN THIS CASE, I THINK -- REALM AND YOU MEANS. IN -- MEMORANDUMS. I THINK IN THIS CASE, WE HAVE GOT A SENTENCING ERROR GOING ON, AND I THINK THAT PUTS A HEIGHTENED BURDEN ON THE JUDGE TO ENSURE THAT WE HAVE A RELIABLY-IMPOSED SENTENCE. NUMBER TWO, IN THIS CASE THE JUDGE ASKED FOR ORDER UP FRONT, WHICH IS SOMEWHAT OF, FROM A DEFENSE LAWYER'S STANDPOINT, CERTAINLY WOULD BE A RED FLAG THE JUDGE MAY POTENTIALLY BE ADVOCATING SOME RESPONSIBILITY TO THE PROSECUTOR, FOR PURPOSES OF ENTERING THE ORDER. WE HAVE, IN THIS CASE, A SENTENCING ORDER WHICH, IN SUBSTANTIAL PART, REFLECTS THE PROSECUTOR'S ANALYSIS, AND NO, MA'AM

JUST IN, AND THE JUDGE HAS -- AND NOT ONLY JUST IN, AND THE JUDGE HAS NEVER REALLY SAID HE IS ADOPTING THE ANALYSIS. IT IS JUST PART OF HIS ORDER.

ISN'T THE PART OF HIS ANALYSIS ADOPTING THE -- THE PART OF HIS ORDER ADOPTING THE ANALYSIS, ISN'T THE PART DEALING WITH THE CASE?

NO. IT DEALT AND QUOTED MATERIAL THAT DEALT WITH THE MITIGATION AND ALSO DEALT WITH THE WEIGHING OF THE TWO PROCESSES.

I THOUGHT THAT THE STATE CONCLUDED THAT THERE SHOULD BE NO MITIGATION, THAT THE TRIAL COURT SEND THE --

RIGHT. RIGHT.

-- DEFENDANT LAWYER'S MEMORANDUM THAT THERE WAS MITIGATION ESTABLISHED, AND THAT THE COURT, THEN, WENT THROUGH THAT. I THOUGHT IT WAS SUBSTANTIALLY JUST --

I DON'T THINK IT VARIED, BECAUSE THE STATE DID CONCEDE SOME OF THE MITIGATION WAS PRESENT AS WELL, AS I RECALL, BUT EVEN THE ANALYSIS PART, WHERE HE WEIGHS THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, SUBSTANTIALLY, I MEAN, IT IS VIRTUALLY VERBATIM FROM THE PROSECUTOR'S MEMO. AND YOU KNOW, WE ARE DEALING WITH YOU KNOW, I THINK THERE, IT LEAVES A QUESTION MARK INTO WHETHER WE CAN SAY THIS JUDGE USED INDEPENDENT ANALYSIS OR NOT. WHETHER THE JUDGE DID OR DID NOT, YOU KNOW, THE WHOLE POINT IS THAT THIS ORDER LEAVES US WITH A QUESTION AS TO WHETHER HE DID OR DID NOT.

CLEARLY THE PROSECUTOR WAS CONCERNED ABOUT SUBMITTING A PROPOSED ORDER, AND THEREFORE REQUESTED THE MEMORANDUM.

YES, YOUR HONOR.

SO IT WENT THE MEMORANDUM WAY. THIS COURT HAS ALWAYS BEEN CONCERNED ABOUT WHETHER THE COURT EITHER DOES OR APPEARS TO ACTUALLY DELEGATE ITS RESPONSIBILITY TO ACTUALLY GO THROUGH THE APPROPRIATE ANALYSIS AND MAKE THE, THIS A VERY SERIOUS DECISION, BY DELEGATING IT TO THE STATE TO DO THAT FOR THEM, AND THEREFORE SETTING OUT REASONING THAT ARGUABLY WAS FOR THE REASONING OF THE TRIAL COURT BUT WAS THE REASONING OF THE STATE, BUT YOU WOULD AGREE THAT, AS YOU HAVE INDICATED BEFORE, THAT IT IS NOT PER SE INAPPROPRIATE FOR THE COURT TO USE PORTIONS OF MEMORANDUMS. YOU JUST THINK THAT --

NO, YOUR HONOR. A -- IN THIS CASE THE TRIAL JUDGE --

-- IN THE CASE -- IN THIS CASE, THAT THE TRIAL JUDGE WENT TOO FAR.

I THINK IT WENT TOO FAR. IN A CASE WHERE THE DEFENDANT IS ACTIVELY SEEKING DEATH, IT STILL LEAVES WE ARE UNSURE. THERE IS STILL A QUESTION.

EVEN MORE --.

THERE IS STILL A QUESTION MARK. THAT IS MY VIEW ON THIS. THE OTHER ISSUE I WILL TOUCH ON BRIEFLY IS THE FINDING OF OR THE USE OF TWO NONVIOLENT FELONIES TO SUPPORT THE AGGRAVATING CIRCUMSTANCE OF A PREVIOUS CONVICTION FOR A VIOLENT FELONY. NOW, THERE WERE, IN FACT, OTHER VIOLENT FELONIES INVOLVED.

ARE THOSE CLEARLY IN THE RECORD? IN OTHER WORDS THERE WAS A SEXUAL BATTERY?

YES, YES, YOUR HONOR.

WHATEVER, IT IS HARD TO DEMONSTRATE PREJUDICE BY THAT.

WELL, I WOULD SUGGEST THAT CERTAINLY THE OTHER AGGRAVATOR, THE OTHER FELONIES COULD HAVE SUPPORTED THE FINDING OF THE AGGRAVATING FACTOR. THE QUESTION MARK IS WHETHER THE HINGERATION OF THESE ADDITIONAL FELONIES -- THE IN CORPORATION OF THESE ADDITIONAL FELONIES CHANGE AT ALL THE ADDITIONAL WEIGHT OF THAT FACTOR. THERE WERE TWO VILE ENFELONIES, ONE LEWD AND LASCIVIOUS ACTS, A FELONY WHICH THIS COURT IN HESS SAID WAS A CRIME OF VIOLENCE AND THERE WERE NO UNDERLYING FACTS PRESENTED IN THE CASE. THERE WAS AN INDICATION THAT UNDER LYING SCORE SHEET MENTIONED SEXUAL CONTACT, BUT THAT REALLY DOES NOT ESTABLISH THE VIOLENT PORTION OR THE CRIME BEING A CRIME OF VIOLENCE. IT WASN'T PRESENTED, REALLY, AS PROOF IN THAT RESPECT, AND FURTHERMORE, I DON'T THINK IT WOULD NECESSARILY, BASED ON THAT STATEMENT ALONE, WE CAN'T DETERMINE WHETHER IT WOULD SATISFY THE LEWIS DEFINITION OF A CRIME OF VIOLENCE FOR THE AGGRAVATING FACTOR. THE OTHER ONE WAS A FEDERAL CRIME OF THREATENING LIFE OF THE VICE PRESIDENT, WHICH HE WAS CONVICTED OF, AND THERE WAS JUST A VUMENT -- A JUDGMENT WHICH HE PLED TO, A JUDGMENT ENTERED IN THE RECORD, STIPULATED INTO THE RECORD. THE FEDERAL DECISIONS ON THAT SAID THE GROVAMENT OF THAT CRIME IS DISRUPTION CAUSED BY THE THREAT, AS OPPOSED TO THE ACTUAL THREAT OR ASSAULT UPON THE PUBLIC OFFICIAL. SO OUR POSITION IS THAT ONE IS NOT ESTABLISHED AS A CRIME OF VIOLENCE, EITHER, UNDER THE LEWIS DEFINITION.

CHIEF JUSTICE: THANK YOU VERY MUCH.

THANK YOU.

GOOD MORNING, CHIEF JUSTICE ANSTEAD. MAY IT PLEASE THE COURT. CHARMAINE MILL SAPS ON BEHALF THE STATE. I WOULD LIKE TO TALK ABOUT THE JURY SELECTION, BECAUSE I WOULD LIKE TO TELL YOU WHAT ACTUALLY HAPPENED. THEY DID STRIKE TWO JURORS FOR CAUSE AND TWO JURORS PERENTORILY, AND ONE OF THOSE JURORS STICK PHONE CAUSE WAS BASED ON HIS VIEW OF IMPOSING THE DEATH SENTENCE. JERRY KING WAS STRICKEN FOR CAUSE BY THE DEFENSE, BECAUSE HE CONSIDERED A LIFE SENTENCE A WASTE OF OF TIME AND MONEY AND NO AMOUNT OF MITIGATION COULD BE PRESENTED THAT WOULD CAUSE HIM TO VOTE FOR LIFE, BECAUSE THE PEOPLE THAT THE DEFENDANT MURDERED DIDN'T HAVE A CHANCE. THAT WAS ONE JUROR STICK PHONE CAUSE. ANOTHER JUROR, JUROR FAGAN, WAS STRICKEN, BECAUSE SHE WAS A CLOSE PERSONAL FRIEND OF THE PROSECUTOR'S INTERN. JUROR DOAN WAS STRICKEN PERENT BY THE, BY DEFENSE COUNS-- PEREMPTORYLY BY DEFENSE COUNSEL, AS WAS JUROR DR. BRADKE, SO THERE WERE BOTH FOR-CAUSE AND PEREMPTORY CHALLENGES MADE BY DEFENSE DURING THIS JURY SELECTION.

AND DOES THE RECORD REFLECT WHY THESE TWO JURORS THAT HAVE BEEN PICKED OUT BY THE DEFENSE AS, SHOULD HAVE BEEN STRICKEN OR NOT?

BECAUSE HAD HE THEY SHOULDN'T HAVE BEEN STRICKEN. -- BECAUSE THEY SHOULDN'T HAVE BEEN STRICKEN. THE TWO JURORS AT ISSUE HERE ARE JUROR McALWAYS SISTER AND -- McAHLISTER AND JUROR TILPIN.

COULD HE HAVE EXERCISED A PEREMPTORY CHALLENGE ON THEM?

I AM ASSUMING YOU CAN EXERCISE A PEREMPTORY ON ANYBODY, BUT, NO, A TRIAL JUDGE MAY NOT --

I UNDERSTOOD HIS ARGUMENT TO BE THAT DEFENSE COUNSEL ATTEMPTED TO, WHAT WAS THE DEFENSE SORT OF CALLED HIM BACK AND SAID, NO, DON'T EXERCISE A CHALLENGE ON THAT

PERSON.

I THINK YOU CAN ONLY ARGUE THAT BASED ON THE RECORD REGARDING JUROR McALLISTER. THERE IS NO RECORD TO SUPPORT THAT FOR JUROR TILLMAN.

SO WHAT WAS SAID ABOUT JUROR McALLISTER?

I WOULD THIS IS DEFENSE COUNSEL TALKING AND I AM READING FROM PAGE 93 OF JURY SELECTION. McALICETER IS NOT A FOR-CAUSE CHALLENGE? THE JUDGE ASKED THE DEFENDANT. THE DEFENDANT SAID THAT'S RIGHT. THE COURT ASKED THE DEFENDANT ARE YOU SATISFIED WITH THIS JUROR REMAINING ON THE PANEL? THE DEFENDANT RESPONDS YES, SIR. ANOTHER -- RESPONDS YES, SIR. THERE WERE TWO DEFENSE COUNSEL. SAYS NO OBJECTION, YOUR HONOR. THE COURT SAYS, MR. BLACKWELDER, DO YOU AGREE? DEFENDANT RESPONDS YES, YOUR HONOR. SO THE FIRST PROBLEM WITH THIS IS YOUR HONOR, REALLY, WHAT HE IS ASKING IS FOR THE JUDGE TO STOP BEING THE JUDGE IN THE CASE AND TO COME DOWN AND BE SPECIAL COUNSEL, AND WE SIMPLY CANNOT HAVE TRIAL JUDGES BECOMING SPECIAL COUNSEL, OPERATING NOT ONLY FOR CAUSE BUT EXERCISING THE DEFENDANT'S PEREMPTORY CHALLENGES? WE CAN'T HAVE THAT. YOU CANNOT PUT A TRIAL JUDGE IN THAT POSITION, WHERE HE WOULD GUESS WHETHER HE, PERSONALLY, WOULD STRIKE THAT JUROR, IF HE WERE TRYING THIS CASE. SO THE STATE'S FIRST POSITION ON THIS IS THIS IS WAIVED TWICE OVER, FIRST BY NOT MAKING THE FOR-CAUSE CHALLENGE AND THEN FOR NOT EXERCISING PEREMPTORY CHALLENGE ON THESE TWO JURORS. THE, BOTH, HE DID HAVE PERENT OTHER -- PEREMPTORY CHALLENGES REMAINING. YOUR HONOR, THE RECORD IS A LITTLE UNCLEAR ON EXACTLY HOW MANY, BUT HE DID SEEM TO HAVE NUMEROUS PEREMPTORY CHALLENGES REMAINING. THE STATE'S SECOND POSITION IS THERE IS NOTHING WRONG WITH EITHER ONE OF THESE JURORS. FIRST OF ALL, JUROR TILLMAN WAS, HAD EXPERIENCED A FRIEND IN A DOMESTIC VIOLENCE MURDER SITUATION. SHE WAS VERY UNCOMFORTABLE WITH WHAT SHE CONSIDERED DOMESTIC VIOLENCE CASES. THEYICS PLANED TO HER THAT THIS IS NOT A DOMESTIC -- THEY EXPLAINED TO HER THAT THIS IS A NOT A DOMESTIC VIOLENCE CASE. WOULD YOU HAVE ANY PROBLEMS? SHE REPEATEDLY SAYS THINGS LIKE SHE ASSURES DEFENSE COUNSEL OVER AND OVER AGAIN THAT SHE CAN RECOMMEND LIFE, IF MITIGATION OUTWEIGHS AGGRAVATION. OVER AND OVER, SHE SAYS THAT SHE WOULD IGNORE THE DEFENDANT'S WISHES. I WILL IMPOSE, I WILL NOT TAKE THAT INTO CONSIDERATION. SHE SAYS THAT SHE IS JUST NOT SUBJECT FOR CAUSE CHALLENGE. JUROR McALLISTER, IS REHABILITATED, SO TO SPEAK. AT FIRST, WHEN DEFENSE COUNSEL IS TALKING TO HIM, HE SAYS, WELL, IT WOULD BE DIFFICULT FOR ME TO DO THIS. BUT THEN, THEY GO BACK AND THEY ASKED HIM, THE PROSECUTOR ASKED HIM CAN YOU FOLLOW THE LAW, BASICALLY, AND WHAT JUROR McALLISTER SAYS IS THIS, THIS IS THE PROSECUTOR TALKING TO THE JUROR. IF AGGRAVATING CIRCUMSTANCES DO NOT OUTWEIGH MITIGATING, COULD YOU VOTE TO RECOMMEND LIFE IN PRISON? AND HE SAYS I BELIEVE I COULD, YES, SIR. SO YOUR HONOR, AT THE END, HE IS, HE HAS, BOTH THESE JURORS ASSERTED TO THE TRIAL COURT THAT THEY WILL IGNORE THE DEFENDANT'S WISHES AND BASE THEIR DECISION, BASED ON AGGRAVATORS AND MITIGATORS. THEY ARE NOT SUBJECT TO FOR-CAUSE CHALLENGES. ON THE SECOND ISSUE, THE SENTENCING ORDER MATCHING THE STATE'S MEMORANDUM --

YOU WILL AGREE ON THAT, THAT THERE ARE VARIOUS PARTS OF THE TRIAL COURTORDER THAT SEEM TO BE TAKEN VERBATIM FROM THE STATE'S SENTENCING MEMORANDUM.

ABSOLUTELY, YOUR HONOR. THERE ARE LARGE PARTS OF THE AGGRAVATING PART TAKEN FROM THE STATE'S MEMORANDUM. BUT YOUR HONOR, WHEN A JUDGE IS FACED WITH TWO MEMOS, AND HE TAKES THE AGGRAVATION FROM THE STATE AND THE MITIGATION FROM THE DEFENSE, THAT IS JUST NOT A PROBLEM. WHAT WE REQUIRE TWO THINGS, NUMBER ONE, WE ARE WORRIED ABOUT NOTICE. WE DIDN'T WANT THE IMPROPER DELEGATION GOING ON IN PART, BECAUSE OF A DUE PROCESS NOTICE CONCERN. THAT PART IS JUST NOT AT ISSUE HERE. BOTH COUNSEL GOT EACH OTHER'S MEMO, AND EVERYBODY KNEW THAT EVERYBODY HAD SUBMITTED WRITTEN

MEMANDUMPTION TO THE -- MEMORANDUMS TO THE TRIAL COURT, SO THERE IS NO NOTICE TO THE OTHER SIDE, EXPARTE PROBLEM WITH THIS. THE ONLY PROBLEM, THE ONLY ISSUE HERE IS WHETHER THE TRIAL COURT INDEPENDENTLY WEIGHED THIS, AND WHEN THE TRIAL COURT FINDS TWO STATUTORY MENTAL MITIGATION, BASED ON A FACTOR THAT THE STATE SAID SHOULDN'T EVEN BE CONSIDERED AS MITIGATING, AND THEN HE GOES ON AND FINDS MORE MITIGATION, BASED ON THAT, THEN EVEN IN THE DEFENSE MEMORANDUM, AND THE DEFENSE MEMORANDUM, THEY ARGUE ONLY ONE OF THE STATUTORY MITIGATORS, THE EXTREME EMOTIONAL DISTRESS. THERE, YOU JUST CANNOT, WHEN, WHILE FROM IS VERBATIM LANGUAGE TAKEN, THERE IS, ALSO, NUMEROUS INSTANCES THROUGHOUT THIS, WHERE IT IS VERY CLEAR THE JUDGE PROPERLY FOLLOWED HIS DUTY TO INDEPENDENTLY WEIGH AGGRAVATORS AND MITIGATORS. MOREOVER, YOUR HONOR, THEY DID NOT, IN THEIR SENTENCING MEMORANDUM, EVEN REALLY DISPUTE THE FOUR AGGRAVATORS AT ISSUE HERE. IN THE DEFENSE MEMORANDUM, THEY SAY, THEY LIST THEM, THE FOUR AGGRAVATORS THAT THE STATE IS SEEKING, AND THEY SAY YOU CAN CONSIDER THIS. THEY DON'T EVEN ARGUE AGAINST THEM, IN THE DEFENSE MEMORANDUM. MOREOVER, THE DEFENDANT STIPULATED TO SOME OF THIS, SO REALLY, THIS SENTENCING MEMORANDUM DOES FULFILL THE JUDGE'S OBLIGATION TO INDEPENDENTLY WEIGH BOTH AGGRAVATION AND MITIGATION. AND THERE IS NOTHING WRONG WITH A TRIAL COURT USING LANGUAGE FROM ONE OF THE PARTIES, AS LONG AS HE AGREES WITH THAT LANGUAGE, AND IT IS VERY CLEAR THAT HE DID, INDEPENDENTLY, THINK ABOUT THIS DECISION TO SENTENCE THIS DEFENDANT TO DEATH. ON THE LAST ISSUE, THE NONVIOLENT FELONIES, THERE WERE NUMEROUS FELONIES AT ISSUE HERE. ONE OF THOSE WHICH THIS COURT HAS HELD IN HESS, YOU HAVE DIRECTLY HELD THAT SEXUAL BATTERY STATUTE IS PER SE A CRIME OF VIOLENCE. THIS NOT ONLY WAS A CONVICTION FOR SEXUAL BATTERY. IT WAS A CONVICTION FOR CAPITAL SEXUAL BATTERY. SO ONE OF THESE IS ABSOLUTELY UNDER EXISTING CASE LAW FROM THIS COURT, A CRIME OF VIOLENCE. SO THERE, YOU KNOW, IT WAS JUST THERE IS EXTRA THERE. THE STATE ASKS YOU TO AFFIRM THE JUDGMENT INCIDENTS. THANK YOU.

CHIEF JUSTICE: COUNSEL.

NOTHING FURTHER TO ADD.

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

MARSHAL: PLEASE RISE.