Lawrence Joey Smith v. State of Florida

LAST CASE ON THE COURT'S DOCKET THIS MORNING IS SMITH VERSUS STATE OF FLORIDA.

GOOD MORNING. MY NAME IS PAUL HELM, AND I REPRESENT THE APPELLANT LAWRENCE JOEY SMITH, AND MR. SMITH AND HIS CODEFENDANT WERE INDICTED FOR THE FIRST-DEGREE MURDER OF ROBERT CRAWFORD AND THE ATTEMPTED MURDER OF STEPHEN TUTTLE. MR. SMITH WAS SEPARATELY TRIED. A VERY BRIEF FACTUAL CONTEXT, MR PIERCE DESIRED TO PURCHASE 1,000 GEL TABS OF LSD. HE APPROACHED A TEENAGED BOY RESIDING WITH HIS STEPFATHER AT A PLACE CALLED "WE SHELTER AMERICA." THIS BOY CALLED, IN TURN CALLED STEPHEN TUTTLE. MR. PIERCE ENDED UP GIVING $1200 TO MR. TUTTLE, WHO THEN ASSOCIATED HIMSELF WITH MR. CRAWFORD, AND THEY WENT OUT AND MADE AN EFFORT TO BUY THE DRUGS, BUT IN THE PROCESS THE MONEY WAS STOLEN FROM THEM. THEY RETURNED TO "WE SHELTER AMERICA", WHERE MR. PIERCE PRODUCED A 40 CALIBER PISTOL AND HELD THEM HOSTAGE. HE CALLED, HE MADE A TELEPHONE CALL TO THEODORE BERFIELD AND ASKED MR. BURROW-THEODORE BUTTERFIELD AND ASKED MR. BUTTERFIELD TO BRING ANOTHER MAN BRITINGHAM AND ANOTHER DEFENDANT LAWRENCE SMITH, TO BRING HIM TO "WE SHELTER AMERICA". AND ONCE THEY WERE THERE, THERE WAS A BRIEF CONVERSATION BETWEEN MR. PIERCE AND MR. SMITH, BUT THE WITNESSES DID NOT HEAR WHAT WAS SAID. WHAT MR. PIERCE SAID THAT WAS HEARD WAS THAT THEY WERE, THE BOYS WERE GOING TO TAKE THEM OUT AND SHOW THEM WHERE THE PEOPLE WERE THAT THIS TAKEN THE MONEY. THEN HE TURNED TO THE STEPFATHER OF THE ORIGINAL BOY THAT HE HAD CONTACTED, KEN SHOOK, AND TOLD HIM THAT, WELL, ACTUALLY THEY WERE GOING TO TAKE THEM OUT AND PUNCH THEM IN THE JAW AND LET THEM WALK HOME. THAT IS ALL HE WAS GOING TO DO. BUT SO THE FOUR MEN, PIERCE, SMITH, BUTTERFIELD AND BRITTING HAM, ALL BEING ARMED, GOT INTO PIERCE'S CAR, WITH CRAWFORD AND TUTTLE, AND --

BOTH OF THIS TESTIMONY ESTABLISHED BY THE TWO, BUTTERFIELD AND THE TWO OTHERS? IN OTHER WORDS --

WELL, MOST OF THE ORIGINAL, THEIR TESTIMONY ESTABLISHES WHAT HAPPENED AFTER THEY CAME INTO THE SCENE. ALONG WITH MR. TUTTLE. BECAUSE MR. TUTTLE, WHILE HE WAS SHOT IN THE HEAD, HE SURVIVED. THE PRECEDING ON EVENTS BEFORE THEY WERE INVOLVED, WAS ESTABLISHED MOSTLY THROUGH MR. TUTTLE AND VARIOUS, MR. LAUX, THE STEPFATHER AND VARIOUS TEENAGERS INVOLVED.

UNTIL YOUR CLIENT CAME ON THE SCENE, HE HAD NOT BEEN INVOLVED.

HE HAD NOT BEEN INVOLVED WITH THE ORIGINAL DRUG TRANSACTION AT ALL, AND THERE IS NO EVIDENCE IN THE RECORD THAT HE KNEW THAT ANY SUCH DRUG TRANSACTION ATTEMPTED DRUG TRANSACTION, HAD OCCURRED.

AS FAR AS YOUR FIRST POINT ON THE COMMENT THAT WAS MADE.

YES, MA'AM.

WAS THERE A, WAS THIS SOMETHING THAT HAD BEEN REVEALED IN PRETRIAL? WAS THERE A MOTION IN LIMINE? WAS THERE AN ATTEMPT TO INTRODUCE THIS AS WILLIAMS RULE OR WAS THE FIRST TIME THAT ANYONE EVER HEARD THIS STATEMENT --

I BELIEVE, YOUR HONOR, WHEN THE, MR. BUTTERFIELD MADE THE STATEMENT AT TRIAL, THAT IT WAS THE FIRST TIME THAT ANYBODY HAD HEARD THE STATEMENT. IN CONTRAST, I DIDN'T FOLK OUTS ISSUE, I DID NOTICE IN PREPARING FOR ORAL ARGUMENT THAT, DEFENSE COUNSEL, IN CROSS-EXAMINING MR. BUTTERFIELD, ASKED HIM ABOUT A DEPOSITION THAT MR. BUTTERFIELD HAD GIVEN PRIOR TO TRIAL, AND IN THE DEPOSITION, DEFENSE COUNSEL ASKED, AFTER THE SECOND ONE THAT MR. CRAWFORD HAD GOTTEN OUT, AND YOU HEARD THE TWO GUNSHOTS, WHEN JOEY GOT BACK IN THE CAR, DID YOU HEAR ANY CONVERSATIONS BETWEEN HIM AND HANS PIERCE OR ANYBODY? AND MR. BUTTERFIELD'S ANSWER WAS NO, SIR. DID YOU HEAR ANYBODY SAY ANYTHING ABOUT IT? ANSWER, NO, SIR.

WAS THERE A RICHARDSON-TYPE OBJECTION?

YOUR HONOR, DEFENSE COUNSEL DID NOT RAISE A DISCOVERY VIOLATION. THERE WAS NO RICHARDSON INQUIRY. BUT I DO THINK THE FACT THAT, ON DEPOSITION, MR. BUTTERFIELD HAD NOT REVEALED THE EXISTENCE OF SUCH A STATEMENT IT CALLS INTO QUESTION WHETHER SUCH A STATEMENT WAS ACTUALLY MADE BY MR. SMITH.

THAT WAS NOT ARGUMENT?

NO, SIR, THAT WAS NOT ARGUMENT. BUT THE SPECIFIC --

WE ARE GETTING AHEAD A LITTLE BIT. PIERCE HAS BEEN, HAS RECEIVED THE DEATH PENALTY ALSO, IS THAT CORRECT?

YES, SIR. HE WAS SEPARATELY TRIED AND CONVICTED, IS MY UNDERSTANDING, THAT HE WAS SENTENCED TO DEATH, AND THAT HIS APPEAL IS, ALSO, COMING BEFORE THIS COURT FORM.

SO THE CLAIM HERE WAS THAT SMITH WAS -- BEFORE THIS COURT.

SO THE CLAIM HERE WAS THAT SMITH WAS THE ACTUAL ONE TO DO THE KILLINGS OR THE KILLING. IS THAT CORRECT?

YES, YOUR HONOR. ACCORDING TO BUTTERFIELD AND BRITTING HAM, WHO ARE BOTH BOTH UNINDICTED ACCOMPLICES AT THE TIME, MR. LAWRENCE SMITH WAS THE TRIGGERMAN, AND WHAT HAPPENED WAS THAT THEY DROVE OUT INTO THE COUNTRY, PIERCE MADE A U-TURN AND STOPPED. PIERCE ORDERED TUTTLE OUT OF THE CAR. SMITH WAS IN THE FRONT PASSENGER SEAT OF THE TWO-DOOR CAR, SO HE HAD TO GET OUT, IN ORDER FOR MR. TUTTLE TO GET OUT OF THE BACKSEAT, AND ACCORDING TO BRITTINGHAM, I BELIEVE IT WAS, PIERCE TOLD MR. SMILT TO -- MR. SMITH TO POP HIM IN THE JAW AND MR. SMITH REPLIED "F THAT" AND SHOT TUTTLE IN THE BACK OF THE HEAD.

HAD SMITH ACQUIRED A WEAPON THAT PIERCE HAD PREVIOUSLY AT THAT TIME?

YES. THE MURDER WEAPON AND THE WEAPON USED TO, THE WEAPON USED TO SHOOT BOTH TUTTLE AND MR. CRAWFORD, MR. CRAWFORD IS THE MURDER VICTIMS, WAS PIERCE'S 40 CALIBER PISTOL. IN THE CAR, AS THEY WERE DRIVING ALONG, ALONG, MR. SMITH BROUGHT UP THE FACT THAT HIS GUN JAMMED, AND HE TRADED PISTOLS WITH SMITH

HOW MANY MINUTES BEFORE THEY TURNED OFF ON TO THE DIRT ROAD DID THAT OCCUR?

I DON'T BELIEVE THERE WAS A DIRT ROAD INVOLVED HERE.

THE ROAD OTHER THAN --

THEY DROVE SOUTH A CERTAIN DISTANCE ON HIGHWAY 41.

41, RIGHT.

I DON'T THINK IT IS CLEAR JUST HOW FAR THEY DROVE, AND THEN THEY TURNED WEST AND DROVE OUT HIGHWAY 54, AND I BELIEVE THAT THE WITNESSES IN THE CAR SAID THAT THEY THOUGHT THEY DROVE 3-TO-10 MILES OUT HIGHWAY 54, OFF OF HIGHWAY 41, BUT ONE OF THE CRIME SCENE TECHNICIANS DETERMINED THAT THE DISTANCE FROM HIGHWAY 41, DOWN HIGHWAY 54 TO THE SCENE WHERE CRAWFORD WAS SHOT WAS --

WHERE HE TURNED AROUND.

-- WAS ACTUALLY ONLY 1 AND-A-HALF MILES.

BUT DOES THE RECORD REFLECT WHEN, IN THAT SEQUENCE, THE GUNS WERE EXCHANGED?

WHEN THEY WERE ON HIGHWAY 41.

WHILE HE WAS STILL ON 41.

YES, YOUR HONOR.

SO SOME MATTER OF MINUTES AT LEAST, BEFORE --

BASICALLY.

OKAY.

BUT --

COUNSEL, I DON'T KNOW WHAT ISSUES YOU ARE INTENDING TO ADDRESS, BUT I WOULD LIKE YOU TO ADDRESS ISSUE NUMBER 4 ABOUT WHAT THE TRIAL COURT FOUND AND WHAT HE FELT, WHETHER HE FELT BOUND TO IMPOSE THE DEATH PENALTY OR THE JURY HAD FOUND AGGRAVATORS --, WHERE THE JURY HAD FOUND AGGRAVATORS.

OKAY. THAT WAS NOT WHERE I WAS GOING TO START.

OKAY. START WHEREVER YOU WANT, BUT I WOULD LIKE YOU TO ADDRESS THAT AT SOME POINT.

WELL, TO ANSWER YOUR QUESTION THE TRIAL COURT EXPRESSLY STATED IN THE SENTENCING ORDER, THAT HE FOUND THAT THE AGGRAVATING CIRCUMSTANCES FAR OUTWEIGHED THE MITIGATING CIRCUMSTANCES, AND THAT THE LAW OF FLORIDA, UNDER THOSE CIRCUMSTANCES, REQUIRED HIM TO IMPOSE A DEATH SENTENCE. THAT, IN FACT, IS NOT THE LAW. THE LAW IS THAT EVEN WHEN A WEIGHING OF 9 AGGRAVATING AND MIGHT -- A WEIGHING OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES INDICATES THAT DEATH WOULD BE AN APPROPRIATE PENALTY, THE JURY MAY STILL RECOMMEND LIFE. THE TRIAL JUDGE MAY STILL, IN HIS DISCRETION IMPOSE LIFE, AND EVEN IN THIS COURT, IN ITS DISCRETION CAN FIND THAT LIFE IS AN APPROPRIATE SENTENCE.

DID THE JURY INSTRUCTIONS DEVIATE FROM THE STANDARD INSTRUCTION?

NO, SIR. THE JURY INSTRUCTIONS DID NOT DEVIATE. THE POINT, THE POINT I WAS TRYING TO MAKE IN THAT ISSUE REGARDING THE PROSECUTOR'S ARGUMENT TO THE JURY, WAS HE, THE PROSECUTOR TOLD THE JURY THAT THEY WERE, THERE WERE TWO CIRCUMSTANCES IN WHICH THEY WERE OBLIGATED TO RETURN A DEATH RECOMMENDATION. ONE WAS IF THEY FOUND AGGRAVATING CIRCUMSTANCES SUFFICIENT FOR DEATH BUT NO MITIGATION, AND THE OTHER WAS WHERE THEY FOUND THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED THE MITIGATING

CIRCUMSTANCES. NOW, THE IMPROPER ARGUMENT BY THE PROSECUTOR WAS NOT PRESERVED THERE IS NO REQUIREMENT, UNDER FLORIDA LAW, THOUGH, TO PRESERVE THE QUESTION OF THE COURT'S MISAPPLICATION OF THE LEGAL STANDARD. AND THE REASON I BROUGHT UP THE PROSECUTOR'S MISSTATEMENT OF THE LAW TO THE JURY IS BECAUSE I BELIEVE THAT HIS MISSTATEMENT OF THE LAW TO THE JURY IS THE ORIGIN OF THE COURT'S MISUNDERSTANDING OF THE LAW, AND THE REASON WHY THE COURT MISSTATED THE LAW, AND MISAPPLIED THE LAW AND THE SENTENCING -- IN THE SENTENCING ORDER, AND BECAUSE THE PROSECUTOR'S REMARKS, EVEN THOUGH THEY WERE NOT OBJECTED TO SUCCEEDED IN MISLEADING THE JUDGE, I THINK THERE IS A VERY REAL DANGER THAT THE PROSECUTOR REMARKS, ALSO, COULD HAVE MISLED THE INJURY -- THE JURY INTO MISS APPLYING THE LAW INTO MAKING THEIR DEATH RECOMMENDATION, SO I AM ARGUING THAT, INSTEAD OF MERELY REVERSING THE TRIAL COURT'S FINDING, BECAUSE OF ITS MISAPPLICATION OF THE LAW AND REMANDING FOR RESENTENCING SOLELY BY THE TRIAL JUDGE, THAT THIS COURT OUGHT TO REMAND FOR RESENTENCING FOR A WHOLE NEW RESENTENCING TRIAL, BEFORE A NEW JURY, SO THAT WE WOULD NOT HAVE A DEATH RECOMMENDATION BY THE JURY THAT IS TAINTED BY THE PROSECUTOR'S MISSTATEMENT OF THE LAW.

BUT YOU AGREE THAT THERE WAS NO PRESERVATION --

THERE WAS NO PRESERVATION OF THE PROSECUTOR'S MISSTATEMENT. I ABSOLUTELY AGREE WITH THAT.

AND YOU ALSO AGREE THAT THE JURY INSTRUCTIONS WERE APPROPRIATE.

YES, YOUR HONOR, THE JURY INSTRUCTIONS WERE THE STANDARD INSTRUCTIONS.

SO IT SEEMS TO ME WE ARE ONLY DEALING WITH WHAT HAPPENED AFTER THE JURY RECOMMENDATION. AND IF WE AGREE WITH YOU THAT THE JUDGE MISAPPLIED THE LAW, MISUNDERSTOOD WHAT THE LAW WAS, DO WE STOP THERE AND SAY WE HAVE GOT TO REMAND FOR RESENTENCING, OR DO WE UNDERTAKE A HARMLESS-ERROR ANALYSIS AND HAVE NOW, A JURY RECOMMENDATION OF DEATH, AND UNDER OUR CASE LAW, THE JUDGE, ALTHOUGH NOT BOUND BY IT, MUST GIVE IT GREAT DEFERENCE?

WELL, YOU ARE SAYING WE SHOULD GO TO GREAT DEFERENCE TO -- WE SHOULD GIVE GREAT DEFERENCE TO A JURY RECOMMENDATION THAT I AM SAYING IS TAINTED BY THE PROSECUTOR'S MISSTATEMENT OF THE LAW TO THE JURY.

YOU I AM NOT SAYING ANYTHING. I AM WILL ASKING YOU -- I AM ASKING YOU IF, ONCE WE AGREE WITH YOU, MUST WE STOP THERE AND REMAND, OR MUST WE UNDERTAKE A HARMLESS-ERROR ANALYSIS, TO DETERMINE WHETHER TO REMAND?

I THINK THAT YOU CAN UNDERTAKE A HARMLESS-ERROR ANALYSIS, BUT I THINK, BUT THE STANDARD FOR HARMLESS ERROR IS WHETHER THE ERROR AFFECTED THE OUTCOME. FOR THE JUDGE TO APPLY THE WRONG LEGAL STANDARD IN DECIDING WHETHER TO IMPOSE A DEATH SENTENCE THAT, NECESSARILY AFFECTED HIS DECISION! HIS DECISION WAS AFFECTED BECAUSE HE MISUNDERSTOOD THE LAW HAD HE CORRECTLY UNDERSTOOD, BY MISUNDERSTANDING THE LAW, BY BELIEVING THAT THE LAW REQUIRED HIM TO IMPOSE A DEATH SENTENCE, THAT FORECLOSED HIM FROM REASONABLY CONSIDERING THE POSSIBILITY OF NOT IMPOSING A DEATH SENTENCE.

NOW, THE JUDGE ALSO SAID THAT THE AGGRAVATORS GREATLY OUTWEIGH THE MITIGATORS.

YES, YOUR HONOR.

IN CIRCUMSTANCES WHERE THAT FINDING IS MADE, WHAT WOULD ALLOW A JUDGE TO

NEVERTHELESS, IMPOSE LIFE?

BASICALLY, THE LAW IS THAT EVERY STEP OF THE PROCEEDINGS, THE, THERE IS A POSSIBILITY FOR MERCY AND THAT THE LAW PRESERVES THAT POSSIBILITY FOR MERCY.

DOES THE LAW PRESERVE THAT POSSIBILITY FOR THE JUDGE AS WELL AS FOR THE JURY?

YES, YOUR HONOR, AND THIS COURT HAS SAID SO. YEAH, THIS COURT SAID THAT, EVEN THOUGH CERTAIN SITUATIONS, WHEN YOU WEIGH THE AGGRAVATING VERSUS THE MIGHT GLATING CIRCUMSTANCES -- VERSUS THE MITIGATING CIRCUMSTANCES, CERTAIN SITUATIONS WOULD APPEAR TO CALL FOR DEATH, BUT BUT THAT THIS COURT IS BOUND TO IMPOSE -- BUT THAT THE COURT IS BOUND TO IMPOSE THE DEATH SENTENCE. EVERY ACTOR IN THE SENTENCING PROCESS STILL HAS THE POSSIBILITY OF CONSIDERING MERCY

CAN YOU TELL US ABOUT ONE CONTINUING PROBLEM THAT SEEMS TO BE RAISING ITS HEAD MORE AND MORE, AND THAT IS THE CONFLICT BETWEEN PROSECUTORS AND DEFENSE COUNSEL, AS TO HOW FAR THE STATE CAN GO IN DISCUSSING THE AGGRAVATORS AND MITIGATORS. NOW, THIS IS SOMETHING THAT IS NOT REALLY CHOREOGRAPHED TOTALLY AS PROSECUTORS STAND BEFORE A JURY AND TRY TO EXPLAIN. THAT WE HAVE SEEN IT MORE AND MORE. WOULD YOU DESCRIBE FOR ME WHAT YOU BELIEVE TO BE THE FURTHEREST EXTENT TO WHICH THE STATE MAY GO WITH REGARD TO THIS CONCEPT. IS IT THEY SHOULD APPLY OR MAY APPLY THE DEATH PENALTY? WHAT IS THE FURTHEREST ELEMENT, AND ALSO ADDRESS IF WE HAVE, IS THIS A STANDARD LESS, IS THIS A STANDARD LESS PROCESS, THAT IT IS UP TO THE JURY AND WHAT THE MITIGATORS SHOULD DO IS RENDER A TOTALLY USELESS DECISION. IF THEY TAKE IT WHERE THEY WANT, THEN HOW DOES THAT AFFECT THE DEATH PENALTY?

IT IS NOT WHAT THE COURT WANTS. OBVIOUSLY THE FROM THE OR IS ENTITLE -- OBVIOUSLY THE PROSECUTOR IS ENTITLED TO TELL THE JURY THAT THE LAW PROVIDES CERTAIN AGGRAVATING CIRCUMSTANCES FOR A PERSON TO BE ELIGIBLE FOR DEATH. YOU HAVE TO FIND THAT AT LEAST ONE OF THOSE AGGRAVATING CIRCUMSTANCES HAS BEEN PROVEN BEYOND A REASONABLE DOUBT. NOW, IN DECIDING WHAT SENTENCE TO RECOMMEND, THE LAW PROVIDES THAT YOU ARE TO CONSIDER WHETHER YOU KNOW, WHICH AGGRAVATING CIRCUMSTANCES HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT. AND YOU ARE TO CONSIDER WHATEVER MITIGATING CIRCUMSTANCES HAVE BEEN PROVEN TO YOUR SATISFACTION AND YOU ARE TO WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND THEN DECIDE WHAT SENTENCE YOU FEEL IS APPROPRIATE.

AND IF THE AGGRAVATORS OUTWEIGH, JUST A MINUTE, IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS, WHAT CAN THEY, THEN, SAY?

THAT THE JURY MAY RECOMMEND THE DEATH SENTENCE, IF THE AGGRAVATORS --

THAT IS AS STRONG AS IT MAY BE.

IN ORDER TO, IN ORDER TO ADHERE TO WHAT THIS COURT HAS SAID IN I KNOW BEYOND A REASONABLE DOUBT AND WHAT -- IN HENYARD, I WOULD SAY YES -- IN HENYARD, I WOULD SAY YES, BECAUSE IF THEY STATED IN MORE DIRECT, STRONGER TERMS, THAT THEY BASICALLY DIRECT THE JURY, WHEN THE AGGRAVATION OUTWEIGHS YOU WILL RECOMMEND DEATH, THEN THE PROSECUTOR HAS RUN AFOUL OF WHAT THIS COURT HAS SAID THE LAW IS.

WHAT ABOUT THE WORD "SHOULD"?

IT KIND OF BOTHERS ME, BECAUSE YOU ARE GETTING INTO THE STATE MAKING ITS ARGUMENT, AND IT SEEMS TO ME THAT THE STATE IS TRYING TO DEMONSTRATE TO THE JURY THAT, UNDER THE FACTS OF THIS CASE, YOU KNOW, DEATH IS REALLY THE APPROPRIATE PENALTY FOR THIS

CASE. WHEREAS, OF COURSE, ON THE OTHER SIDE, THE DEFENSE IS TRYING TO MAKE THE ARGUMENT THAT, UNDER THE CIRCUMSTANCES OF THIS CASE, THAT SOMETHING LESS THAN DEATH WOULD SATISFY, WOULD BE SATISFACTORY, AND SO WHEN WE GET INTO THESE ARGUMENTS ABOUT "MAY" VERSUS "SHOULD", IT JUST SEEMS TO ME THAT WE ARE HAMSTRINGING THE PROSECUTOR FROM MAKING A STRONG ARGUMENT TO THE JURY THAT DEATH IS APPROPRIATE!

WELL, YOUR HONOR, THIS COURT HAS RULED THAT A PROSECUTOR MAY NOT SAY THAT YOU MUST IMPOSE DEATH. I, WHAT, IN THE PROCESS OF ASKING YOUR QUESTION, I THINK YOU SUGGESTED THE MOST APPROPRIATE LANGUAGE FOR THE PROSECUTOR TO USE, AND THAT IS WHEN THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES, DEATH IS THE APPROPRIATE SENTENCE!

COULD WE GET TO POINT ONE.

I WOULD LIKE TO!

WHAT IS YOUR, WHY WAS IT ERRONEOUSLY ADMITTED? IS IT A WEIGHING THAT THE PREJUDICE OUTWEIGHS PROBATIVE VALUE OR IT HAS NO PROBATIVE VALUE?

WELL, FIRST OF ALL, I THINK IT HAS NO PROBATIVE VALUE.

ALL RIGHT. AND IT DOESN'T GO, THE STATE ARGUES IT GOES TO HIS INTENT AND HOW DOES IT NOT GO TO THAT?

WELL, THE STATEMENT IS, WHEN JOEY GOT BACK IN THE CAR, HE HAD MADE A STATEMENT THAT THAT WAS THE 13th OR 14th PEOPLE THAT HAD BEEN, THAT HE HAD SHOT. THERE IS NO INDICATION IN THAT STATEMENT, THAT THE PEOPLE WHO WERE SUPPOSEDLY PREVIOUSLY SHOT, AND BY THE WAY THERE IS NO RECORD THAT MR. SMITH EVER SHOT ANYBODY ELSE, THERE IS NO INDICATION IN THAT STATEMENT THAT ANY OF THOSE PEOPLE WERE INTENTIONALLY SHOT.

WAS HIS DEFENSE THAT HE, MISTAKENLY SHOT THESE PEOPLE OR THAT HE DIDN'T SHOOT THEM AT ALL?

HIS DEFENSE WAS HE DIDN'T SHOOT THEM AT ALL.

SO IT WASN'T IT MIGHT BE, WOULD YOU AGREE THAT, IF, IF HE SAID THIS WAS AN ERROR IN SHOOTING THESE PEOPLE, THAT THE GUN WENT OFF ACCIDENTALLY, WAS THERE ANY EVIDENCE THAT THE STATE MIGHT BRING IN THAT WOULD BE SOMETHING WE WOULD LOOK AT?

YES, YOUR HONOR, BUT THAT IS NIGHT THE DEFENSE IN THIS CASE. THE DEFENSE IN THIS CASE -- THAT WAS NOT THE DEFENSE IN THIS CASE. THE DEFENSE IN THIS CASE WAS AN EFFORT BY DEFENSE COUNSEL, THROUGH CROSS-EXAMINATION OF THE STATE'S WITNESSES AND ARGUMENT TO THE JURY, THAT THE ACTUAL SHOOTING HAD TO HAVE, WAS DONE BY SOMEBODY OTHER THAN JOEY SMITH.

IT WAS ACTUALLY SOME THEORY OF RACE GESTAE THAT IT WASN'T -- OF RES GESTAE THAT IT WASN'T REALLY BEING ADMITED FOR THE TRUTH OF THE MATTER. IT WAS JUST SORT OF PART OF WHAT HE BLURTED OUT WHEN HE WALKED AWAY.

THE COURT ADMITS THAT IT WAS PART OF THE TESTIMONY. FRANKLY I DON'T UNDERSTAND THAT RULING F IT WERE NOT PART OF THE TESTIMONY, THERE WOULD BE NO REASON TO OBJECT.

BUT MR. HELM, THE CONTEXT IN WHICH THIS CAME IN WAS THAT THEY WERE TALKING, THAT, THE QUESTIONS WERE ABOUT DID YOU SEE WHO SHOT HIM, BEING SHOT? DID YOU HEAR AN A

GUNSHOT? YES, SIR. DID YOU SEE TUTTLE FALL? NO, SIR. WHAT IS THE NEXT THING THAT HAPPENED? AND THEN IT GOES, HE SAYS, YOU GOT TWO, YOU SAW TWO SHOTS GO OFF. YES. AND DID YOU SEE A FLASH? THEN IT GOES ON THROUGH THAT IS THE SEQUENCE ON THE, DID YOU HEAR JOEY MAKE ANY STATEMENTS TO PIERCE? FONTS SAID SOMETHING ABOUT DEAD OR SOMETHING. I DIDN'T HEAR EXACTLY WHAT HE SAID. I COULDN'T HEAR EXACTLY WHAT WAS SAID, BUT WHEN JOEY GOT BACK IN THE CAR, WHEN JOEY GOT BACK IN THE CAR, HE HAD A STATEMENT. WELL, THAT THAT WAS THE 13th OR 14th PEOPLE THAT HE HAD BEEN SHOT. I MEAN, THIS WAS A DISCUSSION ABOUT THE SEQUENCE OF WHAT WAS GOING ON AT THE TIME THAT THESE SHOTS WERE FIRED, CORRECT? I MEAN, IT WAS WITHIN THAT CONTEXT.

YES.

OKAY. AND SO IT WASN'T AN EFFORT. DON'T YOU HAVE TO AGREE THAT IT WASN'T AN EFFORT TO PROVE ANY PRIOR CRIMES? THIS WAS A CONTEXTUAL TYPE OF STATEMENT THAT WAS BEING MADE, AS TO WHAT THIS EYEWITNESS SAID AND HEARD THE DEFENDANT SAY, AT THE TIME THIS WAS GOING ON.

IF, IN FACT, HE EVER HEARD HIM SAY THAT. YOUR HONOR, THE POINT IS, IS THAT PARTICULAR STATEMENT, "THAT WAS THE 13th OR 14th PEOPLE" THAT HE HAD SHOT. THIS IS ALMOST IDENTICAL TO THE KIND OF, THE STATEMENT THAT THIS COURT FOUND TO BE REVERSIBLE ERROR IN JACKSON VERSUS STATE, WHERE A WITNESS, A STATE WITNESS TESTIFIED THAT THE DEFENDANT CLAIMED THAT HE WAS A THOROUGH BRED KILLER.

THAT WAS THE DETROIT GANG GUY?

YES. THE STATEMENT WAS MADE IN A DIFFERENT CONTEXT. BUT THE POINT IS, IS THAT THERE IS NO EVIDENCE WHATSOEVER THAT LAWRENCE JOEY SMITH EVER SHOT ANYBODY, BEFORE HE SHOT STEVEN TUTTLE AND ROBERT CRAWFORD, AND THIS EVIDENCE IS PLACING THIS STATEMENT, IS PLACING BEFORE THE JURY, THE IDEA THAT MR. SMITH IS SOME KIND OF ARMED LUNATIC WHO IS RUNNING AROUND, SHOOTING PEOPLE, ON A REGULAR BASIS, THAT HE HAS SHOT TWELVE OR 13 PEOPLE BEFORE THE SHOOTINGS THAT TOOK PLACE IN THIS CASE, AND YET THAT INFORMATION IS NOT RELEVANT TO THE ISSUES IN THIS CASE. IT IS NOT PROBATIVE OF --

WELL, ISN'T IT RELEVANT OR PROBATIVE, IF THE DEFENSE IS IT WASN'T ME. IT WAS THE OTHER GUY DRIVING THE CAR, DOESN'T IT REALLY GO TO THAT ISSUE? AND SECONDLY, JUST ASK WAS THERE ANY REQUEST FOR A LIMITING INSTRUCTION, ONCE THE OBJECTION WAS DENIED?

NEW YORK CITY YOUR HONOR, AND THIS COURT DOES NOT REQUIRE SUCH AN INSTRUCTION, WHEN STATEMENTS LIKE THIS ARE MADE. IN ZUBACK VERSUS STATE, THIS COURT EXPRESSLY RULED THAT A CURETIVE INSTRUCTION COULD NOT REMOVE THE KIND OF TAINT THAT THIS KIND OF INFORMATION --

THE JUDGE OVERRULED THE OBJECTION, DIDN'T HE?

HE DID OVERRULE THE OBJECTION YES.

BUT THERE WASN'T ANY LIMIT TO THE INSTRUCTION.

NO, YOUR HONOR, THERE WAS, BUT THE CASE LAW, STATE OF FLORIDA, DOES NOT REQUIRE A REQUEST FOR SUCH AN INSTRUCTION.

SUMING IT IS PURE WILLIAMS RULE.

EVEN IF THIS COURT WERE TO FIND THAT THERE IS SOME PROBATIVE VALUE TO THE STATEMENT STILL, THIS IS AN OVERWHELMING PREJUDICIAL STATEMENT, A STATEMENT THAT WOULD CAUSE

THE JURY TO SPECULATE, WITHOUT EVIDENCE --

OTHER THAN THIS STATEMENT, WAS IT EVER MENTIONED AGAIN BY A PROSECUTOR, DEFENSE COUNSEL OR ANYBODY ELSE, ANY OTHER WITNESSES AT ANY OTHER TIME DURING THE TRIAL, IN EITHER EVIDENTIARY PHASE OR IN ARGUMENT BEFORE THE JURY?

NO, YOUR HONOR, IT WAS NOT, BUT THIS IS NOT THE KIND OF STATEMENT THAT JURORS FORGET, AND I THINK THE TRIAL JUDGE ILLUSTRATED THAT THIS IS NOT THE KIND OF STATEMENT THAT PEOPLE FORGET, BECAUSE THE TRIAL JUDGE PARAPHRASED THE STATEMENT IN HIS SENTENCING ORDER. AND IN FACT, TWISTED THE EVIDENCE THAT CAME BEFORE THE JURY AND TURNED IT INTO SOMETHING MUCH WORSE.

CHIEF JUSTICE: WE HAVE GONE WELL BEYOND YOUR TIME. IF YOU WANT TO SAVE ANY TIME AT ALL FOR REBUTTAL, REALIZING OUR DISCUSSION HAS BEEN EXTENSIVE DURING YOUR MAIN ARGUMENT. BUT THIS IS AN APPROPRIATE TIME, IF YOU ARE GOING TO SAVE ANY TYPE AT ALL.

THANK YOU, YOUR HONOR. -- IF YOU ARE GOING TO SAVE ANY TIME AT ALL.

THANK YOU, YOUR HONOR. I JUST WANT TO EMPHASIZE THAT EVEN IF YOU FIND SOME RELEVANCE TO THE STATEMENT THAT THE PREJUDICE TO THE DEFENSE CLEARLY OUTWEIGHS PROBATIVE VALUE. THIS IS THE SORT OF EVIDENCE ON WHICH THIS COURT HAS REVERSED NUMEROUS TIMES. I HAVE ALSO CITED IN MY BRIEF, CASES FROM OTHER STATES WHERE SIMILAR REMARKS WERE MADE AND OTHER STATES HAVE ALSO FOUND IT NECESSARY TO REVERSE AND REMAND FOR A NEW TRIAL, AND I WOULD RESPECTFULLY REQUEST THAT THE COURT DO SO IN THIS CASE. THANK YOU.

CHIEF JUSTICE: THANK YOU.

MAY IT PLEASE THE COURT. I AM CANDACE SABELLA REPRESENTING THE STATE OF FLORIDA. WITH REGARD TO THE STATEMENT OF THE 13th OR 14th PERSON THAT HE HAD SHOT, I CITED TWO CASES IN MY BRIEF, AND THIS CASE PRESENTS A BETTER CASE THAN EITHER OF THOSE CASES AND THIS COURT HELD THAT SIMILAR TYPE OF STATEMENTS WERE ADMISSABLE. IN BOTH OF THOSE CASES.

LET ME ASK YOU A QUESTION.

SURE.

IS THIS STATEMENT BEING OFFERED FOR THE TRUTH OF THE MATTER, THAT IS EITHER TO SHOW THAT IT WAS AN ABSENCE OF MISTAKE OR THAT HE WAS MORE LIKELY TO BE THE SHOOTER BECAUSE HE HAD DONE THIS 14 TYPES BEFORE?

NO, YOUR HONOR. IT WAS NOT ADMITTED TO ESTABLISH THAT HE HAD SHOT TWELVE OTHER PEOPLE. THE ONLY REASON THE STATEMENT WAS, AGAIN, WE DON'T HAVE ARGUMENT AS TO THE REASON WHY IT IS ADMITTED. THE TRIAL COURT MAY OVERRULE THE OBJECTION IN THE TESTIMONY, BUT IT WAS NEVER ARGUED BY THE STATE THAT YOU CAN FIND THAT HE COMMITTED THESE MURDERS BECAUSE HE HAS ALREADY KILLED TWELVE PEOPLE.

THIS IS WHAT VERY MUCH CONCERNS ME IN THIS CASE. WHAT CONCERNS ME, AND I REALIZE THAT A RICHARDSON VIOLATION OBJECTION WASN'T MADE, BUT WE HAVE GOT A VERY, VERY EXTENSIVE WILLIAMS RULE PROTECTION, WHICH IS THAT THIS TYPE OF EVIDENCE IS THE TYPE OF EVIDENCE THAT ISN'T SUPPOSED TO BE JUST THROWN IN AT THE LAST MINUTE, IN THE MIDDLE OF A DEATH CASE, BUT THAT IF THERE IS A INTENT TO INTRODUCE WILLIAMS RULE EVIDENCE, THE JUDGE CONSIDERS IT BEFORE TRIAL. THIS IS A STATEMENT OF THE DEFENDANT, SO IT WOULD COME IN UNDER OTHER DISCOVERY REQUIREMENTS OF THE STATE. THEN THE JUDGE CAN MAKE A

DETERMINATION IF IT IS TRUE, WHICH THEY HAVE GOT, IF IT IS WILLIAMS RULE, IT HAS GOT TO BE THAT THERE IS A LIKELIHOOD THAT HE COMMITTED OTHER CRIMES, AND THEN MAKE A BALANCING TEST. HERE A DEPOSITION WAS TAKEN, SO THERE IS NO NOTICE THE DEFENDANT HAS THAT IT EXIST, SO THEY CAN'T FILED A -- FILE A MOTION IN LIMINE TO LIMIT IT, WHEN THEY DON'T KNOW IT EXISTS. WHAT PROTECTION DO WE HAVE, IF WE ALLOW SOMETHING LIKE THIS TO JUST BE BLURTED OUT AND WITHOUT THE JUDGE HAVING AN OPPORTUNITY TO, IN A REASONED WAY, TO LOOK AT THIS IN A PRETRIAL SETTING? COULD YOU JUST ADDRESS THAT ISSUE?

YOUR QUESTION ASSUMES THAT DEFENSE COUNSEL DIDN'T KNOW THIS SIMPLY BECAUSE IT WASN'T IN THE DEPOSITION. THERE IS NOTHING IN THIS RECORD THAT SUGGESTS THAT HE WAS IN ANY WAY SURPRISED, A FPB THERE HAS --

IF IT IS WILLIAMS RULE EVIDENCE, IT IS NOT A QUESTION, IT IS NOT THE DEFENDANT'S OBLIGATION TO FILE A MOTION IN LIMINE.

THE OTHER PART OF THAT IS IT IS CLEARLY NOT WILLIAMS RULE EVIDENCE, AS THE STATE WAS NOT INTRODUCING IT TO SHOW THAT HE COMMITTED THESE OTHER CRIMES. THE ONLY REASON THIS STATEMENT IS RELEVANT AND ADMISSIBLE, IS BECAUSE IT SHOWS THE DEFENDANT'S INTENT, WHEN HE GOT BACK IN THAT CAR, THAT HE KNEW HE HAD SHOT THIS PERSON, AND THAT THAT WAS HIS STATE OF MIND AT THE TIME. THAT, WHEN YOU HAVE A DEFENSE THAT "I DID NOT DO IT. SOMETHING ELSE HAD THIS 40. IT WAS ONE OF THESE OTHER PEOPLE." AND THE DEFENDANT TO THE END MADE THAT CONTENTION, AND THEN THE STATE HAS EVIDENCE THAT HE GETS IN THE CAR AND SAYS I SHOT HIM. IT IS THE 13th OR 14th PERSON, WE ARE NOT INTRODUCING IT TO SHOW THAT HE HAD A PROPENSITY BECAUSE THERE WERE TWELVE OTHER PEOPLE THIS. STATEMENT IS ADMISSIBLE BECAUSE IT SHOWS --

WAS THERE A REQUEST FOR DISCOVERY, HERE, OF ANY STATEMENTS THE STATE KNEW ABOUT BY THE DEFENDANT?

NO, YOUR HONOR. PRIOR TO TRIAL? I DON'T KNOW, YOUR HONOR. WITH REGARD TO THIS STATEMENT, THERE WAS CLEARLY NO OBJECTION ON THAT BASIS, SO WE CANNOT ASSUME --

LET'S GO OVER THIS STEP-BY-STEP. ALL RIGHT. LET'S ASSUME THAT THERE WAS A REQUEST FOR DISCOVERY OF ANY STATEMENTS MADE BY THE DEFENDANT.

CORRECT.

CAN YOU TELL US WHETHER OR NOT THE STATE ADVISED THE DEFENDANT OF THE EXISTENCE OF THIS STATEMENT?

I CANNOT TELL YOU THAT AT ALL AND THE REASON I CANNOT TELL YOU THAT, IS BECAUSE IT WAS NOT RAISED AS OBJECTION.

WILL THE RECORD TELL WAS THAT?

I DON'T BELIEVE SO, YOUR HONOR, BECAUSE --

RECORD WILL NOT. IN OTHER WORDS THE RECORD DOESN'T CONTAIN A DEMAND FOR DISCOVERY OR THE STATE'S RESPONSE? WE DON'T HAVE ANY OF THAT IN THIS RECORD?

IT MAY VERY WELL CONTAIN THE REQUEST. I DO NOT KNOW IF THERE IS A RESPONSE. I KNOW THAT THIS STATEMENT IS NOWHERE IN THERE. I KNOW THAT THERE IS NO OBJECTION ON THE BASIS THAT HE DID NOT KNOW ABOUT IT.

BUT YOU DON'T KNOW ANYTHING ABOUT THE RECORD IN TERMS OF WHETHER IT WILL

DEMONSTRATE --

NO, YOUR HONOR.

-- THE STATE ADVISED THE DEFENDANT OF THE EXISTENCE OF THIS, BECAUSE --

NO, YOUR HONOR. IT WAS NOT RAISED AT CONCEPTION. -- IT WAS NOT RAISED, THAT OBJECTION.

I THOUGHT THAT IT WAS AS A SURPRISE TO THE STATE AS TO THE DEFENDANT, THAT IT HAD NOT BEEN MADE BEFORE.

I DID NOT ASSERT THAT, YOUR HONOR.

WAS THE WITNESS ASKED, DURING DEPOSITION, ABOUT ANY STATEMENTS MADE BY THE DEFENDANT?

YES, YOUR HONOR.

DID THE WITNESS DISCLOSE THIS STATEMENT?

NO, YOUR HONOR.

AND THAT IS NOT A CONCERN OF THE STATE?

YOUR HONOR, THERE WAS NO OBJECTION AT TRIAL THAT HE DID NOT KNOW THIS. WITHOUT AN OBJECTION BY DEFENSE COUNSEL THAT HE WAS UNAWARE OF THIS STATEMENT, WE CANNOT ASSUME THAT HE WAS AND WEAR OF THIS STATEMENT. APPELLANT COUNSEL DID NOT RAISE AN ISSUE THAT THERE WAS A DISCOVERY VIOLATION AND THAT THE DEFENSE COUNSEL WAS UNAWARE OF THIS STATEMENT. WE DID -- WE CANNOT ASSUME, ON THE RECORD BEFORE US, THAT THERE WAS ANY DISCOVERY VIOLATION, BECAUSE NOBODY HAS ASSERTED IT.

DID THE STATE KNOW ABOUT THE STATEMENT?

I DO NOT KNOW THAT, YOUR HONOR, BECAUSE IT IS NOT IN THE RECORD.

SO WE HAVE NO INDICATION THAT ANYONE, THAT THIS MAY HAVE, FOR ALL WE KNOW THEN, A SPONTANEOUS STATEMENT MADE BY THIS WITNESS THAT NEITHER THE DEFENSE NOR THE STATE HAD ANY KNOWLEDGE OF BEFOREHAND?

YOUR HONOR, I HAVE NOTICED THAT A COUPLE OF YOU HAVE THIS PORTION OF THE RECORD. MY MEMORY OF THIS QUESTIONING AND I DON'T HAVE IT IN FRONT OF ME, IS THAT THE STATE WAS ATTEMPTING TO GET HIM TO SAY THAT THERE WAS A STATEMENT HE MADE WHEN HE GOT BACK IN THE CAR. IT MAY HAVE BEEN IN REFERENCE TO THE PRIOR STATEMENT, AS TO IF HE DID, BUT I BELIEVE IT WAS IN REFERENCE TO THE 13th AND 14th. YOU HAVE IT IN FRONT OF YOU AND YOU CAN SEE THAT AS WELL AS I CAN, BUT THE FACT IS, THERE IS NO OBJECTION IN THIS RECORD THEY DIDN'T KNOW ABOUT IT, AND YOU CANNOT ASSUME THAT THERE IS A DISCOVERY VIOLATION, WHEN DEFENSE COUNSEL, TRIAL COUNSEL DIDN'T COME UP AND SAY WAIT A MINUTE, YOUR HONOR, I NEVER KNEW ANYTHING ABOUT THIS! I MEAN, IF HE HAD NOT HEARD ABOUT IT, CLEARLY HE WOULD HAVE MADE THAT OBJECTION!

THE STATE OF MIND, IS IT ONE OF THE, IS THE STATE NOW ADVANCING IN THIS PROCEEDING, THAT, IF THE TYPE OF EVIDENCE THAT WE NORMALLY THINK OF WILLIAMS RULE EVIDENCE, THAT IS TO BE PROTECTED BY A THOROUGH PRETRIAL HEARING, SO, BECAUSE WE KNOW THAT, WHEN THIS TYPE OF EVIDENCE COMES IN, THAT IT IS, THAT IT CAN'T BE RAISED, WHEN YOU HEAR THAT SOMEONE HAS BEEN SHOT SOMEONE 13 OR 14 TYPES, AND IS -- TIMES, AND IS THE STATE'S

POSITION THAT IF IT IS BEING OFFERED FOR THE STATE OF MIND AT THE TIME OF THE SHOOTING, THAT THE STATE HAS NO OBLIGATION TO FILE A NOTICE OF INTENT TO USE WILLIAMS RULE EVIDENCE AND COMPLY WITH THE REQUIREMENT OF BOTH THE STATUTE AND THE RULE?

YOUR HONOR, I DO NOT BELIEVE THIS IS WILLIAMS RULE EVIDENCE. AND WHETHER THEY MAY HAVE AN OBLIGATION UNDER A CERTAIN SET OF FACTS IS NOT THE ISSUE. THE ISSUE IS THAT THIS PARTICULAR STATEMENT GOES TO HIS INTENT. I SHOT HIM.

THAT IS WHAT I WAS ASKING YOU. YOU ARE SAYING THAT IT IS INTENT THAT I SHOT HIM, WHICH TO ME IS ABSENCE OF MISTAKE, WHICH IS ONE OF THE EXCEPTIONS TO WHY YOU WOULD ALLOW IN OR MAY BE ABLE TO ALLOW IN COLLATERAL CRIME EVIDENCE TO WEIGH IT, IS SUBJECT TO THE WILLIAMS RULE, SO THAT IS WHAT I WAS TRYING TO UNDERSTAND, WHEN YOU SAY IT GOES TO A STATE OF MIND. TO ME, THAT IS ONE OF THE EXCEPTIONS TO WHEN IT IS BEING OFFERED FOR SOMETHING OTHER THAN TO SHOW BAD CHARACTER, BUT THEN THE STATE, IN ORDER TO DO THAT, HAS TO FIRST GIVE THE TRIAL JUDGE AN OPPORTUNITY TO EVALUATE IT, AND THEN SO THE JUDGE CAN MAKE THOSE DETERMINATIONS, AND THEN FINALLY MAKE A DETERMINATION OF WHETHER THE PROBATIVE VALUE IS OUTWEIGHED BY THE PREJUDICE. IT CAN'T BE DONE, WHEN IT IS JUST THROWN IN IN THE MIDDLE OF THE TRIAL. THERE IS NO WAY TO DO THAT. THAT IS WHAT WILLIAMS RULE --

WE ARE NOT INTRODUCING THIS EVIDENCE AS WILLIAMS RULE EVIDENCE TO SHOW HIS PROPENSITY TO COMMIT SOME OTHER CRIME. THIS IS A STATEMENT THAT HE MADE DURING THE COURSE OF THIS MURDER THAT HE SHOT THIS MAN. IT IS WHETHER IT IS THE 13th, 14th, IT DOESN'T MAKE ANY DIFFERENCE, AND THAT IS NOT WHAT PROVES HIS STATE OF MIND. WHAT PROVES HIS STATE OF MIND IS HE IS SAYING I SHOT HIM! THAT IS THE ONLY THING THAT IS RELEVANT, AND AS THE TRIAL COURT NOTED IN HIS ORDER WHEN HE WAS TALKING ABOUT THIS, IT PROBABLY WAS JUST BRAG DOSE YO, AND REALLY YOU HAVE GOT A 22-YEAR-OLD MAN MAKING THIS STATEMENT. THAT IS WHAT IT WAS. THAT IS THE ASSERTION WE HAVE BEFORE US, BUT THAT BRAG DOSE YO SHOWS THAT HE INTENDED TO COMMIT THIS CRIME.

HOW DID THE STATE USE IT IN CLOSING ARGUMENT?

THE STATE DID NOT USE IT IN CLOSING ARGUMENT.

DOES THAT STRIKE YOU AS STRANGE THAT IT IS SUCH RELEVANT INFORMATION THAT THE STATE WOULDN'T WANT TO SAY ON TOP OF THAT THAT HE IS SAYING HE DIDN'T SHOOT THIS PERSON. LOOK WHAT HE SAID TO THE WITNESS AT THE TIME OF THE SHOOTING?

MR. ALLEN IS A VERY EXPERIENCED PROSECUTOR, AND I HIM SURE THAT HE DIDN'T WANT TO HAVE TO -- AND I AM SURE THAT HE DIDN'T WANT TO HAVE TO TREAD ON THIS ANY MORE THAN HE ABSOLUTELY HAD TO, AND WE ARE GOING TO LIMIT IT TO THE TESTIMONY THAT IS THERE AND HE DOESN'T GO ANY FURTHER WITH IT AND DOESN'T MAKE ANYMORE OUT OF IT THAN THERE IS BEFORE US, AND THERE IS NO FURTHER ARGUMENT, THEN IN THE EVENT THIS COURT DID FIND A PROBLEM, WE CAN STAND IN FRONT OF YOU AND SAY, YOUR HONOR, IT CLEARLY HARMLESS BECAUSE IT ONLY MENTIONED THAT ONE TIME AND NOBODY RELIED UPON IT.

WHAT ABOUT THE TRIAL COURT? THE TRIAL COURT SEEMED TO RELY ON IT, AND THEN IN FACT GOT IT WRONG. OKAY.

YES. HE APPARENTLY DID GET IT WRONG. I COULD FIND NO SUPPORT IN THE RECORD OR EVEN --

WOULD YOU AGREE THE TRIAL COURT DID RELY ON IT?

ACTUALLY WHAT THE TRIAL COURT SAID WAS I CAN'T REALLY RELY ON THIS. IT IS PROBABLY BRAG DOSEIOUS. I CAN'T GUESS WHAT HE MEANS, BUT HE DOES KNOW THAT EVEN IF THERE WAS

A PROBLEM WITH THIS STATEMENT, THAT IT DOESN'T HAVE ANY IMPACT ON HIS FINDING FOR CCP. AND HIS FINDINGS FOR COLD, CALCULATED AND PREMEDITATED CONSISTS OF SIX PAGES WHERE HE GOES OVER THE FACTS. WHEN YOU ELIMINATE THIS ONE THING AND HE RECOGNIZES RIGHT UP FRONT THAT, BECAUSE OF, THERE IS NO SUPPORT FOR ANY CONTENTION THAT HE KILLED OTHER PEOPLE, AND THAT IT IS QUESTIONABLE IN NATURE THAT --

WHERE DID THE TRIAL COURT GET THIS ADDITIONAL THING ABOUT -- IKE NOT TELL YOU THAT, EITHER, YOUR HONOR. I WENT THROUGH THE DEPOSITIONS. I WENT THROUGH THE RECORD. I WENT THROUGH FONTS PIERCE'S RECORD, AND I COULD NOT FIND THAT PARTICULAR STATEMENT ANYWHERE, YOUR HONOR.

COULD YOU ADDRESS THE CCP ISSUE OF WHY WAS THERE ENOUGH EVIDENCE TO FIND THAT AGGRAVATOR?

YOUR HONOR, THIS COURT THAT IS CONSISTENTLY HELD, WHERE YOU HAVE AN EXECUTION-STYLE KILLING, WHICH IS WHAT WE HAVE IN THE INSTANT CASE, THAT COLD, CALCULATED AND PREMEDITATED IS SUPPORTED. IN THIS PARTICULAR CASE, AFTER HAVING COME TO THE SCENE WITH A GUN, AFTER HAVING TRADED FOR A GUN THAT WOULD WORK, STOPPING AND SHOOTING MR. TUTTLE IN THE BACK OF THE HEAD, PRONOUNCING HIM DEAD BECAUSE HE SHOT HIM IN THE HEAD WITH A 40, THEY THEN STOP A FEW STEPS AWAY. HE ORDERS THIS OTHER GUY OUT. SHOOTS HIM ONCE AND HE FALLS TO THE GROUND, THEN HE STANDS OVER HIM AND GIVES HIM ANOTHER SHOT AND THEN GETS BACK IN THE CAR AND SAYS "I SHOT HIM." IN THESE CASES, THIS COURT HAS CONSISTENTLY FOUND, COLD, CALCULATED AND PREMEDITATED.

BUT ISN'T THERE ALSO THE REQUIREMENT OF ADVANCED PLANNING AND PREMEDITATION, AND THE FACT THAT THEY HAD GUNS WHEN THEY FIRST WENT TO THE HOUSE IS EVIDENCE THAT THEY WERE THERE, BECAUSE POSSIBLY THERE WAS DRUG DEALERS WITH GUNS, AND HE HAD TO PROTECT THEMSELVES, BUT DOESN'T PER SE, SHOW THAT THERE WAS HEIGHTENED PREMEDITATION.

WELL, YOUR HONOR, IT IS THE STATE'S CONTENTION THAT THERE WAS SOME ADVANCED PLANNING, BECAUSE THERE IS EVIDENCE THAT FONTS PIERCE AND JOEY SMITH WENT TO THE SIDE AND HAD A CONVERSATION BEFORE THEY ORDERED EVERYBODY IN THE CAR.

WE DON'T KNOW WHAT THEY SAID.

WE DO NOT KNOW WHAT THEY SAID.

THEY COULD HAVE SAID LET'S GO OUT AND PUNCH THESE PEOPLE IN THE FACE AND LET THEM WALK HOME.

ABSOLUTELY BUT IT IS CIRCUMSTANCE EVIDENCE THAT THERE WAS A CONVERSATION, BECAUSE WHEN THEY GOT BACK IN THE CAR AND THEY TRADED GUNS SO THAT THEY WOULD MAKE SURE THAT SMITH HAD A WORKING GUN AND SMITH GETS OUT AND SHOOTS HIM, HE GETS BACK IN THE CAR AND FONTS PIERCE, WHO TOLD HIM WHEN HE GOT OUT OF THE CAR TO POP HIM IN THE JAW AND MR SMITH RESPONDS TO THAT, HE DOESN'T GO OH, MY GOD YOU SHOT HIM OR KILLED HIM. TO THE CONTRARY, HE SAID IS HE DEAD. TO THE CONTRARY, CIRCUMSTANTIAL WHICH INDICATES, BUT BEYOND THAT WE DON'T HAVE TO PROVE THAT THERE WAS A COLD, CALCULATED AND PREMEDITATED PLAN WAY IN ADVANCE. WE HAVE TO PROVE THAT, AT THE TIME HE COMMITED THAT SECOND SHOOTING, THE MURDER, THAT AT THAT TIME, HE HAD A COLD, CALCULATED, HEIGHTENED PREMEDITATION AND CLEARLY, AFTER HAVING JUST SHOT MR. TUTTLE AND PRONOUNCING HIM DEAD AND THEN DRIVING DOWN THE ROAD, FINDING ANOTHER ABANDONED AREA WHERE THERE IS NOBODY COMING AND SHOOTING THE SECOND VICTIM, THAT IS COLD, CALCULATED AND PREMEDITATED.

WHERE DO WE DRAW THE LINE BETWEEN IT BEING PREMEDITATED ENOUGH TO BE FIRST-DEGREE MURDER AND THEN GOING BEYOND THAT AND SAYING THAT IT IS SUPER PREMEDITATED ENOUGH TO HAVE A CCP AGGRAVATOR ATTACHEDA?

AND THAT IS WHERE YOU GIVE INTO THE COLD CALCULATED PART, BECAUSE THE COLDNESS IS ESTABLISHED BY HIS STATEMENT. THE COLDNESS IS ESTABLISHED BY THE WAY HE GETS IN AND OUT. HE SAID NO PROBLEM. THE CALCULATION IS ESTABLISHED BY THE WAY THEY DRIVE, FIND PLACES, THE TRADING OF THE GUNS. THERE IS SO MUCH EVIDENCE OF COLD, CALCULATED AND PREMEDITATED IN THIS CASE, THAT JUST CLEARLY IT IS UNQUESTIONABLE, AND WITH REGARD TO THAT ONE STATEMENT THAT THE SENTENCING JUDGE MADE, HE EVEN RECOGNIZES THAT THIS MAY BE EXCLUDEABLE, AND HE NOTES THAT HIS FINDING STANDS ANYWAY, AND CLEARLY IT DOES.

WOULD YOU ADDRESS THE CONFLICT THAT IS GOING ON AT THE TRIAL LEVEL, BETWEEN DEFENSE COUNSEL AND PROSECUTORS, WITH REGARD TO DISCUSSIONS WITH THE INJURY ON WHAT YOU DO WITH AGGRAVATORS AND MIGHTORS, AND HOW FAR ONE -- AND MITIGATORS, AND HOW FAR ONE MAY GO FROM YOUR VIEW, THE STATE'S VIEW, AND IF WE DON'T GO THAT FARTION WHAT KIND OF QUICKSAND ARE WE IN?

YOUR HONOR, FIRST OF ALL LET ME POINT OUT ONE THING. COUNSEL POINTED TO HENYARD AND SAID IN HENYARD, THE TRIAL JUDGES WERE ALLOWED TO IGNORE THE -- THE TRIAL JUDGE WAS ALLOW TO IGNORE HENYARD, AND I DON'T SEE THAT ANYWHERE IN HERE FOR THAT OPINION, AND IN CONTRARY THE TRIAL COURT IS NOT FREE TO IGNORE THE JURY'S RECOMMENDATION AND THE FACT THAT YOU HAVE SUBSTANTIAL AGGRAVATION THAT COMPLETELY OUTWEIGHS MINIMAL NONSTATUTORY MITIGATION, ITSELF, BUT AS FAR AS THE ARGUMENTS THAT ARE MADE, AND THIS DOES NOT MEAN THAT I AM SIDESTEPING THE FACT THAT IT IS PROCEDURALLY BARRED WITHOUT A DOUBT. THEY DON'T EVEN CONCEDE THE FACT THAT IT IS PROCEDURALLY BARRED, BUT JUST AS A GENERAL MATTER, WHEN I READ THE PROSECUTOR'S CLOSING ARGUMENT, IT SEEMED VERY CONSISTENT WITH THE LAW. HAVING READ THIS COURT'S OPINIONS, WHERE YOU HAVE A PROBLEM WITH THE REQUIRED LANGUAGE, THE ONLY WORDS THAT HE USED THAT THIS COURT MAY HAVE A PROBLEM WITH IS YOU HAVE AN OBLIGATION. WHICH, TO ME THE LAW SUGGESTS CLEARLY THAT THEY DO HAVE AN OBLIGATION, WHEN THE AGGRAVATING OUTWEIGHS MITIGATING SO SUBSTANTIALLY, AND TO STRANGLE THE PROSECUTORS FROM BEING ABLE ABLE TO ARGUE THAT -- FROM BEING ABLE TO ARGUE THAT TO A JURY IS REALLY DOING A DISSUBPOENAS SERVICE TO JUSTICE.

IS -- A DISSERVICE TO JUSTICE.

IS THIS A CONFLICT GOING ON IN TRIALS, WITH THE DEFENSE OBJECTING TO THESE KINDS OF THING IT IS AND THE PROSECUTORS STILL SAYING THIS IS HOW WE READ THE LAW?

NOT TO MY KNOWLEDGE, YOUR HONOR. THERE IS ALWAYS AN ONGOING PROBLEM IN PROSECUTORS TRYING TO DO THE BEST JOB IS THAT THEY CAN AND TRYING TO ARGUE FORCEFULLY FOR THE STATE IF THEY CAN, WITHIN THE BOUND OF THE LAW, AND TRYING TO UNDERSTAND WHAT THOSE BOUNDARIES ARE. OUR SEMINARS ARE FULL OF CONFERENCES ABOUT THAT, THAT EVERYBODY IS TRYING TO MAINTAIN THEMSELVES WITHIN THE LAW BUT STILL TO DO THE BEST JOB THAT THEY CAN. IN THIS CIRCUMSTANCE, IT WAS NOT OBJECTED TO. IT WAS NOT A DeLAND -- A DEMAND THAT THEY HAD, THAT THEY DIDN'T HAVE ANY DISCRETION AND BEYOND THAT IN REBUTTAL, DEFENSE COUNSEL TOLD THE JURY THAT THEY COULD APPLY MERCY. HE TOLD THEM THAT THEY COULD DO THAT. THEY COULD IGNORE ALL THAT AND JUST APPLY MERCY IN THIS CASE, BECAUSE IT IS A YOUNG MAN WHO HAD LOST HIS FATHER AND HAD JUST LOST HIS WAY.

WHAT ABOUT THE SENTENCING ORDER?

THE SENTENCING ORDER, YOUR HONOR, AGAIN, AS I POINTED OUT, HENYARD DOES NOT SAY THAT THE TRIAL COURT CAN JUST SIMPLY IGNORE THE AGGRAVATING VERSUS MITIGATING. OUR STATUTE SETS OUT THAT, WHEN THE AGGRAVATING, ACTUALLY THE REVERSE OF THAT, WHEN THE MITIGATING IS NOT, DOES NOT OUTWEIGH THE AGGRAVATING, THAT DEATH IS THE APPROPRIATE SENTENCE. IN THIS PARTICULAR CASE, YOU HAVE THREE VERY SUBSTANTIAL AGGRAVATING FACTORS. THERE IS THE PRIOR VIOLENT FELONY OF ATTEMPTED MURDER AND THERE IS DURING THE COURSE OF A KIDNAPING AND THEN THERE IS COLD CALCULATED AND PREMEDITATED. BALANCED AGAINST HE HAD HAS LOVING FAMILY, HISTORY OF DRUG ABUSE, HE WAS A GOOD KID. THERE WAS AGGRAVATE -- THERE WERE MITIGATING CIRCUMSTANCES PERMITTED. I THINK WHAT THE JUDGE WAS TALKING ABOUT IN HIS ORDER, AND THIS IS THE FINAL LANGUAGE IN THE ORDER, SAYS THE AGGRAVATING FACTORS FAR OUTWEIGH THE MITIGATING FACTORS AND AS SUCH REQUIRE THAT THE APPROPRIATE PUNISHMENT IN THIS CASE IS DEATH. DEATH IS NEVER A PLEASANT OR EASY RESOLUTION TO ANY CRIMINAL CONDUCT AND THIS COURT IS DEEPLY SADDENED -- SADDENED THAT DEATH MUST EVEN BE CONSIDERED, HOWEVER DEATH MUST BE IMPOSED WHEN THE AGGRAVATING FACTORS FAR OUTWEIGH THE MITIGATING FACTORS AND THIS COURT IS GOVERNED BY LAW. IT IS A COUNTRY OF LAW NOT MEN, AND IT REQUIRES THE DEATH SENTENCE TO BE RENDERED.

IS THAT AN INCORRECT STATEMENT OF THE LAW, THE ULTIMATE SENTENCE, WHERE IT SAYS HOWEVER, THE LEGISLATURE OF THE STATE HAS REQUIRED THAT DEATH MUST BE IMPOSED WHEN THE AGGRAVATING CIRCUMSTANCES FAR OUTWEIGH THE MITIGATING FACTORS, AND THIS COURT MUST BE GUIDED BY THE LAW. IS THAT A CORRECT STATEMENT?

I THINK THAT IS A ACCURATE STATEMENT OF THE LAW, ALTHOUGH THE LAW ALSO REQUIRES HIM TO CONSIDER AND GIVE GREAT WEIGHT TO THE RECOMMENDATION BY THE JURY, WHICH IN THIS CASE WAS 8-TO-4 FOR DEATH. I THINK WHAT HIS ULTIMATE SENTENCE WAS, HIS PERSONAL OPINION AS TO THE APPROPRIATENESS OF THE DEATH PENALTY AT ALL IS NOT THE ISSUE. THE ISSUE IS THE FACTS AND THE LAW, AND WHERE YOU HAVE SUBSTANTIAL AGGRAVATION VERSUS MINIMAL MITIGATION AND A JURY'S RECOMMENDATION OF DEATH, IT IS HIS RESPONSIBILITY TO IMPOSE A DEATH SENTENCE UNDER THE LAW. IF THERE ARE NO FURTHER QUESTIONS, THANK YOU.

THANK YOU.

MR. HELMS, LET ME ASK YOU, ON CCP, DOESN'T, ISN'T WALLS PRETTY CLOSE HERE, IN SUPPORT OF CCP, WHERE IT IS THE SECOND PERSON, YOU REMEMBER WAHLS, IT WAS THAT BURGLARY, THE INTENT WAS, UNDER THE CONFESSION OF WAHLS, WAS TO BREAK INTO THE MOBILE HOME, AND THEN THE GIRLFRIEND TIED THE BOYFRIEND UP AND THE FIRST KILLING WAS THE BOYFRIEND OR THE FIRST STABBING WAS THE BOYFRIEND AND THEN THE COURT SAID THAT, THAT THE PREPLAN COULD BE, COULD WAS ENOUGH WHERE IT WAS AFTER THE FIRST BOYFRIEND STABBING AND AS TO THE SECOND VICTIM?

YOUR HONOR, TO BE HONEST, I DON'T RECALL WAHLS. I WOULD LIKE TO CLARIFY WHAT THIS COURT SAID IN HENYARD. THE SPECIFIC REMARK BY THE PROSECUTOR, IN HENYARD, THAT THIS COURT SAID WAS A MISSTATEMENT OF THE LAW, WAS IF THE EVIDENCE OF THE AGGRAVATORS OUTWEIGHS MITIGATORS BY LAW, YOUR RECOMMENDATION MUST BE FOR DEATH. THIS COURT EXPLAINED, QUOTE, CERTAIN FACTUAL SITUATIONS MAY WARRANT THE INFLICTION OF CAPITAL PUNISHMENT, BUT NEVERTHELESS WOULD NOT PREVENT EITHER THE TRIAL JURY, THE TRIAL JUDGE, OR THIS COURT, FROM EXERCISING REASONED JUDGMENT IN REDUCING THE SENTENCE TO LIFE IMPRISONMENT. IN OTHER WORDS, DEATH IS NEVER MANDATORY. THANK YOU.

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

MARSHAL: PLEASE RISE.