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## **Thomas C. Thibault v. State of Florida**

LAST CASE ON THE COURT'S DOCKET IS THOMAS C THIBAUT VERSUS STATE.

GOOD MORNING. IF YOU'RE READY TO PROCEED, YOU MAY PROCEED.

THANK YOU. MAY IT PLEASE THE CASHING, MARK WOE LEN SKI ON BEHALF OF THE APPELLATE THOMAS THIBAUT. THIS IS A DIRECT APPEAL FROM JUDGMENT AND SENTENCES OF DEATH. THE PROCEDURAL HISTORY OF THE CASE IS THAT THE APPELLATE ENTERED PLEAS OF GUILTY TO THREE COUNTS OF FIRST DEGREE MURDER, AS WELL AS ONE COUNT OF ARMED ROBBERY WITH A FIREARM. THE MATTER THEN PROCEEDED TO PHASE TWO PROCEEDINGS WITHOUT A JURY. I HAVE RAISED TWO ISSUES ON APPEAL. MR. THIBAUT RELIES ON THE POSITION SET FORTH IN THE BRIEFS WITH REGARD TO THE RING CLAIM. AS REGARDS TO THE OTHER CLAIM, THE SECOND CLAIM, THE CLAIM CONCERNING THE WAIVER OF THE ADVISORY JURY, THESE ARE THE FACTS THAT ARE RELEVANT, AS YOU CONSIDER THAT CLAIM. MR. THIBAUT HAD BEEN AFFORDED THE OPPORTUNITY TO ENTER A PLEA OF GUILTY EARLIER IN THE PROCEEDINGS, WITH THE RECOMMENDATION THAT MR. THIBAUT WOULD BE SENTENCED TO THREE CONSECUTIVE LIFE SENTENCES. AS PART OF THE PLEA, ALTHOUGH THE STATE SEEMS TO INDICATE THAT IT DID NOT HAVE BEARING ON WHETHER OR NOT -- ON WHAT THE PENALTY WOULD BE AS PART OF THE PLEA, MR. THIBAUT GAVE AN EXTENSIVE STATEMENT. DURING THAT STATEMENT, HE EXPLAINED HIS OWN COME REPLIESTY IN THIS MATTER AS WELL AS THE COME REPLIESTY OF OTHERS. RIGHT AFTER HE GAVE THE DETAILED STATEMENT, MR. THIBAUT CAME INTO COURT AND AT THE TIME HE WAS BEFORE THE JUDGE OR THE TRIAL JUDGE, MR. THIBAUT QUESTIONED WHETHER OR NOT HE WANTED TO PROCEED WITH HIS LAWYERS. HE ASKED THE JUDGE TO REPLACE HIS LAWYERS. THE JUDGE ASKED HIM TO TAKE ADDITIONAL TIME TO CONSIDER THAT. THE STATE MADE CLEAR AT THAT TIME THAT IF MR. THIBAUT DID NOT PLEAD GUILTY THEN A PLEA OFFER WAS GOING TO BE WITHDRAWN. LATER ON AS IT TURNED OUT MR. THIBAUT DECIDED TO CONTINUE WITH HIS LEAD COUNSEL, ALTHOUGH HIS PHASE TWO COUNSEL WAS REPLACED AND SUBSTITUTE COUNSEL WAS APPOINTED BY THE COURT. A FEW MONTHS LATER MR. THIBAUT ENTERED HIS PLEA AND HE ENTERED THAT PLEA STRAIGHT UP, DIRECTLY TO THE JUDGE. THERE WAS NO SENTENCING ACCOMMODATION. THERE WAS NO UNDERSTANDING WITH THE STATE. THERE WAS NO AGREEMENT. AT THE TIME THAT HE ENTERED HIS PLEA, A FULL PLEA COLLOQUY TOOK PLACE. TRIAL JUDGE WENT THROUGH ALL THE RIGHTS MR. THIBAUT WAS GIVING UP. THE TRIAL JUDGE INQUIRED AS TO MR. THIBAUT'S UNDERSTANDING WITH REGARD TO THE PLEA, WITH REGARD TO THE PLEA OF GUILTY TO THE GUILT PHASE. AT THAT TIME, DURING THE COLLOQUY IN THE PLEA FOR THE GUILT PHASE, THE JUDGE INQUIRED AS TO WHETHER OR NOT THERE WAS GOING TO BE JURY PARTICIPATION IN THE PENALTY PHASE. THE JUDGE VERY SPECIFICALLY INQUIRED OF COUNSEL. AND COUNSEL RESPONDED. LEAD COUNSEL RESPONDED THAT HE HAD HAD DISCUSSIONS WITH MR. THIBAUT ABOUT THIS MATTER. THAT THEY HAD NOT DECIDED -- ACTUALLY HE DIDN'T SAY THEY HADN'T DECIDED. WEIGH SAID WAS THERE WAS NEW PHASE TWO COUNSEL THAT HAD COME ON BOARD. THAT PHASE TWO COUNSEL HAD NOT BEEN ON THE CASE FOR VERY LONG --.

LET'S SKIP AHEAD NOW. SO, HE MAKES THIS STATEMENT ON THE RECORD. AND THEN I TAKE IT PHASE TWO COUNSEL CAME ON, PREPARED FOR PHASE TWO. IS THAT CORRECT?

THAT'S RIGHT. I PRESUME HE PREPARED. HE CERTAINLY PRESENTED.

THEN THE DESIGNATED TIME CAME WHEN THEY WERE GOING TO HAVE THIS PHASE TWO PENALTY, RIGHT?

YES.

SO THEY GO ON IN TO HAVE IT. AND THERE IS NO JURY. I MEAN NO ONE, NO ONE MISSED THAT FACT, CORRECT? THERE WASN'T ANY JURY THIS?

CERTAINLY WOULD HAVE TO CONCEDE, WOULD BE IMPOSSIBLE TO MISS THAT FACT.

DID ANYBODY SAY ANYTHING ABOUT THE FACT THERE WAS NO JURY?

THE RECORD IS SILENT AS ANYONE SAYING ANYTHING AT THAT TIME OR ANY OTHER TIME. THAT THERE WOULD BE NO JURY. THAT THERE WAS AN AGREEMENT TO NO JURY. THAT THE DEFENDANT UNDERSTOOD THAT THERE WOULD BE NO JURY. IN FACT THE RECORD IS SILENT ON ALL OF THOSE GROUNDS. AND IN ALL OF THOSE AREAS.

WHAT WOULD HE MAKE OF THIS? HERE YOU HAVE GOT A SITUATION IN WHICH THE STATUTE SAYS THERE IS TO BE AN ADVISORY JURY. THAT YOU GOT LAWYERS THAT ARE THERE REPRESENTING BOTH THE STATE AND THE DEFENDANT, YOU HAVE GOT A JUDGE THAT'S BEEN TRYING THESE CASES FOR, EVER SINCE CAPITAL PUNISHMENT WAS RESTORED IN FLORIDA, SINCE 1974. AND NOBODY TALKS ABOUT THE FACT THAT THERE IS, THERE ARE 12 PEOPLE MISSING IN THIS SCENARIO?

IT IS AN INCREDIBLE LACK OF EVIDENCE THAT NEEDS TO BE IN THIS RECORD THAT ISN'T IN THIS RECORD. AND IS EXACTLY WHAT THIS COURT SEEMED TO BE TALKING ABOUT IN LAMADLINE.

LAMADLINE IS THE CASE THIS COURT DECIDED IN AN ALMOST IDENTICAL SITUATION. THE COURT FOUND THAT THE TRIAL COURT WENT THROUGH, HAD AN EXCELLENT COLLOQUY CONCERNING GUILT. HAD AN EXCELLENT COLLOQUY WITH THE DEFENDANT CONCERNING WHETHER HE WANTED TO PLEAD GUILTY TO THE CAPITAL CHARGE. BUT THEN THE COURT POINTED OUT THERE WAS NO COLLOQUY.

I UNDERSTAND THAT THIS COURT MADE THAT VERY CLEAR IN 1974. AND HAD ANOTHER CASE SPECIFICALLY -- WHAT I'M CONCERNED ABOUT, WHAT THE LAWYERS ARE DOING HERE. BOTH FOR THE STATE AND THE DEFENSE. WHEN THAT DOESN'T EVEN BRING THIS UP.

IF THE COURT IS DISCUSSING WHETHER THERE CAN BE A WAIVER THERE, CERTAINLY I DON'T BELIEVE UNDER THE CASE LAW THAT THEY CAN. --.

I'M DISCUSSING JUST HOW INFURIATING THIS SITUATION IS WHEN -- AND WHAT IS THE PUBLIC TO EXPECT IF THE LAWYERS DON'T EVEN BRING THIS UP?

CLEARLY INFURIATING TO THE COURT. CERTAINLY DIFFICULT FOR THE PUBLIC. TREMENDOUSLY PREJUDICIAL FOR THE DEFENDANT. THERE IS NO QUESTION THAT THE LAWYERS WERE THERE. THAT THE LAWYERS AND THE TRIAL JUDGE KNEW THERE WAS NO JURY. AND THAT THE LAWYERS AND THE TRIAL JUDGE KNEW OR SHOULD'VE KNOWN THAT THERE WAS NO COLLOQUY.

DOES THIS COURT -- DOES THIS RECORD SUPPORT A CONCLUSION THAT THE PARTIES UNDERSTOOD THAT THERE WOULD BE NO JURY IN THE SECOND PHASE? I MEAN WE HAVE SOME KIND OF COLLOQUY WITH THE DEFENSE ATTORNEY AFTER -- I ASSUME IT WAS SOMETIME AFTER THE ENTRY OF THE GUILTY PLEA, IS THAT CORRECT?

IT WAS DURING THE ENTRY OF THE GUILTY PLEA.

AND AS THE DEFENSE ATTORNEY BASICALLY SAYS, AND IT WAS MY UNDERSTANDING THAT WE WILL BE REQUESTING A PHASE TWO HEARING WITH JUST YOUR HONOR. AT SOME POINT DURING THAT COLLOQUY, HE MAKES THAT STATEMENT, SO I'M ASKING YOU THAT BASED ON THAT STATEMENT AND A FEW OTHERS THAT WERE MADE IN THERE, IS THERE AN UNDERSTANDING BETWEEN ALL THE PARTIES HERE THAT DEFENDANT WAS WAIVING A JURY IN THE SECOND PHASE?

LET ME ANSWER YOU THIS WAY AND I THINK IT'S IMPORTANT WHEN YOU POINT OUT AND A FEW OF THE OTHER STATEMENTS THAT WERE MADE. I THINK IT IS IMPORTANT TO CONSIDER ONE OF THE OTHER STATEMENTS THAT WAS MADE. AND THAT STATEMENT THAT WAS MADE BY COUNSEL WAS THAT THIS WOULD BE A DECISION THAT THE LAWYERS AND THE CLIENT WOULD MAKE AT SOME POINT IN TIME. CLEARLY INDICATING THE COURT'S QUESTION WAS, ABOUT FOUR FOLD. AS THE COURT POINTED NOUT THE COLLOQUY. COURT ASKED, HAVE YOU DISCUSSED THIS WITH YOUR CLIENT? HAVE YOU DECIDED WHAT YOU WANT TO DO? CAN YOU GIVE ME SOME ADVICE AS TO WHETHER OR NOT WE ARE GOING TO HAVE A JURY? AND THERE IS THE COMMENT YOU POINT OUT, WHERE THE COMMENT SAYING WE HAVE DISCUSSED IT. AND THEN THE DEFENSE LAWYER GOES ON TO SAY WE CONTINUE TO DISCUSS IT, NEW COUNSEL HAS JUST COME ON AND WE WILL MAKE A DECISION AT SOME POINT LATER IN TIME. WHAT YOU DON'T HAVE THERE IS ANY COMMENT FROM THE DEFENDANT. ANY DISCUSSION WITH THE DEFENDANT. ANYTHING DIRECTED TO THE DEFENDANT FROM THE JUDGE, FROM THE PROSECUTOR, FROM ANYBODY ELSE. AND YOU CERTAINLY HAVE WHAT I THINK ANYBODY WOULD HAVE TO FIND TO BE LESS THAN AN EXPRESSED WAIVER. AT BEST, WHAT THAT COLLOQUY WAS WAS AN INDICATION THAT THERE HAD BEEN DISCUSSION, THERE WOULD BE DISCUSSION, AND THAT AT SOME FURTHER POINT IN TIME, A DECISION WOULD BE MADE. NOT TO AVOID YOUR CENTRAL QUESTION. AND I THINK THIS GOES BACK TO WHAT JUSTICE WELLS WAS TELLING ME. I CERTAINLY CAN'T STAND HERE AND TELL YOU THAT THERE WAS NO UNDERSTANDING, THAT THERE WAS NO JURY THERE. CLEARLY THERE WAS NO JURY THERE. CLEARLY NOBODY RAISED THAT ISSUE ON THE RECORD BEFORE THE LOWER TRY BUB NATURAL. WHETHER THAT'S AN INDICATION OR IMPLICATION THAT THIS HAD TO BE SOME UNDERSTANDING, I DON'T KNOW. BUT THE ISSUE IS WHETHER OR NOT YOU CAN FIND THAT UNDERSTANDING FROM A TOTALLY SILENT RECORD. I THINK THE LAW IS WELL SETTLED THAT YOU CANNOT. NOW THERE HAVE BEEN ADDITIONAL CASES BEYOND LAMADLINE. LAMADLINE OF COURSE WAS THE CASE, THE 1974 CASE AS JUSTICE WELLS POINTS OUT, WHERE THE FACTS WERE DIRECTLY SIMILAR TO THIS CASE. SUBSEQUENTLY AND FAIRLY RECENTLY, THIS COURT DECIDED IN GRIFFIN VERSUS STATE THAT THE WAIVER OF THE ADVISORY JURY, IN THE SENTENCING PHASE IN A CAPITAL CASE IS AKIN AND WILL BE TREATED AKIN BY THIS COURT FOR PROCEDURAL PURPOSES TO THE QUESTION OF WHETHER OR NOT A PLEA IS FREE AND VOLUNTARY AND WHETHER OR NOT A PLEA SHOULD BE VACATED. AND THE COURT INDICATED THAT THIS MATTER -- THAT A MATTER SUCH AS THAT SHOULD BE SENT BACK TO THE LOWER TRIBUNAL AND ABSENT THAT AND COUNSEL HAS RAISED AN MY OPPONENT RAISED IN THEIR BRIEF THE QUESTION WHETHER OR NOT THIS ISSUE WAS PROPERLY PRESERVED. I THINK IT IS THE MOST IMPORTANT PART OF THE UNDERSTANDING OF THIS ISSUE. AND WHAT IS CRUCIAL IN THE UNDERSTANDING OF THE ISSUE AND WHY THIS ISSUE IS NOT CONTROLLED BY GRIFFIN. IS THE DIFFERENCE BETWEEN THE LAMADLINE CASE AND THE GRIFFIN CASE. BOTH OF WHICH REMAIN GOOD LAW. IN GRIFFIN, YOU CITED LAMADLINE WITH APPROVAL. LAMADLINE REMAINS THE LAW. THE SITUATION IN GRIFFIN WAS DISTINCT FROM THIS CASE AND DIS -- DISTINCT FROM LAMADLINE. THE TRIAL JUDGES COLLOQUY WAS INSUFFICIENT, THAT THE TRIAL JUDGE HAD IMPROPERLY ADVISED THE DEFENDANT AS TO WHAT WOULD HAPPEN DURING A PHASE TWO PROCEEDING. IN THIS CASE THE TRIAL JUDGE HAD SUGGESTED THAT DURING PHASE TWO, THE STATE WOULD BRING FORTH EVIDENCE AND PUT ON TESTIMONY THAT WOULD TEND OR WOULD SEEK TO PROVE THE AGGRAVATING CIRCUMSTANCES. THE ARGUMENT IN GRIFFIN IS THAT WHAT WAS MISSING WAS THAT THE TRIAL COURT DID NOT ADVISE THE DEFENDANT THAT IN FACT AT THE PHASE TWO HEARING, HE WOULD HAVE THE OPPORTUNITY TO PRESENT EVIDENCE, PRESENT TESTIMONY THAT WOULD SET FORTH THE MITIGATING CIRCUMSTANCES THAT WOULD TEND TO PROVE --.

I UNDERSTAND -- IT'S APPARENT HERE THAT THERE WAS NOTHING THAT WAS DONE TO RAISE THIS, PUT IT ON THE RECORD AS IS REQUIRED BY OUR CASES. I THINK THAT'S SELF-EVIDENT. WHAT I'M TRYING TO FIND OUT IS HOW THIS KIND OF THING COULD GO ON AND HERE WE SIT UP HERE IN TALLAHASSEE, HOW MANY YEARS AFTER THIS FACT?

THIS IS THREE YEARS LATE.

THREE YEARS LATER.

ALMOST THREE YEARS LATER.

AND WAS THIS EVER BROUGHT BACK TO THE ATTENTION OF THE TRIAL JUDGE?

MATTER HAS NEVER BEEN BACK BEFORE THE TRIAL JUDGE ON THIS ISSUE.

AT LEAST IF YOU COMPARE THESE CASES TO GUILTY PLEA CASES, WHICH APPARENTLY WE HAVE DONE, AT LEAST IN GUILTY PLEA CASES, IN ORDER TO CONTEST THE VOLUNTARINESS OF A GUILTY PLEA, YOU HAVE GOT TO FILE A MOTION TO WITHDRAW WITHIN 30 DAYS, DO YOU NOT?

I WOULD AGREE.

AT LEAST AS TO GUILTY PLEASE, WE HAVE SOME KIND OF A FORUM FOR THIS ISSUE TO BE BROUGHT TO THE JUDGE'S ATTENTION BEFORE IT IS RAISED ON APPEAL. SO IF WE ARE GOING TO ADOPT A JURISPRUDENCE THAT MAKES THESE KINDS OF WAIVERS AKIN TO A GUILTY PLEA, SHUNT WE ALSO IMPOSE A REQUIREMENT THAT THAT ISSUE BE BROUGHT TO THE JUDGE'S ATTENTION?

I THINK TO A GREAT DEGREE THAT WAS DONE UNDER CERTAIN CIRCUMSTANCES IN YOUR GRIFFIN CASE. I THINK THAT'S WHAT THIS COURT DID AND I THINK THAT'S WHAT THIS COURT SUGGESTED. HOWEVER, IN THE SITUATION LIKE THIS, WHERE THERE IS NO COLLOQUY, WHERE THE QUESTION IS NOT WHETHER OR NOT THE COLLOQUY IS SUFFICIENT. THE QUESTION IS NOT OPEN WHETHER OR NOT THE LOWER TRIBUNAL COULD PROVIDE THROUGH A HEARING ADDITIONAL INFORMATION THAT WOULD HELP THIS COURT UNDERSTAND SOME OF THE ANSWERS THAT JUSTICE WELLS IS POINTING OUT, IN A SITUATION LIKE THAT, I WOULD THINK THAT THIS WOULD BE MORE AKIN TO A SITUATION LIKE INEFFECTIVE ASSISTANCE OF COUNSEL. INEFFECTIVE ASSISTANCE OF COUNSEL ORDINARILY COULD NOT BE RAISED ON DIRECT APPEAL. INEFFECTIVE ASSISTANCE OF COUNSEL ORDINARILY WOULD BE REQUIRED TO BE TAKEN BACK TO THE LOWER TRIBUNE NATURAL TO ALLOW THE LOWER TRIBUNAL TO HOLD EVIDENTIARY HEARINGS, TO DETERMINE FACTUAL CIRCUMSTANCES SURROUNDING THE CLAIM BEFORE IT COULD COME BEFORE THIS COURT OR BEFORE ANY REVIEWING COURT. THERE IS AN EXCEPTION. THE EXCEPTION IS WHEN THE RECORD IS SO CLEAR ON ITS FACE THAT THE INEFFECTIVE ASSISTANCE OF COUNSEL IS THERE WITHIN THE FOUR CORNERS OF THE RECORD BEFORE THE COURT.

BUT WHAT IF WE GO BACK AND INEFFECTIVE ASSISTANCE OF COUNSEL IN THIS CASE IN EVIDENTIARY HEARING, COUNSEL TESTIFIES I HAD SEVERAL MEETINGS WITH MY CLIENT, I TOLD HIM THAT WE'D BE BETTER OFF HAVING A PENALTY PHASE WITH THIS JUDGE BECAUSE IN THIS CIRCUIT, JURIES ARE VERY STRICT AND THEY'RE LIABLE TO IMMATERIAL POSE A DEATH PENALTY, I'D RATHER GO BEFORE THIS JUDGE. AND HE SAID WELL IT'S UP TO YOU IF THAT'S WHAT YOU THINK, LET'S GO WITH THAT. WHERE IS THE INEFFECTIVE ASSISTANCE AT THAT POINT?

INEFFECTIVE ASSISTANCE ISN'T RAISED HERE BECAUSE I DON'T KNOW THERE IS WITHOUT THAT KIND OF FACTUAL DEVELOPMENT. HOWEVER, WHAT THERE IS CLEARLY ON THIS RECORD IS EXACTLY WHAT LAMADLINE SAYS THERE CANNOT BE.

FOUR ARGUMENT, I THOUGHT YOUR ARGUMENT IS, GRIFFIN ISN'T APPLICABLE HERE BECAUSE THERE IS NO WAIVER, SO THERE WAS NOTHING REALLY TO HAVE CHALLENGED IN THE TRIAL COURT UNDER THE GRIFFIN STANDARD. THAT'S NOT YOUR ARGUMENT?

THAT IS, YOU UNDERSTAND MY ARGUMENT EXACTLY. THAT IS IN FACT MY ARGUE UCHLT. THAT THIS CASE IS NOT AKIN TO GRIFFIN. THIS CASE IS NOT AKIN TO SPAN, WHICH IS THE OTHER CASE THAT WAS CITED OR PRESENTED IN SUPPLEMENTAL AUTHORITY, WHICH IS ANOTHER CASE WHERE THIS COURT CONSIDERED THE ISSUE OF THE WAIVER OF PHASE TWO AND SAID GO BACK TO THE TRIAL COURT FIRST. IN SPAN, THERE WAS ALSO A QUESTION OF WHETHER OR NOT THE COLLOQUY THAT TOOK PLACE AND WHETHER THE JUDGE ACTUALLY TREATED THE ABILITY TO WAIVE THE PHASE TWO JURY AS A RIGHT, AS OPPOSED TO SOMETHING THAT THE DEFENDANT -- I'M SORRY, SOMETHING THE JUDGE HAD TO ACCEPT AS OPPOSED TO SOMETHING THAT THE JUDGE HAD THE RIGHT TO ACCEPT.

WHAT WOULD HAPPEN, I DON'T KNOW IF IT'S EVER HAPPENED, IN A CASE WHERE JUDGE PROCEEDED TO SENTENCE A DEFENDANT AND THERE WAS NO GUILTY PLEA COLLOQUY AND NO WAIVER, DO WE HAVE ANY CASES WHERE THAT HAPPENED?

I AM NOT FAMILIAR WITH ANY CASES WHERE THAT HAPPENS. BUT I THINK THAT YOUR QUESTION HITS FOYBT OF MY ARGUMENT EXACTLY. CERTAINLY IF SUCH A CASE CAME BEFORE THIS COURT AND DEFENDANT WALKED IN AND JUDGE SENTENCED HIM TO PRISON, THERE WAS NO COLLOQUY AND NO PLEA, THIS COURT WOULD NOT SEND IT BACK TO THE LOWER TRIBUNE NATURAL TO DETERMINE FREENESS AND VOLUNTARINESS OF THE PLEA. SITUATION HERE IS ESSENTIALLY THE SAME. SITUATION HERE IS THE DEFENDANT COMES IN AND AT SOME POINT THE LAWYERS TELLS THE JUDGE, WE WILL LET YOU KNOW. WE ARE THINKING ABOUT WAIVING JURY. WE MAY WAIVE JURY. WE'RE GOING TO DISCUSS IT AND WE'LL LET YOU KNOW.

WERE YOU THE TRIAL COUNSEL?

I WAS NOT.

I GUESS THIS IS REALLY A QUESTION FOR THE STATE. WE HAD, AS JUST WELLS POINTS OUT, JUDGE MOUNDS BEING QUITE AN EXPERIENCED CRIMINAL TRIAL COURT JUDGE. WAS THERE ANY ATTEMPT TO SEE WHETHER THERE ARE SOME HEARINGS THAT WERE MISSING BETWEEN THE HEARING WHERE THEY SAID WE ARE GOING TO BE TALKING TO OUR CLIENT AND THEN THE START OF THIS TRIAL? WAS AN ATTEMPT MADE TO RECONSTRUCT THE RECORD TO SEE IF WE HAVE EVERYTHING?

THERE WAS. THERE IS A SUPPLEMENTAL RECORD. THERE ARE THINGS TRANSCRIBED THAT ARE AS SIMPLE AS PLEA CONFERENCES ON OTHER CASES, WHERE THIS CASE WAS MENTIONED PRAN THETCALLY AS SOMETIMES HAPPENS IN TRIAL COURTS. THERE SIMPLY IS NOTHING ELSE IN THIS RECORD ANYWHERE. AND AGAIN THE QUESTION IS BETTER ASKED TO THE STATE, YOU'RE RIGHT. BUT I COULD RESPOND AS TO WHAT THE SUPPLEMENTAL RECORD AND THE RECORD IS. THERE SIMPLY IS NOTHING IN THE RECORD ANYWHERE THAT WOULD INDICATE -- THAT WOULD TAKE AWAY THE SILENCE THAT YOU NOW HAVE. THE SILENCE OF THE RECORD AS TO WHETHER OR NOT THERE WAS A COLLOQUY THAT WOULD TAKE THIS CASE OUT OF THE ANALOGY YOU JUST POINTED OUT. SOMEBODY WALKS IN AND SAYS I MAY PLEAD LATER. HE WALKS BACK IN AND THE JUDGE SENTENCES HIMSELF. ESSENTIALLY THAT IS WHY THIS CASE IS DIFFERENT THAN GRIFFIN. IT IS NOT CONTROLLED BY GRIFFIN. IT IS CONTROLLED BY THE STILL GOOD LAW AS CITED BY THIS --.

I HAVE ANOTHER CONCERN HERE. IS THAT, HERE WE HAVE GOT A SITUATION WHICH THESE LAWYERS, THAT ARE THE TRIAL COUNSEL, GO IN THERE AND THE JUDGE OBVIOUSLY IS PROCEEDING ON THE BASIS THAT AT SOMEBODY POINT IN TIME THERE WAS A WAIVER OF THE

JURY. AND SO RATHER THAN CALLING THAT TO THE COURT'S ATTENTION, THEY GO AHEAD AND SEE HOW THEY DO HERE, BANGING -- BANKING THE ERROR, KNOWING THEY'RE GOING TO GET ANOTHER SHOT. I MEAN, THAT'S RE-DOING IT THEN.

THAT'S AN INTERPRETATION OF THE RECORD THAT OBVIOUSLY CAN BE MADE BECAUSE YOU OBVIOUSLY HAVE MADE THAT INTERPRETATION. LET ME GIVE YOU AN EXAMPLE OF SOMETHING ELSE IN THIS VERY RECORD THAT SHOWS WHY THAT IS NOT ALWAYS A SITUATION IN TRIALS. IN THIS VERY RECORD, THERE IS TESTIMONY BY TELEPHONE OF A PSYCHOLOGIST WHO APPEARS IN, FROM LAST VAGUE GAS. HIS TESTIMONY IS BROUGHT BEFORE THE COURT. AT NO TIME WAS THE PSYCHOLOGIST EVER SWORN. THE TESTIMONY COMES IN, CONTAINED WITHIN THE RECORD. IT IS NOT SWORN TESTIMONY. IT'S DEFENSE TESTIMONY. IN FACT JUDGE MOUND RELIES ON SOME OF THAT TESTIMONY IN HIS FINAL ORDER. BUT NONETHELESS, THE TESTIMONY WAS NEVER SWORN, AND THE MATTER WAS NEVER SWORN BEFORE THE COURT. THE WITNESS WAS NEVER SWORN. NOW ONE WAY TO LOOK AT THAT JUSTICE WELLS IS TO SAY THE LAWYERS HAVE CAUGHT ON TO THAT AND HAD TO BE PLAYING GOTCHA WITH THE COURT. THE OTHER WAY IS SIMPLY IT IS A DEFICIENCY IN THE RECORD, SIMPLY UNSWORN TESTIMONY NOT WORTHY OF BEING CONSIDERED. I THINK THAT IS SOMEWHAT ANALOGOUS TO THE QUESTION OF WERE THESE LAWYERS SITTING BACK AND PLAYING GOTCHA? THERE IS NO REASON TO BELIEVE THAT THEY WERE. THE COURT WENT FORWARD, THE LAWYERS WENT FORWARD WITH THE COURT'S PROCEDURES AS THEY DID IN LAMADLINE. THE OWN NEWS IS NOT, AT LEAST UNDER THE CASE LAW, THE ONUS IS CERTAINLY NOT ON THE DEFENDANT OR DEFENSE COUNSEL OR THE PROSECUTOR TO BRING MATTERS TO THE COURT'S ATTENTION OR IN ORDER TO PRESERVE THEM IN THIS SCENARIO. THE ONUS IS UPON THE RECORD, THE COURT, THE STATE, THE ONUS IS UPON THE RECORD TO SHOW THE WAIVER, THE SHOW THE COLLOQUY. AS JUSTICE PER JI ANSI SAID, THE DIFFERENCE, I SHOULDN'T CREDIT HER WITH SAYING THIS, I DON'T KNOW IF THIS IS AS FAR THE JUSTICE WENT. THIS IS AS FAR AS I HAVE GONE WITH HER QUESTION. SITUATION IS ROUGHLY AQUIN -- AKIN TO A JUDGE SENTENCING SOMEONE WITHOUT A COLLOQUY. CERTAINLY THIS COURT WOULD ACT. THEN ADD TO THAT SITUATION THE FACT THIS IS A CAPITAL CASE. THE HEIGHTENED CONSIDERATION THAT THIS COURT GIVES ALL RECORDS IN CAPITAL CASES. THIS COURT'S WILLINGNESS TO GO INTO EVERY CORNER, AFTER NOOK AND CRANNY OF THE RECORD. WHAT'S RAISED AND WHAT'S NOT RAISED AND TO FIND AND MAKE SURE THERE IS NO ERROR WHEN THE ULTIMATE PENALTY IS INVOLVED.

STATE V UPTON IS CITED, A CASE ABOUT HOW YOU WAIVE A JURY TRIAL FOR THE GUILT PHASE. IS IT YOUR POSITION, IT SAYS THE DEFENDANT MAY WAIVE IN WRITING A JURY TRIAL WITH CONSENT OF THE STATE. DOES THAT RULE, AND THEREFORE OUR DECISION IN UPTON, REALLY GOVERN THIS CASE, BECAUSE THIS WAS A JURY TRIAL ISSUE. AND YOU KNOW, WHY WOULDN'T THAT RULE SAY IN THAT CASE THAT EITHER DEFENDANT HERE HAS TO SIGN IT OR THERE'S GOT TO BE A WAIVER, YOU KNOW, AN A COLLOQUY WITH THE JUDGE.

THAT WOULD PROBABLY BE A BETTER SCENARIO AND PROBABLY BE A BETTER RULE. IT IS NOT THIS COURT'S RULE. PERHAPS THAT IS WHERE THIS COURT WAS GOING IN GRIFFIN WHEN THIS COURT SUGGESTED THE RULES COMMITTEE SUGGEST A COLLOQUY AND SUGGEST A SITUATION WHEREBY JUDGES WOULD HAVE GUIDANCE AS TO WHAT TO DO. BUT THE RULE THAT ALLOWS THE WAIVER BY THE SIMPLE WRITING OF A WAIVER OF TRIAL, A WRAFER OF JURY TRIAL IN THE RULES OF CRIMINAL PROCEDURE IS NOT APPLICABLE IN THIS SITUATION BASED UPON THE OTHER RULINGS OF THIS COURT, WHICH IS MADE CLEAR THAT IF THERE IS A WAIVER, THE WAIVER CAN BE ORAL. IF THE WAIVER IS CLEAR, IT'S EXPRESSED. IN FACT IT CAN BE EXPRESSED BY, ACCORDING TO HOEMS, IN THE DEFENDANT'S PRESENCE BY HIS COUNSEL AS LONG AS IT'S CLEAR AND IT'S EXPRESSED. SO THE WRITING ALONE, WHILE THE WRITING ALONE WOULD BE SUFFICIENT, THE WRITING ALONE IS NOT NECESSARY.

THE MARSHAL HAS REMINDED US YOU'RE INTO YOUR REBUTTAL TIME. MIGHT BE A GOOD TIME TO PAUSE.

THANK YOU.

GOOD MORNING.

MAY IT PLEASE THE COURT, DEBRA REST SIGNIFICANT KNOW ON BEHALF OF THE STATE OF FLORIDA.

REGARDING POINT ONE, I'D LIKE TO POINT OUT BRIEFLY TO THE COURT THAT YOU I SUPPLEMENTED LYNCH VERSUS STATE WHICH COURT DECIDED ON JANUARY 9, SAYING WHEN A DEFENDANT HAS WAIVED THEIR ADVISORY JURY THAT THIS COURT WILL NOT CONSIDER A RING ISSUE. ON ANY, A WAIVER OF ADVISORY JURY. REGARDING POINT TWO, I JUST WANT TO POINT OUT IN ANSWER TO JUSTICE, I SUBSTITUTED A CASE VERSUS HERNANDEZ WHERE THIS CASE SAID THAT RULE DOES NOT APPLY IN THE CAPITAL SENTENCING CONTEXT.

IS LAMADLINE STILL GOOD LAW? OR DOESN'T THAT COMPEL A REVERSAL IN THIS CASE?

LAMADLINE IS STILL GOOD LAW. THAT DIDN'T INVOLVE THE REQUIREMENT OF A WRITTEN WAIVER.

EVEN UPTON SAYS IT IS EITHER WRITTEN OR YOU HAVE A VERBAL COLLOQUY. AND THE DEFENDANT HAS TO ACKNOWLEDGE IT. IS LAMADLINE, -- IF IT IS STILL GOOD LAW, WHY DOESN'T THAT GOVERNOR REQUIRE A REVERSAL EVEN IF IT SEEMS TO BE AN UNFORTUNATE CIRCUMSTANCE IN THIS CASE?

WELL THE STATE'S POSITION FIRST IS THAT I BELIEVE THAT APPELLATE COUNSEL IS READING GRIFFIN TOO NAH NARROWLY. GRIFFIN VERY CLEARLY SAID THAT IF A DEFENDANT WANTS TO CHALLENGE VOLUNTARINESS OF A WAIVER OF ADVISORY JURY, THAT IS SOMETHING HE HAS TO DO FIRST IN THE TRIAL COURT. AND THAT WAS NEVER DONE HERE.

BUT THEY NEVER GOT THAT FAR HERE. WHERE IN THIS RECORD DOES EITHER THE DEFENSE COUNSEL OR THE STATE'S ATTORNEY GET IT EXPRESSLY IN THE RECORD AS THIS COURT'S 1974 CASE SAID IT HAD TO BE DONE, THAT THIS DEFENDANT WAS GOING TO NOT HAVE AN ADVISORY JURY? IT IS NOT THE RESPONSIBILITY OF DEFENSE COUNSEL. THE STATE HAS A RESPONSIBILITY TO DO THAT.

WE DON'T HAVE ANYTHING EXPRESSLY. WHAT WE DO HAVE IS THAT THE PLEA COLLOQUY WHERE THE GUILTY PLEA WAS ENTERED, IT IS CLEAR FROM THERE THAT THAT WAS THE UNDERSTANDING OF BOTH PARTIES. IN ADDITION TO WHAT DEFENSE COUNSEL SAID, AND WEIGH SAID TO THE COURT WAS THAT HE HAD HAD MANY DISCUSSIONS WITH HIS CLIENT THROUGHOUT THE PAST SEVERAL WEEKS AND THEY HAD DECIDED THEY WOULD WAIVE AN ADVISORY JURY.

IS THERE ANYWHERE THAT THE PARTY HIMSELF MAKES A STATEMENT IN THIS RECORD AS TO THE WAIVER OF THE JURY? ANYWHERE?

NO THERE IS NOT. BUT I POINT OUT TO THE COURT THAT IN HOLMES, WHICH WAS DECIDED AFTER LAMADLINE, THAT THIS COURT HELD THAT A DEFENSE COUNSEL'S EXPRESSED WAIVER ON THE RECORD IN THE PRESENCE OF THE DEFENDANT WAS SUFFICIENT. THAT WAS SUFFICIENT WAIVER OF ADVISORY JURY.

THE PROBLEM HERE THOUGH, YES, THERE IS AN INDICATION PERHAPS THAT THAT HAD BEEN TALKED ABOUT BEFORE. AND EVEN THAT THAT WAS REALLY CONTEMPLATED. BUT THAT NOW YOU HAD ANOTHER LAWYER THAT WAS GOING TO BE ON THE CASE FOR THE PENALTY PHASE, AND JUDGE, WE'RE GOING TO DISCUSS IT AGAIN AND WE'LL LET YOU KNOW. THAT IS, THAT AS OPPOSED TO HAVING A WAIVER AND THEN LATER HAVING THE DEFENSE CLAIM THAT REALLY THE WAIVER WASN'T VOLUNTARY. YOU KNOW, THAT THE LAWYER TOLD HIM THE WRONG SCOOP

OR HE WAS UNDER THE INFLUENCE OF DRUGS. OR WHATEVER THE MYRIAD OF REASONS THEY MAY COME UP WITH TO TRY TO CLAIM THAT THE WAIVER WASN'T VOLUNTARY, BUT IN THOSE CASES, THERE IS A WAIVER. YOU HAVE THE WAIVER TO BEGIN WITH. HERE, ISN'T IT VERY DIFFICULT TO FIND WITH REFERENCE TO THE STATEMENTS OF THE LAWYER THAT THERE ACTUALLY IS A WAIVER? IN OTHER WORDS, ISN'T YOUR COLLEAGUE HERE CORRECT IN SAYING THAT ALTHOUGH THE LAWYER SAID YEAH, THAT'S SORT OF WHAT THE GAME PLAN WAS BEFORE, THAT WE HAVE GOT A NEW LAWYER IN THE CASE AND JUDGE, WE'LL LET YOU KNOW. THAT IS, THAT THAT MAY BE WELL WHAT WE'LL DO, BUT THEN IT JUST NEVER GOT DONE.

THERE CERTAINLY WASN'T A POLICY WITH THE DEFENDANT. THERE CERTAINLY WASN'T. BUT AGAIN THERE WAS A CLEAR UNDERSTANDING BETWEEN THE PARTIES THAT THEY WERE GOING TO PROCEED WITHOUT THE ADVISORY JURY. THERE IS EVEN A COMMENT BY THE STATE ATTORNEY, ASSISTANT STATE ATTORNEY IN THE RECORD AT THE PLEA COLLOQUY, I THINK IT IS ON PAGE T-25, WHERE SHE EVEN INDICATES THAT IT'S HER UNDERSTANDING FROM DISCUSSIONS WITH DEFENSE COUNSEL THAT THEY WERE GOING TO PROCEED WITHOUT THE ADVISORY JURY.

TO HAVE A WAIVER, WE HAVE SAID YOU GOT TO HAVE A WAIVER. THAT IS, YOU HAVE GOT TO HAVE EITHER THE DEFENDANT HIMSELF DO THIS WAIVER ON A RECORD, THAT THE COURT CAN SEE, OR YOU HAVE GOT TO HAVE THE LAWYER PARTICIPATE IN THIS AND GIVE THE COURT AN EXPRESS WAIVER WHERE THE DEFENDANT IS PRESENT. WE DON'T HAVE THAT HERE.

AND THE STATE'S POSITION IS THAT THE PURPOSE, THE PURPOSE OF THESE WAIVERS, PURPOSE OF THE COLLOQUYS WITH THE DEFENDANT IS MAKE SURE THESE WAIVERS ARE VOLUNTARY. AND IF YOU LOOK AT THIS RECORD, YOU CAN TELL THAT IT CLEARLY WAS VOLUNTARY ON THE PART OF THIS DEFENDANT, THAT HE WANTED TO WAIVE HIS ADVISORY JURY.

THIS IS THE PROBLEM. ALL DUE RESPECT, BECAUSE IT'S CLEARLY WAS DISCUSSED. AND I ASSUME YOU'RE RELYING ONLY ON THE DISCUSSIONS THAT OCCURRED AFTER THE GUILTY PLEA WAS.

IT WAS ACTUALLY AT THE GUILTY PLEA COLLOQUY.

IN LOOKING AT THIS, IT DOESN'T ANTICIPATE THAT THERE IS GOING TO BE FURTHER DISCUSSIONS AS TO HOW TO PROCEED? CONCERNING WHETHER THERE IS GOING TO BE A PENALTY PHASE JURY OR NOT?

WELL THERE IS CLEARLY A STATEMENT BY DEFENSE COUNSEL THAT HE WAS RESERVING THE RIGHT TO CHANGE HIS MIND.

AND BECAUSE IN READING AGAIN LAMADLINE AND THE PROBLEM IS, WE START OUT THERE REGRETTABLY THE RECORD FAIL TOSS REFLECT WHETHER DEFENSE COUNSEL, THE PROSECUTOR OR THE TRIAL COURT ADVISED THE DEFENDANT THAT HE HAD A RIGHT TO HAVE A JURY IMMATERIAL A PANELED TO RENDER ADVISORY, WHETHER HE SHOULD BE SENTENCED TO DEATH OR LIFE IN PRISON ISN'T THAT RIGHT EVEN MORE CRITICAL AS FAR AS SAYING THAT WE CAN'T PRESUME SOMETHING ABOUT WHAT THE DEFENSE KNEW ABOUT WHAT HE WAS GIVING UP UNLESS IT'S ON THE RECORD?

YES. I MEAN, IT CLEARLY REQUIRES A COLLOQUY WITH THE DEFENDANT. THE CASE LAW CLEARLY REQUIRES THAT. THE STATE'S POSITION IS JUST IF YOU LOOK AT WHAT HAPPENED IN THIS RECORD, YOU CAN SHOW THAT THERE WAS VOLUNTARINESS OF THIS ADVISORY WAIVER BY THE DEFENDANT. IT WAS NOT SOMETHING THAT WAS INVOLUNTARY ON HIS PART. THERE WAS NINE MONTHS BETWEEN HIS PLEA COLLOQUY AND HIS SENTENCING HEARING. THERE COULD HAVE BEEN ADDRESSED. IF IT WAS SOMETHING THAT WAS NOT VOLUNTARY ON HIS PART AND THAT NEVER HAPPENED.

WHEN WE TALK ABOUT WAIVER, VERSUS VOLUNTARY, VOLUNTARY MEANS THE GUY WASN'T

COERCED INTO SOMETHING. WASN'T ON DRUGS, HE WASN'T, AGAIN AS JUSTICE ANSTEAD SAID, WASN'T MISINFORMED. A WAIVER THOUGH MEANS A KNOWN RELINQUISHMENT OF A RIGHT. AND THAT IS WHAT IS TOTALLY MISSING FROM EVEN WHAT YOU HAVE ALLUDED TO. AND THAT'S WHY I'M SAYING THAT RING EVEN MAKES THAT NO LIGHT EVEN MORE CRITICAL TO MAKE SURE THAT THERE IS AN AFFIRMATIVE ACKNOWLEDGMENT THAT THE PERSON HAS THAT RIGHT TO A JURY TRIAL AND THAT THAT DEFENDANT IS KNOWINGLY GIVING UP THE RIGHT IN PHASE TWO TO THIS. ISN'T THAT THE PROBLEM? NOT WHETHER IT'S VOLUNTARY. BUT WHETHER HE IS, HAS AFFIRMATIVELY WAIVED A KNOWN RIGHT. THAT'S WHAT BOYKIN, FROM BOYKIN ON TEACHES, YOU KNOW, TRIAL JUDGES AND ATTORNEYS, THAT THAT'S WHAT HAS TO BE ON THE RECORD.

RIGHT. BUT THE PURPOSE OF THAT AFFIRMATIVE SHOWING ON THE RECORD IS TO MAKE SURE THAT IT IS VOLUNTARY WHAT HE'S DOING.

BUT ISN'T THE POINT THAT IN UPTON, THIS COURT WAS ASKED A CERTIFICATED QUESTION, IN 1996, AFTER HERNANDEZ, AS TO WHETHER THAT WAIVER HAS TO BE BY THE PARTY -- BY THE DEFENDANT RATHER THAN BY COUNSEL. AND THIS COURT SAID IT DID. NOW WITH THAT CASE LAW, WHAT I'M REALLY HAVING A PROBLEM WITH IS THAT, WHAT OBVIOUSLY TO ME AT LEAST, WHAT I'M READING, IS THAT JUDGE MOUNTS THOUGHT THAT HE DID HAVE A WAIVER. THE PEOPLE HERE, THE LAWYERS HERE PROCEEDED ON THE BASIS, GIVEN IN GOOD FAITH, I WOULD ASSUME, THAT THERE HAD BEEN A WAIVER HERE. BUT SOMEWHERE ALONG THE LINE, ABOUT THREE YEARS AGO, IT WAS DISCOVERED THERE WASN'T A WAIVER. AND HERE WE ARE UP HERE IN TALLAHASSEE, THIS MAN'S OVER ON DEATH ROW. AND THERE IS AN ABSOLUTE, IN OUR CASES, AN ABSOLUTE RIGHT THAT HE HAS TO HAVE HAD A JURY UNLESS HE EXPRESSLY WAIVED IT. AND I CAN'T FOR THE LIFE OF ME, I'M HAVING A HARD TIME FIGING -- FIGURING OUT WHY WE HAVEN'T GIVEN IT TO HIM IN THIS THREE YEAR PERIOD. CAN YOU EXPLAIN THAT TO ME?

YOUR HONOR, THE BEST WAY I CAN EXPLAIN THAT, IS TO SAY AGAIN, THAT THE PURPOSE OF HAVING A WAIVER IS TO SHOW THAT IT IS A VOLUNTARY DECISION ON THE BASIS OF THE DEFENDANT. I THINK IF THIS RECORD IS EXAMINED AS A WHOLE, WE CAN TELL IT WAS THE DEFENDANT'S INTENT TO WAIVE THE ADVISORY JURY. HE AT NO POINT, THERE WERE NINE MONTHS IN BETWEEN, HIS PLEA COLLOQUY AND HIS ACTUAL SENTENCING OR AND AT NO TIME WAS THERE A REQUEST FOR AN ADVISORY JURY AT THAT POINT. THEREAFTER, AFTER HISAL LOW CUSHION HEARING, THERE WAS THREE MONTHS BEFORE THE SENTENCING ORDER WAS ACTUALLY READ. AND AGAIN THERE WAS NO OBJECTION TO THE FACT THERE HADN'T BEEN ADVISORY JURY.

THE STATE'S POSITION IS THAT THIS RECORD IS ADEQUATE TO DEMONSTRATE A WAIVER.

WHEN YOU PUT EVERYTHING TOGETHER. AND ALSO THE COURT CAN TAKE JEW TIRBL -- JUDICIAL NOTICE OF THE CO-DEFENDANT, JOHN CHAMBERLIN, AT S CO2 1150. AND IN THAT CASE, AND ON THE RECORD ON APPEAL CONTAINS THE DEPOSITION FROM MR. THIBAUT AND ALSO HE TESTIFIED AT HIS CO-DEFENDANT'S TRIAL. IN THERE HE MAKES A STATEMENT THAT HE ACKNOWLEDGES THAT HIS LAWYER HAD ADVISED HIM THAT HE PROBABLY HAD A BETTER CHANCE OF GETTING A LIFE SENTENCE BEFORE THE JUDGE RATHER THAN THE JURY, CONSIDERING THE FACTS OF HIS CASE. SO, AND THAT SAID, I BELIEVE ARE 1746-48. SO IT SHOWS AGAIN HIS INTENTION AND THE VOLUNTARINESS OF WHAT HE DID IN WAIVING THE ADVISORY JURY.

THANK YOU VERY MUCH.

I ASK YOU TO AFFIRM. THANK.

YOU MR. MARSHAL, TIME LEFT?

UNLESS THE COURT HAS FURTHER QUESTIONS OF ME, I DON'T IMAGINE YOU'D WANT TO HEAR ME REPEAT MY ARGUMENT AGAIN SO I'D WAIVE THE REMAINDER OF MY REBUTTAL TIME UNLESS

THERE ARE OTHER QUESTIONS.

THANK YOU BOTH VERY MUCH. COURT WILL STAND IN RECESS UNTIL TOMORROW MORNING AT 9:00.