The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

Norman Mearle Grim, Jr. v. State of Florida

MAY IT PLEASE THE COURT, MY NAME DAVE DAVIS REPRESENTING GRIM IN GRIM VERSUS STATE. BEFORE HE TOLD THE TRIAL COURT -- ON SEXUAL BATTERY, HE TOLD THE TRIAL COURT THAT HE HAD NO INTENTION, IF FOUND GUILTY, THAT HE WOULD PROCEED WITH ANY EVIDENCE OF MITIGATION AND DID NOT WANT HIS LAWYER TO ARGUE ANYTHING IN MITIGATION. THE COURT, AT THAT TIME, HAD A HEARING THAT THIS COURT HAS APPROVED IN OUR OUTLINE IN COOMBS, IN WHICH THE OUTLINE OF POSSIBLE MITIGATION THAT WAS FOUND IN THIS CASE, SPECIFICALLY HE SAID THERE WAS SOME MENTAL MITIGATION. IN PARTICULARLY, HE SAID THAT DR.^JAMES LARSON, THE PSYCHOLOGIST IN THIS CASE, WOULD SAY THAT BOTH STATUTORY MENTAL MITIGATORS WOULD APPLY. THE COURT HELD THE HEARING. HE THEN PROCEEDED TO HAVE THE TRIAL. DURING THE TRIAL, THE FACTS CAME OUT AS FOLLOWS, THAT ON THE MORNING OF JULY 27, 1998, SOMEONE, FOR SOME REASON, THREW A ROCK OR A LUG NUT THROUGH MS.^CAMPBELL'S WINDOW AND BROKE IT. SHE CALLED THE POLICE. THIS IS EARLY IN THE MORNING, ABOUT FIVE IN THE MORNING. SHE CALLED THE POLICE. THE POLICE CAME OUT. MR. GRIM, WHO LIVED NEXT DOOR TO HER, CAME OUT AND EVENTUALLY INVITED HER OVER TO HIS HOUSE FOR COFFEE, AND THAT WAS ESSENTIALLY THE LAST THAT WAS EVER SEEN OF HER. SHE WAS, HER BODY WAS THEN FOUND LATER ON THAT AFTERNOON, IN PENSACOLA BAY. MR. GRIM, IN THE MEANTIME, HAD JUST GOTTEN IN HIS CAR AND DRIVEN OUT AND WOULD EVENTUALLY DRIVE OUT TO OKLAHOMA. HE WAS ARRESTED AND BROUGHT BACK, AND AS I SAID, HE WAS CHARGED WITH THESE TWO OFFENSES. HE WAS CONVICTED AS CHARGED, AND, AGAIN, AT PENALTY PHASE, THE -- ALL THAT WAS PRESENTED WAS JUST A CASE FOR AGGRAVATION. HE PRESENTED NOTHING IN MITIGATION. HE REFUSED TO LET HIS LAWYER ARGUE ANYTHING IN MITIGATION. HIS THEORY, HIS IDEA BEING THIS IS SOMETHING HE WANTS ME TO LET YOU KNOW, THAT HE BELIEVES HIMSELF INNOCENT, AND HE STRONGLY CONTESTS THAT HE IS INNOCENT OF THESE CRIMES, AND THAT IF HE IS NOT, IF THIS COURT DOESN'T AGREE, HE AS ?? HE WOULD JUST AS SOON DIE. THAT IS THE POSITION AT THIS POINT.

HAVE YOU RAISED ANY ISSUES WITH REGARDS TO GUILT?

YES. IT DEALS WITH A STATEMENT THAT MISS CAMPBELL MADE. SHE WAS THE LAWYER WITH THE CONSTRUCTION COMPANY OVER IN PENSACOLA, AND APPARENTLY SHE FELT THAT THIS COMPANY OR A MEMBER OF THIS COMPANY WAS MAKING THREATS AGAINST HER, AND SHE SAID AT ONE POINT THAT IF HER BODY ENDS UP IN THE BAY, THAT THEY, THE POLICE SHOULD LOOK TO HENRY COMPANY HOMES. THE COURT REFUSED TO LET THAT COME IN, FINDING NO EXCEPTION TO THE HEARSAY RULE TO ALLOW IT IN, BUT THE ARGUMENT THAT WE MAY HEAR IS THAT THERE WAS, GRIM'S DEFENSE REALLY WAS PREDICATED ON THIS, THAT THERE WAS SOMEBODY ELSE AND THEY, IN FACT, CAME INTO HIS HOUSE AFTER HE LEFT AND AFTER HE SAYS THE POLICE LEFT.

AFTER HE LEFT WHEN?

DURING THIS ORIGINAL INVESTIGATION, WHEN THEY THREW THE ROCK OR THE LUG NUT THROUGH THE WINDOW, THE POLICE CAME OUT AND INVESTIGATED, AND THEN AFTERWARDS, WHILE THE POLICE WERE STILL INVESTIGATING, HE SAID MY DOGS ARE LOOSE. HE GOT IN HIS CAR AND TOOK AND LEFT TO OKLAHOMA.

HOW DOES THIS SQUARE, HOWEVER, WITH THE EVIDENCE THAT WAS PRESENTED IN THIS CASE? NOW, MR. GRIM, AS I UNDERSTAND, LEFT IN THESE CARS TO GET THESE DOGS AND WAS NOT SEEN

AGAIN UNTIL THEY PICKED HIM UP IN OKLAHOMA?

ACTUALLY THERE IS A VIDEO THAT IS INCRIMINATING GUILT.

HE WAS NOT SEEN BY THE POLICE AGAIN UNTIL THEY PICKED HIM UP IN OKLAHOMA?

THAT'S RIGHT.

AND HE HAD THE SAME CAR WITH HIM IN OKLAHOMA?

THAT'S CORRECT.

IN THIS CAR THERE WAS ALL KIND OF FIBER AND BLOOD EVIDENCE, ET CETERA, THAT WAS INTRODUCED AT TRIAL. AM I CORRECT?

I BELIEVE SO.

AND SO WAS THERE SOME EVIDENCE THAT MR. GRIM WAS SOMEHOW INVOLVED WITH THIS PERSON THAT IS THE SUBJECT OF THIS STATEMENT?

THE SUBJECT OF THE STATEMENT WAS THE VICTIM.

NO. THE VICTIM MADE THE STATEMENT, BUT THERE WAS ??

NO. NO. THERE IS NO EVIDENCE. THE OTHER PERSON WAS, I THINK, A SECRETARY OR A PARALEGAL OR ACCOUNTANT THAT SHE MADE THAT STATEMENT TO. GRIM DIDN'T KNOW.

HOW DOES THAT STATEMENT, THEN, SQUARE WITH ALL OF THIS EVIDENCE CONCERNING THE VICTIM'S BLOOD AND THE FIBERS AND ALL OF THIS IN HIS CAR AND HIS HOUSE?

I AM NOT ARGUING THE STATE PRESENTED INSUFFICIENT EVIDENCE, BUT I AM SAYING THIS WAS AN ARGUMENT THAT HE COULD HAVE MADE TO THE JURY, THAT THERE COULD HAVE BEEN OTHER PEOPLE THAT PLANTED THAT EVIDENCE IN HIS HOUSE.

WHAT WAS THAT OTHER BASIS, THAT IT CAME IN EXCITED UTTERANCE?

NO. SIMPLY A DUE PROCESS RIGHT.

BUT THERE IS SOME QUESTION THERE AS AN ISSUE, AS TO THE RELIABILITY OF A STATEMENT. SHE THINKS THERE IS SOMEBODY THAT MAY HAVE BEEN OUT TO GET HER, BUT, AGAIN, GOING BACK TO JUSTICE QUINCE, THERE IS NOTHING AT ALL THAT IS CORROBORATING ANYTHING ABOUT THAT WHOEVER THIS OTHER PERSON IS COULD HAVE HAD ANYTHING TO DO WITH IT.

YOU HAVE GOT HER MAKING THIS SORT OF STATEMENT WITH NO IDEA THAT SHE IS EVENTUALLY GOING TO BE MURDERED. IT IS CERTAINLY JUST MERE FACT THAT SHE MAKES IT. WHY WOULD SHE MAKE THIS? UNLESS ??

WHEN DID SHE MAKE IT, IN RELATIONSHIP TO THIS MURDER?

IT WAS SOMETIME, I AM NOT SURE OF THE EXACT DATE. IT WAS MAYBE A WEEK OR TWO EARLIER. I AM NOT REAL SURE, BUT IT WAS EARLIER, AND SHE HAD BEEN INVOLVED IN THIS LITIGATION. THERE IS SOME INDICATION THAT SHE HAS SOME FEAR THAT SHE WOULD BE MURDERED, NOT BY NORMAN GRIM BUT BY SOMEBODY CONNECTED WITH THIS CONSTRUCTION COMPANY. THE FACT THAT SHE MADE IT WITH NO OTHER REASON THAN HER OWN PERSONAL FEAR, I MEAN, PEOPLE DON'T MAKE THOSE STATEMENTS, UNLESS THEY HAVE REASON TO.

BUT THE STATEMENT THAT JUSTICE QUINCE REFERRED TO, THERE WAS EXHAUSTIVE EVIDENCE AT THE VICTIM'S HOME, IS THAT CORRECT? TYING ??

NOT AT THE VICTIM'S HOME. THEY DIDN'T FIND ANYTHING AT THAT TIME, BUT LATER ON IN THE AFTERNOON, THEY GOT A SEARCH WARRANT TO SEARCH HIS HOUSE, AT WHICH POINT THEY WOULD FIND A COOLER WITH A CLAW HAMMER TIED TO THE MURDER AND THE VICTIM'S GLASSES AND SOME OTHER BLOODY ITEMS. I HAVE TO CONCEDE THEY HAVE A STRONG CIRCUMSTANTIAL EVIDENCE CASE AGAINST HIM. IT IS CLEAR TO ME THAT THEY DO.

THERE WAS EVIDENCE. I THOUGHT THAT THERE WAS, ALSO, EVIDENCE AT THE VICTIM'S RESIDENCE AND SURROUNDING THE VICTIM? THERE IS NOTHING, NO FINGERPRINTS? NOTHING TYING THE VICTIM ??

I WILL SAY HER FINGERPRINT WAS FOUND ON A COFFEE MUG IN THE DEFENDANT'S HOUSE.

BUT HIS FINGERPRINTS OR NOTHING ABOUT HIM WAS FOUND AT THE VICTIM'S RESIDENCE?

AS I RECALL, NO. MOST OF THIS EVIDENCE THEY FOUND IN HIS HOUSE OUT OF HIS COOLER, AND THAT IS WHERE, THAT IS WHERE THEY FIND IT.

BUT THIS IS STRICTLY A CHAMBERS ??

CHAMBERS.

ANYTHING THAT WOULD HAVE TO BE ADMITTED, IF THE DEFENDANT ASSERTS IT IN HIS DEFENSE, NO MATTER ORDINARY USE OF EVIDENCE.

WELL, IN THE SENSE THAT THERE IS EVERY INDICATION THAT THIS IS A RELIABLE STATEMENT. NOBODY HAS EVER SAID THAT SHE FABRICATED THIS STATEMENT OR ANYTHING LIKE THIS.

WAS THERE ANY EVIDENCE IN THIS CASE THAT SOMEBODY ELSE WAS INVESTIGATED OR IN ANY EVENT ??

NO. I MEAN, OTHER THAN THEY LATCHED ON TO NORMAN GRIM PRETTY QUICKLY, WHEN HE TAKES OFF.

WAS INFORMATION PROVIDED TO THE INVESTIGATING AUTHORITY?

I AM SURE IT WAS. THE DEFENDANT CAME UP ?? I DON'T KNOW IF THEY WERE SERIOUS ABOUT INVESTIGATING OTHER PEOPLE, BUT ANYWAY, THAT IS ??

IF YOU WOULD TURN YOUR ATTENTION, THOUGH, TO YOUR COMPLAINTS ABOUT THE TRIAL COURT'S ACTION.

YEAH. I MAKE THAT MENTION SIMPLY BECAUSE I WANT YOU TO KNOW THAT THIS IS WHAT GRIM IS FEELING AS TO GUILT. AS TO THE SENTENCING PHASE, AS I SAID, HE WANTS TO DIE, AND THE COURT HAD THIS HEARING ON THIS AND ON THIS POSITION, AND THE COURT SAID, WELL, AT THE SPENCER HEARING, AFTER THE JURY HAD RECOMMENDED DEATH 12-TO-7, NOT HEARING ANY MITIGATION. THE COURT, AT THAT POINT, DEVELOPED A CASE FOR MITIGATION, WHICH HE DOES. A LITTLE BIT MORE AT THE HEARING, HAD COME UPON HIS OWN INVESTIGATION AND THE COURT FOUND MOST OF THIS IN THE SENTENCING, MOST OF IT WILL FIND ITS WAY, BUT THE COURT SPECIFICALLY REJECTS TWO STATUTORY MENTAL MITIGATORS, AND THE ARGUMENT HERE IS THAT GRIM, ALTHOUGH HE WANTED TO DIE, NEVER WAIVED HIS RIGHT TO A JURY RECOMMENDATION. HE WAS ENTITLED TO A JURY RECOMMENDATION, AND THIS COURT IN MOHAMMED, BASICALLY TRACKING UP TO THIS POINT THE FACTS IN THIS CASE, AGREED THAT

WHEN A TRIAL COURT GIVES A SENTENCING RECOMMENDATION THAT HAS BEEN SKEWED BECAUSE A DEFENDANT WANTS TO DIE AND PRESENTS NOTHING IN MITIGATION, THEY CAN'T. THE SUBSEQUENT DEATH SENTENCE IS INVALID, BECAUSE THE JUDGE HAS GIVEN THE SKEWED JURY RECOMMENDATION.

SO WHAT ARE YOU SAYING HERE? YOU HAVE A DEFENDANT WHO SAYS, I DON'T WANT YOU TO PRESENT MITIGATION. THE JUDGE HAS A HEARING, FINDS THAT THE DEFENDANT IS COMPETENT TO SAY THIS.

RIGHT.

SO ARE YOU, THEN, YOUR ARGUMENT, THEN, IS THAT THE JUDGE SHOULD NOT HAVE LISTENED TO THIS?

NO. NO. ABSOLUTELY NOT. TO THE CONTRARY.

SO HOW DO YOU SQUARE BOTH OF THESE? HOW DO YOU LET THE DEFENDANT WAIVE IT AND THEN COME BACK AND SAY THE TRIAL JUDGE ??

WHAT I AM SAYING IS THE EVIDENCE THERE AS DEVELOPED BY MR. KIPRIOS FOR THE SPENCER HEARING, SHOULD HAVE BEEN PRESENTED TO THE JURY. THEY KNEW AT THE COOMBS HEARING, THE JUDGE KNEW THERE WAS EVIDENCE, OBVIOUSLY OVER HIS OBJECTION, BECAUSE HE DIDN'T WANT ANY MITIGATION PRESENTED.

WE HAVE MOHAMMED, WHICH DIDN'T APPLY IN THIS CASE, BECAUSE MOHAMMED WAS PERSPECTIVE, BUT IN MOHAMMED, THE MOST MAJORITY REQUIRED WAS THAT THE JUDGE ORDER AN INDEPENDENT PSI. THIS JUDGE DID FAR MORE, AND AS YOU SAY, ACTUALLY CONSIDERED A WEALTH OF MITIGATION, AS FAR AS THE ERROR IN MOHAMMED, WHICH HAD TO COMPEL THE JURY'S RECOMMENDATION OF GREAT WEIGHT. HERE THE JUDGE SPECIFICALLY SAID, IN THE SENTENCING ORDER, THAT IN REACHING A SENTENCING DECISION, THIS COURT HAS ESSENTIALLY FOLLOWED THE TWO SEPARATE PATHS RECOGNIZED BY LAW. IT DUALLY CONSIDERED THE JURY RECOMMENDATION BUT ALSO INDEPENDENTLY WEIGHED THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND BOTH HAVE LED TO THE SAME POINT. THIS JUDGE HAS DONE EXACTLY WHAT WE ENVISIONED A JUDGE WOULD DO IN MOHAMMED, SO I DON'T KNOW HOW ??

IN WHICH YOU DIDN'T GO FAR ENOUGH IN MOHAMMED, IS WHAT I AM SAYING. WHAT I AM SAYING, WHEN THERE IS MITIGATING EVIDENCE AND THE JURY IS GOING TO MAKE A RECOMMENDATION AND THAT RECOMMENDATION IS GOING TO BE SKEWED BECAUSE THE JURY DOESN'T CONSIDER THAT MITIGATION, WHAT YOU NEED TO DO IS PRESENT THAT EVIDENCE TO THE JURY.

BUT SURELY YOU CAN'T SAY THAT THIS TRIAL COURT ERRED IN NOT FOLLOWING WHAT YOU ARE NOW SAYING, THAT WE DIDN'T GO FAR ENOUGH IN MOHAMMED.

THAT'S CORRECT.

SO, I MEAN ??

THE ERROR IS THAT HE SHOULD HAVE, IF HE IS GOING TO GIVE THAT MITIGATION GREAT WEIGHT, AND HE KNEW THE MITIGATION IS OUT THERE THAT HAS GOT TO BE PRESENTED TO THE JURY. YOU CAN'T JUST KEEP THAT MITIGATION AWAY FROM THE JURY.

BUT THIS JUDGE WENT TO EXTRAORDINARY LENGTHS EVEN TO, REALLY, IT REALLY IS EXTRAORDINARY HERE. THE JUDGE VIRTUALLY HAS ANTICIPATED MOHAMMED AND SAYS THAT, I AM NOT, I REALIZE THAT THERE IS A PROBLEM WITH THE JURY'S RECOMMENDATION, WHICH IS

THE PROBLEM WE DEALT WITH IN MOHAMMED, AND THEREFORE I HAVE GOT TO SORT OF INDEPENDENTLY, ON ANOTHER TRACK, ANALYZE ALL OF THIS, AND HE DID THAT.

BUT GRIM NEVER WAIVED HIS RIGHT TO A JURY RECOMMENDATION. THAT IS, YOU HAVE GOT TO, THAT IS THE KEY HERE. IF HE HAD WAIVED IT, THIS ARGUMENT IS OUT, BUT HE NEVER WAIVED THAT RIGHT, SO ??

WE HAVE NEVER SAID, THOUGH, AND YOU AGREE, THAT WE HAVE NEVER SAID BEFORE MOHAMMED AND WE HAVEN'T SAID, IN MOHAMMED, THAT THE JUDGE MUST DO WHAT HE DID FOR HIMSELF HERE, AND THAT IS COMPEL THE PRESENTATION OF EVIDENCE BEFORE THE JURY. IS THAT CORRECT?

THAT IS WHAT I AM SAYING YOU NEED TO DO TODAY. NO. IT DOESN'T BEFORE MOHAMMED, AND THAT IS WHY I SAY, I AM TAKING A DEEP BREATH HERE, BECAUSE ??

YOU AGREE THAT NOBODY ASKED FOR THAT IN THIS CASE?

NO. NOBODY ??

BUT YOU AGREE THE JUDGE HERE WENT TO EXTRAORDINARY LENGTHS.

YES. I WAS SITTING THERE SAYING, GEEZ, WHAT AM I GOING TO SAY ON THIS GUY'S BEHALF? HE ANTICIPATED MOHAMMED. HE REQUESTED PSI. HE REQUESTED SEPARATE COUNSEL. BUT GRIM NEVER WAIVED HIS RIGHT TO A JURY TRIAL AND JURY RECOMMENDATION.

EVEN IF WE ACCEPT YOUR PREMISE THAT IT WAS ERROR, WOULDN'T IT, AT BEST, BE HARMLESS ERROR, IN REGARD OF THE COURT GOING AHEAD AND ALLOWING EVIDENCE, AND THE COURT PUTTING IT ON RECORD AND SAYING, I AM CONSIDERING IT, IN LIGHT OF THE FACT THAT THE DEFENDANT DID NOT PUT ON MITIGATING EVIDENCE, HIMSELF.

LET ME TELL YOU WHY. WHAT WOULD HAVE HAPPENED IF HE HAD PRESENTED THAT MITIGATION? WOULD THAT INDEPENDENT JURY HAVE COME TO THAT SAME CONCLUSION? THE ANALYSIS FOR A LIFE RECOMMENDATION IS RADICALLY DIFFERENT THAN FOR THE DEATH RECOMMENDATION. UNDER A LIFE SENTENCE, LIFE RECOMMENDATION, WE ARE LOOKING FOR A REASONABLE BASIS FOR THE JURY'S RECOMMENDATION AND SAYING, NO, IT IS NOT THERE. THAT IS THE REASON FOR THE HARM, BECAUSE THE JURY, IN LIGHT OF THE OTHER MITIGATION AND OTHER MENTAL MITIGATION PRESENTED, WOULD HAVE RECOMMENDED LIFE, THEREFORE, I WOULD PROBABLY NOT BE HERE TODAY.

THE ONLY WAY TO CURE THE DEFENDANT'S ELECTION NOT TO PUT ON MITIGATING EVIDENCE IS FOR THE JUDGE TO PUSH THE ISSUE AND FORCE MITIGATING EVIDENCE BE PUT IN. IS THAT ??

THAT IS ESSENTIALLY ?? WHEN THE JUDGE NOTICED THE MITIGATING EVIDENCE AND THE DEFENDANT HAS NOT WAIVED HIS RIGHT TO TRIAL, THEN THERE HAS GOT TO BE SOME PRESENTATION, IF THE JUDGE IS GOING TO CONSIDER THAT MITIGATION, WHICH HE HAS TO.

WHY ISN'T IT JUST AS PLAUSIBLE THAT, WHEN A JURY, A DEFENDANT COMES BEFORE THE COURT AND SAYS, I DO NOT WANT TO PRESENT MITIGATING EVIDENCE, THAT HE IS ESSENTIALLY SAYING, I DON'T WANT A JURY RECOMMENDATION?

A JURY DETERMINATION IS A FUNDAMENTAL RIGHT. IT IS IN THE CONSTITUTION, I BELIEVE, THE SIXTH AMENDMENT. HE CAN WAIVE IT. HE DID WAIVE IT HERE, AND INTERPRETING THAT, SAYING IF YOU ARE GOING TO WAIVE A JURY TRIAL, YOU HAVE GOT TO EXPLICITLY TELL THE JUDGE, TELL THE DEFENDANT THAT. YOU HAVE GOT TO GO THROUGH THE PROS AND CONS.

DID THE JUDGE ASK HIM ??

HE SHOULD HAVE.

BY, IN FACT, WAIVING THE PRESENTATION OF MITIGATION EVIDENCE, ARE YOU, IN FACT, ALSO WAIVING A JURY RECOMMENDATION?

YES. AND DO YOU WANT ME, THE JUDGE, TO BE THE SOLE SENTENCEOR IN THIS CASE? AND IF HE HAD DONE THAT AND GONE THROUGH THE FULL COLLOQUY, TO MAKE SURE THAT HE KNOWINGLY AND INTELLIGENTLY AND FULLY WAIVED HIS RIGHT TO A JURY TRIAL, THIS WOULDN'T BE AT ISSUE HERE.

AND IN MOHAMMED, THE JUDGE GAVE THE SENTENCING RECOMMENDATION GREAT WEIGHT AND THEN DIDN'T INDEPENDENTLY RECEIVE ANY INFORMATION ABOUT MITIGATING. HERE THE JUDGE GOT ALL THIS INFORMATION ABOUT MITIGATING, WEIGHED IT, AND IN THE SENTENCING ORDER EXPLICITLY STATED THAT, ALTHOUGH I HAVE GOT THIS INFORMATION ABOUT THE JURY, I AM GOING TO INDEPENDENTLY LOOK AT WHAT I HEARD AND MAKE THAT DECISION, AND I THINK THAT PART OF THE CASE THAT I GUESS WAS KLUCOCH, WHERE THE JUDGE COULD HAVE DISCRETION AND MAYBE THE JUDGE WOULD, AFTER MOHAMMED, TO ACTUALLY ALLOW THAT PRESENTATION TO BE BEFORE THE JURY, TO SAY THAT IT IS, THAT THE WAY THIS JUDGE, IN TERMS OF THE SENTENCING ORDER, EVALUATED THE JURY'S RECOMMENDATION. IT DID NOT COMPEL HIM TO REACH THE RESULTS HE DID, AND I JUST, YOU AGREE IT IS DIFFERENT THAN MOHAMMED, AT SENTENCING.

NO. NO. NO. NO.

WELL, THEN YOU NEED TO LOOK AT WHAT THE JUDGE SAID IN MOHAMMED.

NO. ESSENTIALLY THE JUDGE ACKNOWLEDGED, IN MOHAMMED AND IN THIS CASE, HE IS GIVING THE JURY'S RECOMMENDATION GREAT WEIGHT, AND HE CANNOT DO THAT, AND SO WHEN THE JUDGE GOES THROUGH AN INDEPENDENT ANALYSIS AND SAYS HE COMES TO THE SAME RESULT, IT IS NOT A HARMLESS ERROR QUESTION, BECAUSE, NO, THE JURY MAY VERY WELL HAVE RECOMMENDED LIFE, AND THAT IS WHY I AM SAYING THAT, WHEN THERE IS MITIGATING EVIDENCE PRESENT, THAT THE JURY HAS TO BE, PARTICULARLY IF THERE IS GOING TO BE AND JURY RECOMMENDATION, THE JURY HAS GOT TO BE AWARE OF IT. THAT IS ESSENTIALLY WHAT ESPINOSA VERSUS FLORIDA IS SAYING, IS FLORIDA HAS SPLIT THIS DECISION IN TWO, AND UNTIL THE DEFENDANT WAIVES THAT RIGHT TO HAVE ONLY THE JUDGE DO THE SENTENCING, THE JURY HAS GOT TO BE INFORMED OF THE FACTS, JUST AS THE SENTENCING COURT, AND THAT IS ESSENTIALLY THE ARGUMENT HERE, IS THAT THE JUDGE GAVE GREAT WEIGHT TO THE JURY'S RECOMMENDATION. HE COULD NOT DO IT, UNTIL THE JURY HAD AT LEAST THE SAME INFORMATION THAT HE HAD.

WHAT IS THE CONSTITUTIONAL IMPEDIMENT TO, ONCE THE DEFENDANT SAYS, I DON'T WANT PRESENTATION OF MITIGATION, WE HAVE GONE THROUGH THE WHOLE COLLOQUY AND DETERMINED THAT HE IS COMPETENT AND CAN DO THIS, THAT NO MITIGATION IS PRESENTED TO EITHER THE JURY OR THE JUDGE?

WELL, I WOULD SAY, SUGGEST THAT, IF YOU WANT TO HAVE A RELIABLE SENTENCE, AND IF YOU WANT TO VALIDLY EXECUTE THIS MAN, AND YOU KNOW THERE IS MITIGATION OUT THERE, YOU CAN'T IGNORE IT.

HOW DO YOU KNOW?

WELL, THAT IS ??

THE DEFENDANT HAS ALREADY SAID, I DON'T WANT THE PRESENTATION OF MITIGATION. HOW DO YOU KNOW THAT THERE IS MITIGATION?

THAT IS WHAT THE COOMBS HEARING IS DESIGNED TO DO. THIS IS WHAT I CAN PROVE IN THE MITIGATION PHASE, BASED ON RELIABLE INFORMATION, AND UNLESS THE DEFENDANT WAIVES HIS RIGHT TO THE JURY, THE JURY HAS GOT TO HAVE THAT INFORMATION, IF THE JURY IS GOING TO MAKE A RECOMMENDATION. THIS PUSHES MOHAMMED. I AGREE WITH YOU, I AM LOOKING AT WHAT HAPPENED IN MOHAMMED. YOU DID NOT TAKE THIS, BUT I AM SAYING YOU ARE GOING TO HAVE TO GO BEYOND MOHAMMED. MOHAMMED IS NOT THE FINAL ANSWER TO THIS PROBLEM. IT IS A DIFFICULT PROBLEM. I AM SIMPLY MAKING THIS ARGUMENT, CONTRARY TO MR. GRIM. HE WANTS TO DIE. IF HE IS FOUND GUILTY, HE WANTS TO DIE, BUT IF NOT, HE WANTS TO GO BACK AND PROVE HIS INNOCENCE, SO WHAT I AM SAYING HERE IS, YOU CANNOT TRUST THE RELIABILITY THAT WE ATTACH TO A SENTENCING ORDER IS NOT HERE, BECAUSE THE JURY RECOMMENDATION WAS SKEWED, AND THE TRIAL JUDGE DID NOT PROPERLY GIVE THIS EVIDENCE TO A JURY.

YOU WANT US TO COME UP WITH A RULE THAT SAYS, WHEN A DEFENDANT WAIVES MITIGATION, THAT THE JUDGE SHOULD INQUIRE AND ASCERTAIN WHETHER THE DEFENDANT, ALSO, WILL WAIVE A PENALTY PHASE ADVISORY TO THE JURY, WHICH THE DEFENDANT CAN DO.

THAT IS ONE THING.

AND IF THEY DO THAT, THEY CAN DO IT AND GET THE PSI, LIKE WE DID IN MOHAMMED. HOWEVER, IF THEY CHOOSE TO WANT TO HAVE THE ADVISORY RECOMMENDATION OF THE JURY,, AND THAT MIGHT BE A PREFERABLE WAY, IF WE WERE GOING TO ADVISE FOR THE FUTURE, BUT I THINK WE GET BACK TO TRYING TO DECIDE WHETHER, IN THIS CASE, WHAT THE JUDGE DID DO, WHICH WAS FOLLOW WHAT WE CAME OUT WITH AFTERWARDS IN MOHAMMED, WHY THERE WOULD BE ERROR.

LET ME SAY THIS. MOHAMMED IS PERSPECTIVE ONLY, OBVIOUSLY. IT DOESN'T INCLUDE THE PIPELINE CASE, AND THAT CASE IS NOT A PIPELINE CASE.

YOU ARE SAYING MOHAMMED DIDN'T GET YOU THERE. HOW DO YOU GET THERE? IS IT AN EXTRAPOLATION OF THE TETTER CASE THAT WOULD GET TO YOUR POSITION?

IT IS AN ACCUMULATION OF CASES. I HATE TO STAY THAT. MOHAMMED POINTS YOU IN THE RIGHT DIRECTION, BUT IF YOU STOP SHORT OF WHAT HAPPENS WHEN A DEFENDANT DOESN'T WAIVE HIS RIGHT TO A JURY AND THE RESULTING MITIGATION, YOU DIDN'T ANSWER THAT QUESTION.

WAS A TETTER REQUIRED?

TETTER SAYS YOU HAVE TO GIVE THE JURY'S RECOMMENDATION GREAT WEIGHT, AND I THINK, YES, SINCE, YES, TETTER DOES REQUIRE, IF YOU ARE GOING TO GIVE, LIKE THE JUDGE SAID HERE, GIVE IT GREAT WEIGHT, THEN, AND THEN, ALSO, ESPINOSA SAYS IF WE ARE GOING TO SPLIT THIS SENTENCING IN TWO, THOSE SENTENCES HAVE TO BE EQUALLY INFORMED OF THE LAW BUT OF THE FACTS AS WELL.

YOU ARE IN YOUR REBUTTAL.

YES. THANK YOU VERY MUCH. MR.^CHIEF JUSTICE

MR. FRENCH.

MAY IT PLEASE THE COURT. MY NAME IS CURTIS FRENCH, ASSISTANT ATTORNEY GENERAL REPRESENTING THE STATE OF FLORIDA IN THIS CASE. I WOULD LIKE TO ADDRESS THE WHOLE

MOHAMMED ISSUE FIRST, I SUPPOSE. I AM NOT SURE EXACTLY WHAT PORTION OF THE RECORD OPPOSING COUNSEL IS CITING TO, WHEN HE SAYS THE DEFENDANT WANTS TO DIE. I WOULD REFER TO THE TRANSCRIPT VOLUME FIVE, AT PAGES 824 AND 828. AS I READ WHAT THE DEFENDANT IS STATING TO THE COURT, HIS CONCERN IS ??

IS THIS THE COLLOQUY BETWEEN THE DEFENDANT AND THE COURT FOR WAIVING ??

COON HEARING. YES, MA'AM.

?? THE MITIGATION?

YES, MA'AM. CALLED THE COON HEARING. COON VERSUS STATE. WHAT THE DEFENDANT'S CONCERN IS, IS THAT SOME OF THIS EVIDENCE THAT IS OSTENSIBLY MITIGATING, IS, IN FACT, HARMFUL TO HIM AND WOULD BE HARMFUL TO HIM AND PREJUDICIAL TO HIM DOWN THE LINE. WHAT HE SAYS, AT PAGE 824, THERE ARE SOME MITIGATING FACTORS THAT I BE DON'T WANT ON THE RECORD FOR THE APPEALS PROCESS. BASICALLY, HE DOESN'T WANT THE APPELLATE COURT TO KNOW ABOUT IT, SOME OF THE THINGS HE HAS FOUND OUT, MEANING HIS EXPERTS MIGHT BE INCRIMINATING. PAGE 828 SAYS, I AM HOPING THAT SOMEDAY I GET ANOTHER TRIAL. OKAY. AND THAT THE APPEALS COURT IS AWARE OF SOME OF THE THINGS OR SOME OF THE MITIGATING FACTORS. I WILL NEVER GET ANOTHER TRIAL. THAT IS WHAT I AM TRYING IT TO SAY. HIS JUDGMENT IS THE PRESENTATION OF SOME OF THE MITIGATING EVIDENCE THAT THE TRIAL COUNSEL WAS PREPARED TO OUTLINE DURING THE COON HEARING, INCLUDING WHAT DR.^LARSON MIGHT HAVE HAD TO SAY IN MITIGATION, WOULD, IN FACT, BE HARMFUL TO HIM. NOW, WHETHER THAT IS A VALID JUDGMENT OR A JUDGMENT THAT SOMEBODY ELSE MAY OR MAY NOT AGREE WITH OUR POSITION, IS THAT IT IS HIS JUDGMENT, AND UNDER THIS COURT'S CASE LAW, SINCE HAMLIN CONSISTENTLY ?? SINCE HAMLIN HAS THE RIGHT TO WAIVE MITIGATION, AND THAT IS WHAT HE CHOSE TO DO IN THIS CASE.

IN OTHER WORDS, HE IS MAKING A STRATEGIC DECISION THAT, ALTHOUGH HE REALLY WANTS THE JUDGE TO WEIGH THE AGGRAVATING AND LOOK AT THIS AND MAYBE DECIDE TO IMPOSE A LIFE SENTENCE, HE IS CONCERNED THAT THERE MIGHT BE SOME MITIGATION THAT WOULD ACTUALLY BE HARMFUL TO HIM.

THAT IS HOW I READ HIS TESTIMONY.

THAT IS REALLY NOT QUITE A COON SITUATION ANYWAY, WHICH IS SAYING, LISTEN, THERE MIGHT BE SOME MITIGATION THAT IS OKAY, BUT I AM NOT AGREEING THAT SOME OF THIS MITIGATION MIGHT ACTUALLY BACKFIRE?

AS I READ HIS TESTIMONY, HE IS NOT REALLY OBJECTING TO THE COURT CONSIDERING THAT WHICH IS ALREADY IN THE RECORD, BUT HE IS OBJECTING TO ANYTHING ADDITIONAL COMING IN, PARTICULARLY OBJECTING TO DR.^LARSON'S REPORT OR TESTIMONY COMING IN, OR EVEN COUNSEL SUMMARIZING, AT THIS HEARING, WHAT DR.^LARSON MIGHT HAVE HAD TO SAY. HE DIDN'T WANT IT ON THE RECORD. I THINK CLEARLY, AND I AGREE THAT THIS COURT COMMITTED NO ERROR UNDER MOHAMMED, THAT HE CLEARLY REVIEWED THIS EVIDENCE IN PENALTY PHASE. HE ACKNOWLEDGED, FIRST, THAT, OF COURSE, THIS COURT'S CASE LAW SAID THAT HE WAS REQUIRED TO GIVE GREAT WEIGHT TO THE JURY RECOMMENDATION, BUT HE, ALSO, UNDERSTOOD THAT, IN THIS CASE THE JURY HADN'T HEARD ANYTHING IN MITIGATION, AND THEREFORE REVIEWED THE EVIDENCE TWO WAYS. FIRST OF ALL, GIVING GREAT WEIGHT TO THE JURY RECOMMENDATION AND SECONDLY, REVIEWING IT INDEPENDENTLY AND GIVING NO WEIGHT TO THE JURY RECOMMENDATION, CAME TO THE SAME CONCLUSION BOTH WAYS, AND I THINK CLEARLY HE AVOIDED THE ERRORS THAT THE JUDGE IN MOHAMMED MADE. SECONDLY, IT AS HAS BEEN POINTED OUT, HE ORDERED A PSI AT THE TIME THIS SENTENCING OCCURRED. THAT WASN'T REQUIRED, AND MOHAMMED STILL DOESN'T APPLY TO THIS CASE, BECAUSE THIS CASE WASN'T FINAL AT THE TIME. NEVERTHELESS, HE COMPLIED WITH MOHAMMED. HE EVEN WENT

FURTHER AND APPOINTED SPECIAL COUNSEL TO PRESENT MITIGATION AND MAKE ARGUMENTS IN MITIGATION FOR THE DEFENDANT. NOW, THE ONLY COMPLAINT THAT I CAN FIGURE OUT THAT APPELLATE COUNSEL IS MAKING, IS WHAT HE IS SAYING IS THAT NOT ONLY SHOULD THIS COURT NOW, FOR THE FIRST TIME EVER, REQUIRE SPECIAL COUNSEL TO BE APPOINTED IN THESE KINDS OF CASES, AND WHICH HE DID APPOINT SPECIAL COUNSEL, BUT TO DO SO BEFORE THE JURY PROCEEDING AND, IN FACT, WHAT APPELLATE COUNSEL WOULD HAVE US DO IS OVERRULE HAMLIN AND APPOINT A SPECIAL COUNSEL TO PRESENT EVIDENCE TO THE JURY AND HAVE A FULL ADVERSARY HEARING.

ONE OF THE CASES IN MOHAMMED, IT WAS, WENT BEFORE A JURY, AND IN THIS CASE IT WENT BEFORE THE JURY. IF, IN REVIEWING THE CASES BEFORE MOHAMMED, WHICH INVOLVED DEFENDANTS WHO DID NOT WANT TO PRESENT MITIGATION, ALL THOSE OTHER CASES INVOLVED SITUATIONS WHERE THERE WAS NO JURY. IS THAT YOUR RECOLLECTION OF THE CASE LAW?

WELL, MOHAMMED THERE WAS A JURY. PRIOR TO THAT?

BEFORE.

I HAVE LOOKED AT THEM RECENTLY. I DON'T RECALL THE ANSWER TO THAT PARTICULAR QUESTION.

BECAUSE IT WOULD SEEM THAT IT WOULD GO ALONG THAT, IF SOMEBODY WAS SAYING, WE DON'T WANT MITIGATION CONSIDERED, THEN THE IDEA OF THE JURY SITTING THERE AND JUST LISTENING TO AGGRAVATING EVIDENCE REALLY DOESN'T ENHANCE THE RELIABILITY.

THE JURY COULD DETERMINE THAT THAT AGGRAVATING EVIDENCE WAS SUFFICIENT TO WARRANT A DEATH SENTENCE, EVEN WITHOUT EVIDENCE PARTICULARLY ADMITTED IN MITIGATION.

BUT UNDER THE CIRCUMSTANCES, I THINK IT IS KLUCOCH, IT WOULDN'T MAKE SENSE, THEN, IF YOU WERE GOING TO DO IT THAT WAY, TO HAVE THE SPECIAL COUNSEL, IF YOU ARE GOING TO APPOINT ONE, BE APPOINTED SO THE JURY CAN HEAR IT, TOO.

IN KLUCOCH, THERE WAS ONLY ONE AGGRAVATOR IN THAT CASE. FRANKLY, THE STATE WOULD HAVE A PROBLEM WITH ANY REQUIREMENT THAT THE TRIAL JUDGE APPOINT SPECIAL COUNSEL. I THINK I AM AFRAID IT WOULD BE A CLEAR VIOLATION OF FERETTA. I THINK THE DEFENDANT DOES HAVE THE RIGHT TO CHOOSE IN WHAT WAY, IF AT ALL, HE IS GOING TO PRESENT MITIGATION. HE CAN REPRESENT HIMSELF.

LET ME ASK YOU THIS. IF WE ARE GOING TO CONTINUE DOWN THE ROAD OF THE DEFENDANT HAS THE RIGHT TO WAIVE MITIGATION, THEN WHAT IS, WHAT DO YOU CONTEND IS THE BEST SOLUTION? DOES THE WAIVER OF MITIGATION ALSO WAIVE A JURY RECOMMENDATION, OR JUST WHAT SHOULD BE DONE? IN THIS SITUATION, YOU WOULD WAIVE IT, AND NOW YOU ARE SAYING IT SHOULD BE CONSIDERED, AND THE JURY SHOULD HAVE HEARD IT, SO WHERE DO WE GO FROM HERE?

I THINK THE DEFENDANT CAN WAIVE MITIGATION WITHOUT NECESSARILY WANTING TO WAIVE A JURY, SO I DON'T KNOW THAT THAT WOULD NECESSARILY BE AUTOMATIC. HERE THE DEFENDANT INDICATED, AND I REFER TO VOLUME FIVE OF THE TRANSCRIPT, PAGE 815 ??

HOW DO WE EVALUATE WHAT THE JURY HAS DONE, IF, IN FACT, THE JURY HAS NOT HEARD ANY MITIGATION, AND YET THE TRIAL JUDGE, AT LEAST IN THE PART, RELIES ON WHAT THE JURY ??

IF THE JURY RECOMMENDS LIFE WITHOUT HEARING ANY RECOMMENDATION, THEN WE GIVE GREAT WEIGHT TO THAT, I WOULD THINK. AND I THINK THAT IS POSSIBLE.

IN THAT SITUATION, WHERE THE JURY RECOMMENDED LIFE. WE ARE IN A SITUATION WHERE THE JURY, HAVING HEARD ONE SIDE OF IT, RECOMMENDED DEATH.

YES.

SO HOW ARE WE SUPPOSED TO EVALUATE THAT NOW, SINCE THE JUDGE IS REQUIRED TO LISTEN TO THE MITIGATION ANYWAY? WHAT DO WE ??

WE EVALUATE ?? WHAT DO YOU PROPOSE?

TO REVIEW THE JURY'S RECOMMENDATION.

TO REVIEW THE WHOLE THING?

WE REVIEW WHAT THE JUDGE DID AND THE DECISION HE MADE AND DETERMINE WHETHER IT IS APPROPRIATE UNDER THE EVIDENCE. LET ME POINT OUT, TOO, YOU KNOW, THAT MITIGATION SOMETIMES COMES IN IN THE GUILT PHASE. THERE ARE THINGS THAT ARE MITIGATING ABOUT THE CIRCUMSTANCES OF THE EVENTS. FOR EXAMPLE, THAT HE WAS USING DRUGS OR ALCOHOL, OR THERE MIGHT BE OTHER THINGS, TOO.

ISN'T THE BOTTOM LINE OF THIS, THOUGH, THAT WE ARE EVALUATING THIS AS IF THE DEFENDANT REALLY WAIVED A JURY RECOMMENDATION, BECAUSE A TRIAL COURT WENT AHEAD AND DID A PARALLEL ANALYSIS.

IN THIS CASE, SINCE THE JURY RECOMMENDED DEATH, THEN, YES, THE TRIAL COURT REVIEWED IT INDEPENDENTLY, AND WE CAN JUST DISREGARD THE JURY RECOMMENDATION.

HAVEN'T WE, THOUGH, GIVEN TRIAL JUDGES GREAT FLEXIBILITY IN MOHAMMED, TO DO A VARIETY OF THINGS, BASED ON THE CIRCUMSTANCES THAT ARE PRESENT? THERE WAS NOTHING TO PROHIBIT THE JUDGE HERE, WAS THERE, FROM APPOINTING COUNSEL TO PRESENT MITIGATION TO THE JURY? MOHAMMED WOULD ALLOW THAT, WOULD IT NOT?

MOHAMMED MADE THAT SUGGESTION. YES.

IT HAPPENED IN KLUCOCH, RIGHT?

OFF THE TOP OF MY HEAD, I CAN'T RECALL THAT WAS PRESENTED TO THE JURY IN KLUCOCH.

I THOUGHT THE JURY GOT A RECOMMENDATION.

OF DEATH?

OF LIFE.

I COULD BE WRONG ON THAT. MY MEMORY IS NO.

DID THE JUDGE PRESENT SEPARATE COUNSEL TO THE JURY, IS THAT RIGHT?

AS I RECALL, THE SENTENCING JUDGE DETERMINED THAT THE AGGRAVATION OUTWEIGHED THE MITIGATION AND APPEALED AND DETERMINED THAT THE DEATH SENTENCE WAS DISPROPORTIONATE, SINCE THERE WAS ONE AGGRAVATING AND SUBSTANTIAL MITIGATION.

TO DETERMINE WHETHER OR NOT WE CAN DO OUR PROPORTIONALITY REVIEW, IF WE DON'T HAVE MITIGATION THERE IN THE RECORD? HERE THE MITIGATION IS IN THE RECORD.

IT IS IN THE RECORD.

IT WAS PRESENTED TO THE TRIAL COURT JUDGE, IS THAT CORRECT? SO THAT CONCERN IS ALLEVIATED BY WHAT THE JUDGE DID DO.

I THINK THIS COURT DOES HAVE TO RECOGNIZE THAT, IN CASES IN WHICH THE DEFENDANT DOES NOT WAIVE MITIGATION THAT, HE DOESN'T NECESSARILY PRESENT ALL POSSIBLE MITIGATING EVIDENCE AVAILABLE TO HIM, AND WE HAVE, SEE, THIS HAPPENS IN POST CONVICTION ALL THE TIME. FOR EXAMPLE, THE DEFENDANT GETS A MENTAL HEALTH EXPERT WHO EVALUATES HIM, AND THEY GET THE EVALUATION AND DECIDE NOT TO USE THAT, BECAUSE, A, IT IS ONLY A LITTLE BIT HELPFUL BUT IT IS ALSO HARMFUL OR IT IS HARMFUL BUT MIGHT - OR IT IS HELPFUL BUT MIGHT LEAD TO REBUTTAL EVIDENCE, AND IN THAT KIND OF SITUATION ??

WHAT WE ARE TALKING ABOUT IS A RELIABLE PROCEEDING, AND HERE, IF I AM UNDERSTANDING WHAT THE STATE IS SAYING, IS THAT WE CAN HAVE PRETTY GOOD ASSURANCE OF RELIABILITY, BECAUSE THERE WAS AN INDEPENDENT LAWYER APPOINTED, AND THAT INDEPENDENT LAWYER PUT IN THE RECORD, FOR THE TRIAL COURT TO CONSIDER, AND THE TRIAL COURT DID CONSIDER, EXTENSIVE EVIDENCE OF MITIGATION. IS THAT RIGHT?

THERE WAS EVIDENCE OF MITIGATION IN THE RECORD, PRIMARILY FROM THE DEPOSITIONS, AND, YES, THE COURT CONSIDERED THAT, AS HE WAS SUPPOSED TO UNDER MOHAMMED. I WOULD SUGGEST THAT A MORE RELIABLE DETERMINATION IS NOT NECESSARILY BENEFICIAL TO THE DEFENDANT, AND IN DEFENDANT'S JUDGMENT WAS CORRECT THAT THE MITIGATION, PERHAPS IN THE FORM OF DR.^LARSON'S TESTIMONY, WOULD HAVE BEEN HARMFUL TO HIM, THAT CALLING DR.^LARSON AS A WITNESS AND PUTTING THAT IN MIGHT HAVE MADE FOR A MORE RELIABLE SENTENCING DETERMINATION BUT NOT NECESSARILY ONE THAT WOULD BE MORE FAVORABLE TO THE DEFENDANT.

THAT IS WHY I DON'T KNOW THAT THAT WAS EVEN ARGUED TODAY, BUT I WOULD AGREE WITH YOU THAT THAT CERTAINLY WOULDN'T BE ERROR, UNDER THE CIRCUMSTANCES OF THIS CASE, IF THE JUDGE WOULD HAVE A SIMILAR OBLIGATION TO HAVE TO, AS A MATTER OF LAW, BECAUSE IT WAS PROFFERED IN COON HEARING, BASICALLY, HAVE CALLED DR.^LARSON. I DON'T THINK THAT ANYTHING WE HAVE SAID IN MOHAMMED WOULD SUGGEST THAT THAT WOULD HAVE TO HAPPEN, SO I AM NOT SURE WHAT POINT ?? YOU WANT THIS AFFIRMED, AND YOU ARE SAYING THAT THERE IS NOTHING IN MOHAMMED.

NOTHING. BUT I ALSO WANTED TO ADDRESS THE SUGGESTION IN MOHAMMED AND ALSO THE SUGGESTION MADE HERE, TODAY, THAT WE SHOULD, AS A MATTER OF COURSE, APPOINT SPECIAL COUNSEL TO PRESENT THIS, OVER THE DEFENDANT'S OBJECTION, OVER THE DEFENDANT'S BELIEF AND JUDGMENT THAT HE DOESN'T WANT ANYTHING PRESENTED IN MITIGATION. I THINK FERETTA DOES APPLY IN THE SENTENCING HEARING, AND THE DEFENDANT HAS SOME VERY STRONG INTEREST IN HOW THAT SENTENCING GOES.

BUT WE DON'T HAVE, TODAY, MR. DAVIS APPRISING THAT RULE IN THAT CASE.

I THINK ANY SPECIAL RULE THAT WOULD APPLY IN FERETTA, AND WE DON'T HAVE TO DO THAT, BECAUSE SPECIAL COUNSEL DOES NOT HAVE TO DO ANYTHING THAT IS OVER AND ABOVE WHAT WAS AVAILABLE IN THE RECORD OR AVAILABLE BY WAY OF PSI, SO JUSTICE HARDING, I BELIEVE, EXPRESSED IN HIS CONCURRING OPINION ON MOHAMMED, WHETHER OR NOT IMPLICATED HERE, THIS JUDGE DID NOTHING WRONG IN MOHAMMED AND THERE IS NO MOHAMMED ERROR. I WOULD, ALSO, THAT IS ISSUE TWO. I THINK THERE IS NO MERIT TO THAT. I THINK CERTAINLY, IF A DEFENDANT DID WAIVE AND HE HAD CONSULTED AND DECIDED NOT TO USE HIM, I DON'T THINK THE JUDGE WOULD HAVE ANY RIGHT WHATSOEVER, TO CALL THAT WITNESS AS A COURT'S WITNESS AND ELICIT THAT TESTIMONY OVER THE DEFENDANT'S OBJECTION, AND I DON'T THINK THE LAW WOULD BE ANY DIFFERENT, JUST BECAUSE HE HAS WAIVED MITIGATION. JUST

ADDRESSING BRIEFLY THE HEARSAY ISSUE NUMBER THREE, JUST TO ADD A LITTLE BIT TO WHAT IS ALREADY SAID, I WOULD POINT OUT ALL OF THE OTHER EVIDENCE, AND IT HAS BEEN MENTIONED THAT, WHEN THE DEFENDANT WAS ARRESTED IN OKLAHOMA, HE WAS WEARING A PAIR OF SHORTS. ON THAT PAIR OF SHORTS WERE SPOTS OF BLOOD. IT WAS ANALYZED. DNA ANALYSIS WAS DONE OF THOSE SPOTS, AND IT MATCHED THE VICTIM. SECONDLY, THERE WAS A TRASH BAG BOX IN THE HOUSE, IN THE DEFENDANT'S HOUSE ON HIS MICROWAVE. HIS BLOODY FINGERPRINTS WERE ON THAT TRASH BAG. THAT BLOOD WAS THE VICTIM'S BLOOD.

WAS THERE EVER ANY MOTIVATION POSTED FOR THIS MURDER?

IT WAS A SEXUAL BATTERY. AND THAT WAS ONE OF THE AGGRAVATORS. HE WAS ALSO THE VICTIM OF SEXUAL BATTERY. PAST THAT, I CAN'T SAY WHAT HIS MOTIVATION WAS.

DID THE STATE ARGUE THAT WHATEVER HAPPENED THAT BROUGHT THE POLICE THERE ORIGINALLY WAS SOMETHING MR. GRIM WAS TRYING TO DO?

I THINK THAT IS A REASONABLE INFERENCE. I DON'T KNOW THAT, NEVER EXPLICITLY SAID THAT. I DON'T KNOW FOR SURE THAT HE WAS THE ONE THAT THREW THAT LUG NUT THROUGH THE WINDOW AND BROUGHT THE POLICE OVER THERE, BUT CERTAINLY WHILE THE POLICE OFFICER WAS THERE, HE INVITED HER TO COFFEE, AND OF COURSE SHE APPARENTLY DID GO IN AND HAVE A CUP OF COFFEE, BECAUSE THERE WAS A COFFEE CUP IN THE HOUSE WITH HER FINGERPRINT ON IT, AND WE KNOW THERE WERE OTHER THINGS THAT HAPPENED IN THE HOUSE, BECAUSE HER BLOOD WAS ALL OVER THE HOUSE AND SO ON AND SO FORTH.

AM I CORRECT THAT, AT THE TRIAL, THE DEFENDANT ARGUED THE EXCITED UTTERANCE EXCEPTION?

I BELIEVE THAT IS CORRECT.

AND IS THAT BEING ARGUED AT THIS STAGE NOW?

THE STATEMENT AS TO INTEREST. I DON'T KNOW, BUT I CERTAINLY DON'T THINK IT QUALIFIES AS A STATEMENT AGAINST INTEREST. WE DON'T EVEN ??

THERE WAS A DIFFERENT ARGUMENT AT THE APPELLATE LEVEL THAN AT THE TRIAL LEVEL, RELATIVE TO THE ASA.

I AM NOT SURE. BUT IT IS NOT ADMISSIBLE UNDER ANY EXCEPTION THAT HE HAS COME IN WITH AT TRIAL OR HERE, AS FAR AS THERE BEING A STATEMENT AGAINST INTEREST. WE DON'T EVEN KNOW WHO MADE THE STATEMENT. ALL WE KNOW IS THAT THE VICTIM, ABOUT THREE WEEKS BEFORE HER DEATH, WENT TO A HOME. I AM NOT SURE IF IT WAS HENRY HOMES OR NOT, WAS EXPECTING SOMEBODY TO BE THERE THAT WASN'T, AND AS A RESULT SHE HAD TO GO UP INTO THE ATTIC, AND AS A RESULT GOT DUSTY AND DIRTY AND THOUGHT IT WAS ASBESTOS. AT ANY RATE, SHE WAS UPSET ABOUT THAT, AND SHE HAD A HEARING TO GO TO, AND SHE HAD TO GET READY QUICKLY AND GO TO THAT HEARING, AND WHOEVER WAS UP THERE, I DON'T KNOW WHO THAT WAS, WARNED HER THERE WAS SOMETHING SHE SHOULDN'T BE DOING AND WARNED HER OF THAT, AND SHE SAID, IF I END UP IN THE BAY, ASK HENRY HOMES, BUT ULTIMATELY HENRY HOMES, AND LET ME GET INTO THE RECORD THAT HE WAS ALLOWED TO CROSS?EXAMINE DETECTIVE DAVIS AS TO HENRY HOMES WITH A REPORT THAT MIGHT HAVE SOMETHING TO DO WITH THAT. DETECTIVE DAVIS SAID THAT, WHEN HE SENT AN INVESTIGATOR TO LOOK AT IT, AND IT WAS BASELESS. THE DETECTIVE ELECTED NOT TO CALL ANYBODY FROM HENRY HOMES OR LOOK AT THAT OR ESTABLISH WHO MADE THE STATEMENTS, AND BESIDES THAT, THE EVIDENCE IS SO OVERWHELMING, IT WOULDN'T HAVE MADE ANY DIFFERENCE ANYWAY. EVEN IF THERE WAS ERROR, IT WOULD HAVE BEEN EXCLUDED, AND IT WOULD HAVE BEEN HARMLESS. MR.^CHIEF JUSTICE

THANK YOU. MR.^DAVIS.

COUNSEL, CAN YOU CLARIFY FOR ME, UNDER WHICH EXCEPTION IS HEARSAY?

THERE ARE NO EXCEPTIONS. THE COURT IS CORRECT. EXCITED UTTERANCE, NO, THIS IS SOMETHING THE DEFENDANT ARGUED HE NEEDED AND WAS RELIABLE INFORMATION AND SHOULD HAVE BEEN ALLOWED AS AN EXCEPTION TO THE GENERAL.

WHICH EXCEPTION IS THAT?

THERE IS NO EXCEPTION. I AM JUST SAYING UNDER CHAMBERS VERSUS MISSISSIPPI.

I THINK HE MAY HAVE, OR POSSIBLY FOR TRIAL HE SAID HE WANTED TO HAVE THIS INFORMATION. BUT I DO WANT TO GO BACK TO JUSTICE QUINCE'S QUESTION THAT HE WAIVED THE JURY BECAUSE HE WAIVED MITIGATION. UNLESS THE DEFENDANT EXPLICITLY, IN WRITING, WAIVES THE JURY RECOMMENDATION, HE GETS IT, AND THERE WAS NOTHING HERE, SO WHETHER HE GETS A JURY RECOMMENDATION, AND WE CANNOT ASSUME THAT BECAUSE HE WAIVED MITIGATION HE, ALSO, WAIVED THE JURY. HE HAD A JURY RECOMMENDATION HERE. WE HAVE THAT ??

BUT IN ESSENCE, IF THE DEFENDANT CAN'T, YOU ARE REALLY ARGUING THAT A DEFENDANT CANNOT WAIVE MITIGATION.

IF THERE IS MITIGATION THERE. HE DOESN'T HAVE TO PRESENT IT. I AM NOT SAYING HE DID. THAT IS WHAT HAMLIN IS SAYING, THE DEFENDANT HAS THE RIGHT TO CONTROL HIS FATE AND ALL OF THESE SORT OF THINGS, BUT ALL HE CAN CONTROL IS THE MITIGATION THAT HE WANTS TO PUT ON. IF THE COURT KNOWS OF MITIGATION AND KNOWS IT IS OUT THERE AND THE DEFENDANT HAS NOT WAIVED HIS RIGHT TO A JURY TRIAL OR JURY RECOMMENDATION, THEN THE COURT HAS AN OBLIGATION TO, IN ORDER TO ENSURE A RELIABLE JURY SENTENCING, WHERE YOU SPLIT BETWEEN THE JURY AND THE JUDGE, THE JURY HAS GOT TO BE AS WELL AWARE OF THAT MITIGATION AS THE TRIAL COURT.

BUT IT REALLY BOILS DOWN TO NO DIFFERENCE, DOES IT?

WELL, I SEE THE PROBLEM YOU HAVE WITH HAMLIN IS HAMLIN, WELL, IT GOES BACK TO STATE VERSUS HAMLIN. TO WHAT DEGREE CAN THE DEFENDANT CONTROL HIS FATE? IF HE DOESN'T WANT TO PRESENT MITIGATION, THAT IS FINE, BUT IF YOU, AS THE STATE OF FLORIDA, ARE GOING TO ASK FOR DEATH, AND YOU KNOW THERE IS MITIGATION OUT THERE AND IGNORE IT, HOW CAN YOU SAY THAT DEATH SENTENCE IMPOSED IS RELIABLE? THAT IS WHAT I AM SAYING, IF THE TRIAL COURT KNOWS THERE IS MITIGATION, AND THE JURY IS ALSO GOING TO MAKE A RECOMMENDATION, IT CANNOT IGNORE THAT MITIGATION. THAT IS WHAT THE UNITED STATES SUPREME COURT SAID, NOT QUITE LIKE THAT, BUT THAT IS THE LOGICAL, THAT WHEN THERE IS MITIGATION OUT THERE, THAT IF THE COURT IS GOING TO RELY ON IT, IN SENTENCING THE PERSON TO DEATH, THE JURY HAS, ALSO, GOT TO BE AWARE OF IT, IF THEY ARE GOING TO MAKE A RECOMMENDATION, AND THAT IS MY ARGUMENT HERE. IF HE HAD WAIVED HIS RIGHT TO A JURY RECOMMENDATION, THIS WOULD HAVE BEEN A 30?SECOND ARGUMENT, BUT HE DIDN'T, AND WHEN THE JUDGE CONSIDERS MITIGATION AND THE JURY DOESN'T HAVE IT, THAT SUBSEQUENT SENTENCE, EVEN THOUGH HE SAYS HE DID IT INDEPENDENTLY, THAT JURY COULD HAVE RECOMMENDED LIFE, AND THAT IS WHY, UNDER YOUR QUESTION, JUSTICE SHAW, IT IS NOT HARMLESS. FOR THOSE REASONS, I WOULD URGE THIS COURT TO REVERSE, FOR AT LEAST A NEW SENTENCING HEARING AND HOPEFULLY A NEW TRIAL. THANK YOU. MR.^CHIEF JUSTICE

THANK YOU, COUNSEL. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE. THE COURT WILL BE IN RECESS. THE MARSHAL: PLEASE RISE.