Alfonso Green v. State of Florida

THANK YOU ROBERT MOELLER. I AM AN ASSISTANT PUBLIC DEFENDER FOR THE TENTH JUDICIAL CIRCUIT , HERE ON BEHALF THE APPELLANT ALPHONSO GREEN. M R . GREEN WAS ORIGINALLY CONVICTED OF FIRST-DEGREE M URDER OF DORA AND RO BERT NICHOLS, IN 1987 , ANDSENTENCED TO DEATH. THIS COURT AFFIRMED HIS CONVICTIONS AND SENTENCES IN 1991. MR. GREEN, THROUGH COUNSEL , SUBSEQUENTLY FI LED MO TIONS FOR POST-CON VICTION RE LIEF , PURSUANT TO FLORIDA R UL E OF CRIMINAL PROCEDURE 3.850 , AND THAT MOTION WENT THRO UGH SEVERAL AM ENDS AMENDMENTS , BUT SE VERAL AMEN DMENTS , BEFORE IT WAS FINA LLY RESOLVED BY A STIPULATION BETWEEN THE STATE AND THE DEFENSE, THAT MR . GREEN WOULD RECEIVE A N EW PENALTY PHASE ON LY, THE ORIGINAL 3.850 HAD ATTACKED B OT H HIS CONVICTIONS AND HIS SENTENCES.

CHIEF JUSTICE: WE ARE FAMILIAR WITH THE PROCEDURAL POSTURE.YOU HAVE A LI MITED T IME , ANDWOULD YOU LIKE TO TELL US WHICH ISSUES YOU ARE GOINGTO BE FOCUSING ON.

YES. IF I CAN , IF I HAVE TIME , I W ILL AD DRESS THE FIRST THREEISSUES, THE FIRST ISSUE IN THE BRIEF DEALING WITH THE COURT'S RESPONSE TO A QUESTION THAT THE JU RY HAD D URING THEIR DELIBERATIONS ON PENALTY . THE QUESTION THAT THE JURY PROPOUNDED WAS, D OES A LIFE SENTENCE WITH OUT POSSIBILITY OF P A ROLE FOR 25 YE ARS , START WITH THE YEAR 1 987 , WHICH WAS WHEN MR . GREEN WAS ORIGINALLY CONVI CTED AND SENTENCED , O R DOES IT START WITH TODA Y. THAT WAS THE WRITTENQUESTION FROM THE JURY , AND OVER DE FENSE OBJECTION , THE COURT WR OT E THIS ANSWER TO THE QUESTION. THE DEFENDANT, IF SENTENCEDTO LIFE WITHOUT POSSIBILITY OF PAR OLE FOR 25 YEARS , WOULD BE ENTITLED TO CREDIT FOR ALL J AI L TIME SE RVED AGAINST THE LIFE SENTENCE. HOWEVER , THERE IS NO GUARANTEE THAT HE WOULD BE GRANTED PAROLE AT OR ANY T IME AFTER 25 YEARS.

IS THERE ANY CONTENTION THAT THIS , THE FIRST PAR T, IS DIFFERENT OR CONT RARY TO WHAT OCCU RRED IN DO WNS ?

YES. I THINK D O UNS IS DISTINGUISHABLE FR OM THIS CASE, MAINLY BECAUSE , IN DOWNES, THE DEFENSE ATTORNEY HAD MADE AN ARGUMENT TO THE JURY , THAT A LIFE SENTENCE WOULD PRO TECT SOCIETY FROM THE DEFE NDANT FOR THE NE XT 25 YEARS . AND UNDER TH OSE CIRCUMSTANCES, IT WAS APPROPRIATE FOR THE COURT TO CLARIFY THAT HE WOULD BE ENTITLED TO C REDIT FOR THE TIME THAT HE HAD ALREADY SERVED, IN ORDER TO C LEAR UP ANY POSS IBLE MISLEADING OF THE JURY, D UE TO THE DEFENSEARGUMENT.

IS THERE ANYTHING INCORRECT A BOUT THE STATEMENT OF THE LAW THAT WAS PROVIDED BY THE COURT IN THIS CASE?

I CAN'T SAY THAT THERE WAS ANYTHING INCORRECT IN THE STATEMENT OF LAW , ITSELF. IN ORDER TO AND R ICE THE JURY FULLY , THE DEFENSE ARGUED, AND IT WOULD HAVE BEEN PREFERABLE FOR THECOURT, IF HE WAS GOING TO ANSWER THE QUESTION AT ALL , TO GO ON AND TELL THEM AB OUT THE POSSIBILITY OF CONSECUTIVE LIFE SENTENCES , IN WHICH CASE THE DEFENDANT WOULD NOT HAVE BEEN ELIGIBLE FOR PAROLE FOR 50 YEARS .

WOULD WE NOT BE INTO TELLING TRIAL JUD GES THAT IT IS APPROPRIATE TO INSTRUCT ON MA TTERS THAT ARE JUST POSSIBILITIES , THAT MAY OR MAY NOT EVER OC CUR? WOULD WE NOT BE L EADING ALONG THOSE LINES , IF WE WOULD APPROVE THAT T YPE OF INSTRUCTION IN A CASE

SUCH AS THIS?

WELL , I THINK HE IS ESSENTIALLY THAT IS WHAT THECOURT DID IS INSTRUCTED THE JURY ON SOMETHING THAT MI GHT OR MIGHT NOT OCCUR . THAT IS , WHETHER THE DEFENDANT WOULD BE PAROLED, THIS WAS SOMETHING THAT THE JURY SHOULD NOT HAVE BEEN CONSIDERING , AND IN F ACT EVEN THE TRIAL COURT, HIMSELF , OBSERVED THAT THE ONE PROBLEM THAT I A M HAVING WITH THIS WH OLE THING IS THIS , THE VERY N ATURE OF THIS QUESTION TELLS ME THAT THEY ARE CONCERNING THEMSELVES WITH SOMETHING THAT THEY ARE NOT SUPPOSED TO BE CONCERNED WITH. THEY ARE SUPPOSED TO BE CONCERNED WITH WHETHER THE AGGRAVATING , MITIGATING CIRCUMSTANCES JUSTIFY THIS SENTENCE OR JUS TIFY THAT SENTENCE, AND IT JUST SEEMS TO O PEN UP A WHOLE CAN OF WORMS , WHEN YOU START ANSWERING A QUESTION LIKE THIS.

S O , IS IT ERROR, IS IT REVERSIBLE ER ROR , AND I F THE DEFENDANT WANTED AN ANSWER , A QUESTION THAT WAS AN ELABORATION ON THIS, ARE YOU TELLING US THAT , REALLY , WHAT THE TRIAL JUDGE SHOULD HAVE SAID WAS NOT WHAT THE DEFENDANT RE QUESTED BUT TO SAY THAT THIS IS NOT SOMETHING FOR YOUR CONSIDERATION?

NO. THE DEFEND ANT'S FIRST POSITION, PRIMARY POSITION,WAS THAT THE JUDGE SHOULD NOT HAVE ANSWERED THE QUESTION AT ALL , EXCEPT PERHAPS TO TELL THE JURY TO RELY ON THE PREVIOUS INSTRUCTIONS. HIS FALLBACK POSITION WAS THAT, I F THE COURT WAS GOING TO ANSWER IT , HE SHOULD HAVE PROVIDED MORE INFORMATIONTHAN WHAT HE DID HERE , A LONG THE LINES THAT I JUST SPOKEABOUT , REGARDING CONSEC UTIVE LIFE SENTENCES AND INELIGIBILITY FOR PAROLE FOR 50 YEARS, BUT THE DEFENSE ATTORNEY'S PRIMARY POSITION WAS THAT HE SHOULD N'T ANSWER THE QUESTION , PERIOD.

WAS IT REALLY PRESERVED , WHEN HE IS GIVING AN ALTERNATIVE SUGGESTION? IN OTHER WORDS, IF IT IS NOT, MAYBE IT WOULD HAVE BEEN PREFERABLE OR MA YBE NOT , TO ANSWER IT AS YOU ARE SUGGESTING, BUT IN TERMS OF S AYING THAT IS IT , FIRST OF ALL, I MEAN , WHAT IS YOUR POSITION AS TO WHET HER IT I S REALLY ADEQUATELY PRESERVED?

I CERTAINLY THINK IT IS PRESERVED , BECAUSE THE DEFENSE CLEARLY OBJECTED TO THE , GI VING ANY FU RTHER INSTRUCTION.HE WANTED THE COURT NOT TO ANSWER THE QUESTI ON AT ALL , AND I DON'T SEE HOW TELLINGTHE JUDGE , WELL , JUDGE, IF YOU ARE GO ING TO ANSWER IT THE WAY YOU PRO POSE HERE, THE N I WOULD LIKE TO YOU ELABORATE A BIT MORE. I DON'T SEE HOW THAT IS NOT PRESERVING THE ISSUE. I FEEL THAT IT IS PRESERVED. CERTAINLY.I WOULD LIKE TO MOVE ON , NOW , TO THE NEXT ISSUE , HAVING TODO WITH THE FACT THAT THE ORIGINAL SENTENCING JUDGE , WHO WAS JUDGE MENENDEZ , DIDN'T FILE HIS WR ITTEN SENTENCING ORDER , UN TIL LONG AFTER HE ORALLY SENTENCE D MR . GREEN TO DEATH.

THIS IS ON , THIS IS THE SENTENCING ORDER ON THE SENTENCING THAT WAS SET ASIDE , IS THAT CORRECT?

RIGHT. THAT'S CORRECT.

HOW IS THAT AN ISSUE IN THIS SENTENCI NG?

WELL , IF THE COURT WOULD SUBPOENA OUR ARGUMENT WOULD ACCEPT OUR ARGUMENT , THE ISSUE IS BECAUSE THE JUDGE DI DN'T ENTER HIS ORIGINAL SENTENCING ORDER IN A TIMELY MATTER UNTIL SEVERAL MONTHS AFTER THE ORAL SEPTEM BER, THEN UNDER VAN RO YAL , A LIFE SENTENCE SHOULD BE IMPOSED , BECAUSETHE JUDGE DID NOT FIND A STATUTORY SCHEME IN

WASN'T THAT RAISED ON THE APPEAL FRO M THE FIRST SENTENCING?

THAT CERTAINLY WOULD HAVE BEEN THE PRE FERABLE TIME TO RAISE IT, YES , AND I DON'T KNOW WHY IT WASN'T RAISETHERE HAD.MY OPPO NENT PO INTED OUT THAT IT WASN'T RAISED IN THE ORIGINAL APPEAL. I HAVE NO IDEA WHY IT WASN'T RAISED, BECAUSE CERTAINLY VAN ROYAL HAD BEEN DECIDEDAT THAT POINT AND IT SHOULD HAVE BEEN RAISED. PERHAPS THERE WAS SOME INEFFECTIVE ASSI STANCE O F APP ELLATE COUNSEL AT THAT TIME IN NOT RAISING IT. THE CAP ITAL COLLATERAL COUNSEL DID RAISE IT IN E ARLY VERSIONS OF THE 3.850 MOTION HERE , BUT I T WAS NOT INCLUDED IN LATER MOT IONS. AGAIN, I DON'T KNOW WHY THAT IS THE CASE.

WHY IS THAT NOT ELIMINATED, PURSUANT TO THE STIPULATION THAT WAS ENTERED INTO , WHICH SEEMED TO ME THERE WAS, AM I CORRECT IT WAS APPR OVED BY THE COURT?

YES. THE STIPULATION WAS, YES.

BECAUSE IT JUST SEEM S AS THOUGH THAT WHAT WAS CONTEMPLATED BY THE PARTIESIS THAT, OKAY, W E B OTH HAVE SOME PROBLEMS ON BOTH EN DS, WHAT IS GOING ON HERE, AND WE ARE GOING TO STIPULATE AWAY SOME OF THESE PROBLEMS , AND WE ARE GOING TO GIVE A N EW PENALTY PHASE AND P ICK UP AT THAT POINT . AS I READ THAT, WHERE IS THAT, M Y THINKING , WRONGWITH REGARD TO THAT STIPULATION ?

WELL , I DON'T KNO W WHAT THE EX ACT THINKING WAS IN THAT 3 .850 , WITH THAT ISSUE. IT IS PERHAPS THEY WERE GOING TO LOOK AT THE PENA LTY TRIAL , BUT I THINK IF YOULOOK AT THE WAY THIS WAS HANDLED ORI GINALLY WITH JUDGE ME LENDEZ REALLY MA KING NO SPEC IFIC FINDINGS OF AGGRAVATION OR MITI GATION AT ALL , WHEN HE SENTENCED HIM ORALLY ON O C TOBER 23 , 1 98 7 , I JUST HAVE REAL PROBLEMS WITH THE REAL AB ILITY OF THE ON , OF THE ORIGINAL DEATH SENTENCE AND THE FACT IT WASN'T DISCUSSED, THE SC HEME WITH VAN ROYAL.

I DON'T THINK THAT IS REALLY A RESPONSIVE ANSWER TO JUSTICE LEWIS . WHEN THE STIPULATION WAS ENTERED THAT THEY WOULDAGREE TO A NEW PENALTY PHASE , IT WAS NECESSARILY A WAIVER OF ANY CLAIM THAT WOULD ARISE OUT OF THE ORIGINAL DEATH SENTENCE . I DON'T KNOW, UNLESS THEY WOULD HAVE SAID , WELL , BUT WE ARE PRESERVING THIS ISSUE , WHICH WOULDN'T BE TIMELY RAISED, ANYWAY , HOW CAN YOU STAND BEFORE US, AND SAY THAT THE STIPULATION DID NOT WAIVE ALL O F THE O R ANY CLAIM OF DEFECT IN THE ORIGINAL SENTENCING ORDER?

WELL , I MAY BE MAKING A STRETCH. IT JUST SEEMS TO ME , THAT IT WAS JUST VERY TROUBLING TO ME , THE WAY IT WAS HA NDLED ORIGINALLY, AND THE FACT THAT IT WAS MENTIONED IN THE EARLIER VERS IONS OF THEMOTION AND NOT INCLUDED LATER. AGAIN , THERE COULD BE SOME POSSIBLE INEFFECTIVE ASSISTANCE OF COUNSEL AS PECT , B UT THAT IS ABOUT ALL I CAN SAY REGARDING THAT. IF I COUL D MOVE ON, THEN , TO THE NEXT ISSUE REGARDING THE BURGLARY AND PECUNIARY GAIN AGGRAVATORS. WE HAVE ESSENTIALLY GO T TO ASPECTS TO T HIS ISSUE , ONEIS THE LA CK OF EVIDENCE TO SUPPORT THIS PARTIC ULAR AGGRAVATOR AND MORE PARTICULARLY, I WOULD LIKE TO TALK ABOUT THE JURY INSTRUCTION ON BURG LARY THAT WAS GIVEN TO THE SENTENCING JURY IN THIS CASE . IT DID NOT CO MPLY WITH THIS COURT'S DELGADO DECISION.

DIDN'T W E , ON THAT , DIDN'T WE IN JIMINEZ EXPRESSLY SAY THAT DEL GADO WAS NOT

YES , BU T WE WERE TALKINGABOUT HOW THE JURY WAS INSTRUCTED ON BURGLARY , WHETHER THEY WERE PROPERLY INSTRUCTED, WHICH TO ME THAT IS A COMPLETELY DIFFERENT MATTER. IN FACT THE BURGLARY ISSUE WAS REO PENED , AS A RESULT OF THIS NEW PENALTY PROCEEDING. THE FACT THAT HE HAD AL READY BEEN, HIS ORIGINAL CONVICTION AND SENTENCE WERE FINALIZED , THAT IS TRUE , BUT IN A SENSE THAT I S WHY DELGADO APPLIED IN THIS C ASE. A ST RETCH O F THE COURT SAID IT WAS VERY BRIEF , OWNED BY ANOTHER WITHOUT

THE PERMISSION OR CONSENT OF THE O WNER , WITHOUT CONSENT TO COMMIT AN OF FENSE THE RE IN , AND CERTAINLY THE E VIDENCE SHOWED THAT APPE LLANT 'S ENTRY INTO THE LANDLORD'S RESIDENCE WAS CONSENTUAL AND THEREFORE FURS UNIT TO DEL PURSUANT TO DELG ADO , HE SHOULD NOT HAVE BEEN GUILTY OF BURGLARY AND COULD NOTHAVE BEEN G U ILTY OF BURGLARY BUT THE JURY VERDICT DECIDEDTHAT HE WAS, AND W E DECIDED IN THE S MITH APPEAL OUT OF THIS STATE, THAT THE COURT DECIDEDED THAT IT WAS FUNDAMENTAL ERROR TO INSTRUCT A JURY IN THIS WAY. THERE, THE COURT IN SMITH , SAID THAT SMITH ARGU ES THAT THE TR IAL COURT COM MITTED FUNDAMENTAL ERROR BY INSTRUCTING THE JURY THAT BURGLARY COULD BE COMM ITTED BY RE MAIN ING IN A STRUCTURECONTRARY TO THIS COURT'S OPINION IN DELGADO , AND THE COURT AGREED WITH THE APPELLANT THERE THAT IT WAS FUNDAMENTAL ERROR.WITH REGARD TO THE LAST ISSUE , THE RING ISSUE , I WOULD LIKE TO RELY UPON MY BRIEF AS TO THAT ISSUE, BECAUSE IT HAS BEEN ADDRESSED BY THIS COURT ON ANUMBER OF OCCASIONS. THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH. ,,

MAY IT PLEASE THE COURT. BOB LANDRY APPEARING ON BEHALF THE STATE THIS MORNING.WITH RESPECT TO THE FIRST ISSUE ON WHETHER THE TRIALCOURT AB USES DISCRETION IN ANSWERING THE JURY 'S QUESTION, I THINK THE COURTDID NOT ABUSE ITS DISCRETION. I THINK THE DECI SION OUT OF THIS COURT, DO WN S VERSUS STATE AND OTHER CASES C ITED WATERHOUSE ANN WHITFIELD , ALSO WATERHOUSE ANN WHITFIELD, ALSO CITED IN OURBRIEF, WHICH HE LD THAT IT WAS NOT ABUSE OF DISCRETION FOR THE COURT TO - -

MR . LAND RY.

YES.

COULD WE A DDRESS THE CON CEPT, CERT AINLY THE TRIAL JUD GE WAS CONCERNED WITH WHAT WAS HAPNINGT JURY PROCESS , AND YOU WOULD HAPPENING IN THE JURY PROCESS, AND YOU WOULD AGREE , WOULD YOU NOT , THAT THIS QUESTION WAS MISS DIRECTING WHAT THE JURY SHOULD HAVE BEEN CONSIDERING WHEN WE TALK ABOUT A PENALTY PHASE?

PENALTY PHASE. YES, S IR .

RIGHT. YOU WOULD AGREE WITH THAT THAT THEY SHOULD NOT BE LOOKING AT THOSE. THEY ARE LOOKING AT AGGRAVATORS. THEY ARE LO OKING AT MITIGATORS AND THE BALANCING OF THESE FACT ORS.

THEY SHOULD BE LOOKING AT THE APPROPRIATENESS OF THE DEATH PENALTY VERSUS A LIFE SENTENCE VIS-A- VIS THEEVIDENCE THAT IS PRESENTED IN TER MS OF AGGR AVATION AND MITIGATION.

WHETHER THE PAROLE WOULD OCCUR AT A PARTICULAR TIME, REALLY , REALL Y WOULD NOT BE A PART OF THAT , WOULD IT? FROM AN ACADEMIC STANDPOINT , THAT WOULD NOT BE A PART OF THE ELEMENTS THAT YOU WOULD BE A BALA NCING , WOULD IT?

MAYBE THE CRITICISM, THEN , SHO ULD BE DIRECTED TO THE STANDARD JURY INSTRUCTION. THE JURY WAS INS TRUCTED THAT THEIR OPTIONS WERE TO CONSIDER EITHER DEATH OR L IFE IMPRISONMENT WITHOUTTHE ELIGIBIL ITY OF PAROLE FOR 25 YEARS. SO HAVING PUT THE M IN THAT POSTURE , I THINK, THEN , THECOURT , IF THE JURY HAD AQUESTION AS TO WHAT THAT MEANT , AS TO WHEN IS THAT SUPPOSED TO START TYPE OF THING , THEN THAT IS OBVIOUSLY THE JURY 'S CURIOSITY WAS PICKED AT THAT POINT WAS PIQUED AT THAT POINT .

WHAT YOU ARE SAYING IS OUR STANDARD JURY INSTRUCTIONS NOW WILL DIRECT THE JURY TO THINK ABOUT THAT TYPE OF ISSUE.

WELL , I THINK THE INSTRUCTIONS NOW ARE EITHER DEATH OR LIFE IMPRISONMENT .

AT THAT POINT IN TIME.

RI GHT .

CAN I FOLLOW-UP ON THAT?

SURE .

DID EITHER THE DEFENSE OR THE STATE REQUEST THE JUDGE TO ELABORATE, NOT ON CONSECUTIVE OR STACKING OR WHATEVER BUT REDIRECTING THE JURY TO CONSIDER AGGRAVATING AND MITIGATING CIRCUMSTANCES , TO TAKE IT AWAY FROM DIRECTING THE JURY , DIR ECTING THE JURY AWAY FROM THIS ISSUE , B ACK TO THE PROPER ROYA L?

THE PROPER ROLE?

NO. I DON'T THINK , HIS OBJECTION INITIALLY WAS THE COURTSHOULD NOT ANSWER THE QUESTION. THE COURT SHOULD SI MPLY SAY RELY ON YOUR MEMORY AS TO THE ORIGINAL INST RUCTION. WHEN THE COURT INDICATEDTHAT IT WAS GOING TO CONCUR WITH THE STATE'S ARGUMENT THAT DOWNS , YOU KNOW , PERMITTED HI M TO ANSWER THE QUESTION, THEN HE SAID, WELL , IF YOU ARE GOING TO GET INTO I T, THEN WHAT YOU SHOULD DO IS , ALSO INSTRUCT THEM ONTHE ADDED BASIS THAT THERE IS A POSSIBILITY THAT YOUCOULD GIVE HIM TWO CONSECUTIVE LIFE SENTENCES , IN WHICH CASE THE ELIGIBILITY OF PAROLE WOULD BE 50 YEARS. BUT THERE WASN'T THE THIRD OPTION OF GOING BACK AND RECLARIFYING THE PO RTION OF THE INSTRUCTION?

NO. THE DEFENSE DIDN'T DO THAT AT ALL, NO. ,,

YOU ARE SAYING THIS ISSUE WOULD COME UP WITH THE OPTION OF LIFE WITH 25 YEARS AND IS LESS LIKELY TO COME UP WITH PROBLEMS IN THE FUTURE.

THAT WOULD BE MY OPTION , BECAUSE NOW IT I S SIMPLY DEATH OR LIFE IMPRISONMENT. IT IS POSS IBLE THAT THE JURY COULD COME BACK AND SAY WHAT D OES LIFE REALLY MEAN , BECAUSE WE HAVE HEARD ABOUT PEOPLE BEING RELEASED E ARLY AND THAT TYPE OF THING. THIS HAD MORE LIKELIHOOD OF INTERPRETATION, BECAUSE ATTHE TIME THE 19 86 LAW WAS IN EFFECT. AGAIN, I F THE TRIAL COURT HAD AGREED WITH DEFENSE COUNSEL'S SECONDARY REQ UEST , AND SIMPLY SAY BY THE WAY, I MIGHT GIVE THE GUY LIFE AND HE MIGHT GET TWO CONSECUTIVE LIFE SENTENCES , IN WHICH IS 50 YEARS, I THINK THAT HA S A DANGER IN ITSELF, OF INDICATING OR IMPLYING TO THE JURY, THAT THE JUDGE IS THINKING IN T ERMS O F GIVING A LIFE SENTENCE AT THAT POINT , W HEN IN FACT HE IS NOT E VEN CONSID ERING EITHER OPTION AT THAT POINT, UNTILHE GE TS THE RECOMMENDATION FROM THEM, SO I THINK ITWOULD BE UNFAIRLY SUGGESTING TO THE JURY , THAT HE MIGHT JUST WELL AVOID ANY PROBLEM THAT THE DEFENSE MIGHT HAVE, S IMPLY BY SUGGESTING TO THEM THAT HE IS GOING TO GIVE TWO LIFE SENTENCES. WITH RESPECT TO THE SECOND ISSUE THAT I S PRESENTED ON THIS APPEAL AS TO THE SENTENCING ORDER BACK IN 1987, WE HAVE ARGUED IN OUR B RIEF THAT THAT C LAIM IS PROCEDURALLY BARRED. HE DIDN 'T RAISE IT ON DIRECT APPEAL. HE DIDN'T RAISE IT O N A REHEARING.HE PRESENTED IT, I GUESS , IN ONE OF HIS ORIGINAL POSTCONVICTION MOTIONS BE LOW , WHICH HE THEREUPON ABANDONED BY FILING AN AM ENDED POSTCONVICTION MOTION, WHICHDID NOT INCLUDE IT. HE ABANDONED IT AGAIN, BY STIPULATING TO A WAIVER OF ALL ISSUES .

WAS IT EVEN , JUST BECAUSE , JUST TO MAKE S U RE ON THE M ERITS , GROSSMAN CAME OUT IN 1988. WOULD THIS HAVE BEEN A MERITORIOUS CLAIM , IF IT WAS RAISED POSTCONVICTION, AS AN

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL?

NO. I DON'T THINK SO. A S WE HAVE ARGUED IN OURBRIEF , THE GROSSMAN RULE CAME OUT IN, I THINK , JUNE OF '88 , AND THIS COURT HAD , THE TRIAL COURT HAD COMPLIED WITH WHAT THE GROS SMAN RULE ULTIMATELY WAS. IN OTHER WORDS THIS COURT S AID, AS OF 30 DAYS A FTER GROSSMAN IS FI NAL , THEN THE JUDGE HAS TO DO , HE HAS TO M AKE HIS WRITTEN FINDINGS AND ALL OF THAT, AND THIS JUDGE HAD DONE ALL OF THIS IN COMPLI ANCE WITH GROSSMAN , IN JANUARY OF 1 988. SOME O F THE CASE LAW HADINDICATED THAT THE , SO LONG AS THE TRIAL COURT ISSUES ITS CORRECT WR ITTEN SENTENCING FINDINGS PRIOR TOTHE NOTICE OF APPEAL BEING F ILED AND PRIO R TO THE REC ORD BEING CERT IFIED , THEN THAT DOES NOT CA RRY A JURISDICTIONAL PROBLEM WITH THIS COURT, AND I WOULD ADD , OBVIOUSLY, THAT THIS COURTDID NOT HAVE ANY DIFFICULTY IN PRO VIDING MEANINGFUL APPELLATE REVI EW, ON THE BASIS OF THAT ORIGINAL SENTENCING ORDE R, BECAUSE THE COURT REVIEWED THE ORDER. THE C OURT, I THINK , FOUNDONE OR TWO MITIGATING OR AGGRAVATING FACTORS IMPR OPER BUT STILL FO UND THAT THEDEATH SENTENCE WAS APPROPRIATE.SO WE DO NOT HAVE THE DANGERS ASSOCIATED WITH THE VAN ROYAL SITUATION. VAN ROYAL WAS A SITUATION IN WHICH THERE WAS A LIFE RECOMMENDATION. THE TRIAL JUDGE, WHEN H E ORALLY PRONOUNCED SENTENCE , DID NOT GIVE HIS REA SON OR WHAT HE WAS BASING HIS FACTS ON, AND THEN PREPARED HIS W RITTEN SENTENCE , WRI TTEN FINDINGS SUBSEQUENT TO THIS COURT GETTING THE APPEAL, G ETTING THE RECORD AND GETTING THE , SO IT WAS, THE DANGERS THAT THE COURT TALKED ABOUT IN THE VAN ROYAL SITUATION , SIMPLY ARE NOT PRESENTE D IN THIS CASE. SO WE WOULD SUBMIT THAT THECLAIM IS , B OTH , PROCEDURALLY BARRED AND IS MERITLESS , BECAUSE THE TRIAL JUDGE DID COMPLY WITH WHAT ULTIMATELY BECAME THE GROSSMAN RUL E. WITH R ESPECT TO THE THIRD ISSUE THAT HAS BEEN PRESENTED HERE , WITH REGARD TO THE SUFFICIENCY OF THE PECK N ARY PECUNIARY GAIN AGGRAVATORS , CLEARLY IT IS SUFFICIENT ON THAT SKOFERMENT THE DEFENDANT RETURNED TO THE VICTIM'S HOME AFTER PAYING THE RE NT, SPECIFICALLY FOR THE PURPOSE OF GETTING THE RENTAL CHECKBACK. HE NE EDED THE $250 SO HE COULD BUY MORE DRUGS THAT HE WAS USI NG THAT NIGHT. HE AR MED HIM SELF WITH A BUTCHER KN IFE FROM HIS HOME AND APPROACHED AND ENTERED AND CL EARLY THE EVIDENCE THAT WAS PRESENTED , INCLUDING THE DOUBLE HOP SIDE AT THE REST DID HOMICIDE AT THE RESIDENCE PLUS THE DEFENDANT'S EXTR EME EVIDENCE IN SEARCHING FOR THE CHECK , THE NEIGHBORS HEARD THE RANSACKING ANDFURNITURE IN THE APARTMENT BEING MO VED. CLEARLY IT WAS AGGRAVATING CIRCUMSTANCES. WITH RESPECT TO THE CLA IM OF THE BURGLARY , LI MITED BURGLARY INSTRUCTION THAT WAS GIVEN, THERE WAS NO OBJECTION TO THAT BELOW. THIS IS NOT A BURGLARY CONVICTION. THIS DEFENDANT WAS CONVICTED OF TWO COUNTS O F FIRST-DEGREE MURDER . WITH RESPECT TO DELG ADO , THE LEGISLATURE HAS EN ACTED AN AMENDMENT T O THE STATUTE, AGAIN , I BELIEVE AS OF MAY 21 , 2004 , WHICH IN DICATED ITS DISAGREEMENT WITH THIS COURT'S DELGADO PROGENY AND OUTLINED , ONCE AGA IN, THAT THE LAW I N EFFECT AT THE TIME AS THEY PERCEIVE IT , IS THE PREDELGADO LAW. THIS C RIME OCCURRED I N 1986. THAT LAW SHOULD BE APP LIED HERE. CERTAINLY IT WAS A BURGLARY , AT THE TIME THAT HE COMMITTED HIS OF FENSE AT THIS TIME IN 198 6, AND WE WOULD SUBM IT THAT , SINCE THE JURY WAS INSTRUCTED PURSUANT TO WHAT THIS COURT HAD SAID ON THE PRIOR APPEAL , THAT THERE SHOULD BE A MERGER OF PECUNIARY GAIN AND THE BURGLARY, AND THE JURY WAS INSTRUCTED ON THAT. THE TRIAL JUDGE FOUND BECK UNION AREA GAME PEC UNIARY GAIN AND DID NOT FIND BURGLARY, AND WE STRONGLY URGE AND SUPPORT THE DEATH SENTENCE SHOULD BE FOUND BY THIS COURT. I F THERE IS ANOTHER ISSUE, THE RING ISSUE BEFORE THIS COURT , I THINK THIS COURTHAS PREVIOUSLY ADD DECEMBERED THAT, AND I DON'T THINK THERE ADDRESSEDTHAT, AND I DON'T THINKTHERE ARE ANY GROUNDS FOR REVEFERS AL OE THAT - - REVERSAL ON THAT ISSUE. IF THE COURT HAS NO QUESTIONS , I WILL ASK THECOURT TO AFFIRM.

CHIEF JUST ICE: REBUTTAL.

I WANT TO MAKE ONE POINTWITH REGARD TO THE FI RST ISSUE , THE COURT 'S ANSWER TO THE

JURY QUESTION , AND THEY RETURNED WITH A 10-TO-2 JURY RECOMMENDATION, JUST 15 MINUTES AFTER THE COURT ANSWERED THEIR QUESTION, SO THIS WAS SOMETHING OBVIOUSLY VERY MUCH ON THE JURY'S MINDS , AND THE ANSWER THAT THE COURT GAVE VERY LIKELY HAD AN E F FECT ON THEIR RECOMMENDATIONS , SINCE THEIR RECOMMENDATIONS WERE RETURNED SO SOON AFTER THEQUESTION WAS ANSWER ED.

LET ME ASK YOU SOMETHING. UNDER THE LAW , CAN A JURY FIND CERTAIN AGGR AVATING CIRCUMSTANCES EX IST , THAT THE MITIGATORS DO NOT OUTWEIGH BUT STILL RECOMMEND LIFE IN PRISON?

I BELIEVE THEY CAN , BECAUSE THE JURY IS, FIRST , CHARGED WITH THERESPONSIBILITY OF FINDING THAT THERE IS SUFFICIENT AGGRAVATING CIRCUMSTANCES IN ORDER TO JUSTIFY A DEATH SENTENCE. THEN THEY PROC EED TO CONSIDER WHETHER THE MITIGATION OVERCOMES TH OSE AGGRAVATORS , SO I BELIEVE THE ANSWER IS YES TO THAT QUESTION.

SO THAT QUESTION I S N'T NECESSARILY IRRELEVANT , IF THE JURY FINDS , THE JURY COULD HAVE DETERMINED THAT THERE WERE AGGRAVATING CIRCUMSTANCES , THAT THERE WEREN'T SUFFICIENT MITIGATORS BUT FIGURED, WELL , WE MAY BE MERCIFUL ON THE DEFENDANT, IF WE KNOW THATHE IS GOING TO S PEND ACERTAIN AM OUNT OF TIME IN PRISON.

WELL, THAT IS JUST , NOTSOMETHING THAT THEY SHOULD BE CONSIDERING , AND I THINK EVEN THE COURT HAD SERIOUS QUESTIONS ABOUT WHETHER THEY SHOULD BE CONSIDERING THIS.

CHIEF JUSTICE: THANK YOU VERY MUCH.ALL RIGH T. WE ARE GOING TO T AKE A B RIEF , FIVE-MINUTE RECESS TO , BEFORE WE CA LL THE N EXT CASE.

MARSHA L: PLEASE RISE.