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Michael L. Robinson v. James v. Crosby, Jr.

MARSHAL: PLEASE RISE . HEAR YE.HEAR YE.HEAR YE.THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW SESSION. ALL WHO HAVE CAUSE TO PLEA , DRAW NEAR , GIVE ATTENTION AND YOU SHALL BE HEARD. G OD S AVE THESE UNITED ST ATE S , THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SE ATE D.

CHIEF JUSTICE: GOOD MORNING, LADIES AND GENTLEMEN, AND WELCOME TO THE FLORIDA SUPREME COURT . THE FIRST CASE ON TODAY'S DOCKET IS ROBINSON VERSUS STATE OF FLORIDA . ARE THE PARTIES READY? YOU M AY PROCEED.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS MELISSA MINSKDONHO , AND I REPRESENT MICHAEL ROBINSON, WHO IS CURRENTLY SENTENCED TO DEATH.IN 1995, MR . RO BINSON PLED GUILTY AND WAIVED HIS RIGHT TO A PENALTY-PHASE JURY.IN 1996, THIS COURT VACATED THE DEATH SENTENCE AND REMANDED TO THE T RIAL COURT TO CONDUCT A NEW PENALTY PHASE HE ARING , BEFORE THE JUDGE ALONE. IN ACCORD ANCE WITH F ARR. A NEW PEN ALTY P HASE PROCEEDING TOOK PL ACE IN 1997, AND I N 1999 , THIS COURT AFFIRMED THE NEW DEATH SENTENCE IMPOSED BY THE TRIAL COURT. THEREAFTER

WOULD YOU JUST CLARIFY THAT , AT THAT T IME , THE NEW PENALTY PHASE, THE DEFENDANT AT THAT TIME CHANGED HIS MIND ABOUT WHETHER HE WA NTE D THE DEATH PENALTY IM POSED , AND ACTUALLY THEREFORE , THERE WAS AFFIRMATIVE PRESENTATION OF EVIDENCE AT THAT SECOND PENALTY PHASE.

THAT'S CORRECT, YOUR HONOR. HE HAD CHA NGED HIS MI ND, ANDHE ACTUALL Y MO VED T O WITHDRAW HIS PREVIOUSLY ENTERED PLEA .

THIS WAS THE PRESENTATION OF EVIDENCE BEFORE THE TRIAL C OURT JU DGE. IS THAT CORRECT?

CORRECT .

IN ACCORDANCE WITH OUR REMAND.

THAT'S CORR ECT . THERE ARE THREE GROUNDS FOR REVERSAL THAT I W OULD LIKE TO RAISE. FIRST, MR . ROB INSON RECEIVED INEFFECTIVE ASSISTANCE O F COUNSEL, WHEN TR IA L COUNSEL FAILED TO PROPERLY WITHDRAW MR. ROBINSON'S PREVIO USLY P LEA.

WHAT WOULD HAVE BEEN THE REAL BASIS FOR THE WITHDRAWAL OF THE PLEA ? AS I UNDERSTAND IT , AT THE INITIAL PLEA HEA RING , HE WAS QUESTIONED EXTENSIVELY ABOUT HIS DE SIRE T O WITHDRAW, TO ENTER A PLEA , AND THE COURT FOUND IT VOLUNTARY, SO WHAT WAS THE B ASIS , NOW , FOR WITHDRAWING THE PLEA?

SPECIFICALLY, YOUR HONOR , AND THIS IS RE ALLY THE CRUX OF THE CASE , IS THAT IN 1996, WHEN MR . ROBINSON MOVED TO WITHDRAW HIS PLEA , HE HADTHE RIGHT, PURSUANT TO F LORIDA RULE OF CRIMINAL PROCEDURE 3.17 0, THAT AT ANY TIME BEFORE SENTENCE, A PERSON MAY WITHDRAW THE PLEA. THIS COURT RE VERSED AND REMANDED FOR A NEW PENALTY PHASE

HEARING.

IT WASN'T FOR A COMPLETE PENALTY PHASE HEARING, WASIT? I T WAS A LIMITED HEARINGBEFORE THE TRIAL COURTJUDGE.

WELL , YOUR HONOR, I RESPECTFULLY DISAGREE WITH. THAT.

WHAT WAS THE LANGUAGE IN OUR OP INION?

ABSOLUTELY. I WILL READ THAT T O THIS COURT. THE LANGUAGE IN THE 1996 OPINION WAS , WE VA CATE DEATH SENTENCE IMP OSE ED BY THE TRIAL COURT. WE REMAND TO THE TRIAL COURT TO CONDUCT A NEW PENALTY PHASE HEARING BEFORE THEJUDGE ALONE , IN ACCORDANCE WITH FA RR , AND THAT IS

WHAT DO YOU THINK BEFORE THE JUDGE ALONE , MEANS?

I AGREE WITH THAT , B UT MY THIRD POINT THAT I RA ISED THAT I HAVEN'T GOTTEN TO , STATES THAT I THINK THIS COURT ERRED IN REMANDING T.

LET'S NOT GET OFF TRACK N OW, OF THE QUESTION, REALLY, THAT JU STICE Q UINCE HASASKED YOU IN TERMS OF THE BASIS FOR SEE KING TO WITHDRAW THE PLEA. HOW MANY YEARS ARE WE AFT INITIAL PLEA WAS E NTERED?

TODAY OR - - WE ARE TWO YEARS AFTER. HE PLED IN 1995, AND IN 1997 , HE WAS B A CK IN F RONT OF THE TRIAL COURT FOR A NEW SENTENCING PROCEEDING . THIS COURT HAS ACTUALLY LAID OUT THE LA W IN THE ROBINSON APPEAL , ABOUT THE STANDARD WHICH IS NECESSARY TO WITHDRAW A PLEA. AND I PRO POSE THAT THAT STANDARD IS M UC H L ESS OF A STANDARD THAN IT IS TO FIND SOMEONE COMPETENT T O ENTER A PLEA.

SO YOU ARE REALLY SAYING THAT THE BASIS OF THE MOTION TO WITH DRAW THE PLEA, WOULDHAVE BEEN HIS COMPETENCY ?

WEL L

OR SIM PLY , ARE YOU SI MPLY SAYING THAT , BECAUSE THEREWAS NO SENTENCE AT THAT P OINT , HE JUST HAD AN ABSOLUTE RIGHT TO WITHDRAW HIS PLEA?

NO. WELL, HE HAD AN ABS OLUTE RIGHT TO ATTE MPT TO WITHDR AWHIS PLEA. HOWEVER, IT IS ALWAYS AT THE DISCRETION OF THE TRIALCOURT.IF THE LAW YER ME ETS CERTAINSTANDARDS. THE LAWYER IN THIS PARTICULAR CASE WAS INEFFECTIVE , BEC AUSE HE DIDN'T ORAL M O TION. HE DI DN'T PUT IT IN WRITING. THE CL IENT HAD REQUESTED THAT HE WAS THAT THE BASIS OF THE TRIAL JUDGE'S DE NIAL, THEFACT THAT IT WAS NOT IN WRITING?

NO. THAT WAS NOT THE BAS IS OF HER DENIAL. SHE, TO ANSWER YOUR QU ESTION , SHE DENI ED IT BASI CALLY SAYING I WAS THERE IN '95 . IN HER OR DER , IT IS TO CLAIMTHREE , T HIS IS WHAT WE ARE TALKING ABOUT IN THE 3.850PROCEEDING IS TO CLAIM 3 AND IN HER ORDER SHE ADDRESSES THAT. SHE STATES I WAS THERE IN 1995. I WAS THERE IN 1997. HE SEEMED FINE TO ME. I QUESTIONED HI M. WE HAD A LENGTHY COLLOQUY. HE SEEMED FINE TO ME. I PROPOS E THAT THAT IS NOT THE CORRECT STAN DARD.

HAD HE BEEN , HAD THEREBEEN A COMPETENCY DETERMINATION PR IOR T O THE E NTRY OF HIS PLEA?

THERE HAD BEEN A COMPETENCY DETERMINATION , BUT THAT IS NOT THE STANDARD. THE STANDARD IS ME NTAL WEAKNESS. AND THERE IS A DIFFERENCE. AND THAT IS WHAT I AM HERE

TO TELL THE COURT. THE STANDARD TO WITHDRAW A PLEA IS LESS THAN THAT , THAN WHAT IS NECESSARY TO MAKE THE PLEA. OF COURSE THIS COURT

WHAT IS THE STANDARD? IN OTHER WORDS HELP OUT , TELLING US WHAT THE STANDARD SAN THEN DEMONSTRATING ON THIS RECORD , HOW THE TRIAL COURT ERRED I N TERMS OF APPLYING THAT STANDARD, UNDER THE CIRCUMSTANCES OF THIS CASE.

THANK YOU. I WILL .

WHAT IS THE STANDARD?

THE FIRST, IS THERE MUST BE A GOOD CAUSE BEFORE ANY SENTENCE, TO PE RMIT THE PLEA OF GUILTY TO BE WITHDRAWN . THE RULE SHOULD BE LIBERALLY CONSTRUED IN FAVOR OF THE DEFENDANT , AND THE DEF ENDANTSHOULD BE PERMITTED TO WITHDRAW A PLEA, IF HE FI LES A PROPER MOTION AND PROVES THAT THE PLEA WAS ENT ERED UNDER MENTAL WEAKNESS , MISTAKE , SURPRISE, MISAPPREHENSION , FEAR , PROMISE OR OTHER CIRCUMSTANCES AFFECTING HIS RIGHTS.

IS IT THE MENTAL WEAKNESS PORTION OF THAT STATEMENTTHAT YOU ARE RELYING ON?

IT IS THE MENTAL WEAKNESS PORTION OF THAT STATEMENT.

SO TELL US WHAT WAS DEMONSTRATED, YOU KNOW, BELOW , IN TERMS OF THE INADEQUACY OF COUNSEL , IN M AKING A CASE WHICH , THIS IS YOUR PO INT, RIGHT?

ABSOLUTELY.

THIS IS AN INEFFECTIVE NESS CLAIM.

ABSOLUTELY IT IS.

SO WHAT WAS DEMONSTRATED IN THESE PROCEEDINGS BELOW THAT DEMONSTR ATES THAT A REASONABLE LAWYER WOULD HAVE DONE SOMETHING ELSE THAT WOULD CL EARLY HAVE ENTITLED THIS DEFE NDANT TO WITHDRAW HIS PL AY?

HIS PLEA?

WHAT THE LAWYER SHOULD HAVE DONE IS PUT IT IN WRITING.HE SHOULD HAVE R EQUESTED AN INDEPENDENT HEARING , AND THEN I AM GOING TO GE T TO WHAT HE SHOWED, WHAT WE SHOWED IN THE 2 0 03 EVIDENTIARY HEARING.

THESE ARE PROCEDURAL THI NGS , ARE THEY NOT? THAT IS THAT THE JUDGEIDN'T HOLD IT AGAINST THE LAWYER THAT THE LAWYER MADE AN ORAL MOTION , RIGHT?

CORRECT.

SO THE JUDGE RULED ON THAT THE. WHAT IS THE ME AT OF THE COCONUT? WHAT IS IT THAT YOUR CLAIM ING WAS DEMON STRATED NOW , THAT EXISTED AT THAT T IME THAT THE LAWYER COULD HAVE ADVOCATED?

FROM THE BEGINNING , EVEN THE FIRST PSYCHOLOGIST THAT EXAMINED MR . ROBINSON BACK IN 1995, STATED THAT HE SUFFERED FROM MENTAL ILLNESS. CHRONIC MENTAL ILLNESS, B RAIN DAMAGE , SU FFERED FROM SEVERE COCA INE ABUSE AND WITHDRAWAL. THERE IS ABSOLU TELY NO IN CONSISTENCY IN THIS RECORD THAT MR . ROBINSON SUF FERS F ROM A MA JOR MENTAL DISORDER T HAS BEEN THAT DAY WAY IT HAS BEEN THAT WAY FROM DAY ONE. THE 1995 EXPERT THAT THETRIAL LAWYER USED TO THE 1997 EX PERTS . NOW , WHAT W E DID AND WHAT WE WERE

ABLE TO DO IS TO SHOW THAT THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN 1997, FOR HIS FAILURE TO WITHDRAW HIS PLEA, WAS THAT HE FAILED TO BRING UP THE MENTAL WEAKNESS. WE PRESENTED EVIDENCE OF THREE, OF A PSYCHOLOGIST, A NEUROPSYCHOLOGIST AND A NEUROPHARMACOLOGIST, STATING THAT MR. ROBINSON WAS SUFFERING FROM A SEVERE MENTAL DISORDER, MANIC, BIPOLAR DISORDER WITH MANIC, HIGH MANIC STATES. HIS ABILITY TO REASON, TO HAVE JUDGMENT, TO THINK CLEARLY, WAS ALL COMPROMISED, AND EVERY SINGLE EXPERT INCLUDING THE STATE'S EXPERT, SAID THAT MR. ROBINSON WAS ACTING UNDER A MENTAL WEAKNESS.

SO UNDER YOUR THEORY, THEN, WHENEVER THE DEFENDANT HAS A BIPOLAR DISORDER, HE CAN'T ENTER A GUILTY PLEA?

NO. BECAUSE MY THEORY IS THAT THE WITHDRAWING, THE REQUEST TO WITHDRAW THE PLEA IS LESS OF A STANDARD THAN THE PLEA, ITSELF.

SO HE CAN ENTER A PLEA BUT THEN CAN WITHDRAW IT ON A WHIM, BECAUSE HE HAS A BIPOLAR DISORDER. SO BY DEFINITION, HE HAS A MENTAL WEAKNESS, AND HE CAN WITHDRAW IT AT ANY TIME.

I DON'T THINK IT IS A WHIM. I THINK IT HAS TO BE PROVED, AND

BUT UNDER YOUR THEORY, THE FACT THAT HE HAS A BIPOLAR DISORDER, ITSELF, PROVES MENTAL WEAKNESS, SO IN EVERY CASE IN WHICH A DEFENDANT HAS A BIPOLAR DISORDER, HE CAN WITHDRAW A PLEA, BASED ON MENTAL WEAKNESS.

NO. I DISAGREE WITH THAT. I THINK YOU WOULD HAVE TO HAVE SUBSTANTIAL, COMPETENT TESTIMONY, EXPERT TESTIMONY, BECAUSE BIPOLAR DISORDER IN AND OF ITSELF, RISES TO DIFFERENT LEVELS.

SO WHAT EVIDENCE IN THE RECORD WAS THERE THAT HIS BIPOLAR DISORDER AFFECTED HIS ABILITY TO ENTER A GUILTY PLEA.

EVIDENCE THAT WE PRESENTED INCLUDING THE STATE'S EXPERT, STATED THAT MR. ROBINSON WAS IN A NEAR SUICIDAL STATE AT THE TIME, SEVERE DEPRESSION.

AT THE TIME OF WHAT?

AT THE TIME THAT HE ENTERED HIS PLEA IN 1995.

THIS WAS BASED ON EXAMINATIONS DONE WHEN?

IN 2003. BUT I WAS ABLE TO RELATE IT BACK, AND WE HAVE THE SAME NEUROPSYCHOLOGIST IN 2003, THAT THE DEFENSE COUNSEL USED IN 1997.

SO HE, THEN, CONTINUOUSLY WAS IN A SUICIDE RISK STATE?

NO. IT FLUCTUATES AND GETS BETTER AND WORSE, BUT AT THE TIME THAT HE PLEADED, IT WAS SIX MONTHS THAT HE PLEADED, IT WAS SIX MONTHS AFTER HE HAD BEEN ARRESTED, AND HE WAS IN A SEVERE SUICIDAL STATE AT THAT TIME. HE WANTED TO DIE. I THINK HE WAS EVEN IN THE NEWSPAPER SAYING I CAN'T DO IT MYSELF BUT I WANT THE STATE TO KILL ME, AND

IN DENYING THIS CLAIM, DIDN'T THE TRIAL COURT RELY SUBSTANTIALLY, ON THE THOROUGHNESS OF THE EXAMINATION OF THE DEFENDANT, AS TO HIS MENTAL STATE, AND AS TO HIS COMPETENCY TO ENTER A PLEA? ISN'T THAT, REALLY, WHAT THE TRIAL JUDGE DID, WAS IMMEDIATELY, THEN, FOCUS ON SAY, LET'S SEE WHAT WE DID AT THE TIME OF THE PLEA, TO BE

ABSOLUTELY CERTAIN, IN A CASE LIKE THIS, WHERE WE ARE TALKING ABOUT THE DEATH PENALTY AND EVERYTHING, THAT HE WAS EXAMINED AND EXAMINED BY MORE THAN ONE MENTAL HEALTH EXPERT, TO BE SURE THAT HE WAS COMPETENT AND TO ENTER THIS PLEA. ISN'T THAT WHAT THE TRIAL COURT RELIED ON, IN DENYING THIS CLAIM?

SHE DID, BUT

WHY, WHERE DID SHE GO WRONG?

I SUBMIT THAT IS THE WRONG STANDARD. THE STANDARD IS MENTAL WEAKNESS, AND THERE IS A DIFFERENCE.

YOU KNOW, YOU HAVE BEEN SAYING THAT A FEW TIMES, AND I HAVE SOME PROBLEMS WITH THAT. I UNDERSTAND A RULE THAT, BEFORE SENTENCING, THAT PLEAS SHOULD BE, YOU SHOULD CONSIDER THEM LIBERALLY, A REQUEST TO WITHDRAW PLEAS, BUT IN A DEATH PENALTY SITUATION, WHAT YOU WOULD REALLY BE SAYING IS THAT, AFTER SOMEONE HAS PLED GUILTY, GONE THROUGH A FULL PENALTY PHASE, THAT SOMEHOW THE STANDARD THEY COULD WITHDRAW IT ANY TIME UP TO THE SENTENCING IN A DEATH CASE, HAVE WE EVER STATED THAT, AS FAR AS THE MENTAL COMPONENT, THAT THERE IS A DIFFERENT STANDARD, AS FAR AS MENTAL STANDARD, FOR WHETHER YOU CAN WITHDRAW A PLEA AND WHEN YOU CAN ENTER A PLEA?

NO, AND I LOOKED. I SEARCHED ALL THE WAY BACK.

IT DOESN'T MAKE A WHOLE LOT OF SENSE TO ME. IT MAKES SENSE TO SAY THAT WE WANT TO FAVOR DEFENDANTS GOING TO TRIAL, BUT AS FAR AS WHETHER YOU SHOULD BE OF ONE MENTAL STATE TO ENTER THE PLEA, BUT THEN TO WITHDRAW IT YOU HAVE A REDUCED STANDARD, WOULD JUST CREATE CHAOS, IN TERMS OF DEATH PENALTY CASES, FOR SURE, BECAUSE YOU WOULD SAY THEY MET, THEY WERE COMPETENT, YES, BUT THEY WERE MENTALLY WEAK. IF THEY ARE MENTALLY WEAK, THEN BASED ON WHAT YOU ARE SAYING, MAYBE THIS PLEA SHOULDN'T HAVE PENNSYLVANIA SHOULDN'T HAVE BEEN ENTERED TO BEGIN WITH, SO I DO NOT SEE A LEGAL BASIS FOR SAYING THAT THERE SHOULD BE A DIFFERENT STANDARD, AND IF YOU CAN'T POINT ANY CASE LAW TO US, THEN YOU ARE REALLY ASKING US TO MAKE NEW LAW ON THIS IN A POSTCONVICTION CASE.

YOUR HONOR, I SEE WHAT YOU ARE SAYING AND I, MYSELF, STRUGGLED WITH THIS WHEN I WAS PREPARING, BUT IT SEEMS TO ME THAT, FROM READING A LOT OF THE JURISPRUDENCE, FROM 1908, WHEN THIS LANGUAGE WAS FIRST ENACTED, THAT THERE HAS BEEN A DIFFERENCE. AS A MATTER OF FACT, THIS COURT RELIED ON A FIRST DCA CASE CALLED BAKER, AND IT QUOTED THAT CASE WHEN IT WROTE THE STANDARD IN THIS ROBINSON CASE. AND IN THAT CASE, A DEFENDANT PLEADED GUILTY, CAME BACK A WEEK LATER BEFORE SENTENCING, AND SAID I WAS ACTING UNDER MENTAL, THIS IS THE ONLY CASE I COULD FIND, BY THE WAY, I WAS ACTING UNDER MENTAL WEAKNESS AT THE TIME THAT I TOOK THE PLEA BECAUSE I HAD TAKEN FINE BASH TOLL THE DAY PHENOBARBITOL THE DAY OF THE HEARING, AND I WAS RELAXED, AND I WAS FEELING NO PAIN.

VERY SHORTLY AFTER ENTERING THE PLEA, THE DEFENDANT SAYS, WAIT A MINUTE, I'M A DE A MISTAKE, AND HERE IS WHY I MADE A MISTAKE, BUT I MADE A MISTAKE, AS OPPOSED TO SEVERAL YEARS LATER, AFTER YOU HAVE GONE THROUGH APPELLATE PROCEEDINGS AND THE WHOLE WORKS KIND OF THING, AND PLUS THAT YOU HAVE HAD THIS, WITH THE INITIAL PLEA, THIS THOROUGH EXAMINATION WITH REFERENCE TO THE COMPETENCY THAT HE ENTERED THE PLEA TO BEGIN WITH. IN THE CASE THAT YOU ARE TALKING ABOUT, THAT DIDN'T OCCUR, DID IT?

NO, BUT JUST WHAT I AM STATING WITH THE CASE NAME CITING IS THAT THERE IS A LESSER STANDARD. THIS MAN WASN'T INCOMPETENT. HE WASN'T INSANE.

I THINK WE HAVE SORT OF BEAT THIS

I WANTED TO ANSWER YOUR QUESTION THAT I LOOKED. I WENT ALL THE WAY BACK TO 1908 WHEN THIS LANGUAGE WAS FIRST ENACTED, WHICH CITES AND GOES BACK TO A 1894 KANSAS CASE, WHICH HAD NOTHING TO DO WITH THAT.

BUT WE HAVE NEVER SAID THAT THERE IS A LOWER STANDARD OF MENTAL COMPETENCE FOR WITHDRAWING A PLEA THAN THERE IS FOR ENTERING A PLEA.

NO, NOT, YOUR HONOR, TO THAT EX-PENALTY TENTH. TO THAT EXTENT.

AND CERTAINLY, MEDICATION, ALTHOUGH SOMEONE IS COMPETENT THERE, IS A THOROUGH EXAMINATION ABOUT THINGS, SUCH AS WHETHER YOU ARE THE INFLUENCE OF MEDICATION WHEN YOU ENTER A PLEA, SO THOSE ARE TAKEN INTO CONSIDERATION WHEN A DEFENDANT ENTERS A PLEA. WE DON'T WANT PEOPLE THAT ARE UNDER MEDICATION OR UNDER SOME OTHER DURESS, TO BE ENTERING PLEAS, AND THAT IS PART OF THE COLLOQUY.

THAT IS WHAT I THINK HAPPENED HERE. HE WAS UNDER SOME SORT OF MENTAL DURESS.

YOU ARE IN YOUR REBUTTAL. I DON'T KNOW IF YOU WANT TO ADDRESS ANY OTHER POINTS.

MAY I UNDERSTAND, WITH REGARD TO THIS ARGUMENT, ARE YOU PRESENTING THIS IN THE INEFFECTIVE ASSISTANCE OF COUNSEL KIND OF CONTEXT, SO, ARE YOU SUGGESTING THAT WE DON'T EVEN LOOK TO THE SECOND PART OF THAT ANALYSIS, WITH REGARD TO THE FACTS, UNDERLYING FACTS OF THE CASE AND WHETHER THE INDIVIDUAL WOULD HAVE ACTUALLY ENTERED A DIFFERENT PLEA, BASED UPON THE FACTS THAT WE HAVE?

NO. I AM SAYING THAT YOU HAVE TO DO THIS, THE ANALYSIS, THE PREJUDICE ANALYSIS, THE STRICKLAND ANALYSIS.

WE STILL HAVE TO DO THAT.

ABSOLUTELY.

HERE DO WE NOT HAVE HERE, AN INDIVIDUAL WHO HAD BEEN DISCOVERED STEALING FROM SOMEONE, AND THEN WENT THROUGH AN ACT, AT LEAST FOUND BY A JURY, TO A VOID GOING BACK INTO A PRISON SETTING? WE HAVE CONFESSIONS, AND AS I GO THROUGH AND READ IT, WHAT IS THE DEFENSE? WHAT DEFENSE WAS AVAILABLE, SO THAT THERE WOULD BE A TRIAL ON THIS? YOU KNOW, IT IS WELL AND GOOD TO TALK ABOUT WEAKNESSES, BUT WHAT IS THE PRACTICAL IMPACT, WITH REGARD TO THE FACTS THAT THEY WERE FACING, THIS LAWYER WAS FACING, TO TRY THIS CASE?

JUDGE, I THINK YOU ARE RIGHT, IN STATING THAT HE DID CONFESS AND ALL OF THOSE THINGS ARE TRUE. HOWEVER, I WILL SAY THAT THE PENALTY PHASE IS A DIFFERENT SITUATION. AND THAT THIS COURT HAS STRONGLY UPHOLD THE NOTION FOR THE PENALTY PHASE. IT IS A STRONG RIGHT, A SIXTH AMENDMENT RIGHT, AND I AGREE WITH YOU.

THAT IS A DIFFERENT ISSUE, ISN'T IT? THE ISSUE OF WHETHER OR NOT HE SHOULD HAVE HAD A RESENTENCING TO A JURY AS OPPOSED TO THE JUDGE. IT IS REALLY A DIFFERENT ISSUE AS TO WHETHER

I DIDN'T HAVE A CHANCE TO GET TO THAT POINT, BUT IT IS IN THE BRIEF, THE HABEAS PETITION, I THINK, RAISES INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR NOT BRINGING THAT I SHALL BRING UP, AND THIS COURT, I BELIEVE THAT ISSUE UP, AND I BELIEVE IT WAS AN

ERROR FOR THIS COURT TO

APPELATE COUNSEL WOULD HAVE RAISED THE ISSUE OF FAILURE TO HAVE THE , A JURY DETERMINATION ?

BASICALLY JUST HE WAS INEFFECTIVE FOR NOT BRINGING UP THE POINT THAT THIS COURT ERRED , IN ITS DECISION, IN 1996 , TO SEND IT BACK FOR A JUDGE . ALONG SENTENCING THERE, IS A LIVEN CASES ALONG CAMPBELL. AS A MATTER OF FACT THIS COURT IN JACKSON SAID A CAMPBELL REWEIGH DOES NOT ENTITLE A DEFENDANT TO PRESENT NEW EVIDENCE THIS. COURT REMANDED THE CASE FOR A NEW EVIDENTIARY HEARING.

THERE WASN'T NEW EVIDENCE PRESENTED. THERE WAS NO , THERE IS NO ALLEGATION HERE THAT NEW EVIDENCE WAS NOT PRESENTED. AS I UNDERSTAND IT, THERE WERE THREE MENTAL HEALTH EXPERTS AND OTHER PEOPLE WHO TESTIFIED AT THIS NEW PENALTY

CORRECT AND THE STATE COULD HAVE EVEN RAISED MORE AGGRAVATORS IF THEY WANT , SO IF HE WAS SENT BACK FOR A NEW EVIDENTIARY HEARING, THEN HAD HE A RIGHT TO A JURY AT THAT TIME , AND THIS COURT REVERSING IT FOR A JUDGE-ALONE SENTENCE WAS AN ERROR AND COUNSEL 'S FAILURE TO RAISE THAT ON APPEAL WAS AN ERROR.

I WANT TO MAKE SURE THAT YOU ANSWERED THE PREJUDICE PRONG QUESTION.

I AM SORRY . RIGHT. THE PREJUDICE PRONG IS ON A CASE WHEN SOMEBODY PLEAS GUILTY IS LAID OUT IN THIS COURT'S CASE IN GROVENER, I THINK I AM PRONOUNCING IT RIGHT.

ACTUALLY ALSO IN HILL VERSUS LOCKHART.

YES . AND SLIGHTLY DIFFERENT STANDARD THAN STRICKLAND BUT FIRST YOU FIND DEFICIENT PERFORMANCE AND THEN YOU FIND THERE IS PREJUDICE, AND I WOULD BE DIRECTING THE COURT TO LOOK TO 1997 HEARING AND COUNSEL'S FAILURE TO PROPERLY WITHDRAW THE PLEA, AS THE TIME WHEN MY CLIENT MR. ROBINSON , RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED , BECAUSE HAD THE LAWYER IN 1997 , PROPERLY MOVED TO WITHDRAW THE PLEA AND GONE THROUGH ALL OF THE CORRECT PROCEDURES , THE PLEA WOULD HAVE BEEN WITHDRAWN, AND HE WOULD HAVE HAD THE CHANCE TO HAVE A JURY , ESPECIALLY AT THE PENALTY PHASE . THE JUDGE IN HER ORDER , NEVER DISCUSSED THE PROPER STANDARD.

HE DID HAVE A JURY IN THE ORIGINAL PENALTY PHASE.

NO , HE DID NOT.

BECAUSE HE WAIVED THAT.

RIGHT.

OKAY. SO THAT IS THE PART THAT YOU , THAT THE ORIGINAL CASE WAS JUDGE-ONLY PENALTY PHASE. YOU ARE SAYING THAT HE WOULD HAVE WITHDRAWN HIS RIGHT TO HAVE A JURY.

RIGHT. RIGHT.

ALL RIGHT. ANY , YOU ARE IN , SUBSTANTIALLY IN YOUR REBUTTAL . >> I AM APOLOGIZE. THANK YOU .

MAY IT PLEASE THE COURT. MY NAME IS BARBARA DAVIS. I REPRESENT THE STATE OF FLORIDA. I WOULD LIKE TO ADDRESS , FIRST , THE MOTION TO WITHDRAW THE PLEA. FIRST , I WANT TO POINT OUT THAT HE HAD BEEN INCARCERATED FOR APPROXIMATELY SIX MONTHS , BY THE TIME

HE ENTERED THIS PLEA. THERE WAS AN EXTENSIVE COLLOQUY. THERE WAS THE OPINIONS OF TWO MENTAL HEALTH EXPERTS THAT HE WAS COMPETENT. THAT HAS NEVER BEEN CHALLENGED. THE COMPETENCY TO ENTER THE PLEA . THEY ARE NOW SAYING THAT THERE WAS SOME KIND OF MENTAL WEAKNESS, WHICH IS SEVEN YEARS AFTER THE ORIGINAL PLEA WAS ENTERED. THIS COURT FOUND , IN ROBINSON TWO, THAT HE WAS , THE PLEA WAS VOLUNTARILY AND INTELLIGENTLY ENTERED.

WHEN YOU LOOK AT THE RECORD HERE , WASN'T THE MOTION TO WITHDRAW THE PLEA , REALLY , PRETTY PERFUNCTORY. I MEAN , THE TRIAL COUNSEL DID NOT GO IN TO A LOT OF DETAIL, AS TO WHY THE COURT SHOULD ALLOW THE WITHDRAWAL OF THE PLEA , SO WAS THE COURT REALLY LEFT WITH ANY OPTION BUT TO DENY THE MOTIONS , SINCE COUNSEL DIDN'T REALLY DEVELOP IT?

COUNSEL , AT THE EVIDENTIARY HEARING, TESTIFIED THAT THERE WAS ABSOLUTELY NO BASIS TO WITHDRAW THE PLEA. THE PLEA WAS VOLUNTARY. HE HAD NO QUESTION IN HIS MIND, AND HE DID NOT WANT TO BRING A FRIVOLOUS MOTION. HOWEVER, SINCE THE CLIENT HAD REQUESTED THAT, HE DID WANT TO PRESERVE THE HE BROUGHT IT ORAL TESTIMONY. HE SAID THAT THE GROUNDS WERE THAT IT WAS NOT VOLUNTARY, BUT HE COULDN'T FLUSH THOSE OUT.

WHOSE DECISION?

THE DEFENDANT'S.

REALLY , TO FILE A MOTION TO WITHDRAW?

IT IS THE DEFENDANT'S. AND MR. BENDER ADMITTED THAT HE SHOULD HAVE DONE THAT IN WRITING, BUT LET ME ADDRESS JUSTICE LEWIS'S QUESTION AS TO THE PREJUDICE. THIS IS A CASE IN WHICH HE CONFESSED TWICE. HE LED THEM TO THE BODY. HE LED THEM TO THE MURDER WEAPONS. HE GAVE TWO FULL CONFESIONS . THE FORENSICS MATCHED. EVERYTHING.

YOU ARE TALKING ABOUT THE PENALTY-PHASE JURY PART AS BEING THE PREJUDICE NOT THE GUILT PHASE , IF I UNDERSTAND THE IR ARGUMENT. THEY ARE SAYING, HERE , AT LEAST THEY SHOULD HAVE BEEN ENTITLED TO HAVE A JURY DURING A PENALTY PHASE , IF THIS ISSUE HAD BEEN HANDLED APPROPRIATELY BY COUNSEL .

AND I THINK WE ARE MIXING TWO ISSUES UP. THEY HAVE ONE ISSUE THAT COUNSEL WAS INEFFECTIVE FOR NOT MOVING TO WITHDRAW THE ENTIRE PLEA. THE ENTIRE PLEA. AND THE JURY ISSUE IS THAT , THIS COURT ERRED BY SENDING IT BACK FOR A PENALTY PHASE TO JUDGE ALONE.

I THOUGHT , LET'S , HE PLED GUILTY AFTER SIX MONTHS. HE PLED GUILTY TO THE CRIME.

YES .

OKAY. THEN HOW LONG AFTER THE GUILTY PLEA, WAS IT SET FOR SENTENCING?

THEY HAD THE , HE PLED IN JAB AREA . IN JANUARY. IN MARCH, THEY HAD THE PENALTY PHASE, THE MITIGATION WAS PROFFERED TO THE JUDGE.

SO WAS THERE A TIME BETWEEN THE ENTRY OF THE GUILTY PLEA AND THE PENALTY PHASE , WHERE HE WAIVED HIS RIGHT TO A PENALTY-PHASE JURY? BECAUSE THAT IS THE SECOND PART OF THE KNOWING AND VOLUNTARY. YOU CAN PLEAD GUILTY , BUT YOU STILL HAVE A RIGHT TO A JURY TRIAL ON THE PENALTY PHASE, SO AT WHAT POINT DID HE KNOWINGLY AND VOLUNTARILY WAIVE HIS PENALTY-PHASE JURY ?

IN MARCH OF '95 , AND THAT IS WHER E HE SAID I PREVENT, I DO NOT WANT MY ATTORNEYS
HOW LONG BETW EEN THE
JANUAR Y TO MAR CH.

SO THERE WAS ANOTHER TIME IN WHICH HE WAS OFFERED TO HAVE A PENALTY-PHASE JURY ,
EVEN IF HE PLED GU ILTY TO THE CRIME.

YES, SIR, YES, MA'AM, AND THEN HE WAS NOT SENTEN CED TO U NTIL APRIL 1 2, S O THERE IS
ANOTHER OPPORTUNITY. AND YOU HAVE TO LOOK AT WHAT HE SAID, AT THE RESENTENCING
HEARING , AND IT IS IN THE RECORD WHAT , AT THE RESENTENCING , THEY HAD DISCUSSED
WHETHER T O RE CUSE THE JUDGE , AND YOU ALL HAD FOUND ON DI RECT AP PEAL , O R THE ,
YEAH , DIRECT APPEAL , THAT SHE WAS NOT B IASED , AND THEY DECIDED THAT THEY WANTED
JUDGE RUSS ELL , BECAUSE SHE WAS N UMD TO THE FACTS OF THE SHE WAS NUMBED TO THE
FACT S OF THECASE. SHE AND MR . ROBINSON HAD A VERY GOOD RAPPORT.

WE ARE STA RTING NO W TO MIX ISSUES.

ISSUES .

WOULD YOU COME BACK ANDHELP US A LITTLE BIT IN ANSWER TO JU STICE PARIENTE'S
QUESTION, AND THAT IS HELP US WITH THE PROCEDURE AND THE MENTAL EXAMINATIONS THAT
TOOK PLACE IN THIS CASE, WITH R E FERENCE TO THE ENTRY OF A GUILTY PLEA AND, AL SO, THE
WAIVER OF A JURY WITH THE PENALTY PHASE. DID ALL OF THAT HA PPEN A T ONE TIME ? WAS IT
SEQUENCED , AND WERE THE MENTAL EXAMINATIONS ONLY BEFORE THE ENTRY OF THE GUILTY
PLEA, OR WERE THEY, A LSO , PART O F THE WAIVER? HELP ME.IN OTHER WO RDS HELP US , AGAIN
, BECA USE I THINK , NOW , THERE IS A LITT LE BIT OF CONFUSION ABOUT HOW THAT ALL TOOK PL
ACE.

IN JANUARY , TH AT WAS THEPLEA. JANUARY OF ' 95. AND DEFENSE COUNSEL CAME IN AND SAID
WE HAVE HAD TWO EXPERTS EXAMINE MR . ROBINSON , BECAUSE HE IS REFUSING TO ALLOW US
TO DO ANYTHING FOR HIM. THEY DID NOT HAVE THE WRI TTEN RE PORT OF DR . BERLAND , BUT
THEY SAID HE HAS BEEN EXTENSIVE LYINVOLVED IN THE CASE. THEY TALKED ABOUT DR.
BERLAND 'S FINDINGS. THEY SAID DR . APPLE HAD DROPPED THE BALL , BUT THEY HAD TALKED
TO HER. SHE SAID HE WAS COMPETENT B UT THEY DID NOT HAVE A WRITTEN REPORT. THEY AS
KED THE COURT TO APPOINT YET ANOTHER EXPE RT, SO THAT THEY WOULD HAVE THE TWO
EXPERTS ON COMPETEN CY.

BUT THEY WERE T ELLING THE COURT AT THAT TIME THAT HE WANT TODD , B OTH, PLEAD
GUILTY AND WAIVE A JURY FOR THE PENALTY PHASE. IS THAT

AT THE PLEA , YES, AND THEN HE ACTUALLY WAIVED THEPENALTY PHASE IN MARC H. AND THEN
THEY WENT THROUGH A WHOLE COLLOQUY ON THAT , WAIVING THE JURY .

WHEN, WITH REFERENCE TO THE MENTAL EXAMINATIONS , FOR HIS COMPETENCY , TO BOTH
ENTER A PLEA AND TO WAIVE A JURY, WERE THERE SEPARATE EXAMINATIONS FOR THAT, OR WAS
IT JUST AN EXAMIN ATION FOR THAT PERTINENT TO ENTERING A GUILTY PLEA , OR DID THE
EXPERTS FOCUS ON HISCOMPETENCY TO DO BOTH ? HELP US.

YES. THEY , AND THE REPORTS OF DR. BERLAND AND DR . KIRKLAND AREATTACHED TO OUR AN
SWER BRIEF. AND DR. BE RLAND DID HIS EXAMINATION BEFORE THE ENTRYOF THE PLAECHLT DR .
KI RK LAND OF THE PLEA. DR . KIRKLAND DID HIS EXAMINATION IN FEBRUARY , RIGHT AFTER THE
ENTRY OF THEPLEA, AND BEFORE , ACTU ALLYIT WAS TWO MONTHS BETWEEN THE PLEA AND THE
PENALTYPHASE.BEFORE THE PENALTY PHASE. AND THEY DIDN'T SPECIFICALLY ADDRESS WHETHE

R HE WAS COMPETENT TO WAIVE A JURY. THEY SAID HE IS COMPETENT TO STAND TRIAL AND ENTER A GUILTY PLEA UNDER THE STANDARDS.

I GUESS WHAT I AM SEEING NOW, AND THIS IS A LITTLE BIT DIFFERENT AND MAYBE IT JUST WASN'T FOCUSED ON IN THE DIRECT PART OF THIS ARGUMENT, IS THAT THERE IS A GOOD REASON NOT TO ALLOW SOMEONE, MONTHS LATER OR YEARS LATER, TO WITHDRAW A GUILTY PLEA, BECAUSE YOU HAVE, YOU KNOW, YOU ARE NOW INTO THE PENALTY PHASE, BUT WHEN IT WAS SENT BACK, AND I AGREE WITH YOU THAT WE SENT IT BACK BEFORE A JUDGE ONLY, BECAUSE ALL WE WERE LOOKING AT WAS THIS WAS A GUY THAT WANTED TO DIE, AND WE WANTED THE JUDGE TO CONSIDER ALL OF THE EVIDENCE IN THE RECORD UNDER NAR, BUT AT THAT POINT WHEN UNDER FARR, BUT AT THAT POINT WHEN IT WAS SENT BACK, THE DEFENDANT SAID I WANTED TO WITHDRAW MY PLEA, BUT WAS HE MAKING A POINT THAT HE REALLY WANTED TO HAVE A JURY TRIAL ON THE PENALTY PHASE?

NEVER. NEVER.

THAT WAS NOT REALLY.

NO. IN FACT, AT THE JULY 27, 1997 HEARING, MR. ROBINSON SPEAKS TO THE COURT, BEGINNING AT PAGE 232, AND THIS WAS AFTER THE EVIDENCE WAS PRESENTED, AND HE IS SPEAKING TO THE JUDGE WITH A VERY GOOD UNDERSTANDING OF THE ISSUES, AND HE TELLS HER, YOU ASKED ME IN JANUARY, DID I CHANGE MY MIND. I DIDN'T CHANGE MY MIND. I JUST TOOK MY HAND OUT OF IT, AND I WANTED, AND MY SPIRITUAL ADVISORS HAVE NOW ADVISED ME THAT IT WOULD BE COMMITTING SUICIDE, IF I AFFIRMATIVELY SUGGEST THE DEATH PENALTY, SO I AM TAKING MY HAND OUT OF THE ISSUE. I WANT GOD TO DO HIS WORK. HE SAW THAT THE REVERSAL FOR RESENTENCING WAS ASSIGNED, AND HE WAS TALKING ABOUT THE MITIGATORS. SO HE IS SPEAKING TO THE JUDGE. HE NEVER SAYS HE WANTS A JURY, AND IN FACT HE TELLS THE JUDGE, I FEEL VERY GOOD THAT THE SUPREME COURT REVERSED TO YOU, THE JUDGE ALONE, TO MAKE THIS DECISION. AND THAT WAS, THAT IS ON PAGE 255 OF THE RECORD.

BUT THE COUNSEL, DID HIS ATTORNEY ASK TO HAVE THE JURY?

NO. THEY FOLLOWED THIS COURT'S MANDATE, AND I WANT TO POINT YOU TO THE SPENCER CASE, THE DUSTY RAY SPENCER CASE, WHICH WAS DECIDED IN 2003, AND ON THE JURY ISSUE, WE ARE TALKING ABOUT INEFFECTIVE ASSISTANCE OF COUNSEL, AND WHEN THIS COURT ISSUES A DIRECT MANDATE THAT THIS GOES BACK TO JUDGE ALONE, COUNSEL CAN'T BE INEFFECTIVE FOR CHALLENGING THAT. ANOTHER JUDGE AT THAT POINT, WHEN HE WAS MOVING TO WITHDRAW THE PLEA, IF THE DISCUSSION WAS, LISTEN, WE DON'T HAVE MUCH CHANCE TO WITHDRAW YOUR GUILTY PLEA BUT THERE IS REALLY NO REASON NOT TO HAVE YOU HAVE A JURY TRIAL WHERE YOU WILL HAVE THE ADVANTAGE, THEN, OF HAVING A JURY LISTEN TO ALL OF THE EVIDENCE, AND AT LEAST GIVE THAT A TRY, BECAUSE THAT WOULD BE, THEN, FROM A JUDICIAL POINT OF VIEW, SINCE IT WAS GOING BACK FOR A NEW SENTENCING, TO HAVE A JURY IMPANELLED, MAY HAVE BEEN SOMETHING THAT THE JUDGE WOULD HAVE CONSIDERED, BUT WAS THAT, AGAIN, I FEEL LIKE WE ARE TALKING ABOUT ONE WAS WHETHER OUR MANDATE SAID JURY TRIAL, NO JURY TRIAL, VERSUS THE WITHDRAWAL OF THE PLEA IN THIS TWO-PRONGED IDEA THAT HE WANTED TO WITHDRAW IT, BOTH AS TO HIS GUILT PHASE, AS WELL AS WITHDRAW HIS JUDGE-ONLY REQUEST FOR THE PENALTY PHASE, AND YOU ARE SAYING IT REALLY WASN'T EVER

NO. THERE WAS NEVER A REQUEST FROM COUNSEL THAT HE WANTED A JURY. IN FACT, EVEN THOUGH THERE WAS NO EVIDENTIARY HEARING, ON THE ISSUES OF RECURRING THE TRIAL JUDGE OR WAIVING THE JURY

WHY WASN'T THAT NEGLIGENT CONDUCTOR UNREASONABLE CONDUCT ON THE PART OF COUNSEL? THAT IS THE COMPETENCY OF COUNSEL ISSUE, WHY WASN'T THAT INCOMPETENCY OF COUNSEL, NOW THAT IT LOOKS LIKE THE DEFENDANT IS STARTING TO HAVE A CHANGE OF MIND,

YOUKNOW , THAT THE OF FENSE HAPPENS , THE DEFENDANT HASJUST SAID GO AHEAD AND KILL ME. I DID A TERRIBLE THING , AND NOW WE ARE SOMETIME AWAY FROM THAT, AND WE HAVE THIS REMAND , AND SO NOW , WHY WOULDN'T COMPETENT COUNSEL SAY, WELL , THIS FELLOW IS FINALLY STARTING TO COME AROUND , AND WHILE HAVING A NEW GUILTY PHASE WOULDN'T DO US MUCH GOOD BECAUSE THEEVIDENCE IS OVERWHELMING , BUT HAVING A PENALTY-PHASE JURY GIVES US ANOTHER CRACK AT SAVING HIS LIFE , SO WHY WOULDN'T COMPETENT COUNSELHAVE ACTED TO AT LEAST WITHDRAW THE WAIVER AT THAT TIME? BECAUSE THAT IS A SEPARATE ISSUE FROM OUR REMAND.

YES, SIR. AND FIRST OF ALL , TWO THINGS. FIRST OF ALL , HE FOLLOWED THIS COURT'S MANDATE, SO HE CAN'T BE INCOMPETENT OR DEFICIENT FOR, AND IT SAYS THAT IN THE SPENCER CASE. WE HAVE DIFFERENT WAYS OF REMAND.

ISN'T THAT A SEPARATE ISSUE , THOUGH , FROM THE ISSUE OF FOLLOWING THIS COURT'S MANDATE, NOTWITHSTANDING THIS COURT'S MANDATE , THE DEFENDANT HAD A RIGHT TO ASK THE TRIAL JUDGE TO WITHDRAW HIS WAIVER AND GIVE HIM A JURY , DIDN'T HE? IN OTHER WORDS ISN'T THAT A SEPARATE ISSUE FROM THE MANDATE?

WE ARE TALKING ABOUT WHETHER COUNSEL WAS DEFICIENT, WHETHER HE WAS INCOMPETENT . IF I WERE DEFENSE COUNSEL , WOULD I BE INCOMPETENT , IF I DID NOT , WOULD I, I MEAN , WOULD I BE EXPECTED TO GO BEFORE THE TRIAL JUDGE AND SAY THE SUPREME COURT IS COMPLETELY WRONG ABOUT, THIS AND IT DOESN'T COME BACK TO THE JUDGE ALONE.

THE ARGUMENT IS NOT THAT THE SUPREME COURT IS WRONG ABOUT THIS. OBVIOUSLY THAT IS WHAT WE DID IN THE CONTEXT OF WHAT WAS GOING ON AT THE TIME . I ASSUME THAT WHAT COUNSEL WOULD DO IS SAY, JUDGE , YOU MAY REMEMBER , THIS IS A FELLOW THAT, AFTER THIS CRIME OCCURRED, HE WANTED THE STATE TO KILL HIM FOR THE TERRIBLE THING THAT HE DID , AND WE , YOU KNOW, WE TRIED TO CONVINCE HIM TO HAVE A JURY , ALSO , ON THIS THING , AND , BUT , WE WERE NOT SUCCESSFUL. NOW , WE ARE A COUPLE OF YEARS AWAY FROM THAT , AND THE DEFENDANT NOW , IS OF A MIND TO HAVE THE ASSISTANCE OF THE JURY , AND SO WE THINK WE ARE ENTITLED TO WITHDRAW HIS WAIVER.

THERE IS NO EVIDENCE THAT THE EVIDENCE EVER WANTED A JURY OR ASKED COUNSEL FOR A JURY.

HELP US .

ISN'T PART OF THE RECORD THAT YOU JUST READ TO US , THAT THE DEFENDANT STATED TO THE JUDGE , THAT THE CASE BEING BACK BEFORE THE JUDGE , WAS WHAT THE DEFENDANT WANTED. WASN'T THAT

YES. EXACTLY. THAT IS WHAT HE SAID AT RESENTENCING. ALSO, COUNSEL TESTIFIED AT THE EVIDENTIARY HEARING, THEY DISCUSSED HAVING JUDGE RUSSELL OR TRYING TO RECUSE HER. EVEN THOUGH IT HAD BEEN SENT BACK, AND HE SAID , NO , I WANT JUDGE RUSSELL ON THIS CASE. I THINK I HAVE THE BEST CHANCE WITH HER TO GET A LIFE SENTENCE. SHE IS NUMBED TO THE FACTS. SHE LIKES ME. AND THAT IS THE EVIDENCE FROM THE EVIDENTIARY HEARING.

IS THERE ANYTHING, THOUGH, FROM THE EVIDENTIARY HEARING, ABOUT THIS, HAVING A JURY OR NOT HAVING A JURY , THOUGH, FOR THE PENALTY PHASE?

NO, SIR, BECAUSE THERE WAS NO EVIDENTIARY HEARING ORDERED ON THAT ISSUE.

COULD I ASK ONE QUESTION WITH REGARD TO WHEN THE CASE WAS HERE BEFORE , WHETHER THE DEFENDANT HAD ASSERTED SOME TYPE OF IMPROPRIETY WITH REGARD TO THE JUDGE ACTUALLY CONDUCTING THE PENALTY PHASE , AS OPPOSED TO A JURY THAT WAS A PREDICATE OR

PRO MPTED THAT SPECIFIC LANGUAGE IN THE OPINION? THE LANGUAGE SAYING THIS G OES BACK FOR CONSIDERATION , BY THE JUDGE ONLY. WAS THAT AN ISSUE? WAS THAT SOMETHING THAT WAS DISCUSSED HERE AT ALL, OR DID THAT LANGUAGE JUST FIND ITS WAY INTO THE OPINION?

ROBINSON TWO , THE ONLY CHALLENGE TO THE JUDGE, AND IT WAS EITHER ROBINSON ONE OR TWO, WAS THAT SHE MADE INAPPROPRIATE COMMENTS. THEY THOUGHT T SHE WAS BIASED. THERE WAS NO DISCUSSION ABOUT JUDGE OR JURY. IT IS THAT THE JUDGE HAD NOT CONSIDERED THE MITIGATION AND IT WAS SENT BACK. IT IS ALMOST A HYBRID CAMPBELL.

BECAUSE WE COULD HAVE SENT IT BACK JUST FOR THE JUDGE NOT TO HAVE A NEW PENALTY PHASE, JUST TO LOOK AT THE EVIDENCE IN THE RECORD , AND CONSIDER THAT EVIDENCE IN DETERMINING WHETHER TO IMPOSE A DEATH PENALTY. I MEAN , THIS WAS SORT OF AN OPPORTUNITY , NOW , THAT WASN'T REALLY ENVISIONED BY OUR MANDATE , I WOULD THINK. THE DEFENDANT ACTUALLY HAD AN OPPORTUNITY TO NOW PRESENT PENALTY PHASE TESTIMONY.

YES. BECAUSE BEFORE, HE HAD JUST PROFFERED IT, BECAUSE THE DEFENDANT WOULD NOT ALLOW HIM TO PRESENT ANYTHING , SO HE SAID, IF I WERE ALLOWED TO PRESENT ANYTHING , I WOULD HAVE PROFFERED THIS AND THIS AND THIS, AND THEN EVERYBODY SAID, BUT THE JUDGE CAN'T CONSIDER IT . BUT THIS IS WHAT I WOULD HAVE DONE UNDER COOMBS. THEN IT WAS SENT BACK FOR FARR. THE FIRST THING IT DID WHEN IT CAME BACK FOR RESENTENCING, THEY SAID OKAY, WHAT ARE THE PARAMETERS NOW? JUDGE ALONE. DEFENSE COUNSEL , I WANT TO PRESENT ALL NEW EVIDENCE. THEY TOOK A CONTINUANCE. THEY GATHERED ALL THEIR EXPERTS.

AND THE STATE COULD HAVE SAID THAT WAS BEYOND THE MANDATE BUT THEY DIDN'T.

THEY DIDN'T. THEY ALLOWED EVIDENCE. THE STATE, ALL WE DID WAS REPLAYED THE CONFESSION. DETECTIVE GRIFFIN TESTIFIED AND THAT WAS OUR TESTIFIED AND THAT WAS OUR ONLY WITNESS.

THERE WAS NO TESTIMONY ABOUT HE WANTED A JURY .

NO.

FOLLOWING UP JUSTICE LEWIS 'S QUESTION , MY RECOLLECTION IS THAT, WHEN THE CASE WAS HERE IN '96 , THAT THE ANALYSIS THAT WE WERE INVOLVED IN AT THAT TIME , WAS WHETHER THE JUDGE HAD FOLLOWED FARR.

YES.

AND THE DECISION WAS MADE THAT THE JUDGE HAD NOT FOLLOWED FARR, AND THEREFORE WAS SENT BACK TO THE JUDGE TO CONSIDER FARR.

YES .

IN THE MITIGATION THAT WAS PRESENTED.

EXACTLY.

WHICH WE HELD THAT THE JUDGE HAD NOT PROPERLY CONSIDERED.

YES.

IS THAT?

YES. IN FACT SHE HAD UNCONSIDERED IT. AND THAT WAS THE REASON IT WENT BACK TO THE JUDGE. YOU NEEDED TO CONSIDER THIS. AND SO THEN IT WENT BACK. SINCE THEY HAD JUST PROFFERED IT, THEY ALLOWED HIM, OKAY, NOW, GO AHEAD AND PRESENT IT ALL. AND HERE IS THE MITIGATION I WOULD HAVE PRESENTED AND THAT THE JUDGE SHOULD HAVE CONSIDERED. SO, AND THERE WAS NO TALK ABOUT A JURY. MR. ROBINSON IS TALKING TO THE JUDGE AT ALL THESE OPPORTUNITIES. HE NEVER ASKED FOR ANYTHING. IN FACT WHAT WE DO HAVE IN THE RECORD REFUTES THAT. I MEAN, HE NEVER ASKED COUNSEL FOR IT. THERE IS NO EVIDENCE HE EVER ASKED COUNSEL AND JUST TO POINT OUT THAT THEY HAVE THE BURDEN IN A 3.850, SO I MEAN, WHEN THIS CAME BACK, THE BURDEN OF PLEADING, AND YOU LOOK AT THE PLEADINGS THAT THEY MAKE, IT NEVER SAYS IN THEIR 3.850, AS FAR AS THEM ALLEGING GROVENER, WELL, EXCEPT FOR THE MISADVICE OF COUNSEL, I WOULDN'T HAVE PLED, AND I WANT TO GO FORWARD WITH A VOLUNTARY INTOXICATION, WHICH WAS GROVENER. HE HAS NO DEFENSES. THERE IS NO PREJUDICE ON THAT, AND IF THERE ARE NO QUESTIONS, THEN I WILL JUST RELY ON THE BRIEF ON THE OTHER ISSUES. I THINK THAT IS ALL I WANTED TO POINT OUT. THANK YOU.

CHIEF JUSTICE: YOU USED YOUR TIME. IF YOU WANT A MINUTE FOR REBUTTAL.

THANK YOU. I JUST WANTED

CHIEF JUSTICE: MS. DAVIS WAS NICE ENOUGH TO NOT USE ALL YOUR TIME UP. WE APPRECIATE THAT.

I JUST WANTED TO ADDRESS JUSTICE ANSTEAD'S CONCERNS ABOUT THE JURY. WE DID RAISE, IN CLAIM ELEVEN, THAT COUNSEL FAILED TO REQUEST A JURY ON SENTENCING. THE SENTENCING PHASE. WE WERE DENIED AN EVIDENTIARY HEARING ON THAT ISSUE. I DEBATED BRINGING THAT AS A MAIN ISSUE BEFORE THE COURT. HOWEVER, DURING MY RESEARCH, I CAME UPON A CASE WHICH STATES THAT THAT IS BASICALLY LAWFUL THE CASE, AND THAT THIS COURT IS THE ONLY COURT WITH JURISDICTION TO CHANGE THAT. THAT IS WHY I RAISED IT AS AN ERROR OF THIS COURT OR AS AN ERROR OF THE APPELLATE COUNSEL FOR NOT RAISING IT ON DIRECT APPEAL, BUT I HAD IT IN MY 3.850. I WANTED TO BRING IT UP AS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. I WAS DENIED EVIDENTIARY HEARING ON THAT ISSUE, AND THEN IN MY RESEARCH, I FOUND THAT LAW OF THE CASE. I DON'T WANT TO REPEAT MYSELF.

DID YOU HAVE AN EVIDENTIARY HEARING ON THE ALLEGATIONS THAT COUNSEL WAS NOT COMPETENT IN SEEKING TO WITHDRAW THE PLEA?

WE DID ON CLAIM THREE, WHICH WAS THE WITHDRAWAL OF THE PLEA, RIGHT, BUT SHE DIDN'T GIVE US AN EVIDENTIARY HEARING ON CLAIM ELEVEN, WHICH WAS THE FAILURE, BUT I WILL STATE THAT JUST BECAUSE MR. ROBINSON SAID IN THE RECORD I WANTED TO BE BACK BEFORE THIS JUDGE, DOES NOT MEAN HE DIDN'T WANT A JURY. HE WANTED HIS PLEA WITHDRAWN, AND MY ANSWER TO JUSTICE LEWIS WITH REGARD TO THE DEFENSE, ALL I AM LOOKING FOR IS A WAY TO GET BACK, YOU ASKED ME WHAT IS THE PREJUDICE IN THE GUILT PHASE. WELL, THE WAY TO GET BACK IS HE WAS MOVING TO WITHDRAW HIS PLEA TO GET BACK TO SQUARE ONE. IS THERE A DEFENSE? PROBABLY NOT, JUDGE. I DON'T KNOW. I WOULD HAVE TO BE THE TRIAL COUNSEL AND LOOK AT IT ALL OVER AGAIN, BUT WHAT I WAS SAYING NOT TO CONFUSE JUSTICE PARIENTE, WHAT I WAS SAYING WAS THAT, IF I GET BACK TO SQUARE ONE, AT LEAST I GET A PENALTY-PHASE JURY. THAT IS ALL I WAS SAYING, NOT THAT YOU KNOW, I WANT TO WAIVE THE GUILT PHASE, TRIAL, OR HAVE A JURY FOR GUILT PHASE. I WAS TRYING TO ANSWER THE QUESTION FAIRLY THAT I AM NOT SURE THERE IS A GREAT DEFENSE. I DON'T KNOW. I WASN'T THE TRIAL LAWYER.

BUT THAT IS PART OF YOUR BURDEN OF PROOF, IS IT NOT ON A CLAIM LIKE THIS IS TO SHOW THAT COUNSEL SHOULD HAVE ATTEMPTED TO WITHDRAW IT, BECAUSE THERE WAS A VIABLE

DEFENSE TO THE CASE.

ACTUALLY UNDER GROVENER, IF I AM SAYING THAT CORRECTLY, NO. WHAT GROVENER SAYS IS , UNTHE PREJUDICE CLAIM, PART, IS THAT WE HAVE TO PROVE THAT , BUT FOR COUNSEL'S ERRORS , MR . ROBINSON WOULD HAVE PLEADED IN . THANK YOU . WOULD HAVE PLEADED NOT GUILTY.

CHIEF JUSTICE: THANK YOU VERY MUCH TO BOTH OF YOU FOR A HELPFUL ORAL ARGUMENT