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**Harold A. Blake v. State of Florida
SC05-1302**

>> ALL RISE.

OYE, THE SUPREME COURT OF
FLORIDA IS NOW IN SESSION.
ALL THOSE HAVING BUSINESS
BEFORE THIS COURT, DRAW NIGH,
GIVE ATTENTION, AND YOU
SHALL BE HEARD.

GOD SAVE THESE UNITED
STATES, THE GREAT STATE OF
FLORIDA, AND THIS HONORABLE
COURT.

>> GOOD MORNING.

>> LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.
PLEASE BE SEATED.

>> GOOD MORNING, FRIENDS.
WELCOME TO THE FLORIDA
SUPREME COURT.

AND OUR ORAL ARGUMENT
CALENDAR FOR WEDNESDAY,
OCTOBER 10th.

THE FIRST CASE ON OUR
CALENDAR IS BLAKE v. STATE.
MR. NORGARD?

>> THANK YOU.

MAY IT PLEASE THE COURT.
BOB NORGARD ON BEHALF OF THE
APPELLANT HAROLD BLAKE.

I KNOW THAT YOU'LL ARE WELL
AWARE THE FACTS SO I AM NOT
GOING TO TRY TO REGURGITATE
THOSE FOR YOU UP HERE.

WHAT I AM GOING TO DO IS I
AM GOING TO START, FIRST OF
ALL, BY TALKING ABOUT THE
PROPORTIONALITY ASPECT OF
THIS CASE.

AND IN DISCUSSING THE
PROPORTIONALITY IN THIS CASE,
I THINK ONE OF THE THINGS I
NEED TO ADDRESS IS THE JURY
RECOMMENDATION BECAUSE
CERTAINLY EVEN AT THIS LEVEL,
EVERYBODY, ONE OF THE FIRST
THINGS YOU DO IS WELL WHAT
DID THE JURY RECOMMEND?
IT'S ONE OF THESE SEVEN-5

CASES 12-0 AND THAT'S
CERTAINLY SOMETHING THIS
COURT CERTAINLY LOOKS AT AND
ONE OF THE THINGS I WANT TO
LOOK AT IN TAKING THE JURY
RECOMMENDATION WITH A GRAIN
OF SALT ASIGNIFICANT GRAIN
OF SALT IN THIS CASE IS THAT
THE MOST SIGNIFICANT --

>> NOW, WAIT A MINUTE, ARE
WE ALLOWED TO TAKE A JURY
RECOMMENDATION WITH A
SIGNIFICANT GRAIN OF SALT IN
ANY CASE?

>> WELL, I BELIEVE IN THIS
INSTANCE --

>> DON'T THE JURY
INSTRUCTIONS SAY THINGS
SPECIFICALLY CONTRARY TO
THAT?

>> WELL, ALTHOUGH WHAT I'M
ABOUT TO TALK ABOUT IS NOT
SOMETHING THAT I WOULD
CONSIDER TO BE FUNDAMENTAL
ERROR AND DON'T BELIEVE IS
FUNDAMENTAL ERROR, AND
CERTAINLY IN ONE OF
YESTERDAY'S CASES YOU ALL
WERE DEALING WITH ISSUES OF
FUNDMENTAL ERROR, IN THIS
CASE THE MOST SIGNIFICANT
PRIOR -- THE MOST
SIGNIFICANT AGGRAVATING
FABLTER IS THE PRIORITY
VIOLENT FELONY OF THE PRIOR
MURDER.

THE JURY IN THAT CASE HAD
FOUND THAT MR. BLAKE WAS NOT
THE SHOOTER, SO THERE WAS A
SPECIFIC FINDING --

>> BUT, THAT'S NOT THE
POINT.

IN A PRIOR MURDER.

IT'S NOT THE FACT OF WHETHER
WE GOT THE DEATH PELT --
PENALTY IN THAT MURDER HE
WAS STILL CONVICTED FOR THE
MURDER.

>> CERTAINLY.

TWO POINTS I AM TRYING TO
MAKE BEFORE YOU FOLLOW UP
WITH A QUESTION BEFORE I
MADE MY FIRST POINT IS THAT
CERTAINLY THE FACT THAT HE'S

NOT THE SHOOTER, THOUGH,
WOULD GIVE IT LESSER WEIGHT
THAN IF HE WERE THE SHOOTER.
AND I THINK EVERYBODY UP
HERE WOULD AGREE WITH THAT.
IF HE HAD BEEN THE SHOOTER
IN THAT PRIOR CASE GIVEN
THOSE FACTS, IT WOULD BE --

>> WAS THAT A CASE THAT WAS
SIMILAR TO THIS CASE?

WAS THIS A, A ROBBERY
SITUATION AND THEY, AND
SOMEONE WAS KILLED?

>>, THE, THE FIRST CASE, THE
CASE INVOLVING THE PRIOR
MURDER WAS A SITUATION WHERE
THE CAR PULLED UP ON A
STREET, SOMEBODY CAME OVER
TO THE CAR, AND THERE WAS AN
ATTEMPTED ROBBERY.

THE ROBBERY THAT THE SUBJECT
OF THE CASE BEFORE THIS
COURT IS A CONVENIENCE STORE
ROBBERY.

>> WELL, IT MAY BE A
CONVENIENCE STORE ROBBERY
VERSUS ANOTHER KIND OF
ROBBERY, BUT DON'T YOU
REALLY HAVE A SITUATION
WHERE WE HAVE A DEFENDANT
DOING THE SAME KIND OF
ACTIVITY, AND SO WHY SHOULD
WE GIVE IT ANY, ANY LESSER
WEIGHT?

>> WELL, THE FACT THAT HE'S
NOT THE SHOOTER, I THINK IS
A SIGNIFICANT POINT.
IN THAT PARTICULAR CRIME, A
JURY FOUND THAT HE WAS NOT
THE SHOOTER.

AND THE POINT THAT I WAS
TRYING TO MAKE ABOUT THE
JURY RECOMMENDATION IS THAT
DESPITE THIS COURT'S
AUTHORITY IN LeBRON v.
STATE, WHICH WE DEALT WITH
LEBRAN 3 YESTERDAY AFTERNOON,
BUT IN LeBRON 1 AND LeBRON 2,
WE DEALT WITH JURY FINDINGS
WHERE MR. LeBRON WAS NOT THE
SHOOTER.

IN THIS CASE, WITHOUT THE
OBJECTION OF DEFENSE COUNSEL,
THIS JURY WAS PRESENTED

EVIDENCE THAT MR. BLAKE WAS THE SHOOTER.

>> WELL TURBSH PEERS WHAT -- WE'RE WHERE YOU'RE -- IT APPEARS THAT WHERE YOU'RE HEADED ON THIS CASE, JUST TO KIND OF CAPSULIZE THIS IS THAT THIS IS IN THE CATEGORY OF THESE CASES AS WE LOOK AT THEM IN THE SPECTRUM OF A ROBBERY GONE BAD AND DIDN'T START OUT -- THAT'S WHERE YOU'RE HEADED WITH THIS AND IT IS BECAUSE OF THESE AGGRAVATORS, NOT THE CIRCUMSTANCES OF THIS PARTICULAR SHOOTING, BUT THOSE OTHER THINGS WITH THE AGGRAVATORS THAT PUT IT OVER THE TOP WITH REGARD TO A DEATH PENALTY ANALYSIS ON PROPORTIONALITY.

>> YES, SIR.

>> AND, BUT I DO THINK THAT YOU DO NEED TO THEN GET BACK INTO -- WE HAVE DONE THAT AS JUSTICE QUINCE IS ASKING BECAUSE YOU DO HAVE BASICALLY THE SAME REPETITIVE AND WHY SHOULD IT BE ANALYZED DIFFERENTLY?

>> ALL RIGHT, WELL, FIRST OF ALL, LET'S TAKE A LOOK AT THE, YOU KNOW, WE HAVE TO LOOK AT IT IN THE CONTEXT OF THE MITIGATION AND AGGRAVATION IN THIS SPECIFIC CASE.

WE ALSO HAVE TO OF COURSE LOOK AT THE CASE LAW THAT THIS COURT HAS RENDERED IN THIS AREA OF PROPORTIONALITY, BUT WHAT THE TRIAL COURT DID IN ITS FINDINGS OF FACT IS THAT ONE OF THE AGGRAVATING FACTORS WAS THAT MR. BLAKE WAS ON PROBATION.

ALTHOUGH THE ATTORNEY GENERAL IN THEIR BRIEF ARGUED THAT PERHAPS THE JUDGE SHOULD'VE GIVETEN MORE THAN JUST SOME WEIGHT, I THINK THAT THE TRIAL JUDGE, I MEAN, YOU KNOW, I DON'T

HAVE A LOT OF QUIBBLES WITH THE TRIAL JUDGE'S ORDER. I KNOW A LOT OF TIMES WE ARE UP HERE ARGUING OVER WHETHER THE TRIAL JUDGE DID A GOOD JOB WITH THE ORDER OR NOT BUT I THINK CERTAINLY HIS ANALYSIS TO GIVE THE PROBATION AGGRAVATING FACTOR SOME WEIGHT IS IN ACCORD WITH THAT PARTICULAR FACT IN THIS PARTICULAR CASE, AND IT'S CONSISTENT WITH OTHER CASES.

>> BUT, BUT, COULDN'T IT BE REALLY THAT THE TRIAL JUDGE JUST GAVE THAT SOME WEIGHT BECAUSE WE ALREADY HAVE THE OTHER FACTOR OF THE PRIOR VIOLENT FELONY, AND THESE KINDS OF THINGS SORT OF MESH TOGETHER.

AND SO YOU'VE ALREADY GIVEN GREAT WEIGHT TO THE PRIOR VIOLENT FELONY.

AND SINCE IT'S ALL KIND OF GOING ALONG THE SAME ROAD, AS IT WERE, THAT YOU'VE GIVEN THE OTHER ONE INSTEAD OF GREAT WEIGHT, YOU GIVE IT SOME WEIGHT BECAUSE THEY'RE ALL KIND OF INTERTWINED.

>> YEP, I MEAN, WITH ALL DUE RESPECT, I DON'T THINK YOU'VE GIVEN THE TRIAL JUDGE AS MUCH CREDIT AS HE DESERVES.

I WOULD AGREE WITH HIM THAT, YOU KNOW, A PRIOR MURDER IS SOMETHING THAT GENERALLY AND IS GIVEN GREAT WEIGHT BUT WHEN WE ARE DEALING WITH EACH AND EVERY AGGRAVATING FACTOR, WHERE THE JUDGE, ALTHOUGH MY UNDERSTANDING IS THAT IT IS NOT REQUIRED WHERE THE JUDGE DID MAKE FINDINGS OF FACT AS TO WEIGHT, WE HAVE A SITUATION WHERE HE LOOKED AT AN AGGRAVATING FACTOR THAT COULD POTENTIALLY INVOLVE SOMEBODY WHO WAS IN PRISON AT THE TIME OF THE MURDER,

THAT WOULD CERTAINLY CARRY MORE WEIGHT THAN SOMEBODY BEING ON PROBATION OR SOMEBODY ON COMMUNITY CONTROL OR SOMEBODY THAT WAS AN ESCAPEE FROM PRISON AT THE TIME OF THE MURDER. THAT WAS ON PROBATION FOR SIGNIFICANT VIOLENT FELONY, SOMETHING OF THAT NATURE.

>> WELL --

>> THE JUDGE MADE A WEIGHING DECISION.

>> MAYBE I'M MISSING YOUR POINT HERE.

SO, YOU DO NOT -- YOU ARE NOT TAKING ISSUE WITH THE FACT THAT THE TRIAL JUDGE JUST GAVE THAT SOME WEIGHT.

>> CORRECT, I MEAN, I THINK THAT'S AN ACCURATE CHARACTERIZATION OF THAT --

>> SO, YOU'RE USING THAT, HOWEVER, TO SAY THAT HE SHOULD HAVE ALSO GIVEN JUST SOME WEIGHT TO THE PRIOR VIOLENT FELONY?

IS THAT WHAT YOU'RE --

>> NO, IN THIS INSTANCE, I MEAN, I THINK WHAT WE'RE DEALING WITH AND WHAT'S ON THE TABLE IS A AGGRAVATING FACTOR BASED ON PROBATION WHERE THE JUDGE GAVE IT SOME WEIGHT.

A PRIOR, A FELONY MURDER AGGRAVATOR ATTEMPTED ROBBERY, WHICH THE JUDGE GAVE MODERATE WEIGHT TO, AND THEN THE PRIOR MURDER, WHICH THE JUDGE GAVE GREAT WEIGHT TO.

YES, SO LET ME GO BACK TO THAT SO I HAVE TO SAY WHETHER IT'S THE QUESTIONING JUST, YOU HAVEN'T -- DIDN'T -- YOU HAVEN'T YET GOT YOUR FIRST POINT OUT.

HAVE YOU GOTTEN YOUR FIRST POINT OUT YET THAT --

>> YES, MA'AM.

>> WHICH IS THAT WE SHOULD TAKE WHAT WITH A GRAIN OF SALT?

THAT'S WHAT -- BECAUSE THE

PRIOR FELONY, WHICH I AGREE WITH YOU ELEVATES THIS. YOU GOT TO DO SOMETHING WITH THAT OR ELSE THERE'S NO ISSUE ON PROPORTIONALITY. BUT THE JUDGE FINDS AN AGGRAVATING FACTOR THAT, FIRST OF ALL, THIS WAS THE SAME WEAPON THAT WAS USED IN BOTH THE CRIMES, THE ONE, THE WEEK BEFORE AND THEN THE ONE WE ARE HERE ON. AND THEN IT SAYS THE RECORD EVIDENCE SUPPORTS A FINDING THAT DEFENDANT WAS AN ACTIVE PARTICIPANT IN THE ATTEMPTED ROBBERY AND HAD PERSONAL CONTACT WITH THE VICTIM, WHO WAS FATALLY SHOT. YOU TAKE ISSUE WITH THAT FACTUAL FINDING OF THE TRIAL COURT?

>>, NO, MA'AM.

>> ALL RIGHT.

SO NOW IT'S NOT AS IF, AND YOU HAVE MAYBE A DIFFERENT -- HE WAS IN THE VEHICLE, THE GETAWAY VEHICLE FOR THE FIRST -- PRIOR ONE. HE WAS MAYBE NOT THE SHOOTER, BUT THE JUDGE FINDS HIM AS AN ACTIVE PARTICIPANT. WHAT -- ACTIVE PARTICIPANT. WHAT IS, ONCE THE JUDGE FINDS AN ACTIVE PARTICIPANT. IT'S A PRIOR VIOLENT FELONY EVEN THOUGH AGREED IT'S NOT SOMETHING HE SERVED AND THEN HE GOT OUT.

I MEAN, IT'S LIKE A TWO-WEEK BAD PERIOD IN HIS LIFE, YOU COULD ARGUE, BUT FOR PROPORTIONALITY, I DON'T KNOW HOW YOU TAKE THAT AND THE ROBBERY OF THIS AND THE FACT THAT HE'S ON PROBATION, EVEN THOUGH IT'S NOT FOR VIOLENT OFFENSES, AND SAY THAT THE DEATH PENALTY IS NOT PROPORTIONATE.

SO GIVE US YOUR BEST SHOT HOW THAT PRESENCE OF THE OTHER PRIOR VIOLENT FELONY, WHICH IS A MURDER THAT HE'S

AN ACTIVE PARTICIPANT IN,
COUPLED WITH THIS MURDER,
AND HE'S ON PROBATION, AND
IT'S A, IT'S A ROBBERY,
TAKES THIS FROM THOSE
ROBBERY-GONE-BAD CASES TO
SOMEBODY THAT IS DESERVING
OF THE DEATH PENALTY.

>> WELL, I THINK, AGAIN, YOU
HAVE TO LOOK AT THIS ON TWO
LEVELS.

NUMBER ONE --

>> WELL, FIRST OF ALL, IS
THAT QUESTION THAT I'M
ASKING, DOES THAT -- AM I
MISSING WHAT WE'VE GOT TO BE
LOOKING AT?

>> NO, MA'AM.

I MEAN, I AM NOT QUIBBLING
WITH THE JUDGE'S ORDER.

>> HOW I'M ANALYZING IT?
YOU OBVIOUSLY --

>> NO, MA'AM.

>> WELL, WHAT PART OF WHAT I
SAID DOESN'T -- DO YOU SAY
THAT WE CAN FIND ALL THAT,
THAT THE PRIOR VIOLENT
FELONY GREAT WEIGHT ON
PROBATION AND ATTEMPTED
ROBBERY AND STILL SAY IT'S
NOT PROPORTIONATE?

>> YES, MA'AM.

>> ALL RIGHT, WELL, WHAT'S
YOUR BEST CASE ON THAT?

>> ALL RIGHT.

AND SO JUST TO CLARIFY
EARLIER POINT, LIKE I SAID,
WHAT -- THE ONLY POINT I WAS
TRYING TO MAKE REGARDING THE
12 VOTE RECBY THE JURY SUS
WAS THEY WERE PROVIDED
EVIDENCE WITHOUT OBJECTION
THAT MR. BLAKE WAS THE
SHOOTER, WHICH --

>> IN THIS CASE?

>> IN THIS CASE.

>> ALL RIGHT SO --

>> NO, PARDON ME, IN THE
PRIOR VIOLENT FELONY MURDER,
ALTHOUGH A JURY HAD FOUND
HIM NOT TO BE THE SHOOTER.

>> THEY DID NOT KNOW THAT IN
THIS CASE?

>> THEY WERE PRESENTED

EVIDENCE THAT HE WAS THE SHOOTER.

>> SO LET ME ASK YOU A QUESTION.

>> WITHOUT OBJECTION BY THE COUNSEL.

>> YOU KNOW, SOMETIMES PEOPLE WILL SAY THEY ARE FOUND NOT GUILTY, THEY ARE FOUND INNOCENT.

NOW WAS THE JURY'S FINDING IN THIS OTHER CASE THAT SPECIFIC FINDING HE DID NOT SHOOT THE FIREARM OR THE STATE DID NOT MEET THEIR BURDEN OF PROOF?

DID THEY FIND SOMEBODY ELSE THAT WAS THE SHOOTER?

>> WELL, THE TRIAL -- AS THE TRIAL JUDGE CHARACTERIZED, THERE WAS A FINDING BY THE JURY THAT HE WAS NOT THE SHOOTER.

THAT WAS BASED ON THE JURY'S SPECIAL VERDICT FORMS REGARDING WHETHER OR NOT HE DISCHARGE ADFIREARM DURING THE COURSE OF THE CRIME.

>> OKAY.

>> THE JUDGE IN THIS CASE, IN THE SENTENCING ORDER FOUND THAT HE WASN'T THE SHOOTER?

>> CORRECT.
CORRECT.

>> NOW FLIPPING IT OVER AGAIN TO -- FIRST --

>> SO ALL YOU'RE SAYING ON THAT ONE IS THAT WHEN WE ARE LOOKING AT THE 12 VOTES, IF WE WERE TO LOOK AT THAT FOR PROPORTIONALITY, WHICH I DON'T KNOW THAT WE ACTUALLY DO FOR PROPORTIONALITY, YOU WOULD SAY THERE'S SOMETHING WRONG BECAUSE THEY DIDN'T KNOW HE WASN'T SH SHOOTER IN THE PRIOR VIOLENT FELONY.

>> RIGHT.

>> OKAY.

SO NOW LET'S GO BACK.

HE'S NOT THE SHOOTER BUT HE'S ANICT ACTIVE PARTICIPANT.

YOU HAVE GOT THREE
AGGRAVATORS, ONE VERY
STRONG.

WHAT IS THE, THIS CASE --

>> AND HOPEFULLY, JUSTICE
WELLS.

>> WHAT, I'M BEFORE YOU MOVE
AWAY FROM THAT, I'D LIKE TO
TO -- FOR YOU TO DESCRIBE
WHAT WAS ACTUALLY PRESENTED
TO THE JURY ABOUT THIS
SHOOTING TWO WEEKS BEFORE.

>> WELL, WHAT -- --

>> WHY DON'T YOU GO THROUGH
THEM.

ASK JUSTIN PARIENTE'S
QUESTION, THEN WE'LL KEEP
THAT IN MIND THEN ANSWER
THIS ONE.

GO ON.

>> JUSTIN PARIENTE, I HOPE
WE'RE ON THE SAME PAGE, AND
I THINK WE ARE ON THE SAME
PAGE I'M NOT DISPUTING THE
FACT THAT THE TRIAL JUDGE
GAVE THIS PRIOR CASE GREAT
WEIGHT.

THAT'S WHAT I HOPE WE'RE
ALSO ON THE SAME PAGE IS IN
EVALUATING THE ROBBERY IN
THIS CASE THAT HE ONLY FOUND
THAT THAT WAS ENTITLED TO
MODERATE WEIGHT.

HE CERTAINLY COULD'VE
GIVETEN GREATER WEIGHT THAN
MODERATE WEIGHT, BUT BASE
SAID ON HIS OVERALL VIEW OF
THE FACTS OF THE CASE, HE
GAVE IT MODERATE WEIGHT.

AND AS TO THE ISSUE OF
PROBATION, HE GAVE THAT
PARTICULAR AGGRAVATING
FACTOR SOME WEIGHT.

WHAT WE'RE JUX POSING THAT
WITH IS TWO MITIGATING
FACTORS, ONE OF THEM BEING
THE STATUTORY MITIGATING
FACTOR OF AGE WHERE THE
JUDGE GAVE THAT MODERATE
WEIGHT.

>> ALTHOUGH, 23, AND I MEAN
LOOKING AT THAT FRANKLY, I
COULD FIND 20 OTHER JUDGES
THAT WOULD GIVE IT NO

WEIGHT.

>> WELL --

>> I'M JUST -- IN TERMS OF
LOOKING, IT'S NOT LIKE HE'S
18.

>> I UNDERSTAND.

>> HE'S 23.

>> AND YOU KNOW, CERTAINLY
THOUGH IN THIS JUDGE IN THIS
ORDER DISCUSSED THAT IN
EVALUATING THAT MITIGATING
FACTOR THAT HE THOUGHT ABOUT
IT VERY CAREFULLY BUT
NONETHELESS GAVE IT MODERATE
WEIGHT.

>> WHERE IS THERE ANY --
THIS LOOKS TO BE ONE OF THE
MOST SENSITIVE EVALUATIONS
THAT I'VE EVER SEEN IN THE
SENTENCING ORDER, WHERE THE
JUDGE IS APPARENTLY BENDING
OVER BACKWARDS TO FIND EVERY
MITIGATING CIRCUMSTANCE, YOU
KNOW, THAT, THAT HAS BEEN
PRESENTED.

THE AGE MITIGATING FACTOR, I,
I, IN OTHER WORDS, THIS
LOOKS LIKE A CLASSIC CASE OF
A TRIAL JUDGE DISCHARGING
THE DUTIES OF A HEAVY DUTIES
THAT ARE PUT ON HIS
SHOULDERS.

WHERE'S THE FLAW?

>> WELL, WE'RE ALL ON THE
SAME PAGE.

I THINK HE DID AN ADMIRAL
JOB.

>> WHERE IS THE FLAW?

>> WELL, HE FOUND TWO
MITIGATING FACTORS THAT HE
ATTRIBBUATED MODERATE WEIGHT
TO.

JUXTAPOSE THAT WITH ONE
AGGRAVATING FACTOR OF
MODERATE WEIGHT, HE FOUND
TWO MITIGATING FACTORS THAT
HE GAVE SOME WEIGHT TO, ONE
MITIGATING FACTOR THAT HE
GAVE SOME WEIGHT TO, TWO
OTHER MITIGATING FACTORS
THAT HE GAVE LITTLE WEIGHT
TO AND VERY LITTLE WEIGHT TO,
AND CERTAINLY ALSO IN THIS
RECORD THAT THE COURT CAN

LOOK AT THAT THIS JUDGE DID NOT CONSIDER, AND I THINK THAT IN PART WAS DUE TO DEFENSE COUNSEL NOT MAKING THE JUDGE AWARE OF THIS UNDER CAMPBELL, BUT WAS THE DEFENDANT'S USE OF DRUGS AT THE TIME OF THE OFFENSE.

>> SOUNDS LIKE --

>> WELL, LET'S GET AN ANSWER TO JUSTICE WELLS' QUESTION AND THEN WE GO NEXT.

HE'S ASKING YOU ABOUT --

>> I DO WANT TO SAY, I STILL HAVEN'T FOUND OUT WHAT CASE THIS IS LOOKING AT PROPORTIONALITY, WHAT IT WAS MOST LIKE SO JUST REMEMBER THAT STILL WAS MY --

>> IF YOU WOULD, PLEASE.

JUSTICE WELLS HAD ASKED YOU ABOUT WHAT THE JURY WAS TOLD WITH REGARD TO WHAT HAPPENED AND SO PLEASE RESPOND TO THAT QUESTION.

>> ESSENTIALLY, WHAT THE JURY WAS TOLD REGARDING THE PRIOR VIOLENT FELONY MURDER WAS THAT AFTER THE CRIME OCCURRED, A, THE WAY THEY PRESENTED THIS WAS THROUGH THE LEAD DETECTIVE IF THE CASE, THE LEAD DETECTIVE TESTIFIED THAT MR. BLAKE WENT TO SOMEONE ELSE'S HOUSE.

THAT WHEN HE GOT TO THAT PERSON'S HOUSE, THAT HE MADE THE ADMISSION THAT HE HAD JUST SHOT SOMEBODY, THAT HE JUST BUCKED OR SOME KIND OF PHRASE OF THAT NATURE, THAT HE SAID THAT MR. GREEN, THE CODEFENDANT WAS WITH HIM BUT CLEARLY TO THIS WITNESS, ACCORDING TO DETECTIVE -- THE STATE PUT ON ADDITIONAL TESTIMONY THAT MR. BLAKE DENIED INVOLVEMENT IN THE CASE.

THEY PUT ON ADDITIONAL TESTIMONY THAT THE CODEFENDANT DENIED INVOLVEMENT, DENIED BEING

THE SHOOTER IN THE CASE.
AND THERE WAS SOME TESTIMONY
AS TO THE PHYSICAL
DESCRIPTION OF THE HAIR OF
THE PARTICIPANTS.

BUT CLEARLY WHAT CAME OUT
WAS THAT MR. BLAKE THROUGH
THIS DETECTIVE'S TESTIMONY
CONFESSED TO A THIRD PARTY
TO BE IN THE SHOOTER
ALTHOUGH A JURY HAD
ESSENTIALLY FOUND THAT HE
WAS NOT THE SHOOTER.

>> AND THAT THAT WAS A
ROBBERY?

>> YES, SIR.

>> SITUATION, AND THAT IT
WAS WITHIN TWO WEEKS PRIOR
TO THIS CONVENIENCE STORE
ROBBERY THAT THIS MURDER --

>> YES, SIR.

>> OKAY, NOW JUSTICE QUINCE
HAD A QUESTION.

>> WHEN YOU WERE GOING
THROUGH THE AGGRAVATING AND
THE MITIGATING
CIRCUMSTANCES, IT SEEMS TO
ME THAT YOU'RE GETTING TO
THE POINT THAT WE HAVE
ALWAYS SAID THAT THIS ISN'T
REALLY A COUNTING GAME; THAT
YOU DON'T REALLY COUNT UP
THE NUMBER OF AGGRAVATING
CIRCUMSTANCES VERSUS THE
NUMBER OF MITIGATING
CIRCUMSTANCES, BUT THAT
SEEMS TO BE WHERE YOU'RE
GOING WHEN YOU TALK ABOUT
ONE YOU HAVE GOT ONE
AGGRAVATOR WITH GREAT WEIGHT
AND YOU HAVE GOT THIS
MITIGATOR THAT THAT'S
WEIGHT, AND THAT KIND OF
THING.

SO AREN'T YOU REALLY ASKING
US TO NEGATE WHAT WE'VE SAID
IN THE PAST ABOUT COUNTING
THESE, THESE AGGRAVATORS AND
MITIGATORS?

>> YEAH, I MEAN, CERTAINLY

-- WHAT I'M NOT TRYING --

I'M NOT TRYING TO DO THAT I
UNDERSTAND THAT THE ANALYSIS
OF MITIGATION AGGRAVATION IS

NOT A COUNTING PROCESS.
I UNDERSTAND THAT.
WHAT I AM TALKING ABOUT IS
THE FACT THAT THIS TRIAL
JUDGE IN ANALYZING THE
MITIGATION IN THE CASE
ASSIGNED THE SAME WEIGHT
THAT HE GAVE PROBATION, SOME
WEIGHT, TO FOUR MITIGATING
FACTORS HE GAVE THE SAME
WEIGHT.

SOME WEIGHT.

I'M TALKING ABOUT THE
WEIGHT, THE RELATIVE WEIGHT
THAT HE GAVE THESE
MITIGATORS, AND THEN --

>> BUT IT STILL, ENDS UP
WITH, IF YOU'VE GOT FOUR
MODERATE WEIGHTS ON THIS
SIDE AND ONE MODERATE ON
THAT SIDE, THAT'S WHAT IT
STILL, IS, IS BOILING DOWN
TO IS WHAT YOU'RE SAYING.

YOU KNOW?

BECAUSE WE HAVE FOUR
MODERATE WEIGHTS ON THE
MITIGATING SIDE VERSUS ONE
ON THE AGGRAVATING SIDE,
THEN THIS CAN'T BE
PROPORTIONAL.

>> WELL, I THINK ONE OF THE
PROBLEMS THAT YOU KNOW,
WE'RE DEALING WITH HERE IS
THAT CERTAINLY UNDER
CAMPBELL, JUDGES ARE
EXPECTED TO GIVE WEIGHT TO
NONSTATUTORY MITIGATING
FACTORS SO THAT NOW ALL THE
CATCH-ALL MITIGATING FACTORS
AND SO WE'VE DEVELOPED THIS
PROCESS WHERE THROUGH THEIR
ORDERS, JUDGES, YOU KNOW,
USE A LOT OF ADJECTIVES.

LITTLE WEIGHT --

>> LET ME ASK YOU THE
QUESTION THIS WAY.

IF WE HAD A PRIOR VIOLENT
FELONY THAT WAS ONE MURDER
AND THE JUDGE SAYS I GIVE
THAT GREAT WEIGHT, IS THAT
EQUAL TO ANOTHER DEFENDANT
WHO HAS A PRIOR VIOLENT
FELONY OF FOUR PRIOR MURDERS,
AND THE JUDGE SAID, I GIVE

THAT GREAT WEIGHT?
YOU'RE SAYING THAT JUST
BECAUSE HE SAYS GREAT WEIGHT,
IT'S, IT'S EQUAL IN, IN ALL
ASPECTS NO MATTER WHAT THE
CIRCUMSTANCES, AND THEN YOU
HAVE TO SAY, YOU HAVE TO ADD
UP GREAT WEIGHT, SOME WEIGHT,
MODERATE WEIGHT VERSUS
MITIGATORS, GREAT WEIGHT,
MODERATE WEIGHT, SOME
WEIGHT.

I DON'T THINK THAT'S WHAT
THE CASES SAY.

>> TO SOME EXTENT, WE HAVE
TO TRY TO BE OBJECTIVE WHEN
IT COMES TO WEIGHING THESE
THINGS AND MAKING DECISIONS
AS TO HOW MUCH WEIGHT DO YOU
GIVE A PARTICULAR MITIGATING
FACTOR, HOW MUCH WEIGHT DO
YOU GIVE A PARTICULAR
AGGRAVATING FACTOR AND ONE
OF THE POINTS I WAS ABOUT TO
MAKE IS CERTAINLY JUDGES
HAVE BEEN VERY CREATIVE WHEN
IT COMES TO ATTRIBUTE AING
WEIGHTS MODERATE AND WHEN
LOW.

YOU GET SOME, SLIGHT, VERY
LITTLE BUT WHEN THEY WANT TO
EMPHASIZE TO THIS COURT THAT
SOMETHING IS A VERY WEIGHTY
AGGRAVATOR, THE ONLY PHRASE
YOU EVER SEE IS GREAT
WEIGHT.

>> WOULD YOU GO BACK TO
ANSWERING JUSTICE PARIENTE'S
CASE LAW.

>> I'M TRYING TO SAY, WHEN
WE SEE PROPORTIONALITY, YOU
DON'T SEE THIS, MAYBE WE
HAVE BEEN CRITICIZED FOR NOT
DOING ENOUGH OF IT, WE TRY
TO LOOK AT THE CIRCUMSTANCES
OF WHAT THE CRIME IS, WHAT'S
THE AGGRAVATOR AND WHAT'S
THE MITIGATOR.

WHEN I LOOK AT WHAT THE
JUDGE DID, HE ESSENTIALLY
GAVE SOME WEIGHT TO THE FACT
THAT THE DEFENDANT EXHIBITED
APPROPRIATE COURTROOM
BEHAVIOR ABOUT 95% OF THE

DEFENDANTS DO.

AND THAT HE DIDN'T DISPLAY
VIOLENCE, MODERATE WEIGHT,
AND THEN THE OTHER WAS
SUPPOSEDLY HE WAS REMORSEFUL
AND COOPERATED.

SOME WEIGHT WHICH IS
ARGUABLY HE REALLY, YOU KNOW,
THAT HE DID.

THERE'S NOTHING HERE, I MEAN,
YOU, BECAUSE I HAVEN'T HEARD
YOU SAY AND THERE'S
SUBSTANTIAL MITIGATION,
FRANKLY, AND MAYBE THAT
WE'RE GOING TO SEE THIS IN
POST-CONVICTION, THIS IS ONE
OF THE LEAST MITIGATED CASES
THAT I'VE SEEN.

SO WHAT, I GO BACK TO ASK
YOU WITH THESE WEIGHTY
AGGRAVATORS, AND I AM VERY,
YOU KNOW, THE PRIOR VIOLENT
FELONY OF MURDER IS A
SIGNIFICANT AND AGGRAVATOR.

IT'S NOT JUST THAT HE, 10,
15 YEARS AGO COMMITTED A
BURGLARY OR SOMETHING.
SO TELL US, AS YOU LOOK AT
OUR CASES, WHAT CASES ARE,
THAT YOU WOULD ARGUE BECAUSE
WE HAVE TO LOOK AT ALL OF
OUR CASES, IS THIS MOST LIKE
WHERE WE SAID IT WAS NOT
PROPORTIONATE AND THEY
SHOULD -- IT SHOULD'VE BEEN
GIVEN LIFE IN PRISEN?

>> RIGHT.

THAT, I MEAN, YOU KNOW,
ESSENTIALLY WHAT I WAS FIRST
TRYING TO DO, SINCE I'M NOT
TRYING TO AVOID YOUR
QUESTION.

>> WELL, IT FEELS THAT WAY
BECAUSE WE ARE NOW DOWN TO
YOUR TIME AND I STILL
USUALLY SAY IT'S MOST LIKE
THIS CASE, THIS CASE, THIS
CASE.

YOU ARE VERY FAMILIAR WITH
THE CASES.

WHAWHAT -- YOU'D HAVE TO GO
TO THE ROBBERY-GONE-BAD.

WHAT CASE IN THE
ROBBERY-GONE-BAD IS THIS

MOST SIMILAR TO WHERE WE
REDUCED IT TO LIFE?
BOO WELL, AGAIN, THOSE CASES
ARE CITED IN MY BRIEF.
I MEAN I'M NOT -- I'M NOT
STANDING UP HERE.
>> BUT THEY'RE NOT SIMILAR
TO.
THAT'S PROBABLY WHY.
>> WELL, I THINK THE URBAN
CASE.
>> YOU DID SAY SOME -- CITE
SOME CASES IN YOUR BRIEF
THAT INVOLVED THE AGE
MITIGATOR.
AND WHERE THIS COURT SAID
THIS IS REALLY A, A LIFE
SENTENCE AND REVERSED THE
SENTENCE OF DEATH BUT IN
THOSE CASES, IN ALL THOSE
CASES, I BELIEVE THE
DEFENDANT WAS 17 YEARS OLD.
AND UNDER CURRENT PRECEDENT,
THEY COULDN'T EVEN BE
SENTENCED TO DEATH.
>> WELL, IN URBAN AND
LIVINGSTON THEY WERE, BUT IN
THE TERRY CASE, HE WAS
ACTUALLY THE SAME AGE AS
MR. BLAKE OR APPROXIMATELY
THE SAME AGE.
AND CERTAINLY, I THINK
ANALOGOUS IS OF THE TERRY --
ANALYSIS OF THE TERRY CASE,
WHICH WAS ALSO CITED IN MY
BRIEF SUPPORTS MY POSITION
RELATED TO THIS MATTER.
AND PART OF THE REASON I WAS,
YOU KNOW, VERY FRANKLY GOING
THROUGH THE JUDGE'S ANALYSIS
OF THE MITIGATION IS THE
SENSE I'M GETTING AT LEAST
FROM YOU JUSTICE PARIENTE IS
THAT YOU DISAGREE THAT YOU
THINK HE GAVE IT MORE WEIGHT
THAN HE SHOULD AND I THINK
JUSTICE ANSTEAD'S QUESTION
SORT OF IMPLY THAT AS WELL.
BUT YOU KNOW I'M DEALING
WITH WHAT THE TRIAL JUDGE
FOUND THAT --
>> I'M ARGUING THE OTHER WAY
WITH YOU GUYS.
>> I UNDERSTAND BUT SEE THE

PROBLEM I HAVE OR WE HAVE
IT'S SORT OF LIKE WHAT WE DO
IN BAR CASES WHEN WE DO
PROPORTIONALITY IS THAT WE
WOULD HAVE A REAL PROBLEM IF
A JUDGE IN ONE PART OF THE
STATE GAVE GREAT WEIGHT TO
THE SAY IT WAS 30 YEARS OLD,
AND SOMEONE ELSE GAVE IT NO
WEIGHT.

SO WE HAVE TO LOOK AT AND
SAY, LISTEN, IT'S 223 AND HE
DIDN'T FIND ANYTHING THAT
SHOWED HE HAD A CHRONICLE,
YOU KNOW, THAT EVEN THOUGH
HIS CHRONOLOGICAL AGE WAS
OLDER HE WAS REALLY BARELY
FUNCTIONING AND, AND THAT
KIND OF THING.

SO AGE IS A NUMBER, AND I'VE
ALWAYS THOUGHT WE PROBABLY
IN LOOKING AT TYOU KNOW, YOU
TAKE -- WE LOOK AT NOW
PEOPLE THAT ARE 18 TO 19,
THOSE ARE THE YOUNGER PEOPLE
AND THEN REALLY EVEN THOUGH
WE KNOW THAT KIDS DON'T
MATURE UNTIL THEY'RE
PROBABLY 30 YEARS OLD, WE
HAVE A LOT OF DEFENDANTS
THAT UNFORTUNATELY ARE IN
THIS AGE, AND I, I, SO
THAT'S MY, THAT'S WHY I, I
DON'T SEE THAT OTHER THAN
HIM BEING 23 THERE WAS
ANYTHING FOUND THAT REALLY
SHOWS THAT THIS, YOU KNOW,
WHATEVER THE WEIGHT WAS
GIVEN, THAT, YOU KNOW, IT
WAS SORT OF A GIFT TO YOU.
BUT IT DOESN'T HELP IN THE
PROPORTIONALITY ANALYSIS, I
DON'T THINK.

>> RIGHT, AND I MEAN, I
UNDERSTAND THAT, YOU KNOW,
MURDER IS A SIGNIFICANT
AGGRAVATING FACTOR, AND I'M
NOT DISPUTING THAT FACT.
WHAT I AM TRYING TO DO IS
ARGUE THE FACTS OF THIS CASE
BASED ON MY ANALYSIS WITH
THE CASE LAW.

LET ME TALK ABOUT ISSUE
NUMBER TWO, AND I CAN DEAL

WITH THAT FAIRLY BRIEFLY.
IN THAT PARTICULAR SITUATION
AS YOUR AWARE, AND REFRESH
YOUR RECOLLECTION, THE JUDGE
WAS FACED WITH A SITUATION
WHERE MR. BLAKE AT ONE POINT
HAD ASKED TO HAVE HIS
ATTORNEY REMOVED FROM THE
CASE AND HAVE A NEW COURT
APPOINTED ATTORNEY AFTER
SOME CONVERSATIONS IN A
HOLDING CELL THAT AREN'T
PART OF THIS RECORD.
THAT MOTION WAS WITHDRAWN AT
A LATER POINT IN TIME THIS
JUDGE ACTUALLY CONDUCT
ADNELSON INQUIRY.
-- CONDUCTED A NELSON
INQUIRY.
HEARD WHAT THE DEFENSE
ATTORNEY HAD TO SAY, HEARD
WHAT BLAKE HAD TO SAY, AND
ULTIMATELY RULED THAT IT DID
NOT MEET CRITERIA OF NELSON
AND HE WASN'T GOING TO
APPOINT A SECOND ATTORNEY.
THE POINT THAT I WANT TO
MAKE WITH RESPECT TO THAT
PARTICULAR ISSUE IS THAT,
YOU KNOW, THE FACT THAT THE
TRIAL JUDGE BY TAKING IT
UNDER ADVISEMENT NEVER GOT
TO THE STEP OF THE PROCESS
OF SAYING TO MR. BLAKE AT
ANY POINT IN TIME THAT I'M
NOT APPOINTING ANOTHER
ATTORNEY BUT YOU DO HAVE THE
RIGHT TO REPRESENT YOURSELF.
>> IS THERE, IS THERE A
DECISION THAT REQUIRES THAT
AS PART OF THE NELSON
PROCESS AND INQUIRY THAT YOU
THEN PROCEEDING
AUTOMATICALLY INTO THE
BEGINNINGS OF A ANALYSIS?
DO WE HAVE CASES THAT TELL
US THAT UNDER THE FACTS
GIVEN HERE?
WHERE THE JUDGE WENT THROUGH
EVERYTHING, ALLOWED THE
STATEMENTS AS TO WHAT THE
COMPLAINTS WERE, AND THEN
MADE THE STATEMENT THAT
THERE'S NOT A BASIS?

IS THERE A CASE UNDER THAT CIRCUMSTANCE THAT REQUIRES THAT?

>> UM, THIS CASE, OTHER CIRCUMSTANCES WHICH HAVE NOT REQUIRED IT, THAT TYPICALLY REQUIRE AN AFFIRMATIVE REQUEST ON THE PART OF THE DEFENDANT.

BUT WHAT I WAS TO EMPHASIZE TO THIS COURT IS THAT CERTAINLY A LOT OF TIMES WHEN YOU ARE DEALING WITH THESE ISSUES YOU ARE DEALING WITH CLIENTS WHO ARE SIMPLY TRYING TO MANIPULATE THE SYSTEM.

I KNOW THAT'S FRUSTRATE FOR THE COURT.

I'M A TRIAL ATTORNEY PRIMARILY.

DO APPELLATE WORK, BUT I MEAN, IT'S FRUSTRATING FOR TRIAL ATTORNEYS.

AND I DON'T SEE MR. BLAKE AS BEING SOMEBODY IN THAT CATEGORY.

>> DON'T ALL CASES REQUIRE UNEQUIVOCAL REQUEST FOR SELF-REPRESENTATION BEFORE THIS KIND OF COLLOQUY IS REQUIRED?

>> IN CERTAIN SITUATIONS THE COURT HAS SAID THAT'S WHAT'S REQUIRED TO TRIGGER THAT COLLOQUY BUT WHAT I WANT TO PUT IN PERSPECTIVE IN THIS CASE IS HERE'S A CLIENT WHO BRINGS IT TO THE COURT'S ATTENTION THAT HIS ATTORNEY'S NOT IN CONTACT WITH HIM.

IS THEN ASKED TO SAY IN THE ABSTRACT WHILE HE'S BEEN SITTING IN JAIL, WET WELL, WHATS TRR YOUR ATTORNEY NOT DOING WHEN HE'S NOT EVEN HAD CONTACT WITH HIS ATTORNEY, HE CERTAINLY KNEW HIS ATTORNEY HAD NOT FILE ADMOTION TO SUPPRESS. HE FILED ONE ON HIS OWN AND WAS TOLD HE COULDN'T DO THAT.

IT WAS A SITUATION WHERE IN HIS CASE, I MEAN, ALTHOUGH MR. BLAKE MAY NOT HAVE BEEN AWARE OF IT AS AN EXPERIENCED TRIAL ATTORNEY I AM THAT HIS ATTORNEYS DID NOT FILE THE DEATH PENALTY MOTIONS IN THE CASE.

THEY DID NOT OBJECT TO EVIDENCE THAT HE WAS THE SHOOTER COMING BEFORE THE JURY.

THEY DID NOT MAKE OTHER OBJECTIONS IN THE RECORD THAT I FEEL SHOULD'VE BEEN MADE.

AND CERTAINLY AN UNSOPHISTICATED DEFENDANT'S NOT NECESSARILY GOING TO KNOW THAT.

>> SO YOUR ARGUMENT REALLY IS THAT THE TRIAL JUDGE ERRED IN NOT REMOVING COUNSEL?

I MEAN, FROM WHAT YOU ARE SAYING, BUT THE TRIAL JUDGE DOESN'T, DIDN'T HAVE ALL THIS INFORMATION THAT YOU ARE GIVING US ABOUT WHAT THE ATTORNEY DIDN'T DO AND THAT KIND OF INFORMATION, SO.

>> RIGHT.

>> SO HOW CAN WE BASE A DETERMINATION OF WHAT WENT ON AT THAT POINT?

>> AND HOW --

>> ON WHAT YOU ARE NOW PRESENTING TO THE COURT.

>> AND THE PROBLEM IS HOW CAN A DEFENDANT BE EXPECTED TO TELL A JUDGE WHAT HIS ATTORNEY'S NOT DOING WHEN HIS ATTORNEY'S NOT COMMUNICATING WITH HIM AND HE'S UNAWARE OF WHAT HIS ATTORNEY'S DOING OR NOT DOING I MEAN, HE MADE SOME VERY SPECIFIC THINGS THAT HE FELT HIS ATTORNEY WASN'T DOING.

THERE WERE SOME FEELINGS ON HIS PART THAT HIS ATTORNEY DIDN'T CARE ABOUT HIS CASE AND WASN'T WORKING HARD ON

IT.

>> BUT MY POINT IS THAT YOU HAVE TO DEMONSTRATE TO US THAT THE TRIAL JUDGE ERRED IN SOME WAY WHEN HE SAID THAT THIS ATTORNEY, HE WAS NOT GOING TO TAKE THIS ATTORNEY OFF OF, OF THIS CASE, THAT THERE WAS INFORMATION BEFORE THE TRIAL JUDGE THAT WOULD REQUIRE HIM TO HAVE REMOVED THAT ATTORNEY.

>> WELL, I'M NOT SAYING THAT, BASED ON THE EVIDENCE BEFORE THE JUDGE, AND BASED ON THE CURRENT CASE LAW, IS NOT A BASIS TO REMOVE THE ATTORNEY BECAUSE SIMPLY MR. BLAKE WAS IN THE DARK AS TO WHAT HIS ATTORNEY WAS DOING OR NOT DOING, AND WAS SOMEWHAT SHOOTING IN THE DARK IN TRYING TO GUESS ADD WHAT THE ATTORNEY WASN'T DOING BUT WHEN YOU HAVE A CLIENT THAT'S PUT IN THAT POSITION, WE HAVE NO WAY OF KNOWING IF HE'S AWARE OF THE RIGHT TO REPRESENT HIMSELF, AND IF HE'S THAT DISSATISFIED WITH HIS ATTORNEY, CERTAINLY HE DOES HAVE THE RIGHT TO DO THAT EVEN IF THE COURT DOES CHOOSE NOT TO REMOVE THAT ATTORNEY AND APPOINT OTHER COUNSEL AND YOU KNOW WE ADVISE THE CLIENTS OF ALL KINDS OF THINGS THAT THEY DON'T NECESSARILY ALWAYS TAKE THE GOOD ADVICE YOU HAVE THE RIGHT TO AN ATTORNEY, YOU HAVE THE RIGHT TO REMAIN SILENT -- WE HAVE ATTORNEYS --

>> WELL THE FLIPSIDE OF THAT IS THAT OUR SYSTEM IS DESIGNED TO PROTECT AGAINST THAT IN A COLLATERAL REVIEW IF YOU TAKE THAT APPROACH THEN WHAT WE ARE DOING IS ENCOURAGING FOLKS WHO ARE RECEIVING INADEQUATE REPRESENTATION TO DISCHARGE

THEM AND THEN ELIMINATE THAT
AND THEN WE HAVE A BUNCH OF
PEOPLE RUNNING AROUND
REPRESENTING THEMSELVES
INADEQUATELY.

SO IT SEEMS LIKE THERE'S A
DANGER AREAL DANGER IN
TRYING TO EMPHASIZE THAT
KIND OF APPROACH IT, DON'T
YOU THINK?

AS YOU LOOK AT IT FROM A
POLICY?

>> FROM A POLICY STANDPOINT,
I UNDERSTAND WHAT THE
COURT'S SAYING BUT ON THE
OTHER SIDE, IT'S A
FUNDAMENTAL CONSTITUTIONAL
RIGHT, THE RIGHT TO
REPRESENT THEMSELVES.

>> YEAH, BUT IF THE SYSTEM
CRUMBLES, THEN THE WHOLE
SYSTEM CRUMBLES.

>> WELL, I MEAN DO WE CREATE
A SYSTEM WHERE WE KEEP
DEFENDANTS IN THE DARK ABOUT
VERY FUNDAMENTLING L RIGHT.

>> YOU MAY RAISE POINTS
ABOUT THE COMMUNICATION AND
THINGS THAT OUGHT TO BE
STANDARD.

>> AND I THINK IT WAS
CERTAINLY.

>> BUT TO GIVE YOURSELF
REPRESENTATION, I'M NOT SURE
THAT'S WHERE IT GOS.

>> I CERTAINLY TINK IT WOULD
GET THE JUDGE'S ATTENTION
THAT EVEN AFTER BEING TOLD
THAT I AM NOT GOING TO GIVE
YOU ANOTHER LAWYER THEN I AM
GOING TO DO IT MYSELF
BECAUSE I AM SO HAPPY WITH
WHAT THIGUY IS DOING AND
THEN TRIES TO MAKE AN EFFORT
TO REPRESENT HILLSELF THEN
MAYBE THE JUDGE -- HE MAY
NOT ALSO LET THE PERSON JUST
BUMBLE THROUGH THIS PROCESS
THAT'S JUST TREMENDOUSLY
COMPLEX.

>> I UNDERSTAND, BUT WHEN
THE ATTORNEY'S BUM LLG
THROUGH IT WITH THE
DEFENDANT WITH THE

COURT-APPOINTED ATTORNEY.
THANK YOU, SIR.

>> THE STATE.

>> MAY IT PLEASE THIS
HONORABLE COURT.

YOUR HONORS, MY NAME IS
KATHERINE BLANCO WITH THE
ATTORNEY GENERAL'S OFFICE
REPRESENTING THE STATE OF
FLORIDA.

I WOULD LIKE TO ADDRESS THE
TWO ISSUES THAT MY OPPOSING
COUNSEL HAS ARGUED THIS
MORNING.

BEGINNING LIKEWISE, EXCUSE
ME, YOUR HONORS, WITH THIS
CLAIM OF PROPORTIONALITY,
THAT'S HIS ISSUE 3 ON
APPEAL.

THIS DEFENDANT DEMONSTRATED
A READY WILLINGINIZE TO
KILL.

LESS THAN TWO WEEKS BEFORE
MR. PATEL WAS SHOT AND
KILLED AT HIS CONVENIENCE
STORE THIS DEFENDANT WAS
INVOLVED IN INMURDER OF
ANOTHER INDIVIDUAL BY THE
NAME OF KELVIN YOUNG.

>> IT IS DISTURBING THAT THE
JURY IN THIS CASE WAS TOLD
THAT HE WAS THE SHOOTER.
WHEN HE WAS NOT THE SHOOTER.

>> THE JURY WAS TOLD DURING
THE PENALTY PHASE BY
DETECTIVE THE DETECTIVE THAT
AN INDIVIDUAL BY THE NAME OF
PRESTON WAS THE INDIVIDUAL
TO WHOM MR. BLAKE CONFESSED.
HE SAID I SHOT SOMEONE.

HE, AND HE USED THE TERM
BUCK ADJACK, WHICH IS
APPARENTLY RESISTING A
ROBBERY, IN THAT SAME
DEPUTY'S TESTIMONY IN THE
PENALTY PHASE, AND OF COURSE
THIS WAS THE DEFENDANT'S
CONFESSION THEY INTRODUCED
IT, AND IN THE SAME PENALTY
PHASE, THEY, THROUGH THE
SAME WINS, THEY ALSO
INTRODUCED TESTIMONY THAT
THERE WAS ANOTHER WITNESS AT
THE SCENE THAT HE THOUGHT

THE SHOOTER HAD DREADS.
MR. BLAKE HAS A CLEAN SHAVEN
HEAD.
THE CODEFENDANT, RICHARD
GREEN WORE DREADS.
NOW THE CIRCUMSTANCES OF THE
KELVIN YOUNG SHOOTING CAR
PULLS UP SHORTLY AFTER
MIDNIGHT, A GROUP OF PEOPLE
STANDING -- AROUND.
>> ARE THEY REALLY TRYING TO
EXPLAIN AWAY LATER YOUR
COUNSEL, YOUR OPPOSING
COUNSEL SAYS THAT THERE WAS
A SPECIFIC INTERROGGATORY
SPECIAL JURY VERDICT THAT
FOUND THAT HE WAS NOT THE
SHOOTER.
>> THE, THE, THE
INTERROGGATORY WAS
POSSESSION VERSUS USE.
SO IT WAS A FINDING OF
POSSESSION OF FIREARM RATHER
THAN A USE.
SO TO THAT EXTENT, YES.
YOU HAVE TWO INDIVIDUALS
THAT PULL UP IN A CAR IN THE
KELVIN YOUNG CASE, ONE OF
THEM THE DRIVER IS COVERED
FROM THE NOSE DOWN WITH SOME
TYPE OF A BANDANA.
GUN IS THROUGH THE WINDOW A
DEMAND FOR MONEY.
THERE ARE TWO PEOPLE IN THE
CAR.
MR. YOUNG WALKS TOWARDS THE
VEHICLE, TELLS OTHER PEOPLE
TO RUN, THEY DEMAND MONEY,
HE SAYS WE DON'T HAVE ANY.
THINK THEY'RE JOKING AS HE
WALKS TOWARDS THE CAR.
THEN HE TURNS AND A SHOT IS
FIRED AND HE IS HIT IN THE
LOWER BACK AND KILLED AT THE
SCENE.
SO THAT'S THE CIRCUMSTANCE
OF THAT CRIME, THE TWO
INDIVIDUALS WHO ARE PROVEN
TO BE RICHARD GREEN AND THE
DEFENDANT HAROLD BLAKE.
BUT THE JURY, THAT'S TRUE,
IN THE KELVIN YOUNG CASE,
MADE A FINDING OF POSSESSION
OF THE WEAPON, NOT USE OF

THE GUN.

>> OKAY.

WELL, BUT AGAIN, YOU AGREE THAT THAT, THAT JURY VERDICT, YOU CAN'T COME IN AND CHANGE WHAT THE JURY FOUND, AND IT IS INAPPROPRIATE IF YOU COME IN AND GO BEHIND IT TO TRY TO PROVE IN THIS PROCEEDING OR MAKE STATEMENTS IN THIS PROCEEDING CONTRARY TO A SPECIFIC JURY VERDICT.

YOU AGREE WITH THAT.

>> WELL, WHAT I AGREE WITH, YOUR HONOR S THAT, YES, WE ARE BOUND BY THE JURY'S VERDICT BUT I DO NOT BELIEVE THAT IT'S INAPPROPRIATE TO SHOW THE CHARACTER OF THAT OFFENSE.

THE CIRCUMSTANCES OF THAT OFFENSE.

WE UNDERSTAND THAT THAT --

>> HAVE YOU READ LeBRON, ONE OF THE LeBRON CASES SPECIFICALLY STATES, AND THAT'S THE REASON FOR THE REVERSAL, BECAUSE OF THE INCONSISTENCY IN TRYING TO PROVE THAT A SHOOTER WAS MR. LeBRON CONTRARY TO A SPECIFIC FINDING BY A JURY.

>> AND IN THIS PARTICULAR CASE, THE EVIDENCE, THE LIMITED EVIDENCE THAT WAS PRESENTED VIA THAT DETECTIVE SHOWED THE CHARACTER OF THE DEFENDANT'S CONFESSION AND THE JURY KNEW THAT HE WAS FOUND NOT TO BE THE SHOOTER. I MEAN, THAT WAS ARGUED AT LENGTH, SO I DO NOT THINK IN ANY WAY, SHAPE, OR FORM THAT THIS JURY WAS MISLEAD.

IF THERE IS A SUPPOSITION THAT THE JURY WAS MISLED, NO, IT WAS THE FACT THAT THEE CONFESSED TO IT, THEN HE DENIED IT, AND THEN WE HAVE TWO PEOPLE THAT ARE UNRECOGNIZABLE IN SOME STAGE AND OH, BY THE WAY, THERE'S SOMEBODY IDENTIFIED BY THE SHOOTER THAT MAY HAVE

DREADS.

>> I'M NOT SURE, JUST CLARIFY BECAUSE YOU HAVE THROWN OUT A LOT OF THINGS. WAS THIS JURY TOLD THAT IN THE PRIOR MURDER THAT HE WAS FOUND ONLY TO HAVE POSSESSED THE FIREARM, NOT USED IT? WAS THE JURY TOLD THAT BY THE STATE?

>> THE JURY KNEW. IT WAS EXTENSIVE ARGUMENT BY THE DEFENSE ACTUALLY THAT HE WAS NOT THE SHOOTER.

>> HOW DID THEY KNOW THAT? >> THE DEFENSE ARGUMENT AND THE CROSS EXAMINATION OF THE DETECTIVE.

>> DID THEY NOT UP FRONT SAY THE PRIOR VIOLENT FELONY IS ONE WHERE THE DEFENDANT WAS FOUND ONLY TO HAVE POSSESSED BUT WE ALSO WANT TO GIVE -- THE STATE MAKES SURE THAT THE JURY WAS NOT MISLEAD ON THAT?

>> WELL, IT DID COME OUT TRUE. THE TESTIMONY OF DETECTIVE GRISHAM WHEN HE SAYS WE HAVE A CONFESSION, WE ALSO HAVE A STATEMENT THAT THE SHOOTER WORE DREADS AND WE ALSO HAVE WHAT COMES IN AS THE WHEN, WITH REGARD TO THE JUDGMENT

--

>> YEAH, WE'RE GOING TO BE -- WE CAN GO BACK AND LOOK AT THIS.

THIS IS, THE CREDIBILITY OF THE STATE AS, AND AS OFFICERS OF THE COURT, I JUST NEED TO KNOW FROM YOU WITH -- WHICH SOUNDS TO ME LIKE NO, THEY DIDN'T DIRECTLY, THEY WERE NOT DIRECTLY TOLD BY THE PROSECUTOR THAT IN THE -- THERE WAS ALREADY CONVICTION AND IN THAT CONVICTION HE WAS FOUND ONLY TO HAVE POSSESSED THE FIREARM NOT USED IT. IS THAT CORRECT THAT THAT

WAS NOT TOLD FIRST AND THEN SAID BUT LISTEN, THERE ARE CIRCUMSTANCES THAT MAKE IT WORSE THAN THAT EVEN SOUNDS?

>> THE -- I'M SORRY, YOUR HONOR, ARE YOU ASKING ME IF THE JUDGMENT AND SENTENCE CAME IN BEFORE THE DETECTIVE?

>> WELL -- WAS IT OFFERED THROUGH, WHATEVER, DID IT COME SNIN.

>> THE SEQUENCE, AND I HAVE MY PENALTY PHASE WITNESSES, AND, SO I HAVE MY WITNESSES DOWN.

THE SEQUENCE OF THE JUDGMENT AND SENTENCE VERSEATHIZE WITNESSES FOR SOME REASON I RECALL THE JUDGMENT SENTENCE CAME IN FIRST BUT I COULD BE

--

>> STAND BY THE VERDICT FORM.

>> BUT WHEN YOU BRING IT IN, YOU HAVE, YOU HAVE THIS DEFENDANT HAS BEEN CONVICTED OF A PRIOR MURDER.

THE FIRST TIME THEY HEAR THIS, THIS JURY LEARNS ABOUT THAT IS WHEN THEY ARE TOLD ABOUT THE KELVIN YOUNG MURDER ON AUG--

>> THE VERY, VERY SIMPLE QUESTION THAT'S ON THE TABLE.

PLEASE ANSWER.

>> CERTAINLY, AND, AND --

>> QUESTION AS TO WHETHER THE JURY KNEW ABOUT THE SPECIAL INTERROGGATORY FORM DURING THIS JURY TRIAL AND IF SO, WHEN.

IT'S A VERY SIMPLE QUESTION.

>> I DON'T KNOW THAT THE JURY KNEW ABOUT THE SPECIAL INTERROGGATORY JURY VERDICT FORM.

I KNOW THAT THE JURY WAS CLEARLY INFORMED THAT THE DEFENDANT WAS NOT CONVICTED AS BEING THE SHOOTER.

>> OKAY.

>> DID THE STATE CONCEDE

THAT POSITION?

IN OTHER WORDS, I'M A LITTLE
CONFUSED BECAUSE I FIND HERE
IN THIS JUDGE'S SENTENCING
ORDER THAT IN ESSENCE HE
FINES THAT THE DEFENDANT WAS
NOT THE SHOOTER IN THE PRIOR
VIOLENT FELONY.

NOW, HE DOES FIND THAT AT
THE SAME TIME, THE DEFENDANT
WAS NOT THE SHOOTER, THAT HE
WAS POSSESSION OF A WEAPON
POINTING, YOU KNOW, AT, YOU
KNOW, APPARENTLY, BUT THAT,
I WANT TO COME BACK THOUGH
BECAUSE --

>> TLUR WERE TWO GUNS.

>> WHAT WE'RE CONCERNED
ABOUT THOUGH IS WHETHER OR
NOT THE STATE, OKAY, DURING
THE SENTENCING PHASE BEFORE
THE JURY, TOOK THE POSITION
BEFORE THE JURY THAT HE WAS
THE SHOOTER IN THE PREVIOUS
VIOLENT FELONY CONTRARY TO
WHAT APARENTLY A JURY FOUND
AND, AND CONTRARY TO WHAT
THE JUDGE IN THIS CASE
FOUND.

SO MY QUESTION IS, DID THE
STATE TAKE THE POSITION AT
SENTENCING THAT THIS
DEFENDANT WAS THE SHOOTER IN
THE PRIOR VIOLENT FELONY?

>> I THINK THE STATE TOOK
THE POSITION, YOUR HONOR,
THAT THIS DEFENDANT HAD
CONFESSED AT ONE POINT TO
BEING THE SHOOTER.

BUT IN FACT, THE JURY DID
NOT FIND HIM TO BE THE
SHOOTER.

>> SO THE STATE -- THE STATE,
THE STATED --

>> THAT WE HAVE A CONFESSION
FROM THIS DEFENDANT.
THAT HE ADMITTED TO
MR. PRESTON THAT HE SHOT
SOMEONE WHO BUCKED THE JACK.
AND THEY ALSO HAVE --

>> ISN'T THE STATE THOUGH
BOUND BY, IN OTHER WORDS,
WHAT I'M CONCERNED ABOUT
THERE IS THAT JUST AS THESE

CASES GO THROUGH AND JURY FINDS WHATEVER AND THEY GET AFFIRMED AND, AND -- ISN'T THE STATE BOUND BY THAT FINDING BY THAT JURY, AND ISN'T THE STATE REALLY OUT OF LINE IF THEY ARE CONTINUED TO TRY TO ARGUE SORT OF LIKE ALTHOUGH THE JURY IN THE PREVIOUS CASE FOUND THAT HE WAS NOT THE SHOOTER, IT'S STILL OUR POSITION THAT HE WAS THE SHOOTER AND IN CONSIDERING THIS PRIOR VIOLENT FELONY, THAT, THAT'S WHAT WE WANT YOU TO CONSIDER.

THEREFORE, YOU SHOULD GIVE A GREAT DEAL OF WEIGHT TO THIS PRIOR VIOLENT FELLOPY, MORE WEIGHT THAN YOU WOULD GIVE IT IF HE WAS NOT THE SHOOTER.

AND ISN'T THAT REALLY IMPROPER FOR THE STATE TO MAKE THAT ASSERTION AFTER A JURY HAS LEGALLY CONCLUDED THAT HE WAS NOT THE SHOOTER AND THE TRIAL JUDGE IN THIS CASE HAS AFFIRMED THAT?

>> YOUR HONOR, I THINK WHAT THE STATE WAS ATTEMPTING TO DO WAS TO SHOW THE TRUE CHARACTER AND THE CIRCUMSTANCES OF THAT PRIOR VIOLENT FELONY OFFENSE.

IT IS TRUE, HE, THE DEFENDANT WAS FOUND NOT TO HAVE USED THAT WEAPON.

BUT IT CANNOT BE SO SANITIZED THE DEFENDANT'S OWN STATEMENTS, EVEN THOUGH THEY, ESSENTIALLY IT WAS THE JURY PARDON PERHAPS ON THE THE POSSESSION VERSUS USE OF THAT FIREARM.

>> CAN THE STATE ARGUE -- WAS IT A WRITTEN CONFESSION OR IS THIS JUST SOMEONE CAME IN A JAILHOUSE INFORMANT SAID HE ADMITTED TO ME?

>> IT WAS NOT A JAILHOUSE INFORMANT.

IT WAS A FRIEND OF THE

DEFENDANTS.

>> SO IT WAS THE TESTIMONY
OF THE WITNESS.

>> IT WAS --

>> IT WAS NOT A SIGNED
STATEMENT OR SWORN STATEMENT
OF THIS DEFENDANT?

>> WELL, HE TESTIFIED IN
COURT, SO TO THAT EXTENT HE
SWORE TO WHAT THE DEFENDANT
HAD TOLD HIM.

THE TRIAL COURT IN THIS CASE
JUSTIN ANSTEAD, WHICH YOU
REFERRED TO, MADE THE
SPECIFIC FINDING WITH REGARD
TO THE TESTIMONY IN THE
KELVIN YOUNG CASE, PAGE 401
OF VOLUME 2.

THEY DID FIND BY THEIR
VERDICT THAT THE DEFENDANT
DID NOT PERSONALLY DISCHARGE
THE FIREARM TO CAUSE DEATH
THAT DUDS NOT NEGATE THE
FACT REQUIRING TO THE PRIOR
VIOLENT FELONY AGGRAVATOR.

IT IS CONSISTENT WITH THE
FINDING THAT THE THE
DEFENDANT WAS DRIVING THE
VEHICLE AND DEMANDING MONEY
AS HE POINTED A GUN AT THE
VICTIM.

THERE WAS TESTIMONY IN THE
RECORD THAT A SECOND PERSON
IN THE VEHICLE ALSO POSSESS
ADFIREARM.

THE RECORD EFT EVIDENCE
SUPPORTS THE FIND THAT THE
DEFENDANT WAS AN ACTIVE
PARTICIPATE IN THE
ATTEMPTING ROBBERY AND HAD
PERSONAL CONTACT WITH THE
PERSON --

>> I AM NOT IMPRESSED WITH
THE JUDGE'S ANALYSIS IN THAT
RESPECT BUT IT DOESN'T
RESOLVE THE ISSUE OF WHETHER
IT'S APPROPRIATE, OBVIOUSLY
THE JURY RECOMMENDATION
PLAYS A, AN IMPORTANT ROLE.

>> CERTAINLY.

>> IN ANALOGOUS IS OF THE
CASE SO I'M JUST, I REMAIN
CONCERNED ABOUT WHETHER IT'S
APPROPRIATE FOR THE STATE

AFTER THIS HAS HAPPENED AND,
AND THE TRIAL JUDGE HAS
OUTLINED IT IN WHAT YOU JUST
READ, APPROPRIATE FOR THE
STATE NOW TO ARGUE TO A JURY
AFTER A PREVIOUS JURY HAS
NOT, HAS NOT BEEN FOUND THAT
HE'S NOT THE SHOOTER THAT HE
IS THE SHOOTER AND THAT
THEREFORE YOU SHOULD GIVE
MUCH MORE WEIGHT, AND THAT'S
REALLY WHAT, I THINK YOU
WOULD AGREE THAT ORDINARILY,
YOU WOULD GIVE MORE WEIGHT
TO A PRIOR VIOLENT FELONY
WHERE THE DEFENDANT WAS THE
SHOOTER, WAS THE KILLER AS
OPPOSED TO WHETHER HE WAS
THE, THE DRIVER OF THE CAR
OR WHATEVER.

HERE WE'VE GOT SOME MORE
CIRCUMSTANCES AS THE TRIAL
JUDGE HAS POINTED OUT, BUT
DO YOU THINK IT'S
APPROPRIATE FOR THE STATE IN
THE FACE OF THAT TO ARGUE TO
THE JURY THAT HE STILL WAS
THE SHOOTER?

>> I THINK WHAT THE STATE'S
ARGUMENT WAS, AND AGAIN I
RETURN TO DEFENDANT'S OWN
STATEMENT, THERE WAS A,
TESTIMONY IN THE RECORD
WHICH SOUGHT TO CLARIFY THE
PRONOUN USE, WHETHER WE SHOT
SOMEONE OR HE SHOT SOMEONE
OR I SHOT SOMEONE.

>> WASN'T THAT ALL --

>> AND THAT ALSO --.

>> WASN'T THAT ALL RESOLVED
IN THE PREVIOUS CASE.

>> WELL, WITH RESPECT TO THE
FINDING OF POSSESSION, RIGHT,
THERE -- THEY CERTAINLY
CANNOT GET AROUND THE
FINDING THAT HE POSSESSED
AND WAS AN ACTIVE
PARTICIPANT CERTAINLY UNDER
TYSON v. ARIZONA IF THIS
WERE THE --

>> CAN THE STATE GET AROUND
THE FACT THAT --

>> NO.

>> THAT HE WAS FOUND NOT TO

BE THE SHOOTER.

>> NO.

BUT I THINK IN, IN FAIRNESS
TO THE PROSECUTOR'S ARGUMENT,
TO FAIRLY DEPICT THE
CIRCUMSTANCES OF THAT CASE,
BECAUSE YOU MAY INDEED, WE
UNDERSTAND THAT HE WAS FOUND
NOT TO HAVE USED THE GUN.
THAT THAT WAS A JURY FINDING
OF THAT.

BUT I DO NOT BELIEVE THAT IT
WOULD BE NECESSARY TO
SANITIZE THE DEFENDANT'S OWN
STATEMENTS, ESPECIALLY WHEN
THEY COME IN WITH IN
CONJUNCTION WITH, LOOK, THE
JURY KNOWS THAT HE WAS FOUND
NOT TO BE THE SHOOTER.

BUT THE JURY THEN IS
PROHIBITED FROM LEARNING
THAT HE CONFESSED TO HIS
PARTICIPATION IN THIS CRIME.

>> LET ME ASK YOU A
QUESTION.

WHAT WAS GREEN?

WAS GREEN FOUND GUILTY OF --

>> GREEN WAS THE
CODEFENDANT, AND SO BOTH OF
THEM ARE HAVE BEEN FOUND
GUILTY AND GREEN IN THIS
CASE AS WELL HAS BEEN FOUND
GUILTY.

YOU HAVE, THESE ARE TWO
COHORTS WHO WERE GOING OUT
ON A --

>> MY QUESTION WAS DID GREEN
GO TO JURY TRIAL AND WAS HE
FOUND GUILTY OF BEING THE
SHOOTER OR IS THIS THE CAY
CASE WHERE THEY COULDN'T --
THE STATE COULDN'T PROVE
WHICH ONE WAS THE SHOOTER?

72 IT MAY HAVE BEEN ONE
WHERE THEY ARE POINTING THE
FINGER AT EACH OTHER.

IT'S NOT IN THE RECORD.

GREEN IS IDENTIFIED AS THE
SHOOTER.

WE HAVE TESTIMONY THAT THE
MAN WITH DREADS WAS THE
SHOOT IN THIS RECORD AND
THAT COMES IN THROUGH THE
DETECTIVE.

>> BUT IN THIS RECORD THIS JURY WOULD NOT HAVE KNOWN THAT CIRCUMSTANCE.

>> THAT'S MY RECOLLECTION FROM THE PENALTY PHASE, YOUR HONOR.

>> MY CONCERN GOING BACK TO YOUR PREVIOUS STATEMENT IS THAT I SEE A DIFFERENCE BETWEEN THE STATE ARGUING THE JURY FOUND THAT HE POSSESSED THE GUN, IT'S THE SAME GUN THAT WAS USED IN THIS CASE, AND ARGUING THAT THE DEFENDANT CONFESSED TO BEING SH THATTER -- THE SHOOTER WITHOUT THEN ALSO PLAS IN EVIDENCE SOMEHOW THAT THE JURY FOUND THAT HE WAS NOT THE SHOOTER BECAUSE THAT MISLEADS THE JURY INTO BELIEVING THAT HE WAS THE SHOOTER.

WHEN YOU SAY WHY ARE YOU GOING TO PRESENT EVIDENCE THAT HE CONFESSED TO BEING THE SHOOTER, WHEN THE JURY CLEARLY SAID HE DID NOT SHOOT THE VICTIM WITHOUT PUTTING THAT IN EVIDENCE AS WELL.

>> WELL, YOUR HONOR, I THINK IT WAS IN EVIDENCE FOR THE JUDGMENTS IN SENTENCES IN THE ARGUMENTS PRESENTED TO THE JURY.

SO I THINK IT WAS PRESENTED TO THE JURY.

>> WHEN YOU SAY THE JUDGMENTS AND SENTENCES, WAS THE JURY VERDICT IN THE PRIOR CASE PUT IN EVIDENCE?

>> IT WAS ARGUED EXTENSIVELY SO I CANNOT MAKE A JUDGMENT WHETHER IT WAS -- EXTENSIVE ARGUMENT ON THAT.

>> DID COME COME UP TO THE JURY EITHER FROM THE DEFENSE SIDE OR THE PROSECUTOR'S SIDE IN CLOSING ARGUMENT OR THROUGH A WITNESS THAT THE JURY FOUND HE WAS NOT THE SHOOTER?

>> YES.

YES.

DURING ARGUMENT PRIMARILY.

>> YOU SEE, THERE'S --, YOU KNOW, THIS IS, THIS IS ONE OF THESE CASES, AND IF PEOPLE PROSECUTORS ARE WATCHING THIS, THAT'S FINE, BECAUSE I THINK WHAT YOUR SEEING IS THAT WHAT IS IN THE JUDGE'S ORDER IS CLEARLY A BALANCED VIEW OF THIS PRIOR CRIME.

WHAT MR. NORGARD HAS REPRESENTED TO US, AND WHAT WE HAVE CONCERNS BECAUSE WE HAVE GOT TO LOOK AT IS THIS BEING SET UP FOR

POST-CONVICTION IS THAT YOU SAY, WELL, IT WAS ARGUED.

BUT I'M LOOKING AT THE JUDGMENT THAT'S IN, IT DOESN'T SAY ANYTHING ABOUT THE FINDING, IF THE, WHERE, YOU SHOULD BE ABLE TO, SINCE THIS IS A CRITICAL THING, SAY IT'S ON PAGE 455 ON THE RECORD, THAT THE SPECIAL VERDICT FORM WAS PUT IN, AND THE JURY KNEW THAT HE WASN'T SH SHOOTER BECAUSE MR. NORGARD'S SAYING, YOU KNOW, THIS MIGHT BE FUNDAMENTAL ERROR BECAUSE THE DEFENSE LAWYER NEVER OBJECTED TO THEM THINKING HE WAS THE SHOOTER.

SO COULD -- IF YOU CAN, JUST, WHEN YOU SAY YEAH, IT WAS IN ARGUMENT, THAT'S WHAT WAS -- HAS BEEN ASKED.

DID THE PROSECUTION EXPLAIN TO THE JURY WHAT JUSTICE CANTERO SAID, WHICH IS THAT HE WAS FOUND, HE WAS NOT FOUND TO BE USING THE GUN. HE WAS FOUND TO BE POSSESSING THE GUN.

DESPITE THAT, THE CHARACTER OF THIS CRIME IS SUCH THAT IT WASN'T THAT HE WAS JUST IN THE VEHICLE.

HE WAS AN ACTIVE PARTICIPANT.

THIS IS HOW WE KNOW THAT.

AND THAT WOULD BE A FAIR
THING FOR THE STATE TO BE
ABLE TO DO.

IS THAT HOW IT WAS DONE?
>> THAT IS MY ARGUMENT FROM
THE PROSECUTOR'S CLOSING,
YOUR HONOR.

AND SO I REGRET THAT I DO
NOT HAVE THE SPECIFIC PAGE
TO POINT TO YOU.

I'D ASK THIS COURT'S
INDULGENCE TO ALLOW ME TO
HIGHLIGHT THAT PAGE VIA
SUPPLEMENTAL FILING AND
CERTAINLY MR. NORGDARD CAN
MAKE THAT BECAUSE I VERY
MUCH WOULD LIKE TO HAVE THAT,
THAT SPECIFIC PAGE AND I
REGRET THAT I DON'T HAVE IT
FOR THE COURT TODAY WITH
RESPECT TO EXTRACTING THE
PROSECUTOR'S EXACT ARGUMENT
ON THAT.

CERTAINLY IT'S THE CLOSING
ARGUMENT IN THE PENALTY
PHASE.

WE HAVE THE VOLUME THERE BUT
TO NARROW IT DOWN FOR THE
COURT TO A, ADDRESS THIS
COURT'S CONCERN.

>> WELL, THE ARGUMENT WOULD
MEAN --

>> WITH RESPECT TO --

>> YOU SAID IT MIGHT BE IN
HIS ARGUMENT SO YOU'RE
AGREEING THAT IT'S NOT --
WAS NOT PUT IN THE RECORD
THAT THE JURY VERDICT WAS
THAT HE USED, DID NOT USE
THE GUN, THAT HE POSSESSED
THE GUN?

>> IT IS NOT MY RECOLLECTION
AT THIS MOMENT THAT THAT
VERDICT FROM THAT PRIOR
CASE, THE JUDGMENT SENTENCED
HIM THE SPECIFIC JURY
VERDICT.

I KNOW THAT THERE WAS
EXTENSIVE DISCUSSION ABOUT
IT.

BUT I WILL CERTAINLY MAKE
SURE THAT THIS COURT IS
NOTIFIED IN WRITING VIA
SUPPLEMENTAL RESPONSE AND OF

COURSE MR. NORGDARD WITH
RESPECT TO THE PAGE LINE AND
VERSE.

ON THAT.

>> IF WE HAVE THAT.

IF WE HAVE THAT JUDGMENT AND
SENTENCE IN THE RECORD, IS,
IS THAT AN INDICATION THAT
THE PROSECUTOR ACTUALLY
MOVED THAT INTO EVIDENCE OR

--

>> HE DID.

>> OR HE -- HOW DOES IT GET
INTO OUR RECORD?

THE JUDGMENT IS SENTENCED
FROM THE PRIOR MURDER?

>> THOSE WERE ADMIT DURING
THE PENALTY PHASE, YOUR
HONOR.

AND SO IT'S DURING THE
COURSE OF THE PENALTY PHASE,
QUITE FRANKLY.

JUSTICE PARIENTE HAS ASKED
OPPOSING COUNSEL, I GUESS
ESSENTIALLY WHAT'S YOUR BEST
CASE?

WHAT ARE YOUR BEST CASES
WITH RESPECT TO THE
PROPORTIONALITY CLAIM, AND
I'D LIKE TO DIRECT THIS
COURT'S ATTENTION TO THE
CASES BOTH ON THE NOTION OF
THE ROBBERY-GONE-BAD, AND
STATE WOULD VERY MUCH
DISPUTE A NOTION THAT THIS
WAS A ROBBERY GONE BAD.

ROBBERY-GONE-BAD -- THOSE
CASES THAT ARE SORT OF A
ROBBERY-GONE-BAD WHICH ARE
CHARACTERIZED AS THAT OFTEN
INVOLVE A SITUATIONS WHERE
THERE'S A RESISTANCE, HAND
TO HAND TYPE OF COMBAT
RESISTANCE.

IN THIS CIRCUMSTANCE, YOU
HAVE A DEFENDANT TESTIMONY
AS PRESENTED THAT HE
APPROACHES THE STORE, HE GOT
A .9 MILIMETER GUN IN ORDER
FOR THAT WEAPON TO DISCHARGE
YOU HAVE TO HAVE A CLIP LOAD
UNDER TO IT, YOU ALSO HAVE
TO HAVE THE SAFETY FEATURE
OFF AND YOU HAVE TO HAVE THE

SLIDE MECHANISM ENGAGED AND SO THAT THE SHOT IS FIRED FROM OUT, OUTSIDE THE STORE, DOUBLE DOORS, OUTSIDE THE GLASS DOORS.

THIS IS NOT A HAND TO HAND CONFRONTATION ROBBERY GONE BAD BUT EVEN IF IT WERE --

>> CAN I JUST ASK A QUESTION?

HOW MUCH MONEY.

THIS WAS A CONVENIENCE STORE ROBBERY.

>> HE DID NOT GO IN THE STORE.

IT WAS AN ATTEMPTED ROBBERY.

>> DOES THOUGHT TELL YOU SOMETHING, NOT AGAIN, I DON'T THINK IT'S LIKE THE CASE OF MR. NORGDARD BUT IT ALMOST MAKES IT EVEN SORT OF, WELL, WHAT WERE THEY DOING? WERE THEY JUST -- DID THEY HAVE A VENDETTA AGAINST THE OWNER?

I MEAN, WURNLT THEY -- YOU WOULD THINK THAT THEY WERE GOING -- WEREN'T THEY, YOU WOULD THINK THEY WOULD GO IN THERE TO COMMIT A ROBBERY IT SOUNDS WORSE THAN A ROBBERY GONE BAD.

ROBBERY, HE KILLED SOMEONE AND THEN HE DIDN'T EVEN TAKE MONEY.

>> AN ATTEMPTED ROBBERY GONE BAD SO IT SEEMS TO ME THAT THAT SHOWS SOMETHING WHERE THE INTENT WAS TO ROB.

SOMETHING SCREWED UP, EITHER THE OWNER, YOU KNOW, STARTED TO REACT OR WOULDN'T LET THEM IN AND A GUN GOES OFF.

>> WELL, IN THE SPAN OF 12 DAYS, YOU HAVE TWO ROBBERY GONE BAD IN THE SENT SENSE THAT BOTH VICTIMS DIED AND NO MONEY IS REQUIRED.

>> YOU HAVE AGAIN, I THINK THE PRIOR VIOLENT FELONY IN THIS CASE, IF YOU DIDN'T HAVE THAT, I THINK THIS WOULD BE A DIFFERENT CASE.

>> CERTAINLY.

CERTAINLY, CERTAINLY,.
>> BUT WHEN YOU TRY TO GET
THE CIRCUMSTANCES OF THIS
CAW YAO SORT OF THINKING
WHAT IS GOING ON, UNLESS
THERE WAS SOME TALK ABOUT
THEY WERE GOING TO TRY TO
TAKE MONEY FROM DRUG DEALERS,
WAS THERE ANYTHING THAT THE
OWNER OF THIS STORE WAS A,
WAS DEALING IN DRUGS?

>> OH, NO.

TO THE CONTRARY, A VERY
LAW-ABIDING MAN.
WIFE AND TWO CHILDREN, CAME
TO THIS COUNTRY.

MR. PATEL, NO.

THIS WAS NOT AT ALL A,.

>> AND THE JUDGE'S FINDING.

>> AN EASY TARGET IS WHAT IT
WAS.

IT WAS EARLY, I'M SORRY,
JUSTIN -- JUSTICE CANTERO.

>> THE JUDGE'S FINDINGS IF
NOT EXPLICITLY IMPLY THAT IT
WAS A ROBBERY GONE BAD
BECAUSE IT WAS COMMITTED FOR
A FINANCIAL GAIN.

>> WELL, YOU HAD A COMMITTED
FOR FINANCIAL GAIN CERTAINLY
AND, AND THE ATTEMPTED
ROBBERY.

THE CIRCUMSTANCES THAT WE
KNOW ABOUT THIS OFFENSE,
YOUR HONOR, THE DEFENDANTS
WENT TO THE BACK SIDE OF THE
STORE.

THEY WERE GOING TO JUMP A
FENCE AND, AND ONE OF THE
NEIGHBORS LET THE DOGS OUT
SO THEY WERE SPOOKED AND GOT
BACK IN THEIR CAR AND
DECIDED TO GO AROUND AND
PARK IN THE PARKING LOT.

ESSENTIALLY IT WAS AN EASY
TARGET.

YOU HAVE AN INDIVIDUAL WHO
OPENS THE STORE AT 6:00 IN
THE MORNING.

THEY WERE GOING TO CONFRONT
HIM FIRST THING WHEN HE WENT
INTO THE STORE.

IN ORDER TO TAKE ADVANTAGE
OF THE FACT THAT IT'S STILL

DARK OUTSIDE, THAT HE WOULD BE ALONE, AND THAT THEY WOULD BE ABLE TO ESSENTIALLY HAVE AN EASY MARK.

>> SO THEY WEREN'T PLANNING TO KILL HIM?

>> I MEAN THERE'S NO CCP FOUND HERE.

>> THERE'S NO CCP.

>> I GUESS ALL I'M SAYING ABOUT IT, IF YOU DIDN'T HAVE THE PRIOR VIOLENT FELONY, YOU ARE SAYING IT'S A DIFFERENCE THAT INSTEAD OF THEM GOING IN, HOLDING THE GUN, GOING IN, MAKING SURE HE GETS EVERYTHING OUT OF HIS CASH REGISTER, THEY TAKE THE MONEY AND THEN THERE'S A STRUGGLE, AND THEY KILL HIM, THAT THIS ONE IS WORSE BECAUSE THEY SHOOT BEFORE THEY ROB, AND ALL I'M SAYING IS SINCE THEY DIDN'T TAKE THE MONEY, THIS SOUNDS AS SCREWED UP AS A ROBBERY GONE BAD BECAUSE THE INTENT DOESN'T SEEM TO BE TO KILL HIM BECAUSE IT WASN'T, HE WASN'T, YOU KNOW, HOLDING DRUGS OR SOMETHING, BUT TO ROB HIM.

SO IF IT WEREN'T FOR -- DO YOU AGREE THAT IF IT WEREN'T FOR THE PRIOR VIOLENT FELONY, YOU'D HAVE SOME PROBLEMS IN THIS CASE ON WHETHER THE CRIME WAS PROPORTIONATE?

>> I THINK THE PROSECUTOR ADMITTED BELOW EVEN THAT IF IT WERE NOT FOR THE PRIOR VIOLENT FELONY, THIS WOULD NOT BE A DEATH PENALTY CASE.

>> SO WE ARE ON THE SAME PAGE.

>> CERTAINLY.

ABSOLUTELY, YOUR HONOR.

>> ABOUT THIS IT SEEMS TO ME, I MEAN, WHETHER YOU CALL IT A ROBBERY GONE BAD OR WHATEVER YOU CALL IT, BUT THE, THE PROPRIETOR OF THE STORE WAS STANDING IN THE STORE AND THEY COULD NOT GET

IN?
IS THAT THE SCENARIO?
AND SO THEY SHOOT HIM?
>> YOUR HONOR, WHAT HAPPENED,
IT'S DARK OUTSIDE, YOU HAVE
THREE OF THEM GO UP TOWARDS
THE FRONT DOOR OF THE STORE,
AND A PORTION OF THIS CRIME
WAS ACTUALLY CAPTURED ON
VIDEOTAPE.
YOU HAVE THE STORE
SURVEILLANCE TAPE WHICH RUNS
FROM THE BACK OF THE STORE
TOWARDS THE FRONT AND IN THE
VIDEOTAPE, WHICH THE COURT
HAS IN THE RECORD.
IT'S ONE MINUTE AND 38
SECONDS LONG, YOU HAVE --
YOU SEE THE PROPRIETOR,
MR. PATEL, HE IS CLEANING
COUNTERS, THE LEFT-HAND
SIDE, AND HE'S GOT A SPRAY
BOTTLE IN HIS HAND, IN ONE
HAND AND A TYPE OF A RAG IN
THE OTHER.
SO HE'S GOT THAT.
THEN YOU SEE HIM GO UP
TOWARDS THE FRONT OF THE
STORE, NOT A VERY BIG
EXPANSIVE SPACE AND THEN YOU
SEE HIM AT THE RIGHT-HAND
SIDE AND YOU SEE GLASS
SHATTER.
YOU SEE GLASS SHATTER AND HE
IS HIT ACTUALLY IN HIS LEFT
SIDE AND THE BULLET
PENETRATES THROUGH HIS ARMS,
LEFT SIDE, GO ATHROUGH THE
HEART AND ENDS UP BEING
LODGED.
>> YOU HAVE HE WOULDN'T LET
THEM IN OR HE SHOT THEM OR
THEY WERE SHOOTING TO TRY TO
GET IN AND SO IT SEEMS TO ME
IT'S EVEN WORSE THAN A
ROBBERY GONE BAD.
THEY'RE SHOOTING HIM AND
GETTING NOTHING OUT OF IT.
WHAT'S THE POINT OF SHOOTING
HIM?
>> THE, WELL, ANOTHER
SENSELESS MURDER.
I MEAN, THE SAME WAY THE
KELVIN YOUNG WAS.

THE, THE, DEFENDANT WAS
PREPARED TO SHOOT IS
UNDENIABLE.
THAT HE WAS PREPARED TO
SHOOT.
IF ANYTHING, CAME TOWARDS
HIM.
AND WHETHER IF PERHAPS IT
WAS A GESTURE OF GOING
TOWARDS THE DOOR BY THE
VICTIM TO LOCK THE DOOR OR
HAVE A SPRAY BOTTLE IN HIS
HAND HE SHOT RIGHT THROUGH
THAT GLASS AND KILLED
MR. PATEL, VERY SENSELESS
MURDER.
TERRIBLE SET OF
CIRCUMSTANCES, AND
ADMITTEDLY, IF WE DID NOT
HAVE, IF THE FACT WAS NOT
THAT THIS DEFENDANT IS AN
ACTIVE PARTICIPANT IN A
PRIOR VIOLENT FELONY WHERE
ANOTHER MAN IS LEFT DEAD
BEING SHOT ONE BULLET DOWNED
AND NO MONEY IS RECOVERED
FROM THAT, THIS WOULD NOT
HAVE BEEN PROSECUTED AS A
DEATH PENALTY CASE.
I DON'T THINK THAT ANYONE
HAD, HAD DISPUTED THAT.
CERTAINLY THAT'S, THAT'S
WHAT SET THIS, SETS THIS
CASE LIGHT YEARS APART WITH
RESPECT TO PROPORTIONALITY.
>> THEREFORE, THE PRIOR
VIOLENT FELONY AND THE
CIRCUMSTANCES SURROUNDING IT
BECOME CRUCIAL TO WHETHER
THIS IS A DEATH SENTENCE OR
NOT, AND IF THE JURY IS
MISINFORMED ABOUT THE
CIRCUMSTANCES OF THAT PRIOR
VIOLENT FELONY, AND THE JURY
IS TOLD HE IS THE SHOOTER
AND THEREFORE THIS IS
EXACTLY THE SAME THING THAT
HAPPENED BEFORE, HE KILLED
SOMEONE ELSE, NOW HE'S
KILLING THIS PERSON, TO ME,
THAT'S CRITICAL IN
DETERMINING WHETHER THIS
DEATH PENALTY SHOULD STAND.
>> AGAIN, YOUR HONOR, IN

RESPONSE TO MY COMMENTS TO JUSTICE PARIENTE, I WILL AGAIN, YOUR HONOR, I WILL BE SUBMITTING THE SUPPLEMENTAL LINE AND VERSE WITH RESPECT TO THE PROSECUTOR'S ACTUAL ARGUMENT BECAUSE I DO NOT BELIEVE THAT THE JURY WAS MISLED IN ANY WAY, SHAPE, OR FORM.

WITH RESPECT TO THE CASE --

>> WAS THERE OBJECTION BY THE DEFENSE?

>> TO THE TESTIMONY?

>> YES.

>> NO.

>> WAS THERE OBJECTION TO WHAT CAME IN CONCERNING THE PRIOR JUDGMENT?

>> NO, NOT IN MY RECOLLECTION THERE WAS NOT, YOUR HONOR. AND IT WAS VERY LIMITED, IT WAS VERY NARROW.

SOMETIMES PENALTY PHASES, THIS ONE WAS ABOUT A MONTH AFTER THE TRIAL, AND SO YOU HAVE THE TESTIMONY OF CALVIN YOUNG'S FIANCE WHO TESTIFIES AND THEN THE DETECTIVE WHO TESTIFIES, AND, EXCUSE ME, THE ADDITIONAL WITNESSES.

AND THE MULTIPLE DEFENSE WITNESSES WHO ARE PRESENTING THE FAMILY-TYPE MITIGATION.

BUT BEFORE I GET OFF, I WOULD LIKE TO POINT OUT THAT THE CASE THE STATE IS PRIMARILY RELYING ON WITH RESPECT TO A -- IN HERST THE DEFENDANT, THERE WAS A ROBBERY OF A FAST FOOD STORE. THIS IS NOT ACCOUNTING PROCESS AS I THINK THE COURT HAS EMPHASIZED.

BUT THEN HE COUNTS THOUGH. I'M NOT SURE THAT WE'RE AWAY FROM THAT STRAIGHT UP COUNTING. IN MENDOZA, DEATHS PENALTY WAS UPHELD DESPITE A CLAIM OF A SPUR OF THE MOMENT REFLEXIVE RESPONSE.

YOU HAVE THE AGO SAY TO HAVE AND OF COURSE DURING ROBBERY. THE MELTON CASE YOU HAVE THE TWO AGGRAVATING FACTORS. HERE YOU HAVE MINIMAL MITIGATION FROM THE STATE'S STAND POINT AND

NO COMPELLING MITIGATION.

>> AGAIN, ALL OF THOSE CASE,
ASSUMING THAT THE PRIOR VIOLENT
FELONY STANDS --

>> YES, YOUR HONOR.

>> THOSE CERTAINLY SUPPORT YOUR
POSITION.

IF YOU ONLY HAD THE FACT THAT HE
WAS ON PROBATION AND THE FACT
THAT IT WAS IN THE COURSE OF A
BURGLARY, YOU CONCEDE IT
WOULDN'T BE A DEATH PENALTY
CASE?

>> THE PROSECUTOR AGREED WITH
THAT BELOW, YOUR HONOR.

>> NO ONE DISPUTES HE HAS THAT
PRIOR VIOLENT FELONY CONVICTION,
THAT'S UN DISPUTED.

BUT YOU HAVE TWO OF THEM WITH
THE GUN.

>> IN ALL THE OTHER CASES THAT
I'VE SEEN WHERE WE HAVE UPHELD A
DEATH PENALTY BECAUSE THE PRIOR
VIOLENT FELONY INVOLVED A
MURDER, THE DEFENDANT ACTUALLY
COMMITTED THE MURDER IN THOSE
CASES.

EITHER THROUGH A STABBING OR
SOMETHING.

THE DEFENDANT WAS NOT ONLY
ACTIVELY INVOLVED IN SOMETHING
THAT RESULTED IN A DEATH BUT
COMMITTED THE MURDER.

IS THERE A CASE WHERE THE PRIOR
VIOLENT FELONY INVOLVED THE
DEFENDANT NOT BEING THE SHOOTER?

>> IN THOSE PRIOR VIOLENT FELONY
CASES WHERE YOU HAVE, WELL, YOU
KNOW, YOU CAN GET THE DEATH
PENALTY BY BEING, YOU KNOW, AN
ACCOMPLICE.

YOU DON'T HAVE TO BE THE
SHOOTER.

I THINK WE CITED STEPHENS.

BUT CASES WHERE THERE'S A PRIOR
VIOLENT FELONY OF A SERIOUS
FELONY, YOU HAVE DEREK TYRONE
SMITH.

THAT WAS AN ARMED ROBBERY, SO
YOU DON'T HAVE THAT SAME LEVEL
OF VIOLENCE, BUT YOU HAVE A ONE
GUNSHOT TO A FLEEING INDIVIDUAL
WHO'S TRYING TO THWART THE
OFFENSE.

YOU HAVE ALSO WITH RESPECT TO I BELIEVE IN MELTON, IN MELTON YOU MAY HAVE THAT SIMILAR CIRCUMSTANCE.

SO IT'S NOT MY -- I DO NOT BELIEVE THAT THE FACT THAT HE WAS NOT A SHOOTER RENDERS HIM INELIGIBLE ON THAT PRIOR VIOLENT FELONY BECAUSE HE COULD BE ELIGIBLE FOR THE DEATH PENALTY EVEN IF HE WERE NOT THE SHOOTER UNDER THE ARIZONA LINE OF CASES, YOUR HONOR.

>> AND WITH THAT, YOU'VE UTILIZED ALL YOUR TIME.

MR. NOR GUARD, WE USED UP ALL YOUR TIME.

I'LL GIVE YOU A MINUTE AND A HALF IF YOU NEED TO RESPOND.

>> MAY I ASK FOR CLARIFICATION? AM I PERMIT TODAY FILE RESPONSE OF SUPPLEMENT HEARING?

>> YES, AS LONG AS EVERYONE RECEIVES COPIES.

>> SO LET'S GET BACK, I THINK, TO WHAT APPEARS TO BE THE CRUX OF THE CASE WHICH IS WAS THE JURY INFORMED AT ANY POINT DURING THE PENALTY PHASE WHETHER BY THE STATE OR BY THE DEFENSE THAT THE JURY IN THE PRIOR CASE FOUND THAT THE DEFENDANT WAS NOT THE SHOOTER?

>> THAT WAS ONE OF THE POINTS I WAS GOING TO BRING UP.

I APPRECIATE YOU BRINGING THAT UP AND REMINDING ME.

THE DEFENSE ACTUALLY BROUGHT IT UP.

THE STATE DID NOT BRING IT UP.

IT WAS THE STATE THAT BROUGHT IT TO THE JURY'S ATTENTION THAT HE WAS FOUND NOT TO HAVE DISCHARGED THE FIREARM IN THAT PRIOR CRIME.

>> YOU JUST SAID IT WAS THE STATE THAT BROUGHT IT TO THE ATTENTION OF THE JURY THAT HE DIDN'T --

>> THE DEFENSE.

>> YOU SAID STATE.

>> I APOLOGIZE.

>> THAT'S WHAT EARLIER YOU HAD SAID THE DEFENSE LAWYER WAS NOT ACTING APPOINTMENTLY BECAUSE HE

LET THIS ALL IN.

>> WELL, UNDER HE BARON, IF HE'S OBJECTED TO IT, IT NEVER WOULD HAVE COME IN.

>> HE DIDN'T OBJECT, BUT DID HE PUT ON EVERY DAY OF THAT?

>> HE DID TRY TO BRING OUT EVIDENCE TO TRY TO REBUT IT, BUT --

>> I UNDERSTAND THAT.

HE DIDN'T MAKE THE OBJECTION, WE UNDERSTAND THAT.

AND THAT CREATES A PROBLEM ITSELF, BUT THEN THE QUESTION WAS HOW WAS IT PRESENTED TO THE JURY?

THROUGH WHAT MECHANISM?

>> I'M NOT SURE IF IT WAS BE A VERBAL PROPER OR WHETHER HE SUBMITTED THE ACTUAL JURY VERDICT, BECAUSE THE JUDGMENT AND SENTENCE WOULD NOT REFLECT THAT.

>> RIGHT.

>> I APPRECIATE LISTENING TO ME ON THE PROPORTIONALLY TOIPT. I UNDERSTAND YOUR FEELINGS ON THAT.

FROM A LAWYER STAND POINT WE LOOK AT BLUSH BLURBS AND CASES. VERY LITTLE COULD GO ON GIVING YOU INSIGHT IN THIS, BUT I THINK THE TERRY CASE IS SOMETHING YOU NEED TO TAKE AHEARTED LOOK AT THIS.

I AGREE WITH JUSTICE CANTERA'S POINT, BEING A NONSHOOTER, THE CASES THAT DEAL WITH DEATHS WHERE THERE'S A PRIOR MURDER, TO MY REX INVOLVE WHERE THE PERSON DID THE KILL, WAS CONVICTED, PUNISHED, COMMITTED ANOTHER MURDER.

WAS TYPICALLY THE TRIGGER MAN THE SECOND TIME AROUND OR THE ACTUAL KILLER, AND I THINK THE FACT THAT WE HAD THE DISCUSSION WE DID ABOUT THE DEFENSE LAWYERS NOT OBJECTING TO SOMETHING THAT IS, YOU KNOW, AT THIS POINT --

>> IS IT YOUR POSITION THAT THE STATE DURING THE PENALTY PHASE BEFORE THE JURY DID ASSERT TO THE JURY THAT THIS DEFENDANT WAS

THE SHOOTER IN THE PRIOR CASE?
>> THEY BROUGHT OUT EVIDENCE
THAT HE MADE A STATEMENT TO THAT
EFFECT.

YOU KNOW, I THINK THEY HAD TO
ACKNOWLEDGE AND AGREE THAT THE
PRIOR JURY HAD MADE THAT FINDING
(SO YOU'RE NOT MAKING THE CLAIM
THAT THE PROSECUTOR WAS ASKING
THE JURY TO FIND THAT HE WAS THE
SHOOTER?

>> RIGHT NOW I'M DRAWING A BLANK
ON THAT.

I KNOW THAT THEY DID PRESENT --
>> WELL, YOU HAVEN'T RAISED THAT
POINT ON APPEAL.

>> PARDON ME?

>> YOU HAVEN'T RAISED A POINT
LIKE THAT ON OI APPEAL.

>> THE REASON I BROUGHT THAT UP
WAS --

>> RIGHT, BUT YOU DID IT IN
TERMS OF THE FACT OF THE WEIGHT
OF THE JURY.

YOU HAVE NOT, AS I READ YOUR
PAPERS, YOU HAVE NOT RAISED A
POINT ON APPEAL THAT THERE WAS A
WITH WHAT THE STATE INTRODUCED
AS TO THIS PRIOR VIOLENT FELONY.

>> THAT'S CORRECT.

BECAUSE, IN MY OPINION, AND I
THINK THE COURT WILL AGREE WITH
ME, IT'S NOT FUNDAMENTAL ERROR,
IT'S SOMETHING THAT WOULD HAVE
TO BE PRESERVED BY OBJECTION.

>> SO MAYBE SOMETHING ON POST
CONVICTION.

>> SECONDLY, A CLIENT WHO'D
COMPLAINED ABOUT THE
PERFORMANCE --

>> ONE LAST QUESTION FROM
JUSTICE BELL.

>> JUDGE ALCOTT, THE JUDGE IN
THIS CASE, PRESIDED OVER THE
TRIAL OF THE CO-DEFENDANT GREEN
IN THE CASE HERE BEFORE US,
CORRECT?

DID HE ALSO PRESIDE IN THE OTHER
CASES?

THE OTHER MURDER?

>> I DON'T BELIEVE HE DID.

>> DIFFERENT JUDGE?

ON BOTH

GREEN --

>> PRIOR CONVICTION BY MR. BLAKE
AS TO THE PRIOR MURDER, I
BELIEVE THAT WAS JUDGE
McCARTHY.

>> AND WHAT ABOUT GREEN'S TRIAL
ON THAT OTHER CHARGE?

>> I DON'T RECALL.

>> AND WITH THAT, WE'VE USED
MORE THAN YOUR TIME.

THANK YOU VERY MUCH.

THANK YOU VERY MUCH --

>> ALWAYS A PLEASURE TO BE HERE.

[LAUGHTER]

>> WE APPRECIATE YOUR EFFORTS
HERE.

THANK YOU VERY MUCH.