Jeffrey Allen Muehleman v. State of Florida

SC05-353

>>PROCEED, MR. LYKES
>>MAY IT PLEASE THE COURT
AND MR. BROWNE. ITS MY PRIVILEGE
TO BE HERE BEFORE YOU THIS
MORNING AND TO ARGUE THE
CASE OF MR. MUEHLEMAN, I HOPE MY
REMARKS ARE PLEASING TO YOU.
THE MUEHLEMAN CASE BEGAN IN 1983.
>> I THINK WE ALL KNOW THE HISTORY
GIVE US YOUR BEST POINT WHY
THIS CASE SHOULD BE REVERSED?
>> I'LL BE GLAD TO DO THAT.
ONLY REASON I WANTED TO MENTION
THE 1983 WAS BECAUSE THE CASE
WAS PRESIDED OVER THEN BY JUDGE
CROCKETT FARNELL.
THAT IS THE MAIN POINT AS FAR
AS THE APPEAL GOES WITH RESPECT
TO MR. MUEHLEMAN.
MR. MUEHLEMAN'S CASE WAS
RETURNED TO PINELLAS COUNTY FOR
A NEW SENTENCING HEARING AND HE
ARRIVED IN PINELLAS COUNTY AND
APPEARED BEFORE HONORABLE
BRANDT DOWNEY ON SEPTEMBER
12th, 2002.
MR. MUEHLEMAN'S CASE ARRIVED
TO PINELLAS COUNTY WITH A VERY
EXPLICIT BRIEF BUT CLEAR ORDER
AND THAT CLEAR ORDER WAS TO
CONDUCT A NEW SENTENCING
HEARING AND THAT MR. MUEHLEMAN
SHOULD IMMEDIATELY BE ADVISED
HIS RIGHT TO COUNSEL.
>> BUT IT DIDN'T, THE ORDER
RETURNING IT TO, FOR PENALTY
PHASE DID NOT RETURN IT TO A
PARTICULAR JUDGE.
IN FACT, JUDGE FARNELL HAD BEEN
OUT OF THE CRIMINAL DIVISION
FOR SEVERAL YEARS.
IN FACT THIS CASE HAD
LANGUISHED ON POST-CONVICTION
FOR SEVERAL YEARS WHICH IS WHY
THIS COURT FELT IT JUST HAD TO
GO BACK FOR A NEW PENALTY

PHASE.
AND SO WHERE IN THE RULES OR, IN THE LAW WOULD MR. MUEHLEMAN HAVE A RIGHT FOR A CASE TO GO BACK TO A JUDGE WHO IS NO LONGER IN THE CIVIL DIVISION TO HAVE A SPECIFIC JUDGE HEAR HIS CASE?
WHAT ARE YOU RELY ON FOR THAT PRINCIPLE OF LAW?
>> YOUR HONOR, THE, FLORIDA RULES OF CRIMINAL PROCEDURE AT 3.770.C-1 AND C-2, GOVERN THE RESENTENCING.
C-1 DISCUSSES RESENTENCING IN STANDARD FELONIES.
AND C-2 DISCUSSES RESENTENCING WITH RESPECT TO CAPITAL CASES.
THEY ARE WORDED SLIGHTLY DIFFERENTLY BECAUSE THERE IS AN OBVIOUS DIFFERENCE IN THE PROCEEDINGS BUT THEY BOTH REQUIRE THAT THE CASE SHOULD BE RETURNED TO THE ORIGINAL SENTENCING JUDGE UNLESS THERE IS SOME NECESSITY.
THE CASE OF MADRIGAL WHICH IS CITED IN MY BRIEF AND THE CASE OF CORBETT DISCUSS WHEN IT IS NECESSARY TO USE A DIFFERENT JUDGE AND I BELIEVE IT IS THE MADIGRAL CASE WHICH SPECIFICALLY STATES THAT THE FACT THAT A JUDGE IS IN A DIFFERENT DIVISION BUT STILL AVAILABLE IN A GEOGRAPHICAL AREA DOES NOT CREATE A NECESSITY FOR A NEW JUDGE.
THIS IS A CASE WITH RESPECT --
>> THIS COURT HAS NEVER HELD THAT THERE, AT LEAST TO MY KNOWLEDGE SINCE I HAVE BEEN HERE, THAT THERE IS AN ENTITLEMENT ON A RESENTENCING OR A NEW TRIAL FOR THERE SO TO BE THE SAME JUDGE.
IN FACT WE HAVE SENT CASES BACK TO BE HEARD BY DIFFERENT JUDGES.
>> YOUR HONOR, I COMPLETELY AGREE WITH WHAT YOU JUST SAID.
>> RIGHT.
>> THAT IS WHY THIS IS AN IMPORTANT CASE BECAUSE IT IS A

CASE OF FIRST IMPRESSION.
NOT ONLY IS WHAT YOU JUST SAID TRUE, BUT WHAT IS ALSO TRUE I AM AWARE OF NO CASE THAT I COULD FIND THAT SAID IT'S OKAY TO DO IT THIS WAY.
SO ACCORDINGLY --
>> ISN'T A CRITICAL CIRCUMSTANCE HERE THERE WILL BE A NEW SENTENCING PROCEEDING BEFORE A JURY PRIOR TO SENTENCING?
THAT IS GOING TO HAPPEN, RIGHT?
>> THAT IS ABSOLUTELY CORRECT, YOUR HONOR.
AND THERE HAS TO BE A NEW JURY BECAUSE A DIFFERENT JUDGE WAS USED.
AND WHAT'S INTERESTING ABOUT THAT UP UNTIL MAY 23rd, WHICH IS ACTUALLY FOUR DAYS AFTER THE SENTENCING HEARING WAS ACTUALLY, FOUR DAYS AFTER THE RESENTENCING HEARING WAS ORIGINALLY SCHEDULED, JUDGE DOWNEY STILL LABORED UNDER THE IMPRESSION THAT IT WOULD BE POSSIBLE FOR MR. MUEHLEMAN TO WAIVE THE JURY.
I SAY THAT BECAUSE, IT SORT OF POINTS OUT THE LACK OF ATTENTION THAT WAS GIVEN TO THIS RULE WHEN THEY MADE THE DECISIONS THEY MADE AT THE TIME.
AS YOU POINTED OUT IF THERE IS NEW JUDGE USED, THERE MUST BE A NEW SENTENCING HEARING.
>> EVERY CASE WE HELD ABOUT A NEW PENALTY PHASE, THIS DIDN'T GO BACK TO BE NEW FINDINGS BEFORE A SAME JUDGE.
THIS WENT BACK FOR A NEW PENALTY PHASE.
SO UNDER THE CLEAN SLATE RULE THERE WAS NO ORIGINAL JURY AND THERE IS CERTAINLY NO ORIGINAL JUDGE.
AND I'M TRYING TO AGAIN, THAT'S WHY I'M, ARE YOU HANGING YOUR HAT ON THE RULE OF PROCEDURE 3.700-C-2?
THAT IS YOUR WHOLE CASE.

>> YES, MA'AM.
THAT'S NOT MY WHOLE CASE.
>> THAT IS YOUR WHOLE CASE ABOUT THE RIGHT TO HAVE JUDGE FARNELL, IS THAT CORRECT?
>> RIGHT.
I WOULD ASK YOUR HONOR TO EXAMINE THE CASES OF CORBETT AND CRAIG BECAUSE THEY DISCUSS THIS CLEAN SLATE DOCTRINE AND THEY ALSO TALK ABOUT, WHEN I READ THOSE CASES AND WHEN I READ THE LANGUAGE OF THOSE CASES THEY DISCUSS VERY CLEARLY THAT IT IS EVEN MORE IMPORTANT, AT LEAST THE WAY I READ THOSE CASES, THAT IT'S EVEN MORE IMPORTANT TO KEEP THE SAME SENTENCING JUDGE IN A CAPITAL CASE THAN IT WOULD BE IN C-1. WHICH IS A STANDARD FELONY CASE.
NOW, THE LANGUAGE IN C-1 FOR WHATEVER REASON IS MORE EXPANSIVE THAN THE LANGUAGE IN C-2.
IT TALKS ABOUT THE REQUIREMENT TO BE FAMILIAR WITH PLEA NEGOTIATIONS AND ALL KINDS OF THINGS LIKE THAT.
C-2 IS JUST RIGHT TO THE POINT AND IT SAYS, UNLESS THERE IS SOME NECESSITY, IT SHOULD GO BACK TO THE SAME COURT.
AND, --
>> BUT ISN'T THAT, YOU KNOW, AGAIN, I THINK, AND THERE IS A LITTLE BIT OF, YOU KNOW, IN TERMS OF THE HISTORY OF THE RULE BUT I WANT TO GO BACK TO, LET'S JUST SAY, LET ME GO TO THE NEXT STEP.
TELL ME HOW MUEHLEMAN WAS HARMED BY THIS CASE GOING BEFORE JUDGE DOWNEY RATHER THAN GOING BACK TO JUDGE FARNELL.
>> WELL, THE FIRST WAY I LIKE TO RESPOND TO THAT IS THAT I BELIEVE IT'S THE MADIGRAL CASE AND MAY ALSO BE THE CORBETT CASE THAT SAYS YOU DON'T HAVE TO SHOW HARM.
THAT IF THIS RULE IS VIOLATED AND THERE IS NOT NECESSITY THAT

IS PER SE REVERSIBLE ERROR.
THE SECOND THING I WOULD LIKE TO SAY AND IT'S --
>> WAS 3, WAS THAT RULE CITED BELOW TO ANYBODY?
>> 3.7001, I BELIEVE MOST MADIGRAL AND CORBETT WERE.
>> THEY WERE CITED TO THE JUDGE BELOW BY MR. MUEHLEMAN?
>> I BELIEVE THAT THEY WERE BUT, I DON'T WANT TO STAND HERE AND TELL YOU THAT BECAUSE I'M NOT, I'M NOT THAT FAMILIAR WITH THE MOTIONS THAT WERE FILED AT THAT TIME.
BUT I BELIEVE THAT AT LEAST, I'M PRETTY SURE CORBETT WAS.
AND I THINK THAT MADIGRAL ACTUALLY CAME BACK FROM THE COURT OR THE STATE BUT I DON'T WANT TO GUESS.
AND SO I WOULD RATHER NOT ANSWER THAT.
>> HOW DO WE DEFINE NECESSARY? IN ANY CAPITAL CASE IN WHICH IT'S NECESSARY THAT THE SENTENCE BE PRONOUNCED OTHER THAN THE JUDGE WHO PRESIDED.
IF JUDGE FARNELL HAD DIED, --
>> THAT WOULD OBVIOUSLY NOT BE NECESSARY.
>> IF HE RETIRED.
>> THAT WOULD BE NECESSARY.
>> IF AHEAD HE HAD NOW BEEN FOR 15 YEARS IN THE CIVIL DIVISION, NOT CURRENTLY QUALIFIED TO HEAR CAPITAL CASES?
ISN'T THAT, ISN'T THAT, I'M STILL TRYING TO GET TO WHETHER THE RIGHT IS ONE THAT ENDURES TO THE DEFENDANT OR ONE THAT IS READ IN CONJUNCTION WITH OTHER RULES GOVERNING THE ADMINISTRATION OF JUSTICE?
IN OTHER WORDS IF THIS COURT FELT IT WAS NECESSARY FOR THE, FOR THIS CASE TO GO BACK TO JUDGE OTHER THAN JUDGE FARNELL BECAUSE HE WAS NO LONGER IN THE CIVIL DIVISION AND HE HAD THIS, THESE PROCEEDINGS HAD DRAGGED ON FOR OVER A DECADE, WOULD THAT BE, WOULD THAT BE NECESSITY?

>> I THINK THE BEST WAY I'D LIKE TO START WITH ANSWERING THAT I THINK THE CASES SAY THAT THE SITUATION WE HAD WAS NOT NECESSITY.
NOW, DEATH OF A JUDGE, NECESSITY.
RETIREMENT OF THE JUDGE? NECESSITY.
SOME SORT OF DISABILITY OF THE JUDGE --
>> WHAT BOTHERS ME IS THAT IT SEEMS TO ME THAT THIS ARGUMENT GETS, GETS AWAY FROM THE PURPOSE OF THIS RULE.
THE PURPOSE BEHIND THIS RULE, AS I HAVE UNDERSTOOD IT, IS THAT UNDER OUR CAPITAL SENTENCING SCHEME, THE JURY IS MAKING A RECOMMENDATION TO THE JUDGE AND SO IT'S NECESSARY FOR THE JUDGE AND THE JURY TO HEAR THE SAME EVIDENCE.
AND, SO, IF THAT DOESN'T HAPPEN, OR CANNOT HAPPEN, AND IT'S NECESSARY TO HAVE A NEW JUDGE, THIS PROVIDES THAT THERE'S GOING TO BE A NEW JURY.
AND HERE, WHOLE THING WAS ALLEVIATED BECAUSE WE ORDERED THERE TO BE A NEW PENALTY PHASE.
SO, --
>> YOUR HONOR, IT IS EITHER IN CRAIG OR CORBETT THAT THE THIS COURT EXPRESSED THE VIEW THAT THE SENTENCING JUDGE IS THE MOST IMPORTANT PERSON IN THE CAPITAL CASE BECAUSE AS, WE KNOW, JUDGES CAN OVERRIDE JURIES.
>> BUT IN CROCKETT, CORBETT, STATED THAT THE DIFFICULT AREA OF DEATH PENALTY PROCEEDINGS DICTATES THE JUDGE IMPOSING THE SENTENCE SHOULD BE THE SAME JUDGE WHO PRESIDED OVER THE PENALTY PHASE.
>> RIGHT.
>> NOT THE LAST PENALTY PHASE HEARING BUT THE ONE WHERE THE JUDGE THEN WHO IS GOING TO BE PRONOUNCING SENTENCE HEARS BECAUSE IT'S A HYBRID

SITUATION.
THERE ARE SORT OF CO-SENTENCERS.
THE JUDGE HEARS EVERYTHING IN THE PENALTY PHASE.
AND THEN THE JUDGE HAS A SPENCER HEARING.
IN FACT THERE COULD BE AN ARGUMENT IT'S BETTER FOR THERE TO BE A DIFFERENT JUDGE BECAUSE OFTEN TIMES JUDGES WHETHER DE NOVO SENTENCING END UP RELYING ON SOMETHING FROM A PRIOR PROCEEDINGS.
WE GO NO, YOU CAN'T DO THAT.
CLEAN SLATE RULE, IT STARTS ALL OVER AGAIN.
SO IN FACT HAVING JUDGE FARNELL COULD HAVE REALLY CAUSED MORE PROBLEMS THAN IT, SO, WHY, SO ISN'T THAT WHAT CORBETT SAYS THOUGH?
THAT IS, IF THIS HAD BEEN SENT BACK FOR A RESENTENCING WITHOUT, AFTER, OR FOR A RECONSIDERATION OF FINDINGS, YOU HAVE A POINT THAT IT MAYBE SHOULD HAVE GONE BACK TO THE ORIGINAL SENTENCING?
>> MAY I SUGGEST TO YOUR HONOR THAT THE CLEAN SLATE RULE IS SOMETHING WHICH MAY BECOME NECESSARY BECAUSE OF THE USE OF A DIFFERENT JUDGE.
AND THAT THE CLEAN SLATE RULE DOES NOT APPLY IN CASES UNLIKE CORBETT --
>> BUT WE DIDN'T GIVE.
AS JUSTICE WELLS SAID, WE DIDN'T GIVE THE OPTION FOR IT TO GO BACK REIMPOSITION TO REANALYZE THE ORIGINAL PENALTY PHASE.
WE WERE GIVING AN OPPORTUNITY BECAUSE THAT WAS CLAIMED BRING MR. MUEHLEMAN OVER TEN YEARS THERE WAS SOMETHING WRONG WITH THE PENALTY PHASE AND HE DIDN'T HAVE EFFECTIVE ASSISTANCE OF COUNSEL.
WE WERE GIVING HIM AN OPPORTUNITY TO REPRESENT MITIGATION EVIDENCE TO TRY TO CONVINCE A JURY AND A JUDGE THAT THIS CASE WAS NOT A DEATH

PENALTY CASE.
I'M NOT SURE WHY WE'RE HERE ARGUING THIS PARTICULAR POINT.
FRANKLY IT'S QUITE FRUSTRATING THAT MR. MUEHLEMAN DIDN'T TAKE ADVANTAGE OF WHAT THIS COURT PROVIDED TO HIM, WHICH WAS A NEW PENALTY PHASE.
>> IF I MAY MOVE ON, BECAUSE I THINK IT WILL HELP TO ANSWER YOUR QUESTION, THE TWO OTHER PRINCIPLE POINTS OF MY ARGUMENT HAVE TO DO WITH THE COUNSEL WHICH I BEGAN TO TALK ABOUT THE REQUIREMENT THAT THIS COURT GAVE TO PINELLAS COUNTY TO IMMEDIATELY ADVISE HIM OF HIS RIGHT TO COUNSEL AND THE FARETTA HEARING THAT WAS FINALLY CONDUCTED ON MAY 19th, THE DAY THAT THIS MATTER WAS SUPPOSED TO HAVE GONE TO HEARING.
HAD MR. MUEHLEMAN BEEN PROPERLY ADVISED OF COUNSEL, HAD HE BEEN PROPERLY ADVISED WHAT IT MEANT --
>> MANIFEST FROM THE TRANSCRIPT OF THESE PROCEEDINGS THAT HE KNEW OF HIS RIGHT AND HE DECIDED HE WANTED TO REPRESENT HIMSELF.
>> OKAY.
>> IS THERE ANY WAY YOU CAN READ THAT AND COME TO A DIFFERENT CONCLUSION?.
>> YES.
YES, THERE IS, YOUR HONOR.
AND THAT WOULD BE, THAT ONCE THE DECISION WAS MADE THAT HE WASN'T GOING TO HAVE THE SAME JUDGE THAT HE HAD BEFORE, AS HE BELIEVED THAT HE WAS ENTITLED TO, THAT HE THEN BELIEVED THAT ANYTHING HE DID FROM THAT POINT FORWARD WOULD WAIVE THAT RIGHT.
AND THAT'S WHY ULTIMATELY WE GET BACK TO THIS SAME ISSUE, THE 3.7000-C-2 ISSUE AND IT'S IMPORTANT BECAUSE I LOOKED AT BOTH C-1 AND C-2 AND I COULD NOT FIND EITHER ANYTHING IN THE LANGUAGE OF THE RULE, NOR COULD I FIND ANY DECISION DECIDED

ANYWHERE IN FLORIDA THAT WOULD SAY THAT THAT TERM, NECESSITY IN C-IT SHOULD BE CONSTRUED OR INTERPRETED ANY DIFFERENTLY THAN THE TERM NECESSITY AS IT'S USED IN C-1.
AND THAT'S WHY THIS IS AN IMPORTANT CASE BECAUSE, THE CLEAN SLATE DOCTRINE TURNS ON THIS AND, HE RIGHT OF A DEFENDANT TURNS ON THIS AND I THINK IT'S, IT'S CLEAR --
>> LET ME, THE KEEP SLATE DOCTRINE, I'M SORRY, THIS COURT HAS HELD IN MANY CASES OTHER THAN THE CASE HERE PRECEDENT, THE BEING THE FIRST CASE, THAT THE CLEAN SLATE DOCTRINES APPLIES IN ANY NEW PENALTY PHASE HEARING.
WE HELD THAT FOR WALSH.
WE HAVE A SERIES OF CASES THAT MAKE THAT CLEAR THAT IF THERE'S GOING TO BE A NEW PENALTY PHASE, THEN THE CLEAN SLATE RULE APPLIES.
>> YOUR HONOR, I WOULD AGREE THAT THERE HAVEN'T BEEN ANY CASES THAT HAVE HELD OTHERWISE, BUT I WOULD ALSO VERY RESPECTFULLY SUBMIT TO YOUR HONOR, EACH AND EVERYONE OF THOSE CASES, IN FACT I'M PRETTY SURE PRESTON WAS A CASE WHICH I WAS TRYING TO THINK OF NAME OF IT, IS THAT NOT THE ONE WHERE THE ORIGINAL JUDGE HAD GONE TO THE APPEALS COURT AND THEY WERE GOING TO SEND THE APPEALS COURT JUDGE BACK DOWN TO PRESIDE OVER THE SENTENCING PHASE BUT THEN SOMETHING ELSE HAPPENED.
IN EVERYONE OF THOSE CASES YOU'RE TALKING ABOUT WITH THE CLEAN SLATE DOCUMENT, DOCTRINE WAS WHEN IN FACT A DIFFERENT JUDGE WAS APPOINTED OR FOUND THE RESPONSIBILITY TO PRESIDE OVER THE RESENTENCING.
I WAS UNABLE TO FIND A SINGLE CASE, AND THAT'S WHY, I REALLY URGE EACH AND EVERYONE OF YOU TO CONSIDER THE RAMIFICATIONS OF THIS INTERPRETATION BECAUSE,

I BELIEVE THAT WHEN YOU HAVE
LANGUAGE IN C-2 WHICH VERY
CLEARLY SAYS, IT'S A MATTER OF
NECESSITY, THAT MUST EXIST
BEFORE YOU CAN DENY THIS RIGHT
TO THE SAME JUDGE.
AND I CAN SEE THE REASONS FOR
THAT.
BECAUSE, THE SENTENCING JUDGE
IN THE ORIGINAL PENALTY PHASE
HEARS THINGS AND KNOWS ABOUT
THINGS THAT ARE PART OF HIS
INSTITUTIONAL MEMORY AND THAT
CANNOT AND SHOULD NOT ALWAYS GO
TO A JURY.
>> YOU'RE WELL INTO YOUR
REBUTTAL TIME.
>> THANK YOU, YOUR HONOR.
I WOULD ASK, TEN FOR EVERY TIME
I COME UP HERE.
THANK YOU VERY MUCH.
>> GOOD MORNING.
SCOTT BROWNE ON BEHALF OF THE
STATE OF FLORIDA.
>> CAN YOU ADDRESS THAT LAST
REMARK COUNSEL MADE?
I WONDER ABOUT THAT.
SAYS THAT SIMPLY SOME THINGS
THAT MUST BE WITHIN
INSTITUTIONAL MEMORY OF THE
COURT THAT MAKE IT ABSOLUTELY
NECESSARY, THE SAME JUDGE
PRESIDE.
>> ABSOLUTELY, NOT YOUR HONOR.
IN FACT, WITH THE CLEAN SLATE
RULE, I'M SURE I WOULD BE
CONFRONTED WITH, AS I HAVE IN
THE PAST, AN ALLEGATION THAT
THE JUDGE VIOLATED THE CLEAN
SLATE RULE AND HE TOOK SOME
EVIDENCE THAT WAS NOT IN FACT
PRESENTED DURING THE PENALTY
PHASE.
>> IT WOULD SEEM TO ME THE
REVERSE ARGUMENT WOULD BE MADE
I DON'T WANT TO GO BEFORE THE
SAME JUDGE WHO ALREADY IMPOSED
THE DEATH PENALTY.
I WANT, YOU KNOW, IF I WANT TO
GET CLEAN SHOTS.
SO THAT'S WHY I'M NOT AMUSED
BY IT, I'M SOMEWHAT CONCERNED
ABOUT THE ARGUMENT THIS
ABSOLUTE RIGHT TO JUDGE FARNELL

WHO IMPOSED DEATH PENALTY AND
YOU KNOW, DIDN'T ACT ON THIS
CASE FOR OVER A DECADE TO SAY
THAT, SOMEHOW JUDGE PARNELL WAS
THE PERSON AND ONLY PERSON THAT
MR. MUEHLEMAN WANTED.
COULD YOU ADDRESS THOUGH,
BECAUSE I, THE ISSUE ABOUT, YOU
KNOW, WE WERE CLEARLY CONCERNED
IN THIS POST-CONVICTION CASE,
ALTHOUGH OUR ORDER WAS SHORT,
WITH THE DELAY AND MAYBE SOME
RELIABILITY IN THE PENALTY
PHASE AND WE WANTED TO MAKE
ABSOLUTELY SURE MR. MUEHLEMAN
KNEW HE HAD A RIGHT TO COUNSEL
AND YOU KNOW, ALL EFFORTS MADE
TO SEE IF HE WOULD, YOU KNOW,
UNDER FARETTA, YOU KNOW, WOULD
OBTAIN THAT RIGHT.
CAN YOU ASSURE US THAT OUR
ORDER WAS COMPLIED WITH IN
EVERY RESPECT AS FAR AS
MR. MUEHLEMAN KNOWING HE HAD A
RIGHT TO COUNSEL?
MY CONCERN IS, DID HE HAVE A
MISCONCEPTION IF HE DIDN'T, YOU
KNOW, THAT HE WOULD WAIVE HIS
RIGHT ABOUT GETTING JUDGE
FARNELL IF HE GOT HIMSELF A
LAWYER?
>> NO, YOUR HONOR, ABSOLUTELY
NOT.
IN FACT DURING THE VERY FIRST
HEARING ON REMAND, AND THAT WAS
DECEMBER 12th, 2002,
JUDGE DOWNEY ADDRESSED THE
ISSUE OF COUNSEL AND RIGHT OFF
THE BACK THE APPELLANT SAID
THERE'S NOT GOING TO BE ONE.
I'M GOING TO REPRESENT MYSELF
IN THIS MATTER.
IN FACT THE JUDGE HAD A VERY
EXPERIENCED PUBLIC DEFENDER,
RON IDE STANDING BY IN COURT
DURING THE VERY FIRST HEARING.
SO IT BECAME CLEAR EVEN BEFORE
THE ISSUE OF THE WRONG JUDGE,
ACCORDING TO MR. MUEHLEMAN
PRESIDING OVER HIS CASE THAT HE
WAS GOING TO EXERCISE HIS RIGHT
TO REPRESENT HIMSELF.
AND AGAIN, YOU HAVE TO LOOK AT
THIS CASE WITH THE HISTORICAL

CONTEXT.
THERE IS A FULL FARETTA HEARING
IN MARCH OF 1999 WHEREAS, JUDGE
FARNELL WENT THROUGH EVERY
SINGLE QUESTION AND ADVISED
APPELLANT, YOU HAVE A RIGHT TO
AN ATTORNEY AND HE DECIDED TO
REPRESENT HIMSELF.
SO IT IS IN THAT CONTEXT AND
THE FACT THAT THIS COURT'S
ORDER ADVISED MR. MUEHLEMAN OF
HIS RIGHT TO COUNSEL AND THEN
HE QUOTE THIS COURT'S REMAND
ORDER IN HIS SUBSEQUENT MOTION.
>> THERE WAS A POINT IN THAT
FIRST HEARING WHERE HE ASKED
HIM ABOUT, WHAT HE COULD DO IS
GET HIM, STANDBY COUNSEL.
>> THAT IS CORRECT, YOUR HONOR.
>> AND HE ASKED IF THE ISSUE OF
APPOINTING A STANDBY COUNSEL
COULD BE PUT OFF UNTIL THE
PRETRIAL.
WAS THE ISSUE OF HAVING A
STANDBY COUNSEL THEN, ADDRESSED
AGAIN BY THE COURT?
>> ULTIMATELY, IT WAS.
THERE WAS NO, I KNOW NO STANDBY
COUNSEL WAS APPOINTED.
I BELIEVE IT WAS ADDRESSED ON
AT LEAST TWO OCCASIONS.
AND HE ALSO WANTED, PERHAPS TO,
CONSULT WITH AN APPELLATE
ATTORNEY ON HIS OWN.
BUT AGAIN, THE JUDGE IN THIS
CASE REPEATEDLY ASKED HIM, YOU
KNOW, HOW ABOUT COUNSEL?
AND HE SAID THERE'S NOT GOING
TO BE ONE.
AND HE REPRESENTED HIMSELF ON
APPEAL TO THE SECOND DISTRICT,
AND ON APPEAL AGAIN, TAKING
EXTRAORDINARY WRIT TO THIS
COURT.
SO HE EXERCISED HIS RIGHT.
AND IN FACT WHEN THE TRIAL
COURT JUST PRIOR TO TRIAL
INSISTED UPON GOING THROUGH A
FARETTA INQUIRY, THE DEFENDANT
SAID, HEY, LOOK, WHY ARE YOU
ASKING ME THIS AGAIN?
I REFUSED BECAUSE I'VE ALREADY
GONE THROUGH THIS.
I JUST, THE VERY FACT THAT THE

COURT WAS QUESTIONING HIM ON
COUNSEL HE TOOK IT AS AN
INFRINGEMENT UPON HIS OWN
CONSTITUTIONAL RIGHT TO
REPRESENT HIMSELF.
>> I GUESS MY CONCERN IS THIS.
THAT THE POST-CONVICTION
PROCEEDING THAT WENT ON FOREVER
WAS ALL ABOUT HAVING AN UNFAIR
PENALTY PHASE AND THERE BEING A
LOT MORE EVIDENCE OF
MR. MUEHLEMAN'S MENTAL STATE,
MENTAL ILLNESS, WHATEVER WOULD
BE THERE TO PUT ON.
AND, YOU KNOW, WE THEN GO
THROUGH THAT FOR ALL THAT TIME.
IT GOES BACK AND, I'M STILL
JUST, I'M CONCERNED THAT
MR. MUEHLEMAN WAS ACTING UNDER
A COMPLETE MISCONCEPTION ABOUT
WHAT, WHAT, YOU KNOW, ABOUT THE
PENALTY PHASE.
I MEAN BECAUSE, AGAIN, WHEN WE
WENT, HE WENT TO THE PENALTY
PHASE HE REFUSED TO PUT ON ANY
MITIGATION, CORRECT?
>> THAT IS CORRECT, YOUR HONOR.
YOUR HONOR, IT WAS
MR. MUEHLEMAN'S CHOICE THOUGH.
HE WAS TOLD IF HIS DECISION, IF
HE IS RELYING ON HIS RIGHT TO A
PARTICULAR JUDGE WAS INCREDIBLY
RISKY, HE WAS ADVISED BY THE
JUDGE NOT TO RELY ON THAT.
HE WAS ADVISED EVEN BY THE
PROSECUTOR IT WOULD BE FOOLISH
TO DO SO.
SO IT WAS MR. MUEHLEMAN'S
CHOICE TO EMBARK UPON THE
STRATEGY.
THE STATE DID EVERYTHING IT
COULD, THERE IS NO MISCONDUCT
ON THE PART OF THE STATE HERE.
IT WAS A CHOICE MADE BY
MR. MUEHLEMAN.
AND IF I CAN ADDRESS THE ISSUE
OF THE PRESIDING JUDGE, THERE
WAS IN FACT A DETAILED ORDER BY
THE CHIEF JUDGE DEMERS IN THIS
MATTER AND THE STATE CITED IT
EXTENSIVELY IN ITS BRIEF.
THE CHIEF JUDGE AND THE APPLE
LANT CITED 3.700-C-2.
THE JUDGE RECOGNIZED JUDGE

CROCKETT FARNELL HAD BEEN IN
THE CIVIL DIVISION FOR YEARS.
THAT IT WAS COMING BACK FOR A
RESENTENCING WHICH IS A CLEAN
SLATE THAT ORIGINAL ORIGINALLY
IT WAS NOT A CAPITAL TRIAL.
IT WAS A PLEA ENTERED IN THIS
CASE AND IT WAS NECESSARY TO
HAVE A DIFFERENT JUDGE.
AND REMEMBER, THIS IS 20 YEARS
ON.
IT IS, JUDGE FARNELL HAS SINCE
RETIRED.
IT'S, AMAZING THAT I THINK,
GIVEN THE LAPSE OF TIME THAT
JUDGE FARNELL WAS EVEN AN
ACTIVE JUDGE.
HE HAD NO PARTICULAR RIGHT TO
JUDGE FARNELL IN THIS CASE.
AND THIS COURT'S DECISION IN
CORE BET STATES THE POLICY --
CORBETT STATES THE POLICY IF
THE JUDGE WHO PRESIDES OVER
SENTENCING IS NOT THE JUDGE WHO
PRESIDED OVER A TRIAL IN THIS,
THE CASE IS REMANDED FOR
SENTENCING, THE JUDGE MUST
IMPANEL A NEW JURY AND HEAR THE
PENALTY PHASE ANEW.
AND THAT IS WHAT HAPPENED IN
THIS CASE.
SO THERE WAS NO VIOLATION OF --
BALL, AND SPECIFICALLY ONLY
CASE DIRECTLY ON POINT IS
CORBETT.
THAT WAS COMPLIED WITH IN THIS
CASE.
IT WAS NECESSARY FOR A NEW
PENALTY PHASE AND ALL THE
EVIDENCE THAT WAS HEARD IN THAT
PENALTY PHASE THERE IS A CLEAN
SLATE.
THE JUDGE WOULD HAVE NO BENEFIT
FROM HAVING SAT THROUGH A
GUILTY PLEA 20 YEARS EARLIER.
AND AGAIN IF HE TOOK INTO
CONSIDERATION EVIDENCE FROM
THAT EARLIER CASE, THAT WAS NOT
PRESENTED HERE, MOST ASSUREDLY
I WOULD BE UP HERE ARGUING ON
APPEAL THAT THE JUDGE'S
RELIANCE WAS EITHER HARMLESS OR
NOT ERROR.
>> ARE SAYING THAT C-1 OR 2

APPLIED IN THIS CASE?
>> C-2.
C-1 DOES NOT APPLY TO CAPITAL CASES.
>> BUT ONCE HIS DEATH SENTENCE, I GUESS, NO, HIS DEATH SENTENCE IS STILL THERE, CORRECT?
>> IT'S STILL A CAPITAL CASE.
>> STILL, IN OTHER WORDS, NO, BECAUSE THEY HAD A NEW PENALTY PHASE.
>> NEW PENALTY PHASE.
>> SO WHY ISN'T IT, WHY ISN'T C-1 THE APPLICABLE RULE?
>> WELL, BECAUSE, C-2 SPECIFICALLY APPLIES TO A CAPITAL CASE AND PENALTY PHASE. SO BY ITS LANGUAGE ITSELF --
>> I THOUGHT THAT JUDGE DEMERS, I'M JUST LOOKING AT HIS ORDER, THOUGHT C-1 APPLIED.
>> NO.
HE WAS DISTINGUISHING I THINK C-1 AND C-2.
THIS IS NOT -- THEY WERE AWARE OF 3.700 AND THE CHIEF JUDGE ENTERED A VERY DETAILED ORDER IN THIS CASE ASSIGNING THE NEW JUDGE.
AND AGAIN THIS IS A CASE, 20 YEARS ON, AND JUDGE FARNELL HAD NOT BEEN IN THE CIVIL, THE CRIMINAL DIVISION FOR A MATTER OF 15 YEARS, SO IF WAS NO ADDED BENEFIT TO
THE DEFENDANT TO GET A PARTICULAR JUDGE, EVEN IF HE HAD SUCH A RIGHT UNDER THE LAW CLEARLY DOES NOT HELP.
>> DO WE KNOW ANYTHING -- BY THAT TIME -- WE HAD -- RULES IN PLACE, CONTINUING SUCH -- FOR JUDGES -- CAPITAL CASES, QUALIFYING -- DO WE KNOW ANYTHING ABOUT THAT?
IN THIS CASE IS IT, AS YOU WOULD -- I ASSUME THE JUDGES IN THE CIVIL DIVISION FOR MANY YEARS HE WOULD NOT HAVE TAKEN THE REQUIRED -- EDUCATION COURSES, THAT'S CORRECT, WERE --
>> YOUR HONOR, I KNOW THAT WAS A CONCERN OF THE STATE BELOW.

BUT IN THE CHIEF JUDGE'S ORDER
HE INDICATED THAT BOTH JUDGE
FARNELL AND JUDGE DOWNEY WERE
BOTH QUALIFIED, SO --
>> IF YOU CAN --
>> -- INFER, I THINK, THAT -- AGAIN,
WE DON'T KNOW FOR SURE, HE
JUST INDICATED THAT BOTH
JUDGES WERE QUALIFIED.
SO -- PERHAPS HE DID TAKE -- I
CAN'T REPRESENT TO THE COURT
THAT I KNOW FOR A FACT THAT HE
WAS UP TO DATE.
>> HE WAS IN THE CIVIL DIVISION FOR
MANY YEARS.
>> THAT IS CORRECT, YOUR
HONOR.
AGAIN, MR. MUEHLEMAN IN THIS
CASE GOT EXACTLY THE PENALTY
PHASE HE DESIRED, HE WAS
REPEATEDLY ADVISED AGAINST
THE COURSE HE WAS TAKING, AND
HE CHOSE TO EXERCISE HIS OWN
RIGHTS AND REPRESENT HIMSELF.
HE CHOSE THAT.
AND THE STATE
DID EVERYTHING IN ITS POWER TO
ENSURE THAT MR. MUEHLEMAN HAD
THE PENALTY PHASE THAT THIS
COURT DEMANDED IN ITS
DECISION AND REQUIRED, AND HE
WAS GIVEN EVERY OPPORTUNITY,
EVERY STAGE OF THE PROCEEDINGS
TO EXERCISE HIS RIGHT TO HAVE
COUNSEL FOR THAT
PENALTY PHASE.
>> ALL THIS AMAZES ME.
WE SAID THIS SHOULD BE EXPEDITED WHEN
IT WAS SENT BACK IN 2002.
WE ARE HERE SIX YEARS LATER, SO I
GUESS OUR SAYING SOMETHING
SHOULD BE EXPEDITED HAS NO
EFFECT ON ANYBODY.
>> WELL, THIS
HEARING CAME WITHIN MONTHS --
AND THEN -- I THINK, PART OF
IT WAS GETTING ALL THE
DOCUMENTS TO MR. MUEHLEMAN.
AND, AGAIN, I DON'T PROFESS TO
KNOW WHY THERE WAS A DELAY.
AGAIN, I INHERITED THIS CASE
FROM ANOTHER COUNSEL.
BUT, AGAIN, EXPEDITED, I'M SORRY
IT WAS NOT AS QUICK, WE

WOULD ALL LIKE IT --
LITIGATION CAPITAL CASES IN
PARTICULAR WOULD BE EXPEDITED.
UNFORTUNATELY, THAT IS NOT
ALWAYS THE CASE.
>> NOTHING FURTHER.
>> THANK YOU.
>> THANK YOU.
>> REBUTTAL.
>> FIRST OF ALL, JUDGE --
>> YOU RESPOND TO -- BECAUSE I
-- I CAN'T HELP BUT FEEL THAT
TO SOME DEGREE THERE MIGHT BE A
SPILLOVER EFFECT FROM THE
FACT THAT WE PROBABLY HAVE
COMMENTED FROM TIME TO TIME, OR
THE PRACTICE HAS BEEN THAT IN
COLLATERAL PROCEEDINGS, IN
DEATH PENALTY CASES THAT, IF
POSSIBLE, THE ORIGINAL
PRESIDING JUDGE PRESIDE OVER
THOSE, THESE VERY REASONS THAT
YOU ARE TALKING ABOUT,
INSTITUTIONAL MEMORY.
BUT I HAVE DIFFICULTY IN THIS CASE
WHERE WE'RE TALKING ABOUT A
SENTENCING PROCEEDING -- OF
WHAT WHAT ARE THE
INSTITUTIONAL MEMORY THINGS --
FIRST OF ALL, LET ME APOLOGIZE
IF I CONFUSED YOU WITH
REMARKS I DIDN'T MEAN TO SAY
IT WAS NECESSARY, THERE WAS MANIFEST
NECESSITY, BUT THERE MUST BE A
REASON WHY, IF YOU GO BACK TO
THE SAME JUDGE, THE RULE
DOESN'T REQUIRE YOU TO IMPANEL
A NEW JURY.
>> BUT THAT CAN'T BE.
IN OTHER WORDS, IT COULDN'T BE IN THIS
CASE THAT IF IT WENT BACK TO
JUDGE FARNELL THAT
MR. MUEHLEMAN WANTED A JURY
TRIAL, THAT HE WOULDN'T GET
ONE.
SO THIS -- THAT IS NOT
POSSIBLE UNDER THE CAPITAL
SENTENCING SCHEME, THERE IS
SOMETHING -- THAT IS BEING
MISINTERPRETED BY THE
RULE, THAT ISN'T QUITE FITTING.
DO YOU AGREE?
I MEAN WOULD YOU AGREE IF YOU
REPRESENT A CLIENT, THEY GET A

NEW PENALTY PHASE, IT GOES BACK TO
THE SAME JUDGE, THE JUDGE GOES NO,
YOU CAN'T GET A NEW -- A JURY
RECOMMENDATION, IF THEY DON'T
WAIVE IT?
>> I DIDN'T SAY THAT,
YOUR HONOR.
BUT THE RULE IS
VERY CLEAR AND THE
INTERPRETATION IS VERY CLEAR
THAT IF YOU DO GO TO A
DIFFERENT JUDGE YOU HAVE TO
HAVE A NEW JURY.
BUT IF YOU -- IF YOU GO BACK TO
THE SAME JUDGE YOU DON'T HAVE
TO HAVE A --
>> ISN'T THAT BECAUSE -- ON
SOME OCCASIONS IT MAY BE A
CASE IS REMANDED FOR
REEVALUATION OF THE
AGGRAVATION OF MITIGATION FOR
A NEW SENTENCING ORDER.
BUT IF A COURT ORDERS, AS THIS
COURT DID, A NEW PENALTY
PHASE, THAT IS A DIFFERENT
CATEGORY THAN JUST GOING BACK
FOR RESENTENCING.
I MEAN YOU
AGREE WITH THAT?
>> YOUR HONOR, YOU ALL MAKE
THE RULES.
>> I SAID DO YOU AGREE WITH
THAT.
>> WELL, NO, I DON'T.
>> YOU --
>> I DON'T AGREE WITH THAT.
I DON'T AGREE WITH IT.
THE CONDITION I DON'T AGREE WITH
THAT THE RULE DOESN'T SAY THAT
I'M THE ATTORNEY I HAVE TO
LIVE BY THE RULE.
IF THE RULE SAID
THAT I WOULD AGREE WITH IT,
AND THEN I WOULD KNOW THAT -- YOU
KNOW, NOT TO DO THIS,
UNLESS THAT WERE THE
SITUATION, BUT THE RULE DOESN'T
SAY THAT'S CORRECT.
>> A RULE DOESN'T
COVER A CIRCUMSTANCE -- FOR
ITS RETURN FOR A NEW PENALTY
PHASE, DOES THE RULE ADDRESS A
NEW PENALTY PHASE?
YES?

>> NO, IT DOESN'T.
>> IT TALKS ABOUT SENTENCING SO THAT'S CORRECT.
>> I MEAN TO ME IT MAKES GOOD SENSE, BUT --
>> I GUESS IT DOES ADDRESS THE NEW PENALTY PHASE, BECAUSE IT SAYS THAT IF YOU GO BACK TO A DIFFERENT JUDGE YOU HAVE TO HAVE A JURY, YOU HAVE TO START OVER AGAIN.
>> BUT IF -- YOU ARE NOT AGAIN SAYING THAT TWO PEOPLE COULDN'T -- IS IT JUST LIKE IT'S GOING TO BE A WAIVER, SOMEONE WOULDN'T BE ALLOWED TO WAIVE IF THE JUDGE AGREED TO IT?
-- THE RULES ARE THE SAME.
>> I WOULD SAY NOT, YOUR HONOR.
>> CLARIFY THAT RULE, SO THAT THERE IS NOT A -- THAT -- COMPORTS WITH WHAT THE LAW REQUIRES.
>> I THINK THE WAY YOU READ THE RULE RIGHT NOW, WITHOUT INTERPRETATION OR -- IF YOU CAME BACK TO THE SAME JUDGE, THE DEFENDANT SAID, "I WANT TO WAIVE A JURY," YOU COULD DO IT.
>> BUT IF THE --
>> -- PLEASE COMPLETE YOUR --
>> WHAT I WANT TO SAY ABOUT JUDGE FARNELL IS -- AND IT IS NOT PART OF THE RECORD -- BUT WHEN I CAME BACK FROM IRAQ IN 2005 HE WAS IN CRIMINAL COURT, AND I DON'T KNOW HOW LONG HE HAD BEEN THERE, BUT HE WAS A CRIMINAL ADMINISTRATIVE JUDGE. SO HE HADN'T BEEN OUT OF CRIMINAL LAW FOR 15 YEARS.
>> DOES THE RECORD TELL US --
>> NO, IT DOESN'T.
>> -- HOW LONG HE HAD BEEN IN THE CIVIL DIVISION -- IN AT THE TIME THIS FIRST GOT BACK.
>> NO, IT DOESN'T, BUT IT SOUNDS LIKE THE COURT WAS INCLINED TO ASSUME HE HAD BEEN OUT FOR 15 YEARS.
I WANTED TO CLARIFY THAT THAT WAS NOT THE CASE.

>> THANK YOU.
>> YOU ARE NOT CLAIMING
ANY PARTICULAR PREJUDICE?
>> ABSOLUTELY NOT.
I'M SAYING I
HAPPEN TO KNOW FOR A FACT THAT
WAS NOT THE CASE.
>> MAYBE IT IS SOMETHING THAT
COULD BE JUDICIALLY NOTICED.
>> WOULD YOU AGREE THE
CIRCUMSTANCE LIKE THAT, LIKE
THIS, THERE ARE NO
INSTITUTIONAL MEMORY ISSUES?
>> NO, I SAY THAT ONLY BECAUSE
THE JUDGE HAS SO MANY UNIQUE
RESPONSIBILITIES, FOR
INSTANCE, IN THIS CASE --
>> WHAT I'M -- I GUESS IT IS
LIKE THE EARLY QUESTION THAT
JUSTICE PARIENTE RAISED, IF
ANYTHING, THE INSTITUTIONAL
MEMORY ISSUES WOULD WEIGH
AGAINST HAVING A JUDGE THAT
PREVIOUSLY SENTENCED YOU TO
DEATH -- PRESIDING OVER YOUR
CASE.
>> I HAD A SENTENCING CASE
WHERE THE ISSUE OF VINDICTIVENESS
CAME UP.
CASES LIKE THAT
YOU CERTAINLY WOULDN'T WANT.
BUT SOMETHING JUST CAME TO MY
MIND HERE, IT SORT OF
TOUCHES ON ONE OF MY OTHER
ISSUES.
>> I'M AFRAID YOU ARE OUT OF
TIME.
>> CAN I HAVE ONE MINUTE, YOUR
HONOR?
>> WELL --
>> -- QUICK, BECAUSE WE'VE GOT --
TO COMPLETE THIS.
>> THREE OR FOUR OF THE
WITNESSES WHO TESTIFIED AT THE
PENALTY PHASE, HAD TESTIMONY
READ, WERE STATE ATTORNEYS WHO
READ THE TESTIMONY.
THE ORIGINAL
TRIAL COURT WOULD HAVE SEEN
THE DEMEANOR OF THE
PEOPLE WHO GAVE THE ORIGINAL
TESTIMONY.
WOULDN'T THAT BE MORE FAIR?
>> THANK YOU VERY MUCH.

>> PLEASE RISE.