

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

**Michael A. Hernandez, Jr. v. State of Florida**

**SC07-647**

>> THE NEXT CASE ON THE COURT'S DOCKET IS HERNANDEZ v. STATE.  
>> MR.^DAVIS.  
>> MAY IT PLEASE THE COURT.  
MY NAME'S DAVE DAVIS  
REPRESENTING MR.^MICHAEL  
HERNANDEZ IN THE FIRST-DEGREE  
MURDER CASE THE FACTS IN THE  
CASE AREN'T PARTICULARLY  
DIFFICULT A LITTLE BIT LENGTHY  
BUT ON THE MORNING OF NOVEMBER  
19th, 2004, MR.^HERNANDEZ AND  
SHAWN ARNOLD HAVE SPENT \$300 OF  
ARNOLD'S RENT MONEY BLOWING IT  
ON COCAINE.

ARNOLD AT THE END OF THIS THEY  
STILL WANTED TO USE ONE MORE  
COCAINE SO ARNOLD SUGGEST THEY  
GO TO HIS SUPPLIER DAVID  
EVERETTE AND GET MORE MONEY OR  
COCAINE.

INSTEAD OF MR.^EVERETTE THEY  
GET HIS MOTHER.

>> IT SEEMS LIKE MR.^ARNOLD HAD  
THE DRUGS AND INSTIGATED THIS  
WHOLE THING BUT MR.^HERNANDEZ  
HAD A DRUG PROBLEM TOO.

>> HE HAD GROWN UP USING  
COCAINE SINCE 9 OR 10,  
SOMETHING LIKE THIS.

I GET THE IMPRESSION ONCE HE  
GOT MARRIED HE SORT OF GOTTEN  
OFF OF THAT BUT HE WAS STILL  
USING ALCOHOL FAIRLY HEAVILY  
AND I THINK HE WAS STILL USING  
COCAINE, SO.

>> WOULD YOU HELP US WITH, YOU  
HAVE A LOT OF ISSUES HERE.

>> EIGHT ISSUES, YES.

>> WHAT ISSUES --

>> NUMBER ONE AND TWO ARE THE  
ONES I WANT TO FOCUS ON.

THE ONE WITH THE SHACKING AND  
KIND OF CARRY OVER FROM OUR  
LAST ARGUMENT THE

PROPORTIONALITY WHEN YOU HAVE GOT TWO DEFENDANTS, ONE GIVEN LIFE AND THE OTHER GIVEN DEATH.

>> ON THE SHACKLING.

>> THE SHACKLING.

>> ALL RIGHT WELL YOUR ARGUMENT, THE JUROR THAT OBSERVED THE SHACKLING AND MADE THE STATEMENTS DID HE SERVE ON THE JURY.

>> NO, HE DID NOT.

HE WAS EXCUSED FOR CAUSE.

>> SO WHAT REALLY, YOUR ARGUMENT HAS TO BE YOUR ARGUMENT BECAUSE THIS ONE JUROR SAW SHACKLING.

>> RIGHT.

>> OR EVIDENCE OF IT, THAT THE WHOLE JURY MUST'VE SEEN IT.

>> WELL, WHAT HAPPENED, IF YOU WANT ME TO, I'LL JUST SKIP RIGHT TO THE ISSUE THEN.

>> YES, WELL, LET SOMEBODY -- YOU ONLY HAVE A LIMITED TIME.

>> GOOD.

I UNDERSTAND.

KEVIN MANCUSI AFTER VOIR DIRE CAME UP TO THE JUDGE AND AFTER INITIAL DOCKING HE SAID -- WHAT HAPPENED WAS THE COURT ORDERED THE DEFENDANT SHACKLED.

THERE'S NO QUESTION HE SHOULD'VE ORDERED HIM SHACKLED AND THE COURT TOOK SOME EFFORTS TO HIDE THIS FROM THE JURY.

>> A LOT OF EFFORTS.

>> A LOT OF EFFORTS.

HE PUT CURTAINS IN FRONT OF THE PROSECUTION'S TABLE AND THE DEFENSE TABLE, PUT, I THINK HE ACTUALLY MOVED THE TABLE A LITTLE BIT FROM THE JURY SO THAT THEY WOULDN'T SEE HIM. THEY PUT BOOKS OVER.

THERE TOLD THE BAILIFF TO SAY, INSTEAD OF SAYING ALL RISE SAY COURT COME TO ORDER, SO HE DID -- AND THERE'S NO QUESTION THE COURT MADE SOME, GOOD EFFORTS.

THERE WAS A HALLWAY IN WHICH THE PERSPECTIVE JURORS KIND OF SAT, AND THAT'S THE PROBLEM IS THE COURT PUT A BLACKBOARD THERE BUT ONE OF THE JURORS

MANCUSI SAW HERNANDEZ WALKING  
ACROSS SHACKLED.

>> YOU'RE NOT ARGUING THERE IS  
A PROBLEM WITH THE ACTUAL  
SHACKLING.

>> NO.

>> HE MADE THE CORRECT  
FINDINGS.

>> NO PROBLEM AT ALL.

I MEAN, THERE'S THERE WAS, THE  
COURT ORDERED HIM ACTUALLY  
SHACKLED AT HIS WAIST AND FEET.  
THE SHERIFF SAID LOOK THE STUN  
BELT WORKS JUST FINE BUT THAT'S  
NOT AN ISSUE.

>> YOU HAVEN'T RAISED THAT.  
THAT'S NOT YOUR ISSUE.

>> NO.

>> AND YOU HAVEN'T RAISED  
ANYTHING THAT ONCE THEY DECIDED  
THERE SHOULD BE SHACKLING THAT  
THE PROCEDURE THAT THE JUDGE  
FOLLOWED WERE VIOLATIVE OF THE  
PROCESS.

>> NO, NOT AT ALL BUT THE  
QUESTION THEN COMES UP, WHAT  
HAPPENED -- WHAT SHOULD THE  
COURT HAVE DONE WHEN THE  
PERSPECTIVE JUROR MANCUSI SAYS  
HE SEES HIM WALKING.  
IT'S A HARD THING TO GET OUT OF  
YOUR HEAD.

>> CAN I ASK ONE QUESTION ABOUT  
THE STATUS OF THE RECORD ON  
THAT?

IN GOING THROUGH READING THE  
BRIEFS AND TAKING A LOOK AT  
THIS, IT APPEARS PEERED SOMEONE  
SAW FEET AND BLACK PANTS.

>> THAT WAS --

>> AND SO WAS IT DEVELOPED IN  
THE RECORD?

I HAVE NOT SEEN THAT, AS TO YOU  
KNOW, THE NECESSARY SETUP NAT  
EVERYBODY ABSOLUTELY WAS GOING  
TO SEE THIS?

A LITTLE UNCLEAR.

I MEAN CERTAINLY THIS GUY  
SURMISED AND SAID MAYBE IT WAS  
AND I'M ASSUMING THAT IT WAS  
BUT.

>> THIS IS WHAT HE SAYS.

HE SAYS I SEE THE DEFENDANT  
WALKING FROM ONE DOOR TO THE

OTHER.

NOW, WHAT HE SAW, THE BLACKBOARD WAS UP THERE, AND HE SAW THE SHACKLES ON THE FEET AND SURMISED I'M ASSUMING HE SURMISE.

>> THERE'S NO EVIDENCE HE SAW HIS FACE.

>> NO HE DID SEE THE DEFENDANT. THE DEFENDANT WAS THE ONLY ONE, THE ONLY ONE PERSON SHACKLING SO HELD FROM HOLDING CELL TO THE COURTROOM HE SAW THAT AND SURMISED THAT THIS WAS THE DEFENDANT.

AND WHAT MAKES IT, WHAT MAKES IT EVEN WORSE IS ONCE HE SAW THAT, HE WENT, WENT BACK IN THE COURTROOM AND THEN IT WAS LIKE, YOU KNOW, HE'D EATEN THE FORBIDDEN FRUIT.

HIS EYES WERE OPEN AND THEN HE STARTED NOTICING THERE'S CURTAINS ON THE TABLE.

THERE'S BOOKS AND YOU KNOW ALL THIS SORT AND SO IT BECAME OBVIOUS TO HIM THAT THE COURT WAS MAKING SOME EFFORT TO HIDE THE SHACKLING.

AND, AND LIKE I SAID, I DON'T HAVE ANY FAULT WITH IT, BUT ONCE THE, ONCE MANCUSI'S EYES WERE OPENED THIS IS NOT JUST A BRIEF SORT OF OH, I SEE HIM WALKING THERE AND I'LL JUST FORGET ABOUT IT.

IT WAS EVERY DAY OF THE TRIAL.

>> WELL, BUT THAT'S GOING TO BE IN EVERY DACE BECAUSE I MEAN EVERY CASE WE SEE WHERE THERE THERE'S A SHACKLING OF EVERY KIND THERE ARE CURTAINS UP, THINGS DONE SO YOU DON'T HAVE THIS ISSUE.

>> THAT'S CORRECT BUT THE REAL PROBLEM IN THIS CASE IS WHAT DO YOU DO WHEN ONE PERSPECTIVE JUROR SEES THAT?

WHAT SHOULD THE COURT HAVE DONE?

THAT'S REALLY THE ISSUE HERE IS WHAT SHOULD THE COURT HAVE DONE.

>> YOU'RE SAY AGCOURT SHOULD

HAVE -- WHAT -- FIRST OF ALL,  
WHAT DID THE, WHAT DID THE  
DEFENSE LAWYER SAY?

>> THE DEFENSE LAWYER, I ASKED  
MANCUSI IS THIS GOING TO HAVE  
ANY EFFECT ON YOU HE SAID YES  
IT WOULD THE DEFENSE LAWYER  
SAYS WELL, TO MAKE IT LONG  
STORY SHORT HE SAID I MOVE FOR  
MISTRIAL WE GOT TO START ALL  
OVER AGAIN, AND, AND START THIS

--

>> AND THE JUDGE SAID?

>> THE JUDGE SAID NO THE COURT  
FULLY ANTICIPATED THAT AT SOME  
POINT IT WAS POSSIBLE EVEN  
PROBABLY THAT PERSPECTIVE  
JURORS WOULD BECOME AWARE OR  
WOULD BECOME WEAR OF THE  
RESTRAINTS.

THAT WOULD BE NAIVE TO THINK WE  
WOULD GO THROUGH A TWO-WEEK  
TRIAL WITHOUT SOMEONE BECOMING  
AWARE OF IT AND IN FACT HE TOLD  
YOU IN THE RECORD THAT YOU ARE  
TO ASSUME THAT SOME OF THE  
JURORS WOULD SEE --

>> ALL RIGHT, SO NOW AT THAT  
POINT HE HAS DENIED THE MOTION  
FOR MISTRIAL, WHICH IS WHAT  
YOU'RE -- SO YOU'RE SAYING HE  
ABUSED.

>> YES, HE SHOULD'VE GRANTED

--

>> HE ABUSED HIS DISCRETION BUT  
THEN AS JUSTICE LIEUSIS SAYING,  
OKAY LET'S JUST ASSUME THIS  
JURY PANEL, BECAUSE YOU DIDN'T  
SAY THE DEFENSE LAWYER DIDN'T  
SAY I'D LIKE TO QUESTION EACH  
OF THE JURORS AS TO WHETHER  
THEY'VE SEEN SHACKLING OR --

>> WELL.

>> WOULD THAT BOTHER THEM?

>> WELL, THEY TALKED ABOUT  
THAT.

>> BUT IT WASN'T ASKED FOR.

>> WELL, IT WAS, WELL, THEY  
TALKED ABOUT IT BUT THEY SAID  
NO THAT REALLY KIND OF  
ACCENTUATES THE WHOLE PROBLEM.

>> THE ONLY THING HE COULD'VE  
DONE IS A MISTRIAL.

>> YEAH.

>> LET'S JUST ASSUME THAT AT THAT POINT THEY DIDN'T ASK FOR ANY OTHER JUROR TO BE CONVENTIONED AND THEY WENT ON AND NOBODY WAS FOUND TO BE BIASED OR, YOU KNOW, A PROBLEM.

>> WHAT DID THE JUDGE SAY TO THIS JUROR?

>> WELL, THEY EXCUSED HIM FOR CAUSE.

>> OKAY.

SO THAT WAS DONE.

>> THAT WAS DONE.

BUT WHAT MANCUSI ALSO DID WHEN HE WAS ASKED WERE THERE PERSPECTIVE JURORS OUT THERE. A HALF DOZEN.

>> THE DEFENSE LAWYER DIDN'T ASK SPECIFIC JURORS BE QUESTIONED.

>> NO.

>> AND SO MY QUESTION IS, ASSUMING THE JUDGE HAD GIVEN THAT REMEDY, AND --

>> THE REMEDY BEING?

>> OF STARTING OVER AGAIN.

>> OKAY.

>> WE HAVE YOU HAVE HIM QUESTION THE PROCEDURES OR THE DEFENDANT SHOULD'VE BEEN SHACKLED SO AT SOME POINT AS THE JUDGE SAYS IT'S INEVITABLE, YOU KNOW, IN THIS CASE WITH THAT MAYBE A JUROR MIGHT SEE IT.

>> WELL, THAT'S, YOU -- IT CAN'T BE INEVITABLE.

THAT'S THE WHOLE PURPOSE.

IT'S SUPPOSED TO BE KEPT FROM THE JURY BECAUSE WHEN YOU SHACKTHAL DEFENDANT THAT BECOMES INHERENTLY PREJUDICIAL SO THE JUDGE IS WRONG WHEN HE SAYS IT'S INEVITABLE HE SHOULD'VE STOPPED IT RIGHT THEN AND STARTED AGAIN.

>> BUT IT REALLY COMES DOWN TO WHETHER THE JUDGE ABUSED HIS DISCRETION.

IN DENYING THE MISTRIAL.

>> RIGHT.

>> AND SO THE RULE SEEMS TO ME THAT YOU'RE ASKING FOR WOULD BE A BRIGHT LINE RULE AS OPPOSED

TO A DISCRETION ON THE PART OF THE TRIAL JUDGE BECAUSE ISN'T WHAT YOU'RE SAYING IS THAT ONCE ONE JUROR SEES THE SHACKLE, THEN THERE'S GOT TO BE A MISTRIAL.

>> HOW DO YOU CURE THIS THING? I MEAN, THAT'S THE ONLY WAY THAT I SEE.

>> SO IT'S NOT AN ABUSIVE DISCRETION.

>> WELL WE CAN CALL IT A BRIGHT LINE RULE IF YOU WANT TO BUT IN THIS CASE WHAT HAPPENED THE JUDGE SIMPLY SAID YOU'RE -- -- THE JURORS ARE GOING TO SEE IT AND WHEN THE LAW SAYS THIS IS INHERENTLY PREJUDICIAL WE HAVE GOT TO KEEP THIS STUFF FROM THE JURORS AND WHEN THE JUDGE SAYS, YOU KNOW, THERE'S NOTHING I CAN DO TO KEEP IT AWAY.

>> WHAT DO WE HAVE IN THIS RECORD THAT REALLY INDICATES THAT ANY OTHER JUROR OTHER THAN MR.^MANCUSI ACTUALLY SAW THE DEFENDANT IN SHACKLES?

>> YOU HAVE OTHER THAN HIM SAYING THERE WERE OTHER JURORS OUT THERE WITH ME WHEN I SAW IT, NO OTHER EVIDENCE.

>> I MEAN, WE HAVE NO EVIDENCE THAT THESE OTHER JURORS WERE EVEN LOOKING IN THE SAME DIRECTION.

>> YES, THAT'S ABSOLUTELY RIGHT.

>> THAT MR.^MANCUSI WAS LOOKING AT.

WE HAVE NO IDEA THAT ANY OTHER JUROR EVERY SAW -- SO IT SEEMS TO ME THAT THE REAL ISSUE IS YOU SHOULDN'T HAVE THIS DEFENDANT SHACKLED AT ALL BECAUSE AT SOME POINT SOME JUROR MIGHT SEE HIM BUT THAT'S NOT YOUR ARGUMENT.

>> NO.  
NO.

>> SO I'M NOT SURE WHAT IT IS THAT WE --, THAT THE TRIAL JUDGE COULD HAVE DONE.

>> GRANTED A NEW TRIAL.  
THAT'S WHAT HE --

>> GRANT A NEW TRIAL, WHERE THE DEFENDANT WOULD BE SHACKLED.

>> AND THEY WOULD HAVE TO MAKE MORE STRENUOUS EFFORTS TO KEEP IT AWAY FROM --

>> THEY WOULD HAVE TO DO WHAT?

>> TAKE MORE STRENUOUS EFFORTS TO --

>> WELL, DID THEY CHANGE AFTER MANCUSI'S SEEKS THE SHACKLING?

>> NO.

>> YOU HAVE NO EVIDENCE THAT IN THE REST OF THIS TRIAL ANY JUROR SAID ANYTHING OR THAT THE DEFENSE LAWYER SAID THIS IS NOT GOOD BECAUSE THEY'RE SEEING THE DEFENDANT COME IN EVERY DAY IN SHACKLES?

>> NO, NO.

>> SO ISN'T THAT IN THIS CASE DISPROVE EVERYTHING YOU'RE, ANY INFERENCE.

>> NO, NOT AT ALL.

WHAT YOU'RE DOING IS SAYING BECAUSE THERE WAS NOTHING, EVIDENCE,, THERE WAS NOTHING AND YOU JUST CAN'T MAKE THAT ASSUMPTION.

>> BUT YOU ARE SAYING BECAUSE ONE PERSON SAW IT WE'RE SUPPOSED TO ASSUME EVERYONE SAW IT.

>> WELL, THE QUESTION IS AND THAT IS WHY I CITED COOPER v. OKLAHOMA WHO PAYS THE BIGGEST MISTAKE, WHO BEARS THE BIGGEST, SUFFERS THE MOST IF YOU MAKE A WRONG DECISION?

IF YOU MAKE A WRONG DECISION AND YOU DO WHAT THE COURT SAID IN THIS CASE AND YOU DON'T GRANT A NEW TRIAL AND THERE WAS IN FACT JURORS SAT ON THAT JURY WHO SAW THIS, THAT'S INHERENTLY PREJUDICIAL.

>> CAN I ASK A QUESTION ABOUT THIS TRY TO BREAK THIS IN PARTS S. THERE ANYTHING THAT OCCURRED DURING THE TRIAL BEFORE, I MEAN, AFTER THIS ONE EVENT DURING THE TRIAL ITSELF, EITHER THE, VOIR DIRE, INTERROGATION OF WITNESSES, WHERE SOMETHING IRREGULAR OCCURRED OR ERROR

OCCURRED WITH REGARD TO  
KNOWLEDGE OF SHACKLING?

>> NOT THAT I SAW, NO.

>> OKAY.

SO WE GO BACK THEN TO REALLY  
THE ONLY THING THAT WE'RE  
TALKING ABOUT IS, IS THAT  
PRELIMINARY PERIOD OF TIME WHEN  
JURORS ARE OUT IN THE HALLWAY.

>> RIGHT.

RIGHT.

>> AND SO YOU'RE SAYING THAT  
THEY COULD NOT INTERROGATE  
OTHER JURORS ABOUT THAT BECAUSE  
JUST INTERROGATING ABOUT IT  
ITSELF RAISES THAT JUDICIARY.

>> RIGHT.

RIGHT.

>> SO THE ONLY WAY THAT YOU  
CORRECT THE PROBLEM BECAUSE THE  
DEFENDANT WAS IN THE SAME  
HALLWAY WHERE OTHERS MAY HAVE  
SEEN HIM IS TO AUTOMATICALLY  
DECLARE THIS IS A MISTRIAL.  
WE'RE GOING TO -- IT'S NOT EVEN  
STARTED THE TRIAL YET.

I ASSUME THAT THEY'RE JUST  
CALLING PEOPLE IN.

IT IS TO JUST DISCHARGE THAT.

>> PARTICULAR PANEL.

>> PROSPECTIVE PANEL AND BRING  
ANOTHER ONE UP FROM DOWNSTAIRS.

>> THAT'S CORRECT.

>> THAT'S WHAT YOUR RAY  
SAGGING.

>> THAT'S THE ARGUMENT.

>> NOTHING TO DO WITH THE TRIAL  
JUST OUTSIDE.

>> YEAH.

YEAH, THAT'S WHAT I'M SAYING  
AND I WANT TO MAKE SURE THAT  
THERE'S SOME REAL QUESTION OF  
JUSTICE QUINCE YOU SEEM TO  
INDICATE THERE'S NO EVIDENCE  
ANYBODY ELSE SAW THAT WELL FLIP  
AROUND THAT, THERE'S NO  
EVIDENCE ANYBODY DIDN'T SEE IT.  
THAT'S PROBLEM.

WE JUST SIMPLY DON'T KNOW.

>> ARE WE TO THEN JUST ASSUME  
THAT THESE OTHER JURORS SAW  
THIS?

>> NO, NO.

>> THESE JURORS OR PERSPECTIVE

JURORS.

>> PERSPECTIVE JURORS.

>> AND DO WE KNOW THAT THESE OTHER SIX PEOPLE WHO WERE IN THE HALL OR HOWEVER MANY IT WAS EVEN SERVED ON THIS JURY.

>> NO, YOU DON'T.

NO, BUT THAT'S THE PROBLEM AND THAT'S WHY I CITE COOPER -- YOU DON'T KNOW.

SOMETIMES YOU JUST DON'T KNOW THE ANSWERS.

>> WHY WOULDN'T HAVE THE BETTER APPROACH HAVE BEEN TO AT LEAST ASK SOME QUESTIONS INDIVIDUALLY OF JURORS AND IF ANYONE HAD SEEN TTHAT, WERE YOU IN THE HALLWAY EVEN?

I MEAN AT LEAST YOU COULD GET IT DOWN TO A GROUP OF NUMBERS.

>> WELL, THAT, THEY WOULD -- LIKE I SAY, THEY WERE TALKING ABOUT THAT BUT THEY KIND OF SAID WHAT QUESTIONS DO YOU ASK THAT DOESN'T TIP --

>> SO THERE IS NO QUESTION. WHAT YOU ARE SAYING THERE ABSOLUTELY IS NO KIND OF QUESTIONING WHERE YOU CAN NARROW THIS DOWN?

>> I COULD CERTAINLY ASK PERSPECTIVE JUROR, DO YOU KNOW ANYBODY ELSE ON THIS PANEL? WERE YOU -- DID YOU KNOW MR.^.

>> HUR FLAN DES.

>> NO, MR.^MANCUSI?

WERE YOU -- DID YOU, WERE YOU STANDING THERE WITH HIM?

>> DID YOU HAVE ANY DISCUSSION WITH HIM.

SOMETHING, I MEAN, YOU COULD ASK OR YOU COULD ASK MANCUSI.

>> MANCUSI IS HIS NAME THE STATE, THE COURT DIDN'T GO THAT FAR.

THEY SEEMED TO AGREE WE REALLY CAN'T ASK ANY QUESTIONS SO DON'T THINK -- DEFENSE COUNSEL DIDN'T ASK ANY QUESTIONS BUT NEITHER DID THE PROSECUTION.

>> BUT MR.^DAVIS IT SEEMS TO ME WE HAVE GOT TO MAKE DECISIONS ON THE BASIS OF WHAT THE RECORD IS.

>> MM-HMM.

>> AND THAT, THAT THE TRIAL JUDGE IS REALLY IN A PLACE TO MAKE, MAKE A CALL HERE.

>> WELL, HIS CALL IS --

>> UNLESS YOU HAVE A BRIGHT LINE RULE.

>> WELL, I, YOU KNOW,.

>> SHACKLE --

>> THE MORE WE'RE TALKING ABOUT, MAYBE WE OUGHT TO SAY THAT BECAUSE I JUST DON'T SEE HOW THEY COULD'VE ASKED ANY QUESTIONS THAT WOULD NOT HAVE ACCENTUATED THE PROBLEM OR AT LEAST ILLUMINATED THE PROBLEM TO SOME PERSPECTIVE JURORS.

>> CAN WE GO ON?

I THINK YOU WANTED TO TALK ABOUT PROPORTIONALITY.

>> I THINK WE HAVE -- WE UNDERSTAND WHAT YOU ARE SAYING AND OF COURSE AGAIN, I THINK THAT SHACKLING AND THAT ISSUE IS CERTAINLY FIRST AND FOREMOST AND I THINK I'M MOST IMPRESSED THAT YOU CANNOT -- YOU DON'T FIND A BASIS TO CRITICIZE THE TRIAL COURT FOR EITHER SHACKLING OR THE PROCEDURES FOLLOWED AND I THINK THAT'S WHERE WE'RE HAVING A --

>> RIGHT.

I HAVE NO PROBLEM WITH THE ORDER SHACKLING HIM. ONE OF THE PROBLEMS I HAVE THE COURT SAID YOU ARE GOING TO FIND OUT ANYWAY TOO BAD. AND THE COURT DID --

>> ISN'T THAT REALLY TRUE IF, IF I'M SITTING AS A JUROR IN A TRIAL THAT'S GOING TO GO ON FOR MULTIPLE WEEKS AND I AM SITTING THERE LOOKING AT SOMEBODY SITTING AT THE TABLE AND HE NEVER REACHES UP AND SCRATCHES HIS NOSE AND I NEVER SEE HIS HANDS, ISN'T IT.

>> WELL, I MEAN, THAT KIND OF GOES BACK I DON'T REALLY COMPLAIN ABOUT HIS ORDER. THE SHERIFFS SAID THE STUN BELT WORKS JUST FINE.

>> BUT YOU DIDN'T RAISE.

>> I KNOW.

IT DOES LOOK STRANGE.

THEY DON'T KNOW BUT YOU DO, THE JUDGE SAYS YOU KNOW THEY ARE GOING TO FIND OUT THAT EXCEEDS THE WHOLE PURPOSE OF THE LAW ABOUT BEING INHERENTLY PREJUDICIAL.

>> LET'S GO TO PROPORTIONALITY. I THINK THAT'S WHAT YOU WANTED TO GO OVER.

>> LET ME MOVE OVER TO PROPORTIONALITY.

THE PROSECUTION OFFERED MR.^SHAWN ARNOLD A LIFE SENTENCE IF HE WOULD TESTIFY. THEE GETS THE SENTENCE AND REFUSED TOS TO TESTIFY AND SO ARNOLD, NOT ARNOLD BUT HERNANDEZ THEN GETS THE DEATH SENTENCE AND WHAT I AM SAYING IS THAT UNDER THE LAW OF ENMAN v. FLORIDA AND TISON v. ARIZONA.

>> DID THE TRIAL COURT MAKE AGFINDING ABOUT THAT?

>> HE DID NOT SPECIFICALLY ASK -- WELL HE FOUND MITIGATING -- I'M SORRY, THAT'S ONE OF THE ERRORS I'M SAYING HERE IS THE COURT LOOKED AT THAT BUT HE SAYS NO I AM NOT GOING TO CONSIDER THIS AS MITIGATING. HE SPECIFICALLY REJECTED IT AS MITIGATING.

>> I'M LOOKING AT NUMBER 26, AND IT -- OF HIS SENTENCE. I MEAN.

>> YES.

>> PARAGRAPH 26.

>> RIGHT.

>> ON PAGE 20 WHILE BOTH DEFENDANT AND THE CO-DEFENDANT ARE RESPONSIBLE FOR THE VICTIM'S DEATH, DEFENDANT HIMSELF ADMITTED THAT HIS HANDS BROKE THE VICTIM'S NECK AND HELD THE KNIFE THAT SLASHED HER NECK.

SUBSEQUENTLY, WHEN DEFENDANT SPOKE TO MS.^HARTMAN INDICATED THE DEFENDANT WOULD NOT COMPLETE THE MURDER WHILE THE COURT RECOGNIZES DISPARATE

TREATMENT EXIST, IT IS JUSTIFIED.

NOW, WE CAN LOOK AT THAT THIS IS UNLIKE THE FIRST CASE WE'RE ON DIRECT APPEAL, THAT ISSUE OF WHAT IS, THAT, SO THE JUDGE RECOGNIZED, WHICH IS HELPFUL TO US, THAT THERE WAS A LIFE SENTENCE AND NOW YOU WHAT DO YOU HAVE TO SHOW US THAT THERE WAS EQUAL OR GREATER CULPABILITY ON THE PART OF THE DEFENDANT THAT GOT LIFE?

>> WELL, WHAT, WHAT WE ARE TALKING ABOUT IS SHAWN ARNOLD. WE HAVE TO TALK ABOUT HIM.

>> EQUAL OR GREATER CULPABILITY AS FOR THE MURDER.

>> RIGHT AS TO ARNOLD.

FIRST OF ALL, LET ME LOOK AT THE PARAGRAPH THAT I JUST READ. FIRST OF ALL THE COURT REJECTED THAT AS MITIGATION.

WIT v. STATE SAID YOU CAN'T DO THAT.

THE COURT COULD NOT REJECT THAT AS MITIGATION.

>> IF THE COURT FINDS THAT THERE IS NO EQUAL CULPABILITY, THEN WHAT'S THE MITIGATION?

>> WELL, ALL I'M SAYING IS THE COURT HERE FOUND -- HE SAID DOES NOT MITIGATE THE DISPARATE TREATMENT DOES NOT MITIGATE THE DEFENDANTS WHAT I'M SAYING IS WE NEED TO LOOK AT -- JUST AS PRELIMINARY MATTER THE COURT REJECTED THIS AS MITIGATION.

>> WHAT WOULD BE THE MITIGATION?

>> THAT THEY WERE BOTH EQUALLY CULPABLE.

>> WELL THE JUDGE FOUND THEY WEREN'T EQUALLY CULPABLE.

>> THE FACTS ARE THE JUDGE IS WRONG.

>> MR.^DAVIS, YOU'VE, THE YEARS I'VE BEEN HERE VERY CANDID ABOUT FACTS IN THESE CASES, AND GIVE US, GIVE US WHAT THE FACTS WERE AS, AT THIS MURDER.

>> OKAY.

TO SHOW THAT HERE ARE THE FACTS THAT WHAT HAPPENS IS AFTER THE

TWO MEN GOT.

>> FACTS THAT WOULD SHOW THAT THEY'RE EQUALLY CULPABLE.

>> OKAY.

THE FACTS ARE THEY BOTH GOT STONED -- STARTED USING MARIJUANA, NOT MARIJUANA BUT COCAINE ON THE MORNING OF THE 19th THEN WHEN THEY EXHAUSTED THE MONEY SUPPLY OF THEIR COCAINE THEN WENT TO EVERETTE'S HOUSE HE WASN'T THERE.

MRS. EVERETTE HIS MOTHER WAS, AT WHICH POINT SHE COMES OUT TO THE FRONT DOOR.

ARNOLD TELLS HERNANDEZ GRAB HER.

HERNANDEZ GRABS HER THEY GO INSIDE AT WHICH POINT ARNOLD STARTS MAKING SOME THREATS THAT HE HAD -- THAT HER SON OWED HIM MONEY AND HE PUT A GUN UP ASIDE HIS HEAD.

THEN ARNOLD GOES TO THE BATHROOM, COMES BACK WITH A PILLOW TRIES TO SMOTHER TRIES TO KILL MS.^EVERETT BY SMOTHERING HER.

HE CAN'T DO THAT AT WHICH POINT

--

>> NOW, WHO TESTIFIES TO THAT?

>> THAT CAME OUT IN THE, HERNANDEZ'S CONFESSION.

THAT TRIAL THAT WAS PRESENTED AS HIS CONFESSION.

ARNOLD DOESN'T TESTIFY AT TRIAL.

THE ONLY EVIDENCE OF THIS COMES FROM HERNANDEZ'S CONFESSION SO ARNOLD CAN'T, CAN'T KILL HER.

HERNANDEZ SAYS SOMETHING TO THE EFFECT OF WELL YOU'RE WEAK AND LET ME -- SO HE TAKES OVER AND THEN HE WILL BREAK

MRS.^EVERETTE'S NECK AT WHICH POINT ARNOLD WILL GIVE A HERNANDEZ A KNIFE AT WHICH HE COMPLETES THE MURDER AND CUTS HER THROAT AFTER WHICH ARNOLD AND HERNANDEZ RANSACK THE HOUSE.

ARNOLD FINDS A PURSE WITH A DEBIT CARD AND THE TWO MEN WILL SPEND THE DEBIT CARD.

>> SO YOU ARE NOT SAYING HERNANDEZ IS LESS CULPABLE.  
>> THEY'RE EQUALLY CULPABLE. AT LEAST ARGUABLY.  
>> SO AT LEAST ACCORDING TO HERNANDEZ'S DEFENSE, HE BROKE HER NECK.  
>> HE BROKE HER NECK, YES.  
>> AND THEN HE.  
>> SLASHED HER THROAT.  
>> SLASHED HER THROAT AND THAT KILLED HER.  
>> THAT KILLED HER, YES.  
>> SO HE CONFESSED TO HAVING BEEN DONE THE ACTUAL PHYSICAL ACTS THAT CAUSED HER DEATH.  
>> THAT'S CORRECT.  
>> HOW DOES THAT -- YOU SAID SOMETHING ABOUT ENMAN TISON. HOW IS THIS.  
>> OKAY LET ME JUST GO TO TISON BECAUSE THAT'S THE ONE THAT REALLY, BECAUSE IN TISON, THE TISON BROTHERS HELPED THEIR FATHER ESCAPE, WHO WAS SERVING A SENTENCE FOR MURDER, HELPED THEIR FATHER ESCAPE FROM AN ARIZONA PRISON, THEY GOT OUT, THEIR BROTHERS THEN GAVE THEIR FATHER SOME GUNS.  
AND ABOUT FOUR DAYS LATER, THEY USED THESE GUNS TO KILL FOUR PEOPLE.  
WHILE THEY WERE DOING -- WHILE THE FATHER WAS USING THE GUN, IT WAS THE FATHER WHO USED THE GUNS TO KILL THESE FOUR PEOPLE -- ACTUALLY TWO, FATHER AND ANOTHER MAN ACTUALLY KILLED THESE OTHER PEOPLE, THE BROTHERS SAT THERE AND AFTER GETTING THE GUNS, THEN THEY, JUST STOOD THERE AND WATCHED THE MURDERS GO DOWN.  
THE BROTHERS DID NOT COMMIT THE MURDER.  
>> RIGHT, BUT NOW, THAT'S WHY CAN ASKED YOU.  
HERE THOUGH IN ANSWER TO JUSTICE'S WELLS' QUESTION BY HIS OWN CONFESSION HE COMMITTED THE MURDER.  
>> BUT WE ARE LOOKING AT ARNOLD'S CULPABILITY.

>> BUT THAT'S NOT ENMAN TISON.

>> YES, IT IS, YES, IT IS.

>> MAYBE WE'RE -- I THOUGHT ENMAN TISON IS WHERE THE PERSON ISN'T THE MURDER.

>> NO.

NO.

WELL, ARNOLD'S NOT THE MURDER. ARNOLD'S DOES EVERYTHING TO FACILITATE HERNANDEZ COMMITTING THE MURDER AND THE QUESTION IS WHEN, WHEN ARNOLD GETS THE LIFE SENTENCE UNDER THIS COURT'S PROPORTIONALITY REVIEW THAT PEOPLE WITH EQUAL CULPABILITY HAVE TO GET THE SAME SENTENCE. HOW DO WE TREAT THE DISPARATE SENTENCING HERE?

AND SO WHAT I AM SAYING IS ARNOLD IS AS EQUALLY CULPABLE UNDER THE ENMAN TISON RATIONALE AS HERNANDEZ IS AND ACTUALLY I DON'T THINK WE NEEDN'T LOOK AT TISON JUST ENMAN.

ARNOLD WAS PRESENT AT THE MURDER A MAJOR PARTICIPANT IN THE BURG HEAR AND ROBBERY. HE PROVIDED THE MURDER HE TRIED TO KILL MRS.^EVERETTE AND UNDER ENMAN WOULD CERTAINLY --

>> AS WE LOOK AT --

>> AT THE EVIDENCE AT SOME POINT HE DID SOMETHING TO GIVE HER A --

>> YEAH, THAT, AND THAT --

>> AND CAN'T YOU KIND OF INFER FROM ALL THESE CIRCUMSTANCES THAT HE MAYBE JUST DIDN'T REALLY HAVE WHAT IT TOOK TO ACTUALLY ACCOMPLISH JUST THE KILLING OF THIS LADY AND THAT IT WAS THE DEFENDANT WHO'S BEFORE US HERE WHO, WHO WAS NECESSARY, HIS ACTS WERE NECESSARY TO ACCOMPLISH IT IF IT HAD NOT BEEN FOR HIS ACTS, SHE MIGHT'VE SURVIVED THIS?

>> THAT'S NOT THE TEST.

THE TEST UNDER ENMAN AND TISON THAT IT, THIS IS CARELESS, WRECKLESS INDIFFERENCE TO THE HUMAN LIFE AND THAT'S CERTAINLY COMES OUT WITH ARNOLD.

HE'S THE ONE THAT GETS THE  
WHOLE THING GOING.

HE'S THE ONE --

>> EQUAL, EQUAL CULPABILITY.

>> WELL HE TRIED TO KILL HER  
AND HE MAKES SOME FEEBLE EFFORT  
TO TRY AND REVIVE HER BUT HE  
NEVER STOPS -- AFTER THAT, HE  
THEN GIVES HERNANDEZ THE KNIFE.  
IF HE WAS REALLY TRYING TO SAVE  
HER, HE WOULDN'T HAVE GIVEN THE  
KNIFE.

HE DOES NOTHING.

>> NOT MORE CULPABLE TO  
ACTUALLY BREAK HER NECK AND TO  
CUT HER THROAT?

>> WELL, WELL, WHETHER IT'S  
MORE -- I THINK IT'S AT LEAST  
EQUAL CULPABILITY UNDER THE  
ENMAN AND TISON AT LEAST THE  
TISON ACT.

>> CAN I ASK ONE QUESTION?

>> SHOWED --

>> AS YOU ARE GOING THROUGH  
THIS PROCESS, WHERE DO YOU  
FACTOR IN AND HOW DOES IT  
FACTOR IF AT ALL THAT THIS  
OTHER INDIVIDUAL, THE  
CO-DEFENDANT IF YOU WILL,.

>> MR. ^ARNOLD.

>> WAS, WAS SUBJECT OF A PLEA  
BARGIN?

>> WELL.

>> AND THERE WAS A PLEA, AND IT  
HAP -- HAPPENS WHERE THERE ARE  
MULTIPLE INDIVIDUALS ARE  
INVOLVED AND PLEAS ARE ENTERED  
INTO.

SOMETIMES IT'S REFERRED TO IN  
THE VERY COLLOQUIAL KIND OF  
TERM SOMETIMES YOU HAVE TO DEAL  
WITH THE DEVIL TO DO THESE  
THINGS SO HOW DOES THAT FIGURE  
IN OUR ANALYSIS HERE?

WHETHER HE TESTIFIED OR NOT  
THAT WAS CERTAINLY WAS PART OF  
THE APPROACH IN THIS CASE?  
HELP ME WITH THAT.

>> OKAY.

JUSTICE WELLS, IN HIS DISSSENT  
IN HAZEN BROUGHT, BRINGS UP THE  
SAME ISSUE WEIR YOU'RE TALKING  
ABOUT.

IN THIS CASE WE DON'T HAVE THE

HAZEN SITUATION THE PROSECUTOR  
DIDN'T HAVE TO MAKE THE  
DECISION BECAUSE HERNANDEZ  
CONFESSED.

IN HAZEN, THERE WAS REAL  
QUESTION OF WHAT ACTUALLY  
HAPPENED SO THE PROSECUTOR HAD  
TO MAKE A DECISION.

I GOT, I HAVE GOT TO GET  
SOMEBODY AND OFFER LIFE TO  
SOMEBODY.

AND HE JUST MADE THE WRONG  
CHOICE.

>> WELL, LET'S GO BACK TO --  
YOU'VE CONFUSED -- YOU'VE  
HELPED TO CONFUSE ME.  
AND THAT'S NOT WHAT YOU WANT TO  
DO.

>> NO.

>> MAYBE YOU DIDN'T CONFUSE  
ANYBODY ELSE.

>> LET'S SEE WHAT WE CAN DO IN  
ANOTHER MINUTE OR SO.

>> BECAUSE I AM LOOKING AT  
YOU'VE RAISED ONLY  
PROPORTIONALITY.

NOW THE ISSUE OF WHAT JUSTICE  
LEWIS IS TALKING ABOUT IS IF  
THEY HAD PLED HIM TO  
SECOND-DEGREE, YOU WOULD AGREE  
BASED ON OR MORE RECENT CASE LAW  
YOU WOULDN'T BE LOOKING AT THE  
CULPABILITY, CORRECT.

>> YES.

>> HE PLED TO FIRST-DEGREE.

>> GOT LIFE.

>> YOU LOOK AT THAT, EXPLAIN TO  
ME HOW ASSUMING THAT WE AGREE  
WITH YOU THAT THERE IS EQUAL  
CULPABILITY HERE, DO WE HAVE A  
CASE THAT SAYS THAT ONCE  
THERE'S EQUAL CULPABILITY,  
SOMEONE ELSE, SOMEONE GETS  
LIFE, THAT THE DEFENDANT MUST  
GET LIFE?

IS THERE A CASE THAT --

>> HAZEN, HAZEN IS THE ONE I  
CITED.

>> BUT IS THAT A CASE?

THAT SAYS THAT IT'S A BRIGHT  
LINE RULE THAT IF YOU FIND  
EQUAL CULPABILITY, THAT YOU  
DON'T EVEN DISCUSS  
PROPORTIONALITY THAT THE PERSON

HAS TO GET LIFE?

>> THAT'S WHAT PROPORTIONALITY  
-- THAT'S WHAT THIS COURT'S  
PROPORTIONALITY REVIEW IS WHEN,  
IS DEFENDANTS WHO SHARE THE  
SAME CULPABILITY SHOULD GET THE  
SAME SENTENCE.

>> YES, BUT THERE IS MORE  
IMPROPORTIONALITY.  
YOU LOOK AT OTHER ISSUES.  
WHAT THE AGGREGATORS --  
AGGRAVATORS AND MITIGATORS.

>> THAT'S ONE PART.

>> THAT'S ONE PART BUT THEN  
EQUAL CULPABILITY DOESN'T EQUAL  
IN A PER SE DECISION.

>> I THINK IT DOES.

>> WHY DIDN'T YOU RAISE IT THAT  
WAY.

>> I THOUGHT I HAD.

ISSUE NUMBER TWO IS THAT --  
ISSUE NUMBER TWO IS THAT WHEN  
DEFENDANT'S SHARES EQUAL  
CULPABILITY.

>> OKAY I'M SORRY YOU HAVE.

>> LET ME MAKE SURE I  
UNDERSTAND WHAT YOUR ARGUMENT  
IS THAT BECAUSE THERE WAS A  
PLEA THEN IN RESPONSE TO MY  
QUESTION, BECAUSE THERE WAS A  
PLEA, AND THAT PLEA WAS TO A  
LIFE SENTENCE, THAT AS A MATTER  
OF LAW, AS A MATTER OF LAW,  
MR. HERNANDEZ COULD NOT RECEIVE  
THE DEATH PENALTY IN THIS CASE.

>> BECAUSE HE WAS EQUALLY  
CULPABLE WITH ARNOLD, YES.

>> BUT IF WE FIND.

>> IF HE'S NOT EQUALLY --

>> IF WE FIND NAT HE IS -- THAT  
HE IS MORE CULPABLE BECAUSE  
AGAIN NOW OBVIOUSLY IF THERE  
WAS, IF YOU HAD SOME OTHER  
WITNESSES THAT SAID SOME, YOU  
KNOW, WHO'VE GOT ARNOLD YOU ARE  
SAYING DECIDED TO WHERE TO GO  
TO ROB.

>> RIGHT.

>> THE VICTIM AND SO WAS, WAS,  
WAS THERE ANY EVIDENCE THAT  
ARNOLD DOMINATED?

>> NO.

>> HER?

>> NO I WOULD SAY THAT YOU GOT

TWO CRACKHEADS THAT ABOUT BOTH THE SAME CULPABILITY, SAME LEVEL OF PARTICIPATION. EXCEPT THAT HERNANDEZ IS THE ONE WHO ACTUALLY DOES THE MURDER BUT THAT DOESN'T MAKE ANY DIFFERENCE UNDER THE TISON ANALYSIS IN THE SENSE THAT ARNOLD SHOWED RECKLESS INDIFFERENCE TO MRS. EVERETTE LIFE BY GETTING HIM THE KNIFE AND MORE SIGNIFICANTLY, TRYING TO KILL HER HIMSELF. EVEN UNDER TISON HE'S EQUALLY CULPABLE.

SEE I'VE GONE INTO MY --

>> YOU'RE WELL INTO YOUR REBUTTAL IF YOU'D LIKE TO SAVE SOME TIME.

MR. LATHAN.

>> MAY IT PLEASE THE COURT, MRS. CHIEF JUSTICE.

THE ISSUE, WELL, I'LL TALK A LITTLE BIT ABOUT THE SHACKLING QUICKLY JUST TO GIVE SOME CONTEXT TO WHAT ACTUALLY TOOK PLACE AND WHAT, AND WHAT MR. MANCUSI ACTUALLY SAID WHEN HE WAS QUESTIONED MR. MANCUSI SAID ON THE QUESTIONS HE WAS ASKED WELL DID YOU SPEAK ABOUT WHAT YOU SAW WITH ANYBODY THAT YOU WERE NEXT TO?

AND HE SAID NO.

ARE YOU AWARE THAT ANYBODY, ARE YOU AWARE THAT ANYBODY NOTICED WHAT TOOK PLACE OR THIS, THIS INDIVIDUAL WALKING WITH THE SHACKLES, THE PERSON WITH THE BLACK PANTS WALKING WITH THE, WITH THE SHACKLES, AND HE SAID I DIDN'T SPEAK TO ANYBODY, NOBODY MADE REFERENCE OF IT TO ME, I DIDN'T SPEAK ABOUT IT TO ANYBODY ELSE.

THE TRIAL COURT HAD A, A, THE DETAILED HEARING WITH REGARDS TO MR. HERNANDEZ COMPORIMENT WHILE HE WAS INCARCERATED HE TALKS ABILITY THAT HE WAS -- HE VIOLENTLY ASSAULTED A JAIL, JAIL EMPLOYEE AND AGAIN, I KNOW THIS IS CONCEDED.

I KNOW THE DEFENSE ACTUALLY

CONCEDED THAT THE SHACKLING WAS APPROPRIATE.

IN DECK THAT RECENT -- WITH THE UNITED STATES SUPREME COURT AND ACTUALLY MAKES REFERENCE TO THE FACT THAT THERE WILL BE INCIDENTS WHERE SHACKLING WILL TAKE PLACE --

>> YOUR OPPONENT SEEMS TO TAKE THE POSITION THAT ONCE THE, THE, SOMEONE OBSERVES THE SHACKLING, AND THERE WAS THE POSSIBILITY, AND THE POSSIBILITY THAT OTHER PERSPECTIVE JURORS SAW THE SHACKLING THAT WE SHOULD JUST START AT THAT POINT WITH ANOTHER JURY PANEL AND PROCEED FROM THERE TO MAKE -- AND THEN MAKE SURE THAT OTHER PEOPLE WILL NOT SEE THE SHACKLING AND HOW DOES THAT SQUARE WITH THE CASE LAW?

WHAT IS THE TRIAL JUDGE'S OBLIGATION ONCE SOMEONE HAS OBSERVED IT?

>> WELL, WELL I THINK THAT THE TRIAL COURT MADE THE CORRECT OBSERVATION WHEN THEY SAID THERE WILL BE INSTANCE WHEREAS, IN THE CASE OF, OF A TWO-WEEK TRIAL OR WHAT HAVE YOU, YOU'RE GOING -- THERE WILL BE SOMEBODY WHO -- IT'S ILLOGICAL TO THINK THAT NOBODY WILL ACTUALLY NOTICE THAT --

>> BUT ISN'T HIS OBLIGATION TO TRY TO NEGATE THAT? BECAUSE ISN'T THAT THE WHOLE POINT OF THE SHACKLING LAW IS THAT YOU DON'T WANT PERSPECTIVE JURORS TO SEE THE DEFENDANT SHACKLED AND MAKE WHATEVER CONCLUSIONS THEY DRAW FROM A PERSON BEING SHACKLING?

>> WELL, THE CASE LAW SAYS IT'S INHERENTLY PREJUDICIAL BUT IT IS WITHIN THE TRIAL COURT'S DISCRETION PROVIDED THERE IS SOME UNDERLYING SPECIFIC INTEREST RELATED TO THE SPECIFIC FACTS OF THIS SPECIFIC TRIAL, AND THIS IS WHAT TOOK PLACE, THAT WAS THE PURPOSE OF

THE HEARING IT WAS SPECIFIC FINDINGS WERE MADE AFTER THIS PARTICULAR DEFENDANT IN CASES LIKE DECK ACTUALLY STAND FOR THAT PROPOSITION.

MOREOVER, THIS COURT SEPTEMBER 4th CAME OUT WITH

HARRY JONES v. McNEAL AND THIS WAS A POSTCONVICTION ISSUE BUT ONE OF THE -- THERE WAS AN IAC CLAIM RAISED ABOUT SHACKLING AND ONE OF THE OBSERVATIONS AT THIS COURT MADES WAS THERE WAS NO SHOWING THAT -- THERE HAD BEEN NO SHOWING MADE THAT ANY JUROR ACTUALLY SAW THE INDIVIDUAL, THE DEFENDANT WEARING SHACKLES.

IN THIS, ON THIS RECORD THAT WE HAVE WE HAVE NO SHOWING THAT ANY JUROR SAW SHACKLES.

ALL WE HAVE IS MR. MANCUSI IF YOU LOOK AT HIS VOIR DIRE QUESTIONING HE MAKES REFERENCE TO THE FACT HE WAS A RATHER RELUCTANT JUROR FROM THE BEGINNING HE HAD SOME FAMILIARITY WITH THE CASE BEFOREHAND HE HAD HEARD SOME STUFF BEFORE IT AND THEN HE TALKS ABOUT HE WAS AROUND PEOPLE AND HE SAW THIS, THESE BLACK LEGS, BLACK PANTS WALKING UNDERNEATH THIS, THIS CHALKBOARD.

AND HE ASSUMED IT WAS THE DEFENDANT.

AND THERE SEEMS TO BE THE IMPLICATION FROM THE, FROM THE, ON THE RECORD IS THAT ALL THE PARTIES SEALED TO CONCEDE IT PROBABLY WAS BUT THERE IS NO DEFINITE FINDERS WITH REGARDS ONE WAY OR THE OTHER.

BUT AGAIN SPECIFIC FINDINGS WERE MADE.

SPECIFICALLY RELATED TO THIS PARTICULAR DEFENDANT, AND YOU KNOW, THIS WAS WELL WITHIN THE TRIAL COURT'S DISCRETION AND SO DECK IS COGNIZANT THERE ARE INSTANCE WHERES VISIBLE SHACKLES IS PERMISSIBLE PROVIDED THERE IS THIS TYPE OF

UNDERLYING RATIONALE IS PROVIDED BY THE TRIAL COURT. I JUST WANT TO TALK ALSO QUICKLY ABOUT THE SECOND ISSUE THAT'S RAISED AND THAT GETS --

>> DON'T TALK QUICKLY ABOUT THAT ONE.

LET'S TALK SLOWLY ABOUT THAT ONE.

>> OKAY.

LET'S TALK SLOWLY.

>> FOR ME AT LEAST.

>> NO, I UNDERSTAND.

>> I HAVE, YOU KNOW, I WAS SOMEHOW LOOKING AT JUST PROPORTIONALITY AND I WANT TO GO BACK TO WHAT OUR CASE LAW HAS SAID, WHICH IS THAT, AND IT SEEMS LIKE YOU HAVE IN YOUR BRIEF CONCEDED THAT WHERE A CO-DEFENDANT IS EQUALLY OR MORE CULPABLE DISPARATE TREATMENT OF THE CO-DEFENDANT MAY RENDER PUNISHMENT DISPROPORTIONAL.

YOU SEEM TO ARGUE FIRST THE TRIAL COURT MADE A FINDING THAT IN THIS CASE THE CO-DEFENDANT WAS MORE CULPABLE.

NOW, WE, THAT'S ONE -- I MEAN, SO ARE YOU -- IS THAT YOUR ARGUMENT THAT HE IS MORE CULPABLE OR ARE YOU SAYING THAT EVEN IF HE IS EQUALLY CULPABLE THE DEATH SENTENCE IS STILL JUSTIFIED?

>> I'LL TAKE -- FIRST THE FIRST PART OF YOUR QUESTION.

THE FACTS IS CLEAR FROM THIS RECORD THAT HERNANDEZ WAS THE MORE CULPABLE PARTY WITH REGARDS TO THESE TWO.

I THINK JUSTICE CANADY, WHAT HAPPENED WAS THEY HAD THIS ROUX THEY WANTED TO GET MONEY FROM DAVID EVERETTE.

RUTH EVERETTE HAPPENED TO BE THERE.

>> WHO KNEW THE EVERETTES.

>> ARNHOLD A PRIOR ACQUAINTANCE THEY WERE BOTH ROOFERS THEY HAD APPARENTLY SMOKED CRACK TOGETHER A COUPLE OF TIMES.

>> ARNOLD DID KNOW HIM.

>> ARNOLD KNEW HIM.

>> SO WHO'S IDEA WAS IT TO GO TO EVERETTE'S HOUSE.

>> ARNOLD KNEW IT AND ARNOLD HAD BEEN A SUPPLIER TO EVERETTE.

EXCUSE ME, RIGHT.

EVERETTE HAD SUPPLIED TO DRUGS TO ARNOLD ON OCCASION.

>> WHO BROUGHT WEAPONS TO THE HOW HOUSE?

>> ACCORDING TO THE RECORD, THIS WAS, THIS WAS A THREE-INCH KNIFE THAT THEY HAD USED TO CUT A CRACK ROCK.

SO.

>> WHO BROUGHT IT.

>> LET'S BE CLEAR ABOUT WHAT TOOK PLACE THOUGH.

ARNOLD THEN GOES TO THE BATHROOM, USES THE PILLOW, SAYS LOOK, I CAN'T DO THIS.

>> OKAY BUT THE IDEA WAS, WHOSE PLAN WAS IT TO GO MURDER.

>> THE PLAN -- THE PLAN WAS TO ROB.

THE PLAN WAS NOT TO -- THE MURDER -- THE ROBBERY, THE ROBBERY MAY HAVE BEEN COMING OUT OF THE MIND OF, OF, OF, OF, OF ARNOLD BUT THE MURDER WAS ACCOMPLISHED AND EFFECTUATED BY HERNANDEZ I DON'T THINK WHAT WE HAVE HERE.

>> I DON'T UNDERSTAND SOMETHING.

IF ARNOLD, THEY COME IN, DO THEY ROB THE VICTIM?

>> WELL, THEY GET HER, THEY GET HER PURSE AND AFTERWARDS AND THEY, THEY, THEY TAKE HER ATM CARD.

>> AFTER SHE -- SO WHOSE IDEA WAS IT TO START?

YOU SAID THAT AT SOME POINT ARNOLD SAID HE STARTS TO SUFFOCATE THE VICTIM AND SAYS I CAN'T GO THROUGH WITH IT.

>> HE TAKES THE PILLOW AND SAYS -- AND THEN PULLS OFF, SEES THAT SHE BEGINS HYPERVENTILATING TRYING TO GET IT BACK TO HELP HER WITH HER BREATHING TO PERHAPS

RESUSCITATE HER YOU KNOW TO  
WHATEVER THE INSTANCE WAS HER  
-- THEY MAKE REFERENCE IN THE  
RECORD TO THE FACT THAT SHE  
APPEARED TO BE HYPERVENTILATING  
AND HE WANTED TO ALLAY HER  
CONCERNS AND STOP.

STOP HER FROM I GUESS HER HEAVY  
BREATHING.

THIS DISGUSTED HERNANDEZ.

HERNANDEZ CALLS HIM A  
DERISIVE NAME.

IT'S IN THE BRIEF.

HOW THE MURDSEER DESCRIBED HE  
LITERALLY GRABS HER AROUND THE  
NECK AND CRUSHES HER NECK AND  
THEN HE TAKES THE KNIFE AND HE  
SLASHES HER, SLASHES HER  
THROAT.

SO THE ARGUMENT IS HERNANDEZ IS  
THE ONE IF YOU ARE GOING TO  
WEIGH THE CULPABILITY OF THESE  
TWO INDIVIDUALS WITH REGARDS TO  
ACTUALLY WHAT HAPPENED WITH  
REGARD TO THIS MURDER THIS WAS  
HERNANDEZ'S, HERNANDEZ CHOKED  
HER AND HERNANDEZ CUT HER  
THROAT.

THE MEDICAL EXPERT SAID THAT  
HER INJURIES WERE DIRECTLY  
CAUSED BY THE INJURIES WHICH  
OCCURRED TO HER NECK WITH THE,  
BOTH THE NECK, THE, THE TRAUMA  
TO THE NECK AND THE, AND THE  
THROAT SLASHING SO THIS, IF YOU  
WANT TO COMPARE WHAT THE TWO  
INDIVIDUALS DO YOU HAVE ONE  
PERSON SAY LOOK I CAN'T DO THIS  
I CAN'T GO THROUGH WITH THIS  
AND THE OTHER PERSON SAID  
BASICALLY YOU'RE, I WOULD SAY  
THE NICE WAY TO SAY YOU'RE A  
WIMP, LET ME TAKE --

>> THAT CAME OUT THROUGH  
HERNANDEZ'S CONFESSION.

>> HERNANDEZ' CONFESSION HE  
MAKES THAT AND HE ALSO SAYS TO  
THIS HARTMAN ANOTHER PERSON I  
GUESS WHO WAS A FAMILY FRIEND  
AND ACQUAINTANCE THAT THEY --  
THESE WERE A GROUP OF FRIENDS  
THEY ALL SEEMED TO KNOW ONE  
ANOTHER.

>> GETTING YOU TO SLOW DOWN

JUST A LITTLE BIT.

>> SORRY.

>> THAT'S ALL RIGHT.

WE ALL GET EXCITED AS WE DO  
THESE THINGS.

>> PASSIONATE.

>> WELL, I UNDERSTAND THAT.  
I APPRECIATE THAT.

BUT IN HELPING US TO UNDERSTAND  
THE EVENTS OF THE DAY, AS THEY  
WERE GOING OVER TO THIS HOUSE..

>> MM-HMM.

>> IS THE RECORD CLEAR AS TO  
WHO THEY EXPECTED TO BE THERE?  
WHAT THEY EXPECTED TO DO?  
OR ONE OR THE OTHER?

>> THE ASSUMPTION WAS THAT THEY  
WERE GOING TO RUN INTO DAVID  
EVERETTE.

>> OKAY, SO THE PLAN WAS NOT TO  
GO HURT THIS LADY.

THE PLAN WAS TO GO SEE THE GUY.

>> RIGHT.

>> AND, YEAH, GET, GET EITHER  
APPARENTLY GETTING THIS MONEY  
MAYBE GET CRACK BUT THE PLAN  
WAS TO GO SEE HIM.

HE ACTUALLY WENT TO WORK THAT  
DAY.

HIS MOTHER HAD DRIVEN HIM TO  
WORK THAT DAY AND SO SHE JUST  
HAD UNFORTUNATE HAPPENSTANCE  
SHE WAS ACTUALLY HOME THEY WENT  
TO THE HOUSE WITH I SPEAK TO  
SNAPPER.

SNAPPER IS HIS STREET NAME, AND  
THEN THEY BROUGHT HER INTO THE  
HOUSE AND THIS IS --

>> THAT'S WHO THEY ASKED FOR?  
AND THIS INDIVIDUAL WAS NOT  
THERE.

IS THAT AT THAT POINT WHEN SHE  
WAS THEN FORCED INTO THE HOUSE?

>> YES.

YES.

AND THEN THEY, THEN SHE WAS  
FORCED INTO THE HOUSE AND, AND  
THEN THE SUBSEQUENT SERIES OF  
EVENTS TOOK PLACE.

>> AND CCP WAS NOT, AN  
AGGRAVATOR.

>> NO.

NO.

THAT WAS NOT.

>> IN TERMS OF IF WE DECIDE THAT THE JUDGE'S FINDING WHICH SEEMS TO BE WHAT YOU'RE SAYING WHICH IS THAT THE, THAT HERNANDEZ WAS MORE CULPABLE IN THIS CASE BECAUSE HE ACTUALLY WAS THE PROCURING FORCE OF THE MURDER.

>> YES.

>> AS OPPOSED TO YOU -- DIDN'T YOU SAY ARNOLD WAS, YOU KNOW, WAS THERE.

HE KNEW WHO THE PERSON WAS. THOSE THINGS THAT OBVIOUSLY THAT YOU PLED TO FIRST-DEGREE MURDER.

>> MM-HMM.

>> SO HE'S VERY SIGNIFICANTLY INVOLVED IN THIS CASE.

>> MM-HMM.

>> CORRECT?

>> ARNOLD.

ON PROPORTIONALITY ISSUES, AND IN TERMS OF LOOKING AT WHETHER YOU DO COMPARE DEFENDANTS, AND THIS IS ALWAYS CONFIRMING.

THIS DEFENDANT WHAT'S THE WORST POSSIBLE, YOU KNOW, CHILDHOOD YOU COULD HAVE, THIS CHILDHOOD IS PRETTY FAR UP THERE IN TERMS OF A PRETTY AWFUL CHILDHOOD.

>> I THINK ANYBODY WOULD SAY HERNANDEZ, THIS IS A TOUGH CHILDHOOD.

>> HE IS 23 AT THE TIME.

>> YES.

>> AND HE HAD THE JUDGE FOUND THAT HE HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY AT THE TIME HE COMMITTED THE CAPITAL.

>> RIGHT.

>> FELONY.

>> RIGHT.

>> AS YOU SAID, THEY'RE CRACKHEADS.

>> THEY WERE, LIKE YOU SAY THEY WERE MINOR THEY WERE CRIMES FOR EXAMPLE THERE WAS A, A BURG HEAR IN TENNESSEE THAT A PRIOR EMPLOYER AND THEY REDUCED IT TO, TO PETTY THEFT SO BASICALLY THERE WAS A FINDING OF NO.

>> DO WE KNOW ABOUT ARNOLD --

HOW OLD WAS ARNOLD?

>> YEAH,.

>> NOT IN THE RECORD?

>> I --

>> TEE ME THIS IS -- WHEN WE THINK OF THE LAST CASE WHERE YOU HAD AN OLDER BROTHER AND WHO WAS THE --

>> YEAH I THINK THERE WAS -- THEY WERE CONTEMPORANEOUS IN TERMS OF AGE.

ONE WASN'T SIGNIFICANTLY OLDER.

>> DOES ARNOLD HAVE A SIGNIFICANT CRIMINAL HISTORY? DO WE KNOW THAT?

>> WHAT WE DO KNOW IS THAT AGAIN IT'S NOT REALLY DEVELOPED ENTIRELY IN THE RECORD.

WE DO KNOW THAT THESE ARE PEOPLE WITH LONG-STANDING ADDICTION ISSUES BUT THERE IS

--

>> THE RECORD -- THE RECORD WASN'T DEVELOPED THEN ABOUT THE COMPARATIVE CULPABILITY -- FOR THE JURY, THE COMPARATIVE CULPABILITY OF ARNOLD AND HERNANDEZ?

>> -- THIS RECORD DOESN'T --

>> RIGHT THE -- WAS ON HERNANDEZ AND I DO WANT TO EMPHASIZE, AGAIN, THE SUGGESTION THAT THIS FALLS WITHIN THE RUBRIC OF TISON AND, THIS IS NOT A SITUATION WHERE SOMEONE HAD TANGENTIAL RELATIONSHIP OR WAS A GETAWAY DRIVER. HERNANDEZ EFFECTUATED A BRUTAL CRIME.

THIS VICTIM WAS FIGHTING BACK. I MEAN THERE WAS -- THERE WAS DNA UNDERNEATH THE FINGERNAILS. I'M SORRY.

I JUST WANT TO MAKE SURE --

>> I KNOW, I KNOW THIS IS A BRUTAL CRIME BUT WE ARE REALLY DEALING MORE HERE WITH THE CO-DEFENDANT THAT GETS LIFE AND JUST TRYING TO UNDERSTAND WHERE THAT GOES T. LOOKS TO ME LIKE WHETHER DEFENDANT ACTED UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON WAS THE TRIAL

JUDGE SAYS THE DEFENSE SEEMS TO HAVE ABANDONED ITS ARGUMENTS REGARDING THE APPLICABILITY OF THESE FACTORS AND I THINK AGAIN HEARING TODAY NOBODY IS TRYING TO ARGUE THAT HERNANDEZ WAS LESS CULPABLE.

CORRECT?

>> RIGHT.

>> I'D LIKE YOU TO JUST ADDRESS A POINT THAT MR. ^DAVIS DIDN'T GET TO AND THAT IS ALLOWING THE STATE EXPERT, DR. ^McCLAREN TO SIT IN THE ENTIRE PENALTY PHASE AND, YOU KNOW, BY THEIR APPROACH ESSENTIALLY TAILOR HIS TESTIMONY TO WHAT WAS --

>> I WOULD HESITATE -- I DON'T THINK THAT I THINK A FEW THINGS NEED TO BE --

>> WASN'T THAT WHAT THEIR POINT IS?

>> THAT'S WHAT THEIR ARGUMENT IS.

>> LET'S NOT TALK OVER ONE ANOTHER.

>> ALL RIGHT.

OKAY.

>> IT REALLY IS HELPFUL, ESPECIALLY FOR JUSTIN ANSTEAD IF I CAN ASK A QUESTION AND THEN YOU CAN ANSWER IT. SO I WANT YOU TO ADDRESS THE POINT THAT THEY'VE RAISED THAT DR. ^McCLAREN WAS ALLOWED TO SIT IN THE ENTIRE PENALTY PHASE AND THEREFORE TAILOR HIS PENALTY PHASE MENTAL HEALTH TESTIMONY ON BEHALF OF THE STATE BECAUSE OF WHAT HE LISTENED TO.

AND THAT WAS VIOLATED THE RULE OF -- WOULD YOU ADDRESS THAT.

>> RIGHT.

I APOLOGIZE, YOUR HONOR, IF I WAS SPEAKING OVER.

AS THIS COURT HAS RECOGNIZED IT WAS WITHIN THE TRIAL COURT'S DISCRETION TO ALLOW, AND I, IN CASE PONT SELLY, THIS COURT MADE THE, MADE REFERENCES WHEN THE COURT HAS GREAT DISCRETION TO ALLOW AN EXPERT TO, TO, TO REMAIN WITHIN, TO REMAIN -- THE, THE RULE OF SEQUESTRATION

IS INVOLVES GREAT DISCRETION.  
AS THIS COURT HAS ALL THE WAY  
BACK TO BURNS IN 92 AND  
STRASER.

I BELIEVE IN 96, I BELIEVE IT  
HAS BEEN RECOGNIZED THERE WILL  
BE INSTANCES WHERE WITNESS --  
EXCUSE ME, EXPERT STATE EXPERT  
WILL, WILL BE PERMITTED TO  
STAY, REMAIN WITHIN THE

>> REMAIN WITHIN THE COURTROOM.  
THERE'S NO SUGGESTION,  
PARTICULARLY IN THIS CASE THAT  
THE TESTIMONY OF McCLAREN WAS  
SOMEHOW ALTERED OR EFFECTED BY  
WHAT HE HEARD FROM DR. BINGHAM  
OR DR. TURNER.

IF YOU LOOK AT THE SENTENCING  
ORDER, THE TRIAL COURT  
ACTUALLY -- WHEN HE'S EVALUATING  
THE MENTAL HEALTH PROBLEMS OF  
HERNANDEZ --

>> DO WE HAVE IN THIS RECORD A  
FILE REPORT BY THE MENTAL HEALTH  
EXPERT THAT WE COULD POSSIBLY  
COMPARE WHAT HE SAYS AT TRIAL  
WITH WHAT HIS REPORT WAS ON THIS  
DEFENDANT?

>> YES.

AND I HAVE TO -- THERE IS --  
APPARENTLY THERE WAS, YOU KNOW,  
THERE WERE FINDINGS, I MEAN,  
FINDINGS THAT WERE MADE WITH, BY  
McCLAREN.

I JUST WANT TO MAKE SURE THAT  
THE COURT UNDERSTANDS THAT  
TURNER, BINGHAM, AND McCLAREN  
ALL SORT OF MAKE THESE SORT OF  
VERY GENERALIZED -- I MEAN, ALL  
FIND SIMILAR CONCLUSIONS ABOUT  
WHETHER THE VARIETY OF  
PERSONALITY DISORDER IS  
ACKNOWLEDGED TO THE EXTENT  
WHICH, YOU KNOW, THE CHILD HAD  
DISCUSSED THE EXTENT OF HIS  
LIFE.

AND SO --

>> BUT I THINK WHAT WE'RE TRYING  
TO GET AT IS THERE -- IF HE DID  
NOT TAILOR HIS -- YOU'RE SAYING  
HE DID NOT TAILOR HIS TESTIMONY  
BASED ON WHAT HE HEARD WHILE HE  
WAS SITTING IN THE COURTROOM.

>> RIGHT.

>> BUT IS THERE SOME OBJECTIVE WAY WE CAN MAKE THAT COMPARISON? THE REPORTS THAT HE GAVE TO SEE THAT THERE WAS NO TAILORING OF HIS --

>> RIGHT.

I BELIEVE THE RECORD THAT IS THERE IS RECORD FROM, I BELIEVE TURNER, BINGHAM AND McCLAREN ALL PROVIDED PROCEEDINGS, I BELIEVE THEY HAVE.

IT IS IN THE RECORD WITH THEIR EVALUATIONS OF HERNANDEZ BEFOREHAND.

BUT, AGAIN, THIS WAS SORT OF, THIS WAS A DISCRETIONARY CALL.

>> SO IS THE RULE OF PONTICELLI THAT --

>> NO, I JUST WANT TO SAY THAT -- I'M NOT SAYING THAT PONTICELLI -- I'M JUST SAYING IT'S WHEN THE COURT'S --

>> SO IS THERE A -- WOULD THE RULE EMERGE FROM THIS THAT REALLY SINCE IT'S THE PENALTY PHASE THAT EXPERTS CAN JUST SIT IN?

I JUST WANT TO UNDERSTAND THAT -- IN A COURTROOM AND LISTEN TO THE TESTIMONY OF EVERYONE ELSE?

CAN, IN OTHER WORDS, CAN YOU ALLOW, BECAUSE A LOT OF TIMES YOU'VE GOT A SITUATION WHERE YOU HEAR TWO OF THE DEFENDANT'S EXPERTS, AND IT'S AS IF THEY HADN'T TALKED TO EACH OTHER BEFORE, SO OBVIOUSLY IT WOULD BE VERY HELPFUL FOR A DEFENDANT SITTING IN WHILE THE OTHER EXPERT TESTIFIED.

IS THAT OKAY?

>> WE CAN, WE CAN TELL BY WHAT ACTUALLY -- I MEAN, AGAIN, WE SORT OF, WE SORT OF HAVE TO GO ON THE RECORD THAT WE HAVE AND WE SORT OF RELY ON THE DISCRETION [INAUDIBLE] AFFORDED THE DISCRETION OF THE TRIAL COURT.

>> THE COURT HAS LONG DRAWN A DISTINCTION BETWEEN THE RULE OF SEQUESTRATION AS IT APPLIES TO

FACTUAL WITNESSES AND AS IT APPLIES TO EXPERT WITNESSES, CORRECT?

>> YES.

>> AND THE POINT BEING THAT AN EXPERT IS THERE TO GIVE AN OPINION, AND THAT OPINION IS NOT GOING TO BE -- OR THE TRIAL COURT COULD DETERMINE THAT IT WOULD NOT BE HARMFUL FOR THE TRIAL, FOR THAT EXPERT IN RESPECT TO THE EXPERT'S OPINION TO HEAR THE ACTUAL FACTS. OR WHAT IS PRESENTED BY OTHER WITNESSES AT THE TRIAL.

>> RIGHT.

>> AND THIS COURT, AS A COURT, SEEMS TO ME I DON'T -- HAS THERE BEEN ANY AUTHORITY OUT OF THIS COURT TO THE CONTRARY?

>> NO.

NO, YOUR HONOR.

NO.

>> SO THEN, AGAIN, I MEAN, I DON'T -- I'M ASKING YOU JUST AS AN OFFICER OF THE COURT THEN IT WOULD SEEM TO ME IF THAT'S TRUE, THAT REALLY WE OUGHT TO ALLOW EXPERTS IN PENALTY PHASES TO SIT IN.

YOU KNOW, MAYBE THAT'S A GOOD THING BECAUSE OF WHAT JUSTICE WELLS IS SAYING.

I JUST DIDN'T KNOW WE HAD GOT ON THAT POINT BECAUSE I DON'T REMEMBER THIS ISSUE EITHER BEING RAISED OR EVER SEEING THE FACT THAT AN EXPERT SITS IN DURING THE ENTIRE PENALTY PHASE.

>> RIGHT.

NO, FIRST TIME I'VE EVER HAD TO CONFRONT IT AS WELL IN THE BRIEF ISSUES I'VE HAD WITH THIS COURT.

>> BUT YOU REALLY ARE TELLING US IT'S WITHIN THE TRIAL JUDGE'S DISCRETION, THAT HE COULD HAVE ALLOWED THE DEFENSE EXPERT TO SIT IN THE COURTROOM --

>> YES.

>> -- AND LISTEN TO THESE WITNESSES.

AND WE HAVE JUST LEFT THAT, AS LONG AS IT'S AN EXPERT WITNESS,

WE'VE SORT OF LEFT THAT TO THE DISCRETION OF THE COURT?

>> YES.

>> BUT CANDIDLY YOU SAID IT HADN'T COME UP IN A CASE.

>> NO, I'M TALKING ABOUT --

>> BUT IS THERE A CASE OUT THERE THAT STANDS FOR THAT PROPOSITION?

>> THAT ALLOWS THE STATE --

>> ALLOW ANY EXPERT IN THE PENALTY PHASE IS FINE.

>> I MEAN, I KNOW IN BURNS I THINK THERE WAS A STATEMENT WITH REGARDS -- AND I ACTUALLY HAVE QUOTED THE LANGUAGE RIGHT HERE -- TALKING ABOUT THE TRIAL COURT DID NOT ABUSE DISCRETION BY EXEMPTING BOTH THE STATE AND DEFENSE EXPERTS FROM THE SEQUESTRATION RULE.

>> IS THERE SOME STANDARDS THAT ARE APPLICABLE IN MAKING OR EXERCISING THAT DISCRETION?

WHAT IS A TRIAL JUDGE TO LOOK TO IF IT'S NOT A BLANKET RULE --

>> RIGHT.

>> -- WHAT ARE THE PARAMETERS OF SITTING IN?

OR ARE THERE ANY?

OR JUST SAY, WELL, NO, I THINK SHOULD SIT IN.

WHAT GUIDES THE APPLICATION OF THE RULE?

>> CERTAINLY, AGAIN, I WOULD BE RELUCTANT TO FASHION SOME OVERARCHING RULE WITH REGARDS TO WHETHER THEY CAN OR CANNOT.

I SIMPLY DO BELIEVE THAT WHEN YOU HAVE AN EXPERT WHO THESE ARE ALL INFORMATION, ALL THESE VARIOUS EXPERTS AND THE THREE EXPERTS IN THIS PARTICULAR CASE ALL SEEM TO REACH VERY SIMILAR CONCLUSIONS WITH REGARDS TO THIS PARTICULAR INDIVIDUAL.

IT DOESN'T SEEM TO BE THE HARMER, THERE DOESN'T SEEM TO BE -- I THINK WE'VE BECOME CONCERNED WHETHER THERE'S INCIDENCES OR SUGGESTIONS THAT SOMEHOW --

>> BUT THEN THAT WOULD SEEM TO

SUGGEST TO ME THAT YOU'RE SAYING  
IF THEY HAVE DISPARATE  
CONCLUSIONS ABOUT THE DEFENDANT,  
THEN IF THE TRIAL JUDGE ALLOWS  
THEM TO SIT IN, IT WOULD BE AN  
ABUSE OF DISCRETION TO ALLOW IT.  
BUT SINCE IN THIS INSTANCE THEY  
HAD SIMILAR --

>> I --

>> [INAUDIBLE] THE DEFENDANT,  
THEN IT'S OKAY IF THEY'RE  
SIMILAR.

BUT IF THEY'RE NOT SIMILAR, IT  
ISN'T OKAY?

>> NO.

AND I DON'T WANT TO COME OUT,  
SAY SOME RULE THAT -- THERE  
CERTAINLY MIGHT BE INSTANCES  
WHERE DEFENSE AND STATE EXPERTS  
MAY HAVE COME TO CONTRARY  
CONCLUSIONS, AND THEY BOTH HAVE  
SAT IN THE COURTROOM, SO I'D BE  
RELUCTANT TO MAKE SOME  
OVERARCHING LEAP LIKE THAT.

I JUST WANT TO MAKE SURE ON THIS  
RECORD THE QUESTION OF WHETHER  
OR NOT THERE WAS -- WITH REGARDS  
TO ALLOWING McCLAREN TO STAY  
IN.

ON THIS RECORD WE DON'T HAVE  
ANYTHING, YOU KNOW, ANY  
SUGGESTION ONE WAY OR THE OTHER.

>> IT SEEMS TO ME THAT IF WE --  
WITHOUT ANY GUIDELINES OF WHAT  
WOULD CONSTITUTE HOW THE JUDGE  
WOULD EXERCISE DISCRETION, THE  
BEST YOU MIGHT SAY HERE -- AND  
MAYBE IT'S WHAT YOU'RE ALSO  
SAYING -- IS THAT IN THIS CASE  
SINCE THERE ISN'T ANY VARIATION  
BETWEEN McCLAREN'S REPORT AND  
WHAT HE TESTIFIED TO AND THERE'S  
NOT ANY SIGNIFICANT VARIATION  
FROM THE EXPERTS, ANYTHING HE  
LEARNED IN THE COURTROOM, THAT  
IT'S HARMLESS.

IF IT IS ERROR, IT'S HARMLESS  
BEYOND A REASONABLE DOUBT.  
IS THAT YOUR POSITION?

>> YES.

CERTAINLY, YOUR HONOR, TO THE  
EXTENT THAT -- WELL --

>> BECAUSE YOU CAN'T MAKE -- IF

YOU'RE A TRIAL JUDGE, THE TRIAL JUDGE ISN'T GOING TO SAY I'M GOING TO LET THIS EXPERT IN IF YOU CAN GUARANTEE ME HE'S GOING TO TESTIFY JUST LIKE HE TESTIFIED -- WHAT HE SAYS OR SHE SAYS IN THE REPORT.

AND IF THERE'S NOT GOING TO BE A DISPARITY.

THAT WOULD BE AN AFTER-THE-FACT SITUATION WHERE THEY HELPED OR HARM, THEY HELPED OR NOT HELP BY SITTING IN.

THAT'S WHAT SEQUESTRATION HAS TO DO WITH.

SO IT SEEMS THAT WITHOUT GUIDELINES THAT WE OUGHT TO, IN THIS CASE AT LEAST, SAY WE'LL FIGURE OUT IF THERE ARE ANY GUIDELINES, BUT IN THE CASE EVEN IF IT WAS ERROR, BECAUSE OF WHAT YOU'VE SAID IT REALLY DIDN'T EFFECT McCLAREN'S TESTIMONY.

>> EXACTLY.  
EXACTLY.

>> LET ME ASK YOU A QUESTION ABOUT -- WHAT IS THE EVIDENCE IN THIS CASE THAT SUPPORTS THE AGGRAVATING FACTOR OF AVOID ARREST?

>> THERE WAS TESTIMONY FROM DIVINE HARTMAN.

HARTMAN WAS A FAMILY FRIEND OF HERNANDEZ.

SHE SPOKE WITH HIM WHILE HE WAS INCARCERATED, AND APPARENTLY HERNANDEZ CONFESSED TO HER, YOU KNOW, THE REASON THAT HE KILLED RUTH EVERETTE WAS BECAUSE SHE HAD SEEN THEIR FACES.

SHE TESTIFIED TO THIS AT TRIAL --

>> SO THE ONLY EVIDENCE WE HAVE IS THIS STATEMENT BY MR. HERNANDEZ THAT SAYS THAT'S WHY HE DID IT.

>> YEAH.

AND THE QUESTION IS ASKED TO HER TWICE, WELL, AGAIN, WHY DID HE SAY THAT HE DID IT?

AND HE SAID THAT BECAUSE, BECAUSE SHE HAD SEEN OUR FACES. THE TRIAL COURT IN THE

SENTENCING ORDER MAKES REFERENCE TO THE FACT THEY RELIED ON THIS TESTIMONY, FOUND HARTMAN TO BE A CREDIBLE WITNESS.

HE MAKES REFERENCE IN VARIOUS OTHER PARTS OF THE SENTENCING ORDER SHE WAS VERY UPSET ON THE STAND TALKING ABOUT VARIOUS ASPECTS OF HER TESTIMONY.

SO SHE MAKES REFERENCE TO THE FACT THAT SHE HAD NO AX TO GRIND WITH HERNANDEZ, SHE LOVED HIM VERY MUCH, BUT SHE SAID HERNANDEZ TOLD HARTMAN, HARTMAN TESTIFIED TO THIS FACT AT TRIAL.

IF THERE'S NO OTHER QUESTIONS, YOUR HONOR, WE'D ASK THAT YOU AFFIRM THE SENTENCE OF MICHAEL HERNANDEZ.

THANK YOU.

>> MR. DAVIS, YOU HAVE A COUPLE MORE MINUTES.

>> THANK YOU.

WELL, LET ME -- JUSTICE PARIENTE, SECTION 90.616 CODIFIES THE RULE SEQUESTRATION, AND THERE'S A SUBPARAGRAPH, C, THAT YOU CAN EXCUSE SOMEBODY FROM THE RULE OF SEQUESTRATION IF THEIR PRESENCE -- A PERSON WHOSE PRESENCE IS SHOWN BY THE PARTY'S ATTORNEY TO BE ESSENTIAL TO THE PRESENTATION OF THE PARTY'S CAUSE.

McCLAREN -- ALSO I DON'T RECALL IN THE RECORD THAT I SAW ANY REPORT OF DR. McCLAREN'S IN THE RECORD.

THERE MAY BE, BUT I JUST DIDN'T SEE IT.

IT WAS NOT NECESSARY FOR DR. McCLAREN TO SIT IN THERE. HE HAD SIX MONTHS.

HE WAS APPOINTED SIX MONTHS BEFORE THE TRIAL TO GET HIMSELF READY.

>> LET'S JUST -- BUT WHAT YOU'RE -- IN YOUR EXPERIENCE AS AN APPELLATE LAWYER DEALING WITH THIS CASE, IS IT REGULARLY THE CASE IN PENALTY PHASES THAT EXPERTS, BOTH DEFENDANT'S AND THE STATE'S, DO SIT IN?

>> WHAT'S -- IT'S NOT FUNNY, BUT

INTERESTING.

I'VE GOT ANOTHER CASE IN WHICH DR. McCLAREN TESTIFIED, HE DID THE EXACT SAME THING.

>> [INAUDIBLE]

>> THAT'S THE ONLY ONE I'VE SEEN THAT IN.

THAT'S WHY IT'S KIND OF FUNNY, DR. McCLAREN'S THE ONLY ONE I'VE SEEN DO THAT.

>> IF I WERE A DEFENSE LAWYER, I'D LIKE MY EXPERTS TO SIT IN BECAUSE I'D MAKE SURE THEY TESTIFIED CONSISTENTLY.

>> WELL, IF I WAS SEEING DR. McCLAREN, I'D OBJECT TO IT --

>> WE HAVE CASES OUT OF THIS COURT THAT WOULD SAY IT IS WITHIN THE DISCRETION OF THE TRIAL COURT TO ALLOW AN EXPERT TO SIT IN WHILE TESTIMONY IS BEING GIVEN.

>> AND I'M ASSUMING THAT DISCRETION IS BOUNDED, AND I THINK THAT'S WHAT YOU'RE GETTING TO AS A STANDARD.

AS YOU LOOK AT 916, SUBPARAGRAPH 2C IF THAT PRESENCE IS ESSENTIAL TO THE PRESENTATION OF THE PARTY'S CAUSE.

AND THERE'S A CASE, BURNS WHICH MR. LATHAM CITES, WHICH TALKS ABOUT ABOUT THIS IS THE ONLY OPPORTUNITY I THINK STATE PSYCHOLOGISTS HAD TO LOOK AT THE DEFENDANT.

SO THAT WAS NECESSARY.

IN THIS CASE DR. McCLAREN HAS SIX MONTHS, THERE'S NO NEED --

>> WHAT IS THE -- LET'S JUST SAY IT WAS ABUSE.

WHERE IS THE HARM IN THIS CASE? McCLAREN TESTIFIES PRETTY CONSISTENTLY WITH YOUR EXPERTS.

>> WELL, NO, HE DIDN'T. HE DIDN'T.

HE MADE -- HE -- WHAT HE'S DOING, FIRST OF ALL, HE KIND OF SHADED HIS TESTIMONY IN THE SENSE -- I DON'T MEAN THAT IN AN EVIL SENSE, BUT IN THE SENSE HE DIDN'T FIND THE MITIGATORS THAT

THE DEFENSE COUNSEL, DEFENSE  
PSYCHOLOGISTS FOUND.  
BUT I THINK THE HARM -- FIRST OF  
ALL, THAT'S NOT -- AND I HATE TO  
SAY THIS, THAT'S NOT MY BURDEN.  
THAT'S THE STATE'S BURDEN TO  
SHOW THE LACK OF HARM.  
I SIT HERE AND SAY THIS IS THE  
ERROR, NOW YOU SHOW LACK OF  
HARM.  
SO THAT'S WHAT WE'RE SAYING  
HERE.  
SEE MY TIME HAS JUST ABOUT RUN  
OUT, SO THANK YOU VERY MUCH.  
>> THANK YOU.  
THANK BOTH OF YOU.  
THE COURT WILL BE IN RECESS FOR  
TEN MINUTES.  
>> PLEASE RISE.  
  
>> PLEASE RISE.  
  
>> LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.  
PLEASE BE SEATED.