

>> PLEASE RISE.

HEAR YE HEAR YE HEAR YE.

THE SUPREME COURT OF FLORIDA IS  
NOW IN SESSION.

ALL WHO HAVE CAUSE TO PLEA, DRAW  
NEAR, GIVE ATTENTION AND YOU  
SHALL BE HEARD.

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

LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING.

AND WELCOME TO THIS SESSION OF  
THE FLORIDA SUPREME COURT.

THE FIRST CASE ON OUR AGENDA  
THIS MORNING IS BARNES VERSUS  
STATE.

ARE THE PARTIES READY TO  
PROCEED?

YOU MAY PROCEED.

>> GOOD MORNING, MAY IT PLEASE  
THE COURT, I'M GEORGE BURDEN,  
DAYTONA BEACH FLORIDA, HERE ON  
BEHALF OF THE APPELLANT, JAMES  
BARNES.

HE PLED GUILTY TO FIRST DEGREE  
MURDER IN BEVARD COUNTY,  
FLORIDA, AND WAS SENTENCED TO  
DEATH.

A VERY UNCOMFORTABLE -- I'M  
UNCOMFORTABLE ABOUT THIS CASE,  
BECAUSE THIS CASE INVOLVES A 6TH  
AMENDMENT AND HOW IT BLENDS WITH  
THE 8TH AMENDMENT, UNIFORMITY IN

SENTENCING.

AND, I'M VERY, VERY HAPPY WITH THE -- WITH WHAT THE COURT HAS DONE IN THAT REGARD OVER THE YEARS AS A MEMBER OF THE DEFENSE BAR.

BUT, THIS IS A CASE WHERE UNIQUE SET OF FACTS, THAT MAKES US HAVE PAUSE TO THE PROGRESS THAT HAS BEEN MADE.

>> ARE YOU ARGUING THE APPOINTMENT OF THE SPECIAL COUNSEL, DURING THE PENALTY PHASE, THAT IS WHERE WE ARE.

>> THAT IS PART OF MY ARGUMENT, YES.

>> OKAY.

IN THE CASE, I THINK IT IS CLEAR THAT FERETTA WAS VIOLATED, BECAUSE MR. BARNES, WHO WAS A LEGAL INTERN AND WAS VERY FAMILIAR WITH THE LAW, CHALLENGED EVERYTHING THAT THIS WELL-INTENTIONED TRIAL JUDGE TRIED TO DO.

AND I WILL SUBMIT TO THIS COURT, THE TRIAL JUDGE BENT OVER BACKWARDS TO FOLLOW THE SCHEME THAT THIS COURT DEVELOPED OVER THE YEARS.

BUT, THE TRIAL JUDGE FAILED.

THE TRIAL JUDGE FAILED BECAUSE UNDER THE CASE LAW IN FLORIDA, AND THE U.S. SUPREME COURT, MR. BANS HAS A RIGHT TO DETERMINE HOW HIS WHOLE CASE IS

GOING TO GO AND AS JUSTICE  
CANADY SAID IN JUNE IN MCKENZIE  
YOU CAN'T TELL SOMEBODY TO STAND  
IN THE CORNER AND BE QUIET WHEN  
THEY HAVE A 6TH AMENDMENT RIGHT  
TO REPRESENT THEMSELVES, YOU  
CAN'T DO THAT.

>> WELL, LET ME -- AS I  
UNDERSTAND, PART OF YOUR  
ARGUMENT, THE ARGUMENT IS THAT  
MR. BARNES DID NOT COMPLETELY  
GIVE UP HIS RIGHT TO PRESENT  
MITIGATION EVIDENCE AND WHAT  
MITIGATION EVIDENCE DID  
MR. BARNES ACTUALLY PRESENTLY TO  
THE COURT?

>> IT IS AS FOLLOWS:  
MR. BARNES CONTACTED THE STATE,  
AND WANTED TO CONFESS, DURING  
RAMADAN BECAUSE HE HAD CONVERTED  
TO ISLAM AND WANTED TO PURIFY  
HIS SOUL, SO TO SPEAK, AND SO IF  
YOU WOULD ALLOW HIM TO CONFESS  
DURING RAMADAN HE WOULD DO SO  
AND FACE WHATEVER PUNISHMENT  
CAME FORWARD AND HIS ARGUMENT  
WAS ONE OF REDEMPTION AND ONE  
OF, TO USE HIS WORDS, HE MANNED  
UP AND WANTED TO TELL THE TRUTH,  
FOR THE FIRST TIME IN HIS LIFE.  
AND MR. BARNES WAS VERY MINDFUL  
OF WHAT MITIGATION WAS ENTAIL IN  
THIS CASE, BASED ON HIS PAST  
HISTORY.  
AND, HE THOUGHT THAT WHOLE  
MITIGATION DEVELOPMENT WHICH WE

DID GET IN THIS RECORD, WOULD  
DEFEAT THAT WHOLE MITIGATION  
STRATEGY.

WHICH IS NOT ALLOWED, UNDER CASE  
LAW.

YOU CAN'T INTERFERE WITH A  
COMPETENT DEFENDANT'S MITIGATION  
STRATEGY.

>> WELL, IF HE HAD -- SO IF HE  
HAD ELECTED TO THE -- FOR THE  
SAME REASON THAT HE HAD  
CONVERTED TO ISLAM, OR HE SAW  
THE LIGHT, AND HE HAD CONFESSED,  
AND HIS -- BECAUSE OF HIS  
RELIGIOUS BELIEFS HE FELT THAT,  
YOU KNOW, HIS FATE SHOULD BE IN  
THE HANDS OF A HIGHER POWER, AND  
HE ELECTED NOT TO PUT ON ANY  
MITIGATION, WOULDN'T YOUR  
ARGUMENT BE EXACTLY THE SAME,  
WHICH IS, THAT THE PROCEDURES  
THAT HAVE BEEN SET UP OVER THE  
YEARS, VIOLATE THE 6TH AMENDMENT  
RIGHT OF SELF-DETERMINATION, AND  
HAVEN'T WE REALLY REJECTED THAT,  
BECAUSE AS YOU ACKNOWLEDGED AT  
THE BEGINNING, WE HAVE GOT AN  
8TH AMENDMENT OBLIGATION TO MAKE  
SURE THAT THE DEATH SENTENCE IS  
PROPORTIONATE, SO, TO UNDERSTAND  
WHETHER THIS IS SOMEBODY WHO IS,  
YOU KNOW, SCHIZOPHRENIC, WHETHER  
HE WAS ABUSED, DURING HIS  
CHILDHOOD, IF THAT -- IF THE  
JUDGE IN HIS OR HER  
DETERMINATION BEYOND THE PSI,

DECIDES TO PUT ON UP SPECIAL  
COUNSEL --  
APPOINT SPECIAL COUNSEL AND SO  
I'M NOT SURE I UNDERSTAND,  
BECAUSE HERE HE WANTED TO ARGUE  
REDEMPTION, THAT THAT IS -- HE  
DIDN'T PUT A MITIGATION CASE ON,  
HOW THAT IS DIFFERENT  
CONCEPTUALLY THAN CASES WHERE  
SOMEONE SAYS, I DON'T WANT TO  
PUT ON ANY MITIGATION.

>> WELL, IN THIS CASE, THE  
MITIGATION --

>> AND LIKE WHAT MY QUESTION IS  
--

>> YES, I DO NIGHT WOULD BE  
DIFFERENT IF YOU SAID, WELL, HE  
PUT ON SOMETHING, HE WANTED TO  
SHOW HE WAS A REALLY GREAT GUY  
AND PUT ALL OF THESE WITNESSES  
ON AND THEN SOME OTHER PICTURE  
EMERGED BUT THAT IS NOT WHAT HAS  
HAPPENED HERE.

>> THAT IS CORRECT.

YOU SEE, THE TRIAL JUDGE WASN'T  
CONFRONTED WITH THE PSI, THAT  
EXPOSED MAYBE SOMETHING THAT HAD  
TO BE DISCOVERED.

THAT DIDN'T HAPPEN HERE.

YOU SEE, UNDER YOUR SCHEME, WHAT  
HAS TO HAPPEN IS, ACCEPT  
MR. BARNES' MITIGATION, AC SET  
UP AND HOW TO PIS UNDER THIS  
RULES PROMULGATED AFTER MOHAMMED  
AND AFTER THE JUDGE READS THAT  
IF THERE IS SOMETHING GLARING IN

THAT PSI, THAT NEEDS TO BE  
FLUSHED OUT, I SUBMIT THAT THE  
CASE LAW SUPPORTS THE LAW TO DO  
THAT AS LONG AS IT DOESN'T  
FRUSTRATE THE STRATEGY, AND,  
THIS IS A UNIQUE SET OF FACT WE  
WILL NOT COME ACROSS OFTEN AND  
THE STRATEGY.

>> I HAVE REDEEMED MYSELF, I AM  
THIS KIND OF PERSON, WHEREAS THE  
AGGRAVATION IS, HE HAS  
ANTI-SOCIAL PERSONALITY DISORDER  
AND HE IS ONE OF THOSE 1%-ERS IS  
THAT HES ONE OF THOSE BAD  
PEOPLE, THE MITIGATION DEVELOPED  
BY DR. RIEBSAME, A PERSON WITH  
NO EMPATHY AND CONSCIENCE AND  
GOES AGAINST HIS STRATEGY AND  
YOU WILL NOT COME ACROSS A FACT  
PATTERN LIKE THIS, IT IS UNIQUE.

>> DOES IT MACK A DIFFERENCE TO  
OUR ANALYSIS THAT A JURY WAS NOT  
INVOLVED HERE IN THIS PENALTY  
PHASE?

>> I THINK IT IS IMPORTANT TO  
NOTE THAT, BECAUSE MOST OF THE  
CASES THERE WAS A JURY  
RECOMMENDATION, AND WHETHER IT  
WAS GIVEN WEIGHT AND SO FORTH  
AND HERE WE DON'T HAVE THAT.  
SO, YES, IT IS DIFFERENT, BUT,  
THE CONCEPTS ARE THE SAME, IN  
TERMS OF HOW THE 8TH AMENDMENT  
AND THE 6TH AMENDMENT INTERPLAY.

>> ISN'T THAT IMPORTANT, THEN,  
BECAUSE IF IT WAS -- IF YOU --

AS YOU WOULD ARGUE, THERE WAS SPECIFIC MITIGATION, THE JUDGE FOUND, THAT THE JUDGE SHOULD BE HAVE FOUND, THAT HE HAD ANY SOCIAL PERSONALITY.

>> OR A PSYCHOPATH.

>> THEN, WHAT WE DO IS SAY, OKAY, THAT, THEN THE JUDGE, SHOULDN'T HAVE FOUND THAT, BECAUSE IT WOULDN'T HAVE BEEN DEVELOPED AND BECAUSE -- DISREGARD IT, AND THEN WE LOOK, STILL, AS TO WHETHER THE SENTENCE IS PROPORTIONATE.

I MEAN, ONE THAT -- I MEAN, IN OTHER WORDS, IT IS HARD TO UNDERSTAND, IF IT WILL COME OUT IN THE PSI, IF A JUDGE IMPROPERLY RELIES ON SOMETHING, AS AGGREGATION, THEY SHOULDN'T HAVE RELIED ON.

BUT WHAT YOU ARE SAYING HERE, IS I MEAN, EVERYBODY THINKS' JUDGE IN PROPERLY RELIED ON SOMETHING THAT WOULD BE MITIGATION, AND THAT PREJUDICED HIS -- THEISM CONSISTING SIGNIFICANCE OF THE DEATH PENALTY.

>> IT NOT ONLY VIOLATED THE 6TH AMENDMENT, IT VIOLATED DUE PROCESS.

BECAUSE, THE LINE OF CASES, THE WILLIAMS AND THE YORK CASE IN THE 1940s, THERE IS A RIGHT TO CONFRONTATION WHEN IT COMES TO FIFTH MITIGATION EVIDENCE.

AND, THIS EVIDENCE CAME IN OVER  
OBJECTION.

AS HEARSAY EVIDENCE.

IT WAS HEARSAY, ALL OF THIS  
STUFF AND --

>> LET ME ASK YOU.

THEN HOW DOES THE TRIAL JUDGE  
AND HOW DO WE CARRY OUT OUR  
OBLIGATION, IF WE ARE GOING TO  
BE FACED WITH A RECORD THAT  
SHOWS A MAN WHO BREAKS INTO A  
LADY'S HOUSE AND COMMITS MURDER,  
A MAN WHO HAS LATER COMMITTED A  
MURDER, KILLED HIS WIFE, HE ALSO  
HAS A PRIOR RECORD, WE ARE FACED  
WITH A RECORD THAT SIMPLY SAYS,  
HE'S NOW CONVERTED TO ISLAM, IS  
THIS CASE PROPORTIONAL?

HOW IN THE WORLD DO WE IN FACT  
CARRY OUT THAT KIND OF  
OBLIGATION WHETHER THIS CASE IS  
PROPORTIONAL, IF WE KNOW NOTHING  
ELSE ABOUT MR. BARNES?

>> I BELIEVE THIS COURT ANSWERED  
THAT QUESTION IN HAMLIN WHERE --  
HAMBLEN WHERE THE TRIAL JUDGE  
TAKES THE PSI AND EXAMINES IT AND  
DOES THE BEST THEY CAN BASED ON  
THE INFORMATION QUELLED FROM  
THAT AND THE COURT HAS NOT  
OVERRULED --

>> WAS IT HAMBLEN OR KLOKOC  
WHERE A SPECIAL COUNSEL AS  
APPOINTED.

>> KLOKOC.

>> WE APPROVED THAT, THOUGH IT'S

NOT A REQUIREMENT, APPROVED THAT  
USE OF SPECIAL COUNSEL.

>> THAT'S CORRECT AND THE  
HAMBLEN THE COURT MADE A NOTICE,  
ANSWERED THAT SPECIFIC QUESTION,  
THE TRIAL JUDGE LOOKING AT WHAT  
THE TRIAL JUDGE DID WITH  
INFORMATION AVAILABLE, SATISFIED  
THAT 8TH AMENDMENT REQUIREMENT.

>> WELL, IF THE TRIAL JUDGE  
LOOKING AT THIS RECORD, A MAN  
WHO COMMITTED TWO MURDERS AND WE  
KNOW NOTHING ELSE ABOUT HIM, WHY  
IS IT AN ABUSE OF DISCRETION FOR  
THE TRIAL JUDGE TO APPOINT A  
SPECIAL COUNSEL UNDER THOSE  
CIRCUMSTANCES, BEFORE, YOU KNOW,  
MAKING A DECISION ABOUT WHETHER  
THE MAN SHOULD LIVE OR DIE.

>> I THINK THAT AS A MEMBER OF  
THE DEFENSE BAR, THAT IS  
SOMETHING WE WANT TO HAVE  
HAPPEN.

WE DO.

BUT, IN THIS PARTICULAR CASE,  
MR. BARNES HAD BEEN IN PRISON  
NOW FOR OVER A DECADE.  
SINCE HE MURDERED HIS WIFE, AND,  
IN HIS VIEW, HE KNEW IN HIS  
MIND, WHAT KIND OF STUFF WAS OUT  
THERE, IN HIS PAST AND NONE OF  
IT WAS HELPFUL.

AND HE WAS HIS OWN ATTORNEY.  
THAT THE COURT DID NUMEROUS  
FERETTA HEARINGS TO MAKE SURE  
THE PERSON KNEW WHAT HE WAS

DOING AND SO IS MR. BARNES THE CAPTAIN OF HIS SHIP OR NOT. THAT IS THE QUESTION HEAR, AND THE ANSWER IS, HE IS. SO, HOW HAS THE 8TH AMENDMENT BEEN VIOLATED HERE.

>> WELL, IT WAS -- TO DO IT PROPERLY, YOU HAVE TO JUST TAKE UNDER THE RULE, THE PSI, THAT IS PREPARED AND EXTENDED PSI, ALL OF THESE RECORDS, AND, FRANKLY, I MEAN --

>> IT WOULD BE HERE, POST-CONVICTION, MAKING AN ARGUMENT, THAT THE TRIAL COURT -- IN FAILING TO APPOINT A SPECIAL COUNSEL AND IMPOSING DEATH UNDER THESE KINDS OF CIRCUMSTANCES.

>> WELL, IN HOJAN YOU SAID YOU CANNOT DO THAT, COME BACK AND ARGUE, JUST THIS YEAR.

>> HASN'T STOPPED MANY DEFENDANTS IN THE PAST.

>> OH, ABSOLUTELY NOT, AS I SAID FROM THE BEGINNING I'M NOT PLEASED WITH THE CASE BECAUSE I'M AFRAID WHAT A COURT -- NOT IN A NEGATIVE SENSE, IS GOING TO HAVE TO DO WITH THESE KINDS OF SETS OF FACTS.

BECAUSE, THERE HAS BEEN GREAT PROGRESS MADE BY THIS COURT, IN TRYING TO BALANCE THE 6TH AMENDMENT RIGHT AND THE 8TH AMENDMENT RIGHTS.

>> ISN'T THERE A DIFFERENCE, IN THE APPLICATION... [INAUDIBLE].

>> YES.

ABSOLUTELY.

>>... DO HAVE AN OBLIGATION TO MAKE AN EFFORT TO MATURE, RELIABLE, INDIVIDUALIZED SENTENCES.

>> ABSOLUTELY.

>> AND IT IS A STATUTORY OBLIGATION AN ISN'T THAT WHAT THE... [INAUDIBLE].

>> THE TRIAL JUDGE, YES, AS I SAID, SHOWED A GREAT DEAL OF PATIENCE, AND BENT OVER BACKWARDS TO COMPLY WITH WHAT HAS BEEN EVOLVING LAW OUT OUT OF THIS COURT.

ABSOLUTELY, I SALUTE THE JUDGE.

>> WHERE WAS YOUR CLIENT'S PREJUDICE?

GIVEN THE WEIGHTIEST AGGRAVATORS THAT EXIST, THAT WOULD APPLY TO THIS CASE, HOW WAS HE PREJUDICED BY THE TRIAL COURT TRYING TO FIND SOMETHING TO LOOK INTO, TO APPLY IN AN INDIVIDUALIZED SENTENCE.

>> THE MCKASKLE CASE IN THE U.S. SUPREME COURT SAYS -- THIS WAS A STAND BY COUNSEL, STAND BY COUNSEL WAS DOING STUFF, AND WHAT EXTENT THEY CAN DO AND CAN'T DO WHEN SOMEONE IS REPRESENTING THEMSELVES. AND THAT COURT BACK THEN IN THE

'80s SAID, YOU CAN'T -- IT IS A VIOLATION OF THE 6TH AMENDMENT, AND IT IS FUNDAMENTAL ERROR, TO OVERSTEP THE BOUNDS OF COUNSEL WHO IS DEEMED TO BE IN CHARGE OF THE PENALTY PHASE, LIKE WAS THE CASE HERE.

THAT IS THE ANSWER.

>> WELL, MCKASKLE HAS NO RELIEF, RIGHT, IN THAT CASE THERE WAS NO RELIEF AND HOW DO YOU DEAL WITH WHAT THE COURT SAID THERE, THE GENERAL STATEMENT, A PER SE DEFENDANT MUST GENERALLY ACCEPT ANY UNSOLICITED HELP OR HINDRANCE THAT MAY COME FROM THE JUDGE WHO CHOOSES TO CALL WITNESSES FROM PROSECUTOR... [INAUDIBLE] PRESENT EVIDENCE FAVORABLE TO THE DEFENSE FROM THE PLURAL VOICES SPEAKING FOR THE DEFENSE IN THE TRIAL AND MORE THAN ONE DEFENDANT OR FROM A AMICUS COUNSEL APPOINTED TO ASSIST THE COURT.

>> IT CAN ALL WORK AS LONG AS IT DOESN'T DEFEAT THE PERSON'S STRATEGY.

AND THAT IS WHAT MCKASKLE SAYS AND ALL THESE THINGS ARE FINE.

>> WHAT EVIDENCE DO WE HAVE IN THE SENTENCING ORDER THAT THIS STRATEGY MR. MCKASKLE RELIED ON WAS DEFEATED.

>> IT WAS DEFEATED BECAUSE WE HAVE --

>> BY THE ACTIVITIES OF  
APPOINTED COUNSEL.

>> THE -- IN THE SENTENCING  
ORDER ITSELF, THE DISCUSSION OF  
THE PERSONALITY DISORDERS IN  
MR. -- MR. BARNES HAD, THE FACT  
THAT HE WAS A PSYCHOPATH AND ALL  
OF THOSE THINGS WERE -- THE  
DECISION DR. RIEBSAME MADE WERE  
FROM ALL THIS THINGS POINTED OUT  
IN THE BRIEF, FROM THE POLICE  
REPORT AND OTHER ITEMS AND THE  
DOCTOR TESTIFIED THAT HE HAD A  
LOT MORE MATERIAL TO REVIEW THAN  
MOST CASES.

WITH AN UNCOOPERATIVE DEFENDANT.

AND, THESE IN THIS WERE ALL  
HEARSAY AND THAT THIS DEFENDANT  
OBJECTED TO AND UNDER --

>> SO, I JUST -- I GUESS THE  
REAL QUESTION, THOUGH, IS, IF WE  
HAD A RECORD THAT JUST HAD THE  
STATE'S CASE OF AGGRAVATION,  
WHICH WAS WHAT, SIX OR SEVEN  
DIFFERENT AGGRAVATING  
CIRCUMSTANCES.

>> SIX.

>> AND WE HAD A CASE OF THE  
MITIGATION, THAT MR. BARNES  
WANTED TO PUT ON WHICH IS NOW  
I'M CHANGED MAN, BASICALLY,  
OKAY?

WOULD THE SENTENCING PROCEEDING  
HERE HAVE BEEN DIFFERENT?

CAN WE SAY THAT THIS DEFENDANT  
WOULD HAVE IN FACT RECEIVED A

LIFE SENTENCE?

BECAUSE IT SEEMS TO ME THE TRIAL JUDGE EVEN PUT IN THE SENTENCING ORDER, THAT MR. BARNES HAD IN FACT, YOU KNOW, TAKEN RESPONSIBILITY FOR THE CRIME.

SO THAT PART OF MR. BARNES' STRATEGY WAS IN FACT CONSIDERED BY THE TRIAL COURT.

>> THAT'S CORRECT I ACCEPT YOUR OBSERVATION AND I SUBMIT I DON'T SEE HOW A TRIAL JUDGE COULD COME OUT WITH A DIFFERENT DETERMINATION HAD THE -- THINGS BEEN DONE EXACTLY MR. BARNES' WAY.

AND AN OUTCOME-DETERMINATIVE APPROACH, I DON'T SEE HOW THINGS WOULD HAVE COME OUT DIFFERENTLY.

>> YOU KNOW, THE PROBLEM HERE IS THAT YOU ARE FIGHTING A CASE WHERE YOU READ WHAT HE WROTE IN HIS LETTER CONFESSION, YOU KNOW, AND I HAVE BEEN ON THIS COURT FOR OVER A DECADE AND KEEP ON THINKING WE HAD SEEN YOU KNOW -- THIS IS THE WORST WE HAVE SEEN.

THIS IS, YOU KNOW, GRAPHIC DESCRIPTION BY THE DEFENDANT, ALMOST A... A LEGATO VIEW OF... [INAUDIBLE] OF THE VICTIM.

AND IT IS... TO SAY, STAND UP HERE AND SAY, AT LEAST, WHEN... PROPORTIONALITY AND THE GOVERNOR MAKES A DECISION AS TO WHETHER

THIS MAN WILL BE EXECUTED, NOT TO TRY TO UNDERSTAND WHETHER THERE WAS ANYTHING IN HIS BACKGROUND, WHICH THERE WAS. AS A CHILD.

THAT MIGHT MITIGATE WHAT HE DID. YOU KNOW, SITTING HERE, TO SAY, I'M REALLY SORRY, I DID IT, IS NEVER GOING TO MAKE A DIFFERENCE, AND SO, HE DIDN'T HAVE -- I GUESS I THINK THAT THE LAW PROFFERS TO YOUR ARGUMENT AND FIRST YOU ADMITTED IT WOULDN'T MAKE A DIFFERENCE AND SECOND THERE WAS NOT A MITIGATION STRATEGY.

IT WANT LIKE THE LAWYER SAID, I WILL SHOW THAT THIS WAS THE GUY THAT WAS ALWAYS, YOU KNOW, VOLUNTEERING AT THE CHURCH AND HE, YOU KNOW, HELPED NEIGHBORS AND ALL OF THAT KIND OF THING, AND I DON'T WANT TO PUT ON MENTAL HEALTH MITIGATION. HE DIDN'T.

THAT WASN'T HIS STRATEGY. AND SO THAT IS WHY I DON'T KNOW, YOU KNOW, AGAIN, THERE MAY BE A CASE WHERE... INAUDIBLE WHERE THERE IS A... [INAUDIBLE] BUT THAT IS NOT THIS CASE.

>> IF THE TRIAL COURT HERE HAD DONE A PRE-SENTENCE INVESTIGATION UNDER THE RULE AND REVIEWED IT, AND MADE A RECORD OF THAT, THAT AFTER REVIEWING

THIS I HAVE CONCERNS LEARNING ABOUT THIS PERSON'S CHILDHOOD THAT THIS NEEDS TO BE EXAMINED, I THINK THAT -- I THINK I WOULD HAVE A DIFFERENT CASE HERE, TODAY BUT THAT IS NOT WHAT HAPPENED.

THIS TRIAL JUDGE --

>> YOU ARE SAYING THE ERROR IS IN ORDERING THE PSI AT THE SAME TIME THAT THE ORDER -- THE ORDER OF SPECIAL COUNSEL, BECAUSE WE HAVE BEEN IN THIS 18 MINUTES AND YOU HAVEN'T --

>> I'M GOING TO THE DISSENT IN MOHAMMED.

WHERE IT TALKS ABOUT WHAT -- HOW THE 6TH AMENDMENT CAN BE PRESERVED IN THESE KINDS OF CIRCUMSTANCES.

AND, WHAT IT IS, IS THAT YOU HAVE THE PSI ORDERED, AND, IF THE PSI DISCLOSES SOMETHING THAT THE TRIAL JUDGE NEEDS MORE INFORMATION ABOUT, THEY CAN GO TO PURSUE IT IN SOME WAY.

YOU SEE, THAT DIDN'T HAPPEN HERE.

AT ALL.

THIS JUDGE WENT RIGHT TO MUHAMMAD, BECAUSE SHE'S WASN'T SATISFIED WITH THE MITIGATION PRESENTATION NOT KNOWING WHETHER ANY MITIGATION EXIST AND THAT IS NOT WHAT THE LAW IS HERE YOU CAN'T DO THAT.

YOU HAVE TO HAVE THE  
PRE-SENTENCE INVESTIGATION.  
AND, OH, AND AFTER SEEING THAT  
PRE-SENTENCE INVESTIGATION, YOU  
LEARN ABOUT MAYBE SOME PROBLEMS  
IN THE CHILDHOOD.

>> YOU ARE SAYING THAT IS TRUE  
ALSO IF THE DEFENDANT PRESENTS  
NO MITIGATION.

>> THAT'S CORRECT.

THE PROCEDURE IS SPELLED OUT.  
IT WASN'T FOLLOWED HERE.

YOU HAVE TO HAVE THE PSI AND SEE  
IF THERE IS SOMETHING IN THE PSI  
THAT ALERTS FURTHER  
INVESTIGATION AND THAT IS WHAT  
HAMBLEN SAYS IT CAN BE ADEQUATE  
TO DO WHAT THE 8TH AMENDMENT  
REQUIRED AND HAMBLEN HAS NOT  
BEEN OVERTURNED BY THE COURT.

>> IS YOUR PROBLEM WITH THE PSI  
IN THIS CASE?

WHAT IS YOUR OBJECTION?

>> WELL, TWO-FOLD.

FIRST OF ALL, IT -- WELL, WHAT  
MR. BARNES DID WAS, HE OBJECTED  
TO THE HEARSAY IN THE PSI.

>> DID HE TESTIFY ANYTHING IN  
PARTICULAR THAT WAS  
OBJECTIONABLE, DID HE SPECIFY  
ANYTHING IN PARTICULAR THAT WAS  
OBJECTIONABLE IN THE PSI?

>> HE... HE STATED THAT THE  
REPORT THAT WAS ALREADY  
EXCLUDED, THE EXAMINATION BY  
DR. RIEBSAME, HE SPECIFICALLY

MENTIONED THAT AND THE DOCTOR'S  
OPINIONS WERE ALL BASED ON  
HEARSAY, EVERYTHING HE VIEWED  
WAS HEARSAY.

>> WE WERE TALKING ABOUT THE  
PSI, SPECIFICALLY.

>> I THINK HE FILED A MOTION TO  
STRIKE THE PSI, DIDN'T HE.

>> YES.

>> MOTION AS HEARSAY.

>> YES, THAT'S CORRECT.

>> AND I BELIEVE THAT WAS THE  
ONLY OBJECTION RAISED .

>> THAT'S CORRECT.

>> AND I THINK THE TRIAL COURT  
IN MY... [INAUDIBLE] MAKES THE  
OBJECTIONS AND TOLD HIM I CANNOT  
MAKE A BLANKET RULING, SO GIVE  
ME SPECIFIC OBJECTIONS, AND HE  
DID NOT MAKE... [INAUDIBLE].

>> BECAUSE I BELIEVE HE OBJECTED  
TO A PSI BEING DONE.

THE PSI WAS NOT BEFORE THEM YET  
AND THAT IS WHY THE JUDGE RULED  
THE WAY SHE DID, I BELIEVE, IS  
BECAUSE --

>> BUT THAT COUNTERS YOUR  
ARGUMENT MADE EARLIER THAT ALL  
OF THE JUDGE WAS REQUIRED TO DO  
HERE IS LISTEN TO THE STRATEGY,  
AND ORDER A PSI.

>> WELL, ACTUALLY --

>> YOU CAN'T HAVE IT BOTH WAYS.

>> WELL, THAT IS THE PROBLEM,  
THAT IS UNIQUE ABOUT THE CASE,  
IS THAT MR. BARNES WENT ABOUT IT

IN A VERY EFFECTIVE WAY IN TERMS  
OF ATTACKING ALL OF THESE  
THINGS.

HE ATTACKED GARDINER VERSUS  
FLORIDA SAYS THAT THERE IS DUE  
PROCESS IN CONFRONTATION RIGHTS  
IN THESE MATTERS.

WILLIAMS VERSUS NEW YORK WAS THE  
CASE THAT SAID, YOU KNOW, YOU  
CAN HAVE HEARSAY AND YOU CAN  
HAVE THESE THINGS, BECAUSE THE  
JUDGE NEEDS IT, TO MAKE A PROPER  
DECISION.

WELL, GARDINER SAYS, NO,  
CONFRONTATION IS REQUIRED AND  
THERE IS DUE PROCESS RIGHTS  
INVOLVED AND SO, WITH THAT  
DECISION, HOW DO YOU NOT STRIKE  
SOME OF THESE THINGS THAT ARE  
HEARSAY, IF IT IS REQUESTED BY  
THE DEFENDANT, WHICH IS A VERY  
RARE --

>> HE NEVER IDENTIFIED THE  
SPECIFIC STATEMENTS THAT FELL  
WITHIN THE SCOPE OF...

[INAUDIBLE] DID HE.

>> I DON'T BELIEVE SO.

>> WELL, THEN THAT'S A PROBLEM.

>> WELL, HE MENTIONED THINGS, HE  
DID MENTION THINGS THAT HE  
DIDN'T LIKE.

THAT WERE SAID ABOUT HIM IN THE  
POLICE REPORT AND SO FORTH --

>> LISTING THINGS HE DOESN'T  
LIKE ARE DIFFERENT FROM SAYING  
THAT THIS PARTICULAR STATEMENT,

THE POSITION OF THIS PARTICULAR TESTIMONY STATEMENT IS A VIOLATION OF CRAWFORD AND IF HE DIDN'T IDENTIFY ANYTHING THAT SPECIFICALLY VIOLATED CRAWFORD WHICH THE TRIAL COURT I THINK WAS ASKING HIM TO DO, THEN, I MEAN, INVITED HIM TO DO THAT, THEN, DOESN'T THAT MEAN THIS CLAIM IS ESSENTIALLY UNPRESERVED.

>> NO, BECAUSE -- NO, BECAUSE DR. RIEBSAME HAD TO RELY ON THIS HEARSAY TO MAKE HIS OPINION TO THE COURT. HAD TO.

IF HE CAME OUT WITH THE OPINION THAT HE HAD ANTI-SOCIAL PERSONALITY DISORDER THERE HAD TO BE A BUNCH OF THINGS IN HIS PAST --

>> I DON'T THINK SO HOW THAT ANSWERS THE PRESERVATION QUESTION.

>> WELL, I -- I SEE WHAT YOU ARE SAYING, HE DID, DID MENTION A BUNCH OF THINGS, THAT WERE IN HIS FILE, THAT WERE NOT PROPER. 8 OR 9 THINGS, HE DID MENTION THEM.

HAVING TO DO WITH THINGS THAT WERE NOT VERY, VERY -- PUT IN A VERY GOOD LIGHT WHEN HE WAS HERE.

HE DID DO THAT.

>> COULD YOU HELP ME UNDERSTAND,

I BELIEVE I UNDERSTOOD YOU TO SAY THAT IF A PSI HAD BEEN COMPLETED HERE, AND THEN THE NEXT STEPS TAKEN, THERE IS NO CONSTITUTIONAL PROBLEM AND DID I UNDERSTAND YOU TO MAKE THAT ARGUMENT.

>> THAT'S CORRECT.

>> HELP ME UNDERSTAND THAT THE -- WHY THE SKIPPING OF THAT PSI STEP, WHICH ITSELF IS NOT A CONSTITUTIONAL REQUIREMENT, NOW CONVERTS WHAT THE TRIAL JUDGE DID, INTO A CONSTITUTIONAL AIR REPORT.

THAT IS WHAT I AM HAVING A PROBLEM WITH.

THAT, JUST BY NOT TAKING THAT ONE STEP, WHICH ITSELF IS NOT OF A CONSTITUTIONAL NATURE...

>> BECAUSE YOU HAVE -- BECAUSE THE APPOINTMENT OF THE COUNSEL, COULD HAVE BEEN UNNECESSARY. FIRST OF ALL.

>> DOES THAT, IF IT IS UNNECESSARY, IS THAT A CONSTITUTIONAL VIOLATION.

>> WELL, IN THIS CASE, IT WAS -- IT IS A CONSTITUTIONAL VIOLATION, WHERE YOU HAVE A PERSON WHO WANTS TO MITIGATE HIS PENALTY PHASE LIKE WE DID HERE. YOU HAD A PERSON WHO WAS APPOINTED IN THE PENALTY PHASE, AND WANTED TO LITIGATE IT HIMSELF, A UNIQUE --

>> YOU ARE SIDE STEPPING THE PSI  
ISSUE AND SAYING HE DIDN'T WANT  
THE PSI, EITHER, BUT IF THE  
COURT ORDERED IT AND THEN DONE  
THE -- TAKEN THESE OTHER STEPS  
THERE IS NO CONSTITUTIONAL ISSUE  
WE MUST FACE, YET, BECAUSE THERE  
IS NO PSI, WHICH ITSELF IS NOT  
REQUIRED, UNDER THE  
CONSTITUTION, WE NOW CONVERTED  
IT, INTO A CONSTITUTIONAL  
VIOLATION, THAT IS WHAT I AM  
TRYING --

>> I'M TRYING SAY THAT I... I AM  
PLEASED THAT THE COURT CAME UP  
WITH A PROCEDURE, WHERE YOU HAVE  
DEFENDANTS LIKE THIS.  
THAT DON'T WANT TO HAVE A FULL  
FLUSHING-OUT OF MITIGATION, THAT  
A PSI IS DONE AND REVIEWED TO  
ASSIST THE TRIAL JUDGE, TO DO  
THEIR 8TH AMENDMENT FUNCTIONS.  
THAT IS WHAT I SAID, BUT, UNDER  
YOUR CASE LAW, OF HAMBLEN AND  
OTHERS, THEY CANNOT HAVE A PSI,  
I PRESUME, IF THEY -- IF YOU  
FOLLOW HAMBLEN TO ITS CONCLUSION  
THAT PERSON CAN RESTRICT THOSE  
FACTS, UNDER A 6TH AMENDMENT  
RIGHT TO COUNSEL, BECAUSE, THEY  
ARE CAPTAIN OF THEIR DESTINY AND  
CAPTAIN OF THEIR SHIP.

>> BUT, THIS RECORD, YOU KNOW,  
YOU LOOK AT THE PS -- MITIGATION  
THAT WAS IN FACT ENTERED INTO  
THE RECORD HERE.

THAT HE HAD MENTAL, EMOTIONAL  
DISTURBANCE.

THAT HE ABUSED DRUGS FOR A LONG  
TIME.

HE DID NOT HAVE A LOVING  
RELATIONSHIP WITH HIS MOTHER AND  
HIS FATHER.

THAT HE WAS A CAPABLE PERSON AND  
COULD CONTRIBUTE TO SOCIETY AND  
HAD TAKEN STEPS TO BETTER  
HIMSELF, HE WAS SEXUALLY ABUSED  
AS A CHILD.

I MEAN, THESE ARE ALL THE KINDS  
OF MITIGATING EVIDENCE THAT  
COURTS LOOK AT ALL OF THE TIME  
TO DETERMINE -- AND THESE ARE IN  
MY ESTIMATION, TRULY MITIGATING  
KINDS OF EVIDENCE.

I AM -- I GUESS I REALLY DON'T  
SEE WHY A TRIAL COURT COULD NOT  
IN GOOD FAITH TRY TO GET THIS  
KIND OF INFORMATION SO THAT THE  
TRIAL COURT REALLY CAN MAKE A  
DETERMINATION ABOUT LIFE AND  
DEATH.

WITH A DEFENDANT WHO, IN IS  
SENSE, HAS PUT ON NO MITIGATION  
EXCEPT FOR THE FACT THAT HE CAME  
FORWARD AND CONFESSED TO THIS.

>> I AGREE.

I THINK EVERY DEATH AND PENALTY  
CASE SHOULD HAVE THE OPPORTUNITY  
TO HAVE AS MUCH MITIGATION  
EVIDENCE AS POSSIBLE.

DUE TO THE 8TH AMENDMENT UNIFORM  
SENTENCING.

I AGREE WITH THAT.

BUT --

>> MAYBE WE SHOULD REALLY BE CHANGING, INSTEAD OF ADHERING TO WHAT YOU THINK, IS A STRICT PSI, THEN, IF THAT SHOWS SOMETHING, WE CAN -- YOU CAN GO ON, MAYBE WE CAN GIVE THE TRIAL JUDGE DISCRETION TO DO IT EVEN FROM THE BEGINNING.

>> WELL, BUT I AM COMFORTABLE SAYING THAT, WITH FERETTA AND WHAT THAT CASE SAYS AND MCKASKLE SAYS AFTER THAT.

>> I DON'T UNDERSTAND HOW THE PSI CHANGES IT.

IT IS CONTRARY TO THE CLIENT'S WISHES.

I DON'T WANT IT.

>> THIS IS THE PROBLEM THE TRIAL JUDGES HAVE IN READING ALL OF THESE DECISIONS, EXACTLY WHAT IS BEING POSED HERE.

>> I MEAN, YOU KNOW, WHAT JUSTICE QUINCE READ FROM THE SENTENCING ORDER, WE HAVE SEEN SENTENCING ORDERS, PEOPLE SENTENCED TO DEATH, FOR HORRENDOUS CRIMES AND NOT ONE CLUE AS TO WHAT IN THEIR CHILDHOOD OR WHAT IN THEIR MAKEUP CAUSED A CRIME OF THIS NATURE TO OCCUR AND NOW, WE HAVE A SENTENCING ORDER, THAT HAS INTELLIGENTLY MITIGATION AND YOU ARE ESSENTIALLY TELLING THIS

COURT THAT THAT VIOLATES YOUR  
CLIENT'S RIGHTS.

AND I THINK YOU KNOW, PROBABLY,  
WAY INTO YOUR REBUTTAL.

THIS IS WHAT -- YOU CANNOT  
IDENTIFY ANYTHING IN THE  
SENTENCING ORDER THAT IS HARMFUL  
TO YOUR CLIENT.

>> WELL, I THINK THAT  
MR. BARNES' ARGUMENT WAS THAT  
CALLING HIM A PSYCHOPATH DIDN'T  
HELP HIM.

UP AND, ALSO, I HAVE TROUBLE --  
>> YOU THINK HE WOULDN'T HAVE  
BEEN CALLED A PSYCHOPATH, IF ALL  
WE HAD WAS THE NATURE OF THIS  
CRIME?

>> THAT IS A GREAT QUESTION.  
BUT, WHAT TROUBLES ME THE MOST,  
IS THAT WHEN MR. BARDWELL WAS  
ASSIGNED AND HAD A DIFFICULTY  
WITH MR. BARNES, HE WROTE IN THE  
LETTER, I WILL NOT BEG YOU TO  
COOPERATE WITH MY TASK SINCE I  
HAVE NO STRONG AVERSION TO THE  
DEATH PENALTY IN THIS CASE.

I HAVE NO ETHICAL OBLIGATION TO  
PRESENT YOUR BEST INTERESTS.

THAT IS VERY TROUBLING.

THAT THE ATTORNEY THAT IS  
ASSIGNED TO ASSIST THE JUDGE AND  
MR. BARNES IN THIS CASE HAS THAT  
ATTITUDE.

AND THAT IS EXACTLY --

>> SEE, WHO IS HE REALLY  
ASSIGNED TO ASSIST, THE COURT OR

IN BARNES.

>> UNDER MUHAMMAD IT'S THE COURT.

BUT HE IS THERE, THIS JUDGE HAD HIM WORK WITH MR. BARNES, AS I PUT IT IN BRIEF, A HYBRID MUHAMMAD SITUATION AND I CAN'T SEE HOW, IN A CASE WHERE YOU HAVE THAT PERSON AS AN ADVOCATE FOR MR. BARNES IN THE DEVELOPMENT OF MITIGATION. THAT IS WHAT HE IS, AND HE HAS THIS ATTITUDE.

I THINK THAT IS VERY TROUBLING.

>> YOU HAVE ALMOST USED ALL OF YOUR TIME, IF YOU WANT TO ADDRESS ANY OTHER ISSUES, THIS MORNING.

>> THANK YOU.

>> THANK YOU.

>> MAY IT PLEASE THE COURT, I'M BARBARA DAVIS, I REPRESENT THE STATE OF FLORIDA.

THE MUHAMMAD COUNSEL, MR. BARDWELL, WAS COURT COUNSEL, HE WAS MUHAMMAD COUNSEL, IT WAS MADE PERFECTLY CLEAR TO MR. BARNES, THIS IS NOT YOUR ATTORNEY.

THIS IS AN INFORMATION-GATHERING PERSON THAT IS ASSISTING THE COURT IN GATHERING MITIGATION. OVER AND OVER AND OVER IT WAS POINTED OUT TO MR. BARNES, HE IS NOT YOUR ATTORNEY.

MR. BARNES HAD STAND BY

ATTORNEY, WHICH WAS MR. MOORE,  
THE PUBLIC DEFENDER.

WHO, WHEN THE JUDGE ASKED HIM,  
PURSUANT TO FOOTNOTE 15 OF  
MUHAMMAD WHICH SAYS, IF -- IN  
THE -- THE JUDGE HAS THE  
DISCRETION TO APPOINT COUNSEL,  
SHE TRIED TO APPOINT MR. MOORE,  
AND HE SAID I WILL NOT BE  
MUHAMMAD COUNSEL, I AM HIS  
ATTORNEY, I DON'T WANT TO DEAL  
WITH THE CONFLICT.

>> AND THE CONFLICT WAS THAT  
MR. BARNES WAS NOT -- DID NOT  
WANT MITIGATION.

>> CORRECT.

>> IS THAT A KEY... [INAUDIBLE]  
DECISION WE HAVE TO MAKE IN THIS  
CASE, THAT IS, WHETHER IN THIS  
CASE, ALTHOUGH... [INAUDIBLE]  
STRATEGY THAT THIS DEFENDANT,  
[INAUDIBLE] DO WE HAVE TO MAKE  
THAT DECISION FIRST, BEFORE WE  
DECIDE WHETHER THERE WAS ANY  
OTHER VIOLATION OF THE  
CONSTITUTIONAL... [INAUDIBLE].

>> WELL, THE ISSUE HERE IS, I  
MEAN, WE RECOGNIZE FERETTA,  
FLORIDA RECOGNIZES THAT CASE AND  
FLORIDA ALSO HAS A STATE  
PROCEDURE WHEN A DEFENDANT WANTS  
TO REPRESENT HIMSELF, AND NOT  
PRESENT MITIGATION.

>> THAT IS WHY I ASKED YOU THAT  
QUESTION, THE THRESHOLD...  
[INAUDIBLE] MITIGATION STRATEGY,

MITIGATION STRATEGY WAS NOT  
[INAUDIBLE].

>> RIGHT.

>> BECAUSE, WHAT I WOULD ASK YOU  
IS THIS HYPOTHETICAL...

[INAUDIBLE] MR. BARNES  
REPRESENTED BY A LAWYER.  
AND THE LAWYER IS AT TIMES --  
WELCOMES MITIGATION BUT  
MR. BARNES... [INAUDIBLE] HE  
HAS, NO, I WANT REMORSE AS A  
MITIGATOR.

IF THAT IS WHAT HIGH...

[INAUDIBLE] THE JUDGE SAYS,  
I'M... [INAUDIBLE] CAN THE JUDGE  
STILL ORDER A PSI, PER MUHAMMAD  
AND McKASKLE... [INAUDIBLE].

>> YES, THE HYPOTHETICAL YOU  
JUST GAVE ME, THAT IS HAMBLEN  
AND IN MUHAMMAD, THE DEFENDANT  
WAS ASKING THE COURT TO RECEIVE  
FROM HAMBLEN AND THE COURT SAID  
PROSPECTIVELY HERE'S WHAT WE  
WANT TRIAL JUDGES TO DO.

IF THE DEFENDANT IS WAIVING  
MITIGATION EVIDENCE, NOW,  
REMEMBER, MR. BARNES WAIVED ALL  
MITIGATION EVIDENCE, AND HE  
REFUSED TO ARGUE ANY MITIGATION

--

>> I'M ASKING YOU, IS AND I  
DON'T KNOW HOW TO -- [INAUDIBLE]  
IS THAT THE DEFENDANT'S LAWYER  
SAYS THE ONLY MITIGATION I'M  
PUTTING ON IS REMORSE, NOW,  
REMORSE IS A MITIGATOR.

AND THIS JUDGE SAYS, WELL, THAT IS... IN THIS CASE, I'M ORDERING THE PSI FIRST, AND I'M GOING TO APPOINT SPECIAL COUNSEL BECAUSE I THINK THAT OTHERWISE, WE ARE POTENTIALLY -- POTENTIALLY... [INAUDIBLE] CAN THE JUDGE DO THAT?

>> YES.

AND THAT IS WHAT THIS JUDGE DID. THAT THIS JUDGE NOT ONLY HAD MR. MOORE PUT ON THE RECORD, EVERYTHING HE WOULD HAVE DONE IN MITIGATION, SHE ORDERED THE PSI ON MAY, 2006, IN HER ORDER, 2025 AND AFTER THE MITIGATION, AFTER SHE ORDERED THE PSI THEY WENT TO THE PENALTY PHASE, JANUARY 2007, AT THE PENALTY PHASE WHEN MR. BARNES REFUSED TO PRESENT MITIGATING EVIDENCE, SHE SAID WELL, I HAVE THE PSI, I NEED TO CONSIDER APPOINTING MUHAMMAD COUNSEL AND IT WAS AT THAT POINT AT THE PENALTY PHASE AFTER HE REFUSED TO PRESENT ANYTHING SHE DID FOLLOWED MUHAMMAD BY THIS LETTER --

>> MAYBE I'M STILL NOT -- I'LL TRY ONE MORE TIME, WITH MY SLIGHT VARIATION IN MY QUESTIONING.

COUNSEL, REPRESENTING MR. BARNES SAYS, MY MITIGATION I WILL BE PRESENTING IS THAT HE IS SHOWING REMORSE FOR THIS MURDER.

THAT IS MY MITIGATION.  
AND PUTS ON A DEFENDANT WHO SAYS  
I AM -- I COMMITTED THIS CRIME  
AND I AM SO SORRY.  
I HAVE... [INAUDIBLE] I  
APOLOGIZE TO THE VICTIM.  
AND THAT IS HIS MITIGATION.  
IS THAT -- IN THAT SCENARIO, AND  
THAT IS... [INAUDIBLE] PUTS IT  
ON.  
AND THE JUDGE SAYS, I AM  
ORDERING A PSI AND I...  
[INAUDIBLE].  
>> IN THE CASE, YOUR DEFENDANT  
PRESENTED MITIGATING EVIDENCE.  
IF HE WANTS TO LIMIT THAT  
PRESENTATION, TO HIS TESTIMONY,  
THEN, THE JUDGE WOULD DO A  
HAMBLEN INQUIRY OF THE DEFENSE  
COUNSEL TO COVER DEFENSE  
COUNSEL.  
THAT COMPLETELY -- THAT IS  
COMPLETELY DIFFERENT FROM MY  
CASE AND BY THE WAY, THE JUDGE  
WOULD ORDERS A PSI PURSUANT TO  
RULE 3.710 IN ANY CASE, ANY  
CAPITAL CASE NOW BUT THAT IS  
DIFFERENT FROM MY DEFENDANT WHO  
REFUSED TO PRESENT ANYTHING AT  
ALL AND THE JUNE FOUND THAT IN  
HER ORDER, HE REFUSED TO PRESENT  
ANY EVIDENCE WHATSOEVER.  
AND THE JUDGE FOLLOWED MUHAMMAD  
TO THE LETTER.  
OKAY.  
YOU ARE REFUSING TO PRESENT

THIS.

AND THE STAND BY COUNSEL SAID HE HAS BEEN CONSISTENT AND NOT PRESENTING MITIGATION, AND THE JUDGE APPOINTED SOMEONE, TO ASSIST HER IN GATHERING THE EVIDENCE, OF MITIGATION.

WHICH IS EXACTLY WHAT SHE IS SUPPOSED TO DO.

THIS ISN'T INFRINGING ON THE DEFENDANT'S RIGHT TO REPRESENT HIMSELF, THIS, MR. BARDWELL IS HELPING THE COURT DO HER JOB, WHICH IS EXACTLY WHAT MUHAMMAD SAID, WE'RE NOT INFRINGING ON HIS RIGHT, HE HAS EVERY RIGHT TO REPRESENT HIMSELF BUT THE COURT ALSO HAS EVERY RIGHT TO DO HER JOB AND THE -- THERE IS A LITANY OF CASES WHERE THIS COURT SAID THE RIGHT TO REPRESENTATION DOESN'T MEAN YOU GET TO ABUSE THE TRIAL JUDGE, SO THAT THE TRIAL JUDGE CANNOT DO HER JOB.

>> WELL --

>> DOING THE -- DOES DOING THE COURT'S JOB INVOLVING FERRETING OUT INFORMATION THAT IS ACTUALLY HARMFUL TO THE DEFENDANT?

THE CIRCUMSTANCE MAY BE DIFFERENT HERE WHERE THERE IS ONLY A JUDGE INVOLVED.

BUT, CONSIDER A CIRCUMSTANCE WHERE THERE IS A JURY.

AND, THE INFORMATION CAME IN, ABOUT THE DEFENDANT BEING A

PSYCHOPATH OR A SOCIOPATH OR  
WHATEVER.

IS IT THIS JUDGE'S  
RESPONSIBILITY TO APPOINT  
SOMEONE TO FERRET OUT  
INFORMATION, SUCH AS THAT?  
WHICH WILL BE PRESENTED TO A  
JURY, THAT IS GOING TO HAVE TO  
MAKE A RECOMMENDATION?

>> THIS IS NOT THAT CASE, BUT --

>> I UNDERSTAND THAT.

>> THAT IS ONE THING THAT THIS  
COURT MIGHT WANT TO CLARIFY FOR  
TRIAL JUDGES, WHO FIT IN THE  
POSITION, BECAUSE, THERE WAS A  
REFERENCE TO MCKASKLE AND IT WAS  
IMPORTANT IN THAT CASE THAT THE  
JURY WAS THERE, AND THE  
PERCEPTION OF YOUR  
SELF-REPRESENTATION IN FRONT OF  
THE JURY AND MCKASKLE SAID AFTER  
THE FOOTNOTE 7 THAT WAS READ  
THAT THE JUDGE, WE PRESUME THE  
JUDGE WILL DIFFERENTIATE THESE  
THINGS AND I THINK THIS CORE --  
THE CASE BRINGS UP TO THIS COURT  
SOME OF THE FINER NUANCES WITH  
DEFENDANTS WHO ARE USING THIS  
RIGHT TO SELF-REPRESENTATION, TO  
WRAP THE CASE AROUND THE ACTUAL  
ENTANGLEMENT INTO A WEB.  
THIS JUDGE DID EVERYTHING BY THE  
LETTER.

>> HE SAID, HE DID NOT DO IT BY  
THE LETTER AND THERE WAS NO PSI  
THAT PROCEEDED TO -- DIRECTLY

INTO SPECIAL COUNSEL.

WHAT IS THE STATE'S RESPONSE WITH REGARD TO THAT POSITION BEING ARGUED.

>> STATE'S RESPONSE IS THAT THE ORDER AT PAGE 2025 NOTES A PSI WAS ORDERED ON MAY 11, 2006. ON -- THIS WAS RIGHT AFTER HE PLED.

MR. BARNES PLED ON MAY 2ND, 2006.

AND WANTED TO WAIVE THE ADVISORY JURY AND WANTED TO WAIVE EVERYTHING.

SHE ORDERED THE PSI.

THE PENALTY PHASE WAS NOT UNTIL JANUARY, 2007.

AFTER THE PENALTY PHASE, WHERE HE REFUSED TO PRESENT ANY MITIGATION, A WEEK AFTER THAT, SHE APPOINTED HER COUNSEL, CORE COUNSEL, MUHAMMAD COUNSEL, AND, ORDERED AN UPDATE TO THE PSI.

WHICH WAS THEN UPDATED.

AND MR. BARNES EVEN WAS ASKING WHY IS THERE A SECOND PSI?

THIS IS ALL IN THE RECORD.

>> SO THE FACTUAL PREDICATE IS AN INCORRECT FACTUAL PRECEDENT.

>> I DID LEAVE OUT THE SECOND PSI AND PUT THE CHRONOLOGY IN MY BRIEF, BECAUSE IT WAS SO CONVOLUTED AT ALL THE HEARINGS AND IT APPEARS THE HEARING, THE RECORD FOR THE SECOND PSI WAS IN FEBRUARY OR MARCH OF '07.

IT WAS IN THOSE -- THAT SECTION  
OF HEARINGS.

NOW, ALSO I WANT TO POINT OUT  
THAT IN MUHAMMAD, IT SAYS, THAT  
THE TRIAL JUDGE HAS THE  
DISCRETION TO EITHER -- AND I'M  
ON PAGE 364.

THAT THE TRIAL JUDGE GATHERS THE  
PSI, THE SCHOOL RECORDS,  
EVERYTHING, AND IN THE THEY HAVE  
THE DISCRETION TO APPOINT  
COUNSEL.

AND ON THE NEXT PAGE, ON 364, IN  
FOOTNOTE 15, THIS COURT NOTES  
THAT ANY COUNSEL PERFORM THE  
FUNCTION IS ACTING SOLELY AS AN  
OFFICER OF THE COURT.

SO, AND THE JUDGE MADE CLEAR TO  
MR. BARNES, HE'S NOT YOUR  
ATTORNEY.

HE'S MY ATTORNEY.

THE ONLY REASON MR. BARNES WAS  
INVOLVED IN ANY DISCUSSIONS, IS  
BECAUSE THE JUDGE WAS VERY  
CAREFUL THAT HE HAD THE PSI,  
THAT HE WAS SURPRISED BECAUSE  
HE'S HIS OWN ATTORNEY, HE WANTED  
A MEETING WITH MR. BARDWELL TO  
SEE EVERYTHING THAT MR. BARDWELL  
HAD.

HE IS HIS OWN ATTORNEY.

JUDGE SET UP A MEETING FOR HIM  
TO GO TO.

SO, BASICALLY, IN THE TRIAL --  
THE TRIAL COURT ORDER AND,  
REMEMBER, THE THING ABOUT

NEGATIVE VERSUS POSITIVE INFORMATION, IN FRONT OF THE JURY, THAT MAY BE SOMETHING THIS COURT NEEDS TO CLARIFY, IN FRONT OF THE JUDGE, NOT REALLY, BECAUSE NEGATIVE CAN BE A POSITIVE.

I MEAN, DR. RIEBSAME FOUND EXTREME EMOTIONAL DISTURBANCE A STATUTORY MITIGATING CIRCUMSTANCE, IT WASN'T JUST ANY SOCIAL, ANTI-SOCIAL PERSONALITY AND BORDERLINE PERSONALITY WITH NARCISSISTIC FEATURES AND MR. BARNES READ THE DSM AND HE SAID I'M JUST A BURNED OUT SOCIOPATH, I READ THE DSM AND I THINK I HAVE A BORDERLINE PERSONALITY DISORDER.

SO, DR. RIEBSAME RELIED ON INFORMATION, WHICH AN EXPERT RELIES ON.

>> DON'T WE ALSO, THE REASON IT BECOMES DIFFICULT IF A JURY IS INVOLVED, DEFENSE LAWYERS ARE PUTTING ON A CASE OF MITIGATION PUT ON ANTI-SOCIAL PERSONALITY DISORDER AND IT IS A RECOGNIZED DISORDER AND SOME DEFENSE LAWYERS THINK WELL, THAT DOES SOUND LIKE THAT IS NOTHING, THE PERSON IS A SOCIOPATH OR A PSYCHOPATH, IT DOESN'T REALLY EXPLAIN ANYTHING OTHER THAN THEY DO TERRIBLE THINGS BUT WE HAVE HAD CASES WHERE THAT KIND OF

EVIDENCE IS PUT ON, AND FOUND TO BE MITIGATING.

SO, IT IS NOT NECESSARILY A NEGATIVE DIAGNOSIS.

WOULD YOU AGREE THAT WE HAVE GONE BOTH WAYS ON WHAT WE CALL IT?

>> AND --

>> IS WHAT -- WOULD YOU AGREE.

>> YES, I ABSOLUTELY DO.

AND, YOU KNOW, IF A DEFENSE COUNSEL FINDS THEMSELVES IN THAT QUANDARY, THEY HAVE THE SPENCER HEARING WHICH IS WHAT THE SPENCER HEARING IS FOR BUT I DO THINK THAT --

>> DON'T WE ALSO HAVE CASES WHERE WE HAVE SPECIFICALLY DETERMINED THAT IT'S NOT INEFFECTIVE ASSISTANCE OF COUNSEL, THAT FAILED TO PUT ON A TESTIMONY WHICH IS -- WHICH INVOLVED BENNETT -- DESIGNATION OF THE DEFENDANT AS A SOCIOPATH OR A PSYCHOPATH.

>> ABSOLUTELY.

HOWEVER, THE WAY THOSE CASES GET TO YOU ON INEFFECTIVENESS IS THAT ON POSTCONVICTION, THE DEFENDANT SAYING, COUNSEL WAS INEFFECTIVE FOR NOT PRESENTING THIS, BECAUSE IT CAN ALL BE MITIGATION, SO, IT IS A BIT OF A CONUNDRUM BUT THE BOTTOM LINE, IN THE, IS THE PROCEDURES IN MUHAMMAD, AND THE PROCEDURES IN

RULE 3.710, ARE STATE PROCEDURES, WHICH ENSURE THAT THE TRIAL JUDGE CAN DO HER JOB. THEY DO NOT CONFLICT WITH FERETTA, BECAUSE IT IS NOT HIS ATTORNEY.

IT IS THIS JUDGE'S ATTORNEY.

>> IF THAT WERE THE CASE, THAT IT IS JUST A MATTER OF BEING THE JUDGE'S ATTORNEY WHO -- AND THE JUDGE NEEDS TO FULFILL HER OBLIGATION TO ENSURE INDIVIDUALIZED SENTENCING, ALSO, AUTHORIZED IT WHERE MINIMAL MITIGATION IS PUT ON.

WE HAVE SEEN CASES, AGAIN, WHERE THERE IS LIKE BASICALLY NOTHING, BASED ON THE -- YOU KNOW, A COUPLE OF FAMILY MEMBERS, WHO SAY, THE GUY IS A NICE GUY AND DOES NOTHING TO EXPLAIN ANYTHING, AND NOT QUITE, WE ARE IN A KIND OF A GRAY AREA.

ABOUT, YOU KNOW, WHETHER IT DOES HELP THE JUDGE, BUT I'M SURE A JUDGE TRYING TO MAKE THESE VERY DIFFICULT DECISIONS, I -- IF I WERE THE JUDGE TRYING TO MAKE THESE VERY DIFFICULT DECISIONS, I WOULD WANT THAT -- IN MANY CASES WHERE THERE IS ONLY MINIMAL MITIGATION, BUT...

[INAUDIBLE] THE SPECIAL COUNSEL TO BE... [INAUDIBLE].

>> YES.

AND THAT IS MORE A CONCERN, MORE

OF A COON CONCERN WHERE IF THE DEFENDANT WANTS TO LIMIT THE PRESENTATION, WE HAVE COUNSEL PUT ON THE RECORD WHAT COULD HAVE BEEN PRESENTED, SO HE CAN'T COME BACK AND SAY, COUNSEL WAS INEFFECTIVE, SORE PUTTING ON THE LIMITED AMOUNT AND IF THIS JUDGE SUSPECTS THERE IS A LOT MORE OUT THERE AND IT IS BEING LIMITED THAT IS BASICALLY A PROTECTION AGAINST COUNSEL BY GETTING BLIND SIDED POSTCONVICTION, WE DON'T HAVE A PROBLEM WHEN WE HAVE A DEFENDANT REPRESENTING HIMSELF BECAUSE HE SAID AT THE BEGINNING, IF YOU REPRESENT UMP YOU ARE NOT INEFFECTIVE AND WE DON'T HAVE THAT ISSUE ON POSTCONVICTION.

BUT, MOHAMMED IS VERY CLEAR THAT WHEN A DEFENDANT COMPLETELY REFUSES TO PARTICIPATE, IN THE PROCESS, THE COURT HAS THE RIGHT, TWO CHOICES, GET THE PSI, THE SCHOOL RECORDS, THE MILITARY, AND IN HER DISCRETION, CAN GO AHEAD AND APPOINT COUNSEL TO DO THIS EXERCISE FOR HER. AND THAT IS EXACTLY WHAT SHE DID.

I DON'T THINK I HAVE ANYTHING ELSE.

OH, MR. -- THE DEFENSE COUNSEL SAID THAT MR. BARDWILL, THE MUHAMMAD ATTORNEY, WAS STAND BY

COUNSEL.

HE ABSOLUTELY WAS NOT STAND BY  
COUNSEL.

MR. BARNES HAD STAND-BY COUNSEL,  
MR. MOORE, AND MR. BARDWELL WAS  
MUHAMMAD COUNSEL.

>> IF THERE IS NO FURTHER  
QUESTIONS I WOULD ASK THE JUDGE  
TO AFFIRM.

>> YOU HAVE 30 SECONDS BUT I'LL  
GIVE YOU A MINUTE IF YOU WOULD  
LIKE --

>> I WANTED TO CLARIFY ONE  
THING.

THE INITIAL PSI WAS A STANDARD  
PSI REQUEST.

PSI, I'M REFERRING TO, IS THE  
MUHAMMAD PSI.

THAT WAS COMING OUT OF MUHAMMAD  
WHERE MITIGATION IS NOT PUT  
FORWARD.

THAT PSI WAS NOT ORDERED AHEAD  
OF TIME.

AND THERE IS NO RECORD THAT THE  
JUDGE REVIEWED ANY KIND OF  
MEANINGFUL PSI, PURSUANT TO  
MOHAMMED, THAT WOULD JUSTIFY  
GETTING STAND BY COUNSEL.

THAT WAS THE DISTINCTION I WAS  
MAKING.

THERE WAS A PSI ORDERED  
PERFUNCTORY, BUT AFTER THE  
PENALTY PHASE GOT A CERTAIN  
POINT SHE ORDERED THE PSI THAT  
WOULD DISCLOSE THE KIND OF  
THINGS TO DEVELOP MITIGATION

THAT WAS THE DISTINCTION AND I  
DIDN'T MEAN TO MISLEAD THE  
COURT.