>> PLEASE RISE.

HEAR YE, HEAR YE, HEAR YE.

THE FLORIDA SUPREME COURT IS

NOW IN SESSION.

ALL WHO HAVE CAUSE TO PLEAD

DRAW NEAR, GIVE ATTENTION AND

YOU SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,

THE GREAT STATE OF FLORIDA AND

THIS HONORABLE COURT.

LADIES AND GENTLEMEN, THE

FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING AND WELCOME TO

THE FLORIDA SUPREME COURT.

THE FIRST CASE ON OUR DOCKET

TODAY IS ARMSTRONG VERSUS THE

STATE OF FLORIDA.

>> MAY IT PLEASE THE COURT.

MY NAME IS JOHN COTRONE.

I REPRESENT THE APPELLANT ON

THIS MATTER.

WE ARE SEEKING REVIEW OF

SENTENCING OF PENALTY PHASE

HEARING ON AUGUST 7th OF 2009

WHERE THE APPELLANT WAS
SENTENCED TO DEATH BY THE
HONORABLE MICHAEL GATES.
I HAVE SET OUT IN MY BRIEF FOUR
POINTS THAT I WISH TO ARGUE IN
FRONT OF YOUR HONORS THIS
MORNING.
HOWEVER I WOULD LIKE TO
INITIALLY START WITH THE THIRD
POINT, WITH THE TRIAL COURT'S
ANSWERING OF A JURY QUESTION IF
I MAY.
INITIALLY IT SHOULD BE NOTED
THAT THIS WAS A SECOND PENALTY
PHASE HEARING FROM AN INITIAL
CONVICTION AND SENTENCE OF
DEATH IN 1991.
A HORRIFIC SET OF FACTS WHERE A
DEPUTY WAS MURDERED AND ANOTHER
DEPUTY WAS SERIOUSLY INJURED.
THERE WAS A SENTENCE OF DEATH
AND IT WAS AFTER A INEFFECTIVE
ASSISTANCE OF COUNSEL HEARING
IT WAS BROUGHT BACK FOR A
SECOND PENALTY PHASE HEARING.

IN THIS SECOND PENALTY PHASE
HEARING IN APRIL OF '09 THE
STATE IN ESSENCE HAD ANOTHER,
BEST WAY TO PHRASE IT, A
MINI-TRIAL WHERE THEY PRESENTED
NUMEROUS EVIDENCE INCLUDING THE
SURVIVING DEPUTY, SALLUSTIO.
THE DEFENSE PRESENTED EVIDENCE.
IMPORTANTLY THE DEFENDANT
TESTIFIED IN EIGHT HOURS OF
TESTIMONY.
THE REASON WHY I BRING THIS UP
IS AFTER THE TESTIMONY AND THE
COURT INSTRUCTED THE JURY, THE
JURY CAME BACK WITH A QUESTION.
SPECIFICALLY THE JURY ASKED,
WILL THE 17 YEARS THE DEFENDANT
SERVED BE INCLUDED IN THE
25-YEAR SENTENCE?
IMPORTANT TO NOTE THERE WAS A
SECOND QUESTION.
THE SECOND QUESTION DEALT WITH
THE TESTIMONY OF DEPUTY
SALLUSTIO AND ALSO THE
DEFENDANT.

SO IN ESSENCE THEY WANTED A
READBACK OF DEPUTY SALLUSTIO'S
TESTIMONY WHICH WAS QUITE
COMPELLING BUT ALSO THEY WANTED
TO HEAR EIGHT HOURS OF
TESTIMONY FROM THE DEFENDANT.
WHO CLEARLY, I THINK THE
ARGUMENT CAN BE MADE, THAT THIS
JURY WITH THOSE TWO QUESTIONS
WAS SERIOUSLY CONSIDERING
WHETHER TO IMPOSE A LIFE
SENTENCE OR NOT.
>> WHAT WAS THE SECOND QUESTION
PRECISELY?
>> THEY WANTED THE TESTIMONY OF
DEPUTY SALLUSTIO AND THE
DEFENDANT.
THE QUESTION WAS PHRASED, NOT
SPECIFICALLY WHAT THEY SAID BUT
THE COURT INTERPRETED THAT
AS --
>> WHAT DID THEY SPECIFICALLY
SAY?
>> THEY WANTED TO HEAR, WE WANT
A READBACK BUT WANTED TO HEAR

THE TESTIMONY OF BOTH SALLUSTIO

AND THE DEFENDANT.

THEY DIDN'T SAY READBACK.

CLEARLY THEY DIDN'T UNDERSTAND

THE PHRASEOLOGY.

BUT AFTER SOME DEBATE OUTSIDE

THE PRESENCE OF THE JURY THE

COURT DECIDED TO READ BACK THAT

TESTIMONY AND IT CERTAINLY WAS.

BUT IMPORTANTLY HOW THAT WAS

ASKED BY THE JURY ALONG WITH

THE QUESTION OF WILL THE 17

YEARS BE COUNTED TOWARD THE 25.

>> SO WHAT IS YOUR ARGUMENT?

HOW DOES IN FACT THE READBACK

OF THAT TESTIMONY PLAY INTO

YOUR ARGUMENT THAT THE TRIAL

JUDGE SHOULD HAVE GIVEN A

DIFFERENT INSTRUCTION

CONCERNING THE 17 YEARS?

>> WHAT HAPPENED WAS THE STATE

WAS PREPARED FOR THIS QUESTION.

WHEN THIS QUESTION WAS RAISED,

THEY HAD CASE LAW AND

IMMEDIATELY THEY PRESENTED THE

DOWNS CASE.

AND JUDGE GATES REVIEWED THE

DOWNS CASE AND WAS TROUBLED

WITH THE LANGUAGE IN THE DOWNS

CASE BECAUSE IN DOWNS IT TALKED

ABOUT THE DEFENSE OPENING THE

DOOR TO ARGUMENT REGARDING THE

25-YEAR SENTENCE.

>> BUT WAS, IS THE DOWNS CASE

THE CASE WHERE THERE WAS A

SECOND QUESTION CONCERNING

CREDIT FOR TIME SERVED BUT

WHETHER OR NOT HE WOULD IN FACT

BE PAROLED AFTER THE 25 YEARS?

>> THE DOWNS CASE ALLOWED, AS

WAS INTERPRETED BY THE STATE

AND FORWARDED TO THE TRIAL

COUNSEL, THAT THE COURT COULD

ANSWER THE QUESTION SIMPLY BY

ANSWERING THE QUESTION, YES.

AND THAT'S IN FACT ULTIMATELY

WHAT THE COURT DID, WAS, YES.

>> SO WHAT WAS WRONG WITH THAT?

>> THAT'S, TOOK ME A LITTLE

WHILE TO GET THERE.

WHAT WAS WRONG WITH THAT DOWNS

CASE WAS PRESENTED TO THE COURT

AND THE JUDGE WAS TROUBLED BY

THE LANGUAGE BECAUSE THAT WAS A

LIMITED BASIS WHERE THE COURT

JUST ANSWER THAT QUESTION YES,

THE TIME SERVED SHOULD BE GIVEN

BECAUSE THE DEFENSE ARGUED THAT

THE DEFENDANT WOULD SPEND 25

YEARS IN PRISON, WHICH WAS NOT

TRUE.

SO THE --

>> BUT IN THIS SITUATION, ISN'T

THAT ALSO TRUE, THAT HE, THAT

THE 17 YEARS THAT HE HAD

ALREADY BEEN IN PRISON COUNTS

TOWARDS THE 25 YEARS?

>> IT IS ABSOLUTELY TRUE.

>> OKAY. SO --

>> HOWEVER, HOWEVER THE WAY THE

COURT ANSWERED THE QUESTION

COMPLETELY MISLED THIS JURY.

IT WAS A HALF-TRUTH.

>> YOUR POINT HERE WAS THEY

SHOULD HAVE, THE JUDGE SHOULD

HAVE ADDITIONALLY SAID WHAT WE

APPROVED IN GREEN.

IS THAT THERE IS NO GUARANTY

THAT THE DEFENDANT WOULD BE

GRANTED PAROLE ON OR AFTER 25

YEARS?

>> IF THE COURT --

>> I WANT TO MAKE SURE.

>> YES, AND NO.

I THINK WHAT THE COURT SHOULD

HAVE DONE, AND I THINK WHAT THE

STATE SHOULD HAVE DONE IS

INITIALLY TOLD THE COURT, THE

STATE SHOULD HAVE TOLD THE

COURT TO READ, PURSUANT TO

WATERHOUSE YOU SHOULD RELY ON

THE STANDARD INSTRUCTION.

WHAT THE COURT SHOULD HAVE DONE

IN THIS CASE WAS RELY ON THE

STANDARD INSTRUCTIONS.

>> WHICH SAYS WHAT?

>> IN WATERHOUSE HE WOULD HAVE

READ THE STANDARD INSTRUCTION,

WHERE NOT ONLY ARE YOU -- THAT

BUT ALSO LIFE IN PRISON WITH

THE POSSIBILITY OF PAROLE AFTER

25 YEARS.

THAT'S WHAT THE COURT SHOULD

HAVE READ.

WATERHOUSE SUPPORTS THAT NOTION

AS WELL.

IN THIS CASE THE COURT REFUSED

TO ANSWER THE SECOND PORTION OF

THE STANDARD INSTRUCTION.

REFUSED TO ANSWER THE GREEN

INSTRUCTION.

>> WOULD AN INSTRUCTION THAT

SAYS WHAT YOU JUST ALLUDED

TO HAVE ANSWERED THE QUESTION

THE JURY ASKED, WHICH IS, DOES

THE 17 YEARS COUNT TOWARD THE

25 YEARS?

THAT'S THE QUESTION THAT WAS

ASKED.

BY TELLING THEM THAT THE

SENTENCE IS LIFE WITH 25 YEARS

MANDATORY MINIMUM BASICALLY,

DOES NOT ANSWER THAT QUESTION.

>> BUT TAKING THE ANALYSIS A

STEP FURTHER, IF, WHEN THE JURY

IS TOLD, YES, THEY GET, HE GETS

CREDIT FOR THAT, HE IS TELLING

THIS COURT THAT YOU MIGHT LET A

CONVICTED COP KILLER OUT IN

EIGHT YEARS.

AND THE DIFFERENCE IN THIS

CASE, IN OUR CASE, AS TO ALL

THE CASES CITED BY EITHER SIDE

IS TIME ESSENCE, THE TIME

ESSENCE.

THIS CASE IS 17 YEARS INTO

MR.^ARMSTRONG'S SENTENCE.

EVERY OTHER CASE, DOWNS, GREEN,

GORE, WATERHOUSE, HITCHCOCK,

ARE ALL CASES WHERE TIME WAS

NOT REMOTELY AS CLOSE.

10 YEARS I BELIEVE WAS ON, ON

GORE.

11 YEARS ON GREEN.

>> WHAT ABOUT HITCHCOCK?

>> HITCHCOCK, YOUR HONOR, IS

THE CASE THAT I BELIEVE SHOWS

THE PREJUDICE AND CERTAINLY THE

CASE WHERE THE JUDGE ERRED.

HITCHCOCK WAS A CASE WHERE

THERE WAS, THE PROXIMITY IN

TIME THEY RECOGNIZED THE

PREJUDICE.

IN FACT THE LANGUAGE IN GORE

WHICH WAS HANDED TO JUDGE

GATES --

>> SHE WAS ASKING YOU ABOUT

HITCHCOCK.

>> I WAS GOING TO READ THE

LANGUAGE.

>> YOU SAID GORE.

>> GORE CITES HITCHCOCK.

AND IF THE COURT WOULD HAVE

RELIED ON HITCHCOCK, THE COURT

WOULD HAVE REALIZED THE

PREJUDICE IT CREATED BY

ANSWERING THE QUESTION WITH A

INCOMPLETE ANSWER.

>> EXPLAIN HOW -- LET ME GO

BACK TO SOMETHING.

IN THIS TRIAL DID THE DEFENSE

TRY TO OFFER ANYTHING ABOUT AN

EXPERT ON PAROLE AND HOW RARELY

IF EVER PAROLE IS GRANTED TO

SOMEONE CONVICTED OF

FIRST-DEGREE MURDER?

>> THAT IS THE DISTINCTION IN

THIS CASE, NO.

>> SO THERE WAS NOTHING.

>> THE OTHER CASES --

>> THERE WAS NO ATTEMPT, EVEN

THOUGH WE'VE REJECTED IT TO

SAY, LISTEN, I LIKE TO

STIPULATE TO A LIFE SENTENCE?

DID THE DEFENSE TRY TO DO THAT?

>> NO. IN FACT HITCHCOCK

TALKS ABOUT

WHERE THE STATE TRIED TO ELICIT

AND ARGUED TESTIMONY THAT THE

DEFENDANT WAS GOING TO BE

RELEASED SOON BECAUSE THAT WAS

CLOSE IN TIME JUST LIKE OUR

CASE HERE.

AND THE COURT SAID, NO, YOU CAN

NOT DO THAT.

THE PROBLEM HERE IS, APPARENTLY

THE COURT DID NOT RECOGNIZE

HITCHCOCK, THE TRIAL COURT

LEVEL BECAUSE THE OUR CASE IS

17 YEARS INTO THE SENTENCE.

AND INSTEAD OF THE STATE
ATTORNEY ARGUING THIS, IN
ESSENCE THE JUDGE ARGUED IT FOR
THE STATE AND THE RECORD BEARS
OUT THAT THE TRIAL COUNSEL FOR
THE DEFENSE RECOGNIZED WHAT THE
STATE ATTEMPTED TO DO WAS BACK
DOOR WHAT THEY WEREN'T ALLOWED
TO DO.
>> WAIT, WAIT.
GOING BACK TO WHAT JUSTICE
QUINCE SAID, THE QUESTION WAS
STRAIGHTFORWARD.
WILL THE 17 YEARS BE COUNTED TO
THE 25?
>> ABSOLUTELY.
>> AND I DON'T KNOW WHAT, ANY
CASE THAT WOULD SAY GIVING A
TRUTHFUL, CORRECT, ANSWER, IS
ITSELF AN ABUSE OF DISCRETION.
SO I THINK YOUR ARGUMENT IF IT
IS GOING TO, IF IT IS GOING TO
HAVE ANY CHANCE OF RESONATING
HERE, THAT CLEARLY WHAT THE
JURY WAS WORRIED ABOUT, AS YOU

SAID, IS GETTNG OUT.

SO ONCE YOU KNEW THEY WERE

FOCUSED, ONCE THE JUDGE KNEW

THEY WERE FOCUSED ON THE

CREDIT, WITH THE SPECTER OF

EIGHT YEARS, SOMETHING MORE,

YOU'RE SAYING THE ERROR WAS IN

NOT STATING SOMETHING ELSE.

BUT I THINK IF YOU SAY, WELL,

NO, HE SHOULD HAVE IGNORED THAT

QUESTION AND JUST GONE BACK TO

THE STANDARD JURY INSTRUCTIONS

YOU WOULD BE HEAR ON ANOTHER

ARGUMENT.

YOU WOULD BE SAYING THAT WAS AN

ABUSE.

>> INITIALLY THAT WAS THE COURT

SHOULD HAVE DONE.

HOWEVER THE COURT DECIDED TO

ANSWER THE QUESTION AND THAT'S

WHERE --

>> WHAT CASE SAYS THAT A JUDGE

CAN ERR BY ANSWERING ACCURATELY

A QUESTION ASKED BY THE JURY?

UNLESS IT IS SOMETHING WHERE,

IT IS NOT WITHIN THEIR PURVIEW,

LIKE HAS HE EVER, YOU KNOW, WAS

HE ARRESTED 25 YEARS --

SOMETHING THAT WASN'T IN

EVIDENCE.

WHAT CASE STANDS FOR THE

PROPOSITION THAT ACCURATE

ANSWER IS ERROR?

NOW MAYBE --

>> HITCHCOCK.

I THINK HITCHCOCK ANSWERS THAT

QUESTION.

AND I THINK WHAT THIS ISSUE AS

TO CREDIT FOR TIME SERVED WHERE

I THINK EVERY, SHOULD BE TAKEN

ON A CASE-BY-CASE BASIS AND I

THINK CASE COULD BE

DISTINGUISHED FROM THE OTHER

CASES WHERE IN DOWNS, THAT'S

THE ONLY CASE WHERE THE COURT

ACTUALLY JUST READ THAT ANSWER,

THE HALF-ANSWER I LIKE TO CALL

IT.

THE GORE CASE TALKS ABOUT, IN

THAT CASE THERE WAS TWO

QUESTIONS.

THE COURT ANSWERED THE INITIAL

QUESTION JUST LIKE IN DOWNS

WHERE THEY, WERE TOLD THAT HE

WOULD GET CREDIT FOR TIME

SERVED.

HOWEVER THERE WAS A SECOND

QUESTION IN GORE.

THE SECOND QUESTION WAS TALKING

ABOUT THE PAROLE ISSUE, JUST

LIKE IN OUR CASE.

THE COURT DECLINED TO ANSWER

THAT QUESTION AND READ THIS

STANDARD JURY INSTRUCTION.

AND THE REASON THE DISTINCTION

IN THAT CASE AND IN OUR CASES,

IN GORE AGAIN, IT COMES TO THE

TIME ISSUE AND WHAT WAS

PRESENTED AT THE PENALTY PHASE.

WHAT WAS PRESENTED AT THAT

PENALTY PHASE WAS, IN ESSENCE

THE JURY HEARD ALL THE

TESTIMONY.

IN FACT THERE WAS A WITNESS IN

THE CASE.

HIS NAME WAS STONE.

WHO TESTIFIED IN ESSENCE THE

DEFENDANT WAS NEVER GOING TO BE

RELEASED.

HE HAD CONSECUTIVE LIFE

SENTENCES.

AND IT WAS BROUGHT OUT IN --

>> IF I GET YOUR POINT

CORRECTLY, I THINK WHAT YOUR

GRIPE, YOU MAJOR GRIPE IS THE

FACT THAT THE JURY WAS NOT TOLD

BY THE JUDGE, AS IN GREEN, THAT

THERE IS NO GUARANTY THAT YOUR

CLIENT WILL BE PAROLED AFTER 25

YEARS?

>> YES. THAT'S OUR MAJOR --

>> IN GREEN THE JUDGE SAID,

HOWEVER THERE IS NO GUARANTY

THAT THE DEFENDANT WOULD BE

GRANTED PAROLE AFTER 25 YEARS.

THAT'S WHAT YOU WANTED THE JURY

TO HEAR?

YOU WANTED THE JURY TO HEAR,

OKAY, HE WILL GET 17 YEARS OF

CREDIT?

>> RIGHT, YES.

>> BUT NO MORE THINKING HE WILL

GET OUT IN EIGHT YEARS BECAUSE

HE MAY NOT GET PAROLE AT ALL.

>> SO YOU WANTED THE JUDGE TO

ANSWER A QUESTION THAT WAS NOT

ASKED BY THE JURY?

>> WHAT I WANTED THE JUDGE TO

FOLLOW ULTIMATELY FOLLOW GREEN

AND SAY AS JUSTICE LABARGA IS

SUGGESTING.

THE POSSIBILITY, THERE IS NO

GUARANTY OF PAROLE.

>> WHAT WAS THE QUESTION ASKED?

>> WAS THAT QUESTION ASKED?

BY THE JURY?

>> NO, THAT QUESTION WAS NOT

ASKED.

>> OH.

>> AGAIN IF WE GO BACK TO GORE

WHERE THE COURT, I THINK WHAT

THE COURT NEEDS TO BE CONCERNED

WITH, AND WHAT THE TRIAL COURT

SHOULD HAVE BEEN CONCERNED WITH

WAS ALTHOUGH I ANSWERED THE

QUESTION ACCURATELY, WHAT IS
THE EFFECT OF THE ANSWER?
AND IN OUR CASE IT'S MUCH
DIFFERENT THAN IT WAS IN THE
DOWNS CASE BECAUSE THIS
DEFENDANT COMPLETED 17 YEARS OF
HIS SENTENCE.
SECOND, THERE WAS ABSOLUTELY NO
TESTIMONY IN THIS TRIAL
REGARDING HOW MUCH TIME THE
DEFENDANT WAS GOING TO DO.
IN FACT, WHICH MAKES MATTERS
WORSE, THIS DEFENDANT WAS
CONVICTED OF CONSECUTIVE LIFE
SENTENCES ON THIS CASE, WHICH
THE JURY WAS NEVER INFORMED OF.
IN ESSENCE THE REAL TRUTH THE
DEFENDANT WASN'T GETTING OUT IN
EIGHT YEARS AND HE WASN'T
GETTING OUT ANY TIME IN THE
NEAR FUTURE.
>> GOING BACK TO MY POINT FOR A
SECOND, I WANT TO STAY HERE FOR
A SECOND.
IT IS ACCURATE FOR THE COURT TO

HAVE STRUCKED THE JURY THAT THE

DEFENDANT WAS ENTITLED TO ALL

CREDIT, CREDIT FOR ALL TIME HE

HAS SERVED, WHICH WOULD HAVE

BEEN 17 YEARS.

THAT IS ACCURATE, YOU AGREE

WITH THAT?

>> THAT IS AN ACCURATE ANSWER

TO THAT QUESTION.

IT IS TRUE.

>> IT WOULD ALSO HAVE BEEN

ACCURATE IF THE JUDGE HAD

INSTRUCTED THE JURY THAT HE IS

ENTITLED TO ALL CREDIT FOR

CREDIT FOR ALL TIME HE HAS

SERVED BUT THERE IS NO GUARANTY

HE WILL BE PAROLED AFTER 25 YEARS?

THAT WOULD HAVE BEEN ACCURATE

TOO.

>> THAT WOULD HAVE BEEN

ACCURATE AS WELL.

>> AND THAT WOULD HAVE BEEN THE

ANSWER OR THE INSTRUCTION THAT

YOU FEEL THE JUDGE SHOULD HAVE

TOLD THE JURY?

>> YES.

I FEEL IN A CASE WHERE THE FACT

IN THE JUDGE'S SENTENCING

ORDER, IF I MAY, HE INDICATES,

THIS COURT NEVER FORGETS THAT

DEATH IS DIFFERENT AND I'M HELD

TO A HIGHER SCRUTINY.

IF THAT IS IN FACT TRUE, THEN I

THINK THE GREEN INSTRUCTION

WOULD BE THAT HIGHER SCRUTINY.

>> I'M CONFUSED.

LISTEN TO THE WHOLE TRANSCRIPT

I THOUGHT A FEW MINUTES BEFORE

WHEN I ASKED THE SAME QUESTION

OF JUSTICE LABARGA ANSWERED,

WHICH IS YOU WOULD WANT THE

GREEN ANSWER, YOU SAID NO, YOU

WOULDN'T WANT ANY OF THIS YOU

WOULD WANT THE STANDARD JURY

INSTRUCTION READ.

COULD YOU CLARIFY, LET ME

FINISH MY QUESTION.

>> OKAY. WHAT IS YOUR POSITION?

IS IT THAT THE GREEN ADDITIONAL

SENTENCE, WHICH WAS WHAT THE

DEFENSE COUNSEL ARGUED WOULD

HAVE BEEN, WHAT THE JUDGE

SHOULD HAVE DONE, OR, NO,

SHOULD HAVE JUST BEEN THE

STANDARD JURY INSTRUCTION?

>> OKAY, IF I MAY.

>> DO YOU RECALL THAT FROM A

FEW MINUTES AGO.

>> ABSOLUTELY.

I THINK WHAT I'M SUGGESTING TO

THE COURT THE APPROPRIATE ON A

DEATH PENALTY CASE WHERE A

QUESTION LIKE THAT IS ASKED BY

CREDIT FOR TIME SERVED I THINK

INITIALLY THE COURT SHOULD HAVE

READ THE STANDARD JURY

INSTRUCTION.

THE COURT DID NOT READ THE

STANDARD JURY INSTRUCTION.

>> WAS HE ASKED TO READ THIS.

>> ABSOLUTELY.

>> WHO ASKED?

>> THE STATE DID NOT, IN FACT

THE STATE WAS PREPARED FOR THAT

ANSWER THAT THEY WERE ABLE TO

OBTAIN.

>> I WANT TO ASK AN ADDITIONAL

QUESTION.

WHICH IS BECAUSE HE WAS

CONVICTED OF CONSECUTIVE LIFE

SENTENCES WOULDN'T IT BE, THE

STATEMENT, THERE IS NO GUARANTY

THE DEFENDANT WOULD BE GRANTED

PAROLE AFTER 25 YEARS, ACTUALLY

BE INACCURATE?

DID SOMEBODY ASK THE JUDGE TO

SAY, FOLLOWING, YES HE GETS

CREDIT FOR THE 17 YEARS AS

APPLIED TO 25 YEARS, BUT

BECAUSE HE HAS CONSECUTIVE LIFE

SENTENCES HE WILL NOT BE

PAROLED AT ALL?

DID ANYONE ASK THE JUDGE?

>> NO ONE ASKED THAT QUESTION

BUT IT WAS NEVER ARGUED IN THE

CASE.

>> WOULD THAT HAVE BEEN,

WOULDN'T HAVE REALLY SOLVED THE

PROBLEM HERE?

>> ABSOLUTELY.

>> BUT THE DEFENSE LAWYER NEVER

ASKED THE JUDGE TO, THAT

ANSWER?

>> THE DEFENSE LAWYER ASKED

THAT THE STANDARD INSTRUCTION

BE READ.

WHEN THAT WAS NOT GOING

ANYWHERE, THE DEFENSE THEN

ASKED THAT THE GREEN

INSTRUCTION BE READ.

THAT'S WHAT THE DEFENSE ASKED

FOR AND THE COURT SAID, NO, I'M

GOING TO ANSWER THE QUESTION AS

HE ANSWERED IT, PERIOD.

>> WHAT YOU'RE SAYING, WAS IT

ARGUED TO THE JURY THAT YOU

DON'T HAVE TO WORRY ABOUT

PAROLE AFTER 25 YEARS BECAUSE

HE IS GOING TO BE GETTING

CONSECUTIVE LIFE SENTENCES?

>> NO.

>> AND THE JURY DIDN'T KNOW HE

WAS GETTING, BECAUSE HE HADN'T

BEEN SENTENCED YET, HAD HE?

>> NO.

ACCORDING TO THE RECORD THE
JURY WOULD THINK THAT THIS
INDIVIDUAL WOULD BE RELEASED IN
EIGHT YEARS.
>> WOULDN'T THE PROBLEM BE THEN
AT THAT POINT THE JURY ISN'T
INSTRUCTED ON THE OTHER SENTENCE
THAT IT MIGHT RECEIVE FOR
CRIMES? THAT'S A PROBLEM.
BECAUSE HE HASN'T BEEN, HE
ATTEMPTED FIRST-DEGREE MURDER,
HAD HE BEEN SENTENCED ON THAT YET?
>> YES, HE HAD A PRIOR --
>> WE HAD THE PRIOR BUT NOBODY,
DID ANYONE TRY TO ARGUE THAT TO
THE JURY?
EVEN THOUGH IN FIRST-DEGREE
MURDER CASE IT IS LIFE WITHOUT
PAROLE AFTER 25 YEARS HE
ALREADY HAS A CONVICTION FOR
ATTEMPTED FIRST DEGREE MURDER
WITH MANDATORY LIFE SENTENCE?
>> NO, THAT WAS NOT ARGUED.
AND AGAIN THE JURY WAS CLEARLY
CONFUSED AND THEY WERE

CONSIDERING LIFE.

AND I THINK IN REASONABLENESS

TEST THE GREEN INSTRUCTION WAS

REASONABLE HERE.

>> BUT YOU DID SAY, LET ME MAKE

SURE I UNDERSTAND THIS, THE

JURY DID KNOW THAT HE HAD IN

FACT BEEN CONVICTED OF

ATTEMPTED FIRST DEGREE MURDER

AND HAD BEEN SENTENCED TO LIFE?

>> YES. IT WAS NOT ARGUED --

>> IT WASN'T ARGUED BUT THEY

HAD THAT INFORMATION?

>> YES.

>> LET ME UNDERSTAND

SPECIFICALLY WHAT YOU'RE

SAYING.

SHOULD HAVE BEEN INSTRUCTED BUT

WAS NOT.

IS IT THAT THERE'S NO GUARANTY

OF PAROLE?

IS THAT WHAT YOU'RE SAYING

SHOULD HAVE BEEN GIVEN BUT WAS

NOT?

>> I THINK GREEN, CERTAINLY IS

THE BEST OF ANSWER ONCE THE

JURY, ONCE THE COURT DECIDE NOT

TO READ THE STANDARD

INSTRUCTION.

>> WHAT WORDS SHOULD HAVE COME

OUT OF THE JUDGE'S MOUTH ON

INSTRUCTION TO THE JURY BUT DID

NOT?

>> WHAT I THINK, IF YOU'RE

ASKING ME MY OPINION, I THINK

THE --

>> I'M ASKING YOUR ARGUMENT AS

WHAT THE ERROR IS.

>> THE GREEN, THE LANGUAGE IN

GREEN.

>> WHAT IS THAT LANGUAGE?

>> THAT THERE IS NO GUARANTY

THAT HE WOULD RECEIVE PAROLE.

>> IS THAT LANGUAGE IN THE

STANDARD JURY INSTRUCTION?

>> NO.

>> SO YOU WERE SAYING A FEW

MOMENT HE SHOULD HAVE GIVE THE

STANDARD JURY INSTRUCTION.

>> BUT THE COURT DECIDED TO GO

UP THE MENU SO TO SPEAK.

ONCE HE DECIDED TO GO UP THE

MENU NOW IT IS HIS DUTY TO

ANSWER THE QUESTION IN A PROPER

FASHION.

IF HE WOULD HAVE JUST READ THE

JURY INSTRUCTION, THE STANDARD,

WE WOULDN'T HAVE THIS PROBLEM.

THAT'S WHAT --

>> THE STANDARD IS WHAT?

>> IT IS LIFE WITH THE

POSSIBILITY OF PAROLE AFTER

25 YEARS.

>> THE JURY INSTRUCTION SAYS,

THE SENTENCING POSSIBILITIES

FOR FIRST-DEGREE MURDER IS

DEATH OR LIFE IN PRISON WITH 25

YEARS.

>> WITH THE POSSIBILITY OF --

>> PAROLE AFTER 25 YEARS, AND

JUST LEAVE IT AT THAT.

>> YES. AND THAT'S WHAT THE

CASE LAW SUGGESTS.

>> IF I UNDERSTAND YOUR

ARGUMENT, THAT WOULD HAVE BEEN

YOUR FIRST CHOICE, THAT THE

COURT JUST INSTRUCT ON THE JURY

INSTRUCTION?

HOWEVER SINCE THE COURT

UNDERTOOK THE TASK OF TELLING

THE JURY THAT HE IS GOING TO

GET CREDIT FOR TIME SERVED.

THEN IT IS YOUR POSITION HE

SHOULD HAVE CONTINUED?

>> YES.

>> AND ALSO INFORMED THE JURY

THERE'S NO GUARANTY THAT THIS

PERSON WOULD BE PAROLED, WHICH

ALSO WOULD HAVE BEEN ACCURATE?

AM I CORRECT?

>> YES. AND I THINK THE CASE

LAW, WATERHOUSE, PERRIMAN, BELL,

ALL SUGGEST THE SAME.

MOST IMPORTANTLY, WATERHOUSE,

IF THE COURT HAD GIVEN

WATERHOUSE IT IS MY BELIEF HE

WOULD HAVE READ THE INITIAL

INSTRUCTION.

>> YOU'RE DOWN TO LITTLE MORE

THAN EIGHT MINUTES TOTAL

REMAINING IN YOUR REBUTTAL

TIME.

>> FINALLY I WOULD JUST IN

CLOSING, THERE IS NO DOUBT THAT

IT WAS A INCOMPLETE

RESPONSE THAT PREJUDICED THE

DEFENDANT AND PLAYED A CRITICAL

ROLE IN THE JURY'S DECISION.

THE, AND THERE WAS NO MENTION OF

THE LIFE SENTENCES.

THERE WAS NO MENTION AT ALL OF

THAT.

AND I BELIEVE THAT THE JURY WAS

PUT IN THE POSITION BY THE

JUDGE NOT BY THE STATE, WHERE

IN HITCHCOCK THE PREJUDICE IS

GREAT BECAUSE IT'S ONLY AN

EIGHT-YEAR SENTENCE LEFT TO DO.

IN HITCHCOCK, WHEN IT IS THAT

CLOSE IN TIME, THE STATE

CERTAINLY WASN'T ALLOWED TO

ARGUE THAT.

IN THIS CASE, IN OUR CASE THE

STATE WAS ABLE TO ORIGINAL THAT

THROUGH THE JUDGE WHEN THE

JUDGE ANSWERED THE QUESTION THE

WAY HE DID.

AND I DON'T, NO REASONABLE

PERSON WOULD HAVE TAKEN THE

VIEW ADOPTED BY THE COURT BY

JUST ANSWERING THAT QUESTION

THE WAY HE DID.

>> I HAVE TWO QUESTIONS.

DID ANYONE ARGUE, BECAUSE I'M

NOW REREADING WHAT THE JURY'S

QUESTION WAS.

OF THE 17 YEARS HE SERVED BE

INCLUDED IN THE 25-YEAR

SENTENCE?

THAT'S NOT, THAT'S INCORRECT IN

ITSELF.

THERE IS NO SENTENCE OF --

[INAUDIBLE]

DID SOMEONE POINT OUT THAT

ITSELF SHOWED THE JURY HAD

MISCONSTRUED 25, LIFE WITHOUT

PAROLE FOR 25 YEARS?

>> NO.

>> BUT THAT'S, AND YOU DON'T

MAKE THAT, YOU DON'T MAKE THAT

ARGUMENT THAT THE QUESTION

ITSELF IS, SHOWS A

MISAPPREHENSION OF WHAT THE

SENTENCE WAS FOR FIRST-DEGREE

MURDER OF THE DEPUTY?

>> I THINK, AGAIN, WE'RE

READING INTO THAT.

THE JURY IS CONCERNED ABOUT A

CONVICTED COP KILLER BEING

RELEASED IN EIGHT YEARS.

>> THEN THE OTHER QUESTION I

HAVE IS, I JUST WANT TO MAKE

SURE, DID THE JURY KNOW ABOUT

HIS OTHER LIFE SENTENCES?

I THOUGHT, I FIRST THOUGHT YOU

SAID NO, THEN YES. THEN OF

COURSE MISS CAMPBELL WILL

STRAIGHTEN THAT OUT.

DID THE JURY KNOW HE HAD

CONSECUTIVE LIFE SENTENCES FOR

THE OTHER CRIMES?

>> IT WAS NEVER, NO.

>> WELL, NOW, YOU TOLD ME --

>> IT WAS NEVER ARGUED TO THIS

JURY.

>> YOU SAID IT WAS NEVER ARGUED

BUT YOU SAID THE JURY WAS IN

FACT INFORMED OF THAT.

SO IS IT YES OR NO?

YOU CLEARLY TOLD ME THAT THE

JURY KNEW HE HAD BEEN CONVICTED

OF ATTEMPTED MURDER AND THAT HE

HAD BEEN SENTENCED TO A LIFE

SENTENCE FOR THAT.

>> I MISSPOKE.

I BELIEVE THE JURY DID NOT

KNOW.

IN FACT IT WAS NOT ARGUED IN

ESSENCE, WAS NEVER AN ISSUE.

IN FACT, THE TRIAL COURT --

>> MAY NOT HAVE BEEN ARGUED BUT

GENERALLY IN THESE

RESENTENCINGS THERE IS SOME

KIND OF STATEMENTS THAT ARE

MADE PRIOR TO THE TAKING OF

EVIDENCE AND ALL OF THAT.

WHAT, IS THERE ANY PLACE IN

THIS RECORD WHERE THE JURY WAS

TOLD HE HAD BEEN CONVICTED OF

FIRST AGREE, ATTEMPTED

FIRST-DEGREE MURDER?

>> MY RECOLLECTION IN THIS

ISSUE WAS THE TRIAL, THE

DEFENSE TEAM, THERE WAS TWO

ATTORNEYS.

WHEN EVER THE ISSUE OF TIME WAS

LEFT, TIME TO GO OR ANY OTHER,

THEY STOOD AWAY FROM THAT WITH

A 20-FOOT POLE.

IT NEVER CAME OUT.

NEVER WAS BROUGHT OUT IN THIS

CASE.

THERE WAS TIMES WHERE THE

MENTION OF THE 17-YEAR

SENTENCE --

>> BUT THAT NOTWITHSTANDING

WHAT WE'RE TALKING ABOUT IS THE

ATTEMPTED MURDER CONVICTION.

HE WAS IN FACT AT THAT POINT

ALREADY CONVICTED OF

ATTEMPTED MURDER ALSO?

>> MY UNDERSTANDING OF THE

RECORD IS NO.

>> OKAY.

>> DOWN TO FOUR MINUTES NOW.

>> THANK YOU.

>> WHY YOU JUST START WITH THAT

ONE.

>> AFTER YOUR NAME.

>> MAY IT PLEASE THE COURT.

LESLIE CAMPBELL WITH THE

ATTORNEY GENERAL'S OFFICE ON

BEHALF OF THE STATE.

I DO HAVE AN ANSWER FOR YOUR

HONORS ON WHETHER OR NOT THE

JURY WAS ACTUALLY INFORMED.

IF I MAY I WILL LOOK THROUGH MY

NOTES FOR CAREFULLY.

I WOULD THINK THAT THEY WERE

NOT.

I DON'T RECALL THAT THEY WERE.

>> BUT, MISS CAMPBELL, ISN'T

THAT SORT OF BASIC SO WHAT IS

GOING ON HERE?

IN THAT IN THESE RESENTENCES,

RESENTENCING HAD THIS COME UP

OVER AGAIN BECAUSE CASES ARE

SHOWING THAT WHEN THESE OLDER

CASES COME UP, THE JURY, THEY

ARE GOING TO GIVE A LIFE

SENTENCE AND THEY HEAR THIS
POSSIBILITY OF PAROLE IN 25
YEARS, THEY DON'T WANT THESE
DEFENDANTS OUT.
SO HERE WHAT YOU HAVE A
DEFENDANT NOT GETTING OUT
BECAUSE HE IS ALREADY CONVICTED
OF ATTEMPTED FIRST DEGREE
MURDER AND GIVEN A LIFE
SENTENCE, ISN'T THE JURY LED BY
AN ANSWER THAT MAKES THE JURY
THINK THAT HE MAY GET OUT IN 25
YEARS?
>> NO, YOUR HONOR, THE JURY IS
NOT MISLED. THE JURY IS TOLD --
>> LET ME ASK YOU THIS.
IF THIS DEFENDANT HAD GOTTEN A
LIFE SENTENCE WITH THE
POSSIBILITY OF PAROLE IN 25
YEARS, WOULD THIS DEFENDANT GET
OUT IN 25 YEARS?
>> THERE'S A POSSIBILITY AND
THAT'S ALL THERE IS.
THERE IS NO GUARANTY ONE WAY OR
THE OTHER.

>> LIFE SENTENCES ALSO HAVE

PAROLE AFTER 25 YEARS?

>> I DON'T BELIEVE SO, YOUR

HONOR.

>> SO HOW WOULD HE GET OUT?

>> AS FAR AS JUST ON THE --

>> YOU DON'T GET OUT, I DON'T

THINK THE DEPARTMENT OF

CORRECTIONS SAYS YOU CAN LEAVE

ON THIS SENTENCE BUT YOU WILL

STAY ON THAT.

I MEAN, HE CAN'T GET OUT!.

>> IF THEY WERE LIFE SENTENCES,

YES.

IF THE LIFE SENTENCES WERE ON

THE OTHER.

BUT THEN I WOULD POINT, YOUR

HONOR, TO GORE WHERE THE COURT

WAS ASKED WHETHER OR NOT IT WAS

ERROR NOT TO TELL THE JURY THAT

HE WOULD NOT GET OUT OF PRISON

ON THE OTHER LIFE SENTENCES.

AND THIS COURT SAID IT WAS NOT

ERROR.

THIS COURT SAID THAT IT WAS

PERFECTLY FINE FOR THE TRIAL
COURT TO SAY YOU HAVE TO RELY
ON WHAT YOU WERE INSTRUCTED.
>> THAT'S ONE THING.
BECAUSE ALL THEY ASKED IN THIS
THAT THEY REREAD THE STANDARD
JURY INSTRUCTION.
I SAY ONCE THE JUDGE NOW
PROCEEDS TO TRY TO ANSWER THE
QUESTION YOU AGREE THAT EVEN
THE QUESTION ITSELF SHOW AS
MISAPPREHENSION SAYING THE
WILL THE 17 YEARS HE SERVED BE
INCLUDED IN THE 25-YEAR
SENTENCE?
>> I THINK WE'RE TALKING ABOUT
JURORS WHO ARE MAYBE WRITING
SOMETHING SHORTHAND.
THEY WERE CLEARLY INSTRUCTED
THAT THE SENTENCE WAS LIFE
WITHOUT THE POSSIBILITY OF
PAROLE FOR 25 YEARS.
>> ARE YOU TELLING ME THAT THIS
JURY BY ASKING THAT QUESTION
WASN'T CONCERNED IN ITS

DELIBERATIONS WHERE IF THEY
GIVE A LIFE SENTENCE THAT IS
GIVEN GREAT WEIGHT, IT IS TRULY
A LIFE OR DEATH MATTER FOR
MR.^ARMSTRONG IN THIS
SITUATION, THAT THEY, BY ASKING
THAT QUESTION THEY WEREN'T
CONCERNED WITH WHETHER IN
DECIDING WHAT SENTENCE TO GIVE,
THEY WEREN'T CONCERNED WHETHER
HE WAS GOING TO GET OUT IN 25
YEARS?
>> I WOULD AGREE THAT THEY ARE
CONCERNED WITH THE AMOUNT OF
TIME THAT HE SPENT IN JAIL AND
HOW THAT IMPACTED ON HIS
SENTENCE.
>> SO WHY WOULDN'T THE ANSWER
BE FIRST OF ALL, THE SENTENCE
WOULD BE A LIFE SENTENCE WITH
ONLY A POSSIBILITY OF PAROLE
AFTER 25 YEARS?
WHY ISN'T THAT THEN THE, THAT
THE OTHER IS MISLEADING?
BECAUSE CREDIT FOR TIME SERVED

DOESN'T GO TO ANYTHING OTHER

THAN WHEN YOU MIGHT BE ELIGIBLE

FOR PAROLE, NOT WHEN YOU WOULD

GET OUT?

>> I THINK, YOUR HONOR, IS

READING MORE INTO THE QUESTION

THAN THE --

>> WHAT DO YOU THINK, WHY DID

THE JURY, REALIZING, WE CAN'T

GO INTO, I'M THINKING AND I

THINK DEFENSE COUNSEL IS

THINKING AND I'M THINKING,

MR.^ARMSTRONG IS THINKING THE

JURY WAS TRYING TO FIGURE OUT

WHETHER TO GIVE A LIFE

SENTENCE.

THEY DIDN'T WANT THIS MAN OUT

BECAUSE THAT'S WHAT WE KNOW

THAT JURIES WILL SAY, THIS IS A

HORRIBLE CRIME.

HE SHOULDN'T GET OUT.

HE WON'T GET OUT.

AND WHAT ELSE WOULD THEY BE

THINKING IN ASKING ABOUT THE 17

YEARS?

>> I DON'T KNOW HOW A JUDGE

COULD FORMULATE A, AN ANSWER TO

SAY, THAT HE WILL NOT GET OUT

OF PRISON ON, ON THE, WHEN

THERE'S A POSSIBILITY OF

PAROLE.

THE QUESTION WAS DEALING WITH

THE DEATH SENTENCE.

>> THEY ASKED THE QUESTION AND,

SO I ASK YOU AGAIN.

IF IT ISN'T THE JURY WAS TRYING

TO FIGURE OUT WHEN HE WAS GOING

TO GET OUT, WHAT WAS THE REASON

FOR THE QUESTION?

>> I'M NOT DISPUTING THAT, YOUR

HONOR.

>> OKAY. SO WHY IS IT NOT

INACCURATE TO BECAUSE THEY

HAVE ALREADY SAID, THEY CALLED

IT A 25-YEAR SENTENCE, WHY

ISN'T INACCURATE TO SAY THE 25

YEARS IS NOT A SENTENCE.

HIS SENTENCE WOULD BE A LIFE

SENTENCE AND THERE WOULD ONLY

BE A POSSIBILITY OF PAROLE

AFTER 25 YEARS, BUT THE 17
YEARS COUNTS TO THE PERIOD IN
WHICH THE PAROLE WILL BE
EVALUATED?
>> NUMBER ONE, THE JURY IS
ALREADY INSTRUCTED ON THAT
THERE WAS A POSSIBILITY OF
PAROLE AFTER 25 YEARS.
NUMBER TWO, THEY, THE DEFENSE
COUNSEL NEVER ASKED TO TALK
ABOUT THE OTHER SENTENCES AND
HOW THAT IMPACTED.
SO TO ASK THE JUDGE TO MAKE A
STATEMENT, THAT THERE WOULD BE
A THERE WOULD BE NO GUARANTY OF
PAROLE ON ANYTHING, HE COULD
MAKE THAT STATEMENT, HOWEVER IT
IS NOT ABUSE OF DISCRETION NOT
TO MAKE THAT STATEMENT.
>> IS IT CLEAR -- LET'S MAKE
SURE.
IT'S CLEAR IN THE RECORD THAT
NO ONE QUESTIONED THE JUDGE
ABOUT WHAT THE SENTENCE, WHAT
THE QUESTIONS FROM THE JURY

MEANT.

>> EVERYONE WAS UNDER THE

ASSUMPTION IT WAS --

>> DOES HE GET CREDIT TOWARDS

THE 25-YEAR MINIMUM.

>> RIGHT.

>> LET'S PUT IT THAT WAY FOR

THE 17 YEARS HE HAD ALREADY

SERVED.

>> YES.

>> AND WASN'T THERE DURING THE

COURSE OF AT LEAST SOMEBODY'S

TESTIMONY AT THE SENTENCING

HEARING, WASN'T THERE SOME

INDICATION THAT HE HAD IN FACT

HAD BEEN CONVICTED OF SOME

OTHER CRIMES DURING THIS

PERIOD.

>> YES.

>> WHETHER THEY TALKED ABOUT

THE SENTENCE OR NOT I'M NOT

SURE BUT AS I RECALL THIS

RECORD THERE IS SOME TESTIMONY

DURING THE PENALTY PHASE THAT

HE HAD BEEN CONVICTED OF OTHER

CRIMES.

>> YES.

>> AND SENTENCED ON THOSE.

>> A SEPARATE ARMED ROBBERY.

>> I GUESS MY QUESTION HERE IS,

AREN'T WE HERE ON WHETHER OR

NOT THE TRIAL JUDGE ERRED BY

NOT TAKING THE NEXT STEP AND

SAYING, BUT THERE'S NO GUARANTY

THAT HE WILL BE PAROLED AFTER

25 YEARS?

AND THAT'S, IN MY ESTIMATION,

THAT'S THE REAL QUESTION HERE.

>> YES. AND --

>> WAS IT ERROR NOT TO GO

ANOTHER STEP.

>> OR WAS IT ABUSE OF

DISCRETION NOT TO GO ANOTHER

STEP BECAUSE THAT IS THE

STANDARD?

THAT'S THE QUESTION BUT THEN WE

ALSO HAVE THE TRIAL JUDGE NOT

BEING ASKED TO DISCUSS WHAT THE

PAROLE POSSIBILITIES ARE BASED

ON THE OTHER SENTENCES HE HAS.

HE IS MERELY ASKING WHAT THE

PAROLE POSSIBILITIES ARE

FOR THE DEATH SENTENCE.

AND NOTHING WAS BROUGHT BEFORE

THE COURT ON THAT.

>> NOT REALLY THE PAROLE

POSSIBILITIES.

HE WAS REALLY ASKED ABOUT

CREDIT FOR TIME SERVED.

>> THAT'S WHAT THE JURY ASKED,

YES. BUT DURING ARGUMENT THEN

DEFENSE COUNSEL HAD ASKED FOR

SOME SORT OF INSTRUCTION ABOUT

PAROLE.

AND BASED ON THE CASE LAW THERE

IS NO REQUIREMENT FOR THE COURT

TO GIVE THAT INSTRUCTION, THAT

ADDITIONAL INSTRUCTION.

HE ANSWERED THE FIRST QUESTION

ACCURATELY. HE GAVE THE LAW ON THAT

QUESTION.

>> LET ME, IN GREEN THE

INSTRUCTION WAS IN FACT GIVEN

THAT THERE'S NO GUARANTY THAT

HE IS GOING TO BE PAROLED AFTER

25 YEARS.

WHAT WAS THE QUESTION THAT WAS

ASKED BY THE JURY IN GREEN?

AND I THOUGHT EVEN WITH US THE,

IT WAS THE DEFENSE THAT WAS

EVEN ARGUING THAT HE SHOULDN'T

HAVE GONE THAT FAR?

>> THAT'S CORRECT.

THE GREEN CONTENDS THAT THE

COURT IMPROPERLY RESPONDED TO

THE QUESTIONS AND --

>> THE QUESTION IN GREEN WAS,

JUDGE DOES A LIFE SENTENCE

WITHOUT POSSIBILITY OF PAROLE

START IN THE YEAR 1987 OR DOES

IT START TODAY?

>> AND THEN THE SECOND QUESTION

WAS --

>> THE JUDGE RESPONDED, THE

DEFENDANT, THE DEFENDANT IS

SENTENCED TO LIFE WITHOUT

PAROLE WOULD BE ENTITLED TO

CREDIT FOR ALL TIME IN JAIL

SERVED AGAINST A LIFE SENTENCE

HOWEVER THERE IS NO GUARANTY

THAT A DEFENDANT WILL BE

GRANTED PAROLE AT OR AFTER 25

YEARS.

>> THAT WAS THE ANSWER.

>> THAT IS THE ANSWER IN GREEN.

LET ME ASK YOU THIS QUESTION.

THE CODEFENDANT IN THIS CASE HE

WENT TO TRIAL, AM I CORRECT,

SEPARATE TRIAL?

>> YES.

>> AND HE WAS CONVICTED?

>> YES.

>> AND THERE WAS A PENALTY

PHASE.

>> YES.

>> AND THE JURY RECOMMENDED

LIFE?

>> YES.

>> AND HE WAS SENTENCED TO

LIFE.

NOW DID THE JUDGE SENTENCE THE

CODEFENDANT TO LIFE BEFORE THIS

DEFENDANT'S TRIAL, THE

CODEFENDANT? IN OTHER WORDS --

>> IT WAS BEFORE THE

CODEFENDANT'S SECOND PENALTY

PHASE, YES.

>> SO WAS THE JURY IN THIS

SECOND PENALTY PHASE MADE AWARE

OF THE FACT THAT THE

CODEFENDANT HAD RECEIVED A LIFE

SENTENCE?

>> MR.^ARMSTRONG TRIED TO MAKE

THAT AN ISSUE WHEN HE WAS

SAYING THAT THE STATE HAD MADE

A DEAL THAT MR. COLEMAN

WAS THE ACTUAL SHOOTER.

THE STATE MADE A DEAL WITH HIM

TO GIVE MR.^ARMSTRONG THE DEATH

PENALTY AND GIVE MR.^COLEMAN

LIFE.

>> MY RECOLLECTION OF THE FACTS

IS, IT SEEMS TO ME WE HAD THIS

SHOOTOUT OUTSIDE OF CHURCH'S

FRIED CHICKEN PLACE AND SEEMS

TO ME BOTH DEFENDANTS WERE

SHOOTING.

JUST SO HAPPENS THIS

DEFENDANT'S GUN IS THE GUN

BULLETS WERE MATCHED TO THE

VICTIM.

>> IT IS NOT ONLY, NOT ONLY THE

BULLETS, YOUR HONOR, IT IS THE

LOCATION OF THE DEFENDANT IN

RELATIONSHIP TO THE TWO

OFFICERS.

IT'S WHERE THE BLOOD IS FOUND

AND IT'S WHERE OFFICER GREENEY

IS FOUND DEAD AND ALSO THE FACT THAT

THERE IS STIPPLING AND BURN

MARKS ON THE OFFICER'S SHIRT.

>> IT WAS PROVEN THIS

DEFENDANT'S GUN THAT SHOT THE

OFFICER?

>> NOT THE DEFENDANT'S, GUN,

YOUR HONOR.

NO, THE GUN WAS NEVER FOUND.

IT WAS PROVEN THIS DEFENDANT HAD

DONE THE SHOOTING.

>> BECAUSE HE WAS SEEN WITH A

.9 MILLIMETER, WHATEVER IT WAS?

>> YES. THERE WAS BLOOD,

GREENEY'S BLOOD WAS IN THE CAR.

OFFICER GREENEY HAD A BLOODSHOT

WOUND NINE TO 18 INCHES AWAY.

THAT PLACED MR.^ARMSTRONG NEXT

TO OFFICER GREENEY AT THE TIME

THAT THE SHOTS WERE FIRED.

>> GIVE THE FACT THAT BOTH

DEFENDANTS WERE SHOOTING THEIR

GUNS THERE WAS A POSSIBILITY

ALSO THAT THE CODEFENDANT COULD

HAVE HIT THE OFFICER?

>> NOT OFFICER GREENEY.

>> HE GOT A LIFE SENTENCE, JUST

SEEMS TO ME THAT GIVE THE FACTS

OF THIS CASE THAT A LIFE

SENTENCE WAS A REAL

POSSIBILITY.

>> IN THIS CASE?

>> IN THIS CASE.

>> I DON'T BELIEVE --

>> NOT A LIFE SENTENCE FROM THE

JUDGE BUT A LIFE RECOMMENDATION

FROM THE JURY WAS A REAL

POSSIBILITY.

>> I DON'T BELIEVE SO, YOUR

HONOR.

THERE ARE THREE VERY STRONG

AGGRAVATORS.

AND IT WAS PROVEN BEYOND A

REASONABLE DOUBT THAT THIS

DEFENDANT, MR.^ARMSTRONG, WAS

THE SHOOTER.

NOT ONLY WAS THE ONE WHO SHOT

AND KILLED OFFICER GREENEY BUT

HE IS THE ONE WHO SHOT AND

INJURED SERIOUSLY OFFICER

SALLUSTIO.

>> WASN'T ARMSTRONG HIMSELF

SHOT?

>> YES HE WAS.

>> WAS HE SHOT BY THE BULLETS

FROM HIS CODEFENDANT?

>> THAT COULDN'T BE DETERMINED

BUT OFFICER SALLUSTIO DID FIRE

AT ARMSTRONG.

>> THIS IS GOING BACK, AND I

KNOW, I READ THIS SOMEPLACE

THAT IN TERMS OF SOMEBODY, A

JUDGE AT SOME POINT DID THE

ANALYSIS OF THE RELATIVE

CULPABILITY OF

ARMSTRONG AND HIS CODEFENDANT.

>> IN THE SENTENCING ORDER,

YOUR HONOR.

>> IN THIS SENTENCE ORDER?

>> I BELIEVE SO.

THIS WAS PART OF THIS CASE.

WHILE THEY WEREN'T SUPPOSED TO

ARGUE LINGERING DOUBT,

MR.^ARMSTRONG WAS LOOKING FOR

THE MITIGATORS OF LITTLE

INVOLVEMENT AND ALL --

>> I'M NOT TALKING ABOUT WHAT

JUSTICE LABARGA IS TALKING

ABOUT WHICH IS THE RELATIVE

CULPABILITY ARGUMENT, TWO

EQUALLY CULPABLE DEFENDANTS,

ONE GETS LIFE AND ONE GETS

DEATH THERE IS AN ISSUE THERE

WITH PROPORTIONALITY.

>> BUT NOT IN THIS CASE, YOUR

HONOR.

IT IS PROVEN BEYOND A

REASONABLE DOUBT THAT IT WAS

MR.^ARMSTRONG --

>> I'M ASKING YOU DID, SO ARE

YOU SAYING IT IS IN THE JUDGE'S

CURRENT SENTENCING ORDER THAT

THAT THE RELATIVE

CULPABILITY ANALYSIS IS MADE?

>> THE JUDGE IS TALKING ABOUT

THE ARGUMENT AND ALSO THE

REASONS WHY HE IS REJECTING THE

MITIGATION OF THE DEFENDANT

NOT, BEING MINOR PARTICIPANT.

>> MINOR PARTICIPANT IS

DIFFERENT --

>> THERE IS SECOND ONE, YOUR

HONOR. HE WAS NOT, HE WAS UNDER

DURESS.

HE WAS NOT SUBSTANTIAL, NOT IN

THE SUBSTANTIAL DOMINATION OF

ANOTHER.

SO BOTH OF THOSE GO TO

MR.^ARMSTRONG'S CLAIM THAT I

WAS JUST THERE TO PICK UP MY

GIRLFRIEND.

>> I UNDERSTAND THAT.

NO ONE HERE IS THINKING THAT

MR.^ARMSTRONG WAS JUST AN

INNOCENT BISTANDER, OKAY, NOR

DID THE JURY OBVIOUSLY BUT IT

IS A 9-3 REC.

IT IS ENOUGH TO GIVE HIM DEATH.

NOW WE GO BACK TO TRYING TO

FIGURE OUT WHETHER THIS JURY,

AT LEAST THREE OTHER MEMBERS,

WERE LEANING TO GIVE HIM A LIFE

SENTENCE.

WE ALL, LET'S FACE IT HERE.

THAT IF SOMEBODY, WE KNOW THE

JURIES NOW ONCE THEY KNOW LIFE

WITHOUT THE POSSIBILITY OF

PAROLE ARE RECOMMENDING DEATH

LESS.

THAT IS JUST, THAT IS THE FACTS

AND DEATH SENTENCES ARE BEING

RECOMMENDED LESS.

SO NOW WE JUST GO TO, WHAT I'M

TROUBLED BY, THE SITUATION

WHERE IF I'M THE JUDGE AND I KNOW

THIS MAN IS NOT GETTING OUT,

THAT MAY INFLUENCE ME TO GIVE A

LIFE SENTENCE.

BUT IF I THINK HE MIGHT GET

OUT, I WOULD GO, I WOULD RATHER

GIVE HIM A DEATH SENTENCE HE

WILL NEVER GET OUT.

HE MAY NEVER BE EXECUTED BUT HE

WILL NEVER GET OUT.

THE JURY DOESN'T HAVE THAT

KNOWLEDGE THAT WE AS JUDGES

HAVE AND LAWYERS.

AND THAT'S WHY ANSWERS TO THESE

QUESTIONS ARE TROUBLING IN THAT

IF THE, AND I APPRECIATE WHAT

YOU'RE ARGUING, WHICH IS THAT

IT IS A QUESTION.

THE ANSWER WAS ACCURATE AND I

AGREE AS FAR AS IT WENT IT MAY

HAVE BEEN ACCURATE BUT IT

DOESN'T TELL THE WHOLE STORY

AND THAT'S WHY I DON'T

UNDERSTAND HOW NOT GIVING THE

ADDITIONAL GREEN SENTENCE AT

THE VERY LEAST WASN'T THE

PROPER THING TO DO.

NOW MY COLLEAGUES MAY ARGUE IT

IS STILL NOT ABUSE OF

DISCRETION, BUT WE'LL HAVE TO

FOR THESE CASES COME UP WITH,

WHAT WE SUGGEST AS BEING THE

RECOMMENDED INSTRUCTION OR

WE'RE GOING TO KEEP ON GETTING

THESE.

ARE YOU SAYING ON BEHALF OF THE

STATE, LET'S SAY, LET'S ASSUME

THIS CASE, YOU KNOW, WE AGREE

IT IS NOT ABUSE OF DISCRETION.

WOULD THE JUDGE HAVE BEEN WRONG

IF HE HAD ADDED THE GREEN LINE,

THERE'S NO GUARANTY THAT THE

DEFENDANT WOULD BE GRANTED

PAROLE ON OR AFTER 25 YEARS?

WOULD HE HAVE ABUSED HIS

DISCRETION IN GIVING THAT

ADDITIONAL LINE?

>> THIS COURT FOUND THAT

ADDITIONAL INFORMATION WOULD

NOT BE AN ABUSE OF DISCRETION

IN GREEN.

>> WHAT WE'RE REALLY DOING IS

SAYING AND THIS IS WHAT SCARES

ME IN THESE DEATH CASES THE

DIFFERENCE MAY BE BETWEEN THIS

MAN HAVING A DEATH SENTENCE OR

A LIFE SENTENCE WHETHER ONE

JUDGE ADDS THAT LINE THAT IS

NOT ABUSE OF DISCRETION AND

ANOTHER JUDGE DOESN'T.

DOESN'T THAT STRIKE YOU AS

BEING, WHEN WE TALK ABOUT

DISCRETION, NOT THE TYPE OF

SITUATION THAT SHOULD BE

SUBJECT TO THAT TYPE OF

DISCRETION?

I'M JUST GOING TO GIVE THIS

SENTENCE BUT NOT THAT SENTENCE?

>> WELL, YOUR HONOR, IF IT WAS

SO IMPORTANT TO GIVE THAT

ADDITIONAL LANGUAGE THIS COURT

CERTAINLY WOULD HAVE SAID, THIS

LANGUAGE IS REQUIRED IF YOU

GIVE THIS OTHER LANGUAGE.

THERE WAS NOT ABUSE OF

DISCRETION.

>> SOMETIMES WE DO THINGS

SLOWLY.

SOMETIMES WE LOOK BACK.

I WAS ONE THAT THOUGHT WE

SHOULD BE ALLOWING DEFENDANTS

TO STIPULATE TO LIFE WITHOUT

THE POSSIBILITY OF PAROLE SO WE
WOULDN'T HAVE THIS.
AND THAT WAS JUSTICE VANCE AND I
THOUGHT THAT WAS APPROPRIATE
AND MY COLLEAGUES DISAGREED.
I FEEL MORE STRONGLY ABOUT THAT
THESE INSTRUCTIONS NEEDED TO
BE, GOT TO COME TO GRIPS.
I HAVE TO LOOK BACK AT GREEN TO
SEE BUT, YOU KNOW, WE,
SOMETIMES IN RETROSPECT.
WHAT I'M ASKING GOING FORWARD,
WOULDN'T IT BE ADVISABLE FOR
THIS COURT TO COME UP WITH A,
IN RETRIALS, BECAUSE THAT'S
WHERE IT COMES UP, A STANDARD
INSTRUCTION WHEN THESE
QUESTIONS ARE ASKED OR
ACTUALLY, OR YOU EVEN GIVEN?
WOULDN'T THAT BE ADVISABLE?
>> THIS COURT, THIS JURY WAS
INSTRUCTED PROPERLY BOAT ON THE
TERMS OF A POSSIBLE LIFE
SENTENCE AND ON THE CREDIT FOR
TIME SERVED.

>> I APPRECIATE YOU'RE DOING
YOUR JOB AS AN ADVOCATE BUT I'M
ASKING YOU GOING FORWARD,
WOULDN'T IT CERTAINLY BE EASIER
FOR YOU TO HAVE A STANDARD
INSTRUCTION TO BE ABLE TO HAVE
THE JUDGES READ WHEN THOSE
KINDS OF QUESTIONS ARE ASKED?
>> I'M ABOUT TO AGREE WITH YOU,
YOUR HONOR.
>> OKAY. YOU STARTED WITH
THAT, I WOULD HAVE LET YOU GO
ON AND ON.
>> I'M SAYING IN THIS CASE I
DON'T THINK THAT NEEDS TO BE
DONE.
THERE IS NO REASON TO REVERSE
OR VACATE THIS SENTENCE AND
SEND IT BACK DOWN.
IN THIS COURT WISHES TO ASK THE
RULES COMMITTEE OR THE
COMMITTEE THAT COMES UP WITH
THE STANDARD INSTRUCTIONS, THEN
FINE BUT THIS, IN THIS CASE
THERE IS NO ABUSE OF DISCRETION.

THE JURY WAS INSTRUCTED

PROPERLY.

AND, THEREFORE, THIS SENTENCE

SHOULD BE AFFIRMED.

>> IT'S ALWAYS INTERESTING TO

ME BECAUSE EVEN IN GREEN WHEN

THE JUDGE GAVE IT, THE DEFENSE

THEN IS ARGUING THAT THE TRIAL

JUDGE SHOULDN'T HAVE GIVEN IT.

>> WE'RE LAWYERS.

>> CATCH-22.

>> WHAT IS REALLY THE PROPER

THING THAT SHOULD BE DONE WHEN

JURIES ARE QUESTIONING WHAT A

25-YEAR MINIMUM MANDATORY OR

EVEN A 50-YEAR MINIMUM

MANDATORY REALLY DOES MEAN?

>> BUT IN THIS CASE, I MEAN IF

YOU LOOK AT THE QUESTION THE

JURY ASKED, THE QUESTION WAS,

WILL THE 17 YEARS BE SERVED BE

INCLUDED IN HIS 25-YEAR

SENTENCE?

IT SEEMS TO ME THAT THE JURY

WAS FOCUSED ON THAT 25-YEAR

SENTENCE.

THEY WEREN'T THINKING ABOUT

LIFE.

THEY WERE WORRIED ABOUT THIS

GUY GETTING OUT IN EIGHT YEARS.

IT SEEMS THAT UNDER THOSE

CIRCUMSTANCES, THE JUDGE SHOULD

HAVE TOLD THEM THAT YES, HE

COULD GET OUT IN 25 YEARS BUT

THERE IS NO GUARANTY HE WILL.

THAT WOULD HAVE FIXED THE WHOLE

THING.

BUT IT SEEMS TO ME THAT THE

JURY WAS FIXATED ON THAT

25-YEAR SENTENCE.

>> THE JURY CLEARLY WAS

INTERESTED IN WHAT THE 17 YEARS

IN PRISON, HOW THAT WOULD BE

CALCULATED.

>> RIGHT.

>> I DON'T NECESSARILY AGREE

THEY BELIEVED THAT AT THE

MINUTE THE 25 YEARS HIT THAT HE

WAS GOING TO GET OUT.

THEY WERE INSTRUCTED THERE WAS

A POSSIBILITY.

I MEAN WE'RE TALKING ABOUT LAY

PEOPLE WHO ARE NOT NECESSARILY,

QUICKLY WRITING A QUESTION.

I DON'T BELIEVE THAT WE CAN

READ INTO THIS QUESTION THAT

THEY THINK THAT HE'S GOING TO

GET OUT WHEN THE 25 YEARS HITS.

THEY WERE TOLD IT IS A

POSSIBILITY.

THEY WERE TALKING ABOUT WHAT

THE 25-YEAR TERM, HOW THAT

CALCULATED.

IF THERE ARE NO OTHER QUESTIONS

ON THIS ISSUE, I MIGHT, IF THE

COURT WISHES, I COULD GO

BRIEFLY INTO THE OTHER ISSUES

IN CASE GONE ON INTO REBUTTAL.

LET ME JUST QUICKLY SAY THAT

THE EVIDENCE SINCE THIS WAS A

RESENTENCING, IT REQUIRES THAT

THE STATE TO PROVE ITS CASE.

THE ISSUE WAS WHETHER OR NOT

THE DEFENDANT WAS THE PARTY

THAT DID SHOOT BOTH OFFICERS,

KILLED OFFICER GREENEY.

SO BOTH THE PHOTOGRAPHS AND THE

BLOOD EVIDENCE WAS NECESSARY.

>> I JUST WANT, ABOUT THE

PROPORTIONALITY ARGUMENT WHICH

I THINK YOU RAISED WHICH WE

APPRECIATE.

ON, HE HAS NOT ONLY THE

CONTEMPORANEOUS ATTEMPTED FIRST

AGREE BUT THERE WAS ACTUALLY A

PRIOR ARMED ROBBERY FROM ABOUT

A WEEK BEFORE THE SENTENCE

AFTERWARDS.

SO WE HAVE BOTH A

CONTEMPORANEOUS AS WELL AS A

SEPARATE VIOLENT FELONY?

>> YES, WE HAVE THE ONE THAT

WAS COMMITTED A FEW DAYS

BEFORE.

IT WAS A ROBBERY.

AND ALSO THE MURDER, THE

ATTEMPTED MURDER OF OFFICER

SALLUSTIO.

AND WE ALSO HAVE THE

CONTEMPORANEOUS ROBBERY OF THE

CHURCH'S CHICKEN WHICH IS THE

FELONY MURDER.

AND THEN WE HAVE THE FACT THAT

OFFICER GREENEY IS A LAW

ENFORCEMENT OFFICER.

>> RIGHT. SO THERE ARE --

>> TWO ROBBERIES, YES.

>> THERE WAS A ARMED ROBBERY A

WEEK BEFORE THIS?

>> NOT AT CHURCH'S.

AT A SEPARATE LOCATION.

>> THESE WEREN'T USED IN THE

ORIGINAL SENTENCING? THEY USED

A CONVICTION THAT WAS LATER

OVERTURNED?

>> THAT'S BECAUSE THE ROBBERY

AT A SEPARATE LOCATION WAS NOT,

HE WASN'T CONVICTED OF THAT

BEFORE THE SENTENCING ON THE

CAPITAL CASE.

BUT WAS CONVICTED AFTERWARDS.

SO NOW IT BECOME AS PRIOR FOR

THE RESENTENCING.

>> WHAT WAS THE FIRST JURY

RECOMMENDATION?

>> I BELIEVE 9-3 AGAIN, YOUR

HONOR.

>> OKAY.

>> BASICALLY THE SAME EVIDENCE.

I ASK YOU TO AFFIRM.

THANK YOU VERY MUCH.

>> MAY IT PLEASE THE COURT, I

THINK IT'S CLEAR WE COULD ALL

AGREE THAT THE JURY HAD A,

NEEDED HELP FROM THE COURT.

UNDERSTANDING THAT THE JUDGE

READ THE INITIAL INSTRUCTION.

THE JURY STILL NEEDED HELP IN

DETERMINING WHETHER TO GIVE A

LIFE SENTENCE OR A DEATH

SENTENCE.

>> THE JURY DIDN'T SAY THAT

THOUGH.

NO, I'M SORRY, IF I CAN FINISH.

>> I'M SORRY.

>> THE QUESTION WANTS TO KNOW,

WHEN HE WILL BE ELIGIBLE FOR

PAROLE.

THAT'S THE ONLY MENTION THAT

THE JUDGE HAD MADE OF 25 YEARS
AND DID IT TWICE IN ACCORDANCE
WITH THE STANDARD INSTRUCTIONS
THAT LIFE SENTENCE WITHOUT THE
POSSIBILITY OF PAROLE FOR 25
YEARS.
AND THE JURY IS ASKING WHEN
DOES THAT CALCULATION BEGIN?
IS IT TODAY OR DOES THE TIME
THAT HE SERVED COUNT TOWARDS
THAT 25 YEARS FOR THE
POSSIBILITY OF PAROLE.
NOT FOR HIS SENTENCE, ALL THEY
USED THE WORDS IN THIS
QUESTION BUT THE ONLY 25 YEARS
WAS ABOUT PAROLE, WASN'T IT?
>> RESPECTFULLY I WOULD ARGUE
WHY THE REASON THEY'RE ASKING
THAT QUESTION SO THEY COULD
QUOTE, UNQUOTE, DO THE RIGHT
THING.
>> WE COULD SPECULATE ALL DAY
AND THAT'S WHAT WE'VE BEEN
DOING ALL MORNING BUT WHAT
THEY'RE THINKING, NOT THINKING.

WE, THE LAW ALWAYS SAID WE'RE

NOT SUPPOSED TO SPECULATE WHAT

JURORS MAY BE THINKING.

WE KNOW WHAT THEY ASKED.

SO FROM THAT QUESTION YOU CAN

DRAW THE REASONABLE CONCLUSION

THAT'S BEEN THROWN AROUND

THAT'S ONE THING BUT JUST GET

INTO PURE SPECULATION WHAT

THEY'RE DOING, WHAT THEY'RE

THINKING THAT WE CAN'T GET

INTO, YOU AGREE WITH THAT?

>> YES.

>> SO IF IT IS NOT ON THE FACE

OF THE QUESTION, THEN WE CAN

NOT GET INTO THE JUROR'S MIND.

>> RESPECTFULLY --

>> THAT IS CORRECT? IS THAT

CORRECT?

>> YES.

RESPECTFULLY I THINK THERE IS

DISTINCTION HERE WITH A DEATH

PENALTY CASE AND THIS ISSUE --

ON THE RESENTENCING.

THAT IS WHY I SPENT GREAT TIME

IN THE BEGINNING TALKING ABOUT

THE ORIGINAL JURY INSTRUCTION,

THAT IF THE COURT WERE JUST TO

HAVE READ THE JURY INSTRUCTION

AGAIN WE WOULD NOT BE FACED

WITH THE CONJECTURE THAT THE

COURT DOES NOT WANT TO GO INTO.

HOWEVER --

>> BUT ISN'T THIS -- WELL,

OKAY.

>> AND THE CASE LAW TALKS

ABOUT, WATERHOUSE IS A CLEAR

CASE WHERE THERE WERE MANY

QUESTIONS INCLUDING THE PAROLE

ISSUE WHERE THAT COURT, THAT

JURY WANTED TO KNOW WAS HE

GOING TO FLORIDA, IS HE GOING

TO NEW YORK?

WHEN IS HE GOING TO GET OUT?

DOES THAT MEAN THERE WILL BE A

CONSECUTIVE SENTENCE.

THEY ASKED ALL THESE QUESTIONS

AND THE COURT THERE REREAD THE

INSTRUCTIONS.

THAT WAS IT.

>> HOW DOES REREADING THE

INSTRUCTION CURE YOUR CONCERN

BEING TOLD THAT HE MAY NOT HAVE

PAROLE?

>> BECAUSE IT TALKS ABOUT, THAT

IS THE POSSIBILITY OF PAROLE.

IT ACTUALLY MENTIONS THAT

AGAIN.

HERE THE COURT JUST GAVE HALF

THE ANSWER.

AND THAT ANSWER IS GOES TO THE

COMPLETE DETRIMENT OF THE

DEFENDANT.

IN THIS CASE --

>> NOT THE SUBSTANCE OF THE

INSTRUCTION, IT'S THE TIMING?

>> I WAS GOING TO ARGUE, THE

FACT IN THIS CASE I THINK THE

DISTINCTION THAT CAN BE MADE,

THE DEFENDANT WAS INTO HIS

SENTENCE 17 YEARS.

AND INITIALLY I SAID TO THIS

COURT THIS IS THE CASE WHERE

THE DEFENDANT HAS DONE THE MOST

TIME.

AND I THINK THAT'S SOMETHING

THAT NEEDS TO BE LOOKED AT IF

THE COURT IS CONCERNED ABOUT A

PROPER INSTRUCTION.

AND THAT'S WHY I FEEL IT IS

EGREGIOUS AND IT IS AN ABUSE OF

DISCRETION BECAUSE NOW THE

COURT IS TELLING THEM, GETS

CREDIT FOR ALL THAT TIME AND

THAT'S IT.

AND IT'S OUT THERE.

IT'S LIKE THE WHITE ELEPHANT IN

THE ROOM.

HE CAN GET OUT IN EIGHT YEARS.

THAT IS, WHEN IT IS NOT TRUE.

FINALLY IF I MAY, HITCHCOCK,

THE LANGUAGE IN HITCHCOCK

ADDRESSED THIS.

IT STATES I KNOW I'M RUNNING

-- HITCHCOCK BASICALLY HAS THE

STATE ATTORNEY ARGUING TO A

JURY THAT HE'S GOING TO GET OUT

SOON.

IN THAT CASE IT WAS ANOTHER

TIME ISSUE. IT WAS ALMOST OVER.

THE DEFENDANT'S SENTENCE WAS

ALMOST OVER.

IT WAS OVERTURNED AND ARGUED

THAT THE STATE IS NOT ALLOWED

TO MAKE THAT ARGUMENT WHEN IT

IS SO CLOSE TO THE TIME.

>> DID THEY MAKE THE ARGUMENT

HERE?

THAT WAS NOT PART OF WHAT

HAPPENED HERE, WAS IT?

>> NO, IT WASN'T THE STATE.

IT WAS THE JUDGE WHO DID IT FOR

THE STATE.

>> WELL --

>> THE JUDGE ANSWERED THE

QUESTION WITH THE SAME ARGUMENT

THAT THE STATE MADE IN

HITCHCOCK SAYING HE WOULD GET

CREDIT FOR THE 17 YEARS.

AND THAT IS IT.

>> RIGHT.

YOUR TIME HAS NOW EXPIRED.

>> I APPRECIATE THE COURT'S

TIME. THANK YOU.

>> WE THANK BOTH SIDES FOR YOUR

ARGUMENT.

THE COURT WILL NOW TAKE A TEN

MINUTE RECESS.

>> PLEASE RISE.