

>> THE NEXT CASE ON THE DOCKET
WILL BE KIRKMAN V. STATE.

>> OKAY.

DIRECT APPEAL.

WHENEVER YOU'RE READY, SIR.

>> MAY IT PLEASE THE COURT, MY
NAME IS GEORGE BURDEN, I'M FROM
DAYTONA BEACH, FLORIDA.

I'M HERE ON BEHALF OF VIRGINIA
TEASE KIRKMAN.

MR. KIRKMAN WAS CONVICTED OF
FIRST-DEGREE MURDER IN BREVARD
COUNTY FOR THE MURDER OF
CALIFORNIA REESE NOLES.

THERE WAS THREE ISSUES PRESENTED
IN THE BRIEF.

THERE ARE SOME FACTS I WANT TO
BRING TO THIS COURT'S ATTENTION
THAT I THINK REALLY SETS THE
TABLE FOR WHAT I THINK IS THE
MOST IMPORTANT THINGS FOR THIS
CASE.

MR. PRATT, CHRISTOPHER PRATT, IS
A BAHAMIAN NATIONAL THAT CAME TO
THE COUNTRY SOME MONTHS BEFORE
THESE EVENTS, AND HE CAME TO
JOIN MR. KIRKMAN AND HIS CREW OF
OTHER PEOPLE TO BE INVOLVED IN
THE DRUG TRAFFICKING.

THEY WERE DRUG TRAFFICKERS, AND
EVERYTHING CAME TO LIGHT WITH
MURDER WHEN THEY WERE CAUGHT
MOVING A SUBSTANTIAL AMOUNT OF
DRUGS UP THE I-95 CORRIDOR.

AND IN THAT ARREST, THEY WERE
GIVEN TO FEDERAL AUTHORITIES.
ONE OF THE MEMBERS OF THAT GROUP
CAME FORWARD AND SAID I KNOW
ABOUT ALL THESE MURDERS.

SO THAT'S HOW IT GOT STARTED,
WHERE THE STATE OF FLORIDA BEGAN
TO INVESTIGATE THE MURDER OF
WILLIE PARKER.

AND WHEN THAT HAPPENED,
MR. PRATT GOT INDICTED FOR THE
MURDER OF WILLIE PARKER IN 2006.
NOW, HE SAT IN JAIL FOR FOUR
YEARS WAITING TO BE TRIED FOR
THAT MURDER.

AND THERE CAME A TIME WHERE WE

DECIDED I DON'T LIKE PRISON ANYMORE, AND HE CAME FORWARD AND SAID I CAN TELL YOU ABOUT THE MURDER OF CALIFORNIA REESE NOLES.

>> SO WAS MR. KIRKMAN INDICTED FOR THE MURDER OF WILLIE PARKER ALSO?

>> YES, JUSTICE.

>> SO HE WAS-- BOTH OF THEM WERE SITTING IN JAIL.

>> THAT IS CORRECT.

>> OKAY.

>> YES.

AND THE DEAL HE WAS ABLE TO FASHION WAS THAT HE WOULD GET CHARGED WITH SECOND-DEGREE MURDER FOR BOTH MURDERS, AND HE WOULD GET TEN YEARS ON EACH CHARGE CONSECUTIVE.

AND FOR MR. PRATT--

>> CONTINUOUS PROBATION THEREAFTER.

>> YES.

YES, JUSTICE.

WITH PROBATION THEREAFTER.

>> AND SO HE ACHIEVED HIS GOAL OF NOT SPENDING THE REST OF HIS LIFE IN PRISON.

NOW, MS. NOLES WAS A BAHAMIAN NATIONAL AS WELL, A BOYFRIEND OF MR. PRATT-- PARDON ME, A GIRLFRIEND OF MR. PRATT.

AND SHE CAME TO JOIN HIM AND WAS ONLY IN THE COUNTRY FOR A FEW MONTHS.

AND IN THE EVENING BEFORE HER DEMISE, SHE WAS AT A CLUB, KARL'S CLUB IN COCOA BEACH, AND GOT CITED FOR DISORDERLY CAN CONDUCT.

AND A GOOD SAMARITAN POLICE OFFICER, GIOVANNI FREEMAN, GOT PERMISSION TO DRIVE HER BACK TO THE DIXIE MOTEL.

AND THEY EXCHANGED PHONE NUMBERS.

AND WHEN MR. FREEMAN GOT OFF WORK, HE CALLED AND SAID WOULD YOU LIKE TO GO OUT, AND SHE

AGREED.

WELL, END WHEN HE CAME TO
PICK-- WHEN HE CAME TO PICK HER
UP, HERE COMES MR. PRATT.
NOW, THIS IS A RIPLEY'S BELIEVE
IT OR NOT.

MR. PRATT WAS CITED BY
MR. FREEMAN THAT DAY FOR A
TRAFFIC INFRACTION.

SO EVEN THOUGH HE WAS IN A
CIVILIAN CAR, CIVILIAN CLOTHES,
HE GOES, THAT'S A POLICE
OFFICER.

HE GAVE ME A TICKET TODAY.
AND HE ASKED HER WHERE SHE'S
GOING.

WE'RE NOT DOING NOTHING.

WELL, THEY DID DO SOMETHING.
THEY DIDN'T SHOW BACK UP UNTIL
7:00 IN THE MORNING.

NOW, BY MR. PRATT'S OWN
ADMISSION, HE WAS VERY, VERY
ANGRY ABOUT THE FACT THAT HIS
GIRLFRIEND WOULD GO OFF WITH
OFFICER FREEMAN.

AND AT THAT POINT-- AND THIS IS
WHAT YOU MAKE NO SENSE IN THE
RECORD OF THIS.

HE MADE THE CONCLUSION THAT HE
WAS NO LONGER SAFE AT THE DIXIE
MOTEL.

WHAT WAS HE FEARING?

WHAT WAS HE AFRAID OF?

THAT WAS NEVER DELVED INTO BY
DEFENSE COUNSEL.

WHAT WAS HE AFRAID OF AT THE
DIXIE MOTEL AND THAT HE HAD TO
TAKE HER AND GO AND SEE MANY
KIRKMAN.

>> WELL, DIDN'T HE SEE
MR. KIRKMAN BEFORE HE TOOK HER?
I THOUGHT THE RECORD ANTICIPATED
THAT AFTER-- INDICATED THAT
AFTER THE VICTIM LEFT WITH THE
POLICE OFFICER, THAT MR. PRATT
THEN WENT TO SEE MR. KIRKMAN
ABOUT AND TOLD HIM ABOUT THIS
WHOLE INCIDENT BEFORE PACKING
THEIR CLOTHES AND TAKING HER
OVER TO MR. KIRKMAN'S.

I MEAN, I THINK THAT MAKES A DIFFERENCE AS TO AT WHAT POINT THE DEFENDANT THAT THAT WE'RE TALKING ABOUT, WHICH IS MR. KIRKMAN, ACTUALLY KNEW AND UNDERSTOOD THAT THERE MIGHT BE A POLICE OFFICER INVOLVED IN OR MAYBE GETTING KNOWLEDGE ABOUT THEIR WHOLE DRUG ACTIVITIES.
>> JUSTICE, YOU'RE ABSOLUTELY RIGHT.

THERE WAS A TIME OF SEVEN OR EIGHT HOURS WHERE MR. PRATT WAS, BY HIS OWN ADMISSION, LOCKED OUT OF HIS APARTMENT OR HIS HOTEL ROOM.

AND HE WENT TO SEE MR. KIRKMAN.
>> OKAY.

>> HE EXPLAINED WHAT HE HAD SAW. AND THIS, OF COURSE, THIS IS ALL MR. PRATT'S TESTIMONY. NOTHING CORROBORATES ANY OF THIS.

THIS IS MR. PRATT'S STORY. AND HE--

>> I THINK-- IT'S HIS STORY, BUT HE TESTIFIED UNDER OATH, AND HE WAS CROSS-EXAMINED ABOUT THE PLEA DEAL.

IS IT'S COMPETENT EVIDENCE OF WHAT TO OCCURRED.

I'M NOT SURE-- I JUST WANT TO MAKE SURE, ARE YOU, ARE WE TALKING NOW ABOUT THE TYSON ANALYSIS OR THE RELATIVE PROPORTIONALITY?

>> WELL--

>> WHAT IS YOUR--

>>-- THEY'RE BOTH TIED TOGETHER.

I WANTED TO MAKE THIS POINT. I'LL GET RIGHT TO THE CHASE HERE.

THE JURY HAD A SPECIALTY INTERROGATORY VERDICT.

>> HAD A WHAT?

>> A SPECIAL INTERROGATORY VERDICT.

>> OKAY.

>> AND-- ON THE AGGRAVATORS.

AND THE ENTIRE THEORY OF THE CASE BY THE STATE WAS THIS CRIME WAS MOTIVATED SOLELY FOR WITNESS ELIMINATION.

THAT'S IT.

SHE WAS GOING TO-- SHE WAS WITH A POLICE OFFICER, AND SHE WAS COOPERATING.

ON THEIR DRUG ACTIVITIES AND, ACCORDING TO MR. PRATT, MR. KIRKMAN BELIEVED THE MURDER OF WILLIE PARKER HAD ALREADY HAPPENED.

NOW, MR. PRATT SAYS SHE KNEW NOTHING ABOUT THAT, BUT IT DOESN'T MATTER FOR PURPOSES OF THIS DISCUSSION.

HE SAYS HE BELIEVES SO.

SO WITNESS-- THE STATE GAVE NO OTHER EXPLANATION FOR THIS.

BUT THE JURY CAME BACK AND SAID THAT THIS AGGRAVATING FACTOR DID NOT FLY.

THAT IS WHAT'S SO CRITICAL IN THIS CASE.

>> OKAY.

SO ON EDMUND TYSON THOUGH, EVEN IF WE ACCEPT YOUR ARGUMENT THAT THERE WAS EQUAL OR GREATER CULPABILITY ON THE PART OF PRATT, THAT HE WAS REALLY THE MOTIVATOR.

UNDER EDMUND TYSON, I DON'T SEE HOW THIS ISN'T-- HE DOESN'T, HE'S NOT ELIGIBLE FOR FIRST-DEGREE MURDER AND THE DEATH PENALTY.

SO COULD YOU JUST FIRST-- NOT THE QUESTION OF WHETHER THERE SHOULD BE AT SOME POINT A REDUCTION TO LIFE, BUT ON THE ISSUE OF--

>> YES.

IN THE BRIEF, THOSE CASES ARE CITED AS AN INTRODUCTION, BUT THE REAL POINT THAT IS PUT FORWARD IN THE BRIEF IS THIS COURT'S OWN JURISPRUDENCE ON THIS ISSUE WHERE IF PEOPLE ARE EQUALLY CULPABLE, YOU CAN'T HAVE

SOMEONE EXECUTED AND SOMEONE GET TEN YEARS.

PERIOD.

>> NOW YOU'RE TALKING ABOUT THE RELATIVE CULPABILITY.

I THINK, YOU KNOW, AGAIN, BASED ON OUR CASELOAD, YOU HAVE A 10-2 HERE.

AND MAYBE THE TWO PEOPLE THAT VOTED FOR LIFE DECIDED THAT, YOU KNOW, THAT MR. PRATT WAS MORE CULPABLE AND DETERMINED THAT THE DEATH PENALTY WAS NOT APPROPRIATE.

SO YOU HAVE ON THAT MOST LIKELY A NEW PENALTY PHASE.

NOW, THE ISSUE THAT YOU'RE ASKING US AS A MATTER OF LAW TO DECIDE ON THIS RECORD THAT IF MR. KIRKMAN WAS LESS-- I THOUGHT WHAT YOU WERE SAYING WAS ACTUALLY LESS CULPABLE THAN MR. PRATT.

AND I'M NOT SEEING THAT ON THIS RECORD.

>> WELL, YOU HAVE TO-- THE ONLY-- THE WAY YOU SEE IT IS YOU REJECT THE ENTIRE STATE'S THEORY OF THE CASE.

WHAT LIKELY HAPPENED HERE, YOU HAD A SCORNE D BOYFRIEND.

>> BUT YOU HAVE STILL MR. KIRKMAN IS SEEN BUYING THE TAPE, THE ROPE--

>> THE SHOVEL.

>>-- THE SHOVEL AND THEN COMES UP WITH A STORY THAT HE WAS BUYING THAT BECAUSE HE WAS ON A JOB--

>> HE WORKED FOR RAINBOW CONCRETE.

THAT'S CORRECT.

>> AND WASN'T THAT TOTALLY DISPELLED?

WHAT WAS THAT ABOUT IF HE'S NOT THE MOVER ON THIS?

>> I'LL BE DELIGHTED TO EXPLAIN. YOU HAD A IMMIGRANT--

>> IN ALL OF THIS, AREN'T YOU ESSENTIALLY ASKING US TO BE THE

FINDER OF FACT?

>> YES.

>> OKAY.

>> SOMETHING YOU SPECIFICALLY--
>> JUST WANTED TO BE CLEAR ABOUT
IT.

>> SOMETHING YOU SPECIFICALLY
REJECTED IN YOUR DISSENT IN
McCLOUD.

AND I UNDERSTAND THAT DISSENT.
BUT THIS COURT HAS DONE IT
BEFORE.

THEY'VE DONE IT--

[INAUDIBLE]

THEY'VE DONE IT, YOU GUYS DID IT
IN HAZEN.

>> LET'S GO BACK TO--

>> LET ME ASK YOU ABOUT THIS
CASE.

>> YES.

>> ISN'T THERE CLEARLY EVIDENCE
HERE THAT WOULD SUPPORT THE
CONCLUSION THAT MR. KIRKMAN WAS
MORE CULPABLE THAN MR. PRATT?

I MEAN, JUST LOOKING AT THE
RECORD, TESTIMONY GIVEN UNDER
OATH, WHAT THE JURY HEARD.
COULDN'T A RATIONAL JUROR LOOK
AT ALL OF THAT AND SAY HE IS
MORE CULPABLE, MR. KIRKMAN'S
MORE CULPABLE?

HE ORDERED THIS TO HAPPEN.

>> YOU CAN IF YOU BELIEVE
MR. PRATT'S TESTIMONY.

THAT IS THE ONLY EVIDENCE.
THAT IS THE ONLY EVIDENCE.

>> BUT RIGHT NOW, THAT'S
COMPETENT SUBSTANTIAL EVIDENCE
AND I DON'T KNOW HOW-- MAYBE
AGAIN WHAT YOU'RE SAYING THIS
DOESN'T ADD UP, RIGHT?

THAT IS WHAT YOU'RE SAYING.

I THINK GOING BACK TO THIS.
THIS IS NOT A SITUATION LIKE
McCLOUD.

McCLOUD THE JURY MADE A
FINDING ABOUT WHO SHOT WHO HAD
THE GUN, WHO SHOT, SO McCLOUD
WAS A DIFFERENT ANIMAL.

I DO NOT AGREE WITH THIS

JURISPRUDENCE, BUT THE COURT SAID IF THERE IS NOT SECOND-DEGREE MURDER YOU DO NOT DO A RELATIVE CULPABILITY ANALYSIS, ISN'T THAT CORRECT?

>> ACCORDING TO McCLOUD YOU CAN NOW, YES.

>> YOU THINK McCLOUD, YOU THINK McCLOUD RECEDED FROM SHEER VERSUS MOORE?

WE SAID THAT IN THERE?

>> YES IT SPECIFICALLY SAYS THAT.

>> I THOUGHT IT SAID THIS WAS UNIQUE SITUATION BUT.

>> IT DOES SAY IT IS UNIQUE.

>> OKAY.

IT SAYS DEATH IS DIFFERENT AND EVERY MURDER IS DIFFERENT AND YOU HAVE TO LOOK AT THOSE CIRCUMSTANCES.

I HAVE TO COMPLIMENT JUSTICE CANADY HE WROTE VERY EXTENSIVE DISSENT WHERE HE PUT A LOT OF--

>> BUT YOU DIDN'T LIKE IT, DID YOU?

>> JUSTICE CANADY, I CAN ADMIRE GOOD WRITING.

YOU MADE VERY IMPORTANT POINTS. THE FACT OF THE MATTER.

>> YOU THINK THAT WAS RIGHT AND WE SHOULD GO WITH THAT IN THE FUTURE.

>> I DON'T THINK HE SAID THAT.

>> YOU HAVE TO RECOGNIZE SOMETHING WELL-WRITTEN AND WELL-REASONED AND IT WAS.

BUT THE MAJORITY OF COURT SAID DEATH IS DIFFERENT, EVERY CASE AND CIRCUMSTANCES IS DIFFERENT AND WE HAVE TO LOOK AT THOSE TO DO JUSTICE.

NO ONE WITH A STRAIGHT FACE CAN SAY MR. PRATT'S IS NOT CULPABLE IN THIS CASE.

>> AND, NO ONE IS SAYING HE IS NOT CULPABLE.

HE HAS BEEN CONVICTED OF SECOND-DEGREE MURDER.

HE HAS BEEN SENTENCED FOR THAT

SECOND-DEGREE MURDER BUT WHAT YOU HAVE TO CONVINCING US OF IS THAT MR. KIRKMAN IS NOT MORE CULPABLE WHEN IT IS CLEAR FROM THE RECORD, IT SEEMS TO ME, AND THE JURY WAS FREE TO BELIEVE MR. PRATT'S TESTIMONY, MR. PRATT'S SAYS HE TOLD KIRKMAN ABOUT THE ENCOUNTER WITH THE POLICE OFFICER.

KIRKMAN BECAME VERY CONCERNED ABOUT HIS DRUG DEALINGS AND WHAT SHE MIGHT REVEAL TO THE POLICE OFFICER.

HE WENT AND GOT THE CEMENT AND THE DUCT TAPE, ALL THINGS NECESSARY TO BIND HER AND THROW HER IN THIS GRAVE ALIVE.

I DON'T KNOW HOW YOU GET AROUND THE FACT THAT HE WAS THE MOVING FORCE IN THIS MURDER?

>> VERY EASY.

THIS, MR. PRATT'S, IS A BAHAMIAN NATIONAL WHO HAD ONLY BEEN IN THE COUNTRY FOR A FEW MONTHS.

>> AREN'T THEY ALL BAHAMIAN CITIZENS?

WASN'T MR. KIRKMAN AND MISS, I FORGOT THE VICTIM'S NAME, KNOWLES.

IS THAT HER NAME.

>> SHE WAS BAHAMIAN NATIONAL AS WELL.

>> HOW DOES THAT HELP OR HURT ANYTHING?

>> VERY EASY.

IF YOU ARE MAD AT YOUR GIRLFRIEND SLEEPING WITH A POLICE OFFICER, AND SUSPICIOUS OF WHAT SHE MAY BE UP TO--

>> WASN'T THERE SOME RECORD TESTIMONY, THIS WAS REALLY OFF AGAIN, ON AGAIN KIND OF RELATIONSHIP?

>> THAT IS EXACTLY WHAT MR. PRATT'S CLAIMS.

>> OKAY.

>> WE DON'T HAVE ANYONE ELSE TO SUBSTANTIATE THAT.

LIKE I SAID, THIS IS LIKE THE

JACKSON CASE WHERE THIS COURT MADE A SPECIFIC STATEMENT THAT WHEN THE ONLY EVIDENCE YOU HAVE IS UNCORROBORATED BY ONE OF THE CODEFENDANTS, YOU HAVE TO BE CAREFUL AND THIS IS EXACTLY ONE OF THOSE CASES.

THIS IS NOT--

>> WELL, I MEAN SOME OF IT SEEMS TO ME, IF THEY WENT TO MR. KIRKMAN'S PLACE, THEY ARE CORROBORATED BY OTHER WITNESSES LIKE MR. KIRKMAN'S OWN GIRLFRIEND WHO INDICATES THEY WERE SITTING OUT IN THE CAR AND MR. KIRKMAN COMES TO THE CAR WITH THE ITEMS AND THEY GO OFF, YOU KNOW, TO THE REMOTE AREA WHERE THEY KILL HER?

>> THIS ARGUMENT WOULDN'T HAVE MUCH LEGS IN THE JURY CONCLUDED ON THE SUMMATION, THERE WAS A DOMINANT REASON FOR THIS MURDER. BUT THEY REJECTED THAT. THAT MEANS SOMETHING.

>> CORROBORATION, I MEAN, I KNOW THAT YOU HAVE AN ARGUMENT ON THIS ISSUE--

[INAUDIBLE]

THAT WAS PRESENT DURING THE PREVIOUS--

[INAUDIBLE]

KIRKMAN VICTIM IN THAT CASE AND--

>> THAT'S CORRECT.

>> SO THE THEORY WAS-- DOING WHAT HE DID.

HE KNEW HE MEANT BUSINESS. I KNEW HE HAD A GUN ON HIM. I SEEN HIM SHOOT SOMEBODY. I'M GOING TO BURY HER.

THAT CORROBORATES, AT LEAST THESE ARE FACTS FROM WHICH A JURY CAN REASONABLY RELY OR BELIEVE THE TESTIMONY OF--

[INAUDIBLE]

CAN YOU SAY THAT.

>> THAT'S CORRECT, BUT, GOING TO THE 402, 403 ARGUMENT IN THE BRIEF, THE CASE LAW FROM THIS

COURT, TO ME IS VERY, VERY TROUBLING BECAUSE, I SPENT A LOT OF YEARS DOING CAPITAL TRIALS. WHAT THIS COURT IS CONCERNED ABOUT IS NOT THE SUBSTANCE OF THE EVIDENCE BUT THE QUANTITY OF THE EVIDENCE.

THE FACT THAT THE MURDER WAS DISCLOSED ISN'T SO MUCH MORE CONCERN AS TO WHETHER OR NOT YOU POUND THE FACT THAT THIS OTHER MURDER, THIS OTHER MURDER. THAT IS WHAT CONCERNS THIS COURT.

>> I'M NOT, BEFORE WE GET INTO THE ACTUAL ADMISSIBILITY OF THE-- TALKING ABOUT CORROBORATION, ADDING TO [INAUDIBLE].

ADDING TO CREDIBILITY OF MR. PRATT'S TESTIMONY.

>> SOMEBODY HAD A WATCH, MISS KNOWLES, SOMEBODY HAD TO WATCH HER WHILE THEY GOT THESE THINGS BECAUSE I THINK THE EVIDENCE EQUALLY SUPPORTS THE FACT THAT THEY BOTH DECIDED TOGETHER THAT SHE WAS GOING TO DIE FOR HE IS A SCORNFUL BOYFRIEND AND SHE KNOWS ABOUT OUR DRUG DEALING AND IT'S NOT, HE IS MAD AT HER. HE ADMITTEDLY PUNCHED HER SEVERAL TIMES FOR HER INFIDELITY.

>> BUT YOU'RE SUGGESTING THAT THE ROLE, THE FACT THAT SHE KNEW ABOUT THE DRUG DEALING WAS A MOTIVATING FACTOR?

>> OH, ABSOLUTELY.

>> LET ME GO BACK TO YOUR, THE WAY YOU'RE RELYING ON THE JURY'S FINDING THAT THERE WAS, THAT, THEIR REFUSAL TO FIND THE AVOID OR PREVENTING A LAWFUL ARREST AGGRAVATOR.

IN TRYING TO FIGURE OUT WHAT IS GOING ON THERE, COULDN'T THE JURY BE THINKING, WE DON'T KNOW THAT THEY THOUGHT SHE WAS GETTING READY TO TURN THEM IN

FOR SOMETHING THAT HAD ALREADY HAPPENED AND THAT THEY WERE, UNLESS THEY ELIMINATED HER RIGHT NOW, THEY WERE IMMINENTLY GOING TO BE ARRESTED?

BUT, INSTEAD THOUGHT, WELL, MAYBE THE, SHE'S DANGEROUS BECAUSE OF THIS RELATIONSHIP WITH THE POLICE.

THIS IS A PROBLEM THAT COULD COME.

AND JURY MAY HAVE THOUGHT THAT, THAT, FOR THAT SHE MIGHT BE A PROBLEM FOR THEM WAS NOT ENOUGH TO SATISFY THE, THAT PARTICULAR AGGRAVATOR.

DOESN'T THAT MAKE SENSE OF IT ALL?

>> YOU KNOW, YOU COULD, YOU COULD MAKE THAT ARGUMENT BUT EVEN, LET'S SAY EVERYTHING YOU SAY IS TRUE.

THEY WOULD STILL HAVE TO FIND WITNESS ELIMINATION, BECAUSE WHAT OTHER MOTIVE THEY HAVE? THERE IS NO OTHER MOTIVE.

>> THE FEAR NOT THAT SHE'S WITNESSED ANYTHING BUT THAT SHE'S GOT A RELATIONSHIP, SHE MAY KNOW OR SUSPECT THINGS THAT SHE'S GOING TO DOWN THE ROAD TELL THE POLICE ABOUT BECAUSE OF THE RELATIONSHIP SHE HAS WITH THAT OFFICER.

I MEAN, IT SEEMS LIKE TO ME YOU'RE JUST HANGING TOO MUCH ON THAT, AND YOU COULD SEE THAT A JURY BEING VERY CAREFUL ABOUT THE FINDINGS THEY MAKE, WOULD DECIDE, WE DON'T HAVE ENOUGH TO KNOW EXACTLY THAT ALTHOUGH WE-- BUT STILL, THEY BELIEVED THAT THEY WERE GETTING RID OF HER BECAUSE OF THE RELATIONSHIP SHE HAD WITH THE LAW ENFORCEMENT OFFICER AND KIRKMAN'S CONCERN ABOUT WHERE THAT WAS GOING TO GO AND THE RISK THAT PUT THEM IN. DOESN'T THAT ALL MAKE SENSE?

>> IT TOTALLY MAKES SENTENCE AS

YOU DESCRIBE IT BUT TO ME YOU'RE DESCRIBING PRIMA FACIA WITNESS ELIMINATION.

>> I WOULD THINK A JURY WOULD NOT THINK OF THAT AS WITNESS ELIMINATION.

MORE LIKE TROUBLE ELIMINATION OR A POTENTIAL PROBLEM ELIMINATION AS OPPOSED TO A WITNESS.

THE IDEA THAT SHE ACTUALLY SAW SOMETHING.

THEN BECAUSE OF THAT THEY WERE IN IMMINENT RISK OF ARREST.

>> PLUS FOR AVOID ARREST THEY HAVE TO FIND AS SOLE MOTIVE.

IF THEY FOUND IT WAS A COMBINATION OF MOTIVES, RIGHT?

>> I DON'T KNOW WHAT THE OTHER--

[INAUDIBLE]

>> HE WAS HELPING PRATT BECAUSE, SHE WAS, HE WAS A SCORNE BOYFRIEND.

>> THAT IS EXACTLY--

>> ON THIS OTHER MURDER THING YOU WILL BE OUT OF YOUR TIME, FIRST OF ALL, DID THAT CASE GO TO TRIAL, THIS OTHER MURDER?

>> PARKER?

>> YES.

>> IT DID FOR MR., FOR.

>> MR. KIRKMAN?

>> YES.

>> SO HE HAS A DEATH SENTENCE IN THAT?

>> HE GOT LIFE.

>> GOT LIFE IN THAT ONE?

OKAY.

>> YES.

>> THAT'S A, THAT'S FLORIDA CASE?

>> YES.

>> OKAY.

THE QUESTION THAT YOU WERE RAISING ABOUT THE, IT IS NOT WILLIAMS RULE, IT IS THE ISSUE OF THE MOTIVE FOR THIS MURDER, HOW DID IT BECOME A FEATURE OF THE TRIAL AS OPPOSED-- DIDN'T THE JUDGE LIMIT WHAT WOULD COME

IN?

I MEAN I THOUGHT THAT--

>> ABSOLUTELY.

>> HE ACTUALLY DID?

>> YES.

>> AND REALLY EXERCISED, IN MY VIEW SOME REAL DISCRETION ABOUT HOW MUCH TO LET THE JURY HEAR.

>> JUSTICE YOU'RE ABSOLUTELY RIGHT.

IF FOLLOWING YOUR CASE LAW THAT'S WHERE I WOULD HANG MY HAT IF I WAS IN YOUR SHOES.

LOOK IT, THIS JUDGE BENT OVER BACKWARDS JUST TO-- BUT I AM TELLING YOU, TO FIND OUT, THIS GUY'S MURDERED TOGETHER BEFORE, IT IS SO DAMNING IN THE CONTEXT OF THIS CASE BECAUSE THE WHOLE CASE, THE ENTIRE CASE HINGES ON THE JURY BELIEVING MR. PRATT'S, WHO BY HIS OWN ADMISSION COMMITTED THIS MURDER.

NOW HE SAYS THAT I WAS AFRAID OF MR. KIRKMAN.

HE SAT IN THE CAR AND HE HAD A GUN IN HIS--

>> WE'RE GOING BACK TO THIS ISSUE, ARE YOU SAYING NOTHING ABOUT THE PARK PARKER MURDER CAN COME IN?

IS THAT YOUR POSITION?

THAT NOTHING, THEY WOULD NOT KNOW ANYTHING ABOUT IT?

>> THE CIRCUMSTANCES OF THIS CASE, YES.

>> SHORT OF THAT, YOU REALLY DON'T HAVE AN ARGUMENT THIS WAS MADE A FEATURE OF THE TRIAL?

>> OH, IT WASN'T.

>> OKAY.

>> NO, I AS YOU COMMAND THE JUDGE BENT OVER BACKWARDS AND JUDGE CORRECTLY IT-- STATE CAME FORWARD AS WILLIAMS RULE ARGUMENT THIS, IS NOT WILLIAMS RULE EVIDENCE, IT IS NOT INTERTWINED, IT IS NOT SIMILAR AND IT GOES TO MY POINT THEN, A DIFFERENT VIEW.

>> LET ME ASK YOU THIS.

>> YES.

>> IF THE TESTIMONY WAS THAT THEY WERE BOTH UNDER INDICTMENT FOR MURDER, CORRECT?

>> YES.

>> OKAY.

ISN'T THE FACT THAT YOU'RE UNDER INDICTMENT FOR MURDER, DOESN'T THAT GIVE YOU A MUCH STRONGER MOTIVE TO ELIMINATE SOMEONE WHO YOU IS FRATERNIZING, IN YOUR CIRCLE FRATERNIZING WITH POLICE?

IF I'M UNDER INDICTMENT FOR MURDER AND THIS PERSON KNOWS ME AND SPENDS TIME WITH ME AND IN MY CIRCLE IS GOING OUT WITH A POLICE OFFICER, ISN'T THAT A BIGGER MOTIVE FOR MURDER THAN IF I'M UNDER SUSPICION POTENTIALLY FOR DRUG ACTIVITY?

>> OH, ABSOLUTELY.

>> SO HIGHLY, HIGHLY, HIGHLY, RELEVANT?

>> YES IT WOULD BE RELEVANT IF THAT WAS THE MOTIVATION FOR THIS MURDER BUT THE JURY REJECTED IT. THEY DID.

AND YOU GUYS HAVE MADE THAT POINT, YOU MADE THE POINT IN McCLOUD.

YOU HAD A SPECIAL VERDICT OF WHO THE SHOOTER WAS.

YOU LOOKED AT THAT INFORMATION FROM THE JURY BECAUSE IT WASN'T CLEAR FROM THE RECORD, WHO THE SHOOTER WAS IN McCLOUD BUT YOU LOOKED AT THE SPECIAL VERDICT, AND HUNG YOUR HAT ON THAT AND YOU SHOULD DO THAT HERE.

IT IS APPLES TO APPLES.

JUSTICE CANADY WITH STANDING.

IT IS APPLES TO APPLES, IT TRULY IS AND YOU CAN LOOK TO THAT IF YOU FOLLOW WHAT YOU DID IN McCLOUD LAST NOVEMBER.

SO, I WILL RESERVE THE REST OF MY TIME UNLESS THERE ARE ANY OTHER QUESTIONS?

>> THANK YOU.

>> MR. CHIEF JUSTICE AND MAY IT PLEASE THE COURT.

GOOD MORNING YOUR HONORS, MY NAME IS TAYO POPOOLA AND REPRESENT THE STATE IN THIS MATTER.

I ADDRESS ISSUE THREE, THE EDMUND TYSON ISSUE SINCE WE SPENT SO MUCH TIME.

ENMUND-TISON.

THE FACT THEY DID NOT FIND THE WITNESS ELIMINATION AGGRAVATOR. JUST AS YOU PUT IT, THE FACT THAT THE JURY COULD HAVE SAID TO ITSELF, BECAUSE THERE WAS NO ACTUAL ARREST GOING ON AT THAT TIME, BECAUSE MISS KNOWLES WAS JUST MERELY IN MR. KIRKMAN'S CIRCLE, AND THE FACT THAT THE EVIDENCE DID SHOW SHE SHE WAS AWARE OF AT LEAST SOME OF THE CRIMINAL ACTIVITIES MR. KIRKMAN WAS ENGAGED IN, THAT IS WHY MR. KIRKMAN MADE THE DECISION THAT MISS KNOWLES HAD TO BE KILLED BECAUSE IN FACT THAT'S WHAT MR. PRATT'S TESTIFIED TO. HE SAID THAT KIRKMAN BELIEVED THAT MISS KNOWLES WAS INFORMING THE POLICE ABOUT HIS CRIMINAL ACTIVITIES AND BECAUSE OF THAT, HE DID NOT WANT HER AROUND. SO THE SITUATION IS EXACTLY AS YOU PUT IT IN TERMS OF WHY THE JURY COULD REJECT THE WITNESS ELIMINATION AGGRAVATOR BUT YET STILL FIND PREMEDITATION. THE FACT IS THAT WE KNOW THE JURY DID FIND PREMEDITATION BECAUSE THEY FOUND THE CCP AGGRAVATOR.

SO THEY FOUND HEIGHTENED PREMEDITATION IN THIS CASE. SO ALTHOUGH THE JURY VERDICT IN THE GUILT PHASE DID NOT DIFFERENTIATE BETWEEN PREMEDITATED MURDER AND FELONY MURDER, THE FACT THEY FOUND THE CCP AGGRAVATOR SHOWS THAT THEY

DID FIND THAT KIRKMAN HAD A HEIGHTENED PREMEDITATION TO KILL MISS KNOWLES, AND THE EVIDENCE SUPPORTING THAT WAS BASED ON THE FACT THAT AFTER MR. PRATT'S WENT TO MR. KIRKMAN AND TOLD HIM HE WAS CONCERNED THAT MISS KNOWLES WAS BASICALLY, HE WAS CONCERNED ABOUT THE RELATIONSHIP, WHY MISS KNOWLES WAS FRATERNIZING WITH THIS POLICE OFFICER, THAT SHE WAS ANGRY AND HAVING SEX WITH ANOTHER MAN, MR. PRATT'S WAS VERY CLEAR AT TRIAL THAT HE AND MISS KNOWLES ONLY HAD SEX OCCASIONALLY, THAT THEY WERE NOT ENGAGED IN A ROMANTIC RELATIONSHIP AT THAT TIME. MORE IMPORTANTLY, HE ALSO SAID THAT WASN'T EVEN THE ISSUE. HE DIDN'T CARE IN TERMS OF, IN TERMS OF ROMANTIC INTEREST.

>> WHO SAID THAT?
KNOWLES?

>> MR. PRATT'S.

>> LET'S JUST, DO WE TAKE NOTE MR. PRATT'S SAYS WITH A GRAIN OF SALT, DIDN'T HE, THEY WERE TOGETHER THE NIGHT BEFORE. THE GIRLFRIEND GOES, GIRLFRIEND, MAYBE FRIEND WITH BENEFITS, FRIEND, GOES WITH THE, THEY GO TO THE BAR.

THE POLICE OFFICER COMES AND THEN, THERE IS NO QUESTION THE POLICE OFFICER, OR THE DEPUTY HAS SEX WITH THIS WOMAN.

WHAT HAPPENS WHEN, WHO PUNCHES HER OUT THE NEXT DAY?

WAS THAT MR. PRATT'S OR MR. KIRKMAN?

>> MR. PRATT'S DID ADMIT MISS KNOWLES IN THE CAR.

HE SPECIFICALLY SAID I HIT HER BECAUSE I WAS CONCERNED SHE JUST PUT US IN A LIFE AND DEATH SITUATION WITH MR. KIRKMAN. THOSE WERE HIS EXACT WORDS AT TRIAL.

BECAUSE MR. PRATT'S WAS AWARE

THAT KIRKMAN HAD JUST KILLED
MR. PARKER 17 DAYS PRIOR.
>> HAD MR. PRATT'S NOT BEEN
INVOLVED WITH THE PARKER MURDER?
>> MR. PRATT'S WAS INVOLVED.
>> UNDERSTAND THIS, THEY HAD TWO
MURDERS THEY NEEDED TO SOLVE.
THEY HAD TO MAKE, YOU KNOW HE,
AFTER ALL THESE YEARS, THEY HAD
TO MAKE A DEAL WITH SOMEBODY.
PRATT COMES FORWARD AND HE THEN
IS ABLE TO SHOW THEM WHERE THE
VICTIM WAS BURIED.
SO THEY MAKE A DEAL.
IT IS ONE OF THE MOST-- 10-YEAR
FOR HIS PARTICIPATION IN THIS
MURDER IS, BUT THE JURY KNOWS
THAT, AND THEY EVALUATE IT.
SO BUT AS FAR AS TRYING TO DIED
WHETHER THESE TWO WERE EQUALLY
CULPABLE IN THIS MURDER IT IS
REALLY HARD FOR, FOR ME TO BUY,
BUT I'M NOT THE JUROR, RIGHT,
THAT RELATIVE CULPABILITY, THAT
THEY'RE PROBABLY NOT EQUALLY
CULPABILITY BUT I THINK OUR CASE
LAW SAYS, SECOND-DEGREE MURDER
YOU DON'T COMPARE IT.
ISN'T THAT-- I THINK IN THAT
WAY I DON'T THINK McCLOUD DID
ANYTHING FOR THAT CASE LAW, DO
YOU?
>> NO, YOUR HONOR.
RESPECTFULLY WITH REGARD TO
ENMUND-TISON THAT WE'RE NOT
PUTTING AWAY THE GET AWAY DRIVER
OR LOOKOUT.
>> ENMUND-TISON IS THE NOT THE
ISSUE BUT PROPORTIONALITY?
ISN'T THAT THE ISSUE.
>> THE STATE WOULD-- ONE FACT
OPPOSING COUNSEL IS LEAVING OUT,
IS THE FACT THAT MR. PRATT'S
TESTIFIED THAT KIRKMAN
THREATENED TO KILL HIM IF HE DID
NOT DO AS HE HAD INSTRUCTED.
HERE WE HAVE KIRKMAN THAT MADE
THE DECISION THAT MISS KNOWLES
HAS TO DIE BECAUSE THE FACTS AS
SHOW THAT PRATT PROTESTED

KILLING MISS KNOWLES.
HE SAID HE DIDN'T WANT TO DO IT.
HE ASKED MR. KIRKMAN NOT TO DO
IT.

HE ARGUED WITH HIM AND SAID, I
BELIEVE HER.

I BELIEVE SHE IS NOT COOPERATING
WITH LAW ENFORCEMENT BUT OVER
AND OVER THE TESTIMONY SHOWED
THAT KIRKMAN REPEATEDLY SAID, I
DON'T BELIEVE HER, I DON'T
BELIEVE YOU, I DON'T BELIEVE
HER, SHE HAS TO DIE.

>> IS KIRKMAN THE SORT OF, I
GUESS, KINGPIN OF THIS DRUG
GROUP?

I MEAN WAS PRATT WORKING FOR
MR. KIRKMAN OR, OR WERE THEY
EQUALLY INVOLVED IN THIS WHOLE
DRUG RING?

I'M TRYING-- PRATT SAID HE WAS
AFRAID OF MR. KIRKMAN.

THAT HE, KIRKMAN CARRIED A GUN
AROUND.

HE ACTUALLY SAW HIM KILL
SOMEONE.

SO I'M TRYING TO GET IN MY OWN
MIND THEIR RELATIVE POSITIONS IN
THIS DRUG AFFAIR.

>> RESPECT-- I UNDERSTAND THE
POINT THAT YOUR HONOR IS MAKING
AND THE STATE WOULD CONTEND THAT
MR. KIRKMAN WAS THE MASTERMIND
BEHIND EVERYTHING BECAUSE IF WE
LOOK AT WHO EVERYONE REPORTS TO,
THE FACT THAT MR. PRATT'S
REPORTS TO MR. KIRKMAN WHAT'S
GOING ON, THE FACT THAT EVEN
WHILE KIRKMAN WAS IN PRISON HE
IS DIRECTING PEOPLE TO DESTROY
EVIDENCE, TO BURN THE VAN AND
THINGS OF THAT NATURE.

SO THE EVIDENCE REALLY DOES SHOW
IT WAS KIRKMAN WHO WAS THE
MASTERMIND.

HE DIRECTED ALL THE ACTIVITIES
AND EVERYONE WAS REPORTING TO
HIM WHAT WAS GOING ON EVEN WHILE
HE WAS LOCKED UP FOR THIS
OFFENSE.

>> YOU'RE MENTIONING, WE HADN'T DISCUSSED IT, I THINK IT IS IMPORTANT EVIDENCE, THE RECORDED PHONE MESSAGES THAT KIRKMAN, THE CALLS THAT KIRKMAN MADE DURING THE TIME HE WAS INCARCERATED, CORRECT?

>> YES, YOUR HONOR.

>> WHAT ARE THE RELATIVE AGES OF THESE TWO MEN?

>> THEY WERE IN THEIR, I WANT TO SAY EARLY TO MID 20s, MAYBE EARLY 30s BUT CERTAINLY YOUNGER THAN THAT.

THEY WERE NOT MIDDLE-AGED ADULTS IF YOU WILL.

>> WAS IT THAT PRATT WAS THE YOUNG KID-- AGAIN TRYING TO UNDERSTAND WHAT WAS GOING ON. ONCE AGAIN WE'RE REALLY RELYING-- WHAT ELSE OTHER THAN PRATT'S TESTIMONY REVEALS THAT IT WAS KIRKMAN WAS THE KINGPIN OF THIS OPERATION?

>> WELL IF WE ALSO LOOK AT CARLOS BUCKNER'S TESTIMONY AND THE TESTIMONY OF TONY ROGERS, THE FACT THAT ONCE, AFTER CONFRONTING MISS KNOWLES ABOUT HER RELATIONSHIP WITH THE POLICE OFFICER, MR. KIRKMAN SAID, I DON'T BELIEVE YOU, AND AT THAT POINT KIRKMAN THEN GOES TO HOME DEPOT WHERE HE IS SEEN ON VIDEO BY HIMSELF PURCHASING THESE SUPPLIES.

THEN HE GOES BACK TO THE HOUSE. HE DIRECTS MR. PRATT'S TO TIE UP MISS KNOWLES.

HE TELLS PRATT, UNLESS YOU DO AS I SAY, I WILL PUT YOU IN THE HOLE WITH HER.

THOSE, THOSE WERE THE FACTS THAT CAME OUT AT TRIAL.

AND SO THE FACT THAT YOU HAVE APPELLANT OBSERVED ON VIDEO PURCHASING THE SUPPLIES TO MURDER MISS KNOWLES, THE FACT THAT HE IS DIRECTING TAMIKO SMITH TO BURN THE VAN AFTER HE

IS LOCKED UP, IT IS CLEAR THAT SHOWS EVEN NOTWITHSTANDING MR. PRATT'S TESTIMONY, THAT KIRKMAN WAS THE MASTERMIND BEHIND THIS ENTIRE OPERATION. SO IF THERE ARE NO MORE QUESTIONS REGARDING ISSUE NUMBER THREE, THE ENMUND-TISON ISSUE, I WILL SPEAKING REAL BRIEFLY ABOUT THE WILLIAMS RULE ISSUE. IT IS THE STATE'S POSITION THAT THE TRIAL COURT CORRECTLY ALLOWED THIS EVIDENCE INTO TRIAL.

FIRST I WANT TO POINT OUT THAT ALTHOUGH OPPOSING COUNSEL STATES THAT THE JURY WAS TOLD THAT KIRKMAN HAD PREVIOUSLY MURDERED ANOTHER PERSON, IT IS IMPORTANT TO NOTE THAT THAT WAS NOT ACTUALLY WHAT CAME OUT AT TRIAL BECAUSE JUSTICE PARIENTE, AS YOU SAID THE TRIAL JUDGE WAS VERY CAREFUL TO LIMIT WHAT THE JURY COULD HEAR DURING THE GUILT PHASE.

SO THE TRIAL JUDGE DID NOT WANT THE JURY TO FIND OUT THAT KIRKMAN HAD IN FACT MURDERED MR. PARKER.

INSTEAD HE ALLOWED THE STATE TO INTRODUCE EVIDENCE SIMPLY THAT KIRKMAN WAS INVOLVED, HE WAS INDICTED AND THAT PRATT PLED TO THE OFFENSE.

SO BASED OFF OF THAT-- I BELIEVE YOU HAVE A QUESTION?

>> GO ON.

>> OKAY.

SO BASED OFF OF THAT THE STATE WOULD CONTEND THAT THE EVIDENCE WAS RELEVANT TO ESTABLISH MOTIVE BECAUSE MR. PRATT'S TESTIFIED THAT APPELLANT BELIEVED THAT MISS KNOWLES WAS INFORMING LAW ENFORCEMENT ABOUT HIS ACTIVITIES.

SO DUE TO THE FACT THAT WILLIE PARKER'S MURDER HAD OCCURRED JUST 17 DAYS PRIOR TO MISS

KNOWLES' MURDER AND NOW MR. KIRKMAN IS AWARE THAT MISS KNOWLES IS HAVING A SEXUAL RELATIONSHIP OR SOME TYPE OF A RELATIONSHIP WITH THE POLICE OFFICER AND BASED OFF OF THAT, HE MAKES THE DECISION THAT SHE CAN NOT LIVE BECAUSE HE DID NOT KNOW THE EXTENT OF HER RELATIONSHIP WITH YOU LAW ENFORCEMENT, WHAT EXACTLY IT WAS THAT SHE WAS DOING WITH THEM, BUT HE BELIEVED BASED OFF OF TONY ROGERS' TESTIMONY AND CHRIS PRATT'S TESTIMONY SHE WAS IN FACT TALKING TO LAW ENFORCEMENT ABOUT HIS ACTIVITIES AND HE MADE THE DECISION BASED ON THAT THAT SHE HAD TO DIE.

WE RESPECTFULLY THIS COURT AFFIRM THE TRIAL COURT'S RULING THAT THE EVIDENCE WAS ADMISSIBLE, AND REAL BRIEFLY AS TO ISSUE NUMBER ONE, WE RECOGNIZE THIS COURT'S DECISION IN HURST v. STATE IN TERMS OF WHAT IS REQUIRED TO IMPOSE THE DEATH PENALTY.

THE STATE WOULD STILL CONTEND THAT THE COURT SAID ANY YOU HURST ERROR IS CAPABLE OF HARMLESS ERROR REVIEW, HERE WE HAVE THE JURY WHO WAS TOLD THAT MR. KIRKMAN WHO ALREADY PREVIOUSLY KILLED MR. PARKER BECAUSE DURING THE PENALTY PHASE THE JUDGE DID ALLOW THE STATE TO GO INTO THE WILLIE PARKER EVIDENCE IN DEPTH.

SO THE JURY WAS TOLD DURING THE PENALTY PHASE THAT MR. KIRKMAN DID IN FACT KILL WILLIE PARKER AND HE WAS CONVICTED OF PREMEDITATED MURDER BECAUSE OF THAT.

HERE THE JURY HAD EVIDENCE MR. KIRKMAN WHO ALREADY KILLED SOMEONE PREVIOUSLY, WHO KIDNAPS THIS WOMAN AND BURIES HER ALIVE AND THE JURY FOUND, AGGRAVATORS

THAT HE WAS ON PROBATION AT THE TIME OF THE OFFENSE--

>> UNDER HURST v. STATE DOESN'T THIS COURT'S PRECEDENT, THAT YOU HAVE TO, THE JURY HAS TO UNANIMOUSLY FIND THAT THE AGGRAVATORS OUTWEIGH THE MITIGATORS?

>> THAT IS WHAT HURST v. STATE--

>> RIGHT.

AND YOU HOW DO THESE ARGUMENTS HELP US REACH A CONCLUSION THAT THERE WAS, THAT THERE WAS HARMLESS WITH RESPECT TO THAT HURST v. STATE REQUIREMENT?

>> BECAUSE IF WE LOOK AT HARMLESS ERROR TEST, THE STATE WOULD CONTEND, WE RECOGNIZE THAT THIS COURT'S DECISION IS ADVERSE TO OUR POSITION, BUT THE UNDER THE HARMLESS ERROR TEST--

>> YOU RECOGNIZE THE ONLY WAY WE COULD FIND HARMLESS ERROR IS TO RECEDE FROM THAT PART OF HURST VERSUS STATE?

>> THE STATE WOULD RESPECTFULLY THIS COURT TO RECEDE FROM THAT PART OF HURST VERSUS STATE BECAUSE OF THE HARMLESS ERROR TEST ALLOWS THIS COURT TO ASK THE QUESTION, HOW WOULD A RATIONAL JURY PROPERLY INSTRUCTED VIEW THIS AGGRAVATION?

SO WE HAVE TO LOOK AT THE AGGRAVATION AND THE MITIGATION. SO HERE THE JURY WAS TOLD THAT KIRKMAN, WHO HAD PREVIOUSLY MURDERED SOMEONE BEFORE, KIDNAPS A WOMAN, BURIES HER ALIVE. THEY FOUND HAC AND CCP WHICH THIS COURT SAID WAS TWO OF THE MOST HEINOUS AGGRAVATORS. IN TERMS OF MITIGATION, ONLY THING THEY HEAR FROM A SINGLE WITNESS, KIRKMAN'S GODSISTER AND HE WAS A GOOD GODBROTHER AND TOLD ME TO DO MY HOMEWORK. IT IS THIS STATE'S POSITION THEY

DO NOT NEED TO SEND THIS CASE
BACK WHO KIRKMAN PREVIOUSLY
MURDERED SOMEONE BEFORE AND
KIDNAPS A WOMAN AND BURIES HER
ALIVE OUTWEIGHS THE FACT THAT
HIS GODSISTER SAYS SHE DID HIS
HOMEWORK.

WE WOULD ASK THE STATE TO
AFFIRM.

IF THERE IS ARE NO FURTHER
QUESTIONS, IT HAS BEEN MY
PLEASURE.

THANK YOU, YOUR HONORS.

>> I SHOULD HAVE ASKED YOU ABOUT
THIS BEFORE AND I APOLOGIZE, BUT
IT IS PERPLEXING TO ME, UNDER
YOUR ONLY GUILT PHASE ISSUE YOU
ARGUE ALLOWING THE JURY TO HEAR
ABOUT KIRKMAN'S INVOCATION OF
HIS RIGHT TO REMAIN SILENT IS
SERIOUS CONSTITUTIONAL ERROR,
CORRECT?

I MEAN YOU SAY THAT.

>> THAT IS CORRECT.

>> OKAY.

BUT YOU ALSO SAY THAT YOU
RECOGNIZE THAT YOU'RE NOT
ENTITLED TO RELIEF ON THAT
BECAUSE IT IS UNPRESERVED,
CORRECT?

>> YES.

>> SO YOU COULD MAKE A
FUNDAMENTAL ERROR ARGUMENT AND
ACTUALLY RAISE THAT ISSUE,
RIGHT?

>> I BELIEVE SO, YES.

>> OKAY.

SO THE FACT THAT YOU DIDN'T AN
INDICATION THAT YOU BELIEVE
THERE IS NO GOOD-FAITH BASIS TO
MAKE THE ARGUMENT?

>> NO.

I, NOT AT ALL.

>> SO YOU'RE JUST PUTTING UP A
RED FLAG SAYING THAT YOU HAVE
WAIVED AN ISSUE THAT IS VALID
THAT YOU COULD HAVE RAISED?

>> WELL I THINK THAT IN THIS
PARTICULAR CASE, THAT'S GREAT
QUESTION.

IN THIS CASE THEY SOUGHT SPEEDY TRIAL BECAUSE OF THE WAY THAT THE APPELLATE DECISIONS WERE COMING, THEY WANTED TO GO INTO THAT WINDOW IN SPEEDY TRIAL AND TRY TO GET GAIN FROM THAT. AND AS A CONSEQUENCE, THERE WAS NO MITIGATION DEVELOPED IN THIS CASE FOR THAT REASON.

THEY HAD MITIGATION EXPERTS. I SUBMIT TO YOU THERE IS PLENTY OF MITIGATION THAT COULD HAVE BEEN PRESENTED IN THIS CASE. REGARDLESS OF THE OUTCOME THIS WILL BE GOING FOR INEFFECTIVE ASSISTANCE.

>> I'M ASKING BUT THE GUILT PHASE.

>> YES.

>> YOU'RE AWARE OF THIS COURT'S PRECEDENT IF WE FIND NO FUNDAMENTAL ERROR THE ISSUE CAN'T BE EFFECTIVELY, THAT MEANS THERE IS NO PREJUDICE, RIGHT?

>> WELL I THINK IT COULD BE RAISED IN THE INEFFECTIVE ASSISTANCE OF COUNSEL, THAT THEY DIDN'T OBJECT.

AND--

>> BUT NOT IF WE FOUND FUNDAMENTAL ERROR. FOUND THERE WAS NO FUNDAMENTAL ERROR.

IN OTHER WORDS IF YOU RAISE THIS AS FUNDAMENTAL ERROR CLAIM AND WE REJECTED THAT ON APPEAL, IF YOU TRIED TO RAISE LATER AS INEFFECTIVE ASSISTANCE OF COUNSEL, ALL CASE LAW WOULD YOU SAY THERE IS NO PREJUDICE IF THERE IS NO FINDING OF FUNDAMENTAL ERROR, CORRECT?

>> YES.

IF THERE IS NO FUNDAMENTAL, THAT'S CORRECT.

>> SO BY, AN ISSUE OUT THERE THAT YOU'RE NOT, THAT YOU'RE CLEARLY WAIVING ON APPEAL, ARE YOU JUST TRYING TO SET UP A SORT OF SAVE THIS FOR LATER SO THAT

YOU CAN BRING IT AS A--
>> I THINK THE, THE STRATEGY
THERE WAS TO ALERT FUTURE
LITIGANTS OF SOME OF THE
PROBLEMS IN THIS CASE AS FAR
AS--

>> IF THERE IS, IF THERE IS A
VALID ARGUMENT, WHICH YOU SAID
THAT THERE WAS, THIS WAS
FUNDAMENTAL ERROR, WHY ISN'T
INEFFECTIVE ASSISTANCE OF
APPELLATE COUNSEL NOT TO RAISE
IT?

>> I JUST IN MY EXPERIENCE I
HAVE NOT SEEN VERY MUCH SUCCESS
RAISING INEFFECTIVE ASSISTANCE
ON THE FATES OF THE RECORD.

>> NO, NO.

I'M, YOU'RE SAYING THIS IS
SERIOUS CONSTITUTIONAL ERROR BUT
WHAT YOU DON'T ARGUE IN A
SEPARATE ISSUE ON APPEAL WHICH
WOULD BE REQUIRED TO ACTUALLY
PRESERVE-- I MEAN MAKE THE
ISSUE AN ISSUE ON APPEAL, THIS
IS FUNDAMENTAL ERROR.

NOWHERE IN HERE-- YOU SAY IT IS
SERIOUS CONSTITUTIONAL ERROR.
THAT IS NOT A STANDARD.

IT IS EITHER PRESERVED ERROR OR
FUNDAMENTAL ERROR.

>> THAT'S CORRECT.

>> YOU'RE NOT ARGUING IT IS
FUNDAMENTAL ERROR.

YOU'RE WAVING A FLAG HERE IS
SERIOUS CONSTITUTIONAL ERROR.

YOU'RE NOT ARGUING THAT.

YOU CAN ONLY ARGUE FOR REVERSAL
IF IT IS FUNDAMENTAL ERROR,
RIGHT.

>> THAT'S CORRECT.

>> YOU THINK THERE IS
POTENTIALLY THERE IS A GOOD
FAITH ARGUMENT THAT IT IS BUT
YOU'RE NOT MAKING THAT ARGUMENT.
SO YOU'RE WAIVING A VALID--
THAT YOU SAY YOU HAVE ON APPEAL
AND I JUST DON'T UNDERSTAND THAT
AT ALL.

>> I HAVE TO TELL YOU THAT, I

HAVE DONE A LOT OF CASES WITH THIS TEAM OF ATTORNEYS AND I ALWAYS FIND THAT THEIR REPRESENTATION IS DEFICIENT. I DON'T KNOW HOW THEY'RE STILL ON THE ROLLS TO BE SELECTED AS COUNSEL.

>> WE'RE NOT TALKING ABOUT THEIR REPRESENTATION.

I'M ASKING YOU--

>> I.

>> I'M ASKING WHY YOU ARE RED FLAG ARE FOE ME IN A BRIEF THAT YOU'RE WAIVING AN APPELLATE ISSUE THAT YOU THINK IS A VALID POTENTIAL APPELLATE ISSUE?

>> I THINK THAT THERE IS, THERE IS CONSTITUTIONAL ERROR, SERIOUS CONSTITUTIONAL ERROR AND FUNDAMENTAL ERROR.

WHETHER IT WAS ONE OR THE OTHER IS ARGUABLE.

>> SO YOU THINK THERE IS NO GOOD FAITH ARGUMENT THIS IS FUNDAMENTAL ERROR?

>> I THINK IT IS CONSTITUTIONAL ERROR.

WHETHER IT IS--

>> WHAT IS THAT?

>> IT'S A TERM THAT IS USED IN THE JURISPRUDENCE.

IT IS USED INTERCHANGEABLY, CONSTITUTIONAL AND FUNDAMENTAL BUT NOT ALL CONSTITUTIONAL ERROR IS FUNDAMENTAL ERROR REALLY.

BUT YOU KNOW MAYBE IT WAS ERROR NOT TO RAISE IT.

I WILL SAY THAT.

I THINK THAT, YOU MAKE A VALID POINT AND I MAY HAVE MADE AN ERROR IN THIS CASE.

>> BEFORE YOU SIT DOWN, I HAVE JUST ONE QUESTION.

>> OF COURSE.

>> YOU AGREE THAT THE HURST CONSIDERATION IS SUBJECT TO HARMLESS ERROR ANALYSIS?

>> ABSOLUTELY.

>> AND ONE OF THE BASIS AND HOW WOULD YOU DESCRIBE IT, RELATES

TO A JURY, A RATIONAL JUROR
COULD FIND SOMETHING OTHER THAN
DEATH UNDER THE CIRCUMSTANCES,
THAT IS ONE OF THE CRITERIA?

>> YES, SIR.

>> HOW WOULD YOU DESCRIBE
APPLICATION OF THAT ONE ELEMENT?

>> WELL IN THIS PARTICULAR CASE
WHERE THERE WAS NO MITIGATION
DEVELOPED, THERE IS A STRONG
CASE TO ARGUE HARMLESS ERROR IN
THIS CASE.

>> OKAY.

>> THERE TRULY IS.

>> I'M TRYING TO PLACE THIS IN
CONTEXT AND IT SEEMS TO ME HURST
CONTEMPLATE THAT YOU MAY HAVE
CIRCUMSTANCES JURORS FOUND THEIR
WAY ON TO JURIES THAT WILL NOT
FIND APPLICATION OF THE DEATH
PENALTY.

HERE WE HAVE, AND, ONLY HAD TWO
OF THESE SINCE I'VE BEEN ON THE
COURT, THAT INVOLVES BURYING
SOMEONE ALIVE.

THAT IS WHAT THIS CASE INVOLVES,
AM I CORRECT?

>> YES.

>> AND A JURY FOUND THAT WAS
PLANNED, AND THE EVIDENCE IS
CLEAR, ONE OF THE ELEMENTS
JURIES DON'T HAVE TO FIND, THIS
GUY KILLED SOMEBODY ELSE.
WHAT DOES IT TAKE FOR THE DEATH
PENALTY TO APPLY IN FLORIDA WHEN
THERE IS NO MITIGATION?

>> WELL, I'LL TELL YOU, I'LL
JUST CITE TROY VICTORINO.
THIS COURT ORDERED A NEW
SENTENCING HEARING FOR HIM.

>> THE VICTORINO, THE THOUGHT
THEY HAD STOLEN SOMETHING FROM
HIM, BREAKS INTO THE HOUSE?
THAT IS ONE WE'RE TALKING ABOUT,
IN DAYTONA?

>> TORCHED THE DOG.

>> YEAH.

THEY DIDN'T BURY SOMEBODY ALIVE
DID THEY?

I ONLY KNOW ONE OTHER ONE THAT

MISS COLE WAS INVOLVED IN.
I'M TRYING TO GET MY HANDS
AROUND THIS CONCEPT DID HURST
INDICATE IT WAS INTENDED TO
PROTECT IRRATIONAL VERDICTS.

>> YES.

>> IT WAS.

>> I AGREE WITH THAT BUT THIS
COURT AND SINCE THOSE DOWN THE
LINE IT SORT OF WOULD BE, IT'S A
BRIGHTLINE RULE AND NOT
EVERYBODY UP HERE AGREES BUT
IT'S A BRIGHTLINE RULE IF THERE
IS NOT UNANIMOUS JURY VERDICT.

>> LET ME ASK YOU THIS QUESTION.
YOU SAID THERE WAS SCANT
MITIGATION.

IF I'M A JUROR, I LOOK AT THIS
GUY I MIGHT THINK WAS EQUALLY
CULPABLE GOT LIFE AND HOW IS IT
IN TERMS OF THE RECOMMENDATION
FOR DEATH, WHY IS THAT
REASONABLE?

SO TWO JURORS MIGHT-- I MEAN SO
IS THAT NOT-- I MEAN, WHAT DEAD
THE DEFENDANT ARGUE TO THE JURY
WHY HE SHOULDN'T GET THE DEATH
PENALTY?

>> IN CLOSING ARGUMENT IT WAS
ARGUED THAT THE DEFENSE THEORY
OF THE CASE WAS, THIS WAS A
SCORNED BOYFRIEND THAT WANTED TO
GET RID OF HIS GIRLFRIEND.
HE WASN'T FROM THIS COUNTRY.

>> SO IT WAS ABOUT THE FACT THAT
THE CODEFENDANT, WHO WOULD HAVE
BEEN A CODEFENDANT GOT LIFE, I
MEAN GOT 10 YEARS, NOT LIFE?
THE.

>> YES.

EXACTLY.

>> IS THAT WHAT YOU JUST SAID?
I DIDN'T HEAR YOU SAY THAT.
I HEARD HER SAY THAT.

>> I DIDN'T, NO.

>> OKAY.

>> IT WAS 10 YEARS.

THAT IS EXACTLY WHAT WAS ARGUED
IN CLOSING ARGUMENT.

WHAT HE USED THE WORDS AND A

BOMB NATION, THIS GENTLEMAN WHO
ADMITTEDLY BURIED THIS WOMAN
ALIVE, WHO WAS MR. PRATT'S, HE
IS THE ONE WHO DID IT AND HE GOT
10 YEARS.

AND NOW YOU WANT TO SENTENCE
THIS FELLOW TO DEATH.

IF YOU REJECT WITNESS
ELIMINATION, THEY'RE EQUALLY
CULPABLE.

HE HELPED HIM OUT.

HE WOULDN'T KNOW WHERE TO GO TO
THE BODY TO BURY IT.

HE CAME FROM THE BAHAMAS.

HE SOUGHT OUT SOMEBODY THAT
WOULD KNOW HOW TO TAKE CARE OF
THIS.

>> YOUR TIME IS UP.

THANK YOU FOR ARGUMENTS.

THE COURT IS IN RECESS UNTIL
9:00.