

>> OKAY OUR NEXT CASE IS MARK H WILSON V STATE OF FLORIDA, SC2023-0320.

>> Appellee: MAY IT PLEASE THE COURT?

MY NAME IS KATHERYN RADTKE AND I REPRESENT MR. WILSON.

MR. WILSON WAS SENTENCED TO DEATH.

I WILL ADDRESS A FEW ISSUES, WITHSTAND HOWEVER ON ALL ISSUES RAISED IN THE BRIEFS.

AS TO ISSUE NUMBER 1 THE TRIAL COURT ERROR IS A MATTER OF LAW BY ALLOWING THE JURY TO CONSIDER THE COLD CALCULATED AND PREMEDITATED AGGRAVATING FACTOR UNDER THE CIRCUMSTANCES OF THE TRIAL IN THIS CASE.

THE WRITTEN VERDICT ON THE MURDER COUNTS WAS A GENERAL VERDICT OF GUILT.

THAT VERDICT WAS REACHED JUST MINUTES AFTER THE JURY HAD TOLD THE COURT THAT IT HAD NOT REACHED UNANIMOUS AGREEMENT ON THE PREMEDITATION THEORY.

IN MANY CAPITAL CASES A VERDICT OF GUILTY OR FIRST-DEGREE MURDER IS VALID WHETHER OR NOT IT REFLECTS UNANIMITY ABOUT THE UNDERLYING AREA OF GUILT.

IN THIS CASE THE STATE CONCEDED BELOW THAT IF THE JURORS HAD CHECKED THE BOX TO SAY THEY WERE UNANIMOUS ONLY ON THE FELONY MURDER THEORY THE STATE WOULD'VE BEEN PRECLUDED FROM SEEKING A FINDING THAT THE CCP FACTOR WAS PRESENT.

THE STATE ONLY PURSUED THE ENIAC AGGRAVATE HER AS TO DAYTON BUT THERE WERE TWO AGGREGATORS.

>> Justice Charles Canady: COUNSEL LET ME ASK YOU THE PREMISE FOR THIS WHOLE ARGUMENT.

MAYBE I AM MISSING SOMETHING HERE BUT IT SEEMS LIKE TO ME THAT WHAT A JURY CAME WITH FROM THE COURT WAS A CONCERN ABOUT THE VERDICT FORM AND IT REALLY PRESENTED A HYPOTHETICAL QUESTION.

IT SAYS, SO IF WE, IF WE ARE NOT UNANIMOUS AS TO PREMED WHICH LINE ON THE FORM DO WE USE?

THERE'S MORE PEOPLE ON JURIES AND SO WHEN THEY LOOK AT A FORM IT REALLY DOESN'T MAKE SENSE.

THEY MIGHT VERY WELL ASK A HYPOTHETICAL QUESTION THAT WOULD NOT REFLECT ANYTHING ABOUT WHETHER THIS IS UNANIMOUS OR NOT UNANIMOUS.

THIS IS FRAMED AS A HYPOTHETICAL QUESTION.

IF WE ARE NOT UNANIMOUS.

WHAT AM I MISSING ABOUT THAT?

I'M NOT SURE IF IT MATTERS, REALLY, ANYWAY BUT THE PREMISE FOR THE WHOLE ARGUMENT HERE SEEMS TO ME TO BE FAULTY.

>> Appellee: ACTUALLY YOUR HONOR I WOULD SAY IT IS NOT FAULTY.

WELL, YOU ARE A LITTLE FAULTY RATHER WITH ALL DUE RESPECT.

[CHUCKLE] I USED TO DO A LOT OF TRIALS.

>> Justice Charles Canady: I'M AT RISK OF BEING FAULTY!

COUNSEL AGREES.

[LAUGHTER]

>> Appellee: YES IT WILL.

I HAVE DONE A LOT OF TRIALS AND FREQUENTLY IS MY EXPERIENCE THE JURY COMES OUT AND THEY SAY JUDGE, WE HAVE A QUESTION AND SOME OF US ARE THINKING ALONG THESE LINES.

AND THAT IS THE WAY IT APPEARS TO ME IN READING THE RECORD.

>> Justice Charles Canady: I'M JUST READING WHAT I SEE IN THE RECORD.

AND AGAIN, I UNDERSTAND THAT THERE ARE PEOPLE THAT WILL SPOT A FLAW IN WHAT HAS BEEN PRESENTED TO THEM AND SAY WHY WOULD YOU GIVE US THAT AND THEN SAY, COME BACK AND SAY THIS JURY IS REALLY SMARTER THAN THESE LAWYERS WHO GAVE US THESE INSTRUCTIONS OR THE INSTRUCTIONS FOR THE JUDGE.

>> OR THEY ARE SAYING AND WHAT WE BELIEVE IS MORE LIKELY THEY ARE SAYING JUDGE, WE ARE NOT ALL IN AGREEMENT.

WE ARE NOT UNANIMOUS.

WHAT WE ARE ASKING THE COURT TO DO IS GIVE US A LITTLE MORE GUIDANCE THERE.

>> Justice: HOW DO WE DECIDE THIS ISSUE IN FAVOR OF YOUR CLIENT BASED ON ANYTHING OTHER THAN SPECULATION?

>> I WOULD SAY IT'S NOT SPECULATION, YOUR HONOR.

I WOULD SAY THERE'S FURTHER EVIDENCE THAT IT WAS NOT UNANIMOUS.

THE DISAGREEMENT IN THE TRIAL COURT CONCERNS THE JURY'S REVELATION THAT IT DID NOT UNANIMOUSLY FINDS THAT HE PREMEDITATED THE KILLINGS.

THE RECORD SHOWS THAT ONLY 5 MINUTES ELAPSED BETWEEN THE PAUSE IN DELIBERATION AND JURY VERDICT.

THEY WERE PREVIOUSLY OUT FOR 2 HOURS.

IT IS UNLIKELY ON THIS RECORD THAT THE JURY CHANGED THEIR MINDS IN JUST 5 MINUTES OR THE VERDICT WAS BASED ON A UNANIMOUS FINDING THAT PREMEDITATION WAS SHOWN.

>> Justice: IT SEEMS VERY SPECULATIVE.

I CAN'T IMAGINE WHAT THEY WERE DOING.

>> Appellee: I DON'T THINK-

>> Justice: CAN YOU DIRECT US TO A CASE WHERE IT RELIED ON A FACTOR OF THE VALIDITY OF A JURY'S CONCLUSION OR A VERDICT?

>> Appellee: RIGHT OFFHAND YOUR HONOR I'M NOT -

>> Justice John Couriel: I DON'T THINK THERE IS ONE.

I'M SURPRISED YOU CALLED A PORT OF THE RECORD BECAUSE YOU ARE RIGHT.

THE RECORD IS FROM THE TIME THEY LEFT TO THE TIME THEY CAME BACK IN BUT I CAN'T GIVE A CASE IN ANY COURT WHERE THAT HAS BEEN A MAIN CONSIDERATION ALONG THE LINE YOU ARE PROPOSING HERE.

>> Appellee: WELL -

>> Justice Jamie Grosshans: IT SEEMS TO FOLLOW JUST AS LIKELY IF THE CANDIDATES HYPOTHETICAL IS CORRECT.

IF THEY WERE PROPOSING SOMETHING THE MINUTE THE FORM WAS CLEARED AND THEY HAD ALREADY AGREED ON EVERYTHING AND IT ONLY TOOK 5 MINUTES TO FIX - TO FILL OUT THE CORRECT FORM.
IF WE ARE GOING TO SPECULATE WE CAN KIND OF GO BOTH WAYS ON THAT.
>> Appellee: I DON'T KNOW IF IT IS SPECULATION BECAUSE THERE ARE OTHER FACTORS GOING ON IN THIS CASE WITH THE JURY.
THE JURY INSTRUCTIONS THAT WERE GOING ON THAT SUGGEST THAT THERE WAS DEFINITELY A PROBLEM IN THE ARGUMENTS AS WELL.
WITH DIRECTING, TRYING TO DIRECT, THE STATE TRYING TO DIRECT THE JURORS TO IGNORE A LOT OF THINGS THAT WERE BEING SAID.
ON BEHALF OF THE DEFENDANT.
OR THE APPELLANT IN THIS CASE.
IF YOU LOOK FOR EXAMPLE AT POINT NUMBER 5 WHERE WE ARE ARGUING THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST TO AMEND THE STANDARD JURY INSTRUCTIONS TO REMOVE THE REASONABLE QUALIFIER FROM THE DEFINITION OF MITIGATING CIRCUMSTANCES.
AND IN THAT INSTANT THE DURING THE STATE ATTORNEYS CLOSING AND THIS IS PART OF THAT ARGUMENT.
IF YOU GO TO PAGES 3407 TO 3409 OF THE RECORD, THE STATES CLOSING ARGUES IF THE JURY FINDS ANY AGGRAVATE HER TO BE PROVEN IS STILL HAS TO BE UNANIMOUS.
AND WHEN YOU LOOK AT THE MITIGATING CIRCUMSTANCES THE ARGUMENT CONTINUES IT CAN BE ANYTHING.
AND THEN THEY ARE SORT OF POO-POOING THE EVIDENCE SUBMITTED BY THE DEFENDANTS.
AND THAT GOES INTO ANOTHER ISSUE WITH THE INSTRUCTION REQUIRING, ACCORDING TO THE STATE THAT ANYTHING THAT REASONABLY INDICATES THE DEATH PENALTY IS NOT APPROPRIATE COULD BE CONSIDERED AS A MEDICAID OR.
BUT THEN THEY ARE ARGUING ABOUT WAYNE THAT AGAINST THE AGGRAVATION, THE AGGREGATORS.
THAT MITIGATING FACTOR THERE WHICH IF IT EXISTS DOES NOT, DOES A REASONABLY INDICATES THAT THE DEATH PENALTY IS NOT APPROPRIATE? AND SUGGESTING THAT ONE, IN THE ARGUMENT THAT ONE AGGRAVATING FACTOR CAN OUTWEIGH ANY MITIGATING FACTOR SHOWN BY THE DEFENSE.
AND THAT IS WHERE THE FEDERAL CONSTITUTIONAL LAW COMES IN.
THE ARGUMENT BY APPELLANT IS THAT THE DENIAL OF A SPECIAL JURY INSTRUCTION IS REVIEWED FOR DISCRETION.
A SPECIAL INSTRUCTION MUST BE SUPPORTED BY EVIDENCE.
BUT WE ARE ASKING, ARGUING, BASED ON A FEDERAL LAW THAT THE STANDARD JURY INSTRUCTIONS TO REMOVE, SHOULD REMOVE THE REASONABLE QUALIFIER FROM THE DEFINITION OF MITIGATING CIRCUMSTANCES.
I THOUGHT SOMEONE WAS STARTING TO SAY SOMETHING.
FLORIDA'S PRELIMINARY AND FINAL JURY INSTRUCTIONS FOR USE IN THE PENALTY PHASE BOTH INCLUDE THIS REASONABLE OR REASONABLY

QUALIFIER.

BUT OUR ARGUMENT IS THAT SHOULD HAVE NO PLACE IN THE JURY ROOM. IT REQUIRES THE COURT TO ADDRESS AGGRAVATING FACTORS AND MITIGATING CIRCUMSTANCES THAT ARE REASONABLY ESTABLISHED BY THE EVIDENCE.

BUT THE US SUPREME COURT REQUIRES IN CAPITAL CASES THAT EACH JUROR MUST BE ALLOWED TO CONSIDER ALL MITIGATING EVIDENCE. THE STATE'S ARGUMENT THEN, IN CLOSING REALLY CUTS AGAINST THAT. AND IT IS OUR ARGUMENT THAT IT SHOULD NOT.

THE CASES THE CHIEF CASES IN THIS AREA ARE AND I'M NOT SURE OF THE PRONUNCIATION BUT IT LOOKS LIKE THE COVEY VERSUS NORTH CAROLINA WHICH SIDE MILLS VERSUS MARYLAND.

THE REQUEST CHANGE TO THE STANDARD INSTRUCTION WOULD HAVE EFFECTUATED THE DEFENDANT'S RIGHT TO BREATHE PROTECTED BY FEDERAL AND FLORIDA DUE PROCESS CLAUSES.

THAT IS ONE OF THE MORE IMPORTANT OF THE ISSUES THAT WE HAVE IN THIS CASE.

>> Justice Charles Couriel: EVEN IF WE AGREE WITH YOU DON'T WE HAVE TO FIND THE COURTS INSTRUCTION TO THE STANDARD JURY INSTRUCTION?

>> Appellee: YES YOUR HONOR.

THAT IS ARGUED, ALSO.

IN FACT IN THIS PARTICULAR CASE AND HOW THE TRIAL PROGRESSED.

THE REQUESTED CHANGE TO THE STANDARD INSTRUCTION WOULD HAVE EFFECTUATED THE DEFENDANT'S RIGHT TO BE PROTECTED BY THE FEDERAL AND FLORIDA'S DUE PROCESS CLAUSES TO HAVE THIS JURY CORRECTLY AND INTELLIGENTLY INSTRUCTED.

THE APPELLANT HAS THE RIGHT TO HEIGHTENED RELIABILITY IN THE CAPITAL PROCESS.

IN THE PROCEEDINGS.

IN THE INSTRUCTION THAT WAS REQUESTED WOULD HAVE EFFECTUATED HIS RIGHT.

>> Justice Charles Canady: I'M STRUGGLING TO UNDERSTAND HOW THIS HAS PROTECTED SOMEONE'S RIGHT TO ESSENTIALLY SAY THAT THEY CAN HAVE THE SYMBOL MITIGATION.

THAT SEEMS TO BE WHAT YOU ARE SUGGESTING.

>> Appellee: YOUR HONOR I DON'T THINK IT IS UNREASONABLE MITIGATION.

>> Justice Charles Canady: WELL, YOU ARE QUIBBLING WITH THE WORD REASONABLE, RIGHT. WHAT IS THE OPPOSITE OF REASONABLE?

THE OPPOSITE OF REASONABLE WHICH YOU QUIBBLE IS UNREASONABLE!

>> Appellee: ACTUALLY, THERE IS NO REQUIREMENTS.

IN FACT THE FEDERAL CASE LAW CERTAINLY -

>> Justice Charles Canady: NOW THAT WE COME TO IT YOU CAN HAVE UNREASONABLE MITIGATION!

THIS IS ABOUT THE CONSTITUTIONAL RIGHT TO HAVE UNREASONABLE MITIGATION.

>> Appellee: I'M SORRY YOUR HONOR THAT'S NOT WHAT I MEANT.

WHAT WE ARE SAYING IS THERE IS MITIGATION.
IT HAS A BASIS IN FACT.

45 MITIGATORS WITH BASES AND FACTS.

WE ARE BEING ARGUED AGAINST BY THE STATE BY BEING THINGS THAT THE
JURY SHOULD JUST DISREGARD.

AND THE JURY SHOULD ONLY GO TO IT IF IT IS REASONABLE.

AND THEN IT GOES ON TO ARGUE THAT THE MITIGATING FACTORS -

>> Justice Charles Canady: IN THIS ARENA IS IN THE CASE THAT YOU'VE GOT
TWO DIFFERENT THINGS GOING ON WITH SUGGESTED MITIGATION.

YOU'VE GOT WHETHER IT IS FACTUALLY ESTABLISHED.

WHETHER THE UNDERLYING FACTS OR FACT OBTAINED.

BUT THEN YOU HAVE THE QUESTION ONCE YOU'VE GOTTEN OVER THAT
HURDLE YOU HAVE THE QUESTION OF WHETHER IT IS OF A MITIGATING
NATURE.

AND THOSE ARE KIND OF TWO DIFFERENT THINGS.

THE FACT THAT SOMEONE COMES AND SAYS THIS IS MITIGATION DOESN'T
MEAN THAT THERE'S MITIGATION.

I MEAN, IT'S NOT AN AUTOMATIC THING IF THEY START MITIGATION.

AM I MISSING SOMETHING WHEN I THINK THAT?

>> YOUR HONOR IF YOU HAVE EXPERT WITNESSES AS THERE WERE IN THIS
CASE ON THE APPELLANT'S BEHALF AND THE ARGUMENT OF THE STATE IS
URGING THE JURY APPARENTLY, TO JUST NOT ACCEPT THAT.

AS PART OF THIS REASONABLE JURY INSTRUCTION WHICH IS NOT AT ALL IN
LINE WITH WHAT SHOULD HAVE BEEN DONE.

>> Justice Charles Canady: THE PROBLEM, TO A CERTAIN EXTENT, HERE WE
HAVE THESE DUELING EXPERTS WITH DIFFERENT VIEWS EXPRESSED BY
EXPERTS.

AND THE FINDERS OF FACT ARE ENTITLED TO DISCREDIT.

>> Appellee: YES YOUR HONOR BUT I NEED TO ADD THAT WAS NOT NEARLY
THE ONLY MITIGATING FACTOR HERE.

THERE WERE 45 MITIGATER'S RAISED IN THIS CASE.

AND TO HAVE AN ARGUMENT ALLOWED TO TELL THE JURY DON'T MESS WITH
ANY OF THOSE SEEMS UNFAIR.

NOT IN LINE WITH DUE PROCESS.

AND ACTUALLY, IT DID AFFECT ADVERSELY MY CLIENTS RIGHT TO BE
PROTECTED BY THE DUE PROCESS CLAUSE TO HAVE THIS JURY CORRECTLY
AND INTELLIGENTLY INSTRUCTED.

>> Justice Jamie Grosshans: I WANT TO BE CLEAR I'M SURE ON THE ARGUMENT.
THE PROSECUTOR IN SOME SORT OF ARGUMENT INCORRECTLY USE THIS IN
A WAY THAT WAS IN ERROR DO NOT BE CORRECTED OR WAS IT A JURY
INSTRUCTION IN ITSELF?

>> Appellee: IT IS THE JURY INSTRUCTION AND THIS PARTICULAR ARGUMENT
WAS SORT OF ALLOWED BY THAT JURY INSTRUCTION OR AT LEAST
APPARENTLY ENCOURAGED THIS ARGUMENT BECAUSE THE PROSECUTOR
WAS REPEATEDLY USING THE WORD REASONABLY WHICH IT IS OUR VIEW, IT
DOES NOT BELONG THERE AT ALL.

THE WORD REASONABLY DETRACTS FROM HIS RIGHTS.
TO HAVE A JURY INTELLIGENTLY INSTRUCTED.

AND TO HAVE -THERE'S A LITTLE BIT MORE.

IT'S THE REASONABLE QUALIFIER THAT SEEMS TO BE IN COOPERATED INTO
THE STANDARD INSTRUCTIONS.

IT REQUIRES, IT APPLIES THE REVIEW OF SENTENCE ORDERS BUT HAS NO
PLACE IN THE JURY ROOM, IS OUR ARGUMENT AS IT MAY -

>> Justice Jamie Grosshans: THEY WERE ALSO TOLD THEY COULD NOT LOOK AT
ANYTHING THAT HAD ALL MITIGATER'S OR ANYTHING THAT SUPPORTS LIFE
SENTENCE OR INDICATE THE DEATH PENALTY.

IN OTHER WORDS ANYTHING, ALL, THEY ARE ALSO USED THERE, CORRECT?

>> Appellee: YES YOUR HONOR.

HOWEVER THIS ARGUMENT SEEMS TO NEGATE ALL OF THAT.

IT IS TELLING THE JURY TO JUST IGNORE IT.

>> Justice Jamie Grosshans: THE ARGUMENT ON BEHALF OF THE PROSECUTOR.
WAS THAT OBJECTED TO?

>> Appellee: YES, YOUR HONOR.

>> Justice Jamie Grosshans: WAS THAT IN THE BRIEF?

>> Appellee: YES YOUR HONOR, IT WAS IN .5, IN BOTH BRIEFS.

ALL RIGHT.

SO, LET'S SEE.

GOING TO .3, THE VICTIM IMPACT TESTIMONY SHOULD NOT HAVE INCLUDED
REFERENCE TO PAST TRAUMA TO THE VICTIMS FAMILIES.

YOU MAY RECALL THERE WAS SOME PRETTY SEVERE THINGS THAT HAD
HAPPENED TO TWO CHILDREN IN THE FAMILY PRIOR TO THIS AND IT WAS
THAT VICTIM IMPACT TESTIMONY WAS ALLOWED OVER OBJECTION.

BUT IT REFERENCES TO PAST TRAUMA TO THE VICTIMS FAMILY WHICH HAD
NOTHING TO DO WITH THIS CASE.

>> Justice Charles Canady: DOESN'T EXPLAIN THE CONTEXT THAT THE FAMILY
WAS GOING THROUGH WHEN THEY EXPERIENCED THIS ADDITIONAL
TRAGEDY?

APPARENTLY THESE VICTIMS HERE HAD JUST COME TO BE WITH THE FAMILY A
COUPLE OF WEEKS BEFORE AND THEY HAD COME BECAUSE OF THESE
EARLIER TRAGEDIES AND THE DECISION WAS MADE TO GET THE FAMILY
CLOSER TOGETHER AND THEN THIS HORROR BEFALLS THEM.

IT'S JUST EXPLAINING THAT CONTEXT WHICH INTENSIFIES THE SIGNIFICANCE
OF THE LOSS.

IT PUTS THE LOSS ASSOCIATED WITH THESE MURDERS AND THE LOSS OF
THE LIVES OF THE VICTIMS IN THE CONTEXT EXPERIENCED BY THE FAMILY IS
THAT RIGHT?

>> Appellee: NO YOUR HONOR WITH RESPECT THAT'S NOT RIGHT.

THE VICTIM IMPACT TESTIMONY SHOULD NOT HAVE INCLUDED THAT
REFERENCE BECAUSE THAT EVIDENCE WAS A SOURCE OF PREJUDICE AND
HAD NO PROBATIVE VALUE IN THIS CASE AND IT WAS NOT ADMISSIBLE THUS
UNDER SECTION 90.403.

>> Justice John Couriel: CAN WE TAKE A LOOK AGAIN AT FLORIDA STATUTE

DOUBLED THE WHICH TALKS ABOUT VICTIMS CONSTITUTE IN THE NATURE OF ITS PROBATIVE VALUE IS THAT SUCH EVIDENCE SHALL BE DESIGNED TO DEMONSTRATE THE VICTIMS WEAKNESS AS A VULNERABLE HUMAN BEING AND THEY RESULT IN LOSS TO THE COMMUNITY BY THE VICTIM'S DEATH.

>> Appellee: YES.

>> Justice John Couriel: I STRUGGLED TO SEE HOW THAT COVERS THIS KIND OF EVIDENCE.

>> Appellee: MAYBE I WASN'T CLEAR.

THE EVIDENCE THAT WE ARE TALKING ABOUT HAS NOTHING TO DO WITH THE DEATHS OF PAYTON AND ROBERT.

IT HAS TO DO WITH TESTIMONY BY MEMBERS OF THE FAMILY CONCERNING A STEP DAUGHTER WHO HAD BEEN IN THE ICU THE PREVIOUS YEAR WITH A SEVERE INFECTION AND HAD DIED OF SEPTIC SHOCK.

AND ANOTHER STEPDAUGHTER WHO WAS IN A BAD CAR ACCIDENT.

AND THAT IS THE PRIOR.

>> Justice John Couriel: MAYBE WE ARE TALKING PAST EACH OTHER.

I'M TALKING ABOUT DEBORAH BENSON'S TESTIMONY.

>> Appellee: I'M SORRY?

>> Justice John Couriel: DEBORAH BENSON'S TESTIMONY COULD THEY ONLY HAD TWO WEEKS WITH THE BOYS.

THE CIRCUMSTANCE-

>> Appellee: I'M NOT REFERRING TO THAT.

THAT IS PERFECTLY ACCEPTABLE.

>> Justice John Couriel: WHAT TESTIMONY ARE YOU REFERRING TO?

>> Appellee: THE STUFF ABOUT THE TWO STEPDAUGHTERS PRIMARILY. THAT IS THE VICTIM IMPACT TESTIMONY THAT SHOULD NOT HAVE BEEN INCLUDED WITH REFERENCE TO PAST-IT SHOULD NOT HAVE INCLUDED THIS REFERENCE TO THE PAST TRAUMA OF THE FAMILY WITH THE STEPDAUGHTERS.

IT HAD NOTHING TO DO WHATSOEVER TO DO WITH MR. WILSON.

IT HAD NOTHING TO DO WITH THESE EVENTS.

THAT WAS SOMETHING THAT IS A LOSS THAT WAS NOT CAUSED BY ANYTHING TO DO WITH THIS CASE AND SHOULD NOT HAVE BEEN INCLUDED IT WAS PREJUDICIAL.

>> Justice John Couriel: OBVIOUSLY IT IS PREJUDICIAL.

I LOVE IT WHEN SOMEONE STANDS UP AND SAYS OBJECTION PREJUDICIAL IT HURTS ME --.

HOW IS IT THAT NO REASONABLE JUDGE COULD LET THAT IN?

>> Appellee: NO REASONABLE JUDGE SHOULD ALLOW THAT IN GIVEN THE DUTY OF FAIRNESS THAT THE JUDGE OWES TO THE APPELLANT.

TO THE DEFENDANT IN THE CASE.

THE JUDGE SHOULD NOT, THIS HAS NOTHING TO DO WITH THE VICTIM'S UNIQUENESS AS AN INDIVIDUAL.

>> Justice John Couriel: I THINK IT DOES.

>> Appellee: THE STEPDAUGHTERS?

THEY ARE NOT PART OF THIS CASE.

>> Justice John Couriel: I DON'T MEAN TO ARGUE WITH YOU BUT COULDN'T A REASONABLE JUDGE CONCLUDED AS JUSTICE KENNEDY WAS ARTICULATING THAT IT MAKES SENSE TO TELL THE STORY OF HOW THESE PEOPLE CAME TO BE LIVING UNDER THIS ROOF AND HOW THE TRAGEDY OCCURRED?

>> Appellee: WE MUST RESPECTFULLY DISAGREE THEN.

>> Justice John Couriel: OKAY.

>> Justice Charles Canady: THE UNDERLYING TO YOUR POINT IS THAT SOMEHOW THIS WILL CAUSE THE JURY TO HAVE SYMPATHY INAPPROPRIATE SYMPATHY FOR THE FAMILY HERE BECAUSE SOMEBODY DIED IN THE HOSPITAL.

IT IS GOING TO BE GREATER THAN WHATEVER JUDGMENT THEY MIGHT RENDER BASED ON THE FACT THAT THESE TWO YOUNG BOYS WERE BEATEN TO DEATH WITH A HAMMER AND HAD THEIR THROATS SLIT.

>> Appellee: YES YOUR HONOR.

IT IS INAPPROPRIATE.

WE ARE ARGUING, THEREFORE, FOR A NEW PENALTY PHASE.

BECAUSE THE EVIDENCE THAT IS SUPPOSED TO BE ADMITTED MUST SHOW THE VICTIM'S UNIQUENESS AS AN INDIVIDUAL AND THE LOSS CAUSED BY THE VICTIM'S DEATH WHICH IS IN RELATED AT ALL TO THE TWO STEPDAUGHTERS AND THEIR ILLNESS AND THE CAR ACCIDENT.

WHILE THE DISPUTED TESTIMONY EXPLAINED THE EXTENT OF THEIR LOSS IT DID NOT TEND TO DEMONSTRATE THE VICTIM'S UNIQUENESS AS INDIVIDUALS AND BY VICTIMS I MEAN ROBERT AND TATUN.

THE ENDS ADMISSIBLE PART OF THE STATEMENT SHOULD HAVE BEEN REDACTED.

OKAY.

AS TO POINT NUMBER 2 THE TRIAL COURT ERRED IN ADMITTING EVIDENCE BY THE WAY OF PROCESS BY REFUSING TO CONSIDER THE DEFENSE EXPERT. WHETHER A CIRCUMSTANCE IS MITIGATING IN NATURE IS SUBJECT TO DE NOVO REVIEW.

AND THIS PARTICULAR ARGUMENT IMPLICATES THE FINDINGS OF EDDINGS VERSUS OKLAHOMA.

ALL MITIGATING EVIDENCE MUST BE CONSIDERED AND WEIGHED.

AND IN THIS CASE THE COURT DECLINED TO CONSIDER THE APPELLANT'S IRRATIONAL STATEMENTS THAT HE MADE.

THE TWO QUESTIONS BEFORE THE TRIAL COURT.

>> Justice Charles Canady: HE WAS SAYING ALL KINDS OF THINGS.

THERE'S NO QUESTION ABOUT THAT.

[LAUGHTER] HE'S TRYING TO DEFLECT.

HE'S IN A BAD SPOT.

WASN'T IT IN THEIR TESTIMONY, THEIR EXPERT TESTIMONY THAT THERE WERE SIGNS THAT HE IS MALINGERING?

>> Appellee: THAT WAS FROM THE STATES EXPERT I BELIEVE.

>> Justice Charles Canady: IT IS THERE.

IT MAY BE THE STATES EXPERT AND YOU MIGHT NOT LIKE IT BUT IT'S THERE.

>> Appellee: THE THING IS YOUR HONOR, THE COURT CAN'T EXCLUDE

MITIGATING EVIDENCE FROM THE WEIGHING PROCESS AND IT REFUSES TO -
>> Justice Charles Canady: IT IS VERY CLEAR THAT IN OUR CASE LAW THAT A PARTICULAR STORY CAN BE DISCREDITED BASED ON THE FACTS THAT ARE IN THE RECORD.

>> Appellee: BUT YOUR HONOR, THAT IS NOT THE ONLY THING. I DISAGREE ACTUALLY THAT IT'S BEING DISCREDITED.

HE SAID SOME REMARKABLY STRANGE THINGS AND ONE OF HIS EXPERTS WAS TALKING ABOUT, IF I RECALL CORRECTLY AND I DON'T REMEMBER WHICH EXPERT BUT ONE OF THE DEFENSE EXPERT SAID SOMETHING TO THE EFFECT OF HIS BRAIN DAMAGE FROM THE LENGTHY LONG-TERM USE OF METH. IF HIS BRAIN IS DAMAGED -

>> Justice Charles Canady: I UNDERSTAND YOUR POSITION ON THAT BUT YOU HAVE TO CONCEDE THERE'S OTHER THINGS IN THE RECORD WENT INTO OTHER WAYS OF LOOKING AT WHAT WAS GOING ON AND THE IMPACT THAT HE METH HAD IN THIS PARTICULAR EPISODE AND THESE PARTICULAR TO MURDERS TO WHICH HE CONFESSED.

>> Appellee: WELL, I REALLY DON'T THINK I CAN CONCEDE THAT YOUR HONOR BUT I RESPECT YOUR OPINION.

THIS MAINLY IS ABOUT MAKING SURE THAT THE COURT DOES NOT EXCLUDE MITIGATING EVIDENCE FROM THE WAY IN PROCESS. IT MUST BE INCLUDED.

>> Justice Charles Canady: I'M SORRY YOU ARE WELCOME TO KEEP GOING BUT YOU ARE EATING INTO YOUR REBUTTAL TIME. IT IS SOLELY UP TO YOU.

>> Appellee: I'M GOING TO SAVE A COUPLE OF MINUTES THEN.

>> Justice Charles Canady: ALL RIGHT, THANK YOU.

>> Appellee: GOOD MORNING MAY IT PLEASE THE COURT, COUNSEL MY NAME IS DORIS MEACHAM AND I AM HERE ON BEHALF OF THE STATE. I WILL START WITH CLAIM NUMBER 1 AS COUNSEL DID REGARDING THE JURY INSTRUCTION.

IT SEEMS THAT THE JURY WAS CONFUSED BECAUSE THE JURY INSTRUCTION WAS INCORRECT AND THAT'S WHY THEY CAME BACK WITH THE QUESTION AS JUSTICE KENNEDY NOTED IN THE COURT DID AS WELL AGAIN THE JURORS ARE SMARTER THAN ALL OF US.

APPARENTLY THE FIRST PRONG OF THE VERDICT FORM WAS CONFUSING BECAUSE IT WAS INCORRECT.

AND THAT'S WHAT WE CAN DEFINITELY GAIN FROM THE RECORD.

ANYTHING ELSE WOULD BE YOUR SPECULATION ON COUNCILS PART.

THE JURY CAME BACK WITH A GENERAL VERDICT AND THE COURT WAS FREE TO INFORM AND INSTRUCT THE JURY ON THE CCP AGGRAVATE HER BECAUSE THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THAT AGGRAVATE HER AND THERE WAS NO ERROR ON THE PART OF -

>> Justice Charles Canady: TELL ME IF I AM REMEMBERING CORRECTLY PART OF THE COMPETENT SUBSTANTIAL EVIDENCE IS THAT THE DEFENDANT ACTUALLY SAID PREPLAN THE MURDERS.

>> Appellee: RIGHT.

HE WENT IN THERE BECAUSE HE ALLEGED THERE WAS SEXUAL ABUSE GOING ON AND HE SWITCHED WEAPONS.

HE WENT IN WITH A KNIFE AND THEN HE GOT A HAMMER.

ONE OF THE KIDS WAS ASLEEP AND THERE WAS NO DANGER TO HIM.

CLEARLY ALL ELEMENTS OF CCP WERE FOUND IN THIS CASE.

THE NEXT ISSUE WAS NUMBER 5.

AND COUNSEL ARGUES THAT THE REASONABLE LANGUAGE SHOULD HAVE BEEN TAKEN OUT OF THERE.

AGAIN IT IS TRIAL COURT.

USE THE STANDARD JURY INSTRUCTION.

THERE IS NO ABUSE OF DISCRETION BY THE COURT IN THIS ISSUE.

IN FACT, AS STATED AGAIN BY JUSTICE KENNEDY, THEY CAN PRESENT AS MANY MITIGATION FACTORS AS THEY WANT AND THE JURY DOES NOT HAVE TO FIND THE MITIGATING.

THEY CAN FIND THAT THEY WERE PROVEN BUT NOT THAT THEY WERE MITIGATING.

AND AS FAR AS THE REASONABLE QUALIFIER, AS THE STATE ARGUED DOWN BELOW, THE MITIGATION IS SUBJECTIVE AND THE REASONABLE QUALIFIER DOESN'T SUGGEST AN EMOTIONAL RESPONSE OTHER THAN REASON.

SHE SAID IT VERY ELOQUENTLY.

IF ONE JUROR DOES NOT FEEL FOR EXAMPLE A DEFENDANT'S FATHER HAD A CRIMINAL HISTORY OR THAT THE MOTHER WAS AN ALCOHOLIC, MAYBE THEY WILL REASONABLY FEEL THAT IS MITIGATING.

AND THAT IS WHAT HAPPENED HERE.

I BELIEVE THERE WERE 44 MITIGATE HER'S AND THEY DID NOT FIND THAT MITIGATING AND I BELIEVE IF YOU LOOK AT THE FACT OF THE CASE, THE FACT THAT PERHAPS HE WAS AN ALCOHOLIC OR USED METH IN COMPARISON TO THE FACT THAT HE WENT INTO THIS HOME AND SLASHED THE THROATS OF TWO YOUNG CHILDREN AND EAT THEIR SCHOOLS AND WITH A HAMMER, PERHAPS THEY DID NOT FIND THE LACK OF LOVE OR SUPPORT OF THE FAMILY MITIGATING IN THIS INSTANCE.

AS FOR CLAIM NUMBER 3, THIS WAS THE VICTIM IMPACT EVIDENCE.

ACCORDING TO FLORIDA STATUTE 92411, THE VICTIM EVIDENCE IS DESIGNED TO DEMONSTRATE THE VICTIM'S UNIQUENESS AND THE LOSS TO THE COMMUNITY AND TO THE FAMILY.

THE GRANDMOTHER TESTIFIED DURING HER VICTIM IMPACT STATEMENT AND IT WAS A LONG ONE AND THIS WAS ONE SENTENCE OUT OF IT.

SHE TALKED ABOUT THESE KIDS HOW MUCH SHE LOVED THEM AND THAT IS A REASON THEY WERE THERE WAS BECAUSE OF HER SHE LOST HER CHILD IN A CAR ACCIDENT AND THE OTHER ONE ALMOST DIED.

AND THAT IS WHEN IT WAS A DECISION FOR THE FAMILY TO MOVE.

EVERY DAY OF HER LIFE SHE BLAMES HERSELF FOR THE MURDER OF THESE CHILDREN BECAUSE THEY WOULD NOT HAVE BEEN MURDERED ACCORDING TO HER IF THEY WOULD NOT HAVE MOVED OVER THERE.

THE REASON THEY MOVED WAS BECAUSE OF THAT ACCIDENT.

SO AS THE JUDGE BELOW DETERMINED IT WAS PART AND PARCEL OF THE

WHOLE STORY.

IT WAS RELEVANT AND IT WAS ACCEPTABLE VICTIM IMPACT STATEMENTS. AGAIN, IF YOU WERE TO DETERMINE IT WASN'T SOMETHING THAT SHOULD HAVE BEEN INCLUDED, THERE'S NO ABUSE OF DISCRETION OR THERE'S NO HARMLESS ERROR OR THERE IS A HARMLESS ERROR.

I JUST DON'T SEE HOW YOU CAN TAKE THAT PHRASE AND SAY THAT IS WHY THE JURY CAME BACK WITH A DEATH SENTENCE.

THAT IS NOT WHY THEY CAME BACK.

THE FACTS OF THIS CASE ARE SO HORRIFYING.

THAT IS WHY THEY CAME BACK WITH A DEATH SENTENCE.

THE MEDICAL EXAMINER TESTIFIED THAT ROBERTS NECK HAD A SAWING MOTION.

THAT IS THE KNIFE WOUND TO HIS NECK.

THE KNIFE WAS INSERTED AND TWISTED INTO HIS JAW.

ON TATUN HE HAD SIMILAR WOUNDS.

11 TO 12 SLICES AGAIN A SAWING MOTION WITH THE KNIFE AND HE WAS CONSCIOUS.

HE TRIED TO GET A WAY.

THERE WAS DEFENSIVE WOUNDS AND THERE WAS A BLOODIED HANDPRINT ON THE WALL NEAR THE ELECTRICAL OUTLET.

THAT IS WHY THE JURY CAME BACK WITH A DEATH SENTENCE.

NOT BECAUSE OF THE VICTIM IMPACT STATEMENT.

THE NEXT ISSUE WAS .2 REGARDING THE METHAMPHETAMINE INTOXICATION BY THE DEFENDANTS.

THIS WAS CONSIDERED BY THE COURT AND BASED ON ALL OF THE EVIDENCE THERE WAS NO FINDING THAT HE WAS UNDER THE INFLUENCE AT THE TIME OF THIS MURDER.

THERE WAS A POLICE OFFICER WHO TESTIFIED TO TALKING TO THE DEFENDANT THAT DAY.

THERE IS A VIDEO OF IT, OF THE INTERACTION AND THERE'S NO INDICATION THAT HE WAS UNDER THE INFLUENCE AT THE TIME.

THAT MORNING HE WENT ABOUT HIS BUSINESS AND TO HIS DOCTOR APPOINTMENT AND WENT TO THE STORE.

THE MOTHER TESTIFIED THAT SHE DIDN'T SEE ANYTHING THAT HE WAS UNDER THE INFLUENCE.

SHE HAD SEEN HIM THE NIGHT BEFORE WHEN HE WAS OUTSIDE SHARPENING THE KNIFE IN PREPARATION FOR WHAT HE WAS GOING TO DO THAT EVENING.

THE OFFICERS THAT ARRESTED HIM AND SPOKE WITH HIM AGAIN ALSO NO INDICATION THAT HE WAS UNDER THE INFLUENCE.

THE COURT DID CONSIDER IT AND THEY REJECTED IT PROPERLY REJECTED IT.

IT IS CLEAR FROM THIS CASE THAT THE DEFENDANT WENT IN THERE WITH A PREPLANNED NOTION THAT HE WAS GOING TO KILL THESE KIDS.

CCP WAS PROPERLY INTRODUCED TO THE JURY.

IT IS CLEAR FROM THE RECORD THAT HE WAS NOT UNDER THE INFLUENCE OF DRUGS AT THE TIME.

HE WAS CLEAR MINDED ENOUGH TO GO IN THERE AND SWITCH WEAPONS TO MAKE SURE THE JOB WAS DONE.

TO LEAVE A NOTE BEHIND TO GATHER UP THE EVIDENCE AND HIDE IT. IT IS CLEAR FROM THE RECORD THAT THE VICTIM IMPACT STATEMENT WAS PROPERLY GIVEN AND THE REASON THAT THE JURY CAME BACK WITH A DEATH SENTENCE WAS BASED ON THE FACTS OF THE CASE.

AND FOR THAT, THE STATE WOULD ASK THAT YOU AFFIRM THE DEATH SENTENCES AND CONVICTIONS DOWN BELOW.

THANK YOU.

>> Justice: THANK YOU COUNSEL.

>> Appellee: IN RESPONSE REALLY TO THE STATE ARGUMENT AS REPLIED AS 2.5 THERE WAS NO REQUEST, THERE WAS NO REQUIREMENT TO USE THE STANDARD INSTRUCTION.

IT IS NOT MANDATORY THAT THE COURT DO THAT.

AND THAT'S WHY IT WAS REQUESTED BELOW THAT IT NOT BE USED.

AS IT MAY IN COURAGE, THE MAJORITY TO DISMISS THE HOLDOUTS CONCERNS AS UNREASONABLE IF THEY ARE ARGUABLY BASED ON EMOTION. THAT IS SOMETHING, THERE IS A REASON FOR GETTING RID OF THAT REASONABLE QUALIFIER.

IT MAY LEAD THE JURORS TO MISUNDERSTAND HOW THEY ARE SUPPOSED TO BE TREATING THEIR FELLOW JURORS AND WHAT THEIR REASONS FOR NOT BEING ALL IN SYNC WITH THE VOTE.

IF THEY ARE ARGUABLY AND THEY SHOULD BE ABLE TO KEEP THEIR OPINION. WHETHER IT IS REASONABLE ACCORDING TO ANYONE ELSE'S OPINION IF SOMEONE FEELS THEY HAVE SOME CONCERNS ON THE JURY THEY HAVE THE RIGHT, INDEED FEDERALLY TO KEEP THAT OPINION.

AND THIS PARTICULAR ARGUMENT FOR THIS PARTICULAR INSTRUCTION CUTS AGAINST THAT.

THE US SUPREME COURT REQUIRES IN THE TWO CASES I PREVIOUSLY MENTIONED IN CAPITAL CASES EACH JUROR MUST BE ALLOWED TO CONSIDER ALL MITIGATING EVIDENCE AND THAT IS WHAT DIDN'T QUITE GET DONE IN THIS CASE AND WE ARE ASKING THE COURT TO CAREFULLY CONSIDER THAT WHICH I KNOW YOU WILL DO THAT.

BUT YOU WILL ALSO SEND THIS BACK TO THE COURT FOR A NEW TRIAL AT LEAST A NEW PENALTY PHASE.

THANK YOU.

>> Chief Justice Carlos Muniz: THANK YOU VERY MUCH WE WILL BE IN RECESS FOR 10 MINUTES.

>> ALL RISE!