

>> ALL RISE.

HEAR YE, HEAR YE, HEAR YE,
SUPREME COURT OF FLORIDA IS IN
SESSION.

ALL WHO HAVE CAUSE TO PLEA, DRAW
NEAR.

GIVE ATTENTION, YOU SHALL BE
HEARD.

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

LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.

PLEASE BE SEATED.

>> GOOD MORNING.

OUR FIRST CASE TODAY IS DAVIS V.
THE STATE OF FLORIDA.

AND DAVIS V. DIXON.

NUMBERS 2117-78 AND 22-882.

>> CHIEF JUSTICE, THERE ARE
ACTUALLY TWO CASES HERE TO
ARGUE.

DO YOU PREFER THAT WE DO EACH
CASE INDIVIDUALLY WITH THE
APPELLANT AND THE APPELLEE, OR
DO YOU PREFER THAT I ARGUE BOTH
CASES UP FRONT?

>> LET'S DO THEM INDIVIDUALLY.

>> INDIVIDUALLY.

THANK YOU, SIR.

MY NAME IS STACY BIGGERT, AND I
REPRESENT LEON DAVIS IN HIS
POST-CONVICTION CASES.

THE FIRST CASE FOR ARGUMENT
TODAY IS SC-2117-78 WHICH I WILL
REFER TO AS THE HEADLEY CASE.

I WILL FOCUS MY ARGUMENT ON
ISSUE 8 WHICH IS ALSO DUPLICATED
AT ISSUE 10 IN SC-177-79.

THE COURT PRIORITIZED EXPEDIENCY
OVER MR. DAVIS' DUE PROCESS
RIGHTS WHEN THE REQUEST FOR A
COMPETENCY REQUEST WAS DENIED.
MITIGATION, MENTAL HEALTH
MITIGATION.

AS A THRESHOLD ISSUE, THIS CLAIM
IS PRESERVED FOR APPELLATE
REVIEW.

MR. DAVIS' CASE CAN BE
DISTINGUISHED BETWEEN CARATELLI
V. STATE WHICH IS PROVIDED IN
THE ANSWER BRIEF AND ALSO THE
CASE THAT THIS COURT REGULARLY

CITES FOR PRESERVATION ISSUES.

IN CARATELLI, THE DEFENSE ATTORNEY MADE A STATEMENT THAT IF HE HAD MORE PEREMPTORY CHALLENGES, HE WOULD USE THEM. HE DID NOT ACTUALLY ASK FOR MORE PEREMPTORY CHALLENGES.

IN RESPONSE TO THAT, THE JUDGE DID NOTHING, THE JUDGE SAID NOTHING.

MR. DAVIS' CASE IS MORE ANALOGOUS TO THE COLVIN V. WILLIAMS CASE WHICH IS THE CASE THAT CARATELLI DISTINGUISHES.

IN COLVIN V. WILLIAMS, THE PLAINTIFF OBJECTED WHEN THE DEFENSE TRIED TO ENTER EVIDENCE ABOUT PLAINTIFF'S PRIOR LITIGATION EXPERIENCE.

IN RESPONSE TO THE ARGUMENT, THE JUDGE SAID, FINE, AND THEN DID NOTHING TO PREVENT THE DEFENSE FROM PUTTING THE DISPUTED MATTERS INTO EVIDENCE.

THE CARATELLI COURT DISTINGUISHED COLVIN BECAUSE THE COURT'S VERBAL RESPONSE, FINE, AND HIS SUBSEQUENT CONDUCT -- DOING NOTHING TO PREVENT THE DEFENSE FROM PUTTING THE ISSUES INTO EVIDENCE -- LEFT NO DOUBT AS TO HIS RULING.

AND MR. DAVIS' CASE, POST-CONVICTION COUNSEL MADE A CLEAR REQUEST FOR A COMPETENCY EVALUATION.

LIKE THE JUDGE IN COLVIN, JUDGE JACOBSON ACKNOWLEDGED THE REQUEST AND ASKED THE STATE TO RESPOND.

AND LIKE THE JUDGE IN COLVIN, THE COURT LEFT NO DOUBT AS TO HIS RULING.

HE HEARD FROM POST-CONVICTION COUNSEL AND HE HEARD FROM THE STATE, AND THEN HE GRANTED THAT STATE'S MOTION TO PRECLUDE MITIGATION EVIDENCE.

POST-CONVICTION COUNSEL'S MOTION SHOULD HAVE BEEN TAKEN SERIOUSLY, BUT THE DISCUSSION AT THIS HEARING WAS NOT ABOUT MR. DAVIS' COMPETENCY.

THE DISCUSSION AT THESE HEARINGS

WAS ABOUT EXPEDIENCY AND MOVING THIS CASE ALONG.

I WANT TO --

>> [INAUDIBLE]

>> I DON'T DISCUSS IT BECAUSE I DON'T ARGUE THAT THE CASE IN NO WAY WAS PRESERVED.

THE ISSUE WAS BROUGHT UP BY THE STATE IN THEIR ANSWER BRIEF WHEN THEY CLAIM THAT IT WASN'T PRESERVED, SO I AM RESPONDING TO THAT ARGUMENT, SIR.

NONE OF THE DELAYS IN THE CASE WERE MR. DAVIS' FAULT.

HIS FIRST EVIDENTIARY HEARING WAS SCHEDULED FOR JANUARY 2020, AND IT WAS CONTINUED BECAUSE HIS ATTORNEY RESIGNED FROM HIS JOB. THAT WASN'T HIS FAULT.

HE WAS ASSIGNED NEW COUNSEL IMMEDIATELY, AND TWO MONTHS LATER COVID-19 HIT.

AND THERE WERE MONTHS AND MONTHS AND MONTHS OF COURT DELAYS THAT WERE NOT HIS FAULT.

EVEN ONCE THE COURTS WERE OPEN AGAIN, THERE WERE ISSUES WITH TRANSPORTING PRISONERS FROM D.O.C., AND JAILS WOULDN'T ACCEPT PRISONERS FROM D.O.C., AND EVEN IF THEY WOULD POSSIBLY ALLOW THEM THERE, THEY WOULDN'T ALLOW THEM TO APPEAR BY VIDEO, OR THEY WOULDN'T ALLOW THEIR ATTORNEYS TO SEE THEM.

AGAIN, THESE DELAYS WERE NOT MR. DAVIS' FAULT.

BACK TO COUNSEL'S REQUEST THAT IT SHOULD HAVE BEEN TAKEN SERIOUSLY, WHILE THE COURT WAS NOT OBLIGATED TO TAKE COUNSEL'S REPRESENTATIONS AS CONCLUSORY, THOSE REPRESENTATIONS SHOULD HAVE BEEN IN THE COURT'S CONSIDERATION.

THE UNITED STATES SUPREME COURT HELD AN EXPRESS DOUBT BY ONE WITH THE CLOSEST CONTACT WITH THE DEFENDANT IS UNQUESTIONABLY A FACTOR THAT SHOULD BE CONSIDERED.

THE PERSON WITH THE CLOSEST CONTACT TO MR. DAVIS WAS HIS ATTORNEY.

POST-CONVICTION COUNSEL ALSO SATISFIED THE REQUIREMENTS OF 3.211.

YES, THIS WAS AN ORAL MOTION AT THIS HEARING.

HOWEVER, THE JUDGE ACKNOWLEDGED HER MOTION AND ASKED THE STATE TO RESPOND.

THE STATE RESPONDED TO THE MOTION, AND THERE WERE NO ARGUMENTS MADE AT THE HEARING THAT THIS COMPETENCY EVALUATION MOTION WAS NOT PUT IN WRITING.

POST-CONVICTION COUNSEL ADDRESSED MR. DAVIS' DEMONSTRATED HISTORY OF MENTAL ILLNESS AND HIS WAFFLING BETWEEN ALLOWING AND DISALLOWING MITIGATION.

COMPETENCY GOES TO THE HEART OF WHETHER A DEFENDANT HAS THE CAPACITY TO MAKE A COGENT, LEGALLY-BINDING DECISION.

NOT ONLY DID THE COURT NOT TAKE MR. DAVIS' COUNSEL'S REPRESENTATION SERIOUSLY, BUT THE COURT ALSO IGNORED SIGNIFICANT RED FLAGS THAT CREATED A RECORD OF MR. DAVIS HAVING A DIFFICULTY CONSULTING WITH HIS ATTORNEYS WITHIN A REASONABLE DEGREE OF RATIONAL UNDERSTANDING AND A DOUBT AS TO WHETHER HE HAD A FACTUAL UNDERSTANDING OF THE PROCEEDINGS.

THIS IS THE STANDARD OF -- V. UNITED STATES AND IS CODIFIED IN 3.221.

THE COURT WAS WELL ACQUAINTED WITH MR. DAVIS' CASE, AND HE WAS AWARE THAT MR. DAVIS STRUGGLED WITH UNDERSTANDING WHAT WAS HAPPENING IN HIS CASE.

AND HIS LACK OF UNDERSTANDING OFTEN LED TO PARANOIA AND DISTRUST OF HIS ATTORNEYS AND SUSPICIONS THAT THEY WERE HIDING THINGS FROM HIM.

IN FACT, THE COURT RECEIVED NUMEROUS LETTERS, LETTERS TO THE CLERK AND LETTERS TO THE BAR, TO THIS EFFECT.

EARLIER IN THE POST-CONVICTION

PROCESS, THE COURT WAS VERY PATIENT WITH MR. DAVIS. HE WOULD BRING HIM IN FOR HEARINGS WHEN NORMALLY THEY PROBABLY WOULDN'T TRANSFER A CAPITAL INMATE TO COURT FOR THESE TYPES OF HEARINGS. HE WOULD ALLOW MR. DAVIS TO APPEAR BY PHONE, AND HE WAS VERY PATIENT IN TRYING TO HELP HIM UNDERSTAND HIS POST-CONVICTION PROCESS AND WHAT WAS HAPPENING. HOWEVER, AS SOON AS THE COVID SHUTDOWN HAPPENED AND ALL THE CASES STARTED TO GET BACKLOGGED AND DELAYED AND THEN THERE WAS A PUSH TO GET THIS CASE MOVING, THE COURT'S EARLIER CONCERNS ABOUT MR. DAVIS' DUE PROCESS RIGHTS EVAPORATED AND WERE REPLACED BY A RUSH TO GET THIS CASE TO THE EVIDENTIARY HEARING. THE QUESTION THAT WAS BEFORE THE COURT WAS WHETHER THE COURT HAD A REASONABLE GROUND TO BELIEVE THAT MR. DAVIS MAY BE INCOMPETENT, NOT WHETHER HE WAS INCOMPETENT --

>> SO WHAT'S FACTUAL PREDICATE FOR THAT, THAT YOU ASSERT THAT GAVE THE COURT THE REASONABLE GROUNDS THAT YOU BELIEVE THE COURT HAD?

>> RED FLAGS THAT I DISCUSS; THE EXPERIENCE THAT HE HAD WITH MR. DAVIS FOR MONTHS KNOWING THAT HE DID HAVE SOME SERIOUS ISSUES UNDERSTANDING THE PROCEEDINGS AND UNDERSTANDING THE FACTUAL BASIS OF THE PROCEEDINGS AND THAT COMPETENCY IS FLUID AND COUNSEL WAS REPRESENTING THAT, SHE HAD CONCERNS ABOUT HIS --

>> WHAT WERE HER CONCERNS RELATED TO?

WASN'T IT ABOUT HIS INDECISIVENESS ABOUT WHETHER TO DO MITIGATION?

>> THAT'S A RED FLAG, YOUR HONOR, I WOULD ARGUE. AND ALSO SHE MENTIONED MENTAL ILLNESS.

>> WELL, BUT THAT SEEMS TO ME TO

BE VERY, VERY THIN.
I MEAN, PEOPLE VACILLATE ON
ISSUES LIKE THAT.
THAT'S NOT UNCOMMON.
THAT'S NOT A SIGN OF A LACK OF
CONFIDENCE.
THAT'S JUST, YOU KNOW, IT'S A
HIGH STAKES, HIGH STAKES
SITUATION, AND PEOPLE WILL
VACILLATE.
THAT'S -- IF VACILLATION WAS,
POINTED TO INCOMPETENCE, IT
WOULD BE LIKE, IT WOULD BE --
WE'D HAVE IT ALL OVER THE PLACE.
SO I JUST THINK THAT'S
EXTRAORDINARILY THIN.
WHAT AM I MISSING ABOUT THAT?
>> THAT IT'S ONE RED FLAG OF
MANY.
AND WHILE ONE RED FLAG MAY NOT
SEEM --
>> WASN'T THAT THE HEART OF IT?
>> NO.
IT WAS ALSO HIS MENTAL ILLNESS
AND HIS RECORD OF MENTAL ILLNESS
THAT SHE CITED AT THE HEARING.
AND PLUS THIS COURT WAS AWARE OF
OTHER THINGS.
I MEAN, HE HAD HANDLED HIS CASE
FOR TEN YEARS?
AND HE HAD MANY ENCOUNTERS WITH
MR. DAVIS, AND SO HE HAD A
RECORD AND A REASON TO
BELIEVE THAT COUNSEL --
>> HE DIDN'T BELIEVE THAT.
>> I THINK THAT THE RECORD --
I'M SORRY, YOUR HONOR.
THE RECORD ACTUALLY SHOWS THAT
HE DIDN'T TAKE IT SERIOUSLY
BECAUSE HE WANTED TO GET THIS
CASE TO AN EVIDENTIARY HEARING.
>> I THINK IMPUGNING A BAD
MOTIVE OF A JUDGE LIKE THAT IS
EXTRAORDINARY --
>> NO, SIR --
>> WELL, I DON'T KNOW HOW YOU
CHARACTERIZE THAT OTHER THAN
SAYING THE JUDGE IS GOING TO
IGNORE WHAT HE'S REQUIRED TO PAY
ATTENTION TO IN ORDER TO DO
SOMETHING TO EXPEDITE THE CASE.
AND THAT'S IMPUGNING A BAD
MOTIVE TO HIM, IT SEEMS TO ME.
>> NO, SIR, I'M NOT --

>> MAYBE THAT'S NOT YOUR INTENTION, BUT YOU LOOK AT IT OBJECTIVELY, THAT SEEMS TO BE A REASONABLE TAKEAWAY.

>> WELL, HIS BEHAVIOR AT THE HEARING WAS THAT WHEN THE DISCUSSION CAME UP ABOUT THIS, HE WAS VERY CONCERNED WITH THE STATE'S ARGUMENT THAT IF HE GRANTED THIS MOTION, THAT THE STATE WOULD THEN HAVE TO HIRE EXPERTS AND THAT IT WOULD TAKE MUCH LONGER IN ORDER TO DO THIS, AND THAT WOULD RESCHEDULE THE EVIDENTIARY HEARING.

AND THE RECORD IS PRETTY CLEAR THAT AT EVERY PRETRIAL HEARING WE HAD HE WAS EXTREMELY APOLOGETIC ESPECIALLY TO THE STATE THAT THIS EVIDENTIARY HEARING WASN'T GOING FORWARD. AND I THINK HE WAS UNDER A LOT OF PRESSURE.

I CAN'T --

>> WHAT RULE ARE YOU ASKING US TO ADOPT WHEN A JUDGE EXPRESSES FRUSTRATION WITH, YOU KNOW, DELAY THAT I THINK IS WITHIN THE RANGE OF JUDICIAL DISCRETION IN TERMS OF MOVING A CASE FORWARD? WHAT IS IT THAT YOU'RE ASKING US TO DO WITH THIS?

>> THE JUDGE NEEDS TO PUT THE DEFENDANT'S DUE PROCESS RIGHTS AHEAD OF EXPEDIENCY.

>> I -- NO ONE IS ARGUING THAT, COUNSEL, AND I THINK IT'S THE, I GUESS I HAVE THE SAME REACTION THAT JUSTICE CANADY HAS. THOSE TWO THINGS ARE NOT NECESSARILY, AT LEAST ON THIS RECORD, IN CONFLICT AS FAR AS I CAN TELL.

THE JUDGE HAS EVERY EXPECTATION TO MOVE A CASE FORWARD EXPEDITIOUSLY, AND IF A JUDGE IS -- YOU'RE SAYING IT'S ON THE RECORD.

YOU'RE SAYING THAT THE JUDGE'S BEHAVIOR, YOU'RE MAKING COMMENTS ABOUT WHAT YOUR ASSESSMENT OF THE JUDGE'S DEemeanOR WAS BELOW, AND YOU'RE ASKING US ON THAT BASIS TO SAY THAT THE

DEFENDANT'S DUE PROCESS RIGHTS
WERE VIOLATED?
THAT SEEMS, TO USE A WORD THAT'S
BEEN USED ALREADY TODAY, REALLY
THIN.

>> THANK YOU, YOUR HONOR.
I'M NOT MAKING COMMENTS ABOUT
HIS Demeanor, I'M MAKING
COMMENTS ABOUT THE WAY THE
HEARING WAS CONDUCTED AND THAT
THERE WASN'T ANY -- THE REQUEST
FROM COUNSEL WAS NOT TAKEN
SERIOUSLY, AND THE ENTIRE
DISCUSSION WAS ABOUT GETTING
THAT CASE TO HEARING.

>> PART OF THE DYNAMIC HERE,
COUNSEL, IT SEEMS TO ME IS THAT
WE KNOW THAT THERE ARE CASES
WHERE THIS COMPETENCY ISSUE WILL
KIND OF BE RAISED THAT DOESN'T
HAVE MUCH OF A FOUNDATION.
AND THEN, BUT THE ATTITUDE IS,
WELL, WHY NOT?

WHY NOT DO -- MAY NOT BE A
SUFFICIENT TRIGGER FOR DOING THE
EVALUATIONS, BUT WHY NOT.
AND, BUT THAT'S NOT, THAT
DOESN'T MEAN IT OUGHT TO BE
DONE.

THAT DOESN'T MEAN THAT BECAUSE
SOMETIMES WE SAY WHY NOT, WE
JUST GO AHEAD AND DO IT BECAUSE
SOMEBODY'S, YOU KNOW, GOING TO
RAISE THIS FLAG WHETHER IT'S
BASED ON ANYTHING THAT'S
SUBSTANTIAL OR NOT.

THAT DOESN'T MEAN IT SHOULD BE
DONE.

AND IF THE JUDGE IS SAYING,
LOOK, WE'VE GOT THESE OTHER
THINGS THAT WE NEED TO MOVE THIS
FORWARD AND THE JUDGE IS MAKING
A DECISION THAT IT'S NOT
WARRANTED.

AND I JUST, I'M SKEPTICAL.
BUT I UNDERSTAND WHY YOU'RE
ARGUING IT.

>> THANK YOU, YOUR HONOR.
I ALSO DON'T THINK THAT THERE'S
ANYTHING IN THE RECORD THAT
SHOWS THE COUNSEL DID NOT MAKE
THAT MOTION IN GOOD FAITH.
AND PROCEEDING WITH A POSSIBLY
INCOMPETENT CLIENT THAT WOULD

VIOLATE HIS DUE PROCESS RIGHTS.
YOUR HONOR, I WOULD LIKE TO ALSO
ADDRESS ONE ADDITIONAL ISSUE ON
THIS CASE.

I WOULD LIKE TO TALK ABOUT ISSUE
2, IF YOU DON'T HAVE ANY FURTHER
QUESTIONS ABOUT THE COMPETENCY
ISSUE.

ISSUE 2 IS ACTUALLY AN
INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM FOR FAILURE TO
OBJECT TO THE COURT'S GRATUITOUS
COMMENTS TO THE JURORS ABOUT THE
EVIDENCE IN THIS CASE.

SO DURING JURY SELECTION, TRIAL
COUNSEL DID NOT OBJECT AND, IN
FACT, HE AGREED TO THE COURT'S
COMMENTS THAT THE INJURIES TO
THE VICTIMS IN THIS CASE WERE SO
UNIQUELY GRUESOME THAT HE WAS
GIVING A WARNING TO JURORS THAT
HE HAD NEVER GIVEN BEFORE DURING
ALL OF HIS TIME ON THE BENCH.

SO THE COMMENTS SINGLED OUT
MR. DAVIS' CASE TO THE JURY.
THE COURT SAID, THIS CASE IS
TRULY NOT FOR THE FAINT OF
HEART.

THE PHOTOGRAPHS ALONE ARE
GRAPHIC.

THE COURT THEN EXPLAINED TO THE
JURY THAT HE HANDLES ALL THE
FIRST-DEGREE MURDER CASES IN THE
CIRCUIT, AND IN HIS 16 YEARS ON
THE BENCH HE'S SEEN A LOT.

HE ALSO TOLD THE JURY, I DON'T
NORMALLY GIVE THIS KIND OF
PRESENTATION.

HE SINGLED OUT MR. DAVIS' CASE
AS MORE GRAPHIC AND GRUESOME
THAN ANY OTHER CASE.

THE COURT'S PURPOSE, HIS
STATEMENT OF THE REASON WHY HE
DID THIS AND THE REASON WHY
COUNSEL SAID HE DIDN'T OBJECT
WAS THEY WANTED TO DETERMINE IF
POTENTIAL JURORS COULD COPE WITH
THE EMOTIONAL ASPECTS OF THIS
CASE.

TRIAL COUNSEL DIDN'T OBJECT
BECAUSE HE SAID HE AGREED.
HOWEVER, IT WAS TRIAL COUNSEL'S
JOB TO KEEP THE COURT FROM
PACKING THE AGGRAVATION WITH HIS

COMMENTARY.

THE COURT COULD HAVE ACCOMPLISHED THIS GOAL OF BRINGING IN THE JURORS AND SHOWING THEM THESE GRAPHIC PICTURES WITHOUT MAKING HIS OWN COMMENTS ON THE EVIDENCE.

TRIAL COUNSEL SHOULD HAVE OBJECTED TO THESE COMMENTS BECAUSE THE JUDGE WAS BASICALLY SAYING I'VE HANDLED ALL THE CASES, ALL THE FIRST-DEGREE MURDER CASES IN THE CIRCUIT, AND I'VE SAT THROUGH 16 YEARS ON THE BENCH, AND THIS CASE IS SO BAD THAT I HAVE TO DO SOMETHING THAT I'VE NEVER DONE BEFORE.

HE'S BASICALLY ADDRESSING AN AGGRAVATOR BEFORE IT EVEN GOES TO THE JURY.

>> BUT, COUNSEL, I MEAN, THIS IS A HORRIFIC CASE.

I MEAN, THIS IS, LIKE, THIS IS MORE LIKE AN ACKNOWLEDGMENT OF THE REALITY OF THIS HORROR OF WHAT HAPPENED.

SO I'M, IT'S HARD FOR ME TO SEE HOW THESE COMMENTS ARE GOING TO AFFECT THE JURY IN A WAY THAT THEY WOULD NOT BE AFFECTED JUST BY THE FACTS THAT CRY OUT.

I MEAN, IT'S -- BECAUSE IT'S THE NATURE OF IT.

AND, I MEAN, ANYBODY WOULD UNDERSTAND THAT.

I MEAN, WE LOOK AT A LOT OF CASES AND THERE ARE A LOT OF HORRIFIC CASES.

THAT'S KIND OF THE NATURE OF THE CASES THAT COME TO US.

NOT ALL OF THEM, BUT A LOT.

BUT THIS IS ONE THAT DEFINITELY DOES STAND OUT.

BECAUSE OF THE WAY THE MURDERS WERE -- THE VICTIMS AND THE WAY THAT THE MURDERS WERE COMMITTED.

SO I'M, AGAIN, I UNDERSTAND WHY YOU'RE ARGUING THIS, BUT I HAVE A HARD TIME SEEING HOW THIS REALLY MAKES A DIFFERENCE.

>> YOUR HONOR, YOU'RE RIGHT.

THE SCENE AND THE CRIMES WERE HORRENDOUS, AND THAT'S WHY THE JUDGE DID NOT NEED TO ADD HIS

COMMENTARY ON THIS BECAUSE, I
MEAN, THERE WAS ALREADY AN
UPHILL FIGHT HERE ON THIS CASE.

>> DOESN'T THE COURT THEN FOLLOW
THAT UP BY REMINDING THE JURY
ABOUT THE PRESUMPTION OF
INNOCENCE?

BECAUSE YOU KIND OF OMITTED THAT
THAT FROM THE STATEMENT.

DOESN'T THE COURT THEN GO ON TO
DESCRIBE THE BURDEN OF PROOF AND
THE PRESUMPTION OF INNOCENCE?

>> HE DOES DO THAT, YOUR HONOR.

>> OKAY.

SO IT SEEMS REALLY ODD THAT YOU
WOULD SELECT THAT PART OF THE
COURT'S INSTRUCTION AND OMIT AN
ACKNOWLEDGMENT THAT THE COURT
FOLLOWED UP A STATEMENT THAT
ESSENTIALLY SAYS YOU ARE GOING
TO SEE EVIDENCE OF THE
IMMOLATION OF TWO PEOPLE.

I'M PREPARING YOU FOR THAT.

AND REMEMBER THAT THE DEFENDANT
BENEFITS FROM THE PRESUMPTION OF
INNOCENCE.

IF THAT'S NOT A MORE COMPLETE
STATEMENT OF WHAT THE COURT
REALLY SAID, HELP ME.

BECAUSE IT SEEMS TO ME LIKE YOUR
STATEMENT TO US TAKES OUT OF
CONTEXT THE ALLEGEDLY
OBJECTIONABLE REMARKS AND
DOESN'T CANDIDLY PUT BEFORE OUR
COURT WHAT THE COURT ACTUALLY
SAID.

CAN YOU CORRECT ME IF I'M WRONG?

>> YOU'RE NOT WRONG, YOUR HONOR,
THAT HE TALKS ABOUT THE
PRESUMPTION OF INNOCENCE, BUT HE
ALSO -- AND THAT WASN'T IN WHAT
YOU JUST SAID.

HE STATED THAT THIS IS THE WORST
I'VE EVER SEEN.

SO THIS JURY THAT THEY'RE
PICKING RIGHT NOW IS NOT ONLY
GOING TO BE HIS GUILT PHASE JURY
THAT DETERMINES GUILT OR
INNOCENCE --

>> AND WHAT OF JUSTICE CANADY'S
QUESTION THAT HOWEVER
PREJUDICIAL THE IMPACT OF THESE
STATEMENTS MAY BE, THAT
PREJUDICE PALES OR IS AT LEAST

EQUAL TO THE PREJUDICE OR
NEGATIVE EFFECT OF THE ACTUAL
PICTURES, THE ACTUAL EVIDENCE IN
THIS CASE?

>> BECAUSE IT'S PUTTING THE
WEIGHT OF THE COURT BEHIND THE
EVIDENCE AND HIS COMMENTS BEHIND
THE EVIDENCE.

>> OKAY.

AND HELP ME UNDERSTAND WHAT WE
WOULD REVIEW THIS FOR?

>> YOU WOULD REVIEW THIS FOR
INEFFECTIVE ASSISTANCE OF
COUNSEL BECAUSE COUNSEL DID NOT
OBJECT TO THESE STATEMENTS THAT
WERE MADE.

>> AND YOUR POSITION WOULD BE
THAT THE LAWYER'S DECISION NOT
TO OBJECT IN LIGHT OF THAT
CONVERSATION IS THE
CONSTITUTIONAL EQUIVALENT OF
YOUR CLIENT HAVING HAD NO
COUNSEL UNDER STRICKLAND?

>> HE CAN'T HAVE VALID
REPRESENTATION DURING THAT
HEARING BECAUSE HIS ATTORNEY
ALLOWED THIS TO HAPPEN.

>> THAT SEEMS LIKE A HARD SELL.

>> THANK YOU.

>> -- REMEDY IF THERE HAD BEEN
AN OBJECTION?
EXCUSE ME.

WOULDN'T THE REMEDY HAVE BEEN
SOMETHING KIND OF EQUIVALENT TO
WHAT THE COURT ENDED UP SAYING
ANYWAY, REMINDING THE JURORS
ABOUT THE PRESUMPTION OF
INNOCENCE?

>> THAT COULD BE A POTENTIAL
REMEDY, YOUR HONOR, BUT THE
CAT'S ALSO OUT OF THE BAG.

THE COURT HAS ALREADY TOLD THE
JURORS WHAT HE THINKS ABOUT THIS
CASE AND THIS EVIDENCE.

>> SO IT'S A MISTRIAL.

>> YES, YOUR HONOR, THAT'S WHAT
WOULD HAPPEN, AND YOU'D HAVE TO
PICK A NEW JURY.

>> YOU'RE DOWN TO ONE MINUTE OF
YOUR REBUTTAL TIME.

>> THANK YOU, YOUR HONOR.

>> THANK YOU VERY MUCH.

>> THANK YOU, YOUR HONOR.

>> GOOD MORNING, MAY IT PLEASE

THE COURT, MY NAME IS MARILYN BECCUE.

I REPRESENT THE STATE OF FLORIDA.

RESPECTFULLY, I THINK COUNSEL IS BEING SOMEWHAT UNFAIR TO BOTH THE TRIAL JUDGE AND THE POST-CONVICTION JUDGE.

A LITTLE CONTEXT IS IMPORTANT IN DETERMINING THE DECISIONS.

I'LL START WITH THE COMPETENCY ISSUE THAT THE POST-CONVICTION JUDGE MADE.

THIS CASE, INDEED, WAS LONG IN COMING TO AN EVIDENTIARY HEARING FOR A VARIETY OF REASONS, SOME OF WHICH WERE OUT OF MR. DAVIS' CONTROL AND SOME OF WHICH WERE OUT OF THE COURT'S AND THE STATE'S CONTROL BECAUSE OF THE COVID-19 PANDEMIC.

NONETHELESS, THERE WAS A SIGNIFICANT AMOUNT OF LITIGATION THAT OCCURRED IN THE POST-CONVICTION CONTEXT.

I APOLOGIZE THAT I DON'T HAVE THE RECORD CITE, BUT DURING THE EVIDENTIARY -- EXCUSE ME, DURING THE HEARING REGARDING THE STATE'S MOTION TO STRIKE THE MENTAL HEALTH MITIGATION CLAIMS, COUNSEL DID NOT SPECIFY THAT SHE WAS REQUESTING A COMPETENCY EVALUATION.

THE COMMENT WAS MORE AKIN TO MR. DAVIS UNDERSTANDS THAT WE'VE DONE SOME MITIGATION INVESTIGATION.

HE DOES NOT WANT MITIGATION EVIDENCE PRESENTED AT THE POST-CONVICTION HEARING.

I TOLD HIM THAT YOU, REFERRING TO THE COURT, MIGHT WANT TO DO A COLLOQUY WITH HIM.

THERE WAS NO INDICATION THAT HE DID NOT UNDERSTAND THE PROCEEDINGS, THAT HE DID NOT -- THAT HE WAS NOT ABLE TO ASSIST HIS COUNSEL, THAT THERE WERE SOME FACTUAL ELEMENTS THAT HE NEEDED TO PARTICIPATE WITH.

BASED ON THE REQUEST THAT WAS MADE DURING THAT HEARING, THE CONVERSATION THEN BECAME, WELL,

IF THIS IS AN ISSUE THAT NOW MR. DAVIS IS GOING TO START SAYING THAT HE WANTS TO NOW PRESENT MITIGATION, THEN THE STATE WOULD HAVE TO HIRE SOME EXPERTS AND DO SOME EVALUATIONS, AND WE'RE ALREADY THREE YEARS APPROXIMATELY INTO THIS LITIGATION.

THAT WAS WHY THE STATE FILED THE MOTION TO STRIKE THOSE TWO CLAIMS ON BOTH OF THE CASES, BECAUSE INITIALLY MITIGATION CLAIMS WERE PRESENTED, BUT THERE WAS NEVER ANY EXPERT REPORTS PROVIDED.

WAS NO FACTUAL BASIS FOR THE CLAIM, THERE WAS NO LEGAL BASIS FOR THE CLAIM AT THIS POINT AFTER WE HAD LITIGATED IT FOR A NUMBER OF YEARS, AND THAT WAS THE IMPETUS FOR THE STATE TO FILE THOSE TWO MOTIONS.

IT IS CONSISTENT WITH MR. DAVIS' POSITION ALL ALONG THAT HE DID NOT WANT MITIGATION EVIDENCE PRESENTED.

HE DID NOT WANT -- WELL, I SHOULDN'T SAY THAT.

HE DID NOT WANT EXTENSIVE MENTAL HEALTH MITIGATION PRESENTED EITHER BEFORE AFTER HIS CONVICTIONS OR DURING THE POST-CONVICTION PROCEEDINGS.

MR. DAVIS APPEARED AT THE POST-CONVICTION EVIDENTIARY HEARING.

HE TESTIFIED IN THE BP CASE.

HIS ANSWERS WERE CONTEXTUALLY APPROPRIATE.

HE DIDN'T APPEAR TO NOT UNDERSTAND WHAT WAS GOING ON. HE KNEW WHO THE PLAYERS WERE IN THE COURTROOM.

IF AT ANY TIME HIS ATTORNEY OR THE JUDGE THOUGHT THAT THERE WAS AN INDICATION THAT MR. DAVIS WAS NOT COMPETENT, THAT ISSUE COULD HAVE BEEN RAISED RIGHT THERE AND THEN.

BECAUSE, AS COUNSEL STATED, COMPETENCY CAN BE FLUID.

HE COULD BE INCOMPETENT AT ONE POINT AND COMPETENT AT ANOTHER.

SO THERE IS NO PRECLUSION FROM HOW MANY TIMES YOU CAN RAISE A DEFENDANT'S COMPETENCY. I'LL MOVE ON, IF THERE'S NO QUESTIONS WITH THAT ISSUE, I'LL MOVE ON TO THE ISSUE REGARDING THE COMMENTS OF THE TRIAL JUDGE AND THE PHOTOGRAPHS. THIS IS A PARTICULARLY HORRENDOUS CASE, THERE IS NO DOUBT ABOUT THAT. THE JUDGE NEVER SAID THAT THIS IS THE WORST CASE HE SAW OR THESE ARE THE WORST PHOTOGRAPHS. HE DID SAY THEY WERE PARTICULARLY GRAPHIC, AND THEY ARE. WHAT HE WAS INFORMING THE PANEL OF, THE LARGE PANEL OF, WAS THIS PROCEDURE IS GOING TO BE SLIGHTLY DIFFERENT BECAUSE OF THE NATURE OF THE PHOTOGRAPHS IN THIS CASE. WE ARE GOING TO SHOW YOU PHOTOGRAPHS IN INDIVIDUAL VOIR DIRE. THAT ISN'T ORDINARILY DONE. SO HE WAS EXPLAINING TO THE JURY THIS PROCEDURE'S SLIGHTLY DIFFERENT AND THIS IS WHY. AND MR. NORGDARD DIDN'T OBJECT BECAUSE MR. NORGDARD WANTED THOSE PHOTOGRAPHS -- OR REPRESENTATIVE THE PHOTOGRAPHS SHOWN TO INDIVIDUAL VOIR DIRE, INDIVIDUAL JURORS BECAUSE THEY DID NOT WANT TO GET INTO THE MIDDLE OF A TRIAL AND THESE JURORS SEE THOSE PHOTOGRAPHS AND, AS MR. NORGDARD TESTIFIED AT THE EVIDENTIARY HEARING, HE HAS BEEN IN CASES WHERE ONCE A JURY SEES HORRIFIC PHOTOGRAPHS, HE LOSES THEM. AND HE DID NOT WANT THAT TO HAPPEN. SO HE WANTED TO SOMEWHAT DESENSITIZE POTENTIAL JURORS TO THE IMPACT OF THE PHOTOGRAPHS THAT THEY WOULD BE SEEING, AND THEY DID SEE THEM. THEY SAW THE REPRESENTATIVE PHOTOGRAPHS, AND THEY SAW MORE AT TRIAL. SO HE DID HAVE A STRATEGIC

REASON FOR WANTING POTENTIAL JURORS TO SEE THOSE PHOTOGRAPHS. THE JUDGE'S COMMENTS WERE NOT OVERLY PREJUDICIAL, THEY WEREN'T A COMMENT ON MR. DAVIS' GUILT OR INNOCENCE.

THEY WERE A COMMENT ON THE FACT THAT THESE JURORS WERE GOING TO SEE SOMETHING THAT IS DIFFICULT FOR ANYONE TO SEE.

AND WE ASK JURORS TO DO VERY DIFFICULT THINGS, AND ONE OF THEM IS TO LOOK AT PHOTOGRAPHS THAT REALLY NO PERSON SHOULD HAVE TO LOOK AT, UNFORTUNATELY. SO I DON'T THINK THERE'S ANY ISSUE REGARDING THE JUDGE COMMENTING ON THE EVIDENCE, AND THERE WAS NO BASIS FOR MR. NORGARD TO OBJECT TO SOMETHING THAT HE REQUESTED THE COURT DO.

>> SO WOULD YOU PUT THIS IN THE CATEGORY OF NOT IDEAL OR AFFIRMATIVELY APPROPRIATE?

>> I THINK --

>> PUTTING ASIDE THE PREJUDICE ISSUE.

>> I THINK AFFIRMATIVELY APPROPRIATE WHEN ALL THE PARTIES AGREED TO IT.

WITH REFERENCE TO THE PHOTOGRAPHS, YOUR HONOR?

>> NO, WHICH -- IN TERMS OF THE COMMENTARY.

>> I THINK IT'S APPROPRIATE.

I DON'T THINK EVERY JUDGE NEEDS IT OR HAS TO DO IT, BUT I DON'T THINK THERE'S ANYTHING PARTICULARLY OBJECTIONABLE UNLESS THE DEFENSE COUNSEL DOES NOT WANT THE JURY, THE POTENTIAL JURORS TO SEE THAT.

THERE'S, YOU KNOW, SURE, COULD YOU OBJECT?

WOULD IT BE REVERSIBLE ERROR? PROBABLY NOT.

BECAUSE AS HAS BEEN POINTED OUT, THE JUDGE FOLLOWED UP THAT COMMENT WITH AN INSTRUCTION OF THE PRESUMPTION OF INNOCENCE.

>> IN SOME WAYS HERE IT'S ACTUALLY CONSISTENT WITH THE TRIAL COUNSEL'S STRATEGY.

>> OH, ABSOLUTELY.

>> I MEAN IT'S NOT LIKE, NOT AT ODDS.

SO WHEN THE JUDGE SAYS THAT, IT'S THE TRIAL COUNSEL'S, IT'S LIKE ON THE SAME THEME THAT THE TRIAL COUNSEL IS TRYING TO FOLLOW.

>> ABSOLUTELY.

>> AND WHICH DOES NOT, ON THE FACE OF IT, SEEM TO BE AN UNREASONABLE THING FOR A TRIAL COUNSEL TO BE CONCERNED ABOUT AND TO BE TRYING TO DEAL WITH IT IN THE WAY THAT TRIAL COUNSEL WAS DEALING WITH IT.

>> AND THAT'S WHAT MR. NORGARD TESTIFIES TO IN THE EVIDENTIARY HEARING.

>> I'VE BEEN TRYING TO ISOLATE THE USE OF THE WORDS, IS IT THE WORST.

AM I RIGHT THAT DOES NOT APPEAR IN THE RECORD?

THE COURT DID NOT SAY THAT?

>> THE COURT DID NOT SAY THAT. WHAT HAD HAPPENED WAS DURING INDIVIDUAL VOIR DIRE, MR. NORGARD IDENTIFIED A POTENTIAL JUROR WHO HAD SERVED ON A CAPITAL CASE PREVIOUSLY. HE DID NOT WANT THAT JUROR ON THE PANEL, ALTHOUGH I THINK SHE ULTIMATELY DID APPEAR ON THE JURY.

HE WAS LOOKING FOR A REASON TO STRIKE HER FOR CAUSE.

>> RIGHT.

>> SO WHAT MR. NORGARD SAID WAS, AS THE JUDGE SAID, THESE ARE SOME OF THE WORST PHOTOGRAPHS THAT HE'S EVER SEEN.

SO HE WAS PARAPHRASING WHAT THE JUDGE HAD SAID --

>> OKAY.

BUT THERE WAS NO JUDICIAL STATEMENT THAT THIS WAS THE WORST EVIDENCE THE JUDGE HAD SEEN.

>> NOT THAT I COULD FIND IN THE RECORD, YOUR HONOR.

IF THERE ARE NO FURTHER QUESTIONS?

THE STATE WOULD REQUEST THAT

THAT YOU AFFIRM THE DENIAL OF
POST-CONVICTION --

[INAUDIBLE]

>> THANK YOU.

I JUST WANT TO MAKE A FEW
COMMENTS --

>> WHY'D YOU TELL US THAT THERE
WAS A JUDICIAL STATEMENT THAT
THIS WAS THE WORST EVIDENCE THE
JUDGE HAD SEEN?

>> BECAUSE THE JUDGE SAID THAT
I'VE BEEN ON THE BENCH FOR 16
YEARS, I'VE DONE ALL THE
FIRST-DEGREE MURDER CASES IN
THIS CIRCUIT, AND I'VE NEVER HAD
TO DO THIS BEFORE.

THAT'S ESSENTIALLY WHAT THE
JUDGE SAID.

>> THAT'S NOT -- I DON'T THINK
THAT'S WHAT YOU TOLD US.

I THINK YOU TOLD US THAT THE
JUDGE SAID THIS WAS THE WORST
EVIDENCE HE'D SEEN, AND THAT'S
JUST NOT IN THE RECORD, IS IT?

>> BUT IT'S A PARAPHRASE OF
EXACTLY WHAT HE SAID.

MEANING OF WHAT HE SAID WAS THAT
THESE ARE THE WORST OF WHAT I'VE
SEEN, AND THAT'S WHY I HAVE TO
DO THIS WITH YOU TODAY.

THANK YOU, YOUR HONORS.

IF YOU HAVE NO FURTHER
QUESTIONS, I WOULD ASK THAT YOU
REMAND THIS CASE TO THE CIRCUIT
COURT FOR A NEW TRIAL.

>> AND YOU CAN FEEL FREE TO TAKE
A MINUTE OR TWO TO GET YOUR HEAD
TOGETHER FOR THE NEXT ONE.