Leonardo Franqui v. State of Florida

MR. CHIEF JUSTICE: GOOD MORNING AND WELCOME TO THE ORAL ARGUMENT CALENDAR FOR FRIDAY OF THE FLORIDA SUPREME COURT. THE FIRST CASE WE WILL HEAR ORAL ARGUMENT IN THIS MORNING IS FRANKY VERSUS STATE. MR. -- IS FRANQUI VERSUS STATE. MR. LIPINSKI.

MAY IT PLEASE THE COURT. THIS IS A DEATH PENALTY SENTENCING, SENT BACK TO THIS COURT FOR RESENTENCING. THE CASE AROSE OUT OF A BANK ROBBERY IN NORTH MIAMI. MR. FRANQUI WAS ONE OF THE PARTICIPANTS IN THAT ROBBERY BUT HE DID NOT FIRE THE FATAL SHOT. AN OFFICER WORKING OFF DUTY AS A BANK GUARD WAS KILLED AT THE FIRST POINT IN THE ROBBERY. THE FIRST POINT I WOULD WANT TO ARGUE IS WHETHER THE TRIAL COURT MISINTERPRETED THE INSTRUCTION WITH REGARD TO WEIGHING THE AGGRAVATING AND MITIGATING INSTRUCTIONS AND REALLY THROW OUT THIS TRIAL. IN THE CASE OF HENYARD VERSUS STATE, THIS COURT STATED THAT A JURY IS NEITHER COMPELLED NOR REQUIRED TO RECOMMEND DEATH, WEIGHING AGGRAVATING OR MITIGATING FACTOR, AND THAT WAS LAST YEAR IN AARON AND UNLESS BROOKS VERSUS STATE.

DID THE JUDGE GIVE THE CORRECT JURY INSTRUCTION AT THE END? YOUR COMMENTS, AS I TAKE IT THAT YOU ARE REFERRING TO, OCCURRED IN THE VOIR DIRE STAGE?

JUDGE, IT OCCURRED DURING THE VOIR DIRE STAGE. A COMMENT ALONG THOSE LINES WAS DONE DURING CLOSING ARGUMENT BY THE STATE. WHERE THE STATE MADE, TOLD THE JURY IT IS YOUR OBLIGATION THAT YOU VOTE FOR THE DEATH PENALTY, IF AGGRAVATION IS STRONGER THAN MITIGATION, BUT IN THE JURY INSTRUCTIONS, I SUBMIT THAT THE COURT DID, USING OTHER LANGUAGE, MAKE ESSENTIALLY THE SAME INSTRUCTION. ON PAGE 1154 OF THE INSTRUCTIONS THE COURT INSTRUCTED THE JURY IT IS YOUR DUTY TO FOLLOW THE LAW THAT WILL NOW BEGIN TO YOU BY THE COURT. MUST. AND RENDER TO THE COURT AN ADVISORY SENTENCE, BASED UPON YOUR DETERMINATION. A RECOMMENDATION, A TO WHETHER SUFFICIENT AGGRAVATING CIRCUMSTANCES EXIST TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY AND WHETHER SUFFICIENT MITIGATING CIRCUMSTANCES EXIST TO OUTWEIGH ANY AGGRAVATING CIRCUMSTANCES TO EXIST. THIS IS BASICALLY THE SAME LANGUAGE OR THE SAME THOUGHT THAT THIS COURT FOUND WAS IMPROPER IN BROOKS.

BUT ISN'T THAT DIRECTLY FROM THE APPROVED STANDARD JURY INSTRUCTIONS, BEEN GIVEN OVER AND OVER, AND HAS BEEN APPROVED, BEFORE, BY THIS COURT, HAS IT NOT?

THE STANDARD JURY INSTRUCTIONS HAVE. THE CASES THAT I HAVE CITED TO THE COURT, ALL, STATE, AND BROOKS ESSENTIALLY STATES THAT IT WAS ERROR FOR THE COURT, FOR THE PROSECUTOR, AND THAT IS WHY THIS CASE IS INTERESTING AND EVEN MORE EGREGIOUS, I WOULD STATE, BECAUSE --

MR. LIPINSKI.

YES, JUDGE.

AS I UNDERSTAND JUSTICE LEWIS'S QUESTION AND MY QUESTION IS, IS THE LANGUAGE FROM THE STANDARD JURY INSTRUCTIONS THAT YOU JUST READ?

I BELIEVE IT IS. I HAVE TO DEFER TO THE STANDARD JURY INSTRUCTION. I BELIEVE IT IS, BUT I

BELIEVE THAT THE TEXT OF THIS LANGUAGE IS ESSENTIALLY WHAT WAS PROHIBITED IN BROOKS.

WASN'T THE CONCERN, IN BROOKS AND HENYARD, THAT THE, AND I FORGET WHETHER IT IS THE PROSECUTOR OR THE TRIAL COURT, BUT THAT THE JURY MIGHT BE TOLD THAT, WITH REFERENCE TO THE NUMBERS OF THE AGGRAVATORS OR THAT THERE MIGHT SIMPLY BE A MATHEMATICAL CALCULATION, AND THAT THEY, THEN, WOULD HAVE NO CHOICE, IN TERMS OF THEIR DECISION, AS TO THE DEATH PENALTY?

-- AS OPPOSED TO AN EXAMINATION OF THE STATUTORY SCHEME, WHICH, INDEED, INSTRUCTS THE COURT AND JURORS TO USE AGGRAVATING AND MITIGATING CIRCUMSTANCES AS THE METHOD OF ANALYSIS TO DETERMINE THEIR RECOMMENDATION OR DECISION, AS TO LIFE OR THE DEATH PENALTY. ISN'T THAT CORRECT?

I BELIEVE IN THE CASES OF GARR I KNOW AND URBAN -- OF GUARANAND URBAN, THE -- OF GARRIN AND URBAN, THE COMMENTS BY THE PROSECUTION WERE IN THE AGGRAVATORS OUTNUMBER THE MITIGATORS. HOWEVER, THE COMMENT IN HENYARD, THE LEADING CASE, IS IF THE EVIDENCE OF THE AGGRAVATORS OUTWEIGHS MITIGATORS.

BUT THE WORD USED, IF I RECALL, WAS "MUST", IN OTHER WORDS THAT WE WERE CONCERNED IN THAT OPINION. IS THAT CORRECT?

MUST BE FOR DEATH.

IN OTHER WORDS THAT THERE COULD BE NO -- IN OTHER WORDS THE JURY HAD NO CHOICE IN THE MATTER AT THAT POINT, AND SO I AM WONDERING IF IT IS THE SAME CONCERN THAT YOU ARE EXPRESSING HERE. LET'S GO BACK, FIRST OF ALL, IS IT CORRECT THAT THE STATUTE CONTEMPLATES AND, INDEED, INSTRUCTS JUDGES AND JURIES, THAT THE METHOD OF ANALYSIS IS TO DETERMINE AGGRAVATORS AND MITIGATORS AND THEN TO USE THAT ANALYSIS AS A WAY OF COMING UP WITH IN THE CASE OF A JURY, THEIR RECOMMENDATION, AND IN THE CASE OF THE JUDGE, A DECISION.

I BELIEVE THAT THE COURT IS CORRECT THAT THAT IS A STEP IN IT. I BELIEVE THE COURT WAS CORRECT IN HENYARD, WHEN THE COURT STATED CERTAIN FACTUAL SITUATIONS MAY WARRANT THE INFLICTION OF CAPITAL PUNISHMENT BUT ENVELOPES WOULD NOT PREVENT EITHER THE TRIAL JURY, THE TRIAL JUDGE, OR THIS COURT FROM EXERCISING REASONED JUDGMENT IN REDUCING THE SENTENCE TO LIFE IMPRISONMENT. SO EVEN THOUGH THE AGGRAVATORS MAY OUTWEIGH THE MITIGATORS, THIS COURT, IN HENYARD, STATED THAT THAT WAS NOT THE END-ALL FOR THE JURY TO MAKE ITS RECOMMENDATION, ONLY BECAUSE THE AGGRAVATORS OUTWEIGH THE MITIGATORS, AND THAT IS THE PROBLEM IN THIS CASE.

SO YOU ARE CLAIMING THAT THE STANDARD JURY INSTRUCTION IS IMPROPER AND CONTRARY TO THE STATUTE. IS THAT CORRECT?

IF THAT IS WHAT, AND I WILL DEFER TO WHAT -- I DON'T HAVE IT PRECISELY IN MY MIND RIGHT NOW. IF THAT IS WHAT THE STATED JURY INSTRUCTION SAYS, I BELIEVE THAT THE ASKED INSTRUCTION, WHICH WAS REQUESTED BY THE DEFENSE IN THIS PARTICULAR CASE, WAS THAT IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS, YOU MAY CONSIDER, AT THAT POINT. I BELIEVE THAT IS A STEP IN THE PROCESS. THAT IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS, THEN YOU CONSIDER IT, AND THAT IS IN LINE WITH WHAT HENYARD SAYS, THAT EVEN THOUGH THE AGGRAVATORS OUTWEIGH THE MITIGATORS, THAT IS NOT THE END-ALL. THAT IS THE NEXT THING FOR THE JURY TO CONSIDER, AND HOW DO WE KNOW THAT AT ONE POINT, I SUBMIT THAT EVEN THE TRIAL COURT RECOGNIZED THAT, BECAUSE IN ITS SENTENCING ORDER, WHICH IS REFLECTED AT PAGE 174 OF THE RECORD, THE COURT STATES, IN WEIGHING THE AGGRAVATING CIRCUMSTANCES AGAINST THE MITIGATING CIRCUMSTANCES, THE COURT UNDERSTANDS THE PROCESS IS NOT SIMPLY A QUANTITATIVE ANALYSIS BUT A QUALITATIVE ONE. IT IS NOT A

QUESTION --

IF DO THAT, THEN WHAT KIND OF INFORMATION ARE WE GIVING THE JURY? YOU ARE TELLING THE JURY, IN THOSE CIRCUMSTANCES, TO DO WHATEVER YOU WANT TO DO, NO MATTER HOW YOU FEEL ABOUT THIS.

NO, JUDGE, AND I THINK THAT IS WHAT THE SCHEME IS, THAT BEFORE YOU CAN CONSIDER IMPOSING THE DEATH PENALTY, THE STATE HAS TO PROVE, BEYOND A REASONABLE DOUBT, THAT AGGRAVATING CIRCUMSTANCES EXIST. AND IF MITIGATING CIRCUMSTANCES ARE PROVEN TO A REASONABLE CERTAINTY, THAT THE JURY WEIGHS THE AGGRAVATING CIRCUMSTANCES AGAINST THE MITIGATING CIRCUMSTANCES. IT IS AT THAT POINT THAT THEY MAY CONSIDER THE DEATH PENALTY, BECAUSE IF THE AGGRAVATING CIRCUMSTANCES DON'T OUTWEIGH THE MITIGATING CIRCUMSTANCES, THEY NEVER GET TO THE POINT OF CONSIDERING, WHICH IS --

ARE WE REALLY BACK TO THE REAL PROBLEM IS WHETHER OR NOT THE TRIAL JUDGE AND THE PROSECUTOR USED MANDATORY LANGUAGE?

PRETTY MUCH, YES, JUDGE.

SO I GUESS GOING BACK TO YOU HAD TALKED ABOUT SOME OF THESE INITIAL STATEMENTS, AND THERE CLEARLY IS AT LEAST ONE MISSTATEMENT OF THE LAW BY THE TRIAL JUDGE AT THE BEGINNING, IN THE VOIR DIRE, WHICH SAID THAT THE LAW REQUIRES THAT YOU RECOMMEND A SENTENCE OF DEATH. THAT WAS EARLY ON, AT THE VERY, WHILE THE JURY WAS BEING QUALIFIED, SO WHAT WE, WHAT STANDARD, THEN, WOULD YOU SUGGEST THAT WE APPLY, IN LOOKING AT THIS TOTALITY OF WHAT THE JURY WAS INSTRUCTED? IF, IN FACT, AT THE END, THE JUDGE GAVE THE STANDARD JURY INSTRUCTION, WHICH HAS BEEN APPROVED BY THIS COURT, WHICH ACCURATELY STATES THE LAW. THE SENTENCING ORDER ACCURATELY REFLECTS THAT THE JUDGE UNDERSTOOD WHAT HIS RESPONSIBILITY WAS. WHY SHOULD YOU BE ENTITLED TO A NEW SENTENCING HEARING, BECAUSE OF THESE INITIAL MISSTATEMENTS THAT THE TRIAL JUDGE --

IF I MAY JUST FINISH WHAT WAS IN THE SENTENCING ORDER, AFTER THE COURT SAID THAT THE PROCESS IS NOT SIMPLY A QUALITATIVE ANALYSIS, QUANTITATIVE ANALYSIS BUT A QUALITATIVE ONE. IT IS THE COURT'S DUTY TO LOOK AT THE NATURE AND QUALITY OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, WHICH HAVE BEEN ESTABLISHED. AND THAT, I THINK, PRETTY MUCH WHAT THIS COURT WAS GETTING AT IN HENYARD. IN HENYARD, WHEN THIS COURT SAID CERTAIN FACTUAL SITUATIONS MAY WARRANT THE INFLICTION OF CAPITAL PUNISHMENT BUT NEVERTHELESS WOULD NOT PREVENT EITHER THE TRIAL JURY, IF THE JURY KNEW THAT IT COULD CONSIDER IT, BUT IT WAS NOT, IT, NOT THAT IT MUST IMPOSE A RECOMMENDATION OF DEATH, IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS. THE TRIAL JUDGE, AND WE KNOW THE TRIAL JUDGE DID IT, EVEN THOUGH THE TRIAL JURY WASN'T ALLOWED TO DO IT, HE CONSIDERED IT THAT THE COURT'S DUTY TO LOOK AT THE NATURE AND QUALITY OF THE AGGRAVATORS AND MITIGATORS, AND THEN THIS COURT, SO I SUBMIT --

WHAT, DID YOU SAY THAT YOU PROPOSED AN INSTRUCTION TO THE JUDGE?

I PROPOSED.

WHAT WAS, WHAT DID THAT INSTRUCTION SAY?

MY, I WOULD, THAT IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS, THEN YOU MAY CONSIDER IMPOSING, AND THAT COMES TO EXACTLY WHAT THE COURT SAID HERE.

WHAT DOES THE STATUTE SAY?

THE STATUTE. THE STATUTE 921.121-4-1, SAYS THAT, A, WHETHER THE ADVISORY SENTENCE IS SUPPOSED TO BE BASED UPON WHETHER THE SUFFICIENT AGGRAVATING CIRCUMSTANCES EXIST, AS HE NUMBERIATED IN SUBSECTION 5. B, WHETHER SUFFICIENT MITIGATING CIRCUMSTANCES EXIST THAT OUTWEIGH THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST, AND, C, BASED UPON THESE CONSIDERATIONS, THE SECOND PART, WHETHER THE DEFENDANT SHOULD BE SENTENCED TO LIFE IMPRISONMENT OR DEATH, AND I SUBMIT TO THE COURT THAT IS THE DISCRETION. THAT IS WHERE THE TRIAL COURT COMES IN AND SAYS IT IS THE COURT'S DUTY TO LOOK AT THE NATURE AND QUALITY AND NOT JUST NUMBERS OR NOT JUST WEIGHING PROCESS.

BUT DOESN'T THE STANDARD JURY INSTRUCTION PRETTY MUCH PARALLEL THE STATUTE, THE LANGUAGE THAT YOU HAVE JUST READ FROM THE STATUTE?

NOT IN THE SENSE --

THE STANDARD INSTRUCTION.

NOT IN THE SENSE THAT THERE IS NOT THIS CONSIDERATION. THE STANDARD JURY INSTRUCTION, I SUBMIT, AND I CAN'T RECALL IMMEDIATELY WHAT THE STANDARD INSTRUCTION IS. IF IT PARALLELS WHAT WAS GIVEN TO THE COURT ON 1154, IT IS CONTRARY TO BROOKS.

BUT YOU LAY GREAT RELIANCE ON HENYARD, AND HENYARD, WE UPHELD, WE AFFIRMED THE DEATH PENALTY IN HENYARD.

YES, SIR, JUDGE.

AND IN HENYARD, THE STANDARD JURY INSTRUCTION WAS GIVEN. CORRECT?

YES, AND THIS COURT SAID --

IN HENYARD, THERE WAS AN ISOLATED COMMENT, CORRECT?

YES, JUDGE.

AND SO IT SEEMS TO ME, EXPLAIN TO ME WHY HENYARD ISN'T, REALLY, AUTHORITY FOR AFFIRMING, RATHER THAN REVERSING HEAR.

WELL, HENYARD SAID IT WAS A MISSTATEMENT. HENYARD AND BROOKS ARE THE TWO CASES MOST ON POINT, WHICH INDICATE THAT IT IS A MISSTATEMENT OF THE LAW TO TELL THE JURY THAT, IF THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACT ON, THAT YOU ARE REQUIRED TO IMPOSE A DEATH PENALTY.

PART OF THE REASON THAT WE FOUND THE PROSECUTOR'S STATEMENT TO THE JURY THAT THEY MUST RETURN A VERDICT A CERTAIN WAY, WAS THAT THE JUDGE HAD CORRECTLY BEGIN THE STANDARD JURY INSTRUCTIONS. ISN'T THAT CORRECT? ISN'T THAT PART OF THE REASON THAT FOUND THAT ERROR TO BE HARMLESS?

THE MISSTATEMENT WAS NOT REPEATED BY THE TRIAL COURT, WHEN INSTRUCTING THE JURY PRIOR TO THE PENALTY PHASE DELIBERATIONS. NOW, IT DOESN'T SAY WHAT INSTRUCTION WAS GIVEN IN THE OPINION. BUT I SUBMIT TO THE COURT THE INSTRUCTION WAS BEGIN AT THE END OF THIS PARTICULAR CASE. IT IS CONTRARY TO BROOKS, IN WHICH THE INSTRUCTION SAYS WHETHER YOU ARE SUPPOSED TO DETERMINE WHETHER SUFFICIENT AGGRAVATING CIRCUMSTANCE EXIST TO JUSTIFY THE IMPOSITION OF DEATH PENALTY AND WHETHER SUFFICIENT MITIGATING CIRCUMSTANCES EXIST TO OUTWEIGH ANY AGGRAVATING CIRCUMSTANCES. SO ONCE AGAIN, IT IS THIS WEIGHT. IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS, THE JURY SAID IT IS YOUR DUTY TO RECOMMEND, AND IT STARTED RIGHT AT THE

BEGINNING OF THIS CASE. RIGHT AT THE BEGINNING, WHEN THE COURT SAID PAGE 16, NOW LET ME EXPLAIN TO YOU WHAT YOUR ROLE IS WHAT YOUR SFONT IS. 17. IF YOU BELIEVE THAT THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS, THE LAW REQUIRES THAT YOU RECOMMEND DIT. 17 TO 18, IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS, IN THAT CASE YOU SHOULD RECOMMEND A SENTENCE. AS TO THE ROLE, 18, THAT IS YOUR ROLE, IF YOU ARE SELECTED TO SERVE ON THIS JURY.

SO IS YOUR POINT THAT, IN THIS CASE, UNLIKE HENYARD, IT WAS THE TRIAL JUDGE THAT INITIALLY MADE THE MISSTATEMENTS OF THE LAW AND THAT, NO MATTER SINCE THE TRIAL JUDGE DIDN'T RECOGNIZE THE ERROR THAT, THE JURY WAS LEFT WITH THAT --

ABSOLUTELY, AND THE ERROR WAS CALLED TO THE TRIAL JUDGE'S ATTENTION AT PAGE 31 OF THE RECORD HENYARD WAS MENTIONED, AND THE DEFENSE OBJECTED AND SAID, JUDGE, COULD YOU PLEASE GIVE A CORRECT INSTRUCTION THAT THEY ARE NOT REQUIRED TO RETURN A VERDICT OF DEATH. THE COURT SAYS, NO, I AM NOT GOING TO GIVE THAT INSTRUCTION. BRING ME THE CASE.

DO YOU EQUATE "SHOULD" WITH "MUST"?

YES, JUDGE.

RATHER THAN "SHOULD" BEING EQUATED WITH "MAY", WHICH WOULD GIVE SOME LATITUDE AND THE JUDGING THAT YOU ARTICULATE. REALLY, THE JUDGE SAYING THAT YOU MUST, ISN'T THERE A DISTINCTION BETWEEN "MUST" AND "SHOULD"?

I DON'T KNOW WHAT THE STATE WANTS TO CALL IT, BUT I CAN ONLY TELL THIS COURT, IF IT TELLS ME I SHOULD DO SOMETHING, I DON'T CONSIDER THAT DISCREATION KREINGS AREA, AND WHAT -- DISCRETIONARY. I DON'T THINK THAT IS REQUIRED. WHEN YOU HAVE SIX LAY PEOPLE OFF THE STREET, THEY HAVE TWO SIDES, EACH WANTING WHAT THEY WANT, AND THE JUDGE IS IN THE MIDDLE GIVING INSTRUCTIONS, AND WHEN THE JUDGE TELLS YOU YOU SHOULD DO SOMETHING, LIKE YOU SHOULD APPEAR HERE AT 8:FOR IN THE MORNING. YOU SHOULD COME -- AT EIGHT THIRTY IN THE MORNING. YOU SHOULD COME BACK PROMPTLY FROM LUNCH. THAT IS AN OBLIGATION. THAT IS A REAL DIRECTION FROM THE JUDGE THAT YOU DO THIS.

MR. LIPINSKI, YOU ARE IN YOUR REBUTTAL TIME. IT IS UP TO YOU.

I WOULD ONLY RELY UPON MY BRIEF, THE BRIEFS, FOR THE OTHER POINTS, WHICH I HAVE THANK YOU VERY MUCH.

MAY IT PLEASE THE COURT. SANDRA JAGGARD, ON BEHALF OF THE ATTORNEY GENERAL OF THE STATE.

MS. JAGGARD, WHAT ABOUT OPPOSING COUNSEL'S OPPOSITION THAT THAT THIN NUANCE, THE AVERAGE JUROR IS NOT GOING TO RECOGNIZE, IF HE IS TOLD BY THE JUDGE THAT IT IS, IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS, YOU SHOULD, AS OPPOSED TO YOU MUST. IS THERE A TRUE DISTINCTION THAT THE AVERAGE JUROR IS GOING TO RECOGNIZES IT, AND HE IS GOING TO TAKE THAT AS A DIRECTION FROM THE JUDGE THAT, IF YOU HAVE MORE AGGRAVATORS, YOU SHOULD COME BACK WITH THE DEATH SENTENCE. ISN'T THAT PRACTICALLY MANDATORY AT THAT POINT, IN THE MIND OF THE JUROR?

I HAVE NO IDEA WHAT IS IN THE MIND OF THE JUROR, BUT "SHOULD" IS NOT A MANDATORY WORD. IT IS A DISCRETIONARY WORD, AND IF YOU PROHIBIT THE STATE FROM EVEN TELLING THE JURY WHAT THEY SHOULD DO, WHEN THE AGGRAVATORS OUTWEIGH THE MITIGATORS, THE STATUTE DOES SAY WHEN THE AGGRAVATORS OUTWEIGH THE MITIGATORS, YOU RECOMMEND DEATH. THE STANDARD JURY INSTRUCTION, WHICH WAS THE INSTRUCTION READ IN THIS CASE,

DOES SAY THAT WHEN THE AGGRAVATORS OUTWEIGH THE MITIGATORS, YOU SHOULD RECOMMEND DEATH.

DO YOU TAKE THE POSITION, THEN THAT, THE INITIAL STATEMENT BY THE TRIAL JUDGE, TO THE JURY, WHICH WAS IF YOU BELIEVE THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS, THEN THE LAW REQUIRES THAT YOU RECOMMEND A SENTENCE OF DEATH. IS THAT AN ACCURATE STATEMENT OF THE LAW?

MY POSITION WOULD BE THAT, YES, IT IS. I UNDERSTAND THAT THIS COURT HAS RULED TO THE CONTRARY, BUT IT IS THE JUROR'S DUTY TO FOLLOW THE LAW, AND THE LAW DOES SAY THAT YOU ARE SUPPOSED TO RECOMMEND DEATH UNDER THOSE SITUATIONS. THE JURY CERTAINLY DOES HAVE A POWER OF PARDON.

HOW WOULD THAT BE IN TERMS OF WHAT IS REQUIRED, SINCE WE SAY, IN CASES SUCH AS DICK SON AND OTHERS, THAT, IT IS ONLY THE MOST AGGRAVATING AND LEASED THE MITIGATED -- AND LEAST MITIGATED THAT QUALIFY FOR THE DEATH PENALTY, AND THAT IT IS NOT SIMPLY A WEIGHING OF ONE AGAINST THE OTHER THAT, IT IS AN OVERVIEW, SO HOW IS IT THAT, IF THERE ARE, WOULDN'T THAT TELL A JURY THAT, IF THERE IS TWO AGGRAVATORS AND ONLY ONE MITIGATOR, THAT THEY ARE NOW REQUIRED. THAT IS WHAT IT SAYS. REQUIRED TO RECOMMEND A SENTENCE OF DEATH? IS THAT A MISSTATEMENT OF THE LAW?

NO, IT WOULDN'T, BECAUSE IT SAYS OUTWEIGH, NOT OUTNUMBER, AND UNTIL YOU HAVE TO LOOK AT WHAT THOSE AGGRAVATORS ARE. YOU HAVE TO LOOK AT THE FACTS OF THIS CASE. YOU HAVE TO LOOK AT WHAT THE MITIGATORS ARE AND DO THEY OUTWEIGH.

YOU ARE SAYING THAT THE JUDGE THAT NEXT, IF WE WRITE THIS OPINION, WE SHOULD SAY THAT IT IS PERFECTLY THAT THE STANDARD JURY INSTRUCTION, REALLY, COULD BE REWRITTEN TO SAY IF YOU BELIEVE THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING, THE LAW REQUIRES THAT YOU RECOMMEND A SENTENCE OF DEATH, THAT THAT WOULD NOT BE A MISSTATEMENT OF THE LAW?

THAT WOULD BE MY POSITION. IT WOULD, ALSO, BE MY POSITION THAT THIS COMMENT IS NOT PRESERVED, BECAUSE THERE WAS NO CONTEMPORANEOUS OBJECTION TO THIS COMMENT. THIS COMMENT WASN'T OBJECTED TO. THE COMMENT CONSIDERS OCCURS ON PAGE 17 AND 18. THE JUDGE FINISHES ALL HIS OPENING STATEMENTS, DOES QUESTIONING ABOUT PRETRIAL PUBLICITY, IS TAKING A RECESS, WHEN THIS OBJECTION COMES. THAT WAS NOT A CONTEMPORANEOUS OBJECTION, AND SO THIS COMMENT ISN'T PRESERVED.

BUT IN ESSENCE, THE DEFENSE ATTORNEY BROUGHT THE CASE OF HENYARD TO THE ATTENTION OF THE TRIAL JUDGE. THEY DISCUSSED IT AT SOME LENGTH AND SO WASN'T THE PURPOSE OF A CONTEMPORANEOUS OBJECTION SERVED IN THIS CASE, BECAUSE THE TRIAL JUDGE KNEW WHAT THE DEFENSE POSITION WAS AND ACTUALLY CONSIDERED IT?

AFTER HE HAS THE CONTEMPORANEOUS OBJECTION, HE DOESN'T SAY "MUST" AGAIN. HE SAYS "SHOULD", SO HAD THEY OBJECTED THEN, WE COULD HAVE HAD THE DISCUSSION THEN, AND YOU COULD HAVE --

GOOD THE DEFENSE ATTORNEY ASK -- DID THE DEFENSE ATTORNEY ASK FOR ANY KIND OF INSTRUCTION?

WHAT HE ASKED THE TRIAL COURT TO INSTRUCT THE JURY WAS THAT IT HAD UNBRIDLED RECOMMENDATION TO RECOMMEND LIFE, WHATEVER THEY FELT LIKE, AND THAT IS NOT THE LAW, EITHER, AND IT SAYS WE DON'T INSTRUCT ON JURY PARDONS HAD, WHICH IS WHAT THAT JURY WAS ASKING FOR AN INSTRUCTION ON.

WE DISCUSSED HENYARD, BUT REFRESH MY RECOLLECTION ABOUT BROOKS. WE AFFIRMED IN HENYARD, DID WE NOT, AND WE FOUND THAT THE INSTRUCTIONS THAT WERE GIVEN, REALLY, MITIGATED ANY ISOLATED ERROR IN TERMS OF WHAT THE PROSECUTOR HAD SAID TO THE JURY ABOUT YOU MUST OR WHATEVER THE LANGUAGE WAS. IS THAT CORRECT?

YES, YOU DID.

OKAY. NOW, REFRESH MY RECOLLECTION ABOUT BROOKS. WAS BROOKS BEFORE OR AFTER HENYARD?

BROOKS IS AFTER, AND I AM NOT REALLY SURE WHETHER YOU AFFIRMED OR REVERSED, BUT IT WAS NOT ON THE BASIS OF THAT COMMENT. IF IT WAS A REVERSIONAL, IT -- A REVERSAL, IT WAS ON THE BASIS OF CUMULATIVE COMMENTS THROUGHOUT THE TRIAL. IF WE ADOPTED JUSTICE SHAW'S POSITION AND CONCLUDED THE STATE SHOULD HAVE SAID "SHOULD", YOU WOULD NEVER BE ABLE TO ASK THE JURY WOULD YOU BE ABLE TO SET ASIDE YOUR FEELINGS ABOUT THE DEATH PENALTY AND FOLLOW THE LAW AND NOT TELL THEM UNDER WHAT CIRCUMSTANCES THE LAW SAYS YOU RECOMMEND DEATH. YOU ARE GOING TO BE SITTING THERE AND WILL YOU FOLLOW THE LAW. WHAT IS THE LAW? WELL, I CAN'T TELL YOU. AND SO THE STATE'S POSITION IS THAT THE COMMENT SHOULD BE DEEMED PROPER. IF IT IS NOT DEEMED PROPER, THE FIRST COMMENT IS NOT DEEMED PROPER, IT IS NOT PRESERVED. THE REMAINING COMMENTS WITH "SHOULD" WERE PROPER, AND THAT IN ANY EVENT, THIS ERROR WAS HARMLESS, BECAUSE IT IS AN ISOLATED COMMENT.

THE STATE'S POSITION THAT IT IS CURRENTLY THE LAW OF FLORIDA, THAT IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS, THEN THE JURY MUST RECOMMEND DEATH.

IT IS A THE STATE'S POSITION IS THE LAW SAYS THE AGGRAVATORS OUTWEIGH THE MITIGATORS, YOU RECOMMEND DEATH. JUSTICE PARIENTE'S QUOTE FROM DIXON CONCERNED PROPORTIONALITY REVIEW. THE JURY ISN'T GOING TO KNOW WHAT HAPPENED.

THE STATE'S UNDERSTANDING THAT THAT IS THE LAW OF FLORIDA AT THE PRESENT TIME?

THAT IS WHAT THE STATUTE SAYS SAYS.

YOU ARE NOT ANSWERING MY QUESTION. MY QUESTION, LISTEN CLOSELY. THE QUESTION IS, IS IT THE STATE'S POSITION THAT THAT IS THE LAW IN FLORIDA CURRENTLY?

YES. THAT IS WHAT THE STATUTE SAYS.

THANK YOU.

COULD YOU COMMENT ON THE ISSUE RAISED BY THE APPELLANT, WITH REFERENCE TO THE TRIAL COURT NOT FINDING, AS MITIGATION THE DEFENDANT'S CHILDHOOD AND FAMILY BACKGROUND.

THE TRIAL COURT, IN FACT, CONSIDERED ALL OF THIS. AND THE TRIAL COURT REJECTED IT, BECAUSE WHILE THE DEFENDANT WAS RAISED BY A SERIES OF PEOPLE, EEP ONE OF THESE PEOPLE LOVED AND SPOILED THE DEFENDANT. THEY NEVER DID ANYTHING ANDUOUS I HAVE TOWARDS HIM, AND THEREFORE THE FACT THAT HE HAD A SERIES OF PARENTAL FIGURES YOURS IN HIS -- FIGURES IN HIS LIFE WAS NOT MITIGATING.

WAS THERE ANY COURSE OF DESCRIBING THE CHILDHOOD AND THE FAMILY BACKGROUND THAT HE WAS ABUSED OR NEGLECTED OR DEPRIVED?

NO. IN FACT FAMILY MEMBERS TESTIFIED THAT HE WAS LOVED AND NEVER ABUSED, PHYSICALLY

OR EMOTIONALLY, BY ANY OF THESE PEOPLE.

WHAT WAS THE CIRCUMSTANCE WITH HIS MOTHER AND FATHER?

THE DEFENDANT WAS CONCEIVED OUT OF WEDLOCK. THE DEFENDANT WAS NOT EVEN AWARE THAT THE PERSON WHO RAISED HIM AS HIS FATHER AND WHOSE LAST NAME HE HAS, WAS NOT HIS FATHER, UNTIL AFTER HE HAD COMMITTED THESE CRIMES. HE WAS RAISED BY A STEPFATHER, MR. FRANQUI. THE DEFENDANT'S MOTHER LEFT THE FAMILY, WHEN THE DEFENDANT WAS ONE OR TWO YEARS OLD, AND THE DEFENDANT CONTINUED TO LIVE WITH HIS FATHER, AND THE PERSON HE HAD ALWAYS KNOWN TO BE HIS FATHER, AND HIS FAMILY, BEING RAISED IN PART BY AN AUNT CELL I KNOW. WHEN THE FAMILY -- CELINE. WHEN THE FAMILY LEAVES CUBA AND THE CHILD IS TEN, THE AUNT CELINE STAYS BEHIND, AND THE DEFENDANT CONTINUES TO LIVE IN THIS COUNTRY WITH HIS FATHER AND GRAND MOTHER. HE HAS A HALF BROTHER WHO DIES. THE FATHER TURNS TO DRUGS. THE FATHER LEAVES THE FAMILY. HE IS BEING RAISED BY HIS AUNT, BY HIS GRANDMOTHER AND HIS AUNT AND UNCLE. THE UNCLE HAS A FALLING OUT WITH THE REST OF THE FAMILY, BECAUSE HE WANTS TO FORCE THE DEFENDANT'S FATHER INTO DRUG TREATMENT AND THE REST OF THE FAMILY DOESN'T, AND HE DOESN'T SEE THE FATHER FOR SEVERAL YEARS AND THE GRANDMOTHER IS NO LONGER ABLE TO CONTROL HIM, SO HE GOES TO LIVE WITH THE AUNT AND UNCLE FULL-TIME.

IN TWO OTHER TRIAL COURT ORDERS, THEY WERE CONSIDERED AS MITIGATING FACTORS, CORRECT?

AND IN JONES THIS COURT SAID THAT SIMPLY HANDING YOUR CHILD OFF INTO A LOVING HOME IS PROPERLY REJECTED AS MITIGATION.

SO WE HAVE GOT, THERE IS SUCH DISCRETION THAT THE SAME EVIDENCE, ONE JUDGE COULD SAY SHOULDN'T COUNT, AND. THE JUDGE SAYS IT COUNTS, AND WE JUST UPHOLD IT EITHER WAY?

WELL, YOU HAVE TO LOOK AT THE SITUATION. WAS THIS DETRIMENTAL TO THIS DEFENDANT? THERE IS NO EVIDENCE THAT THIS HAD ANY PSYCHOLOGICAL EFFECT ON ONLY. THE EVIDENCE IS THAT ALL THESE PEOPLE LOVED HIM. THEY DOTED ON HIM. IT IS NOT PHYSICALLY OR EMOTIONALLY ABUSED BY THIS.

YOU ARE SAYING SIMPLY TELLING SOMEONE A STORY, EVEN THOUGH IT IS NOT A STORY THAT IS OF A NORMAL FAMILY, IN TERMS OF A MOTHER AND FATHER, THIS IS, 2 IS SORT OF A -- IT IS SORT OF AN UNUSUAL SITUATION, WITHOUT BE THERING SOME LINKAGE TO HOW THIS AFFECTED THE DEFENDANT EMOTIONALLY, THERE IS NO REASON --

HOW THIS HAS SOME EFFECT ON HIS CULPABILITY FOR THIS CRIME?

OR REALLY IS THE CULPABILITY FOR THE CRIME OR, I MEAN, WHEN WE LOOK AT, IF THERE WAS CHILDHOOD ABUSE, THERE IS NOT A NECESSITY TO LINK IT UP TO THE CRIME, WHY THE PERSON COMMITTED THE CRIME, FOR SOMETHING TO BE A MITIGATING FACT OR, IS THERE?

WELL, I THINK YOU HAVE CONSIDERED, ALMOST, A PER SE LINK, BECAUSE IT AFFECTS YOUR PENALTY TO HAVE BEEN ABUSED, WHEREAS HERE SIMPLY BEING RAISED BY A SERIES OF PEOPLE THAT LOVE YOU, WHERE THERE IS NO EVIDENCE THAT YOU FELT ABANDONED BY ANY OF THESE PEOPLE. THE DEFENDANT DOESN'T TESTIFY HE FELT HORRIBLE ABOUT HAVING TO BE PASSED BACK AND FORTH, AND SINCE THESE PEOPLE WERE STANDING UP THERE SAYING WE WENT FROM MY HOUSE TO HER HOUSE TO HER HOUSE AND WE ALL LOVED HIM AND WE ALL TREATED HIM WELL. AND THE TRIAL COURT PROPERLY CONSIDERED THIS AND SAID IT IS NOT MITIGATING. AND EVEN IF YOU WERE TO FIND THAT TO BE ERROR, THE ERROR WILL BE HARMLESS. YOU HAVE THREE AGGRAVATORS HERE, TWO OF WHICH ARE MERGED AGGRAVATORS. YOU HAVE A PRIOR MURDER IN AMONGST THE PRIOR VIOLENT FELONY AGGRAVATOR, AND YOUR MITIGATION IS

BASICALLY, WELL, IS HE A GOOD FATHER TO CHILDREN HE HASN'T SEEN, ONE OF WHOM WAS A MONTH OR TWO MONTHS OLD WHEN HE WAS ARRESTEDED. THE OTHER ONE WAS TWO. BUT IS HE A WONDERFUL FATHER TO THESE CHILDREN HE HAS NEVER BEEN AROUND. THAT HE COOPERATED BY CONFESSING CONFESSING. AND THAT HE SUDDENLY STARTED READING SELF-HELP BOOKS AND FOUND FAITH AND CUSTODY. SO THE AGGRAVATORS ARE GOING TO OUTWEIGH THE MITIGATORS, EVEN IF YOU GIVE THAT EVIDENCE ANY CREDIT, AND THEREFORE ANY ERROR WOULD BE HARMLESS. IF THE COURT HAS NO FURTHER QUESTIONS, THE STATE WOULD RESPECTFULLY REQUEST YOU AFFIRM.

THANK YOU, MS. JAGGARD. MR. LIPINSKI, REBUTTAL YOU MEANT.

YES, YOUR HONOR. IF I MIGHT, THE COURT ASKED WHAT THE PROPOSED INSTRUCTION WAS. THE PROPOSED JURY INSTRUCTION BY LEONARDO FRANQUI IS REFLECTED AT PAGE 127. THIS INSTRUCTION WAS THE STATE IS REQUIRED TO, THE STATE IS REQUIRED TO PROVE BEYOND A REASONABLE DOUBT EVERY ELEMENT OF THE OFFENSE. AGGRAVATING FACTORS ARE LIKE ELEMENTS OF A CAPITAL FEEL FELONY AND THAT THE STATE MUST ESTABLISH THEM BEYOND A REASONABLE DOUBT. THE STATE IS REQUIRED TO PROVE THAT AGGRAVATING CIRCUMSTANCES, IF ANY, OUTWEIGH THE MITIGATING CIRCUMSTANCES, BEFORE YOU MAKE CONSIDER A DEATH SENTENCE. AND THAT IS BASICALLY THE INSTRUCTION THAT, ON 31 TO 32, THAT THE DEFENSE FIRST WANTED. THE FIRST, THE DEFENSE FIRST WANTED, AND THIS IS REFLECTED WHEN DEFENSE COUNSEL 31 SAYS WE BELIEVE UNDER HENYARD, DEATH IS NEVER AN APPROPRIATE SENTENCE. THE JURY CAN VOTE FOR MERCY, EVEN IF THEY FOUND THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATINGS, AND I HAVE A CITE FOR THAT. THAT IS AN INSTRUCTION THAT SAYS YOU CAN TELL A JURY THAT? I BELIEVE WHAT YOU INSTRUCTED THE JURY WAS INAPPROPRIATE. THE COURT SAYS I THINK YOU ARE WRONG. THE COURT GOES ON TO SAY BUT, UNLESS THAT IS LIKE SAYING THAT THE FLORIDA SUPREME COURT HAS, ALSO, RECOGNIZED THE ABILITY OF JURORS TO EXERCISE A JURY PARDON THAT, DOESN'T MEAN YOU ARE ENTITLED TO HAVE AN INSTRUCTION. YOU CAN FORGET THE LAW AND GIVE A PARDON. THAT DOESN'T ALLOW FOR JURY PARDON. I AM NOT GOING TO GIVE AN INSTRUCTION, AND THEN THE COURT GOES ON, AND MAKES THE OTHER COMMENTS. ONCE AGAIN, THIS COMES UP AT 90, WHEN AT THIS TIME, THE DEFENSE COUNSEL HANDS HENYARD TO THE COURT, HANDS HENYARD TO THE COURT. THE COURT, AT THAT TIME, AND REQUESTS THE COURT TO GIVE AN INSTRUCTION, BASED UPON WHAT HENYARD SAYS, THAT EVEN IF THE JURY FINDS THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES, IT IS WITHIN THEIR DISCRETION TO RETURN A RECOMMENDATION OF LIFE. COULD CONSIDER. COULD CONSIDER A DEATH RECOMMENDATION. JUDGE, I AM NOT GOING TO DO THAT. AS I REPEAT MY QUESTION TO THE JURORS AND MY FINAL INSTRUCTIONS I WILL TELL THEM THEY SHOULD. I AM NOT GOING TO TELL THEM IGNORE THE LAW. ALL RIGHT. BRING IN THE JURY. ONCE AGAIN, THE COMMENTS GO ON. ONCE AGAIN AT 301 OF THE TRANSCRIPT, DEFENSE COUNSEL OBJECTS AGAIN, AND THE JURY, THE INSTRUCTIONS GO, THE INSTRUCTIONS, AND ALSO THE COMMENTS BY THE PROSECUTOR, RELYING UPON THE COURT NOT FOLLOWING HENYARD, GO ON. THE SAME THING AT PAGE 436. AN OBJECTION WAS MADE BY DEFENSE COUNSEL ON BASIS THAT HENYARD IGNORED. AND THE NEXT THING AT 506. AT THIS POINT FOR THE FIRST TIME THE PROSECUTOR TALKS ABOUT HENYARD AT ALL. I HAVE DONE SOME RESEARCH ON A LEGAL ISSUE COUNSEL RAISED THE OTHER DAY IN HENYARD. I HAVE, THERE ARE SOME CASES, I LEFT THEM IN MY OFFICE. THERE IS NOTHING IMPROPER BY TELLING THEM THAT THEY SHOULD, IN FACT, FOLLOW THE INSTRUCTIONS AND SAY IF THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES, THEN THEIR VOTE SHOULD BE FOR THE DEATH PENALTY. AND THAT CONTINUED ALL THE WAY THROUGH, AND THIS PARTICULAR CASE, UP UNTIL THE PROSECUTION'S CLOSING. PAGE 1073. IF THE AGGRAVATION, AGGRAVATION IS ALWAYS STRONGER, ALWAYS MORE POWERFUL IN YOUR HEARTS AND IN YOUR MINDS, THE JUDGE IS GOING TO TELL YOU IT IS YOUR OBLIGATION THAT YOU SHOULD VOTE THE RECOMMENDED DEATH PENALTY. WE SUBMIT THAT, ALL THE WAY THROUGH, AND THEN AS I SAID, THE JUDGE RECOGNIZED THAT IT IS JUST NOT AWAY,, WHEN AS I QUOTED FROM THE COURT IN HIS SENTENCING ORDER, HE RECOGNIZED THAT, EVEN AFTER THE

AGGRAVATING OUTWEIGH THE MITIGATING, IT IS THE COURT'S DUTY TO LOOK AT THE QUALITY OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES WHICH HAVE BEEN ESTABLISHED.

SINCE SEEING, AGAIN, AND THAT GOES BACK TO A QUESTION I ASKED YOU ORIGINALLY, SEEING THAT THE JUDGE RECOGNIZED IT IN THE SENTENCING ORDER, SEEING THAT THE JUDGE CORRECTLY INSTRUCTED THE JURY, WHY ISN'T THE OTHER COMMENTS HARMLESS?

ALL THE WAY UP TO THAT TIME. ALL THE WAY THROUGH THE SELECTION OF THE FIRST, ALL THE WAY THROUGH THE QUESTIONING OF THE FIRST JURY PANEL, THE FIRST JURY PANEL WAS INFECTED WITH THOSE COMMENTS, BY BOTH THE STATE AND THE COURT, AND IN THE SECOND JURY PANEL, THE QUESTIONING IN THAT PARTICULAR CASE, THE, AND THAT STARTED ON PAGE 367. THE COMMENTS CONTINUED. THIS JURY PANEL, WHEN IT WAS CHOSEN, THERE WASN'T ONE JUROR THAT WAS SELECTED THAT DIDN'T HEAR THIS.

MR. LIPINSKI, YOUR TIME IS UP. THANK YOU VERY MUCH, COUNSEL, AND COUNSEL, JUSTICE HARDING, I NEGLECTED TO SAY JUSTICE HARDING WHO IS UNABLE TO BE HERE THIS MORNING, BUT WILL BE ON THE PANEL IN THIS CASE, AND HE WILL HAVE THE VIDEO AND THE AUDIO OF THE ORAL ARGUMENT. YOU SHOULD BE AWARE.

THANK YOU, YOUR HONOR.