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Johnny Shane Kormandy v. State of Florida

THE FINAL CASE ON THE COURT'S CALENDAR THIS MORNING IS CORE MANDY VERSUS STATE. -- KORMANDY VERSUS STATE. MR. KAUFMAN.

THANK YOU, YOUR HONOR. THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS CHET KAUFMAN. I AM HERE REPRESENTING JOHNNY SHANE CARM ANDY, THE APPELLANT IN -- KORMANDY, THE APPELLANT IN A CAPITAL CASE RESENTENCING. I WOULD LIKE TO RESERVE FIVE MINUTES OF REBUTTAL AND ALL OF THE ISSUES THAT ARE NOT DISCUSSED HERE, ORALLY, I REFER TO THE BRIEF. THE COURT IS FAMILIAR WITH THESE CIRCUMSTANCES, HAVING SEEN AND WRITTEN A COUPLE OF OPINIONS ON THE SUBJECT ALREADY. THE FOCUS THAT I WOULD LIKE TO PLACE HERE, ON THE ORAL ARGUMENT IS THE PROPORTIONALITY REVIEW. THIS COURT HAS DONE PROPORTIONALITY REVIEWS IN SCORES OF CASES INVOLVING CO-PERPETRATEORS, AND I AM SUGGESTING THAT, IF YOU APPLY THE ANALYSIS THAT YOU HAVE USED IN THOSE CO-PERPETRATOR CASES, YOU WILL BE COMPELLED TO FIND, ON THIS RECORD, THAT A LIFE SENTENCE IS THE APPROPRIATE SENTENCE.

ISN'T, PERHAPS, THE MAJOR FACTOR THAT WE HAVE IDENTIFIED, IN MOST OF THE CASES AS A DISTINCTION, IS THE PERSON THAT ACTUALLY COMMITS THE MURDER? AND IN THIS CASE, ISN'T THERE SUBSTANTIAL EVIDENCE THAT, IS IT KORMANDY?

KORMANDY IS HOW IT IS PRONOUNCED.

KORMANDY IS THE PERSON THAT ACTUALLY COMMITTED THE MURDER, AND THAT IS A SUBSTANTIAL FACTOR ALL BY ITSELF THAT WOULD DISTINGUISH, IN TERMS OF ANY PROPORTIONALITY ANALYSIS?

YES AND NO.

THIS DEFENDANT FROM HIS COHORTS?

YES AND NO, YOUR HONOR. WHAT YOU ARE TALKING ABOUT IS A TRIGGERMAN DOCTRINE, AND WHAT THIS COURT HAS DONE, IN THE VARIOUS CO-PERPETRATOR CASES, IS ADDRESS THE TRIGGERMAN, BY LOOKING AT WHETHER OR NOT A PERSON INTENTIONALLY CAUSED SOMEBODY'S DEATH, AND IF ONE OF THE CO-PERPETRATEORS INTENTIONALLY CAUSED A DEATH, CERTAINLY THAT PERSON WOULD BE THE TRIGGERMAN IN THAT CASE, AND THEN YOU LOOK AT THAT PERSON'S RELATIVE CULPABILITY TO OTHERS THIS. IS NOT SUCH A CASE. THIS IS A CASE WHERE THE EVIDENCE DOES NOT ESTABLISH THAT THERE WAS AN INTENTIONAL HOMICIDE.

WELL, LET'S TAKE IT A STEP AT A TIME. FIRST OF ALL, YOU WOULD AGREE, THEN, THAT, IF -- THAT THE JUDGE AND THE JURY IN THIS CASE WERE ENTITLED TO FIND THAT YOUR CLIENT WAS THE ACTUAL TRIGGERMAN AS YOU PHRASE IT, OR THE ACTUAL KILLER. IS THAT CORRECT?

THERE WAS EVIDENCE THAT WOULD SUPPORT THAT CONCLUSION. YES, YOUR HONOR. THERE WAS, ALSO, EVIDENCE TO THE CONTRARY.

WELL, CLEARLY THE MAJOR FACTOR, INSOFAR AS THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE, A LARGE PART OF THAT WAS THE FINDING THAT YOUR CLIENT WAS THE ACTUAL PERPETRATOR, ACTUALLY INFLICTED THE FATE, ALONE, IS THAT NOT CORRECT?

I DON'T KNOW THAT THAT IS TRUE, YOUR HONOR. IT DEPENDS ON WHETHER OR NOT WE ARE LOOKING AT WHAT THE JUDGE'S FINDINGS WERE, WHICH I HAVE ARGUED VOCIFEROUSLY THROUGHOUT MY BRIEF, IS TOTALLY BASED ON A THERE THAT I THIS COURT ALREADY REJECTED AS A MATTER OF LAW IN THE PRIOR APPEAL. THE JUDGE, HERE, PREDICATED, I SHOULD SAY, THE STATE, IN ITS PRESENTATION OF THE CASE, TOTALLY PREDICATED ITS THEORY UPON THE PREMEDITATION OF WIT WITNESS ELIMINATION THEORY THAT THIS COURT ADDRESSED IN ITS APPEAL AND FOUND THAT THE PREMEDITATIONAL LAW HAD NOT BEEN PROVED THAT, THERE WAS NO INTENT OF PROOF OF INTENTIONAL HOMICIDE IN THIS CASE, AND THEREFORE IT WAS A REVERSIBLE ERROR NOT TO GIVE A JUDGMENT OF ACQUITTAL ON THE PREMEDITATION THEORY. THE PREMEDITATION THEORY WAS BASED SOLELY ON THE WITNESS'S THEORY, THAT IT WAS A PREMEDITATED MURDER, AND IT WAS PREMEDITATED BECAUSE THE PERPETRATORS WENT INTO THE HOUSE WITH THE INTENTION OF ELIMINATING THE WITNESSES. THAT IS THE SOLE AND EXCLUSIVE THERE THAT I THIS STATE HAS PRESENTED, AND THAT THEORY CANNOT BE DISCONNECTED FROM THE WITNESS ELIMINATION THEORY. THAT WAS REJECTED BY THIS COURT AS A MATTER OF LAW IN THE FIRST APPEAL.

ONE OF THE THING THAT IS THE US SUPREME COURT HAS DONE, IN EXTENDING THE DEATH PENALTY BEYOND THE ACTUAL PERPETRATOR IN THE IN MAN-TYSON ANALYSIS -- IN THE INMAN-TYSON ANALYSIS, WAS THAT WE SHALL ALSO INCLUDE, IN THE POTENTIAL FOR DEATH CANDIDATES, THOSE PEOPLE THAT COMMIT ACTS THAT ARE SO WILLFUL OR CULPABLE IN THEIR ACTIONS THAT, EVEN THOUGH THEY WEREN'T PREMEDITATED OR INTENDED, THAT THEY, ALSO, CAN BE INCLUDED AND SUBJECT TO THE DEATH PENALTY? NOW, WHY EVEN ACCEPTING THE DISPUTE ABOUT WHETHER OR NOT THE ACTUAL FINAL FIRING OF THE GUN WAS AN ACCIDENT OR PREMEDITATED, WHY, UNDER THOSE CIRCUMSTANCES, WOULDN'T YOUR CLIENT STILL BE SET APART FROM THE OTHERS, IN TERMS OF HIS CULPABILITY, BECAUSE HE IS OBVIOUSLY DOING SOMETHING THAT NOT ONLY COULD LEAD TO BUT, IN THIS CASE, DOES LEAD TO THE SENSELESS KILLING OF THE VICTIM?

WHAT YOU ARE REFERRING TO, YOUR HONOR, EXCUSE ME, IS THE TYSON EIGHTH AMENDMENT PROPORTIONALITY DOCTRINE, AND THE TYSON CASE THAT STATES THE PROPOSITION THAT YOU HAVE JUST DISCUSSED DEALS SPECIFICALLY WITH AN INTENTIONAL HOMICIDE THAT IS A VERY, VERY IMPORTANT FACTOR. IN THAT CASE, THE PERPETRATORS OF THE HOMICIDE, I BELIEVE IT WAS THE FATHER OF THE TYSON BROTHERS, INTENTIONALLY CAUSED THE DEATHS OF THE INDIVIDUALS IN THAT CASE. THERE IS ABSOLUTELY NO QUESTION WHATSOEVER. SO THE ONLY ISSUE IN THAT CASE WAS WHETHER, WHEN THERE IS A INTENTIONAL MURDER, DO THE CO-PERPETRATEORS, WHO, THEMSELVES, DID NOT PULL THE TRIGGER, SHOULD THEY, ALSO, BE SUBJECT TO THE DEATH PENALTY, UNDER THE EIGHTH AMENDMENT, AND THE COURT SAID, UNDER THOSE CIRCUMSTANCES, YES. THE COURT DID NOT ADDRESS, AND SUBSEQUENTLY HAS NOT ADDRESSED THE SITUATION WHERE THE DEATH WAS NOT CAUSED INTENTIONALLY BUT WAS CAUSED BY AN ACCIDENT, SO THE TYSON DOCTRINE, ALTHOUGH YOU ACTUALLY PORTRAY IT, DOES NOT DIRECTLY APPLY HERE, TO PERMIT THE DEATH SENTENCE IN THIS INSTANCE.

ISN'T THE WORD "ACCIDENT", THOUGH, SORT OF A MISNOMER FOR WHAT HAPPENED UNDER THE CIRCUMSTANCES OF THIS CASE, WHERE WE ARE TALKING ABOUT AN ARMED BURGLARY, AND THEN THE ACTS THAT FOLLOWED, AFTER THIS, AND THEN THE HOLDING OF THE GUN TO THE HEAD OF THE VICTIM, UNTIL IT FINALLY DISCHARGES? IN OTHER WORDS -- CALL THAT AN ACCIDENT IN THE NORMAL COURSE OF WHAT WE TAKE TO BE AN ACCIDENT, ISN'T THAT A MISNOMER, UNDER THE CIRCUMSTANCES OF THIS CASE?

NO, YOUR HONOR. IT IS NOT A MISNOMER. IT IS, ALSO, THE ACTUAL EVIDENCE THAT WAS PRESENTED, AND, ALSO, THE BASIS UPON WHICH THIS COURT DECIDED THE FIRST APPEAL. THAT WAS THE THEORY THAT WAS PRESENTED. IT COULD HAVE BEEN AN INTENTIONAL MURDER OR IT COULD HAVE BEEN AN ACCIDENTAL MURDER, AND THIS COURT, LOOKING AT THOSE TWO THEORIES AND LOOKING AT THE EVIDENCE IN THIS CASE, SAID, WELL, IT MAY NOT HAVE BEEN AN

INTENTIONAL MURDER, AND THE STATE HAS NOT CARRIED ITS BURDEN TO PROVE AN INTENTIONAL MURDER. THE ONLY OTHER THEORY WAS AN ACCIDENT, AND I DON'T THINK THAT IS A MISNOMER, BECAUSE THAT IS EXACTLY WHAT THE EVIDENCE WAS IN THIS CASE, THAT IT COULD HAVE BEEN AN ACCIDENTAL FIRING. YOU ARE SUGGESTING THAT IT MIGHT HAVE BEEN A RECKLESS ACCIDENT. I AM NOT SUGGESTING OTHERWISE.

I AM SUGGESTING THAT, IN THE CONTEXT OF YOU ARGUING THE RELATIVE CULPABILITY OF THE PARTICIPANTS IN THIS CRIME, ALL OF WHICH WOULD BE CANDIDATES FOR THE DEATH PENALTY, IN TERMS OF CULPABLEITY, THAT, IN OTHER WORDS, UNDER THE FACTS HERE, THAT BOTH THE JUDGE AND THE JURY WERE ENTITLED TO CONCLUDE THAT YOUR CLIENT WAS THE MOST CULPABLE OF THE PARTICIPANTS IN THIS CRIME. IS THAT NOT CORRECT?

I THINK THEY ARE ALLOWED TO TAKE INTO CONSIDERATION, THE FACT THAT THE GUN WENT OFF WHILE IT WAS IN MY CLIENT'S HANDS, AS OPPOSED TO THE OTHER INDIVIDUALS IN THE CASE, YES, BUT THAT IS NOT THE SOLE RESPONSIBILITY OF THIS COURT, IN LOOKING AT PROPORTIONALITY REVIEW. THIS COURT, IN PROPORTIONALITY CASES, HAS LOOKED AT MANY FACTORS, NOT JUST WHETHER OR NOT ONE INDIVIDUAL WAS, PERHAPS, THE MORE CULPABLE OF THE OTHER TWO.

I AM NOT DISPUTING THAT, BUT WOULD YOU NOT AGREE THAT THE JUDGE AND THE JURY WOULD BE ENTITLED TO FIND THAT YOUR CLIENT WAS THE MOST CULPABLE OF THE PARTICIPANTS IN THIS CRIME?

I AM NOT SURE THAT THAT IS A CLEAR-CUT ANSWER, YOUR HONOR, BECAUSE THE EVIDENCE ALSO SHOWS THAT BUFKIN WAS THE LEADER OF THIS CRIME. BUFKIN LED THE EPISODE. BUFKIN WAS THE ONLY ONE WHO WENT INTO THAT HOUSE WITHOUT A MASK ON, WITHOUT ANYTHING ON HIS HANDS TO COVER HIS IDENTITY, TO CONCEAL HIMSELF. BUFKIN WAS THE ONE WHO HAD OBTAINED THE GUN THAT THEY USED TO ENTER THE HOUSE. BUFKIN WAS THE FIRST ONE IN. BUFKIN WAS THE ONE WHO STARTED GIVING ORDERS. BUFKIN IS THE ONE WHO PUT THE PEOPLE DOWN IN THE KITCHEN. BUFKIN IS THE ONE WHO LED THIS THING. TASON WAS INCREDIBLY THE MOST CULPABLE OF THE LEADERS AND THE ONE WHO STARTED THE RAPIST AND SAID SOME VERY CRUEL THINGS DURING THE COURSE OF THE SEXUAL EPISODES.

NEITHER OF THEM, HOWEVER, KILLED ANYBODY, DID THEY?

THE EVIDENCE IS NOT CONCLUSIVE AS TO THAT.

BUT A JUDGE AND A JURY, AS YOU HAVE ALREADY CONCEDED, WOULD BE ENTITLED, UNDER THE EVIDENCE THAT WAS PRESENTED HERE, TO CONCLUDE THAT IT WAS YOUR CLIENT THAT WAS THE SOLE PERSON THAT ACTUALLY KILLED SOMEBODY.

THERE IS EVIDENCE THAT THEY COULD RELY ON, YES, YOUR HONOR. HOWEVER, AGAIN, THAT IS NOT THE ISSUE BEFORE THIS COURT. THE ISSUE IS NOT WHETHER OR NOT THE JURY COULD HAVE SO CONCLUDED. THE ISSUE IS ON THE TOTALITY OF THIS RECORD, WHETHER OR NOT THE PENALTY IS PROPORTIONAL, AND THIS, YOUR QUESTIONS, ALTHOUGH QUITE VALID, DO NOT ADDRESS THE OTHER FACTORS THAT THIS COURT HAS APPLIED IN PROPORTIONALITY CASES. FOR EXAMPLE, THE COURT HAS ALWAYS LOOKED AT WHETHER OR NOT THE CO-PERPETRATEORS HAD BEEN CONVICTED OF THE SAME OR LESS OR OFFENSES. THIS COURT, I THINK, RECENTLY, IN KITE, SAID IF IT IS LESSER OFFENSES, THEN PROPORTIONALITY DOESN'T APPLY, BUT HERE WE HAVE TWO COME PERPETRATORS CONVICTED OF THE EXACT SAME CRIMES, FIRST DEGREE MURDER AND THE ANSWER LATER CRIMES. WHETHER OR NOT THE MURDERER WAS THE DOMINANT FORCE BEHIND THE CRIMINAL EPISODES HAD, IN THIS CASE BUFKIN WAS THE FORCE BEHIND THE CRIMINAL EPISODES. THE EVIDENCE IS PRETTY CLEAR AS TO THAT. HAZEN WAS CLEARLY THE DOMINANT FORCE IN THE SEXUAL CRIMES THAT OCCURRED HERE. THE FACTOR THAT THE COURT HAS LOOKED AT IS WHETHER OR NOT THERE WAS THE INTENT TO CAUSE THE DEATH AND THE

EVIDENCE DOES NOT PROVE AN INTENT TO CAUSE DEATH. WHETHER THE INDIVIDUALS HAD A MORE CRIMINAL HISTORY, THE EVIDENCE IN THIS RECORD SHOWS THAT THE CLEAR CRIMINAL HISTORY, THE STATE OFFERED AS PROVE IN THIS CASE, WAS KORMANDY'S COMMISSION OF THE CRIMES HERE, IN THIS EPISODE, WHEREAS, AS WE KNOW FROM THIS RECORD, THAT BUFKIN WAS AN ESCAPED INMATE AT THE TIME THE EPISODE OCCURRED. WE KNOW THAT HAZEN HAD A PRIOR RECORD OF FELONY CONVICTIONS AND CONVICTIONS OF FALSE STATEMENT AND DISHONESTY. WE KNOW THAT ALL OF THE AGGRAVATORS THAT WERE APPLIED, THE TWO AGGRAVATORS, UNLESS, OF COURSE, YOU WANTED TO READ THE ORDERS, FINDING FIVE AGGRAVATORS THE TWO AGGRAVATORS THAT THE TRIAL COURT ENUMERATED IN THIS RECORDER -- IN THIS ORDER, BOTH A ROSE OUT OF THESE CIRCUMSTANCES AND NOT ANY ANSWER LATER CRIME, WHICH ARE FACTORS THAT WE LOOK AT IN PROPORTIONAL PROPORTIONALITY, SO IF YOU LOOK AT ALL OF THE FACTORS IN THIS RECORD AND NOT JUST ONE POINT ABOUT WHETHER OR NOT THE GUN WAS IN KORMANDY'S HAND WHEN IT DISCHARGED, THEN ALL OF THOSE FACTORS, TOGETHER, LOOKING AT THE CO-PERPETRATEORS HERE, LOOKING AT THE LIFE SENTENCING HERE, THAT, IN ITS TOTALITY, DICTATES A LIFE SENTENCE.

HOW DOES THIS ALL, ALL OF THIS INFORMATION THAT YOU KEEP ALLUDING TO, HOW DOES THIS SQUARE WITH A DEFENDANT HAVING AN INDIVIDUALIZED SENTENCING, IF WE ARE, ALSO, GOING TO CONSIDER, IN A PARTICULAR DEFENDANT'S SENTENCING, WHETHER OR NOT THEY HAVE A WORSE RECORD THAN SOMEONE ELSE OR BETTER RECORD, CRIMINAL RECORD? IF SOMEONE ELSE'S LIFE IS BETTER OR WORSE THAN, YOU KNOW, THIS DEFENDANT'S LIFE. HOW DOES THAT SQUARE WITH THE WHOLE IDEA THAT A SENTENCING COULD BE INDIVIDUALIZED?

YOUR HONOR, THE QUESTION THAT I THINK, IN PART, WAS ADDRESSED, IN CALLAN VERSUS COLLINS, IN JUDGE BLACKMON'S SENTENCING THERE, MANY THING IN HIS THE JURISPRUDENCE, AND I HAVE RAISED THAT ISSUE HERE, ALSO, AS PART OF MY 07 THINKS TO THE DEATH -- OF MY OPPOSITION TO THE DEATH PENALTY HERE, IT IS VERY DIFFICULT TO SAY WHETHER OR NOT SOMEBODY WHO HAS A DIFFERENT BACKGROUND SHOULD BE GIVEN DEATH AND. THE PERSON, WITH A LESSER BACKGROUND, BE GIVEN LIFE OR VICE VERSA. IT IS NOT CLEARLY RECONSILABLE, YOUR HONOR. THERE ARE A LOT OF THINGS ABOUT THE DEATH PENALTY THAT ARE CLEARLY NOT RECONSILABLE. AND YET, OF COURSE, THAT IS THE BALL THAT THIS COURT HAS USED, TIME AND AGAIN FOR DECADES.

IT SEEMS LIKE YOUR PRIME ARGUMENT HERE HAS TO REVOLVE AROUND, AGAIN, THE DEGREE OF CULPABILITY THAT YOUR CLIENT HAS FOR THE MURDER, AND IF -- AND I AM LIKELY TO ADDRESS, I GUESS, IN THAT CONTEXT, WHAT LEEWAY THE TRIAL COURT HAD, BECAUSE IT LOOKED LIKE HIS ANALYSIS OF WHY IT WAS NOT EQUAL CULPABILITY WAS BECAUSE KORMANDY WAS DOING THIS TO AVOID ARREST, TO, THERE WAS A PREPLAN, AND THINGS THAT YOU SAY THAT WE HAVE ALREADY DECIDED IN A PRIOR APPEAL, OR THIS COURT DECIDEDED IN A PRIOR APPEAL, AS A MATTER OF LAW, COULDN'T BE FOUND, SO IT SEEMS LIKE THAT IS WHERE YOU HAVE GOT -- I NEED TO UNDERSTAND. IN OTHER WORDS YOU HAVE A TRIAL COURT. NORMALLY WE LET THE TRIAL COURT DECIDE THE QUESTION OF RELATIVE CULPABILITY, SUBJECT TO OUR PROPORTIONALITY REVIEW. HERE, THE TRIAL COURT MAKES THE DECISION THAT HE IS MORE CULPABLE.

BECAUSE THE TRIAL COURT DECIDED NOT TO PAY ATTENTION TO THIS COURT'S MANDATE, THE TRIAL COURT CHOSE TO DETERMINE, ON ITS OWN THAT, THIS WAS, IN FACT, A PREMEDITATED HOMICIDE, WHEN THIS COURT SAID, AS A MATTER OF LAW, IT IS NOT A PREMEDITATED HOMICIDE. WHEN THE TRIAL COURT CHOOSES TO IGNORE THE MANDATE OF THE COURT --

THE STATE HADN'T PROVED THAT WITH THE GUILT PHASE, AS A MATTER OF LAW, DOES THAT, THEN, FIND THE STATE AND THE TRIAL COURT -- FINE THE STATE AND THE TRIAL COURT FOR ASSESSING THE PUNISHMENT?

ABSOLUTELY NO DOUBT ABOUT IT, AND ESPECIALLY WHEN THE GUILT GUILT-PHASE THEORY IS PART OF THE CIRCUMSTANTIAL EVIDENCE THAT THE STATE HAS TO PROVE, WHICH IT CERTAINLY WAS, HERE, PREMEDITATION, VERSUS, ON FOR EXAMPLE, COLD AND CALCULATED MURDER. THIS STATE PARTICULARLY DIRECTED THE TRIAL COURT NOT TO FIND CCP ON THE REMAND.

BUT HE USES IT FOR ASSESSMENT OF CULPABILITY.

I THINK, YOUR HONOR, THAT MIGHT JUST BE A WAY TO MINCE WORDS. I FIND IT VIRTUALLY IMPOSSIBLE TO BELIEVE THAT THE JUDGE WAS NOT FINDING COLD, CALCULATED AND PREMEDITATED, WITNESS ELIMINATION, AND HEINOUS, ATROCIOUS AND CRUEL, BASED ON THE LANGUAGE THAT THE TRIAL COURT USED IN ITS ORDER.

YOU ARE IN YOUR REBUTTAL TIME.

THANK, YOUR HONOR. I WILL SIT DOWN AND RESERVE THE REST OF MY TIME.

MAY IT PLEASE THE COURT. CURTIS FRENCH, REPRESENTING THE STATE OF FLORIDA. I THINK WE NEED TO ADDRESS THESE THINGS IN SOME KIND OF ORDER, WHEN WE ARE TALKING ABOUT PROPORTIONALITY. WE HAVE, ON THE ONE HAND, A TYSON CONSTITUTIONAL PROPORTIONALITY EVALUATION, IN WHICH THE DETERMINATION THAT YOU HAVE TO MAKE IS, IS THIS DEFENDANT'S INDIVIDUAL CULPABILITY SUFFICIENTLY GREAT TO WARRANT A DEATH SENTENCE, UNDER THE STANDARDS SET OUT IN TYSON? PAST THAT, YOU, ALSO, HAVE WHAT THIS STATE DOES, WHICH IS A COMPARATIVE PROPORTIONALITY REVIEW, IN WHICH YOU COMPARE THE FACTS OF THIS CASE WITH THE FACTS OF OTHER CASES, AND THE IDEA IS THAT YOU ARE REVIEWING ALL OF THE, LOOKING AT THIS CASE IN COMPARISON WITH ALL OF THE OTHER DEATH PENALTY CASES, TO DETERMINE OR IN ORDER TO PROPOSE OAT CONSISTENCY IN SENTENCING, AND FINE -- TO PROMOTE CONSISTENCY IN SENTENCING, AND FINALLY WE HAVE THE COMPARATIVE PROPORTIONALITY REVIEW THAT IS RAISED IN THIS CASE, WHICH HAS TO DO WITH THE SENTENCES OF THE CODEFENDANTS. WE WOULD CERTAINLY DISAGREE WITH ANY SUGGESTION THAT TYSON HOLDS THAT ONLY PREMEDITATED MURDERERS CAN GET THE DEATH SENTENCE OR CODEFENDANTS OF PREMEDITATED MURDERS CAN GET THE DEATH SENTENCE. I THINK THE CLEAR MESSAGE OF TYSON IS THAT, IF YOU ARE --

WELL, I GUESS, I THOUGHT HIS ARGUMENT REALLY WASN'T THAT IT WAS ONLY PREMEDITATED MURDERS BUT THAT INTENTIONAL KILLING. AS OPPOSED TO PREMEDITATED. THAT EVEN IF IT WAS, SAY, DURING THE COURSE OF A FELONY, THAT IT COULDN'T AND ACCIDENT. I GUESS THAT IS THE WAY I INTERPRETED HIS ARGUMENT.

IF THAT IS HIS ARGUMENT, I WOULD STILL DISAGREE WITH IT, BECAUSE, AS I RECALL, THE TYSON STANDARD, IT HAS TO BE THAT YOU ACTED WITH A RECKLESS DISREGARD TO THE POSSIBILITY THAT DEATH MAY OCCUR, THAT YOU CONTEMPLATED USING LETHAL FORCE, AND OTHER FACTORS THAT DON'T NECESSARILY MEAN THAT YOU KILLED INTENTIONALLY AT A PARTICULAR TIME. IN THIS PARTICULAR CASE, I THINK CLEARLY THE MURDER IS SOMETHING THAT WAS QUITE FORESEEABLE, IF YOU GO INTO A RESIDENCE, YOU INVADE A RESIDENCE, YOU ARE ARMED WITH A .44 CALIBER WEAPON, AND BY THE WAY, THESE VICTIMS WERE REPEATEDLY THREATENED WITH DEATH, THROUGHOUT THESE PROCEEDINGS, IF THEY DIDN'T COOPERATE. IN FACT THEY DID COOPERATE, AND MR. McADAMS IS NEVERTHELESS DEAD. THE IT A VERY AGGRAVATED CRIME, AND IN FACT, THE TRIAL JUDGE FOUND, EXPLICITLY, IN REJECTING THE PROPOSED MITIGATE OR, THAT MR. KORMANDY'S DEATH SENTENCE WAS DISPROPORTIONATE TO OR DISPARATE TO THE SENTENCES OF THE DEFENDANTS. IT IS VERY CLEAR THAT KORMANDY, HIMSELF, SHOT McADAMS IN THE BACK OF THE HEAD WHILE HE KNELT ON THE KITCHEN FLOOR AND PLEADED WITH HIS WIFE NOT TO BE HURT. THE EVIDENCE IS CLEARLY THAT KORMANDY WAS THE KILLER AND, IF NOTHING ELSE, THAT DISTINGUISHES HIM FROM HIS TWO CODEFENDANTS.

LTS SAY BACK HERE -- LET'S SAY STAY BACK HERE. IF IN MAN WAS THE SHOOTER, WE DON'T

HAVE TO -- IF INMAN WAS THE SHOOTER, WE DON'T HAVE TO DO THAT ANALYSIS IN THIS CASE. TO WHAT EXTENT IN PROPORTIONALITY, WOULD THE TRIAL COURT BE BOUND, BY THIS COURT FINDING, AS A MATTER OF LAW, THAT THE STATE HAD NOT PROVED PREMEDITATION, IN TERMS OF, BECAUSE YOU JUST SAID THAT THE JUDGE FOUND THAT HE, THAT KORMANDY SHOT THE VICTIM EXECUTION STYLE, WHICH WOULD NOT ONLY SUPPORT PREMEDITATION BUT MIGHT SUPPORT CCP AS WELL. I MEAN, HOW DOES THAT, YOU HAD AN UNUSUALLY PROCEDURAL POSTURE. I WANT TO UNDERSTAND WHAT YOU ARE SAYING THE JUDGE'S LEEWAY WAS, ON MAKING A FINDING OF FACT AS FAR AS EQUAL CULPABILITY. OR RELATIVE CULPABILITY.

KORMANDY ARGUES THAT THIS COURT MANDATED OR ISSUED SOME SORT OF MANDATE. WHAT THIS COURT SAID, IN ITS ORIGINAL OPINION, AFTER REVERSING THE PENALTY PHASE OR REVERSING THE DEATH SENTENCE ON OTHER GROUNDS, SAYS WE CAUTION THE TRIAL COURT ON AN ADDITIONAL POINT. CLEARLY A MURDER CANNOT BE COLD, CALCULATED AND PREMEDITATED, WITHOUT ANY PRETENS EVER JUSTIFICATION -- ANY PRETENSE OF JUSTIFICATION, AND THIS COURT DID NOT CONCLUDE, I DON'T THINK, PREMEDITATION, AND CLEARLY THIS COURT IS RESENTENCING CONDUCTED ON A CLEAN SLATE, AND IN FACT, I BELIEVE, ON INMAN --

ARE YOU SAYING THE FACT THAT, IF YOU HAVE NOT PROVEN PREMEDITATION IN THE GUILT PHASE?

YOU CAN PRESENT ADDITIONAL EVIDENCE IN THE PENALTY PHASE.

ADDITIONAL EVIDENCE IN THE PENALTY PHASE.

THAT'S CORRECT. WHETHER OR NOT THERE IS REVERSAL. IN FACT, IF YOU HAD A TRIAL AND YOU CAN PRODUCE EVIDENCE ON A CHARGE OF FELONY MURDER AND THEN YOU WANTED TO PRESENT COLD, CALCULATED AND PREMEDITATED AGGRAVATORS, YOU COULD PRESENT EVIDENCE AT THAT TIME.

WHAT WAS IN THIS CASE THAT WOULD POINT TO PREMEDITATION THAT HAD NOT BEEN PRESENTED BEFORE?

THE TRIAL COURT, FIRST OF ALL I DISAGREE WITH KORMANDY THAT THE TRIAL COURT FOUND A CCP AGGRAVATOR. I DON'T THINK HE DID. I DON'T THINK THERE IS ANY LANGUAGE SPECIFICALLY SUPPORTING SUCH A FINDING. HE DID FIND THAT THE PARTIES ENTERED THE RESIDENCE WITH THE INTENT TO ELIMINATE THE WITNESSES, AND --

WHAT EVIDENCE?

BASED ON SEVERAL THINGS, INCLUDING THE FACT THAT BUFKIN, WHO WAS IN THE BACK ROOM, AFTER KORMANDY SHOT MR. McADAMS, THAT BUFKIN SHOT INTO THE GROUND OR INTO THE FLOOR, RATHER THIS AFTERNOON SHOOTING MRS. McADAMS. IT IS THE STATE'S THEORY THAT THAT WAS PART OF THIS PLAN, IN THAT WHAT BUFKIN WAS TRYING TO DISSUADE THE OTHER TWO DEFENDANTS THAT, HE HAD CARRIED OUT HIS PART OF THE BARGAIN, AND CARRIED OUT HIS PREEXISTING PLAN TO ELIMINATE WITNESSES. IN ADDITION, THERE IS THE HAZEN TESTIMONY FROM HIS CASE THAT WAS INTRODUCED INTO THE RECORD IN THIS CASE, BY THE DEFENDANT. IT WASN'T PRESENTED TO THE JURY, BUT IT WAS PRESENTED TO THE COURT, BEFORE THE COURT MADE ITS SENTENCING DECISION. CASE ENTESTIFIED -- KAZEN TESTIFIED THAT, IF HE HAD BEEN IN THERE AND BEEN IN THE BACK ROOM WITH MRS. McADAMS, THAT HE WOULD HAVE MADE SURE THAT SHE WAS DEAD. NOW, I SUGGEST THAT THAT IS ADDITIONAL EVIDENCE THAT, IN FACT, WITNESS ELIMINATION WAS THE PLAN, AND THAT BUFKIN, FOR WHATEVER REASON, FAILED TO CARRY OUT HIS PART OF THE BARGAIN.

THE REALITY, THOUGH, IS, HERE THAT YOU REALLY DON'T HAVE DIFFERENT EVIDENCE FROM THE

RECORD THAT THIS COURT HAD THAT WAS BEFORE, BEFORE. WOULD YOU DEAL WITH THE ISSUE THAT THE STATE DID NOT ASK FOR THESE ADDITIONAL AGGRAVATORS THAT THE TRIAL COURT TALKS ABOUT AFTER IT FINDS TWO AGGRAVATORS. IS THAT CORRECT?

THAT'S CORRECT.

NOW, WHAT ARE WE TO DO WITH AN ORDER THAT FINDS TWO AGGRAVATORS, HAS THE PROPORTIONALITY ANALYSIS THAT YOU HAVE REFERRED TO, THAT POINTS TO KORMANDY, BUT YET CONTAINS LANGUAGE THAT SEEMS TO FIND ADDITIONAL AGGRAVATORS THAT THE STATE DIDN'T ASK FOR, AND THAT APPEARS TO BE RULED OUT, AT LEAST IN PART BY OUR PRIOR RULING? WHAT ARE RETO DO WITH ALL THAT LANGUAGE THAT THE TRIAL COURT PUTS IN ITS ORDER?

THAT --

THAT SEEMS TO BASE THIS DECISION ON ADDITIONAL AGGRAVATION THAT WAS NOT ASKED FOR AND THEREFORE IT REALLY WASN'T THE SUBJECT OF ANY RESPONSE BY THE DEFENDANT. WHAT ARE WE TO DO WITH THAT LANGUAGE IN THE SENTENCING ORDER THAT SEEMS TO FIND ALL THIS ADDITIONAL AGGRAVATION?

WHAT YOU DO IS REVIEW THE RECORD, TO SEE IF THE FINDINGS WERE SUPPORTED BY THE RECORD. THE CASE LAW OF THIS COURT IS CONSISTENT THAT THIS COURT CAN CONSIDER AGGRAVATORS THAT ARE PROVED AND ESTABLISHED BY THE EVIDENCE, EVEN IF NOT PRINTED TO OR -- PRESENTED TO OR FOUND BY THE TRIAL COURT, AND IF THAT IS THE CASE, I CERTAINLY THINK THE TRIAL COURT CAN FINDING AVATEORS THAT ARE NOT EXPLICITLY PRESENTED TO IT, AS LONG AS THOSE AGGRAVATORS ARE SUPPORTED BY THE EVIDENCE. WE ALSO THINK THAT HE FOUND TWO, BECAUSE HE, ALSO, FOUND THE HAC AGGRAVATOR, AND KORMANDY DOES NOT CONTEND THAT THAT EVIDENCE FAILS TO SUPPORT THAT AGGRAVATOR. IT CLEARLY DOES. AS FAR AS THE WITNESS ELIMINATION AGGRAVATOR AND WHAT THIS COURT SAID PREVIOUSLY, I WOULD POINT OUT THAT THE WITNESS ELIMINATION, AVOID-ARREST AGGRAVATOR, WAS PRESENTED AND FOUND AT THE ORIGINAL KORMANDY SENTENCING. THIS COURT DID NOT ADDRESS THAT. THIS COURT DID NOT SAY YOU CAN'T FIND THIS, UNLESS YOU FIND PREMEDITATION OR OTHERWISE GIVE ANY WARNINGS ABOUT THAT, AND I THINK THE STANDARD IS DIFFERENT. YOU CAN FIND A WITNESS ELIMINATION AGGRAVATOR, WITHOUT NECESSARILY FINDING PREMEDITATION PER SE. IN THIS PARTICULAR CASE, ONE THEORY THAT THE STATE WOULD HAVE WHICH MAKES THIS DIFFERENT, IS THAT EVEN IF, YOU ACCEPT THAT KORMANDY DIDN'T MEAN TO FIRE THE GUN WHEN HE DID, THAT THE SHOOTING AT THAT PARTICULAR TIME WAS AN ACCIDENT, YOU COULD NEVERTHELESS SEE THAT THEY WENT INTO THAT HOUSE WITH THE PLAN TO ELIMINATE THE WITNESSES, AND WE THINK THE EVIDENCE IN THIS CASE DOES ESTABLISH THAT FINDING.

DOESN'T THAT, THEN, GO RIGHT BACK TO THE EQUAL CULPABILITY ISSUE, BECAUSE BUFKIN, I GUESS THE QUESTION IS, HOW CONSISTENT SHOULD THE COURT BE, IN DEALING WITH SEVERAL DEFENDANTS? THAT THE IDEA IS THAT BUFKIN IS THE ONE THAT GOES IN WITHOUT A MASK. BUFKIN IS PORTRAYED BY THIS COURT AND BY THE STATE IN THE TRIAL OF BUFKIN, AS THE RINGLEADER, AND BUFKIN IS THE ONE THAT DOES SOMETHING, NOW YOU ARE SAYING, IN THE BACK, TO SHOW THAT AT LEAST HE 2409 THAT THERE WAS SOME PRECON -- THAT HE THOUGHT THAT THERE WAS SOME PRECONCEIVED PLAN, SO I UNDERSTAND THIS ARGUMENT BEING NOT, IF BOTH BUFKIN AND HAZEN GOT THE DEATH PENALTY, WE MIGHT NOT BE HERE ON PROPORTIONALITY ARGUMENT FOR KORMANDY, BECAUSE THERE IS A ARGUMENT THAT BUFKIN SHOULD HAVE, WAS ELIGIBLE FOR THE DEATH PENALTY BUT THE STATE PLED HIM --

OF COURSE THE STATE HAD REASONS TO PLEAD HIM.

I UNDERSTAND THAT. BUT IF WE WERE HERE AND ALL THREE OF THEM WERE ELIGIBLE FOR THE

DEATH PENALTY, WE WOULD HAVE THE EDMOND TYSON, THAT THIS IS REC -- RECKLESS, BUT WHEN TWO OF THEM DON'T GET THE DEATH PENALTY AND WHAT YOU HAVE NOW IS THAT THIS WAS PRO CONCEIVED PLAN THAT ALL OF THEM WENT IN TO DO THIS TERRIBLE, HORRENDOUS CRIME KROOIM, DOES THE CONSTITUTIONALITY OF THE DEATH PENALTY -- OF THIS CRIME, DOES THE CONSTITUTIONALITY OF THE DEATH PENALTY SHOW THAT, HOW WE LOOK AT ONE SINGLE MURDER, EVEN IF THE FACTS IN THE TRIAL --

IT DEPENDS ON WHAT YOU LOOK AT, BECAUSE KORMANDY WANTS JUST PORTIONS OF THE RECORD THAT HE PUTS IN, AND ALSO HE RELIES ON THE FACTS OF THE HAZEN CASE AND THAT IS HIS OPINION BUT ADDS TO SUGGESTING TO THE COURT TO LOOK AT THE HAZEN OPINION, TO SEE WHAT WAS PRESENTED, AND IF YOU LOOK AT THE RECORDS IN ALL THREE OF THE CASES, WHICH IS WHAT I THINK YOU HAVE TO DO TO ANALYZE CULPABILITY, I THINK THAT YOU FIND THAT BUFKIN HAS AN IQ OF BETWEEN 65 AND 72. WHAT OTHER MITIGATION MIGHT BE PRESENT IN BUFKIN'S PARTICULAR CASE, WE DON'T KNOW, BECAUSE THERE IS NO PENALTY-PHASE HEARING, AND I THINK THIS COURT HAS MADE IT CLEAR THAT, WHEN ONE IS EVALUATING CULPABILITY, BETWEEN THE CODEFENDANT AND OUTSIDE THE CODEFENDANT CONTEXT, WHEN YOU ARE EVALUATING HAMMOND, YOU CAN'T EVALUATE HIS CULPABILITY, UNLESS WE HAVE MITIGATION EVIDENCE TO REVIEW AND UNLESS WE KNOW WHAT CAN BE PRESENTED IN MITIGATION, SO IN THIS CASE WE DON'T KNOW WHAT BUFKIN COULD HAVE PRESENTED, EXCEPT, AS FORT YOUTH, BEAUTIFUL -- AS FORTUITY, BUFKIN HAS A MENTALLY-BORDERLINE IQ.

IF YOU CAN'T GO BACK AND COMPARISON CASE TO THE OTHER, THEN THE ENTIRE FOR PRORINGSALITY ANALYSIS THAT THIS COURT ENKEFERS -- PROPORTIONALITY ANALYSIS THAT THIS COURT ENDEAVORS, YOU CAN'T FIND OUT, IN THE OTHER CASES, WE DON'T DREDGE UP THE RECORDS THAT SAY LET'S LOOK SPECIFICALLY WHAT THE IQ WAS IN THE CASE WHERE CCP WAS FOUND. IN CASES OUTSIDE OF IT. SO WHEN WE ARE DEALING WITH, I DON'T KNOW IF YOU CALL IT INTERNAL PROPORTIONALITY WITHIN THE CASE, ARE YOU SAYING THAT, UNLESS WE HAVE THREE PENALTY PENALTY-PHASE PROCEEDINGS, THAT WE CAN NOT DO A VALID COMPARISON OF THE THREE DEFENDANTS, FOR THE PURPOSES OF DECIDING WHETHER THERE IS EQUAL OR GREATER CULPABILITY?

WELL, I WOULD RAISE THAT QUESTION. I WOULD POINT OUT THAT THIS COURT HAS, I DON'T KNOW IF YOU CALL IT DREDGED UP, BUT CERTAINLY LOOKED AT THE PENALTY PHASES IN OTHER CASES. FOR EXAMPLE IN RE AND IN BRADLEY BOTH FAIRLY RECENT CASES, AND IN BRADLEY, YOU LOOKED AT THE PENALTY PHASE TRANSCRIPT OF HIS CODEFENDANT AND DETERMINED THAT THERE WAS THIS VARIOUS MITIGATION PRESENT THEIR, AND THAT THEREFORE, BASED ON THAT, THERE WAS A REASON FOR BRADLEY TO GET A LIFE SENTENCE VERSUS BRADLEY'S DEATH SENTENCE, AND ALSO IN RE, AND IN RE THE CODEFENDANT -- IN REY, THE CODEFENDANT -- IN RAY, THE CODEFENDANT LATER TOOK CIRCUMSTANCES INTO GIVING THE LIFE SENTENCE, AND I DON'T KNOW WHY YOU COULDN'T DO THAT HERE. THERE ARE OTHER CIRCUMSTANCES THAT KORMANDY ARGUES, AND HE ARGUES, BASED UPON THIS RECORD, AND THE THING IS, HOW THIS CAME UP IN THIS PARTICULAR RESENTENCING, THAT KORMANDY WAIVED THE SIGNIFICANT NO CRIMINAL HISTORY MITIGATOR, SO NO EVIDENCE WAS PRESENTED, OF COURSE, BECAUSE THE STATE CAN'T PRESENT EVIDENCE, THEN ON APPEAL ON PROPORTIONALITY, HE ARGUES THAT KORMANDY HAS NO PRIOR RECORD. THE ONLY CRIMES HE HAD BEEN CONVICTED OF WERE THE ONES ARE A RISING OUT OF THIS CASE, WHEREAS THE RECORD SHOWS THAT BUFKIN AND HAZEN HAVE CRIMINAL RECORDS, AND OUR VIEW IS, EITHER, A, YOU DON'T CONSIDER IT AT ALL BECAUSE IT IS WAIVER, AND, B, YOU ACTUALLY LOOK AT WHAT THE CRIMINAL RECORDS OF THE CODEFENDANTS ARE VERSUS KORMANDY AND THAT IS SET OUT IN THE ORIGINAL SENTENCING, AND IT IS ALSO SET OUT IN THE PSI, AND HE HAS AN EXTENSIVE CRIMINAL RECORD. WE WOULD JUST SAY LOOK AT ALL OF THAT, AND IF YOU LOOK AT THAT, IT SEEMS TO ME THAT KORMANDY IS MORE CULPABLE, NOT ONLY BECAUSE IS HE THE TRIGGERMAN BUT BECAUSE OF THE OTHER FACTORS, TOO. EVEN IF THE TRIAL COURT ERRED IN FINDING THE WITNESS ELIMINATION AGGRAVATOR, THE STATE WOULD CONTEND, NEVERTHELESS THAT, THAT WAS NECESSARILY AN

AGGRAVATOR AND THAT WOULD BE THE MOST HARMLESS ERROR. WE HAVE THE PRIOR VIOLENT FELONY AGGRAVATOR, BEING THE RAPE OF MRS. McADAMS, THE RAPE COMMITTED DURING A HOME INVASION BURGLARY AND ALSO THAT THE CRIME WAS HEINOUS, AT ATROCIOUS AND -- AN ATROCIOUS AND CRUEL. BY THE WAY, THE ONLY MITIGATION THAT HE REALLY ARGUED WAS THAT HIS CODEFENDANTS GOT A LIFE SENTENCE, AND IN VIEW OF THE FACT THAT KORMANDY IS THE ACTUAL KILLER AND THE ONLY REASON THIS CASE IS A MURDER CASE, WE SUBMIT THAT MITIGATION IS WORTH, AT BEST, VERY LITTLE WEIGHT. IF THERE ARE NO FURTHER QUESTIONS, ILLEGAL I ON MY BRIEF AS TO ANY OTHER ISSUES THAT I DIDN'T ADDRESS HERE TODAY.

THANK YOU, MR. FRENCH. REBUTTAL, MR. KAUFMAN?

THANK YOU, YOUR HONOR. THERE ARE A NUMBER OF POINTS I NEED TO ADDRESS HERE. FIRST, COUNSEL SAYS THAT THE CASE LAW IS CONSISTENT, THAT THIS COURT COULD NOT -- COULD FINDING AVATEORS NOT ARGUED. THAT IS ABSOLUTELY FALSE. I HAVE GIVEN THIS COURT THE CASES. CANADY IS ONE. HAMILTON IS. THE. THEY ARE IN MY BRIEF. WHERE THIS COURT SPECIFICALLY SAID THAT THEY CANNOT, THAT THIS COURT WILL NOT AND CANNOT DO SO. AND THOSE ARE FAR MORE RECENT CASES THAN ANYTHING THE STATE SEEKS TO RELY UPON. THE STATE'S THEORY OF WITNESS ELIMINATION, ABOUT WHY THE SECOND SHOT WAS FIRED IN THE BACK ROOM, THAT WAS RELIED UPON BY THE DISSENT IN THE FIRST OPINION IN THIS CASE, AS EVIDENCE OF WITNESS ELIMINATION PREMEDITATION, SO THIS COURT'S MAJORITY OPINION ALREADY REJECTED THAT AS SUFFICIENT EVIDENCE TO SHOW PREMEDITATION OF WITNESS ELIMINATION. I CANNOT MORE STRONGLY PROTEST THE USE OF NONRECORD EVIDENCE, THE STATE'S RELIANCE ON NONRECORD EVIDENCE TO DISTORT THESE PROCEEDINGS. I HAVE FILED MY MOTION TO STRIKE THE STATE'S BRIEF. I RESTATED MY OBJECTIONS IN MY REPLY BRIEF. I WILL RESTATE THEM NOW. THIS IS A GROSS MISCARRIAGE OF JUSTICE, AND THE COMPLETE DENIAL OF DUE PROCESS, CONFRONTATION, AND OTHER RIGHTS OF MY CLIENT, TO BRING UP ALL OF THESE NONRECORD FACTS THAT WERE NOT PRESENTED BELOW. I POINTED OUT, QUITE SPECIFICALLY IN MY MOTION, IN MY REPLY BRIEF THAT, THE CASE UPON WHICH COUNSEL SEEKS TO RELY, COUNSEL OUGHT TO KNOW BECAUSE IT WAS COUNSEL'S OFFICE CASE AND I KNOW BECAUSE IT WAS OFFICE'S CASE, IN BRADLEY, THE RECORD, IN FACT, HAD BEEN PRESENTED, THE RECORD OF THE CO-PERPETRATOR HAD BEEN PRESENTED IN THE TRIAL COURT AND WAS MADE PROPERLY RECORD IN THE TRIAL, BUT NONETHELESS I POINTED OUT, REGARDLESS OF THE OMISSION IN THE TRIAL COURT'S OPINION, YOU DIDN'T HAVE TO SAY WHERE IN THE RECORD IT WAS, BUT IT WAS IN THE RECORD, PLACED IN THE RECORD OF THE TRIAL COURT. THE ONLY RECORDS UPON WHICH I HAVE RELIED IN THIS CASE ARE THE RECORDS THAT WERE PROPERLY PLACED IN THIS RECORD. COUNSEL ARGUED, SUCH IS THE IQ. THE IQ EVIDENCE IS NOT IN THIS RECORD. IT WAS IN. THE TRIAL RECORD.

WE HAVE BEEN ASKED TO TAKE JUDICIAL NOTICE OF OTHER RECORDS RECORDS?

YES, YOU HAVE, AND YOU HAVE NO AUTHORITY TO TAKE JUDICIAL NOTICE OF RECORDS THAT ARE OUTSIDE OF THE RECORD IN THIS CASE, TO TAKE AS FACT, FACTS THAT WERE PRODUCED IN. THE CASE. YOU HAVE ISSUED A PIN I DON'T KNOW THAT SPECIFICALLY -- AN OPINION THAT SPECIFICALLY STATES THAT, RECENTLY, AS A MATTER OF FACT, I THINK IN 2000, I SUBMITTED THAT THIS MORNING IN SUPPLEMENTAL AUTHORITY. THE COURT, ALSO, UNDER THE STATUTE, HAS NO SUCH AUTHORITY. IT COMPLETELY --

YOU WERE NOT ARGUING EARLIER THAT YOU WERE YOU CAN LOOK AT THE CODEFENDANT'S RECORD. I THOUGHT YOU MADE THAT ARGUMENT EARLIER.

YOUR HONOR, WHAT I HAVE DONE IS I HAVE LOOKED AT THE CODEFENDANTS' RECORDS, TO THE EXTENT THAT THE RECORDS OF THOSE PROCEEDINGS WERE PRESENTED IN THIS RESENTENCING. THERE WERE PORTIONS OF THOSE PROCEEDINGS THAT WERE PRESENTED IN THIS RESENTENCING. THOSE ARE PORTIONS THAT WERE LEGITIMATELY PART OF THIS ERROR, UPON WHICH -- OF THIS

RECORD, UPON WHICH YOU CAN RELY.

WHAT ARE YOU SPECIFICALLY TAKING EXCEPTION TO?

SPECIFICALLY? WELL, YOUR HONOR, I COULD GO DOWN THE LIST HERE, OR I COULD DIRECT YOU TO LOOK AT MY MOTION TO STRIKE THE STATE'S BRIEF, IN WHICH I DID BULLET POINTS OF ABOUT 12 OR 15 DIFFERENT THINGS. TRANSCRIPTS FROM HAZEN'S CASE. TRANSCRIPTS FROM BUFKIN'S CASE. THE IQ EVIDENCE. TRIPTSZ FROM MY CLIENT'S -- TRANSCRIPTS FROM MY CLIENT'S OWN PRIOR APPEAL, WHICH MY CLIENT'S EVIDENCE CAME IN TO SHOW IQ FROM HIS OWN EXPERT IN MENTAL MITIGATION, AND YET IN THIS CASE AT TRIAL BELOW, MY CLIENT EXPRESSLY WAIVED THE OPPORTUNITY TO PRESENT THAT EVIDENCE, FOR WHATEVER REASONS HE HAD, TO MAKE SURE THAT THAT DIDN'T COME IN.

MR. KAUFMAN, YOUR TIME IS UP. THANK YOU VERY MUCH.

THANK YOU, YOUR HONOR. MR. CHIEF JUSTICE: THE COURT WILL BE IN RECESS.