THE COURT WILL NOW
PREPARE TO TAKE UP THE NEXT
CASE.
>> MAY IT PLEASE THE COURT.
>> I WILL CALL THE CASE UP.
>> THE COURT WILL NOW PROCEED
WITH THE CONSIDERATION OF
MOSLEY VERSUS THE STATE.
COUNSEL FOR THE APPELLATE IS
RECOGNIZED.
>> THANK YOU, YOUR HONOR.
MAY IT PLEASE THE COURT.
MY NAME IS BARBARA BUSHARIS
REPRESENTING MISTER MOSLEY.
I WOULD LIKE TO RESERVE 5
MINUTES FOR REBUTTAL.
TODAY I WANT TO FOCUS IN
PARTICULAR ON TWO ARGUMENTS
MADE IN THE INITIAL BRIEF
RELATING TO WHY MISTER MOSLEY
SHOULD HAVE A NEW PENALTY
TRIAL, WITH EVIDENTIARY
MOVEMENTS THE COURT MADE THAT
PREVENTED MISTER MOSLEY FROM
FULLY CROSS-EXAMINING THE MAIN
WITNESS AGAINST HIM AND
PREVENTED HIM FROM FULLY
PRESENTING MITIGATING EVIDENCE.
THE FIRST ISSUE, YOUR HONORS IS
THAT THE TRIAL COURT USED ITS
DISCRETION WHEN IT PREVENTED
MISTER MOSLEY FROM PROCESSING
70 BERNARD GRIFFIN WHO WAS THE
KEY WITNESS, A BOUNTY IN THE
EARLIER GUILT PHASE AND
MOREOVER BY ADDRESSING THE JURY
DIRECTLY TO BOLSTER MISTER
GRIFFIN'S CREDIBILITY AND FOUND
FOR HIS CREDIBILITY AS A
WITNESS.
THIS OCCURRED WHEN MISTER
MOSLEY WANTED TO QUESTION
MISTER GRIFFIN ABOUT TESTIFYING
AND IN PARTICULAR TO ASK ANY
EXPECTATION FOR TESTIFYING
GIVEN HE WAS THEN SERVING A 20
YEAR SENTENCE FOR CRIMES
COMMITTED AFTER MISTER MOSLEY
-- MISTER GRIFFIN WAS A
CO-DEFENDANT AND WAS PLACED ON
PROBATION FOR THAT.
ALWAYS OFFERED A QUESTION --
>> AS A TECHNICAL MATTER, THE

TESTIFYING WITNESS WAS NOT
ELIGIBLE FOR A SENTENCE
REDUCTION DURING THE PENALTY
PHASE TESTIMONY THAT THE
STATUTE LAYS OUT THAT HE CAN
QUALIFY FOR THE BENEFIT WITH
APPREHENSION OR CONVICTION BUT
SILENT TO THE PENALTY PHASE.
HOW DO YOU RESPOND TO THE
STATE'S ARGUMENT ON THAT FRONT?
>> I RESPOND THAT IT IS
IRRELEVANT WHAT IS TAKING PLACE
IN THE PENALTY PHASE.
IT APPLIES TO MISTER GRIFFIN,
THE FINANCIAL ASSISTANCE, THE
STATUTE CONTAINS NO TIME
LIMITATION ON THE PERIOD IN
WHICH THE STATE CAN BENEFIT
OVER THAT.
>> LET'S GET SOME FIRST
PRINCIPLES SQUARED AWAY.
THE TESTIMONY TO WHICH YOU
OBJECT BEFORE US TODAY HAPPENED
AT THE PENALTY PHASE, RIGHT?
>> THAT'S RIGHT.
>> AT THAT TIME MISTER MOSLEY
HAD ALREADY BEEN CONVICTED.
>> THAT IS CORRECT.
>> THERE IS NO LONGER ANY
TESTIMONY BEING GIVEN AT THE
PENALTY PHASE THAT WOULD BE TO
HIS APPREHENSION OR CONVICTION.
IS THAT CORRECT?
>> THAT IS CORRECT BUT IT
DOESN'T MATTER.
BECAUSE THE STATUTE APPLIES TO
ANY PERSON WHO PROVIDES
SUBSTANTIAL ASSISTANCE IN THE
IDENTIFICATION, REST, OR
CONVICTION OF ANY OTHER PERSON
ENGAGED IN CRIMINAL ACTIVITY
THAT WOULD CONSTITUTE A FELONY.
THAT IS IT.
>> THE STATUTE DOESN'T SAY
SENTENCE, IT DOESN'T SAY
PUNISHMENT, RIGHT?
>> IT DOESN'T HAVE TO BECAUSE
MISTER GRIFFIN CAME WITHIN THE
TERMS OF THE STATUTE WHEN HE
PROVIDED THE TESTIMONY HE
PROVIDED TO FIRST IDENTIFY
MISTER MOSLEY AS A PERPETRATOR
>> THAT'S, THAT'S CERTAINLY
TRUE, BUT AGAIN, I WANT TO JUST

FOCUS US ON WHAT'S BEFORE US
TODAY.
WHAT'S BEFORE US TODAY IS THE
TESTIMONY AT THE PENALTY PHASE
AND THAT ALONE, RIGHT?
THERE ISN'T ANY OTHER TESTIMONY
THAT IS THE SUBJECT OF OUR CASE,
IS THERE?
>> WHAT'S BEFORE US TODAY, YOUR
HONOR, IS THE DENIAL OF THE
OPPORTUNITY TO IMPEACH
MR. GRIFFIN BY QUESTIONING HIS
MOTIVE.
AND IF THERE'S ANY POSSIBILITY
THAT HE HOPED FOR OR EXPECTED
SOME KIND OF BENEFIT, HOWEVER
INTANGIBLE, FOR HIS TESTIMONY
THAT WAS LEGITIMATE.
AND UNDER THE TERMS OF THE
STATUTE, HE COULD STILL HOPE FOR
A BENEFIT BECAUSE OF HIS
PARTICIPATION IN THIS
LITIGATION.
THERE'S NO LIMITATION THAT JUST
BECAUSE YOU TESTIFY LATER IN A
PENALTY PHASE TRIAL, YOU
COULDN'T STILL EXPECT A BENEFIT
FOR HELPING TO IDENTIFY, ARREST
OR CONVICT SOMEONE OF A FELONY.
SO BECAUSE THAT'S OPEN-ENDED,
HIS MOTIVATION WAS POTENTIALLY
IN QUESTION, AND IT WAS A
LEGITIMATE SUBJECT OF
QUESTIONING.
THE WAY THAT THE COURT RESPONDED
TO IT, MOREOVER, WENT FAR BEYOND
SIMPLY RESPONDING BASED ON THE
TERMS OF THE STATUTE, ALTHOUGH
OUR POSITION WOULD BE THAT THE
COURT WAS LEGAL AND CORRECT WHEN
IT SAID THERE'S NO WAY TO CHANGE
A SENTENCE THAT HAS ALREADY
BEGUN TO BE SERVED.
BUT ACTUALLY THE COURT'S EXACT
WORDS WERE THERE IS NO LEGAL
AVENUE FOR THAT SENTENCE TO BE
CHANGED AT ALL EXCEPT, PERHAPS,
BY HIS DEATH AND CUSTODY.
THAT WAS LEGALLY INCORRECT.
BUT THE COURT WENT BEYOND THAT.
THE COURT IMMEDIATELY RESPONDED
TO THIS LINE OF QUESTIONING BY
SAYING LET ME ASSURE THE JURY
RIGHT NOW THAT THERE'S NO LEGAL

AVENUE FOR THE SENTENCE TO BE CHANGED.
THE COURT DIDN'T EVEN WAIT FOR AN OBJECTION TO THE CROSS-EXAMINATION, BUT SPOKE DIRECTLY TO THE JURY PUTTING THE WEIGHT OF THE COURT'S AUTHORITY BEHIND MR. GRIFFIN'S TESTIMONY.
MR. MOSLEY SAID THE STATE COULD WRITE A LETTER ASKING TO REDUCE MR. GRIFFIN'S SENTENCE, AND THE COURT JUST TOLD HIM TO SIT DOWN.
MR. MOSLEY SPECIFICALLY SAID I'M TRYING TO ESTABLISH A MOTIVE FOR MR. GRIFFIN'S TESTIMONY, AND THE COURT SAID I AM NOT GOING TO LET YOU ESTABLISH SOMETHING THAT IS NONEXISTENT.
THAT IS A CLEAR COMMENT TO THE JURY THAT YOU CAN BELIEVE THIS WITNESS, THIS WITNESS HAS NO MOTIVE TO FABRICATE, TO EXAGGERATE, TO SHAME HIS TESTIMONY IN EVERY WAY, IN ANY WAY.
AND THAT WAS AN IMPROPER RESPONSE.
>> LET ME-- EXCUSE ME, I MAY HAVE MISSED THIS, BUT DID DEFENSE COUNSEL PROFFER THE CROSS-EXAMINATION THAT HE WOULD HAVE CONDUCTED?
>> WELL, AT THAT POINT, YOUR HONOR, DEFENSE COUNSEL WAS MR. MOSLEY SINCE HE WAS REPRESENTING--
>> RIGHT.
>>-- BY THAT TIME.
>> BUT THERE WAS NO PROFFER.
>> THERE WAS NO PROFFER, BUT I WOULD SAY WHEN THE COURT'S RESPONSE IS NEXT TOPIC, MR. MOSLEY, MR. MOSLEY, NEXT TOPIC OR YOU'LL SIT DOWN, THAT THAT WAS THE COURT EFFECTIVELY CUTTING OFF THAT LINE OF INQUIRY.
SO, BUT YOU'RE CORRECT THAT HE DIDN'T PROFFER SPECIFIC TESTIMONY BESIDES WANTING TO SAY THAT HE WAS TRYING TO ESTABLISH A MOTIVE FOR MR. GRIFFIN IN BEING THERE.
AND HE HAD ALREADY BROUGHT OUT

THAT MR. GRIFFIN'S EARLIER DEAL WITH THE STATE AT THE TIME OF MR. MOSLEY'S FIRST TRIAL HAD NOT BEEN, YOU KNOW, COMPLETELY DISCLOSED OR DESCRIBED ACCURATELY.
THAT AT THAT POINT HE BELIEVED-- AND I DON'T HAVE HIS EXACT WORDS IN FRONT OF ME, BUT THAT HE DENIED HAVING AN EXPECTATION OF BENEFIT WHEN ACTUALLY HE DID AND WAS SENTENCED QUITE RIGHTLY FOR HIS PARTICIPATION IN THE EARLIER OFFENSE.
BUT GOING BACK FOR JUST A MOMENT TO THE SUBSTANTIAL ASSISTANCE STATUTE ITSELF, THE STATUTE GIVES THE STATE THE DISCRETION TO SEEK TO BENEFIT SOMEBODY FOR SUBSTANTIAL ASSISTANCE WITHOUT PUTTING ANY LIMITATION ON WHEN THE STATE CAN SEEK TO DO THAT.
AND THE ONLY CASE THAT I FOUND SO FAR THAT'S DIRECTLY CITED THAT STATUTE, WHICH IS THE McFADDEN DECISION OF THIS COURT, BE-- THE DEFENDANT WAS SERVING SENTENCES THAT HAD HAD BECOME FINAL TWO YEARS BEFORE A SUBSTANTIAL THE ASSISTANCE MOTION WAS FILED.
AND YET THAT WAS NOT A REASON TO DENY THE SUBSTANTIAL THE ASSISTANCE MOTION.
SO THERE'S REALLY NOTHING IN THE STATUTE THAT LETS US SAY THAT IT WOULD NOT, COULD NOT APPLY TO MR. GRIFFIN AT THE TIME HE TESTIFIED AT THE MOST RECENT PENALTY PHASE.
AND WHAT'S THE MOST HARMFUL ABOUT IT IS NOT JUST THAT IT DENIED MR. MOSLEY HIS RIGHT OF CONFRONTING THE WITNESS AND QUESTIONING THE WITNESS, BUT THAT IT WAS DONE IN A WAY THAT LET THE JURY KNOW FROM ALMOST THE VERY BEGINNING OF THE TRIAL THAT THE JUDGE HAD VOUCHED FOR THIS WITNESS AND PUT HIS AUTHORITY, THE TRIAL COURT'S AUTHORITY BEHIND THE TESTIMONY THAT THE WITNESS WAS GIVEN.

AND THAT HAPPENED ALMOST AT THE BEGINNING OF THE PENALTY PHASE.
MR. GRIFFIN, I BELIEVE, WAS THE SECOND WITNESS TO TESTIFY, SO THE SECOND WITNESS THAT THE JURY HEARD.
AND IT WAS HIS TESTIMONY THAT ESTABLISHED THE MOST SERIOUS AGGRAVATORS THAT WERE AT ISSUE.
NOT JUST THEIR EXISTENCE, BUT I WOULD ARGUE ALSO THE WEIGHT THAT THE JURY SHOULD GIVE THEM BECAUSE IT WAS HIS TESTIMONY THAT DESCRIBED TO OFFENSES.
THERE WERE NO OTHER EYEWITNESSES.
AND THAT WAS EMPHASIZED IN CLOSING ARGUMENT WHEN THE STATE REMINDED THE JURY THAT THE ONLY EYES AND EARS THAT WE HAVE TO RELY ON FOR WHAT HAPPENED ARE MR. GRIFFIN'S.
SO FOR ALL OF THOSE REASONS, YOUR HONOR, AND BECAUSE THE TRIAL COURT WAS LEGALLY INCORRECT IN ITS INABILITY OR THE INABILITY OF ANY COURT TO GIVE MR. GRIFFIN SOME KIND OF A BENEFIT AND BECAUSE OF THE MANNER IN WHICH THE TRIAL COURT RESPONDED TO THAT LINE OF INQUIRY, THEN THE ERROR WAS HARMFUL AND IT WAS AT THE COURT'S DISCRETION.
SO WE WILL REQUEST A NEW PENALTY PHASE ON THE BASIS ALONE.
YOUR HONORS, THERE IS ALSO ANOTHER EVIDENTIARY ISSUE WHERE THE COURT ABUSED ITS DISCRETION, AND THAT WAS IN PREVENTING MR. MOSLEY FROM PRESENTING MITIGATION TESTIMONY FROM HIS MOTHER HAVING TO DO WITH, AMONG OTHER THINGS, THE EFFECT ON HIM OR LEARNING OR KNOWING THAT HIS FATHER HAD SEXUALLY ABUSED TWO OF HIS SISTERS WHEN THEY WERE YOUNGER.
AND THIS TESTIMONY WAS PROFFERED TO THE COURT.
IT ALSO WAS PRESENTED DURING MR. MOSLEY'S FIRST PENALTY THE PHASE TRIAL WHEN HE WAS FIRST CONVICTED.

THE ONLY RATIONALE FOR EXCLUDING
IT WAS FAULTY BECAUSE THE
EVIDENCE WAS NOT OFFERED TO
ATTACK THE FATHER.
IT WAS OFFERED TO SHOW THE
EFFECT THAT THIS KNOWLEDGE AND
THIS PERVASIVE SEXUAL ABUSE
WITHIN HIS FAMILY HAD ON
MR. MOSLEY.
MR. MOSLEY'S MOTHER HAD PERSONAL
KNOWLEDGE OF THAT.
THAT WAS DEMONSTRATED IN THE
RECORD OF THE TESTIMONY THAT SHE
WAS ALLOWED TO GIVE AT THE FIRST
TRIAL.
SHE HAD PERSONAL INFORMATION,
THE FACT THAT HE DID NOT LIVE
WITH HER DURING HIS CHILDHOOD IS
NOT RELEVANT TO WHETHER SHE
COULD TESTIFY TO SEEING CERTAIN
EVENTS WITHIN THE FAMILY WOULD
HAVE AN EFFECT ON HIM.
AND THE NATURE OF THAT ABUSE AND
THAT ASSUMPTION WITHIN THE
FAMILY WAS HIGHLY RELEVANT
MITIGATION EVIDENCE.
I WOULD NOTE THAT THE JURY FROM
HIS FIRST PENALTY PHASE WAS NOT
UNANIMOUS IN RECOMMENDING DEATH,
AND THAT ONE OF THE, ONE OF THE
REASONS COULD BE THAT THEY HEARD
A FULLER MITIGATION CASE.
THAT JURY HAD HEARD ALL OF THE
GUILT EVIDENCE AS WELL.
THEY DIDN'T JUST HEAR THE
PENALTY PHASE.
BUT HERE YOU HAD A JURY THAT BY
THE TIME THEY WERE VOTING ON
MITIGATION DIDN'T EVEN FIND
MITIGATION THAT'S CLEARLY IN THE
RECORD, LET ALONE MITIGATION
THAT WAS ARGUABLE.
AND SO WE WOULD ARGUE THAT THAT
DECISION PREVENTING HIM FROM
PRESENTING HIS MOTHER'S FULL
TESTIMONY TO THE JURY IN THE
SECOND PENALTY PHASE WAS ALSO AN
ABUSE OF DISCRETION, AND THAT IT
PREVENTED HIM FROM FULLY
DEVELOPING THE MITIGATION THAT
HE WAS ENTITLED TO PRESENT.
YOUR HONORS, THERE'S ANOTHER
ISSUE I WOULD LIKE TO BRING UP
WHICH IS THE COURT'S FAILURE TO

ADDRESS MR. MOSLEY'S UNEQUIVOCAL
REQUEST TO REPRESENT HIMSELF AT
THE SPENCER HEARING THAT WAS
HELD AFTER HIS PENALTY PHASE
TRIAL.
THE CHRONOLOGY OF EVENTS
RELATING TO MR. MOSLEY'S
SELF-REPRESENTATION SHOW THAT AT
THE BEGINNING OF JURY SELECTION
HE DID EQUIVOCATE AS TO WHETHER
HE WANTED TO REPRESENT HIMSELF
OR WHETHER HE WOULD ACQUIESCE IN
CONTINUING TO BE REPRESENTED BY
COUNSEL WITH WHOM HE HAD ONGOING
DISAGREEMENTS OVER HOW TO HANDLE
DIFFERENT DECISIONS IN HIS CASE.
BUT ONCE HE BEGAN REPRESENTING
HIMSELF WHICH WAS, I BELIEVE, ON
THE SECOND DAY OF JURY
SELECTION, HE CONSISTENTLY
REPRESENTED HIMSELF.
EVEN THOUGH THE OFFER OF COUNSEL
WAS REMOVED, THE NEXT DAY OF
JURY SELECTION AND EACH DAY OF
THE PENALTY PHASE TRIAL, HE'S
VERY CONSISTENT.
NOW I WANT TO REPRESENT MYSELF.
WHEN THE VERDICT CAME DOWN,
MR. MOSLEY WAS ASKED IF HE
WANTED ASSISTANCE FOR PURPOSES
OF THE SPENCER HEARING, AND AT
THAT POINT HE AGREED TO ALLOW
COUNSEL TO BE REPRESENTED.
AND YET IN ADVANCE OF THE
HEARING, REFILED AN UNEQUIVOCAL
REQUEST TO REPRESENT HIMSELF.
SO HE WAS REALLY AT THAT POINT
RETURNING TO THE STATUS QUO OF
THE ENTIRE PENALTY PHASE WHICH
WAS REPRESENTING HIMSELF.
>> HOW LONG BEFORE THE HEARING
WAS THAT MOTION FILED?
>> AT LEAST A WEEK, YOUR HONOR.
>> AND, AND I MAY BE-- I DON'T
MEAN TO STEAL YOUR THUNDER HERE,
BUT ISN'T IT ALSO THE CASE THAT
AT THE OUTSET OF THE HEARING THE
STATE ACTUALLY BROUGHT UP THAT
MOTION THAT WAS PENDING?
>> YOU'RE CORRECT, YOUR HONOR.
THE STATE SAID I BELIEVE PRIOR
TO ADDRESSING THE PLEADINGS, WE
NEED TO ADDRESS THAT REQUEST,
REFERRING BACK TO A PRO SE

PLEADING THAT MR. MOSLEY HAD
FILED.
AND THE COURT SIMPLY SAID,
THAT'S FINE, I INTEND TO DO SO,
AND THEN ASKED THE COUNSEL--
ASKED BOTH COUNSEL TO MAKE
ARGUMENTS.
SO THE COURT REALLY JUST IGNORED
THAT REQUEST.
THE DEFENSE COUNSEL ALSO ASKED,
YOU KNOW, IN SO MANY WORDS ARE
YOU SURE YOU WANT ME TO PROCEED,
AND THE COURT HAD DEFENSE
COUNSEL PROCEED TO MAKE
ARGUMENTS ON A MOTION COUNSEL
HAD FILED.
AND THEN WHEN COUNSEL WAS
FINISHED AND MR. MOSLEY SAID I
WANTED TO REPRESENT MYSELF FOR
PURPOSES OF THIS HEARING, THE
COURT SAID WE'RE PAST THAT.
AND THAT WAS THE END OF IT.
SO THE COURT REALLY JUST ARRIVED
AT THAT HEARING HAVING DECIDED
TO GO AHEAD WITH COUNSEL AND
IGNORED MR. MOSLEY'S UNEQUIVOCAL
REQUEST WHICH WE WOULD ARGUE IS
ERROR ALSO.
AND I BELIEVE I'M INTO MY
REBUTTAL TIME NOW, SO I WILL
YIELD THE REST OF MY TIME.
SAVE THE REST OF MY TIME.
THANK YOU, YOUR HONOR.
>> THANK YOU.
COUNSEL FOR THE STATE.
>> MR. CHIEF JUSTICE, MAY IT
PLEASE THE COURT, I'M ASSISTANT
ATTORNEY GENERAL DAVID CHAPPELL,
AND I REPRESENT THE STATE IN
THIS MATTER.
JUMPING RIGHT INTO THE ARGUMENTS
PRESENTED BY OPPOSING COUNSEL,
FIRST IS THE ISSUE OF WHETHER
THE SUBSTANTIAL COMPLIANCE
STATUTE EVEN APPLIES IN THIS
PARTICULAR CASE.
I THINK IT'S VERY IMPORTANT THAT
THIS COURT BE AWARE OF AND NOTE
THE CONTEXT IN WHICH THE
DEFENDANT WAS CROSS-EXAMINING
MR. GRIFFIN HERE.
IMPORTANTLY, THIS IS THE
DEFENDANT'S SECOND PENALTY
PHASE.

HE DID NOT HAVE A NEW GUILT
PHASE.
THIS WAS ONLY A PENALTY PHASE
SPECIFICALLY TO DETERMINE
WHETHER THE DEFENDANT WAS,
SHOULD RECEIVE THE DEATH PENALTY
OR LIFE SENTENCE FOR HIS MURDER
OF THE 10-MONTH-OLD INFANT, HIS
SON.
IN THIS CONTEXT, THE FACTUAL
ASSERTIONS THAT WERE MADE BY
MR. GRIFFIN WHO WAS THE
CO-DEFENDANT WITH THE DEFENDANT
AT THE INITIAL TRIAL, CLEARLY
JUST ESTABLISHED THE BACKGROUND
FACTS FOR THIS PARTICULAR CASE.
THAT FACTUAL ASSERTION DIDN'T
CHANGE FROM SECOND PENALTY PHASE
FROM THE INITIAL TRIAL, AND
THOSE FACTS ARE CLEARLY
REFLECTED IN THIS COURT'S
OPINIONS DEALING WITH
MR. MOSLEY'S DIRECT APPEAL AND
THE APPEAL OF THE DENIAL OF HIS
POST-CONVICTION CLAIMS.
INITIALLY.
SO THE FACTUAL BACKGROUND THAT
WAS ESTABLISHED HERE WAS LARGELY
NOT SOMETHING THE STATE NEEDED
TO UTILIZE MR. GRIFFIN IN ORDER
TO PUT ON.
THEY COULD HAVE MERELY READ
TRIAL TRANSCRIPT TESTIMONY, THEY
COULD HAVE INTRODUCED THIS
COURT'S OPINIONS TO ESTABLISH A
FACTUAL BASIS THAT THE JURY
COULD THEN MAKE A CONCLUSION AS
TO WHETHER OR NOT THE DEFENDANT
DESERVED LIFE OR DEATH.
ALL OF WHICH IS TO SAY THAT IN
THIS PARTICULAR CONTEXT EVEN IF
THIS COURT DETERMINES THAT
SUBSTANTIAL COMPLIANCE STATUTE
WAS APPLICABLE SOMEHOW IN
MR. GRIFFIN'S SITUATION, ANY
ERROR THAT OCCURRED HERE WAS
CLEARLY HARMLESS.
NOW, THE STATE IS NOT CONCEDING
BY ANY STRETCH OF THE
IMAGINATION THAT SUBSTANTIAL
COMPLIANCE STATUTE APPLY.
AS JUSTICE COURIEL CLEARLY
POINTED OUT, THE STATUTE REFERS
TO THE DETENTION, ARREST OR

CONVICTION OF THE DEFENDANT.
>> BUT THE REALITY, I MEAN, I THINK THE ARGUMENT THAT IS BEING MADE IS THAT THE STATE COULD, UNDER THAT STATUTE, GO BACK AND SEEK TO GET A REDUCTION IN THE SENTENCE FOR THE ASSISTANCE THAT HAD BEEN PROVIDED IN THE EARLIER PHASES OF THE CASE WHICH, YOU KNOW, WHICH WERE REALLY QUITE ESSENTIAL TO THE CASE OR VERY IMPORTANT AND THAT THERE'S NO TIME LIMIT IN THE STATUTE IN THE STATE'S ABILITY TO GO BACK AND DO THAT.
ISN'T THAT CORRECT?
>> YOUR HONOR, I THINK THE PROBLEM WITH THE ARGUMENT THAT WAS ADVANCED IN OPPOSING COUNSEL IN HER REPLY BRIEFING AND IN ORAL ARGUMENT IS THAT BASED ON THAT ARGUMENT, THE STATE COULD DO THAT AT ANY POINT IN TIME BASED ON THE INITIAL TRIAL TESTIMONY--
>> BUT-- WELL, THAT-- OKAY, BUT THERE'S NOTHING IN THE STATUTE THAT HAS A TIME FRAME, IS THERE?
IS THERE ANYTHING IN THE STATUTE THAT LIMITS THE TIME PERIOD WITHIN WHICH THE STATE CAN SEEK TO REWARD SUBSTANTIAL ASSISTANCE?
>> NO, YOUR HONOR.
HOWEVER, IN THIS PARTICULAR CONTEXT MR. MOSLEY WAS QUESTIONING MR. GRIFFIN SPECIFICALLY WITH RESPECT TO ANY ARRANGEMENT AS TO HIS TESTIMONY DURING THE NEW PENALTY PHASE.
THAT WAS THE THRUST OF HIS ARGUMENT WITH RESPECT TO HIS CROSS-EXAMINATION QUESTIONS WITH.
A QUESTION THAT BEGAN-- AND I BELIEVE I NOTED THIS IN MY BRIEF-- WASN'T ACTUALLY ASKED AND ANSWERED IN THE STATE'S REDIRECT.
SO EVEN ASSUMING THAT THIS COURT FINDS THAT THAT WOULD HAVE BEEN A PROPER BASIS FOR UTILIZING THE STATUTE, MR. GRIFFIN'S TESTIMONY

DURING THE SECOND PENALTY PHASE
COULD NOT HAVE BEEN THE BASIS
FOR THAT KIND OF AN ARRANGEMENT
THAT KIND OF ARRANGEMENT WHETHER
THE STATUTE WOULD HAVE APPLIED
FOR HIS INITIAL TRIAL TESTIMONY
IS SOMETHING THAT THE STATE
COULD HAVE UTILIZED AT ANY POINT
IN TIME GOING ALL THE WAY BACK
TO MR. GRIFFIN'S CONVICTIONS
WHEN THOSE WERE IMPOSED AND THAT
JUDGMENT WAS IMPOSED AND DID NOT
IN THE ANY WAY, SHAPE OR FORM
RELATE TO HIS TESTIMONY AT THE
SECOND PENALTY PHASE.
>> COUNSEL, IF THIS ISN'T TOO
MUCH OF A DISRUPTION, CAN I TAKE
YOU TO THE FARETTA ISSUE AT THE
SPENCER HEARING?
>> YES, YOUR HONOR.
>> THIS IS NOT A CASE, IS IT,
LIKE MCRAE WHERE THERE IS
EVIDENCE THAT THE DEFENDANT WAS
BEING DISRUPTIVE OR THAT THE
DEFENDANT WAS ABUSING THE
PROCESS BY INVOKING HIS RIGHT TO
COUNSEL.
INDEED, I THINK IT'S HARD TO SAY
HE WAS ABUSING THE PROCESS WHEN
NINE DAYS PRIOR TO THE SPENCER
HEARING HE FILES, YOU KNOW, A
UNEQUIVOCAL REQUEST TO REPRESENT
HIMSELF.
THAT SOUNDS PROCEDURALLY QUITE
SOUND AND NOT DISRUPTIVE.
MY QUESTION FOR YOU IS ON WHAT
REASONABLE BASIS COULD A TRIAL
COURT JUDGE HAVE DONE WHAT THE
JUDGE DID HERE AT THE SPENCER
HEARING?
IF THERE IS AN ARGUMENT THAT
THIS WAS NOT AN ABUSE OF
DISCRETION, GIVE IT TO US.
>> YES, YOUR HONOR.
SPECIFICALLY, I THINK THAT THE
ONLY ARGUMENT THAT IS AVAILABLE
TO THE STATE IN THIS CONTEXT IS
ASKING THIS COURT TO LOOK AT THE
ENTIRETY OF THE RECORD BEFORE IT
TO EVALUATE THE TRIAL COURT'S
INTERACTION WITH MR. MOSLEY AND
WITH MR. MOSLEY'S ATTORNEY.
>> OKAY.
WOULD YOU AGREE WITH OPPOSING

COUNSEL'S RECITATION OF THAT
RECORD?
I AGREE HE CHANGED POSITIONS
ABOUT WHEN, ABOUT WHETHER TO
AVAIL HIMSELF OF COUNSEL.
BUT IS, WAS COUNSEL CORRECT IN
SORT OF RECITING HOW THAT CAME
TO PASS?
>> MOSTLY, I WILL SAY.
I THINK WHEN I REFER TO
REVIEWING THE ENTIRETY OF THE
RECORD, I MEAN THE ENTIRE
PENDENCY OF HIS PENALTY PHASE
WHICH WAS IN THE WORKS FOR, I
BELIEVE, AT LEAST TWO YEARS.
AND WHICH HE MADE MULTIPLE
REQUESTS TO REPRESENT HIMSELF,
MULTIPLE DEMANDS FOR NELSON
HEARINGS, REQUESTS FOR REFUSAL
OF A TRIAL COURT AT ONE POINT IN
TIME, AND ALL THROUGHOUT ANYTIME
THAT THE TRIAL COURT WAS LOOKING
AT GRANTING HIS MOTION FOR
SELF-REPRESENTATION, HE
SPECIFICALLY REQUESTED ONE OF
TWO THINGS.
FIRST, HE WANTED HIS
NEWLY-DISCOVERED EVIDENCE MOTION
TO BE HEARD.
AND WHEN THE TRIAL COURT
INFORMED HIM THAT THAT WAS NOT
GOING TO HAPPEN, THEN HE AGAIN
BECAME COMBATIVE WITH THE COURT.
IN ADDITION TO THAT, HE ALSO
REQUESTED I THINK AT ONE POINT
IN TIME IT WAS A 15-MONTH
CONTINUANCE, AND AT ANOTHER
POINT IN TIME IT WAS AN
111-MONTH CONTINUANCE.
AND THOSE WERE REPEATED
ASSERTIONS THAT HE MADE.
IN FACT, AT HIS INITIAL--
EXCUSE ME, RIGHT BEFORE JURY
SELECTION OCCURRED IN THIS CASE,
HE DEMANDED TO REPRESENT HIMSELF
AND HAVE AN 11-MONTH
CONTINUANCE.
AND I BELIEVE THERE'S ABOUT TEN
PAGES OF TRANSCRIPTION IN WHICH
HE ARGUES WITH THE TRIAL COURT
AND SAYS HE DOESN'T WANT TO
REPRESENT HIMSELF UNLESS HE GETS
HIS 11-MONTH CONTINUANCE.
AND AT ONE POINT HE SAID THE

TRIAL COURT WAS TREATING HIM
LIKE A SLAVE BECAUSE HE DIDN'T
HAVE ANY CONSTITUTIONAL RIGHTS.
AND I MENTION THIS BECAUSE THAT
IS THE CONTEXT IN WHICH THE
TRIAL COURT WAS EVALUATING HIS
DECISION TO FILE HIS MOTION FOR
SELF-REPRESENTATION AT THE
SPENCER HEARING.
AND THE TRIAL--
>> BUT THERE'S NO, BUT-- PART
OF THE PROBLEM WITH THAT IS THAT
THERE'S NO, THERE'S NO
SUGGESTION THAT THE COURT
EVALUATED IT IN LIGHT OF
ANYTHING.
THE COURT, AFTER IT WAS BROUGHT
TO THE COURT'S ATTENTION QUITE
CLEARLY, THE COURT JUST IGNORED
IT.
THE COURT DIDN'T SAY, NO, I'M
GOING TO DENY THAT FOR THIS
REASON.
THE COURT JUST SAID, YOU KNOW,
WE'RE GOING AHEAD, AND I GUESS
YOUR ARGUMENT IS IT JUST KIND
OF-- IT'S OBVIOUS WHY THE COURT
DID WHAT IT DID, BUT COURTS ARE
SUPPOSED TO HAVE HEARINGS AND
CONSIDER THOSE THINGS, AREN'T
THEY?
>> YOU'RE ABSOLUTELY CORRECT,
YOUR HONOR.
AND THE FACT THAT THE COURT IN
THIS CASE DID NOT IMMEDIATELY
MAKE A RULING ON THE DEFENDANT'S
MOTION FOR SELF-REPRESENTATION,
THE STATE DOES CONCEDE WAS AN
ERROR.
HOWEVER, IF THIS COURT, AGAIN,
LOOKS AT THE CONTEXT OF THE
RECORD SPECIFICALLY WITH RESPECT
TO THE SPENCER HEARING, OPPOSING
COUNSEL WASN'T ENTIRELY CORRECT
WHEN SHE TALKED ABOUT WHAT THE
COURT SAID AT THE END OF THE
SPENCER HEARING.
THE COURT SAID EVEN IF I HAD
RULED ON IT, I WOULD HAVE DENIED
IT.
SO THE COURT CLEARLY HAD AT
LEAST THOUGHT ABOUT THIS AND HAD
TAKEN INTO ACCOUNT WHAT RULING
IT WOULD HAVE MADE IF IT HAD

PROPERLY MADE THAT RULING AT THE START OF THE SPENCER HEARING.
SO SO THAT, AGAIN, IS WHY I SAY THAT THE ENTIRETY OF THE RECORD IN THIS CASE IS REALLY THE ONLY BASIS THAT THE STATE CAN ASSERT THAT ANY ERROR WAS, IN FACT, HARMLESS.
IN ADDITION TO THE FACT THAT THE RECORD ALSO CLEARLY INDICATES THE DEFENSE COUNSEL CONFERRED WITH APPELLANT DURING THE SPENCER HEARING ABOUT THE PRESENTATION OF ANY ADDITIONAL EVIDENCE OR ARGUMENT.
SPECIFICALLY THAT OCCURRED ON RECORD PAGE 1768.
AND, I MEAN, IT'S IN THE RECORD THAT DEFENDANT DID AT LEAST COMMUNICATE WITH HIS ATTORNEYS ABOUT WHAT HE WANTED TO PRESENT AT THIS SPENCER HEARING.
AND IN THIS PARTICULAR CONTEXT, ALTHOUGH HARMLESS ERROR ANALYSIS IS NOT APPROPRIATE IN FARETTA ERA CONTEXT, ALL OF THE CASE LAW SURROUNDING THAT PARTICULAR SUBJECT PERTAINS TO THE ENTIRETY OF A JURY TRIAL, THE ENTIRETY OF ANY TRIAL FOR THAT MATTER UNDER THE SIXTH AMENDMENT.
TO MY KNOWLEDGE, THIS COURT HAS NEVER SPECIFICALLY ADDRESSED WHETHER A HARMLESS ERROR ANALYSIS CAN BE PERFORMED IN THE FARETTA CONTEXT FOR A SPENCER HEARING.
AND IN THIS PARTICULAR INSTANCE, THIS SPENCER HEARING INVOLVED THE PRESENTATION OF ONE PIECE OF EVIDENCE, THE TRANSCRIPT FROM THE ORIGINAL PENALTY PHASE IN THE WHICH THE DEFENDANT'S MOTHER PROVIDED TESTIMONY CONCERNING THE MITIGATING EVIDENCE THAT'S DISCUSSED IN ISSUE TWO.
THAT WAS THE SOLE PIECE OF EVIDENCE THAT WAS PRESENTED.
AND WHILE THERE ARE SPENCER HEARINGS THAT ABSOLUTELY INVOLVE ADDITIONAL EXPERTS COMING IN AND A PLETHORA OF WITNESSES TESTIFYING, THAT'S NOT WHAT HAPPENED IN THIS CASE.

>> WELL, BUT THE RECORD WE HAVE HAS A STATEMENT FROM THE DEFENDANT SAYING I HAVE IMPORTANT THINGS I WANTED TO SAY AT THIS HEARING.
SO WE, TO THE CHIEF'S QUESTION, THERE'S NO WAY REALLY FOR US TO KNOW, IS THERE, WHAT WAS THE POTENTIAL SUBJECT OF SPENCER HEARING OR WHAT THE COURT REASONED IN DECIDING IT WASN'T WORTH LETTING THE DEFENDANT SPEAK, DO WE?
>> CANDIDLY, JUSTICE CURIEL, I THINK THE FAULT FOR THAT AT LEAST IN PART HAS TO LIE WITH THE IT WAS WHO DIDN'T SPECIFICALLY ARTICULATE ANYTHING ON THE RECORD AT THE TRIAL COURT, BUT MORE IMPORTANTLY, HE'S NEVER ADVANCED--
>> BUT HE WAS CUT OFF.
TO LAY THAT AT HIS DOOR WHEN HE WAS CUT OFF, AND I'M NOT SAYING THAT THE DEFENDANT HERE WAS DOING EVERYTHING HE COULD TO SPEED THESE PROCEEDINGS ALONG.
I MEAN, I UNDERSTAND THAT HE HAD A DIFFERENT APPROACH.
BUT HE'S ALSO GOT SOME RIGHTS, AND HE WAS JUST CUT OFF.
HE DIDN'T HAVE AN OPPORTUNITY TO PRESENT ANYTHING REALLY.
DID HE?
>> WELL, YOU ARE CORRECT, YOUR HONOR, THAT THE TRIAL COURT DID, IN FACT, DENY HIS REQUEST AND REFUSED TO GO BACK AND REOPEN THE SPENCER HEARING TO PERMIT HIM TO PRESENT ANYTHING AT THAT POINT IN TIME.
HOWEVER, THE TRIAL COURT-- AND THE RECORD SHOWS THIS-- CLEARLY ENGAGED IN A DISCUSSION WITH THE DEFENDANT AS FAR AS WHAT THE FARETTA REQUEST WAS SUPPOSED TO ENTAIL.
AND I BELIEVE THAT THE DEFENDANT AT THAT POINT IN TIME HAD THE OPPORTUNITY TO INFORM-- THE DEFENDANT MERELY MADE ILLUSORY STATEMENTS, I WANTED TO PRESENT ARGUMENTS TO THE COURT, I HAD ARGUMENTS, BUT NEVER IDENTIFIED

WHAT THOSE ARGUMENTS WERE OR
EVEN STATED THAT HIS ATTORNEYS
REFUSED TO ADVANCE THOSE
PARTICULAR ARGUMENTS AND ASK FOR
A NELSON HEARING AT THAT POINT
IN TIME.
NONE OF THAT HAD OCCURRED, ALL
OF WHICH WOULD HAVE SERVED TO
PRESERVE THAT ISSUE FOR
APPELLATE REVIEW AND ALLOWED THE
TRIAL COURT TO MAKE A MORE
INFORMED DECISION WHEN IT WAS
RULING ON THE FACT THAT IT
WASN'T GOING TO REOPEN THE
SPENCER HEARING TO ALLOW THE
DEFENDANT TO REPRESENT HIMSELF.
AND AS FAR AS THE ADDITIONAL
POINT, EVEN IF THE TRIAL COURT
HAD CUT HIM OFF AND REFUSED TO
ALLOW HIM TO MAKE ANY AWE
CIRCUMSTANCES WHATSOEVER, THAT
DOESN'T EXCUSE THE FACT THAT ON
APPEAL EITHER IN THE INITIAL
BRIEF OR IN THE REPLY BRIEF
THERE HAS BEEN NO STATEMENT AS
TO WHAT PARTICULAR ARGUMENTS THE
DEFENDANT WANTED TO ADVANCE IN
ANY CAPACITY WHATSOEVER.
SO AGAIN, HARMLESS ERROR
ANALYSIS IN THIS CONTEXT WITH
RESPECT TO THIS SPECIFIC CASE, I
THINK, IS HIGHLY APPROPRIATE
ONLY BECAUSE OF THE VERY LIMITED
PERIOD OF TIME IN WHICH THE
SPENCER HEARING OCCURRED AND THE
FACT THAT THERE HAS BEEN NO
ADVANCEMENT OR IDENTIFICATION OF
ANY ARGUMENTS OR EVIDENCE THAT
THE DEFENDANT WANTED TO MAKE AND
WASN'T ALLOWED TO MAKER OR
WANTED TO PRESENT AND DIDN'T
PRESENT OR SOMETHING THAT HIS
ATTORNEYS DID THAT HE WISHED
THEY DID NOT DO.
THAT HAS NEVER BEEN FLUSHED OUT
OR PLACED IN FRONT OF A COURT IN
ANY CAPACITY WHATSOEVER.
BRIEFLY, I'D LIKE TO TOUCH ON
ISSUE TWO WHICH OPPOSING COUNSEL
MENTIONED WHICH WAS MITIGATING
EVIDENCE THAT THE DEFENDANT WAS
NOT PERMITTED TO PRESENT IN
FRONT OF THE JURY.
AND A COUPLE OF POINTS THAT I

THINK ARE IMPORTANT TO NOTE HERE
IS THAT WHILE THE FIRST JURY IN
THIS CASE ONLY VOTED 8-4 TO
SENTENCE THE DEFENDANT TO DEATH,
THE JURY IN THIS CASE WAS, IN
FACT, UNANIMOUS IN THEIR
RECOMMENDATION AND WAS UNANIMOUS
IN THEIR FINDINGS OF THE
EXISTENCE OF THE STATUTORY
AGGRAVATORS, THE SUFFICIENCY OF
THOSE AGGRAVATORS AND THAT THOSE
AGGRAVATORS OUTWEIGHED THE
MITIGATING CIRCUMSTANCES.
IN ADDITION, AS OPPOSING COUNSEL
POINTED OUT, THE JURY IN THIS
CASE DID NOT FIND A SINGLE
MITIGATING CIRCUMSTANCE.
THE TRIAL COURT ACTUALLY FOUND
ALL OF THE MITIGATING
CIRCUMSTANCES THAT EXISTED
INSIDE OF THE SENTENCING ORDER.
ADDITIONALLY, WITH RESPECT TO
THE FIRST PENALTY PHASE, THE
ONLY MITIGATING CIRCUMSTANCE
THAT I COULD FIND THAT WOULD
HAVE MASKED THE MITIGATING
EVIDENCE THE DEFENDANT WANTED TO
PROPOSE WAS THAT THE DEFENDANT
SAW PHYSICAL AND SEXUAL ABUSE
WHEN HE WAS A YOUNG CHILD.
AND THE TRIAL COURT IN THE FIRST
PENALTY PHASE SPECIFICALLY GAVE
THAT LITTLE WEIGHT.
ALL OF WHICH IS TO SAY IN TERMS
OF SOME TYPE OF ERROR IN THIS
CONTEXT HAS TO BE DEEMED
HARMLESS BEYOND A REASONABLE
DOUBT.
AND THIS COURT IS MORE THAN
CAPABLE OF REWEIGHING THE
AGGRAVATING FACTORS AND
MITIGATING CIRCUMSTANCES AS THE
UNITED STATES SUPREME COURT HAS
SAID IS APPROPRIATE IN
McKINNEY V. ARIZONA.
SO TO THE EXTENT THAT THIS COURT
DEEMS THAT THE TRIAL COURT'S
DECISION TO EXCLUDE THAT
EVIDENCE WAS ERROR, THEN THE
STATE WOULD ASK THAT THIS COURT
PERFORM THAT REWEIGHING ANALYSIS
AND COME TO THE INESCAPABLE
CONCLUSION THAT ANY ERROR WITH
RESPECT TO THAT WAS, IN FACT,

HARMLESS.
IF THERE ARE NO FURTHER
QUESTIONS FROM THE COURT, THEN
THE STATE WOULD JUST REQUEST IF
THIS COURT DECIDES THE DEFENDANT
WAS, IN FACT, OR ENTITLED TO
REPRESENT HIMSELF AT THE SPENCER
HEARING, THAT THIS COURT MERELY
REMAND THE CASE FOR A NEW
SPENCER HEARING AND GO NO
FURTHER THAN THAT.
OTHERWISE THE STATE WOULD ASK
THE COURT TO AFFIRM THE DEATH
SENTENCE.
THANK YOU.
>> THANK YOU.
WE'LL NOW HEAR REBUTTAL.
>> YOUR HONORS, I'M JUST GOING
TO ADDRESS TWO THINGS.
REGARDING THE SPENCER HEARING,
THE ISSUE IS NOT WHAT THE COURT
DID OR DIDN'T SAY WHEN DECIDING
NOT TO REOPEN THE HEARING.
THE ISSUE IS THE COURT IGNORING
THE UNEQUIVOCAL REQUEST TO
REPRESENT MR. MOSLEY TO
REPRESENT HIMSELF AT THE SPENCER
HEARING.
WE DON'T KNOW WHAT MR. MOSLEY
WANTED TO ADVANCE, AND I AS
COUNSEL ON APPEAL FOR MR. MOSLEY
CANNOT GIVE YOU THAT INFORMATION
BECAUSE I CAN'T REFER TO MATTERS
OUTSIDE THE RECORD.
BUT THE REASON THOSE MATTERS ARE
OUTSIDE THE RECORD IS BECAUSE
MR. MOSLEY WAS CUT OFF IN
PRESENTING THEM.
JUST AS DURING THE BRIEF TIME
THAT HE WAS REPRESENTED BY
COUNSEL AT THAT HEARING THERE
WAS REFERENCE TO SENTENCING
MEMORANDA THAT WERE APPARENTLY
NOT OFFERED AND NOT RELIED ON
ON.
SO WE HAVE INFORMATION THAT
WASN'T RELIED ON, BUT WE DON'T
KNOW WHAT IT WAS.
I HAVE TO AGREE WITH THAT.
REGARDING THE CROSS-EXAMINATION
OF MR. GRIFFIN, I HAVE TO
DISAGREE WITH THE STATE'S
CHARACTERIZATION OF HIS
TESTIMONY AS JUST PROVIDING

BACKGROUND FACTS.
MR. GRIFFIN MAY HAVE BEEN
TESTIFYING AT THE PENALTY PHASE,
BUT HIS TESTIMONY WAS ABSOLUTELY
ESSENTIAL TO ESTABLISHING THE
AGGRAVATORS AGAINST MR. MOSLEY.
THE HAC AGGRAVATOR, THE CCP
AGGRAVATOR DEPENDED DIRECTLY ON
HIS TESTIMONY.
AND SO THE STATE CHOSE TO PUT
HIM ON IN PERSON TO TESTIFY TO
THOSE THINGS TO MEET ITS BURDEN
AT THE PENALTY PHASE HEARING
THAT SUBJECTED HIM TO
CROSS-EXEMPTION.
SO SO THAT WAS THE STATE'S
CHOICE TO PUT HIM ON, BUT ONCE
HE WAS THERE TESTIFYING, HIS
MOTIVE, HIS POTENTIAL BIAS
BECAME FAIR GAME FOR
CROSS-EXAMINATION.
AND TO PREVENT MR. MOSLEY FROM
DOING THAT, PARTICULARLY IN THE
MANNER IN WHICH THE TRIAL COURT
RULED ON THAT AND ADDRESSED THE
JURY ABOUT IT, WAS AN ABUSE OF
DISCRETION.
IT WAS HARMFUL, AND IT WARRANTS
REVERSAL FOR--
[INAUDIBLE]
IF THERE ARE NO FURTHER
QUESTIONS, YOUR HONOR, I WILL
STOP THERE.
>> ALL RIGHT.
WELL, WE THANK YOU--
>> THANK YOU.
>>-- WE THANK YOU BOTH FOR YOUR
ARGUMENTS TODAY.
THAT IS THE FINAL CASE ON OUR
DOCKET.