

>> ALL RISE.
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.
>> OUR LAST CASE FOR THE DAY IS
SPARRE V. STATE OF FLORIDA.
YOU MAY PROCEED.
>> THANK YOU, YOUR HONOR.
NADA CAREY REPRESENTING THE
APPELLANT.
THERE ARE TWO ISSUES IN THIS
CASE, BOTH CONCERN THE PROBLEM
OF INSURING A RELIABLE AND
PROPORTIONATE SENTENCE WHEN THE
DEFENDANT CHOOSES NOT TO CONTEST
THE DEATH PENALTY --
[INAUDIBLE]
MITIGATION.
AND THE FIRST ISSUE GIVEN THAT
INTEREST, IT'S OUR CONTENTION
THAT THE TRIAL COURT ABUSED ITS
DISCRETION IN NOT HEARING AND
CONSIDERING THE CONSIDERABLE
MITIGATING EVIDENCE THAT WAS
AVAILABLE AT BOTH THE PENALTY
PHASE AND AT THE SENTENCING
HEARING.
>> UNDER OUR CASE LAW, WHAT IS A
TRIAL COURT'S OBLIGATION WHEN A
DEFENDANT SAYS THAT HE DOES NOT,
HE OR SHE DOES NOT WANT TO
PRESENT MITIGATING WITNESSES?
WHAT OPTIONS DOES A TRIAL JUDGE
HAVE?
>> WELL, THE PRIMARY OBLIGATION
OF THE TRIAL COURT IS TO
CONSIDER ALL POSSIBLE MITIGATING
EVIDENCE.
AND BEYOND THAT, THE TRIAL COURT
MUST ORDER A PSI.
AND IN ADDITION TO THAT, IF THE
TRIAL COURT IS ALERTED TO THE
PROBABILITY OF SIGNIFICANT
MITIGATION, THE TRIAL COURT HAS
DISCRETION TO HEAR THAT EVIDENCE
BY CALLING PERSONS WITH
MITIGATION AS ITS OWN WITNESSES
OR BY APPOINTING SPECIAL COUNSEL
TO DO SO.
AND IN THIS CASE THE DEFENSE
COUNSEL'S PROFFER OF
CONSIDERABLE MENTAL HEALTH
MITIGATION AND OTHER MITIGATION
RELATED TO THE DEFENDANT'S
BACKGROUND SHOULD HAVE ALERTED
THE TRIAL COURT TO THE
PROBABILITY OF SIGNIFICANT
MITIGATION THAT IT NEEDED TO
CONSIDER IN ORDER TO IMPOSE THE
DEATH PENALTY IN THIS CASE OR TO
IMPOSE A SENTENCE IN THIS CASE.
>> WELL, DO YOU RAISE AS AN
ISSUE THAT THERE WAS -- SINCE WE

DO REQUIRE THE TRIAL COURT TO CONSIDER MITIGATION THAT'S IN THE RECORD, THAT THIS -- YOU'RE URGING US TO RECEDE FROM MOHAMED.

BUT ARE YOU SAYING THAT THERE WAS MITIGATION IN THIS RECORD THAT THE TRIAL COURT DID NOT CONSIDER OR THAT THERE WAS MORE MITIGATION THAT SHOULD HAVE BEEN PRESENTED, AND THE TRIAL COURT ABUSED ITS DISCRETION IN NOT HAVING SOMEONE PRESENT THAT?

>> THE LATTER, YOUR HONOR.

>> OKAY.

>> I THINK UNDER MOHAMED -- AND, OF COURSE, IN MOHAMED THE COURT WAS SPECIFICALLY LOOKING AT WHAT THE PSI MIGHT INDICATE -- BUT IN MOHAMED THE PSI INDICATED CONSIDERABLE MENTAL MITIGATION IN RECORDS RELATED TO THAT, PRIOR HOSPITALIZATIONS, ETC. WHEN THE COURT SENT THAT BACK FOR RESENTENCING, IT GAVE THE COURT DISCRETION TO ATTAIN THOSE RECORDS AND HEAR THE WITNESSES WHO WOULD PROVIDE OR PRESENT THAT MITIGATION WHENEVER NECESSARY.

AND UNDER THAT PRINCIPLE ARGUING THAT IN -- WE'RE ARGUING THAT IN THIS CASE THE WITNESSES WERE THERE, THE TRIAL COURT WAS AWARE THAT THERE WERE FOUR MENTAL HEALTH WITNESSES WHO WERE PREPARED TO TESTIFY TO FIVE DIFFERENT PSYCHIATRIC DIAGNOSES OF THE DEFENDANT, PREPARED TO TESTIFY THAT HE HAD PTSD AND A NUMBER OF DIFFERENT PSYCHIATRIC DIAGNOSES AND ALSO TO THE EXISTENCE AND APPLICABILITY OF BOTH OF THE MENTAL MITIGATING CIRCUMSTANCES.

>> SO WHAT IS THE RULE THAT YOU'RE NOW EXPOUNDING?

AS I UNDERSTAND IT, YOU WANT US TO GO FURTHER THAN MOHAMED.

>> WELL, I DON'T KNOW IF IT REALLY GOES FURTHER.

I THINK MOHAMED, IT WAS CLEAR IN MOHAMED --

>> BUT YOU, YOU WANT US TO REQUIRE THE TRIAL JUDGE AS OPPOSED TO GIVING THE TRIAL JUDGE DISCRETION, IT SOUNDS LIKE TO ME.

YOU WANT US TO REQUIRE THE TRIAL JUDGE TO CALL WITNESSES UNDER WHAT CIRCUMSTANCES?

>> WELL, OKAY.

IN MY FIRST ISSUE -- OF COURSE,
WE GOT THE SECOND ISSUE, BUT I'M
ASSUMING YOUR HONOR'S ADDRESSING
THE FIRST ISSUE.

>> UH-HUH.

>> THE COURT, THIS COURT GAVE
THE TRIAL COURT DISCRETION.
I THINK THE PROBLEM IS IT'S NOT
CLEAR WHAT GUIDES THE TRIAL
COURT'S DISCRETION.

SINCE MOHAMED THE TRIAL COURTS
HAVE SORT OF BEEN ALL OVER THE
PLACE HERE.

AND WHAT I'M SUGGESTING SHOULD
GUIDE THE TRIAL COURT'S
DISCRETION IS THE RULE SET OUT
IN MOHAMED WHICH IS IF THE TRIAL
COURT IS ALERTED TO THE
PROBABILITY OF SIGNIFICANT
MITIGATION, THE TRIAL COURT MUST
HEAR THAT EVIDENCE ONE WAY OR
ANOTHER EITHER BY APPOINTING
SPECIAL COUNSEL TO PRESENT IT OR
BY CALLING THOSE WITNESSES AS
COURT WITNESSES.

THE DISCRETION HAS TO BE GUIDED
BY SOMETHING.

IN THIS CASE THE WITNESSES WERE
ALL THERE.

THEY WERE WAITING IN THE
COURTROOM.

THEY WERE AVAILABLE.

AND I DON'T THINK THE TRIAL
COURT HAD THE DISCRETION TO
IGNORE THAT EVIDENCE THAT WAS
READILY AVAILABLE IN THE --

>> WHAT DID THE TRIAL COURT --
DID THE TRIAL COURT STATE --
SEE, I GUESS WHAT -- THERE'S
NOBODY ARGUING THAT THE TRIAL
COURT SHOULD HAVE DONE.

WE HAVE A CASE TOMORROW WHERE
THE JUDGE DID APPOINT STANDBY
COUNSEL TO PRESENT MITIGATION,
AND I AM CONCERNED ABOUT THE
LACK OF GUIDELINES.

BUT WHAT, DID THE TRIAL COURT
SAY ANYTHING AS TO WHY HE OR SHE
DECIDED NOT TO CALL THE MENTAL
HEALTH EXPERTS THAT WERE THERE?

>> UM, ALL WE HAVE REALLY TO
LOOK AT IS THE SENTENCING ORDER.
THE TRIAL COURT STATED IN HER
SENTENCING ORDER THAT SHE
RECOGNIZED SHE HAD DISCRETION TO
CALL WITNESSES.

OTHER THAN THAT, WHEN SHE
REJECTS A NUMBER OF THE PROPOSED
MITIGATING CIRCUMSTANCES
INCLUDING THE MENTAL MITIGATING
CIRCUMSTANCES, SHE STATES THREE
OR FOUR DIFFERENT TIMES I

RECOGNIZE DR. KROP HAD THIS TESTIMONY, DR. ALLYGOOD HAD THIS TESTIMONY, DR. GREENBERG HAD THIS TESTIMONY, ETC., BUT I'M NOT REQUIRED TO ACCEPT THIS BASED ON A PROFFER.

>> BUT THEY -- ACTUALLY, DIDN'T THE TRIAL COURT SAY MORE WHICH WAS THAT IN LIGHT OF THE WAY THE SCENE WAS -- BECAUSE WE'RE TALKING ABOUT THE STATUTORY MENTAL MITIGATORS --

>> THE EXTREME EMOTIONAL DISTURBANCE.

>> -- THAT SHE REJECTS THAT BASED ON A NUMBER OF THINGS WHICH INCLUDE THAT HE TELLS A GIRLFRIEND HE WANTED TO KNOW WHAT IT FELT LIKE TO STAB SOMEBODY, THAT HE CLEANED UP AFTERWARDS, THAT HE, YOU KNOW, SEEMED WHEN HE WENT TO THE HOSPITAL AFTER THE MURDER, HE SEEMED COMPLETELY COMPOSED, SO THAT IT WASN'T LIKE IT WAS IN A BLIND THAT THE JUDGE REJECTED THE STATUTORY MENTAL HEALTH MITIGATION.

>> SHE REJECTED THE EXTREME EMOTIONAL DISTURBANCE MITIGATOR I THINK BASED PRIMARILY ON THAT LETTER, IN THIS AFTER-THE-FACT LETTER BY A DEFENDANT WHO WANTS THE DEATH PENALTY WITHOUT EVEN HEARING THE COUNTERVAILING EVIDENCE, WITHOUT HEARING THE TESTIMONY OF AN EXPERT WHO WAS IN THE COURTROOM AND READY TO TESTIFY THAT THAT MITIGATOR EXISTED.

I THINK THAT'S A VIOLATION OF DUE PROCESS IF NOTHING ELSE. TO COME TO A CONCLUSION ABOUT SOMETHING THAT --

>> WELL, IT CAN'T BE A VIOLATION, IN MY VIEW.

I MEAN, THIS IS WHERE IT'S A HARD QUESTION WHERE IT FALLS. IT CAN'T BE A VIOLATION OF THE DEFENDANT'S DUE PROCESS WHEN THE DEFENDANT KNOWINGLY AND AFTER BEING ADVISED THAT HE HAS THIS RIGHT WAIVES IT.

I MEAN, TO ME THE ONLY ISSUE, THE ISSUE ON WHETHER MOHAMED SHOULD BE EXTENDED PROSPECTIVELY IS JUST WHETHER IT RESULTS IN UNEQUAL, DISPARATE TREATMENT OF EQUALLY-CULPABLE DEFENDANTS OR LESS CULPABLE DEFENDANTS.

BUT I DON'T SEE HOW IT'S THE DEFENDANT'S DUE PROCESS RIGHTS

THAT ARE AFFECTED WHEN THE DEFENDANT KNOWINGLY WAIVES THE RIGHT TO PRESENT MITIGATION, ADAMANTLY SO.

>> WELL, I MEAN, THIS COURT HAS ALREADY RECOGNIZED THAT DESPITE THE WAIVER THE STATE HAS AN INDEPENDENT OBLIGATION TO CONSIDER ALL AVAILABLE MITIGATING EVIDENCE.

>> BUT YOU SAID IT WAS A DUE PROCESS ISSUE.

I'M NOT SURE IF THAT'S WHERE IT WOULD FALL.

DUE PROCESS MEANING PERSONAL TO THE DEFENDANT AS OPPOSED TO THE COURT'S OBLIGATION TO INSURE THAT THERE IS SOME UNIFORMITY IN THE CRITERIA UNDER WHICH SOMEBODY IS SUBJECTED TO THE DEATH PENALTY.

>> WELL, I WAS MERELY POINTING OUT, YOUR HONOR, THAT FOR THE TRIAL JUDGE TO MAKE A DECISION ABOUT A PARTICULAR MITIGATOR HEARING ONLY ONE SIDE OF THE EQUATION WHEN SHE'S BEEN ALERTED THAT THERE IS A COUNTERVAILING VIEW IS A PROBLEM.

>> SO IS THE PROBLEM REALLY THAT -- DOES THE DEFENDANT REALLY HAVE A RIGHT TO WAIVE THE PRESENTATION OF MITIGATION?

I MEAN, IT SEEMS TO ME THAT WE ARE NOW CAUGHT IN A POSITION WHERE WE'RE SAYING THIS DEFENDANT HAS THIS RIGHT.

BUT ON THE OTHER HAND, WE'RE SAYING NOT REALLY, BECAUSE THE COURT IS NOW GOING TO -- YOU'RE ARGUING THE COURT SHOULD BE OBLIGATED TO BRING IN THESE VERY WITNESSES THAT THE DEFENDANT IS NOW SAYING THAT -- THAT THE DEFENDANT IS SAYING HE DOESN'T WANT TO PRESENT, BUT THE COURT IS NOW OBLIGATED TO PRESENT THEM?

AND SO DOES THE DEFENDANT REALLY HAVE A RIGHT TO NOT PRESENT MITIGATION?

>> I THINK THAT'S AN EXCELLENT QUESTION, YOUR HONOR, AND I'VE THOUGHT ABOUT IT TOO.

BASED ON WHAT THE COURTS, THE LAST 25 YEARS OF TINKERING WITH THIS ISSUE, IF YOU LOOK AT MOHAMED AND IF YOU LOOK AT THE BARNES CASE WHERE THE TRIAL COURT CLEARLY HAS A RIGHT TO APPOINT SPECIAL COUNSEL IF THE

COURT WANTS TO, THE DEFENDANT'S RIGHT AT SOME POINT IS ILLUSORY AT THIS POINT.

>> WHEN SPECIAL COUNSEL IS APPOINTED --

>> YES.

>> LET'S TAKE THIS EVEN FURTHER. WHEN SPECIAL COUNSEL IS APPOINTED, IS THE OBLIGATION ON SPECIAL COUNSEL TO ACTUALLY PRESENT WITNESSES, OR IS THE OBLIGATION THAT SPECIAL COUNSEL WILL DO INVESTIGATION AND THEN MAKE A PRESENTATION TO THE COURT OF WHAT THAT INVESTIGATION HAS UNCOVERED?

>> WHEN SPECIAL COUNSEL'S APPOINTED, MY UNDERSTANDING IS SPECIAL COUNSEL PRESENTS THE TESTIMONY.

IF NO INVESTIGATION HAS BEEN DONE TO THAT POINT -- AND IN WAYS THERE ALREADY HAS BEEN, FOR EXAMPLE, HERE THERE WAS A FULL AND COMPLETE INVESTIGATION DONE --

>> -- SAID THEY HAD 24 WITNESSES.

>> EXACTLY.

AND THEY WERE IN THE COURTROOM RIGHT THERE, AVAILABLE TO BE HEARD AND TO TESTIFY.

AND UNDER THOSE CIRCUMSTANCES I WOULD SAY IT WAS AN ABUSE OF DISCRETION NOT TO HEAR THAT MITIGATING EVIDENCE.

AND IN MOHAMED WHEN THE COURT SAID WE ARE REQUIRING A PSI, I THINK IT WAS THE COURT'S UNDERSTANDING THAT THAT PSI WOULD BE COMPREHENSIVE, THAT THAT WOULD PROVIDE THE TOOLS FOR THE COURT TO COME TO AN INFORMED DECISION.

>> DID ANYBODY INDICATE THAT THE PSI WASN'T COMPREHENSIVE, BUT DID THEY OBJECT TO IT OR DID THEY TRY TO ADD ANYTHING TO THE PSI?

>> NO.

>> OKAY.

>> NO.

BUT, I MEAN, YOUR HONOR, YOU FOLKS HAVE THE PSI, AND IT'S QUITE CLEAR THE PSI'S INADEQUATE CERTAINLY STANDING BESIDE THE FULL AND COMPLETE MITIGATION INVESTIGATION --

>> BUT ISN'T THAT, THAT'S ANOTHER ISSUE, YOU KNOW, THAT ISN'T SPECIFICALLY RAISED BY YOU ON APPEAL, WHICH IS THAT IN

MOHAMED WE GO THROUGH IN GREAT
DETAIL WHAT WE EXPECT TO HAVE IN
THE PSI WHICH IS COMPREHENSIVE
RECORDS, MEDICAL RECORDS, SCHOOL
RECORDS.

EXCUSE ME.

YOU KNOW, NOT JUST A RECITATION
OF THE BAD STUFF.

AND SO IF THIS PSI, WHICH I
THINK -- WHICH I KNOW IS IN THE
RECORD AND WE HAVE BEFORE US WAS
NOT ADEQUATE, SHOULDN'T --
THAT'S A DIFFERENT ISSUE THAN
WHETHER STANDBY COUNSEL SHOULD
HAVE BEEN APPOINTED OR THE COURT
SHOULD HAVE CALLED ALL THE
WITNESSES THAT WERE IN THE
COURTROOM TO DO WHAT THE
DEFENDANT JUST SAID HE WANTED TO
WAIVE.

>> UM, WELL, I DON'T KNOW HOW
ONE WOULD RAISE THAT ISSUE.

IT'S MY UNDERSTANDING --

>> WELL, YOU'D RAISE IT THE WAY
YOU JUST RAISED, ON APPEAL.
WHICH IS THIS PSI DID NOT COMPLY
WITH MOHAMED.

>> BUT THIS PSI IS A TYPICAL
PSI.

NOT REQUIRED TO DO.

>> WELL, IF YOU READ MOHAMED,
RESPECTFULLY, I THINK THAT IS AN
ISSUE IF IT'S ONLY JUST A
RECITATION OF WHAT THE DEFENDANT
SAYS AND THAT IT ISN'T MORE
COMPREHENSIVE, THEN THAT'S AN
OBLIGATION OF DEFENSE COUNSEL ON
APPEAL TO SAY THIS PSI DID NOT
COMPLY WITH MOHAMED.

>> WELL, I WOULD AGREE WITH
THAT, YOUR HONOR.

I THINK IT WAS -- I DON'T KNOW,
I MEAN, THIS REALLY GETS US INTO
THE SECOND ISSUE ABOUT THESE
PSIs.

PSI DONE BY A PROBATION OFFICER.
THESE FOLKS ARE NOT TRAINED TO
DEVELOP MITIGATION.

I DON'T KNOW, I SUPPOSE THEY CAN
GET RECORDS, BUT THEY USUALLY
DON'T.

I'VE NEVER SEEN ANY MEDICAL
RECORDS OR SCHOOL RECORDS OR ANY
OF THAT IN ANY OF THE CASES I'VE
HANDLED.

>> BUT THERE'S OFTEN IN PSIs
INFORMATION ABOUT THE
DEFENDANT'S BACKGROUND.

IT SEEMS TO ME IT IS MORE --
I'VE READ THOSE THAT HAVE MORE
THAN JUST THE DEFENDANT'S
RECITATION.

>> WELL, THAT MAY BE.
IN THIS PARTICULAR -- GENERALLY,
THEY SPEAK TO THE DEFENDANT AND
MAYBE ANOTHER FAMILY MEMBER.
IN THIS CASE THEY GET, THEY
SPEAK TO THE DEFENDANT AND
GENERALLY GET CONFIRMATION OF
WHAT THE DEFENDANT SAYS FROM A
FAMILY MEMBER, AND THAT'S WHAT
HAPPENED HERE.

I DON'T KNOW IF THEY HAVE THE
MEANS OR THE TOOLS TO GO BACK
OUT AND GET MEDICAL RECORDS AND
ALL KINDS OF THINGS.

ONE OF THE THINGS THAT WAS
MISSING, OF COURSE, WAS THE
RECORDS FROM TARA HALL, THE
BOYS' HOME WHERE HE WAS IN
ADOLESCENCE AND EARLY CHILDHOOD.

>> LET ME ASK YOU, WHEN YOU
ORDER A PSI, IS IT JUST A MATTER
OF CALLING UP AND TELLING THE
PROBATION OFFICER WHO IS TO DO
IT, OR DO YOU SEND THEM AN A
ORDER OUTLINING WHAT YOU WANT IN
IT?

>> I, YOUR HONOR --

>> YOU DON'T KNOW.

OKAY, NEVER MIND.

>> I DON'T KNOW.

IT'S MY UNDERSTANDING THE TRIAL
JUDGE ORDERS THE PSI.

THAT'S DONE BY THE TRIAL JUDGE.
BUT I REALLY DON'T KNOW THE
PROCEDURE FOR THAT.

>> BUT I GUESS I'M STILL
CONCERNED WITH HOW DO WE HONOR A
DEFENDANT'S RIGHT IF WE SAY THE
DEFENDANT HAS THAT RIGHT TO NOT
PRESENT MITIGATING WITNESSES,
HOW DO WE HONOR THAT RIGHT AND
YET ON THE OTHER HAND HAVE
INFORMATION THAT THE TRIAL JUDGE
CAN MAKE A SENSIBLE
DETERMINATION ABOUT AGGRAVATING
AND MITIGATING CIRCUMSTANCES?

>> WELL, I THINK YOU DO IT JUST
THE WAY I'VE SUGGESTED AND THE
WAY THE COURT OUTLINED IN
MOHAMED.

THE TRIAL COURT HAS AN
INDEPENDENT OBLIGATION TO INSURE
A FAIR SENTENCE.

>> SO IN THIS CASE IT'S THE
TRIAL JUDGE'S OBLIGATION, YOU
CONTEND, TO CALL THE 24
WITNESSES THAT THE DEFENDANT HAD
SAID HE DIDN'T WANT PRESENTED?

>> TO CALL THOSE OR HAVE
APPOINTED COUNSEL OR EVEN
DEFENSE COUNSEL PRESENT THE --

>> IT DOESN'T MATTER WHO DID IT,

WHETHER IT'S STANDBY COUNSEL OR
THE COURT ITSELF --

>> YES.

>> -- IF THE WITNESSES ARE
CALLED, IT'S IN DIRECT
CONTRAVENTION TO WHAT THE
DEFENDANT HAS SAID HE OR SHE
WANTS.

>> THAT'S TRUE, YOUR HONOR.
BUT WE'RE WAY PAST THAT POINT.
WE'VE CROSSED THAT BRIDGE.
THIS COURT HAS APPROVED IN
NUMEROUS CASES APPOINTMENT OF
SPECIAL COUNSEL TO INVESTIGATE,
DEVELOP AND PRESENT MITIGATING
EVIDENCE DESPITE THE DEFENDANT'S
WISHES.

>> SO MAYBE WE SHOULDN'T BE
SAYING THAT HE HAS THAT RIGHT.

>> WELL, I, YOU KNOW, LIKE I
SAY, IT SEEMS TO BE AN ILLUSORY
RIGHT AT THIS POINT.

>> HOW IS IT ILLUSORY IF HE SAID
HE DOESN'T WANT IT?

ALL HE HAS TO SAY IS, YES, I
WANT IT, AND HE HAS IT.

>> WELL, HE CAN SAY I DON'T WANT
THIS PRESENTED TO THE JURY, BUT
DESPITE THAT THE TRIAL JUDGE
STILL HAS AN OBLIGATION AND THE
STATE OF FLORIDA STILL HAS AN
OBLIGATION TO PRESENT AS FULL A
CASE OF MITIGATION AS POSSIBLE
IN ORDER TO HAVE A FAIR,
UNIFORM, NON-ARBITRARY AND
RELIABLE DEATH PENALTY.

>> BUT DID THE TRIAL JUDGE FIND
ANY MITIGATION AT ALL?

>> THE TRIAL JUDGE FOUND SOME
MITIGATION, YES.

>> BASED UPON WHAT?

>> SHE FOUND, UM -- HOLD ON JUST
A MINUTE.

THE TRIAL JUDGE FOUND IN
MITIGATION --

>> I THINK HIS QUESTION WAS
BASED ON WHAT, WHAT EVIDENCE WAS
PRESENTED TO THE TRIAL JUDGE
THAT HE, TO MAKE THESE FINDINGS?

>> SHE FOUND SOME MITIGATION.
NEGLECT, ABUSE, A COUPLE OF
OTHER THINGS BASED ON THE PSI
AND THE DEFENDANT'S STATEMENT
WHEN HE WAS BEING INTERROGATED
BY THE POLICE.

DURING HIS INTERVIEW HE
MENTIONED SOME THINGS THAT
HAPPENED DURING HIS CHILDHOOD.
SO THE TRIAL JUDGE BASED HER
FINDINGS ON THAT, BUT SHE ALSO
REJECTED NUMEROUS POTENTIAL
MITIGATION STATING I CAN'T

ACCEPT IT BECAUSE IT WAS ONLY IN
A PROFFER.

NOW, DISCRETION HAS TO BE
REASONABLE.

AND I DON'T THINK THAT YOU CAN
DISAGREE THAT IT WOULD BE
UNREASONABLE GIVEN THE TRIAL
JUDGE'S DUTY TO CONSIDER ALL
POSSIBLE MITIGATION AND TO HAVE
A FULL AIRING OF THE MITIGATION
CASE NOT TO CALL THESE
WITNESSES.

THERE'S REALLY NO REASON NOT TO.

>> DOES FARETTA ENTER INTO THE
ANALYSIS OF THESE QUESTIONS AT
ALL, OR IN YOUR VIEW IS IT
TOTALLY IRRELEVANT?

>> IT'S MY VIEW THAT IT DOES NOT
BASED ON THIS COURT'S DECISION
IN MOHAMED AND THE RECENT BARNES
CASE.

IN BARNES THIS COURT, I THINK,
CAME OUT PRETTY CLEARLY IN
SAYING THAT IN FLORIDA THE
STATE'S INTEREST IN RELIABLE
SENTENCING IS PARAMOUNT.

AND IT CERTAINLY OUTWEIGHS A
DEFENDANT'S PERSONAL WISHES OR
HIS DESIRE TO DIE.

DEFENDANT HAS A RIGHT TO
REPRESENT HIMSELF BUT NOT TO
CHOOSE HIS SENTENCE.

NOT IN FLORIDA.

AND THAT -- IN BARNES THE COURT
REFERRED THAT TO THE 8TH AND
14TH AMENDMENTS' REQUIREMENT OF
INDIVIDUALIZED SENTENCING.

DEFENDANT'S WISH TO DIE IS AN
ARBITRARY FACTOR, IT SHOULD HAVE
NO RELEVANCE.

>> WELL, WE'VE BEEN STRUGGLING
WITH THIS FOR A LONG TIME.

>> YES.

>> AND WE GOT TO MOHAMED WHERE,
I MEAN, THERE WAS A SERIES OF
CASES INCLUDING CLUECUCK WHERE
THE JUDGE DID PUT ON OR HAVE
STANDBY COUNSEL OR SPECIAL
COUNSEL APPOINTED.

AND BASED ON WHAT WAS PRESENTED
AS TO SERIOUS MENTAL ILLNESS,
THE SENTENCE WAS REDUCED TO
LIFE.

MY QUESTION IS WHEN WE ADOPTED
THE REQUIREMENT PROSPECTIVELY IN
MOHAMED, SINCE THAT TIME ARE
THERE ANY STATES THAT HAVE GONE
FARTHER THAN WE HAVE AS FAR AS
COURT-ORDERED ADDITIONAL
REQUIREMENTS IMPOSED WHEN A
DEFENDANT WISHES TO WAIVE
MITIGATION?

BECAUSE IT SEEMS LIKE WE -- THE STATE HAS TO PUT ON ANYTHING THEY HAVE AVAILABLE, THE DEFENSE LAWYER HAS TO SAY EVERYTHING THAT HE OR SHE DID TO INSURE THAT ALL THE MITIGATION WAS INVESTIGATED, AND THE JUDGE -- PSI, A COMPREHENSIVE PSI HAS TO BE PREPARED AND CONSIDERED, AND THEN THE JUDGE HAS DISCRETION TO ALSO, IF WARRANTED, HAVE ADDITIONAL WITNESSES PUT ON. BUT WHAT OTHER, HAVE ANY OTHER STATES GONE BEYOND THAT? OR EVEN THERE?

>> YOUR HONOR, TO MY KNOWLEDGE THERE ARE TWO OTHER, TWO OTHER STATES THAT ARE CONSISTENT WITH FLORIDA; NEW JERSEY AND, I THINK, GEORGIA.

AT LEAST THERE'S ONE CASE WHERE GEORGIA HAS SAID, YOU KNOW, RELIABLE SENTENCING REALLY TRUMPS A DEFENDANT'S RIGHT TO REPRESENT HIMSELF OR HIS WISH TO DIE.

THOSE ARE THE TWO STATES.

>> AND I THINK IN NEW JERSEY THAT'S -- WE BORROWED WHAT HAD HAPPENED IN NEW JERSEY.

SO HAVE THEY GONE FARTHER IN -- WHAT YOU'RE REALLY SAYING IS THAT IN EVERY CASE WHERE THE DEFENDANT WAIVES MITIGATION IS THAT THERE SHOULD BE NO DISCRETION OF THE TRIAL COURT. TRIAL COURT MUST EITHER PUT ON THE WITNESSES OR HAVE COUNSEL. AND I UNDERSTAND, YOU KNOW, I -- WE ADVOCATED FOR THAT VIEW, BUT I'M ASKING YOU DID ANYONE, HAS ANY -- HAS NEW JERSEY GONE FARTHER THAN WHAT HAPPENED AT THE TIME IN MOHAMED?

>> I DON'T KNOW, YOUR HONOR. I'M NOT FAMILIAR WITH CASES. I DON'T KNOW IF APPOINTING COUNSEL IS STANDARD IN NEW JERSEY OR HOW IT'S DONE THERE.

>> I THINK WE'RE CONCERNED IN THIS CASE BECAUSE THERE COULD BE A VERY COMPELLING CASE WHERE SOMEBODY IS CLEARLY EXTREMELY MENTALLY ILL AND YET COMPETENT TO STAND TRIAL.

BUT IN THIS CASE YOU'VE GOT SOME PRETTY STRONG AGGRAVATORS. AND AS JUSTICE PERRY SAID, THE JUDGE DID FIND SOME MITIGATION --

>> JUST ONE AGGRAVATOR AND THEN THE BURGLARY, THE TECHNICAL

BURGLARY --
>> THE AGGRAVATOR WAS --
>> HAC.
>> AND I'M NOT SURE WHY CCP
WASN'T FOUND.
WAS IT ASKED FOR?
>> NO.
>> OKAY.
WELL, I MEAN, IF --
>> YOUR HONOR --
>> LET ME JUST, THERE REALLY IN
TERMS OF HIM HAVING PTSD OR
OTHER TYPES OF MENTAL
DEFICIENCIES, I'M NOT REALLY
SEEING THAT AS BEING THE KIND OF
THING THAT WOULD CRY OUT TO HAVE
A HIRED MEDICAL EXPERT OR
PSYCHOLOGICAL EXPERT BE CALLED
AS OPPOSED TO SOMEBODY WHO, YOU
KNOW, HAD BEEN COMMITTED FOR
OTHER REASONS AND HAD A DOCTOR
THAT WAS THERE PREPARED TO SAY
THIS DEFENDANT HAS BEEN THIS WAY
HIS ENTIRE LIFE OR SOMETHING
LIKE THAT, MENTALLY RETARDED.
WHAT DO YOU SAY ABOUT THAT IN
THIS CASE?
WHY THIS IS SO COMPELLING TO
HAVE REQUIRED ANY JUDGE TO HAVE
CALLED THESE WITNESSES THAT WERE
RIGHT THERE.
>> I THINK IT'S EXTREMELY
COMPELLING.
YOU HAVE AN EXPERT WHO WAS
PREPARED TO TESTIFY THAT BOTH
THE STATUTORY MENTAL MITIGATORS
EXISTED.
>> I KNOW.
BUT YOU UNDERSTAND THAT THERE
ARE MANY, MANY CASES WHERE
EXPERTS COME AND TESTIFY THAT
THERE ARE STATUTORY MITIGATORS
MET, BUT IT'S GIVEN NOT A LOT OF
CREDIBILITY --
>> WELL, HOW CAN --
>> -- BECAUSE OF THE
CIRCUMSTANCES OF THE CRIME.
>> YOUR HONOR, HOW CAN WE JUDGE
IT WHEN WE HAVEN'T HEARD THE
WITNESSES?
THAT'S THE BIG PROBLEM HERE.
I CAN'T COMMENT ON THE STRENGTH
OF THE TESTIMONY OF THESE 25
WITNESSES, NOR CAN THIS COURT
EVALUATE IT WHEN REVIEWING THIS
CASE IF WE DON'T HAVE THE
EVIDENCE BEFORE US.
THAT IS THE CHIEF PROBLEM BEFORE
US TODAY.
AND THAT'S THE PROBLEM THAT
WE'VE HAD SINCE HAMBLIN WAS
DECIDED.

THIS COURT HAS RECOGNIZED THAT.
WITHOUT THE FACTS DEVELOPED AND
PRESENTED AT THE TRIAL LEVEL,
THIS COURT CAN'T CONDUCT ANY
SORT OF PROPORTIONALITY REVIEW.
I COULDN'T EVEN RAISE
PROPORTIONALITY IN THIS CASE
BECAUSE I DON'T HAVE THE
TESTIMONY.

I DON'T HAVE THE EVIDENCE.
I CAN'T ARGUE THAT THE TRIAL
JUDGE WAS WRONG BECAUSE I DON'T
HAVE -- THE COUNTERVAILING
EVIDENCE WAS NEVER PRESENTED TO
THE JUDGE.

SHE REJECTED IT OUT OF HAND
WITHOUT EVEN HEARING THE
TESTIMONY.

AND I DON'T THINK THAT COMPORTS
WITH WHAT THIS COURT HAS SAID IS
THE PRIMARY INTEREST IN THIS
CASE, WHICH IS RELIABLE
SENTENCING, DEATH PENALTY
SENTENCING.

AND --

>> YOU ARE IN YOUR REBUTTAL
TIME.

>> OKAY.

I'LL SAVE MINE FOR REBUTTAL.
THANK YOU.

>> MAY IT PLEASE THE COURT,
ASSISTANT ATTORNEY GENERAL
CHARMAINE MILLSAPS FOR THE
STATE.

THIS COURT HAS ALREADY REJECTED
THESE ARGUMENTS IN GRIMM AND IN
RUSH.

FIRST OF ALL, IN GRIMM YOU HELD
THAT THE DEFENDANT WHO'S WAIVED
MITIGATION MAY NOT COMPLAIN ON
APPEAL ABOUT THE FACT THAT THEY
DID NOT CALL -- IN THAT CASE,
DR. LARSON -- AS A WITNESS.

SO I THINK GRIMM SAYS IF YOU
WAIVE IT BELOW, YOU BASICALLY
WAIVE AN ARGUMENT THAT THE
EXPERT SHOULD HAVE BEEN CALLED
AS A COURT WITNESS.

>> AND IF THAT WERE THE CASE,
MOHAMED WOULD HAVE NEVER
EXISTED, BECAUSE HE WAIVED
MITIGATION.

WE FOUND REVERSIBLE ERROR BY THE
JUDGE GIVING GREAT WEIGHT TO THE
JURY'S RECOMMENDATION.

BUT MY QUESTION REALLY IS
LOOKING BACK AT MOHAMED WHICH
WAS A STEP AT THAT TIME, WE DID
VEST JUDGES WITH DISCRETION TO
DETERMINE WHETHER WITNESSES
SHOULD BE CALLED OR COUNSEL
APPOINTED.

THE QUESTION IS I WAS LOOKING IN MOHAMED, WHAT ARE THE -- THERE HAS TO BE SOME GUIDELINES TO GUIDE THE JUDGE'S DISCRETION. AGAIN, WE HAVE A CASE TOMORROW WHERE THE JUDGE DID APPOINT COUNSEL TO PRESENT MITIGATION. SO WHAT IS -- IF WE ARE GOING TO TELL JUDGES IN CAPITAL CASES, WHAT IS TO GUIDE THEIR DISCRETION AS TO WHETHER THEY'RE TO APPOINT COUNSEL OR CALL THE WITNESSES OF THEIR OWN? WHAT WOULD YOU SAY?

>> WELL, YOUR HONOR, SHE'S NOT ADVOCATING FOR DISCRETION WHEN YOU ARGUE THAT THE COURT MUST HEAR FROM THE WITNESSES.

YOU'RE --

>> WELL, I'M ASKING -- I UNDERSTAND.

BUT I'M ASKING YOU, I MEAN, THE FIRST ISSUE WAS THAT THE JUDGE ABUSED HER DISCRETION.

SO WHAT I'M ASKING YOU IS, AND I'M, I MEAN, ASKING BECAUSE I'M NOT SURE I KNOW THE ANSWER AS WELL AS I'D LIKE TO HEAR THE STATE'S POSITION ON IT, BECAUSE THE STATE HAS AN INTEREST IN MAKING SURE THAT THE DEATH PENALTY IS NOT IMPOSED ARBITRARILY.

IS WHAT SHOULD GUIDE THIS DISCRETION?

THIS JUDGE SAYS, NO, I'M NOT GOING TO PRESENT OR I'M NOT GOING TO CALL THIS WITNESS, AND ANOTHER JUDGE SAYS BASED ON THE EXACT SAME FACTS I AM GOING TO SINCE THEY'RE RIGHT HERE.

I WANT TO HEAR FROM ONE OR TWO OF THE MENTAL HEALTH EXPERTS. WHAT'S TO GUIDE THE DISCRETION? IS IT JUST A FLIP OF THE COIN?

>> WELL, BUT, YOUR HONOR, YOU NEED -- ESPECIALLY IN THIS CASE WHAT YOU'RE SAYING IS YOU WOULD JUST CALL DR. KROP.

WELL, NO.

WE'RE ALSO GOING TO -- IF THE DEFENSE CALLS DR. KROP, THE STATE IS ALLOWED TO CALL ITS OWN MENTAL HEALTH WITNESS.

>> OF COURSE.

OF COURSE.

>> YOU'RE GOING TO BE HOLDING AN ENTIRE PENALTY PHASE --

>> WELL, BUT YOU ADMIT THAT THERE ARE CASES THAT HAVE, YOU KNOW, I DON'T KNOW IF THEY'RE HALF OF THE CASES WHERE THE

JUDGES ARE ALLOWING OR
APPOINTING COUNSEL?

YOU KNOW, I DON'T KNOW WHAT THE
NUMBERS ARE.

BUT THE STATE AT THAT POINT
HAS -- WE'VE ALREADY CROSSED THE
POINT WHERE THAT WOULD BE
REVERSIBLE ERROR FOR THEM TO
HAVE APPOINTED SPECIAL COUNSEL
IN VIOLATION OF FARETTA.

>> BUT --

>> SO I'M STILL TRYING TO ASK
YOU THE QUESTION, WHAT SHOULD
GUIDE THE JUDGE'S DISCRETION?

>> WELL, YOUR HONOR, I DON'T
THINK THEY SHOULD BE CALLING
THESE WITNESSES AS COURT
WITNESSES.

BUT I THINK YOU'RE MISSING THE
POINT IN GRIMM.

IN GRIMM HE DID APPOINT SPECIAL
COUNSEL, BUT THEY LISTENED TO
THE -- THEY GOT THE MENTAL
HEALTH EXPERT TO DO A WRITTEN
REPORT.

YOUR HONOR, YOU REALLY -- I
THINK WHAT YOU SHOULD DO MORE OF
THIS ON WRITTEN SUBMISSIONS.
HER REAL ARGUMENT HERE, YOUR
HONOR, WHICH YOU'VE REJECTED IN
RUSH IS WHEN DEFENSE COUNSEL
PUTS FORWARD A KUHN COLLOQUY
THAT ALL THAT INFORMATION WHICH
IS PROFFERED -- AND YOU POINTED
THAT OUT IN RUSH, IT'S NOT
EVIDENCE, IT'S A PROFFER.
WHAT SHE'S SAYING IS EVERYTHING
PRESENTED SHOULD BE ACCEPTED AS
MITIGATING EVIDENCE AND FOUND BY
TRIAL JUDGE.

AND ALL THOSE WITNESSES SHOULD
BE CALLED.

IN EFFECT, YOUR HONOR, THAT
WOULD HAVE THE EXACT EFFECT OF
AT LEAST AS TO THE JUDGE HOLDING
THAT YOU CANNOT WAIVE
MITIGATION.

BECAUSE SHE WANTS ALL 25 -- ALL
24 --

>> SO IF YOU WERE, AGAIN --
WHICH I HEARD YOU SAY BECAUSE IT
WOULD BE WRONG FOR THE JUDGE TO
CALL WITNESSES AS HIS OR HER OWN
COURT WITNESSES EVEN THOUGH BY
APPROVED THAT AS BEING ONE
POSSIBLE WAY TO APPROACH THIS IN
MOHAMED.

YOU'RE SAYING WE SHOULD RECEDE
FROM THAT PORTION OF MOHAMED.

>> PARTS OF MOHAMED.

FOR EXAMPLE, YOU SHOULD NOT GIVE
GREAT WEIGHT TO A JURY'S

RECOMMENDATION OF DEATH.

THAT, IN FACT, WAS A ONE-SIDED PRESENTATION.

SO THAT PART OF MOHAMED, YEAH, I CERTAINLY AGREE WITH THAT.

BUT, YOUR HONOR, THE OTHER THING I THINK WHERE YOU NEED TO GO IF YOU'RE GOING TO DO THIS, YOU NEED THIS MORE AT THE PSIS AND WRITTEN REPORTS.

FOR EXAMPLE, HERE THE JUDGE COULD HAVE SAID, WELL, I'M NOT GOING TO CALL DR. KROP, BUT DO YOU HAVE A WRITTEN REPORT FROM DR. KROP?

OKAY?

AND SO BECAUSE, YOUR HONOR, USUALLY WHAT -- TO ANSWER YOUR QUESTION, WHAT A JUDGE USUALLY DOES IS ORDER A PSI, BUT NOT A PARTICULAR TYPE OF PSI.

FOR EXAMPLE, IN THIS PSI THEY RELIED ON THE GRANDMOTHER.

THEY DID NOT GET THE MEDICAL RECORDS.

THE DEFENDANT HERE WAS ADMINISTRATIVELY DISCHARGED FROM --

>> SO ISN'T THAT A VIOLATION OF MOHAMED?

NOW, IT HASN'T BEEN RAISED, BUT I HAVE MOHAMED IN FRONT OF US, AND IT SAYS --

>> YOUR HONOR, I'M JUST TELLING YOU THAT PART DOESN'T WORK BECAUSE THAT'S NOT -- JUDGES JUST PLAIN ORDER A PSI.

THEY DO NOT ORDER, OH, YOU KNOW, I WANT A MINOR PSI OR A REAL PSI OR AN EXTENSIVE PSI.

THEY PLAIN ORDER A PSI.

AND THE BETTER WAY TO GET THIS INFORMATION, IF YOU ASK ME, IS TO HAVE THE DOCTOR SUBMIT WRITTEN REPORTS STRAIGHT TO THE TRIAL JUDGE.

I DON'T UNDERSTAND DOING IT THROUGH THE PSI.

WHAT THEY SHOULD HAVE DONE HERE IS EXACTLY WHAT HAPPENED IN GRIMM WHICH IS HAVE THE MENTAL HEALTH EXPERT NOT TESTIFY, BUT SUBMIT THE WRITTEN REPORT.

NOW, MAYBE DR. KROP IN THIS CASE DIDN'T HAVE A WRITTEN REPORT IN WHICH CASE THE TRIAL JUDGE SHOULD HAVE SAID, WELL, I WANT ONE.

>> IN THE MOHAMED LINE OF CASES, YOU CONSIDER THE PSI MANDATORY, CORRECT?

>> YES, YOUR HONOR.

>> AND YOU CONSIDER THAT
WHOMEVER HAS DONE AN
INVESTIGATION ABOUT THE
MITIGATION, IS THAT A MANDATORY
STEP?

>> NO, YOUR HONOR, BECAUSE UNDER
RUSH YOU REJECTED THAT.

>> SO THAT'S NEVER A STEP.
SO THEN WE HAVE DIFFERENT
CLASSES OF CASES, THOSE WHERE
THERE IS DEFENSE COUNSEL, BUT
THERE'S A WAIVER.
IS THERE NOT A MANDATORY
REQUIREMENT THAT DEFENSE COUNSEL
DO AN INVESTIGATION OF
MITIGATION?

>> YES.

>> OKAY.
SO THAT'S --
[INAUDIBLE]
[INAUDIBLE CONVERSATIONS]

>> NO, I UNDERSTAND.
PLEASE LET ME -- I'M TRYING TO
SEE WHERE WE'RE GOING HERE
BECAUSE WE'RE APPARENTLY HAVING
TWO CLASSES OF CASES PRESENTED
NOW IN OUR CAPITAL LITIGATION.
IF THERE'S COUNSEL, THEN THERE'S
A MANDATORY LOOK AT MITIGATION
BY DEFENSE COUNSEL, MANDATORY,
AND DISCLOSURE OF THAT TO THE
COURT, CORRECT?

>> AND UNDER YOUR KUHN LINE --
>> RIGHT.
WELL, I MEAN, THIS IS -- THEY'RE
ALL FLOWING TOGETHER.
IF THERE IS NO COUNSEL PRESENT,
THEN THAT'S A STEP THAT'S
MISSING FROM THOSE IN WHICH
THERE'S NO COUNSEL.

>> THERE'S ALWAYS COUNSEL
PRESENT, YOUR HONOR.

>> REPRESENTING -- MS. MILLSAPS.
DO YOU UNDERSTAND WHAT I'M
SAYING?

>> NO, I DO NOT.

>> OKAY.
IN ONE CASE YOU'LL HAVE AN
ATTORNEY REPRESENTING A
DEFENDANT WHO JUST REFUSES TO
PUT ON MITIGATION, CORRECT?

>> YES.

>> AND IN THAT SITUATION, THIS
COURT'S OPINIONS REQUIRE THAT
THAT COUNSEL INVESTIGATE
MITIGATION AND DISCLOSE IT TO
THE COURT, CORRECT?

>> SO THAT THE DEFENDANT --
>> SO IS THAT CORRECT?

>> YES.

>> AND IF THERE'S NO COUNSEL
REPRESENTING THE DEFENDANT --

NOT STANDBY, BUT NO COUNSEL
REPRESENTING A DEFENDANT --
THAT'S A STEP THAT'S DIFFERENT.

>> YES.

IF HE HAD --

>> SO WE HAVE TWO DIFFERENT --

>> IF HE HAS ASSERTED HIS
FARETTA RIGHTS AND IS
REPRESENTING HIMSELF.

>> SO WE HAVE TWO DIFFERENT
CLASSIFICATION OF CASES THAT
PROCEED FORWARD.

>> BUT --

>> WE HAVE THOSE IN WHICH
THERE'S AN ATTORNEY PRESENT SO
YOU CAN EVALUATE, AT LEAST A
JUDGE CAN LOOK AT WHAT'S
PROFFERED AND COME TO SOME
DECISION AS TO IF SOMETHING ELSE
SHOULD BE DONE.

BUT IF THERE'S NO COUNSEL
PRESENT, THAT'S A STEP THAT'S
MISSING AND DIFFERENT FROM A
NON-REPRESENTED DEFENDANT.

>> IF A DEFENDANT REPRESENTS
HIMSELF UNDER FARETTA, WE
WOULD --

>> AND IS THAT A VIABLE AND IS
THAT A CONSTITUTIONAL DIFFERENCE
OR ONE THAT CAUSES A
CONSTITUTIONAL PROBLEM WITH THAT
DIFFERENCE AND THAT APPROACH?
BEFORE SENTENCING IF YOU HAVE A
LAWYER -- IF YOU WAIVE
MITIGATION, THE COURT IS GOING
TO HEAR AT LEAST A PROFFER OF
MITIGATION.

IF YOU'RE REPRESENTING YOURSELF
AND YOU'VE WAIVED IT, THERE'S NO
WAY A JUDGE CAN EVER KNOW WHAT
THE MITIGATION IS IN A SIMILAR
FASHION.

>> YES.

A DEFENDANT WHO'S REPRESENTED
HIMSELF, YOUR HONOR.

>> RIGHT.

AND THAT'S WHAT I'M ASKING, DOES
THAT CREATE A CONSTITUTIONAL
PROBLEM?

>> NO, YOUR HONOR, BECAUSE
THAT'S WHAT FARETTA ALLOWS THEM
TO DO.

>> AND THAT'S BECAUSE OF
FARETTA.

>> YES.

FARETTA ALLOWS THEM TO REPRESENT
THEMSELVES, AND A FARETTA --
LET'S CALL HIM A PRO SE BECAUSE
THAT'S WHAT HE IS -- IS NOT
GOING TO DO A KUHN COLLOQUY WITH
THE JUDGE.

THAT'S WHAT YOU DO TO INSURE HIS

WAIVER --

>> WELL, ISN'T THE KUHN COLLOQUY AND ALL THAT IS INVOLVED IN KUHN DESIGNED TO INSURE THAT THE WAIVER IS KNOWING AND IS WELL INFORMED?

>> INTELLIGENT, KNOWING THAT THE DEFENDANT'S WAIVER OF MITIGATION IS KNOWINGLY AND

INTELLIGENTLY -- KNOWINGLY INTELLIGENT AND FULLY WAIVED.

YES.

YOU'RE DOING IT FOR THE PURPOSE OF FOR GIVING HIM THE BACKGROUND.

HERE IS WHAT I WOULD PRESENT, AND THEN YOU TURN TO DEFENDANT -- EXACTLY WHAT HAPPENED HERE -- AND SAID DO YOU UNDERSTAND THAT'S WHAT COUNSEL WOULD DO?

AND DO YOU WANT THAT WAIVED? IT IS FOR THE PURPOSE OF MAKING HIS WAIVER VOLUNTARY.

THAT IS WHAT YOU'RE DOING KUHN FOR.

NOW, WHEN A DEFENDANT REPRESENTS HIMSELF, YOUR HONOR, AND THAT'S JUST THE -- WE DON'T DO THE -- THERE IS NO KUHN EQUIVALENT --

>> OH, I UNDERSTAND.

I'M NOT QUESTIONING THAT.

I UNDERSTAND THAT'S THE DIFFERENCE.

BUT IT IS A SIGNIFICANT DIFFERENCE IF THE MITIGATION IS AT LEAST PROFFERED TO A JUDGE.

YOU'RE ASKING WHAT CONTROLS DISCRETION.

IT WOULD SEEM THAT THAT WOULD BE ONE OF THE FACTORS IN DISCRETION, THAT IF YOU'RE REPRESENTED BY COUNSEL AND THAT ATTORNEY PRESENTS THE MOST HORRIFIC CASE OF MITIGATION YOU'VE EVER SEEN, THERE'S A METHOD TO EVALUATE DISCRETION ON WHERE YOU APPOINT SOMEONE OR NOT.

AND ON THE OTHER HAND, IF THERE'S NO COUNSEL, THAT'S NEVER DISCLOSED, SO THERE'S NO WAY, THERE'S NO OBJECTIVE WAY THAT A TRIAL JUDGE HAS -- OR WE HAVE -- TO EVALUATE THE EXERCISE OF DISCRETION.

THERE'S NO PARAMETER TO IT, IS THERE?

>> BUT, YOUR HONOR, REMEMBER, IF YOU DO IT IN THE PRO SE DEFENDANT'S CONTEXT, YOU'RE TRULY VIOLATING FARETTA.

>> WELL, I UNDERSTAND THAT.
THIS IS THE DICHOTOMY THAT WE'RE
IN HERE.

>> OKAY.

>> AND MY QUESTION IS, THOUGH,
THAT THESE CASES THEN END UP IN
A DIFFERENT POSTURE WITH REGARD
TO THE DISCRETION.

>> PRO SE DEFENDANT CASES END UP
DIFFERENTLY.

>> WELL, BUT THERE IS THEN,
THERE IS FOR ALL CASES SINCE
MOHAMED A REQUIREMENT OF A
COMPREHENSIVE PSI THAT IS TO BE
MEANINGFUL SHOULD INCLUDE
PREVIOUS MENTAL HEALTH PROBLEMS
INCLUDING HOSPITALIZATION,
SCHOOL RECORDS AND RELEVANT
FAMILY BACKGROUND.

NOW, IF THAT IS NOT BEING DONE,
THEN THAT IS A PROBLEM WITH
COMPLIANCE WITH MOHAMED
RATHER -- AND THAT WE NEED TO
INSTRUCT JUDGES ON.

BUT FURTHER AS TO THE TWO
CLASSES OF DEFENDANTS, WE THEN
HAVE THE DEFENDANTS WHO EVERYONE
GETS A PSI, PRESUMABLY
COMPREHENSIVE, AND THEN IN SOME
CASES JUDGES ARE CALLING
WITNESSES OR HAVING COUNSEL
PRESENT MITIGATION, AND IN
OTHERS THEY ARE NOT.

NOW, I'M TRYING, I'M STILL
TRYING TO GET TO WHAT IS TO
GUIDE THAT JUDGE'S DISCRETION
ONCE THEY GET THE PSI.

THE WITNESSES ARE THERE AS TO
WHETHER THEY THEN APPOINT
COUNSEL BECAUSE IS IT THAT THERE
IS A PROBABILITY OF SIGNIFICANT
MITIGATION THAT THE JUDGE
CONCERNED ABOUT IS NOT BEING
PRESENTED?

IS -- THAT'S WHAT WE ARE TALKING
ABOUT IN MOHAMED; THAT IS, THE
PROBABILITY OF SIGNIFICANT
MITIGATION.

NOW, MS. CAREY IS SAYING IN THIS
CASE THERE WAS A PROBABILITY OF
SIGNIFICANT MITIGATION, AND THE
JUDGE ABUSED HER DISCRETION BY
NOT CALLING WITNESSES.

CAN YOU RESPOND TO WHY THAT'S
NOT A VIOLATION OF MOHAMED?
WHY IT WAS IN HER DISCRETION NOT
TO CALL WITNESSES IF THERE WAS A
PROBABILITY OF SIGNIFICANT
MITIGATION?

OR IS THE STATE SAYING THIS WAS
NOT SIGNIFICANT MITIGATION,
THESE WERE JUST SOME HIRED

MENTAL HEALTH -- I MEAN, LET'S GET TO THIS ISSUE HERE.
WHY DIDN'T THIS JUDGE ABUSE HER DISCRETION IN APPOINTING COUNSEL OR CALLING THESE WITNESSES?
>> THE LATTER, AND FOR TWO REASONS.
I'M SAYING THERE WASN'T SIGNIFICANCE.
DR. KROP'S DIAGNOSIS --
>> WELL, THAT'S THE FIRST -- NOW WE'RE GETTING TO WHAT -- THAT'S WHY I ASKED YOU WHAT SHOULD GUIDE THE DISCRETION, AND YOU KEPT ON TELLING ME, YOU KNOW, NOTHING GUIDES THE DISCRETION, THIS IS NOT A WORKABLE CASE. MOHAMED'S NOT WORKABLE.
SO YOU'RE SAYING IF YOU LOOK AT DR. KROP'S, WHAT, HIS REPORT? BECAUSE THE REPORT'S NOT IN EVIDENCE.
>> NO, THERE'S NO REPORT.
>> IN MOHAMED DID THE COURT SAY WHAT SHOULD GUIDE DISCRETION OF THE JUDGE?
>> NO, YOUR HONOR.
>> HAS THIS COURT EVER SAID WHAT SHOULD GUIDE THE DISCRETION?
>> NO, YOUR HONOR.
>> DOES DISCRETION MEAN DISCRETION?
>> YES.
DISCRETION CANNOT BE HERE BECAUSE IT'S NO LONGER DISCRETIONARY IF YOU'RE GOING TO MAKE A RULE --
BUT LET ME ALSO GO BACK TO, AND I THINK THIS CASE HIGHLIGHTS IT, WHAT ARE YOU GOING TO DO WHEN YOU CALL SOMEBODY LIKE DR. KROP AND IT ENDS UP GOING SOUTH? BECAUSE HERE ONE OF DR. KROP'S DIAGNOSES, HIS FIVE POSSIBLE DIAGNOSES, ONE OF THEM WAS INTERMITTENT EXPLOSIVE DISORDER WHICH IS VERY EASILY REBUTTED BY CROSS ON THE, BY THE PROSECUTOR'S PART.
AND SECONDLY, AS PART OF HIS INTERVIEWS HE ADMITTED, THE DEFENDANT, SPARRE, ADMITTED TO SHOOTING DOGS AND RUNNING OVER CATS WITH LAWNMOWERS.
AND WHAT'S MORE, YOUR HONOR, IS YOU CANNOT DO JUST THESE TWO STEPS.
NOT ONLY DID WE CROSS DR. KROP ON THAT, BUT IF YOU WANT FULL MITIGATION PRESENTED, THEN YOU'RE GOING TO HAVE TO ALLOW THE STATE TO CALL ITS OWN EXPERT

THAT COULD END UP WITH
ANTISOCIAL AS THE DIAGNOSIS
HERE.

AND SO THIS ALSO HAS A
SIGNIFICANT -- NOT ONLY DO I
BELIEVE THAT THIS WAS NOT
SIGNIFICANT MITIGATION, YOUR
HONOR, THE DIAGNOSIS WERE
POST-TRAUMATIC STRESS DISORDER
FROM BEING IN THE BOYS' HOME.
BUT SECONDLY, YOUR HONOR, YOU'RE
GOING TO HAVE TO FACE THE
SERIOUS DOWNSIDES OF WHEN YOU
CALL THESE EXPERTS ON THEIR OWN,
BOTH THE -- ONE OF THE DIAGNOSES
AND THE TORTURING ANIMALS WOULD
COME OUT.

AND THEN THE STATE GETS TO REBUT
ALL THESE THINGS.

SO YOU COULD VERY WELL END UP
WITH A CASE IN MITIGATION THAT
LOOKS MORE LIKE A CASE IN
AGGRAVATION THAT YOU HAVE FORCED
THE DEFENDANT, IN VIOLATION OF
FARETTA, TO PRESENT.

AND, YOUR HONOR, I WOULD LIKE TO
GO BACK A LITTLE BIT TO YOUR
QUESTION BECAUSE I DON'T THINK
IT'S QUITE AS DIVERGENT AS YOU
MAY THINK.

BECAUSE UNDER RUSH YOU ALL SAID
WHAT WAS IN THE KUHN COLLOQUY IS
NOT EVIDENCE, IT'S JUST A
PROFFER.

AND THE TRIAL COURT DID NOT
VIOLATE MOHAMED BY NOT TAKING
ALL THE INFORMATION IN THE KUHN
COLLOQUY AS MITIGATION.

SO UNDER RUSH YOU'VE ALREADY
REJECTED THAT THE KUHN INQUIRY
AUTOMATICALLY ESTABLISHES
MITIGATION OR SOMEHOW --

>> I MEAN, THERE'S NO WAY YOU
CAN ESTABLISH ANYTHING OTHER
THAN EVIDENCE PROPERLY ADMITTED.
I MEAN, THAT'S FOR SURE.

BUT GOING BACK TO THE -- I STILL
HAVEN'T HAD, THAT I'VE HEARD, IS
A FULL ANSWER AS TO WHAT WAS THE
MITIGATION.

WAS THAT THE ONLY THING, THE
POST-TRAUMATIC STRESS?

BECAUSE HE STARTED GOING
EVERYWHERE.

>> THERE WERE FIVE DIAGNOSES --

>> AND WHAT DO YOU BELIEVE THOSE
TO BE?

>> POST-TRAUMATIC STRESS
DISORDER, IMMINENT EXPLOSIVE
DISORDER, AAHD, THERE WAS --
SUBSTANCE ABUSE WAS THE FOURTH,
AND BIPOLAR SCHIZOID AFFECTING

DISORDER.

THE OTHER TWO EXPERTS WERE GOING TO TESTIFY SOLELY REGARDING THE POST-TRAUMATIC STRESS DISORDER. AND THEY SAID IT WAS STEMMING FROM THE DEFENDANT'S TIME IN THE BOYS' HOME, TARA HALL, WHEN HE WAS 11, 12 AND 13.

>> THESE WERE DISCLOSED HOW?

>> I'M READING FROM THE KUHN COLLOQUY, YOUR HONOR.

THAT'S WHAT.

BUT THAT IS A PROFFER, NOT EVIDENCE THAT --

>> I UNDERSTAND.

>> COULDN'T THE JUDGE FIND SOME OF THAT AS NONSTATUTORY MITIGATION?

>> THEY DID, YOUR HONOR.

THE JUDGE FOUND I WOULD SAY FOUR THINGS AS -- THEY FOUND 13 NONSTATUTORIES.

THAT'S WHY I THINK THIS IS HARMLESS ANYWAY IN THIS CASE.

THE JUDGE FOUND, SHE FOUND AGE AS A STATUTORY MITIGATOR AND THEN 13 NONSTATUTORY MITIGATORS INCLUDING THINGS LIKE THE DEFENDANT HAD BEEN NEGLECTED.

I THINK TWO, THREE, FOUR AND SIX WERE, IN FACT, FOUND FROM THIS -- REALLY SHE GOT IT FROM THE KUHN.

IN OTHER WORDS, WHY SHE DIDN'T REALLY FOLLOW RUSH, SHE DID IT IN THE DEFENDANT'S FAVOR.

SHE BASICALLY TOOK A LOT FROM THE KUHN COLLOQUY AND FOUND IT AS NONSTATUTORY MITIGATION.

SO LOOK AT NUMBER TWO, NUMBER THREE, NUMBER FOUR AND NUMBER SIX.

AND THEN DR. BUFFINGTON, WHO WAS A PHARMACOLOGIST, WAS GOING TO TESTIFY ABOUT HIS LONG-TERM DRUG USE.

BUT THE DEFENDANT ADMITTED DURING THE CONFESSION THAT HE TOOK THE PILLS OUT OF HER PURSE AFTER HE KILLED HER.

HE WAS NOT ON DRUGS AT THE TIME OF THIS OFFENSE.

SO DR. BUFFINGTON'S TESTIMONY ISN'T GOING TO HELP YOU ONE BIT. BECAUSE IT'S AFTER THE FACT.

HE TAKES THOSE PILLS FROM THE DEFENDANT'S, FROM THE VICTIM'S PURSE ON THE WAY OUT.

>> BUT THAT DOESN'T NECESSARILY NEGATE THE FACT THAT HE MAY HAVE USED -- YOU WERE TALKING ABOUT LONG-TERM USE.

YOU'RE JUST TALKING ABOUT AT THE
MOMENT OF THE OFFENSE.
BUT WASN'T HIS TESTIMONY GOING
TO BE MORE OF THE LONG-TERM USE
OF DRUGS?

>> AND ALCOHOL ABUSE, YOUR
HONOR, THAT'S TRUE.
AND, YES, THOSE COULD BE.
BUT WE'RE TALKING ABOUT
SIGNIFICANT MITIGATION.
YOUR HONOR, I TOOK MOHAMED TO BE
THE FOLLOWING: WHEN THERE IS A
REAL POSSIBILITY OF SOMETHING
LIKE THE --

[INAUDIBLE]
CASE WHERE THE DEFENDANT IS
SIGNIFICANTLY MENTALLY IMPAIRED,
YOU'RE NOT DOING IT FOR ALL, FOR
MINOR MITIGATION.
YOU'RE DOING IT FOR SUBSTANTIAL
MITIGATION.

A GOOD ARGUMENT THAT WE
SHOULDN'T EVEN BE TALKING ABOUT,
ABOUT MOHAMED HERE BECAUSE IT
JUST DOESN'T RISE TO THAT LEVEL.
>> HOW DO YOU MAKE THE
DETERMINATION PRIOR TO HEARING
THE WITNESSES OF WHAT IS
SUBSTANTIAL MITIGATION AND WHAT
ISN'T?

I, YOU KNOW, THIS WHOLE AREA IS,
IN MY MIND, A BIT CONVOLUTED.
SO HOW DOES THE TRIAL JUDGE EVEN
MAKE THE DETERMINATION AS TO IS
THIS SIGNIFICANT ENOUGH THAT I
SHOULD CALL WITNESSES OR NOT?

>> WELL, YOUR HONOR, THAT'S WHY
I THINK YOU'RE ASKING ME WHAT WE
COULD DO TO MAKE THIS BETTER,
AND I PERSONALLY WOULD HAVE
ASKED FOR THE MENTAL HEALTH
EXPERT TO GENERATE A REPORT.
YOUR HONOR, FOR EXAMPLE --

>> BUT LET ME ASK YOU THEN IF
YOU GENERATE THE REPORT, WHAT DO
YOU DO WITH IT?

DO YOU -- DOES IT COME INTO
EVIDENCE, OR DOES THE TRIAL
JUDGE JUST READ IT AND MAKE SOME
FINDING?

WHAT DO YOU DO WITH THE REPORT?
I MEAN, HOW IS IT DIFFERENT FROM
IF YOU'RE GOING TO ACCEPT IT,
HOW IS IT DIFFERENT FROM
ACCEPTING THE WITNESS?

>> WELL, FOR THE EXACT SAME
REASON YOU WOULD DO THE PSI.
IT WOULD DEPEND ON -- YES, THE
FIRST THING YOU DO IS READ IT.
AND THEN THE SECOND THING YOU DO
IS DECIDE IF THE DIAGNOSIS IS
SERIOUS ENOUGH TO BE

SUBSTANTIAL.

>> WOULDN'T YOU HAVE TO HAVE THE STATE TO SUBMIT A REPORT ALSO?

>> YES, YOUR HONOR.

IF WE HAVE AN EXPERT --

>> AND WOULDN'T THE DEFENSE HAVE TO HAVE A CHANCE TO REBUT THAT?

>> YOUR HONOR, AND --

>> I MEAN, THERE'S A QUAGMIRE WE'RE SETTING UP HERE.

>> YES, YOU ARE.

YOU'RE GETTING IN --

>> WHAT WE SHOULD DO, IN ESSENCE, IS SIMPLY SAY YOU MUST HAVE MITIGATION PRESENTED WHETHER YOU WANT IT OR NOT.

>> BUT YOU CAN'T DO THAT --

>> I KNOW, BUT THAT'S THE ONLY REAL ANSWER.

>> YES.

AND THAT'S THE REAL QUAGMIRE HERE.

>> CAN I ASK A QUESTION JUST TO CLARIFY SOMETHING FOR ME?

MAYBE I MISUNDERSTOOD WHEN I HEARD IT EARLIER, BUT THERE WAS TWO AGGRAVATORS IN THIS CASE, AM I CORRECT?

>> YES, YOUR HONOR.

>> HAC?

>> YES.

>> AND DURING THE COURSE OF BURGLARY.

>> YES.

>> I HEARD EARLIER THERE WAS JUST ONE DURING THE COURSE OF BURGLARY.

>> NO, YOUR HONOR.

I SAID ONE MITIGATOR.

>> NO, I HEARD --

>> HAC WAS DEFINITELY FOUND.

THERE WERE TWO.

THERE WERE TWO AGGRAVATORS HERE, YOUR HONOR.

THEY WERE BOTH GIVEN GREAT WEIGHT, BUT ONE OF THEM WAS DEFINITELY HAC.

THIS VICTIM WAS STABBED OVER 80 TIMES, AND SHE HAD OVER 30 DEFENSIVE WOUNDS.

AND HE BASICALLY KILLED HER FOR THE RUSH, THE THRILL OF DOING IT, WHICH IS THE OTHER PROBLEM HERE.

WE'VE GOT THE DEFENDANT'S OWN TESTIMONY AS TO WHAT MOTIVATED THIS MURDER.

HE GAVE A CONFESSION, AND THEN HE WROTE A LETTER SAYING THAT.

AND THE TRIAL COURT RELIED ON THAT TO, IN PART, TO REJECT THE MENTAL MITIGATION.

BUT, YES, YOUR HONOR, IT IS A QUAGMIRE.

I'M NOT TRYING TO MINIMIZE THE FACT THAT IT'S A QUAGMIRE.

BUT YOU CANNOT GET OUT OF THE QUAGMIRE BY VIOLATING THE SIXTH AMENDMENT RIGHT TO REPRESENT YOURSELF.

THAT'S NOT A WAY OUT OF THIS DILEMMA.

AND A LOT OF, A LOT OF THE SOLUTIONS PROPOSED ESPECIALLY BY OPPOSING COUNSEL DO JUST THAT. THEY VIOLATE THE SIXTH AMENDMENT RIGHT --

>> SO YOU'RE SUGGESTING THAT IF THE, FIRST OF ALL, REINFORCING THE PSI REQUIREMENT THAT WHEN THESE -- THIS IS NOT TO BE AN ORDINARY PSI TO HAVE RECORDS, BUT THEN ALSO REQUIRE SUBMISSION OF THE REPORT SO THEN THE STATE GETS TO SUBMIT A REPORT.

MANY TIMES IT'S THE STATE REALLY, AND WE'VE SAID HAS THE OBLIGATION TO GIVE MITIGATION. SO IF YOU HAD A SITUATION WHERE THERE HAD BEEN A DIAGNOSIS OF A MENTAL RETARDATION, I MEAN AS AN EXTREME EXAMPLE, THE STATE -- YOU WOULD, YOU KNOW -- HAS THAT OBLIGATION TO MAKE SURE THAT'S PRESENTED TO THE JUDGE IN THESE SITUATIONS.

>> I THINK THAT'S A BRADY OBLIGATION. THAT'S NOT A MOHAMED OBLIGATION. THAT'S BEYOND MOHAMED.

>> I THOUGHT WE SAID IN ONE OF THE CASES PRE-MOHAMED THAT THE STATE HAS THE SAME, THAT IF THEY'VE GOT MITIGATION -- I'VE SEEN IN CASES THE STATE PUT, MAKE SURE THAT ANYTHING IN THE RECORD THAT THEY HAVE IS ALSO PUT ON.

AND YOU'RE SAYING THAT'S UNDER BRADY, NOT UNDER THE --

>> WELL, THE MENTAL RETARDATION. NO.

THE -- FOR EXAMPLE, LET'S TAKE THE SCHOOL RECORDS HERE.

THAT WOULDN'T BE BRADY, BUT THAT MAY WELL BE UNDER THE -- BUT THE POINT I WAS REFERRING TO, YOUR HONOR, IS IF THEY INTRODUCE DR. KROP'S REPORT, WE'RE ENTITLED TO HIRE AN EXPERT AND PUT INTO THE RECORD OUR REPORT AS WELL.

SO THAT'S THE OTHER PROBLEM HERE.

I'M HEARING SOME GOING TOWARD
UNREBUTTED MITIGATION.
AND THAT'S -- ACCURACY MEANS
WHETHER WHAT COMES OUT IS GOOD
OR BAD.
AND IF YOU'RE GOING TO SAY THE
EIGHTH AMENDMENT TRUMPS THE
SIXTH -- WHICH I THINK THE
UNITED STATES SUPREME COURT
WOULD DISAGREE WITH -- BUT
ACCURACY IS ACCURACY.
AND YOU NEED IT FROM ALL SOURCES
WHETHER IT HELPS OR HURTS THE
DEFENDANT.
YOU CANNOT DO ONE-SIDED OR
ONE-WAY MITIGATION
PRESENTATIONS.
THAT'S -- THERE'S NO
JUSTIFICATION FOR THAT.
SO I'D LIKE TO SUM UP NOW.
I DO NOT THINK THAT THE KUHN
COLLOQUY IS ANYTHING BUT A
PROFFER.
IT'S NOT EVIDENCE, SO THE JUDGE
DID NOT ABUSE HER DISCRETION BY
AUTOMATICALLY ACCEPTING IT.
I THINK YOU'VE REJECTED THIS IN
GRIMM, YOU REJECTED WHY THE
MENTAL HEALTH EXPERT WAS -- THE
REPORT WAS INTRODUCED.
DR. KROP WAS NOT -- DR. LARSON
IN THAT CASE -- WAS NOT CALLED A
SUPPORT WITNESS.
I THINK IT WAS ALSO HARMLESS IN
THIS PARTICULAR CASE AND, NO,
YOU SHOULD NOT RECEDE FROM
HAMBLIN BECAUSE YOU'LL BE
VIOLATING THE SIXTH AMENDMENT IF
YOU DO.
FARETTA AND McCASKILL ALLOW
THE DEFENDANT TO WAIVE
MITIGATION.
THAT IS A, HE HAS A RIGHT TO DO
THAT.
AND SO THE TRIAL COURT HERE DID
NOT ABUSE HER DISCRETION IN HER
TREATMENT OF MITIGATION, AND YOU
SHOULD NOT RECEDE FROM HAMBLIN.
THANK YOU FOR YOUR TIME.
>> THANK YOU.
REBUTTAL?
>> YES, YOUR HONOR.
IT'S BEEN 25 YEARS SINCE
HAMBLIN, AND WHEN HAMBLIN WAS
DECIDED, WE DIDN'T HAVE A
HISTORY.
WE HAVE A HISTORY NOW.
AND WHAT THAT HISTORY HAS
REVEALED IS THAT APPOINTMENT OF
SPECIAL COUNSEL WORKS BEST.
JUDGES DO THAT IN CASES ALREADY.
THE COURT HAS FOUND THAT THAT'S

NOT A VIOLATION OF FARETTA
RIGHT.
AND IF THE COURT WANTS TO INSURE
UNIFORM NONARBITRARY SENTENCING
IN DEATH PENALTY CASES, THAT'S A
SOLUTION TO THE PROBLEM.
WHAT WE WANT IS TO PRESENT THE
SENTENCER AS FULL A COMPLETED
CASE, AS COMPLETE A CASE OF
MITIGATION AS POSSIBLE.
AND LISTENING TO ALL OF US
TODAY, I FEEL LIKE WE'RE GOING
DOWN THE RABBIT HOLE.
THE SOLUTION IS RIGHT THERE.
REQUIRE APPOINTED COUNSEL IN
EVERY CASE.
THERE'S ABSOLUTELY NO REASON NOT
TO.
IT DOESN'T TAKE ANYTHING AWAY
FROM TRIAL COURTS.
IT DOESN'T PLACE AN EXTRA BURDEN
ON TRIAL COURTS.
AND, FRANKLY, I THINK TRIAL
COURTS WOULD WELCOME IT.
THEIR JOB IS TO MAKE A DECISION
WITH AS MUCH INFORMATION AS
POSSIBLE.
AND IF APPOINTED COUNSEL IS
REPRESENTED TO EITHER
INVESTIGATE AND DEVELOP
MITIGATION THAT HAS NOT BEEN
DONE SO OR TO PRESENT THE
TESTIMONY BY THIS --
>> SO YOU THINK THAT APPOINTING
AN ATTORNEY IN EVERY CASE TO
PRESENT MITIGATION IS -- AND
THAT CAN, THAT CAN STAND BESIDE
THE FACT THAT A DEFENDANT HAS
THE RIGHT TO NOT PRESENT
MITIGATION?
>> THE COURT HAS --
>> WAIT A -- I'M JUST --
>> SORRY.
>> YOU'RE STILL ASKING US TO GO
EVEN A STEP FURTHER AND SAY IN
EVERY CASE THERE SHOULD BE AN
APPOINTED COUNSEL TO PRESENT
MITIGATION.
CAN THOSE TWO THINGS STAND NEXT
TO EACH OTHER?
>> YES --
>> -- OR ARE WE JUST GIVING LIP
SERVICE TO A DEFENDANT HAVING A
RIGHT TO NOT PRESENT MITIGATION?
>> I DO BELIEVE IT'S GIVING LIP
SERVICE TO THAT, BUT THOSE --
THAT DECISION HAS ALREADY BEEN
MADE.
>> BUT NOW YOU'RE ASKING US TO
TAKE IT EVEN FURTHER --
>> WELL, WHAT I'M SUGGESTING IS
THAT IT NOT BE ARBITRARY.

IN OTHER WORDS, WHAT'S HAPPENED IS IN SOME CASES JUDGES APPOINT SPECIAL COUNSEL.

IN OTHER CASES THE JUDGE DECIDES, HMM, I THINK I WANT AN EVALUATION FROM THIS EXPERT, OR I THINK I WANT TO HEAR THIS FAMILY MEMBER TESTIFY --

>> SO THAT'S ON A CASE-BY-CASE BASIS.

>> YES.

>> SO THE JUDGE CAN EXERCISE SOME DISCRETION AS TO WHETHER OR NOT THEY THINK IT'S NECESSARY, IS IT NOT?

>> AND THE ONLY THING THAT GUIDES THE JUDGE'S DISCRETION IS WHAT'S IN THEIR HEAD.

THERE'S NO WAY FOR THE COURT TO REVIEW WHETHER WHAT THE JUDGE HAS CHOSEN MIGHT BE SIGNIFICANT MITIGATION --

>> BUT I THOUGHT YOU SAID, I THOUGHT YOU SAID THE TRIAL COURTS WOULD WELCOME THE FACT THAT IF WE REQUIRED THEM TO APPOINT --

>> YES.

>> -- COUNSEL --

>> I DO.

>> THEY HAVE THE DISCRETION TO DO SO ALREADY IF THEY WANTED TO.

>> WELL, THAT'S RIGHT.

BUT THEY'RE NOT USING THAT DISCRETION AS THIS CASE INDICATES.

>> SO --

[INAUDIBLE]

>> WHAT, YOUR HONOR?

THEY HAVEN'T BEEN TOLD THAT IT'S NECESSARY.

AND I THINK THAT'S WHAT'S REQUIRED HERE.

>> WELL, IT SEEMS TO ME AGAIN FOR THIS CASE AND, AGAIN, WE HAVE A CASE TOMORROW WHERE THE JUDGE DID APPOINT WHERE I THINK THE PERSON HAD BEEN -- COMMITTED INSANITY BASED ON ANIMAL CRUELTY, THAT THERE IS A DIFFERENCE DESPITE WHAT YOU SAID BETWEEN THESE EXPERTS LIKE A DR. KROP WHO IS HIRED AND KIND OF REVIEWS THINGS AND SAYS THIS PERSON HAS PTSD WHICH BECAUSE HE WAS IN THE BOYS' HOME VERSUS SOMEBODY THAT HAS HAD A LIFELONG HISTORY OF A DIAGNOSED MENTAL ILLNESS, I SEE A QUALITATIVE DIFFERENCE LIKE A CLUECUCK CASE WHERE THAT WAS THE CASE.

SO WHY WOULDN'T THE ISSUE HERE

BE THAT THERE WAS NOT A
PROBABILITY OF SIGNIFICANT
MITIGATION BASED ON WHAT WAS
PROFFERED?

THESE WERE NOT, THESE WERE
WITNESSES HIRED NOT BASED ON
ANYTHING THAT HAD BEEN DIAGNOSED
IN HIS PAST.

WHY WOULDN'T THAT BE A GOOD
DIVIDING LINE FOR --

>> THERE WERE FOUR EXPERTS.

>> SOUNDS LIKE THEY WERE SAYING
THE SAME THING; DRUG ABUSE,
PTSD --

>> NO.

>> NOT TO MINIMIZE THAT, BUT
THAT CERTAINLY ISN'T THE KIND OF
MITIGATION THAT IS GOING TO, IN
MY VIEW RESPECTFULLY, MITIGATE
THIS CRIME WHICH WAS A PRETTY
HORRENDOUS CRIME.

>> YOUR HONOR, THEY WEREN'T ALL
THE SAME.

AND I THINK MY -- MS. MILLSAPS
MISREPRESENTED.

DR. KROP WAS GOING TO TESTIFY
ABOUT FIVE PSYCHIATRIC DIAGNOSES
STEMMING FROM HIS CHILDHOOD.

>> WERE THEY IN THE RECORD?

>> A RESULT OF HIS CHILDHOOD.

>> IN THE CHILDHOOD RECORDS --
ACTUAL DIAGNOSES?

>> I'M GETTING TO THAT LATER.
BASED ON HIS EVALUATION.

DR. BUFFINGTON -- I THINK WE
TALKED ABOUT DR. BUFFINGTON --
THE EFFECTS OF LONG-TERM DRUG
AND ALCOHOL ABUSE SINCE THIS
PERSON WAS 11, 12 OR 13,
PARTICULARLY THE EFFECTS ON THE
FRONTAL LOBE.

DR. ALLYGOOD AND DR. GREENBERG
WERE TO TESTIFY TO A HISTORY OF
MENTAL HEALTH ISSUES DATING BACK
TO AGE 11, 12 AND 13 WHEN HE WAS
IN THE TARA HOME FOR BOYS.

THEY WERE NOT SOLELY GOING TO
TESTIFY ABOUT HIS PTSD.

WHAT THEY WERE GOING TO TALK
ABOUT WAS A LACK OF TREATMENT
FOR PTSD.

SO THIS WAS SIGNIFICANT MENTAL
MITIGATION THAT COVERED THE SPAN
OF HIS LIFETIME FROM AGE 11 TO
AGE 19.

HE WAS 19 WHEN THE CRIME WAS
COMMITTED.

SO THIS WAS SIGNIFICANT
MITIGATION.

I DON'T THINK IT COULD BE
CONSIDERED ANYTHING OTHER THAN
SIGNIFICANT MITIGATION.

WHETHER IT'S SUFFICIENT FOR THIS COURT TO SAY DEATH IS NOT THE APPROPRIATE PENALTY, I DON'T KNOW THAT.

BUT THE COURT CAN'T MAKE THAT DECISION WITHOUT HEARING THE TESTIMONY AND WITHOUT CONSIDERING THE EVIDENCE.

AND, UM, IF THE CONCERN IS FAIR, RELIABLE AND UNIFORM SENTENCING, THIS IS THE WAY TO DO IT.

APPOINTMENT OF SPECIAL COUNSEL TO FIND AND PRESENT WHATEVER MITIGATION IS AVAILABLE.

THIS INSURES THAT SOMEONE WHO'S TRAINED TO DO SO WILL DO HIS BEST TO LOCATE AND PRESENT WHATEVER MITIGATION EXISTS.

THIS PRESERVES THE ADVERSARIAL SYSTEM OF JUSTICE WHICH THIS COURT RECOGNIZED IN CLUECUCK WAS IMPORTANT TO APPELLATE REVIEW.

SURELY IT'S MORE IMPORTANT TO GETTING THE INFORMATION, THE FACTS AT THE TRIAL LEVEL.

>> YOUR TIME HAS EXPIRED.

THANK YOU FOR YOUR ARGUMENTS.

>> OH.

>> YOU'RE TWO MINUTES OVER.

>> OH.

THANK YOU, YOUR HONOR.

I APPRECIATE IT.

>> THANK YOU.

COURT IS ADJOURNED.

>> ALL RISE.