

>> ALL RISE.

SUPREME COURT OF FLORIDA IS NOW  
IN SESSION, PLEASE BE SEATED.

>> CASE OF KACZMAR VERSUS STATE.

>> THANK YOU.

THIS HONORABLE COURT, I'M NADA  
CARRIE, REPRESENTING

MR. KACZMAR.

THIS IS ON RESENTENCING.

THE COURT PREVIOUSLY AFFIRMED  
MR. KACZMAR'S CONVICTION OF  
FIRST-DEGREE MURDER IN THE DEATH  
OF MARIA RUIZ BUT SENT IT BACK  
FOR A NEW PENALTY PHASE  
PROCEEDING AFTER STRIKING TWO OF  
THE AGGRAVATING FACTORS AS  
INAPPLICABLE.

AT THE NEW PENALTY PHASE  
PROCEEDING MR. KACZMAR WAIVED  
ANY MITIGATING EVIDENCE BEFORE  
THE JURY, SAYING HE WANTED TO  
RECEIVE THE DEATH PENALTY IN  
ORDER TO BE GUARANTEED LEGAL  
COUNSEL IN BOTH APPEALS AND  
OTHER PROCEEDINGS IN REGARD TO  
THE CONVICTION.

SO THE FIRST ISSUE WE ADDRESS  
CONCERNS THE TRIAL COURT'S, IN  
REIMPOSING THE DEATH SENTENCE  
WHETHER THE TRIAL COURT  
REVERSIBLY ERRORRED IN GIVING  
THE JURY'S RECOMMENDATION GREAT  
WEIGHT.

>> CAN I JUST ASK A QUESTION  
ABOUT THE WAIVER?

>> SURE.

>> IT, DID HE WAIVE THE BECAUSE  
HE THOUGHT HE WOULD GET GREATER  
REVIEW OF HIS DEATH SENTENCE?  
AND DID SOMEONE EXPLAIN THAT  
THAT WAS NOT THE CASE?

THAT IT'S LIKE, HE WILL GET A  
LOT OF REVIEW BUT IF HE DOESN'T  
PRESENT MITIGATION IT IS GOING  
TO HAMPER THE ABILITY TO REVIEW  
IT?

I JUST THOUGHT NORMALLY PEOPLE  
WAIVE MITIGATION DO IT SO THEY  
CAN HASTEN THE IMPOSITION, THE  
ULTIMATE CARRYING OUT OF THE  
DEATH SENTENCE.

THAT BOTHERED ME.

>> MY UNDERSTANDING, AND HE  
STATED THIS IN COURT, HE SAID,  
SOMETHING ABOUT THIS IS DUVAL

COUNTY.

I'M GOING TO GET THE DEATH SENTENCE HERE NO MATTER WHAT. AND WHAT HE WAS CONCERNED ABOUT WAS GET GETTING A GUARANTY OF LEGAL COUNSEL BECAUSE OF COURSE HE IS APPOINTED LEGAL COUNSEL IN POST-CONVICTION APPEALS IN STATE AND FEDERAL COURT IF HE GET AS DEATH SENTENCE.

IF THE SENTENCE IS REDUCED TO LIFE EITHER AS A RESULT OF THIS APPEAL TO THIS COURT OR THE JURY'S RECOMMENDATION, WHICH HE DIDN'T REALLY BELIEVE IN ANYWAY, THEN HE IS WILL NOT GET A LAWYER GUARANTEED.

THAT IS WHAT HE STATED. UNDER THE RULES.

>> WELL, CONTINUE WITH YOUR ARGUMENT.

>> THAT SEEMS TO BE HIS MAIN CONCERN OF GETTING A LAWYER.

I WILL JUST ADD--

>> BUT HIS CONVICTION HAD ALREADY BEEN AFFIRMED?

>> YES.

BUT HE STILL FEELS HE HAS POST-CONVICTION APPEALS OF THE CONVICTION.

OTHER EVIDENCE RELATED TO VARIOUS THINGS.

THAT AREN'T RELEVANT HERE TODAY. BUT I WOULD ALSO POINT OUT THAT, HE WAS OFFERED A LIFE SENTENCE. THE STATE OFFERED HIM A LIFE SENTENCE IN THIS CASE ON THE RESENTENCING IF HE WOULD GIVE UP HIS APPEALS OF THE CONVICTION AND HE DIDN'T WANT TO DO THAT PAUSE HE HAS ALWAYS STATED HE DID NOT COMMIT THIS CRIME.

SO HE REFUSED THE OFFER OF A LIFE SENTENCE.

SO TURNING TO THE FIRST ISSUE, THE QUESTION HERE IS WHETHER THE TRIAL JUDGE'S IMPOSITION OF THE DEATH PENALTY WAS ERROR BECAUSE THE JUDGE GAVE GREAT WEIGHT TO THE JURY'S RECOMMENDATION, IT WAS 12-0 RECOMMENDATION DESPITE THE FACT THAT THE JURY DID NOT HEAR ANY MITIGATING EVIDENCE IN THIS CASE AND WHAT THE JUDGE SAID IN HIS ORDER WAS THE JUDGE,

JURY WAS FULLY JUSTIFIED IN A  
12-0 RECOMMENDATION.

THE COURT IS REQUIRED TO GIVE  
THE JURY RECOMMENDATION GREAT  
WEIGHT AND CITED SEVERAL CASES  
FROM THIS COURT, WHICH, DOES  
TRIAL JUDGE GIVE THE  
RECOMMENDATION GREAT WEIGHT.  
THIS COURT AGREES WITH THE  
JURY'S ASSESSMENT OF THE  
AGGRAVATING CIRCUMSTANCES AND  
SAYS I FULLY AGREE THE DEATH  
SENTENCE IS JUSTIFIED IN THIS  
CASE.

SO I THINK BASED ON THOSE WORDS  
AND WHAT THE JUDGE SAID--

>> BUT DIDN'T THE JUDGE MAKE  
INDEPENDENT FINDING AS TO THE  
AGGRAVATORS AND MITIGATORS?

>> YES.

THE JUDGE DID THAT.

>> HE DID SAY THAT, ISN'T THAT  
SIMILAR TO THE RIM CASE?

WHERE HE, THE JUDGE FOLLOWED  
THAT NORMAL COLLOQUY THAT IS  
NORMALLY GIVEN IN THESE CASES  
WHERE THERE IS A JURY.

BUT HE, HE INDEPENDENTLY WAIVED  
THE EVIDENCE HIMSELF AND CAME TO  
HIS OWN INDEPENDENT CONCLUSION.

>> YES.

AND THE JUDGE HAS TO DO THAT IN  
EVERY CASE.

I BELIEVE IN MOHAMMED, THE JUDGE  
ALSO RECOGNIZED THAT HE WAS  
REQUIRED TO DO AN INDEPENDENT,  
WHAT DID THE JUDGE SAY IN  
MOHAMMED.

ULTIMATE DECISION RESTS WITH THE  
TRIAL JUDGE.

SO THAT'S CLEAR THAT THE JUDGE  
UNDERSTOOD THE ULTIMATE DECISION  
WAS HIS.

THE QUESTION IS DID HIS  
DECISION, WAS HIS DECISION IN  
PART BASED ON HIS RELIANCE OF  
THE JURY'S RECOMMENDATION IN  
THIS CASE?

>> LET ME ASK YOU THIS.

DID I NOT READ SOMEPLACE WHERE  
THE MITIGATION WAS PRESENTED  
THAT WAS PRESENTED IN THE PRIOR  
SENTENCING?

>> IT WAS PRESENTED DURING A  
SPENCER HEARING TO THE TRIAL

JUDGE BUT NONE OF THAT  
TESTIMONY, I THINK THERE WERE  
SIX WITNESSES INCLUDING AN  
EXPERT.  
NONE OF THAT WAS PRESENTED TO  
THE JURY ON THE RESENTENCING.  
>> DID THE DEFENSE COUNSEL ARGUE  
THAT THERE WAS SOME MITIGATION  
IN THE CLOSING ARGUMENT?  
>> YES.  
DEFENSE COUNSEL DID THE BEST HE  
COULD BASED ON THE EVIDENCE  
PRESENTED BY THE STATE RELATED  
TO THE CIRCUMSTANCES OF THE  
CRIME.  
>> SO, OKAY.  
SO ALTHOUGH IT WAS NOT, HE DID  
ARGUE, I MEAN LIKE, AS I RECALL,  
I MEAN, NUMEROUS, NOT JUST ONE  
OR TWO, BUT MULTIPLES OF  
MITIGATION, WASN'T IT?  
>> THAT'S CORRECT, YOUR HONOR.  
>> SO I MEAN, HOW, I MEAN, DOES  
THAT NOT DISTINGUISH THIS A  
LITTLE BIT, OR MAYBE A GREAT  
DEAL FROM THE CASES THAT SAY NO  
MITIGATION AT ALL, BECAUSE AT  
LEAST DEFENSE COUNSEL THOUGHT  
THERE WAS MITIGATION HERE?  
>> I--  
>> NONE OF THESE ARE ALL THE  
SAME, I UNDERSTAND.  
>> RIGHT.  
>> BUT WHY SHOULD WE NOT-- LET  
ME ASK IT THIS WAY THEN.  
WHY SHOULD WE NOT APPLY THE  
STANDARD THAT JUSTICE PERRY IS  
SUGGESTING, THAT THERE WAS  
MITIGATION IN THIS RECORD AND  
DEFENSE COUNSEL ARGUED IT TO THE  
JURY?  
>> WELL I THINK THE ISSUE IS  
WHETHER THE JURY WAS ABLE TO  
PERFORM ITS STATUTORY ROLE.  
>> RIGHT.  
>> AND I THINK WHEN THERE'S ALL  
THIS MITIGATION, AND THAT  
INCLUDES, TAKING INTO ACCOUNT  
THE AGGRAVATION, THE THINGS THAT  
BEAR ON THE GRAVITY AND THE  
BACKGROUND, AND CIRCUMSTANCES OF  
THE DEFENDANT'S LIFE.  
IN THIS CASE THEY KNEW NOTHING  
ABOUT THE BACKGROUND OF THE  
DEFENDANT, WHICH IS A HUGE

PART--

>> I THINK WE'RE TALKING PAST ONE ANOTHER.

I DO UNDERSTAND THAT BUT ARE YOU SAYING THAT DEFENSE COUNSEL ARGUED FABRICATED MITIGATION?

>> DEFENSE COUNSEL TOOK WHAT HE COULD FROM THE STATE'S CASE.

>> RIGHT.

>> THAT INCLUDED BASICALLY THAT HE WAS ON DRUGS AT THE TIME OF THE CRIME BUT THE JURY DIDN'T HEAR ANYTHING ABOUT THE EFFECT OF THOSE DRUGS OR ABOUT DEFENDANT'S LONG-TERM DRUG USE.

>> YEAH, OKAY.

>> IT WAS NOT PRESENTED AS MITT NATION.

IT WAS-- MITIGATION.

IT WAS BASICALLY PRESENTED AS SOMETHING THAT OCCURRED DURING THE CRIME.

>> HE CALLED IT MITIGATION THOUGH, DIDN'T HE? THE DEFENSE COUNSEL CALLED IT MITIGATION.

>> YES, HE DID, YES.

>> TWO QUESTIONS.

DID THE DEFENSE LAWYER ARGUE THAT HE SHOULD NOT GET THE DEATH PENALTY?

>> YES.

>> OKAY.

AND WAS THERE EVER A SUGGESTION THAT THE PART OF MOHAMMED WHERE THERE WOULD BE, THERE'S A WAIVER OF MITIGATION, THAT A, SEPARATE LAWYER PRESENTS THE MITIGATION, WAS THAT EVER ADVANCED TO THE JUDGE IN THIS CASE?

>> SEE THE JUDGE DID HAVE THE MITIGATING EVIDENCE.

>> BUT AS FAR AS--

>> IN FRONT OF THE JURY, NO. THAT NEVER CAME UP.

>> I THINK TENSION WE HAVE HERE, IN MANY CASES WHERE THERE IS A WAIVER OF MITIGATION IT IS REALLY BECAUSE THE DEFENDANT WANTS TO HASTEN THE DEATH PENALTY.

SO THEY DON'T EVEN ALLOW THEIR LAWYERS TO ARGUE FOR A LIFE SENTENCE.

SO THIS IS SORT OF A MIXED BAG

SO TO SPEAK.

>> YES.

>> WHERE IT'S BEING OFFERED BUT NOT REALLY.

SO HOW DOES, WHERE DOES THAT FIT IN THE SPECTRUM OF THE A JUDGE SHOULD GIVE TO THE JURY'S RECOMMENDATION?

>> WELL, I WOULD SUGGEST THAT WHEN THE JURY DOES NOT HEAR ANY MITIGATION PRESENTED BY THE DEFENSE COUNSEL AS MITIGATING EVIDENCE, WHAT THE JURY GETS IS A BUNCH OF WITNESSES PRESENTED BY THE STATE AND NOTHING ELSE. AND UNDER THOSE CIRCUMSTANCE-- IF THERE IS LITTLE OR NO MITIGATION THE MOHAMMED RULE SHOULD APPLY.

>> THE WORST THAT WOULD HAPPEN, LET'S JUST SAY, AND I THINK, I'M SURE WE'LL HEAR THE OTHER SIDE, THE MOST THAT WOULD DO, IF WE THOUGHT THE JUDGE RELIED HEAVILY ON THE JURY'S RECOMMENDATION, WHICH I DON'T NECESSARILY SEE THAT'S THE CASE HERE BUT, WOULD BE FOR THE JUDGE TO REEVALUATE IT WITHOUT CONSIDERATION OF THE JURY'S RECOMMENDATION, RIGHT? THERE IS NOTHING THAT WOULD ALLOW FOR NEW PENALTY PHASE?

>> NO, NOT A NEW, NOT A NEW JURY DETERMINATION.

>> RIGHT.

>> JUST GO BACK TO SPENCER AND IT--

>> AND THE JUDGE DID IN HIS SENTENCING ORDER WENT THROUGH AN EVALUATED A LOT OF MITIGATION THAT WAS REALLY JUST, IT WAS ALL PUT IN FROM THE LAST TRIAL. AND IT LOOKED LIKE, ACTUALLY, YOU KNOW, GAVE WEIGHT TO SEVERAL OF THESE, MAYBE, IT WASN'T GREAT WEIGHT, BUT IT WAS NOTHING IN THE RECORD THAT COULD HAVE SUPPORTED THE WAY THE RECORD WAS PUT, STATUTORY MITIGATION. THE AGE MITIGATE-- MITIGATOR IS NOT A MITIGATE TORE BECAUSE HE WAS 24 AT THE TIME AND THERE IS NO EVIDENCE OF LACK OF MATURITY. I DON'T SEE LOOKING AT THIS, ANY WAY YOU SLICE IT, THIS COULD

HAVE BEEN A, GETTING THE JURY  
WASN'T GOING TO BE RECOMMENDING  
LIFE WITH WHAT WAS, BEFORE IT,  
THAT THE JUDGE WAS, WHAT WAS  
BEFORE HIM, WOULD SAY, OH, WELL,  
THIS THE MITIGATION IN THIS CASE  
CLEARLY OUTWEIGHS THE  
AGGRAVATION?

SEE I MEAN--

>> ARE YOU ASKING ME?

>> IDEA THAT IT WOULD GO BACK  
FOR SOMETHING THAT SEEMS LIKE A  
COMPLETE WASTE OF TIME GIVEN  
THAT HE DID WEIGH ALL OF THIS  
MITIGATION THAT CAME IN A WAY  
THAT WASN'T THE BEST WAY.  
WAS THIS ORIGINAL TRIAL JUDGE  
FROM THE FIRST CASE?

>> IT WAS.

>> SO HE ACTUALLY SAW THAT  
MITIGATION AND HE, HE EVALUATED  
IT.

SO OTHER THAN SAYING, WELL, I'M  
GOING TO GIVE THE JURY'S  
RECOMMENDATION WEIGHT, DOESN'T  
EVERY OTHER PART OF THIS, OF  
THIS SENTENCING ORDER SHOW A  
CAREFUL WEIGHING OF THE  
AGGRAVATION AND MITIGATION?

>> IT DOES AND I THINK THE  
QUESTION IS, I MEAN, I THINK,  
ARE YOU ASKING ME, SHOULD THE  
COURT APPLY A HARMLESS ERROR  
TEST?

THAT'S MY FIRST QUESTION.

>> LET'S GO WITH THAT.

I WILL ANSWER THAT, YES.

>> IN MOHAMMED THE COURT DID NOT  
DO THAT.

THE COURT REVERSED.

>> IN MOHAMMED, THE JUDGE DIDN'T  
EVEN HAVE MITIGATION IN  
MOHAMMED, AM I CORRECT IN THAT?

>> I DON'T RECALL.

>> THERE WERE SEVERAL ERRORS IN  
MOHAMMED.

BUT THE SENTENCING ORDER DIDN'T,  
I MEAN I DON'T THINK THE JUDGE  
HAD THE ADVANTAGE OF HAVING ANY  
MITIGATION SO THERE REALLY  
WASN'T MUCH FOR THE JUDGE TO DO.

>> OKAY.

SO I HAVE A SECOND ANSWER.

>> OKAY.

>> OR A SECOND POINT.

AND THAT'S, I THINK THE REAL QUESTION IS, DID THE JUDGE GIVE WEIGHT TO THAT 12-0 RECOMMENDATION?

YOU LOOK AT WHAT THE JUDGE SAYS AND IT APPEARS THE JUDGE DID BECAUSE HE MENTIONS IT THREE TIMES IN THE ORDER.

>> WITH A NON-STATUTORY AGGRAVATOR?

I MEAN THAT SEEMS TO BE WHAT YOUR ARGUMENT IS COMING DOWN TO NOW?

IF YOU'RE SAYING THAT THE JUDGE BY MENTIONING IT THREE TIMES REALLY, DID HE CONSIDER THAT AS AGGRAVATION?

>> THAT IS ONE WAY OF LOOKING AT IT BUT I WAS REALLY GOING TO JUSTICE PARIENTE'S QUESTION, WHY SHOULD WE SEND IT BACK?

I THINK IF THE JUDGE CONSIDERED IT, IN ANY OF HIS VALUATION, THAT MIGHT HAVE BEEN PART OF WHY HE EVALUATED, FOR EXAMPLE, THE AGGRAVATING FACTORS THE WAY HE DID OR EVALUATED EVEN THE MITIGATION THE WAY HE DID, IF HE CONSIDERED THAT 12-0 RECOMMENDATION AND THE OTHER POINT I'D LIKE TO MAKE IS, WE DON'T HAVE A SCALE HERE WHERE YOU WEIGH ONE AND WEIGH THE OTHER.

SOMETIMES THE MITIGATING CAN AFFECT THE GRAVITY OF THE AGGRAVATING FACTORS.

SO THE JUDGE MIGHT HAVE SAID, WELL, THEY VOTE THE 12-0, THEY THINK THIS IS EXTREMELY WEIGHTY AGGRAVATION, AND I AGREE WITH THAT.

WHEREAS IF THE JURY HAD IN FACT HEARD ALL OF THIS INFORMATION ABOUT HIS BACKGROUND, FOR EXAMPLE, HE WAS IN THIS EXTREMELY VIOLENT, PHYSICALLY ABUSIVE BACKGROUND HIS WHOLE LIFE.

AND, THAT MIGHT HAVE AFFECTED THE WEIGHT OF THE PRIOR VIOLENT ROBBERY WHICH HAPPENED WHEN HE WAS 17 YEARS OLD.

MIGHT HAVE AFFECTED THE WEIGHT OF THE HAC AGGRAVATOR AS WELL



WHICH THIS COURT HAS SEVERAL TIMES POINTED OUT THAT THE DEFENDANT'S EMOTIONAL MENTAL STATE CAN BE A FACTOR THERE.

>> SURE.

BUT THE JUDGE, THE JUDGE ACTUALLY IN THIS SITUATION WAS FAR BETTER THAN THE JURY BECAUSE HE HAD ALL OF THE MITIGATION, PLUS HE HAD SEEN IT LIVE PREVIOUSLY.

SO, HE LOOKED AT ALL OF THAT, AND REALLY ALTHOUGH, I'M, CERTAINLY, SOME OF HIS, THIS MAN'S EARLY CHILDHOOD WAS CERTAINLY MARKED BY VIOLENCE AND, YOU KNOW, SEEING, I GUESS HIS MOTHER, THE FATHER SHOOTING MOTHER OR THE MOTHER SHOT THE FATHER, SOMETHING LIKE THAT IN THE EARLY YEARS, THIS HAPPENED, IN A WAY THAT IT'S HARD TO SEE HOW THAT TYPE OF MITIGATION WOULD EVER OUTWEIGH WHAT, I MEAN, WE GOT TO ASSUME GUILT RIGHT NOW, WHAT HE DID TO THIS VICTIM AND HOW HE DID IT AND HE DID IT IN A RAGE AND, SO I GUESS I'M JUST STILL TRYING TO, MAYBE IT IS BACK TO HARMLESS ERROR. SEEMS TO ME DIDN'T REALLY ON THE JURY'S RECOMMENDATION.

IT APPEARS FROM READING THIS ORDER THAT HE RELIED ON HIS OWN EVALUATION OF THE AGGRAVATION AND MITIGATION?

>> WELL, I MEAN THE COURT HAS TO DECIDE THAT.

THE JUDGE MENTIONED IT.

HE NOTED THAT HE IS REQUIRED TO. GOING BACK TO YOUR QUESTION, IS THERE ANY WAY THAT THE JUDGE COULD HAVE COME TO A DIFFERENT CONCLUSION?

LOOKING AT THE PROPORTIONALITY I RAISE, I CITED FIVE DIFFERENT CASES THAT ARE VERY SIMILAR TO THIS ONE THAT INVOLVED A CRIME OF SUDDEN RAGE AND, EITHER INVOLVED DRUGS OR ALCOHOL. AND WHEN, WHERE HAC WAS ONE OF THE AGGRAVATORS, IN THREE OF THESE CASES, CRAMER, WILSON, AND FERINAS, THERE WERE TWO AGGRAVATORS, ONE OF THEM,

CRAMER, THE DEFENDANT HAD A  
PRIOR ATTEMPTED MURDER.  
IN FERINAS THERE WAS A  
KIDNAPPING.  
AND THERE WAS A PRIOR VIOLENT  
FELONY IN WILSON AS WELL.  
THERE ARE AT LEAST THREE CASES  
WHERE THE COURT HAS REDUCED THE  
DEATH PENALTY TO A LIFE SENTENCE  
FINDING THAT THAT'S NOT THE  
APPROPRIATE PENALTY IN  
SITUATIONS VERY SIMILAR TO  
MR. KACZMAR'S.

>> THEN YOU'RE ARGUING TO THIS  
COURT ABOUT PROPORTIONALITY.  
>> I'M ARGUING TO THIS COURT  
ABOUT THAT BUT IF THE COURT  
RECOGNIZES THAT THE TRIAL JUDGE  
MAY HAVE TAKEN THAT JURY  
RECOMMENDATION AND INTO  
CONSIDERATION AND SEND IT BACK,  
THE TRIAL JUDGE WOULD BE FACED  
WITH ADDRESSING ANY ARGUMENTS BY  
DEFENSE COUNSEL RELATED TO THOSE  
ISSUES AS WELL.  
IF THERE ARE NO MORE QUESTIONS,  
THANK YOU.

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

I'M GOING TO TALK ABOUT THE  
MOHAMMED ISSUE AS WELL.  
THIS COURT HAS REPEATEDLY SAID  
THAT FOR MOHAMMED TO APPLY THERE  
MUST BE A COMPLETE WAIVER OF  
MITIGATION.

THERE WAS A, THERE WAS NOT A  
COMPLETE WAIVER IN THIS CASE.  
YOU SAID COMPLETE WAIVER IN  
THREE CASES.

HERE, THERE WAS NOT JUST AGE  
PRESENTED, WHICH WAS SUPPORTED  
BY A STIPULATION BUT--

>> WAIT A SECOND.

THE AGE OF 24?

>> ALMOST 25.

>> OKAY.

LET'S, BUT LET'S ASSUME MOHAMMED  
APPLIES.

DID THE JUDGE ERR IN THE  
SENTENCING IN GIVING JURY  
RECOMMENDATION GREAT WEIGHT,  
EITHER WAY, IS THERE, CAN WE  
APPLY A HARMLESS ERROR ANALYSIS

IN READING THE WHOLE SENTENCING ORDER?

SO LET'S ASSUME MOHAMMED APPLIES HERE.

I REALIZE WE COULD MAKE AN ARGUMENT THAT MOHAMMED DOESN'T BUT WHAT WOULD BE YOUR ARGUMENT?

>> YOU CAN DO HARMLESS.

YOUR HONOR, I WOULD SAY THIS, IT IS NOT JUST AGE.

I THINK WE'RE GETTING IMPRESSION THAT ONLY MITIGATION PRESENTED TO JURY WAS AGE AND THAT IS NOT TRUE.

THERE WAS DRUG USE, SPORTED BY THE STATE'S CASE.

>> THERE WAS NO EVIDENCE.

THE DEFENDANT WAIVED MITIGATION.

>> THERE WAS EVIDENCE.

>> ALL THE MITIGATION THAT WAS PRESENTED IN THE LAST PENALTY PHASE, HE SAID I DON'T WANT THAT PRESENTED.

THE ONLY DIFFERENCE IS THAT HE DIDN'T, DISALLOW HIS LAWYER FROM STILL ARGUING FOR LIFE.

BUT THERE WAS NO QUESTION THAT THERE WAS NO PRESENTATION OF MITIGATION BECAUSE THE DEFENDANT WAIVED IT.

>> BUT THERE WAS EVIDENCE BY, THE STATE PUT ON HIS TESTIMONY, AND STATE'S WHOLE THEORY OF THIS.

THERE WAS EVIDENCE FROM THE STATE'S CASE THAT HE WAS DOING DRUGS THAT NIGHT, WHICH WAS ONE OF THE ARGUMENTS.

IT IS NOT JUST AGE.

HE HAD EVIDENCE OF AGE BY STIPULATION BUT THEY ALSO HAD EVIDENCE OF DRUG USE BY THE STATE'S OWN CASE.

THAT WAS IN THE STATE'S CASE.

SO THERE WAS MORE THAN JUST AGE.

THERE WAS DRUG USE.

THERE WAS ALSO RESPECTFUL BEHAVIOR IN FRONT OF, IN THE COURT AND JURY CAN SEE THAT FOR THEMSELVES.

SO IT WAS MORE-- I DO NOT WANT YOU TO GET THE IMPRESSION IT WAS LIMITED SOLELY TO AGE.

THAT IS NOT TRUE.

SOME OF THESE MITIGATORS WERE

SUPPORTED BY EVIDENCE IN THE STATE'S CASE.

AND IT IS PERFECTLY FINE FOR A DEFENSE COUNSEL TO USE THE STATE'S CASE TO SUPPORT HIS ARGUMENT.

HE THEN, THERE WAS MORE THAN THAT.

WHEN MONDLIN WAS CROSSED, IT WAS ADMITTED HE WAS TESTIFYING IN EXCHANGE FOR GETTING HIS LIFE SENTENCE ON A WHOLE SEPARATE CRIME REDUCED.

SO THAT, THAT MITIGATION WAS ALSO SUPPORTED BY EVIDENCE.

THE JURY HEARD THAT FROM MANDLIN'S OWN TESTIMONY.

THERE WAS MORE THAN AGE HERE.

IT IS NOT ACCURATE TO SAY AGE WAS ONLY MITIGATOR PRESENTED, SUPPORTED BY EVIDENCE.

THERE WERE OTHER MITIGATORS SUPPORTED BY EVIDENCE AND ARGUED TO THIS JURY.

BUT LET'S ASSUME FOR A MINUTE NOW IF YOU'RE GOING TO SAY WE'LL HAVE TO SPLIT THE BABY ON MOHAMMED NOW, WE'LL HAVE TO DECIDE WHICH IS ENOUGH MITIGATION PRESENTATION FROM MOHAMMED TO APPLY AND FOR IT TO NOT.

THAT IS ONE--

>> ISN'T THAT THE WHOLE PURPOSE OF MOHAMMED?

TO MAKE SURE WHEN THIS COURT ULTIMATELY DECIDES IF THE DEATH PENALTY WAS PROPERLY IMPOSED AND WHETHER IT IS PROPORTIONATE, THAT WE'VE GOT THAT SOLEMN OBLIGATION TO MAKE SURE THE JUDGE HAS DONE A CAREFUL WEIGHING?

AND THEREFORE, I STILL GO BACK TO THAT IN THIS CASE WHICH IS DIFFERENT, AND THIS IS A FRIENDLY QUESTION, BECAUSE ALL OF THE MITIGATION WAS ENTERED INTO FROM THE LAST CASE TO THE JUDGE, THE JUDGE HAD, AND THE JUDGE SAW THAT BEING PRESENTED, AND THE JUDGE WEIGHED IT, THAT THIS IS NOT A, TO ME, A MOHAMMED SITUATION WHERE I DON'T THINK ANY MITIGATION CAME IN AT ALL?

>> AND IF I REMEMBER MOHAMMED RIGHT, THERE WAS NO PSI. THERE CERTAINLY WERE NO TRIAL TRANSCRIPTS FROM THE FIRST ONE IN MOHAMMED. NONE OF THAT HAPPENED AT ALL. NOT ONLY DID THE JUDGE SEE THIS PERSON, BUT THE PROSECUTOR HERE ENTERED AGAIN THE TRANSCRIPTS FROM THE FIRST PENALTY PHASE SO WE COULD GO, SO THE JUDGE COULD GO THROUGH AND READ IT. SO IT IS DRAMATICALLY DIFFERENT IN TERMS OF WHAT THE SENTENCING ORDER IN MOHAMMED DID NOT HAVE VERSUS WHAT OUR SENTENCING ORDER DEFINITELY DOES WE HAVE PSIs. THERE WAS A WHOLE, A WHOLE PART OF MOHAMMED WAS, THIS COURT MANDATING THE GETTING OF PSIs, LOOKING FOR MITIGATION. THIS JUDGE DIDN'T EVEN HAVE TO GO LOOKING FOR MITIGATION LIKE A NORMAL JUDGE IN A MOHAMMED. IT WAS LITERALLY, THE TRANSCRIPTS OF THE FIRST PENALTY PHASE INCLUDING MENTAL HEALTH TESTIMONY. THE FIRST PENALTY PRESENTATION INCLUDED NOT JUST FAMILY AND FRIENDS, YOU KNOW, THE AUNT, BUT ALSO A MENTAL HEALTH EXPERT. I'M GOING TO MISPRONOUNCE HIS NAME, BUT DR. MOANDOKI. SO THIS JUDGE HAD EVERYTHING, YOUR WHOLE MOHAMMED PROCEDURE WAS DESIGNED TO GET THE JUDGE TO HAVE THIS KIND OF MITIGATION. THAT WAS THE WHOLE PURPOSE OF YOUR MOHAMMED PROCEDURE AND THIS JUDGE IN THIS CASE HAD ALL OF THAT. HE HAD THAT AND MORE. I HAVE NEVER SEEN AS MUCH AS THIS BECAUSE HE REALLY HAD, HE HAD A PENALTY PHASE. THE JUDGE DID. THE JURY DIDN'T HEAR IT BUT THE JUDGE HAD A PENALTY PHASE THAT HE HAD SAT THROUGH THE FIRST TIME AND HAD THE TRANSCRIPTS PRESENTED TO HIM THIS TIME TO GO THROUGH AND CLEAR FROM HIS SENTENCING ORDER, AND I THINK

THIS GOES TO HARMLESS, HE DID IN FACT GO THROUGH IT, IN FACT FIND USING THOSE TRANSCRIPTS AND THAT PRESENTATION THAT HE SAT AND LISTENED TO HE FOUND MITIGATION BASED ON THAT.

SO THE HARM IN MOHAMMED OF THE JUDGE NOT GETTING MITIGATION DID NOT OCCUR AT ALL IN THIS CASE.

SO THE ENTIRE VEHICLE THAT YOU'VE DESIGNED MOHAMMED FOR, CLEARLY HAPPENED IN THIS CASE. NO.

I THINK IF YOU SEND IT BACK, WHICH WOULD BE JUST FOR A NEW, JUST FOR A NEW SPENCER AND NEW SENTENCING ORDER, IT WOULD NOT BE FOR A NEW PENALTY PHASE. ALL THE JUDGE IS GOING TO DO IS SAY, I ALREADY CONSIDERED ALL OF THIS.

HE IS LITERALLY GOING TO DELETE THIS LINE, SAY, OKAY, I GUESS I SHOULDN'T HAVE PUT THAT IN THERE.

AND YOU'RE GOING TO GET THE EXACT SAME SENTENCING ORDER MINUS BASICALLY WHAT IS A FOOTNOTE IN THIS ONE.

SO, YES I DO THINK YOU CAN RECOGNIZE THAT THIS JUDGE HAD ALL OF THE INFORMATION THAT THIS COURT WAS CONCERNED ABOUT, THE MOHAMMED COURT, NOT HAVING, AND NOT ONLY HAD IT.

BUT CLEARLY USED IT.

HE GOES THROUGH THE SENTENCING ORDER, THE AMENDED SENTENCING ORDER IN THIS CASE, IS, YOU KNOW, HE IS DONE PAGE AFTER PAGE OF MITIGATION.

BASICALLY, HE, AND, HE USES, IT IS NOT JUST THAT HE IS JUST, YOU CAN TELL FROM THIS SENTENCING ORDER THAT HE HAS REREAD THESE TRIAL TRANSCRIPTS OF THE FIRST PENALTY PHRASE.

HE USES DR. MANDOKI'S TESTIMONY THROUGHOUT THIS.

PAGE 11, BASICALLY HIS TESTIMONY.

BUT IT'S ALL THROUGH THIS.

PAGE 12.

BASICALLY MOST OF THIS SENTENCING ORDER IS THE JUDGE'S

VIEW OF MITIGATION.  
AND HE GETS THAT FROM A  
PRESENTATION HE BOTH SAT  
THROUGH, PRESIDED OVER THE FIRST  
TIME AND WAS GIVEN TRANSCRIPTS  
OF, SO HE COULD, YOU KNOW,  
REFRESH HIS MEMORY.  
SO THE HARM IN MOHAMMED DID NOT  
HAPPEN IN THIS CASE.  
IF THERE ARE NO FURTHER  
QUESTIONS--  
>> PROPORTIONALITY?  
>> EXCUSE ME?  
>> PROPORTIONALITY ISSUE.  
>> YOUR HONOR, IN THIS CASE,  
THERE ARE TWO AGGRAVATORS.  
THERE ARE TWO OF THE WEIGHTIEST  
AGGRAVATORS THIS COURT HAS  
FOUND.  
IT IS PRIOR VIOLENT FELONY AND  
HAC.  
AND HAC WAS BASED ON THE ON  
93 STAB WOUNDS.  
THIS WAS A STRUGGLE.  
THE FATAL WOUND OCCURRED AT THE  
END.  
THE REASON THE MEDICAL EXAMINER  
SAID THEY OCCURRED TO THE END,  
SHE COULDN'T HAVE RESISTS AS  
MUCH AS SHE DID.  
THERE WERE MULTIPLE DEFENSIVE  
WOUNDS ON THIS VICTIM.  
THE VICTIM WAS STABBED FIVE  
TIMES IN THE BACK.  
SHE HAD A DEFENSIVE WOUND TO THE  
WEB ALL THE WAY DOWN TO THE  
CARPAL.  
ALL THAT HAD TO HAPPEN BEFORE  
THE FATAL WOUNDS AT END.  
THERE WAS ALSO NO BLOOD.  
SHE DIDN'T BREATHE IN THE BLOOD.  
SO, THIS  
STRUGGLE AND THIS STABBING WENT  
ON THROUGHOUT THIS HOUSE.  
SO HAC IS VERY MUCH SUPPORTED IN  
THIS CASE.  
THERE WAS NO STATUTORY  
MITIGATION.  
AND REMEMBER WHEN I SAY THAT,  
I'M NOT RELYING ON-- THERE WAS  
A FULL PRESENTATION.  
WHEN I'M DOING PROPORTIONALITY  
ANALYSIS, I'M RELYING ON THE  
SENTENCING JUDGE'S ORDER.  
THAT MEANS THE ENTIRE MITIGATION

PRESENTATION FROM THE FIRST  
PENALTY HAS PHASE HAS BEEN  
CONSIDERED AND BEFORE YOU.  
WHEN I SAY THERE IS NO STATUTORY  
MITIGATION, I DON'T MEAN IT  
WASN'T PRESENTED.

I MEAN IT WAS PRESENTED TO THIS  
JUDGE.

BECAUSE WE GO ON THE JUDGES WHEN  
WE DO PROPORTIONALITY.

SO THE WHOLE MOHAMMED ISSUE JUST  
GOES AWAY AS PART OF THE  
PROPORTION IN THE.

-- PROPORTIONALITY.

WE GO ON SENTENCING ORDER.

THIS JUDGE'S SENTENCING ORDER  
TAKES INTO CONSIDERATION ALL THE  
MITIGATION AND GOES THROUGH--  
THE DOCTOR AT THE FIRST PENALTY  
PHASE SAID THERE WAS NO MAJOR  
MENTAL ILLNESS.

THE JUDGE USES THAT TO REJECT  
BOTH STATUTORY MENTAL  
MITIGATORS.

BOTH STATUTORY MENTAL MITIGATORS  
WERE CONSIDERED AND PROPERLY  
REJECTED, BECAUSE THE EVIDENCES  
THE SOLE EVIDENCE IS THAT THERE  
WAS NO MENTAL MITIGATION.

SO YOU HAVE A CASE WITH TWO  
WEIGHTY AGGRAVATORS, NO  
STATUTORY MITIGATION, EITHER OF  
AGE OR OF MENTAL AND YOU HAVE 15  
NON-STATUTORY MITIGATION TIED TO  
ANIMALS THAT WERE GIVEN SLIGHT  
WEIGHT.

I WOULD SAY THAT THE  
NON-STATUTORY THAT HAD ANY  
SUBSTANCE TO IT WAS THE  
ABUSIVE FATHER.

HIS UPBRINGING WAS CONSIDERED  
MULTIPLE WAYS AND GIVEN WEIGHT  
AS MULTIPLE NON-STATUTORY.  
HE CONSIDERED ALCOHOLIC FATHER  
AS SEPARATE ONE.

GAVE THAT WEIGHT.

HE CONSIDERED THE ABUSIVENESS OF  
HIS FATHER AND GAVE THAT WEIGHT.  
SO THE, HIS CHILDHOOD WAS IN  
FACT CONSIDERED AND GIVEN SLIGHT  
WEIGHT.

AND THIS, THIS IS, GIVEN THOSE  
FACTORS THAT YOU HAVE TWO  
WEIGHTY AGGRAVATORS, NO  
STATUTORY MITIGATION AND MINOR



NON-STATUTORY MITIGATION, THIS  
CASE IS PROPORTIONAL AND THIS  
DEATH SENTENCE SHOULD BE  
AFFIRMED.

>> JUST ON THE PRIOR VIOLENT  
FELONY WHEN HE WAS COMMITTED AS  
JUVENILE, 17.

>> YES.  
HE WENT TO ADULT PRISON.

>> ARE THERE ANY DETAILS WHAT  
THAT FELONY WAS?

>> IT WAS ROBBERY.  
I HAVE MEAN I CAN TELL YOU.

>> THERE ARE ROBBERIES AND  
ROBBERIES.

>> NO, .  
YES.

>> ONLY REASON I ASKED WHEN IT  
IS STIPULATED TO AND WE  
OBVIOUSLY, TO ME IN THIS CASE  
HAC IS ENTITLED TO GREAT  
WEIGHT-- GREAT WEIGHT, WOULD BE  
NICE TO KNOW ABOUT DETAILS OF A  
PRIOR VIOLENT FELONY BEFORE THE  
JUDGE SO WE CAN DECIDE WHETHER  
IT SHOULD BE GIVEN GREAT WEIGHT  
OR NOT BECAUSE--

>> BUT YOUR HONOR--

>> NOT ALL ROBBERIES ARE EQUAL.

>> I REALIZE THAT BUT  
UNFORTUNATELY IT WAS STIPULATED  
AND THE STIPULATION INVOLVED  
LIKE THE COUNTY NUMBER.

>> WHAT SENTENCE, DID HE GET A  
SENTENCE?

HE WAS TRIED AS AN ADULT.  
WHAT WAS HIS SENTENCE?

>> HE WAS SENTENCED TO PRISON.  
HE WENT AWAY TO PRISON AND THAT  
WAS AS MITIGATOR.

>> HOW LONG?

I THINK IT WAS TWO-YEAR SENTENCE  
OR SOMETHING.

>> YES, IT WAS A RELATIVELY  
SHORT, BUT, YOUR HONOR, I DO NOT  
KNOW BECAUSE IT WAS STIPULATED  
TO.

AND WHEN THERE IS A STIPULATION,  
WE DON'T KNOW AS MUCH  
ABOUT THE FACTS OF THE  
UNDERLYING ROBBERY.

ANYWAY, THE, THE HAC IS VERY  
MUCH PRESENT AND THERE'S JUST NO  
MITIGATION TO OVERWHELM THE HAC.  
THEREFORE THE DEATH SENTENCE

SHOULD BE AFFIRMED.  
AND THANK YOU VERY MUCH FOR YOUR  
TIME.  
>> YOUR HONOR.  
JUST A COUPLE OF POINTS.  
THERE WAS SOME INFORMATION ABOUT  
THE ROBBERY.  
KACZMAR AND ANOTHER COULD  
DEFENDANT APPARENTLY HIT OR  
KNOCKED DOWN AND KICKED A MAN  
AND TOOK HIS WALLET AND JEWELRY.  
THAT IS WHAT WE KNOW ABOUT IT.  
WAS SENTENCED TO TWO OR THREE  
YEARS PRISON.  
>> IT SAYS ON THE PSI, SUDDEN  
SNATCH.  
>> YES.  
KNOCKED HIM DOWN.  
GOING BACK TO HOE PALMED THOUGH,  
I DON'T THINK THIS CASE IS  
DISTINGUISHABLE FROM MOHAMMED.  
THE TRIAL JUDGE IN MOHAMMED DID  
HAVE A PSI.  
MOHAMMED WAS THE CASE IN BETWEEN  
WAR WE ENCOURAGED THE JUDGES  
THAT THEY REQUIRED IT.  
SO THE JUDGE IN MOHAMMED DID  
HAVE PSI.  
HE DID CONSIDER MITIGATION AND  
HE DID FIND MITIGATION,  
INCLUDING THE DEFENDANT'S AGE OF  
23.  
GOOD BEHAVIOR DURING TRIAL.  
COOPERATION WHEN ARRESTED AND  
HIS DIFFICULT AND UNSTABLE  
CHILDHOOD.  
WHICH I SUPPOSE WAS REVEALED IN  
THE PSI.  
SO I DON'T THINK THIS CASE IS  
DISTINGUISHABLE FROM MOHAMMED IN  
THAT RESPECT.  
SO, IF THERE ARE NO FURTHER  
QUESTIONS, I WOULD ASK THE COURT  
TO, FIRST, TO VACATE HIS  
SENTENCE AND REDUCE IT TO LIFE.  
AND AS DISPROPORTIONATE PENALTY  
AND SECOND TO RETURN IT TO THE  
TRIAL JUDGE TO CONSIDER THE  
SENTENCE WITHOUT RELYING ON THE  
JURY'S RECOMMENDATION OF THE  
DEATH IN ANY WAY.  
THANK YOU, YOUR HONOR.  
>> THANK YOU.  
THANK YOU FOR YOUR ARGUMENTS.