

>> THE NEXT CASE IS
COZZIE V. STATE.

>> MAY IT PLEASE THE COURT,
WILLIAM McLAIN APPEARING FOR
STEVEN COZZIE.

I'D LIKE TO ARGUE TWO ISSUES
TODAY, THIS MORNING, AND I'D
RELY ON MY BRIEF AS TO THE
REMAINING ISSUES.

I'D LIKE TO ADDRESS ISSUES ONE
DEALING WITH A COST CHALLENGE
DENIAL AND ISSUE FOUR DEALING
WITH IMPROPER EVIDENCE COME
ANYTHING AND WILLIAMS RULE ED.
THE TRIAL COURT IMPROPERLY
DENIED CAUSE CHALLENGES FOR TWO
PERSPECTIVE JURORS WHO COULD NOT
CONSIDER A LIFE SENTENCE AS A
MERCY RECOMMENDATION IF THE
MITIGATION DID NOT OUTWEIGH THE
AGGRAVATION.

COUNSEL'S QUESTION TRACKED THE
STANDARD JURY INSTRUCTION THAT
WAS GIVEN IN THIS CASE WHICH
CLEARLY INDICATES THAT THE JURY
HAS THE AUTHORITY, MAY RECOMMEND
THE DEATH SENTENCE IF THE
AGGRAVATION IS NOT OUTWEIGHED BY
THE MITIGATION, IMPLYING THAT
THERE ARE TWO OPTIONS AT THAT
POINT.

AND THEN FURTHER IN THE
INSTRUCTION IT EXPLICITLY STATES
THAT REGARDLESS OF THE ANALYSIS
OF THE AGGRAVATING AND
MITIGATING CIRCUMSTANCES, THE
JUROR IS NEVER COMPELLED OR
REQUIRED TO VOTE FOR A DEATH
SENTENCE.

TWO JURORS RESPONDED
NEGATIVELY--

>> SO LET ME ASK YOU THIS.
SO IS THE CONVERSE OF THAT TRUE,
THAT A JURY-- YOUR ARGUMENT
REALLY IS THAT A JURY MUST BE
OPEN MINDED AND BE ABLE TO
CONSIDER MERCY, BASICALLY.
SO--

>> YES, YOUR HONOR.
THAT'S THE ESSENCE OF THE

ARGUMENT.

>> BUT THE STATE THEN ASKED AND, AGAIN, THE JURY INSTRUCTION SAYS WHAT THE JURY INSTRUCTION SAYS WHICH IS JUST BECAUSE YOU FIND THE AGGRAVATORS OUTWEIGH THE MITIGATORS DOESN'T MEAN YOU HAVE TO VOTE FOR DEATH.

I MEAN, AND WE-- ACTUALLY, THERE'S A CASE THIS MORNING WHERE YOU SEEING A SATERS AND NO MITIGATORS, AND JURORS VOTED-- THREE JURORS VOTED FOR LIFE. BUT THEN THE STATE ASKS YOU UNDERSTAND IT WILL BE YOUR PERSONAL DECISION WHETHER IF THE MITIGATORS DON'T OUTWEIGH THE AGGRAVATORS TO DECIDE WHAT TO VOTE, YOU UNDERSTAND THAT WOULD BE YOUR DECISION.

AND DOESN'T THAT THEN CLARIFY-- AND, AGAIN, WE'RE TALKING ABOUT THESE GENERAL QUESTIONS THAT ARE ASKED IN A VACUUM, DOESN'T THAT-- AND THEY ALL, THOSE TWO JURORS VOTED OR SAID THEY COULD DO THAT, THAT THEY UNDERSTAND IT WOULD BE THEIR PERSONAL DECISION.

I MEAN, DOESN'T THAT CLARIFY THAT THEY'RE NOT OBLIGATED? AND BECAUSE WHAT YOU'RE WORRIED ABOUT IS SOMEONE FEELING THEY'RE OBLIGATED TO VOTE FOR THE DEATH SENTENCE IF THEY FIND THE AGGRAVATORS OUTWEIGH THE MITIGATORS.

>> YOU'RE TALKING ABOUT THE STATEMENTS THAT THE PROSECUTOR ELICITED FROM THE TWO JURORS. IT WOULD BE THEIR PERSONAL DECISION.

BUT IT WASN'T, IT WASN'T CLEAR ABOUT A PERSONAL DECISION AS TO WHETHER TO APPLY MERCY OR NOT. IN FACT, THE PROSECUTOR WAS OF THE OPINION THAT THEY DIDN'T HAVE TO CONSIDER AT ALL IF YOU READ THE FULL ANALYSIS AND DISCUSSION WITH THE TRIAL JUDGE.

HIS POSITION WAS THEY CAN, BUT THAT'S NOT SOMETHING THEY HAVE TO EVEN BE ADDRESSING AT ALL. AS I RECALL THE RECORD, THAT QUESTION DIDN'T REALLY ADDRESS THE ISSUE THAT WAS THE FOUNDATION FOR THE CAUSE CHALLENGE.

IT SAYS YOU UNDERSTAND THAT THIS WHOLE IDEA OF VOTING FOR DEATH OR NOT VOTING FOR DEATH IS YOUR PERSONAL DECISION.

WELL, IT IS.

A PERSONAL DECISION HOW TO DO THE ANALYSIS, A PERSONAL DECISION REGARDING HAVING TO VOTE FOR DEATH OR NOT, BUT THEY CLEARLY STATED THAT THEY WERE NOT WILLING TO CONSIDER RECOMMENDING A LIFE SENTENCE IF THE MITIGATION--

>> WELL, SO THE KEY IS THIS. THE JURY INSTRUCTION SAYS REGARDLESS OF YOUR FINDINGS IN THIS RESPECT YOU'RE NEITHER COMPELLED, NOR REQUIRED TO RECOMMEND A SENTENCE OF DEATH. WERE THEY ASKED THAT QUESTION?

>> YES, SPECIFICALLY.

>> AND THEY SAID WE COULD NOT, WE WOULD EVEN-- WE WOULD NOT-- WE UNDERSTAND WE'RE NOT COMPELLED OR REQUIRED, BUT WE WOULD RECOMMEND A SENTENCE OF DEATH IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS?

>> THAT EXACT QUESTION WAS ASKED.

IN FACT, THE DEFENSE COUNSEL INCORPORATED THE ENTIRE JURY INSTRUCTION IN THE QUESTION. THE TRIAL JUDGE REFUSED TO LET HIM USE THE TERM "MERCY," SO HE ACTUALLY DRAFTED OR PRESENTED THE QUESTION WITH A FULL INSTRUCTION SAYING, YOU KNOW, YOU MAY RECOMMEND DEATH IF THE MITIGATION DOES NOT-- IF THE MITIGATION DOES NOT OUTWEIGH THE AGGRAVATION, YOU MAY IMPOSE A

DEATH SENTENCE OR RECOMMEND A
DEATH SENTENCE.

AND THEN IT STATED REGARDLESS OF
YOUR FINDINGS IN THIS RESPECT,
YOU ARE NEITHER COMPELLED NOR
REQUIRED TO RECOMMEND DEATH.

AND THEN HERE'S THE QUESTION, I
HESITATE TO READ, BUT THIS IS
WHAT THE QUESTION FROM THE
DEFENSE COUNSEL.

MY QUESTION TO YOU IS, IF YOU
FIND HIM GUILTY IN THE GUILT
PHASE OF PREMEDITATED MURDER,
EITHER THEORY, AND YOU FIND ONE
AGGRAVATING CIRCUMSTANCE HAS
BEEN PROVED BEYOND A REASONABLE
DOUBT OR THAT THE MITIGATION
DON'T OUTWEIGH THE AGGRAVATION,
YOU MAKE ALL THOSE FINDINGS, ARE
YOU STILL WILLING TO CONSIDER A
LIFE SENTENCE RECOMMENDATION
EVEN AFTER MAKING THOSE
FINDINGS?

AND TWO JURORS SAID, NO.

ONE JUROR SAID, YES.

>> WELL, YOU KNOW, HERE IS MY
PROBLEM.

I MEAN, AGAIN, I APPRECIATE IF
SOMEONE SAYS THEY CAN'T, THAT IF
THEY REALLY CAN'T DO THAT, BUT
THESE-- SOMETIMES WHEN WE'RE
TRYING TO FIND OUT WHAT A JUROR
REALLY THINKS AND THE SORT OF
DISTINGUISHING CASES BETWEEN
SOMETHING IN THEIR BACKGROUND
WHICH MAKES THEM, YOU KNOW, THEY
HAD A FAMILY MEMBER THAT WAS
MURDERED, YOU KNOW?

AND NOW YOU'RE REALLY ASKING
THEM TO DO SOMETHING THAT YOU
KIND OF LOOK AT AND SAY THEY'RE
PREDISPOSED.

BUT IT SEEMS-- AND I'M NOT
TRYING TO BE HARD ABOUT THIS,
BUT IT SEEMS THAT THE QUESTION
MAY HAVE BEEN A LITTLE DIFFICULT
FOR THE JURORS TO FOLLOW.

YOU'RE SAYING, NO, THEY WERE
VERY CLEAR, AND OTHER JURORS
SAID THEY COULD DO IT.

BUT THEN THE STATE COMES BACK AND ASKS THEM-- AND, AGAIN, WE'RE ONLY TALKING ABOUT WHETHER THEY SHOULD HAVE BEEN EXCUSED FOR CAUSE BECAUSE THEY WERE PREEMPTORLY STRICKEN-- THAT YOU UNDERSTAND YOU'RE NOT REQUIRED, THE IT'S GOING TO BE YOUR PERSONAL DECISION.

AND, YOU KNOW, AT THAT POINT THEY COULD HAVE SAID, WELL, NO, I UNDERSTAND THAT IF THE AGGRAVATORS OUTWEIGH THE MITIGATORS, I AM COMPELLED TO VOTE FOR DEATH.

AND THEY DIDN'T SAY THAT, SO IT JUST DOESN'T SEEM THAT IT IS A SLAM DUNK.

THEY HAD TO BE EXCUSED FOR CAUSE.

>> I DON'T KNOW HOW ELSE HE COULD HAVE PRESENTED IT GIVEN THE FACT THAT THE JUDGE HAD LIMITED HIM IN HIS ABILITY TO ASK THE QUESTION, BECAUSE HE WOULDN'T LET HIM USE THE TERM "MERCY" UNTIL LATER ON IN THE PROCEEDINGS.

>> IT'S PROBABLY A GOOD THING NOT TO USE BECAUSE MERCY HAS SOME OTHER CONNOTATION TO IT. THE JURY INSTRUCTION IS VERY CLEAR ABOUT THAT THEY'RE NOT REQUIRED TO DO IT.

AND THEN THE STATE FOLLOWS UP AND SAYS YOU UNDERSTAND IT'S YOUR PERSONAL DECISION.

THEY GO, YES, WE UNDERSTAND THAT.

>> BUT THE PHRASING OF THE PROSECUTOR'S QUESTION WAS YOU UNDERSTAND THE SENTENCING PROCESS IS YOUR PERSONAL DECISION.

HE DID NOT SPECIFICALLY TIE IT IN TO THAT ASPECT OF THE INSTRUCTION, BECAUSE IF YOU READ THE WHOLE DISCUSSION BETWEEN PROSECUTOR AND DEFENSE COUNSEL AND THE JUDGE, THE PROSECUTOR

WAS SAYING THEY DON'T HAVE TO
CONSIDER IT.

I MEAN, IN THIS DISCUSSION WITH
THE JUDGE.

THEY DON'T HAVE TO-- IT'S
THERE, BUT THEY DON'T HAVE TO
CONSIDER.

THAT'S AN OPTION FOR THEM.

THEY DON'T HAVE TO CONSIDER IT.

SO IT'S NOT CLEAR THAT THAT'S
WHAT THE PROSECUTOR WAS TALKING
ABOUT IN THOSE INSTRUCTIONS.

MOREOVER, TALKING ABOUT WHETHER
THIS PRESENTED A REASONABLE
DOUBT ABOUT THE ABILITIES OF THE
JUROR TO BE OPEN MINDED ABOUT
THE QUESTION, AND THEY
SPECIFICALLY SAID NO WHEN THEY
WERE DIRECTLY ASKED THE
QUESTION.

SO WHEN YOU'RE TALKING ABOUT A
CAUSE CHALLENGE ISSUE, WHEN
YOU'RE TALKING ABOUT WHETHER
THERE'S A REASONABLE DOUBT ABOUT
THE ABILITY OF A JUROR TO BE
OPEN MINDED ABOUT THAT QUESTION,
I THINK THAT'S SUFFICIENT.

>> HAVE WE SAID THAT JURORS MUST
CONSIDER RENDERING A VERDICT
BASED ON MERCY?

IS THAT THE LAW?

THAT JURORS MUST CONSIDER ACTING
ON THE BASIS OF MERCY?

>> I THINK THE INSTRUCTION
INDICATES THAT.

MERCY IS AN INTEGRATED PART OF
OUR DEATH PENALTY PROCEEDING.
THIS COURT IN THE JURY
INSTRUCTIONS BY USE OF THE TERM
"MAY IMPOSE A DEATH SENTENCE IF
THE AGGRAVATION IS--

>> WELL, THAT'S A DIFFERENT
THING THAN WHAT I THINK YOU'RE
ARGUING, WHICH IS THAT THEY MUST
AFFIRMATIVELY ACKNOWLEDGE THAT
THEY WILL CONSIDER MERCY.

IS THAT RIGHT?

I MEAN, I'M TRYING TO
UNDERSTAND.

>> YEAH.

IN ESSENCE, YES, BECAUSE I THINK THAT'S WHAT THE LAW REQUIRES. MERCY HAS BEEN, THE CONCEPT OF MERCY'S BEEN A PART OF THE DEATH PENALTY JURISPRUDENCE FOR A LONG TIME.

THE INSTRUCTION NOW CLEARLY SAYS, AND IT RECOGNIZES MERCY AS PART OF THE PROCESS BY THE USE OF THE TERM "MAY."

WHEN MITIGATION DOESN'T OUTWEIGH THE AGGRAVATION, YOU MAY IMPOSE DEATH MEANING YOU MAY ALSO NOT IMPOSE DEATH WHICH, IN ESSENCE, WOULD BE AN EXERCISE OF MERCY, IF YOU WILL.

AND THE LATER INSTRUCTION EXPLICITLY TELLING YOU'RE NEVER REQUIRED TO IMPOSE DEATH UNDER ANY CIRCUMSTANCES.

SO, YES, THAT IS PART OF THE ANALYSIS THAT A JURY HAS TO MAKE, OKAY?

THE AGO-- THE MITIGATION DOESN'T OUTWEIGH THE AGGRAVATION, AND I MAY IMPOSE DEATH, BUT THAT IMPLIES I MAY NOT IMPOSE DEATH.

>> BY WHAT STANDARD DOES A JUROR MAKE THAT DETERMINATION?

>> THE--

>> OR IS THIS A PURELY STANDARDLESS ELEMENT OF THE PROCESS?

>> JURIES MAKE DISCRETIONARY DECISIONS THROUGHOUT THE DEATH PENALTY PROCESS.

THEY MAKE DISCRETIONARY DECISIONS ABOUT AGGRAVATORS.

>> WELL, I UNDERSTAND--

>>-- ABOUT THE ANALYSIS.

>> I UNDERSTAND YOUR POINT ABOUT THAT, BUT WHEN DO-- SO WHAT YOU'RE SAYING CAN IS THERE ARE NO STANDARD BY WHICH THE DETERMINATION OF WHETHER TO EXERCISE MERCY APPLIES.

IT'S A TOTALLY AD HOC, RANDOM, STANDARDLESS PROCESS.

>> NO, IT'S NOT TOTALLY AD HOC,

STANDARDLESS PLACE.
IT'S PART OF JURIES' DISCRETION,
DECISION MAKING IN ALL KINDS OF
CASES.

WE LEAVE IT UP TO THE JURY'S
DISCRETION TO MAKE DECISIONS.

>> WELL, HISTORICALLY,
MR. McLAIN, WE HAVE UNDERSTOOD
THAT THERE'S A THING SUCH AS A
JURY PARDON.

>> YES.

>> AND IS THAT SOMETHING THAT
JURIES CAN CERTAINLY VOTE THEIR
CONSCIENCE AND THAT IT'S BEEN
KNOWN TO HAPPEN, BUT IF A JUROR
WOULD RESPOND TO A QUESTION
THAT, NO, I DON'T THINK WE
SHOULD HAVE A JURY PARDON, THAT
I SHOULD FOLLOW THE LAW THAT I'M
INSTRUCTED ON, WHERE DOES THIS
FIT IN, THIS ANALYSIS OF THESE
THINGS THAT WE DON'T HAVE
CRITERIA FOR IT AS TO WHEN OR
WHEN NOT TO, BUT IT'S JUST IN
THIS THING THAT A JURY HAS, THIS
POWER?

>> YEAH.

THE JURY HAS POWER, AND THE JURY
PARDON SITUATION USUALLY COMES
UP IN A GUILT PHASE--

>> WELL, I UNDERSTAND, BUT IT'S
STILL PART OF THE DECISION
MAKING PROCESS.

>> YES.

>> AND NO JURY INSTRUCTIONS--

>> THAT'S CORRECT.

>>-- THAT DEAL WITH THAT JUST
AS THERE ARE NONE THAT DEAL WITH
THIS SPECIFIC ISSUE.

>> IT'S AN INHERENT POWER--

>> EXACTLY.

BUT IF A JUROR DOES NOT ENGAGE
IN THAT, IS IT GROUNDS TO REMOVE
THEM FROM THE PROCESS?

>> IN THE DEATH PENALTY ARENA,
IT IS.

BECAUSE WE HAVE A LONG HISTORY
OF MERCY BEING AN ISSUE IN THE
DEATH PENALTY PROCESS JURORS
HAVE TO MAKE.

BEFORE THE NEW STATUTE, THAT WAS THE ONLY THING THEY WERE ASKED TO DO.

IT'S BEEN A RECOGNIZED PART, THIS COURT HAS RECOGNIZED IT AS PART OF--

>> WELL, WE'VE RECOGNIZED THAT AS PART OF THE PROCESS.

>> BUT THE JURY INSTRUCTION NOW INCORPORATES IT.

IT'S ACKNOWLEDGED THAT IT'S PART OF THE PROCESS, AND THE JURY INSTRUCTION HAS INCORPORATED THE CONCEPT.

WHEN YOU TELL THE JURORS--

>> WELL, BY TELLING SOMEONE YOU ARE NOT COMPELLED TO DO SOMETHING, I'M WONDERING HOW YOU ARE EVALUATE WHEN THAT PERSON RESPONDS, WHEN WE TELL THEM A YOU DO NOT, YOU'RE NOT COMPELLED, YOU'RE NOT REQUIRED, AND THEN THAT PERSON RESPONDS I'M NOT, I WOULD NOT CONSIDER SOMETHING ELSE, HOW--

>> I THINK--

>>-- THAT POWER THEN CONVERTS INTO THE ANSWER THAT DISQUALIFIES SOMEONE.

>> WELL, AGAIN, I'LL GO BACK TO THE JURY INSTRUCTION.

WHEN YOU USE THE TERM YOU MAY IMPOSE DEATH IF A MITIGATION DOESN'T OUTWEIGH THE AGGRAVATION ARE, THAT IMPLIES THE ALTERNATIVE POSITION WHICH IS, IN ESSENCE, PART OF THE MERCY CONSTRUCTION, THAT YOU DON'T HAVE TO.

AND THEN JUST AS CONFIRMED AGAIN BY THE SECOND LANGUAGE SAYING REGARDLESS OF YOUR ANALYSIS REGARDING AGGRAVATING, MITIGATING CIRCUMSTANCES YOU'RE NEITHER COMPELLED, NOR REQUIRED TO VOTE FOR DEATH.

THAT IS, THAT INSTRUCTION HAS NOW INTEGRATED THE WHOLE CONCEPT OF MERCY IN THE DEATH PENALTY ARENA INTO PART OF THE ANALYSIS.

AND IF-- I THINK A DEFENDANT IS ENTITLED TO HAVE A JUROR WHO HAS THE STATE OF MIND THAT'S OPEN ENOUGH.

AND THE QUESTION WAS, TO THEM, WOULD YOU AT LEAST CONSIDER DOING THIS?

NOT WILL YOU DO IT, WILL YOU GO THROUGH-- WILL YOU AT LEAST CONSIDER THIS AS AN ANALYSIS OPTION.

WHEN THEY SAID NO, THEY WERE LEFT WITH A JUROR WHO WAS ALREADY FORECLOSED EVEN CONSIDERING DOING THAT.

>> ARE SEE, I GUESS I'M LOOKING AT THIS A LITTLE DIFFERENTLY, AND MAYBE IT'S BECAUSE I THINK IT DOESN'T FORECLOSE ON BEING OPEN MINDED.

THE VERY BEGINNING OF THE PROCESS, AND THIS IS NOT-- WHEN YOU GET INTO THE PENALTY PHASE AND, YOU KNOW, WE EVEN SAY OUR PROPORTIONALITY DISCUSSION THAT IT'S NOT A SIMPLE WEIGHING, YOU KNOW?

YOU FIND ONE, TWO AGGRAVATORS AND THREE MITIGATORS, AND YOU WEIGH IT.

SO IT'S A DIFFICULT PROCESS THAT JURORS GO THROUGH.

THE IDEA THAT THEY'RE GOING TO BE FIXED BECAUSE YOU SAY, LISTEN, THEY'RE TRYING TO HOLD ONTO SOMETHING, SOME SANITY THAT, OKAY, IF I AGGRAVATORS OUTWEIGH MITIGATORS, I'M GOING TO GO AHEAD, AND I'M GOING TO VOTE FOR DEATH.

AND YET THEY DON'T REALLY UNDERSTAND THE WEIGHING PROCESS AT THAT TIME.

WHAT ELSE DO WE TELL THEM ABOUT HOW TO EVEN WEIGH AGGRAVATORS OUTWEIGHING MITIGATORS?

DO WE EXPLAIN THAT TO THEM AT ALL EVEN IN THE JURY INSTRUCTIONS?

>> NO.

>> WE'RE ALL TALKING ABOUT THIS IS SOME SCIENTIFIC PROCESS, BUT THE TRUTH IS, IS THAT THERE IS-- AND, YOU KNOW, MAYBE THERE'S A DEGREE OF ARBITRARINESS IN THE JURY RECOMMENDATION, YOU KNOW? ONE WAY OR ANOTHER 6-6 GIVES ONE THING, 675 THE OTHER, AND SO I GUESS MY POINT ON THIS IS THAT YOU REALLY WHEN YOU'RE JUST ASKING THIS QUESTION IN THE ABSTRACT AND THERE'S NOTHING ELSE TO INDICATE, THEY HAVE A FIXED MIND ABOUT THE DEATH PENALTY.

I DON'T KNOW HOW THAT AUTOMATICALLY DISQUALIFIES THEM FROM SERVING.

AND SO I'M LOOKING AT IT A LITTLE BIT DIFFERENTLY AS IT'S TOO EARLY IN THE PROCESS TO SAY BASED ON THAT ONE ANSWER, THEY WOULD NOT BE ABLE TO APPROPRIATELY WEIGH AND CONSIDER THEIR DISCRETIONARY DECISIONS.

>> WELL, THAT ONE ANSWER STILL GOES TO THE VERY HEART OF THE QUESTION OF WHETHER THEY WOULD-- IF, AGAIN, IF THE MITIGATION DOESN'T OUTWEIGH THE AGGRAVATION WHERE THEY WOULD NEVERTHELESS EVEN CONSIDER THE POSSIBILITY OF VOTING FOR LIFE. AND THAT WAS THE QUESTION.

THAT WAS THE REAL, THAT'S THE REAL ISSUE, WOULD YOU BE OPEN ENOUGH TO CONSIDER-- THAT YOU HAVE THE AUTHORITY, JUROR. YOU HAVE THE AUTHORITY TO MAY OR MAY NOT--

>> BUT MAYBE THE QUESTION MIGHT HAVE BEEN, WELL, WHAT DO I BASE THAT AUTHORITY ON IF I FIND JUST BECAUSE I'M FEELING, YOU KNOW, LIKE A GOOD PERSON THAT DAY AND I WANT TO GIVE MERCY, OR YOU KNOW WHAT?

I'VE LOOKED AT THESE AGGRAVATORS, I'VE LOOKED AT

THESE MITIGATORS.

IT LOOKS LIKE MAYBE THE AGGRAVATORS OUTWEIGH THE MITIGATE CANNERS, BUT AS WE SAW OFTEN-- CAN THIS DOESN'T SEEM LIKE A DEATH PENALTY CASE, YOU KNOW?

MAYBE IT'S BECAUSE THE CO-DEFENDANT GOT LIFE, AND I JUST DON'T THINK THAT THE KID WAS 18 AND, YOU KNOW, THAT IS, I THINK THAT EVEN THOUGH HE'S 18-- BUT IT CAN'T BE IF THEY HAD TO WRITE IT DOWN AND EXPLAIN IT LIKE JUDGES HAVE TO EXPLAIN IT, MAYBE THEY COULDN'T EXPLAIN IT.

AND THEY DON'T KNOW THAT AT THAT, THIS POINT, AT THE BEGINNING OF THE PROCESS. WHAT THEY'RE GOING TO HEAR.

>> YOU KNOW ARE, THEY WERE GIVEN THE INSTRUCTION, THEY WERE TOLD THAT THEY DIDN'T HAVE TO IMPOSE DEATH AND THEY DIDN'T HAVE-- YOU KNOW, EVEN IF THE MITIGATION DIDN'T OUTWEIGH THE AGGRAVATION, AND TWO OF THEM SAID WOULD YOU EVEN, WOULD YOU CONSIDER EXERCISING YOUR AUTHORITY, IF YOU WILL, NOT TO IMPOSE DEATH IN THAT SITUATION, AND TWO JURORS SAID, NO.

I WON'T.

>> DIDN'T THEY ALSO SAY THAT THEY WOULD NOT AUTOMATICALLY VOTE FOR THE DEATH PENALTY?

>> YES.

YEAH.

>> DOESN'T THAT, DOES THAT MEAN THAT THEY'RE OUTSIDE OF THAT BOX YOU JUST PUT THEM IN?

>> NO, BECAUSE AUTOMATIC, NOT AUTOMATICALLY VOTING FOR THE DEATH PENALTY, THAT OFTEN COMES UP IN THE CONCEPT BECAUSE SOME JURORS THINK ANYBODY CONVICTED OF FIRST-DEGREE MURDER SHOULD AUTOMATICALLY GET THE DEATH SENTENCE.

IT DOESN'T NECESSARILY ADDRESS THE SAME QUESTION BECAUSE THE IDEA OF THE EXERCISE OF MERCY REALLY IS AFTER THE AGGRAVATING AND MITIGATING ANALYSIS IS DONE.

>> I THINK WHAT'S AGGRAVATING TO ME IS THAT THIS WHOLE THING COULD HAVE BEEN SOLVED IF THEY, IF THE JUDGE HAD GIVEN A COUPLE MORE PREEMPTORIES.

BECAUSE THEY DID STRIKE THESE JURORS.

I MEAN, SO-- I MEAN, THESE JURORS DID NOT SERVE.

>> THEY DID NOT.

>> BUT YOU-- AND IT SEEMS LIKE YOU PRESERVED THE ISSUE.

BUT REALLY THAT SORT OF SOLVES THOSE PROBLEMS IF WE ARE A LITTLE BETTER ON GIVING PREEMPTORIES.

>> AND WE OFTEN SEE THAT IN CASES.

OKAY.

I'LL MOVE ON TO MY OTHER ISSUE. ISSUE FOUR, AND I'M GOING TO ADDRESS PRIMARILY THE VICTIM IMPACT ISSUE.

IN THIS CASE THE DEFENSE LAWYER ARE MOVED IN LIMINE ASKING THE COURT TO BE SURE VICTIM IMPACT DIDN'T GO OVERBOARD.

HE ASKED TO HAVE IT PROFFERED, THE JUDGE DENIED HIM A PRETRIAL PROFFER ON THE IMPACT.

THE JUDGE DID EXCLUDE A VIDEO THAT THE PROSECUTOR WAS THINKING ABOUT PRODUCE, BUT THE JUDGE DID NOT DO THAT PRETRIAL WHICH OFTEN HAPPENS.

THEY EVALUATE WHAT'S GOING TO BE PRESENTED AS VICTIM IMPACT IN ORDER TO KEEP IT FROM BECOMING EXCESSIVE OR EMOTIONAL AND THAT TYPE OF THING.

>> DID YOU SAY THE JUDGE DID OR DIDN'T DO THAT?

>> DID NOT DO THAT.

>> AND WHY-- JUST, SO CLARIFY THIS.

WHY DON'T JUDGES LOOK AT WHAT THE VICTIM-- I THOUGHT WHERE THEY ASKED DON'T INCLUDE THAT, WE DON'T WANT MORE THAN TWO OR THREE, THAT-- I DON'T UNDERSTAND YOU SAYING THEY DON'T DO THAT.

>> IT DIDN'T HAPPEN IN THIS CASE.

>> SO NOBODY KNEW THE POEM WAS GOING TO BE INTRODUCED?

>> NOBODY REALLY KNEW THE POEM WAS GOING TO BE INTRODUCED. I CAN'T SAY THAT THE DEFENSE LAWYER WASN'T AWARE THERE WAS A LOT OF MATERIAL COMING IN, AND HE DID OBJECT.

>> WELL, RIGHT.

YOU JUST SAID HE SAID I DON'T WANT THE VIDEO GOING IN.

>> CORRECT.

>> I MEAN, WE'VE GOT A SITUATION HERE WHERE IF YOU HAD TO TAKE WHAT IS HORRENDOUS FOR-- THIS IS A BEYOND HORRENDOUS CASE. YOU'VE GOT TO, I KNOW YOU'RE DEALT THE CARDS HERE, AND YOU'VE BILLION DOING ITS A LONG TIME. -- BEEN DOING IT A LONG TIME. YOU'VE GOT THIS 15-YEAR-OLD GIRL, RIGHT?

IS THAT--

>> THAT'S CORRECT.

>> BE OKAY.

SO WE'RE JUST TALKING NOW ABOUT WHAT DO WE, WHAT IS IT THAT YOU SAY WAS EXCESSIVE?

>> WELL, IT'S, IF YOU READ THE TESTIMONY EVEN THOUGH ONLY THREE WITNESSES TESTIFIED, IT WAS--

>> AND I'M THINKING PALM.

I THINK THAT'S ANOTHER CASE.

>> NO, NO.

NO, THERE WERE--

>> HUH?

>> THERE WAS A PELL INTRODUCED IN THIS CASE AS WELL.

>> OKAY.

>> THAT WAS INTRODUCED AS WELL. HERE--

>> BUT THERE IS A POEM IN ANOTHER CASE TODAY, I THINK.
>> HERE THE-- THEY DIDN'T DO A VIDEO, BUT THE VICTIM'S MOTHER WAS ON THE WITNESS STAND FOR ALMOST AN HOUR TESTIFYING NOT ONLY ABOUT THE TYPICAL VICTIM IMPACT YOU WOULD EXPECT, BUT THEY ALSO NARRATED WITH PHOTOGRAPHS ALL OF THE COMMUNITY EVENTS AND THE COMMUNITY MEMORIALS, AND THERE WAS DETAILED TESTIMONY ABOUT HOW MANY PEOPLE SHOWED UP AT THE FUNERAL, HOW MANY PEOPLE CAME TO THE VIEWING, HOW LONG IT TOOK FOR THE CARS TO COME TO THE FUNERAL WHICH WAS AT THEIR HOME--

>> WELL, MR. McLAIN, AS YOU LOOK AT THIS RECORD, THIS MAY HAVE BEEN ONE OF THE MOST OUTSTANDING YOUNG PEOPLE THAT I HAVE READ ABOUT IN AN AWFUL LONG TIME.

THIS YOUNG WOMAN HAD IMPACT ON HER CHURCH, ON THE COMMUNITY, ON HER FAMILY ARE.

AND THE IMPACT OF THIS YOUNG LIFE WAS ABSOLUTELY ASTOUNDING. AND THAT'S WHAT VICTIM IMPACT-- OUR LEGISLATURE HAS TOLD US IT COMES IN.

AND I CAN UNDERSTAND THAT WE DON'T WANT TO HAVE PASSION AND EMOTION, BUT WHEN ONE TAKES THE LIFE OF SOMEONE SO OUTSTANDING, IT'S GOING TO BE DIFFERENT THAN IF IT'S SOMEONE WHO WAS LESS FORTUNATE AND LIVED ON THE STREETS.

I MEAN, IT'S JUST DIFFERENT.

>> YOU KNOW, I ACKNOWLEDGE THAT. IT'S-- BUT THERE IS STILL A REQUIREMENT THAT THE JUDICIAL PROCESS IN THE SENTENCING PHASE BE PROTECTED FROM EXCESSIVE VICTIM IMPACT AND OVEREMOTIONAL PRESENTATION OF VICTIM IMPACT.

>> ONE HOUR IS EXCESSIVE?

>> NOT THE TIME ALONE, BUT WHAT SHE WAS PRESENTING WAS-- ALL THE PHOTOGRAPHS ABOUT, ALL THE--

THIS WAS MORE OF A DISCUSSION RATHER THAN DIRECT LOSS TO THE COMMUNITY, BUT IT WAS A PRESENTATION OF OUTPOURING OF SUPPORT FROM THE COMMITTEE WHICH WAS REALLY SOMETHING DIFFERENT THAN WHAT WAS THE LOSS OF LIFE TO THIS COMMUNITY.

HOW IS THE FACT THAT WE HAVE PHOTOGRAPHS OF ALL THE BUSINESS MARQUEES MEMORIALIZING HER? WHAT'S THE IMPACT OF THE FACT THAT THERE WERE--

>> IT DEMONSTRATES THIS YOUNG WOMAN HAD AN IMPACT ON A FAR-RANGING SCOPE OF PEOPLE IN A SMALL COMMUNITY, AND I'M MISSING THE ARGUMENT THAT BECAUSE A BUSINESS DOWN THE STREET RECOGNIZED THIS YOUNG WOMAN AND HER LIFE, SOMEHOW THAT BECOMES EXCESSIVE IF WE LET THE JURY KNOW THAT I SOMEHOW THIS WOMAN TOUCHED THAT BUSINESS.

>> I THINK IT'S A MATTER OF DEGREE HERE.

AND BECAUSE NOT ONLY WAS IT THE BUSINESSES DOWN THE STREET, IT WAS, YOU KNOW, IT WAS THE OUTPOURING DURING THE FUNERAL PROCESS OF THE COMMUNITY, BECAUSE IT WAS A SMALL COMMUNITY.

BUT THEY HAD, YOU KNOW, THE WHOLE MEMORIAL T-SHIRTS WERE DOWN, AND THAT WAS PART OF THE PROCESS THAT WAS, YOU KNOW, PRESENTATIONS AND DEDICATIONS, BALL GAMES THROUGHOUT THE COMMUNITY AND VARIOUS AND SUNDRY THINGS.

>> HERE'S THE PROBLEM, AGAIN, WE'VE GOT THIS SORT OF DICHOTOMY ON THIS SCHIZOPHRENIC, YOU KNOW, BETWEEN THE JURY CAN HEAR VICTIM IMPACT STATEMENT, BUT THEY'RE

NOT TO CONSIDER SYMPATHY FOR THE VICTIM.

, WHICH THE FACTS OF THIS CRIME ARE SUCH THAT THAT WOULD BE INEVITABLE.

BUT THERE'S A RIGHT TO PRESENT IT.

AND THE QUESTION OF WHEN IT CROSSES THE LINE, ALL OF THIS IS WITHIN THE SCOPE OF WHAT THIS STATUTE ALLOWS FOR VICTIM IMPACT AS BOTH JUSTICE POLSTON AND JUSTICE LEWIS ARE SAYING.

WHAT I'M ALWAYS STRUCK WITH IS WAS THERE ANY CONTROL BY THE TRIAL JUDGE?

AND YOU SAID, WELL, THE JUDGE KEPT OUT A VIDEO, AND THEN YOU'RE SAYING BUT THEY DIDN'T KNOW WHAT ELSE WAS GOING TO COME IN.

BUT IT SEEMS TO ME THAT'S INCUMBENT ON THE DEFENSE LAWYER TO DISCOVER, YOU KNOW, MAKE SURE IN ADVANCE AND BRING THAT SPECIFICALLY TO THE JUDGE'S ATTENTION.

>> I DON'T KNOW THAT THEY WEREN'T AWARE THAT THERE WAS THIS MATERIAL OUT THERE, BUT I THINK THE--

>> WELL, WHAT DID THEY WANT TO-- WHAT DID THEY ASK THE JUDGE TO DO?

>> I THINK LIMIT THE SCOPE OF WHAT WAS PRESENTED.

>> BUT THERE ISN'T ANYTHING, YOU'RE SAYING THAT IT SHOULDN'T HAVE HAD-- THAT THIS AFFECTED THE COMMUNITY.

BUT THE IMPACT ON THE COMMUNITY CAN PART OF-- IS PART OF WHAT VICTIM IMPACT IS ABOUT.

SO IT'S NOT IMPROPER THAT THE JURY KNEW THAT THE COMMUNITY WAS GREATLY AFFECTED BY THE LOSS OF THIS YOUNG WOMAN.

IS IT?

>> THAT'S CORRECT.

I THINK IT'S THE MATTER OF

DEGREE.

THE IT'S A 4-3 ANALYSIS.

DID IT GO TOO FAR?

>> BUT AGAIN, IT'S HARD TO DECIDE, THE JUDGE NEEDS TO HAVE IT, UNDERSTAND IT IN ADVANCE AND THE DEFENSE LAWYER NEEDS TO SAY, LISTEN, I DON'T THINK THIS PART SHOULD COME IN.

YOU'RE IN YOUR REBUTTAL, BUT, I MEAN, IT'S A HARD AREA.

>> THE DEFENSE LAWYER DID OBJECT A FEW TIMES THROUGH THERE, HE MADE MOTIONS FOR MISTRIAL AT LEAST TWO OR THREE TIMES DURING THIS PROCESS.

SO THE DEFENSE LAWYER WAS SEEKING TO STOP SOME THINGS, IF YOU WILL, OR TO SLOW IT DOWN, LIMIT IT IN SOME FASHION.

I'LL SAVE WHAT TIME I HAVE.

THANK YOU.

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

WITH REGARD TO THE CAUSE CHALLENGES, THE ISSUE IS NOT PRESERVED.

WHILE THE DEFENSE REQUESTED ADDITIONAL PREEMPTORY CHALLENGES, THEY REQUESTED THOSE CHALLENGES NOT BECAUSE THE TRIAL COURT HAD IMPROPERLY DENIED CAUSE CHALLENGES BASED ON DEATH QUALIFICATION QUESTIONS, BUT BECAUSE THERE HAD BEEN AN EXCESSIVE AMOUNT OF PRETRIAL PUBLICITY.

THE TRIAL COURT HADN'T DENIED ANY CAUSE CHALLENGES ON PRETRIAL PUBLICITY.

YOU KNOW, THE TRIAL COURT WAS NOT ON NOTICE THAT THE DEFENSE WAS CLAIMING BY THAT OBJECTION THAT HE HAD A PROBLEM WITH THE CAUSE CHALLENGES HE HAD GRANTED ON DEATH QUALIFICATION.

THEREFORE, THE ISSUE BEING RAISED ON APPEAL IS DIFFERENT

THAN THE ONE THAT WAS RAISED IN
THE TRIAL ARE COURT.

AND THEN, OF COURSE, WHEN THEY
GOT TO THE END AND YOU'RE
SUPPOSED TO RENEW YOUR
OBJECTIONS, THE DEFENSE DIDN'T
RENEW OBJECTIONS TO CAUSE
CHALLENGES.

THEY RENEWED OBJECTIONS TO DEATH
QUALIFICATION IN ITS ENTIRETY
BASED ON--

[INAUDIBLE]

SO AGAIN, THEY DIDN'T PRESERVE
IT BECAUSE YOU HAVE A DIFFERENT
ISSUE.

EVEN IF THEY HAD PRESERVED
IT, THE TRIAL COURT WOULD NOT
HAVE COMMITTED MANIFEST DENYING
THESE CAUSE CHALLENGES.

THIS COURT HAS RECOGNIZED THAT
THAT JURY INSTRUCTION ABOUT NOT
HAVING TO RECOMMEND DEATH EVEN
IF YOU DETERMINE DEATH IS
APPROPRIATE IS A JURY PARDON,
AND REFUSING TO GRANT A JURY
PARDON IS NOT NOT FOLLOWING,
REFUSING TO FOLLOW THE LAW, IT'S
AGREEING TO FOLLOW THE LAW.
AND THESE PEOPLE, THEREFORE, DID
NOT INDICATE THEY WOULD NOT
FOLLOW THE LAW ON THE DEATH
PENALTY AND WERE NOT EXCUSABLE
FOR CAUSE BASED ON THAT ANSWER.
IN FACT, THIS COURT IN DAVIS
HELD THAT IT WAS NOT AN ABUSE OF
DISCRETION FOR A TRIAL COURT TO
DENY A CAUSE CHALLENGE TO A JURY
WHO REFUSED TO CONSIDER MERCY
BECAUSE MERE MERCY IS NOT A
PROPER MITIGATING CIRCUMSTANCE.
SO THE FIRST ISSUE YOU SHOULD
AFFIRM.

WITH REGARD TO THE SECOND ISSUE,
THE TRIAL COURT ACTUALLY DID AT
THE PRETRIAL HEARING ON--

>> I'M JUST TRYING TO THINK THIS
OUT LOUD.

SO IT'S, AGAIN, THE JURY
INSTRUCTION NOW DOES SAY
REGARDLESS OF YOUR FINDINGS,

YOU'RE NEITHER COMPELLED, NOR
REQUIRED TO RECOMMEND A SENTENCE
OF DEATH.

OKAY.

SO IF A JUROR SAYS IF I FIND THE
AGGRAVATORS OUTWEIGH THE
MITIGATORS, I WILL ALWAYS IMPOSE
THE DEATH PENALTY.

>> IF THE JUROR AGREES TO
CONSIDER ALL THE MITIGATION AND
AGREES TO THEN REACH ITS
DECISION BASED ON THE EVIDENCE
AND ITS WEIGHT, THE JUROR'S
PERSONAL WEIGHING OF THAT
EVIDENCE, HE IS FOLLOWING THE
LAW.

>> SO WHAT DOES THAT SENTENCE IN
THE JURY INSTRUCTION--

>> THAT SENTENCE AS THIS COURT
HELD IN FRANKIE, IN DUE BEGAN
AND IN-- INFORMING THE JURY
THEY HAVE THE ABILITY TO GRANTED
A JURY PARDON.

AND PERSONALLY, I DON'T THINK IT
BELONGS IN THE JURY
INSTRUCTIONS--

[LAUGHTER]

BUT YOU'VE PUT IT THERE, AND
IT'S STILL A JURY PARDON.

>> BECAUSE WHEN THE PROSECUTORS
WERE SAYING YOU UNDERSTAND THAT
IF YOU FIND THE AGGRAVATORS
OUTWEIGH THE MITIGATORS, YOU ARE
REQUIRED TO IMPOSE THE DEATH
PENALTY, WE SAID OVER AND OVER
THAT WAS NOT A PROPER STATEMENT.

>> BECAUSE THE JURORS RETAIN
THIS ABILITY TO PARDON.

BUT IN FRANKIE, A CASE--

>> YEAH.

I LOOK AT IT A LITTLE
DIFFERENTLY WHICH IS, AND YOU
SEE IT ALL WHEN THERE'S SPECIAL
INTERROGATORIES, THE WEIGHING
PROCESS ABOUT NUMBERS IS MORE
AGGRAVATORS THAN MITIGATORS,
WHAT THE MITIGATORS ACTUALLY
MEAN.

AT LEAST AT THE BEGINNING, IT IS
JUST TOO ABSTRACT, AND, YOU

KNOW, THAT'S WHERE I'D GO ON THIS, THAT I THINK THAT IT DOESN'T NECESSARILY MEAN THEY COULDN'T LOOK AT THIS AND STILL SAY, WELL, I DON'T KNOW, I CAN'T FIGURE OUT THIS WEIGHING THING, BUT THIS DOESN'T STRIKE ME AS BEING A DEATH PENALTY CASE. THAT'S HOW THEY DO IT. HAY DON'T GO WE'RE GOING TO-- THEY DON'T GO WE'RE GOING TO AT UP THE--

>> WELL, IT'S A QUALITATIVE. IT'S NOT QUANTITATIVE.

>> WE DON'T TALK ABOUT THAT FOR THEM.

>> WE DO TALK TO THEM ABOUT IT BEING A QUALITATIVE.

WE DON'T TELL THEM WHAT THE AGGRAVATORS ARE.

WE DO ALLOW THAT THE MITIGATORS IN GENERAL BE ASKED ABOUT, AND THESE JURORS ACTUALLY SAID THEY WOULD CONSIDER THE MENTAL HEALTH MITIGATION THE DEFENSE WAS PLANNING TO PRESENT AND THAT THEY WOULD BASE THEIR DECISION BASED ON WEIGHING OUT THE AGGRAVATION AGAINST THE MITIGATION.

THEY DIDN'T SAY THEY WOULD NOT FOLLOW THE LAW ON THE DEATH PENALTY.

>> THE, I THINK JUSTICE PARIENTE IS CORRECT WITH THIS ELEMENT, AND JUSTICE CANADY'S QUESTION ABOUT THE STANDARDS FOR LOOKING AT THIS, I THINK BACK TO 16, 17 YEARS AGO WHEN I FIRST CAME TO THE COURT.

EVERY GROUP OF PROSECUTORS, EVERY GROUP ARE OF DEFENDERS THAT I TALKED WITH, THIS WAS THE SINGLE MOST CONTROVERSIAL KIND OF ISSUE.

PROSECUTORS WANTED TO SAY, YES, YOU HAVE TO RECOMMEND DEPTH IF THEY-- DEATH IF THEY OUTWEIGH, AGGRAVATORS OUTWEIGH, AND THE DEFENDANTS SAYING, NO BE,

YOU'RE NOT REQUIRED TO DO IT,
AND HOW DO WE PROPERLY ALLOW
QUESTIONING ALONG THOSE LINES?
I MEAN, THAT'S WHAT THIS IS
ABOUT.

AND IF SO, WHAT ARE THE RESULTS?
BE HE'S SAYING THAT YOU HAVE TO
EXCUSE THE JURORS WHO HE'S
SAYING, IN ESSENCE, THEY'VE
REFUSED TO FOLLOW WHAT THE COURT
WOULD REQUIRE, AND YOU'RE
SAYING, ON THE OTHER HAND, NO,
THIS IS IN THE AREA OF THE JURY
PARDON.

THEY HAVE THE POWER TO DO IT,
BUT IT'S NOT REQUIRED BY LAW.
SO, I MEAN, IT SEEMS AS THOUGH
THERE SHOULD BE SOMETHING.

MAYBE WE NEED TO READDRESS THE
JURY INSTRUCTIONS OR--

>> I WOULD SUGGEST TAKING OUT
THE LANGUAGE ABOUT THE JURY
PARDON OUT OF THAT JURY
INSTRUCTION.

>> OR MAKE IT A LITTLE CLEARER
OR SOMETHING OF THAT NATURE.
JUST SO IT'S NOT A STANDARDLESS
KIND OF-- BECAUSE I, TOO, LEAN
TOWARD THE DIRECTION THAT THIS
BECOMES A STANDARDLESS, YOU
KNOW, PROCESS.

HOW DO YOU MEASURE?

SO YOU HAVE A DIFFERENT
APPLICATION IN DADE AND DUVAL
COUNTIES?

AND THAT'S NOT HOW A SYSTEM OF
LAW OUGHT TO OPERATE HERE.

>> WELL, THE WAY IT'S SUPPOSED
TO WORK IS THE JURORS ARE
SUPPOSED TO SIT DOWN, THEY'RE
SUPPOSED TO CONSIDER THE
EVIDENCE, DETERMINE WHAT
AGGRAVATORS ARE FOUND, WHAT
MITIGATORS ARE FOUND AND
QUALITATIVELY WEIGH THEM AGAINST
EACH OTHER.

AND IF THE JURORS DETERMINE THE
AGGRAVATORS OUTWEIGH THE
MITIGATORS, THEY SHOULD IMPOSE
DEATH.

AND IF THEY FIND THE OTHER WAY
AROUND, THEY SHOULD IMPOSE LIFE.
NOW, THEY HAVE THE OPPORTUNITY
TO--

>> WELL, THAT'S A PRETTY BLACK
AND WHITE KIND OF DEMARCATION,
BUT THAT DOESN'T SEEM TO BE
WHERE THE JURISPRUDENCE OF THE
STATE IS.

>> WELL--

>> AND IT'S--

[INAUDIBLE CONVERSATIONS]

>> A JURY PARDON.

AND IN FRANKIE, ONE OF THE CASES
ABOUT THE REQUIRED, THIS COURT
ACTUALLY ACKNOWLEDGED THAT THE
JURY INSTRUCTION THAT YOU NOW
HAVE IS A JURY PARDON.

AND FOUND THE TRIAL COURT DIDN'T
ABUSE ITS DISCRETION, IS
REFUSING TO GIVE THAT
INSTRUCTION BECAUSE IT'S A JURY
PARDON.

>> BUT WE WENT THROUGH, I THINK
THESE ALL CAME OUT OF THE WHOLE
REWRITE OF THE DEATH PENALTY
INSTRUCTIONS, AND, YOU KNOW,
WE'LL HAVE FLORIDA'S DEATH
PENALTY STATUTE'S GOING TO BE
FRONT AND CENTER, I THINK, THIS
WEEK OR NEXT WEEK IN THE U.S.
SUPREME COURT.

BUT I THINK THAT THE ISSUE
ABOUT-- YOU'RE FOCUSING AND
SAYING, HA, WE TELL THEM THEY'RE
NOT COMPELLED OR REQUIRED.

BUT THE TRUTH OF THE MATTER IS
IF YOU READ THAT JURY
INSTRUCTION-- AND, AGAIN, A LOT
OF US HAVE BEEN DOING THIS NOW
FOR A LONG TIME-- THE IDEA OF
HOW THEY WEIGH IT--

>> UH-HUH.

>> AGAIN, AND YOU KNOW THIS,
THAT IF A CO-DEFENDANT HAS
GOTTEN LIFE--

>> WELL, THAT'S A MITIGATOR.

>> IT'S A-- BUT IT IS THE KIND
OF THING THAT EVEN THOUGH IT'S A
BAD CRIME, THEY MAY FIND THAT

THAT QUALITATIVELY IS NOT IMPORTANT.

BUT THEY DON'T, YOU KNOW, WE DON'T GIVE THEM A CHECKLIST LIKE A SHOPPING LIST NOT ONLY SAYING FIND THESE AGGRAVATORS, YOU KNOW, WE'VE REJECTED THAT, AND THEN ALSO TELL US HOW MUCH WEIGHT YOU'RE GIVING IT.

AND THEN LIKE WE ASK A SENTENCING JUDGE TO DO.

AND THAT'S REALLY WAY IN FLORIDA THAT WHATEVER WAY THE JURORS VOTE, I MEAN, IF THEY VOTE FOR DEATH, IT'S UP TO THE TRIAL JUDGE THEN TO LOOK AND SAY WE'RE GOING TO DO THAT CAREFUL WEIGHING.

WE DON'T IMPOSE THAT ON JURORS BECAUSE IT'S A RECOMMENDATION.

>> WELL, WE DO.

WE INSTRUCT THE JURORS THAT THEY'RE SUPPOSED TO GO THROUGH THE EXACT SAME WEIGHING PROCESS THE TRIAL COURT DOES.

AND SOME JURORS MAY, IN YOUR CASE, DETERMINE THAT THE FACT THE CO-DEFENDANT DIDN'T GET DEATH IS A MITIGATOR THAT OUTWEIGHS THE AGGRAVATORS NO MATTER HOW HORRIBLE THE CRIME IS.

AND THAT'S NOT A JURY PARDON.

TELLING THEM STRAIGHT UP NO MATTER WHAT YOU'RE WEIGHING IS A JURY PARDON, AND THIS COURT HAS ACKNOWLEDGED AS MUCH.

AND THE MERE FACT THAT-- THE PERP SAYS I'M NOT GOING TO CONSIDER GRANTING A JURY PARDON DOESN'T MEAN THEY WON'T FOLLOW THE LAW.

YOU WANT TO ASK THAT QUESTION, YOU GET THE ANSWER, YOU CAN USE YOUR--

>> I WANT TO KNOW HOW SOMEBODY CAN IF IT SAYS YOU'RE NOT REQUIRED OR COMPELLED AT THE BEGINNING OF A CASE WHERE THEY

HAVE NO UNDERSTANDING TO SAY, WELL, I KNOW I'M NOT REQUIRED OR COMPELLED BUT I'M NOT GOING TO DO IT, I MEAN, THAT SEEMS LIKE THAT'S NOT AN OPEN MIND ABOUT IT, AND THAT'S THE PROBLEM WITH TAKING THESE QUESTIONS AHEAD OF TIME.

BUT YET, YOU KNOW, WE CERTAINLY KNOCK OFF ALL THE JURORS THAT SAY I REALLY DON'T BELIEVE IN THE DEATH PENALTY.

WE KEEP ON JURORS THAT SAY WE BELIEVE IN THE DEATH PENALTY.

>> AND WE KNOCK OFF ALL THE JURORS WHO SAY I'M NOT GOING TO CONSIDER THE MITIGATION.

I'M AUTOMATICALLY GOING TO RECOMMEND DEATH IF X, Y OR Z HAPPENED.

THESE PEOPLE EXPRESSLY SAID THAT'S NOT TRUE.

THEY EXPRESSLY SAID THEY WOULD CONSIDER THE MITIGATION.

WHAT THEY SAID IS ONCE I'VE DONE THAT WEIGHING PROCESS AND I'VE MADE MY DECISION, UNDER THE LAW AS TO WHAT THE APPROPRIATE SENTENCE IS, I'M NOT CONSIDERING A JURY PARDON, AND THAT IS NOT GROUNDS.

WITH 3 GROUND DELAYS WITH REGARD TO THE IMPACT EVIDENCE,

WHAT HAPPENED PRE-TRIAL IS THE TRIAL COURT SAID I AM NOT GOING TO REQUIRE THE STATE TO PROPER PRETRIAL BUT WHEN WE GET TO THE PENALTY PHASE I WILL REQUIRE THE STATE TO PROPER IT OUTSIDE THE JURY, RECTIFYING PAGES 7

MANDATE, THE TRIAL COURTS DIDN'T PRECLUDE THEM KNOWING ABOUT IT AND THE DEFENSE BEFORE THE PENALTY PHASE COMMENCED

RECTIFYING 31, PAGE 1601

ACKNOWLEDGED THEY HAD SEEN ALL THE -- THEY ONLY SPECIFIC OBJECTIONS THEY MADE DURING ANY OF THE VICTIM IMPACT EVIDENCE TO MANY OF THE VICTIM IMPACT

EVIDENCE BEING OUTSIDE THE SCOPE OF PROPER VICTIM IMPACT WAS WHEN THE STATE ASKED THE FATHER WHAT HE WAS FEELING WHEN HE REALIZED HIS DAUGHTER WASN'T -- THE TRIAL COURT SUSTAINED THE OBJECTION.

>> HOW DID THE VIDEO NOT COME IN?

>> THAT WAS EXCLUDED FREE TRIAL, THEY SAID YOU ARE NOT PLAYING THAT VIDEO.

YOU CAN CALL YOUR WITNESSES.

>> WE HAVE SEEN THIS IN MANY CASES.

WE NEED DEFENSE LAWYERS TO BE VERY SPECIFIC HOW THEY WANT IT LIMITED.

THE JUDGE CAN'T LOOK AT THIS AFTER THE FACT WEEKEND LOOK AT IT AFTER THE FACT, WE NEED TO MAKE SURE THE PROCESS, YOU ARE SAYING THE PROCESS WAS A PROPER.

>> THE TRIAL COURT OFFERED THE TRIAL COURT -- I ALREADY KNOW WHAT IT IS, MY CONCERN IS IT WILL BE A FUTURE QUESTION.

>> THE PROBLEM IS WHEN YOU HAVE SUCH A WONDERFUL PERSON, HALF-HOUR OR TWO IS GOING TO BE EMOTIONAL.

>> WE ARE SUPPOSED TO BE ALLOWING THE JURORS TO SEIZE ALL HARM THEY CAUSE.

>> ONCE THEY FEEL WHAT IT WAS AS OPPOSED TO THE 15-YEAR-OLD THAT WAS A RUNAWAY, AND DECIDING WHETHER TO VOTE FOR IT.

>> THEY ARE JUST ALLOWED TO KNOW ABOUT IT, NOT TO CONSIDER IT AS AGGRAVATION.

THOSE WERE NOT THE ONLY LIMITS THE TRIAL COURT, AFTER THE FIRST WITNESS TESTIFIED AND THE DEFENSE WAS COMPLAINING HOW LONG WAS ON THE STAND, THE TRIAL COURT TOLD THE STATE NEXT WEEK TO WITNESSES YOU CAN'T GO BACK OVER THE COMMUNITY SO MOM TESTIFIES ABOUT THE COMMUNITY AND HERSELF AND THE IMMEDIATE

TRIAL, DAD TESTIFIES ABOUT HIMSELF, THE EXTENDED FAMILY AND THE GODFATHER TESTIFIES ABOUT HIS FAMILY AND THE CHURCH COMMUNITY SO EACH ONE OF THESE WITNESSES AND YOU HAVE HELD THAT FOR DISCRETION, TESTIFIED ABOUT DISTINCT AREAS THE TRIAL COURT DID LIMIT THE TESTIMONY AND THE TESTIMONY WAS FOR THE VICTIM AND THE STATE RESPECTFULLY REQUESTS THERE ARE NO FURTHER QUESTIONS THAT YOU REFER.

>> ONE POINT REGARDING ISSUE 1, COUNSEL FOR THE STATE SUGGESTED IT WASN'T PRESERVED.

I RESPECTFULLY DISAGREE.

I THINK IT WAS CLEAR THE PRESERVED, NOT TO BELABOR IT THIS MORNING, I FULLY ADDRESS THIS IN THAT BRIEF.

>> THE COURT IS IN RECESS FOR TEN MINUTES.

>> ALL RISE.