ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DENNIS SOCHOR, Petitioner v. FLORIDA

CASE NO: 91-5843

PLACE: Washington, D.C.

DATE: Monday, March 2, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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DENNIS SOCHOR, :

Petitioner :

v. : No. 91-5843

FLORIDA :

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Washington, D.C.

Monday, March 2, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

GARY CALDWELL, ESQ., West Palm Beach, Florida; on behalf of the Petitioner.

CAROLYN M. SNURKOWSKI, ESQ., Assistant Attorney General of Florida, Tallahassee, Florida; on behalf of the Respondent.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 91-5843, Dennis Sochor v. Florida.

Mr. Caldwell.

ORAL ARGUMENT OF GARY CALDWELL

ON BEHALF OF THE PETITIONER

MR. CALDWELL: Mr. Chief Justice, and may it please the Court:

Florida's death penalty statute, as the Supreme Court of Florida held in 1972 --

QUESTION: Could you speak up, please?

MR. CALDWELL: I apologize, Justice O'Connor.

QUESTION: It is hard to hear. Maybe you could raise the podium or something.

MR. CALDWELL: I have a soft voice, I'm afraid. Am I audible now? Am I audible now?

QUESTION: Yes.

MR. CALDWELL: Okay, good.

In 1972, in State v. Dixon, the Florida Supreme Court held that Florida's death penalty statute is reserved for the most aggravated and least mitigated of the most serious crimes. It has held steadfastly to that position ever since.

The Florida death penalty statute attains this

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goal by a process of weighing aggravating and mitigating circumstances. The primary actor in this weighing process is the jury. The jury has been the main actor in Florida sentencing since the very earliest days of Florida's statehood. And accordingly, the Supreme Court of Florida last year held that there is a State constitutional double jeopardy right to a reasonable jury verdict. That is, if there has been a reasonably arrived at life verdict, then the defendant may not be sentenced to death.

Accordingly, it is our position that Florida is more like a Oklahoma and Mississippi, that is, it is more like a jury-sentencing State than it is like a judge-sentencing State, such as Arizona. This distinction is important --

QUESTION: Well, this Court has said in several opinions, I guess, that it's a State that -- in which the judge sentences.

MR. CALDWELL: Justice O'Connor, it has said repeatedly that ultimately Florida is a judge-sentencing court. That is correct. Nevertheless, this Court has also recognized in Proffitt and in other cases the primacy in Florida -- jury -- sentencing of the penalty verdict. And in Hitchcock, the Court held that it's necessary that the jury as well as the judge not be restrained in the consideration of mitigation.

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For instance, the Court has always recognized that the Florida system is a tripartite system. And it is clear from Florida law, and from this Court's recognition of the primacy of Tedder v. State, that under Florida law, the jury considers -- conducts the weighing in the first instance.

The Court recognized that in Proffitt when it discussed Tedder and the importance of the jury role in sentencing, and when it discussed the heinous in the circumstance. In Proffitt, the Court held that the heinous in the circumstance was constitutional as construed in that decision, and that that provided adequate guidance, both for the jury and for the sentencing judge.

Where -- again, where there's been a life verdict which has been reasonable arrived at after the weighing of the sentencing circumstances, that is dispositive of the sentencing decision in Florida.

Accordingly, it's -- the role of the jury cannot be sentence -- cannot be ignored. The Florida Supreme Court has recognized that where there is a constitutional defect in the jury proceeding, then the entire sentencing proceeding is unconstitutional. Accordingly where, as here, there's been an error in the trial court jury sentencing phase of the case that makes the entire

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sentencing proceeding unconstitutionally defective. And that happened in this case.

First with respect to the cold, calculated, and premeditation circumstance, the Florida Supreme Court held that the evidence did not support that circumstance, and that the trial court had improperly entered it into its weighing process. Accordingly, Mr. Sochor did not get a constitutionally required correct weighing of the aggravating and mitigating circumstances. No actor in the State's system properly weighed the aggravating and mitigating circumstances, so that under Parker v. Dugger, an error occurred. The only way of correcting that error would have been through a reweighing of the sentencing circumstances. And the Florida Supreme Court has long, long held that it does not reweigh circumstances.

This Court held in Goode back in the seventies, that --

QUESTION: Well, they don't reweigh any mitigating circumstances, do you?

MR. CALDWELL: Yes, sir, I believe that they do. They reweigh the mitigating evidence sometimes. Sometimes they don't.

QUESTION: Just the mitigating evidence, you say?

MR. CALDWELL: Well, Justice White, it's hard to

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tell really what the Florida Supreme Court does. You can sort of pick out a case that says almost anything. In Parker --

QUESTION: How about in this case? What's -- I thought the -- I thought it was found by the judge that there weren't any mitigating circumstances.

MR. CALDWELL: The judge said that there were no mitigating circumstances to outweigh --

QUESTION: And the supreme court affirmed that.

MR. CALDWELL: The short answer to your question has to be qualified, I'm afraid. The sentencing judge said that there were no mitigating circumstances to outweigh the aggravating circumstances. He did discuss the mitigating evidence in a sentencing order. We don't know what mitigation the jury may have found. Presumably it found some mitigation because there was substantial mitigation before the sentencing jury.

Accordingly, the jury certainly, because it was presented with an improper aggravating circumstance, and had lots of mitigating circumstances before it -- the jury did have mitigating circumstances to weigh against the aggravation, and therefore, the jury part of the weighing process was improper.

QUESTION: Do you mean -- I don't mean to put you off your argument, but don't you mean that the jury

had mitigating evidence to weigh? It didn't find any circumstances, isn't that right?

MR. CALDWELL: Justice Souter, that is correct. The jury does not make specific findings one way or the other.

QUESTION: Okay. So what it was weighing is -- against the aggravating circumstances what it was weighing was evidence. Not specific findings, but it was weighing evidence, mitigating evidence.

MR. CALDWELL: No specific findings, yes, sir. However, there were mitigating circumstances presented to the jury pertaining to Mr. Sochor's mental state at the time of the event.

QUESTION: But what you mean is that there was evidence which had a mitigating tendency. Isn't that what you mean?

MR. CALDWELL: In part, yes, sir. Perhaps you and I are talking about apples and oranges.

QUESTION: Well, what I'm talking about -- when I'm using the word circumstance, I'm talking about specific findings which are provided for by statute -- the finding, for example in this case, cold-blooded or what not. And when you use circumstance just to mean any fact that had a mitigating tendency, it just gets confusing. And I think what you mean, if I understand you correctly,

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is that the jury had evidence of mitigating facts, but it did not go through a purpose -- a process of finding that mitigating circumstances, as a term of art, existed. Is that fair?

MR. CALDWELL: Justice Souter, I'm afraid that -- I hate to say it's not fair. The Florida statute is extremely vague about what the jury does. The jury is charged with weighing mitigating and aggravating circumstances.

QUESTION: Yes, but the Florida statute, as I understand it, does not say there are certain facts which we will dignify by the term mitigating circumstances. They are a, b, c, d, and e. There is no such provision in Florida law, is there?

MR. CALDWELL: The statute has a list of mitigating circumstances.

QUESTION: It does?

MR. CALDWELL: Yes, sir.

QUESTION: And is the jury instructed to find them in the same -- or fail to find them -- in the same sense that it is instructed to find or fail to find aggravating circumstances?

MR. CALDWELL: Yes, sir. That's --

QUESTION: So that in this case the jury had mitigating evidence, but it in fact made no findings that

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mitigating circumstances had actually been proven.

MR. CALDWELL: Well, sir, it makes -- yes, because it makes no find -- specific findings of fact as to aggravating circumstances or mitigating circumstances. It's a general verdict.

QUESTION: Okay. Oh.

QUESTION: The jury then is charged as to its duty to deal with aggravating circumstances and with mitigating evidence, but then it simply returns a verdict of death or not death.

MR. CALDWELL: Yes, sir, it's a general verdict.

QUESTION: And it's an advisory verdict.

MR. CALDWELL: Chief Justice Rehnquist, that is correct. It is an advisory verdict. However, it is qualified in this way: that if it is reasonable and it's a life verdict, the judge must find it. And the judge's findings as to aggravating and mitigating circumstances are disregarded on appeal.

QUESTION: Yes, but here it was not a life verdict, was it?

MR. CALDWELL: No, sir. It was a verdict for death. However, again under Florida law, the judge is ordinarily expected to follow the penalty verdict. One way of looking at what the judge does in the sentencing order is the judge's order rationalizes the verdict.

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QUESTION: We've had a couple of cases earlier on, Spaziano and then per curiam several years later, kind of explaining what we thought that process was.

MR. CALDWELL: The Florida process is that the jury in the first instance makes the determination as to whether it should be a death sentence or a life sentence. And it bases that on the weighing of aggravating and mitigating circumstances. Although it is a general verdict, the jury is assumed to weigh these things out, count them up, figure out what sort of weight to give them. And the judge is -- where there's a life verdict, is almost completely bound to follow it. And when there is a death verdict, it's almost that close. That is, what the judge does in the sentencing order is basically rationalize what the jury has done.

QUESTION: And the judge does make specific findings, right?

MR. CALDWELL: Yes, Justice Souter.

QUESTION: In other words, he doesn't come in with a general verdict, as it were. He makes specific findings of aggravating circumstances, or mitigating.

MR. CALDWELL: Yes, Justice.

QUESTION: In this case he found four aggravators and he found no mitigators.

MR. CALDWELL: He found -- he went through the

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so-called statutory mitigating circumstances and found that none of them applied. As to the so-called catchall none statutory mitigating circumstance, he wrote what the evidence was, or some of the evidence. He didn't go through all of it. He said based on that it did not constitute a nonstatutory mitigating circumstance. And then he said the court does not find sufficient -- the court does not find mitigating circumstances to outweigh the aggravating circumstances. He did say that he weighed aggravating and mitigating circumstances. It is somewhat ambiguous.

QUESTION: I don't think it's ambiguous at all. He is much more specific than that. He said, however, after considering the testimony, their testimony -- he's talking about specific testimony -- this court finds no nonstatutory mitigating circumstances. He found both no statutory mitigating and specifically found no nonstatutory mitigating. That's what he said.

MR. CALDWELL: Well, he said that that evidence did not constitute nonstatutory. There was other nonstatutory mitigation before the court, specifically, the --

QUESTION: No. He said, after -- however, after considering their testimony, this court finds no nonstatutory mitigating circumstances.

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MR. CALDWELL: Yes, sir. Yes, sir, Justice Scalia. He said after considering their testimony. There was other evidence of nonstatutory mitigating character, which was the trial evidence.

QUESTION: Oh, you think he meant that -- what?

MR. CALDWELL: I'm saying he was ambiguous.

QUESTION: I don't think it's ambiguous at all. He clearly found no nonstatutory mitigating circumstances.

QUESTION: On what page in the record will we find this colloquy that you're discussing?

MR. CALDWELL: It's the sentencing order, Mr. Chief Justice, in the joint appendix. It's --

QUESTION: It's on page 15 of your brief.

MR. CALDWELL: Well, unfortunately, there is a typographical error in my brief on that. Page 353 has the exact quotation.

QUESTION: Thank you.

MR. CALDWELL: I apologize for the typographical error.

It's the end summary in the middle of page 353 of the joint appendix. Well, also, the eighth -- paragraph number 8 preceding that.

QUESTION: Where it starts out: In summary, it is the conclusion of the court, after carefully and conscientiously weighing the aggravating and mitigating

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circumstances, that there are sufficient aggravating circumstances to justify and warrant the imposition of the death penalty, and that there are no mitigating circumstances to outweigh the aggravating circumstances? Where do you find the ambiguity there?

MR. CALDWELL: Well, he says that he is weighing the aggravating and mitigating circumstances, so there is some weighing going on there. But let me emphasize --

QUESTION: There is certainly -- you have to read something else from an earlier part of the paragraph in to bring an ambiguity to that sentence: there are no mitigating circumstances to outweigh the aggravating circumstances. I suppose you could say that the phrase to outweigh might modify mitigating.

MR. CALDWELL: All right. The important point --

QUESTION: Mr. Caldwell, before you go on --

MR. CALDWELL: Yes, sir?

QUESTION: I'm concerned about what is just above what you've read.

MR. CALDWELL: Paragraph 8?

QUESTION: Paragraph 8 on page 353, which begins, stating the subject: any other aspect of the defendant's character or record and any other circumstances of the offense. There were several members

of the defendant's family who tearfully and grievously testified. However, after considering their testimony, this court finds no nonstatutory mitigating circumstances.

And the first sentence of 8 says, any other aspect of the defendant's character or record.

I think that's absolutely clear to me that there are just no nonstatutory mitigating circumstances found by the district court.

MR. CALDWELL: He didn't consider the other nonstatutory mitigating circumstances. The -- I think that's -- at least that much is clear.

The important point that I am trying to make and that I started off with was that, nevertheless, the Supreme Court of Florida treats as naught, a finding of no mitigating circumstances, where there's a life verdict. Where there's a life verdict, the court goes -- just considers that an improper finding. It's -- it is, in effect, a provisional finding by the trial court.

QUESTION: But this was not a life verdict.

MR. CALDWELL: Yes, Mr. Chief Justice. We are saying, however, that in order to conduct a harmless error analysis, there has to be a consideration of what the jury verdict might have been. Because if there is a life verdict, then this finding of the trial judge just counts as nothing. It has no value under the Florida system.

Once there is a life verdict, then it's presumed that the jury found all of the statutory and nonstatutory mitigating circumstances. So that when there has been an error which could have affected the jury verdict, then we're in an entirely different position.

And that's what our argument is: that under Florida, the jury's verdict is so important that it -- if the error could have affected that, and that there could reasonable have been a life verdict, then it is as though all of those mitigating circumstances were found. And that's -- that is something that is as clear as anything from Florida law. It's been part of Florida law since well before Proffitt.

The Court recognized that in Proffitt that under the so-called Tedder doctrine, that the jury is the primary decision maker, and that where there has been this reasonably arrived at life verdict, these sorts of findings made by the judge just don't count for anything. And we set out in somewhat excruciating detail in our brief all of the cases which say that again and again.

The primacy of the jury plays into both of the issues before the Court. I'd like to talk briefly about the second issue as to the especially heinous, atrocious, or cruel aggravating circumstance, which this Court has dealt with many times since Proffitt. In 1984, the

Florida Supreme Court just simply abandoned the Proffitt definition of the circumstance. Proffitt has held that the circumstance was constitutional where it was limited to the conscienceless or pitiless crime, which is unnecessarily torturous.

In Pope v. State, the Florida Supreme Court wrote at some length its disapproval of the conscienceless or pitiless standard. It held that the conscienceless or pitiless standard went to the mindset of the defendant, that they didn't like that because, in that case, it had led to application of the circumstance because the defendant had pled not guilty and the judge had concluded that meant the defendant had no remorse, and therefore, the crime was especially heinous, atrocious, or cruel.

But the Supreme Court of Florida did not stop there. The supreme court went on to say that it disapproved of the conscienceless or pitiless limitation, that some years previously it had written it out of the jury instructions, and that now it was specifically disapproving of it, and that the defendant's mindset, quote, unquote, was no longer at issue in any case. Accordingly, the supreme court simply kicked out the Proffitt definition, putting Florida into the same position as Oklahoma in the Maynard case.

Because Florida has not followed Proffitt, the

heinousness circumstance is unconstitutional. We have two arguments pertaining to that. One is the Maynard argument, which is that the court applies a circumstance to either the intent of the defendant, or it can hold that the intent is irrelevant. It can apply to the manner of the killing, or it can hold that the manner is completely irrelevant. Or it can apply to the effect on the victim, or it can hold that the effect to the victim is completely irrelevant. That was exactly the vice in the Oklahoma statute, which the Court denounced in Maynard. And that is the condition of the circumstance now in Florida.

The second argument is that --

QUESTION: Excuse me. You're on the -- you did not object at trial to the --

MR. CALDWELL: To the jury instruction.

QUESTION: Yes, on cruel and -- the heinous circumstance instruction, right?

MR. CALDWELL: That is correct, Justice Scalia.

QUESTION: I don't understand why you say you are not procedurally barred. As I read the State court's opinion, it did rely upon a procedural bar. Although it went on to discuss the merits, that was an alternate ground. Wouldn't that be enough to say that you're procedurally barred?

MR. CALDWELL: No, sir. And before I discuss

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that more fully, let me point out that our principal emphasis of our argument is that the circumstance itself is unconstitutional. The cause in adopting that jury instruction, the Florida Supreme Court authoritatively construed the circumstance as no longer containing the Proffitt definition. They said in Pope the defendant's mindset is never at issue. They said that that's completely irrelevant. We've gotten rid of that Proffitt definition. We don't like it. And that's what resulted in our having this jury instruction.

Now, more directly to answer your question, in the first instance, we did move prior to trial and argue that the circumstance was unconstitutionally vague, which it is under Pope. Pope, when they approved that jury instruction, they said this is the definitive construction of the statute. After that, we really didn't have any objection to the jury instruction, because according to Pope, the jury instruction was a proper instruction under Florida law. It stated what the circumstance was. We had argued that the circumstance is unconstitutional. Beyond that, we really had no more argument to make to the trial judge because the trial judge had said this is a correct formulation of the statute.

Additionally, Florida's law on --

QUESTION: Well, then you should raise your

unconstitutional objection at that point. It seems to me you should either do one or the other.

MR. CALDWELL: We did make the unconstitutional argument in the trial court. Yes, sir.

QUESTION: In connection with the instruction?

MR. CALDWELL: Prior to trial we made that argument.

QUESTION: Prior to trial.

MR. CALDWELL: Yes, sir. And we raised the constitutionality under Pope in the Supreme Court of Florida, and it addressed the constitutionality of the statute, and held it's fine, as they've always held.

QUESTION: And Florida's rule is that you must in any event make a specific objection to the instruction or there is a procedural bar?

MR. CALDWELL: They frequently invoke that as a procedural bar, Justice Kennedy, but not always. We have set out --

QUESTION: Why wasn't it invoked here?

MR. CALDWELL: It was -- there was no specific -- I'm sorry. Am I making myself unclear? There was no objection to the jury instruction at bar. No, sir.

QUESTION: All right. And that, under Florida law, can be a procedural bar if it's invoked by the appellate court.

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MR. CALDWELL: It can be, yes, sir.

QUESTION: All right. And suppose the appellate court here said we find there is a procedural bar. As an alternate ground, we find the claim has no merit. Would that have been adequate to prevent our review?

MR. CALDWELL: No, sir.

QUESTION: And the reason is?

MR. CALDWELL: Because this Court has held that where the court does not apply the procedural bar consistently at the time of the trial, it is not a bar to this Court's review. We laid out what the law was at the time of this '87 trial in our brief, which was that the court held -- and the court held in this case, and has held since -- the jury instruction issues may be addressed on appeal for the first time without an objection in the trial court where what is termed fundamental error has occurred. And in this --

QUESTION: Yes. Where there's plain error. Fundamental error or plain error?

MR. CALDWELL: It's called fundamental error in Florida. It is somewhat -- it is formulated in the opinion set out in the appendix here to the Supreme Court in our case as -- in various ways the -- including that it amounts to a denial of due process. Where there is a denial of due process, it is reviewed on appeal, even

without an objection.

QUESTION: Well, why doesn't it make those cases distinguishable? I mean, is it clear to you that there is -- well, I'm sure you're going to say yes. It's not clear to me that there is fundamental error here -- if there is.

MR. CALDWELL: Well, I submit that under Maynard there is because the State has been relieved of its burden of proving the elements of the circumstance, because the instruction given is constitutionally defective.

QUESTION: Then any error is fundamental error.

MR. CALDWELL: Oh, no, Justice Scalia. I'm not saying that. I'm saying that where, as here, there is a constitutionally defective jury instruction, there has been, in essence, a denial of due process, which is what this fundamental error doctrine addresses.

Further -- I'm sorry.

QUESTION: You see -- you have to tell me why you think this is a fundamental error. Is anything a fundamental error that is not a harmless error? Are those two categories of error? Harmless and fundamental?

MR. CALDWELL: No, the Florida -- Florida uses fundamental error in a different way than the Federal courts do. Florida definition of fundamental error is a denial of due process, where the jury instruction denies

due process -- I assume they mean like a burden-shifting instruction -- then it will be addressed on appeal.

I'm into my last time here. I'd like to save -- reserve my time.

QUESTION: Very well, Mr. Caldwell.

Ms. Snurkowski, we'll hear from you.

ORAL ARGUMENT OF CAROLYN M. SNURKOWSKI

ON BEHALF OF THE RESPONDENT

MS. SNURKOWSKI: Mr. Chief Justice, and may it please the Court:

I think from the onset I would like to clarify a point, if in fact any confusion exists, with regard to something that was provided in the State's brief. And that is that the Tedder standard is not applied when a death recommendation is made by the trial court. So I want to be put on notice with regard to that, that in fact the Florida Supreme Court in applying its Tedder standard, which is the mechanism by which the Florida Supreme Court reviews the jury's recommendation, does not apply when the jury recommends death. It only applies when there's a life recommendation. Which gets me to the point of some of the questions today with regard to what is the role of the jury in Florida.

From the inception, after Furman, the role of the jury in Florida has been to provide the conscience of

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the community, to provide the conscience of the community, some expression, some ability to come forward and express what their views are. And in that sense, the legislature, in creating a mechanism under the statute that allows for the jury to hear aggravating and mitigating circumstances, it provides them the opportunity to determine whether in fact life or mercy -- life and mercy, for that matter -- will be given. If no mercy is given, we can be confident that that results, because they do not make findings of fact. There is nothing in the statute that makes findings of fact, nor is their recommendation binding, contrary to what was said today.

QUESTION: In a case in which the jury does not -- I'm sorry, a case in which the jury does recommend death, what is the articulation under Florida law of the weight to be given to that recommendation?

MS. SNURKOWSKI: That recommendation is given the same recommendation as a life recommendation. And that is that when the appellate court reviews it, because -- one other point before I finish that -- is that in the statute, the statute specifically provides that when the trial court finds aggravating and mitigating circumstances and reduces it to writing, the very first words directed to him is notwithstanding the jury's recommendation. The jury's recommendation is --

QUESTION: No, but what weight does he have to give the jury's recommendation?

MS. SNURKOWSKI: He is not to give it any weight with regard to his findings with regard to the proper and appropriate sentence based on the aggravating and mitigating circumstances that are being presented to him at the sentencing proceeding.

QUESTION: Well, if he doesn't give it any weight at all, why does Florida go through the process of having the jury make a recommendation?

MS. SNURKOWSKI: Because the weight that's being given the recommended sentence is an appellate weight. It's for the Florida Supreme Court to ascertain whether in fact the conscious of the community has spoken in such a way.

QUESTION: All right. Now, how does the appellate weighing of the -- strike that. I'm not going to use that term.

MS. SNURKOWSKI: It's not --

QUESTION: How does Florida articulate the degree of weight to which the appellate court should ascribe?

MS. SNURKOWSKI: Under the -- under the appellate way, which is the Tedder standard, which is that the recommendation of life would be given great weight.

And then we have a standard that articulates that we do not have arbitrary and unbridled imposition of a sentence based on some -- the conscience of the community, which is not -- it's not narrowed.

QUESTION: Okay. Life gets great weight. What does death get?

MS. SNURKOWSKI: Death gets great weight also.

QUESTION: They both do.

MS. SNURKOWSKI: Because in fact, the great weight that is given the death recommendation equates to no mercy. And the Florida Supreme Court is then faced with the idea that the conscience of the community has expressed its view that when death has been recommended by a jury, no mercy is to be given.

QUESTION: Perhaps I'm under an misimpression. I had thought, under the Florida system, that as the jury returns the recommendation of life, that the trial judge can upset that only if he finds that no reasonable jury could have come to that conclusion.

MS. SNURKOWSKI: That's an appellate review of that. The trial court does not make that determination. He has to explain in his order, his written order, the basis for that.

QUESTION: But surely the appellate court doesn't impose a standard on the trial judge that the

standard -- that the trial judge doesn't have to apply himself.

MS. SNURKOWSKI: That's --

QUESTION: If you're a trial judge in Florida, and you receive a verdict from a jury which recommends life, my understanding that the trial court's duty is to sentence him to life unless he can find that no reasonable jury could have come to that conclusion. Isn't that correct?

MS. SNURKOWSKI: I think his obligation is to sentence and make a determination if there is aggravating factors that even qualify individual A for death: and second of all, determine if the aggravating outweighs the mitigation; and then third, he makes a statement with regard to why he believes no rational juror would have -- would differ from this result.

QUESTION: But that is not inconsistent with the proposition I put to you, is it?

MS. SNURKOWSKI: No, Your Honor. He does make -- he makes a determination, but that is not his role --

QUESTION: But he cannot make that determination unless he finds that the jury has committed -- has departed very substantially from the evidence. It seems to me that you're really, with all respect, that you're

quibbling with us in your answer to Justice Souter when he was asking you about this. You said, oh, well that's for the appellate court to do. Well, all the appellate court does is determine whether or not the trial court properly applied standards under Florida law. And that standard is that the verdict cannot be set aside, the life recommendation, unless there is this very, very high standard that the trial court finds. Is that not correct?

MS. SNURKOWSKI: That's correct. But to clarify, the point is that the jury is not making any findings that he can look to to make an assessment as to whether their recommendation is logical or unbridled. All they --

QUESTION: I understand that. They give simply a general verdict, so he must assess all of the evidence.

MS. SNURKOWSKI: Absolutely. And in that --

QUESTION: The standard is the one that I have described.

MS. SNURKOWSKI: Yes, Your Honor, but that is applied in every case, whether it's death or life, as far as the trial court is concerned. He has to make that assessment. And in fact, in Florida, it is not unheard of that a jury will come back with a death recommendation, and in fact, the trial court will impose life. And in fact, the sentence then is life. So he's making --

QUESTION: Does that frequently happen?

MS. SNURKOWSKI: It's not that frequent, but it does happen, Your Honor.

QUESTION: There is a statement somewhere in the papers, this has never happened.

MS. SNURKOWSKI: No, that's not correct, Your Honor. It does happen.

QUESTION: Although the Supreme Court of Florida has.

MS. SNURKOWSKI: Pardon me?

QUESTION: Although the Supreme Court of Florida has changed it.

MS. SNURKOWSKI: Certainly.

QUESTION: But not a trial court.

MS. SNURKOWSKI: There have -- yes, Your Honor, that is not -- it's not the -- I would not -- I couldn't give a percentage to it, but it is not unrare that it happens. Yes, Your Honor. That does frequently happen.

And it also points to another aspect of this with regard to what the jury's recommendation, how important that is. For example, the Florida Supreme Court has found that when the trial court has not properly submitted written findings, that life is the appropriate sentence, no matter what the jury's recommendation might be. Now that's irrespective of how rational or how

irrational. They may have reasoned through the same evidence. This in not different evidence; this is not at a different occasion. This is the same evidence, the same presentation of evidence.

QUESTION: May I ask a question about the standard of review in Florida of a trial judge's statement in the finding that there are no nonmitigating circumstances, the difference between mitigating evidence and mitigating circumstance that Justice Souter indicated?

Suppose, as in this case, a lot of evidence is offered as to mental stability, alcoholism, he supported the family for a while, and so forth and so on, in which it clearly is mitigating evidence. And the judge says, well, I've heard all this, and I don't disbelieve any of it, but in my judgment, it does not carry enough weight to be called a mitigating circumstance. Does the Supreme Court of Florida review that at all, or as its opinion seems to suggest, is this entirely a matter for the trial judge to just decide whether or not this evidence is worthy of the characterization as a mitigating circumstance?

MS. SNURKOWSKI: The Florida Supreme Court's appellate review is twofold. First of all, it's to determine that the statute has been applied appropriately. And so, in so doing that, it makes a determination by

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reviewing the whole record to ascertain whether in fact the aggravation has been proven beyond a reasonable doubt, and in fact, if the mitigation has been considered and weighed. Because now we have a decisional law out of Florida that says, and comes out which -- which is a result of Hitchcock also, that they must not only consider, but it has to be weighed, given some weight.

And so the Florida Supreme Court will reweigh that as part of their appellate function to ensure that in fact the death penalty has appropriately been applied. And in fact, in Sochor's case, the court did that.

QUESTION: Did they do that in -- did they do that in this case?

MS. SNURKOWSKI: Absolutely. They go through each of the aggravating factors. They determine --

QUESTION: No, they did not in the aggravating. I'm talking about the nonstatutory mitigating, and as to that, what they said, the decision as to other particular mitigating circumstance is proven lies with the judge and jury.

MS. SNURKOWSKI: That's correct, but they also go through the mitigation and -- in the opinion of the court, and tell -- and explain why it has been negated by other aspects of the record with regard -- for example, of the mental health. There were three mental doctor --

mental health experts who examined Mr. Sochor. And in fact, two of them were presented by the defendant at the trial. Their testimony reflected that at the most he had a personality disorder, and in fact, one of his doctors indicated that his MMPI was fake-bad, meaning that he was not -- he was trying to fool the doctor.

The third doctor, which was the State's doctor, came up with the same result.

QUESTION: Is it your understanding that they, the Florida Supreme Court concluded that the mitigating evidence offered was untrue?

MS. SNURKOWSKI: I think it was -- it was refuted, that mitigation --

QUESTION: I understand on the mental condition.

MS. SNURKOWSKI: Yes, Your Honor.

QUESTION: But as things like whether he supported the family when his father wasn't working and his alcohol problem, that that was untrue?

MS. SNURKOWSKI: Well, there are -- there was evidence, for example, the very thing that you point to, that he, for a period of time, helped his father when his father was laid off. And that during that time, he would turn over his paycheck. That very well in some circumstance may be very compelling mitigation, but it may be a piece of evidence that in a given case does not rise

to the level of mitigation.

QUESTION: Well, that's my point. That's my point. What did the Florida Supreme Court do with respect to that bit of evidence here?

MS. SNURKOWSKI: I don't know. I cannot --

QUESTION: Didn't they say that that's a matter for the trial judge which we don't review?

MS. SNURKOWSKI: Yes. Well, there is -- no. I think what they were saying or suggesting that there is some level of a determination of the trial court -- he's the trier of fact, he as the sentencer -- has to make those determinations. And unless there is some reason why he has not done his job and has not found or done --

QUESTION: Well, there was a reason in this case, namely that he relied on at least one aggravating circumstance that was improper. Does that give rise to any duty to review the rest of what his determination was?

MS. SNURKOWSKI: Absolutely, because that would be a part of the harmless error analysis if -- given everything as they -- as it stands, absent that aggravating factor, would death be the same result? Is that the appropriate penalty for this case? And that's exactly what the Florida Supreme Court did in this case.

QUESTION: Where did they do that? Where in the appendix?

MS. SNURKOWSKI: At the very -- at the end of the opinion. It's on page 381 and 382 of the appendix, joint appendix. It says: Even after removing the aggravating factor of cold, calculating, and premeditated, there still remains three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there is no mitigating circumstances does not necessarily require resentencing.

QUESTION: Doesn't necessarily. Does it require --

MS. SNURKOWSKI: Absolutely.

QUESTION: -- anybody to reweigh the aggravating versus mitigating?

MS. SNURKOWSKI: Yes. But when they're talking about does it necessarily mean it has to be rescinded, that is the point in fact, that in fact they are looking at it. It doesn't mean that it automatically has to go back down for resentencing proceeding. That they will undertake some analysis to Ensure that in fact the sentence, as it results from three aggravating factors and no mitigation, as is appropriate.

QUESTION: Ms. Snurkowski, I apologize for what I'm afraid is going to make the confusion worse, but I've got to ask the question. As I understand, you're referring to the carry-over paragraph that begins at 381

of the appendix.

MS. SNURKOWSKI: Yes, Your Honor.

QUESTION: And you're saying in effect, that's the point at which the Florida Supreme Court considered the evidence, mitigating evidence, even though no mitigating factors were found for purposes of harmless error. But isn't the Florida Supreme Court's object at that point to conduct a disproportionality analysis? And that is not the same thing as its harmless error analysis.

MS. SNURKOWSKI: That's absolutely correct. And --

QUESTION: Okay. Now where did it go through a harmless error analysis in response -- going back to Justice Steven's question -- where did it go through a harmless error analysis, which considered, let alone discussed, mitigating evidence?

MS. SNURKOWSKI: Well, certainly, if it -- if they had said the magic words, harmless error, we wouldn't be here. I wouldn't have to articulate that.

QUESTION: Well, I don't know we would have or not, but they didn't say the magic words, and where can you find a harmless error analysis that considers mitigating evidence in that opinion? I mean, the question invites the answer. I don't see it.

MS. SNURKOWSKI: Well, as a matter of fact, the

State would submit that the case authority cited right after that, Robinson, Holton, James, Francois, all are cases that stand for that very proposition: that a harmless error analysis can be made, and when aggravating factor has been struck and there is still exist -- aggravating factors, and there's no mitigation or little mitigation, that death can be the appropriate sentence.

QUESTION: Well, let's assume that that's an appropriate statement of law. It has nothing to do, it seems to me, with the question whether they went through that process in this case.

MS. SNURKOWSKI: But I would respectfully submit that that begs the question that the Florida Supreme Court does not do its responsibility or doesn't carry out its appellate function. And I would urge the Court that there is no evidence, let alone strong evidence, that it doesn't happen --

QUESTION: You mean unless the Florida Supreme Court said we are not going to do harmless error analysis here, that we've got to assume that it did?

MS. SNURKOWSKI: No, Your Honor. I think that -- but I think there is a presumption that an appellate court will do its practices, and in fact, under the statute --

QUESTION: How can you go through an analysis

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without analyzing anything? I mean, I don't see any discussion here.

MS. SNURKOWSKI: To the point that, if the Court is suggesting that there has to be expansive articulation, it's not there. The point is where there's a shorthand the court has used -- it's pointed to cases which stands for the proposition that harmless error is done. It's done in a circumstance identical to the Instant case. It's routinely done as a matter of course of the appellate process, when after the normal appellate role is done, if there is an aggravating factor or there is some mishap with regard to the appropriateness of the sentence, a harmless error analysis is done to ascertain whether in fact at that point the death penalty is appropriate.

QUESTION: Certainly our Clemons case is not consistent with any submission that a court is deemed to perform its duty to reweigh the evidence, is it?

MS. SNURKOWSKI: No.

QUESTION: But isn't --It seems to me that that's what you're arguing to us here.

MS. SNURKOWSKI: Well, I don't know that a --

QUESTION: That that's quite inconsistent with Clemons.

MS. SNURKOWSKI: Well, I don't know if a reweighing is the same as a harmless error analysis. I

would --

QUESTION: Either one.

MS. SNURKOWSKI: The Florida Supreme Court has announced that it does not do a reweighing with regard to an error.

QUESTION: That is true.

MS. SNURKOWSKI: It will apply a harmless error analysis.

QUESTION: Clemons said that either one would do.

MS. SNURKOWSKI: Correct.

QUESTION: But that one had to be performed, and there was no presumption that the State performed it if it wasn't there on the record.

MS. SNURKOWSKI: And I would submit to the Court respectively that, in fact, it is on the record. The fact that it is not articulated to the extent that we now have to have every word down as to how they went through, and they said, well, yes, now we go back through this opinion, and we realized that HAC is still valid. We realize that this was committed during the course of a felony. There was in fact a prior violent felony.

And with regard to the mitigation, we again find that the doctors' testimony would not have changed, because nothing has -- nothing has been skewed with regard

to the facts before the trier of fact, or for that matter, the appellate court. They have gone through this evidence to ensure that the death penalty is appropriate, the statute has been applied, that the aggravating factors have been proven beyond a reasonable doubt, that the trier of fact has assessed the mitigation, and considered it -- not only considered it, but given it some weight.

And there is no rational basis upon which to conclude that the language that is used in this opinion reflects that they have not undertaken a harmless error analysis, because in fact it does. And in matter of fact -- you know, this order would be perfect, or the supreme court's opinion would be perfect if it said, I give to you the -- at page 382, under the circumstances of this case, the error was harmless -- and those are my words -- and in comparison with other death cases, we find Sochor's sentence of death proportionate to his crime.

Those are the three words we're missing: the error is -- or four words: the error is harmless. That's what you're asking. Because if that were there, if that were present in this opinion, I'm not so sure that we would be having to discuss whether in fact they have to articulate even greater language with regard to what in fact has to be done.

Going to the order of the court, the trial

court, in fact, the --

QUESTION: Before you go on, you do acknowledge that the harmless error analysis has to be done.

MS. SNURKOWSKI: Absolutely. Well, it doesn't have to be done. It's a case-by-case analysis. And there are occasions when the court is so convinced that there is no harmless error analysis to be done, it's remanded for a new sentencing proceeding.

QUESTION: But you acknowledge that if one of the aggravating factors was inappropriate, the court itself would have had to determine that, beyond a reasonable doubt, there were no mitigating factors that the jury could have considered. Is that what the harmless error would have been here?

MS. SNURKOWSKI: That the State has proven beyond a reasonable doubt that the sentence is appropriate, that the results would not have changed what our standard is, that taking the aggravating and mitigating circumstances, that the State has come forward and demonstrated that what's left, the results would not change. It doesn't that the mitigation is proven beyond a reasonable doubt, no.

QUESTION: Right.

MS. SNURKOWSKI: Because the -- in fact, it doesn't have to be. That's a --

QUESTION: If that's what you mean by harmless error then, then maybe the sentence the court used is adequate. Under the circumstances of this case and in comparison with this case, we find Sochor's sentence of death proportionate to his crime.

MS. SNURKOWSKI: But again, they're not making a finding. If I've said something that would be confusing, I, you know, apologize. But they're not making a finding that the mitigation has been proven beyond a reasonable doubt. What the harmless error analysis undertaken by the court is is that removing the tainted circumstance, that left with that, the State has come forward and demonstrated beyond a reasonable doubt -- which is an assertion the State has to argue on a appellate level -- that the results were the same.

QUESTION: The same result would have happened.

MS. SNURKOWSKI: Absolutely.

QUESTION: The result in the recommendation from the jury.

MS. SNURKOWSKI: No. The jury has no input with regard to a harmless error analysis. The State's contention is because the jury is a conscience of the community and its role is important with regard to deciding whether mercy should be granted, at the point in time when a -- let's go a death recommendation by the

jury. When that death recommendation goes to the Florida supreme court for consideration, certainly no mercy has been given. That concept of the jury's recommendation is no longer within the factoring when the harmless error analysis has to be done, because at -- later determination has been made that the --

QUESTION: Then I don't understand why you're talking about harmless error analysis. If the jury -- if the jury determination is given no weight at all, all you have to do is reweigh. We all agree --

MS. SNURKOWSKI: But the Florida Supreme Court has said it doesn't reweigh. They only apply a harmless error analysis. And the reason, I suspect, that they do the harmless error analysis is in those instances where life is recommended. And so it equates to some sort of degree of mercy, and the Florida Supreme Court has to struggle with its Tedder standard and determine whether in fact in some circumstances where life is recommended, the trial court imposes a death sentence, overrides it -- a judicial override -- and the Florida Supreme Court affirms the override.

QUESTION: May I ask another question? Would you agree that there could be cases in which, after looking at the whole record, the Florida Supreme Court could conclude that the death penalty is not

disproportionate to other death penalties throughout the State, but that nevertheless, prejudicial error had occurred?

MS. SNURKOWSKI: Yes. I don't think they get to a -- I don't think they get to the proportionality --

QUESTION: Because the mere fact that they conclude something is not disproportionate really doesn't speak to the question whether error occurred.

MS. SNURKOWSKI: No, it does not, but normally, you don't get to proportionality, because there's no purpose in trying to compare this case with another. In fact, if you're going to reverse with either a new sentencing or a reducing --

QUESTION: Well, you get to proportionality in this case because the last paragraph of the opinion responds to the argument that it was disproportionate.

MS. SNURKOWSKI: I submit that then begs the question that in fact not only a harmless error analysis was done, but a proportionality analysis was done, which is mandated by the court's own decision in Brown v. Wainwright, which is the second prong of what I was suggesting to you at a previous occasion -- earlier. And that is, under Brown v. Wainwright, the courts -- has two roles: to make -- ensure the proportionality this case -- the given case is proportionate to all other death

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cases, and then, again, go back to the discussion that we've had with regard to the appropriateness of it.

QUESTION: Is it fair to say that, in a close case, either a life or death sentence might survive a proportionality analysis, but that either a life or death sentence might be the result of error that was not harmless?

MS. SNURKOWSKI: I don't know if I can answer the question because the Florida Supreme Court does not review life sentences. If you're talking about -- if you're talking about what the jury may have recommended --

QUESTION: Oh, I see, so the only proportionality analysis -- okay, we'll just modify my question then. Let's say it's a close case. The actual sentence is a death sentence, and the court finds that it is not disproportionate to other -- to the -- to other death sentences under other circumstances. Isn't it also the case that even though the death sentence survives the proportionality analysis, it still may be the result of error which could not be called harmless?

MS. SNURKOWSKI: Absolutely.

QUESTION: Okay.

MS. SNURKOWSKI: And there could be a basis upon which, in fact, they reverse (inaudible) sentencing.

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QUESTION: My only point is if you can't argue from the fact that they survived -- that the sentence survived to proportionality analysis, that they must therefore also have conducted a harmless error analysis.

MS. SNURKOWSKI: Well, I beg to differ because I don't see --

QUESTION: Well, I thought you just admitted something which is inconsistent with differing.

MS. SNURKOWSKI: Well, the reason I -- what I was going to say is I beg to differ because I don't believe that -- you're putting the horse before the cart, it seems to me, when you're saying that they're going to do a proportionality review. Proportionality review --

QUESTION: Well, they did it in this case.

MS. SNURKOWSKI: Absolutely.

QUESTION: I'm talking about this horse and this cart. And they did it in this case. And I don't see how you can infer from the fact that they did proportionality in this case that they also must have done harmless error.

MS. SNURKOWSKI: Because, I would submit to the Court, that in fact they point to cases that suggest that that's exactly what they do. They have not been that articulate, but in fact, that is what they intended by their opinion.

QUESTION: Okay. But the point then is we know

they did harmless error because they've cited a harmless error case, not because they did proportionality analysis.

MS. SNURKOWSKI: Yes.

QUESTION: Okay.

QUESTION: Ms. Snurkowski?

MS. SNURKOWSKI: Yes?

QUESTION: I don't understand what you consider harmless error analysis to be. You need some baseline as to what was harmless. What do you mean by harmless error analysis? What would it have shown would have come out the same? You say it would not have shown that the jury recommendation would have come out the same. That is not what its object is?

MS. SNURKOWSKI: No, it's to --

QUESTION: It's to show that what would have come out the same?

MS. SNURKOWSKI: The sentencer, who is the trial judge, would not have come out with the same result. He would not have reached the result that death is appropriate, because skewing the aggravation that he found in his order and looking at the mitigation, that he would not with confidence say that -- because this is not in numbers. We're not weighing how many ags and how many mitigation --

QUESTION: But you acknowledged earlier that he

cannot impose a death sentence unless -- if the jury had recommended life, unless no reasonable jury could have recommended life.

MS. SNURKOWSKI: Well, but that is -- that's --

QUESTION: So part of his determination, it seems to me, is the jury's determination.

MS. SNURKOWSKI: But that's only after he has made a determination that in fact death is a viable sentence, one; and second of all, he in his own mind has determined that the aggravation that has been proven outweighs any -- mitigation that has been presented. And then he makes a determination as to why no reasonable person would differ.

But that does not obviate his responsibility to come forward. We do not say once the jury makes a recommendation of life, he has no further obligation. He's the only one that explains whether the sentence is appropriate or not. We don't know what the jury does. They are not obligated. There is no constitutional mandate that give us any reasons.

And in fact, it goes back to what I previously argued with regard to their role. Their role is the conscience of the community. Their role is to grant mercy. The only way they can grant mercy is if they hear mitigation. Aggravation will never equate to mercy. And

in fact, that's why the appellate standard of Tedder v. Florida is so -- our State -- is so important, because the Florida Supreme Court is the entity. This is the means by which we bring in, we build into the appellate process the consideration of the jury, the conscience of the community. There is no other way we can articulate that because they are not required, nor should they be required, to give reasons. The only person who has to give reasons is the trial judge. He has to make those findings.

Now, true, as I have stated before, that in fact, under the appellate function, the appellate court in reviewing the appropriateness of that expression of mercy, whether no mercy or not, must give deference to that recommendation. But as I started out my argument, Tedder is not a standard used by the appellate court in determining the appropriateness of the jury's recommendation of death.

The State would ask this Court to affirm the Florida Supreme Court. Thank you.

QUESTION: Thank you, Ms. Snurkowski.

Mr. Caldwell, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF GARY CALDWELL

ON BEHALF OF THE PETITIONER

MR. CALDWELL: Thank you, sir.

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Justice Stevens and Justice Souter, you were asking about the difference between proportionality analysis and a harmless error analysis. At footnote 14 of our initial brief, we cite the case of Lucas v. State, where the Supreme Court of Florida makes it clear they're different analyses. In Lucas, the court held that the death penalty was proportionate and said we cannot say, however, that the court properly found the death sentence appropriate. And they reversed.

The only other matter I want to address was the State has said that the -- in effect that the jury does not weigh circumstances. It makes a decision as to mercy or not. The Florida Supreme Court does not allow a jury instruction on mercy. It does -- the jury is instructed to weigh circumstances. I'm just a little bit surprised about that.

One other thing. Justice Scalia, before I was responding to your question about fundamental errors. Is there any further question about that? Okay.

QUESTION: I'm sure if there are, Justice Scalia will ask them.

(Laughter.)

MR. CALDWELL: Okay. I apologize.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr.

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Caldwell.

The case is submitted.

(Whereupon, at 1:55 p.m., the case in the above-entitled matter was submitted.)

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BY Michelle Sanders

(REPORTER)