Daniel O. Conahan, Jr. v. State of Florida

THE FINAL CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS ON CONAHAN VERSUS STATE. --

YOUR HONOR, MY NAME IS PAUL HELM, AND I REPRESENT THE APPELLANT DANIEL O'CONAHAN. HE REQUESTED ME AS COUNSEL AND REQUIRED ME AS SUBSTITUTE COUNSEL. NOW, I AM AWARE IN ASSIST ALWAYS VERSUS STATE -- I AM AWARE, IN ADAMS VERSUS STATE THAT, YOU WILL NOT ENTERTAIN PRO SE FILINGS. HOWEVER, SINCE MY CLIENT HAS ENLISTED MY SERVICES, I HAVE AN OBLIGATION TO CALL HIS MOTION TO YOUR ATTENTION, AND ACCORDINGLY I HAVE FILED A MOTION TO WITHDRAW AS COUNSEL, ATTACH AGO COPY OF HIS PRO SE MOTION AS AN EXHIBIT. MY WHOLE POINT IS I AM PRO SE COUNSEL, AND I DON'T THINK I SHOULD ARGUE HIS ALLEGATIONS. HE WAS CONVICTED AND TRIED IN COURT FOR FIRST-DEGREE MURDER AND KIDNAPING OF ONE RICHARD MONTGOMERY. FOLLOWING A PENALTY-PHASE TRIAL BEFORE A JURY, THE JURY UNANIMOUSLY RECOMMENDED DEATH AND THE JUDGE, ACCORDINGLY, SENTENCED MR. O'CONAHAN TO DEATH. THE FIRST ISSUE BEFORE THE COURT WAS WHETHER THE EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH PREMEDITATION IN SUPPORT OF THE CONVICTION ON COUNT I OF THE INDICTMENT. THE STATE'S EVIDENCE IN THIS CASE IS CIRCUMSTANTIAL. AND WHILE I CONCEDE THAT THE STATE'S CIRCUMSTANTIAL EVIDENCE IS CONSISTENT WITH THE HYPOTHESIS OF GUILT, THAT MR. O'CONAHAN DID, IN FACT, PREMEDITATE THE MURDER IN QUESTION, I WOULD URGE THE COURT TO CONSIDER THAT IT IS ALSO CONSISTENT WITH A REASONABLE HYPOTHESIS THAT THE MURDER WAS NOT PREMEDITATED. NOW, I BASE THIS LARGELY UPON THE STATE'S EVIDENCE INVOLVING COLLATERAL INCIDENTS PRIOR TO AND AFTER THE KILLING OF MR. MONTGOMERY.

SO THE REASONABLE HYPOTHESIS IS THAT THIS OCCURRED HOW? THAT THIS MURDER OCCURRED DURING SEX PLAY? WHAT?

ESSENTIALLY. YES, YOUR HONOR. THE STATE PRUDENT PRENTED EVIDENCE THAT MR. -- -- PRESENTED EVIDENCE THAT MR. CONAHAN TOLD HIS LOVER IN CHICAGO THAT HE HAD A FANTASY OF PICKING UP A HITCHHIKER AND TAKING HIM TO THE WOODS AND TYING HIM UP AND HAVING SEX WITH HIM. THE STATE PRESENTED EVIDENCE VERY MUCH LIKE THAT, INVOLVING ONE STANLEY BURTON IN 1994. MR. CONAHAN OFFERED MR. BURTON $150 TO POSE FOR NUDE PHOTOGRAPHS. THEY WENT TO AN IS HE CLUEDED AREA -- TO A SECLUDED AREA, WITH MR. BURTON CONSENTING TO THIS ACTIVITY, AND THEN AFTER TAKING A FEW PICTURES OF MR. BURTON AS HE REMOVED HIS CLOTHES, MR. CONAHAN ASKED HIM TO STAND NEXT TO A TREE. MR. BURTON AGREED, AND MR. CONAHAN LOOSELY DRAPED SOME PIECES OF CLOTHES LINE-TYPE ROPE AROUND MR. BURTON AND THEN, ACCORDING TO MR. BURTON, CONAHAN SNAPPED THE ROPES. I AM NOT SURE EXACTLY WHAT HE MEANS BY THAT, BUT THE ROPES WERE DRAWN TIGHT AROUND MR. BURDEN'S BODY, SO THAT HE WAS TIED TO THE TREE. AT THAT POINT, MR. CONAHAN ENGAGED MR. BURTON IN ORAL SEX, TO WHICH MR. BURTON HAD AGREED. MR. CONAHAN THEN ATTEMPTED ANAL PENETRATION. AT THAT POINT MR. BURTON SAID HE BEGAN TO RESIST, BY SHIFTING HIS BODY AGAINST THE TREE TO WHICH HE WAS TIED. HE SAID THAT CONAHAN RESPONDED BY SNAPPING THE ROPES AROUND HIS NECK, SO THAT THEY WERE PULLED VERY TIGHTLY.

AND SO THE REASONABLE HYPOTHESIS IN THIS CASE IS THAT THE SAME THING HAPPENED?

YES, YOUR HONOR. AND MR. BURTON --

DO WE HAVE ANY EVIDENCE IN THIS RECORD THAT SUPPORTS THE SEX THEORY? AS I UNDERSTOOD, THERE WAS NO SEMEN OR ANYTHING IN THIS PARTICULAR CASE.

YOUR HONOR, THAT IS CORRECT.

THAT TOOK PLACE.

THE STATE, ITSELF, CHOSE TO PRESENT EVIDENCE OF THE FANTASY, EVIDENCE OF THE BURTON INCIDENT, AND TWO INCIDENTS AFT MURDER, WHERE MR. CONAHAN APPROACHED POLICE DETECTIVES, ACTING UNDERCOVER, AND, ALSO, OFFERED THEM $150 TO POSE FOR NUDE BONDAGE PICTURES.

BUT IS THAT --

THE POINT IS THE STATE HAS ESTABLISHED A PATTERN OF MR. CONAHAN'S BEHAVIOR, SHOWING THAT HE ACTS OUT OR ATTEMPTS TO ACT OUT THE FANTASY OF TAKING A YOUNG MAN INTO THE WOODS, TYING HIM UP, AND TRYING TO HAVE SEX WITH HIM. NOW, IN THE CASE OF MR. MONTGOMERY, WHO DIED, THERE ARE NO EYEWITNESSES TO THE EVENTS.

DON'T WE ALSO HAVE, IN THE BURTON CASE, IN ADDITION TO ALL OF THIS GOING ON, WHEN HE TIED -- HE IS TIGHTENING THESE ROPES OR SOMETHING, AND THE GUY IS SQUIRMING. HE IS TALKING ABOUT DIE, DIE! DO WE GO ONTO THAT PART OF THIS FANTASY, PLS?

YES, YOUR HONOR.

ACCORDING TO MR. CONAHAN -- ACCORDING TO MR. BURTON, MR. CONAHAN PULLED THE ROPES TIGHTLY AROUND HIM FOR HALF AN HOUR AND SAYING "DIE", BUT HE DIDN'T, IN FACT, STRANGLE HIM TO DEATH.

I THINK JUSTICE ANSTEAD HAD A QUESTION.

IT IS REALLY A FOLLOW-UP ON THE SAME QUESTION, THAN IS IN TERMS OF THE COLLATERAL CRIME EVIDENCE INVOLVING THE VICTIM, BURTON, IS THAT THE NAME?

YES, YOUR HONOR.

WOULDN'T YOU AGREE THAT THE EVIDENCE THAT WAS PRESENTED BY THE BURTON ATTACK, IF I CAN USE THAT WORD LIGHTLY, WOULD SUPPORT A CHARGE OF ATTEMPTED MURDER OF BURTON, BECAUSE OF THE EVIDENCE THAT HE DID, IN DEED, ATTEMPT TO KILL HIM, AND USE THIS LANGUAGE OF HIS FRUSTRATION THAT BURTON WOULDN'T DIE.

BUT I AM SAYING THAT THERE IS THAT THAT EVIDENCE CAN BE INTERPRETED TWO DIFFERENT WAYS, AND BOTH ARE REASONABLE. THE FIRST IS MR. BURTON'S INTERPRETATION, WHICH WAS CONAHAN WAS TRYING TO KILL HIM. MY INTERPRETATION IS, IF HE TRIED TO CHOKE HIM FOR HALF AN HOUR AND HAD HIM TIED TIGHTLY TO A TREE, AND HE DESIST THES IN CHOKING HIM, HE WOULDN'T HAVE PULLED THE ROPES AROUND MR. BURTON FOR HALF AN HOUR AND THEN DO NOTHING. HE COULD HAVE GONE BACK TO HIS CAR AND GOTTEN A TIRE IRON AND BEATEN HIM TO DEATH. HE COULD HAVE DONE A NUMBER OF THINGS TO MR. BURTON AND KILLED HIM, IF THAT WAS HIS INTENT. MY ARGUMENT IS THE FACT THAT HE APPEARED TO ATTEMPT TO KILL MR. BURTON FOR HALF AN HOUR WITHOUT DOING SO, INDICATES THAT IT WAS NOT TRAWL I HIS INTENT TO DILL -- IT WAS NOT TRULY HIS INTENT TO KILL MR. BURTON BUT RATHER ACTING HIS BONDAGE FANTASY OUT, AND THE FACT THAT HE DIDN'T KILL MR. BURTON DEMONSTRATES HIS INTENT NOT TO DO SO, BECAUSE HE COULD HAVE.

JUSTICE PARIENTE.

TO ME, ONCE YOU BRING IN THIS OTHER CRIME WHICH WAS IN THE GUILT PHASE, THAT IT IS HARD TO ARGUE THAT, AT LEAST THAT THE EVIDENCE FOR THE JURY TO CONSIDER, WAS THAT THAT WAS VERY CONSISTENT WITH INTENT, AT LEAST TO, INTENT TO KILL.

I AM CONCEDING THAT THE EVIDENCE IS CONSISTENT WITH THE HYPOTHESIS OF GUILT. AGAIN, I AM SAYING IT IS SUBJECT TO TWO INTERPRETATIONS, BOTH OF WHICH ARE REASONABLE.

BUT THEY HAVE TO BE EQUALLY REASONABLE FOR YOU TO NOT GO TO THE JURY. CORRECT?

WELL, THERE WAS NO JURY, SO THE FACT FINDERING WAS UP TO THE JUDGE, BUT IT WAS A REASONABLE HYPOTHESIS THAT HE WAS NOT INTENDING TO KILL.

BUT IF THIS HAD BEEN A JURY, WOULD IT BE A DIFFERENT STANDARD?

I DON'T SEE HOW IT CAN BE A DIFFERENT STANDARD.

THE FACT THAT THERE IS A REASONABLE HYPOTHESIS.

IF IT IS ANY REASONABLE HYPOTHESIS, IT REQUIRES ACQUITTAL. IT IS NOT A QUESTION OF WHETHER THE HYPOTHESIS OF INNOCENCE IS AS STRONG AS THE HYPOTHESIS OF GUILT. THIS COURT HAS REPEATEDLY STATED NO MATTER HOW STRONGLY THE CIRCUMSTANTIAL EVIDENCE SUGGESTS GUILT, IF THERE IS A REASONABLE HYPOTHESIS OF INNOCENCE, GUILT CANNOT BE SUSTAINED.

BUT IS THIS A REASONABLE HYPOTHESIS OF INNOCENCE, WHEN --

YOUR HONOR, IT IS ALMOST IDENTICAL TO THIS COURT'S PRIOR DECISIONS IN HOFERT AND RANDALL.

LET ME FOCUS ON, AND THEN HAVE YOU BOTH RESPOND TO MY QUESTION AND DISCUSS RANDALL, IF YOU WILL, BUT MY CONCERN IS THAT WHEN IS HIS ATTEMPT TO KILL BURTON IF THAT EVIDENCE IS TO BE ACCEPTED AND YOU SAID IT IS TO BE ACCEPTED, THAT HE, HIMSELF, EXPRESSED FRUSTRATION AT NOT BEING ABLE TO SUCCESSFULLY COMPLETE HIS ATTEMPTS TO KILL BURTON, ISN'T IT MORE REASONABLE AND THAT MAY NOT EVEN BE HYPOTHESIS, THAT THE ONLY REASON THAT HE DID NOT COMPLETE THE KILLING OF BURTON IS BECAUSE BURTON FRUSTRATED HIS ATTEMPT, AND SO HE COULD NOT PHYSICALLY COMPLETE THE ACT THAT HE, WITHOUT DISPUTE, EXPRESSED THE DESIRE TO DO, THAT IS THAT HE REPEATEDLY, OUT OF HIS OWN MOUTH IF I UNDERSTAND THE EVIDENCE THAT WAS PRESENTED BELOW, BY BURTON, SAID, YOU KNOW, WHY WON'T YOU DIE, AND OBVIOUSLY THAT HE WAS TRYING TO KILL HIM, AND SO THAT THE END RESULT OF AM NOT KILLING HIM WAS NOT THAT HIS DESIRE NOT TO KILL HIM BUT THAT HE WAS PHYSICALLY FRUSTRATED BY BURTON, IN HIS RESISTANCE. NOW, THAT, IN OTHER WORDS, WHAT --

YOUR HONOR, I THINK YOU PARTIALLY MISUNDERSTOOD ME, AS TO MR. BURTON'S TESTIMONY.

ALL RIGHT.

OF COURSE WE HAVE TO ACCEPT, AS GIVEN, THAT MR. BURTON'S TESTIMONY IS TRUE, THAT CONAHAN CHOKED HIM FOR 30 MINUTES, THAT CONAHAN HIT HIM IN THE HEAD, APPARENTLY WITH HIS HAND. BURTON DIDN'T SAY. AND THAT CONAHAN SAID "WHY WON'T YOU DIE?" OBVIOUSLY WE HAVE TO TAKE THAT AS TRUE, BUT MY QUESTION TO THE COURT IS, IF MR. CONAHAN WAS TRULY TRYING TO KILL MR. BURTON, WHY DIDN'T HE. HOW COULD HE -- THE HYPOTHESIS THAT HE DIDN'T, BECAUSE HE WAS PHYSICALLY FRUSTRATED BY THE RESISTANCE. THAT IS THAT BURTON WAS RESPONSIBLE FOR AM NOT BEING KILLED.

BUT, YOUR HONOR, MR. BURTON WAS TIED TO THE TREE. HE COULDN'T GO ANYWHERE.

BUT WASN'T THERE SOMETHING ABOUT TURNING HIS HEAD SO THAT THE ROPES WOULD NOT HIT THE WINDPIPE, AND I DON'T KNOW WHAT ALL THE -- YOU HELP US WITH IT. I MEAN, PHYSICALLY, IF HE IS TURNED SO THAT IT JUST WON'T HAPPEN AND HE HAS NO OTHER MECHANISM EXCEPT TO LET HIM GO, I THINK THAT IS WHERE WE ARE HEADED WITH THIS.

YOUR HONOR, I FIND IT IMPOSSIBLE TO BELIEVE THAT HE HAD NO OTHER MECHANISM TO KILL MR. BURTON, IF HE WAS REALLY TRULY INTENT ON KILLING HIM. HE HAD HIM TIED TIGHTLY TO THE TREE. WHAT WAS TO PREVENT HIM FROM KILLING HIM IN SOME OTHER MANNER BESIDES CHOKING HIM?

WELL, WHAT DID PREVENT HIM FROM KILLING HIM.

HE QUIT. HE DECIDED NOT TO KILL HIM.

HE QUIT AFTER WHAT PERIOD OF TIME?

ACCORDING TO MR. BURTON 30 MINUTES OF MR. BURTON TWISTING AND TURNING AGAINST THE TREE.

BUT YOU DON'T THINK IT IS A REASONABLE HYPOTHESIS THAT HE JUST GAVE UP IN FRUSTRATION?

YES. I THINK THAT IS A REASONABLE HYPOTHESIS. I HAVE CONCEDED THERE IS A REASONABLE HYPOTHESIS OF GUILT IN THIS CASE. I AM SAYING THERE IS ANOTHER REASONABLE HYPOTHESIS THAT IT WAS NEVER HIS INTENT TO ACTUALLY KILL MR. BURTON. THIS ACT OF STRANGLING HIM WAS PART OF HIS SEEKING SOME SORT OF WEIRD GRATIFICATION FROM TYING MR. BURTON TO THE TREE AND TRYING TO HAVE SEX WITH HIM.

BUT ISN'T THAT INCONSISTENT WITH THE WORDS OUT OF HIS OWN MOUTH? WHY WON'T YOU DIE! AND DID BURTON SAY ANYTHING ELSE THAT CONAHAN SAID, IN TERMS OF TRYING TO KILL HIM?

NO, SIR. HE DIDN'T.

WHY DON'T YOU DIE. THAT WAS IT?

THAT IS ALL I RECALL FROM THE RECORD. BUT THE POINT REMAINS THAT, ONCE MR. CONAHAN QUIT CHOKING MR. BURTON, HE STOOD THERE AND ALLOWED MR. BURTON TO PICK UP THE WIRE CUTTERS THAT HAD BEEN USED TO CUT THE ROPES, AND HE LET MR. BURTON CUT HIMSELF FREE, AND HE OFFERED TO PAY HIM THE MONEY. WHY WOULD HE DO THAT, IF HE WAS TRULY INTENT ON KILLING MR. BURTON?

WHAT IS THE PHYSICAL EVIDENCE THOUGH, OF THE DEATH OF THE VICTIM IN THIS CASE? MONTGOMERY. THAT IS THAT IS THE PHYSICAL EVIDENCE HERE, ALSO, CONSISTENT WITH AN INTENTIONAL KILL SOMETHING.

THE PHYSICAL EVIDENCE ESTABLISHES THAT LIGATURES WERE TIED AROUND MR. MONTGOMERY'S NECK, AROUND HIS CHEST, HIS ABDOMEN, HIS WRIST THES AND HIS ANKLES, BEFORE DEATH. DR. AMANI TESTIFIED THAT THE CAUSE OF DEATH WAS ASPHYXIATION, SECONDARY TO STRANGULATION. THERE WERE OTHER INJURIES THAT WERE INFLICTED AFTER DEATH. CERTAINLY THE GENITALS WERE AMPUTATED AFTER DEATH. BUT MOST IMPORTANTLY ARE THE CRISSCROSS SCRATCH MARKS ON MR. MONTGOMERY'S BACK, AND THERE WERE SIMILAR MARKS ON MR. BURTON BURTON'S BACK, I BELIEVE, FROM MOVING AGAINST THE TREE, BUT WITH MR. MONTGOMERY, DR. AMAMI TESTIFIED THAT IT IS HIS OPINION THOSE CRISSCROSS SCRATCH

MARKINGS WERE MADE POST MORTEM, AFTER DEATH, IN OTHER WORDS, AND HE SAID THAT THEY COULD HAVE BEEN MADE BY THE BODY RUBBING AGAINST THE TREE. APPARENTLY IN DR. AMAMI'S OPINION, THE SCRATCH MARKS ON MR. MONTGOMERY'S BACK WERE MADE WHEN THE BODY WAS HANGING FROM THE TREE, AFTER DEATH, AND WHEN THE BODY WAS SUBSEQUENTLY REMOVED FROM THE TREE. IF YOU WILL RECALL, THE BODY WAS NOT DISCOVERED TIED TO THE TREE. IT WAS DISCOVERED WITH ALL THE BINDINGS CUT AWAY. THE BODY WAS MOVED AND WRAPPED IN A PIECE OF CARPET PADDING.

THE TRIAL COURT EXPRESSLY DEAL WITH THE ISSUE OF WHETHER THERE WAS A REASONABLE HYPOTHESIS OF INNOCENCE HERE AND OF NO INTENT TO KILL?

THE ARGUMENT THAT THE EVIDENCE WAS INSUFFICIENT FOR PREMEDITATION WAS CLEARLY MADE BY DEFENSE COUNSEL. THE COURT DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL, IN -- I KNOW IN THE COURT'S SENTENCING ORDER, THAT THE COURT EXPRESSLY FOUND THAT THE CRISSCROSS SCRATCHES ON MR. MONTGOMERY'S BACK WERE MADE BEFORE DEATH, AND EVIDENCE THAT HE STRUGGLED FOR HIS LIFE, AND THAT FINDING BY THE TRIAL COURT IS CLEARLY CONTRARY TO DR. AMAMI'S TESTIMONY. DR. AMAMI'S OPINION WAS THAT THOSE SCRATCH MARKS WERE MADE AFTER DEATH, BUT HE CONCEDED THAT THEY COULD HAVE BEEN MADE AT THE TIME OF DEATH. I THINK PART OF WHAT CAUSED THE COURT'S CONFUSION, BY THE TIME IT WROTE THE SENTENCING ORDER, WAS THAT DR. AMAMI WAS NOT AVAILABLE TO TESTIFY AT THE PENALTY PHASE, AND A SUBSTITUTE MEDICAL EXAMINER, DR. HOOSIER, WHO NEVER EXAMINED THE BODY, ITSELF, BUT WHO EXAMINED ALL OF DR. AMAMI'S MATERIALS, SHE TESTIFIED THAT THE CRISSCROSS SCRATCH MARKS COULD HAVE BEEN MADE EITHER BEFORE DEATH OR AFTER DEATH. BUT THE COURT MADE A CLEAR-CUT FINDING THAT THEY WERE DEFINITELY MADE BEFORE DEATH, AND THAT IS NOT CONSISTENT WITH THE ACTUAL MEDICAL EXAMINER'S ACTUAL FINDINGS.

DO YOU HAVE SOME OTHER ISSUES TO --

YES, YOUR HONOR. THE SECOND ISSUE CONCERNS THE SUFFICIENCY OF THE PROOF OF KIDNAPING. AGAIN, RELYING ON THE SAME PATTERN OF BEHAVIOR, ESTABLISHED BY THE STATE, ON THE PART OF MR. CONAHAN --

AT SOME POINT, HE, IF HE GOES THERE VOLUNTARILY AND IS TIED UP VOLUNTARILY, AT SOME POINT HE NO LONGER CONSENTS. AND IT IS AGAINST HIS WILL. IS THAT SUFFICIENT FOR KIDNAPING KIDNAPING?

BUT HOW DID SHE PROVE THAT HE REVOKED HIS CONSENT? THERE IS NO EVIDENCE OF -- THERE IS NO EVIDENCE OF NONCONSENT. THERE IS EVIDENCE THAT INDICATES THAT HE DID AGREE TO GO AND POSE AND APPARENTLY TO POSE FOR BONDAGE PICTURES.

HOW ABOUT THE, YOU HAVE ALREADY MENTIONED THAT THERE WERE THESE MARKS ON THE BACK THAT --

WHICH DR. AMAMI --

-- WHICH COULD HAVE BEEN INTERPRETED AS FORMING OR, AGAIN TRYING TO GET AWAY?

AGAIN, THE OPINION OF THE MEDICAL EXAMINER WHO EXAMINED THE BODY WAS THAT THOSE WERE POST MORTEM INJURIES. THEREFORE THEY COULDN'T HAVE RESULTED FROM A STRUGGLE. THERE IS NO DIRECT EVIDENCE PRESENTED BY THE STATE, THAT THERE WAS EVER ANY PARTICULAR POINT AT WHICH MR. MONTGOMERY'S CONSENT WOULD HAVE BEEN WITHDRAWN. THE MERE FACT THAT HE WAS TIED TIGHTLY ENOUGH TO CHOKE TO DEATH DOESN'T ESTABLISH THAT HE WAS WITHDRAWING HIS CONSENT, AND THE ONLY PREDEATH INJURIES, ACCORDING TO DR. AMAMI, WERE THE BINDINGS, THEMSELVES, THE LIGATURE MARKS.

IF HE DOESN'T CONSENT TO BEING KILLED, AND IF THE KILLING AGAIN, I GUESS IT ALL STARTS TO FOLLOW THE OTHER, BUT THE WILL KILLING IS PREMEDITATED, IN THAT THERE IS A LONG STRUGGLE, CAN THE KIDNAPING OCCUR AT THAT --

YOUR HONOR, THERE IS NO EVIDENCE OF A LONG STRUGGLE REGARDING MR. MONTGOMERY. THERE IS NO EVIDENCE OF ANY STRUGGLE REGARDING MR. MONTGOMERY.

SO YOU, ALSO, DISAGREE WITH THE HAC FINDINGS, THE AGGRAVATOR?

I DID NOT ATTACK THE HAC AGGRAVATOR, BECAUSE BECAUSE DR. WHOSEIER TESTIFIED THAT HE WAS PROBABLY CONSCIOUS AT THE TIME OF DEATH. HE COULD HAVE LOST CONSCIOUSNESS ACCORDING TO DR. AMAMI, IN TEN SECONDS. IT COULD HAVE TAKEN LONGER, MAYBE 5 MINUTES, FOR MR. MONTGOMERY TO DIE.

IF SOMEBODY CONSENTS TO BE TIED UP FOR THE PURPOSE OF SOME KIND OF SIDE-MASS ON KISSTIC SEX AND THEN THEY -- SIDE-MASS ON KISSTIC -- SADOMASOCHISTIC SEX, THEN THEY ARE SHOT, THERE WAS NOT A KIDNAPING, CORRECT?

YES.

AT SOME POINT SOMEBODY AGREES TO HAVE SEX YOU BUT IN THE CASE OF CONFINEMENT, SAY IN THE CASE OF MR. BURTON, HE NO LONGER WANTED TO BE CONFINED, IT WOULD BE KIDNAPING.

MR. BURTON'S CASE, HE BEGAN TO RESIST, WHEN MR. CONAHAN ATTEMPTED ANAL PENETRATION. IN THE CASE OF MR. MONTGOMERY, WHO DIED, THERE IS NO EVIDENCE OF ANY ANAL PENETRATION, AND WE HAVE NO WAY OF KNOWING WHETHER THERE WAS AN ATTEMPT ATTAINAL PENETRATION.

WELL, THE CONSENT BE BEYOND A REASONABLE DOUBT?

THE STATE HAS TO PROVE, BEYOND A REASONABLE DOUBT, THAT MR. MONTGOMERY DID NOT CONSENT TO BE BOUND THE WAY HE WAS BOUND AND THE STATE HAS NOT CARRIED THAT BURDEN.

BOUND TO THE EXTENT OF DEATH, THAT HAS TO BE THE PREMISE?

NO, YOUR HONOR, BECAUSE MY ARGUMENT REGARDING PREMEDITATION IF YOU WILL RECALL, IS THAT THE ACTUAL KILLING OF MR. MONTGOMERY WAS INADVERTENT. IT WAS NOT AN INTENTIONAL ACT ON THE PART OF MR. CONAHAN.

BUT THEN ON THE CONVERSE, THOUGH, IT WOULD HAVE TO, THEN, BE KIDNAPING, IF THAT WERE NOT INTENDED. THAT WAS NOT PART OF THE CONSENT AND SO AT LEAST HAD TO BE BOUND TO THAT POINT, BEYOND CONSENT, IF IT IS AN ACCIDENT. THEN THAT WAS NOT PART OF, HE MUST HAVE BEEN -- THOSE ARE INCONSISTENT, IT SEEMS TO ME.

I DON'T BELIEVE SO, YOUR HONOR. I AM SORRY. I DISAGREE WITH YOU.

OKAY.

I WOULD ALSO POINT OUT THAT, IF THIS COURT FOUND EVIDENCE OF PREMEDITATION, THEN YOU MUST CONFIRM THE FIRST-DEGREE MURDER CONVICTION ON THE BASIS OF FELONY MURDER THEORY. NOW, THE PROBLEM WITH THAT ARGUMENT IS THAT MR. CONAHAN WAS SEPARATELY INDICTED BY THE GRAND JURY, WITH BOTH PREMEDITATED MURDER IN COUNT I, AND WITH FELONY MURDER DURING THE COMMISSION OF A KIDNAPING IN COUNT II. THE TRIAL JUDGE, AS FINDER OF THE JUDGE FOUND A FINDING ON COUNT I. THERE WAS NO FINDING ON COUNT II. THE

MOST SIMILAR PRINCIPLE WAS BERING TON VERSUS STATE, IN 1981 AND I HAVE FOUND ONE IN SENTENCING IN 1989, AND THE THEORY IS IF THE JURY FINDS GUILT ON ONE COUNT OF INDICTMENT INFORMATION AND FAILS TO RETURN ANY VERDICT AT ALL ON A SECOND COUNT, THEN THAT OPERATES, AS A MATTER OF LAW, AS ACQUITTAL ON THE SECOND COUNT.

DID THE STATE NOLLE PROS?

YES, YOUR HONOR, THE STATE DID NOLLE PROS THE FELONY MURDER CHARGE.

THAT WAS A PRO GOWNSMENT -- PRONOUNCEMENT IN OPEN COURT OR WAS IT A WRITTEN DOCUMENT?

IT WAS AFTER THE COURT HAD FOUND HIM GUILTY OF COUNT I AND THE STATE NOLLE PROSSED ON COUNT II.

WHAT IS THE SIGNIFICANCE OF THAT, FOR THE STATE TO NOLLE PROS AFTER THERE HAS BEEN A FINDING OF GUILT BY THE COURT?

I AM NOT SAYING NOLLE PROSSED BY THE STATE IS THE CONTROLLING FACTOR. THE CONTROLLING FACTOR IS THE COURT MADE NO FINDING OF GUILT OR INNOCENCE ON COUNT II, AND THAT AS A MATTER OF LAW, THAT IS ACQUITTAL, AND BECAUSE ACQUITTAL UNDER PRINCIPLES OF DOUBLE JEOPARDY, IS ABSOLUTELY FINAL, THERE CAN BE NO FURTHER PROCEEDINGS AGAINST MR. CONAHAN FOR FELONY MURDER, AND IT WAS UNCONSTITUTIONAL TO PROCEED AGAINST MR. CONAHAN IN THE PENALTY PHASE, ON THE FELONY MURDER AGGRAVATOR, BECAUSE OF THAT. I AM GETTING INTO MY REBUTTAL TIME, SO I WOULD LIKE TO RESERVE THE REST.

THANK YOU, MR. HELM.

MAY IT PLEASE THE COURT. MY NAME IS BOB LANDRY REPRESENTING STATE ON THIS APPEAL. WITH RESPECT TO THE FIRST ISSUE AS TO PREMEDITATION, I THINK THE TRIAL COURT OBVIOUSLY AND CORRECTLY FOUND THAT THERE WAS EVIDENCE, SUFFICIENT EVIDENCE OF PREMEDITATION. THE ARGUMENT THAT IS BEING ADVANCED HERE BY MR. HELM IS, REALLY, INCONSISTENT, TOTALLY INCONSISTENT, EVEN WITH THE TESTIMONY OF HIS OWN CLIENT. HIS OWN CLIENT TESTIFIED AT TRIAL, MR. CONAHAN, THAT HE NEVER MET THIS VICTIM. HE ACKNOWLEDGED THAT HE DID HAVE A SEXUAL LIAISON WITH THE WILLIAMS RULE WITNESS, MR. BURTON, BUT THE ARGUMENT BEING ADVANCED THAT THIS IS SIMPLY A SEXUAL ESCAPADE THAT WENT TOO FAR IN, AS A SIMILARITY TO THE RANDALL CASES AND THE HOLFORD CASES IS CLEARLY NOT HERE.

YOU ARE SAYING WHAT IS THE EVIDENCE OF PREMEDITATION?

WELL, YOU HAVE, FIRST OF ALL, WITH RESPECT TO THE BURTON INCIDENT, I MEAN, YOU HAVE CERTAINLY AN INTENT TO KILL MR. BURTON THERE, BY THE PROLONGED STRANGLING OF HIM FOR 20 TO 30 MINUTES, PLUS HIS ASSOCIATE AT THAT TIME -- HIS ASSERTION AT THAT TIME "WHY WON'T YOU DIE", AS TO SOME OF THE QUESTIONING IN THE PRECEDING ARGUMENT POINTED OUT, IT IS QUITE CLEAR THAT THE REASON THAT BURTON WAS NOT KILLED WAS BECAUSE OF THE INABILITY OF THE DEFENDANT TO COMPLETE THAT MISSION IN FRUSTRATION, BECAUSE THAT VICTIM KEPT TURNING HIS HEAD.

WHAT ABOUT THE ARGUMENT, THOUGH, THAT REALLY THERE WAS A REANNUNCIATION OF THAT, WHEN IT WAS DECIDED TO LET BURTON LIVE. THAT IS HE OBVIOUSLY DECIDED NOT TO COMPLETE WHATEVER HIS INITIAL -- AND WHY WOULDN'T THAT BE A REASONABLE HYPOTHESIS?

WELL, I THINK HE DECIDED NOT TO, AFTER 20 OR 30 MINUTES OF STRUGGLING AND EXHAUSTION AND HE FINALLY WAS UNABLE TO COMPLETE HIS MISSION. IT WAS A VICTIM WHO WAS ABLE TO

EXTRICATE HIMSELF OR THE DEFENDANT DIDN'T RELEASE HIM AND ALL OF. THAT THE VICTIM WAS ABLE TO EXTRICATE HIMSELF, AND AFTER THE DEFENDANT LEFT, HE CUT HIMSELF LOOSE WITH THE PLIER INSTRUMENT AND WAS ABLE TO GET HIMSELF TO THE HOSPITAL, WHERE HE REPORTED TO LAW ENFORCEMENT AND TO THE NURSE WHO WAS THERE, THAT HE HAD JUST BEEN RAPED AND SOMEONE HAD TRIED TO KILL HIM, SO I MEAN IT IS QUITE CLEAR THAT THERE WAS AN ATTEMPTED KILLING THERE. NOW, MOVING ON TO --

JUSTICE QUINCE HAD A QUESTION.

AS I UNDERSTAND YOUR ARGUMENT ARE YOU SAYING THAT, AT THE TRIAL, THE DEFENDANT'S DEFENSE WAS "I DID NOT DO THIS"?

THAT'S CORRECT.

AND SO IF THAT IS THE DEFENSE THAT WAS PRESENTED, I AM NOT SURE IN THIS WHOLE CIRCUMSTANTIAL EVIDENCE AND REASONABLE HYPOTHESIS OF INNOCENCE, SITUATION, THAT DOES THE STATE HAVE TO DEFEND AGAINST THE DEFENDANT'S DEFENSE AND ANY REASONABLE HYPOTHESIS OF INNOCENCE?

WELL, I THINK THE STATE DOESN'T HAVE TO DISPROVE EVERY POSSIBLE I AM PLAUSIBLE DEFENSE, WHICH -- IMPLAUSIBLE DEFENSE. WHICH WAS PRESENTED IN THE COURTROOM. THE STATE DID MORE THAN SHOW A PREMEDITATED INTENT TO KILL MR. MONTGOMERY IN THIS CASE. YOU HAVE THE PREPLANNING. YOU HAVE HIM PURCHASING THE ROPE THE KNIFE, MAKING A WITHDRAWAL FROM THE BANK AFTER LURING THE VICTIM TO A PHOTOGRAPHIC SESSION INVOLVING BONDAGE. YOU HAVE HIM, IN ADDITION, YOU HAVE THE OBVIOUS, THE WAY THAT THIS CRIME OCCURRED IS THAT THE VICTIM WAS STRANGLED TO DEATH, AND QUITE TO THE CONTRARY OF WHAT DEFENSE COUNSEL ARGUES, THAT THERE WAS, I SUBMIT, A VERY SEVERE STRUGGLING BY THE VICTIM. I MEAN, YOU HAD --

BUT YOUR ANSWER TO JUSTICE QUINCE'S QUESTION IS THAT, IF I UNDERSTAND YOU CORRECTLY JUST BY WHAT YOU ARE SAYING NOW, IS THAT JUST BECAUSE THE DEFENDANT TESTIFIED THAT HE WAS COMPLETELY INNOCENT AND WASN'T EVEN INVOLVED DOESN'T RELIEF THE STATE OF ITS BURDEN OF PROOFING ITS CASE OR TAKE AWAY THE RIGHT OF THE DEFENDANT TO MOVE FOR A DIRECTED VERDICT, ON THE BASIS THAT THE STATE HAS NOT PROVED ITS CASE. IS THAT CORRECT?

THE STATE DID PROFITS CASE.

BUT THE STATE HAS THAT, STILL HAS THAT BURDEN, REGARDLESS --

THE STATE HAS THE BURDEN OF DEMONSTRATING THAT THE EVIDENCE HAS BEEN SUFFICIENT TO SUPPORT PREMEDITATION. AND THEY HAVE DONE THAT HERE. THE THE CONTENTION THAT MR. CONAHAN IS MAKING IS THAT, SINCE HE DIDN'T ACTUALLY COMPLETE THE MURDER OF MR. BURTON AND THEREFORE HE -- THERE FOR HE HAD NO INTENT TO DO THAT AGAIN, WE SUBMIT FLIES IN THE FACE OF REASON AND ALL OF THE EVIDENCE THAT HAS BEEN PRESENTED. YOU HAVE THE ABRASIONS AND THE LIGATURE MARKS AND THE BRUISES ON THE VICTIM MONTGOMERY, WHICH I SUBMIT DEMONSTRATE THAT HE WAS RESISTING THROUGHOUT, AND --

I THOUGHT THAT THE DEFENDANT'S ARGUMENT, AT LEAST, IS THAT THE MEDICAL EXAMINER SAID THESE WERE MARKS THAT OCCURRED AFTER DEATH?

I UNDERSTOOD THE MEDICAL EXAMINER, DR. AMAMI TO BE TESTIFYING THAT THEY WERE BOTH POST MORTEM AND ANTI-MORTEM INJURIES. LET ME CHECK MY BRIEF HERE. HE SAYS IN HIS TESTIMONY THE POST-MORTEM INJURIES TO THE WRIST WERE CONSISTENT WITH THE LIGATURES BEING TIED TO THE BRINGS THES AS THE VICTIM WAS -- TO THE WRISTS AS THE VICTIM WAS

BEING STRANGLED, SO I UNDERSTAND THE TESTIMONY THAT YOU HAVE BOTH PREMORTEM AND POST-MORTEM INJURIES, AS THE STRANGULATION IS GOING ON. THE ARGUMENT BEING, THAT WAS MADE AT THE TIME OF TRIAL BY THE TRIAL DEFENSE COUNSEL WAS THAT ALL THESE BRUISES OR ALL OF THESE MARKS THAT OCCURRED ON THE BODY WERE AFTER THE VICTIM WAS TIED UP, AFTER DEATH, AND THAT SEEMED TO, THE TRIAL COURT, OBVIOUSLY, WAS INCONSISTENT WITH WHAT THE EVIDENCE SHOWED.

IS IT CORRECT THAT THE EVIDENCE ABOUT THE FANTASY DID NOT INCLUDE A COMPONENT OF KILLING THE VICTIM?

THE FANTASY WHICH HE TOLD HIS FORMER LOVER, MR. LIENEDY, WAS THAT HIS FANTASY WAS TAKING A YOUNG BOY OUT TO THE WOODS AND HAVING SEX WITH HIM. HE DIDN'T FANTASIZE TOWARDS HOMICIDE, BUT THE STATE'S ARGUMENT IS THAT HIS FANTASY OBVIOUSLY EVOLVED, WHEN IT CAME TIME TO DEALING WITH THE ATTEMPT ON MR. BURTON AND WITH MR. MONTGOMERY.

WAS THAT SPECIFICALLY DISCUSSED IN THE TESTIMONY OF HIS FRIEND?

I AM SORRY.

THAT ASPECT, WAS THAT SPECIFICALLY DISCUSSED IN THE TESTIMONY OF HIS FRIEND?

THE TESTIMONY OF HIS FRIEND WAS THAT --

MURDER COMPONENT. THE KILLING COMPONENT. WAS THAEF ENTOUCHED UPON?

I THINK -- WAS THAT EVEN TOUCHED UPON?

THE LINDY FANTASY, IT WASN'T INCLUDED.

WAS THAT TOUCHED UPON, OR WAS HIS QUESTION DID THAT INCLUDE MURDER AND THE ANSWER WAS, NO, IT DID NOT?

I THINK THE TESTIMONY IN GENERAL THIS IS WHAT THE FANTASY WAS HE TOLD ME AT ONE TIME, BUT I DIDN'T TAKE IT SERIOUSLY. I DIDN'T REGARD IT AS A SERIOUS COMPONENT. SERIOUS.

AND THIS IS DURING THE GUILT PHASE OR THE PENALTY?

I THINK THAT WAS GUILT PHASE.

AS FAR AS UNDERSTANDING HOW THIS EVIDENCE CAME IN, IS IT, IT CAME IN IN THE GUILT PHASE BEFORE THE JUDGE, BUT THEN IT DIDN'T COME IN AS EVIDENCE IN THE PENALTY PHASE, BEFORE THE JURY?

THE --

CAN YOU CLARIFY THAT?

YES. THE, DURING THE GUILT PHASE, THE STATE PUT ON TESTIMONY OF, I GUESS IT WAS DETECTIVE SOUTO, AND THE, MR. BURDEN -- MR. BURTON, TO TALK ABOUT THE INCIDENT, AND THE JUDGE RULED THAT THAT WAS ADMISSIBLE AS WILLIAMS RULE EVIDENCE, BOTH AS TO IDENTIFYITY, MODUS APRENDI, AND MOTIVE AND THAT -- MODUS OP RENT I AND MOTIVE AND THAT KIND OF THING. WHEN THE STATE DEEMED IT AS EVIDENCE, HE DEEMED IT AS TOO PREJUDICIAL, SO WHAT THE JURY HEARD, BASICALLY IN TERMS OF THE KIDNAPING AND THE INCIDENT WITH BURTON, WAS SIMPLY THAT THE FACT OF CONVICTION THAT THE JUDGE HAD THAT THE -- THE DECISION OF THE JUDGMENT OF GUILT AS TO THE FIRST-DEGREE MURDER AND

AS TO THE KIDNAPING, BUT THEY DIDN'T HEAR, YOU KNOW, THE DETAILS OF THE STANLEY BURTON INCIDENT.

AT WHAT STAGE DID IT BECOME A KIDNAPING? I THINK THE STATE WOULD HAVE TO CONCEDE THAT IT STARTED OUT AS A VOLUNTARY ACT, AND ACCORDING TO THE STATE'S THEORY, AT WHAT POINT DID IT EVOLVE INTO KIDNAP SOMETHING.

WELL, I THINK IT EVOLVED AT THE POINT WHERE THE, WHERE THE DEFENDANT BEGAN TO CONFINE HIM AND THE VICTIM STRUGGLED AGAINST IT. OBVIOUSLY WHEN HE WAS BOUND TO THE TREE AND EITHER SEXUAL ASSAULT STARTED TO OCCUR AT THAT TIME, BUT WHEN THE VICTIM STARTED, CERTAINLY WHEN THE VICTIM STARTED TO RESIST, AS INDICATED BY THE WOUNDS ON HIS BODY, ON HIS BACK AND HIS FRONT AND HIS WRIST THE, CERTAINLY THAT WAS A CONFINEMENT AGAINST HIS WILL. I MEAN, I THINK IT IS SIMILAR TO THE SOUTO CASE AND GORE AND SOME OF THOSE OTHER CASES, IN WHICH THE VICTIM GOES OFF VOLUNTARILY WITH THE DEFENDANT, AND NO ONE EVER HEARS ABOUT THEM AGAIN UNTIL --

BUT THE PROBLEM WAS GOING WITH HIM TO, I GUESS, SATISFY HIS FANTASIES AND GET PAID FOR THAT.

BUT THE VICTIM -- EXCUSE ME.

GO AHEAD.

BUT THE VICTIMS IN THE OTHER CASES, IN GORE AND THESE OTHER CASES, WERE INVOLVED, APPARENTLY YOUNG WOMEN WHO APPARENTLY WENT OFF WITH THE DEFENDANT IN A VOLUNTARY CAPACITY, EITHER HAVING LEFT A LOUNGE OR GOING OFF ON A TRIP WITH HIM, AND THEN SUBSEQUENTLY THEY ARE FOUND IN ABOUND CAPACITY OR IN SOME, WITH SOME OTHER EVIDENCE DEMONSTRATING THAT THEY WERE, IN FACT, RESTRAINED AGAINST THEIR WILL.

LET ME DECLARE, NOW, WHEN HE TIED HIM TO THE TREE, THAT IS WHEN IT BECAME A KIDNAPING? IS THAT THE STATE'S CASE?

WELL, IT IS THE STATE'S CASE WHEN, IT IS THE STATE'S ARGUMENT THAT THE KIDNAPING, IT OCCURS, CONFINEMENT AGAINST HIS WILL OCCURS WHEN THE VICTIM IS CERTAINLY GOING TO RESIST HIS BEING CONFINED.

DOES THAT NECESSARILY HAVE TO BE BASED ON SPECULATION? THAT IS THAT IF YOU ARE TALKING ABOUT SOME POINT THAT WE REALLY CAN'T KNOW. THAT IS THAT HE APPARENTLY IS PART OF THIS AGREEMENT OR WHATEVER HERE, CERTAINLY A REASONABLE INFERENCE IS THAT THE VICTIM MAY HAVE INITIALLY AGREED TO BE BOUND, AND SO HOW CAN WE KNOW, BASED ON THIS KIND OF EVIDENCE, WHEN THAT COULD HAVE OCCURRED?

WELL --

LET ME BRING YOU BACK TO AN ANALOGY OR A HYPOTHETICAL, AND THAT IS IF THE SAME THING OCCURS HERE, INSOFAR AS THE VICTIM AGREEING TO GO FOR PHOTOGRAPHS OR WHATEVER, AND THEN, AS THE VICTIM IS POSING FOR A PHOTOGRAPH, THE DEFENDANT PULLS OUT A GUN AND SHOOTS HIM. WOULDN'T BE THERE AN INSUFFICIENT CASE FOR KIDNAPING, IN A CASE LIKE THAT?

WELL, I DON'T KNOW THAT THERE WOULD BE AN INVOLUNTARY CONFINEMENT AT THAT POINT.

WELL, WHY -- IF THE VICTIM IS KILLED, BY CHOKING -- IN OTHER WORDS YOU ARE SAYING THAT THEN IF THE VICTIM --

IS RESISTANT --

-- SAME FACTS, BUT IF THE KILLING IS DONE BY CHOKING, THEN THERE IS A KIDNAPING?

AND THE CIRCUMSTANCES DEMONSTRATE THAT THERE WAS PHYSICAL RESISTANCE IN THE INABILITY TO COMPLETE THE RESISTANCE BY THE VICTIM AS EVIDENCED BY THE VICTIM BEING BOUND AND STRUGGLING.

BUT AT THAT POINT, THEN, DOESN'T THE KIDNAPING AND THE MURDER REALLY MERGE, AS OPPOSE ODD TO IN GORE THERE WAS NO EVIDENCE THAT -- AS OPPOSED TO IN GORE THERE WAS NO EVIDENCE THAT THE VICTIM MAY HAVE AGREED TO VOLUNTARILY GO WITH THE PERSON, BUT THERE WAS NO EVIDENCE THAT THEY HAD AGREED TO BE TIED UP OR WHATEVER, BUT HERE --.

NO, BUT AT SOME POINT THE VICTIM PRESUMABLY CHANGED HER MIND ABOUT, IN THE GORE LINE OF CASES. WE DON'T KNOW EXACTLY WHETHER THAT MOMENT WAS. I AM SORRY.

BUT THERE IS NO EVIDENCE IN GORE THAT ANY OF THE VICTIMS AGREE TO BE BOUND. I THINK THAT IS REALLY WHERE I AM HAVING A PROBLEM, AS FAR AS WE KNOW THE EVIDENCE IS FAIRLY CLEAR THAT THERE WAS AN AGREEMENT HERE TO BE BOUND, AND YOU ARE SAYING, WELL, THE TIME IT BECAME AGAINST HIS WILL IS WHEN HE WAS MURDERED. BUT ISN'T THAT, THEN, JUST, I MEAN, THAT IS THE EVIDENCE ESTABLISHED FOR ANYBODY -- I DON'T KNOW HOW OFTEN THIS FACTUAL SCENARIO OCCURS, BUT, AGAIN, WHY IS IT DIFFERENT THAN A SITUATION THAT, IF IT IS AT THE END MR. CONAHAN HAD SHOT THE VICTIM, WHICH YOU WOULDN'T HAVE A KIDNAPING THERE.

I THINK THERE WAS ANOTHER CASE THAT WE CITE THE IN OUR BRIEF. -- CITED IN OUR BRIEF. A THIRD DCA CASE OR ONE OF THE DCA CASES IN WHICH THERE HAD BEEN A SIMILAR SITUATION WHERE THE VICTIM HAD BEEN TIED IN HIS BED IN A MOTEL ROOM, I THINK, AND STRANGLED, AND THAT WAS GENERAL FACT PATTERN IN THIS CASE, AND THE COURT FOUND THE KIDNAPING --

IF YOU TAKE THE STATE'S THEORY TO ITS ULTIMATE AND YOU START OUT WITH THE VICTIM VOLUNTARILY GOING WITH THE DEFENDANT, AND BEING MURDERED AT SOME POINT, IT SEEMS TO ME, IF I AM FOLLOWING THE STATE'S CASE, YOU WOULD ALWAYS HAVE A KIDNAPING IN THAT, BECAUSE AT SOME POINT, IT GOES AGAINST WHAT THE VICTIM IS VOLUNTEERING TO DO.

I THINK IF A VICTIM GOES OFF WITH A DEFENDANT SOMEWHERE AND THEN, INJUSTICE ANSTEAD'S EXAMPLE, I GUESS THE DEFENDANT SIMPLY TURNS A GUN ON HIM AND SHOOTS HIM, YOU KNOW, I DON'T SEE THAT THAT SATISFIES THE CONFINEMENT ASPECT OF THE KIDNAPING STATUTE, WHICH IS WHAT WE HAVE GOT HERE. I THINK THAT WHILE THE VICTIM MAY HAVE BEEN LURED INITIALLY, INTO A SITUATION IN A SECLUDED AREA, ONCE THE ROPE IS PUT ON THERE AND TIGHTENED SO THAT HE IS CONSTRAINED AGAINST HIS WILL, AND OBVIOUSLY IT WAS AGAINST HIS WILL AT THE TIME THAT ALL OF THESE INJURIES ARE BEING INFLICTED UPON HIM AND HE IS RESISTING, ACCORDING TO THE MEDICAL TESTIMONY AND THE TRIAL JUDGE'S FINDINGS, I THINK THAT IS WHERE WE HAVE THE KIDNAPING.

HELP ME WITH THE PENALTY-PHASE EVIDENCE, IN TERMS OF YOU HAVE JUST SAID THAT THE JUDGE EXCLUDED, FROM THE PENALTY PHASE, EVIDENCE OF THE OTHER EPISODE AND OF THE FANTASY, BOTH? IS THAT RIGHT?

NO. NO. HE DIDN'T ALLOW BURTON'S TESTIMONY TO COME IN AS TO HIS INCIDENT.

THE BURTON. BUT HE DID ALLOW THE FANTASY TESTIMONY DURING THE PENALTY PHASE?

YEAH. HE ALLOWED THAT IN, BECAUSE THEY ALLOWED, THEY PUT ON AN OFFICER TO TESTIFY. THEY PUT ON AN OFFICER AT PENALTY, TO TESTIFY TO THAT THE DEFENDANT, NOT THROUGH

LINDY, BUT THE DEFENDANT HAD MADE A STATEMENT, IN ONE OF HIS INTERVIEWS WITH THE POLICE, THAT HE INDEED DID HAVE THAT FANTASY OF HAVING SEX --

DID THE TRIAL JUDGE, THEN, IN -- IN OTHER WORDS HE DIDN'T ALLOW THAT BEFORE THE JURY, BUT DID HE RECEIVE THAT EVIDENCE, HIMSELF, IN TERMS OF DETERMINING THE AGGRAVATION IN THE CASE

WELL, THE JUDGE, OF COURSE, MADE THREE FINDINGS OF AGGRAVATION. HAC --

BUT I AM TRYING TO, IN TERMS OF EVIDENTIARY WEISS, TO UNDERSTAND THE JUDGE'S RULING, AND THEN WHAT THE JUDGE WAS ENTITLED TO RELY ON, WHEN THE JUDGE MADE THE DETERMINATIONTIVE AGGRAVATION WAS THE THEORY THAT THAT WAS LIMITED TO WILLIAMS RULE OR A NARROW PURPOSE, IN ORDER TO PROVE INTENT, YOU KNOW, IN THE FIRST-DEGREE MURDER CHARGE? BUT THEN HE WOULD NOT ALLOW IT TO BE CONSIDERED AS EVIDENCE OF AGGRAVATION?

LET ME JUST, MAYBE THIS WILL CLARIFY IT, TO READ FROM THE JUDGE'S SENTENCING FINDINGS. HE SAYS THE EVIDENCE OF THE ATTEMPTED STRANGULATION OF BURTON WAS ADMITTED IN THE GUILT PHASE TRIAL BEFORE THE WILLIAMS RULE EVIDENCE BUT NOT BEFORE THE JURY. THE EVIDENCE AS TO BEING BOUND AND STRANGULATION AND CUTTING IN BOTH INSTANCES. THE PREPHOTO AND BONDAGE IS THE SAME. THE VICTIM WHO MANAGED TO SURVIVE AND THE STORY OF THE VICTIM, WHO DID NOT, IS STRIKING STRIKINGLY SIMILAR. IT IS DISCUSSED ONLY IN THE CONTEXT OF THE RELEVANCE TO THIS AGGRAVATOR. THE METHOD AND TECHNIQUE AND EVIDENCE EVIDENCE COLD, CALCULATED AND SYSTEMATIC APPROACH TO LURE MR. MONTGOMERY TO A PLACE WHERE HE WAS KILLED AND A BONDAGE POSITION FROM WHICH HE COULD NOT ESCAPE.

SO THE TRIAL JUDGE DID CONSIDER THAT EVIDENCE, HIMSELF, IN DETERMINING AGO SFLAINGS.

WELL, PRESUMABLY SO, AS FURTHER SUPPORT FOR HIS FINDING. ON THAT AGGRAVATING FACTOR.

WAS THERE ANY OBJECTION TO HIS CONSIDERATION OF THAT EVIDENCE?

I DON'T THINK SO. I MEAN, I THINK PROBABLY THE DEFENSE WAS HAPPY THAT THE JURY DID NOT GET TO HEAR THE BURTON INCIDENT, BECAUSE I THINK THE STATE WAS SOMEWHAT SURPRISED, AND YOU KNOW, I THINK THE STATE ANTICIPATED THAT THE BURTON TESTIMONY WOULD COME, AGAIN, AS DID THE GUILT PHASE, AND WHEN THE JUDGE SAID IT COULDN'T COME IN, THERE WAS A LIMITATION ON THE PRESENTATION TO THE JURY.

WHAT IS THE SIGNIFICANCE, IF ANY, OF THE STATE'S NOLLE PROS IN THIS INSTANCE, WHERE THERE HAS BEEN A JUDGMENT OF GUILT ON THE FIRST COUNT, AND SILENCE AS TO THE SECOND COUNT? AND THEN THE STATE, AFTER THAT POINT, NOLLE PROSS THE SECOND COUNT. IS THERE ANY SIGNIFICANCE TO THAT AT ALL?

I DON'T THINK THERE IS ANY SIGNIFICANCE. I WOULD LIKE TO TALK FOR A SECOND ABOUT THE SILENCE ACQUITTED THE DEFENDANT FELONY MURDER. I THINK WE HAVE TO KEEP IN MIND THAT FIRST-DEGREE MURDER IS JUST ONE OFFENSE. PREMEDITATION OF FELONY MURDER IS SIMPLY TWO WAYS OF COMMITTING THE SAME ONE CRIME FORM NOW, WHEN THE JUDGE CAME BACK -- CRIME. NOW, WHEN THE JUDGE CAME BACK, FOLLOWING THE PRESENTATION OF EVIDENCE AND FOUND THE DEFENDANT GUILTY OF PREMEDITATED MURDER, HE, ALSO, FOUND HIM GUILTY OF KIDNAPING, TWO SEPARATE CRIMES, SO OBVIOUSLY HIS SILENCE ON FAILING TO ARTICULATE ANYTHING MORE, IS SIMPLY, IN MY VIEW, A RECOGNITION OF THE FACT THAT THERE NEED NOT BE ANYMORE STATEMENT BY HIM, SINCE THERE CAN ONLY BE ONE JUDGMENT FOR A MURDER IN THE CASE. YOU CAN'T GIVE TWO JUDGMENTS FOR ONE MURDER, SO THE FACT THAT THE TRIAL

JUDGE DID NOT MENTION THE FELONY MURDER VERDICT THAT HE IS PERFORMING REALLY DOESN'T MEAN ANYTHING. IN TERMS OF WHAT THE PROSECUTOR DID THEREAFTER, THAT WAS A SITUATION WHERE, AFTER SENTENCING HAD OCCURRED, THE JUDGE HAD IMPOSED DEATH AND IMPOSED A 15-YEAR SENTENCE FOR KIDNAPING, AT THE END OF IT ALL, THE PROSECUTOR GETS UP AND SAYS, JUDGE, THE BAILIFF OR THE MARSHAL OR WHOEVER IS HANDLING THESE EXHIBITS OR EVERYTHING HERE, WANTS TO KNOW WHAT TO DO WITH ALL THIS PAPERWORK, AND OBVIOUSLY SINCE WE HAVE ALREADY BEGIN THE JUDGMENT AND SENTENCE ON MURDER, THERE IS NOTHING MORE TO BE DONE ON THIS, SO WE WILL NOLLE PROS THAT. I THINK THAT IS REALLY A MEANINGLESS GESTURE ON HIS PART. OBVIOUSLY THERE COULD NOT BE ANY FURTHER PROSECUTION ON FELONY MURDER, IN LIGHT OF THE DOUBLE JEOPARDY CLAUSE. IRRESPECTIVE OF WHETHER THERE WAS AN ACQUITTAL OR A GUILTY VERDICT, SO I THINK HE WAS SIMPLY SAYING, AT THAT POINT, THERE IS NOTHING FURTHER, MISSOURI MORE PAPERWORK TO BE DONE ON -- FURTHER FURTHER, NO MORE PAPERWORK TO BE DONE ON THAT ISSUE. CLEARLY THE WHOLE IDEA OF A NOLLE PROS IS THE STATE AGREES NOT TO INITIATE A PROSECUTION, WHICH WAS DONE IN THIS CASE, SO I SUBMIT THAT IT REALLY WAS IN SNIFBLTH SIGNIFICANT ACTION BY -- INSIGNIFICANT ACTION, ON THE PART OF THE PROSECUTOR. IF THE COURT DOES NOT HAVE ANY FURTHER QUESTIONS, WE WILL RELY ON OUR BRIEF.

THANK YOU. MR. HELM?

I REALLY DON'T HAVE ANYTHING FURTHER. IF THE COURT HAS FURTHER QUESTIONS, I WOULD BE HAPPY TO ANSWER THEM.

THANK YOU, COUNSEL. THANK YOU FOR YOUR ASSISTANCE IN THIS CASE. THE COURT WILL BE IN RECESS.