Paul Fitzpatrick v. State of Florida

CHIEF JUSTICE: ALL RIGHT. FITZPATRICK VERSUS STATE. IF COUNSEL IS READY, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. I AM DOUG CONNOR REPRESENTING THE APPELLANT IN THIS CASE, PAUL FITZPATRICK. THIS IS A DIRECT APPEAL FROM A CONVICTION FOR FIRST-DEGREE MURDER, AND IMPOSITION POSITION OF A -- AND IMPOSITION OF A SENTENCE OF DEATH. THIS CASE STARTS BACK IN JANUARY IS THE 80. -- IN JANUARY OF 1980. AT THE TIME, PAUL BROWN, WHO WAS THE STATE'S STAR WITNESS AT TRIAL, WHO WAS RESIDING WITH A HOMOSEXUAL AND GETTING A PLACE TO LIVE AND A LITTLE BIT OF MONEY, IN EXCHANGE FOR SEXUAL FAVORS. ONE NIGHT HE INVITED OVER TWO GIRLS.

IS THIS BACK IN MASSACHUSETTS?

YES. THIS IS BACK IN THE SCENARIO. THE TWO GIRLS WERE OVER AND FITZPATRICK WAS THERE. MR. MEN ARRESTED -- MR. MENNARD, WHO WAS THE PERSON THAT MR. FITZPATRICK WAS STAYING WITH --

THIS MASSACHUSETTS SCENARIO, ARE YOU CONCEDING THAT THIS IS ALL PART OF THE HISTORY, BECAUSE IF IT STARTED THERE, IT SEEMS TO INDICATE THAT THOSE PRIOR CRIMES ARE RELEVANT TO WHAT, THEN, OCCURRED.

WELL, I AM JUST TRYING TO PUT THIS IN A CHRONOLOGICAL ORDER, SO AS IT WAS PRESENTED TO THE TRIAL, AT TRIAL, SO, ANYWAY, MR. MENARD BECAME ANGRY AT THIS AND ORDERED THE GIRLS TO LEAVE. PAUL BROWN DECIDED HE WANTED TO GET EVEN WITH THIS, AND HE ASKED MR. FITZPATRICK, YOU WANT TO ROB THIS GUY? NOW, FITZPATRICK HAD ALWAYS BEEN UNDER THE ASSUMPTION THAT THIS WAS BROWN'S UNCLE, BECAUSE THAT IS WHAT BROWN CALLED HIM IS HIS UNCLE, AND HE SAID YOU WANT TO ROB YOUR UNCLE? AND HE SAID THIS ISN'T MY UNCLE. THIS IS A FAG THAT PICKED ME UP, SO BOTH OF THEM PROCEEDED TO THEN TIE-UP MENARD, HOLD A KNIFE TO HIS THROAT. THEY TOOK HIS MONEY, TOOK HIS STEREO EQUIPMENT AND DROVE AWAY IN HIS CAR. NOW, TO ESCAPE PROSECUTION, THEY LEFT MASSACHUSETTS AND CAME TO FLORIDA. AND REGISTERED AT A HOTEL IN DOWNTOWN TAMPA, THE FROM INN, AND PAUL BROWN WAS THE ONE WHO ACTUALLY DID THE REGISTRATION, GOT THE RECEIPT FOR THE ROOM AND SO FORTH. NOW, THEY WERE HERE FOR APPROXIMATELY TWO WEEKS AT THAT TIME, AND DURING THIS TIME, THERE WAS A HOMOSEXUAL MAN LIVING IN CLEARWATER, HOLLINGER WAS HIS NAME, WHO WAS STABBED TO DEATH, AND HAD HIS STEREO EQUIPMENT AND HIS AUTOMOBILE TAKEN FROM HIM IN THE PROCESS. NOW, INVESTIGATORS AT THE TIME TOOK A LOT OF FINGERPRINTS, AND IN FACT THEY FOUND THE RECEIPT, THE HOTEL RECEIPT IN, AT THE VICTIM'S RESIDENCE, AND THEY WERE ABLE TO MATCH FINGERPRINTS AT THAT RESIDENCE, TO FINGERPRINTS THAT WERE IN THIS HOTEL ROOM THAT BROWN AND FITZPATRICK HAD OCCUPIED. HOWEVER, THEY WERE NEVER, BECAUSE THE HOTEL RECEIPT WAS MADE UNDER AN IF I CAN TISSUE US NAME, THEY WERE -- UNDER A FICTITIOUS NAME, THEY WERE NEVER ABLE TO COLLECT ANYTHING FURTHER FOR A LONG TIME T WASN'T UNTIL 1995 THAT A DETECTIVE REOPENED THE INVESTIGATION AND WAS ABLE TO DETERMINE THAT THESE FINGERPRINTS WERE, IN FACT, DID IN FACT BELONG TO FITZPATRICK. THEY LOCATED FITZPATRICK, AND THEN THEY WERE ABLE TO LOCATE PAUL BROWN.

WHERE WERE THESE FINGER PRESENTS LOCATED THAT THEY USED?

THEY WERE ON, THERE WAS SEVERAL FINGERPRINTS ON THE GLASSES IN THE LIVING ROOM. THERE WAS FINGERPRINTS IN THE BATHROOM, I THINK, MAYBE ON A DOOR, AS WELL AS A DOOR TO A SEPARATE ROOM.

AND THE VEHICLE, ALSO, THE VICTIM'S VEHICLE, ALSO?

THE VICTIM'S VEHICLE WAS ON THE OUTSIDE PASSENGER DOOR, THE FRAME OF THE DOOR WAS FITZPATRICK'S FINGERPRINT.

ARE YOU GOING TO BRING US UP TO THE ISSUES THAT YOU ARE GOING TO ADDRESS.

OKAY. I JUST WANTED TO TO SAY THAT, AT TRIAL -- JUST WANTED TO SAY THAT, AT TRIAL PAUL BROWN WAS THE ONE THAT TESTIFIED THAT THE TWO WERE TOGETHER THE WHOLE TIME IN FLORIDA, EXCEPT FOR ONE NIGHT WHEN FITZPATRICK LEFT AND CAME BACK, LATER, ON THE -- TO THE HOTEL ROOM WITH RED STUFF ON HIS SHOES, AND HE THREW HIS SHOES OUT THE WINDOW, AND THEY IMMEDIATELY LEFT THE HOTEL ROOM THE NEXT DAY, DESPITE THE FACT THAT THEY HAD PAID IN ADVANCE FOR ANOTHER NIGHT. FITZPATRICK TESTIFIED AT TRIAL THAT THEY HAD BEEN PICKED UP WHILE THEY WERE HITCHHIKING PIE HOLLINGER, WENT TO HIS -- HITCHHIKING BY HOLLINGER AND WENT TO HIS RESIDENCE, AND THERE FITZPATRICK HAD A LOT TO DRINK AND FELL ASLEEP ON THE COUCH, AND WHEN HE WOKE UP, HE FOUND BROWN STABBING HOLLINGER TO DEATH IN THE KITCHEN, AND AT THAT POINT THEY GRABBED THE STEREO STUFF AND DROVE AWAY IN HIS CAR. BROWN'S TESTIMONY WASN'T EVEN THERE. FITZPATRICK, I WAS THERE BUT BROWN DID THE STABBING OF THE VICTIM. THE FIRST ISSUE I WOULD LIKE TO ADDRESS IS THE FACT THAT, DESPITE DEFENSE COUNSEL'S REQUEST THAT THE JURY NOT BE ALLOWED TO CONSIDER FELONY MURDER ON, WITH BURGLARY AS AN UNDERLYING AGGRAVATING FACTOR, THE, AND THAT SHE CITED NOT DELGADO, EVEN THOUGH DELGADO HAD BEEN OUT, IT WAS A VERY RECENT OPINION AT THAT TIME, BUT RELYING ON THIS COURT'S DECISION IN MILLER, WHICH WAS BASICALLY WAS A BUSINESS PREMISES BUT THE SAME IDEA THAT, UNLESS SOMEONE SURREPTITIOUSLY HIDES THEMSELVES ON THE PREMISES, THAT YOU CAN'T BE CONVICTED OF BURGLARY.

NOW, HOW DO WE DEAL WITH THAT IN THIS CASE, BECAUSE WE, ALSO, HAVE ANOTHER, WE HAVE THE ROBBERY ASPECT AS WELL, CORRECT?

THAT IS TRUE.

THAT IS A LITTLE BIT DIFFERENT. WE HAVE THE PREMEDITATION AND THE FELONY MURDER ON BOTH BURGLARY AND ROBBERY, AND IF WE DON'T HAVE THE BURGLARY, HOW DOES THAT, IF AT ALL, HOW DOES THAT COME INTO PLAY NOW? IS THAT A DIFFERENT SCENARIO? DOES THAT CHANGE OUR ANALYSIS OR WHERE DOES THAT TAKE US?

WELL, THIS COURT HAS ALREADY ADDRESSED IN MACKERLY, THE FACT THAT IF THE JURY IS INSTRUCTED ON A LEGALLY-INADEQUATE THEORY OF LAW, IT DOESN'T MATTER WHETHER THERE IS SEVERAL LEGALLY-ADEQUATE THEORIES AS WELL. IF THEY COULDN'T HAVE RELIED ON THE LEGALLY-INADEQUATE THEORY, THEN THE CONVICTION IS TAINTED.

WAS THERE A SEPARATE VERDICT FOR THE ROBBERY?

NO. THE ONLY VERDICT WAS FOR MURDER IN THE FIRST-DEGREE.

AND DID MR. FITZPATRICK, DID HE A SPECIAL VERDICT FORM IN THIS CASE?

I DON'T BELIEVE HE DID. I DON'T BELIEVE HE DID.

SO THERE IS NO ACTUAL CONVICTION FOR BURGLARY OR ROBBERY.

THAT'S CORRECT. THE ONLY CONVICTION IS FOR MURDER IN THE FIRST-DEGREE. IT DOESN'T SPECIFY PREMEDITATED T DOESN'T SPECIFY FELONY. JUST MURDER IN THE FIRST-DEGREE. THAT IS THE CONVICTION, THE VERDICT --

DIDN'T HE ADMIT THE ROBBERY THOUGH? HE TOOK THE STAND AND SAID IT WAS REALLY BROWN THAT DID IT NOT ME.

YEAH. WELL, HE WAS SORT OF SAYING THAT HE PARTICIPATED IN THE GRAND THEFT. HE CALLED IT A GRAND THEFT, TAKING, HE HELPED BROWN TAKE THE STEREO EQUIPMENT OUT TO THE VICTIM'S AUTOMOBILE AND TO DRIVE AWAY WITH IT. THAT IS, THAT WAS THE THEORY OF DEFENSE AT TRIAL WAS I AM ONLY GUILTY OF GRAND THEFT. WHICH WOULD, OF COURSE, NOT BE. ROBBERY WOULD SUPPORT A FELONY MURDER CONVICTION. HE SAID THAT HE WASN'T GUILTY OF THE, YOU KNOW, EVEN IF, IT WAS SHRIMP A GRAND THEFT THAT HE ADMITTED TO. -- IT WAS SIMPLY A GRAND THEFT THAT HE MADED TO.

HOW DOES THE STATUTE CONCERNING BURGLARY APPLY IN THIS CASE? WHEN WAS THIS CASE TRIED IN RELATIONSHIP TO WHEN THAT STATUTE WAS PASSED?

OKAY. THIS CASE WAS TRIED RIGHT AFTER DELGADO CAME OUT. I BELIEVE DELGADO CAME OUT FEBRUARY 3, 2000, AND THE TRIAL HERE STARTED FEBRUARY 14, 2000. SO HE WAS TRIED DURING THE PERIOD THAT, BEFORE THE LEGISLATURE ACTED. HIS MOTION FOR NEW TRIAL, WHEN THE COUNSEL DISCOVERED DELGADO PENDING, AND ASKED THE JUDGE TO SET ASIDE THE VERDICT AND GRANT NO TRIAL -- AND GRANT A NEW TRIAL, THAT WAS HEARD AND DECIDED BEFORE THE LEGISLATURE ACTED TO ATTEMPT TO NULLIFY DELGADO. AND, OF COURSE, THIS COURT RECENTLY DECIDED IN FLOYD, THAT DELGADO WAS STILL APPLICABLE, THAT TO ALL EVENTS, THAT THE LEGISLATURE TOOK AWAY DELGADO RETROACTIVE TO FEBRUARY 1, 2000, THAT THAT DOESN'T AFFECT ANY PROSECUTIONS FOR ANY CRIMES THAT OCCURRED BEFORE FEBRUARY 1, 2000.

THIS CRIME WAS COMMITTED IN 1980.

1980.

AND IT WAS COMMITTED AT A TIME WHEN THE BURGLARY STATUTE WAS NOT INFECTED WITH DELGADO.

IT WAS BEFORE THE BURGLARY STATUTE WOULD ACTUALLY HAVE BEEN INTERPRETED, WITH REGARD TO THE REMAINING-IN LANGUAGE.

RIGHT T HAD THE REMAINING-IN LANGUAGE IN IT?

YES. YES. IT IS THE SAME STATUTE. IT IS THE SAME STATUTE.

OKAY. AND IN THIS INSTANCE, THE ONLY AGGRAVATOR THAT WAS FOUND WAS ROBBERY. THE UNDERLYING FELONY.

YES. THE FELONY.

YES. SO THAT IN THIS INSTANCE, WHAT WE ARE DEALING WITH IS AN INSTRUCTION ON BURGLARY THAT WAS DEALING WITH THE BURGLARY STATUTE THAT HAD BEEN INTERPRETED UNDER ROBERTSON, CORRECT?

WELL, IT IS THE SAME BURGLARY STATUTE, YES. YES.

RIGHT. AND HILLINEZ OUT OF THIS COURT. EEL-AND HEM I KNOWEZ OUT OF THIS -- AND JIMENEZ OUT OF THIS COURT, AND DELGADO WAS NOT FINAL AT THE TIME THAT THIS CASE WAS TRIED.

IT WAS NOT FINAL. IT WAS FINAL, OF COURSE, BY THE TIME THE TRIAL COURT RULED ON THE MOTION FOR NEW TRIAL.

AND THE TIME, WHEN THIS COURT RULED ON THE ISSUE OF RETRO ACTIVITY, IT HELD THAT DELGADO WAS NOT RETROACTIVE. IS THAT CORRECT?

THAT'S CORRECT WHEN IT WAS TRIED, THE MOTION BEFORE THIS COURT, IT WAS RULED THAT THE TRIAL JUDGE HAD COMMITTED ERROR AT THE TIME, UNDER THE EXISTING STATE OF THE LAW.

IT IS THE SAME CIRCUMSTANCE THAT WE FACED IN FLOYD, WHERE THERE WAS A BURGLARY AND THE JURY WAS INSTRUCTED ON IT, THAT SITUATION, CORRECT?

THAT'S CORRECT.

THE EXACT STATUTE AND THAT IS WHAT HAPPENED. THE ONLY DIFFERENCE THAT WE HAVE HERE IS THERE IS AN ADDITIONAL ROBBERY CHARGE.

THERE IS THE ADDITIONAL ROBBERY CHARGE WHICH COULD SUPPORT A FELONY MURDER THEORY, BUT AS I POINTED OUT IN MACKERLY AND LIONS FROM THE SECOND DISTRICT -- AND LYONS FROM THE SECOND DISTRICT, THAT IF THE JURY IS ALLOWED TO ADEQUATE A THEORY FOR THE CONVICTION, I BELIEVE THE BURGLARY CONVICTION, I BELIEVE IT WAS APPOINTED OUT, COULD NOT STAND, BECAUSE LEGALLY IT TAINTS THE VERDICT. I WOULD, ALSO, LIKE TO ADDRESS THE SECOND ISSUE, WHICH IS THE TRIAL COURT'S LIMITATION ON THE CROSS-EXAMINATION OF PAUL BROWN. NOW, PAUL BROWN WAS THE STAR WITNESS AT TRIAL. THE CONVICTION COULDN'T HAVE BEEN HAD WITHOUT PAUL BROWN'S TESTIMONY, AND IF THE JURY WAS DEPRIVED OF AN OPPORTUNITY TO LEARN ALL THE SAILIENT DETAILS ABOUT PAUL BROWN'S LIFE, WHICH WOULD HAVE A BEARING ON HIS CREDIBILITY AND THE CREDIBILITY OF PAUL BROWN WAS AN ABSOLUTELY ESSENTIAL THING FOR THE JURY. THERE WAS ACTUALLY THREE POSSIBILITIES HERE, EITHER IT WAS AS FITZPATRICK TESTIFIED, THAT PAUL BROWN DID THE STABBING, OR IT WAS PAUL BROWN TESTIFIED FITZPATRICK DID THE STABBING, OR THERE WAS LOTS OF CIRCUMSTANTIAL EVIDENCE THAT BOTH OF THEM COULD HAVE BEEN INVOLVED IN THIS.

ONE OF THE THINGS THAT YOU ARGUE ABOUT THE LIMITATION ON CROSS-EXAMINATION IS THIS POST-TRAUMATIC STRESS DISORDER.

YES.

HAS MR. BROWN BEEN DIAGNOSED WITH HAVING SUCH AN ILLNESS?

YES. YES, HE HAD, AND IN FACT HE WAS RECEIVING SOCIAL SECURITY DISABILITY PAYMENTS BASED ON HIS POST-TRAUMATIC STRESS SYNDROME.

AND WHAT DO YOU CONTEND IS, HAD THE TRIAL JUDGE ALLOWED THIS CROSS-EXAMINATION, WHAT WOULD IT HAVE DEMONSTRATED TO THE JURY?

WELL, WHAT WE REALLY WANTED TO SHOW TO THE JURY, WE WANTED THE JURY TO HEAR ALL THE EVIDENCE ABOUT PAUL BROWN, SO THEY COULD, YOU KNOW, EVALUATE THIS.

HOW WOULD THIS POST-TRAUMATIC STRESS DISORDER HAVE AIDED THE JURY IN ANY WAY?

WELL, IT WOULD HAVE GIVEN THEM AN IDEA OF SOMEONE WHO MIGHT EXPLODE, SOMEONE WHO, BECAUSE HIS, ANOTHER THING THAT THE DEFENSE WANTED TO BRING OUT IS THAT PAUL BROWN'S FATHER HAD MOLESTED HIM AS A CHILD, AND WHEN YOU HAVE A SITUATION WHERE YOU HAVE A STAR WITNESS AND THE JURY CAN'T, THE JURY SHOULD BE ABLE TO DECIDE, YOU KNOW, THEY ARE EACH POINTING THE FINGER AT EACH OTHER, A LOT OF WHAT GOES INTO THE JURY'S THINKING IS YOU KNOW, IS, WELL, WHO REALLY HAD THE MOTIVE HERE, TO YOU KNOW, TO COMMIT SUCH A CRIME? AND YOU KNOW, AND PERHAPS IT IS MUCH MORE PAUL BROWN THAN IT IS PAUL FITZPATRICK.

YOU ARE NOT TALKING ABOUT TRADITIONAL IMPEACHMENT, SO MUCH AS YOU ARE SUBSTANTIVE EVIDENCE THAT MIGHT POINT THE FINGER TOWARDS THIS OTHER PERSON, THAT CORRECT?

WELL, I AM TALKING ABOUT EVERYTHING THAT BEARS ON THE CREDIBILITY OF, YOU KNOW, JUST HOW IS THE JURY GOING TO PERCEIVE THIS WITNESS, WHEN THEY CAME BACK WITH THEIR QUESTIONS. I MEAN, THEIR QUESTIONS WERE ALL --

TRYING TO DETERMINE, NOW, WHETHER YOU FEEL THAT YOU WOULD HAVE BEEN ENTITLED TO CALL OR WHOEVER WAS THE TRIAL LAWYER, THE DEFENDANT, WOULD HAVE BEEP ABLE TO CALL WITNESSES, YOU KNOW, LIKE THE PHYSICIAN THAT DIAGNOSED THIS WITNESS OR PEOPLE THAT KNEW THE FACTUAL HISTORY OF THE WITNESS. IS IT YOUR POSITION IN THIS CASE, THAT IN ADDITION TO THE CROSS-EXAMINATION, THAT THIS EVIDENCE WOULD HAVE BEEN ADMISSIBLE IN THE DEFENDANT'S CASE-IN-CHIEF?

WELL, I THINK THAT IS, YOU KNOW, THAT IS A BRIDGE THAT YOU MIGHT CROSS, IF, YOU KNOW, IF YOU CROSS-EXAMINE PAUL BROWN AND THEY DENIED THESE THINGS, THEY YOU REALLY GET INTEREST IS THIS A COLLATERAL MATTER OR IS IT NOT.

IS IT IMPEACHMENT? I AM TRYING TO FIT IT INTO A CATEGORY, SO THAT WE CAN EVALUATE THE TRIAL COURT'S DISCRETION OR AUTHORITY.

IT GOES TO BIAS, AND IT GOES TO CREDIBILITY.

IT IS IMPEACHMENT. SO YOU SAID. OKAY.

ISN'T IT, ISN'T THAT SORT OF CHARACTER-TYPE EVIDENCE, AND YOU KNOW, WE LOOK AT USUALLY WHEN THEY HAVE SORT OF NOT REVERSE WILLIAMS RULE BUT YOU ARE TRYING TO PIN IT ON SOMEONE ELSE, WHETHER THE SAME TESTIMONY COULD THE STATE HAVE BROUGHT OUT THAT PAUL FITZPATRICK WAS MORE LIKELY TO DO IT BECAUSE OF THINGS THAT OCCURRED IN HIS BACKGROUND 15, 20 YEARS AGO. YOU CERTAINLY WOULD BE SDREEM SCREAMING TO SAY, NO, THEY CERTAINLY COULDN'T BRING THAT OUT, BECAUSE THE RELEVANCE, IT WOULD BE -- WOULD BE SCREAMING TO SAY, NO, THEY CERTAINLY COULDN'T BRING IT OUT, BECAUSE THE RELEVANCE, IT WOULD BE, SOMETHING IN A CATEGORY, SOMETHING HAPPENS TO SOMEONE AS CHILD, THAT AS TO EACH THING, YOU ARE NOW, SHOW THE -- SHOULD THE SAME STANDARDS APPLY, IN TERMS OF ANALYZING THE EVIDENCE.

WELL, LET'S SAY IN THE ORDINARY PROSECUTION, YOU KNOW, YOU CAN'T CROSS-EXAMINE A DEFENSE WITNESS ABOUT, YOU KNOW, BRING IN CHARACTER, UNLESS IT IS REALLY VERY WELL RANT, AND -- UNLESS IT IS REALLY RELEVANT, BUT THIS IS NOT THE ORDINARY SITUATION. THIS IS A SITUATION WHERE YOU HAVE A PERSON WHO HAD AT LEAST EQUAL MOTIVE IF NOT MORE, TO COMMIT THIS ACT, WHO IS, YOU KNOW, WHO IS THE STATE'S CHIEF WITNESS, AND YOU GET, WHEN THE STATE IS DEPENDING ON A STAR WITNESS, THIS STATE HAS SAID SEVERAL TIMES THAT YOU HAVE TO HAVE MORE, YOU KNOW, MORE LATITUDE IN CROSS-EXAMINATION. YOU CAN'T HAVE A REALLY RESTRICTIVE TYPE OF CROSS-EXAMINATION, WHICH IS WHAT THE TRIAL COURT DID HERE. I MEAN, PAUL BROWN SHOULD NOT BE PRESENTED AS JOHN Q CITIZEN. HE IS NOT. AND

THE JURY WAS REALLY DEPRIVED OF AN OPPORTUNITY TO JUST SORT THROUGH THIS WHOLE SITUATION. WHO ARE THE PEOPLE INVOLVED, AND YOU KNOW, WHO SHOULD BE BELIEVED AND WHO SHOULDN'T BE BELIEVED.

HOW DOES THIS TESTIMONY GO TO THE WITNESS'S BIAS, IF WE UNDERSTAND BIAS, ORDINARILY, TO MEAN THAT HE IS BIASED AGAINST THE THE DEFENDANT OR HOWEVER YOU, BUT I AM HAVING DIFFICULTY, IN HIS CHILDHOOD, SHOWS THAT HE IS BIASED OR THIS CONDITION THAT HE HAS SHOWS THAT HE IS BIASED. IS THAT YOUR POSITION?

WELL, IT IS SORT OF DAMAGE EVENINGSIALLY BIASED, BECAUSE -- SORT OF TANGIANTIALLY BIASED, BECAUSE IT HAS THAT THE CONVICTION OF PAUL FITZPATRICK BE CONVICTED AND PAUL BROWN BE SET FREE. IT IS A TANGENTIAL INTEREST HERE.

WAS IT BROUGHT OUT THAT IT WAS THIS WITNESS THAT COMMITTED THE MURDER?

THAT IS SORT OF WHERE IT IS GOING. I MEAN, YOU WILL CERTAINLY --

THAT IS NOT REALLY, THEN, THE IMPEACHMENT THAT YOU HAVE --

WELL, IT'S --

I AM HAVING TROUBLE, AS I SAID BEFORE, WHERE IS THERE, WHAT CASE IS IT THAT HAS THE CLOSEST ANALOGY TO A SITUATION LIKE THIS, WHERE YOU ARE BRINGING OUT BACKGROUND INFORMATION LIKE THAT? OF A WITNESS THAT COMES IN AND TESTIFIES.

I AM NOT SURE IF THERE REALLY IS A CASE THAT IS THAT CLOSE TO IT. WE WERE JUST TALKING, HERE, ABOUT THE UNITED STATES SUPREME COURT HAS SAID, YOU KNOW, WHEN YOU DENY ANY, YOU SHOW A CONFRONTATIONAL PLUS VIOLATION, WHEN THERE IS DENIAL OF APPROPRIATE CROSS-EXAMINATION, AND THIS WAS APPROPRIATE CROSS-EXAMINATION UNDER THE CIRCUMSTANCES.

BUT THE TRIAL COURT PERMITTED A GREAT DEAL OF TESTIMONY, WITH REGARD TO ALCOHOL AND THE USE OF DRUGS, AND THE IMPACT ON MEMORY AND THIS WITNESS IS APPARENTLY IMPEACHED PRETTY THOROUGHLY ON THOSE KINDS OF THING THAT IS IMPACT THE TESTIMONY IN THIS PARTICULAR CASE, AS OPPOSED TO THE SUBSTANCE OF HIS BACKGROUND, SO I AM HAVING DIFFICULTY SEPARATING THOSE TWO AS PEBTS.

WELL, JUST BECAUSE THE COURT ALLOWED CROSS-EXAMINATION ON SOME THINGS -- ASPECTS.

WELL, JUST BECAUSE THE COURT ALLOWED CROSS-EXAMINATION ON THOSE THINGS, WHAT WOULD BE BOUND TO COME OUT BECAUSE OF PAUL BROWN'S TESTIMONY ANYWAY, BECAUSE THAT EXPLAINS HOW HE HAPPENED TO GO TO, YOU KNOW, LOOKING FOR A DEAL IN THE FIRST PLACE TO TESTIFY.

IS THERE A PROFFER OF ANY OF THE SUBSTANTIVE BACKGROUND KIND OF THING, THAT IS OUTLINED FOR THE JUDGE IN A PROFFER THAT YOU CAN FIND? I DIDN'T SEE A PROFFER IN CONNECTION OF LOOKING FOR WHAT WAS REALLY THE TRIAL LAWYER WAS TRYING TO DO.

YEAH. WELL, THIS CAME UP ACTUALLY ON THE STATE'S MOTION IN LIMINE, AND THE STATE MOVED TO EXCLUDE ANY CROSS-EXAMINATION, BASED ON, THAT WENT TO THESE VARIOUS CATEGORIES, AND DEFENSE COUNSEL JUST BASICALLY SAID LET'S LET ME DO MY CROSS. IF YOU HAVE OBJECTIONS AT THE TIME, WE WILL DEAL WITH IT ON A, AS IT ARISES, AND THE STATE WAS ABLE TO GET THIS BLANKET ORDER SAYING STAY AWAY FROM THIS TOPIC, STAY AWAY FROM THAT, STAY AWAY FROM THAT.

BUT DON'T WE HAVE TO HAVE SOME KIND OF PROFFER, SO THAT WE CAN UNDERSTAND WHAT IT IS, THE SUBSTANCE OF WHERE YOU ARE TRYING TO GO WITH THAT?

I THINK IF IT HAD BEEN THE OTHER WAY AROUND, WHERE IT HAD BEEN THE DEFENSE COUNSEL THAT STARTED TO CROSS-EXAMINE AND THE JUDGE SAYS I DON'T SEE THE RELEVANCE OF IT, IT WOULD BE INCUMBENT UPON THE DEFENSE COUNSEL TO SHOW SOME KIND OF RELEVANCE TO WHERE HE WAS GOING, BUT THIS IS THE OTHER WAY AROUND. THIS IS WHERE THE STATE IS SAYING THESE ARE FORBIDDEN TOPICS. WE CAN'T, WE DON'T WANT YOU TO GO THERE, AND THE TRIAL JUDGE SAYING YOU CAN'T GO THERE, SO IN THAT POINT, I DON'T THINK THAT THE TRIAL COUNSEL HAS THE BURDEN TO SHOW, YOU KNOW, OTHER THAN WHAT HE ARGUED AS TO WHY HE WANTED TO GET, WHY THOSE TOPICS WERE RELEVANT. YOU KNOW, I DON'T THINK HE HAS ANY BURDEN TO SHOW ANY SPECIFICS AS TO YOU KNOW, WHAT HE WOULD HAVE SAID AND WOULD NOT HAVE SAID, IF HE HAD BEEN PERMITTED. IF THERE ARE NO FURTHER QUESTIONS, I WILL RESERVE THE BALANCE OF MY TIME.

YOU ARE NOT GOING TO TOUCH ON THE WILLIAMS RULE PROBLEM THAT YOU RAN INTO AT ALL?

JUST TO SAY THAT YOU KNOW, BASICALLY REITERATE WHAT I SAID IN MY BRIEF THAT, YOU KNOW, WHILE THERE WAS SIMILARITY BETWEEN THE TWO CRIMES, YOU HAVE DIFFERENCES IN THAT IT WAS PAUL BROWN'S IDEA IN THE FIRST PLACE, WITH THE FIRST SITUATION, AND THEN, TOO, YOU WOULD HAVE CRIMES THAT ARE, AS FAR AS A PERSON BEING INVITED INTO A HOMOSEXUAL'S HOME AND THEN ENDING UP ROBBING AND, YOU KNOW, TAKING THEIR PROPERTY, AND YOU KNOW, IN THIS PARTICULAR CASE, THE PERSON WAS STABBED TO DEATH. YOU KNOW, IT IS NOT REALLY AN UNIQUE CRIME, AND IT WAS USED TO PROVE FITZPATRICK'S IDENT.

IS THAT THE -- IDENTITY.

IS THAT THE ONLY REASON THE STATE PRODUCED IT IS FOR I HAD SNIT.

THEY LISTED A LOT OF REASONS.

COULD YOU ADDRESS THE REASONS, BECAUSE -- IT IS FOR IDENTITY?

THEY LISTED A LOT OF REASONS.

COULD YOU ADDRESS THE REASONS, BECAUSE THEY MENTIONED THE SIMILARITY, BUT WHAT BEING IT INTERTWINED WITH CASES LIKE ZACH AND HIMEY. COULD YOU DIFFERENTIATE THOSE CASES?

I THINK THE ONLY BASIS FOR SAYING THAT IT IS INTERTWINED IS BECAUSE IT SHOWS HOW BROWN AND FITZPATRICK HAPPENED TO BE IN FLORIDA, YOU KNOW, IN THE FIRST PLACE, AND THAT IS, BUT THAT IS REALLY ALL IT SHOWS. IT DOESN'T, IT DOESN'T SHOW THAT, THERE IS NOTHING ABOUT WHAT THEY DID TO MENARD THAT WOULD MEAN THAT IT WOULD HAVE TO HAPPEN TO SOMEONE ELSE.

HOW DID THIS GO, PROCEDURALLY? THAT IS YOU HAVE MENTIONED ABOUT THE STATE'S MOTION IN LIMINE, WITH REFERENCE TO THE OTHER ISSUE. IS THIS A SITUATION WHERE THE STATE FILED A NOTICE UNDER THE CRIMINAL RULE, WITH REFERENCE TO WILLIAMS?

YES. YES, THEY DID.

AND THERE WAS A HEARING IN ADVANCE OF TRIAL?

YES.

AND WHAT WAS THE CLAIM OF THE STATE, IN TERMS OF WANTING TO USE THIS EVIDENCE? IN OTHER WORDS WOULDN'T THAT ANSWER THE QUESTIONS THAT WE ARE ASKING NOW?

YES. IT WAS BASICALLY THAT THE STATE JUST CLAIMED IT WAS, YOU KNOW, IT WAS RELEVANT TO MOTIVE AT WHICH TIME WAS RELEVANT TO, YOU KNOW, THEY CALLED IT, THEY SAID THERE WAS SUBSTANTIAL SIMILARITY BETWEEN THE TWO. THEY SORT OF TRIED TO GET AWAY FROM THE FACT THAT THEY WERE TRYING TO PROVE IDENTITY OF FITZPATRICK, BUT THAT IS CLEARLY WHAT THEY WERE TRYING TO PROVE. AND THAT IS WHERE THE, YOU KNOW, THE HEIGHTENED TEST COMES IN, IS WHEN THEY ARE TRYING TO PROVE IDENTITY.

ALL RIGHT. THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS BOB LANDRY, REPRESENTING THE STATE ON THIS APPEAL. FIRST OF ALL WITH RESPECT TO THE DELGADO ISSUE, I JUST WANT TO CLARIFY SOME OF THE CHRONOLOGY AS TO THE TIMING ON THIS. OF COURSE, THE CRIME OCCURRED BACK IN FEBRUARY OF 1980. THAT IS WHEN THE MURDER WAS COMMITTED AND THE DEFENDANT FLED THE STATE. ULTIMATELY WAS CAPTURED 14 YEARS LATER, 15 YEARS LATER. THE TRIAL OCCURRED DURING THE WEEK OF FEBRUARY 14-THROUGH-18 OF THE YEAR 2000, AS COUNSEL MENTIONED, AND THAT WAS AFTER THIS COURT'S INITIAL OPINION IN DELGADO. DELGADO WON, WHERE IN I THINK THE COURT HAD INDICATED THAT THE BURGLARY CONVICTION HAD TO BE SET ASIDE BUT THE MURDER CONVICTION COULD STAND. SUBSEQUENTLY THE, THERE WAS, THE JURY RECOMMENDED DEATH ON FEBRUARY 22. THE NEW TRIAL MOTION THAT WAS FILED BY THE DEFENDANT WAS HEARD AND DENIED, I GUESS, ON JULY 28, AND AT THAT TIME, HE WAS ARGUING DELGADO WON, BECAUSE THIS COURT'S REVISED OPINION IN WHICH THE COURT HELD THAT THE MURDER CONVICTION COULD ALSO NOT STAND, THAT DID NOT ISSUE UNTIL AUGUST 1, SO WHAT WAS BEFORE THE TRIAL COURT, REALLY ON, A MOTION FOR NEW TRIAL THAT HE DENIED, WAS, REALLY, THE INITIAL DELGADO OPINION WHICH HAD NOT YET BECOME FINAL AT THAT TIME. SUBSEQUENTLY, OF COURSE, THE COURT, THE TRIAL COURT IMPOSEED A CENT OF DEATH ON SEPTEMBER 13 IN THE YEAR 2000. -- IMPOSED A SENTENCE OF DEATH IN THE YEAR 2000 ON SEPTEMBER 13. WE SUBSEQUENTLY ARGUED IN THE BRIEF AND IT IS NOW ABUNDANTLY CLEAR THAT THE LEGISLATURE HAS OVERRULED AND NULL -- NULLFIED DELGADO.

WOULD YOU ARGUE AT LEAST THAT ONE PHASE OF IT, THAT THE STATUTORY AMENDMENT IS NOT TO BE APPLIED TO THOSE EVENTS THAT OCCURRED PRIOR TO FEBRUARY OF THAT YEAR. WHERE DOES THAT TAKE US HERE, IF WE ASSUME THAT THE DELGADO THEORY WOULD APPLY, AND IT CANNOT SUPPORT THE FELONY MURDER UNDER THE BURGLAR I CHARGE? WE DO -- UNDER THE BARGALREADY I -- UNDER THE BURGLARY CHARGE? WE DO HAVE SEPARATE UNDER THIS AREA. WHAT IS IT THAT YOU SEE SHOULD APPLY HERE?

IF I UNDERSTAND YOUR HONOR'S QUESTION CORRECTLY, YOU ARE ASKING IF WE SHOULD ASSUME DELGADO IS CORRECT OR THE CASE LAW.

RIGHT.

IF DELGADO IS THE LAW GOVERNING HERE, I DON'T KNOW, IT SEEMS TO ME THAT WE MAY STILL BE IN THE SAME POSTURE OF THE REVISED OPINION IN DELGADO ON AUGUST 1, BECAUSE WHAT THE COURT HELD THERE, WAS THAT THE, BASICALLY WE COULDN'T, THE COURT COULDN'T DECIDE WHETHER OR NOT THE JURY HAD DECIDED, BASED ON A LEGITIMATE FAILURE OF PREMEDITATION, OR BASED ON THE ILLEGITIMATE THEORY OF BURGLARY FELONY MURDER, AND SINCE THE JIM COULDN'T BE MADE AS TO WHICH THEORY IT MIGHT HAVE BEEN RELIED UPON, THEN YOU HAD TO SET ASIDE THE WHOLE THING. HERE, OF COURSE, WE DO HAVE THE ADDITIONAL EXTRA EVIDENCE OF THE ROBBERY, BUT, AGAIN, WE STILL HAVE, I GUESS, PERHAPS A DILEMMA OF NOT KNOWING, YOU KNOW, WHICH ALTERNATIVE THEORY MAY HAVE BEEN ADOPTED AT ALL BY THE JURY, SO MY ANSWER TO THE WHOLE PROBLEM OF DELGADO IS THAT IT

WAS ERRONEOUSLY DECIDED T WASN'T THE LAW. THE LAW IN EFFECT AT THE TIME WAS ROUTLY AND McVEIGH, AND THOSE CASES SAID THAT WHEN YOU REMANY IN THE STRUCTURE AFTER BUILDING -- REMAIN IN THE STRUCTURE OF A BUILDING, PERMISSION IS WITHDRAWN, AND --

I THINK I FOUND MYSELF IN THE MINORITY THERE, SO WE REALLY HAVE TO WORK WITH DELGADO.

I THINK, AND WHAT THE LEGISLATURE HAS DONE WAS, WHEN THEY GOT TOGETHER IN MAY OF 2001, WAS BASICALLY SAY WE ARE SELECTING THE FEBRUARY 1 DATE TO COVER THE LAW THAT WAS IN EFFECT PRIOR TO DELGADO TWO DAYS BEFORE THE OPINION CAME OUT IN DELGADO, TO MAKE SURE THAT EVERYONE UNDERSTANDS THAT WHAT HAD PREVIOUSLY BEEN ANNOUNCED AS THE LAW IN VOLLEY AND IN ROBERTS AND IN ALL OF THESE OTHER CASES, AND I DON'T SEE ANY UNFAIRNESS TO THE DEFENDANT, BECAUSE THE DEFENDANT SAYS, YOU KNOW, YOU HAVE TO GIVE HIM THE BENEFIT OF THE LAW THAT WAS IN EFFECT AT THE TIME, TYPE OF THING.

MY QUESTION, SIR, IS PREDICATED ON, IF IT IS DETERMINED THAT THE LEGISLATURE COULD NOT DO THAT, THAT IS REALLY WHERE I WANTED ON TO SEE WHAT YOUR ANSWER IS BEFORE WE GO THERE, BECAUSE I THINK IT IS A DIFFERENT RESULT CERTAINLY. IT IS A DIFFERENT QUESTION YOU ARE ANSWERING, AND WHERE DOES YATES TAKE US, IF WE HAVE THE ADDITIONAL ROBBERY INVOLVED? DOES THAT TAKE US, DOES THAT SHED ANY LIGHT ON THIS? DOES THAT CREATE A DIFFERENT SITUATION?

WELL, YOU KNOW, THE YATES CASE AND REASONING, I THINK, YOU KNOW, PROBABLY STILL HAS PLIK ABILITY HERE. -- APPLICABILITY HERE. I DON'T KNOW, I AM NOT SURE WHETHER OR NOT THE COURT CAN DO A, YOU KNOW, HARMLESS-ERROR ANALYSIS AND SAY THAT THE JURY WOULD HAVE DECIDED, ON THE BASIS OF THE ROBBERY ALONE, ALTHOUGH TO ME IT SEEMS TO ME THAT THE FACTS OF THE CASE PRETTY MUCH DEMONSTRATE THAT IT WAS A ROBBERY THAT WAS INVOLVED IN THIS CASE.

BUT IS THERE ANY LAW THAT SAYS WE CAN DO IT ON A HRM HRMLESSNESS -- ON A HARMLESSNESS BASIS THAT YOU ARE AWARE OF?

I AM NOT AWARE OF ANY AT THE PRESENT TIME. MAYBE I HAVEN'T RESEARCHED YATES ENOUGH, BECAUSE, REALLY, THE SCOPE OF MY ARGUMENT AND WHERE I WAS GOING WITH THE BRIEF WAS SIMPLY, YOU KNOW, GOING FORWARD WITH TRYING TO ARGUE AND ASSERT THAT --

I CERTAINLY APPRECIATE YOUR CANDOR IN APPROACHING IT. THAT IS WHAT WE ARE REALLY NEEDING TO DISCUSS TODAY.

WELL, AND YOU KNOW, THE IDEA OF THE DEFENSE ARGUES THAT, REALLY, HE OUGHT TO BE PUT BACK IN THE POSTURE THAT HE WAS AT THE TIME OF THE CRIME IN 1980, AT THE TIME OF 1980, YOU KNOW, ROUTELY CAME OUT IN '83 BUT ROUTLY COMMITTED THIS CRIME? 1979. ROUTLY COMMITTED THIS CRIME IN 1979 AND ARGUED THAT YOU COULDN'T ARGUE A ROBBERY ON HOMICIDE, BECAUSE I WAS ALLOWED ON TO THE PREMISES AND SUBSEQUENTLY COMMITTED ALL OF THESE, ROBBERY, BURGLARY, KIDNAPING AND MURDER, AND THIS COURT REJECTED THAT, SO I THINK PUTTING HIM BACK IN THE POSTURE OF WHAT THE LAW WAS BACK IN 1980, IS HE WOULD LOSE. HE WOULD NOT GET THE BENEFIT OF THAT.

WHAT DOES THE RECORD SHOW US, AS FAR AS WHAT THE STATE ARGUED OR RELIED ON, REALIZING IT MAY NOT BE DETERMINEDTIVE -- DETERMINATIVE, BUT DID THE STATE RELY ON THE BURGLARY AS THE FELONY FOR THE FELONY MURDER?

IN THE, IN FRONT OF THE JURY, THE STATE?

IN OTHER WORDS, RIGHT, THE ARGUMENT TO THE JURY AND THE PRESENTATION OF THE CASE TO

THE JURY, DID THE STATE --

THE STATE ARGUED BOTH PREMEDITATION. THE STATE ARGUED FELONY MURDER BURGLARY AND FELONY MURDER ROBBERY, AND, OF COURSE, YOU KNOW, ALL THE EVIDENCE TO SUPPORT THE ROBBERY CERTAINLY INCLUDED THE FACT THAT THE VICTIM'S BODY APPARENTLY HAD BEEN TURNED OVER. THE WALLET HAD HE BEEN REMOVED FROM HIS BODY AND IT WAS COVERED WITH BLOOD AND LAYING NEARBY AND MONEY HAD BEEN TAKEN. THE STEREO EQUIPMENT HAD BEEN TAKEN. THE VICTIM'S AUTOMOBILE HAD BEEN TAKEN, JUST LIKE IN THE MENARD INCIDENT UP IN MASSACHUSETTS.

BUT THE STATE DIDN'T SEPARATELY FILE OR CHARGE HIM WITH ROBBERY, AND SO WE DON'T HAVE, IF THIS IS THE CASE WHERE THERE WAS A SEPARATE COUNT FOR ROBBERY, AND THE JURY FOUND IT, WE COULD RELY ON THE FACT THAT THERE WAS ACTUALLY AN ACTUAL FINDING OF ROBBERY, BUT WE DON'T HAVE THAT.

NO. THEY ONLY CHARGED FIRST-DEGREE MURDER AND THE STATE PROCEEDED ON THE ALTERNATIVE PREMEDITATION AND FELONY MURDER THEORIES. THERE IS NO, YOU KNOW, PERHAPS, PERHAPS THE STATE PROBABLY COULDN'T HAVE EVEN FILED CHARGES ON BURGLARY, BECAUSE THE STATUTE OF LIMITATIONS.

COULD YOU ADDRESS THE COLLATERAL CRIME ISSUE. ARE YOU STILL MAINTAINING, ON APPEAL, THAT THIS COMES IN FOR IDENTITY, AS OPPOSED TO SOME OF THE ALTERNATIVE BASIS?

WELL, I THINK THERE ARE MULTIPLE REASONS, AND JUSTIFICATIONS FOR THIS. I MEAN, I DON'T KNOW THE, CERTAINLY THE DEFENDANT'S IDENTITY WAS AN ISSUE UNIFORMITY I MEANEST, HAD PLED NOT GUILTY. -- I MEAN, HE HAD PLED NOT GUILTY. THE STATE DIDN'T KNOW WHAT HIS ULTIMATE EXPLANATION WAS GOING TO BE. HE HAD DENIED TO DETECTIVE RING, EVER BEING IN THIS PART OF THE STATE OF FLORIDA.

SURE BUT IDENTITY WAS AN ISSUE FOR SURE, BUT HOW DID THE CRIME IN MASSACHUSETTS HAVE THE KIND OF FINGERPRINT-TYPE OF SIMILARITIES, EXCUSE ME, LET ME FINISH, THAT WE HAVE HERE TO FORE REQUIRED, WHEN THE STATE IS USING IT FOR IDENTITY, AS OPPOSED TO OTHER PURPOSES?

WELL, I THINK YOU HAVE, AND MAYBE YOU WANT TO TIE IT INTO THE CONCEPT OF MODUS OPERANDI, THAT BASICALLY IT, MR. FITZPATRICK UTILIZES THE OPPORTUNITY THAT IS AVAILABLE TO PREY UPON A CERTAIN TYPE OF VICTIM, VULNERABLE HOMOSEXUAL VICTIM, WHEN HE NEEDS MONEY OR HAS, OR IS RUNNING LOW ON FUNDS, AND THAT OPPORTUNITY A VEILS ITSELF. CERTAINLY IN ADDITION TO THE IDENTITY, I MEAN, I THINK --

BUT MENARD WAS SOMEBODY THAT WAS WELL-KNOWN TO BROWN. THEY HAD HAD ALIVE-IN RELATIONSHIP, CORRECT? AND WHEREAS THE VICTIM IN THIS CASE WAS SOMEBODY THAT I GUESS WAS EITHER PICKED UP OR SOMEONE THAT HE DIDN'T KNOW. I MEAN, ISN'T THAT A PRETTY BIG DIFFERENCE?

WELL, THAT IS CERTAINLY A DISTINCTION, IN TERMS OF THE, HOW THE CRIME OCCURRED IN THIS INCIDENT. WE DON'T KNOW THE CIRCUMSTANCES OF HOW HE MET HOLLINGER, OTHER THAN HIS BASIC TESTIMONY.

AND IN THIS, THIS, IN ONE CASE, YOU HAVE GOT BROWN AND FITZPATRICK BOTH INVOLVED, AND THE OTHER ONE, THE STATE IS SAYING THAT ONLY FITZPATRICK IS INVOLVED. IN THE ONE YOU HAVE THAT THE MOTIVATION WAS THAT THEY WERE UP SET WITH THE FACT THAT HE WOULDN'T LET THE, WOULDN'T LET THEM USE THE CAR TO TAKE THE GIRLS HOME, AND THERE IS NO SIMILAR SITUATION. I MEAN, VIRTUALLY, I GUESS I AM JUST SEEING VERY, VERY LITTLE SIMILARITY, OTHER THAN THERE IS A FEW TERRIBLE CRIMES, AND WHEN SOMEONE IS MURDERED,

THE OTHER SOMEONE IS ROBBED, IDENTITY IS HOW IT CAN BE PUT IN FOR IDENTITY PURPOSES.

WELL, THE, CERTAINLY YOU KNOW, YOU HAVE AN ADDITIONAL, YOU KNOW, REQUIREMENT WHEN YOU ARE USING IT FOR PURPOSES OF IDENTITY, TO HAVE MORE THE FINGERPRINT SIMILARITY TYPE THING, BUT THAT UNIQUE CIRCUMSTANCES FACTOR DOESN'T APPLY FOR OTHER PURPOSES, LIKE MOTIVE. YOU KNOW, YOU HAVE THE FINNEY CASE, WHERE --

HOW IS, I AM SURE HAVING, FIRST OF ALL, DID THE JUDGE DO, BECAUSE IT SEEMS TO ME WHEN YOU LOOK AT OTHER THINGS, LIKE MOTIVE OR WHATEVER, YOU HAVE GOT TO DO AT SOME POINT, A 403 ANALYSIS TO SEE IF THE PREJUDICIAL EFFECT OUTWEIGHS ANY PROBATIVE VALUE, WHICH, IF YOU GET, HOW DOES THE MOTIVE FOR THE CRIME DOWN IN FLORIDA, RELATE TO THE FACTS OF THE CRIME UP IN MASSACHUSETTS?

WELL, I THINK IN BOTH INSTANCES, IT WAS A SITUATION WHERE THE DEFENDANT NEEDED MONEY. THE OPPORTUNITY WAS THERE TO TAKE MONEY TO STEAL THE STEREO AND PAWN THAT.

BUT THAT IS SIMILARITY. I MEAN, HOW DOES THE CRIME THAT OCCURRED IN MASSACHUSETTS LEAD TO A MOTIVE FOR A CRIME DOWN IN FLORIDA?

WELL, THE CRIME IN MASSACHUSETTS, YOU KNOW, PROVIDED THE, YOU MIGHT SAY LIMITED FUNDS AVAILABLE FOR THEM TO COME TO FLORIDA IN THE FIRST PLACE. AND THE SITUATION WITH HOLLINGER AS A VICTIM WAS A SIMILAR-TYPE SITUATION, WHERE THE, HOWEVER THE DEFENDANT MET MR. HOLLINGER, HE WAS EITHER INVITED INTO HIS HOME OR CAME INTO HIS HOME, AND WITH A SIMILAR TYPE VICTIM AND THE OPPORTUNITY WAS THERE TO STEAL AND, IN THIS INSTANCE, OBVIOUSLY IT WAS A DIFFERENT KIND OF RESULT. THERE WAS ONLY ONE PERSON ACTING RATHER THAN TWO. THEREFORE THERE WAS MORE AFTER STRUGGLE.

THAT, AGAIN, I GUESS YOU ARE STILL GOING GOOD BACK TO -- GOING BACK TO IDENTIFYITY, BUT YOU SAY THE MOTIVE, YOU SAY THE REASON THEY WERE IN FLORIDA WAS BECAUSE THEY HAD GOTTEN THE MONEY IN MASSACHUSETTS, AND THEREFORE THAT ALL OF THE DETAILS OF THE CRIME UP IN MASSACHUSETTS BECOME RELEVANT, TO SHOW WHY THEY WOULD HAVE BEEN IN FLORIDA?

WELL, THE, IN TERMS OF, I MEAN I DON'T THINK THAT THE JURY CAN UNDERSTAND THIS CASE, UNLESS THEY UNDERSTAND WHAT HAPPENED IN MASSACHUSETTS. I THINK THERE IS A IN INEXPLICABLY INTERTWINED ASPECT TO THIS WHICH EVEN THE DEFENSE ACKNOWLEDGED AT THE TIME OF THE HEARING ON THIS. HERE WE HAVE A DEFENDANT WHO LIVES UP IN MASSACHUSETTS, HAS NO CONNECTION TO FLORIDA WHATSOEVER, AND THERE IS BASICALLY NO CONNECTION TO HIM BY WHICH THE JURY CAN UNDERSTAND HOW AND WHY THIS WOULD HAVE OCCURRED. AFTER THEY HAD ROBBED MR. MENARD UP IN MASSACHUSETTS AND COME TO FLORIDA AND ENGAGED IN PARTYING FOR A WEEK, THE TESTIMONY WAS CLEAR THAT THE MONEY WAS RUNNING OUT. THEY ONLY PROBABLY HAD LESS THAN $100 AT THAT POINT, SO OBVIOUSLY MR. FITZPATRICK, YOU KNOW, CERTAINLY SAW AN OPPORTUNITY AND AVAILED HIMSELF OF IT.

INEXTRICABLY INTERTWINED, WHICH IS ZACH, AND TO ME I GET CONCERNED WHEN COLLATERAL CRIMES EVIDENCE, WHICH IS THE MOST HIGHLY INFLAMMATORY KIND OF EVIDENCE THAT, WHEN WE BLUR THE THEORIES, WE POTENTIALLY DON'T GIVE ENOUGH GUIDANCE TO THE TRIAL COURTS ON IT. MOTIVE AND INEXTRICABLY INTERTWINED ARE JUST TWO DIFFERENT THEORIES, AND YOU ARE NOW THROWING IN THAT THERE WAS A CONCESSION. ARE YOU SAYING CONCESSION AT TRIAL THAT THESE WERE INEXTRICABLY INTERTWINED, THAT YOU COULDN'T, THAT THE JURY WOULD NEVER UNDERSTAND WHAT HAPPENED IN THIS CRIME, WITHOUT UNDERSTANDING --

I AM SAYING --

-- WHAT OCCURRED IN MASSACHUSETTS?

I AM SAYING THAT WHETHER THEY HAD A HEARING ON WHETHER SOME OF THE COLLATERAL EVIDENCE SHOULD BE EXCLUDED OR NOT, I AM SAYING THAT THE DEFENSE COUNSEL STATED AFFIRMATIVELY IN THE RECORD, THAT HE UNDERSTOOD THAT A LOT OF THIS STUFF WAS INEXTRICABLY INTERTWINED, THE MENARD CRIME UP IN MASSACHUSETTS AND THE CRIME HERE, IN FLORIDA. HE WAS APPARENTLY TRYING TO LIMIT, PERHAPS, SOME OTHER CRIMINAL ACTIVITY THAT HAD OCCURRED, AND THE STATE WAS, YOU KNOW, GOING TO BE DWROOING, IN TERMS OF THE TRIAL, AND I THINK THAT THIS CASE LAW OUT OF THIS COURT DEMONSTRATES THAT YOU DON'T HAVE TO HAVE, YOU KNOW, HAVE TO HAVE ONE PIECE OF JUSTIFICATION TO ALLOW OTHER EVIDENCE IN,.

WHAT WAS THE, WAS THERE A BALANCING TEST EMPLOYED TO SAY, WELL, YOU DON'T, IF YOU ARE GOING TO SHOW IT, TO SHOW THAT THEY WERE IN MASSACHUSETTS, BUT THEN THEY KMATED CRIME, AND THEY WENT DOWN TO FLORIDA -- COMMITTED A CRIME AND THEN THEY WENT DOWN TO FLORIDA, TO LIMIT THE DETAILS OF WHAT OCCURRED IN THE HOME IN MASSACHUSETTS IS NOT REALLY BEING RELEVANT TO WHAT IT WAS BEING SOUGHT TO BE ADMITTED FOR, TO HAVE, THAT THE PREJUDICE OUTWEIGHED ANY PROBATIVE VALUE FOR THAT REASON? DID THAT OCCUR IN THIS CASE?

THE TRIAL COURT ENTERED A WRITTEN ORDER. HE HAS A WRITTEN ORDER IN THE RECORD ON THAT, AND I CAN'T RECALL, NOW, WHETHER OR NOT HE TALKED ABOUT IN ANY PARTICULAR DETAIL, AS TO WHETHER ANY OF THE DESIRED TESTIMONY WOULD HAVE PREJUDICIAL IMPACT OR NOT, BUT HE DID SAY THAT HE REGARDED ALL, AS RELEVANT FOR ALL OF THE REASONS STATED IN THE STATE'S BRIEF, AS WELL AS IN HIS ORDER OBVIOUSLY.

I AM STILL HAVING DIFFICULTY WITH YOUR, WITH THE THEORY OF ADMISSIBILITY HERE, THAT WAS ADVANCED BY THE STATE. YOU ARE SAYING, IS IT FOR IDENTITY? IS THAT --

WELL, I THINK --

IN OTHER WORDS LIST OFF FOR ME WHAT ARE THE THEORIES THAT THE STATE OFFERED THIS AND THAT ARE --

WELL, THE STATE OFFERED IT TO SHOW HIS IDENTITY, THAT THERE WAS THE IDENTITY OF THE CRIMINAL.

IS THAT REALLY GOING TO HOLD UP, UNDER A WILLIAMS RULE ANALYSIS HERE, WHERE WE HAVE THESE TWO, REALLY, TOTALLY DIFFERENT CIRCUMSTANCES? THE THING WITH THE UNCLE AND THE GIRLS AND SORT OF A SPONTANEOUS THING, THAT YOU, YOURSELF, SAID MODUS OPERANDI, BUT WE DON'T HAVE A DEFENDANT THAT HAS BEEN COMMITTING A STRING OF CRIMES, AND YOU KNOW, SORT OF HAS A, IF THE GLOVE FITS KIND OF SITUATION HERE, DO WE?

WELL, I THINK THE CASE THAT I WOULD RELY ON IS CHANDLER VERSUS STATE, WHERE THE DEFENDANT, HE KILLED A MOTHER AND HER TWO DAUGHTERS.

THERE YOU DO HAVE, DON'T YOU, THE APPROACH OF WOMEN UNDER THESE --

BUT --

I THOUGHT THE EPISODE IN MASSACHUSETTS ARGUMENT WAS THAT, REALLY, IT WAS THE OTHER, BROWN THAT WAS INVOLVED, AND THIS WAS BROWN'S UNCLE OR WHATEVER, AND IT HAD TO DO WITH THE GIRLS AND ALL, YOU KNOW, THAT. THAT IT WASN'T PICKING UP A HOMOSEXUAL ON THE STREET OR WHATEVER, AND GOING TO THEIR HOUSE AND DOING SOMETHING.

BUT WHEN YOU LOOK AT THE TESTIMONY OF MR. MENARD, MENARD TESTIFIEDFIED IN ALL OF THIS, AND HIS TESTIMONY IS VERY MUCH NOT ASSERTING THE SUBORDINATE POSITION OF MR. FITZPATRICK THAT IS BEING ARGUED HERE TODAY. MR. MENARD'S VIEW OF IT ALL WAS THAT FITZPATRICK WAS THE ONE WHO PUT THE KNIFE TO HIS THROAT. HE SAID, HE TESTIFIED HE COULDN'T UNDERSTAND WHY FITZPATRICK WOULD BE SO ANGRY TO HIM, BECAUSE HE, YOU KNOW, HARDLY KNEW OF TYPE OF THING, AND THAT -- KNEW HIM TYPE OF THING, AND THAT HE MADE A STATEMENT, MENARD MADE A STATEMENT TO BROWN BUT HE SAID IT LOUD ENOUGH FOR FITZPATRICK TO HEAR IT, BECAUSE HE WANTED FITZPATRICK TO HEAR IT, TO THE EFFECT OF, YOU KNOW, I HOPE YOU DON'T DO ANYTHING TO ME, I HOPE YOU DON'T HARM ME OR KILL ME OR WHATEVER, BECAUSE THERE ARE PEOPLE IN THE OFFICE, YOU KNOW, WHO KNOW ABOUT YOU, MR., MEANING MR. BROWN, AND THE EFFECT OF IT WAS THE AUTHORITIES WILL BE ABLE TO TRACE THE PERPETRATORS OF ANYTHING BAD TO ME, IF ANYTHING BAD HAPPENS TO ME, AND HE MADE THAT STATEMENT, BECAUSE HE SAID HE WANTED FITZPATRICK TO HEAR IT. I MEAN, HIS, THE MENARD TESTIMONY IS QUITE CLEAR THAT IT IS FITZPATRICK THAT IS THE RINGLEADER, THE MAN TO BE FEARED IN THIS EPISODE. YOU TIE THAT IN WITH WHEN HE COMES DOWN TO FLORIDA AND, OF COURSE, FITZPATRICK IS ACTING ALONE NOW, FOR HOLLINGER, AND HE DOESN'T HAVE HELP TYING ANYBODY UP. HE DOESN'T --

BUT DOESN'T THAT JUST SHOW THAT THESE THINGS ARE NOT THE SAME? THAT IS THAT THE STATE'S THEORY IN THIS CASE IS THAT FITZPATRICK IS ACTING ALONE, WHEREAS IN THE OTHER CASE, IT APPEARS THAT THAT WAS INITIATED BY BROWN IN TOTALLY DIFFERENT CIRCUMSTANCES.

IT IS TRUE THAT THE MENARD INCIDENT, THE TWO PEOPLE WERE TOGETHER, AND IN THE HOLLINGER INCIDENT THEY WEREN'T, BUT I GO BACK TO CHANDLER, BECAUSE IN CHANDLER, THE ARGUMENT WAS THE INCIDENT THAT IS BEING PROSECUTED AND THE WAY IT HAPPENED WAS DIFFERENT FROM OTHER RAEP INCIDENTS WITH MR. -- RAPE INCIDENTS WITH MR. CHANDLER, AND THIS COURT SAID, WELL, YOU KNOW, THE KINDS OF VICTIMS MAY HAVE BEEN DIFFERENT T MAY HAVE BEEN A DIFFERENT APPROACH THAT THE DEFENDANT TOOK TO IT ALL, BUT IT WAS CLOSE ENOUGH. IT DIDN'T HAVE TO BE THE EXACT CIRCUMSTANCES, AND DUCK SET ANOTHER CASE WHERE -- AND DUCKET. IT IS ANOTHER CASE WHERE I THINK --

AREN'T YOU SAYING THAT WE HAVE REALLY BROADENED THE WILLIAMS RULE TO BE ALMOST ANYTHING? IF THESE TWO HAD COMMIT ADD ROBBERY AFTER 7-ELEVEN IN MASSACHUSETTS, I TAKE IT THAT THAT WOULD HAVE BEEN ADMISSIBLE, IF THAT IS WHY THEY WERE IN FLORIDA?

NO. I THINK WE, THERE WASN'T AN OPEN SESAME IN CHANDLER, THAT ANY KIND OF CRIME CAN COME IN. THE PURPOSE OF WILLIAMS RULE, WHAT IS CONDEMNED IN WILLIAMS RULE IS SIMPLY THE STATE MAY NOT MAKE A GENERAL ATTACK ON CHARACTER, AND I DON'T THINK THAT THERE HAS SIMPLY BEEN A GENERAL ATTACK ON CHARACTER HERE. I THINK THAT THE CRIME UP IN MASSACHUSETTS WITH MR. MENARD HAS GREAT DEAL OF BEARING AND UNDERSTANDING OF WHAT HAPPENED TO MR. HOLLINGER. FITZPATRICK HAS NO CONNECTION TO FLORIDA WHATSOEVER. OBVIOUSLY HIS FINGERPRINTS ARE ULTIMATELY FOUND THEIR, AND HE HAS TO FIND SOME WAY TO EXPLAIN THAT --

THE ROBBERY OF THE 7-ELEVEN IN MASSACHUSETTS AND THAT IS WHAT THEY WERE FLEEING FROM, THAT WOULD ALSO EXPLAIN WHY THEY WERE IN FLORIDA AND THE CONNECTION TO FLORIDA, SO I TAKE IT THAT THAT WOULD BE YOUR SAME THEORY.

BUT I THINK THERE IS MORE SIMILARITIES HERE THAN A HOLDUP. I THINK YOU HAVE THE SELECTION OF A VICTIM. CERTAIN VULNERABLE VICTIM IN HIS RESIDENCE. YOU HAD THE SAME, STEALING THE SAME VEHICLE, SAME ITEMS, VEHICLE, WALLET, CLOTHING, A STEREO EQUIPMENT. I MEAN, IT IS SIMPLY WHAT SEEMS TO ME IS THAT IT IS AN OPPORTUNITY, A CRIME OF OPPORTUNITY THAT MR. FITZPATRICK AFTER ALD HIMSELF OF. -- AVAILED OF SLM OF IN THIS

INSTANCE.

-- AVAILED HIMSELF OF IN THIS INSTANCE.

WOULD YOU ADDRESS THE CROSS-EXAMINATIONISH JEW?

YES. WHAT HAPPENED WAS -- THE CROSS-EXAMINATION ISSUE?

YES. WHAT HAPPENED WAS, WHEN THE STATE HAD CONCLUDED ITS DIRECTION OF MR. BROWN, THE STATE HAD APPARENTLY A PENDING MOTION IN LIMINE IN EFFECT AND WANTED TO BE HEARD ON THAT, AND THE DEFENDANT ARGUED THAT HE WANTED TO BE ABLE TO CROSS-EXAMINE MR. BROWN AS TO WHETHER OR NOT HE COULD GET INTO THE FACT THAT, IN DEPOSITION, BROWN HAD STATED THAT HE HAD A SOCIAL SECURITY DISABILITY FOR POST-TRAUMATIC STRESS DISORDER. THE STATE ARGUED THAT BASICALLY I THINK UNDER THE EDWARDS LINE OF CASES, THAT UNLESS YOU CAN SHOW THAT THE, YOU CAN PROFFER EVIDENCE OR SOME KIND OF CASE LAW TO THE EFFECTIVE THAT UNLESS YOU CAN SHOW THAT POST-TRAUMATIC STRESS DISORDER WOULD AFFECT ONE'S ABILITY TO TEST MY -- TESTIFY, THAT IF THEY COULDN'T DO THAT, WHAT IT SIMPLY WAS, WAS TO SIMPLY MAKE A CHARACTER ATTACK ON THE WITNESS. THE TRIAL COURT BASICALLY AGREED WITH THE STATE AND FOUND THAT IT WASN'T RELEVANT TO THE SITUATION. WITH RESPECT TO THE COMPLAINT THAT THE DEFENSE WANTED TO GET INTO, THE FACT OF MOLESTATION BY THE FATHER OF THE DEFENDANT, ESSENTIALLY WHAT THEY WERE TRYING TO DO WAS THEY MADE THE ARGUMENT TO THE COURT THAT IT IS MORE LIKELY THAT HE WOULD LASH OUT TOWARDS HOMOSEXUALS, BUT I MEAN, IF YOU, THERE IS NO PROFFER MADE, IN TERMS OF THERE WAS NO OFFER OF IF WE ASKED THESE QUESTIONS, HERE IS WHAT THE ANSWERS ARE GOING TO BE, AND IF YOU LOOK AT THE DEPOSITION OF MR. BROWN, THERE IS NO INDICATION IN THERE AT ALL THAT HE HAS ANY KIND OF HOSTILITY, ANGER, BIAS OR ANYTHING ELSE TOWARDS HOMOSEXUALS. WHAT, WE SUBMIT THAT THIS CASE IS PRETTY MUCH LIKE THE HABER CASE THAT WE HAVE CITED IN OUR BRIEF. HABER WAS A CASE IN WHICH MRS. HABER WAS CHARGED WITH THE MURDER OF HER HUSBAND AND HAD USED MR. GRANT, I BELIEVE, TO COMMIT THE CRIME. WHEN GRANT TESTIFIED ON CROSS-EXAMINATION, THE DEFENSE WANTED TO, REALLY, POSE A NUMBER OF QUESTIONS, REALLY, DESIGNED TO SHOW THAT HE WAS, THAT HE RATHER THAN MRS. BROWN WAS RESPONSIBLE FOR THE CRIME, TYPE OF STUFF, AND THE FEDERAL COURT DENIED HABEAS RELIEF ON THE DEFENSE ARGUMENT THAT HIS CONFRONTATION RIGHTS WERE VIOLATED, HIS CROSS-EXAMINATION RIGHTS WERE LIMITED, AND SAYING YOU ARE NOT REALLY GETTING INTO BIAS. YOU ARE REALLY TRYING TO PROVE THAT HE WAS A KILLER, AND THAT IS NOT, THE COURT COULD LIMIT THE CROSS-EXAMINATION IN --

WHAT WAS THE DEFENSE HERE? WHAT WAS THE DEFENSE OFFERED BY -- AS IT TURNED OUT, AS IT TURNED OUT, THE DEFENDANT GOT ON THE STAND AND SAID I WAS THERE. I WAS PRESENT. I WAS INVITED IN PIE HOLLINGER AND HAD A FEW DRINKS AND PASSED OUT ON THE COUCH, AND WHEN I WOKE UP, IT WAS -- INVITED IN BY HOLLINGER AND HAD A FEW DRINKS AND PASSED OUT ON THE COUCH, AND WHEN I WOKE UP, IT WAS BROWN THAT HAD THE VICTIM AND STABBED HIM AND WAS KILLING HIM.

IS THAT HOW IT PLAYED OUT?

THAT IS ULTIMATELY HOW THE CASE PLAYED OUT. I DON'T KNOW THAT THE TRIAL COURT WAS EVER TOLD THAT WE ARE GOING TO GET ON THE STAND AND DO THAT. WE DON'T KNOW. IT WAS KIND OF LIMITED AT THAT POINT, AS TO WHAT THE REASONING WAS, AS TO WHY IT WOULD BE, WHY IT WOULD BE RELEVANT. I SUBMIT THAT, AT THE VERY LEAST, THAT TRIAL COUNSEL SHOULD HAVE SAID, JUDGE, HERE IS WHERE WE ARE GOING WITH THIS. WE ARE GOING TO SAY HE DID IT AND THIS IS WHAT WE THINK HE IS GOING TO ANSWER TO IT. BY THE WAY, WE WOULD SUBMIT THAT, WHEN YOU LOOK AT THE TOTALITY OF THE TOTAL CROSS-EXAMINATION AND

EVERYTHING ELSE, THAT DEFENSE COUNSEL WAS BEGIN A GREAT DEAL OF OPPORTUNITY TO INQUIRE INTO HIS BIAS, HIS MOTIVATION. THEY INQUIRED AS TO, YOU KNOW, WHY HE HAD LIED, IF HE HAD LIED TO DETECTIVE RING, WHETHER HE FEARED GOING BACK TO PRISON AND WHY HE WASN'T FORTHCOMING WITH EVERYTHING. DID HE HAVE ANY KIND OF CONCERNS ABOUT BEING CHARGED WITH EITHER AS AN ACCESSORY OR SOMETHING ELSE. I MEAN, THERE WAS SIGNIFICANT AND MASSIVE CROSS-EXAMINATION AS TO HIS MOTIVES AND BIAS IN THE CASE.

IF YOU COULD JUST SWITCH GEARS FOR A MOMENT, BECAUSE I DON'T KNOW HOW MUCH MORE TIME YOU HAVE, ISSUES FIVE AND SIX RAISE ISSUES RELATED TO IN THIS CASE, THE JURY RETURNED A DEATH RECOMMENDATION OF 8-TO-4, AND THE DEFENDANT RAISED AN ISSUE OF, AS I UNDERSTAND IT, AT THE TRIAL COURT AND NOW HERE, THAT A NONUNANIMOUS JURY RECOMMENDATION IS UNCONSTITUTIONAL, BOTH UNDER THE FLORIDA CONSTITUTION AND, ALSO, IN LIGHT OF RING. COULD YOU ADDRESS, SINCE THIS IS A DIRECT APPEAL, SO IT IS IN A DIFFERENT PROCEDURAL POSTURE AS SOME OF THE OTHER CASES WE ARE CONSIDERING, AND SINCE THIS WAS A 8-TO-4 RECOMMENDATION, WHY THE REASONING OF THE UNITED STATES SUPREME COURT IN RING AND OUR PRIOR OPINION IN ALFORD, DOES NOT REALLY REQUIRE THAT THERE BE AN UNANIMOUS JURY FINDING OF THE AGGRAVATORS.

WELL, YOU KNOW, I, OBVIOUSLY THE CASE IS BEFORE THE COURT IN THE KING AND BOTTOSON CASES, AND --

KING WAS 12-0 AND THEY ARE IN POSTCONVICTION. THIS IS --

WELL, THIS IS -- AS TO SIMPLY WHETHER IT IS A, YOU KNOW, A VIOLATION OF THERE HAS TO BE AN UNANIMOUS, I MEAN, HE WAS, MY OPPONENT, I THINK, WAS SIMPLY CITING STATE LAW CASES, TO THE EFFECT THAT, YOU KNOW, THOSE CASES SHOULD NOT BE ADHERED TO. I DON'T KNOW THAT THEY MADE THAT KIND --

THAT IS PRETTY IMPORTANT THOUGH, BECAUSE WE DO HAVE THE AUTHORITY TO RECEDE FROM STATE LAW CASES, IF THEY ARE NO LONGER OF PROPER CONSTITUTIONAL SIGNIFICANCE, IN LIGHT OF THE UNITED STATES SUPREME COURT --

LET ME JUST RESPOND TO ISSUE SIX ON THE APRENDI/RING ARGUMENT, AND AS WE ARGUED IN OUR BRIEF, WE THINK THIS CLAIM IS PROCEDURALLY BARRED. HE DID NOT FILE ANY KIND OF COMPLAINT OR MOTION BELOW, AS I RECALL, SAYING THAT THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL REQUIRED WHATEVER RING AND APRENDI HELD TO REQUIRE. HIS COMPLAINT WAS THAT I HAVEN'T BEEN GIVEN NOTICE ENOUGH FOR COUNSEL, IS NOT GOING TO BE EFFECTIVE IN NOT UNDERSTANDING WHAT THE AGGRAVATORS ARE AND THINGS OF THAT NATURE, SO HIS, YOU KNOW, HE HAD THE OPPORTUNITY. HE CAN'T ARGUE THAT HE DIDN'T, HE COULDN'T HAVE, HE DIDN'T HAVE THE TOOLS TO CONSTRUCT THE ARGUMENT, BECAUSE JONES WAS THE UNITED STATES WAS OUT ON THE BOOKS. HE CERTAINLY COULD HAVE SAID I AM GOING RELY ON JONES AND OBVIOUSLY APRENDI SAID THAT JONES WAS A PRECURSOR TO APRENDI, SO WE ASSERT FIRST OF ALL, THAT THE CLAIM IS PROCEDURALLY BARRED, AND SECONDLY THAT IT IS MERITLESS UNDER THE KING AND BOTTOSON LINE OF CASES.

CHIEF JUSTICE: THANK YOU VERY MUCH.

IF YOU HAVE NO FURTHER QUESTIONS, I ASK THE COURT TO AFFIRM. THANK YOU.

CHIEF JUSTICE: COUNSEL. HOW MUCH TIME DOES COUNSEL HAVE LEFT?

I WOULD JUST LIKE TO ADDRESS A FEW MOINTS POINTS BRIEFLY. ONE -- A FEW POINTS BRIEFLY. ONE WAS JUSTICE LEWIS WAS ASKING ABOUT A YATES LINE OF CASES, AND THERE IS A MORE RECENT CASE, GRIFFIN V UNITED STATES 502 US 4619191, WHICH SAYS THAT JURY -- 502 US 46, 1991, WHICH SAYS THAT THE JURY, IT FOLLOWS YATES AND SAYS THAT THE VERDICT CAN'T STAND. I

WOULD LIKE TO MENTION, ON THE COLLATERAL CRIME ISSUE, COUNSFOLT STATE WAS MENTIONING CHANDLER AS HIS AUTHORITY FOR ALLOWING THE EVIDENCE IN. NOW, CHANDLER WAS A VERY, THE COURT DID ALLOW IT ON -- COUNSEL FOR THE STATE WAS MENTIONING CHANDLER AS HIS AUTHORITY FOR ALLOWING IT IN, THE EVIDENCE IN, NOW, CHANDLER WAS A VERY, THE COURT DID ALLOW IT ON THE STANDING THAT THE MAN DID INVITE YOUNG WOMEN TO GO OUT ON A BOAT WITH HIM. HE TOOK ONE WOMAN OUT ON A BOAT AND RAPED HER AND BROUGHT HER BACK AND THEN HE TOOK THREE OTHER WOMEN OUT ON THE BOAT AND THEY WERE MURDERED, AND THE ARGUMENT WASN'T THAT, BECAUSE THE FIRST CRIME WAS A RAPE AND THE OTHER ONE WAS MURDER, THAT IT WASN'T SUFFICIENTLY SIMILAR, AND THIS COURT SAID, WELL, YOU KNOW, IT IS CLOSE ENOUGH, THE FACT THAT HE TOOK, USED A BOAT. THAT IS NOT THE, THAT IS NOT AS SIMILAR A, THAT IS VERY UNUSUAL TYPE OF THING FOR A DEFENDANT TO EMPLOYEE. AS REGARDS THE STATE'S ARGUMENT THAT IT WAS NOT PRESERVED, THE RING ISSUE, THE FACT OF THE MATTER IS THAT TRIAL COUNSEL DID ASK FOR A STATEMENT OF AGGRAVATING CIRCUMSTANCES, AND THEN SPECIFICALLY REQUIRED, ASKED FOR A VERDICT FORM FOR THE JURY TO HAVE THEIR VOTE ON EACH OF THE AGGRAVATING CIRCUMSTANCES THEY WERE INSTRUCTED ON, AND OUR POSITION IS --

WAS THERE AN ISSUE ABOUT THE UNANIMITY, THAT IS REQUIRING THE JURY TO BE UNANIMOUS?

THAT, ALSO, WAS A MOTION THAT WAS RAISED BY DEFENSE COUNSEL, WAS DENIED BY THE TRIAL JUDGE, BASED ON THE AUTHORITY OF ALFORD. NOW --

SO THEY DID ASK FOR, THAT IT BE AN UNANIMOUS VERDICT.

WELL, IT WAS ALSO, IT WAS SAYING THAT, BASICALLY A VERDICT THAT IS NOT UNANIMOUS, THAT IS TAINTED BUT ALSO RAISING THE FACT THAT, UNDER FEDERAL CASE LAW UNDER JOHNSON V La, A VERDICT -- UNDER JOHNSON V LOUISIANA, A VERDICT, THAT THE UNITED STATES SUPREME COURT APPROVED A 9-TO-3 GUILT OR INNOCENCE VERDICT ON NONUNANIMOUS, BUT SAID THAT ANYTHING LESS THAN 9-TO-3 IS NOT A SUBSTANTIAL MAJORITY AND WOULD GET THEM IN TROUBLE AND WELL ARE TRYING ON TO APPLY TAKE TO A DEATH PENALTY SITUATION THAT, ANYTHING LESS THAN A 9-TO-3 VERDICT, AND OF COURSE THIS IS ALL PRE-RING, BUT WE ARE SAYING THAT THAT IS CONSTITUTIONALLY IMPERMISSIBLE.

CHIEF JUSTICE: OKAY. THANK YOU VERY MUCH. THANK YOU BOTH VERY MUCH. THE COURT WILL NOW STAND IN RECESS UNTIL TEN O'CLOCK TOMORROW MORNING.