Wydell Jody Evans v. State of Florida

MR. CHIEF JUSTICE

THE FINAL CASE ON THIS MORNING'S ORAL ARGUMENT CALENDAR IS EVANS VERSUS STATE. MR. BECKER.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. COUNSEL. MY NAME IS MIKE BECKER, AND I AM ASSISTANT PUBLIC DEFENDER IN DAYTONA BEACH, AND I REPRESENT WYDELL JODY EVANS. MR. I HAVE ANSWER WAS CHARGED -- IN EVANS WAS CHARGED, BY INDICTMENT, WITH ONE COUNT OF FIRST-DEGREE PREMEDITATED MURDER ONE COUNT OF KIDNAPING OF ANGEL FOSTER AND ERIC HOGAN WITH THE INTENT TO COMMIT FELONY, TO WIT MURDER, A COUNT WITH AN AGGRAVATED ASSAULT USING A FIREARM ON HOGAN AND A COUNT OF PRIOR CONVICTION OF A FELON. THIS LAST COUNT WAS A SEVERED TRIAL AND WAS NOT INCLUDED IN THIS APPEAL. MR. EVANS WAS CONVICTED, AFTER A JURY TRIAL, OF ALL THREE CHARGES AND AT A PENALTY PHASE THE JURY RECOMMENDED DEATH BY A COUNT OF 10-TO-2. THE TRIAL COURT SENTENCED MVANS TO DH FOR THE MURDER, FING TWO AGGRAVATING FACTORS, AND SOME MITIGATING FACTORS. HE, ALSO, SENTENCED HIM TO LIFE FOR THE KIDNAPING, AS A PRISON RELEASEE REOFFENDER AND A CONCURRENT SENTENCE OF 108 MONTHS FOR AGGRAVATED ASSAULT, WHICH WAS A GUIDELINE SENTENCE. ON APPEAL MR. EVANS RAISED SIX ISSUES, AND BECAUSE OF TIME CONSTRAINTS, I DON'T THINK I WILL GET TO ALL SIX ISSUES, AND I WANT THE COURT KNOW THAT ANY I DON'T GET TO, WE WILL RELY ON OUR ARGUMENTS AND WHAT IS IN THE BRIEF. THE FIRST ISSUE IS ARTICLE I IN THE BRIEF, AND THAT IS THAT THE TRIAL COURT ERRED IN ALLOWING THE POLICE OFFICERS TO TESTIFY AS TO HEARSAY STATEMENTS WHICH WERE MADE BY ERICA FOSTER AND SAMMY HOGAN. THE TRIAL COURT RULED THAT THEE STATEMENTS IDENTIFYING THE APPELLANT AS HAVING COMMITTD THE OFFENSES WERE ADMISSIBLE AS EXCITED UTTERANCES. ON APPEAL WE CON FEND THAT THIS RULE -- WE CONTEND THAT THIS RULING BY THE TRIAL COURT WAS ERROR. THE SHOOTING OF ANGEL FOSTER, WHICH WAS THE VICTIM IN THIS CASE, OCCURRED IN SAMMY HOGAN'S CAR. SAMMY HOGAN, ANGEL FOSTER, ERICA I AM SORRY, ANGEL JOHNSON, ERICA FOSTER, AND APPELLANT ADLIENO ODNAD, ANOTHER INDIVIDUAL PRESENT IN THE CAR AT THE TIME.

DID THOSE PERSONS TESTIFY?

YES, THEY DID. ALL FOUR SURVIVING INDIVIDUALS TESTIFIED AT TRIAL.

I REALIZE IT IS SORT OF IN REVERSE OF, BUT LET'S ASSUME THAT IT WAS ERROR BY THE TRIAL COURT TO ADMIT THOSE OUT OF COURT STATEMENTS. HOW WAS YOUR CLIENT HARMED, THIS THIS -- IN THIS PARTICULAR CASE, BY THE ADMISSION OF THOSE STATEMENTS, SINCE AT LEAST THOSE TWO WITNESSES TESTIFIED AND GAVE EXTENSIVE TESTIMONY AND THEN WERE CROSS-EXAMINED. HELP ME WITH THAT PROPOSITION.

OKAY. THIS CASE BOILED DOWN TO BASICALLY A SWEARING MATCH BETWEEN SAMMY HOGAN AND ERICA FOSTER, ON THE ONE HAND, AND LENA ODNAD ON THE OTHER HAND. THE DEFENSE IN THIS CASE WAS SPENT SDENTAL SHOOTING, SO -- ACCIDENTAL SHOOTING, SO IT WAS REALLY CRITICAL AS TO WHAT HAPPENED IN THIS THING AND THE CREDIBILITY OF THE WITNESSES WAS ABSOLUTELY CRUCIAL IN THIS CASE. SAMMY HOGAN AND ERICA FOSTER INITIALLY LIED ABOUT THIS AND THEIR TESTIMONY IS REPLETE IN ALL KINDS OF INSTANCES,S IN THE WHOLE TRIAL, THERE IS A LOT OF INCONSISTENCY THROUGHOUT. SO THEIR CREDIBILITY, AFTER THEY ALLOWED

THE POLICE OFFICERS TO TESTIFY TO BASICALLY COME IN AND RECOUNT THIS, AND ALSO THESE WERE POLICE OFFICERS WHO KNEW THESE INDIVIDUALS FOR A LONG PERIOD OF TIME, WERE FAMILIAR WITH THEM, IT GAVE A STAMP OF APPROVAL TO THE SUBSEQUENT STATEMENTS AND, IN ESSENCE, BOLSTERED THEIR CREDIBILITY, AND WHEN IT COMES DOWN TO, AS I SAID A SWEARING MATCH, THEN THE CREDIBILITY IS THE KEY ISSUE HERE, AND THAT IS WHY IT IS HARMFUL ERROR IN THIS PARTICULAR CASE.

WHAT WAS THE STATEMENT, WHAT WAS THE STATEMENT THAT WAS ADMITTED?

BASICALLY THE RECOUNTING OF, THAT THERE WAS AN ARGUMENT AND APPELLANT SHOT ANGEL FOSTER AND POINTED THE GUN AT HER AND SHOT HER.

SO IT WASN'T JUST IDENTIFICATION OF THE DEFENDANT, BUT IT WAS THE ACTUAL RAE COUNTING OF HOW IT HAPPENED -- THE ACTUAL RECOUNTING OF HOW IT HAPPENED?

HOW THE DEFENDANT DID IT, YES AND, AGAIN, THE INITIAL STATEMENTS BY BOTH SAMMY HOGAN AND ERICA FOSTER WAS THAT THIS WAS A DRUG DEAL THAT WENT BAD, AND THAT ANGEL HAD SOLD SOME BAD DRUG TO SAY A WHITE MALE, AND IN A CREAM-COLORED CAR OR AN ORANGE OR YELLOW COUGAR CAR OR SOMETHING LIKE THAT. ERICA FOSTER CHANGED HER TESTIMONY, ONLY AFTER OFFICER YORKE SAID YOU ARE LYING, AND IT WAS DONE SPECIFICALLY IN RESPONSE TO QUESTIONING BY THE POLICE OFFICERS.

BUT WASN'T THAT SORT OF AN ACROSS-THE-BOARD, AS TO ALMOST ALL THE WITNESSES? THAT IS THAT INITIALLY THEY ALL TRIED TO AVOID THE FACT OF HOW THE INCIDENT ACTUALLY OCCURRED, AS FAR AS THE DEFENDANT'S INVOLVEMENT AND WHAT OCCURRED HERE.

I THINK THAT'S RIGHT, EXCEPT --

AND EVERYBODY, THAT THE TRIAL MORE OR LESS CONCEDED THAT THT IS WHAT HAD OCCURRED, THAT IS THAT EVODS COMING UP WITH SORT OF A FABRICATED STORY, TO BEGIN W.

EXACTLY. I THINK THE ONLY ONE WHO MAY BE CONSISTENT THROUGHOUT WAS LENA ODNAD. HE HAD OTHER INCONSISTENCY, BUT I THINK HE WAS FAIRLY CONSISTENT THROUGHOUT HIS TESTIMONY.

THE DRUGSTORE I REALLY WAS NEVER ACCREDIT -- THE DRUG STORY WAS NEVER REALLY A CREDIBLE STORY BEFORE THE JUDGE OR THE JURY, WAS IT? AND CERTAINLY THE DEFENDANT, NOBODY REALLY ASERTED THAT, OTHER THAN AS AN INITIAL REACTION TO COVER UP.

RIGHT. RIGHT.

AND THIS WAS ALL EXPLORED DURING THE TRIAL, WAS IT NOT?

THE FACT THAT THEY LIED.

FABRICATIONS AND ALL THOSE KINDS OF THINGS, I MEAN, THROUGH CROSS-EXAMINATION.

IT WAS, YES, BUT, AGAIN, YOU HAVE TO UNDERSTAND THAT THIS TESTIMONY, THE OFFENDING TESTIMONY, WE ARE CONTENDING, CAME FROM POLICE OFFICERS. POLICE OFFICERS ARE GIVEN, JUST IN THE HIERARCHY OF THINGS, A LOT MORE CREDIBILITY. CERTAINLY IN THIS CASE, BEYOND ANY QUESTION, THEY WERE GIVEN A LOT MORE CREDIBILITY THAN THE WILDLY DIVERGENT TESTIMONY OF THE PARTICIPANTS HERE.

WASN'T THERE A CLAIM HERE THAT THE WITNESSES, IN TALKING ABOUT THE SHOOTING, AS IT WAS, WERE ACTUALLY LYING OR FABRICATING THAT OR WAS THE CLAIM MORE OF THE

PERCEPTION AND THE CIRCUMSTANCES THAT EVERYBODY HAD A DIFFERENT STORY WHERE THEY WERE LOCATED. HELP ME WITH THAT, BECAUSE NOBODY DENIED THAT THE DEFENDANT IS THE ONE THAT HAD THE WEAPON, AND THAT WAS THE WEAPON THAT CAUSED THE DEATH.

RIGHT. EXACTLY.

AND SO, BUT ARE WE TALKING, NOW, ABOUT A WITNESS THAT, WHERE THE CLAIM WAS, WELL, THAT WITNESS ISSOLUTELY FABRICATING THE STORY KIND OF THING, AND I AM STATING IT IN EXTREME TERMS, JUST TO HAVE YOU EXPLAIN, OR WAS IT THAT DIFFERENT PERCEPTIONS THAT COULD REALLY, BE ACCOUNTED FOR, YOU KNOW, BY THE FACT THAT THEY WERE IN A DIFFERENT POSITION AND HOW THEY MIGHT HAVE SEEN IT.

THE VICTIM WAS IN THE BACKSEAT OF THE CAR, AND TWO OF THE WITNESSES WERE IN THE BACKSEAT WITH THEM, SO PRESUMABLY THEY WOULD HAVE KIND OF THE SAME PERSPECTIVE, YOU WOULD THINK.

ONE RIGHT BY THE VICTIM, AND THE OTHER FURTHER AWAY.

RIGHT. BUT I MEAN, THEY ARE ALL THREE IN THE BACKSEAT OF A CAR, AND SAMMY HOGAN WAS DRIVING, AND PRESUMABLY WHILE HE IS DRIVING, HE IS NOT TURNED AROUND LOOKING, SO HE CERTAINLY HAS A DIFFERENT PERSPECTIVE ON THAT, SO, YES, THERE IS A QUESTION OF PERSPECTIVES HERE FROM WITNESSES BUT I DON'T THINK THAT THEY ALL NECESSARILY ALL OF THEM HAD COMPLETELY DIFFERENT PERSPECTIVES. SO I AM NOT SURE IT IS AS CRUCIAL, WITH REGARD, CERTAINLY, TO THE TWO IN THE BACKSEAT.

ARE, THE TWO WITNESSES WERE VERY ASSERTIVE, IN TERMS OF THE DEFENDANT INTENTIONALLY FIRING THE SHOT INTO THE VICTIM OR NOT?

WELL, THAT IS A GOOD QUESTION. SOMETIMES THEY WERE AND SOMETIMES THEY WEREN'T. SO I GUESS THE ANSWER, NO, THEY WEREN'T, BECAUSE SOMETIMES THEY WERE AND SOMETIMES THEY WEREN'T, BUT ON OCCASION THEY WERE VERY ASSERTIVE ABOUT WHAT HAPPENED, AND OTHER TIMES THEY SAID, NO, LENA ODNAD, WHEN I SAID HE WAS CONSISTENT ALL OF THE WAY AROUND AND I TAKE THAT BACK NOW, HE REALLY WASN'T, IN THAT HE BASICALLY CHANGED HIS STORY A LITTLE BIT, SAYING THAT IT WASN'T INTENTIONAL, TOO, IT WAS AN ACCIDENT, BUT HE NEVER CAME UP WITH A STORY ABOUT A DRUG DEAL GOING BAD. THAT IS WHAT I MEANT IN THAT REGARD. MR. CHIEF JUSTICE

JUSTICE SHAW HAD A QUESTION.

YOU RAISE TWO ISSUES RELATIVE TO THE KIDNAPING. ONE IS ADDRESSED TO THE INSTRUCTION, ITSELF, AND THE OTHER IS TO WHER OR NOT THERE WAS A KIDNAPING. WOULD YOU ADDRESS THOSE.

I WOULD BE GLAD TO, YOUR HONOR. THAT, IN FACT, WAS GOING TO BE MY NEXT ISSUE HERE, IF I CAN JUST GET TO IT. AND I WILL START WITH THE CONFUSING INSTRUCTION, AND IN THIS CASE, IT IS IMPORTANT TO UNDTAND WT THE JURY WAS CHARGED WITH OR WHAT THE DEFENDANT WAS CHARGED WITH. HE IS CHARGED WITH KIDNAPING, AND THE CHARGE, ITSELF, IS SOMEWHAT OF A CONFUSING CHARGE, BECAUSE CHARGED WITH KIDNAPING ALL THREE PEOPLE IN A SINGLE COUNT. IT DOESN'T SAY "OR". IT SAYS "AND". WHEREAS IT DOESN'T SAY "AND" AND R". ITSAYS WITH INTENT TO INFLICT BODILY HARM OR TO TERROE R TO COMMIA FELOY, WHIH IS O WIT MURDER. WHEN THE JURY IS INSTRUCTED AND THE INSTRUCTION IN THE RECORD COMBINES THE JURY INSTRUCTION ON THESE TWO THEORIES, AND, FOR INSTANCE, IF YOU ARE PROCEEDING ON THE THEORY THAT IT IS KIDNAPING WITH THE INTENT TO FACILITATE THE COMMISSION AFTER FELONY, THEN ONE OF THE ELEMENTS IS THAT -- THE COMMISSION OF A FELONY, THEN ONE OF THE ELEMENTS IS THAT YOU MUST INSTRUCT THEM WITH THE INTENT TO FACILITATE THE

COMMISSION OF A FELONY, TO WIT MURDER, AND THEN, AFTER THAT IN DEFINING AND REFINING WHAT THE CONFINEMENT REQUIREMENTS ARE THEY GO ON TO SAY THAT THE CONFINEMENT MUST NOT BE INCIDENTAL TO THE FELONY. MUST HAVE MADE RISK OF DETECTION GREAT ERROR WHATEVER. IT TOTALLY ELIMINATED THAT ELEMENT BUT STILL GAVE THOSE, SO THEY MADE NO SENSE, BECAUSE THEY SAID, YOU KNOW, THE CONFINEMENT MUST NOT BE MERELY INCIDENTAL TO THE FELONY. WHAT FELONY ARE THEY TALKING ABOUT? IF THEY ARE TALKING ABOUT KIDNAPING, THEN WE HAVE GOT A CIRCULAR ARGUMENT GOING, BECAUSE YOU CAN'T SAY THAT THAT IS THE FELONY THAT YOU ARE INTENDING TO FACILITATE. IT IS SORT OF LIKE, AND THERE ARE THOSE CASES ON THE BURGLARY STATUTE, WHERE IT SAYS YOU ARE CHARGED WITH BREAKING AND ENTERING, WITH THE INTENT TO COMMIT AN OFFENSE, TO WIT BURGLARY, AND THE COURTS HAVE CONDEMNED THAT, BECAUSE THAT IS A CIRCULAR INSTRUCTION. IT CAN'T BE BURGLARY THAT THE OFFENSE THAT YOU ARE INTENDING TO COMMIT CAN'T BE BURGLARY. SIMILARLY HERE IT CAN'T OBVIOUY BE KIDNAPING, BUT THEY WEREN'T TOLD THAT, AND THE INSTRUCTION JUST SAYS "THE FELONY", SO BECAUSE THEY ILLUMINATED THAT ELEMENT, THAT ESSENTIAL ELEMENT OF THE MURDER, IT BECOMES A VERY CONFUSING INSTRUCTION HERE. AND IT IS, ALSO, THE INTENT TO TERRORIZE, YOU, ALSO, HAVE A QUESTION IN THIS CASE, AS TO WHEN THIS KIDNAPING EVEN STARTED BECAUSE WITHOUT QUESTION, EVERYBODY WAS TOGETHER VOLUNTARILY INITIALLY, SAMMY HOGAN --

WAS THE INSTRUCTION USED, IN ANY WAY, BY THE PROSECUTION, TO ARGUE IMPROPERLY TO THE JURY, WITH REFERENCE TO PROVING THIS CLAIM? IN OTHER WORDS DID THE PROSECUTION, THEN, IN SOME WAY TAKE ADVANTAGE OF THE CONFUSING NATURE OF THE INSTRUCTION?

NO. NO. AND I WON'T TELL THIS COURT THAT IT DID.

HOW ABOUT ADDRESSING THE SUFFICIENCY OF THE EVIDENCE, WITH REFERENCE TO THE -- THERE WERE THREE KIDNAPING -- THESE ARE THE THREE PEOPLE IN THE BACKSEAT OF THE VEHICLE?

RIGHT. NO. NO. TWO IN THE BACKSEAT AND THEN THE DRIVER. THE THIRD IN THE BACKSEAT, LENA ODNAD, WAS NOT LISTED AS A VICTIM. IT WAS SAMMY HOGAN'S CAR. SAMMY HOGAN AGREED TO TAKE APPELLANT TO COCOA. THEY WERE IN THE CAR VOLUNTARILY. THEY SAW THE TWO GIRLS ON THE SIDE OF THE ROAD. THEY STOPPED. APPELLANT TALKED TO ANGEL. ANGEL, THEN, TALKED TO ERIC AND SAID DO YOU WANT TO GO TO COCOA WITH THEM? THEY GOT IN THE CAR. THEY ARE ALL RIDING ALONG. THEY STOP AND GET GAS. THEY GET SNACKS.

BUT AFTER THE SHOOTING OF ANGEL, ISN'T, I NOTE THE TRIAL JUDGE, IN THE SENTENCING ORDER, SAYS THAT THE DEFENDANT TURNED THE GUN ON SAMMY, AND TOLD HIM TO DRIVE TO THE HOUSE WHERE HE WAS GOING TO, BIG DICK'S HOUSE, I THINK WAS THE TESTIMONY, OR THASTTHE TRIAL JUDGE FOUND.

WELL, DON'T FORGET THAT MR. EVANS WAS CONVICTED OF AGGRAVATED ASSAULT ON SAMMY.

WELL --

FOR POINTING THE GUN AT HIM AND THREATENING HIM.

THE TRIAL JUDGE SAID, IN THE SENTENCING ORDER THAT, THE DEFENDANT REFUSED TO ALLOW SAMMY HOGAN TO DRIVE TO THE HOSPITAL. INSTEAD HE POINTED THE GUN AT SAMMY HOGAN AND TOLD HIM TO DRIVE TO BIG DICK'S HOUSE.

WELL, AND APPARENTLY HE DID DRIVE TO BIG DICK'S HOUSE. AND IF THAT IS KIDNAPING, IT IS CERTAINLY NOT KIDNAPING OF ANGEL JOHNSON AND --

WHAT WAS THE THERE I HAVE KIDNAP SOMETHING.

THAT THIS WAS TERRORIZING, BASICALLY, IS WHAT THEY WENT OFF ON.

FROM THE BEGINNING? IN OTHER WORDS FROM THE --

I GUESS FROM THE BEGINNING, FROM WHEN THE GUN GOT PULLED OUT. FROM THAT BEGINNING. CERTAINLY THE BEGINNING WHEN THEY GET IN THE CAR, I DON'T THINK THE STATE WAS EVER SUGGESTING THAT HE WAS TERRORIZING THEM AT THAT POINT, AND THERE WAS NO EVIDENCE TO SUPPORT THAT, EITHER. ONCE, AND, AGAIN, THIS GOES BACK TO THE CONFUSING WAY THAT THIS IS CHARGED. IS HE CHARGED WITH KIDNAPING ALL THREE OF THEM, NOT JUST ONE OF THEM. SO PRESUMABLY THE STATE SHOULD HAVE TO PROVE ALL THREE OF THEM, PAW THAT IS HOW THEY CHARGED IT, AND I DON'T THINK THAT YOU CAN PROVE THAT THERE IS KIDNAPING ON ANGEL, BECAUSE I DON'T THINK SHE WAS EVER CONFINED AGAINST HER WILL IN THIS CASE FOR ANY PURPOSE. THEN, AS TO THE OTHER TWO, YES, HE POINTED THE GUN AT SAMMY, BUT HE WAS CONVICTED OF THE AGGRAVATED ASSAULT ON SAMMY.

SHE DIDN'T DIE INSTANTLY, DID SHE?

WELL, SHE DIDN'T -- I MEAN, IT WAS NOT AN INSTANT DEATH, BUT ACCORDING TO THE MEDICAL EXAMINER WHO DID THE AUTY, SAID SHE WOULD HAVE BEEN RENDERED UNCONSCIOUS IN JUST A FEW MINUTES.

SHE WAS TAKEN, THOUGH, FROM WHERE SHE WAS SHOT TO, WAS SHE NOT IN THE CAR, WHEN THEY WENT TO BIG DICK'S HOUSE TO BORROW --

YES, SHE WAS.

SO SHE WAS, RATHER THAN BEING TAKEN TO THE HOSPITAL, SHE WAS DIRECTED. WASN'T THERE SOME DISCUSSION THERE ABOUT TAKING HER TO THE HOSPITAL?

YOU KNOW, THERE WAS, AND, AGAIN, THIS IS ANOTHER PROBLEM THAT WE HAVE WITH THE RECORD HERE. I DON'T KNOW WHERE BIG DICK'S HOUSE WAS, IN RELATION TO WHERE SHE GOT SHOT, EXCEPT THAT WE KNOW IT WASN'T TOO FAR, BECAUSE OF THE TIME FRAME THAT IS INVOLVED HERE.

SHE WAS MOVED FROM WHEREVER SHE WAS SHOT TO BIG DICK'S HOUSE.

RIGHT. BUT, YOU KNOW, YOU CAN SAY SHE WAS MOVED BY SAMMY HOGAN. HE WAS DRIVING. WHEN IT GOT TO BIG DICK'S HOUSE, ALSO, THEY HAD EVERY OPPORTUNITY TO JUST LEAVE. DEFENDANT WAS OUT OF THE CAR, AND HE DIDN'T HAVE THE GUN AT THAT POINT. IT IS FAIRLY CLEAR THAT HE DID NOT HAVE THE GUN AT THAT POINT.

AT SOME POINT, DIDN'T HE GIVE THE GUN TO --

LENO, AND LENO TOLD THEM TO LEAVE.

AT WHAT POINT DID THAT OCCUR? AT BIG DICK'S HOUSE?

IT IS NOT CLEAR FROM THE WITNESSES AND THE WITNESSES SOMEWHAT DISAGREE ON THIS, BUT ONE WITNESS SAID IMMEDIATELY AFTER THE SHOOTING HE GAVE IT TO LENO. ANOTHER SAID WHEN THEY GOT TO BIG DICK'S, HE GAVE IT TO LENO, BUT AT ANY POINT, AT BIG DICK'S, THE DEFENDANT DIDN'T HAVE THE GUN. LENO HAD IT, AND LENO TOLD HIM TO GET OUT.

WHAT DID THEY ARGUE TO THE JURY, THE STATE, AS TO WHEN HE TOLD HIM TO GET OUT?

IT OCCURRED, AGAIN, THEY WENT ON THE TERRORIZING THEORY MAINLY SO IT WOULD HAVE TO

BE FROM THE POINT THE GUN WAS BROUGHT OUT, IS WHAT THEY ARGUED HERE, BUT, AGAIN, THEY ARE CHARGED WITH ALL THREE OF THEM, AND I DON'T THINK UNDER ANY THEORY, REALLY, ANGEL FIT IN AS A KIDNAPING CHARGE. AND YOU KNOW, THEN YOU WONDER WHY LENO WASN'T INCLUDED IN THERE, BECAUSE SUPPOSEDLY HE WAS UNDER THE SAME, YOU KNOW, POWER OR WHATEVER, OF APPELLANT, SO I JUST DON'T THINK THERE IS ANY EVIDENCE TO WITHSTAND A KIDNAPING CHARGE IN THIS CASE, AND INTERESTINGLY, THE JUDGE, HE WAS NOT CHARGED WITH FELONY MURDER, WAS NOT INSTRUCTED ON FELONY MURDER, AND THE JUDGE DENIED AND THE STATE DIDN'T EVEN ARGUE THAT THIS WAS IN THE COURSE OF A KIDNAPING. MR. CHIEF JUSTICE

JUSTICE SHAW HAD A QUESTION.

WELL, IF SOMEBODY HAD A QUESTION STILL ON THE KIDNAPING.

YES, I DO. WHAT EFFECT, IF WE WERE TO, SINCE THERE IS ENOUGH EVIDENCE OF PREMEDITATED MURDER, WHAT EFFECT DOES NOT FINDING SUFFICIENT EVIDENCE OF KIDNAPING THE VICTIM HAVE ON THE MURDER DEATH SENTENCE?

WELL, IT NECESSARILY WOULDN'T HAVE ANYTHING ON THE DEATH SENTENCE, BECAUSE THERE WASN'T AN AGGRAVATING CIRCUMSTANCE FOUND OUT OF THERE, BUT IT WOULD CHANGE, PERHAPS, THE WAY THAT THE JUDGE LOOKED AT THIS. BECAUSE THE JUDGE WAS OF THE OPINION THAT THERE WAS A KID THATING, APPARENTLY. SO HIS WHOLE FINDINGS MIGHT COME INTO PLAY THEN ON THERE, AND HE CERTAINLY SHOULD BE GIVEN THE OPTION AND THE DUTY TO REEVALUATE THAT, IN LIGHT OF THAT.

BUT THEY DIDN'T USE THE KIDNAPING AS AN AGGRAVATING CIRCUMSTANCE.

NO, BUT THE JUDGE HAD, BEFORE HIM, THE FACTS THAT THE STATE WAS ARGUING TO SUPPORT THE KIDNAPING. AND, I MEAN, THE FACTS, THE WHOLE FACTS OF THE CASE, I THINK ARE PART AND PARCEL OF HIS FINDINGS OF FACT FOR THE MURDER. NO, THEY WEREN'T USED AS A SEPARATE AGGRAVATING CIRCUMSTANCE, BUT I DON'T THINK THAT YOU CAN SAY THAT THE COURT JUST DISCOUNTED.

WHAT WOULD YOU DO? SEND IT -- WHAT WOULD YOU SUGGEST THAT WE DO, SEND IT BACK FOR REEVALUATION?

YES. I THINK YOU SHOULD. IF YOU FIND THAT THERE IS SUFFICIENT EVIDENCE, YOU KNOW, TO SUPPORT THE MURDER BUT NOT THE KIDNAPING, YES. IT WOULD HAVE TO GO BACK, ANYWAY FOR RESENTENCING.

WHAT WOULD A TRIAL JUDGE DO? HE SAID I DIDN'T FIND THIS EXISTED AS AN AGGRAVATING FACTOR. I DIDN'T CONSIDER IT.

WELL, THERE ARE FINDINGS IN HIS FINDINGS OF FACT THAT INDICATE THAT A KIDNAPING WAS COMMITTED, SO HIS FINDINGS OF FACT WOULD BE FAULTY IN THIS. AND I MEAN, WE DON'T KNOW WHAT IMPACT IT HAD ON HIM. THAT IS WHY WE WOULD ASK THAT IT WOULD BE SENT BACK FOR RECONSIDERATION.

BUT WHAT DO THE FACTS ACTUALLY, EVEN IF THERE IS NO KIDNAPING, THE FACT THAT HE PUT THE GUN ON THE GUY, TOLD THE GUY TO GO TO THIS OTHER PERSON'S HOUSE, THOSE FACTS ARE FACTS, WHETHER THEY CONSTITUTE KIDNAPING OR NOT.

BUT IF THE JUDGE THINKS THEY ARE KIDNAPING, IT IS JUST TO SAY THAT IT IS ANOTHER CRIME THAT WAS COMMITTED, I THINK, I DON'T THINK WE CAN JUST SAY THAT THE JUDGE IGNORED. THAT I MEAN, HUMAN NATURE WOULD TELL YOU, IF THERE IS ANOTHER CRIME INVOLVED HERE

THAT, THAT IS ANOTHER FACTOR YOU WOULD CONSIDER. NOW, YOU DON'T CONSIDER IT NECESSARILY A SEPARATE AGGRAVATING FACTOR, BUT I MEAN, JUDGES, AGAIN, ARE HUMAN. THEY ARE GOING TO CONSIDER A LOT OF THINGS. MR. CHIEF JUSTICE

JUSTICE SHAW HAS A QUESTION.

I DON'T THINK I HAVE EVER SEEN THE PSI USED AS IT WAS IN THIS INSTANCE, BEFORE THE JURY, SO TELL US --

I HAVEN'T, EITHER.

-- TELL US WHAT THE HARM IS HERE TO YOUR CLIENT, PREJUDICED HERE.

YOU DID NOT HAVE THE PREP REMEMBER COME IN, SO YOU -- A PREPARER COME IN, SO SO YOU DID NOT HAVE THE PSI. THE PSI WASN'T EXAMINED.

THE ONLY SPOKE OF THE S AULT PRIOR.

RIGHT. NOW -- THE ASSAULT PRIOR.

RIGHT. YOU HAVE TO UNDERSTAND THAT THE DEFENSE OBJECTED TO THE WHOLE THING, SO, AGAIN, ONCE THAT WAS RESOLVED, THE REDACTION AND THAT SORT OF THING.

THE ASSAULT ON THE MOTORCYCLE POLICEMAN.

RIGHT.

HOW WAS YOUR CLIENT PREJUDICED,, TO BEGIN WITH?

WELL, AGAIN --

DIDN'T HE HAVE AN OPPORTUNITY TO REBUT THAT? DIDN'T HE HAVE AN OPPORTUNITY TO SAY, NO, IT DIDN'T HAPPEN THAT WAY SFWH? -- THAT WAY?

WELL, THE ONLY WAY HE COULD REBUT IT IS BY TAKING THE STAND IN HIS OWN BEHALF. NOW, SHOULD HE HAVE TO DO THAT? I SUGGEST TO YOU THAT, NO, HE SHOULDN'T. YOU KIND OF PUT IT IN A HOBSON'S CHOICE. THIS IS COMING IN. I CAN'T CHALLENGE IT EXCEPT BY GIVING UP MY RIGHT NOT TO TESTIFY.

COULD THIS HAVE BEEN ADMITTED BYLIVETESTIYOF SONE WO WAS A WITNESS OR DETECTIVE?

YES, ABSOLUTELY.

WELL, WOULDN'T THE DEFENDANT BE IN THE SAME POSITION, THEN?

NO. BECAUSE THEN YOU CAN ACTUALLY CROSS-EXAMINATION THAT PERSON AND TEST THAT PERSON'S CREDIBILITY AND RECOLLECTION IN THE WHOLE THING. YOU KNOW, HERE YOU CAN'T DO THAT THAT.

AREN'T THE CERTIFIED COPIES OF THE CONVICTIONS ENTERED INTO EVIDENCE?

YES.

DID THAT -- GOING BACK TO THIS ISSUE OF THE PREJUDICE HERE TO YOUR CLIENT, IS THE RECOUNTING OF HOW IT HAPPENED THAT YOU THINK WOULD BE PREJUDICIAL?

ABSOLUTELY. ABSOLUTELY. IT IS THE FACTS BEHIND IT. THAT ARE THE PREJUDICIAL PART.

WOULDN'T YOU RATHER HAVE THE POLICE OFFICER TESTIFY TO THE FACTS OF THE BRAWL, RATHER THAN HAVE THE INERT DOCUMENT?

YES. IF THAT IS WHAT THEY ARE GOING TO DO, RATHER THAN JUST PSI, WHERE YOU CAN'T CHALLENGE ANY OF THOSE THINGS, OTHER THAN TAKING THE STAND AND SAID NO, IT DIDN'T HAPPEN THAT WAY.

AND THAT IS WHAT HE WOULD, THAT, SO HE COULDN'T, OBVIOUSLY COULDN'T CROSS-EXAMINATION.

BECAUSE YOU, JUST AS AN EXAMPLE, AND, AGAIN, THEY WEREN'T DEVELOPED HERE, SO I CAN'T SAY FOR SURE, BUT SUPPOSE THIS COP WAS 6-10, WEIGHED 300 POUNDS. WELL, YOU KNOW, THE JURY GETS TO SEE THAT PERSON, AND THIS IS THE SUPPOSED VICTIM, YOU KNOW, YOU THEN CAN ASSESS HOW SERIOUS THAT PRIOR OFFENSE IS.

BUT IS THIS AN ERROR THAT IS SUBJECT TO HARMLESS-ERROR ANALYSIS? IF IT IS AN ERROR.

I WOULD SAY NO. AND THE REASON BEING IS BECAUSE THIS IS A CASE WHERE THERE ARE ONLY TWO AGGRAVATING CIRCUMSTANCES, AND THE PRIOR VIOLENT FELONY CONVICTION SOUNDS AWFUL, BUT IT IS, IN FACT, NOT THAT BAD, AND, AGAIN, TWO OF THESE PRIOR VIOLENT FELONIES WERE BATTERY ON A LAW ENFORCEMENT OFFICER. BATTERY ON A LAW ENFORCEMENT OFFICER IS JUST AN ENHANCED MISDEMEANOR, THAT IS A FELONY BY REASON OF THE FACT THAT IT IS A LAW ENFORCEMENT OFFICER THAT IS A VICTIM. IT COULD BE A VERY VIOLENT FELONY.

BUT WHEN THE REDACTED PSI WAS READ, IT WOULD SHOW THAT IT WAS NOT A MAJOR ASSAULT ON A POLICE OFFICER. I THINK IN ONE INSTANCE HE KICKED HIM OR TH.

WELL, SEE, THEDEFENDANT TOOK THE STAND. HE BASICALLY HAD TO --

IT WOULD ALMOST BE --

-- AND SAID THIS WAS A CASE OF POLICE --

-- IN FAVOR OF THE DEFENDANT.

AND I WOULD AGREE WITH YOU, EXCEPT THE DEFENDANT TOOK THE STAND AND SAID THIS WAS A CASE OF POLICE BRUTALITY. WELL, YOU KNOW, COMING FROM A DEFENDANT WHO IS FACING LIFE OR DEATH, IS THE JURY JUST GOING TO ACCEPT THAT AT FACE VALUE, WHEREAS IF YOU COULD SEE THE ACTUAL VICTIM, THEY MIGHT BE INCLINED TO SAY, WELL, YOU KNOW, HE IS PROBABLY RIGHT. YOU CAN'T JUDGE THE CREDIBILITY OF A PIECE OF PAPER.

YOU DON'T HAVE ANY KEEZ -- ANY CASES THAT SAY THIS CANNOT BE DONE?

NO. THE COULD NOT CASE THAT THE JUDGE RELIED ON, I DON'T THINK, STANDS FOR THE PROPOSITION THAT A PSI CAN GO TO A JURY LIKE THIS. I THINK THE STATE, REALLY, EXPANDED THAT, BECAUSE THAT TALKS ABOUT THEUDGE CONSIDERING THAT, AND WE ALL KNOW THAT JUDGES ARE IN A LOT DIFFERENT POSITIONS THAN THE JURY IS IN THIS CASE. THY N FILTER OUT STUFF, WHEREAS JURIES NECESSARILY DON'T.

THE NEXT ISSUE RELATIVE TO SHIFTING THE BURDEN TO THE DEFENDANT COME FORWARD. ANOTHER COMMENTS.

COULD YOU ADDRESS THAT BRIEFLY.

I WOULD BE GLAD TO. THERE WERE TWO COMMENTS HERE, AND I THINK THE ISSUE THAT I REALLY NEED TO COME TO GRIPS WITH IS THE PRESERVATION ISSUE. DURING THE CLOSEING ARGUMENT, THE PROSECUTOR SAID, THE DEFENSE BASICALLY SAID THIS IS AN ACCIDENT. WE DON'T HAVE THE GUN. HE DID ALL HE COULD TO GET RID I. IF HE HAD THE GUN, HE COULD HAVE PROVEN THIS. WE WOULDN'T BE HERE TODAY. THEY COME BACK AND THE PROSECUTOR, AGAIN, SAYS THAT. THE DEFENSE IMMEDIATELY OBJECTS AND SAYS THAT IS SHIFTING THE BURDEN AND REFERENCES THE FIRST COMMENT. THE TRIAL JUDGE OVERRULED THE OBJECTION AND SAID IT GOES TO HIS MOTIVATIONS AND TO EXPLAIN HIS INCONSISTENCIES. I DON'T KNOW WHAT INCONSISTENCIES EXPLAINS, BECAUSE I DON'T THINK THAT NECESSARILY HAS ANYTHING TO DO WITH INCONSISTENCIES IN THE DEFENDANT'S TESTIMONY. SO THE STATE ARGUES, SINCE THE FIRST COMMENT WAS A NOT OBJECTED TO, THIS -- WAS NOT OBJECTED TO IT, THIS 'T PRESERVED, BUT ITAS TIMELY AND WASN'T OVERRULED. SO I THINK IT IS PRESERVED. SECRETARY SECONDLY THE STATE CLEARLY IN SIN -- HE COULDLY, THE STATE -- SECONDLY, THE STATE CLEARLY INSINUATED THAT HE DIDN'T HAVE THE GUN. HE GAVE IT TO LENO. MR. CHIEF JUSTICE

YOU ARE INTO YOUR REBUTTAL.

I WOULD LIKE TO SAVE THAT COUPLE OF MINUTES, IF I COULD, IF THERE ARE NO MORE QUESTIONS. THANK YOU. MR. CHIEF JUSTICE

MS. RUSH.

MAY IT PLEASE THE COURT. MY NAME IS JUDY TAYLOR RUSH. I AM AN ASSISTANT ATTORNEY GENERAL, REPRESENTING THE STATE OF FLORIDA. I WOULD LIKE TO ADDRESS, FIRST OF ALL, DEFENSE COUNSEL'S CLAIM THAT THIS AMOUNTED TO A SWEARING MATCH.

CAN YOU PULL THE MIKE UP A LITTLE BIT THERE.

IS THAT BETTER? I WOULD LIKE TO DRAW THE COURT'S ATTENTION TO THE SENTENCING ORDER OF THE TRIAL JUDGE, AT PAGE 651, WHERE, IN THE JUDGE FOUND AS A FACT THAT, IN REGARD TO THE CLAIM, THAT THE VICTIM MOVED FORWARD AND SLAPPED THE GUN, CAUSING IT TO FIRE. THE COURT SAID THIS EXPLANATION IS RENDERED PHYSICALLY IMPOSSIBLE, BY THE TESTIMONY OF THE MEDICAL EXAMINER, AND THE LOCATION OF THE BULLET HOLE IN THER. ALL OF WHICH IS CONSISTENT WITH THE OTHER TESTIMONY, THAT THE VICTIM DID NOTHING TO GET HERSELF SHOT. SO THE CLAIM THAT IT CAME DOWN TO MERELY AS TO WHETHER IT WAS AN ACCIDENT OR NOT, CAME DOWN TO MERELY A SWEARING MATCH BETWEEN SAMMY AND ERICA, VERSUS LENO AND EVANS, IS CLEARLY NOT THE CASE. THE RECORD, ALSO, SHOWS THAT, NOT ONLY DID EVANS, HIMSELF, DEMONSTRATE TWO OR THREE TIMES, DURING HIS TESTIMONY, HOW HIS VERSION OF HOW THE SHOOTING OCCURRED, THE MEDICAL EXAMINER, ALSO, DEMONSTRATED FOR THE JURY AND THE JUDGE, SO THE JUDGE HAD THE BENEFIT OF THOSE THINGS, WHEN HE MADE THIS FINDING IN HIS SENTENCING ORDER, THAT IT WAS PHYSICALLY IMPOSSIBLE FOR IT TO BE AN ACCIDENT.

GOING TO THE FIRST ISSUE AS TO WHETHER IT IS HARMLESS BEYOND A REASONABLE DOUBT.

CORRECT.

THE STATE, AND THE STATE HAS THIS GREAT CASE, AND THEY DECIDE THEY ARE GOING TO PUT ON A POLICE OFFICER, TO TESTIFY TO WHAT WITNESSES HAVE TOLD HIM. WHAT WAS THE BASIS THAT THE STATE WAS SEEKING TO PUT IN THAT HEARSAY EVIDENCE?

THE TRIAL JUDGE ADMITTD, AS AN EXCITED OUTRANS. THE STATE, OF COURSE, WAS SEEKING TO HAVE AN IDENTIFICATION OF THE SHOOTER. AND THERE IS A STATUTE, AND THERE HIS CASE LAW. THE POWER CASEY FILEDS SUPPLEMENTAL AUTHORITY, WHICH WOULD INDICATE THAT AN IDENTIFICATION MADE BY A PERSON WHO HAD THE OPPORTUNITY TO PER SEEFB, WOULD NOT BE

-- TO PERCEIVE, WOULD NOT BE HEARSAY. HOWEVER, THE TRIAL COURT ADMITTED IT AS AN EXCITED OUTRANS AND EXCEPTION TO THE HEARSAY RULE -- UTTERANCE AND EXCEPTION TO THE HEARSAY RULE, AND THE STATE WOULD NOT SUPPORT THAT.

I AM THINKING OF CASES YESTERDAY, SAYING IT IS SO-AND-SO, WOULD BE A STATEMENT OF AN IDENTIFICATION OF A PERSON BUT MR. BECKER SAID THAT THERE WAS MORE SAID THAN JUST THAT IS WHO IT IS, THAT THEY ACTUALLY, DID THE POLICE OFFICER TESTIFY TO SOME OF THE DETAILS OF WHAT THE WITNESSES TOLD HIM, ABOUT HOW THE SHOOTING OCCURRED?

THE OBJECTION IN THE TRIAL COURT NEVER CAME, UNTIL THE POINT WHEN THEY, THE POLICE OFFICER WAS ASKED WHO, AND SHE RESPONDED, IN OTHER WORDS, WHO DID ERICA TELL YOU WAS THE SHOOTER. SHE RESPONDED "WYDELL", AND THEN SHE BEGAN TO SPELL THE NAME W W-Y-D, AND THEN COST OBJECTION, SO IF THE ISSUE IS BROADER ON APPEAL, THAT WASN'T THE COMPLAINT IN THE TRIAL COURT. THE COMMENT --

AS OPPOSED TO IT BEING A KPIED UTTERANCE -- AN EXCITED UTTERANCE, THE THEORY BEHIND THAT IS TO KEEP, THE WITNESS DOES NOT HAVE AN OPPORTUNITY OR TIME TO FABRICATE A STORY OR TO MAKE UP SOMETHING.

THAT'S CORRECT.

NOT ONLY DID THEY HAVE TIME HERE, BUT THE STORY WAS FABRICATED. SO HOW COULD IT BE AN EXCITED UTTERANCE?

I WOULD DISAGREE WITH BOTH THE STATEMENT THAT THEY HAD TIME AND THAT THE STORY WAS FABRICATED, TO THIS EXTENT. THE STORY THAT ERICA BLURTED OUT AT THE HOSPITAL, WHEN SHE WAS FIRST MET BY THE POLICE OFFICERS WAS WHAT EVANS HAD FABRICATED, WHAT EVANS HAD TOLD HER, YOU SAY THIS OR I AMG O KILL YOU, AND I AM GOING TO KILL YOUR FAMILY, SO IT WASN'T SOMETHING SHE HAD THOUGHT ABOUT AND COME UP WITH ON HER OWN. IT WAS SOMETHING THE KILLER SAID TO HER, THIS IS WHAT YOU TELL THEM.

BUT --

AND THE KILLER SAID YOU TELL THEM THAT ANGEL WAS SHOT BY SOMEONE SHOOTING AT THE CAR, AND THAT IS WHAT THEY SAID, THAT SOMEONE WAS SHOOTING AT THE CAR IN A BAD DRUG DEAL AND SOMEONE GOT SHOT. IT WASN'T WHAT EVANS SAID TO HER ON HER OWN. IT WAS AFTER WIPING THE FINGERPRINTS AND TAKING HIS PROPERTY FROM THE VEHICLE. HE SAYS, NOW, YOU TELL THEM THAT IT WAS SOMEBODY SHOOTING AT THE CAR, AND THAT IS WHAT SHE SAID. HOWEVER, EVEN IF THAT WOULD NOT -- EVEN IF IT WOULD NOT QUALIFY AS AN EXCITED UTTERANCE TO THAT POINT, IT DOES QUALIFY, BECAUSE ERICA NEVER GAVE THE IDENTIFICATION TESTIMONY. SHE NEVER SAID IT WAS WYDELL, UNTIL AFTER ANOTHER STARTLING EVENT OCCURRED, AND THAT STARTLING EVENT WAS WHEN OFFICER YORKE TOLD HER THAT HER CLOSE FRIEND ANGEL HAD DIED. TO THAT POINT, ERICA AND SAMMY DIDN'T KNOW WHAT ANGEL'S FATE MIGHT BE. THEY, I AM SURE, HOPED THAT SHE WOULD SURVIVE, AND THERE WOULD BE SOME PROBLEMS FROM IT, BUT IT WOULDN'T BE THE SERIOUS EVENT THAT IT TURNED OUT TO BE. AS SOON AS OFFICER YORKE TESTIFIED THAT, AS SOON AS SHE TOLD HER THAT ANGEL HAD DIED, ERICA, THEN, SAID OH, WELL, I AM AFRAID, AND SHE SAID, WELL, WHO WAS IT, AND AT THAT POINT IS WHEN SHE REVEALED IT WAS WYDELL.

THE KIDNAPING. WOULD YOU MOVE TO THAT ISSUE.

YES. WHICH PART OF THAT ISSUE DO YOU WANT TO GO OVER FIRST, THE INSTRUCTION OR --

BOTH THE INSTRUCTION, AND WHETHER OR NOT E WAS A KIDNAPING OF ALL OF THE PEOPLE OR WHETHER YOU HAD TO HAVE A KIDNAPING OF EVERYONE NAMED IN THE INDICTMENT.

AS FAR AS THE JURY INSTRUCTION ISSUE, THERE WAS NO OBJECTION AT TRIAL, SO THEY HAVE TO MEET A STANDARD OF FUNDAMENTAL ERROR IN THE GIVING OF THE INSTRUCTION. THE INSTRUCTION, AS BEGIN, ACTUALLY BENEFITED THE DEFENDANT IN THIS SENSE THAT IT REQUIRED THE STATE TO PROVE MORE THAN IS NECESSARY UNDER THE STATUTE, IN ORDER TO GET A CONVICTION OF KIDNAPING WITH THE INTENT TO TERRORIZE. WHAT HAPPENED WAS THEY GAVE THE INSTRUCTION FOR KIDNAPING WITH INTENT TO TERRORIZE, AND THEN ALSO GAVE THE PART OF THE INSTRUCTION FOR KIDNAPING TO FACILITATE A CRIME, BEING MURDER IN THIS CASE, THAT WENT INTO WHAT IS REQUIRED, AS FAR AS THE TYPE AND NATURE OF CONFINEMENT AND SO ON. SO THIS CASE, UNDER THIS INSTRUCTION, THE STATE HAD TO PROVE MUCH MORE THAN IS REQUIRED BY THE STATUTE FOR KIDNAPING WITH INTENT TO TERRORIZE.

BUT THE INSTRUCTION, DOES THE STATE AGREE THAT IT WAS A CONFUSING INSTRUCTION AS IT WAS GIVEN? AN INCOMPLETE, IN PART.

I DID NOT FIND THE CONSTRUCTION TO BE CONFUSING. AT LEAST NOT ON THE INTENT TO TERRORIZE, EXCEPT TO THE EXTENT THAT IT ADDS ADDITIONAL BURDEN ON THE STATE, BUT THE PART OF THE INSTRUCTION ON INTENT TO TERRORIZE IS ACCURATE. IT IS THE STANDARD INSTRUCTION, AND THAT WAS THE STATE'S THEORY ALL ALONG ON THE KIDNAPING, WAS IT WAS AN INTENT TO TERRORIZE, SO THERE WAS NO CONFUSION ON THE PART OF THE JURY AS TO WHAT IT WAS THAT THE STATE WAS ASSERTING HAD OCCURRED IN THE CASE, SO IT WAS, I SUBMIT IT WAS NOT A CONFUSING STATEMENT, ALL IT DID WAS ADD TO THE STATE'S BURDEN, SOMETHING NOT REQUIRED BY THE STATUTE.

IT WAS SUBMITTED ON BOTH THEORIES. IS THAT WHAT YOU ARE SAYING? THE FELONY AND TO TERRORIZE.

IT WAS CHARGED ON BOTH. THE STATE PURSUED, THROUGHOUT THE TRIAL, THOUGH,INTENT TO TERRORIZE, KIDNAPING, AS --

DID THEY ABANDON THE OTHER?

I DON'T BELIEVE THERE WAS A SPECIFIC ABANDONMENT, BUT I DO KNOW THAT THE ARGUMENT AND THE EVIDENCE WENT TO THE INTENT TO TERRORIZE.

TO COMMIT A FELONY WAS STILL A PART OF THAT INSTRUCTION. WHAT WAS THE FELONY WE ARE TALKING ABOUT HERE?

I BELIEVE IT WOULD BE THE MURDER. THE KIDNAPING OCCURRED IN --

ANY KIDNAPING OCCURRED AFTER THE MURDER.

YES. I TAKE THAT BACK. IT WOULD HAVE TO HAVE BEEN THE AGGRAVATED ASSAULT. SAMMY HOGAN TESTIFIED THAT THE GUN WAS APPOINTED AT HIM AT LEAST TWO DIFFERENT TIMES, AND AT ERICA AT LEAST ONCE. THE AGGRAVATED ASSAULT WAS CHARGED WITH SAMMY. AND THE, AND SAMMY TESTIFIED THAT ONCE, WHEN THE GUN WAS APPOINTED TO HIM, WAS JUST BEFORE EVANS TURNED AND SHOT ANGEL IN THE BACKSEAT, ACTUALLY. EVANS HAD BEEN CHARGING ANGEL WITH BEING UNFAITHFUL TO HIS BROTHER AND SAMMY WAS SAYING, NO SHE DIDN'T DO, IT AND I GUESS THE DEFENDANT DIDN'T LIKE THAT, AND HE POINTED A GUN AT HIM FIRST AND THEN TURNED THE GUN ON ANGEL.

IN LIGHT OF THECT, WAS THE BURDEN ON THE STATE TO PROVE THAT EVERYBODY WAS KIDNAPPED?

I DON'T BELIEVE SO. I THINK THE BURDEN WAS THE STATE TO PROVE THAT ANY ONE OF THOSE

THREE WERE. HOWEVER, THE STATE DID PROVE THAT ALL THREE WERE. THERE WAS ABSOLUTELY PLENTY OF EVIDENCE THAT ALL THREE OF THOSE PEOPLE WERE KIDNAPPED, SO IF THE STATE DID HAVE THE BURDEN, AND IF MR. BECKER SAYS SOMEWHAT UNCLEAR BECAUSE THERE IS NO LINKING CAUSES BETWEEN THE NAMES BUT IF THE STATE DID HAVE THE BURDEN TO PROVE ALL THREE OF EM,T DDIN THIS CASE. NO DOUBT ABOUT IT. MR. BECKER WAS ONLY --

WHAT IS THE STATE'S UNDERSTANDING OF THE LAW ON THAT THAT? IF YOU ARE CHARGED WITH KIDNAPING ALL THREE, WHAT IS THE STATE'S UNDERSTANDING OF THE LAW ON THAT? THAT IT IS A BURDEN TO PROVE IT OR THEY CAN PROVE ONE OF THEM AND IT PROVES --

I THINK YOU GET BACK TO WHETHER IT IS CHARGED IN THE CON JUNKTIVE OR THE DISJUNKTIVE, WHETHER THIS WAS JUST ONE --

THIS WAS CLEARLY IN THE --

IF IT IS -- IF YOU ARE GOING TO IMPLY A "AND", IT WAS ANGEL AND SAMMY AND ERICA, THEN THEY HAVE TO PROVE ALL THREE, WHICH WE DID. IF IT IS GOING TO BE GUIDO KIDNAPING WITH INTENT TOTER -- IF IT IS GOING TO BE KIDNAPING WITH INTENT TO "OR", THEN --

WHEN DID THE KIDNAPING TAKE PLACE?

RIGHT AFTER THE SHOOTING OF ANGEL. AT THAT POINT, ANGEL SAID TO EVANS, YOU SHOT ME FOR REAL, WYDELL. YOU SHOT ME FOR REAL. SHE FALLS OVER INTO ERICA'S LAP, WHO IS SITTING BESIDE OF HER, AND ERICA ASKS LENO TO ROLL THE WINDOW DOWN TO GIVE ANGEL SOME AIR, BECAUSE SHE IS GASPING, TRYING TO BREATHE, AND EVANS SAID, NO, YOU ARE NOT TO ROLL THE WINDOW DOWN. THAT BITCH IS DEAD. SHE DEAD. ANGEL WAS, HAD JUST SPOKEN TO WYDELL MOMENTS BEFORE HE MADE THAT STATEMENT IN HER PRESENCE. SHE, ALSO, SPOKE TO SAMMY ON THE WAY TO THE HOSPITAL, APPROXIMATELY TEN MINUTES LATER, ORIENTED IN TERMS OF TIME AND WHAT WAS GOING ON WITH HER, WHEN SHE SPOKE TO HIM, SHE WAS CLEARLY CONSCIOUS AND THINKING AND THINKING ABOUT WHAT WAS HAPPENING TO HE, AND THAT SHE NEEDED SOME HELP, IN ASKING SAMMY FOR IT, SO IT IS A REASONABLE INFERENCE THAT ANGEL HEARD THESE THINGS BEING SAID AND DONE, INCLUDING THE THREATS MADE BY EVANS, TO SAMMY AND TO ERIC A, WHO WANTED TO TAKE ANGEL TO THE HOSPITAL, AND HE REFUSED TO LET THEM, A GUN TO SAMMY'S HEAD AND SAID, NO, YOU ARE NOT GOING TO THE HOSPITAL. YOU ARE TAKING ME TO BIG DICK'S HOUSE, SO I THINK THE EVIDENCE THAT ANGEL WAS TERRORIZED IS, IT IS REALLY PRETTY OVERWHELMING, IN THIS CASE, AND THEN, ALSO, FOR THE FACT THAT SAMMY AND ERICA WERE TERRORIZED. BEFORE HE SHOT ANGEL, EVANS WAS STANDING AT A GAS STATION OUTSIDE THE CAR, PUTTING GAS IN THE CAR, WITH ERICA THERE. IT WAS EVANS AND ERICA, AND LENO I BELIEVE THE TESTIMONY WAS, AND HE ASKS ERICA, WHAT WOULD YOU DO IF YOU HAD A GUN TO YOUR HEAD? SHE SAYS, WELL, I WOULD BE SCARED. SO MOMENTS LATER, WHAT DOES HE DO? HE PUTS A GUN TO HER HEAD, AND HE SAYS, NO, YOU ARE NOT TAKING HER TO THE HOSPITAL. SHE IS GOING TO BIG DICK'S HOUSE AND THAT IS WHERE THEY WENT, AND ERICA WAS SCARED. SHE WAS TERRIFIED. SHE TESTIFIED SHE WAS AFRAID. AND, OF COURSE, HE WENT ON, AS DID SAMMY, AND HE WAS AFRAID.

AT BIG DICK'S HOUSE, DIDN'T THEY SEPARATE, SOMEHOW, THEN, AND LENO ENDED UP WITH THE GUN AND EVANS, EVERYBODY COULD HAVE LEFT AT THAT POINT. EVANS WAS A WAY FROM THEM. IS THAT CORRECT?

EVANS HAD STEPPED AWAY FROM THE VEHICLE. HE WAS STILL, ACCORDING TO SAMMY'S TESTIMONY, VERY CLOSE TO THE VEHICLE. ALSO ACCORDING TO BIG DICK'S TESTIMONY, HE TESTIFIED AT TRIAL HE WAS PRETTY CLOSE TO THE VEHICLE, BUT THESE PEOPLE WERE TERRORIZED OF EVANS. THEY HAD JUST SEEN HIM SHOOT A 17-YEAR-OLD GIRL POINT-BLANK IN THE CAR.

HE DIDN'T HAVE THE GUN AT THAT POINT, DID HE?

IT IS NOT ENTIRELY CLEAR. TWO OF THE WITNESSES TESTIFIED THAT HE HAD GIVEN THE GUN TO LENO AND TOLD HIM TO DISPOSE OF IT. EVANS, HIMSELF, HOWEVER, SAID HE DIDN'T DO. THAT HE SAID THAT HE LAID THE GUN DOWN, AND HE DIDN'T SAY WHEN HE LAID IT DOWN. MR. CHIEF JUSTICE

LET ME MOVE YOU TO THE PROPORTIONALITY ISSUE ISSUE. WE HAVE CASES THAT, WHERE THERE WAS DEATH BY A SINGLE GUNSHOT, AS IN THIS, THAT, REALLY, DISTINGUISH CASES THAT COME TO MY MIND, SINCE I HAVE BEEN ON THIS COURT, THAT HAVE TO DO WITH SINGLE GUNSHOT OR THOMPSON, WHICH IS KILLING OF A PERSON IN A SUBWAY SHOP OUT IN PENSACOLA. AND THAT WAS REDUCED TO LIFE. TERRY, WHICH WAS A CASE IN DAYTONA BEACH, WHERES A SHOOTING, A ROBBERY IN A FILLING STATION IN DAYTONA BEACH, AND THAT WAS REDUCED TO LIFE. SINCLAIR WAS A ROBBERY BY A SINGLE GUNSHOT WOUND, TAXI DRIVER DOWN IN BREVARD COUNTY. HOW DOES THIS CASE DIFFER FROM THOSE SINGLE GUNSHOT CASES, WHICH THIS COURT HAS REDUCED TO LIFE?

WELL, JUSTICE WELLS, THE CASES THAT YOU MENTIONED, WERE ALL CASES WHERE THE, IT WAS A SITUATION OF A ROBBERY GONE BAD. IT WAS NOT AN INTENTIONAL PREMEDITATED MURDER, LIKE WE HAD IN THIS CASE. NOT ONLY THAT, BUT IN THOSE CASES, IF I RECOLLECTION -- IF MY RECOLLECTION SERVES, THE DEATH WAS IMMEDIATE, AND THAT IS NOT THE CASE HERE, THAT THE TESTIMONY REFERENCED A MINUTE AGO CLEARLY SHOWS THAT ANGEL WAS ALIVE AFTER HE SHOT HER. SHE WAS ORIENTED TO TIME AND PLACE AND CIRCUMSTANCES AND WHAT WAS HAPPENING. SHE WAS ALIVE ABOUT TEN MINUTES LATER, AND THEY WERE TAKING HER TO THE HOSPITAL. AGAIN, ORIENTED TO TIME AND PLACE AND WHATCIFICALLY WAS HAPPENING TO HER AND WHO WAS AT FAULT FOR IT? SHE SAID TO SAMMY, HE SHOT ME.

YOU DON'T HAVE HAC OR CCP BEING FOUND HERE. YOU ARE SAYING THAT, IF A GUNSHOT SUCCEEDS IMMEDIATELY IN KILLING SOMEONE, THAT DOESN'T GET, AND THAT IS, THERE ARE NO OTHER AGGRAVATORS, THAT WOULDN'T WOULD DISTINGUISH A CASE, JUST WHETHER, HOW LONG IT TAKES A PERSON TO DIE? IF IT IS THE SAME GUNSHOT THAT IS JUST A SINK WILL HE WILL GUNSHOT? -- A SINGLE GUNSHOT?

YES. I BELIEVE THAT CAN MAKE THE DIFFERENCE. THIS COURT DECIDED A CASE, I BELIEVE IT WAS JTION JACKSON -- IT WAS JACKSON, SOMETIME BACK, IN WHICH, LET ME GET TO MY NOTES ON THAT, IN WHICH THE DEFENDANT HAD SHOT THE VICTIM ONE TIME. THE VICTIM DID NOT DIE IMMEDIATELY. THEY PLACED HIM IN A LAUNDRY BAG ON THE FLOOR OF THE CAR, AND THEY DROVE THE VICTIM AROUND FOR A WHILE. THE VICTIM WANTED MEDICAL HELP. THEY REFUSED TO GET HIM ANY, AND HE DIED, AND THIS COURT SAID THAT WAS SUFFICIENT FOR HEINOUS, ATROCIOUS AND CRUEL.

I GUESS MY POINT IS, HERE, IS THAT THOSE ARE NOT THE AGGRAVATORS IN THIS CASE, HAC AND CCP, SO WE DON'T, IN DOING OUR PROPORTIONALITY, WE DON'T REACH OUT AND SAY, WELL, WE ARE GOING TO ADD SOME AGGRAVATORS IN THAT SHOULDN'T FIND. I MEAN, IF THIS CASE, IF IT WEREN'T FOR THE PRIOR VIOLENT FELONY AGGRAVATOR, THAT HE WAS ON PROBATION, WHICH IS SET THOSE ASIDE, AND YOU HAVE JUST THIS MURDER, WOULD THIS BE, THERE WOULD BE NO AGGRAVATORS.

THERE WOULD HAVE BEEN NONE FOUND BY THE TRIAL JUDGE. HOWEVER, THIS COURT HAS INDICATED, IN ITS DECISIONS IN THE PAST, ECHOLS VERSUS STATE AT 484 PAGE 568 FLORIDA 1985, THAT IT IS THIS COURT'S, QUOTE, DUTY AND RESPONSIBILITY TO REVIEW THE ENTIRE RECORD IN DEATH PENALTY CASES AND, AND I AM LEAVING OUT A LITTLE BIT HERE THAT IS NOT PERTINENT, ALL EVIDENCE ANIMATERS APPEARING IN THE RECORD SHOULD BE CONSIDERED, WHICH SUPPORT THE TRIAL COURT'S DECISION, AND IN ECHOLS, WHAT THIS COURT DID WAS SAY THE TRIAL JUDGE

ONLY FOUND THREE AGGRAVATORS BUT GUESS WHAT? WE HAVE REVIEWED IT, AND WE SEE THAT THERE IS A FOURTH ONE HERE, AND IT WAS PRIOR VIOLENT FELONY, AND THIS COURT, THEN, SAID THAT IT HAD THE DUTY AND RESPONSIBILITY TO CONSIDER THAT, AND DID SO, AND SO I DO SUBMIT THAT THIS COURT CAN CONSIDER THE CIRCUMSTANCES OF ANGEL'S DEATH, CAN CONSIDER HOW SHE SUFFERED, AND THE DEFENDANT'S CALLOUS AND TOTALLY IN DIFFERENT REGARD FOR HER SUFFERING. WOULDN'T EVEN LET LENO ROLL THE WINDOW DOWN AND GIVE HER A LITTLE BIT OF AIR TO BREATHE.

WAS THE JURY INSTRUCTED ON THOSE AGGRAVATORS, HAC AND CCP?

NO. THE JURY WAS INSTRUCTED ON ONLY THE TWO THAT WAS FOUND. THE TRIAL COURT FOUND THOSE TWO AGGRAVATORS TO FAR OUTWEIGH THE SCANT NONSTATUTORY MIGHT SKAINGS. THERE WAS NO STATUTORY MITIGATION FOUND. THERE WAS LITTLE NONSTATUTORY FOUND, AND NOT A LOT OF WEIGHT WAS GIVEN TO WHAT WAS FOUND.

BUT FINDING THE TWO AGGRAVATORS THAT HE HAD HAD, THESE PRIOR --

PRIOR VIOLENT FELONIES, TWO BATTERIES ON A LAW ENFORCEMENT OFFICER AND ONE AGGRAVATED ASSAULT, AND THEN ON PROBATION AT THE TIME. I MEAN, HE HAD BEEN OUT OF JAIL A DAY AND-A-HALF WHEN HE KILLED THIS GIRL.

HOW LONG HAD HE BEEN IN PRISON BEFORE HE -- ON AND OFF FOR THE PAST EIGHT YEARS.

THE MOST RECENT TIME.

I DON'T KNOW HOW LONG HIS SENTENCE WAS FOR THE MOST RECENT SERVED MOST RECENT TO THE MURDER. I WOULD, ALSO, LIKE TO POINT OUT ONE CASE QUICKLY, THAT I THINK IS FAIRLY COMPARABLE TO THIS ONE THAT BEING SCHILOTO, AT FLORIDA 91 SO.2D, AND THAT WERE THAT THERE WERE TWO AGOS FOUND, ONE PRIOR VIOLENT FELONY AND ONE WAS IT WAS COMMITTED DURING A FELONY FELONY. -- TWO AG'S FOUND, ONE PRIOR VIOLENT FELONY AND ONE WAS IT WAS COMMITTED DURING A FELONY. ONE WAS IT WAS INTENDED TO, AND THERE WAS ONE STATUTORY MITIGATOR IN THAT ONE, AND THIS WAS NONE, AND THERE WERE SEVERAL STATUTORY MITS THAT WERE GIVEN A LITTLE TO, I BELIEVE, SOME WEIGHT, AND THIS COURT SAID THAT DEATH WAS A PROPORTIONATE SENTENCE IN THAT CASE, SO WE WOULD SUBMIT THAT IT IS COMPARABLE.

ONE OTHER POINT. IF WE FIND THAT THE INSTRUCTION ON KIDNAPING WAS IN ERROR, CONFUSING TO THE POINT THAT IT WOULD BE ERROR, WHAT WOULD, WHAT IS THE STATE'S POSITION, RELATIVE TO WHAT THIS COURT SHOULD DO IN THAT INSTANCE?

WELL, IT WOULD BE A HARMLESS ERROR. IF IT WAS ERROR, BECAUSE THERE WAS OVERWHELMING EVIDENCE OF THE INTENT TO TERRORIZE ALL THREE OF THE KIDNAPING VICTIMS. THE, GIVING OF THE ADDITIONAL INFORMATION REGARDING THE TYPE OF MOVEMENT THAT WOULD BE REQUIRED FOR THERE TO BE KIDNAPING, WOULD NOT TAKE AWAY FROM ANY OF THAT OVERWHELMING EVIDENCE, WHICH --

ARE YOU EQUATING FUNDAMENTAL ERROR AND HARMLESS ERROR IN THIS INSTANCE? IF I UNDERSTOOD WHAT YOU SAID EARLIER, THERE WAS NO OBJECTION TO THIS.

THAT'S CORRECT. IT WOULD HAVE TO BE A STANDARD OF FUNDAMENTAL ERROR, BUT THEY CERTAINLY DIDN'T DO. THAT THEY COULDN'T DO THAT. NOT WITH THE OVERWHELMING EVIDENCE OF THE KIDNAPING AS TO ALL THREE OF THESE INDIVIDUALS, THE FACT THAT THE COURT, ALSO, SAID, WELL, YOU NEED TO, ALSO, FIND, OR CONSIDER THESE TYPES OF CONSTRAINT OR CONFINEMENT IN REACHING YOUR DECISION, COULDN'T POSSIBLY COME TO THE LEVEL THAT THEY WOULD NEED TO ESTABLISH TO GET FUNDAMENTAL ERROR. MR. CHIEF JUSTICE

JUSTICE SHAW HAD ANOTHER QUESTION.

ON THE SHIFTING OF THE BURDEN HERE, SOME OF THIS LANGUAGE USED BY THE PROSECUTOR IS, DOES COME VERY CLOSE TO WHAT WE HAVE HELD TO BE A SHIFTING OF THE BURDEN. HAD WE HAD THE GUN, WE WOULD ALL WOULD BE, THAT GUN, WE ALL WOULD BE SITTING HERE WITH NO DOUBT WHATSOEVER, LET ALONE A REASONABLE DOUBT, THAT THE DEFENDANT INTENDED TO KILL HER. YOU HAVE TO REMEMBER THAT A LOT OF THE THINGS THAT ARE MISSING IN THIS CASE ARE FROM THE DEFENDANT'S INTENTIONALLY ABORTING YOU. WE HAVE HELD LANGUAGE OF THAT NATURE TO BE A SHIFTING OF THE BURDEN. IT ALMOST REQUIRES THE DEFENDANT TO TAKE THE STAND AND SAY SOMETHING.

WELL, THE LANGUAGE IN THIS CASE, WELL, FIRST OF ALL, THE STATE'S POSITION IS THAT THIS ISSUE OR CLAIM IS NOT PRESERVED FOR APPEAL. THE REASON FOR THAT IS THIS FIRST STATEMENT THAT THEY NOW COMPLAIN ABOUT, THE PROSECUTOR WENT INTO DETAIL, COMMENTING ON THE DEFENSE THAT EVANS HAD PRESENTED, AND YOU HAVE TO REMEMBER THAT THESE COMMENTS CAME IN REBUTTAL CLOSING. SHE WAS REBUTTING WHAT THE DEFENSE HAD JUST ARGUED, IN ITS CLOSING ARGUMENT, AND SHE WAS POINTING OUT THE HOLES OR FLAWS IN THE DEFENSE'S THEORY OF EVENTS AS HAD JUST BEEN PRESENTED. THERE WAS NO OBJECTION MADE, WHEN SHE WENT INTO THESE DETAILS DETAILS. THEN, SOME TEN PAGES LATER, IN THE TRANSCRIPT, AND I DON'T KNOW HOW MUCH TIME THAT WAS, BUT IT WAS SOME TIME LATER, SHE RETURNED SOMEWHAT TO THE SUBJECT AND AT MR. BECKER INDICATED THAT AS SOON AS SHE MENTIONED THE GUN THERE WAS ANOTHER OBJECTION. WELL, THAT IS NOT THE WAY IT READS.

THE SUBSEQUENT STATEMENT WAS A LITTLE STRONGER THAN THE FIRST STATEMENT. THAT COULD EXPLAIN WHY THE OBJECTION CAME THEN.

WELL, THE SUBSEQUENT STATEMENT DIDN'T COME WHEN SHE MENTIONS THE GUN, AS HE SAID. THE SUBSEQUENT STATEMENT CAME AFTER SHE HAD MENTIONED THAT THERE WAS A PLAN, AND THAT THE REASON THAT THE DEFENDANT DIDN'T TURN HIMSELF IN, AS HE HAD CLAIMED HE INTENDED TO DO ALL ALOG,S BECAUSE HE NEEDED TIME TO GO TO THIS MOTEL AND GET HIS PLAN TO AVOID RESPONSIBILITY FOR THE MURDER IN FACT, AND IT WAS WHEN SHE BEGAN TO ARGUE T PART OF IT, THAT THE DEFENSE OBJECTED. SO ON APPEAL, IT IS LIKE, WELL, THE PROBLEM WAS SHE MENTIONED THIS GUN, BUT THAT IS NOE THE OBJECTION CAME IN THE TRIAL RT EXCUSE. I HAVE A SORE THROAT. AND AND THE OBJECTION THERE APPEARS TO JUST BE ENTIRELY TO THE REFERENCE OF THE PLAN TO FORMULATE AND HOW TO AVOID A PLAN TO, FORMULATE A PLAN TO AVOID RESPONSIBILITY FOR THE MURDER, AND, OF COURSE, AS YOU KNOW FROM THE RECORD, HE, EVANS ATTEMPTED, ONCE HE WAS TAKEN INTO CUSTODY OR TAKEN DOWN FOR QUESTIONING, ATTEMPTED TO CONVINCE THE POLICE THAT WHAT HE HAD DONE WAS NO MORE THAN A MANSLAUGHTER, AND HE DRAGS OUT SOME CASE HE HAS HEARD ABOUT AND SAYS, WELL, ON THIS CASE THESE WERE THE FACTS, AND IN MY CASE THESE ARE THE FACTS, SO IT COULD BE NO MORE THAN A MANSLAUGHTER, AND IT WAS THAT KIND OF THING THAT SHE WAS ADDRESSING, SO THE STATE WOULD SUBMIT THAT, IF ANYTHING IS PRESERVED, IT IS ONLY IN REGARD TO THE PART OF THE ARGUMENT ABOUT THE PLAN. ALSO, I WOULD LIKE TO POINT OUT, IF ALL THE SUPPLEMENTAL AUTHORITY, THE RECENT DECISION IN DOWNS VERSUS STATE THAT WAS ISSUED BY THIS COURT ON SEPTEMBER 26 OF THIS YEAR,ND N THAT CASE, THE COURT SAID THAT THE STATEMENT SOMEWHAT SIMILAR TO WHAT WE HAVE HERE WAS OBVIOUSLY INTENDED TO IMPEACH DOWNS IN THAT CASE, AND TO DEMONSTRATE TO THE JURY THAT DOWNS'S VERSION OF EVENTS WAS CONCOCTED SOMETIME AFTER THE EVENTS, AND THAT IS WHAT WE HAVE HERE. THAT IS THE SAME SITUATION WE HAVE HERE. AND, ALSO, IN DOWNS, OR LIKE OCCURRED IN DOWNS, EVANS, HERE, WAIVES HIS CONSTITUTIONAL RIGHTS AND TALKED TO THE OFFICERS, FIRST LIED TO THEM FOR TWO HOURS AND EVENTUALLY TOLD THEM, WELL, YEAH, I WAS TOLD HOLEDING THE GUN WHEN IT WENT -- I WAS HOLDING THE GUN WHEN IT WENT OFF

BUT MAINTAINED IT WAS AN ACCIDENT. HIS FIRST STORY WAS HE WASN'T EVEN THERE, BUT TALKED TO THE OFFICERS, AND THEN HE TESTIFIED AT TRIAL VOLUNTARILY, AND THE COMMENTS MADE IN THIS CASE WERE FAIR COMMENTS ON THEVIDENC, THE EVIDENCE THAT WAS PRESENTED AT THE TRIAL. THE STATE IS ALLOWED TO COMMENT ON THE EVIDENCE THAT THE DEFENDANT BRINGS FORWARD, AND HIS EVIDENCE WAS, HIS TESTIMONY THAT, OH, WELL, I PLANNED TO TURN MYSELF IN ALL THE TIME. I WAS JUST GOING TO DO IT, YOU KNOW, AS SOON AS I COULD, THE NEXT MORNING, THE FIRST THING THE NEXT MORNING, AND THAT IS WHAT SHE WAS COMMENTING ON, WHEN THE OBJECTION CAME, AND THE STATE WOULD STAND THAT THE OBJECTION WOULD BE PROPERLY OVLED, BECAUSE IT WAS A FAIR COMMENT ON THE EVIDENCE, AND, ALSO, ON THE ARGUMENT THAT THE DEFENSE COUNSEL HAD JUST GIVEN. THIS WAS REBUTTAL CLOSING. AND THAT IS WHAT HE HAD HAMMERED ON. THAT IS WHAT HE HAD TALKEDOUT ABOUT.

YOU DIDN'T TOUCH ON THE PSI. WHAT IS YOUR POSITION ON WHETHER THAT WAS ERRONEOUSLY ADMITTED?

WELL, THAT IT WAS NOT ERRONEOUSLY ADMITTED. I FILED ANOTHER CASE, SUPPLEMENTAL AUTHORITY ON THAT POINT RECENTLY. THAT WAS BOWLS VERSUS STATE OUT OF THIS -- BOLES VERSUS STATE IN THIS COURT ON OCTOBER 11 OF THIS YEAR. IN THAT CASE THE STATE PUT ON, I BELIEVE IT WAS AN OFFICER TO TESTIFY TO THE FACTS AND CIRCUMSTANCES UNDERLYING THE PRIOR VIOLENT FELONIES, AND THIS COURT SAID THAT THERE WAS AN OPPORTUNITY TO REBUT THE HEARSAY AND THAT BOLES DID NOT OR COULD NOT REBUT. IT DOESN'T MAKE IT INADMISSIBLE, AND, OF COURSE, THERE WAS THE OPPORTUNITY IN THIS CASINGS, EVANS CHOSE TO TAKE THE STAND AND TESTIFY ABOUT THE EVENTS, BUT NOT ONLY THAT, WHEN YOU LOOK AT THE TRANSCRIPT OF THE RECORD, YOU WILL SEE THAT THE PROSECUTOR AT FIRST WANTED TO PUT IN THE 923'S WITH THE PSI, AND THEN THERE WERE SOME OBJECTION TO SAY THAT, AND SO SHE SAYS, WELL, OKAY, LET'S CUT OUT THE OBJECTIONABLE STUFF, AND WE WILL JUST PUT IN A SUMMARY OF THE FACTS OF THE UNDERLYING FELONIES AND SHE WORKED WITH THE DEFENSE COUNSEL AND THE JUDGE. THE THREE OF THEM WORKED TOGETHER, TO COME UP THAT SUMMARY, AND MY READING OF THE RECORD IS THE DEFENSE COUNSEL WAS SATISFIED WITH WHAT THEY CAME UP WITH. EVERYTHING THAT HE RAISED THAT WAS A PROBLEM IN HIS MIND, THE STATE SAID TAKE IT OUT. LEAVE IT OUT.

THERE WAS NO GENERAL OBJECTION TO THE PSI?

THAT IS NOT -- THERE WAS, TO BEGIN WITH, BUT THAT IS WHEN THE STATE WANTED TO PUT IN THE 923, BUT ONCE THEY HAD WORKED TOGETHER, TO REDACT THE STATEMENT OR THE SUMMARY THAT WOULD GO TO THE JURY, I DON'T SEE ANY OBJECTION ANYWHERE. I DON'T BELIEVE THERE WAS. ALSO, IN THE BOLES -- MR. CHIEF JUSTICE

YOU ARE OUT OF TIME.

I AM SORRY. MY PAPERS WERE COVERING THE LIGHT. THANK YOU, YOUR HONOR. MR. CHIEF JUSTICE

REBUTTAL.

I JUST HAVE A POINT I WANT TO MAKE. AS TO THE FIRST ISSUE, THE STATE SAYS THERE WASN'T A SWEARING MATCH, THAT IN THE FINDINGS OF THE TRIAL JUDGE IT COULD ONLY HAPPEN IN ONE WAY. THAT IGNORES THE FACTS THAT WITNESSES DID GUNSHOT REST DID YOU TESTS AND IT WAS POSITIVE ON THE HANDS OF THE VICTIM. THAT INDICATES HER HAND CAME AWFULLY CLOSE TO THE GUN AT THE TIME, SO THERE IS SOME SUPPORT IN THE EVIDENCE FOR THAT. THIS IS THE FIRST TIME, TODAY, THAT I EVER HEARD THE STATE SAYING THE REASON THEY WERE PUTTING THAT EVIDENCE IN IS FOR IDENTIFICATION PURPOSES. THEY DID NOT ARGUE THAT BELOW. DID NOT ARGUE THAT IN THE BRIEF. SHE SAYS SHE FILED A SUPPLEMENTAL AUTHORITY. I

SUBMIT THAT IS IMPROPER. SHE IS TRYING TO RAISE IT IN SUPPLEMENTAL AUTHORITY. THAT WAS NEVER RAISED BELOW. IN FACT, WHEN THE OBJECTION WAS MADE, THE STATE SAID NOTHING TO ERIC A. THE STATEMENTS ARE ERICA. IT WAS THE JUDGE WHO SAID IT WAS AN EXCITED UTTERANCE. THEN WHEN IT WAS OBJECTED TO THE STATEMENTS OF SAMMY, THE STATE NEVER CITED IDENTIFICATION, SO I THINK IT IS IMPROPER FOR THE STATE TO BE ARGUING THAT NOW. AS TO WHEN ERICA MADE THAT STATEMENT, NO TIME FOR REFLECTIVE THOUGHT, ON THE WAY TO THE HOSPITAL, SHE MADE A PHONE CALL AND TOLD SOMEBODY. SHE CERTAINLY HAD TIME FOR REFLECTIVE THOUGHT. ALSO, THIS WAS IN RESPONSE TO YORKE SAYING YOU ARE LYING. THAT IS WHAT THE STARTLING EVENT WAS, BEING CONFRONTED THAT THEY ARE LYING, SO I WOULD SAY THAT, AS TO THE KIDNAPING, THE STATE CHARGED, WITH THE INTENT TO FACILITATE AN OFFENSE, THE INDICTMENT SAYS MURDER. NOWHERE DOES IT SAY AGGRAVATED ASSAULT. SO FOR THE STATE TO SAY THAT WAS WHAT THE EVENTS WAS, THAT WASN'T WHAT WAS EVER CHARGED. NOW, AS FAR AS ANGEL WAS CONSCIOUS AND ALL THROUGH THIS STUFF THAT, YOU KNOW, SHE DID, THE EVIDENCE JUST COULDN'T, THE STATE'S N EVIDENCE DOESN'T SHOW THAT SHE WAS CONSCIOUS RIGHT UP UNTIL SHE GOT TO THE HOSPITAL. THE MEDICAL EXAMINER SAID THAT SHE WOULD HAVE DIED WITHIN TEN MINUTES, AND SHE WOULD HAVE BEEN UNCONSCIOUS BEFORE THAT. WELL, IF YOU BELIEVE THE TESTIMONY OF THE STATE'S WITNESSES, THEY WERE AT BIG DICK'S HOUSE FOR TEN MINUTES, SO SHE COULD NOT HAVE BEEN CONSCIOUS WHEN SHE GOT TO THE HOSPITAL, SO I THINK THE EVIDENCE BELIES THAT, ALSO. YOU KNOW, AND, IT SAYS THAT THE DEFENDANT WOULD NOT LET LENO LOWER THE WINDOW. WELL, LENO SAID I DID OPEN THE WINDOW. SO WHAT DO YOU DO? THANK YOU. MR. CHIEF JUSTICE

THANK YOU, MR. BECKER. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.