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Joel Diaz v. State of Florida

CHIEF JUSTICE: GOOD MORNING. DIAZ VERSUS STATE. IF COUNSEL IS READY, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. I AM STEVE BOLOTIN. I AM FROM JACKSONVILLE AND REPRESENT THE APPELLANT JOEL DIAZ. THE DEATH PENALTY IS THE EXCEPTION NOT THE RULE FOR THE FIRST-DEGREE MURDER PENALTY IN FLORIDA. IT IS FOR THE MOST AGGRAVATED AND LEAST MITIGATED OF MURDERS AND NEITHER IS THE CASE HERE. SIMILARLY, THE HAC AGGRAVATING CIRCUMSTANCE IS AN EXCEPTION NOT A RULE, APPLIED ONLY TO THE, YOU KNOW, ALL FIRST-DEGREE MURDERS ARE, BY THEIR NATURE, HEINOUS. THAT IS WHY THEY ARE FIRST-DEGREE MURDERS, AND THE CRIME MUST BE ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL, IN ORDER TO QUALIFY FOR THE AGGRAVATOR.

MR. BOLOTIN, YOU ARE MORE FAMILIAR WITH THE DETAILS OF THIS RECORD THAN I AM. COULD YOU EXPLAIN WHAT THE RECORD REVEALS, CONCERNING THE LENGTH OF TIME THAT, FROM THE TIME THAT DIAZ WAS THERE WITH THE DAUGHTER OF THE VICTIM, AND THE LENGTH OF TIME, THEN, TO THE VICTIM'S ACTUAL DEMISE.

OKAY. THE RECORD DOES FOR THE CLEARLY REVEAL THE EXACT LENGTH OF TIME. WHAT WE HAVE GOT IS WE HAVE GOT THE VICTIM'S WIFE BARBARA SHAW, TESTIFYING THAT, FROM THE POINT IN TIME WHEN SHE HEARD HER DAUGHTER PUTTERING AROUND IN THE KITCHEN AND THEN HEARD WHAT SHE THOUGHT WERE GUNSHOTS, FROM THAT POINT UNTIL THE TIME WHEN SHE HEARD HER HUSBAND TALKING TO JOEL DIAZ IN THE BEDROOM, JUST SEEMED LIKE A MINUTE OR SO TO HER, BUT IT -- BUT SHE SAID IT PROBABLY WAS LONGER. IT JUST SEEMED VERY FAST TO HER. WE KNOW THE SEQUENCE OF EVENTS OF WHAT OCCURRED. WE DON'T KNOW HOW LONG THEY WERE NECESSARILY OUT IN THE STREET OR IN THE YARD. WE DO KNOW THAT THE PERIOD OF TIME FROM WHATEVER OCCURRED IN THE GARAGE AND MY FIRST POINT ON APPEAL MAKES THE ARGCRUELTY P THAT JOIL -- THE ARGUMENT THAT JOEL DIAZ'S TESTIMONY OF WHAT OCCURRED IN THE GARAGE WAS THAT HE WAS STRUCK IN THE FACE WITH A FIST OR A TOOL OR AN OBJECT BY CHARLES SHAW, AND THAT IS WHEN THE MOMENTUM OF THE NATURE OF THE CONVERSATION CHANGED. THE TWO BETWEEN THAT AND THE SHOOTING WAS VERY SHORT, A MATTER OF A MINUTE OR SO.

THIS ALL BEGAN AROUND 5:30 AND 6:00 A.M.?

THAT WAS, I BELIEVE, THE PERIOD OF TIME IN WHICH JOEL DROVE WITH HIS BROTHER AND HIS BROTHER'S GIRLFRIEND, TO THE LOCATION.

AND THEN HE, THEN THE VICTIM CAME FIRST, INTO THE GARAGE, IS THAT HOW I HAVE GOT THIS PICTUREED?

WELL, THE DAUGHTER. THE VICTIM.

RIGHT. SHE BACKED OUT.

WELL, WHAT OCCURRED WITH THE DAUGHTER IS SHE CAME INTO THE GARAGE TO LEAVE FOR WORK. SHE HIT THE GARAGE DOOR OPENER. JOEL HAD BEEN STANDING IN THE DRIVEWAY BY ONE OF THE CARS. HIS CAR WAS ALREADY LONG GONE. HIS BROTHER HAD DROPPED HIM OFF AND HE

HAD WALKED TO THE HOUSE. HE THOUGHT THAT HE HAD MAYBE MISSED HER, THAT SHE HAD GONE TO WORK AND WAS GETTING READY, THINKING ABOUT LEAVING WHEN THE GARAGE DOOR WENT UP. SHE WENT AND KIND OF DUCKED UNDER THE GARAGE DOOR, AND THAT IS WHEN HE APPROACHED THE CAR AND CONFRONTED HER. HE WAS POINTING THE GUN AND ASKING HER TO GET OUT OF THE CAR. SHE SAYS EVENTUALLY, WHEN SHE REALIZED THAT IT WASN'T GOING ANYWHERE, SHE SAID LET ME GET MY STUFF AND KIND OF LEANS DOWN AS IF TO GET HER STUFF AND HITS THE GAS AND BACKSER ATCALLY OUT OF THE DRIVEWAY VERY FAST. JOEL HAD HIS HAND ON THE CAR AND REARED BACK AND WAS KIND OF STARTLED BY THE OCCURRENCE AND THAT IS WHEN HE BEGAN FIRING IN THE DIRECTION OF THE CAR. SHE WAS GRAZED AND INJURED, ALTHOUGH SHE DIDN'T REALIZE THAT UNTIL SHE GOT TO THE HOSPITAL.

NOW, YOU ARE CHALLENGING THE TRIAL COURT'S FINDING AS TO HAC.

I AM CHALLENGING HIS FINDINGS OF HAC, CCP AND THE DEATH PENALTY.

HOW ABOUT ADDRESSING THE FINDINGS OF THE TRIAL COURT THAT THE TRIAL COURT BELIEVES SUPPORTED A FINDING OF HAC AND TELL US, IN YOUR VIEW, WHERE THE TRIAL COURT WENT WRONG.

WELL, IN MY VIEW, THE TRIAL COURT WENT WRONG IN A NUMBER OF PLACES. I WILL START WITH HAC, ALTHOUGH ON CCP WHEN I GET TO THAT, I THINK I HAVE IDENTIFIED SEVEN PLACES WHERE HE WENT WRONG ON THAT ONE, BUT ON HAC, OKAY, I WANT TO START FIRST WITH -- BECAUSE THERE SEEMS TO BE, I WANT TO TALK ABOUT THE FRANCES CASE BRIEFLY. THERE IS A LONG LINE OF CASES IN GUNSHOT HOMICIDES THAT MAKE IT CLEAR THAT A FINDING OF HAC IS PRESUMPTIVELY NOT TO BE MADE IN A GUNSHOT HOMICIDE CASE, AND THAT THE ONLY EXCEPTION TO THAT IS WHERE THE EVIDENCE SHOWS A PROTRACTED PERIOD OF, KNOW, TORTUROUS SUFFERING BY, ENDURED BY THE VICTIM.

IS THERE EVIDENCE HERE, AS I UNDERSTOOD THERE TO BE, FROM THE WIFE, OF A PERSON BEING FOLLOWED INTO THE BATHROOM AND, FIRST, PLEADING AT ONE POINT OR ANOTHER, FOR THEIR LIFE, AND,000 DOES THAT FACTOR IN, WHETHER -- AND HOW DOES THAT FACTOR IN, WHETHER IT IS A GUN, WHETHER IT IS A KNIFE OR SOME OTHER WEAPON?

I CITED NUMEROUS CASES IN THE BRIEF OF CIRCUMSTANCES LIKE THIS OR WORSE, WHERE THE COURT REJECTED A FINDING OF HAC, SHOWING THAT DID IT DID NOT SHOW AN INTENT, EITHER THE ACTUALALITY OF PROTRACTED TORTUROUS SUFFERING OR THE INTENT TO INFLICT SUCH. THE BUCKNER CASE, THE BONIFAY CASE, THE, KIRK, NO, I AM NOT REMEMBERING THE NAME HERE. STARTS --

THAT'S ALL RIGHT. YOU NEED NOT --

THERE IS ANOTHER ONE AS WELL, WHOSE NAME I AM NOT RECALLING. LOOK PARTICULARLY AT BONIFAY. BONIFAY IS A CASE WHERE THERE WAS A PERSON HAD HIRED HIS COUSIN TO KILL A PARTICULAR INDIVIDUAL. THEY WENT TO THE LOCATION OF THE STORE AND FAILED, DIDN'T DO IT, SO THEY WERE SENT BACK THE NEXT NIGHT. TURNED OUT A DIFFERENT GUY WAS WORKING THERE. THE DEFENDANT, HIS CODEFENDANT SHOT THE VICTIM FROM OUTSIDE THE STORE, HITTING HIM, WOUNDING HIM, SHOT HIM TWICE, THEN ENTERED THROUGH A WINDOW, ENTERED INTO THE STORE AND WERE LOOKING AROUND, YOU KNOW, FOR ITEMS TO STEAL STEAL OR WHATEVER -- ITEMS TO STEAL OR WHATEVER IN THE STORE, WHILE THE VICTIM WAS IN THE STORE TALKING ABOUT HIS WIFE AND CHILDREN AND BEGGING FOR HIS LIFE, THE VICTIM TOLD HIM TO SHUT UP AND SHOT. I THINK PARTICULARLY GIVEN THAT THIS WAS AN UNPLANNED DOMESTIC MURDER AND THE HEATED EMOTIONAL STATE THAT JOEL DIAZ WAS IN, ESPECIALLY I WANT TO RELY MORE HEAVILY IN THIS CASE ON THE EXHIBIT, THE REPORT INTRODUCED BY THE STATE FROM THE STATE PSYCHIATRIST, DR. KEON, WHICH AT LEAST IN MANY WAYS IS AT GOOD AS THE DEFENSE EXPERT, DR. CLINIC ON THAT POINT. I MEAN, IT IS -- DR. CLING, ON THAT POINT.

IT IS VERY CLEAR FROM THE STATE'S EXPERT WHOM THEY INTRODUCED THAT, JOEL DIAZ WAS IN A VERY HEATED EMOTIONAL STATE OVER THIS IS, UNREC WITNESSED LOVE, ANGER, HIS -- UNREC WYATTED LOVE, ANGER, HIS BEHAVIOR HAD CHANGED SUBSTANTIALLY. HE QUIT HIS JOB, ACCORDING TO HIS BROTHER.

HOW DOES THAT EXPLAIN THE FACT THAT, ON THIS RECORD, MR. DIAZ ENCOUNTERS THE FATHER ON THE LAWN, RIGHT? ON THE FRONT LAWN.

THE FATHER ACTUALLY CAME OUT AND CONFRONTED MR. DIAZ ON THE LAWN.

SO THAT IS WHERE THE INITIAL CONFRONTATION BETWEEN THE TWO TAKE PLACE. SOMEHOW THEY GET TO THE GARAGE. THEY WE GET TO THE BEDROOM. THEN WE GET TO THE BATHROOM. I MEAN, DURING ALL THIS TIME, YOU KNOW, HE SHOOTS THE GUY OR ATTEMPTS TO, AND THERE IS NO BULLETS IN THE GUN, AND HE RELOADS THE GUN AND FOLLOWS HIM INTO THE BATHROOM. I UNDERSTAND THE HEATED SITUATION OR POSSIBLY HEATED SITUATION BETWEEN MR. DIAZ AND THE FORMER GIRLFRIEND, BUT HOW IS THIS TRANSLATE -- BUT HOW DOES THIS TRANSLATE TO THE MURDER OF THE PHATER?

HOW DOES IT TRANSLATE. FIRST OF -- TO THE MURDER OF THE FATHER?

WHEN HE GOT THERE, NOTHING IN WORDS WAS GOING TO CALM ANYBODY DOWN. ANOTHER INTENDED VICTIM HAD LEFT THE SCENE, AT THE POINT WHERE THE FATHER AND MR. DIAZ, THEN, HAVE THEIR INITIAL CONTACT.

FIRST OF ALL, I DON'T AGREE THAT SHE WAS THE INTENDED VICTIM HAD, IN THE SENSE THAT HE HAD GONE -- I DON'T THINK THERE WAS ANY EVIDENCE THAT HE HAD GONE TO THE HOUSE WITH THE INTENT TO SHOOS SHOOT -- TO SHOOT MRS. SHAW.

WHAT ABOUT THE LETTER?

THAT IS A SUICIDE NOTE. I WILL READ THE LETTER TO THE BROTHER. I THINK THE LETTER TO THE BROTHER IS VERY IMPORTANT ON MR. DIAZ'S MENTAL STATE. BEAR IN MIND HE HAD BEEN UP ALL NIGHT DRINKING CROWN ROYAL AND HAD NO SLEEP, STEWING IN HIS OWN SITUATION. JOSE, FIRST OF ALL I WANT TO APOLOGIZE TO YOU FOR LYING TO YOU TO TAKE ME WHERE YOU DID. THERE IS NO WAY I HAVE TO DO WHAT I DID BUT TO CONFRONT THE LADY AND ASK HER WHY, AND NOT KNOWING IS REALLY KILLING ME AND THAT IS WHAT HAPPENED TO HER. IF WHAT HAPSENSE WHAT I PREDICT, THEN I WANT YOU TO KNOW THAT I CAN'T GO ON LIKE THIS. IS TOO MUCH MAIN. THAT IS ALL THERE IS TO SAY. IT'S TOO MUCH. JOEL. PS LET ME DAD KNOW THAT I LOVE HIM. I AM NOT CLOSE TO HIM BUT THAT DOESN'T MEAN I DON'T LOVE HIM, BECAUSE I DO.

NOT ONLY HE DIDN'T TAKE JUST ONE BULLET AND IF HE WAS GOING TO COMMIT SUICIDE, HE DIDN'T HAVE TO GO TO HIS FORMER IF I RECALL GIRLFRIEND'S HOUSE TO -- TO HIS FORMER GIRLFRIEND'S HOUSE TO DO SO AND HE TOLD THE MOTHER I COULDN'T KILL YOUR DAUGHTER SO I KILLED YOUR HUSBAND. COMBINED WITH ALL THAT, CAN'T THAT NOTE ALSO BE INTERPRETED ASSETS A MURDER MURDER/SUICIDE NOTE OR A MURDER NOTE?

I THINK IT IS CONSISTENT. THE NOTE SAYS NOTHING ABOUT I AM GOING TO KILL LESS THAN TWO OR ANYTHING LIKE. THAT THE NOTE IS CONSISTENT WITH ONLY BEING A SUICIDE NOTE. IT IS NOT NECESSARILY -- I MEAN, IT DOESN'T EXCLUDE THE POSSIBILITY OF MURDER IS/SUICIDE, BUT IT DOESN'T SAY IT AND IT DOESN'T IMPLY IT. NOW, AS FAR AS TAKING THE EXTRA BULLETS, I MEAN HE DIDN'T NEED THAT MANY BULLETS TO KILL HIMSELF, BUT HE ALSO DIDN'T NEED THAT MANY BULLETS TO KILL ALISA. THE STATEMENT TO THE WIFE, ADMITTEDLY UNDER ALL THE EXPERTS, AND IT HAS WEIGHT AS THE COMMENT ON WHAT HAD OCCURRED NOT ON WHAT HE INTENDED TO HAVE OCCUR.

YOU WERE GOING TO TELL US WHERE THE TRIAL COURT WENT WRONG IN HAC.

I DID CCP HERE, TOO. ON THE QUESTION OF HAC, LIKE I SAY THERE, IS ABSOLUTELY NO EVIDENCE HERE OF ANY INTENT TO INFLICT EXCESSIVE OR UNNECESSARY PAIN AND SUFFERING ON JOEL'S PART. THE STATE ARGUED, AMONG OTHER THINGS, THAT, WELL, WHY DID HE SHOOT HIM IN THE LEG FIRST, AS IF HE WAS AIMING TO GRAZE THE BACK OF HIS LEG. HE IS PROBABLY NOT A REAL GOOD SHOT.

DO YOU AGREE, DO YOU NOT, THAT INTENT TO CAUSE IT IS NOT THE SOLE TEST?

IT IS NOT THE SOLE TEST.

WHAT IS THE SNORE.

THE OTHER TEST IS WHETHER THE PERSON ACTUALLY ENDURED EXCESSIVE OR TORTUROUS PAIN AND SUFFERING, AND AGAIN, UNDER THE LINE OF CASES THAT I CITED, NOTABLY BUCKNER, BONIFAY, ALSO SANTOS, ALSO THE ONE THAT SOUNDS LIKE KIRKHAM THAT I CAN'T REMEMBER, BUT I HAVE STATED AT LEAST EIGHT CASES IN THE BRIEF WHERE I DON'T THINK THAT PROBLEM WAS SATISFIED, EITHER.

WHAT DOES IT TAKE TO SATISFY THAT ELEMENT, IN YOUR ESTIMATION?

YES. THE VAST MAJORITY OF CASES WHERE THIS COURT HAS AFFIRMED FINDINGS OF HAC IN GUNSHOT CASES ARE CASES THAT INVOLVE THE CASE THAT YOU JUST HEARD, WHERE THERE WAS A RAPE PRIOR TO THE PILLOW BEING PLACED TO HER HEAD AND HER BEING SHOT. CASES WHERE THE VICTIM WAS BOUND. CASES WHERE THE VICTIM WAS OTHERWISE RENDERED HELPLESS FOR ACTION TENDED PERIOD OF TIME, TAUNTED WITH THEIR IMPENDING DEATH. I CITED THE CASES OF POOLER AND WYATT. AGAIN, I TALKED ABOUT BUCKNER AND BONIFAY AS BOTH BEING CASES WHERE HAC WAS STRICKEN, EVEN THOUGH THEY WERE WORSE THAN THIS CASE. IN BOTH OF THOSE CASES, THE DEFENDANT MADE TAUNTING OR MEAN COMMENTS TO THE VICTIM BEFORE THE FINAL SHOT, ALONG THE LINES OF, ONE OF THEM, HAVEN'T YOU HAD ENOUGH, MOTHER IF YOU CANER, ONE ONE WAS "SHUT UP "CO! ON THE OTHER HAND OF CASES OF POOLER AND WYATT, TAUNTING COMMENTS ALONG WITH OTHER PROTRACTED BEHAVIOR WAS ENOUGH TO FIND HACN WYATT, I BELIEVE THE VEHICLE -- TO FIND HAC. IN WYATT, I BELIEVE THE VICTIMS WERE TIED UP, HERDED INTO A ROOM. THE WOMEN WERE RAPED AND THE FINAL VICTIM THE DEFENDANT SAID LISTEN CAREFULLY AND YOU CAN HEAR THE BULLET COMING. IN THE WYATT CASE, WHICH IS A MUCH LONGER AND MORE PROTRACTED SITUATION THAN THIS, THE VICTIM WAS SCREAMING AND RUNNING FOR HER LIFE, "DIDN'T I TELL YOU I WOULD KILL YOU, BITCH!" THOSE ARE CASES OF HAC WHICH TALKS ABOUT THE DEFENDANT'S ENJOYMENT OR INDIFFERENCE TO THE SUFFERING OF OTHERS AND THE SUGGESTION THAT THE DEFENDANT WAS GETTING SOME PER VERSE PLEASURE OUT OF THE CRIME. HERE YOU DON'T HAVE THAT. HERE, AFTER THE CRIME, NOT ONLY WAS THERE NO TAUNTING, EVEN THOUGH THERE WAS OPPORTUNITY TO DID IT, THE DEFENDANT AFTER THE CRIME, APOLOGIZED TO THE VICTIM'S WIFE AND SAID I AM SURE YOU WILL NEVER FORGIVE ME FOR THIS AND MADE A PHONE CALL TO HIS MOTHER SAYING I HAVE DONE SOMETHING WRONG AND I WILL HAVE TO BE PUNISHED. IT IS CLEAR THAT HE HAD REMORSE, EVEN AT THAT STAGE. IT IS CLEAR THAT HE DID NOT ENJOY IT OR DO THIS FOR ENJOYMENT. THERE WAS NO TAUNTING OF THE VICTIM. THERE WAS NO TORTURING OF THE VICTIM, EVEN THOUGH THERE WAS EVERY OPPORTUNITY IN THE WORLD. BARBARA SHAW TESTIFIED THERE WAS NOTHING TO KEEP JOEL DIAZ FROM LEAVING. SHE WAS A QUADRIPLLEGIC.

ARE YOU CHALLENGING THE JUDGE'S FACTUAL FINDINGS?

YES, I AM.

WHAT WAS THE FIND SOMETHING.

AS TO THE HAC FINDING, THE JUDGE MADE TWO ERRORS OF MISS CONSTRUCTION OF THE FACTS IN THE EVIDENCE, THAT BOTH WENT, TO ONE OF THEM WAS THE TESTIMONY OF BARBARA SHAW, WHICH IS THE EVIDENCE MOST IN FAVOR OF THE STATE ON THIS, IN THE LIGHT MOST IN FAVOR OF THE STATE AT THIS POINT, THAT WHEN THE GUN CLICKED THAT, JOEL WAS JUST VERY FAST, AND THAT HE QUICKLY RELOADED THE GUN AND THAT MR. SHAW HAD, THERE WAS NO NOWHERE FOR HIM TO GO BUT THROUGH JOEL OR OVER BARBARA, AND SO HE RETREATED INTO THE BATHROOM AND IT ALL HAPPENED VERY FAST. THE STATE'S STRENGTH ALSO TESTIFIED THAT IT HAPPENED VERY FAST.

THAT WAS BEFORE THERE WAS ANY GUNSHOT.

THEY WERE BOTH --

HE RUNS INTO THE BATHROOM WHILE JOEL IS RELOADING.

RIGHT, AND IT ALL HAPPENED VERY QUICK. TOO QUICK FOR ANYBODY TO DO ANYTHING ABOUT IT, ACCORDING TO BARBARA.

AND THEN THERE ARE THREE SHOTS.

THEN THERE ARE THREE SHOTS.

AND THEN HOW LONG BEFORE THE NEXT TWO SHOTS?

APPROXIMATELY 30 SECONDS. OKAY. ANYWAY, JOEL WAS JUST SO QUICK, WHICH IS, AND THERE ARE SOME REASONS, I MEAN THE JUDGE WAS ENTITLED TO BELIEVE THAT, BUT THERE ARE SOME QUESTIONS AS TO WHETHER OR NOT THAT IS EVEN PLAUSIBLE THAT MR. SHAW WOULD NOT HAVE JUMPED JOEL WHEN THE GUN CLICKED, FOR REASONS THAT I HAVE CITED IN THE BRIEF.

WE HAVE GOT TO TAKE THAT IN THE LIGHT MOST FAVORABLE TO THE STATE, RIGHT?

CORRECT. I THINK THE JUDGE WAS ENTITLED TO BELIEVE BARBARA SHAW ON. THAT BARBARA'S TESTIMONY WAS THE ABSOLUTE MOST FAVORABLE TO THE STATE ON THAT.

AND THERE IS ALSO NO EVIDENCE THAT HE HAD ONE OF THESE AUTOMATIC REVOLVER RELOADING MACHINES THAT HAS THE BULLETS IN THEM ALREADY, SO AT LEAST HE HAD TO PUT IN, GO IN HIS POCKET AND PICK OUT THE BULLETS AND ONE BY ONE, PUT THE BULLETS INTO THE CHAMBER, DID HE NOT?

WELL, THERE IS NO EVIDENCE, THERE IS NO DESCRIPTION OF THAT OCCURRING, FROM BARBARA.

BUT THERE HAS GOT TO BE, IF HE HAD WASTED, ALREADY, ALL THE BULLETS AND THE EVIDENCE WAS HE DID, HE HAD TO, NUMBER ONE, CLICK OUT THE REVOLVER CHAMBER, PRESS THE BUTTON SO THAT ALL THE SPENT SHELLS FALL ON THE FLOOR, GO INTO HIS POCKET, PULL OUT THE REPLACEMENT BULLETS AND THEN, ONE BY ONE, PUT THE BULLETS INTO THE CHAMBER AND THEN CLICK BACK THE CHAMBER INTO THE REVOLVER. THAT IS HOW A REVOLVER WORKS RIGHT?

PRESUMABLY YOU WOULD HAVE ALL OF THAT.

SO ASSUMING HE HAD TO DO ALL OF THAT, IT HAD TO TAKE MORE THAN A COUPLE OF SECONDS TO DO ALL OF THAT, CORRECT?

I DON'T KNOW HOW FAST, MORE THAN A SECOND OR TWO, I WOULD ASSUME, BUT, AGAIN, PAR BRA'S TESTIMONY WAS THAT JOEL WAS -- BARBARA'S TESTIMONY WAS JUST THAT JOEL WAS

VERY FAST AND THAT MR. SHAW HAD NOTHING TO DO BUT TO RETREAT IN THE BATHROOM, AND THEN THE TESTIMONY COMES THAT TWICE JOEL SLOWLY RELOADED THE REVOLVER. WHETHER SOMETHING HAPPENED FAST OR SLOW MIGHT BE DIMINIMOUS, BUT IN A CASE LIKE THAT WHAT THE JUDGE IS TRYING TO DO HERE IS TO SUGGEST THAT SOMEHOW HE WAS SAFERING IT, AND THERE IS NO VERSION -- SAVORING IT, AND THERE IS NO VERSION OF THE EVIDENCE THAT SUPPORTS THAT FACT THAT THAT OCCURRED. THE OTHER FACTUAL MISTAKE THAT THE JUDGE MADE WAS HE STATED ON HIS SENTENCING ORDER IN THE HAC THAT THE MEDICAL EXAMINER DETERMINED THAT THE FINAL TWO SHOTS WERE THE SHOT TO THE CHEST AND THE SHOT TO THE HEAD. THE MEDICAL EXAMINER MADE NO SUCH TESTIMONY. HER TESTIMONY WAS THAT SHE COULD NOT DETERMINE THE ORDER OF THE SHOTS.

WHAT ABOUT CCP?

CCP. BACK TO THE SEVEN ERRORS. THERE WERE FOUR ELEMENTS OF CCP. THE STATE SATISFIED ONLY ONE OF THOSE ELEMENTS ON, AS TO THE ATTEMPTED MURDER OF LISA, IF SHE WAS THE VICTIM, AND GO WITH THAT AUMS AS TO WHY -- WITH THAT ASSUMPTION AS TO WHY --

I THINK THAT IS A HUGE ASSUMPTION, BUT LET'S GO WITH THAT YOU CANNOT TRANSFER ANY INTENT FROM LISA SHAW TO MR. SHAW'S --

HOW DOES THAT WEIGH IN THE PROVENS SANS-CASE? -- PROVENZANO CASE?

AT THAT TIME HE WAS OPERATING FROM HIS PREPLANNED INTENT TO KILL OFFICERS HEERSON AND SHIRLEY, IN OTHER WORDS -- OFFICERS HEERSON -- EPPERSON AND SHIRLEYLY.

HE TURNED AROUND AND KILLED THE PEOPLE THAT WERE CHASING HIM, WHICH WERE DIFFERENT THAN THE PEOPLE HE INTENDED TO KIM.

COURT'S FINDING IN PROVENS SAN-WAS DISTINGUISHED -- PROVENS VAN-WAS DISTINGUISHED FROM -- PROVENZANO WAS DISTINGUISHED FROM WILSON, IN THAT THERE WAS ONE SHOOTING, NOT TWO SEPARATED IN TIME BY A SCENES OF UNANTICIPATED, SIGNIFICANT EVENTS THAT OCCURRED BETWEEN THE DEFENDANT AND THE ACTUAL VICTIM, WHO WAS ALSO THE INTENDED VICTIM, SO THAT BY THE TIME, IN OTHER WORDS YOU HAVE GOT, ACCORDING TO JUSTICE PARIENTE'S HYPOTHETICAL, WHICH I THINK THE EVIDENCE ABSOLUTELY DOES NOT SUPPORT, BUT ASSUMING THAT HE HAD COME IN THERE WITH A PREPLANNED INTENT TO KILL LISA. HE FIRES AT LIST A LISA IS GONE. SHE SO THE WAY TO THE HOSPITAL. MR. SHAW COMES OUT AND SOMETHING IS OCCURRING BETWEEN CHARLES AND JOEL OUTSIDE. WITNESSES SEE PART OF LISA AND DEBORAH WILSON SEES PART OF THIS, WHERE JOEL IS POINTING THE GUN AT CHARLES AND CHARLES IS ADVANCING AT HIM, YELLING AT HIM, POINTING HIS FINGER AT HIM. JOEL IS NOT SHOOTING CHARLES SHAW AT THAT POINT. YOU CAN SAY MAYBE HE DIDN'T WANT TO SHOOT HIM WHERE THERE WERE WITNESSES, BUT NUMBER ONE HOW DO HE -- HOW DID HE KNOW HE WAS GOING TO GO BACK IN THE HOUSE, AND NUMBER TWO, WHEN HE DID GO BACK IN THE HOUSE, HE SHOT HIM IN FRONT OF MRS. SHAW, WHICH HE TALKED TO HER AT LENGTH AND DID NOT ELIMINATE. THERE IS NO INTENT IN JOEL'S MIND HERE ABOUT WORRYING ABOUT WITNESS ELIMINATION, SO IT IS CLEAR AT SOME POINT BETWEEN THIS CONFRONTATION BETWEEN JOEL AND CHARLES, THERE WAS NO INTENT ON JOEL'S PART TO SHOOT CHARLES OR ANYBODY. SOMETHING HAPPENED.

WHAT ABOUT WHAT HE DISCUSSED EARLIER, THAT NOT ONLY DID HE TAKE FIVE OR SIX BULLETS AND PUT THEM IN THE CHAMBER, BUT HE ALSO TOOK REPLACEMENT BULLETS, AND THAT COMBINED WITH THE LETTER THAT COULD BE INTERPRETED AS A MURDER/SUICIDE NOTE AND COMBINED WITH THE STATEMENT TO THE MOTHER LATER THAT I COULDN'T KILL YOUR DAUGHTER, THERE FOR I KILLED YOUR HUSBAND, ISN'T THAT ENOUGH EVIDENCE THAT HE INTENDED THAT DAY TO KILL SOMEBODY.

I THINK THERE RECEIVED THAT HE CONDITIONALLY INTENDED TO KILL HIMSELF. I THINK YOU HAVE GOT TO READ THAT NOTE PRETTY CAREFULLY. I THINK THIS WOULD BE PURE SPECULATION IF YOU READ INTO THAT NOTE ANYWHERE, ANY INTENT TO KILL LIST A BUT AGAIN IF HE DID INTEND TO KILL LISA, THAT INTENT COULD BE TRANSFERRED TO THE SHOOTING OF CHARLES. NOW, WE KNOW THAT JOEL TESTIFIED THAT, WHILE THEY WERE IN THE GARAGE, HE WAS STRUCK IN THE FACE BY CHARLES WITH HIS FIST OR AN OBJECT OR A TOOL, AND AT THAT POINT HE LOST IT ANT MURDER OCCURRED IN SHORT ORDER AFTER THAT. THAT, CLEARLY SOMETHING HAPPENED TO CHANGE THE MOMENTUM AND NATURE OF THIS CONFRONTATION. DO WE KNOW FOR SURE THAT JOEL IS TELLING THE TRUTH? MAYBE NOT BUT THE LAW ON AGGRAVATING CIRCUMSTANCES, AS WITH CONVICTIONS THAT, WHEN THE STATE IS TRYING TO PROVE THEM BY CIRCUMSTANTIAL EVIDENCE, THE EVIDENCE MUST NEGATE A REASONABLE HYPOTHESIS INCONSISTENT WITH THE AGGRAVATOR. DOES THE EVIDENCE NEGATE WHAT JOEL SAID ABOUT GETTING HIT IN THE FACE IN THE GARAGE AND CAUSING HIM TO LOSE IT? IF ANYTHING, THE STATE'S EVIDENCE STRONGLY TENDS TO CORROBORATE THAT. WHAT EVIDENCE IS THAT? YOU HAVE GOT YOU HAVE GOT THE BOOK PHOTOGRAPH WHICH -- YOU HAVE GOT THE BOOKING PHOTOGRAPH WHICH SHOWS THE ABERRATION ON THE LEFT CHEEK RIGHT UNDER THE EYE. I WOULD SUGGEST THE COURT LOOK AT THAT, BECAUSE I DON'T THINK THE COURT WOULD BE ABLE TO CONCLUDE THAT THAT WAS CAUSED BY A FLYING CHARRED OF GLASS. THAT WAS -- A FLYING CHARD OF GLASS.

IT NEGATES MORAL JUSTIFICATION?

NO. IT NEGATES COLD CALCULATION. LET ME TALK ABOUT THE THREE ELEMENTS OF CCP, THE THREE ELEMENTS OF CCP ARE COLDNESS, WHICH IS COOL AND YOU MEAN KAUM REFLECTION, DON'T -- AND COOL AND CALM REFLECTION, DON'T HAVE IT. COLDNESS. ANYTHING COMING FROM THE SUICIDE NOTE. A PLAN. THERE IS NOTHING IN THE SUICIDE NOTE OF A SHEER PLAN TO KILL LISA, MUCH LESS CHARLES.

SO WAITING A LONG TIME TO PURCHASE THE GUN AND BUYING THE A.M. -- THE AMMUNITION, DOES NOTHING, IS NOT CONSIDERED IN THIS CCP, AS IT RECEIPTS TO ---AS IT RELATES TO THE FATHER.

AS TO THE FATHER CERTAINLY NOT. AS TO THE DAUGHTER, MAYBE IT COULD BE CONSIDERED, BUT IT WOULD BE EXTRAORDINARILY WEAK AS AN INFERENCE, BECAUSE OKAY, HE BUYS THE GUN THREE WEEKS EARLIER. IS HE BUYING THE GUN FOR PROTECTION? IS HE BUYING IT TO KILL LISA? IS HE BUYING IT TO KILL HIMSELF? THE STATE MADE VERY MUCH OF THE FACT THAT HE WAS ANNOYED WITH A THREE-DAY WAITING PERIOD. HE WAS FINE WITH THAT BUT WHEN HE GOES TO GET THE GUN, THE FOLKS AT THE GUN STORE SAY YOU ARE A CONDITIONAL NONAPPROVAL. WE CAN'T GIVE YOU THE GUN BUT COMMITTEE WE CAN'T CANCEL THE TRANSACTION. THERE IS EVIDENCE THAT HE WAS IRATE AND THAT IS THE KIND OF BUSINESS TRANSACTION THAT WOULD MAKE ANYBODY IRATE. THAT WAS THE TWO-WEEK PERIOD BETWEEN WHEN HE TOOK THE GUN AND THIS INCIDENT OCCURRED.

BUT IN THIS SITUATION ISN'T THERE EVIDENCE THAT HE HAD TIME TO REFLECT ON WHATEVER IT IS HE BOUGHT THE GUN FOR. HE BOUGHT GUN, AS I UNDERSTAND IT, AT LEAST A MONTH BEFORE THIS MURDER TOOK PLACE OR AT LEAST AT FEW WEEKS BEFORE THIS MURDER TOOK PLACE, AND SO DURING THIS PERIOD OF TIME, DON'T YOU HAVE THE OPPORTUNITY FOR REFLECTION AND ALL OF THAT, WHICH PLANNED TO THIS INFLECTION, ALSO?

HE WOULD HAVE CERTAINLY HAD MORE THAN ENOUGH TIME TO REFLECT ON IT, BUT THERE IS NO EVIDENCE THAT THAT WAS WHAT HE WAS DOING.

DO WE HAVE CASES WHERE THE CCP ELEMENT IS FOUND IN THE VERY MOMENTS BEFORE THE KILLING TAKES PLACE, AND I AM TALKING, THERE, ABOUT, WELL, IT MIGHT NOT BE ENOUGH FOR

HAC, ABOUT THE FACT THAT HE HAD DID HAVE TO CONTEMPLATE, WHEN -- ABOUT THE FACT THAT HE DID HAVE TO CONTEMPLATE, WHEN HE WENT UP THE STAIRS, HE HAD THAT GUN. HE RELOADED AND THEN RAN IN. THERE IS THE BEGGING FOR THE LIFE. HE IS THEN, THAT THAT PART IS A DELIBERATE ACT. DO WE HAVE ANY CASES WHERE THAT WOULD BE ENOUGH FOR CCP?

I THINK YOU HAVE CASES REFUTING THAT THAT WOULD BE ENOUGH FOR A CCP, AND I WOULD CITE THE FARINAS CASE, WHICH RECEDES FROM THE PHILLIPS CASE ON THAT POINT.

CHIEF JUSTICE: YOU ONLY HAVE A FEW MINUTES.

I AM GOING TO RESERVE THE REST OF MY TIME, OTHER THAN TO SAY IN ADDITION TO WHAT I HAVE ARGUED HERE, WELL, I WILL SAVE IT FOR REBUTTAL.

MAY IT PLEASE THE COURT. MY NAME IS STEPHEN AKE, AND I REPRESENT THE STATE OF FLORIDA IN THIS CASE. I GUESS I WILL BEGIN DISCUSSING THE HAC AGGRAVATOR, BECAUSE THAT IS WHERE COUNSEL STARTED HIS ARGUMENT, AND I WOULD LIKE TO ADDRESS SOME OF HIS CONTENTIONS AS TO THE VERY FIRST PART AS JUSTICE LEWIS STATED EARLIER, ABOUT THE DEFENDANT'S INTENT TO CAUSE PAIN AND SUFFERING IS NOT THE SOLE TEST THAT GOES INTO FINDING THIS AGGRAVATOR. IN FACT, THE CASE LAW, AS RECENTLY AS EARLIER THIS YEAR IN MORRISON, HAS STATED THAT YOU HAVE TO FOCUS ON THE MEANS OF THE DEATH AND NOT THE DEFENDANT'S INTENT.

DO YOU AGREE THAT THERE IS A SERIES OF CASES IN THIS COURT, STARTING WITH DIXON THAT UPHELD THE AGGRAVATOR, THAT TALKS ABOUT WHERE THERE IS NOT INTENT, THERE HAS GOT TO BE UTTERING, SOMETHING ABOUT WHAT THE DEFENDANT DID OR DIDN'T DO, THAT IS STILL PART OF HAC? IT MAY NOT BE ACTUAL SPECIFIC INTENT BUT THERE HAS GOT TO BE AT LEAST UTTER INDIFFERENCE TO THE SUFFERING OR SOMETHING.

YES. THERE ARE A LINE OF CASES THAT DISCUSS THAT, AND AS I SAID, THERE IS ALSO A LINE OF CASES THAT HAVE SEEMED TO HAVE RECEDED FROM THAT AND SAID THAT THE FOCUS NEEDS TO BE ON THE MEANS AND MANNER OF THE DEATH, NOT ON HIS INTENT, THE DEFENDANT'S INTENT IN THIS AGGRAVATOR, AND WHAT YOU ARE LOOKING AT IS YOU HAVE GOT TO LOOK AT WHAT HAPPENED TO THE VICTIM, AS FAR AS THE AMOUNT OF SUFFERING AND WHAT TOOK PLACE IN THE MURDER, AND I THINK IN THIS CASE, WE KIND OF PIECEMEAL NUMEROUS FACTS IN THE ARGUMENT THERE, AND I WOULD KIND OF LIKE TO SAY OPPOSITE -- SIN OPPOSITE IT IN TERMS -- SYNOPSIS IT IN TERMS OF WHAT HAPPENED TO JUSTICE SHAW.

GIVEN YOUR VIEW OF THE CASE LAW AND HOWEVER IT SHAKES OUT, WHAT THE DEFINITION OF HAC IN YOUR VIEW NOW, AS IT -- DEFINITION OF HAC IS, IN YOUR VIEW NOW, AS IT IS SETTLED OUT, WHAT SHOULD WE BE LOOKING AT IN TERMS OF DECIDING WHETHER THE FACTUAL PATTERN IN THIS CASE FITS THE PARTICULAR AGGRAVATOR. WHAT WAS THE HAC AGGRAVATOR INTENDED TO COVER?

AS I CITED IN THE BRIEF, MORRISON, WHICH CAME OUT EARLIER IN, I BELIEVE IT WAS MARCH OF THIS YEAR, THIS COURT STATED THAT, REGARDLESS OF MORRISON'S INTENT TO INFLECT PAIN ON THE VICTIM, THE MEANS AND MANNER IN WHICH DEATH WAS INFLECTED IN THIS CASE JUSTIFIES IT, AND THEN IT CITES A NUMBER OF CASES, GUZMAN AND BROWN, AND IN ITS PERPETRATIONS, UNLIKE THE CCP AGGRAVATOR, WHICH IS TO A PARTICULAR STATE OF MIND, THE HAC AGGRAVATOR FOCUSES ON THE MANNER AND THE CIRCUMSTANCES SURROUNDING THE DEATH. AS I RECOGNIZED EARLIER WITH JUSTICE PARIENTE, THERE ARE SOME CASES OUT THERE THAT TALK ABOUT BOTH INSTANCES OF THE DEFENDANT'S INTENT --

ALL YOU ARE TALKING ABOUT NOW IS THE DEFENDANT'S INTENT, SO THE DEBATE ABOUT THAT, I AM ASKING YOU TO GIVE US A DEFINITION HOW IS, FIRST OF ALL WE STARTED WITH, I TAKE IT, HEINOUS AT ATROCIOUS AND CRUEL.

ESPECIALLY HEINOUS AT ATROCIOUS AND CRUEL. CORRECT.

WHAT DO OUR INITIAL OR WHAT DO OUR CASES AS THEY SETTLE OUT, DEFINE THIS AGGRAVATOR AS CONSTITUTING? WHAT ARE THE SFLMENTS.

THE UTTER INDIFFERENCE TO THE VICTIM'S SUFFERING AND -- -- WHAT ARE.

THE KEY ISSUE IS INDIFFERENCE.

DO WE AGREE?

IT AGAIN GOES TO THE DEFENDANT'S INTENT AND I DON'T KNOW WHETHER THIS SOLE AGGRAVATOR FIST EXISTS OR NOT, AND THE SOLE AGGRAVATOR, I DON'T KNOW THAT THIS, IN THIS CASE YOU HAVE A MENTAL ANGUISH.

WHAT IS THE DEFINITION, THEN, THAT YOU WOULD HAVE US APPLY?

THE DEFINITION AS SET OUT THAT THE MURDER WAS ESPECIALLY HEINOUS, AT ATROCIOUS OR KRURBLTION AND THEN AS THOSE TERMS ARE DEFINED, MEANING THE UTTER INDIFFERENCE TO THE VICTIM'S SUFFERING, TORTUROUS MURDER, THOSE KINDS OF THINGS ARE ALL FACTORED INTO IT. I THINK WE HAVE THAT IN THIS CASE. YOU HAVE TO REALIZE THAT, IN THIS CASE THE VICTIM IS AWOKEN IN THE MORNING. HE HEARS HIS WIFE SAY LISA JUST LEFT FOR WORK. THERE ARE FIVE SHOTS. SHE HEARD THOSE FIVE SHOTS. THEY KNOW ABOUT THIS PROBLEM WITH THE EX-BOYFRIEND. HE GOES OUT THERE AND SEES HIM IN THE YARD, CONFRONTS HIM, AND FOR WHATEVER REASON THERE, IS SOMETHING THAT TRANSPIRES THERE, AND THE DEFENDANT HAS ONE STORY AND THE STATE HAS A TOTALLY DIFFERENT STORY IN THEIR EVIDENCE, TOTALLY CONTRADICTS ALMOST EVERYTHING THAT THE DEFENDANT TESTIFIED TO AS TO WHAT HAPPENED. I THINK WE SET THAT OUT IN THE FIRST ISSUE AS TO WHAT HAPPENED OUTSIDE IN THE YARD. WE HAVE AN EYEWITNESS THAT SAW IT AND SAID THAT THERE WAS NO PHYSICAL CONFRONTATION. CHARLES SHAW WENT BACK INSIDE, AND THEN THE DEFENDANT WENT INSIDE AFTER HIM.

ON THAT, THOUGH, WASN'T THERE THE TESTIMONY THAT ACTUALLY THE DEFENDANT WAS BACKING UP, AS MR. SHAW WAS --

RIGHT. MR. SHAW WAS A BIGGER MAN, THAT MR. DIAZ --

WELL, IT IS UNCLEAR AS TO WHY HE WAS BACKING UP. ONE WITNESS SAYS THAT LISA SHAW'S CAR WAS TAKING OFF AND HE WAS WALKING BACKWARDS INTO THE STREET LOOKING DOWN AS HER CAR WAS LEAVING, AND THEN AT THAT TIME CHARLES SHAW WAS COMING OUT OF THE HOUSE AND HE IS POINTING AT HIM OR PERHAPS YELLING AT HIM OR SOMETHING OF THAT SORT, AND THE DEFENDANT HAS THE GUN BEHIND HIS BACK, ACCORDING TO THE EYEWITNESS. IT IS AT THIS TIME THAT CHARLES SHAW GOES INSIDE AND THEN THE DEFENDANT FOLLOWS HIM INSIDE. NOW, OF COURSE, THE DEFENDANT HAS AN OPEN ROAD AT HIS DISPOSAL AND HE IS ARMED WITH GAUN, A AND MR. SHAW HAS JUST WOKEN UP AND STANDING IN HIS UNDERWEAR.

HOW DOES THE STATE EXPLAIN WHATEVER BRUCE IT WAS THAT WAS ON THE DEFENDANT'S -- WHATEVER BRUISE IT WAS THAT WAS ON THE DEFENDANT'S FACE, THAT THE DEFENDANT ARGUES SUPPORTS HIS THEORY THAT MR. SHAW HIT HIM.

WELL, YOUR HONOR, THERE IS NO DIRECT EVIDENCE TO CONTRADICT THAT STATEMENT. I WOULD JUST SUBMIT THAT, ONE, I HAVE REVIEWED THE BOOKING PHOTO AND I DON'T SEE IT. BARBARA SHAW DIDN'T SEE IT. SHE TESTIFIED THAT SHE DIDN'T NOTICE ANY ABERRATION TO HIS FACE. THE LAW ENFORCEMENT OFFICERS DIDN'T NOTICE IT. ONE OF THEM TESTIFIED THAT HE LOOKED LIKE

HE HAD AN ABERRATION BUT THAT IT WAS ALL SCABED UP. I DON'T KNOW WHETHER WHEN THAT ABERRATION OCCURRED T COULD HAVE HAPPENED AT ANY TIME. IT COULD HAVE HAPPENED WHEN HE WAS ARRESTED. THAT IS NOT THE POINT. BUT EVEN IF MR. SHAW DID STRIKE HIM, IT DOES NOT CREATE A STOPPAGE IN THE CRAIN OF -- IN THE CHAIN OF EVENTS AND IT WASN'T A TURNING POINT OF WHERE HE SUDDENLY LOST CONTROL OF WHAT HE WAS DOING. EVEN IF MR. SHAW DID GET INTO SOME KIND OF CONFRONTATION WITH HIM IN THE GARAGE, WHICH AS I STATED EARLIER THE WITNESS OBSERVED MR. SHAW GO INSIDE AND THEN THE DEFENDANT GO IN AFTER HIM. I DON'T THINK THAT TOOK PLACE.

THE STATE'S POSITION IS THAT, EVEN IF MR. SHAW STRUCK HIM, YOU WOULD STILL HAVE A DEATH CASE. THIS WOULD BE ONE OF THE HEINOUS AND AT TROEK ATROCIOUS AND CRUEL -- AT ATROCIOUS AND CRUEL --

CORRECT, YOUR HONOR, AND THAT IS WHAT TOOK PLACE. HE EMPTIED FIVE SHOTS AFTER FIVE-SHOT REVOLVER AT LISA SHAW. SHE WAS VERY FORTUNATE NOT TO HAVE GOTTEN KILLED. SHE WAS STRUCK IN THE NECK AND THE SHOULDER AND TWO LODGED IN THE STEERING WHEEL. HE WAS AIMING ON TO KILL HER, AND THEN HE GOES INSIDE AND POINTS THE FIREARM AT MR. SHAW AND PULLS THE TRIGGER, AND NOTHING HAPPENS BECAUSE THERE IS NO AMMUNITION IN THE GUN. MR. SHAW RELAXES, AND JOEL OPENS THE SILL -- THE SILL I KNOWERS.

-- THE CYLINDER.

LET'S ASSUME THAT CHARLES SHAW DID STRIKE HIM IN THE FACE. HOW DOES THAT FACTOR IN?

IT DOESN'T FACTOR IN AT ALL. YOU HAVE MR. SHAW FIGHTING FOR HIS LIFE WITH AN ARMED DEFENDANT, AND CLEARLY GIVEN WHAT DID TRANSPIRE IN THE BEDROOM, WHICH WE DO HAVE EYEWITNESS TESTIMONY FOR, SO IF HE DID GET STRUCK SOMETIME BEFORE, THEN WE DON'T KNOW IT, BUT ANOTHER FACTOR TO CONSIDER IS THAT BARBARA SHAW TESTIFIED THAT SHE HEARD HER HUSBAND COME INSIDE AND SAY CALM DOWN. HE WAS PLEADING FOR HIS LIFE AT THAT POINT IN A SOFT VOICE, NOT THE KIND OF ANGRY VOICE THAT WOULD COINCIDE WITH SOME KIND OF CONFRONTATION THAT HAD JUST TAKEN PLACE, BUT THEY COME IN THE BEDROOM. BARBARA SHAW SEES WHAT HAPPENS AND SHE SEES HIM PULL THE TRIGGER AND RELOAD THE GUN, AND HE DOES HAVE TO RELOAD WITH FIVE LIVE BULLETS INTO THE REVOLVER.

DOES THIS CASE HAVE THE ELEMENTS OF A DOMESTIC DISPUTE, WHERE PASSIONS ARE HIGH AND THIS TYPE OF THING? I RECOGNIZE THAT YOU DON'T HAVE AN ACTUAL MARRIAGE OR ANYTHING, BUT YOU HAVE A GIRLFRIEND/BOYFRIEND WITH PASSION, EMOTIONAL INVOLVEMENT.

WELL, TO SOME EXTENT, YOUR HONOR, OF COURSE --

THE PERSON SAYING HE HAS REACHED THE END OF HIS LINE AND HE CAN'T STAND THE PAIN ANYMORE AND THIS TYPE OF THING. IS IT IN THE NATURE OF --

OBVIOUSLY THAT IS WHAT THE APPELLANT HAS ARGUED, AND THERE WAS A BOYFRIEND BOYFRIEND/GIRLFRIEND SITUATION HERE. SHE HAD BROKEN UP AND MOVED OUT TWO MONTHS BEFORE. I THINK IT IS INTERESTING TO NOTE THAT SHE MOVED OUT OF HIS TRAILER TWO MONTHS BEFORE THE MURDER ALMOST EXACTLY, AND THEN AT SOME POINT IN TIME SHE CUT OFF ALL CONVERSATION WITH THE DEFENDANT. SHE CHANGED HER BEEPER NUMBER, AND THAT WAS THE WAY HE CONTACTED HER. HE WAS SCARED TO CONTACT THE PARENTS. HE KNEW THEY DIDN'T LIKE HIM, AND SHE CUTS OFF ALL CONTACT WITH AND ABOUT A WEEK LATER HE GOES OUT AND BUYS THIS GUN AND, OR ATTEMPTS TO BUY THIS GUN AND THEN IT TOOK SOMETIME FOR HIM TO ACTUALLY GET THIS GUN, BUT TO THE EXTENT THAT THERE WAS A BOYFRIEND AND GIRLFRIEND BREAK UP, THAT DID HAPPEN TWO MONTHS BEFORE THIS, BUT THERE WAS A TWO-MONTH WINDOW THERE.

DON'T WE HAVE NUMEROUS FLORIDA CASES THAT SAY THAT YOU DO FACTOR THIS IN, THE EMOTIONAL INVOLVEMENT, IS SOMETHING TO BE CONSIDERED, THERE IS NO DOMESTIC DEFENSE AS SUCH. I APPRECIATE THAT.

NO, AND I THINK THE CASE LAW HAS, THERE USED TO BE MORE OF A DOMESTIC EXCEPTION TO THIS, BUT I THINK THAT HAS KIND OF CHANGED, AND I AM NOT SAYING IT IS NOT A FACTOR AND THE STATE'S EXPERT DID TESTIFY THAT HE WAS VERY EMOTIONAL.

I THINK THAT IS THE DEFENSE'S ARGUMENT, THAT IT REMOVES IT FROM THE DEATH CATEGORY OF THE MOST HEINOUS TYPE OF CRIMES WE HAVE.

WELL, GRANTED HE WAS EMOTIONAL, BUT I THINK YOU HAVE TO LOOK AT THE OTHER CIRCUMSTANCES THAT SUPPORT THE CCP, AND THEY ARE ARGUING THAT THERE WAS NO COLDNESS HERE BECAUSE OF THIS EMOTIONAL SITUATION, AND THE STATE'S EXPERT TESTIFIED THAT THIS WAS A VERY COLD, CALCULATED AND PLANNED MURDER.

HOW LONG AGO HAD THEY BROKEN UP?

TWO MONTHS BEFORE THE MURDER, AND SHE HAD, HE TESTIFIED THAT HE HAD HAD CON STRANT CONVERSATION WITH HER AND SHE SAID NO, THAT SHE HAD GONE -- CONSTANT CONVERSATIONS WITH HER AND SHE SAID NO, THAT SHE HAD GONE OVER TO HIS HOUSE TO GET SOME BELONGINGS, AND I BELIEVE IT WAS LATE SEPTEMBER THAT SHE BROKE UP CONTACT WITH HIM AND CHANGED HER BEEPER NUMBER. HE USED TO CALL AND LEAVE A CODE SO THAT SHE WOULD KNOW THAT IT WAS HIM.

COUNSEL, CAN YOU GET TO, ON THE CCP ISSUE, CAN WE TRANSFER INTENT FROM LISA TO CHARLES?

DEFINITELY, YOUR HONOR, AND THE PROVENZANO CASE THAT YOU SPOKE OF EARLIER, I THINK, IS PRETTY ON POINT IN THIS CASE, IN THAT YOU CAN TRANSFER, ALTHOUGH THE ULTIMATE VICTIM THAT HE MAY HAVE BEEN PLANNING THE MURDER OF WAS NOT ACTUALLY KILLED, YOU CAN TRANSFER THAT INTENT TO THE VICTIM THAT WAS, INDEED, MURDERED, AND IN THAT CASE, LIKE PROVENS SAN-, IN PROVENZANO, HE HAD -- LIKE PROVENS SAN-, HE HAD GONE TO THE COURTHOUSE WITH THE INTENT TO KILL THE OFFICERS, AND HE CONCEALS THE GUN IN HIS JACKET OR WHAT HAVE YOU, AND WHEN HE GETS THERE IT IS NOT THE ARRESTING OFFICERS BUT, AGAIN, HE SHOOTS THEM, A AND THIS COURT SAID HIS PREMEDITATED DESIGN TO KILL THE ARRESTING OFFICERS RESULTED IN THE DEATH OF IN OTHER BAILIFF, AND WE HAVE THE SAME THING HERE.

WASN'T PROVENS SAN-LIKE ONE CONTINUES EPISODES -- WASN'T PROVENZANO LIKE ONE CONTINUES EPISODE OF CONTINUING TO ENCOUNTER PEOPLE, WHILE HE WENT TO THE VICTIMS THAT HE INTENDED TO KILL, AND HERE WE DON'T REALLY HAVE THAT CONTINUAL EPISODE, DO WE?

WELL, IT IS CONTINUAL IN A SENSE. I MEAN THERE, IS A, IN TIME FRAME WEISS, WE DON'T KNOW THE -- IN TIME FRAME WISE, WE DON'T KNOW THE EXACT DETAILS, BUT YOU HAVE LISA LEAVINGS THE CONFRONTATION WITH THE -- YOU HAVE LISA SHAW LEAVING, THE CONFRONTATION WITH THE FATHER AND THEN THEY GO INSIDE.

I THINK WHAT YOU ARE SAYING IS AT THAT POINT, IF HE HAD COME INTENDING TO KILL LISA, ONCE SHE LEFT, HE COULDN'T HAVE MISTAKENLY SHOT FATHER, THINKING THAT HE INTENDED TO KILL LIST A ISN'T THAT WHEN YOU HAVE GOT A -- TO KILL LIZA. ISN'T THAT WHEN YOU HAVE GOT A SHOOTING SPREE AND SOMEONE GETS IN THE WAY?

THAT IS THE TYPICAL EXAM ARE EXAMPLE THAT YOU -- THAT IS A TYPICAL EXAMPLE THAT YOU INTENDED TO KILL SOMEONE AND YOU GOT SOMEBODY ELSE. BUT YOU HAVE HIM TELL GOT MOTHER THAT I INTENDED TO KILL YOUR DAUGHTER AND SHE GOT AWAY AND THAT HE TRANSFERRED THE INTENT TO KILL TO THE FATHER. HE WAS PREJUDICED AGAINST THE DEFENDANT, AND I DON'T KNOW THAT WE HAVE A CASE THAT APPLIES IT, BECAUSE WHAT WE HAVE --

HE ACTUALLY DID INTEND, AT LEAST FOR THE FEW MINUTES BEFORE THE DEATH, TO KILL SHAW, SO THAT IS WHY YOU HAVE GOT PREMEDITATED MURDER --

RIGHT.

-- AS TO SHAW. NO ONE IS DISPUTING THERE IS NOT PREMEDITATED MURDER. NOW, THE QUESTION ABOUT HOW WE GET TO HEIGHTENED PREMEDITATION, THE CCP, THE EXECUTION STYLE, WHERE THAT GOES, DOES IT, DO YOU HAVE TO RELY ON HIS INTENT TOWARDS THE GIRLFRIEND, OR IS THERE INDEPENDENT --

NO. THAT IS THE POINT I AM MAKING, YOUR HONOR, IS YOU DON'T HAVE TO RELY ON IT. IT IS THERE. YOU CAN RELY ON IT. IT IS TWO DIFFERENT THEORIES, BUT THERE IS CLEARLY CCP WITHOUT IT, AND IN THIS CASE YOU HAVE, YOU KNOW, HE FIRES THE -- WELL, FIRST HE MISFIRED. HE PULLED THE GUN OR DIDN'T MISFIRE BUT THERE IS NO AMMUNITION, AND THE REVOLVER, HE FLIPS IT OPEN AND TAKES THE TIME TO RELOAD IT WHILE THE VICTIM RUNS INTO THE BATHROOM. HE IS PLEADING WITH HIS LIFE. HE GOES AND SHOOTS HIM IN THE LOWER LEG AND THEN IN THE ABDOMEN, AND THEN HE GOES AND TALKS WITH THE WIFE WHILE HE IS IN THERE LITERALLY THRASHING ABOUT IN THIS GROWING POOL OF BLOOD, AND I WOULD URGE AND SUBMIT TO THE COURT TO TAKE A LOOK AT THE PHOTOGRAPHS IN THIS CASE, BECAUSE IT DOES GO TO THE STATE'S THEORY AS TO THE ORDER OF SHOTS.

IF WE LEAVE OUT GIRLFRIENDANT SAME EXACT FACTS TO SUPPORT HAC THAT YOU ARE RELYING ON FOR CCP? IN OTHER WORDS JUST GO TO THOSE MOMENTS BEFORE, THE RELOADING OF THE GUN, RUNING IN THE BATHROOM, BEGGING FOR HIS LIFE, SHOOTING HIM THREE TIMES, THEN GOING BACK OUT, THAT THOSE SAME THINGS ARE WHAT YOU ARE GOING TO, THEN, SAY SUPPORTS HAC.

CCP.

DON'T WE HAVE IMPROPER DOUBLING, BECAUSE WE ARE JUST SAYING THE SAME FACTS ARE SHOWING TWO DIFFERENT THINGS?

NO. YOU DON'T HAVE, I MEAN, YOU YOU DON'T HAVE IMPROPER DOUBLING WITH HAC AND CCP, BASED ON THE FACTS IN THIS CASE. I DON'T SEE HOW YOU CAN HAVE THAT. GRANTED, THE ARGUMENT IS THAT THE FACTS SUPPORT CCP ON BOTH A TRANSFERRED INTENT AND JUST AS A PLAIN CCP AS TO CHARLES SHAW, BUT I DON'T THINK THERE IS ANY PROBLEM WITH IMPROPER DOUBLING WITH THIS.

COUNSEL, YOU ARE REFERRING EARLIER TO THE PHOTOGRAPHS THAT YOU ADVISED THAT WE SEE.

RIGHT.

ARE YOU ALLUDING TO THE CIRCUMSTANTIAL EVIDENCE BECAUSE THERE WERE BLOOD SMEARS ON THE FLOOR WHICH INDICATED THAT THE VICTIM WAS ALIVE FOR A WHILE, BEFORE HE CAME BACK?

CORRECT, YOUR HONOR. AS YOU CAN SEE JUST BY THE PHOTOGRAPHS THEMSELVES, THAT THEY

PLAINLY SHOW THAT HE WAS CONSCIOUS AND ALIVE AND HIS HEART WAS PUMPING AND BLOOD WAS POOLING AROUND HIS BODY, AND YOU CAN SEE LITERALLY LARGE SMEARS FROM HIS MOVEMENTS WITHIN THIS POOL OF BLOOD, AND THAT GOES TO SUPPORT THE STATE'S THEORY AS TO THE ORDER OF SHOTS, BEING THE FIRST THREE WERE THE ONE TO THE CAFFEINE TWO TO THE ABDOMEN, AND THEN THE NEXT TWO WERE THE FATAL SHOTS, THE ONES TO THE CHEST AND TO THE BACK OF THE HEAD. YOU HAVE THAT GAP IN TIME THAT BARBARA SHAW TESTIFIED THAT IT WAS 30 SECONDS TO A MINUTE THAT HE CAME IN THERE AND SPOKE WITH HER AND TOLD HER YOUR HUSBAND DESERVES TO DIE, AND THEN HE GOES BACK INSIDE THE BATHROOM AND SHOOTS HIM TWO MORE TIMES.

HOW DO YOU DISTINGUISH BUCKNER THEN?

I DON'T KNOW EXACTLY WHAT BUCKNER, WHICH ONE BUCKNER WAS.

THAT HE SHOT THE VICTIM TWICE, WALKED AWAY, VICTIM EXITED THE VEHICLE AND YELLS OWE MY GOD SOMEONE HELP ME. BUCKNER WALKED BACK TO THE VICTIM AND SHOT HIM THREE MORE TIMES AND SAID MOTHER IF YOU CANER YOU AIN'T HAD ENOUGH.

I THINK YOU HAVE WHAT PRECEDED THAT, ALSO. YOU HAVE MR. SHAW KNOWING WHAT TOOK PLAYS OUT SIDE. YOU HAVE THE DEFENDANT CHASING HIM INSIDE, PUTTING THE GUN AT HIM, PULLING THE TRIGGER AND IT NOT FIRING. HIM VICE IBLY RELAXING AND UNTIL HE FIGURES OUT THAT THIS GUY HAS GOT A POCKET FULL OF LIVE ROUNDS, THEN LOADING THE GUN AND CHASING HIM IN THERE. I THINK THAT IS AN ADDED, DISTINGUISHING FACTOR AS TO THE BUCKNER FACTS. I THINK YOU HAVE TO KIND OF LOOK AT THE WHOLE PICTURE HERE, AS TO WHAT WAS TAKING PLACE IN CHARLES SHAW'S MIND, THAT HE IS AWOKEN IN THE EARLY MORNING HOURS, TO FIVE GUNSHOTS AND KNOWING THAT HIS DAUGHTER HAD PROBABLY JUST BEEN SHOT, AND THEN HE CONFRONTS THIS INDIVIDUAL AND THEY HAVE WHAT TAKES PLACE. YOU YOU KNOW, AFTER HE IS, HAS BEEN, RUNS INTO THE BATHROOM AFTER HAVING, THOUGHT HE MIGHT BE GETTING OUT OF THIS, ONLY TO FIND OUT THAT HE IS RELOADING. HE GOES INTO THE BATHROOM. HE IS PLEADING FOR HIS LIFE. HE GETS SHOT IN THE STOMACH AND FALLS DOWN AND IS LITERALLY THRASHING AROUND IN THE BATHROOM FOR A PERIOD OF TIME, UNTIL THE DEFENDANT FINALLY COMES BACK AND SHOOTS THIS EXECUTION-STYLE SHOT TO THE BACK OF HIS HEAD. I THINK ALL THOSE FACTORS SUPPORT THE AGGRAVATORS HERE.

COUNSEL, CAN YOU SPEAK FOR A SECOND ON THE PROPORTIONALITY, BECAUSE WE HAVEN'T TALKED ABOUT THAT YET.

OKAY.

AND YOU MAY HAVE, DO YOU ADMIT THAT, IF WE INVALIDATE BOTH HAC AND CCP, YOU MAY HAVE A PROBLEM WITH PRO PORTIONALITY?

NO. I WOULD SUBMIT THAT, GIVEN THE OTHER FELONY THAT TAKE PLACE, THE ATTEMPTED MURDER OF LISA SHAW AND THAT YOU HAVE A SERIOUS VIOLENT FELONY OF ATTEMPTED FIRST-DEGREE MURDER. SHE WAS VERY FORTUNATE TO GET OUT OF THERE ALIVE. THE MITIGATION IN THIS CASE IS FAIRLY WEAK. YOU HAVE A COUPLE OF STATUTORY MITIGATORS THAT THE COURT DIDN'T GIVE MUCH WEIGHT TO BECAUSE HE DISCOUNTED THEM FOLLOW VARIOUS REASONS. YOU HAVE THE EXTREME EMOTIONAL DURESS, ONE THAT HE GAVE WEIGHT TO, BUT OTHER THAN THAT, HIS AGE, HE KIND OF GAVE IT LESS WEIGHT BECAUSE OF THE AMOUNT OF TIME THAT HE HAD BEEN LIVING ON HIS OWN AND WHAT HAVE YOU, BUT BASICALLY THERE IS NOT MUCH IN THE LITIGATION STANDPOINT THAT WOULD TEND TO OVER WEIGH, AND EVEN IF YOU GOT RID OF THE HAC AND THE CCP IN THIS CASE, THE AGGRAVATOR WOULD BE THE SUFFICIENT LEVEL OF MITIGATION IN THIS CASE.

SO YOU WOULD AGREE THAT, IF WE STRUCK ONE BUT NOT BOTH OF THE FACTORS THAT WE

TALKED ABOUT, THAT THERE WOULD STILL BE PROPORTIONALITY?

DEFINITELY. IT MAKES IT THAT MUCH STRONGER. I THINK THIS COURT HAS COME OUT AND SAID THAT HAC AND CCP ARE ABOUT THE STRONGEST AGGRAVATORS THAT YOU HAVE AND THEY ARE BOTH PRESENT AND PROPERLY FOUND BY THE TRIAL COURT IN THIS CASE. I REALIZE THAT COUNSEL HAS AN ARGUMENT AS TO SLIGHT DISCREPANCIES IN THE COURT'S ORDER BUT THOSE ARE NOT VERY MEANINGFUL, WHEN YOU LOOK AT THE ENTIRE ORDER AND THE BASIS OF THE COURT'S FINDINGS IN THOSE REGARDS. IF THERE ARE NO FURTHER QUESTIONS THE STATE WILL REST.

CHIEF JUSTICE: COUNSEL.

TO ANSWER JUSTICE CANTERO'S QUESTION QUICKLY ON THE QUESTION OF TRANSFERRED INTENT, THE CASE HERE IS NOT PROVENZANO. IT IS EMERSE THAT IS EXTREMELY CLEAR ON THE FACTS AT SO.2D 551, 486. THE FORMER THREAT TO THE GIRLFRIEND, HOWEVER NOTHING TO SAY THAT THE VICTIM KNEW THE VICTIM WHEN HE ARRIVED WITH THE GIRLFRIEND AT THE APARTMENT. WE REGRET THAT THE INTENT CAN BE TRANSFERRED TO THE VICTIM UNDER THESE CIRCUMSTANCES.

WHY IS THAT PROVENZANO IS NOT SIMILAR? HE IS GOING TO THE ORANGE COUNTY COURTHOUSE AND TAKING A WEAPON WITH HIM AND GOING AFTER PARTICULAR INDIVIDUALS AND THEN AS THE FACTS UNFOLD, HE HAS A PARTICULAR CONTINUOUS EVENT, GOING TO THE COURTHOUSE TO SHOOT.

THIS IS TWO SEPARATE SHOOTINGS, WHICH PROVENZANO WAS ONLY ONE, TWO SEPARATE SHOOTINGS SEPARATED BY A PROTRACTED SERIES OF EVENTS AND SOMETHING THAT THE STATE SAID WASN'T IMPORTANT BUT I THINK WAS EXTREMELY IMPORTANT. SOMETHING OCCURRED, THERE WAS A PERIOD OF TIME WHEN HE HAD, IN MY OPINION, THE ATTEMPT THAT REQUIRED FOR SECOND-DEGREE MURDER TO SHOOT LISA, AND THAT IS WHEN SHE PEELED OUT OF THE GARAGE. HE HAD THAT INTENT. THEN THERE WAS A PERIOD OF TIME DURING THE CONFRONTATION WHEN SHARLS CHARLES WAS APPROACHING -- WHEN CHARLES WAS APPROACHING HIM AND POINTING AND YELLING AT HIM WHEN HE HAD NO INTENT TO SHOOT ANYBODY. THERE WAS A SEPARATE INTENT TO SHOOT THE INTENDED VICTIM CHARLES, AND THAT WAS SOMETHING THAT OCCURRED IN THE GARAGE.

I AM HAVING TROUBLE WITH THIS IS NOT A CONTINUOUS TYPE SITUATION. I THOUGHT THAT HE CAME UNDER THE GARAGE DOOR AND TRIED TO ENGAGE HER IN CONVERSATION AND AS SHE PULLED OUT, HE FIRES, AND THEN SHORTLY THEREAFTER, I MEAN WITHIN A MATTER OF MOMENTS, THEN THE FATHER COMES OUT AND INTO THE YARD AND THEN IT, THEN, FLOWS FROM THE YARD BACK INTO THE HOUSE, AND I ASSUME YOU ARE SAYING, THEN, THE BLOW IS DELIVERED IN THE GARAGE AFTER THEY ARE OUT HERE. THEY COME BACK IN. THEY ARE FLOWING IN THE HOUSE. I AM HAVING DIFFICULTY HOW THIS IS NOT ALL A CONTINUOUS KIND OF A SCENARIO, HAPING THAT EARLY MORNING AT THAT --

IT MAY BE CONTINUES, IN THE SENSE OF LIKE A SCENE FROM A PLAY OR SOMETHING. IT IS NOT CONTINUES AS TO INTENT. HE HAD AN INTENT, AND I AM NOT CONCEDED A FIRST-DEGREE MURDER INTENT, BUT HE HAD AT LEAST AT SECOND-DEGREE MURDER INTENT TO SHOOT LISA AT THE TIME THAT SHE PEELED AWAY, AND HE WAS STARTLED AND FIRED AT THE CAR. THEN HE HAD NO INTENT EVENT DIDN'T KNOW CHARLES WAS COMING -- NO INTENT. HE DIDN'T KNOW CHARLES WAS COMING OUT. SOMETHING OCCURS AND CHANGES THE MOMENTUM OF THAT EVENT. THE EVIDENCE DOES NOT DISPROVE AND I THINK IT IS CORROBORATEED THAT HE LOST HIS TEMPER IN THE GARAGE WHEN SOMETHING OCCURRED, IN THE HEAT OF THE SITUATION, AND AGAIN HE HAD BEEN DRINKING AND UP ALL NIGHT AND WAS EMOTIONALLY DISTRAUGHT. THAT IS WHEN HE FORMED THE INTENT TO KILL CHARLES, AND AS JUSTICE PARIENTE POINTED OUT --

DO WE HAVE ANY EVIDENCE OF WHY HE EVEN WENT TO THE GARAGE? I MEAN, HE IS OUT IN THE YARD, SO WHY, HOW DO WE GET TO THE GARAGE? YOU MAKE A LOT OF THIS BLOW THAT YOUAL END TOOK PLACE IN THE GARAGE. -- THAT YOU ALLEGE TOOK PLACE IN THE GARAGE. HOW DID HE GETS TO THE GARAGE?

I ASSUME HE WALKED THERE, BUT NOBODY TESTIFIED THAT THEY SAW HOW THAT OCCURRED, WHETHER HE FOLLOWED --

SO CAN WE INFER THEN THAT HE IS FOLLOWING CHARLES AS CHARLES IS GOING BACK TO THE HOUSE?

I THINK THERE IS A POSSIBILITY OF THAT. I MEAN, IT IS POSSIBLE ALSO. YOU KNOW, WHETHER HE WAS BACKPEDALING INTO THE GARAGE OR FOLLOWING CHARLES INTO THE GARAGE, I DON'T THINK IT IS CLEAR ON THE RECORD. I THINK THERE WOULD BE SPECULATION ON THAT.

ARE YOU SUGGESTING THAT CHARLES FORCED HIM INTO THE GARAGE?

NO. NO. COULDN'T HAVE FORCED HIM INTO THE GARAGE, BUT THERE IS EVIDENCE AT THE EARLY STAGES OF CONFRONTATION. CHARLES WAS NOT ARMED. HE COULDN'T FORCE HIM NECESSARILY TO DO ANYTHING, BUT HE WAS ADVANCING TOWARD JOEL AND JOEL WAS BACK PEDEDUCATIONALING. JOEL WAS IN EFFECT SAYING I I WAS TRYING TO LEAVE AND HE WAS PREVENTING ME FROM LEAVING. I AM NOT SUGGESTING THAT HE FORCED HIM INTO THE GARAGE.

ARE YOU SUGGESTING THAT THE FATHER WALKING TOWARDS HIM SOMEHOW FORCED HIM INTO THE GARAGE? YOU THINK THAT IS SUPPORTED BY THE EVIDENCE, WHAT COMPELLED OR FORCED HIM TO GO THAT WAY?

I DON'T THINK HE WAS FORCED TO GO INTO THE GARAGE.

HOW ABOUT HAVING CAUSED IT. I AM NOT NECESSARILY SAYING FORCED. I AM HAVING DIFFICULTY, UNLESS YOU ARE SEPARATING OUT SOME FACTS HAD SUPPORT THAT. -- SOME FACTS TO SUPPORT THAT. YOU ARE SEPARATING OUT THAT IT JUST KIND OF HAPPENED. THAT IT IS JUST THERE.

ALL I HAVE GOT FROM THE EVIDENCE IS THAT THEY WERE IN THE BEYOND A REASONABLE DOUBT, THEN IN THE STREET, AND IN THE GARAGE.

IS THAT A FAIR INFERENCE TO DRAW FROM THESE FACTS THAT HE FOLLOWED THE FATHER BACK INTO THE GARAGE?

PROBABLY SO, AND THE REASON I SAY THAT IS BECAUSE OF THE TESTIMONY OF DEBORAH WILSON. I AM NOT SURE IT'S CLEAR BUT I NEED TO MOVE ON TO SOMETHING ELSE.

COUNSEL COULD YOU ADDRESS PROPORTIONALITY? OVER HERE. CAN YOU ADDRESS PROPORTIONALITY, AND I ASSUME THAT IF WE STRIKE BOTH FACTORS YOU ARE DISCUSSING HERE TODAY, THERE IS NO PROPORTIONALITY. CAN YOU ADDRESS THE CIRCUMSTANCE WHERE WE WOULD STRIKE ONE BUT NOT THE OTHER?

I WOULD SAY IF YOU STRIKE ONE BUT NOT THE OTHER IN MY OPINION YOU WOULD STILL NOT HAVE PROPORTIONALITY, IN THE SENSE OF IT BEING THE MOST AGGRAVATED AND LEAST MITIGATED OF ALL CRIMES. BUT SINCE THREE FACTORS WERE FOUND AND ARGUED HEAVILY AND GIVEN TO THE JURY AND THE JUDGE AND IN LIGHT THAT THIS IS A SIGNIFICANTLY MITIGATED CASE, I THINK YOUR ONLY OTHER OPTION WOULD BE REMAND FOR RESENTENCING, AND I WOULD ARGUE THAT THAT SHOULD BE BEFORE A NEW JURY, SO THAT IF YOU ARE NOT GOING TO FIND, IF YOU STRIKE BOTH AGGRAVATORS, IT IS DISPROPORTIONATE. IF YOU STRIKE ONE, I STILL THINK IT

IS DISPROPORTIONATE THAT AT THE VERY LEAST THEN WE SHOULD GET A NEW JURY PENALTY PHASE.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO END ON THAT NOTE AND TAKE IT ON THE BRIEFS FROM THERE. THANK YOU BOTH VERY MUCH. THE COURT WILL NOW STAND IN RECESS UNTIL TOMORROW MORNING.