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02-1666

MARSHAL: PLEASE RISE.

MARSHAL: PLEASE RISE. PLEASE BE SEATED.

CHIEF JUSTICE: AGAIN, WE APPRECIATE COUNSEL BEING READY TO GO ON THE NEXT CASE. DOUGLAS VERSUS STATE.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS NADA CAREY. I AM REPRESENTING MR. DOUGLAS. LUTHER DOUGLAS WAS FOUND GUILTY OF FELONY FIRST-DEGREE MURDER AND SEXUAL BATTERY IN THE DEATH OF MARY ANN HOBGOOD. THE TRIAL JUDGE SENTENCED DOUGLAS TO DEATH, FINDING TWO AGGRAVATING FACTORS, THE FELONY MURDER AND THAT IT WAS HEINOUS, ATROCIOUS AND CRUEL AND THE TRIAL JUDGE ALSO FOUND 16 MITIGATING FACTORS, WHICH INCLUDED THAT LUTHER DOUGLAS HAD NO PRIOR CRIMINAL HISTORY, THAT HIS FATHER WAS ARRESTED FOR CHILD ABUSE AFTER ONE PARTICULARLY EGREGIOUS BEATING OF DOUGLAS, THAT HE WITNESSED VIOLENCE AGAINST HIS MOTHER BY HIS FATHER, THAT HIS FATHER ALSO SEXUALLY ABUSED ONE OF HIS SISTERS FOR SEVEN YEARS, AND THE REVELATION OF THIS ABUSE, APPARENTLY THE FATHER WAS ARRESTED FOR THAT AND EVENTUALLY REMOVED FROM THE HOME. IT HAD A DEVASTATING IMPACT ON MR. DOUGLAS AND THE ENTIRE FAMILY. DOUGLAS HAD A LEARNING DISABILITY. HE LEFT SCHOOL IN SEVENTH GRADE. HE HAS A CLOSE KNIT LOVING FAMILY WHO ARE SUPPORTING HIM, EVEN AFTER HIS CONVICTION. THE TRIAL JUDGE ALSO FOUND THAT HE CAN BE REHABILITATED AND THAT HE CAN BE A PRODUCTIVE PRISON INMATE. THERE ARE TWO POINTS I WOULD LIKE TO ADDRESS TODAY. PRIMARILY, WHETHER DEATH IS THE PROPRIETOR PROPORTIONAL PENALTY IN THIS CASE, BUT, ALSO, I WOULD LIKE TO TOUCH A LITTLE BIT, ON THE TRIAL JUDGE'S FINDINGS DURING MITIGATION. THE TRIAL JUDGE DID FIND NUMEROUS MITIGATING FACTORS. I THINK THERE WERE 30 SEPARATE MITIGATORS THAT WERE PROPOSED. THE JUDGE ALSO REJECTED A NUMBER OF OTHER MITIGATORS, FOR REASONS THAT WE BELIEVE WERE INVALID.

NOW, ON THE ISSUE AS TO WHETHER THE JUDGE FINDS OR REJECTS THE MITIGATOR, WHAT IS OUR STANDARD OF REVIEW ON THAT PARTICULAR ISSUE?

THIS, THE TRIAL JUDGE IS REQUIRED TO FIND A MITIGATOR, IF IT IS PROVED, IF IT IS SHOWN BY A PREPONDERANCE OF CREDIBLE, BELIEVABLE, COMPETENT EVIDENCE.

BUT WHAT IS OUR STANDARD OF REVIEW?

THE STANDARD FOR THIS COURT IS THE TRIAL JUDGE HAS DISCRETION AS TO THE WEIGHT TO BE ASSIGNED, IN TERMS OF FINDING THE MITIGATOR. IF IT IS A MITIGATOR AS A MATTER OF LAW, THE TRIAL JUDGE HAS TO FIND IT, IF IT IS SUPPORTED BY COMPETENT EVIDENCE.

SO AS YOU NOTED, THE JUDGE FOUND MANY OF THE MITIGATORS ESTABLISHED.

THAT'S CORRECT.

WOULD YOU GIVE US AN EXAMPLE OF WHICH MITIGATOR THE JUDGE REJECTED AND NOT PROVEN THAT YOU THINK WAS HOB GOOD.

THERE ARE A NUMBER OF MITIGATORS WHICH I WOULD LIKE TO MENTION. WITH REGARD TO HIS

FAMILY AND WHICH THE TRIAL JUDGE REJECTED, THAT HE LOVES HIS CHILDREN, THAT HE IS A GOOD SON.

LET'S GO BACK TO THIS, AND LET'S SAY HE LOVES HIS CHILDREN. WHO DID HE HAVE TESTIFY ABOUT THAT HE LOVED HIS CHILDREN AND WAS A GOOD FATHER AND SUPPORTED HIS CHILDREN?

THE SAME TWELVE WITNESSES TESTIFIED TO ALL OF THIS MITIGATION. THIS WOULD INCLUDE HIS MOTHER, HIS BROTHER, HIS SISTER, TWO BROTHER-IN-LAWS, A SISTER-IN-LAW, A PATERNAL UNCLE, A LONG TIME FAMILY FRIEND AND A FRIEND OF HIS WHO HAD BEEN HIS FRIEND FOR MANY YEARS AND THAT HE LIVED W I THINK ALL OF THOSE WITNESSES TESTIFIED ABOUT HIS RELATIONSHIP WITH HIS CHILDREN, THAT HE LOVED THEM, THAT HE CARED FOR THEM DEEPLY.

SO WHEN THE JUDGE SAID THE DEFENDANT AT THE AGE OF 25, HAD FOUR CHILDREN WITH FOUR DIFFERENT WOMEN, ALTHOUGH THE DEFENDANT OCCASIONALLY VISITED WITH SOME OF HIS CHILDREN, THERE IS NO EVIDENCE THAT HE DID ANYTHING WORTHWHILE OR BENEFICIAL FOR ANY OF HIS CHILDREN ON A REGULAR BASIS. IS THAT, IS THERE NO COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THAT?

I THINK THAT IS BELIED BY THE RECORD. THE WITNESSES TESTIFIED THAT HE DID SPEND TIME WITH HIS CHILDREN, THAT HE BROUGHT THE CHILDREN TO THE FAMILY GATHERINGS. APPARENTLY THIS WAS A CLOSE KNIT LOVING FAMILY, AT LEAST AFTER THE FATHER LEFT, THAT HE BROUGHT THEM TO THE FAMILY COOK OUTS, THAT THE WOMAN THAT LIVED WITH HIM AND HIS BROTHER FOR SOME TIME, TESTIFIED THAT THE CHILDREN WERE OFTEN AT THE HOUSE.

WAS HE MARRIED TO ANY OF THESE WOMEN?

HE WAS NOT MARRIED TO ANY OF THE WOMEN.

DID HE PAY CHILD SUPPORT?

THERE IS NO EVIDENCE AS TO WHETHER HE DID OR DID NOT PAY CHILD SUPPORT. THERE WAS SOME EVIDENCE THAT HE HELPED, HE BOUGHT THE CHILDREN DIAPERS AND FOOD AND THINGS OF THAT NATURE.

REMIND ME HOW OLD MR. DOUGLAS WAS AT THE TIME OF THE MURDER.

25.

SO WHEN HE IS REFERRING TO IN THE ORDER AS BEING, THAT HE HAD FOUR CHILDREN BY AGE 25.

YES, YOUR HONOR, AND APPARENTLY ONE OF, HIS OLDEST CHILD WAS ABOUT TEN YEARS OLD.

WHERE DID THE CHILDREN LIVE?

THERE IS REALLY NO EVIDENCE OF WHERE THEY LIVED.

DID THEY LIVE WITH DOUGLAS?

NO EVIDENCE THAT THEY LIVED WITH HIM AT TIMES OR DID NOT LIVE WITH HIM AT TIMES. MY SENSE IS THAT THEY LIVED WITH THE MOTHERS AND THAT THE CHILDREN VISITED HIM.

AND NONE OF THE FOUR MOTHERS TESTIFIED AS TO THE KIND OF, I MEAN, AGAIN, WE DON'T WANT TO SPEND TOO MUCH TIME WITH THIS. I AM TRYING TO UNDERSTAND WHETHER THIS IS SOMETHING THAT WAS CLEARLY QUESTIONABLE ABOUT THE KIND OF FATHER HE WAS, AS OPPOSED TO MY GOODNESS, HOW COULD ANY OF THOSE NOT FOUND A MITIGATOR AND WEIGHED

IT?

WHAT IS THE MOST IMPORTANT MITIGATOR THAT YOU FEEL THAT THE TRIAL COURT ERRED IN CONCLUDING? THAT THE EVIDENCE DID NOT SUPPORTING OF FINDING THAT MITIGATOR? LET'S GO TO THAT. WHAT IS THE MOST SIGNIFICANT OF THOSE SUBMITTED THAT YOU FEEL THE TRIAL JUDGE, IF HE HAD FOUND THAT MITIGATOR, THAT IT WOULD HAVE HAD A HEAVY WEIGHT IN THE SCALES ON THE SIDE OF LIFE?

WELL, THE GROUP THAT I JUST MENTIONED, I THINK, IS SIGNIFICANT, AND, ALSO, THE MITIGATION REPRESENTED TO HIS POSITIVE PERSONALITY TRAITS, TO HIS CHARACTER, THAT HE IS 25 YEARS OLD WHEN HE COMMITTED THIS CRIME. NO PRIOR CONVICTIONS. NO PRIOR CRIMINAL HISTORY. NO PRIOR HISTORY OF VIOLENCE. NO TESTIMONY OR EVIDENCE THAT HE EVER HURT ANYBODY, HARMED ANYBODY, HAD CONFLICTS WITH ANYONE. HE WAS DESCRIBED AS A, YOU KNOW, A FRIENDLY, UPBEAT PERSON. HE WAS KINDHEARTED PERSON. HE WAS RESPECTFUL TO HIS ELDERS, BOTH AS A CHILD AND AS AN ADULT. HE HELPED OUT HIS STEPFATHER TESTIFIED HE HAD LIVED OFF AND ON WITH HIS STEPFATHER AND MOTHER, FOR ABOUT SEVEN YEARS, THAT HE GOT UP AND HE MADE BREAKFAST AND BROUGHT THEM TO THEM IN BED. HE DID CHORES. HE CONTRIBUTED. HE PAID BILLS.

ARE YOU SUGGESTING THAT WE HAVE A PICTURE HERE, THAT THIS WAS A COMPLETE ABERRATION, IN TERMS OF HIS CONDUCT, THAT HE, NO SIGNS BY ANY PRIOR CONDUCT, THAT HE WAS A PERSON THAT MIGHT COMMIT A VIOLENT SEXUAL BATTERY AND KILLING LIKE THIS?

THAT'S CORRECT, YOUR HONOR. THERE ISN'T ANY EVIDENCE. IT, SOMETHING HAPPENED THAT NIGHT. ION WHAT. THE JUDGE EVEN SAYS, SAID THERE IS NO MOTIVE FOR THIS. HE WAS HAVING, APPARENTLY, A GOOD TIME WITH THIS WOMAN. THEY WERE GETTING ALONG WELL. HE SNAPPED. AND SOMETHING HAPPENED, BUT THERE IS NOTHING TO INDICATE THAT THIS WOULD HAVE HAPPENED IN THIS CASE, AND I THINK THIS IS VERY SIGNIFICANT, AND -- WHAT WAS THE MENTAL HEALTH, MITIGATION, IF ANY, IN OTHER WORDS, WAS, WERE THERE ANY MENTAL HEALTH PROFESSIONALS THAT ATTEMPTED TO PIECE THIS TOGETHER AND COME UP WITH SOME KIND OF AN EXPLANATION?

THAT IS THE BIG QUESTION MARK, BECAUSE THERE WAS NO MENTAL HEALTH TESTIMONY OF ANY KIND.

AND --

AND I CAN'T EXPLAIN THAT.

WELL, THE OTHER THING IS ABOUT READING WHAT THE JUDGE HAS A PRETTY THOROUGH, COMPLETE SENTENCING ORDER, AND DOES CONSIDER EACH OF THE THINGS THAT YOU MENTIONED, AND YOU KNOW, YOU SAY THERE IS NO EXPLANATION FOR THIS CRIME. IT IS SORT OF LIKE MOST OF THE CRIMES THAT WE HEAR ABOUT, WE SAY HOW COULD SOMEBODY DO THESE CRIMES, SO I AM NOT SURE THAT THAT REALLY HELPS US WITH PROPORTIONALITY, ABSENT SOME MENTAL HEALTH TESTIMONY, BUT THE JUDGE DID FIND HE WAS ABUSED BY HIS FATHER, BOTH PSYCHOLOGICALLY AND PHYSICALLY BUT THAT THE FATHER HAD LEFT THE HOME AT NINE YEARS, THAT HE SAW THE FATHER COMMIT ACTS OF DOMESTIC VIOLENCE ON HIS MOTHER, THAT THE MOTHER TESTIFIED HE WAS BEATEN FREQUENTLY BY THE FATHER. HE WEIGHED THAT. HE GAVE THOSE LITTLE WEIGHT. I MEAN, IT IS PRETTY HARD TO SAY THAT, UNFORTUNATELY WE HAVE A LOT OF DOMESTIC VIOLENCE IN THIS SOCIETY, THAT SOMEBODY, BECAUSE THEY HAVE WITNESSED DOMESTIC VIOLENCE OR BEEN THE SUBJECT OF PHYSICAL ABUSE, THAT THAT WOULD MITIGATE THE FACTS OF THIS CRIME, THAT THE COURT FOUND. ARE YOU GOING TO TELL US THAT MAYBE SOME OF THE AGGRAVATORS SHOULDN'T HAVE BEEN FOUND IN THIS CASE? AN ARGUMENT ABOUT HAC. CAN YOU SERIOUSLY DISPUTE THAT THIS RECORD DOESN'T SUPPORT

HAC?

WELL, WE DO SUPPORT THAT THE RECORD DOESN'T SHOW BEYOND ANY REASONABLE DOUBT, THAT THE VICTIM WAS CONSCIOUS WHEN THE BEATING TOOK PLACE. THE EVIDENCE SUGGESTS IT HAPPENED VERY QUICKLY, OVER A SHORT PERIOD OF TIME. THERE WAS NO PREMEDITATION. THE JURY ACQUITTED DOUGLAS OF PREMEDITATION. THERE IS NO INDICATION --

I THOUGHT THERE WAS SOME EVIDENCE OF DEFENSIVE, WERE THERE NOT, SOME DEFENSIVE WOUNDS KIND OF THINGS, IN TESTIMONY, AND EVIDENCE OF BLOWS ALL OVER THE BODY, AS THOUGH THE, I THOUGHT THAT, AM I MISTAKEN IN THE EVIDENCE, THAT THE MEDICAL EXAMINER THAT, THE INDIVIDUAL, IT APPEARED, WAS TURNING, MAYBE, FROM SIDE TO SIDE?

IT IS POSSIBLE, AND THAT WAS --

WAS THAT THE TESTIMONY?

YES, SIR. THAT'S CORRECT. AND THE DEFENSIVE WOUNDS, THE DEFENSIVE WOUND IS A WOUND ON YOUR HANDS OR YOUR ARM. THAT IS WHAT IT IS, AND THE MEDICAL EXAMINER SAID, YOU KNOW, I CAN'T SAY WHETHER THAT IS WHAT HAPPENED. THAT IS WHAT WE CALL THEM. DEFENSIVE WOUNDS. I CAN'T SAY THAT --

WE HAVE A MOTION IN THESE CASES WHEN WE LOOK AT THESE THINGS, AND WHEN THE EVIDENCE SUGGESTS THAT THEY ARE IN A POSITION OR THE BLOWS ARE IN A POSITION THAT IT APPEARS THAT AN INDIVIDUAL IS TRYING TO WARD OFF BLOWS OR SOMETHING LIKE THAT, ISN'T THAT, THAT IS HOW I AM USING THE PHRASE, THAT I READ IN THESE CASES, IS THAT NOT THE EVIDENCE HERE?

THAT IS THE EVIDENCE HERE, BUT I WILL POINT OUT THERE IS ANOTHER CASE THAT I CITED IN MY BRIEF, EWAN, AND THIS COURT FOUND THAT HAC WAS NOT PROVED. THERE WERE DEFENSIVE WOUNDS THERE, AND THERE WERE A NUMBER OF BLOWS, BUT THERE WAS NOT ENOUGH EVIDENCE TO SHOW. HAC REQUIRES SOME SORT OF PROLONGED SUFFERING ON THE PART OF THE VICTIM.

DID THE MEDICAL EXAMINER TESTIFY, WITH REGARD TO WHETHER ONE OF THESE BLOWS WOULD HAVE BROUGHT SUDDEN DEATH OR WHETHER THERE WAS A PERIOD OF TIME INVOLVED?

HE TESTIFIED THAT THEY ALL HAPPENED VERY QUICKLY, I BELIEVE, AND HE COULDN'T SAY WHICH BLOW OCCURRED FIRST. HE SAID ANY NUMBER OF THE BLOWS COULD HAVE RENDERED HER UNCONSCIOUS IMMEDIATELY, SO THE FIRST BLOW COULD HAVE DONE THAT AND THAT WAS HIS TESTIMONY.

HIS TESTIMONY WAS THAT THE FIRST BLOW COULD HAVE --

COULD HAVE.

WAS SHE RUN OVER BY A MOTOR VEHICLE?

YES, SHE WAS, AFTER DEATH.

WHAT WAS THE TESTIMONY THAT, IN TERMS OF HER, WAS THE MEDICAL TESTIMONY THAT SHE WAS ALREADY DEAD?

YES. THAT WAS POST-MORTEM.

HOW DO YOU DISTINGUISH, FOR PROPORTIONALITY, THIS CASE FROM MANSFIELD? MANSFIELD

WAS THE SITUATION DOWN IN KISSIMMEE, THE TWO AGGRAVATORS WERE HAC AND SEXUAL BATTERY, AND IT WAS, THE WOMAN WAS BATTERED BY MANSFIELD, AND THERE WERE FIVE MITIGATORS FOUND, VERY SIMILAR TO THE MITIGATORS IN THIS CASE, AND THE COURT UPHELD MANSFIELD, AS FAR AS THAT QUESTION WAS CONCERNED.

I CAN'T TELL.

DO YOU HAVE FURTHER HAC? DO YOU HAVE FURTHER RESPONSE TO JUSTICE WELLS?

I DON'T KNOW WHAT THE MITIGATION WAS IN THAT CASE. THE THING ABOUT THIS CASE IS EVERY CATEGORY OF SUBSTANTIAL MITIGATION EXISTS HERE. I DON'T KNOW IF, IN THAT CASE, THERE WAS NO PRIOR HISTORY. FOR EXAMPLE IN THAT CASE, THERE WAS NO PRIOR HISTORY.

THE TRIAL COURT REDUCES THAT IS, BY REASON OF SAYING THAT THERE WAS SOME DRUG INVOLVEMENT, ISN'T THAT, I MEAN, THAT IS THE WAY I READ THE ORDER.

THERE WAS SOME EVIDENCE OF DRUG USE. HIS MOTHER SAID HE -- WHERE DID THAT HE WAS COME FROM?

HE SOLD DRUGS TO BUY A PAIR OF SHOES. HE GOT INTO DRUGS. THAT IS REALLY ALL WE HAVE.

THE TESTIMONY CAME FROM HIS MOTHER?

FROM HIS MOTHER, AND ION WHEN THAT OCCURRED, WHETHER THAT OCCURRED --

WHAT IS THE CASES THAT YOU SAY -- AND I DON'T KNOW WHEN THAT OCCURRED. WHETHER THAT OCCURRED --

WHAT IS THE CASES THAT YOU SAY MAKE THIS NOT PROPORTIONAL?

ION CASE I WOULD LIKE TO BRING UP IS --

ONE CASE I WOULD LIKE TO BRING UP IS THE WILSON CASE IN THAT CASE, THERE WERE TWO AGOS FOUND, HAC AND PRIOR VIOLENT FELONY, AND THERE WAS NO OR VERY LITTLE MITIGATION. IN THAT CASE, WILSON BEGAN BEATING HIS STEPMOTHER WITH A HAMMER, AND WHEN HIS FATHER ENTERS, HE BEGAN BEATING THE FATHER, AND A CHILD WAS THERE, AND HE STABBED A CHILD WITH SCISSORS, AND THEN HE GOT A PISTOL, AND HE SHOT HIS FATHER IN THE FORWARD, AND THEN EMPTIED THE PISTOL INTO A CLOSET WHERE HIS STEPMOTHER HAD BEEN HIDING. HE WAS CONVICTED OF FIRST-DEGREE PREMEDITATED MURDER OF HIS FATHER, AND SECOND-DEGREE MURDER IN THE DEATH OF THE CHILD. THE STEPMOTHER APPARENTLY SURVIVED. AND IN THAT CASE, THIS COURT REVERSED --

WHAT WAS THE MITIGATION IN THAT?

THERE WAS NO MITIGATION.

NO MITIGATION.

WHAT THE COURT EMPHASIZED WAS THE FACT THAT, EVEN THOUGH PREMEDITATION WAS FOUND, IT HAPPENED VERY QUICKLY, AND THERE WAS NOT A LOT OF TIME FOR CONSCIOUS REFLECTION REFLECTION. AND IN THIS CASE WE HAD THAT EVEN TO A GREATER DEGREE, PLUS THE JURY ACQUITTAL ON PREMEDITATION.

HOW DO WE HAVE THAT EVEN TO A GREATER DEGREE? IN OTHER WORDS, WHAT IS YOUR EVIDENCE THAT THAT HAPPENED VERY QUICKLY?

WELL, HERE, OKAY, THERE IS NO WEAPON. THERE IS NO PLANNING. HE DID THIS WITH HIS FIST OR A ROCK. IT IS NOT REALLY CLEAR WHAT THE MURDER WEAPON WAS. THE MEDICAL EXAMINER'S TESTIMONY SUGGESTS THAT THIS WAS A FRENZIED RAGE SPONTANEOUS KILLING, YOU KNOW, JUST BEATING.

I THOUGHT THERE WAS EVIDENCE OF A TIRE IRON OR SOMETHING OF THAT NATURE INVOLVED.

THERE WAS A LUG WRENCH THAT WAS FOUND. IT WAS PROPOSED AS A POSSIBLE, THAT HE MAY HAVE USED IT.

BUT IT WAS NOT CONNECTED SUFFICIENTLY BY ANY EXPERT TESTIMONY OR EVIDENCE?

I DON'T THINK SO. IT MAY HAVE HAD HER BLOOD ON IT. I THINK THE ROCK MAY HAVE HAD SOME BLOOD ON IT, SO WE DON'T KNOW. ANOTHER DEFENDANT DIDN'T TESTIFY, EVEN IN THE HAC?

IF THERE WAS HAC -- IF THERE WAS NO HAC, THERE WOULD BE NO SEXUAL BATTERY, AND SO THE QUESTION OF FINDING HAC IS REALLY VERY IMPORTANT TO OUR DECISION, BUT IN THIS CASE HE HAD TO SPECULATE, IT SAID, ABOUT WHETHER OR NOT THE VICTIM WAS ALIVE, BUT MY UNDERSTANDING OF THE TESTIMONY IS THAT HE DID NOT THINK IT WAS LIKELY THAT THE VICTIM WAS KNOCKED UNCONSCIOUS BY THE FIRST BLOW, AND HE POINTED TO THE FACT THAT SHE HAD WOUNDS ON ALL SIDES OF HER HEAD, THAT SHOWED TO HIM THAT SHE WAS TRYING IT TO TURN AWAY FROM THE BEATING AND THEN AS JUSTICE LEWIS POINTED OUT, THE DEFENSIVE WOUNDS ON HER HAND. DO YOU CONTEST THAT THE MEDICAL EXAMINER, INSTEAD OF SAYINGION WHETHER SHE WAS UNCONSCIOUS FROM THE FIRST BLOW THAT, IT WAS UNLIKELY THAT SHE WAS UNCONSCIOUS FROM THE FIRST BLOW?

HE SAID SHE COULD HAVE BEEN. AND WITH REGARD TO THAT SCENARIO, THAT IS A POSSIBLE SCENARIO. THAT SHE WAS MOVING. THIS APPARENTLY TOOK PLACE INSIDE HIS VEHICLE, THAT SHE WAS MOVING WHEN HE WAS DOING THIS. IT IS ALL SPECULATIVE. WE JUST REALLY DON'T KNOW.

WHAT DO YOU HAVE THAT IT HAPPENED INSIDE THE VEHICLE?

HE CONFESSED TO HIS FRIEND AND HE SAID HE BEAT HER UP IN THE CAR. AND THE OTHER POINT I WOULD LIKE TO MAKE IS I THINK HAC IS IMPORTANT, BUT REGARDLESS OF WHETHER IT IS TECHNICALLY FOUND, THE TWO PRONGS ARE WAS THERE PROLONGED SUFFERING AND PAIN CAUSED TO THE VICTIM, AND SECONDLY, WAS IT INTENTIONALLY OR DELIBERATELY CAUSED BY THE DEFENDANT, THAT SHOWED HIS INDIFFERENCE TO HER SUFFERING? AND FOR NUMBER TWO, I DON'T THINK WE HAVE THAT HERE. AND FOR THE FIRST ONE, I THINK THAT IS MITIGATED BY THE FACTS HERE.

HOW IS IT, YOU SEE, THAT IS WHERE I GUESS, AND WITHOUT MENTAL HEALTH MITIGATION, I DON'T SEE WHERE THERE IS ANYTHING TO MITIGATE THE NATURE OF THIS CRIME, AND THE FACT THAT HE DIDN'T DO IT BEFORE, YOU KNOW, IS AGE 25, I MEAN, AGAIN, WE HAVE SOME DEFENDANTS THAT DON'T HAVE A HISTORY. WHAT ABOUT HIS STATEMENT THAT, WHERE HE ACTUALLY AGAIN,ION IF IT IS A JAILHOUSE PERSON, THAT THEY HAVE EVIDENCE AGAINST HIM BECAUSE HE TOOK THE PUSSY? WHAT DO YOU SAY ABOUT THAT STATEMENT?

ACCORDING TO THE JAILHOUSE SNITCH, THAT MEANS THAT HE COMMITTED SEXUAL BATTERY ON HER.

SO DO YOU CONCEDE THAT THERE IS ENOUGH EVIDENCE FOR SEXUAL BATTERY?

WE HAVEN'T ARGUED THAT.

TELL US, RECAP FOR US HIS STATEMENT, IN OTHER WORDS THAT HE TOLD SOMEBODY ELSE HOW IT HAPPENED. THAT ACCOUNT.

IT WAS VERY BRIEF.

THE STATEMENT WAS VERY BRIEF OR --

IT WAS, YES, IT WAS HIS FRIEND. ACTUALLY IT WAS THE WOMAN THAT WAS OUT WITH THEM THAT NIGHT. HE WENT OUT WITH HIS FRIEND AND HER FRIEND, WHO WAS THE VICTIM. AND LATER THAT NIGHT, HE CALLED HER UP ON THE PHONE AND SAID I HAVE SOMETHING TO TELL YOU, AT 4:00 A.M., AND HE SAID HE HAD, I BELIEVE WHAT HE SAID IS SHE DISRESPECTED HIM AND HE HIT HER AND BEAT HER UP IN THE CAR.

WHAT, AS FAR AS THE MENTAL HEALTH, I AM CONCERNED ABOUT THAT. WERE THERE EXPERTS APPOINTED? DID DEFENSE COUNSEL REQUEST ACCESS AND THE BENEFIT OF MENTAL HEALTH EVALUATION OR ELECT NOT TO PRESENT? WHAT DOES THE RECORD REFLECT ABOUT THAT?

I BELIEVE AN EXPERT WAS REQUESTED, AND THAT IS ALL THAT WAS THERE. I DON'T KNOW IF ONE WAS EVER OBTAINED. ANOTHER FRIEND, WHETHER WE DISCOUNT IT OR NOT, IT IS PRETTY POWERFUL TESTIMONY. FIRST OF ALL, EVEN THOUGH IT IS AFTER THE FACT. HE CLEANED HIS ENTIRE VEHICLE OUT. HE TOLD HER THAT HE HAD BEATEN THE VICTIM AND THROWN HER OUT OF THE CAR, LEAVING HER FOR DEAD, AND THAT HE BEAT HER BECAUSE, QUOTE, SHE DIDN'T HAVE SEX WITH BLACK BOYS. WAS THAT AN ACCURATE STATEMENT OF WHAT JONES SAID ABOUT WHAT THE DEFENDANT SAID?

I DON'T BELIEVE THERE WAS ANY TESTIMONY THAT HE BEAT HER BECAUSE SHE DIDN'T HAVE SEX WITH BLACK BOYS. I THINK THAT IS ACTUALLY CONFUSING THE TWO WITNESSES. MY RECOLLECTION IS THAT MISTY JONES, WHO WAS THE FRIEND --

HIS GIRLFRIEND?

YES. HIS GIRLFRIEND, HAD A CONVERSATION WITH HER AFTER HE CONFESSED, SHE ASKED HIM DID SHE REFUSE TO HAVE SEX WITH YOU BECAUSE YOU ARE BLACK? AND HE DIDN'T SAY ANYTHING. HE JUST SMILED. THAT IS MY RECOLLECTION OF THAT. THERE IS ALSO EVIDENCE THAT DOUGLAS WAS DRINKING HEAVILY THAT NIGHT, WHICH, AGAIN, I THINK HAS AN IMPACT ON HOW WE LOOK AT HAC. AND WHETHER THAT EXISTS.

DID YOU TRY, DID THE DEFENSE OFFER, AS STATUTORY MITIGATION, THAT HE WAS UNDER EXTREME EMOTIONAL OR MENTAL DISTURBANCE ON THAT NIGHT?

I DON'T BELIEVE THAT THE DEFENSE OFFERED EITHER OF THE STATUTORY MITIGATORS.

SO WHAT EVIDENCE, YOU SAY HEAVY DRINKING.

THE JUDGE FOUND HE WAS DRINKING HEAVILY. THE JUDGE FOUND THAT, IN HIS SENTENCING ORDER, AND THAT IS BASED ON THE TESTIMONY OF MISTY JONES, THAT WHEN THE THREE WENT OUT, THEY WENT OUT AND BOUGHT A BOTTLE OF RUM. SHE WAS NOT DRINKING, BUT DOUGLAS AND THE VICTIM WERE DRINKING, AND THEY SPENT THE WHOLE EVENING BAR HOPPING. THEY HAD GONE TO THREE OR FOUR DIFFERENT BARS AND WERE DRINKING THAT NIGHT. SHE SAYS SHE WASN'T DRINKING. IF THE COURT HAS NO FURTHER QUESTIONS, ILL RESERVE THE REST OF MY TIME FOR REBUTTAL. THANK YOU.

GOOD MORNING.

MAY IT PLEASE THE COURT. CURTIS FRENCH REPRESENTING THE STATE OF FLORIDA IN THIS

CAUSE. ALLOW ME TO START BY ADDRESSING THE ASSERTION THAT THE JUDGE FOUND THAT THE DEFENDANT HAD BEEN DRINKING HEAVILY. I WOULD REFER TO THE JUDGE'S SENTENCING ORDER AT PAGE 27 IN THE RECORD, IN WHICH IT WAS ESTABLISHED THAT THE DEFENDANT HAD BEEN DRINKING ALCOHOL AT THE TIME THAT HE KILLED MRS. HOBGOOD. THE EXTEND WAS NOT ESTABLISHED. WE WOULD FIND THAT THE JUDGE FOUND THAT HE WAS DRINKING HEAVILY, AND THE EVIDENCE --

IT WENT ON TO TALK ABOUT HOW HE WAS ABLE TO DRIVE THE MANUAL SHIFT TRANSMISSION, TO FURTHER SUBSTANCE IT.

THAT HE WAS NOT IMPAIRED. YES. AND OUR REVIEW OF THE EVIDENCE FAILS TO ESTABLISH THAT HE WAS DRINKING HEAVILY. THERE IS SOME EVIDENCE THAT HE WAS DRINKING, BUT THE ONLY EVIDENCE IN THE RECORD IS THAT, AT THE OUT SET OF THIS CHRISTMAS EVE DATE, A THAT THEY BOUGHT A BOTTLE OF, I BELIEVE, RESUME, AND THAT THE DEFENDANT AND THE VICTIM DRANK OUT OF THAT BOTTLE. HOW MUCH OF IT THEY DRANK, WE DON'T KNOW HOW MUCH ELSE THEY MIGHT HAVE DRUNK. WE DON'T KNOW. WE DO KNOW THAT THE VICTIM'S BLOOD ALCOHOL LEVEL WAS ANALYZED AFTER SHE WAS MURDERED, AND IT WAS .05 WHICH IS, OF COURSE, LESS THAN THE AMOUNT THAT WOULD RENDER HER INTOXICATED. OF COURSE WE DON'T KNOW WHAT HIS BLOOD ALCOHOL LEVEL WAS. THE, I WILL ADDRESS THE HAC AGGRAVATOR FIRST, AND POINT OUT NUMBER ONE, THE DEFENDANT'S STATEMENT TO MISTY JONES WAS THAT MARY ANN HOBGOOD HAD DISRESPECTED HIM. THAT HE HAD HIT HER, PULLED HER INTO THE CAR AND BEAT HER ALL OVER THE CAR AND THROWN HER OUT FOR DEAD. HIS STATEMENT THERE AFTER, TO THOMAS BROWN, THERE WERE A COUPLE OF STATEMENTS. THE FIRST STATEMENT WAS THAT HE HAD RUN OVER MARY ANN HOBGOOD BECAUSE SHE WOULDN'T MOVE. SUBSEQUENTLY, THEY WERE TOGETHER AGAIN. THIS WAS SOME MONTHS LATER, AND THE DEFENDANT TOLD MR. BROWN THAT THE REASON HE HAD RUN OVER HER WITH THE CAR WAS BECAUSE HE HAD BEAT HER TO DEATH AND WANTED TO MAKE IT LOOK LIKE A VEHICULAR HOMICIDE, BECAUSE HE WOULD ONLY GET A FIVE-YEAR SENTENCE. HE ALSO, AT THAT TIME, TOLD HIM IN EFFECT THAT HE HAD RAPED THE VICTIM.

DID HE SAY IN EFFECT. WHAT WAS THE --

THE DEFENDANT, WHAT HE SAID THE DEFENDANT SAID THAT HE, QUOTE, TOOK THE PUSSY.

SO THE STATE DOESN'T CONTEND SHE WAS ALIVE WHEN HE RAN OVER HER WITH --

I THINK THE EVIDENCE IS UNDISPUTED THAT SHE WAS DEAD WHEN HE RAN OVER HER WITH THE CAR.

COULD YOU ADDRESS THE HAC FACTOR AND YOU KNOW, IN THIS CIRCUMSTANCE, DO WE LOOK AT, YOU KNOW, WE DON'T SAY BUT OBVIOUSLY HAC, IF FOUND, A VERY WEIGHTY AGGRAVATOR, BUT IS THERE, DOES OUR CASE LAW LOOK AT THE ISSUE THAT, A DEATH THAT OCCURS WITHIN, WE DON'T KNOW HOW LONG OR DO WE? DO WE KNOW HOW LONG THE PERIOD OF --

NOT EXACTLY.

EXTREMELY HEINOUS, ATROCIOUS AND CRUEL IS THE AGGRAVATOR.

SURE.

WHAT EVIDENCE DOES THE STATE HAVE, AS TO HOW LONG THE DEFENDANT, THE VICTIM WAS ALIVE WHILE SHE WAS --

WE WOULD TAKE ISSUE WITH THE DEFENSE ASSERTION THAT THE MEDICAL EXAMINER TESTIFIED THAT SHE COULD HAVE BEEN KNOCKED UNCONSCIOUS WITH THE FIRST BLOW. THE QUESTION

THAT WAS POSED TO HIM ON CROSS-EXAMINATION WAS THE DEFENSE COUNSEL POINTED TO A CERTAIN INJURY AND SAID IF THAT HAD BEEN THE FIRST BLOW, WOULD SHE HAVE BEEN RENDERED IMMEDIATELY UNCONSCIOUS? HE SAID YES, BUT THEN HE WENT ON TO ELABORATE AND EXPLAIN WHY HE DIDN'T THINK THAT WAS THE FIRST BLOW.

DOES THE CASE LAW DISTINGUISH BETWEEN, YOU KNOW WHEN WE HAVE A STABBING DEATH OR WE USUALLY SAY HAC BY THE VERY NATURE, BETWEEN THIS DEATH, BEING A WEIGHTY AGGRAVATOR AND THE OTHER FELONY MURDER AND THEY DON'T FIND HIM GUILTY OF PREMEDITATED MURDER, SO THE UNDERLYING FELONY IS SEXUAL BATTERY. HE HAS NO PRIOR VIOLENT FELONY. DOES IT MATTER AT ALL, QUALITATIVELY, FOR ANALYSIS, WHETHER IT IS A TEN-SECOND PERIOD OR AN HOUR PERIOD? DOES THAT, DO WE EVER TAKE THAT INTO CONSIDERATION, IN LOOKING AT WHETHER DEATH IS THE APPROPRIATE PENALTY?

GENERALLY IF IT IS IMMEDIATE, IT IS NOT HAC. THIS COURT HAS AFFIRMED HAC, IN CASES WHERE THE DEATH COULD HAVE OCCURRED WITHIN A MINUTE, AND --

I ASK YOU WHETHER, BECAUSE THERE MAY HAVE BEEN OTHER AGGRAVATORS. I AM SAYING WHERE THAT IS ESSENTIALLY THE AGGRAVATOR, DOES IT MATTER AT ALL FOR OUR PROPORTIONALITY ANALYSIS, IN TERMS OF COMPARING OTHER CASES, WHETHER IT A PROLONGED TORTURE OR SOMETHING THAT TAKES PLACE WITHIN A MINUTE OR LESS?

I THINK THE INDIVIDUAL FACTS OF THE CASE WOULD ALWAYS BEAR UPON THE ANALYSIS, AND GO TO THE WEIGHT OF THE AGGRAVATOR. IN THIS CASE, I WOULD SUBMIT IT IS QUITE CLEAR THAT IT DIDN'T HAPPEN WITHIN TEN SECONDS. DR. ARFORD, THE MEDICAL EXAMINER, TESTIFIED THAT THERE WERE A NUMBER OF DEFENSIVE WOUNDS, AND LET ME SAY, TOO, THAT THIS COURT HAS REPEATEDLY AFFIRMED THE HAC AGGRAVATOR IN CASES OF BEATING DEATHS, PARTICULARLY I AM THINKING OF GRANT DENNICLAR, WHERE THIS COURT REJECTED THE NOTION THAT THE VICTIM HAD DIED INSTANTLY BECAUSE THERE WERE DEFENSIVE WOUNDS N THIS CASE, THERE WERE NUMEROUS DEFENSIVE WOUNDS.

I WASN'T CONTESTING THAT THERE WAS EVIDENCE FOR HAC. WHAT I WAS ASKING YOU, DOES THE COURT'S PROPORTIONALITY ANALYSIS, DO WE DISTINGUISH THE NATURE OF THE HAC?

THIS --

HAVE WE EVER DONE THAT?

THIS COURT HAS, IN CONDUCTING ITS PROPORTIONALITY ANALYSIS, CONSIDERED THE WEIGHT OF THE AGGRAVATORS, PARTICULARLY VIOLENT FELONY AGGRAVATORS. I WOULDN'T SUGGEST THAT WITH HAC BUT THIS IS A PARTICULAR STRONG AND WEIGHTY HAC AGGRAVATOR. HER RIGHT CLAVICLE WAS BROKEN, HER NOSE WAS BROKEN, HER SHOULDER DISLOCATED. THESE WERE ALL PREMORTEM INJURIES, ALL BEFORE HE RAN OVER HER. SHE WAS DISFIGURED SO BADLY BY THE BEATING, NOT BY BEING RUN OVER, BUT WHILE THE BEATING CCURRED WHILE SHE WAS ALIVE, THAT SHE WAS UNRECOGNIZABLE. SHE HAD INJURIES ALL OVER HER HEAD, WHEN THE OPINION OF THE MEDICAL EXAMINER SHOWED THAT SHE WAS ALIVE AND STRUGGLING AND TRYING TO AVOID BEING HIT.

WAS IT WITH FIST, OR WAS IT SOMETHING --

THERE WAS A ROCK FOUND AT THE SCENE WHICH WAS CONSISTENT WITH SOME OF THE INJURIES THAT HAD THE VICTIM'S BLOOD ON IT. IT WAS POSITIVELY IDENTIFIED BY A DNA ANALYSIS. THERE WAS ALSO A LUG WRENCH AT THE SCENE THAT HAD HUMAN BLOOD THAT WAS NOT IDENTICAL, THERE WASN'T ENOUGH SAMPLE ON IT TO POSITIVELY IDENTIFY IT WAS HERS BUT IT HAD HUMAN BLOOD ON IT. THERE WERE ALSO MARKINGS ON HER THAT WERE CONSISTENT IN SIZE AND SHAPE WITH THAT LUG WRENCH FOUND AT THE SCENE AND THE ROCK FOUND AT THE

SCENE.

WHERE WERE THE ROCK AND THE, I MEAN, WAS THERE A THEORY AS TO WHAT WAS THE FATAL BLOW? IN OTHER WORDS WAS THE STATE'S THEORY THAT HE FIRST STARTED BEATING HER WITH HIS FIST AND THEN, WHEN SHE WASN'T DEAD AT THAT POINT, THAT HE THEN TOOK THE ROCK OR THE LUG? WAS THERE ANYTHING LIKE THAT, AS FAR AS THE SEQUENCE OF WHAT --

NO. THE, THERE WERE A NUMBER OF FATAL INJURIES. IT WAS MASSIVE TRAUMA TO HER HEAD IS WHAT CAUSED HER DEATH. THE DEFENSE COUNSEL ASKED IF THESE INJURIES COULD HAVE BEEN CAUSED BY A FIST, AND DR. ARFORD INITIALLY SAID IT IS POSSIBLE, BUT THEN HE SAID, IN LIGHT OF THE EXTENSIVE BREAKAGE OF BONES IN THIS CASE, HE THOUGHT IT WAS EXTREMELY UNLIKELY THAT THESE INJURIES COULD HAVE BEEN CAUSED BY A FIST, BECAUSE IT WAS JUST DIFFICULT TO BREAK A BONE WITH A FIST, AND HE, IN FACT, TESTIFIED THAT WOMEN HAVE MORE, I THINK HE PRONOUNCED THE WORD GROSSIAL BONES, BUT EVEN SO IT IS HARDER TO DO THIS WITH A FIST.

ALL OF THIS OCCURRED INSIDE THE VEHICLE?

I DON'T KNOW THAT ALL OF IT OCCURRED INSIDE THE VEHICLE. THERE WAS CERTAINLY RESPONSIVE BLOOD INSIDE THE VEHICLE REMAINING AFTER HE TRIED TO CLEAN IT UP. THERE WAS A SPOT ON THE ROOF OF THE CAR AND ON THE PASSENGER SEAT AND IN OTHER PLACES AND, ALSO, OF COURSE, BLOOD ON THE UNDERSIDE, FROM WHERE HE RAN OVER HER. GETTING BACK TO HOW MUCH TIME TO SIPHON THE WOUNDS ALL OVER HER HEAD, DEFENSIVE WOUNDS, LACERATIONS AND CONTUSIONS ON THE PALM OF HER RIGHT HAND AND FINGERS, ABRASIONS AND CONTUSIONS ON HER FOREARMS, LACERATIONS ON HER THUMB AND INDEX FINGER AND ALSO CONSISTENT WITH THAT, HE TRIED TO HIT HER AND ALSO DEFENDING OFF BLOWS AND TRYING TO PROTECT HER HEAD AND FACE AS SHE WAS BEING BEATEN. HE COUNTED 24 WOUNDS THAT WERE ADMINISTERED, AND HE SAID, WHILE WAS SHE ALIVE? HE SAID THAT WAS A MINIMUM NUMBER, BECAUSE A LOT OF THESE WERE OVERLAPPING BLOWS AND SHE HAD OBVIOUSLY BEEN HIT MORE THAN ONE TIME IN THESE PLACES AND HE COULDN'T SAY HOW MANY TIMES SHE HAD BEEN HIT. THE ENTIRE BACK OF HER HEAD HAD BEEN CAVED IN AND SHE HAD HEMORRHAGING THAT OCCURRED ON THE BACK OF HER SCALP ALL ACROSS THE HEAD. IT WAS AN EXTREMELY VICIOUS AND BRUTAL BEATING.

THERE ARE CASES FROM OUR COURT WHERE THERE WERE BEATING DEATHS WHERE WE HAVE SAID IT WAS ERRONEOUS TO FIND HAC. ARE YOU FAMILIAR WITH ELAM, THAT YOUR OPPONENT HAS CITEED?

YES, AND I THINK THAT IS ONE OF THE VERY FEW CASES IN WHICH THIS COURT FOUND A BEATING DEATH NOT TO BE HAC BUT IN THAT CASE THERE WAS NO EVIDENCE, THERE WAS A PROLONGED BEATING THAT THE VICTIM, WHOEVER IT WAS, COULD HAVE BEEN KILLED ALMOST INSTANTLY AND THERE WAS NO EVIDENCE, THE COURT DIDN'T AT LEAST IN THE ITS OPINION, MENTION EVIDENCE OF ANY DEFENSIVE WOUNDS. WHEN THERE HAVE BEEN DEFENSIVE WOUNDS, THIS COURT HAS REPEATEDLY AND OVER AND OVER AGAIN CONFIRMED HAC ON BEATING DEATHS.

HOW ABOUT ZACHURUSKI.

I AM SOMEWHAT FAMILIAR WITH IT. I BELIEVE HIS CHILDREN AND HIS WIFE.

THE COURT FOUND THERE WERE NO DEFENSIVE WOUNDS IN THAT CASE AND HAC.

I DON'T RECALL THE FACTS OF THAT CASE. I KNOW THERE WERE A NUMBER OF OTHER AGGRAVATORS IN THAT CASE, AND I DON'T RECALL SPECIFICALLY ON HAC.

LET ME ASK YOU A QUESTION ABOUT THE JURY FOUND SPECIFICALLY THAT THERE WAS NO

PREMEDITATION?

NO, THEY DID NOT.

WAS IT A GENERAL VERDSIGNIFICANT.

IT WAS A SPECIAL VERDICT, AND WHAT THEY DID WAS THEY FAILED TO CHECK THAT THE KILLING WAS PREMEDITATED. IT WAS PRESENTED TO THEM THAT WE THE JURY FIND THE DEFENDANT GUILTY OF MURDER IN THE FIRST DEGREE AS CHARGED IN THE INDICTMENT AND THEN IF YOU FIND GUILTY OF MURDER IN THE FIRST DEGREE, YOU MUST CHECK ONE OR BOTH OF THE FOLLOWING AND THEY CHECKED FELONY MURDER. THEY CERTAINLY DID NOT FIND IT PREMEDITATED. THEY FOUND IT WAS A FELONY MURDER, BUT I WOULD DISPUTE THAT THEY --

THEY FOUND FELONY MURDER, WITH SEXUAL BATTERY BEING THE UNDERLYING FELONY.

CORRECT.

AND DID THE DEFENSE REQUEST THAT THERE BE A SPECIAL VERDICT FOR FINDINGS OF THE AGGRAVATORS, SUCH AS HAC? I AM REALLY ASKING YOU THIS AS A RING.

THERE WAS AN EXTENDED PRETRIAL REQUEST FOR VARIOUS THINGS RELATING TO, THAT I THINK THAT MAY HAVE BEEN ONE OF THEM. I DON'T RECALL SPECIFICALLY.

ASSUMING THAT THE VERDICT REVEALED THAT THE JURY DIDN'T FIND PREMEDITATION, IS THE, IS THAT INCONSISTENT? IS IT INCONSISTENT TO SAY THERE IS NO PREMEDITATION, THAT THERE IS HAC?

WELL, AGAIN, THE JURY WAS INSTRUCTED THAT, TO FIND FIRST-DEGREE MURDER, THEY COULD FIND IT ONE OF TWO-WAYS. IT WAS NOT NECESSARY TO FIND BOTH, AND I WOULD SUGGEST THAT FAILING, OBVIOUSLY THEY DIDN'T CHECK PREMEDITATED MURDER. I DON'T KNOW THAT THEY REJECTED IT. THEY COULD SIMPLY HAVE NOT REACHED IT, IN ACCORDANCE WITH THE INSTRUCTIONS.

COULD YOU GIVE US YOUR VIEW OF THE PICTURE THAT WAS PAINTED OF THIS DEFENDANT, AT THE PENALTY PHASE. YOU KNOW, HOW OLD HE WAS, WHAT HIS EDUCATION WAS. WHAT HE DID FOR A LIVING.

HE WAS --

THIS THING ABOUT THAT HE WAS THE FATHER OF FOUR CHILDREN. WHAT IS THE PICTURE THAT EMERGES THAT --

HE WAS 25 YEARS OLD.

-- YOU COULD PAINT FOR US.

HE WAS 25 YEARS OLD AT THE TIME OF THE MURDER. HE WAS SOMEBODY WHO WAS VERY GOOD AT GETTING A JOB. HE KNEW EXACTLY THE RIGHT THINGS TO SAY. HE DIDN'T HAVE ANY TROUBLE GETTING WORK. HE APPARENTLY WAS A GOOD WORKER WHEN HE WANTED TO WORK BUT HE CHOSE NOT TO. I THINK THE CLEAR PICTURE FROM THIS RECORD AND ESPECIALLY THE TESTIMONY OF HIS MOTHER IS THAT HE DROPPED OUT OF SCHOOL BECAUSE IT WAS TOO MUCH LIKE WORK AND HE WOULD RATHER JUST HANG AROUND AND SELL DRUGS AND SUPPORT HIMSELF BY SELLING DRUGS BECAUSE IT WAS EASIER THAN WORKING, AND PARTYING AND HANGING OUT WITH THE LADIES, IS HER TERM. THE --

WHAT WAS HIS WORK HISTORY? DID HE WORK STEADILY?

NO, HE DID NOT. ONE OF THE WITNESSES, I BELIEVE HIS BROTHER-IN-LAW, A MANAGER AT A FAST FOOD RESTAURANT, SAID THAT HE HAD WORKED THAT, LUTHER DOUGLAS HAD WORKED FOR HIM ON A COUPLE OF OCCASIONS AND WAS A GOOD WORKER, BUT, AGAIN, HE WASN'T FIRED. HE WASN'T RELEASED, HE WASN'T TERMINATED. HE JUST CHOSE NOT TO WORK THERE AND HE HAD A VERY IRREGULAR WORK HISTORY, AS A MATTER OF FACT. HE ALSO APPARENTLY DIDN'T HAVE A PARTICULAR PLACE TO LIVE. HE WOULD STAY WITH HIS SISTER FOR A WHILE OR STAY WITH HIS MOTHER FOR A WHILE OR STAY WITH HIS BROTHER FOR A WHILE AND HANG OUT HERE AND HANG OUT THERE, AND APPARENTLY WENT WITH THE MOTHERS OF HIS CHILDREN, HE LIVED WITH THEM AT TIMES, TOO. MATTER OF FACT, HE HAD THE KEY TO THE HERMELA DOZIER'S CAR, WHICH HE BORROWED TO, WITHOUT ASKING HER, TO GO OUT ON A DATE, SO HE BORROWED ONE GIRLFRIEND'S CAR TO GO OUT ON A DATE WITH ANOTHER GIRLFRIEND AND THEN ULTIMATELY WOUND UP WITH THE VICTIM IN THIS CASE, BUT --

IT WASN'T HIS CAR.

IT WAS NOT HIS CAR WHERE THIS CRIME OCCURRED.

AND AFTER THE CRIME, AFTER HE MURDERED MARY ANN HOBGOOD, HE GAVE THE VICTIM'S JACKET AND HER JEWELRY TO HIS GIRL APPREHEND HERMELA DOZIER, AND THERE WAS BLOOD ON THAT JACKET WHICH WAS IDENTIFIED AS THE VICTIM'S. ALSO THE DEFENDANT'S JACKET WAS FOUND AT THE SCENE AND THAT, ALSO, HAD BLOOD IDENTIFIED AS THE VICTIM'S ON IT. THERE WAS TESTIMONY THAT HE LOVED AND CARED FOR HIS CHILDREN, BUT THIS TESTIMONY WAS PRESENTED BY PEOPLE WHO INVARIABLY DIDN'T KNOW HOW MANY CHILDREN HE HAS, AND I AM NOT SURE, ONE WITNESS TESTIFIED THAT, WELL, THERE IS TWO THAT I KNOW OF. THE OTHER SAID MAYBE THREE. HIS MOTHER SAID HE HAD FOUR AND ION IF THAT INCLUDES MISTY JONES'S SISTER'S CHILD AND THERE WAS TESTIMONY THAT MISTY JONES'S SISTER WAS PREGNANT BY LUTHER DOUGLAS, SO I DON'T KNOW IF THAT WOULD MAKE FIVE CHILDREN OR NOT.

WHERE WAS HE LIVING AT THE TIME OF THIS CRIME?

I DON'T THINK THE RECORD BEARS THAT OUT.

BUT YOU WOULD CONTEST THAT THIS, THE RECORD DOES NOT PAINT HIM AS A MODEL CITIZEN HERE, DEVOTED TO HIS FAMILY AND HIS CHILDREN.

I THINK THERE IS LITTLE OR NO EVIDENCE THAT HE WAS DEVOTED TO HIS CHILDREN. NONE OF THE WITNESSES, BESIDES NOT KNOWING HOW MANY CHILDREN HE HAD, NONE OF THEM KNEW IF HE SUPPORTED THEM OR NOT. THE ONLY TESTIMONY IS THAT TWO WITNESSES TESTIFIED THAT THEY HAD KNOWN HIM, ON AT LEAST ONE OCCASION, TO BUY PAMPERS FOR THE CHILDREN, AND APPARENTLY HE TALKED ABOUT THEM FROM TIME TO TIME, AND HE DID, FROM TIME TO TIME, BRING THEM TO SEE FAMILY. DON'T KNOW HOW MUCH TIME HE SPENT WITH THEM. WE KNOW THAT HE WASN'T WITH THEM CHRISTMAS EVE, BECAUSE HE WAS OUT ON THIS EPISODE. AND I THINK IT IS ALSO INTERESTING AND SIGNIFICANT TO NOTE THAT NONE OF THE FOUR CHILDREN THAT HE HAS CAME IN HERE AND TESTIFIED ABOUT HOW MUCH HE LOVED HIM OR DIDN'T LOVE HIM OR WHETHER OR NOT HE WAS A GOOD FATHER. NONE OF THE MOTHERS OF THE FOUR CHILDREN TESTIFIED IN THIS CASE, EITHER. THERE IS NO MENTAL HEALTH EXPERT TESTIMONY THERE. IS SOME TESTIMONY FROM THE MOTHER THAT, AFTER THE FATHER WAS ARRESTED AND LEFT THE HOME, THAT HE HAD TROUBLE IN SCHOOL BECAUSE HE HAD A SECRET HE COULDN'T TELL, BUT IF YOU READ THE RECORD AS A WHOLE, IT APPEARS THAT AFTER THE FATHER LEFT, MOST OF THE WITNESSES TESTIFIED THAT HE HAD A WONDERFUL FAMILY, IT WAS THE BEST FAMILY YOU COULD POSSIBLY ASK FOR, AND THE MOTHER TOOK HIM TO CHURCH AND SO FORTH. THERE IS TESTIMONY THAT, AT SOME POINT THE DEFENDANT DECIDED YOU KNOW, THAT HE DIDN'T WANT TO LIVE WITH HIS MOTHER BECAUSE SHE WAS A LITTLE BIT TOO STRICT, SO HE

WENT AND LIVED WITH HIS SISTER FOR A WHILE.

WAS THERE A REQUEST FOR A MENTAL HEALTH EXPERT TO BE APPOINTED?

THERE WAS, AND THE TRIAL COURT GRANTED THAT Q I WOULD REFER TO THE RECORD AT PAGES 118-THROUGH-121.

AND DO WE KNOW ANYTHING ABOUT THE OUTCOME OF THAT? IN OTHER WORDS WHETHER HE WAS EXAMINED BY ANYBODY?

ALL THE RECORD BEARS OUT IS THAT THAT WAS GRANTED. MY ASSUMPTION WOULD BE THAT HE WAS EVALUATED AND DEFENSE COUNSEL CHOSE, FOUND NOTHING HELPFUL THERE, BUT I DON'T KNOW THAT. THE RECORD DOESN'T SAY, ONE WAY OR THE OTHER, BUT ANYWAY THERE IS NO MENTAL HEALTH TESTIMONY, AND THE JUDGE FOUND A NUMBER OF MITIGATORS, FOR EXAMPLE, THAT HE WAS, I BELIEVE THAT HE FOUND HE WAS IN SPECIAL ED CLASSES BECAUSE OF HIS MATH AND READING DEFICIENCIES. THE ONLY REAL TESTIMONY SUPPORTING THAT IS HIS MOTHER SAID HE HAD TROUBLE WITH MATH AND READING IN SCHOOL. AFTER HE QUIT SCHOOL, HE HAD OPPORTUNITIES TO GO BACK AND, ACCORDING TO THE MOTHER, HE DECIDED THAT WAS TOO MUCH LIKE WORK AND HE WOULD RATHER HANG OUT WITH THE LADIES AND STUFF, BUT SINCE HE HAS BEEN ARRESTED FOR THIS CRIME, HE HAS OBTAINED HIS G.E.D. AND HE READS ALL OF THE TIME. MOST OF THE WITNESSES TESTIFIED THAT HE WAS VERY SMART. ONE WITNESS TESTIFIED THAT HE WAS A LITTLE SLOW, SO THEY ARE NOT ALWAYS TOTALLY INCONSISTENT, BUT THE PICTURE THAT IS POINTED, WHEN YOU READ THE TOTALITY OF THE TESTIMONY, IS THIS DEFENDANT WAS NOT A MODEL CITIZEN. THERE IS NO PARTICULAR EVIDENCE, I THINK THE JUDGE PROPERLY REJECTED THE EVIDENCE THAT HE LOVED AND SUPPORTED HIS CHILDREN, AND THE JUDGE ACTUALLY FOUND A NUMBER OF MITIGATORS AND EVALUATING ALL OF THE MITIGATORS. OUR CONTENTION WOULD BE THAT HIS FINDINGS ARE SUPPORTED BY THE RECORD, TO THE EXTENT THAT THE REJECTION OF ANY OF THESE MITIGATORS WAS ERROR AT ALL, IT IS CERTAINLY HARMLESS ERROR.

HOW ABOUT THE MITIGATOR OF NO PRIOR CRIMINAL HISTORY?

THE JUDGE ACTUALLY FOUND. THAT HE GAVE IT LITTLE WEIGHT, BECAUSE THE RECORD SHOWED THAT, IN FACT, HE HAD ENGAGED IN ILLEGAL ACTIVITIES, ESPECIALLY DRUG ACTIVITIES, EITHER USING OR SELLING DRUGS.

YOUR OPPONENT, THAT ALL CAME OUT OF THE MOTHER? IS THAT --

THE DRUGS, YES, I THINK SO. I THINK THE MOTHER WAS THE ONLY ONE THAT REFERENCED THE DRUGS. THERE WAS OTHER TESTIMONY ABOUT AM NOT WORKING AND NOT HAVING A JOB BUT MANAGING SOMEHOW TO SUPPORT HIMSELF.

LET ME GO BACK TO THE ISSUE OF THE NO PRIOR SIGNIFICANT CRIMINAL HISTORY. THE MOTHER, THERE ARE TWO DIFFERENT THINGS. ONE, YOU ARE SAYING THAT THE TESTIMONY THAT HE WAS USING AND SELLING DRUGS, HOWEVER THE JUDGE FOUND, IN THE SENTENCING ORDER WHEN HE WAS TALKING ABOUT THE HISTORY OF WHETHER HE WAS INTOXICATED OR UNDER, AT THE TIME OF THE CRIME, SAID THERE IS NO HISTORY OF ALCOHOL OR DRUG ABUSE. WHAT IS THE EXACT TESTIMONY ABOUT WHAT HIS HISTORY WITH DRUGS WAS, BEFORE THIS CRIME? IN OTHER WORDS, WHAT TYPE OF DRUGS, WAS HE SELLING AS AWAY TO SUPPORT HIMSELF, AND JUST COULD YOU BE AS SPECIFIC AS POSSIBLE, ABOUT THAT.

THE TESTIMONY INCLUDED SEVERAL THINGS, BUT ONE IN PARTICULAR COMES TO MY MIND IS NEAR THE CONCLUSION OF IT, WAS THAT HE WOULD BE A GOOD INFLUENCE ON OTHER PRISONERS, BECAUSE HE COULD RELATE TO THEM BECAUSE HE UNDERSTANDS LIVING ON THE STREETS AND SELLING DRUGS. SOMETHING LIKE THAT. NOW, THERE IS NOT A LOT OF TESTIMONY

ABOUT THAT OR DRUG HISTORIES. THERE IS NO EVIDENCE THAT I AM AWARE OF, THAT HE WAS ACTUALLY ADDICTED TO ANY DRUGS OR HAS, OR HAD ABUSED THEM TO A GREAT DEGREE, JUST FACT THAT HE HAD USED THEM AND APPARENTLY SOLD THEM. OF COURSE, YOU CAN SELL DRUGS.

WAS HE EVER ARRESTED?

NO. THERE IS NO EVIDENCE THAT HE WAS EVER ARRESTED FOR SELLING DRUGS.

WHAT WAS HIS MOTHER'S TESTIMONY ABOUT THE DRUG INVOLVEMENT?

WELL, IT IS, I DON'T KNOW THAT I COULD GO RIGHT TO THAT PAGE.

CAN YOU PARAPHRASE?

MY, I THINK, I THOUGHT I DID PARAPHRASE IT. BUT SHE MENTIONED THE FACT THAT HE HAD STRAYED, AND THAT WHEN HE WAS IN SCHOOL THAT HE HAD QUIT SCHOOL, AND THAT WHEN HE WANTED A PAIR OF SHOES, HE WOULD JUST SELL DRUGS TO BUY THEM, AND I DON'T THINK SHE WAS REFERRING TO THAT AS AN ISOLATED INCIDENT. IT WAS JUST AN EXAMPLE THAT SHE WAS USING, TO ILLUSTRATE THAT HE SUPPORTED HIMSELF IN THAT MANNER.

SO IT WAS A GENERALITY, I TAKE IT, OF HIS INVOLVEMENT WITH DRUGS.

YES, AND I DON'T KNOW HOW MUCH EVIDENCE EXACTLY. THAT WAS THE EVIDENCE AND, AGAIN, THE JUDGE FOUND NO SIGNIFICANT CRIMINAL HISTORY MITIGATE OR AND DISMISSED IT AS GIVING THE WEIGHT OF THAT EVIDENCE, GIVEN -- SHE ALSO SAID HE LOVED TO PARTY, AND I THINK PARTYING IS AN EUPHEMISM FOR DOING DRUGS. SHE SAID HE WOULD BE A GOOD INSPIRATION FOR YOUNGER PEOPLE BECAUSE HE KNOWS WHAT STREET LIFE WAS LIKE, AS FAR AS SELLING DRUGS AND BEING OUT THERE. WE WOULD ASK THIS COURT TO AFFIRM.

CHIEF JUSTICE: THANK YOU. MR. MARSHAL, HOW MUCH TIME? ABOUT FIVE MINUTES? OKAY. COUNSEL. COUNSEL, IT SOUNDS LIKE THERE WAS PRETTY EXTENSIVE TESTIMONY, IN TERMS OF THIS EXTENSIVE BEATING, YOU KNOW, WITHIN THE AUTOMOBILE, WITH THE NUMBER OF BLOWS, THE DEFENSIVE WOUNDS, HIS STATEMENTS ABOUT IT AND EVERYTHING. WHY WOULDN'T THAT ALL ADD UP TO SUFFICIENT EVIDENCE TO SUPPORT THE FINDING OF HEINOUS ATROCIOUS AND CRUEL?

BECAUSE WE DON'T KNOW IF SHE WAS CONSCIOUS DURING THE BEATING.

ISN'T THAT USUALLY WHAT THIS COURT HAS DONE WITH DEFENSIVE WOUNDS, THAT IS THAT PEOPLE DO THAT WHILE THEY ARE CONSCIOUS, IS THAT THEY RESIST AND THAT IS HOW THE MEDICAL EXAMINER'S TESTIMONY, DOESN'T THAT SUPPORT THE FINDING THAT SHE WAS CONSCIOUS DURING A SUBSTANTIAL PART OF THIS BEATING?

WELL, IT SUPPORTS IT BUT I DON'T THINK IT PROVES IT BEYOND A REASONABLE DOUBT, AND I WILL JUST REFER THE COURT TO WHAT IT SAID IN ELAM, ALTHOUGH THE VICTIM WAS BLUDGEONED AND HAD DEFENSIVE WOUNDS, THE MEDICAL EXAMINER TESTIFIED THE ATTACK COULD HAVE TAKEN PLACE IN A VERY SHORT PERIOD OF TIME. AND I THINK THAT IS ALSO WHAT COULD HAVE HAPPENED IN THIS CASE, BASED ON THE EVIDENCE THAT WE HAVE HERE.

HOW MANY WOUNDS WERE THERE?

I BELIEVE THERE WERE BETWEEN TEN AND 17 TO HER HEAD.

NOT ONLY -- ANYTHING ON THE REST OF HER BODY?

SHE HAD, I BELIEVE, SOME WOUNDS TO HER SHOULDERS THAT WERE ALSO PRIOR TO DEATH OR AT THE TIME OF DEATH. AND THAT IS ANOTHER THING THE MEDICAL EXAMINER SAID, THESE ALL HAPPENED BEFORE DEATH, AND HE SAYS AND THAT INCLUDES RIGHT AT THE TIME OF DEATH. ESSENTIALLY, WHICH I READ TO MEAN THIS COULD HAVE HAPPENED IN A VERY SHORT PERIOD OF TIME, AND I DO BELIEVE THE COURT HAS DISTINGUISHED, GOING BACK TO YOUR INQUIRY, JUSTICE PARIENTE, THE CASES, THE HAC CASES WHERE IT WAS AN EXTENDED OR OBVIOUSLY TORTUROUS TO THE VICTIM, AND IN THOSE CASES WHERE THE BRUTALITY OF THE CRIME WAS THE RESULT OF EITHER INTOXICATION OR MENTAL ILLNESS OR AN UNCONTROLLED RAGE, AND I HAVE CITED THOSE CASES IN MY BRIEF ON PAGE 36.

BUT ISN'T IT THE VIEW OF HAC, ONE CAN ADMINISTER A HORRIBLE BEATING AND SUGGEST I DID NOT INTEND TO DO ANYTHING, YET WE REVIEW THAT OR VIEW THAT FROM THE PERSPECTIVE OF THE VICTIM, WHO HAS SUSTAINED THAT ATTACK, DO WE NOT, OR THAT WOULD ALWAYS BE THE REASON, I DIDN'T REAL INTEND TO DO ANY HARM, AND THAT WOULD BE THE ONLY EVIDENCE, I DID NOT INTEND TO DO ANYTHING.

WELL, I THINK THE COURT VIEWS IT FROM BOTH PERSPECTIVES. DID THE DEFENDANT INTEND TO DO THIS? DOES THIS SHOW CALLOUS INDIFFERENCE OR DESIRE TO --

ISN'T IT PHRASED WITH THE DISJUNCTIVE "OR" INDIFFERENCE, AS YOU GO BACK TO GUZMAN, DOESN'T GUZMAN SAY AN INTENT TO TORTURE "OR" INDIFFERENCE?

I CAN'T CITE THE CASE RIGHT HERE, BUT MY UNDERSTANDING IS THAT THE COURT HAS ALWAYS SAID THEY ARE BOTH IMPORTANT.

ISN'T THERE AN IMPLICATION, THOUGH, FROM A LARGE NUMBER OF WOUNDS OR BLOWS LIKE THIS, THAT THERE WOULD BE A CALLOUS INDIFFERENCE TO THE CONSEQUENCES OF WHAT SOMEONE WAS DOING? IN OTHER WORDS WHETHER IT IS A KIND OF THING THAT ANYBODY SAYS THEY INTENDED IT OR NOT, AT SOME POINT, THEY ARE OBVIOUSLY, JUST BY GOOD SENSE, HELD ACCOUNTABLE FOR THE CONSEQUENCES OF WHAT THEY ARE DOING, AND SO WOULDN'T THERE BE AN INVOCATION OF CALLOUS INDIFFERENCE, JUST BY THE NUMBER OF APPARENTLY, VERY TERRIBLE BLOWS HERE, WHEN I SAY TERRIBLE, IN TERMS OF THE DAMAGE THAT, YOU KNOW, THAT THEY WERE DOING? SO WOULDN'T THAT SUPPORT THE FINDING OF CALLOUS INDIFFERENCE?

I UNDERSTAND YOUR QUESTION, YOUR HONOR, AND I THINK THE DIFFERENCE IS WHETHER, THE INDIVIDUAL WHO IS DOING IT HAS SOME CONSCIOUS OR REFLECTIVE UNDERSTANDING OF WHAT THEY ARE DOING OR WHETHER --

WHERE HAVE WE EVER SAID THAT THERE IS SOME REQUIREMENT THAT THERE BE SOME CONSCIOUS REFLECTIVE UNDERSTANDING OF WHAT THEY ARE DOING? I SEE THAT WHEN WE GET TO PREMEDITATION, MAYBE, OR CCP AND THAT, BUT I AM HAVING A LITTLE DIFFICULTY WITH SOMEBODY WHO IS ADMINISTERING, AS I SAY, THE QUALITY OF BLOWS THAT WERE ADMINISTERED HERE, AND THEN THE NUMBER OF BLOWS. I AM HAVING DIFFICULTY UNDERSTANDING THAT THERE BE SOME REQUIREMENT. IF YOU ADMINISTERED 30 DEADLY BLOWS TO SOMEBODY, AND THEN THAT THERE WOULD HAVE TO BE ADDITIONAL PROOF THAT THEY REFLECTED ON THAT, IN ORDER FOR THERE TO BE A FINDING OF HEINOUS, ATROCIOUS AND CRUEL. WOULDN'T THERE BE AN INFERENCE OF CALLOUS INDIFFERENCE, IF --

NO, I DON'T THINK THERE IS A INFERENCE. THE POSSIBILITY IS THAT THIS BEATING WAS A FRENZIED ATTACK. THE ONLY ANALOGY THAT I CAN GIVE IS THE DIFFERENCE BETWEEN FIRING A WEAPON AND RELOADING IT OR FIRING AN AUTOMATIC, WHEN HE PULLS THE TRIGGER AND THE BULLETS JUST KEEP GOING.

FIRE AGO WEAPON, THOUGH, IS THE LETHALNESS OF A BULLET -- FIRING A WEAPON, THOUGH, IS THE LETHALNESS OF A BULLET GOING THROUGH SOMEBODY'S HEART OR BRAIN OR WHATEVER, COMPARED TO THE DIFFERENCE IN CAUGHT QUALITY OF BLOWS THAT ARE BEING ADMINISTERED TO SOMEONE, DOESN'T THAT DISTINGUISH, YOU KNOW, SHOOTING SOMEONE AND THEY DIE RIGHT AWAY OF A GUNSHOT, AS OPPOSED TO SAY, A BEATING DEATH BY REPEATED WOUNDS HERE? YOU EITHER, IN OTHER WORDS, OUR CASE LAW HASN'T DISTINGUISHED THOSE SITUATIONS?

WELL, YES, IT HAS, BUT I THINK WHAT IS IMPORTANT HERE IS, DID THE DEFENDANT INTEND TO CAUSE THE VICTIM PAIN AND SUFFERING, AND DID SHE, IN FACT, EXPERIENCE PROLONGED SUFFERING? THAT IS WHAT THE COURT REPEATEDLY --

CALLOUS INDIFFERENCE RULE.

CALLOUS INDIFFERENCE PLAYS SOME PART.

HAC WAS THAT THIS WAS A FRENZIED ATTACK. THIS WAS NOT SOMETHING THAT WAS CAREFULLY PLANNED AND THOUGHT OUT, BUT WHAT CASE SAID THAT THE FRENZIED NATURE OF IT REMOVES THE AGGRAVATOR OF HEINOUS, ATROCIOUS AND CRUEL?

CHIEF JUSTICE: I AM GOING TO LET YOU ANSWER THAT QUESTION BUT THEN WE HAVE TO CONCLUDE, BECAUSE WE ARE WELL OVER THE TIME. YOU CAN RESPOND TO THAT QUESTION.

ALL I CAN DO IS CITE THE ELAM CASE AND THE OTHER CASES ON PAGE 36 OF MY BRIEF, WHERE THE COURT HAS RECOGNIZED THE FRENZIED NATURE OF THE ATTACK DOES MITIGATE THE GRAVITY OF HAC. IN SOME CASES IT MAY MAKE IT NOT EXIST AND JUST ONE MORE POINT, IF YOU WOULD TAKE A LOOK AT THE CASES THAT THE STATE CITED IN ITS BRIEF, WHICH IT SAYS ARE COMPARABLE, YOU LOOK AT THE HAC WAS FOUND IN MOST OF THOSE CASES, AND IN ALL OF THOSE CASES, IT WAS A PROLONGED ATTACK THAT TOOK PLACE OVER A LONG PERIOD OF TIME, AND THE COURT RECOGNIZED THAT THE DEFENDANT KNEW WHAT HE WAS DOING. HE INTENDED THIS TO HAPPEN, AND THAT IS NOT WHAT WE HAVE IN THIS CASE.

CHIEF JUSTICE: THANK YOU VERY MUCH. THANK YOU, BOTH, VERY MUCH.

THANK YOU, YOUR HONOR.