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William Coday v. State of Florida

THE NEXT CASE ON THIS MORNING'S DOCKET IS WILLIAM CODAY VERSUS THE STATE OF FLORIDA . GOOD MORNING.

MAY IT PLEASE THE COURT. MY NAME IS JEFFREY ANDERSON , AND I REPRESENT THE APPELLANT IN THIS CASE , MR . WILLIAM CODAY . I WOULD LIKE TO , FIRST , JUST JUMP INTO THE FIRST ISSUE IN THIS CASE .

CHIEF JUSTICE: WOULD YOU JUST TELL US SO WE WILL KNOW AS SORT OF A ROAD MAP, WHAT ISSUES YOU WILL BE STRESSING THIS MORNING.

I AM GOING TO TRY TO ADDRESS THEM AS THEY APPEAR IN THE BRIEF, WHICH MEANS ILL RUN OUT, SOON , OF TIME.

BEFORE YOU RUN OUT , WOULD YOU START GETTING TO IT AND MAKE SURE THAT YOU TOUCH ON YOUR ISSUE ABOUT THE FAILURE TO FIND THE MITIGATING FACTOR OF CONFORMING YOUR CONDUCT AND THE PROPORTIONALITY.

OKAY.

I WOULD ACTUALLY, IF I WERE YOU, I WOULD START WITH THOSE.

OKAY . I AM HERE FOR YOU GUYS , SO THE FIRST , THE SEVENTH ISSUE IN THE BRIEF AND THE FIRST ONE I WILL ADDRESS , IS THE REJECTION OF THE MITIGATION OF ABILITY TO CONFORM CONDUCT , BEING SUBSTANTIALLY IMPAIRED, AND OUR POINT ON THIS, IS THAT THE EVIDENCE WAS UNCONTROVERTED , SUPPORTING THIS MITIGATING CIRCUMSTANCE.

I UNDERSTAND THERE WERE FIVE MENTAL HEALTH EXPERTS, WHO ALLIFIED TO THIS , BUT WHAT WAS THEIR IMONY BASED ON ?

IT WAS BASED ON HUNDREDS OF HOURS OF TESTS GIVEN TO THE WILLIAM CODAY , OF REVIEWING , OF INTERVIEWS REVIEWING THE RECORDS , HIS BACKGROUND AND REVIEWING THE CRIMINAL RECORDS OF THIS CASE, EVERY ASPECT OF IT .

IS THERE A CASE THAT SAYS THAT A COURT IS REQUIRED TO ACCEPT THE IMONY OF EXPERTS, THAT IS UNREBUTTED BY OTHER EXPERTS BUT REBUTTED BY LAY WITNESSES ?

NO. I THINK, IF THERE IS A DISPUTE FACTUALLY, AS TO THE BASIS FOR THE , THAT THE , FACTS THAT THE EXPERTS RELIED ON, AND THAT IS IN DISPUTE, I THINK THE JUDGE IS FREE TO DISREGARD THE EXPERTS UNDER THAT VERY LIMITED CIRCUMSTANCES . THIS IS NOT ONE OF THOSE CASES.

SO WHAT CASE SAYS THAT A JUDGE MUST ACCEPT EXPERT IMONY THAT IS REBUTTED BY ONLY LAY WITNESSES OR EVEN UNREBUTTED EXPERT IMONY? IS THERE A CASE THAT SAYS THAT THE COURT MUST ACCEPT THAT AS TRUE? OR DOES CREDIBILITY NOT, IS NOT TAKEN INTO ACCOUNT IN THAT INSTANCE?

I AM SORRY. I MUST HAVE MISPOKE. IF THERE IS A CREDIBLE THING WHERE SOME FACT AT THE

EXPERTS -- FACT THAT THE EXPERTS ARE RELYING ON IS DISPUTED, THE JUDGE CAN USE THAT FACT AGAINST THE EXPERT'S OPINION, AND HE WON'T BE, UNDER THAT LIMITED CIRCUMSTANCE, YOU KNOW, CONFINED BY THE EXPERT OPINION. HE CAN REJECT IT UNDER THAT CIRCUMSTANCE.

HASN'T THIS COURT, HAVE AN OPINION OUT THERE WHICH SAYS THAT, DIFFERENT FROM EYEWITNESS FACTUAL IMONY, THAT OPINION IMONY BY AN EXPERT, CAN BE EVALUATED BY THE COURT, AND IF THE COURT DETERMINES THAT THE OPINION IMONY IS NOT CREDIBLE, THE COURT DOESN'T HAVE TO RELY UPON IT? DIFFERENTIATING BETWEEN FACT IMONY AND OPINION IMONY.

I THINK THAT, WHERE THE OPINION IMONY IS UNREBUTTED BY ANY THING AND HAS THE FACTUAL SUPPORT, I THINK, THE, I THINK THIS COURT HAS SAID THAT THE TRIAL JUDGE IS BOUND BY THAT.

BUT WHAT CASE ARE YOU REFERRING TO?

I DON'T RECALL OFFHAND. I WILL GET INTO IT IN REBUTTAL.

CAN WE APPROACH THIS IN, FROM JUST MAYBE A LITTLE DIFFERENT DIRECTION, THE SAME KIND OF SCENARIO. HOW DID ALL OF THESE EXPERTS ACCOUNT FOR THE FACTUAL INFORMATION IN THE CASE ALONG THE LINES OF THE PLANNING, OF THE WITHDRAWAL OF MONEY, OF THE PLANNED EXODUS FROM THE STATE AND FROM THE COUNTRY? HOW DID THE EXPERTS, WHO TALK IN TERMS OF "OUT OF CONTROL" DEAL WITH OR HANDLE OR ADDRESS THOSE FACTS?

WELL, THEY DEALT WITH IT, THE FACT THAT HE WAS INTENDING, I MEAN, HE WAS INTENDING, IF YOU WENT TO EUROPE, WAS TO COMMIT SUICIDE. I MEAN, THAT WAS PART OF HIS OBSESSION AND PART OF HIS PROBLEMS. IT WASN'T, YOU KNOW, EVEN THE STATE ATTORNEY, ABOUT THIS PREPLANNING, THE STATE ATTORNEY, ON 18 22 OF THE TRANSCRIPTS IN HIS CLOSING ARGUMENT, EVEN DISAVOWED THAT THIS WAS A PLANNED KILLING LIKE THAT.

THEY DIDN'T TRY TO GET CCP AS AN AGGRAVATOR?

NO. NO. THEY DIDN'T AT ALL.

WHAT IS THE DIFFERENCE THAT YOU SEE, BETWEEN THE MENTAL AGGRAVATOR OF COMMITTED WHILE, THE CRIME WAS COMMITTED WHILE HE WAS UNDER THE INFLUENCE OF EXTREME EMOTIONAL OR MENTAL DISTRESS, AND WHAT ACTUALLY HAS TO BE ESTABLISHED, TO FIND THAT THE DEFENDANT, LACKS THE CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCTOR CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW, THAT THAT IS SUBSTANTIALLY IMPAIRED? I DON'T KNOW THAT WE HAVE EVER ACTUALLY DISCUSSED THE DIFFERENCES, BUT EXPLAIN HOW ONE IS DIFFERENT FROM THE OTHER, AND GOING BACK TO WHAT JUSTICE QUINCE SAID, WHAT WAS IT THAT THE EXPERTS SAID ABOUT THAT MITIGATOR, THAT WOULD BE COMPELLING INFORMATION? OTHER THAN JUST FACTS OF THE CRIME. WHAT, CAN YOU FIRST, IN OTHER WORDS, WHAT IS THE DIFFERENCE BETWEEN THE TWO, IF SOMEONE IS UNDER INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE AT THE TIME OF THE CRIME? CAN HE, ALSO, HAVE THE ABILITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT?

WELL, I THINK THEY ARE NOT JUST REPUTATIONS OF ONE ANOTHER.

HOW ARE THEY DIFFERENT AND HOW, AGAIN, GOING BACK TO WHAT JUSTICE LEWIS SAID, TO NOW, GIVEN THE FACTS OF THIS CRIME, WHERE IS THERE AT LEAST CONSCIOUSNESS OF, THAT HE IS GOING TO DO SOMETHING, BECAUSE HE HAS PLANNED, WHATEVER THAT PLAN WAS, MAY BE UP FOR GRABS, BUT HE WAS DOING SOMETHING TO GET OUT OF THE COUNTRY, AFTER THIS INCIDENT.

WELL, GOING TO THAT INCIDENT, I HAVE LOOKED AT THE CASE LAW AND I CAN'T TELL YOU FOR THAT INCIDENT, IT IS TRUE YOU CAN'T HAVE OPERATING UNDER EXTREME EMOTIONAL OR MENTAL DISTRESS.

WE HAVE TO KNOW, WHETHER A JUDGE SHOULD REJECT IT OR ACCEPT IT, HOW IT IS DIFFERENT. YOU OUGHT TO BE ABLE TO TELL US THAT, BASED ON YOUR YEARS AS AN APPELLATE PUBLIC DEFENDER, DOING DEATH PENALTY CASES.

WREATH. I THINK THE SECOND ONE IS -- RIGHT. I THINK THE SECOND ONE IS MORE AIMED AT, WELL, IT IS WHAT IT SAYS. HIS CAPACITY. IT HAS GOT TO BE ONE THING YOU CAN, IT IS MORE, FOR WANT OF A BETTER TERM, SUBJECTIVE AS TO HIM. IT IS ONE THAT YOU NEED MORE MENTAL HEALTH EXPERT IMONY ON.

IS IT A DIMINISHED CAPACITY MITIGATOR, TO SAY THAT, AT THAT TIME, THAT HE DIDN'T KNOW HE WAS DOING ANYTHING WRONG, OR DIDN'T UNDERSTAND HE WAS DOING SOMETHING WRONG?

IT IS NOT TO THAT EXTENT, BUT HIS CAPACITY JUST SAYS, AS IT SAYS, IT IS IMPAIRED. IT IS NOT LIKE AN INSANITY, BUT IT IS TO THE DEGREE THAT THERE IS SOME --

I GUESS ONE OF THE THING THAT IS COMES TO MIND, IS WHEN YOU ARE LOOKING AT THAT PARTICULAR MITIGATOR, ARE WE LOOKING AT -- MITIGATOR, ARE WE LOOKING AT IT IN POINT OF TIME OF WHEN THE ACTUAL CRIME OCCURRED, OR ARE WE LOOKING AT IT IN A CONTINUUM? BECAUSE AS I SEE WHAT THE TRIAL JUDGE SAYS, HE IS SAYING THAT, FOR 20 YEARS, THIS MAN, YOU KNOW, WENT ALONG HIS LIFE. HE, I MEAN, RECORD INDICATES HE WAS MARRIED TWICE. HE HAD MULTIPLE RELATIONSHIPS WITH VARIOUS WOMEN, AND EVERYTHING WENT ALONG FINE, AND THEN YOU KNOW, THIS MURDER OCCURS. SO HOW DO WE DECIDE IF HE HAD THE ABILITY TO CONFORM HIS CONDUCT, WHEN WE KNOW FOR AT LEAST TWENTY YEARS HE DID!

IT IS NOT OVER CONTINUUM. IT IS AT THE TIME OF THE OFFENSE, AND THE JUDGE WAS INCORRECT IN SAYING THERE WERE NO OTHER OCCASIONS WHERE THIS WOULD APPEAR, BECAUSE WHILE HE WAS, JUST WHILE HE WAS AWAITING TRIAL, HE GOT HIS FINAL DIVORCE PAPERS FROM HIS WIFE, AND HE WENT INTO A PSYCHOTIC STATE THEN AND TRIED TO COMMIT SUICIDE. AND THAT CERTAINLY WOULD BE DEFINED AS, YOU KNOW --

SO WHENEVER HE GETS INTO SOME RELATIONSHIP AND IT DOESN'T GO THE WAY HE WANTS TO, HE CAN'T CONFORM HIS CONDUCT.

WELL, IT IS MORE THAN JUST THAT, BUT IT IS WHEN, YOU KNOW, THE DOCTORS EXPLAINED, WHEN, IT HAS TO DO WITH THAT PARTIALLY, BUT YOU HAVE TO LOOK AT THE WHOLE BACKGROUND OF WHAT WAS GOING ON. IN HIS CASE WITH GLORIA GOMEZ, IT WAS A CASE OF BETRAYAL ON HIS, THE WAY HE WAS LOOKING AT IT, BECAUSE THE DOCUMENT THAT WAS INTRODUCED INTO EVIDENCE SHOWED THAT THEY HAD A RELATIONSHIP. THEY HAD TALKED ABOUT PLANS TO MARRY, HAVE CHILDREN, AND -- TO MARRY, HAVE CHILDREN, AND FRIENDS WERE TELLING MR. CODAY AT THAT TIME THAT SHE WAS JUST USING HIM, SHE WAS NOT GOING TO, SHE WASN'T IN LOVE WITH HIM. SHE WAS JUST USING HIM BECAUSE OF IMMIGRATION PROBLEMS, AND SHE REASSURED HIM, NO, THAT WASN'T THE CASE, THAT I AM THINKING ABOUT MARRYING YOU BECAUSE I LOVE YOU, AND THEN LATER ON, GOING TO THE DAY OF THE INCIDENT WHEN SHE TOLD HIM THAT SHE NEVER LOVED HIM, THAT IS WHAT EVERYBODY SAYS TRIGGERED AN EMOTIONAL RESPONSE.

WAS THE EVIDENCE OF THE INCIDENT IN GERMANY, 20 YEARS PREVIOUSLY OR WHATEVER THAT PERIOD OF TIME WAS, WAS THAT BEFORE THE TRIAL COURT?

THE ONLY TIME THAT CAME IN, WAS THERE WAS VERY SLIGHT CROSS-EXAMINATION ABOUT IT AT THE PENALTY, EXCUSE ME, AT THE SPENCER HEARING, AND THAT WAS ONLY, THE DETAILS OF IT WE WEREN'T BROUGHT OUT INTO EVIDENCE EVER, BUT IN FACT THE TRIAL JUDGE HELD IT WAS NOT GOING TO BE ADMISSIBLE, EXCEPT IF THE EXPERTS WERE CROSS-EXAMINED, IF YOU PUT ON EVIDENCE AS TO IMPAIRED CAPACITY, THEY COULD BE CROSS-EXAMINED, IF THAT WAS PART OF THE FINDING.

LET'S SEE IF WE CAN'T GET BACK TO THE QUESTION OF HOW DID THE EXPERTSIFY THAT THE CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT ON THE DAY OF THIS INCIDENT WAS SUBSTANTIALLY IMPAIRED, BESIDES SAYING THAT IT WAS, WHAT SPECIFICALLY, LED THEM TO THAT UNIFORM CONCLUSION?

WELL, IT WAS, AS I SAID, IT WAS BASED ON THE RECORDS AND THE HEARINGS AND EVALUATIONS AND SOME OF HIS BACKGROUND, AND INCIDENTS THAT OCCURRED, AND THE FACT THAT, IN THE HEARING, THEY FOUND SEVERAL MENTAL ILLNESSES, INCLUDING ALMOST TO THE EXTENT OF BIPOLAR DISORDER.

HOW LONG AFTER THE INCIDENT, WERE THESE DONE?

SOME OF THE DOCTORS, I REMEMBER ONE OF THE DOCTORS, IT IS AT VARIOUS TIMES, TO BE HONEST WITH YOU.

WHAT WAS THE SOONEST AFTER THE INCIDENT, THAT THIS WAS DONE?

I KNOW IT WAS, SOME OF IT WAS IN 1999. THAT IS THE EARLIEST I CAN SEE RIGHT HERE OFF MY NOTES.

THE MURDER WAS '97? IS THAT RIGHT?

YES. I THINK SO.

OKAY. SO, GO AHEAD. I DIDN'T MEAN TO TAKE YOU OFF YOUR TRAIN --

GIVE US SOME HELP ON THIS. YOU ARE USING GENERALITIES. CAN YOU BE MORE SPECIFIC IN THE RESPONSE. NOT JUST THAT WE RELIED ON HEARINGS OR INCIDENTS. I THINK THAT IS WHAT THE POINT OF THE QUESTION WAS, TO TRY TO GET SOME INFORMATION TO FILL IN THE GAPS. COULD YOU DO THAT?

AND IF I MISS THIS, A LOT OF IT IS IN MY INITIAL BRIEF 18-THROUGH-28, BUT A LOT OF THE HEARING WAS, IT HAD TO DO WITH PSYCHOLOGICAL HEARING, AND IT IS, LIKE I SAID, THEY FOUND SEVERE MENTAL ILLNESSES.

YOU KNOW WHAT? WE ARE NOT REALLY GOING TO GET ANYWHERE, IF YOU CAN'T GIVE US SPECIFICS. I DON'T MEAN TO CUT YOU OFF, BUT IN YOUR BRIEF HAS THE INFORMATION, I MEAN, IF WE ARE WRITING THIS OPINION, WHAT WE ARE REALLY SAYING IF WE WERE TO REVERSE ON THIS GROUND IS TO SIMPLY SAY, WELL, THE EXPERTS FOUND THAT HE DIDN'T HAVE THIS CAPACITY, AND YET WE CAN'T EVEN DEFINE WHAT IT MEANS AND HOW IT DIFFERS FROM EXTREME MENTAL OR EMOTIONAL DISTURBANCE, THEN WE REALLY JUST DON'T HAVE MUCH MORE CLARIFICATION. LET'S ASSUME, JUST GETTING OFF THIS POINT AND JUST GO TO PROPORTIONALITY, ASSUME THAT WE DON'T, THERE IS ONE STATUTORY MITIGATOR, AND ONE AGGRAVATOR. DON'T OUR CASES, OUR MORE RECENT CASES IN BLACKWOOD AND BUTLER, I THINK BOTH OF WHICH I DISSENTED IN, BUT DON'T THOSE PROVIDE BASIS FOR PROPORTIONALITY IN THIS CASE?

WELL, I DON'T THINK THIS COURT HAS ABANDONED ITS, THE CASE LAW ABOUT WHERE THERE IS

BUT ONE AGGRAVATING CIRCUMSTANCE . DEATH IS DISPROPORTIONATE , UNLESS THERE IS VERY LITTLE OR NOTHING IN MITIGATION , AND I THINK THOSE CASES FALL UNDER THAT , WHERE THERE ISN'T MUCH MITIGATION , AND IN THIS CASE , DESPITE THE FACT THERE IS BUT ONE STATUTORY MITIGATING CIRCUMSTANCE, IT IS AN EXTREMELY STRONG ONE THAT THE TRIAL COURT FOUND. AND --

THIS WAS AN EXTREMELY STRONG ONE , WASN'T IT?

I WAS TALKING ABOUT THE MITIGATING CIRCUMSTANCE. THE AGGRAVATING CIRCUMSTANCE IS A STRONG ONE, TOO , BUT UNDER THE CIRCUMSTANCES , IT IS NOT AS STRONG AS IT NORMALLY IS .

I BEG TO DIFFER ON THAT , BECAUSE THERE IS , LIKE , WHAT , 40-SOMETHING OR 90-SOMETHING STAB WOUNDS ?

THERE WERE , WE DON'T. A NUMBER, YOU ARE CORRECT. I HAVEN'T BEEN HERE THAT LONG BUT IT IS THE MOST STAB WOUNDS THAT I HAVE SEEN SINCE I HAVE BEEN HERE.

I DON'T KNOW HOW MANY OF THOSE WERE , I DON'T WANT TO QUIBBLE AND MINIMIZE THE INJURIES, BECAUSE THEY WERE GREAT , NO MATTER WHAT STANDARD YOU USE. ANOTHER MEDICAL EXAMINER --

MEDICAL EXAMINER ADVISED 144, EVEN WORSE THAN YOU SAY.

140 OR SOME SUCH NUMBER WERE ACTUAL STAB WOUNDS WHERE THE INCISION WAS GREATER THAN THE WIDTH OF THE INJURY, WHICH MEANS THAT IT PENETRATED SUBSTANTIALLY , AND A NUMBER OF OTHERS WERE CUTS OR SOMETHING LIKE THAT.

NOT TRYING TO , I HAVE CITED LEFAVE AND SCOTT AND THE AUSTIN CASE IN POINT ONE OF MY BRIEF, TO EXPLAIN POINT THREE. I AM SO RRY ABOUT. THAT TO EXPLAIN THAT A LARGE NUMBER OF WOUNDS LIKE THAT IS OFTEN INDICATIVE OF AN EMOTIONAL FRENZY, AND THAT IS WHY I AM SAYING , NOT SAYING THE RESULTS ARE MINIMAL.

STICKING TO OUR CASE LAW IN LEFAVE AND SCOTT , HAVEN'T WE SAID THAT A STABBING IS THE ENOUGH TO ESTABLISH THE HAC AGGRAVATOR , AND HERE WE HAVE NOT ONE STABBING BUT 144 STABBINGS , AND ISN'T IT , NOT ONLY DOES THAT NOT , NOT ONLY DOES THAT ESTABLISH THE HAC FACTOR, BUT IT IS A PRETTY AGGRAVATING AGGRAVATOR .

IT IS --

AS HAC GOES . AS FAR AS OUR CASE LAW.

THERE IS ALSO CASE LAW THAT SAYS MULTIPLE STABBINGS IS NOT AUTOMATICALLY HAC. IT DEPENDS UPON CIRCUMSTANCES .

IS THAT FROM OUR COURT THAT SAYS IT IS NOT AUTOMATICALLY?

I AM AND PLAYING MY WORDS NOT AUTOMATICALLY. THERE IS MULTIPLE STAB WOUNDS WHERE HAC WAS NOT FOUND IN THIS COURT. IT SAID HAC DIDN'T APPLY .

LET'S ASSUME THAT HAC APPLIES. WHAT YOU ARE SAYING IS THAT THE NATURE OF THE CRIME IN THIS CASE AND SOME OF THE BASIS FOR WHICH THE EXPERTS FOUND THAT HE WAS ACTUALLY UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTRESS, WAS ACTUALLY THE WAY THE CRIME WAS COMMITTED, THAT IT WAS AN EMOTIONAL CRIME.

RIGHT. CORRECT.

AND THAT IS REALLY THE CASE, THOUGH, AND IN ANY OF THE HAC CASES, WHERE THERE ISN'T JUST A SLOW TORTURE, THOSE CASES ARE USUALLY ONES OF EMOTION. I THINK THAT BLACKWOOD MAY HAVE BEEN THAT AND BUTLER, BUT ARE YOU SAYING THAT, IN THOSE CASES, THE MENTAL MITIGATOR WAS NOT FOUND, IS THAT THE DIFFERENCE?

YES. THERE WERE NO STRONG MENTAL MITIGATORS FOUND, FOR EXAMPLE, IN BLACKWOOD. IT WAS HIS, HE HAD AN OTHER MITIGATOR BUT IT WASN'T THE TYPE OF MITIGATION IN THIS CASE, THAT RELATES TO THE CRIME ITSELF.

THIS IS WHAT I HAVE A PROBLEM WITH IN THIS CASE. WE TALKED ABOUT THE FACT THAT THERE WAS THIS PRIOR PLANNING TO DO SOMETHING, WHICH WAS HE HAD THE TICKET. HE HAD THE MONEY WITHDRAWN. HE ASKED HER TO COME TO HIS HOME. HE OBVIOUSLY DIDN'T HAVE TWO TICKETS, SO HE WASN'T PLANNING THAT SHE WAS GOING TO GO WITH HIM TO EUROPE. WHAT, AND THIS IS SOMETHING THAT JUST IS ALSO CONCERNING ME, THE FIRST PART OF THIS CRIME STARTED WITH HIM USING A HAMMER. IS THAT CORRECT?

UM-HUM. YES.

AND THE CRIME IN GERMANY, 20 YEARS BEFORE, IN WHICH THE EXPERTS WERE MENTIONED, THE WEAPON -- WERE CROSS-EXAMINED, THE WEAPON WAS A HAMMER, AND SO UNDERSTANDING, I GUESS, THE ARGUMENT WAS, NO, THIS WASN'T A PREPLANNED KILLING. HE JUST WAS IN A FRENZY AFTER HE HEARD THAT SHE NEVER LOVED HIM. IT STILL DOESN'T JUST SEEM TO BE LIKE SOMETHING WHERE SOMEONE COMES IN AND SEES THEIR SPOUSE WITH ANOTHER PERSON AND THEY, YOU KNOW, GO BALLISTIC, THAT THERE WAS SOMETHING HERE THAT MAKES THIS DIFFERENT. NOW, CAN YOU HELP ME ON THAT? I DON'T KNOW IF YOU, IT JUST, I UNDERSTAND CIRCUMSTANCES WERE NOT FOUND. I UNDERSTAND WE CAN'T LOOK AT THE PRIOR VIOLENT FELONY ISSUE FROM GERMANY, BUT THERE IS JUST SOMETHING ABOUT THIS THAT DOESN'T SIT WELL WITH ME ABOUT HOW THIS CRIME OCCURRED.

YOU KNOW, FIRST OF ALL, YOU KNOW, WE ARE DISCUSSING THE PRIOR GERMANY INCIDENT, ALTHOUGH I DON'T THINK WE SHOULD, BECAUSE IT WAS EXCLUDED AND THEY REALLY DIDN'T DEVELOP THIS DURING --

IT WAS CROSS-EXAMINED --

IT WAS USED AS PART OF THE NO SIGNIFICANT HISTORY, DIDN'T HE? THEY WANTED NO SIGNIFICANT HISTORY, AND THE TRIAL JUDGE ACTUALLY USED IT TO DEMONSTRATE THAT THAT WAS NOT A STATUTORY MITIGATOR.

RIGHT. HE JUST USED IT AS AN OCCURRENCE BUT NOT THE DETAILS LIKE ARE BEING USED RIGHT NOW THAT IT WAS, WE NEVER DEVELOPED THROUGH AN AVERAGE SERIAL PROCESS, EXACTLY WHAT HAPPENED IN GERMANY, BECAUSE THE EXPERTS WERE RELYING ON THAT TO SUPPORT THEIR FINDING OF MITIGATION.

HOW DID THE EXPERTS BECOME AWARE OF THAT CRIME IN GERMANY? YOUR EXPERTS. DEFENDANT'S EXPERTS. EXCUSE ME.

I THINK THEY ALL WERE LOOKING AT THE RECORDS.

PROVIDED BY DEFENSE COUNSEL?

PROBABLY DEFENSE COUNSEL. I AM GUESSING. I DON'T KNOW.

I DON'T KNOW THAT , A GAIN , WE HAVE GOT ALL THESE QUESTIONS, SO , JUST A GAIN , ON THE CRIME, THE FACT THAT THERE IS NOT ONLY A L ARGENUMBER OF WOUNDS BUT I T STARTS OUT WITH HIM HAMMERING AND HE, ALSO , HAD , AGAIN, SOME PLAN TO LEAVE THE COUNTRY , SO HO W WAS THAT EXPLAINED?

THE PLAN TO LEAVE THE COUNTRY WAS, FIRST OF ALL HE DIDN'T PURCHASE THE TICKET AHEAD OF TIME. HE PURCHASED IT AFTERWARD, AND IT CAN B E CONSCIOUSNESS OF GUILT OF THE CRIME, BUT HIS PREPLANNING TO LEAVE , O R MAKING PO SSIBLE ARRANGEMEN TS TO LEAVE , WERE JUST THAT HE WAS DEPRESSED OVER THEIR RELATIONSHIP, AND IF HE SHOULD NOT BE ABLE T O WIN HER BACK , REUN ITE , H E EVEN TOLD HER, AS HE FIRST MET HER, IF YOU DON'T COME BACKWITH ME , I AM GOING TO LEAVE AND KILL MY SELF .

WHAT WERE THE DETAILS , IN TERMS OF I AM GRAPPLING WITH THE SAME I S SUE THAT HAS BEEN POSED TO YOU HERE , THAT IS THAT WE HAVE THE COINCIDENCE , AND IT IS WITHIN HIS KNOWLEDGE OBVIOUSLY , THAT HE HAD COMM ITTED A SIMI LAR CRIME IN GERMANY SOME TWENTY YEARS BEFORE. HE KNOWS THAT .

RIGHT.

HE IS AWAR E OF THAT. AND THERE HE HAD GONE DOWN INTO THE BA SEMENT OF THE HOUSE WHERE HE WAS AND SECURED A HAMMER AND COME BACK UP TO WHERE THE VI CTIM WAS IN HIS BEDR OOM OR WHEREVER. ALL RIGHT. BUT HE OBVIOUSLY KNOWS INTIMATELY, WHAT HA PPEDED THERE BEFORE , AND I AM WONDERING IF THIS ISN'T PART OF A REL EVANT ANAL YSIS OF HIS MENTAL STATE AND SU CH. WHAT WERE THE DETA ILS HERE , IN TE RMS OF HIM HAVING A HAMMER AVAILABLE WHILE SHE WAS THERE VISITING WITH HIM ? WHAT EVIDENCE CAME OUT , INOTHER WORDS, DID THE EVIDENCE COME OUT THAT , AS OPPOSED TO HAVING TO GO TO THE KITCHEN OR SOMEPLACE , DID HE HAVE A HAMMER SI TTING ON HIS N IGH T STAND , OR TELL ME. HELP ME.

THE HAMMER WAS ON A YELLOW PA GES TELEPHONE BOOK RIGHT NEXT TO THE B ED.

THERE WERE TWO HAMMERS, RIGHT?

THERE WAS ANOTHER HAMMER. THERE WERE TWO.

ISN'T THIS A LIT TLE STRANGE THAT, TW ENTY Y EARSBEFORE, HE COMMITTED AN OFFENSE LIKE THIS , WITH A HAMMER, AND NOW, WHEN HE HAS THE GIRLFRIEND COME BACK OVER THAT HAS REJ ECTED HIM , APPARENTLY, AND HE IS TR YI NGTO WORK IT OUT , THAT H E HAS GOT TWO HAMMERS SITING THERE , THE SAME TOO L THAT HE HAD USED TWENTY YEARS BEFORE? I AM HAVING TR OUBLE PLUGGING THAT IN, YOU KNOW, TO T HAT JUST BEING, YOU KNOW, THAT JUST HAPPENS TO BE WHERE HE KEEPS HIS HAMMERS. TOO IS A STRANGE THING. ONE OF THE EX-WIVES IFIED THAT THERE WAS APROBLEM WITH THE BED, AND THAT IS WHERE WHERE SHE K EPT A HAMMER NEAR THE BE D, TOO , WHEN SHE WAS MARRIE D TO HIM AND HE KEPT A HAMMER THERE,TOO, TO CONSTANTLY FIX THE BED.I MEAN, THAT WAS THE IMONY.IT IS A STRANGE THING. I AG REE . BUT THAT IS WHAT THE FACTS WERE SHOWING, AS FAR AS THE WEAPONS BEING THERE. BUT THE PHOTOS AND EVERYTHING SHOWED THAT THIS WAS A VERY S MALL AM OUNT , AND THE KILLING OCCURR ED IN A VERY LI MITED SP ACE , AND ALL THE PHYS ICAL EVIDENCE --

BUT HE HAD T O GO SOMEPLACE TO GET THE KNIFE, DIDN'T HE? DID HE ACTUALLY HAV E TOLEAVE THE ROOM?

REACH AR OUND. IT IS NOT CLEAR BUT IT COULD HAVE BEEN THAT ALL HE HAD TO DO WAS REACH AROUND THE CORNER, BECAUSE THE CORNER IS THE KITCHEN AND THE BEDROOM. AND HE, REALLY, DIDN'T HAVE TO DO MUCH MOVEMENT.

BEFORE YOU SIT DOWN , I SEE YOU ARE REALLY INTO YOUR REBUTTAL. WOULD YOU ADDRESS BRIEFLY, THE HEAT OF PASSION ARGUMENT THAT YOU MAKE IN YOUR FIRST ISSUE.

OKAY. IT IS , THAT WAS , OBVIOUSLY THERE IS NO QUESTION THAT HE KILLED HER. THE WHOLE THING WAS WHAT STATE OF MIND DID HE HAVE , AND THE DEFENSE ARGUED HEAT OF PASSION, THAT THIS WAS AN EMOTIONAL RESPONSE TO WHAT HAPPENED.

HOW DO WE DISTINGUISH THIS CASE FROM KILGORE , WHERE THIS COURT WAS FACED WITH THE SAME KIND OF QUESTION OF WHETHER OR NOT IT WAS ERROR TO NOT GIVE A SPECIAL INSTRUCTION ON HEAT OF PASSION?

IN KILGORE , THE THE JUDGE'S PREROGATIVE IN REJECTING THE INSTRUCTION BECAUSE IT WAS CONFUSING , WAS THE LAST SENTENCE OF THE PARAGRAPH ON 89 8.

WHAT ABOUT THE INSTRUCTION THAT WAS OFFERED HERE IN DON'T YOU THINK THAT WAS PRETTY CONFUSING? IT IS A VERY LENGTHY DISCUSSION, WITH AN ATTEMPT TO DEFINE A LOT OF TERMS.

IT COULD HAVE BEEN WRITTEN , PROBABLY, BETTER , BUT , AND IT PROBABLY WOULD HAVE BEEN, IF THE STATE HAD OBJECTED TO IT BEING CONFUSING, OR THE TRIAL JUDGE HAD MADE ANY MENTION OF I AM REJECTING IT BECAUSE IT IS CONFUSING AND MISLEADING. THAT COULD HAVE BEEN CORRECTED. THAT SHOULDN'T BE THE PROBLEM WITH THIS. THE PROBLEM WITH THIS IS THAT THE JUDGE FOUND THAT EXCUSEABLE HOMICIDE , THE STANDARD INSTRUCTIONS PORTRAYED THE THEORY OF DEFENSE,, WHICH UNDER PALMORE , WE ARE CLAIMING IT TO NOT.

THE STANDARD INSTRUCTION TALKS ABOUT THE HEAT OF PASSION. IT USES THOSE WORDS , RIGHT?

CORRECT.

SO WHY IS IT AN ABUSE OF DISCRETION FOR THE TRIAL JUDGE JUST TO GIVE THE STANDARD INSTRUCTION WITH THAT LANGUAGE IN IT AND REFUSE TO GIVE ANOTHER ONE?

BECAUSE THAT , AN EXCUSEABLE HOMICIDE, IT IS RELATED AS A COMPLETE DEFENSE. IT DEFINES THE KILLING AS BEING LAWFUL, WHICH WAS NOT THE DEFENSE IN THIS CASE . WE HAVE TO GIVE EXCUSEABLE HOMICIDE. THE JURY HAS TO MAKE THAT DETERMINATION, WHETHER IT IS UNLAWFUL OR NOT , BUT BY GIVING THAT INSTRUCTION , DEFINED INSTRUCTIONS BY THE TRIAL COURT THAT YOU ARE TO FOLLOW THE LAW AS I HAVE INSTRUCTED YOU ON , HE DID THAT FIVE OR SIX TIMES FORM THE JURY HAS ESSENTIALLY BEEN TOLD THIS IS THE ONLY WAY YOU CAN CONSIDER HEAT OF PASSION, AND IT WAS INCONSISTENT WITH THE DEFENSE.

WHERE WAS THERE, IN THE PROPOSED INSTRUCTIONS , YOU SAY THERE IS TWO ELEMENT , THE PASSION AND THEN THE LAWFUL PROVOCATION . WHERE WAS THIS ANY EVIDENCE IN THIS CASE OF LAWFUL PROVOCATION?

WELL , I THINK THAT CAME , THE PROVOCATION IN ALL OF THOSE OTHER CASES , THE USUAL CASE, IS BETRAYAL BY ONE SPOUSE AGAINST ANOTHER OR ONE PERSON IN RELATIONSHIP WITH ANOTHER, AND I SUBMIT THAT HER LYING TO HIM , KNOWING SHE LIED TO HIM ALL THIS TIME , ABOUT LOVING HIM , HE DIDN'T KNOW THAT UNTIL SHE SAID I HAVE NEVER LOVED YOU. THEIR WHOLE RELATIONSHIP WAS A LIE AND THAT WAS A BETRAYAL, WHICH AT LEAST CREATED A JURY QUESTION AS TO HEAT OF PASSION. I WILL RESERVE THE REST OF MY TIME. THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH. MS. CAMPBELL.

GOOD MORNING. MAY IT PLEASE THE COURT. LESLIE CAMPBELL WITH THE ATTORNEY GENERALS

OFFICE . IF I MAY START , I THINK JUDGE, JUSTICE WELLS , YOU WERE GETTING AT THE ISSUE OF WHEN EXPERT'S IMONY COULD BE REJECTED AND THAT WOULD BE FOSTER, AND THE STATEMENT IN THAT CASE WAS EXPERT IMONY ALONE , DOES NOT REQUIRE A FINDING OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE. EVEN UNCONTROVERTED OPINION IMONY -- EVEN UNCONTROVERTED OPINION IMONY CAN BE REJECTED , ESPECIALLY WHEN IT IS HARD TO RECONCILE WITH OTHER EVIDENCE PRESENTED IN THE CASE. AS LONG AS THE COURT CONSIDERED ALL OF THE EVIDENCE, THE TRIAL JUDGE'S DETERMINATION OF LACK OF MITIGATION WILL STAND , ABSENT OF PALPABLE ABUSE OF DISCRETION.

ISN'T THAT THE KEY , THOUGH, THAT IS THAT THERE HAS TO BE SOME EVIDENCE THAT THE TRIAL JUDGE BASES HIS DECISION ON , DOES THERE NOT , AND WHEN EVALUATING AN ISSUE , AND SO HERE IS THE ISSUE , AS FAR AS WHETHER THIS MITIGATE OR EXISTED , AND SO YOUR OPPONENT IS POINTING OUT , HEY , I HAVE GOT FIVE EXPERTS THAT NOT ONLY EXPRESS THE OPINION BUT ALSO DOCUMENTED THE BASIS OF THEIR OPINION , OKAY , AND NOW WE HAVE A TRIAL COURT FINDING THAT REJECTS THAT, SO WHAT WE ORDINARILY DO , THEN, IS LOOK OVER ON THE OTHER SIDE AND SAY, WELL , WHERE IS THE, EITHER, EXPERT OR LAY EVIDENCE OR FACTUAL , YOU KNOW, WHATEVER IT IS , THAT WOULD SUPPORT A REJECTION OF THAT MITIGATOR , IN THE FACE OF THIS OTHER EVIDENCE , SO HELP US HERE. IN OTHER WORDS WHAT WOULD BE THE FACTS OR THE EVIDENCE THAT THE TRIAL JUDGE WOULD UTILIZE, THEN , TO DETERMINE , TO REJECT THAT MITIGATOR . YOU KNOW , WE HAVE CASES IN THE PAST , WHERE WE HAVE LAY IMONY THAT , WELL , A PERSON WASN'T DRINKING. I HAD A CONVERSATION WITH HIM. HE WASN'T EMOTIONAL AT ALL. AS A MATTER OF FACT , HE WAS TOTALLY RATIONAL , AND YOU KNOW, THAT , WHATEVER . WHAT DO WE HAVE HERE , THOUGH, THAT COUNTERS --

I THINK I UNDERSTAND BECAUSE ARE GETTING AT , JUSTICE ANSTEAD. THERE ARE TWO ASPECTS TO THIS. NUMBER ONE, WE HAVE, WE DON'T HAVE COMPLETELY UNCONTROVERTED IMONY FROM THE EXPERTS. LET ME START WITH THAT, AND THEN I WILL GET INTO THE FACTS THAT NEED TO BE LOOKED AT, BOTH BEFORE AND AFTER THE CRIME , AS WELL AS THE WRITINGS OF MR . CODAY. FIRST OF ALL, DR . JACOBSON DID NOT FIND THAT MR . CODAY DIDN'T KNOW WHAT HE WAS DOING WAS WRONG , AND DR . GOLDSTEIN SAID THAT CODAY KNEW THAT HE WAS HITTING MS. GOMEZ , AND HE KNEW THAT HE WAS HURTING MS. GOMEZ , AND HE KNEW THAT HE WAS CAUSING SERIOUS INJURY, SO I THINK THOSE TWO DO CONTROVERT, TO AN EXTENT , WHAT THE OTHER EXPERTS ARE SAYING.

BUT HOW IS THAT MITIGATOR WORDED? I THOUGHT THAT IT WAS A "OR" YOU WERE UNABLE , EVEN IF YOU KNOW WHAT YOU ARE DOING, YOU WERE UNABLE TO INFORM IT TO THE REQUIREMENTS OF LAW.

IT IS. IT IS A " OR". IT IS WHETHER OR NOT YOU CAN , YOU UNDERSTAND WHAT YOU ARE DOING AND CAN CONFORM YOUR CONDUCT.

OR CONFORM .

TO THE REQUIREMENTS OF LAW. HOWEVER , IF YOU TAKE A LOOK AT THE FACTS THAT WE HAVE IN THIS CASE , THE PRIOR PLANNING, AND IT WAS EXTENSIVE , AND THE STATE ATTORNEY DID NOT BACK AWAY FROM THAT. WHAT HE WAS SAYING IN HIS OPENING , OR HIS REBUTTAL CLOSING, I SHOULD SAY , HE WAS SAYING OBSESSION IS NOT LOVE, AND THAT IS IN ESSENCE , WHAT THE DEFENSE WAS ARGUING . WE HAVE THIS OBSESSION WITH GLORIA, AND THEREFORE WHEN SHE REJECTED HIM , HE JUST BLEW UP . THE MAN SCRIPT THAT WAS WRITTEN WHICH WAS VERY SELF-SERVING, AND IT WAS WRITTEN OVER A THREE-MONTH PERIOD OF TIME WHEN HE WAS IN EUROPE , WHEN CODAY WAS IN EUROPE AND NOT IN AFRICA. THAT DOES SHOW PREMEDITATION. IT, THERE IS A MOTIVE IN THIS CASE, AND THE MOTIVE WAS RAGE. THE TITLE IS A JOURNEY INTO OBSESSION. THERE MAY NOT HAVE BEEN ANY PLANING IN THIS CASE, BUT THERE WAS THE CONSCIOUS DECISION TO KILL. IT WAS MORE OF A "OR" COMMENT .

WOULD YOU AGREE THERE CAN BE A CONSCIOUS DECISION TO KILL, BECAUSE THAT IS PREMEDITATED, YOU HAVE GOT PREMEDITATED MURDER, AND, STILL, HAVE THE MENTAL MITIGATOR OF THE CAPACITY TO CONFORM YOUR CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED?

I HAVE SEEN THAT WHERE BOTH ARE GIVEN. HOWEVER, IN THIS PARTICULAR CASE, IT, THE MITIGATE OR DOES NOT APPLY, AND IF YOU WILL LOOK AT THE FACTS, AGAIN --

JUST GOING TO WHAT THE JUDGE SAID, THE JUDGE SEEMED TO BASE HIS REJECTION ON THE FACT OF WHAT, HOW THIS MAN LIVED HIS LIFE FROM THE TIME HE WENT FROM GERMANY, UNTIL, UP TO THE CRIME, AND THAT HE LIVED HIS LIFE WITHOUT INCIDENT. WOULD YOU, AND THAT IS, IN TERMS OF TRYING TO, YOU KNOW, UPHOLD THE TRIAL JUDGE, WHICH IS OUR, YOU KNOW, WHAT WE TRY TO DO, IT SEEMS THAT, BY CONCENTRATING ON WHAT HE DID FOR 20 YEARS, AS OPPOSED TO AT THE TIME OF THE CRIME, THAT HE IS REALLY NOT DEALING WITH THE, THIS MENTAL MITIGATE OR, SO WOULD YOU HELP ME OUT ON WHAT I ASKED MR. ANDERSON, WHICH IS EXACTLY WHAT DOES THIS MENTAL MITIGATE OR MEAN, AS OPPOSED TO THE ONE THAT DISCUSSES BEING COMMITTED UNDER THE INFLUENCE OF EXTREME EMOTIONAL DISTURBANCE, AND DOES IT RELATE TO THE TIME OF THE CRIME, AS OPPOSED TO WHETHER SOMEONE LIVED A LAW-ABIDING LIFE OR NOT?

IT DOES RELATE TO THE TIME OF THE CRIME. HOWEVER, THE PHRASE THAT YOUR HONOR IS LOOKING AT, WAS A MOREOVER PHRASE. INITIALLY THE COURT, INITIALLY THE COURT --

HE JUST SAID THE EXPERTS DON'T CONVince THE COURT HE IS RELIEVED FOR ACCOUNTABILITY OF HIS CONDUCT OTHERWISE IS NOT AWARE OF THE CONSEQUENCES. IT DOESN'T HELP US IN UNDERSTANDING WHY, WHY DID THE IMONY OF THE MENTAL, YOU KNOW, IN OTHER WORDS WE ARE HAVING TO, THEN, GUESS AT WHAT FACTS THE JUDGE WOULD HAVE BASED THAT ON, AND SO TELL US WHAT THOSE FACTS WOULD BE.

MAYBE IT COULD HAVE BEEN MORE ARTFULLY WRITTEN. HOWEVER, I INTERPRET THAT AS LOOKING AT ALL OF THE FACTS SURROUNDING THE CRIME, AND MOREOVER, HE DID HAVE TWENTY YEARS WHERE HE HAD RELATIONSHIPS WITH WOMEN, BROKE UP WITH THEM, WORKED WITH THEM, LIVED WITH THEM, AND DID NOT COMMIT THIS KIND OF CRIME. HE COMMITTED IT IN GERMANY, WHICH WAS BEFORE THE COURT WHEN THEY DISCUSSED WHETHER OR NOT THE GERMAN CONVICTION COULD COME IN, SO THE TRIAL COURT WAS WELL AWARE OF THE FACTS.

SO YOU DON'T THINK THIS GUY JUST LOST IT? YOU DON'T THINK THAT EVERYTHING AROUND THIS IS THAT THIS IS A GUY THAT WAS DEVASTATED AND THEN LOST IT, WHETHER, WHETHER THAT MEANS HE GETS THE DEATH PENALTY OR NOT, I MEAN, IT DOESN'T, IS THAT THE STATE'S CONTENTION? I MEAN, THEY DIDN'T ASK FOR CCP, CORRECT? I BELIEVE THE PROSECUTOR WAS LOOK --

I BELIEVE THE PROSECUTOR WAS LOOKING FOR CCP AND HE WAS NOT ALLOWED TO ARGUE IT TO THE JURY.

YOU HAVEN'T CROSS APPEALED ON THE BASIS.

NOT ON THE CCP. NO. THE WHOLE ASPECT OF MR. CODAY'S EXISTENCE WITH GLORIA OR WITH GLORIA GOMEZ, SHOWS THAT HE, HE WAS INFATUATED WITH HER. IF YOUR HONOR WILL LOOK AT THE TRANSCRIPT, IT WAS PURELY A SEXUAL RELATIONSHIP, AND EACH TIME THAT SHE EITHER DIDN'T CALL HIM OR WAS GONE FOR A PERIOD OF TIME, HE BECAME ENRAGED. HE WAS ANGRY THAT SHE WASN'T WITH HIM. AND THIS FINAL EVENT IN JUNE AND JULY OF 1997, HIS RAGE, HE RELASED HIS RAGE, AND HE WAS ANGRY WITH HER FOR NOT COMING BACK TO HIM.

WELL, FROM WHAT YOU ARE SAYING, IT SEEMS TO ME WE HAVE A BUILD-UP HERE OF SOMEONE

WHO MAY NOT HAVE BEEN ABLE TO CONTROL HIS CONDUCT AND CONFORM IT TO THE REQUIREMENTS, AND SO I GUESS I AM REALLY BOTHERED ABOUT THE LANGUAGE THAT WE USE IN CAMPBELL AND CASES THEREAFTER, WHICH, REALLY, TALK ABOUT THE MITIGATING FACTOR HAVE TO BE REASONABLY ESTABLISHED, TO BE FOUND AS A MITIGATING FACTOR. AND HERE WE HAVE, YOU KNOW, FIVE MENTAL HEALTH EXPERTS, WHETHER WE, IT IS OPINION EVIDENCE OR NOT, I MEAN THEY HAVE ALL OPINED THAT, FOR VARIOUS REASONS HE COULD NOT CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW, EVEN THOUGH WE HAVE, ON THE OTHER HAND, THE LAY WITNESSES WHO TALK ABOUT HOW HE HAS LIVED HIS LIFE DURING THAT TWENTY-YEAR PERIOD, AND SO HOW DO WE DETERMINE OR IS IT UP TO US TO DETERMINE, WHETHER OR NOT THIS MITIGATING FACTOR HAS BEEN REASONABLY ESTABLISHED.

I THINK IT IS UP TO THE TRIAL COURT TO DETERMINE. THAT OF COURSE --

HE SHOULD LAY IT OUT AS TO WHY IT IS NOT REASONABLY ESTABLISHED, SHOULDN'T HE?

AND HE DID. HE IS SAYING I DO NOT BELIEVE THE EXPERTS, AND ON TOP OF THAT, THERE IS THIS TWENTY-YEAR PERIOD OF TIME WHEN MR. CODAY COULD LIVE WELL WITHIN SOCIETY. AND THEN COMING DOWN TO THE FEW DAYS SURROUNDING THE CRIME, WE HAVE MR. CODAY TRYING TO CALL MS. GOMEZ, AND HE DOES REACH HER. WE HAVE HIM SAYING, IN THE MANUSCRIPT, I KNOW THAT SHE IS NOT GOING TO -- IN THE MANUSCRIPT, I KNOW THAT SHE IS NOT GOING TO CALL ME, NOT GOING TO COME SEE ME, UNLESS I TELL HER THAT I AM DYING OF CANCER. WE HAVE HIM MAKING A CONSCIOUS DECISION TO LURE HER BACK TO THE APARTMENT. WE HAVE HIM TAKING MONEY OUT OF HIS ACCOUNT.

LET ME ASK YOU A QUESTION ABOUT THE NATURE OF THE CRIME. THERE IS CERTAINLY ENOUGH, BASED ON OUR CASE LAW, FOR THERE TO BE HOMICIDE. I LOOK BACK AT THE HISTORY AND TO ME HOMICIDE WAS MORE MEANT FOR SOMEONE WHO SETS OUT TO REALLY WANT TO TORTURE SOMEONE OVER A PERIOD OF TIME AND KIND OF GETS SOME PLEASURE OUT OF IT, ALTHOUGH WE HAVE SAID INTENT DOESN'T REALLY PLAY A PART, BUT IS THE STATE CONTENDING THAT THE WAY WITH ALL OF THESE 140 STAB WOUNDS, THAT THIS WAS ACTUALLY SOMETHING THAT HE WAS, THAT HE ACTUALLY SET OUT TO KILL HER THAT WAY? COULD YOU TELL ME ABOUT THAT. YOU KNOW, IN OTHER WORDS HOW, SORT OF LOOK, MAYBE GOING OVER INTO PROPORTIONALITY, HOW THE HOMICIDE AND EXTREME MENTAL OR EMOTIONAL DISTURBANCE, HOW THEY COME TOGETHER IN THIS CRIME.

WE HAVE MR. CODAY ADDITIONALLY HITTING GLORIA GOMEZ WITH A HAMMER. HITS HER SEVERAL TIMES. SHE TAKES THAT HAMMER AWAY FROM HIM. SHE FIGHTS HIM AND TAKES THAT HAMMER AWAY. HE REALIZES THAT, AND HE PUTS THAT IN HIS CONFESSION, THAT THERE WAS A STRUGGLE, AND SHE TOOK THE HAMMER FROM ME. I WENT FOR ANOTHER HAMMER, HE SAYS, AND A KNIFE, SO HE CONSCIOUSLY KNEW HE WENT FOR ANOTHER HAMMER AND A KNIFE, AND HE CONTINUED TO EITHER HIT HER WITH THAT HAMMER AND NOT ONLY JUST BALL PART OF THE HAMMER BUT THE CLAW PART OF THE HAMMER, AND HE DID SEVERE DAMAGE TO HER HEAD, FACE, TETH, I MEAN, IT WAS CLEAR, CLEAR THAT THOSE ACTIONS WERE VERY, VERY PAINFUL TO HER. HE THEN STABBED HER. HIS CONFESSION ENDS WITH, I STOPPED STABBING HER, WHEN I HAD THE KNIFE, I STABBED THE KNIFE THROUGH HER THROAT, AND SHE IS HOLDING MY ARM, AND AT THAT POINT, AT THAT POINT, WHEN I FEEL THAT SHE IS DEAD, HE NO LONGER, HE NO LONGER STABS HER, SO WE KNOW THAT HE IS --

HE WAS STABBING HER TO KILL HER.

HE WAS STABBING HER TO KILL HER. HE WAS CONTINUING TO STAB HER, UNTIL SHE DID NOT DIE. UNTIL SHE DIED.

LET ME ASK YOU TO SEGUE FROM THERE, AS AN APPROPRIATE, ASSUMING THAT WE FIND THE TRIAL COURT DID ERR IN REJECTING THIS OTHER MENTAL MITIGATOR, WOULD YOU ADDRESS

THE ISSUE OF WHETHER OR NOT, THEN, THE IMPOSITION OF THE DEATH PENALTY WAS STILL PROPORTIONAL. EVEN IN FINDING THE TWO MENTAL MITIGATORS.

I THINK IT SHOULD GO BACK DOWN FOR ANOTHER HEARING BY THE TRIAL COURT. LET HIM MAKE THAT DETERMINATION, AS TO WHETHER OR NOT THE MITIGATE OR HAS ANY WEIGHT TO IT. AND LET HIM MAKE THAT EVALUATION AGAIN.

SO THAT THIS COURT SHOULDN'T DO THAT, IF WE DETERMINE THAT THAT WAS ERROR TO REJECT THAT MITIGATOR, THE STATE'S POSITION IS THAT WE SHOULD SEND IT BACK TO THE TRIAL COURT, TO PLUG THAT INTO AN EVALUATION.

UNLESS THIS COURT IS GOING TO AFFIRM THE CONVICTION, BASED ON PROPORTIONALITY, BUT IF THE COURT IS OF THE MIND-SET THAT AN EVALUATION CAN'T BE DONE, THEN THE TRIAL COURT NEEDS TO DO THE RESENTENCING. WITH RESPECT TO WHAT WAS DONE AFTER THE CRIME, WHICH, AGAIN, SHOWS THAT THERE WAS THOUGHT THAT WENT INTO IT, MR. CODAY'S BAGS WERE PACKED. HE CALMLY BATHED, CHANGED CLOTHES, AND CAUGHT AN AIRPLANE TO NEW YORK. HE USED MS. GOMEZ'S CAR TO DO THAT. ON THE PLANE, HE WAS AS CALM AS CALM COULD BE. THE WITNESSES, THE AIRLINE PASSENGER SAW NOTHING IN HIS Demeanor THAT INDICATED ANY EMOTIONAL DISTURBANCE OR ANYTHING, WHICH, AGAIN, REBUTS ANY CLAIM THAT MR. CODAY --

WHAT WAS THE TIME FRAME BETWEEN THE DEATH AND GETTING ON THE AIRPLANE?

WE ARE TALKING HOURS. MAYBE TWO, THREE HOURS.

HE WAS ABLE TO GET ON A PLANE TO EUROPE IN TWO OR THREE HOURS AFTER --

NO. HE WAS ON A PLANE TO NEW YORK. HE DROVE DOWN TO MIAMI, USED HER CAR TO DRIVE TO MIAMI, AND CAUGHT AN AIRLINE FLIGHT TO LaGUARDIA, AND THEN FROM LaGUARDIA, THE NEXT DAY, HE -- I DIDN'T KNOW THESE DAYS YOU COULD BE ABLE TO GET ON A PLANE THAT QUICKLY ANYPLACE.

HAD HE ALREADY CHECKED OUT THE AIRLINES. WHILE HE HADN'T PAID FOR A TICKET, HE HAD DETERMINED WHEN THE FLIGHTS WERE AND WAS VERY CONCERNED THAT MS. GOMEZ DIDN'T GET TO HIS HOME.

EXCEPT THAT THAT WOULD REFUTE, YOU ARE NOT CONTENDING THAT THERE WAS AN EVIDENCE THAT HE WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE. THAT AGGRAVATOR WAS FOUND. I GUESS I AM STRUGGLING MYSELF, WITH JUST TRYING TO UNDERSTAND WHERE THEY BREAK OFF AND SO THAT ONE ISN'T THAT DOESN'T NECESSARILY FOLLOW FROM THE OTHER.

YOU CAN BE, YOU CAN HAVE A MENTAL ILLNESS, BUT IF THAT MENTAL ILLNESS DOESN'T CAUSE YOU TO LOSE CONTROL OF YOUR CAPACITY TO EITHER UNDERSTAND WHAT IS GOING ON ABOUT YOU AND AS FAR AS THE LAW IS CONCERNED, AND TO CONFORM YOUR CONDUCT, THEN YOU CAN HAVE ONE MITIGATE OR WITHOUT THE OTHER MITIGATOR, AND THAT IS WHAT HAPPENED IN THIS CASE.

WHAT DID THE EXPERTS SAY, THEN, ABOUT WHETHER HE KNEW WHAT HE WAS DOING WAS WRONG, AT THE TIME THAT HE WAS DOING IT.

THEY, ALL, THEY --

OR WHETHER HE WAS ABLE TO CONTROL HIMSELF IN DOING IT, I GUESS IS THE OTHER, THE "OR".

AS I QUOTED , YOUR HONOR, WE HAD TWO EXPERTS THAT , I GUESS THE BEST WAY , THEY BACK TRACKED A LITTLE FROM THE INITIAL STATEMENT THAT THEY FOUND BOTH MITIGATORS . BUT BUT THE TRIAL COURT WAS WELL WITHIN ITS RIGHTS TO NOT FIND THAT THAT PARTICULAR MITIGATOR WAS FOUND, BASED ON BOTH HOW THE EXPERTS LOOKED AT ALL OF THE EVIDENCE, INCLUDING THE GERMAN CONVICTION , AND ITS SIMILARITIES, HOW , AND THE INFORMATION, THE EVENTS THAT SURROUNDED THE KILLING IN GERMANY, AS WELL AS THE EVENTS THAT SURROUNDED THE KILLING OF MS. GOMEZ. THOSE TWO , THE WAY THAT THE EXPERTS PUT IT TOGETHER , COULD BE REJECTED FROM , BY THE TRIAL COURT , BASED ON EVERYTHING THAT MR. CODAY DID JUST BEFORE THE KILLING OF MS. GOMEZ AND HIS LIFE FOR THE TWENTY YEARS BETWEEN THOSE TWO CRIMES.

COMPARE THIS TO, LIKE , NORMAN GRIM, WHERE THERE WAS EVIDENCE OF AN IMPULSE CONTROL DISORDER. SIMILAR SORT OF FACTUAL CIRCUMSTANCES HERE, WHERE THERE WAS JUST THIS BRUTAL BEATING AND KILLING . IN ANSWER TO JUSTICE PARIENTE'S QUESTION, HOW WERE HIS MENTAL PROBLEMS RELATED TO THE INABILITY TO CONTROL THE RAGE OR THE IMPULSE?

WELL --

IF AT ALL.

WHAT THE EXPERTS WERE GETTING AT , IS THAT , GIVEN HIS LIFE AND , I DON'T WANT TO SAY FEAR OF REJECTION , BUT THAT SORT OF ASPECT OF HIS LIFE , THAT, THEY THOUGHT , DOVETAILED INTO INABILITY TO CONTROL THE CONDUCT.

WAS IT RELATED TO THE DEPRESSION, LET'S SAY , HIS MAJOR DEPRESSION?

THEY MADE IT RELATED. THEY CONNECTED IT THAT WAY. THEY SAID, WELL , HE IS DEPRESSED AND THEREFORE THIS IS WHAT HAPPENS , THAT HE DEINVOLES INTO THIS - - HE DEVOLVES INTO THIS --

THERE IS A DIFFERENCE BETWEEN SOMEBODY BEING DEPRESSED. THE DIAGNOSIS WAS A BORDER PERSONALITY DISORDER AND MAJOR DEPRESSIVE WITH PSYCHOTIC FEATURES. THAT IS A LITTLE BIT DIFFERENT THAN SAYING SOMEBODY IS DEPRESSED OVER , THEIR GIRLFRIEND OR BOYFRIEND LEAVING THEM.

THAT IS HOW THEY EXPLAINED IT. HOWEVER , HIS ACTIONS AROUND THE TIME OF THE CRIME AND THROUGHOUT HIS LIFE , DO NOT SHOW THAT . THAT, THE , THE PLANNING AND ALL OF THAT , THAT WENT INTO HIS COMMITTING OF THE CRIME , CERTAINLY DOESN'T SUPPORT WHAT THE , AND SUPPORTS WHAT THE TRIAL COURT FOUND , WHICH WAS THAT HE WAS ABLE TO CONFORM HIS CONDUCT. AND SOME OF THE EXPERTS SAID HE KNEW WHAT HE WAS DOING WAS WRONG , AND THAT HE WAS HURTING MS. GOMEZ , SO THERE WAS SUFFICIENT --

WHEN YOU SAY PLANNING , WITH COMMISSION AFTER CRIME, WHAT FACTS ARE OR EVIDENCE -- WHAT FACTS OR EVIDENCE ARE YOU TALKING ABOUT THERE?

AGAIN, THAT WOULD BE WITHDRAWING OF THE MONEY , CHECKING WITH THE AIRLINES, SETTING UP RESERVATIONS , WHILE HE DOESN'T PAY FOR THE TICKET, HE, FOR EUROPE --

YOUR OPPOSITION SAYS THAT ALL OF THAT WAS NO BIG SECRET THAT, HE PLANNED ON LEAVING AND AS A MATTER OF FACT, PART OF THAT WAS HE ACTUALLY PLANNED ON GOING TO GERMANY OR WHEREVER AND KILLING HIMSELF.

THAT IS WHAT HE SAYS --

UNRELATED TO THE CRIME COMMITTED HERE.

THAT IS WHAT HE SAYS THREE MONTHS AFTER THE CRIME , IN A BOOK THAT TOOK HIM THREE MONTHS TO WRITE. THAT IS NOT WHAT HE TOLD HIS EMPLOYER. HIS EMPLOYER DIDN'T KNOW ANYTHING ABOUT HIS LEAVING. IF MR . CODAY WAS GOING TO LEAVE FOR ANY PERIOD OF TIME, HE CERTAINLY AS A MODEL EMPLOYEE THAT HE WAS DESCRIBED AS --

NOT LEAVING THE COUNTRY , WHAT OTHER EVIDENCE WAS THERE?

HE TOOK OUT MONEY, ALMOST ALL OF HIS SAVINGS. HE LEFT \$600 IN HIS ACCOUNT AND HAD \$6,000 IN CASH AND TRAVELERS CHECKS. CERTAINLY HE DOESN'T APPEAR TO BE A MAN GOING TO EUROPE TO KILL HIMSELF. LOOKS LIKE A MAN GOING TO EUROPE TO STAY FOR A WHILE.

WHAT ABOUT ACCESS TO THE HAMMERS OR WHATEVER? DID THE STATE CLAIM THAT THE HAMMERS WERE INTENTIONALLY PLACED , SO THAT HE WOULD HAVE EASY ACCESS TO THOSE , AND THAT, REALLY, HIS PLAN WAS TO USE THE HAMMERS ON HER?

THE STATE DIDN'T DISPUTE THAT THERE WAS A HAMMER IN THE BEDROOM. HOWEVER , THE STATE DID --

NOT DISPUTING. I AM TALKING ABOUT , DID THE STATE CLAIM THAT THE PLANNING INCLUDED THIS DETAILED PLAN ON WHAT THE WEAPON WOULD BE AND HAVING IT RIGHT THERE AND AVAILABLE AND THAT THAT WAS PART OF HIS PLAN AND SCHEME ALL ALONG?

THE STATE DIDN'T SAY THAT HAVING THE WEAPON THERE WAS PART OF THE PLAN AND SCHEME. HOWEVER, HE , OF COURSE , WOULD KNOW THAT THE WEAPON IS IN THERE , IF THAT IS WHAT THERE FOR THE INNOCENT PURPOSE OF FIXING HIS BED , BUT CERTAINLY ONCE THE FIRST HAMMER IS TAKEN AWAY FROM CODAY AND HE GOES FOR A SECOND AND A KNIFE , THAT DEFINITELY SHOWS ADDITIONAL PREMEDITATION, EVEN IF, LET'S SAY , MR. CODAY DIDN'T KNOW HE WAS GOING TO, YOU KNOW, STRIKE HOME WITH THAT HAMMER , THE INITIAL HAMMER, HE CERTAINLY COULD HAVE FORMED AN ADDITIONAL INTENT, IN ORDER WHEN HE WENT TO GET THE SECOND HAMMER AND THE KNIFE.

WAS THERE ANY EVIDENCE THAT HE WAS INJURED ? SOMETIMES YOU HAVE THE MUTUAL COMBAT AND SOMETIMES YOU GET THE RAGE BECAUSE YOU GET HIT BACK OR SOMETHING LIKE. THAT WAS THERE ANY EVIDENCE THAT -- LIKE. THAT WAS THERE ANY EVIDENCE THAT HE WAS HIT BY HER WITH THE HAMMER OR OTHERWISE?

THE BRUISING SHOULD HAVE BEEN GONE AT THAT TIME. HE DIDN'T COME BACK TO THE STATES FOR THREE MONTHS.

HE WAS A PASSENGER ON THE AIRLINE.

NO ONE SAW ANY INJURIES ON HIM, AND I DON'T BELIEVE THERE WAS ANY BLOOD OR ANY EVIDENCE OF HIS BLOOD IN THE APARTMENT. HOWEVER, HIS CLOTHES WERE FULL OF BLOOD. THERE WAS PHYSICAL CONTACT BETWEEN THE TWO.

WELL, DOES THE STATE ACCEPT OR DO THEY ACCEPT AT TRIAL , THAT HIS GOAL IN GETTING HER THERE WAS TO HOPEFULLY HAVE HER BACK WITH HIM? IN OTHER WORDS HIS GOAL WASN'T TO KILL HER .

I BELIEVE THE ARGUMENT --

UNDER THE CIRCUMSTANCES WHICH THAT WAS THE LAST-DITCH EFFORT. --

THAT WAS THE LAST-DITCH EFFORT. EITHER SHE CAME BACK OR HE WAS GOING TO KILL HER.

THOSE WERE THE TWO OPTIONS.

OR THE OTHER OPTION WAS HE WAS GOING TO HAVE HER EITHER COME BACK OR HE WAS LEAVING FOR GERMANY TO KILL HIMSELF.

THAT WAS THE SELF-SERVING COMMENT, BUT, NO, THE STATE'S THEORY WAS THAT HE WAS LURING HER BACK THERE. THAT WAS THE WHOLE IDEA OF THE, THAT, THE CANCER ARGUMENT.

IT SEEMS IN BOTH THE GERMANY CASE AND THIS ONE, THAT THERE WAS THE THREAT OF SUICIDE ON HIS PART. IS THERE ANY INDICATION, OTHER THAN THOSE TWO INCIDENTS, THAT HE MADE GESTURES OR EFFORTS TO COMMIT SUICIDE?

IN JAIL, WHAT, THREE, FOUR YEARS AFTER THE CRIME, THERE WAS A SUICIDE ATTEMPT.

BEFORE THE CRIME. AFTER THE CRIME IN GERMANY OR AFTER THIS CRIME?

AFTER THIS CRIME.

BEFORE THE CRIME.

BEFORE THIS CRIME? LET ME SAY NOT THAT I RECALL THAT THERE WAS AN ACTUAL SUICIDE ATTEMPT.

YOUR OPONENT REFERS TO A SUICIDE ATTEMPT THAT GREW OUT OF THE BREAK UP OF A DIVORCE OR ANOTHER RELATIONSHIP.

THAT'S CORRECT AND THAT IS AFTER THIS PARTICULAR CRIME, A FEW YEARS AFTER THIS CRIME. THE DIVORCE PAPERS CAME THROUGH FOR TUSCA AMARI, AND AT THAT POINT, THAT THERE WAS A SUICIDE ATTEMPT. HOWEVER, JUST AS AN ASIDE, MR. CODAY WOULD HAVE BEEN UNABLE TO MARRY MS. GOMEZ, AND -- TO MARRY MS. GOMEZ AND THEY SPOKE OF MARRIAGE TOWARDS THE END. HE WAS MARRIED THE WHOLE TIME THAT HE WAS SEEING GLORIA GOMEZ, AND IF THE COURT WILL READ THE MANUSCRIPT THAT WAS WRITTEN IN EUROPE, HE TALKS ABOUT HER SEEKING MARRIAGE WITH OTHER MEN, BUT HE DOESN'T OFFER IT, SO THAT IS KNOWN TO HIM EARLY ON.

DO WE KNOW ANYTHING ABOUT HIS PREVIOUS MARRIAGES AND HOW HE MAY OR MAY NOT HAVE REACTED WHEN THOSE MARRIAGES BROKE UP? HE WAS MARRIED BEFORE. AS I UNDERSTAND, HE WAS MARRIED TWICE.

TWO. TWO.

AT THE END OF THE FIRST ONE, DO WE HAVE ANYTHING IN OUR RECORD THAT TALKS ABOUT HIS REACTION TO THE BREAK UP OF THAT MARRIAGE?

I DON'T BELIEVE WE HAVE ANY INFORMATION AS TO HOW HE ACTUALLY REACTED TO THE BREAK UP OF THE FIRST MARRIAGE, BUT THAT, HIS FORMER, HIS FIRST WIFE DIDIFY FOR HIM, AND --

SHE IS NOT THE ONE WHO TALKED ABOUT THE BED, IS SHE, THE HAMMER BEING IN THE ROOM FOR THE BED PURPOSES?

THAT I AM A LITTLE CONFUSED ON. HOWEVER, SHE IS THE ONE THAT SAID THAT HE OPENED DOORS TO HER. THE MOST BEAUTIFUL LIFE OF MUSIC AND ART AND SHE TALKED ABOUT HIM IN VERY OPEN AND GLOWING TERMS THAT HE WAS VERY GOOD TO HER. AND HE WAS GOOD TO HER DAUGHTER.

THE SECOND WIFE WAS THE WOMAN IN NEW YORK?

THAT'S CORRECT .

JUST A QUICK ASIDE ON THE RING ISSUE. THIS IS A DIRECT APPEAL . THERE IS NO PRIOR VIOLENT FELONY, AND THERE IS A 9-TO-3 DEATH RECOMMENDATION. WAS THERE, I KNOW THERE WAS A REQUEST MADE FOR SOME SPECIAL INTERROGATORIES AT THE TIME THAT THE JURY QUESTIONS CAME OUT THAT THEY WONDERED IF THEY COULD HAVE AN UNDECIDED VOTE. WAS THERE ANY REQUEST IN THIS CASE , THIS WAS DECIDED , I GUESS , POST RING? THAT ACTUALLY THE DECISION --

I BELIEVE IT CAME OUT , THE FINAL DECISION WAS , IT WAS POST APPELLATE AND THE FINAL DECISION MAY HAVE BEEN JUST RIGHT AROUND THE TIME OF RING .

MUST HAVE BEEN , ACTUALLY JULY 26, THE SENTENCING ORDER . OF 2002.

THAT'S CORRECT.

IN ANY EVENT , WAS THERE A REQUEST FOR A SPECIAL INTERROGATORY ON THE AGGRAVATING FACTORS? IN OTHER WORDS IS IT THE STATE'S CONTENTION THAT THE RING CLAIM WAS NOT PRESERVED OR WAS PRESERVED?

THE FURMAN CLAIM WASN'T PRESERVED. AS FAR AS THE RING , THERE WERE ARGUMENTS THAT WERE MADE, AS FAR AS THE CONSTITUTIONALITY OF THE DEATH PENALTY. THOSE, I DON'T BELIEVE , ARE IN THE RECORD BECAUSE THEY COULDN'T BE , THE COURT REPORTERS NOTES COULDN'T BE FOUND , BUT THE STATE ATTORNEY SAID THAT WE HAD ARGUMENT ON THE SIXTH AMENDMENT CLAIMS, SO WE DIDN'T MAKE A PRESERVATION ARGUMENT. HOWEVER, THIS COURT HAS AFFIRMED IN BUTLER AND FOUND NO PROBLEM WITH HAC AS THE SOLE AGGRAVATOR AND REJECTED THE RING .

IN OTHER WORDS THE IDEATHAT, IF , EVEN IF RING APPLIED, IT IS ALMOST THE ARGUMENT WOULD BE THAT THEY MUST HAVE FOUND, THEY HAD TO FIND AT LEAST ONE AGGRAVATOR TO RECOMMEND THE DEATH PENALTY.

THEY FOUND HAC , BUT --

WE DON'T KNOW THAT THEY FOUND HAC.

THAT WAS THE ONLY AGGRAVATOR THAT WAS OFFERED.

OKAY. I THOUGHT YOU SAID THE CCP WAS ARGUED.

NO. NOT TO THE JURY .

OKAY .

CAN WE NOW DISCUSS THE HEAT OF PASSION.

HEAT OF PASSION. YES .

> THERE WAS NO HEAT OF PASSION. MR. CODAY 'S SELF-SERVING COMMENTS.

I GUESS THE REAL PROBLEM I HAVE WITH THIS, AND YOU CAN FOCUS ME IN ON THIS, IS THAT, THERE IS A WHOLE LINE OF CASES THAT TALK ABOUT A JURY SHOULD BE INSTRUCTED ON A DEFENDANT'S THEORY OF DEFENSE , IF THERE IS ANY EVIDENCE THAT HAS BEEN SUBMITTED THAT WOULD SUPPORT SUCH A THEORY. AND SO IN THIS CASE -- .

HIS THEORY OF DEFENSE WAS THAT THIS WAS SECOND-DEGREE MURDER. HIS THEORY OF DEFENSE WASN'T --

BASED ON HEAT OF PASSION.

BASED ON HEAT OF PASSION, AND HE WAS GIVEN THE HEAT OF PASSION INSTRUCTION IN THE BEGINNING, AND THE JUDGE TOLD THEM THAT THESE INSTRUCTIONS -- INSTRUCTIONS GO FOR FIRST-DEGREE, SECOND-DEGREE, MANSLAUGHTER, AND SO HE HAD A HEAT OF PASSION INSTRUCTION, WHICH WOULD HAVE, IF FOUND, NEGATED THE PREMEDITATION ATTEMPT. HOWEVER, IF IT WASN'T SUFFICIENT --

DID THE INSTRUCTION INSTRUCT THAT WAY, THAT THE HEAT OF PASSION NEGATES THE INTENT, OR DOES IT TALK IN TERMS OF EXCUSEABLE?

IT TALKS IN TERMS OF EXCUSEABLE. HOWEVER, YOU HAVE TO HAVE, AND I WILL GET THE EXACT WORDS FOR YOU, YOU NEED TO HAVE A SUFFICIENT PROVOCATION, SO IF THE JURY FINDS THAT THIS ISN'T A SUDDEN OR SUFFICIENT PROVOCATION, THE JURY KNOWS THAT IT CAN GO DOWN TO SECOND-DEGREE, SO MR. CODAY WAS INSTRUCTED ON HIS DEFENSE, WHICH WAS THE DEFENSE TO FIRST-DEGREE MURDER. IT WOULDN'T NECESSARILY JUST GO TO PREMEDITATION, BUT HE WAS IN -- TO PREMEDITATION, BUT HE WAS INSTRUCTED ON A DEFENSE TO FIRST-DEGREE MURDER, WHICH IS WHAT HE WAS ASKING FOR. I AM DEFENDING MYSELF AGAINST FIRST-DEGREE. PLEASE FIND ME GUILTY OF SECOND-DEGREE. THAT IS WHAT HE TOLD THE JURY IN OPENING AND IN CLOSING.

WHAT IS THE STANDARD INSTRUCTION THAT WAS ACTUALLY READ? WHAT DID IT ACTUALLY SAY?

THE WHOLE INSTRUCTION, SAYS A KILLING OF A HUMAN BEING IS JUSTIFIABLE HOMICIDE AND LAWFUL, IF NECESSARILY DONE WHILE RESISTING AN ATTEMPT TO MURDER OR COMMIT A FELONY UPON THE DEFENDANT OR TO COMMIT A FELONY IN ANY DWELLING HOUSE IN WHICH THE DEFENDANT WAS OR, WAS AT THE TIME OF THE KILLING. THE KILLING OF A HUMAN BEING IS EXCUSEABLE, AND THEREFORE LAWFUL UNDER ANY ONE OF THE FOLLOWING THREE CIRCUMSTANCES. ONE, WHEN THE KILLING IS COMMITTED BY ACCIDENT AND MISFORTUNE UNION, IN DOING ANY LAWFUL ACT -- MISFORTUNE, IN DOING ANY LAWFUL ACT BY ANY ORDINARY MEANS WITH ORDINARY CAUTION AND WITHOUT ANY UNLAWFUL INTENT, OR, TWO, WHEN THE KILLING OCCURS BY ACCIDENT AND MISFORTUNE, IN THE HEAT OF PASSION, UPON ANY SUDDEN AND SUFFICIENT PROVOCATION, OR, THREE, WHEN THE KILLING IS COMMITTED BY ACCIDENT OR MISFORTUNE, RESULTING FROM A SUDDEN COMBAT, IF A DANGEROUS WEAPON IS NOT USED AND THE KILLING IS NOT DONE IN A CRUEL AND UNUSUAL MANNER. AND THEN, FROM THERE, THE COURT IS INSTRUCTING THAT THE JURY IS TO LOOK AT THE FIRST HIGHEST CRIME AND THEN IF THEY FIND ANYTHING THAT NEGATES THAT, TO LOOK TO THE NEXT HIGHEST CRIME, AND SO FORTH. SO IF THE JURY HAD --

SO IF THE JURY FOUND HEAT OF PASSION, IT WOULD HAVE TO EXCUSE THE HOMICIDE AND FIND AM NOT GUILTY.

IF THE JURY FOUND THAT HE HAD SOME SORT OF HEAT OF PASSION BUT IT WASN'T SUFFICIENT, THEN IT WOULD LOOK FOR SECOND-DEGREE. IF THE JURY FOUND THAT HE WAS COMPLETELY EXCUSED BECAUSE IT WAS, IT IS A COMPLETE DEFENSE THAT WAS SUFFICIENT, THAT, SOME GIRLFRIEND WHO BROKE UP WITH FIVE WEEKS BEFORE, TELLS YOU I AM NOT IN LOVE WITH YOU AND THAT IS SOME SORT OF SUFFICIENT PROVOCATION, THEN, OKAY, FINE, THEN YOU DON'T FIND HIM GUILTY OF FIRST-DEGREE MURDER. HOWEVER, THAT HAS NEVER BEEN THE LAW. THAT ONE WOMAN TELLING A MAN, THAT SHE IS NOT IN LOVE WITH HIM AND DOESN'T WANT TO SEE HIM, IS PROVOCATION FOR A KILLING.

THE INSTRUCTION THAT WAS REQUESTED, TALKS ABOUT LAWFUL PROVOCATION. EVEN IF SOME ONE SEES A , THEIR SPOUSE WITH AN OTHER PERSON IN A SE XUAL ACT, THA T IS STILL NOT LAWFUL , I MEAN , WHAT -- I MEAN, A LAWFUL PROVOCATION IS , REALLY , A MISNOMER, I SN'T IT?

DEFENSE OF OTHERS. YOU SEE YOUR C HILD IS BEING , HAS BEEN R APED OR SEXUALLY MOLESTED, YES , THAT IS, HAS BEEN FOUND TO BE HEAT O F PASSION , FINDING YOUR WIFE OR YOUR HUSBAND IN BED WITH ANOTHER , YES , THAT HAS BEEN --

WOULD YOU SA Y THAT IS NOT REALLY, IN THE TRUTH OF THE MATTER , THAT MA YBE SOCIETY'S TACIT APPROVAL IN THE PAST BUT IT REALLY ISN'T LAWFUL PROVOCATION.

BUT HA VING A GIRLFR IEND TELL YOU HAS NEVER BEEN , AND IN FACT THAT IS WHAT THIS COURT FOUND, I BELIEVE IT WAS INFE R HE WILL, WHERE A SINGLE -- IN FE HRAL , WHERE THE DEFENDANT HAD KILLED HIS EX-GIRLFRIEND AND A LAWFUL PROVOCATION HAD OCCURRE D .

DON'T YOU BELIEVE THAT THIS INSTRUCTION WOULD HAVE ONLY LED THE JURY TO EXCUSEABLE HOMICIDE NOT TO THIS IS SUE ABOUT FINDING SECOND-DEGREE IN THE CONTEXTOF THE WAY THE INSTRUCTION IS GIVEN?

I DON'T BELIEVE THAT IS WHAT THE COURT FOUND IN KILGORE. THE INSTRUCTION --

I AM NOT TALKING A BOUTWHAT THE COURT FOUND IN KILGORE OR WHATEVER. YOU HAVE READ US THE INSTRUCTION , AND IT IS SOLELY RE LATED , DID IT NOT, TO EXCUSEABLE HOMI CIDE.

IT RELATED TO EXCUSEABLE HOMICIDE, BUT IT, A LSO , DEFINED WHAT HEAT OF PASSIONWAS, AND IT DID HAVE TH OSE ADD VERBS OR ADJECTIVES , DISCUSSING THAT THERE HAS T O BE SUFFICIENT AND A SUDDEN PROVOCATION .

NEVER TOLD THE JURY THAT THE DEFENSE HERE , IS THAT THIS WAS JUST SECOND-DEGREE , AND IF YOU FIND THAT THE KILLING WAS DONE IN THE HEAT OF PASSION, THAT YOU C OULDFIND THAT IT WAS SECOND- DEGREE.

OVERALL, THAT IS WHAT THE INSTRUCTION SAID. IF YOU DON'T FIND THAT HE IS GUILTY OF THE FIRST CRIME, WHICH WOULD B E FIRST PREMEDITATED MU RDER, THEN YOU CAN LOOK AT SECOND.

CHIEF JUSTICE: WE CAN LOOK AT BOTH OF THE INSTRUCTIONS AND MAKE OUR DETERMINATION.YOUR TIME HAS EXP IRED . THANK YOU VERY MU CH.

THANK YOU AND I ASK YOU TO AFFIRM.

MR . ANDERSON .

FIRST OF ALL , JUS TICEWELLS, THE CASE THAT I THOUGHT I WAS LOOKING FOR , FOR PO INT SEVEN ON WHE TH ERYOU HAVE TO ACCEPT EXPERT IMONY , IS STATED IN THE BRIEF AS JOHNSON AT 6 60 AT 637. IN THIS CASE , I DISAGREE WITH THE APPELLEE ON WHAT THE EXPERTS IFIED TO. THEY WERE ALL IFIED TO BOTH ME NTAL MITIGA TORS EXISTING. IN FACT , TWO OF THE EXPERTS IFIED THAT, IF THEY HAD IFIED DURING THE GUILT PHASE, THEY WOULD HAVE S AID HE WAS INSANE AT THE TIME O F THE OFFENSE.

EVEN IF WE FIND THAT THE TRIAL COURT E RRED HERE , WHY WOULDN'T THAT BE HARM LESS , IN THE FACE OF THE , REALLY , SUBSTANTIAL AGGRAVATION IN THE FORM OF HAC THAT WE HAVEHERE?

BE CAUSE YOU WOULD HAVE TWO , IT WOULD BE LIKE , YOU KNOW , I G U E S S M Y PROPORTIONALITY POINT , I TALKED ABOUT FARI NA, AND THAT, THE FACTS HERE ARE KIND OF SIMILAR TO THAT , OBSESSION AND T R Y I N G TO REUNITE WITH THE PERSON THEY LOVE, AND THAT INCLUDED HAC AND ANOTHER AGGRAVATING CIRCUMSTANCE , AND PROPORTIONAL IT Y , FAR INAS WAS NOT PROPOR TIONAL , AND I KNOW IT HAS BEEN AR G U E D THAT IS A DOMESTIC CASE, BUT THIS COURT DID NOT JUST RELA TE ON THAT CASE.THERE WAS A RECENT ANALYSIS LOOKING AT THE HEAT OF PASSION INVOLVED IN THAT.

HO W DID THE EXPERTSCONNECT THE MEN TAL ILLNESS ES WITH THE OOH HOW DID THEY CONTACT THE MENTAL -- ILLNESSES WITH THE RA GE?

HOW DID THEY CONNECT THE MENTAL ILLNESSES?

HOW DID HE GE TS IN A FIT OF RAGE IF THE GIR LFRIEND TELLS YOU I DON'T LOVE YOU ANYMORE.

I THINK IT RELATES TO WHAT WE NT ON IN HIS HIS TORY, THE HISTORY OF HIM BELIEV ING THAT SHE REALLY , REALLY LOVED HIM BECAUSE HE HAD BEEN REASSURED BY HER MANY MANY TIMES THAT SHE DID , AND HE HAD PLANNED TO LIVE WITH HIS LI FE WITH HER, AND IT CAME AS KI ND OF A SUDDEN BLOW TO HIM THAT SHE HAD NEVER LOVED HIM. IT WAS MORE THAN JUST SA Y I N G , YOU KNOW , I AM NOT GE T T I N G BACK TOGETHER WITH YOU.

MY POINT IS , OTHER T HAN THE FIRST STAT UTORY MITIGATOR , I AM TR Y I N G T O RELATE IT TO THE SECOND ONE AND THAT IS REALLY THE O NEWE ARE ARGUING OVER. HOW DID THE EXPERTS CONNECT THAT TO THE INAB ILITY OR SUBSTANTIAL IMPAIRMENT OF THE AB ILITY TO CONTROL BEHAVIOR OR CONFORM IT TO THE LAW?

THEY TAL KED ABOUT A PSYCHOTIC B REAK WHEN SHE RELATED THAT SHE NEVER L OVEDHIM ,, WHICH THEN, RESU LT ED IN A DISSOCIATIVE STATE ON HIS PART , AND AS A RESULT OF THAT , HE WAS NOT , DIDN'T HAVE THE CAPA CITY T O CONFORM.

HOW DO WE EXCUSE T HECOMMENT INFRINGE, HOW DO WE SEPARATE THAT FROM T HECOMMENT HE JUST GOT MADATH AS HELL , FR OM THE W A Y THEY PUT IT, THE EXPERTS. WE CAN PUT FANCY TERMS ON IT , BUT I AM JUST TALKING ABOUT LAY WITNESSES , EXPERTS, H OWDO WE SEPARATE THE T WO ?

IF IS, I THINK IT I S BASED ON THEIR TOTAL HISTORY OF THE CASE AND THE TOTAL MENTAL ILLNESS. I MEAN, NO RMAL PE OPLE D ON'THAVE THE MENTAL ILLN ESSES AND PSYCHO TIC FEATURES THAT HE HAS LONG -TERM . AND THIS WENT BACK T O SOMEONE ASKED THE QUESTION OF WHEN WAS H E EXAMINED,THEN, AND I LO OKED FOR MY NOTES AND I STILL COULDN'T REFRESH ON THAT, BUT HE WAS EXAMINED BY PSYCHOLOGYITION S -- PSYCHOLOGISTS AND PSYCHIATRISTS IN THE LATE '70s AND THERE WAS EVEN SOME IMONY AS TO THE ' 80 s AND THESE FINDINGS HAVE BEEN CONSISTENT THROUGHOUT THE YEARS AS TO HIS MENTAL HEALTH.

CHIEF JUSTICE: MR . ANDERSON, WITH OUR HELP, YOUR TIME IS EXPIRED . THANK YOU TO BOTH OF YOU F ORYOUR RESPONSES TO OUR QUESTIONS, AND THIS COURT WILL TAKE ITS MORNING RECESS