

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

Faunce Levon Pearce v. State of Florida

NEXT CASE ON THE COURT'S DOCKET IS PIERCE VERSUS STATE. GOOD MORNING.

GOOD MORNING, JUSTICE HOW ARE YOU. JUDGES, I WANTED TO START WHAT QUESTION. CORRESPONDENCE FROM THE CLERK'S OFFICE INDICATED THAT YOU MIGHT LIKE AN OUTLINE OF THE FACTS AND CIRCUMSTANCES OF THIS CASE PRIOR TO BEGINNING ARGUMENT, BUT MR. MARSHAL HAD INDICATED THAT PERHAPS THAT WASN'T NECESSARY.

CHIEF JUSTICE: YOU CAN BE SURE THAT WE ARE FAMILIAR WITH THE FACTS AND CIRCUMSTANCES. ANY FACTS AND CIRCUMSTANCES THAT YOU WANT TO DISCUSS AS A PREDICATE TO THE ISSUES, BUT I THINK IT IS, EVEN WITH HAVING 30 MINUTES THAT, TIME IS VERY LIMITED, SO IF YOU COULD TELL US WHAT ISSUES YOU ARE GOING TO ADDRESS AND THEN GET RIGHT TO THOSE ISSUES, WE WOULD APPRECIATE IT.

THANK YOU, JUDGE. THE FIRST THING I WOULD LIKE TO DISCUSS, AND I THINK IS RATHER IMPORTANT IN THE CONSIDERATION OF THIS CASE, IS THAT I THINK THAT THERE WERE, IN THE APPELLEE'S BRIEF IN THIS CASE AND ALSO IN THE FINDINGS OF FACT THAT THE TRIAL COURT MADE WITH REGARD TO THIS MATTER, A LOT OF SPECULATION BY COUNSEL AND THE TRIAL COURT, WHERE THERE WAS NO EVIDENCE IN THE RECORD TO SUBSTANTIATE THAT. IN ALL FIVE ARGUMENTS THAT WERE ADDRESSED IN THE BRIEF, THE STATE INDICATED, OVER AND OVER AGAIN, THAT THE APPELLANT BROUGHT HIS CODEFENDANT INTO THIS EPISODE OR ASKED THEM, WHICH THERE WERE THREE ACTORS THAT CAME ON TO THE SCENE ARMED AFTERWARDS, THAT WENT OUT WITH THE VICTIMS IN THIS PARTICULAR CASE. I WANT TO POINT OUT TO THE COURT THAT IN THE RECORD, THERE IS NO EVIDENCE THAT THE APPELLANT ASKED ANYONE BUT THE WITNESS BERFIELD, TO COME OVER -- THE WITNESS BUTTERFIELD, TO COME OVER ON THE DAY THAT THIS EVENT OCCURRED.

WAS THERE NOT SOME INFORMATION ON THE SCENE THAT EVENING AND INFORMATION ABOUT PEOPLE BEING THERE?

MR. BUTTERFIELD TESTIFIED THAT HE WAS WITH SOME OTHER PEOPLE DURING THE COURSE OF THE TRIAL, BUT THERE WAS NO EVIDENCE SHOWING THAT THE APPELLATE ASKED ANYBODY TO COME AND ASKED ANYBODY TO ARM THEMSELVES, OTHER THAN MR. BUTTERFIELD, SO TO PRESUME --

HERE IS WHERE PERHAPS, A THUMBNAIL SKETCH OF THE FACTS MIGHT BE APPROPRIATE, BECAUSE IT APPEARS FROM THE RECORD, THAT CERTAINLY AT LEAST INITIALLY, YOUR CLIENT WAS THE MAIN ACTOR IN WHAT WAS GOING ON HERE.

THAT'S CORRECT.

WHY DON'T YOU PAINT THAT LITTLE BIT OF A PICTURE YOUR FOR US, SO, AND THEN TAKE YOUR ISSUES AS THEY OPERATE OUT OF THAT, OUT OF THAT CONTEXT, WITH REFERENCE TO SENDING THESE PEOPLE TO PURCHASE DRUGS AND THEN BEING QUITE UPSET, IF YOU CAN USE THAT WORD, WHEN THEY CAME BACK AND CLAIMED THAT THEY HAD, MONEY HAD BEEN TAKEN AND THERE WERE NO DRUGS, AND NOW HE, IN ESSENCE, WAS HOLDING THEM PRISONER. IS THAT CORRECT?

WELL, THAT IS THE STATE'S ARGUMENT AND SOME OF THE COURT'S FINDINGS.

TELL US WHAT THE EVIDENCE AT TRIAL DEMONSTRATED IN THIS REGARD.

JUDGE, I THINK THAT SALIENTLY AND WITH REGARD TO WHAT WE HAVE JUST DISCUSSED UP TO THIS POINT, THE VICTIMS, TUTTLE AND CRAWFORD, MET UP WITH THE APPELLANT IN THIS PARTICULAR CASE. THE APPELLANT GAVE MONEY TO BUY DRUGS TO ANOTHER WITNESS, WITH AN ADMONISHMENT IN REGARD TO THAT. THE APPELLANT STAYED BEHIND, WHILE EVERYBODY LEFT TO MAKE THE PURCHASE OF THE DRUGS.

WHAT WAS THE ADMONISHMENT?

THE ADMONISHMENT WAS SOMEWHERE ALONG THE LINES OF YOU KNOW, YOU BETTER BRING ME BACK MY MONEY OR THE DRUGS. OKAY. THE MONEY PASSED THROUGH MANY HANDS AND WAS VENT UNIFORMLY STOLEN, AND THE PELL -- AND WAS EVENTUALLY STOLEN, AND THE APPELLANT WAS ADVISED OF THE LOSS OF THE MONEY. THE VICTIMS AND THE WITNESSES --

TUTTLE WAS --

STOP RIGHT THERE.

TUTTLE WAS ONE OF THE PEOPLE THAT WAS SHOT ULTIMATELY.

YES. HE WAS THE ONE WHO WAS SHOT.

YES.

HE WAS ALSO THE PERNFORSED TO HAVE SEX WITH PIERCE, CORRECT?

YES. CORRECT.

AND TUTTLE TESTIFIED AS TO THOSE EVENTS.

THAT'S CORRECT.

AND THAT HE WAS FORCED, HE AND THE VICTIM OF THIS MURDER WERE FORCED TO GET INTO THE VEHICLE, AND AFTER HE HAD BEEN UNDER THE DOMINATION OF PEARCE, AT LEAST TO THE EXTENT OF BEING FORCED TO HAVE SEX, ORAL SEX OR COMMIT ORAL SEX OR PERFORM ORAL SEX ON PEARCE THAT, IS ESTABLISHED IN THIS RECORD, IT NOT?

I THINK THAT IT IS EQUIVOCAL THAT THE VICTIMS WERE FORCED INTO THE VEHICLE.

THAT IS TESTIMONY THAT IS IN THIS RECORD, CORRECT?

THERE IS TESTIMONY BY MR. TUTTLE THAT THERE WAS A SEXUAL ACT. I DON'T THINK THAT IS DISPUTED AND I THINK THAT IT WASN'T A FOCUS OF THE CASE BY EITHER SIDE, UNDERSTANDABLY, AND I DON'T KNOW THAT IT RAISES AN ISSUE OF COMPULSION ABOUT THE, MR. TUTTLE GETTING INTO THE CAR AT A LATER POINT. AND THE EQUIVOCATION HERE IS THAT THERE WAS SOME TESTIMONY THAT THESE PEOPLE WENT ALONG WILLINGLY IN THE VEHICLE, ACTUALLY THE GENTLEMAN WHO WAS ONE OF THE, TWO INITIAL WITNESSES TESTIFIED THAT HE VOLUNTEERED TO GO ALONG.

CHIEF JUSTICE: I THINK IT IS IMPORTANT, NOW, FOR YOU TO IDENTIFY SPECIFIC ISSUES THAT YOU ARE GOING TO ADDRESS AND GO AHEAD AND IT DO THAT.

-- AND GO AHEAD AND DO THAT.

JUSTICES, THE OTHER THINGS THAT I THINK THAT ARE IMPORTANT THAT THE COURT KNOW IS

THAT THERE WERE THESE SUPPOSITIONS AND SPECULATIONS MADE BY THE COURT AND COUNSEL FOR THE APPELLEE IN ALL FIVE OF THE ARGUMENTS, IN ALL BUT ARGUMENT NUMBER THREE, THE OTHER SUPPOSITION WAS THAT, AFTER TUTTLE WAS SHOT, THAT MR. PEARCE WANTED ASSURANCE FROM MR. SMITH THAT HE WAS DEAD. NOW, WHERE, THEY ARE RELYING ON THE QUESTION "IS HE DEAD".

I AM AFRAID THE DIFFICULTY WE ARE HAVING IS THAT YOU HAVE TO TAKE AN ISSUE THAT YOU HAVE RAISED HERE AND NOW TIE THAT IN, IN OTHER WORDS, TO DEMONSTRATE YOUR ARGUMENT THAT THIS WAS A SUBSTANTIAL ERROR AT THE TRIAL COURT PROCEEDINGS, SO TAKING THE ISSUE THAT YOU THINK, FOR INSTANCE --

I WOULD LIKE TO TALK ABOUT THE PENALTY ASPECTS OF THE CASE, THEN, FIRST, AND THEN WITH REGARD TO ARGUMENT FOUR, THAT THE {MUR} MURDER OCCURRED DURING THE -- THAT THE MURDER OCCURRED DURING THE COURSE OF A KIDNAPING. THE FIRST THING I WANT TO APOLOGIZE TO COUNSEL AND APPELLEE, THAT THE VERBIAGE ABOUT THE DOMINANT MOTIVE NECESSITY COMES FROM THE CLARK CASE LISTED RIGHT AFTER THAT, NOT FROM DELAP, AND I WOULD ALSO POINT OUT THAT THE STATE CITES THE FILLMORE CASE, ALSO FOR THE PROPOSITION OF THE NECESSITY TO SHOW THAT THE KIDNAPING WAS A DOMINANT MOTIVE OF THE PELLIANT, IN ORDER TO SUBSTANTIATE THIS USE AS AN AGGRAVATING CIRCUMSTANCE. JUDGE, THE, THE STATE OUTLINES UNPROVEN FACTS IN THAT PARTICULAR ARGUMENT, IN SUPPORT OF THE AGGRAVATING FACTOR, AGAIN, USING THIS, THAT THE APPELLANT BROUGHT MR. SMITH INTO THIS. THAT IS NOT PROVEN. THAT HE SOUGHT --

LET'S GET TO THAT PARTICULAR POINT.

YES, MA'AM.

I MEAN, WHETHER HE SAID "BRING SMITH" PARTICULARLY OR NOT, SMITH, IN FACT, CAME TO THAT "WE SHELTER" PLACE, WITH MR. BUTTERFIELD AND MR. BRITINGHAM, IS THAT CORRECT?

YES, MA'AM.

AND HE CAME ARMED TO THAT PLACE AND WENT WITH MR. PEARCE IN THE CAR WITH THESE GUYS, SO WHY DOES IT MAKE A SIGNIFICANT DIFFERENCE AS TO WHETHER OR NOT MR. PEARCE ASKED HIM TO COME OR HE VOLUNTEERED TO COME?

BECAUSE IT IS SIGNIFICANT, BECAUSE BOTH THE COURT AND THE STATE REACHED BACK TO THAT TELEPHONE CALL IN EACH INSTANCE, AND IN EVERY ONE OF THESE ARGUMENTS, THEY SAY, WELL, MR. PEARCE ASKED MR. SMITH TO COME OVER TO "WE SHELTER AMERICA", AND THAT NEVER HAPPENED.

BUT, AGAIN, TRYING TO UNDERSTAND WHAT ISSUE YOU ARE TALKING ABOUT AS TO THE KIDNAPING, THE, WHAT IS IT ABOUT THE KIDNAPING THAT IS, AND THE FINDING THAT THAT WAS AN AGGRAVATING CIRCUMSTANCE, THAT WAS IMPROPER? IS THAT ISSUE FOUR THAT YOU ARE --

YES.

OKAY. SO JUST TRY, BECAUSE WE REALLY DO HAVE LIMITED TIME, WHAT IS IT ABOUT THE, THAT CHARGE AND THE COURT'S FINDING AS TO THE KIDNAPING THAT WAS NOT PROPER?

QUICKLY, THE COURT AND THE STATE OUTLINED THESE UNPROVEN FACTS THAT, SMITH WAS BROUGHT IN, THAT HE SOUGHT THE ASSURANCE OF DEATH AFTER THE INITIAL SHOOTING TOOK PLACE, THAT THE APPELLANT, AND THIS TERM IS THROWN OUT OFTEN, ORCHESTRATED ALL OF THIS, WHEN THAT IS A NECESSITY OF PROOF IN SOME OF THE CASES THAT WE ARE --

YOU SAY ASSURANCE. THAT SOUNDS TO ME LIKE GOING TO THE CCP OR THE PREMEDITATION. WAS THERE CCP FOUND?

YES.

AS TO, AND SO ONE OF THE BASIS THAT YOU ARE SAYING WAS INCORRECT WAS THE FACT THAT, AFTER TUTTLE WAS SHOT, THAT HIM ASKING WAS HE DEAD AND WAS NOT A PROPER CIRCUMSTANCE TO USE TO INFER THAT THIS WAS ALL PART OF A CONTINUED PLAN?

BOTH THE COURT AND THE STATE, STATE THAT BECAUSE HE SOUGHT ASSURANCE OF DEATH, THEY MADE THAT ARGUMENT IN BOTH OF THE PENALTY ASPECTS OF THIS CASE, AND IT IS JUST NOT SUBSTANTIATED BY THE EVIDENCE.

WAS THE STATEMENT NOT MADE?

THE STATEMENT WAS MADE. THE QUESTION WAS ASKED "WAS HE DEAD", BUT THERE WAS NO TESTIMONY ABOUT THE INFLECTION OF SOUTHEAST OR ANYTHING. IF I SAW -- THERE WAS NO TESTIMONY ABOUT THE INFLECTION OR ANYTHING. IF I SAW YOU LYING DEAD, EXACTLY, THE THING IS THAT THE COURT SPECULATES AND ARGUES AND SO DOES THE STATE, THAT THAT MEANT THAT HE WAS CHECKING TO SEE IF MR. SMITH DID WHAT HE TOLD THEM, BUT THAT IS NOT NECESSARILY WHAT THOSE WORDS MEAN.

BUT ISN'T THERE CIRCUMSTANTIAL EVIDENCE, PARTICULARLY THE MURDER THAT OCCURRED DIRECTLY AFTER THAT, THAT IT IS NOT AN UNREASONABLE INFERENCE, SO WAS THERE ANY EVIDENCE TO THE CONTRARY? YOU HAD THE OTHER PEOPLE WHO CAME ALONG IN THE PROCESS IN THE CAR. DID ANYBODY DISPUTE THE REASONABLE INFERENCE MADE?

YES.

ANY SUBSTANTIAL DISPUTE?

YES. THE WITNESSES SPECIFICALLY ONE OF THEM, {STES}FIED THAT NOBODY -- TESTIFIED THAT NOBODY EXPECTED MR. SMITH TO SHOOT EITHER ONE OF THESE PEOPLE, EVEN AFTER THE FIRST SHOOTING TOOK PLACE, THAT MR. CRAWFORD, NO ONE IN THE CAR EXPECTED MR. SMITH TO SHOOT MR. CRAWFORD THE SECOND --

HOW WOULD HE KNOW WHAT THE PEOPLE IN THE CAR EXPECT?

THAT WAS HIS TESTIMONY IN THE RECORD.

SO HE COULD SAY THAT HE DIDN'T EXPECT.

CORRECT. HE USED THE WORDS, AND I BELIEVE AS POINTED OUT BY COUNSEL FOR THE APPELLEE, THERE WAS AN OBJECTION THAT WAS SUSTAINED, BUT THE JURY WASN'T ASKED TO DISREGARD IT, BUT THE OTHER THING IS, AND THE IMPORTANCE OF THE DECISION BY THE TRIAL COURT NOT TO ALLOW THE IMPEACHMENT OF THE WITNESS THROUGH THE USEFUL THE VIDEO, AND THAT BECOMES IMPORTANTS BECAUSE THERE ARE ADDITIONAL STATEMENTS THAT THAT WITNESS HEARD OR DIDN'T HEAR IN THE CAR OR BOTH, THAT WOULD ARE HAVE DONE EXACTLY WHAT -- THAT WOULD HAVE DONE EXACTLY WHAT THE COURT IS ASKING ABOUT AND SUBSTANTIATE ON BEHALF THE APPELLANT, THAT HE DID NOT HAVE SOME PRECONCEIVED NOTION OF WHAT MR. SMITH WAS GOING TO DO TO MR. CRAWFORD.

EVEN IF IT WAS ERROR NOT TO ALLOW HIM TO IMPEACH HIM, WHAT YOU ARE NOW SAYING IS THAT IT SHOULD HAVE BEEN USED ALSO AS SUBSTANTIVE EVIDENCE, AND DOES THIS ACTUALLY, THIS PRIOR INCONSISTENT STATEMENT, DOES IT, IS IT APPLICABLE TO, AS SUBSTANTIVE

EVIDENCE?

NO, MA'AM. THERE IS NO WAY THAT THAT --

BUT YOU ARE SAYING THAT IT SHOULD HAVE BEEN USED AS SUBSTANTIVE EVIDENCE.

THE THING IS THAT, IF YOU LOOK AT THE CASES THAT SUPPORT THE IDEA THAT THIS IMPEACHMENT SHOULD HAVE BEEN ALLOWED, THEY TALK IN GENERALITIES ABOUT THE JURY HAVING ALL OF THE EVIDENCE, AND THE BEST EVIDENCE IN THAT SORT OF THING, AND I THINK THAT, MAYBE INARTFULLY IN MY OWN WORDS, I AM SAYING THAT THE JURY SHOULD HAVE HEARD THIS EVIDENCE, BECAUSE IT WAS BEGIN BY THE WITNESS THE DAY AFTER THIS TOOK PLACE, AND THAT, BUT THE BOTTOM LINE IS THAT IT COULD ONLY BE USED FOR IMPEACHMENT, BUT THE IMPORTANT THING IS THAT THE CASES DISCUSS THE NECESSITY, ESPECIALLY WHEN THE CASE IS SO SERIOUS AND THE LITTLE THINGS LIKE THE INFLECTION OF A VOICE, OR THE ORDER AFTER QUESTION, AND THING THAT IS HAPPEN, ESPECIALLY IN THAT AUTOMOBILE OUT THERE IN THE MIDDLE OF THE NIGHT, YOU KNOW, AMONG THESE PEOPLE, SO IMPORTANT THAT THE JURY HEAR EVERYTHING, AND ALTHOUGH IT BY LAW CON INSTITUTES -- CONSTITUTES IMPEACHMENT ONLY, I THINK IN THESE CASES THE IMPORTANT PART IS THAT IT WAS CRITICAL THAT THE JURY HEAR EVERYTHING, INCLUDING THE IMPEACHMENT TESTIMONY. THE OTHER FACTORS THAT THE STATE AND THE COURT RELIED ON IS THAT YOU KNOW, THAT MR., THAT THE APPELLANT DID NOT LET THE BOYS LEAVE THE OFFICE THAT, HE WAS THE ONE WHO SUPPLIED THE GUN, THAT THE APPELLANT WANTED THE VICTIMS DEAD. NONE OF THOSE THINGS ARE SUBSTANTIATED BEYOND A REASONABLE DOUBT IN THIS PARTICULAR CASE.

WELL, HOW ABOUT THE, HE SUPPLIED THE GUN? I MEAN, BOTH, MR. BUTTERFIELD AND MR. BRITTINGHAM TESTIFIED THAT MR. SMITH'S, SAYS TO MR. PEARCE, MY WHATEVER KIND OF GUN HE HAD IS, JAMS, AND MR. PEARCE GAVE HIM THAT GUN. THAT IS NOT IN THE RECORD?

IT IS BUT IT IS NOT IN THAT RECORD ORDER, AND THAT IS THE INTERESTING PART OF IT. THE TRADE OF WEAPONS TAKES PLACE BEFORE MR. SMITH INDICATES WHY HE WANTS THE GUN, SO TO USE THE FACT THAT MR., THAT FAUNCE PEARCE GIVES THE GUN TO MAKE SURE HE HAD ONE IN WORKING ORDER, AGAIN, IS A FALSE PRESUMPTION IN THIS PARTICULAR CASE, BECAUSE AGAIN IF YOU LOOK AT THE RECORD, MR. SMITH SAYS "GIVE ME THE GUN", AND AFTER THAT HE SAYS "MINE JAMS", SO TO SAY THAT MR. PEARCE WAS PROVIDING HIM A WORKING WEAPON IS YOU KNOW, THE CART AND THE HORSE.

BUT MR. PEARCE WAS PROVIDING HIM A WEAPON.

HE GAVE HIM THE GUN IN EXCHANGE FOR THE GUN THAT MR. SMITH HAD, SO, AND YES, I MEAN, TO THE EXTENT THAT THAT GUN CHANGED HANDS, THE GUN HAS CHANGED HANDS, BUT THE ARGUMENT IS THAT HE GAVE HIM THAT GUN ON PURPOSE, WITH PARTICULAR KNOWLEDGE, AND THAT WAS NOT PROVEN UP IN THIS PARTICULAR CASE. THE STATE HAS A DISCUSSION IN ARGUMENT FOUR, ABOUT THE APPELLANT OR ADMITS THAT THE APPELLANT NOT BEING THE SHOOTER, IS INCONSEQUENTIAL IN THIS CASE, YOU KNOW, FOR PURPOSES OF ESTABLISHING THIS AGGRAVATOR.

THE AGGRAVATOR, NOW, OF KIDNAP SOMETHING.

NO. YES. RIGHT. EXACTLY.

WELL, GOING BACK TO THE KIDNAPING AND THE ISSUE OF WHETHER, BECAUSE WE ARE, TWO THINGS, WHETHER WHAT HE SAID OR THOUGHT ABOUT AFTER THE FIRST VICTIM WAS SHOT, WITH THE FACT THAT THESE TWO VICTIMS, ONE THAT WAS KILLED AND THE OTHER WOUNDED, WERE IN THE VEHICLE AGAINST THEIR WILL. NOW, AS TO THE ULTIMATE VICTIM, AFTER TUTTLE WAS SHOT, WHAT IS YOUR ARGUMENT FOR HOW THERE ISN'T A CONTINUED KIDNAPING? I MEAN, DID

THEY SAY THE OTHER -- NOW YOU CAN LEAVE OR WHAT IS THE --

ACTUALLY MR. PEARCE PULLED OVER THE CAR AND TOLD MR. CRAWFORD TO GET OUT, AND THAT WAS THE EXTENT OF IT. IT WAS WHEN HE DIDN'T GET OUT, MR. SMITH, ON HIS OWN VOLITION, AS TESTIFIED BY THE OTHER WITNESSES, HOPS OUT OF THE SEAT, GRABS MR. CRAWFORD AND PULLS HIM OUT OF THE CAR AND THEN SHOOTS HIM. THERE, YOU KNOW, CERTAINLY WAS EVIDENCE THAT ALL MR. PEARCE DID WAS STOP THE CAR AND ATTEMPT TO DISCHARGE MR. CRAWFORD.

THAT WAS, WASN'T THERE, THERE WASN'T, PEARCE DIDN'T DRIVEWAY AFTER THE TUTTLE SHOOT SOMETHING.

HE DROVE 200 YARDS, AND OF COURSE THERE IS A ARGUMENT THERE. THE STATE AND, AGAIN, THE COURT WANTS TO SAY BECAUSE HE ASKED THE QUESTION IS HE DEAD, SOMEHOW HE HAD ORCHESTRATED THE FIRST HOMICIDE AND WAS MAKING SURE HE WAS DEAD, AS OPPOSED TO JUST MAKING A GENERAL INQUIRY, AND THAT SOMEHOW PROVED THAT HE KNEW THAT MR. SMITH WAS GOING TO SHOOT CRAWFORD, WHEN HE STOPPED DOWN THE ROAD, AND, AGAIN, PART OF THAT IMPEACHMENT TESTIMONY INCLUDED SOME NONRECOLLECTED STATEMENTS BY THE WITNESS THAT IT WAS SMITH THAT SAID, YOU KNOW, DRIVE THE CAR, AND STOP THE CAR, AND ALL OF THAT, AND THAT, AGAIN, THAT IT WAS EXPRESSED THAT NOBODY KNEW WHAT MR. SMITH WAS GOING TO DO, AS TO MR. CRAWFORD.

IN CONTEXT, AND THE JUSTICE ASKED YOU AT THE BEGINNING AS TO THE JURY CERTAINLY COULD LOOK AT PEARCE AND SAY, AGAIN, GOING BACK TO WHO HAD THE MOTIVE TO DO SOMETHING TO THESE TWO BOYS. SMITH IS BEING CALLED IN, BUT PEARCE IS THE PERSON THAT GOT RIPPED OFF, THAT IS UPSET, THAT IS DIRECTING, AND THAT IS, WHY {SKNT} THAT ALL PERFECT -- WHY ISN'T THAT ALL PERFECTLY PROPER CIRCUMSTANTIAL EVIDENCE TO LOOK, IN LOOKING AT THAT WHOLE PICTURE?

BECAUSE BEGGING YOUR PARDON, YOU ARE MAKING THE SAME PREMISE ERROR THAT THE COURT DID, AND THAT IS THAT MR. PEARCE CALLED IN MR. SMITH, AND THE RECORD DOES NOT SUBSTANTIATE THAT. THE MAN SHOWED UP.

AFTER SMITH SAYS, WHEN HE SAYS, WHEN PEARCE SAYS "IS HE DEAD", WHAT DOES SMITH SAY?

HE SAID SURE, SOMETHING LIKE SURE, I SHOT HIM IN THE HEAD WITH A .40 CALIBER OR SOMETHING LIKE THAT.

WHAT DOES THE RECORD SHOW WHY MR. SMITH WAS THERE?

THE RECORD SHOWS THAT HE HAPPENED TO BE AT THE PREMISE WHERE MR. BUTTERFIELD WAS AT THE TIME OF THE PHONE CALL, AND THE RECORD REVEALS ONLY THAT, AFTER MR. PEARCE CALLED MR. BUTTERFIELD AND SPECIFICALLY ASKED HIM TO COME AND TO BE ARMED, THAT HE COLLECTED MR. SMITH AND THE OTHER GENTLEMAN, AND BROUGHT THEM WITH HIM TO "WE SHELTER AMERICA".

WHAT RELATIONSHIP H DID MR. SMITH HAVE TO THE VICTIMS IN THIS PARTICULAR CASE?

THERE WAS NONE AND THERE WAS NONE WITH PEARCE, EITHER, BEFORE THIS DAY.

THERE WAS NOTHING BEFORE THAT?

HE HAPPENED TO GO TO "WE SHELTER AMERICA" TO TALK TO MR. SHOOK, AND THAT IS WHO HE THOUGHT COULD GIVE HIM THE GEL CAPS HE WANTED AND THAT IS ULTIMATELY WHO HE GAVE THE MONEY TO. IT ULTIMATELY WENT TO MR. SHOOK'S HANDS AND DOWN TO THE YOUNG LADY

THAT WAS ULTIMATELY RIPPED OFF.

WHEN SMITH GOT THERE, I MEAN, SMITH SAID SOMETHING TO THE EFFECT, WE ARE HERE TO DO BUSINESS, CORRECT?

RIGHT.

I MEAN, THAT WAS SMITH'S FIRST WORDS, ACCORDING TO THIS RECORD.

WHAT IS INTERESTING AND IMPORTANT ABOUT THAT, YOUR HONOR, IS THE FACT THAT THE TRIAL COURT SAID OH, IT IS OBVIOUS WHEN HE SAID THAT, THAT MR. PEARCE HAD CALLED HIM THERE TO KILL THESE TWO BOYS. WELL THAT, IS NOT SUBSTANTIATED BY THE RECORD. THE REAL BUSINESS WAS AND AS IT WAS DISCUSSED WITH MR. BUTTERFIELD ON THE PHONE AND BACK AT THE "WE SHELTER AMERICA", WAS THE BUSINESS WAS TO GET HIS MONEY BACK. THERE WAS NEVER ANY DISCUSSION THAT ANY OF THESE PEOPLE WERE DRAWN TO THE SCENE FOR ANY REASON, OTHER THAN TO RECOVER THE MONEY, TO GO TO THAT MOTEL AND GET HIS MONEY BACK. THAT WAS THE BUSINESS THAT THEY WERE TALKING ABOUT, AND IT IS INTERESTING THE TRIAL COURT SPECULATES IN ITS WRITTEN FINDINGS, THAT --

SO THE EVIDENCE PRESENTED, SMITH HAD ABSOLUTELY NO MOTIVE OR REASON FOR HAVING THESE PEOPLE OUT OF THE CAR AND THEN SHOOTING THEM.

WE DON'T KNOW.

HE HAD ABSOLUTELY NO CONNECTION WITH THEM, AND SO THIS IS JUST TO SORT, A SORT OF A STRANGE OCCURRENCE THAT HE WAS THERE AND DIDN'T KNOW THESE PEOPLE AND THEN PICKED THEM OUT?

MR. BUTTERFIELD BROUGHT --

PICKED THEM OUT AND GOT THEM IN THE CAR AND THEN SHOT THEM, AND THERE IS NO EXPLANATION IN THE RECORD.

NONE. BECAUSE THE THING IS THAT MR. SMITH SHOWS UP. MR. PEARCE DIDN'T KNOW HE WAS GOING TO COME, AND THERE IS NO RECORD DISCUSSION THAT HE WAS DIRECTED TO DO ANY OF THIS. AS A MATTER OF FACT, THE RECORD IS CONTRARY TO IT, BECAUSE AS THE COURT PROBABLY KNOWS IN READING THE BRIEF, WHAT MR. PEARCE ACTUALLY SAID IS, YOU KNOW, WITH REGARD TO MR. TUTTLE, IS YOU KNOW, STEP OUTSIDE AND PUNCH HIM IN THE JAW. THAT IS ALL OF THE -- THAT IS ALL THAT THE RECORD SHOWS. WHETHER MR. SMITH GOES OFF HALF COCKED IN BOTH INSTANCES AND SHOOTS. THIS IS CERTAINLY THE KIND OF INDEPENDENT ACT THAT HAS BEEN RECOGNIZED BY THE COURT.

THAT IS TRUE AS TO TUTTLE BUT THEN WHAT ABOUT AS TO CRAWFORD? BY THE TIME WE GET TO CRAWFORD GETTING OUT OF THE CAR, PEARCE ALREADY KNOWS WHAT HAPPENED TO TUTTLE. HE KNOWS HE DIDN'T GET PUNCHED IN THE JAW AND HE KNOWS THAT SMITH HAS A GUN AND HE IS GETTING CRAWFORD OUT OF THE CAR, SO AT THAT POINT DOESN'T HE HAVE SOME KNOWLEDGE OF WHAT IS GOING TO HAPPEN TO CRAWFORD?

THERE IS THE POTENTIAL, YES, YOUR HONOR, BUT THE THING IS THAT AGAIN --

IT'S A PROBABILITY, MORE THAN POTENTIAL, GIVEN TO WHAT JUST HAPPENED TO TUTTLE?

YOU DON'T KNOW THAT AND THAT IS WHAT THE RECORD DOESN'T SUPPORT. FIRST OF ALL, THE RECORD REFLECTS IN THE IMPEACHMENT TESTIMONY THAT THERE IS A CONFLICT THERE WHY MR. PEARCE PULLED OVER THE CARMENT DID HE DO IT ON HIS OWN VOLITION OR DID HE DO AT

THE DIRECTION OF MR. SMITH? THAT ISN'T ESTABLISHED. ALL MR. PEARCE DID IS STOP THE CAR AND TELL MR. CRAWFORD TO GET OUT. OKAY. IT IS MR. SMITH WHO PULLED HIM OUT OF THE CAR AND DID WHAT HE DID, SEPARATE AND APART FROM ANY INSTRUCTION.

THE POINT IS THAT PEARCE KNEW WHAT WAS GOING TO HAPPEN TO CRAWFORD BECAUSE HE SAW WHAT HAPPENED TO TUTTLE.

YOU CAN SPECULATE THAT, AND THAT IS WHAT THE TRIAL COURT IS DOING IN THIS CASE IS SPECULATING. IT HAS NOT BEEN PROVED THERE. IS NO EVIDENCE OF THAT IN THE RECORD.

THERE IS TWO INFERENCES. THERE IS ANOTHER INFERENCE. THE INFERENCE IS HE PULLED OVER BECAUSE HE THOUGHT GEE, TUTTLE GOT SHOT. I SURE DON'T WANT PEARCE TO GET SHOT -- I STILL DON'T -- WHAT IS THE OTHER VICTIM?

CRAWFORD.

-- CRAWFORD TO BE SHOT, AND EVEN THOUGH CRAWFORD HAS JUST WITNESSED THIS WHOLE THING AND THAT IS BEEN KIDNAPPED AND EVERYTHING ELSE, HOW IS THAT, IN TERMS OF INFERRING, IN THAT WE TAKE THE HISTORY AND LOOK AT ALL OF THE CIRCUMSTANCES, HOW IS THAT, IN TERMS OF I GUESS, THE PRE-MED TAKINGS ASPECT AS TO -- THE PREMEDITATION ASPECT AS TO CRAWFORD, A REASONABLE INFERENCE, AN EQUALLY REASONABLE INFERENCE?

I THINK IT IS {BAUST} ESTABLISHMENT OF THE REQUISITION THAT IS HAVE MADE BY THIS -- I THINK IT IS BECAUSE OF THE ESTABLISHMENT OF THE REQUISITIONS THAT HAVE BEEN MADE BY THE COURT, TO HEIGHTEN THE APPELLANT'S --

ARE YOU CONCEDE SOMETHING.

I AM CONCEDED THAT THERE WAS NEITHER PROVEN THE FELONY ASPECT OF THIS NOR THE PREMEDITATION, UNDER THE CIRCUMSTANCES, AND BECAUSE THERE AREN'T SUPPORTING FACTS, THAT BOTH THE BRIEF AND THE FINDINGS OF THE COURT ARE RAMPANT WITH FINDINGS THAT ARE NOT ESTABLISHED BY THE EVIDENCE IN THE CASE.

IS THIS A GENERAL VERDICT WHERE IT WAS EITHER PREMEDITATION OR FELONY?

YES, MA'AM.

AND THE FELONY MURDER WOULD BE THE KIDNAPING.

YES, MA'AM. JUST GOING ON, THE STATE CITES THE LE BRON CASE IN THIS ARGUMENT, AND OF COURSE THAT IS A CASE WHERE THE DEFENDANT ACTUALLY, YOU KNOW, SHOT THE VICTIM, AND THAT THERE WAS NO EVIDENCE FOUND BY THE COURT THAT {NINLS} ACTED -- THAT ANYBODY ELSE ACTED IN CAUSING THE DEATH OTHER THAN MR. LE BRON. THE DuBOIS CASE CITED BY THE STATE, REQUIRES, BASED ON OUR DISCUSSION JUST A MOMENT AGO THAT, THE APPELLANT BE A MAJOR ACTOR IN THE FELONY IN WHICH HE KNEW THE OUTCOME OR SUBSTANTIAL VIOLENT FELONY UNDER CIRCUMSTANCES LIKELY TO RESULT IN LOSS OF LIFE, AND AGAIN IN DuBOIS, THE VICTIM WAS A HANDS ---THE APPELLANT WAS A HANDS-ON PARTICIPANT. HE HELPED PUT THE VICTIM IN THE CAR AND RAPED THE VICTIM AND THAT SORT OF THING, WHEREAS ON THIS CASE MR. PEARCE, IT PROVES, AND IT WAS NOT IN THE RECORD, THAT HE WAS INVOLVED. I HAVE JUST OUTLINED ON PAGE 51, THE FACT THAT MR. PEARCE PROVES HE KNEW THE CIRCUMSTANCES. THAT IS ON PAGE 51 OF THE APPELLEE'S BRIEF. GOING TO THE COLD AND CALCULATED ASPECT OF IT, THIS IS A FUNDAMENTAL ERROR COMMITTED BY THE TRIAL COURT, IN STEINHORST AND COCOCOONY, IN WHICH THE CASE DEALT WITH JURY AND WITNESSS AND NOT AN AGGRAVATING FACTOR IN CONSIDERATION OF THE DEATH-PENALTY CASE. AGAIN, JUST PROBABLY AN ILLUSTRATION, THE STATE IN THIS PORTION OF THE ARGUMENT CITES, IN TOTAL, THE TRIAL

JUDGE'S FINDINGS FOR THE SUPPORT OF COLD, CALCULATED AND PREMEDITATED, IF YOU LOOK AT PAGES 53, 54 AND 55, ALL OF THESE THING THAT IS THEY HAVE CITED AS FACTS IN SUPPORT, THE TRIAL COURT, ARE THING THAT IS HAVE NOT BEEN AM PROVEN IN THE RECORD. ALL OF THESE THINGS IN THE CENTER OF THIS PAGE, AGAIN ALL OF THIS ONE AND ALL OF THIS STUFF THAT I HAVE YELLOWED ON ALL OF THESE PAGES AND THE FOLLOWING ONE, ARE NOT THINGS THAT ARE SUBSTANTIATED IN THE RECORD. THE HERTZ CASE CITED BY THE APPELLEE, WAS ONE THAT ESTABLISHED THESE REQUIREMENTS, AND, AGAIN, IN THAT CASE, THE VICTIMS WERE GAGGED AND BOUND TWO HOURS PRIOR TO THEIR DEATH, AND THE DEFENDANTS IN THAT CASE HAD A PROVEN MUTUAL DISCUSSION TO SHOOT THE VICTIMS. HERE, THERE IS NO EVIDENCE OF CALCULATION AND NO HEIGHTENED PREMEDITATION AS WE DISCUSS. THIS CASE IS MORE LIKE THE MAHN CASE THAT WAS CITED. A RASH AND SPONTANEOUS ACTION OF THE CODEFENDANT, KILLING EVIDENCE, NO ANALYTICAL THINKING ON THE PART OF MR. PEARCE, NO CONSCIOUS WILL AND PLAN TO KILLETS OF THESE VICTIMS.

LET ME -- TO KILL EATS OF THE VICTIMS.

-- TO KILLETS OF THESE VICTIMS -- TO KILL EITHER OF THESE VICTIMS.

LET ME ASK ONE QUESTION, DO YOU KNOW THAT THEY WERE SUPPOSED TO GO TO A HOTEL OR SOME OTHER PLACE, WASN'T THAT THE EVIDENCE?

YOU HAVE TO TRAVEL OFF OF 41 AND GO WEST ON EITHER STATE ROAD 54 OR 52 IN PASCO COUNTY, TO REACH THE OTHER OF THE HOTEL, AND THAT IS THE DIRECTION THEY WERE GOING. IT IS A DESOLATE AREA IN EITHER ONE OF THOSE ROADS, TRAVELING IN THAT DIRECTION.

BUT THEY WERE IN AN ISOLATED AREA?

THEY PULLED OFF TO THE SIDE OF THE COUNTY HIGHWAY. THAT IS ALL.

FOR WHAT REASON?

THAT IS WHAT IS SPECULATED HERE. OKAY. THE STATE WANTS TO SAY THAT MR. PEARCE PULLED OVER WITH THE INTENTION OF HAVING MR. SMITH SHOOT THESE PEOPLE, BUT THE RECORD DOESN'T ESTABLISH THAT.

SO WHAT IS YOUR POSITION THAT THE RECORD ESTABLISHES AS A MINIMUM, REASONABLE INFERENCE?

REASONABLE INFERENCE, AS WAS STATED BY THE WITNESSES, THAT THESE PEOPLE CAME OVER TO RECOVER MR. PEARCE'S MONEY, THAT THEY WENT IN THE CAR WITH THE BOYS, FOR ONE OF TWO PURPOSES, ONE TO HAVE THE BOYS SHOW THEM THE MOTEL WHERE THE RIP OFF TOOK PLACE, AND TO TAKE THEM HOME, AND THESE WERE THINGS THAT WERE TESTIFIED TO AND STATED BY SOME OF THE WITNESSES IN THIS CASE.

AND PEARCE STOPPED AND THE PERSON GOT OUT OF THE CAR AT A MINIMUM, FOR A BATTERY OR AGGRAVATED ASSAULT TO BE COMMITTED.

BASED ON MR. PEARCE'S STATEMENT AS TESTIFIED TO, IT WOULD HAVE TO BE BELIEVED THAT HE EXPECTED MR. SMITH TO PUNCH HIM. YES. AT THAT POINT.

OR WITH A WEAPON TO DO AN AGGRAVATED ASSAULT?

BUT THE ISSUE WAS IS THE KIDNAPING PROVED NOT THE BATTERY, BECAUSE THE THING IS THAT IT COULD HAVE BEEN MR. PEARCE'S SPONTANEOUS IDEA TO JUST DISCHARGE HIM ON THE SIDE OF THE ROAD, PUNCH HIM IN THE JAW AND GO ABOUT THEIR BUSINESS. THERE IS NO EVIDENCE THAT

THERE WAS EVEN A PLAN TO PUNCH HIM IN THE JAW WHEN THEY LEFT "WE SHELTER AMERICA".

WITH REGARD TO THE KIDNAPING, THOUGH, IT DOESN'T APPEAR THAT THE GROUP WAS HELD BY FORCE, AT THE LOCATION OF "WE SHELTER" INITIALLY. DO YOU AGREE WITH THAT?

MR. PEARCE WENT OUTSIDE OF THE FACILITY ON A COUPLE OF OCCASIONS WITH ONE OR TWO OF THE WITNESSES AND LEFT EVERYBODY ALONE IN THE ROOM TOGETHER.

WERE THEY NOT TAKEN IN THERE BY AT LEAST THE THREAT OF FORCE INITIALLY?

WELL, THEY CAME BACK OF THEIR OWN VOLITION. WE LOST YOUR MONEY. WE GO BACK.

I UNDERSTAND. BUT AFTER THAT POINT, WHEN THEY WERE PLACED IN THE ROOM, ARE YOU SUGGESTING THAT THERE IS NO EVIDENCE IN THE RECORD THAT THERE WAS ANY THREAT OF FORCE TO KEEP THEM OR PLACE THEM IN THAT LOCATION?

THERE IS SOME EVIDENCE, BECAUSE THEY SAY HE HAD A GUN AND HE WAIVED IT AROUND, BUT THERE IS OTHER EVIDENCE THAT SAYS HE DISARMED HIMSELF ON TWO OCCASION. HE PROVIDED ONE OF THE WITNESSES WITH A WEAPON AT SOME POINT. AND --

WHAT IS --

LEFT THE PREMISE.

WHAT IS WITH REGARD TO THE ENTRY OF THE MOTOR VEHICLE, IS THERE EVIDENCE, IN LOOKING AT IT IT APPEARS, AT LEAST AS PRESENTED AND IN LOOKING AT THE TESTIMONY, THAT IT IS REASONABLE TO CONCLUDE FROM WHAT IS SAID, THAT THERE IS, SOMEONE IS TOLD, WITH THREAT OF FORCE, TO GET INTO THE VEHICLE?

WELL, I THINK --

DO YOU DISPUTE THAT OR THERE IS NO EVIDENCE?

BOOT STRAPPING THERE, IF YOU SAY UNEQUIVOCALLY THAT MR. PEARCE WAS HOLDING THEM AGAINST THEIR WILL, BASED ON ALL OF THE EVIDENCE, AND AS I AM SUGGESTING OR STATING, THERE IS PLENTY OF EVIDENCE THAT MAYBE THAT IS NOT TRUE. HE DID MAKE A STATEMENT "YOU GUYS GET IN THE CAR." WHEN THEY ASKED THE WITNESSES --

AND HOLDING UP A WEAPON. YES? NO.

YES, I BELIEVE AT THE POINT HE MADE THAT STATEMENT, HE DID, BUT THE THING IS HE ASKED ONE OF THE VICTIMS, DID YOU FEEL COMPELLED TO GET IN THERE, AND HE SAID NO, AND THEN ONLY ON CROSS-EXAMINATION OR REDIRECT BY THE STATE, DIDN'T YOU FEEL LIKE YOU HAD TO GET IN THERE AND YOU KNOW, THEN HE SAID YES.

HOW DID THEY ARRIVE AT THE SCENE, CRAWFORD AND TUTTLE?

WHICH SCENE? THE "WE SHELTER AMERICA"? THEY CAME BACK ON THEIR OWN.

HOW IT? DID THEY WALK OR DID THEY HAVE THEIR OWN -- HOW? DID THEY WALK OR DID THEY HAVE THEIR OWN VEHICLE?

I DON'T THINK ANYBODY AS INDICATED, BUT THEY DROVE THERE WITH MS.^HAFNER, WHO PICKED THEM UP AND WAS THERE WITH THE PEOPLE WHO STOLE THE MONEY AND PERHAPS MR. SHOOK AS WELL.

THEY HAD TO SIT ON TOP OF REACH OTHER IN BETWEEN TWO OTHER INDIVIDUALS IN THE BACK OF A SMALL VEHICLE?

THAT IS WHERE THEY ENDED UP. THERE WAS NO SPECIFIC DISCUSSION THAT ANYBODY TOLD THEM THAT THAT IS HOW THEY HAD TO GET INTO THE VEHICLE, BUT THIS IS A T-TOP SPORTS CAR WITH ONLY TWO SEATS IN THE FRONT, WHICH MEANT THAT EVERYBODY ELSE HAD TO RIDE IN THE BACK.

CHIEF JUSTICE: I AM AFRAID THAT WITH OUR HELP AND ALL OF OUR QUESTIONS, THAT WE HAVE USED UP ALL OF YOUR TIME. THANK YOU VERY MUCH.

THANK YOU.

THANK GOOD MORNING. SCOTT BROWNE FOR THE STATE OF FLORIDA. YOUR HONORS, WHAT THE APPELLANT COUNSEL CALLS SPECULATION AND UNPROVEN FACTS, ARE IN FACT, BASED UPON FACTUAL TESTIMONY DEVELOPED BELOW AND FAIR INFERENCES FROM THOSE FACTS, DEVELOPED BELOW.

MR. BROWNE, IF WE WOULD SEGREGATE OUT TOTALLY, WHAT HAD HAPPENED TO THE FIRST INDIVIDUAL WITH THAT SHOOTING, WHAT WOULD BE THE STATUS OF THE EVIDENCE THAT WE WOULD BE DEALING WITH? WE WOULD KNOW THEY FORCED THEM INTO THE ROOM, FORCED THEM INTO THE CAR, AND THEN, WITH THE VICTIM, THE ACTUAL VICTIM, STOPPING OF THE CAR AND THE POINT IS ISN'T IT REALLY THE WHOLE THRUST OF THIS CASE CENTERS ON WHAT HAPPENED WITH THAT FIRST INDIVIDUAL, AND WHAT INFERENCES YOU CAN MAKE FROM THAT INFLECTIONS INVOICE, THAT COUNSEL HAS SAID, IT SEEMS TO TURN THIS WHOLE SET, BECAUSE ALL OF THE STATEMENTS OTHERWISE, IS THAT IT IS NOT A MURDER THAT IS INTENDED BUT THEY ARE GOING TO GO AND ROUGH HIM UP. WOULD THAT BE A FAIR?

YOUR HONOR, I DISAGREE WITH THAT, BECAUSE IF YOU RECALL, IT STARTS MUCH EARLIER THAN THAT. WHEN THE BOYS LEFT WITH PEARCE'S MONEY, HE MADE IT VERY CLEAR TO THEM, THIS MONEY IS YOUR LIFE. BRING BACK THE DRUGS OR THE MONEY. ANOTHER WITNESS SAYS, THEN, TWO WITNESSES TESTIFIED THE MONEY IS YOUR LIFE. THEY HEARD THAT, AND THIS IS PEARCE WITH A GUN SAYING THAT. SO PEARCE CONTROLLED THE BOYS' FATE FROM THAT MOMENT ON, AND IN FACT WHEN HE LEARNED ABOUT THE DRUG RIP OFF, THERE WAS A PHONE CALL TO THE OFFICE WHERE PEARCE AND BRYANT LOUTZ WERE STAYING, AND LOUTZ RELUCTANTLY TOLD HIM HEY, LOOK, THEY LOST YOUR MONEY. IT WAS A RIPOFF. AND HE GOES THAT IS PRETTY MUCH WHAT I FIGURED. THEY WILL HAVE TO PAY THE CONSEQUENCES, AND --

EVEN WITH YOUR LIFE, WHAT WOULD BE THE ACTUAL CONSEQUENCES, AND PLEASE DO --

IT BECOMES VERY CLEAR WHEN YOU PUT ALL OF THE FACTS TOGETHER, IT IS ABUNDANTLY CLEAR THAT MR. PEARCE HELD THESE BOYS RESPONSIBLE FOR RIPPING HIM OFF AND FOR STEALING HIS MONEY AND HE MADE IT VERY CLEAR WHAT THE CONSEQUENCES WERE GOING TO BE UP FRONT, AND HE CARRIED TWO OF THOSE CONSEQUENCES. IN FACT THE KIDNAPING BEGAN VERY EARLY HERE, BECAUSE REMEMBER THAT PEARCE MET THE BOYS WHEN THEY DROVE UP, AND I BELIEVE THERE IS TESTIMONY THAT AMANDA HAFNER DROVE UP. THE GATE SURROUNDING THE "WE SHELTER AMERICA" WAS LOCKED. THERE IS A TEN FOOT HIGH FENCE GOING AROUND THE OFFICES AND BARBED WIRE ON TOP, SO PEARCE COMES OUT AND GREETES THEM AT THE CAR AND SAYS COME INTO THE OFFICE, COME ON, SO THE KIDNAPING STARTS THERE. HE TERRORIZES THEM. HE IS ANGRY. HE POINTS THE GUN AT AMANDA HAFNER'S FACE. THESE PEOPLE ARE NOT FREE TO GO. FAUNCE PEARCE IS CONTROLLING EVERYTHING THAT HAPPENED HERE. IN FACT HE TELLS THEM "YOU CAN'T GO." HE TOLD BRIAN LOUTZ, WHEN HE SAID, LOOK, HE IS AFRAID FOR THESE KIDS. BRIAN LOUTZ, SAID HEY, I WILL GET YOU THE MONEY. LET'S TAKE THEM HOME. HE TOLD THEM NO, YOU CAN'T. WHEN AMANDA HAFNER, HER BROTHER PULLS UP, THEY HAVE TO GO OUT AND UNLOCK THE INDICATE, SO THEY ARE IN THE OFFICES SURROUNDED BY THE GATE AND

THE FENCE, SO WHEN AMANDA HAFNER SAYS I WANT THE BOYS. YOU HAVE GOT TO TAKE THE BOYS AND HE GOES NO. YOU HAVE TUTTLE ASKING PEARCE CAN I GO? HE IS BEING TERRORIZED AND IS AFRAID. HE SAYS CAN I GO AND PEARCE SAID NO. THE KIDNAPING BEGAN VERY EARLY AND EVERYTHING THAT ENSUED SHOWED THAT THIS WAS PART AND PARCEL OF FAUNCE PEARCE'S PLAN FOR THE BOYS, NO ONE ELSE'S.

BUT GOING BACK TO THE PLAN, IF IT IS KIDNAPING YOU HAVE GOT FELONY MURDER.

YES, YOUR HONOR.

I GUESS WE ARE TRYING TO DECIDE WHICH ISSUE WE ARE GOING TO ADDRESS, SO YOU ARE SAYING THERE IS ENOUGH WITH THE KIDNAPING FOR FELONY MURDER.

THERE IS ENOUGH FOR FELONY, AGAIN, A PREMEDITATION. ONE OF THE THEORIES --

THE KIDNAPING WAS ONE OF THE QUESTIONS. WAS THERE A SEPARATE, THERE WASN'T A SEPARATE KIDNAPING COUNT?

NO, YOUR HONOR. IT WAS INSTRUCTED TO THE JURY KIDNAPING WITH THE INTENT TO EITHER INFLICT BODILY HARM OR TO TERRORIZE. THE EVIDENCE IS OVERWHELMING. AND IN FACT IT IS UNCONTRADICTED.

SO WHAT ABOUT THE HEIGHTENED PREMEDITATION? NOW, AGAIN, I THINK WHY ISN'T IT A FAIR INFERENCE THAT AT LEAST CERTAINLY UP UNTIL THE SHOOTING OF TUTTLE, THAT THE PLAN WAS TO TERRORIZE, TO SCARE THEM. I MEAN, WHY WOULD YOU KILL TWO BOYS OVER THIS TYPE OF THING? WHY WOULD THAT BE --

IT IS THE CODE --

WHAT IS THERE THAT SUPPORTS THAT INFERENCE THAT THE PLAN TO KILL WAS HATCHED AT THAT POINT? WHERE IS THE STATE'S THEORY AS FAR AS THE EVIDENCE THAT PEARCE INTENDED TO KILL THE BOYS.

HE SAID BRING ME THE DRUGS OR THE MONEY. HE DID NOT CONTEMPLATE LOSING HIS MONEY AND IS HELD ACCOUNTABLE. HE SAYS BOYS, PLURAL, AND WE DON'T KNOW SPECIFICALLY IF HE KNEW THAT SMITH WAS THERE WITH BUTTERFIELD.

THEY KNEW EACH OTHER?

YES. THEY WERE ASSOCIATES. PEARCE CALLED THEM HIS BOYS, AND IN FACT HE MADE A STATEMENT THERE, MY BOYS ARE COMING HERE AND WE ARE GOING TO TAKE CARE OF BUSINESS, AND THIS COINCIDES WITH JOEY SMITH. WHEN HE GETS THERE, HE SAYS WE ARE HERE TO TAKE CARE OF BUSINESS. THE ONLY BUSINESS HE IS THERE TO TAKE CARE OF IS THAT ORCHESTRATED AND DIRECTED --

WHAT KIND OF BUSINESS RELATIONSHIP DID THEY HAVE?

THEY ARE FRIENDS. I GUESS FAUNCE PEARCE HAD LOANED BRITTINGHAM MONEY. SO THEY ARE FRIENDS, AND THE ONLY REASON THEY SHOW UP AT "WE SHELTER AMERICA" IS BECAUSE OF FAUNCE PEARCE.

HE SAYS THEY ARE HERE?

YES. AFTER THE BOYS ARRIVED, REMEMBER THAT PEARCE HAS A CONVERSATION WITH SMITH OUT OF EVERYONE'S HEARING. WE DON'T KNOW WHAT IS SAID BUT THEY CLEARLY HAD THE

OPPORTUNITY TO PLAN WHAT HAPPENED.

JUST AS A QUESTION ON THE SIDE, WE HAVE A CODEFENDANT SMITH.

YES, YOUR HONOR.

WERE THESE CASES, THEY WERE SEVERED, BUT DID THE SAME JUDGE HEAR THE EVIDENCE IN BOTH CASES?

YES. I WOULD HAVE TO CHECK THAT BUT I BELIEVE SO.

DO YOU KNOW WHICH CASE WAS TRIED FIRST?

I BELIEVE SMITH WAS, ONLY BECAUSE THE PSI HAD THE RESULTS OF HIS TRIAL. I DO BELIEVE SMITH WAS TRIED FIRST, BUT THAT IS AN EDUCATED GUESS, IF YOU WILL, ON MY PART. AGAIN, BUT, GOING BACK HERE, HE CALLS FOR ARMED BACK UP, AND THAT IS KEY HERE. HE DOESN'T SAY, WELL, JUST COME AND HELP ME OUT. HE WANTS THEM TO COME ARMED, AND THEY DO. AND WHAT DOES PEARCE DO? HE DIRECTS THE BOYS INTO THE CAR AND I BELIEVE THAT APPELLANT'S COUNSEL WANTS THIS COURT TO SPECULATE THAT THESE BOYS WERE HAPPY AND VOLUNTARILY GOT IN THAT CAR. NO. THEY WERE TERRIFIED. IN FACT, TUTTLE HAD BEEN FORCED TO PERFORM A DEGRADING SEXUAL ACT ON MR. PEARCE. THESE CHILDREN OR THESE BOYS WERE TERRIFIED, AND THAT IS CLEAR FROM THE EVIDENCE. THEY WEREN'T GOING IN THAT CAR.

WHAT IS THE RECORD IN THE PEARCE CASE, REMEMBER WHAT THE RECORD DOES IN THE SMITH CASE, BUT IN PEARCE, DOES THE RECORD REFLECT WHERE, WHAT THE POSITIONING OF THESE PEOPLE WERE, WHEN THEY GOT IN THE CAR?

YES, YOUR HONOR. WHO WAS IN THE FRONT AND WHO WAS IN THE BACK?

THAT IS AN IMPORTANT POINT, YOUR HONOR, BECAUSE JOEY SMITH GETS IN FRONT WITH PEARCE, AND THEN BRITTINGHAM AND BUTTERFIELD ARE ON EITHER SIDE. THE TWO BOYS ARE SANDWICHED BETWEEN TWO ARMED INDIVIDUALS.

THIS IS A TWO-DOOR SEDAN. CONVERTIBLE.

I BELIEVE A TRANS AM WITH T-TOP. AND IT IS CLEAR THE {BROIS} ARE BETWEEN TWO -- THE BOYS ARE BETWEEN TWO ARMED INDIVIDUALS, AND DURING THE RIDE OUT THERE IS A CONVERSATION OVERHEARD IN THE CAR. IT IS FAUNCE PEARCE PROVIDING JOEY SMITH AN OPERABLE 40 MILLIMETER HANDGUN, THE WEAPON USED IN THE MURDER, AND WHY DOES HE DO THAT? BECAUSE JOEY SMITH SAYS MY GUN, MY PISTOL JAMMED. WHY GIVE HIM A HANDGUN?

HE SAYS THIS THING ABOUT THE JAMMING OCCURS AFTER THE ACTUAL HANDING OVER OF THE WEAPON. THE EXCHANGE OF WEAPONS THAT IT IS AFTER THAT POINT THAT SMITH SAYS, MY GUN JAMS.

MY RECOLLECTION IS THERE WAS, HE INDICATED, HE CLAIMED THAT HIS NINE MILLIMETER JAMMED, AND THEN PEARCE HANDED OVER HIS 40 MILLIMETER. THAT IS MY RECOLLECTION OF THE EVIDENCE, BUT I AM NOT ABSOLUTELY SURE ON THAT. I DON'T THINK IT IS SIGNIFICANT. EITHER WAY, HE IS GIVING HIS OPERABLE 40 MILLIMETER TO JOEY SMITH, AND WE KNOW THAT IS THE MURDER WEAPON.

WHEN THE CAR STOPS THE FIRST TIME, THERE SOME EVIDENCE OF PEARCE GIVING SMITH INSTRUCTIONS AS TO WHAT HE WANTS DONE?

YES, YOUR HONOR. HE SAYS --

WHAT?

-- BREAK HIS JAW. TEACH HIM A LESSON FOR STEALING MY SIT, MY MONEY, AND -- MY SHIT, MY MONEY, AND THIS HOLDS PEARCE RESPONSIBLE. JOEY SMITH GETS OUT OF THE CAR AND SHOOTS THEM ONCE IN THE HEAD.

SO GOING BACK, YOU ARE SAYING FOR CCP, THAT THE PLAN TO KILL STARTED AT THE TIME OF THE KIDNAPING. I CAN ACCEPT WHAT YOU ARE SAYING THAT THE KIDNAPING STARTED AT THE POINT THAT THEY CAME TO THE OFFICE, BUT IF THAT IS A STATEMENT, HOW IS THAT CONSISTENT, AT LEAST AS TO AT THAT POINT, THAT THERE WAS NO HEIGHTENED PREMEDITATION TO KILL THESE BOYS?

WELL, YOUR HONOR, I THINK FIRST OF ALL, I MUST MENTION THAT, ON REVIEWING THE SUFFICIENCY OF THE EVIDENCE FOR AGGRAVATORS, THIS COURT LOOSE AT THE SUFFICIENCY AND NOT THE WEIGHT OF EVIDENCE, BUT TO GET BACK TO THAT WE IF YOU LOOK AT THE EVIDENCE FROM THE MOST FAVORABLE VIEW, PEARCE WANTED TO HUMILIATE THESE BOYS. HE FORCED TUTTLE TO PERFORM A SEXUAL ACT UPON HIM UNDER THE POINT OF A GUN. MAYBE HE WANTED HIM, PART OF THE PLAN WAS TO BREAK HIS JAW AND THEN SHOOT HIM, BUT WHAT IS CLEAR IS THAT WHEN SMITH GETS BACK IN THE CAR, IF IS NOT CONCERN FOR TUTTLE, ARE YOU SURE IS HE DEAD? MAYBE WE CAN GET HIM TO A HOSPITAL. IT IS NOT SURPRISE. IT IS NOT WITHDRAWAL. IT IS NOT OH, MY GOD, NOW WE ARE IN TROUBLE. IT IS ARE YOU DEAD FOR SURE -- IT IS, ARE YOU SURE HE IS GO AHEAD DEAD, FOR SURE?

IS -- IT IS, ARE YOU SURE HE IS DEAD, FOR SURE?

POPPING SOMEONE IS A LITTLE DIFFERENT, IN MY MIND, ANYWAY, FROM BREAKING A JAW, SO WAS THERE SOME TESTIMONY TO THAT EFFECT?

THERE WAS. I BELIEVE THE TWO WITNESSES, BRITTING MA'AM AND BUTTERFIELD -- BRITTINGHAM AND BUTTERFIELD, IT WAS POP HIS JAW OR BREAK HIS JAW. I KNOW IT WAS SAID BY DIFFERENT WITNESSES.

AT THIS POINT COULD YOU ADDRESS THE ISSUE OF THE FAILURE OF THE TRIAL COURT TO ALLOW THE IMPEACHMENT OF THE PRIOR STATEMENTS?

YES, EVEN IF WE ASSUME THAT THE TRIAL COURT ABUSED ITS DISCRETION THAT IS NOT REVERSIBLE ERROR, BASED UPON THIS RECORD, AND THE REASON FOR THAT IS, AS DEFENSE COUNSEL ALREADY POINTED OUT, DEFENSE COUNSEL SUCCESSFULLY ELICITED FROM BRITTINGHAM WHILE ON THE STAND, THAT NO ONE IN THE CAR EXPECTED HIM TO SHOOT. AS FAR AS HE WAS CONCERNED, NO ONE IN THE CAR EXPECTED SMITH TO SHOOT THE VICTIM.

BRITTINGHAM.

YES. FROM BRITTINGHAM. SO HE HAD ALREADY GOTTEN THAT POINT ACROSS, BECAUSE HE WASN'T PARTY TO THE PLAN EARLIER WITH SMITH.

WOULD YOU AGREE THAT THE CRITICAL WITNESSES, AS TO THE CCP ISSUE, WOULD BE BRITTINGHAM AND BUTTERFIELD?

I WOULD, BUT I ALSO INDICATE THAT THERE ARE APPROXIMATELY SIX WITNESSES THAT WE WOULD BE RELYING ON, TO PROVE CCP, BECAUSE REMEMBER, THERE WAS THAT THREAT UP FRONT. THE MONEY IS YOUR LIFE.

I GUESS I AM LOOKING ESPECIALLY AT THE QUESTION, ISN'T IT A FACT THAT YOU TESTIFIED PREVIOUSLY THAT FAUNCE SEEMED TO BE SURPRISED AND SAID WHAT THE HELL? WHAT DID YOU

DO THAT FOR! THAT IS A PRETTY SUBSTANTIAL DISCREPANCY FROM SAYING THAT, IS HE DEAD AND ARE YOU SURE? SAYING THAT, ACTUALLY SAYING WHAT, HOW, AND IN THE RECORD THERE IS NO ISSUE, THERE IS NO STATEMENT AS TO HOW PEARCE SAID THAT, SO IMPEACHMENT, TO SAY THAT HE, THAT THERE WAS A SIGNIFICANT THING, HE SEEMED SURPRISED, AND THE WHAT THE HELL, WHAT DID YOU DO THAT FOR, HOW IS THAT NOT SIGNIFICANT IMPEACHMENT OF HIS IN-COURT STATEMENT?

YOUR HONOR, MY ANSWER TO THAT IS NUMBER ONE, IT IS IT NOT ADMISSIBLE FOR SUBSTANTIVE EVIDENCE. SO LET'S JUST ASSUME THAT THAT DESTROYS HIS CREDIBILITY COMPLETELY. TAKE HIS TESTIMONY OUT OF THE EQUATION.

BUTTERFIELD.

BRITTINGHAM.

BRITTING -- BRITTING HAM.

WHAT IS THE RESULT? HE IS STILL CONVICTED OF FIRST-DEGREE MURDER. HE IS STILL CONVICTED OF ATTEMPTED FIRST-DEGREE MURDER FOR TUTTLE AND WE STILL HAVE CCP. THE UNDERLYING FACTS ARE TESTIFIED TO --

BUT YOU ARE MAKING THAT EVALUATION OR THAT JUDGMENT FOR A JURY, OKAY, THAT WAS THERE, AND OF COURSE, WE CAN'T STEP INTO THE HEADS OF THE JURY. WE DON'T KNOW WHAT IMPACT THAT MAY HAVE HAD ON THE JURY, DO WE?

WELL, I THINK THERE IS A GOOD INDICATION, WELL THERE, IS AN INDICATION HERE THAT DEFENSE COUNSEL DID A GOOD JOB WITH THIS CASE, BECAUSE THE DEFENDANT WAS CHARGED WITH THE ATTEMPTED FIRST-DEGREE MURDER OF STEVEN TUTTLE. THE JURY CAME BACK WHAT LESSER-INCLUDED DEFENSE, ATTEMPTED FIRST-DEGREE MURDER. THE ONLY ATTACK OF PEARCE'S, WITH REGARD TO TUTTLE, WE DO KNOW THAT THERE IS NO WAY YOU CAN REALLY REVIEW THIS AND COME UP WITH HARMFUL ERROR. IN OTHER WORDS THERE IS NO POSSIBILITY AFTER DIFFERENT VERDICT IN THIS CASE, AND REMEMBER THAT THAT IMPEACHMENT ONLY GOES TO THE TUTTLE SHOOTING. WHAT DO WE HAVE WITH CRAWFORD? NOW, PEARCE KNOWS WHAT HAPPENED TO TUTTLE. THERE IS NO DOUBT ABOUT IT. SMITH, IT WAS A MIRACLE THAT TUTTLE SURVIVED, BUT WHEN HE GETS BACK IN THE CAR, PEARCE DOESN'T DRIVE OFF UNTIL HE GETS THAT ASSURANCE THAT HE IS DEAD. ARE YOU SURE HE IS DEAD? YEP. I SHOT HIM IN THE HEAD WITH A 40. WAS HE CONCERNED FOR TUTTLE'S WELL NEAR? WAS HE GOING TO GO BACK AND TAKE HIM TO THE HOSPITAL?

NOW THE JURY HAS HEARD THE IMPEACHMENT THAT HE IS SURPRISED AND SAYS WHAT THE HELL DID YOU DO THAT FOR.

AND IT IS NOT ONLY THAT. HE SAYS APPARENTLY SMITH TOLD PEARCE TO EITHER GO GO! OR DRIVE DRIVE! AND IT IS TUTTLE THAT DIRECTED PEARCE TO STOP THE CAR?

THAT DID COME OUT, BECAUSE YOU RECALL THAT THE JURY HAD LEARNED FROM HIS PRIOR WRITTEN STATEMENT THAT HE HAD GIVEN TO THE POLICE ABOUT THOSE PARTICULAR FACTS, AND I THINK I PUT THAT IN MY BRIEF.

SO THE ONLY THING HE DIDN'T HEAR WAS --

THE VIDEOTAPE.

BUT WHAT TESTIMONY DID THE JURY NOT HEAR THAT WAS IN THE VIDEOTAPE THAT IS PERTINENT TO THIS ISSUE?

WHAT DEFENSE COUNSEL, I THINK HE OFFERED THE ENTIRE TAPE, WHICH LARGELY CORROBORATES BRITTINGHAM'S TESTIMONY, BUT PRIMARILY HE SAID I WANT PEARCE'S REACTION TO WHAT JOEY SMITH DID, SO HE SAID WHAT THE HECK OR WHAT ARE YOU DOING. I THINK WORDS TO THAT EFFECT. SO THAT IS WHAT THE JURY DID NOT HEAR.

BUT THEY HEARD THE OTHER --

THE JURY DID HEAR HIS TESTIMONY ALREADY, THAT NO ONE IN THE CAR EXPECTED SMITH TO SHOOT HIM, SO THEY ALREADY HEARD THAT. THEY HAVE ALREADY HEARD --

WHEN YOU SAY THAT THE JURY DID NOT HEAR THAT, HE GOT IT OUT ON CROSS-EXAMINATION. THEY JUST DIDN'T HEAR THE TAPE BUT THEY HEARD THE STATEMENT THAT HE MADE ON THE TAPE, THROUGH THE CROSS-EXAMINATION.

EXACTLY, YOUR HONOR. THEY DID HEAR THE STATEMENT, AND THEY DID HEAR BRITTINGHAM SAY, WELL, I DON'T RECALL. I DON'T REMEMBER. SO IN SOME WAY, YES, THEY HEARD IT. THEY DIDN'T HEAR THE VIDEOTAPE, BUT THE VIDEOTAPE LARGELY CORROBORATES BRITTINGHAM'S TESTIMONY, SO IF WE ARE BRING THE WHOLE VIDEOTAPE IN, WE HAVE A LOT OF NEGATIVES ABOUT PEARCE, THE FACT THAT HE AND JOEY SMITH WERE THREATENING HIM AND AGAIN, THE RECORD SHOWS THAT PEARCE AND SMITH WERE IN THIS TOGETHER. THEY THREATENED BRITTINGHAM AND BUTTERFIELD WITH DEATH. THEY WEREN'T SURE ABOUT THOSE TWO GUYS.

I DON'T KNOW IF THE ARGUMENT WAS PRECISELY MADE THIS WAY, BUT IN THIS CASE THE DEFENDANT WAIVED ALL MITIGATION.

YES, YOUR HONOR. ANOTHER JURY STILL, MUST HAVE BEEN A PRETTY GOOD ARGUMENT FOUND, 10-2 FOR DEATH.

YES, YOUR HONOR.

WE HAVE A SITUATION WHERE THERE IS NO SEPARATE FINDING OF THE KIDNAPING. THE CCP BECOME AS PRETTY CRITICAL AGGRAVATOR. WOULDN'T THAT IMPEACHMENT EVIDENCE IN THE VIDEOTAPE, IF IT WAS, IF IT HAD BEEN PROPERLY ALLOWED AS IMPEACHMENT, ASSUMING IT WAS ERROR, BEEN SOMETHING THAT THE JURY COULD HAVE CONSIDERED IN THE PENALTY PHASE, AND HOW CAN WE SAY THAT IT WAS HARMLESS, BECAUSE CERTAINLY IT IS NOT JUST SUBSTANTIVE EVIDENCE BUT HEARSAY CAN BE ALLOWED AS TO THE PENALTY PHASE. COULD YOU ADDRESS THAT?

WELL, OBVIOUSLY THAT ISSUE WAS NOT BRIEFED, BUT EVEN IF WE ASSUME, I DON'T THINK THAT THAT STATEMENT WAS THE MOST RELIABLE. I DON'T KNOW, IF I WERE THE PROSECUTOR, I WOULD OBJECT TO IT, BECAUSE BRITTINGHAM, I HAVE LOOKED AT HIS SWORN STATEMENT. I HAVE LOOKED AT HIS PRIOR DEPOSITION TESTIMONY. NOWHERE ELSE DOES HE SAY WHEN PEARCE GOT BACK IN THE CAR, "WHAT THE HECK", AND BECAUSE THAT COULD HAVE BEEN AN INADEQUATE PROFFER, WE DON'T KNOW HOW BRITTINGHAM, IF HE HAD ACTUALLY SEEN AND HEARD HIS STATEMENT, AND I DO BELIEVE THAT THERE IS A LACK OF A PROFFER HERE, I DO BELIEVE THAT THIS WOULD HAVE A SUBSTANTIAL IMPACT ON CCP, BECAUSE NUMBER ONE WE DON'T KNOW HOW IT WOULD HAVE BEEN BRIEFED, AND NUMBER TWO, I DON'T KNOW HOW THE STATE WOULD HAVE CONSIDERED THAT, OR COULD HAVE, AND WE WOULD HAVE OTHER STATEMENTS OF HIS TESTIMONY SAYING I DON'T RECALL THAT AT ALL, AND BUTTERFIELD SAYING NO, THE ONLY CONVERSATION BETWEEN PEARCE AND SMITH WAS "IS HE DEAD? ARE YOU SURE?" ,, AND SO I THINK BRITTINGHAM AND SMITH, WHO WAS A FRIEND OF PEARCE, WE ARE SPECULATING AWAY, TO THE DEGREE THAT --

SO IN THIS CASE DID DEFENSE COUNSEL ASK THAT THE VIDEO BE PLAYED TO THE WITNESS AND

TO THEN PROFFER WHAT THE WITNESS'S TESTIMONY WOULD BE IN THAT MANNER?

YOUR HONOR, WHAT HAPPENED WAS, INITIALLY WHEN HE WANTED TO PLAY IT, BRITTINGHAM WAS STILL ON THE HAND AND THE JURY WAS THERE OBVIOUSLY. BUT WHAT HAPPENED LATER WAS, DURING THE PROFFER, HE INITIALLY BROUGHT BRITTINGHAM BACK AND SAID DO YOU RECALL MAKING A TAPED STATEMENT AT THE POLICE STATION? I THINK TWO DAYS OR ONE DAY AFTER THE MURDERS. AND HE SAID, YES, I DO RECALL, BUT THAT IS THE EXTENT OF THE PROFFER. DEFENSE COUNSEL DISMISSED BRITTINGHAM AND THEN CLAIMED --

IN THE PROFFER, HE DIDN'T PLAY THE TAPE WHILE BRITTINGHAM WATCHED IT AND THEN OFFER HIS RESPONSE TO THAT.

EXACTLY, YOUR HONOR, AND SO AGAIN, WE DON'T KNOW WHAT BRITTINGHAM, HOW HE WOULD HAVE EXPLAINED THAT, AND AGAIN, BECAUSE WE ARE SPECULATING, I COULD SUBMIT THAT WE COULD EASILY COUNTER THAT STATEMENT. I WOULD, WITH THE PRIOR STATEMENTS THAT I HAVE SEEN, INCLUDING HIS DEPOSITION, BUT, AGAIN, THERE IS ABSOLUTELY OVERWHELMING EVIDENCE IN THIS CASE. WE HAVE AMANDA HAFNER, LOU TZ, SHOOKS, BRITTINGHAM, AND SURVIVING VICTIM TUTTLE ESTABLISH THE FIRST-DEGREE PREMEDITATED MURDER, THE FELONY MURDER AND THE ATTEMPTED SECOND-DEGREE MURDER. I WANT TO BRIEFLY TOUCH UPON COUNSEL'S ARGUMENT ON THE KIDNAPING AGGRAVATOR. COUNSEL SUBMITS THAT FILLMORE, THIS COURT'S DECISION IN FILLMORE, WHICH WAS CITED IN MY CASE, IN MY BRIEF, STANDS FOR THE PROPOSITION THAT KIDNAPING MUST BE SHOWN TO BE THE DOMINANT MOTIVE, IN ORDER TO APPLY AS AN AGGRAVATOR. I HAVE REREAD A PORTION OF MY BRIEF. FILLMORE STANDS FOR THE PROPOSITION THAT THE AVOIDING ARREST AGGRAVATOR MUST BE SHOWN TO BE THE DOMINANT MOTIVE. THE STATE HAS FOUND NO CASE THAT STANDS FOR THE PROPOSITION THAT ONE OF THE ENUMERATED FELONIES HAS TO BE SHOWN TO BE THE DOMINANT MOTIVE. THERE ARE AGGRAVATORS THAT LOOK AT DIFFERENT ASPECTS OF OFFENSES AND THAT SOME CERTAINLY DO LOOK AT THE MOTIVATION, LIKE AVOIDING ARREST, BUT KIDNAPING IS NOT ONE OF THOSE. IF -- THE STATE HAS NOTHING FURTHER. THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT WILL TAKE THE CASE FROM HERE. WE ARE NOW GOING TO TAKE OUR MORNING RECESS OF 15 MINUTES. THE COURT WILL BE IN RECESS FOR 15 MINUTES BEFORE WE HEAR THE NEXT CASE.

MARSHAL: PLEASE RISE.