Michael Duane Zack III v. State of Florida

HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING AND WELCOME TO THE FLORIDA SUPREME COURT. THE FIRST CASE ON THE COURT'S DOCKET THIS MORNING IS ZACK VERSUS THE STATE OF FLORIDA. ARE THE PARTIES READY. MS.^McDERMOTT.

GOOD MORNING. MAY IT PLEASE THE COURT. LINDA McDERMOTT ON BEHALF OF MICHAEL ZACK. I WOULD LIKE TO BEGIN BY ADDRESSING A COUPLE OF ISSUES IN THE WRIT OF HABEAS CORPUS, THE FIRST ISSUE BEING THE NEAL ERROR THAT OCCURRED DURING VOIR DIRE, WHEN THE STATE EFFECTIVELY REMOVED BOTH OF THE AFRICAN-AMERICAN FEMALES FROM THE JURY. THE LAWS OF THIS COURT HAVE ESTABLISHED A PROCEDURE TO FOLLOW WHEN MAKING A NEAL CHALLENGE, AND TRIAL COUNSEL DID FOLLOW THE PROCEDURE PROPERLY IN THIS CASE.

DID HE REALLY FOLLOW THE PROCEDURE, THOUGH, BECAUSE IT SEEMS AS IF, WHEN THE FINAL JURY WAS SELECTED, COUNSEL WAS REQUIRED TO OBJECT TO THAT FINAL JURY AND COUNSEL DIDN'T DO. THAT HE WAIVED THE CLAIM, AT THAT POINT.

WHAT I MEANT WAS, HE FOLLOWED THE PROCEDURES THAT ARE SET FORTH IN DORSEY AND IN TERMS OF, IN CURTIS, I AM SORRY, IN TERMS OF THE ACTUAL STATING THAT THEY BELIEVED THERE WAS A NEAL ERROR AND REQUESTING THE REEVENT. IF HE FAILED WHEN THE FINAL JURY WAS ABOUT TO BE SWORN, THEN THERE IS STILL AN ISSUE OF ERROR. THERE IS STILL AN ISSUE FOR THE APPELLATE ATTORNEY TO RAISE.

WE NEVER, EVER, HAVE WE, SAID THAT, IF THE ISSUE WAS NOT PRESERVED BY ACCEPTING OR REJECTING AGAIN, THAT THAT COULD BE FUNDAMENTAL ERROR, TO BE REVERSED ON APPEAL. IS THERE ANY CASES WHERE THAT WAS SAID?

IN THE CASES WHERE YOU HAVE REVIEWED NEAL ERROR, THERE ARE PREEMPTORIES THAT YOU REVIEW OR WHATEVER IT MAYBE, BUT THAT IN THE CASE OF THIS ERROR THAT IS OF CONSTITUTIONAL MAGNITUDE, WOULD FALL UNDER THIS COURT'S CASE LAW REGARDING FUNDAMENTAL ERROR. THAT THAT ERROR REACHES DOWN TO THE VERY VERDICT.

I THINK YOU WILL FIND THAT WE HAVE NOT FOUND THAT POINT TO BE, HAVE MERIT ON APPEAL BECAUSE IT WASN'T PRESERVED, SO I SUGGEST YOU MOVE ON TO SOME OTHER AREAS.

THE SECOND ISSUE THAT I WOULD LIKE TO ADDRESS IS THE CLAIM AND ISSUE OF NONSTATUTORY ERROR THAT WAS ADDRESSED.

WHAT EXACTLY ARE YOU CLAIMING, REGARDING THE NONSTATUTORY AGGRAVATION?

THAT DR. McCLARIN HAD ALLEGEDLY MET WITH --

THE DEFENDANT TOOK THE STAND IN THIS CASE. WASN'T THERE TESTIMONY ELICITED FROM HIM ON DIRECT EXAMINATION, CONCERNING THE VERY STATEMENTS THAT HE MADE TO LAW ENFORCEMENT, CORRECT?

CORRECT.

AND DURING THE COURSE OF THAT EXAMINATION OF HIM ON THOSE STATEMENTS, WASN'T THERE A QUESTION AND ANSWER, CONCERNING WHETHER OR NOT DURING THAT STATEMENT, HE MADE SOME STATEMENTS ABOUT HIS DEALINGS WITH WOMEN?

RIGHT, BECAUSE HE MADE SOME COMMENCE TO THE EFFECT THAT, YOU KNOW, MY MOTHER WAS TAKEN AWAY FROM ME BY MY SISTER AND MY DAUGHTER WAS TAKEN AWAY FROM ME BY HIS EX-GIRLFRIEND, AND HE WAS UPSET AND SAYING THIS IS WHERE ALL OF MY PROBLEMS BEGAN, AND SORT OF TRYING --

WHY ISN'T THIS TESTIMONY FROM THE PHYSICIAN, RELEVANT IN THAT CONTEXT, BECAUSE THE DEFENDANT WAS SAYING, WAS MAKING THESE STATEMENTS ABOUT HIS PROBLEMS WITH WOMEN.

WELL, HE MADE THOSE STATEMENTS TO LAW ENFORCEMENT, AND THEN THAT STATEMENT SUBSEQUENTLY CAME IN, IN THE GUILT PHASE OF THE TRIAL, TO PROVE THAT HE WAS GUILTY OF THE CRIMES THAT HE HAD BEEN CHARGED W NOW, WHAT HAPPENED DURING THE PENALTY PHASE WAS DR. McCLARIN WAS ASKED ABOUT DOES THIS DEFENDANT, IN YOUR OPINION, HAVE THIS HOSTILITY TOWARD WOMEN, AND HE SAID HE DID, AND HE GAVE THESE REASONS, AND HE SAID I HAVE INTERVIEWED SOMEONE WHO TOLD ME ABOUT THESE BEATINGS THAT WOULD OCCUR BETWEEN MR. ZACK AND HIS FORMER GIRLFRIEND, AND THERE WAS THIS WHOLE COLLOQUY, DEFENSE COUNSEL OBJECTED, THERE WAS A COLLOQUY BETWEEN THE PARTIES AND THE JUDGE ABOUT THAT ISSUE, VERY LENGTHY, AS SET OUT IN MY BRIEF, BUT THE PROBLEM WITH THIS IS FIRST OF ALL IT WASN'T RELEVANT. IT GOES TO ABSOLUTELY NONE OF THE AGGRAVATORS IN THE CASE.

WELL, THE STATE SEEMS TO ARGUE HERE THAT IT IS RELEVANT BECAUSE THE DEFENDANT, IN EXPLAINING HIS ATTACK ON THE VICTIM, SAID THAT SHE PUSHED SOME HOT-BUTTON ISSUE OF HIS CONCERNING HIS MOTHER, AND SO WASN'T IT RELEVANT TO SORT OF REBUT THAT PRESENTATION BY THE DEFENSE?

WHAT THE STATE IS SAYING, FIRST OF ALL, IT DOESN'T MAKE SENSE. THEY ARE SAYING THAT SOMEHOW, THAT THIS PRIOR CONDUCT, BAD CONDUCT, UNCHARGED CRIMINAL CONDUCT ON HIS PART, SOMEHOW RELATES TO HIS RELATIONSHIP WITH THE VICTIM IN THIS CASE. THEY SAY THAT IT SUPPORTED, THAT TRIAL COUNSEL SUPPORTED AGGRAVATORS. IT DOESN'T SUPPORT ANY AGGRAVATORS, TO SAY THAT HE HAD THIS ABUSIVE RELATIONSHIP WITH A FORMER GIRLFRIEND.

BUT IT DOESN'T ABSOLUTELY SUPPORT AN AGGRAVATOR, BUT CAN IT REBUT A MITIGATOR?

CERTAINLY, IF IT WAS REBUT AGO MITIGATOR, BUT IT WASN'T REBUTTING ANY OF THE MITIGATION THAT WAS PRESENTED. DR. MAYOR AND THE OTHER DOCTORS, WERE NOT SAYING THAT THIS HOT BUTTON WAS, THAT WASN'T THE ONLY REASON FOR THE MITIGATION THAT THEY SAID WAS PRESENT, AND SO IT WASN'T REBUTTING THAT, IN FACT WHAT TRIAL COUNSEL WAS SAYING IT WAS NECESSARY TO PUT IT IN FOR, WAS BECAUSE HE SAID THAT IT RELATED, HE SAID IT RELATED TO THE AGGRAVATION AND THAT IS NOT THE CASE T DID NOT RELATE TO THE AGGRAVATION. I MEAN, THIS UNCHARGED CRIMINAL CONDUCT IS EXACTLY THE TYPE OF CONDUCT IN PERRY, THAT THIS COURT FOUND WAS REVERSIBLE ERROR.

IS THIS BEING RAISED AS A HABEAS CLAIM OR INEFFECTIVE ASSISTANCE?

THIS IS A HABEAS CLAIM, BECAUSE IT WAS PRESERVED AT TRIAL.

WASN'T THIS DEALT WITH ON DIRECT APPEAL?

NO. THE ISSUE THAT WAS DEALT WITH ON DIRECT APPEAL WAS THE ISSUE OF THE EX-GIRLFRIEND, THEN, CAME IN AND TESTIFIED ABOUT SOMETHING COMPLETELY UNRELATED ABOUT MR. ZACK'S RELATIONSHIP WITH HIS STEPFATHER, SO THAT ISSUE, THIS WAS NEVER RAISED ON DIRECT APPEAL OR DISCUSSED IN ANY WAY.

COULD IT HAVE BEEN RAISED ON DIRECT APPEAL?

ABSOLUTELY. IT WAS PROPERLY PRESERVED. DEFENSE COUNSEL OBJECTED TO THIS STRENUOUSLY. MOVED TO STRIKE THE TESTIMONY, LIMIT IT, AND NONE OF THAT WAS DONE. THE COURT OVERRULED THE OBJECTION AND ALLOWED THE TESTIMONY IN, SO IT WAS PROPERLY PRESERVED. THIS IS EXACTLY LIKE HILDWIN. HILDWIN, THIS COURT HAS SAID THAT IT IS SUPPOSED TO BE ABOUT THE DEFENDANT'S CHARACTER, AND IN HILDWIN AND HITCHCOCK AND GERALDS, THIS COURT HAS SAID THAT UNCHARGED CRIMINAL CONDUCTOR PRIOR CRIMINAL CONDUCT THAT DOES NOT RELATE TO THE PRIOR VIOLENT FELONY AGGRAVATOR, IS NOT ADMISSIBLE AT THE PENALTY PHASE, AND THAT IS WHAT THIS WAS. THIS IS, CERTAINLY, HIGHLY PREJUDICIAL INFORMATION. I MEAN, THE JURY WAS HEARING THAT HE REPEATEDLY BEAT HIS EX-GIRLFRIEND, AND THEN THE STATE USED THIS TO SAY THAT, IN THEIR BRIEF, THEY USED IT TO SAY THAT THIS WOULD HAVE BEEN REBUTTAL TO THE REMORSE ISSUE, THAT MR. ZACK COULDN'T HAVE HAD REMORSE, BECAUSE HE CONTINUED, EVERY TIME HE WOULD BEAT HIS GIRLFRIEND, HE WOULD APOLOGIZE, AND THEN HE WOULD DO IT AGAIN.

JUST HOW MANY ISSUES WERE RAISED BY THE APPELLATE COUNSEL?

TWELVE ISSUES WERE RAISED. EIGHT OF THEM RELATED TO PENALTY PHASE, AND FOUR OF THEM, I BELIEVE, RELATED TO GUILT PHASE.

SO IN A SITUATION WHERE WE HAVE GOT A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, HELP ME, IF THE COURT THOUGHT THAT THERE WAS A POSSIBLE REASON TO QUESTION APPELLATE COUNSEL, WHAT IS THE PROCEDURE THAT IS FOLLOWED?

MY UNDERSTANDING IS THE PROCEDURE THAT IS FOLLOWED IS, FIRST, YOU HAVE TO ACTUALLY ESTABLISH THAT, HAD THIS CLAIM BEEN BROUGHT, IT WOULD HAVE MERIT, AND I THINK THAT OBVIOUSLY IT DOES, BUT THEN SECONDLY THEN YOU WOULD MOVE INTO THE ISSUE OF, WAS APPELLATE COUNSEL DEFICIENT IN NOT BRINGING --

CHIEF JUSTICE: WOULD THE MERIT HAD TO HAVE BEEN BY ITSELF OR IN COMBINATION, FOR REVERSAL?

THAT'S CORRECT, AND I THINK IN ANALYSIS, BY DOING THAT FIRST, YOU EFFECTIVELY TAKE CARE THE PREJUDICE ISSUE IN THE STRICKLAND ANALYSIS, BECAUSE YOU WOULD HAVE FOUND MERIT TO THAT CLAIM. SO, AND AS TO THAT ISSUE, IN TERMS OF WHETHER OR NOT HE WAS DEFICIENT, I MEAN, THIS WAS A PROPERLY PRESERVED CLAIM. IT WAS A STRONG CLAIM. IF YOU LOOK AT THE CASE LAW FROM THIS COURT, THERE IS VERY STRONG CASE LAW ABOUT NOT NONSTATUTORY AGGRAVATION. OUR ENTIRE DEATH PENALTY STATUTE, THE CONSTITUTIONALITY OF IT RESTS ON THE FACT THAT WE HAVE SPECIFIC STATUTORY AGGRAVATORS THAT ARE SET FORTH IN THE STATUTE, AND THAT NO NONSTATUTORY AGGRAVATION SHOULD BE INTRODUCED. OTHERWISE THAT REALLY UNDERMINES THE ENTIRE ISSUE OF PROPHET AND WHETHER OR NOT OUR STATUTE IS CONSTITUTIONAL. AND IN THE BRIEF THE STATE TALKED ABOUT WHETHER OTHER JURISDICTIONS ALLOWED NONSTATUTORY AGGRAVATION.

IN THE CONTEXT OF A CASE LIKE, THIS WHERE THERE ARE FOUR STRONG AGGRAVATORS HERE, IS THERE ANY ROOM IN THIS ANALYSIS FOR HARMLESS ERROR?

QUITE FRANKLY, I DON'T THINK YOU CAN OVERSTATE THE IMPACT OF HEARING THAT THAT THIS

DEFENDANT HAS VICTIMIZED WOMEN AND BRUTALIZED THEM IN HIS PATH.

ISN'T THE ANALYSIS HERE THAT THERE IS A PREVIOUS MURDER THAT THE DEFENDANT HAD ALSO COMMITTED?

CORRECT.

IN THE CONTEXT OF THIS CASE, IT SEEMS TO ME THAT YOU MIGHT HAVE TO MAKE A HARMLESS ERROR, AT LEAST DISCUSS HARMLESS ERROR BECAUSE OF THESE MURDERS THAT ARE PRETTY BRUTAL.

CORRECT. GOING BACK TO HILDWIN AND THE FOCUS OF THE PENALTY PHASE IS SUPPOSED TO BE ON THE CHARACTER OF THE DEFENDANT. HEARING THE FACT THAT --

AS RELATED TO THE CIRCUMSTANCES OF THE MURDER.

AS RELATED TO THE CIRCUMSTANCES OF THE MURDER, BUT I THINK HEARING THAT THE DEFENDANT HAS HAD ABUSIVE PASTS WITH FEMALES AND STATING IT HAD TO DO WITH THE MURDER, I DON'T THINK, IS RELEVANT.

DOESN'T THAT HAVE TO DO WITH HIS PUSH-BUTTON CONTROL, WITH REGARD TO ARGUMENT OF THE EXPERT? ISN'T IT FAIR REBUTTAL?

I DON'T THINK IT WAS FAIR REBUTTAL. WELL, FIRST OF ALL, THE STATE ARGUED THAT IT WAS AGGRAVATION, SO THEY TOLD THE JUDGE THAT IT WAS AN AGGRAVATION AND THAT, AS TO THE REBUTTAL OF THE HOT BUTTON ISSUE THAT HAD PRESENTED, BEEN PRESENTED AT THE GUILT PHASE, SO I DON'T THINK THAT THAT WAS, REALLY, FAIR, YOU KNOW, FAIR REBUTTAL, AND, ALSO, NOW THAT THEY ARE SAYING IT IS REBUTTAL TO REMORSE, WHICH I DON'T THINK THAT MAKES ANY SENSE WHATSOEVER, IN TERMS OF THE CONTEXT OF THE CASE, BUT, AGAIN, GOING BACK TO, IF YOU LOOK AT GARY -- IF YOU LOOK AT PERRY, THE SAME EXACT ARGUMENT WAS MADE. IN PERRY, THE STATE SAID THAT IT WENT TO THE REBUTTAL. THE TRIAL, THE DEFENDANT HAD MADE CLAIMS OF A NONVIOLENT NATURE, AND SO THEN THEY PRESENTED HIS TESTIMONY ABOUT THE BEATING OF THE EX-WIFE, IN PENALTY PHASE, SO THIS IS SORT OF THE SAME EXACT ISSUE. EVEN IF IT WAS USED AS REBUTTAL, IN PERRY THIS COURT SAID IT IS STILL REVERSIBLE ERROR, TO INTRODUCE THAT EVIDENCE, BECAUSE IT WAS HIGHLY INFLAMMATORY TO THE JURY AND SHOULDN'T HAVE BEEN PRESENTED.

DO WE GIVE APPELLATE COUNSEL ANY DEFERENCE AS TO THE STRATEGY EMPLOYED AND WHICH ISSUES TO RAISE AND HOW MANY ISSUES TO RAISE AND WHEN COUNSEL HAS RAISED TWELVE ISSUES, DO WE HAVE TO SAY IT IS INEFFECTIVE BECAUSE HE DIDN'T RAISE A 13th ISSUE? WHAT KIND OF ROLE DID THE STRATEGY ON THE FIELD PLAY?

WELL, BECAUSE WE DON'T KNOW ABOUT THE STRATEGY, I CERTAINLY DON'T THINK THAT THAT CAN AFFECT, THAT CERTAINLY CAN'T WORK AGAINST MR. ZACK. WE CAN'T SPECULATE THAT IT WAS STRATEGY NOT TO RAISE THIS ISSUE BECAUSE HE FELT THOSE OTHER CLAIMS WERE MORE MERITORIOUS OR STRONGER CLAIMS. WE JUST DON'T KNOW WHY HE DIDN'T DO IT. HE SIMPLY COULD NOT HAVE REALIZED THAT IT WAS AN IMPORTANT ISSUE. THE STATE IS SAYING BECAUSE PERRY CAME OUT THREE YEARS LATER, HE, YOU KNOW, HE DIDN'T REALLY KNOW THAT THAT WAS AN ISSUE. THAT IS A POSSIBILITY. BUT THAT IS NOT REALLY CORRECT, WHEN YOU LOOK AT THE CASE LAW THAT WAS OUT THERE, SO HE WAS UNDER THAT MISIMPRESSION THAT BEATING A PREVIOUS GIRLFRIEND WAS NOT GOING TO BE CONSIDERED NONSTATUTORY AGGRAVATION. THAT WOULD BE DEFICIENT. IF YOU LOOK AT GERALDS AND HITCHCOCK AND HILDWIN, YOU CAN SEE THAT THAT WOULDN'T BE SORT OF AN EFFECTIVE WAY TO BE REVIEWING THE RECORD AND UNDERSTANDING THE LAW, HOLDING TO THOSE FACTS.

I ASSUME THAT COUNSEL ALSO FELT THAT THE TWELVE ISSUES COUNSEL DID RAISE WERE ALSO MERITORIOUS OR ELSE COUNSEL WOULDN'T HAVE RAISED THEM, SO WHEN YOU HAVE A LOT OF ISSUES ON APPEAL AND THE COMMON KNOWLEDGE THAT THE MORE ISSUES YOU RAISE, THE LESS FORCE EACH PARTICULAR ISSUE IS GOING TO HAVE IN A BRIEF, DO WE GIVE ANY KIND OF DEFERENCE AT ALL, TO COUNSEL FOR NOT RAISING A 13th MERITORIOUS ISSUE, WHEN COUNSEL RAISED TWELVE OTHERS?

WELL, I DON'T THINK WE CAN ASSUME ANYTHING ABOUT COUNSEL'S BEHAVIOR, BECAUSE WE HAVEN'T HAD THE OPPORTUNITY TO DEVELOP ANY KIND OF RECORD IN THAT REGARD, SO IT CERTAINLY SHOULDN'T BE USED AGAINST MR. ZACK THAT WE ARE SPECULATING ABOUT HE FELT THESE TWELVE ISSUES WERE MORE MERITORIOUS. IT COULD BE A WHOLE HOST OF REASONS WHY HE DIDN'T RAISE THIS SPECIFIC CLAIM.

SO WHY DO WE DO IN THAT KIND OF CASE? HAVE WE EVER REMANDED OR APPOINTED A REFEREE?

I BELIEVE AT THIS POINT, I DON'T HAVE THE CASE, ANY CASE I CAN FIND, BUT MY RECOLLECTION IS THAT THIS COURT HAS, IN VERY LIMITED CASES, REMANDED CASES ON HABEAS ISSUES, AND I DON'T KNOW THAT THAT WAS EVER TO DETERMINE WHAT THE STRATEGY OF COUNSEL WAS, BECAUSE I THINK THAT THERE HAVE BEEN OTHER ISSUES THAT WERE REMANDED BECAUSE THEY NEEDED A LITTLE BIT OF FACTUAL DEVELOPMENT.

CHIEF JUSTICE: BEFORE YOU SIT DOWN, YOU ARE IN YOUR REBUTTAL, YOU RAISED A CLAIM THAT WE HAVE NEVER, NEVER FOUND HAD MERIT, WHICH IS THAT THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL AT POSTCONVICTION, COUNSEL, BUT I DO WANT TO UNDERSTAND, WAS THE POSTCONVICTION COUNSEL IN THIS CASE, OBVIOUSLY WAS NOT YOU. A REGISTRY COUNSEL?

CORRECT.

AND WHY DID THE REGISTRY COUNSEL, I THOUGHT THEY HAD TO CONTINUE UNTIL THE CASE, UNTIL THE END OF THE CASE. WHAT WERE THE CIRCUMSTANCES?

OF MY REPRESENTATION?

NO. OF WHY THE REGISTRY COUNSEL DIDN'T CONTINUE.

BECAUSE I WAS REPRESENTING MR. ZACK. I WILL RESERVE THE REFS MY TIME FOR REBUTTAL. THANK YOU.

MAY IT PLEASE THE COURT. CHARMAINE MILLSAPS REPRESENTING THE STATE. TALKING ABOUT THE APPELLATE COUNSEL ISSUES, FIRST OF ALL IT WAS NOT PRESERVED. COUNSEL DID NOT RAISE THE NEAL CHALLENGE. AND PRESERVATION MATTERS EVEN MORE IN JURY SELECTION, BECAUSE THE REASON YOU REQUIRE TRIAL COUNSEL TO OBJECT TO THE FINAL JURY, IS BECAUSE JURY SELECTION IS AN ONGOING, CHANGING PROCESS, AND HE MIGHT END UP BEING HAPPY WITH THAT PARTICULAR JURY, AND IF HE DOES NOT RENEW THAT OBJECTION, THIS IS NOT SOME SORT OF TECHNICAL REQUIREMENT. THE REQUIREMENT THAT YOU RENEW THE OBJECTION, IS BECAUSE IT CAN CHANGE SO MUCH, THAT COUNSEL'S OBJECTION TO THAT JUROR --

CHIEF JUSTICE: SO WE HAVE NEVER, EVER, HAVE WE, ANALYZED THE JURY SELECTION UNDER A FUNDAMENTAL ERROR ANALYSIS? WE HAVE ALWAYS REQUIRED A TROTTER OR THAT IT BE PRESERVED.

YES. TROTTER AND JOYNER, YOU REPEATEDLY GAVE IT. I THINK IT IS THE LOGIC OF JOYNER IS THE REASON YOU CAN'T DO IT UNDER FUNDAMENTAL ERROR, BECAUSE SOMEBODY WORSE CAN ROTATE INTO THIS EARTH, AND SO COUNSEL MUST RENEW THAT FINAL OBJECTION. THIS WAS NOT

PRESERVED. IT IS, ALSO, DOESN'T HAVE ANY MERIT TO IT. THE PROSECUTOR'S OBJECTION WAS NOT MERELY THAT THEY HAD A FAMILIARITY WITH POST-TRAUMATIC STRESS DISORDER AND FETAL ALCOHOL SYNDROME. IT WAS TO THIS PARTICULAR CENTER THAT THESE TWO PROSPECTIVE JURORS WORKED AT. THE LAKE ABUSE CENTER, ACCORDING TO THE PROSECUTOR, HAD AN INTIMATE CONNECTION WITH THE CRIMINAL JUSTICE SYSTEM, AND HE DIDN'T LIKE THAT. AND PROSECUTORS ARE WELCOME TO NOT LIKE EMPLOYMENT AT A PARTICULAR PLACE, AND THAT IS WHAT HE DIDN'T LIKE, AND THAT IS NONRACIAL, AND SO THIS, ALSO, IS MERITLESS.

WASN'T THERE THREE PEOPLE THAT COUNSEL OBJECTED TO?

YES, THREE, BUT ONE WAS STICK PHONE CAUSE. SHE STARTED CRYING. THE JUDGE, HIMSELF, I AM ASSUMING THE ONE, YOU ARE TALKING ABOUT THE ONE, THERE WAS SOMETHING IN HER PAST THAT MADE HER, SHE COULD NOT HAVE SAT THROUGH TRIAL.

THIS WAS THE ONE WHERE HER SISTER WAS KILLED?

RIGHT. AND IT WAS CLEAR ON DIRECT. SHE WAS SOMETHING CLOSE TO CRYING, YOUR HONOR, SO THAT WAS A FOR-CAUSE CHALLENGE, THAT SHE ISN'T EVEN RAISING THAT. AS I UNDERSTAND WHAT SHE IS SAYING APPELLATE COUNSEL SHOULD HAVE RAISED IS THE TWO PROSPECTIVE JURORS THAT WERE NOT IN THAT CATEGORY, THE TWO THAT WORKED AT LAKE ABUSE CENTER, SHEILA GILHAM AND MS.^JONES, SO I DON'T THINK THAT SHE IS EVEN SAYING THAT COUNSEL WAS INEFFECTIVE, WITH REGARDS TO THAT ONE. AND THEN THE INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT RAISING NONSTATUTORY AGGRAVATION, COUNSEL NOT ONLY RAISED TWELVE ISSUES, HE WROTE 101-PAGE INITIAL BRIEF, SO WHAT HE WOULD HAVE HAD TO HAVE DONE IS DELETE ONE OF THESE ISSUES. THIS COULD NOT BE ISSUE NUMBER 13.

CHIEF JUSTICE: LET'S TALK ABOUT THE MERIT. DOES THE ISSUE HAVE MERIT OR NOT?

NO, BECAUSE AT THE TIME, IT IS NOT DEFICIENT PERFORMANCE, BECAUSE AT THE TIME, THE CASE THAT WAS AVAILABLE TO HIM WAS WALKER. PERRY WAS NOT AVAILABLE.

CHIEF JUSTICE: WE WILL GO BACK. IF THIS ISSUE WERE RAISED TODAY, DOES SHE HAVE, DOES MS.^McDERMOTT HAVE A POINT THAT IT WAS IMPROPER NONSTATUTORY AGGRAVATION?

IT WOULD, NO, AND HERE IS WHY. IN THIS PARTICULAR CASE, WHICH IS NOT TRUE IN PERRY, THE PROSECUTOR DID NOT ARGUE TO THE JUDGE THAT IT SHOULD BE ADMITTED AS AGGRAVATION. HE WAS REBUTTING THE HOT-BUTTON THEORY. THIS IS TO REBUT. THIS IS TRUE REBUTTAL EVIDENCE. THAT DIDN'T HAPPEN IN PERRY.

WE ARE SORT OF MIXING, SORT OF, HARMLESSNESS AND THEN THE RELEVANCEY, AS FAR AS WHAT THEIR EW THAT THIS WENT TO. DOES THE STATE TAKE A POSITION HERE, THAT THERE WERE OTHER WOMEN, FOR EXAMPLE, AND THEY COULD HAVE TESTIFIED AS TO THE DEFENDANT THAT HE WAS IN SOME WAY VIOLENT TOWARDS THEM. IS THAT USED BY THE STATE?

NO, YOUR HONOR. WE WOULD NOT HAVE USED THAT.

YOU ARE NOT POINTING OUT, LET'S SAY THAT THE STATE SAID, IN REBUTTAL TO THE TESTIMONY OF ONE OF THE EXPERTS PRESENTED BY THE DEFENDANT, THAT HE HAD A PARTICULAR VULNERABILITY, WITH REFERENCE TO HIS MOTHER, AND THAT IF SOMEBODY SAID SOMETHING ABOUT HIS MOTHER, THAT IT WAS A HOT BUTTON, AS WE CHARACTERIZED IT, SO THE STATE SAID, ALL RIGHT, SO THAT HAPPENED.

ONCE HE INTRODUCED IT, AND THIS DOES GO TO, THE STATE SAID, AFTER THAT TESTIMONY WAS PRESENTED, YOU ARE SAYING THE STATE COULD HAVE PRESENTED ANY WOMEN WHO HE HAD A VIOLENT ALTERCATION WITH.

NOT JUST ANY, REMEMBER, SHE, MORE THAN THAT. SHE, HE, WHAT THIS, YES. BUT YOU COULDN'T DO IT. IT WOULD HAVE HAD TO HAVE BEEN TAILORED TO THE HOT-BUTTON THEORY. TO REBUT. IT WOULD HAVE TO BE NARROW ENOUGH AND KEPT WITHIN THE NARROW BOUNDS, TO REBUT THAT, BUT, YES, WE COULD HAVE. WE COULD HAVE INTRODUCED THIS TO REBUT HIS HOT-BUON THEORY. ONCE HE PUTS THAT ON, AND REMEMBER HE IS PUTTING IT ON IN MITIGATION, I MEAN IN PENALTY PHASE AS MITIGATION.

YES.

WE ARE ALLOWED, FOR INSTANCE, IF HE GETS UP AND SAYS HE IS NONVIOLENT IN THE PENALTY PHASE, YES, WE COULD PROVE PRIOR VIOLENCE. TO REBUT THAT. SO, YES, WE CAN DO THAT. MOREOVER, THIS IS NOT CONSTITUTIONAL. NONSTATUTORY AGGRAVATION IS ADMISSIBLE. IT IS NOT A VIOLATION OF THE EIGHTH AMENDMENT, THE UNITED STATES SUPREME COURT.

NONSTATUTORY AGGRAVATION.

IS NOT A VIOLATION OF THE EIGHTH AMENDMENT. IT IS NOT ADMISSIBLE UNDER FLORIDA LAW. IT IS NOT A VIOLATION OF THE EIGHTH AMENDMENT THIS. IS NOT A CONSTITUTIONAL ISSUE. THE UNITED STATES SUPREME COURT HAS REPEATEDLY HELD THAT NONSTATUTORY AGGRAVATION IS ADMISSIBLE. THE FEDERAL DEATH PENALTY STATUTE ADMITS NONSTATUTORY AGGRAVATION. GEORGIA ADMITS NONSTATUTORY --

WHAT IS THAT GOING TO? IN OTHER WORDS, WE ARE LOOKING AT WHETHER A POINT SHOULD HAVE BEEN RAISED ON APPEAL, AND THIS POINT WOULD BE EVALUATED UNDER FLORIDA LAW, SO I AM NOT SURE I AM UNDERSTANDING WHAT RELEVANCE IT IS THAT SOMETHING ELSE HAPPENED AT THE FEDERAL LEVEL.

I WOULD USE IT AS PART OF HARMLESS.

THAT IS A PROPERLY PRESERVED OBJECTION, THAT UNDER FLORIDA LAW, NONSTATUTORY AGGRAVATION IS NOT ALLOWED.

RIGHT.

THAT WE COULD EVALUATE THE HARMLESSNESS THAT IT IS NOT A CONSTITUTIONAL ERROR?

WELL, BUT, IN PERRY, SOME OF YOUR LANGUAGE DID SEEM TO THINK IT WAS AN EIGHTH AMENDMENT VIOLATION. WE POINTED OUT THAT IT IS NOT AN EIGHTH AMENDMENT VIOLATION. BUT, YOUR HONOR, EVEN MORE, WHAT WAS AVAILABLE TO COUNSEL AT THE TIME WAS THE CASE OF WALKER. AND YOU HAD FOUND A COMMENT THAT YOU FOUND TO BE NONSTATUTORY AGGRAVATION, TO BE HARMLESS FOR TWO REASONS, AND THOSE TWO REASONS WERE PRESENT IN THIS CASE, TOO. COUNSEL WOULD HAVE THOUGHT, EVEN IF HE RECOGNIZED, THIS HE WOULD HAVE THOUGHT OKAY, UNDER WALKER ALL I AM GOING TO GET IS A RULING FROM THIS COURT THAT THIS IS HARMLESS. THIS ISNOT DEFICIENT, EITHER, BECAUSE HE WOULD HAVE THOUGHT, UNDER THE CASE LAW THAT WAS AVAILABLE --

DO WE NEED TO EVALUATE THE TWELVE ISSUES THAT WERE RAISED, TO SEE IF THEY LOOKED LIKE THEY WERE MUCH MORE MERITORIOUS, BECAUSE I DON'T KNOW IF THIS WAS A CASE THAT COUNSEL FELT, THIS IS HARMLESS, SO I WON'T RAISE IT.

I THINK THAT COUNSEL KNOWS THEY HAVE TO ADDRESS HARMLESS, AND TRULY I CAN'T IMAGINE --

IF SOMEBODY WOULD SAY WHEN YOU HAVE INCIDENCE OF, ASSUMING IT COULD BE ERROR AND YOU ARE SAYING IT IS RELEVANT, BUT THAT IT WOULDN'T HAVE SOME EFFECT ON THE JURY,

HEARING ABOUT NOT ONLY WAS THIS A VIOLENT MURDER BUT THEY ARE SAYING THIS WAS AN EMOTIONAL REACTION, AND THEN YOU HEAR ABOUT A LONG HISTORY OF ABUSING WOMEN, THAT THAT MIGHT NOT HAVE AN EFFECT ON A JURY, SO HOW IS, APPELLATE COUNSEL WOULD DECIDE I AM SURE THAT THE SUPREME COURT WILL REJECT THAT. YOU KNOW, I WOULDN'T THINK THAT WOULD GO INTO THE MIX OF A GOOD APPELLATE LAWYER ON A DEATH-PENALTY CASE.

WELL, I DISAGREE WITH WHETHER A GOOD APPELLATE LAWYER WOULD TAKE INTO CONSIDERATION ON THE ISSUE WHETHER IT IS HARMLESS, UNDER EXISTING CASE LAW. UNDER WALKER, YOU SAID, BECAUSE THE PROSECUTOR DID NOT USE IT AS AGGRAVATION AND DID NOT REFER TO IT AT CLOSING, AND THE JURY WAS NOT INSTRUCTED, SO IT WAS HARMLESS. THE FACTORS FOR WALKER ARE NOT HARMLESS. BUT COUNSEL, LET'S TALK ABOUT THE ISSUES THAT WERE RAISED, FOR INSTANCE. HE GOT TWO AGGRAVATORS STRICKEN ON APPEAL. THERE WAS A LOT OF MERIT TO CLAIMS HE DID RAISE. HE IS A BOARD-CERTIFIED APPELLATE SPECIALIST. HE WROTE A 101-PAGE INITIAL BRIEF AND A 43-PAGE REPLY BRIEF, ADDRESSING EIGHT OR NINE OF THE TWELVE ISSUES, AGAIN, SO HE, ALSO, WROTE IN REPLY TO THOSE, AND I JUST THINK IT IS NOT DEFICIENT PERFORMANCE, WHEN UNDER THE CASE LAW, THAT, A, HE DIDN'T, PERRY AND THE EXACT FACTS WERE NOT AVAILABLE TO HIM. THAT DECISION WAS NOT OUT.

YOU ARE SAYING THAT UNDER PERRY TODAY, IT WOULD HAVE BEEN PERFECTLY ADMISSIBLE.

YES. IT IS DISTINGUISHABLE.

WHAT WAS THE DIFFERENCE IN THE CASE AS TO THE DEFENDANT? IN OTHER WORDS, I AM HAVING A LITTLE DIFFICULTY WITH THE WAY THAT THIS GETS MIXED IN. IF THE STATE HAS ONE INITIAL THEORY, IN TERMS OF ITS PROSECUTION, AND NOW IN ESSENCE, SHIFTS GEARS AND SAYS, WELL, REALLY THE REASON THAT HE KILLED THIS WOMAN IS BECAUSE HE HAS A LONG HISTORY OF VIOLENCE TOWARDS WOMEN. I AM CONCERNED THAT WE END UP PUTTING THIS CASE IN A COMPLETELY DIFFERENT CONTEXT FOR A JURY. THAT IS, AS FAR AS WHAT THE JURY WOULD THINK, IF WE HAVE GOT SOMEBODY HERE THAT HAS SERIAL VIOLENCE AGAINST WOMEN, THEN WE HAVE GOT A COMPLETELY DIFFERENT PERSON THAN HAS INITIALLY BEEN DESCRIBED TO US, BOTH BY THE PROSECUTION AND THE DEFENSE, AS FAR AS THEIR THEORY OF, WHAT WAS THE STATE'S THEORY INITIALLY, AS FAR AS HOW THIS OCCURRED.

OUR INITIAL THEREY IS THAT HE IS A SERIAL RAPIST AND MURDERER. THAT IS WHAT THE PROSECUTION'S THEORY WAS. THAT WAS HIS INITIAL THEORY. WE DIDN'T CHANGE THEORIES.

WHY WASN'T THIS EVIDENCE, THEN, OFFERED INITIALLY, TO BE ONE OF THE SERIAL CRIMES, THAT, IN OTHER WORDS, THE EVIDENCE OF VIOLENCE AGAINST HIM.

IN THE GUILT PHASE, AS, LIKE, AN ELEMENT? BECAUSE IT DOESN'T GO TO ANY ELEMENT. I MEAN, WE COULDN'T DO THIS IN GUILT. WE PROBABLY COULDN'T EVEN DO IT IN PENALTY, UNTIL HE RAISES HIS HOT BUTTON DEFENSE. WE ARE USING THIS AS REBUTTAL TO MITIGATION, NOT DIRECTLY AS AGGRAVATION, AND CERTAINLY NOT AS PART OF THE GUILT PHASE.

AS FAR AS THE VIOLENCE AGAINST THE OTHER WOMEN, HE WAS NEVER CONVICTED OF A FELONY FOR ANY OF THOSE?

NO. WE NEVER, WE NEVER. NO.

I GUESS THAT IS WHAT JUSTICE ANSTEAD'S QUESTION IS, IS COULD YOU HAVE INTRODUCED IT AS ANY KIND OF AGGRAVATOR IN YOUR CASE-IN-CHIEF IN THE PENALTY PHASE, AS A PRIOR VIOLENT FELONY OR SOMETHING LIKE THAT.

NO. IT PROBABLY WOULD NOT QUALIFY AND WE WOULDN'T HAVE USED IT AS AGGRAVATION. WE LIMITED OUR THEORY TO THOSE TWO IN THE GUILT PHASE AND DIDN'T BRING IN THE OTHER

MURDERS. WE DIDN'T EXPAND IT TO THE TWO MURDERS AND RAPE THAT WE --

WHAT WAS THE EXTENT OF THE EVIDENCE OF THIS, QUOTE, HOT BUTTON ISSUE, PRESENTED BY THE DEFENSE?

HE CALLED FOUR. HE CALLED FOUR MENTAL EXPERTS IN PENALTY PHASE. HE CALLED DR. CROWN, DR. LARSON, DR. MAY HER, AND MANY OF THEM THAT, IS WHAT HE WAS TRYING, THEY WERE TRYING TO EXPLAIN HIS BACKGROUND. HE HAD CALLED FOUR MENTAL HEALTH EXPERTS, AND THE STATE, THE PROSECUTOR DID NOT SAY, HE SAID I AM TRYING TO REBUT WHAT WE JUST HEARD.

ALL FOUR TESTIFIED THE SAME WAY? THEY ALL TESTIFIED THAT HE KILLED THIS WOMAN BECAUSE THERE WAS SOME REFERENCE TO HIS MOTHER DURING THE ALTERCATION?

MOST OF THEM DID. YES. SOME OF THEM, YES. MOST, THAT WAS, MOST OF HIS, DR. CROWN AND DR. LARSON AND DR. SPENSE AND DR. MAYER, MOST OF TESTIMONY WAS, NOW, HE WAS ALSO TRYING TO EXPLAIN HIS MENTAL BACKGROUND. BOTH STATUTORY MENTAL MITIGATORS WERE FOUND, BASED ON THAT TESTIMONY, AS WAS DIRECT, SO THEY WERE REALLY GOING FOR THE STATUTORY MITIGATORS, AND THIS DEFENDANT DID HAVE A HISTORY, LONG HISTORY, STARTING AT ELEVEN, TWELVE YEARS OLD, AS FAR AS BEING TREATED BY THE MENTAL HEALTH COMMUNITY FOR BEHAVIORAL PROBLEMS, SO THEY WERE GOING THROUGH ALL OF THAT FOR THE PURPOSE WHICH THEY ACHIEVED, OF GETTING THE TWO STATUTORY MENTAL MITIGATORS.

BUT THEY ALL TESTIFIED THAT THEY WERE TOLD THAT, DURING THIS ALTERCATION THERE WAS SOME REFERENCE TO HIS MOTHER, AND THAT THAT WAS A FLASH POINT FOR HIM THAT CAUSED THE VIOLENCE.

YES. I MEAN, THAT, THEY WERE TRYING TO EXPLAIN, AND MANY OF THEM DID EXPLAIN, HIS HISTORY. THAT A LOT OF THIS STARTED WHEN HIS SISTER KILLED HIS MOTHER. NOW, HE CLAIMED ON THE TAPE THAT HE SAW IT, BUT IN FACT HE WAS HUNDREDS OF MILES WAY.

WAS THAT POST-TRAUMATIC?

FROM THAT INCIDENT.

AND WAS THIS INCIDENT RELATE TO DO THAT THEREY?

YES. THE THEORY IS, HE HAS ANGER TOWARD WOMEN, AND THIS IS HIS OWN THEORY.

THE DEFENSE THEORY. WHAT WAS THE DEFENSE THEORY IN EXPLAINING HOW THE UNDERLYING CIRCUMSTANCES OF THIS MURDER RELATED TO HIS PTSE.

THAT HE VIEWS WOMEN AS HAVING TAKEN THINGS FROM HIM. HIS MOTHER. HIS CHILD. HE SAID THAT, HIMSELF, IN THE CONFESSION, AND THEN THEY TALK ABOUT HOW THIS WOULD AFFECT YOU AS A CHILD, TO HAVE YOUR MOTHER KILLED.

DID ANY OF HIS EXPERTS INTERVIEW HIS PRIOR WIFE?

DR. McCLARIN DID. THAT IS WHERE HE GETS THIS. I THINK THEY CROSSED ON SOME OF THEM, AND THEY HAVE NOT TALKED AS MUCH TO THE PEOPLE ASSOCIATED WITH THEM. THAT WAS ONE OF THE AREAS, I THINK, THE PROSECUTOR CROSSED SOME OF THEM, THE FACT THAT SOME OF THEM DIDN'T SEEM TO KNOW AS MUCH ABOUT HIS INTERPERSONAL RELATIONSHIP BACKGROUND AS DR. McCLARIN DID.

DID THE PROSECUTOR TRY TO CROSS-EXAMINE THE DEFENSE WITNESSES, BY BRINGING IN THIS

TESTIMONY OF THE EX-WIFE OR THE OPINION OF DR. McCLARIN? MY UNDERSTANDING IS THE ONLY REFERENCE IN THIS RECORD, IS IN REBUTTAL, THE STATE PUTS ON DR. McCLARIN. HE MAKES HIS REFERENCE. THAT IS IT. THE PROSECUTOR DIDN'T BRING ON THE PRIOR WIFE AND DID NOT TRY TO CROSS-EXAMINE OR IMPEACH THE DEFENSE WITNESSES' POSITIONS BY THE SAME ARGUMENT. IS THAT CORRECT OR INCORRECT?

YES. HE WAS NOT, HE DID NOT TRY TO BRING ON, I THINK SHE IS MORE A GIRLFRIEND THAN AN EX-WIFE.

I AM SORRY.

BUT WE DID NOT TRY TO GET HER DIRECTLY. NO. THEY NEVER TRIED TO CALL HER.

DID THE PROSECUTOR EVER ATTEMPT TO IMPEACH THE DEFENSE EXPERT WITNESSES BY THIS EVIDENCE?

NO. THERE WAS SOME COMMENT WITH THE EXPERT ABOUT HOW THEY WEREN'T AS FAMILIAR WITH THE DEFENDANT A POSITION BACKGROUND, THAT THEY HAD NOT GONE AS FAR, AND THEY LEFT OPEN WHAT THEY MEANT BY THAT. THE PROSECUTOR DID REFERENCE THAT HE WAS NOT AS FAMILIAR WITH THE DEFENDANT AND HIS INTERPERSONAL RELATIONSHIPS. THE STATE WOULD ASK YOU TO AFFIRM THE TRIAL COURT'S DENIAL OF THE 3.850 RELIEF AND THE HABEAS.

I DO HAVE TO SAY THAT THE STATE HAS MISREPRESENTED A FACT THAT IS VERY IMPORTANT. AS TO THE FIRST JUROR, JUROR GILHAM, THE PROSECUTOR DID NOT SAY IT WAS ABOUT WHERE SHE WORKED. THE PROSECUTOR SAID THE REASON HE WAS STRIKING HER WAS BECAUSE SHE HAD FAMILIARITY WITH THE MENTAL HEALTH DISORDERS THAT THE DEFENSE WAS GOING TO BE PRESENTING. THAT WAS NOT TRUE. SHE DID NOT RESPOND WHEN THE DEFENSE ASKED SPECIFICALLY IS ANYONE FAMILIAR WITH PTSE OR IS ANYONE FAMILIAR WITH FETAL ALCOHOL SYNDROME. SHE WORKED AT THE CENTER THAT CAME OUT IN INITIAL QUESTIONING, BUT SHE NO FAMILIARITY, ON THIS RECORD, OF ANY OF THE ISSUES, SO THAT FACT IS INCONSISTENT.

WAS THAT POINTED OUT, WHEN THEY WERE DISCUSSING THE STATE'S REASONS FOR EXERCISING THE CHALLENGE, WAS IT POINTED OUT THAT SHE DID NOT HAVE THAT FAMILIARITY?

IT WAS APPOINTED OUT THAT, THEN WHEN THE STATE TRIED TO SAY IT IS BASED ON WHERE THEY WORKED, THE TRIAL COUNSEL SAID I DON'T THINK THAT THAT IS AN ADEQUATE REASON, AND THE JUDGE AGREED. I DON'T THINK JUST BASED ON WHERE THEY WORKED IS AN ADEQUATE REASON, YET HE STILL WENT ON TO ALLOW THE STRIKE TO COVER. SO I DON'T THINK DEFENSE COUNSEL SPECIFICALLY SAID THERE IS AN INCONSISTENCY. HE OBVIOUSLY DIDN'T HAVE THE RECORD IN FRONT OF HIM, TO SHOW WHAT SHE HAD SAID IN THE VOIR DIRE OR WHAT SHE DIDN'T SAY --

WERE ALL OF THE PREEMPTORY CHALLENGES USED IN THIS CASE?

I DON'T RECALL THAT FACT, YOUR HONOR.

SO THERE WAS NO, AT THE END OF VOIR DIRE, THERE WASN'T ANY PERSON THAT THE DEFENSE WANTED TO STRIKE BUT THEY HAD USED UP THEIR PREEMPTORY CHALLENGES OR ANYTHING LIKE THAT?

RIGHT. NOT TO MY KNOWLEDGE, AND THEN JUST QUICKLY TO MOVE ON TO THE NEXT ISSUE ABOUT THE NONSTATUTORY AGGRAVATION. THE INFORMATION WAS PRESENTED THROUGH DR. McCLARIN, AND THAT WITNESS, CANDACE FLETCHER, DID ULTIMATELY TESTIFY, BUT SHE WASN'T QUESTIONED IN REGARD ABOUT THE PRIOR ABUSE, BUT IN THIS WHOLE ISSUE ABOUT PTSE AND THAT DIAGNOSIS --

THE REASON THAT YOU DON'T HAVE A VICTIM COMING IN THROUGH A DOCTOR, DOES THAT INFLUENCE A HARMLESS ERROR {SNALZ}.

I WOULD SAY IT RECEIVE EVEN WORSE, BECAUSE IT APPEARS THAT THE DEFENSE DIDN'T HAVE ANY ABILITY TO CROSS-EXAMINE THAT WITNESS. IN PERRY, IT CAME IN THROUGH THE ACTUAL VICTIM OF THE ABUSE, AND THE DEFENSE WAS ABLE TO CROSS-EXAMINE AND LEARN THAT THIS WAS GOING ON WHILE MR. PERRY WAS INTOXICATED. WHETHER OR NOT THAT DECREASED HIS LEVEL OF CULPABILITY AS TO THE ABUSE, YOU KNOW, I DON'T KNOW IF THE JURY REALLY TOOK IT THAT WAY, BUT IN THIS CASE WITH DR. McCLARIN TESTIFYING TO THE HEARSAY, THERE WAS NO ABILITY TO CROSS-EXAMINE AND FIND OUT WAS THERE ANY SORT OF, ANYTHING THAT MAY HAVE, LIKE, PLAYED INTO THIS WHOLE ABUSE AND REALLY HOW OFTEN WAS IT? I MEAN, IT WAS DR. McCLARIN SAYING THIS HAPPENED OVER AND OVER AND OVER AGAIN, BASED ON WHAT HE WAS TOLD, SO I THINK IT ACTUALLY MAKES IT WORSE.

WAS THIS IN HIS WRITTEN REPORT?

IN DR. McCLARIN'S WRITTEN REPORT? I DON'T THINK IT WAS. I THINK THAT IT JUST CAME UP AT THE PENALTY PHASE, AND --

WHAT I AM TRYING TO GET TO IS THE DEFENSE COUNSEL, PRIOR TO THE PENALTY PHASE, HAVE KNOWLEDGE THROUGH THE WRITTEN REPORT OR DEPOSITION OF DR. McCLARIN, THAT DR. McCLARIN WOULD BE TESTIFYING ABOUT THIS?

NO. BECAUSE THIS ISSUE CAME UP, WHEN YOU LOOK AT THE RECORD, YOU CAN SEE THAT IT IS COMING UP RIGHT AT THE MOMENT WHEN DR. McCLARIN MAKES THE STATEMENT HE HAS GOT HOSTILITY TOWARDS FEMALES, AND THEN DEFENSE COUNSEL IS JUMPING UP OBJECTING AND THEN THIS WHOLE ISSUE COMES UP, AND HE SAYS IT IS NOT RELEVANT. YOU KNOW, AND THE STATE IS SAYING WE ARE GOING TO BE CALLING THE VICTIM AND WE ARE GOING TO BE CALLING CANDACE FLETCHER, SO IT REALLY ARRIVES AT THE PENALTY PHASE.

IT IS REALLY DIFFERENT THAN, YOUR HONOR, I HAVEN'T HEARD ANYTHING ABOUT THIS. I DON'T KNOW ANYTHING ABOUT THE PRIOR GIRLFRIEND OR THIS HAS CAUGHT ME BY SURPRISE S THERE ANYTHING IN THE RECORD TO INDICATE THAT THIS TESTIMONY WAS A SURPRISE TO DEFENSE COUNSEL?

ONLY JUST WAY THAT IT TRANSPIRES, THAT HE, AT THAT POINT, STARTS MAKING THE OBJECTIONS AND ARGUING THAT IT SHOULDN'T BE ADMISSIBLE, BUT HE DOESN'T SPECIFICALLY STATE I HAVE NO PROBLEMS WITH THIS.

DIDN'T THE DEFENDANT, ONE OF MY PROBLEMS WITH THIS IS THAT WE HAVE A DEFENDANT WHO ALSO TESTIFIED ABOUT THIS KIND OF BEHAVIOR, IN HIS DIRECTION, DIDN'T HE?

NO. HE NEVER TESTIFIED ABOUT THIS BEHAVIOR. HE MADE AN OFFHAND COMMENT IN HIS STATEMENT --

DID HE ASK ABOUT FIGHTING WITH HIS GIRLFRIEND, DURING DIRECTION?

I DON'T RECALL, I ACTUALLY DON'T RECALL. THAT I APOLOGIZE. I WOULD ASK THIS COURT REVERSE THE LOWER COURT'S FINDING AND ISSUE A NEW TRIAL FOR MR. ZACK. THANK YOU.