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Franklin Delano Floyd v. State of Florida

MARSHAL: PLEASE RISE. PLEASE BE SEATED.

CHIEF JUSTICE: THE LAST CASE ON THE COURT'S CALENDAR FOR THIS MORNING, IS FLOYD VERSUS THE STATE OF FLORIDA. MR. CONNOR, ARE YOU READY?

JUSTICES, GOOD MORNING. MAY I PLEASE THE COURT. I AM DOUGLAS CONNOR REPRESENTING THE APPELLANT IN THIS CASE, FRANKLIN FLOYD. THIS IS A, FROM FIRST-DEGREE CONVICTION OF MURDER AND SENTENCE OF DEATH IMPOSED IN PINELLAS COUNTY. IN MARCH 1995, SKELETAL REMAINS WERE FOUND BY HIGHWAY WORKERS IN PINELLAS COUNTY.

MR. CONNOR, YOU KNOW THAT YOU KNOW THAT WE ARE VERY FAMILIAR WITH THE FACTS AND I THINK YOU HAVE SOME SUBSTANTIAL POINTS TO ARGUE. DO YOU WANT TO TELL US WHICH POINTS YOU ARE GOING TO ARGUE AND PROCEED FROM THERE.

OKAY. YES. I PLAN TO ADDRESS THE ISSUE TWO, WHICH IS THE ADMISSION OF THE COLLATERAL CRIME EVIDENCE. I, ALSO, ISSUE THREE, WHICH IS THE ADDITION OF THE PHOTOGRAPHS, AND ISSUE FOUR, ALSO, TIME PERMITTING, WHICH WAS TESTIMONY BY AN FBI EXAMINER, REGARDING COMPARISONS.

SO WHY DON'T YOU GET RIGHT INTO THE ISSUE ABOUT THIS IS THE COLLATERAL CRIME OF THE KIDNAPING AND THE STEALING OF THE TRUCK IN WHICH THE PHOTOGRAPHS WERE FOUND.

YES. YES. THIS WAS, OCCURRED APPROXIMATELY FIVE YEARS AFTER THE HOMICIDE, WHICH IS IN QUESTION HERE. AND IT WAS IN OKLAHOMA. MR. FLOYD KIDNAPPED AN ELEMENTARY SCHOOL PRINCIPAL AND A FIRST GRADE CHILD, LEFT THE PRINCIPAL TIED TO A TREE IN THE WOODS AND THEN TOOK THE PRINCIPAL'S VEHICLE, WHICH WAS A PICKUP TRUCK, AND THE CHILD AND DROVE AWAY.

WHY DIDN'T, WHY ISN'T IT SUFFICIENT WITH THE TRIAL, WHAT THE TRIAL JUDGE DID HERE, TO SANITIZE, BECAUSE YOU MUST AGREE THAT THE PHOTOGRAPHS WERE SOMETHING OBTAINED THAT WAS SOMETHING THAT WAS DIRECTLY

OUR POSITION IS THE SAME AS DEFENSE COUNSEL AT TRIAL, WHICH WAS THAT, YES, WHAT IS RELEVANT IS THAT HE HAD POSSESSION OF THE ELEMENTARY SCHOOL PRINCIPAL'S TRUCK, AND HE WOULD STIPULATE THAT HE STOLE THE TRUCK, YOU KNOW, WAS NOT THE PRINCIPAL'S INTENTION TO LET HIM USE THE VEHICLE, BUT HE HAD POSSESSION OF THAT TRUCK, AND SO THAT WOULD GIVE HIM AN OPPORTUNITY TO HAVE, TO PUT THE PHOTOGRAPHS THERE. AND IT IS OUR POSITION AND STILL IS, THAT THAT IS ALL THAT SHOULD HAVE COME BEFORE THE JURY.

WHAT ABOUT THE FACT THAT HE, WHERE HE PARKED NEXT TO THE HAY BALS, AND THAT THERE WERE ITEMS THAT HE WAS REMOVING TO THE TRUCK.

WHAT HE DID IS HE TOLD THE PRINCIPAL AND FIRST GRADE CHILD TO GO TO WHERE HE HAD A MAKESHIFT CAMPGROUND. HE HAD HIS SLEEPING BAG THERE. IT WAS HIS STUFF. IT IS WHERE HE LIVED AT THAT PARTICULAR POINT IN TIME.

SO WHY AREN'T THOSE DETAILS , AND , A GAIN , UNDERSTANDING THAT YOU SE EM TO AGREE THAT THIS IS AN ORDINARY WILLIAMS RULE SITUATION. THIS IS NOT TO SHOW A N INEXTRICABLY INTERTWINED. THIS IS TO SHOW THE BASIS FOR THE PHOTOGRAPHS BEING I N THIS TRUCK THAT DID NOT BELONG TO HIM, SO WHY ISN 'T, ALSO, THE FACT THAT HOW HE GOT THERE , THE FACT OF WHERE THE TRUCK WAS PARKED , THE FACT OF THE LO ADING I N O F THE PROPERTY, ALSO , R ELEVANT TO THE S T ATE'S CASE.

WELL , THAT HAS SUCH MARGINAL RELEVANCE, THAT I WOULD SAY EVEN THAT SHOULD BE EXCLUDED ON THE 403 ANALYSIS, BUT EVEN I F WE SAY, WELL , WE COULD HAVE LET THAT I N , I MEAN , THE POINT IS, REA LLY , THE EV IDENCE WASN'T SANITIZED. THAT IS WHAT THE TRIAL JUDGE SAID SH E WAS DOING , BUT IT REALLY WASN'T , BECAUSE WHAT SHE DISALLOWED WAS MENTION OF A GUN GUNN AND MENTION OF THREATS OF DEATH. NOW , IT WAS VERY CLE AR TO THE JURY AND THE PRINCIPAL , HIMSELF , SAID, WELL , NO, HE DIDN'T CONSEN T TO G O ALONG ON THIS , HE DIDN'T CONSEN T TO GO WITH MR . FLO YD I N THE TRUCK. IT WAS OBVI OUS THAT THERE MUST HAVE BEEN A WE APON USED , THERE MUST HAVE BEEN SOME SORT OF THRE ATS. THEY WEREN'T GOING OUT FOR A PICNIC OR ANYTHING LIKE THAT , AND SO THAT IS WHY I SAY THE FACT THAT THAT WAS SANITIZED , DOESN'T REALLY MA TTER , BECAUSE THE JURY OBVIOUSLY UNDERSTOOD THAT THERE MUST HAVE BEE P A WE APON AND THERE MUST HAVE BEEN A WEAPON AND TH ERE MUST HAVE BEEN THREATS , OR EL SE THE PRINCIPAL WOULDN'T HAVE TAKEN A FIRST GRADER OUT OF THE CLASSROOM AND OFF WITH FLOYD I N A TRUCK.

THE QUESTION I HAVE, BECAUSE I MI GHT AGREE THE FACT WHY DO YOU NEED TO SHOW THAT HE WAS TIED TO THE TREE , , THAT FACT , B UT I N CON TEXT , HOW DID THAT BECOME SO INFLAMMATORY, I MEAN , CONSIDERING THE FACTS OF THIS CRIME AND THE O VERALL SITUATION , WAS THIS, THIS BECOME A HIGHLIGHT OF THE STATE'S CASE?

WELL, IT DID , AND IT IS ALSO, REALLY , THE MOST INFLAMMATORY PART. YOU KNOW, THE FACT OF THE MATTER IS , IS THAT YOU KNOW , THE D ANCERS FROM CLUBS ARE OFTEN VICTIMS OF CRIM ES, AND SO, YOU KNOW, BUT TO SHOW FLOYD, WHAT THEY HAD TO SHOW ABOUT MR. FLOYD BECAUSE THEY N EVER CONN ECTED HIM AT AL L TO THE ACTUAL SHOOTING OF THE DA NCER , WHICH IS WHAT CAUSED HER DEA TH. THEY HAD NO CONNECTION WHATSOEVER , YOU KNOW , EVIDENCE ON THAT PART . WHATSOEVER. WHAT THEY HAD TO SHOW, THAT HERE WAS THE PERSON WHO COULD DO OUTRAGEOUS LY DRAMATIC, YOU KNOW , VIOLENT ACTS, AND THAT IS WAS TO CONVINC E THE JURY , IF YOU SHOWED THEM THAT THEY WOULD , HE WOULD DO SOMETHING EVEN WORSE , IF SOMETHING CA N BE WORSE , YOU KNOW, THAT WAS REALLY A PART OF THEIR , THAT WAS THE REASON THAT THE STATE WANTED THIS EVIDENCE I N.

HOW LONG DID THE TRIAL LAST ?

IT WAS A LONG TRIAL. I AM NOT SURE IF IT WAS TEN DAYS OR LESS .

THIS TRANSCRIPT, THIS IS , LIKE , TEN P A GES AFTER TEN -DAY, TEN PAGES OF THE TRANSCRIPT OF A TEN- DAY TRIAL IS WHAT THIS EVID ENCE CONSUMES APPROXIMATELY.

WELL , NOW , WHEN I SAY TEN DAYS, I AM TALKING ABOUT JURY SELE CTION AND THERE I S APPROXIMATELY TEN PAGES , BUT IT IS NOT THE NUMBER OF PAGES , IT IS NOT THE LE NGTH OF THE TESTIMONY. IT IS THE INFLAMMATORY NATURE OF THE SPEAKING OF THE CRIME.

WAS IT REFERENCED I N OPENING STATEMENTS OR CLOSING ARGUM ENTS BY THE STATE?

I AM PRETTY SUR E THAT IT WAS MENTIONED I N CL OSING , BUT I CAN'T VOUCH FOR THAT. I DON'T REME MBER SPECIFICALLY.

BUT CERTAINLY YOU WOULD REMEMBER IT , YOU HAVE MA DEAN ARGU MENT WHAT THE

STATEWOULD HAVE ARGUED , CERTAINLY IF THEY HAD USED THIS TO SAYHERE IS A GU Y THAT IS CAPABLE OF ANYTHING , HE KIDNAPPED A YOUNG C HILD AND A PRINCIPAL , NOW YOU WOULD BE TALKING ABOUT A DIFFERENT ISSUE. YOU DON'T POINT TO ANYTHING IN CLO SING ARGUMENT OF THAT NATURE.

NO. NO. NOT OF THAT N ATURE , NO.

THE COURT ALSO GAVE A LIMITING INSTRUCTION AS TO THEY HAVE HAD , CORRECT?

WELL , WHAT THE COURT DID , IT WAS ACTUALLY, TO MY OPINION WAS NOT LIMITING. IT WAS AN AGGRAVATING INSTRUCTION , BECAUSE I HAVE NEVER SEEN A JUDGE TELL THE JURY WHAT A WIT NESS I S GO ING TO TESTIFY FOR THE PROSECUTION, BE FORE THE WITNESS ACTUALLY TESTIFIED , AND THAT IS WHAT SHE DID. SHE , BEFORE THEY PRESENTED THE WITN ESS, THE JUDGE TO LD THE JURY HE IS GOING TO TESTIFY TO THIS , HE IS G OING TO TESTIFY TO THAT , HE IS G OING TO TESTIF Y TO THIS, AND FO CUSING THEIR ATT ENTION ON THIS IS A VERY IMPORTANT PART OF THE TR IAL.

IS THERE AN OBJECTION TO THAT LIM ITING INSTRUCTION?

THERE WAS NOT .

IT SEEMS TO ME, AGAIN , THAT EVERYTHING THAT THE JUDGE ATTEMP TED TO DO , IN THAT THE PROSE CUTOR WAS ASKING LEADING QUESTIONS, WAS, ALL , DESIGNED TO MAKE SURE IT DIDN'T GO B E YOND WHAT HAD BEEN DEGREED TO.

WELL , IT WHAT HAD BEEN A GREED TO .

WELL, IT WASN'T AGREED TO. THAT WAS HER RULING.

WHAT HAD BEEN DISCHARGED

AND THE FACT OF THE R ULING ITSE LF , WAS BASED ON A VERY FA ULTY LEGALREASONING , BECAUSE SHE ADMITTED THIS ON THE I DEA THAT IT SHOWED HIS STATE OF MIND AND REFERRED TO CASES VASQUEZ AND CA RUSO . NOW , THOSE ARE CASES WHERE COLLATERAL CRIME WAS ADMITTED, IN ORDER TO SHOW THE DEFENDANT'S STATE OF MIND WHEN HE COMMITTED THE CRIME FOR WHICH HE WAS BEING TRIED. NOW, THIS CRIME HAPPENED FIVE YE ARS AFTER THE COMMESO HOMI CIDE, SO THERE IS NO WAY THAT HIS STATE OF MIND FIVE YEARS LATER, COULD HAVE BEEN RELEVANT TO

I THOUGHT THAT WAS WHY SHE ALLOWED IN THE WHOLEPACK OF PHOTOGRAPHS. NO. YOU ARE SAYING THERE WAS A RULING ABOUT LETTING IN THIS EVIDENCE OF THE KIDNAPING , WAS TO SHOW HIS STATE OF MIND?

IF I CAN READ FROM , I AM SORRY , I DON 'T HAVE THE ORDER WITH ME .

CHIEF JUSTICE: OKAY.WELL, WE CAN LO OK AT THAT.

THERE IS A ORDER THAT SPECIFICALLY SAID IT WAS BEING ADMITTED TO SHOW STATE OF MIND AND C ITED VASQUEZ AND CAR USO , DECISIONS BY THIS COURT AS AUTHORITY FOR ADMITTING THE WHOLE TESTIMONY ABOUT THE TYING THE PRINCIPAL TO THE TREE AND THE WHOLE KIDNAPING AND CARJACKING IN CIDENT .

CHIEF JUSTICE: AND YOU WANT TO GO ON TO THE PHOTOGRAPHS.

OKAY . PHOTOGRAPHS , NOW , IN THIS, IN THESE PHOTOGRAPHS THAT WERE FOUND, IT WAS IN AN

ENVELOPE CONTAINED 97 PHOTOGRAPHS ALL TOGETHER . NOW , 16 OF THEM WERE OF COMMESSO, WHEN SHE WAS BOUND AND HAD BEEN BEATEN . NOW , SEVEN , OUT OF ALL OF THOSE 97 , SEVEN WERE ACTION CLUED BY THE SEVEN WERE EXCLUDED BY THE TRIAL JUDGES BEING OUTRAGEOUS CHILD PORNOGRAPHY. HOWEVER, SHE ADMITTED THAT A LOT OF THE PHOTOGRAPHS THAT SHE WAS LETTING INTO EVIDENCE WOULD BE CONSIDERED CHILD PORNOGRAPHY AS WELL.

I AM NOT SURE IF THE COUNSEL EVER IDENTIFIED SPECIFIC PHOTOGRAPHS THAT WERE OBJECTIONABLE AS OPPOSED TO GROUPS OF PHOTOGRAPHS OR THE PHOTOGRAPHS IN GENERAL.

COUNSEL'S POSITION WAS SIMPLY THAT ANY NUDE PHOTOGRAPHS , YOU KNOW , PARTICULARLY OF PEOPLE WHO WERE UNKNOWN AT ALL , WERE NOT AT ALL RELEVANT AND SHOULD NOT BE ADMITTED . THERE WERE ALSO SPECIFIC OBJECTION TO SAY USING SO MANY PHOTOGRAPHS OF A CHILD WHO WAS CLOTHED , BUT WHO WAS POSED IN WHAT MIGHT BE CONSIDERED SEXUALLY EVOCATIVE TYPE POSES.

THE REASON THE STATE WANTED THEM INTRODUCED AND THE REASON THE COURT ALLOW THEM INTRODUCED, IS BECAUSE MANY OF THE POSES ARE THE SAME POSES IN WHICH THE VICTIM WAS FOUND IN SOME OF THOSE PICTURES AS WELL.

NO, YOUR HONOR. THAT IS INCORRECT. IN FACT , WHAT THE JUDGE SAID , THE PHOTOS ARE SIMILAR IN KIND TO SHARON . NOW , SHARON WAS SHARON MARSHAL , WHO WAS LIVING WITH MR . FLOYD , WHEN HE WAS USING THE NAME WARREN MARSHAL. SHE WAS LIVING AS HIS DAUGHTER. SHE LATER BECAME HIS WIFE. AND THERE WERE PHOTOGRAPHS OF HER THAT WERE IN THIS COLLECTION.

ALL RIGHT. AND THE PICTURES OF SHARON, THE FACT THAT THESE PHOTOGRAPHS WERE FOUND IN THAT CAR, THAT HE STOLE , AND THE FACT THAT THIS WAS SHARON , PUT HIM , CONNECTED HIM WITH SHARON , CORRECT?

WELL

AND CONNECTED HIM WITH THE OTHER CHILDREN AND WITH THE VICTIM. IT WAS ALL TIED TOGETHER, WASN'T IT?

WELL, IT IS CONNECTED , YES. SHARON MARSHAL HAD BEEN A DANCER WITH CHERYL COMMESSO , WHO WAS THE VICTIM. SO THEY WERE CONNECTED AND ALSO THE FACT THAT THERE WERE PHOTOGRAPHS OF PEOPLE WHO FLOYD KNEW THAT WERE AMONG THESE 97.

SOME WERE OF AN OTHER DANCER'S OR ANOTHER FRIEND'S DAUGHTER, AS WELL?

FRIEND'S DAUGHTER.

AND SHE WAS IN THE SAME CLOTHES IN THOSE PICTURES AS OTHER PICTURES THAT THE FRIEND IDENTIFIED AS HER DAUGHTER WEARING.

YES. THERE WERE , THE FRIEND BROUGHT IN SOME PICTURES THAT FLOYD HAD TAKEN OF NORMAL PHOTOGRAPHS OF HER CHILD THAT HAD BEEN TAKEN AT THE SAME TIME , WHICH WERE COMPARED TO THE ONES THAT HE , YOU KNOW , HAD POSED DURING THE SAME TIME PERIOD.

SO THAT WAS RELEVANT TO SHOW THAT FLOYD POSSESSED THESE PICTURES, NUMBER ONE , AND HE COULD HAVE TAKEN THE PICTURES, NUMBER TWO.

YES.

AND THEY WERE PART OF THE PICTURES THAT WERE INCLUDED IN THE '97 WITH IN THE 97 WITH THE PICTURES OF THE VICTIM.

THAT'S CORRECT.

SO THEY CONNECTED THEM ALL TOGETHER, AND, ALSO, DID SOME OF THE PICTURES ALSO PORTRAY A SOFA IN THE BACKGROUND THAT SOME OF THE WITNESSES IDENTIFIED AS BELONGING TO THE DEFENDANT?

WELL, THOSE WERE THE PHOTOGRAPHS OF THE VICTIM, HERSELF. COME ON. THERE WERE NO OTHER PHOTOGRAPHS, THOUGH, OF THE WE ARE SAYING THOSE PHOTOGRAPHS ARE DEFINITELY RELEVANT. THOSE DEFINITELY SHOULD HAVE BEEN.

ONES OF THE VICTIM, YOU AGREE ARE RELEVANT, BUT OBVIOUSLY HE COULD ARGUE THAT, WELL, ANYONE COULD HAVE TAKEN THE PHOTOGRAPHS OF THE VICTIM, SO, NOW DO YOU AGREE THAT PHOTOGRAPHS OF THE VICTIM AND PHOTOGRAPHS OF SHARON, HIS DAUGHTER / WIFE, ALSO WOULD CONNECT UP HIM AS BEING THE ONE THAT, PERSON THAT TOOK ALL THE PHOTOGRAPHS?

WELL, IT CERTAINLY WAS, HAD TO BE THE STATE'S CASE THAT, YOU KNOW, THAT THESE WERE ALL HIS PHOTOGRAPHS, YOU KNOW, OTHERWISE THAT THEY WERE JUST HER E, A BUNCH OF PHOTOGRAPHS AND WE DON'T KNOW WHO THEY ARE.

SO WHY ISN'T IT THERE FOR RELEVANT, OTHER THAN THE ONES THAT WERE EXCLUDED AS BEING SO OUTRAGEOUS THAT ANY PROBATIVE VALUE WAS OUTWEIGHED BY THE PREJUDICE, CAN YOU POINT, ARE THERE OTHER PHOTOGRAPHS THAT WERE LET IN THAT WERE SIMILARLY SO OUTRAGEOUS, BECAUSE, A GAIN, YOU ARE CONCEDED THAT THE PHOTOGRAPHS OF THE VICTIM SHOULD HAVE COME IN. CORRECT? THAT IS CORRECT?

WELL, YES, CORRECT. AND IT IS CORRECT, ALSO, THAT

THEY ARE PRETTY OUTRAGEOUS IN THEMSELVES.

WELL, OF COURSE. OF COURSE. BUT, YOU KNOW, THAT IS THE CRIME. WHAT WE ARE TALKING ABOUT THERE IS EVIDENCE OF OTHER CRIMES. NOW, CONNECT HIM TO THE PEOPLE THAT HE KNEW. THEY WERE PERFECTLY FINE PHOTOGRAPHS THAT DIDN'T SHOW ANY SORT OF PORNOGRAPHY, THAT COULD HAVE BEEN ADMITTED, AND THE FACT IS, AS WE HAVE HERE.

WHY WOULDN'T YOU HAVE TO HAVE THE PHOTOGRAPHS THAT WERE FOUND WITH THE PACKAGE, TO CONNECT THIS INDIVIDUAL TO THAT PACKAGE OF PHOTOGRAPHS? YOUR POSITION OF THIS LADY COULD HAVE COME IN AND HANDED PHOTOGRAPHS, BUT IF THEY WERE NOT CONNECTED TO THE PHOTOGRAPHS IN THE PACKAGE, IT WOULD NOT HAVE CONNECTED THIS INDIVIDUAL, MR. FLOYD, TO THAT PACKAGE OF PHOTOS.

NO. WE ARE NOT SAYING, WHAT WE ARE SAYING IS THE WHOLE PACKAGE OF PHOTOGRAPHS SHOULDN'T HAVE COME IN. WE ARE DEFINITELY SAYING THAT SOME OF THE PHOTOGRAPHS COULD HAVE COME IN, BUT NOT 90, WHEN THERE ARE ONLY 16 THAT ARE OF THE VICTIM. THIS WAS NO REASON TO ALLOW ALL OF THE PHOTOGRAPHS, PARTICULARLY THE ONES OF UNIDENTIFIED PEOPLE, YOU KNOW, THAT WAS, YOU KNOW, THE TRIAL JUDGE, HERSELF, SAID THIS IS CHILD PORNOGRAPHY. IT WAS EXTENSIVELY, THIS WAS EXTENSIVE

SHE EXCLUDED THOSE, RIGHT?

NO. NO. SHE SAID I AM LETTING IN LOTS OF PHOTOGRAPHS THAT WOULD BE CONSIDERED CHILD PORNOGRAPHY. SHE EXCLUDED ONLY THE SEVEN THAT SHE CONSIDERED THE VERY WORST THE,

BUT YOU KNOW

THE ONES THAT SHE LET HIM WERE OF THE LET IN WERE OF THE FRIEND'S DAUGHTER, CORRECT?

NO. SHE ALSO LET I N NU DEPHOTOGRAPHS OF WOMEN AND CHILDREN. TIME TALKING ABOUT CHILDREN. MY UNDERSTANDING IS THAT THE ONLY PORNOGRAPHIC PHOTOGRAPHS OF CHILDREN WERE OF SHARON AND THE FRIEND'S DAUGHTER. I DON'T THINK EVEN THE FRIEND'S DAUGHTER.I THINK IT WAS JUST SHARON.

WELL

BUT EITHER WAY , IT WOULD CONNECT HIM TO

THAT IS NOT CORRECT , JUSTICE.

WHICH OTHER ONES?

THERE ARE ADMITTEDLY NUDE PHOTOGRAPHS OF CHILDREN AND POSSIBLY WOMEN , POSS IBL Y TEENAGERS , THAT ARE IN THIS , IN THE SET.

I AM TALKING ABOUT CHILDREN. I AM NOT TALKING ABOUT WOMEN.

IN MY OPINION, THESE ARE CHILDREN, SI NCE WE DON'T KNOW WHO THEY ARE .

WHAT BASIS D O YOU HAVE TO SAY THEY ARE CH ILDREN , OTHER THAN OPINION?

WELL

WE KNOW IF THEY ARE CHILDREN OR NOT , RIGHT? WE DON'T KNOW THAT THEY ARECHILDREN, BECAUSE ALL WE SEE I S THE GENITAL ARE A, CORRECT?

YES. BUT THERE IS A DIFFERENCE BETWEEN A CHILD'S GE NITAL AREA AND AN AD ULT 'S , AND THAT IS WHAT YOU CAN SEE. AND IT IS ADMITTED BY THE TRIAL JUDGE , THAT YOU KNOW , THESE ARE PHOTOGRAPHS THAT WOULD BE CONSID ERED CHILD PORNOGRAPHY.

LET ME ASK YOU

THAT IS WHAT IT IS ARGUED IN THE CLOSING BY THE

LET M E ASK YOU A QUESTION. WAS THIS RAISED IN THEMOTION IN LI MINE PRET RIAL OR WHEN THE STATE SO UGHT TO ADMIT THE PHOTOGRAPHS?

IT WAS R A ISED EXTENSIVELY PRETRIAL, BUT THE JUDGE DEFERRED IT TO THE AC TUAL TIME WHEN IT CA ME, TO DECIDE WHICH PHOTOGRAPHS

IN THE OPENING STATEMENT, DID DEF ENSE COUNSEL MA KE A N OPENING STATEMENT?

I BELIEVE SO .

WAS THE DEFENSE BASICALLY , THAT THE, IN THE OPE NING STATEMENT , AND OTHERWISE , THAT THESE IT EMS WERE PLANTED.THEY WERE NOT MR . FLOYD'S. HE WASN'T THE PHOTOGRAPHER AND MS. COMMESO WAS NOT IN THE PICTURES.WAS THAT THE ESSENTIAL DEFENSE OR WHAT WAS THEDEFENSE?

THE DEFENSE WAS JUST BASICALLY THAT THE STATE HASFAILED TO PROVE THEIR CASE.

NO. I MEAN IN OPENING STATEMENTS , NOT THE END.

IN OPENING STATEMENTS .

WAS THERE ANY STATEMENT MADE REGARDING THESE PHOTOS?

I DON'T BELIEVE SO , BECAUSE I DON'T , AT THAT POINT IT HADN'T BEEN DETERMINED WHAT WOULD COME IN AND WHAT WOULD NOT COME IN.

OKAY .

ONE LAST QUESTION ABOUT THAT, DID THE DEFENSE LAWYER MAKE DISCREET ARGUMENTS ABOUT CATEGORIES OF THESE PHOTOGRAPHS, IN TERMS OF THEIR ADMISSIBILITY? I THINK YOU CAN SEE THROUGH THE QUESTIONING HERE , THAT THERE APPEARS TO BE AT LEAST THREE CLEAR-CUT CATEGORIES OF THESE PHOTOGRAPHS THAT PROBABLY WOULD BE ADMISSIBLE . THE PHOTOGRAPHS OF THE VICTIM. THE PHOTOGRAPHS OF THE DEFENDANT 'S DAUGHTER. ALL RIGHT . TO CONNECT HIM TO THE PACKAGE THAT, ALSO , HAD, AND THEN THE PHOTOGRAPHS OF HIS FRIEND 'S DAUGHTER, OKAY , THAT, AGAIN , NOW , WOULD ESTABLISH HIS CONTACT WITH THAT PACKAGE OF PHOTOGRAPHS , AND SO THERE ARE AT LEAST THREE DISCREET CATEGORIES AMONGST THOSE PHOTOGRAPHS THAT ARGU ABLY WOULD BE ADMISSIBLE , THEN.

CORRECT. THEY ARE RELEVANT. YES.

TO TIE HIM TO THE PACKAGE OF PHOTOGRAPHS, AND THEN INCLUDING THE PHOTOGRAPHS OF THE VICTIM. YOU KNOW, THAT HE WOULD HAVE IN HIS POSSESSION . NOW , DID THE DEFENSE LAWYER DISCREETLY BREAK UP THESE AND THEN ARGUE TO THE JUDGE, WELL, JUDGE , I CAN UNDERSTAND WHY YOU MIGHT ADMIT THOSE, BUT THEN THERE ARE A CATEGORY OF PHOTOGRAPHS OF PEOPLE WE DON'T KNOW WHO THEY ARE. THEY ARE NOT THESE PEOPLE THAT I HAVE DESCRIBED IN THOSE THREE DISCREET CATEGORIES, AND THERE IS NO RELEVANCE AT ALL TO THE ADMISSION OF THOSE PHOTOGRAPHS.

WELL

IS THAT WHAT DEFENSE LAWYER DID?

HE DIDN'T DO QUITE THAT. WHAT HE DID IS HE SAID, WELL , YES, THE VICTIM'S PICTURES COME IN. YES, WE SAY THAT A PICTURE OF SHARON MARSHALL CAN COME IN, BUT WE DON'T HAVE TO HAVE A LOT. WE DON'T HAVE TO HAVE ONES WHERE SHE IS UNCLOTHED. YES, WE CAN HAVE A PICTURE OR TWO OF THE CHILD, THE FRIEND'S CHILD THAT CAN COME IN, BUT WE DON'T NEED 20 OF THEM OF HER IN SEXUALLY EROTIC POSITIONS , AND WE CERTAINLY DON'T NEED UNIDENTIFIED PEOPLE JUST SHOWING , WHICH BASICALLY SHOWED GENITALIA .

WHAT ARE THE NUMBERS , IF WE TAKE , FOR INSTANCE , THOSE THREE DISCREET CATEGORIES , DO YOU KNOW HOW MUCH THAT MAKES UP, OF THE TOTAL 90 PICTURES THAT WERE ADMITTED?

WELL , LIKE I SAY, IT IS A QUESTION OF , YOU KNOW , I THINK THERE WERE PROBABLY SEVEN OR EIGHT PHOTOGRAPHS OF SHARON MARSHALL ADMITTED. THE DEFENSE SAID ONLY TWO WOULD SUFFICE .

I AM NOT TALKING ABOUT HOW MANY WOULD SUFFICE. I AM JUST ASKING YOU IF YOU CAN TELL US THAT, IF WE TAKE THOSE THREE TO DAY CATEGORIES , DOES THAT CONSTITUTE THOSE THREE CATEGORIES, DOES THAT CONSTITUTE 70 OF THE PHOTOGRAPHS OR 20 OR DO YOU KNOW?

I WOULD SAY , THE UNIDENTIFIED, YOU KNOW , THE ONES THAT ARE TOTALLY

UNIDENTIFIED CONSTITUTE HOW MANY?

CONSTITUTE, MAYBE , HE N INE OR TEN. CONSTITUTE, MAYBE , NINE OR TEN. I DON'T KNOW THE AMOUNT, SO THAT IS S MALL COMPARED TO THE 90.

SO THE BULK OF THESE, THEN, SOME 80-PLUS , WERE IN THESE THREE CATEGORIES THAT WE HAVE TAL KED ABOUT. IS THAT CORRECT?

THAT WOULD BE CORRECT.

OKAY .

BUT , AGAIN, OF COURSE, OUR POSITION IS THAT IT WAS MADE TO BE PREJUDICIAL, ANDTHAT IS , IN FACT , THE WAY IT WAS USED.

THERE IS OTHER CATEGORIES WHICH WE HAVEN'T DISCUSSED, WHICH MAY BE A V ERY SMALLNUMBER OF PHOTOGRAPHS, BUT THEY ARE INNOCUOUS . THEY ARE HIS BOAT AND THINGS LIKE THAT.

CORRECT.

SO EVEN THOSE , I DON'T THINK YOU WOULD CARE ABOUT THOSE AND THOSE CERTAINLYCONNECT HIM UP AS WELL , SO THAT IS AN OTHER CATEGORY, ALTHOUGH THAT IS RESPONSIBLE FOR, MAYBE , ONE OR TWO OF THE PHOTOGRAPHS.

CORRECT. CORRECT. NOW , I THINK IT IS IMPORTANT THAT THE IS SUE O F SEXUAL DEPRAVITY IS A FEATURE OF THE CASE. IT WAS ARGUED EXTENSIVE LY IN CLOSING ARGUMENT . THE PROSE CUTOR REFERRED TO CHILD PORN , TEENAGED WOMEN IN VAR IOUS POSITIONS UNCLOTHED . HE WENT ON T O KEEP REFERRING TO THIS A S A LITTLE COLLECTION, AND HOW CHILDREN WERE IN SEXUALLY E ROTICA POSITIONS, AND YOU KNOW , JUST SHO ELING SHOWING HIS , THAT THIS JUST SHOWINGTHAT THIS WAS A MAN WHAT S ICK MIND.THAT OF HIS THE WHOLE POINT THAT WAS THE WHOLE POINTOF THIS EV IDENCE.

LET ME JUST GO BA CK. THE A CTUAL PHOTOGRAPHS OF THE VICTIM , THEMSELVES , WHICH SHOWS SOMEBODY WITH A SICK MIND.

TR UE, BUT THE POIN T IS THAT IS WHAT IS BEING TRIED. IS THIS THE PERSON WHO A CTUALLY COMMITTED THIS HOMICIDE?

THEN YOU HAVE , IT , WAS IT HIS BIOLOGICAL DAUGHTER?

NO. IT WAS NOT HIS BIOLOGICAL DAUGH TER.THIS WAS A WOMAN WHO APPARENTLY, I G UESS , A RUNAWAY WHO HE HAD BEFRIENDED AND ALLOWED TO LIVE WITH HIM .

DO YOU WANT TO G O ON TO YOUR NE XT POINT .

OKAY. THIS HAS TO DO WITH ALLO WING THE F BI EXAMINER , THOMAS MUSHRUMO, TO TESTIFY AS AN EXPERT WITNESS TO THE JU RY A BOUT THESE PHOTOGRAPHS. NOW , WHAT THEY SAID , BECAUSE OF HIS TRAINING WITH THE FBI , HE COULD DISTINGUISH DETAILS IN PHOTOGRAPHS AND OBJECTS IN A SIDE BY SIDE COMPARISON , AND BECAUS E HE DID THIS M ORE OFTEN THAN THE JURORS DID IT, HE HAS SPECIAL PO WERS , AND THEREFORE SHO UL D BE ALLOWED TO TESTI FY AS AN EX PERT .

HE ALSO IDENTIFIED A THUMB , C ORRECT , AS CONSISTENT WITH THE DEFENDANT ' S?

YES. THAT, OF COURSE , IS WHAT IS PREJUDICIAL HERE, IS THE FACT THAT HE DID DO SIDE-BY-

SIDE COMPARISONS OF THE , OF A THUMB THAT WAS IN THE PICTURE , ONE OF THE PICTURES OF THE VICTIM WHEN SHE WAS BOUND AND BEATEN WITH A PHOTOGRAPH THAT HE HAD TAKEN OF MR. FLOYD'S THUMB WHILE HE WAS IN COUNTY JAIL. AND HE SAID THAT HE COULD FIND NO INCONSISTENCIES BETWEEN THE TWO OF THEM

CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL, BUT IF YOU WANT, ARE THERE ANY OTHER POINTS YOU WANT TO TOUCH ON BEFORE YOU SIT DOWN?

NO. I WOULD JUST LIKE TO EXPAND SLIGHTLY ON THIS , AND THAT IS TO SAY THAT USUALLY THERE IS NO RECOGNIZED EXPERTISE INSIDE BY SIDE COMPARISON .

YOU ARE NOT TALKING ABOUT THE ACTUAL PRINTS. YOU ARE JUST TALKING ABOUT THE ACTUAL THUMB, ITSELF , IS THAT WHAT WAS COMPARED?

YES. A PHOTOGRAPH OF A THUMB.

OF A THUMB NOT PRINTS.

NOT THUMB PRINTS. NO.

YOU ARE SAYING IT IS NOT A RECOGNIZED FIELD OF EXPERTISE?

THAT'S CORRECT, AND USUALLY THE EXPERTS INFORM THE JURY , GIVE THEM AN UNDERSTANDING OF SUBJECT MATTER WHICH THEY DON'T UNDERSTAND , THEMSELVES, AND ALL OF THE JURORS WERE PARTICULARLY CAPABLE OF COMPARING THINGS SIDE-BY-SIDE, TO TELL WHETHER IT LOOKED THE SAME TO THEM OR NOT .

THIS WAS , THERE, IT WAS COMPARING OF A PHOTOGRAPH OF SOMETHING WITH, I GUESS, PHOTOGRAPHS OF THE SAME OBJECT , SIX YEARS LATER, WHEN THEY WERE FOUND , IN A DETERIORATED CONDITION , CORRECT?

THAT WOULD BE, I GUESS , YEAH , THAT WOULD BE CORRECT, BUT, OF COURSE , YOU KNOW , THE PHOTOGRAPH, ITSELF , WAS BLOWN UP AND ENHANCED, SO THE RESULTING PRINTS THAT THE JURY SAW WERE ACTUALLY PRETTY GOOD.

SO WHAT YOU ARE TESTIFYING TO IS THIS PHOTOGRAPH AFTER EARRING OR NAIL PHOTOGRAPH OF AN EARRING OR NAIL, IT RESEMBLES THE NAIL FOUND SIX YEARS LATER IN THE WOODS, AFTER HAVING DETERIORATED WITH THE ELEMENTS, OVER A PERIOD OF SIX YEARS.

YES. CORRECT.

HOW WAS HE TENDERED TO THE JURY?

AS AN EXPERT .

IN?

SIDE-BY-SIDE COMPARISON .

AND THEY WENT THROUGH HIS TRAINING AND CREDENTIALS AND EXPERIENCE HIS TRAINING AND CREDENTIALS AND EXPERIENCE AND ALL OF THAT OTHER?

THAT'S CORRECT.

AND WAS DEFENSE COUNSEL ABLE TO CHALLENGE THAT TENDER?

WELL , DEFENSE COUNSEL DIDN'T DE NY I THAT HE HAD EXPERIENCE. DEFENSE DIDN'T DENY THAT HE HAD EXPERIENCE. DEFENSE COUNSEL WOULD SAY THAT THIS WOULD MAKE THIS PERSON A SUPER JURO R, TO DO WHAT THE JURY CAN DO FOR THEMSELVES.

HIS BEING AN EXPERT WAS NOT IN QUESTION. THE QUESTION WAS WHETHER OR NOT HIS EXPERTISE WAS NE EDED.

WELL, IT IS NOT A RECOGNIZED FIELD OF EXPERTISE, FOR ONE.

WAS THAT OBJECTED TO?

YE S. YES, IT WAS.

THE FBI APPARENTLY RECOGNIZED IT AS A FIE LD OF EXPERTISE, RIGH T?

WELL , CERTAINLY FOR DOING THEIR PARTICULAR , THEY GIVE TRAINING, CERTAINLY, TO SO APPARENTLY OFFICIALS IN THE FBI THAT WERE SPECIALIZED INSIDE B Y SIDE COMPARISON .

YES. AS PART OF AN FBI EXA MINER 'S JOB TO BE AB LE TO PE RFORM THIS. WE ARE SAYING IT HAD , WHAT AMOUNTED TO WAS TAKING THE CASE AWAY FROM THE JURY AND S AYING THEY SHOULD ACCEPT THIS PERSON AS AN AUTHORITY AND NOT QUESTION THE EVIDENCE FOR THEMSELVES. THANK YOU. I WILL RES ERVE .

GOOD MOR NING , YOUR HONORS. MAY IT PLEASE THE COURT. I AM CA ROL DITTMAR FROM THE ATTORNEY GEN RAMS OFFICE , REPRESENTING THE AND GENERALS OFFICE , REPRESENTING THE APPELLEE IN THIS CASE, THE STATE OF FLORIDA. ON THE WILLIAMS RULE EVIDENCE, THE JU DGE MENTIONED AN ORDER AND DID MENTION HER STATE OF MIN D IN THE CONCLUSION OF THAT ORDER. FIRST SHE DET AILS THE F ACTS AND THE EV IDENCE WHICH SHE INSISTS NEED S TO BE EXCLUDED, THE R E FERENCE TO THE GUN , THE D UCT TA PE ON THE MOUTH, THE THRE ATS , AND REFERENCETO WHAT SHE FELT COULD BE INCLUDED. ANOTHER RE ASON OF THESE CRIMES AND MENTIONED , WERE BECAUSE OF THE PHOTOGRAPHS F OUND IN THE TRUCK. AND THE PHOTOGRAPHS WERE NOT FOUND SLAPPED IN THE TRU CK BUT HIDDEN.

HIDDEN UP UNDER THE TRUCK BED.

TH ERE IS NO QUESTION WHETHER THE PHOTOGRAPHS GOT IN THE TRUCK AT THE TIME OF THE KIDNAPING IS PR ETTY SPECULATIVE, RI GHT? I MEAN , HE HAD THAT TRUCK FOR A PERIOD OF TIME , B E FORE IT WAS

HE HAD THE TRUCK FOR A PER IOD OF TIME , AND THAT - -

WE DON'T KNOW , REALLY, WHEN THE PHOTOGRAPHS WERE PLACED IN THE TRUCK.

I THIN K THE REASONABLE INFERENCE IS THAT , WHEN HE TAKES THE PRINCIPAL AND THE LITTLE BO Y TO THE WOODS , THE PRINCIPAL S E ES HIS PERS ONAL BELONG INGS, SEES HIS SLEEPING BAG, CAN TELL THAT THERE IS A OB UNDER THE S LEEPING BAG, AND THEN WHEN THE PRINCIPAL IS TIED TO A TREE AND MR . FLOYD COMES BACK AND SAYS HO W DO YOU OPEN THE BACK OF YOUR TRUCK AND THE PRINCIPAL TELL S HIM THAT, HE THEN HEARS THINGS BEING THROWN IN TO THE TRUCK.

THROWN INTO IT.

HE DID NOT

SO FR OM A REAS ONABLE POINT OF VI EW , THEY COULD HAVE BEEN PL ACED THERE FROM THE

TIME THAT HE GOT THE TRUCK UNTIL THE TIME THAT THE TRUCK WAS ABANDONED.

YES.

SO WHAT I HAVE TROUBLE UNDERSTANDING IS, WHAT IS THE RELEVANCE OF THE FACT THAT HE TIES HIM TO THE TREE, THAT HE KIDNAPS THE BOY, THAT ALL OF THE CIRCUMSTANCES, HOW DOES THAT HELP PROVE THAT PHOTOGRAPHS WERE PUT IN THE TRUCK, BECAUSE THAT IS THE ONLY REASON YOU WANT

YOU STILL HAVE TO SHOW THE CIRCUMSTANCES OF THE FACT THAT HE IS ON THE RUN HERE. HE IS COMMITTING CRIMINAL ACTS, AND HE IS TAKING THESE THINGS WITH HIM. HE IS MAINTAINING POSSESSION OF THEM, AND IT APPEARS TO BE ALL HIS WORLDLY BELONGINGS, AT THIS LITTLE PLACE IN THE WOODS.

SO IT IS NOT, REALLY, PUT IN TO PUT SHOW THE CHAIN OF THE TRUCK BUT TO SHOW THAT, THIS IS SEVERAL YEARS LATER, SO ANY CRIMINAL ACT THAT HE WOULD HAVE COMMITTED, BETWEEN THE TIME THAT HE ALLEGEDLY COMMITTED THIS MURDER, WHEN HE IS CAUGHT, COMES INTO EVIDENCE?

I AS SURE YOU THERE ARE MANY CRIMINAL ACTS HE ANYTIME COMMITTED THAT DID NOT COME INTO THAT HE COMMITTED THAT DID NOT COME INTO EVIDENCE.

SO IT WASN'T PUT IN TO SHOW HE IS ON THE RUN. BECAUSE YOU SAID THAT.

THAT IS ONE OF THE FACTORS. THE JURY IS ENTITLED TO AN INTELLIGENT ACCOUNTING OF THE CRIME.

WHY? WHAT DOES IT MATTER? IF THE TRUCK WAS BORROWED FROM A NEIGHBOR, THE ISSUE WAS THAT AT SOME POINT, HE TAKES POSSESSION OF THIS TRUCK, THAT, THEN, ENDS UP HAVING PHOTOGRAPHS THAT ARE HIS THAT CONNECTS THE PHOTOGRAPHS, THE PHOTOGRAPHS CONNECT HIM WITH THE CRIME NOT THE TRUCK.

BUT YOU STILL HAVEN'T SHOWN WHY HE WOULD, IN THE COURSE OF JUST HAVING ACCESS TO THIS TRUCK, WHY HE WOULD PUT THINGS, EVERYTHING THAT HE OWNED IN HIS LIFE, INTO THE TRUCK, AND KEPT ON.

WERE THERE THINGS IN THE TRUCK AT THE TIME THAT WERE CONNECTED THINGS IN THE TRUCK AT THE TIME THAT WERE CONNECTED UP TO THE CRIME?

NO, TO MY KNOWLEDGE, NOTHING ELSE WAS IN THE TRUCK.

WHAT IF THEY FOUND HIM TWO YEARS AFTER AND HE WAS LIVING IN A MOTEL AND HE HAD HIS EARTHLY BELONGINGS THERE. WHAT IS THE DIFFERENCE BETWEEN WHAT IS THE DIFFERENCE BETWEEN THAT AND THE ELEMENTS OF THE CRIME?

IF HE WAS LIVING IN A HOTEL ROOM

AGAIN, THE CRIME OCCURS, WHAT YEAR?

1989.

THE KIDNAPING.

1994 WAS THE KIDNAPING.

WHEN WAS HE ARRESTED.

HE IS ACTUALLY ARRESTED IN 1990 FOR SOME PERIOD OF TIME BY THE FEDERAL AUTHORITIES. BASED ON AN OUTSTANDING WARRANT, AND THAT IS NOT ANYTHING THAT IS IN THE TRIAL. IT IS IN PRE TRIAL THAT , HE IS ACTUALLY IN CUSTODY. HE IS INDICTED IN THIS CASE IN 1999.

SO HOW MANY

I BELIEVE IT MAYBE 1997 AND THEN THE INDICTMENT APPEALED .

HOW LONG WAS THE TIME BETWEEN WHEN HE WAS ARRESTED FOR THIS AND THE TRUCK WAS TAKEN?

THE TRUCK WAS TAKEN IN 1994 AND THE INDICTMENT WAS TAKEN IN 1994 AND THE INDICTMENT, I BELIEVE WAS IN 1997.

BUT YOU ARE SAYING HE WAS INCARCERATED FOR SOME THING ELSE.

YES. AT THAT POINT. I THINK THE TRIAL JUDGE HAD THE SAME PROBLEM THAT YOU DID , AND IN FACT HER INITIAL RULING WAS THAT THE JURY WOULDN'T HEAR ANY OF THAT , AND THEN AS SHE CAME THROUGH THE STATE'S CASE, SHE APPRECIATED THE FACT THAT THE STATE REALLY COULDN'T PRESENT THE CASE INTELLIGENTLY , WITHOUT HAVING THE JURY HEAR

THAT IS WHAT I AM ASKING

IN FACT HER ORDER , SHE OSTENSIBLY RELATES THE FACTS AND CONDUCTS A LEGAL ANALYSIS IN HER ORDER. SHE CONCLUDES THE KIDNAPING OF MR . DAVIS AND MICHAEL HUGHES, AND I AM READING FROM THE RECORD, THE PAGE NUMBER 1276 6 IN THE ORDER ON THE WILLIAMS RULE NUMBER 2766 IN THE ORDER ON THE WILLIAMS RULE , STATED THAT THE CARJACKING LINKED FRANKLIN FLOYD TO THE PICKUP TRUCK , AND TO PLACE HIM IN THE SOLE AND EXCLUSIVE POSSESSION OF THE TRUCK WHERE THE PHOTOGRAPHS WERE EVENTUALLY FOUND . SECOND, THE KIDNAPING AND CARJACKING

LET ME ASK YOU A QUESTION BEFORE YOU GO ON.

OKAY.

SECOND, THERE IS AN ABSENCE OF EVIDENCE CONNECTED HIM TO THE TRUCK AND THE SCENE.

NOTHING ELSE CONNECTS HIM TO THE TRUCK.

NOTHING IN THE WORLD .

NOTHING CONNECTS HIM TO THE TRUCK , OTHER THAN THE EVIDENCE, THE PRINCIPAL AS A WITNESS.

HE IS WILLING TO STIPULATE.

HE IS WILLING TO STIPULATE THAT HE STOLE THE TRUCK AND HAD ACCESS TO THE TRUCK FOR A PERIOD OF TIME.

LET'S STOP AT NUMBER ONE , ALL RIGHT , WHY IS IT ABSOLUTELY ESSENTIAL , AS YOU ARE READING THE TRIAL JUDGE'S ORDER, IF HE IS WILLING TO STIPULATE THAT HE HAD POSSESSION OF THE TRUCK , IN OTHER WORDS, IN SORT OF AN OVER SIMPLISTIC VIEW, IT APPEARS , OBVIOUSLY , IMPORTANT FOR THE STATE, TO SHOW HE HAD POSSESSION OF THE TRUCK, SO THAT HE HAD THE OPPORTUNITY TO PUT THE PHOTOGRAPHS , YOU KNOW, UNDERNEATH THERE. OKAY. BUT BEYOND

THAT , WHY , IN OTHER WORDS, WHAT IS THE RELEVANCY OF HOW HE OBTAINED POSSESSION OF THE TRUCK , ESPECIALLY WHEN HOW HE OBTAINED POSSESSION OF THE TRUCK INVOLVES THIS COLLATERAL CRIME?

THAT IS WHY THE JUDGE GOES ON BEYOND NUMBER ONE , AND SHE SAYS , NUMBER TWO , SECONDLY , THE KIDNAPING AND CARJACKING HAS ITS OWN UNIQUE AND SIGNIFICANT RELEVANCE, IN THAT FLOYD COMMITTED THESE ACTS WHILE IN THE POSSESSION OF THE PHOTOGRAPHS. THE PHOTOGRAPHS WHICH MEMORIALIZED THE LOCATION AND APPEARANCE OF OUR VICTIM IN THIS ALLEGED HOMICIDE.

I AM MISSING THAT. WHAT , I DON'T

YOU DON'T SEE THE UNIQUE AND SIGNIFICANCE YOU DON'T SEE THE JURY HEARING TWO DIFFERENT STORIES

TRYING TO CONVICT THIS DEFENDANT, I CAN SEE THAT THE STATE WOULD WANT TO SHOW THAT THIS IS THE MOST HORRIBLE PERSON IN THE WORLD! AND , OF COURSE , THE FACTS OF THE CRIME ARE OBVIOUSLY, WE ALL AGREE THAT , YOU KNOW, ABOUT THAT TO BEGIN WITH , BUT IF WE ARE FOLLOWING THE RULE ALONG, THAT, NO , YOU DON'T ALLOW EVIDENCE AFTER COLLATERAL CRIME , TO PROVE HIS EVIDENCE OF A COLLATERAL CRIME TO PROVE HIS COMMISSION OF THIS CRIME , AND JUDGE, WHAT WE DO WANT TO DO, THOUGH , IS THAT THE PHOTOGRAPHS ARE A LINK HERE. THEY ARE ABSOLUTELY CRITICAL TO OUR CASE , AND YOU KNOW, WE WANT TO ADMIT THEM , AND ONE OF THE LINKS IN THE CHAIN OF GETTING THOSE INTO EVIDENCE , IS THAT WE HAVE TO DEMONSTRATE THAT HE WAS IN POSSESSION OF THAT TRUCK , AND THEREFORE WHILE HE WAS IN POSSESSION OF THE TRUCK , HE COULD HAVE PUT AND DID PUT THE PHOTOGRAPHS UNDER THERE . NOW , THAT , I AM WITH YOU ALL THE WAY THERE. BUT I AM HAVING TROUBLE BEYOND THAT , AND I DON'T , I AM , QUITE CANDIDLY I DON'T GET WHAT THE TRIAL JUDGE IS SAYING. THE FIRST REASON SHE GIVES IS TAKEN CARE OF BY THE FACT THAT THE DEFENSE IS WILLING TO STIPULATE THAT HE HAD POSSESSION OF THE TRUCK. NOW , I DON'T KNOW ABOUT THE EXTENT OF THE STIPULATION , WHETHER IT IS ADEQUATE, BUT ASSUMING IT WAS ADEQUATE TO GET POSSESSION, SO THAT THE STATE HAS THAT LINK IN THE CHAIN , IN ORDER TO HAVE HIM IN POSSESSION OF THE TRUCK, SO HE HAD THE OPPORTUNITY TO PUT THE PHOTOGRAPHS UNDERNEATH THERE, BUT TELL ME, AGAIN , WHAT IS THE RELEVANCE OF THESE OTHER THE RELEVANCY OF THESE OTHER EVENTS , IN OTHER WORDS THE KIDNAPING AND THE CARJACKING AND EVERYTHING, WHAT IS THE RELEVANCY OF THAT TO THIS CRIME?

TO SHOW THAT THIS COLLECTION WAS SIGNIFICANT TO HIM PERSONALLY .

HOW DOES IT SHOW THAT?

THAT HE IS KEEPING UP WITH IT AND POSSESSING IT AND MAINTAINING IT , WHILE ALL OF THESE OTHER THINGS ARE GOING ON.

WHERE IS THERE ANYTHING IN THIS EVIDENCE ABOUT THE KIDNAPING AND EVERYTHING , ABOUT THE PACKAGE OF PHOTOGRAPHS? IS THERE ANYTHING ? THERE IS NOTHING THERE ABOUT THAT, IS THERE?

NO, BUT YOU HAVE TO MAKE THAT CONNECTION THAT THIS IS SOMETHING THAT HE IS KEEPING WITH HIM THROUGHOUT THE COURSE OF HIS LIFE , TAKING , GOING THROUGH THESE EVENTS THAT YOU OR I PROBABLY CAN'T RELATE TO BUT THAT IN HIS SITUATION , THE SIGNIFICANCE

THE PACKAGE OF PHOTOGRAPHS DOES THAT, DOES IT NOT?

I AM SORRY , SIR.

PROVING THAT HE WAS IN POSSESSION OF THE ENVELOPE WITH THE PACKAGE OF PHOTOGRAPHS, PROVES THAT.

ABSOLUTELY. WE HAD TO PROVE HE WAS IN POSSESSION OF THE PHOTOGRAPHS.

HOW DOES THE KIDNAPING AND THE CARJACKING PROVE THAT ?

WELL , YOU HAVE TO SHOW , I DON'T KNOW HOW YOU COULD HAVE TOLD THE JURY HE HAD ALL HIS WORLDLY POSSESSIONS, AND HE PLACED THEM IN THIS SITUATION WHERE HE IS TRYING TO GET AWAY AND ESCAPE, AND HE IS TAKING THEM WITH HIM , JUST BECAUSE HE HAS ACCESS TO THE TRUCK. YOU ARE LEAVING A BIG GAP FOR WHAT THE JURY

WHAT DO HIS WORLDLY POSSESSIONS HAVE TO DO WITH GETTING THE PHOTOGRAPHS INTO EVIDENCE, BECAUSE HE HAD POSSESSION OF THE TRUCK AND , OBVIOUSLY , THROUGH THE OTHER CIRCUMSTANCES OF CONNECTING THE PHOTOGRAPHS TO HIM WHEN YOU LOOK AT THEM.

THEY SHOW THE SIGNIFICANCE OF THE PHOTOGRAPHS TO HIM PERSONALLY . THERE ISN'T IT BECAUSE OF THE WEIRD PLACE WHERE THE PHOTOGRAPHS WERE LOCATED , AND, AGAIN, MAYBE I WASN'T SURE , HOW LONG UNTIL HE SOLD OR THE TRUCK WAS ABANDONED OR WHATEVER , HOW LONG BETWEEN THE KIDNAPING AND WHEN THE TRUCK WAS NO LONGER IN HIS POSSESSION?

WE DON'T KNOW EXACTLY WHEN THE TRUCK WAS ABANDONED. WE KNOW THAT IT WAS TAKEN ON SEPTEMBER 12 , 1994, FROM OKLAHOMA. IT WAS FOUND ABANDONED IN TEXAS , ON OCTOBER 22 , 1994 , BUT APPARENTLY IT HAD BEEN PARKED IN THIS PARKING LOT AND ABANDONED FOR SEVERAL WEEKS. SO WE DON'T KNOW EXACTLY WHEN HE ABANDONED IT.

WE DON'T KNOW WHEN THE PHOTOGRAPHS MUCH STUCK INTO THIS

NO , WE DON'T.

ALL RIGHT. SO THAT IS WHERE THE SIGNIFICANCE TO ME, WOULD BE TO SAY HOW DID , WHAT IS SO SIGNIFICANT IS THAT HE TOOK THESE PHOTOGRAPHS AND HE HID THEM, AND THAT HAS NOTHING TO DO WITH THE CIRCUMSTANCE OF THIS KIDNAPING. THAT IS WHERE , AGAIN, I CAN SEE IT, IF WHAT THE GUY OBSERVED WAS THAT HE STARTED DOING ALL THESE WEIRD THINGS WITH HIS POSSESSIONS. HE STARTED STUFFING THEM IN DIFFERENT PLACES , BUT SIMPLY THROWING STUFF IN THE TRUCK, WHICH HE DIDN'T ACTUALLY SEE, HE HEARD, HE OBSERVED SOME THINGS AND SEEING BULGES , DOES NOT HE BULGES , DOES NOT EQUATE TO ANYTHING ABOUT THE PHOTOGRAPHS.

BUT THE PHOTOGRAPHS ARE STILL WITHIN WHAT HE HAS AT THE TIME, AND HE HAS TO BE ABLE TO SHOW

WE DON'T KNOW. THAT.

THAT IS TRUE. THAT IS AN INFERENCE WE ARE ASKING THE JURY TO MAKE, AND THE OTHER PROBLEM HERE IS THE STATE HAS TO REBUT THEIR PRIMARY DEFENSE OF TAMPERING, AND EVEN THOUGH HE IS STIPULATING HE HAD ACCESS TO THE TRUCK , HE IS NOT STIPULATING HE HAD ANYTHING TO DO WITH ANY OF THESE PHOTOGRAPHS. HE IS NOT STIPULATING THAT THE PHOTOGRAPHS WERE EVER EVEN IN THE TRUCK , SO WE HAVE TO SHOW THE WHOLE SERIES, FOR THE JURY TO HAVE A FULL UNDERSTANDING OF WHY HE WOULD HAVE THESE PHOTOGRAPHS, WHY THEY WOULD EVEN BE THERE , WHY THEY WOULD BE INVOLVED , IF IT WAS JUST SOMETHING THAT HE HAD ACCESS TO THE TRUCK FOR A WEEK WHEN IT WAS STOLEN, IF I WERE ON A JURY , I AM GOING TO BE PRETTY SKEPTICAL ABOUT , JUST BECAUSE SOMEBODY STOLE A

TRUCK FOR A WEEK THAT THEY HAD SOMETHING IN THERE, AND I THINK THAT WAS SO CRITICAL AS THE JUDGE CAME TO UNDERSTAND THE CASE, SHE APPRECIATED THAT. THE THIRD THING THAT SHE NOTICED WAS THAT FLOYD HAD DRIVEN OFF WITH HUGHES, WITH MICHAEL HUGHES AND THE COLLECTION OF PHOTOGRAPHS, AND THAT THAT HAS ITS OWN UNIQUE AND SIGNIFICANT RELEVANCE, IN SHOWING THAT THESE ARE TWO THINGS THAT IS FLOYD, ACCORDING TO THE STATE, CARED ABOUT THE MOST.

HOW DOES SHE KNOW THAT HE DROVE OFF WITH THE COLLECTION OF PHOTOGRAPHS?

BECAUSE THEY WERE NOT LEFT IN THE WOODS WITH THE PRINCIPAL. THAT IS AN INFERENCE.

HOW DO WE KNOW THE PHOTOGRAPHS WERE THERE AT THE TIME? HOW DO WE KNOW HE DIDN'T HAVE THE PHOTOGRAPHS SOMEPLACE ELSE AND HE WENT AND GOT THEM OR WHATEVER?

WE DON'T KNOW THAT. THE ONLY INFERENCE IS THAT HE CERTAINLY, WHEN HE WENT FROM OKLAHOMA TO PRESUMABLY TEXAS, IN THIS TRUCK, WE DON'T EVEN KNOW THAT HE IS THE ONE THAT LEFT IT IN TEXAS, BUT WE KNOW THAT AT SOME POINT, THESE PHOTOGRAPHS WERE THERE AND THAT WE HAVE TO BE ABLE TO CONNECT HIM TO THESE PHOTOGRAPHS, IN ORDER TO MAKE THE STATE'S CASE HAVE ANY INTELLIGENCE AT ALL.

WHAT HAPPENED TO THE SON?

THE SON IS APPARENTLY PRESUMED DEAD, STILL MISSING.

SO FROM THE TIME HE HAS BEEN SEEN

AT THIS POINT, I DON'T BELIEVE THE SON IS EVER SEEN AGAIN BY ANYBODY.

THAT IS

THAT IS NOT DEVELOPED IN THE RECORD.

WHAT IS THE EVIDENCE THAT WAS PRESENTED, CONCERNING THE KIDNAPING ITSELF?

THE EVIDENCE ALL CAN COME FROM THE TESTIMONY OF JAMES DAVIS ALL CAME FROM THE TESTIMONY OF JAMES DAVIS, WHO WAS THE PRINCIPAL. ACCORDING TO HIS TESTIMONY, HE WAS AT SCHOOL WORKING WHEN MR. FLOYD CAME INTO THE SCHOOL, ASKED TO SEE HIM, ASKED TO TALK, APPARENTLY, NOW, DIDN'T COME IN BUT HAD A GUN AND TOLD HIM WE NEED TO GO GET MICHAEL HUGHES OUT OF ONE OF YOUR FIRST GRADE CLASSES, AND THE PRINCIPAL ACQUIESCED TO THAT. THEY WALKED TO THE CLASS WHERE THE PRINCIPAL CALLED THE BOY OUT. FLOYD INSTRUCTED THE PRINCIPAL TO TELL HIS SECRETARY YOU ARE GOING TO BE GOING ON AN ERRAND AND YOU WILL BE BACK SOON. THEY DID THAT. THEY LEFT THE SCHOOL GROUND, GOT INTO THE PRINCIPAL'S TRUCK, DROVE A SHORT WAY TO THE WOODS. THE PRINCIPAL OBSERVED HIS, SOME PERSONAL PROPERTY, SLEEPING BAG IN THE WOODS. MR. FLOYD TELLS MICHAEL, WE ARE GOING TO GO LOOK FOR A DOG. THERE IS A DOG AND WE ARE GOING TO GO OFF AND FIND HIM, SO MICHAEL DOESN'T KNOW WHAT HE IS DOING WHEN HE TAKES THE PRINCIPAL BACK AND TIES HIM TO THE TREE. TIES HIM TO THE TREE. THE, AS I RELATED EARLIER ABOUT DAVIS SAYING HE WOULD COME BACK AND ASKED HOW TO OPEN THE CAMPER AND ALSO ASKED HOW TO PUT THE TRUCK INTO REVERSE, CAME BACK A COUPLE OF TIMES, SO HE IS RELATING THOSE INCIDENTS. HE BELIEVES HE HEARS THE TRUCK LEAVE OR HE HEARS THE TRUCK LEAVING THE AREA, AND THAT FOR SEVERAL HOURS HE WAS TRYING TO CRY OUT, UNTIL SOMEONE HEARD HIM.

SO WAS IT ALSO THE STATE'S POSITION THAT ANY ERROR IN ADMITTING THIS WAS HARMLESS UNDER THE CIRCUMSTANCES?

YES , Y OUR HO NOR. AND I THINK WHAT I S CRITICAL

HOW ABOUT HI TTING THAT A LICK.

WELL , BECAUS E OF THE - -

IN OTHER WORDS, ARE YOU SAYING IT WAS PRE TTY INNOCUOUS TESTIMONY?

IN ADDITION , THEY, IN THE WAY THAT THE JUDGE SANITIZE ED IT, IN KE EPING OUT THE DEATHTHREATS AND THE DUCT TAPE AND THE GUN , I KNOW THAT THEY MINIMI ZED THAT NOW. THEY DIDN'T , A T THE TIME OF TRIAL THEY DIDN'T SAY, WELL , JUDGE , YOU ARE NOT DOINGANYTHING AND WE DON'T WANT YOU TO EXCLUDE THESE, BUT NOW THEY COMPL AIN THAT THAT D IDN'T REALLY MINIMIZE ANYTHING, AND I THINK THAT IN FACT THAT I S VERY SIGNIFICANT, PARTICULARLY WHEN OUR VICTIM WAS SHOT , AND YOU KNOW , THE JUDGE I SN'T LE TTING THEM HEAR THAT THIS MAN HAD A FIREARM AND HAD ACCESS TO A FIR EARM . THAT IS STILL BEING EXCLUDED. THAT WAS A SIGNIFICANT THINGTO EXCLUDE WHEN YOU HAVE A VICTIM THAT HAS BEEN SHOT. IN ADDITION

DOES THE TESTIMONY SHOW , SAY THAT HE LEFT WITH M ICHAEL HUGHES?

YES , YOUR HONOR .

AND WAS MICHAEL HUGHES IN SOME OF THESE PHOTOGRAPHS?

NO.

OK AY. SO THE , I S THAT THE S UM OF THE TESTIMONY CONCERNING MICHAEL HUGHES THAT WAS BEFORE THE GU ILT PH ASE JURY?

ACTUALLY AS FAR AS MICHAEL HUGHES , YES , ALTHOUGH THE CO URT READ A STIPULATION WHICH BENEFITED THE DEFEND ANT , TO A JURY , THAT SA ID THAT HE HAD DEVELOPED A RELATIONSHIP WITH MICHAEL HUGHES , WHERE HE F ELT LIKE MICHAEL HUGHES WAS HIS STEPSON, THAT THE OKLAHOMA HE EM AUTHORITIES HAD TERM INATED HIS - - OKLAHOMA AUTHORITIES HAD TERMINATED HIS PARENTAL RIGHT S.

THAT WAS IN THE GUILTPHASE.

THAT WAS WHEN THEEVIDENCE WAS FIRST PRESENTED. SHE WANTED TO LAY THE BACKGROUND SO THAT IT IS SETTING UP THAT IT IS MITIGATING THAT HIS PARE NTAL RIGHTS TO MICHAEL HAD BEEN SEVERED , AND I T TURNS IT INTO MORE A FTER EMOTIONAL UNDERSTANDING CRIM E FOR THEJURY TO SEE , AND , I THINK, LESS INFLAMMATORY AND LE SS

THE THING ABOUT THE C HILD DISAPPEARING.

NO, SIR. THE JURY DID NOT HEAR ANYTHING ABOUT THAT.

HOW ABOUT MO VING ON TO THE PHOTOGRAPHS.

BEFORE YOU MOVE ON , DID THE JUDGE GIVE A LI MITING INSTRUCTION, BOTH BEF ORE AND AFTER THE TESTIMONY?

THIS JUDGE THAT , LIMITING INSTRUCTION WAS GIVEN TO THE JURY OVER AND OVER AGAIN , BOTH BEFORE , D URING , AND AFTER THE DAVIS TESTIMONY , AND ADDI TIONALLY WITH SOME OF THE OTHER ACTS THAT WERE DESCRIBED IN THE EVIDENCE , WHEN THEY TALKED ABOUT THE PICTURES THEY RECEIVED LIMITING INSTRUCTIONS ON THAT, AND , OF COURSE , IN HERFINAL

INSTRUCTIONS TO THE JURY, SHE GAVE, SHE ADDRESSED THE FACT THAT THEY HAD HEARD EVIDENCE ABOUT OTHER CRIMES, AND, A GAIN, REMINDED THEM OF HOW LIMITED THEY COULD USE THAT TESTIMONY. SO THEY WERE EXTENSIVELY, AND SHE, SHE FREQUENTLY SOUGHT IN PUT FROM THE PARTIES ON GIVING THE INSTRUCTIONS, ON CRAFTING HER INSTRUCTIONS. THERE WERE A NUMBER OF THINGS THAT SHE FELT LIKE THEY HAD TO BE ABLE TO LET THE JURY KNOW ABOUT, AND PART OF IT WAS EXPLAINING THE PICTURES AND THE FACT THAT THEY WEREN'T SEPARATING THE RECEIVING THE '97 PICTURES THAT THEY HAD HEARD BUT THEY HAD TO CRAFT AN INSTRUCTION, SHE DIDN'T WANT TO TELL THE JURY THAT YOU CAN'T SEE THE ONES THAT ARE TOO BAD, SO THERE WAS A LOT OF WORK AND EFFORT THAT WENT INTO THAT AND A LOT OF WORK AND EFFORT THAT WENT INTO CRAFTING THIS EVIDENCE, TO TRY AND KEEP OUT THE MOST PREJUDICIAL AND STILL LET THE STATE HAVE THE PROBATIVE FORCE OF THE EVIDENCE AVAILABLE.

REGARDING THE PHOTOGRAPHS, SO THAT YOU CAN ARGUE THAT, WHAT IS THE, WHAT WAS THE PURPOSE OF ALLOWING IN ALL OF THE PHOTOGRAPHS OF THE FEMALE GENITALIA THAT ARE LITERALLY UNATTACHED TO ANY BODIES OR FACES OR ANYTHING LIKE THAT, THEY WERE ALL CROPPED?

THE PURPOSE OF LETTING IT IN IS THAT IT WAS, IN DEED, A COLLECTION OF PHOTOGRAPHS, AND AS A COLLECTION, THE JUDGE DETERMINED THAT COLLECTION WAS RELEVANT, AND IT, EVERYTHING IN THE COLLECTION IS RELEVANT. AT THAT POINT, AND SHE REALIZED THAT SHE HAD TO REMOVE THE MOST PREJUDICIAL, BUT THE COLLECTION THAT IS RELEVANT TO EVERY PICTURE THAT HAS RELEVANCY, BECAUSE THEY TAKE WHAT ARE OTHERWISE COMPLETELY RANDOM, UNRELATED PICTURES AND THEY TURNED THEM INTO A COLLECTION.

WHY IS THE PART OF THE COLLECTION, ASSUMING THAT THE THREE CATEGORIES THAT WE HAVE TALKED ABOUT BEFORE, THAT IS THE PHOTOGRAPHS OF THE VICTIM, THE PHOTOGRAPHS OF THE OTHER, OF HIS DAUGHTER, AND THE PHOTOGRAPHS OF THE OTHER, THE FRIEND'S DAUGHTER, IF I UNDERSTAND IT, AND FROM COUNSEL'S ANSWER, SOUNDED LIKE THOSE CONSTITUTED 80 OF THE 90 PHOTOGRAPHS THAT WERE ADMITTED. WHY, WHAT IS THE RELEVANCE, ASSUMING THOSE NUMBERS ARE RIGHT, OF THE OTHER TEN PHOTOGRAPHS THAT WERE APPARENTLY OF NOBODY IDENTIFIED AS BEING CONNECTED TO THE DEFENDANT AND THAT WOULD BE DIRECTLY RELEVANT TO HIS CONNECTION TO THE COLLECTION AND THEN TO THE VICTIM, YOU KNOW, IN THIS CASE, WHICH THOSE THREE CATEGORIES SEEM TO ESTABLISH THAT. WHY THE OTHER TEN PHOTOGRAPHS OF UNKNOWN PEOPLE?

WELL, THERE WERE NOT TEN PHOTOGRAPHS THAT WERE IDENTIFIED BELOW AS, JUDGE, THESE ARE THE TEN PHOTOGRAPHS THAT PUSH US OVER THE LINE. THESE ARE THE ONES THAT SHOULD NOT COME IN. WHAT WAS OBJECTED

IT WASN'T IN THE OBJECTION, THEN, THAT JUDGE, THE PHOTOGRAPHS OF THE PEOPLE THAT AREN'T IDENTIFIED AND AREN'T IN THE THREE CATEGORIES I MENTIONED, SHOULD NOT COME IN

THE OBJECTION BELOW WAS THAT THERE IS ONE PICTURE OF THE BOAT, THE ONE PICTURE OF THE BOAT AND THE 16 PICTURES OF CHERYL SHOULD COME IN AND NOTHING ELSE. THAT WAS THE OBJECTION BELOW FOR APPELLATE PURPOSES.

THERE WAS NO ARGUMENT MADE BELOW THAT, EVEN IN THE WORST CASE SCENARIO, JUDGE, THAT AT LEAST YOU SHOULDN'T ALLOW THESE PHOTOGRAPHS OF THE UNIDENTIFIED PERSONS THAT ARE IN THEM.

THERE WAS AN ACKNOWLEDGMENT BY THE DEFENSE BELOW THAT THEY COULD SEE THE RELEVANCY OF ONE PICTURE OF SHARON, ALSO, BE INCLUDED. SHARON MARSHALL ALSO BE INCLUDED WITH THE BOAT AND WITH THE 16 PICTURE OF THE VICTIM. THEY SAID YOU PUT IN

ONE PICTURE OF SHA RON MARSHALL AND WE ACKNOWLEDGE THAT THOSE PICTURES ARE NUDE OR IN SOME STAGE OF DRESS , AND THAT CAN COME IN AND THE BOAT CAN COME IN AND THE 16 PICTURES CAN COME IN AND NOTHING ELSE SHOULD COME IN , AND THAT WAS THE POSITION OF THE DEFENSE AT TRIAL.

LET'S GO AHEAD AND UNDERSTAND, WHY IS IT , SINCE , WHY IS IT SIGNIFICANT THAT THEY WERE A COLLECTION ?

IT IS SIGNIFICANT THAT THEY ARE A COLLECTION , BECAUSE YOU NEED TO TIE HIM TO THESE SIXTEEN PICTURES OF THE VICTIM IN THIS CASE . PARTICULARLY WHEN HIS ARGUMENT IS THAT SOME OR ALL OF THESE PICTURES HAVE BEEN PLANTED, AND THAT IS HIS DEFENSE, THAT THESE THINGS HAVE BEEN TAMPERED WITH.

OK AY. SO WE HAVE, IT IS HIS BOAT.

YES.

ALL RIGHT. SO SOME BODY WOULD HAVE , AND IT IS HIS DAUGHTER/WIFE.

RIGHT .

IT IS HIS , SOMEBODY'S FRIEND .

HE LEN KELLER'S CHILDREN , AND THOSE ARE UNIQUE , BECAUSE SHE HAD PICTURES WHICH FLOYD HAD GIVEN HER , WHICH APPEAR TO HAVE BEEN TAKEN AT THE SAME TIME , AS THE PICTURES IN HIS COLLECTION, INNOCENT PICTURES. NOW, HE , ALSO, HAD IN HIS COLLECTION, MANY THAT ARE INNOCENT PICTURES. AND I KNOW YOU TALKED ABOUT THE TEN , JUSTICE ANSTAD, AND I WENT THROUGH AND TRIED TO DIVIDE THEM UP, AND IT IS VERY SUBJECTIVE. SO IT IS HARD TO GIVE A NUMBER . BUT WHEN I WENT THROUGH AND JUST TRIED TO DIVIDE THEM UP INTO CATEGORIES , I ENDED UP WITH MOST OF THEM BEING IN THAT CATEGORY OF THE SUGGESTIVE CLOTHED SUGGESTIVE -TYPE POSING OF THE PICTURES THAT WERE ADMITTED. THE RELEVANCE FOR THOSE IS IT SHOWS THAT HE TOOK THE PICTURES. HE WAS AWARE OF THE PICTURES. AND HE IS TIED TO THE PICTURES THROUGH THE TESTIMONY OF HELEN KELLER , BECAUSE SHE HAD THE SAME PICTURES THAT HE HAD TAKEN AT THE SAME TIME, AND YOU LOOK AT THE KIDS AND THEY ARE WEARING THE SAME CLOTHES, AND IT IS APPARENTLY IT IS APPARENT THEY WERE TAKEN AT THE SAME TIME AND AT THE SAME PLACE, IN HIS APARTMENT IN OKLAHOMA , SO THAT IS A VERY CLEAR THING , THAT HE HAD TAKEN THE PICTURES OF THE CHILDREN.

THOSE PICTURES WERE THE SIMILAR POSES AND CLOTHES WHEN HE DID TAKE THE PICTURES?

THE JUDGE SAID IT APPEARED TO BE POSED THE SAME WAY OF THE VICTIM , AND ANYTHING THAT SHE SAW WAS SIMILARITY LIKE THAT, SHE KEPT IN , AND DID NOT KEEP OUT FROM THE JURY. AND THAT WAS HER EXPLANATION , WHEN SHE SAID I AM LETTING IN SOME THAT , ACCORDING TO WHAT THE JUDGE SAID, SHE SAYS I WOULD CONSIDER THIS PORNOGRAPHIC, BUT I THINK IT IS RELEVANT , BECAUSE OF THE WAY THEY ARE POSED THE SAME WAY THAT THESE OTHER PICTURES ARE POSED .

I GUESS THAT IS WHERE THE PROBLEM STARTS TO HAPPEN. THEY ARE SIMILAR TO NOT THE VICTIM , NOT TO THE VICTIM

SOME OF THEM ARE , AND SOME .

IT IS CONFUSING. ANOTHER PICTURES OF THE VICTIM ARE SEXUAL IN NATURE , ALSO, SO IT IS HARD TO EXCLUDE THOSE OUT AND SAY THEY ARE SIMILAR TO THIS BUT NOT SIMILAR TO THAT.

HOW OLD WAS THE VICTIM? ANOTHER VICTIM WAS 19 , ANDTHERE IS DISAGREEMENT IN THE RECORD ABOUT HOW OLD, THIS ACHILD OR IS THIS AN ADULT? I THINK AT ONE POINT THE JUDGE AND THE DEFENSEATTORNEY SAY, WE JUST A GREE TO DISAGREE ON THAT POINT. THAT IS VERY SU BJECTIVE , ANDTHREE , I KNOW THAT THREE OF THE PICTURES THAT WERE EXCLUDED, DEMONSTRATE THE COMMISSION OF A CAPITAL SEXUAL BATTERY IN PROGRESS . AND THE JUDGE CLEARLY WASNOT GOING TO LET THOSE G O BACK TO THE JURY , AND SHE IN ADDITION TO THOSE THREE, SHE WANTED TO TAKE OUT THE ONES AND SHE WAS FOCUSING ON THE O NES THAT INVOLVED CHILDREN THAT YOU COULD CLEARLY IDENTIFY THAT THEY WERE CHILDREN, AND SO THAT WAS HER CONCERN, TO KE EP THE WORST PICTURES OUT , AND THIS IS A CASE , ALL ABOUT DRAWINGTHE LINE, AND WE ARE NOT UP HERE TO DAY FOR ME TO SAY WHERE THE LINE SHOULD BE DRAWN OR FOR YOU T O SAY WHERE THE LINE SHOULD BE D RAWN. WE ARE HERE TO SAY DID THE JUDGE DRAW THE LINE OWN ROENBLY, BECAUSE THAT I S HERJOB. THAT IS REASONABLY , LAWBECAUSE THAT IS HER J OB, THAT IS - - REASONABLY, BECAUSE THAT IS HER JOB , THAT IS HER DISCRETION ANDTHERE WERE TWO OR THREE-DAY HEARINGS BA SED PARTICULARLY ON THE EVIDENCE OF TAMPERING , AND IT WAS STILL MAINTAINED AT TRIAL, AND IT WAS AL WAYS OUT THERE, BUT THE PREJUDICIAL BALANCING TEST WAS SOMETHING THAT THEY KNEW FROM THE BEGINNING WHEN THEYWERE HAVING THE PRETRIAL HEARINGS THAT THEY WERE GOING TO GET IN THE TRIAL. THE JUDGE SAID ALL AL ONG , THERE ARE SOME OF THESEPICTURES THAT THE JURY IS NOT GOING TO SEE , THAN IS C LEAR, THAT THAT WASACCEPTED BY EVERYBODY FROM THE BEGINNING.WE ARE GOIN G TO HAVE TO G O THROUGH AND PULL OUT THEWORST OF THE WORST AND SHE EXERCISED HER DISC RETION VERY REAS ONABLY IN TR YING IT TO DETERMINE WHICH PICTURES WERE REALLY GOING OVER THE LINE, AND SHE KEPT THOSE OUT AND EXCHROOED CL UED ED AND EXCLUDED THOSE, AND THAT IS EXACTLY WHAT THIS COURT HASSAID YOU NEED TO DO IN THIS SITUATION, AND I DON'T SEE ANY ABUSE OF DISCRETION INTHE WAY THAT SHE DID THAT, AND THERE IS NOT AN ABUSE OF DISCRETION PRESERVED, SO THAT, WELL , THESE FIVE PICTURES ARE THE ONES THAT WE DON'T THINK SHOULD HAVE GONE TO THE JURY. THE WH OLE , THE ARGUMENT HEREHAS BEEN , WELL , OKAY , WE SEE THE RELEVANCE OF THE BOAT, AND WE SEE THE RELEVANCE OF THE VICTIM AND MAYBE ONEPICTURE OF SHARO N MARSHALL BUT EVERYTHING ELSE SHOULD COME OUT. THAT WOULD NOT LEAVE THEJURY WITH ANY SENSE OF WHAT THIS COLLECTION WAS. THESE PICTURES WOULD L OOK VERY OUT OF PLACE, IF IT IS JUST 16 PICTURES A FTER VICTIM AND A PICT URE OF ABOAT, AND A JURY IS GOING TO BE VERY , I WOULD THINK , WOULD BE VERY CONCERNED A BOUT MA KING A LOT OF INFERENCES, W HEN THEY ARE NOT GIVEN THAT WHO LE PICTURE , AND JUST ICE ANST EAD, I KNOWIN THE JIMMY R YCE CASE EARLIER THIS MORNING , YOU SAID, WELL, THE STATE IS GOING SAY IN A CRI MINAL CASE WE JUST WA NT THE TRUTH. WE JUST WANT THE TRUTH OUTTHERE, AND CERTAINLY THE TRUTH CAN BE VERY PREJUDICIAL, AND THIS JUDGE , I THINK DID A FABULOUS JOB WITH THIS TRIA L. SHE TRIE D TO KEEP EVERYBODYON A VERY SHORT LE ASH , BECAUSE THERE WERE ALL KINDS OF PRE JUDICIAL AC TS THAT THE DEFENDANT HAD BEEN INVOLVEDIN, AND WHEN YOU HAVE A CASE THAT

LET ME ASK YOU ABOUT PREJUDICIAL ACTS.

YES.

IF WE CONCLUDE THAT THE ADMISSION OF THE TESTIMONY CONCERN ING THE KIDNAPING , THE TYING UP OF MR . HUGHES , OR WHOEVER THE PRINCIPAL IS , MR . DA VIS , IF WE CONCLUDE THAT THOSE THINGS WERE, I N FACT, ERROR , IN ANSWER TO ONE OF JUSTICE ANSTEAD'S QUESTIONS, YOU SAID THAT THIS , I T WOULD BE HARMLESS , BUT WHY IN THIS CIRCUMSTANCE , WHEN PRACTICALLY EVERYTHING THAT WE HAVE THAT CONN ECTS THIS DEFENDAN T TO THE MURDER IS, REALLY , CIRCUMSTANTIAL , WHY WOULD NOT THIS EVIDENCE THAT HE HAS BEEN INVOLVED IN OTHER CRIMES , HOW CAN W E REALLY SAY THAT THAT WOULD BE HARMLESS?

WELL , FIRST , I DISAGREE THAT THIS IS A CIRCUMSTANTIAL EVIDENCE CASE. I THINK THAT THERE IS AGREAT DEAL OF DIRECT EVIDENCE, IN CLUDING HIS PRIOR THRE ATS , HIS THREATENING

LETTERS TO THE WITNESSES. I THINK THE PICTURES THEMSELVES, ARE NOT CIRCUMSTANTIAL. THEY ARE DIRECT EVIDENCE. WHEN YOU LOOK AT THE PICTURES OF CHERYL COMMESSE, YOU ARE WITNESSING A KIDNAPING IN PROGRESS. YOU HAVE BECOME AN EYEWITNESS. I UNDERSTAND IT WAS A CIRCUMSTANTIAL THING.

WE DON'T HAVE FINGERPRINTS. WE DON'T HAVE GUNS. WE DON'T HAVE A LOT OF OTHER THING THAT IS WE NORMALLY SEE IN A MURDER CASE, SO I JUST WANT YOU TO EXPLAIN TO ME WHY THIS IS NOT HARMFUL ERROR, IF IT IS ERROR.

BECAUSE I THINK THERE IS NO REASONABLE POSSIBILITY THAT THE JURY VERDICT IS BASED ON ANY OF THIS IMPROPER EVIDENCE AND NOT ON THE EVIDENCE THAT ACTUALLY WENT TO THE CRIME AGAINST CHERYL. THE, AND THE JUDGE MAKES THE COMMENT, HERSELF, SHE SAID NO JURY IS GOING TO CONVICT HIM OF MURDER BASED ON THESE PICTURES.

WE HAVE A PRIOR THREAT, AND WE HAVE PHOTOGRAPHS.

WE HAVE THE PRIOR THREATS, WHERE HE, VERY SHORTLY, WE HAVE A VERY NARROW TIME FRAME. WE KNOW THAT VERY SHORTLY BEFORE THE VICTIM DISAPPEARED, THAT MR. FLOYD HAD BEEN CALLING HER, SAYING WHERE DOES THIS PERSON LIVE, WHAT IS HER LAST NAME, I AM GOING TO MAKE HER PAY. SHE IS GOING TO BE SORRY FOR WHAT SHE HAS DONE. SO WE HAVE THOSE THREATS. THE SAME WITNESS THAT HEARD THOSE THREATS, LATER SEES MR. FLOYD ARGUING WITH THE VICTIM IN THIS CASE, OUTSIDE THE BAR, AND SHE KNOWS THAT THEY ARE HAVING A HEATED ARGUMENT, SO WE HAVE THOSE. THEN WE HAVE THE PICTURES, AND, AGAIN, THE EXPERT TESTIMONY WITH THE PICTURES, WE KNOW THAT CHERYL IS IDENTIFIED, THE VICTIM, THROUGH DIRECT TESTIMONY BY FOUR DIFFERENT WITNESSES. WE KNOW THAT THE CLOTHES THAT SHE IS WEARING IN THE PICTURES ARE CONSISTENT, ARE THE SAME CLOTHES THAT ARE FOUND IN THE FIELD WHERE HER SKELETON IS FOUND. THE FINGERNAILS ARE THE SAME. THE INJURIES TO HER FACE HAVE NOT EVEN GONE THROUGH THE HEALING PROCESS, SO WE KNOW THAT HER DEATH OCCURS WITHIN THIS SAME PROXIMITY OF TIME, BASED ON, AND THAT IS ALL DIRECT EVIDENCE. THAT IS ALL WITNESSES THAT ARE LOOKING AT THE PICTURES AND CAN TELL YOU THAT.

I JUST WANT TO, YOU HAVE CERTAINLY FINISHED RESPONDING TO THE QUESTION BUT YOUR TIME EXPIRED ABOUT A MINUTE AGO.

THERE IS A GREAT DEAL OF EVIDENCE WHICH TIES HIM TO THIS AND TO THESE PICTURES, AND THE JURY WAS ALWAYS GOING TO HEAR THAT HE WAS HOLDING SHARON OUT AS HIS DAUGHTER AND HE LATER MARRIED HER. THEY ARE GOING TO SEE THE PICTURES OF CHERYL, AND ON TOP OF THAT, I DON'T SEE HOW ANYTHING COULD BE TOO PREJUDICIAL THAT THE JURY IS NOT GOING TO BE SWAYED BY THE EVIDENCE THAT ACTUALLY WAS PRESENTED ON THE CRIME. WE ASK YOU TO AFFIRM THE JUDGMENT AND SENTENCE IMPOSED. THANK YOU.

CHIEF JUSTICE: REBUTTAL. YOU HAVE GOT A HALF MINUTE.

I JUST WANTED TO ADDRESS, THE STATE HAS BEEN CONTINUALLY ARGUING THAT THE COLLECTION OF PHOTOGRAPHS WAS IMPORTANT, THAT IT HAD TO COME IN AS A COLLECTION. NOW, THE FACT IS, MOST PEOPLE HAVE PHOTO ALBUMS, AND THE STATE NEVER TRIES TO BRING IN THEIR WHOLE PHOTO ALBUM AS SOME SORT OF EVIDENCE, UNLESS IT IS RELATED TO THE CRIME FOR WHICH THE PERSON IS BEING TRIED. AND IN THIS CASE THE ONLY REASON THEY WANTED THE COLLECTION IS BECAUSE OF THE NATURE OF IT, BECAUSE OF WHAT WAS CONTAINED IN THE CHILD PORNOGRAPHY ASPECTS OF IT AND THEY JUST WANTED TO PORTRAY HIM AS A PERSON WITH A SICK MIND.

WERE ANY OF THESE PICTURES, WAS THE SETTING THE SAME? CAN WE GATHER THAT FROM THIS COLLECTION OF PICTURES, WHERE THE SETTING IS THE SAME, WHERE THE VICTIM AND THE

DAUGHTER WERE FOUND , I MEAN, OR POSED , AND THE OTHER PEOPLE THAT WE KNOW NOTHING ABOUT?

NO. NO. THE ONES, THE PHOTOGRAPHS OF THE VICTIM WERE THE ONLY ONES THAT WERE TAKEN , SUPPOSEDLY INSIDE HIS TRAILER AND WERE IDENTIFIED AS BEING IN SIDE HIS TRAILER. THESE PHOTOGRAPHS WERE TAKEN O VER A PE RIOD OF YEARS , ANDMANY IN UN KNOWN PLACES. THE ONLY ONES THEY KNOW WHERE IT WAS IS WHERE THE PEOPLE ARE IDENTI FIED AND COULD TESTIFY AS TO WHEN THOSE WERE TAKEN.

GOING BACK TO THE COLLATERAL CRIME AND THE ADMISSION OF THE EVIDENCE OF THAT, WHY ISN'T THAT JUST A SITUATION, THAT IS TO UGH THAT IT TURNS OUT THAT HE GOT THE TRUCK BY A CARJACKING OR WHATEVER , IF , FOR INST ANCE , HIS TRUCK , A FTER THIS EVENT IN THIS EVENT INCURRED , THEY FOUNDTHE TRUCK WITHIN A F EW DAYS AND IT HAD HIS IDENTIFICATION AND IT HADTHE GUN IN IT, AND THE GUN WAS IDE NTIFIED AS THE GUN THAT KILLED THE VICTIM HERE. ARE YOU SAYING THAT THE FACT THAT HE DI D A CARJACKING TO GET THE TRUCK , WOULD NOT, THEN, BE ADMISSIBLE IN EVIDENCE, TO SHOW HIS CONNECTION TO THE GUN THAT WAS FOUND IN THE TRUCK A WEEK LAT ER?

WELL , THAT, I N THAT CASE , YOU WOULD HAVE , IF , THAT WOULD BE SAYING THAT THE GUN THAT WAS USED FIVE Y EARS PREVIOUSLY WAS THE SAME GUN , AND IN THAT CASE IT WOULD BE. IT WOULD BE APPLICABLE.

WHY, THE PHOTOGRAPHS ARE THE SAME SITUATION, ARE THEY NOT?

THEY WEREN'T FOUND IN CONNECTION WITH THE INCIDENT. THEY WERE FOUND , DISCOVERED YOU KNOW , SOMETIME LATER , AND , AGAIN , YOU KNOW, THEEVIDENCE OF HOW THE , O F , THAT HE DID HAVE THE TRUCK IS VERY IMPORTANT , BUT THEFACT THAT , HOW HE GOT THE TRUCK WHEN HE WAS WILLING TO STIPULATE TO HOW HE , THAT HE DID HAVE THIS TRUCK AND IT WAS NOT BY THE PRINCI PAL AGREE ING

DOES T HIS INCLUDE THAT THERE WAS A ABANDONMENT OF IT, TO O? BECAUSE TO ME I T SEEMSIMPORTANT IN THE CONTEXT OF THINGS THAT SOMEBODY WOULD POTENTIALLY LE AVE , WHY WOULD SOMEBODY LEAVE THESE PHOTOGRAPHS IN THERE , THE CIRCUMSTANCES SURROUNDING THE TAKING AND ABANDONMENTOF THE TRUCK, ARE IMP ORTANT , BECAUSE , OBVIOUSLY, WHY WOULD SOMEBODY POTENTIALLY L EAVE THESE PICTURES BE HIND, UNLESS THERE WAS SOME EXIGENCY, SO WAS THE STIPULATION WAS I ADMIT I STOLE IT OR I ADMIT I STOLE IT AND ABANDONED IT IN TEXAS?

HE WAS NEVER AS KED TO STIPULATE TO. THAT I THINK HE CERTAINLY WOULD HAVE, HAD HE THE QUESTION IS NOT WAS HE ASKED , BECAUSE WASN'T THAT AN OF FER BY THE DEFENDANT TO WHAT HE WOULD STIP ULATE TO?

HE NEVER CONTESTED THAT THE TRUCK WAS FOUND. IT WAS FOUND ABANDONED. HE NEVER OBJECTED , HE NEVER EVEN CROSS-EXAMINED THE WITNESS WHO TESTIFIED TO WHERE IT WAS FOUND.

I THOUGHT THAT THE DEFENDANT HAD VOLUNTEERED TO STIPULATE TO SOMETHING.

HE VOLUNTEERED TO STIPULATE THAT H E STO LE THE PRINCIPAL 'S TRUCK. THAT IS WHAT H E VOLUNTEERED TO S T IPULATE TO , WAS THAT HE HAD POSSESSION OF IT, AND THAT, IT WASN'T BECAUSE THE PERSON HAD GI VEN PERMISSION .

CHIEF JUSTICE: WITH OUR HELP, YOU HAVE USED UP THE REST OF YOUR TIME , AND W E WILL TAKE THE CASE UNDER ADVISEMENT AND, A LSO , CONSIDER ALL THE OTHER POINTS R AISED IN YOUR BRIEF. THANK YOU VERY MU CH. THE COURT WILL BE IN RE CESS UNTIL NINE O'CLOCK

TOMORROW MORNING .

MARSHA L: PLEASE RISE. ,, ,,