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John M. Buzia v. State of Florida

, BUZ IA VERSUS STATE OF FLORIDA. I SEE MS. DA VI S MAKING HER THIRD APPEARANCE FOR T HEWEEK. I HOPE YOU CAN KE EP TRAC K OF EVERYTHING.

MAY IT PLEASE THE COURT. MY NAME IS GE ORGE BU RDEN FROM THE SE VENTH JUDICIAL CIRCUIT ON BEHALF MR . JO HN BUZIA, CONV ICTED OF FIRST-DEGREE MURDER AND SENTENCED TO DEATH FOR T HEMURDER OF CHAR LES KE RSCH.

CHIEF JUSTICE: BEFORE WEGET INTO YOUR ARGUMENT , YOU HAVE RAISED MANY ISSU ES ON APPEAL, AND I NOTE THAT THEY ARE ALL RELATED TO THE PENALTY PHASE.

UM-H UM.

CHIEF JUSTICE: I JUST WANT, YOU HAVE , YOU DETERMINED NOT TO RAISE ANY GUILT-PHASE ISSUES .

THAT IS CORRECT, CH IEF JUSTICE, AND THE REASON IS, IN THIS PARTICUL AR CASE , THE EVIDENCE THAT WAS PRESENTED IS, REALLY, THE STA TEMENTS OF MR. BUZIA , THE STATEMEN TS THAT WERE MADE BY THE BLO OD SPLATTER EVIDENCE P ERSON , THE EVIDENCE THAT WAS PRESENTED BY MR. BUZIA , MADE IN TWO DIF FERENT STATEMENTS. WHEN HE WAS INTERVIEWED BY THE POLICE, THEN WHEN HE SPOKE TO HIS DOCT ORS . AND THEN THE F INAL TWO AR EAS OF EVIDENCE ARE THE ME DICAL EXAMINER'S TESTIMONY AND MRS. KERSCH'S TESTIMONY.YOU PUT THEM ALL TOGE THER , AND PUT THE M IN A LOGICAL SEQUENCE, AND IT ONLY CONCLUDES THAT THERE WERE JUST TWO, AT MOST , AGGRAVATING FA CTORS IN THIS CASE, AND NOT S I X. THAT THE JUDGE FO UND . AND I WOULD LIKE TO EXPLAINWHY THAT IS , STARTING WITH THE MEDICAL EXAMINER , BECAUSE THAT IS PURE SCIENTIFIC EVIDENCE THAT WAS PRESENTED. HE EXPLAINED THAT THE VICT IM IN THIS CASE , SUFFERED THREE DIFFERENT INJURIES TO THE HEAD, PA RDON ME , FO UR. THE FIRST ONE WAS A PUNC H TO THE FACE. THE SECOND ONE WAS A STRIKING OF THE LEFT SIDE OF THE HEAD, THE THIRD ONE WAS THE BACK OF THE HEAD, AND THE FOURTH ONE WAS THE BASE OF THE SKULL.

THESE DIDN'T ALL TAKE PLACE AT THE SAME TIME, CORRECT?

NO , THEY DID NOT.

HE ESSENT IALLY TOL D THE POLICE WHAT HE HAD DONE A NDHOW HE IT GONE TO THE GARAGE , GOTTEN AN AX , COME BACK WITH THE AX, HIT HIM OVER THE HEAD WITH AN AX, ALL OF THOSE FACTS AD MITTED TO, CORRECT?' MA DE, IN HIS IN ITIAL, T HAT IS NOT TOTA LLY CORRECT , JUSTICE, AND THAT IS WHY JUSTICE LESTER, I THINK , GOT IT WRONG, BECAUSE WHEN HE FIRST G AVE HIS TESTIMONY TO THE POLICE, HE WOULD NOT ADMIT TO THE FACT THAT H E USED AN AX ON MR . KERS CH, AND HE SAID , IN STEAD, HE HIT HIM WITH BOTH OF HIS HA NDS ON THE BACK OF THE HEAD AND KNOCKED HIM TO THE GROUND.

DIDN'T HE SAY , ALSO , THAT HE HI T HIM WITH THE BACK OF THE AX?

HE SAID THAT LATER ON.

L ATER O N BUT HE SAID IT. HE HAS AD MITTED THAT .

YES, BUT THE JUDGE RELIED UPON HIS INITIAL STATEMENTS TO POLICE THAT HE STRUCK HIM WITH HIS FISTS WHILE HE TRIED TO GET UP. IN HIS ARGUMENT OF WHY AN AGGRAVATING FACTOR EXISTED, WHEN IN FACT IT DID NOT, AND I WILL EXPLAIN. THAT THERE WERE TWO HITS WITH THE AX. IT IS WHAT IS ALLEGED BY THE BLOOD --

CHIEF JUSTICE: LET'S MAKE SURE, BECAUSE YOU SAID ONLY TWO AT THE MOST, WERE PROPERLY FOUND. I ASSUME YOU AGREE THAT THE PRIOR VIOLENT FELONY AGGRAVATOR WAS - - AGGRAVATOR WAS PROPERLY FOUND.

THAT IS CORRECT.

AND WHAT WAS THE OTHER ONE?

PROPER VIOLENT FELONY.

AND WHAT WAS THE OTHER ONE?

FELONY MURDER.

CHIEF JUSTICE: BECAUSE THEY ACTUALLY FOUND THIS DEFENDANT GUILTY OF FELONY MURDER, THE FELONY BEING BURGLARY, THE ROBBERY?

YES. YES.

CHIEF JUSTICE: WAS IT, YES, THE BURGLARY OR THE ROBBERY?

IT IS YES TO BOTH.

CHIEF JUSTICE: BECAUSE IF THERE IS THE BURGLARY IS ONE, THEN YOU HAVE GOT PECUNIARY GAIN, EVEN THOUGH THE JUDGE DIDN'T FIND IT AS A THIRD.

WELL, THE PREDICATE TO THE BURGLARY WAS -- THE PREDICATE TO THE BURGLARY WAS ROBBERY, THOUGH, SO IT EMERGED, EITHER WAY.

CHIEF JUSTICE: SO LET'S GO, THEN, TO, ARE YOU NOW GOING THAT THERE IS NO HAC, IS THAT WHAT --

THAT'S CORRECT. THERE IS NO CCP.

CHIEF JUSTICE: BUT ON THE ONE THAT YOU ARE TALKING ABOUT, AS FAR AS HOW THE VICTIM WAS MURDERED, WHAT, ARE YOU SAYING THAT IT DOESN'T MEET HAC? I JUST WANT TO TAKE THEM ONE AT A TIME.

RIGHT AND I WILL TELL YOU WHY, THE MEDICAL EXAMINER'S TESTIMONY AND I URGE YOU ALL TO REVIEW IT. IT IS VERY BRIEF. THE MEDICAL EXAMINER SAID THAT HE WAS PUNCHED IN THE FACE. THE FIRST INJURY WAS TO THE NOSE AND EYE WAS FROM A FIST. HE SAID THAT THE INJURY TO THE BACK OF HIS HEAD, THE FIRST INJURY WHICH COULD HAVE BEEN FATAL, WAS CAUSED BY HIM HITTING HIS HEAD ON A HARD OBJECT LIKE A FLOOR. THE OTHER INJURY ON THE SIDE OF THE HEAD, WHICH WAS FOUR INCHES INSIDE, WAS EITHER MADE, LIKELY MADE BY THE AX.

CHIEF JUSTICE: LET'S JUST GO, WASN'T SOME THING IMPORTANT THAT YOU WANT TO MAKE SURE WHERE IT HAPPENED. HE IS KNOCKED TO THE FLOOR, BUT I THOUGHT THERE IS TESTIMONY THAT AT SOME POINT, THIS VICTIM IS, STARTS TO, GETS UP. EITHER HE IS ON ALL FOURS OR IS GETTING UP. IS THAT CORRECT?

THAT WAS IN THE INITIAL STATEMENT TO POLICE, AND I WAS TRYING TO DISTINGUISH FOR JUSTICE. CAN THAT BE THAT WAS NOT TRUE, BECAUSE HE DIDN'T WANT TO ADMIT THE USE OF THE AX. HE WOULDN'T ADMIT TO IT. HE SAID -- TO IT. HE SAID HE HIT MRS. KERSCH WITH THE AX BUT THAT IS NOT TRUE. THAT IS PATENTLY INCORRECT. WE KNOW THAT NOW. WHAT HE HAD WAS THREE INTERVIEWS FROM HIS DOCTORS ABOUT EXACTLY WHAT HAPPENED AND THERE HE EXPLAINS THAT HE PUNCHED THEM AND THEN HE GRABBED AN AX AND STRUCK HIM.

WAIT A MINUTE. WHICH PART ISN'T TRUE, THE PART THAT THIS VICTIM WAS TRYING TO GET UP, AND HE HIT HIM AGAIN? THAT IS NOT TRUE?

WITH HIS FIST, THAT IS CORRECT. IT IS TRUE BECAUSE --

WAIT. HE WAS TRYING TO GET UP. IS THAT TRUE?

NO.

SO THE VICTIM IS JUST LYING THERE.

THE BLOOD SPLATTER EVIDENCE SUPPORTS THAT, ALSO.

BLOOD ALL OVER THE FLOOR, AND THE VICTIM, THE DEFENDANT JUST HITS HIM AGAIN, NOT THAT THE VICTIM IS GETTING UP AND HE HITS HIM AGAIN, BUT HE JUST HITS HIM.

THAT'S RIGHT. THE BLOOD SPLATTER EVIDENCE SUPPORTS THAT AS WELL.

IS LYING HELPLESS ON THE FLOOR.

I WILL EXPLAIN THAT AS WELL. IT WAS, AS HE EXPLAINED TO HIS DOCTORS AFTER ON, THAT HE HAD STRUCK HIM IN THE FACE AND THEN HE REACHED FOR AN AX AND HIT HIM, PROBABLY THIS LEFT, THIS FOUR-INCH INJURY, STRIKING BLOW TO THE HEAD. HE, THEN, HIT THE GROUND, WITH FORCE ENOUGH THAT IT COULD HAVE BEEN DEADLY, ACCORDING TO THE MEDICAL EXAMINER, BECAUSE THE INJURY TO THE BACK OF HIS HEAD FRACTURED HIS SKULL WHEN HE HIT THE FLOOR AND WAS UNCONSCIOUS AT THAT POINT, AND THEN HE CONTINUED HIS CRIMINAL ENTERPRISE, AND THEN WHILE HE WAS LEAVING, MR. KERSCH WAS COMING FLU, AND HE -- COMING THROUGH, AND HE STRUCK HIM WITH THE AX, THE LAST BLOW THAT WAS, ACCORDING TO THE BLOOD SPLATTER OF MEDIUM VELOCITY, JUST AS MR. BUZIA SAID. I DIDN'T HIT HIM WITH ALL MY FORCE. I HIT HIM NOT WITH THE SHARP EDGE, WITH THE BLUNT EDGE, TO KNOCK HIM SILLY.

CHIEF JUSTICE: SO I JUST WANT TO MAKE SURE. THE STATEMENT THAT THE JUDGE MAKES IN HIS SENTENCING ORDER, WAS, BUT THEN ATTEMPTED TO GET UP ON ALL FOURS, IS NOT SUPPORTED BY COMPETENT --

THE MEDICAL EXAMINER OR THE BLOOD SPLATTER EVIDENCE. PERSON.

CHIEF JUSTICE: THEY CONTRADICT THAT? DON'T WHAT ADICT IT.

YES, BECAUSE THERE IS -- CONTRADICT IT.

YES, BECAUSE THERE IS NO INJURY ON THE BACK OF THE HEAD FROM STRIKING HIM WITH HIS FIST.

YOU ARE CONTENTING THAT HE DIDN'T INTEND TO KILL HIM. HE INTENDED TO KNOCK HIM SILLY.

YES.

AND THAT IS A FINDING FROM THE JURY OF PREMEDITATED MURDER?

YES.

BUT THEN WE HAVE TO ASSUME THAT HE INTENDED TO KILL.

I SAID -- YOU'RE NOT ARGUING THAT THERE IS COMPETENT, SUBSTANTIAL EVIDENCE. I DON'T SEE THAT IN YOUR BRIEF.

THERE IS COMPETENT EVIDENCE IF WE TAKE THE FACT ---.

IF THE JURY TOOK FOR GRANTED THAT AND FOUND PREMEDITATED MURDER, THEN YOUR ARGUMENT DIDN'T INTEND, CONTRADICTS IT.

HE DID NOT. THE EVIDENCE FROM THE BLOOD SPLATTER PERSON IS THAT HE DID NOT. AND THE REASON IT CAUSED MORE INJURY, AS THE MEDICAL EXAMINER SAYS, IT WAS MORE AFTER MEDIUM-VELOCITY BLOW, IF YOU TALK TO THE MEDICAL EXAMINER, IS BECAUSE HIS SKULL WAS ALREADY FRACTURED IN THAT AREA WHEN HE STRUCK HIM IN THAT AREA, FROM THE INITIAL FALL, SO IT MADE MORE AFTER KIBACHBLINGT.

WHAT IS THIS PARTICULAR EVIDENCE RELEVANT TO?

ALL IN ALL AND I WILL EXPLAIN.

WOULD -- ALL IN ALL, AND I WILL EXPLAIN.

WOULD YOU EXPLAIN HOW THIS IS HAPPENING. YOU ARE CONTENDING THAT THERE WERE TWO ENCOUNTERS, THE FIRST ENCOUNTER WITH THE PERSON DOURNTION AND THEN AS YOU CAN TELL FROM THE QUESTIONS THERE, CERTAINLY FROM THE ORDER AND FROM WHAT WE HAVE SEEN, THERE APPEARS TO HAVE BEEN A SECOND ENCOUNTER FOR A SECOND REASON, THAT HE IS COMING AROUND OR GETTING UP. THERE SEEMS TO BE TWO. IS THAT WRONG?

THAT IS NOT WRONG. THERE WERE TWO ENCOUNTERS.

OKAY, AND WHAT WAS HAPPENING THAT PRODUCED THE SECOND ENCOUNTER? WAS THERE NOT A MOVEMENT OR SOMETHING THAT, OF A CONSCIOUS NATURE?

ACCORDING TO THE TESTIMONY OF MR. BUZIA, NOT HIS TESTIMONY, HIS STATEMENT TO HIS DOCTORS, MR. KERSCH WAS STARTING TO MOVE, AND BY THE BLOOD SPLATTER EVIDENCE, HE WAS IN A LOW POSITION TO THE FLOOR WHEN HE WAS STRUCK THE SECOND TIME.

THAT WOULD BE A POSITION FOR A JURY TO FIND THAT THIS PERSON WAS IN FACT, CONSCIOUS AND STRUGGLING TO COME TO THEIR FEET, OR FROM THE JUDGE, BASED UPON THE EVIDENCE PRESENTED TO EXTRAPOLATE FROM THE JURY'S FINDINGS THAT THERE WAS IN CONSCIOUSNESS, SO THAT WOULD IMPLY OR CERTAINLY ESTABLISH THE CONSCIOUS AWARENESS OF THIS ATTACK GOING ON WHILE THE BEATINGS' CONTINUING.

JUSTICE LEWIS, I POINT TO ANOTHER AREA OF EVIDENCE AND THAT IS MRS. KERSCH. IF YOU LISTEN TO HER TESTIMONY, THERE WAS A STRUGGLE AT THE DOOR AND THEN SHE WENT UNCONSCIOUS, AND THEN SHE WOKE UP BRIEFLY IN THE DEN AND WAS UNCONSCIOUS AGAIN. SHE DIDN'T KNOW WHAT HAPPENED. SHE HAD NO PAIN, NO FEAR. I SUBMIT TO YOU, MR. KERSCH EXPERIENCED THE SAME THING AS MRS. KERSCH. LOOK AT HER TESTIMONY OF HOW THE ATTACK WENT TO HER. SHE HAD --

WE CAN'T DEDUCE FROM WHAT HAPPENED TO MRS. KERSCH AND HOW SHE CAME IN AND OUT OF CONSCIOUSNESS AND THEN EXTRAPOLATE AND SAY THAT IS EXACTLY WHAT HAPPENED TO MR. KERSCH. WE CAN'T DO THAT.

YOU CERTAINLY CAN, JUSTICE. THAT IS WHAT IS CONSISTENT. WHAT THE JUDGE FOUND IN HIS SENTENCING ORDER, THERE IS NO TESTIMONY FROM MR. BUZIA THAT, FOR EXAMPLE, THIS GENTLEMAN PLED FOR HIS LIFE, THIS GENTLEMAN SCREAMED FOR HELP, THIS, OR ANY KIND OF INDICATION HE WAS CONSCIOUS. NOTHING! THERE IS NO EVIDENCE WHATSOEVER TO PRESENT THAT. THE ONLY THING WE HAVE, IS THAT HE GOT UP ON ALL FOURS IN HIS FIRST INITIAL STATEMENT, WHICH WE KNOW, NOW, IS NOT TRUE, BECAUSE HE USED AN AX, AND WE WOULDN'T WANT --

SO YOU ARE SAYING WHATEVER THE EVIDENCE IS ABOUT THE MOVEMENT OR WHATEVER HE DID, THAT THERE IS NO WAY THAT ONE CAN COME FROM THAT, THAT IS NOT COMPETENT, SUBSTANTIAL EVIDENCE THAT THERE WAS ANY CONSCIOUS AWARENESS OF ANYTHING. AS A MATTER OF LAW IS WHAT YOU ARE SAYING.

THAT'S CORRECT AND THE BLOOD SPLATTER EVIDENCE WOULD SUPPORT THAT AS WELL.

WHY, WHAT WAS THE EXPLANATION FOR YOUR CLIENT GOING BACK THE SECOND TIME WITH THE MALE VICTIM?

HE WAS GATHERING, HE WAS GOING TO TAKE GOODS OUT OF THE HOUSE TO STEAL AND MONEY AND LOOKING FOR MONEY AND SO FORTH, AND BEFORE HE LEFT, THIS GENTLEMAN CAME TO. HE HIT HIM.

CAME TO?

WELL THAT, IS NOT HIS WORD. HE WAS MOVING. HE WAS AFRAID HE WAS GOING TO COME TO, CAN MEAN. IT IS NOT CLEAR. -- TO CONSCIOUSNESS. IT IS NOT CLEAR. THAT IS THE PROBLEM. IT IS NOT CLEAR EXACTLY EXACTLY WHAT HAPPENED.

CHIEF JUSTICE: ISN'T IT CLEAR FROM THE EVIDENCE THAT HE WAS STILL ALIVE AND A THREAT TO HIM IN COMPLETING HIS ROBBERY?

ABSOLUTELY

CHIEF JUSTICE: OKAY. WELL, THERE FOR NOW WE GET BACK TO THE FACT THAT, IF IT PROCEEDED ON BETWEEN TIME ONE AND TWO, AND HE IS MOVING AROUND, THAT IS CERTAINLY, IN TERMS OF HIS, AND, AGAIN, HE IS INCAPACITATED, THAT CERTAINLY FITS INTO OUR PAST CASES, TALKING FWH BEING A -- TALKING ABOUT THIS BEING A PARTICULARLY HEINOUS, ATROCIOUS AND CRUEL WAY OF KILLING SOMEBODY.

IN BEATING CASES, THERE HAS TO BE SOME SORT OF EVIDENCE THAT THE VICTIM KNEW OF THE IMPENDING HARM THAT WAS COMING TO THE M. IF YOU LOOK AT MRS. --

CHIEF JUSTICE: HE IS, IF HE IS MOVING AROUND, AND STILL MAKING NOISE, I MEAN, EVEN WHEN HE LEFT, THE MAN WAS STILL GROANING. RIGHT?

NO.

CHIEF JUSTICE: THE JUDGE SAYS THAT.

ACCORDING TO THE MEDICAL EXAMINER, NO, THE LAST HIT OF THE AX WOULD HAVE RENDERED HIM UNCONSCIOUS IMMEDIATELY AND THEN --

CHIEF JUSTICE: SO THAT IS ANOTHER PART OF THE SENTENCING ORDER THAT IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE?

THAT'S CORRECT. THE INITIAL FALL REND ERED HIM UNCONSCIOUS AND HE WOULD HAVE POSSIBLY DIED OF THAT JURY, ACCORDI NG TO THE MEDICAL EXAMIN ER.

CHIEF JUSTICE: NOW , YOU DIDN'T HAVE A HEAD CAL EXAMINER -- A MEDICAL EXAMINER TESTIFY AT T HIS TRIAL.

YES, A MEDICAL EXAMINER DID TESTIFY.

CHIEF JUSTICE: TESTIFY TO WHAT YOU ARE SAYING. THAT WITH A REASON ABLE DEGREE OF PROBABILITY , THE FALL REN DERED HIM UNCONSCIOUS, AND THE ROAR ATTACKS WERE -- AND THE OTHER ATTACKS WERE , REA LLY , NEEDLESS.

THE STATE ASKE D WHAT WAS THE RANGE OF INJUR IES TO EACH ONE OF THESE THING S. THE MEDICAL EXAMINER S AID THERE WAS A LA RGE POO L OF BLOOD UNDER THE S KULL FRACTURE IN HIS BACK THAT WAS LIKELY CA USED B Y THE FLOOR, AND THAT , THE STATE ATTORNEY ASKED WOULD THAT HAVE CAUSED DEATH? HE SAID, YES , IT COU LD HAVE. THE PROB LEM IN THIS CAS E IS THE MEDICAL EXAMINER TESTIMONY, A LOT OF IT WAS LEADING. IF YOU READ IT, THE STATE ATTORNEY WAS TRYING TO G UIDE HIM DOWN THE PA TH FOR THESE AGGRAVATORS, AND THE DEFE NSE OBJECTED, AND S O HE GOT O FFTRACK AND NEVER GOT THE RIGHT QUESTIONS. WAS THIS, WAS IT POSS IBLE THIS GENTLEMAN WAS CONSCIOUS AND AWARE OF HIS ATTACK? NEVER ASKED. MEDICAL EXAMINER NEVER ANSWERED. LIKE YOU HAD I N WIL LIS Y , FOR EXAMPLE, WHERE YOU HAVE AN ATTACK OF A WO MAN IN THE HOUSE. THERE IS THOSE KINDS OF QUESTIONS ASKED OF THE THE MEDICAL EXAMINER. THOSE WEREN'T ASKED IN THIS CASE.

CHIEF JUSTICE: LET'S G O TO THE "AV OID ARREST". WHAT IS, HE IS INCAPACITA TED , THE ONE VICTIM.

UM-HUM .

HE I S PRO CEEDING WERE GOING AL ONG AND , TO COMP LETE HIS RO BBERY , AND THEN THIS GENTLEMAN, THE HUS BAND COMES IN . HE COULD HAVE LEFT , BU T HE STAYED . WHAT IS IT ABOUT THAT , THOSE FACTS, THAT DON'T RISE TO THE LE VEL OF A VOID ARR EST?

WELL, IN THE SENTEN CING ORDER, HE MAKES A N ABSURD CLAIM.IT IS PATENTLY ABSURD AND I WILL STATE IT FOR YOU. HE CLAI MS THAT HE TOOK MRS. KERSCH INTO THE DEN AND TOOK D UCT TAPE TO SECURE THE DOOR FROM HER TO LEAVE , WAITING FOR HIM T O COME TO KILL HIM AND ROB HIM . THERE IS NO EVIDENCE TO SUPPORT THAT WHATSOEVER. THAT IS WHAT THE WITNESS , THE LAWFUL ARREST AVOIDANCE IS BASED ON , THE PREDICATE OF THAT ASSE RTION , W HERE THERE IS ABSOLUTELY NO EVIDENCE THAT MR. BUZIA FORMED THAT IN HIS MIND WHATSOEVER!

CHIEF JUSTICE: WELL, WAIT. THAT IS DIFFERENT. IF HE INCAPACITATED MR . BUZIA IN ORDER TO ROB HIM , THAT IS NOT AVOID ARREST. THE AVOID ARREST IS THE DOMINANT REASON FOR K ILLING HIM, WAS T O , BECAUSE HE WAS CONCERNED HE WOULD BE RECOGNIZED, SO HE DIDN'T ROB , DID HE RO B MR. BUZIA?

YES.

CHIEF JUSTICE: HE TOOK MONEY FROM HIM?

YES. HE TOOK HIS WALL ET. HE TOOK HIS CAR, NOT MRS. KERSCH'S CAR. HE TOOK HIS , AND HE SA

YS IN THE AVOID ARREST, IN THE SENTING ORDER, HE SPECIFICALLY CLAIMS THAT - - IN THE SENTENCING ORDER , HE SPECIFICALLY CLAIMS THAT SHE WAS PLACED IN THE DEN AND LEFT ALIVE AND DUCT-TAPED THE DOOR SO SHE COUL DN'T GET OUT, SO HE COULD WAIT F ORHIM TO COME HOME AND ROB HIM AND KILL HIM SO HE COULDN'T BE IDENTIFIED AS THE SUSPECT. THAT MAKES ABSOLU TELY NO SENSE BUT THAT IS WHAT HE SAYS IN HIS SENT ENCING ORDER. IT MAKES N O SENSE , AND THIS COURT HAS CONSIS TENTLY HELD THAT AVOID ARREST IS MEANT FOR PE OPLE , SUSPECTS THAT ARE FL EEING LAW ENFORCEMENT.

CHIEF JUSTICE: WHERE , BUT WHEN THE ATTACK TAKES P LACEON MR. BUZIA , IT IS IN THE GARAGE?

IT IS IN THE ENTRANCE FROM THE GARAGE TO THE KITCHEN AREA, I BELI EVE.

CHIEF JUSTICE: W AS THERE ANY EVIDENCE AT THAT PO INT THAT MR. BUZIA WOULD HAVE , THAT THE VICTIM WOULD HAVE RECOGNIZED MR. BUZIA?

YES. HE CERTAINLY WOULD HAVE RECOGNIZED HIM IMMEDIATELY.

CHIEF JUSTICE: SO, OK AY , SO THEREFORE WHY DID HE KIL L MR. BUZIA ? WHAT WAS THE DEF ENSE AS TO, I MEAN, HE SAID HE DIDN'T INTEND TO, BUT ASS UMING H E KILLED HIM --

HE WANTED TO L EAVE WITH HIS, THE THINGS THAT HE STOLE, TO USE T O GO G ETDRUGS. THAT IS WHAT HIS WHOLE MODE OF OPERATION WAS, AND THE JUDGE MAKES THE CLAIM , AND THIS TIES INTO CC P BUT IT IS A PART OF HAC , TIES INTO CC P THAT THIS DEFE NDANT , THIS APPELLANT FORMED THE IDEA THAT HE WAS GOING TO ROB A NDMURDER THESE PEOPLE BEFORE HE EVEN GOT TO THE HO USE. THERE IS ABSOLUTELY NO EVIDENCE TO SUPPORT THAT. HE HAD, HE HAD GOTTEN PAID THE DAY BEF ORE , \$200. HE SPENT \$ 100 ON CRACK. HE WENT TO TA RGET AND B OUGHT \$100 OF CLOTHES BECAUSE H E HADN'T HAD A CH ANGE OF CLOTHES IN THREE O R FOUR DAYS, SO IN THE MO RNING TO MEET MR. KERSCH AND GO B ACK TO WORK AT THE HOUSE, HE BRINGS THE CLO THES BACK TOTARGET AND GETS MONEY AND BUYS CR ACK AGAIN AND G ETS HIGH. AFTER HE GETS HIGH , HE GOESTO THE HOUSE AND FOR ALL WE KNOW IS TO DO THE J OB A NDGET MORE MONE Y BUT HE WAITS AND NOBODY IS T HERE. HE WAITS FOR HOURS AND THEN MRS. KERSCH COMES HOME AT 4:30 AND THAT IS CRITICAL, BECAUSE IT IS COMMON SENSE WITH A COUPLE IN THE IR SEVENTIES, THAT MR. KERSCH WAS GOING TO BE NOT F ARBEHIND, 4:30 COMING Y OUHOME. WE DON'T KNOW WHEN HE CAME HOME. THE EVIDENCE DOESN'T SAY , BUT JUST COMMON SENSE T E LLS YOU HE WASN'T THERE VERY LONG BEFO RE MR . KERSCH CAME HOME.

DID YOU ALSO ARGU E IN THIS CASE THAT, THE CCP AGGRAVATOR IS NOT FO UND , IS NOT PRESENT HERE?

YES, I DID .

AND SO WHY ISN'T IT ? YOU AL READY JUST TAL KED ABOUT THE FACT THAT HE, THIS M AN COMES TO THESE PEOPLE'S HOUSE IN THIS GATED NEIGHBORHOOD. HE WAITS UNTIL SO MEONE COMES IN , INTO THE NEIGHBORHOOD THAT WAY, WAITS AT THE HOUSE UNTIL SOMEONE COMES HOME . HE HAS ALREADY ATTACKED ONE VICTIM AND THEN WAITS FOR THE OTHER VICTIM, SO WHY ISN'T ALL , DON'T ALL OF THESE CIRCUMSTANCES DEMONSTRATE THAT THIS WAS A COLD AND CALCU LATED MURDER?

WELL , ONE OF THE RE ASONS WHY HE SAID IT WAS CCP IS BECAUSE HE CHANGED HIS CLOTHES A FTER THIS ATT ACK.

HE DID , IN FAC T, DO THAT? HE CLEANED UP THE HOUSE?

HE CHANGED HIS TOP AND I SUBMIT TO YOU HE HAD BEEN WEARING THE SAME CLOTHES FOR THREE OR FOUR DAYS AND GOT BLOODY AND THAT IS WHY HE CHANGED HIS CLOTHES.

WHAT ABOUT CLEANING UP THE CRIME SCENE, QUOTE/UNQUOTE.

IT SEEMS, THE JUDGE SAID HE ATTEMPTED TO . THERE WASN'T A CLEANING OF THE CRIME SCENE TO THE EXTENT TO HIDE THAT THE CRIME OCCURRED. THERE WAS THE BEGINNING AFTER ATTEMPT AND IT WAS ABANDONED AND WE CAN ONLY ASSUME IT WAS ABANDONED BECAUSE MR. KERSCH CAME HOME AND HE WANTED TO LEAVE HER LOCKED IN THE ROOM AND GET AWAY WITH HIS STUFF.

CHIEF JUSTICE: YOUR ARGUMENT IS THAT THE MOTIVE FOR BEING THERE WAS TO ROB , WAS IT THE VERY , I MEAN, WASTO ROB THEM , AND I KNOW WE DO HAVE CASES THAT SAY IF THE INTENT BEFOREHAND WAS TO ROB , NOT TO MURDER , WE ARE NOT GOING TO FIND THIS HEIGHTENED PREMEDITATION OF CCP, WHICH INVOLVES A LOT OF PLANNING. TO ME, OF ALL OF THE AGGRAVATORS , THAT IS THE ONE THAT DOES CONCERN ME THE MOST ABOUT IT BEING FOUND , BUT --

LET ME RESPOND TO THAT , BECAUSE THIS IS VERY IMPORTANT. YOU ARE RIGHT. THERE IS TWO THINGS TO LOOK AT. DID MR. BUZIA BRING A WEAPON WITH HIM TO THE HOUSE , BECAUSE IN THE CASES WHERE YOU FIND IT WITH THIS, THE PERSON BRINGS A WEAPON.

BUT HE WENT TO THE GARAGE TO GET THE AX, AND DON'T WE, ALSO, HAVE CASES WHERE THEY COME WITHOUT A WEAPON BUT THEN GO AND OBTAIN THE WEAPON WITHIN THE HOUSE AND THEN GO USE THAT WEAPON ON THE INDIVIDUALS? DON'T WE HAVE CASES LIKE THAT?

YOU DO , BUT IN THIS CASE , THE JUDGE IS MAKING THE ASSERTION THAT HE FORMED THE PLAN BEFORE HE EVEN GOT TO THE HOUSE. HE WAS STILL HIGH ON COCAINE AFTER MISSING HIS JOBPPOINTMENT.

IF THE TRIAL JUDGE HAD FOUND THAT THERE WAS SUFFICIENT CALCULATION AND PREMEDITATION AND IT WAS COLDLY DONE WHILE IN THE HOUSE, THEN THE FACTS WOULD SUPPORT THAT , IF - - WOULD HAVE SUPPORTED THAT, IF THE JUDGE HAD FOUND THAT RATHER THAN THE OTHER?

IF HE FOUND THAT , IT WOULD BE SPECULATION NONETHELESS! IT WOULD BE SPECULATION THAT HE PLANNED TO MURDER THESE PEOPLE. HE NEVER HAD VIOLENCE IN HIS BACKGROUND. HE WASN'T A VIOLENT PERSON. HE DIDN'T HAVE A PROPENSITY FOR VIOLENCE.

CHIEF JUSTICE: WHAT IS YOUR BEST CASE ON SHOWING THAT CCP DOES NOT EXIST? CASE THAT WE HAVE DECIDED, BECAUSE I KNOW WE HAVE TALKED A LOT IN CASES ABOUT CCP, AND THIS IS , YOU KNOW, THINGS, OBVIOUSLY EVERYONE HAS A WEAPON TO KILL SOMEBODY WHEN THEY KILL THEM UNLESS THEY STRANGLE THEM , SO WE CAN'T SAY JUST BECAUSE YOU HAVE A WEAPON , IT IS CCP.

I BELIEVE I CITED THE JERRY OLD CASE FOR - - THE JERROLD'S CASE FOR AUTHORITY, AND THAT IS THE ONLY ONE I CAN RECALL . BECAUSE WHEN YOU HEAR MR. BUZIA'S CONFESSION , THEN HIS STATEMENT TO DOCTORS , AND THE JUDGE FOUND AS A NONSTATUTORY ADMIT, THAT HE COOPERATED, AND MOST OF HIS STATEMENTS WERE TRUE IN THE SENTENCING ORDER. IF YOU LOOK AT HIS STATEMENTS AND ACCEPT THEM , WHICH THE JUDGE CLAIMS HE DID , THEN CCP IS NOT THERE!

WHERE DOES IT LEAVE US, IF WE WOULD COME TO THE CONCLUSION THAT MAYBE THERE ARE NOT THE SIX OR TEN OR WHATEVER AGGRAVATORS AS YOU ARE ARGUING. HOWEVER , THERE IS HAS, AND THERE IS A PRIOR VIOLENT FELONY CONTEMPORANEOUS FELONY.

YES.

AND I GUESS MAYBE SOME OTHER S.DOES THAT NOT LEAVE NEWS A HARMLESS SITUATION OR WHERE DOES THAT TAKE US?

WELL , I WANT TO SAY THAT HAC DOES ON THE APPLY , BECAUSE THERE IS NO EVIDENCE THAT THIS GENTLEMAN WAS CONSCIOUS, AND IN PAIN , FOR THIS CASE. THE MEDICAL EXAMINER DIDN'T SAY SO. HE WASN'T ASKED AND HE DIDN'T SAY SO .

CERTAINLY IF YOU DON'T HAVE CCP AND HAC, THEN OUR CASE LAW TENDS TO TREAT KNOWS AS -- TREAT THOSE AS PRETTY SIGNIFICANT. IT MAY BE THERE BUT IT IS A DIFFERENT STORY.IF THERE IS HAC HERE , WHERE DOES THAT LEAVE US?

WELL , I WILL TELL YOU THAT THERE WERE FOUR MEMBERS OF THE JURY THAT FELT THAT WAY, AND THEY FELT THAT WAY WITHOUT HEARING THE SPENCER HEARING , THAT HAD MR . BUZIA SAVING, HELPING SAVE THE LIFE OF SOMEONE IN THE SEMINOLE COUNTY JAIL OR MR . BUZIA SHOWING REMORSE OR MR . BUZIA TALKING ABOUT HOW HE WILL DEDICATE HIS LIFE TO CRIME PREVENTION PROGRAMS. THE JURY DIDN'T HEAR ANY OF THAT! AND FOUR OF THEM, STILL , FOUND THAT THE MITIGATION OUTWEIGHED --

CHIEF JUSTICE: HOW OLD WAS MR. BUZIA AT THE TIME - -

HE WAS APPROXIMATELY BETWEEN 40 AND 42 YEARS OLD .

CHIEF JUSTICE: SO THIS IS REALLY A DIFFERENT PROFILE OF A PERSON THAN WE USUALLY SEE.THIS IS A PERSON THAT HAD, APPARENTLY A VERY PRIVILEGED UPBRINGING, WENT TO COLLEGE , GRADUATED --

IS HIM FAMILIAR WHERE HE GREW UP. BEAUTIFUL AREA.

CHIEF JUSTICE: DID HE GRADUATE FROM COLLEGE?

NO. I DON'T BELIEVE HE GRADUATED. I BELIEVE HE DROPPED OUT OF FSU WITHOUT GRADUATING.

CHIEF JUSTICE: BUT THEN IT SEEMS THAT DRUGS AND ALCOHOL TOOK OVER HIS LIFE.

YES, AND THAT IS WHERE THE JURORS WHO VOTED FOR LIFE WERE COMPELLED BY THAT TESTIMONY THAT HIS LIFE WAS OUT OF CONTROL.

CHIEF JUSTICE: HAD THAT BEEN THE CASE , IN OTHER WORDS FROM THE TIME HE DROPPED OUT , WHICH PRESUMABLY IS IN HIS EARLY TWENTIES. WHAT DO WE KNOW ABOUT WHAT HAPPENED BETWEEN HIS TWENTIES AND HIS FORTIES. NEVER ARRESTED FOR ANYTHING , I MEAN, NO CONVICTIONS FOR ANY OTHER CRIMES.

NO VIOLENT CRIMES CERTAINLY.

CHIEF JUSTICE: WAS HE HOMELESS?

EVERY YEAR IN HIS LIFE , GOT PROGRESSIVELY WORSE. HE HAD JOBS IN THE TOURISM INDUSTRY, AT DISNEY WORLD , MANAGING RESTAURANTS , AND THE LIKE , AND AS THE DRUGS BECAME MORE AND MORE OF HIS LIFE, HE SPIRALED DOWN TO THE POINT WHERE HE WAS DOING ODD JOBS FOR MR . KERSCH AND OTHERS, TO GET MONEY AND LIVING, HIS BROTHER'S BACKYARD IN A TENT. THAT WAS HOW LOW THIS GENTLEMAN HAD GOT TEN . AND I HAVE TO TELL YOU , TO SEE THE GROUP OF PEOPLE FROM ALL OVER THE COUNTRY THAT KNEW HIM WHEN

HE WAS YOU NGER , COME FORWARD TO THIS CASE AND TESTIFY , IS NOTHI NG I HAVE EVER SEEN BEFORE . HE OBVI OUSLY LEFT AN IMPRESSION UPON PEO PLE IN HIS YOUNGER YEARS , AND JUST FELL OFF THE TA BLE SO TO SPEAK.

CHIEF JUSTICE: HE GAVE , THE JUDGE GAVE THE FACT THAT HE EXPRESSED REM ORSE , HE SAYS HE GAVE IT LIT TLE WEIGHT . YOU DON'T , DO YOU ATTACK ANY OF THE WE IGHING OF THE MITIGATORS?

I DON'T . I FEEL THAT SO MUCH OF THE STATUTORY AGGRAV ATING FACTORS WAS NOT SU PPORTED BY SUBSTANTIAL COMPETENT EVIDENCE, THAT BY A PROPORTIONALITY ANALYSIS , THE DEATH PENALTY DOES NOT APPLY IN THIS CASE.

CHIEF JUSTICE: BUT W ITH THAT, IF YOU, SO WE ACCEPT THE MITIGATION FOR WHA T IT IS.

UM-H UM. RIGHT.

CHIEF JUSTICE: IF WE SEE THAT THERE IS , THE TWO YOUHAVE AG REED TO AND HAC , ISN'T THAT , UNDER OU R CASE L AW, MORE THAN SUFFICIENT T O STAND THIS JURY VERDICT , SENTENCE OF LIFE?

NOT NECESSARILY. BOTH STATUTORY M E NTAL MITIGATORS WEREN'T FOUND BY THE NONSTA TUTORARY WERE AND HE GAVE THEM SUBSTANTIAL WEIGHT.

CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL, IF YOU WOULD LIKE TO SAVE SOME. THANK YOU .

MS. DAVIS .

MAY IT PL EASE THE COURT . MY NAME IS BARBARA DAVIS. I RE PRESENT THE STATE OF FLORIDA.

CHIEF JUSTICE: I NOTE THAT WE HAVE A SPECIAL VERDICT IN THIS CASE WHICH FOUND HIM GU ILTY OF FIRST-DEGREE MURDER, W HICHHELPED YOU SUBSTANTIALLY ALONG THE WAY. I CAN'T HELP , EVEN THOUGH I LOST THE IS SUE I N ST EELE , HOW HELPFUL IT WOULD HAVE BEEN IF WE HAD JURY FIND INGS ON THESE AGGR AVATORS AND KNEW WHAT THE JURY FOUND TO BE THE AGGRAVATION, BUT I F YOU COULD RES POND TO THE ARGUMENTS ABOUT , HE SEEMS TO FOCUS ON THE AGGRAVATORS , AND --

YES.

CHIEF JUSTICE: YOU THINK NOT ONLY WERE THESE, SHO ULD HAVE BEEN FOUND PROPER LY BUT EVEN MORE S HOULD HAVE BEEN FOUND.

Y ES.

CHIEF JUSTICE: THE MOST AGGRAVATORS I HAVE EVER SEEN IN ONE CASE , P ILED TOGE THER.

YES .

MS. DAVIS , LET ME SEE IF I CAN FOCUS YOU ON THESE AGGRAVATORS.THERE SEEMS TO BE AND MAYBEYOU CAN CL ARIFY , A SEEMING INCONSISTENCY , GIVING THE STATE OF OUR LAW, IN FINDING THE AVOID-AR REST AGGRAVATOR , IN WHICH THE FLEEING THE LAW SEEMS TO BE THE PRIMARY MODE OF AVO IDING ARREST AND WHICH IN CCP , THE HE IGHTE NED AGGRAVATION OF PLANNING A MURDER AND NOT JUST PLANNING THE ROB BERY, AND IT SEEMS THE EVIDENCE THAT ANYTHING THAT WAS PLANNED , H ISTESTIMONY IS THAT HE PLANNED TO GO THERE AND ROB THEM, THEN WHEN HE GOT THERE, H E KILLED THEM AND THERE IS A FINDING OF AN AGGRAVATOR THAT HE KILLED THEM TO AVOID ARREST. HOW DO WE RECONCILE TH OSE TWO

AGGRAVATORS IN THIS , UNDER THE CIRCUMSTANCES OF THIS CASE?

AND YOU CAN HAVE A VOIDARREST AND CCP , AND I WILL GO THRO UGH HIS CONFESSION AND TELL YOU EXA CTLY HOW THOSE , THERE ARE SEP ARATE FACTS TO SUPPORT B OTH OF THOSE AGGRAVATORS . NOW, UNLIKE WHAT MR . BURDEN SAID, THE TRIAL JUDGE'S ORDER WAS SUPP ORTED BY ALL OF THE FACTS . IN MR. BUZIA'S CONF ESSION , AND I WILL TELL YOU THE PAGES , FI RST EVER AL L HE SAID THREE TIMES, HE WAS NOT DOING -- FIR ST OF ALL , HE SAID THREE TIMES HE WAS NOT DOING DRUGS.HE HAD HAD A FEW BEERS BEFORE. THEY TESTED HIS BLOOD AT THE TIME OF ARREST. THERE WERE NO COCAINE METABOLISM IN HIS BLOOD. HE SA ID AT PAGE 69 5 IN THE RECORD OF HIS CONFESSION, 696 AND 6 97 AND 69. NO DRUGS. HE DID CHOCHLT ON PAGE 7 06 , HE SAID -- WHAT , ON PAG E 7 ON 6 , H E SAID WHAT HE DID WAS HE HIT MRS. KERSCH. HE MO VED HER INTO THE BEDROOM AND COVERED HER U P AND TRIED TO COVER THE EVIDENCE AND LEFT HER IN THERE.AND THEN HE WENT ABOUT THE HOUSE, LOOKING --

CHIEF JUSTICE: WOULD YOU AGREE THAT THERE IS NO EVIDENCE, BEFORE HE ENT ERED THE HOUSE, THAT HE, THIS M ANWHO WAS IN HIS FOR TIES WHO HAD NEVER COMM ITTED A VIOLENT ACT THAT WE AR E AWARE OF IN HIS LIFE , INTENDED TO KILL TWO ELDERLY PEOPLE. WHAT IS THE EVIDENCE OF THAT HEIGHTEN ED PREMEDITATION , NOT THAT IT WAS , OBVI OUSLY , PREMEDITATION ITSE LF CAN OCCUR THAT MATT ER OF SECONDSBEFORE, THAT HE , BEFORE HE ENTERED THE HOUSE, THAT HE HAD THAT INTENT ION TO KILL THE TWO VICT IM S , AND , OFCOURSE, HE DIDN'T KILL ONE OF THEM ANY WAY , BUT WHAT IS THE EVIDENCE?

WHEN HE STA RTED OUT , HE WAS GO ING TO ROB THEM . NOW - -

CHIEF JUSTICE: SO YOU AGREE , THAT, AG AIN, BECAUSE THE JUDGE SEEM ED TO D O W HAT I HAVE SEEN IN SOME OTHER CASES, IS AS SUME THAT T HEINTENT TO ROB WOULD BE , SUPPLY THE HEIGHTENED PREMEDITATION FOR CCP AND YOU AG REE IT CAN'T.

THIS, AND SEE --

CHIEF JUSTICE: DO YOU AGREE WITH THAT?

YES, BUT I AM NOT SA YING THE JUDGE TOOK THIS AND TRANSFERRED IT. WHAT HA PPENED WAS H E STARTEDWITH THEA, TO ROB HER , AND AS THIS DEVELOPED , T HIS HAPPENED OVER AN EX TENDED PERIOD OF TIME. AS THIS DEVELOPED , AND H E SAYS IT IN HIS CONFESSION, HE REALIZED , OKAY , CH ARLES IS GOING TO C OME IN THE DO OR, BECAUSE HE KNEW HE WAS COMING HOME SHORTLY. WHAT AM I GOING TO DO? JUST SAY I BEAT YOUR WIFE UP? AND HE STARTED MA KING T HEDECISION, NO, I HAVE GOT TO GET CHARLES. HE MET HIM COMING THROU HOUT DOOR. THEY MADE EYE CONTACT. HE HIT HIM WITH HIS FIST , AND THE MEDI CAL EXAMINER ALLOCATED E ACH INJ URY TO THE HARM THAT IT WOULD HAVE CAUSED. THE BL ACKING O F THE EYE AND THE HEMORRHAGING , THAT WOULD BE A FIST, AND THEN HE SAYS IN HIS CONFESSION --

CHIEF JUSTICE: HOW MUCH TIME, MAYBE THAT IS WHAT W E NEED TO KNOW, SO WHAT YOU ARE SAYING IS THERE WAS ENOUGH TIME A FTER HE HAD INCAPACITATED AND HADN'T KILLED THE WI FE.

YES

CHIEF JUSTICE: WHICH IS SORT OF, AGAIN, AL THOUGH THE JURY FOUND IT WAS PREMEDITATED AS TO CHARLES , THERE COULD BE A GOOD ARGUMENT THAT HE REALLY DID NOT MEAN TO KILL ETS OF T HE M BUT THE JURY REJECTED , BUT --

ACTUALLY --

CHIEF JUSTICE: HOW MUCH TIME ELAPSED BETWEEN WHEN HE INCAPACITATED THE WIFE TO WHEN CHARLES CAME HOME?

15 MINUTES TO A HALF-HOUR. AND DURING THIS TIME , HE WENT --

CHIEF JUSTICE: THAT IS THE KIND OF HEIGHTENED CCP THAT HE HAVE -- THAT WE HAVE , AND HE WAS , DURING THAT TIME , WAS THINKING HE IS GOING T O KILL HIM. THAT IS WHAT THE JUDGE WOULD HAVE TO FIND.

HE WAS GOING THROUGH T HEHOUSE , LOO KING AT THINGS , AND THEN HE REALIZES, H E HEARS THE GA RAGE DOOR OPENER, AND THEN HE KNOWS CHARLES IS COMING IN, AND HE THOSE , OKAY , I HAVE GOT T O GET CHARLES. AND I AM ON PAGE 706 OF THE RECORD. I CONSIDERED MY O P TIONS , A NDI KNEW I HAD TO T AKE CHARLES OUT. SO, THAT ISN'T EXAC TLY WORDS.

CHIEF JUSTICE: WELL , THAT WOULD BE, AND AVOID ARREST, BECAUSE HE WAS, THEN, THAT WOULD SUPPORT AVOID ARREST,WHICH IS THAT YOU WOULD , HE WAS REAL IZING BECAUSE WHAT HE HAD DURNTION MAYBE HE DIDN'T -- WHAT HE HAD DONE , MAYBE HE DIDN'T K PEND INTEND TO INCAPACITY -- HE DIDN'T INTEND TO INCAP ACITATE , DIDN'T KILL THE WIFE , BUT THEN HE FI GURED I HAVE GOT TO KILL CAN CHARLES BECAUSE THAT WOULD SUPPORT KILL ING HIM BECAUSE HE WOULD F IND THE WIFE.

YES.

THAT WOULDN'T BE THE DOMINANT PURPOSE. ROBBERY HAD TO BE HE WA NTED TO KILL HIM BECAUSE HE WANTED TO AVOID ARREST FOR THE WIFE. IS THAT CORRE CT?

THIS IS EVO Lving AND THE CONFESSION TRACKS HIS ME NTAL STATE THROUGH THE W HOLETHING.HE FORMS THE INTENT TO KILL CHARLES , BECAUSE H E KNOWS CHARLES KNOWS HIM. HE IS AN EMPLOYEE. HE WORKS THERE. HE KNOWS WHERE THE AX ES ARE , BECAUSE HE IS FI XING THE GARAGEATIC. HE KNOWS EXACTLY WHERE EVERYTHING IN THAT HOUSE IS , THAT THE AXES ARE ON TOP O F THE CABINET. AFTER HE GETS CHARLES DO WN , AND HIS OWN CONFESSI ON IS THAT CHARLES , HE HIT HIM , BRUTALLY WITH HIS FIST AND GOT HIM DOWN. CHARLES GOT BACK UP ON ALL FOURS , AF TER HE WAS BA CK , ROBBING HIM AND GETTING THINGS OUT - -

CHIEF JUSTICE: THAT WAS IN THAT FIRST STATEMENT, B UTMR. BURDEN S AYS THAT THAT IS ABSOLUTELY, CANNOT BE CORRECT, BA SED ON THE EVIDENCE IN THE MEDICAL EXAMINER'S EVIDENCE.

NO.THAT IS ABSOLUTELY SUPPORTEDBY THE MEDICAL EXAMINER 'S EVIDENCE. THE MEDICAL EXAMINER WENT THROUGH EACH INJURY AND TOLD US WHICH ONES WERE CREATED BY THE FISTS , WHICH ONES BY THE AX, AND - -

CHIEF JUSTICE: WHAT IS IT THAT SHOWS THAT HE WAS NOT IN A HAVE YOU PINE POSITION? -- IN A SUPINE POSITION?

WELL , BUZIA SAYS HE HIT HIM WITH HIS FISTS AFTER HE GOT UP ON ALL FOU RS. THEN HE , S TILL , H E REALIZES , AND THIS IS PAGE 708 , HE SAYS, I KNEW HE WAS GONNA DIE. HE WAS COMMITTED AT THAT POINT . HE DIDN'T SAY HE WAS , AND THE OFFICER SAID , SO YOU WERE COMMITTED. YOU HAD MADE A COMMITMENT ATTHAT POINT. HE SAID YEAH. SO, THEN HE REALIZES THAT THEA, HE HEARS THEA M O ANING. CHARLES IS STILL MOANING UNCONSCIOUS.HE GOES IN THE GAR AGE. HE GETS THE AXES. HE WA LKS PAST CHARLES, A NDHE GOES AND THERE ARE TWO BLOWS TO THEA , AND THAT IS ESTABLISHED BY THE BL OOD SPATTER. AND THE BLOOD SP ATTER IS THAT THERE MUST BE TWO BLOWS, BECAUSE THE FIRST BLOW CREATES BLOOD. THE SE COND BLOW CREATES THE CAST OFF, AND IN THE EXHIBITS THERE IS A LL OF THE THINGS OF HOW THE CAST O FFWAS AND HOW THE BLOWS ARE, AND THEA NEVER SAID SHE WAS NOT IN PAIN. SHE WAS

IN EXCRUTIA TING PAIN. SHE SAID I HEAR MY TORMENTER COMING BACK AND MY HEAD EXPLODED. SO HE HAS GOT HER DISABL ED, AND HE THINKS SHE IS D EAD. HE GOES BACK, AND HE HITS CHARLES TWO TIMES WITH THE AX, IN A SUPINE POSITION.NOW, WE KNOW HE WAS I N A SUPINE POSITION, BECAUSE T HEBLOOD SPATTER WAS NO MORE THAN 18 INC HES, SO THE FIRST BLOW WOULD HAVE HAD TO HAVE BEEN, CREATE THE BLOOD , AND THEN THE SECOND BLOW , WHICH WAS THE CAST OFF , WHICH UNHINGED, IT WAS SO HARD TO UNINC. HIS E NTIRE SKULL , WAS THE F ATAL BLOW. AND THE MEDICAL EXAMINER WENT THROUGH EACH PART OF THIS, AND THE JUDGE, HIS ORDER IS SUPPORTED BY THE EVIDENCE.

COUN SEL SUGGESTS THAT THE MEDICAL EXAMINER DOESN'T GET TO THAT POINT. THAT THERE REALLY IS N O TESTIMONY WITH REGARD TO THIS PERIOD OF CONSCIOUSNESS , AFTER THE BLOW S AND THE STRIKING OF THE, OF THE HEAD ON THE F LOOR . WHAT DO YOU THINK?WHAT IS THE EVIDENCE. WOULD YOU SHARE NOT WHA T YOU THINK IT IS. WOULD YOU SH ARE THE EVIDENCE W ITH US.

YOU HAVE TO PUT , THE MEDICAL EXAMINER CAN TELL US WHICH BLOW BLOW WAS CA USED BY WHICH , BY A FIST, BY AN AX, AND YOU PUT IT TOGETHER WITH BUZIA'S CONFESSION ANDHE PUTS IT ALL TOGETHER. HE SAYS --

I AM T ALKING ABOUT THE CONSCIOUSNESS, N OTNECESSARILY THE BLOW-BY-BLOW BUT AT WHAT POINT WAS THERE A LOSS OF KNOWLE DGE OR A CONSCIOUS AWARENESS OF WHATEVER IS GOING ON?

WELL , IT WOULD HAVE HAD , THE TWO BLOWS BY THE AX , WERE PRETTY MUCH SIMULTANEOUS, AND THAT WAS IT.

AND TH AT IS WHAT THE MEDICAL EXAMINER SAYS HE WAS A WARK AND AWARE -- AWAKE AND AWA RE, UNTIL THAT POINT IN TIME .

I DON'T KNOW IF HE SAI D THAT, BUT BUZIA SAID HE WAS MOVING, HE WAS MOANING , AND THAT IS , AND THEA WAS STILL ALIVE.HE WAS STILL AL IVE . HE KNEW THEY WERE MO VING. THEY WERE GROANI NG. HE EVEN AT ONE POINT SAID YELLING.

IT MUST COME FROM THOSE FACTS. THAT IS YOUR VI EW OF THE RECORD --

IT COMES FROM HIS OWN CONFESSION.

THAT IS WHERE WE MUST DRAW, THEN, THE A WIERNESS OF THE PE NDING D E ATH -- THE AWARENESS OF THE PENDING DEATH COMES FROM A MEDICALEXAMINER AND NOT FROM ANYTHING EL SE.

WELL , IF HE HAD HIT HIM WITH THE AX AT THE GIRNTION THEN HE WOULD NEVER HAVE HAD TO HAVE -- THE AX AT THE BEGINNING , THEN HE WOULD NEVER HAVE HAD TO HAVE HIT HIM WITH THE AX, BECAUSE THE AX JUST MOVED HIS HEAD. THERE WERE NO NEED FOR BLOWS OF THE FIST AFTE R THE BLOW WITH THE AX.

I THINK WE ARE ALL TALKING ABOUT SOME AWAR ENESS OF THE PENDING DEA TH THAT , EMOTION THAT IS CREATE D IN THE VICTIM .

HE CERTA INLY WAS. WHEN HE WALKE D IN AND SAW BUZIA INSIDE THE HOUSE , BECAUSE HE NEVER CAME INS IDE THE HOUSE , AND HE STARTED BEATING HIM WITH HIS FISTS, AND THEN HE IS DOWN ON THE GROUND, AND HE IS TRY ING TO GET UP. HE KNOWS HIS WIFE IS HOME BECAUSE HER CAR IS T HERE. HE IS TRY ING TO GET UP ON ALL FOURS, AND BUZIA BE ATS HIM DO WN, AND THEN HE STILL IS CONSCIOUS , MOANING AND GROANING, AND THAT IS WHEN BUZIA GOES IN THE GARAGE , GETS THE AX , AND TRIE S TO KILL BOTH OF THEM.

WHAT WAS THE PERIOD OF TIME FROM THE TIME THAT CHARLES CAME IN THROUGH THE DOOR , UNTIL BUZIA LEFT ? IS THAT ESTABLISHED IN THE RECORD ? HOW LONG DOES ALL OF THIS BEATING TAKE PLACE?

NO , THE TIME BETWEEN WHEN HE HIT THEA AND STARTED WANDERING AROUND, BUT HE DOES SAY THAT HE WAS GOING THROUGH CHARLES'S POCKETS AND THEN HE WAS GOING THROUGH THE ROOMS AGAIN, AND THEN HE WAS CLEANING HIMSELF OFF, AND THEN HE WENT AND GOT THE AXES. SO HE HAD DISEMBLED THEM , AND , REMEMBER, THE DUCT TAPE IS RIGHT THERE ON THE DOOR. IF HE HAD MEANT TO JUST , I MEAN, IT IS 72 YEAR-OLDS. HE HAD NEMME INCAPACITATED. HE -- HE HAD THEM INCAPACITATED. HE HAD TWO SETS OF CAR KEYS , THEY ARE WALLETS , HE COULD HAVE JUST LEFT, AND, NO , HE WENT AND GOT THE AX AND TRIED TO KILL THEM, AND WE KNOW THAT THEY WERE BOTH LOCATED --

WHERE WAS THE AX LOCATED?

THE AX WAS IN THE GARAGE. HE WAS WORKING IN THE GARAGEATIC AND THERE ARE CABINETS IN THE GARAGE, A NDMR. KERSCH HAS LITTLE STEP STOOL TO HELP HIM GET UP ON TOP OF THINGS , SO HE WENT UP THERE AND YOU COULD SEE A BLOODY, A BLOOD SMEAR ON THE CABINET, AND HIS PALM PRINT ON THE CABINET , AND THE AXES WERE ON THE TOP .

SO IT WAS SOME DISTANCE FROM WHERE CHARLES WAS INCAPACITATED?

WELL, CHARLES WAS IN THE FOYER , AND SO HE WOULD HAVE HAD TO GO OUT OF THE FOYER INTO THE GARAGE AND CROSS THE GARAGE, TO THE CABINETS. BUT THEN HE SAYS HE WENT PAST CHARLES TO GET THEA, BECAUSE HE COULD HEAR HER STIRRING, THEN, HITS HER TWICE, AND THEN HE COMES BACK AND CHARLES IS STIRRING , AND HE HITS HIM TWICE .

WHERE WAS THE EVIDENCE , YOU SAID EARLIER THAT, AFTER HE HIT CHARLES , THAT CHARLES GOT UP ON ALL FOURS AND HE HIT HIM AGAIN. IS THAT FROM HIS CONFESSION , AND IS THAT CORROBORATED BY ANYTHING THE MEDICAL EXAMINER TESTIFIED TO?

IT IS IN HIS CONFESSION , AND I CAN'T FIND THE CITE RIGHT NOW. I THINK IT IS 708 THOUGH.

AND YOUR OPPONENT SAYS THAT THAT IS WRONG , THAT THE FACT THAT HE WAS ON ALL FOURS IS WRONG . IS THAT BECAUSE HE SAID SOMETHING DIFFERENT LATER, TO SOMEBODY ELSE, THAN WHAT HE SAID IN HIS CONFESSION?

NOT THAT I KNOW OF. I MEAN, HE , HE WENT THROUGH ALL OF THE DETAILS OF EVERYTHING, TO THE MENTAL HEALTH EXPERTS , AND THERE WAS DR . REIBSAIN FOR THE DEFENSE AND DR. DANZINGER FOR THE STATE. BUT BY THAT TIME, HE WAS IN A COCAINE DILIRIUM -- DILIRIUM OR A COCAINE FRENZY , WHERE HERE WE HAVE ALL OF THE OFFICERS SAYING HE WAS PERFECTLY CLEAR. THE VIDEOTAPED CONFESSION SHOWS THAT HE WAS PERFECTLY CLEAR. HE REMEMBERED THAT HE GOT THEA'S MASTER CARD AND EXACTLY WHAT HE HAD DONE AND WHERE HE HAD GONE, SO BY THE TIME WE GET TO THE EXPERTS , YOU KNOW, I WOULDN'T GIVE A WHOLE LOT OF CREDIBILITY TO THE SELF-REPORTING - -

CHIEF JUSTICE: YOU SEE THAT, IS AN INTERESTING THING. YOU DON'T WANT TO GIVE A LOT OF CREDIBILITY TO SELF-REPORTING, EXCEPT AS IT IS INSURE-REPORTING THAT WILL, YOU KNOW , BASICALLY PUTS THIS PERSON TO DEATH , AND I WANT TO , A GAIN , MAKE SURE THAT THE STATEMENT THAT SAYS, WAS UNABLE TO MOVE BUT THEN ATTEMPTED TO GET UP ON ALL FOURS, CAME FROM THE INITIAL STATEMENT.

YES.

I TH OUGHT WHAT JUSTICE CANTERO ASKED AND I THOUGHT I HAD ASKED IT EAR LIER , WAS IS THAT STATEMENT CORROBORATED BY THE MEDICAL EXAMINER ? YOU SEEM TO BE VERY FAMILIAR WITH THE RE CORD --

YES.

CH IEF JUSTICE: SO IT IS A PRETTY IMPORTANT, EITHER Y ESYOU KNOW THAT OR NO , YOU DON'T KNOW THAT.

THERE WERE MULTIPLE FIST WOUNDS, AND THE MEDICAL EXAMINER, I AM P RETTY SURE HE COULD NOT SAY - -

CHIEF JUSTICE: I 'LL BET YOU ARE, BECAUSE I A M ASSURE THAT IF HE HAD SAID HE WAS ON ALL FOUR S, IT THAT YOU WOULD HAVE THAT INFORMATIONFOR US .

NO. THE MEDICAL EXAMINER SAIDTHERE WAS A VARIETY O F FIST-INDUCED WOUNDS, BUT THESTATEMENT THAT HE WAS UP ON ALL FOURS IS ON PAGE 70 9 OF THE CONFESSION , AND SEE, MR . BUZIA, I MEAN, YOU CAN'T SAY HIS CONFESSION DOES N'T HAVE CREDIBILITY, BECAUSE THIS WAS MADE AT THE TIME HE HADA LOT OF REM ORSE AND HE F ELT VERY BADLY AB OUT WHAT HE DID, AND HE EVEN SAYS AT THE END , MR. KERSCH NEVER DID ANYTHING BUT TR Y TO HELP ME.

CHIEF JUSTICE: SO YOU AGREE THAT HE, FROM THE BEGINNING, SHOWED REMORS E FOR THIS, FOR THESE TERR IBLE CRIME.

OH, YES.

CHIEF JUSTICE: WHY DID THE JUDGE, EVEN THOUGH I N TERMS OF WE ARE NOT SUPPOSED TO QU ESTION THE WEIGHT , WHY DID HE GIVE THAT L I TTLE WEIGHT ?

I DON'T KNOW .

CHIEF JUSTICE: I MEAN , IT SEEMS TO ME THAT THIS IS, B Y HIS WORDS , IF HE HADN'T S AID ANYTHING, WE PROB ABLY WOULDN'T KNOW, WOULDN'T BE ABLE TO ESTABL ISH HAC , AVOID ARREST, AND YET THE VERY FACT THAT HE WAS SO , FELT SO BADLY FOR WHAT HAPPENED, IS JUST LIKE , DISMISSED.

BUT I THINK YOU HAVE TO WEIGH THAT AGA INST THE FACT THAT HE COULD HAVE , TH EY WERE OLDER PEOPLE. HE COULD HAVE JUST TA KEN THAT DUCT T YPE TAPE AND LEFT WITH THE MUST NOT -- DUCT TAPE AND LE FT WITH THE MONEY THAT HE WANTED.

BUT HE DIDN'T K IL L MRS. KERSCH.

JUST BY THE GRACE OF GOD.

CHIEF JUSTICE: IF HE WAS A GOOD MURDERER , HE SHOULD HAVE BEEN ABLE TO FINISH H EROFF.HE MUST HAVE KNOWN SHE WAS STILL IN SOME STATE OF NOT HAVING BEEN --

SHE WAS AS C LOSE TO D EATH AS YOU CAN COME. IN FACT, SHE CRAWLED INTO THE OFFICE , DI ALED 9 11 , MANAGED TO ANSWER THE POLICE AT THE DOOR. THEY SAID WHO DID THIS? SHE SAID JO HN BUZIA AND COLLAPSED . NOW , IF I CAN JUST RUN THROUGH A FEW OF THE OTHER ISSUES IN THE CONFESSION , THAT, HIS CONFESSION PR ETTY MUCH PUTS TOGETHER THE WHOLE SCENARIO, AND THE TIME A NDTHE AMOUNT OF TIME THAT PASSED AND ESTABLISHES ALL OF THE AGGRAVATORS .

WHAT ABOUT THE AGGRAVATOR THAT YOU CON TEND THE TRIAL J U DGE SHOULD HAVE FOUND , WHICH WAS , CONCERNED PECUNIARY ROB BERY , BURGLARY AND PECU NIARY GA IN. THE STATE IS IN A , SORT OF AN INTERESTING PO SITION HERE , ARGUING THAT THE TR IAL JU DGE GAVE IT NO WEIGHT, AND MOST OF THE TIME THE STATE IS SAYING THAT IS WITHIN THE T RIAL JUDGE 'S PREROGATIVE , TO EVEN FIND A MITI GATING O R CIRCUMSTANCE AND GIVE IT N O WEIGHT, SO NOW WE HAVE THE TRIAL JUDGE FIND ING AN AGGRAVATING CIRCUMSTANCE AND GIVING IT NO WEIGHT.

WELL , THE INTERE STING THING , THOUGH , IS , I MEAN , THE DEFENSE HAS ALREADY CONCEDED THAT DU RING THE ROBBERY WAS ESTABL ISHED. WHAT HA PPENED WITH --

THE TRIAL JUDGE SAYS THAT , TOO.

YES. BUT WHAT HAPPENED IS HE SAYS , I AM NOT GOING TO CONSIDER THESE. THE STATE SAID , OK AY , PECUNIARY GAIN , AND DURING A ROBBERY ME RGE , BUT WE , A LS O , HAVE A KIDNAPING , SO WE WANT THIS INDEPENDENT AGGRAVATOR OF A KID NAPING , AND THEY , THE JUDGE SAID, WELL , I KN OW THERE WAS A KIDN APING , BUT I AM TROUBLED BY THE FACT THAT THE JURY DIDN 'T HAVE A VERDICT ON TH AT, SO I AM N OTGOING TO CONSIDER THAT. AND THEN HE WENT BA CK , A NDON EA CH OF THE ONES , HE SAYS, SO , I CAN'T CONSIDER PECUNIARY GAIN , BECAUSE IT IS MERGED WITH DUR I NG THE ROBBERY, AND THEN HE GOES T O DURING THE ROBBERY, AND HE SAYS I CAN'T CONSIDER , THIS BECAUSE IT IS MERGED WITH PECUNIARY GAIN, AND THEN HE DIDN'T CONSIDER EITHER O NEOF THEM, SO THAT IS A LE GAL MISTAKE. HE -- BUT HE CONSIDERED THEM.

NO, HE DIDN'T CON SIDER THE M.HE PUT THEM IN HIS OR DER, AND HE SAID THE STATE ESTABLISHED THESE BEYOND A REASONABLE DOUBT, BUT IF Y OULOOK AT HIS --

HE GAVE THEM NO, IT IS THE WEIGHT OF IT THAT HE GAVE NO WEIGHT TO THEM , RIGHT?

NO. HE JUST DIDN'T, HE SAI D I A M JUST, PAGE 658 , ACCORDINGLY , THE COURT DOES NOT CONSIDER THE AFOREMENTI ONED COU NTS THREE AND FOUR, FOR PURPOSES OF THIS AGGRAVATING CIRCUMSTANCE, THE ROBBERY AND THE BUR GLARY . I AM NOT GOING TO CON SIDER THE ROBBERY AND THE BURG LARY , BECAUSE THEY DO UBLE WITH THE PECUNIARY GAIN , AND THEN HE GOES THROUGH THIS CONVERSATION.

SO HE FINDS PECUNIARY .

YES.

WHAT, IN THIS WHOLE SCENARIO, WHAT DID THE T RIALJUDGE CONSIDER, WHAT DID H E FIND, AND WHAT DID HE GIVE NO WEIGHT ?

BECAUSE YOU ARE AR GUING -- NO WEIGHT? BECAUSE YOU ARE ARGUING THAT THE TRIAL JUDGE SHOU LD HAVE FOUND THESE AS AGGRAVATING CIRCUMSTANCES, CORRECT?

HE NO IRND CIRCUMSTANCES BUT HE SAID I CAN NOT CONSIDER THESE BECAUSE THEY ARE MERGED. IT IS A LEGAL , HE , HE S JUTS , AND YOU KNOW -- HE JUST , ANDYOU KNOW, I THINK THIS IS A LOT OUR FA ULT, BECAUSE WE HAD THIS KIDNA PING THING GOING ON TO GET PECU NIARY GAIN DURING A ROBBERY AND DURING A KIDNAPING , WHI CHWOULD NOT BE DOUBLE , AND HE SAID, WELL, NO , STATE, YOU HAVE TOLD ME THAT THESE T WO ARE MERGED , AND THAT IS W HY YOU ARE TRYING TO GET DURING A KIDNAPING , WELL , I AM NOT COMFORTABLE WITH DURING A KIDNAPING , BECAUSE THE JURY DOESN'T GIVE ME A VERDICT ON THAT, WHICH, THAT IS ALSO A LEGAL MISTAKE, SO , THEN , H E GAVE, HE DIDN'T CONSIDER EITHER PECUNIARY GAIN O R DURING A ROBBERY , WHICH H E FOUND WERE ESTABLISHED BEYOND A REASONABLE DOUBT. AND AT HIS ORDER , 658 , AND 676 , HE SAYS , I DO NOT CONSIDER THESE , BECAUSE THEY ARE MERGED , AND I

THINK HE JUST GOT CONFUSED, BECAUSE OF THIS KIDNAPING BUSINESS GOING ON HERE, AND HE SAID, OKAY, I AM NOT GOING TO CONSIDER THAT, BECAUSE, AND THESE ARE MERGED, AND I CAN'T CONSIDER THOSE, EITHER, SO EVEN THOUGH THE DEFENSE CONCEDES THAT THOSE WERE ESTABLISHED, AND THERE WAS A JURY VERDICT ON THIS, THE JUDGE DIDN'T CONSIDER THEM. SO I AM JUST ASKING THE COURT TO RECTIFY THAT LEGAL MISTAKE.

WHAT IS THE LAW, AS FAR AS THE KIDNAPING AGGRAVATOR? DO WE, DOES THE JURY HAVE TO CONVICT ON THE KIDNAPING, IN ORDER FOR US TO USE THAT, OR FOR THE TRIAL COURT TO USE THAT AS AN AGGRAVATING CIRCUMSTANCE?

NO, SIR, THAT IS THE TURNER CASE. THEY DO NOT HAVE TO CONVICT ON THAT, AND --

WHAT ABOUT AFTER RING? TURNER WAS PRE-RING, THOUGH, RIGHT?

I AM SURE IT WAS.

DOES RING IMPACT THAT DECISION?

THEY HAVE JUST BEEN DOING A LOT OF TALKING.

THE JUDGE CAN FIND AN AGGRAVATING CIRCUMSTANCES, AND THIS IS IN MY BRIEF, ALSO. A JUDGE CAN FIND AN AGGRAVATE ARE CIRCUMSTANCE THAT WAS WITHOUT A DOUBT BEFORE THE JURY, SO EVEN THOUGH WE DIDN'T GET A CHARGE AND CONVICTION ON KIDNAPING, HE FOUND THAT IT WAS PROVEN BEYOND A REASONABLE DOUBT.

DID YOU ARGUE THAT TO THE JURY, THAT THIS WAS A MURDER DURING THE COURSE OF KIDNAP SOMETHING.

YES, AND THE JURY WAS INSTRUCTED ON THAT HOWEVER, IT WAS NOT CHARGED IN THE PENALTY PHASE. IT WAS NOT CHARGED IN THE INDICTMENT, AND THERE WAS NO JURY VERDICT ON A KIDNAPING. THEREFORE THE JUDGE SAID I AM, UNLESS THERE IS, I, HE SAID, ACTUALLY, I AM NOT WILLING TO CONSTITUTIONALLY FIND THE AGGRAVATING CIRCUMSTANCE, INDEPENDENT OF THE JURY.

WITHOUT THE IDENTIFICATION THAT JUSTICE PARIENTE WAS -- WITHOUT THE IDENTIFICATION THAT JUSTICE PARIENTE -- THE ITEM THAT JUSTICE PARIENTE WAS TALKING ABOUT, WE DON'T KNOW WHETHER THE JUDGE FOUND THAT OR NOT?

NO. NO.

BECAUSE ABOUT FLOYD IN 2002, DIDN'T WE REFUSE TO FIND AN AGGRAVATING CIRCUMSTANCE, WHERE THE JURY DIDN'T FIND THE PREDICATE OFFENSE?

IN FLOYD?

YES.

IS THAT MURDER FLOYD?

THE 2002 FLOYD.

THAT, YES, IT COULD GO EITHER WAY, BUT I WOULD SAY THE KIDNAPING PART IS AN ABUSE OF DISCRETION. THE PARTY HIM MORE CONCERNED WITH IS THE PART THAT THE JURY DID FIND, THAT DURING THE ROBBERY, PECUNIARY GAIN, WHICH CLEARLY THE JUDGE SHOULD HAVE CONSIDERED, AND BECAUSE OF ALL OF THIS CONFUSION WITH THE KIDNAPING, HE DIDN'T.

YOU AGREE THAT ALL OF THIS IS RENDERED MOOT, THAT WITH AT LEAST THE AGGRAVATORS THAT WERE FOUND, THEY AT LEAST PROVEN BEYOND A REASONABLE DOUBT, AND WE FOUND THAT THOSE ARE SUFFICIENT TO MAKE THE DEATH SENTENCE PROPORTIONAL, THEN YOUR CROSS APPEAL IS RENDERED MOOT. WE DON'T HAVE TO ADDRESS THOSE ISSUES.

YES. AND IT IS JUST, THERE IS A LEGAL MISTAKE THERE, AND IT IS JUST NICE TO GET THINGS CLEARED UP. BUT, AND I WOULD POINT OUT THAT, IN ECHOLS AND KENNEDY, THIS COURT DID GO AHEAD AND FIND THAT AGGRAVATE -- DID GO AHEAD AND FIND THAT AGGRAVATING CIRCUMSTANCE EXISTED, SO THAT COULD JUST ADD INTO THE MIX. I DON'T THINK I HAVE ANY OTHER MAIN POINTS. I THINK THE MAIN THING IS THAT THE CONFESSION PRETTY MUCH SLASHED ALL THE AGGRAVATE -- ESTABLISHED ALL THE AGGRAVATING CIRCUMSTANCES. THE JUDGE DID AN EXHAUSTIVE REVIEW OF EVERYTHING. AND I WOULD ASK THE COURT TO AFFIRM THE SENTENCE OF DEATH. THANK YOU.

CHIEF JUSTICE: REBUTTAL.

> THANK YOU. THERE WAS A VERY POINTED QUESTION, CONCERNING C.C.P. AT WHAT POINT FROM THE STATEMENTS OF MR. BUZIA AND ALL OF THE EVIDENCE, DID HE FORM THE INTENT TO KILL MR. KERSCH? AND THE STATE SAID THAT, WHEN HE FELT THAT THE WIFE WAS NOW BEAT UP AND IN THE ROOM AND HE HAD TO DO SOMETHING, WELL, THAT OCCURRED, THAT OCCURRED WHEN HE HEARD THE GARAGE DOOR OPEN. THAT IS WHEN HE THOUGHT THAT, AND WHEN HIS STATEMENT IN HIS CONFESSION, WHEN HE HEARD THE GARAGE DOOR OPEN, THAT HAS TO BE MR. KERSCH. I HAVE TO DO SOMETHING.

TELL ME WHEN HE WENT AND GOT THE AX.

ACCORDING TO THE -- AND --

-- THREE INTERVIEWS THAT HE MADE, IN HIS INITIAL CONFESSION, IT IS NOT CLEAR, BUT IN THE THREE DIFFERENT INTERVIEWS HE MADE TO HIS DOCTORS, HE GOT THE AX IMMEDIATELY UPON WHEN MR. KERSCH ENTERED, BECAUSE HE STRUCK HIM WITH HIS FIST AND THEN HE HIT HIM WITH AN AX.

WHOSE BLOOD WAS IT ON THE CABINET THAT THE STATE REFERRED TO? WAS IT MRS. KERSCH'S OR MR. KERSCH'S?

THE CABINET, I BELIEVE IT WAS MR. KERSCH. I BELIEVE.

SO HE WOULD HAVE ALREADY HAD TO ENCOUNTER MR. KERSCH IN THE KITCHEN, BEFORE HE GOT THE AX, IF IT WAS MR. KERSCH'S BLOOD ON THE WALL.

THAT'S CORRECT. AND THAT, SEE, IF YOU ACCEPT THE STATE'S VERSION, THERE HAS TO BE AN ADDITIONAL INJURY TO MR. KERSCH, AND THAT IS WHY I SAY THE MEDICAL --

HOW MANY AXES WERE THERE?

THERE WERE TWO AXES FOUND AT THE SCENE, AND THE EVIDENCE WASN'T CLEAR WHETHER BOTH AXES WERE USED OR ONE AX WAS USED.

BUT THE POINT WAS, AS I UNDERSTAND THE FACTS, THAT THE FIRST BLOW IS TO MR. KERSCH, TO CHARLES, WERE IN THE HOUSE, IN THE KITCHEN, FOYER, WHATEVER.

YES.

AND THEN MR. BUZIA WALKED FROM THERE, OVER TO IN THE GARAGE AND GOT AX OR AXES,

WHICH WERE UP IN A CABINET, CORRECT? THEN CAME BACK INTO THE FOYER AND HIT MR . KERSCH BUZIA WITH THE -- AND HIT MR . BUZIA WITH THE AX. ISN'T THAT WHAT HAPPENED?

NO. BECAUSE THAT IS NOT WHAT HE EVENTUALLY TOLD HIS DOCTORSHAPPENED. HE, WHEN HE WAS IN ITIALLY INTERVIEWED , HE SAID I BLACKED OUT. I DON'T RECALL EVEN HITTINGMR. KEFERMING WITH AN AX -- MR. KERSCH WITH AN AX AND EVENTUALLY CONCEDED , YES, I MUST HAVE DONE I T.THAT WAS THE INITIAL CONFESSION.

BUT WE KNOW IN THIS SCENARIO, THAT MR . KERSCH WAS HIT WITH A AK AX.

YES. HE WAS -- WITH AN AX.

YES. HE WAS HIT IN ONLY TWO POSSIBLE PLACES, ACCORDINGTO THE MEDICAL EXAMINER, IN THE BASE OF THE SKULL AND THE LEFT SIDE OF THE HEAD. LEFT SIDE OF THE HEAD WERE THE TWO PLACES HE WAS HIT. THE LE FT SIDE OF THE HEAD WAS NOT A BIG BLOW, BECAUSE THE AX SIZE WAS 8 I N CHES. THE MARK WAS ONLY FOUR INCHES, SO I T WASN'T A F ULL HIT TO THE LEFT SIDE OF THE HEAD.

HAD HE HIT MRS. KERSCHWITH AN AX ?

PARDON?

HAD HE HIT THE WIFE WITH AN AX?

YES. BY HIS O WN ADMI SSION .

HE HAD ALR EADY USED AN AX ON HER, BEF ORE HE ENCOUNTERED THE HUSBAND. IS THAT CORRE CT?

IT IS NOT CLEAR , BUT IT IS POSSIBLE. IT COULD HAVE HAPPEN ED THAT WAY. THAT IS THE PROBLEM WITHTHIS CA SE. THE SEQUENCING I S TO TALLY CONJECTURE. IT IS TOTALLY CONJE CTURE , BUT THE BLOOD SPLA TTER EVIDENCE AND THE MEDICAL EXAMINER, WE KNOW WHAT K ROO COULDN'T HAVE HAPPENED. WE KNOW -- WHAT COULDN'T HAVE HAPPENED. WE KNOW TAKE THERE WAS NO DOUBLE FIST TO THE BACK OF THE HEAD .

I THOUGH T IN AN SWER TO JUSTICE BELL'S QUESTION, THAT YOU HAD INDICATE D THAT THE EVIDENCE WAS THAT IT WAS CHARLES'S BLOOD THAT WAS ON THE CABINET WHERE THE AXES WERE.

I BELIEVE THAT IS THE CASE. I BELIEVE SO . AND IT, JUST THAT THE , AND THE MEDICAL EXAMINER 'S TESTIMONY IS AS THE STATE SAID IT WAS. WHAT INJURY WAS CA USED B Y WHAT. AND IF YOU TAKE THAT AND TAKE THE BLOOD SP LATTER TOGETHER, HE COULD NOT HAVE BEEN MUR DERED I N A THREE-STAGE FA SHION WITH COLD, C R UEL REFLECTION , AS THE JUDGE STATES IN HIS SENTENCING ORDER . IT COULD NOT HAVE HAPPENED THAT WAY. IF YOU LOOK AT THOSE THI NGS, IT COULDN'T HAVE. BECAUSE THE INJURIES AREN'T THERE TO SUPPORT A THREE-STAGE ATTACK.

CHIEF JUSTICE: MR. BURDEN, YOUR TIME HAS EXP IRED , AND HE WILL -- WELL WILL T AKE THIS MA TTER UNDER 5D -- ANDWE WILL TAKE THIS MATTER UNDER ADVISEMENT AND REVIEW THE RECORD CAREFU LLY. I APPREC IATE YOUR CAN DOR , BUT BOTH TO YOU , MS. DAVIS AND TO MR. BURDEN IN ANSWERING OUR QUESTIONS. THE COUR T IS GO ING TO TAKE ITS MORNING RECESS OF T ENMINUTES, SI NCE WE HAVE TWO MORE CASES.

MARSHAL: PL EASE R ISE.