

I WILL BEGIN, HOWEVER, WITH, VERY BRIEFLY, WITH THE FIRST I WANT TO APPEAL IN CLOSING ARGUMENTS.

THERE WERE TWO COMMENTS THAT WE WERE ZEROING IN ON.

FIRST, WHERE THE PROSECUTOR REFERRED TO THE DEFENDANTS TESTIMONY AS NONSENSICAL AND NONSENSE.

THERE WAS AN OBJECTION MADE SAYING, THIS IS DEMEANING THE DEFENSE AND THE TRIAL COURT OVERRULED THE OBJECTION IN AND THE PROSECUTOR AGAIN REITERATED THAT IT WAS NONSENSICAL.

>> HE SAID IT AND THEN HE EXPLAINED WHY IT MADE NO SENSE. I AM PRETTY SENSITIVE TO CLOSING ARGUMENTS MISCONDUCT BUT I DON'T SEE THIS AS BEING IN A CATEGORY OF DOING ANYTHING BUT FIRST SAYING THIS DOES, HE SAID THIS MAKES NO SENSE AND HERE IS WHY. WHAT IS WRONG WITH IT?

>> HAD HE LEFT IT AT THAT, I AGREE WITH YOU AND THAT IS WHAT THE STATE ARGUES IN THEIR BRIEF THAT IS REALLY ALL HE SAID. HE USES THE WORDS AND THE WORDS THEMSELVES HAVE VERY CLEAR MEANING.

THEY ARE DEMEANING WORDS, NONSENSICAL.

IT DOESN'T MEAN IT DOESN'T MAKE SENSE.

IT MEANS SOMETHING MORE THAN JUST DOESN'T MAKE SENSE.

>> WHAT IS MORE?

>> NONSENSICAL MEANS IT IS RIDICULOUS AND ABSURD.

THAT IS SOMETHING MORE THAN JUST

IT DOESN'T MAKE SENSE.

>> WELL I MEAN TO SOME EXTENT,  
WHEN YOU LOOK AT WHAT THE ACTUAL  
TESTIMONY WAS THAT THIS LADY,  
THIS YOUNG GIRL, HAS AGREED TO  
BE TIED UP AND ALL OF THIS WHEN  
SHE IS HAVING THIS REAL HOT  
DISCUSSION WITH HIM.

WHY ISN'T THAT NONSENSE?

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>> BECAUSE I THINK, WELL, I  
DON'T THINK IT IS NONSENSE.

>> WELL, IT IS CERTAINLY  
UNBELIEVABLE.

IF HE HAD USED THE TERM  
UNBELIEVABLE--

>> ISN'T THAT FOR THE JURY TO  
DECIDE, WHETHER IT IS BELIEVABLE  
OR NOT?

>> BUT HE MOVED ON.

IT'S NOT LIKE HE DWELLS ON HER.  
HE THEN EXPLAINED HERE IS WHY IT  
MAKES NO SENSE.

>> BUT THEN WHEN YOU COUPLE IT  
WITH HIS FOLLOW-UP COMMENT  
SAYING HE NEVER EXPLAINED THIS,  
THAT KIND OF DOVETAILS IN WITH A  
NONSENSICAL COMMENT.

>> AT THAT POINT THE JUDGE  
SUSTAINED THE OBJECTION AND THE  
QUESTION THERE THEN IS WHETHER A  
LITTLE COLORFUL DESCRIPTION  
TOGETHER WITH ANOTHER STATEMENT  
THAT THAT IS THEN EXPLAINED  
WHICH IS THAT HIS EXPLANATION  
MADE NO SENSE WOULD BE A BASIS  
TO GRANT A NEW TRIAL.

I DON'T SEE IT.

>> AGAIN, THIS COURT HAS  
CERTAINLY ISSUED ENOUGH OPINIONS  
TALKING ABOUT YOU CAN'T Demean  
EITHER THE DEFENSE OR DEFENSE  
COUNSEL OR WHATEVER.

>> THERE IS A BIG DIFFERENCE TO  
ME AND DEMEANING DEFENSE COUNSEL  
FIRST OF ALL.

I DON'T KNOW WHAT IS IMPROPER IN  
BEING ABLE TO USE ADJECTIVES TO  
SAY, AND YOU AGREED EARLIER,  
SAYING THIS MAKES NO SENSE.

THIS IS REALLY NOT AN  
EXPLANATION.

HE PUT ON A CASE AND, AS JUSTICE  
QUINCE SAID, I SAY IT IS  
PREPOSTEROUS.

HOW ABOUT THAT ONE?

>> I THINK THAT WOULD BE  
IMPROPER.

>> BUT IT IS WHAT IT IS.

OKAY, IT IS LUDICROUS.

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HOW IS IT THAT --

WHAT WAS HIS EXPLANATION?

LET'S HEAR IT SO WE ALL CAN MAKE  
SURE WE KNOW.

WHAT DID THE DEFENDANTS SAY AS  
TO WHY HE TIED UP HIS ADOPTED  
DAUGHTER?

>> HE SAID BECAUSE HE WANTED HER  
TO GO OUT TO THE CAR WITH HIM  
AND SHE SAID NO.

HE SAID, DO I HAVE TO TIE YOU  
UP?

AND SHE SAID YES, YOU HAD  
BETTER.

>> OR CAN I TIE YOU UP?

>> CAN I TIE YOU UP TO GO TO THE  
CAR?

>> NO, NO, NO, SHE SAID HE  
WOULDN'T GO TO THE CAR WITH HER.

>> THAT MAKES PERFECTLY GOOD  
SENSE.

>> I THINK YOU ARE STILL  
PLANNING TO GO TO THE CAR AT  
THAT POINT.

>> WHY DID HE HAVE TO TIE HER

UP?

>> SO SHE WOULDN'T LEAVE.  
HE WAS CONVICTED ALSO OF  
KIDNAPPING.

>> WHAT DID HE SAY ABOUT THAT  
EXPLANATION?

>> WELL I MEAN THEY CALLED IT  
NONSENSE.

>> YOU SAID IT WOULD BE OKAY.

>> THAT DOESN'T MAKE ANY SENSE.

>> IT DEFIES COMMON SENSE  
OUTSIDE THE REALM OF--

>> HE SAID YOU CAN USE YOUR  
COMMON SENSE LADIES AND  
GENTLEMEN, BUT TO USE THESE  
TERMS THAT HAVE REAL MEANING TO  
THEM AND NOT GOOD MEANING.  
I MEAN YOU KNOW THEY ARE VERY  
PEJORATIVE.

>> IT MAKES NO SENSE.

>> IT MAKES NO SENSE.

NONSENSE DOESN'T MEAN IT MAKES  
NO SENSE.

AND I QUOTED WEBSTER'S.

>> NON MEANS NONSENSE RIGHT?

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>> IT GOES BEYOND NONSENSE,  
MAKING NO SENSE.

WHEN YOU DOVETAIL IT IN WITH HIM  
SHIFTING THE BURDEN AND AGAIN  
HIS TESTIMONY WAS HE DIDN'T KNOW  
HOW HIS WIFE GOT STABBED.

AND THEN IN THE CLOSING ARGUMENT  
HE SAID THERE WAS NO ESTIMATION  
OF HOW THE BODY GOT THERE.

THAT MAKES SENSE IN HIS  
TESTIMONY.

IF HE DIDN'T KNOW HOW HE GOT  
SHOT HE WOULDN'T HAVE AN  
EXPLANATION AS TO HOW THE BODY  
GOT THERE.

I MEAN BUT THEN TO SUGGEST HE  
HAD SOME DUTY TO EXPLAIN THAT I

THINK CLEARLY SHIFTED THE BURDEN  
IN THAT CASE.

THE SECOND ISSUE THAT I WOULD  
LIKE YOU TO GET TO IS THE JUROR  
MISCONDUCT.

IN THIS PARTICULAR CASE AFTER  
THE JURY HAD CONVICTED THE  
DEFENDANT THREE WEEKS LATER THEY  
HAVE THE PENALTY PHASE IN ON THE  
SECOND DAY OF THE PENALTY PHASE,  
THE ALTERNATE JUROR SENT A  
LETTER TO THE COURT SAYING THAT  
THE JURORS WERE DISCUSSING THE  
CASE AND HAD MADE COMMENTS  
INDICATING THEY WERE REJECTING  
THE MITIGATION BEFORE THE CASE  
WAS EVEN FINISHED.

THE COURT INFORMED THE PARTIES  
OF THIS.

THEY HAD A HEARING.

DEFENSE COUNSEL MOVED FOR A  
MISTRIAL.

THEY CALLED IN THREE JURORS.

>> I THOUGHT YOU SAID SOMETHING  
THAT WAS MORE SIGNIFICANT AND  
MORE TROUBLING AND WHETHER THEY  
WERE DISCUSSING THE CASE IS THAT  
THEY WERE MAKING COMMENTS THAT  
COULD BE SEEN AS ETHNICALLY  
DISCRIMINATORY.

>> I THINK WHEN THEY HAD THE  
HEARING THEY DID THAT.

>> THE FIRST THING WAS THEY WERE  
JUST DISCUSSING THE CASE?

>> I THINK I SET FORTH WHAT HE  
SAID IN THERE.

>> DO WE HAVE THE LETTER?

>> YES, I THINK YOU DO.

ONE COMMENT WAS ABOUT A SAD  
STORY IN ANOTHER COMMENT ABOUT  
THE EMOTIONAL DECISION.

THE LETTER ITSELF WAS NOT NEARLY

AS INSTRUCTIVE AS WHAT THE TESTIMONY WAS.

WHEN THEY BROUGHT THE THREE JURORS DOWN, THEN IT WAS EXPLORED FURTHER AND IT WAS THINGS LIKE IF YOU ARE GOING TO COME TO AMERICA YOU HAVE TO LIVE BY AMERICAN STANDARDS AND AMERICAN LAW.

>> DID HE TESTIFY?

>> NOBODY SEEMED TO KNOW WHO IT WAS THAT SAID IT.

>> IT WAS SOMETHING THAT WAS GOING ON IN THE JURY ROOM?

>> YES.

THE THREE JURISTS WHO TESTIFIED -- IT WAS FOUR PERSONS AND IT WAS ALL BEGUN BY AN ALTERNATE JUROR VALENTI.

BOTH PERKINS AND A FOURTH PERSON AGREED OTHER PEOPLE WERE THERE WHEN THIS HAPPENED, BUT THEY BOTH DENIED MAKING THE STATEMENT SO THAT LOGICALLY MEANS ONE OR THE OTHER JUROR.

>> THE COMMENTS WERE MADE AFTER THE GUILT PHASE BEFORE THE PENALTY PHASE HAD COMPLETED AND THE JUDGE MADE A DETERMINATION. WHAT WAS THE JUDGE'S DETERMINATION?

>> THEY DENIED BASED ON THOSE THREE JURORS THERE HASN'T BEEN, THERE MAY HAVE BEEN A LACK OF COMPLIANCE WITH THE COURT'S INSTRUCTIONS BUT I THINK SHE MEANT THE VERDICT THAT THERE HAD BEEN A VERDICT YET.

>> INHERENT VERDICT PROBABLY.

>> I THINK THAT MIGHT BE A MISTAKE IN THE TRANSCRIPT.

>> WHAT WAS THEIR STATEMENT

BECAUSE THERE HAD BEEN IN THE  
DELIBERATIONS YET.  
WHAT WERE THE FINDINGS REGARDING  
THESE RACIAL OR ETHNIC  
STATEMENTS THAT HAVE BEEN MADE.

>> I'M SORRY?

>> DID THE JUDGE MAKE FINDINGS  
WHETHER THERE HAD BEEN RACIAL OR  
ETHNIC SLURS?

DID ANYONE ASK AFTER THE  
MISTRIAL WAS DENIED FOR THE JURY  
TO BE INSTRUCTED THAT THESE  
CONSIDERATIONS MUST PLAY NO PART  
IN THEIR DELIBERATIONS?

>> NO.

>> BUT THE JUDGE DID GIVE AN  
INSTRUCTION AFTER THIS, DIDN'T  
HE?

>> RIGHT.

YOU CANNOT DISCUSS THE CASE AND  
BASICALLY REITERATING WHAT THE  
INITIAL --

>> THAT YOU CANNOT DISCUSS THE  
CASE BEFORE THE END OF THE  
DELIBERATIONS OR MAKE UP YOUR  
MIND BEFORE ALL OF THE EVIDENCE  
IN THAT KIND OF THING, CORRECT?

>> RIGHT.

>> MY CONCERN THERE, AND IT  
WOULD BE ONE I MIGHT WANT TO  
EXPLORE, IS YOU MIGHT NOT WANT  
SOMEONE TO DISCUSS THE CASE  
BEFORE THE END WHICH AS WE KNOW  
IS HUMAN NATURE THAT THIS  
PROBABLY OCCURS MORE THAN WE  
REALIZE BUT THE OTHER IS THE  
KIND OF STATEMENTS THAT WERE  
MADE WHICH IS IF IT IS CORRECT  
THAT WELL, THERE CAN'T BE ANY  
MITIGATION HERE AND ANYONE THAT  
COMES TO THIS COUNTRY DOESN'T  
GET, THEY HAVE GOT TO LIVE BY

AMERICAN STANDARDS AND SO FORTH.  
HOW WAS THAT ADDRESSED AS TO  
THOSE ETHNIC REMARKS?

>> UNFORTUNATELY I DON'T THINK  
IT WAS ADDRESSED AND THAT IS THE  
PROBLEM WE HAVE WITH THE  
CONFIDENCE YOU HAVE IN THE JURY  
RECOMMENDATION THAT ULTIMATELY  
WAS FOR DEATH.

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>> I GUESS ONE OF THE QUESTIONS  
THOUGH IS THE DEFENSE COUNSEL  
ACTUALLY --

>> DID THE DEFENSE COUNSEL MAKE  
ANY REQUEST OF THE TRIAL JUDGE  
AS IT REGARDS ANY KIND OF RACIAL  
OR ETHNIC COMMENTS?

>> NOT THAT I RECALL THAT HE  
MADE A SPECIFIC REQUEST FOR A  
PARTICULAR TYPE OF INSTRUCTION.  
SHE DID GIVE THEM THE  
OPPORTUNITY TO INTERVIEW THE  
REST OF THE JURORS WHICH BOTH  
COUNCILS DECLINED.

>> BOTH DECLINED?

>> DECLINED.

I DON'T THINK THAT IS  
NECESSARILY DISPOSITIVE OF THIS  
BECAUSE CLEARLY FROM THE THREE  
THAT TESTIFIED MORE PEOPLE HEARD  
IT.

I THINK THE THREE WHO TESTIFIED,  
NONE OF THEM MADE IT SO THEY ALL  
HEARD IT SO SOMEBODY ELSE HAD TO  
HAVE MADE THOSE COMMENTS.

>> DID THE DEFENSE ATTORNEY CITE  
THE JUDGE TO POWELL?

>> I BELIEVE SO.

HE DID CITE CASE LAW TO HER.

>> IS IT YOUR POSITION THAT THE  
ETHNIC SLURS THAT WERE MADE, AND  
I'M GOING TO CATEGORIZE THEM,  
THE COMMENTS THAT WERE MADE

DEROGATORY OF THE DEFENDANTS  
CONSTITUTED ACTUAL JUROR  
MISCONDUCT?

>> YES.

>> SO YOU THINK UNDER POWELL  
THEN?

>> I RELIED ON POWELL IN MY  
BRIEF.

>> IT WOULD HAVE BEEN IN A  
PENALTY PHASE?

>> YES, BELIEVE THAT IS.

>> THERE IS NOTHING THAT  
INDICATES THIS WAS PART OF THE  
GUILT PHASE?

>> I CAN POINT TO ANYTHING IN  
THE GUILT PHASE.

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THE ONLY THING I CAN POINT TO  
WAS THE ALTERNATE JURORS SAID  
THEY DISCUSSED THE CASE BEFORE  
DELIBERATIONS IN THE GUILT PHASE  
TWO AND NOW THEY ARE DOING IT  
AGAIN IN THE PENALTY PHASE.

DEFENSE COUNSEL DIDN'T  
SPECIFICALLY TIE THAT BACK INTO  
THE GUILT PHASE SO THAT IS WHY I  
AM NOT ARGUING THAT IT WOULD  
REQUIRE A NEW TRIAL NECESSARILY.  
BUT OF COURSE THIS COURT CAN  
ULTIMATELY DECIDE THAT ISSUE.  
IT WAS NOT EXPLORED AT THE TRIAL  
LEVEL.

AND AS I SAID, I BELIEVE THE  
DEFENSE WAS CLEARLY BASED ON THE  
CULTURAL DIFFERENCES HERE.  
THAT WAS A MAJOR PART OF THE  
PENALTY PHASE.

DEFENSE COUNSEL, OR THE  
PROSECUTOR, IN HIS BRIEF,  
COUNSEL DID NOT WRITE THAT BRIEF  
BUT HE MINIMIZED ADVICE SAYING  
THAT I WAS OVERSTATING THE  
DEFENSE.

WELL I DON'T THINK YOU CAN  
OVERSTATE WHAT THE DEFENSE WAS.  
THAT WAS CLEARLY WITH THE  
DEFENSE WAS.

THEY PRESENTED THIS EVIDENCE OF  
WHAT HIS LIFE WAS IN VIETNAM AND  
HOW THAT TRANSLATED TO AMERICA  
AND THE WHOLE THING.

I DON'T THINK THAT IS  
OVERSTATING IT AT ALL AND TO  
DISMISS IT BY THAT KIND OF  
COMMENT I THINK IS JUST WRONG.  
SO I THINK WE HAVE MADE THE CASE  
THAT THERE WAS CLEARLY  
MISCONDUCT THERE AND WE HAVE A  
FINDING BY THE TRIAL COURT THAT  
THE JUROR WAS NOT FOLLOWING HER  
INSTRUCTIONS.

THE NEXT ISSUE I WOULD LIKE TO  
ADDRESS IS THE FINDING OF  
HEINOUS, ATROCIOUS AND CRUEL AND  
IN THIS CASE THE TRIAL COURT  
FOUND THAT AGGRAVATING FACTOR  
AND IT IS OUR CONTENTION THAT IT  
SIMPLY DOES NOT MEET THE TEST.

YES, THERE WAS A STABBING HERE,  
AND THERE WERE SIX STAB WOUNDS  
AND I THINK 10 WOUNDS ALTOGETHER  
BUT SOME OF THOSE WERE EXIT  
WOUNDS, SO THEY WERE ACTUALLY  
SIX STAB WOUNDS.

AND OBVIOUSLY I THINK SHE WAS  
CONSCIOUS DURING THE ATTACK AS  
IT ALL HAPPENED VERY QUICKLY.

I THINK IT PRETTY MUCH CAN BE  
DESCRIBED AS A FRENZIED ATTACK.

IT HAPPENED VERY QUICKLY.

>> THERE WERE DEFENSIVE WOUNDS.

>> THERE WAS ONE DEFENSIVE WOUND  
ON THE BACK OF HER HAND.

THE JUDGE SAID IT WAS ON THE  
PALM OF HER HAND BUT THE MEDICAL

EXAMINER SAID IT WAS ON THE BACK OF HER HAND.

IT WAS A MISSTATEMENT BY THE TRIAL COURT.

THE TRIAL COURT ALSO SAID WHILE SHE LAY HELPLESS SHE COULD HEAR THE VICIOUS ATTACK BY THE DEFENDANT ON MR. HIGGINS.

THERE IS JUST NO EVIDENCE THAT SHE COULD HEAR THAT ATTACK.

>> NO BUT --

>> EVIDENCE THAT WHAT?

>> THAT THE VICTIM COULD HEAR THE VICIOUS ATTACKS BETWEEN MR. PHAM AND MR. HIGGINS GOING ON.

>> WAS THERE EVIDENCE -- THIS WAS ALL SORT OF TAKING PLACE IN ONE AREA.

SHE WAS IN THE AREA WHERE THE ATTACK BETWEEN MR. HIGGINS AND MR. PHAM WAS GOING ON.

>> NO.

THEY WERE IN THE KITCHEN AND SHE WAS IN THE HALLWAY.

HER BODY WAS IN THE HALLWAY.

THE HALLWAY ENTERED INTO LIKE, I DON'T KNOW IF IT IS A DINING ROOM AREA OR WHATEVER AND BEYOND THE DINING ROOM WAS THE KITCHEN AND THE MAIN PART OF THE ATTACK BETWEEN THE APPELLANT AND MR. HIGGINS WAS IN THE KITCHEN.

I DON'T MEAN TO SUGGEST THAT THIS IS A HUGE HOUSE OR ANYTHING.

IT IS AN APARTMENT.

AGAIN THERE IS NO EVIDENCE THAT SHE COULD ACTUALLY HEAR THIS ATTACK GOING ON.

>> BUT IS THERE EVIDENCE SHE WAS IN A GREAT DEAL OF PAIN FROM THE

AFFLICTION OF THESE WOUNDS?  
>> THE MEDICAL EXAMINER  
TESTIFIED THERE WOULD HAVE BEEN  
PAIN, YES.  
>> AND SHE WAS IN FACT CONSCIOUS  
FOR SOME PERIOD OF TIME?  
>> HOW LONG IS WHAT IS UP FOR  
GRABS.  
THE MEDICAL EXAMINER.  
>> SHE SAID IT WAS NOT  
IMMEDIATE.  
>> NO.  
IT COULD HAVE BEEN AS LITTLE AS  
TWO MINUTES AND UP TO 10  
MINUTES.  
>> WAS THAT IN THE PRESENCE OF  
HER DAUGHTER?  
>> THE DAUGHTER WAS PRESENT,  
YES.  
>> COULD THE DAUGHTER LEAVE?  
DID SHE MOTION FOR HER DAUGHTER  
TO LEAVE THE AREA?  
>> IT IS UNCLEAR.  
THE DAUGHTER SAID SHE POINTED TO  
THE DOOR.  
NOW SHE DIDN'T SAY ANYTHING TO  
HER.  
>> SHE WAS STABBED IN THE  
THROAT.  
>> I DON'T KNOW IF THAT IS WHAT  
SHE WAS TELLING THE DAUGHTER TO  
DO BUT THE DAUGHTER ORIGINALLY  
WASN'T WITH THE MOTHER.  
THE DAUGHTER WENT TO THE MOTHER  
AFTER SHE HAD --  
I AM SORRY SHE WAS WITH THE  
MOTHER AND APPARENTLY RAN NEXT  
DOOR IN THE TESTIMONY AND THEN  
CAME IN AND GOT INVOLVED IN THE  
FRAY BETWEEN HIGGINS AND THE  
DEFENDANT BECAUSE SHE PICKED UP  
A POT AND HIT THE DEFENDANT.

SOMEHOW SHE GRABBED A KNIFE FROM THE DEFENDANT AND THEN SHE WENT OVER TO HER MOTHER AND WHEN THE POLICE CAME AND SHE WAS STANDING OVER HER MOTHER WITH A KNIFE.

>> BUT SHE GRABBED THE KNIFE FROM THE DEFENDANT?

>> YES.

AGAIN, I AM NOT SO SURE.

THERE WAS NOT A LOT OF REALLY ABSOLUTE TESTIMONY IN THIS CASE.

>> BUT WE DO KNOW THAT THE STABBING OF THE WIFE TOOK PLACE BEFORE MR. HIGGINS ACTUALLY ENTERED THE APARTMENT, CORRECT?

>> WELL, NO WE DON'T.

THAT IS THE PROBLEM AND I WILL TELL YOU WHY WE DON'T.

MOST OF THE TESTIMONY CAME FROM LANA.

LANA SAID THE MOTHER CAME IN AND CAME INTO HER ROOM AND THE DEFENDANT CAME FROM BEHIND THE DOOR AND STABBED HER AND IN HER BEDROOM AND IN LANA'S BEDROOM.

IN THE PRETRIAL STATEMENT SHE GAVE TO THE POLICE, SHE SAID HER MOTHER CAME IN WITH HIGGINS.

NOW, HIGGINS SAYS NO, I WAS PARKING MY MOTORCYCLE AND I HEARD SCREAMING AND I WENT UP AND THEN SHE WAS ALREADY ON THE FLOOR AND THEN I GOT INVOLVED IN THE THING WITH --

>> WELL, WE DO KNOW THAT, OR DO WE GET THE STABBING ACTUALLY HAD TAKEN PLACE BEFORE THE STRUGGLE BETWEEN MR. HIGGINS AND MR. PHAM?

>> YES.

I THINK WE DO.

YES.

>> BECAUSE THE STRUGGLE WITH PHAM WAS IN THE KITCHEN AND SHE WAS IN THE HALLWAY.

>> RIGHT.

NOW INTERESTING, LANA SAID THE STABBING OCCURRED IN HER BEDROOM YET NO BLOOD WAS FOUND IN THE BEDROOM AT ALL.

SO THAT IS WHY I SAY THERE IS A LOT OF STUFF THAT DOESN'T MAKE A LOT OF SENSE IN THIS PARTICULAR CASE BUT I DON'T KNOW THAT IT IS -- HOW RELEVANT IT IS.

>> I AM NOT FAMILIAR WITH THE LAYOUT OF THE APARTMENT. WAS THE HALLWAY WE ARE TALKING ABOUT IMMEDIATELY OUTSIDE OF THE BEDROOM?

>> YES.

THE HALLWAY WAS OUTSIDE OF THE BEDROOM BUT LANA SAID THE DOOR TO HER BEDROOM WAS CLOSED AND THE DEFENDANT WAS BEHIND IT AND HER MOTHER CAME INTO THE BEDROOM AND THEN THE DEFENDANT JUMPED OUT AND STABBED HER IN THE THROAT, AND THEN IT MOVED INTO THE HALLWAY.

BUT AGAIN, THE LACK OF BLOOD KIND OF -- I DON'T KNOW, MAKES THAT IMPROBABLE.

BUT ANYWAY, THAT IT WAS HEINOUS, ATROCIOUS AND CRUEL WAS NOT SUPPORTED RIGHT.

YES IT OBVIOUSLY IS A TERRIBLE THING AND IT WAS BUT IT WAS A FRENZIED ATTACK.

IT WAS NOT THIS PROLONGED TORTUROUS ACT THAT THE DEFENDANT DID.

>> DOES IT HAVE TO BE IN ORDER TO BE HEINOUS, ATROCIOUS AND

CRUEL?

ISN'T THE SUFFERING OF THE  
VICTIM PART OF THAT ANALYSIS?

>> YES IT IS BUT IN THIS  
PARTICULAR CASE AGAIN WE DON'T  
HAVE A QUANTIFIABLE, AND I CITED  
SOME CASES WHERE THERE WAS  
EVIDENCE THAT THE VICTIM  
SUFFERED THROUGH 60 MINUTES.  
THAT IS CLEARLY --

>> YOU HAVE HAD CASES WHERE  
FIRST OF ALL STABBING AND  
STRANGULATION GENERALLY HAVE  
BEEN FALLING WITHIN THE HAC  
BECAUSE THERE IS NOT AN  
IMMEDIATE --

SO WHEN YOU SAY 60 MINUTES  
AREN'T THERE CASES WHERE AS LONG  
AS THERE IS CONSCIOUSNESS FOR A  
PERIOD OF A MINUTE OR TWO  
MINUTES THAT IT IS A PETITION?

>> YES THERE HAVE BEEN CASES  
LIKE THAT, YOUR HONOR, BUT AGAIN  
IN THIS CASE, AND I HAVE CITED  
SOME CASES AND WE CAN CITE CASES  
FOR BOTH PROPOSITIONS HERE I  
THINK AND THAT IS WHY THE  
TROUBLE WITH A FINDING OF  
HEINOUS, ATROCIOUS AND CRUEL.

>> THERE IS ONE THING TO FIND IT  
AND THE OTHER IS THAT IT IS THE  
JURY AND THE JUDGE FUNCTION AND  
THE WEIGHING IS A JUDGE FUNCTION  
BUT IN LOOKING AT IT, THERE WAS  
THIS CASE.

MAYBE WE WOULD SAY THIS ISN'T  
THE WORST OF THE HAC CASES AND I  
KNOW YOU HAVE GOT CCP AND YOU  
HAVE GOT, I KNOW YOU HAVE ISSUE  
ON THEIR PRIOR FELONY BUT YOU  
HAVE A CONTEMPORANEOUS FELONY,  
CONTENTIOUS MURDER OF

MR. HIGGINS SO MAYBE THOSE ARE  
ADDITIONAL DRAWN AGGRAVATORS IN  
THIS CASE.

>> I DO WANT TO JUST MENTION THE  
STATEMENT BY THE TRIAL COURT IN  
SUPPORT OF THE HEINOUS,  
ATROCIOUS AND CRUEL, AGAIN I  
THINK IT IS SPECULATIVE WHEN SHE  
SAYS THE VICTIM COULD HEAR THE  
STRUGGLE GOING ON AND SO I THINK  
THE CONSCIOUSNESS ASPECT HERE  
RELIES A LOT ON SPECULATION, SO  
I'M NOT SO SURE IT CAN BE  
SUSTAINED BECAUSE IT CLEARLY WAS  
A FRENZIED ATTACK.

IT HAPPENED VERY QUICKLY.

THE VICTIM WAS DEAD AT THE TIME  
THE POLICE GOT THERE.

>> DIDN'T THE MEDICAL EXAMINER--

>> DID I UNDERSTAND CORRECTLY  
THAT THE VICTIM WAS POINTING AT  
THE DOOR AFTER SHE HAD BEEN  
STABBED IN THE NECK?

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>> OKAY, I DON'T KNOW IF SHE WAS  
POINTING THE SHE MOTIONED TOWARD  
THE DOOR BUT THAT WAS AFTER SHE  
WAS STABBED.

>> SHE IS STABBED IN THE NECK,  
SUFFERING FROM THIS WOUND AND IS  
POINTING AT THE DOOR SAYING SHE  
IS GESTURING TOWARD THE DOOR SO  
SHE IS OBVIOUSLY GOT SOME  
CONSCIOUSNESS AFTER SUFFERING  
THIS WOUND THAT WOULD BE A FATAL  
WOUND.

>> THERE WAS SOME CONSCIOUSNESS.  
I'M NOT DISPUTING THAT.

>> SHE KNOWS HER DAUGHTER HAS  
SEEN HER STABBED AND SHE IS  
TRYING TO GET HER DAUGHTER OUT  
OF THE ROOM.

>> I DON'T KNOW IF THAT IS -- I

MEAN SHE JUST MADE A GESTURE  
TOWARD THE DOOR, ACCORDING,  
ACCORDING TO LANA.  
THAT IS LANA'S INTERPRETATION.  
>> BUT SHE WAS THERE.  
>> RIGHT, RIGHT BUT DON'T FORGET  
LANA HAD BEEN OUT AND CAME BACK.  
LANA HAD A CHANCE TO GO.  
THIS WHOLE THING ABOUT TYING  
UP--  
>> YOU SAID LANA HAD GONE OUT  
THE DOOR AND WHEN LANA CAME  
BACK, THAT IS WHEN THE MOTHER  
MOTIONED TO THE DOOR?  
>> LANA LEFT AND THEN SHE CAME  
BACK TO SAY --  
>> WHY WOULD LANA COME BACK?  
>> BECAUSE HER MOTHER IS THERE.  
>> SO WAS THE PERSON WHO LANA  
SAYS KILLED HER MOTHER.  
>> BUT THIS IS ABOUT THE  
PROCESSION OF THINGS, ABOUT THE  
VICTIM AND IT ALL SEEMS TO ME TO  
POINT TO A PERCEPTION THAT THE  
VICTIM WOULD HAVE HAD OF THE  
HORRIFYING CIRCUMSTANCES THAT  
SHE WAS CONSCIOUS OF AND  
REACTING TO.  
BASED ON THE TESTIMONY.  
>> I WOULD LIKE TO -- JUSTICE  
PARIENTE, YOU MENTIONED IT WAS  
CCP.  
WE DO NOT BELIEVE IT WAS CCP IN  
THIS CASE, FOR SEVERAL REASONS  
BUT FIRST OF ALL, AND AGAIN  
THERE IS NO, AND I'M NOT ARGUING  
THAT THERE IS A DOMESTIC  
EXCEPTION TO THE DEATH PENALTY.  
THERE ISN'T.  
THE DOMESTIC SITUATION THAT WAS  
INVOLVED HERE WEIGHS VERY  
HEAVILY ON WHETHER THIS WAS CCP.

THIS WAS AN ONGOING PROBLEM WITH THE DEFENDANT AND HIS ESTRANGED WIFE.

THEY DISAGREED EXTREMELY ON HOW THE CHILDREN SHOULD BE BROUGHT UP.

THE JUDGE LEARNED -- HE LEARNED THAT DAY FROM HIS 10-YEAR-OLD DAUGHTER THAT THEIR MOTHER HAD PROVIDED CONDOMS TO HER AND TO THE 13-YEAR-OLD.

>> DOES THE DEFENDANT TAKE WEAPONS WITH HIM OR PROCURE THEM AT THE SITE?

>> THE DEFENDANT SAID HE DID NOT TAKE THE WEAPONS.

LANA SAID SHE TURNED AROUND AND HE WAS STANDING THERE WITH TWO KNIVES IN HIS HAND.

>> IS THAT NOT ONE FACTOR THAT THE CASES HAVE USED THAT YOU TAKE A WEAPON TO THE SITE FOR WHICH YOU CAN DRAW THAT HEIGHTENED PREMEDITATION IN GOING TO A SCENE PREPARED FOR SOMETHING AND CERTAINLY IS NOT A BARBECUE.

>> YES, THAT IS ONE SITUATION, BUT AGAIN, LOOKING AT THE TRIAL COURTS REASONING HERE, THERE ARE FACTS THAT SHE MADE THAT CANNOT BE SUSTAINED BY THE EVIDENCE.

THE TRIAL COURT STATED THAT THE DEFENDANT --

LANA ASCERTAINED THAT SHE WAS ALONE IN THE APARTMENT.

THAT IS SIMPLY NOT TRUE.

HIS YOUNGER DAUGHTER CALLED HIM EARLIER THAT DAY AND HE MADE PLANS TO GO OVER THERE AFTER WORK.

>> HOW DO WE KNOW THAT?

>> PARDON ME?

>> HOW DO WE KNOW THAT?

>> THE DEFENDANT TESTIFIED TO IT.

>> BUT ONCE HE GOT THERE, HE TIES UP HIS DAUGHTER AND HE LAYS IN WAIT WITH THE KNIVES FOR HIS WIFE.

THAT DOESN'T SOUND LIKE SOMEBODY THAT IS UPSET ABOUT THE WAY THE MOTHER IS RAISING THEIR CHILDREN, BUT SOMEBODY WHO IS DECIDING THAT SHE SHOULD NO LONGER BE ALIVE IN THIS WORLD. I DON'T UNDERSTAND.

I DON'T UNDERSTAND HOW THE LAYING IN WAIT AND HIDING WITH THE KNIVES DOES ANYTHING BUT SHOW CCP.

>> I THINK IT IS A PRODUCT OF THE ONGOING DISPUTE THAT THEY HAD THAT COLORED HIS PERCEPTION.

>> YOU COULD SAY THERE WAS EMOTIONAL DISTRESS BUT I THINK THE JUDGE FOUND IT NOT AS STATUTORY BUT NONSTATUTORY AND THAT YOU LOOK AT IN MITIGATION. I WOULD AGREE WITH YOU THAT HAS BEEN ESTABLISHED, BUT THAT -- WE HAVE HELD THAT DOESN'T PREVENT A FINDING OF CCP.

>> ACTUALLY THIS COURT HAS COME FAIRLY CLOSE TO SAYING THAT THAT IS A FACT THAT WAS NEGATED BECAUSE IT IS ANTITHETICAL I BELIEVE THE WORD THIS COURT HAS USE TO FINDING IT IS A COLD ACT SO I BELIEVE THIS COURT HAS SAID THAT CAN NEGATE.

>> YOU ARE NOW DOWN TO TWO MINUTES.

>> THEN I WILL JUST SAVE

WHATEVER TIME I HAVE, BUT WE WOULD ASK THIS COURT TO REVERSE THE DEATH PENALTY AND ASK FOR A NEW PENALTY PHASE.

THANK YOU.

>> MAY IT PLEASE THE COURT?

MEREDITH CHARBULA, ASSISTANT ATTORNEY GENERAL FOR THE APPELLEE.

IF THIS COURT WOULD INDULGE ME I WOULD LIKE TO TAKE THE ISSUES IN THE REVERSE ORDER THAT THE APPELLANT RAISED.

JUSTICE LEWIS, THE ANSWER TO YOUR QUESTION REGARDING TESTIFYING, NOT ONLY DID SHE SEE THE KNIVES IN HIS HAND WHEN PHAM ENTERED THE APARTMENT AND DRAGGED HER DOWN TO THE FLOOR BUT SPECIFICALLY THOSE KNIVES DID NOT COME FROM THE APARTMENT SO THERE IS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THAT.

I THINK MAYBE THE APPELLANT IS CORRECT AND THAT PERHAPS THE TRIAL JUDGE FINDINGS REGARDING THE PHONECALL THAT HE CALLED TO ASCERTAIN SHE WAS HOME ALONE MAY HAVE NOT BEEN SPECIFICALLY CORRECT.

PERHAPS WHAT SHE SHOULD HAVE SAID IS THAT SHE ASCERTAINED THAT SHE WAS HOME ALONE AND HE DID THAT.

WHEN HE TALKED TO HER HE ASCERTAINED THAT SHE WAS HOME ALONE.

HE THEN WENT TO HER APARTMENT AND EVERY OTHER FINDING IS ABSOLUTELY SUPPORTED BY THE EVIDENCE.

LANA TESTIFIED HE BROUGHT THE WEAPONS TO THE SCENE AND THEY WEREN'T FROM HIS HOME. HE BOUND HER IMMEDIATELY. HE TOOK HER INTO THE ROOM AND I THINK IT IS SIGNIFICANT HE CLOSED THE BEDROOM DOOR, SO WHAT IS THAT GOING TO DO? WHEN MOM COMES HOME SHE IS LOOKING FOR HER DAUGHTER AND I THINK THE TESTIMONY IS NOT SPECIFICALLY THAT THE ATTACK HAPPENED IN THE BEDROOM. I THINK THAT IS A LITTLE BIT WHAT LANA TESTIFIED ACTUALLY IS WHEN HER MOTHER CALLED OUT TO HER. FOR SOME REASON SHE COULDN'T CALL BACK AND HER MOTHER OPENED THE DOOR AND IMMEDIATELY THE DEFENDANT JUMPED OUT. SHE SAID LOOKOUT AND IMMEDIATELY JUMPED OUT TO ATTACK. WHERE THAT EXACTLY HAPPEN, WHETHER IT WAS IN THE BEDROOM OR THE ENTRANCE WAY IS NOT EXACTLY CLEAR AT THAT POINT.

>> HOW LONG HAD LANA BEEN TIED UP?

>> I THINK SHE ESTIMATED 45 MINUTES TO ABOUT AN HOUR.

>> SO HE HAD BEEN LAYING IN WAIT AND THERE WAS NO CONVERSATION THAT HE HAD WHEN THE MOTHER CAME IN?

HE IMMEDIATELY ATTACKED?

>> HE IMMEDIATELY ATTACKED HER.

>> BUT DIDN'T HE HAVE A CONVERSATION WITH LANA?

>> THAT IS ANOTHER POINT, EXACTLY RIGHT.

THIS IS ANOTHER THING THAT

INDICATED A COLD AND CALCULATED NATURE.

HE WAS NOT ONLY LYING IN WAIT BUT PLANNING IT.

HE TOLD LANA THAT HE HOPED SHE WOULD FORGIVE HIM FOR WHAT HE DID AND SHE WOULD TAKE CARE OF HER LITTLE SISTERS WHEN HE AND HER MOM WERE GONE.

THERE WAS NO CONVERSATION ACCORDING TO LANA'S TESTIMONY. WHEN HE HEARD THE MOM COME IN THE DOOR HE GRABBED THE KNIVES WHERE HE HAD STORED THEM WHILE THEY WERE WAITING UNDER THE BED OR UNDER A CUSHION I THINK SHE SAID.

HE HID BEHIND THE CLOSET AND OF COURSE WHEN MOM, NATURALLY, COMES HOME AND CALLS HER DAUGHTER'S NAME AND DOESN'T GET A RESPONSE AND GOES TO OPEN THE BEDROOM DOOR HE IMMEDIATELY JUMPS OUT WITHOUT A SINGLE WORD, STABS HER IN THE THROAT.

THE CONFRONTATION GOES INTO THE HALLWAY AND SHE DOESN'T SEE THAT FROM THERE.

SO IN BRINGING THE WEAPONS TO THE SCENE, WE HAVE GOT HIM LYING IN WAIT.

WE HAVE GOT HIM TELLING HIS DAUGHTER ESSENTIALLY, I AM GOING TO KILL YOUR MOM IMMEDIATELY, HIDING BEHIND THE DOOR AND IMMEDIATELY ATTACKING HER WITHOUT ANY CONVERSATION.

I WOULD LIKE TO POINT OUT THAT ONE OF THE THINGS THE DEFENDANT SAID ABOUT HIS WIFE WAS THIS NOTION OF THIS IS AN ONGOING DOMESTIC DISPUTE AND EVERYTHING

IS MESSED UP.

THE DEFENDANT SAID HE WOULD GO OVER TO HER HOUSE, TO HER APARTMENT, ON MONDAYS AND SHE WOULD COOK A MEAL FOR HIM AND HE WOULD GIVE HER MONEY.

OF COURSE THIS COURT HAS REPUDIATED ANY IMPLICATION.

THIS COURT HAS NEVER HAD A DOMESTIC VIOLENCE EXCEPTION.

THE DEATH PENALTY BUT THE COURT AND EVIDENCE HAS MADE CLEAR THAT

WE DON'T HAVE A DOMESTIC

VIOLENCE EXCEPTION AND THIS IS

NOT A CONFRONTATION THAT

HAPPENED OUT OF AN ARGUMENT.

THIS IS NOT A CASE WHERE THEY

HAD A VIOLENT ARGUMENT AND HE

KILLED HER IN THE HEAT OF THE

ARGUMENT.

THIS IS HIM JUMPING OUT AND

IMMEDIATELY STABBING HER AFTER

LYING IN WAIT FOR AN HOUR,

BRINGING THE WEAPONS IN AND

TELLING THE DAUGHTERS, BY THE

WAY, I AM KILLING YOUR MOM.

>> WHAT WERE THE STATES'

EXPLANATION FOR THE MOTIVE OF

THIS, THAT THEY HAD A

RELATIONSHIP THAT WAS RELATIVELY

GOOD.

WAS IT LEARNING ABOUT THE

CONDOMS THAT GOT HIM TO ACT IN A

WAY THAT I GUESS WAS OUT OF

CHARACTER?

HE WAS A GREAT EMPLOYEE.

>> HE WAS A VERY GOOD EMPLOYEE.

THERE WERE SIGNIFICANT PROBLEMS

IN HIS FAMILY'S LIFE BEFORE THIS

INCIDENT.

THEY WERE ESTRANGED.

HE HAD A DOMESTIC VIOLENCE

INJUNCTION ISSUED AGAINST HIM REGARDING THE KIDS.

>> WHAT WAS THE STATE'S EXPLANATION FOR THE MOTIVATION OF THIS?

>> I AM NOT SURE THAT THE EVIDENCE REALLY SUPPORTED IT. THERE WASN'T A SPECIFIC MOTIVE EXCEPT THAT HE WAS, HE DIDN'T LIKE IT THAT HE WASN'T IN THE FAMILY AND THAT SHE WAS RAISING HIS KIDS.

I THINK THERE WAS TESTIMONY ABOUT THAT.

HE WAS UPSET SHE WAS BECOMING AMERICANIZED AND NOT RAISING THE KIDS IN TRADITIONAL VIETNAMESE MANNER.

HE HAD DISAGREEMENTS WITH HER TREATMENT THAT, FOR INSTANCE, SHE ALLOWED THE KIDS TO SPEND THE NIGHT WITH FRIENDS AND HE WOULD ONLY ALLOW THAT WITH COUSINS.

BUT AS FAR AS SAYING THAT SPECIFICALLY IS THE MOTIVE, NO. WHAT WE DO HAVE IS HIS PLANNING OF IT THOUGH AND THAT ESTABLISHES THE CCP.

GOING DOWN TO THE HAC, THIS 32-YEAR-OLD MOTHER OF THREE WAS STABBED SIX TIMES.

ONE WAS SO SEVERE IT WENT THROUGH AND THROUGH.

IT WENT THROUGH HER LUNGS, HER HEART AND OUT THE RIBS.

ANOTHER WAS ALL THE WAY TO THE HILT.

THE MEDICAL EXAMINER TESTIFIED THAT THE STABBING WAS SO MUCH FORCE THAT IT WENT TO THE HILT AND THE HILT BRUISED HER NECK.

SIX STAB WOUNDS, THREE INCISED WOUNDS AND SHE HAD 10 WOUNDS TO HER BODY BECAUSE ONE OF THEM WAS THROUGH AND THROUGH.

HER LUNGS WERE COLLAPSED AND THE MEDICAL EXAMINER TESTIFIED THAT THE KNIFE WOULD HAVE IMMEDIATELY COLLAPSED HER LUNGS SO SHE WAS STRUGGLING TO BREATHE.

LANA TESTIFIED SHE WENT OVER TO HER MOTHER AND SHE WAS ASKED I THINK, DID YOUR MOTHER SAY ANYTHING?

SHE SAID NO SHE COULDN'T, BUT SHE MOTIONED TOWARD THE DOOR. WHAT WAS SHE TELLING HER? RUN.

THE MEDICAL EXAMINER SAID THERE WAS NO WOUNDS, FOR INSTANCE TO HER HEAD THAT WOULD HAVE RENDERED HER UNCONSCIOUS.

HER BLEEDING, A LOT OF HER BLEEDING WAS INTERNAL SO THAT LOSS OF BLOOD THAT YOU MIGHT SEE LET'S SAY IN A SHOOTING OR SOMETHING, A LOT OF THAT WAS INTERNAL SO THAT WOULD HAVE, CONSCIOUSNESS WOULD HAVE BEEN GRADUAL.

>> WHAT DID THE MEDICAL EXAMINER -- USUALLY THEY ARE ABLE TO SAY THE PERSON WAS CONSCIOUS FOR THIS AMOUNT OF TIME BEFORE LOSING CONSCIOUSNESS.

WAS THERE TESTIMONY ON THAT?

>> HE SAID DEATHS WOULD HAVE OCCURRED ANYWHERE BETWEEN TWO AND 10 MINUTES AND THERE WAS NOTHING THAT WOULD HAVE RENDERED HER UNCONSCIOUS UNTIL SHE

SUFFERED A SUFFICIENT LOSS OF LOW TO PUT HER INTO SHOCK AND THAT WOULD HAVE BEEN GRADUAL BECAUSE MOST OF THE WOUNDS WERE INTERNAL SO HE DEFINITELY ESTABLISHED THAT CONSCIOUSNESS WAS NOT IMMEDIATE BECAUSE HE DID NOT FIND ANY HEADPHONES THAT WOULD HAVE RENDERED HER UNCONSCIOUS.

HE ALSO TESTIFIED -- HE DESCRIBED THE PAIN SHE WOULD HAVE HAD WITH THE STAB WOUNDS AND ON A SCALE OF ONE TO 10, 10 BEING THE MOST PAINFUL IT WOULD HAVE BEEN A NINE.

ALSO SHE WAS CUT UNDER HER LEFT ARM AND THAT SEVERED THE BICEP NERVE AND THAT WOULD HAVE ALSO BEEN PAINFUL BUT ALSO THE LUNGS. THE COLLAPSING OF THE LUNGS AND THE EFFORTS OF LANA'S TESTIMONY.

>> THERE WERE TWO KNIVES BEING USED?

DO YOU KNOW?

>> THE MEDICAL EXAMINER COULD NOT TESTIFY THAT SHE WAS STABBED WITH TWO KNIVES.

SHE AT ONE POINT HAD TWO NICE. CHRISTOPHER HIGGINS SAID WHEN PHAM ATTACKED HIM WHEN HE CAME INTO THE APARTMENT HE HAD ONE KNIFE IN HIS HAND.

TO BLOODY KNIVES WERE FOUND AT THE SCENE AND A MEAT CLEAVER IN WHICH SAM ADMITTED HITTING MR. HIGGINS IN THE HEAD WITH. THE MEDICAL EXAMINER DID TESTIFY THE WOUNDS WERE CONSISTENT WITH A BUTCHER KNIFE WITH NOT TOO SHARP EDGES, BUT ONE SMOOTH.

>> DID IT SAY ANYTHING ABOUT

WHOSE BLOOD WAS ON THE KNIVES?  
>> THERE WAS NO BLOOD TESTING ON  
THE KNIVES BUT SHE HAD SIX STAB  
WOUNDS TO HER BODY.

>> WOULD HAVE BEEN HELPFUL TO  
KNOW IF BOTH OF THE KNIVES WOULD  
HAVE BEEN USED.

>> BOTH WERE BLOODY, BUT OF  
COURSE WE ALSO HAVE A  
CONFRONTATION WITH CHRISTOPHER  
HIGGINS.

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WHEN CHRISTOPHER HIGGINS FIRST  
CAME IN THE HOUSE HE WAS  
ATTACKED BY SAM AND CUT ALONG  
THE LEFT SIDE OF THE FACE AND  
PERMANENTLY SEVERING THE NERVES  
ON THE LEFT SIDE OF THE FACE  
WITH THOSE SAME WEAPONS SO WE  
HAVE BLOOD OF CHRISTOPHER  
HIGGINS IN THE HOME AS WELL.  
THE FOURTH THING NOW AND NOT  
EXACTLY KEEPING WITH MY ORDER  
BUT GOING TO THE FIRST ISSUE.  
I THINK THIS COURT HAS FAIRLY  
CONSIDER THE FACT THAT THE WORD  
NONSENSE MEANS WITHOUT COMMON  
SENSE AND YOU SEE THE PROSECUTOR  
EXPLAINING HOW PHAM'S  
EXPLANATION OF HOW HE TIED HIS  
DAUGHTER UP WAS INCONSISTENT  
EVEN WITH HIS OWN TESTIMONY THAT  
HE HAD A CONFLICT WITH HER ABOUT  
WHAT SHE WAS LOOKING AT ON THE  
INTERNET.

I THINK NOTHING MORE NEED TO BE  
SAID ABOUT THAT UNLESS THE COURT  
HAS SPECIFIC QUESTIONS.

I WANT TO FOCUS ON THE BURDEN  
SHIFTING.

THE DEFENDANT TOOK THE STAND.  
WHEN HE TOOK THE STAND HE PUTS  
HIS CREDIBILITY IN ISSUE AND

THIS COURT HAS SAID BEFORE THAT WHEN A DEFENDANT TAKES A STAND UP WAS HIS CREDIBILITY AT ISSUE IT IS PERFECTLY PROPER OR THE PROSECUTION TO POINT OUT INCONSISTENCIES IN HOW INCREDIBLE THIS TESTIMONY IS AND WE HAVE HIM TALKING ABOUT AN EXPLANATION AND A DEFENSE OBJECTING IN THE COURTS SUSTAINING IT AND THE COURT SAYING THIS PROSECUTOR CAN'T TALK ABOUT THE DEFENDANT'S TESTIMONY AND THAT IS EXACTLY WHAT HE DID.

HE THEN TALKED ABOUT THE DEFENDANT'S TESTIMONY AND THE CONTRARY EVIDENCE FROM LANA AND CHRIS HIGGINS, SO THERE IS SO SOME KNOW WE BURDEN SHIFTING ANYTHING CRITICAL TO AN EXAMINATION OF THIS, IF THIS COURT REALLY WISH US TO DELVE INTO IT IS THAT THE DEFENDANT WHEN HE TESTIFIED, HE WAS VERY PRECISE IN EVERY SINGLE THING HE DID.

WHAT HE TALKED ABOUT WITH LANA, HOW HE FORGOT HIS CIGARETTES DOWN IN THE CAR, HOW MUCH MONEY HE HAD IN HIS POSSESSION, EXACTLY WHAT HAPPENED.

BUT WHEN HE WAS ASKED HOW HIS WIFE GOT STABBED SIX TIMES AND CUT THREE MORE TIMES HE SAYS I HAVE NO IDEA.

AND ALSO ONE OF THE THINGS YOU SHOULD CONSIDER IS THIS ARGUMENT WHERE THE ALLEGED BURDEN SHIFTING CAME DURING THE REBUTTAL ARGUMENT AND THE DEFENSES AREN'T CLOSING

ARGUMENTS.

THE GIST OF IT IS HE HAS NO IDEA  
HOW HE STABBED HER.

PHAM TESTIFIED THAT HE AND  
HIGGINS WERE LOCKED IN THIS  
MORTAL STRUGGLE FROM THE DINING  
ROOM TO DELIVERING HIM TO THE  
KITCHEN AND YOU KNOW DEFENSE  
THEORY WAS WELL MAYBE SHE GOT  
HURT DURING THE STRUGGLE.

BUT PHAM DIDN'T TESTIFIED THAT  
SHE ATTEMPTED TO GET IN THE WAY,  
THAT SHE EVER WAS IN THE WAY OR  
HE EVEN SAW HER.

>> WAS THE IMPLICATION THAT  
SOMEONE ELSE WAS STABBED?

>> WELL --

>> IF HE WAS STRUGGLING WITH A  
DAUGHTER THEN THE IMPLICATION  
WAS THAT.

>> I DON'T THINK THE DEFENSE  
SUGGESTED THAT.

THE DEFENSE WAS THAT SHE SOMEHOW  
GOT IN THE MIDDLE OF IT AND  
SOMEHOW GOT THAT.

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OF COURSE PHAM DIDN'T TESTIFY TO  
THAT AT ALL.

HE TESTIFIED HE WAS FIGHTING  
WITH HIGGINS AND NEVER SAID  
ANYTHING ABOUT HIS WIFE GETTING  
IN THE WAY.

SO I THINK WHEN YOU LOOK AT IT,  
IT IS NOT BURDEN SHIFTING.

IS COMMENTING ON THE DEFENDANT'S  
DECISION OF EVERYTHING HE DID AT  
HIS INABILITY TO EXPLAIN HOW SHE  
DIED AND THAT WAS IRRELEVANT TO  
THE CASE AND ESPECIALLY IN LIGHT  
OF HIS TESTIMONY THAT HE WAS  
FIGHTING WITH HIGGINS AND HAS NO  
IDEA HOW HIS WIFE GOT STABBED SO  
I THINK THAT IS FAIR COMMENT.

LET ME TURN NOW TO THE JUROR  
ISSUE.  
WHAT HAPPENED DURING THE PENALTY  
PHASE, AND SEVERAL WITNESSES HAD  
ALREADY TESTIFIED.  
PHAM'S SISTER HAD TESTIFIED.  
PHAM'S FORMER BROTHER-IN-LAW  
TESTIFIED.  
HIS BROTHER-IN-LAW WAS ONE OF  
HIS FORMER EMPLOYERS IN THE  
THREE POLICE OFFICERS FROM  
ALTAMONTE SPRINGS SHOWED THAT  
PHAM HAD SOME MAIL ADDRESSED TO  
HIM AND TO AMY AND SO HE  
PRESENTED THAT.  
HE CAME FORWARD WITH THIS LETTER  
WHICH I DO NOT FIND IN THE  
RECORD, AND THE TRIAL JUDGE DID  
EXACTLY WHAT SHE WAS SUPPOSED TO  
DO.  
SHE GAVE A COPY OF THE LETTER TO  
BOTH COUNCILS AND INVITED THEM  
TO INTERVIEW MR. VALENTI AND  
MR. VALENTI CAME IN AND SAID  
THAT HE HAD HEARD SOME COMMENT  
IN PASSING AND I THINK THE  
COMMENTS HE FOCUSED ON WAS YOU  
KNOW EVERYONE HAS A SAD STORY.  
IF YOU COME TO AMERICA YOU HAVE  
TO LIVE BY AMERICAN LAW.  
SOMEONE SAID SOMETHING ABOUT AN  
EMOTIONAL VERDICT, BUT HE SAID  
THAT THIS WAS IN PASSING IN THE  
HALLWAYS.  
YOU KNOW, LIKE NOT NECESSARILY  
IN THAT JURY ROOM.  
THAT HE DID TESTIFY IN THAT JURY  
ROOM AT TIMES YOU NOTE DURING  
THE GUILT PHASE SOMEBODY WAS  
SAYING, WAS TALKING ABOUT THE  
DNA EVIDENCE IN THE FINGERPRINT  
EVIDENCE BUT IT WAS MORE IN THE

CONTEXT OF I WONDER WHAT IS  
COMING NEXT?

>> I WOULD LIKE TO FOCUS ON NOT  
WHETHER THERE WAS DISCUSSION  
ABOUT THE EVIDENCE, WHETHER  
UNDER POWELL THERE WERE OVERT  
ACTS OF JURISTS MISCONDUCT  
CONCERNING ETHNIC BIAS.  
AND THEREFORE THERE WAS VOIR  
DIRE WE WERE DEALING WITH THE  
VIETNAMESE DEFENDANT, WHO CAME  
TO THIS COUNTRY AND THE EVIDENCE  
WAS PUT FORTH WAS REALLY TO SHOW  
THAT I GUESS HIS FATHER WAS IN  
THE VIETNAMESE ARMY.  
HE WAS ONE OF NINE.  
HE HAD THIS TERRIBLE STORY.  
IT WASN'T LIKE EVERYONE HAS A  
SAD STORY.

THIS WAS A PRETTY INCREDIBLE  
STORY OF MAYBE WHAT WAS COMMON  
AMONG VIETNAMESE COMING TO THE  
COUNTRY.

THE JURORS ASKED COULD THEY  
EVALUATE THAT TESTIMONY AND WERE  
THERE QUESTIONS ABOUT THAT AND  
VOIR DIRE.

>> I DO NOT RECALL WHETHER THAT  
WAS EXPLORED.  
WHAT I CAN TELL YOU IS THAT THE  
JURORS WHO CAME IN, MR. APPLEMAN  
AND MR. PERKINS TESTIFIED THAT  
THEY HEARD THIS COMMENT BUT AT  
NO TIME DID THEY EVER PERCEIVE  
OR HEAR PREMATURE DELIBERATIONS,  
ANYONE SAY THEY WOULDN'T KEEP AN  
OPEN MIND.

>> I GUESS THIS IS MY -- YOU  
SEEM TO BE DISMISSING IT BECAUSE  
MAYBE IT WASN'T IN THE JURY ROOM  
BUT IT WAS OUTSIDE OF THE JURY  
ROOM BUT DO YOU TAKE THE COMMENT

THAT EVERYONE HAS HAD A ROUGH LIFE AND IF YOU WANT TO COME TO AMERICA YOU HAVE TO LIVE BY AMERICAN STANDARDS TO BE AN ETHNIC SLUR?

>> ABSOLUTELY NOT.

I THINK THAT WOULD BE A PERFECTLY FINE STATEMENT TO MAKE IN THE PENALTY PHASE WHERE THE ARGUMENT IS THAT HE HAD, AS A VIETNAMESE REFUGEE AND WHAT HIS CIRCUMSTANCES WERE, NOT LIKE WHAT WOULD GO ON WITH SOMEONE BEING RAISED IN THIS COUNTRY.

>> FIRST OF ALL, I THINK SAYING SOMEONE HAS TO ADHERE TO AMERICAN STANDARDS IS TRUE BECAUSE EVERYONE IS GOING TO BE JUDGED BY AMERICAN LAW BUT FIRST OF ALL I THINK YOU NEED TO LOOK BACK AT WHAT THE REAL OBJECTION WAS.

THE REAL OBJECTION AT THE TIME WAS NOT THAT THIS WAS A RACIAL ETHNIC SLUR.

>> WHAT ARGUMENT WAS MADE THOUGH?

WAS IT PRESERVED?

>> CERTAINLY THE TRIAL JUDGE DID NOT PERCEIVE IT AS THAT.

I DON'T RECALL, I DON'T RECALL WHETHER THERE WAS A SPECIFIC ALLEGATION OF RACIAL SLUR.

WHAT I CAN TELL YOU IS THE TRIAL JUDGE DID NOT ADDRESS IT BECAUSE I DON'T THINK HE PERCEIVED THAT WAS THE OBJECTION.

I AM SORRY, SHE PERCEIVED THE OBJECTION WAS THAT THE JURORS HAD ALREADY MADE UP THEIR MIND THAT THEY HAD SAID THEY COULD KEEP AN OPEN MIND AND THEY WOULD

CONSIDER ALL THE MITIGATION.  
>> CLEARLY THE DISCUSSION WAS  
GOING IN A DIFFERENT DIRECTION.  
SO OKAY, YOU ARE GOING TO  
CONTEST WHAT WAS PRESERVED OR  
NOT SO LET'S TAKE THE NEXT STEP.  
ASSUMING IT WAS PRESERVED,  
DISCUSS IT IN THAT LIGHT.  
FOR EXAMPLE I COULD SEE THE  
CASES WHERE JURORS MAY TALK  
ABOUT THE UPBRINGING AND  
BACKGROUND OF POOR MINORITIES IN  
THIS COUNTRY AND MAKE STATEMENTS  
LIKE THAT.  
THAT DOESN'T EXCUSE THAT THEY  
WILL BE HELD TO THE SAME  
STANDARDS WHICH WOULD  
DEMONSTRATE A RACIAL BIAS GOING  
INTO THE DETERMINATION BY A  
JURY.  
AND WOULD THAT NOT BE A PROBLEM?  
>> WELL, I THINK THAT IF THAT  
WAS INJECTED INTO THE  
DELIBERATIONS, PERHAPS.  
>> BUT THE STATEMENTS.  
I THOUGHT THE -- THAT ARE  
CULTURALLY AND RACIALLY BIASED.  
IN OTHER WORDS PART OF THE  
DISCUSSION, DELIBERATION OR NOT.  
AM I MISTAKEN THAT STATEMENTS  
CAN GO ON LIKE THAT IF IT IS NOT  
PART OF AN ACTUAL DELIBERATION?  
>> WELL, YES, I AGREE WITH YOUR  
GENERAL PREMISE BUT I DON'T  
THINK --  
>> IT CAN BE AND THINGS SAID IN  
THE PRESENCE OF THE JURY WHETHER  
IN THE HALLWAY OR BEING ESCORTED  
SOMEPLACE.  
THEY ARE PRIVATE, THEY ARE  
TOGETHER SO THAT CAN BE USED,  
WHATEVER IS SAID.

SOMETHING TERRIBLE OR SOMETHING NOTHING.

>> I THINK IF THERE IS EVIDENCE SUPPORTING A JUROR WAS INJECTING RACIAL BIAS INTO ANY PART OF THE TRIAL, CERTAINLY THAT WOULD BE THE CASE BUT I THINK WE DON'T HAVE ANY KIND OF COMMENTS AGAINST VIETNAMESE PERSONS. WE HAVE IMMIGRANTS TO THIS COUNTRY FROM AUSTRALIANS TO BRITISH PEOPLE IMMIGRATING TO THIS COUNTRY.

>> AGAIN I'M A LITTLE CONCERNED THAT YOU DON'T SEE THIS AS AN ETHNIC BIAS.

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THE WHOLE THRUST OF THE DEFENSE AND MITIGATION WAS COMING -- ABOUT HIM COMING FROM VIETNAM. WE ARE NOT LIVING IN A NAÏVE WORLD HERE ABOUT WHAT IS SAID THAT WAS POLITICALLY CORRECT. WE HAVE AN OBLIGATION TO TRY TO ENSURE TO THE EXTENT WE CAN THAT ETHNIC AND RACIAL BIAS OR GENDER BIAS DOES NOT PLAY A PART IN THE JURY DELIBERATION.

SO YOU SAY, I MEAN I AM CONCERNED THAT THE STATE DOESN'T SEEM TO BE SEEING WHAT WOULD BE WRONG WITH JURORS SAYING SOMETHING LIKE THAT.

>> YOU KNOW, I THINK WHAT WE HAVE HERE IS, WE HAVE THE JURORS PRESENT SENSE UNDER THE BREATH, NOT COMMUNICATED TO ANYONE AS FAR AS THE CONVERSATION AND NOT PART OF THAT CELEBRATIONS AND I THINK, YOU THINK IT IS A LEAP TO SAY THAT IF THAT PERSON MADE THAT STATEMENT, THAT MEANS THAT THEY WOULD HOLD MR. PHAM TO

HIGHER STANDARDS THAN THEY WOULD  
A PERSON WHO WAS BORN IN AMERICA  
OR THAT THEY WOULD APPLY A  
DIFFERENT LAW OR THAT THEY  
WOULDN'T CONSIDER THE FACT OF  
HIS CHILDHOOD AND THE TRAUMA  
THAT HE ENDURED ON THE TRIP TO  
MALAYSIA AND ULTIMATELY TO  
AMERICA.

AND SO, YES, WOULD I LIKE  
JURORS --

WE CANNOT CONTROL WHAT JURORS  
THINK.

>> NO AND THAT IS NOT WHAT WE  
DO.

WE CAN THOUGH DISCUSS WHAT THEY  
SAY AND THAT IS WHAT WE ARE  
TALKING ABOUT HERE.

WE HAVE GOT POWELL AS THE  
GUIDING CASE.

>> I THINK POWELL, POWELL WAS  
NOT CITED.

>> I DON'T RECALL POWELL BEING  
CITED TO THE TRIAL COURT AT  
LEAST AT THE TIME OF THE  
CONSIDERATIONS.

I MAY BE MISTAKEN ON THAT.

>> THAT IS A PRETTY BIG POINT,  
BECAUSE YOU SAID THAT THIS WAS  
NOT PRESERVED.

THAT IS NOT WHAT YOU RAISED.

>> MY ARGUMENT WAS MORE, RATHER  
THAN PRESERVATION, WAS THAT WITH  
THE TRIAL JUDGE WAS FACING WAS  
ALLEGATIONS THAT THE JURORS WERE  
ENGAGE IN CONDUCT WHERE THEY HAD  
MADE UP THEIR MIND ABOUT THE  
MITIGATION, THAT THEY HAD  
ALREADY FORECLOSED.

THE GIST OF HIS ARGUMENT BEFORE  
JUDGE ALVA WAS THE JURORS MISLED  
ME BECAUSE THEY ACTUALLY HAVE

ALREADY MADE UP THEIR MINDS,  
THEY WON'T CONSIDER MY  
MITIGATION.

AND OF COURSE, YOU KNOW, TAKING  
THAT APART, I THINK YOU KNOW IF  
THE DEFENDANT OF COURSE IS NOT  
ENTITLED TO A JURY WHO WILL  
FAVORABLY CONSIDER HIS  
MITIGATION, ONLY KEEPING AN OPEN  
MIND TO ALL OF THE EVIDENCE THAT  
IS AN IN MR. VALENTI AND  
MR. PERKINS AND MR. APPLEMAN  
SAID THEY WERE UNDER NO  
IMPRESSION THAT ANYONE WAS  
REJECTING MITIGATION OR HAD  
ALREADY MADE UP THEIR MIND OR  
WAS REFUSING TO CONSIDER  
MITIGATION.

AND SO I THINK, NONE OF THIS WAS  
PART OF DELIBERATIONS.

IT WAS MORE UNDER THE BREATH  
BECAUSE THEY WERE BEING SHUTTLED  
IN AND OUT OF THE JURY ROOM.

>> WHY WERE THE JURORS THAT WERE  
EXAMINED CHOSEN TO BE EXAMINED?  
IT IS A LITTLE DISCONCERTING TO  
ME.

>> I CAN TELL YOU, I THINK I CAN  
EXPLAIN THAT.

AND THE NUMBER ONE MR. VALENTI  
IDENTIFIED MR. APPLEMAN -- WHO  
MADE THOSE COMMENTS.

MR. PERKINS AND APPLEMAN  
HEARD -- THEY HAD HEARD UNDER  
THE BREATH COMMENTS TO THAT  
EFFECT.

THE TRIAL JUDGE OFFERED  
OPPORTUNITY TO INTERVIEW THE  
JURORS AND THE DEFENSE COUNSEL  
DECLINED.

SHE ALSO OFFERED TO GIVE ANY  
SPECIFIC INSTRUCTION THAT THE

DEFENSE COUNSEL WOULD LIKE TO GIVE, AND DEFENSE COUNSEL DECLINED TO PROPOSE ONE, SO JUDGE ALVA SAYS I WILL GIVE THE INSTRUCTION AGAIN ABOUT KEEPING AN OPEN MIND AND THE DEFENSE COUNSEL SAID WELL THAT WON'T CURE IT BUT THAT IS FINE BUT DIDN'T PROPOSE ANOTHER. DIDN'T MOVE TO STRIKE. THERE WERE 14 JURORS. DIDN'T MOVE TO REPLACE MR. APPLEMAN.

>> YOU SAY THE JUDGE GAVE THE DEFENSE ATTORNEY THE OPPORTUNITY TO EXAMINE THE REST OF THE JURORS?

>> SHE DID AND DEFENSE SAID WELL I THINK BASICALLY WE WILL JUST HEAR MUCH OF WHAT WE HAVE ALREADY HEARD.

>> AT THAT POINT, THE DEFENSE ATTORNEY MOVED FOR A MISTRIAL?

>> THAT IS CORRECT.

>> WHAT WAS THE BASIS OF MOVING TO A MISTRIAL?

THAT THEY HAD ALREADY BEGUN DELIBERATIONS?

THEY HAD A CLOSED MIND?

WERE THERE ANY ALLEGATIONS THAT IT WASN'T ETHNIC, THAT THEY WERE MAKING A CLAIM OF ETHNIC BIAS?

>> MY RECOLLECTION FROM THE RECORD IS THAT THEY CLAIM, THAT THE JURORS, AND I DON'T HAVE THE TRANSCRIPT WITH ME, BUT THE JURORS HAD ALREADY MADE UP THEIR MIND, HAD FORECLOSED, HAD ALREADY DECIDED THEY WERE REJECTING THE MITIGATION AND HAD DISOBEYED THE INSTRUCTIONS TO KEEP AN OPEN MIND.

THAT WAS MY RECOLLECTION OF THE  
OBJECTIONS AT THE TIME.

>> LUCKILY WE WILL BE ABLE TO  
NOTE SPECIFICALLY WHAT WAS IN  
THE RECORD.

>> THE FIRST THING I DO WHEN I  
GO BACK.

>> THIS IS WHY IT'S IMPORTANT TO  
HAVE CREDIBILITY WITH THE COURT  
AND I THINK YOU HAVE CREDIBILITY  
WITH THE COURT.

>> THANK YOU, YOUR HONOR.

>> PAST ARGUMENTS.

WE TRY TO GET THE BEST WE CAN  
OUT OF LAWYERS.

>> I ASSURE YOU I TRY TO GIVE  
YOU THE BEST INFORMATION.

>> I APPRECIATE IT AND IT IS  
IMPORTANT IF IT WAS PRESENTED AS  
A CLAIM TO DISCUSS THE CASE.

TO ME IT DOESN'T RAISE THE  
POWELL ISSUE.

IT RAISES ISSUES AS TO WHETHER  
YOU KNOW THEY MADE UP THEIR  
MIND.

IF I WAS MORE CONCERNED WITH  
WHAT APPEARED TO BE A REJECTION

AND LIKE JUSTICE LEWIS SAID IF  
SOMEBODY WAS SAYING IT WAS A

BLACK DEFENDANT AND WHITE

JURORS, I AM SORRY HE GREW UP  
DOWN IN MIAMI IN OVERTOWN, BUT  
EVERYONE HAS GOT A ROUGH LIFE.

A DIFFERENT THING THAN IF  
SOMEONE IS FROM SOUTH AUSTRALIA.

THIS IS THE REAL WORLD HERE.

>> WELL, I AGREE WITH YOU IN  
THAT THAT WHEN YOU ARE SAYING  
WAS THIS AN ETHNIC SLUR, AND  
WHEN HE DON'T HAVE ANY COMMENT  
LIKENED POWELL ABOUT A SPECIFIC  
ETHNIC GROUP, WHEN WE SIMPLY

HAVE A STATEMENT UNDER THE BREATH, NOT COMMUNICATED AND NOT INTENDED TO BE COMMUNICATED TO ANYONE, THAT IS A SAD STORY BUT WHEN YOU COME TO AMERICA IF YOU KNOW YOU HAVE TO LIVE BY AMERICAN LAW WHICH OF COURSE IS TRUE.

BUT.

>> AGAIN HE IS NOT ATTACKING ON THE GUILT PHASE.

WE ARE REALLY TALKING ABOUT WHETHER HEARING MITIGATION THAT IS VERY POWERFUL.

SOMEONE SAYS, IT WOULD BE LIKE SAYING YOU KNOW THOSE THAT CAME OVER FROM CUBA.

WELL THEY CAME OVER FROM THERE.

IT IS TOO BAD THAT THEY WERE TORTURED OR SOMETHING, BUT THEY HAVE TO COME HERE AND THEY HAVE TO LIVE BY AMERICAN STANDARDS.

IT IS A DIFFERENT --

WE UNDERSTAND CERTAIN THINGS ABOUT WHAT IS SAID AND WHAT THOSE THINGS MIGHT MEAN.

I'M SURE THE JURORS AND POWELL SAID THEY WERE MAKING RACIAL JOKE SO THEY WEREN'T EVEN TALKING ABOUT DELIBERATIONS.

>> I THINK THAT IS MUCH MORE, MUCH MORE COMPELLING OF RACIAL BIAS, SOMEONE WHO TELLS A JOKE THAT INCLUDES RACIAL SLURS.

BUT WHAT WE HAVE HERE AGAIN IS A PRESENT IMPRESSION UNDER THE BREATH THAT WAS NOT INTENDED TO BE COMMUNICATION.

EVEN MR. VALENTI SAID HE DIDN'T HEAR ANY PREMATURE DELIBERATIONS.

BOTH MR. PERKINS AND APPLEMAN

SAID THEY HEARD NO ONE.  
THEY DIDN'T EVEN GET THE SENSE  
THAT ANYONE HAD CLOSED THEIR  
MIND TO MITIGATION.

>> THEY WERE APPARENTLY  
IDENTIFIED AS THE ONES THAT MADE  
THE COMMON.

>> MR. VALENTI DID THAT  
MR. APPLEMAN DIDN'T IDENTIFY  
MR. PERKINS, SO I THINK THAT THE  
TRIAL JUDGE WAS IN THE BEST  
POSITION AND SHE LOOKED AT THOSE  
JURORS.

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SHE LOOKED THEM IN THE EYE AND  
HEARD THEIR TESTIMONY.  
SHE EVALUATED THEIR CREDIBILITY  
AND SHE WAS CONVINCED THAT THEY  
HAD NOT AND WHEN YOU LOOK, AGAIN  
YOU LOOK AT HER RULING SHE TALKS  
ABOUT THE FACT IS THAT THERE IS  
NOTHING SHE SEES THAT IS GOING  
TO CAUSE THEM TO CLOSE THEIR  
MIND.

>> WHAT WAS THE POSITION OF THE  
JURY?

>> SEVEN MEN, FIVE WOMEN.  
EVEN THOUGH THERE WERE SEVERAL  
MELBOURNE CHALLENGES TO EVERYONE  
BUT THE RACIAL COMPOSITION OF  
THE JURY WAS NOT DISCLOSED IN  
THE RECORD THAT I COULD SEE BUT  
THERE WERE SEVEN MEN AND FIVE  
WOMEN.

>> IF THE COURT HAS NO MORE  
QUESTIONS, THEN WE WOULD ASK  
THAT THIS COURT AFFIRM  
MR. PHAM'S CONVICTIONS AND  
SENTENCED TO DEATH.

>> THANK YOU.  
JUST WANT TO CLARIFY SOMETHING  
FOR THE COURT.  
THE CHALLENGE THAT THE COUNCIL

MADE TO THE JUROR BEGINS IN  
BULLY IN TWO OF THE PENALTY  
PHASE, VOLUME 13 OF THE RECORD  
AND BEGINS ON PAGE 218.

ON PAGE 220 DEFENSE COUNSEL  
SPECIFICALLY SAID AND TALKING  
ABOUT THE PROBLEM WITH THE  
AFFIDAVIT IS WE SPECIFICALLY  
ASKED THEM ABOUT CULTURAL  
MITIGATION.

WE TOLD THEM WE WERE PRESENTING  
INFORMATION ABOUT OUR CLIENTS  
CHILDHOOD AND ABOUT WHERE HE WAS  
FROM, THE BACKGROUND AT ALL OF  
THIS AND ALL THE JUROR SAID THEY  
WOULD CONSIDER THESE MATTERS.

NOW THE ALTERNATE JUROR IS  
TELLING US THEY ARE CLEARLY  
INDICATING THEY ARE NOT GOING TO  
FAIRLY CONSIDER ALL OF THE  
EVIDENCE AND THEY HAVE ALREADY  
DISMISSED OUR MITIGATION BEFORE  
WE HAVE EVEN FINISHED WITH IT SO  
YES I BELIEVE THE ISSUE WAS.

DID THEY CITE POWELL?

I DON'T BELIEVE THEY CITED THE  
POWELL CASE.

>> DO YOU SEE THAT'S A DIFFERENT  
ISSUE THAT IF YOU ARE SAYING  
THAT THEY ARE ALREADY TO  
DELIBERATE OVER MISCONDUCT UNDER  
POWELL, AND I UNDERSTAND THIS IS  
IN THE HEAT OF A TRIAL, BUT WAS  
POWELL EVER CITED TO THE JUDGE?

>> I DON'T THINK SO BUT AGAIN  
THEY HAD SOME CASE LAW BUT I  
THINK IT WAS GENERAL CASE LAW.

>> THE KEY TO THE LANGUAGE, IF I  
HEARD CORRECTLY, WAS THAT THEY  
HAD DISMISSED MITIGATION.

>> THAT IS ONE.

DISMISSED EVEN BEFORE THEY WERE

FINISHED WITH IT AND REACHED CONCLUSIONS BEFORE HE PUT WE PUT IN ALL THE EVIDENCE.

>> BASIC WAY IT WAS REFERRED THAT THEY WERE DISMISSING THIS EVIDENCE SO IT WAS RELATED TO THE TERRIBLE JOURNEY THE DEFENDANT HAD LEAVING VIETNAM.

>> YES.

SO I BELIEVE THE ISSUE IS PRESERVED AND THE STATE CERTAINLY DIDN'T ARGUE IT WASN'T PRESERVE.

>> BUT THERE WAS A DIFFERENT STANDARD TO WHETHER WE WOULD LOOK TO A NEW TRIAL ON WHETHER THERE WERE PRETRIAL DELIBERATIONS VERSUS UNDER POWELL WHICH IS A VERY STRONG STATEMENT THAT IF THERE IS DEMONSTRATED BIAS OVER MISCONDUCT, THOSE ARE TWO DIFFERENT THINGS.

>> I UNDERSTAND.

I DON'T KNOW WHAT ELSE YOU CAN CONSIDER THAT STATEMENT. WHEN YOU COME TO AMERICA YOU HAVE TO LIVE BY AMERICAN STANDARDS REPRESENTING SOME KIND OF A RACIAL BIAS OR ETHNIC BIAS. THAT TO ME IS A COMMON SENSE INTERPRETATION.

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>> DO YOU AGREE THAT THE JUDGE HAD ASKED IF THE DEFENSE LAWYER APPOINTED TO EXAMINE THE OTHER JURORS?

>> YES AND HE SAID HE THINKS THEY WOULD COME OUT WITH THE SAME THING WHICH GIVEN WHAT THIS WAS, I HAVE NO DOUBT THAT IS PROBABLY WHAT WOULD HAPPEN. AND AGAIN, THINK I SAID THIS

HAPPENED IN THE JURY ROOM.  
IT DIDN'T HAPPEN NECESSARILY IN  
THE JURY ROOM BUT IN THE AREA  
WHERE THE JURORS WERE KEPT PRIOR  
TO SUCCUMBING TO THE COURTROOM  
SO IT WAS NOT SPECIFICALLY THE  
JURY ROOM.

THANK YOU.

>> WE THANK YOU BOTH.

THE COURT WILL NOW TAKE ITS  
MORNING RECESS OF 10 MINUTES.

>> PLEASE RISE.