

>> THE NEXT CASE ON THE COURT'S
AGENDA IS COLE V. STATE.

>> MAY IT PLEASE THE COURT,
WILLIAM McLEAN REPRESENTING
TIFFANY COLE.

THIS CASE CAME OUT OF
JACKSONVILLE.

MS. COLE ALONG WITH THREE OTHER
DEFENDANTS WERE CHARGED FOR THE
DEATHS OF REGGIE AND CAROL
SUMNER.

I KNOW THIS COURT RECENTLY
DECIDED ONE OF THE
CO-DEFENDANT'S CASES, MICHAEL
JACKSON.

I WOULD LIKE TO SPEND MY TIME
THIS MORNING ON THREE ISSUES.
ISSUE ONE WHICH DEALS WITH THE
JUDICIAL COMMENT THAT THE COURT
MADE DURING THE
CROSS-EXAMINATION OF BRUCE NIXON
WHO WAS ONE OF THE CO-DEFENDANTS
WHO TESTIFIED FOR THE STATE.

ISSUE THREE DEALING WITH THE
UNEQUAL TREATMENT OF
CO-DEFENDANTS VIS-A-VIS
SENTENCING UNDER THE SLATER
PRINCIPLES.

AND THEN ISSUE FOUR WHICH DEALS
WITH THE IMPROPER FINDING OF HAC
IN PARTICULAR.

IN THIS CASE DURING THE
TESTIMONY OF BRUCE NIXON, ONE OF
THE CO-DEFENDANTS IN THE CASE
WHO TESTIFIED FOR THE STATE, THE
TRIAL COUNSEL WAS PROBING THE

LIMITS AND THE RANGE OF HIS PLEA AGREEMENT.

HIS PLEA AGREEMENT ON THE FACE OF IT WAS A GUIDELINE SENTENCE STRAIGHT-UP PLEA WHICH WAS WITHIN A RANGE OF 52 YEARS TO LIFE, AND COUNSEL WAS IN THE MIDST OF PROBING HIM ABOUT THE FACT THAT THE 52 YEARS WAS NOT A HARD FLOOR ON THE AGREEMENT, THAT THE JUDGE IN HIS DISCRETION COULD GO BELOW THE 52 YEARS.

AND, IN FACT, THE JUDGE ULTIMATELY DID GO DOWN TO 45 YEARS.

DURING THAT INQUIRY THE JUDGE, AND THE QUESTION WAS, "AND JUDGE WEATHERBY, HE COULD GO DOWN TO BELOW 52 YEARS CAN'T HE?"

THE STATE SAID, "OBJECTION, YOUR HONOR.

NO BASIS FOR OBJECTION."

THE COURT SAID, "THAT'S ABSOLUTELY NOT THE CASE, MR. TILL."

THAT COMMENT BY THE COURT WAS A COMMENT ON THE CREDIBILITY OF THE DEFENSE LAWYER AND MISLEADING TO THE JURY REGARDING THE PARAMETERS OF THE PLEA.

>> BUT DIDN'T THEN -- TWO THOUGHTS ABOUT THAT.

THE CONCERN I HAD WAS THE WAY HE PHRASED IT WASN'T THE JUDGE WOULD HAVE DISCRETION DEPENDING ON YOUR TESTIMONY OR, YOU KNOW,

THERE WAS A STATE
REPRESENTATIVE.

HE USED THAT PHRASE "GO BELOW
THE 52 YEARS."

"THE JUDGE CAN GO BELOW THE
BETTER YOU TESTIFY HERE."

I DON'T KNOW WHAT WAS IN THE
JUDGE'S MIND, BUT I THINK IF I'M
SITTING THERE AS A TRIAL JUDGE
AND THEY'RE IMPLYING THAT THE
BETTER HE TESTIFIES, THAT'S
GOING TO -- THE JUDGE IS GOING
TO DO SOMETHING.

IT MAY BE WHAT JUDGE WEATHERBY
WAS REACTING TO.

BUT THEN DON'T THEY, DIDN'T
THEY -- LATER IN THIS CASE
WEREN'T THEY ALLOWED TO GO INTO
THE TERMS OF THE PLEA AGREEMENT
AND SHOW THAT IF HE COOPERATED,
WHICH IS REALLY WHAT THEY WERE
GETTING AT, THAT THEY COULD GO
BELOW 52?

SO I GUESS IT'S TWO QUESTIONS.
ONE IS IT WASN'T JUST COULD YOU
GO BELOW 52 YEARS, IT WAS USING
THIS PHRASE, "THE BETTER YOU
TESTIFY JUDGE WEATHERBY WILL,
YOU KNOW, REWARD YOU," NUMBER
ONE.

AND TWO, TO THE EXTENT THAT IT
WAS IMPLYING IT WAS FIXED AT 52
YEARS, DIDN'T THEY GET AN
OPPORTUNITY TO LATER ASK ABOUT
THE ACTUAL TERMS?

>> THE ANSWER TO THAT QUESTION

LIES LATER IN THE
CROSS-EXAMINATION.

THEY HAD A BENCH CONFERENCE.

THEY BROUGHT UP THE ISSUE OF THE
RANGE OF THE PLEA AGREEMENT, AND
THIS IS WHERE WE LEARN THAT THIS
WAS, IN FACT, THE -- THE PLEA
AGREEMENT WAS WHAT WAS ON THE
JUDGE'S MIND BECAUSE THE JUDGE
DID NOT UNDERSTAND THAT HE COULD
GO BELOW THE 52 YEARS.

AND THAT WAS CORRECTED BY BOTH
THE STATE AND THE DEFENSE, AND
THE JUDGE ACKNOWLEDGED, OKAY,
I'M CORRECTED ON THAT.

YOU CAN INQUIRE.

AND THERE'S SOME FURTHER INQUIRY
ABOUT THAT WAS CONDUCTED ON
CROSS-EXAMINATION.

SO FROM THAT AS TO THE POINT ONE
WE KNOW THAT THE TIME THE JUDGE
MADE HIS COMMENT THAT IT WAS THE
PARAMETERS OF THE PLEA ON HIS
MIND, NOT THE SUBTLETIES OF THE
PHRASEOLOGY OF THE QUESTION
ITSELF.

>> AT THE TIME THE JUDGE MADE
THE COMMENT, AN OBJECTION WAS
NOT RAISED AT THAT POINT.

IT WAS ONLY RAISED LATER WHEN,
ACTUALLY WHEN THERE WAS A BENCH
CONFERENCE ON SOMETHING ELSE.

AM I CORRECT?

>> THAT'S CORRECT, YOUR HONOR.

>> SO THERE WASN'T A
CONTEMPORANEOUS OBJECTION TO THE

JUDGE'S COMMENT AT THE TIME IT
WAS MADE?

>> NO, THERE WAS NOT.

>> SO WE'RE DEALING WITH --
[INAUDIBLE]

>> YES, YOUR HONOR.

>> OKAY.

>> AND IT'S CRITICAL HERE
BECAUSE, AS I SAID, THEY DID GET
TO EXAMINE THE PARAMETERS OF THE
PLEA SOMEWHAT.

BUT THE TESTIMONY FROM BRUCE
NIXON WAS, WELL, MY LAWYER SAID
IT WAS POSSIBLE IT MIGHT GO
BELOW THE 52 YEARS BUT NOT
LIKELY.

AND I THINK YOU TAKE THAT, THAT
KIND OF TESTIMONY FROM THE
DEFENDANT IN COMBINATION WITH
THIS STATEMENT FROM THE JUDGE
WHEN THE THING FIRST CAME UP,
"THAT'S ABSOLUTELY NOT THE CASE,
MR. TILL."

>> WELL, DID YOU ASK --

>> WE STILL HAVE THE IMPACT OF
THAT STATEMENT MISLEADING THE
JURY.

>> DID YOU ASK THE TRIAL JUDGE
TO MAKE ANY KIND OF CURATIVE --

>> NO, YOUR HONOR, DID NOT.

>> -- STATEMENT?

>> VIS-A-VIS THE COMMENT?

NO.

>> WHY IS THIS FUNDAMENTAL
ERROR?

IS IT EVERY TIME THE JUDGE SAYS

SOMETHING -- WE CAN SEE THAT THE STATEMENT SHOULD NOT HAVE BEEN MADE.

WHY IS THIS SOMETHING THAT WOULD REQUIRE THAT THIS WHOLE TRIAL BE SET ASIDE BECAUSE OF THIS ONE STATEMENT THAT THE COURT MADE?

>> THERE'S A NUMBER OF ISSUES HOW THIS IMPACTS NOT ONLY GUILT, BUT PENALTY PHASE OF THE TRIAL. AND I'LL GO THROUGH THOSE.

NUMBER ONE, THE STATEMENT NOT ONLY MISLED, ARGUABLY MISLED THE JURY AS TO THE PARAMETERS OF THE PLEA AND THE FACT THAT THEY TALKED ABOUT IT LATER DIDN'T TOTALLY CURE IT BECAUSE THE JURY HAD ALREADY HEARD.

HE SAID, WELL, MAYBE THEY CAN GO BELOW, BUT WE'VE ALREADY HEARD THIS JUDGE.

HE THINKS IT'S 52 YEARS PERIOD.

WE'RE NOT SURE THAT CLEARED UP THE PARAMETER OF THE PLEA.

NUMBER TWO --

>> BUT THE DEFENSE WAS GIVEN EVERY OPPORTUNITY TO CLEAR IT UP.

>> HE WAS GIVEN THE OPPORTUNITY TO CLEAR IT UP WITH THE WITNESS REGARDING THAT.

>> WELL, AND IF, IF THE DEFENSE HAD WISHED FOR AN INSTRUCTION TO BE GIVEN, A CURATIVE INSTRUCTION TO BE GIVEN, THEY HAD THE OPPORTUNITY TO REQUEST THAT, DID

THEY NOT?

>> YES, YOUR HONOR.

>> THEY FAILED TO DO THAT?

>> WE'RE DEALING IN FUNDAMENTAL ERROR, AND I THINK NOT ONLY DOES IT GO TO STILL THE PARAMETERS OF THE DEAL NOT BEING TOTALLY CLARIFIED FOR THE JURY GIVEN THE COMBINATION OF THE WAY THE WITNESS TESTIFIED AND THE WAY THE JUDGE'S COMMENT WAS STILL HANGING OUT THERE, IF YOU WILL --

>> WE HAVE TO BE CLEAR HERE. THE JUDGE NEVER SAID THERE'S NO WAY THIS CAN BE LESS THAN 52 YEARS, HE JUST SAID, ABSOLUTELY --

>> NOT CORRECT.

YOU'RE WRONG WHEN YOU SAY THAT.

>> RIGHT.

>> I DON'T KNOW WHAT THAT MEANS.

>> WELL, YOU'RE WRONG WHEN YOU SAID THE WHOLE STATEMENT WHICH GOES BACK TO JUSTICE PARIENTE'S COMMENT HE WAS SAYING THE BETTER YOU TESTIFY HERE --

>> THAT WAS NOT WHAT WAS IN THE JUDGE'S MIND AT THE TIME IT WAS DONE --

>> BUT WHAT'S ON THE JUDGE'S MIND IS REALLY NOT NECESSARILY THE POINT.

IT'S THE WAY THE JURY HEARS THIS, ISN'T IT?

>> EXACTLY.

AND I'M NOT SURE THE SUBTLETIES
WOULD HAVE GONE IN FAVOR OF, OR
WOULD HAVE -- YOU KNOW, WE DON'T
KNOW WHAT THE JURY -- THE JURY'S
VERY SENSITIVE TO WHAT JUDGES
SAY IN THE COURTROOM.

AND THAT WAS STILL HANGING OUT
THERE.

>> BUT I GUESS, YOU KNOW, STILL
YOU'VE CONCEDED WE'RE DEALING
WITH FUNDAMENTAL ERROR, AND I,
AND I REALIZE WE ASK DEFENSE
LAWYERS TO DO A LOT WHEN THINGS
COME UP ON THE SPOT TO TRY TO
FIGURE OUT WHAT THE BEST WAY TO
DEAL WITH THIS IS, AND I DON'T
WANT TO BEAT A DEAD HORSE ON
THIS.

THE JUDGE COULD HAVE GIVEN A
STATEMENT TO THE JURY;
MR. NIXON'S PLEA AGREEMENT,
WHICH IS 52 YEARS TO LIFE, COULD
BE LESS DEPENDING ON HOW HE
TESTIFIES.

WHICH COULD BE VERY IMPACTFUL.
BUT THE JUDGE OBVIOUSLY THOUGHT
HE WAS GIVING THE DEFENSE THAT
OPPORTUNITY WHEN HE ALLOWED
FURTHER CROSS-EXAMINATION ON THE
ISSUE, CORRECT?

I MEAN, THAT'S -- SO THE JURY
HEARD THAT IT WASN'T NECESSARILY
THE CASE, BUT NOW YOU'RE ASKING
US TO SAY, WELL, THE JURY MUST
HAVE BEEN INALTERABLY INFLUENCED
BY THE JUDGE SAYING THIS PLEA

AGREEMENT WAS SOMETHING ELSE.

>> I WOULD SAY THAT BASED UPON THE WAY BRUCE NIXON TESTIFIED ABOUT IT AND THE FACT THIS STATEMENT WAS HANGING OUT THERE UNCORRECTED, IF YOU WILL, IT STILL IMPACTED THE CLARITY WITH WHICH THE PLEA AGREEMENT WAS PRESENTED TO THE JURY.

I MEAN, THE -- ANOTHER THING I WOULD LIKE TO POINT OUT, THIS WAS A CRITICAL STATE WITNESS.

>> WELL, I THINK THAT GOES WITHOUT SAYING THAT HE'S A CRITICAL --

>> YEAH, HE'S DEFINITELY A CRITICAL STATE WITNESS.

>> AS YOU WOULD SAY, YOU KNOW, HE PLED TO -- WHAT WAS THE PLEA TO?

>> HE PLED TO SECOND-DEGREE MURDER, AND HE ENDED UP WITH A 45-YEAR SENTENCE.

>> THE, YOUR SECOND POINT ON THESE MYRTLE BEACH PHOTOGRAPHS. ARE YOU GOING TO TALK ABOUT THAT?

>> I CAN.

>> JUST REAL QUICKLY, WERE THESE PHOTOGRAPHS THAT THE DEFENSE KNEW WERE GOING TO BE OFFERED AHEAD OF TRIAL?

>> I UNDERSTAND THAT HE WAS AWARE THAT THEY WERE PHOTOGRAPHS.

>> AND WERE THESE PHOTOGRAPHS,

HOW CLOSE IN PROXIMITY TO THE
CRIME, TIME OF THE CRIME WERE
THE PHOTOGRAPHS TAKEN?

DOES THE RECORD REVEAL THAT?

>> YES, IT DOES.

BECAUSE THROUGH THE TESTIMONY
OF, YOU KNOW, IN THIS CASE WE
HAVE SOME DETAILS ABOUT
TIMELINES AND THAT SORT OF THING
BOTH FROM BRUCE NIXON, AND
THEY'RE ALSO FROM TIFFANY COLE
WHO GAVE US SOME TIMELINE
INFORMATION OF WHAT HAPPENED
PRIOR TO THIS.

AND, IN FACT, THE PHOTOGRAPHS
WERE TAKEN ON A TRIP TO MYRTLE
BEACH.

IT WOULD HAVE BEEN IN AT LEAST
ROUGHLY A MONTH BEFORE THE
OFFENSE HERE.

>> BUT I GUESS MY PROBLEM WITH
THIS RECORD IS THAT AT THE TIME
THEY'RE OFFERED INTO EVIDENCE
THE DEFENSE OBJECTS AND JUST
SAYS THEY'RE NOT RELEVANT.

THE STATE GOES, THEY ARE
RELEVANT, AND THE JUDGE GOES,
I'M LETTING THEM IN.

>> AND WE DON'T KNOW WHY THE
JUDGE LET THEM IN.

>> WELL, WE DON'T KNOW WHY BOTH
SIDES.

DOESN'T THE DEFENSE HAVE SOME
OBLIGATION IF THIS IS THE KIND
OF THING THAT YOU GO IS REALLY
HARMFUL STUFF THAT THE, IS

RELIED ON --

>> YEAH.

>> LOOKING AT THESE PHOTOGRAPHS WHICH I HAVE NOT YET PHYSICALLY LOOKED AT THE PHOTOGRAPHS TO BRING TO THE JUDGE'S ATTENTION, IT'S NOT RELEVANT.

THEY'RE A MONTH BEFORE, THEY DON'T SHOW MOTIVE FOR THE CRIME, SOMETHING SO THAT THE JUDGE HAS A BASIS TO MAKE AN INTELLIGENT RULING ON IT.

>> THE PHOTOGRAPHS JUST HAPPEN TO BE SOME PHOTOGRAPHS THAT WERE FOUND IN THE EFFECTS THAT THE DEFENDANT HAD AT THE TIME OF ARREST.

AND THEY HAPPENED TO RELATE BACK TO A TRIP A MONTH EARLIER, OR A MONTH BEFORE THE CRIME OCCURRED. AND THEY CAME IN WITH A BUNCH OF OTHER INFORMATION.

THERE WASN'T ANY INDICATION HOW PROSECUTION INTENDED TO USE --

>> [INAUDIBLE]

>> I'M SORRY.

>> I BELIEVE THAT TIFFANY COLE WAS DRIVING AN RX-7 MAZDA, AND HE ACTUALLY FOLLOWED THE LINCOLN TOWN CAR TO THE CRIME, TO THE BURIAL SITE AND DRIVING THAT RX-8 CAR.

>> YES.

>> SO ONE OF THE PHOTOGRAPHS THAT WAS SHOWN TO BE REPRESENTED WAS THE GROUP SITTING ON THE

HOOD OF THIS RX-8 MAZDA CAR IN MYRTLE BEACH A MONTH BEFORE THE MURDER.

SO THERE'S SOME CONNECTION, THERE'S SOME RELEVANCE THERE.

>> THERE COULD BE SOME CONNECTION.

>> AND THERE'S ALSO THE CONNECTION OF THE FACT THAT THESE PEOPLE KNEW EACH OTHER, AND THEY PARTIED TOGETHER IN MYRTLE BEACH, AND THERE'S THAT COHESIVENESS.

THERE'S ANOTHER YOUNG LADY THAT WASN'T THERE AS WELL, BUT I THINK THE RELEVANCE IS THE COURT JUST BY LOOKING AT THEM CONNECTED THE DOTS WITHOUT SOMEONE ACTUALLY SAYING, THIS IS RELEVANT FOR THAT REASON.

ISN'T THAT THE CASE?

>> IT'S NOT CLEAR IN THE RECORD EXACTLY WHAT THE REASONING WAS BECAUSE NO ONE SAID ANYTHING.

>> LET'S BE CLEAR, THE COURT REJECTED THE OBJECTION OF A LACK OF RELEVANCY.

>> YES.

YES.

>> DOESN'T IT ALSO DEMONSTRATE THE PATTERN THAT FOLLOWED AFTER THESE MURDERS, THIS GROUP CONTINUED IN SPENDING MONEY AND GOING OUT AND DOING THESE KINDS OF THINGS?

>> WELL, THESE PHOTOGRAPHS WOULD

HAVE BEEN FROM AN EVENT WELL
BEFORE --

>> I UNDERSTAND.

BUT THEY'RE PARTYING TOGETHER,
THEY'RE DRINKING TOGETHER, AND
THIS IS WHAT THEY WERE DOING.

I MEAN, AFTER -- ISN'T THIS THEY
WENT BACK UP TO SOME LOCATION
WERE STAYING IN A HOTEL AND
CONTINUING THE SAME PATTERN OF
ACTIVITY?

NEEDING MONEY TO LIVE THIS
LIFESTYLE, WASN'T THAT HOW THIS
ALL CONNECTED TOGETHER?

>> I DON'T KNOW THAT THE
PHOTOGRAPHS OF SOME YOUNG PEOPLE
WHO HAPPENED TO BE AT THE BEACH
PARTYING A MONTH BEFORE THE
CRIME REFLECTS BACK ON --

>> WELL, LET'S ASSUME BY THE
QUESTIONS THAT THE JUSTICES HAVE
ASKED THAT THERE IS, QUOTE,
RELEVANCE.

THAT IS WHETHER IT'S GREAT
RELEVANCE OR MARGINAL RELEVANCE,
IT'S RELEVANCE.

THE PROBLEM IS WHAT SOMEONE
NEEDS TO ASK THE JUDGE TO DO IS
TO DO A 403 ANALYSIS.

THAT IS, YOU KNOW, IS IT GOING
TO BE USED IN A WAY THAT IS, YOU
KNOW, WHERE THE PREJUDICE
OUTWEIGHS ANY PROBATIVE VALUE?

NO ONE ASKS THE JUDGE TO DO
THAT, AND TO ME THAT'S REALLY
WHAT YOU'RE ARGUING IS THAT THEN

THE STATE TOOK IT, AND, YOU KNOW, I GUESS THERE'S ONE WHERE SHE'S GOT A DOLLAR BILL IN HER MOUTH OR SOMETHING AND USED IT IN A WAY THAT MAYBE ISN'T JUST AS BENIGN AS WE'RE TALKING ABOUT IT.

AND, YOU KNOW, JUST SHOWING THE MAZDA WAS THERE A MONTH BEFORE THE CRIME.

BUT THAT ARGUMENT, THE JUDGE NEVER HAD A CHANCE TO RULE ON THAT ARGUMENT, AND THAT'S WHAT I'M SAYING ABOUT --

>> THAT'S CORRECT.

>> -- IF THE DEFENSE HAD FILED A MOTION OF LIMINE AND, YOU KNOW, ALERTED THE JUDGE IF THEY WERE CONCERNED ABOUT IT, THAT'S WHAT THEY'D HAVE TO DO.

AND THEN THE JUDGE WOULD SAY, YEAH, I SEE IT'S A LITTLE RELEVANT, BUT I AGREE IT'S USED FOR OTHER PURPOSES.

IT MAY BE MORE PREJUDICIAL, AND THAT'S NOT DONE.

>> I HAD A BETTER RECORD, YOUR HONOR, BUT THAT WASN'T DONE, BUT THE PROBLEM IS STILL THERE.

I MEAN, THE IMPACT IT HAS ON THE CASE, AND WE'RE DEALING WITH A CAPITAL CASE.

THESE TRIAL PHASE ISSUES, THEY HAVE A SPILLOVER EFFECT THAT MAY NOT BE QUANTIFIABLE OR READILY IDENTIFIABLE, BUT THERE'S A

SPILOVER EFFECT FROM ALL THESE TYPES OF PROBLEMS THAT HAPPEN THAT COULD IMPACT A JURY'S VOTE IN THE PENALTY PHASE.

WE MAY NEVER BE ABLE TO TOTALLY DISCERN HOW THAT MIGHT OCCUR, BUT THESE PROBLEMS NEVERTHELESS, IN MY OPINION, DO HAVE A SPILOVER EFFECT THROUGHOUT THE CASE.

>> YOU MENTIONED THE HAC, AND CERTAINLY SHE DIDN'T DIG THE GRAVE, BUT IT SEEMS TO ME WHY THIS NOT A LITTLE DIFFERENT CATEGORY THAN THOSE WHERE YOU'RE ARGUING VICARIOUS IMPOSITION OF THE HAC AGGRAVATING FACTOR DUE TO HER THOROUGH INVOLVEMENT AND BEING THERE WHEN IT WAS DUG, FOLLOWING THE VEHICLE IN WHICH THE TWO VICTIMS HAVE BEEN PLACED IN THE TRUNK IN EVIDENCE IN THIS TRIAL THAT I'M NOT EVEN SURE IN THE OTHER ONE THAT SHE DID KNOW THAT THE VICTIMS WERE IN THAT VEHICLE, AND ALTHOUGH SHE MAY HAVE WAITED OUT AT THE ROAD WHEN THE ACTUAL BURIAL WAS TAKING PLACE, THAT SHE WAS SO INTIMATELY INVOLVED IN EVERY ASPECT OF THIS -- SET UP THE DEAL, SHE'S THE ONE WHO KNEW THE PEOPLE.

ISN'T THIS REALLY IN ANOTHER CATEGORY?

>> THAT'S NOT THE EVIDENCE IN

THIS CASE, YOUR HONOR.

>> [INAUDIBLE]

>> THAT'S NOT THE EVIDENCE.

THEY HAD CIRCUMSTANTIAL EVIDENCE, AND THE ONLY THING THEY HAD WAS TIFFANY COLE WAS, QUOTE, THE GIRLFRIEND OF MICHAEL JACKSON.

>> SHE'S THE ONLY ONE, THERE'S EVIDENCE SHE'S THE ONLY ONE WHO KNEW THESE VICTIMS, AND SHE TOOK HER BOYFRIEND TO GO MEET THEM, IS THAT NOT CORRECT?

>> WHAT HAPPENED WAS --

>> IS THAT CORRECT?

>> SHE TOOK HER BOYFRIEND, AND THEY SPENT THE NIGHT THERE.

THERE WAS NO INDICATION --

>> THE VICTIMS.

>> THERE WAS NO INDICATION THAT THERE WAS A CRIME UNDER CONSIDERATION AT THAT POINT.

>> BUT ISN'T THERE ALSO TESTIMONY THAT SHE WAS THERE HOLDING THE FLASHLIGHT WHEN HER CONFEDERATES DUG THE GRAVE FOR THESE VICTIMS?

>> LET'S LOOK AT THE --

>> ISN'T THERE TESTIMONY OF THAT OR NOT?

>> YES.

BUT THERE'S ALSO TESTIMONY THAT SHE DID NOT KNOW WHAT THAT HOLE WAS BEING DUG FOR AS DID BRUCE NIXON, THE STATE'S WITNESS, WHO SAID I DIDN'T KNOW WHAT WE WERE

DIGGING THE HOLE --

>> SHE KNEW THE DIMENSIONS OF IT.

>> SHE WAS --

>> ISN'T IT THE CASE THAT THERE'S NO PLAUSIBLE EXPLANATION FOR WHY THAT HOLE WAS BEING DUG OTHER THAN AS A GRAVE FOR THE VICTIMS OF THIS, OF THIS CRIME THAT THEY WERE PLANNING?

>> THERE IS, IT'S HER TESTIMONY WAS SHE DIDN'T KNOW WHY THE HOLE WAS BEING DUG.

SHE KNEW IT HAD SOMETHING TO DO WITH THE ROBBERY.

>> WOULDN'T A TRIAL JUDGE FIND THAT --

>> THERE WAS ALSO THE TEST --

>> WELL, JUST, COULD YOU ANSWER THAT QUESTION?

>> WELL, PLAUSIBILITY IS A FINDING OF FACT ISSUE, YES.

>> AND THE JURY THEY WERE GIVEN IN THIS CASE A SPECIAL VERDICT ON GUILT, AND THEY FOUND HER GUILTY OF PREMEDITATED MURDER.

>> YES, YES.

>> I THOUGHT YOU WERE GOING TO TALK ABOUT -- IS THAT NOT THE CASE?

>> THAT IS THE CASE.

WHAT I'D LIKE TO DO IS --

>> BUT GO BACK TO THIS ISSUE OF I THINK WE'RE TALKING ABOUT NOT WHETHER SHE WAS GUILTY OF KNOWING THE MURDERS WERE GOING

TO HAPPEN, BUT DOESN'T HAC FOCUS
ON KNOWING THAT THEY WERE GOING
TO BE BURIED ALIVE OR --

>> YES, I'M SORRY.

THAT DEALS WITH VICARIOUS
LIABILITY.

THERE WAS NO EVIDENCE THAT SHE
KNEW THE MANNER OF DEATH AND HOW
IT WAS GOING TO BE PERFORMED.

>> WELL, THERE'S SOME TESTIMONY
HERE THAT THERE HAVE BEEN SOME
EARLIER STATEMENTS ABOUT EITHER
STABBING OR SHOOTING OR --

>> WELL, MICHAEL JACKSON --
ACCORDING TO BRUCE NIXON, THERE
WAS A DISCUSSION WHERE MICHAEL
JACKSON SAYS I'M GOING TO INJECT
THEM WITH SOME KIND OF MEDICINE.

>> OKAY.

>> THERE WAS -- BRUCE NIXON,
WELL, THERE WAS NO INDICATION
THAT THEY WERE GOING TO BE
BURIED ALIVE.

AND THIS WAS THE SOLE FOUNDATION
FOR THE JUDGE'S FINDING OF HAC.

>> HE NEVER -- THE PROBLEM HE --

>> HE NEVER ANALYZED IT.

>> THE PROBLEM WE HAVE WITH THE
JUDGE'S ORDER IS HE DOESN'T
ANALYZE IF THERE IS A BASIS, AS
JUSTICE LEWIS IS SAYING, FINDING
THAT SHE KNEW THEY WERE GOING TO
BE TAKEN ALIVE IN THE TRUNK.

I MEAN, IT'S LIKE AS I'M SEEING
THIS THERE SEEMS TO ME THAT SHE
KNEW THEY WERE GOING, I MEAN,

THERE'S EVIDENCE THAT THE JURY AND THE JUDGE COULD FIND SHE KNEW THEY WERE GOING TO BE KILLED, THAT THERE IS EVIDENCE OF PREMEDITATED MURDER AND MAYBE EVEN HEIGHTENED PREMEDITATION. BUT THE EVIDENCE COULD EQUALLY SHOW SHE THOUGHT THEY WERE GOING TO BE -- THEY'RE VERY FRAIL PEOPLE -- THAT THEY WERE GOING TO BE KILLED AT THE HOUSE AND THEN TAKEN TO THIS SITE TO BE BURIED.

I MEAN, THAT'S THE BEST ARGUMENT ON HAC.

>> REGARDING THE HAC ISSUE, THERE WAS NO EVIDENCE SHE KNEW THE MANNER --

>> OR THAT THEY WERE GOING TO BE TAKEN IN THE TRUNK ALIVE.

>> ALIVE OR ANY OF THAT.

>> IS THERE EVIDENCE TO SUPPORT THAT AT THE TIME THEY WERE TAKEN FROM THE HOUSE AND THEY WERE IN THIS LITTLE CARAVAN OUT TO THE GRAVE SITE THAT SHE KNEW THAT THEY WERE, HAD BEEN PLACED IN THE TRUNK OF THE OTHER CAR?

>> ACCORDING TO HER OWN TESTIMONY, IT WAS, THAT WAS THE FIRST TIME SHE LEARNED THAT THEY HAD BEEN ABDUCTED FROM THE HOUSE, WHILE THEY WERE ENROUTE IN THE CARS.

>> SHE KNEW THEY WERE PLACED IN THE TRUNK OF THE CAR.

>> DURING THE CARAVAN TO THE --

>> I THOUGHT THAT SOMEBODY
PUSHED A BUTTON.

GOING BACK TO THE SAME QUESTION,
I THOUGHT THERE WAS SOMETHING
ABOUT A -- THEY WERE USING
NEXTEL PHONES, AND SOMEBODY HIT
A BUTTON, AND SHE KNEW BEFORE
THAT, WAS MY UNDERSTANDING, THAT
THEY WERE BEING TAKEN.

>> WELL --

>> IS THAT INCORRECT?

>> I DON'T THINK THERE'S
EVIDENCE THAT SHE KNEW THEY WERE
BEING TAKEN IN THE CAR.

>> DID SHE --

>> ACCORDING TO HER TESTIMONY,
SHE DIDN'T KNOW THEY WERE IN THE
TRUNK OF THE CAR UNTIL THEY WERE
ALREADY IN THE CARAVAN MOVING
TOWARD THE WOODS.

THEY WERE COMMUNICATING WITH THE
NEXTEL PHONES, AND SHE OVERHEARD
A CONVERSATION BETWEEN MICHAEL
JACKSON, WHO WAS IN THE CAR SHE
WAS DRIVING, WITH ALAN WADE WHO
WAS IN THE VICTIMS' AUTOMOBILE,
AND IT WAS OVERHEARING THAT
CONVERSATION THAT SHE GLEANED
THAT THEY WERE ACTUALLY IN THE
TRUNK.

>> WELL, IF WE, IF WE FIND THAT
HAC IS NOT PRESENT HERE FOR
TIFFANY COLE, THERE ARE -- LET'S
GO OVER WHAT THE AGGRAVATORS ARE
THAT STILL EXIST AND HAVE THIS

ARGUED TO THE JURY AND WHAT THE JUDGE FOUND.

AREN'T THERE OTHER VERY STRONG AGGRAVATORS IN THIS CASE TO SUPPORT THE DEATH PENALTY FOR TIFFANY COLE OTHER THAN HAC? WHAT OTHER AGGRAVATORS WERE FOUND?

>> THERE WERE, THERE WERE A NUMBER OF OTHER AGGRAVATORS.

>> WHAT ARE THEY?

>> INCLUDING CCP --

>> THERE ARE TWO DEATHS?

>> WELL, PREVIOUS CONVICTION OF VIOLENT FELONY BASED ON CONTEMPORANEOUS --

>> SO TWO PEOPLE ARE KILLED, ESPECIALLY VULNERABLE, AND SHE KNEW THEY WERE ESPECIALLY VULNERABLE.

SHE PARTICIPATED IN BUYING THE DUCT TAPE AND ALL THE OTHER THINGS THAT WERE USED TO EITHER BOTH KIDNAP AND HELP TO KILL THESE VERY VULNERABLE PEOPLE. WHAT -- SO THOSE ARE, YOU KNOW, ALTHOUGH USUALLY WE THINK HAC IS, YOU KNOW, ONE OF THE MOST AGGRAVATING OF THE AGGRAVATORS, IT SEEMS TO ME THAT YOU'VE GOT BASED ON WHAT EVERYONE ELSE IS ASKING YOU SOME VERY, VERY STRONG AGGRAVATION HERE.

>> YES, YOUR HONOR, THERE ARE SOME OTHER AGGRAVATORS.

MOST OF THEM WERE OUTGROWTH OF

THE CRIME ITSELF OR ATTRIBUTABLE TO HER THROUGH THE PRINCIPLE THEORY OR THE ACTIONS OF --

>> WELL, THAT'S TRUE WITH HAC TOO.

I MEAN, EVEN IF SHE DIDN'T, YOU KNOW, YOU ARGUED, I'M SURE, TO THE JURY OR DEFENSE LAWYER THAT SHE DIDN'T, YOU KNOW, THE MOST YOU CAN SAY IS THAT SHE KNEW THAT THEY WERE GOING TO TAKE MONEY FROM THEM.

SHE NEVER KNEW ANYTHING ABOUT THE WAY THIS CRIME WAS GOING TO BE COMMITTED, CORRECT?

>> CORRECT.

CORRECT.

>> SO WE DON'T KNOW BECAUSE WE DON'T HAVE SPECIAL VERDICT FORMS WHETHER THE JURY EVEN FOUND HAC.

>> NO, WE DON'T.

AND THE HAC FACTOR, AGAIN, THE FOUNDATION FOR IT FROM THE JUDGE'S ORDER WAS STRICTLY WHERE THE KILLING TOOK PLACE.

>> SO I'M ASKING THERE --

>> NO EVIDENCE SHE HAD THAT.

>> IF WE WERE TO DO TWO THINGS, THE TWO OTHER OPTIONS ARE TO LOOK AT IT FROM A HARMLESS ERROR POINT OF VIEW, OR IF WE CAN'T TELL WHETHER THE JUDGE WOULD STILL HAVE IMPOSED THE DEATH SENTENCE, THE JUDGE HIMSELF, COULD WE RETURN IT FOR THE JUDGE TO CONSIDER IT WITHOUT THE HAC

OR TO MAKE THE FINDINGS UNDER PEREZ AND OMELUS?

I MEAN, THAT WOULD BE A THIRD OPTION.

>> REGARDING THAT ARGUMENT, YES.

>> AM I INCORRECT THAT THE TRIAL JUDGE DID NOT ASSIGN WEIGHT TO THESE AGGRAVATORS IN HIS ORDER?

>> I DON'T RECALL THAT HE ASSIGNED WEIGHT TO THE AGGRAVATORS.

>> THAT WOULD BE A DOUBLE REASON TO MAYBE, I MEAN, AS A REASON TO ASK THE JUDGE TO LOOK AT THIS EITHER --

>> YEAH.

I'D HAVE TO REVIEW THE ORDER SPECIFICALLY, BUT THE OTHER ISSUE I WANT TO ADDRESS IS THE UNEQUAL TREATMENT OF CO-DEFENDANTS UNDER --

>> I'M SORRY?

>> THE OTHER ISSUE I WANT TO ADDRESS IS ISSUE THREE DEALING WITH THE UNEQUAL ADDRESS OF CO-DEFENDANTS.

>> WELL, WE'VE JUST AFFIRMED MICHAEL JACKSON.

CO-DEFENDANT NIXON WHO DOES SEEM TO BE VERY INVOLVED, BUT UNDER OUR CASE LAW NOW HE PLED TO SECOND DEGREE, SO THAT'S NOT A BASIS TO COMPARE FOR PROPORTIONALITY, IS IT?

>> YES, IT IS.

>> I MEAN, I DON'T AGREE WITH

THAT, BUT THAT'S WHAT THE LAW IS.

>> I DON'T THINK THAT'S THE LAW AT ALL, YOUR HONOR.

I THINK THIS COURT HAS -- THE TWO CASES THAT THE STATE CITES, BOTH OF THOSE INSTANCES THE ACTUAL CULPABILITY FOR SECOND-DEGREE MURDER WAS DETERMINED BY A JURY.

I THINK IT ONLY A SECOND-DEGREE CONVICTION OF A CO-DEFENDANT IS ONLY EXCLUDED FROM THE SLATER ANALYSIS IF IT WAS A FINDING OF THE ACTUAL CULPABILITY OF A DEFENDANT BY A JURY VERDICT OR A JUDGE FINDING OF GUILT FOR SECOND-DEGREE MURDER.

>> DON'T WE HAVE, ISN'T THE STATE HELPED HERE BY THE JURY'S FINDING?

AND CORRECT ME IF I'M WRONG, BUT DIDN'T THIS SENTENCING ORDER, I MEAN, DIDN'T THE JURY FIND PREMEDITATED MURDER?

>> YES.

>> I WAS UNDER THE IMPRESSION THAT OUR JURISPRUDENCE RECOGNIZED THAT SOMETIMES THE STATE'S GOT TO DEAL WITH THE DEVIL TO PUT A CASE TOGETHER, AND THAT IN CONNECTION WITH PLEA SITUATIONS THAT IT WAS DIFFERENT THAN OTHERS.

AND IS THAT UNDERSTANDING WRONG?

>> I THINK IT'S WRONG, YOUR

HONOR --

>> I MEAN, DO WE HAVE CASE LAW?

DO WE HAVE CASE FIRST?

DO WE HAVE AUTHORITY NOW --

>> THE CLOSEST CASE THAT WE HAVE

TO THIS POINT IS ON POINT

DOESN'T DEAL WITH A

SECOND-DEGREE MURDER PLEA, BUT

IT IS A PLEA CASE, AND IT WAS A

COMPARISON CASE OF TWO

NON-TRIGGER MEN.

YOU HAD THREE PEOPLE ACTIVELY

INVOLVED IN A HOME INVASION

ROBBERY/SEXUAL BATTERY.

THE STATE AND THE COURTS AGREED

THE ACTUAL TRIGGER MAN IN THE

DEATH OF THE HUSBAND, BUT ALL

THREE WERE ACTIVELY INVOLVED IN

THAT HOME INVASION.

BUFFKIN AND HAZEN, AGAIN, WERE

ACTIVELY INVOLVED.

BUT THIS COURT REVERSED THE

DEATH SENTENCE IN HAZEN AFTER A

COMPARISON OF BUFFKIN AND HAZEN

IN A SLATER ANALYSIS.

AND EVEN THOUGH HAZEN HAD BEEN A

RESULT OF A PLEA, ALBEIT TO

FIRST-DEGREE MURDER.

NOW --

>> CAN I ASK YOU ABOUT ENGLAND?

DIDN'T WE SAY IN ENGLAND IN

INSTANCES WHERE THE

CO-DEFENDANT'S LESSER SENTENCE

WAS THE RESULT OF A

PROSECUTORIAL --

>> IF YOU READ THOSE CASES WHERE

THIS COURT HAS REJECTED THE CLAIM, YOU'LL FIND ACTUALLY THIS COURT HAS DISCUSSED THE SLATER THING, AND IN EVERY ONE OF THOSE CASES -- I READ EVERY CASE THAT THIS COURT CITED IN THE CASE.

IN EVERY ONE OF THOSE INSTANCES, THE PERSON RECEIVING THE LESSER OFFENSE PLEA OR JURY VERDICT TO A LESSER SENTENCE THERE WAS NO QUESTION THAT THEY WERE OF LESSER CULPABILITY.

THIS CASE IS DIFFERENT IN THE SENSE THAT WE HAVE A SECOND-DEGREE PLEA TO SOMEONE WHO MAY BE EQUALLY OR MORE CULPABLE THAN COLE.

AND FACTUALLY I DON'T THINK ANYBODY TAKES ISSUE WITH THE FACT THAT BRUCE NIXON WAS ACTIVELY INVOLVED IN THIS MURDER.

AND HE, IF ANYTHING, WAS MORE INVOLVED IN THE ACTUAL KILLING AND MAY HAVE EVEN TURNED THE SPADE ON THESE INDIVIDUALS BASED UPON HIS AFTER-THE-FACT STATEMENTS.

HE WAS MORE CULPABLE THAN COLE IN THE ACTUAL KILLINGS, AND CERTAINLY COLE'S INVOLVEMENT WASN'T ANY MORE CULPABLE THAN HIS.

SO AT BEST FROM THE STATE'S POSITION SHE WAS EQUALLY CULPABLE, AND UNDER THE SLATER

ANALYSIS SHE SHOULD BE ENTITLED
TO A REVERSAL OF HER DEATH
SENTENCE.

AND THE FACT THAT IT WAS THE
SECOND-DEGREE MURDER -- IF THE
COURT ADOPTS THE POSITION THAT
THE STATE CAN OFFER A
SECOND-DEGREE MURDER PLEA TO A
CO-DEFENDANT REGARDLESS OF HOW
INVOLVED THAT CO-DEFENDANT MIGHT
BE AND FOREVER PREVENT THIS
COURT FROM A SLATER REVIEW OF
ANOTHER CO-DEFENDANT WHO COMES
UP WITH A DEATH SENTENCE, THIS
COURT WILL BE ABDICATING ITS
REVIEW ABILITY TO THE STATE'S
DISCRETION TO ENTER INTO PLEAS.

>> I GUESS I THOUGHT WE HAD DONE
THAT.

WE'LL HAVE TO LOOK -- WHETHER
THE END RESULT IS WHAT YOU SAY,
MY RECOLLECTION OF THESE CASES
IS WHAT JUSTICE CANADY IS
SAYING, BUT WE'LL CERTAINLY LOOK
AT THAT AND LOOK --

>> WELL, THE CASES THE STATE
RELIES ON WERE CLEARLY JURY
VERDICTS OF SECOND-DEGREE
MURDER, AND THIS COURT HAS SAID
IF THERE IS A FINDING OF FACT BY
A JURY OR A JUDGE --

>> MY POINT IS THERE ARE CASES
OTHER THAN WHICH THE CASES THE
STATE MIGHT HAVE RELIED UPON.

>> YES, YOUR HONOR.

BUT IF YOU LOOK AT THE

JURISPRUDENCE AS A WHOLE THERE
MAY BE COMMENTS IN OTHER
CASES --

>> [INAUDIBLE]

>> I'M SORRY?

>> WHAT ABOUT HOLDINGS IN OTHER
CASES?

>> WELL, IF THIS COURT LOOKS AT
THE ENTIRE JURISPRUDENCE AS A
WHOLE, THEY ARE GOING -- MAY
VERY WELL FIND COMMENTS AND
CASES WHERE THIS PARTICULAR
ISSUE WASN'T SO POINTEDLY
INVOLVED.

BUT IF YOU REVIEW THOSE CASES
AND ALL THE CASES THAT WERE
CITED IN THE SHERE DECISION,
THEY ALL INVOLVED EITHER JURY
VERDICTS, THEY INVOLVED ACTUAL
FINDINGS BY THE COURT OF LESSER
CULPABILITY, OR I THINK THERE
WAS, YOU KNOW, NONE OF THEM
ACTUALLY AROSE TO A SLATER
REVERSAL SITUATION.

BUT IN A NUMBER OF THOSE CASES
THIS COURT ACKNOWLEDGED THE
SLATER RULE AND SAID, WELL, THIS
DOESN'T APPLY BECAUSE HE'S
CLEARLY LESSER.

IT WAS INVOLVED.

AND AGAIN, IF THIS COURT'S GOING
TO ALLOW THE DISCRETION OF THE
PROSECUTION TO ENTER INTO PLEA
AGREEMENTS TO SECOND-DEGREE
MURDER AND THEREBY INSULATE FROM
REVIEW UNDER SLATER OTHER

DEFENDANTS' DEATH SENTENCES, YOU
KNOW, I DON'T, I THINK WE'RE --
I DON'T THINK THAT'S WHAT THE
CONSTITUTION IS ALL ABOUT HERE.

>> AND WITH THAT, YOU HAVE USED
MORE THAN YOUR TIME THIS
MORNING.

WE THANK YOU.

>> THANK YOU.

>> MAY IT PLEASE THE COURT,
CAROLYN SNURKOWSKI FROM THE
ATTORNEY GENERAL'S OFFICE.

TO ANSWER YOUR QUESTION, GARCIA
V. STATE SAYS THIS --

>> WOULD YOU TALK INTO THE MIC
SO WE CAN HEAR YOU?

>> OH, I'M SORRY.

IT SAYS THIS COURT UPHELD THE
PLEA BARGAINING WITH A LESS
CULPABLE DEFENDANT AND INDICATED
THE --

>> BUT I GUESS WHAT HE IS SAYING
IS THAT IT SURE DIDN'T PRECLUDE
US FROM EVER, LIKE, LET'S JUST
ASSUME THAT THE PLEA WAS MADE
WITH MICHAEL JACKSON.

MICHAEL JACKSON THE
CO-DEFENDANT.

I KNOW YOU KNOW, BUT I JUST WANT
TO MAKE SURE.

[LAUGHTER]

AND IT IS CLEAR THAT THE PERSON
WHO GOT THE FIRST-DEGREE MURDER
DEATH SENTENCE IS LESS CULPABLE
THAN THE ONE WITH THE PLEA
AGREEMENT.

DO YOU SAY THAT WE HAVE CASES --

>> YES.

>> -- THAT ALSO SAY -- IT'S THE STATE'S DETERMINATION THAT THAT PERSON WAS LESS CULPABLE, WE CAN'T GO BEHIND IT.

>> BECAUSE YOU CAN'T LOOK AT, THERE'S NO CREDIBILITY DETERMINATION, YOU CAN'T ASSESS THAT.

AND THE STATE DID PROVIDE THE COURT WITH ADDITIONAL NOTICE OF ADDITIONAL AUTHORITY, SMITH V. STATE.

>> IN THIS CASE DID THE, WAS THE DEFENDANT PRECLUDED FROM ARGUING TO THE JURY THAT THE DEATH PENALTY SHOULD NOT BE IMPOSED BECAUSE LOOK AT BRUCE NIXON AND LOOK WHAT HE ADMITTED TO?

>> NO.

NO.

THEY HAD FULL OPPORTUNITY TO MAKE THOSE ARGUMENTS TO THE JURY.

>> DID THEY MAKE THAT, WOULD THAT BE SOMETHING THAT THE JUDGE COULD CONSIDER IN ANY WAY IN HIS DECISION TO IMPOSE DEATH? IN OTHER WORDS, WE'RE SAYING YOU CAN'T, IT'S NOT A PROPORTIONALITY ISSUE, BUT IS THE TREATMENT OF A CO-DEFENDANT SOMETHING THAT THE TRIAL JUDGE COULD CONSIDER?

>> I THINK IN THIS PARTICULAR

CASE THAT WAS ONE OF THE THINGS THAT WAS ARGUED TO THE JURY TO THE EXTENT THAT THEY WERE ARGUING THAT TIFFANY COLE WAS NOT, WAS LIKE NIXON AND NOT LIKE JACKSON AND NOT LIKE LEE.

>> BUT IF IT'S NOT A LEGAL ARGUMENT, WHAT IS, WHAT DOES IT GO TO?

IN OTHER WORDS, IF IT'S NOT RELEVANT FOR PURPOSES OF OUR CONSIDERATION, WHAT IS --

>> WELL, THE TRIAL COURT DID FIND IN THIS PARTICULAR CASE AT ONE OF THE STATUTORY MITIGATIONS THAT SHE WAS A MINOR PLAYER AND GAVE IT SOME WEIGHT, I MEAN, A LITTLE BIT OF WEIGHT IN THAT SHE WAS NOT A MAJOR PARTICIPANT. THOSE ARE TWO OF THE AGGRAVATORS -- MITIGATORS, EXCUSE ME -- SPECIAL MITIGATORS THAT WERE FOUND BY THE COURT IN THIS INSTANCE.

>> BUT THEN THAT WAS SOME COMPARISON OF HER ROLE VERSUS NIXON'S ROLE?

>> NO, NO.

>> AND IF THE TRIAL JUDGE HAD FOUND, IN FACT, THAT HER ROLE WAS --

>> LESS.

>> -- RELATIVELY MINOR IN COMPARISON.

>> IN COMPARISON TO JACKSON.

>> WELL, IN COMPARISON TO ANY OF

THEM --

>> RIGHT.

>> -- WE WOULD NOT REVERSE THAT ON APPEAL EVEN IF THE STATE, SAY, FILED A NOTE OF APPEAL FOR THAT, WOULD WE?

>> NO.

>> WELL, LET ME ASK YOU ABOUT THAT MITIGATOR, THE MINOR PARTICIPANT MITIGATOR.

ISN'T THAT ORDER A LITTLE ODD ON THAT?

BECAUSE THE COURT ULTIMATELY SAYS, THIS COURT CANNOT SAY THAT HER PARTICIPATION WAS RELATIVELY MINOR.

ACCORDINGLY, THIS MATTER IS AFFORDED LITTLE WEIGHT.

IT SOUNDS LIKE IT'S LITTLE WEIGHT, LIKE IN NO WEIGHT.

>> CORRECT.

>> IF THE COURT CANNOT SAY HER PARTICIPATION WAS RELATIVELY MINOR, SO IT SEEMS LIKE THAT THAT MITIGATOR --

>> I THINK HE WAS TRYING TO GIVE CREDIT AND MAYBE NOT AS ARTICULATE AS HE COULD HAVE BEEN, BUT, IN FACT, THAT WAS ONE OF THE STATUTORY MITIGATING FACTORS THAT WAS PRESENTED TO HIM WITH REGARD TO MITIGATION.

>> I HAVE A -- OKAY.

>> DIDN'T HE, IT ALMOST SEEMS LIKE BECAUSE THERE WAS SOME EVIDENCE THAT SUPPORTED THAT,

NAMELY HER TESTIMONY --

>> CORRECT.

>> -- HE FELT LIKE HE HAD TO OR
MAYBE I'M READING SOMETHING IN
HERE, BUT IT WAS ALMOST LIKE
BECAUSE THERE WAS SOME EVIDENCE
HE FELT LIKE IT HAD TO BE GIVEN,
HAD TO BE CONSIDERED --

>> CORRECT.

>> -- BUT HE WAS NOT CONVINCED
BY THE EVIDENCE.

>> I THINK THAT'S A FAIR
STATEMENT OF WHAT HIS ANALYSIS
WAS, THAT IT WAS PRESENTED, AND
HE MUST CONSIDER THAT WHICH IS
PRESENTED.

AND HE GAVE IT AS LITTLE WEIGHT
AS POSSIBLE BECAUSE IN TERMS OF
WHAT THE EVIDENCE SHOWED AND, IN
FACT, WHAT THE EVIDENCE EVEN
FROM TIFFANY COLE SHOWED.

SHE TALKED ABOUT HER
PARTICIPATION IN THIS CRIME AND
TRIED AT EVERY AVENUE TO
DISSUADE HER ROLE AS NOT BEING
AS A MAJOR PLAYER AS OPPOSED TO
A MINOR PLAYER.

HOWEVER, THE END RESULT WAS SHE,
THOUGH, AGREED WITH WHAT
MR. NIXON SAID AND CONCURRED
THAT WHAT HE SAID WAS ACCURATE
AS TO WHAT HAPPENED AND WHAT
TRANSPIRED AND THAT SHE WAS A
FULL PARTICIPANT.

NIXON TESTIFIED AND SAID SHE WAS
A FULL PARTICIPANT.

HE ONLY KNEW AND, AGAIN, HIS VANTAGE POINT COMES FROM COMING INTO THE GAME LATE AND LEAVING EARLY IN THE SENSE THAT HE LEFT THE DAY AFTER THE MURDER, AND THEN HE WAS FACILITATED HOW THE BODIES WERE ULTIMATELY FOUND. BUT HE WENT AND PARTIED, OPENED HIS MOUTH AND TALKED ABOUT WHAT HE HAD DONE.

HE DIDN'T KNOW WHAT HAPPENED AFTERWARD, AND HE DIDN'T REALLY KNOW WHAT HAPPENED BEFORE HE WAS ACTUALLY INVITED INTO THIS LITTLE GROUP OF FOUR TO ENGAGE IN THIS CRIMINAL CONDUCT.

SO, I MEAN, HIS VANTAGE POINT IS ONLY THAT THOSE, A COUPLE OF DAYS BEFORE WHEN THEY DIG THE GRAVE HE GETS INVITED TO HELP DIG THE GRAVE.

HE ASKS IF HE CAN BE INVOLVED IN THE CRIME BECAUSE THEY'RE TALKING ABOUT THE CRIME BECAUSE HE KNOWS ABOUT IT, AND HE WANTS INVOLVEMENT BECAUSE THERE'S MONETARY BENEFIT TO DOING SO. AND THEN HE GETS THE BENEFIT, HE DOES THE CRIME, HE'S AT THE CRIME SCENE.

HE IS NOT PRESENT WHEN THE VICTIMS ARE PUT INTO THE GRAVE. HIS TESTIMONY IS THAT HE COMES OUT AND TALKS TO TIFFANY, AND THEN HE GOES BACK, AND THEN WADE COMES OUT.

>> NEITHER OF THEM.

FOR THIS CASE NEITHER OF THEM
ARE PRESENT, NEITHER COLE OR --

>> COLE IS ALWAYS SITTING IN THE
CAR.

>> -- NIXON.

OKAY.

A COUPLE OF QUESTIONS ABOUT
COLE'S INVOLVEMENT.

FIRST OF ALL, YOU ARE HELPED --
THE STATE, I BELIEVE, IS HELPED
CONSIDERABLY BY THE SPECIAL
GUILT PHASE VERDICT FORMS THAT
FOUND TIFFANY COLE GUILTY OF
PREMEDITATED MURDER.

NOT JUST --

>> CORRECT.

FELONY MURDER, CORRECT.

>> AND SO IN TERMS OF TYSON AND
THAT ISSUE, WE DON'T NEED TO
DEAL WITH IT.

IT'S A NON-ISSUE BECAUSE THE
SPECIAL VERDICT FORM FOUND THAT.

>> CORRECT.

>> BUT IT'S MY CONCERN ABOUT
TIFFANY COLE, BECAUSE I DON'T
SEE HER AS BASED ON THE EVIDENCE
I THINK THE STATE CAN MAKE A
VERY GOOD ARGUMENT THAT SHE WAS
IN THERE FROM THE BEGINNING AT
LEAST TO ROB THESE PEOPLE, AND
IF NIXON IS TO BE BELIEVED, AT
LEAST KNEW THEY WERE GOING TO BE
MURDERED.

>> RIGHT.

THERE WAS DISCUSSION.

HE SAID THAT THEY DISCUSSED THE MURDER.

>> ALL RIGHT.

BUT AS FAR AS THE JUDGE IN HIS SENTENCING ORDER I JUST HAVE -- MY PROBLEMS WITH THE JUDGE'S SENTENCING ORDER, HE STARTS OUT BY SAYING IT SHOULD BE NOTED THAT THE TRIALS OF THESE DEFENDANTS -- MEANING JACKSON, COLE, AND WADE -- WERE SUBSTANTIALLY SIMILAR, IF NOT IDENTICAL.

THEREFORE, DIFFICULT TO PARTICULARIZE THE SENTENCING ORDERS ALTHOUGH EFFORTS HAVE BEEN MADE, PASSAGE OF NECESSITY ARE SIMILAR AND IN SOME INSTANCES VERBATIM.

ADDED TO THAT STATEMENT FROM THE TRIAL JUDGE IS THE FACT THAT NONE OF THE AGGRAVATORS ARE WEIGHED INDEPENDENTLY.

THE JURY BECAUSE WE'VE SAID THEY CAN'T MAKE SPECIAL FINDINGS ON AGGRAVATORS, DON'T MAKE FINDINGS ON AGGRAVATORS.

SO MY CONCERN IS WITH THE HAC WITHOUT ANALYZING IT UNDER THE PEREZ OR OMELUS CASES WITH NO WEIGHT HAVING BEEN ASSIGNED -- YOU SEE SOMETIMES WHERE A TRIAL JUDGE WILL SAY, WELL, EVEN IF I DIDN'T FIND HAC --

>> CORRECT.

>> -- I'D FIND THE OTHER

AGGRAVATORS.

DON'T WE AT THE VERY LEAST
BECAUSE OF THAT, THESE PROBLEMS
OUT OF AN ABUNDANCE OF CAUTION
SEND THIS BACK TO THE JUDGE FOR
A RESENTENCING TO CONSIDER THAT,
WEIGH THE AGGRAVATORS, TO LOOK
AT HAC OR EITHER STRIKE IT, AND
WOULDN'T THAT BE BETTER IN THE
LONG RUN FOR THIS, FOR THE STATE
AND FOR THIS CASE TO HAVE THAT
DONE NOW RATHER THAN LATER?
BECAUSE I'M SURE YOU DON'T AGREE
WITH A NEW SENTENCING, BUT AT
LEAST FOR A RESENTENCING BEFORE
THE JUDGE?

>> WELL, I'M TRYING TO THINK OF
A -- I'M IN A CONUNDRUM BECAUSE
I WAS TRYING TO THINK OF A
CIRCUMSTANCE WHERE THAT HAS
OCCURRED.

USUALLY WE DON'T DO THAT --

>> OH, I THINK WE'VE -- I'M
PRETTY SURE WE'VE ALLOWED --

>> WELL, I'M NOT ARGUING --

>> THE FACT THAT YOU SAY WE
MIGHT NOT HAVE GIVES ME PAUSE.

>> I THINK IN THIS CASE WHILE,
YOU KNOW, I WOULD LIKE THIS TO
BE A PERFECT CASE AND A PERFECT
RECORD, THE FACT, A, THAT THE
TRIAL JUDGE DID NOT MAKE AN
ASSESSMENT AS TO THE WEIGHT HE
GAVE TO THE HAC I THINK ONLY
GOES TO THE PROBLEM OF WHETHER,
IN FACT, IF YOU FIND THIS IS A

PEREZ-TYPE CASE WHERE THERE'S VICARIOUS LIABILITY THAT DOESN'T ATTACH TO HER BECAUSE THERE'S NO EVIDENCE TO SHOW HOW THE CRIMES ARE COMMITTED, ABSENT THAT I THINK THAT IT WOULD BE HARMLESS ERROR BECAUSE THERE'S STILL SIX AGGRAVATING FACTORS IN THIS PARTICULAR CASE THAT ARE -- THERE'S NO POSSIBLE WAY THE MITIGATION IN THIS CASE COULD OUTWEIGH THAT.

AND SO IT'D BE HARMLESS ERROR BEYOND A REASONABLE DOUBT TO SUGGEST THAT, IN FACT, HAC FACT IN THIS PARTICULAR CASE WOULD MATTER.

I'M NOT ADVOCATING YOU STRIKE IT, BECAUSE THIS IS A CASE WHERE I THINK THERE IS ABILITY TO ASSESS.

THIS WOMAN WAS INVOLVED IN EVERY ASPECT OF THIS CRIME.

THE ONLY THING, AS I SAID IN MY BRIEF, THE ONLY THING SHE DIDN'T DO WAS PUT A SHOVEL TO THE DIRT AND PUT THE LAST SHOVEL IN.

>> WELL, IN THAT REGARD BECAUSE WE ALWAYS WHEN WE TRY TO LOOK AT HARMLESS ERROR, WE'RE LOOKING AT THE JURY AND THE JUDGE IN TERMS OF DECIDING ON A PARTICULAR AGGRAVATOR.

DID THE STATE ARGUE HAC TO THE JURY?

>> YES.

>> BECAUSE IT STRIKES ME WHEN I REREAD OUR OPINION IN MICHAEL JACKSON THAT SOME OF THE MORE HORRENDOUS ASPECTS OF THIS CRIME ARE THE VULNERABILITY OF THESE VICTIMS AND THIS IMAGE OF THEM BEING BURIED ALIVE WHICH WE ATTRIBUTE TO MICHAEL JACKSON, AND, YOU KNOW, WE'LL SEE ABOUT THE OTHER DEFENDANTS.

BUT REALLY IS IN THIS CASE IF THAT WAS ARGUED -- AND IT SHOULDN'T HAVE BEEN UNLESS THE THRESHOLD WAS MET -- THEN HOW CAN WE SAY THAT IT DIDN'T AFFECT THE JURY'S DETERMINATION OF WHETHER THEY WOULD RECOMMEND LIFE OR DEATH?

>> BECAUSE WE ALSO HAVE AGGRAVATORS THAT ARE EQUALLY -- THE FRAGILITY OF THESE POOR, THESE TWO SOULS WITH REGARD TO THEIR HEALTH PROBLEMS AND THEIR ABILITIES, THE CRIME ITSELF; HOW THEY WERE TAKEN OUT OF THE MIDDLE OF THE NIGHT.

THIS IS AT 10:30 AT NIGHT, THEY'RE IN THEIR UNDERGARMENTS, ALL THEIR APPARATUS TO HELP THEM WITH THEIR MOBILITY WAS LEFT AT THE HOME.

THEY WERE DUCT TAPED UP, THEY WERE --

>> BUT WE, YOU KNOW, AGAIN --

>> PUT IN THE TRUNK.

THOSE ARE ALL THINGS THAT

HAPPENED AND EXIST NO MATTER HOW
THEY DIED.

>> BUT YOU, AS YOU WOULD
ACKNOWLEDGE IF TIFFANY COLE HAD
BEEN, QUOTE, MERELY THE GETAWAY
DRIVER, WE HAVE -- WE'RE TALKING
HERE NOT ABOUT WHETHER SHE'S
CULPABLE OF FIRST-DEGREE MURDER
AND SHOULDN'T SPEND THE REST OF
HER LIFE IN PRISON.

THE ISSUE IS WHETHER THIS IS A
CASE FOR TIFFANY COLE JUST LIKE
IT WAS FOR MICHAEL JACKSON THAT
IS DESERVING OF HER THE DEATH
PENALTY.

I'M JUST ASKING -- I'M NOT
TRYING TO MINIMIZE WHAT THIS
CRIME IS ABOUT.

YOU KNOW, WE'RE TALKING ABOUT --
WHEN YOU SAY HARMLESS ERROR,
WE'VE GOT TO LOOK AT, ALSO,
WHETHER THIS WOULD HAVE HAD AN
EFFECT ON THE JURY'S VERDICT IF
IT WAS ARGUED THAT WAY.

>> AND I UNDERSTAND THAT.

>> AND IF IT WAS NOT FOUND
PROPERLY OR NOT INSTRUCTED ON,
THEN WHETHER IT WOULD HAVE MADE
A DIFFERENCE TO THE JURY, I
DON'T KNOW.

I WASN'T, YOU KNOW, ISN'T THAT,
THOUGH, THE WAY WE HAVE TO LOOK
AT IT?

>> BUT THE HARMLESS ERROR IS HAS
THE STATE SHOWN BEYOND A
REASONABLE DOUBT THAT THE DEATH

PENALTY WOULD HAVE BEEN IMPOSED HAD THIS HAC NOT BEEN FOUND, AND I AM SUGGESTING THAT THE SIX REMAINING ARE SO STRONG THAT THERE'S NO BEYOND A REASONABLE DOUBT.

COLD AND CALCULATED, THAT'S NEVER BEEN CHALLENGED HERE. YOU HAVE THE FRAGILITY OF THESE INDIVIDUALS WHICH IS AN AGGRAVATING FACTOR THAT THE LEGISLATURE HAS FOUND TO BE AN IMPORTANT AGGRAVATING FACTOR, AND I THINK THERE'S NO QUESTION -- IF YOU LOOK AT THE FACTS OF THIS CASE -- THERE'S NO QUESTION ABOUT THEIR HEALTH AND THEIR STATUS IN LIFE.

YOU LOOK AT THE FACT THAT THIS WAS TWO MURDERS THAT OCCURRED, YOU LOOK AT THE FACT THAT IT WAS KIDNAPPING AND ROBBERY.

YOU LOOK AT THE FACT THAT THIS WAS TO AVOID ARREST, AND I MIGHT ADD WHILE THAT'S AN ISSUE THAT'S BEFORE THE COURT IN THIS PARTICULAR CASE, IN MICHAEL JACKSON IT WAS NOT ADDRESSED.

AND THE COURT HAD NO PROBLEMS WITH THE ISSUE OF AVOIDING ARREST AND CLEARLY WOULD HAVE BEEN MUCH CLOSER WITH REGARD TO THIS VICTIM OR THIS DEFENDANT, RATHER, THAN IT WOULD HAVE BEEN WITH MICHAEL JACKSON SINCE HE WAS A COME-ALONG.

AND SHE ACTUALLY BOUGHT A CAR FROM THESE INDIVIDUALS AND KNEW THEM WHEN THEY WERE IN CHARLESTON, SOUTH CAROLINA.

SO YOU HAVE THOSE PARTICULAR AGGRAVATING FACTORS WEIGHED AGAINST THE MITIGATION.

AND THIS IS NOT A CRIME THAT IS HEAVILY MITIGATED WITH MENTAL HEALTH ISSUES.

WE HAVE A WOMAN WHO THROUGH DR. MILLER INDICATES THAT SHE HAS ISSUES WITH DOMINANCE AND SHE HAS CONTROL ISSUES AND THAT SHE HAD A DIFFICULT LIFE.

BUT ON THE BACK SIDE OF THAT IN SPITE OF THE FACT SHE HAD A DIFFICULT LIFE WE HAVE A MITIGATING FACTOR, EXCUSE ME, THAT SHE WAS, SHE TOOK CARE OF HER FATHER WHO REPORTEDLY, I THINK, WAS THE SAME PERSON WHO SHE ASSERTS SEXUALLY ASSAULTED HER BECAUSE HE WAS DYING OF CANCER JUST PRIOR TO THIS EVENT HAPPENING.

YOU HAVE ALSO -- THIS IS NOT THE HEAVIEST MITIGATOR CASE WE'VE EVER SEEN, BUT YOU DO HAVE THESE WEIGHTY AGGRAVATING FACTORS.

SO BEYOND A QUESTION I THINK THAT EVEN STRIKING, WHICH I WOULD SUGGEST YOU DON'T STRIKE, BUT EVEN STRIKING THE HAC FACTOR IS NOT GOING TO MAKE A DIFFERENCE IN THIS MATTER, TO

ANSWER THAT QUESTION.

>> SO YOU SAID, "I SUGGEST YOU
DON'T STRIKE THE HAC FACTOR,"
BUT HOW DO WE DEAL WITH THE CASE
LAW THAT TALKS ABOUT THE --

>> VICARIOUS.

>> -- VICARIOUS LIABILITY FOR
HAC?

WE DO KNOW -- WHILE I AGREE WITH
YOU THAT THIS DEFENDANT
PARTICIPATED EVERY STEP OF THE
WAY IN THIS, MY PROBLEM IS THAT
WE DON'T REALLY HAVE ANY
EVIDENCE THAT SHE KNEW THE
MANNER THAT THIS DEATH WAS GOING
TO TAKE PLACE.

I MEAN, WE DO HAVE THE EVIDENCE
ABOUT THAT HE WAS GOING TO PUT
SOME KIND OF MEDICATION IN THEM.
THEY WERE OLD AND FRAIL, AND HE
WAS GOING TO MEDICATE THEM.
SO WE DON'T HAVE ANYTHING IN
THIS RECORD THAT INDICATES SHE
KNEW AND UNDERSTOOD THESE PEOPLE
WERE GOING TO BE BURIED ALIVE
WHICH IS THE BASIS FOR THE HAC?

>> WELL, I AGREE WITH YOU THAT
WE DON'T KNOW SHE KNEW THEY WERE
GOING TO BE BURIED ALIVE.

I AGREE WITH THAT BECAUSE I
DON'T THINK EVEN MR. WADE
EITHER -- AND HIS CASE IS COMING
UP IN A MONTH -- BUT, I MEAN, I
THINK SHE MAKES A STATEMENT IN
HER TESTIMONY THAT SHE DIDN'T
THINK THAT WADE KNEW THAT

JACKSON WAS GOING TO THROW THEM
ALIVE INTO THE GRAVE.

BUT SHE'S OUT THERE, SHE KNOWS
ABOUT THE, SHE KNOWS ABOUT THE
GRAVE BECAUSE THEY'RE DIGGING
THE GRAVE, AND SHE'S HOLDING THE
FLASHLIGHT.

>> WHO IS, WHERE DOES THAT
TESTIMONY COME FROM THAT SHE
KNEW ABOUT THE GRAVE BECAUSE SHE
WAS HOLDING THE FLASHLIGHT?

>> I BELIEVE THAT'S NIXON.

AND SHE CONCURS WITH EVERYTHING
NIXON SAID.

THERE'S A PLACE IN THIS RECORD
WHERE SHE'S TESTIFYING AND SHE'S
ASKED ABOUT DO YOU BELIEVE OR
WHAT IS YOUR VIEW, IN ESSENCE --
AND I'M JUST PARAPHRASING --
ABOUT WHAT NIXON SAID, AND SHE
SAYS, EVERYTHING HE SAID IS
RIGHT, IS CORRECT.

>> AM I CORRECT THAT THE HOLE,
IT WAS 6 FEET WIDE AND 4 FEET
DEEP?

AM I INCORRECT IN THOSE
DIMENSIONS?

>> I DON'T KNOW.

I DON'T REMEMBER ANY
SPECIFICS --

>> I THINK SHE MENTIONED
SOMEWHERE ALONG THE LINE THAT
SHE THOUGHT THE HOLE WAS BEING
DUG TO BURY THE MATERIALS THAT
THEY STOLE.

>> CORRECT.

CORRECT.

>> I JUST WONDERED 6 FEET WIDE,
4 FEET DEEP --

>> AND AT THAT POINT THEY HADN'T
STOLEN ANYTHING.

THAT'S A MISREPRESENTATION.

THEY HAD TAKEN STUFF FROM THE
HOUSE, BUT THEY WENT BACK AFTER
THE MURDERS AND TOOK A COMPUTER,
AND AT THE TIME OF THE MURDERS
WHEN -- NOT THE TIME -- THE TIME
OF THE KIDNAPPING, JACKSON TOOK
A LOT OF PAPERWORK FROM THE
HOUSE.

THEY HAD RAMPAGED THE HOUSE TO
LOOK FOR MATERIALS WITH REGARD
TO PIN NUMBERS BECAUSE, IN FACT,
I MEAN, THAT'S THE OTHER THING
WE'RE KIND OF FORGETTING HERE,
AND I APOLOGIZE BECAUSE I FORGOT
TOO.

THEY NEEDED THE PIN NUMBERS.

THERE WAS A REASON THEY DROVE
THOSE PEOPLE OUT THERE.

AND THE PIN NUMBERS CAME OUT
AFTER JACKSON HAD BURIED THE
SUMNERS, AND HE HAD IT ON A PAD,
AND SHE SAW THAT TOO.

THAT WAS PART OF IT.

THEY NEEDED THE PIN NUMBERS, AND
THEY DIDN'T HAVE THE PIN NUMBERS
AT THE TIME THEY LEFT THE HOME,
THEIR HOME.

>> SO AT THE TIME THESE FOLKS
WERE BEING BURIED, SHE WAS OUT,
OUTSIDE THE ROAD PARKED IN HER

RX-8 MAZDA, WHATEVER --

>> MAZDA, RIGHT.

>> MAZDA.

SHE WAS NOT PRESENT AT THE TIME THAT THEY WERE SHOVELING THE DIRT OVER THESE PEOPLE.

>> THAT'S CORRECT.

THAT IS ABSOLUTELY CORRECT.

AND SHE WAS ALSO NOT THERE WHEN THEY WENT AND GOT THE SUMNERS FROM THE HOUSE.

JACKSON AND SHE SAT OUTSIDE, AND THEY USED THE WALKIE-TALKIES OR THE RADIOS TO COMMUNICATE WITH THE NIXON AND WADE INSIDE AS TO WHAT WAS GOING ON INSIDE THERE.

>> WELL, WAS THERE EVIDENCE THAT SHE KNEW THEY HADN'T GOTTEN THE PIN NUMBERS FROM INSIDE, THAT THEY HADN'T HAD THAT INFORMATION YET?

>> I THINK THE EVIDENCE CAN BE INFERRED, THE FACT THAT JACKSON BROUGHT OUT A BAG AND PUT IT IN THE CAR AND SAID SOMETHING TO THE EFFECT OF PAPERS OR SOMETHING LIKE THAT.

AND I WANT TO SAY THERE WAS SOME TESTIMONY WITH REGARD TO THEY NEEDED THE PIN NUMBERS.

THAT WAS WHAT THEIR GOAL WAS, TO GET THE PIN NUMBERS.

AND THEY HADN'T GOTTEN THE PIN NUMBERS AT THAT POINT.

>> TO MS. COLE.

>> I DON'T KNOW --

>> I THINK WE'RE GOING, I THINK THE QUESTION, AGAIN, WE KNOW WE'VE GOT PREMEDITATED MURDER HERE, WE KNOW WE HAVE CCP -- AT LEAST THAT'S NOT BEING QUESTIONED.

SO IF YOU COULD GET BACK TO THE HAC ISSUE, VICARIOUS HAC.

WE HAVE AFFIRMATIVE TESTIMONY FROM NIXON THAT JACKSON TOLD THE CO-DEFENDANTS THEY WOULD TAKE CARE OF THE VICTIMS BY INJECTING THEM WITH A SHOT OF MEDICINE. THAT --

>> THAT WAS EARLY ON.

>> ISN'T THAT A WONDERFUL WAY TO GO, BUT IT CERTAINLY BEATS BEING BURIED ALIVE.

SO WHAT IS THE EVIDENCE OF, OF THIS VICARIOUS LIABILITY?

>> OKAY.

WELL, THE IDEA, AND THAT'S -- NIXON IS SAYING AT SOME POINT IN TIME THERE'S A DISCUSSION BY THE FOUR OF THEM ABOUT USING -- THIS IS NIXON -- ABOUT THAT JACKSON WAS GOING TO INJECT THEM. THAT WAS JUST SOMETHING THAT WAS SAID IN PASSING.

IT DOESN'T SOUND LIKE ANYTHING NIXON -- NIXON NEVER RATIFIES AND SAYS THAT'S THE WAY IT'S GOING TO BE DONE, WE'RE GOING TO TAKE THEM OUT THERE.

THAT KIND OF DISCUSSION WAS NOT ARTICULATED BY NIXON.

WE KNOW THERE WERE

DISCUSSIONS --

>> I GUESS THE OTHER PART IS
THERE DOESN'T HAVE TO BE
EVIDENCE UNLESS I'LL GO BACK AND
READ THE EXACT LANGUAGE OF OUR
CASES THAT, AGAIN, THE JUDGE
DOESN'T ANALYZE IT.

YOU KNOW, WE'RE GOING BACK TO
HIS FINDING OF HAC WITHOUT ANY
DISCUSSION, AND THE JURY FINDING
IT OUT, YOU KNOW, THE JURY
INSTRUCTION DOESN'T TALK ABOUT
VICARIOUS.

THAT WE HAVE EVIDENCE -- USUALLY
YOU WOULD BE SAYING THERE'S
COMPETENT, SUBSTANTIAL EVIDENCE
TO SUPPORT THE FINDING.

IF THE JUDGE HAD SAID SHE KNEW
IT BECAUSE --

>> RIGHT.

>> -- WE'D THEN LOOK AND SAY,
OKAY, IS THERE OR ISN'T THERE?
BUT I'M TRYING TO LOOK AND SEE
WHERE IS THE EVIDENCE FOR THE
JUDGE TO FIND IT?

IT DOESN'T LOOK LIKE HE
CONSIDERED THE ISSUE OF
VICARIOUS AND THEN MADE THAT
DECISION.

THAT'S THE PROBLEM I'M HAVING.

>> I THINK HOW HE GETS TO THAT
IS HOW HE'S TALKING ABOUT HOW
THE CRIME OCCURRED.

WHAT WE HAVE TO LOOK AT IS WHAT
DID SHE KNOW?

SHE WAS PRESENT WHEN THE GRAVE
WAS DUG --

>> I'M ASKING YOU THE TRIAL
JUDGE.

THE TRIAL JUDGE DIDN'T MAKE
FINDINGS.

AS I POINTED OUT THE TRIAL JUDGE
AT THE BEGINNING OF THE
SENTENCING ORDER SAYS, THEY'RE
ALL RUNNING TOGETHER, SO I DON'T
KNOW IF THIS IS EVIDENCE FROM
THIS CASE OR THE OTHER CASE AND
THEN DOESN'T ASSIGN WEIGHT TO
ANY OF THE AGGRAVATORS.

>> I AGREE, BUT I'M JUST TRYING
TO SUGGEST WHAT THE EVIDENCE IS
THAT HE KNEW.

HE WAS SAYING, OKAY, I'M TYING
ALL THE DOTS TOGETHER.

HE SAID THE NATURE OF THIS CRIME
JUSTIFIES THIS AGGRAVATING
FACTOR.

WHAT HE KNEW AND WHAT THE JURY
KNEW WAS THAT, A, SHE WAS
INVOLVED IN THE DIGGING OF THE
GRAVE.

SHE ALSO WAS INVOLVED IN
PURCHASING AND FACILITATING --
GETTING, PURCHASING THE GLOVES
AND THE TAPE THAT WAS USED.

THERE WAS ALSO SOME SARAN WRAP
THAT WAS PURCHASED THAT WAS
APPARENTLY NOT USED.

WHAT THAT WAS FOR, WE KNOW NOT,
BUT IT WAS A BIG ROLL OF SARAN
WRAP.

WHO KNOWS WHAT -- THAT CERTAINLY WOULD NOT IF IT WAS PART OF THE CRIMINAL ENDEAVOR TO KILL, GOING TO BE PART OF SOMEBODY INJECTING SOMETHING.

SHE KNOWS AS THEY'RE GOING OUT THERE THAT THE SUMNERS ARE IN THE TRUNK OF THE CAR BOUND UP, AND SHE KNOWS, AND SHE DOES NOTHING ABOUT ANY OF THAT.

SHE KNOWS THAT THEY'RE DRIVING OUT TO A REMOTE LOCATION WHERE THERE'S BEEN A GRAVE DUG OR A BIG HOLE DUG AND THAT THEY DON'T HAVE ANYTHING WITH THEM THAT THEY'RE GOING TO BURY IN THERE EXCEPT THAT THE TWO BODIES -- THE VICTIMS -- ARE IN THE TRUNK OF THEIR LINCOLN, AND THEY'RE GOING OUT THERE.

AND SHE ALSO KNOWS AND THE JURY KNOWS AND THE JUDGE KNOWS IS THAT WHEN JACKSON LEAVES THAT AREA, THE BODIES ARE LEFT THERE, AND THEY'RE NOT COMING BACK OUT. AND THEY HAVE THE SHOVELS THERE, AND THEY LEFT THE SHOVELS THERE.

>> BUT ISN'T ALL OF THAT REALLY SUSCEPTIBLE TO THE NOTION THAT WE'RE GOING TO INJECT THESE PEOPLE WITH THIS MEDICINE AND KILL THEM OR EVEN HIT THEM OVER THE HEAD WITH THE SHOVEL OR, EVEN THOUGH THERE'S NO EVIDENCE OF THAT, AND THEN PUT THE BODIES IN THE GRAVE?

WE ARE FOCUSING ON DID THIS
WOMAN HAVE ANY NOTION THAT THE
MANNER OF THIS DEATH WAS GOING
TO BE PUTTING THESE PEOPLE IN
THIS HOLE ALIVE AND COVERING
THEM WITH THIS DIRT?

>> I THINK THE ANSWER IS, NO,
BUT I'M SUGGESTING TO YOU THAT
OMELUS AND PEREZ DON'T REQUIRE
THAT IT HAS TO BE THE SPECIFIC
EVENT.

IT HAS TO BE AN IDEA OF HOW IT'S
GOING TO HAPPEN.

IF YOU RECALL IN THE WILLIAMS
CASE, I THINK IT'S WILLIAMS, IT
WAS A CASE THAT I HANDLED MANY
YEARS AGO.

IT'S AN OVERRIDE CASE WHERE ONE
OF THE -- HE WAS NOT THE
MURDERER.

HE WAS ACTUALLY THE BIG
POOPA.

THE MIAMI BOYS CASE, IN THAT
CASE THE ARGUMENT WAS THERE HE
SAID I WANT YOU TO GET RID OF
THEM. THEY'RE TAKING MY MONEY.
I WANT YOU TO GET RID OF THEM.
THERE WAS A STRONG ARGUMENT TO
BE MADE, THE PAINFUL DEATH THEY
INCURRED WAS GOING TO BE THE
KIND OF DEATH THAT WAS
CONTEMPLATED BY HIS REMARKS,
YOU'RE TO ELIMINATE THEM.
THAT WAS CLOSE TO THE SAME KIND
OF THING.

I DON'T THINK ANY OF YOUR CASES

SPECIFICALLY SAY THEY HAVE TO KNOW ABSOLUTELY THAT THEY'RE GOING TO PUT TWO PEOPLE IN THE GRAVE.

THEY WILL HAVE ALL THIS DIRT ON THEIR CHEST.

THEY'RE GOING TO GET THE PIN NUMBERS AND TORTURE THEM FOR THE PIN NUMBERS.

INSTEAD OF LEAVING THEM THERE FOR THE ANTS TO GET, THEY WILL DIG DIRT AND COVER THEIR HEAD AND HAVE THEM SUFFOCATE TO DEATH.

I DON'T THINK THAT IS WHAT IS REQUIRED.

>> BUT TO THE EXTENT, DON'T YOU HAVE TO READ OUR CASES AS SAYING THAT THE DEFENDANT IN QUESTION HAS TO HAVE KNOWLEDGE OF THE PARTICULAR CIRCUMSTANCE, THAT THE PARTICULAR CIRCUMSTANCE IS GOING TO OCCUR WHICH IS THE CIRCUMSTANCE THAT MAKES IT HAC?

>> THAT IS THEY'RE GOING TO PUT THEM, GOING TO BE PUT IN THESE HOLES.

WHETHER THEY ARE ALIVE GOING INTO THE HOLE OR --

>> BUT IF THEY'RE PUT INTO THE HOLE DEAD, THAT IS NOT NECESSARILY HAC.

DEPENDS WHAT HAPPENED BEFORE.

>> RIGHT.

>> WHAT HAPPENS AFTER THEY'RE

DEAD DOESN'T EFFECT WHETHER
THERE IS HAC.

>> ABSOLUTELY.

>> WHAT HAPPENS, IT IS THE
EXPERIENCE THAT THESE VICTIMS
ARE SUFFERING, AS IN THE PERIOD
LEADING UP TO THE THEIR DEATH.

>> RIGHT.

>> AND IF THIS IS OBVIOUSLY THE
BURYING ALIVE IS A HORRENDOUS
EXPERIENCE WHICH EASILY FALLS
WITHIN THE HAC.

I THINK CONCEIVABLY PUTTING
THEM IN THE TRUNK IN
CIRCUMSTANCES WHERE THEY HAVE
TO THINK ABOUT THEIR FATE AS
THIS LITTLE CARAVAN ITSELF
COULD CONSTITUTE HAC AS WELL.
BUT, TO THE EXTENT THAT THE
DEFENDANT HAS TO KNOW,
ACCORDING TO OUR CASES, OF HOW
THE MURDER WOULD BE
ACCOMPLISHED.

>> RIGHT.

>> AND I THINK THAT HAS TO BE
UNDERSTOOD AS THE PARTICULAR
MANNER IN WHICH THE DEATH IS
GOING TO BE CAUSED, I DON'T SEE
HOW WE CAN SAY THAT THAT EXISTS
HERE.

>> WHAT, AGAIN, I UNDERSTAND
WHAT YOU'RE SAYING AND I
UNDERSTAND WHAT THE CASES SAY.
I DON'T THINK WE'VE HAD A CASE
RIGHT ON POINT WITH REGARD TO
THIS KIND OF A CIRCUMSTANCE

WHERE IN FACT THE SUMNERS WERE
BROUGHT OUT THERE.

THEY'RE BEING TORTURED.

DIRT GONE UP TO THEIR CHEST.

THEY'RE TORTURED FOR THE PIN
NUMBERS AND THEN THEY ARE
KILLED.

WHETHER THEY LEVELED SHOVEL ON
THEIR HEADS OR BURIED ALIVE
THAT IS THE SAME THING.

>> I THINK WE'RE GOING BACK
AROUND IN A CIRCLE BECAUSE IF
THE JUDGE MADE THE FINDINGS
THAT WE HAD ASKED JUDGES TO
MAKE IN PEREZ, AND THESE
ARGUMENTS WERE MADE BEFORE THE
JUDGE AND THEN WE TRY TO FIGURE
OUT IF THERE IS COMPETENT
SUBSTANTIAL EVIDENCE ONE WAY OR
ANOTHER.

BUT RIGHT NOW IT IS, THAT'S
WHY, I WILL LOOK AT CASES AS TO
WHETHER FIRST, WHETHER THE
JUDGE COULD STILL CONSIDER THAT
ON, JUST BEFORE THE JUDGE AT
THE SENTENCING ORDER OR WHETHER
IT NEEDS TO GO BACK FOR WHOLE
RESENTENCING OR WHETHER IT IS
HARMLESS BEYOND A REASONABLE
DOUBT.

THE PROBLEM YOU'RE HAVING HERE,
TO ME AT LEAST, WITHOUT THIS
BEING, IN A PROPER MODE FOR
THIS COURT TO EVALUATE.

WE'RE ENGAGING IN A LOT OF
SPECULATION AND FACT-FINDING,

AS TO WHETHER SHE KNEW THEY WERE GOING TO BE TAKEN ALIVE, TORTURED FOR THE PIN NUMBERS. YOU'RE SAYING YEAH, THINK SHE WOULD HAVE KNOWN THAT, AND SO WE'RE MAKING THIS UP AS WE GO. FOR US TO TRY TO BE THE FACT-FINDER ON THIS ONE, WE REALLY NEED THE JUDGE AND JURY TO BE THE FACT-FINDER.

>> ONLY THING I SUGGEST TO YOU, THAT IS IF IN FACT THE COURT FINDS THERE IS INSUFFICIENT BASIS UPON WHICH TO FIND HAC IN THIS CASE, THE FACT JURY WAS INSTRUCTED, WHETHER THERE IS SUFFICIENT EVIDENCE, IT IS NOT THAT I HAVE TO FIND IT, THAT YOU HAVE SUFFICIENT EVIDENCE. JURY INSTRUCTION DOES NOT INFECT THE JURY WITH REGARD TO THE APPROPRIATENESS OF THE INSTRUCTIONS TO BE GIVEN.

ULTIMATELY IF THE AGGRAVATING FACTOR IS FOUND NOT SUFFICIENTLY PROVEN DOESN'T MEAN IT NEGATES THE WHOLE PROCESS.

SECOND OF ALL, IF YOU FIND --

>> DON'T WE ACTUALLY NEED TO REVISE THE JURY INSTRUCTION TO TAKE INTO ACCOUNT WHAT WE'VE BEEN JUST TALKING ABOUT?

>> I'M ON THE JURY INSTRUCTION COMMITTEE.

SECOND PART OF THAT IS, THAT IF

IN FACT YOU FIND THERE IS
INSUFFICIENT EVIDENCE WHICH
HAPPENS ALL THE TIME IN A
CAPITAL CASES WHERE THERE MAY
BE AGGRAVATING FACTOR THAT MAY
NOT BE FOUND TO BE PROVEN
BEYOND A REASONABLE DOUBT BY
THIS COURT, A HARMLESS ERROR
ANALYSIS CAN BE MADE.

IN THIS PARTICULAR CASE BECAUSE
OF THE OVERWHELMING EVIDENCE OF
STATUTORY AGGRAVATING FACTOR.
SIX OF THEM UNASAILED THIS CASE
CERTAINLY CALLS FOR THE DEATH
PENALTY.

THANK YOU.

>> THANK YOU BOTH FOR YOUR
ARGUMENTS.

THE COURT WILL TAKE ITS MORNING
RECESS FOR 10 MINUTES.

>> PLEASE RISE.

SUPREME COURT IS NOW IN RECESS.