GOOD MORNING, LADIES AND GENTLEMEN. WELCOME TO THE FLORIDA SUPREME COURT, THE FIRST CASE ON THE CALENDAR THIS MORNING IS MICHAEL STOLL VERSUS THE STATE OF FLORIDA. MR. BECKER. YOU MAY PROCEED.

NICE TO SEE YOU. HAPPY NEW YEAR.

THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS MICHAEL BECKER. I AM ASSISTANT PUBLIC DEFENDER IN DAYTONA BEACH AND I REPRESENT MICHAEL STOLL IN THE APPEAL OF HIS CONVICTION FOR THE FIRST-DEGREE MURDER OF HIS WIFE, JULIE, AND THE DEATH SENTENCE RECEIVED BY THE JUDGE. THE JURY RECOMMENDED DEATH BY A 7-5 VOTE AND THE JUDGE FOLLOWED IT, FINDING TWO AGGRAVATING FACTORS AND VERY LITTLE ON MITIGATION. ON APPEAL, APPELLANT RAISED SIX ISSUES, WHICH WE WILL ADDRESS IN ORDER. RATHER THAN TAKE UP TIME WITH THE ADDRESS OF THE FACTS, I WILL TAKE UP THE FACTS OF THE ISSUES, UNLESS THIS COURT HAS ANY QUESTIONS CONCERNING THE FACTS. THE FIRST ISSUE ON APPEAL IS THAT THE TRIAL COURT ERRED IN PRESENTING THE TESTIMONY OF DANA MART ANYONE REBUTTAL. DANA MARTIN WAS A FRIEND OF JULIE STOLL, THE VICTIM. THE STATE ATTEMPTED TO PRESENT HER TESTIMONY DURING THE CASE-IN-CHIEF, BUT THE TRIAL COURT RULED THAT IT WAS IMPROPER THERE AFTER, AND SO HE DID NOT LET THE STATE PRESENT IT AGAIN. THEREAFTER THE STATE TRIED TO GET IT DURING THE REBUTTAL STAGE AND THE JUDGE REVERSED HIS DECISION AND RULED THAT IT WAS PROPER REBUTTAL. BRIEFLY WHAT SHE TESTIFIED TO WAS THAT SHE WAS A FRIEND OF JULIE STOLL FOR MANY YEARS AND THAT THREE MONTHS PRIOR TO THE DATE OF THE MURE, WHICH WAS -- OF THE MURDER, WHICH WAS IN NOVEMBER, JULIE CAME TO HER HOUSE AND WAS VERY UPSET AND CRYING AND SAID THAT SHE AND MICHAEL HAD BEEN UP ALL NIGHT, FIGHTING, AND THAT SHE WAS AFRAID, AND THAT IF ANYTHING HAPPENED TO HER, THAT MISS MARTIN SHOULD GO TO THE POLICE AND TELL HER THAT MICHAEL DID IT. SHE, ALSO, TOLD -- JULIE, ALSO, TOLD MARTIN THAT APPELLANT HAD THREATENED TO KILL HER ON MORE THAN ONE OCCASION, AND SHE KNEW THAT EVENTUALLY HE WOULD DO IT. SHE, ALSO, WAS PERMITTED TO TESTIFY THAT SHE SAW BRUISES ON JULIE AT SOME POINT MORE THAN FOUR MONTHS BEFORE THIS, AND THAT JULIE HAD TOLD HER THAT MICHAEL WAS RESPONSIBLE FOR CAUSING THE BRUISES. WE CONTEND, ON APPEAL THAT, THIS EVIDENCE WAS SIMPLY IN ADMISSIBLE FOR ANY REASON.

WHAT DID -- WHAT WAS THE TESTIMONY THAT ALLEGEDLY ALLOWED IT -- THAT HAPPENED THAT ALLOWED IT TO COME OUT ON REBUTTAL? WHAT WAS IT IN REBUTTAL TO?

I AM UNCLEAR WITH THAT, AND I THINK OSTENSIBLY, AND WHAT THE STATE HAS ARGUED, THAT IT WAS USED TO REBUT THE PRETRIAL STATEMENT OF APPELLANT THAT WAS ADMITTED INTO EVIDENCE BY THE STATE AND SOME OF HIS TRIAL TESTIMONY, SPECIFICALLY THAT HE AND JULIE HAD A GOOD MARRIAGE. HOWEVER, WE CONTEND THAT IT REBUTS NEITHER OF THOSE. FIRST, AS TO THE CONTENTION OF THE PRETRIAL STATEMENT, APPELLANT GAVE FOUR STATEMENTS THE DAY THAT HE WAS ARRESTED. AT TRIAL, APPELLANT -- AND IN THE THIRD AND FOURTH STATEMENT, APPELLANT SPECIFICALLY REPUTED THE FIRST TWO STATEMENTS. HE SAID THEY WERE NOT TRUE. YET THE STATE -- THE STATE CHOSE TO ADMIT THOSE. NOW, OUR CONTENTION IS THE STATE CAN'T CHOOSE TO ADMIT SOMETHING AND THEN BRING IN EVIDENCE TO REBUT THOSE STATEMENTS, ESPECIALLY WHEN THEY HAVE BEEN REPUDIATED BY THE PERSON WHO SAID THEM.

THE STATEMENTS WERE ADMITTED BY THE STATE, IN ITS CASE-IN-CHIEF?

YES.

AND AT THAT POINT, WHEN THE STATE TRIED TO PUT ON DANA MARTIN'S TESTIMONY, THE JUDGE, AT THAT POINT, THAT IS AT THE END OF THE STATE'S CASE, RULED THAT IT WAS IN ADMISSIBLE. CORRECT?

THAT'S CORRECT.

SO YOUR CONTENTION IS THAT THE ONLY STATEMENT THAT THE STATE IS NOW SAYING IT REBUS IS THE -- REBUTS IS THE STATEMENT THAT THEY HAD A HAPPY MARRIAGE?

WELL, NO, ON APPEAL, THE STATE IS STILL ARGUING THAT IT REBUTS THAT STATEMENT, THE FIRST PRETRIAL.

WE AGREE WITH YOU THAT STATE CAN'T PUT SOMETHING ON AND THEN WE RE BUTT IT, AS TO WHAT THE DEFENDANT CONTENDED, WHAT HE TESTIFIED TO IN DEFENSE.

AGAIN, WHAT HE TESTIFIED TO WAS THAT HE THOUGHT THAT HE AND JULIE HAD A GOOD MARRIAGE.

WHAT ABOUT THE STATE CONTENDED THAT IT WAS ADMISSIBLE TO REBUT THE CONTENTION THAT SOMEONE ELSE SOLICITED MURDER?

WELL, AGAIN, THAT WAS FROM THE PRIOR STATEMENTS.

THAT WAS FROM THE PRIOR STATEMENTS?

RIGHT. RIGHT. THAT WERE REPUDIATEED.

HE DIDN'T TESTIFY TO THAT IN DEFENSE OF THIS?

NO. NO. HE DID NOT. ACTUALLY I BELIEVE IT WAS THE INMATE, THE JAIL HOUSE INMATE WHO TESTIFIED TO THAT.

AT THE TIME OF THESE STATEMENTS THAT WERE TENDERED TO BE ADMITTED, WHAT WAS THE -- WHAT WAS THE PROCEDURE? DID THE -- DID THEY PROFFER THE TESTIMONY AND THEN --

YES. IN THE CASE-IN-CHIEF, IT HAD BEEN PROFFERED, AND THE JUDGE RULED THAT IT WAS IN ADMISSIBLE.

OKAY. AND THEN, SO, IN REBUTTAL, THE STATE ATTEMPTED TO GET THIS TESTIMONY IN, AND WHAT WAS THEIR REASON? WHAT WAS THEIR STATED REASON FOR DOING IT?

AGAIN, THEY SAID TO REBUT EVIDENCE THAT HAD COME OUT, BUT THE ONLY POSSIBLE EVIDENCE THAT HAD COME OUT WAS THAT APPELLANT TESTIFIED THAT HE THOUGHT THAT HE AND JULIE HAD A GOOD MARRIAGE.

BUT, REALLY, THE CONTENTION, THE ARGUMENT, CENTERED AROUND A CASE OUT OF THE FIFTH DISTRICT, CALLED BRADFORD. ISN'T THAT RIGHT?

I BELIEVE SO. I DON'T HAVE --

BRADFORD HAD SET UP A SITUATION IN WHICH THERE WERE -- WAS AN ISSUE IN THAT CASE THAT, REALLY, CITED A COUPLE OF CASES OUT OF THIS COURT, PEED AND KENNEDY, AND SET UP A SITUATION IN WHICH THE STATE OF MIND OF THE VICTIM, AS TO WHETHER THE VICTIM WAS IN FEAR OR NOT, MADE IT AN EXCEPTION TO THE HEARSAY RULE ON REBUTTAL.

EXACTLY. EXACTLY.

NOW, HERE YOU HAVE A SITUATION IN WHICH THIS DEFENDANT TESTIFIED -- IN FACT YOU HAVE THIS SITUATION IN A LOT OF DOMESTIC VIOLENCE SITUATIONS, WHERE THE VICTIM GOES AND TELLS SOMEONE, YOU KNOW, I AM SCARED TO DEATH OF MY PARTNER. AND THEREFORE, REALLY, IT COMES DOWN TO WHETHER YOU ARE GETTING THIS TESTIMONY IN FOR THE PROOF OF THE FACT THAT THE DEFENDANT COMMITTED THE CRIME OR WHETHER IT IS GOING TO THE EXISTENCE OF WHETHER THE DEFENDANT WAS IN FEAR OR --

THE VICTIM.

-- THE VICTIM WAS IN FEAR OR SOME OTHER ISSUE. WOULDN'T YOU AGREE WITH THAT?

YES. I WOULD AGREE WITH THAT.

NOW, WHY ISN'T THE STATEMENT OF THE DEFENDANT, IN HIS DIRECT TESTIMONY, THAT YOU KNOW, WE HAD -- I THOUGHT WE HAD A GREAT RELATIONSHIP. WHY WOULDN'T IT REBUT THAT?

-- TO SAY, NO, THAT SHE TOLD HER BEST FRIEND, SHORTLY BEFORE THIS OCCURRED, THAT HE WAS BEATING ME UP!

ONE, OKAY, IT IS NOT BECAUSE THE DEFENSE AT TRIAL, AND THE EVIDENCE IS DEFT DIDN'T KILL JULIE STOLL. CHRIS STEWART KILLED JULIE STOLL. I MEAN, THAT IS UNCONTROVERTED, THAT CHRIS STEWART IS THE ONE WHO ACTUALLY KILLED JULIE STOLL, SO THIS ISN'T A SITUATION WHERE IT IS NECESSARY TO PROVE THAT THE DEFENDANT KILLED JULIE STOLL, BECAUSE THAT DIDN'T HAPPEN. NOW, WHETHER OR NOT HE WAS INVOLVED IN IT, THAT IS A DIFFERENT QUESTION.

WHY IS THAT A DIFFERENT QUESTION?

WELL, BECAUSE IDENTITY OF WHO KILLED HER WASN'T IN QUESTION HERE.

BUT THERE IS A QUESTION HERE AS TO HIS INVOLVEMENT IN IT. HIS INSTIGATION OF THE MURDER, ISN'T IT?

BUT THE -- THAT'S TRUE. BUT THE TESTIMONY OF DANA MARTIN DIDN'T, IN NO WAY, WENT TO THAT.

WELL, ISN'T IT, TO FOLLOW WITH JUSTICE WELLS' QUESTION, I MEAN, WOULDN'T IT BE PERTINENT AS TO WHETHER OR NOT, IF THEY DID NOT HAVE A GOOD RELATIONSHIP, AND HE WAS BEATING UP ON HER, WAS THAT SOME REASON FOR HIM TO HAVE GOTTEN STEWART TO KILL HER?

I DON'T THINK THAT THAT NECESSARILY FOLLOWS.

IT MAY NOT NECESSARILY FOLLOW, BUT ISN'T THAT SOME EVIDENCE THAT WOULD SUPPORT THAT THERE PI?

NO. I DON'T THINK IT IS. IN THIS COURT, IN ITS KENNEDY DECISION, IT IS PRETTY SPECIFIC ABOUT THE SITUATIONS WHERE THIS TYPE OF EVIDENCE CAN COME IN. AND IT COMES IN TO REBUT WHERE A CLAIM BY THE DEFENDANT OF SELF-DEFENSE OR A CLAIM BY THE DEFENDANT THAT THE DEATH WAS ACCIDENTAL. NEITHER ONE OF THOSE WAS CLAIMED. IT IS, ALSO, ADMISSIBLE TO CLAIM OR TO REBUT A CLAIM OF THE DEFENDANT THAT THE VICTIM COMMITTED SUICIDE. THAT CERTAINLY WASN'T THE CASE HERE. IT DOESN'T FIT UNDER KENNEDY.

I AM NOT CERTAIN THAT I UNDERSTAND YOUR ARGUMENT ON THIS ISSUE.

OKAY.

WHAT WAS THE LEGAL OBJECTION THAT WAS MADE IN THE COURT BELOW, WHEN THESE STATEMENTS WERE OFFERED?

THAT IT WAS IMPERFECT MIBL HEARSAY.

-- THAT IT WAS IMPERFECT MISSIBLE HEARSAY -- THAT IT WAS IMPERMISSIBLE HEARSAY.

WHAT YOU STARTED OUT WAS THAT IT WASN'T REBUTTING ANYTHING. THAT IS AN ENTIRELY DIFFERENT ISSUE OF WHETHER IT IS HEARSAY AND WHETHER OR NOT THERE IS SOME EXCEPTION TO THE HEARSAY RULE THAT WOULD PERMIT IT IN. SO YOU NEED TO HELP ME A LITTLE BIT. LET ME FINISH FOR A MINUTE. IF THE DEFENDANT TESTIFIES TO THE JURY THAT MY WIFE AND I HAD A FINE RELATIONSHIP. THERE WAS NO ANIMOSITY, NO TROUBLES TROUBLES -- NO TROUBLES BETWEEN US WHATEVER, AND HE WANTED THE JURY TO BELIEVE THAT AS PART OF HIS CLAIM OF INNOCENCE, WOULDN'T IT BE RELEVANT AND PROPER REBUTTAL FOR A STATEMENT LIKE THAT FOR EVIDENCE TO COME IN THAT, NO, HE DID NOT HAVE A GOOD RELATIONSHIP WITH HIS WIFE, AND AS A MATTER OF FACT THERE WAS GREAT ANIMOSITY BETWEEN THEM? I AM JUST TALKING ABOUT RELEVANCY IN REBUTTAL. WOULDN'T THAT BE, IF THAT IS WHAT HE IS TRYING TO GET THE JURY TO ACCEPT AS A BASIS --

IF THAT IS WHAT HE SAID, BUT HE DIDN'T SAY THAT.

WHAT DID HE SAY?

HE ACKNOWLEDGED, DURING HIS TESTIMONY, THAT THEY DID HAVE PROBLEMS. HE ACKNOWLEDGED THAT THERE WAS THE INCIDENT, THE BATTERY INCIDENT. THAT CAME OUT.

WHAT DID HE SAY ABOUT --

HE SAID THAT HE THOUGHT THAT THEY HAD A GOOD RELATIONSHIP.

WELL, IT IS HARDLY A GOOD RELATIONSHIP, IF WHAT THE WIFE REPORTED TO THE FRIEND IS ACCURATE, IS IT?

HOW DO WE KNOW IT IS ACCURATE?

NOW WE ARE COMING TO SOMETHING DIFFERENT.

THAT IS THE HEARSAY PART OF IT.

THAT IS THE WHOLE POINT. YOU HAVE BEEN ASSERTING HERE THAT IT IS NOT REBUTTAL, THAT IT WASN'T REBUTTING ANYTHING.

IT IS IMPROPER REBUTTAL.

NOW, LET'S TALK ABOUT, THEN, THE HEARSAY.

TO BE ADMISSIBLE UNDER THE HEARSAY, IT WOULD HAVE TO FIT UNDER THE EXCEPTION. IT IS CLEARLY HEARSAY. I DON'T THINK THERE IS ANY QUESTION.

WHAT IS THE EXCEPTION?

THE STATE IS ARGUING THAT IT FITS UNDER THE EXCITED UTTERANCE EXCEPTION OR THE STATE OF MIND EXCEPTION. FIRST OF ALL, UNDER THE EXCITED --

THE STATE OF MIND, DID THE STATE CLAIM --

APPARENTLY THEY ARE NOT CLAIMING THAT THE VICTIM'S STATE OF MIND WAS AN ISSUE HERE, AND INDEED IT WASN'T. AT LEAST I DIDN'T INTERPRET THE STATE'S ARGUMENT TO BE ASSUMING THE STATE OF MIND OF THE VICTIM WAS. SOMEHOW THEY ARE SAYING IT REFLECTS THE STATE OF MIND OF THE DEFENDANT. BUT THERE HIS CASE LAW OUT OF THIS COURT AND 803-3, THAT SHOW NOT THE THIRD PARTY'S STATE OF MIND, AND I THINK THAT IS CLEAR UNDER THE EVIDENCE CODE.

SO YOU ARE SAYING THAT THERE IS NO EXCEPTION AND THE HEARSAY RULE, AS SET OUT IN THE EVIDENCE CODE, THAT WOULD PERMIT THE ADMISSION.

NO. THAT IS OUR POSITION. YES. AS TO THE EXCITED UTTERANCE, THIS WAS NEVER ARGUED BELOW. THE JUDGE NEVER MADE A RULING THAT THEY WERE ADMISSIBLE UNDER EXCITED UTTERANCES, SO THERE HIS CASE LAW FROM THE FIFTH, YOUNG VERSUS STATE AND STATE VERSUS ALLEN, THAT SAYS THEY ARE NOT -- THEY CAN'T ARGUE FOR THE FIRST TIME, ON APPEAL, THAT THESE ARE EXCITED UTTERANCES, BECAUSE CERTAIN FACTUAL DETERMINATIONS HAVE TO BE MADE, BEFORE THAT CAN COME IN, AND, AGAIN, THIS WAS NEVER DONE BELOW.

TO SHOW THE STATE OF MIND OF THE VICTIM, WOULD IT MAKE ANY DIFFERENCE IN YOUR ARGUMENT?

IF, SOMEHOW, THE STATE OF MIND OF THE VICTIM WAS RELEVANT, PERHAPS. I DON'T SEE HAD, IN THIS PARTICULAR CASE, THE STATE OF MIND OF THE VICTIM WAS RELEVANT AT ALL.

DID THE STATE AFTERWARDS, IN ARGUMENT OR OTHERWISE TO THE JURY, ARGUE THIS TO THE JURY? AS EVIDENCE OF THE DEFENDANT'S GUILT?

I BELIEVE THERE WAS MENTION IN THE CLOSING ARGUMENT TO THAT EFFECT, THAT THIS IS SOMETHING THEY NEED TO CONSIDER. I WON'T GO AS FAR AS TO SAY THEY EMPHASIZE THIS OVER OTHER PIECES OF EVIDENCE. BUT, YES, IT WAS ARGUED DURING THE CLOSING ARGUMENT.

HOW WAS IT ARGUED? WAS IT ARGUED THAT, IN TRUTH AND FACT, THEY HAD A BAD RELATIONSHIP, AS IS EVIDENCED BY --.

YES. THEY DID ARGUE THAT. YES, THEY DID ARGUE THAT.

SO THEY DID ARGUE THE TRUTH OF THOSE STATEMENTS. IS THAT WHAT YOU ARE SAYING?

YES. BECAUSE THEY SAID THAT PROVES THAT HE WAS WRONG. IS WHAT THEY WERE SAYING. SO OUR CONTENTION IS, AGAIN, THAT WHILE IT -- WE ARE ARGUING IMPROPER REBUTTAL, IT GOES BACK TO THE HEARSAY OBJECTION. IT IS IMPROPER REBUTTAL, BECAUSE IT IS STILL HEARSAY, AND IT HAS TO BE ADMISSIBLE UNDER SOME EXCEPTION FOR IT TO BE PROPER REBUTTAL, TO BE ADMISSIBLE AS REBUTTAL, AND THERE IS JUST SIMPLY NO EXCEPTION THAT IT FITS. THE CASES THAT THE STATE HAS CITED IN THEIR BRIEF, AS I MENTION, INVOLVE CONFIRM STATEMENTS BY THE DEFENDANT.

YOU HAVE GOT A NUMBER OF OTHER ISSUES.

THE SECOND ISSUE THAT I WOULD LIKE TO ADDRESS IS THAT THE TRIAL COURT --

I KNOW THAT YOU WERE GOING TO GO IN ORDER, BUT YOU HAVE TAKEN A LOT OF TIME IN THE FIRST POINT, AND I AM INTERESTED IN YOUR TALKING ABOUT POINT FOUR, THE PRIOR STATEMENT OF THE VICTIM, BECAUSE I THINK IT IS POINT FOUR.

THE POLICE REPORT?

THE POLICE REPORT PARTICULARLY THE STATEMENT OF THE VICTIM ON THE INCIDENT REPORT THAT WAS ADMITTED INTO EVIDENCE, AND WHETHER THAT WAS PROPERLY PRESERVED.

OKAY. EXCUSE ME. THE -- PRIOR TO TRIAL, THE STATE ASKED THE JUDGE TO TAKE JUDICIAL NOTICE OF THE COURT FILE IN THE BATTERY CONVICTION. THE BATTERY CASE OF THE DEFENDANT AGAINST HIS WIFE. THERE IS AN OBJECTION TO THIS THAT THIS IS HEARSAY. THE TRIAL COURT OVERRULED THIS AND SAID HE WOULD TAKE JUDICIAL NOTICE OF NOT THE ENTIRE CASE FILE, BUT THE INCIDENT REPORT THAT WAS WRITTEN BY JULIE, AND THE PLEA THAT WAS ENTERED OF NO CONTEST. TO THE OFFENSE. THERE AFTER, WHEN, I BELIEVE IT WAS JULIE'S MOTHER WAS TESTIFYING THE STATE WANTED HER --.

AT THAT POINT, AT THE BEGINNING OF TRIAL, DID THE COURT ACTUALLY, THEN, ADMIT THE EVIDENCE, TAKE JUDICIAL NOTICE AND SAY I AM GOING TO -- I AM NOT GOING TO ALLOW THE WHOLE FILE IN, BUT I AM GOING TO ALLOW HER STATEMENT IN?

HE TOOK JUDICIAL NOTICE AT THAT POINT. IT WASN'T FORMALLY TENDERED INTO HE HAVE, BUT HE DID TAKE JUDO-INTO EVIDENCE, BUT HE DID TAKE -- IT WASN'T FORMALLY TAKEN INTO EVIDENCE, BUT IT WAS ARGUED AT THAT POINT.

WHAT WAS THE DETERMINATION THEN?

AT THAT POINT IT WAS ADMITTED INTO ARGUMENT.

WHAT WAS THAT POINT?

I DON'T THINK THERE WAS ONE. IT JUST SAID THAT THE COURT CAN TAKE JUDICIAL NOTICE OF COURT FILES, SO I ASSUME THEY WERE ARGUING IT WAS AN EXCEPTION FOR COURT FILES.

THEY TOOK IT UNDER, THEY SAID UNDER 9.203.

JUDICIAL NOTICE OF COURT FILES. THERE WAS NO ARGUMENT THAT IT WAS HEARSAY, BASICALLY, BUT JUST THAT IT WASN'T COVERED UNDER HEARSAY OR HEARSAY IS IRRELEVANT, I GUESS. WHEN JULIE'S MOTHER TESTIFIED, THE STATE WANTED HER TO READ THIS. THIS WAS, AGAIN, OBJECTED TO AND SAID IT WAS HIGHLY PREJUDICIAL, AND THE JUDGE AGREED, AND HE WOULD NOT LET HER TESTIFY.

SO WHAT WOULD BE YOUR POSITION AS TO WHY THE OBJECTION, BASED ON HEARSAY, SHOULD NOT HAVE BEEN RENEWED AT THAT TIME, FOR PRESERVATION?

I BELIEVE, MY READING OF THIS WHOLE THING IS THE JUDGE HAD MADE HIS RULING AND HAD REJECTED THE HEARSAY OBJECTION.

IT WAS ALREADY IN EVIDENCE?

IT WAS NOT FORMALLY IN EVIDENCE, BUT HE HAD ALREADY TAKEN JUDICIAL NOTICE OF IT. IT WAS IN -- OFFICIALLY ASSIGNED AN EVIDENTIARY NUMBER.

WAS IT MADE CLEAR INITIALLY, WHEN IT WAS OFFERED, THAT WHAT WAS BEING OFFERED WAS HER COMPLAINT AND THE NO CONTEST PLEA? THAT THOSE WERE THE TWO THINGS?

YES. THAT WAS CLEAR. I MEAN THE JUDGE MADE THAT VERY SPECIFIC, THAT THEY WERE THE ONLY TWO ITEMS THAT HE WOULD ALLOW IN.

WOULD YOU AGREE CERTAIN PARTS OF THE FILES, WAS IT THE ISSUE OF THIS DOMESTIC

VIOLENCE CHARGE, WAS PART OF THE ISSUE IN THE CASE, BOTH BROUGHT UP BY THE DEFENSE AND THE STATE, THAT CERTAIN PARTS OF THAT FILE OR THE FACT THAT THAT CHARGE HAD OCCURRED WOULD BE ADMISSIBLE? IN OTHER WORDS ARE YOU SAYING THAT THE WHOLE THING SHOULDN'T HAVE COME IN OR JUST STATEMENT THAT JULIE STOLL MADE, HER HANDWRITTEN STATEMENT?

I -- OUR POSITION IS THAT THERE WAS EVIDENCE OF THE INCIDENT THAT CAME UP. THAT CAME IN. THAT WAS GOING FOR COME IN. -- THAT WAS GOING TO COME IN. THE STATE SHOULDN'T HAVE PUT IT IN, BECAUSE THAT WAS INADMISSIBLE HEARSAY.

THE PROSECUTION FOR DOMESTIC ASSAULT AGAINST THE DEFENDANT?

RIGHT. RIGHT. WHAT WE HAVE, HERE, IS YOU HAVE THE BOLLING CASE OUT OF THIS COURT THAT SETS POLICE REPORTS ARE CLEARLY HEARSAY AND DON'T FIT UNDER ANY EXCEPTION TO THE HEARSAY.

WAS THERE ANY ATTEMPT BY THE STATE TO SHOW THIS WAS EXCITED UTTERANCE OR FALL UNDER ANY OTHER EXCEPTION?

NO. THE HEARSAY WAS NOT EVEN ARGUED BY THE STATE. THEY ARGUED ONLY THAT IT COMES IN UNDER THE JUDICIAL NOTICE SITUATION. THE DEFENSE OBJECTION WAS CLEARLY THAT IT WAS HEARSAY. IT CONTAINS A LOT OF FAIRLY IRRELEVANT INFORMATION. IT INCLUDES POSSIBLE THREATS TO HIS CHILDREN, WHICH WERE CLEARLY NOT AND ISSUE IN THIS CASE AT ALL, YET THAT IS CONTAINED IN THIS POLICE STATEMENT. THERE ARE THINGS ABOUT A POSSIBLE GUN THAT HE HAD. THAT WAS NOT AARON EW IN THIS CASE. BUT THAT IS HIGHLY PREJUDICIAL. THIS POLICE REPORT JUST SIMPLY IS FILLED WITH IRRELEVANT AND VERY, VERY PREJUDICIAL INFORMATION. WHEN YOU COUPLE THIS WITH THE TESTIMONY OF DANA MARTIN, THIS IS BEING OFFERED TO SHOW JUST A PROPENSITY ON THE PART OF THE DEFENDANT, HERE, TO COMMIT ACTS OF VIOLENCE, AND YOU KNOW, THE EVIDENCE, AND THE PREJUDICE, IS JUST INCREDIBLE. THIS IS NOT AN OVERWHELMING EVIDENCE CASE. YOU HAVE GOT THE ACTUAL KILLER, CHRIS STEWART, WHO IS THE -- BASICALLY THE SOLE EVIDENCE AGAINST THE DEFENDANT IN THIS CASE. IT BECAME A SWEARING MATCH BETWEEN CHRIS STEWART AND MICHAEL STOLL, SO YOU ARE NOT -- AND YOU HAVE GOT CHRIS STEWART, WHO HAS MOTIVATION TO LIE AND IS AN ADMITTED LIAR AND AN ADMITTED MURDERER, SO THIS IS NOT ONE OF THOSE CASES, I THINK, THAT THIS ERROR IS SUBJECT TO THE HARMLESS ERROR STATUTE OR MAY BE SUBJECT TO AN ANALYSIS, BUT I DON'T THINK THAT YOU CAN ARRIVE AT A CONCLUSION THAT IT WAS HARMLESS BEYOND A REASONABLE DOUBT.

IS THERE A NOTICE OF WILLIAMS RULE EVIDENCE, FIRST FILED, BUT THE STATE ABANDONED THAT. THEY WEREN'T ATTEMPTING TO SHOW THE WILLIAMS RULE.

THAT WAS ABANDONED. THAT WAS NOT PURSUED.

WHAT WAS THE STATE'S ARGUMENT ABOUT WHY THIS SHOULD HAVE COME IN? WHAT WAS IT RELEVANT TO, THEN, BASED ON THE STATE'S --

WELL, AGAIN, THE STATE ARGUES, ON APPEAL, THAT, AGAIN, IT REBUTS TESTIMONY AND --

BUT THIS CAME IN -- THIS STATEMENT CAME IN THIS THE STATE'S CASE.

YES. SO THE ONLY THING THEY COULD REBUT AND WHAT THE STATE ARGUES IS IT REBUTS THE PRETRIAL ARGUMENTS THAT THE STATE, THEMSELVES, ADMITTED, SO CLEARLY YOU CAN'T HAVE REBUTTAL OF SOMETHING THE STATE CHOOSES TO PUT IN. THAT JUST SHOULDN'T BE ALLOWED. BECAUSE THE STATE CAN'T SET UP THE STRAW MAN, AS I MENTIONED IN THE BRIEF, JUST TO KNOCK IT DOWN, BECAUSE THAT IS NOTHING BUT PURE PREJUDICE THERE. I WOULD LIKE TO GO

BACK TO THE SECOND ISSUE, IF I CAN. WELL, LET ME ACTUALLY GO TO THE PROPORTIONALITY ISSUE, IF I CAN. IN THIS CASE, CHRIS STEWART KILLED JULIE STOLL. THERE IS NO DOUBT ABOUT THAT. HE ADMITTED TO IT. THERE SIMPLY IS NO QUESTION. YET HE WAS GIVEN A PLEA OFFER TO PLEA TO SECOND-DEGREE MURDER FOR A TERM OF 50 YEARS, WHICH ALL PARTIES AGREE WILL BE SUBSTANTIALLY LESS THAN 50 YEARS. WHEN EVALUATING THIS, IN THE -- IN HIS ORDER, THE TRIAL COURT ACCORDED THE DEAL THAT CHRIS STEWART, NO WEIGHT. HE SAYS I GIVE IT NO WEIGHT! THAT JUST HIS MIND BOGGLING. HOW CAN YOU HAVE THE ACTUAL MURDERER, WHO IS GIVEN A SWEETHEART DEAL, AND TO THAT BE GIVEN NO WEIGHT IN CONSIDERING THE APPROPRIATE SENTENCE FOR MICHAEL STOLL HERE. THE STATE TRIES TO PAINT MICHAEL STOLL -- CHRIS STEWART AS SOME INCAPACITATED BOY. THAT IS NOT THE SITUATION. CHRIS STEWART HAD BEEN IN THE MILITARY. HE SPENT A YEAR AND-A-HALF IN THE MILITARY, AND THEN HE WAS LESS THAN HONORABLY DISCHARGED. HE WAS OUT ON HIS OWN, AND, YES, HE MAY HAVE HAD A DRINKING PROBLEM, BUT NO SHOWING THAT ALCOHOL PLAYED ANY PART IN THIS MURDER. PHYSICALLY CHRIS STEWART WAS BIGGER THAN MICHAEL STOLL. CHRIS STEWART WAS 6 FOOT 2 AND ABOUT 220 POUNDS. MICHAEL STOLL IS 5 FOOT 10, ABOUT IS 70 POUNDS. SO THE RELATIVE CULPABILITY OF THE PEOPLE HERE, THERE IS, ALSO --

THE RELATIVE CULPABILITY, WASN'T THERE PROOF OFFERED THAT THE JUDGE COULD ACCEPT AND THAT THE JURY COULD ACCEPT THAT IT WAS YOUR CLIENT THAT WANTED HIS WIFE MURDERED, AND THAT STEWART WAS ACTING AT THE INSTANCE OF YOUR CLIENT AND UNDER THE DIRECTION OF YOUR CLIENT? THAT THIS WAS NOT AN INDEPENDENT ACTOR IDEA ON THE PART OF STEWART. WASN'T THERE SUBSTANTIAL PROOF OF THAT?

WELL, THROUGH CHRIS STEWART. HE TESTIFIED THAT HE DID IT BECAUSE MICHAEL ASKED HIM TO DO IT.

THE JUDGE AND THE JURY COULD ACCEPT THAT.

BUT WHEN YOU EVALUATE THAT, YOU NEED TO CONSIDER THERE WAS NO THREAT BY MICHAEL TO CHRIS. THERE WAS NO COERCION. THERE WAS NO OFFER OF FINANCIAL REWARD.

WHAT EVIDENCE WAS THERE THAT STEWART HAD SOME SEPARATE MOTIVATION?

JUSTS IT -- JUST TESTIMONY OF MICHAEL.

WHAT WAS THE SEPARATE MOTIVATION?

THAT HE DIDN'T LIKE THE WAY JULIE WAS TREATING MICHAEL, THAT SHE WAS PLANING TO DIVORCE HIM AND TAKE ALL HIS PROPERTY AND HIS MONEY, AND THAT HE JUST DIDN'T LIKE THE WAY THAT JULIE WAS TREATING HIM.

AND THE JUDGE AND JURY WERE FREE TO DISREGARD THAT, WERE THEY NOT, TO NOT BELIEVE THAT?

THEY CAN DISBELIEVE THAT, BUT WHEN YOU ARE DECIDING THE APPROPRIATE PENALTY HERE, YOU CAN'T DISREGARD THE FACT THAT THE ACTUAL MURDER, MURDERER, THE TRUE KILLER HAS BASICALLY GOTTEN AWAY WITH THIS. YOU KNOW, THE RELATIVE CULPABILITY, FOR A LONG TIME THIS COURT HAS PRIDED THEMSELVES THAT --

SOMEBODY ELSE HIRES SOMEBODY TO DO THE KILLING, YOU USE THE WORD THE TRUE MURDERER, COULDN'T THAT TERM JUST AS WELL BE APPLIED TO THE PERSON THAT CAUSES IT TO HAPPEN? THAT IS THAT HAS SOMETHING -- ACTS THROUGH SOMEONE ELSE?

IF YOU BELIEVE CHRIS STEWART, WHICH, AGAIN, THE ONLY THING THAT MICHAEL DID WAS ASKING. HE DIDN'T HIRE HIM TO DO IT. HE DIDN'T GIVE HIM ANYTHING TO DO IT. ALL CHRIS

STEWART HAD TO DO WAS SAY NO.

I THOUGHT THAT STEWART TESTIFIED THAT THEY ACTED TOGETHER.

WELL --

STEWART DIDN'T TESTIFY THAT THEY FIRST BRUTALIZED HER AND THEN STEWART, IN ESSENCE, JUST FINISHED HER OFF?

NO. ALL THE BLOWS -- ALL THE BLOWS THAT WENT ON AND EVERYTHING THAT WAS DONE, PUTTING THE BAG OVER THE HEAD. CHRIS DID THAT. HE TESTIFIED THAT HE DID THAT. HE SAID MICHAEL BROUGHT THE BAG, WHICH INTERESTINGLY ENOUGH THE BAG WAS NEVER FOUND.

HE DIDN'T TESTIFY THAT MICHAEL PARTICIPATED IN ANY WAY IN ANY OF THE EVENT?

I THINK WENT AND GOT HER. WHEN SHE TRIED TO GET OUT OF THE DOOR, THEY BOTH GOT HER AND BROUGHT HER BACK INTO THE BEDROOM.

DIDN'T HE TELL STEWART HOW TO BREAK THE IN THE CASE OF HIS WIFE? WASN'T HE THERE, WITH STEWART, FOR THE ENTIRE TIME THAT THIS WAS GOING ON?

YES, HE DID, BUT, AGAIN, I AM NOT HERE ARGUING THAT MICHAEL ISN'T -- DOESN'T BEAR SOME CULPABILITY HERE. I AM NOT SUGGESTING THAT. WE ARE TALKING ABOUT THE RELATIVE CULPABILITY. CHRIS STEWART JUST HAD TO SAY NO. HE CHOSE TO DO THIS FREELY.

WHERE DO YOU GET THIS FREELY, IF THE EVIDENCE IS THAT IT WAS YOUR CLIENT THAT PREVAILED ON HIM TO DO THIS?

BECAUSE THERE WAS NO COERCION OR ANYTHING. THAT IS WHY I AM SAYING HE FREELY CHOSE TO ACCEPT --

DO YOU AGREE THAT THE JUDGE AND JURY WERE FREE TO CONCLUDE THAT IT WAS YOUR CLIENT THAT WANTED HIS WIFE MURDERED?

YES. BUT I DON'T THINK THEY ARE FREE TO CONCLUDE, BECAUSE I DON'T THINK THE EVIDENCE SUPPORTS THE IDEA THAT CHRIS STEWART WAS IN ANY WAY COERCED INTO DOING THIS.

WASN'T THERE SOME TESTIMONY THAT STEWART WAS SORT OF A DRIFTER TYPE, HAD LIVED THERE IN THE HOME OF MICHAEL AND HIS WIFE, THAT THEY SORT OF TREATED -- THEY WERE SORT OF MOTHER AND FATHER FIGURES TO HIM, QUITE FRANKLY? ISN'T THAT PART OF THIS WHOLE SCENARIO THAT WE ARE TALKING ABOUT?

YES. UM-HUM.

AND THAT HE HAD -- HE WORKED. HE WAS AN EMPLOYEE OF MICHAEL. AND COULDN'T THE JUDGE AND THE JURY CONSIDER THIS AS PLAYING INTO IT, HIS VULNERABILITY, YOU KNOW?

EXCEPT, THEN, ON THE FLIP SIDE OF THAT, HE KILLED HIS MOTHER FIGURE.

HERE HIS BOSS, AND THE PERSON THAT IS THE FATHER FIGURE, IN HIS MIND, COMES TO HIM AND LISS IS ITS HIM TO MURDER -- AND SOLICITS HIM TO MURDER?

HE, ALSO, TESTIFIED THAT HE HAD NOTHING AGAINST JULIANNE THAT HE LOVED JULIANNE JULIE WAS LIKE A MOTHER TO HIM. THAT DOESN'T MAKE SENSE THAT THIS FATHER FIGURE CAN COME AND SAY LET'S KILL YOUR MOTHER FIGURE. THEY WERE BOTH LIKE PARENTS TO HIM. NOT JUST ONE.

DO YOU WANT TO SAVE SOME OF YOUR TIME FOR REBUTTAL?

I WOULD, IF I COULD. THANK YOU.

MS. RUSH.

MAY IT PLEASE THE COURT. MY NAME IS JUDY TAYLOR RUSH, ASSISTANT ATTORNEY GENERAL REPRESENTING STATE IN THE CASE. THE FIRST ISSUE IS WHETHER OR NOT THE TESTIMONY OF THE MOTHER SHOULD HAVE BEEN ADMITTED IN TRIAL. THE STATE WANTS TO POINT OUT THAT THERE WAS NO REBUTTAL IN THE TESTIMONY. THE OBJECTION WAS THAT IT WAS HEARSAY. THE STATE ARGUES THAT IT WAS HER TESTIMONY THAT FIT THE EXCEPTIONS TO HERE SAY, BECAUSE IT WAS A REPEAT OF WHAT JULIE HAD TOLD HER AT A TIME WHEN SHE WAS UNDER THE STRESS CAUSED BY THE EXCITEMENT OF AN ALL-NIGHT ARGUMENT WITH STOLL, IN WHICH HE HAD REPEATEDLY THREATENED TO KILL HER. THE EVIDENCE WAS JULIE HAD COME --

WAS THAT THE ARGUMENT MADE? DID THE JUDGE EVER MAKE A DETERMINATION THAT THIS STATEMENT WOULD COME IN UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE?

I DON'T THINK THAT THOSE WORDS WERE ACTUALLY USED, BUT THAT THOSE FACTS AND THAT ISSUE WAS TALKED ABOUT.

DOESN'T THE JUDGE, WITH THE EXCITED UTTERANCE EXCEPTION, HAVE TO MAKE A DETERMINATION OR PRELIMINARY FACTUAL DETERMINATION, AS TO WHETHER THE CIRCUMSTANCES OF THE KPIED UTTERANCE EXCEPTION HAD BEEN MET, AND WOULD YOU AGREE WITH THAT?

I BELIEVE THERE WAS PLENTY OF EVIDENCE THAT IT HAD BEEN MET.

I AM ASKING YOU, DOESN'T THE JUDGE, AS A PREREQUISITE TO THAT EVIDENCE COMING IN, AS AN EXCEPTION TO THE HEARSAY RULE, UNDER THE EXCITED UTTERANCE EXCEPTION, THE TRIAL JUDGE HAVE TO MAKE A DETERMINATION, AS A MATTER OF PRELIMINARY FACTUAL MATTER, THAT IT FITS THE PREREQUISITES FOR THE EXCITED UTTERANCE EXCEPTION, BASED ON OUR CASE LAW?

AT SOME POINT HE HAS TO MAKE THAT DETERMINATION.

WAS IT EVER MADE IN THIS RECORD?

I DON'T BELIEVE THERE IS ANYWHERE ON THE RECORD WHERE IT IS EXPLICITLY STATED THAT IT WAS MADE.

IS IT MADE AT ALL, MS. RUSH, IS IT MADE IN ANY PART OF EITHER THE FIRST TIME IT WAS OFFERED OR THE SEC TIME IT WAS OFFERED?

I DON'T BELIEVE THAT IT IS STATED ON THE RECORD IN THAT MANNER, NO. THE EVIDENCE, HOWEVER, THAT IT WAS AN EXCITED UTTERANCE, WAS BEFORE THE JUDGE, AND THE FIRST TIME AROUND HE DIDN'T WANT TO LET IT IN THIS THE CASE-IN-CHIEF, BUT HE MADE IT CLEAR THAT, IF THE TESTIMONY WAS SUCH THAT IT WOULD AUTHORIZE IT, THAT HE WOULD RECONSIDER IT FOR REBUTTAL, AND WHEN IT CAME UP LATER, AFTER STOLL TESTIFIED AT THE TRIAL, AT THAT POINT HE DETERMINED TO LET IT IN.

BUT WASN'T THAT -- IF IT WAS AN EXCITED UTTERANCE, IT WOULD HAVE BEEN ADMISSIBLE ON DIRECT, ON THE CASE-IN-CHIEF. ISN'T THAT CORRECT?

IT COULD HAVE BEEN ADMISSIBLE ON DIRECT.

BUT HE DETERMINED IT WAS NOT ADMISSIBLE?

WELL, I DISAGREE WITH THE STATEMENT THAT HE DETERMINED IT WAS NOT ADMISSIBLE. I THINK A BETTER READING OF THE RECORD --

HE SUSTAINED THE OBJECTION, DID HE NOT?

A BETTER READING OF THE RECORD, YOUR HONOR, I WOULD SUBMIT, IS THAT THE JUDGE HADN'T DECIDEDED FOR SURE WHETHER IT WAS ADMISSIBLE OR NOT BUT THAT THE STATE DIDN'T REALLY NEED TO PUT IT IN THE RECORD AT THAT POINT, AND THAT IF IT BECAME APPARENT THAT IT WAS NEEDED IN REBUTTAL, THAT HE WOULD RECONSIDER IT AT THAT TIME.

BUT THAT IS AN ENTIRELY DIFFERENT ISSUE. IF IT IS ADMISSIBLE, IT IS ADMISSIBLE.

WELL, THE JUDGE DID NOT ADMIT IT AT THE CASE-IN-CHIEF. THAT'S CORRECT.

AND SO HE DID NOT MAKE ANY STATEMENT REGARDING THE FINDING THAT JUSTICE PARIENTE INDICATED HE HAD TO MAKE?

NOT SPECIFICALLY ON THE RECORD DID HE MAKE THAT FINDING.

WHEN DID THIS STATEMENT, WHEN WAS THIS STATEMENT, CONVERSATION, MADE WITH THE WITNESS?

WE, IT OCCURRED IMMEDIATELY AFTER JULIE WAS ABLE TO ESCAPE FROM THE HOUSE WHERE SHE HAD BEEN INVOLVED IN THIS ALL-NIGHT FIGHT WITH STOLL.

SOMETIME LONG BEFORE --

IT WAS IN AUGUST OF '94. THAT WAS ALMOST EXACTLY THREE MONTHS PRIOR TO HER MURDER IN THIS CASE.

MY PROBLEM THAT I AM WRESTLING WITH ON EXCITED UTTERANCE, REALLY, IS THAT I SEE THAT CONCEPT AS KIND OF A RES JESTI EXCEPTION, AS WE FOUND IT TO BE IN A CASE CALLED ROGERS, WHERE THERE WAS A MURDER IN WEST PALM BEACH, AND IT HAD TO DO WITH A PERSON IN A CAR AND THEN GOING OUT IMMEDIATELY AFTER THE OCCURRENCE OF THE MURDER AND SAYING, AND MAKING A STATEMENT. NOW, IN ORDER FOR EITHER EXCITED UTTERANCE OR A 803 EXCEPTION TO THE HEARSAY RULE HERE, IT -- WOULDN'T IT HAVE TO BE SOMETHING THAT THERE WAS AN ISSUE IN THE CASE AS TO THE VICTIM'S STATE OF MIND, FOR EITHER OF THOSE EXCEPTIONS TO APPLY?

I DON'T BELIEVE SO. I BELIEVE THE CASE LAW IS THAT THE STATE OF MIND OF THE DEFENDANT IS AT ISSUE IN SITUATIONS LIKE THIS. THERE IS THE MONGLIN CASE AND THE FARRELL CASE THAT ARE CITED IN THE STATE'S BRIEF ON THAT POINT. THE STATEMENTS THAT STOLL MADE WERE ADMISSIONS AGAINST INTEREST. AND THEY WERE RELEVANT TO REBUT THE DEFENSE CONTENTION THAT STEWART WAS THE SOLE KILLER AND THAT STOLE WAS ONLY INVOLVED AFTER THE FACT. IN OTHER WORDS --

ARE YOU SEPARATING, NOW, TWO PARTS OF THE STATEMENT? ONE STATEMENT, AND IT WAS USED VERY EFFECTIVELY IN THE STATE'S CLOSING ARGUMENT, WAS THAT JULIE HAD EXTRACTED A PROMISE FROM DANA MARTIN THAT, IF SHE EVER HEARS THAT SHE HAD -- WAS DEAD, IT TO GO TELL THE AUTHORITIES THAT MICHAEL STOLL DID IT. AND THAT IS WHAT THE STATE USED IN ITS CLOSING ARGUMENT, TO SAY WHY THIS WAS SO POWERFUL. THE SECOND PART OF WHAT YOU

ARE TALKING ABOUT IS WHERE DANA MARTIN RELATES WHAT JULIE STOHL SAID HER HUSBAND SAID TO HER, WHICH IS THAT HE HAD THREATENED TO KILL HER MORE THAN ONCE, WHICH, ISN'T THAT THE PART OF WHAT YOU ARE CLAIMING WOULD BE AN ADMISSION? THE PROBLEM IS IT IS DOUBLE HEARSAY, ISN'T IT? IT IS NOT THAT MICHAEL STOLL TOLD DANA MARTIN THAT HE WAS GOING TO KILL HIS WIFE, WHICH IS SOME OF THE CASES THAT THE STATE CITES. IT IS THAT DANA MARTIN SAID JULIE STOHL SAID -- JULIE STOLL SAID THAT HER HUSBAND THREATENED TO KILL HER?

AT THE TIME THAT SHE MADE THAT STATEMENT, IT WAS AN EXCITED UTTERANCE, AND IT WAS AN EXCEPTION TO THE HEARSAY RULE, SO THAT LEVEL OF HEARSAY IS REMOVED, AND THEN YOU GET THE ADMISSION --

AND JUSTICE WELLS WAS ASKING YOU THAT, IF IT WAS AN EXCITED UTTERANCE, THAT THE PART WHERE SHE SAID HE HAD THREATENED TO KILL HER WOULD, THEN, AND PART OF THE SUBSTANTIVE EVIDENCE?

YES.

BUT WE FIRST HAVE TO GET BY THAT THE STATE NEVER OFFERED IT AS AN EXCITED UTTERANCE, AND THE JUDGE NEVER MADE THAT DETERMINATION, AND SO WE WOULD HAVE TO LOOK AT THIS RECORD TO MAKE AN INDEPENDENT DETERMINATION THAT IT FITS INTO THAT, ON THE FIRST TIME ON APPELLANT REVIEW?

AND THE STATE WOULD OFFER THE RULE OF LAW THAT, IF THE TRIAL JUDGE'S RULING WAS RIGHT FOR ANY REASON, THEN IT SHOULD BE UPHELD. AND THAT --

CAN YOU GET TO THE STATE OF MIND FOR A MOMENT. ARE WE TALKING ABOUT, AS FAR AS THE STATE IS CONCERNED, ARE WE TALKING ABOUT THE STATE OF MIND OF THE DEFENDANT OR THE STATE OF MIND OF THE VICTIM?

PRIMARILY WE ARE TALKING ABOUT THE STATE OF MIND OF THE DEFENDANT. AND THAT IS THE CASES CITED IN THE BRIEF ARE MONGLIN AND FARRELL AND, ALSO,ES KHOBAR, WHERE -- -- AND, ALSO, ESCOBAR, WHERE --

HOW DOES THE STATE TOGGLE THAT TOGETHER?

BECAUSE IT SHOWS WHO SOLICITED THE MURDER. IN OTHER WORDS THE ENTIRE DEFENSE AT TRIAL WAS THAT IT WAS STEWART WHO WAS THE KILLER AND ALL STOLL DID WAS HELP TO COVER IT UP AFTER THE FACT, AND SO THIS EVIDENCE SHOWING HOW HE MISTREATED HIS WIFE AND THAT HE HAD THREATENED TO KILL HER AND HAD SAID, AND SHE HAD SAID TO MS. MARTIN, IF I COME UP MURDERED, YOU SHOULD TELL THE POLICE THAT STOLL EITHER DID IT OR HAD IT DONE. AND THAT GOES TO WHO SOLICITED THE MURDER.

BUT ISN'T THE PROBLEM, WITH USING ESCOBAR OR MONGLIN, THE FACT THAT, IN BOTH THOSE CASES, THE STATEMENT THAT WAS COMING IN WAS A STATEMENT MADE BY THE DEFENDANT TO A WITNESS. IN MONGLIN, HE MADE A STATEMENT TO A FELLOW INMATE THAT HE WAS GOING TO GET A CAR AND SHOOT SOMEBODY, AND IN ESCOBAR, IT WAS A STATEMENT MADE BY ESCOBAR TO MANILA, WHO WAS A WITNESS, AS TO ESCOBAR'S STATE OF MIND? HERE YOU HAVE A STATEMENT BY THE VICTIM THAT YOU ARE TRYING TO GET IN.

THAT'S CORRECT. IT WAS, STILL, HOWEVER, A STATEMENT MADE BY THE DEFENDANT TO A WITNESS, AND THE STATEMENT MADE BY THE DEFENDANT WAS TO JULIE, WHO WAS THE VICTIM, BUT SHE GAVE IT TO DANA, UNDER AN EXCITED UTTERANCE, SO EXCEPTION TO THE HEARSAY RULE, SO IT COMES IN THAT WAY. THAT IS THE STATE'S ARGUMENT ON THIS ISSUE.

WELL, GOING TO THE -- AS I UNDERSTAND THE ARGUMENT, THE TRIAL COURT WAS ON THE BASIS OF THE BRADFORD DECISION. AND THE BRADFORD DECISION IS, REALLY, BASED UPON A 803 EXCEPTION, AS I READ BRADFORD, FOR THE, UNDER PAREN THREE THERE, AND THE LAST OF THAT SAYS THE DECLARANT, WHICH IN THIS CASE IS THE VICTIM, AS IN BRADFORD IT WAS THE DEFENDANT THERE. THE STATE OF MIND OR MOTION OR PHYSICAL SENSATION AT THAT TIME OR ANY OTHER TIME, WHEN SUCH STATE IS AT ISSUE IN THE ACTION. NOW, WHAT WAS THE ISSUE IN THE ACTION, AS TO THE VICTIM'S STATE OF MIND? IN BRADFORD, IT WAS THE VICTIM WAS IN FEAR.

WELL, IN THIS CASE, STOLL TESTIFIED THAT, AT THE TRIAL, THAT HE BELIEVED THAT THEY HAD A HAPPY MARRIAGE, AND THAT THEY HAD HAD ABSOLUTELY NO PROBLEMS UNTIL JANUARY THE 31th, AT WHICH TIME MRS. STOLL JUST FLIPPED OUT, AND THE STATE WOULD SUGGEST THAT THE VICTIM'S STATE OF MIND WAS RELEVANT TO REBUT THAT TESTIMONY. TO THAT EFFECT.

IS THAT HOW IT WAS USED, THEN, BY THE STATE, IN CLOSING ARGUMENT? AS TO -- FOR THAT LIMITED PURPOSES -- PURPOSE OF SHOWING THEY DIDN'T HAVE A HAPPY MARRIAGE?

THAT WAS ONE OF THE PURPOSES THAT IT WAS USED FOR.

1204 OF THE RECORD, THE STATE GOES ON, AT SOME LENGTH, AND SAYS THAT SHE CAME BACK FROM BEYOND THE GRAVE AND MADE DANA MARTIN PROMISE HER THAT SHE WOULD GO TO THE AUTHORITIES AND TELL HER THAT MICHAEL STOLL DID IT AND THAT JULIE WAS IN FEAR FOR HER LIFE. SO THERE WAS NO REFERENCE IN THE STATE'S CLOSING ARGUMENT THAT THIS WAS JUST TO SHOW THAT, LOOK, THEY DIDN'T HAVE A HAPPY MARRIAGE. THEY HAD A MARRIAGE WHERE HE WAS A BATTERER.

WELL, IT WAS OBVIOUS, THOUGH, IN THE PRESENTATION OF THE EVIDENCE THAT A LOT OF IT WAS GEARED TOWARDS SHOWING THAT THEY DIDN'T HAVE A HAPPY MARRIAGE, THAT THEY HAD HAD PRIOR INCIDENCES BETWEEN THEM, WHICH WAS CONTRARY TO WHAT STOLL HAD TESTIFIED TO.

THAT WAS IN EVIDENCE, WASN'T IT? I MEAN THE WHOLE ISSUE OF THE PRIOR DOMESTIC VIOLENCE INCIDENT WAS THE JURY KNEW ABOUT IT, BECAUSE IT WAS -- THAT WAS PART OF THE CIRCUMSTANCES OF WHAT THE PROBATION OFFICER TESTIFIED TO ABOUT THAT CHARGE, AND SO THERE WAS EVIDENCE THE JURY ALREADY HAD THAT THERE WAS A DOMESTIC VIOLENCE CHARGE. THIS WENT FAR BEYOND THAT, BECAUSE, AGAIN, IT, REALLY, I GUESS, THE PART THAT I FOUND MOST COMPELLING WAS THIS IDEA THAT DANA MARTIN CAME FORTH TO MAKE SURE THAT THE JURY KNEW THAT MICHAEL STOLL WAS THE MURDERER, BECAUSE HER BEST FRIEND HAD TOLD HER THAT THAT, THAT IF SHE WAS DEAD, THAT WAS THE PERSON THAT WOULD HAVE DONE IT, AND THAT THERE FOR IT WAS REALLY COMING IN FOR THE TRUTH OF THAT MATTER TO SHOW THAT JULIE STOLL SAID MY HUSBAND IS THE MURDERER. IT WAS AS IF SHE HAD LEFT THE NOTE TO SAY THAT, YOU KNOW, IF I AM FOUND DEAD, IT IS MY HUSBAND THAT DID IT.

YOUR HONOR, THERE WAS OVERWHELMING EVIDENCE THAT MICHAEL STOLL WAS THE MURDERER IN THIS CASE. THAT WAS FAR -- YES, THAT IT WOULD BE CERTAINLY A HARMLESS ERROR, IF IT WAS ERROR AT ALL. NOT ONLY DID STOLL, HIMSELF, PERSONALLY CONFESS, TWICE, TO RANDY MEYERS, THAT HE KILLED HIS WIFE, STEWART SEPARATELY, IN A PREVIOUS TIME, TOLD MEYERS THAT STOLL HELPED HIM KILL JULIE. STOLL, ALSO, TOLD HIS EX-WIFE, MRS. WEISS, IN A TELEPHONE CONVERSATION HE INITIATED AFTER HE WAS ARRESTED AND PUT IN JAIL FOR THIS CRIME, THAT HE WAS PRESENT AT THE TIME JULIE WAS MURDERED. IN HIS THIRD INTERVIEW, I BELIEVE IT WAS, WITH THE POLICE, IN RESPONSE TO A QUESTION ASKED BY THE OFFICER WHEN DID YOU FIRST. THE PLAN OR DESIGN TO KILL YOUR WIFE, HE SAYS, WELL, IT WAS ON OCTOBER 31, AFTER WE HAD AN ARGUMENT. SO HE ADMITTED THAT HE FORMED A PLAN OR DESIGNED TO KILL HIS WIFE TO THE OFFICER. HE, ALSO, WE HAVE, OF COURSE, STEWART'S

TESTIMONY REGARDING WHAT THE EVENTS OF THE MURDER WERE. AND WE HAVE STOLL'S TESTIMONY AT TRIAL THAT, AFTER HAVING THE ARGUMENT WITH JULIE, ON OCTOBER 31, HE SAID, TO STEWART, QUOTE, THE PITCH HAS TO DIE. CLOSE QUOTE. SO THERE IS OVERWHELMING EVIDENCE IN THIS CASE OF STOLL STOLL'S GUILT OF THIS CRIME, AND IT IS FAR AND AWAY MORE DAMAGING EVIDENCE THAN THE TESTIMONY OF MS. MARTIN. I WOULD JUST PARENTHETICALLY LIKE TO POINT OUT THAT THE ISSUE OF THE STATE'S CLOSING ARGUMENT THAT YOU ALLUDED TO IN CONNECTION WITH THIS ISSUE WAS NOT RAISED BY THE APPELLANT IN THIS CASE.

WHAT DO YOU MEAN?

HE NEVER ARGUED THERE WAS IMPROPER PROSECUTORIAL ARGUMENT.

IT WAS IN EVIDENCE. WE WERE JUST TALKING ABOUT HOW IT WAS ACTUALLY USED IN THIS CASE, AND I WAS TRYING TO SEE HOW, TO MAKE SURE WE UNDERSTOOD THAT IT WASN'T REALLY USED AT ALL TO REBUT A VERY NARROW CONTENTION OF THERE BEING A HAPPY MARRIAGE. IT WAS USED AS DIRECT EVIDENCE OF GUILT. THERE WAS NOTHING IMPROPER ABOUT THE STATE DOING THAT, ONCE IT CAME INTO EVIDENCE. I WASN'T -- THERE WAS NO LIMITING ASPECT TO IT.

ANOTHER POINT THAT THE APPELLANT RAISED WAS THAT STEWART'S STATEMENT NUMBER FOUR TO THE OFFICERS THAT WAS GIVEN ON THE NIGHT OF THE MURDER WAS PLAYED TO THE JURY, AFTER STEWART'S TESTIMONY. AND THE STATE HAD ASKED THE JUDGE TO ALLOW THE PLAYING OF THE TAPE TO REBUT AN IMPLIED CHARGE OF RECENT FABRICATION, AND THEY WEREN'T THROUGH QUITE A LENGTHY LITTLE COLLOQUY IN REGARD TO IT IN THE RECORD, WHERE IT WAS MADE CLEAR THAT THE STATE'S CONCERN WAS THAT THE DEFENSE, IN CROSS-EXAMINING MR. STEWART, HAD IMPLIED THAT THE PROVISION OF THE PLEA BARGAIN THAT WAS ENTERED ON JUNE 4 OF '97, WHICH REQUIRED STEWART TO TESTIFY IN ACCORDANCE WITH THE STATEMENT HE GAVE THE STATE ATTORNEY ON THAT DAY, WAS DIFFERENT THAN THE THINGS THAT STEWART HAD PREVIOUSLY SAID, AND THERE WAS TESTIMONY, STATEMENTS ASKED TO STEWART ON CROSS TO THE EFFECT OF IF YOU, TODAY, REALIZED THAT SOMETHING THAT YOU SAID WAS, IN YOUR JUNE 4 STATEMENT, WAS INCORRECT, WOULDN'T YOU STILL BE BOUND TO TESTIFY, AS YOU SAID ON JUNE 4? AND HE SAID YES, AND HE ASKED, EVEN IF IT WAS WRONG AND YOU, NOW, HAVE REALIZED THAT IT WAS WRONG? AND HE SAYS YES. SO IT WAS REAL CLEAR THAT THERE WAS IMPLIED CHARGE THAT HE HAD CHANGED HIS TESTIMONY ON THE FOURTH OF JUNE AND WAS NOW STUCK WITH THAT. SO STATE WAS SUCCESSFUL IN CONVINCING THE JUDGE THAT STATEMENT NUMBER FOUR, STEWART NEEDED TO COME IN TO REBUT THE IMPLIED CHARGE OF RECENT FABRICATION. NOW, AT NO POINT IN THAT RECORD COULD I FIND WHERE THE ISSUE THAT WAS ARGUED BELOW WAS AS IT IS PRESENTED ON APPEAL, WHICH, ON APPEAL, STOLL HAS SAID, WELL, ALL WE TRIED TO DO WAS ESTABLISH THAT STEWART CHANGED HIS STATEMENT ON THE NIGHT OF THE MURDER, AFTER HE REALIZED STOLL HAD IMPLICATED HIM. THAT IS NOWHERE IN THE RECORD. THE ISSUE IN THE TRIAL COURT WAS THAT IT WAS IMPLIED CHARGE OF RECENT FABRICATION, AND THAT WAS THE SITUATION CLEARLY, BASED ON STEWART'S TESTIMONY. SO THE STATE WOULD SUBMIT THAT THAT WAS PROPERLY ADMITTED IN REBUTTAL. THE THIRD POINT THAT STOLL RAISED WAS THE RELEVANCY OF AN AUTOPSY PHOTOGRAPH, AND I WOULD JUST LIKE TO POINT OUT THAT THE TRIAL JUDGE WENT TO CONSIDERABLE EFFORT TO PRELIMINARILY SCREEN THESE PHOTOGRAPHS. THE TEST FOR ADMISSION OF GRUESOME PHOTOGRAPH IS RELEVANCY AND NOT NECESSITY, AND THE ARGUMENT ON APPEAL IS, WELL, IT WASN'T NECESSARY TO PERMIT THE MEDICAL EXAMINER TO TESTIFY IN FRONT OF THE JURY OR TO HIS DETERMINATION OF THE CAUSE OF DEATH. HOWEVER, THE MEDICAL EXAMINER DID TESTIFY THAT HE REGARDED IT AS NECESSARY TO IDENTIFY THAT THE PERSON HE DID THE AUTOPSY ON WAS THE VICTIM IN THE CASE, JULIE.

WAS THAT EVER AT ISSUE, THE IDENTITY OF THE VICTIM OR THAT COUPLED WITH THE DOCTOR'S STATEMENT THAT, REALLY, THESE PHOTOGRAPHS DIDN'T HELP ME DETERMINE THE CAUSE OF DEATH? WHAT IS THE RELEVANCY THEN, IF -- IDENTITY OF THE VICTIM WAS TRULY NOT AN

ISSUE, WAS IT?

WELL, I THINK IT WAS AN ISSUE. THE TRIAL JUDGE REGARDED IT AS NOT HAVING BEEN ESTABLISHED, BECAUSE THAT IS PRIMARILY THE BASIS ON WHICH HE ADMITTED THAT PHOTOGRAPH.

HOW DID IT BECOME AN ISSUE, THE VICTIM'S IDENTITY? DID ANYBODY QUESTION WHO IT WAS THAT WAS KILLED?

THAT THE AUTOPSY WAS PERFORMED ON? SEE, THEY HAD CHRISTOPHER STEWART WHO, TESTIFIED THAT THE VICTIM WAS JULIE STOLL. BUT THEY NEEDED TESTIMONY THAT THE PERSON THE AUTOPSY WAS PERFORMED UPON WAS JULIE STOLL, AND SINCE STEWART WASN'T PRESENT AT THE AUTOPSY, THE MEDICAL EXAMINER COULD TESTIFY TO THAT. THE MEDICAL EXAMINER, ALSO, SAID THAT IT WAS NECESSARY TO HIS REPORT, BECAUSE HE MADE IT A PART OF HIS REPORT, AND IT WAS INCLUDED, THAT PHOTOGRAPH WAS INCLUDED WITHIN HIS REPORT. SO, YOU KNOW, IT APPEARS TO ME THAT IT WAS NOT ONLY A RELEVANT PHOTOGRAPH BUT THAT IT WAS NECESSARY TO THE EXTENT THAT IT WAS PART OF HIS REPORT AND CORROBORATED WHAT HE HAD SAID FOUND.

PART OF HIS REPORT DOES NOT NECESSARILY MAKE IT LEGAL VANITY, DOES IT? -- MAKE IT RELEVANT, DOES IT?

IT CORROBORATES WHAT THE MEDICAL EXAMINER TESTIFIED TO AT THE TRIAL, SO IT WAS ADMISSIBLE FOR THAT PURPOSE AS WELL, AND, OF COURSE, THE STATE WOULD CONTEND THAT ANY ERROR IN ADMISSION OF THAT PHOTOGRAPH WOULD HAVE BEEN A HARMLESS ERROR, DUE TO THE OVERWHELMING EVIDENCE OF THE GUILT, AND, ALSO, DUE TO THE CUMULATIVE NATURE OF THE PHOTOGRAPH.

WAS THERE ONLY ONE AUTOPSY PHOTOGRAPH PUT IN?

THERE WAS ONLY ONE THAT WAS CHALLENGED IN THIS CASE BY THE DEFENDANT. IF THERE WERE OTHERS, I MEAN IT IS OBVIOUSLY HIS BURDEN TO EXPLAIN WHY IT WOULD HAVE BEEN AN ABUSE OF DISCRETION WHICH IS THE STANDARD IN THIS CASE, FOR THE TRIAL JUDGE TO ADMIT THIS AUTOPSY PHOTOGRAPH. ON POINT -- ON THE POINT REGARDING THE CULPABILITY OF THE DEFENDANT AND MR. STEWART, THE STATE ASSERTS THAT MR. STOLL WAS FAR MORE CULPABLE THAN STEWART IN THIS CASE. STEWART WAS THE 19-YEAR-OLD WITH THE LONG HISTORY OF ALCOHOL ABUSE. HE HAD BEEN ASKED TO LEAVE THE ARMY. HAD HE BEEN KICKED OUT OF HIS MOTHER'S HOME. HE HAD NOWHERE TO GO. HE HAD NOWHERE TO LIVE, OTHER THAN WITH THE STOLLS. HE HAD NO FRIEND, THE EVIDENCE WAS, EXCEPT FOR MICHAEL STOLL.

BEFORE -- COULD YOU DISTINGUISH BETWEEN HOW THE FACT THAT SOMEBODY, A CODEFENDANT OR A POTENTIAL CODEFENDANT GETS LIFE AND ANOTHER DEFENDANT GETS DEATH, HOW THAT SHOULD BE LOOKED AT FOR PURPOSES OF WHETHER IT IS A MITIGATOR, EITHER STATUTORY OR NONSTATUTORY, VERSUS OUR COURT'S PROPORTIONALITY REVIEW? IS IT THE SAME THING? IN OTHER WORDS IS, ONCE A DETERMINATION IS MADE BY THIS COURT OR THE TRIAL COURT THAT IT WAS NOT EQUALLY CULPABLE, THAT THE DEFENDANT THAT GOT DEATH WAS MORE CULPABLE, THEN DOES NOT HAVE TO BE FOUND AS MITIGATOR? IS THAT HOW YOU INTERPRET THE CASE LAW?

ARE YOU ASKING ME DID THE TRIAL JUDGE HAVE A TO FIND THIS WAS MITIGATOR?

TO DISTINGUISH BETWEEN IT AS A MITIGATING CIRCUMSTANCE, IN OTHER WORDS GIVING IT NO WEIGHT, AS WITH THE PROPORTIONALITY REVIEW, LOOKING AT ONE DEFENDANT GOT LIFE AND THE OTHER DEFENDANT GOT THE DEATH PENALTY?

I DON'T BELIEVE THE TRIAL JUDGE IS REQUIRED TO FIND THAT IT IS A MITIGATOR. I BELIEVE THAT HE CAN LOOK AT ALL OF THE EVIDENCE PRESENTED IN THE COURT AND MAKE A DETERMINATION AS TO WHETHER THIS EVIDENCE IS TRULY MITIGATING OR NOT, AND IF HE --.

IF THEY FIND THAT -- IF THE FINDING IS THEY WEREN'T EQUALLY CULPABLE, THAT THE DEFENDANT THAT GOT LIFE WAS MORE CULPABLE, THAT IS WHAT WE SHOULD BE LOOKING AT? WHETHER IT IS A MITIGATOR OR WHETHER ON PROPORTIONALITY? DO YOU UNDERSTAND WHAT I AM SAYING?

I DON'T THINK I DO.

WHAT IS -- WHEN YOU SAY THE JUDGE DOESN'T HAVE TO FIND IT AS A MITIGATOR, THAT IS IF HE FINDS, IN THIS CASE, THAT THIS DEFENDANT WAS MORE CULPABLE, IS THAT WHAT THE FINDING HAS TO BE?

THAT IS WHAT HE FOUND IN THIS CASE. THAT IS CORRECT. HE FOUND THIS DEFENDANT WAS MORE CULPABLE. BUT THE STATE WOULD SUBMIT THAT IT DOESN'T NECESSARILY HAVE TO BE THE FINDING THAT ONE IS MORE CULPABLE THAN THE OTHER. THEY CAN BE EQUALLY CULPABLE AND STILL THE DEATH PENALTY CAN BE IMPOSED ON ONE AND NOT ON THE OTHER, UNDER APPROPRIATE CIRCUMSTANCES. IN THIS CASE, AS THE PROSECUTOR MADE CLEAR BELOW, THE STATE WAS REQUIRED TO MAKE A DEAL WITH THE DEVIL. THERE WERE TWO PEOPLE THERE. STOLL IS THE ONE WHO PLANNED THIS CRIME. STOLL IS THE ONE WHO DIRECTED EVERY ASPECT OF THIS CRIME. STOLL IS THE ONE WHO MADE SURE THAT ONLY HE AND STEWART WERE THERE. AND BECAUSE TWO OF THEM WERE THERE, THE STATE NEEDED THE TESTIMONY OF STEWART TO ESTABLISH STOLL'S HAVING MASTERMINDED THIS CRIME. THE STATE SUBMITS IT WOULD BE MOST UNJUST TO ALLOW THIS MAN WHO MASTERMINDED THIS CRIME AND PLANNED IT OUT IN THIS MANNER TO ESCAPE THE DEATH PENALTY, WHICH HE WELL QUALIFIES FOR, MERELY BECAUSE THE STATE HAD TO CUT A DEAL WITH THE OTHER CODEFENDANT IN ORDER TO GET THE TESTIMONY THAT WAS NECESSARY IN THE CASE.

BUT CAN THE STATE, CAN THE TRIAL JUDGE GIVE NO WEIGHT, ONCE HE FINDS THAT STOLL WAS NOT THE KILLER, THE ACTUAL KILLER, CAN IT GIVE, ACTUALLY GIVE NO WEIGHT TO THE FACT THAT THE CO-CONSPIRATOR WAS THE ACTUAL MURDERER?

YES, YOUR HONOR. I BELIEVE, UNDER THE CASE LAW, THAT HE CAN GIVE IT ANY WEIGHT HE DEEMS IS PROPRIETOR NO WEIGHT, IF THAT IS WHAT HE DEEMS IS APPROPRIATE, UNDER THE CIRCUMSTANCES, WHEN HE IS CONSIDERING MITIGATING CIRCUMSTANCES.

HE CAN MAKE THAT FINDING AND YET COME UP WITH THIS IS NOT A LEGITIMATE MITIGATOR AT ALL?

I BELIEVE HE CAN MAKE THAT FINDING, AND HE CAN GIVE IT NO WEIGHT, IF THAT IS HIS DETERMINATION, BASED ON THE EVIDENCE THAT IS BEFORE HIM.

AS I UNDERSTAND, HE DIDN'T SAY THAT THIS WAS NOT A LEGITIMATE MITIGATOR. WHAT I READ, I MEAN, DIDN'T HE SAY THAT THIS IS NOT MITIGATING, UNDER THE CIRCUMSTANCES OF THIS CASE?

THAT IS CORRECT. IT WAS NOT MITIGATING UNDER THE CIRCUMSTANCES OF THIS CASE, NOT THAT A DIFFERENT SENTENCE COULD NEVER BE MITIGATING BUT THAT, UNDER THE CIRCUMSTANCES OF THIS CASE, IT WASN'T MITIGATING. THE STATE WOULD LIKE TO MENTION A COUPLE OF CASES ON THIS POINT TO THE COURT. ONE IS THE LARSALEER CASE, WHICH WAS REFERENCED IN THE BRIEF. IN LARSELERE, HER CASE WAS UPHELD, EVEN THOUGH SHE WASN'T THE TRIGGER MAN, BECAUSE SHE WAS PRESENT FOR THE MURDER AND ACTIVELY PARTICIPATED IN THE MURDER AND SHE PLANNED IT IN A COLD AND CALCULATED MANNER, AND SHE WAS THE MASTERMIND AND DOMINATING FORCE IN THE PLAN AND EXECUTION. WE HAVE ALL OF THOSE

FACTORS IN THIS CASE. STOLL WAS PRESENT. HE ACTUALLY PARTS PATED AND PLANNED IT IN A COLD AND CALCULATED MANNER. HIS PARTICIPATION WAS NOT RELATIVELY MINOR.

WAS THAT CASE DEALING WITH WHERE A CODEFENDANT GOT LIFE?

ACTUALLY IT WAS DEALING WITH WHERE A CODEFENDANT WAS ACQUITTED AND THE ONE WHO WAS ALLEGED TO BE THE TRIGGER MAN WAS ACQUITTED. THERE IS ANOTHER CASE THE STATE WOULD LIKE TO OFFER. I PLAN TO FILE IT AS SUPPLEMENTAL AUTHORITY. SINCE I HAVEN'T YET FILED IT, UNLESS YOU AUTHORIZE ME TO DO SO, I DON'T THINK IT IS APPROPRIATE TO ARGUE IT. I JUST WANT TO CITE THE CASE. I HAVE GIVEN MR. BECK AREA COPY OF IT BEFORE -- MR. BECKER A COPY OF IT BEFORE THIS MORNING AND THAT IS HEATH VERSUS STATE AT 48 SO.2D 660, 1994. UNLESS THE COURT HAS FURTHER QUESTIONS, THE STATE WILL RELY ON ITS BRIEF IN THIS CASE.

DID YOU WANT TO ADDRESS THE ISSUE OF THE VICTIM'S STATEMENT IN THE INCIDENT REPORT?

OKAY. I SKIPPED OVER THAT ONE. OKAY. THIS WAS THE SWORN STATEMENT THAT JULIE STOLL GAVE, REGARDING WHAT HAPPENED DURING THE INCIDENT THAT LED TO THE BATTERY CONVICTION. IN THAT CASE, THE STATE ASSERTS THAT THE ISSUE WAS NOT PRESERVED FOR APPEAL, BECAUSE THE DEFENSE COUNSEL OBJECTED, WHEN IT WAS FIRST SUGGESTED THAT THE JUDGE TAKE JUDICIAL NOTICE OF IT, AND THEY TALKED ABOUT IT, AND THE JUDGE SAYS, WELL, I AM GOING TO TAKE JUDICIAL NOTICE OF IT, AND THEN THE PROCEEDINGS CONTINUED.

BUT HE SPECIFICALLY DIDN'T SAY, WELL, I WILL TAKE IT. WHAT HE SAYS IS THE REQUEST TO TAKE JUDICIAL NOTICE OF THE ENTIRE COURT FILE IS GRANTED, TO THE THE EXTENT THAT THE INCIDENT FILED BY MRS. STOLL IS ADMISSIBLE, THE ONE THAT IS IN HER HANDWRITING, AND THE SENTENCE WHERE THERE IS A PLEA ENTERED, WITH PART OF THAT REDACTED. I WILL DO THE REDACTING AND THEN HE GOES ON. HE HAS ALREADY RULED IT TO BE ADMISSIBLE AT THAT PIBT -- AT THAT POINT, CORRECT?

HE HAS ALREADY RULED THAT IT IS GOING TO BE PART OF THE DOCUMENTS THEY WERE ULTIMATELY ADMITTED. HE HAS. AND THEN, WHEN THEY GET TO THE POINT WHERE THE STATE WANTS THAT INFORMATION READ TO THE JURY BY THE VICTIM'S MOTHER, THERE IS AN OBJECTION BY DEFENSE COUNSEL TO THE READING OF IT BY THE WITNESS.

THAT WAS ALREADY IN EVIDENCE, AND THEN THIS IS A QUESTION OF WHETHER IT IS GOING TO BE READ OR GIVEN TO THE JURY.

I WOULD TEN TO AGREE WITH COUNSEL -- I WOULD TEND TO AGREE WITH COUNSEL BECKER, WHEN HE SAID THAT IT WASN'T IN EVIDENCE AT THAT POINT. THE JUDGE HAD MADE A PRELIMINARY RULING, SIMILAR TO A RULING ON A MOTION IN LIMINE OR WHATEVER, THAT HE WAS GOING TO ADMIT IT, BUT THEN WHEN IT YEAH TIME TO BE OFFERED -- WHEN IT CAME TIME TO BE OFFERED, THEIR OBJECTION WAS TO THIS WITNESS READING IT, AND ONCE THAT OBJECTION WAS SUSTAINED AND IT WAS GOING TO BE PUBLISHED TO THE JURY, THERE WAS NO FURTHER OBJECTION, AND WITH REGARD TO THE MOTION TO SUPPRESS AND THE MOTION IN LIMINE, IS THAT THERE HAS TO BE AN OBJECTION MADE AT THE TIME THAT IT WAS OFFERED, AND THERE WASN'T ONE IN THIS CASE, SO WE WOULD SUBMIT THAT IT WAS NOT PRESERVED FOR APPEAL, AND, OF COURSE, ANY ERROR IN REGARD TO ITS ADMISSION, WE WOULD ASSERT, WAS HARMLESS, DUE TO THE OVERWHELMING EVIDENCE OF HIS GUILT.

THANK YOU. MR. BECKER.

I HAVE A COUPLE OF QUICK POINTS. FIRST OF ALL, AS TO THE CONTENTION OF THE STATEMENT OF THE CODEFENDANT, NUMBER FOUR, THE EVIDENCE, IN FACT, THAT CAME IN, VOLUME 13, PAGES 1057 AND 1058 SPECIFICALLY DEALT WITH THE TIMING OF DEFENDANT'S STATEMENT VERSUS STATEMENT NUMBER FOUR OF CHRISTOPHER STEWART, SO THAT WAS RAISED BELOW, AS

THE DEFENSE WAS CONTENDING IT WAS STATEMENT NUMBER FOUR THAT WAS RECENTLY FABRICATED, AFTER MICHAEL HAD GIVEN HIS STATEMENT, SO IT WASN'T TO REBUT, AND THERE WAS NO ALLEGATION THAT THE TRIAL TESTIMONY WAS RECENTLY FABRICATED. THE STATE HAS BEEN ARGUING THAT ALL OF THESE THINGS ARE HARMLESS ERROR BECAUSE OF THE OVERWHELMING EVIDENCE, AND YET THE STATE WAS UP HERE AND SAID THAT THE STATE WAS REQUIRED TO MAKE A DEAL WITH THE DEVIL BECAUSE THEY NEEDED CHRISTOPHER STEWART'S TESTIMONY. THEY TELLS ME THAT THIS WAS NOT AN OVERWHELMING EVIDENCE. THAT OUTSIDE OF CHRISTOPHER STEWART'S TESTIMONY, THEY HAD A VERY TENUOUS CASE AT BEST, SO THE ARGUMENT THAT THIS WAS ALL HARMLESS ERROR DOESN'T RING TRUE. IN LARZELERE AND IN HEATH, LARZELERE IS NOT APPLICABLE, AS FAR AS THE PROPORTIONALITY REVIEW, BECAUSE THERE WAS NO CODEFENDANT WHO GOT A LESSER SENTENCE. THE CODEFENDANT WAS ACQUITTED AND THEREFORE NOT GUILTY, SO YOU CAN'T SAY THAT BECAUSE HE WAS ACQUITTED, SHE CAN'T GET THE DEATH PENALTY. IN HEATH, THE LANGUAGE IN HEATH IS THAT THE JUDGE GAVE THE CODEFENDANT'S STATEMENT SUBSTANTIAL WEIGHT. WE DON'T HAVE THAT HERE. SO HEATH IS EASILY DISTINGUISHABLE.

BUT YOU WOULD AGREE, UNDER THIS COURT'S CASE LAW, THAT A SENTENCER, THE JUDGE, COULD MAKE A DETERMINATION THAT SOMETHING WAS MITIGATING INNATE BUT NOT MITIGATING UNDER THE FACTS OF THE CASE. WOULDN'T YOU AGREE? THIS COURT SAID THAT. RIGHT?

I KIND OF AGREE BUT NOT COMPLETELY, BECAUSE MY INTERPRETATION WITH THE JUDGE HERE, DID, WAS HE DIDN'T FIND IT AS A MITIGATING FACTOR. NO. I THINK THAT IS A LEGITIMATE READING OF WHAT HE DID HERE.

THANK YOU.

THANK YOU.