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Harry Butler vs State of Florida

THE NEXT CASE ON THE COURT'S DOCKET IS BUTLER VERSUS STATE. THANK YOU, COUNSEL, FOR YOUR HELP IN THIS CASE. DOES.

GOOD MORNING. MY NAME IS KEVIN BRIGGS. I AM HERE TO REPRESENT MR. HARRY BUTLER, CONVICTED OF A DEATH IN PINELLAS COUNTY, AND IN THIS CASE, IN THE BRIEF, I WOULD LIKE TO CONCENTRATE ON ISSUES 1 AND 6 OF THE BRIEF. OF COURSE I WOULD ANSWER ANY QUESTIONS THAT YOU HAVE. IN ISSUE ONE --

RELATING TO ISSUE ONE, WAS THERE ANY FILING, IN THE TRIAL COURT, BY THE STATE, OF A NOTICE THAT THEY INTENDED TO OFFER EVIDENCE OF SIMILAR CRIMES?

I BELIEVE THERE -- I DON'T RECALL, YOUR HONOR. I DON'T BELIEVE THERE WAS, BUT I CAN'T SAY FOR SURE.

THERE IS A RULE OF CRIMINAL PROCEDURE THAT ANTICIPATES THAT, IS THAT CORRECT?

THAT'S CORRECT. I THINK IT IS IMPORTANT TO NOTE THAT THE STATE WASN'T SEEKING TO BRING ADDITIONAL WITNESSES, AS -- TO PRESENT THIS BAD CHARACTER EVIDENCE. THEY BROUGHT IT IN VIA CROSS-EXAMINATION OF A NUMBER OF WITNESSES.

YOU HAVEN'T RAISED, AS AN ISSUE, FAILURE TO COMPLY WITH THAT RULE OF CRIMINAL PROCEDURE?

NO. I HAVE NOT RAISED THAT ARGUMENT IN THE BRIEF.

BUT SO FAR AS YOU KNOW, THERE WAS NO NOTICE OF INTENT TO RELY ON EVIDENCE OF SIMILAR CRIMES.

I DON'T BELIEVE THERE WAS, JUSTICE ANSTEAD.

AND THERE WAS NO PRETRIAL HEARING, OTHER THAN ON THE MOTION IN LIMINE?

NO. THERE WAS NO NOT, AS I RECALL.

WHEN -- AS YOU ADDRESS THESE, WOULD YOU MAKE SURE THAT YOU ADDRESS THE ISSUE OF -- IN EACH CASE, WHETHER OR NOT IT WAS PRESERVED. WHETHER THERE WAS SPECIFIC OBJECTIONS MADE, AT THE TIME THAT THE EVIDENCE WAS BEING PRESENTED.

SURE. THAT IS AN ARGUMENT THAT THE STATE REPEATEDLY MAKES, THAT THESE ISSUES WERE NOT PRESERVED. AS FAR AS ISSUE ONE, THE ISSUE OF BAD CHARACTER AND PROPENSITY TO COMMIT VIOLENCE, THIS WAS, FIRST, RAISED IN A MOTION, WRITTEN MOTION IN LIMINE, AND SPECIFICALLY --

WE KNOW ABOUT THE MOTION IN LIMINE, BUT I THINK WHAT WE ARE INTERESTED IN, THERE ARE SEVERAL DIFFERENT PARTS OF THE BAD CHARACTER EVIDENCE. ONE IS, FOR EXAMPLE, THE DOMESTIC ASSAULT THAT WAS TWO DAYS BEFORE.

THAT'S CORRECT.

IT IS MY UNDERSTANDING THAT THAT WAS NEVER ACTUALLY CONTESTED, THAT THE DEFENDANT AGREED THAT THAT COULD COME IN, SO IF YOU -- WE ARE TALKING ABOUT DIFFERENT ASPECTS OF THERE IS A 1993 INCIDENT. THERE IS THE QUESTION OF THIS -- OF THE SEXUAL ASSAULT, ASSOCIATED WITH THE MARCH 1 1, SO IF YOU CAN SEPARATE THOSE AS TO WHETHER --

SURE. THAT IS A IMPORTANT POINT, BECAUSE IT IS THE -- IS MY CONTENTION THAT THIS WAS A CALCULATED SCHEME, BY THE PROSECUTOR, TO INTRODUCE BAD EVIDENCE, BAD COLLATERAL EVIDENCE. THE FIRST INSTANCE IS A 1993 INCIDENT, WHERE THAT WAS FOUR YEARS PRIOR TO THE INSTANT OFFENSE, WHERE THE PROSECUTOR INTRODUCED EVIDENCE THAT THE, MR. BUTLER, ATTACKED THE WOMAN, STRUCK HER, PUNCHED HER, ACTUALLY PUT HER -- HIS FOOT ON HER THROAT, AND THERE WAS AN OBJECTION TO THIS EVIDENCE, THE RELEVANCY OF THIS EVIDENCE.

AT WHAT POINT?

AT WHAT POINT.

AT WHAT POINT WAS THE OBJECTION MADE?

WHEN THIS -- WHEN THE PROSECUTOR, ON CROSS-EXAMINATION OF THEODORE DALLAS, BEGAN TO QUESTION DALLAS REGARDING THIS MATTER, THERE WAS A RELEVANCY OBJECTION TO IT, AND THERE WAS A REFERENCE TO THE EARLIER MOTION IN LIMINE.

WELL, THAT WAS COMING IN, BECAUSE HE, MR. DALLAS, TESTIFIED FOR -- IS HE A DEFENSE WITNESS?

HE WAS. HE WAS A DEFENSE WITNESS. THAT'S CORRECT.

HE SAID THAT HE THOUGHT THE RELATIONSHIP BETWEEN YOUR CLIENT AND THE DECEASED WAS THAT THERE WAS -- IT WAS A GOOD RELATIONSHIP. WASN'T THIS PROPER CROSS-EXAMINATION TO TEST HIS KNOWLEDGE OF OF THEIR RELATIONSHIP, TO TEST WHAT HE HAD SAYSFIED TO?

THAT IS WHAT THE STATE ARGUES, JUSTICE PARIENTE, BUT I WOULD MAINTAIN THAT, IT IS NOT A COMPLETELY OPEN DOOR HERE. THERE WERE OTHER WAYS TO ATTACK THE CREDIBILITY OF MR. DALLAS. THE STATE COULD HAVE PROSECUTOR COULD HAVE ASKED MR. DALLAS WAS THERE NOT AN OPPORTUNITY FOR THE VIAL TONES OCCUR THAT YOU WERE NOT AWARE OF? AND THAT WOULD HAVE BEEN ONE APPROACH. BUT, INSTEAD, THE STATE INTERJECTED, INTO THE TRIAL, HIGHLY-IN INFLAMMATORY, IRRELEVANT --

WAS THAT IN 1993, SUBJECT TO THE MOTION IN LIMINE?

I DON'T KNOW IF THIS WAS SPECIFICALLY LABELED AS A 1993, BUT THE MOTION IN LIMINE ADDRESSED ALL PRIOR ACTS OF VIOLENCE, PRIOR.

THE STATE WOULD SAY THAT THEY WEREN'T GOING TO PLAN TO GO INTO IT IN THEIR CASE-IN-CHIEF, AND THE DOOR WAS OPEN. WAS THERE A PROFFER, FIRST, BY THE STATE, THAT THEY WERE, NOW, INTENDING TO GO INTO THIS BAD CHARACTER?

THERE WAS NO PROFFER. THIS CAME UNEXPECTEDLY OR NOT UNEXPECTEDLY BY THE DEFENSE, BECAUSE THIS WAS A CONCERN THAT WAS RAISED EARLIER, IN THE MOTION IN LIMB ME -- LIMINE, BUT THIS WAS JUST SOMETHING THAT ABRUPTLY CAME OUT IN CROSS-EXAMINATION.

AS I UNDERSTAND IT, IN THIS 1993 OFFENSE, THERE WAS SOME BLUNT TRAUMA KIND OF INJURY THAT WOULD BE KIND OF SIMILAR TO THE INJURIES THAT WERE INFLICTED, DURING THE COURSE OF THIS MURDER. ISN'T THAT TRUE? AND UNDER THAT CIRCUMSTANCES, WOULDN'T THAT

QUALIFY AS SIMILAR FACT EVIDENCE?

IT IS SIMILAR, IN THE SENSE THAT IT WAS AN ATTACK UPON -- LET ME GET ONE THING STRAIGHT, FIRST, IS THAT THIS IS COMPLETELY UNSUBSTANTIATED. THIS IS AN ALLEGATION THAT THE PROSECUTOR BROUGHT, PRODUCED, WITH NO FURTHER EVIDENCE, NO CONVICTION, NO OTHER WITNESSES TESTIFYING AS TO IT. AND THAT THE ONLY ALLEGATION WAS PHYSICAL --

ARE YOU SAYING THAT DID NOT OCCUR?

PARDON ME?

ARE YOU ALLEGING THAT THIS DID NOT OCCUR? EYE CAN'T SAY CONCLUSIVELY THAT IT DID NOT. I AM ONLY SAYING THAT THE RECORD INDICATES ONLY THAT THIS WAS THE PROSECUTOR'S ASSERTION ON CROSS-EXAMINATION. THAT THESE THINGS OCCURRED.

BUT THE STATE DIDN'T OFFER ANY MEDICAL EVIDENCE, FOR INSTANCE, OR ANY WITNESSES TO A SEXUAL BATTERY OR CHOKING OR WHATEVER THAT OCCURRED?

NO, YOUR HONOR. THERE WAS NO ALLEGATION WITH REGARDS TO THE 1993, OF SEXUAL BATTERY.

THE INFORMATION CAME OUT, IN THE FORM OF LEADING QUESTIONS. IS THAT BECAUSE ARE SAYING?

THAT'S CORRECT. THAT'S CORRECT. AND SETTING ASIDE THE '93 INCIDENT, THE ATTACK ON MR. BUTLER'S CHARACTER DID NOT STOP THERE. WHEN CROSS-EXAMINATION OF HIM, THE PROSECUTION BROUGHT OUT THAT THE STATE ATTORNEYS OFFICE WAS CONTEMPLATING RAPE AND KIDNAPPING CHARGES, CONCERNING A MARCH 11 INCIDENT -- MARCH 11 INCIDENT BETWEEN MR. BUTLER AND THE VICTIM.

THAT IS THE ONE, THOUGH, THAT THE DEFENDANT CONCEDED WAS RELEVANT TO SHOW MOTIVE, BECAUSE IT WAS FOLLOWING THAT INCIDENT THAT HE WAS, THEN, KICKED OUT OF THE HOUSE. SO, NOW, THIS PART ABOUT THE RAPE AND THE KIDNAPPING, CAME OUT IN CROSS-EXAMINATION OF MR. BUTLER. CORRECT?

THAT'S CORRECT.

SO, AGAIN, THIS IS SOMETHING WHERE, NOW, WE ARE LOOKING AT HOW DID THE STATE, THEN, SEEK TO INTRODUCE THIS EVIDENCE? THEY WEREN'T SEEKING TO INTRODUCE IT AS WILLIAMS RULE EVIDENCE OR AS PRIOR, TO SHOW MOTIVE, BUT IT WAS TO IMPEACH HIS CREDIBILITY IN WHAT REGARD? WHAT WOULD YOU -- THAT IS WHAT THEY ARE GOING TO SAY, THAT IT WAS APPROPRIATE CROSS-EXAMINATION. WHAT IS YOUR RESPONSE TO THAT?

I WOULD, AGAIN, POINT OUT THAT THIS IS NOT JUST A WIDE OPEN DOOR TO ACCUSATIONS. IF YOU COMPARE IT TO A SITUATION WHERE YOU CAN COMPARE IT WITH REPEAT VIOLATIONS OF A FELONY CONVICTION, THE STATE IS NOT ALLOWED TO BRING IN THE NATURE OF OR SUBSTANCE OF THOSE CONVICTIONS. THE PROSECUTION CAN ONLY ASK THE DEFENDANT IF HE HAS, IN FACT, BEEN CONVICTED. IT IS NOT AN OPPORTUNITY TO INTERJECT, INTO THE TRIAL, EVERY ACCUSATION THAT THE PROSECUTOR CAN MAKE, AND THAT IS ESSENTIALLY WHAT OCCURRED HERE. AND IF I COULD POINT OUT, JUSTICE PARIENTE, THE DEFENSE, AT THE TRIAL LEVEL, CONCEDED THAT, AND I WILL CONCEDE, THAT THE MARCH 11, THE FACT OF THE DOMESTIC, THAT THERE WAS A DOMESTIC INCIDENT, I WOULD CONCEDE THAT THAT IS RELEVANT TO SHOW MOTIVE. HOWEVER, I WILL NOT CONCEDE THAT THE SPECIFIC ALLEGATIONS OF RAPE AND KIDNAPPING ARE, ALSO, THERE. THEY ARE NOT RELEVANT, AND I WON'T CONCEDE THAT POINT.

WHY WASN'T IT HARMLESS?

WHY WAS IT NOT HARMLESS?

IN THIS CASE, THE EVIDENCE ESSENTIALLY IS -- THE ONLY ACTUAL EYEWITNESS TO THE CRIME WAS SIX-YEAR-OLD GIRL, AT THE TIME OF THE OFFENSE, AND SHE ONLY OBSERVED, BY HER OWN ADMISSION, THE, MR. BUTLER'S LEG, WHICH SHE CLAIMED WAS MR. BUTLER'S LEG, ON HER MOTHER, AT THE TIME OF THE ATTACK. THIS IS A WITNESS THAT, WHEN SHE WAS ASKED BY THE POLICE WHAT HAPPENED, RIGHT AFTER, THE POLICE ARRIVED AT THE SCENE, SHE WAS UNABLE TO MAKE AN ALLEGATION THAT, YES, HER FATHER KILLED HER MOTHER. THE ONLY OTHER SUBSTANTIAL EVIDENCE OF GUILT IS DNA EVIDENCE THAT SHOWS THAT THE VICTIM'S BLOOD OR ALLEGEDLY SHOWS THE VICTIM'S BLOOD ON SOME TENNIS SHOES OR A TENNIS SHOE THAT BELONGED TO THE DEFENDANT.

DID THEY ACTUALLY SAY IT WAS THE VICTIM'S BLOOD, OR WAS IT, MORE, THAT IT WAS CONSISTENT WITH THE VICTIM'S DNA?

IT WAS CONSISTENT WITH THE VICTIM'S DNA. THAT POINT WAS NOT CONCEDED.

DID THEY USE THE 1993 INCIDENT AND INFORMATION ABOUT THE RAPE AND KIDNAPPING IN CLOSING, TO SAY, LOOK, THIS MUST BE THE GUY, BECAUSE, LOOK, HE HAS DONE IT IN 1993. HE TRIED TO RAPE HER AND KIDNAP HER. WAS THAT EMPHASIZED IN CLOSING ARGUMENTS?

I DON'T BELIEVE IT WAS, YOUR HONOR. YOBLING IT WAS HIGHLIGHTED. -- I DON'T BELIEVE IT WAS HIGHLIGHTED. HOWEVER, I AM NOT ABSOLUTELY SURE ON THAT POINT. IF I COULD TURN TO THE LAST ISSUE OF THIS BRIEF, IN REGARDS TO THE PENALTY PHASE --

BUT BEFORE YOU GET AWAY FROM THE ISSUE OF HARMLESSNESS, THERE WAS CONSIDERABLE OTHER EVIDENCE IN THIS TRIAL, CONCERNING THE RELATIONSHIP BETWEEN THE VICTIM AND THE DEFENDANT AND THE STORMY NATURE OF IT, CORRECT?

THAT'S CORRECT. RIGHT.

AND IN FACT THAT THERE HAD BEEN SOME VIOLENCE INVOLVED.

RIGHT. THAT IS CORRECT.

SO THIS WASN'T JUST ONLY EVIDENCE THAT THERE WAS, THAT THERE HAD BEEN INCIDENCES OF VIOLENCE. INVOLVING THIS DEFENDANT AND THIS VICTIM?

I DON'T BELIEVE THERE WAS ANY OTHER TESTIMONY BY WITNESSES, AS TO SPECIFIC ACTS OF VIOLENCE THAT MR. BUTLER COMMITTED UPON THE VICTIM. THERE WAS SOME TESTIMONY, I BELIEVE, BY THE VICTIM'S SISTER, THAT THIS WAS, IN FACT, A STORMY RELATIONSHIP, AND MR. BUTLER WAS IN AND OUT OF THE HOUSE AT PARTICULAR POINTS IN TIME. AND THAT LEADS ME INTO THE PROPORTIONALITY ARGUMENT THAT THIS WAS A SERIOUS LONG-TERM RELATIONSHIP. MR. BUTLER AND THE VICTIM HAD THREE CHILDREN TOGETHER, AND THIS WAS A VERY STORMY, PASSIONATE AFFAIR, WHERE THIS COURT HAS CONSISTENTLY HELD, WHERE A KILLING OCCURS, IN THE MIDST OF THESE CIRCUMSTANCES, THAT THE DEATH PENALTY IS NOT PROPORTIONATE PENALTY IN SUCH A CASE. THE OTHER ASPECT OF THE PROPORTIONALITY ARGUMENT IS --

ARE THERE CASES WHERE THERE HAS BEEN ONE AGGRAVATING FACTOR -- AS I UNDERSTAND THIS CASE, ONE AGGRAVATING FACTOR THAT WAS FOUND WAS HEINOUS, ATROCIOUS AND CRUEL. WAS THAT CORRECT?

THAT'S TRUE.

AND HAVE WE AFFIRMED DEATH PENALTY CASES, WHERE THAT WAS THE SOLE AGGRAVATING FACTOR?

I BELIEVE THAT THERE ARE SUCH CASES. HOWEVER, THIS COURT HAS MADE IT CLEAR THAT THEY WILL ONLY AFFIRM, IN THE CASE OF A SINGLE AGGRAVATOR, WHERE THERE IS LITTLE OR NO MITIGATION.

THE MITIGATION THAT WAS PRESENTED IN THIS CASE WAS GIVEN MINIMAL WEIGHT BY THE TRIAL JUDGE, WASN'T IT? I MEAN, WHAT DO WE HAVE, BASICALLY, THE DEFENDANT GREW UP WITHOUT HIS NATURAL MOTHER, AND THAT HE WAS A GOOD SON AND SISTER -- I MEAN BROTHER.

THERE WERE FOUR NONSTATUTORY MITIGATORS THAT THE COURT FOUND. THE COURT GAVE THEM LITTLE WEIGHT. I WOULD ARGUE WITH THAT. I MEAN, MR. BUTLER, THESE FOUR MITIGATORS, MR. BUTLER HAD A LONG-TERM DRUG PROBLEM. HIS FATHER TESTIFIED THAT HE WAS --

WHO WAS -- HOW WAS THAT PRESENTED? WHAT DO WE HAVE ABOUT LONG-TERM DRUG USE, OTHER THAN HIS OWN STATEMENTS THAT HE USED DRUGS?

THERE WAS TESTIMONY -- EXPERT TESTIMONY FROM DR. MILES AN HOUR, AT THE, I BE -- FROM DR. MIER, I BELIEVE, AT THE SENTENCING HEARING.

WHAT DID HE BASE HIS TESTIMONY ABOUT LONG-TERM DRUG USE ON?

HE BASED HIS TESTIMONY ON THE OBJECTIVE FACT THAT SOMEBODY, UNDER THE INFLUENCE OF COCAINE, IN THE MIDST OF A VIOLENT EMOTIONAL ACT, SUCH AS THIS INVOLVED, THAT THAT WOULD POSSIBLY RESULT IN WHAT HE CALLED PERSERVATION, WHICH IS A REPRESENTATIVE TYPE OF OUT LASH.

WAS IT JUST DEFENDANT'S SELF-REPORTING, ABOUT DRUG USE, OR DID WITNESSES COME IN AND SAY HE HAS BEEN USING DRUGS FOR --

THERE WERE A NUMBER OF WITNESSES THAT TESTIFIED THAT THEY HAVE USED COCAINE ON REPEATED OCCASIONS, ON THE LATE-NIGHT, EARLY-MORNING HOURS OF THIS OFFENSE.

BUT NOT JUST THIS EVENT. I UNDERSTAND DR. MARINE WAS TALKING ABOUT -- DR. MARIN WAS TALKING ABOUT LONG-TERM DRUG USE, SO WHAT DO WE HAVE IN THE RECORD AND DID THE DOCTOR BASE HIS TESTIMONY, CONCERNING LONG-TERM DRUG USE, A HISTORY OF DRUG USE. WHERE IS THE EVIDENCE THAT SUPPORTS A HISTORY OF DRUG USE?

I BELIEVE HE BASED IT ON HIS, YOU KNOW, HIS INTERVIEW AND HIS QUESTIONING OF MR. BUTLER. AND UPON HIS, JUST HIS EXPERT KNOWLEDGE THAT SUCH DRUG USAGE COULD RESULT IN THAT PARTICULAR TYPE OF BEHAVIOR.

I UNDERSTAND, AND IN THIS CASE, THAT THE JUDGE DID NOT FIND THE AGGRAVATOR A PRIOR VIOLENT FELONY. MR. BUTLER WAS CROSS-EXAMINED ABOUT THERE BEING TEN PRIOR FELONIES. IS THERE ANYTHING IN THE RECORD AS TO THE NATURE OF THESE FELONIES? ARE WE TO ASSUME THAT THESE WERE NOT VIOLENT FELONIES, BUT OTHER, EITHER DRUG-RELATED, OR DO WE KNOW ANYTHING ABOUT HIS -- I AM TRYING TO UNDERSTAND IF WE UNDERSTAND ANYTHING ABOUT HIS PAST OR WHETHER THERE WAS A -- WHETHER THE STATE TRIED TO GET IN ANYTHING ABOUT THAT AGGRAVATOR.

IF I REMEMBER CORRECTLY, THE PRIOR OFFENSES, HIS PRIOR CRIMINAL RECORD, WERE PRIMARILY DRUG OFFENSES. I DON'T REMEMBER ANY SERIOUS VIOLENT OFFENSES.

AND WAS THIS -- WAS THE VICTIM THAT WAS OF THIS MURDER, THE CHILDREN, HER CHILDREN, ARE THEY MR. BUTLER'S CHILDREN?

THAT'S CORRECT. THERE WERE THREE CHILDREN THAT THEY HAD.

WAS THERE ANY TESTIMONY ABOUT HIS RELATIONSHIP WITH THOSE CHILDREN? THEIR AGES AND WHAT THE NATURE OF HIS RELATIONSHIP WITH THEM?

THERE WAS ONLY TESTIMONY BY MR. BUTLER THAT HE, YOU KNOW, HE LOVED HIS CHILDREN, DESPITE WHAT HAPPENED, AND --

WAS HE SUPPORTING THEM? ANY TESTIMONY ABOUT THAT IN THE RECORD, ABOUT WHETHER HE WAS PROVIDING FOR THEM?

THERE WAS -- THE DEFENSE BELOW ARGUED THAT THAT HE WAS SUPPORTING HIS CHILDREN FINANCIALLY. THAT WAS ARGUED BELOW. I DON'T RECALL IF MR. BUTLER, SPECIFICALLY, SAID THAT. I WOULD POINT OUT, TO THIS COURT, THAT THE ONLY -- IN REGARDS TO MR. BUTLER'S PRIOR RECORD, THE ONLY CASES THAT I COULD -- THAT IS DOMESTIC VIOLENCE OR DOMESTIC-TYPE CONTACTS, IS WHERE THERE WAS A PRIOR FELONY. I BELIEVE A PRIOR VIOLENT FELONY. I BELIEVE IN SPENCER CASE, THE DEATH PENALTY WAS UPHeld BY THIS COURT, AND IN THAT CASE, THE DEFENDANT HAD ACTUALLY COMMITTED A PRIOR MURDER.

WE NORMALLY ONLY USE THE RELATIONSHIP, IN REGARD TO A COLD, CALCULATED AGGRAVATOR, HAVE WE NOT?

THOSE ARE THE -- WHERE THAT HAS BEEN FOUND BY THE JUDGE, WE HAVE, OFTENTIMES, REVERSED THAT, BECAUSE OF THE DOMESTIC RELATIONSHIP OF THE PARTIES.

THAT IS TRUE. JUSTICE HARDING.

BUT THAT WAS NOT FOUND HERE.

THAT WAS NOT FOUND HERE. IN FACT, I BELIEVE THE STATE ADMITTED THAT, YOU KNOW, THEY WERE NOT EVEN SEEKING THAT.

AND SO, BUT -- I GUESS MY QUESTION IS HOW DOES -- WAS THAT MITIGATING YOUR -- YOU ARE SUGGESTING THAT IT MITIGATES IT, TO MAKE THE SENTENCE DISPROPORTIONATE OR NOT PROPORTIONAL. HOW DOES THAT AFFECT THE FACT THAT IT A FAMILIAR RELATIONSHIP, WHEN CCP HAS NOT BEEN FOUND TO MAKE IT DISPROPORTIONATE?

IT MAKES IT DISPROPORTIONATE. IN ONE SENSE, IN THAT IT ONLY LEAVES A SINGLE AGGRAVATOR, THE HEINOUS, ATROCIOUS, CRUEL NATURE. THE -- IT MAKES IT DISPROPORTIONATE, IN THAT THERE ARE OTHER CASES, WHERE, IN VERY SIMILAR CIRCUMSTANCES, THIS COURT HAS -- IS FOUND THAT TYPE OF KILLING, NOT TO WARRANT THE DEATH PENALTY. IN FACT THERE, IS ONE CASE WHERE THE DEFENDANT WAS CONVICTING OF HACKING HIS THE PERSON THAT HE WAS HAVING A RELATIONSHIP, HACKING HER TO DEATH, AND THERE WAS A DISTRICT COURT DECISION THAT SAID THAT THAT WOULD NOT EVEN CONSTITUTE FIRST-DEGREE MURDER, THAT THAT WOULD BE SECOND-DEGREE MURDER, AND THERE IS, ALSO, THAT ASPECT OF THIS OFFENSE.

THE STATE DIDN'T SEEK CCP. THERE IS NO QUESTION THAT, IF YOU BELIEVE THE STATE'S EVIDENCE, THAT THIS DEFENDANT HAD ACTUALLY HAD A PRECONCEIVED INTENT TO KILL HER THAT WAS EXPRESSED AT LEAST TWO DAYS BEFORE THIS INCIDENT. CORRECT? I MEAN, IF YOU BELIEVE THE STATE'S WIT NEDZ.

RIGHT -- WITNESSES.

RIGHT. THERE WAS A PRIOR THREAT. HOWEVER, I WOULD, AGAIN, POINT OUT THAT THIS WAS A LONG-TERM UP AND DOWN AGAIN, HEATED RELATIONSHIP, AND I HAVE NO DOUBT THAT --

BUT YOU ARE NOT SUGGESTING THAT, BECAUSE THIS CAME OUT OF A DOMESTIC VIOLENCE SITUATION, THAT WE SHOULD SOMEHOW FIND THIS TO BE A MORE MITIGATED OFFENSE THAN IF THESE WERE STRANGERS, ARE YOU?

I AM NOT SUGGESTING THAT -- THE FACT THAT IT IS A DOMESTIC VIOLENCE CASE, PER SE, PRECLUDES THE DEATH PENALTY, BUT THAT IS ONE OF THE CIRCUMSTANCES AND A VERY WEIGHTY CIRCUMSTANCE THAT THIS COURT SHOULD CONSIDER.

I THINK YOU ARE INTO YOUR REBUTTAL.

OKAY. THANK YOU.

MR. LANDRY.

MAY IT PLEASE THE COURT. MY NAME IS BOB LANDRY, REPRESENTING THE STATE ON THIS APPEAL. WITH RESPECT TO THE FIRST ISSUE THAT HAS BEEN RAISED, HERE, CONCERNING THE TRIAL COURT'S RULING ON THE MOTION IN LIMINE AND THE INTRODUCTION OF EVIDENCE AT TRIAL, AS WE POINTED OUT IN OUR BRIEF, I THINK THERE WAS NO VIOLATION OF THE COURT'S RULING ON THE MOTION IN LIMINE. THEY HAD -- THERE WAS -- JUST BEFORE THE TRIAL BEGAN, JUST CROSADO, WHO WAS THE PRESIDING JUDGE AT THIS TRIAL, APPARENTLY REVIEWED OR HAD BROUGHT TO HIS ATTENTION, AGAIN, ON -- PURSUANT TO THE DEFENDANT'S MOTION IN LIMINE, AN EARLIER RULING THAT JUDGE RONDALINO HAD MADE.

WHAT ABOUT THE FACT THAT WE KNOW THAT JUDGE RONDALINO HAD SAID THE FACT OF THE MARCH 11 DOMESTIC VIOLENCE WAS RELEVANT TO A MOTIVE. HE WAS ONLY CHARGED WITH DOMESTIC VIOLENCE, ISN'T THAT CORRECT?

HE WAS ARRESTED AND CHARGED WITH MISDEMEANOR DOMESTIC BATTERY.

AND SO THE STATE NEVER CHARGED HIM WITH SEXUAL BATTERY OR KIDNAPPING, AS A RESULT OF THAT, SO WHAT IS THE RELEVANCY OF THE STATE CROSS-EXAMINING HIM, CONCERNING THOSE TWO OFFENSES, WHEN HE WAS NEVER CHARGED WITH THEM?

WELL, IF WE ARE TALKING ABOUT THE DEFENSE WITNESS DALLAS, HE WAS --

I BELIEVE THIS QUESTIONING WAS QUESTIONS TO THE DEFENDANT, HIMSELF.

OKAY. WITH RESPECT TO THE DEFENDANT, HE HAD GOTTEN ON THE STAND AND SAID THAT HE LOVED HER MORE THAN ANYTHING, THAT HE WOULD NEVER DO ANYTHING TO HURT HER, THAT SHE WAS ESSENTIALLY HIS LIFE AND HE WOULD NEVER ENGAGE IN ANY LIFE-THREATENING OR SERIOUS INJURY OF THAT NATURE. IN FACT, THAT WAS HIS TESTIMONY ON DIRECTION. AS TO THE CROSS-EXAMINATION OF HIM, THEN, IT BECAME CLEAR THAT, OOFBL, THAT SOME OF THAT COULD BE -- THAT, OBVIOUSLY, THAT SOME OF THAT COULD BE CHALLENGED. YOU SAY YOU HAVE NEVER DONE ANYTHING TO HURT HER, AND WHAT ABOUT THAT INCIDENT HERE AND WHAT ABOUT THAT INCIDENT THERE? SO I THINK IT WAS RELEVANT TO DEMONSTRATE THAT HIS TESTIMONY, ON DIRECT, WAS NOT QUITE AS ACCURATE AS HE WAS LETTING ON.

YOU CAN DO THAT, BY TALKING ABOUT CHARGES THAT WERE NEVER FILED?

WELL, NO, THE DEFENSE ASSERTS, IN THE -- I THINK IN HIS REPLY BRIEF, THAT THAT IS WHAT THE

STATE SHOULD HAVE ASKED A WITNESS, THAT WERE THERE ANY OTHER CHARGES FOUND -- FILED AGAINST HIM, AND THE WITNESS WAS NOT -- I THINK IT IS MORE -- IT IS BETTER PROCEDURE TO ASK THE WITNESS IF HE KNOWS ABOUT PRIOR INCIDENTS, RATHER THAN WHETHER OR NOT CHARGES WERE FOUND, BECAUSE CHARGES MAY BE FOUNDED OR UNFOUNDED. IT SEEMS TO ME THAT THE DEFENDANT, IN ESSENCE, KIND OF OPENED THE DOOR, WHEN HE TESTIFIED ON DIRECT, THAT, YOU KNOW, HE DIDN'T HAVE ANY PROBLEMS. THIS WAS NOT A THROW-DOWN FIGHT, HE SAID. THIS WAS A MINOR ARGUMENT. HE WAS, ALSO, THE DEFENDANT WAS --

MR. LANDRY, THE PROBLEM ABOUT THE RAPE AND THE KIDNAPPING CHARGE IS THAT, AS JUSTICE QUINCE IS SAYING, IF IT IS NOT FILED, IT IS NOT A QUESTION OF WHETHER IT HAD TO BE FILED, IN ORDER FOR IT TO BE INQUIRED INTO, BUT ONCE YOU START TO ASK LEADING QUESTIONS, WHERE YOU SUGGEST CERTAIN THINGS TO THE JURY, WELL, ISN'T IT TRUE THAT THIS HAPPENED OR THAT HAPPENED, THE DEFENDANT IS PUT IN A POSITION OF HOW DO THEY DISPROVE SOMETHING, ONCE THE JURY HEARS THAT, SO THEY HAVE NOT DISPUTED THAT THE MARCH 11 INCIDENT WAS PROBATIVE. IN FACT, THAT WAS ALLOWED IN, IN THE CASE-IN-CHIEF, BUT WE ARE TALKING ABOUT WHAT YOU CAN DO, THROUGH CROSS-EXAMINATION, TO INSINUATE THINGS THAT MAY NOT BE ACTUALLY PROVED IN -- BY OTHER EVIDENCE.

THAT IS EXACTLY WHY THE STATE IS MAKING THE POINT, IN ITS BRIEF, THAT THERE WAS NO OBJECTION TO ANY OF THIS. THERE WAS ONLY ONE OBJECTION TO THE STATE'S CROSS-EXAMINATION OF MR. BUTLER. WITH RESPECT TO THE STATEMENTS ABOUT WHETHER HE WAS ASKED ABOUT SEXUAL BATTERY AND KIDNAPPING, MY RECOLLECTION OF THE RECORD IS THAT HE WAS BEING ASKED WHETHER OR NOT THE VICTIM HAD TOLD THE POLICE ABOUT THAT, AND WHAT HIS REACTION TO THAT WAS. NOW, I DON'T KNOW WHETHER OR NOT IT COULD HAVE BEEN -- THERE MIGHT HAVE BEEN A HEARSAY OBJECTION. THE POINT OF IT THERE WAS NO OBJECTION TO THAT, BY DEFENSE COUNSEL. I THINK THE REASON FOR THAT IS THAT THE DEFENSE -- THE DEFENDANT WAS GIVING FAVORABLE TESTIMONY TO THE JURY. HE WAS SAYING, YOU KNOW, THAT BAY ESSENTIALLY IS VINDICTIVE AND CARRIES A GRUDGE AND SHE IS THE KIND OF PERSON THAT WOULD CALL THE POLICE ON YOU, EVEN IF THERE WERE UNFOUNDED CHARGES. SO I THINK IT WAS APPROPRIATE FOR THE STATE TO GET INTO WHETHER OR NOT, CERTAINLY GET HIS REACTION AS TO THE STATEMENT THAT HE MAY HAVE OVERHEARD THE VICTIM TELLING THE POLICE, AT THE INCIDENT, THAT HE WAS THERE AT THE TIME. WITH RESPECT TO AND AS I SAY, THE ONLY OBJECTION THAT WAS INTERPOSED BY DEFENSE COUNSEL, CONCERNED WITH WHETHER OR NOT THE DEFENDANT WAS TOLD, BY THE POLICE, THAT THEY WERE THINKING OF RECOMMENDING TO THE PROSECUTOR THAT THE CHARGES BE UPGRADED FROM A MISDEMEANOR TO A FELONY. AND THAT OBJECTION WAS MADE, AND THE COURT, YOU KNOW, KIND OF TOLD THE PROSECUTOR TO REPHRASE THE QUESTION OR TO MAKE IT CLEARER, ALONG THAT LINE, AND --

DO YOU AGREE THAT THE STATE NEVER FILED ANY NOTICE OF ITS INTENT TO OFFER WILLIAMS RULE EVIDENCE?

NO. I AM NOT CERTAIN ABOUT THAT, AND YOUR HONOR ASKED THAT QUESTION BEFORE. I DON'T RECALL -- MY RECOLLECTION IS THAT THERE MAY BE A NOTICE OF WILLIAMS RULE IN THE FILE, AND THE REASON I SAY THAT IS I HAVE A VAGUE RECOLLECTION OF CERTAIN PEOPLE BEING NAMED AS POTENTIAL WITNESSES. I DON'T -- THAT MAY HAVE BEEN THE MATTER THAT CAME BEFORE JUDGE RONDALINO, AND WE DON'T HAVE A TRANSCRIPT OF WHAT HIS RULING WAS. IN THE MOTION IN LIMINE, THERE IS NOTHING.

WHAT WAS THE PURPOSE OF THE MOTION IN LIMINE?

WELL, THE MOTION IN LIMINE WAS TALKING ABOUT THE 1997 INSIDE GEPT, AND -- INCIDENT.

BUT ISN'T THERE A PART SIX, A PARAGRAPH 6, IN THAT MOTION IN LIMINE, WHICH TALKS -- WHICH

WOULD INCLUDE THE 1993 INCIDENT, ALSO?

I MEAN -- INCIDENT, ALSO? I MEAN, THE LANGUAGE OF IT SAYS, BASICALLY, ANY PRIOR ALLEGATIONS OF ABUSE, PHYSICAL OR EMOTIONAL, TOWARD LESLIE FLEMING.

YEAH. THAT'S IN THERE, AND AT THE MOTION IN LIMINE, THE STATE SAYS WHATEVER IS HEARSAY IS HEARSAY, AND WE ARE NOT GOING TO GET INTO INTRODUCING HEARSAY TESTIMONY AS TO WHAT BAY MAY HAVE TOLD OTHER PEOPLE AND HAVE THOSE WITNESSES COME OUT AND TESTIFY AS TO HER BEING IN FEAR OR OTHER INCIDENTS.

DO YOU AGREE WITH YOUR OPEN OPENENT -- OPPONENT THAT THE STATE NEVER OFFERED ANY OTHER PROOF, IN THE FORM OF WITNESSES OR ANYTHING, OF A SEXUAL BATTERY OR CHOKING OR ANY OF THAT STUFF, FROM 1993?

THE STATE DIDN'T PUT ON ANYTHING ITS CASE-IN-CHIEF ON THAT.

DID IT PUT ANYTHING ON, IN THE WHOLE TRIAL, ON THAT?

WELL, I MEAN, THEY MAY HAVE ASKED DALLAS, WHO WAS THE DEFENSE WITNESS, ON CROSS.

I UNDERSTAND THAT ALL OF THAT IS BEING CHALLENGED HERE. I AM ASKING, NOW, WHETHER THE STATE PUT ON ANY COMPETENT PROOF OF THAT.

OF PRIOR SEXUAL BATTERY OR KIDNAPPING?

NO, THEY DIDN'T. MY RECOLLECTION AS TO ONE OF JUSTICE PARIENTE'S QUESTIONS EARLIER, I DON'T THINK IT WAS MENTIONED IN CLOSING ARGUMENT. JUST TALKING.

SO IF I AM UNDERSTANDING THIS, IF THE 1993 INCIDENT CAME OUT ONLY IN CROSS-EXAMINATION, CAME OUT WITHOUT A PROFFER FIRST, YOU -- AND THE STATE NEVER SOUGHT TO INTRODUCE IT AS WILLIAMS RULE EVIDENCE, CORRECT, IN ITS CASE-IN-CHIEF.

AT TRIAL. THAT'S CORRECT.

SO THE SOLE ISSUE, THEN, FOR US TO LOOK AT IS, ONE, WAS IT A PROPER SUBJECT OF CROSS-EXAMINATION, AND IF IT WASN'T, WHETHER IT WAS PROPERLY OBJECTED TO, AND, YOU KNOW, IF IT WERE PROPERLY PRESERVED, THEN WAS IT HARMLESS. IS THAT THE -- BECAUSE YOU ARE NOT SAYING THAT, REALLY -- THAT DALLAS MADE THE STATEMENT THAT YOU COULD HAVE GOTTEN IN THIS 1993 INCIDENT.

NOT. I THINK THE STATE WAS TRYING TO ELICIT, ON CROSS, EXACTLY WHAT THE BASIS OF HIS KNOWLEDGE IS, AS TO THE NATURE OF THIS RELATIONSHIP. HE TESTIFIED ON --

THAT IS VERY NARROW. IN OTHER WORDS, YOU WERE NOT TRYING. THE STATE DID NOT FRY TO INTRODUCE THIS AS IS A -- DID NOT TRY TO INTRODUCE THIS AS A SIMILAR CRIME EVIDENCE.

I DON'T THINK THEY DID. I THINK THEY WERE RESPONDING ON CROSS-EXAMINATION OF WITNESSES.

THEY DIDN'T TRY --

NOT --

THEY DIDN'T FIND A WILLIAMS RULE. THEY DIDN'T TRY TO INTRODUCE IT IN THEIR CASE-IN-CHIEF, AND YOU ARE, NOW, ARGUING THE SOLE REASON IT BECAME RELEVANT WAS IT WAS PROPER CROSS-EXAMINATION OF A WITNESS, AS TO HIS KNOWLEDGE OF THE NATURE OF THEIR

RELATIONSHIP.

I THINK THAT IS CORRECT. I THINK IT IS CORRECT THAT THE STATE DIDN'T, YOU KNOW, ATTEMPT TO INTRODUCE, AT TRIAL, ANY WILLIAMS RULE EVIDENCE. NOW, AS I MENTIONED BEFORE, IN RESPONSE TO ONE OF THE OTHER QUESTIONS, THERE MAY HAVE BEEN A PRETRIAL WILLIAMS RULE MOTION, AS I SAY, I HAVE A VAGUE RECOLLECTION OF WIT WITNESSES' NAMES BEING LISTED ON SOME KIND OF A MOTION, AND MAYBE FOLLOWING THAT HEARING, THE STATE ATTORNEY MADE A DECISION NOT TO USE IT OR MAYBE GOT A A -- AN ADVERSE RULING OR WHATEVER IT MAY HAVE BEEN. THERE MAY HAVE BEEN SOME ARGUMENT ABOUT THAT EARLIER, BUT MY RECOLLECTION OF THE TESTIMONY AT TRIAL IS THAT YOUR HONOR'S RECOLLECTION IS REPORT CORRECT. -- RECOLLECTION IS CORRECT.

IT WAS NOT USED IN CLOSING ARGUMENT?

I DON'T BELIEVE SO. I THINK THE STATE ESSENTIALLY ARGUED THAT THE TOTALITY OF THE EVIDENCE DEMONSTRATED, YOU KNOW, THAT THIS DEFENDANT WAS A VERY OBSESSIVE INDIVIDUAL. HE WAS UPSET AND CONCERNED THAT BAY WAS SEEING ANOTHER MAN NAMED ADD ONEIES. HE WAS UP -- ADONIS. HE WAS UPSET ABOUT THAT. DIDN'T WANT TO LOSE HER, AND THAT FUELED HIS MOTIVATION TO GO BAN BACK AND KILL HER -- TO GO BACK AND KILL HER, AFTER HE GOT OUT OF JAIL, AS HE HAD TOLD ONE OF HIS TWO ASSOCIATES, AFTER HE GOT OUT OF JAIL. WITH RESPECT TO THE PROPORTIONALITY ARGUMENT THAT HAS BEEN SUBMITTED HERE, TODAY, I THINK THAT THE -- IT IS TRUE THAT THIS IS A SINGLE AGGRAVATOR CASE. IT IS A HEINOUS, ATROCIOUS AND CRUEL CASE. THIS COURT HAS ENUNCIATED, A NUMBER OF TIMES, HOW IMPORTANT THE HAC FACTOR IS, IN THE LEGISLATIVE SCHEME. THE MITIGATING EVIDENCE THAT WAS PRESENTED WAS, REALLY, QUITE WEAK. HAD HE THEY HAD THE -- THEY HAD THE DEFENDANT'S FATHER AND ANOTHER RELATIVE TESTIFY, ON HIS BEHALF, THAT HE LOVED HIS FAMILY, TYPE OF THING. THE TRIAL JUDGE GAVE AMPLE CONSIDERATION TO ALL OF THAT AND POINTED OUT IN THE SENTENCING ORDER THAT A REALLY LOVING FATHER DOESN'T MURDER THE CHILDREN'S MOTHER AND LEAVE THEM TO FIND THE BODY IN THE MORNING, IN THE LIGHT OF DAY.

WHAT WAS -- THIS IS -- THERE WAS A -- THE MOTHER OF THE DEFENDANT WAS MURDERED WHILE HE WAS A CHILD?

YEAH. ANOTHER FATHER --

THE DEFENDANT'S FATHER TESTIFIED THAT THE DEFENDANT'S MOTHER HAD BEEN MURDERED, WHEN THE DEFENDANT WAS A CHILD, AND THAT HE, HIM SELF, HAD BEEN BEEN ACCUSED OF THE CRIME. THE FATHER WAS A SUSPECT BUT THAT HE WAS ACQUITTED.

HE WAS ACQUITTED?

RIGHT.

WERE THERE FACTUAL CIRCUMSTANCES GIVEN BY THE MURDER AND THE --

NO.

-- THE DEFENDANT'S KNOWLEDGE OF IT OR EXPOSURE TO THE MURDER, THE BODY OR ANYTHING?

NO. I THINK THE FATHER JUST TESTIFIED THAT -- AS TO THE FACT THAT HE HAD BEEN CHARGED WITH IT AND ACQUITTED AND POINTED OUT THAT HE DIDN'T DO IT KIND OF THING. I DON'T THINK THERE WAS ANY TESTIMONY -- LET ME CLARIFY THAT A LITTLE BIT. DR. MAHER, AT THE SPENCER HEARING, REFERRED TO THAT A LITTLE BIT, BUT HIS TESTIMONY WAS EQUIVOCAL. HE SAID THAT,

WHEN CHILDREN ARE EXPOSED TO VIOLENCE AT AN EARLY AGE, EITHER IT CAN HAVE A POSITIVE IMPACT ON THEM, THEY CAN GET OVER IT, OR IT CAN HAVE A NEGATIVE IMPACT, BUT I MEAN, IT JUST DIDN'T --

DO WE KNOW ANYTHING IN THIS RECORD, ABOUT HIS EXPOSURE TO ANY VIOLENCE, CONCERNING HIS MOTHER'S DEATH. IN OTHER WORDS WAS SHE MURDERED AWAY FROM THE HOME?

SHE WAS MURDERED AND LEFT HIM MOTHERLESS AT THAT TIME.

SO WE DON'T, FOR INSTANCE, KNOW THAT HE WITNESSED THE MURDER OR THAT HE SAW THE BODY OR --

NO. I DON'T THINK THERE IS ANY --

A VIOLENT EPISODE.

I DON'T THINK THERE IS ANY EVIDENCE IN THE RECORD ON THAT AT ALL. AND IN REGARD TO DR. MAYOR'S -- MAHER'S TESTIMONY, AT THE SPENCER HEARING, CONCERNING -- HE WAS VERY CAREFUL, AT THE BEGINNING, TO POINT OUT THAT HIS TESTIMONY WAS GIVEN, HIS EXAMINATION OR HIS EVALUATION MUST BE CONSIDERED WITHIN VERY CLOSE PARAMETERS. HE DIDN'T STUDY ANY RECORDS OF ANYTHING. HE HADN'T REVIEWED TRIAL TESTIMONY OR ANYTHING ELSE. ALL HE HAD DONE WAS AT THE DIRECTION OF THE DEFENSE COUNSEL, HAD INTERVIEWED THE DEFENDANT, AND THE DEFENSE TEAM APPARENTLY HAD DESCRIBED, TO HIM, CIRCUMSTANCES OF THE CRIME, IN WHICH WHAT HAPPENS, IF YOU TAKE COCAINE, AND ONE OF HIS ARGUMENTS OR OPINIONS WAS THAT USE OF COCAINE CAN LEAD TO THIS SEPARATION, WHICH IS A REPRESENTATIVE TYPE OF BEHAVIOR, AND HE ON BIND THAT -- OPINED THAT MAYBE THESE 40 OR 50 STAB WOUNDS WOULD COMPARE TO THAT, AND HE COMPARED IT TO AN OBSESSIVE, COMPULSIVE KIND OF DISORDER ANALOGY. THE WEAKNESS OF ALL OF THAT IS HE ADMITTED THAT THE DEFENDANT DIDN'T TELL HIM, YOU KNOW, THAT HE WAS UNDER THE INFLUENCE OF COCAINE AND DIDN'T KNOW HOW MUCH HE HAD TAKEN AND ALL OF THIS KIND OF STUFF, AND IT WAS NEVER CLEAR HOW MUCH WAS INVOLVED, BUT THE WEAKNESS, IT SEEMS TO ME, IS THAT THE DEFENDANT, FIRST OF ALL, HAD TESTIFIED AT TRIAL. HE GAVE GREAT DETAIL OF ALL OF THE CIRCUMSTANCES THAT NIGHT. HE HAD NO IMPAIRMENT OF MEMORY. HE COULD ACCOUNT FOR ALMOST EVERY MINUTE OF THE DAY AND NIGHT.

DID ANYBODY TESTIFY, DURING THE PENALTY PHASE, THAT THIS DEFENDANT HAD A LONG-STANDING COCAINE ABUSE PROBLEM OR DRUG ABUSE PROBLEM, GOING BACK TO HIS CHILDHOOD?

NO. NO. THE ONLY TESTIMONY, REALLY, RELATING TO COCAINE USAGE, REALLY, CAME OUT IN THE TRIAL IN GUILT PHASE, WHERE A NUMBER OF WITNESSES TALKED ABOUT --

ABOUT THE COCAINE USE, AROUND THE TIME.

PARTY. CORRECT.

BUT THERE WAS NO TESTIMONY THAT HE WAS A COCAINE ADDICT AND HAD BEEN FOR HIS WHOLE LIFE OR ANYTHING LIKE THAT.

NO. NO. AND CERTAINLY DR. MAHER'S TESTIMONY, AGAIN, HE ADMITTED THAT HE DID NOT DO ANY COMPLETE ANALYSIS OR ANYTHING LIKE. THAT HE WAS -- IT SEEMS TO ME THAT HE WAS TALKING, LIKE, ALMOST IN A THEORETIC H THEORETICAL CONTEXT, AS TO -- IN A THEORETICAL CONTEXT, AS TO COCAINE AND WHAT IT CAN DO AND IF YOU ARE ENGAGED IN REPRESENTATIVE BEHAVIOR, BUT THE MEDICAL EXAMINER POINTED OUT AS TO THE REPRESENTATIVE WOUNDS HERE. YOU DON'T JUST HAVE REPRESENTATIVE WOUNDS. YOU HAVE TORTURE WOUNDS ON THE

VICTIM. YOU HAVE STABBINGS AND SLASHING. THE ASSAULT LASTED MORE THAN TEN MINUTES. ANOTHER STATE DIDN'T TRY THE PRIOR VIOLENT FELONY AGGRAVATOR?

NO. THE ONLY I THINK WAS THE HAC AGGRAVATOR.

AND WE DON'T KNOW ANYTHING AS TO HIS HISTORY, THE PRIOR VIOLENT FELONIES. MUCH THEY DRUG-RELATED. DWRUING POSSESSION, THOSE TYPE OF -- DRUG POSSESSION, THOSE TYPE OF THINGS?

MY IMPRESSION IS THAT THEY WERE DRUG-RELATED OR THEY MAY HAVE INVOLVED SELLING DRUGS, IF NOT USING, BECAUSE I THINK THERE WAS SOME EVIDENCE PUT ON AS TO -- THE TRIAL JUDGE'S TREATMENT ON THE ISSUE, AS TO WHETHER OR NOT HE WAS A GOOD PARENT AND LOVING PARENT AND ALL THAT, HAD TO DO WITH THE JUDGE MADE A DETERMINATION, FROM THE RECORD, THAT HE APPARENTLY MADE HIS LIVING THROUGH SELLING OR USING DRUGS. SOMETHING ALONG THAT LINE.

DID HE EVER GET ANY TREATMENT FOR HIS DRUG PROBLEM?

THERE IS NO INDICATION IN THE RECORD OF ANYTHING ALONG THAT LINE. I MEAN, IT MAY -- HIS PRIOR CRIMINAL INVOLVEMENT MAY HAVE SIMPLY BEEN SELLING ON THE STREET, BECAUSE HE WAS APPARENTLY -- THAT IS HOW HE WAS MAKING HIS LIVING, BUT THERE IS NO TESTIMONY, AT ALL, OF THE NATURE OF TREATMENT OR ANYTHING OF THAT NATURE. WE WOULD ASK THE COURT TO AFFIRM THE JUDGMENT AND SENTENCE, AND UNLESS THE COURT HAS ANY QUESTIONS ON ANY OF THE OTHER ISSUES, AS I SAY THIS IS A SINGLE AGGRAVATOR CASE, I UNDERSTAND, BUT THIS COURT HAS AFFIRMED A NUMBER OF SINGLE AGGRAVATOR CASES. THE IDEA THAT THIS IS -- THE COURT SHOULD FIND THIS TO BE DISPROPORTIONATE, BECAUSE THERE IS SOMEWHAT AFTER DOMESTIC SETTING, AS HAS BEEN POINTED OUT, THE DOMESTIC EXCEPTION, IF THERE IS ONE, RELATES TO THE CCP FACTOR, WHICH IS NOT APPLICABLE HERE. THIS WAS, CERTAINLY, A VERY VIOLENT AND TERRIBLE DEATH THAT RESULTED IN THIS CASE. A SINGLE AGGRAVATOR CASE RECENTLY THAT THIS COURT APPROVED OF WAS CARD OWN A, IN WHICH -- CARDONA, IN WHICH A MOTHER TORTURED HER CHILD TO DEATH, OVER PARED OF TIME, AND EVEN IN THAT CASE THERE WAS EXTENSIVE MENTAL MITIGATION INVOLVED, MITIGATING FACTORS THAT WERE PRESENT THAT ARE NOT PRESENT HERE, SO WE WOULD ASK THE COURT TO AFFIRM.

BEFORE YOU SIT DOWN, LET ME ASK YOU ABOUT, I BELIEVE IT IS ISSUE THREE, WELL, THE PROBATION VIOLATION REPORT. AT THE MOTION FOR NEW TRIAL, WAS THERE A -- ANY KIND OF HEARING OF AN EVIDENTIARY SORT THAT TOOK PLACE?

WELL, THERE WAS -- I AM RELUCTANT TO SAY EVIDENTIARY. I THINK THERE WAS -- THE COURT WANTED TO HEAR THE RESPONSES OF BOTH THE STATE AND DEFENSE, AS TO WHEN THEY FOUND OUT ABOUT IT OR COULD HAVE FOUND OUT ABOUT IT AND THINGS OF THAT NATURE.

SO WHEN IT WAS IT? I AM HAVING A LITTLE TROUBLE GETTING THAT INTO PERSPECTIVE. WHEN DID THE DEFENSE FIND OUT ABOUT THIS PROBATION REPORT?

THE ALLEGATION WAS MADE, IN THE MOTION FOR NEW TRIAL, AND AT THE HEARING, WAS THAT THE DEFENSE FOUND OUT ABOUT IT, THAT THEY HAD GOTTEN A PHONE CALL FROM THE PUBLIC DEFENDER'S OFFICE. THE ATTORNEYS REPRESENTING MR. BUTLER WERE NOT PUBLIC DEFENDERS. THEY WERE EITHER PRIVATELY RETAINED OR CONFLICTED OUT. THEY GOT A CALL FROM PUBLIC DEFENDER'S OFFICE, AND, APPARENTLY, WERE INFORMED, AT THAT TIME, THAT LOLA YOUNG'S PROBATION HAD BEEN REVOKED AND DID THEY KNOW ABOUT THAT, AND THEY SAID THEY DIDN'T.

AND WHEN HAD THAT OCCURRED?

WHEN DID THEY GET THE PHONE CALL?

NO. WHEN WAS THE PROBATION REVOKED IN THIS REPORT?

I DON'T HAVE THE DATES HANDY. PRESUMABLY IT MAY HAVE BEEN -- I WOULD GUESS PRIOR TO TRIAL. I MEAN BECAUSE WHEN LOLA YOUNG IS CALLED TO TESTIFY, SHE APPEARS IN A JAIL SUIT, AND IN THE ORANGE UNIFORM, AND SHE TESTIFIES, AT THAT TIME, THAT SHE IS RESIDING IN THE COUNTY JAIL, PURSUANT TO A REVATION -- REVOCATION SITUATION. SO FARTHER OF THE STATE'S -- SO PART OF STATE'S ARGUMENT ON APPEAL IS THAT THEY HAD MORE THAN SUFFICIENT INFORMATION AVAILABLE, THAT THEY COULD HAVE DISCOVERED THIS REPORT, WITH THE EXERCISE OF DUE SDWRINLS. THE -- I MEAN, IT WASN'T, REALLY, A SECRET ABOUT HER HAVING ANY KIND OF A HISTORY OF HISTORY OF DRUG PROBLEMS. SHE WAS DEPOSED SIX MONTHS BEFORE TRIAL OR WHATEVER AND GAVE HER HISTORY AS TO HER PROBLEMS WITH DRUGS, AND EVEN IN THIS PROBATION REPORT THAT WE ARE TALKING ABOUT, YOU KNOW, THERE IS NO INDICATION THAT SHE WAS UNDER ANY KIND OF COCAINE HALLUCINATION OR ANYTHING OF THAT KIND, AT THE TIME OF THE, EITHER AT THE INCIDENT OR AT THE TIME OF HER TESTIMONY. SO FOR ALL OF THESE REASONS, WE SUBMIT THAT THIS CLAIM WAS PROBABLY REJECTED AS MERITLESS, BUT IN ANSWER TO YOUR HONOR'S QUESTION, I THINK THIS ALL OCCURRED, THIS INQUIRY OCCURRED AT THE TIME OF THE MOTION FOR NEW TRIAL, AFTER THE VERDICT HAD COME IN OR PRETTY CLOSE IN TIME TO THAT. ONCE AGAIN, WE ASK THE COURT TO AFFIRM. THANK YOU.

MR. BRIGGS. REBUTTAL.

IF I COULD ADDRESS THE CONTENTION THAT THE EVIDENCE OF BAD ACTS WASN'T PRESERVED, I WOULD POINT OUT THE STATEMENT, IN THE MOTION IN LIMINE THAT WAS FILED PRETRIAL THAT, SOUGHT TO EXCLUDE, AND I QUOTE, ANY MENTION OF ANY PRIOR ALLEGATIONS OF ABUSE, PHYSICAL OR EMOTIONAL, TOWARDS LESLIE FLEMING, BY THE DEFENDANT.

BUT DIDN'T THE TRIAL JUDGE SAY -- THE TRIAL JUDGE DIDN'T SPECIFICALLY RULE ON THAT, DID HE? AND HE SAID WE WILL DEAL WITH THIS BASICALLY AT THE TIME IT COMES UP, AND AT THE TIME IT CAME UP, WAS THERE AN OBJECTION?

THAT IS TRUE. THE COURT MADE THAT RULING. I JUST BROUGHT THAT -- MADE THAT POINT, BECAUSE PART OF THE REASON FOR THE CONTEMPORANEOUS OBJECTION RULE IS THAT THE COURT WILL BE AND RIZED OF THE ISSUE AND HAVE AN OPPORTUNITY TO RULE ON THE ISSUE. AT THE TIME, DURING DALLAS'S, MR. DALLAS'S CROSS-EXAMINATIONS, THERE WAS REPEATED OBJECTIONS. THE STATE IS ARGUING THAT, ON CROSS-EXAMINATION OF MR. BUTLER, THAT THERE WAS NO OBJECTION. THERE WAS A REFERENCE THAT THE PROSECUTION DID QUESTION MR. BUTLER ABOUT THE MARCH 1 1 INCIDENT AND BROUGHT OUT SOME OF THE FACTS, BUT WHEN IT CAME OUT THAT THE POSSIBILITY OF KIDNAPPING AND RAPE CHARGES WERE CONTEMPLATED BY THE STATE ATTORNEYS OFFICE, THERE WAS AN OBJECTION IN THE COURT AND IT DENIED AN OPPORTUNITY FOR DEFENSE COUNSEL TO, EVEN, APPROACH AND ARGUE THE ISSUE.

BUT YOU ARGUE OR ASSERT THAT, IF THE DEFENDANT TIMES A MOTION IN LIMINE, AND THAT THE COURT GRANTS, THAT, BEFORE THE STATE CAN GO INTO THOSE AREAS ON CROSS-EXAMINATION, THAT THEY MUST, FIRST, SEEK PERMISSION FROM THE COURT, BECAUSE ONCE THOSE QUESTIONS GET ASKED, THE JURY HEARS IT, AND BASICALLY THE CAT IS OUT OF THE BAG.

I WOULD AGREE, YOUR HONOR, THAT THAT WOULD BE AN APPROPRIATE RULE TO AVOID THE SITUATION LIKE WE HAVE IN THIS CASE, WHERE THE PROSECUTION IS REPEATEDLY BRINGING UP IRRELEVANT, BAD ACTS.

WAIT. BUT DID THE -- DID COUNSEL BRING BACK UP, THE QUESTION OF THE MOTION IN LIMINE AT ANY POINT, PRIOR TO THIS HAPPENING?

-- PRIOR TO THIS CROSS-EXAMINATION, DID COUNSEL, WHEN THIS WITNESS CAME --

I BELIEVE, DURING THE CROSS-EXAMINATION OF MR. DALLAS --

RIGHT. BUT PRIOR TO THE TIME THAT THE QUESTION WAS OUT, WAS THE COURT -- WAS THE MOTION IN LIMINE, REPOSED TO THE COURT?

IT WAS NOT SPECIFICALLY NOT INTRODUCED AS A MOTION IN LIMINE, NOT RENEWED AS A MOTION IN LIMINE.

SO WE WOULD HAVE HARD TIME, HAVING A RULE THAT SAYS THAT THE JUDGE HAS GOT TO STEP IN AND, AFTER ANY MOTION IN LIMINE HAS BEEN FILED, AND SAY, YOU KNOW, I AM GOING TO HOLD THIS BACK AND CONSIDER IT WHEN IT COMES UP AT THE TRIAL, AND THEN THE LAWYER DOESN'T BRING IT UP. YOU CAN'T PUT THAT KIND OF BURDEN ON THE JUDGE, CAN WE?

I THINK THAT THE STATE COULD HAVE THE BURDEN OF PROFFERING WHAT THEY INTEND TO ASK, PRIOR TO THAT. I THINK THE RECORD IS CLEAR THAT THE TRIAL JUDGE DIDN'T HAVE COMPLETE CONTROL OVER WHAT WAS OCCURRING HERE. HE CAUTIONED THE STATE AGAINST BRINGING OUT THE KIDNAPPING AND RAPE ALLEGATIONS, IN OPENING STATEMENTS, AND THEY DID NOT, BUT THEN THEY BROUGHT IT OUT DURING CROSS-EXAMINATION, AND IF I COULD ADDRESS THE CONTENTION BY THE STATE, THAT THIS WAS JUST IMPEACHMENT EVIDENCE, I MEAN, THIS JUST WENT BEYOND IMPEACHMENT EVIDENCE. I MEAN, THE PROSECUTOR, AFTER AN OBJECTION HAD ALREADY BEEN ENTERED, THE PROSECUTION CONTINUED TO ASK, TO MR. DALLAS, ISN'T IT A FACT THAT SHE WAS ALLEGING THAT HE COMMITTED FORCIBLE RAPE, THAT SHE WAS SCREAMING GURGTHE INCIDENT -- DURING THE INCIDENT, AND DECEMBER FIGHT OBJECTIONS -- DESPITE OBJECTIONS AND DESPITE SOME WARNING BY THE TRIAL JUDGE NOT TO GO INTO THESE MATTERS, THE PROSECUTION CONTINUED, AND I WOULD SUBMIT THAT THIS TYPE OF AN ATTACK SHOULD BE THE BASIS FOR A NEW TRIAL FOR MR. BUTLER. IF I COULD TURN MY ATTENTION TO THE PROPORTIONALITY ARGUMENT, I BELIEVE THERE IS SOME QUESTION WHETHER HIS, MR. BUTLER'S COCAINE ADDICTION OR HABIT HAD BEEN ESTABLISHED. I THINK DR. MAYOR'S TESTIMONY ESTABLISHED THAT. MR. BUTLER TOLD MR. , DR. MAHER, ABOUT HIS LONG-TERM COCAINE ADDICTION. INCLUSION, THE --

IN TERMS OF IT IS UP TO THE JUDGE TO WEIGH IT, AND SOMEONE JUST SELF-REPORTING OF A DRUG USE, ABSENT SOME OTHER INDICATION OF HOW THIS WAS AFFECTING HIM ON A LONG-TERM BASIS, AS FAR AS WHETHER HE GOT TREATMENT OR DIDN'T GET TREATMENT OR FROM RELATIVES ABOUT IT, IF THE JUDGE DISCOUNTS IT AND GIVES IT LITTLE WEIGHT, HOW CAN WE REWEIGH IT?

I AM NOT ASKING THIS COURT TO NECESSARILY REWEIGH THAT MITIGATOR, BUT I AM JUST ASKING THAT THIS IS JUST ONE OF THE MITIGATING CIRCUMSTANCES THAT PRECLUDE --

IT DOESN'T SEEM LIKE THIS BEING FAIRLY LIMITED MITIGATION.

I WOULD ADMIT THAT THERE IS NOT EXTENSIVE MITIGATION, BUT THERE IS MITIGATION, DEFINITE MITIGATION, AND THE COURT, THIS COURT, HAS HELD THAT THE DEATH PENALTY IS ONLY WARRANTED IN THOSE CASES WHERE THERE IS ONE AGGRAVATOR, WHERE THERE IS LITTLE OR NO MITIGATION. I WOULD, ALSO, MAKE THE ARGUMENT THAT THE DOMESTIC NATURE OF THIS OFFENSE IS A FORM OF MITIGATION, IN AND OF ITSELF. I RMS THAT THIS ARGUE -- I REALIZE THAT THIS ARGUMENT WAS NOT PRESENTED BY -- BUT DOESN'T THE LEGISLATURE, IT WOULDN'T BE APPLICABLE HERE, ACTUALLY, RECOGNIZE THAT DOMESTIC VIOLENCE SHOULD, IN THE FUTURE, BE CONSIDERED AS AN AGGRAVATING CIRCUMSTANCE?

I AM UNAWARE OF THAT PROVISION, YOUR HONOR, BUT I MEAN, TO ESTABLISH THAT AS

AGGRAVATOR IN THIS CASE, WOULD CLEARLY BE CONTRARY TO A GREAT BIT OF PRECEDENT THAT THIS COURT HAS ESTABLISHED.

YOU ARE SAYING IT SHOULD BE -- YOU ARE SAYING WE SHOULD ACTUALLY VIEW IT AS A MITIGATING CIRCUMSTANCES, AND I DON'T KNOW WHERE, IN THE LAW, THAT WE WOULD RECOGNIZE SOMEONE WHO ENGAGES IN DOMESTIC VIOLENCE AS BEING ENTITLED TO MITIGATION.

I AM NOT ARGUING THAT IT IS A MITIGATING CIRCUMSTANCE, PER SE, ONLY THAT IT IS ONE OF THE CONSIDERATIONS THAT THIS COURT SHOULD LOOK AT, WHEN DECIDING WHETHER THE DEATH PENALTY IS PROPORTIONATE. I MEAN, THIS COURT HAS CITED, IN GARREN V STATE, THAT WHEN THE MURDER IS A RESULT OF A DOMESTIC CONFRONTATION, THAT THE DEATH PENALTY IS NOT NECESSARILY WARRANTED, AND THERE IS NOTHING IN THIS CASE TO SUGGEST THAT THIS IS ANYTHING BUT THAT TYPE OF SITUATION. THAT, PLUS THE PRESENCE OF ONLY ONE AGGRAVATOR, IS REASON THAT THE DEATH PENALTY IS JUST NOT APPROPRIATE IN THIS CASE.

IS YOUR OPPONENT CORRECT THAT, IN TERMS OF ANY WORK HISTORY OR WHATEVER, CONCERNING YOUR CLIENT, THAT HE APPARENTLY MADE HIS LIVING OFF THE SALES OF DRUGS?

THERE WAS SOME SUGGESTION OF THAT, BUT THERE WAS, ALSO, A TESTIMONY, I BELIEVE, BY A MR. WOODS, THAT HE, MR. BUTLER WORKED FOR HIM, DOING CEMENT TYPE WORK. I MEAN, I THINK --

WHAT EVIDENCE IS THERE, IN THE RECORD, IN OTHER WORDS, WAS THERE ANY ATTEMPT TO PUT EVIDENCE IN THE RECORD ABOUT THE DEFENDANT'S BACKGROUND AND WORK HISTORY AND -- HOW OLD WAS THE DEFENDANT?

I BELIEVE HE WAS 36, AT THE TIME OF THE CRIME, YOUR HONOR.

SO WHAT WAS HIS EMPLOYMENT HISTORY?

THAT WASN'T -- ISN'T EVIDENT IN THE RECORD, ASIDE FROM THE FACT MR. WOODS' TESTIMONY THAT MR. BUTLER WORKED FOR HIM, AND, I BELIEVE, MR. WOODS RAN A -- SOME TYPE OF MASONRY BUSINESS.

WE DON'T KNOW HOW LONG HE WORKED FOR HIM OR WHAT HE DID FOR HIM.

NO, YOUR HONOR.

OKAY. THANK YOU.

YOUR TIME IS UP, MR. BRIGGS. THE COURT WILL BE IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE RISE.