Maurice Lamar Floyd v. State of Florida

MR. CHIEF JUSTICE: NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS FLOYD VERSUS STATE. MR. QUARRELS. -- MR. QUARLES.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM CHRIS QUARLES, AND I REPRESENT MAURICE FLOYD IN THIS CASE FROM PUTNAM COUNTED, MR. -- COUNTED, WHERE MR. FLOYD WAS CONVICTED OF THE MURDER OF HIS MOTHER-IN-LAW, MARY GOSS. ALSO AGGRAVATED ASSAULT. HE WAS CONVICTED OF THE MURDER. AT THE TIME HE AND MARY'S DAUGHTER WERE HAVING MARITAL DIFFICULTIES. THEY HAD ONLY BEEN MARRIED FOR A FEW MONTHS AND MARRIED FOR A YEAR AND-A-HALF. MAURICE WAS JEALOUS AND DISAPPEAR PROVED OF MISS WIFE'S DRINKING AND SOCIALIZING AND DRINKING WITH OTHERS AT CLUBS. TWO NIGHTS BEFORE THE MURDER WAS HER BIRTHDAY. SHE WENT OUT, OVER MAURICE'S OBJECTIONS AND PROCEEDED TO GO TO A LOCAL NIGHTCLUB, WHERE HE TRACKED HER DOWN AND THEY HAD ANOTHER ARGUMENT. THEY ARGUED THAT NIGHT AS WELL AS THE NEXT MORNING. HE WARNED TRI-LANE THAT, IF SHE WENT OUT DRINKING AGAIN, HE WOULD KILL HER, AND IF HE COULDN'T GET TO HER, HE WOULD KILL SOMEONE SHE LOVED, HER FATHER, HER MOTHER, OR THREE CHILDREN. SHE HAD THREE CHILDREN FROM PRIOR RELATIONSHIPS. NONE OF THEM WERE MAURICE'S CHILDREN.

WAS THAT THE STATEMENT THAT HE DELINEATED, YOUR MOTHER, YOUR FATHER OR YOUR THREE CHILDREN?

THAT WAS HIS WIFE'S STATEMENT. THE NEXT DAY, ON A SUNDAY, SHE TOOK HER GOD DAUGHTER SHOPPING ALL DAY, AND ONCE AGAIN MAURICE OBJECTED TO THIS, AND SHE WAS GONE PRETTY MUCH THE ENTIRE DAY, APPARENTLY. HE ENCOUNTERED HER ON THE STREETS OF PALATKA, ADDRESSED THE FACT THAT SHE HAD NOT COME HOME YET, AND SHE ULTIMATELY DROPPED HER GOD DAUGHTER OFF. MAURICE ENCOUNTERED HER, AGAIN, ON THE STREETS OF PALATKA, AND SHE PROCEEDED TO DRIVE AWAY, AND HE GAVE CHASE IN HIS CAR, AND DURING THE DRIVE, HE RAMMED HER CAR AT LEAST ONCE FROM BEHIND. SHE DROVE TO THE SHERIFF'S OFFICE, JUMPED OUT OF HER CAR. MAURICE WAS IN HOT PURSUIT. HE JUMPED OUT OF HIS CAR. THE DEPUTY ON DUTY THAT EVENING, IT WAS EARLY, SEVEN O'CLOCK IN THE EVENING. HE ATTEMPTED TO DETERMINE WHAT WAS GOING ON. HE THOUGHT THERE WAS A DOMESTIC DISPUTE, OBVIOUSLY, AND HE ATTEMPTED TO PLACE MAURICE FLOYD IN HANDCUFFS. HE TURNED AND RAN FROM THE SCENE AND TREE-LANE APPARENTLY STAYED AT THE SHERIFF'S OFFICE AND ATTEMPTED TO FILL OUT THE NECESSARY PAPERWORK. THEY WERE UNABLE TO FIND HIM. THEY KNEW WHERE HE WORKED AND KNEW WHERE TO FIND HIM, SO THEY PLANNED TO ARREST HIM THE NEXT MORNING AT HIS PLACE OF EMPLOYMENT. TREE-LANE CALLED HER MOTHER, WHERE EARLIER THAT DAY, MAURICE FLOYD HAD DROPPED OFF THE THREE CHILDREN AT HIS MOTHER-IN-LAW'S HOUSE FOR HER TO BABY-SIT, WHILE TREE-LANE WAS OUT. SHE WARNED HER MOTHER WHAT HAD HAPPENED, AND THE MOTHER SAID SHE WOULD TAKE CARE OF THE CHILDREN. WELL, APPARENTLY MAURICE FLOYD WENT TO MARY GOSSET'S -- MARY GOSS'S HOUSE THAT EVENING. IT WAS A VERY HOT NIGHT IN PALATKA.

HOW MANY HOURS ELAPSED BETWEEN THAT CONVERSATION? THIS APPARENTLY HAPPENED IN THE EVENING AND THE CONFRONTATION WAS EARLIER. DO WE KNOW ANYTHING ABOUT MR. FLOYD'S WHEREABOUTS FOR ANYTHING THAT FILLS IN THAT GAP BETWEEN WHEN THE FIRST INCIDENT OCCURRED AND --

I DON'T RECALL IF THE TIME WAS DELINEATED. I THINK THE SHERIFF'S STATION INCIDENT WAS

ABOUT SEVEN-THIRTY.

SEVEN-THIRTY?

IN THE EVENING.

SO IT WAS, ALSO, THAT EVENING.

YES. YES. SEVEN OR SEVEN-THIRTY IN THE EARLY EVENING, AND THE SHOOTING OCCURRED LATER THAT EVENING. IT WASN'T -- I GATHERED IT WAS CERTAINLY BEFORE MIDNIGHT, BUT I CAN'T RECALL, RIGHT NOW, WHETHER THERE WAS ANY TESTIMONY ABOUT HOW LONG AFTERWARDS IT WAS.

WE KNOW THAT THE LAW ENFORCEMENT ARRIVED AFTER ELEVEN SO IT WASN'T AS THOUGH THIS OCCURRED AT EIGHT O'CLOCK OR 8:30, WAS IT?

YOU MAY BE RIGHT. I DON'T REMEMBER THAT. THAT DOES SOUND FAMILIAR, NOW THAT YOU MENTION IT.

SO WE HAD A FOUR, FOUR-HOUR INTERIM?

RIGHT. RIGHT.

AND WE HAVE SOME EVIDENCE, DO WE NOT, OF INDIVIDUALS PACING IN FRONT OF THE HOUSE FOR SOME PERIOD OF TIME.

CORRECT.

SOMETHING ALONG THOSE LINES. SO WE DO HAVE SOME PARAMETERS.

RIGHT. RIGHT. YES. THEY DID, THE NEIGHBORS ACROSS THE STREET, IT WAS A VERY HOT NIGHT, AND THE TWO NEIGHBORS ACROSS THE STREET, ONE, IN TWO DIFFERENT HOUSES, WERE SITTING OUT ON THEIR PORCH, TRYING TO GET RELIEF FROM THE HEAT, AND THEN THEY WOULD PERIODICALLY GO INSIDE AND GET DRINKS OF WATER AND THEN TRY TO SLEEP. THEY SAW TWO INDIVIDUALS, ONE SAW TWO MEN, ONE OF THEM FITTING MAURICE'S DESCRIPTION, PACING UP AND DOWN ON THE STREET IN FRONT OF MARY GOSS'S HOME.

YOU KNOW YOU ARE -- I KNOW YOU ARE TRYING TO SET THE STAGE FOR THE ISSUES THAT YOU HAVE, BUT THIS TIME GOES BY IN A HURRY.

YOU ARE RIGHT.

COULD YOU GET TO THE POINT?

THE FIRST POINT IS ESSENTIALLY A DELGADO ISSUE.

BEFORE YOU MOVE ON, WOULD YOU JUST TELL ME THIS, IS THERE ANY EVIDENCE AS TO WHEN THE DEFENDANT PROCURED THE WEAPON? DID HE HAVE IT AT THE TIME THAT HE RAMMED ON -- RAMMED HIS WIFE, THE BACK OF HIS WIFE'S CAR, OR IS THERE NO TESTIMONY CONCERNING WHEN THE GUN WAS PROCURED?

I DON'T BELIEVE THERE WAS ANY TESTIMONY ASSERTING WHEN THE GUN WAS PROCURED. ESSENTIALLY THE FIRST ISSUE I HAVE IS A DELGADO ISSUE, WHICH THE OPINION WAS NOT ISSUED, UNTIL AFTER MR. FLOYD'S TRIAL, AND WE ASSERT ON APPEAL, AND THAT THE EVIDENCE --

WAS THERE ANY OBJECTION TO THIS IN THE TRIAL COURT?

NO. THERE WAS A MOTION FOR JUDGEMENT OF ACQUITTAL THAT WAS FOCUSED ON THE FACT THAT MISS, ONE OF THE EYEWITNESSES'S TESTIMONY INDICATED THAT ONE OF THE MEN HE SAW PACING WAS ON THE PORCH AND THEN HE WENT AROUND THE CORNER AND DISAPPEARED, CONTRARY TO THE STATE'S THEORY. THAT WAS A SPECIFIC MOTION FOR GROUNDS FOR ACQUITTAL.

BUT NO SUFFICIENCY OF THE EVIDENCE AS TO BURGLARY?

I CONCEDE THAT.

SO YOU ARE TRYING TO ARGUE THIS, NOW, AS SOMETHING FUNDAMENTAL THAT THIS COURT SHOULD MORE OR LESS, ON INITIATIVE, RECOGNIZE.

HE DID MAKE A BARE BONES MOTION FOR JUDGMENT OF ACQUITTAL CLAIMING THAT THE EVIDENCE DID NOT ESTABLISH A PRIMA FACIE CASE. HE, ALSO, FILED A MOTION FOR NEW TRIAL, SAYING THAT THE VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

WELL, IN ADDITION TO IT NOT BEING RAISED, DO WE HAVE EVIDENCE HERE, WHERE THERE WAS A VIOLENT BREAKING? THAT IS WAS THERE DAMAGE TO THE DOOR, IF I UNDERSTAND IT?

THE FRONT DOOR WAS DAMAGED, AND THE STATE'S THEORY WAS THAT HE KICKED IT IN, BUT AS I ARGUED PREVIOUSLY, THERE WERE TWO NEIGHBORS ACROSS THE STREET THAT SAW MUCH OF WHAT TRANSPIRED, DURING THE INCIDENT, AND NOBODY HEARD OR SAW THE DOOR BEING KICKED IN, AND IN FACT THEY SAW --

BUT THAT WOULD DO KNOW MORE THAN RAISE AN ISSUE ABOUT THAT, WOULD IT NOT? THAT IS, IF YOU HAVE GOT THE PHYSICAL DAMAGE TO THE DOOR, UNDER CIRCUMSTANCES LIKE THIS, SURELY YOU ARE NOT SAYING THAT THERE ISN'T, THEN, SOME EVIDENCE THAT THERE WAS A FORCEFUL ENTERING?

I AM SAYING THAT, BECAUSE --

BUT THERE IS NO EVIDENCE THAT THERE WAS ANY FORCEFUL ENTRY.

CORRECT. CORRECT.

WHAT WAS THE DAMAGE TO THE -- THE FRONT DOOR LOCK WAS DAMAGED -- WHAT WAS THE DAMAGE TO THE --

THE FRONT DOOR LOCK WAS DAMAGED, AND THE EVIDENCE ESTABLISHED THAT, AT SOME POINT, AND HE WAS THERE FOR AN HOUR, APPARENTLY, BEFORE THE SHOOTING STARTED, AT HIS MOTHER-IN-LAW'S HOUSE. HE WAS INSIDE. THEY SAW HIM TALKING TO HIS MOTHER-IN-LAW, AND HE WAS ARGUING WITH HER HEATEDLY, BUT NOT ATTACKING HER, AND THE CHILDREN SAID THAT SHE WOKE THEM UP AND SENT THEM ACROSS THE STREET, AND THAT IS WHEN THEY SAW THE ALTERCATION BEGIN, THE PHYSICAL ALTERCATION BEGIN BETWEEN MAURICE AND HIS MOTHER-IN-LAW.

ANY QUESTION BUT THAT THIS WAS FRESH DAMAGE TO THE DOOR?

NO QUESTION THAT IT WAS FRESH DAMAGE.

SO THAT IT WAS CONTEMPORARY.

CORRECT. THE HUSBAND TESTIFIED THAT IT WAS LEFT LIKE THAT WHEN HE LEFT THAT MORNING.

AND THERE WAS SOME TESTIMONY THAT THE GRANDMOTHER WAS DRESSED IN HER NIGHTGOWN?

CORRECT. THOSE WERE THE TWO CIRCUMSTANCES THE STATE RELIED ON, TO ESTABLISH THAT IT WAS A NONCONSENTUAL ENTRY. HOWEVER, AS I POINTED OUT, THE CHILDREN SAW MAURICE SLAMMING THE FRONT DOOR ON HIS MOTHER-IN-LAW, AS SHE ATTEMPTED TO ESCAPE, AFTER SHE SENT THE CHILDREN ACROSS THE STREET. AND THERE WAS A VERY PHYSICAL ALTERCATION AT THE FRONT DOOR, ANDS SLAMMING -- AND HE WAS! ING THE DOOR ON HER AND SHE -- AND HE WAS SLAMMING THE DOOR ON HER AND SHE COULDN'T GET OUT, AND I THINK THAT IS WHEN THE INITIAL ALTERCATION OCCURRED, AND HE WAS SLAMMING THE BACK DOOR. HER HUSBAND TESTIFIED THAT SHE WOULD NEVER INVITE ANYONE INTO THE HOUSE, IF SHE WERE DRESSED FOR BED. THIS OVERLOOKS THE FACT THAT THE NEIGHBORS ACROSS THE STREET SAW HER TALKING THROUGH THE SCREEN DOOR, WITH MAURICE, FOR SOME TIME, THEN, HE DROPPED THE KIDS OFF EARLIER THAT DAY. I MEAN HE WAS HER SON-IN-LAW. I THINK RATHER THAN STAND IN THE FRONT DOORWAY DRESSED IN HER NIGHTGOWN, I THINK IT IS JUST AS REASONABLE HYPOTHESIS IN WHAT ACTUALLY OCCURRED, SHE EVENTUALLY SAID COME ON IN. MAYBE SHE WAS TRYING TO PLAY INDICATE HIM AND SHE REALIZED HE WAS UPSET, BUT IT WAS NOT A FORCED ENTRY. I THINK THE EVIDENCE IS MUCH MORE CONSISTENT WITH A HYPOTHESIS THAT THE DOOR WAS DAMAGED DURING THE ALTERCATION, AND SHE INVITED HIM IN.

HOW SHOULD WE DEAL WITH THE TELEPHONE WARNING THAT CAME THAT EVENING, FROM THE SHERIFF'S OFFICE TO THE HOME, WARNING THE VICTIM THAT THERE IS A PROBLEM? SHOULD THAT BE FACTORED IN? SHOULD IT NOT BE FACTORED IN, AS WE ANALYZE STATE OF MIND, AS WE ANALYZE WHAT IS HAPPENING ON THE SCENE THAT NIGHT?

WELL, I THINK IT MUST BE FACTORED IN. I WILL CONCEDE THAT IT HAS TO BE BUT THAT WAS TRILANE'S WARNING TO HER MOTHER-IN-LAW. SHE OBVIOUSLY DIDN'T THINK THAT THERE WAS ANY IMMINENT THREAT THAT MAURICE WAS GOING TO GO THERE, BECAUSE SHE WENT OUT CLUBING THAT NIGHT. SHE DIDN'T GO TO HER MOTHER'S HOUSE TO PROTECT HER MOTHER OR HER CHILDREN. SHE MADE THE PHONE CALL, AND THEN, TRUE ENOUGH, MAURICE WENT THERE, BUT AS I SAID BEFORE, HE WAS THERE AN HOUR. MAYBE HE WAS MAD. MAYBE HE WANTED TO DO SOMETHING, BUT --

WHAT ABOUT THIS TELEPHONE CONVERSATION? WAS THERE NOT SOME EXCHANGE OF INFORMATION ABOUT PROTECTING THE CHILDREN AND THAT THE GRANDMOTHER WOULD NOT PERMIT THIS INDIVIDUAL, THE DEFENDANT, TO HARM THE CHILDREN? WAS THERE THIS FULL DISCUSSION ABOUT SOMETHING ALONG THOSE LINES?

TRUE.

SO IT WAS MORE THAN JUST A HELLO, HOW ARE YOU KIND OF --

TRUE. TRUE. SHE TOLD HER MOTHER WHAT HAD HAPPENED, AND THAT, YOU KNOW, PROTECT THE KIDS.

IMPORTANTLY HER MOTHER RESPONDED TO THAT AND SAID I WILL PROTECT THE CHILDREN.

SHE DID.

AND NOT LET HIM GET THE CHILDREN.

SHE DID.

AND SO, WELL, THAT IS CERTAINLY NOT, IF WE ARE GOING TO PUT THAT ON ONE SIDE OF THE

SCALE OR THE OTHER, THAT CERTAINLY WOULD NOT SUGGEST THAT SHE WOULD OPEN THE DOOR WIDE AND HIM COMING IN AND HAVING ACCESS TO THE CHILDREN, WOULDN'T IT?

PERHAPS, BUT I THINK THAT THE OTHER CIRCUMSTANCES OBSERVED BY THE NEIGHBORS SORT OF MILL TATE AGAINST THAT. -- SORT OF MILITATE AGAINST THAT. HE DIDN'T RUN OVER THERE TO CARRY OUT HIS THREAT AND BASICALLY EXECUTE HIS MOTHER-IN-LAW OR THE CHILDREN. HE WENT OVER THERE TO TALK, APPARENTLY, TO HIS MOTHER-IN-LAW ABOUT THE PROBLEMS THAT HE AND TREELANE WERE HAVING AND THEY TALKED FOR AN HOUR, AND THE KIDS WHEN THEY WOKE UP, THEY SAID MAURICE WAS STANDING IN THE LIVING ROOM AND HE LOOKED MAD, PERHAPS WITH THE INTENT TO KILL HER BUT WITHOUT THE PREMEDITATED DESIGN, AND I THINK THE SITUATION ESCALATED, OVER THAT HOUR, INTO WHAT TRANSPIRED.

WHERE DOES IT FIT IN, WITH REGARD TO I THINK, DOES THE RECORD NOT SHOW THAT SHE WAKENED THE CHILDREN AND SENT THEM TO GO CALL THE POLICE? SHOULD THAT NOT BE FACTORED INTO SOME -- WE HAVE A WARNING AND WE HAVE HER SENDING THE CHILDREN, GO CALL THE POLICE. HOW DOES THAT, DOES THE TIMING THROW THAT DIFFERENTLY?

RIGHT. I THINK THAT SHOWS SHE REALIZED THE SITUATION HAD ESCALATED AND THAT THERE WAS DANGER, THAT THINGS HAVE GOTTEN OUT OF HAND PERHAPS. I DON'T RECALL, MAYBE SHE DID TELL THEM TO CALL THE POLICE. SHE SAID RUN OVER TO AUNT SO-AND-SO'S HOUSE, JUANITA'S HOUSE, ACROSS THE STREET, TO GET OUT OF HERE, AND THEN SHE TRIED TO GET OUT, HERSELF, AND ULTIMATELY DID, AND THAT IS WHEN THE KILLING HAPPENED, SECOND-DEGREE AT MOST IS MY ARGUMENT.

AND WAS THAT THE DEFENSE AT TRIAL, BASICALLY, THAT THIS WAS A HEAT OF PASSION SHOOTING, OR THERE WASN'T ANY DISPUTE ABOUT HIM AS THE IDENTITY OF THE KILLER?

WELL, NO, AS I SAID BEFORE, HE MOVED FOR JUDGMENT OF ACQUITTAL, BASED ON THE FACT THAT IT WAS NOT HIM.

BUT THE ESSENTIAL ARGUMENT TO THE JURY WAS IT WAS A HEAT OF PASSION?

I DON'T RECALL THAT BEING ARGUED. HE DID ARGUE THAT IT DIDN'T MAKE ANY SENSE THAT THE NEIGHBORS SAW THE CULPRIT RUN AROUND THE CORNER, AND THAT WAS NOT MAURICE.

SO HE ARGUED TO THE JURY THAT THE STATE HAD NOT PROVEN THAT IT WAS HIM.

THAT'S MY RECOLLECTION. YES. APPELLATE LAWYERS SHOULD PAY BETTER ATTENTION TO WHAT TRIAL LAWYERS ARGUE, I GUESS.

BUT THE CHILDREN DID TESTIFY.

THEY DID.

AT LEAST TWO OF THEM SAID THAT THIS WAS MAURICE.

THEY DID.

WHO HAD BEEN SHOOTING AT THE GRANDMOTHER.

THEY DID. MOVING ON TO MY SECOND POINT, THAT INVOLVES THE EXCUSAL OF A POTENTIAL JUROR, OVER AN OBJECTION TO THE RES NEUTRAL REASON GIVEN BY THE PROSECUTOR, WHEN ASKED ABOUT THE DEATH PENALTY, IF ANYBODY HAD ANY PROBLEMS, TWO PEOPLE EVIDENTLY RAISED THEIR HANDS. THEY WERE QUESTIONED AT LENGTH BY THE PROSECUTOR. THE STATE NEVER QUESTIONED THIS PARTICULAR JUROR INDIVIDUALLY. HE RELIED, INSTEAD, ON THE

DEFENSE ASKING POTENTIAL JUROR RIOS HOW HE FELT ABOUT THE DEATH PENALTY, AND RIOS REPLIED I DON'T KNOW. YOU DON'T KNOW AT THIS POINT? NO, I DON'T.

WAS THIS ERROR PRESERVED?

YES. IT WAS PRESERVED. HE OBJECTED VEHEMENTLY. HE DISPUNTED THE REASON -- HE DISPUTED THE REASON GIVEN, WHICH WAS BODY LANGUAGE. THE PROSECUTOR SAID WHEN HE ASKED HIM ABOUT THE DEATH PENALTY, I OBSERVED BODY LANGUAGE THAT INDICATED TO ME HE DID NOT LIKE THE DEATH PENALTY. DEFENSE COUNSEL SAID I DIDN'T SEE ANY BODY LANGUAGE. CLEARLY HE WAS IN A BETTER POSITION TO OBSERVE, TOO, MY CONTENTION BEING THAT HE WAS THE ONE QUESTIONING HIM. I THINK AT THAT POINT IT WAS INCUMBENT UPON THE PROSECUTOR TO QUESTION JUROR RIOS MORE CLOSELY. HE CAN'T JUST SAY, BODY LANGUAGE.

DID THE TRIAL COURT MAKE ANY OBSERVATIONS?

NO, HE DID NOT. ALL HE SAID WAS I AM NOT IN A POSITION TO READ BODY LANGUAGE. HE SAID SOMETHING TO THE EFFECT THAT EVERYBODY HAS BODY LANGUAGE.

DO WE KNOW WHAT THE MAKEUP OF THE JURY WAS?

THEY DID MAKE A POINT OF, BEFORE THEY SWORE THE JURY, THEY DID MAKE A POINT OF POINTING OUT THAT THE FACT THAT THERE WERE, I THINK, THREE AFRICAN-AMERICANS ON THE JUROR. HOWEVER, THAT OVERLOOKS THE FACT THAT JUROR RIOS WAS HISPANIC, AND THAT WAS ESTABLISHED BY THE RECORD, EVERYBODY CONCEDED HE WAS HISPANIC.

THE TRIAL JUDGE'S DID NOT -- THE TRIAL JUDGES DID NOT EXCUSE THE JUROR BECAUSE OF BODY LANGUAGE. DIDN'T HE ACTUALLY EXCUSE HIM BECAUSE THE POTENTIAL JUROR MADE AN EQUIVOCAL STATEMENT CONCERNING HIS ABILITY TO IMPOSE A DEATH PENALTY?

I DON'T THINK SO. THE JUDGE SPECIFICALLY SAID, IN ADDRESSING THE RES NEUTRAL REASON, HE SAID I AM GOING TO CONCLUDE THE REASON EXPRESSED IS RES NEUTRAL. I AM NOT SURE I AM IN A POSITION TO READ BODY LANGUAGE, BUT CERTAINLY PEOPLE EXPRESS THEMSELVES BY THEIR MOVEMENTS, THEIR EYES, AND IN LIGHT OF THE FACT THAT HE IS A DIFFERENT MINORITY THAN THE DEFENDANT, WHICH I CONCEDE INCORRECT APPLICATION OF THE LAW, I AM GOING TO CONCLUDE THAT THIS IS A RES NEUTRAL EXERCISE, A PREEMPTORY, AND I WILL ALLOW IT.

BUT DIDN'T THE STATE MAKE THE STATEMENT THAT THE REASON THAT IT IS BEING ASSERTED IS DUE TO THE EQUIVOCAL NATURE OF THE RESPONSE THAT THE, WITH REGARD TO THE DEATH PENALTY? ISN'T THAT THE OBJECTION THOUGH? I MEAN IN THE RESPONSE, THAT IS THE RESPONSE THAT THE PROSECUTOR GAVE IN THE COURTROOM, WAS IT NOT? JUDGE, THIS PERSPECTIVE JUROR EXPRESSED, IN VERY HE EQUIVOCAL TERMS, VIEWS OF THE -- IN VERY EQUIVOCAL TERMS, VIEWS OF THE DEATH PENALTY.

BASED UPON HIS VIEWS OF HIS BODY LANGUAGE.

I DIDN'T READ IT THAT WAY. IT SAID BASED UPON IT?

YES.

BUT THE JUROR ANSWERED. THAT WAS THE EQUIVOCAL ANSWER.

THAT WAS THE EQUIVOCAL ANSWER BUT THAT WAS NOT THE REASON GIVEN BY THE PROSECUTOR. HE SAYS, AT VOLUME 6, BANK 1107 -- PAGE 1107, MR. WITHE ASKED HIM ABOUT THE BODY LANGUAGE, AND WHAT I PERCEIVED TO BE A NEGATIVE RESPONSE, WITH REGARD TO THE IMPOSITION OF THE DEATH PENALTY, THEN LATER ON HE SAYS OR AT LEAST EQUIVOCAL AT

BEST, BUT CLEARLY HE IS BASING THAT ON WHAT HE OBSERVED HIS BODY LANGUAGE, WHICH WAS NOT SUBSEQUENTLY CONFIRMED BY THE TRIAL JUDGE, AND I THINK THAT IS CRITICAL FOR THE RECORD, THAT THERE NEEDS TO BE SOME CONFIRMATION.

IT DOESN'T SAY BODY LANGUAGE ALONE. IT SAYS BY ANSWER.

HE DOES SAY THAT.

IF WE HAD A SITUATION WHERE WE HAD A SITUATION WHERE WE HAD NO BODY LANGUAGE BUT WE JUST HAD THAT RESPONSE, THAT THE STATE OR THE DEFENSE, IN A CASE, WOULD SAY THAT THE EQUIVOCAL ANSWER, IN RESPONSE TO THAT, IS SUCH THAT I AM EXCUSING THIS JUROR.

FIRST HE SAYS --

WOULD THAT BE ENOUGH? BECAUSE WE KNOW BODY LANGUAGE, BECAUSE THERE HIS CASE LAW THAT THAT DOESN'T SATISFY, BUT HOW ABOUT WOULD JUST ANSWER, BE, TO THE PROSECUTOR OR THE DEFENSE, WOULD THAT BE SUFFICIENT, UNDER FLORIDA LAW, AS A RES NEUTRAL REASON?

YES, BUT HE THROWS IN THE EQUIVOCAL AT BEST, AT THE END. HE SAYS, BY ANSWER, WHAT I PERCEIVED TO BE A NEGATIVE RESPONSE. NOT EQUIVOCAL. HE SAYS "NEGATIVE" AT THAT POINT SO I THINK HE WAS SORT OF GETTING HIS DUCKS IN A ROW AND THREW IN EQUIVOCAL AT THE END, BUT I THINK CLEARLY THE RECORD REFLECTS HE IS BASING IT ON BODY LANGUAGE COMPLETELY. RUNNING OUT OF TIME HERE. THE NEXT POINT I WOULD LIKE TO ADDRESS IS THE THIRD POINT IN THE BRIEF, WHERE NOBODY CAUGHT IT AT TRIAL, BUT THE STANDARD JURY INSTRUCTION ON THE CATCHALL THE NONSTATUTORY MITIGATING FACTOR, WAS AND BRIDGED, IN VERTENTLY, APPARENTLY -- WAS A BRIDGED, IN VERTENTLY -- INADVERTENTLY, APPARENTLY, JUST ON "B "", THE WRITTEN JURY INSTRUCTIONS WERE NOT FOUND. THE CLERK DID NOT HAVE THEM. HOWEVER, THE FINDINGS OF FACT THAT THE JUDGE WROTE, IN SUPPORT OF THE DEATH PENALTY, ALSO, USED THAT SAME LANGUAGE. "ANY OTHER CIRCUMSTANCES OF THE OFFENSE", NOT THE CHARACTER BACKGROUND OF THE DEFENDANT, AND WE ARGUE ON APPEAL THAT THAT WAS FUNDAMENTAL ERROR.

NONE OF THIS WAS OBJECTED TO?

NO. THAT WAS NOT OBJECTED TO. I CONCEDE THAT.

ARE ANY OF YOUR POINTS ON APPEAL RELATED TO THE TRIAL COURT NOT CONSIDERING, AS NONSTATUTORY MITIGATION, ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER?

NO. HE CONSIDERED THEM ALL. HOWEVER, THE JURY DID NOT GET THAT INSTRUCTION, AND OBVIOUSLY DID NOT CONSIDER IT, AND IN FACT BECAUSE OF THE LANGUAGE OF THE INSTRUCTION THEY WERE GIVEN, WE CONTEND THEY GAVE THE AGGRAVATING FACTORS A COUPLE OF WHICH WERE CLEARLY UNSUPPORTED BY THE EVIDENCE AND SHOULD NOT HAVE BEEN GIVEN, DOUBLE WEIGHT. ANY OTHER CIRCUMSTANCES OF THE OFFENSE. SO IN EFFECT, THEY WERE INSTRUCTED THAT THEY COULD CONSIDER AGGRAVATING FACTORS TWICE.

I WAS JUST TRYING, LOOKING AT THE SENTENCING ORDER IN THIS CASE, I DIDN'T REALLY SEE THERE BEING MANY ASPECTS OF THE DEFENDANT'S CHARACTER. THERE WAS NO MENTAL HEALTH MITIGATION, EITHER STATUTORY, NONSTATUTORY, SO IN TERMS OF NOT ONLY THAT IT WASN'T OBJECTED TO, BUT I AM TRYING TO EVEN SEE WHAT WAS IT THAT WAS ARGUED TO THE JURY ABOUT THE NONSTATUTORY MITIGATION THAT THEY WOULD HAVE ESSENTIALLY NULLFIED, BECAUSE THEY DIDN'T GET THIS INSTRUCTION?

THE ONLY THING THAT THE DEFENSE LAWYER ARGUED TO THE JURY WAS THAT THE DEFENDANT

ASSISTED COUNSEL THROUGHOUT TRIAL AND SOME OTHER NEBULOUS, HERE WE GO --

AND THOSE WERE FOUND, HOWEVER.

NOT A PROBLEM IN COURT. THAT IS TRUE. THOSE WERE FOUND. HOWEVER, I THINK THAT THE JURY COULD HAVE CONSIDERED OTHER FACTORS THAT THE DEFENSE ATTORNEY DIDN'T ARGUE. HE ARGUED TWO ADDITIONAL ONES AT THE SPENCER HEARING, THAT HE DID NOT ARGUE TO THE JURY, THAT HE, MAURICE OBVIOUSLY CARED ABOUT KEEPING THE FAMILY TOGETHER AND DISAPPEAR PROVED OF HER DRINKING AND SMOKING. -- AND DISPROVED OF HER DRINKING AND SMOKING.

GIVEN THE CIRCUMSTANCES OF WHAT HAPPENED AND WHO HE KILLED, IT IS HARD TO SEE HOW THAT WOULD YOU KNOW, I GUESS WHAT I AM TRYING TO SEE, THE INSTRUCTION IN THIS CASE, EVEN IF IT HAD BEEN GIVEN, I DON'T SEE HOW THE JURY WOULD HAVE COME OUT WITH A DIFFERENT RECOMMENDATION, GIVEN WHAT YOU HAVE PROPOSED AS NONSTATUTORY MITIGATORS.

WELL, I, ALSO, THINK THAT A JURY, EVEN THOUGH THE DEFENSE LAWYER DIDN'T ASK FOR IT, MIGHT HAVE CONSIDERED MAURICE FLOYD'S YOUNG AGE, 21, AT THE TIME. I THINK --

THAT IS DIFFERENT. THAT IS A QUESTION OF WHETHER OR NOT THERE SHOULD HAVE BEEN AN INSTRUCTION ON THE STATUTORY MITIGATOR OF AGE.

WELL, BUT I THINK THAT THAT, COUPLED WITH HIS OBVIOUS IN MATURITY, AS FAR AS HIS OBSESSIVE JEALOUSY WITH, CONCERNING HIS WIFE, COULD HAVE BEEN CONSIDERED BY THE JURY, EVEN IF THEY HAD NOT BEEN INSTRUCTED ON THE STATUTORY MITIGATOR OF AGE. I WISH HE HAD ASKED FOR IT.

DO YOU THINK THAT WOULD HAVE BEEN COVERED, JUST BY A CATCHALL PHRASE OF ANY OTHER ASPECT OF HIS CHARACTER, THAT THE JURY WOULD HAVE PICKED UP ON THE FACT THAT HE WAS 21 ANGEL US?

BACKGROUND.

WITHOUT -- AND JEALOUS? WITHOUT THE DEFENSE ATTORNEY ACTUALLY MAKING A POINT OF THAT?

YES. I THINK JURORS ARE MORE PERCEPTIVE THAN WE GIVE THEM CREDIT FOR. I THINK THAT THEY VERY WELL MIGHT HAVE ASKED CONSIDERED THAT COUPLED WITH HIS JEALOUS BEHAVIOR. YES.

BUT WE KNOW IN FLORIDA, IN CIVIL CASES, THAT, IF A JUDGE SAYS I AM GOING TO GIVE X, YZ INSTRUCTION BUT FAILS TO DO SO AND COUNSEL DOESN'T CATCH IT, THAT IT IS NOT CONSIDERED FUNDAMENTAL ERROR, AND I RECOGNIZE THAT THERE IS A FAR DIFFERENCE BETWEEN A CRIMINAL CASES, BUT ARE THERE DIFFERENCES SINCE THE UNITED STATES SUPREME COURT APPROVED THIS KIND OF ARGUMENT AND MITIGATION KIND OF CIRCUMSTANCE, ANYWHERE ELSE ACROSS THE COUNTRY, SAID THAT THE MERE FACT THAT YOU DON'T READ THE INSTRUCTION ON THAT MITIGATION IS SO CRITICAL, THAT WE ARE GOING TO CONSIDER THAT FUNDAMENTAL ERROR?

NO. I CAN'T POINT YOU TO A CASE WHERE THAT WAS HELD TO BE ABSOLUTELY FUNDAMENTAL.

IS THERE ANYTHING CLOSE TO THAT THAT WE CAN LOOK TO, BECAUSE WE ARE HAVING DIFFICULTY FINDING SUCH AUTHORITY.

I HAVE NOT SEEN ONE, NO. I WILL LOOK. AND TO GIVE HIM CREDIT, THE DEFENSE LAWYER DID ASK FOR A SPECIFIC INSTRUCTION ON THE NONSTATUTORY MITIGATORS THAT HE PROPOSED, THE TWO, WHICH WAS DENIED, SO HE DID SORT OF PRESERVE IT IN THAT WAY. I THINK I WILL SAVE THE REST OF MY TIME FOR REBUTTAL. THANK YOU.

THANK YOU, MR. QUARLES. MR. RUSH. -- MS. RUSH.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS JUDY TAYLOR RUSH. I AM AN ASSISTANT ATTORNEY GENERAL, REPRESENTING THE STATE OF FLORIDA IN THIS CASE. IN REGARD TO THE CLAIM THAT THERE WAS NO BURGLARY IN THIS CASE, BASED ON THE HOLDING IN THE DELGADO CASE, THE STATE WOULD LIKE TO DRAW THE COURT'S ATTENTION TO THE EVIDENCE WHICH WE CONTEND IS OVERWHELMING, THAT THIS WAS NOT A CONSENTUAL ENTRY, AND, OF COURSE, THAT IS THE ONLY CONSIDERATION IN REGARD TO DELGADO. THEY HAVE THE BURDEN OF PROOF IN THIS REGARD, REVIEWING THIS ON A MOTION FOR JUDGMENT OF ACQUITTAL ACQUITTAL. THE TATE IS ENTITLED TO ALL OF THE REASONABLE INFERENCES FROM THE EVIDENCE. THE EVIDENCE AT TRIAL ESTABLISHED THAT THE HOME WAS BROKEN INTO. THE DEPUTY WHO ARRIVED AT THE SCENE TESTIFIED AT TRIAL.

WHAT WAS THE ACTUAL CONDITION OF THE, I GUESS IT WAS THE SCREEN DOOR. IS THAT WHAT WE ARE TALKING ABOUT?

YES.

BECAUSE THE DEFENSE CONTENDS THAT THIS DAMAGE COULD HAVE TAKEN PLACE DURING THE TIME WHEN THERE WAS THAT PHYSICAL CONFRONTATION BETWEEN THE VICTIM AND A DEFENDANT, SO HOW DOES THE CONDITION OF THE DOOR NEGATE THAT?

WELL, THE DEPUTY WHO TESTIFIED AT TRIAL, SAID THAT THE DOOR HAD BEEN KICKED IN. I THINK THAT IS THE DIFFERENT THAN JUST -- I THINK THAT IS DIFFERENT FROM JUST DAMAGE WHERE HE TRAPPED HER AGAINST THE WALL. THAT WAS THE PHRASE THAT HE USED VERY SPECIFICALLY AT TRIAL, WAS THAT THE DOOR HAD BEEN KICKED IN.

THAT WAS HIS CHARACTERIZATION OF IT, BUT WHAT WAS THERE TO SUBSTANTIATE THAT IT WAS KICKED IN, VERSUS PULLED BACK AND FORTH AND DONE THAT WAY?

I DON'T KNOW WHAT WAS THERE TO SUBSTANTIATE IT, EXCEPT THAT THE DEPUTY TESTIFIED THAT IT HAD BEEN BUSTED UP AND KICKED IN, OR THAT THE LOCK HAD BEEN BUSTED AND THE DOOR HAD BEEN KICKED IN, AND MR. GOSS TESTIFIED THAT THE LOCK WAS IN GOOD CONDITION. THERE WAS NO PROBLEMS WITH THE DOOR, WHEN HE LEFT FOR WORK EARLIER THAT DAY. WE, ALSO --

TO BE CLEAR, WE ARE TALKING, ARE WE NOT, ABOUT THE INSIDE DOOR, NOT THE SCREEN DOOR, RIGHT?

IT IS -- I DON'T BELIEVE THAT THAT IS REAL CLEAR ON THE RECORD. I LOOKED FOR THAT AGAIN LAST NIGHT, TO TRY TO DETERMINE JUST HOW MANY DOORS WERE AT ISSUE AND WHERE THEY WERE. IT SEEMS TO ME THAT THE REASONABLE INFERENCE OR A REASONABLE INFERENCE FROM THE RECORD, MIGHT BE THAT THERE WAS A WOODEN DOOR, WHICH SHE HAD OPENED TO -- AT SOME POINT, AND THERE WAS A SCREEN DOOR, WHICH PROBABLY HAD THE LOCK ON IT. THE EVIDENCE WAS IT WAS AN EXTREMELY HOT NIGHT. EVERYONE WAS HAVING TROUBLE OR A LOT OF PEOPLE WERE HAVING TROUBLE EVEN SLEEPING. THAT IS WHY THE NEIGHBORS WERE AWAKE AND ON THEIR FRONT PORCHES THIS LATE AT NIGHT. THIS HAPPENED AROUND ELEVEN, ELEVEN-FIFTEEN, ELEVEN-THIRTY, AND I BELIEVE THAT MOST LIKELY, THE SCREEN DOOR IS THE ONE THAT HAD THE LOCK ON IT AND WAS OPENED TO LET AIR INTO THE HOUSE.

IS THE RECORD CLEAR ABOUT THAT?

THE RECORD IS NOT CLEAR ABOUT THAT.

THERE IS ONE VISUAL DIFFERENCE THAT I HAVE OF SCREEN DOORS AND INTERIOR DOORS, IS THAT SCREEN DOORS PULL OUT. OKAY. AND THAT INTERIOR DOORS, THE FRONT DOOR, GOES IN. AND SO ORDINARILY, WHEN SOMEBODY SAYS THE DOOR WAS KICKED IN --

THAT WOULD BE QUITE A KICK.

IT WOULD BE THE INTERIOR DOOR THAT, WHEN I SAY THE INTERIOR, IN OTHER WORDS, THE WOODEN OR WHATEVER FRONT DOOR, THE SOLID DOOR ENTRANCE, BUT THE RECORD IS UNCLEAR ABOUT THAT?

I DID NOT FIND ANYTHING DEFINITIVE IN THE RECORD TO, WHICH SAID WHETHER IT WAS THE SCREEN DOOR OR THE WOODEN DOOR THAT HAD BEEN KICKED IN.

BUT THERE WAS CLEAR TESTIFY THAT -- CLEAR TESTIMONY THAT THE DOOR HAD BEEN BROKEN OPEN.

THE DOOR HAD BEEN KICKED IN, ANGAND I THINK ONE TIME THE PHRASE "BUSTED UP" WAS USED. THEY SAID THE LOCK WAS BUSTED ON THE DOOR, SO THERE IS, OF COURSE OTHER EVIDENCE ESTABLISHING THAT IT WAS NOT CONSENTUAL, AND THAT INCLUDES THAT THE VICTIM HAD BEEN TOLD, SEVERAL HOURS EARLIER ON THE PHONE, BY HER DAUGHTER, THAT HER LIFE HAD BEEN THREATENED. THE MOTHER'S LIFE HAD BEEN THREATENED. THE CHILDREN'S LIVES HAVE BEEN THREATENED, AND HER RESPONSE WAS HE WON'T GET MY GRANDCHILDREN, SO I THINK THIS COURT CAN REST PRETTY ASSURED, AS I AM SURE THEY DID IN THE LOWER COURT, THAT THIS LADY WAS NOT GOING TO OPEN THAT DOOR AND LET MR. FLOYD IN. MR. FLOYD EVEN CHARACTERIZES HIS OWN STATE IN THE BRIEF, AS BEING VERY UPSET, WHEN HE ARRIVED AT THE HOUSE. SHE CERTAINLY -- VISIBLY UPSET, WAS THE WORD THAT HE USED, ON PAGE 26 OF THE BRIEF. SHE CERTAINLY WOULD NOT LET THIS PERSON INTO HER HOME, HAVING THREATENED THE CHILDREN AND HERSELF, LATE AT NIGHT, WHEN HE WAS VISIBLY UPSET AT THE TIME. IN ADDITION TO THAT, WE HAVE THE TESTMONY OF MRS. MRS. FIGEROA ACROSS THE STREET, WHICH INDICATED SHE COULD SEE INSIDE THE HOME. MS. GOSS WAS SITTING ON THE SOFA AND THAT THE DEFENDANT APPROACHED HER WITH A LOUD, ANGRY VOICE, YELLING ABOUT HER GOING TO, SHE WAS GOING TO CALL THE GD CRACKERS, WHICH MS. FIGEROA WAS A REFERENCE TO WHITE PERSONS, SO IT IS, JUST SEEMS THAT IT MAKES FOR SENSE AT ALL TO SAY THAT THIS WAS A CONSENTUAL ENTRY. I WOULD ALSO POINT OUT THAT MR. BROWN, WHO WAS ONE OF THE OTHER NEIGHBORS ACROSS THE STREET, TESTIFIED THAT HE HEARD A, QUOTE COMMOTION, AND THEN HE HEARD LOUD ANGRY MALE VOICE, SO THE STATE WOULD SUBMIT THAT THAT TESTIMONY THAT HE HEARD A COMMOTION WOULD BE CONSISTENT WITH THE DOOR BEING KICKED IN, AND THAT THAT IS THE COMMOTION THAT HE HEARD, AND THAT WAS FOLLOWED BY THE LOUD, ANGRY MALE VOICE OF MR. FLOYD, AS HE ENTERED THE HOME WITHOUT THE CONSENT OF THE GRANDMOTHER. ANOTHER THING, OF COURSE, THAT WAS ON THE RECORD, SHOWING THAT SHE WOULD NOT HAVE VOLUNTARILY LET HIM INTO THE HOME, WAS THE HUSBAND'S TESTIMONY THAT, IN MORE THAN 20 YEARS OF MARRIAGE, SHE HAD NEVER LET ANYONE INSIDE THEIR HOME, UNLESS SHE WAS FULLY DRESSED, WAS HIS TESTIMONY, AND, OF COURSE, THE RECORD IN THIS CASE SHOWS THAT THIS LADY WAS IN HER NIGHTGOWN. SHE HAD BEEN ASLEEP WITH HER GRANDDAUGHTER, IN ONE OF THE BEDROOMS OF HER HOME, AND THE TWO GRANDSONS WERE ASLEEP IN ANOTHER ROOM. AND THE EVIDENCE, ALSO, SHOWED THAT, AT THE TIME HER BODY WAS FOUND, SHOT BETWEEN THE TWO HOUSES ACROSS THE STREET, HER GOWN WAS UP AROUND HER WAIST AND SHE HAD NO UNDER GARMENTS ON, SO HER STATE OF UNDRESS WOULD, ALSO SUPPORT A FINDING THAT THE ENTRY INTO THE HOME WAS NOT CONSENTUAL. SO THERE IS A WEALTH OF EVIDENCE ON THE RECORD, CERTAINLY FAR MORE

THAN IS NEEDED TO MEET THE BURDEN IN THIS CASE, OF ESTABLISHING IT WAS A NONCONSENTUAL ENTRY, AND THEY HAVE NOT MET THEIR BURDEN OF OVERCOMING THAT, SO DELGADO REALLY PROVIDES THEM NO RELIEF, AND IN ANY EVENT, EVEN IF THERE WAS A CONCLUSION MADE THAT THERE WAS NOT A FELONY MURDER, BECAUSE THE ENTRY WAS CONSENTUAL, IT WOULD STILL BE A HARMLESS SITUATION, BECAUSE THERE WAS PLENTY OF EVIDENCE OF PREMEDITATED MURDER THAT WAS CHARGED, AND HE WAS CONVICTED OF PREMEDITATED MURDER AS WELL. REGARDING THE JUROR RIOS.

ON THE PREMEDITATION ISSUE, OBVIOUSLY THEY HAVE THE THREAT THE DAY BEFORE. YOU HAVE GOT THE, THAT HE GOES THERE WITH A GUN, BECAUSE THE GUN IS NOT -- WAS NOT FROM THE HOUSE. CORRECT?

RIGHT. THAT'S CORRECT.

THE ONLY THING THAT I GUESS THAT I WAS INTERESTED IN WAS IF HE WAS GOING THERE WITH THE IDEA OF, WAS THE STATE'S THEORY THAT HE WENT THERE WITH THE IDEA OF KILLING HER OR GOING THERE WITH THE IDEA OF CONFRONTING HER, AND THEN THAT IT ESCALATED? BECAUSE IT WOULD SEEM ODD THAT AN HOUR WOULD GO BY, WHERE APPARENTLY THERE WAS ENOUGH TIME FOR HER TO GET THE CHILDREN OUT AND UNTIL THE ACTUAL SHOOTING TOOK PLACE.

THE POSITION OF THE STATE WAS THAT HE WENT THERE WITH THE PLAN OF KILLING SOMEBODY THAT TREELANE LOVED, BECAUSE THAT IS WHAT HE HAD THREATENED HER, THREE SEPARATE TIMES, WITH DOING IF SHE DID SOMETHING THAT HE DIDN'T LIKE AGAIN, AND SHE DID. DO THAT. SHE WENT AND PICKED UP HER GOD DAUGHTER, SPENT SOME TIME WITH HER. SHE HAD DONE THAT WITHOUT HIS PERMISSION OR CONSENT. SO HE WAS MAKING GOOD HIS INTENTION WAS TO MAKE GOOD, ON HIS THREAT.

SO, THEN, THE PRIMARY MOTIVE WOULDN'T BE TO, FOR HIM TO BE, HAVE AVOIDED ARREST. HOW DOES THAT FIT IN, THAT THEORY THAT HE, THAT THE KILLING WAS TO, SORT OF, AVENGE THIS THREAT THAT HE MADE TO HIS WIFE, FIT IN WITH WHY HE WOULD, WHETHER THE PRIMARY MOTIVE WAS TO ELIMINATE HER AS A WITNESS OR TO AVOID ARE AES?

I DON'T BELIEVE THAT THE LAW SAYS THERE CAN ONLY BE ONE PRIMARY MOTIVE. IT SAYS A PRIMARY MOTIVE MUST BE TO AVOID ARREST, AND IN THIS CASE, AS FAR AS AVOIDING ARREST, WE HAVE HIS DIRECT STATEMENT MADE TO MS. LAMB, VERY SHORTLY AFTER THE MURDER IN THIS CASE. HE WALKS INTO MISS LAMB'S HOME. HE PULLS HIS GUN OUT OF HIS WAISTBAND. HE LAYS IT DOWN ON HER BEDROOM DRESSER, AND HE SAYS I JUST SHOT MISS MARY, THE GRANDMOTHER, BECAUSE SHE WAS GOING TO CALL THE POLICE ON ME. YOU CAN'T GET A WHOLE LOT MORE CLEAR THAN THAT, THAT THAT WAS ONE OF A PRIMARY MOTIVE FOR THE KILLING. IN ADDITION TO THAT, YOU HAVE THE TESTIMONY OF MISS FIGEROA, WHO SAYS SHE WAS ON THE PORCH. SHE SAW THIS BLACK MAN TOWERING OVER MRS. GOSS, SPEAKING IN A LOUD, ANGRY VOICE, THAT HE SAID SHE WAS GOING TO CALL THE GD CRACKERS, AND AS HE SPOKE, HE APPROACHED HER IN A THREATENING OR MENACING MANNER, BUT CAUGHT SIGHT, MRS. FIGEROA, OF HER, SHE BELIEVED, AND WALKED AWAY. YOL BELIEVE THAT THE RECORD SHOWS THAT HE WAS IN THAT HOME FOR AN HOUR. MRS. FIGEROA TESTIFIED TO APPROXIMATELY 30 MINUTES HAVING PASSED AT THE MOST, FROM THE TIME THAT SHE SAW HIM ENTER OR THAT HE WAS INSIDE AND THE TIME THAT SHE HEARD THE SHOTS FIRED. SO I WOULDN'T NECESSARILY AGREE THAT IT WAS THAT MUCH TIME, ALTHOUGH SOME PERIOD OF TIME CERTAINLY PASSED. I WOULD, ALSO, POINT OUT, IN REGARD TO THE AVOID-ARREST AGGRAVATOR, THAT IN FOTOPOULOS HAD, THIS COURT HELD THAT AGGRAVATOR, WHERE THE COURT KNEW OF THE DEFENDANT'S INVOLVEMENT IN ILLEGAL ACTIVITIES, THAT WAS COUNTERFEITING IN THAT CASE, AND HERE IN THIS CASE, MRS. GOSS WELL KNEW THAT FLOYD HAD COMMITTED AN ASSAULT ON HER DAUGHTER THAT AFTERNOON AND THAT HE WAS WANTED BY THE POLICE, AND THAT HE

WAS CONCERNED, AS THE TRIAL JUDGE WROTE IN HIS ORDER, CERTAINLY HE KNEW AND WOULD BE CONCERNED THAT HIS PROBATION, WHICH HE WAS ON AT THE TIME, COULD BE REVOKED, IF HE WERE ARRESTED, SO THAT FURTHER SUPPORTS THAT ONE OF HIS MOTIVES A PRIMARY MOTIVE, WAS TO AVOID ARREST, ELIMINATE HER AS A WITNESS. OF COURSE SHE WITNESSED HIS BURGLARY OF HER HOME, AND THAT HE ACCOMPLISHED THOSE THINGS WITH IT, AND IN ANY EVENT, EVEN IF IT WAS ERROR TO FIND THAT THE ERROR WOULD BE HARMLESS, BECAUSE OF ALL OF THE PRESENCE OF THE OTHER THREE STRONG AGGRAVATORS AND THE SCANT MITIGATION IN THE CASE. THERE IS NO REASONABLE POSSIBILITY THAT HE WOULD HAVE GOTTEN A LIFE SENTENCE. AS A MATTER OF FACT, THE TRIAL JUDGE WROTE, IN HIS SENTENCING ORDER, THAT EACH OF THE AGGRAVATORS, BY THEMSELVES, WERE SUFFICIENT TO OUTWEIGH THE MITIGATION, AND WOULD BE A BASIS SO WITH THREE LEFT, THERE IS NO POSSIBILITY THAT THAT WOULD HAVE RESULTED IN A LIFE SENTENCE, HAD THAT ONE NOT BEEN FOUND.

WAS THERE ANY INDICATION IN THIS RECORD AT ALL, AS TO WHETHER OR NOT THE DEFENSE COUNSEL HAD GOTTEN HI BACKGROUND RECORDS ON THE DEFENDANT, SUCH AS SCHOOL RECORDS?

THERE IS INDICATION IN THE NELSON HEARING, THAT DEFENSE COUNSEL HAD DONE A GREAT DEAL OF INVESTIGATION IN THIS CASE. HE HAD TALKED TO MR. FLOYD'S PARENTS, AND HAD DETERMINED, FROM HIS INTERVIEWS WITH THEM, THAT THEY WERE NOT -- THE TESTIMONY THAT THEY WERE PREPARED TO GIVE WOULD NOT WORK. IT WAS INCONSISTENT WITH THE TIME LINES AND HE BELIEVED THAT THEY WERE NOT BEING TRUTHFUL.

IN REGARDS TO THE MITIGATION AND THE CRIME, ITSELF, WHAT WAS THE TESTIMONY OF DR. GLOCK?

I BELIEVE, WITH REGARD TO THE OFF EPPS, ITSELF, THAT THEY WERE TRYING TO PROP UP THE DEFENSE THAT MRS. LAMB WOULD USE, TO SAY THAT HE WAS THERE EARLIER THAN HE WAS, BUT IT WAS ALSO INDICATED IN THAT SAME HEARING, THAT THEY ASKED THE PARENTS ON WHO TO -- THE PARENTS TO TALK TO DR. CROP ABOUT BACKGROUND, GROWING UP, THOSE KINDS OF THINGS, AND THAT THE PARENTS REFUSED TO DO THAT. AND IT IS, ALSO, INDICATED THAT FLOYD WAS GIVEN TESTS, PSYCHOLOGICAL TESTS BY DR. CROP, AND THAT HE MET WITH DR. CROP, TOGETHER WITH HIS ATTORNEY, MR. WITHE, I BELIEVE IT IS, ON AT LEAST A COUPLE OF OCCASIONS, SO IT SEEMS TO OBPRETTY CLEAR, FROM THE NELSON HEARING, THAT THAT KIND OF THING WAS INVESTIGATED AND INQUIRED INTO, AND FOR STRATEGIC REASONS IT WAS NOT OFFERED AT THE PENALTY-PHASE PROCEEDING.

WAS THERE A PRESENTENCE INVESTIGATION IN THIS CASE?

THERE WAS A PRESENTENCE. ACTUALLY THERE WAS MORE THAN ONE. THERE WAS SOME FROM HIS PREVIOUS OFFENSES. HE HAD, HE WAS ON PROBATION FOR PRIOR BURGLARY AND ASSAULT, I BELIEVE IT WAS. HE HAD, ALSO, PREVIOUSLY COMMITTED ANOTHER MURDER, WHEN HE SHOT HIS BROTHER AT POINT-BLANK RANGE, IN THE HEART, BECAUSE HE SLAPPED HIM ON THE ARM, WHILE FLOYD WAS TALKING ON THE DEFENSE. -- ON THE TELEPHONE. THE JUDGE HAD PSI'S FROM THOSE OFFENSES, AND THEN HE, ALSO, ORDERED AN UPDATEED PSI, WHICH HE HAD REVIEWED, HAD THE ATTORNEYS SUBMIT SENTENCING MEMAND AN AFTER RECEIVING THOSE THING -- MEMORANDA AFTER RECEIVING THOSE THING, AND DID THE SENTENCE IN THIS CASE. HE NOT ONLY HAD THE SPENCER HEARING, WHICH IT IS CLEAR FROM THE RECORD THAT HE HAD ALREADY READ THE PSI'S FROM THE PREVIOUS OFFENSES, AND THAT HE WAS ORDERING AND NOT GOING TO MAKE A DETERMINATION, UNTIL HE HAD RECEIVED THE UPDATED PSI, WHICH HE EXPECTED IN ABOUT A WEEK AT THAT POINT, BUT HE THEN SUBSEQUENTLY HELD THE V.O.P. HEARING, AND IT WAS CLEAR FROM THERE THAT THE PSI UPDATED ONE HAD BEEN RECEIVED, AND THEN, OF COURSE, AFTER THAT WAS THE SENTENCING PROCEEDING, WHERE HE, AGAIN, ADDRESSES THE PSI ISSUE, SO, YES, THE PSI WAS RIGHT UP-TO-DATE, AND HE CONSIDERED THAT,

IN REACHING THE DECISION IN THIS CASE.

HE WAS HOW WOULD AT THE TIME OF THE MURDER? 21? -- HE WAS HOW OLD AT THE TIME OF THE MURDER?

HE WAS FOUR MONTHS SHORT OF 22.

AND THE KILLING OF HIS BROTHER, DO YOU KNOW WHEN THAT OCCURRED?

THE EVIDENCE OR THE STATEMENTS ON THE RECORD INDICATE HE WAS APPROXIMATELY 15 YEARS OF AGE, WHEN HE KILLED HIS BROTHER.

AND WE KNOW NOTHING ABOUT --

ABOUT SIX YEARS IN BETWEEN.

SO WE KNOW NOTHING ABOUT WHAT HAPPENED BETWEEN BIRTH AND 15, AS FAR AS, OR ANYTHING ABOUT HIS CHILDHOOD IN THIS RECORD.

THERE WAS A STATEMENT THAT THE DEFENSE ATTORNEY MADE, IN ONE OF THE HEARINGS, AND I AM NOT SURE RIGHT NOW WHICH ONE IT WAS, WHERE HE SAID THAT OH, I BELIEVE THIS MAY HAVE BEEN ARGUMENT TO THE JURY, THAT HE WAS NOT GOING TO PRESENT ANYTHING OF ABUSED CHILDHOOD. SO THAT AND THE INVESTIGATION DISCUSSED IN CONNECTION WITH THE NELSON HEARING, WOULD SEEM TO INDICATE THAT HE PROBABLY DIDN'T HAVE ANYTHING HE COULD PRESENT.

YOU WERE GETTING READY TO ADDRESS THE JUROR CHALLENGE EARLIER.

YES, SIR. YES. THE JUROR RIOS WAS AN HISPANIC JUROR OR PROSPECTIVE JUROR, AND THE STATE PREEMPTORILY STRUCK HIM AND GAVE A RES NEUTRAL REASON FOR DOING SO. I WOULD LIKE TO REMIND THE COURT THAT IT IS THE BURDEN OF THE OPPONENT OF THE STRIKE TO ESTABLISH THAT THERE WAS SOME PROBLEM WITH THIS, THE PREEMPTORY EXERCISE, AND PREEMPTORY IS PRESUMED TO BE EXERCISED IN A NONDISCRIMINATORY MANNER, SO HE HAS THOSE STANDARDS THAT HE HAS TO MEET. THE STATEMENT MADE BY THE STATE WAS A RES NEUTRAL REASON. HE SAID THE PROSECUTOR, THAT IS, SAID, BY BODY LANGUAGE, AND BY ANSWER, HE PERCEIVED THAT MR. RIOS HAD SOME PROBLEMS WITH IMPOSING THE DEATH PENALTY.

WAS THERE ANY ONLY QAINGS ON THE -- ANY OBLIGATION ON THE PART OF THE PROSECUTOR, TO GO BEYOND THE EQUIVOCAL ANSWER THAT MR. RIOS GAVE TO THE DEFENSE ATTORNEY AND QUESTION HIM, HIMSELF, CONCERNING HIS VIEWS ON THE DEATH PENALTY?

NO, MA'AM. I DON'T BELIEVE THAT THERE WAS, ESPECIALLY NOT IN THIS CASE, AND IN REGARD TO THIS JUROR. THE DEFENSE ATTORNEY HAD, WAS THE ONE WHO WAS ASKING THIS JUROR THE QUESTIONS, AND HE ASKED HIM, VERY SPECIFICALLY, HOW HE FELT ABOUT THE DEATH PENALTY. HE SAYS I DON'T KNOW. AND THEN HE SAYS, SO YOU DON'T HAVE AN OPINION OR YOU DON'T KNOW AT THIS TIME, AND HE SAYS NO. I DON'T BELIEVE THAT THE PROSECUTOR HAD AN OBLIGATION TO TRY TO REHABILITATE THAT JUROR.

IS THAT REALLY ACTUALLY -- I AM SORT OF CONCERNED, THE ONLY THING I AM CONCERNED ABOUT IS SOMEONE IS EITHER GOING TO SAY I AM AGAINST THE DEATH PENALTY, AND THEN THAT IS A BASIS FOR A CAUSE. IF THEY SAY I AM TO THE -- I AM FOR THE DEATH PENALTY, I MEAN, SOMEONE SAYING "I DON'T KNOW", HOW IS THAT, WITHOUT FOLLOWING UP TO UNDERSTAND, BUT YOU UNDERSTAND THIS CASE THIS IS GOING TO BE YOUR OBLIGATION, HOW WOULD THAT, IF WE ALLOWED THAT TO BE A REASON, IN ANY CASE, WOULDN'T THAT, REALLY, APPLY TO ALMOST A WHOLE HOST OF PEOPLE THAT JUST HAVEN'T THOUGHT ABOUT WHETHER

THEY ACTUALLY COULD SAY I AM FOR OR AGAINST THE DEATH PENALTY?

WELL, IF THEY HAVEN'T THOUGHT ABOUT IT, IF THEY DON'T HAVE A -- THEY HAVEN'T REACHED A DECISION WITHIN THEMSELVES, AS TO WHAT THEY WOULD DO WITH, IT I DON'T THINK IT IS FAIR TO FORCE THAT KIND OF A JUROR ON EITHER OF THE LITIGANTS. THAT IS THE REASON WE HAVE DEATH QUALIFICATION OF JURORS, SO WE CAN FIND OUT HOW THE JURORS FEEL ON THAT ISSUE.

THAT DOESN'T REALLY GIVE YOU ANYTHING. IF SOMEONE SAID, AGAIN, I AM AGAINST THE DEATH PENALTY, WOULD THE STATE HAVE A RIGHT TO CHALLENGE THAT PERSON FOR CAUSE, OR WOULD THEY HAVE TO GO FURTHER AND FIND OUT ABOUT WHETHER THEY COULD IMPOSE IT IN A GIVEN CASE?

IT PROBABLY DEPENDS ON THE CIRCUMSTANCES UNDER WHICH THE STATEMENT WAS MADE, THINGS SUCH AS BODY LANGUAGE, TONE OF VOICE, INFLECTIONS, THINGS THAT WE CAN'T TELL FROM THE COLD RECORD BEFORE THE COURT.

DO YOU AGREE THAT IT WAS PRESERVED, OR WAS THERE AN ARGUMENT THAT THIS WASN'T EVEN PRESERVED?

I DON'T BELIEVE IT WAS PRESERVED, FOR THE REASON THAT, WHEN IT WAS TIME TO SWEAR THE JURY, THE DEFENSE COUNSEL DID NOT OBJECT TO THE JUROR PANEL, AND UNDER THIS COURT -- TO THE JURY PANEL, AND UNDER THIS COURT'S DECISION IN MELBOURNE, IT WAS MADE CLEAR THAT THAT WAS A PREREQUISITE, BECAUSE THERE WAS A LOT OF JURY SELECTION THAT OCCURRED AFTER MR. RIOS WAS QUESTIONED, AND IT CERTAINLY IS REASONABLE TO ASSUME, FROM THE FACT THAT THERE WAS NO OBJECTION MADE BEFORE THE PANEL WAS SWORN OR AT THE TIME IT WAS SWORN OR EVEN RIGHT AFTERWARDS, WHEN THE JUDGE SAYS SPECIFICALLY, ANYBODY GOT ANY ISSUES HERE, AND THE ONLY THING THE DEFENSE COUNSEL MENTIONED WAS THE VIDEOTAPE, SO IT IS CERTAINLY REASONABLE TO PRESUME THAT DEFENSE COUNSEL WAS SATISFIED WITH THE 14 MEMBERS THAT HE HAD ON THE JURY PANEL, AND I DON'T BELIEVE IT IS PRESERVED, UNDER THESE CIRCUMSTANCES. I WOULD, ALSO, LIKE TO MENTION THE RODRIGUEZ CASE. IN THEIR BRIEF OF DEFENSE COUNSEL ARGUES, WHILE IT WAS IMPROPER FOR THE TRIAL JUDGE TO SAY ANYTHING ABOUT THE RACIAL MAKEUP OF THE PLAYERS IN THE ISSUE, THE TRIAL JUDGE HAD MENTIONED THAT THERE WERE TWO WOMEN AND ONE MALE BLACKS SEATED ON THE JURY, THAT MR. FLOYD WAS BACK AND THAT MR. RIOS WAS HISPANIC. UNDER THE RODRIGUEZ CASE, THIS COURT SAID, WHEN A JUDGE IS EVALUATING A RES NEUTRAL REASON, TO DETERMINE WHETHER IT IS PRETEXTURAL INNATE, THAT HE SHOULD SPECIFICALLY CONSIDER THE RACIAL MAKEUP OF THE VENIRE, SO THAT IS WHAT THE JUDGE APPEARED TO DO IN 24 CASE, AND I DON'T THINK -- IN THIS CASE, AND I DON'T THINK THERE WAS ANY PROBLEMS WITH THAT. YONL THAT, BUT THE -- NOT ONLY THAT, BUT THE TRIAL ATTORNEY NEVER OBJECTED ON THAT BASIS BELOW. HE NEVER OBJECTED, EITHER, ON THE BASIS, ON ALLEGED APPEAL THAT, WELL, THE JUDGE MADE SOME INDICATION HE DIDN'T SEE THE BODY LANGUAGE. HE DID MAKE A STATEMENT THAT HE WASN'T IN THE BEST POSITION TO SEE THE BODY LANGUAGE. IT DOESN'T MEAN HE DIDN'T SEE ANY OF IT OR THAT HE DIDN'T HEAR TONEAL INFLECTIONS AND THINGS OF THAT NATURE, BUT CERTAINLY AT THAT POINT, DEFENSE COUNSEL SHOULD HAVE SAID, WELL, JUDGE, WE NEED TO GET HIM BACK IN HERE, AND LET'S QUESTION HIM SOME MORE AND LET YOU SEE HIS BODY LANGUAGE, AND THERE WAS NOTHING LIKE TAKE DONE, BUT IN THE -- LIKE THAT DONE, BUT IN THE END THE FINAL THING, OF COURSE, IS HE DIDN'T HAVE ANY OBJECTION TO THE JURY PANEL THAT WAS SWORN AND THAT TRIED HIS CASE. I AM GETTING SHORT ON TIME. I WILL JUST MENTION BRIEFLY, THE JURY INSTRUCTION CLAIM ON HEINOUS, ATROCIOUS AND CRUEL. THE STANDARDS --

THE JUDGE DID NOT FIND THAT, DID HE?

THE JUDGE DID NOT FIND IT AS AN AGGRAVATOR, AND THE REASON HE DECLINED TO DO SO, HE

BELIEVED THAT THE STATE HAD CERTAINLY ESTABLISHED CLEAR AND CONVINCING PROOF OF THE AGGRAVATOR, BUT HE WAS CONCERNED ABOUT THE TORTUROUS ELEMENT, AND HE THOUGHT THAT THE STATE'S PROOF ON THAT ELEMENT OF HAC STOPPED WITH CLEAR AND CONVINCING. IT DID NOT GO ON TO BEYOND A REASONABLE DOUBT, WHICH IS THE STANDARD FOR FINDING AGGRAVATOR. HOWEVER, THE COMPLAINT ON APPEAL IS THAT THE INSTRUCTION SHOULD NOT HAVE BEEN GIVEN TO THE JURY. THE STANDARD FOR GIVING A JURY INSTRUCTION ON HEINOUS, ATROCIOUS AND CRUEL, IS WHETHER THERE IS IN EVIDENCE TO SUPPORT THAT FACTOR, THE FINDING OF THAT FACTOR. AND IN THIS CASE, I WOULD SUBMIT THAT ACTUALLY THE EVIDENCE HERE WAS OVERWHELMING ON HAC, AND HAD THE JUDGE FOUND IT, THIS COURT WOULD HAVE UPHELD IT. THERE IS THE CASE OF POOLER, WHICH IS THE FACTS ARE VERY, VERY CLOSE TO THOSE IN THE INSTANT CASE. IN POOLER, THE DEFENDANT HAD THREATENED THE VICTIM TWO DAYS BEFORE THE MURDER. HE HAD FORCED HIS WAY INTO HER APARTMENT. SHE WAS IN SUCH GREAT FEAR OF HIM THAT SHE HAD VOMITED. SHE HAD RUN FROM HIM FROM HER APARTMENT, AND HE RAN AFTER HER, CAUGHT UP WITH HER, AND SHOT HER IN THE HEAD AND KILLED HER. THAT IS ESSENTIALLY WHAT WE HAVE HERE. IN POOLER, THE COURT UPHELD A FINDING OF HAC. HERE THE FACTS MIGHT EVEN BE MORE EGREGIOUS THAN THAT. WE HAD FLOYD THREATENED MRS. GOSS APPROXIMATELY A DAY BEFORE. HE MADE THREE THREATS TO TREELANE TO THIS EFFECT, THE DAY BEFORE. MRS. GOSS CERTAINLY HAD BEEN TOLD ABOUT THOSE THREATS. THE TESTIMONY WAS CLEAR ON THAT. FLOYD FORCED HIS WAY INTO HER HOME WITH A GUN. HE APPROACHED HER IN A MENACING MANNER, SPEAKING IN A LOUD VOICE. HER FEAR WAS SO GREAT THAT SHE AWAKENED HER SLEEPING GRANDCHILDREN, LATE AT NIGHT, AND SAID TO THOSE CHILDREN, AND THEY TESTIFIED SHE TOLD THEM, RUN TO MISS JEANETTE'S HOUSE FOR SAFETY AND CALL THE POLICE. SHE, THEN, AFTER SHE KNEW THAT SHE HAD GOTTEN THEM OUT OF THE HOUSE AND ON THEIR WAY TO SAFETY TRIED TO GET OUT, HERSELF, ONLY TO HAVE FLOYD SLAP HER AGAINST THE HOUSE BETWEEN THE HOUSE AND THE DOOR, AND EVENTUALLY FORCE HER BACK INSIDE. THEN SHE RUNS OUT THE BACK DOOR, ACROSS HER YARD, ACROSS THE STREET, RUNNING SLIGHTLY, THE TESTIMONY WAS, AWAY FROM THE CHILDREN BUT TO THE SIDE OF HER MAY NOT'S HOUSE, SO IT AND -- OF HER NEIGHBOR'S HOUSE, SO IT APPEARS THAT SHE TRIED, IF SHE WAS GOING TO BE SHOT, HE WAS GOING TO SHOOT HER AND NOT THE KIDS. SHE WASN'T GOING TO GO IN THE EXACT DIRECTION THAT THE KIDS WERE IN, BECAUSE SHE DIDN'T WANT TO PLACE THEM IN DANGER, AND THEN, OF COURSE, THE TESTIMONY WAS THAT FLOYD FIRED TWO SHOTS AT HER. LITTLE JADE, THE SIX-YEAR-OLD GIRL, TESTIFIED SHE SAW HIM LEAVE THE PORCH AND CHASE AFTER HER GRANDMOTHER. HE STOPPED AT SOME POINT SHORT OF CATCHING UP TO HER GRANDMOTHER. SHE THEN HEARD THE THIRD SHOT, AND WHEN SHE LOOKED AROUND SHORTLY AFTER THAT, SHE SAW THAT HE WAS BACK ON THE STEP AND HE TURNED AROUND AND LEFT. SO CERTAINLY HAD THE JUDGE FOUND HAC, THIS COURT WOULD HAVE UPHELD HAC, CERTAINLY, BASED ON UPON THE POOLER. CERTAINLY THE JUDGE ACHIEVED SOME -- CERTAINLY THE STATE ACHIEVED SOME THRESHOLD OF THE EVIDENCE, TO GIVE THE INSTRUCTION.

WHAT ABOUT THE DEFENSE'S ARGUMENT TO THE INSTRUCTION THAT THE ASPECT OF THE CRIME WAS INCOMPLETE AND ACTUALLY FOCUSED THE JURY ON THE AGGRAVATING CIRCUMSTANCES, AS OPPOSED TO THE MITIGATING CIRCUMSTANCES?

WELL, FIRST OF ALL, OF COURSE THERE WAS NO OBJECTION ALONG THOSE LINES IN THE TRIAL COURT. NONE OF THAT WAS RAISED THERE. IT IS SOMETHING THAT THEY HAVE THOUGHT ABOUT ON APPEAL, AND IT IS NOT PRESERVED. I THINK IT WAS THE ARCHER CASE, IF I REMEMBER CORRECTLY, THAT ADDRESSED THAT IN A MANNER OF SPEAKING, AND THE COURT, THERE, SAID THE FAILURE TO OBJECT TO THE GENERAL INSTRUCTION ON NONSTATUTORY MITIGATION, BARS THE CONSIDERATION OF THAT ON APPEAL. AND IN THIS CASE, THE JURY ADVISED, WAS ADVISED BY THE DEFENSE COUNSEL, WHAT --

I AM NOT SURE. IS THAT NONSTATUTORY OR STATUTORY? I HAVE SEEN ARGUMENTS WHERE THAT ANY OTHER ASPECT IS ARGUED AS A STATUTORY, EVEN THOUGH IT MAY BE SIMILAR TO SOME OF

THE ITEMS THAT DEFENSE COUNSEL MAY ARGUE AS NONSTATUTORY MITIGATING, SO IS THAT -- I MEAN IT IS LISTED IN THE STATUTE.

RIGHT.

SO IS THAT A STATUTORY MITIGATING OR NONSTATUTORY MITIGATE SOMETHING.

WELL, I GUESS IT IT COULD BE LOOKED AT -- I GUESS IT COULD BE LOOKED AT, REALLY, EITHER WAY. I DON'T THINK THAT IT MAKES ANY REAL DIFFERENCE.

YOU DON'T GIVE ANY GREATER WEIGHT TO STATUTORY MITIGATE SOMETHING.

NOT NECESSARILY. NO. THAT IS UP TO THE TRIAL JUDGE, TO DECIDE WHAT KIND OF WEIGHT THAT HE WANTS TO ASSIGN TO THE MITIGATION THAT HAS BEEN PRESENTED TO HIM, AND IT IS NOT NECESSARILY GIVEN MORE WEIGHT, JUST BECAUSE IT IS A STATUTORY MITIGATOR. ONE THAT IS THE CASE, BECAUSE OF THE NATURE OF THE STATUTORY MITIGATORS HAVE TO DO WITH MENTAL DIFFICULTIES, BUT THAT IS IT IS NOT A, WELL, IT IS STATUTORY, SO IT GETS INTO A SPECIAL WEIGHT CATEGORY, AND THEN WE LOOK AT ALL OF THIS NONSTATUTORY DOWN HERE. IT IS UP TO THE TRIAL JUDGE TO EVALUATE EACH PROPOSED ITEM OF MITIGATION AND DETERMINE WHETHER IT HAS BEEN PROVED, AND IF IT HAS BEEN PROVED, THEN ASSIGN WHATEVER WEIGHT HE BELIEVES IS APPROPRIATE, SO IT DOESN'T GET ANY AUTOMATICALLY MORE WEIGHT, BECAUSE IT IS A STATUTORY, AS OPPOSED TO A NONSTATUTORY MITIGATOR. AND, OF COURSE, THE CLAIM THAT THE AGE INSTRUCTION SHOULD HAVE BEEN GIVEN WASN'T MADE BELOW, EITHER. AND THERE, ALSO, IS NO EVIDENCE INDICATING THAT HE HAD AN EMOTIONAL OR MENTAL AGE THAT WAS YOUNGER THAN ANY ALMOST 22 YEARS OF PHYSICAL AGE. NOT ONLY THAT, THERE IS NO SHOWING THAT HIS MENTAL FACULTIES WERE IMPAIRED AT ALL. APPARENTLY THIS IS GUY WHO WAS OPPOSED TO DRINKING, SO HE PROBABLY DOESN'T EVEN HAVE THE TYPICAL, WELL, I HAD A FEW BEERS BEFORE THIS HAPPENED, DEFENSE. CERTAINLY IT WASN'T PRESENTED, IF HE DOES. IF HE HAD SOME. AND, ALSO, THE TWO YEARS' SUCCESSFUL COMPLETION OF HIS PROBATION, UP UNTIL THE POINT WHERE HE MURDERED MARY GOSS, INDICATES THAT HE HAD A LEVEL OF MATURITY COMMENCE RAT WITH HIS CHRONOLOGICAL AGE. -- COMMENSURATE WITH HIS CHRONOLOGICAL AGE. UNLESS THERE ARE ANY OTHER QUESTIONS, I BELIEVE WE WILL JUST RELY ON OUR BRIEF. OUR TIME IS UP.

THANK YOU, MS. RUSH. MR. QUARLES. REBATTLE.

THE JUROR ISSUE WAS CLEARLY PRESERVED. THE DEFENSE COUNSEL WAS VERY AWARE OF THE NEED TO OBJECT. HE, AFTER THE JUDGE SEND THE RES NEUTRAL REASON, THE DEFENSE LAWYER SAID, THIS IS A CONTINUING OBJECTION. I KNOW THAT THE LAW, NOW, IS THAT I HAVE TO OBJECT EVERY TIME THE LAWN MOWER GOES BY, I SUPPOSE. THEY WERE CUTTING THE GRASS THAT DAY OUTSIDE THE COURTHOUSE. AND YOU FEEL FREE TO OBJECT ANY TIME. I RECOGNIZE THIS IS DONE OVER YOUR OBJECTION.

YES. OUR CONTINUING -- OVER YOUR OBJECTION. YES. OUR CONTINUING OBJECTION. AND THEN, IMMEDIATELY PRIOR TO THE SWEARING OF THE JURY, THE JUDGE STATED THAT, SINCE THERE HAD BEEN SOME ISSUES DURING THIS PROCESS COME UP ABOUT THE NEAL AND CHALLENGES, THAT IS WHEN THEY PUT ON THE RECORD THE RACIAL MAKEUP OF THE JUROR, SO I THINK DEFENSE COUNSEL FELT INSURED THAT HIS OBJECTION WAS CONTINUING, AND WAS RECOGNIZED. AT THAT POINT IT WOULD HAVE BEEN A USELESS ACT TO OBJECT FURTHER. MR. RIOS'S STATEMENT THAT HE DIDN'T KNOW, I THINK JUSTICE PARIENTE, YOU HAVE A GOOD POINT. THE DEFENSE COUNSEL POINTED OUT THAT THE JUROR IN QUESTION WAS THE BOSSMAN OF ACCRUE OF MIGRANT WORKERS AND HE HAD OTHER THINGS ON HIS MIND, OTHER THAN DECIDING WHAT HIS POSITION ON THE DEATH PENALTY WAS. HE WAS A LABORER. HE WAS NOT ARTICULATE, AND HE HAD OTHER THINGS TO THINK ABOUT, AND THAT WAS NOTHING MORE THAN JUST AN ANSWER THAT INDICATED, WELL, I WILL GIVE IT SOME THOUGHT. I MEAN IT IS

SOMETHING I HAVE NEVER THOUGHT ABOUT. JEANETTE FIGEROA, SHE SAID THAT, AS FAR AS WHETHER THERE WAS AN HOUR THAT MR. FLOYD WAS AT THE HOUSE, THE ENTIRE INSTANCE DENT, I THINK IT IS CLEAR FROM THE RECORD, TOOK AN HOUR FROM MR. FLOYD GOING UP TO ON THE FRONT PORCH AND KNOCKING ON THE DOOR AND TALKING TO THE VICTIM THROUGH THE SCREEN DOOR. MISS FIGEROA'S TESTIMONY WAS THAT THE SHOTS OCCURRED 30 MINUTES AFTER SHE SAW, THROUGH THE WINDOW, FLOYD INSIDE THE HOUSE, TALKING TO THE VICTIM. THAT WAS THE 30-MINUTE PERIOD HE HAD BEEN. THEY BOTH OBSERVED MR. FLOYD TALKING THROUGH THE DOOR, TO THE VICTIM, BEFORE THAT, AND THEN ULTIMATELY HE GOT INSIDE THE HOUSE, AND THAT IS WHEN THINGS ESCALATED, SO I THINK IT IS CLEAR FROM THE RECORD THAT IT WAS A PERIOD OF AN HOUR. IT IS CLEARLY NOT TO AVOID ARREST. IF HE HAD WANTED TO HAVE AVOID ARREST, HE WOULD HAVE JUST FLED THE AREA. INSTEAD HE WENT TO CONFRONT HIS MOTHER-IN-LAW ABOUT HIS MARITAL SITUATION. I CLEARLY DON'T THINK THAT THE EVIDENCE SUPPORTS THAT IS THE DOMINANT MOTIVE.

IS THAT, DOES THE LAW HAVE TO BE, UNDER AVOID ARREST THAT, IT IS THE DOMINANT MOTOR SNIFF.

YES, ESPECIALLY WHEN THE VICTIM IS NOT A POLICE OFFICER.

BUT THIS WAS, AS FAR AS PRESERVATION, DID THE DEFENSE ATTORNEY OBJECT TO GIVING THE AVOID-ARREST AGGRAVATOR, OR ARGUE THAT IT SHOULDN'T BE GIVEN BECAUSE THEY DIDN'T ESTABLISH THAT IT WAS THE DOMINANT MOTIVE?

I BELIEVE HE DID. I KNOW HE OBJECTED TO THE HAC INSTRUCTION VERY HE HAVE HELLENTLY. -- VERY VEHEMENTLY. I THINK HE OBJECTED TO THE AVOID-ARREST AGGRAVATOR AS WELL. I AM NOT POSITIVE. THE FRONT DOOR, THE RECORD, AT VOLUME 8, 1602, SAYS THAT THE FRONT DOOR LOCK WAS BUSTED. IT IS NOT CLEAR IF THEY ARE TALKING ABOUT THE FRONT DOOR, THE SOLID WOOD DOOR OR THE SCREEN DOOR, WITH THE LATCH BUSTED. IT IS REALLY NOT CLEAR.

THE STATE TAKES THE POSITION THAT THE AVOID ARREST WAS NOT OBJECTED TO.

THEY MAY BE RIGHT. IT IS CERTAINLY NOT SUPPORTED BY THE RECORD, THOUGH, AND THIS COURT, I MAY NOT HAVE ARGUED THAT IT WAS ERROR TO INSTRUCT THE JUROR ON IT, BUT I DID ARGUE THAT IT WAS ERROR FOR THE TRIAL JUDGE TO FIND IT, WHERE THE EVIDENCE DOES NOT SUPPORT IT. AND THE COMMOTION THAT THE NEIGHBOR, MR. BROWN, HEARD, WAS LOUD TALKING, NOT THE DOOR BEING BROKEN IN AT VOLUME 9, PAGE 1654-55, HE, THEN, SAT FOR ANOTHER HOUR, BEFORE THE SHOOTING STARTED. SO THE COMMOTION HE HEARD WAS NOT A PHYSICAL KICKING IN THE DOOR. HE CLEARLY SAID IT WAS LOUD TALKING, PEOPLE ARGUE EWING. -- ARGUING. THANK YOU.

THANK YOU, MR. QUARRELS. THANK YOU -- THANK YOU, MR. QUARLES.