Leo Edward Perry, Jr. v. State of Florida

THE SECOND BEING THE IMPROPER FINDING OF THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE, AND THE THIRD BEING THE IMPROPER INTRODUCTION OF EVIDENCE DURING THE PENALTY PHASE OF PRIOR BAD ACTS, WHICH CONSTITUTED NONSTATUTORY AGGRAVATION.

WHAT, IN RESPECT TO PREMEDITATION, WHAT IS, FROM YOUR STANDPOINT, THE WORST CASE IN THE RECORD FOR THE FINDING OF PREMEDITATION? FOR THIS CASE TO GO TO THE JURY ON PREMEDITATION? YOU ARE ATTACKING PREMEDITATION, AS OPPOSED TO COLD, CALCULATED AND PREMEDITATED.

WE ARE ATTACKING BOTH, AND TO SOME EXTENT THIS ARGUMENT ON PREMEDITATION WOULD BLEED OVER INTO THE TWO FACTORS, BUT WE HAVE ASSERTED THAT, AT BEST, THIS WAS A SECOND-DEGREE MURDER. THERE WAS A HYPOTHESIS OF INNOCENCE FORWARDED BY MR. PERRY DURING THE TRIAL. EVEN THOUGH THE STATE HAD ASSERTED THIS WAS A COLD, CALCULATED MURDER, FOR THE PURPOSES OF ROBBERY, THE HYPOTHESIS AND THE EVIDENTIARY SUPPORT FROM MR. PERRY WAS THAT THIS WAS A SPUR OF THE MOMENT KILLING, DURING A PANIC, REALLY, OVERREACTION TO A THREAT THAT MR. PERRY, AT LEAST, PERCEIVED.

BUT WASN'T THERE EVIDENCE IN THE RECORD -- THIS HAPPENED IN A MOTEL ROOM.

YES, YOUR HONOR, IT D.

WASN'T THERE SOME -- YES, YOUR HONOR, IT D.

WASN'T THERE SOME EVIDENCE AS TO -- YES, YOUR HONOR, IT DID.

WASN'T THERE SOME EVIDENCE AS TO THE DAMAGE TO THE SHEET?

YES, YOUR HONOR. THERE WERE CUT MARKS THROUGH THE SHEET. NOW --

WASN'T THERE SOME EVIDENCE FROM THE MEDICAL EXAMINER THAT THERE WAS A JUGULAR VEIN SLICED?

YOUR HONOR, A REVIEW OF THIS EVIDENCE, IN FACT, THE STATE'S EVIDENCE, NOT ONLY IS NOT INCONSISTENT WITH THE DEFENSE THEORY, BUT IT IS CONSISTENT WITH IT. THE, NUMBER ONE, MR. JOHNSON DIED AS A RESULT OF MULTIPLE STAB WOUNDS, WHICH IS CONSISTENT WITH A FRENZIED ATTACK BY SOMEONE WHO IS ACTING IN AN IMPULSIVE MOMENT, SPUR OF THE MOMENT REACTION.

NOW, DIDN'T HE, THE DEFENDANT, TESTIFY, HIMSELF?

YES, YOUR HONOR, HE DID.

AND HIS TESTIMONY THAT HE WAS ON THE FLOOR ASLEEP.

CORRECT.

AND THIS MAN, HE WOKE UP, AND THE VICTIM WAS MASTURBATING OVER HIM. CORRECT?

CORRECT.

AND YET THE EVIDENCE, FROM THE MEDICAL EXAMINER, INDICATES THAT THE VICTIM WAS IN BED WITH THE SHEET, WE WOULD PRESUME, FROM THE FACT THAT THE HOLES IN THE SHEET ARE THE SAME KIND AS THE STABBING WOUNDS IN THE VICTIM, YET THAT EVIDENCE INDICATES THAT THE VICTIM WAS IN BED, AT THE TIME THAT THIS ALL TOOK PLACE, AS OPPOSED TO STANDING OVER THE DEFENDANT.

IT INDICATES THAT THE STATE'S EVIDENCE DOES INDICATE THAT, AT THE TIME OF BLOODSHED, THE VICTIM WAS IN THE BED. HOWEVER, IF YOU REVIEW THE PHOTOGRAPHIC EVIDENCE OF THIS CASE, YOU WILL SEE THAT HE WASN'T TUCKED INTO BED, AS IF SOMEONE WERE SLEEPING. THE SHEET WAS ACTUALLY BUNCHED UP AROUND HIS TORSO, HIS LEGS WERE EXPOSED. IT IS PERFECTLY CONSISTENT WITH THE DEFENSE THEORY THAT HE HAD BEEN OUT OF THE BED, AT SOME POINT. MR. PERRY AWOKE, WAS STARTLED, PANICKED, CONFRONTED HIM. HE, PERHAPS, FELL BACK ON TO THE BED AND THEN THE BLOODSHED OCCURRED IN THE BED, BUT IF YOU REVIEW THE PHOTOGRAPHS IN THIS CASE, YOU WILL SEE THAT THIS SHEET WAS KNOTTED AND BUNCHED UP OVER THE TORSO. HIS LEGS WERE EXPOSED. THE BLANKET AND SPREAD WAS FOLDED BACK, AND IN FACT THERE WAS A DROPLET OF BLOOD ON THE UNDERSIDE OF THE SPREAD. IT IS NOT AT ALL INCONSISTENT WITH MR. PERRY'S THEORY THAT, AT ONE POINT, MR. JOHNSTON WAS OUT OF THE BED, PERHAPS BEFORE THE CONFRONTATION OCCURRED, AND THIS WAS A VERY SMALL MOTEL RAM.

HOW DOES THAT SQUARE WITH THE FACT THAT THE MEDICAL EXAMINER SAID THERE WAS NO SEMEN ON MR. MR. JOHNSTON'S UNDER AWARE?

NOW, THERE WAS NO SEMEN FOUND ON THE UNDERWEAR. THERE WAS A SEMEN STAIN THAT MATCHED THE DNA OF MR. JOHNSTON ON THE BED SHEET. THE MEDICAL EXAMINER DID TESTIFY THAT IT MAY OR MAY NOT HAVE BEEN EVIDENCE OF SOME SORT OF SEXUAL ACTIVITY, THE SEMEN'S PRESENCE, BECAUSE THE SEMEN COULD HAVE BEEN EXPRESSED POST MORTEM, DUE TO RIGOR MORTGAGEIES. HOWEVER, THAT IS ONE THEORY-THAT WOULD BE CONSISTENT WITH MR. JOHNSTON HAVING MASTURBATED SHORTLY BEFORE DEATH, WHETHER OR NOT THE SEMEN WAS EXPRESSED BEFORE DEATH OR POST MORTEM, IT, STILL, COULD HAVE BEEN AN INDICATION THAT THERE WAS SOME SEXUAL ACTIVITY GOING ON AT THAT POINT, SO THAT THE EVIDENCE OF THE SEMEN STAIN IS, IN FACT, CONSISTENT WITH MR. PERRY'S STORY.

YOUR POSITION, WITH REGARD TO THE NATURE OF THE ATTACK, I THINK YOU HAVE COUCHED IT IN TERMS OF THIS IS MORE CONSISTENT WITH A FRENZIED KIND OF RAGE KIND OF THING. WOULD YOU DEELT WITH THE NATO -- DEAL WITH THE NATURE OF THE ACTUAL INJURIES BEING, AS I UNDERSTAND IT FROM LOOKING AT THIS RECORD, DEEP PENETRATIONS INTO THE HEART, NOT, REALLY, A SLASHING OF THE CHEST OR ANYTHING, PARTICULARLY GOING FOR THE THROAT AREA, AND THE DEFENSIVE WOUND ON, I GUESS IT WAS A THUMB OR SOMETHING.

YES, YOUR HONOR.

HELP ME WITH THAT, BECAUSE IT IS, ALSO, IT SEEMS, CONSISTENT WITH THAT, THE PLUNGING OF THE KNIFE INTO THE HEART AREA, INTO THE ORGAN, AND WITH OUR CASE LAW ON THIS, THAT THERE IS SOME DIFFERENCE BETWEEN THE REPEATED STABS TO VITAL ORGANS, AS OPPOSED TO JUST A SLASHING FRENZIED.

THIS WASN'T NECESSARILY REPEATED STABS TO THE VITAL ORGAN. THE HEART WAS PENETRATED. THE LUNG WAS PENETRATED FROM, I THINK IT WAS FOUR CHEST WOUNDS. THERE WAS A CUT ON THE THUMB. THERE WERE THREE CUTS IN THE KNIFE AREA AND THE THROAT AREA. HOWEVER, THE MEDICAL EXAMINER'S TESTIMONY IS VERY INSTRUCTIVE HERE. THE MEDICAL EXAMINER SAID THESE, IN HIS PIN PIN I DON'T OBJECT, THESE -- IN HIS OPINION, THESE

WOUNDS WOULD HAVE OCCURRED WITHIN 20 TO 25 SECONDS, AND THAT UNCONSCIOUS UNCONSCIOUSNESS WOULD HAVE OCCURRED WITHIN A MINUTE, AND DEATH WOULD HAVE OCCURRED WITHIN AN ADDITIONAL FOUR MINUTES. IN ADDITION TO THAT, THAT IS CONSISTENT WITH A FRENZIED ATTACK. ALBEIT, PERHAPS, NOT A SCATTERED WOUNDS ALL OVER THE BODY, TYPE OF ATTACK, BUT THE MEDICAL EXAMINER SAID THESE WOULD HAVE BEEN VERY RAPID WOUNDS. I WOULD, ALSO, POINT OUT THE TWO CASES THAT I HAVE RELIED ON IN THE BRIEF, THE COOLING CASE AND THE KIRKLAND CASE, WHERE THIS COURT REVERSED FOR SECOND-DEGREE MURDER. PARTICULARLY IN THE KIRKLAND CASE, THERE WERE CUTS TO THE THROAT IN THAT CASE. THERE WERE, ALSO, BLUDGEONING BY OTHER STRULTS.

ONE OF THE OTHER -- BY OTHER INSTRUMENTS.

ONE OF THE OTHER CASES WHERE WE LOOK AT PREMEDITATION IS THE ABSENCE OF MOTIVE. IN THIS CASE, AGAIN, ACCEPTING THE FACTS IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS EVIDENCE IN THE FORM OF WANTING TO TAKE PROPERTY, INCLUDING THE MONEY AND WALLET AND THE VEHICLE. NOW, I REALIZE YOU HAVE A DIFFERENT VERSION OF THAT, BUT WE ARE ONLY TALKING, HERE, ABOUT SUFFICIENCY, INORD PER FOR THE PREMEDITATION TO GO TO THE JURY. SO DOESN'T THAT, THE ABSENCE OF MOTIVE, IN A CASE SUCH AS, I GUESS, KIRKLAND OR GREEN, VERSUS THIS CASE, WHERE MOTIVE, BEING THE ALTERNATIVE MOTIVE, BEING NOT THAT HE WAS UPSET BY A SEXUAL ADVANCE BUT THAT HE WANTED TO TAKE THE MONEY. HOW DO YOU GET AROUND THAT?

THAT WAS THE STATE'S THEORY, THAT ROBBERY WAS A MOTIVE. HOWEVER, LOOKING AT THE EVIDENCE, WE HAVE, NUMBER ONE, I DON'T THINK WE CAN DISMISS, FROM THE VERY BEGINNING, HIS ARREST. WHEN HE MADE A SOMEWHAT ABBREVIATED CON NEXT TO THE POLICE OFFICERS -- CONFESSION TO THE POLICE OFFICERS. HE INDICATED WE HAD AN ALTERCATION. I REALIZED HE WAS DEAD. I TOOK THE KEYS TO THE TRUCK TO FLEE. NOW, ASIDE FROM THAT, THE STATE'S EVIDENCE IS CONSISTENT WITH THAT THEORY, NUMBER ONE, MR. JOHNSTON'S BELONGINGS WERE NOT RUMMAGED THROUGH, AS YOU MIGHT HAVE EXPECTED SOMEONE WHO WAS LOOKING FOR PROPERTY TO STEAL. HIS CLOTHES WERE STILL NEATLY FOLDED. HIS SUITCASE WAS STILL PACKED. THE ONLY THING THEY COULD POINT TO MISSING WERE THE KEYS TO THE TRUCK AND THE WALLET, WHICH MR. PERRY SAID HE GRABBED OFF THE TABLE AS HE RAN. AFTER THE HOMICIDE. AND ADDITIONALLY, THERE WAS, ACTUALLY, ALMOST $1200 IN MR. JOHNSTON'S SHIRT POCKET. A YOU HAVE ANOTHER ISSUE THAT YOU ARE GOING TO GET TO, AND WE HAVE, IN THESE CASES WHEN IT COMES UP, IS THE DIFFERENCE BETWEEN WHAT THE JURY'S ROLE WOULD BE AND OUR ROLE IN REVIEWING THE COURT. I WAS IMPRESSED THAT, IN THIS CASE, WE HAVE THE JURY'S FINDINGS OF, BOTH, PREMEDITATION AND COMMITTED IN THE COURSE OF A ROBBERY. SO WE KNOW THAT THAT WAS ARGUED TO THE JURY AND THE JURY REJECTED IT. NOW WE ARE ONLY DEALING WITH WHETHER THERE WAS ENOUGH EVIDENCE TO GO TO THE JURY, TO LET THE JURY MAKE THE DETERMINATION AS TO WHETHER THIS WAS A MURDER COMMITTED FOR THE PURPOSE OF ROBBERY OR WHETHER THIS WAS SOME SPUR OF THE MOMENT, FRENZIED ATTACK, AND WE HAVE GOT, YOU KNOW, THERE IS EVIDENCE ABOUT THE BLOOD SPLATTER, ABOUT THAT HE WAS IN BED. YOU ARGUED THAT HE WASN'T. THE HOLES IN THE SHEETS. ALL POINTING TO SUPPORTING THE STATE'S THEORY OF THE CASE. SO --

WE HAVE EVIDENCE POINTING TO THE STATE'S THEORY. WE, ALSO, HAVE A DEFENSE, REASONABLE HYPOTHESIS OF INNOCENCE OF FIRST-DEGREE MURDER, AND UNDER THE CASE LAW, HE IS ENTITLED TO THAT BENEFIT, UNLESS THE STATE'S EVIDENCE CAN REFUTE IT. I DON'T THINK THAT IS HERE, IN THIS RECORD, AND THAT IS OUR POSITION ON THAT SUFFICIENCY ARGUMENT. I WOULD LIKE TO GO AHEAD AND ADDRESS THE COLD, CALCULATED AND PREMEDITATED ISSUE, DEALING WITH THE AGGRAVATING CIRCUMSTANCE. THERE WAS SOME ADDITIONAL EVIDENCE THAT CAME FORWARD IN THE PENALTY PHASE. MR. PERRY HAD A -- WAS -- IT WAS FLESHED OUT THAT HE HAD A LONG-TERM ALCOHOL AND DRUG ABUSE PROBLEM. HE EXPERIENCED AND HISTORICALLY HAD EXPERIENCED BLACKOUTS. HE, ALSO, EXPERIENCED

EPISODES OF EXTREME AND IRRATIONAL RAGE OR ANGER, WHEN HE WAS DRINKING. THERE WAS TESTIMONY CORROBORATING THAT. DR. DOUGLAS FRAZIER, A PSYCHIATRIST WHO EXAMINED HIM, DIAGNOSED HIM WITH WHAT HE CALLED A NEUROAGGRESSIVE DISORDER, WHICH IS A SHORT-TERM AGGRESSIVE AND HOSTILE ACTS TRIGGERED, SOMETIMES, BY VERY MINOR EVENTS, AND IT IS FREQUENTLY PREACCEPTTATED BY PEOPLE ON CERTAIN MEDICATIONS OR UNDER THE INFLUENCE OF ALCOHOL OR CRACK COCAINE, AS MR. PERRY WAS THAT NIGHT. DR. FRAZIER OPINED THAT HE HAD SUCH AN EPISODE, AT THE TIME OF THIS HAD HOMICIDE. LOOKING TO THE TRIAL COURT'S FINDINGS ON THE CCP, I THINK THERE ARE A NUMBER OF FACTUAL PROBLEMS WITH THE COURT'S ORDER THAT, REALLY, AREN'T SUPPORTED SUFFICIENTLY BY THE EVIDENCE. THE FIRST ONE WE HAVE ADDRESSED SOMEWHAT. HE RELIED ON THE CONCLUSION THAT THE VICTIM WAS ASLEEP AT THE TIME OF THE ATTACK, AND I DON'T THINK THE EVIDENCE IS NECESSARILY CONSISTENT WITH THE VICTIM BEING ASLEEP.

OF COURSE, IF THE VICTIM IS ASLEEP, THAT HELPS YOU ON YOUR ARGUMENT CONCERNING HAC, DOESN'T IT?

NOT NECESSARILY, YOUR HONOR, AND I WOULD SAY --

IF HE IS GOING TO ROB SOMEBODY AND WAIT UNTIL SOMEONE IS ASLEEP, AND THEY QUICKLY STAB THEM IN 20 TO 25 SECONDS, IT IS NOT MUCH --

NOT MUCH TIME.

-- FOR THERE TO BE HAC.

AS FAR AS THIS ISSUE, THOUGH, THE QUESTION WHETHER HE WAS ASLEEP OR AWAKE, THE EVIDENCE IS INCONSISTENT ON THAT. I THINK THE STATE ESTABLISHED THAT THE BLOODSHED OCCURRED WHILE HE WAS IN BED BUT NOT NECESSARILY WHILE HE WAS ASLEEP. FURTHERMORE, WHETHER THE VICTIM WAS ASLEEP OR AWAKE, AS FAR AS THE HAC CIRCUMSTANCE, IS NOT, REALLY, A PERTINENT FACT, SINCE WE ARE LOOKING AT THE STATE OF THE MIND OF THE PERPETRATOR AT THE TIME.

WHAT SHOULD WE DO WITH THE EVIDENCE? YOU ARE SUGGESTING THAT THIS IS AN INTOXICATED RAGE, NONPLANNED KIND OF CIRCUMSTANCE.

YES, YOUR HONOR.

COULD THE JUDGE AND THE JURY TAKE INTO ACCOUNT THE SIGNIFICANT SPECIFIC MEMORY OF ALL OF THE EVENTS, OF EVERYTHING THAT WAS HAPPENING BY MR. PERRY HERE? I MEAN, HIS -- IT APPEARED THAT THERE WAS A WITNESS THAT WATCHED HIM GO DOWN AND GET IN THE TRUCK AND LEAVE, AND HIS RECALL OF PRETTY MINUTE THINGS. DOES THAT IMPACT HOW WE SHOULD LOOK AT THIS ASPECT THAT YOU ARE PRESENTING, NOW, OF THE INTOXICATED RAGE AND THAT THIS IS WHAT IT WAS, THE EXPERT?

I DON'T THINK THE FACT THAT MR. PERRY WAS ABLE TO RELATE SOME DETAILS AS INCONSISTENT WITH HIS HAVING HAD THIS RAGE REACTION THAT THE EXPERT TALKED ABOUT. IN FACT, MR. PERRY SAID, AND WHEN I JUMPED UP AND REACTED, I DON'T, REALLY, HAVE A LOT OF RECALL ABOUT WHAT ACTUALLY HAPPENED. I KNOW MY NEXT MEMORY WAS I WAS STANDING THERE, SITTING THERE WITH BLOOD ON MY HANDS. HE NEVER DENIED THAT HE WAS RESPONSIBLE FOR MR. JOHNSTON'S DEATH. I DON'T THINK IT IS INCONSISTENT WITH THAT AT ALL. SOME OF THE OTHER FACTS THAT THE TRIAL JUDGE RELIED ON FOR THIS AGGRAVATING FACTOR, HE MADE THE CONCLUSION THAT THE STABBING WAS METHODICAL. YEN AGAIN, I DON'T KNOW THAT YOU CAN REACH THAT -- AGAIN, I DON'T KNOW THAT YOU CAN REACH THAT CONCLUSION FROM THE EVIDENCE. THE TESTIMONY, AS I MENTIONED EARLIER, CERTAINLY SUPPORTED A FRENZIED-ATTACK-TYPE OF RAPID WOUNDS. THERE WAS, ALSO, A RELIANCE ON THE -- OR THE JUDGE

RELIED ON A FACT WHICH IS NOT SUPPORTED IN THE EVIDENCE, THAT MR. PERRY PROCURED A DIFFERENT KNIFE THAN THE ONE HE SAID HE CARRIED FOR PROTECTION, IN ORDER TO COMMIT THIS KILLING. NOW, THERE WAS -- THE ONLY PIECE OF EVIDENCE RELIED ON HERE WAS THE MEDICAL EXAMINER'S TESTIMONY THAT THE WOUNDS, SOME OF THE WOUNDS HAD A SHARP EDGE AND A BLUNT EDGE, WHICH WAS CONSISTENT WITH THE WEAPON HAVING BEEN A SINGLE-EDGED INSTRUMENT. MR. PERRY SAID HE USED THE SMALL KNIFE HE CARRIED IN HIS BOOT. HE CALLED IT A BOOT KNIFE, WHICH HAD A DOUBLE-END BLADE. HE SAID THAT, THROUGHOUT, THAT THIS WAS THE KNIFE HE USED AND WAS THE KNIFE HE HAD. BUT JUST FROM THE MEDICAL EXAMINER'S TESTIMONY THAT THERE WAS A BLUNT AND A SHARP EDGE ON THE WOUNDS, THE PROSECUTOR, FOR THE FIRST TIME IN CLOSING ARGUMENT, SUGGESTED THAT HE WENT OUT AND GOT ANOTHER KNIFE AND PROCURED ANOTHER KNIFE TO COMMIT THE OFFENSE. HOWEVER, THAT IS, REALLY, NOT CONSISTENT, BECAUSE THE MEDICAL EXAMINER'S TESTIMONY NEVER SAID IT WAS INCONSISTENT WITH A DOUBLE-EDGED BLADE. AS I POINTED OUT IN MY BRIEF, THE DOUBLE-EDGED BLADE MAY NOT HAVE A HAD A DOUBLE EDGE, ALL THE WAY TO THE HILT ON BOTH SIDES, AND THEREFORE YOU COULD, STILL, GET A BLUNT AND A SHARP-EDGED WOUND, EVEN THOUGH IT WOULD BE A DOUBLE-EDGED BLADE, SO THE IDEA THAT HE HAD THE PRESENCE OF MIND TO GO OUT AND PROCURE A WEAPON OTHER THAN HIS OWN, TO COMMIT IT, CERTAINLY HAS NO SUPPORT IN THE RECORD. ANOTHER MATTER WHICH I WANTED TO POINT OUT WAS THE JUDGE, IN HIS FINDING ON CCP, ALSO, INDICATED THAT THE DEFENDANT USED OR CUT THE THROAT AND CUT THE JUGULAR VEIN, WHICH WAS A MAN OR OF KILLING, WHICH HE HAD DISCUSSED -- A M NA. OR OF KILLING -- A MANOR OF KILLING WHICH HE HAD DISCUSSED WITH HIS EX-WIFE. NOW, THE ISSUE OF THAT GOES TO ISSUE THREE IN THIS CASE, WHICH, IF I HAVE TIME, I WILL ADDRESS, WHICH IS THAT THIS WAS THE EVIDENCE OF PRIOR BAD ACTS THAT SHOULD NOT HAVE BEEN PERMITTED IN THE FIRST PLACE. FURTHERMORE, THIS WAS TOTALLY IRRELEVANT TO THIS CASE. THIS CONVERSATION OCCURRED BETWEEN PERRY AND HIS EX-WIFE, WHEN THEY WERE JUST TALKING ABOUT KNIVES. HE, AT ONE POINT, HAD COLLECTED KNIVES, AND HE HAD SOME LARGE KNIVES AND SOME SMALL KNIVES, AND HIS WIFE WOULD SAY I AM REALLY SCARED OF THE BIG KNIVES, AND HE SAID, YOU KNOW, THE SMALL KNIFE CAN HURT OR KILL SOMEONE JUST AS EASILY AS A LARGE ONE, BY CUTTING THE JUGULAR VEIN.

HOW MANY YEARS BEFORE THIS MURDER DID THAT CONVERSATION TAKE PLACE?

SIX YEARS.

AND WAS THERE A MOTION -- DID THE JURY HEAR THAT EVIDENCE? ANOTHER JURY HEARD THAT EVIDENCE, OVER OBJECTION THAT THAT CAME IN.

YOU OB, NOT ONLY TO THAT STATEMENT BUT, ALSO, THE BULK OF WHAT THE EX-WIFE SAID ABOUT PRIOR ACTS OF VIOLENCE?

RIGHT. SHE DID INDICATE THAT HE BECAME VIOLENT WHEN HE WAS DRINKING, BUT SHE WENT INTO A RATHER EXTENSIVE FIGHT HE HAD WITH A FRIEND. SHE WENT INTO TIMES WHEN HE WOULD BE DRUNK AND HE WOULD SLAP HER AND PUSH HER, AND THERE WAS A WHOLE SERIES OF EVIDENCE. AGAIN, THIS IS GOING INTO ISSUE THREE.

BUT DID HE PUT ON ANY LITIGATING EVIDENCE IN THE PENALTY PHASE?

YES, HE DID.

SO WHAT ABOUT THE ARGUMENT? DID HE PUT HIS NONVIOLENT CHARACTER AT ISSUE?

HE -- THE STATE -- I AM GOING TO GO INTO THAT ISSUE, AND I WILL SET IT UP HERE. THE STATE, THEIR VERY FIRST WITNESS IN THE PENALTY PHASE WAS THE EX-WIFE. THEY IMMEDIATELY LAUNCHED INTO THIS TESTIMONY. THE PROSECUTOR'S THEORY WAS THAT, DURING THE DEFENDANT'S TRIAL TESTIMONY, HE HAD, SOMEHOW, OPENED THE DOOR TO CHARACTER

EVIDENCE. I INVITE THIS COURT TO EXAMINE MR. PERRY'S TRIAL TESTIMONY, AND AS I HAVE OUTLINED IN THE REPLY BRIEF, HE ADDRESSED NOTHING BUT CASE-SPECIFIC MATTERS. NO, I HAVE NEVER USED A KNIFE ON ANYBODY BEFORE. NO, I HAVE NEVER HAD TO DEFEND MYSELF WITH A KNIFE BEFORE. NOT GENERAL GOOD CHARACTER NONVIOLENT EVIDENCE IN HIS TRIAL TESTIMONY. THE PROSECUTOR'S THEORY WAS THAT I HAVE, NOW, THE RIGHT TO BRING THIS IN, IN REBUTTAL, IF YOU WILL, DURING THE PENALTY PHASE. THAT WAS A THEORY THAT THE STATE ARGUED. AND THE COURT LET IT IN. AT A LATER POINT, DURING THE PENALTY PHASE OF THE TRIAL, IN FACT, DURING THE DEFENSE CASE, THEY HAD A DISCUSSION ABOUT WHAT THE MITIGATING CIRCUMSTANCES WERE GOING TO BE. AT THE TIME THIS EVIDENCE CAME IN, THE DEFENSE HAD NEVER ASSERTED THAT IT WAS GOING TO GO FOR THE NO SIGNIFICANT HISTORY OF PLIER CRIMINAL ACTIVITY. THIS EVIDENCE HAD -- OF PRIOR CRIMINAL ACTIVITY. THIS EVIDENCE HAD ALREADY COME IN, BEFORE THAT DECISION WAS MADE, SO I KNOW THAT THE INSTRUCTION WAS ULTIMATELY GIVEN TO THE JURY ON THAT POINT, BUT I DON'T THINK THAT THE STATE CAN SEEK SHELTER FROM THIS ANALYSIS, FROM THAT, IN THAT THE DEFENSE WAS IN THE POSITION, IF YOU WILL, TO HAVE TO EMEEL RATE THE IMPACT OF THIS EVIDENCE -- AMELIORATE THE IMPACT OF THIS EVIDENCE THAT HAD ALREADY COME IN, AND CERTAINLY AVOIDING THE EVIDENCE WAS NO LONGER AVAILABLE.

LET ME GO BACK TO THE EVIDENCE AS TO THE STATEMENT TO THE FORMER WIFE THAT HE COULD -- THAT A PERSON COULD -- WITH A SMALL KNIFE COULD KILL SOMEONE WITH A CUT ON TO THE JUGULAR VEIN. IS THE REASON THAT THAT IS NOT ADMISSIBLE, BECAUSE IT IS NOT RELEVANT AS TO REMOTENESS IN TIME, OR IS IT THAT -- WHAT IS THE BASIS OF --

IT IS REMOTE IN, BOTH -- THE CONTEXT OF THE CONVERSATION IS, BOTH, REMOTE IN TIME AND, ALSO, SUBJECT MATTER. MR. PERRY WASN'T TALKING ABOUT A CONTEMPLATING KILLING SOMEONE. HE WASN'T, WITH HIS WIFE.

THERE WAS EVIDENCE IN THIS RECORD, BY THE TIME THIS STATEMENT CAME IN, THAT ONE OF THE CUTS THAT BROUGHT ABOUT THE DEATH OF THIS VICTIM WAS A CUT TO THE JUGULAR VEIN. CORRECT?

THAT'S CORRECT.

AND THERE WAS SOME EVIDENCE THAT HE HAD A SMALL KNIFE.

THAT'S CORRECT. YES, YOUR HONOR.

NOW, AND THERE WAS AN ISSUE, HERE, AS TO WHETHER THERE WAS CCP, CORRECT?

CORRECT.

NOW, THE -- I AM HAVING A HARD TIME WHY, THEN, ISN'T THAT STATEMENT RELEVANT TO THIS PERSON'S CONDUCT, IN RELATION TO THIS MURDER?

IF IT WAS SOMETHING THAT --

IT IS NOT RELEVANT TO THE DEFENDANT'S STATE OF MIND. IF THIS HAD BEEN A STATEMENT OF FUTURE INTENT ON HIS PART, IF I EVER GET IN A CONFRONTATION WITH SOMEONE, I AM GOING TO KILL THEM, I AM NOT SURE THAT WOULD, EVEN, BE RELEVANT TO CCP. I HAVE CITED A CASE WHERE THIS COURT REJECTED THAT VERY THING. THE CASE NAME ESCAPES ME, BUT IT IS IN THE BRIEFS, WHERE --

WELL, IF HE SAID, YOU KNOW, IF IT WAS RATHER THAN USING A KNIFE TO SLICE JUGULAR VEIN, HE HAD TOLD HIS WIFE, WELL, YOU CAN KILL SOMEONE BY HITTING THEM IN THE BACK -- IN THE SEVENTH VERTEBRAE WITH YOUR HAND, IN A KARATE CHOP, AND THIS FELLOW HAD BEEN HIT

AND KILLED WITH A -- IN THAT METHOD, EVEN THOUGH THIS STATEMENT MADE TO THE WIFE SIX YEARS EARLIER, WOULD THAT BE RELEVANT?

NO, YOUR HONOR.

IT WOULD NOT?

IT WOULD NOT BE RELEVANT. CERTAINLY NOT REFLECTIVE OF THE DEFENDANT'S STATE OF MIND SIX YEARS LATER. I JUST DON'T SEE HOW THAT COULD BE RELEVANT.

WELL, THE RELEVANCE IS THE TEST THAT WE ARE TRYING TO DEAL WITH HERE. IS THAT CORRECT?

-- WAS THAT THE BASIS OF THE OBJECTION?

THE BASIS OF THE OBJECTION WAS RELEVANCE.

OKAY.

AND, OF COURSE, COUPLED WITH THAT, IN THE PENALTY PHASE, IS BALANCING THE PREJUDICIAL IMPACT OF THE EVIDENCE, AND IT, ALSO, CONSTITUTING THE POTENTIALLY CONSTITUTING NONSTATUTORY AGGRAVATION.

WELL, IF IT WAS THE STATE OF MIND THAT THE STATE WAS TRYING TO GET IT IN ON, THEY WERE GOING TO TRY TO GET IT IN ON THE MAIN CASE, TO SHOW PREMEDITATION.

AND THAT DID NOT HAPPEN, YOUR HONOR, AND IN FACT, THE STATE NEVER ASERED THE PRE -- ASSERTED THE PREMEDITATION THEORY FOR THE ISSUE IN THIS CASE. THEY STATED WE ARE REBUTTING CHARACTER EVIDENCE. AND IN FACT, THE PREMEDITATION QUESTION IDEA DID NOT COME UP UNTIL CLOSING ARGUMENT, AND THEN IN THE JUDGE'S SENTENCING ORDER.

DID -- WAS THAT -- IN OTHER WORDS, THEY WERE GOING TO PUT ON THE WIFE, TO TALK ABOUT ALL OF THESE OTHER INCIDENTS, AND THEN THE KNIFE INCIDENT WAS --

ONE OF THEM.

-- WAS JUST ONE OF THESE PRIOR BAD ACTS.

THAT WAS ONE OF THEM. THEY WENT INTO THE KNIFE DISCUSSION. THEY WENT INTO THE FIGHTS AND THAT SORT OF THING.

IF, BEFORE THIS EVIDENCE HAD BEEN PRESENTED, IT WAS KNOWN THAT THE LACK OF A CRIMINAL HISTORY OR CRIMINAL PAST WAS GOING COME WAS GOING TO BE ONE OF THE MITIGATING FACTORS THAT WAS GOING TO BE REQUESTED IN THIS CASE, WOULD THAT CHANGE THE RESULT IN THIS CASE, BECAUSE OF WHEN THAT WAS DETERMINED? WOULD IT HAVE, THEN, BEEN RELEVANT TO DISCUSS THESE EVENTS?

IF THE DEFENDANT HAD ASSERTED THE MITIGATING CIRCUMSTANCES THAT I HAVE NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

IF THE JUDGE SAID I AM GOING TO CONSIDER THAT. I AM GOING TO INSTRUCT ON IT.

AND THEN THE EVIDENCE COMES IN.

WOULD THAT CHANGE WHERE WE ARE?

THIS COURT'S CASE LAW HAS SAID THAT NOT ONLY PRIOR VIOLENT CONVICTIONS BUT, ALSO, PRIOR CRIMINAL ACTIVITIES THAT CAN BE ESTABLISHED, PROVEN.

SO THIS, REALLY, TURNS ON WHEN THE DECISION WAS MADE, AS TO WHAT MITIGATORS WILL BE INSTRUCTED UPON.

THAT IS A FACTOR. THAT IS A FACTOR IN THIS CASE. I THINK, HAD THE DEFENSE, CERTAINLY, NEVER ASSERTED AND ASKED FOR THE INSTRUCTION, WE WOULD HAVE HAD A DIFFERENT ISSUE HERE, BUT GIVEN THE TIMING OF THE REQUEST FOR THE INSTRUCTION, THE MITIGATING CIRCUMSTANCES HAD NOT BEEN RESOLVED UNTIL AFTER THIS EVIDENCE CAME IN. IT WAS DURING THE DEFENSE PENALTY PHASE THAT THEY HAD THAT JURY INSTRUCTION CONFERENCE, AND GIVEN THE FACT THAT THIS EVIDENCE WAS ALREADY IN, THE DEFENSE, AT THAT POINT, HAD NO MOTIVE TO WAIVE IT. IN FACT, THEY WERE PUT IN THE POSITION OF HAVING TO AMELIORATE IT, AND THAT INSTRUCTS INSTRUCTION WOULD -- THAT INSTRUCTION WOULD BE OF ASSISTANCE IN AMELIORATEING IT, BECAUSE HE HAD NO PRIOR CRIMINAL CONVICTIONS. HOWEVER, SINCE THAT OCCURRED AFTER THE ADMISSION OF THIS EVIDENCE, AND THE EVIDENCE WASN'T ADMITED FOR THE PURPOSES OF REBUTTAL, IT MAKES IT A DIFFERENT CASE. AND ON THAT ISSUE, I THINK, AT THE VERY LEAST, MR. PERRY WOULD BE ENTITLED TO A NEW PENALTY PHASE WHAT NEW JURY.

ON THE -- ONE OF THE POINTS YOU HAVE RAISED IS PROPORTIONALITY ARGUMENT, BUT I NOTICE THAT, IN THIS CASE, IT, ALSO, SAID THAT THE JUDGE REJECTED ALL OF THE STATUTORY MITIGATORS. BUT THERE IS, ALSO, SOMETHING WHERE HE TAKES OR SHE OR WHOEVER, TAKES 16 OF ALL OF THE OTHER MITIGATORS, LISTS THEM, AND THEN JUST SAYS THAT HE IS GIVING IT LITTLE OR NO WEIGHT, AND YOU HAVE NOT ATTACKED THAT AS A CAMPBELL PROBLEM. DO YOU NOT SEE A CAMPBELL PROBLEM, WITH THAT LUMPING TOGETHER ALL THE MITIGATORS AND NOT LOOKING AT ANY OF THEM? IT SEEMS THAT THE JUDGE GAVE LITTLE OR NO WEIGHT, BECAUSE HE SAID, WELL, THEY DIDN'T AFFECT THE DEFENDANT AT THE TIME OF THE CRIME.

THAT WAS HIS ULTIMATE CONCLUSION, AS TO ALL OF THEM, AND IT IS NOT A WELL-DRAFTED ORDER. I ADMIT THAT. AND --

I P NOT ASKING YOU TO ADMIT IT.

IT IS NOT A WELL-DRAFTED ORDER.

HE DIDN'T RAISE IT AS AN ISSUE. SHOULD THAT CAUSE ANY CONCERN, AS FAR AS, ACTUALLY, HOW THE ORDER IS, THE WEIGHING TOOK PLACE IN THIS CASE?

IT WOULD HAVE IMPACTED, COULD VERY WELL HAVE IMPACTED THE WEIGHING THE COURT DID OF THE MITIGATION. IN THE PROPORTIONALITY ARGUMENT, I SUGGEST THAT THIS COURT CAN LOOK AT, BOTH, THE FOUND AND NOT-FOUND MITIGATING EVIDENCE, AND SHOULD, IN DETERMINESING THE PROPORTIONAL PROPORTIONALITY.

IN TERMS OF THE DRUG USE, THERE WAS, ACTUALLY, A -- WAS IT A CRACK COCAINE PIPE FOUND AT THE SCENE AND THEN, ALSO, WITHIN A DAY OR SO, IS WHEN THE VEHICLE WAS FOUND, THE PERSON THAT HAD THE VEHICLE SAID THAT THE DEFENDANT HAD TRADED IT FOR DRUGS.

FOR CRACK.

WAS THAT ARGUED, AS FAR AS THAT ALTHOUGH HE MAY NOT HAVE BEEN INTOXICATED AT THE TIME, THAT HE WAS, ACTUALLY, USING DRUGS AT THE TIME, AND THAT, WITHIN THE DAYS FOLLOWING?

THERE WAS CERTAINLY EVIDENCE OF THAT DURING THE GUILT PHASE AND DURING THE PENALTY

PHASE, THAT HE HAD AN ONGOING DRUG PROBLEM, HE HAD AN ONGOING ALCOHOL PROBLEM.

HOW WAS THAT USED, THE FACT THAT THAT PIPE WAS FOUND?

THE PIPE WAS FOUND IN THE ROOM.

WAS HIS FINGERPRINTS FOUND ON IT?

NO. HIS FINGERPRINTS WERE NOT ON THE PIPE. I DON'T THINK THEY RECOVERED ANY PRINTS. ANOTHER VICTIM WAS A 75-YEAR-OLD VICTIM.

YES.

WE DON'T THINK HE WAS USING IT.

AND, AGAIN, THE FACT THAT THE CRACK PIPE WAS IN EXISTENCE CORROBORATES THE DEFENDANT'S THEORY THAT I WAS OUT DRINKING AND SMOKING CRACK COCAINE AND CAME BACK IN, AND I WAS UNDER THE INFLUENCE OF IT, AT THE TIME OF THIS CRIME. THAT IS JUST ONE MORE PIECE OF EVIDENCE CORROBORATING HIS THEORY OF HOW THIS CRIME ACTUALLY HAPPENED. AGAIN, I HAVE, ALSO, ATTACKED THE HEINOUS, ATROCIOUS AND CRUEL FINDING. I THINK WE HAVE, ALREADY, TOUCHED ON IT.

YOU MENTIONED ON THAT, THAT THIS HAC SHOULD FOCUS ON THE STATE OF THE MIND OF THE PERPETRATOR. IS THAT WHAT YOU SAID, RATHER THAN -- AND I SEE OUR CASE LAW AS, REALLY, SAYING IT IS NOT THE STATE OF MIND OF THE PERPETRATOR.

THAT'S CORRECT. I -- WELL, FRANKLY, YOUR HONOR, I THINK THIS COURT'S CASE LAW HAS BEEN INCONSISTENT ON THAT OVER THE YEARS, OF WHAT THE STATE OF MIND THE PERPETRATOR IS, AT ISSUE, ON A HEINOUS, ATROCIOUS FINDING. I THINK THIS COURT'S MOST RECENT PRONOUNCEMENT IS THAT WE DON'T LOOK DIRECTLY AT THE STATE OF THE MIND OF THE PERPETRATOR. I DON'T THINK THERE IS ANY DISPUTE --

SO HELP ME ON THAT, AS FAR AS IF WE HAVE STRAYED, HAVE WE STRAYED, AS TO THE ORIGINAL INTENT OF WHAT THE HAC AGGRAVATOR WAS, WHICH WAS THE DEFENDANT'S DESIRE TO INFLICT A HIGH DEGREE OF SUFFERING ON THE VICTIM, AS OPPOSED TO WHETHER THE VICTIM AS SUFFERED OR THE VICTIM AS DIED.

I THINK THIS COURT HAS MOVED IN BOTH DIRECTIONS AT DIFFERENT TIMES, THROUGHOUT THE HISTORY OF THE DEATH PENALTY HOLDS FIRM, IN CONSIDERING IT TO BE AN ISSUE OR NOT AN ISSUE, IN EVALUATING A HEINOUS ATROCIOUS FACTOR.

ISN'T THIS CASE A LOT LIKE THAT CASE OUT IN PENSACOLA, AGAIN, IN A MOTEL ROOM, WHERE THERE WAS STABBING, TAKING OF MONEY, THE DEFENSIVE WOUNDS ON THE HANDS OF THE VICTIM. THERE WAS SOME EVIDENCE IN THAT CASE THAT BOTH OF THEM WERE INTOXICATED. HOWEVER, IN THIS CASE, I DON'T SEE ANY EVIDENCE THAT THE VICTIM WAS INTOXICATED.

AS I RECALL, THE WHITT ENCASE, THERE WAS, ALSO -- THE WHITEN CASE, THERE WAS, ALSO, EVIDENCE THAT THERE WAS A STRUGGLE, BASED ON THE BLOODSHED IN THE ROOM IN WHITTEN, THAT THERE WAS A STRUGGLE THAT WENT ON THROUGHOUT THAT ROOM. IN THAT CASE WE DON'T HAVE THAT EVIDENCE OF A STRUGGLE. WE DO HAVE THE ONE CUT ON TO THE THUMB AS A DEFENSIVE WOUND. WE HAVE THE MEDICAL EXAMINER'S TESTIMONY SAYING THESE WOUNDS OCCURRED WITHIN 20 TO 25 SECONDS. THE JUDGE FOUND THAT. UNCONSCIOUSNESS WOULD HAVE OCCURRED WITHIN A MINUTE. THE JUDGE FOUND THAT IN THE SENTENCING ORDER. THAT DEATH WOULD HAVE OCCURRED WITHIN FOUR MINUTES. AGAIN, THE JUDGE FOUND THAT IN THE SENTENCING ORDER. I DON'T THINK THERE IS A DISPUTE ON THE FACTS ON THE HAC FACTOR, AS

MUCH AS THE JUDGE'S LEGAL CONCLUSION FROM THOSE FACTS, AND MY POSITION IS THAT, BASED UPON THIS COURT'S DECISIONS, THAT THERE MUST BE, TO BE ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL, THERE MUST BE SOME PERIOD OF TIME OF SUFFERING, UNDUE SUFFERING, ON THE PART OF THE VICTIM, AND THIS COURT HAS, ON NUMEROUS OCCASIONS, SAID THAT THERE WAS INSUFFICIENT EVIDENCE OF HAC, WHERE THE EVIDENCE CLEARLY SHOWED THAT THE VICTIM SUFFER ONLY BRIEFLY BEFORE DEATH, AND THAT IS EXACTLY WHAT WE HAVE HERE, BASED UPON THE TRIAL JUDGE'S OWN FINDINGS OF FACT, BASED UPON THE MEDICAL EXAMINER'S TESTIMONY.

YOU ARE IN YOUR REBUTTAL TIME.

I WILL SAVE WHAT I HAVE LEFT. THANK YOU.

THANK YOU. MS. YATES.

MAY IT PLEASE THE COURT. I AM BARBARA YATES, ASSISTANT ATTORNEY GENERAL FOR THE STATE OF FLORIDA. THE STATE TOTALLY DISAGREES WITH MR. McCLAIN'S PRESENTATION OF THE EVIDENCE.

LET'S DIRECT ATTENTION TO THE FIRST, THE JUDGE'S ORDER ON THE CCP.

THE JUDGE'S ORDER ON THE CCP. THAT IS TIED UP WITH THE PRESENTATION OF EVIDENCE OF PREMEDITATION. THAT WAS SUFFICIENT.

WHERE IS THERE ANY EVIDENCE IN THE RECORD TO SHOW THAT HE WAS ASLEEP AT THE TIME?

THE MEDICAL EXAMINER TESTIFIED THAT, IN HIS OPINION, THAT HE WAS ASLEEP ON THE EDGE OF SLEEP, I AM NOT SURE THAT THAT ACTUALLY MAKES A DIFFERENCE. THE DEFENSE'S CLAIM WAS, YOU KNOW, I WOKE UP. HE WAS MASTURBATING OVER ME. I WAS FREAKED OUT. I WAS DOPED UP. I WAS BLITSED ON COKE AND BOOZE, AND I STRUCK OUT AT HIM. I CAME TO A LITTLE BIT LATER. I WAS SITTING THERE, HOLDING A BLOODY KNIFE IN MY HAND, AND THE VICTIM WAS ON THE BED. THE VICTIM'S POSITION ON THE BED, WHEN YOU LOOK AT THE PICTURES, HE IS IN POSITION TO BE SLEEPING. NOW, THE SHEET IS PULLED UP FROM HIS FEET, AND HIS FEET ARE EXPOSED. HOWEVER, IS HE COVERED WITH THE SHEET. THE VICTIM, THE DEFENDANT SAID THAT HE PUT THE BLANKET AND THE BEDSPREAD OVER HIM. THE MEDICAL EXAMINER TESTIFIED THAT HE WAS LYING PRONE IN PED, WHEN HE WAS STABBED -- IN BED, WHEN HE WAS STABBED, FOUR TIMES IN THE CHEST, THREE TIMES IN THE THROAT. ONE OF THE CHEST WOUNDS WAS SUPERFICIAL. ONE OF THE THROAT WOUNDS WAS SUPERFICIAL. THAT LEAVES FIVE SERIOUS WOUNDS. THREE OF THE THREE SERIOUS WOUNDS TO THE CHEST WOULD HAVE BEEN FATAL. ON ONE WAS INTO THE HEART. ONE WAS INTO THE PERRY CARDIUM. ONE WAS INTO -- PERRY CARDIUM, ONE WAS INTO THE LUNG. ONE WENT THROUGH THE HEART AND INTO THE BONE. IT WAS A FORCEFUL BLOW. TWO OF THE WOUNDS TO THE NECK, ONE, THE ONE THAT SLIT THE JUGULAR WAS FATAL. THE OTHER WAS AN IRREGULARLY-SHAPED WOUND. WE HAVE A DEFENSIVE WOUND ON THE VICTIM'S THUMB. THE MEDICAL EXAMINER TESTIFIED THAT THE IRREGULARLY-SHAPED WOUND IN THE NECK, IN HIS EXPERT MEDICAL OPINION, WAS CAUSED BY THE VICTIM WAS STRUGGLING AT THE TIME. THE MEDICAL EXAMINER, ALSO, TESTIFIED, AT PAGE 535, IN THE RECORD, THAT IN HIS CONSIDERED MEDICAL OPINION, THE CHEST WOUNDS OCCURRED FIRST AND THEN THE NECK WOUNDS. THIS GOES TO CCP AND HAC, BOTH. BECAUSE THE VICTIM WAS CONSCIOUS. HE KNEW HE WAS IN PAIN. THE MEDICAL EXAMINER TESTIFIED IT WOULD HAVE BEEN TREMENDOUS PAIN. EVEN THOUGH HE LOST CONSCIOUSNESS WITHIN ONE MINUTE OF THE STABBING BEGINNING, THAT WAS THE LONGEST MINUTE OF THIS VICTIM'S LIFE.

BASED ON THAT, JUST ON THE HAC ISSUE, UNLESS A DEFENDANT TAKES A GUN AND SHOOTS SOMEBODY IN THE HEART, SO THAT THEY ARE IMMEDIATELY UNCONSCIOUS, IS THERE ANY SITUATION WHERE, IF THERE IS -- IF A VICTIM STAYS CONSCIOUS FOR A MINUTE OR LESS, IS THAT,

ALWAYS, HAC?

YOUR HONOR, YOU FOUND THAT I CAN'T PULL ONE RIGHT OFF THE TOP OF MY HEAD, BUT EVEN IF YOU LOOK AT WHERE IT WAS A GUNSHOT WOUND TO THE HEAD, THE THINGS THAT WERE DONE TO THAT WOMAN BEFOREHAND, THIS COURT SAID WAS ENOUGH. LOOK AT SOME OF THE PROPORTIONALITY CASES THAT I CITED. TAKE A LOOK AT DAVIS, IN 648. HE STABBED ON WOMAN IN HER BED. HE ONLY STABBED HER THREE TIMES. THERE WAS A LITTLE BIT OF A STRUGGLE. THIS COURT APPROVED HAC ON THAT.

I AM ASKING IF WE HAVE EXPANDED HAC, SO, UNLESS SOMEBODY IS -- YOU TAKE A GUN AND SHOOT THEM, SO THAT THEY ARE IMMEDIATELY --

NO, YOUR HONOR, I THINK THAT IS NOT EXPANSION. I THINK THAT HAS TRADITIONALLY BEEN HOW THIS COURT HAS INTERPRETED HAC. OREM IS ONE OF THE MOST RECENT PRONOUNCEMENTS ON HAC, AND IT GOES TO THE PERCEPTION OF THE VICTIM. THERE WAS PLENTY OF TIME. A MINUTE CAN BE AN ETERNITY. THIS MAN WAS IN PAIN. HE KNEW HE WAS BEING KILLED FORM THE WOUNDS THAT WERE INFLICTED, ONE, HE USED A KNIFE. THAT IS INHERENTLY A DANGEROUS WEAPON. HE WENT FOR AREAS OF THE BODY THAT WERE DESIGNED TO CAUSE MAXIMUM PAIN, MAXIMUM INJURY, DEATH, THIS WAS DESIGNED TO QUICKLY OVERCOME THE VICTIM AND EFFECTUATE HIS PLAN OF STEALING HIS PROPERTY.

HOW IS THAT CONSISTENT WITH EFFECTUATE AGO DESIRE TO INFLICT A HIGH DEGREE OF PAB?

-- OF PAIN?

WELL, THE MEDICAL EXAMINER TESTIFIED THAT THIS MAN WOULD HAVE BEEN IN EXTREME PAIN FROM THESE WOUNDS.

I AM TRYING TO UNDERSTAND WHAT DEATH, UNLESS IT IS, THEY ARE UNCONSCIOUS IMMEDIATELY, ISN'T PAINFUL?

WELL, THAT IS NOT THE POINT.

BUT --

TO INFLICT PAIN IS SOMETHING THAT THE DEFENSE HAS COME UP WITH. IT CAN'T BE HAC, UNLESS THERE IS A DESIRE TO INFLICT PAIN. IN OREM, WHICH I BELIEVE IS THE MOST RECENT, THIS CASE THE COURT SAID ENOUGH, AND IT SAID, WELL, I DIDN'T INTEND TO, I DIDN'T HAVE THE MENTAL INTENT ON TO DO THIS, THIS COURT SAYS NO. THE HAC IS DECIDED FROM THE PERCEPTION OF THE VICTIM. THEN, IF THERE ARE MENTAL MITIGATORS THAT REDUCE INTENT, THOSE ARE MITIGATED -- MITIGATORS THAT ARE WEIGHED AGAINST THE HAC. THEY DON'T HAVE A DIRECT EFFECT ON WHETHER OR NOT HAC HAS BEEN ESTABLISHED.

THE REASON THAT I HIM ASKING THIS IS BECAUSE THE PURPOSE OF HAVING ESTABLISHED AGGRAVATORS IS TO SEPARATE CERTAIN MURDERERS APART FROM ALL OTHER MURDERERS, AS THE MOST DESERVING OF THE DEATH PENALTY, AND SO, UNDER A THEORY THAT, UNLESS SOMEBODY IS -- DOES NOT REMAIN CONSCIOUS, AFTER THE FIRST, WHATEVER IT IS, GUNSHOTS, THAT CASE WILL SUPPORT HAC. I JUST WANT TO UNDERSTAND THAT DOESN'T EXPAND THIS AGGRAVATOR TO THE WHOLE, ALMOST ALL OF THE MURDERS, OTHER THAN THOSE WITH A GUN, WHERE THERE IS A SINGLE GUNSHOT WOUND OF THE.

NEW YORK CITY YOUR HONOR. IT DOESN'T. IF YOU LOOK BACK INTO THE HISTORY OF THIS, JUSTICE BOYD WROTE A DISSENT, VERY EARLY ON, IN ONE OF THE CAPITAL CASES, UNDER THE NEW PENALTY, AND HE SAID, IN THAT DISSENT, IN MY OPINION, EVERY MURDER IS HAC, SIMPLY BECAUSE IT IS A MURDER, AND THE COURT, IN GENERAL, SAID, NO, IT IS NOT. THERE HAS TO BE

SOMETHING MORE. IT HAS TO BE SOMETHING THAT MAKES THE VICTIM SUFFER, AND IF YOU, ALSO, GO BACK AND LOOK AT SOME OF THESE VERY EARLY CASES, WHERE THEY ARE SINGLE GUNSHOTS, AND THEY SAY IT IS NOT HAC, YOU LOOK AT THE FACT THAT SOMEBODY CAME UP BEHIND THE VICTIM, ONE SHOT TO THE HEAD. THE VICTIM NEVER KNEW ANYTHING WAS COMING. THE VICTIM NEVER KNEW ANYTHING WAS HAPPENING. SO THIS SIMPLY IS NOT ONE OF THOSE CASES, WHERE THE VICTIM HAD NO IDEA WHAT WAS GOING ON. THIS VICTIM WAS IN TERRIBLE PAIN. HE WAS CONSCIOUS FOR AT LEAST A MINUTE. THERE ARE ANY NUMBER OF OTHER CASES WHERE THIS COURT HAS FOUND HAC ON THOSE FACTS. GOING BACK TO THE EVIDENCE TO SUPPORT PREMEDITATION, MEDICAL EXAMINER TESTIFIED ABOUT THE WOUNDS. THE MEDICAL EXAMINER TESTIFIED THAT, IN HIS CONSIDERED MEDICAL OPINION, THESE WOUNDS WERE INFLICTED WITH A SINGLE-EDGED BLADE. CHRISTINA SANDERS, FROM THE FDLE, MICROFIBER ANALYST, EXAMINED THE SHEET THAT WAS OVER THE VICTIM. SHE SAID THERE ARE EIGHT SLASHES IN THIS SHEET. I TRIED OUT VARIOUS TYPES OF INSTRUMENTS. THE ONE THAT MOST CLOSELY MATCHED THESE SHEETS WAS A SINGLE-EDGED BLADE. WE HAVE DEPUTY SANDERSON, WHO BROUGHT PERRY BACK FROM NEW ORLEANS TO PENSACOLA, WITH DEPP ANY UHAB. MR. -- DEPUTY SANDERSON SAYS HE SAID THAT HE TOOK THE VICTIM'S WALLET FROM THE ROOM. HE TOOK THE VICTIM'S TRUCK. HE STABBED THE VICTIM. WE HAVE JAN JOHNSON, WHO IS THE BLOOD SPATTER EXPERT, SAYING WE HAVE, IN HER OPINION, THE VICTIM WAS PRONE, ON THE BED, WITH HIS HEAD ON THE PILLOW, WHEN HE WAS STABBED. THAT, IN HER OPINION, THE SHEET WAS OVER HIM AND ACTUALLY, IN FACT, TUCKED UNDER ONE ARM. HE WAS IN BED FOR THE NIGHT. FROM THE BLOOD SPATTER, IT WAS ON THE HEADBOARD. IT WAS ON THE WALL ABOVE THE HEADBOARD. IT WAS ON THE WALL DIRECTLY ADJACENT TO THE BED. THIS IS A SMALL ROOM. THE BED IS KIND OF PUSHED INTO A CORNER THAT IS MADE BY THE WALL BETWEEN THE BEDROOM AND THE BATHROOM. SHE, ALSO, TESTIFIED ON CROSS-EXAMINATION, WAS ASKED, WELL, ISN'T THAT CONSISTENT WITH HIM HAVING BEEN STRUCK, FIRST, AT THE FOOT OF THE BED AND FALLING BACK ON THE BED, AND SHE SAID NO. ONE, HE WAS PRONE. HIS HEAD WAS ON THE PILLOW. PLUS THERE IS NO BLOOD SPATTER ON THE TABLE AND CHAIRS, ON THE WALL AT THE FOOT OF THE BED TO INDICATE, THERE IS NO BLOOD SPATTER, NO BLOOD POOLED ANYWHERE EXCEPT WHERE THE BODY WAS FOUND ON THE BED. THESE THINGS GO TO PREMEDITATION. THE STATE PRESENTED SUFFICIENT EVIDENCE, IN ITS CASE, TO SHOW THAT THIS WAS A PREMEDITATED MURDER, AND THIS MOTIVE FOR THIS MURDER WAS STEALING THE VICTIM'S PROPERTY.

LET ME MOVE YOU TO THE ISSUE HAVING TO DO WITH THE WIFE'S TESTIMONY.

RIGHT.

WHERE IS -- WAS THERE, IN THE RECORD, SOMETHING WHERE THERE WAS A CLAIM BEING MADE THAT HE WAS A NONVIOLENT PERSON?

YES HE, SIR. THEY -- YES, SIR. THEY NEVER, ACTUALLY, CAME OUT AND SAID I AM NONVIOLENT. I AM NONVIOLENT! HOWEVER, PERRY TESTIFIED, DURING THE GUILT PHASE, ONE THING BEFORE I GET INTO THAT, PERRY'S TESTIMONY, IN THE GUILT PHASE, IS INTERNALLY INCONSISTENT. HE TESTIFIED, WELL, I STABBED HIM WITH MY BOOT KNIFE, WHICH IS A DOUBLE-END KNIFE. THAT DIRECTLY CONTRADICTS THE EVIDENCE THAT THE STATE PRESENTED, THAT THESE STAB WOUNDS WERE MADE BY A SINGLE-END BLADE. THERE ARE VARIOUS THINGS LIKE THIS. HE SAYS, WELL, I DIDN'T TAKE THE WALLET. I FOUND IT IN THE TRUCK, AFTER I, YOU KNOW, WAS OUT ON THE INTERSTATE. THAT IS DIRECTLY CONTRADICTED BY TESTIMONY FROM A DEPUTY, SAYING WHEN WE WERE ON THE WAY, HE SAID HE TOOK IT FROM THE ROOM. AT A CERTAIN POINT IN TIME, WHEN THE EVIDENCE IS INTRODUCED, THEN, YES, IT DOES BECOME A CREDIBILITY DETERMINATION FOR THE TRIER OF FACT. AS JUSTICE PARIENTE POINTED ON OUT, THERE WERE SPECIAL INSTRUCTIONS GIVEN IN THIS CASE. THE DEFENSE REQUESTED INSTRUCTION ON AFTERTHOUGHT, ROBBERY BEING AN AFTERTHOUGHT. THAT INSTRUCTION WAS GIVEN. THE DEFENSE ARGUED EXTENSIVELY, THIS WAS SIMPLY AN AFTERTHOUGHT. THE JURY DID NOT

BELIEVE THE TESTIMONY THAT THE DEFENSE PRESENTED TO SUPPORT THAT HYPOTHESIS. ALSO THE JURY -- THE DEFENSE, SPECIFICALLY, ASKED FOR A SPECIAL VERDICT FORM. IT SAYS "DO YOU FIND THE DEFENDANT GUILTY OF FIRST-DEGREE MURDER"? CHECK ANYTHING THAT APPLIES. FIRST-DEGREE MURDER, FELONY MURDER. THE JURY CHECKED.

DID THE INSTRUCTIONS SAY THAT THEY SHOULD BE UNANIMOUS ON BOTH FINDINGS?

YES.

DID THE STATE OBJECT TO THAT INSTRUCTION? ON THAT VERDICT FORM?

I DON'T THINK SO. I THINK MS. KNEEL RAISED SOME -- MS. NEAL RAISED SOME, YOU KNOW, WE DON'T HAVE TO DO THIS. THE FLORIDA SUPREME COURT HAS SAID THE GENERAL VERDICT FOR BOTH, IF WE PROVE IT, BUT THE JUDGE --

IT, CERTAINLY, HELPS THE STATE, NOW THAT THERE IS THIS VERDICT.

THE JUDGE DID NOT GO ALONG WITH THAT ARGUMENT AND SAID WE ARE GOING TO GIVE THEM THIS JURY FORM. WE ARE GOING TO GIVE THEM THIS INSTRUCTION.

GOING TO, AS THE CHIEF HAD MENTIONED, THE TESTIMONY OF THE WIFE, I THINK THAT IS AN AREA OF CONCERN, AND EVEN IF WE WOULD ASSUME THAT THE DISCUSSION, WITH REGARD TO HOW ONE WOULD KILL SOMEONE AND THE USE OF A KNIFE TO THE JUGULAR, THAT, SOMEHOW, WOULD COME IN. TALK WITH US A LITTLE BIT ABOUT THIS TIMING, BECAUSE APPARENTLY WE PUT ON THE VERY FIRST WITNESS. NO DECISION IS MADE, AS COUNSEL HAS SUGGESTED, WITH REGARD TO THE MITIGATION OR THE MITIGATING FACTORS. HOW IS THE TIMING ON THAT? JUST ALL OF A SUDDEN WE HAVE GOT THIS LETRA OF EVIDENCE, WITH -- THIS PRETTY OR AN OF EVIDENCE THAT HE -- THIS PLETHORA OF EVIDENCE THAT HE IS A BAD GUY. IT IS NOT ALL THERE.

PERRY TESTIFIED EXTENSIVELY AT THE GUILT PHASE. I THINK HIS TESTIMONY RUNS AT 156 PAGES. IT IS THE MOST EXTENSIVE TESTIMONY THAT IS PRESENTED DURING THE GUILT PHASE, AND DURING, IT HIS LAWYER IS TALKING TO HIM, AND HE KEEPS SAYING, WELL, I DIDN'T INTEND TO DO IT. I WAS DOPED UP. I WAS DRUNK. I HAD THIS MANY BEERS HERE AND THIS MANY SHOTS OF DECK ILL AN AND I PLAYED THIS MANY -- OF TEQUILA AND I PLAYED THIS MANY GAMES OF POOL AND I WENT HERE AND I WENT THERE, AND ALL OF A SUDDEN HE DOESN'T REMEMBER WHAT HAPPENED IN THE ROOM. HE DID REMEMBER THAT AT FIRST THE LIGHT WAS SHINING IN HIS EYES AND HE TURNED HIS BUNK ROLL AROUND.

WHAT DOES THAT HAVE TO DO WITH THE TESTIMONY, IF THE DEFENDANT OPENED THE DOOR -- IF THE DEFENDANT DIDN'T TESTIFY AT ALL AND DID NOTHING, YOU WOULD AGREE THAT THE WIFE'S TESTIMONY COULDN'T HAVE BEEN ENTERED.

NO, I WOULDN'T.

YOU WOULDN'T.

I WOULD SAY THAT IT WAS, PROBABLY, ANTICIPATORY REBUTTAL THEN, BECAUSE THE TESTIMONY BY HIS EXPERT AND BY HIM, AT THE PENALTY PHASE, WAS I AM ONLY VIOLENT WHEN I AM DRUNK, BUT AT THE GUILT PHASE, HE TESTIFIED THAT HE ALWAYS CARRIED A KNIFE. THAT HE CARRIED IT FOR PROTECTION, BUT HE DIDN'T HAVE TO -- HE NEVER HAD TO USE IT. HE REITERATED THAT HE HAD NEVER HAD TO USE A WEAPON ON ANYONE, THAT, YOU KNOW, THIS WENT ALONG WITH HIS THEORY, AND HIS TESTIMONY, THAT ESSENTIALLY HE WAS SO BLITSED, HE -- BLITZED, HE DIDN'T KNOW WHAT WAS HAPPENING.

INDULGE US FOR ONE MOMENT. LET'S ASSUME THAT THAT IS NOT ENOUGH, THAT WHAT WENT ON

DURING THE GUILT PHASE, TALK WITH US A LITTLE BIT ABOUT THIS TIMING ISSUE, BECAUSE THE JURY WAS INSTRUCTED ON THAT MITIGATING FACTOR, WITH REGARD TO DOES HE HAVE A CRIMINAL BACKGROUND, AND WE KNOW THAT THAT IF THAT -- THAT, IF THAT WAS GOING ON TO BE AN ISSUE, THAT THIS IS ADMISSIBLE TESTIMONY. THE DEFENSE SEEMS TO BE SAYING THAT, BECAUSE THE STATE PRESENTED THAT TESTIMONY INITIALLY, THAT THIS CHANGED HOW YOU LOOK AT IT. WHAT IS THE STANDARD? WHAT IS THE LAW IN THIS CIRCUMSTANCE?

YOUR HONOR, IS DID AGREE WITH THAT. IN THE REPLY BRIEF, PAGES 617 OF THE RECORD, WHICH IS THE CONFERENCE, OR IT IS PART OF THE INITIAL CHARGE CONFERENCE OF THE PENALTY PHASE, AND THE PROSECUTOR SAYS, YOU KNOW, THEY ARE ARGUING ABOUT WHETHER THE PROSECUTOR CAN PRESENT THIS STUFF, AND SHE SAYS, WELL, THEY ARE GOING TO GO FOR NO SIGNIFICANT HISTORY, AND THE DEFENSE COUNSEL SAYS, WELL, I DON'T KNOW WHAT WE ARE GOING TO GO FOR YET. WE HAVEN'T HAD TIME TO LOOK AT IT, AND IF THE PROSECUTOR SAYS, IF YOU GO FOR IT, I AM NOT GOING TO DISAGREE WITH IT, AND, IN FACT, COUNSEL DID ASK FOR THE MITIGATOR OF NO SIGNIFICANT PRIOR HISTORY AND ARGUED IT. THE JUDGE USED THIS STUFF ABOUT HIS ONLY VIOLENT -- ABOUT HE IS ONLY VIOLENT WHEN HE IS DRUNK, AND SHE, THE EX-WIFE ONLY TESTIFIED TO ONE INCIDENT. THAT WAS WITH A FRIEND. AND PERRY BEAT HIM SO BADLY, HE HAD TO BE HOSPITALIZED. HE BEAT HIM IN THE HOUSE. HE BEAT HIM OUT IN THE YARD, WHEN THE GUY TRIED TO GET AWAY. DRAGGED HIM BACK IN THE HOUSE AND BEAT HIM SOME MORE, AND THE COPS, YOU KNOW, HAD TO TAKE THE MAN TO THE HOSPITAL. HE WAS VERY BADLY INJURED. MELISSA PERRY, ALSO, TESTIFIED, WHILE SHE WAS A STATE WITNESS, THAT HE WASN'T VIOLENT, UNLESS HE WAS DRUNK, AND THAT SHE STAYED WITH HIM SO LONG, BECAUSE SHE THOUGHT HE WAS GOING TO BE OKAY. HE JUST WASN'T VIOLENT, UNLESS HE WAS DRUNK, THEN SHE TESTIFIED THAT HE ONLY BEAT HER WHEN HE WAS DRUNK.

I AM TRYING TO UNDERSTAND, BECAUSE YOU SAID YOU WERE USING THAT TO REBUT WHAT HE HAD SAID THAT, HE IS ONLY VIOLENT WHEN HE IS DRUNK.

AND HE SAYS THAT HE IS NEVER INTENTIONALLY VIOLENT. ANOTHER QUESTION WAS ASKED, DURING THE GUILT PHASE, IS HE SAID WELL, I WAS HUSDRINK, I DO ANYTHING I COULD TO HUSTLE AND TO TRY TO MAKE A BUCK. THE PROSECUTOR ASKED HIM, WELL, DOES THAT MEAN YOU WOULD HURT SOMEBODY, AND HE SAYS, NO, I WOULD HUSTLE, BUT I WOULD NEVER, IN FACT, HURT ANYONE, SO THERE IS EVIDENCE IN THE GUILT PHASE THAT HE IS TRYING TO PORTRAY HIMSELF AS NONVIOLENT.

SO YOU, AGAIN, NOW, FROM WHAT I UNDERSTAND, YOU ARE ACTUALLY, ARE YOU RELYING, MORE, ON THE STATEMENTS THAT PERRY MADE IN THE GUILT PHASE AND THOSE WERE ON CROSS-EXAMINATION.

SOME OF THEM WERE ON DIRECT EXAMINATION. THE LAST ONE WAS CROSS.

THAT ONE THAT YOU JUST MENTIONED WAS IN RESPONSE TO A QUESTION FROM THE STATE. THE STATE, THEN, DIDN'T USE, SAY, WELL, NOW I AM GOING TO BE ABLE TO IMPEACH HIM IN THE GUILT PHASE ABOUT WHAT HE JUST SAID. THEY WAITED UNTIL THE PENALTY PHASE TO PUT ON HIS WIFE.

JUDGE, I DON'T THINK THEY COULD HAVE PUT IT ON IN THE GUILT PHASE.

OKAY. SO IT DIDN'T, THEN, IMPEACH HIM.

BUT THE PENALTY PHASE IS DESIGNED TO DO A CHARACTER ANALYSIS OF THE DEFENDANT. HE IS CLAIMING, IN THE GUILT PHASE, WELL, YOU KNOW, THIS WASN'T INTENTIONAL. I AM A NONVIOLENT PERSON. AND THAT IS JUST SIMPLY NOT TRUE. AND THIS MIGHT BE CONSIDERED ANTS PENNSYLVANIATORY REBUTTAL. -- ANTICIPATORY REBUTTAL. THAT WILL BE MY DROP BACK POSITION, IF, FOR ANY REASON, THE JUDGE ALLOWS THIS IN. IT DOES NOT GO TO

INTENTIONAL ERROR. NOW, WITH REGARD TO THE STATEMENT THAT MELISSA SAID SIX YEARS BEFORE WHERE HE SAID YOU DON'T NEED A BIG KNIFE TO KILL SOMEBODY. TAKE A LITTLE KNIFE, AND YOU HIT THEM IN THE JUGULAR. TAKEN AT TRIAL, THE DEFENSE WAS ARGUING THAT THIS IS JUST GENERAL KNOWLEDGE. EVERYBODY KNOWS THAT, IF SOMEBODY IS STABBED IN THE JUGULAR, THERE IS A REAL GOOD CHANCE THEY ARE GOING TO DIE. THE STATE'S CONTENTION THAT THIS IS NOT TOO REMOTE IN TIME, AND THAT IT DOES SHOW HIS KNOWLEDGE THAT YOU KILL SHALL BE BY STABBING THEM -- KILL SOMEBODY BY STABBING THEM IN THE JUGULAR, AND THAT IS EXACTLY WHAT HAPPENED HERE.

THIS ISN'T AN ISSUE OF IDENTITY AS TO WHETHER HE DID IT OR NOT.

IT GOES TO THE MOTIVE, THOUGH, AND THIS DOES GO TO CCP, WHERE, YOU KNOW, HE STABBED THIS VICTIM IN THE AREAS MOST LIKELY TO CAUSE SERIOUS INJURY AND INCAPACITATION AND DEATH. HE DID NOT STAB HIM IN AN ARM. HE DID NOT STAB HIM IN A LEG. HE WENT STRAIGHT FOR THE GOOD PARTS, STRAIGHT FOR THE HEART AND STRAIGHT FOR THE NECK. AND HE DID KILL. HE DIED. HE BLED OUT IN LESS THAN FIVE MINUTES.

WHAT DOES THE RECORD SHOW? AS TO HOW LONG THE VICTIM AND THE DEFENDANT HAD BEEN IN CONTACT WITH ONE ANOTHER? HE PICKED HIM UP THAT AFTERNOON?

YOU MEAN.

THE HITCHHIKER?

YES. DURING HIS GUILT PHASE TESTIMONY, PERRY TESTIFIED HE DIDN'T HAVE A WATCH. BUT HE THOUGHT IT WAS BETWEEN ELEVEN AND ELEVEN-THIRTY IN THE MORNING, WHEN THE VICTIM PICKED HIM UP IN ALABAMA.

HE WAS COMING FROM NEW ORLEANS?

NO. NO. HE WAS COMING SOUTH FROM CHICAGO, ON HIS WAY TO HOMESTEAD. HE WORKED CARNIVALS AND FAIRS AND THINGS LIKE THAT. HE HAD BEEN WORKING FOR FRANK BRIGGS' OPERATION IN CHICAGO. IT WAS WINTER. THEY WEREN'T DOING ANYTHING UP THERE. HE KNEW THERE WERE SHOWS IN FLORIDA. HE HAD WORKED FLORIDA BEFORE, DURING THE WINTER, AND HE DECIDED THAT HE WAS GOING. HE LEFT CHICAGO. HE TESTIFIED THAT HE LEFT CHICAGO IN THE AFTERNOON OF THE 19th OF FEBRUARY, THAT HE HITCHHIKED. HE GOT A RIDE WITH A LONG HAUL TRUCKER FROM INDIANAPOLIS TO WHERE HE DROPPED HIM OFF IN ALABAMA. THE VICTIM PICKED HIM UP THERE. PERRY THOUGHT IT WAS BETWEEN ELEVEN AND ELEVEN-THIRTY IN THE MORNING. THE MOTEL CHECK-IN SHOWS THAT THEY CHECKED IN AT 8:30 P.M. ON THE 20th, SO THEY WERE TOGETHER FOR A LONG, CONSIDERABLE AMOUNT OF TIME.

DURING THAT AFTERNOON.

YES. YES. OVER EIGHT HOURS. THE -- PERRY TESTIFIED THAT HE HAD ABSOLUTELY NO INDICATION THE VICTIM MADE NO ADVANCES TOWARD HIM WHILE THEY WERE ON THAT, THAT HE COULD TELL, WHEN SOMEONE WAS HOMOSEXUAL AND HE PICKED UP A RIDE FROM THEM, BECAUSE EVENTUALLY THEY WOULD BE PATTING HIM ON THE KNEE AND STUFF LIKE THAT THIS. -- AND STUFF LIKE THIS. ABSOLUTELY NONE OF THAT HAPPENED.

WHAT DID THE AUTOPSY REVEAL, AS TO THE DRUG CONTENT OF THE VICTIM?

THE VICTIM, THERE WAS NO -- NOW, THE DEFENSE PUT THIS ON, PUT, I BELIEVE IT WAS ONE OF THE FDLE PEOPLE PUT ON IN ITS CASE. THE VICTIM'S TOX SCREEN WAS NEGATIVE, AND HE DID NOT HAVE HIV. SO THE STATE'S OPINION, WE FULLY PROVED THAT THIS WAS, BOTH, A PREMEDITATED MURDER, THE NATURE OF THE WOUNDS, THE OPPORTUNITY, AND IT WAS A

FELONY MURDER. HIS PURPOSE WAS TO STEAL THIS MAN'S PROPERTY. PERRY TESTIFIED THAT HE WAS VERY LOW ON MONEY. HE WAS HITCHHIKING BECAUSE HE DIDN'T HAVE TRANSPORTATION. HE WOUND UP WITH BOTH OF THOSE.

HOW DID YOU SEE THE SNIFFING OF THERE HAVING -- THE SIGNIFICANCE OF THERE HAVING BEEN LEFT OVER $1,000 IN CASH IN THE ROOM?

THERE WAS OVER $1,000 CASH IN THE POCKET OF THE SHIRT THAT THE VICTIM HAD BEEN WEARING DURING THE DAY. PERRY TESTIFIED I SAW HIM PAY FOR OUR MEALS OUT OF THE MONEY IN THE POCKET OF THE SHIRT. HE NEVER SAID HE HAD ANY IDEA HOW MUCH WAS THERE.

DON'T YOU THINK IT WOULD BE SORT OF UNUSUAL, IF THE MOTIVE WAS --

NO, NOT ON THE FACTS OF THIS CASE.

NOT ON THE FACTS OF THIS CASE.

NOT ON THE FACTS OF THIS CASE. NO, MA'AM. WHEN PERRY WAS TESTIFYING DURING THE GUILT PHASE, THE PROSECUTOR ASKED HIM, WELL, DID YOU GO THROUGH THE VICTIM'S BELONGINGS? AND HE SAID NO. ALL I DID WAS THROW MY STUFF TO THE DOOR. I GRABBED THE KEYS AND THE CHIP, AND THAT IS ANOTHER THING. THE SECURITY DEVICE THAT HE ACTIVATED FOR THE TRUCK WOULD START. HE HAD NEVER DRIVEN THIS TRUCK, BUT EVEN THOUGH HE CLAIMS HE WAS SO INTOXICATED THAT HE DIDN'T KNOW WHAT HE WAS DOING, HE HAD THE PRESENCE OF MIND TO TAKE THE CHIP, AS WELL AS THE KEY. ET STARTS THE CAR. THE -- HE STARTS THE CAR. THE NEXT DOOR NEIGHBOR IN THE MOTEL TESTIFIES HE SAW HIM GET IN THE TRUCK. HE DIDN'T APPEAR TO BE INTOXICATED. HE GOT OUT --

HE IS NOT INTOXICATED AND HIS MOTIVE IS TO GET MONEY AND THAT IS WHAT HE WANTS, THAT IS HIS WHOLE THING, DOESN'T IT STRIKE YOU AS BEING A LITTLE ODD THAT HE WOULD LEAVE AND HE KNEW THAT THE VICTIM HAD MONEY --

AS I SAID, NOT ON THE FACTS OF THIS CASE. HE, ALSO, SAID HE TOOK THE WALLET FROM THE MOTEL ROOM. HOW MANY PEOPLE DO YOU KNOW KEEP $1,000 IN THEIR POCKET? MOST PEOPLE WOULD KEEP MONEY IN THEIR WALLET. BUT THE PROSECUTOR ASKED, WELL, DIDN'T YOU RESUME ABLING THROUGH HIS STUFF, AND HE -- RUMMAGE THROUGH HIS STUFF, AND HE SAID NO. I WAS IN PANIC. HE THREW EVERYTHING TOGETHER. I DIDN'T EVEN STOP TO PICK UP MY SUN GLASSES FROM THE FLOOR. THE SHIRT THAT HAD THE MONEY IN IT WAS ON THE FLOOR UNDER A CHAIR. HE JUST DIDN'T NOTICE IT. HE TOOK THE WALLET. HE TOOK THE KEYS. HE TOOK THE SECURITY CHIP. HE GOT ALL OF HIS OTHER BELONGINGS. THE ONLY BELONGINGS OF HIS THAT HE DIDN'T TAKE WERE THE BRYN SUN GLASSES -- WERE THE BROKEN SUNGLASSES WHICH WERE FOUND ON THE FLOOR, AND IF THE CRACK PIPE WAS HIS, IT WAS UNDER THE BED. HE WAS NOT LOOKING FOR STUFF ON THE FLOOR, SO, YES, THE STATE DOES BELIEVE THAT THERE IS A RATIONAL EXPLANATION FOR THIS. AND I WILL DROP BACK TO CREDIBILITY, AGAIN, ALL OF THIS EVIDENCE WAS PRESENTED TO THE JURY. THE JURY WAS WELL-INSTRUCTED. THE JURY WAS WELL-WITHIN -- WAS WELL WITHIN ITS RIGHTS TO FIND, BOTH, PREMEDITATION AND FELONY MURDER. THE TRIAL COURT WAS WELL WITHIN ITS DISCRETION IN FINDING THESE AGGRAVATORS. NOW, ABOUT THE MITIGATORS, PLEASE DO LOOK AT DR. FRAZIER'S TESTIMONY. HIS TESTIMONY, HE TESTIFIED THAT HE DID A CLINICAL, FARM COLLEGECAL EXAMINATION -- PHARMACOLOGICAL EXAMINATION. HIS TESTIMONY IS NOTEWORTHY FOR THE NUMBER OF TIMES, I THINK IT IS AT LEAST SEVEN DURING DIRECTION, WHERE HE QUALIFIES HIS TESTIMONY ABOUT, YES, THE DEFENDANT WAS INTOXICATED AND HIS VERSION OF THINGS IS REASONABLE. THINK, WELL, IF YOU BELIEVE WHAT HE SAID, IF HE CAN BE BELIEVED, IF HE WAS TELLING THE TRUTH, HE REPEATED THAT ON CROSS-EXAMINATION, THAT IF HE COULD BE BELIEVED, THESE, DR. FRAZIER TESTIFIED THAT HIS TESTIMONY ABOUT WHAT HAPPENED THAT NIGHT WAS BASED, VIRTUALLY IN WHOLE, ON ITSELF DEFENDANT'S SELF-SERVING STATEMENTS THAT WERE MADE

TO HIM. THE JURY HEARD ALL OF THIS STUFF. AND MADE ITS DECISION. YOU KNOW, THE 10 TO 2 JURY RECOMMENDATION OF DEATH IS UNANIMOUS ON BOTH TYPES OF MURDER. THE STATE SAYS THERE IS SIMPLY NO REVERSIBLE ERROR, LOOKING AT THE MITIGATING CIRCUMSTANCES, THEY ASKED FOR THREE STATUTORY MITIGATORS, NO SIGNIFICANT HISTORY IN BOTH MENTAL MITIGATORS. THE TRIAL COURT FULLY DISCUSSES BOTH, AS TO WHY THEY WERE NOT PRESENT AND WERE NOT FOUND. INCIDENTALLY THE MENTAL HEALTH EXPERT DID NOT TESTIFY THAT EITHER OF THE STATUTORY MITIGATORS APPLIED. THEN THERE ARE 16 OR 17 NONSTATUTORY MITIGATORS, WHICH DEFENSE COUNSEL CAME UP WITH IN THE SENTENCING MEM-. THE TRIAL COURT -- MEMO. THE TRIAL COURT LISTS THOSE AND THEN SPENDS THREE OR FOUR PAGES DISCUSSING THEM. THE TRIAL DID NOT SIMPLY LIST THEM AND SAY I AM NOT GIVING THEM MUCH WEIGHT. HE DISCUSSED REEVES V STATE, I THINK IT IS 637 SO.2D. THIS COURT SAID THAT, YOU KNOW, NONSTAUD OTHER THINGS CAN BE GROUPED. WHEN YOU LOOK AT THE LIST, IT IS ATTACHED TO THE APPELLATE'S -- APPELLANT'S BRIEF, HIS APPENDIX CHBL THE TRIAL COURT CONSIDERED ALL THE -- CONSIDERED APPENDIX. THE TRIAL COURT CONSIDERED ALL THE MITIGATION AND GAVE IT WEIGHT AND THERE SIMPLY IS NO REVERSIBLE ERROR IN THIS CASE, AND THE STATE WOULD ASK YOU TO AFFIRM THE CONVICTION. THANKS.

THANK YOU, MS. McCLAIN, REBUTTAL.

-- MR. McCLAIN, REBUTTAL?

JUST BRIEFLY. AGAIN, AS TO DR. FRAZIER'S TESTIMONY, I WILL ADDRESS THAT BRIEFLY. IT WAS -- HE BASED HIS TESTIMONY, MORE, ON OTHER EVIDENCE, OTHER THAN THE SELF REPORT OF THE DEFENDANT ALONE. HE, ALSO, HAD EXAMINED POLICE REPORTS, DEPOSITIONS, AND, I AM ASSUMING, INFORMATION FROM FAMILY MEMBERS ABOUT HIS BACKGROUND. MY RECALL OF THE EVIDENCE IS THAT HE DID, IN FACT, RENDER A OPINION ON THE TWO STATUTORY MENTAL MITIGATORS, WHICH EVEN THOUGH THE TRIAL JUDGE, IN ITS ORDER, CHOSE TO REJECT, BASED ON AN EXAMINATION OFING IT, BUT, IN FACT, HE DID RENDER AN OPINION ON THOSE TWO FACTORS. I WANT TO JUMP, BRIEFLY, TO THE QUESTION OF THE BUNCHED-UP SHEET. THERE WAS THE STATE'S POSITION WAS THAT THE SHEET WAS ON MR. JOHNSTON, AS IF HE HAD BEEN SLEEPING. I INVITE THIS COURT TO LOOK AT THE CRIME SCENE PHOTOGRAPHS. YOU WILL SEE THAT THE SHEET IS, IN FACT, WADDED UP. THERE IS, ALSO, A REASON WHY THERE WAS EIGHT CUT MARKS THROUGH THE SHEET. THERE WAS ONLY FOUR WOUNDS TO THE TORSO OF THE BODY, AS THE SHEET WAS TOLDED AND BUNCHED. -- WAS FOLDED AND BUNCHED. ON THE QUESTION OF HAC, I HAVE NOTED CASES FROM THIS COURT, WHERE DEATH DID NOT OCCUR INSTANTANEOUSLY, AND THIS COURT, NEVERTHELESS, FOUND HAC TO BE A FACTOR. THERE IS SUFFICIENT SUPPORT IN THIS COURT'S CASE LAW TO DETERMINE THE HAC FACTOR WAS IMPROPERLY FOUND. I HAVE NOTHING FURTHER AT THIS POINT.

THANK YOU, MR. McCLAIN. THE COURT WILL HAD BEEN IN RECESS. THE MARSHAL: PLEASE RISE.