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## Samuel L. Smithers v. State of Florida

MR. CHIEF JUSTICE: THE NEXT CASE ON THE ORAL ARGUMENT CALENDAR THIS MORNING IS SMITHERS VERSUS STATE. MR. CONNOR.

GOOD MORNING. I AM DOUG CONNOR, APPEARING ON BEHALF OF THE APPELLANT SAM SMITHERS. THIS IS A CAPITAL CASE. MR. SMITHERS WAS CONVICTED FOR TWO SEPARATE MURDERS AT A SINGLE TRIAL. HE RECEIVED DEATH RECOMMENDATION RECOMMENDATIONS AND SENTENCES ON BOTH. INCIDENTS OCCURRED ABOUT 15 DAYS APART, IN THE PERIOD OF MAY 12-20, 1996. BOTH VICTIMS WERE PROSTITUTES FROM THE SAME AREA MOTELS IN TAMP A BOTH WERE FOUND IN THE SAME POND, ON A JAICK VACANT COUNTRY ESTATE -- ON A VACANT COUNTRY ESTATE WHERE SMITHERS WORKED PART-TIME AS A CARETAKER. THERE IS VERY LITTLE EVIDENCE IN THE RECORD OF THE CIRCUMSTANCES OF THE FIRST HOMICIDE, WHERE DENISE ROACH WAS THE VICTIM. THE JUDGE FOUND THAT HER DEATH WAS CONSISTENT WITH BEING PUNCHED IN THE FACE WITH A FIST AND FORCEFUL CONTACT OF HER HEAD WITH A HARD WALL. THE MEDICAL EXAMINER FOUND THAT MULTIPLE BLUNT IMPACT WOUNDS, PUNK TOUR WOUNDS TO THE SKULL -- PUNCTURE WOUNDS TO THE SKULL.

IS THIS THE SAME VICTIM'S BLOOD THAT WAS FOUND IN THE GARAGE AREA?

THAT WAS CONSISTENT WITH HER DNA.

THAT'S CORRECT. YES. THE OTHER HOMICIDE, THAT OF CRISTY COWAN, TOOK PLACE PERHAPS ONLY MINUTES BEFORE SMITH WAS DISCOVERED CLEANING THE AX IN THE GARAGE BY THE DAUGHTER OF THE DECEASED OWNER OF THE ESTATE ESTATE. VIDEOTAPE FROM NEARBY CONVENIENCE STORE SHOWED THAT SMITHERS AND COWAN WERE TOGETHER IN THAT STORE LESS THAN AN HOUR PREVIOUSLY. THE AX WAS APPARENTLY THE MURDER WEAPON. A FEW HOURS LATER, POLICE DISCOVERED THE TWO BODIES IN THE NEARBY POND. HAD BEEN DRAGGED THERE FROM THE GARAGE WHERE THE HOMICIDE TOOK PLACE.

I DON'T WANT TO INTERRUPT YOUR NEARRATION, BUT WE ARE FAMILIAR WITH THE FACTS FROM YOUR DETAILED BRIEFS AND TREATMENT OF THAT, BUT GOING RIGHT TO THE ISSUES THAT YOU WANT TO ADDRESS THIS MORNING.

OKAY. THE FIRST ISSUE I WOULD LIKE TO GO TO IS WITH THE SEVERANCE ISSUE, AND THAT IS, THESE TWO CRIMES WERE CHARGED IN THE SAME INDICTMENT. THE TRIAL JUDGE FOUND THAT THEY OCCURRED 15 DAYS APART. WE CAN'T SAY EXACTLY WHAT THE PERIOD WAS, BUT THAT IS BASED ON WHEN DENISE ROACH WAS LAST SEEN BY THE PEOPLE SHE ASSOCIATED WITH AND, ALSO, BASED ON SMITHERS' STATEMENT TO THE POLICE. NOW, THIS COURT HAS APPROVED JOINDER OF OFFENSES UNDER TWO CIRCUMSTANCES, ONE IS WHEN, SORT OF LIKE A CRIME SPREE. BUNDY IS THE CLASSIFICATION OF FACTS, WHERE INCIDENTS HAPPENED OVER A PERIOD OF HOURS. NOW, IN ROLLING, THE CASE WAS, THERE WAS FIVE MURDERS OVER A PERIOD OF A WEEKEND. NOW, THE COURT, AT THAT POINT, SAID THAT WHAT WAS REQUIRED WAS NOT JUST PROXIMITY OF TIME BUT CONTINUITY OF TEMPORAL CONTINUITY OF THE OFFENSES, AND FOUND THAT THE ROLLING CASE WAS A PROLONGED EPISODE. IT WAS JUST ONE EPISODE, EVEN THOUGH EXTENDED OVER A PERIOD OF DAYS.

DON'T WE HAVE UNUSUAL CIRCUMSTANCES, THOUGH, HERE, AND THAT IS THAT, WITH THE DISCOVERY OF THE TWO BODIES, VIRTUALLY AT THE SAME SCENE, AND REALLY AT THE SAME

TIME, I MEAN, THIS IS ALMOST LIKE GOING AND OPENING A TRUNK AND THERE IS TWO BODIES IN THERE, WITH THE DEFENDANT STANDING WITH HIS AX. I AM NOT TRYING TO, BUT DON'T WE HAVE UNIQUE CIRCUMSTANCES HERE? AS I RECALL, THE TRIAL COURT, OR YOU HELP ME. DID THE TRIAL COURT, ALSO, ALLUDE TO THE FACT THAT THERE WAS AN EXCELLENT CHANCE THAT EVEN IF THESE CASES WERE TRIED SEPARATELY, THAT THE FACTS OF ONE CASE PROBABLY WOULD BE BROUGHT IN, BECAUSE OF THE CLOSE RELATIONSHIP AND THE MO'S, THE MODUS PRAND I OPERANDI HERE, THAT WE HAVE THE TWO BODIES AT THE SCENE, DISCOVERED ALMOST SMUTSLY, AND THEY HAVE -- SIMULTANEOUSLY, AND THEY HAVE BEEN KILLED IN THE SAME WAY, HELP US HERE WHY THIS WOULD NOT BE A CLOSE RELATIONSHIP HERE, AND WHETHER TWO TRIALS OR NOT, THAT EVIDENCE WOULD COME IN, IN THE TRIAL OF THE OTHER.

EVIDENCE WOULD, BUT FIRST I HAVE TO DISAGREE, AS FAR AS BEING KILLED IN THE SIMILAR WAY. BECAUSE CRISTY COWAN, THE SECOND VICTIM, WAS KILLED WITH AN AX.

THE MEDICAL EXAMINER --

GO AHEAD AND FINISH YOUR RESPONSE TO THE JUDGE'S STATEMENT. ANOTHER MEDICAL EXAMINER SPECIFICALLY RULED OUT AN AX IN THE KILLING OF ROACH MUCH THERE WAS NO -- IN THE KILLING OF ROACH. THERE WAS NO SHARP IMPACT. THERE WAS NO USE OF AN AX. IT WAS BLUNT IMPACT, AND THE TRIAL JUDGE FOUND IT WAS CONSISTENT WITH BEING PUNCHED AND HITTING HER HEAD AGAINST THE WALL. NOW, THERE WERE OTHER INJURIES ALSO, BUT THOSE COULD WE WILL HAVE HAPPENED AFTER DEATH.

BUT BOTH -- MR. CHIEF JUSTICE: JUSTICE HARDING HAD A QUESTION.

BUT BOTH WERE PROSTITUTES AND THEY WERE BOTH TAKEN FROM THE SAME MOTEL.

SAME AREA OF MOTELS.

AND TO THE SAME PROPERTY.

CORRECT.

AND THE DEFENDANT HAD SEX WITH BOTH OF THEM INSIDE THE HOUSE.

PROBABLY. AND THEY WERE FOUND, THEY WERE DRAGGED IN A SIMILAR FASHION, TO THE SAME PLACE.

CORRECT.

NOW, WHAT IS IT ABOUT THAT THAT WOULD NOT HAVE ALLOWED THE, OR THAT WOULD HAVE SAID THAT THE JUDGE ABUSED HIS DISCRETION IN ALLOWING THESE CASES TO BE TRIED TOGETHER.

WELL, I AM SAYING THAT I AM NOT DENYING THAT IT COULDN'T HAVE COME IN AS WILLIAMS RULE, BUT IT SHOULD HAVE BEEN SEPARATE TRIALS, AND THE MAIN REASON FOR THAT IS THAT, IF YOU LOOK, IF YOU SAY THAT, IF YOU ARE GOING TO STICK TO YOUR RULES FOR SEVERANCE, WHICH THERE HAS TO BE A TEMPORAL CONTINUITY. YOU CAN'T HAVE SEPARATE INCIDENTS. COME IN AND BE TRIED TOGETHER. YOU KNOW, IF YOU WERE TO SAY, IF THEY ARE SIMILAR ENOUGH THAT YOU CAN TRY THEM ALL AT ONCE, ANY DEFENDANT THAT COMMITTED A RASH OF BURGLARIES OR ROBBERIES OR WHATEVER IN DIFFERENT LOCATIONS AT DIFFERENT TIMES WOULD USE A SIMILAR MO, YOU KNOW, YOU COULD TRY ALL OF THOSE --

BUT WHEN YOU GET TO THE PREJUDICE ASPECT OF AN ISSUE LIKE THIS, WHICH IS SORT OF A BOTTOM LINE KIND OF ISSUE, WHETHER YOU END UP WITH THE DETAILS OF THE CRIME BEING

PRESENTED IN A SEPARATE TRIAL, WHICH IN ESSENCE WOULD APPEAR TO HAVE THE SAME IMPACT, OR WHETHER YOU HAVE THEM BEING PRESENTED AT THE SAME TIME IN A JOINT TRIAL, I AM HAVING DIFFICULTY UNDERSTANDING WHERE THERE WOULD BE ANY LESS PREJUDICE IN HAVING ALL OF THIS EVIDENCE BROUGHT OUT AT A SEPARATE TRIAL, THAN THERE WOULD BE, AND IF YOU CONCEDE THAT ALL THE EVIDENCE COULD BE BROUGHT OUT, THEN WHERE -- I AM HAVING DIFFICULTY SEEING THAT THERE WOULD BE ANY EXTRA PREJUDICE TO HAVING THEM, AND HERE, ALSO, ARGUABLY, WE DON'T KNOW EXACTLY THE TIMES AND SUCH, DO WE NOT, AND CERTAINLY WE HAVE APPROVED JOINT TRIALS IN TEMPORAL CIRCUMSTANCES, EVEN LARGER THAN THIS, HAVE WE NOT?

NOT TO MY KNOWLEDGE. NOT TO MY KNOWLEDGE.

BUT WHERE IS THE PREJUDICE, IF THE SAME THING IS GOING TO HAPPEN.

THE SAME THING ISN'T GOING TO HAPPEN. NUMBER ONE, WHAT YOU HAVE TO DO IS A SEPARATE HARMLESS ERROR ANALYSIS FOR EACH OF THE TWO CASES. YOU DO A HARMLESS ERROR ANALYSIS YOU KNOW, SAY THAT IT IS ERROR TO JOIN THE TWO, YOU DO --

BUT A HARMLESS ERROR ANALYSIS YOU HAVE GOT TO HAVE THE PREDICATE THAT IT IS ERROR, AND WE ARE TALKING ABOUT DISCRETION HERE.

WELL, I AM MAKING THE JUMP, PERHAPS, THAT IT IS ERROR, TO HAVE TRIED THESE CASES TOGETHER, AND FOLLOWING UP ON JUSTICE ANSTEAD'S POINT --

AND I INVITED YOU TO MAKE A JUMP. YOU GO AHEAD.

YOU DO SEPARATE HARMLESS ERROR ANALYSIS FOR EACH OF THE TWO HOMICIDES. NOW, YOU DO THAT FOR THE CRISTY COWAN HOMICIDE, AND OBVIOUSLY THE JURY HEARD ALL THE EVIDENCE ABOUT SMITHERS CLEANING THE AX. HE WAS RIGHT THERE. YOU KNOW, THERE IS NO QUESTION THAT THE JURY DIDN'T CONSIDER OTHER BODY IN THE POND, AS FAR AS WHEN THEY CONVICTED SMITHERS OF THE PREMEDITATED MURDER OF CRISTY COWAN. NOW, THAT IS NOT TRUE WITH ROACH ROACH. DEFINITELY ALL THEY HAD IS HIM BEING A CARETAKER ON THAT ESTATE. THE BODY FOUND IN A POND UNDER, YOU KNOW, YOU JUST -- THE JURY HAD TO SAY, WELL, HE KILLED COWAN THIS WAY. HE PROBABLY DID THE SAME THING TO ROACH. AND YOU HAVE SMITHERS'S STATEMENT, OF COURSE, THAT CAME IN THE POLICE INTERROGATION, WHERE HE ADMITTED KILLING ROACH, BUT IT WAS UNDER CIRCUMSTANCES THAT WOULD BE FOUND MANSLAUGHTER OR POSSIBLY SECOND-DEGREE MURDER. THERE WAS NO EVIDENCE OF PREMEDITATION IN HIS STATEMENT TO THE POLICE. SO THAT IS WHERE THE PREJUDICE IS.

JUSTICE QUINCE HAD A QUESTION.

I BELIEVE HE HAS ANSWERED IT DURING THE COURSE OF THE --

THAT IS WHERE THE PREJUDICE IS. IF THERE WERE SEPARATE TRIALS, SMITHERS MIGHT WE WILL HAVE BEEN FOUND GUILTY OF MANSLAUGHTER OR SECOND-DEGREE MURDER IN THE DEATH OF ROACH. AND THE OTHER THING IS, IF THERE WERE SEPARATE TRIALS AND THE EVIDENCE CAME IN UNDER THE WILLIAMS RULE YOU, COULDN'T USE ALL OF THE EVIDENCE FROM THE COWAN HOMICIDE, BECAUSE THAT WOULD MAKE IT A FEATURE OF THE CASE.

YOUR ARGUMENT IS THAT, IF WE EMPLOYEE A WILLIAMS RULE ANALYSIS TO ALLOW JOINDER, WE HAVE REALLY OBLITERATED THE DIFFERENCE BETWEEN THE RULES GOVERNING JOINDER AND THE WILLIAMS RULE.

THAT'S CORRECT.

WHAT IS YOUR BEST CASE? YOU SAID THAT THIS IS A 15-DAY APART SITUATION THAT, BUT YET YOU HAVE SIMILARITIES IN THAT JUSTICE HARDING SET FORTH THE SCHOLARS OF NOT JUST HOW THE CRIME WAS COMMITTED, BUT THE CIRCUMSTANCES OF IT BEING FROM THE SAME MOTEL, THE SAME CRIMES, AS JUSTICE ANSTEAD SAID, THE DISCOVERY OF THE BODIES IN THIS POND AT THE SAME TIME, DOESN'T THAT FACT, NOT JUST SIMILAR BUT THAT THEY ARE FOUND AT THE SAME PLACE AT THE SAME TIME PUT THEM TOGETHER, BECAUSE IN THE EPISODIC SENSE OF THE FOTOPOULOS CASES.

WELL, THE FOTOPOULOS CASE WAS A CAUSAL LINK. THAT IS WHAT IT WAS PROVED ON.

YOU WERE GIVING -- YOU SAID THAT THE CRIME SPREE SITUATION OF BUNDY, THAT IS NOT THERE, AND THEN THERE IS THE EPISODIC CONNECTION CASES. RIGHT?

THAT IS PRIMARILY FOTOPOULOS.

WHY WOULDN'T THIS FALL MORE INTO THAT SITUATION, THAT THE DISCOVERY OF THE BODIES AT THE SAME TIME RISE TO THE JOINDER.

WELL, WHERE YOU HAVE CAUSAL LINK, IT IS REQUIRED THAT ONE CRIME IN DID YOU SEE THE OTHER.

THAT IS FOTOPOULOS. I AM SAYING AS FAR AS THE JOINDER DISCRETIONARY SITUATION, WHY DOESN'T THIS UNIQUE FACT IN THIS CASE GIVE RISE TO AN APPROPRIATE OF JOINDERS, SEPARATE FROM THE WILLIAMS RULE?

I AM SAYING THAT EITHER YOU HAVE TO HAVE TEMPORAL CONTINUITY OF THE CRIME SPREE OR ELSE YOU HAVE TO HAVE SOMETHING ABOUT THE FIRST CRIME WHICH INDUCED THE SECOND CRIME. FOR INSTANCE IF YOU HAD EVIDENCE THAT ONE PERSON WAS A WITNESS TO THE EARLIER MURDERS, THAT, IF THAT IS WHY, YOU KNOW IF THAT IS WHY SNIT<sup>th</sup> SMITH -- SMITHERS, IF THAT IS WHY IT HAPPENED, THEN YOU HAVE THAT LINK. BUT THERE IS NO LINK HERE.

DON'T YOU HAVE THE TEMPORAL CONTINUITY, BUS BY THE BASIS THAT THE BODIES WERE FOUND -- JUST BY THE BASIS THAT THE BODIES WERE FOUND THEIR AT THE SAME TIME. YOU KNOW, IT IS ALMOST LIKE A SITUATION WHERE THERE ARE TWO BODIES THERE, AND HE IS DIGGING THE GRAVES FOR EACH ONE, AND YOU HAVE THIS VERY UNIQUE CIRCTANS THAT WE ARE TALKING ABOUT THAT LOCATION, OKAY, AND GRANTED THAT THERE MIGHT BE A 15-DAY DIFFERENCE, BUT HIS, AS OUTLINED BY JUSTICE HARDING, THAT WE HAVE THIS REMARKABLE SIMILARITIES OF FACTS IN THE WAY THAT THE PEOPLE WERE KILLED, AT THE SAME SCENE AND THEN THE BADIES BEING DISCOVERED TOGETHER, I MEAN, WOULD IT MAKE SENSE NOT TO TRY THESE TWO TOGETHER, WHEN HE IS RIGHT THERE WITH THE TWO BODIES, DISPOSING OF THEM?

WELL, I THINK THE ELLIS CASE IS A CASE FROM THIS COURT WHERE, AGAIN, THERE WERE TWO -- THERE WAS SIMILAR OFFENSES SEPARATED BY THREE DAYS, ONLY THREE DAYS, OF BLACK MALES BEING KILLED ON ROUTE ONE OUTSIDE JACKSONVILLE, AND YOU KNOW, I DON'T KNOW THAT THE BODIES WERE -- THEY PROBABLY WEREN'T DISCOVERED AT THE SAME TIME, BUT NONETHELESS, THIS COURT SAID THEY WERE DEFINITELY SEPARATE EPISODES AND COULDN'T BE JOINED AT TRIAL. AND THAT IS WHAT WE ARE BASICALLY SAYING IS THAT YOU KNOW, WHEN THE OFFENSES WERE COMMITTED. YOU KNOW, IT IS WHAT --

DO YOU HAVE -- YOUR TIME IS MOVING ON. WHAT -- DO YOU HAVE ANOTHER POINT THAT YOU ARE GOING TO PRESENT?

WOULD YOU MOVE TO YOUR THIRD ISSUE, IF IT DOESN'T THROW YOU OUT OF SEQUENCE, WHETHER THERE WAS FUNDAMENTAL ERROR IN DEFENSE COUNSEL'S WAIVER OF SMITHERS'S PRESENCE FOR THE PRETRIAL MOTION IN LIMINE.

WELL, THIS COURT HAS, YOU KNOW, SAID MANY TIMES, THAT DEFENDANT'S RIGHT TO PRESENCE AT PRETRIAL MOTIONS CANNOT BE WAIVED BY DEFENSE COUNSEL, ONLY BY THE DEFENDANT, HIMSELF. NOW, WHAT WE HAVE IN THIS CASE IS SOMEWHAT DIFFERENT THAN THE OTHER CASES, IN THAT WE HAVE A HEARING WHERE THE DEFENDANT COULD HAVE POSSIBLY ASSISTED HIS COUNSEL IN ARGUING THE MOTION.

THIS IS A MOTION IN LIMINE. RIGHT? I MEAN THIS IS MERELY LIMITING FOR UNTIL THE MATTER GETS ON TO TRIAL, WHAT IS GOING TO BE SAID IN THE OPENING STATEMENT. ISN'T THAT BASICALLY WHAT WE ARE DEALING WITH? MOTION IN LIMINE? I MEAN THIS IS NOT A DISPOSITIVE RULING THAT COULDN'T BE REBROUGHT UP AT THE TRIAL. ISN'T THAT RIGHT?

THAT IS CORRECT. HOWEVER, A FAVORABLE RULING WOULD HAVE KEPT THE EVIDENCE OUT OUT.

IN THE NATURE OF A BENCH CONFERENCE, AND HAVEN'T WE SAID THAT THE DEFENDANT DOESN'T HAVE TO BE PRESENT AT EVERY BENCH CONFERENCE? ISN'T THERE CASE LAW TO THAT EFFECT?

THIS WAS A WHOLE HEARING. THIS WAS A PRETRIAL HEARING, WHERE THEY DIDN'T BRING HIM OVER FROM THE JAIL, AND SO RATHER THAN DELAY THE HEARINGS, THEY JUST WENT AHEAD AND HAD THE HEARING.

HE ACTUALLY AFFIRMATIVELY WAIVED THIS, DID HE NOT?

HE DID. COWAN HE WILL DID. SO IT IS A FUNDAMENTAL-ERROR QUESTION.

AND -- THE WAIVER WAS MADE ON THE RECORD HERE?

BY COUNSEL, YES, BUT THIS COURT HAS SAID, IN OTHER CIRCUMSTANCES WHERE COUNSEL HAS AFFIRMATIVELY WAIVED, THAT YOU KNOW, YOU CAN'T JUST --

IS IT A PER SE POSITION OR DOES THERE HAVE TO AND SHOWING THAT SMITHERS WAS PREJUDICED BY?

YOU HAVE TO SHOW PREJUDICE. YOU HAVE TO SHOW PREJUDICE. AND WE ARE SAYING BECAUSE HE WASN'T ABLE TO CONSULT WITH HIS COUNSEL AND PERHAPS GIVE FACTS THAT WOULD MAKE A FAVORABLE RULING MORE LIKELY, THAT HE WAS PREJUDICED IN THIS REGARD. I WOULD LIKE TO TURN TO THE CONFESSION ISSUE. AND THIS CONFESSION ISSUE HAS TO BE REVIEWED ON THE TOTALITY OF THE CIRCUMSTANCES, AND WE HAVE, HERE, THREE IMPORTANT FACTORS WHICH IMPEDE VOLUNTARY CONFESSION. LET ME FIRST SAY THAT SMITHERS WAS FIRST INTERROGATED ON THE NIGHT WHEN BODIES WERE FIRST DISCOVERED. HE WAS RELEASED AND CAME BACK TO THE POLICE STATION THE NEXT DAY, WHERE HE TOOK A POLYGRAPH. NOW --

WAS THIS DONE VOLUNTARILY, OR WAS HE UNDER ARREST AT THIS POINT?

HE WAS NOT UNDER ARREST. THIS WAS ALL VOLUNTARY.

AND DOES IT MAKE A DIFFERENCE WHEN IT COMES TO GIVING MIRANDA IN THOSE SITUATIONS?

IT DOES, BECAUSE MIRANDA DOESN'T HAVE TO BE GIVEN, UNTIL THE PERSON IS IN CUSTODY. NOW, AFTER HE TOOK THE POLYGRAPH AND WAS INFORMED THAT HE HAD NOT PASSED THE POLYGRAPH, DETECTIVE METZGER MADE A RELIGIOUS APPEAL, BASED ON SMITHERS'S ACTIVITIES WITH THE CHURCH, AND DETECTIVE METZGER SAID, ON THE RECORD, HE KNEW THAT HE MIGHT GET TO HIM THIS WAY TO MAKE A CONFESSION, SAYING THAT, YOU KNOW, IF YOU ARE A GOOD CHRISTIAN, YOU WOULD CONFESS, AND SO THAT IS THE FIRST IMPROPER THING THAT OCCURRED. SECOND IS THAT, WHILE THERE HAD BEEN WRITTEN MIRANDA WARNINGS BEGIN TO SMITHERS, FORMS TO LOOK OVER AND SIGN PRIOR TO THE POLYGRAPH, AFTER HE FINISHED THE POLYGRAPH

AND MADE AN INCRIMINATING STATEMENT TO DETECTIVE METZGER AND THE INTERROGATION RESUMED, THERE WAS NO RENEWED MIRANDA WARNINGS. NOW, THIS WAS IMPORTANT, BECAUSE WE SAY THAT THE WRITTEN MIRANDA WARNINGS ONLY ENCOMPASSED THE POLYGRAPH, ITSELF, AND THAT ONCE HE MADE AN INCRIMINATING STATEMENT, IT WAS PROBABLY AT THAT POINT WHERE HE WAS NOT FREE TO LEAVE. WHERE HE WAS, IN FACT, IN CUSTODY, AND AT THAT POINT THERE SHOULD HAVE BEEN ORAL MIRANDA WARNINGS READ TO HIM, BEFORE THE REASSUMPTION OF THE POLICE INTERROGATION.

IN THIS CASE, THIS DEFENDANT TOOK THE STAND, AT THE TRIAL.

HE DID.

AND HE GAVE A STORY THAT WAS A VERY ELABORATE STORY THAT WAS DIFFERENT THAN WHAT HE TOLD THE POLICE. CORRECT?

THAT'S CORRECT.

AND IN THIS CASE, HE -- THOSE STATES WOULD HAVE BEEN -- THE STATE WOULD HAVE BEEN ABLE TO USE THOSE STATEMENTS, AT THE VERY LEAST, AS IMPEACHMENT EVIDENCE. CORRECT?

I GUESS THEY WOULD HAVE. YES.

TELL US WHAT WE HAVE SAID. WE HAVEN'T PUT ABSOLUTE RESTRICTIONS ON POLICE USING% WRAS I HAVE TECHNIQUES -- ON POLICE USING PERSUASIVE TECHNIQUES TO GET STATEMENT, HAVE WE?

NO. THE COURT --.

WHAT HAVE WE SAID, WHEN THERE IS SOMETHING THAT WE HAVE SAID THAT HAS BEEN VIOLATED HERE?

WELL, ONE THING, I MEAN, THIS COURT IS NOT REVERSED IN HUDSON OR ROMAN, FOR APPEALS TO RELIGIOUS BASIS, BUT THE COURT SAID IT WAS IMPROPER. SO THAT IS BASICALLY WHAT I AM SAYING HERE, IS THE COURT SHOULD FIND IT WAS IMPROPER, AND IT IS ONE OF THE CIRCUMSTANCES THAT SHOULD BE CONSIDERED, INsofar AS WHETHER THE CONFESSION ITSELF WAS VOLUNTARY. NOW, THE THIRD FACTOR THAT IS, THAT MAKES THIS CONFESSION INVOLUNTARY, WAS THAT HIS WIFE WAS PRESENT DURING THE POLICE INTERROGATION, AFTER THE INTERROGATION RESUMED.

BUT DIDN'T THE POLICE TESTIFY THAT THEY DIDN'T ASK HER TO PARTICIPATE, AND THAT THEY DIDN'T, FOR INSTANCE, MAKE HER PART OF THE SITUATION, BY SAYING YOU KNOW, TELL YOUR HUSBAND TO CONFESS OR WHEN YOU GET IN THERE DO THIS OR DO THAT. WASN'T THERE A DISPUTE? IN OTHER WORDS IF I UNDERSTOOD IT CORRECTLY, SHE DID TESTIFY THAT THE POLICE ASKED HER TO DO SOME THINGS.

YES.

BUT THE POLICE DISPUTED THAT. IS THAT RIGHT?

THEY DID, BUT DETECTIVE BLAIR DID SAY THAT SHE MIGHT HAVE TOLD SMITHERS LISTEN TO YOUR WIFE. YOU NEED TO TELL THE TRUTH. SO SHE DID ADMIT THAT SHE MIGHT HAVE GONE THAT FAR. SHE CERTAINLY DIDN'T DIRECT SHARON SMITHERS TO SAY THIS OR THAT, BUT SHE SAYS THAT SHE MIGHT HAVE SAID TO THE DEFENDANT HIMSELF, LISTEN TO YOUR WIFE. YOU NEED TO TELL THE TRUTH.

THAT IS NOT GOING TO, BY ITSELF, THOUGH, MAKE THIS THING INVOLUNTARY, IS IT?

WELL, I SAY THAT, YOU KNOW, THERE IS NO CASE WHERE ANY COURT THAT I KNOW OF HAS EVER APPROVED AN INTERROGATION WHERE THE SPOUSE WAS IN THE ROOM AT THE SAME TIME.

HOW DID THE SPOUSE GET IN THE ROOM?

SMITHERS ASKED FOR.

AT THE REQUEST OF THE DEFENDANT.

WELL, THAT IS CERTAINLY IF THE POLICE HAD REQUESTED HER TO COME IN AND HAVE INTERROGATION, WE WOULDN'T EVEN HAVE HAD TO ARGUE HERE. IT WOULD HAVE BEEN THROWN OUT. BUT YOU KNOW, THE DEFENDANT CAN'T HAVE EVERYTHING THAT, KNOW JUST EVERYTHING THAT -- EVERYTHING THAT, YOU KNOW, JUST BECAUSE HE ASKED FOR SOMETHING WOULD VIOLATE DUE PROCESS. IT CAN'T BE APPROVED.

WOULD WE BE HERE ON A DIFFERENT ARGUMENT, IF THE POLICE HADN'T LET HER IN, WOULDN'T WE?

I THINK THE TRIAL JUDGE WOULD HAVE SUPPRESSED, IF THAT HAD HAPPENED.

SO THAT I UNDERSTAND WHAT YOU ARE SAYING IS YOU ARE SAYING THAT THESE THINGS COMBINED WERE SUFFICIENT, NOT INDIVIDUALLY, BUT IN THE COMBINATION, THEY WERE SUFFICIENT TO SAY THAT THE COURT ERRED WHEN THE COURT REFUSED TO SUPPRESS THIS CONFESSION.

YES. I AM SAYING, UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE STATEMENTS CAN'T BE APPROVED AS, REALLY, VOLUNTARY. IT WAS A PROLONGED INTERROGATION EVEN WITH HIS WIFE PRESENT, AND THIS COURT SHOULD HOLD THAT THOSE STATEMENTS SHOULD HAVE BEEN KEPT OUT.

DO YOU WANT TO TOUCH ON THAT CCP ARGUMENT THAT YOU HAVE IN YOUR BRIEF.

OKAY. CCP FINDING, THIS WAS WITH THE CRISTY COWAN HOMICIDE, AND IT IS BASICALLY BASED ON TWO THINGS. ONE IS DETECTIVE IVERSON RETRACED SMITHERS'S DRIVE FROM WHERE HE WAS AT THE WORKPLACE IN ST. PETERSBURG TO A MOTEL AREA IN TAMPA, TO THE CONVENIENCE STORE AND THEN TO THE COUNTRY ESTATE, AND YOU KNOW, HE FOUND THAT IT WAS, THAT YOU KNOW, HE COVERED THE, SMITHERS MUST HAVE, YOU KNOW, GONE DIRECTLY TO EACH PLACE. YOU KNOW, IT WASN'T, YOU KNOW, A KIND OF RANDOM TYPE OF THING, SO IT DID SHOW A CERTAIN AMOUNT OF PLANNING, IN THAT HE LEFT WORK, PLANNED TO GO TO PICK UP PROSTITUTE, PLANNED TO TAKE HER TO THIS VACANT ESTATE. NOW, WHAT IT DOESN'T SHOW IS IT DOESN'T SHOW THAT SMITHERS INTENDED TO KILL HER. IT SHOWS THAT HE INTENDED TO TAKE HER THERE AND, YOU KNOW, FOR PROPOSED SEXUAL LIAISON, BUT IT IS NO PROOF OF AN INTENT TO KILL HERE.

BUT HOW DOES THE FACT THAT THIS IS THE SECOND MURDER. CORRECT?

THAT'S CORRECT.

HOW DOES THE FACT THAT HE HAD KILLED SOMEONE ELSE A WEEK OR TWO WEEKS PRIOR TO THAT GO INTO THE WHOLE IDEA OF PREMEDITATION?

WELL, THIS COURT, YOU KNOW, IT IS SORT OF LIKE AN INFERENCE THAT HE WANTED TO DO IT AGAIN. THIS COURT HAS SAID THAT YOU CAN'T PROVE FACT, BASED ON INFERENCE OR

SPECULATION.

ISN'T THAT FOR CCP IN GORE AND MORTON, AS WELL?

I REMEMBER GORE. GORE WAS THROWN OUT, BECAUSE THIS COURT SAID THAT, JUST TAKING THE PERSON TO A SECLUDED LOCATION, IN ITSELF, DID NOT PROVE --

BUT DIDN'T USE PRIOR, THE FACT THAT HE HAD MURDERED BEFORE FOR CCP?

MAY HAVE BEEN A SECOND, ANOTHER GORE CASE THAT I AM NOT POSITIVE ON THAT. CHIEF CHIEF YOU ARE IN YOUR REBUTTAL TIME. -- MR. CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL TIME.

OKAY. I WOULD LIKE TO SAY THAT, IN POWER AND IN FINNEY, THIS COURT SAID THAT THE FACT THAT SOMEONE IS MURDERED PREVIOUSLY CAN'T, IN ITSELF, PROVE CCP. POWER AND FINNEY ARE THE CASES, AND CRUMP, I THINK, WAS PARTICULARLY RELEVANT, BECAUSE IN CRUMP, THE DEFENDANT HAD A PATTERN OF PICKING UP PROSTITUTES, BINDING THEM, STRANGLING THEM, AND LEAVING THEIR BODIES IN CEMETERIES. AND THE TRIAL JUDGE FOUND CCP ON A SECOND ONE OF THESE, BASED ON THE FACT THAT, WHEN HE PICKED UP THE PROSTITUTE, THERE WAS A RESTRAINING DEVICE ALREADY IN CRUMP'S TRUCK, AND THIS COURT SAID, WELL, YOU KNOW, EVEN GIVEN THAT PRIOR MURDER THAT HAPPENED THAT WAY, THE RESTRAINING DEVICE AND ALL, IT STILL WASN'T ENOUGH TO PROVE THAT IT WAS COLD, CALCULATED AND PREMEDITATED THAT HE HAD A CAREFUL PLAN TO KILL THE PERSON, WHEN HE PICKED THEM UP, AND THAT IS WHAT WE SUBMIT APPLIES HERE AS WELL. I WILL RESERVE THE BALANCE OF MY TIME. THANK YOU. MR. CHIEF JUSTICE: THANK YOU. MS. SABELLA.

MAY IT PLEASE THE COURT. I AM CANDACE SABELLA, REPRESENTING THE STATE OF FLORIDA. HE IS SUGGESTING IN CAPITAL CASES THAT YOU HAVE IT ALL TOGETHER AND THIS CATEGORY AND THAT CATEGORY, BUT I THINK YOU MUST HAVE A JOINDER, SHOWING A SIGNIFICANT MEANINGFUL RELATIONSHIP BETWEEN THE TWO CRIMES, AND THE FACTORS THAT YOU CAN USE TO SEE THAT CONCLUSION ARE THE CAUSAL LINK. THEY ARE NOT EXCLUSIVE FROM ONE ANOTHER, AND WHAT WE HAVE HERE IS A CRIME THAT HAPPENED SEVEN SEVEN-TO-15 DAYS AFTER THE INITIAL CRIME. THERE WAS EVIDENCE THAT, IN BETWEEN THIS TIME, HE WAS ALSO TRYING TO RECRUIT ANOTHER PROSTITUTE TO GO TO THE PROPERTY WITH HIM. HE HAVE AN IDENTICAL FINDING OF THESE BODIES AT THE EXACT SAME TIME AND EVIDENCE THAT THEY WERE KILLED IN THE EXACT SAME PLACE IN AN ALMOST IDENTICAL MANNER. TO THE POINT TO TRY TO SEPARATE ONE FROM THE OTHER WOULD BE, AS THIS COURT SAID -- WOULD BE, AS THIS COURT SAID IN HENRY, WOULD BE UNLIKELY TO LEAD TO CONCLUSION. THERE IS NO WAY TO GO TO THE BOND AND SAY THAT YOU FOUND ONE BODY AND LEAVE OUT THE OTHER BODY. FOR MRS. WHITEHURST TO SAY WHY SHE INITIALLY WENT TO THE HOUSE WOULD HAVE TO INCLUDE THE INITIAL MURDER. THEY ARE INEXTRICABLY INTERTWIND AND FOR YOU TO SEPARATE THEM, IT WOULDN'T MAKE SENSE, THEY ARE INEXTRICABLY LINKED TOGETHER.

WHEN THE EPISODES IN A CRIME ARE SIMILAR TO DISCUSS WHY A PRIOR COLLATERAL CRIME WILL COME INTO EVIDENCE.

SURE.

AND, OF COURSE, WHEN THEY COME IN, WE HAVE RULES, SUCH AS IT DOESN'T BECOME THE FEATURE OF THE CASE, AND SO THERE ARE RULES TO PROTECT THE DEFENDANT, SO THE FACT THAT, THE MERE FACT THAT THE JURY HEARS THAT TWO PEOPLE ARE KILLED IS GOING TO HEIGHTEN THE POTENTIAL THE JURY IS GOING TO FIND THE DEFENDANT GUILTY, SO I GUESS HELP ME IN SEPARATING OUT HOW USING THE WILLIAMS RULE ANALYSIS, YOU CAN'T, SHOULDN'T CONVERT THAT INTO THE SAME RULES FOR JOINDER, WHAT IS UNIQUE ABOUT THIS CASE VERSUS THE OTHER CASES WHERE IT IS A SERIES OF PROSTITUTES OR A SERIES OF MURDERS IN THE SAME,



YOU KNOW, WITHIN A FEW DAYS, WHERE WE HAVE ALLOWED IT IN AS WILLIAMS RULE, BUT IF THEY HAVEN'T BEEN JOINED.

THIS ISN'T LIKE RANDALL OR CRUMP, WHERE IT IS JUST A SERIES OF PROSTITUTES THAT HE HAPPENED TO PICK UP, HAVE SEX WITH AND THEN SHE WAS MURDERED. THIS IS A CASE WHERE HE PICKS THEM UP FROM THE SAME LOCATION. THERE IS -- HE IS IDENTIFIED BY A PROSTITUTE AS HANGING OUT THERE. BOTH OF THE VICTIMS CAME FROM THE LUXURY MOTEL. THEY ALL NEW EACH OTHER AND ALL HUNG TOGETHER. HE TAKES THEM TO THE WHITEHURST HOUSE AND TAKES THEM IN THE HOUSE AND THEN HE TAKES THEM TO THE GARAGE AND KILLS THEM, THEN STRANGLES THEM AND BEATS THEM WITH SOME SORT OF TOOL, BLUDGEONS THEM AND DRUGS THEIR BODIES OUT AND THROWS THEM IN THE POND. THIS IS NOT A SIMPLE HE PICKED UP A PROSTITUTE AND THEY BOTH HAPPENED TO TIME THIS. IS AN IDENTICAL CRIME THAT, WHEN THEY WERE DISCOVERED, THEY WERE DISCOVERED TOGETHER.

IS THAT ONE OF THE MOST SIGNIFICANT FACTORS IN YOUR MIND THE FACT THAT THEY WERE DISCOVERED AT THE SAME PLACE AT THE SAME TIME AND THAT DISTINGUISHES THIS FROM OTHER CASES THAT WOULD JUST BE WILLIAMS RULE ISSUE CASES?

THAT IS A VERY, VERY WEIGHTY FACTOR TO BE CONSIDERED HERE, BUT IT CERTAINLY IS NOT THE ONLY FACTOR. I MEAN, THESE OTHER CASES WERE TAKEN OUT IN THE PICKUP TRUCK AND TAKEN TO DIFFERENT LOCATIONS. WE HAVE THE IDENTICAL LOCATION, THE IDENTICAL PICK UP, AND THAT THEY ARE DISCOVERED TOGETHER.

WHAT IS THE, IN TERMS OF TIME FRAMES, THIS IS DAYS APART. IN TERMS OF ALLOWING JOINDER OF CRIMES THAT ARE SEPARATE CRIMES? I MEAN, THIS ISN'T THE CRIME SPREE OF BUNDY. CORRECT?

CORRECT.

WHAT IS THE CASE THAT IS MOST SIMILAR, AS FAR AS THERE HAVING BEEN A SEVERAL-DAY SPRAYINGS, WHERE WE HAVE UPHELD THE JOINDER OF OFFENSES?

WELL, ACTUALLY FOTOPOULOS WAS SEVERAL MONTHS APART, BUT HE DISTINGUISHES FOTOPOULOS, BECAUSE HE SAYS THAT THE RAMSEY MURDER WAS THE CAUSE FOR THE SECOND MURDER, AND WE HAVE MADE AN ARGUMENT THAT, INDEED THE FIRST MURDER PROVIDED THE IMPETUS FOR HIM TO THINK I CAN TAKE A PROSTITUTE TO HERE. I CAN KILL HER. I CAN DISPOSE OF THE BODY WITHOUT ANY -- BUT AS I SAID INITIALLY, THIS IS AN UNIQUE CASE, AND IT IS NOT THAT YOU HAVE GOT TO FIT IT INTO ONE OF THESE LITTLE BOXES. IT IS JUST TOTALITY OF THE CIRCUMSTANCES, YOU HAVE TO CONSIDER, AND WHAT WE HAVE HERE IS A VERY SHORT PERIOD OF TIME. THE DEFENDANT, HIMSELF, SAID IT WAS A WEEK AND-A-HALF. I MEAN, THAT IS A VERY SHORT PERIOD OF TIME. IT IS NOT I AM GOING OUT ALL NIGHT KILLING PEOPLE THING, BUT IT CLEARLY IS NOT A COUPLE OF MONTHS.

BUT DID WE, IN THE ROLLING CASE, WAS THAT AN ISSUE, HAS THAT BEEN RAISED AS ISSUE?

YES. IT WAS AN ISSUE IN THE ROLLING CASE.

AND WHAT WAS --

IN THE ROLLING CASE, YOU ALL FOUND THAT IT WAS IN THE NATURE AFTER SPREE AND THAT IT WAS WITHIN A COUPLE OF DAYS AND ALSO THAT, EVEN IF IT HADN'T BEEN, THAT IT WAS HARMLESS, BECAUSE EACH OF THE EVIDENCE WOULD HAVE BEEN ADMISSIBLE, AND BACK TO YOUR ORIGINAL QUESTION AS TO HOW WE GET FROM ONE TO THE OTHER, IT IS WITHIN THE STANDARD ABUSE OF DISCRETION TO SHOW THAT THE TRIAL COURT ERRED, THEY ARE GOING TO HAVE TO SHOW THAT THERE IS SOME KIND OF PREJUDICE, THAT THE BOTTOM LINE RESULT IS

GOING TO BE DIFFERENT. THE BOTTOM LINE RESULT HERE WOULD NOT BE DIFFERENT, BECAUSE THE EVIDENCE OF EACH OF THESE MURDERS IS GOING TO BE ADMISSIBLE, AND HE HASN'T REALLY BEEN ABLE TO IDENTIFY, IN THE EVIDENCE, OUTSIDE OF THE VIDEOTAPE FROM THE CONVENIENCE STORE, THAT WOULD HAVE BEEN ABLE TO BE KEPT OUT. MOST IMPORTANT THING WE HAVE TO REMEMBER HERE, IS THAT MR. SMITHERS ADMITTED TO KILLING THESE VICTIMS. IT IS NOT LIKE WE ARE GOING TO HAVE, OKAY, HE IS JUST ON THE PROPERTY AND THERE IS A BODY HAPPENED TO HAVE BEEN FOUND THEIR. HE HAS ADMITTED TO KILLING THIS WOMAN, SO CLEARLY THEY ARE NOT ABLE TO SHOW PREJUDICE, AND THEY ARE NOT ABLE TO SHOW AN ABUSE OF DISCRETION BECAUSE THESE CASES ARE VERY SIGNIFICANTLY LINKED.

AT TRIAL, DIDN'T HE MAKE, WASN'T THERE A COMPLETELY DIFFERENT STORY?

ABSOLUTELY.

I MEAN DID HE NOT AT TRIAL ADMIT TO KILLING THESE WOMEN? HE ACTUALLY SAID SOME DRUG DEALER OR SOMETHING LIKE THAT KILLED THESE PEOPLE.

AT TRIAL HE SAID HE WAS BEING BLACKMAILED BY DRUG DEALERS AND THAT A DRUG DEALER KILLED DENISE ROACH, AND THAT HE WAS FORCED TO TAKE THE BODY TO THE POND AND DISPOSE OF IT AND THEN CLEANUP AFTERWARDS, AND THAT A WEEK AND-A-HALF LATER, THAT CRISTY COWAN COMES TO THE SAME PROPERTY AND IS TAKEN INTO THE HOUSE, AND WHEN SHE COMES OUT, THEY ORDERED HIM TO GO IN THE HOUSE AND CLEANUP, AND THAT WHILE HE IS OUT, THAT THIS GUY ALSO KILLS HER, AND THEN HE IS REQUIRED TO DISPOSE OF THAT BODY. HE SAID HE DIDN'T CHECK TO SEE IF THEY WERE DEAD. THERE IS NO EVIDENCE WHATSOEVER TO SUPPORT THAT ARGUMENT, THAT THE INITIAL STATEMENTS WERE THAT HE DID KILL THEM. THAT EVIDENCE WOULD HAVE BEEN ADMISSIBLE, NO MATTER WHAT HE TESTIFIED TO AT TRIAL, SO THE EVIDENCE OF EACH OF THESE WOULD HAVE BEEN ADMISSIBLE. THEY WERE CLEARLY INTERLINKED AND APPROPRIATELY TRIED TOGETHER. WITH REGARD TO THE CONFESSION, THE MOST IMPORTANT THING YOU NEED TO UNDERSTAND HERE IS THE DEFENDANT TESTIFIED AT THE SUPPRESSION HEARING AND SAID I UNDERSTOOD MY RIGHTS. I AM IN NO WAY AN IDIOT. THERE IS NOTHING IN HIS TESTIMONY THAT SAID THAT HIS WILL WAS OVER BORN, THAT HE DIDN'T KNOW WHAT HE WAS SAYING WHEN HE SAID IT, THAT THEY SOMEHOW COMPELLED HIM TO SAY SOMETHING THAT HE OTHERWISE WOULD NOT V AT NO TIME DID HE INVOKE HIS RIGHTS, UNLIKE THOSE CASES THAT THEY CITED WITH THE RELIGIOUS IMPLICATION OR WHEN SOMEBODY ELSE IS BROUGHT IN AS A STATE AGENT. HE DIDN'T INVOKE HIS RIGHTS. THEY WERE READ TO HIM THREE TIMES. HE AT NO TIME WAS IN CUSTODY. WHEN HE MAKES HIS INITIAL STATEMENTS AFTER THE POLYGRAPH EXAMINATION, HE IS IMMEDIATELY TURNED OVER TO THE INVESTIGATING OFFICERS. THEY ARE QUESTIONING HIM. HE ASKED FOR HIS WIFE TO COME IN. THEY DON'T WANT HIS WIFE TO COME IN, BUT FINALLY HE INSISTS, SO THEY GO AHEAD AND BRING HER IN. THAT WAS AT HIS INSISTENCE. HE HAD NOT INVOKED HIS RIGHT TO COUNSEL, AND THE U.S. SUPREME COURT HAS SAID, EVEN UNDER CIRCUMSTANCES WHERE THERE HAS BEEN AN IMPLICATION, WHEN THE WIFE OR AS THIS COURT HAS HELD THE GIRLFRIEND WAS BROUGHT IN, THAT THERE IS NO VIOLATION, BECAUSE IT IS NOT THE STATE PROCURING IT AND IT IS NOT A MEANS TO CIRCUMVENT HIS RIGHTS. HE TESTIFIED HE UNDERSTOOD HIS RIGHTS, AND THERE IS NOTHING IN THIS RECORD THAT REFUTES. THAT THE THIRD ISSUE, WITH REGARD TO HIS PRESENCE IN THE MOTION IN LIMINE, COUNSEL HAS FAILED TO EVEN ASSERT EVIDENCE THAT WAS PRESENTED AT TRIAL THAT SHOULD NOT HAVE BEEN ADMITTED. THE MOTION IN LIMINE WAS TO EXCLUDE TESTIMONY THAT HE HAD A PROPENSITY TO CONSORT WITH PROSTITUTES, AND THAT WAS COUNSEL'S STATED OBJECTION TO ANY TESTIMONY. THE COURT SAID I AM GOING TO OVERRULE YOUR MOTION, BUT I INVITE YOU TO BRING IT BACK UP, WHEN THE WITNESSES ARE ACTUALLY PRESENTED, BEFORE THE STATE, THERE WERE THREE PROSTITUTES WHO TESTIFIED. BEFORE THE STATE PRESENTED THEIR LADIES, THEY WENT FOR A BENCH CONFERENCE AND HE RENEWED HIS OBJECTION. HE SAID I DON'T WANT THEM BRINGING OUT SEXUAL ACTS OR PROPENSITY OF THE DEFENDANT. THE COURT SAID I WILL OVERRULE THAT RIGHT NOW, BUT IF THEY ARE GETTING INTO SOMETHING

THAT YOU THINK IS OBJECTIONABLE, THEN YOU RAISE IT AT THAT TIME. DURING THE EXAMINATION OF BONNIE CRUZ, AT ONE POINT HE ASKED HER IF SHE KNOWS ANYTHING ABOUT THE PERSONAL HABITS OF I BELIEVE IT WAS DENISE ROACH. AT THAT POINT THE DEFENSE COUNSEL OBJECTED. HE SAID FOUNDATION. HE SAID I THINK THIS IS WHERE THE STATE IS TRYING TO GET INTO MY CLIENT'S PROPENSITY AND THE STATE SAID THAT IS NOT WHAT WE ARE DOING. WE ARE TRYING TO DO IS GET IN EVIDENCE AS TO THE CONDOM.

ISN'T THIS THE KIND OF MOTION THAT THE DEFENDANT'S PRESENCE WOULD HAVE BEEN HELPFUL? -- WOULD HAVE BEEN HELPFUL? HE COULD AT LEAST HAVE WHISPERED TO HIS LAWYER THAT HE DID NOT OR REFUTED OR WHATEVER, AND ISN'T HE ENTITLED TO BE THERE, TO DO THAT, TO MAKE, TO INFORM HIS LAWYER?

CLEARLY HE IS ENTITLED TO BE PRESENT AT THE HEARING. HIS PRESENCE WAS WAIVED, AND NO OBJECTION WAS ASSERTED TO THE TRIAL COURT BELOW, SO THEIR BURDEN HERE IS TO SHOW FUNDAMENTAL ERROR. THEY HAVE GOT TO SHOW THAT SOMETHING WAS ADMITTED THAT FUNDAMENTALLY UNDERMINED HIS TRIAL. THEY HAVEN'T SHOWN EVEN ANYTHING THAT WAS OBJECTIONABLE THAT WAS PRESENTED, MUCH LESS THAT IT WAS FUNDAMENTAL ERROR. HAD HE A RIGHT TO BE THERE. THAT RIGHT WAS WAIVED AND NO OBJECTION WAS PRESENTED, BUT AS FAR AS THE MOTION IN LIMINE ITSELF, THIS COURT IN ROBERTS LISTED MOTION INS LIMINE AS THE -- MOTIONS IN LIMINE AS THE TYPE OF PROCEEDING WHERE THE PRESENCE OF THE DEFENDANT IS NOT FUNDAMENTALLY NESZ AREA. IN THIS CASE IT WAS -- NECESSARY. IN THIS CASE IT WAS COUNSEL ARGUED. THERE WERE NO WITNESSES PRESENTED. IT WAS JUST STATE SAID THIS IS WHAT WE ARE GOING TO PUT ON AND HE SAID I DON'T WANT HIS PROP FROM ENSITY PUT ON, AND THAT IS -- HIS PROPENSITY PUT ON, AND THAT IS WHERE THEY LEFT IT. THE TRIAL COURT ALSO FOUND, WITH REGARD TO DENISE ROACH THAT, THE CRIME WAS HEINOUS, TROCH US AND CRUEL, AND THE DEFENSE RAISED AN OBJECTION TO THAT. IN HIS STATEMENTS AT TRIAL AND IN HIS CONFESSION, HE DESCRIBED THE MURDER OF DENISE ROACH, THAT SHE WAS SCREAMING AND FIGHTING BACK, THAT SHE WAS THROWING THINGS, HE IS HE, THAT SHE HIT HIM WITH A -- HE SAID, THAT SHE HIT HIM WITH A TIRE IRON, AND IN HIS STATEMENTS WITH REGARD TO THE DRUG DEALER HE SAID THAT SHE WAS FIGHTING AND SCREAMING AND WE CAN PICK AND CHOOSE FROM THE DEFENDANTS'S STATEMENTS TO SUPPORT AN AGGRAVATING FACTOR. CLEARLY THERE IS HE HAVE TO SUPPORT THIS, AND IT WAS APPROPRIATELY FOUND. WITH REGARD TO THE CCP, FOR CRISTY COWAN, FROM IS, I HAVE GOT LISTED HERE, AT LEAST SIX FACTORS THAT WERE FOUND IN SUPPORT OF CCP, WHICH INCLUDED, FIRST AND FOREMOST, THE PRIOR MURDER, AND WHILE THIS ALONE IS NOT SUFFICIENT TO SUPPORT THE FINDING OF CCP, IT IS A FACTOR THAT CAN BE CONSIDERED, IN ADDITION TO ALL OF THE OTHER EVIDENCE, WHICH INCLUDED THE FACT THAT HE, IN A VERY SHORT PERIOD OF TIME, PICKED HER UP, TOOK HER TO THE PROPERTY, LOCKED THE GATE, WHICH NORMALLY IS ONLY LOCKED WHEN NO ONE IS ON THE PROPERTY. HE REMOVED HER TO A REMOTE LOCATION, SO UNLIKE OTHER CASES WHERE YOU HAVE PICKED UP A PROSTITUTE AND YOU ARE JUST GOING FOR SEX, HE COULD HAVE HAD SEX AT THE LUXURY MOTEL. HE HAD SEX AT THE LUXURY MOTEL WITH BONNIE CRUZ, BUT IN THIS CASE, HE CONVINCED HER TO GO TO THIS REMOTE LOCATION, JUST AS HE ATTEMPTED TO ENTICE BONNIE CRUZ TO BOW TO THIS REMOTE LOCATION BY OFFERING HER ADDITIONAL MONEY IF SHE WOULD GO WITH HIM TO SEFFNER. HE ONLY HAD \$26 ON HIS PERSON, AND IN HIS INITIAL STATEMENT TO THE POLICE, HE, ALSO, SAID THAT, AFTER, WHEN MERRIAM WHITEHURST CAME, AFTER HE HAD ALREADY PUT CRISTY COWAN'S BODY IN THE POND, THAT HE COULD HEAR CRISTY COWAN STILL TALKING AND HOLLERING, SO AFTER HE CONVINCED, MRS. WHITEHURST LEFT, HE SAID HE WENT BACK DOWN TO THE POND AND HE BEAT HER WITH A LIMB TO SHUT HER UP AND THEN HE COVERED IT UP SO EVEN IF ALL THAT INITIAL STUFF DIDN'T ESTABLISH CCP, THE FACT THAT HE WENT BACK TO FINISH HER OFF, CLEARLY ESTABLISHES THE COLD, CALCULATED AND PREMEDITATED NATURE OF THE CRIME. WE ASK THE COURT TO AFFIRM THE DEATH SENTENCE IN THIS CASE. THANK YOU.

THANK, COUNSEL. REBUTTAL.

FIRST I WOULD LIKE TO JUST ADDRESS WHAT MY OPPONENT JUST SAID IN REGARD TO THE CCP FACTOR AND NOW THE TRIAL JUDGE, THERE WAS A LOT OF CONTROVERSY AT THE TRIAL, AS TO WHETHER HE REALLY DID HEAR THE VICTIM MOANING FROM THE POND AND WENT DOWN. WHEN THE TRIAL JUDGE FOUND CCP, HE DIDN'T USE THAT AS PART OF HIS FINDING. IN OTHER WORDS HE REJECTED THE IDEA THAT SHE HAD BEEN IN THE POND SCREAMING, AND HE CAME DOWN AND HIT HER WITH BRANCHES, SO THAT SHOULD PLAY NO ROLE IN THE CCP. AS REGARDS THE HAC ON DENISE ROACH, MY OPPONENT SAID THAT SHE WAS SCREAMING AND FIGHTING DURING THE PROCESS. WELL, IN HIS STATEMENT, SHE WAS SCREAMING AND FIGHTING BEFORE HE HIT HER IN THE FIRST PLACE. HE SAID THAT SHE THREW A FLOWER POT AND MADE A DANGER IN THE SIDE OF HIS -- A DINGER IN THE SIDE OF HIS TRUCK AND THAT IS WHEN HE HIT HER AND PUSHED HER AGAINST THE WALL AND THE BOARDS FELL ON HER. THE TRIAL JUDGE FOUND THERE WAS BLUNT IMPACT WITH THE WALL, BUT THE FACT THAT IN HIS STATEMENT THIS OCCURRED IN A MATTER OF SECONDS, HER UNCONSCIOUSNESS OCCURRED IN MATTER OF SECONDS.

WERE THERE DEFENSIVE WOUNDS ON HER BODY?

NO DEFENSIVE WOUNDS WERE FOUND. NOW, THE FACT IS THAT THE BODY WAS DECOMPOSED, SO THERE WAS AN ABSENCE OF EVIDENCE.

WAS THERE EVIDENCE OF STRANGULATION?

THERE WAS EVIDENCE OF STRANGULATION BUT NONE THAT SHE WAS CONSCIOUS CHILES WHILE IT HAPPENED. -- CONSCIOUS WHILE IT HAPPENED, AND THIS COURT HAS HAD CASES WHERE NO PROOF OF CONSCIOUSNESS, YOU CAN'T USE STRANGULATION TO PROVE HAC. AS TO THE DEFENDANT'S STATEMENTS WHERE HE ADMITTED THE KILLINGS, IT IS TRUE BUT PARTICULARLY WITH DENISE ROACH, SHE DIDN'T ADMIT TO ANY PREMEDITATION. HE ADMITTED TO WHAT WOULD BE A MANSLAUGHTER OR SECOND-DEGREE MURDER, SO THEREFORE THAT IS WHAT IS REALLY CRUCIAL HERE, IS THAT THERE IS NO PROOF OF PREMEDITATION, ABSENT WHAT YOU CAN INFER FROM THE COWAN HOMICIDE, WITH THE HOMICIDE OF DENISE ROACH.

WAS THERE ANY, WAS THIS SOME MULTIPLE PUNKTURES IN IT OR SOMETHING?

TO THE SKULL, YES.

DO WE KNOW HOW THOSE WERE INFLICTED?

THE BEST I CAN SAY IS SOME SORT OF TOOL HAD PROBABLY DONE IT. THE TRIAL JUDGE SAID IT COULD HAVE BEEN A SCREWDRIVER. THIS, AGAIN, IS NO, OBVIOUSLY IF IT HAPPENED WHILE SHE WAS CONSCIOUS, YOU KNOW, IT IS HAC, BUT THERE WAS NO PROOF THAT SHE WAS CONSCIOUS, WHEN IT DID HAPPEN, AND AS THE TRIAL JUDGE FOUND, HE SAID THAT YOU KNOW, IF IT SHOWS THAT IT IS CONSISTENT WITH HER BEING HIT VERY HARD WITH A FIST, AND HER HEAD BANGED AGAINST THE HARD WALL, AND THAT WAS PRODUCE UNCONSCIOUSNESS WITHIN A MATTER OF LESS THAN A MINUTE, AND FOR THAT REASON, WE ARGUE THAT HAC CANNOT BE APPLIED TO THE MURDER OF DENISE ROACH. MR. CHIEF JUSTICE: THANK YOU, COUNSEL. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.