>> ALL RISE.
>> SUPREME COURT OF FLORIDA IS NOW IN SESSION.
PLEASE, BE SEATED.
>> THE COURT WILL NOW TAKE UP THE THIRD CASE ON THE DOCKET, HALL V. THE STATE OF FLORIDA.
>> MAY IT PLEASE THE COURT, MY NAME IS JIM, ASSISTANT PUBLIC DEFENDER FROM DAYTONA BEACH. ALONG WITH MEGHAN COLLINS WHO WROTE THE BRIEF, WE REPRESENT ENOCH HALL AND THIS DIRECT APPEAL FROM FIRST-DEGREE MURDER AND RESULT AND SENTENCE OF DEATH.
WE WOULD LIKE TO FOCUS THIS MORNING ON ISSUES THREE AND FIVE FROM THE BRIEF DEALING WITH THE EXTENSIVE, HIGHLY-EMOTIONAL TESTIMONY THAT WAS PRESENTED AT THE PRIOR VIOLENT FELONIES FOR THE AGGRAVATING CIRCUMSTANCE. AND THE IMPROPRIETY OF THE DEATH SENTENCE.
VERY BRIEF STATEMENT OF FACTS REGARDING THESE ISSUES.
IN 2008 WHILE THE DEFENDANT WAS IN PRISON FOR TWO SEXUAL BATTERIES THAT WERE COMMITTED SOME 15 OR 16 YEARS EARLIER, HE WAS WORKING IN THE PRIDE MACHINE SHOP ALONG WITH APPROXIMATELY 70 OTHER INMATES THAT ALSO WORKED IN THAT AREA.
AFTER TAKING FOUR PILLS GIVEN TO HIM BY A FORMER INMATE, THE DEFENDANT LAGGED BEHIND TO SEARCH FOR ADDITIONAL PILLS THAT WERE HIDDEN THERE BY THAT INMATE.
WHEN HE WAS DISCOVERED BY A CORRECTIONS OFFICER, DONNA FITZGERALD, THE DEFENDANT FREAKED OUT AND STABBED HER REPEATEDLY WITH A SHANK WHICH HE FOUND AT THE SCENE.
WHEN HE WAS APPREHENDED --
>> WELL, WE REALLY DON'T KNOW, I MEAN, NOT THAT -- WE DON'T KNOW HE FOUND THE SHANK AT THE SCENE.
>> THE ONLY TESTIMONY THERE WAS REGARDING IT WAS FROM THE DEFENDANT WHERE HE INDICATED THAT HE FOUND IT AT THE SCENE.

THERE WAS TESTIMONY FROM ANOTHER
CORRECTIONS OFFICER THAT HE HAD
SEEN IN THE COURSE OF HIS CAREER
SOME THOUSAND MACHINE SHANKS
FROM FACILITIES SUCH AS PRIDE.
SO IT CERTAINLY WASN'T UNCOMMON
FOR THAT TO OCCUR, AND WE DO NOT
KNOW THAT THE DEFENDANT MADE IT.
>> Let's say we have questions
on the aggravator.
You would agree I would hope
that there are four other very
strong aggravators here.
>> There are other aggravators
Your Honor but we submit with
regard to that, moving ahead to
that, that the trial judge made
the factual finding erroneously
in his order that the defendant
had carefully preplanned this as
evidenced by his bringing the
shank to the scene, his
fabricating it but there is
absolutely no testimony.
>> Lets assume there is no CCT.
Where does that get you in terms
of the rest of the aggravator's
says you already said, the guy
is serving and he has two prior
sexual batteries with these
violent felonies that he is
serving life sentences for.
There is HAC and what else do we
have?
We have a correctional officer.
>> Correct Your honor.
>> We have that.
I mean, this is extremely
heavily aggravated case, is it
not?
I realize you have got you know
to defend or argue for your
client but it looks like all the
cases, he is already in prison
and commits a murder is sort of
up there and cases where the
death penalty is probably
intended to be imposed.
>> We would submit there is
mitigation in this case.
The defendant had been when he
was 19 years old had a dispute
with his girlfriend and the
girlfriend's mother and the
mother's boyfriend were police

officers and they told the
defendant's father they were
going to get the defendant
jailed and raped while in
prison.
There was testimony from
Dr. Krop although he may not
have been suffering from it at
this time that these prior
convictions for sexual abuse
were probably caused by
post-traumatic stress disorder.
>> If you are asking, because
number five is whether it is
proportionate.
What case do you have or are
cases cases that would show that
this death penalty is not
proportionate?
>> There's a case that we cited
in the brief where this court
rejected heinous atrocious and
cruel in that case and based on,
I am sorry MCPP based on the
defendant's mental disturbance
in the case the court would
really waive the findings and we
would submit because of the
defendants remorse which has
been found by this court to be
substantial in many cases --
>> It involved a very seriously
mentally ill individual.
I am not seeing --
you have not attacked the
failure to find significant
statutory mitigation.
You are not attacking, you are
not saying that there was
statutory mitigators that you
have found are you?
>> No, Your Honor.
>> So what we have is and how
old is this defendant at the
time?
>> I believe he was in his
40s.
>> Because he was raped in
prison at 19 and this therefore
is mitigating for after having
raped to other people?
>> Again there was testimony
because of that rape that caused
him psychosexual disorders --
which would cause this violence.

>> The trial judge did not even find nonstatutory mitigation did he?
Did he?
>> Well, there was evidence of suicidal attempt and Baker act for which he gave some weight according to the trial court's findings.
If I may proceed with the issue number three.
The trial court abused its discretion in allowing the presentation of highly emotional extensive testimony thereby focusing the capital jurors attention on extreme trauma and suffering.
The victims had total collateral crimes some 16 years previous.
>> The testimony of the lady was red.
>> That is corrector honor.
But just reading that testimony, it shows that it was highly highly emotional and could inflame the passions of this capitol juror.
>> It's the fact of what he did.
I mean I don't know know it case it says, this isn't collateral crime evidence.
This wasn't admitted and the guilt phase of this case.
This was admitted as evidence of what the nature of the prior crime was and the case was ample that they get -- the state gets to explain the details of the crime and as Justice Labarga said it was done by in one case reading somebody statement.
>> That is corrector honor but while this court has approved the -- prior violent felonies to establish the violent nature this court has repeatedly warned that such of it should be brief, straightforward general and must not be overly emotional.
Duncan, Cox cited by us and by the state.
>> We read one witness testimony was read.
The other witness as I

understand never cried or did anything like that on the stand.
>> Yes, Your Honor.
Page 3034 when the defense objected to the prosecutor leading the witness, the court overruled that objection saying that he was going to allow the state attorney to leave because of the witnesses emotional state Your Honor.
>> What did you interpret that to mean?
>> That she was being emotional in front of the jury.
>> But what was that?
>> That is all.
>> That is all that was said?
>> Let me read if I may some of the testimony that was read to the juror and even though it was read to the juror from the 66-year-old let me ask you this.
Take a look around the courtroom and see if you can recognize the person that did this to you in the courtroom.
Do I have to?
Would you do it for us?
Where is he right over there?
I'm not going to tell you where he is an look and see if you recognize a person.
Answer, Oh my God, please don't, don't.
I don't want to, please let me go.
Let me get out of here.
Oh my God, that is him.
Oh my God this man, how could he do this to a person?
Even though you are just reading it, highly emotional and highly improper under these cases to say you should not, that the juror's intention would be diverted from the crime.
>> Are there any request to redact anything from the statement?
>> Statement?
>> There was her request to not allow this to be read to the jury.
If we cross the hurdle that we

have already said he can go into some of the detail my question to you was were there any request to limit in some way that one witness's testimony?
>> There was no specific requests for a redaction of specific portions of that Your Honor.
>> Your argument is, is that your argument that it should not have been allowed at all, that the victim does not have the right to testify in the state didn't have a right to call the victim?
>> In this other court cases to answer the prior question dealing with this aggravating circumstance during the penalty phase this court has held that these were truly collateral crimes.
That is this court's language, not mine.
We submit that the defense attorney did object saying this was highly prejudicial, and outweighs the appropriate value of it.
This court has said totally unnecessary evidence such as these highly emotional matters should not be presented to the jury and the state risks reversal when it is.
>> Are you making any argument in this case about how the prosecutor used this evidence in the closing argument?
>> Yes, Your Honor.
>> That to me seems like a better argument than you are trying to say this evidence was not admissible at all because as I have read the prosecutor's use of this information, it seems the prosecutor sort of interwove the facts of these prior felonies into the actual aggravators that he was trying to demonstrate in this case.
>> Is interesting to know during the prosecutor's closing argument in the penalty phase,

the prosecutor didn't go into
any of these facts.
It was unnecessary.
Sexual battery etc,  however the
prosecutors did say and use
these in support of heinous
atrocious and cruel for example.
The fear, anxiety and suffering
that goes along with knowing you
are about to die did not make a
difference to someone.
>> Did you have an objection?
>> There was no objection to
that Your Honor but we submit in
the introduction of this
testimony was the error in the
prosecutor used this and this
was the harm we have here.
>> That seems like, the trial
judge has already said it was
admissible so if you think it is
being improperly used it
certainly seems that is the
point that you should object to
have the prosecutor is using it
and not just let it go on.
>> The defense attorney had
objected that it was overly
prejudicial and it doesn't
appear from the record that the
court, the trial court, ever
reviewed this case before was
presented.
We would submit --
>> Moving back to that process,
so it was before the start of
the penalty phase.
Was there a motion in limine as
to the two victims testimony?
>> There was an objection, yes
Your Honor.
>> And the objection I just want
to make sure, was that they
should be excluded?
>> The objection was at was
irrelevant and the testimony
that we presented was overly
emotional and prejudicial.
>> So, but you agree that the
state is allowed to put on
evidence of the details of a
prior violent felony.
>> Some evidence that this court
has held with where the evidence
is unnecessary, where it is

emotional.
>> What do you mean unnecessary?
We have said when someone agrees
to stipulate to the judgment and
conviction that the state
doesn't have to accept the
judgment.
>> That's correct because the
jury should know the violence in
order to way it.
>> Okay, so now again it seems
incumbent that if something goes
too far what we would appreciate
is the redacting of this part of
the statement.
Now you said well the judge did
not review it first but someone
has to bring it up and say
listen she can say all of this
but when she got into the Oh my
God, do I have to look at him,
that should've been kept out?
>> The judge indicated the
entire testimony would be
admitted and that was sufficient
objection.
It became a feature of the
penalty phase in the trial.
Actually the state presented
actual 86 pages of actual
testimony during the penalty
phase of the trial.
55 of those pages were devoted
to this prior violent felony.
Of of the 31 additional pages of
testimony during the state's
case in the penalty phase, all
but four of those pages dealt
with with the highly emotional
victim impact so we submit that
this was a feature of the
penalty phase.
Here we have the first victim,
GS expressing their horror and
having to see the defendant.
Her fear including her reaction
driving past a cemetery plot and
the dependence and difference
for her for nitroglycerin may
have been seen in the earrings
that she wore.
I don't want those earrings,
take them away.
I don't want to see them.
There was highly emotional

testimony from the second victim
DD and the judge indicated she
was being emotional.
She included such unnecessary
and again that is this court's
language in these types of cases
dealing with a prior violent
felony aggravation.
It was unnecessary to include
that she attempted to on herself
in order to present this rape
and sexual assault occurred
during her period with the
defendant and the, highly
emotional overly so we believe
and as this court has warned the
state time and time again, don't
take it too far and they did
including the argument not for
the specific trier aggravator
but four of heinous atrocious
and cruel.
How did he show indifference?
This was a prior victim.
I don't give a damn about your
heart.
Shut up bitch, and they argued.
This made it heinous atrocious
and cruel in this capital case,
not in the prior capital case.
>> Just seems to me that this
defense attorney, jumped out of
his seat.
He already have this evidence
about these two rapes in the
record.
The trial judge had denied his
motion to exclude and to have a
prosecutor use it that way,
well, we will probably see it at
some other time.
>> We again said that the CCP
aggravator had material factual
erroneous matters in that for
the trial judge and that should
be stricken of the mitigating
evidence that was presented.
The defendant exhibited genuine
even before the evidence of the
crime was discovered.
>> Let me ask you something.
We were talking about the CCP
aggravator and you said the
defendant found a shank or the
other prisoner had left the

drugs.
I thought he had not found the drugs that the other prisoner left.
>> In the room where he was looking for the drugs, where drugs were ultimately found when the investigators came.
>> So you are saying in his search for the drugs he found a shank based on what?
>> He gave three different statements and they all conflicted to some extent but the bottom line appeared to be that he discovered the shank shortly before the corrections officer came.
He hid in a closet.
In an attempt to hide from her and this is a different case than the case the court cites in the CCP.
These cases there were lying in a way to attack and kill the victim and here it appears he was hiding in a closet to avoid detection and did not want this confrontation.
>> It seems to me you're making an input that he found the shank while he was looking for the drugs and isn't there just as great an inference that he have the shank already on his person?
>> No come this testimony was he found the shank and there was no testimony whatsoever that he already have that, so that is where the speculation comes from and we submit you can't use that pure speculation to find this beyond a reasonable doubt.
>> Okay, but even if we agree that there is no CCP as Justice Pariente said earlier, where would that leave that?
>> First of all it leaves us with an improper jury recommendation in the case because of our other issues we are arguing that the judge shouldn't have given great weight to the jury recommendation.

>> Because of what?
>> Because of the improper emotional testimony from the prior violent aggravator so the jury was presented with added that caused their recommendation to go in favor of death.
We submit that there was a substantial nonstatutory mitigation including genuine remorse.
As I said before this crime was even discovered the defendant was sobbing and crying out.
>> This is genuine remorse without --
>> That, coupled with the fact that he had been raped in jail and had serious mental issues because of it.
>> 20 years earlier?
>> Yes, Your Honor.
The defendant family testified to a great change and testified he had trouble trusting people and he was angry and isolated.
All of these factors Dr. Krop said show that he was suffering at that time from post-traumatic stress disorder.
>> He had been in prison for 16 years at this point at the time of this murder and do we know what his prison record was like? Did he have a history of fighting in prison or whatever?
>> There is no testimony to that, Your Honor, other than the fact that several inmates testified he was a very hard worker.
>> So all of a sudden --
>> There are records he was suffering from schizophrenia, possible psychosexual disorder as well.
Those are from the DSE records and there's also evidence in the DSE record regarding his explaining his prior rape while in jail.
The fact that the defendant had attempted suicide --
>> How long ago was that?
>> That was obviously before his

imprisonment, Your Honor.
We submit that the improper implements of the jury of this highly emotional testimony tainted their jury recommendation and we ask that this court reversed the remand for a new penalty phase.
Thank you.
>> May it please the court.
I'm Ken Nunnelley and I represent the state of Florida.
Justice Quince let me start with your question about his prison history.
The testimony was in volume six, record page 762, that this man had been under no medication for at least 13 years prior to the time he murdered Officer Fitzgerald.
The defendant, by the testimony by I believe of his own expert, again volume six, is that this man is not psychotic and that he currently meets the involuntary commitment criteria of the Jimmy Ryce act.
The mental mitigation such as it was in this case, was put on at the Spencer hearing, not before the jury and the reason for that is obvious.
We don't have to really waits to figure out that trial counsel did not want to look before the jury information that this man who has previously been convicted of multiple rapes his properly diagnosed as suffering from a cognitive disorder not otherwise specified and from co-works if paraphernalia disorder.
That is the mental state mitigation they came in at the penalty case.
I'm sorry, the Spencer hearing.
These drugs that the defendant was so diligently searching for our ibuprofen, which is known I am sure to all of us and another drug, trade named Tegretol.
I cannot pronounce the chemical name for it -- that according to

the testimony is an
antiepileptic drug that has no
real psychiatric side effects.
The defense experts,
Dr. Buffington, who is a
pharmacologist, not a
psychologist or a psychologist,
testified that in his opinion
Tegretol could not quote, unmask
underlying psychiatric
conditions.
However, the problem with that
in this case as the rest of the
experts testified, is that there
is nothing there to unmask.
Which leaves us with no
statutory mitigation and the
defendants remorse as
mitigation.
Under these facts, this is a
case that beyond doubt cries out
for the death penalty.
The death penalty is -- this is
that case.
This man lay in wait to kill
this officer.
His ultimate motivation we do
not know.
We may find out down the road,
or we may not.
I cannot see that far into the
future.
What we do know is that this
inmate had been an inmate for a
number of years.
He came into the pride program
apparently at correctional and
started out as an apprentice
welder and worked his way up to
a lead welder.
He was well familiar with the
procedures that go on within the
pride component.
>> In terms of the narrative
that you have given and I
essentially agree with
everything except the laying in
wait.
When you have a defendant and
you said we don't really know
why he laid in wait.
His explanation is, I freaked
out.
It doesn't have to be a mental
freaking out.

I am here and I'm discovered and
now I am going to get in
trouble, I freaked out.
He is seen running down the hall
basically admitting what he did
and you would agree that remorse
was properly found.
Doesn't this case still -- I
mean it is my version which is a
little bit closer to the
defendant's version, that is,
which is he discovered doing
something he shouldn't be doing
and he has two prior life
sentences for sexual battery.
Doesn't it cry out just the same
way I guess, without trying to
speculate on CCP, and if so is
in it your case just as strong
without CCP?
>> Yes maam, it is.
The state doesn't have to have
the CCP aggravator to sustain
this conviction, but the state's
position is that under the
facts, that the CCP aggravator
was also properly found.
The reason I say that is this.
This man knows the pride
procedures.
The pride procedures clearly
were bad as the inmates wind up
to check out go through the
metal detector and get patted
down and get their cards, this
man knew from years of
experience and years of working
in pride that if he didn't check
out the CEO was going to come
looking for him.
This man is back in the welding
area and I haven't been back
there and I don't have a clear
picture of the way out of the
pride unit but as I understand
it he was back in the welding
area, which is where he worked,
and according to at least one of
his statements, when he hears
the correctional officer come in
and he has the shank behind his
leg --
>> His motive was to try to
escape from prison?
>> There is some suggestion that

was perhaps part of it.
There was a suggestion to in one of the statements I believe that he was going to do it on the uniform and go and walk out the gate.
Probably not very realistic and I don't know that is a real good theory for him to be using.
>> What was his size?
>> He is a little bit smaller than me.
>> And the victim?
>> Five feet, five inches.
Because I read that I went back and pulled it up on the DOC webpage to see is this realistic or not and it is kind of but was the motivation sexual assault?
It may have been.
We know the officer was found naked from the waist down and she was moved from where she was killed and put on a pushcart of some sort to another area where she was transferred to another pushcart.
>> Did the state charge him with attempted sexual battery?
>> No, maam.
>> So does the state argue?
>> No, there was no mention of a sexual battery during this trial.
Like I say we may find out down the road.
>> I would like to ask you, with the use of the HAC, would you agree that the unobjected to comment, where he -- where the prosecutor says for the HAC, look what he put these other victims to, the improper use of the victim's testimony?
>> That is one of those things that I wish he had not done.
>> It doesn't mean it is fundamental error but unobjected to.
>> Exactly, it's unobjected to.
>> You cannot use the prior violent felony for the HAC itself.
>> If the statement is taken in context I referred to

court to them come the
statements speak for themselves.
>> Again, if any case is going
to be a death penalty case, this
is going to be one.
You have got to prior violent
felonies and for good
aggravators.
Why do to prosecutors going over
try something that is clearly
erroneous?
>> I can't answer that Justice
Pariente.
I suspect, like I said I wish it
would have happened so you all
would not be asking me these
questions but at the end of the
day it doesn't make any
difference at all.
This man got the death sentence
that he received because of what
he did, not because of anything
the prosecutor said or did not
say.
This is a death case.
Actually Justice Pariente there
were three prior sexual offenses
and there's a fourth out there
also that they did not really do
anything with.
Three victims testified and the
fourth did not.
>> We have said that prior
violent felony victims can
testify that we but we have also
said that they can be
overemotional.
Where is the line drawn and was
observed in this case, because
I'm concerned about that part of
the statement which was not
highlighted about where she
starts to talk about, please I
don't want to look at him.
It seems like it's been not a
necessary detail of the crime,
so where is the line and where
their were there parts that
might have --
[INAUDIBLE]
>> Could this case cross the
line?
No, maam.
>> Parts of the testimony were
probably inappropriate such as

the ones that Mr. Wulchak
pointed out.
>> If it had been live
testimony, maybe.
As it was, this is a cold record
read as far as we know.
We don't know the contrary,
we'll put it that way.
Unemotionally in a detached
manner.
>> It would have been easy to
have requested it to be excluded
but that was not done.
There was not a request to
remove part of the.
>> Right, the defense went all
or nothing.
>> There is no case that we have
that would say that they can put
on any detail.
I mean, none.
>> The law is real clear, the
state needs to prove the details
of the prior.
>> And unemotional robbery, they
might want to emphasize that not
all prior violent felonies are
equal.
This is, other than murdering
somebody previously, violently
raping two victims is up there
with --
>> It's pretty close to the top
and keep in mind I will tell you
that both of these, both of
these prior offenses were not
90-second armed robberies.
These were lengthy abductions.
The jury needs to know what they
were and the state is entitled
to put them up.
If the defense had chosen to
step back from their all or
nothing approach and ask for
reduction or limiting or
something of that may church,
then we would have something
else to talk about depending
upon what happened and how the
trial court resolve those
issues.
That is not what happened here.
And that is really about all I
can say to that.
While these were graphic

descriptions, these were graphic crimes, and the corollary would be you take the victim as you find them and the state takes the crimes as we find them in this particular case and we are entitled to put them out.
There was no error on the Florida law for doing so.
I would suggest enclosing that the trial judge properly found all of the aggravating factors that were applied.
I would submit that the coldest aggravator his -- and I don't see the need to reiterate that again other than to state that the defendant knew Officer Fitzgerald.
He knew Officer Fitzgerald was going to be the person coming to find him when he did not check out from the prior facility.
As the trial court found, there are a number of other factors that support the aggravator.
The state's position is they were cracked and finding them.
If the court disagrees, even without the aggravator, death is still the proper sentence.
There is no error at all, any error and is harmless beyond a reasonable doubt and we would ask the conviction be confirmed.
>> May it please the court just briefly to answer the question, where does the court draw the line testimony regarding the prior violent felony aggravated.
I referred the court to known language in two cases, Rhodes and Feeney.
The line must be drawn on that testimony is not relevant or the prejudicial value in this case they said the testimony was irrelevant and the testimony presented to the jury does not relate to the crime for which Rhodes was on trial instead describes a typical trauma and suffering of the victim of a totally collateral crime committed by the appellants.

That is exactly what happened here in Feeney but while recognizing the testimony of some measure can be admissible however the collateral offense --
>> What was the crime in the first case?
>> That was one to which he had fled so there was no trial testimony but they introduced a tape recorded statement of the crime.
Battery with a deadly weapon and attempted robbery.
>> The thing that seems to hit at the heart here, I am not sure that there is any way to describe this event.
This, as one reads it, the brutal rape and what these people went through, I mean how does one sanitize what actually happened when it's non-sanitizable?
>> This court has that in other cases, this was direct testimony.
It wasn't overly emotional.
This clearly was overemotional.
>> The nature of the crime itself is highly, highly to the inth degree of an emotional nature for a female.
>> Was emotional but there was no reason for driving past the graveside, because she saw her graveside and said Oh my gosh is this going to be it?
Her testimony regarding having to identify him in court.
>> I guess there we go back to that was a transcript so the proper way to handle that would be to say Your Honor we don't think any of this should come in but if it does, we excise this portion.
>> The ruling by the court was this was admissible.
>> But you are saying the judge didn't even read it so the only way to make the judge aware of it is to say this is the part that we would ask the --

>> We submit that this was a end of emotional over prejudicial excise in order to prevent it from occurring.
>> That would be an interesting rule of law.
>> Do you think the state would do that --
[INAUDIBLE]
Did you say the state should do it?
>> The state should realize it was really emotional in these cases, Finney and Duncan that we cited.
They risked error by introducing these.
>> There is no obligation on the defense attorneys part under your theory to say judge we don't think they should come and what if you let it come in judge, these are the parts that are overly prejudicial and we ask that you at least reject those portions?
>> I can only assume the defense felt the entirely testimony was overly prejudicial.
You would say the rule of law is if somebody committed to prior -- for which he is serving life sentences that the more egregious the prior crime, the less latitude the state has to explain the crime to the jury?
It goes back to what Justice Lewis the same.
>> There needs to be a line drawn is this court has said. Highly prejudicial is unnecessary which is exactly what happened here.
We asked this court to reverse and remand for a new penalty phase.
Thank you.
>> We thank you both for your argument.