

>> ALL RISE.
HEAR YE, HEAR YE, HEAR YE.
THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEAD,
DRAW NEAR, GIVE ATTENTION, YOU
SHALL BE HEARD.
GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA AND
THIS HONORABLE COURT.
LADIES AND GENTLEMEN.
THE SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> GOOD MORNING AND WELCOME TO
THE FLORIDA SUPREME COURT.
THE FIRST CASE ON OUR DOCKET
TODAY IS KACZMAR VERSUS THE
STATE OF FLORIDA.
>> MAY IT PLEASE THE COURT.
MY NAME IS DAVE DAVIS
REPRESENTING LEO KACZMAR.
THE CASE WHICH THE STATE
CONVICTED MR. ^KACZMAR OF
COMMITTING FIRST-DEGREE MURDER
OF HIS FATHER'S LIVE-IN
GIRLFRIEND MARIA RUIZ.
TRYING TO SEXUALLY BATTER HER
UNDER ATTEMPTED SEXUAL BATTERY
AND TRYING TO BURN THE HOUSE.
HE, KACZMAR'S FAMILY, MISS RUIZ
AND KACZMAR'S FATHER AND UNCLE
ED LIVED THERE.
THIS HAPPENED IN CLAY COUNTY,
DECEMBER 12th, 2008.
THE FACTS, HE WAS CONVICTED.
JURY RECOMMENDED DEATH BY VOTE
OF 11-1.
THE JUDGE IMPOSED THAT SENTENCE
FINDING FOUR AGGRAVATING TO
FACTORS.
I PRESENTED NINE ISSUES TO THIS
COURT.
I'M NOT PREPARED TO ARGUE ALL
NINE BUT SIX OF THEM.
CONSIDERING THE TIME I LIKE TO
FOCUS ON THE FIRST TWO ALTHOUGH
IF YOU HAVE ANY QUESTIONS OF
THE OTHER REMAINING SIX I WILL
BE GLAD TO TALK ABOUT THAT BUT
THE FIRST ISSUE DEALT WITH
WHETHER OR NOT THE PRESENTED
SUFFICIENT EVIDENCE THAT
KACZMAR ATTEMPTED A SEXUAL
BATTERY AGAINST MARIA RUIZ.
IN PRESENTING EVIDENCE TO

SUPPORT THAT THE STATE SHOWED ON DECEMBER 11th, KACZMAR AND A FRIEND RYAN MODLIN, IN THE AFTERNOON OF THAT DAY HAD TO THEM TOGETHER AND RETREATED TO THE BACK OF HIS ROOM WHERE THEY BEGAN TO SMOKE SOME MARIJUANA AND USE COCAINE.

BY 9:00 AT NIGHT, KACZMAR WAS, AS MODLIN SAID, FAIRLY HIGH AND FAIRLY PARANOID.

ABOUT THAT TIME MODLIN LEAVES KACZMAR.

THEN SOMETIME AFTER 11:00 P.M. WILL THEN GO INTO THE LIVING ROOM WHERE MISS RUIZ WAS STAYING.

>> WHAT ARE THE AGES OF THE VICTIM AND THE --

>> I REALLY DON'T KNOW.

KACZMAR IN HIS 30s SOMEWHERE.

I DON'T KNOW ABOUT MISS RUIZ.

>> YOU DON'T KNOW IF THE VICTIM WAS YOUNGER, OLDER?

SHE WAS THE GIRLFRIEND OF HIS FATHER?

>> RIGHT.

>> WE DON'T KNOW IN THE RECORD HOW OLD SHE IS?

>> I'LL BE HONEST.

I CAN'T RECALL WHAT IT IS.

>> HOW LONG HAVE THEY LIVED IN THE SAME PLACE?

>> I DON'T RECALL THAT EITHER. IT HAD BEEN SOME WHILE.

SHE APPARENTLY LIVED THERE AND FELT COMFORTABLE STAYING THERE.

>> HIS FATHER WAS IN PRISON?

>> HIS FATHER WAS IN THE HOSPITAL AT THE TIME.

>> HOSPITAL.

SOMEBODY WAS IN PRISON?

MAYBE NOT.

>> BUT, --

>> TRYING TO GET A SENSE OF THEIR PRIOR RELATIONSHIP AS IT WOULD HAVE COME OUT IN THE GUILT PHASE TO UNDERSTAND THE DYNAMICS IN THEIR RELATIONSHIP. WAS THERE ANYTHING IN THE RECORD ABOUT THE NATURE OF THEIR RELATIONSHIP BEFORE THE NIGHT IN QUESTION?

>> NOT THAT I RECALL.

ALL WE KNOW THAT HE, THEY LIVED

IN THE SAME HOUSE AND THAT WAS ABOUT THE EXTENT OF IT.

>> WE DON'T KNOW FOR HOW LONG?

>> I DON'T RECALL HOW LONG THEY HAVE LIVED THERE OR SHE HAD LIVED THERE.

NOW HE HAD LIVED THERE WITH HIS WIFE AND CHILDREN BUT ON THAT DAY THEY WERE GONE.

CHILDREN AND WIFE ARE GONE AS WAS ROUTINE ON FRIDAY EVENINGS.

BUT THE DEFENDANT HAD, ABOUT

LIKE I SAY, BY 11:00 OR SO

HAD, WITH MODLIN, HE TOLD

MODLIN WHAT HE WANTED TO DO IS

LURE MISS RUIZ INTO THE ROOM,

PLY HER WITH DRUGS AND

HOPEFULLY GET LUCKY AND HAVE

SEX WITH HER.

AFTER MODLIN LEAVES, HE GOES

INTO THE LIVING ROOM AND MAKES

PASSES WITH MISS RUIZ. THEY GET

INTO A TUSSLE.

SHE GOES INTO THE BATHROOM.

HE POUNDS ON THE DOOR.

FOR SOME REASON HE GOES OUTSIDE

AND KNOCKS ON THE BATHROOM

WINDOW.

SHE DOESN'T RESPOND TO THAT BUT

GOES INTO THE KITCHEN.

THE DEFENDANT FOLLOWS HER INTO

THE KITCHEN.

>> IN THE TUSSLE IS THERE

ANY CLOTHES TORN?

>> NO. NO.

YES, I'M GLAD YOU POINTED OUT,

NOT ONLY IN THAT TUSSLE IN THE

LIVING ROOM THEN WHEN THEY GO

INTO THE KITCHEN THEY GET INTO

SORT OF A TUSSLE AGAIN.

SHE AT SOME POINT WILL GRAB A

KITCHEN KNIFE AND POINT IT AT

HIM.

HE WILL KNOCK IT OUT OF HER

HAND.

HIT HER AGAIN AND THEN PROCEED

TO STAB HER.

>> YOU KNOW, YOU DON'T DISPUTE,

OR DO YOU DISPUTE THAT THE

REASON THAT THEY GOT IN THE

TUSSLE WAS BECAUSE HE WAS

MAKING SEXUAL ADVANCES TOWARDS

HER, THAT BECAME AT SOME POINT

UNWANTED?

>> WELL, THAT'S, THAT'S WHY HE,

YEAH. WHAT HE TELLS MODLIN --
>> IF HE COULD GET LUCKY WOULD
MEAN A CONSENSUAL --
>> YEAH.
>> ONCE SOMEBODY REFUSES, AND
THEY'RE BASICALLY SAYING NO, AT
THAT POINT, ANYTHING THAT WOULD
BE DONE SEXUALLY IS UNWANTED.
>> THAT'S RIGHT.
AND THERE WAS NOTHING DONE
SEXUALLY.
>> WHY DOES SHE HAVE THE KNIFE?
>> WELL, TO WARD HIM OFF.
>> OKAY.
>> SECOND TIME HE WAS COMING AT
HER.
>> HE WANTED TO SHAKE HER HAND
OR SOMETHING?
>> NO.
OBVIOUSLY FROM WHAT SHE JUST
HAD GONE THROUGH HE WAS MAKING
PASSES AT HER.
SHE DIDN'T WANT THEM.
>> HE WANTED TO HAVE SEX.
>> WELL HE WANTED TO HAVE SEX
BUT ONLY IF HE COULD GET,
QUOTE, GET LUCKY.
WHICH IMPLIES CONSENSUAL
RELATIONSHIP.
>> I UNDERSTAND THAT ONCE SHE
STANDS WITH A KNIFE DOESN'T THAT
SAY, I DON'T CONSENT?
>> THAT IS ALSO WITH THE TUSSLE
WOULD SAY THE SAME THING.
>> WHY WERE THEY TUSSLING?
>> BECAUSE HE WANTED TO GET
LUCKY.
>> SEXUALLY GET LUCKY.
SHE HAS THE KNIFE.
>> HE KNOCKS IT OUT OF HER
HAND.
>> OKAY.
>> WHEN HE KNOCKS IT OUT OF HER
HAND HE BEGINS TO STAB HER.
>> I GOT IT.
>> UP UNTIL THE POINT THAT
THEY'RE IN THE KITCHEN, LET'S
SAY THEY'RE IN THE KITCHEN AND
THEY'RE TUSSLING BACK AND FORTH
AND LET'S HYPOTHETICALLY, LET'S
SAY SOMEBODY WALKS IN AND STOPS
THE WHOLE THING AND THERE IS NO
MURDER.
UP UNTIL THAT POINT IS THERE AN
ATTEMPTED SEXUAL BATTERY?

>> NO.
>> ADD TO THAT, ADD TO THAT HIS STATEMENT LATER TO CELLMATE WILLIAM FILANCIA, THAT ONCE MODLIN AND HIS GIRLFRIEND AND HIS DEFENDANT'S GIRLFRIENDS LEFT THE HOUSE, THAT HE WAS GOING TO PUT THE MOVE ON MARIA RUIZ.
IF YOU ADD THAT TO THE EQUATION DO YOU THEN HAVE AN ATTEMPTED SEXUAL BATTERY?
>> IF YOU HAVE SOMEONE COMING IN AND THEN INTERRUPTING, THE KNIFE IS NOT A FACTOR HERE. IF SOMEONE COMES IN AND INTERRUPT MAYBE THAT WOULD HAVE BEEN AN ATTEMPT.
>> THE KNIFE IS A FACTOR. THAT'S WHAT HE WOULD HAVE BEEN USING TO TRY TO GET HER TO CONSENT TO A FORCEFUL SEXUAL BATTERY.
AM I MAKING MY DECISION HERE IS, IF YOU'RE CLAIMING UP AND TO THE POINT THAT HE STABBED HER HAD BEEN NO SEXUAL BATTERY, WHICH IS WHAT I THINK YOU'RE ARGUING --
>> ATTEMPTED SEXUAL BATTERY.
>> ATTEMPTED SEXUAL BATTERY.
>> YES.
>> HOW DO YOU JUSTIFY THAT OR RECONCILE THAT WITH HIS STATEMENT LATER TO A CELLMATE HE WAITED FOR EVERYBODY TO LEAVE AND HE WAS GOING TO PUT THE MOVE ON HER?
ARE YOU SAYING THAT WOULD BE CONSENSUAL?
>> WAS HOPING TO GET LUCKY.
>> THAT IS NOT WHAT HE TOLD THE CELLMATE.
THAT IS WHAT HE TOLD MODLIN.
>> THAT IS WHAT HE TOLD MODLIN. BUT THE FACT IS, THAT'S WHAT HE WAS SAYING.
HE WAS, WANTED TO GET HER HYPED UP ON DRUGS AND HOPEFULLY GET LUCKY.
WHEN SHE DOESN'T DO THAT, THAT THERE WAS NOTHING THAT REALLY PREVENTED HIM FROM HAVING SEX WITH HER.
>> WHAT ABOUT HER RUNNING INTO

THE BATHROOM AND THEN HIM, YOU KNOW, BEATING ON THE DOOR AND BEATING ON THE WINDOW?

I MEAN THAT ALL SEEMS TO ME TO PLAY INTO WHETHER OR NOT HE WAS ATTEMPTING TO SEXUALLY BATTER HER AND SHE WAS RESISTING AND RAN AWAY?

>> ALL RIGHT.

FIRST OF ALL, MODLIN IS 6'4", 290 POUNDS.

MISS RUIZ, 5'5", 134.

THAT MAN WEIGHED TWICE AS MUCH AS SHE DID.

>> YOU SAY MODLIN?

>> I'M SORRY.

KACZMAR.

KACZMAR IS 6'4", 290 POUNDS.

I GET THOSE NAMES, ANYWAY.

HE IS CERTAINLY MUCH, MUCH BIGGER THAN MISS RUIZ.

HE COULD HAVE PLOWED THROUGH THE BATHROOM DOOR.

HE DOESN'T.

FOR SOME REASON HE TAPS ON WINDOW.

WHY HE DOES THAT IDIOTIC THING I DON'T KNOW.

BUT AT THAT TIME HE GOES NO FURTHER THAN TUSSLING WITH HER.

WHICH INDICATES VERY -- WELL, WHEN HE MET HER IN THE LIVING ROOM

COULD FORCE LIKE YOU WERE

SUGGESTING, JUSTICE PARIENTE,

HE COULD HAVE FORCED HER TO THE GROUND AND RIPPED OFF HER

CLOTHES. HE DID NONE OF THAT.

>> I'M NOT SUGGESTING THAT.

I AM TALKING ABOUT WHAT HAPPENED.

LET ME ASK YOU A QUESTION IN TERMS OF IMPLICATION OF THIS.

CLEARLY WHEN WE LOOK AND WE

HAVE A CASE I THINK THIS

MORNING WITH MURDERS THAT HAVE

A SEXUAL ELEMENT WHERE SOMEONE

IS SEXUALLY ASSAULTED, RAPED,

AND THEN KILLED.

THOSE CASES HAVE A DIFFERENT

LEVEL IN OUR COURT BECAUSE THEY

HAVE GOT A CRIME OF, THAT

PRECEDED THE DEATH OF SEXUAL

BATTERY, AT LEAST FROM MY POINT

OF VIEW.

IN THIS CASE, THERE WAS A

GENERAL VERDICT, WAS THERE NOT?

>> YES.

>> IF THERE IS AN ISSUE OF
SIMPLY FACTUAL INSUFFICIENCY,
AND THERE'S A GENERAL VERDICT
AND THERE'S CERTAINLY MY VIEW
MEETS PREMEDITATED MURDER FOR
THE MURDER, WHAT, DON'T YOU,
EVEN IF WE FOUND THAT THE
ATTEMPTED SEXUAL BATTERY WAS
SLIM AT BEST, NOT TYPICAL OF
OTHER, OF CASES, IT DOESN'T
MATTER FOR THE GUILT PHASE.

>> YOU'RE SAYING IT'S HARMLESS?

>> I GUESS I COULD USE THAT
WORD HARMLESS BECAUSE, BUT
IT'S DIFFERENT.

IT IS NOT HARMLESS IN THE SENSE
OF WHETHER THE JURY STILL WOULD
HAVE HEARD EVERYTHING ABOUT
WHAT HAPPENED.

THEY CAN DRAW THEIR OWN
CONCLUSIONS WHETHER THERE WAS
SEXUAL MOTIVES BUT AS FAR AS
WHETHER IT WAS ERROR TO SUBMIT
IT TO THE JURY BECAUSE THERE
WASN'T ENOUGH FOR THE SEXUAL
BATTERY, ONCE IT IS SUBMITTED
AS A GENERAL VERDICT IT IS, WE
USE THE WORD HARMLESS, IT IS
NOT REVERSIBLE ERROR.

>> WELL I THINK IT IS UNDER
UNITED STATES COURT CASE OF
YATES VERSUS --

>> I THOUGHT, AND I KNOW YOU'RE
A VERY EXPERIENCED DEATH
PENALTY LAWYER AND YOU CAN, I
KNOW YOU WILL EITHER STAND
CORRECTED OR WE'LL STAND
CORRECTED IF IT IS LEGAL
INSUFFICIENCY, THAT IT IS ONE
THING.

THAT IS THERE WASN'T A CRIME
AND BUT IF IT IS FACTUAL
INSUFFICIENCY, THEN IT IS, IT
IS HARMLESS, NO?

IS THAT YOUR --

>> I DON'T THINK SO.

I'LL BE HONEST I'M NOT QUITE UP
TO SPEED ON --

>> LET'S NOT, BECAUSE I THINK
THAT IS THE DISTINCTION.
AND THEN FOR THE PENALTY PHASE
THEY, YOU WILL BE SAYING THAT
THEY WOULD, THE ATTEMPTED

SEXUAL BATTERY WOULD BE AN
AGGRAVATOR THAT YOU WOULD SAY
TO BE STRICKEN?
>> SHOULD BE STRICKEN, RIGHT.
>> SO I JUST WANT --
>> RIGHT, RIGHT.
>> IN THE GUILT PHASE I JUST
DON'T SEE THAT, JURY HEARS,
YOU'RE NOT SAYING ANY EVIDENCE
THAT WAS ADMITTED SHOULDN'T, IN
FACT EVERYTHING WE'RE SAYING
ABOUT THE CRIME, THE JURY
SHOULDN'T HAVE HEARD IT?
>> WELL THEY'RE GOING TO HEAR
IT SIMPLY BECAUSE IT WAS PART
OF --
>> EXACTLY.
SO I MADE, YOU KNOW, MAYBE HE
THOUGHT HE WAS GOING TO GET
LUCKY.
THEN HE GOT UPSET LIKE SOME
DEFENDANTS DO AND SAID, THEN
I'LL DO IT BY FORCE.
THE JURY, THEY COULD HAVE
CONCLUDED THAT.
>> RIGHT.
>> OR THEY COULD HAVE --
WHATEVER HAPPENED, HE WENT INTO
A RAGE AND HE THEN MURDERED HER
OVER A PERIOD OF TIME THAT -- YOU
CERTAINLY ARE NOT CHALLENGING
HAC?
>> NO.
>> SO, I WAS, JUST WANTED TO
CLARIFY THIS FOR THE GUILT FROM
MY POINT OF VIEW MAKES A
DIFFERENCE.
>> I THINK IT DOES.
I DON'T SEE HOW YOU SEPARATE
OUT THE ATTEMPTED SEXUAL
BATTERY BEYOND A REASONABLE
DOUBT HAD NO IMPACT ON THE
JURY'S VERDICT EVEN THOUGH IT
WAS A GENERAL VERDICT.
AND THIS COURT --
>> YOU'RE NOT SAYING ANY
EVIDENCE THAT SHOULD HAVE,
THAT'S WHAT I WAS ASKING.
THE JURY WOULD HAVE HEARD --
>> THEY WOULD HAVE HEARD.
>> THEY WENT BACK FOR A NEW ANY
PHASE, THE JURY WOULD STILL
HEAR EVERY SINGLE FACT THAT WE
JUST TALKED ABOUT.
>> RIGHT. RIGHT.

>> AND ARE YOU CHALLENGING THE
PREMEDITATION ASPECT OF THIS
MURDER?
>> NOT AT THE GUILT PHASE.
AT THE, AT THE PENALTY PHASE
CERTAINLY I ARGUED IT WAS NOT
HEIGHTENED PREMEDITATION.
>> RIGHT. BUT AT THE GUILT PHASE
THERE IS SUFFICIENT EVIDENCE TO
DEMONSTRATE PREMEDITATION,
ISN'T THERE?
>> I DON'T WANT TO CONCEDE THAT
BUT I CAN SEE YOUR POINT, LET
ME PUT IT THAT WAY.
AS CLOSE A CONCESSION I'M GOING
TO.
WHEN YOU START SAYING THERE IS
EVIDENCE OF PREMEDITATION, I
MEAN WE'RE GOING INTO THE
JURY'S MIND HERE AND WHAT THE
JURY --
>> BUT WHEN YOU HAVE A GENERAL
VERDICT AS JUSTICE PARIENTE
INDICATED TO YOU, AS LONG AS
EITHER ONE OF THOSE ARE LEGALLY
POSSIBLE, THEN I DON'T THINK WE
HAVE AN ISSUE HERE.
WHETHER FACTUALLY YOU COULD
HAVE HAD A MURDER DURING THE
COMMISSION OF A ATTEMPTED
SEXUAL BATTERY IS ACTUALLY A
FACTUAL QUESTION HERE.
>> I THINK IT BECOMES A LEGAL
ONE BECAUSE WE'RE SAYING THERE
IS INSUFFICIENT EVIDENCE SO AS
A MATTER OF LAW.
>> HOW ABOUT DURING THE COURSE
OF THE ARSON?
>> NO. THE ARSON HAPPENED
AFTER THE MURDER.
IT WAS, AFTER HE IS SUPPOSED TO
HAVE KILLED HER HE THEN WENT
BACK AND SOMEBODY GOT SOME
GASOLINE AND STARTED A FIRE.
BY THAT TIME THE MURDER WAS
CERTAINLY -- SO I DON'T THINK
DURING THE COURSE OF AN ARSON.
BUT THE POINT REGARDING THE
ATTEMPTED SEXUAL BATTERY WE'RE
SEEING AT NO TIME DOES KACZMAR
GO BEYOND THE PREPARATION -- SORT
OF THING WE LEARNED IN THE
LAW SCHOOL. YOU HAVE TO GO
BEYOND PREPARATION TO
PERPETRATION.

WHEN YOU LOOK AT THE STATUE,
777.04.
THERE WAS NOTHING REALLY
STOPPED HIM.
BUT FOR SOMETHING ELSE HE WOULD
HAVE --
>> I GUESS YOUR POINT BEING, AND
HE STARTED OUT WITH AN INTENT
THAT HE WOULD HAVE A TRY TO THE
HAVE A SEXUAL RELATIONSHIP.
HE OBVIOUSLY GOT REBUFFED.
>> RIGHT.
>> HE THEN HAD THE OPPORTUNITY
TO ACT ON A UNCONSENSUAL SEXUAL
ACT.
>> THAT'S CORRECT.
>> IN THE LIVING ROOM OR IN ANY
OTHER PLACE AND INSTEAD,
INSTEAD OF TRYING TO SEXUALLY
ATTACK HER HE KILLED HER.
>> RIGHT.
WHAT HAPPENS --
>> I DON'T KNOW IF THAT IS
BETTER FOR HIM BUT --
CERTAINLY NOT BETTER FOR HER.
>> WHAT HAPPENS, SHE HAS A KNIFE.
HE KNOCKS IT OUT OF HER HAND.
IN THE COURSE OF KNOCKING IT
OUT OF HER HAND HE CUT HIS
THUMB.
HE APPARENTLY AT THAT POINT
GOES INTO A RAGE AND PROCEEDS
TO STAB HER.
NOW, WHAT REALLY HAPPENS I
THINK IS VERY MUCH CLOSER -- WE
HAVE A CLEARLY AN AGGRAVATED
BATTERY THAT LEADS INTO A
MURDER.
I THINK THAT WOULD PROBABLY
HAVE BEEN A BETTER CHARGE
INSTEAD OF ATTEMPTED SEXUAL
BATTERY.
>> THAT WOULD HAVE BEEN BUT OUR
CASES IT MERGES.
>> THAT'S RIGHT.
NOT ONLY MERGES BUT THAT, BUT
YOU CAN'T USE, AN AGGRAVATED
BATTERY IS NOT ONE OF THE
ENUMERATED FELONIES.
THAT IS CLEAR WHY THE STATE
CHARGED HIM WITH ATTEMPTED
SEXUAL BATTERY.
THEY WANTED TO USE THAT IN
PREMEDITATED MURDER AND I'M
CONCERNED THAT --

>> WHAT YOU SAID, JUSTICE
LABARGA SAID, THIS IS
INTERESTING WOULD HAVE STOPPED
AT THE POINT THE KNIFE STOPPED,
WHATEVER, WHETHER THE STATE
WOULD CHARGE AND WE WOULD
UPHOLD THE ATTEMPTED SEXUAL
BATTERY CHARGE.

>> RIGHT.

>> WITH THIS EVIDENCE.

>> YES, ONE OF THE CASES I LIKE
TO TALK ABOUT BRIEFLY THE STATE
CITES IN ITS BRIEF, GUDINAS.
IN THAT CASE MR. GUDINAS
WANTED TO HAVE SEX WITH A WOMAN.
SHE RETREATED TO HER CAR AND
HE POUNDED ON THE WINDOWS
THREE TIMES TRYING TO GET
INTO THE CAR AND
TRIES TO SMASH THE WINDOW.
ALL THE WHILE HE IS SAYING I
WANT TO HAVE SEX WITH YOU.
A LITTLE MORE THAN THAT.
SAYS I WANT TO HAVE SEX WITH
YOU.

SHE LEANS ON THE HORN BECAUSE
YOU KNOW HOW IRRITATING HORNS
CAN BE, HE LEAVES.
THIS COURT SAYS THAT WAS ENOUGH
FOR AN ATTEMPTED SEXUAL
BATTERY. WHY?

BECAUSE HE WOULD HAVE HAD SEX
WITH HER BUT FOR THE CAR
WINDOW, BUT FOR HER LEANING ON
THE HORN.

WE HAVE NOTHING IN THIS CASE
SIMILAR TO THAT.

NOTHING REALLY IMPEDED OR
PREVENTED MR.^KACZMAR FROM --

>> WHAT ABOUT THE KNIFE?

>> HE KNOCKED THAT OUT OF THE
HAND.

HE KNOCKED IT OUT OF THE HAND.

NOTHING STOPPED HIM.
AND NOTHING STOPPED HIM FROM
HAVING SEX WITH HER?

>> YES, SIR.

>> BEFORE WE GET TOO FAR INTO
YOUR TIME HERE I WOULD LIKE TO
SPEND SOME TIME ON CCP.

I THINK THAT IS ONE OF YOUR
MAJOR ARGUMENTS, CORRECT.

>> YES, SIR.

I MADE A COLD CALCULATED

ARGUMENT THAT THE MURDER --
>> I'M SORRY, WHAT DID YOU SAY AGAIN?
>> IN ORDER TO MEET THE COLD CALCULATED CCP AGGRAVATOR YOU HAVE TO MEET ALL THREE ELEMENTS.
IT HAS TO BE COLD, IT HAS TO BE CALCULATED AND IT HAS TO BE PREMEDITATED.
GOING BACK TO WHAT JUSTICE QUINCE SAID, WE MAY HAVE HAD ENOUGH PREMEDITATION TO GET PAST THE GUILT PHASE BUT WE DON'T HAVE THE HEIGHTENED PREMEDITATION HERE.
IF WE BARELY HAVE IT HERE WE CERTAINLY DON'T HAVE A COLD ELEMENT AND DON'T HAVE CALCULATED ELEMENT.
WE DON'T HAVE THE COLD METHODOICAL KILLING.
WE DON'T HAVE A CALCULATION THAT GOES INTO THESE THINGS.
>> SO YOUR POSITION IS THIS WAS A FRENZY TYPE KILLING?
>> THAT WAS PART OF IT.
CERTAINLY A FRENZY, HE HIMSELF SAID, WHEN HE TOLD FILANCIA WHAT HAPPENED.
SHE PUT UP THE KNIFE.
HE KNOCKED IT OUT OF HER HAND.
IN THE PROCESS I CUT MY THUMB AND IN THE PROCESS, AS MODLIN WOULD SAY --.
>> WHEN DID THE FRENZY ACTUALLY BEGIN?
>> I WOULD SAY ONCE SHE KNOCKED, SHE PRESENTED THE KNIFE.
HE KNOCKS IT OUT OF THE HAND AND IN THE PROCESS CUTS HIS THUMB AND PAIN FROM THAT AND THE DRUGS AND ALL THAT, I WOULD SAY AT THAT POINT IS WHEN THE FRENZY GRINS.
>> SO PRIOR SO PRIOR TO THAT HE HAD NO INTENTION OF TAKING THIS KNIFE OUT AND STABBING HER.
>> NO. YES.
>> WHEN SHE CUT HIM THAT'S WHAT WHEN HE LOST IT AND STARTED STABBING HER?
>> THAT'S WHEN WE SAY THE FRENZY BEGAN AND INTENT IF YOU

WANT TO CALL THAT TO KILL HER
BEGINS.

>> THERE IS NOTHING IN TERMS OF
THIS AGGRAVATOR AND COMPARING
IT TO OTHER CASES, IF WE ACCEPT
THE STATE'S VIEW INTENT WAS TO
HAVE SEX WITH HER, THERE IS
NOTHING TO INDICATE WHAT HE
SAYS TO HIS JAILHOUSE COMPANION
OR ANYBODY OR ANYBODY, THAT HE,
THAT'S WHY I WAS ASKING ABOUT
THEIR PRIOR RELATIONSHIP.
THAT THERE WAS NO, THERE
WAS NO MOTIVATION THAT HE
WAS GOING TO KILL HER FOR HE
WAS UPSET ABOUT ANYTHING?

>> NO. I MEAN THERE'S NO --
MARIA RUIZ IS QUIET WOMAN.
SHE WOULD STAY IN HER ROOM AND
KNIT OR WHATEVER IT WAS.
FROM THE RECORD THAT WAS EXTENT
OF THE RELATIONSHIP.

SHE STAYED IN THE HOUSE
TOGETHER.

STAYED TO HERSELF.

THERE WAS IN INDICATION AS I
RECALL HAVING FRIENDLY OR
ADVERSE RELATIONSHIP AT ALL.

>> I MEAN ANY --

>> AS FAR AS I KNOW, YES.

>> IT IS ODD THAT THEY HAVE
BEEN IN THE HOUSE AND WE DON'T
KNOW IF THEY WERE FRIENDS?

DID THEY EAT TOGETHER?

NOTHING LIKE THAT?

>> YOU WOULD THINK SO BECAUSE
WHEN YOU HAVE AS MANY PEOPLE AS
YOU DO IN THAT HOUSE YOU WOULD
THINK THERE WOULD BE SOMETHING
BUT AS I RECALL THERE WAS
NOTHING IN THERE INDICATING ANY
SORT OF RELATIONSHIP EITHER FOR
OR AGAINST SEXUAL RELATIONSHIP.

>> IT WAS A TRAILER, CORRECT?

>> I THOUGHT IT WAS A TRAILER
TOO BUT I THINK IT IS A HOUSE.
BUT I -- IT WAS A HOUSE.

>> I THOUGHT I READ DIRECTLY IT
WAS A TRAILER.

>> IT MAY BE BECAUSE I THOUGHT
IT WAS A TRAILER TOO AND I WENT
BACKED AND CHECKED AND THERE
WAS TESTIMONY SAYING IT WAS A
HOUSE.

>> BUT YOU HAD THE DEFENDANT,

YOUR CLIENT, LIVING THERE.
YOU HAD HIS WIFE.
>> HIS WIFE AND TWO CHILDREN.
>> TWO CHILDREN LIVING THERE.
HIS UNCLE ED AND HIS FATHER AND
MARIA RUIZ.
>> HIS FATHER WAS IN JAIL AT
THE TIME?
>> AT THE TIME OF THE MURDER
HIS FATHER WAS IN THE HOSPITAL
AS I RECALL.
>> I THOUGHT IT WAS JAIL.
>> HE WASN'T THERE.
>> SO HOW MANY BEDROOMS ARE WE
TALKING ABOUT HERE?
>> I DON'T KNOW.
YOU KNOW, SOUNDS LIKE A CROWDED
HOUSE.
SHE WAS IN THE LIVING ROOM AT
THE TIME, WHEN HE ACCOSTED HER.
SO YEAH, DOESN'T SOUND LIKE VERY
BIG -- I MEAN --
>> DO YOU KNOW WHETHER RUIZ HAD
HER OWN ROOM?
>> NO. SHE WAS THE BOYFRIEND OF
KACZMAR'S FATHER.
SO I'M ASSUMING THEY SHARED A
ROOM.
>> BUT THAT THEY DON'T GO INTO
ANY RELATIONSHIP THERE -- CAN I
STOP REAL QUICK.
DO I HAVE NINE MINUTES LEFT ALL
TOGETHER OR OF MY 25 MINUTES?
OKAY. THANK YOU.
I'VE GOT CAUGHT ON THAT BEFORE.
BUT, ONE OF THE, WHAT I WOULD
LIKE TO DO IS MOVE TO THE
SECOND ISSUE.
>> REBUTTAL?
>> GOTCHA.
I WANT TO MAKE SURE, I HAVE
ONLY FOUR MINUTES LEFT TO
IMPRESS YOU HERE.
WHAT I DO WANT TO TALK TO YOU
ABOUT IS THE SECOND ISSUE DEALS
WITH A CONVERSATION THAT
HAPPENED AFTER KACZMAR HAD BEEN
ARRESTED.
HE TALKS TO THE JAILHOUSE
INFORMANT, SNITCH, WHATEVER YOU
WANT TO CALL IT, WILLIAM
FILENCIA.
MODLIN COOKS UP IDEA, HE WANTS
TO PLANT EVIDENCE IMPLICATING
MODLIN IN THE MURDER.

FILANCIA SAYS I CAN DO IT.
SOMEBODY THROUGH UNDERCOVER
COP, UNDERCOVER AGENT.
THROUGH FOUR CONVERSATIONS
AGREES FOR \$300 TO PLANT SOME
CLOTHES THAT WOULD SOMEHOW
IMPLICATE MODLIN IN THIS
MURDER.
KACZMAR TALKS TO HIS WIFE,
HONEY, I NEED FOR YOU TO GET
\$300 WE'LL GET SOME CLOTHES AND
THIS IS WHAT IS GOING TO
HAPPEN.
AT TRIAL THAT ESSENTIALLY COMES
OUT.
THE STATE CALLS MISS KACZMAR
TWICE AND ONE TIME SHE GOES
INTO THIS CONVERSATION SHE HAS
WITH HER HUSBAND.
DEFENSE OBJECTS TO IT, SAYING
THAT IS SPOUSAL PRIVILEGE.
STATE SAYS NO THAT IS NOT
SPOUSAL PRIVILEGE.
THEY'RE CONSPIRING TO DO ANOTHER
CRIMINAL ACT.
THE COURT SAYS, THAT'S RIGHT
AND GO AHEAD.
UNDER THE SPOUSAL PRIVILEGE
RULE CODIFIED BY 90.504 THERE
IS NO EXCEPTIONS TO SPOUSAL
IMMUNITY OR SPOUSAL PRIVILEGE.
> WAS THE CONTENTS OF THAT
CONVERSATION TESTIFIED TO BY
ANYONE ELSE?
>> THE UNDERCOVER AGENT WILL
SAY THAT AND I BELIEVE,
FILANCIA WILL SAY THAT AS WELL.
>> WHETHER SHE ACTUALLY
TESTIFIED TO THAT OR NOT, THE
SUBSTANCE OF WHAT WENT ON WOULD
HAVE COME INTO EVIDENCE ANYWAY?
>> WELL IT WOULD HAVE I SUPPOSE
BUT THE REAL QUESTION IS, HOW
MUCH CREDIBILITY DO WE GIVE
WILLIAM FILANCIA BECAUSE HE IS
THE ONE THAT PROVIDES DETAILS?
>> DIDN'T SHE ALSO TELL THE
UNDERCOVER AGENT THAT ALSO?
>> I BELIEVE SO.
WELL, OKAY, YOU'RE ASKING
HARMLESSNESS HERE.
THAT IS THE REAL ISSUE HERE
BECAUSE IT IS CLEARLY NOT -- SO
THE QUESTION, JUSTICE QUINCE,
IS IT HARMLESS?

THE QUESTION REALLY BECOMES,
CAN WE BELIEVE WILLIAM
FILANCIA? HE PROVIDES A LOT OF
DAMNING DETAILS OF MURDER.
HE CLAIMS WHILE IN JAIL KACZMAR
TELLS HIM THE DETAILS.
WHEN THE WIFE ESSENTIALLY
COMING IN BOLSTERING,
MR.^FILANCIA SAYS.
HIS CREDIBILITY IS ENHANCED.
THE QUESTION BECOMES IS IT ENHANCED
AND CAN THE COURT SAY THE
VIOLATION OF THE LAW IS
HARMLESS BEYOND A REASONABLE
DOUBT AND I DON'T THINK YOU CAN
BECAUSE OF FILANCIA'S ENHANCED
CREDIBILITY.

>> YOU SAID IT WAS HARMLESS BUT
IT IS NOT HARMLESS. IT IS A WAIVER.

>> WELL WHAT I'M SAYING IS YES,
WELL, FIRST OF ALL I'M SAYING
THE COURTERED IN ALLOWING THAT
TESTIMONY IN AS A WAIVER TO IT?

>> WHY IS IT NOT A WAIVER?

HE TOLD, HE HAD THE SAME
CONVERSATION WITH THE
UNDERCOVER AGENT THAT
HE HAD WITH HIS WIFE.

ONCE YOU, ONCE YOU LET THE CAT
OUT OF BAG IT'S A WAIVER.

>> THAT CERTAINLY WASN'T ARGUED
BELOW.

AND WHAT WE FIND IS THE COURT
WENT STRICTLY ON, ON THAT,
THAT IT WAS A EXCEPTION TO THE
HUSBAND-WIFE PRIVILEGE WHICH IS
NOT COVERED IN THE RULES.

NOW, LET ME, I SEE. I'VE JUST
ABOUT RUN OUT OF MY TIME.

I APPRECIATE THE TIME YOU HAVE.
THE OTHER SIX ISSUES ARE GOOD
ISSUES BUT I DON'T SIMPLY HAVE
ENOUGH TIME TO ARGUE THEM BUT I
WOULD APPRECIATE, I REALLY YOU
GIVE THEM FULL CONSIDERATION
AND IF YOU DO, I WOULD FEEL
CONFIDENT YOU WILL REVERSE
HIS JUDGMENT

AND SENTENCE REVERSED FOR A NEW
TRIAL OR AT LEAST A NEW
SENTENCINGS HEARING WITHOUT THE
CCP AGGRAVATOR.

THANK YOU VERY MUCH.

>> MAY IT PLEASE THE COURT.
ASSISTANT ATTORNEY GENERAL

CHARMAINE MILLSAPS REPRESENTING --

>> SPEAK UP PLEASE.

TRY TO SPEAK IN THE MIC.

>> SURE WILL. ALL RIGHT.

I'M GOING TO TALK ABOUT THE
SAME THREE ISSUES THAT THE
COURT TALKED ABOUT.

>> I ALSO, I WOULD ALSO LIKE
YOU TO ADDRESS THIS ISSUE OF
THE STATEMENT AND THE RULE OF
COMPLETENESS.

SO JUST DO THAT AFTERWARDS.

>> I'LL BE HAPPY TO GET TO THAT
AS WELL.

ALL RIGHT. STARTING WITH ISSUE
ONE, ATTEMPTED SEXUAL BATTERY,
YOUR HONOR, THE COURT HAS
REJECTED A VERY SIMILAR
ARGUMENT IN GUIDNAS.

YOU FOUND IT TO BE, AND I
QUOTE, WHOLLY WITHOUT MERIT AND
STRAINING CREDIBILITY.

YOUR HONOR, IF YOU WANT TO GET
LUCKY WITH A WOMAN THAT
INVOLVES TULIPS AND CHOCOLATES.
IT DOESN'T INVOLVE SHOVING
MATCHES.

THIS WAS NOT A SHOVING MATCH.
THERE WERE TWO OF THEM WHERE
SHE, AFTER THE FIRST SHOVING
MATCH SHE THEN FEELS THREATENED
ENOUGH SHE GOES AND LOCKS
HERSELF IN THE BATHROOM.

THIS IS THE HOUSE.

>> COULD YOU FILL IN ANYTHING
ABOUT, FROM THE RECORD, THE
RELATIONSHIP BETWEEN THE TWO OF
THEM, AGE OF THE VICTIM?
CERTAINLY MUST HAVE THAT IN THE
RECORD?

>> YOUR HONOR, ACTUALLY THE AGE
OF THE VICTIM, I HAVE THE
DEFENDANT'S AGE.

HE WAS 24 YEARS OLD AT THE TIME
OF THIS CRIME. NEARLY 25.

THIS WAS JUST A FEW DAYS BEFORE
HIS BIRTHDAY.

LET ME EXPLAIN WHO MOVED INTO
THIS HOUSE.

>> SO WE DON'T HAVE THE
VICTIM'S AGE?

>> I DON'T HAVE THE VICTIM'S
AGE.

I THINK SHE WAS IN HER 30s.

>> AGAIN, IN TERMS OF WHETHER

THERE WAS A RELATIONSHIP --
>> SO LET ME TELL YOU ABOUT
THAT, WHO MOVES IN WHERE, OKAY?
HE MOVES IN -- THIS CRIME HAPPENS
IN DECEMBER.
KACZMAR AND HIS WIFE AND TWO
CHILDREN MOVE IN IN OCTOBER.
SHE MOVES IN IN NOVEMBER.
AND THIS CRIME HAPPENS DECEMBER
13th, OKAY?
SO THEY HAVE NOT BEEN LIVING
TOGETHER IN THIS HOUSE FOR
LONG.
THAT'S BASICALLY A LITTLE OVER
A MONTH.
THEY, HE MOVES IN IN OCTOBER.
SHE MOVES IN IN NOVEMBER.
THIS CRIME HAPPENS IN DECEMBER.
OKAY?
THE, AND IT'S NOT CLEAR
WHETHER IT IS A HOUSE OR
TRAILER.
I COULDN'T SEE THAT.
I THINK IT'S A HOUSE.
THE FRONT BEDROOM, THE FRONT
DEN, THEY DESCRIBE IT AS A DEN.
SHE IS USING THAT AS HER
BEDROOM. THE DEFENDANT'S FATHER
IS IN JAIL.
THE DEFENDANT'S UNCLE IS IN THE
HOSPITAL. OKAY?
SO WE'VE GOT, WE'VE GOT AN
UNCLE WHO LIVES THERE.
THIS IS ACTUALLY THE
GRANDMOTHER'S HOUSE.
THEY DO REFER IT TO IT AS HOUSE
WHEN THEY SAY WHO IT BELONGS TO
BUT I DON'T KNOW -- PEOPLE CAN
MEAN THAT IN THE COLLOQUIAL
SENSE.
IT IS THE GRANDMOTHER'S HOUSE.
UNCLE ED LIVES THERE.
UNCLE ED LIVES THERE BUT IS IN
THE HOSPITAL.
THE FATHER LIVES THERE WITH HIS
GIRLFRIEND WHO IS THE VICTIM.
THE FATHER'S NOT THERE.
HE IS IN JAIL.
THE DEFENDANT LIVES THERE.
HE MOVED IN JUST IN OCTOBER
WITH HIS WIFE AND TWO CHILDREN.
OKAY?
>> SO GETTING, SO THE IDEA -- LET
ME JUST, ABOUT THE COMEMENT OF,
COMMENT OF, I HOPE I GET LUCKY.

GOT A 24-YEAR-OLD SAYING THAT WHICH SORT OF PUTS IT BACK TO WHAT AGE SOMEBODY IS, IS HE A BIG MAN?

>> HE IS 6'5" AND WEIGHS 280 POUNDS.

HE HAS 150 POUNDS AND A FOOT OF HEIGHT ON HER.

WE DO HAVE HER WEIGHT AND HEIGHT.

>> I WOULD IMAGINE, I WOULD IMAGINE IF SOMEBODY OF THAT SIZE IN A TRAILER WHERE NO ONE ELSE IS, WANTS TO GET LUCKY AND LUCKY TO HAVE SEX AND NOT, NOT BE CONSENSUAL, THAT WHAT WOULD BE, HAVE STOPPED HIM AFTER SHE OBVIOUSLY REFUSES, FROM RAPING HER?

>> SHE RUNS IN THE BATHROOM AND LOCKS HERSELF IN.

>> OKAY.

SO WHAT YOU'RE SAYING IS --

>> THERE IS A SHOVING MATCH.

>> THERE WASN'T OPPORTUNITY FOR HIM TO ACT ON HIS SEXUAL INTENTIONS?

>> SHE BASICALLY KEEPS TAKING HERSELF OUT OF THE EQUATION, OKAY?

FIRST THEY GET IN A SHOVING MATCH.

THERE ARE TWO SHOVING MATCHES HERE.

THEY GET IN A SHOVING MATCH.

SHE MANAGES TO PUSH HIM FAR ENOUGH AWAY TO RUN IN THE BATHROOM.

IT IS SOMEBODY ELSE'S HOUSE.

HE PROBABLY DOESN'T WANT TO KICK IN THE DOOR.

NOT THAT HE IS NOT CAPABLE OF IT BUT THAT DOESN'T REFLECT HIS INTENTION.

HE GOES OUTSIDE AND POUNDS AND POUNDS LOUDLY ENOUGH THAT WE HAVE A NEIGHBOR, AND THE NEIGHBOR'S GRANDSON TESTIFYING THAT THEY HEAR THIS.

>> WE KNOW ALL THOSE FACTS.

THE QUESTION IS, IN MY MIND, IT'S VERY, YOU KNOW, MAYBE WE HAVE UPHELD ATTEMPTED SEXUAL BATTERY WHERE THERE IS NO

CLOTHING THAT HAS BEEN TORN OR
SOMETHING THAT --
>> YES, YOU HAVE.
>> WE HAVE IN WHAT CASE.
>> IN GUDINAS.
IS WHAT I CITED IT.
>> WHAT WAS SAID IN GUDINAS.
WHAT WAS THE STATEMENT, WE
UPHOLD THE ATTEMPTED SEXUAL
BATTERY.
HE SCREAMS LIKE THE DEFENDANT
DOES HERE.
IN GUDINAS HE SAYS HE WANTS TO F
AND THEN YOU HAVE SLASHES AFTER
THAT.
THAT IS WHAT GUDINAS SAYS.
>> WHEN SOMEONE SAYS I HOPE TO
GET LUCKY, THEIR INTENTION IS
TO RAPE SOMEBODY?
>> GETTING LUCKY, YOU CAN SAY
YOU WANT TO GET LUCKY ALL YOU
WANT.
THAT IS NOT THE STATE'S THEORY
WHY THIS IS ATTEMPTED SEXUAL
BATTERY.
THIS IS PHYSICAL.
HE COMES IN THE DEN.
SHE, THEY HAVE THE DEN.
THEY HAVE A MATTRESS.
THAT'S WHERE HER BED IS, OKAY?
SO YES, THE HOUSE IS VERY
CROWDED, OKAY?
HE MAKES ADVANCES TO HER.
REMEMBER, THOSE ADVANCES, COULD
BE ADVANCES IS ALL IT IS.
COULD BE PHYSICAL TOUCHING.
SHE PUSHES HIM AWAY.
SHE RUNS AWAY, LOCKS HERSELF IN
THE BATHROOM.
>> WHEN YOU SAY ABOUT THE
ADVANCES IT COULD BE THAT HE
TOUCHED HER ON THE BREAST OR,
BUT THAT WOULD BE SPECULATION.
WE WON'T KNOW?
>> WE KNOW WHATEVER HE DID
CAUSED HER TO SHOVE HIM AND RUN
INTO THE BATHROOM.
>> WHAT THEY HAD FROM THE STATE'S
POINT OF VIEW, THERE IS NO
QUESTION THIS IS HAC. THERE IS
NO QUESTION HE DID THIS MURDER.
AT LEAST THAT IS NOT BEING
RAISED AS, THERE IS NO QUESTION
THAT THE WAY HE KILLED HER WAS
HAC.

SO WE'VE GOT THOSE, SO WE'VE GOT A FIRST-DEGREE MURDER CASE AND WE'VE GOT A CASE THAT HAS UNQUESTIONABLE HAC. I DON'T THINK IT IS BEING CONTESTED.

>> NOR THE PRIOR VIOLENT FELONY.

>> NOR THE PRIOR VIOLENT FELONY.

THE ISSUE IS NOT FOR THIS CASE BUT ALL CASES.

WE HAVE TO JUST MAKE SURE WE DON'T EXPAND THE LAW TO CAST, PUT SOMEBODY IN PRISON THAT ISN'T, WHERE THE CIRCUMSTANCES AREN'T, DON'T JUSTIFY IT FOR THE CRIME THEY HAVE BEEN CHARGED WITH.

IF YOU DON'T HAVE ATTEMPTED SEXUAL BATTERY, IS THERE ANOTHER FELONY, FOR FELONY MURDER THAT THE STATE HAD?

>> NO, YOUR HONOR.

WE WENT ON ATTEMPTED SEXUAL BATTERY BUT -- MORE HAPPENS HERE.

>> JUST HOLD, BUT YOU HAVE ALSO WENT ON PREMEDITATED FIRST-DEGREE MURDER?

>> YES, YOUR HONOR.

IT IS IN FACT A GENERAL --

>> IT WAS A GENERAL VERDICT?

>> IT WAS A GENERAL VERDICT.

>> SO CAN YOU EXPLAIN, WE MAY DISAGREE OR I MIGHT AGREE WITH YOU, I DON'T KNOW, HONESTLY ON THE FACTS.

I THINK I'M GOING TO LOOK AT IT, BUT IT'S HARMLESS, CORRECT?

>> ABSOLUTELY, YOUR HONOR.

IT IS ABSOLUTELY HARMLESS.

THIS IS A GRIFFIN, NOT A YATES CLAIM.

AND THEN I'M GOING TO TELL YOU YATES HAS BEEN OVERRULED ANYWAY BY THE UNITED STATES SUPREME COURT.

THEY'RE BOTH SUBJECT TO HARMLESS ERROR BUT STICKING WITH WHAT THIS IS, THE LAW HAS ALWAYS BEEN ACCORDING TO THIS COURT, WHEN IT IS A CLAIM OF LEGAL INSUFFICIENCY, THEN, FACTUAL INSUFFICIENCY, GRIFFIN APPLIES, AND YOU DO HARMLESS

ERROR ANALYSIS.

LET ME DO A HARMLESS ERROR ANALYSIS.

THE VICTIM HERE WAS STABBED 93 TIMES.

SOME OF THOSE WERE STABBED WHEN SHE WAS TRYING TO RUN AWAY WERE IN HER BACK.

FIVE OF THOSE STAB WOUNDS WERE IN HER BACK.

IT IS THE SLASHES TO HER THROAT THAT KILL HER.

MOST OF THE 93 STAB WOUNDS OCCUR FIRST.

THE REASON DR. GILES, THE MEDICAL EXAMINER SAID THAT.

IF YOU SLASH THE THROAT AT THE BEGINNING -- FIRST SHE DIED VERY QUICKLY BECAUSE THOSE WERE VERY FATAL WOUNDS.

BUT YOU WOULD ALSO BREATHE IN AIR -- ALSO BREATHE IN BLOOD.

THERE WAS NO BREATHING IN BLOOD.

HE TESTIFIED THAT THE FATAL WOUND TO HER NECK OCCURRED AT THE END OF THE 93.

SO CLEARLY THIS IS PREMEDITATION.

THIS IS CLEARLY A PREMEDITATED MURDER.

AND SO THEREFORE SINCE THIS IS A CLAIM OF FACTUAL INSUFFICIENCY, IT IS GRIFFIN, NOT YATES THAT APPLIES BUT THE UNITED STATES SUPREME COURT HAS RECEDED FROM EVEN YATES.

THEY'RE BOTH SUBJECT TO HARMLESS ERROR.

FACTUAL OR LEGAL INSUFFICIENCY. IT IS SUBJECT TO HARMLESS ERROR.

THIS IS CLEARLY HARMLESS IN THIS CASE.

>> WHEN YOU DO HARMLESS, FIRST OF ALL AS I ASKED MR. DAVIS, THERE ARE NO FACTS THAT WOULD NOT HAVE COME IN NO MATTER WHETHER THE STATE HAD CHARGED ATTEMPTED SEXUAL BATTERY THAT WENT TO THE JURY?

SO THERE IS NOTHING FACTUALLY THAT DOESN'T COME IN NO MATTER HOW THE CASE IS CHARGED.

>> AND YOUR HONOR, QUITE

FRANKLY, A LOT OF THIS WE WOULD ARGUE THIS IS MOTIVE. THAT YOU'RE GOING TO HAVE TO EXPLAIN WHY, WHY ARE THEY SHOVING EACH OTHER? WHY IS SHE LOCKING HERSELF IN A BATHROOM? WHY IS SHE GOING TO THE KITCHEN TO GET A KNIFE?

>> I AGREE.

MR.^DAVIS, HE AGREES TOO. SO THE HARMLESS ERROR IS IF THERE IS ENOUGH PREMEDITATED, THAT'S ALL YOU DO?

>> THAT'S ALL YOU DO.

>> OKAY.

>> YOU LOOK AT, AND THAT'S THE PROPER WAY TO DO HARMLESS. WHAT I'M ARGUING HERE YOU WOULD LOOK AT THE EVIDENCE THAT GOES TOWARD HIS INTENT --

>> BUT ISN'T THAT A DIFFERENT HARMLESS?

THAT'S WHY I WASN'T SURE I LIKE THE HARMLESS ERROR. HARMLESS ERROR AS FAR AS EVIDENCE THAT COMES IN WHETHER IT IS HARMLESS ERROR BEYOND A REASONABLE DOUBT. I DIDN'T THINK GRIFFIN WAS THAT TYPE OF HARMLESS ERROR. IT WAS REALLY THERE IS ENOUGH TO GO TO THE JURY ON THE FACTUAL ON THE --

>> I --

>> WE ASSUME THERE WAS ENOUGH, THEY FOUND BOTH, SOMETHING LIKE THAT. ISN'T THAT -- SO IT'S A DIFFERENT TYPE OF HARMLESS TEST THAN TEGILA?

>> I'M NOT, IT IS A DIFFERENT LOOK.

I'M NOT SURE IT IS DIFFERENT, WHAT YOU DO, IS THERE SUFFICIENT EVIDENCE ON THE ALTERNATIVE?

>> THAT IS NOT A HARMLESS ERROR FOR TEGILA. THAT IS TO SAY THAT THE JURY --

>> ASSUMPTION FIRST-DEGREE MURDER ANYWAY BECAUSE THERE IS SO MUCH EVIDENCE OF PREMEDITATION THAT IS HOW THAT KIND OF HARMLESS WORKS.

WHAT I'M SAYING THERE IS
MASSIVE AMOUNT OF
PREMEDITATION, THAT INCLUDES 93
STAB WOUNDS INCLUDING NINE IN
THE BACK WHERE SHE IS TRYING TO
RUN.

IT IS LAST ONES.

THE MEDICAL EXAMINER ALSO
DESCRIBES HER DEFENSIVE WOUNDS,
ONE OF WHICH, CUT THE WEB DOWN
ON HER LEFT HAND DOWN TO THE
CARPAL TUNNEL BONES.

THIS ATTACK, THIS WAS NOT
SHORT.

DON'T THINK HE SAID
SIGNIFICANT, I HAVE THE EXACT
QUOTE IN MY BRIEF.

THIS WAS NOT SHORT.

SO THAT IS VERY MUCH
PREMEDITATION.

THAT THE, THE TYPES OF WOUNDS
THE NUMBER, FINAL ONES BEING
FATAL ONES.

THEN I ALSO LIKE TO TALK NOT
JUST ABOUT ISSUE ONE BUT I
WOULD ALSO LIKE TO TALK ABOUT
ISSUE TWO.

THAT IS THE HUSBAND-WIFE
PRIVILEGE.

FIRST OF ALL, YOUR HONOR, I MAY
HAVE, MY BRIEF MAY BE A LITTLE
CONFUSING.

THERE'S NO JOINT CRIME
EXCEPTION IN FLORIDA.

I WAS JUST EXPLAINING THAT THAT
IS, EHRHARDT FOR EXAMPLE,
ADVOCATES IT BUT IT IS NOT IN
OUR STATUTES.

>> IT HAS BEEN USED IN FEDERAL
COURTS?

>> IT HAS BEEN USED IN FEDERAL
COURTS, YES, IT HAS.

BUT ONLY ONE DCA REACHED IT AND
IT IS NOT IN THE TEXT OF THE
STATUTE AND ONCE MORE I
LEARNED THAT THERE WERE
PROPOSALS IN FRONT OF THE
LEGISLATURE AND THEY WERE NOT
ADOPTED.

SO WE DON'T, I THINK IT IS
QUITE FAIR TO SAY THE LAW IN
FLORIDA IS NO THAT THERE IS NO,
WHILE IT MAY BE A GOOD POLICY
THE LAW IN FLORIDA THERE IS NO
JOINT CRIME EXCEPTION.

ALL RIGHT, SO, BUT I'D LIKE TO TALK ABOUT THE HUSBAND-WIFE PRIVILEGE.

FIRST OF ALL, NO MATTER WHAT VIEW YOU TAKE, FACTS AND ACTS ARE OUTSIDE THE PRIVILEGE.

THE FACT THAT SHE WENT, THE WIFE WENT TO McDONALD'S AND PAID THE UNDERCOVER, HIS NAME IS DETECTIVE HUMPHREYS.

SHE THOUGHT HE WAS CARLOS.

HE WAS AN UNDERCOVER.

SHE PAID HIM.

SHE MET HIM AT McDONALD'S AND SHE PAID HIM \$200.

AND THEN SHE MET HIM AGAIN IN THE PARKING LOT AND PAID HIM \$100.

EVERYTHING ABOUT WHAT SHE DID AND WHO SHE MET AND WHAT SHE GAVE TO WHOM AND WHOM SHE PAID, THOSE ARE FACTS AND ACTS.

THOSE ARE NOT COVERED BY PRIVILEGE.

SO THE OVERWHELMING MAJORITY OF THIS IN FACT HAS NEVER BEEN COVERED UNDER ANY VIEW OF HUSBAND-WIFE PRIVILEGE.

ONCE MORE, OPPOSING COUNSEL RELIES ON THE FACT THAT CELLMATE, BILL WILLIAMS, IS A THREE-TIME CONVICTED FELON SO IT IS NOT BELIEVEABLE BUT NOTICE HOW WHAT I SAY HAS ABSOLUTELY NOTHING TO DO WITH THE CELLMATE.

NOT ONLY DID THE UNDERCOVER COP TESTIFY HIMSELF BUT WE REPORTED THE DEFENDANT TALKING TO THE UNDERCOVER COP.

MY WIFE WILL GET TOGETHER \$300 AND PAY YOU FOR PLANTING THIS EVIDENCE.

>> ACTUALLY AS YOU SAY THAT, SO YOU'RE, THE ARGUMENT IS, IS IT HARMLESS OR WAIVED?

>> WELL, YOUR HONOR, I LOOKED AT IT MORE OF HARMLESS BUT TELL YOU THE TRUTH IT IS WAIVED.

>> HOW CAN IT BE A WAIVER?

BECAUSE NO ONE AGREED TO WAIVE THE WORDS SPOKEN BETWEEN THE MAN AND THE WOMAN.

SO THOSE EXTRANEIOUS FACTS DON'T GO TO WAIVING THE PRIVILEGE.

THOSE ARE EXTRANEIOUS FACTS THAT
COME INTO EVIDENCE ANYWAY?
THE WAIVER HAS TO BE VOLUNTARY
RELINQUISHMENT OF THE KNOWN
RIGHT THERE.

>> WELL I AGREE WITH THAT.
IN THAT VIEW, IT WOULD BE MORE
UNDER HARMLESS. UNDERSTAND --
>> SHE DID NOT MAKE THE
STATEMENT TO SOMEONE ELSE AND
THAT THAT OTHER PERSON COME IN,
RIGHT?

>> WELL, NO. THE DEFENDANT MADE
THE STATEMENT TO SOMEBODY ELSE.
>> WELL THAT COMES IN EVIDENCE.
BUT NOT HER STATEMENTS THOUGH.
>> WE HAVE A RECORDING FROM THE
DEFENDANT.

>> BUT NOT HER STATEMENTS.
THE QUESTION ON THE PRIVILEGE
IS WHETHER THE WIFE HAS TO
TESTIFY?

ISN'T THAT WHAT THIS IS ABOUT?

>> THE QUESTION ON THE
PRIVILEGE IS WHETHER THE
DEFENDANT'S WORDS COME IN AND
WHAT I'M TELLING YOU IS --

>> TO THE WIFE?

>> AND THOSE, THE EXACT
SUBSTANCE OF THAT WAS ON A
RECORDING THAT THE JURY HEARD
FROM CARLOS.

>> YOU'RE NOW GOING TO -- IF IT IS
ERROR IT'S HARMLESS IS WHAT I'M
UNDERSTANDING?

>> THAT IS HOW I LOOKED AT IT,
YOUR HONOR.

>> OKAY.

>> I LOOKED AT IT MORE AS
HARMLESS RATHER THAN WAIVER.

>> WE HAVE TO MAKE SURE ABOUT
THIS BECAUSE WE HAVE IMPORTANT
EVIDENTIARY ISSUES.

ON THE ISSUE OF THIS TAPE
RECORDING, AND I ADMITTEDLY HAVE
NOT GONE BACK AND LOOKED AT
CASES BUT I DON'T UNDERSTAND, I
UNDERSTAND THAT HERE IN TERMS
OF THE CONTEXT OF WHAT HE WAS
SAYING TO THIS OFFICER, WHO HE
THOUGHT WAS NOT THE OFFICER,
WAS HIS, HE WAS GOING TO HAVE
HIM COVER UP -- HE GOES, WELL,
YOU KNOW, I DIDN'T DO THIS BUT,
YOU KNOW, BECAUSE I'M INNOCENT

BUT I WANTED, I'M GOING TO
FRAME MY FRIEND ANYWAY.

>> WE'RE --

>> WE'RE MOVING TO
COMPLETENESS.

>> WE ARE.

I DON'T, THE ISSUE BEING THAT
IF HE IS NOT OFFERING THIS,
TESTIFYING AT TRIAL WHERE YOU
WOULD HAVE, OF COURSE, YOU WOULD
GET IMPEACHED WITH PRIOR
VIOLENT FELONIES.

IN TERMS OF GIVING THE WHOLE
CONTEXT OF WHAT HE WAS SAYING,
I MEAN AGAIN, TO ME, LIKE NO
ONE IS GOING TO BELIEVE THAT HE
DID IT EVEN THOUGH HE IS
INNOCENT.

SO IT IS KIND OF, IT MAY END UP
BEING BACK IN THE HARMLESS
CATEGORY BUT I DON'T
UNDERSTAND HOW SOMEONE GIVES UP
AND HAS TO HAVE THE OTHER
CRIMES COME IN WHEN THE WHOLE
STATEMENT IS, OTHER THAN THAT
IS COMING IN AND SO IT'S TAKING
IT OUT OF CONTEXT.

SO TELL ME WHERE THE RULE CAME
IN THAT SAYS THAT IF SOMEBODY
IN THE COURSE OF AN UNDERCOVER
DISCUSSION OR HE SAYS THIS TO
HIS JAILHOUSE MATE, COVER UP,
BUT I'M INNOCENT, THAT YOU ONLY
GET THE PART THAT'S BAD FOR HIM
BUT YOU DON'T GET THE PART
WHERE HE EXPLAINS THAT HE'S
INNOCENT?

>> REMEMBER, WE AGREED TO, WE
WERE QUITE WILLING TO, AS,
OPPOSING COUNSEL SAID, PLAY
EVERYTHING.

REMEMBER, WE SAID WE WOULD
BE HAPPY TO PLAY THIS --

>> BUT YOU SAID --

>> UNDER THE STATUTE AND LET ME
READ YOU THE STATUTE.

YOU'RE SAYING WHERE ARE WE
GETTING THIS.

90.806(1) IS WHERE I'M GETTING
THIS.

THIS IS THE STATUTE WHEN A HEARSAY
STATEMENT IS ADMITTED INTO
EVIDENCE IT MAY BE ATTACKED AS
NORMAL AND THAT MEANS BY
IMPEACHMENT.

YOUR HONOR, THAT IS IN OUR EVIDENCE CODE. NOT ONLY IS THERE A FIRST DCA CASE, OKAY, IT IS NOT ONLY DO THE TREATISES SUCH AS STEIN SAY HOW THAT WORKS BUT THERE'S A STATUTE.

>> BUT WHAT -- THIS COURT HASN'T INTERPRETED THAT STATUTE.

>> YOUR HONOR, THERE IS NO --, NO, YOU HAVE NOT DIRECTLY REACHED THIS, YOU HAVE REACHED IT AS CROSS-EXAMINATION, NOT AS, YOU'VE REACHED IT AS --

>> WHICH TO ME, AND I WILL LOOK AT IT, I JUST DID NOT UNDERSTAND IN ORDER WHERE THE STATE IS TRYING TO SHOW SOMETHING THAT IS HARMFUL FOR THE DEFENDANT, BUT THE CONTEXT OF THE WHOLE STATEMENT, LIKE IF HE, YOU KNOW, WHERE AT SOME POINT HE IS GOING WITH THIS BUT I'M INNOCENT, THAT, IT IS TAKEN OUT OF CONTEXT AND ONLY WAY THAT THE WHOLE CONTEXT COMES IN IF YOU IMPEACH HIM BY SHOWING HIS PRIOR CRIMES?

>> THAT'S WHAT THE STATUTE PROVIDES.

YOUR HONOR, HE DOES NOT GET TO PUT IN A STATEMENT AND THEN IN A HEARSAY STATEMENT DENYING IT AND THEN THAT WOULD LEAVE THE JURY WITHOUT ANY MEANS TO ASSESS THE CREDIBILITY OF THAT. THAT WOULD BE TESTIFYING WITHOUT CROSS. TESTIFYING WITHOUT IMPEACHMENT. THAT IS JUST, I --

>> I KNOW WE SAID THAT WHERE --

>> 806(1).

>> I KNOW WHERE THE DEFENDANT IS TRYING TO GET IN A STATEMENT SAY, IN A POLICE INTERROGATION THAT WAS, AND OF COURSE MANY TIMES IT DOES COME IN ACTUALLY. I MEAN, ALL THE TIMES THAT THERE ARE CONFESSIONS WHERE THEY KEEP ON FIRST DENYING -- SAYING THEY DID NOT, I'VE SEEN A SITUATION WHERE THIS COMES IN, AND YOU SEE THE STATE ALL WHAT

HAPPENED, THAT'S DIFFERENT?
>> VERY DIFFERENT.
THE STATE CAN NOT DO THIS, YOUR
HONOR.
DON'T MISUNDERSTAND MY POSITION.
IT'S WHEN THE DEFENDANT WANTS
IT IN.
THE STATE COULDN'T USE THE
RULE OF COMPLETENESS AS A MEANS
OF GETTING IN HIS PRIORS.
WHEN HE WANTS IT IN.
>> OKAY.
BUT CAN THE STATE GO IN A CASE
WHERE THERE'S A CONFESSION AND
TELL THE JUDGE, ALL WE'RE GOING
TO DO WE WANT TO JUST BRING IN
THE ULTIMATE CONFESSION?
WE'RE NOT GOING, WE'RE NOT
GOING TO DO THE FOUR, ALL THE
OTHER SITUATIONS WHERE THEY
WERE PROTESTING THEIR
INNOCENCE?
>> AND THEN IF THE DEFENDANT
WANTS THE WHOLE THING PLAYED --
>> THAT HAPPENS.
>> THAT'S WHEN IT WOULD HAPPEN.

WHEN THE DEFENDANT BRINGS IT
IN.
WHEN THE DEFENDANT INVOKES THE
RULE OF COMPLETENESS, THEN THIS
IS THE PRICE.
AND IT'S JUST BRUTALLY CLEAR
UNDER THIS STATUTE, THAT'S A
CORRECT INTERPRETATION AND NOT
ONLY OF THE FIRST DCA.
YOU HAVE NOT, YOU HAVE NOT DONE
IT IN RULE OF COMPLETENESS BUT
THE FIRST DCA HAS AND THE
TREATISES ARE ALL THERE.
NO MATTER HOW THE DEFENDANT
GETS HIS STATEMENT IN, FOR THE
JURY TO BE ABLE TO -- NOW, HE'S
THE ONE WHO HAS TO DO IT.
THEY CAN'T USE THIS AS SOME
LITTLE CUTE MECHANISM TO GET
HIS PRIORS IN WHEN HE DOESN'T
TESTIFY.
HE HAS TO INVOKE THE RULE OF
COMPLETENESS.
>> THE STATEMENT ITSELF IF IT
WERE TO COME IN THE WAY THE
STATE WANTS WOULD BE MISLEADING
EVEN THEN IT'S LIKE, THE JUDGE
HAS NO DISCRETION TO SAY, NO,

YOU CAN'T GET IN THAT PART
BECAUSE IT'S GOING TO TAKE IT
OUT OF CONTEXT?

IT HAS TO BE -- SEE, AND AGAIN,
I JUST WANT TO MAKE -- I
APPRECIATE AND YOU MAY BE 100%
RIGHT.

I'M JUST, I'M TRYING TO
UNDERSTAND THIS IN TERMS OF HOW
THE STATE COULD SKATE AROUND
SOMETHING THAT MIGHT BE
MARGINALLY HELPFUL.

AGAIN, I HONESTLY DON'T SEE HOW
THIS WOULD, IN THIS CASE WOULD
MAKE ANY DIFFERENCE.

>> TOTALLY HARMLESS IN THIS
CASE.

BUT LIKE YOU SAY, WE'RE
CONCERNED, THIS IS THE FLORIDA
SUPREME COURT.

YOU WRITE OPINIONS IN DEATH
PENALTY CASES.

THAT LAW GOVERNS NOT ONLY ALL
CAPITAL CASES BUT NONCAPITAL
CRIMINAL CASES.

I UNDERSTAND THAT.

YOUR HONOR, I THINK YOU COULD
PROBABLY GIVE ME A
HYPOTHETICAL WHERE I WOULD SAY
THAT, THAT THE RULE OF
COMPLETENESS COULD, UNDER THE
JUDGE'S DISCRETION, BE INVOKED
WITHOUT, WITHOUT THE
DEFENDANT'S PRIORS.

AND --

>> WHAT IF THE DEFENDANT --
>> PRIOR VIOLENT FELONIES, IT IS
ALL FOR CONVICTION HERE.

>> WHAT IF THE STATE HAS CASES
LIKE THIS AND IF THE DEFENDANT
MAKES MANY STATEMENTS AND THE
WHOLE THING IS PLAYED WITHOUT
ANY DISCUSSION ABOUT REDACTING
ANYTHING, THE STATE JUST PLAYS
THE WHOLE TAPE?

AND IN THERE HE SAYS HE'S
INNOCENT.

DOES THE STATE THEN ALSO GET AN
OPPORTUNITY TO COME IN AND SAY,
OKAY, THIS GUY HAS ALL THE
PRIORS AND ALL THIS WITHOUT THE
STATE TAKING THE STAND?

>> THAT'S WHAT I'M SAYING.

THE STATE CAN'T USE THIS IN A
CUTE WAY TO GET ALL HIS PRIORS

IN.

THAT IS YOUR HYPO THE STATE
BRINGS IT IN AND IMPEACHES HIM.
BECAUSE HE WANTS IT IN.
BECAUSE HE IS INVOKING THE RULE
OF COMPLETENESS.

>> AND YOU'RE SAYING IF THE
JUDGE MAKES A DECISION TO BE
COMPLETE, THAT IS TO NOT
MISLEAD THE JURY, IT NEEDS TO
COME IN IF THE STATES WANTS IT?
THEN ALSO THE DEFENDANT DOESN'T
GET THE, HAVE TO HAVE THE PRIOR
FELONIES COMING IN?

>> YES.

AND LET ME GIVE SOME CONTEXT
TO THAT.

>> IS THAT CORRECT?

>> WHERE I THINK IT WOULD WORK
AND WHERE IT WOULD NOT.
WHEN THE DEFENDANT WANTS TO
BRING IN EXCULPATORY STATEMENTS
IN LIKE THIS DEFENDANT DID, YES
WE GET TO DO THIS.

BUT LET'S SAY DEFENDANT SAID
SOMETHING THAT, MORE IN CONTEXT
BUT WASN'T AS EXCULPATORY.

DO JUDGES HAVE DISCRETION UNDER
FLORIDA'S EVIDENCE CODE TO SAY,
YES, IN THIS UNIQUE SITUATION
BECAUSE I THINK PULLING IT OUT,
I DON'T THINK, I THINK THE RULE
WILL ALWAYS APPLY.

THE RULE I'M ADVOCATING THAT IS
IT IS JUST THE STATUTE, WOULD
ALWAYS APPLY IF THE DEFENDANT
WANTED TO USE EXCULPATORY
STATEMENTS IN.

BUT OTHER STATEMENTS THAT PUT
IT IN CONTEXT I CAN'T THINK OF
AN EXAMPLE FOR YOU, YOUR HONOR,
BUT IN THOSE, THE TRIAL JUDGE
WOULD STILL HAVE DISCRETION.
THIS ISN'T AUTOMATIC, I DON'T
THINK THIS IS AUTOMATIC.

I THINK HE STILL, I THINK YOU
COULD PROBABLY, SAY THE RULE OF
COMPLETENESS REQUIRES IT
WITHOUT 80, WITHOUT 90.806(1)
BEING INVOKED.

>> BUT WHEN HE WANTS TO --

>> WHEN HE WANTS TO PUT IN
EXCULPATORY STATEMENT,
ABSOLUTELY.

>> WHAT ABOUT THE RULE WHERE

ALL THE STATE WANTS IS ALL PRIOR
BAD ACTS OF THE DEFENDANT? THEY
ALWAYS USE INEXTRICABLY
INTERTWINED IF THEY'RE
UNRELATED.

WHY WOULDN'T THE SAME KIND OF
CONCEPT IF THE STATEMENTS
WITHIN THAT ARE, THAT ARE THE,
THE STATE IS TRYING TO KEEP OUT
TO SANITIZE THE CONTEXT BECAUSE
IT'S, YOU KNOW, TO SHOW THE BAD
PART BUT NOT SHOW THE CONTEXT,
IF THE STATEMENTS MADE WERE
INEXTRICABLY INTERTWINED WITH
WHAT WAS SAID THAT, IT NEEDS TO
COME IN?

WE'VE GOT TO GIVE SOME GUIDANCE
TO TRIAL COURTS ON THIS.

WOULD THAT BE AN APPROPRIATE
TEST?

>> I'M SORRY, YOU LOST ME.

>> NO?

IF WHAT IS BEING SAID THE
STATEMENT, WHETHER IT'S A
CONFESSION, WHETHER IT'S,
WHATEVER, IF THE PART THAT THE
STATE IS TRYING TO KEEP OUT SO
THAT THEY CAN MAKE THE
ADMISSION AS BAD AS POSSIBLE,
IS, THE PART THAT THE STATE IS
ATTEMPTING TO EXCLUDE IS JUST,
INTERTWINED WITH WHAT IS BEING
SAID, THEN IT OUGHT TO COME IN.
IT'S NOT THAT THE DEFENDANT HAS
TO BE THE ONE TO SAY, TO BE
COMPLETE, THE REST HAS TO COME
IN.

THE STATE AND THE TRIAL JUDGE
HAVE A OBLIGATION TO MAKE SURE
THAT MISLEADING EVIDENCE
DOESN'T COME IN BEFORE THE
JURY.

>> INEXPLICABLE, YOUR HONOR,
IT IS HARD TO DO IN THE ASPECT.
INEXPLICABLY INTERTWINED,
WHAT YOU'RE SAYING YOU COULDN'T
PULL OUT THE STATEES -

>> AND I WOULD HAVE TO LOOK AT
THIS AGAIN, HOW IT WAS SAID.

>> NOW THE RULE, LET ME, IT IS
CALLED THE ATTACKING AND
SUPPORTING THE CREDIBILITY OF
THE DECLARANT STATUTE,
80.806(1).

THIS IS THE DEFAULT.

I'M NOT SAYING IT IS ALWAYS
INVOKED AND IT'S ALWAYS, THE
MINUTE YOU DO RULE OF
COMPLETENESS YOU ALWAYS DO THAT
BUT THAT'S THE DEFAULT.

IF THE DEFENDANT WANTS HIS
EXCULPATORY STATEMENTS IN, THE
DEFENDANT, THEN THIS RULE
APPLIES AND YES, HIS, AND THAT
IS THE PROBLEM HERE.
HIS FOUR PRIORS WOULD HAVE COME
IN.

NOT JUST HIS PRIOR ROBBERY WE
USED AS THE PRIOR VIOLENT
FELONY.

HE HAD MORE CONVICTIONS THAT
WERE NOT VIOLENT.
SO ALL FOUR OF THEM WOULD HAVE
COME IN.

>> COULD YOU DEAL WITH, COULD
YOU ADDRESS THE CCP?

AND ALSO, IN THE JUDGE'S
SENTENCING ORDER, APPARENTLY
HE, HE DIDN'T PUT THE RIGHT
STIPULATED AGGRAVATOR IN.

IN THE ORDER IT SAYS THE
CAPITAL FELONY WAS COMMITTED BY
A PERSON PREVIOUSLY CONVICTED
OF A FELONY AND UNDER THE
SENTENCE OF IMPRISONMENT,
COMMUNITY CONTROL AND FELONY
PROBATION.

WHEN ACTUALLY WHAT THE
STIPULATION WAS, THE SECOND ONE,
THE DEFENDANT WAS PREVIOUSLY
CONVICTED OF ANOTHER CAPITAL
FELONY OR OF A FELONY INVOLVING
THE USE OF THREAT OF VIOLENCE
TO THE PERSON.

HOW DO YOU, APPARENTLY THE
JUDGE PUT THE WRONG --

>> OKAY.

THE STIPULATION WAS TO A PRIOR
ROBBERY WHERE THE COPERPETRATOR
HAD --

>> I UNDERSTAND THAT.

BUT I'M SAYING WHAT HE
ANNOUNCED ON THE RECORD AND
WHAT HE PUT IN HIS, IN THE
SENTENCING ORDER WAS DIFFERENT
THAN THE STIPULATION.

>> WE, BUT, YOUR HONOR, I'M NOT
SURE, I MEAN THE DEFENDANT,
THERE IS NO DOUBT AND WE STIPULATE
HE HAD A PRIOR VIOLENT FELONY.

>> I'M TALKING ABOUT THE PUT
WRONG STIPULATION OR WRONG
AGGRAVATOR.
>> THERE IS NO STIPULATION THAT
PRIOR EXISTS.
>> THAT'S WHAT I'M SAYING.
>> IF YOU WANT TO CLEAN UP ON
APPEAL, QUITE FRANKLY, YOUR
HONOR, THESE CASES LAST 10 AND
20 YEARS.
WE DON'T WANT SOMETHING WRONG.
WE CAN CORRECT IT.
WE SENT IT BACK TO THE LET THE
JUDGE CORRECT IT.
>> NO, I DON'T THINK YOU NEED
TO DO THAT.
HEAR WHAT THE STIPULATION IS.
>> I UNDERSTAND.
THAT'S NOT WHAT HE SAID.
>> WE AGREE.
>> I'M THINKING WANT TO FIND
SOMETHING TO HANG MY HAT ON.
IF HE AGREED TO TWO, NOT ONE.
IF YOU PUT ONE IN, IS THAT
SUBSTITUTE.
>> AGREED?
>>> HE AGREED.
MAY HAVE BEEN FOR ONE OF THE
OTHER CRIMES.
THE DEFENDANT ACTUALLY HAD,
ONLY ONE VIOLENT, THEREFORE
ONLY ONE WE USED AS PRIOR
VIOLENT FELONY WAS THE ROBBERY
I WAS TELLING YOU ABOUT.
BUT THERE WERE OTHER CRIMES.
BURGLARY.
>> HOWEVER, USE OF VIOLENCE TO
THE PERSON.
HOW -- PERHAPS THE JUDGE PUT THE
WRONG --
>> OKAY.
THE STIPULATION WAS TO A PRIOR
ROBBERY WHERE THE CO-PERPETRATOR
HAD --
>> YEAH, I UNDERSTAND THAT.
I'M SAYING BUT WHAT HE ANNOUNCED
ON THE RECORD AND WHAT HE PUT IN
HIS, IN THE SENTENCING ORDER WAS
DIFFERENT THAN THE STIPULATION.
>> WELL, BUT, YOUR HONOR, I'M
NOT SURE, I MEAN, THE DEFENDANT
THERE'S NO DOUBT AND IT'S BEEN
STIPULATED TO THAT HE HAD A
PRIOR VIOLENT FELONY.
>> I UNDERSTAND THAT.

I'M SAYING WHAT EFFECT, IF ANY,
DOES THE FACT THAT HE PUT THE
WRONG STIPULATION, PUT THE
WRONG --
>> ABSOLUTELY NONE BECAUSE
THERE'S NO DISPUTE THAT THAT
PRIOR EXISTS.
NOW, IF YOU'RE SAYING YOU WANT
TO CLEAN IT UP ON APPEAL --
>> YEAH, THAT'S WHAT I'M SAYING.
>> BECAUSE THESE CASES, QUITE
FRANKLY, YOUR HONOR, THESE CASES
LAST 10 AND 20 YEARS.
WE DON'T WANT SOMETHING WRONG IF
I CAN CORRECT IT.
>> THAT'S MY POINT.
>> YES.
BUT IT'S A VERY EASY FIX.
>> CAN WE SEND IT BACK TO LET
THE JUDGE CORRECT IT?
>> NO, I DON'T THINK YOU NEED TO
DO IT.
I THINK YOU CAN SAY HERE'S THE
STIPULATION, REMEMBER WHAT A
STIPULATION IS.
>> I UNDERSTAND.
BUT THAT'S NOT WHAT HE'S -- I'M
JUST THINKING ABOUT, YOU KNOW,
THEY WANT TO FIND SOMETHING TO
HANG THE HAT ON, AND IF HE
AGREED TO TWO AND NOT THE ONE
AND YOU PUT ONE IN, IS THAT
SUBJECT TO ATTACK?
>> WELL, HE AGREED THAT HE'S
ROBBERY.
>> YEAH.
>> YEAH.
HE AGREED TO HIS ROBBERY, YOUR
HONOR.
>> BUT HE WASN'T ON PROBATION.
>> NO, YOUR HONOR, NOT THAT --
ACTUALLY, HE MAY HAVE BEEN FOR
ONE OF THE OTHER CRIMES.
THE DEFENDANT ACTUALLY HAS --
THE ONLY ONE THAT WAS VIOLENT
AND, THEREFORE, THE ONLY ONE
THAT WE USED AS A PRIOR VIOLENT
FELONY WAS THE ROBBERY THAT I
WAS TELLING YOU ABOUT.
BUT THERE WERE OTHER CRIMES;
BURGLARY, HE WAS ON SEX OFFENDER
PROBATION --
>> I UNDERSTAND THAT.
AND COULD YOU DEAL WITH CCP A
MINUTE?

>> OKAY.

LET ME DEAL WITH CCP.
FIRST OF ALL, YOUR HONOR, UNDER
THIS COURT'S CASE STRAIGHT TO
HARMLESS, IN McWATTERS YOU
STRUCK THE CCP, AND THEN YOU HAD
THREE AGGRAVATORS REMAINING.
THEY WERE THE EXACT SAME THREE
THAT ARE HERE; THE PRIOR VIOLENT
FELONY DURING A COURSE OF A SEX
ACT AND HAC.

>> SO YOU'RE SAYING IT'S
HARMLESS IF THERE ISN'T CCP.
>> UNDER THIS COURT -- THERE'S A
CASE DIRECTLY --
>> I UNDERSTAND.

I JUST WANT TO HEAR YOU SAY IT.
>> HOW DO WE KNOW IT'S HARMLESS
FOR THE JURY IF THE CCP
SHOULDN'T HAVE BEEN SUBMITTED TO
THE JURY?

>> WELL, YOUR HONOR, YOU ALWAYS
DO HARMLESS LIKE THAT.
THIS COURT ALWAYS LOOKS, ALWAYS
DOES HARMLESS LIKE THAT.
THEY NEVER SAY THAT KIND OF
LOGIC IS WE COULD NEVER DO
HARMLESS BECAUSE WE WOULDN'T
KNOW WHETHER IT WAS HARMLESS TO
A JURY, BUT WE DON'T DO THAT.
WE LOOK AT THE ACTUAL FACTS AND
DECIDE IT'S HARMLESS, AND WE DO
IT UP ON APPEAL.
SO WHETHER OR NOT IT WAS
SUBMITTED TO A JURY OR NOT DOES
NOT, I MEAN, IT'S STILL
HARMLESS.

AND THERE'S LITERALLY A CASE
DIRECTLY ON POINT.
McWATTERS IS DIRECTLY ON
POINT.

SO YOU STRIKE THE CCP, SAME
THREE REMAINING AGGRAVATORS.
THERE WAS NO -- THERE WERE FOUR
AGGRAVATORS HERE.
EVEN IF YOU STRIKE THE CCP,
THEY'RE THE THREE REMAINING.
THERE WAS NO STATUTORY
MITIGATION HERE JUST LIKE THERE
WAS NONE -- YOU REFERRED TO IT
AS MINIMAL MITIGATION IN THE
McWATTERS CASE, AND THEN THERE
WERE FOUR -- 14 NONSTATUTORY
THINGS LIKE KIND TO ANIMALS,
LOYAL FRIEND, GOOD, RELIABLE

BUSINESS PARTNER.
ALL ACCORDED SLIGHT WEIGHT.
SO THIS IS DIRECTLY, McWATTERS
IS DIRECTLY A --
>> WHERE WOULD WE BE IF IN
ADDITION TO CCP THAT IT WOULD BE
DETERMINED THAT THE, THERE WAS
NO ATTEMPTED SEXUAL BATTERY
UNDER THESE FACTS?
WHERE WOULD THAT THEN LEAVE US
UNDER YOUR ANALYSIS?
>> WELL, UM, I STILL THINK IT'S
HARMLESS.
YOU STILL HAVE TWO.
NO MENTAL -- AND, TWO, YOU HAVE
A PRIOR VIOLENT FELONY, AND YOU
HAVE HAC, AND THE HAC HERE IS
NOT ONLY NOT ATTACKED, IT'S
LITERALLY ROCK SOLID.
AND YOU HAVE NO STATUTORY MENTAL
MITIGATION, AND YOU HAVE ONLY
14, 14 -- BUT, NOW, SOME OF
THEM, SOME OF THEM, YOUR HONOR,
HAVE A LITTLE MORE SUBSTANCE TO
THEM LIKE RAISED BY AN ALCOHOLIC
FATHER.
BUT ALL OF THEM WERE ACCORDED
SLIGHT WEIGHT.
SO I STILL THINK IT'S HARMLESS.
AND, YOUR HONOR, YOU'RE GOING TO
HAVE TO BE SEEN FROM GADINIS.
THIS CASE HAS MORE OVERT ACTS
THAN THAT DID.
>> IT SEEMS TO ME THAT IT HAS TO
TURN ON THE VERBAL ASPECT
BECAUSE IF EVERY TIME SOMEONE
BEATS ON A CAR THAT TURNS INTO
AN ATTEMPTED SEXUAL BATTERY OR
EVERY TIME THERE IS SOME
PHYSICAL TOUCHING BY A MALE OF A
FEMALE, THEN ATTEMPTED SEXUAL
BATTERY HAS NO MEANING AT ALL.
>> WELL, NOW --
>> THAT JUST SEEMS PROBLEMATIC.
>> WE HAVE THE SCREAMING HERE
TOO.
BOTH NEIGHBORS TESTIFIED THAT
WHEN HE WENT OUTSIDE, THEY HEARD
POUNDING --
>> I HEARD POUNDING.
WHAT WAS SAID OUTSIDE THOUGH?
I DIDN'T HEAR ANYBODY MAKE
REFERENCE TO A SEXUAL ATTACK
OUTSIDE.
>> SHE SAID SHE HEARD THE

F-WORD.

IT WAS THE GRANDMOTHER --

>> WHAT IS IT JUST, QUICKLY,
BECAUSE YOU'RE PAST YOUR TIME.
WHAT WAS SAID OUTSIDE WHILE THE
BEATING ON THE WINDOW WAS GOING
ON?

>> SHE JUST SAID SCREAMING
OBSCENITIES, OKAY?

>> OKAY.

>> NOT SAYING "I'M GOING TO F
YOU"?

>> NO, JUST OBSCENITIES.
REMEMBER, SHE SAID OBSCENITIES,
AND SHE SAID CUSSING.

I MEAN, SHE DID USE THAT WORD.
YOUR HONOR, WE HAVE A LOT MORE.
TWO SHOVING MATCHES, LOCKING IN
THE BATHROOM, THAT'S A LOT MORE
THAN HAPPENED IN --

>> AGAIN, WITH THE ABSENCE OF
SOME SEXUAL OVERTONE, THAT WOULD
CONVERT EVERY PHYSICAL,
AGGRESSIVE SITUATION INTO AN
ATTEMPTED SEXUAL BATTERY.

>> MULTIPLE SHOVING MATCHES
INSTEAD OF --

>> YEAH, THAT'S WHAT I'M SAYING.

>> YEAH.

>> YOU SAY, WELL, THAT DOESN'T,
THAT'S NOT A THREAT.

"GET LUCKY," THAT'S NOT REALLY A
THREAT --

>> NO, NO, YOUR HONOR.

WE DON'T MIND A BIT ABOUT THE
"GET LUCKY."

>> WELL, YOU CHANGE WHEN IT
DOESN'T FILL YOUR NEEDS.

>> NO, NO, IT'S THE MEANS IN
WHICH HE WAS GETTING LUCKY.

I'M SAYING YOU CAN WANT TO GET
LUCKY ALL YOU WANT, AND AS LONG
AS THERE'S TULIPS AND CHOCOLATE
AND DINNER, THAT'S FINE.

BUT SHOVING MATCHES, LOCKING IN
THE BATHROOM --

>> WHEN COUPLED WITH THE PRIOR
STATEMENT IS WHAT IT NEEDS TO
BE.

YOU DON'T AGREE WITH THAT?

>> YES, YOUR HONOR --

>> NEEDS TO BE COUPLED WITH
SOMETHING WITH REFERENCE TO THE
SEXUAL ASPECT OF IT.

>> WAIT A MINUTE.

IF A DEFENDANT ATTACKS SOMEBODY
AND DIDN'T SAY A WORD AND SHE
MANAGES TO GET A WORD -- HE
NEVER SAYS A WORD, BUT HE RIPS
HER CLOTHES --

>> NO, THERE'S NO RIPPING OF
CLOTHES.

I THOUGHT YOU SAID --

>> THERE ISN'T, BUT YOU'RE
ASKING ME A HYPO ABOUT THERE
MUST BE WORDS, AND, NO, THERE
DOES NOT HAVE TO BE WORDS.

>> OKAY.

>> OKAY.

THANK YOU, AND I ASK YOU TO
CONFIRM THE JUDGMENT AND
SENTENCE, AND DEATH SENTENCE.

>> AS TO THE RULE OF
COMPLETENESS, IN THIS CASE AS I
RECALL READING FROM THE RECORD
WE DIDN'T EVEN GET TO THE
IMPEACHING WITH THE PRIOR
RECORD.

THE DEFENDANT SAYS, LOOK, YOU'RE
GOING TO PUT IN SOME OF IT,
YOU'VE GOT TO PUT IN ALL OF IT.
AND THAT WAS ESSENTIALLY HIS
ARGUMENT.

AND THAT'S AS FAR AS IT GOT.
WE NEVER GOT TO IMPEACHMENT OF
PRIOR CONVICTIONS OR STUFF LIKE
THAT.

SO THAT DISCUSSION, IN A SENSE,
IS IRRELEVANT.

THE QUESTION IS, SHOULD THE
COURT HAVE LET THIS EVIDENCE
COME IN.

AND, YES, I MEAN, HIS
EXCULPATORY STATEMENT, YES, I
THINK UNDER THE RULE OF
COMPLETENESS IT SHOULD HAVE COME
IN.

AND I THINK, JUSTICE PARIENTE,
YOU'VE PROBABLY SUMMARIZED MY
ARGUMENT --

>> WELL, I DON'T KNOW IF I'M
RIGHT.

>> YES, YOU'RE RIGHT.

[LAUGHTER]

>> WELL, YOU CAN SAY I'M RIGHT,
BUT MS. MILLSAPS IS SAYING THE
EVIDENCE CODE IS VERY --

>> WELL, WE DON'T GET TO THAT
POINT.

WE JUST -- THE ISSUE IS UNDER

90.108 IS, IN FAIRNESS --

>> ALL RIGHT.

BUT LET'S SAY IT SHOULD HAVE
COME IN, BUT I THOUGHT WHAT IT
WAS IS THEY SAID IT COULD COME
IN, BUT YOUR PRIOR CONVICTIONS
ARE GOING TO COME IN.

>> NO, I DON'T THINK THEY GOT
THAT FAR.

IT WAS JUST SIMPLY --

>> BUT LET ME, LET'S ASSUME THAT
THE DEFENDANT WANTED IT IN AND
EVERYONE AGREED THAT IT WAS
GOING TO BE AT THE COST OF THE
IMPEACHMENT WITH THE PRIOR
CONVICTIONS.

DO YOU AGREE THAT THE STATUTE
MANDATES THAT THAT IS HOW THIS
HAPPENS?

>> THAT THEY WERE THEN GIVEN TO
IMPEACH --

>> IF THE DEFENDANT IS THE ONE,
NOT THE STATE PUTTING IT IN, NOT
THE JUDGE SAYING IT'S NOT, YOU
CAN'T SEPARATE TO THE STATE SO
YOU'RE GOING TO EITHER HAVE TO
HAVE IT ALL IN OR NOT, BUT WHERE
THE DEFENDANT SAYS THEY'RE
LEAVING OUT PARTS THAT I THINK
SHOULD COME IN AND THE JUDGE AND
THE DEFENDANT SAYS, FINE, AND
THE STATES SAY FINE, BUT YOUR
PRIOR CONVICTIONS ARE GOING TO
COME IN.

DO YOU AGREE THAT'S WHAT THE
STATUTE SAYS?

>> FIRST OF ALL, WHICH STATUTE?
I GUESS WE'RE TALKING ABOUT --

>> THE STATUTE MS. MILLSAPS
REFERRED TO THAT --

>> NO, I DON'T THINK SO.

WHY SIMPLY STOP WITH
CONVICTIONS?

IF THERE'S ANYTHING ELSE --

>> BUT I'M NOT -- I THOUGHT --
OKAY.

I'LL LOOK AT THE STATUTE, AND
WE'LL FIGURE IT OUT.

WHAT ABOUT THE HARMLESS ERROR ON
IF WE STRIKE CCP AND ATTEMPTED
SEXUAL BATTERY?

>> BRING IT DOWN TO A
TWO-AGGRAVATOR CASE.

>> WE KNOW IT WOULD STILL BE,
THERE'S NO QUESTION THIS WOULD

STILL BE PROPORTIONATE.
THAT'S NOT HARMLESS.
YOU WOULD -- I MEAN, I WOULD SAY
I WILL JUST TELL YOU THAT EVEN
WITHOUT ATTEMPTED SEXUAL BATTERY
THAT THIS HAS HEIGHTENED HAC,
AND IT HAS PRIOR VIOLENT FELONY.
SO STILL PROPORTIONATE.
THE QUESTION IS, IS IT HARMLESS
IN TERMS OF WHETHER THE JUDGE OR
THE JURY WOULD STILL HAVE
RECOMMENDED AN IMPOSED DEATH?
>> ARE YOU SAYING UNDER THE
HARMLESS STATUTE THE ABSENCE OF
THOSE TWO -- THE PRESENCE OF
THOSE TWO AGGRAVATORS WOULD HAVE
NO IMPACT ON THE JURY'S
RECOMMENDATION?
>> I'M NOT SAYING, I'M ASKING IS
THAT HOW WE'VE ANALYZED IT IN
THE PAST.
>> WELL, IF YOU'RE GOING TO
FIND --
>> SHE SAYS McWATTERS IS
CONTROLLING.
>> WHAT YOU'RE SAYING IS YOU
SHOULD KNOCK OUT NOT ONLY CCP,
BUT THE ATTEMPTED SEXUAL --
>> THAT'S WHAT THE QUESTION WAS
TO MS. MILLSAPS.
I'M ASKING YOU.
>> I'M SAYING, NO, IT COULD NOT
BE HARMLESS BECAUSE YOU WOULD
NOT HAVE INSTRUCTED THE JURY,
THEY COULD HAVE FOUND THOSE
AGGRAVATORS, AND THEN YOU'RE
DOWN TO BASICALLY A
TWO-AGGRAVATOR CASE WITH SOME
MITIGATION.
>> DO YOU AGREE IT'S VERY WEAK
MITIGATION AS WE LOOK AT THESE
CASES?
>> WELL, IT DOESN'T HAVE THE
STATUTORY MENTAL MITIGATORS, AT
LEAST THE COURT DIDN'T FIND
THEM, BUT CERTAINLY THE JURY
COULD HAVE FOUND HE COMMITTED
THIS IN A FRENZY.
>> DID YOU HAVE MENTAL HEALTH
MITIGATION?
>> NO.
NO, THERE WAS NO MENTAL HEALTH
MITIGATION, BUT YOU DON'T
NECESSARILY NEED THE EXPERT.
THAT COULD HAVE BEEN ARGUED TO

THE JURY.
WHAT I'M SAYING HERE IS THAT,
NO, IT WOULD NOT HAVE BEEN
HARMLESS WITH THOSE TWO
AGGRAVATORS.
WITH THAT, I THINK YOU
UNDERSTAND WHERE WE SIT ON THIS
ARGUMENT.
APPRECIATE IT, THANK YOU VERY
MUCH.
>> WE THANK YOU BOTH FOR YOUR
ARGUMENTS.
THE COURT WILL NOW STAND IN
RECESS FOR TEN MINUTES.
>> ALL RISE.