

>> 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 AND
YOU SHALL BE HEARD.

GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA,
THIS HONORABLE COURT.

LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.

>> WELCOME TO THE FLORIDA
SUPREME COURT.

OUR FIRST CASE OF THE DAY IS
PHILLIPE VERSUS STATE OF
FLORIDA.

YOU MAY PROCEED.

>> GOOD MORNING.

I'M DAVID DAVIS. I REPRESENT
LESLY JEAN-PHILLIPPE IN A CASE
OUT OF JACKSONVILLE WHICH --

[INAUDIBLE]

WAS STABBED

DURING THE SUMMER OF 2009, WERE
HEADING TOWARDS THE DIVORCE.

HE WAS TRYING TO STOP THAT.

TALKED TO HIS WIFE.

FIRST OF ALL FELT LIKE HE
NEEDED TIME.

[INAUDIBLE]

HE HAD FLOWN BACK TO RHODE ISLAND
WHERE HE GREW UP.

AFTER A COUPLE DAYS HE CAME
BACK TO FLORIDA.

ON THE WAY BACK, CAUGHT HIS
WIFE AND SAID I WILL TALK
TO YOU LATER OR SAYING DON'T
TALK TO ME.

HE GOT INTO THE AIRPORT,
JACKSONVILLE AIRPORT ABOUT 7:00
THAT EVENING.

IMMEDIATELY BEGAN TRYING TO
CONTACT HIS WIFE ON HIS CELL
PHONE.

AND DURING THE COURSE OF A COUPLE OF HOURS HE TRIES ABOUT 70 TIMES, EITHER CONTACTING HER OR HIS SISTER-IN-LAW.

HIS WIFE, ELKIE, HAD ACTUALLY GONE TO THE AIRPORT A COUPLE HOURS AFTER HE HAD GOTTEN THERE AND PICKED UP HER SISTER. SHE HAD FLOWN IN FROM CALIFORNIA.

THEY HAVE GOING TO MIAMI FOR A BIRTHDAY PARTY THE NEXT DAY. IN ANY EVENT, SHE GOES, SHE AND ELKIE AND ROYA, THAT IS THE SISTER-IN-LAW, GO BACK TO THEIR APARTMENT.

ELKIE PUTS HER FIVE-YEAR SON INTO THE BATHTUB AND THEY TRY ON CLOTHES.

SOMETIME LATER THERE IS KNOCK ON THE DOOR.

SOMEBODY ANNOUNCES, DEFENDANT SAYS HE IS THE PIZZA GUY.

THEY ARE SUSPICIOUS.

THE SISTER-IN-LAW GETS THE KNIFE.

COMES TO THE DOOR, OPENS IT AND -- [INAUDIBLE]

JEAN-PHILLIPE COMES IN, HITS THE SISTER-IN-LAW IN THE HEAD ONE TIME AND WITH THE TIRE IRON.

TIRE IRON HE GOT FROM ELKIE'S CAR SOMETIME BEFORE HE GOT, GOT, KNOCKED ON THE DOOR.

IN ANY EVENT --

>> ARE YOU SAYING AS YOU GO THROUGH THE FACTS THAT JEAN-PHILIPPE HE WAS COMING IN TO RECONCILE WITH THE TIRE IRON?

I'M THINKING THAT YOU'RE, YOU'RE TRYING TO DISPUTE THE JUDGE'S FINDING OF CCP.

>> THAT'S CORRECT.

>> WHERE YOU'RE GOING ON THIS.

>> IF YOU DON'T MIND, IN FACT I WOULD LIKE TO TALK ABOUT THAT FIRST. THAT MIGHT BE BETTER. ANYWAY HE WAS FOUND GUILTY AND FOUND --

>> YOU WOULD AGREE THAT THE IDEA, AND I THINK THAT HE'S COMING IN WITH THE TIRE IRON AND THE WHOLE, WHOLE PATTERN OF HIS BEHAVIOR WAS NOT ONE WHERE HE HAD ANY HOPE OF RECONCILING AND THE REASONABLE, INFERENCES IS HE WAS COMING TO KILL HER?

>> WELL, NO.

AND I SAY THAT BECAUSE HE HAD BEEN TRYING TO TEXT HIS WIFE. IN FACT ONE OF THE MESSAGES THAT CAME IN, WAS OVER OBJECTION EVEN UP TO THE VERY END HE WAS SAYING WE CAN WORK THIS OUT, YOU KNOW. IF WE'RE GOING TO GET A DIVORCE DON'T --

>> MALE IN THE HOUSE?

>> NO. JUST THE 5-YEAR-OLD SON AND TWO WOMEN.

>> NO SELF-DEFENSE THEN, OKAY.

>> [INAUDIBLE]

>> IF HE WAS GOING THERE TO WORK THINGS OUT IN AN AMICABLE FASHION --

>> IF HE WAS GOING TO WORK THINGS OUT, WHY DID HE KILL HIS WIFE WITH A TIRE IRON?

IT WAS A KNIFE.

OBVIOUSLY --

>> MIGHT HAVE THOUGHT THE KNIFE WOULD WORK BETTER.

>> ALREADY GOT THE TIRE IRON, WHY NOT COMPLETE WHAT HE IS DOING WITH THE TIRE IRON.

BUT HE DOESN'T.

HE USES A KNIFE.

>> IT WASN'T A TIRE IRON.

ACTUALLY IT WAS THE JACK.

>> I THINK IT WAS TIRE IRON,
THE THING YOU CRANK IT UP.
SAYS A TIRE IRON.
>> ACTUALLY BROUGHT THE ACTUAL
JACK, NOT THE TIRE IRON.
>> THAT MAY HAVE BEEN.
SOMETHING CONNECTED WITH
CHANGING OF TIRE.
>> THAT TIRE JACK CAME OUT OF
THE VICTIM'S CAR?
>> THAT'S CORRECT.
>> NOT THE CAR HE WAS DRIVING.
>> APPARENTLY HE DIDN'T HAVE A
CAR BECAUSE HE HAD TO WAIT FOR
HER TO COME BACK FROM THE
AIRPORT TO GO GET THE TIRE
JACK, TIRE IRON, WHATEVER IT
WAS.
>> IF I GET THE STORY STRAIGHT
BECAUSE YOU'RE TALKING ABOUT
CCP, HE IS SITTING OUTSIDE
WAITING FOR THEM TO GET BACK.
THEY WALK IN, HER AND HER SISTER.
>> RIGHT.
>> THEN HE GOES, GETS A
CAR JACK.
>> RIGHT.
>> KNOCKS ON THE DOOR.
PIZZA MAN.
>> RIGHT.
>> AS SOON AS SHE OPENS THE
DOOR HE BANGS RIGHT IN THE HEAD
WITH A CAR JACK?
THAT IS THE SISTER.
>> SISTER-IN-LAW.
IT WAS HER SISTER.
>> RIGHT.
RIGHT IN THE HEAD AND THEN HE
WALKS IN.
AND STARTS STABBING HER 52, 53
TIMES.
HOW IS THAT NOT, I MEAN, SEEMS
TO ME, IF EVER THERE WAS A CASE
OF HEIGHTENED PREMEDITATION,
SOMEBODY LYING IN WAIT TO KILL
SOMEBODY.

>> IS HE LYING IN WAIT?
THE COURT SAID HE WAS BUT I
MEAN HE REALLY DIDN'T HAVE MUCH
CHOICE.

SHE WAS COMING BACK FROM THE
AIRPORT.

>> I MEAN REALLY --

>> WHAT ABOUT THE TIRE IRON
THOUGH?

THAT IS THE PROBLEM WE HAVE
HERE.

HE IS COMING THERE TO EXTEND AN
OLIVE BRANCH BUT WITH A TIRE
JACK.

I MEAN, YOU ASKED, WELL, WHY
DIDN'T HE HIT THE WIFE WITH IT?

BECAUSE IT WOULDN'T KILL.
DIDN'T KILL THE SISTER LAW, DID
IT?

>> NO. HE ONLY HIT HER ONCE.

>> DID IT KILL HER?

>> ONLY HIT HER ONCE.

THERE IS PROBLEM, LIKE YOU SAY,
JUSTICE CANADY, WHY BRING A TIRE
IRON IF YOU WANT TO EXTEND THE
OLIVE BRANCH.

IT WAS CLEAR THE WIFE WAS
TRYING TO PUT HIM OFF.

>> HERE'S THE DEAL.

YOU KNOW, THIS MIGHT BE A JURY
ARGUMENT THAT YOU COULD MAKE
BUT WE'RE HERE ON THE ISSUE OF
CCP IF THAT IS WHAT YOU'VE GONE
TO, SEE WHETHER HE IS, THERE IS
COMPETENT SUBSTANTIAL EVIDENCE
TO SUPPORT THE JUDGE'S FINDING.
IT IS TO ME, MOST RESPECTFULLY,
ILLOGICAL THAT HE WAS GOING
THERE TO TRY TO WORK THINGS
OUT BECAUSE, AS JUSTICE LABARGA
POINTED OUT, AS SOON AS THE
RUSE WAS USED TO GAIN ENTRY,
SOON AS HE COMES IN, WHAT IS
THE FIRST THING HE STARTS TO
DO?

HE STARTS BEATING --

>> THE SISTER-IN-LAW.

>> WELL, BECAUSE HE THOUGHT THE SISTER-IN-LAW, UNLESS YOU HAVE SOME OTHER FACTS THAT WOULD BE OVERWHELMINGLY PERSUASIVE I JUST DON'T SEE THIS IS NOT A CASE OF CCP.

>> WELL, I JUST CAN'T UNDERSTAND HOW A MAN IF HE IS GOING TO KILL HIS WIFE, GETS A TIRE JACK AND THEN SAYS, OH, WELL, I DON'T WANT, LET ME GO FIND A KNIFE.

THAT DOESN'T MAKE ANY SENSE.

>> NOT EVERY, OVER 15 YEARS, AND YOU HAVE BEEN DOING THIS LONGER THAN I'VE BEEN SITTING HERE, THERE ARE MANY OF THESE FIRST-DEGREE MURDER CASES WHERE THE DEFENDANT IS NOT 100% LOGICAL, YOU KNOW, MAYBE IF HE WAS A WEALTHY MAN HE WOULD HAVE HIRED A HIT PERSON AND HAD THEM GO IN AND KILL THE WIFE.

>> RIGHT.

>> BUT HE WAS CERTAINLY A PERSON THAT WAS EMOTIONALLY UPSET.

IF YOU'RE GOING TO SAY THEN THAT CCP DOESN'T APPLY BECAUSE OF THAT, YOU KNOW WE HAVE CASES THAT SAY JUST BECAUSE YOU'VE GOT EMOTIONAL ABOUT IT ISN'T ENOUGH TO DEFEAT CCP.

>> RIGHT.

>> SO THE FACT THAT IT ISN'T THE WAY SOMEONE ELSE MIGHT HAVE KILLED THEIR WIFE DOESN'T TAKE AWAY FROM THE FACT THIS IS CCP. IS IT CLASSIC?

NO, IT IS NOT CLASSIC BUT IT'S CERTAINLY VERY CONSISTENT WITH MANY CASES WHERE WE FOUND CCP.

>> LET'S LOOK AT IT THIS WAY THEN.

THE TIRE IRON, THE FACT, THERE ARE TWO FACTS I'M LOOKING AT THAT SHOW LACK OF CCP. WE'LL LOOK AT, THE EMOTIONAL. OKAY, THAT'S BESIDE THE POINT RIGHT NOW BUT TWO FACTS. ONE, HE DIDN'T STAB HER, DIDN'T KILL HER WITH THE TIRE IRON THAT HE BROUGHT IN. I USE THAT AS A FACT. HE DROPPED THAT. GOT THE KNIFE. WE'RE OBVIOUSLY DISPUTING THAT, OKAY? BUT THE ONE THING THAT REALLY BECOMES HARD TO RECONCILE IS WITH CCP WHY DID HE TRY TO COMMIT SUICIDE? THIS COURT IN HARDY SAID -- >> WAIT A MINUTE. THAT IS ANOTHER POINT. HE SAID HE INTENDED TO DO A MURDER-SUICIDE. SO HE DIDN'T GO IN THERE TO EXTEND AN OLIVE BRANCH. >> I DON'T RECALL HIM SAYING A MURDER-SUICIDE. MAY HAVE COME OUT LATER, THAT MAY HAVE BEEN SUGGESTED. I THINK THAT IS WHAT THE STATE -- >> DID YOU SAY HE WAS GOING TO COMMIT SUICIDE? >> I DON'T RECALL HIM SAYING -- >> DID YOU SAY THAT? I'M SORRY, NO. >> I'M SORRY, NO. >> DID HE SAY HE WOULD COMMIT SUICIDE? >> WHAT HE DOES AFTER HE KILLS HIS WIFE HE MAKES INEFFECTUAL EFFORTS TO STAB HIMSELF IN THE STOMACH. THEY ARE SUPERFICIAL WOUNDS. BUT CUTS HIMSELF FAIRLY SERIOUSLY IN THE NECK.

WHEN THE POLICE AND PARAMEDICS FIND HIM HE IS LAYING ON THE FLOOR UNCONSCIOUS IN SHOCK AND NOT BREATHE.

THERE IS, THIS COURT IN HARDY SAID THAT SHOWS A LACK OF CALM OR COOL REFLECTION.

I MEAN, OKAY, IF YOU CAN'T GET OVER THE FACT HE KILLED HIS WIFE WITH A KNIFE RATHER THAN A TIRE IRON HOW DO YOU GET OVER THE FACT HE TRIED TO COMMIT SUICIDE?

HOW DOES THIS COURT, SAID IN HARDY, THAT GOES RIGHT IN THE FACE OF BEING SOMETHING CALM AND REFLECTIVE.

>> HOW DOES THAT CHANGE WHAT HIS PLAN WAS BEFORE HE COMMITTED THE MURDER?

>> IT SHOWS A LACK OF, A LACK OF COOL REFLECTION.

THE GUY CLEARLY REALIZED WHAT HE HAD DONE.

JUSTICE PARIENTE SAID, WELL, WE REJECT CASES WITH EMOTIONAL FRENZY.

IF THAT IS ONLY THING YOU GOT PERHAPS BUT WHEN YOU HAVE AN EMOTIONAL FRENZY TO THE POINT WHERE THE GUY IS WILLING IS GOING TO TRY TO COMMIT SUICIDE AND MAKE A VERY SERIOUS EFFORT IN DOING IT I THINK THAT --

>> IF HIS PLAN WAS, I'M GOING TO KILL MY WIFE AND KILL MYSELF DOES THAT TAKE AWAY FROM THERE BEING CCP?

>> I --

>> WHAT IF SHE HAD ALZHEIMER'S AND HE CAME THERE, SAYS, BUT I CAN'T LIVE WITHOUT MY WIFE SO I'M GOING TO KILL MY WIFE.

>> RIGHT.

>> AND THEN I'M GOING TO KILL MYSELF.

ARE YOU SAYING THAT WOULDN'T BE CCP?

>> I THINK THAT PROBABLY COULD BUT WE HAVE NO EVIDENCE HE WAS INTENDING TO COMMIT SUICIDE BEFORE HE DID IT OR TRIED TO COMMIT SUICIDE BEFORE HE ACTUALLY DID IT.

WHAT OFTEN TIMES HAPPENS, THESE GUYS, THEN THEY, THEY, THE REMORSE SETS --

>> IF THAT PLAN IS FORMED AFTER HE HAD ALREADY KILLED THE WIFE, IT REALLY DOESN'T NEGATE ANY OF THE OTHER FACTORS THAT DEMONSTRATE THAT HE INTENDED AND PLANNED TO KILL HIS WIFE.

>> OH, I THINK IT DOES. THAT'S WHAT YOU SAID IN HARDY. YOU SAID IT DOESN'T SHOW COOL AND REFLECTIVE THOUGHT.

SO I SOMEHOW --

>> DOESN'T SHOW COOL AND REFLECTIVE THOUGHT ABOUT HIM ATTEMPTING TO COMMIT SUICIDE BUT IT DOESN'T IN MY MIND NEGATE WHAT HE DID PRIOR TO THAT.

>> WELL, THEN YOU HAVE TO REEXAMINE HARDY BECAUSE THAT'S WHAT YOU SAID.

>> HARDY, HOW OLD WAS MR. HARDY?

>> I DON'T REMEMBER.

>> TALKING ABOUT THE PALM BEACH COUNTY HARDY?

>> I THINK SO.

>> HE IS 17 YEARS OLD OR 18, HE WAS CONFRONTED BY A POLICE OFFICER. HE PANICKED?

>> RIGHT. RIGHT.

>> YOU'RE SAYING THAT, THE FACTS OF THAT ARE SOMEHOW SIMILAR TO THIS?

>> WELL, ATTEMPTED SUICIDE --

>> BUT AGAIN, YOU CAN'T PICK

OUT A FACT AND SAY, YOU DIDN'T SAY IT IN HARDY BECAUSE IN A CASE SOMEONE ATTEMPTS SUICIDE AFTER THEY KILL THE VICTIM THAT THERE CAN'T BE CCP?

YOU THINK HARDY STANDS FOR THAT PROPOSITION?

>> NOT AS A MATTER OF LAW YOU CAN'T BUT I THINK CERTAINLY VERY STRONG FACTORS SHOWING LACK OF COOL.

GIVE US THE FACTS OF HARDY, YOU'RE SAYING WE HAVE TO RECEDE FROM HARDY.

>> LIKE YOU SAY.

AS I RECALL, THE COPS HAVE STOPPED, I THINK THERE WAS SOME DRUG POSSIBILITIES THERE.

>> HE PANICKED.

>> HE PANICKED, SHOOTS A COP.

AFTERWARDS --

>> HOW, THAT IS NOT, THAT WOULDN'T BE CCP?

THAT IS WHY THE COURT MUST HAVE FOUND NO CCP.

>> WELL, NO. YOU SAID, I MEAN WHAT YOU SAID WAS, I MEAN IT'S NOT THE CRUCIAL, I MEAN IT IS NOT END ALL FACTOR BUT IT BECOMES A IMPORTANT FACTOR. WHETHER, IN HARDY OR IN THIS CASE IT SHOWS THAT THE MAN HAS AN EMOTIONAL FRENZY AND TO SHOW HOW SEVERE THAT EMOTIONAL FRENZY IS AFTERWARDS HE TRIES TO COMMIT SUICIDE.

>> WHAT I FIND INTERESTING THAT ALTHOUGH YOU ATTACK CCP YOU DON'T ATTACK THE LACK OF THE FINDING OF THE STATUTORY MITIGATORS.

NOT THAT THE TWO NECESSARILY MEAN THE SAME THING BUT WHAT IS, WHAT DID THE COURT FIND AS FAR AS THE MENTAL STATE?

DIDN'T THEY, DIDN'T THE COURT

WEIGH IT AND GIVE IT VERY SLIGHT WEIGHT?

>> YES.

>> WHICH IS ANOTHER, AND YOU HAVEN'T ATTACKED THAT SEPARATELY.

YOU HAVEN'T SAID THAT THE WEIGHING OF THAT MITIGATOR WAS ERROR.

SO WE REALLY HAVE A SENTENCING ORDER WHERE YOU'VE GOT ALL THESE STRONG FACTORS FOR CCP AND VERY WEAK MITIGATION.

>> WELL I DON'T THINK, I DON'T PARTICULARLY FACTS SUPPORTING CCP ARE PARTICULARLY STRONG. I SENSE A LITTLE BIT OF DISAGREEMENT HERE.

BUT I REALLY DON'T.

WHEN YOU LOOK AT WHAT THE JUDGE IS SAYING.

HE SNUCK BACK INTO FLORIDA.

HE SNUCK BACK INTO FLORIDA BECAUSE HIS WIFE WOULDN'T ANSWER THE PHONE.

HE SAYS HE GOT A WEAPON.

HE GOT A WEAPON THAT'S TRUE BUT IT WASN'T THE MURDER WEAPON.

I THINK THAT IS IMPORTANT.

>> EVEN IF WE WERE AS CAN SEE, DOESN'T LOOK LIKE WE WOULD, WOULD SAY THERE ISN'T CCP. YOU HAVE HAC.

>> WELL I ATTACKED IT, I SAID THE COURT GAVE IT IMPROPER WEIGHT.

NOT PARTICULARLY STRONG ARGUMENT.

>> THIS WOMAN, POOR VICTIM LAY DYING FOR QUITE SOME TIME.

>> RIGHT.

>> AND YOU'VE GOT THE ATTEMPTED MURDER --

>> AGGRAVATED BATTERY.

>> AGGRAVATED BATTERY OF HER SISTER.

SO THOSE ARE, VERY LITTLE
MITIGATION.

I WOULD BE HARD-PRESSED TO
THINK EVEN WITHOUT CCP THIS IS
A DEATH SENTENCE THAT IS NOT
PROPORTIONATE.

>> WELL, ONE REASON I RAISE THE
HAC TO SHOW THAT EVEN THOUGH
SHE WAS STABBED 52 TIMES THERE
IS MENTAL MITIGATION THERE I
ARGUE HE WAS IN A EMOTIONAL
FRENZY.

I REALIZE YOU SAID THAT ISN'T
ENOUGH TO DEFEAT CCP BUT
CERTAINLY THE MAN IS VERY
UPSET.

HE IS AS HIS WIFE IS SAY
CONTROLLING SORT OF PERSON.
HE BASICALLY LOST CONTROL OVER
THIS SITUATION.

BY THE TIME HE GOT BACK TO
JACKSONVILLE, ON A 26th OF
AUGUST, HIS WIFE IS ACCENTUATED
THAT BY REFUSING TO TALK WITH
HIM.

THAT IS WHAT HE WANTED TO DO.
AT LEAST, THAT IS WHAT
CONTROLLING PEOPLE WANT TO DO,
THEY WANT TO TALK THINGS OUT.
HIS WIFE --

>> NO, CONTROLLING PEOPLE DON'T
WANT TO TALK THINGS OUT.
CONTROLLING PEOPLE WANT TO
CONTROL.

WHEN HE REALIZED HE COULDN'T
CONTROL HIS WIFE, HE DECIDED
SHE WAS NOT GOING TO BE PART OF
THIS WORLD ANYMORE AND IT IS
THE BASEST OF MOTIVES ON A
PERSON THAT WAS EDUCATED -- DID
HE GO TO COLLEGE, THIS
DEFENDANT?

>> HE WAS IN COLLEGE, YES.

>> HE WAS IN COLLEGE.

HE WAS IN THE MILITARY.

>> HAD BEEN IN THE MILITARY.

>> HAD BEEN IN THE MILITARY AND HE DIDN'T LIKE THE FACT THAT HIS WIFE WAS GOING TO LEAVE HIM.

>> I THINK HE, BUT I DON'T THINK HE INFERRED FROM THAT HE WAS GOING TO KILL HER.

>> NOT THAT, NO.

WE WOULD HOPE NOT BECAUSE IN THIS STATE WE HAVE, YOU KNOW, A HIGH NUMBER OF SITUATIONS WHERE THERE'S A DIVORCE.

WE WOULD HOPE THAT -- ALL I WAS SAYING THAT, YOU WERE SAYING HE WAS CONTROLLING AND THEREFORE HE WANTED TO TALK TO HER.

TO ME THE FACT OF HIS PERSONALITY WOULD SUGGEST HE WAS NOT GROWING THERE TO TALK TO HER.

>> I MEAN HE HAD BEEN TRYING FOR THE HOURS UP IMMEDIATELY BEFORE THEY GOT HOME.

HE MADE 78 PLUS PHONE CALLS TO HER. UNSUCCESSFUL.

CONSTANTLY TRYING TO REACH HER AND HE CAN'T REACH HER.

AND SO THEY, AND SO, THAT IS, THAT'S WHAT REALLY HEIGHTENS THE ANGER THAT HE IS IN.

SO HE WALKS INTO THE HOUSE, I DON'T WANT TO USE THE WORD INSANE IN THE LEGAL SENSE BUT OBVIOUSLY VERY EMOTIONALLY UPSET AND NOT THINKING QUITE STRAIGHT.

SO HE GETS THE TIRE IRON.

FOR WHAT REASON, MAYBE IT IS TO KILL HER, MAYBE JUST SHOW OF FORCE BUT, THE FACT THAT HE DROPS IT AND THEN GOES FOR A KNIFE CLEARLY HAS NO CLUE WHAT IS GOING ON.

IF HE WANTS A TIRE IRON, HE HAS TO WAIT UNTIL HIS WIFE GETS HOME BEFORE HE CAN EVEN GET

THAT.

I DON'T SEE A LOT OF PLANNING GOING ON HERE, A LOT OF COOL REFLECTION.

THAT IS WHAT I WILL SAY WITH THE CCP ARGUMENT.

NOW ON THE GUILT PHASE I ARGUED THAT THESE PHONE CALLS THAT THE HUSBAND WAS TRYING TO MAKE, THERE WAS TWO THINGS.

PHONE CALLS PLUS THE ATTEMPTED TEXT MESSAGES, I'M SORRY, AND THEN THE EFFORT TO MAKE PHONE CALLS WHICH APPARENTLY THE PHONE COMPANY CAN RECORD.

AND THERE WAS MOTION TO EXCLUDE THAT AT TRIAL.

THE COURT DENIED IT.

THEN WHAT WE HAVE IS WHAT COMES IN FROM A EVIDENCE TECH, I'M SORRY, A LEGAL COMPLIANCE ANALYSIS FROM AT&T SUBMITTED AFFIDAVIT SAYING THESE ARE THE PHONE NUMBERS I DOWNLOADED THAT CAN BE IDENTIFIED WITH JEAN-PHILIPPE'S CELL PHONE.

THEN A POLICE OFFICER ALSO DOWNLOADED APPARENTLY, IN WORLD OF TEXTING WE GET TO THAT, PHILLIPE STORED ON HIS PHONE.

A DETECTIVE OR SERGEANT BOWERS WHO THEN TESTIFIED AT COURT ABOUT THESE MESSAGES.

WHAT WE'RE SAYING HERE THAT WAS INADMISSIBLE BECAUSE IT WAS HEARSAY.

NOT ONLY HEARSAY BUT HEARSAY WITHIN HEARSAY.

THIS COURT IN BROOKS SAID YOU CAN'T DO.

YOU CAN'T ALLOW, YOU'VE GOT TO BE ABLE TO, UNLESS THE PERSON DOWNLOADED THOSE MESSAGES WAS PERSONALLY AWARE OF THE INFORMATION YOU CAN'T LET IT IN AS A BUSINESS RECORD EXCEPTION.

SO WHAT WE'RE SAYING THE COURT
ERRED LETTING HEARSAY COME IN
AND THAT ERROR WAS DAMNING TO
THE DEFENDANT'S CASE AND HE
SHOULD GET A NEW TRIAL.
THANK YOU VERY MUCH.

>> STEPEHN WHITE, REPRESENTING THE
APPELLEE, ATTORNEY GENERAL'S
OFFICE.

CONSISTENT WITH COURT'S
QUESTIONS HE DIDN'T COME TO THE
DOOR WITH A DOZEN ROSES.

HE CAME THERE WITH HEAVY METAL
OBJECT, WHETHER WE CALL IT A
TIRE IRON OR TIRE JACK.

WE KNOW IT CAME FROM HER TRUNK.
WE KNOW THE SCREWS MATCHED WITH
THE HEAVY METAL INSTRUMENT WITH
THE SCREW HOLES IN THE TRUNK.
WE HAVE A HEAVY METAL OBJECT.
HE MISREPRESENTS HIMSELF AS
PIZZA MAN.

THE FIRST THING HE DOES IS
BASH ROYA IN
THE HEAD AND HER GLASSES FLY OFF
HER AND COWERS AND
STUMBLES INTO THE BATHROOM.
FROM THEN ON ALMOST
CONTINUOUSLY, THE SISTER HEARS
ELKIE, THE MURDER VICTIM,
SCREAMING.

AT SOME POINT ROYA RUNS OUT,
THE SISTER RUNS OUT OF THE
APARTMENT.

THE NEIGHBOR THOUGH, SHE'S,
NEXT DOOR.

SHE HEARS WHAT SHE
CHARACTERIZES HER, WORDS, A
BLOODCURDLING SCREAM NEXT DOOR.
SHE GOES BACK AND FORTH, BACK
AND FORTH BETWEEN TWO
APARTMENTS.

OF COURSE 911 IS CALLED AT SOME
POINT.

SHE TESTIFIES OVER AT
LEAST 15 MINUTES, HEARS

SCREAMS, ALL FEMALE SCREAMS
INSIDE THE APARTMENT.
DON'T OVERLOOK THE 52 TO 53 CUT
AND STAB WOUNDS OF THE VICTIM
ALSO.

LET'S NOT OVERLOOK THE SIX TO
SEVEN BLUNT INSTRUMENT WOUNDS
THOUGH.

>> I THINK THOUGH, THE PROBLEM,
WHEN YOU START TO GET THERE IS
FRENZIED STANDING WHICH --
STABBING WHICH SUPPORTS HAC, IF
YOU DON'T HAVE THE PART WHERE
HE LIES IN WAIT AND STARTS TO
DO SOMETHING IMMEDIATELY WHEN
HE COMES IN, THE FACT IT IS A
FRENZIED KILLING DOES NOT
SUPPORT YOUR ARGUMENT OF CCP I
AGREE WITH YOU ON EVERYTHING
ELSE.

THERE ARE TWO DIFFERENT TYPES
OF AGGRAVATORS AND, YOU KNOW,
I'VE ALWAYS THOUGHT THAT THE
PERSON WHO IS CALCULATED AND
BRINGS THE GUN AND ENDS UP WITH
THE CCP BUT NOT HAC BUT
SOMEBODY WHO IS NOT REALLY
THINKING OF HOW THEY'RE GOING
TO KILL SOMEBODY HAS HAC.
BUT I THINK AGAIN, SO YOU TALK
YOURSELF OUT OF CCP, THE FACT
IS THAT THE ACTIONS THAT HE
TOOK WAITING, TAKING THE IRON,
OR WHATEVER IT WAS --

>> GETTING IT OUT OF THE TRUNK.
>> TAKING IT IMMEDIATELY WHEN
THE DOOR OPENS.

I THINK THE FRENZIED KILLING
DOESN'T NECESSARILY SUPPORT CCP
IT SUPPORTS THE WEIGHING
HEAVILY OF HAC.

>> AND I DON'T WANT TO OF
COURSE TALK THE COURT OUT OF
THE EVIDENCE THAT SUPPORTS NOT
ONLY CCP AND HAC BUT THE
MEDICAL EXAMINER ALSO

TESTIFIED, HE EXPRESSLY SAID, DUE TO, THESE INJURIES, THESE WOUNDS ARE ALL OVER HER BODY FROM ALL DIRECTIONS INCLUDING A STAB WOUND TO THE HEAD. DEEP KNIFE WOUNDS TO EACH LUNGS, THE LIVER. EVERY ANGLE, THE MEDICAL EXAMINER EXPRESSLY SAID GIVEN THE NATURE OF THE WOUNDS THIS WAS NOT A FRENZIED KILLING. EXPRESSLY TESTIFIED AS AN EXPERT THIS WAS NOT A FRENZIED KILLING WHICH SUPPORTS THE COLD ELEMENT OF CCP. OF COURSE WE ALSO HAVE THE CALCULATED PART, GETTING THE TIRE IRON, ET CETERA, ET CETERA. AND AGAIN, LET'S DON'T OVERLOOK THE SIX TO SEVEN BLUNT FORCE INJURY WOUNDS. MY OPPOSING COUNSEL INDICATED HE DROPPED THE TIRE IRON RIGHT AWAY. MAYBE HE DID, MAYBE HE DIDN'T. THE BOTTOM LINE HE CAME IN THERE WITH ONE PURPOSE, AS SOON AS HE GOT RID OF THE ROYA AND THE SISTER, SHE COWERS IN THE BATHROOM, HE GOES AFTER THE ELKIE, THE MURDER VICTIM. GIVEN THE BLUNT FORCE INJURIES ON HER HE USED SOMETHING OTHER THAN KNIVES TO INJURE HER. I MEAN THERE IS REASONABLE INFERENCE HE USED THE TIRE IRON OR TIRE JACK ON HER AS WELL. HE USED SOMETHING BLUNT BECAUSE THE MEDICAL EXAMINER SAID THERE WERE SIX TO SEVEN BLUNT FORCE INJURIES ON HER AS WELL. BUT THE MEDICAL EXAMINER EXPRESSLY TESTIFIED THIS WAS NOT A FRENZIED KILLING AND THERE IS COMPETENT EVIDENCE TO

SUPPORT THAT OPINION IN TERMS OF THE KNIFE WOUNDS ALL OVER HER BODY INCLUDING A KNIFE WOUND TO THE TOP OF HER HEAD WHERE THE KNIFE PENETRATED THE OUTER LAYER OF THE SKULL.

BUT --

>> WE HAVE RULED BEFORE THAT THE DOMESTIC DISPUTE, THE EMOTIONS INVOLVED IN DOMESTIC DISPUTES ARE NOT AN EXCUSE, PRETTY MUCH FOR FRENZIED TYPE KILLING.

>> YES, SIR.

>> BUT YOU WOULD AGREE IN THESE DOMESTIC TYPE OF ISSUES THAT THERE IS AN ELEMENT OF FRENZY INVOLVED IN THEM WHETHER IT ARISES TO THE LEVEL OF SOMETHING LIKE THAT?

>> I CAN NOT AGREE WITH FRENZY. I WOULD AGREE WITH EMOTION, PROVIDING A MOTIVE WHICH PROVIDES THE BACKGROUND FOR THE CALCULATION AND THE COLDNESS.

>> I MEAN IT HAS TO BE SOME TYPE OF HIGHLY CHARGED EMOTIONS INVOLVED WHEN YOU REPEATEDLY STAB SOMEBODY 52 TIMES. YOU CAN JUST PICTURE IT HAPPENING, THE STABBING. IT HAS TO BE SOME KIND OF EMOTIONS INVOLVED, WHETHER THE IT RISES TO THE LEVEL OF FRENZY OR NOT, I DON'T KNOW.

>> AGAIN, DIFFERENCE BETWEEN FRENZY FOR PURPOSES OF THE LAW WITH DETERMINATION AND MOTIVE AND THE EMOTION THAT SUPPLIED THE MOTIVE, BUT OTHERWISE THE COURT WILL BE GOING BACK TO WHAT IT HAS REJECTED.

THAT IS ANY DOMESTIC EMOTIONAL KILLING WOULD BE AN ABSOLUTE DEFENSE, A PER SE DEFENSE TO CCP.

>> BUT I DON'T UNDERSTAND.
WHAT DID THE MEDICAL EXAMINER
USE TO SAY THIS WAS NOT A
FRENZY? BECAUSE I DON'T --
[INAUDIBLE]
STAB WOUNDS AND IN MULTIPLE
PLACES NECESSARILY NEGATES THE
FACT THAT IT COULD HAVE BEEN A
FRENZY?

>> WELL, FROM ALL DIFFERENT
ANGLES AND MULTIPLE DEFENSIVE
WOUNDS TOO, YOUR HONOR.
AND DON'T FORGET THE NEIGHBOR
WHO HEARD THE SCREAMS FOR 15
MINUTES.

THIS WAS A DETERMINED KILLING.
AND GETTING THE TIRE OUT,
HOW --

>> DID THE MEDICAL EXAMINER
ACTUALLY SAY ANYTHING THAT
SUPPORTED HIS OPINION THAT THIS
WAS NOT --

>> HE SAID DUE TO THE NATURE OF
THE WOUNDS FROM ALL ANGLES OVER
ALL PARTS OF HER BODY THAT, IN
HIS OPINION IT WAS NOT A FRENZY
KILLING.

BUT --

>> ARE YOU SAYING, YOU SEE
THIS, I MEAN AGAIN, IT SEEMS TO
ME YOU ARE REALLY FOCUSING ON
SOMETHING THAT IS NOT NECESSARY
FOR THE OUTCOME OF FINDING CCP
AND YOU THINK YOU'RE HEARING
SOME QUESTION ABOUT WHEN
SOMEBODY STABS SOMEONE 50 TIMES
THERE IS SOMETHING ELSE GOING
ON IN THEIR BIAN.

IT IS NOT LIKE HE TIED HER UP
AND THEN DECIDED HE IS GOING TO
TORTURE HER.

IT IS LIKE AS IF, IF HE IS CCP
HE WOULD HAVE GIVEN HER THE
ONE, YOU KNOW, A BLOW TO THE
NECK AND MADE SURE THAT SHE WAS
DEAD, BUT I THINK TO ME IT

SHOWS IT IS SUPPORTIVE OF THE KIND OF, WHAT JUSTICE LABARGA WAS SAYING, THE KIND OF EMOTION THAT WAS GOING ON BECAUSE SHE WAS DIVORCING HIM.

AND AGAIN, I THINK IT SHOWS HAC BUT I JUST DON'T THINK THAT IS YOUR STRONGEST ARGUMENT FOR CCP.

>> WELL, I THINK THE STRONGEST ARGUMENT FOR CCP THAT HE COLDLY, HE WASN'T IN A FRENZY WHEN HE UNSCREWED THE CARJACK.

>> I AGREE WITH YOU.

I THINK YOU GOT THERE.

>> THANK YOU, YOUR HONOR.

IN TERMS OF HARDY BY THE WAY, I THINK YOUR HONOR PUT A FINGER ON IT.

HARDY WAS A SPUR OF THE MOMENT KILLING.

THAT SPUR OF THE MOMENT AFTER THAT HE TRIED TO KILL HIMSELF. THIS WAS NOT A SPUR OF THE MOMENT.

>> TOTALLY DIFFERENT.

I JUST LOOKED IT UP.

I REMEMBER BECAUSE IT WAS A PALM BEACH COUNTY CASE AND TRAGEDY THAT OCCURRED THERE.

>> YES, MA'AM.

IN TERMS OF IF THERE ARE NO FURTHER QUESTIONS ON CCP, IN TERMS OF ISSUE ONE, HERE ARE THE TWO EXHIBITS.

WE'VE HAD CONFUSION BOTH IN THE TRIAL COURT AND ON APPEAL IN THE INITIAL BRIEF IN TERMS OF WHAT THE EXHIBITS WERE AND WHAT WAS RAISED REGARDING THE EXHIBITS.

HERE IS STATE'S EXHIBIT NUMBER 86.

THESE ARE THE AT&T LOGS OF CALLS, NO CONTENT.

JUST LOGS OF CALLS, NUMBER OF

CALLS, NUMBER CALLED FROM, TIME AND DATE. THAT'S IT.

THESE ARE BILLING RECORDS.

THIS STATE'S EXHIBIT 86 WAS PURSUANT TO THE AT&T CERTIFICATION

AS A BUSINESS RECORD.

AND IT'S A BILLING RECORD.

THIS IS CLEARLY NOT CRAWFORD.

CRAWFORD IS WHAT WAS RAISED BELOW BY THE WAY.

THE INITIAL BRIEF DOESN'T RAISE CRAWFORD OTHER THAN MENTIONS CONFRONTATION IN THE ISSUE STATEMENT.

IT SAYS DOWN BELOW COUNSEL RAISED CRAWFORD.

HE DOESN'T DEVELOP ANY, THERE IS NO DEVELOPED CRAWFORD ARGUMENT IN THE INITIAL BRIEF AT ALL.

THE OTHER EXHIBIT, THE TEXT MESSAGES, IT IS 87, THESE WERE DOWN, THESE WERE NOT PURSUANT TO THE AT&T CERTIFICATION, CONTRARY TO WHAT DEFENSE COUNSEL INITIALLY ARGUED BELOW. THESE WERE DOWNLOADED FROM THE DEFENDANT'S PHONE.

THE PHONE THAT HE HAD IN HIS PANTS POCKET WHEN RESCUE CAME. THESE WERE DOWNLOADED BY A FORENSIC OFFICER, AN OFFICER TRAINED IN FORENSICS AND CONSEQUENT DATE THEY SHOWED CONVERSATIONS BACK AND FORTH BETWEEN FRIEND AND ACQUAINTANCES.

CONSEQUENTLY NO CRAWFORD ISSUE.

IT IS NOT TESTIMONIAL.

THE TEXT MESSAGES SHOW INFORMATION HE WAS GETTING THAT MOTIVATED HIM TO DO WHAT HE DID.

THERE ARE A NUMBER OF PARTY ADMISSIONS IN THERE THAT HE

MADE IN TERMS OF MAKING THE STATEMENTS BUT THE BOTTOM LINE IS DOWN BELOW A CRAWFORD ISSUE WAS RAISED, NOT THE ISSUES THAT WERE RAISED IN THE INITIAL BRIEF, DEVELOPED IN THE INITIAL BRIEF.

A CRAWFORD ISSUE WAS RAISED ONLY AS TO WHAT WAS CERTIFIED IN THE AT&T RECORDS.

SINCE THESE, THE TEXT MESSAGES AND STATES EXHIBITS 87 WERE NOT, WERE NOT PART OF THE AT&T CERTIFICATION, THESE WEREN'T ATTACKED DOWN BELOW.

IN FACT WHEN THE PROSECUTOR MENTIONED, NO, I'M NOT GOING TO INTRODUCE THE TEXT MESSAGES PURSUANT TO THE AT&T CERTIFICATION, THIS WAS AFTER DEFENSE COUNSEL MADE THE STATEMENT THAT I THINK IS MENTIONED IN THE REPLY BRIEF THAT'S STILL CONFUSING THE TWO BUT PROSECUTOR CLARIFIED THAT. AND THEN RIGHT AFTER THAT THE JUDGE ASKED DEFENSE COUNSEL, DO YOU HAVE ANY OTHER ARGUMENTS? AND HE SAYS NO.

LATER ON THE DEFENSE COUNSEL WANTS MORE OF THE TEXT MESSAGES INCLUDED TO SHOW THE JURY, TO SHOW THE CONTEXT.

OF COURSE SOME OF THESE ARE ALSO FROM THE STATE'S PERSPECTIVE SHOW THE CONTEXT IN TERMS OF ONE MESSAGE RESPONDING TO THE OTHER.

>> SO THERE IS NO CRAWFORD OBJECTION ON THE PARTY ADMISSIONS COMING THROUGH ON THE TEXT MESSAGES?

>> ON THE TEXT MESSAGES, YES, YOUR HONOR.

THE CRAWFORD OBJECTION WAS AS TO WHATEVER WAS CERTIFIED BY

AT&T.

OF COURSE THE STATE'S ARGUMENT,
IF WE GO TO THE MERITS OF THE
AT&T RECORD IT IS CLEARLY A
ROUTINE BUSINESS RECORD.

IT IS A BILLING RECORD.

THERE WAS A CERTIFICATION BY
SOMEBODY WHO SWORE TO THAT FROM
AT&T.

IT'S A ROUTINE BILLING LOG OF
PHONE CALLS.

ALSO, --

>> HISTORICALLY IT IS A
BUSINESS EXCEPTION RECORD TO
HEARSAY.

WAS IT ONE OF THE ONES CITED BY
JUSTICE SCALIA IN CRAWFORD AS
BEING ONE OF THE INITIAL
EXCEPTIONS TO THE HEARSAY RULE?
I SEEM TO RECALL IT READING
SOMETHING IN CRAWFORD ABOUT
THAT.

>> I BELIEVE ONE OF THE
OPINIONS IN CRAWFORD DOES
EXPRESSLY STATE THAT ROUTINE
BILLING RECORDS, BUSINESS
RECORDS, ARE NOT TESTIMONIAL
FOR PURPOSES OF CRAWFORD.

>> RIGHT.

SAID IT WAS ONE OF THE INITIAL
EXCEPTIONS TO THE HEARSAY RULE
HISTORICALLY.

>> YES, YOUR HONOR.

IF YOU DO GO TO THE MERITS OF
CRAWFORD IT CLEARLY DOES,
NEITHER ONE OF THESE WAS
TESTIMONIAL.

>> WHAT WERE THE BILLING
RECORDS INTRODUCED FOR?

>> ACTUALLY, ROYA, THE SISTER,
TESTIFIED TO A LOT OF WHAT WAS
IN ALL OF THESE.

BUT IN TERMS OF THE AT&T
RECORDS THEY SHOWED 74 PHONE
CALLS THAT THE DEFENDANT MADE
THAT DAY TO, I'M NOT SURE IF IT

WAS JUST THE VICTIM ELKIE OR
ALSO INCLUDED HER SISTER.

>> IT WOULD SEEM TO ME FRANKLY
THIS WOULD SHOW THIS SORT OF
SAME IDEA THAT, IT WAS REALLY
HE WAS TRYING TO RECONCILE WITH
HER.

I DON'T REALLY, I'M NOT SURE
THAT THOSE RECORDS ARE
PARTICULARLY HARMFUL TO THE
DEFENDANT.

>> I WOULD TOTALLY AGREE, YOUR
HONOR.

IN FACT ROYA TESTIFIED, THE
SISTER TESTIFIED, OUR PHONES
WERE GOING OFF ALL THE TIMES AS
MY SISTER WAS BRINGING ME BACK
TO THE AIRPORT.

WE GOT BACK TO THE APARTMENT.
AT THAT POINT I TOLD HIM, DON'T
CALL ANYMORE.

THAT IS ONE OF THE BIG TEXT
MESSAGES IS.

WE HAVE HER TESTIFYING.

>> THE RECORDS WERE REALLY TO
SHOW THE NUMBER OF CALLS.
THE TEXT MESSAGE, HOW DID THOSE
COME IN?

WHAT WAS THE ACTUAL CONTENT OF
ANY TEXT MESSAGE?

>> BASICALLY ALONG THE SAME
LINE, YOUR HONOR, THAT HE WAS
PREOCCUPIED.

>> NO.

HOW DID THAT EXHIBIT, WAS THAT
CREATED OR, AT&T DOESN'T KEEP
YOUR TEXT MESSAGES?

>> THESE WERE NOT FROM AT&T,
NO, YOUR HONOR.

AGAIN THIS IS NOW WE'RE TALKING
ABOUT --

>> COMES OFF HER PHONE?

IS THAT HOW THEY GET THEM?

>> NO, YOUR HONOR, 87 THEN IS
NOT FROM AT&T.

THESE ARE THE TEXT MESSAGES.

>> WHAT I'M ASKING YOU IS WHERE DID THOSE, HOW WAS THAT CREATED?

>> THESE WERE DOWNLOADED FROM THE DEFENDANT'S PHONE.

>> OKAY.

>> CELL PHONE WHICH WAS IN HIS POCKET WHEN HE WAS IN THE CAB TOO, BY THE WAY, TAXICAB DRIVER, SAID THE DEFENDANT USE AD CELL PHONE ON THE WAY OVER THERE.

RESCUE GOT THIS PHONE, POLICE GOT THIS PHONE OUT OF HIS PANTS POCKET.

>> THEN THEY COULD HAVE, WHAT WAS THE OBJECTION TO THOSE?

>> AND IT IS HIS PHONE NUMBER. THAT IS AN EXCELLENT QUESTION DOWN BELOW BECAUSE --

>> I MEAN IT'S HIS PHONE AND IT HAS HIS TEXT, HE IS NOT SAYING SOMEONE ELSE, I DON'T THINK THE DEFENSE WAS SOMEBODY ELSE HAD TAKEN HIS PHONE AND, WAS THE ONE THAT TEXTED IT?

>> THERE IS NOT ONE INDICIA, NOTHING, NOT ONE SCINTILLA OF ANYTHING TO INDICATE -- DID NOT ACCURATELY REFLECT MESSAGES FROM HIS PHONE.

>> WHAT WERE THE TEXT MESSAGES SAYING?

PLEASE I WANT TO TALK WITH YOU?

>> SAME TYPE OF THING WE HAVE THROUGH OTHER EVIDENCE.

HE WAS PREOCCUPIED THROUGH HER LEAVING HIM.

>> I MAY BE WRONG ABOUT THIS, BUT IT SEEMS TO SUPPORT THE DEFENSE HE WAS TRYING TO RECONCILE WITH HER, SO.

>> JUST PART OF THE TOTAL PICTURE.

IT OVERLAPS VERY SUBSTANTIALY

WITH THE OTHER EVIDENCE IN THE CASE BECAUSE ROYA ALREADY TESTIFIED TO A LOT OF THIS TOUGH IN TERMS OF THE PHONE CALLS, CONVERSATIONS SHE HAD WITH HIM.

SO I MEAN, CLEARLY, I MEAN IF SOMEHOW IT WAS PRESERVED, AND IF SOMEHOW THE COURT FOUND IT WAS THERE, IT WAS CLEARLY HARMLESS FOR REASONS AMONG OTHERS YOUR HONOR HASN'T INDICATED.

IT OVERLAPS A LOT OF THE OTHER EVIDENCE.

>> SINCE TEXT MESSAGES MAY BECOME MORE AND MORE OF AN EVIDENTIARY ISSUE AND THEY MAY BE AN EVIDENTIARY ISSUE IN APPELLATE CASES, FROM THE POINT OF VIEW OF THE STATE IS THERE A BETTER WAY TO INTRODUCE TEXT MESSAGES THAN WHAT WAS DONE IN THIS CASE?

>> IN THIS PARTICULAR CASE, SINCE THE DEFENSE DIDN'T PURSUE IT, THE ACTUAL OFFICER WHO WAS TRAINED TO DOWNLOAD THE MESSAGES DIDN'T TESTIFY. THE DETECTIVE TESTIFIED AS TO --

>> THAT IS WHAT YOU WOULD DO?

>> I'M HALF SPECULATING HERE. I HAVE NO DOUBT A COMPETENT PROSECUTOR WHO WOULD PUT THE OFFICER ON WHO DOWNLOADED THEM. WOULD TESTIFY HOW HE DOWNLOADED THEM.

WHY HE DOES IT THIS WAY. HOW THEY ARE STORED IN THE PHONE, ET CETERA, ET CETERA, BASED ON HIS TRAINING.

IN THIS PARTICULAR CASE, THAT OFFICER, THAT FORENSIC OFFICER DID NOT TESTIFY.

THE DETECTIVE TESTIFIED, GAVE A

GLOSS BASICALLY IF YOU WOULD OF WHAT THAT TESTIMONY WOULD HAVE BEEN.

AND BUT AGAIN, THIS GOES BACK TO PRESERVATION.

THERE WAS NO REASON TO LAY THAT DETAILED A PREDICATE BECAUSE THE DEFENSE WASN'T CONTESTING IT AT THAT POINT.

THERE WAS A, AT ONE TIME THE DEFENSE COUNSEL SAID, WELL, SUBJECT TO THE OBJECTIONS THAT I'VE ALREADY MADE.

WELL WE GO BACK TO THE MOTION WHICH DIDN'T PRESERVE THIS AT ALL.

BUT FOR ALL THESE REASONS THE STATE WOULD REQUEST THAT THE COURT AFFIRM THE CONVICTION AND SENTENCE.

THANK YOU, YOUR HONOR.

>> THANK YOU.

REBUTTAL?

>> THE CRAWFORD ISSUES WAS, I DIDN'T DEVELOP IT PARTICULARLY STRONG IN THE INITIAL BRIEF. I CERTAINLY DID IN THE REPLY BRIEF.

WENT BACK AND SAID THE INFORMATION THAT WAS DOWNLOADED WAS TESTIMONIAL, IF YOU LOOK AT --

>> HOW COULD THAT POSSIBLY BE TESTIMONIAL?

I DO NOT UNDERSTAND THAT ARGUMENT, THAT THAT IS TESTIMONY?

>> SERGEANT BOWERS WHEN HE GOT ON THE STAND BROUGHT IN THESE RECORDS AND THEY WERE DEVELOPED SPECIFICALLY FOR THIS TRIAL.

>> BUT THE RECORDS WERE ON THE PHONE.

>> THAT'S TRUE.

THAT'S TRUE.

>> THAT WASN'T DEVELOPED FOR

THE TRIAL. THAT WAS --
>> THAT'S EXACTLY RIGHT.
AND THAT'S EXACTLY RIGHT.
BUT THE OFFICER WHO DOWNLOADED
THOSE, DOWNLOADED THOSE
SPECIFICALLY FOR TRIAL.
THE AT&T COMPLIANCE OFFICER
DOWNLOADED IT SPECIFICALLY FOR
TRIAL.

>> THAT MAKES IT TESTIMONIAL?
>> THE SUBSTANCE OF IT WAS NOT
TESTIMONIAL.

IF IT HAS ANY CASE THAT
SUPPORTS THAT PROPOSITION.
>> YES, DAVIS VERSUS WASHINGTON,
THAT TALKS ABOUT, LET ME SEE.
>> ONE THING IF YOU CREATE THE
SUBSTANCE OF SOMETHING WITH A
VIEW TOWARD TRIAL, LIKE A TEST
OR SOMETHING LIKE THAT, BUT
THIS IS SIMPLY GOING THROUGH A
MECHANICAL PROCESS OF
DOWNLOADING WHAT IS ALREADY
THERE AND IT IS NOT TESTIMONIAL.
>> I THINK IT IS. I THINK IT IS.
WE HAVE A LOT OF DISAGREEMENTS
HERE.

LOOK AT BELVIN, IT WAS A
BREATHALYZER TEST THERE, IT WAS
THE SAME THING.

THEY DEVELOPED THAT
BREATHALYZER TEST SPECIFICALLY
FOR TRIAL AND IT BECAME
TESTIMONIAL.

LOOK AT THE ANALYSIS.
>> BUT THEY DID, THEY DID THE
TEST FOR THAT PURPOSE.
THIS IS, THESE PHONE CALLS OR
TEXT MESSAGES WERE NOT MADE FOR
TRIAL.

>> THAT'S TRUE BUT WHEN THEY
DOWNLOADED IT THEY SPECIFICALLY
WENT IN TO DOWNLOAD THOSE TEXT
MESSAGES, ALL THOSE CALLS
SPECIFICALLY FOR TRIAL, THAT
MADE IT TESTIMONIAL.

>> HOW WOULD YOU, MR. DAVIS,
HOW WOULD YOU, WILL COME UP
TIME AND TIME AGAIN.
THE DEFENDANT'S TEXT MESSAGE,
YOU'RE NOT SAYING, YOU'RE
SAYING IT WASN'T HIS PHONE,
DIDN'T COME FROM HIS PHONE?
>> LET ME SAY THIS, IT WAS FROM
HIS PHONE.
THIS IS THE OTHER POINT.
THERE WAS NO EVIDENCE HE MADE
THOSE PHONE MESSAGES.
>> IS THAT THE OBJECTION, IS
THAT THE OBJECTION BELOW IT IS
NOT RELEVANT BECAUSE ALTHOUGH
IT WAS HIS PHONE SOMEBODY
ACTUALLY WAS, OTHER THAN HIM
WAS HARASSING HIS WIFE THAT
DAY?
>> NOT SOMEBODY ELSE.
I THINK STATE IS TO PROVE.
YOU HAVE TO SHOW THAT THIS
PHONE CALLS CAME, THAT
JEAN-PHILIPPE MADE THESE PHONE
CALLS.
ALL THEY DOWNLOADED IT CAME
FROM HIS PHONE.
>> DIDN'T THE, WASN'T THAT
CORROBORATION BY THE OFFICER
ANYWAY, THAT SHE VERIFIED THAT
HE WAS CALLING HER REPEATEDLY?
SO THOSE ARE THE CALLS.
ON THE TEXT MESSAGES, WHAT IS,
HOW WOULD A PROPER PREDICATE BE
LAID TO PUT TEXT MESSAGES,
WE'VE HAD VOICE MAILS, WE HAVE
A WAY THAT THOSE ARE DONE, AND
THERE'S PREDICATES ABOUT VOICE
MAILS OFF OF A PHONE, HOW WAS
THE TEXT MESSAGE, HOW WAS --
>> YOU'VE GOT TO SHOW THE
PERSON WHO MADE THAT TEXT
MESSAGE, GOT LITTLE THUMBS ON
THE THING IS THE SAME PERSON.
>> HOW WOULD YOU DO THAT OTHER
THAN IT IS HIS PHONE AND NO ONE

ELSE HAD POSSESSION OF THIS PHONE?

>> WE DON'T KNOW THAT.

THAT IS PART OF THE PREDICATE IS GOING TO BE.

>> THAT WAS THE OBJECTION BY THE DEFENDANT?

BECAUSE THAT'S WHAT YOU SAID IT IS CRAWFORD WHICH IS I CAN'T CROSS-EXAMINE THESE RECORDS. NOW YOU'RE SAYING NO, THE PREDICATE WAS NOT ESTABLISHED THAT IT WAS ACTUALLY HE THAT MADE THESE TEXT MESSAGES?

>> IT IS BOTH OF THEM.

FIRST OF ALL THEY NEVER ESTABLISHED THAT JEAN-PHILIPPE, EVEN THOUGH HIS PHONE AND THERE WAS CERTAINLY THE STRONG IMPLICATION THERE THAT IT WAS HIM, BUT THERE IS NO INDICATION THAT JEAN-PHILIPPE IS THE ACTUALLY THE ONE --

>> YOU COULD CERTAINLY ARGUE, THE DEFENSE COULD HAVE ARGUED THAT, THAT IT WASN'T JEAN-PHILIPPE MAKING THOSE CALLS BUT I WOULDN'T THINK THEY WANT TO BECAUSE LIKE I SAID TO MR. WHITE, IT SEEMS THAT FITS IN WITH THE DEFENSE OF A GUY THAT WAS DESPERATE TO WANT TO RECONCILE WITH HIS WIFE?

>> THE STATE USES IT TO SHOW HIS INTENT TO KILL.

THAT IS HOW, WHY IS THE STATE INTRODUCING IT?

THEY'RE NOT --

>> WHAT WAS IN THERE THAT SHOWED THAT?

>> WHAT WAS IN THERE WAS THE 74 CALLS WITHIN A PERIOD OF AN HOUR THAT SHOWS JUSTS AS, THAT IS HOW THE STATE USES IT.

>> BUT THAT IS THE OTHER EXHIBIT, RIGHT?

THAT IS NOT THE TEXT MESSAGES.
>> THE TEXT MESSAGES SHOW HIS
EFFORTS TO TRY TO TALK TO -- WE
CAN WORK THIS OUT.
PLEASE TALK TO ME.
ELKIE IS COMING BACK.
I WILL TALK TO YOU LATER.
MY BATTERY IS LOW.
SHOWS HIM WORKING HIMSELF UP.
MAYBE IT GOES TO CCP TO NEGATE
THAT BUT CERTAINLY THE GUILT
PHASE THE STATE IS USING IT --
>> WHAT WAS THE SPECIFIC
OBJECTION AT TRIAL?
>> THEY OBJECTED TO, FIRST OF
ALL, THEY OBJECTED TO THE AT&T
-- WELL THEY OBJECTED TO THOSE
RECORDS COMING IN AND THERE WAS
ALSO --
>> WHAT'S THE SPECIFIC
OBJECTION?
>> WELL THEY RAISED, THE WAY I
READ IT AND WHEN YOU READ THE
WRITTEN MOTION THEY WERE
OBJECTING TO ALL OF IT COMING
IN, THE TEXT AND PHONE NUMBERS.
>> ON WHAT GROUNDS?
>> THEY CITE BROOKS.
THAT WAS HEARSAY WITHIN
HEARSAY.
THEY WERE CITING CRAWFORD.
THAT IT WAS TESTIMONIAL
EVIDENCE.
THOSE ARE THE GROUNDS THEY
ARGUED.
>> BOTH OF THOSE?
>> RIGHT.
IT IS IN THE WRITTEN MOTION.
THEY CITE BROOKS AND CRAWFORD.
SO I MEAN, THEIR ARGUMENT IS
TESTIMONIAL.
JUSTICE CANADY, I THINK WHAT
YOU NEED TO DO, YOU GOT TO LOOK
AT THE BROOKS ISSUE THAT IT IS
HEARSAY WITHIN HEARSAY SORT OF
THING.

THAT IS WHERE IT BECOMES
TESTIMONIAL.

BY THE TIME IT COMES TO
SERGEANT BOWERS THAT
TESTIFIED IT BECOMES
TESTIMONIAL EVIDENCE.

>> I DON'T UNDERSTAND HOW IT IS
HEARSAY AT ALL.

>> WELL --

>> A TEXT MESSAGE, IT'S NOT
SHOWN, THEY'RE NOT INTRODUCED
TO SHOW THE TRUTH OF THE
SUBSTANCE OF THE STATEMENT.
THEY'RE JUST INTRODUCED TO SHOW
HE MADE THOSE TEXT MESSAGES.

>> BY THE TIME, --

>> ISN'T THERE A DIFFERENCE
THERE?

>> WELL, NO.

BY THE TIME THEY GET TO
SERGEANT BOWERS, SERGEANT
BOWERS IS TALKING, THIS IS THE
GUY WHO TESTIFIED AT TRIAL.
HE'S SAYING HERE'S THE TRUTH.
THAT THE DEFENDANT IS TRYING TO
REACH HIS WIFE AS SHOWN BY HIS
EFFORTS.

THAT BECOMES A HEARSAY WITHIN A
HEARSAY. OKAY?

>> THANK YOU VERY MUCH.

THANK YOU FOR YOUR ARGUMENTS.