>> ALL RISE.
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.
PLEASE BE SEATED.
>> I WANT TO RECOGNIZE THE
UNIVERSITY OF FLORIDA LAW CLASS
IN ATTENDANCE HERE TODAY.
WELCOME YOU AND APPRECIATE YOU
BEING HERE.
NEXT CASE FOR THE DAY IS DAUSCH
VERSUS STATE OF FLORIDA.
>> GOOD MORNING JUDGES, COUNSEL
MAY IT PLEASE THE COURT.
I'M NANCY RYAN REPRESENTING CARL
DAUSCH.
I RAISED A NUMBER OF ISSUES IN
THE BRIEF AND MAY NOT GET TO
THEM ALL TODAY. I DO NOT
MEAN TO DISPENSE ANYMORE OR
CONCEDE ON ANY OF THEM.
I JUST DON'T THINK I WILL GET TO
THEM ALL WITHIN THE HALF HOUR.
THIS WAS A COLD CASE.
THE PROOF HAD A SKETCHY QUALITY.
MY POSITION TODAY THAT PROOF IS
INSUFFICIENT TO SUPPORT A
FIRST-DEGREE MURDER CONVICTION BY
ANY LEGAL THEORY AVAILABLE TO
THE STATE AND ALSO THAT THAT
PROOF IS INSUFFICIENT TO SHOW
THAT THE DEFENDANT WAS IN FACT
THE PERPETRATOR OF THIS MURDER.
>> THE CASE HERE JUST, IF WE CAN
LAY OUT THE FACTS, THE DATE, THE
MURDER OCCURRED IN 1987 AM I
CORRECT?
>> CORRECT, YOUR HONOR.
>> YOUR CLIENT WAS NOT INDICTED
UNTIL 2006?
>> CORRECT.
>> THAT IS ABOUT WHAT, 19 YEARS?
>> CORRECT.
>> ALL RIGHT.
AND THE CHARGING DOCUMENT, HE IS
CHARGED WITH FIRST-DEGREE MURDER,
OBVIOUSLY.
IT SEEMS AS I'M READING THE
STATUTE AND THE INDICTMENT THAT
THE SUBSECTION THAT WOULD
INCLUDE THE INDICTMENT, FELONY

MURDER, WAS NOT INCLUDED IN THE
CHARGE, IS THAT CORRECT?
>> THAT'S CORRECT, YOUR HONOR.
IT IS MY, AM I INTERRUPTING YOU?
>> NO, TYPICALLY, WHEN YOU GET
INDICTMENT OF FIRST-DEGREE
MURDER WHERE THE STATE IS GOING
TO PROCEED UNDER EITHER THEORY
OF PREMEDITATION OR FELONY
MURDER USUALLY YOU HAVE
SUBSECTION 1 AND SUBSECTION 2.
SUBSECTION 1 WOULD BE
PREMEDITATED MURDER.
SUBSECTION 2 IS FELONY MURDER.
IN THIS CASE THE --
>> THAT IS CORRECT, YOUR HONOR.
IF THE STATE NAMES ONLY
PREMEDITATION AS THE SINGLE
THEORY MENTIONED IN THE
INDICTMENT IT IS STILL PERMITTED
TO OBTAIN A VERDICT ON A FELONY
MURDER THEORY.
>> I UNDERSTAND THAT.
BUT I THOUGHT IT WAS JUST
CURIOUS ABOUT THE CHARGING
DOCUMENT IN THIS CASE.
>> ALONG THOSE LINES THE STATE
DID NOT ONCE MENTION
PREMEDITATION IN ITS ARGUMENT TO
THE JURY IN THIS CASE.
THE STATE IN THE TRIAL, THE
GUILT PHASE RELIED SOLELY ON ITS
THEORY OF FELONY MURDER,
SPECIFICALLY AS TO THE ANAL RAPE
AND CHARGE ON COUNT 2.
>> WHAT WAS THE UNDERLYING FELONY
IN THE FELONY MURDER?.
>> I'M SORRY, YOUR HONOR?
>> WHAT WAS THE UNDERLYING
FELONY THE STATE RELIED ON?
>> IN THE GUILT PHASE IT RELIED
SOLELY ON THAT RAPE. ONCE THE
JURY ACQUITTED MR. DAUSCH OF THE
RAPE, AND FOUND HIM GUILTY OF THE
LESSER INCLUDED OFFENSE OF
AGGRAVATED BATTERY THE STATE
SWITCHED GEARS IN THE PENALTY
PHASE AND RELIED ON THE
AGGRAVATORS IT HAD ANNOUNCED IT
WAS GOING TO PROCEED ON. THOSE

MERGED AGGRAVATORS WERE,
COMMITTED IN THE COURSE OF A
ROBBERY AND COMMITTED FOR
PECUNIARY GAIN.
THE JUDGE FOUND AFTER THE
PENALTY PHASE THAT NEITHER OF
THOSE AGGRAVATORS HAD BEEN
PROVED BEYOND A REASONABLE
DOUBT.
>> I WAS GOING TO GET TO THAT A
LITTLE LATER.
LET ME TALK TO YOU ABOUT THAT
SINCE YOU RAISED IT AT THIS
POINT.
THE JUDGE, THE EVIDENCE THAT THE
JUDGE RELIED ON TO ALLOW THE
JURY TO HEAR THOSE TWO
AGGRAVATORS, PECUNIARY GAIN AND
THE ROBBERY, THE TOTALITY OF THE
EVIDENCE ON THAT WAS PRESENTED
DURING THE GUILT PHASE, CORRECT?
>> YES.
>> WAS THERE ANYTHING ADDITIONAL
PRESENTED DURING THE PENALTY
PHASE THAT WOULD HAVE ADDED TO
THE FACTS OF WHAT ROBBERY WAS
COMMITTED OR WHETHER --
>> NO, YOUR HONOR.
AS TO THE ROBBERY ALL THE STATE
RELIED ON THE FACT THE VICTIM'S
CAR WAS TAKEN FROM THE SCENE AND
THE WALLET, THE VICTIM'S WALLET WAS
JETTISONED EMPTY OF CASH IN
GEORGIA.
>> BUT THE JUDGE IN THIS CASE
CHARGED THE JURY WITH THOSE TWO
AGGRAVATORS BASED ON THE FACTS
THAT THE COURT HEARD DURING THE
GUILT PHASE.
>> THAT IS MY RECOLLECTION OF
THE RECORD, YES, YOUR HONOR.
>> SO THE JURY HEARD FOUR
AGGRAVATORS.
THIS IS IMPORTANT TO ME BECAUSE
THE DECISION BY THE JURY WAS
8-4.
AND IN LATER ON OF COURSE THE
JUDGE DECIDED THOSE TWO
AGGRAVATORS THAT HE CHARGED JURY
WITH WERE NOT PROVEN.

>> CORRECT.
>> BUT WHAT CHANGED?
>> WHAT CHANGED?
>> WHAT CHANGED?
I MEAN THE FACTS OF THE CASE
WERE PRESENTED DURING THE GUILT
PHASE AND THAT'S WHAT HE
DECIDED, BASED ON THAT HE
DECIDED TO GIVE THE JURY THOSE
TWO AGGRAVATORS.
AND THEN LATER ON HE DECIDED,
BASICALLY THAT THOSE TWO
AGGRAVATORS WERE NOT PROVEN.
SO WHAT CHANGED THE FACTS?
WHAT WAS PRESENTED DURING THE
PENALTY PHASE THAT MADE THE
JUDGE DECIDE THAT TWO
AGGRAVATORS WERE NOT PROVEN?
>> WELL HE FOUND THEY WERE NOT
PROVEN BEYOND A REASONABLE
DOUBT.
MY UNDERSTANDING IS THAT HE
THOUGHT THERE WAS ENOUGH THERE
TO CHARGE THEM BUT NOT ENOUGH TO
FIND THEM GUILTY.
I HAVE ARGUED IN THE BRIEFS THAT
IT WAS ERROR TO CHARGE ON THOSE
TWO.
>> RIGHT.
>> BECAUSE SOME OF JURORS MAY
HAVE RELIED ON THEM.
SOME OF THE JURORS MAY HAVE
RELIED ON THE OTHER TWO
AGGRAVATORS.
IF I MAY BACKTRACK TO THE GUILT
PHASE FOR A MOMENT, THE PROOF OF
IDENTITY WAS BASED ON THREE
CIRCUMSTANCES.
THE FIRST THAT THE DEFENDANT
ADMITTEDLY RODE IN THE VICTIM'S
CAR.
THAT WAS CONCEDED AT TRIAL.
HE MADE NO EFFORT TO CONCEAL HIS
PRESENCE IN THE CAR.
HIS PALM PRINTS ARE ON THE
PASSENGER DOOR.
THERE ARE TRACES, DNA FROM A
CIGARETTE BUTT.
ALL THOSE TRACES WERE FOUND ON,
I'M NOT SURE WHERE THE CIGARETTE

BUTT WAS FOUND BUT ALL THE
FINGERPRINTS OF HIS WERE FOUND
ON THE PASSENGER SIDE OF THE
CAR.
THEY PROCESSED THE STEERING
WHEEL AND GEAR SHIFT AND FROM
FINGERPRINTS OF THE DEFENDANT'S
WERE FOUND THERE.
SO YOU HAVE THE CIRCUMSTANCE OF
HIM RIDING IN THE CAR.
YOU'VE GOT THE CIRCUMSTANCE --
>> WHAT IS HIS STORY ABOUT WHEN
HE RODE IN THE CAR?
GEOGRAPHY OF THIS BEING IN NORTH
FLORIDA AND THEN DOWN THERE,
I'M, I DON'T FOLLOW ALL THAT.
>> THE DEFENDANT HAS MADE NO
STATEMENTS AT ANYTIME IN THIS
CASE.
HE, AT ALL TIMES SIMPLY ASSERTED
COMPLETE UNAWARENESS THAT ANY
MURDER TOOK PLACE.
HE LEFT, THE DEFENSE CASE
SHOWED --
>> WHAT WAS THE DEFENSE THEORY
HOW HE GOT IN THE CAR?
IS THERE A DEFENSE THEORY?
>> THE DEFENSE THEORY HE WENT
NORTH HITCHHIKING FROM THE REST
STOP ON I-10 WHICH IS THE FIRST
ONE EAST OF I-75.
THE DEFENDANT'S BROTHER
TESTIFIED IN THE GUILT PHASE
THAT HE AND HIS BROTHER AND A
ACCUMULATED FAMILY MEMBERS WERE
IN AN RV.
THEY LEFT FLAGLER BEACH IN THE
AFTERNOON AFTER DARK.
THEY DECIDED TO PULL OVER IN A
REST AREA ON I-10, NEAR I-75.
AND THAT THE DEFENDANT LEFT THEM
AFTER DARK TO HITCHHIKE BACK TO
INDIANA BECAUSE HE WANTED TO
SPEND HIS BIRTHDAY THE NEXT DAY
WITH HIS GIRLFRIEND.
>> LAKE PANASOFKEE IS NOT THERE,
BETWEEN THERE AND INDIANA.
>> IT IS NOWHERE THERE, YOUR
HONOR.
THE TESTIMONY IN THE GUILT PHASE

WAS ALSO THAT THE ONLY REST, THE
NEAREST REST STOP ON I-10 TO
I-75 IN 1987 WAS 50 SOMETHING
MILES EAST OF I-75.
LAKE PAN IS ADDITIONAL 115 MILES
SOUTH ON I-75.
>> BUT IN THE JURY'S THEORY
ISSUE WHERE THEY GOOGLED, THEY
FOUND THAT HE WAS WITH, THEY
LEFT THE FAMILY AT DISNEY WORLD.
>> YES, JUDGE.
THEY --
>> SO, I MEAN THIS WAS, I MEAN,
I WONDERED ABOUT THAT SAME
THING.
HOW WOULD YOU GO BACK SOUTH TO
GO BACK NORTH?
APPARENTLY FROM JURORS GOOGLING,
IMPERMISSIBLE GOOGLING THAT IS
WHAT THEY FOUND -- [INAUDIBLE]
>> JUDGE, THAT IS NOT MY
UNDERSTANDING THAT THE SENTINEL
HAD ITS FACTS RIGHT.
THE SENTINEL REPORTED THAT THE
DEFENDANT HAD BEEN DROPPED OFF
BY HIS FAMILY AFTER A FALLING OUT
AT DISNEY WORLD.
THERE WAS ABSOLUTELY NO PROOF TO
SUPPORT THAT.
THERE IS NOTHING IN THE RECORD
EXCEPT THE SENTINEL ARTICLE
WHICH WAS PUT IN THE RECORD
AFTER THE INQUIRY OF JURORS
CONDUCT.
>> JURY DID THAT DESCRIBING
PEOPLE TALKING ABOUT GOOGLE --
[INAUDIBLE]
THAT PUTS YOUR CLIENT NEAR
SUMTER COUNTY.
>> YES, JUDGE BUT THE JURY DID
NOT SEE THAT UNTIL AFTER THEY
RETURNED THEIR GUILT PHASE
VERDICT.
THERE IS NO PROOF WHATEVER TO
EVER PUT THE DEFENDANT IN HIS
LIFE WEST OF 75 OR SOUTH OF 10.
THE QUESTION IS NOT ONLY WHY,
WHY DID THAT BUT HOW HE DID IT
IN THE SHORT PERIOD OF TIME.
>> WELL, YOU KNOW, ALL OF THAT

IS TRUE BUT THE ANAL SWAB PUTS
HIM THERE -- [INAUDIBLE]
>> IN THE GUILT PHASE.
>> SEEMS LIKE THE ONE PIECE OF
EVIDENCE THAT IS, THAT IS
INCONSISTENT WITH YOUR, WITH THE
HYPOTHESIS OF INNOCENCE HERE IS
THE ANAL SWATCH.
THAT'S THE ONE.
WHY DOESN'T THAT GET, GET THE
STATE PAST THE JLA?
>> IT A WEAK MATCH.
THE STATE'S EXPERT, ONE EXPERT
DID FIND THE ANAL SWAB DID NOT
EXCLUDE THE DEFENDANT. SAYS HER
FIGURES SHOWED 1 IN 290
CAUCASIAN MALES COULD HAVE LEFT
THAT DNA.
SHE ADMITTED ON
CROSS-EXAMINATION THAT HER
MARGIN OF ERROR IS TENFOLD.
AND WHEN DEFENSE COUNSEL ASKED
HER, ARE YOU TELLING ME 1 OUT
OF 29 CAUCASIANS IF I HAD THEM
IN THIS ROOM ONE OF THEM COULD
HAVE LEFT THIS DNA?
SHE SAID YES, ABSOLUTELY.
>> WHY DOESN'T THAT GO TO THE
WEIGHT OF THE EVIDENCE?
WHY ISN'T THAT A JURY QUESTION
WHETHER IT IS ENOUGH OR NOT?
>> JUDGE, IT'S MY POSITION THAT
THE DNA MATCH ALONG WITH, ALONG
WITH THE FACT HE RODE IN THE CAR
AND ALONG WITH THE FACT THAT A
DISSIMILAR LOOKING BLOND MAN
ABANDONED THE CAR I SUBMIT THAT
IS NOT ENOUGH BECAUSE THE MATCH
IS SO WEAK.
IF YOU WON'T GO THAT FAR WITH ME
I SUBMIT MR. DAUSCH IS ENTITLED
TO NEW GUILT PHASE TRIAL BECAUSE
OF SERIOUS EVIDENTIARY ERRORS
THAT TOOK PLACE DURING THE
TRIAL.
>> WELL IF THE DESCRIPTION IS
ALLOWED, THAT THE POLICE OFFICER
PROVIDED, WHICH IS CHALLENGED, I
UNDERSTAND, BUT IT WAS OF A
BLOND, MORE OF A BLOND PERSON,

ABANDONING THE VEHICLE AND
THERE'S AN ATTEMPT TO GET A
PHOTOGRAPH IN.
SO I MEAN, IF YOU WOULD ADD
THAT, NOT A PASSENGER BUT
ABANDONING THE VEHICLE, WHERE
DOES THAT PLAY IN THIS ANALYSIS?
DNA, HUMAN, ON THE HUMAN ASPECT,
DNA ON THE CIGARETTES IN THE
VEHICLE.
IF WE TAKE THE EVIDENCE IN LIGHT
MOST FAVORABLE TO THE STATE,
SOMEONE WHO LOOKS LIKE THIS
PERSON ABANDONING THE VEHICLE,
THAT'S HOW THEY FOUND IT.
I'M NOT SURE WHETHER THERE WERE
FINGERPRINTS ON THE WALLET OR
WERE NOT.
>> THERE WERE NO PRINTS ON
WALLET.
WEATHERING HAD TAKEN PLACE.
>> WE'VE GOT THOSE AND CAN WE
GET THESE INTO THE ISSUES WE'RE
TALKING ABOUT?
WE SEEM TO BE SHOTGUNNING ALL
OVER THE PLACE WITHOUT DRAWING
OUR ATTENTION TO THE ISSUES WE
NEED TO COME IN ON WITH REGARD
TO WHETHER THERE'S ERROR IN THIS
CASE AND WHETHER THERE OUGHT TO
BE A NEW TRIAL.
>> YES, YOUR HONOR, THE ERROR
I'VE BEEN PURSUING MOTION FOR
JUDGMENT OF ACQUITTAL SHOULD
HAVE BEEN GRANTED.
BUT ADDITIONAL LEGAL ERRORS
WHICH CALL FOR A NEW GUILT PHASE
INCLUDE THE ERROR IN ALLOWING IN
EVIDENCE OF THE DEFENDANT'S
SUICIDE ATTEMPT ON THE EVE OF
HIS FIRST TRIAL DATE.
BUT THE EXCLUSION OVER DEFENSE
OBJECTION THE LETTER HE LEFT
WITH HIS BODY TO EXPLAIN
HIMSELF.
THE LETTER SHOWS THAT HE WAS NOT
EXHIBITING CONSCIOUSNESS OF
GUILT.
THE LETTER AFFIRMATIVELY SHOWS
SAYS HE WAS IN DESPAIR, LOOMING

PROSPECT OF UNFAIR CONVICTION.
HE SAYS --
>> THE JUDGE I THINK DID NOT
EXCLUDE THE LETTER.
HE BASICALLY SAID, YOU'RE GOING
TO HAVE TO LAY A FOUNDATION FOR
THE ADMISSION OF THE LETTER.
WHAT IS YOUR UNDERSTANDING OF
THE FOUNDATION TO GET THE
LETTER, SUICIDE NOTE IN?
>> JUDGE, MY RECOLLECTION THAT
THE LETTER WAS IN FACT EXCLUDED.
>> IF YOU HAVE TO TESTIFY,
CLIENT'S GOING TO HAVE TO
TESTIFY TO --
>> HE SAID IT WAS HEARSAY.
>> RIGHT.
>> HOW IS THAT LETTER GOING TO
BE CROSS-EXAMINED?
THE FOUNDATION THAT THE DEFENSE
RELIED ON WAS THE STATEMENT MADE
BY THE FIFTH DCA IN THE MEGGISON
CASE WHICH IS THAT SUCH
STATEMENTS OF INTENTION SHOULD
COME IN A CASE WHERE SUICIDE --
>> YOU'RE MISSING -- HIS POINT IS,
HOW?
YOU HAVE TO BE ABLE TO GET IT
BEFORE THE JURY AND YOU HAVE TO
LAY THE FOUNDATION.
FUNDAMENTAL.
YOU JUST DON'T LAY A LETTER INTO
EVIDENCE.
THAT'S THE QUESTION.
>> THAT WAS THE QUESTION THE
JUDGE HAD.
>> I DID MISUNDERSTAND.
>> WHAT IS THE FOUNDATION?
>> JUDGE, IT WAS FOUND BY A
GUARD IN CLOSE CONJUNCTION WITH
THE BODY.
IT WAS A LETTER TO COUNSEL THAT
SAID, FOUR THINGS.
IT SAID THE CHARGES HAVE BEEN
TRUMPED UP.
COUNSEL COULD HAVE DONE MORE.
I'M BEING LED TO THE SLAUGHTER
AND DO ONE LAST THING FOR ME,
SEND EXCULPATORY --
>> I UNDERSTAND THAT.

BUT HOW DOES THAT COME IN?
WHO, ANY LETTER THAT THE GUARD FIND COMES INTO EVIDENCE?
HOW IS THAT NOT HEARSAY?
>> IT IS, AN OUT OF COURT STATEMENT BY A DECLARANT.
SOME IN UNDER SECTION 90.803 SUB3, STATEMENT OF PRESENT INTENTION OFFERED LATER TO SHOW THE DEFENDANT, DECLARANT ACTED IN ACCORDANCE WITH THAT INTENTION.
THAT IS ANCIENT HEARSAY EXCEPTION THAT THE LEGISLATURE OF COURSE RECOGNIZES THIS COURT HAS OFTEN RECOGNIZED.
IN ADDITION THERE'S A CONSTITUTIONAL GROUND, CRANE VERSUS KENTUCKY, CASE I CITED IN THE BRIEFS SAID THAT WHEN A DEFENDANT TRIES TO EXPLAIN THE CIRCUMSTANCES OF HIS CONFESSION AND IS NOT ALLOWED TO DO SO THE COURT HAS ERRED BECAUSE THE DEFENDANT WAS NOT GIVEN THE, HIS ACCORDED HIS CONSTITUTIONAL GUARANTY OF THE RIGHT TO PRESENT A COMPLETE DEFENSE.
THE ONLY RELEVANCY OF THE SUICIDE ATTEMPT IT IS A TACIT CONFESSION AND THE, I'M GOING TO RELY ON CRANE VERSUS KENTUCKY AS GROUNDS TO DEFEND HIMSELF AGAINST THE INFERENCE WHICH THE STATE ARGUED TO THE JURY THAT THIS IS IN FACT CONSCIOUSNESS OF GUILT.
IN FAIRNESS, THIS COURT REQUIRES COMPLETE WRITINGS TO BE INTRODUCED, BY ANALOGY REQUIRES COMPLETE WRITINGS TO BE INTRODUCED TO EXPLAIN WHAT THE DECLARANT WAS STATING.
I SUBMIT TO YOU IN FAIRNESS THE LETTER SHOULD HAVE COME IN ON THE BASIS, ON THE BASIS OF THE PRISON GUARD, JAIL GUARD'S TESTIMONY THAT HE FOUND IT WITH THE BODY.
THE OTHER EVIDENTIARY ERROR THAT I THINK CALLS FOR A NEW TRIAL

IS THE INDIANA OFFICER'S
TESTIMONY THAT HE KNEW THE
DEFENDANT IN 1987.
THAT HE IS A BEAT OFFICER WITH
THREE DECADES OF EXPERIENCE AND
THAT, YES THE DEFENDANT WAS
BLOND IN 1987.
>> DID THE DEFENSE ATTORNEY NOT
KNOW THE REASON THAT THIS
WITNESS WAS BEING PRESENTED?
IS THIS LIKE A SANDBAG
BECAUSE IT SEEMS TO ME THAT THE
OBJECTION SHOULD HAVE BEEN MADE
LONG BEFORE IT WAS, IF THERE WAS
DISCOVERY AND SOMEONE HAD AN
IDEA WHY, WHY ARE YOU BRINGING
THIS POLICE OFFICER FROM
INDIANA?
>> THE OBJECTION CAME A LITTLE
LATE BUT THE JUDGE CONSIDERED IT
ON ITS MERITS AND SUSTAINED IT
AND IMMEDIATE --
>> HE HAD NO IDEA ABOUT THIS
WITNESS OR WHAT HE WAS GOING TO
TESTIFY OR ANYTHING IS THAT WHAT
YOU'RE TELLING US?
>> I, THAT I DON'T KNOW, YOUR
HONOR.
BUT IT IS MY POSITION THAT THE
POINT IS PRESERVED BECAUSE THE
MOTION FOR MISTRIAL WAS PROMPTLY
MADE AFTER THE RULING SUSTAINING
THE OBJECTION AND WAS DENIED AND
THEN THE MOTION FOR MISTRIAL WAS
RENEWED IN A MOTION FOR TIMELY
FILED MOTION FOR NEW TRIAL AND
THAT WAS DENIED.
SO THE ORDER, THE RULINGS WE'RE
APPEALING HERE ARE THE DENIAL
OF MOTION FOR MISTRIAL AND
MOTION FOR NEW TRIAL.
MY STANDARD, YOUR STANDARD OF
REVIEW HER IS ABUSE OF
DISCRETION.
IT IS OUR POSITION THAT THE
COURT ABUSED ITS DISCRETION
PARTICULARLY DENYING MOTION FOR
NEW TRIAL AFTER HE KNEW THE HARM
THAT WAS DONE BY THIS TESTIMONY,
WE KNOW THAT THE JURORS COULD

NOT WAIT TO GOOGLE THE DEFENDANT
AND FIND OUT JUST WHAT ALL THAT
WAS ABOUT.
>> JUST SO I UNDERSTAND YOU
CLEARLY, WHAT YOU'RE COMPLAINING
ABOUT IS THE FACT THAT THE
OFFICER WAS ALLOWED TO TESTIFY
AS TO THE YOUR CLIENT'S, THE WAY
HE LOOKED WAY BACK THEN?
OR I THOUGHT THAT YOUR CLAIM WAS
THAT WE HAD THIS POLICE OFFICER
COME UP AND THERE IS LIKE TWO
PAGES OF TRANSCRIPT WHERE HE
GOES ON AND ON ABOUT HIS
CREDENTIALS AS A POLICE OFFICER.
AND ALL THE TRAINING HE'S HAD,
ALL OF SUDDEN, BANG THERE'S A
QUESTION, DO YOU KNOW
MR. SO-AND-SO, DATE OF BIRTH,
WHATEVER IT WAS.
I JUST THOUGHT THAT GAVE THE
IMPRESSION TO THE JURY THAT THIS
DEFENDANT OBVIOUSLY HAS SOME
CONTACT WITH THIS OFFICER IN THE
PAST, LAW ENFORCEMENT TYPE OF
CONTACT, ARRESTED.
I THOUGHT THAT WAS YOUR CLAIM?
>> THAT IS THE HARM, NOT -- IT IS
RELEVANT FOR A WITNESS FROM
INDIANA FROM 1987 TO SAY, YES,
THAT IS WHAT THE DEFENDANT
LOOKED LIKE THEN.
IT IS HIS PROFESSION THAT IS
IRRELEVANT. UNLESS HE IS A
HAIRDRESSER AND THE DEFENDANT'S
HAIRDRESSER, IT IS OF NO
RELEVANCE THAT HE IS A POLICE
OFFICER.
IT IS PURELY PREJUDICIAL BECAUSE
THE INFERENCE DOES ARISE, DID
ARISE IN THESE JUROR'S MIND THAT
THE DEFENDANT HAD SOME SORT OF A
CRIMINAL RECORD.
>> AM I CORRECT THERE IS NO
MENTION AT THE TIME THAT WAS
HAPPENING?
>> I ADMIT THE OBJECTION WAS
LATE, YOUR HONOR, BUT IT WAS
FULLY ARTICULATED ON THE RECORD.
THE JUDGE HEARD A GREAT DEAL OF

ARGUMENT.
>> AFTER THE FACT.
THAT IS AFTER THE EVIDENCE WAS
ALREADY IN.
>> HE SUSTAINED THE OBJECTION ON
THE MERITS AND THEN DENIED THE
MOTION FOR MISTRIAL IN SPITE OF
HARM.
THE JUDGE RECESSED THE TRIAL TO
CONSIDER A MOTION FOR MISTRIAL
AND CAME BACK SAID I'M DENYING
BUT SAID ANOTHER COURT MAY VIEW
THIS DIFFERENTLY.
>> LET ME GO BACK TO THE GUILT
PHASE, YOUR JUDGMENT OF
ACQUITTAL ARGUMENT.
JURORS WERE INSTRUCTED ON FELONY
MURDER AND PREMEDITATED MURDER.
>> YES, YOUR HONOR.
>> THEY WERE NOT SPECIAL
INTERROGATORIES TO INDICATE
WHAT --
>> NO, JUDGE, THE VERDICT IS
GENERAL.
>> BUT WAS THERE ALSO, WAS THERE
A SUBSTANTIVE CHARGE OF SEXUAL
BATTERY?
>> YES, JUDGE.
THAT JURY ACQUITTED THE
DEFENDANT OF THAT.
SO THE STATE CAN NOT NOW RELY
UNDER THIS COURT'S MAHN
PRECEDENT, THE STATE CAN NOT
RELY ON FELONY MURDER THEORY AS
FAR AS THE RAPE IS CONCERNED
SINCE HE WAS ACQUITTED OF THAT.
>> THERE WAS NO CHARGE OF
ROBBERY THAT WAS BROUGHT IN THE
GUILT PHASE?
>> THERE WAS NO CHARGE OF
ROBBERY IN THE INDICTMENT.
THE JURY WAS INSTRUCTED AS TO
ROBBERY. THE STATE DID, MADE A
VERY MINIMAL GLANCING ARGUMENT
TO THE JURY.
>> YOU MEAN, ROBBERY AS THE
UNDERLYING --
>> NO, WITH ROBBERY AS THE
UNDERLYING OFFENSE.
>> BUT WE KNOW FROM THE PENALTY

PHASE THAT THE JUDGE BASICALLY
FOUND THAT THE ROBBERY WOULD NOT
HAVE BEEN PROVEN?
>> CORRECT, YOUR HONOR.
>> SO WHAT WE HAVE HERE IS, NO
FELONY, NO FELONY MURDER?
>> THAT'S MY POSITION.
>> NOW GO TO, FORGET THE, I MEAN
DON'T FORGET IT, PUT ASIDE THE ISSUE
OF IDENTITY.
WHY ISN'T THERE ENOUGH EVIDENCE
IN THE MANNER IN WHICH THE
VICTIM WAS KILLED OF
PREMEDITATED MURDER?
>> BECAUSE THE MEDICAL
EXAMINER'S TESTIMONY SHOWS VERY
MINIMAL CONTACT WITH THE VICTIM.
THE APPENDIX WHICH I HOPE THIS
COURT SAW, I BELIEVE I E-FILED
IT, A PHOTOGRAPH OF THE VICTIM
AFTER HIS BODY IS CLEANED UP AND
BEFORE HIS BODY IS CUT INTO.
IT SHOWS VERY MINIMAL BRUISING.
ACCORDING TO THE MEDICAL
EXAMINER THERE WAS TREMENDOUSLY
HARD BLOW TO THE BRIDGE OF THE
NOSE.
BROKE THE NASAL BRIDGE.
BROKE THE BONE BEHIND THE NASAL
BRIDGE.
THERE WAS ALSO AN ADDITIONAL
KICK OR STOMP AS THE STATE WOULD
PLEASED TO PHRASE IT TO THE
CHEST.
THE MEDICAL EXAMINER TESTIFIED
THAT THE INJURY TO THE FACE CAME
FIRST AND THAT IT,
UNCONSCIOUSNESS OR NEAR
UNCONSCIOUSNESS.
AND THAT THE SECOND BLOW
FOLLOWED.
>> WHEN HE WAS FOUND HIS HANDS
WERE TIED AND HIS FEET WERE
TIED, WEREN'T THEY?
>> HE WAS HOG-TIED.
HIS WRISTS WERE TIED TO HIS
ANKLES.
>> MEDICAL EXAMINER TESTIFIED A
NUMBER OF HIS BLOWS, IT WAS
CONSISTENT WITH BEING STOMPED

ON.
HOW THAT DOES NOT GET YOU PAST, FORGET IDENTITY, HOW IS THAT NOT A HOMICIDE FOR PURPOSES OF JOA?
>> THE STATE RELIES VERY HEAVILY ON THE SUPPOSITION THE TYING WAS DONE BEFORE THE TWO BLOWS.
I SUBMIT TO YOU THAT THE RECORD JUST AS EASILY GIVES RISE TO THE INFERENCE THAT THE BODY WAS TIED AFTERWARD TO BE DRAGGED FROM THE SCENE AWAY FROM HEADLIGHTS.
THE BODY WAS NOT FOUND TILL MORNING.
THE BODY WAS FOUND AT THE TREE LINE.
TWO POLICE OFFICERS SAID YES, IT LOOK LIKE HE HAD BEEN DRAGGED THERE.
>> DID SOMEBODY, SOMEONE BEING STOMPED TO DEATH -- HOW, HOW WAS HE KILLED?
>> HE WAS KILLED BY THE BLOW TO THE FACE COMBINED WITH THE KICK TO THE CHEST, CAUSED SWELLING TO THE BRAIN.
>> AND YOU DON'T THINK THAT THE METHOD OF, THE MANNER OF DEATH IS ENOUGH TO AT LEAST ALLOW THE JURY TO FIND PREMEDITATED MURDER?
>> I DON'T THINK IT IS LONG ENOUGH.
I REALIZE THAT REPEATED BLOWS CAN SUPPORT A FINDING OF PREMEDITATION, IF THE INFERENCE LOGICALLY ARISES THAT PERSON MUST HAVE ATTENDED DEATH.
THERE ARE MANY, MANY CASES WHICH THIS COURT AFFIRMED, IN THE CASES STATE RELIES ON WHERE THERE WAS, WHERE THE VICTIM WAS BEATEN TO DEATH.
THERE ARE CASES WHERE AN IRON BAR WAS USED EVEN AFTER THERE IS BRAIN MATTER ALL OVER THE PLACE.
CLEARLY FROM THOSE FACTS THOSE DEFENDANTS INTENDED THEIR VICTIM'S DEATH.
THIS WAS, THE MEDICAL EXAMINER'S

TESTIMONY IS CONSISTENT WITH THE
CONCLUSION THAT THERE WERE NO
MORE THAN TWO BLOWS.
SHE SAID NOTHING ABOUT REPEATED.
TALKED ABOUT THE ONE INJURY TO
THE FACE.
ONE TO THE CHEST.
SAID NOTHING ABOUT REPEATED
BLOWS.
SAID NOTHING ABOUT THE DEFENDANT
ARMING HIMSELF.
WE HAVE NO INDICATION OF PRIOR
DIFFICULTIES.
>> IF WE WERE TO FIND THERE
WASN'T ENOUGH FOR PREMEDITATED
OR FELONY MURDER AND BUT THAT
IDENTITY, THAT THERE WAS ENOUGH
TO GO TO THE JURY, THEN IT WOULD
BE A REDUCTION TO SECOND-DEGREE
MURDER?
THEN WE WOULDN'T CONSIDER THE
PENALTY PHASE ISSUES?
>> JUDGE, THAT IS, THAT RELIEF
WE ASK FOR, REMAND FOR,
WHAT WE'RE ASKING
FOR REMAND FOR A NEW TRIAL ON A
CHARGE NO GREATER THAN SECOND
SECOND-DEGREE MURDER.
>> IF WE DON'T FIND IN THE EVIDENTIARY
HEARING THAT --
>> THAT WOULD BE AN OPTION.
I DID NOT MEAN TO COMPLETELY
NEGLECT THE PENALTY PHASE.
WE BELIEVE THERE WERE TWO
AGGRAVATORS, HEINOUS, ATROCIOUS
AND CRUEL, PRIOR VIOLENT FELONY.
WE HAVE PRIOR FELONY
BUT HEINOUS, ATROCIOUS
AND CRUEL FACTOR I SUBMIT IS NOT
SUPPORTED ANYMORE THAN THE
PREMEDITATION FINDING.
THERE WAS NO SHOWING THAT THE
VICTIM WAS AWARE OF HIS
IMPENDING DEMISE.
THE, TO THE CONTRARY THE MEDICAL
EXAMINER TESTIFIED THAT HE WOULD
HAVE BEEN UNCONSCIOUS OR NEARLY
UNCONSCIOUS AFTER THE FIRST BLOW
TO HIS FACE.
THAT HEINOUS, ATROCIOUS AND CRUEL

AGGRAVATOR JUST ISN'T THERE.
THE MITIGATION, THE MENTAL HEALTH RELATED MITIGATION, WAS GIVEN SHORT-SHRIFT.
IT WAS GIVEN LITTLE WEIGHT.
>> YOUR FIRST ARGUMENT THE PENALTY PHASE WAS INFECTED BY THE JUROR THAT DID HIS OWN RESEARCH?
>> ABSOLUTELY, JUDGE AND THE AFTERMATH.
THE JUDGE DID NOT FIND THAT THE FOREMAN LIED TO HIM ABOUT GOOGLING THE DEFENDANT BUT THE JUDGE'S SPECIFIC FINDINGS IN HIS SENTENCING ORDER INDICATE THAT HE BELIEVED THE FOREMAN LIED.
WHAT THE FOREMAN SAID, I JUST LOOKED AT A HEADLINE IN THE SUMTER COUNTY DAILY COMMERCIAL AND I SAID NOTHING TO NOBODY.
WHAT THE JUDGE FOUND WAS THAT THE FOREMAN DID SOME MINUTES OF RESEARCH AND DISCLOSED HIS FINDINGS TO THE REST OF THE JURORS.
THE OTHER JURORS TESTIMONY DOES IN FACT SUPPORT THAT.
AND, YOUR HONOR, THAT ALONE IS A REASON FOR A NEW PENALTY PHASE ALL TOGETHER IN THIS CASE, BECAUSE THE FEDERAL COURTS AND THIS COURT HAVE VERY, VERY LIMITED TOLERANCE FOR JUROR MISCONDUCT.
THESE JURORS WERE CAUGHT IN A LIE, EITHER TO STAY ON THE JURY, TO FINISH WHAT THEY STARTED OR TO COVER THEIR OWN BUTTS AND THEY WERE STILL ALLOWED TO MAKE A LIFE OR DEATH RECOMMENDATION AFTER THAT.
>> I, AS FAR AS THE GOOGLE ISSUE, THE WORST YOU'RE CLAIMING THAT OCCURRED WAS THE OTHER JURORS LEARNED THAT YOUR CLIENT HAD BEEN CONVICTED OF RAPE AND SENTENCED TO PRISON BUT THAT CAME OUT DURING THE PENALTY PHASE.

AND THAT WAS --
>> YES, YOUR HONOR.
>> GOOGLE BUSINESS DIDN'T TAKE PLACE DURING THE GUILT PHASE?
>> IT DID NOT.
IT IS ALSO MY POSITION THAT THE, THE MISCONDUCT WAS SERIOUS ENOUGH TO CAST DOUBT ON THIS JURY'S ABILITY TO EVEN FOLLOW ITS GUILT PHASE INSTRUCTIONS.
>> OKAY, DIDN'T FOLLOW THE INSTRUCTIONS, I DON'T KNOW HOW HARMFUL THAT IS.
BUT ACTUALLY THE ONE THING ABOUT THE GOOGLE SITUATION THAT CONCERNS ME IS THE FACT THAT MOST, A LOT OF THE JURORS BASICALLY SAID THAT THEY HEARD THAT YOUR CLIENT HAD BEEN AT DISNEY WORLD.
AGAIN, GOING BACK TO THAT WAS MENTIONED TO YOU EARLIER, THAT PUTS HIM CLOSER TO SUMTER COUNTY THAN THE, THAN THE REST AREA ON I-10 AND BUT I THINK THAT IS PROBABLY MORE PREJUDICIAL THAN ANYTHING ELSE.
>> I AGREE WITH YOU, JUDGE.
IT ALSO MAKES A LIAR OUT OF DEFENSE COUNSEL WHO JUST FINISHED ARGUING IN THE GUILT PHASE CLOSING THAT THE DEFENDANT WAS NEVER SEEN BY ANYBODY SOUTH OF 10 OR WEST OF 75.
THE JUDGE FOUND, WELL, YOU'RE GOING TO HAVE A NEW LAWYER, TAKING A NEW APPROACH AT PENALTY PHASE, THAT'S NOT A PROBLEM BUT THE RECORD DOESN'T SUPPORT THAT COMFORTING THOUGHT BECAUSE IN FACT THE, THE TRIAL TEAM DEFENDING MR. DAUSCH IN THE GUILT PHASE STARTED OUT WITH MR. LEE TAKING THE LEAD. AT, AT, ONE POINT, YOU SEE MRS. JENKINS TAKE OVER AND CONDUCT MOST OF THE REMAINING GUILT PHASE AND SHE WAS THE LEAD COUNSEL IN THE PENALTY PHASE.
SO I SUBMIT TO YOU THAT THE

JUDGE'S FINDING THAT THE DISNEY WORLD DISCLOSURE WAS HARMLESS IS NOT IN FACT SUPPORTED BY THE RECORD.
I SEE I'M INTO MY REBUTTAL TIME. I WOULD ASK THE COURT TO AWARD THE RELIEF SUGGESTED BY JUSTICE PARIENTE.
>> MAY IT PLEASE THE COURT. KEN NUNNELLEY ON BEHALF OF THE STATE OF FLORIDA.
THE EVIDENCE ABOUT THE JUROR MISCONDUCT CLAIM WHICH WAS DEVELOPED IN SOME DETAIL BY THE TRIAL COURT SET OUT IN FOOTNOTE 27 OF THE STATE'S BRIEF AND THE EVIDENCE SUGGESTED THAT ONE OR MORE OF THE JURORS HEARD THAT THE DEFENDANT HAD GONE TO DISNEY WORLD IN 2004 WITH HIS FAMILY AND RESPECTFULLY, DISNEY WORLD IN 2004 DOESN'T HAVE ANYTHING TO DO WITH THIS CASE.
IT'S, I AGREE THE JURORS SHOULDN'T HAVE BEEN CONDUCTING GOOGLE SEARCHES ON THEIR iPHONE OR iPHONES OR HOWEVER THEY WERE DOING IT BUT AT THE END OF THE DAY THEY LEARNED THAT THE DEFENDANT HAD BEEN CONVICTED OF RAPE AND THEY FOUND OUT ABOUT THAT THE NEXT DAY ANYWAY OR DAY AFTER THAT.
BUT THEY FOUND OUT ABOUT THAT IN THE PENALTY PHASE AND THE DISNEY WORLD PART IS IRRELEVANT.
IT JUST DOESN'T PLAY IN THE CASE.
WITH RESPECT TO THE MANNER OF THE VICTIM'S DEATH, WHICH I THINK, YOU KNOW, SEEMS TO BE WHERE WE'RE GOING HERE, THE CAUSE OF DEATH AS TESTIFIED TO BY THE MEDICAL EXAMINER WAS MULTIPLE BLUNT FORCE TRAUMA TO THE HEAD, NECK AND UPPER TORSO.
THE VICTIM HAD MULTIPLE SKULL FRACTURES.
HIS INJURIES WERE CONSISTENT WITH HAVING BEEN STOMPED WHILE

HE WAS LYING ON THE GROUND.
THE VICTIM HAD NO DISCERNIBLE DEFENSIVE INJURIES.
THE VICTIM WAS TIED WITH HIS HAND BEHIND HIS BACK, HIS FEET WERE TIED AND HIS HAND AND FEET WERE TIED TOGETHER.
I WOULD SUGGEST THAT THERE WOULD BE NO REASON TO RESTRAIN AN UNCONSCIOUS VICTIM IN THAT MANNER.
I WOULD SUGGEST THAT THE EVIDENCE AS WE KNOW IT FROM THIS ADMITTEDLY VERY, VERY COLD CASE, SUPPORTS THE INFERENCE THAT THE VICTIM WAS TIED UP AND STOMPED TO DEATH BY THE DEFENDANT, CARL DAUSCH.
WITH RESPECT TO THE SUICIDE ISSUE, THE ATTEMPTED SUICIDE ITSELF IS CONSCIOUSNESS OF GUILT AND I WOULD SUGGEST WAS PROPERLY ADMITTED FOR THAT PURPOSE.
THE LETTER OR NOTE OR WHATEVER ONE WISHES TO CALL IT, IS HEARSAY AND IT IS NOT SUBJECT TO ANY EXCEPTION.
>> HERE'S THE PROBLEM I HAVE WITH THAT.
IF, LET'S SAY THAT THE DEFENDANT WAS DYING OF CANCER AND TOLD THE GUARD, I'M GOING TO KILL MYSELF BECAUSE I'M DYING OF CANCER AND THE STATE WAS ALLOWED TO INTRODUCE THE SUICIDE ATTEMPT BUT NOT THE EXPLANATION FOR WHY THE SUICIDE.
WE ONLY ALLOW IN A SUICIDE ATTEMPT, CONSCIOUSNESS OF GUILT, IF THERE'S A REASONABLE INFERENCE THAT THAT, THAT IT'S THERE BUT IF THE, DOES THE STATE CONTEST THAT THE LETTER WAS WRITTEN IN THE DEFENDANT'S HANDWRITING?
THAT THE LETTER WAS IN FACT THE DEFENDANT'S LETTER?
>> I DON'T BELIEVE THERE IS ANY QUESTION ABOUT THAT, JUDGE.
>> SO I GUESS MY CONCERN IS THAT

IT'S MISLEADING, IF YOU'RE GOING TO SAY HE KILLED HIMSELF BECAUSE HE MUST HAVE THOUGHT HE WAS GUILTY BUT WHAT HE SAYS IS, I CAN'T TAKE THIS ANYMORE, KILLING MYSELF BECAUSE I'M GETTING FRAMED AND I WANT OUT, THE JURY IS HEARING SOMETHING ABOUT AN ACTION THAT THERE'S ACTUAL EVIDENCE THAT WASN'T THE REASON. THERE IS SOMETHING ABOUT THAT IN A CASE, A COLD CASE WITH IDENTITY BEING AN ISSUE AND WITH THE SLIMMEST OF EVIDENCE.
I MEAN IT MAY BE ENOUGH FOR A CONVICTION BUT THAT WE WOULD ALLOW THAT TO BE EVIDENCE THAT HELPS CONVICT THIS DEFENDANT. WHAT IS THE, WHAT'S THE ANSWER TO THAT?
>> WELL, JUSTICE PARIENTE, FIRST OF, THE LETTER IS IN THE RECORD. IT SPEAKS FOR ITSELF.
I'M NOT GOING TO TRY TO READ ANYTHING INTO IT BUT ARGUABLY ONE COULD SAY THAT THE DEFENDANT'S STATEMENT IN THIS LETTER TO HIS ATTORNEY, WHICH I DON'T RECALL HAVING SAID ANYTHING DIRECTLY ABOUT WHY, AN EXPLANATION OF AN ATTEMPTED SUICIDE OR SUICIDE ULTIMATELY THAT WAS NOT COMPLETED, HE DID MAKE THE STATEMENT IN THERE I'M BEING LED TO A SLAUGHTER.
IF ONE ACCEPTS THAT IS A STATE OF MIND EXCEPTION TO HEARSAY, THEN PERHAPS THAT SHOULD HAVE COME IN IN A REDACTED VERSION OF THE LETTER BUT THE DEFENDANT IS NOT ENTITLED TO PUT ON HEARSAY WHERE HE COMPLAINS ABOUT THE STATE'S, ABOUT BEING PROSECUTED, WHERE HE COMPLAINS ABOUT WHAT DEFENSE COUNSEL HAS OR HAS NOT DONE, AND WHERE HE OPINES ABOUT WHAT THE DEFENSE DNA EXPERT IS GOING TO SAY,
THAT'S HEARSAY AND THAT'S CLASSIC HEARSAY.

>> THAT MAY BE IRRELEVANT.
THERE MAY BE ANOTHER REASON TO KEEP THAT OUT, WHICH IS THAT IT IS NOT RELEVANT TO THE SUICIDE.
>> BUT HE INSISTED ON PUTTING THE WHOLE THING IN.
HE COULD HAVE ASKED TO REDACT IT.
THEN WE WOULD HAVE SOMETHING TO TALK ABOUT.
RIGHT NOW WHAT YOU HAVE IS AN ATTEMPT -- HE IS GOING TOO BIG IS WHAT HE IS DOING.
HE IS TRYING TO GET THE WHOLE THING IN.
AND THE WHOLE THING DOESN'T COME IN.
>> IS THAT WHY THE JUDGE, DID THE JUDGE SAY THAT, HE SAID, IF YOU TESTIFY, I'LL LET IT IN.
WELL, IF IT IS NOT RELEVANT, IF CERTAIN THINGS, DEFENDANT CAN'T GET UP THERE AND SAY I THINK THAT THE STATE'S DNA EXPERT IS, IS WEAK OR THAT IS, I THINK, HE CAN'T EXPRESS THOSE VIEWS EVEN IF THE DEFENDANT TESTIFIES.
>> HE CAN'T GET IT IN WITH HEARSAY.
IF THE JUDGE, IF THE JUDGE HAD LET THE LETTER IN -- LET'S TURN IT AROUND.
>> I THOUGHT THE JUDGE SAID I WILL LET THE LETTER IN IF THE DEFENDANT TESTIFIES?
>> THE RECORD SPEAKS FOR ITSELF.
I DON'T REMEMBER EXACTLY WHAT HE SAID.
IF AT THE END OF THE DAY IF THAT LETTER COMES IN SOMEHOW, WE FIND OURSELVES IN THE JOHN HUGGINS SITUATION WHERE WE HAVE HEARSAY COMING IN WITH A DEFENDANT NOT GETTING ON THE STAND AND THAT ENTITLES THE STATE TO REBUT THAT HEARSAY WITH THE DEFENDANT'S CRIMINAL RECORD AND WHAT --
>> WAIT, WAIT.
THE DEFENDANT HERE IS OFFERING AN ACT OF, OF AN ATTEMPTED

SUICIDE TO SHOW THIS DEFENDANT
IS GUILTY.
THE STATE IS THE ONE SAYING THAT
I HAVE AN EXPLANATION FOR HIS
ACT.
NOW YOU'RE SAYING THAT IF HE
GETS TO SAY, BUT HERE'S MY
SUICIDE NOTE.
I DIDN'T CREATE THIS NOTE TO USE
AT TRIAL.
THIS IS WHY I WAS KILLING
MYSELF.
NOW YOU'RE SAYING THE STATE
WOULD THEN BE ALLOWED TO SAY
THIS GUY'S A TOTAL LIAR BECAUSE
HE IS A FELON?
>> IT'S HEARSAY. IT'S HEARSAY.
WE WOULD BE ENTITLED TO REBUT
THAT HEARSAY, JUSTICE PARIENTE.
THAT'S WHAT, THAT IS THE WHOLE
POINT.
THE DEFENDANT DOESN'T GET TO PUT
THIS LETTER ON AND THERE WAS
NEVER ANY DISCUSSION ABOUT
REDACTING THE LETTER.
THAT NEVER CAME UP.
THEY NEVER TALKED ABOUT THAT.
IF THEY HAD SUGGESTED, WELL,
JUDGE HALL WOULD LET US, WE WANT
TO REDACT IT.
LET'S PUT IN THE PART WITH STATE
OF MIND.
FALLS WITHIN THE 803.3 STATE OF
MIND AND HE DIDN'T LET HIM DO IT
WE WOULD HAVE SOMETHING TO TALK
ABOUT CERTAINLY BUT WHEN, WHEN
THE REST OF THE LETTER IS
CLEARLY NOT ADMISSIBLE AND NEVER
TRIED TO GET IT BACK TO THE
POINT THAT IT WAS ADMISSIBLE
EVIDENCE THEN, YOU KNOW, THEY
MADE THEIR CHOICE AND THE
DEFENDANT LOSES BASED ON THAT.
WITH RESPECT TO THE LAW
ENFORCEMENT OFFICER FROM
INDIANA, JUSTICE LEWIS

Xxx

>> THERE CAN BE NO DOUBT THAT

THAT WAS THE INTENTION.
>> I DON'T HAVE DIRECT KNOWLEDGE I DO NOT KNOW THE ANSWER BECAUSE I HAVE NOT ASKED THE PROSECUTOR WHAT HIS INTENTIONS WERE WHEN HE PUT THIS WITNESS O. I DO NOT KNOW A FINAL ANSWER TO YOUR QUESTION, JUSTICE LABARGA, BUT I DON'T KNOW THAT WE CAN I DON'T KNOW THAT WE CAN ASSUME THAT THE FACT THAT MR.†DAUSCH WAS KNOWN TO THIS OFFICER MEANS THAT THIS OFFICER KNEW HIM IN SOME OFFICIAL CAPACITY.
>> BUT DID HE DID HE GIVE ANY INFORMATION AS TO ANY OTHER REASON WHY HE MIGHT KNOW HIM?

>> HE JUST HE SIMPLY SAID HE WAS FAMILIAR WITH MR. DAUSCH.
>> HE DIDN'T SAY WE WENT TO HIGH SCHOOL TOGETHER.
>> I DON'T BELIEVE HE SAID THAT.
I DON'T THINK THEY PLAYED BALL TOGETHER OR ANYTHING LIKE THAT.
>> YOU'VE GOT A SITUATION THIS MAY BE HELPFUL TO YOU.
I FEEL LIKE I NEED TO TELL YOU THAT.

>> AUTOMATICALLY THANK YOU.
>> I KNOW.
I KNOW.
WE'VE KNOWN EACH OTHER A LONG TIME.
>> JUSTICE PARIENTE.
>> IS THAT THE JUDGE WHEN THE DEFENSE LAWYER FINALLY GOT AROUND TO OBJECTING, THE JUDGE SUSTAINED IT, CORRECT?
>> YES, MA'AM.
>> SO THE ISSUE REALLY HERE IS WHETHER THE JUDGE SHOULD HAVE GRANTED A MISTRIAL.
>> YES, MA'AM, IT IS.

>> AND I THINK YOU WOULD SAY THAT THAT'S A MUCH HIGHER BURDEN.
I THINK IF HE HAD OVERRULED THE OBJECTION AND LET HIM GO ON, WE MIGHT HAVE SOMETHING, BUT I'M NOT SURE THAT THIS RISES TO THE LEVEL OF A MISTRIAL.
>> IF I WOULD AGREE, AND BECAUSE WE ARE HERE ON THE DENIAL OF A MOTION FOR MISTRIAL AS THE LEGAL THEORY FOR THIS ISSUE, IF THE JUDGE HAD GRANTED THE MISTRIAL, WE WOULD BE HEARING SOMEWHERE DOWN THE ROAD THAT THAT WAS DOUBLE JEOPARDY BECAUSE THE DEFENDANT WAS FORCED TO MAKE THAT MOTION, JUST LIKE JUST LIKE WE HAD IN TURNER, THE CASE WE ARGUED VERY BRIEFLY BEFORE AT THE GUILT PHASE OR ON THE DIRECT APPEAL.
SO AND AT THE END OF THE DAY, THIS IS NOT A BASIS FOR GRANTING A MISTRIAL.
>> LET'S GO BACK TO THE FACT OF IN THIS CASE THE JURY WAS INSTRUCTED ON BOTH PREMEDITATED AND FELONY MURDER.
>> AS A GENERAL VERDICT.
>> I WOULD PREFER A SPECIAL VERDICT SO THAT WE WOULD KNOW.
AS TO THE IS THE STATE ARGUING THAT FELONY MURDER IS STILL SUPPORTED BY THE RECORD EVEN THOUGH THEY FOUND THE DEFENDANT NOT GUILTY OF SEXUAL ASSAULT?
>> THE WAY THIS CASE PRESENTS ITSELF, WE ARE RELYING ON A PREMEDITATED MURDER THEORY.
>> AND SO THERE THE FACT OF HIM BEING HOGTIED AND THE STOMP THAT THAT HOGTYING AND THE INFERENCE IT IS DONE BEFORE THE KILLING WOULD SUPPORT PREMEDITATION.

>> YES, MA'AM, AND THERE ARE NO DEFENSIVE INJURIES.
>> NOW, GOING TO THE PENALTY PHASE, YOU HAVE A NONUNANIMOUS VERDICT AND WE DON'T HAVE SPECIAL INTERROGATORIES.
THE JURY IS INSTRUCTED ON THE PRIOR VIOLENT FELONY?
>> YES.
>> AND ALSO ON THE AND ON HAC.
>> YES, MA'AM.
>> AND THEN TWO OTHERS THAT THE JUDGE FINDS NOT SUPPORTED.
>> YES, MA'AM.
>> WHY ISN'T IT WHAT JUSTICE LABARGA WAS ASKING EARLIER, WHY ISN'T THAT, THE FACT THAT THE JUDGE KNOWS GOING IN, THAT THERE'S NOT ENOUGH TO SUPPORT EITHER OF THESE AGGRAVATORS THAT NORMALLY WOULD BE AGGRAVATORS THAT YOU WOULD HAVE FOUND IN THE GUILT PHASE, WHY IS THAT NOT ERROR OR HOW CAN IT BE HARMLESS WITH A 84 JURY VERDICT WHERE WE DON'T KNOW WHICH AGGRAVATORS THE JURY RELIED ON?
>> IN THIS CASE, JUSTICE PARIENTE, UNDER THESE FACTS AND REMEMBER THAT ROBBERY WAS NOT CHARGED AS AN UNDERLYING FELONY.
I DON'T KNOW WHY, BUT IT WASN'T.
THERE IS CERTAINLY EVIDENCE TO SUGGEST THAT THIS DEFENDANT ROBBED THE VICTIM OF HIS VEHICLE.
I MEAN, THE VEHICLE, FOR HEAVEN'S SAKE, IS FOUND IN TENNESSEE.
OBVIOUSLY THERE IS EVIDENCE TO SUGGEST THAT THE MURDER WAS COMMITTED IN THE COURSE OF A ROBBERY.
ONE COULD MAKE THE ARGUMENT, I SUPPOSE, EVEN THOUGH I DON'T

BELIEVE IT'S IN THE BRIEFS,
THE COUNTERARGUMENT WOULD BE
THAT THE TAKING OF THE VEHICLE
WOULD BE A MERE AFTERTHOUGHT.
WE COULD HERE THAT.
MAYBE WE COULD.
I DON'T KNOW.
BUT AT THE END OF THE DAY,
THERE IS CERTAINLY EVIDENCE
THAT THE MURDER WAS COMMITTED
IN THE COURSE OF A ROBBERY
SUFFICIENT TO LET THAT
AGGRAVATOR GO TO THE JURY.
AND IF THE TRIAL COURT
EVENTUALLY DETERMINED, AS WAS
THE CASE HERE, THAT THE
AGGRAVATOR WAS NOT FOUND OR
SUPPORTED BEYOND A REASONABLE
DOUBT, THEN THAT'S A DIFFERENT
STANDARD.
>> WHAT IF THE JURY WE
DON'T KNOW IF THE JURY FOUND
THAT AGGRAVATOR, IF THERE HAD
BEEN THE FINDINGS OF THE
AGGRAVATORS, YOU WOULD THEN
SAY, NO, THEY COULDN'T HAVE
FOUND THAT AGGRAVATOR OR
PECUNIARY GAIN BASED ON WHAT
THE JUDGE SAID.
IF THEY DON'T FIND HAC, THEN
YOU END UP WITH A SINGLE
AGGRAVATOR CASE FOR THE JURY,
WHICH MAY HAVE INFLUENCED
THEIR DECISION AS TO WHETHER
TO RECOMMEND DEATH OR NOT.
THAT'S ONE OF MY ULTIMATE
CONCERNS WITH THIS.
>> AND I UNDERSTAND WHAT I
SEE WHAT YOU'RE SAYING, BUT AT
THE SAME TIME THIS COURT HAS
HELD THAT IT'S NOT ERROR
THAT AN UNFOUND AGGRAVATOR, TO
KIND OF SHORTHAND THE NAME FOR
IT, IS NOT A BASIS FOR
REVERSAL SO LONG AS THERE WAS
EVIDENCE TO SUBMIT THE
AGGRAVATOR TO THE JURY.
AND I WOULD SUGGEST THAT
THAT'S WHAT WE HAVE IN THIS
CASE, THAT THERE IS EVIDENCE

SUFFICIENT TO ALLOW THAT
AGGRAVATOR TO GO TO THE JURY,
AND THEN THE TRIAL JUDGE DOES
THE TRIAL JUDGE SENTENCING
PROCESS UNDER THE STATUTE AT
THE END WHERE THE DEFENDANT
GETS YET ANOTHER BITE AT THE
SENTENCING APPLE, IF YOU WILL,
AND MAKES HIS DETERMINATION,
WHICH OUR STATUTE REQUIRES HIM
TO MAKE.
AND I WOULD SUGGEST THAT THAT
IS COMPLETELY IN ACCORD WITH
FLORIDA LAW AS IT'S BEEN
INTERPRETED BY THIS LAW.
>> WE KNOW THAT THE
JURISPRUDENCE OUT OF THIS
COURT IS THAT YOU DO NOT HAVE
TO HAVE THE INDEPENDENT
INTERROGATORIES ON THE
AGGRAVATORS.
BUT WHAT IF IN THIS CASE THE
COURT WOULD COME TO A
CONCLUSION THAT OF THE TWO
THAT WERE FOUND BY THE COURT,
THAT HAC DOES NOT APPLY AS A
MATTER OF LAW UNDER THE FACTS
THAT HAD BEEN PRESENTED?
WHERE DOES THAT LEAVE US?
>> WE STILL HAVE THE PRIOR
VIOLENT FELONY AGGRAVATOR,
WHICH IN THIS CASE I WOULD
SUBMIT IS ONE OF THE MOST
FIRST OF ALL, IT'S ONE OF THE
HEAVIEST AGGRAVATORS WE HAVE
UNDER THE SYSTEM.
AND IN THIS PARTICULAR CASE,
THAT IS A VERY SERIOUS
AGGRAVATOR BECAUSE YOU HAVE

>> HAVE WE HELD ON A SINGLE
AGGRAVATOR CASE OF A PRIOR
AMOUNT OF FELONY IF THAT'S
SUFFICIENT, WHERE YOU DO HAVE
SOME MITIGATION, NOT ABSENT,
TOTAL ABSENCE OF MITIGATION,
THAT IT'S SUFFICIENT TO
SUPPORT A DEATH PENALTY?
>> MY MEMORY, JUSTICE LEWIS,
IS THAT THE THEODORE ROGERS

CASE
>> THERE IS ONE?
>> THEODORE ROGERS IS THE ONE
THAT COMES TO MIND.
>> OKAY.
>> I BELIEVE THERE ARE OTHERS,
BUT ROGERS IS THE ONE I KNOW
ABOUT OFF THE TOP OF MY HEAD.
>> I ALWAYS THINK OF A PRIOR
VIOLENT FELONY AS BEING
SIGNIFICANT AGGRAVATOR, BUT
WHERE SOMEBODY HAS COMMITTED A
ROBBERY, RAPE, MURDER, OUT OF
PRISON, DOESN'T LEARN AND THEN
BACK IN AND NOW KILLS.
I DON'T KNOW AND TELL ME
THAT IT'S SHOULD HAVE
THE SAME WEIGHT.
NOT THAT IT'S STILL NOT
SERIOUS.
IF THE RAPE OCCURS AFTER IT.
SO TELL US WHAT THE THEODORE
ROGERS CASE WAS A SINGLE
AGGRAVATOR.
WHAT WERE THE FACTS OF THAT
CASE?
>> I BELIEVE MR.†ROGERS WAS ON
THE SECOND WIFE MURDER.
>> SO, AGAIN, THAT KIND OF
SUPPORTS AT LEAST WHERE I'M
THINKING, THAT YOU'VE GOT
THAT THERE IS A QUALITATIVE
DIFFERENCE IN IT BECAUSE
YOU'RE REALLY LOOKING AT
WHETHER THIS MURDER SHOULD BE
AGGRAVATED BASED ON THINGS
THAT EITHER HAPPEN
CONTEMPORANEOUSLY WITH THE
MURDER OR BEFORE THE MURDER
UNDER THE SCHEME, EVEN THOUGH
WE'VE SAID CONTEMPORANEOUS
AGGRAVATORS CAN BE PRIOR
VIOLENT FELONIES AND
SUBSEQUENT ONES.
>> WELL, I'M NOT GOING TO GIVE
UP THE HAC AGGRAVATOR BECAUSE
I BELIEVE THAT THE EVIDENCE IS
THAT THIS MURDER WAS
ESPECIALLY HEINOUS, ATROCIOUS
OR CRUEL AND UNDER FLORIDA LAW

AS INTERPRETED BY THIS COURT
IT QUALIFIES AS A MURDER THAT
FALLS UNDER THE HEINOUSNESS
AGGRAVATOR.
NOW, WITH RESPECT TO THE PRIOR
VIOLENT FELONY AGGRAVATOR,
THIS MAN HAS A COUPLE OF
BATTERIES, A RAPE, WHAT
INDIANA CALLS AN UNLAWFUL
CONFINEMENT OR CRIMINAL
CONFINEMENT, SOMETHING LIKE
THAT, A ROBBERY AND ANOTHER
BATTERY.
SO THIS MAN HAS A SIGNIFICANT
CRIMINAL HISTORY.
AND I DON'T THINK THAT THE LAW
REQUIRES THE PRIOR VIOLENT
FELONY UNDER THESE
CIRCUMSTANCES, THE
CIRCUMSTANCES PRESENTED BY
THIS CASE, TO BE SOMEWHAT LESS
THAN TO BE OF LESS WEIGHT
THAN A PRIOR VIOLENT FELONY
WHERE THE DEFENDANT COMMITS
THE OFFENSE, GOíS TO PRISON,
GETS OUT AND REOFFENDS.
I DON'T KNOW THAT THE LAW
AND I DON'T BELIEVE THE LAW
REQUIRES A DIFFERENTIAL IN THE
WEIGHT GIVEN TO THE
>> NO, I DON'T THINK IT DOES.
I'M JUST ASKING WHEN WE WERE
TALKING ABOUT WHETHER IT'S
PROPORTIONATE, WHAT THE OTHER
CASES INVOLVED.
>> I THINK IN THIS CASE WHERE
YOU HAVE THE HEINOUS
AGGRAVATOR AND THE PRIOR
VIOLENT FELONY AGGRAVATOR
>> I THINK JUSTICE LEWIS WAS
ASKING ASSUME NO HAC.
>> EVEN WITHOUT HAC, WHICH YOU
ALL KNOW I'M NOT GONNA GIVE UP
ON THAT ONE
>> WELL, YOU DO AGREE THAT OUR
JURISPRUDENCE SAYS YOU
DON'T HAVE TO AGREE WITH IT,
BUT IT SAYS THAT IF THE FIRST
BLOW, FOR EXAMPLE, HAD
RENDERED THE VICTIM HERE

UNCONSCIOUS, THAT THAT WOULD
NOT BRING IT WITHIN THE HAC
CRITERIA.
THERE HAVE BEEN CASES THAT I
HAVE NOT AGREED WITH, BUT THAT
SEEMS TO BE THE LAW.
BUT HERE WE DON'T KNOW THE
SEQUENCING OF THE EVENTS, DO
WE?
>> NOT WITH ANY GREAT DEGREE
OF CERTAINTY.
>> YEAH.
>> WE CAN'T.
I'M JUST SAYING.
>> AND THAT HAPPENS, AND MAYBE
TOO OFTEN.
>> THIS IS, LIKE I SAID TO
BEGIN WITH, A VERY COLD CASE,
AND IT HAS ITS ISSUES AND
SPACES IN IT THAT COME WITH A
COLD CASE.
>> THE SENTENCING ORDER QUOTED
FROM THE MEDICAL EXAMINER
OR DIDN'T QUOTE IT, DESCRIBED
THE MEDICAL EXAMINER'S
TESTIMONY AS SAYING IT WOULD
TAKE HAVE TAKEN SEVERAL
MINUTES FOR THE VICTIM TO DIE.
>> THAT IS CORRECT.
>> COULD YOU ELABORATE ON
THAT?
>> THAT IS WHAT THE MEDICAL
EXAMINER'S TESTIMONY WAS.
AND THE VICTIM, I BELIEVE,
DIED AS A RESULT OF MULTIPLE
SKULL FRACTURES.
THE MEDICAL EXAMINER FOUND NO
DEFENSIVE INJURIES, WHICH
WOULD BE CONSISTENT WITH THE
VICTIM HAVING BEEN TIED UP
BEFORE HE WAS STOMPED TO
DEATH.
WE HAVE AN A LITTLE BIT OF AN
ISSUE BECAUSE OF THE STATE OF
THE BODY WHEN IT WAS
RECOVERED.
I MEAN, THIS WAS JULY†IN
FLORIDA AND HE WAS FOUND ON
THE SIDE OF THE ROAD
MIDMORNING, I BELIEVE, ON JULY

THE 15TH.
SO WE HAVE, I BELIEVE, SOME TESTIMONY OF SKIN SLIPPAGE AND SUCH AS THAT WITH RESPECT TO THE LIGATURES.
BUT STILL THE MEDICAL EXAMINER'S TESTIMONY WAS THAT IT TOOK THE DEFENDANT THE VICTIM SEVERAL MINUTES TO DIE AS A RESULT OF BEING STOMPED TO DEATH.
>> BUT THE EXAMINER DIDN'T TOUCH ON WHAT JUSTICE LEWIS WAS DESCRIBING AS TO WHETHER OR NOT THE BLOWS MAY HAVE RENDERED HIM UNCONSCIOUS OR NOT.
>> THERE'S NO WAY TO REALLY TELL.
YOU CAN'T.
WE CAN'T TELL ABOUT THAT.
>> ALL RIGHT.
>> IT'S THE NATURE OF THE BEAST.
WE CAN'T TELL.
BUT AT THE END OF THE DAY, STATE'S POSITION IS AND I WOULD ASK THE COURT TO AFFIRM THE CONVICTION AND DEATH SENTENCE FOR CARL DAUSCH.
>> REBUTTAL?
YOUR HONOR, JUST THE MEDICAL EXAMINER THAT THE BLOW TO THE FACE CAME FIRST AND UNCONSCIOUSNESS WOULD HAVE ENSUED.
THE TESTIMONY AS I READ IT DOES NOT SUPPORT THE JUDGE'S FINDINGS THAT IT WOULD HAVE TAKEN SEVERAL MINUTES FOR MR. MOBLEY TO DIE.
SHE TESTIFIED IT COULD HAVE TAKEN A FEW MINUTES, BUT THAT HE WOULD HAVE BEEN UNCONSCIOUS AFTER THAT FIRST BLOW.
>> HOW DO YOU RESPOND TO HIS ARGUMENT THE VICTIM IN THIS CASE WAS HOGTIED AND THERE WAS NO DEFENSIVE WOUNDS, WHICH MEANT THERE WAS HE

BASICALLY HE DIDN'T FIGHT,
THAT HE MUST HAVE BEEN
CONSCIOUS DURING THE TIME THAT
HE WAS HOGTIED AND BEATEN
LATER.
HOW IS THAT NOT HAC?
>> MY RESPONSE IS THAT THERE'S
REALLY ONLY TWO LIKELY
SCENARIOS.
ONE IS HE WAS HOGTIED AFTER
DEATH.
THE SECOND IS HE WAS TIED
CONSENSUALLY FOR SOME SORT OF
SEXUAL PURPOSE.
BUT THAT THAT WOULD EXPLAIN
THERE BEING NO DEFENSIVE
WOUNDS.
BUT THAT IN THAT CASE THE
VICTIM WOULD HAVE BEEN UNAWARE
UNTIL BAM TO THE FACE THAT HE
WAS IN TROUBLE INSTEAD OF IN
FOR PLEASURE.
EITHER WAY I DON'T THINK HAC
IS SUPPORTED.
IT JUST IT THE INFERENCE
DOESN'T ARISE THAT HE
>> YOU WOULD AGREE THAT IF HE
WAS HOGTIED FIRST AND THEN
BEATEN AFTER BEING TIED, THAT
THAT WOULD BE HAC.
WOULD YOU AGREE?
>> I WOULD NOT AGREE, JUDGE,
BECAUSE THERE WAS HE
CLEARLY DIDN'T STRUGGLE
ACCORDING TO THE MEDICAL
EXAMINER, HE CLEARLY DIDN'T
STRUGGLE AGAINST BEING TIED.
HE EITHER AGREED TO IT OR HE
WAS DEAD, ONE OR THE OTHER, IS
HOW I READ THE RECORD.
THE INFERENCE JUST DOESN'T
READILY ARISE THAT HE WAS TIED
UP FOR A BEATING BECAUSE OF
THERE BEING ABSOLUTELY NO
EVIDENCE OF A STRUGGLE AND
BECAUSE THE BEATING CONSISTED
OF THAT APPEARS ON THE
MEDICAL EXAMINER'S TESTIMONY,
TWO BLOWS.
IT'S JUST NOT A LIKELY

SCENARIO.
>> I THINK HE'S ACTING THAT THE ACT OF THE HOGTYING IF AN INDIVIDUAL I WOULD LIKE FOR YOU TO ASSUME THAT IT WAS NOT DONE CONSENSUALLY, BUT IF THIS PERSON WERE TIED, AS THE VICTIM WAS TIED IN THIS CASE, BEFORE THE BEATING, AND THEN A SINGLE BLOW PRODUCES DEATH OR PRODUCES UNCONSCIOUSNESS, IS THAT HAC UNDER FLORIDA LAW?
>> IT WOULD GET YOU A LOT FARTHER TOWARD HAC.
I'D STILL SAY NO BECAUSE WE JUST DON'T KNOW WHAT WAS GOING ON BETWEEN THE ASSAILANT AND THE VICTIM WHEN THE TYING TOOK PLACE.
AND SINCE THERE'S NO SIGN OF A STRUGGLE, I CAN'T GET PAST THE FACT THAT THERE'S NO SIGN OF A STRUGGLE.
STATE RELIES ON ASSERTION THAT THERE WERE SEVERAL SKULL FRACTURES.
ALL THE FRACTURES CAME TO THE PLATE, WHICH IS A PERFORATED ASPECT OF THE BONE WHICH SITS BETWEEN THE ORBITS OF THE EYES.
ACCORDING TO THE KENTUCKY CASE I CITED IN THE BRIEF, IT'S FREQUENTLY BROKEN ALONG WITH A BLOW TO THE BRIDGE OF THE NOSE.
THIS IS NOT A CASE WHERE THE VICTIM WAS BEATEN REPEATEDLY UNTIL THERE WERE FRACTURES ALL OVER THE PLACE.
STATE ALSO ASSERTS THAT THE INJURIES WERE CONSISTENT WITH VICTIM LYING DOWN.
THE ONLY TESTIMONY THE STATE CAN RELY ON TO SUPPORT THAT ASSERTION IS PROSECUTOR'S QUESTION WAS THE BLOW TO THE CHEST CONSISTENT WITH A STOMPING.
ANSWER, YES.

STOMPING IS THE PROSECUTOR'S
TERM.
AND THERE WAS NO SIMILAR
TESTIMONY WITH REGARD TO THE
BLOW TO THE FACE.
THERE'S NOTHING TO INDICATE
THAT HE WASN'T TO INDICATE
 THERE'S NOTHING TO
AFFIRMATIVELY INDICATE HE WAS
LYING DOWN WHEN THE BLOW TO
THE FACE CAME.

WITH REGARD TO THE ALLEGATION
MADE TODAY THAT THE DISNEY
TRIP WAS IN THE JURORS' MINDS,
A '04 TRIP, I DON'T RECALL
ANYTHING LIKE THAT IN THE
RECORD.
AS I RECALL THE HEARING WHERE
THE JUDGE EXHAUSTIVELY
INTERVIEWED THE SIX JURORS WHO
HEARD SOMETHING FROM CELL
PHONE RESEARCH, IT WAS MY
UNDERSTANDING THAT WHAT I
CAME AWAY WITH WAS THAT THE
JURORS WERE EXCITED TO HEAR
THAT THE DEFENDANT HAD BEEN
DROPPED OFF DURING THIS 1987
TRIP TO DISNEY WORLD.
I HAVE NO OTHER RESPONSE TO
THAT.
AS TO A REASON TO SUPPORT THE
PECUNIARY GAIN AND DURING THE
COURSE OF A ROBBERY
AGGRAVATORS, THE CAR TAKEN WAS
A 1981 CIVIC, WHICH WAS
ABANDONED THE NEXT DAY.
WHEN THE COURT HAS APPROVED
TAKING THE VICTIM'S CAR AS
EVIDENTIARY SUPPORT FOR
PECUNIARY GAIN, IT'S BEEN IN A
SITUATION WHERE THE DEFENDANT
KEPT THE CAR, NOT WHERE HE
ABANDONED IT ALMOST
IMMEDIATELY.
AND ONE OTHER MATTER.
MY COCOUNSEL, MR.†QUARLES,
TELLS ME HE BELIEVES THERE IS
ONE AND NO MORE THAN ONE CASE
WHERE THIS COURT HAS AFFIRMED

A DEATH SENTENCE BASED SOLELY
ON THE EXISTENCE OF THE PRIOR
VIOLENT FELONY AGGRAVATOR.
I'M SORRY.
I DO NOT KNOW THE ANSWER TO
THAT QUESTION.
I WOULD ASK THIS COURT TO
REVERSE BOTH CONVICTIONS,
REMAND FOR RETRIAL ON AN
OFFENSE NO GREATER THAN A
SECONDDEGREE MURDER.
THANK YOU
>> THANK YOU FOR YOUR
ARGUMENTS.