

>> SUPREME COURT OF FLORIDA IS NOW IN SESSION.

PLEASE BE SEATED.

>> THE LAST CASE FOR THE DAY IS MIDDLETON V. STATE OF FLORIDA. YOU MAY PROCEED.

>> MAY IT PLEASE THE COURT, MY NAME IS JEFFREY ANDERSON, I REPRESENT THE APPELLANT, MR. DALE MIDDLETON.

I'D LIKE TO FOCUS IN ON POINT ONE IN MY BRIEF WHICH ACTUALLY INVOLVES THREE ISSUES.

COLD, CALCULATED AND PREMEDITATED AGGRAVATOR, I'LL CALL THAT CCP FOR ABBREVIATION AND THEN, FINALLY, PROPORTIONALITY.

AND I'LL START OFF WITH CCP.

THE TRIAL COURT IN ITS SENTENCING ORDER SAID THERE WAS A PLAN TO KILL BY MIDDLETON BEFORE HE WENT TO THE RESIDENCE OF THE VICTIM.

AND THE EVIDENCE THAT HE USED TO INFER THIS WAS THE DEFENDANT, MIDDLETON, MADE A STATEMENT EARLIER THAT HE WAS GOING TO TAKE CARE OF SOME BUSINESS, AND HE WAS ANTICIPATING TAKING A SHOWER.

AND THE CASE HE RELIES ON IS A DAVIS CASE, ONE OF THE DAVIS CASES WHERE IT WASN'T INVOLVING A SHOWER STATEMENT OR ANYTHING LIKE THAT, IT WAS WHERE DAVIS WORE A SECOND SET OF CLOTHING OVER HIS REGULAR CLOTHING, AND HE MADE A STATEMENT HE DID THAT BECAUSE HE ANTICIPATED GETTING BLOOD ON IT.

AND I COULD SEE THE NEXUS BETWEEN THAT TYPE OF SITUATION AND SOME PLANNING TO COMMIT A KILLING, BUT I DON'T THINK ANTICIPATING A SHOWER IS THE SAME.

ESPECIALLY IN THE CONTEXT OF THIS CASE, BECAUSE CHRIS LEAN WAS PRESENTED AS A WITNESS BY

THE STATE WHO TESTIFIED THAT MR. MIDDLETON CAME TO HIS HOUSE EARLIER IN THE AFTERNOON, APPROXIMATELY 1:00, TO LOOK AT HIS LEAKING TOILET, AND MR. MIDDLETON DOES SOME HANDIWORK.

AND MIDDLETON HAD PROMISED TO COME BACK LATER IN THE DAY TO FIX THE TOILET.

AND IN BETWEEN IS WHEN HE MAKES THE STATEMENT ABOUT DOING SOME BUSINESS AND NEEDING TO TAKE A SHOWER.

SO THAT COULD BE RELATED TO THAT.

I JUST -- OUR ARGUMENT IS --
>> EXCUSE ME.

DID HE NOT LIVE ACROSS THE STREET FROM THIS LADY?

>> YES.

>> DID THIS LADY KNOW HIM?

>> YES.

>> SO YOUR THEORY IS HE TOOK THE KNIFE FROM HIS KITCHEN, WALKED ACROSS THE STREET 130 FEET OR YARDS, WHATEVER IT IS, KNOCKED ON THE DOOR.

THE LADY KNEW HIM BECAUSE HE'D BEEN THERE ALREADY.

HE INTENDED TO LEAVE HER ALIVE TO WALK BACK ACROSS THE STREET AFTER HE ROBBED HER, IS THAT WHAT YOU'RE CONTENDING?

>> HIS STATEMENT -- THERE'S TWO DIFFERENT THEORIES, ONE IS --

>> I'M TALKING ABOUT WHAT HAPPENED.

>> WHAT?

>> WHAT ACTUALLY HAPPENED.

DID THAT HAPPEN?

WHY DID HE TAKE THE KNIFE?

>> HE HAD THE KNIFE IN HIS BACK POCKET.

>> HE TOOK IT FROM THE KITCHEN, HE SAID.

>> HE TOOK IT --

>> AND PUT IT IN HIS BACK POCKET.

>> HE USES IT TO CLEAN HIS

NAILS.

IT'S A LITTLE KNIFE.

AND EVEN IF YOU BELIEVE HE WENT THERE TO USE THAT TO INTIMIDATE, TO ROB, IT STILL DOESN'T MEAN THAT YOU HAVE CCP.

>> THE POINT IS, WHAT'S THE END GAME TO THAT?

YOU KNOW, PEOPLE DON'T GO ACROSS TO ROB THEIR NEIGHBOR ACROSS THE STREET WITH A KNIFE THINKING THAT THEY'RE GOING TO DO THAT AND THEN --

>> GO BACK HOME.

>> -- LEAVE THE NEIGHBOR, VICTIM AS A WITNESS --

>> I'VE REPRESENTED PEOPLE WHO HAVE DONE THAT.

WHAT THEY DO IS THEY EITHER DON'T PLAN IT OUT OR THINK ABOUT THE CONSEQUENCES, OR IT'S A POSSIBILITY -- HE DIDN'T ADMIT TO IT -- BUT THERE COULD BE A SECOND PLAN.

YOU KNOW, IF HE COULD ROB AND THEN SAY, YOU KNOW, IF YOU TELL ANYBODY, I KNOW WHERE YOU LIVE, AND I'LL COME BACK.

IT'S JUST, I'M SPECULATING, BUT IT COULD BE ANYTHING LIKE THAT.

>> [INAUDIBLE]

THAT THE INTENTION WAS FOR HIM TO WALK ACROSS THE STREET AND ROB THIS LADY BECAUSE HE WAS AWARE OF THE CASH THAT WAS PRESENT IN THE HOUSE AND THE TV SET AND SO ON.

SO HIS INTENTION IN CARRYING THAT KNIFE WAS TO ROB HER.

BUT ONCE IT STARTED, IT ESCALATED TO THE POINT THAT HE TOOK THAT KNIFE AND KILLED HER.

IS THAT WHAT YOU'RE SAYING?

AND THAT'S NOT THE HEIGHTENED --

>> THAT'S NOT NECESSARILY MY THEORY.

BUT THAT COULD HAPPEN.

THEY BEGIN TO STRUGGLE.

AFTER -- HIS STATEMENT TO POLICE WAS HE WENT OVER AND HE ASKED

FOR MONEY.

WHETHER YOU CHARACTERIZE THAT AS MAYBE HE'S NOT TELLING THE FULL STORY AND HE ACTUALLY TRIED TO ROB HER AND SHE RESISTED.

AT SOME POINT SHE ORDERS HIM OUT, AND SHE BEGINS PUSHING, AND THEY GET IN AN ALTERCATION.

AND I BELIEVE THAT EVIDENCE IS CONSISTENT WITH NOT BEING CCP, BECAUSE THERE'S NO CASES I COULD FIND WHERE A STRUGGLE GOES ON, AND IF THAT'S WHERE THE DECISION TO DO EXTREME HARM OR TO KILL IS MADE, IT'S NOT CCP.

>> I MEAN, WE'RE TALKING NOT ONLY MONEY, BUT, I MEAN, THE TV. I MEAN, ARE WE SUPPOSED TO SAY, OKAY, HE WAS JUST GOING TO WALK ACROSS THE STREET AND JUST PICK UP THE TV AND WALK OUT?

I MEAN, HE COULD HAVE GONE WHEN THE LADY WASN'T THERE.

I MEAN, THAT'S THE WHOLE THEORY. HE'S RIGHT THERE.

HE SEES HER MOVEMENTS, WHEN THE CAR IS THERE, NOT THERE.

AND DIDN'T HE TALK WITH SOME FRIENDS ABOUT HE WAS GOING TO HAVE ACCESS TO A TV OR SELLING A TV?

>> NO.

I DON'T THINK THE TV WAS PART OF THE PLAN.

I THINK THAT'S WHAT ENDED UP HAPPENING.

THAT WAS THERE AFTER ALL THIS UNFOLDED.

IT'S, IN FACT, I THINK THE PROSECUTOR EVEN ARGUED BELOW.

HE DIDN'T GO OVER THERE PLANNING TO TAKE A TV.

IT WAS BECAUSE HE THOUGHT THERE'D BE MONEY THERE.

>> SO SHE TESTIFIED -- I BELIEVE THERE WAS SOME TESTIMONY THAT SHE THOUGHT HE HAD SEEN THE CASH --

>> CORRECT.

>> -- SHE DEPOSITED INTO THE

BANK ACCOUNT, BECAUSE SHE WAS AFRAID HE WOULD STEAL IT.
>> RIGHT, SHE WAS CONCERNED.
>> THERE'S EVIDENCE THAT HE WAS AWARE THAT THERE WAS SOME CASH IN THE HOUSE.
>> HE MADE, ALSO MADE A STATEMENT THAT -- TO POLICE -- THAT HE, YOU KNOW, AT SOME TIME HE WAS AWARE THERE WAS MONEY IN THE HOUSE.
HIS STATEMENT'S LESS CLEAR, BUT, YEAH.
THAT'S WHY HE GOES OVER WHEN SHE'S THERE.
HE WANTS MONEY.
WHETHER YOU BELIEVE HIM THAT IT'S HE WANTS TO BORROW MONEY, OR YOU CAN EVEN SAY HE DECIDED TO ROB HER.
>> WHAT ABOUT THE TESTIMONY THAT PRIOR TO HIM ACTUALLY DOING IT HE AND ONE OF HIS COHORTS HAD DECIDED TO GO AND ROB THIS HOUSE ANYWAY?
THAT WAS THE PLAN, WASN'T IT? BECAUSE HE SAW THE TIP MONEY?
>> HE HAD TALKED ABOUT ONE OF HIS PLANS.
HE MENTIONED HER AS A POSSIBLE PERSON TO ROB.
I DON'T KNOW IF THEY WERE PLANNING TOGETHER OR THEY WERE TALKING ABOUT IT, BUT THEY ALSO TALKED ABOUT THEIR PLAN WAS NEVER TO HARM ANYBODY.
AND WHAT'S CONSISTENT WITH THIS IS THAT THIS WAS A STRUGGLE.
>> SO THEIR PLAN WAS NOT TO HARM HER, TO GO IN AND NOT -- ROB HER WHILE SHE'S THERE AND JUST WALK AWAY?
>> WELL, I DON'T KNOW IF THAT WAS PLANNED OUT.
I THINK THE PLAN WAS TO GET MONEY, FIRST MAYBE BY -- I'M JUST HYPOTHESIZING BECAUSE WE DON'T KNOW.
>> [INAUDIBLE]
>> BY EITHER ASKING, YOU KNOW,

MAKING A REQUEST AND THEN IF SHE STARTS REFUSING, MAKING THREATS. AND THEN MAYBE HE DOESN'T THINK OF AN EXIT STRATEGY.

I MEAN, YOU HAVE A PERSON WITH AN IQ OF 83 WHO'S BEEN, YOU KNOW, TAKING A LOT OF DRUGS THAT DAY.

AND CERTAINLY HE'S RESPONSIBLE FOR WHAT HE DID.

IT WASN'T LACK OF TOTAL CONTROL, BECAUSE HE DID TRY TO COVER UP THINGS.

BUT IT DOESN'T MEAN THAT THIS WAS A CAREFUL, CALCULATED PLAN. BECAUSE THE EVIDENCE, THE PHYSICAL EVIDENCE -- PUTTING ASIDE WHATEVER HE SAYS -- SHOWS A CONTINUOUS STRUGGLE THROUGHOUT THE TRAILER FROM THE KITCHEN, THROUGH A HALLWAY AND EVEN IN THE BEDROOM WHEN THINGS ARE PULLING DOWN OFF THE BED, OFF THE DRESSER.

AND YOU KNOW SHE'S STANDING IN THAT BEDROOM BECAUSE BLOOD'S ON THE BOTTOM OF HER FOOT.

SO IT'S CONSISTENT WITH A STRUGGLE GOING ON THROUGHOUT, AND THE STRUGGLE, IT'S NOT CCP WHEN YOU HAVE THAT.

>> ASSUMING, ASSUMING THAT YOU'RE CORRECT FOR A SECOND HERE AND WE STRIKE CCP, ASSUMING YOU'RE CORRECT AND WE STRIKE THE AVOIDING ARREST AGGRAVATOR, THAT STILL LEAVES WHEN THE CAPITAL WAS COMMITTED BY HE WAS ENGAGED IN THE BURGLARY WHICH IS A HEFTY, WEIGHTY AGGRAVATOR.

IT STILL LEAVES THE FACT THAT HE DID IT FOR PECUNIARY GAIN, AND IT STILL LEAVES HAC.

AND HAC IN THIS CASE, IN MY VIEW FROM WHAT I SEE OF THE EVIDENCE, IS --

[INAUDIBLE]

I MEAN, WHAT HE DID.

WE LOOK AT IT FROM THE PERSPECTIVE OF THE VICTIM, AND

SHE CLEARLY SUFFERED.

SO ASSUMING THAT'S THE CASE, I MEAN, WHY ISN'T IT HARMLESS?

>> WELL, ACTUALLY, OUR FIRST ARGUMENT ON THIS IS THAT BECAUSE IT'S SIMILAR TO THE PERRY CASE, YOU HAVE THE SAME, YOU HAVE CCP AND AVOID ARREST WAS STRICKEN IN THAT CASE.

AND HAC REMAINED, FELONY MURDER REMAINED, AND THERE WAS, IF YOU USE THE STATE THEORY, IT WAS A SIMILAR SITUATION TO THIS WHERE PERRY WENT TO AN EX-NEIGHBOR'S HOUSE.

THEY KNEW ONE ANOTHER, AND HE DEMANDED MONEY AND JEWELRY AND THINGS LIKE THAT.

SHE RESISTED, AND HE ENDS UP KILLING HER.

THERE'S MULTIPLE STAB WOUNDS, THERE'S EVIDENCE THAT HE BEAT HER, AND THERE'S ALSO THE FINAL THING THAT CAUSED DEATH WAS STRANGULATION.

SO THAT WAS EVEN MORE HAC THAN IN THIS CASE, I THINK.

AND YOU HAVE THE SAME AGGRAVATION, BASICALLY.

THERE WERE NO STATUTORY MITIGATORS IN THAT CASE.

AND HE HAD NONSTATUTORY MITIGATORS THAT HE WAS GOOD TO HIS FAMILY AND GOOD AROUND THE HOUSE AND, BASICALLY, WAS COOPERATIVE AFTER A FEW DAYS.

AND THE MITIGATION IN THE CASE WAS STRONGER IN THAT CASE.

PERRY ENDS UP WITH LIFE.

AND MY BASIC ARGUMENT ON PROPORTIONALITY IS THAT IT'S A SIMILAR CASE.

I CAN'T FIND ANY OTHER CASE NEAR AS SIMILAR TO THIS CASE AS PERRY IS.

IT'S NOT EVEN CLOSE.

AND PERRY ENDED UP WITH LIFE.

IT WAS BECAUSE OF A TETHER REDUCTION, BUT THAT SHOULDN'T MATTER BECAUSE PROPORTIONALITY,

WE'RE TRYING TO ELIMINATE THE SUBJECTIVE DISCRETIONS OF JUDGES AND JURIES AND ALL THAT AND JUST TREAT SIMILAR CASES SIMILAR.

>> BUT IT DOES MATTER.

I MEAN, IT DOES MATTER IN THAT WE HAVE NOT COMPARED DEATH CASES WITH CASES WHERE --

[INAUDIBLE]

UNLESS IT'S THE CO-DEFENDANT. NOW, WHETHER THAT'S JUST THE WAY IT'S HAPPENED, BUT THE ISSUE I WANT AS FAR AS GOING BACK, YOU'RE GOING TO PROPORTIONALITY.

>> I JUST SKIPPED OVER IT FOR A SECOND.

>> JUSTICE LABARGA WAS ASKING YOU WHY -- I MEAN, BECAUSE I, I MEAN, IN DUE DEFERENCE I THINK THAT MAYBE IT'S PROBABLY PROPORTIONATE EVEN WITH STRIKING, LOOK AT PERRY.

BUT THE QUESTION IS, DOES IT GO -- I MEAN, IS YOUR VIEW THAT IT WOULD HAVE TO GO BACK FOR A NEW SENTENCING, OR CAN WE SAY EVEN THOUGH THEY HAVE THESE TWO ADDITIONAL AGGRAVATORS, THESE OTHER AGGRAVATORS ARE SO WEIGHTY IN THIS CIRCUMSTANCE THAT IT WOULD BE HARMLESS BEYOND A REASONABLE DOUBT?

>> I REALLY DON'T THINK IT'D BE APPROPRIATE TO SAY IT'S HARMLESS BEYOND REASONABLE DOUBT. YOU HAVE PERRY WITH SIMILAR RESULTS, BUT HE ENDS UP WITH LIFE.

IT JUST DOESN'T --

>> WHAT ABOUT IN THIS CASE WE HAVE A TRIAL JUDGE'S ORDER --

>> RIGHT.

>> -- WHICH BASICALLY SAYS, LET'S SEE IF I CAN FIND THE LANGUAGE.

"MOREOVER, ANY OF THE CONSIDERED AGGRAVATING CIRCUMSTANCES FOUND IN THIS CASE STANDING ALONE WOULD BE SUFFICIENT TO OUTWEIGH THE MITIGATION."

SO WE HAVE A TRIAL JUDGE WHO'S TELLING US THESE AGGRAVATORS IN THIS CASE, ANY ONE OF THEM, SO WEIGHTY THAT I WOULD STILL HAVE IMPOSED THE DEATH PENALTY IN THIS CASE.

HOW DO WE VIEW THAT?

>> YEAH.

I, YOU KNOW, NORMALLY I'D THINK IN THIS CASE PARTICULARLY BECAUSE YOU'RE GETTING RID OF TWO, CCP AND AVOID ARREST ARE PRETTY IMPORTANT AGGRAVATORS.

>> BUT WE STILL HAVE, IT'S BEEN POINTED OUT, SOME PRETTY WEIGHTY AGGRAVATORS OF A VERY, VERY HEINOUS, ATROCIOUS WAY THIS LADY WAS DRAGGED THROUGH HER OWN HOUSE AND KILLED.

WE STILL HAVE THE FACT THAT HE DID THIS BECAUSE HE WANTED SOMETHING THAT DIDN'T BELONG TO HIM, BUT BELONGED TO HER. PECUNIARY GAIN.

SO WHY CAN'T WE TAKE THAT TRIAL JUDGE'S STATEMENT?

>> BECAUSE IT'S, I THINK IT'S TOO BOILERPLATE, IS ONE THING. AND I THINK YOU HAVE CASES WHERE YOU HAVE PEOPLE NOW NOT ON DEATH ROW WHERE THE CIRCUMSTANCES ARE SIMILAR.

IT JUST DOESN'T SEEM TO BE CONSISTENT WITH THE FAIRNESS --

>> IT SEEMS TO ME THAT THE TRIAL JUDGE THOUGHT ABOUT THIS CASE, HE THOUGHT ABOUT THE AGGRAVATION AND THE MITIGATION IN THIS CASE. ANY OF THESE, IF I ONLY HAD ONE OF THESE, THIS IS SUCH A BAD AGGRAVATION THAT THE MITIGATION, WHICH IS, YOU KNOW, WE'VE SEEN THIS KIND OF MITIGATION IN MANY OF OUR CASES.

AND WHILE I'M NOT TRYING TO BELITTLE IT, IT ISN'T SOME OF THE WEIGHTIEST MITIGATION THAT WE'VE SEEN EITHER.

AND SO WHY IN THE WORLD IS THIS NOT GIVEN THE FACT THAT THIS IS

STILL A PROPORTIONAL CASE?

>> WELL, I JUST STILL REPEAT MY ANSWER ABOUT PERRY.

BUT THEN I'LL GO TO, AND I REALLY WASN'T GOING TO ARGUE POINT FOUR, BUT I WILL MENTION IT BECAUSE THIS PARTICULAR JUDGE IN A LOT OF HIS SENTENCING DECISIONS WASN'T NECESSARILY BASING EVERYTHING ON A REASONED JUDGMENT.

IT'S THE LATTER PART OF POINT FOUR IN THE INITIAL BRIEF THAT EXPLAINS IT.

>> ABOUT THE PSYCHOLOGICAL TESTIMONY.

>> WELL, EVEN BEYOND THAT. HE MADE SOME SENTENCING DECISIONS, AND HE EXPLAINED THE WAY HE MADE SOME JUDICIAL DECISIONS WHICH I DON'T THINK IS THE WAY WE DO IT.

HE WASN'T NECESSARILY USING A REASONED JUDGMENT, HE WAS USING, YOU KNOW, MY DISCRETION IS THAT UNLESS EVERY JUDGE -- THIS IS HIS PHRASE -- "UNLESS ALL 500 CIRCUIT COURT JUDGES DISAGREE WITH MY RULING, IT'S A CORRECT RULE."

CORRECT RULING.

IF ONE CIRCUIT COURT JUDGE IN FLORIDA WOULD AGREE WITH MY RULING, IT'S CORRECT.

IT'S NOT BASED ON A REASONED JUDGMENT NECESSARILY.

IT'S THE FACT THAT HE CAN MAKE A RULING, AND UNLESS EVERYBODY WOULD --

>> WHAT DOES THAT HAVE -- ONE, THIS IS THE CASE, AND I REMEMBER NOW WHO THE TRIAL JUDGE -- WHERE THE JUDGE IN THE SENTENCING ORDER STARTS TO DISPARAGE PSYCHOLOGICAL TESTIMONY, CITES TO A, AN OPINION, A DISSENT FROM, LIKE, 30 YEARS AGO FROM A D.C. CIRCUIT.

SO IS YOUR ARGUMENT THAT THIS JUDGE REALLY -- I MEAN, WHAT IS

THE ARGUMENT ON THAT?
THAT HE WASN'T, HE WAS BIASED IN
ACTUALLY EVALUATING THE
PSYCHOLOGICAL TESTIMONY?

>> SORT OF.

HE WASN'T GIVING IT A FAIR SHOT
BECAUSE HE DID HAVE A
PRECONCEIVED BIAS TOWARD THE
WHOLE FIELD IN GENERAL.

>> AGAINST IT.

>> AGAINST IT.

>> WHAT WAS THE PSYCHOLOGICAL
TESTIMONY IN THIS CASE?

>> IT, WELL --

>> FIRST OF ALL, HOW OLD WAS
THIS DEFENDANT?

>> MY MIND --

>> HE'S NOT YOUNG, WAS NOT A
YOUNG MAN.

>> NO, HE'S NOT A YOUNG MAN.
HE'S --

>> 30s.

>> 30s, THAT SOUNDS CORRECT.

BUT IT WAS -- YOU HAVE THE
DEFENSE EXPERTS AND THE STATE'S
EXPERTS, AND A BIG PART OF THIS
DEALT WITH AS FAR AS MITIGATION
WAS HOW DID IMPAIRMENT ON THAT
DAY, DRUG TAKING, PLAY A ROLE IN
ANYTHING.

AND ONE PART THERE I REALLY
COMPLAIN ABOUT HERE IS THAT HE
JUST SAID I'M GOING WITH THE
STATE'S EXPERT.

THEY CONSIDERED EVERYTHING, BUT
THEN THE STATE'S EXPERT
TESTIFIED THERE WAS NO EVIDENCE,
NO ONE EVER SAID HE WAS IMPAIRED
THAT DAY.

WHERE HE HAD THE GUY WHO TOOK
THE STATEMENT, THE FIRST
STATEMENT FROM THE DEFENDANT
SAID UNDER HIS, IN HIS OPINION
MIDDLETON WAS UNDER THE
INFLUENCE.

>> OF WHAT?

>> HE DIDN'T SAY.

HE JUST SAID FROM HIS
MANNERISMS, FROM HIS WATERY
EYES, FROM HIS FACE AND

EVERYTHING ELSE, IT LOOKED LIKE HE WAS UNDER THE INFLUENCE.

I THINK HE DID MAKE --

>> WELL, THAT'S CERTAINLY NOT ENOUGH TO SUPPORT OR TO SAY THAT THE JUDGE ERRONEOUSLY REJECTED THE STATUTORY MITIGATOR.

>> WELL, I'M SAYING THAT HE SHOULD HAVE TAKEN AN OVERALL VIEW OF THINGS INSTEAD OF JUST RELYING ON AN EXPERT WHO HADN'T CONSIDERED THAT AND JUST PUT A RUBBER STAMP SAYING SHE CONSIDERED EVERYTHING --

>> SO ARE YOU RELYING ON IMPAIRMENT ON THE DAY, OR IS THERE OTHER DRAMATIC THINGS IN THIS DEFENDANT'S BACKGROUND THAT WERE NOT PROPERLY CONSIDERED?

>> WELL, THE THINGS, MOST OF THE OTHER THINGS WERE CONSIDERED ABOUT HIS BACKGROUND, BUT THE JUDGE I STILL DON'T THINK UNDER THIS REASONED JUDGMENT THING GAVE HIM A FAIR OPPORTUNITY IN WEIGHING IT.

>> THAT'S A HARD APPELLATE ARGUMENT.

>> RIGHT.

>> THAT YOU'RE -- YOU KNOW, BECAUSE JUSTICE QUINCE IS ASKING YOU, WELL, IF THE JUDGE SAID ANY ONE OF THESE WOULD HAVE BEEN ENOUGH FOR THIS JUDGE, EVEN IF THERE WAS ONE AGGRAVATOR, YOU WOULD HAVE IMPOSED THE DEATH PENALTY.

IT'S SORT OF LIKE SAYING BECAUSE -- AND I THINK THIS IS WHAT ENDS UP HAPPENING.

WE TALK ABOUT FIVE-AGGRAVATOR CASES OR THREE-AGGRAVATOR CASES, BUT WHEN YOU HAVE A CASE WHERE SOMEBODY COMES, YOU KNOW, BASICALLY COMES INTO A HOUSE TO ROB WHETHER THEY HAD THE IDEA AHEAD OF TIME THAT THEY WERE GOING TO KILL OR NOT, THAT WHEN THEY -- WHETHER THEY PANIC OR WHATEVER AND THEY TAKE AN

INNOCENT VICTIM AND THEY
BASICALLY ALMOST -- I DON'T KNOW
IF THIS IS THE CASE WHERE THEY
ALMOST, I MEAN, IT'S A TERRIBLE
CRIME OF WHAT HE DOES.

PLUS HE TAKES MONEY.

AND IT'S BURGLARY.

THE FACT THAT AVOID ARREST OR
CCP MAY OR MAY NOT BE PROVEN
DOESN'T REALLY CHANGE THE NATURE
OF WHAT THIS CRIME IS.

NOW, YOU KNOW, AGAIN, YOUR
ARGUMENT IS, WELL, IN PERRY --

>> PERRY, DAVIS AND --

>> BUT THERE WAS IN THAT CASE, I
GUESS, A LIFE RECOMMENDATION.
HERE THE JURY VOTED 12-0 FOR
DEATH.

RIGHT?

IT WAS A UNANIMOUS
RECOMMENDATION.

NOT EVEN --

>> YEAH.

BUT THAT'S MY WHOLE THING ON
PROPORTIONALITY.

IF THE CASES ARE SIMILAR -- IF
I'M WRONG AND THEY'RE
DISSIMILAR --

>> WELL, YOU KNOW, MR. ANDERSON,
YOU'VE BEEN DOING THIS A VERY
LONG TIME.

THE SYSTEM NOT ONLY IS IT NOT
PERFECT, IT'S VERY IMPERFECT.
BUT YET THIS COURT IN DOING ITS
PROPORTIONALITY COMPARES IT TO
CASES IN WHICH THE DEATH PENALTY
HAS BEEN IMPOSED OR REDUCED TO
LIFE.

WE'RE NOT GOING TO TAKE A CASE
WHERE IT WAS A 16-YEAR-OLD
BECAUSE THAT WOULD BE DIFFERENT.

>> RIGHT.

>> I GUESS I WANT TO GO BACK TO
THE HARMLESS ERROR THING THOUGH.
TO ME, THE QUESTION IS, IS IT
HARMLESS FOR THE JURY TO HAVE
BEEN INSTRUCTED ON AGGRAVATORS
IF SOME OF THOSE AGGRAVATORS
WERE NOT PROVEN?

SEEMS LIKE THERE WAS ENOUGH

ANYWAY TO ALLOW THOSE
AGGRAVATORS TO GO TO THE JURY
WHETHER ULTIMATELY THERE'S NOT
ENOUGH EVIDENCE THAT IT'S
PROVEN.

SO HOW DO YOU SEPARATE POSTRING
THE JURY BEING ABLE TO CONSIDER
AGGRAVATORS THAT MAY BE STRICKEN
VERSUS THE JUDGE IN A HARMLESS
ERROR ANALYSIS?

>> WELL, I THINK KASMAR IS THE
CASE I USED TO ARGUE THAT IT
SHOULD GO BACK FOR A NEW PENALTY
PHASE.

BECAUSE THAT NOTED THE MULTIPLE
ERRORS COULD AFFECT THE
RELIABILITY.

IT'S CITED ON, IN MY POINT ONE
IN MY INITIAL BRIEF.

BUT THAT'S PART OF MY REASONING.
THERE'S SO -- THESE ARE BIG
ERRORS.

AND THE JURY COULD BE IMPACTED
BY THINGS, AND IT SHOULD GO
BACK.

IT'S LIKE THESE OTHER CASES.
I STILL COME BACK TO THAT, AND I
CAN'T GET AROUND THAT.

BUT IT JUST SEEMS LIKE THE
FAIRNESS AND CONSISTENCY OF THE
APPLICATION OF THE DEATH PENALTY
IS NOT THERE WHEN YOU HAVE VERY
SIMILAR CASES, AND THE --

>> AND YOU DON'T THINK THAT IN
PERRY THE FACT THAT THE JURY HAD
RECOMMENDED A LIFE SENTENCE AND
THE JUDGE OVERRODE IT DOESN'T
MAKE A DIFFERENCE IN OUR
ANALYSIS HERE?

>> IT SHOULDN'T.

IF MIDDLETON HAD PERRY'S JURY,
HE'D HAVE LIFE RECOMMENDATION.

>> WE DON'T KNOW BECAUSE
THERE'S, YOU KNOW, THE
MITIGATION MAY BE QUALITATIVELY
DIFFERENT.

>> WE KNOW THE MITIGATION IN
PERRY.

YOU GUYS LISTED IT OUT.
HE'S GOOD AROUND HOME, HE'S GOOD

TO HIS FAMILY.
IT'S LESS THAN IN THIS CASE.
I'M NOT TALKING ABOUT DOING A
COMPARISON TO SOME CASE THAT
GETS PLED OUT SOMEWHERE, BECAUSE
WE DON'T HAVE FACTS DEVELOPED TO
COMPARE.

BUT THIS IS A CASE THAT'S GONE
THROUGH THE ENTIRE -- PERRY,
DAVIS, THOSE HAVE GONE THROUGH
THE PROCESS.

AND WE HAVE ALL THE MITIGATION
AND AGGRAVATION AND THE DETAILED
CIRCUMSTANCES TO COMPARE.

BUT WE'RE, I'M WORRIED WE'RE
GOING TO COME OUT TO A DIFFERENT
RESULT, WHICH WE SHOULDN'T.

I SEE I'M DIGGING INTO MY TIME.
I'M IN MY REBUTTAL, BUT I JUST
HAVE TO RELY ON MY REPLY BRIEF
AND INITIAL BRIEF, VERY DETAILED
ON THESE POINTS.

I'LL RELY ON THOSE.

AND UNLESS YOU HAVE FURTHER
QUESTIONS ON ANYTHING, I'LL
RESERVE THE REST OF MY TIME FOR
REBUTTAL.

>> THANK YOU.

>> THANKS.

>> MAY IT PLEASE THE COURT,
LISA-MARIE LERNER WITH THE
ATTORNEY GENERAL'S OFFICE FOR
THE STATE OF FLORIDA, ADDRESSING
INITIALLY THE CCP AGGRAVATOR.
IT IS APPROPRIATE FOR A TRIAL
COURT TO INSTRUCT A JURY ON
AGGRAVATORS, BOTH CCP AND AVOID
ARREST, IF THERE'S SUFFICIENT
EVIDENCE IN THE TRIAL TO JUSTIFY
IT.

AND THIS COURT HAS REPEATEDLY
SAID THAT AND HAS SAID THAT THE
COURT, TRIAL COURT CAN INSTRUCT
THE JURY ON AGGRAVATORS --

>> SO, BUT IT'S VERY DIFFERENT
IN WHAT YOU NEED IN ORDER TO GET
THE INSTRUCTION AND WHAT IS
NEEDED IN ORDER TO FIND THAT THE
AGGRAVATOR ACTUALLY EXISTS.

>> YES.

YES.

>> OKAY.

>> YES.

I WAS GOING TO THAT POINT TO SAY THAT EVEN IF THIS COURT AT SOME POINT DECIDES THAT THE AVOID ARREST AND CCP DON'T APPLY, IT'S NOT APPROPRIATE TO SEND IT BACK FOR A NEW PENALTY PHASE TRIAL. IT WOULD BE UP TO THIS COURT THEN TO DECIDE WHETHER IT WAS, ANY ERROR WAS HARMLESS AND FIND THAT THE DEATH PENALTY SHOULD STAND OR SEND IT BACK TO THE COURT FOR RECONSIDERATION AND A SENTENCING ORDER.

BUT NOT FOR A NEW TRIAL.

HOWEVER, IT'S STATE'S POSITION --

>> WHAT WOULD BE THE POINT OF SENDING IT BACK TO THE TRIAL JUDGE WHEN THE TRIAL JUDGE SAYS THAT HE WOULD HAVE IMPOSED THIS SENTENCE --

>> I AGREE.

>> -- EVEN WITHOUT ALL THE AGGRAVATORS?

>> I AGREE, YOUR HONOR, IT WOULDN'T.

BUT IT'S THE STATE'S POSITION THAT EVEN IF YOU STRIKE THESE TWO AGGRAVATORS, THE DEATH PENALTY IS STILL PROPORTIONAL AND THAT THERE IS COMPETENT, SUBSTANTIAL EVIDENCE IN THE TRIAL RECORD TO SUPPORT BOTH OF THESE AGGRAVATORS.

>> DID YOU --

[INAUDIBLE]

WHAT MR. ANDERSON SAID ABOUT PERRY?

>> WELL, THE SITUATION --

>> -- PERRY OR NOT?

BECAUSE IT DOES LOOK VERY SIMILAR.

>> WELL, THE SITUATION IN PERRY WAS THAT HE WENT OVER THERE TO, I BELIEVE IT'S THE CASE WHERE HE WENT TO GET SOME JEWELRY AND GOT INTO AN ARGUMENT.

AND THE SITUATION, FACTS IN THAT CASE SHOWED THAT HE WENT INTO A RAGE BECAUSE THERE WAS A CONFRONTATION WITH THE VICTIM, AND THERE WAS AN ACTUAL STRUGGLE OR FIGHT GOING ON.

>> WELL, WAIT.

HE WENT TO GET SOME JEWELRY THAT WAS HIS OWN JEWELRY OR --

>> NO.

>> HE WENT TO ROB HER.

>> RIGHT.

>> SO --

>> BUT BASED ON THE FACTS OF PERRY, THE COURT FOUND THAT AVOID ARREST, THIS COURT FOUND THAT THE AVOID ARREST WAS NOT APPROPRIATE BECAUSE HE WENT OVER THERE TO ROB, AND IT BECAME VIOLENT ONLY BECAUSE THE TWO PEOPLE STARTED TO FIGHT.

>> WELL, THAT DOES SOUND LIKE THIS CASE.

>> WELL, NO.

ALSO, INTERESTINGLY ENOUGH IN PERRY, PERRY WAS THE INDIVIDUAL WHO AFTER HE COMMITTED THE CRIME WENT TO THE POLICE ON HIS OWN TO CONFESS.

HE WASN'T EVEN ARRESTED.

SO HIS ACTIONS BOTH DURING THE CRIME AND AFTER THE CRIME NEGATED THE AGGRAVATORS THAT THE TRIAL COURT RELIED ON.

THAT'S NOT THE SITUATION HERE.

THE SITUATION HERE IS YOU HAVE MIDDLETON SAYING TO HIS ROOMMATE ON MORE THAN ONE OCCASION IN THE WEEKS AFTER MR. CHRISTENSEN LEFT TO GO HELP HIS SON, I'M GOING TO ROB ROBERTA.

HER HUSBAND'S AWAY, SHE'S A WAITRESS, AND SHE HAS MONEY.

IF HIS ONLY INTENTION WAS TO ROB HER, HE WAS OVER AT HER HOUSE VISITING HER THE DAY BEFORE, ON JULY 27TH.

HE WAS IN HER HOUSE THAT DAY VISITING, AND HE SAW HER WITH A WAD OF MONEY.

IF HIS SOLE INTENTION WAS TO ROB HER, HE COULD HAVE DONE IT THEN. HE DID NOT.

HE LEFT, WENT BACK TO HIS HOUSE, TOLD HIS ROOMMATE I'M GOING TO GO OVER THERE WHEN SHE'S THERE, AND I'M GOING TO GET THAT MONEY, AND I'M GOING TO TAKE CARE OF IT.

>> I'M GOING TO DO WHAT?

>> TAKE CARE OF IT, GETTING THE MONEY.

>> WELL, DID HE SAY --

>> HE NEVER SAID HE WAS GOING TO KILL HER, I'M NOT SAYING THAT.

BUT --

>> WHAT IS THIS DEFENDANT'S INTELLIGENCE?

>> ROUGHLY 83.

>> I MEAN, IT SAYS IT FALLS BETWEEN 72 AND 83.

THIS IS --

>> YES.

>> -- NOT A, I MEAN, AGAIN, CERTAINLY NOT A MENTALLY RETARDED, INTELLECTUALLY DISABLED INDIVIDUAL, BUT CERTAINLY HAS A LOW IQ.

>> APPARENTLY.

BUT HE ALSO MADE STATEMENTS TO THE DEFENSE PSYCHOLOGIST, DR. BARNARD, THAT HE DELIBERATELY MESSED WITH THE IQ TESTS ON THE STATE'S EXPERTS AND THE OTHER EXPERTS BECAUSE HE KNEW THAT GETTING A LOW IQ WOULD HELP HIM.

HE ACTUALLY SAID HE CHRISTMAS TREED, IE, RANDOMLY FILLED IN THE TEST RESULTS.

SO THE IQ DATA IS QUESTIONABLE.

>> NOT SUBMITTING DATA FROM BEFORE THIS CRIME?

>> NO.

I MEAN, I'M NOT SAYING THAT HE IS A GENIUS, BUT HE PLAYED WITH THE PSYCHOLOGIST TRYING TO GET THE BEST RESULTS FOR HIM GIVEN THE FACT THAT HE WAS FACING THE DEATH PENALTY.

BUT ON CCP, ON THE DAY OF IT HE DELIBERATELY WAITED UNTIL HIS ROOMMATES WERE GONE, SHE WAS THERE, AND EVERYONE ELSE IN THE AREA HAD GONE OFF TO PARTY. AND IT WAS AT THAT POINT HE CHOSE TO TAKE A KNIFE OUT OF THE KITCHEN -- AND IT WAS NOT A KNIFE THAT HE USUALLY CARRIED -- HIDE IT IN HIS BACK POCKET AND GO OVER THERE.

AND I ALSO WANT TO POINT OUT TO THE COURT TO ASK YOU TO ACTUALLY LOOK AT THE PHOTOGRAPHS IN THIS CASE.

THIS IS NOT A SITUATION WHERE, AS MR. ANDERSON SAYS, IT WAS OF A STRUGGLE.

HE ATTACKED HER WITHIN A FOOT AND A HALF OF HER FRONT DOOR. SHE WAS STANDING THERE.

THERE'S NO EVIDENCE OF A STRUGGLE IN THE FRONT DOOR. THE CURTAINS AREN'T DAMAGED, NOTHING IS DAMAGED.

HE ATTACKED HER WITH THE KNIFE WHILE SHE WAS STANDING THERE, AND THERE'S NO EVIDENCE OF THE STRUGGLE.

WHAT THE EVIDENCE SHOWS IS SHE RETREATED.

SHE DID NOT ATTACK.

THE EVIDENCE SHOWS HER BACKING UP INTO THE KITCHEN, TRYING TO PUT THE KITCHEN TABLE BETWEEN HER AND MIDDLETON AND THAT HE FOLLOWED HER AND KEPT STABBING HER IN THE FACE, IN THE SHOULDERS, THE ARMS, THE CHEST. THESE WERE NOT BLOWS TO TRY AND, YOU KNOW, CALM HER DOWN.

HE STABBED HER IN THE NOSE AND IN THE EYE AND IN THE CHEST IN THE KITCHEN.

THERE ARE GREAT POOLS OF BLOOD. THESE ARE NOT JUST DEFENSIVE WOUNDS, EVEN THOUGH SHE HAS THAT.

SHE FELL IN THE KITCHEN.

THE BLOOD RECONSTRUCTION HAS

SAID THAT SHE SLIPPED IN HER OWN BLOOD.

HER FOOT MARKS WERE ON THE WALL AND SO WERE HER HAND MARKS.

AND IT WAS AT THAT POINT THAT MIDDLETON TOOK HER IN A HEADLOCK.

THERE WERE WOUNDS TO HER FACE CONSISTENT WITH HER BEING FORCIBLY RESTRAINED, AND SHE WAS DRAGGED BACKWARDS DOWN THAT HALLWAY.

SHE WAS NOT STRUGGLING WITH HIM, SHE WAS TRYING TO GRASP ON TO THINGS TO PREVENT HIM FROM PULLING HER BACK DOWN THE HALLWAY TO AN ISOLATED BEDROOM WHERE HE SAT THERE --

>> WELL, THAT'S CERTAINLY, YOU KNOW, SEEMS TO ME IT HAS ALL THE EARMARKS OF HEINOUS, ATROCIOUS --

>> AND --

>> THERE'S NO DOUBT ABOUT THAT IN MY MIND.

>> AND CCP.

BECAUSE HE ATTACKED HER IMMEDIATELY.

AND SHE WAS NOT RESISTING.

HE WENT OVER THERE WITH A KNIFE, HE ATTACKED HER WHILE SHE WAS IN THE DOOR.

>> NOW, WHAT DO WE HAVE, THOUGH, THAT NEGATES -- AS I UNDERSTAND HIS STORY IS THAT HE CAME OVER THERE, ASKED HER FOR MONEY, AND SHE REFUSED TO GIVE HIM THE MONEY AND TOLD HIM TO GET OUT, AND THAT'S WHEN HE --

>> ATTACKED HER.

>> -- GOT INTO THE, WHATEVER RAGE HE WAS IN.

>> HE NEVER SAID HE WAS IN A RAGE.

>> WELL, I'M, YOU KNOW, TO ME WHEN SOMEONE DOES THAT KIND OF THINGS THAT HE DID TO HER --

>> IT MEANS HE WANTED TO KILL HER, IS WHAT IT MEANS.

THAT --

>> BUT, BUT, I MEAN, HIS STORY WAS THAT HE ASKED HER FOR MONEY AND THAT WHEN SHE REFUSED AND THEN TOLD HIM TO GET OUT, WHAT NEGATES THAT?

>> IT DOESN'T MATTER BECAUSE EVEN IF THAT'S WHAT HE USED TO GET HER TO ANSWER THE DOOR, HE ATTACKED HER WITH THE KNIFE IMMEDIATELY TRYING TO KILL HER AS SHE STOOD IN THE DOORWAY. AND SHE RETREATED, AND HE PURSUED HER. THAT IS THE INTENT TO KILL. THAT'S NOT AN INTENT TO ROB. HIS INTENT WAS TO INFLICT BODILY INJURY AND KILL HER FROM THE BEGINNING.

>> COUNSEL DESCRIBED THE KNIFE AS BEING A SMALL KNIFE THAT HE USED TO CLEAN HIS NAILS, I THINK HE SAID?

>> NO --

>> YOU, WAS THE KNIFE ADMITTED INTO EVIDENCE?

>> NO.

HE THREW AWAY THE KNIFE AND HIS BLOODY CLOTHING IMMEDIATELY AFTER THIS.

HE HID IT.

BUT HE DESCRIBED IT TO THE POLICE AS A PARING KNIFE.

IT'S NOT A POTATO PEELER, IT'S A PARING KNIFE, USUALLY SEVERAL INCHES LONG.

THIS IS HIS DESCRIPTION, THAT HE TOOK FROM HIS KITCHEN DELIBERATELY AND HID IN HIS BACK POCKET BEFORE HE WALKED OVER THERE.

>> I KNOW THERE ARE KNIVES IN MY KITCHEN THAT ARE SMALL AND VERY SHARP.

>> AND ALSO INTERESTINGLY ENOUGH, THE MEDICAL EXAMINER TESTIFIED THAT, AS YOU ALL KNOW, HE HAD TO SAW THROUGH HER THROAT.

THIS WAS NOT A SIMPLE CUT. IT HAD TO BE MANY TIMES, WHICH

MAKES THE AGGRAVATED HAC, I
AGREE.

BUT THE KNIFE, EVEN AFTER DOING
ALL THIS DAMAGE, WAS SHARP
ENOUGH TO ACTUALLY CUT INTO THE
VERTEBRAE BONE.

SO THE ACTUAL BONE WAS CUT.

SO THIS IS NOT A SMALL, DULL
KNIFE.

THIS KNIFE WAS LONG ENOUGH AND
SHARP ENOUGH TO DO ALL THAT
DAMAGE AND THEN ACTUALLY CUT
INTO THE BONE.

SO THIS IS, THIS IS NOT A
POTATO --

>> WASN'T SHE ALMOST
DECAPITATED?

>> YES, SHE WAS.

I ALSO WANTED TO POINT OUT, AND
THE TRIAL COURT MENTIONED THIS
IN THE SENTENCING ORDER.

MR. MIDDLETON IS ABOUT --

[INAUDIBLE]

ROUGHLY.

THIS WOMAN IS SMALL.

SHE WAS 5-3, 5-4, 130 POUNDS.

HE WAS MUCH LARGER THAN HER TOO.

AND SO YOU HAVE TO COMBINE THAT
WITH THE FACT THAT HE ATTACKED
HER IN THE DOORWAY.

THIS IS CCP.

AND AS TO THE AVOID ARREST, HE
KNEW HER, HE WAITED TIL SHE WAS
HOME.

HE DIDN'T JUST TRY AND ROB HER
OTHERWISE.

HE WAITED FOR EVERYONE ELSE TO
LEAVE AND, AGAIN, I SAID SHE PUT
UP NO RESISTANCE, THERE WERE
NO -- HE DIDN'T TRY AND RESTRAIN
HER AND TAKE THE MONEY OR THE
PROPERTY.

AND HE WENT OVER THERE TO KILL
HER.

HE KILLED HER TO AVOID ARREST
BECAUSE SHE KNEW HIM, AND HE
ACTUALLY LOOKED FOR THE MONEY IN
HER PURSE AND THEN --

>> SEE, I GUESS I JUST THINK --
AND, AGAIN, MAYBE IT JUST

DOESN'T MATTER BECAUSE WHAT HAPPENED IS YOU HAVE SOMEBODY WHO THINKS THERE'S \$200, \$300 THERE THAT COULD HAVE WAITED UNTIL SHE WAS GONE, BUT THROUGH SOME TWISTED REASONING THINKS IT'S A BETTER IDEA TO GO AND GET THE MONEY WHILE SHE'S THERE. AND THEN, OF COURSE, THERE'S NOT EVEN MONEY.

BUT I JUST DON'T SEE THIS AS THAT THIS GUY WAS DECIDING THAT I'M GOING OVER THERE TO KILL HER BECAUSE I'M GOING TO ROB HER OF THIS COUPLE HUNDRED DOLLARS, AND SHE'LL RECOGNIZE ME WHEN HE COULD HAVE JUST AS EASILY WAITED UNTIL SHE WAS GONE.

SO TO ME, ALTHOUGH WHAT YOU'RE SAYING ABOUT THE SECOND SHE OPENS THE DOOR HE ATTACKS HER, I THINK IS -- I WANT TO MAKE SURE MR. ANDERSON ADDRESSES THAT, BECAUSE THAT WOULD BE A DIFFERENT ISSUE.

I DIDN'T THINK, I DIDN'T KNOW THAT THAT FACT WAS --

>> LOOK AT THE, LOOK AT THE PICTURES.

>> BUT IS THAT, WAS THAT ONE OF THE FINDINGS THE JUDGE MADE?

>> YES.

THAT SHE WAS ATTACKED IN THE DOORWAY.

AND ALSO AS I SAID EARLIER, THE FACT THAT HE WAS IN HER HOUSE THE DAY BEFORE WHEN SHE HAD THE MONEY.

IF HIS ONLY, SOLE INTENT WAS TO ROB HER, HE COULD HAVE ROBBED HER THEN WITHOUT HARMING HER. BUT HE WAITED A FULL DAY, ARMED HIMSELF WITH A KNIFE, WAITED UNTIL EVERYONE ELSE WAS GONE AND THEN WENT OVER, ATTACKED HER AND THEN LOOKED IN HER PURSE, HID THE PURSE AND THEN TOOK THE TELEVISION.

JUST BRIEFLY ON MR. MIDDLETON'S POINT FOUR.

THIS COURT -- I'M SORRY, THE TRIAL COURT DID NOT DISPARAGE ALL OF THE PSYCHIATRIC TESTIMONY.

HE REFERENCED BACK TO HIS WRITTEN ORDER ON THE SUPPRESSION MOTION AND ALSO ON THE SENTENCING ORDER, SAID THE PROBLEM WITH PSYCHOLOGICAL TESTIMONY IS AS YOU HAVE IN THIS CASE, YOU HAVE FOUR DOCTORS AND FOUR OPINIONS.

>> BUT HE SAID A LITTLE MORE THAN THAT.

I MEAN, DIDN'T HE TALK ABOUT THE FACT THAT HE WASN'T EVEN SURE THAT ALL THIS PSYCHOLOGICAL STUFF WAS REALLY REAL SCIENCE AND --

>> WELL --?

>> HE MADE, HE DID, IN MY ESTIMATION --

>> HE QUOTED DR. BASEL ON PSYCHIATRIC TESTIMONY, AND THE QUOTE WAS, "PSYCHIATRY IS, AT BEST, AN INEXACT SCIENCE, IF INDEED IT IS A SCIENCE, LACKING A COHERENT SET OF PROVEN, UNDERLYING VALUES NECESSARY FOR ULTIMATE DECISIONS ON KNOWLEDGE OR COMPETENCE."

>> YES.

>> THEN HE GOES ON THE NEXT PAGE, AND HE ACCEPTS THE TESTIMONY OF ONE PSYCHIATRIST. I MEAN, THAT --

>> WELL, WHAT HE DID, I THINK HE WAS TRYING TO SAY IT WAS MORE OF AN ART THAN A SCIENCE.

BUT HE DID GO THROUGH AND DISCUSS THE VARIOUS EXPERTS AND WEIGH THEIR TESTIMONY AND EXPLAIN WHY HE WAS GIVING CREDIBILITY TO ONE AND NOT THE OTHER.

AND IN TERMS OF THE TESTIMONY OF WHETHER OR NOT MIDDLETON WAS IMPAIRED AT THE TIME OF THE OFFENSE, THE OFFENSE WAS BETWEEN 4:30 AND 5:30 ON JULY 28TH, AND

THE TESTIMONY WAS THAT HE HAD --
MIDDLETON TOOK ONE XANAX WITH
MR. BRITNOW IN THE MORNING AND
DID A LITTLE BIT, AND THAT WAS
THE TESTIMONY BY MR. BRITNOW, A
LITTLE BIT OF METH AROUND 1:00.
AND THERE'S NO EVIDENCE THAT HE
DID ANYTHING AFTER THAT.
AND MR. ANDERSON MENTIONED,
WELL, THE STATE EXPERT DIDN'T
KNOW THAT, YOU KNOW, THIS
DETECTIVE SAW MIDDLETON AT 11:30
AT NIGHT WHERE HE HAD GLASSY
EYES.

HOWEVER, THE EVIDENCE WAS THAT
AFTER THEY SOLD THE TELEVISION,
MR. BRITNOW AND MIDDLETON WENT,
DID A BUNCH OF COCAINE, AND THEN
MIDDLETON WENT TO A BAR.
BUT THIS WAS ALL AFTER THE
MURDER.

THE TESTIMONY THAT THE STATE
EXPERT FOCUSED ON WAS AT THE
TIME OF THE CRIME IN COMING UP
TO THE DECISION THAT THE
MITIGATOR WAS NOT ESTABLISHED.
AND THE EVIDENCE AT THE TRIAL
SUPPORTS THAT.

THE FACT THAT MIDDLETON TOOK
DRUGS AFTERWARDS DOES NOT GO
BACK IN TIME AND SHOW THAT HE
WAS IMPAIRED --

>> BUT THE JUDGE DID, IN FACT,
FIND AS A MITIGATING
CIRCUMSTANCE THAT HE HAD A
SUBSTANCE ABUSE PROBLEM AND GAVE
IT SOME WEIGHT, DIDN'T HE?

>> YES, HE DID.

AND ALSO IN TERMS OF WEIGHING
HIS NEGLECTED CHILDHOOD AND THE
OTHER NONSTATUTORY MITIGATION,
THE JUDGE WENT THROUGH AND
DISCUSSED ALL OF THAT BUT ALSO
WAS AWARE THAT, AS THIS COURT
KNOWS, MR. MIDDLETON WAS A
36-YEAR-OLD MAN WITH TWO
CHILDREN.

EARLIER IN LIFE HE HAD HAD GOOD
WORK HISTORY, BUT BECAUSE OF HIS
SUBSTANCE ABUSE HAD NOT BEEN

WORKING RECENTLY.

SO --

>> HE WAS WORKING DOING ODD JOBS.

>> HE WAS DOING ODD JOBS.

BUT THE, THE MERE FACT THAT HE IS DOING DRUGS ON THE DAY OF THIS CRIME, IT'S SORT OF LIKE THE DEFENSE IS TRYING TO GET HIM DIMINISHED CAPACITY WHICH IN THE GUILT PHASE IS NOT ADMISSIBLE. BUT IT'S NOT REALLY APPROPRIATE EVEN IN THE PENALTY PHASE BECAUSE THE EVIDENCE SO SCANT ABOUT THE AMOUNT OF DRUGS HE DID.

HE DID ONE XANAX AND A SMALL AMOUNT OF METH AT LEAST THREE AND A HALF, FOUR HOURS BEFORE THIS CRIME OCCURRED.

IF THIS COURT HAS NO FURTHER QUESTIONS, I ASK YOU TO AFFIRM BOTH THE GUILT AND PENALTY PHASES.

THANK YOU.

>> THANK YOU.

REBUTTAL?

>> THIS IS ONE OF THOSE UNUSUAL SITUATIONS THAT DOESN'T HAPPEN VERY OFTEN, BUT WE HAVE A LOT OF FACTUAL DISAGREEMENTS.

AND I'M NOT GOING TO COVER THEM ALL BECAUSE I DON'T HAVE TIME.

I JUST, I KNOW THIS COURT WILL RELY ON BOTH OF OUR BRIEFS AND THEN MAYBE HAVE TO LOOK UP SOME OF THE FACTS.

>> WHAT ABOUT THAT, THE ISSUE OF WHETHER AS SOON AS THE DOOR OPENED, SHE WAS ATTACKED?

>> NO.

THERE'S NO EVIDENCE OF THAT.

THAT'S NOT THE EVIDENCE.

THE EVIDENCE IS THAT THE ONLY THING WE KNOW AS FAR AS WHEN HE WENT IN INITIALLY IS HIS STATEMENT.

AND WE KNOW THE ATTACK BEGAN IN THE KITCHEN.

THIS IS A VERY SMALL TRAILER,

YOU KNOW?

IT'S VERY SMALL.

LIKE THE HALLWAY WE'RE TALKING ABOUT IS JUST MAYBE FOUR OR FIVE FEET.

SO, YOU KNOW, THERE WAS AN ATTACK IN THE KITCHEN.

THERE'S BLOOD THERE.

THERE'S EVIDENCE OF A STRUGGLE.

>> BUT WHAT ABOUT --

>> THE STATEMENT WAS THAT IT WAS IN THE DOORWAY AND THAT THE JUDGE FOUND THAT IT WAS IN THE DOORWAY.

>> I DIDN'T, I DIDN'T SEE ANY EVIDENCE OF --

>> [INAUDIBLE]

>> THERE WAS A SPECK OF BLOOD A COUPLE FEET FROM THE DOOR, BUT THAT'S ALSO JUST A COUPLE FEET FROM WHERE A LOT OF BLOOD WAS, A LOT MORE BLOOD.

BUT, AND IT'S BEEN TALKED ABOUT, YOU KNOW, HEADLOCKS AND DRAGGING DOWN THE HALLWAY.

THIS IS ALL FROM -- THERE'S ONE DRAG MARK IN THE HALLWAY.

THAT'S WHAT THEY CALL IT.

>> I THOUGHT THAT THE UNDERGARMENTS HAD BEEN PULLED UP OR SOMETHING, OR AM I THINKING OF A DIFFERENT CASE?

THAT INDICATED THAT THIS VICTIM HAD BEEN DRUG.

>> WELL --

>> IS THAT, I MEAN, AM I THINKING OF THE WRONG CASE?

>> NO, NO.

BUT I DON'T KNOW THAT YOU CAN JUMP TO THAT CONCLUSION BECAUSE IF THAT'S HAPPENING, DRAGGING DOWN THE HALLWAY'S BEING DISCUSSED, OVER THE DRAG MARK THERE'S DROPS OF BLOOD THAT THE FORENSIC PEOPLE FOR THE STATE SAID CAME FROM ABOVE WHICH WOULD BE MORE CONSISTENT IF IT'S COMING FROM ABOVE WHEN SHE'S BEEN STABBED IN THE UPPER BODY. THERE'S A DROP OF BLOOD FALLING

AS SHE'S STANDING, THEN MAYBE SHE DRAGS HER FOOT.
>> LET ME ASK YOU HOW BIG IS THE DEFENDANT?
HIS STATISTICS?
>> I HAVE TO GO BY WHAT --
>> WHAT DID SHE SAY?
>> 5-11 APPROXIMATELY?
>> HOW MANY POUNDS?
>> I DON'T KNOW.
I DON'T REMEMBER.
HE WAS BIGGER THAN HER.
>> MUCH BIGGER OR JUST SLIGHTLY BIGGER?
>> NO.
IT'S NOT LIKE HE'S A 300-POUND --
>> I'M WONDERING ABOUT THIS STRUGGLE.
I MEAN, HOW COULD SHE HAVE STRUGGLED WITH HIM?
>> WELL, SHE DID NOT PREVAIL IN THE STRUGGLE.
I'M NOT SAYING THAT.
I'M SAYING SHE FOUGHT.
SHE FOUGHT HARD, AND THERE'S INDICATIONS OF A STRUGGLE THROUGHOUT THE THING.
AND I'M NOT SAYING, I'M NOT ATTACKING HAC IN THIS CASE. THE CASES I'M RELYING ON ARE SIMILAR, AND THEY ALL HAVE HAC.
I'M NOT SAYING THAT.
I'M TRYING TO SAY THAT THE STRUGGLE, IF THAT'S WHEN HE'S MAKING HIS DECISION TO DO A LOT OF HARM TO HER AND KILL HER, THAT'S NOT CCP.
IT'S NOT A DECISION MADE UNDER COOL AND CALM REFLECTION.
AND THERE'S NO CASES WHERE YOU HAVE A STRUGGLE OCCURRING WHERE, YOU KNOW, THERE'S NOTHING ELSE OTHER THAN, YOU KNOW, CHANGING BLOODY CLOTHES AND PREPARING LIKE THAT THAT YOU FIND CCP AND AVOID ARREST.
THIS CASE IS LIKE THE CASES I'M RELYING ON, THE PERRY, THE DAVIS.

AND THE OTHER THING I WANTED TO MENTION, THERE'S BEEN SAID THAT THE EVIDENCE OF IMPAIRMENT COMES ON AFTER THE KILLING FROM TAKING SOME COCAINE.

HE TOOK MORE -- HE TOOK OXYCODONE.

YOU'LL HAVE TO CHECK THE RECORD FOR THAT.

AND STEVE BRITNOW TESTIFIED AT 3:00 THE DEFENDANT WAS "REALLY RIPPED."

>> THAT WAS ON TAKING METH?

>> HE'D BEEN SMOKING METH.

AND, WELL, I DON'T KNOW BRITNOW, BUT AN OBSERVATION WAS MADE LATER SAYING THAT MIDDLETON WAS, OBVIOUSLY, HIGH FROM SMOKING METH.

FOWLER HAD SMOKED METH WITH THEM.

AGAIN, AS FAR AS THE INDIVIDUAL FACTS, I'D SAY CHECK OUR BRIEFS AND THE RECORD BECAUSE, FOR INSTANCE, THE CONVERSATION THAT'S ALLEGED TO HAVE OCCURRED WITH FOWLER, IT JUST SOUNDS WAY DIFFERENT FROM WHAT THE RECORD SHOWS.

AND, BUT I'M -- THEY DID TALK ABOUT HER BEING A POTENTIAL ROBBERY VICTIM.

SO I'M NOT DISPUTING THAT.

UNLESS THERE ARE ANY FURTHER QUESTIONS, I'D JUST ASK THIS COURT TO LOOK INTO THE BRIEFS A LOT MORE THOROUGHLY.

>> THANK YOU FOR YOUR ARGUMENTS. COURT IS ADJOURNED.

>> ALL RISE.

