

>> 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 AND
THIS HONORABLE COURT.

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

>> GOOD MORNING, WELCOME TO THE
FLORIDA SUPREME COURT.

FIRST CASE FOR THE DAY IS DAVIS
VERSUS STATE OF FLORIDA.

YOU MAY PROCEED.

>> GOOD MORNING, JUDGES AND
COUNSEL. MAY IT PLEASE THE COURT
I'M NANCY RYAN FOR APPELLANT
DAVIS.

I'M ASKING THE COURT TO REVERSE
THE DEATH SENTENCE IMPOSED
AGAINST HIM AND GRANT A
NEW PENALTY PHASE WITH A
NEW JUDGE.

IF THAT RELIEF IS NOT GRANTED
I'M ASKING THE COURT TO STRIKE
ONE OF THE ACTIVATING FACTORS
THAT THE JUDGE FOUND AND REMAND
FOR THE JUDGE TO REWEIGH THE
MITIGATING EVIDENCE AS IT
RELATES TO MENTAL HEALTH.

I'M ARGUING HE IS ENTITLED TO A
NEW PENALTY PHASE.

THE ARGUMENTS ARE THAT
JUDGE INTRODUCED A NEW THEORY OF
AGGRAVATION WHICH HAD NOT BEEN
ANNOUNCED BY THE STATE.

OUR POSITION THAT AMOUNTS TO
FUNDAMENTAL ERROR IN THIS CASE.
THIS COURT HAD OCCASION TO
REVIEW THE CASE DID THE SAME
THING.

THERE WAS NO FUNDAMENTAL ERROR.

>> LET ME ASK YOU THIS.

DOESN'T THE RECORD SUGGEST THAT
WHAT THE JUDGE WAS MAKING REFERENCE
TO THAT HE WAS READING FROM
PROPOSED JURY INSTRUCTIONS?

>> YES, BUT IT IS NOT CLEAR AT ALL WHO PROPOSED THEM.

>> IT WOULD BE CLEAR, YOU'RE SAYING IT IS NOT CLEAR WHO PROPOSED THEM.

IS THERE ANY SUGGESTION THAT IS SOMETHING THAT THE JUDGE HIMSELF?

>> I BELIEVE THIS RECORD IS THAT IS UNUSUAL. ORDINARILY THE STATE DOES PROPOSE THEM AND EVERYBODY DOES ALL THE WORK ON THE CHARGE CONFERENCE IN OPEN COURT. IT DOES APPEAR AFFIRMATIVELY AS A PROPOSITION THAT THE RECORD HERE SHOWS THAT THE JUDGE ADDED THAT BEFORE THEY CAME INTO OPEN COURT BECAUSE COUNSEL FOR THE STATE WAS, JUDGE, WHERE ARE YOU MEETING?

>> I THOUGHT THERE WERE TWO COUNSEL FOR THE STATE. FIRST ONE AND SECOND ONE CAME IN?

HE WAS PREPARED TO ARGUE THIS AGGRAVATOR, WAS HE NOT? WAS THERE, YOU ARE YOU SUGGESTING THERE WAS CONSPIRACY BETWEEN THE JUDGE AND SECOND STATE ATTORNEY.

>> ABSOLUTE NOT, YOUR HONOR.

>> MISS VALENTINI, THE CHARGE CONFERENCE, SHE WAS TRAINING DURING THIS TRIAL.

SHE WAS NOT CLEAR WHAT WAS GOING ON.

MR. WHITAKER, VERY EXPERIENCED COUNSEL FOR THE STATE CAME INTO THE COURTROOM.

RECORD IS CLEAR HE WAS VERY EXPERIENCED, IT WAS HIS LAST TRIAL BEFORE RETIRING.

IF YOU READ CHARGE CONFERENCE CAREFULLY, IT SHOWS THAT MR. WHITAKER WAS, SCRAMBLING TO CATCH UP AT THAT POINT.

HE WAS ABLE TO DO SO QUITE QUICKLY.

>> BUT, HERE'S MY PROBLEM. FIRST OF ALL, THE RECORD, NOT

ONLY IS NOT CLEAR BUT TO ME,
MORE, LOGICAL READ SOMETHING
WHAT JUSTICE CANADY AND JUSTICE
PERRY SAID, IT WAS THE CHARGE
CONFERENCE AND THERE WAS A JURY
INSTRUCTION, BUT YOU SAID THAT,
IT WOULD BE FUNDAMENTAL ERROR.
THAT IS WHERE I HAVE THE
PROBLEM, BECAUSE THE DEFENSE
LAWYER IS THERE AND IF THERE'S
AN ISSUE THAT THAT AGGRAVATOR
DOESN'T APPLY IT WOULD SEEM TO
ME BEFORE YOU, THAT IT IS UP TO
THE DEFENSE LAWYER TO MAKE AN
OBJECTION.

SAY, JUDGE, THIS ISN'T BEING
PROPOSED, SOMETHING.

AND THAT LEADS ME TO BELIEVE
MORE LIKELY THAT IN FACT THIS
WAS COMING UP AS A STATE
PROPOSED INSTRUCTION.

BUT IF WE CAN'T TELL-- HOW DO WE
REVERSE ON SOMETHING WHERE THE
RECORD IS EITHER UNCLEAR OR
MAYBE THE WAY THAT IS THE
STATE'S POSITION IS?

>> YOU CAN REMAND FOR --

>> WHEN HAVE WE EVER, THAT SEEMS
TO ME, IF IT IS --

>> IF IT IS NOT CLEAR.

>> I THINK DEFENSE COUNSEL WAS
SURPRISED.

I'M NOT SUGGESTING A CONSPIRACY.
I BELIEVE THEY WERE ALL
SURPRISED IN THAT DEFENSE
COUNSEL DIDN'T COME UP WITH MUCH
ON THE FLY.

HE ARGUED THAT, WELL, THE,
HE ARGUED TO THE JURY AVOID
ARREST REALLY DOESN'T APPLY BECAUSE
THE DEFENDANT DROVE INTO THE
ARMS OF POLICE.

>> YOU'RE ASKING FOR A REVERSAL
ON THE BASIS THAT THE JUDGE
CEASED TO BE A NEUTRAL ARBITER.
WHAT I'M SAYING ABOUT THAT POINT
IS, IT IS NOT AT ALL THE, THE
RECORD JUST DOESN'T DEMONSTRATE
THAT, THAT OCCURRED.

SO WHY WOULD WE REVERSE IN THIS

MURKY, UNCLEAR RECORD TO
RECONSTRUCT IT OR SOMETHING?
JUST WOULD BE NO PRECEDENT TO DO
THAT.

>> WELL, JUDGE, POSSIBLY THIS IS
AN ISSUE CAN NOT BE FLESHED OUT
AS PRACTICAL MATTER UNTIL
POST-CONVICTION IF THE CASE GETS
THAT FAR.

IF IT IS VIEW OF THE COURT THAT
IS IT IS NOT CLEAR I WOULD MOVE
ON TO THE SECOND ISSUE.

>> YOU MENTIONED ROBARDS
EARLIER.

THERE THE PROSECUTOR FILED A
NOTICE OF AGGRAVATORS IT
INTENDED TO PURSUE.

>> YES.

>> IT WASN'T THE CHARGE
CONFERENCE.

IT WASN'T THE ACTUAL JURY
INSTRUCTIONS, JUST A NOTICE
TELLING THE STATE AND DEFENSE,
ACCORDING TO THE DEFENSE, THESE
ARE THE AGGRAVATORS WE INTEND TO
PURSUE.

THE COURT LOOKED AT THOSE AND
SAID, DID YOU NOT FORGET THIS
ONE?

SOMETHING LIKE THAT.

>> YES.

>> THEY SUGGESTED ONE WAS
FORGOTTEN, AND LOW AND BEHOLD
THE NEXT DAY THE PROSECUTOR
AMENDED THE INTENT WITH
ADDITIONAL AGGRAVATOR.
THAT IS A LOT DIFFERENT THAN HERE.
HERE SOMEBODY GAVE THE COURT
JURY INSTRUCTIONS AND THEY'RE
AT THE CHARGE CONFERENCE AND
THEY'RE GOING OVER THESE THINGS.
THAT IS THE BIG DIFFERENCE
THERE.

>> JUDGE, I WOULD POINT OUT THE
IN THIS CASE THE FILED A NOTICE
OF INTENDED AGGRAVATED
CIRCUMSTANCES.

THE STATE SUPPLEMENTED WITH
THAT.

IT WAS NOT IN THE ORIGINAL

RECORD.
I DID NOT SEE IT IN THE PROGRESS
DOCKET.
IT DOESN'T HELP THE STATE AT ALL
BECAUSE IT DOESN'T REFER TO
AVOID ARREST.
IT REFERS TO THE OTHER FIVE.
THERE WAS EVIDENCE THIS WAS IN
FACT A SURPRISE AT THE CHARGE
CONFERENCE.
>> LET'S BE CLEAR.
ARE YOU SAYING THAT ANYWHERE
OUTSIDE OF THE TRANSCRIPT, 2528
2545, WE CAN FIND EVIDENCE
OF THIS?
OR IS THAT THE EXCLUSIVE PLACE
YOU'RE LOOKING TO?
>> THAT IS THE EXCLUSIVE
PLACE I'M LOOKING, YOUR HONOR.
>> IF IT IS I WOULD ASK THE
COURT TO REMAND FOR THE JUDGE
GALLUZO TO MENTAL HEALTH
MITIGATING EVIDENCE.
THE JUDGE REJECTED REQUESTED
STATUTORY MITIGATOR UNDER
INFLUENCE OF EXTREME MENTAL OR
EMOTIONAL DISTRESS.
THE JUDGE GAVE LESS WEIGHT TO
MENTAL HEALTH PROBLEMS IN
GENERAL THAN THE DEFENDANT'S
RESPECTFUL DEemeanOR IN COURT AFTER
HE HAD BEEN MITIGATED IN COURT
SOME TIME.
JUDGE CONSIDERED STATUTORY
AGGRAVATOR OF FUTURE
DANGEROUSNESS.
FIVE TIMES IN THE WRITTEN
SENTENCING ORDER THE JUDGE
REFERS TO THE DEFENDANT'S
COURTROOM STATEMENT HE WOULD GO
OFF HIS MEDICATIONS AND COMMIT
MORE CRIMES.
THIS COURT'S PRECEDENCE THAT
RELATES TO CONSIDERING FUTURE
DANGEROUSNESS IN A CAPITAL
SENTENCING ORDER --
>> YOU HAVE THAT AS A SEPARATE
ISSUE ON APPEAL?
>> YES, YOUR HONOR.
THIS IS POINT TWO IN THE BRIEF.

IN POINT TWO I HAVE DISCUSSED THIS COURT'S PRECEDENT, PEREZ AND MILLER.

IN MILLER THIS COURT REVERSED WHERE THE COURT CONSIDERED THE NON-STATUTORY AGGRAVATORS OF FUTURE DANGEROUSNESS.

IN PEREZ THE COURT DID NOT REVERSE, FOUND NO HARM.

IN PEREZ THE JUDGE MENTIONED FUTURE DANGEROUSNESS IN COURSE OF REJECTING NON-STATUTORY MITIGATOR OF CHILDHOOD ABUSE.

THE JUDGE SAID THAT MADE HIM MORE DANGEROUS, DIDN'T IT?

IN PEREZ YOU HAVE NO HARM.

IN MILLER YOU HAVE HARM WHERE THE COURT HELD THE CONSIDERATION OF STATUTORY AGGRAVATOR TIPPED THE SCALES.

THIS ONE LIES SOMEWHERE IN THE MIDDLE. HERE YOU HAVE THE JUDGE REJECTING WHAT THE COURT REFERS TO AS WEIGHTIEST OF STATUTORY MITIGATORS.

YOU HAVE FIVE REFERENCES TO HIS FUTURE DANGEROUSNESS.

I SUBMIT TO YOU, THAT UNDER THIS COURT'S DECISIONS IN OYOLA AND CAMPBELL, THIS IS NOT THE REASONED CONSIDERATION OF MITIGATION THIS COURT REQUIRES.

ALSO THE COURT MADE FINDINGS THAT WERE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE IN FINDING RELATIVELY LITTLE -- >> SO LET ME ASK YOU THIS.

IN THIS PARTICULAR MITIGATOR, YOU'RE TELLING US THAT THE JUDGE CAN NOT CONSIDER WHEN THIS IS MITIGATING BY DETERMINING WHETHER OR NOT THE DEFENDANT OF HIS OWN FREE WILL WAS NOT TAKING HIS MEDICATION AND THAT KIND OF THING?

BECAUSE THAT SEEMS TO ME WHAT THE JUDGE WAS SAYING HERE. THAT THERE WAS A, NOT A LOT OF WEIGHT BEING GIVEN TO THIS MITIGATOR BECAUSE OF THAT

FACTOR.

SO YOU DON'T THINK THE JUDGE CAN TAKE THAT INTO CONSIDERATION?

YOU CONSIDER THAT NON-STATUTORY AGGRAVATING?

>> FUTURE DANGEROUSNESS THE COURT HAS DETERMINED THAT.

>> I'M NOT TALKING ABOUT FUTURE DANGEROUSNESS.

I'M TALKING ABOUT HIS STATEMENT, THE JUDGE CLEARLY SAYS THAT THIS DEFENDANT WAS NOT TAKING HIS MEDICATION AND HE CHOSE TO DO SO.

ISN'T THAT BASICALLY ONE OF THE THINGS THAT THE TRIAL JUDGE WAS SAYING?

IS THE TRIAL JUDGE ALLOWED TO DO THAT?

>> I DON'T BELIEVE YOU CAN CONSIDER IT IN AGGRAVATION BECAUSE IT IS NOT A STATUTORY AGGRAVATOR.

THE COURT, YOU CAN'T CONSIDER IT AS AGGRAVATION.

>> YOU KNOW HE CAN'T CONSIDER IT AS AGGRAVATION BUT CAN YOU CONSIDER IT IN DETERMINING HOW MUCH WEIGHT YOU'RE GOING TO GIVE TO MENTAL HEALTH MITIGATION?

>> THE FACT THAT THE DEFENDANT WAS OFF HIS MEDICATIONS?

>> AND THE FACT THAT HE HAD FREE WILL AND DID THAT?

>> YES.

IT'S A FACT THE JUDGE CAN CONSIDER.

>> OKAY.

>> WHAT YOU'VE GOT IN ADDITION WHEN THE JUDGE GAVE SO LITTLE WEIGHT TO THE VERY SUBSTANTIAL EVIDENCE OF MENTAL HEALTH PROBLEMS THAT --

>> THE JUDGE'S ORDER IS, HE GOES THROUGH IN GREAT DETAIL, FIRST OF ALL, WHAT, HOW HE CONSIDERS ALL OF THE MENTAL HEALTH EXPERTS AND ONE OF THE BIG ISSUES IN THIS CASE WAS DID HE, DID HE, THE DEFENDANT, HEAR VOICES IN

THE FORM OF DR. PAUL THAT DROVE HIM TO COMMIT THIS TERRIBLE CRIME?

THAT ISSUE, THAT IS, WHETHER HE WAS SO FAR, YOU KNOW, GONE, SO TO SPEAK WITH HIS MENTAL ILLNESS THAT HE REALLY WAS UNDER THE INFLUENCE OF EXTREME EMOTIONAL DISTURBANCE WAS -- FIRST OF ALL IT IS A BIG ISSUE IN THE GUILT PHASE AND THEN IN THE PENALTY PHASE.

SO THE JUDGE, WITH EXPERTS, DECIDED THAT, NO, HE HAD MENTAL ILLNESS BUT HE DIDN'T HAVE THE, HE WASN'T UNDER EXTREME EMOTIONAL DISTURBANCE AT THE TIME OF THE CRIME.

OKAY.

SO, ARE YOU, ARE YOU CHALLENGING THAT REJECTION OF THE STATUTORY MITIGATION?

>> YES, YOUR HONOR.

>> ALL RIGHT.

BUT IF WE SAY THERE'S EVIDENCE BOTH WAYS HE THEN GOES ON AND GIVES IT.

NOW HE SAYS HE GIVES IT SOME WEIGHT.

SO YOU WOULD SAY UNDER THE CIRCUMSTANCES OF THIS CASE THE JUDGE SHOULD HAVE GIVEN GREAT WEIGHT, CORRECT?

>> YES.

>> OKAY.

NOW, ALL I WANT, LET'S ASSUME HE GIVES GREAT WEIGHT BECAUSE WE CAN LOOK AT THIS.

WITH THESE NUMBER OF AGGRAVATING CIRCUMSTANCES IN THIS CASE, AND LEAVE OUT AVOID ARREST BECAUSE I THINK YOU'VE GOT AN ARGUMENT THERE, THIS IS STILL A PROPORTIONATE DEATH SENTENCES. SO WHAT YOU WOULD ASK US TO DO IS REVERSE BECAUSE THE JUDGE SHOULD HAVE GIVEN ONE MITIGATING GREATER WEIGHT THAN JUST SOME WEIGHT?

AND I THINK THAT'S WHERE I HAVE

A PROBLEM WITH YOUR ARGUMENT.
>> I'M NOT SO MUCH ARGUING HE SHOULD HAVE PUT A DIFFERENT DESIGNATION HOW MUCH WEIGHT HE GAVE IT.

I'M ARGUING THAT HE MADE FINDINGS IN SUPPORT OF HIS RULING THAT THERE WAS LITTLE MITIGATION WHICH ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

HE FOUND THAT THE MENTAL HEALTH PROBLEMS DIDN'T EVEN CONTRIBUTE TO THESE OFFENSES AND THERE WAS NO TESTIMONY TO THAT EFFECT.

>> HE SAYS, OR ALTERNATIVELY. HE SAYS, BECAUSE I REREAD THAT LAST NIGHT.

HE DOESN'T, HE SAYS EITHER THAT OR IT WASN'T THE MAJOR CAUSE OF WHAT HAPPENED.

RIGHT?

>> JUDGE, I'M NOT DISPUTING YOUR RECOLLECTION OF THE RECORD BUT AS I RECALL HE SAID IT DIDN'T EVEN CONTRIBUTE.

>> NO, HE SAID IT WAS A FACTOR, IT WAS A CONTRIBUTING FACTOR BUT IT WASN'T THE MAIN ONE.

>> AND THE JUDGE ALSO STATED THAT IT DID NOT EXCUSE THE OFFENSES WHICH, DR. REIBSAME TESTIFIED.

BUT I SUBMIT BEYOND A MEHLMAN'S EXPERTISE AND NOT A PROPER CONSIDERATION.

THERE WAS VERY SUBSTANTIAL MENTAL HEALTH MITIGATION IN THIS CASE.

>> AND THERE IS NO QUESTION. LET'S, THIS IS WHAT I WANT TO GET TO.

I THINK THE JUDGE DID RECOGNIZE THERE WAS SUBSTANTIAL MENTAL HEALTH MITIGATION.

BY GIVING IT SOME WEIGHT WE'VE ALLOWED THAT TO BE THAT THE JUDGE GETS TO SAY IF IT IS SOME WEIGHT OR GREAT WEIGHT.

STILL, THIS IS NOT A CASE, AND

THIS IS WHERE WE GET TO, BECAUSE REALLY FACTS ARE ADMITTED BY THE DEFENDANT'S OWN WORD, THAT THE WAY THIS, WITH THE KIDNAPPING, WITH THE WAY THE CRIME OCCURRED, WITH THE SEXUAL BATTERY, WITH THE CCP, AND I KNOW YOU DISAGREE WITH THAT, AND WITH THE HAC, I DON'T SEE HOW THOSE AGGRAVATING CIRCUMSTANCES WOULD, NO MATTER WHERE THIS MENTAL HEALTH MITIGATION IS WOULD CHANGE THE NATURE OF THE WEIGHING OR THE APPROPRIATENESS OR THE DEATH PENALTY.

SO THAT'S WHERE, I AGREE WITH YOU THERE IS SUBSTANTIAL MENTAL HEALTH ISSUES BUT THE QUESTION IS, YOU'RE SAYING WELL, SEND IT BACK TO THE JUDGE TO REWEIGH IT? I DON'T THINK THAT WILL, YOU KNOW, THAT DOESN'T SEEM LIKE UNDER THE CIRCUMSTANCE, THE SENTENCING ORDER APPROPRIATE REMEDY.

IT IS REALLY A QUESTION, IS IT PROPORTIONATE.

>> WELL, YOUR HONOR, I WOULD ASK ALSO FOR THIS COURT TO STRIKE THE TWO AGGRAVATORS, THE ARGUMENT YOU REFERRED TO JUST NOW, A SEPARATE ARGUMENT.

I BELIEVE AVOID ARREST AGGRAVATOR IS NOT SUPPORTED BY THE RECORD.

YOU HAVE THE DEFENDANT VIRTUALLY DRIVING INTO THE ARMS OF LAW ENFORCEMENT.

THE JUDGE FOUND THE CLOAK OF DARKNESS WAS FALLING.

THAT THE RECORD BELIES THAT.

THAT THE OFFICER WHO TESTIFIED ABOUT THE LIGHT, SAID LIGHT WAS FADING AS THE ENTIRE INVESTIGATIVE TEAM ARRIVED.

>> THE ENTIRE NATURE OF THIS CRIME REALLY DOESN'T CHANGE WHEN THERE'S AVOID ARREST OR NOT.

WHAT MAKE THIS IS CRIME SO AGGRAVATED ARE ALL THE THINGS

THAT OCCURRED BY KIDNAPPING,
THIS WOMAN FOR, YOU KNOW, NO
REASON.

THEN SEXUALLY BATTERING HER AND
THEN CRUELLY KILLING HER.

SO I MEAN THAT'S WHY I SAY, YOU
KNOW, SOMETIMES WE LOOK, IN A
ONE OR TWO AGGRAVATOR CASE,
AVOID ARREST, STRIKING MIGHT
MAKE A DIFFERENCE BUT I DON'T
SEE HOW IT MAKES A DIFFERENCE IN
THIS CASE.

>> JUDGE, I BELIEVE THERE IS
ANOTHER UNSUPPORTED AGGRAVATOR
THE JUDGE CONSIDERED AND COLD
CALCULATED AND HEIGHTENED
PREMEDITATION.

I WILL CONCEDE THE COLDNESS IS
THERE.

I WILL NOT CONCEDE THE
HEIGHTENED PREMEDITATION WAS
THERE.

ALL HE DID BEST FACT PARK DOWN
THE ROAD, TAKE A KNIFE WITH HIM.
THAT IS CONSISTENT HE INTENDED
A RAPE, NOT A MURDER.

THIS COURT HELD IN DOYLE CITED
IN THE BRIEFS A RAPE IS OFTEN
THE RESULT OF THE SAME HOSTILE
AGGRESSIVE IMPULSES. A MURDER
OFTEN IS THE RESULT OF THE SAME
IMPULSES THAT PRECIPITATE A
RAPE.

I JUST DON'T THINK YOU'VE A
HEIGHTENED PREMEDITATION HERE.
THE, HIS BEHAVIOR AFTER THE FACT
BELIES A CAREFUL PLAN.

HE DROVE BACK TO THE SCENE OF
THE CRIME WHEN IT WAS STILL
LIGHT.

DROVE SLOWLY BY.

IT IS HIGHLY RECOGNIZABLE, VERY
DENTED CAR.

HE WAS, HE WAS PRACTICALLY
BEGGING TO BE CAUGHT.

THE JUDGE RELIED ON HIS CALM
DEMEANOR.

THAT WAS SIX HOURS AFTER THE
FACT.

THE JUDGE RELIED ON WRAPPING OF

THE BODY.

AGAIN, THAT IS AFTER THE FACT.
THIS COURT DOESN'T ALLOW
CONSIDERATION OF AFTER THE TACT
ACTIONS TO DETERMINE HEIGHTENED
PREMEDITATION.

THE STATE'S CASE RELIES ON IN
HIS ANSWER BRIEF ON HEIGHTENED
PREMEDITATION ARE
DISTINGUISHABLE THAT THE VICTIM
WAS TAKEN TO OBSCURE LOCATION
AFTER A SERIOUS FELONY HAD BEEN
COMMITTED AND INFERENCE THERE
FOR AROSE THAT, THAT THE
DEFENDANT WAS, HAD TIME TO, HAD
TIME TO PLAN THIS AFTER THE
MURDER.

HERE, HERE YOU JUST DON'T SEE
THE KIND OF FACT PATTERN ON
WHICH THIS COURT HAS FOUND
HEIGHTENED PREMEDITATION.

SO WITH THE TWO AGGRAVATORS NOT
BEING SUPPORTED I WOULD ASK THAT
THIS COURT TO REMAND AS I
REQUESTED AND I WILL RESERVE MY
REMAINING TIME FOR REBUTTAL, IF
I MAY.

>> COUNSEL.

STACY KIRCHER, ASSISTANT ATTORNEY
GENERAL FROM DAYTONA BEACH ON
BEHALF OF THE STATE IN THIS
CASE.

I WOULD BEGIN ADDRESSING SOME OF
THE POINTS YOUR HONOR POINTED
OUT WITH OPPOSING COUNSEL.

AS TO THE FIRST ISSUE OF
JUDICIAL BIAS, I WOULD LIKE TO
POINT OUT THERE WAS NO OBJECTION
AT THE, BY THE DEFENDANT, THERE
WAS NO OBJECTION TO THE, THERE'S
AN OBJECTION TO THE INCLUSION OF
THE AVOID ARRESTING AGGRAVATOR,
BUT THERE WAS NO OBJECTION TO THE
JUDGE BASICALLY READING THROUGH
THE JURY INSTRUCTIONS AT THAT
POINT AND GOING TO NUMBER FOUR.
IT IS -- WELL, THERE IS NOTHING
AT ALL IN READING OF THE
STANDARD FLORIDA JURY
INSTRUCTIONS THAT WOULD VITIATE

THIS TRIAL.
THERE IS NO FUNDAMENTAL ERROR IN
THIS CASE.

THE FACT THAT THE JUDGE IS
ESSENTIALLY READING THROUGH THE
STANDARD JURY INSTRUCTIONS AT
THIS POINT AND IT IS CLEAR FROM
THE CONTEXT OF THE CHARGE
CONFERENCE THAT MISS VALENTINI
IS ONE OF THE STATES'S
COUNSEL AND MR. WHITAKER IS THE
OTHER STATE'S COUNSEL.

IF YOU CLEAR, GO ON AND READ THE
PORTION OF CHARGE CONFERENCE,
MR. WHITAKER IS RESPONSIBLE FOR
THE JURY INSTRUCTIONS.

HE IS OUTSIDE.

COMES INSIDE AND THAT ANY
CONCLUSION THAT MISS VALENTINI --

>> ARE YOU SAYING HE IS THE ONE
THAT GAVE THE INSTRUCTIONS TO
THE TRIAL JUDGE?

>> YES, JUDGE.

>> HOW DO WE KNOW THAT?

>> FROM READING THE ENTIRE RECORD.

ON PAGE, I BELIEVE IT IS 2335 I
BELIEVE, MR. WHITAKER COMES IN
AND SAYS, ESSENTIALLY, THIS IS
THE PACKET THAT HE PROVIDED TO
YOU ON MONDAY.

AND IMPORTANT TO NOTE AS WELL
THAT THE DEFENSE'S TRIAL, IN
PENALTY PHASE DIDN'T BEGIN UNTIL
THAT MONDAY AFTERNOON.

SO HE HAD HAD NOTICE OF THAT
LAST DRAFT OF JURY INSTRUCTIONS
FROM MONDAY MORNING WHEN
MR. WHITAKER PROVIDED IT TO THE
JUDGE.

AT THIS POINT THE THRUST OF
APPELLANT'S ARGUMENT THAT THIS
CASE --

>> LET ME MAKE SURE I UNDERSTAND
WHAT YOU'RE SAYING.

THAT THE SAME PACKET OF JURY
INSTRUCTIONS THAT THE TRIAL
JUDGE WAS READING FROM, THIS IS
THE SAME PACKAGE THAT THE
DEFENSE ATTORNEY HAD?

>> THAT'S WHAT IT APPEARS FROM

THE RECORD, JUDGE, YES.
AND WHEN, WHEN THE JUDGE IS
GOING THROUGH THE JURY
INSTRUCTIONS AND GETS TO NUMBER
FOUR WHICH IS IN THE STANDARD
PACKET OF JURY INSTRUCTIONS HE
IS BASICALLY GOING THROUGH AND
SAYING, COUNSEL, IS THERE ANY
OBJECTION TO THIS, THIS IS WHAT
I'M GOING TO READ TO THE JURY?
WHICH IS STANDARD AT EVERY JURY
TRIAL AT THIS POINT.
AT THAT POINT, DEFENSE COUNSEL,
MR. CAUDILL, RAISING AN
OBJECTION THERE IS NO
HESITATION, HEY, WAIT, JUDGE.
I'M NOT FAMILIAR WITH THAT.
INSTEAD HE GIVES APPROPRIATE
ARGUMENT.
THAT IS NOT THE DOMINANT MOTIVE.
I DON'T FIND THE DOMINANT MOTIVE
HAS BEEN PROVEN THIS CASE SO I
DON'T THINK AVOID ARREST IS
APPROPRIATE.
>> WAS THERE A NOTICE OF
AGGRAVATING CIRCUMSTANCES?
>> THERE WAS.
>> WHEN WAS THAT FILED?
>> IT WAS FILED IN ADVANCE OF
TRIAL.
I BELIEVE THAT WAS, I'VE GOT THE
DATE HERE.
IT IS THE SUPPLEMENTAL RECORD.
I BELIEVE IT WAS FILED
APPROXIMATELY A MONTH PRIOR TO
TRIAL.
BUT THERE WERE TWO SEPARATE
NOTICES.
>> DID EITHER OF THOSE CONTAIN
AVOID ARREST?
>> THEY DID NOT.
THEY CONTAINED THE OTHER FIVE
AGGRAVATING CIRCUMSTANCES THAT
THE STATE INTENDED TO RELY ON.
THEY DID NOT, NEITHER INCLUDED
THE AVOID ARREST AGGRAVATOR.
HOWEVER --
>> IF WE'RE GOING TO HAVE A
NOTICE ON THE STATE AND LET'S
JUST ASSUME, I REALIZE THIS

ISN'T THEIR ARGUMENT BUT IT CONCERNS ME BECAUSE I DON'T THINK AVOID ARREST IS PRESENT IN THIS CASE, SHOULDN'T THE STATE AMEND THE NOTICE OF, OF AGGRAVATING CIRCUMSTANCES SO A DEFENSE LAWYER AT LEAST IS NOT CAUGHT, WHEN THEY GET THE JURY INSTRUCTIONS, ASSUME IT CAME FROM THE STATE, SHOULDN'T WE REQUIRE THAT?

>> WELL, IT IS IMPORTANT TO NOTE, JUSTICE PARIENTE, IN THE SAME ORDER THAT THE TRIAL JUDGE, JUDGE GALLUZZO IS ASKING THE STATE TO PROVIDE THE NOTICE OF AGGRAVATING CIRCUMSTANCES TO THE DEFENSE THEY SAY IN THE SECOND STANZA, HOWEVER UNDER STEELE THIS COURT CAN NOT PRECLUDE THE STATE FROM SEEKING ANY ADDITIONAL AGGRAVATORS BECAUSE OBVIOUSLY STEELE IS SAYING THAT THE STATE IS NOT REQUIRED TO PROVIDE ADVANCE NOTICE OF AGGRAVATORS ON WHICH THEY INTEND TO RELY. HOWEVER THE COURT CAN ASK THAT THE STATE DO THAT AND THAT'S WHAT THEY DID IN THIS STATE. THE STATE DID COMPLY WITH THE TWO SEPARATE NOTICES WITH INTENT TO RELY ON EACH OF THE AGGRAVATORS, HOWEVER NOT INCLUDING AVOID ARREST. IT WOULD BE THE STATE'S POSITION, BECAUSE THE STATE IS NOT REQUIRED TO PROVIDE THAT NOTICE UNDER SEAL, AND THE FACT THAT THE JUDGE IN HIS ORDER SPECIFICALLY STATES, WE CAN'T PRECLUDE --

>> I UNDERSTAND, I UNDERSTAND WHAT STEELE SAYS. I AM JUST SAYING, IT SEEMS YOU HAVE A STAGE FOR A MURDER CASE. YOU HAVE FIVE AGGRAVATORS. THIS SEEMS LIKE, LET'S -- THAT IS NOT SUPPORTED BY THE RECORD.

THE STATE SHOULD NOT WANT TO DO THIS.

I AGREE IT DOESN'T LOOK LIKE THE JUDGE BROUGHT IT UP BUT IT ISN'T, IT IS JUST PROBLEMATIC AND IT SHOULD BE SOMETHING THAT THE STATE RECONSIDERS AS POLICY?

>> IN LOOKING AT THE TRANSCRIPT, IT BEGINS, THERE IS TYPICAL CONVERSATION DURING A CHARGE CONFERENCE AND THE JUDGE SAYS, LET'S GO OVER THESE INSTRUCTIONS.

CAN WE DO IT PAGE BY PAGE? AND THEN THEY DISCUSS THE OTHER INSTRUCTIONS AND THEN THEY GET TO THIS PARTICULAR INSTRUCTION AND HERE IS WHAT THE JUDGE SAYS. AND THEN NUMBER FOUR, THE INSTRUCTIONS FOR AVOID ARREST AGGRAVATOR.

MR. CAUDILL, ANY ISSUES REGARD TO THAT?

MR. CAUDILL RESPONDS AND TELLS THE COURT WHAT HE FELT HIS ISSUES ARE.

THEN HE ALLOWS MR. WHITTAKER TO RESPOND TO MR. CAUDILL'S ARGUMENT AND COURT MAKES HIS FINDING BASED ON THE FACTS AS HE UNDERSTOOD THEM TO BE DURING THE TRIAL.

WHAT IS THE PROBLEM WITH THAT?

>> I AGREE, JUDGE.

>> I UNDERSTAND THAT, WHAT IS RESPONSE ONCE YOU GET BACK OUT THERE.

>> IT WOULD BE THE STATE'S POSITION THAT THIS IS A STANDARD JURY CHARGE CONFERENCE BEFORE BRINGING THE JURY BACK IN AND READING THAT.

SO AT THIS POINT THE JUDGE BASICALLY AS DUTY TO GO THROUGH THE JURY INSTRUCTIONS, GIVE COUNCIL AN OPPORTUNITY TO OBJECT, WHICH HE DOES APPROPRIATELY AT THAT POINT. HE MAKES A RULING AND THEY GO ON.

AGAIN, THERE IS NOTHING FROM THE RECORD TO SUGGEST ANYTHING NEFARIOUS OR THAT, AND IT IS ACTUALLY, IT IS ACTUALLY DIFFERENT THAN ROBARDS.

IN THE ROBARDS CASE WHICH IT IS THE STATE'S POSITION IS ACTUALLY HELPFUL TO THE STATE BECAUSE IT DOES STATE IF THERE'S NO MOTION TO HAVE THE JUDGE RECUSE HIMSELF AT THAT POINT IT DOES HAVE TO BE FUNDAMENTAL ERROR BUT IN THE ROBARDS CASE THE JUDGE IS MUCH MORE SUGGESTING IT.

BASICALLY, SAYING WELL, STATE, I SEE EVIDENCE OF THIS, WHY AREN'T YOU SEEKING THAT?

WHICH IS NOT AT ALL THE CASE WE HAVE HERE.

SO ADDRESSING THE NEXT ISSUE, THE, JUDGE GALLUZZO'S REJECTION OF THE UNDER THE INFLUENCE OF EXTREME EMOTIONAL OR MENTAL DISTURBANCE AT THE TIME OF THE CRIME, IT IS IMPORTANT TO NOTE THAT EACH OF THE DOCTORS, AND APPELLANT WAS EVALUATED BY AT LEAST FOUR DOCTORS IN THIS CASE.

WE HAVE DR. GOLDEN, DR. TRESSLER, DR. DANZINGER AND DR. REIBSAME.

ALL THE DOCTORS WITH THE EXCEPTION OF DR. GOLDEN WHO TESTIFIED BEFORE THE DEFENSE TO SUBSTANTIATE THE INSANITY DEFENSE AGREE, THAT TO SOME TEST THE APPELLANT'S TEST RESULTS ON THE MMPI IS INVALID BECAUSE HE IS SHOWING AT LEAST AN EIGHT STANDARD DEVIATION ON THE F-SCALE WHICH IS A SCALE TESTING MALINGERING.

SO EACH OF THOSE THREE DOCTORS, DR. REIBSAME, DR. DANZINGER AND DR. TRESSLER AGREE THIS HIGHLY INTELLIGENT MAN.

I.Q. IS 127.

130 WOULD BE CONSIDERED GENIUS. HE IS HIGHLY INTELLIGENT MAN WHO SHOWS MALINGERING AT POINTS IT

IS BENEFICIAL FOR HIM TO DO
SO --

>> I APPRECIATE THERE IS
QUESTION IN THIS CASE WHETHER HE
HEARD VOICES.

BUT THERE IS NO QUESTION THAT
THIS DEFENDANT HAD A SIGNIFICANT
HISTORY DURING HIS ADULT LIFE OF
A DIAGNOSIS OF BIPOLAR DISORDER,
CORRECT?

>> ABSOLUTELY.

>> SO WE'RE NOT IN A SITUATION
WHERE THE MENTAL ILLNESS IS
FEIGNED.

THE ISSUE IS REALLY HOW MUCH DID
THE MENTAL ILLNESS CONTRIBUTE
TO, QUOTE, CAUSE THE ACTS ON
THAT DAY.

WOULD YOU AGREE WITH THAT?

>> YES, JUSTICE PARIENTE.

ALL THOSE MENTAL HEALTH
PROFESSIONALS AGREE THAT THE
DEFENDANT IS LEGITIMATELY
BIPOLAR.

WE HAVE POLYSUBSTANCE ABUSE,
EARLY ONSET, STARTED DRUG USE
AT 11.

WE HAVE THAT IN REMISSION
OBVIOUSLY WHEN HE IS IN JAIL BUT
THEY ALL AGREE HE IS BIPOLAR.
THE EXTENT HIS BIPOLAR DISORDER
HOWEVER IS AFFECTING HIS DAILY
ACTIVITIES IS WHAT WE CAN'T
REALLY GET A HANDLE ON BECAUSE
HE HAS SUCH A HIGH MALINGERING
SCALE.

DR. DANZINGER TESTIFIED IT WOULD
BE AKIN TO HAVING AN EIGHT-FOOT
TALL PERSON, NOT IMPOSSIBLE BUT
HIGHLY, HIGHLY UNLIKELY.

ALL OF THESE WITH THE EXCEPTION
OF DR. GOLDEN AGREE THIS

DR. PAUL IS A FABRICATION.

THIS COMMAND HALLUCINATION DID
NOT ACTUALLY HAPPEN.

THE SYMPTOMS HE IS REPORTING AND
DR. DANZINGER AND DR. TRESSLER
AND DR. REIBSAME, TESTIFIED THAT
THE SYMPTOMS HE IS REPORTING ARE
NOT SYMPTOMATIC OF ANY CONDITION

THAT HE WOULD HAVE.
SO THE AUDITORY HALLUCINATIONS
OCCURRING INSIDE HIS HEAD ARE
NOT A SYMPTOM OF HIS BIPOLAR
DISORDER.

THINKS TRIMODALITY, HALLUCINATION,
SMELLING, AND SEEING -- HEARING
VOICE INSIDE HIS HEAD, THEY ARE
NOT SYMPTOMATIC OF ANYTHING THAT
THE DEFENDANT ACTUALLY HAS.

IN THIS CASE IT IS VERY AKIN TO
THE LAWRENCE CASE WHICH THIS
COURT REJECTED THE STATUTORY
MITIGATOR UNDER THE INFLUENCE OF
EXTREME EMOTIONAL DISTURBANCE
AT THE TIME OF THE CRIME, WHEN
THAT DEFENDANT LAWRENCE WAS
CERTIFIABLY PSYCHOTIC BECAUSE
THE JUDGE REASONS IN THE
SENTENCING ORDER, AND THIS COURT
MAKES THE FINDING, THAT BECAUSE
THERE'S PLANNING INVOLVED, AND
BECAUSE THE DEFENDANT IS TAKING
ACTIONS TO BASICALLY HIDE HIS
TRACKS, THAT THAT MENTAL
DISORDER, AND I BELIEVE THE
LANGUAGE IN THIS CASE IS THAT IT
IS THE NATURE OF HIS HEART AS
OPPOSED TO THE RESULT OF AN
OVERRIDING MENTAL OR EMOTIONAL
IMPAIRMENT.

SO IN THAT CASE IT'S A VERY
SIMILAR SITUATION WHERE THE
DEFENDANT HAS A LEGITIMATE,
BONAFIDE MENTAL ILLNESS BUT IT'S
NOT A CAUSE FOR THIS CRIME.
AND OR AN EXCUSE AND BECAUSE HE
IS NOT IN THIS CASE AND
DR. REIBSAME TESTIFIES
SPECIFICALLY WHEN HE HEARS THE
AUDIO RECORDING WHICH IS
LITERALLY MOMENTS AFTER BEING
FOUND WITH THE VICTIM'S DEAD
BODY IN THE BACK OF HIS CAR.
SO IT IS THE CLOSEST THING WE
HAVE TO DEMONSTRATE WHAT HIS
MENTAL AND EMOTIONAL STATE WAS
AT THE TIME OF THE CRIME BECAUSE
IT WAS MERE MOMENTS AFTER BEING
CAUGHT, APPROXIMATELY FOUR HOURS

AFTER COMMITTING THE CRIME.
SO WE CAN HEAR AND IT WAS PLAYED
FOR THE JURY --

>> DOESN'T IT SEEM STRANGE TO
RIDE AROUND WITH THE BODY IN THE
CAR?

DOES SEEM TO ME THAT IT IS
INDICATIVE SOME SERIOUS MENTAL
ISSUES GOING ON HERE AT THE TIME
OF THE CRIME?

>> RESPECTFULLY, JUSTICE QUINCE,
I WOULD DISAGREE.

IN THIS CASE UNDER THIS SET OF
FACTS AND CIRCUMSTANCE THAT IS
GOES TO THE AVOID ARREST
AGGRAVATOR.

AT THAT POINT WHEN HE PICKS UP
THE VICTIM, MISS MALAVE, IT IS
APPROXIMATELY 11:30 IN THE
MORNING. IT TOOK HIM 30
MINUTES AT LEAST TO DRIVE FROM
THE DEALERSHIP IN LONGWOOD BACK
TO HIS HOME IN PINE HILLS,
DURING WHICH TIME THE VICTIM IS
LYING IN HIS BACK SEAT.

HE ALREADY TOLD HER, IF YOU
SCREAM I WILL CUT YOUR THROAT, I
WILL KILL YOU.

SHE IS LYING IN THE BACK SEAT
THIS ENTIRE DRIVE BACK.

WHEN HE TAKES HER BACK TO HIS
HOUSING UNIT, HIS ROOM, HE
TESTIFIES THAT THE RAPE OCCURRED
APPROXIMATELY FOR 45 MINUTES HE
RAPED HER.

AT THAT POINT HE ALLOWS HER TO
PUT HER CLOTHING BACK ON AND
THEN HAS HER LAY FACE DOWN ON
THE BED PROCEEDS TO STRANGLE HER
AT THIS POINT.

THERE IS NO HEIGHTENED EMOTIONAL
STATE.

THERE IS NO HEIGHTENED BY POLAR
DISORDER AND NO CYCLING.

DR. RIEBSAME SAYS HE DOES NOT
APPEAR IN MANIC OR DEPRESSIVE
STATE AT THIS TIME AND HE WAS
VERY CALM, REFLECTIVE. THE CASE
THAT OPPOSING COUNSEL
CITED TALKING ABOUT RAPE IS VERY

OFTEN A HEIGHTENED EMOTIONAL STATE WHICH GOES ALONG WITH THE MURDER THAT IS NOT THE CASE WE HAVE HERE.

>> I GUESS WHAT JUSTICE QUINCE WAS TALKING ABOUT IS, FIRST OF ALL THIS ISN'T A VICTIM THAT WAS, HE APPARENTLY HAD ISSUES WITH JODY AND NOW HE IS GOING TO DECIDE TO DO SOMETHING WITH TO A INNOCENT PERSON HE HAD NO RELATIONSHIP WITH.

HE THEN KILLS HER AND PUTS HER IN THE BACK SEAT OF HIS CAR AND HE THEN HE JUST DRIVES AROUND, INCLUDING DRIVING PAST THE DEALERSHIP.

JUST, AS FAR AS, AGAIN, WE HAVE A LOT OF DEFENDANTS WHOSE ACTIONS ARE, DO NOT APPEAR TO BE, YOU KNOW, THOUGHTFUL AND ALL THIS BUT THIS IS NOT, THIS SEEMS PECULIAR ACTIONS I THOUGHT WHAT WAS JUSTICE QUINCE WAS SAYING, NOT THAT ALL OF THIS OTHER CONDUCT WASN'T INTENTIONAL.

SO --

>> AND MY APOLOGIES.

I WAS LEADING UP TO THAT.

I WILL GET MORE EXPEDIENTLY TO YOUR ANSWER, JUSTICE QUINCE AND JUSTICE PARIENTE.

WHEN HE PUT HER BACK, IT WAS HIS OWN WORDS HE CRAMMED HER INTO THE BACK OF HIS CAR, SHE IS COVERED WITH A BLANKET.

AT THIS POINT WE'RE ONLY APPROXIMATELY 1:00 P.M. IN THE AFTERNOON.

THE INTENTION, THE STATE'S POSITION IS THE WHOLE TIME TO TAKE HER BACK AND DUMP HER BODY BACK IN HER CAR.

THAT HE IS PARKED NEXT TO THE WOODED AREA IN THE BACK OF THE POST-TIME LOUNGE.

AT THIS POINT HE HAS APPROXIMATELY FOUR HOURS TO KILL.

SO HE GOES TO THE CHEESECAKE

FACTORY.

HE HAS A SLICE OF STRAWBERRY
CHEESECAKE.

HE GOES TO THE GUITAR CENTER AND
PLAYS WITH SOME MUSICAL
INSTRUMENTS.

HE GOES TO A PARK TO SMOKE SOME
CIGARETTES.

THAT PUTS HIM BACK, HE IS
CLEARLY KILLING TIME AT THIS
POINT.

IT IS PURPOSEFUL.

OF THE WAITING FOR THE COVER OF
DARKNESS.

THE ONLY THING WE HAVE IN THE, IN
THE RECORD AS TO THE TIMING AND
I KNOW OPPOSING COUNSEL STATED
IN THEIR, IN THEIR REPLY BRIEF
AN APPROXIMATE TIME BASED ON AN
ALMANAC OF SUNSET BUT THE ONLY
THING THAT WE HAVE IN THE RECORD
IS THE TESTIMONY FROM THE
OFFICERS ON SCENE SAYING THAT
DARKNESS WAS FALLING AS THE
INVESTIGATION, AS THE OFFICERS
WERE ARRIVING ON THAT SCENE.
SO THE STATE'S POSITION IS, HE
WAS WAITING FOR THE COVER OF
DARKNESS TO MORE, IN A MORE
CONCEALED FASHION, TO TRANSFER
VICTIM'S BODY FROM HIS CAR TO
HER CAR, DUMP HER AND GO ABOUT
HIS BUSINESS BECAUSE HE HAD
EVERY INTENTION, HE HAD NO
INTENTION OF BEING ARRESTED THAT
DAY.

HE HAD PUT A BIG WHEELS TOY ON
LAYAWAY FOR HIS ESTRANGED, OR
WOULD-BE GIRLFRIEND'S SON THAT
DAY.

BY THE DEFENDANT'S OWN
ADMISSION, HE WASN'T GOING TO
SERVE ANY TIME IN PRISON.
HE HAD, HE WAS ON PROBATION AT
THE TIME OF THIS OFFENSE.
WITH THE 2004 INCIDENT FROM POLK
COUNTY THAT SUBSTANTIATED THE
PRIOR VIOLENT FELONIES WITH HIS
EX-GIRLFRIEND, JODY, MISS ELMKE,
SO HE KNEW THE CONSEQUENCES OF

CARRYING OUT THIS RAGE AGAINST THE VICTIM.

IN THIS CASE IT WAS TO AN INNOCENT VICTIM.

AGAIN, ANOTHER CASE WHERE THIS COURT HAS FOUND REJECTION OF THE UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE AT THE TIME OF THE CRIME WAS HOPKINS, WHICH WAS ALSO A RAPE AND STRANGULATION CASE WHERE HE HAD A LEGITIMATE FRONTAL LOBE IMPAIRMENT BUT AGAIN THE COURT IS FINDING BECAUSE THERE WAS EVIDENCE OF

CONCEALMENT, BECAUSE THERE WAS EVIDENCE OF PLANNING, THAT THAT DIDN'T COMPORT WITH HIS SYMPTOMS OF HIS FRONTAL LOBE IMPAIRMENT.

>> AGAIN, THE DEFENDANT, I FOUND THE PART OF THE SENTENCING ORDER.

WHAT THE JUDGE SAYS WAS, THAT THEY WERE ONLY CONTRIBUTING FACTORS TO HIS CAUSE AND NOT THE CAUSE OF HIS ACTIONS, OR THAT IT WAS SO EXTREME THAT IT WAS A MAJOR FACTOR IN THE INABILITY TO CONTROL HIS BEHAVIOR.

SO I THINK WITH THAT CAVEAT, NOT JUST LIKE HE REJECTS THE MENTAL ILLNESS AS NOT PLAYING A PART. BUT WE'RE TALKING HERE ABOUT THE EXTREME EMOTIONAL DISTRESS.

THE ONLY THING THAT I DID THINK WAS INTERESTING, BECAUSE WE DO ALLOW JUDGES JUST TO WEIGH THEIR, ALL OF THE FACTORS THAT WOULD GIVE THEM GREAT LEEWAY, HE GIVES WEIGHT TO ALL THIS MENTAL HEALTH AND TERRIBLE BACKGROUND AND WHEN IT COMES TO COURTROOM Demeanor HE GIVES GREAT WEIGHT OR SOMETHING.

SOMETIMES YOU FEEL THAT THE JUDGES ARE NOT REALLY SURE HOW TO WEIGH BUT FROM MY POINT OF VIEW AS LONG AS THEY ADEQUATELY EXPRESSED THEIR FINDINGS, THAT IS THE HELPFUL THING AND I THINK

THIS JUDGE HAS DONE THAT.

>> I WOULD AGREE, JUSTICE
PARIENTE.

>> DON'T YOU THINK IT IS A
LITTLE STRANGE YOU GIVE
COURTROOM BEHAVIOR GREAT WEIGHT
AND HISTORY AFTER LIFELONG
MENTAL ILLNESS SOME WEIGHT?
THAT SEEMS A LITTLE ODD IN ITSELF.
>> NOT NECESSARILY.

JUDGE GALLUZZO OBVIOUSLY, THIS IS
NOT IN THE RECORD BUT THAT MAY
HAVE BEEN A PET PEEVE OF HIS OR
SOMETHING THAT WAS IMPORTANT TO
HIM.

AND YOU DO SEE THROUGHOUT THE
RECORD THAT THE JUDGE IS
ATTEMPTING TO MAKE SURE THAT THE
DEFENDANT IS PROPERLY MEDICATED.
THAT HE IS BEING TREATED
PROPERLY.

THAT HE HAD A SHAVE AND A SHOWER
SO THAT HE CAN APPEAR IN HIS
BEST PERSONA FOR THE JURY.

>> LET ME ASK YOU ABOUT THE
STATEMENT THAT IS THE TRIAL
JUDGE MAKES CONCERNING THE
DEFENDANT NOT BEING AMENABLE TO
PRISON LIFE.

THEY DO SEEM ON THE SURFACE AT
LEAST TO BE SOME NON-STATUTORY
AGGRAVATION.

SO HOW DO YOU READ WHAT THE
JUDGE IS SAYING WHEN HE TALKS
ABOUT THOSE PARTICULAR FACTORS?

>> JUSTICE QUINCE, I DISAGREE
WITH APPELLANT'S ASSERTION IT'S
A NON-STATUTORY AGGRAVATOR
BECAUSE HE NEVER SAYS, JUDGE
GALLUZZO NEVER SAYS IN THE
SENTENCING ORDER ANYWHERE ABOUT
FUTURE DANGEROUSNESS.

WHAT HE SAYS IN THIS CONTEXT IS
HE IS TALKING ABOUT THE
MITIGATING FACTOR AND HOW MUCH
WEIGHT TO GIVE TO THE MITIGATING
FACTOR OF WHETHER OR NOT THE
DEFENDANT CAN BE CONTROLLED BY
MEDICATION.

SO WHETHER OR NOT THE DEFENDANT

IS AMENABLE TO MEDICATION AND HOW MUCH WEIGHT TO GIVE THAT. SO THAT WHOLE DISCUSSION ABOUT THE FACT THAT HE CAN BE BETTER CONTROLLED ON MEDICATION BUT HE REFUSES TO TAKE MEDICATION.

AND AT THE TIME OF THIS CRIME HE HAD BEEN UNMEDICATED FOR YEAR-AND-A-HALF SINCE HE WAS RELEASED FROM PRISON THE LAST TIME.

THAT FACTOR IS MERELY GOING TO THE WEIGHT TO GIVE TO THAT MITIGATING CIRCUMSTANCE, THE NON-STATUTORY MITIGATION, WHETHER OR NOT HE CAN BE CONTROLLED BY MEDICATION, WHETHER HE IS AMENABLE TO A LIFE IN PRISON SENTENCE, THAT TYPE OF CONSIDERATION.

SO THERE IS COMPETENT SUBSTANTIAL EVIDENCE BASED ON DEFENDANT'S OWN TESTIMONY DURING THE PENALTY PHASE THAT HE HAS NO INTENTION OF SERVING HIS LIFE IN PRISON.

AND THE JUDGE MAKES A GOOD POINT NOT TO TAKE THE DEFENDANT'S OWN STATEMENTS, WHICH HE SAYS, TO THE JURY, IF YOU DON'T GIVE ME THE DEATH PENALTY, YOU'RE MAKING A BIG MISTAKE.

I'M NOT GOING TO LIVE MY NEXT 40 TO 50 YEARS IN PRISON.

TAKE THAT AS YOU WILL.

THE JUDGE MAKES A POINT NOT TO MAKE THAT AN AGGRAVATING FACTOR.

>> WHEN DID HE, DID THE DEFENDANT SAY THAT?

>> DURING THE PENALTY PHASE TRIAL.

>> IN FRONT OF THE JURY?

>> YES.

>> THE JURY 7-5.

THIS IS BARE MAJORITY.

>> CORRECT.

>> WE DON'T KNOW WHY.

PRESUMABLY BECAUSE OF THE MENTAL ILLNESS.

THAT IS NOT, WE ALLOW SENTENCES AND WE HAVE KIDNAPPING AS AN AGGRAVATOR BUT THIS ISN'T LIKE AN OVERWHELMING VOTE FOR THE DEATH PENALTY.

>> THAT'S CORRECT, JUSTICE PARIENTE, AND THE STATE'S POSITION ON THAT IS, BECAUSE THE DEFENDANT MADE THESE VERY BOLD ASSERTIONS TO THE JURY, I THINK AT THAT POINT MR. CAUDILL BASICALLY HAS TO TAKE KIND OF A UNIQUE STANCE WITH HIS ARGUMENT TO THE JURY.

SO THE THRUST OF DEFENDANT'S, MR. CAUDILL'S CLOSING ARGUMENT TO THE PENALTY PHASE JURY, DON'T GIVE THE DEFENDANT WHAT HE WANTS.

MAKE HIM SIT ON DEATH, OR PARDON ME, LIFE IN PRISON.

MAKE HIM THINK ABOUT WHAT HE DID.

YOU HEARD HIM ASK FOR THE DEATH PENALTY.

REALLY PUNISH HIM.

DON'T GIVE HIM WHAT HE WANTS BASICALLY.

>> LET ME ASK YOU ABOUT CCP. HOW DO YOU RESPOND TO THE ARGUMENT THAT IS WAS IMPULSIVE AFTERTHOUGHT OF THE RAPE AND SEXUAL BATTERY?

>> JUSTICE LABARGA, I STRONGLY DISAGREE WITH THAT.

FIRST THE SEVERAL FACTORS OF UNDER THE BUZIA CASE CITED IN THE STATE'S CASE IF THE DEFENDANT BRINGS A MURDER WEAPON TO THE SCENE THAT IS STRONG INDICATOR FOR CCP ALTHOUGH WITH THE MITIGATION WITH INVESTIGATOR HEMMERT TALKING ABOUT THIS FABRICATED HALLUCINATION OF DR. PAUL HE SAID HE IS GIVEN THE CHOICE OF ONE OF THREE WOMEN TO RAPE AND KILL. THIS IS NOT THE DAY OF.

THIS IS DAYS BEFORE.

SO HE COULD HAVE KILLED A WOMAN AT AUTOZONE.

HE COULD HAVE KILLED ONE OF HIS COWORKERS OR COULD HAVE KILLED THE VICTIM.

HE KNEW THAT THIS VICTIM WORKED ALONE.

HE HAD PREVIOUSLY SPOKEN TO HER ABOUT WHAT CAR SHE DROVE.

SAW THAT HER CAR WAS ALWAYS BY ITSELF IN THE, THE RED '97 MAZDA 3, ALWAYS BY ITSELF IN THE PARKING LOT, SO, PARDON ME.

SO HE KNOWS THAT THE, THAT THE VICTIM KNOWS HIM.

SHE'S WORKING ALONE.

SHE IS A DIMINUTIVE, SMALL PERSON.

SHE IS OF A DEMUR NATURE.

SHE IS 5'1", APPROXIMATELY 95 POUNDS

SHE WOULD NOT POSE MUCH OF A PHYSICAL THREAT OR PHYSICAL RESISTANCE.

WHEN SHE PARKS, HE PARKS NOT AT SUPER SPORT DEALERSHIP BUT DOWN THE ROW AND BACKS HIS TRUCK INTO THE BACK CORNER PARKING LOT NEXT TO THE WOODED AREA.

ARMS HIMSELF WITH A STEAK KNIFE. THIS WAS NOT A UTILITY KNIFE OR FOLDING KNIFE, SOMEONE WOULD NORMALLY CARRY ON THEIR PERSON, THIS WAS EATING UTENSIL, A STEAK KNIFE AND ARMS HIMSELF WITH THAT AND WALKS THE DISTANCE TO THE SUPER SPORT AUTO.

WHEN HE SEES THE VICTIM ALONE AGAIN HE HAS HER CALL HER BOSS. THE BOSS SAID, ROSA HERNANDEZ, I CAN BE THERE 25 MINUTES WITH THE TITLE.

HE KNOWS HE HAS 25 MINUTES WHERE SHE WILL BE ALONE AT THIS POINT. HE IS ALREADY THOUGHT ABOUT THE FACT THAT THIS IS THE VICTIM HE IS GOING TO CHOOSE.

SHE WORKS ALONE.

HE STATES, I KNEW I COULD TAKE HER BACK TO MY PLACE.

ALL MY ROOMMATES WOULD BE WORKING.
I HAVE A PRIVATE ENTRANCE TO MY, TO MY APARTMENT.
WE WOULD BE ALONE.
AND WHEN HE MAKES THE PLAN HE KNOWS THAT HER CAR WILL AROUSE SUSPICION AT HIS HOME.
SO VERY PURPOSEFULLY HAS HER, DRIVES HER CAR, BACKS IT IN NEXT TO HIS.
AND THEN TAKES HIS CAR WITH HER AS A HOSTAGE IN THE BACKPACK TO HIS HOUSE WHERE HE --
>> I GUESS THE QUESTION ON THAT IS JUST, WHY IS THAT NOT EQUALLY INDICATIVE OF THE, OF THE KIDNAPPING AND A RAPE?
WHY IS THAT, WHY DO WE KNOW AT THAT POINT THAT HE WAS INTENDING TO KILL?
I MEAN A LOT OF THIS COMES OUT OF HIS OWN, HIS CONFESSION.
WHAT DOES HE SAY ABOUT WHEN HE FIRST CAME UP WITH THE IDEA THAT HE WAS GOING TO BOTH RAPE HER AND KILL HER?
>> THAT'S CORRECT, JUSTICE PARIENTE.
HE STATES THAT THROUGH THIS DR. PAUL CHARACTER HE HAD TO PICK ONE OF THESE THREE WOMEN TO TAKE BACK TO HIS PLACE, RAPE AND KILL.
IT WAS HIS INTENTION ALL ALONG THAT SHE WAS NEVER GOING TO LEAVE HIS HOME ALIVE.
>> THERE IS NO WAY OUT FOR HIM WITHOUT KILLING HER.
>> CORRECT.
>> HE KNOWS THIS IS NOT SOME STRANGER AND HE HAS CONNECTIONS WITH THE WITH WORK PLACE.
IF HE DOESN'T KILL HER SHE KNOWS WHO HE IS.
>> JUSTICE CANADY, THAT'S A GREAT POINT.
THIS VICTIM THAT GOES TO OUR AVOID ARREST AGGRAVATOR, AT THAT POINT SHE NOT ONLY KNOWS HIM,

HAD PERSONAL CONVERSATIONS WITH HIM, HE HAS BEEN BACK TO THE SUPER SPORT AUTO DEALERSHIP SEVERAL TIMES.

THEY HAVE HIS DRIVER'S LICENSE. THEY HAVE WHERE HE LIVES.

THEY HAVE THE CAR THAT HE DRIVES.

THEY HAVE HIS SOCIAL SECURITY NUMBER.

THEY KNOW, AND FABIANA MALAVE, THE VICTIM IN THIS CASE, WAS THE PERSON TAKING THE INFORMATION.

SHE WAS THE OTHER ASSOCIATE ALONG WITH ROSA AND JOSE HERNANDEZ WHO WORKED AT SUPER SPORT AUTO.

SHE WAS THE ONE IN CONTACT WITH HIM AND NOT ONLY --

>> YOU JUST SAID, I KNOW, YOU CAN HAVE BOTH AT THE SAME TIME, CCP AND AVOID ARREST.

YOU SAID HIS COMMAND FROM DR. PAUL WAS ALWAYS RAPE AND KILL.

NOW, AGAIN, IF YOU'RE GOING TO SAY, WELL WHAT WAS THE REASON FOR THE RAPE, THERE IS NO REASON FOR THE RAPE.

THERE IS NO REASON FOR THE KILL. IT WAS A CRIME OF A DERANGED MIND BUT IT WAS EXECUTED IN A VERY CALCULATED WAY.

IT'S A DEATH CASE BUT I'M NOT, YOU KNOW, SO I THINK, WHAT THE BEST ARGUMENT FOR BEING CCP IS THAT THE WHOLE IDEA WAS THE KIDNAPPING, RAPE, KILL, WAS ALL PART OF THE SAME TORTURED THINKING.

WHETHER IT CAME FROM OUTSIDE A VOICE OR FROM WITHIN, RIGHT? I MEAN ISN'T THAT THE STATE'S ARGUMENT ABOUT IT?

>> CORRECT, JUSTICE PARIENTE, AND THE DOCTORS DO SAY, ALL WITH THE EXCEPTION OF DR. GOLDEN, THAT THIS DR. PAUL OBVIOUSLY IS HIS OWN DESIRE TO DO THAT AND IT'S A WAY TO FABRICATE, TO

BASICALLY LESSEN HIS CULPABILITY
IN THE CRIME.

>> WHAT DID HE DO, WHEN HE IS
CAUGHT WHAT DID HE TELL THEM?
YOU BETTER --

>> THE VERY FIRST THING THAT HE
SAYS, AND THE WAY THAT HE'S
CAUGHT IS ACTUALLY, JOSE
HERNANDEZ HAPPENS TO BE TALKING
TO LAW ENFORCEMENT AT THE SUPER
SPORT AUTO DEALERSHIP.

HE SEES THE CAR DRIVE BY.
HE IS BACK ON HIS WAY TO THE
POST-TIME LOUNGE.

THAT IS THE WAY DIRECTION
HE WOULD TAKE INTO THE VICTIM'S
CAR.

JOSE BACKS OUT AND BLOCKS HIM
IN.

CALLS THE OFFICER.

HIS FACE FALLS, HE GETS
EXPRESSION, SECURE ME.

THE OFFICER NOT REALLY
UNDERSTANDING WHY, DOES SECURE
HIM.

WHEN OFFICER HEMMERT GETS ON THE
SCENE HE GIVES THAT
APPROXIMATELY HOUR-LONG
CONFESSION WHICH IS EXTREMELY
INDICATIVE OF VERY COLD, VERY
CALCULATED.

HE BASICALLY SAYS, I'M A CALLOUS
BASTARD.

WHEN ASKED WHY HE KILLED HER AND
RAPED HER, IF THERE WAS ANYTHING
PARTICULAR ABOUT HER, HE SAID,
IT'S A CRUEL WORLD.

WHEN ASKED IF HE WOULD DO IT
AGAIN, OH, YEAH.

THIS ENTIRE CONVERSATION IS, IS
SHOWING HIS MENTAL STATE AT THE
TIME OF THE CRIME BECAUSE THIS
IS MOMENTS AFTER BEING CAUGHT
AND HIS MOTIVATION FOR DOING SO
OF, BASICALLY, JUST HAVING, AS
HE SAID, A HELL OF A DAY
STRANGLING THE LIFE OUT OF
SOMEONE AND FINDING THAT
LIBERATING.

THAT IS VERY INDICATIVE OF HIS

COLD DEMEANOR AT THE TIME OF
DOING THE CRIME.

IF THERE ARE NO FURTHER
QUESTIONS I WOULD ASK THAT THIS
COURT UPHOLD THE SENTENCE OF
DEATH AND CONVICTION BELOW.
THANK YOU.

>> THANK YOU.

REBUTTAL?

>> AS TO THE, THE FIRST ISSUE,
THE, WHO SUGGESTED THE AVOID
ARREST JURY INSTRUCTION, I
WOULD ASK THE COURT SPECIFICALLY
TO LOOK AT PAGE 2539 OF THE
PENALTY PHASE TRANSCRIPT WHERE
MR. WHITAKER COMES IN, HE IS THE
EXPERIENCED LAWYER WHO CAME IN
THE MIDDLE, GOT MR. WHITAKER
SAYING, I REVIEWED THE JURY
INSTRUCTIONS AND I HAVE A GOT A
COUPLE LITTLE CHANGES.

THAT INDICATES HE WASN'T THE ONE
WHO CAME UP WITH THEM.

ON PAGE 2541, TWO PAGES LATER,
COURT SAYS, MR. WHITAKER,
ANYTHING ELSE YOU WANT TO
ADDRESS THAT'S A CHANGE, WHICH I
THINK SUGGESTS IT WAS THE JUDGE
MAKING THE CHANGES.

THEN ON 2543 YOU'VE GOT
MR. WHITAKER CLEARLY VAMPING
STATE'S POSITION IS, LET ME
FIND, I SUBMIT TO YOU THAT THE
RECORD DOES, THAT PORTION OF THE
TRANSCRIPT DOES IN FACT SUPPORT
A RULING THAT IT WAS THE JUDGE
WHO BROUGHT UP THE AVOID ARREST
AGGRAVATOR.

TO RESPOND TO JUSTICE LABARGA'S
QUESTION, WHERE'S THE PREJUDICE?
DEFENSE COUNSEL DIDN'T HAVE ANY
NOTICE PRIOR, THE AVOID ARREST
WAS FIRST BROUGHT UP ON THE
RECORD AFTER PENALTY PHASE PROOF
CLOSED.

THE DEFENSE DIDN'T KNOW, HE
SHOULD HAVE EMPHASIZED THE FACT
THAT IT WASN'T DARK, IT WAS ONLY
5:30.

JOSE HERNANDEZ RECOGNIZED THE

CAR.

DEFENSE COUNSEL SHOULD HAVE BROUGHT UP ON CROSS-EXAMINATION THE BODY WASN'T CAREFULLY WRAPPED.

A BAG OVER A HEAD AND BLANKET OVER IT.

THE DEFENDANT'S STATEMENT WAS THAT HE HAULED THE BODY OUT ON TO THE CARPORT AND WRESTLED IT INTO THE 4RUNNER OUT IN BROAD DAYLIGHT.

SO, AS TO POINT ONE I SUBMIT TO YOU THAT WE DO BOTH HAVE AN ERROR AND FUNDAMENTAL ERROR IN THAT THERE WAS PREJUDICE.

AS TO THE COLD CALCULATED AND PREMEDITATED AGGRAVATOR, COUNSEL FOR THE STATE HAS ARGUED THAT THE HE TOOK THE MURDER WEAPON IN THE SCENE AS BUZIA.

THE KNIFE WAS NOT USED AS THE MURDER WEAPON.

THE WOMAN WAS STRANGLER.

>> BUT WAS USED AS THE IMPLEMENT TO FORCE HER AWAY FROM THE PREMISES.

IS THERE A DIFFERENCE?

>> I THINK SO, JUDGE, BECAUSE, ALL WE, MY POSITION ALL WE HAVE HERE IS PLANNING OF A RAPE. HE USED IT TO GET HER OUT OF THE OFFICE AND INTO HER CAR.

>> CASE THAT SAYS THAT MAKE THAT IS DISTINCTION, THAT IF YOU TAKE A TO THE SCENE OF A CRIME, IF YOU ULTIMATELY COMMIT THE CRIME OR THE MURDER IN A DIFFERENT FASHION, THAT CAN NOT BE USED AS PART OF A CCP ANALYSIS.

>> IT'S A LOT WEAKER.

IT IS A LOT WEAKER.

AND LOOK, IN THE CONTEXT OF ALL THE PROOF RELATING TO COLD CALCULATED AND PREMEDITATION, COUNSEL FOR THE STATE ARGUES, WELL HE HID HIS TRACKS WELL AND HE PLANNED WELL.

HE DIDN'T PLAN WELL.

ALL OF THE PLANNING WE'VE GOT IS

TAKING, IS PARKING TWO
BUSINESSES DOWN AND TAKING A
KNIFE.

ALL THE HIDING OF TRACKS WE'VE
GOT IS THROWING A BAG OVER THE
HEAD AND A BLANKET OVER THE
BODY.

HE LEFT, HE DIDN'T SANITIZE THE
SCENE IN ANY WAY.

HE LEFT --

>> ISN'T THIS THE ISSUE, AT A
POINT, ISN'T THERE COMPETENT
SUBSTANTIAL EVIDENCE TO SUPPORT
AT THE FACT THAT AT THE TIME HE
KIDNAPPED, THAT HIS PLAN WAS TO
KIDNAP HER, RAPE AND KILL?
FROM HIS OWN MOUTH HE SAYS THAT.
HE SAYS ANOTHER VOICE MADE HIM
DO IT BUT THAT'S TO ME A
DIFFERENCE THAN TRYING TO FIGURE
THIS OUT CIRCUMSTANTIALY.

HE SAYS IT AND WHY SHOULDN'T WE
CREDIT WHAT HE SAYS SINCE AS TO
WHAT HAPPENED?

I MEAN THERE IS NOTHING TO SHOW
IT COMES FROM HIS OWN TESTIMONY?

>> WELL HE SAID A LOT OF THINGS
AT DIFFERENT TYPES.

AFTER, IMMEDIATELY AFTER THE
ARREST HE WAS ASKED WHY HE DID
IT AND COULDN'T COME UP WITH A
REASON.

HE WASN'T TRYING TO HIDE, HIDE
THE BALL.

HE WASN'T TRYING TO PROTECT
HIMSELF.

HE WASN'T GIVING A SELF-SERVING
STATEMENT. -- IMAGINATION.

>> THE DIFFERENCE HIS BETWEEN,
I'M INTENDING TO KIDNAP AND RAPE
AND KILL SOMEBODY AND THEN THE
QUESTION IS, WHY WOULD YOU DO
THAT?

WHICH IS WHY ON A DAY, YOU COME
IN, YOU WANT YOUR TITLE, AND ALL
OF A SUDDEN THE TITLE'S NOT
THERE AND NOW YOU'RE GOING TO
KIDNAP, RAPE AND KILL?

WHY WOULD YOU DO THAT?

SO I THINK THE QUESTION OF THE

WHY IS DIFFERENT FROM, MY PLAN
WAS TO DO IT.

DO YOU NOT SEE THAT AS A
DISTINCTION?

>> I SEE THE DISTINCTION, JUDGE.

>> THERE IS NO REASONABLE,
RATIONAL REASON FOR WHAT THIS
MAN DID BUT WE SEE THAT,
UNFORTUNATELY IN SUCH A HIGH
NUMBER OF MURDERS.

THEY'RE NOT YOUR STANDARD, I'M
JUST GOING TO KILL SOMEONE
BECAUSE I, THEY HAVE SOME
RATIONAL REASON.

THERE IS JUST, THAT'S TYPICAL OF
A LOT OF THE CASES WE SEE.

>> JUDGE, I SEE THE DISTINCTION
BUT I DON'T THINK YOU'VE GOT
HEIGHTENED PREMEDITATION.
THE BEHAVIOR WAS JUST SO
ERRATIC.

>> WELL, I'M ASKING YOU AGAIN.
HE SAYS, I PLAN TO KILL, I MEAN
TO RAPE AND KILL HER.

WHY, IS THAT NOT, WHY CAN'T WE
ACCEPT THAT AS BEING EVIDENCE
THAT COMPETENT SUBSTANTIAL
EVIDENCE TO SUPPORT HEIGHTENED
PREMEDITATION?

YOU WOULD AGREE IF HIS PLAN WAS
TO BOTH RAPE AND KILL, AT THE
POINT HE KIDNAPS HER THERE ARE
CERTAINLY HEIGHTENED
PREMEDITATION, DO YOU AGREE WITH
THAT?

>> I WOULD STILL ARGUE THAT
THERE IS NO CALCULATION.
THAT THERE IS JUST NO CAREFUL
PLAN HERE.

COUNSEL FOR THE STATE IS TRYING
TO MAKE SENSE OF ALL THIS AND
SAYS, WELL HE HAD TO DRIVE
AROUND FOR FOUR HOURS UNTIL IT
WAS DARK.

BUT IT WASN'T DARK.
HE WAS DRIVING AROUND BECAUSE HE
DIDN'T KNOW --

>> SHE WAS ALREADY DEAD THEN.
THIS ISSUE WHAT HE WAS DOING
AFTERWARDS AND WHETHER IT IS

RATIONAL OR NOT, CLEARLY IT HAS SOME SIGNS OF IRRATIONALITY. I DON'T THINK, CCP IS WHAT YOU DO, THAT YOU PLAN IN A SUBSTANTIAL AMOUNT OF TIME OR EVEN SOME TIME, MINUTES BEFORE, BUT YOU KNOW YOU'RE GOING TO KILL THIS PERSON AND THAT YOU'RE NOT DOING IT IN A FRENZY OR SOME OTHER WAY, ISN'T THAT THE HEIGHTENED PREMEDITATION?

>> WELL, JUDGE, I SUBMIT WE DON'T QUITE GET THE HEIGHTENED PREMEDITATION.

THERE WAS NO FRENZY BUT THERE WAS HIS STATEMENTS AFTER THE ACT AND HE IS DAMNING HIMSELF THOROUGHLY AS HE CAN IN INVESTIGATOR HEMMER'S CAR. HE DRAW AS COMPLETE BLANK WHEN IT COMES TO THE KILLING.

>> HOW LONG DO THEY KEEP HIM AT THE SCENE AFTER THEY CAUGHT HIM? WAS HE THERE A COUPLE HOURS? THE QUESTIONING OCCURRED, YOU SAID, WAS IT RIGHT AFTER OR WAS THERE A BREAK IN TIME THAT HE REMAINED AT THE --

>> I DID NOT GET THE SENSE THERE WAS A SIGNIFICANT BREAK BUT IT WAS SINCE, HOURS SINCE. OFFENSES THAT HE, AND I DON'T KNOW HOW LONG IN THE CAR THAT HE MANAGED TO GET THIS VERY CALM AND ADMITTEDLY CALLOUS DEMEANOR TOGETHER.

YOUR HONOR, I, WITH REGARD TO PROPORTIONALITY, I WOULD JUST ENTREAT THIS COURT TO CONSIDER THE FACT CAREFULLY IT'S A 7-5 DEATH REC.

MENTAL HEALTH EVIDENCE IS VERY STRONG.

I HOPE YOU WILL COME TO AGREE WITH ME, TWO OF THE SIGNIFICANT FACT-BASED AGGRAVATORS SHOULD HAVE BEEN STRUCK AND WHAT WAS LEFT JUST WASN'T ENOUGH.

>> YOU DON'T THINK KIDNAP AND RAPE AND A PRIOR ACT WHICH, I

DON'T KNOW HOW HE GOT ON
PROBATION FOR IT, OF DOING
TERRIBLE THINGS TO A PRIOR
GIRLFRIEND, MAKES THIS A, IN
ITSELF, A VERY AGGRAVATED CASE?

>> JUDGE, IT IS AN AGGRAVATED
CASE.

I'M NOT GOING TO TELL YOU IT'S
NOT.

MY POSITION IT IS NOT ONE OF THE
LEAST-MITIGATED CASES TO COME
BEFORE THIS COURT AND I ASK COURT TO
REMAND FOR FURTHER CONSIDERATION.

>> THANK YOU FOR YOUR ARGUMENTS.
THE COURT WILL NOW BE IN RECESS
FOR 10 MINUTES.

>> ALL RISE.