say 40 per side, and you can always give time back, and you would like a -- after you have used 12 minutes in your argument, Mr. Butler?

MR. BUTLER: Yes, sir.

THE COURT: All right, you may proceed.

STATE'S CLOSING ARGUMENT

MR. BUTLER: May it please the Court, Counsel, members of the jury, no longer is the presumption of innocence with this Defendant. You have now found him guilty of the offense of capital murder.

You will review all of the evidence. You have based your decision on that evidence and the law as we discussed it both at jury selection and throughout phases of the trial and final argument yesterday.

We still have the burden of proof. We talked about -- probably more than anything else, we talked about this punishment phase, the phase where we are now, and we talked about the special issues that you will now have the duty of answering.

Again, the burden of proof is beyond a reasonable doubt.

I want you to think about the evidence, all the evidence in the case. We told you the law says the evidence of the crime itself may be enough.

All the evidence at the first phase may be enough. Think of the additional evidence, and apply it when answering these special issues.

Each issue must be proved to you beyond a reasonable doubt but not beyond all doubt.

Intoxication as defined in this Charge says disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

Temporary insanity caused by intoxication means the Defendant's mental capacity was so disturbed from the introduction of a substance into his body that the Defendant either did not know that his conduct was wrong, or he was incapable of conforming his conduct to the requirements of the law he allegedly violated.

Now, we talked with you in jury selection, and we said intoxication is not a defense to a crime but that you may consider it in

mitigation if you want to, but you don't have to.

The law says it may be introduced in mitigation of the penalty attached to the offense for which he is being tried.

I want you to think about the evidence when determining whether or not it ought to be considered in determining whether or not there is any mitigation because he was intoxicated, if he was.

Remember Tony's testimony, and again, let me point out that before you can even consider it, before it makes any difference at all, you have got to determine whether or not it was to such a degree that he was so disturbed that he did not know his conduct was wrong or that he was incapable of conforming his actions to those required by law.

Think about the testimony you have and the evidence that you have as to whether or not he knew it was wrong. That is, as to whether or not he was incapable of conforming his conduct.

Remember what Tony said. He handed me the knife and he said, we are all in this together, and he kept hollering, stab her, stab her, and so I did, and then what did he do? You are not

doing it right. You are doing it wrong. Let me show you how to do it, and he took the knife away and started stabbing.

Are those the actions of somebody who doesn't know what he is doing?

Remember what Gilbert told you. David insisted they move the bodies. David insisted. We have got to move the bodies. Somebody might have seen us.

Is that somebody who does not know what he is doing? I think not, and remember what he said to Kenneth Franks as he had him by the throat and backing him up and poking him with that knife. This is what you get for messing with Lucky.

Are those the actions of somebody who is not capable of conforming his conduct, who is not aware of his actions? No. He knew what he was doing.

He did just exactly what he intended to do, and did you notice something else? You heard Darvin's testimony, too. You talk about corroboration, whether or not these people are telling you the truth, and he said, let me show you how to do it. You are doing it wrong. You are doing

it wrong, Tony, and he takes the knife and says, let me show you how to do it, and what did he tell Darvin as he is holding him up by the hair? Let me show you how a real man hits. That is what David Wayne Spence said, and that is what Tony Melendez said.

David is showing them how to do things. Those are the things that you can take into consideration in determining whether or not that man knew what he was doing when he took the life of Kenneth Franks.

The special issues; Number one, was it done intentionally? Was the conduct of the Defendant, that man, David Wayne Spence, that caused the death of Kenneth Franks committed deliberately, and that is what you all told me or most of you that it means intentionally or on purpose and with the reasonable expectation that the death of the deceased or another would result.

Now, when you have this evidence to look back on, when you have all the testimony before you, that question becomes a little clearer than in the abstract when we talked about it in the beginning.

Are these accidental actions?

Could somebody reasonably be expected to die from being stabbed 20 times with a knife in the area of the heart? Certainly.

Number two, is there a probability that the Defendant, David Wayne Spence, would commit criminal acts of violence that would constitute a continuing threat to society? Both of those questions need to be answered unanimously before you can answer them yes.

I want you to think about all the evidence. I want you to think about all the testimony you heard. Think about the crime. Think about what occurred out there on the night of July 13, 1982.

Then think about the other evidence that was brought you since you returned your verdict as to whether or not this man, David Wayne Spence, carries with him the probability of future dangerousness.

Is there a probability that he will commit criminal acts of violence? You have heard Darvin Pack testify. You have heard Dr. Jolliff testify. You heard Gene Deal testify.

You now know that before any of this happened that man was convicted of the

offense of robbery and sentenced to the penitentiary and that after he got out is when this occurred.

Robbery, you all told me, could be considered a criminal act of violence.

After that is when this crime occurred.

Now, if somebody could have made the decision that you are now called upon to make, if somebody had been able to make that determination, if they had had the opportunity in the latter part of July of 1982 or sometime during August of '82, then you wouldn't probably have had to listen to Darvin Pack tell you what he had to endure and what he is going to carry with him for the rest of his life, and that is what this is all about, isn't it?

Because if somebody could have answered that question back then, then Darvin Pack wouldn't have had to have suffered what he has suffered, and it is now your duty to determine whether or not there is a probability that that man will cause the same kind of suffering to someone else.

Is there a probability that he will commit criminal acts of violence that constitute a continuing threat to society?

I wish that somebody could have answered that question in July or August of 1982, but I don't wish it nearly so as Darvin Pack does and his family.

You have the opportunity and the duty now to answer that question. I want you to look at the evidence. I want you to read this Charge.

I want you to think about it, and I believe, the evidence will dictate to you that there can be no answer but yes to both special issues. Thank you.

MR. VANCE: Could we have the jury excused for a minute for a motion?

THE COURT: All right.

(Whereupon the jury retired from (the courtroom and the following (proceedings took place out of (their presence and hearing:

MR. VANCE: Your Honor, at this time, the Defendant has given us permission to waive closing argument, and in this particular case, provided the Court follows the provisions of Article 36.07, the Code of Criminal Procedure, which merely allows the State to conclude such argument, and it is our contention that if we waive argument,

there will be no further argument in this case.

MR. BUTLER: May it please the Court, I believe, the law says that that is entirely discretionary. It is completely up to the Court. There is no requirement the Court cut the State's argument off.

The agreement was each side would have 40 minutes. If they choose not to argue, that is up to them, but there is no requirement upon the Court to cut our argument off at this point.

MR. VANCE: That is under a different provision of the Code of Criminal Procedure allowing order of argument. The statute is very specific that the State -- they are only allowed to conclude argument, and if we waive argument at this time, they have concluded the argument.

MR. BUTLER: Again, that is within the discretion of the Court.

THE COURT: I have been on both sides of it as a trial lawyer, and I have researched it, and there is no authority whatsoever. Are you sure this is what you want to instruct your attorneys to do, Mr. Spence?

THE DEFENDANT: On the provision that the State has to end argument with what they just did, I will be willing to waive my argument totally.

MR. BUTLER: May it please the Court, they want to have their cake and eat it too. If they want to waive, let them waive, but still, we are entitled to close just as the agreement was before we started final argument.

MR. VANCE: Your Honor, there was no agreement that they can close. They are allowed to argue first, and they are allowed to argue last.

MR. BUTLER: As I read the law, the Court can divide it up any way it sees fit. It is well within the discretion of the Court.

MR. VANCE: Furthermore, generally, the closing portion is rebuttal. How can they rebut something that has never been argued?

MR. BUTLER: There is no provision that the closing portion is rebuttal, Your Honor.

THE COURT: I know it doesn't say that. That is really what is intended but it doesn't say it.

MR. VANCE: Still, Judge, the statute is very specific about the State has a right to conclude. If we waive, they have concluded their argument.

MR. BUTLER: May it please the Court, it is also well within our right to waive opening and reserve the right to close. We could both go after they do, but had we made that request, I am sure it would not have been allowed, and they would have objected to it, although, that also is within the discretion of the Court. There is no requirement -- there is no requirement that --

THE COURT: I understand. I have been in this area very many times.

MR. BUTLER: I would also like to point out that this jury has been made aware that both sides are granted a certain amount of time. They are expecting argument.

If they wanted to do this, they needed to make it made known before the Court advised the jury how long they could expect and what to expect.

MR. VANCE: We didn't know who was going to argue and how much time and what was going to be argued.

THE COURT: If I grant your request, I am going to explain to the jury that you all have waived and that the State therefore has argued last, and I am going to explain to them what is going on.

Now, if you still want to persist, but I am going to tell them exactly why things have changed from what it originally was.

MR. VANCE: If Mr. Spence agrees to that, that is acceptable, Judge.

MR. BUTLER: May it please the Court, we are talking about a trial that has taken some six weeks through jury selection or five weeks through jury selection, and then the trial of this thing, we have been in --

THE COURT: You are not telling me anything I don't know, and that is why I wanted Mr. Spence to go on the record and say that he understands and this is what he wants done.

MR. BUTLER: May it please the Court, both sides are entitled to a fair trial.

THE COURT: Yes, sir.

MR. BUTLER: And I feel that for us to be cut off in the middle of our final argument is not fair to the State.

THE COURT: Well, the Code says the State is entitled to argue last, Mr. Butler. I have seen this happen before, and I am not saying I agree with it.

I am not saying it is the best way to proceed, but this is the way it has been handled that the State --

MR. BUTLER: All right, may it please the Court, we were granted 40 minutes. May I take the rest of it?

THE COURT: You have already concluded.

MR. VANCE: He already concluded, Your Honor.

THE COURT: You are locked in.

MR. BUTLER: We were granted 40 minutes, Your Honor. Can I take the rest of the 40 minutes? The agreement was that I was going to take the first part and whatever time was left and then he had the rest of the time for 40 minutes.

THE COURT: That is not the way it has been interpreted. I would admonish you all to utilize your time and present some type of final argument, but that is strictly your business and --

MR. VANCE: We have discussed it

with our client.

THE COURT: And if that is saying what he wants --

MR. VANCE: He wants it done this way. You have asked him, and that is what he said he wants to do.

THE DEFENDANT: Your Honor, that is what I want to do because I don't think it would make any difference if we argued or not.

MR. FEAZELL: I think it may make a difference if I get to argue, and I want to have my say on this.

I have been involved in this thing for three years -- for three years. I feel like Moses getting up there and getting to peek over into the promised land and being denied the opportunity to go or even the opportunity to look. Three years, and I am -- we are talking about 15 more minutes.

THE COURT: I have no control over the trial strategy of the attorneys, Mr. Feazell, and if this is what they are invoking --

MR. BUTLER: There is no requirement that the Court follow that. If they choose not to argue, that is fine, but you may certainly allow us the full 40 minutes that we were

granted in front of this jury.

THE COURT: Let's see what the Code of Criminal Procedure says. It says the State is entitled to argue last.

MR. BUTLER: It says also, the order is up to the discretion of the Court, and if I take the first --

THE COURT: That order is at the discretion of the Court so long as the State gets to argue last, which in essence says it really isn't up to the Court. It argues itself out of what it says in the beginning, is what it does.

If it says the Court can set the order of argument but the State argues last, that doesn't leave much discretion, does it?

MR. BUTLER: There is no requirement that says I have closed.

THE COURT: You argued last.

MR. BUTLER: I took the first few minutes of the 40 we were granted.

THE COURT: It says, "argued last."

MR. BUTLER: There is no requirement that it be done by one person.

THE COURT: No, sir.

MR. BUTLER: And we were granted 40 minutes.

THE DEFENDANT: It is too much of a showmanship. He is too theatrical.

MR. FEAZELL: Are you really that scared?

THE COURT: All right, you all stop that right now. If you are not talking about the law, I don't want to hear any side bar remarks. That is over around 36 something, I believe.

The order of argument may be regulated by the Presiding Judge, but the State's Counsel shall have the right to make the concluding address -- concluding address to the jury.

If they don't argue, you have concluded the address.

MR. BUTLER: Judge, I only took a portion of the 40 minutes we were granted. It doesn't say that that concluding address has to be done by one person or the opening done by one or all of it done by two. It doesn't say that.

If they choose not to argue, that is fine, but we still have a remainder of 40 minutes to finish our closing argument.

THE DEFENDANT: Your Honor, there

was nothing in that statute that says that the Court has to give them 40 minutes or an hour. So there is nothing about a time limit. It is just the conclusion of argument.

MR. FEAZELL: Judge, the way we interpret that part of the statute is that the trial Court does not have the discretion to allow the Defense to argue last, that that right is with the State since we have the burden, but nowhere is there any authority that by them waiving their argument that we are cut off from concluding what we have left to argue.

THE COURT: There is not any authority on either side of that question.

MR. BUTLER: Well, the authority is that it is within the discretion of the Court.

MR. FEAZELL: It is discretionary. It is not reversible, Judge.

THE COURT: Bring the jury back in here. All right, last chance now. What do you all want to do? I'm going to let them go ahead and argue.

(Whereupon the jury returned into (the courtroom and the following (proceedings took place:

MR. VANCE: In light of the --