Demetris Omar Thomas v. State of Florida

MR. CHIEF JUSTICE: NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS THOMAS VERSUS STATE.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS DAVE DAVIS, REPRESENTATIVE OF THE APPELLANT IN THIS CASE, DEMETRIS OMAR THOMAS, CONVICTED OF SEXUAL BATTERY, AGGRAVATED BATTERY AND KIDNAPING. THE FACTS ARE THAT ON APRIL 19, 1997, MR. THOMAS RAN INTO THE VICTIM IN OKALOOSA COUNTY. HE KNEW HER. THEY GOT INTO AN ARGUMENT OR HE APPARENTLY TOOK HER KEYS FROM HER. HE PUT HER IN THE CAR AND SHE GOT OUT TWO OR THREE TIMES.

AS YOU ARE GOING THROUGH THE FACTS, JUST, AS FAR AS THE HISTORY OF THEM NOTHING OF THEM KNOWING EACH OTHER.

APPARENTLY THEY HAD HAD SEXUAL INTERCOURSE BEFORE. THEY KNEW. THAT IS NOT PARTICULARLY CLEAR IN THE RECORD HOW WELL HE KNEW HER, BUT HE KNEW HER WELL ENOUGH TO TALK WITH HER AND CALL HER A FRIEND OR ACQUAINTANCE OR SOMETHING LIKE THAT. THEY OBVIOUSLY WEREN'T CHUMS THAT RAN AROUND TOGETHER. SHE APPARENTLY BEEN INVOLVED IN SOME INCIDENT SEVERAL MONTHS EARLIER, IN WHICH HIS CAR HAD BEEN STOLEN. IN FACT THAT IS ONE OF THE REASONS THAT HE STOPPED TO TALK ABOUT HER IS THIS STOLEN CAR. THEY HAD HAD SEX BEFORE AND THEY KNEW EACH OTHER IN THAT SORT OF FAMILIAR SORT OF SENSE.

DO WE KNOW THAT FROM HIS STATEMENT, OR IS THERE OBJECTIVE EVIDENCE THAT THEY HAD. WHAT KIND OF RELATIONSHIP BEFORE?

THAT IS WHAT HE SAID. THERE IS NOBODY DENYING IT. NOBODY CALM AND SAID THAT WAS FALSE, BUT IT IS CLEAR THAT HE WASN'T A STRANGER WITH HER. HE TOOK THE KEY AWAY FROM HER. THE CLERK THAT WAS BLOWING THE LEAVES THOUGHT THEY WERE JUST A BOYFRIEND, GIRLFRIEND, HAVING AN ARGUMENT, AND AFTER WHICH HE PUT HER IN THE CAR.

THIS WAS 3:00 A.M. IN THE MORNING, CORRECT?

THAT'S CORRECT.

AND SHE WAS MAKING A TELEPHONE CAR.

THAT'S CORRECT.

AND DID HE WALK UP TO HER AND GRAB THE KEYS?

SHE PUT UP HER HAND AND SAID WAIT A MINUTE. SHE GOT OFF THE PHONE AND THEY APPARENTLY HAD AN ARGYUMENT OR CONVERSATION OR WHATEVER, AND AT SOME POINT HE SNATCHED THE KEYS AWAY FROM HER. HE PUSHED AND PULLED. ACCORDING TO HIM, SHE WENT WILLINGLY ENOUGH TO THE CAR. SHE GOT IN THE CAR AND GOT OUT.

THERE WAS SOME EVIDENCE THAT SHE WAS PUT IN THE CAR.

THAT IS WHAT THE OFFICER, INTERROGATING OFFICER SEEMED TO SAY IS THAT HE ASKED THE

QUESTION, WELL, WAS SHE FORCED IN THE CAR, AND THOMAS SAID, WELL, YEAH, AND THEN HE BACKS UP AND SAID, NO, SHE CAME WILLINGLY ENOUGH ALONG, SO THERE -- BUT WHEN SHE GOT IN THE CAR, SHE TRIED TO GET OUT. HE CAME AROUND AND PUT HER BACK IN THE CAR.

THIS TESTIMONY WAS ALL FROM A CLERK OF THE CONVENIENCE STORE WHERE THIS OCCURRED. IS THAT CORRECT?

YES. SHE WAS BASICALLY TWO OR THREE CAR LENGTHS AWAY BLOWING LEAVES AND SAW WATCHED -- SAW WHAT HAPPENED. SHE WASN'T TOO ALARMED AND THOUGHT IT WAS A BOYFRIEND AND GIRLFRIEND HAVING AN ARGUMENT. AT SOME POINT MS. HOWARD WAS SMILING AT THE CLERK. IT WAS ONE OF THESE SORT OF THINGS. SO ANYWAY THEY DROVE AWAY AND HER BODY WAS FOUND ABOUT THREE OR FOUR DAYS LATER, IN A RESIDENTIAL/CONSTRUCTION AREA IN THE MIDDLE OF THE STREET. SHE HAD BEEN BADLY BATTERED. THE POLICE, A COUPLE OF WEEKS LATER, THEN GOT A WARRANT AN ARREST TO SEARCH HIS HOUSE, AND THEY EVENTUALLY ARRESTED HIM AND GAVE HIM HIS MIRANDA RIGHTS AND HE WOULD ADMIT THAT HE KILLED MS. HOWARD BUT DIDN'T HAVE ANY INTENTION TO DO SO.

WAS THERE ANY INCRIMINATING EVIDENCE FOUND IN THE SEARCH OF HIS RESIDENCE?

AS FAR AS I KNOW, NO. MOST OF THE EVIDENCE CAME FROM HIS CONFESSION, AND WHAT HAPPENED THEY, THEN, LED HIM AROUND TO EVIDENCE OBVIOUSLY AT THE CONSTRUCTION SITE AND THEN AT THE HOSPITAL. THEY HAD NO IDEA, UNTIL HE CONFESSED ABOUT IT. BUT THEY THEN FOUND HIM GUILTY. FOUND FOUR AGGRAVATING FACTORS, SEVERAL MITIGATORS, TOO, ONE MENTAL MITIGATOR AND ONE I WANT TO SPEND A LOT OF TIME ON THAT SPEAKS ABOUT MENTALLY RETARDED AND THE QUESTION I WANT TO ADDRESS TODAY DEALS WITH ISSUES THREE ARE A FOUR THAT I RAISED IN MY BRIEF IS WHAT WE DO WITH THE IDEA THAT THIS MAN IS RETARDED. I ARGUED IN THE BRIEF THAT WE CAN NOT EXECUTE THE MENTALLY MENTALLY-RETARDED. IT IS CONSTITUTIONALLY IN THE FLORIDA STATUTE, THE FLORIDA LEGISLATURE PASSED LAST JUNE THAT IT IS CRUEL AND UNUSUAL PUNISHMENT THAT THE LEGISLATURE FOUND AS WELL AS ARTICLE I SECTION 14 THAT IT IS A CRUEL AND UNUSUAL CLAUSE. WHAT WE FIND, AS WE LOOT WHAT HAS HAPPENED IN THE LAST 11 OR 12 YEARS, LET ME PREFACE THAT IT WAS FIRST OF ALL REALLY NO QUESTION THAT THOMAS WAS MENTALLY RETARDED. JAMES LARSON, PSYCHOLOGIST, TOOK THE STAND AND SAID HE IS WELL WITHIN THE RETARDED RANGE. HE SUFFERED SIGNIFICANT DEFICITS IN ADAPTIVE BEHAVIOR, MEANING BASICALLY HE HAS A TOUGH TIME LIVING IN A MODERN WORLD, AND HE HAD HAD THIS SINCE HE WAS 18.

WE WOULD LINEUP THE NEW STATUTE WITH THE FACTS.

YES.

WOULD WE FIND EVERY ELEMENT THAT IS NEEDED?

YES, YOU WILL.

UNDISAPPOINTED -- UNDISPUTED.

UNDISPUTED. THE NEW FLORIDA STATUTE IS AN AVERAGE OF 100, WHICH IS 69 OR BELOW, SO IT WOULD LINEUP PERFECTLY. IN FACT THAT IS WHAT THE LEGISLATURE DID. THEY TOOK A STANDARD DEFINITION AND ADD TO THAT PLUS YOU DON'T EXECUTE PEOPLE --

AND YOU WANT US TO APPLY THIS RETROACTIVE.

THERE ARE A COUPLE OF THINGS. NUMBER ONE, WE CAN LOOK AT THE STATUTE AS IT APPLIES TO THIS CASE, OR WE CAN TAKE THE STATUTE AND SAY HOW DOES THIS FIGURE INTO OUR EIGHTH AMENDMENT ANALYSIS? THE MORE DIFFICULT QUESTION IS THE RETROACTIVE APPLICATION. IF

YOU WANT ME TO ZIP RIGHT TO THAT --

THERE ARE TWO THINGS. ONE IS WE JUST RECENTLY CAME OUT WITH ANOTHER DECISION IN HALL. ON 3.850.

I AM NOT FAMILIAR.

A COUPLE OF MONTHS AGO, I THINK. IN WHICH WE DID NOT FIND THAT THE PENRY DECISION HAD NOT OVERRULED OUR DECISION IN HALL. NOW, HOW DID THIS SITUATION DIFFERENTIATE ITSELF FROM ALL, UNLESS YOU ARE GOING TO AND --

YOU ARE TALKING ABOUT THE MORE RECENT PENRY DECISION?

RIGHT.

WE NEED TO GO BACK TO THE FIRST PE ARE NRY -- THE FIRST PENRY, WHERE THE COURT SAID IT HAD NO PROBLEM IN EXECUTING THE MENTALLY-RETARDED.

BUT THIS COURT DEALT WITH THAT DECISION IN HALL. ISN'T THAT FACT?

IF YOU ARE RELYING ON THE MOST CURRENT PENRY IN HALL, WHAT I AM SAYING --

I AM TALKING ABOUT THIS COURT'S DECISION TEN YEARS AGO, IN HALL, DEALING WITH THE ORIGINAL PENRY.

WELL, I AM NOT FAMILIAR WITH HALL, BUT LET ME ASK YOU THIS, IF HALL ADDRESSED THE CONSTITUTIONALITY OF EXECUTING THE MENTALLY RETARDED --

YOU TOLD ME HALL IN YOUR BRIEF.

THIS WAS WHEN JUSTICE BARKETT WAS ON THE COURT MORE THAN A COUPLE OF MONTHS AGO.

NO. RIGHT. THEN WE CAME OUT LATER WITH T.

OKAY. WELL WHAT -- THERE HAS BEEN TWO PENRYS, A 1989 PENRY AND THEN IT CAME BACK UP ON A JURY INSTRUCTION QUESTION.

COME BACK TO THE STATUS OF A LAW OUT OF THIS COURT UNDER HALL IS THAT THERE IS NO CONSTITUTIONAL VIOLATION IN EXECUTING THE MENTALLY-RETARDED. THAT MAY BE A SIMPLE CASE.

THAT WAS FOUR YEARS AGO.

THAT IS THE CURRENT STATUS --

THAT IS WHAT I AM TRYING TO SAY.

I THINK JUSTICE WELLS IS ASKING YOU ON --.

HOW HAVE THINGS CHANGED?

THAT IS THE CURRENT STATUS OF THE LAW OUT OF THIS --

OKAY. NOW, LET ME TELL YOU WHY IT IS UNCONSTITUTIONAL, UNDER THE EIGHTH AMENDMENT, AND THE FLORIDA CONSTITUTION. THAT IS WHAT YOU DO, WHEN YOU DO AN EIGHTH AMENDMENT ANALYSIS IN THIS CONTEXT IS YOU LOOK FOR THE EVOLVING STANDARDS OF

DECENCY, AND WHAT THE US SUPREME COURT DID IN PENURY, THE 1989 -- IN PENRY, THE 1989 CASE, IS THEY TOOK A SNAP SHOT OF WHAT WAS GOING ON IN 1989. AT THAT TIME WHAT THE LEGISLATURE IS DOING. AT THAT TIME THERE WERE ONLY TWO STATES THAT PERMITTED EXECUTION OF THE MENTALLY-RETARDED. SINCE THAT TIME OTHER STATES HAVE JOINED THE CROWD. WHEN I FILED THE INITIAL BRIEF, THERE WERE 13 STATES INDICATING THAT THEY SPECIFICALLY DID NOT WANT TO EXECUTE THE MENTALLY MENTALLY-RETARDED. IF WE ADD TO THAT THE OTHER 12 STATES THAT DON'T EXECUTE ANYBODY, THERE ARE 25 STATES, SO I THINK WHAT WE ARE SAYING, WHEN I FILED THIS INITIAL BRIEF IN MARCH IS YOU HAVE 25 STATES THAT PROHIBIT EXECUTING THE MENTALLY-RETARDED, AND THEN THE FEDERAL GOVERNMENT CLEARLY STATED THAT THEY WOULD NOT EXECUTE THE MENTALLY-RETARDED.

THAT IS PENDING BEFORE THE U.S. SUPREME COURT ON THIS QUESTION OF THE EIGHTH AMENDMENT.

THAT'S CORRECT.

COULD I JUST TAKE YOU BACK A MOMENT, TO WHETHER WE CAN, UNDER ON WHAT BASIS WE CAN RETROACTIVELY APPLY THE STATUTE THAT SPECIFICALLY SAYS THE SECTION DOES NOT APPLY TO A DEFENDANT WHO WAS SENTENCED TO DEATH PRIOR TO THE EFFECTIVE DATE OF THIS ACT. IT UNEQUIVOCALLY STATES THAT IN THE STATUTE.

THAT'S CORRECT.

SO HOW DO YOU PROPOSE, WITHOUT GOING TO THE EIGHTH AMENDMENT ANALYSIS, THAT WE APPLY THE STATUTE, AND SECOND OF ALL, EVEN IF WE WERE TO APPLY IT IN ANSWER TO WHAT JUSTICE LEWIS SAYS, THE STATUTE REQUIRES A VERY SPECIFIC PROCEDURE THAT INCLUDES APPOINTING TWO EXPERTS IN THE FIELD OF MENTAL RETARDATION. THIS WOULDN'T FIT UNDER THE STATUTE, WITHOUT IT GOING BACK FOR A RESENTENCING.

OKAY. LET ME ANSWER THE LAST QUESTION FIRST, ABOUT NOT FOLLOWING PROCEDURE. THIS COURT, IN A CASE CALLED MOHAMMED VERSUS STATE, IN WHICH MOHAMMED SPECIFICALLY REQUESTED OR THERE WAS A QUESTION, I BELIEVE, AS TO HIS COMPETENCY TO STAND TRIAL. THE RULE REQUIRES THREE EXPERTS. ONLY ONE SAW HIM, AND I RAISED THE ISSUE AND SAID, LOOK, YOU HAVE GOT TO ABIDE BY THE STATUTE. THE RULE REQUIRES THREE. AND ESSENTIALLY A LEGAL DETERMINATION, THIS COURT RULED, IS ALL THAT IS REQUIRED, SO I AM SAYING THERE IS NO QUESTION AT ALL THAT DEMETRIS THOMAS IS RETARDED. NO QUESTION AT ALL. THE STATE NEVER PRESENTED THEIR EXPERTS AND THAT IS THE END OF THE MATTER. HE SATISFIES THE STATUTORY REQUIREMENT AT THIS POINT, EVEN THOUGH HE MAY NOT HAVE HAD THE TWO OR THREE EXPERTS THAT THE STATUTE REQUIRES. THE STATE COULD HAVE HAD SOME. THEY DID NOT ASK FOR ANY. THEY DID NOT DO ANY SERIOUS QUESTIONING OF HIS MENTAL RETARDATION. IT IS ONLY WHEN WE GET TO THE QUESTION OF A SUPPLEMENTAL BRIEF THAT THERE IS NO QUESTION THAT THIS MAN IS MENTALLY RETARDED, SO I AM SAYING THAT WE HAVE COMPLIED WITH THIS STATUTE. NOW, THE FIRST PART OF YOUR QUESTION, DOES IT RETROACTIVELY APPLY? THE FIRST QUESTION IS WHEN WAS THOMAS SENTENCED. NOW, TO A LAY PERSON THAT MAY WELL BE BACK AT THE TIME WHEN JUDGE BETTER ENSENTENCED -- JUDGE BERENS SENTENCED HIM. UNTIL THIS COURT HAS AFFIRMED A SENTENCE AND UNTIL THE U.S. SUPREME COURT HAS DENIED SENTENCE, THIS MAN HAS NOT BEEN SENTENCED TO DEATH.

SO YOU ARE NOT MAKING AN ARGUMENT THAT WOULD BE EITHER EQUAL PROTECTION VIOLATION OR DUE PROCESS VIOLATION, IF WE DIDN'T LOOK AT THE STATUTE AND SAY THAT MR. THOMAS WAS SENTENCED BY, LET'S ASSUME THAT SENTENCING IS, AT THE TIME, SENTENCING, THAT WOULD TAKE HIM AS HE WAS SENTENCED, NEXT YEAR, THAT HE WOULD GET THE BENEFIT OF THIS AND WOULD BE SPARED THE DEATH PENALTY, BUT BECAUSE HE WAS SENTENCED LAST YEAR, YOU ARE NOT MAKING ANY --

NOT. I DID NOT MAKE THAT ARGUMENT. I WISH I HAD BUT I DID NOT. I GUESS IN MY OWN DEFENSE, GEORGIA HEARD THE SAME ARGUMENT AND REJECTED THE EQUAL PROTECTION OF DUE PROCESS, BUT WHAT THEY DID DO WAS GET RETROACTIVE TO THEIR STATUTE, NOT BECAUSE THEY USED SOME SORT OF LEGAL TECHNICALITY LIKE I AM ARGUING, BUT SIMPLY IT VIOLATED HIS EIGHTH AMENDMENT, THAT TAKING THE GEORGIA STATUTE, IT WAS NOW CRUEL AND UNUSUAL, AND THAT IS WHAT I AM SAYING. WE HAVE A COUPLE OF APPLICATIONS OF 921.137. ONE, WE CAN APPLY RETROACTIVELY BECAUSE HE HASN'T BEEN SENTENCED. THIS COURT HASN'T AFFIRMED HIS SENTENCE, SO HE HASN'T BEEN SENTENCED YET. SECOND OF ALL, UNDER THE EIGHTH ANALYSIS, THIS IS ONE BIG PIECE OF EVIDENCE THAT FLORIDA, AS WELL AS THE REST OF THE NATION, IS MOVING TOWARDS NOT EXECUTING THE MENTALLY-RETARDED. SO THAT IS WHAT WE ARE SAYING IS THE APPLICATION IS BEYOND JUST THIS CASE.

SPENDING A LOT OF TIME ON THIS ISSUE, I KNOW YOU HAVE, ALSO, MADE A PROPORTIONALITY ARGUMENT. DO YOU -- IN LIGHT OF HALL, THE HALL CASE, WHERE THE SENTENCE WAS UPHELD, IN TERMS OF PROPORTIONALITY ISSUE, IS THIS QUALITATIVELY DIFFERENT THAN HALL?

HALL INVOLVED A DOUBLE MURDER I BELIEVE, OF A WOMAN WHO WAS PREGNANT AT THE TIME. THE AGGRAVATOR WAS PARTICULARLY HEINOUS THERE, NOT HEINOUS BUT THE AGGRAVATING AGGRAVATORS THERE, I SUPPOSE. AGGRAVATORS HERE ARE PRETTY MILD. I MEAN HE WAS ON PROBATION AT THE TIME.

HE WAS NEVER IN PRISON FOR THE PRIOR ROBBERY?

NO. THE ROBBERY, ITSELF, WAS BASICALLY, YOU KNOW, STICK THEM UP AND GIVE ME YOUR MONEY SORT OF THING AND THEY KIND OF ROLLED OVER AND DID IT. THERE WAS NO BEATING, NO CONFINEMENT OR THREATS OR ANYTHING LIKE. THAT THERE WAS THE THREAT I AM GOING TO KILL YOU, BUT PRETTY MILD, AND TO GET PROBATION FOR A ROBBERY INDICATES JUST HOW SERIOUS EVERYBODY WAS TAKING THIS.

THIS WAS A PARTICULARLY EGREGIOUS DEATH, WAS IT NOT, THIS PARTICULAR ONE?

LIKE ALL DEATHS ARE EGREGIOUS YOUR HONOR, BUT IS THIS ESPECIALLY HEINOUS, AT ATROCIOUS AND CRUEL? THE TRIAL COURT FOUND IT, YES, AND I AM NOT CONTESTING THAT.

YOU, ALSO, ARE NOT CONTESTING THE FACT THAT THE RECORD OBJECTIVELY EVALUATED THE SUPPORT OF CONVICTION FOR FIRST-DEGREE MURDER?

WELL, I DID CHALLENGE THE SUFFICIENCY OF EVIDENCE OF THE KIDNAPING WITH SEXUAL BATTERY.

I AM TALKING ABOUT THE EVIDENCE TO SUPPORT A CONVICTION FOR FIRST-DEGREE MURDER.

WELL, IF WE -- YOU ARE TALKING ABOUT PREMEDITATED FIRST-DEGREE MURDER? I DIDN'T CHALLENGE IT UNDER THAT GROUND, I DON'T BELIEVE SO, NO. OKAY.

SO THAT MEANS, IF THE KIDNAPING, GOING BACK TO THAT, IS IT THE INITIAL, MAYBE THAT WILL BE SOMETHING I WILL ASK THE STATE, BUT THERE IS A POSSIBILITY OF THERE BEING SEVERAL DIFFERENT PLACES WHERE THE KIDNAPING COULD HAVE OCCURRED, IF, FOR SOME REASON, THE INITIAL INCIDENT IN THE VEHICLE WAS NOT A KIDNAPING. DURING THE COURSE OF WHAT OCCURRED, I MEAN, IT APPEARS --

DO I AGREE WITH THAT? NO.

YOU DON'T SEE --

I MEAN, THE WHOLE STATE SCENARIO IS PRETTY BIZARRE AS IT IS. HE TAKES HER FROM THE SUWANNEE SWIFTY OR WHATEVER AND GOES TO THE HOSPITAL AND HAS SEX. HE APPARENTLY BEATS HER UP PRETTY BADLY AND HAS SEX AND THEN GOES TWO MILES AWAY AND KILLS HER. IT IS PRETTY NEBULOUS WHAT HAPPENS AFTER THEY LEAVE THE CONVENIENCE STORE.

GOING BACK TO PROPORTIONALITY THOUGH, IF THE KIDNAPING AND SEXUAL BATTERY STAND, ALTHOUGH I GUESS THE JUDGE DIDN'T ENHANCE FOR THE SEXUAL BATTERY.

NO.

THE KIDNAPING, YOU HAVE GOT THE PRIOR FELONY, HOW IS THE QUALITY OF THE MITIGATION DIFFERENT THAN THE HALL CASE?

WELL, WHAT THEY FOUND IN THIS CASE, BESIDES THE MENTAL RETARDATION, WHICH I THINK YOU JUST REALLY CAN'T MINIMIZE THAT.

I AM NOT MINIMIZING IT.

BUT HE, ALSO, FOUND THAT HE WAS UNDER THE INFLUENCE OF EXTREME EMOTIONAL DISTURBANCE, WHICH I DON'T BELIEVE WAS IN HALL. HALL WAS ALSO WITH RUFFIN, SO THERE WERE TWO CODEFENDANTS, PERPETRATORS HERE, AND AS I RECALL THEY WENT INTO KIND OF A CONVENIENCE STORE WHERE THEY KILLED A POLICEMAN AND KILLED A WOMAN WHO WAS PREGNANT AS WELL. IN THIS CASE OBVIOUSLY WE DON'T HAVE A DOUBLE HOMICIDE, AND IT WAS JUST A PARTICULARLY EGREGIOUS --

BUT YOU HAD AN ISSUE THERE, IN HALL, OF DOMINATION. I MEAN, THAT RUFFIN WAS THE CO-PERPETRATOR.

RIGHT.

AND THAT WAS AN ISSUE THROUGHOUT. EYE MEAN THE CASES ARE DIFFERENT BUT THE --

I MEAN THE CASES ARE DIFFERENT BUT THE UNIFYING THEME SEEMS TO BE MENTAL RETARDATION, BUT IF THAT IS NOT SUFFICIENT UNDER PROPORTIONALITY, WE ALSO HAVE THE WEAK NATURE OF THE AGGRAVATORS AND THE STRONG NATURE OF THE MITIGATORS, THE ONE MENTAL MITIGATOR UNDER EXTREME EMOTIONAL DISTURBANCE. IN FACT THE TRIAL JUDGE ALMOST MAKES IT SOUND LIKE A MANSLAUGHTER, SAYING IT WAS A HASTILY PLANNED KILLING IN PASSION, OR WORDS TO THAT EFFECT SO IT IS CLEAR THAT HE IS NOT THINKING THIS THING OUT PRETTY WELL. HE GOT HIT IN THE HEAD AND A SWITCH SNAPPED AND HE KILLED THE WOMAN. THAT IS UNFORTUNATE. IN OTHER WORDS NO GUN INVOLVED IN THIS CASE, AS THERE WAS IN RUFFIN. HE GETS ONE OF THOSE BRACES FOR THAT SCAFFOLDING. HE PICKS STUFF UP OFF THE GROUND. OBVIOUSLY HE USED A WEAPON OF CONVENIENCE. YOU HAVE ALL SEEN THE SCAFFOLDING. EIGHT FEET LONG, THE SCISSOR TYPE OF THINGS. HOW HE COULD HAVE KILLED THIS GIRL IS AMAZING. I HATE TO SAY THAT BUT IT IS UNUSUAL. IT IS NOT A STANDARD WEAPON. HALL, THERE WAS A GUN INVOLVED, AND I BELIEVE THERE MAY HAVE BEEN A ROBBERY INVOLVED OF THE CONVENIENCE STORE. I CAN'T REMEMBER THE EXACT FACTS SO THERE ARE QUITE A BIT OF NUMBER DIFFERENCES SIGNIFICANT HERE. THIS REALLY IS ONE OF THE LEAST MITIGATED OF THE MURDERS THAT YOU HAVE SEEN. NOW, I WANT TO MOVE OVER TO THE CONFESSION ISSUE, THAT HE, AFTER HE WAS, AFTER THEY DID A SEARCH, THEY TOOK AND READ HIM HIS MIRANDA RIGHTS. HE CHALLENGED AS TO WHETHER HE INTELLIGENTLY AND KNOWINGLY WAIVED HIS MIRANDA RIGHTS AND SAYS THAT HE WAIVED HIS MIRANDA RIGHTS AND FREELY AND VOLUNTARILY CONFESSED AND WAIVED HIS RIGHTS. THERE IS NO QUESTION OF THE BEHAVIOR OF THE DEFENDANT HERE. THE ONLY OBSTACLE OF THE DEFENDANT IS HIS IQ OF 61. THERE REALLY IS NO EVIDENCE THAT HE UNDERSTOOD WHAT WAS GOING ON WHEN THEY READ HIM HIS MIRANDA RIGHTS. DR. LARSON, WHO TESTIFIED AT THE PENALTY PHASE, ALSO

TESTIFIED AT THE SUPPRESSION HEARING, AND HE SPECIFICALLY EXAMINED THOMAS, TO DETERMINE IF HE UNDERSTOOD HIS MIRANDA RIGHTS. IT WAS A TWO-PART TEST. HE PULLED OUT SEVERAL KEY WORDS OUT OF THE STANDARD MIRANDA WARNING. OUT OF THOSE SIX WORDS HE QUESTIONED THOMAS ON, TWO OF THEM HE UNDERSTOOD. HE KNEW WHAT AN ATTORNEY WAS AND UNDERSTOOD THE POINTS, BUT HE HAD NO CLUE WHAT THOSE WORDS MEANT. MORE SIGNIFICANTLY, WHEN YOU LOOK AT DID HE UNDERSTAND THE RIGHTS THAT ARE INVOLVED HERE, DR. LARSON SAID HE HAD NO CONCEPT OF THE ENTITLEMENT. THESE WERE HIS RIGHTS. THE POLICE COULDN'T TAKE THEM AWAY. THE JUDGE COULDN'T TAKE THEM AWAY, BUT THESE WERE HIS RIGHTS TO EXERCISE.

HOW DO YOU LOOK AT THAT IN THE CONTEXT OF THE FACT THAT MR. THOMAS HAD, IN FACT, GONE THROUGH THIS KIND OF PROCESS BEFORE. HE HAD HIS PREVIOUS CONVICTION. SO HOW DOES THE TRIAL JUDGE WEIGH THAT AGAINST THE FACT THAT HE HAS BEEN THROUGH THIS LEGAL PROCESS BEFORE AND KNEW IT AND BEEN GIVEN THE MIRANDA BEFORE.

WE PRESUME HE KNEW IT BUT IS HE MENTALLY RETARDED, AND THE RETARD SEE THINGS DIFFERENTLY THAN YOU AND I. FOR YOU AND I, A NORMAL PERSON, I HAVE BEEN THROUGH THIS. LET'S GO ON. I KNOW ALL THIS STUFF. THOMAS IS DIFFERENT. WHEN HE SEES HIMSELF IN THE PLACEMENT OF AUTHORITIES, PARTICULARLY MR. WORLEY, ONE OF THE ENTERING RATE -- INTERROGATING OFFICERS, HE SAW HIM AS A FRIEND BECAUSE HE HELPED HIM OUT IN A SITUATION, AND THAT IS WHAT THE RETARDED DO. THEY WANT TO PLEASE THESE AUTHORITY FIGURES. HE SAW WORLEY THERE AND HE KNEW WORLEY HELPED HIM BEFORE AND MAYBE HE WILL HELP HIM AGAIN.

THE FACT THAT YOU WANT TO PLEASE SOMEONE DOESN'T MEAN YOU DON'T NECESSARILY UNDERSTAND WHAT THEY ARE SAYING, CORRECT?

THAT'S CORRECT. BUT IT IS JUST ONE FACTOR. THE JUDGE WAS RIGHT, WHEN HE SAID WE NEED TO LOOK AT THE TOTALITY OF THE FACTORS. THOMAS HAD A PROCLIVITY AND A NATURAL DESIRE TO WANT TO PLEASE THIS OFFICER, SO WE ADD THAT TO HIS LOW INTELLIGENCE AND TO AN EARLY-MORNING SCENARIO WHERE HE IS BEING QUESTIONED. THEN THE QUESTION COMES IN DOES HE KNOWINGLY AND INTELLIGENTLY UNDERSTAND HIS MIRANDA RIGHTS, AND IT IS CLEAR FROM DR. LARSON LARSON'S TESTIMONY THAT HE NEVER UNDERSTOOD THE WORDS IMPLIED IN THAT WARNING, SO THE COURT REALLY HAD NO BASIS UPON WHICH TO BASE HIS DECISION THAT HE FREE AND KNOWINGLY AND INTELLIGENTLY UNDERSTOOD HIS MIRANDA RIGHTS. ON THAT BASIS I WOULD ASK THIS COURT TO REMAND FOR A NEW TRIAL AND TO OVERTURN THE CONVICTIONS AND TO --

HOW DO YOU FACTOR IN DR. LARSON'S LANGUAGE, I THINK IT WAS DR. LARSON, THAT HIS COMPREHENSION IMPROVED WITH EXPOSURE.

DR. LARSON SAID IT WAS PRETTY SLIPPERY. HE WOULD IMPROVE. THE NATURE, YES, IT IMPROVED A LITTLE BIT, BUT THEN HE HAS A SHALLOW MEMORY. IT IS KIND OF LIKE A SHALLOW BOWL TIPS EASILY. IT IMPROVES BUT IN SOME TIME HE WILL FORGET IT. WHAT HAPPENS HERE IS HE KNOWS A LITTLE BIT BUT THEN HE FORGET IT. THAT IS THE NATURE OF MENTAL RETARDATION, IS THAT HIS COMPREHENSION, WHEN DR. LARSON WAS GIVING THE TESTIMONY --

BUT THE COMPREHENSION, DOES IT THEN BECOME A QUESTION OF FACTOR A QUESTION OF LAW MIXED?

WELL, I WOULD LIKE TO SAY A QUESTION OF LAW, BUT IT SOUNDS KIND OF LIKE A QUESTION OF FACT. I MEAN, THAT IS THE DETERMINATION THE JUDGE -- WELL, DR. LARSON, THAT IS WHAT HIS TESTIMONY WAS IS THAT KIND OF WISHY-WASHY. HE NEVER REALLY UNDERSTOOD HIS MIRANDA RIGHTS.

I GUESS THAT IS MY POINT. FACED WITH THIS, THE TRIER OF FACT COULD HAVE A BASIS FAUX-.

DR. -- HAVE A BASIS --

DR. LARSON SAID HE NEVER KNOWINGLY AND INTELLIGENTLY WAIVE THEY. THE WORDS HE DIDN'T UNDER STAND AND THE CONCEPTS, THEMSELVES, AND IF YOU GO OVER AND OVER THEM TIME AND TIME AGAIN, HE MIGHT UNDERSTAND, BUT THEY DIDN'T DO. THAT THEY WENT OVER THEM ONCE AND THEN HE TALKED ABOUT HIS CONFESSION.

AND WHAT ARE YOU TALKING ABOUT?

THE STATEMENTS THAT HE MADE TO THE POLICE, PARTICULARLY WHEN HE WAS DOWN AT THE POLICE STAKES.

AND THAT WOULD BE IN PARTICULAR --

HIS CONFESSIONS TO THE MURDER, IT TO THE HOMICIDE, THAT HE TOOK HER OUT THERE. THEY HAD SEX OUT AT THE HOSPITAL AND THEN, PROBABLY, AND THEN WENT OVER TO THIS CONSTRUCTION SITE. HE WOULD BE EXPRESSING ALL OF. THAT THE STATE WOULD HAVE A HARD TIME PROVING SEXUAL BATTERY, AND WHAT THAT CLERK SAW WAS SUFFICIENT EVIDENCE OF KIDNAPING THAT MIGHT HAVE BEEN ENOUGH, BUT I THINK THEY WOULD HAVE A MUCH MORE DIFFICULT TIME.

ALSO THE OPINION THAT HE ALSO STATED THAT THOMAS'S INTELLECTUAL CAPACITY COULD COMPREHEND MIRANDA RIGHTS, IF THE RIGHTS WERE CAREFULLY EXPLAINED TO HIM OVER A PERIOD OF TIME.

THAT'S CORRECT, AND I SUPPOSE AND DR. LARSON SAID I HAD TO GO VERY SLOWLY TO DO THAT AND THE POLICE DIDN'T. THOMAS SAID THEY WENT VERY FAST. IN FACT, WHAT DR. LARSON SAID IS I HAD TO GO VERY SLOWLY WITH HIM TO ELICIT THESE THINGS. THAT IS AS TO HIS UNDERSTANDING.

BUT HE WOULD REACH A POINT WHERE HE WOULD COMPREHEND. DO I READ THAT INTO --

IT IS CONCEIVABLE. THERE IS NO EVIDENCE. IT MAY BE CONCEIVABLE. THERE IS NO EVIDENCE -- FRANK:LY WHAT HAPPENS, LET'S SAY THOMAS WAS FOUND IN COMPETENT TO STAND TRIAL. WHAT THEY DO IS SEND HIM OFF TO A CHATTAHOOCHEE TYPE OF PLACE TO GET HIM UP TO SPEED AS TO WHAT THE STANDARD IS, WHAT HIS RIGHTS ARE AND STUFF LIKE. THAT IT MISTAKE TWO YEARS. YES, HE MIGHT UNDERSTAND FOR A WHILE, BUT THE POLICE IN THIS CASE NEVER TOOK THAT TIME. THEY KNEW THOMAS WAS SLOW, BUT THEY NEVER WENT THROUGH AND SAID DO YOU KNOW WHAT IT MEANS TO WAIVE YOUR RIGHT TO COUNSEL? WHAT HE MEANS IS, THAT IS WHAT WAVE MEANS TO HIM, SO THERE IS NO EVIDENCE THAT THE POLICE TOOK THE TIME TO GO OVER IT. THEY TREATED HIM LIKE A NORMAL PERSON, ALTHOUGH THEY KNEW HE WAS SLOW, AND THEY ZIPPED RIGHT THROUGH IT, SO THEY COULD GET HIS CONFESSION. THANK YOU VERY MUCH.

MR. WHITE.

THANK YOU, YOUR HONOR. STEVE WHITE, ASSISTANCE ATTORNEY GENERAL, REPRESENTING THE APPELLEE. AS A COUPLE OF PRELIMINARY MATTERS, COUNSEL ARGUES THAT THIS WAS A WEAPON OF CONVENIENCE CONVENIENCE. THE STATE WOULD POINT OUT THAT THOMAS IS 230 POUNDS AND THE VICTIM WAS 137 POUNDS. HIS BODY WAS A WEAPON. HE DIDN'T NEED A WEAPON OF CONVENIENCE, AND HE, OF COURSE, HAD A SPORTS BACKGROUND, AS WAS EVENTUALLY ILLUMINATED IN THE SENTENCING HEARING.

AS FAR AS THE STATE'S CONCERN THE MURDER OCCURRED AT THE CONSTRUCTION SITE? I MEAN THAT IS WHERE --

YES, YOUR HONOR. THE CUL-DE-SAC.

AT THE HOSPITAL, THE OTHER LOCATION, IS THAT, THAT IS WHERE THE SEXUAL BATTERY OCCURRED?

YES, YOUR HONOR. IN A WOODED AREA BEHIND THE HOSPITAL.

WHAT I AM TRYING, I GUESS, TO UNDERSTAND, AND AT THAT POINT, SHE HAS GOT HER SHOES OFF?

YES, YOUR HONOR.

BECAUSE, AND WE KNOW THAT, BECAUSE THERE IS MATERIAL ON HER SOCKS?

DIRTY BOTTOMLESS -- DIRTY BOTTOM OF THE SOX AND SLUDGE CONTACT ON THE BOTTOM OF THE SEX.

AND ON THAT -- OF THE SOX.

AND IN THAT LOCATION SHE WAS NOT SEXUALLY BATTERED IN THE VEHICLE, LIKE THE DEFENDANT SAID BUT ACTUALLY OUTSIDE.

IN FACT, THERE WAS ALSO SOME VEGETATIVE MATTER ON HER THIGH AND HER PUBIC REGION.

SO IT IS THE STATE'S THEORY THAT HER SHOES WERE OFF. WHAT ABOUT HER CLOTHES AT THAT POINT?

TO TAKE HER, THE STATE'S THEORY WOULD BE TO TAKE HER JEANS OFF, SHE REMOVED HER SHOES AND THEN --

SHE REMOVED HER SHOES?

SOMEONE REMOVED HER SHOES.

BECAUSE HER SHOES ARE REMOVED AND HER JEANS ARE REMOVED AT THE HOSPITAL.

RIGHT.

BUT WHEN SHE IS FOUND MURDERED, SHE HAS GOT HER SHOES ON?

THAT'S CORRECT.

AND HER JEANS ON.

THAT'S CORRECT.

AND ARE THEY BUTTONED?

I BELIEVE THE JEANS WERE UNBUTTONED. I AM NOT POSITIVE OF THAT.

WHAT IS THE STATE'S THEORY, IS IT THAT THE DEFENDANT, THEN, DRESSED HER BACK IN HER JEANS AND HER SHOES AND THEN TOOK HER OVER? ANOTHER PROSECUTOR'S THEORY, YOUR HONOR, WAS THAT FOR SOME REASON HE BECAME SPOOKED OR FRIGHTENED. IN FACT, I BELIEVE

IN THE REPLY BRIEF OF THE APPELLANT, THEY POINT OUT THAT THIS WASN'T THE HOSPITAL SCENE, WAS NOT AS REMOTE AS HE MIGHT HAVE OTHERWISE LIKED. PERHAPS HE SAW A CARGO BY. PERHAPS SOMEBODY CAME OUT THE BACK DOOR OF THE HOSPITAL. WE DON'T KNOW. BUT THE STATE'S THEORY AND THE TRIAL COURT WAS THAT, FOR SOME REASON, HE DECIDED TO FINISH UP SOMEWHERE ELSE, IN A MORE REMOTE AREA, AND GOING DOWN THIS CULL DEVAC -- CUL-DE-SAC, THERE WAS NOTHING BUT CONSTRUCTION, UNTIL FARTHER DOWN WHERE HE DIDN'T GO --

I GUESS I AM TRYING TO UNDERSTAND, AND MAYBE THIS GOES AS TO THE SUFFICIENCY OF THE EVIDENCE JUST AS TO HOW THIS MURDER OCCURRED, THAT IT SEEMED UNUSUAL THAT SHE WOULD HAVE, WITH THE RAPE, THAT SHE WOULD HAVE HER SHOES OFF, HER JEANS OFF, BUT THEN END UP WITH HAVING GOTTEN DRESSED, YOU KNOW, AT THAT POINT, AND THEN THE OTHER QUESTION I HAD IS HE SAYS THAT WHAT MOTIVATED HIM TO THIS KILLING FRENZY WAS THAT SHE PROBABLY FREAKED OUT AND SHE WAS STARTED THROWING BRICKS AND PICKING UP THINGS AND THROWING THINGS AT HIM. IS THERE EVIDENCE TO SUPPORT THAT? I MEAN IN OTHER WORDS THAT THERE WAS SOMETHING THAT IN TERMS OF THAT HE HAD A BRUISE ON HIM OR, AND THAT THERE WAS, HIS BLOOD ON BRICKS THAT WERE FOUND AT THE SCENE?

A COUPLE POINTS, YOUR HONOR. NUMBER ONE IS THAT THE HOSPITAL SCENE, MOVING TOWARDS THE CUL-DE-SAC, THERE WAS A BLOODY TOWEL FOUND AT THE HOSPITAL SCENE. THAT TOWEL CONTAINED HER BLOOD.

A LARGE AMOUNT OF BLOOD?

WE DON'T HAVE, IN THE RECORD, HOW MUCH THE VOLUME WAS. NOW, IT WAS TEN DAYS AFTER THE CRIME, WHERE THE POLICE FINALLY GET TO THE HOSPITAL SCENE, BUT IT WAS IDENTIFIED AS HER BLOOD ON THE TOWEL. WE HAVE THE BLOOD ON THE BOTTOM --

I GUESS THE THEORY AGAIN, TRYING TO SEE THE REASONABLE THEORY OF INNOCENCE IS THAT SHE APPARENTLY WAS SOMEBODY THAT HAD NOSE BLEEDS AND IT IS NOT CONSISTENT WITH THAT?

THE DEFENSE PUT ON HER EX-ROOMMATE AND ALSO VERY CLOSE FRIEND, UNTIL THE POINT OF HER MURDER, AND THE ROOMMATE, THOUGH TESTIFIED, ON CROSS-EXAMINATION, THAT SHE HAD NEVER SEEN HER BLEED ANYMORE THAN -- WOULD NOT EVEN FILL A BABY EYE DROPPER. HERE WE ARE TALKING ABOUT BLOOD IN GOOD QUANTITY, IN LARGE QUANTITY, ON THE BOTTOM OF HER SOCKS. WE ARE TALKING ABOUT THE BLOOD ON THE TOWEL AT THE HOSPITAL SCENE. WE ARE TALKING ABOUT A POOL OF BLOOD IN HER LAP, WHICH WOULD BE CONSISTENT WITH HER BLEEDING BEING TRANSPORTED BETWEEN THE HOSPITAL SCENE AND THE CUL-DE-SAC. THAT WAS HER BLOOD, ALSO.

AND THE LAST BEING HER UNCLOTHED BODY?

NO, YOUR HONOR, THE JEANS.

WHERE WAS THE BLOOD SPLATTER ON THE CAR?

THE BLOOD SPLATTER, WE HAVE, IN TYING WITH JUSTICE PARIENTE'S QUESTION, WE HAVE THREE SMUDGES OF HIS BLOOD INSIDE THE CAR, SO AT SOME POINT --

WHERE INSIDE THE CAR?

ON THE STEERING WHEEL, ON THE DRIVER'S SEAT AND ON THE PASSENGER'S SEAT, AND IT IS SMUDGED BLOOD OF HIS IDENTIFIED, SO AT SOME POINT BEFORE THEY GET OUT AND HAVE THIS DISPUTE AT THE CUL-DE-SAC SCENE, AT SOME POINT SHE HAS PUT UP A FIGHT, AND AT SOME

POINT HE IS INJURED.

HOW DO WE KNOW THAT?

WELL, BECAUSE HIS SMUDGED BLOOD, YOUR HONOR, IS IN THREE POINTS INSIDE THE CAR. AND WHEN THEY GET TO THE CUL-DE-SAC, HE, CORK TO HIS STORY -- ACCORDING TO HIS STORY, HE BRINGS UP THE PRIOR INCIDENT OF THE THEFT OF HIS VEHICLE AND SHE GOES BALLISTIC, AND SHE TRIES TO HIT HIM AND THEY HAD THIS DISPUTE OUTSIDE THE CAR. HE TRIES TO GET HER IN THE CAR, I BELIEVE, ONE TIME, BUT THE SMUDGED BLOOD IS CONSISTENT WITH AT SOME POINT AT THE HOSPITAL SCENE, SHE PUT UP SOME SORT OF FIGHT.

WELL, I GUESS I AM STILL HAVING A PROBLEM WITH THE SEXUAL BATTERY, AND I KNOW YOU HAVE TALKED A LOT ABOUT WHAT WAS AT THE HOSPITAL SCENE, BUT COULD YOU JUST LAY OUT HOW THIS DEMONSTRATES A SEXUAL BATTERY.

YES, YOUR HONOR. IT IS THE TOTALITY OF THE FACTS. WE HAVE HER BEING, HER KEYS BEING SNATCHED FROM HER BY THOMAS, AND THE WORD SNATCHED WAS USED, BOTH BY THOMAS AND BY THE CLERK BLOWING THE PARKING LOT, SO HE HAD HAS HER KEYS. HE FORCES HER TO THE CAR, AND WE HAVE A DISPUTE IN TERMS OF WHAT COUNSEL AND WHAT THOMAS IS REPRESENTING. HE FORCES HER TO THE CAR. HE FORCES HER INTO THE CAR. SHE TRIES TO GET OUT OF THE CAR THREE TIMES. YOU CAN'T JUST ISOLATE OUT ONE THING. WE HAVE HIM USING HIS 230 POUNDS TO PHYSICALLY FORCE HER INTO THE CAR, TAKING HER KEYS. SHE TRIES TO GET OUT OF THE CAR THREE SEPARATE TIMES. SHE OPENS THE DOOR, AND HE COMES BACK AROUND AND CLOSES IT THREE SEPARATE TIMES. HE DRIVES HER CAR OFF AND TAKES HER TO A REMOTE AREA.

BEFORE WE LEAVE THAT, DO YOU AGREE THAT THE SAME PERSON THAT SAW THIS, ALSO SAID THAT SHE WAS SMILING? WHEN SHE LEFT AND THAT NOBODY WAS ALARMED? NOBODY CALLED THE POLICE.

SHE ASSUMED THAT IT WAS SOME SORT OF LOVER'S QUARREL. SHE ASSUMED IT WAS -- SHE SAID IT WAS KIND OF A SMILE, LIKE A SMILE, ALTHOUGH SHE DIDN'T SHOW ANY TEETH, AND THAT WAS BEFORE, I THINK THIS IS IMPORTANT, YOUR HONOR, THIS IS BEFORE THOMAS PULLS HER TO THE CAR AND PUSHES HER IN THE CAR. WHATEVER FACIAL EXPRESSION SHE WAS MAKING WAS BEFORE HE PUSHES HER INTO THE CAR AND KEEPS HER IN THE CAR AND DRIVES OFF WITH HER.

YOU ARE SAYING THAT, THE STATE IS HERE. THAT IS WHEN THE KIDNAPING OCCURRED, AT THAT INITIAL --

THAT IS ONE OF THE WAY THAT IS THE KIDNAPING CAN BE PROVED. YES, YOUR HONOR. FORCING HER INTO THE CAR, DRAGGING HER INTO THE CAR, KEEPING HER IN THE CAR AND CONFINEMENT, DRIVING OFF WITH HER, HAVING FORCED HER INTO THE CAR, ABDUCTING HER, THREE DIFFERENT ASPECTS OF THAT PARTICULAR TRANSACTION WOULD SUPPORT THE ELEMENT OF CONFINEMENT OR ABDUCTION, YOUR HONOR.

HOW ABOUT THE SEXUAL BATTERY? WASN'T THERE SOME TESTIMONY THAT THERE WAS NO TRAUMA THERE?

THE MEDICAL EXAMINER TESTIFIED THAT SOMETIMES YOU FIND TRAUMA IN THE GENITALIA AREA BUT STIPULATIONS YOU DON'T, AND IN THIS PARTICULAR CASE THERE WAS NO TRAUMA TO THE GENITALIA. BUT WE HAVE HER BLOOD FOUND AT THE HOSPITAL SCENE. WE HAVE HER BLOOD ON HER SOCKS, AND THERE IS A REASONABLE INFERENCE TO WHICH THE STATE IS ENTITLED, THAT THAT WAS PUT ON THERE BY HER STEPPING IN HER BLOOD AT THE HOSPITAL SCENE, AND QUANTITIES THAT THE ROOMMATE SAID I HAVE NEVER SEEN HER BLEED LIKE THAT BEFORE.

BUT ISN'T IT CORRECT THAT THERE WAS NONE OF HER BLOODIEDFIED IN THE VEHICLE?

THAT. WELL, THERE -- THAT IS TECHNICALLY A CORRECT STATEMENT, YOUR HONOR, BUT THERE WAS SPATTER DIRECTLY ABOVE WHERE SHE WAS SITTING. IT WAS NOT IDENTIFIED. FDLE COULD NOT IDENTIFY IT, BUT IT PRESUMPTIVELY BLOOD --

INSIDE THE CEILING OF THE CAR.

YES, YOUR HONOR, DIRECTLY ABOVE THE PASSENGER IN THE HEADLINER, AND SHE WAS THE LAST ONE SEEN, BY THE CLERK AT THE CONVENIENCE STORE, SITTING IN THE PASSENGER SEAT OF THE CAR.

THEY TRIED TO DO A DNA AND IT WAS NOT CONCLUSIVE?

YES, YOUR HONOR. THEY WERE NOT ABLE TO IDENTIFY IT. THAT IS CORRECT. SO WE HAVE HIS THREE SMUDGES IN THE CAR AND WE HAVE A SPATTER CONSISTENT WITH BLUNT TRAUMA DIRECTLY ABOVE HER HEAD, WHERE SHE WAS SITTING IN THE CAR. PRESUMPTIVE BLOOD, ACCORDING TO THE PRESUMPTIVE TESTS, BUT WE DON'T HAVE THAT IDED. THAT'S CORRECT. NOW -- ID. THAT'S CORRECT. NOW, THERE ARE SEVERAL EXTERIOR LOCATIONS ON THE RIGHT SIDE OF THE CAR AND INSIDE THE CAR AND WE HAVE, IN ADDITION TO THE SOX AND THE TOWEL AND THE VEGETATIVE MATTER, INCONSISTENT WITH HIS STORY THAT THEY HAD SEX IN THE CAR.

THE BLOOD ON THE TOP OF THE CAR WAS SUFFICIENT TO SHOW A SPATTER PASSENGER. IS THAT CORRECT?

YES, YOUR HONOR.

BUT NOT SUFFICIENT TO GET A DNA ANALYSIS ON IT?

YES, YOUR HONOR. IT WAS A SPEC OF BLOOD BASICALLY BUT THE EXPERT WAS ABLE TO IDENTIFY IT AS A SPATTER, GIVEN THE, I ASSUME, THE SHAPE OF THE PARTICULAR SPOT OF BLOOD ON THE HEADLINER. I THINK THAT IS THE CLOTH ROOF INSIDE THE CAR, I BELIEVE, BUT I MEAN, THOSE ARE THE FACTS THAT WE HAVE. THEY COULD NOT GET A DNA ON THAT THAT.

ASSUME THAT THERE WAS THE CONFINEMENT PART OF KIDNAPING. WHAT ABOUT THE OTHER ELEMENTS?

THEY DIDN'T CHALLENGE THE INTENT ELEMENT OF KIDNAPING, YOUR HONOR, IN THE TRIAL COURT BELOW, BUT IN ANY EVENT, OF COURSE THE BEST EVIDENCE THAT WE HAVE OF HIS INTENT IS WHAT HE DID. WE HAVE HER BEING ABDUCTED. I MEAN, IT IS JUST ENTIRELY IMPLAUSIBLE THAT THIS WOMAN WHO IS BEING ABDUCTED, FORCED IN HER CAR AND DRIVEN OFF AGAINST HER WILL, ALL OF A SUDDEN CONSENTS, GETS ROMANTICALLY INVOLVED, HAVING JUST BEEN ABDUCTED BY THIS DEFENDANT.

WELL, YOU SAY THAT THERE WAS BLOOD THAT WAS IDENTIFIED AS HER BLOOD AT THE HOSPITAL SCENE.

YES, YOUR HONOR, ON A TOWEL FOUND AT THE HOSPITAL SCENE.

THAT IS THE TOWEL FOUND AT THE HOSPITAL SCENE TEN WEEKS LATER. AND THEN THERE WAS HER BLOOD AT THE CONSTRUCTION SITE.

YES, YOUR HONOR. HER BLOOD IS, IF YOU LOOK AT THE EXHIBITS, HER BLOOD IS JUST ABUNDANT AT THE CUL-DE-SAC, THE CONSTRUCTION SITE.

HOW FAR WAS THAT?

IT WAS, AND GETTING BACK TO KIDNAPING, IT IS ROUGHLY A MILE AND-A-HALF OR A MILE -- 1.35 MILES FROM THE TOM THUMB, FROM WHERE SHE WAS ABDUCTED, TO THE WOODED AREA BEHIND THE HOSPITAL, AND 3.04 MILES FROM THERE TO THE AREA OF LOUISE DRIVE, THE CUL-DE-SAC.

DOES THE STATE CONCEDE, I DON'T KNOW THAT CONCEDE IS THE RIGHT WORD, BUT IS PART OF THE STATE'S THEORY BASED ON THE EVIDENCE THAT THEY DID KNOW EACH OTHER BEFORE THIS NIGHT? IN OTHER WORDS WHATEVER THE NATURE OF THE RELATIONSHIP WAS, THAT THEY KNEW ONE ANOTHER?

NO, YOUR HONOR. IN FACT, HIS STATEMENT TO THE POLICE, HE DOESN'T MENTION ANY PRIOR LIAISON WITH HER. HE SAID THAT I SAW HER WITH THESE OTHER GUYS WHEN THEY TOOK MY CAR, BUT HE DOESN'T SAY ANYTHING TO THE POLICE ABOUT HAVING SEX BEFORE, AFTER HE LIES TO GET POLICE THE FIRST TIME.

HE DIDN'T SAY WHO IT WAS. JUST TRYING TO PUT THIS CRIME IN CONTEXT, THERE ARE CASES WHERE THE PEOPLE ARE TOTAL STRANGERS, AND A MAN AND DUCTS A STRANGER AND RAPES HER.

RIGHT.

AND THEN KILLS HER, AND THAT IS THE DESIGN. HIS, WHAT HE SAYS IS THAT THIS PARTICULAR DEFENDANT SAYS THAT I WAS MAD, THAT NIGHT. I SAW HER. I HAD BEEN RIPPED OFF. MY CAR HAD BEEN STOLEN. I THOUGHT SHE WAS PART OF IT. I WANTED TO GET TO THE BOTTOM OF THIS, AND THAT IS HIS THEORY. DOES THE STATE, IN TERMS OF ACCEPTING PARTS OF THE STATEMENT AND NOT OTHERS, HAVE A DIFFERENT REASON, FROM HIS SUBJECTIVE MOTIVATION, AS TO WHAT HE WAS THINKING WHEN HE CAME UPON THIS WOMAN THAT NIGHT AT 3:00 A.M., SEES HER ON THE PHONE AND GOES, I AM GOING -- I MEAN THEIR THEORY IS I AM GOING TO MURDER HER. I SAW THIS WOMAN. BUT WHAT WOULD MOTIVATE HIM TO HAVE TAKEN HER FROM THAT PARTICULAR SPOT?

WELL, A COUPLE OF PLAUSIBLE THEORIES. ONE IS THE GRUDGE.

THE GRUDGE THAT HE HAD STATED.

IF YOU ACCEPT HIS STATEMENT. ALTHOUGH THERE WAS EVIDENCE TO THE CONTRARY.

WAS THERE EVIDENCE THAT HIS CAR HAD BEEN STOLEN?

HE DID REPORT HIS VEHICLE, I THINK IT WAS ACTUALLY A TRUCK, I BELIEVE, I AM NOT SURE, BUT IN ANY EVENT, HIS VEHICLE WAS STOLEN. HE REPORTED IT. WHEN THE OFFICER CAME OUT TO DO THE REPORT, THOUGH, CONTRARY TO WHAT HE SAID IN CONJUNCTION WITH THIS CASE, THE OFFICER DID NOT SEE ANY INJURIES ON HIM AT ALL. HE HAD INDICATED IN HIS STATEMENT, IN THIS CASE, THAT HE HAD BEEN BEATEN UP BY THOSE TWO GUYS. THE OFFICER TO WHOM HE REPORTED THE THEFT KALTED HE -- INDICATED HE DIDN'T SEE ANY VISIBLE JURY.

HE REPORTED THE THEFT OF HIS VEHICLE.

WHETHER WE SEE EVERY SINGLE PART OF IT, THERE WAS SOME EVIDENCE THAT HIS CAR WAS STOLEN. HE THOUGHT SHE WAS PART OF IT AND HE WAS UPSET.

YES, MA'AM.

LET'S TALK ABOUT THE DOUBLE JEOPARDY. NOT THE DOUBLE JEOPARDY. THAT WAS THE LAST

CASE.

PLEASE, YOUR HONOR.

ABOUT THE RETARDATION.

YES, SIR.

AND WHERE ARE WE IN THAT REGARD?

YOUR HONOR, A NUMBER OF POINTS. ONE IS THE STATE DISPUTES THOMAS'S CONTENTION THAT HE MET EVERY ASPECT OF THE STATUTE. THE STATE'S POSITION HE MET NONE AS IN ZERO ASPECTS OF THE NEW STATUTE. THAT CLEAR AND CONVINCING WAS NOT THE STANDARD USED BY THE TRIAL COURT. INSTEAD IT WAS A PREPONDERANCE. THAT THE IQ TESTS THAT WERE USED THERE WAS NO EVIDENCE THAT I COULD FIND, ANYWAY, THAT THEY WERE APPROVED BY THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES. ADAPTIVE FUNCTIONING WAS NOT EXPLICITLY DEALT WITH BELOW. ONSET BEFORE 18, ALTHOUGH THERE WAS SOME EVIDENCE OF A SLOWNESS IN STUTTERING AS A CHILD. IT WAS NOT EXPLICITLY ADDRESSED AS SUCH BELOW.

I THOUGHT THAT SOME OF THE STUDIES HAVE GONE BACK-TO-BACK BEFORE, DOES THAT TAKE INTO ACCOUNT THAT PERIOD OF ALL?

HE WAS BETWEEN THE AGES OF 18 AND 19, YOUR HONOR, WHEN THE DOCTOR DID THAT IQ TEST, WHICH WE KNOW NOTHING ABOUT, IN TERMS OF WHETHER IT WOULD MEET TODAY'S STANDARDS.

SCHOOL RECORDS. HOW DID THAT COME ABOUT?

HE DIDN'T DO WELL IN SCHOOL. ACCORDING TO DR. LARSON, HE HAD TROUBLE IN SCHOOL. THAT IS TRUE. THERE WAS EVIDENCE THAT HE WAS SLOW. THE TRIAL COURT, IN FACT, FOUND, USED THE RETARDED WORD, IN HIS FINDINGS OF FACT BUT SAID HE WAS BORDERLINE RETARDED AND MADE THAT FINDING, NOT WITH THE BENEFIT OF THE STATUTE, BUT USING THE PRP ANSWER TEST AND NOT -- THE PREPONDERANCE TEST AND NOT GOING THROUGH SPECIFIC FINDINGS WHICH THE STATUTE REQUIRES WHICH IS NOT HERE, THE SPECIFIC FINDINGS OF THE THREE CRITERIA, IQ, TWO STANDARD DEVIATIONS ABOVE THE MEAN, ONSET BEFORE 18 AND DEFICIT IN ADAPTIVE FUNCTIONING, SO NONE OF THE CRITERIA OF THE STATUTE HAVE BEEN MET. IT IS THE STATE'S POSITION, YOUR HONOR.

DR. LARSON'S TESTIMONY, WHAT IS THE STRONGEST EVIDENCE THAT THE STATE HAS THAT HE DID COMPREHEND HIS RIGHTS?

YOUR HONOR, THE OFFICER TESTIFIED THAT HE MIRANDIZED HIM AT HIS RESIDENCE. I THINK HE WAS STAYING WITH HIS GRANDMOTHER AT THE TIME, AND ASKED HIM IF HE UNDERSTOOD THOSE RIGHTS AND HE INDICATED HE DID. THEY, THEN, PUT HIM IN THE CAR TO TRANSPORT HIM TO THE JAIL, AND AT THAT POINT, BY THE WAY, HE MAKES A SPONTANEOUS STATEMENT WHICH HE LATER ADMITS THAT IT WAS A LIE, THAT IT WAS UNTRUTHFUL, THAT HE SEX WITH HER ON THURSDAY RATHER THAN ON FRIDAY NIGHT, WHEN A MURDER OCCURS ON FRIDAY, BUT UPON GETTING HIM TO THE JAIL THEY MIRANDIZE HIM AGAIN. HE INDICATES THAT HE UNDERSTANDS THE RIGHTS AGAIN. THEY LET HIM LOOK AT THE WAIVER FORM. THEY SEE HIM LOOKING AT THE WAIVER FORM LIKE HE IS READING IT. NOW, HE HAS SOME READING DIFFICULTY, BUT I DON'T BELIEVE THERE IS EVIDENCE THAT HE CAN'T READ AT ALL, SO HE IS LOOKING AT THE WAIVER FORM, LOOKING LIKE IS HE READING IT AND SIGNS THE WAIVER FORM. ASKS NO QUESTIONS ABOUT ANY OF THE TERMS. BY THE WAY, DR. LARSON, I BELIEVE, TESTIFIED AT THE MOTION TO SUPPRESS HEARING THAT, BY THAT TIME HE DID UNDERSTAND THOSE TERMS. I BELIEVE THERE WERE TWO TESTS ADMINISTERED REGARDING THE MIRANDA TERMS. ONE WAS BY DR. CROWN

EARLIER, AND THAT IS THE ONE THAT DR. LARSON RELIES UPON TO OPINE THAT HE DOESN'T UNDERSTAND THE MEANING OF THOSE TERMS, BUT BY THE TIME OF THE MOTION TO SUPPRESS HEARING, HE UNDERSTOOD THOSE TERMS. HE HAS THE CAPACITY TO LEARN, WHICH GETS BACK TO ADAPTIVE FUNCTIONING AS WELL, YOUR HONOR, AND HE IS NO STRANGER TO THE SYSTEM. HE HAS BEEN THROUGH THIS ROUTINE BEFORE. HE HAS BEEN ARRESTED BEFORE. I DON'T HAVE DETAILS AS TO THOSE EARLIER INCIDENTS, BUT HE HAS GOT A PRIOR THEFT CONVICTION. HE HAS GOT A FELONY ROBBERY CONVICTION, AND HE IS ON FELONY PROBATION. HE HAS GOT THE ABILITY TO UNDERSTAND THE RULES OF THE JAIL. THEY INTRODUCED THAT AS MITIGATION, WHICH THE TRIAL COURT CONSIDERED. HE WAS ON FELONY PROBATION, AND WAS ABLE TO UNDERSTAND THOSE RULES JUST FINE AND DO FINE WITH THAT, YOUR HONOR, SO THERE IS ABUNDANT EVIDENCE, DR. LARSON TESTIFIED THAT HIS ADAPTIVE FUNCTIONING WAS HIGHER THAN HIS IQ. THERE IS ABUNDANT EVIDENCE TO SUPPORT THE TRIAL COURT'S RULING THAT, IN FACT, HE DID UNDERSTAND AND KNOWINGLY AND VOLUNTARILY WAIVE HIS MIRANDA RIGHTS. OF COURSE AS THE STATE POINTED OUT IN THE BRIEF, HE WAS ADEPT AT TRYING TO EXPLAIN AWAY THE STATE'S EVIDENCE. THE SEARCH WARRANT WAS READ TO HIM AT THE RESIDENCE. IT INDICATED THAT THE POLICE HAD PROBABLE CAUSE FOR A SEXUAL BATTERY AND KIDNAPING. IT INDICATED THAT THEY WANTED HIS BLOOD. DR. LARSON, I BELIEVE, EVEN TESTIFIED TO THE EFFECT THAT HE COULD PUT TWO AND TWO TOGETHER AND DRAW THE INFERENCE THAT THEY WERE GOING TO BE ABLE TO TIE HIM TO HAVING SEX TO HER. HE TRIED TO EXPLAIN THAT BY SAYING I HAD SEX WITH HER THURSDAY, WHICH WAS THE DAY BEFORE THE MURDER, RATHER THAN ON FRIDAY, WHICH WAS THE, FRIDAY NIGHT, WHICH WAS THE NIGHT OF THE MURDER.

IS THERE ANY EVIDENCE RELATIVE TO HOW HE FUNCTIONED IN SOCIETY? WAS HE EMPLOYED? DID HE HAVE A REGULAR JOB?

APPARENTLY HE BOUNCED AROUND BETWEEN BRICK MASONRY AND AUTO DETAILING. THE DEFENSE PUT ON HIS EMPLOYER ON THE AUTO DETAILING AND SAID HE WAS A GOOD WORKER. SO I, I MEAN, HE, IT CUT BOTH WAYS. I MEAN, HE JUMPED BETWEEN THE TWO JOBS ON THE ONE HAND. ON THE OTHER HAND, DEFENSE COUNSEL EMPHASIZED HIS ABILITY TO MAINTAIN THIS JOB AS MITIGATION, BUT NEVERTHELESS HE SHOWED HIS ABILITY TO ADAPT IN SOCIETY AND UNDERSTAND THE BASIC RULES WE ALL LIVE BY.

JUSTICE PARIENTE HAD A QUESTION.

I AM SORRY.

I REALIZE YOU DON'T AGREE THAT THE DEFENDANT MET THE STATUTORY CRITERIA FOR THE NEW STATUTE, BECAUSE THAT WASN'T IN EFFECT AT THE TIME OF SENTENCING BUT THE STATE DOESN'T, DIDN'T PUT ON ANY EXPERTS TO CONTEST LARSON'S CONCLUSION THAT THIS WAS A MENTALLY-RETARDED INDIVIDUAL. IS THAT CORRECT? YOU DON'T, FOR THE PURPOSE OF MITIGATION, AND OUR PROPORTIONALITY REVIEW, THE STATE HAS NO EVIDENCE TO REFUTE HIS MENTAL RETARDATION.

THE STATE DIDN'T PUT ON ANY EXPERT TESTIMONY, BUT THE PROSECUTOR NEVERTHELESS ARGUED AND POINTED OUT HIS ABILITY TO ADAPTIVE FUNCTIONING IN SOCIETY, INCLUDING THE NO DR'S, THE FELONY PROBATION. HAD HE A DRIVER'S LICENSE. HE WAS ABLE TO NAVIGATE THE ROADS, ET CETERA, AND SO THERE WAS TESTIMONY THAT CONFLICTED WITH DR. LARSON'S OPINION IN THAT REGARD.

THE TRIAL COURT DID NOT FIND THE MITIGATOR OF SUBSTANTIAL IMPAIRMENT OF CAPACITY TO APPRECIATE THE CRIMINALALITY OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW. ONE OF THE POINTS THAT THE DEFENDANT MAKES ON APPEAL IS THAT DR. LARSON'S TESTIMONY DOES NOT, THAT HIS OPINION WAS THAT HE, IN FACT, MET THAT STATUTORY MITIGATOR, AND THAT THERE WAS NOTHING TO CONTRADICT THAT, SO THAT THAT FINDING ON

THAT STATUTORY MITIGATOR IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE. COULD YOU ADDRESS THAT?

YES, YOUR HONOR. I THINK THAT WAS ISSUE SIX. DR. LARSON, AT ONE POINT, ADMITTEDLY HE DID EVENTUALLY USE THE WORDS OF THE STATUTE, SUBSTANTIAL IMPAIRMENT, BUT EARLIER IN HIS TESTIMONY, HE TESTIFIED TO SOME DEGREE, IMPAIRED. HE ALSO INDICATED THAT HIS ADAPTIVE FUNCTIONING WAS HIGHER THAN HIS IQ. AND THAT HE HAD NO MENTAL ILLNESS OR EMOTIONAL DISORDER, AND BASICALLY THAT THE PROSECUTOR ASKS, QUELL, MAY -- WELL, MAY WE EXTRAPOLATE, THEN, THAT HE COMMITS CRIMES BECAUSE HE CHOOSES TO? AND LARSON ANSWERED THAT AFFIRMATIVELY. SO LARSON, BY HIS OWN TESTIMONY, CON CHRICKT -- CONFLICTED WITH HIMSELF. HE TESTIFIED THAT WE MAY EXTRAPOLATE THAT HE COMMITS CRIMES BECAUSE HE CHOOSES TO. HIS "I AM NOT ABLE TO CONFORM TO THE RULES OF SOCIETY", THAT ABILITY IS SUBSTANTIALLY IMPAIRED, PLUS YOUR HONOR, THE TRIAL COURT DID CONSIDER THIS TYPE OF EVIDENCE UNDER EXTREME EMOTIONAL DISTURBANCE AND, ALSO, DID WEIGH, VERY HEAVILY, THE MENTAL MITIGATION, SO I MEAN, THERE ARE OVERLAPPING MITIGATORS TO THIS PARTICULAR MITIGATOR THAT WOULD RENDER ANY TECHNICAL ERROR HARMLESS.

HE GAVE NO WEIGHT TO THE FACT THAT THOMAS OBTAINED A CERTIFICATE OF DIPLOMA, HAD GOOD ATTENDANCE, DIDN'T PRESENT A DISCIPLINARY PROBLEM AND WAS A GOOD WORKER, THINGS THAT YOU SAID THE DEFENDANT PUT ON AND PORTRAYED A PICTURE OF A PERSON WHO WAS TRYING TO BE COMPLIANT IN SOCIETY WITH SOME PRETTY SIGNIFICANT DEFENDANTSIES. HOW DO WE, EVEN WITH TREESE, WHICH SAYS YOU CAN FIND A MITIGATOR AND THEN GIVE NO WEIGHT, WITHOUT ACTION PLANATION OF WHY HE DIDN'T WEIGH THESE, HOW DO WE UPHOLD THAT FIND SOMETHING.

YOUR HONOR, HE DID WEIGH, FOR EXAMPLE, A NUMBER OF ASPECTS OVERLAPPING ASPECTS, SUCH AS HE WEIGHED THE NO DISCIPLINARY REPORTS IN JAIL, WHICH OVERLAPS THE NO DISCIPLINARY PROBLEMS IN HIGH SCHOOL, WHICH WAS, BY THE WAY, YEARS PRIOR, AND SO HE WAIVED SOMETHING THAT WAS MORE RECENT AND DID NOT -- HE WEIGHED SOMETHING THAT WAS MORE RECENT AND DID NOT WEIGH SOMETHING THAT WAS MORE DISTANT. I THINK HE WAS 25 AT THE TIME OF THE CRIME, I THINK, IF MY MATH IS RIGHT, BUT NEVERTHELESS IT IS THEIR BURDEN TO ESTABLISH THE UNREASONABLENESS, UNDER THE ABUSE OF DISCRETION STANDARD OF THE TRIAL COURT'S CONCLUSIONS.

I THOUGHT, UNDER TREESE, WE DID EXPECT THAT IF YOU WERE GOING TO FIND A MITIGATOR BUT GIVE IT NO WEIGHT, THERE WOULD HAVE TO BE AN EXPLANATION ABOUT WHY YOU WEREN'T GOING TO WEIGH IT. WE CAN'T JUST -- WHAT BASIS, YOU ARE SAYING IT WAS A REMOTE 25-YEAR-OLD THAT WAS STILL A GOOD WORKER AND EMPLOYED AS AN AUTOMOBILE DETAILER. I MEAN, WHAT, HOW ABOUT THAT ONE?

TO SOME DEGREE, THEY CUT OPPOSITE OF HIS POSITION OF HIS MENTAL IMPAIRMENT, SO I MEAN, THE TRIAL COURT ON THE ONE HAND --.

YOU ARE NOT SAYING THAT MENTALLY-RETARD INDIVIDUALS CANNOT HOLD EMPLOYMENT IN THIS SOCIETY. HOW IS THE FACT THAT SOMEBODY IS MENTALLY RETARDED BUT STILL TRIES THEIR BEST TO DO THEIR BEST ON A DAY-TO-DAY BASIS, INCONSISTENT WITH THE FACT THAT THEY HAVE GOT LIMITED ABILITY TO COPE WITH, IN A VARIETY OF CIRCUMSTANCES?

THE TRIAL COURT, YOUR HONOR, GAVE GREAT WEIGHT TO EXTREME EMOTIONAL DISTURBANCE. IT GAVE HIS IQ SIGNIFICANT WEIGHT. IT GAVE HIS FAMILY HISTORY SLIGHT WEIGHT. IT GAVE HIS MODEL PRISONER, NO DR'S MODERATE WEIGHT. IT GAVE THE SUBSTANTIAL HEAT OF THE MOMENT WEIGHT AND GAVE HIS RELATIONSHIP WITH HIS FAMILY SOME WEIGHT N THE CONTEXT OF THE ENTIRE CASE, I MEAN, IF THE TRIAL COURT HAD TO SPELL OUT THE WORDS OF WHY HE

WAS FAILING TO DO THIS AND ESPECIALLY IN LIGHT OF, AND THIS IS WHERE THE STATE DISPUTES THOMAS'S POSITION ON THIS, ESPECIALLY IN LIGHT OF THE THREE EXTREMELY HEAVY AGGRAVATORS IN THIS CASE, THAT BASICALLY THESE PARTICULAR MITIGATORS WERE INCONSEQUENTIAL.

I GUESS I AM TRYING TO SEE -- I AM SORRY.

AS I READ, THE ORDER, ENTERED BY THE TRIAL JUDGE, THE TRIAL JUDGE CONSIDERED THESE MATTERS.

YES, YOUR HONOR.

THAT JUSTICE PARIENTE WAS REFERRING TO, AND THEN MADE A DETERMINATION AS TO THEIR WEIGHT THAT THEY WERE, THAT THEY WERE ENTITLED TO NO WEIGHT AS MITIGATION, ALTHOUGH THEY WERE CONSIDERED. IS THAT CORRECT?

YES, YOUR HONOR. THAT IS CORRECT ORDER.

THE MATTER HAVING TO DO WITH THE SCHOOL RECORDS. OKAY.

YES, YOUR HONOR. IN TERMS OF THE, OF HAC, I MEAN, WE HAVE HER BEING ABDUCTED. WE HAVE HER BLOOD AT THE HOSPITAL SCENE. WE HAVE HER BLOOD SPATTERED ALL OVER THE RIGHT SIDE OF HER CAR. WE HAVE HER TRYING TO RUN AWAY 109 FEET AWAY, TAKING A PROTECTIVE FALL, A HIT FROM THE BACK OF THE HEAD AND A PROTECTIVE FALL AND DEFENSIVE WOUNDS TO, SIX DEFENSIVE WOUNDS TO HER HANDS. WE HAVE, IF YOU LOOK AT THE PICTURES, ENORMOUS PAIN AND SUFFERING BY THE VICTIM, ENORMOUS TERROR. HAC IS EXTREMELY, EXTREMELY WEIGHTY IN THIS CASE. WE HAVE PRIOR VIOLENT FELONY, WHICH THIS COURT HAS RECOGNIZED AS A VERY SIGNIFICANT AGGRAVATOR. WE HAVE HIM ON FELONY PROBATION.

WAS THAT FOR THE SAME THING?

YES, YOUR HONOR. HE WAS STILL ON FELONY PROBATION FOR THE ROBBERY IN WHICH HE THREATENED TO KILL SOMEBODY.

WHEN HE DID THAT, AND, AGAIN, NOT MINIMIZING THE ROBBERY, BUT THIS IS THE ONE WHERE HE SAID I HAVE GOT A GUN, AND HE WAS USING HIS FINGERS?

HE SAID IF YOU COME OUT I WILL KILL YOU, BUT THE WITNESS DID NOT SEE A GUN.

AND HE WAS FOUND NOT TO HAVE HAD A WEAPON ON, WITH HIM.

WELL, HE, WELL, WE DON'T KNOW IF HE HAD A WEAPON OR NOT. I MEAN, WHAT HE WAS CONVICTED OF WAS ROBBERY WITHOUT A WEAPON, BUT HE THREATENED TO KILL THE VICTIM AT THE TIME.

AND THAT OCCURRED IN WHAT YEAR? SEVERAL YEARS BEFORE. AND HE HAD BEEN --

'93.

-- ON PROBATION SUCCESSFULLY, WITHOUT COMMITTING ANY OTHER INFRACTIONS, IT FOR A NUMBER OF YEARS.

AND HE HAD A THEFT BEFORE THAT, I BELIEVE, YOUR HONOR. I BELIEVE IT WAS REDUCED TO A THEFT BEFORE THAT, BUT THAT IS A CORRECT STATEMENT.

WAS HE LIVING AT HOME?

HE WAS LIVING WITH HIS GRANDMOTHER, I BELIEVE, YOUR HONOR. BUT WE HAVE, GETTING BACK TO HAC WE HAVE HER TOOTH BEING KNOCKED OUT, SEVERAL TEETH BEING KNOCKED OUT OF HER HEAD, INCLUDING ONE SIX OR SEVEN FEET AWAY. WE HAVE ENORMOUS HAC THAT, IF THE TRIAL COURT COMMITTED ANY TECHNICAL ERROR BY NOT GOING INTO THE REASONING AS TO WHY HE DIDN'T CONSIDER, FIVE OR SIX YEARS AGO, THAT HE WASN'T A DISCIPLINARY PROBLEM IN SCHOOL, AND THAT HE WAS CERTAINLY HARMLESS UNDER THE FACTS OF THIS CASE. THE TRIAL COURT GAVE HIS MENTAL RETARDATION SIGNIFICANT WEIGHT. WEIGHED IT APPROPRIATELY AND CONSIDERED IT APPROPRIATELY GAVE IT APPROPRIATE WEIGHT UNDER THE FACTS OF THIS CASE, BUT IN ANY EVENT, THE STATE CONTENDS THAT, ON THE RETARDATION ISSUE, THAT THE LEGISLATURE'S PLAIN WORDS, AS YOUR HONORS HAVE ALREADY POINTED OUT, IT IS SPELLED OUT IN BLACK AND WHITE, PROSPECTIVE ONLY. PIPELINE DOESN'T APPLY. MR. CHIEF JUSTICE: THANK YOU.

I WOULD APPRECIATE IT IF YOU WOULD AFFIRM THE TRIAL COURT.

I WANT TO MAKE IF VERY CLEAR THAT -- I WANT TO MAKE IT VERY CLEAR THAT WE CAN LOOK AT THAT STATUTE AND SAY IT DOESN'T APPLY BUT UNDER RETROACTIVE, WE HAVE TO CONSIDER THAT STATUTE AS PART OF OUR EVOLVING STANDARDS OF DECENCY. FLORIDA NO LONGER WANTS TO EXECUTE THE RETARDED.

IS THAT FROM THE GEORGIA SUPREME COURT --

YES, YOUR HONOR. THEY HAD A NONRETRO ACTIVITY CLAUSE, I BELIEVE, AND I CITED THAT IN MY BRIEF.

ANY OTHERS SINCE THAT STATUTE?

SINCE I FILED THE INITIAL BRIEF, THERE ARE FOUR OTHER STATES THAT HAVE PASSED BILLS OR ACTS JUST LIKE FLORIDA. ONE OF THEM, COMMITTEE, HAD -- CONNECTICUT, HAD A NONRETROACTIVE APPLICATION. ONE, NORTH CAROLINA, APPLIED IT RETROACTIVELY. IN FACT THE U.S. SUPREME COURT TOOK THE RICARDO, BECAUSE HE WAS SENTENCED TO LIFE. ARIZONA, I WILL BE HONEST, I CAN'T RECALL. BUT I SUPPLEMENTED THE RECORD WITH THOSE STATUTES, ANYWAY, BUT I WANT YOU TO -- I WANT TO MAKE VERY, VERY CLEAR THAT WE ARE LOOKING AT AN EIGHTH AMENDMENT ANALYSIS. WE ARE LOOKING AT THE EVOLVING STANDARDS OF DECENCY. I AM SORRY.

DO YOU AGREE, THOUGH, THAT THE STATUTE REQUIRES MORE THAN JUST THAT SOMEONE HAS GOT AN IQ OF 61. THAT THERE IS SOME VERY, THERE ARE SOME VERY SPECIFIC FINDINGS THAT ARE EXPECTED TO BE PRESENTED AND MADE ABOUT THAT NOT, THAT MAY NOT SAY THAT EVERYONE THAT HAS THIS IQ WILL QUALIFY UNDER THE STATUTE.

YEAH. THE STATUTE USES THE STANDARD DEFINITION OF MENTAL RETARDATION. THREE PRONGS. BEFORE 18. ADAPTIVE BEHAVIOR DEFICITS. HE CAN'T TELL WHICH WAY THE SUN RISES, AND HE HAS AN IQ OF LESS THAN 70.

HE MEETS THE LAST ONE.

YES. HE CLEARLY, AND LARSON TESTIFIED HE MET THE OTHER TWO AS WELL. I MEAN --

WHAT WERE HIS ADAPTIVE? HOW WAS HE FUNCTIONING IN LIFE?

WELL, HE DIDN'T KNOW -- HE COULDN'T TELL WHICH DIRECTION THE SUN ROSE, FOR EXAMPLE. WHAT THEY ARE BASICALLY LOOKING AT ARE WHAT ARE THE INDICATIONS THAT THEY CAPITAL FUNCTION IN MODERN SOCIETY, CAN'T MAKE CHANGE, CAN'T TELL --

WAS HE LIVING ON HIS OWN?

NO. HE WAS LIVING WITH HIS GRANDMOTHER, WHICH IS A CLASSIC INDICATOR OF SOMEBODY WHO IS MENTALLY RETARDED. IF THEY LIVE WITH A GIRLFRIEND WHO IS MORE LIKE A MOTHER. THEY PUT OUT THEIR CLOTHES. THEY COOK THEIR DINNER FOR THEM.

THAT WAS WHAT THOMAS'S TESTIMONY WAS THAT SOMEBODY ELSE COOKED HIS MEALS?

NO.

WHAT DO WE KNOW ABOUT HOW HE WAS LIVING HIS DAY-TO-DAY LIFE?

A 25-YEAR-OLD MAN WAS LIVING WITH HIS GRANDMOTHER. WHEN HE WAS 25 YEARS OLD, I HAD BEEN IN THE ARMY AND STUFF LIKE THIS. THIS IS INDICATORS HERE. LARSON --

TYPES HAVE CHANGED.

BUT THE POINT BEING IS HE FOUND HIM WITH ADAPTIVE BEHAVIOR DEFICITS. THE STATE NEVER CHALLENGED. THAT THERE IS NO CHALLENGE BY THE STATE THAT HE IS MENTALLY RETARDED. WHEN THEY QUESTIONED HIM, LARSON THEY ARE MORE INTERESTED IN WHETHER HE MEETS THE STATUTORY MENTAL MITIGATORS. THERE IS, UNTIL RIGHT NOW, ANY QUESTION THAT THOMAS IS MENTALLY RETARDED.

CAN YOU LOOK AT THE CONVERSATION HE HAD WITH THE POLICE DETECTIVE, THE TRANSCRIPT OF THAT?

WELL, AGAIN, YOU -- LET ME ASK YOU THIS. ARE YOU TRYING TO FIND EVIDENCE THAT HE IS NOT RETARDED?

IS THAT -- WAS THAT CONSIDERED? HIS CONSIDERATION?

I DON'T KNOW IF LARSON TOOK THAT INTO ACCOUNT.

WHAT ABOUT THE JUDGE?

WELL, IF YOU LOOK AT RETARDATION LIKE YOU DO INSANITY IT IS ESSENTIALLY A LEGAL DETERMINATION, AND YOU LOOK, THEN PERHAPS YOU CAN, BUT THERE IS NO EVIDENCE TO REFUTE. THAT I MEAN, THE JUDGE IS NOT AN EXPERT IN MENTAL RETARDATION. THAT IS WHY WE CALL IT --

WHEN YOU TALK ABOUT THE ADAPTIVE ELEMENT, THE CONVERSATION WAS CERTAINLY NOT, WOULD NOT APPEAR TO BE EXTRAORDINARILY LIMITED. THOMAS GAVE VERY DESCRIPTIVE ANSWERS TO WORLEY'S QUESTIONS. IS THAT CONSIDERATION?

HAVE YOU EVER SEEN ANYBODY RETARDED? THEY LOOK NORMAL. THEY SOMETIMES TALK, BUT WHEN YOU START LOOKING AT THEIR INTELLECTUALABILITY AND THE WAY THEY TALK, SOMETIMES THEY TALK VERY OBVIOUSLY RETARDED. SOMETIMES THEY DON'T. BUT YOU LOOK AT WHAT THESE EXPERTS ARE SAYING. THESE PEOPLE CANNOT UNDERSTAND THE WAY YOU AND I UNDERSTAND.

I GUESS MY QUESTION IS, IN READING THE ENTIRE RECORD, THAT THE JUDGE INDICATE THAT HE CONSIDERED THAT ASPECT?

NO. I DON'T BELIEVE HE DID. I MEAN HE FELT --

WAS THAT ARGUED?

NO. HE FELT, THE JUDGE FOUND HIM TO BE MENTALLY RETARDED.

BUT HE FOUND HIS STATEMENT ADMISSIBLE?

YES. HE FOUND HIS STATEMENTS TO BE ADMISSIBLE. WHAT I AM SAYING, AND HE USED THE TOTALITY OF THE CIRCUMSTANCES, EXAMINATION, BUT LARSON NEVER SAID, WELL, HE DID THOSE TWO -- HE DIDN'T UNDERSTAND THE WORDS OR THE CONCEPTS. THANK YOU VERY MUCH.

THANK YOU. MR. CHIEF JUSTICE: THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THE CASE.