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Joseph J. Ramirez vs. State of Florida

UNIQUE IS COMMON TO TOOL MARK EXAMINATION IN GENERAL. WITH RESPECT TO KNIVES, CERTAINLY THE IMPERICAL BASIS FOR THAT IS EXTREMELY THIN. IT CONSISTS OF TWO STUDIES COMPARING MARKS MADE BY TWO EXACTLY MANUFACTURED KNIVES, SO THAT IS NOT VERY MUCH EVIDENCE THAT ALL KNIVES ARE UNIQUE, BUT IF YOU EVEN ASSUME THAT THAT IS TRUE, THEN YOU, ALSO, HAVE THE ISSUE OF WHETHER OR NOT THESE EXPERTS CAN REALLY ACCURATELY AND RELIABLE IDENTIFY KNIFE MARKS FROM STAB WOUNDS AND CARTILAGE.

BUT DOES THAT GO TO THE CREDIBILITY OF THE EXPERTS, THEMSELVES, OR DOES THAT GO TO WHETHER THIS IS A GENERALLY ACCEPTED THEORY?

I MEAN, WELL, IT GOES TO, I THINK YOUR HONOR ASKED, INITIALLY, WHAT WAS THE NOVEL TECHNIQUE, AND IN THIS COURT'S TWO PRIOR OPINIONS, I THINK IT WAS SPECIFICALLY THAT SECOND PART, THE ABILITY TO ACCURATELY AND RELIABLY IDENTIFY ONE KNIFE TO THE SECLUSION OF EVERY OTHER KNIFE IN THE WORLD, AS HAVING MADE A PARTICULAR MARK. THAT IS WHAT THIS COURT SAID, IN RAMIREZ ONE, WAS NOVEL, AND THAT IS WHAT THE STATE NEEDED TO PROVE WAS RELIABLE, BEFORE IT COULD BE ADMITED IN COURT, AND IT IS OUR CONTENTION THAT THEY HAVE MONDAY FESTLY BEEN UNABLE TO DO THAT. YOU HAVE MORE PEOPLE COMING IN, IN RAMIREZ ONE, COMING IN AND SAYING WE KNOW IT WHEN IT -- WHEN WE SEE IT. WE NEVER MAKE A MISTAKE, AND YOU HAVE GOT TO BELIEVE US. BUT MORE RECENTLY IN HADDON AND IN RAMIREZ TWO, IT IS NOT SUFFICIENT, THE COURT FOUND, TO HAVE FRYE, TO HAVE ONLY THE SELF-SERVING EXPERT TESTIMONY. THIS COURT HAS REALIZED THAT THERE HAS TO BE MORE TO IT THAN FINDING FIVE PEOPLE.

FROM YOUR RESEARCH, YOU ARE TELLING US THAT THERE ARE ONLY TWO AUTHORITATIVE SOURCES THAT HAVE OPINED ON THIS SUBJECT OF WHETHER A KNIFE LEAVES AN UNIQUE MARK?

ON KNIFE MARKS. THOSE WERE THE TWO THAT WERE PRESENTED BY THE STATE BELOW AND RELIED ON BY THE TRIAL JUDGE.

BUT IF A KNIFE IS WITHIN THE GENERAL IDEA OF A TOOL, THAT IT IS GENERALLY ACCEPTED, IN THE SCIENTIFIC COMMUNITY, THAT TOOLS LEAVE UNIQUE MARKS.

CERTAINLY TOOL MARK EXAMINERS WOULD CONTEND THAT. I AM NOT FAMILIAR WITH THE EXACT EXTENT OF THE RESEARCH, WITH RESPECT TO OTHER TOOLS, BUT I DO KNOW THAT THOSE TWO STUDIES ARE WHAT IS RELIED ON, WITH RESPECT TO KNIFE MARKS, BUT THAT, STILL, THAT IS ONE PREMISE, AND THEN THE SECOND STEP IS THE QUESTION, AGAIN, OF WHETHER, EVEN IF KNIVES DO MAKE UNIQUE MARKS, WHETHER THESE EXAMINERS, BASED ON THE SUBJECTIVE TECHNIQUE, CAN ACCURATELY AND RELIABLY IDENTIFY ONE KNIFE, TO THE EXCLUSION OF ALL OTHERS, HAVING MADE THIS MARK, WITHOUT EVER HAVING MADE A MISTAKE.

ARE YOU SUGGESTING THAT THERE IS NO MARK, LIKE MIGHT NOT MA'AM STANDARDS, FINGERPRINT -- NO MINIMUM STANDARDS, LIKE FINGERPRINTING, A POINT OF COMPARISON, THAT IT IS A MATCH, THAT THE FACT THAT THE COMMUNITY HASN'T ESTABLISHED POINTS OF COMPARISON, THAT THAT IS WHAT MAKES IT SUBJECTIVE?

THEY ADMIT IT ON THE STAND, THAT IT WAS SUBJECTIVE. THEY AGREED WITH THAT CHARACTERIZATION, BUT, YES, THAT IS TRUE. IT IS THE ABSENCE OF STANDARDS, AND THIS CASE

IS, PERHAPS, ONE OF THE MORE EXTREME KPAMP ELSE OF IT, BUT THEY DON'T USE, FOR EXAMPLE, THE PHOTOGRAPHS THE COMPARISON, LIKE YOU MIGHT USE IN FINGERPRINTS, SO THAT YOU COULD ACTUALLY ILLUSTRATE TO A JURY, BUT THEY COULD DO THAT, AND I GUESS --

I HIM STILL TRYING TO FIGURE OUT, AND MAYBE THE OTHER SIDE OR THE CONTINUATION WITH JUSTICE WELLS IS SAYING, IS THAT IT DOESN'T STRIKE ME AS A VERY UNIQUE THOUGHT THAT SOMEBODY COULD LOOK AT A MOLD OF A KNIFE AND SEE WHERE THE RIDGES OR LOOK AT THAT AND THEN LOOK AT SOMETHING ELSE AND BE ABLE TO LINE THEM UP, TO SAY THEY ARE MADE BY THE SAME INSTRUMENT. AND THAT DOESN'T SEEM LIKE THAT WOULD TAKE, LIKE, YOU KNOW, THAT THIS WOULD DEEM WE WOULD HAVE TO BE IN THE 22nd CENTURY, BEFORE WE COULD DO SOMETHING LIKE THAT, SO WHAT I AM SDUFERBD DISTURBED ABOUT, HERE, IS THAT -- WHAT I AM DISTURBED ABOUT, HERE, IS THAT THERE ISN'T, AND THIS IS YOUR POINT ABOUT HOW IT BECOMES RELIABLE IN A GIVEN CASE, IS THAT YOU HAVE GOT TO BE ABLE TO SAY, WELL, WHEN I LOOKED AT ALL 25 MARKS ON -- OR STRIATIONS, I WAS ABLE TO SEE 20 OF THEM, IDENTITY, AND HERE IT IS. AND THEN IT BECOMES RELIABLE, BUT BECAUSE OF THOSE STANDARDS, AND THEN IT GIVES THE DEFENDANT SOMETHING TO CROSS-EXAMINE BY. IS THAT WHAT -- IS THAT, REALLY, THE CRUX OF WHAT IS MISSING IN THIS CASE?

IT IS ONLY PART OF IT, YOUR HONOR, BECAUSE I THINK IT IS TRUE THAT RELIABILITY CERTAINLY COULD BE ESTABLISHED BY DEVELOPING MORE OBJECTIVE STANDARDS, AND CERTAINLY THERE ARE PEOPLE IN TOOL MARKS THAT HAVE TRIED TO DO THAT, BUT WE ARE NOT EVEN SAYING THAT A SUBJECTIVE IDENTIFICATION TECHNIQUE COULD NEVER BE RELIABLE, EVEN WHOUT HAVING THOSE KINDS OF -- EVEN WITHOUT HAVING THOSE KINDS OF STANDARDS, BUT WHAT WE ARE SAYING IS, IF A CLAIMANT IS RELIABLE, IF YOU ARE GOING TO ON COME INTO COURT AND TELL THE JURY THAT, WHEN YOU MAKE AN IDENTIFICATION, THAT IT COULD NEVER BE WRONG, THAT YOU SHOULD HAVE DONE SOME KIND OF I AM PERCAL EVIDENCE, AND -- I AM PERKAL EVIDENCE, AND -- IMPERICAL EVIDENCE, AND YOU CERTAINLY COULD HAVE DONE THAT. IF THERE WAS A TEST MARK, IF THEY UNDER WENT DHIND OF TESTING, THEN -- IF THEY UNDERWENT SOME KIND OF TESTING, THEN THEY HAVE EXPERTS WHO COME INTO COURT AND SAY THIS MAY BE THE FIRST INFALLIBLE SCIENCE IN HISTORY AND IT HAS NEVER BEEN TESTED.

JUSTICE SHAW?

I THINK YOU HAVE TO RECOGNIZE THAT WE DO HAVE TOOL MARKS AND BITE MARKS EXPERTS, AND IN THIS INSTANCE, THE STATE PUT ON TOOL MARK EXPERTS. IS THAT CORRECT?

THAT'S RIGHT, YOUR HONOR. THESE ARE TOOL MARK EXAMINERS.

AND IT HAS BEEN ESTABLISHED, IN THE SCIENTIFIC COMMUNITY, THAT TOOLS LEAVE CERTAIN STRIATION MARKS THAT CAN BE IDENTIFIED BY OBJECTIVE STANDARDS.

NOT BY OBJECTIVE STANDARDS, YOUR HONOR. I MEAN, THE TOOL MARK EXAMINATION IS STILL SUBJECTIVE. TOOL MARK EXAMINATION, THIS COURT HAS NOT SPECIFICALLY FRYE TESTED IT, BUT THE OVERALL PRINCIPLES OF TOOL MARK EXAMINATION ARE NOT WHAT IS DISPUTED HERE. IT IS THE APPLICATION OF THOSE PRINCIPLES TO STAB WOUNDS AND HUMAN CARTILAGE, AND THAT IS THE INQUIRE HI THAT IS SET OUT, IN RAMIREZ ONE.

IN TOOL MARKS, THE EXPERTS IN TOOL MARKS IDENTIFICATION, DON'T THEY SAY THIS COMPARES WITH SO MANY MARKS, SIMILAR MARKS? DO THEY DO THAT?

THEY DO NOT. THEY SIMILARLY DO NOT NECESSARILY HAVE ANY, YOU KNOW, SAY THAT THERE HAS TO BE A MINIMUM NUMBER OF MATCHING MARKS. I THINK WHAT IS MOST IMPORTANT --

YOU SAY THEY DON'T HAVE THAT IN TOOL MARK STRIATIONS?

NO. THEY DO HAVE STRIATION MARKS, BUT I AM SORRY. I MISUNDERSTOOD YOUR QUESTION. IT IS MY MINIMUM UNDERSTANDING THAT, WITH TOOL MARKS, IN GENERAL, THERE BE A REQUIREMENT OF A MINIMUM NUMBER OF PERCENTAGE OF CORRESPONDING STRIATIONS.

WELL, THAT BEING THE CASE, WHY IS THE KNIFE BHARCK DECIDES -- THE KNIFE MARK DISSIMILAR, IF YOU DON'T NEED A CERTAIN NUMBER, LIKE FINGERPRINT IDENTIFICATION. YOU HAVE SO MANY RIDGES THAT CORRESPOND. IF YOU DON'T NEED THAT, AS AN OBJECTIVE STANDARD, WHY IS IT DIFFERENT WITH THE KNIFE?

WELL, ONE SIGNIFICANT --

AND THE TOOL.

-- DIFFERENCE IS THAT TOOL MARKS ARE SUBJECT TO PROVE ISSUES TESTING. TOOL -- TO PROVE ISSUES I TESTING. TOOL MARK -- TO PROFICIENCY TESTING, AND TOOL MARKS ON DOORS, SUCH AS IN BURGLARY CASES AND SO FORTH, WE HAVE I AM PEERCK ALLOCATE A -- WE DO HAVE IMPERICAL DATA WITH RESPECT TO TOOL MARKS. AND, ALSO, YOU ARE APPLYING A DIFFERENT KIND OF MARK, A STAB WOUND AS OPPOSED TO A SCRAPE MARK, AND DIFFERENT MATERIAL. HUMAN CARTILAGE, AS OFTEN OPPOSED TO -- AS OPPOSED TO SOFTER METALS, AND, ALSO, IN KNIFE MARK IDENTIFICATION, YOU ARE COMPARING SECOND GENERATION, BECAUSE YOU HAVE TO MAKE A CAST, BECAUSE CARTILAGE IS TRANSLUCENT, AND EVEN OF THE PUB LIRCKD PROF ISSUES TESTS -- EVEN OF THE PUBLIC PROFICIENCY TESTS, WE HAVE TOOL MARK MATERIAL AND TOOL MARK IDENTIFICATION. WE HAVE ABSOLUTELY NO INFORMATION ABOUT KNIFE MARK IDENTIFICATION.

IS THERE A KNIFE MARK IDENTIFICATION EXPERT IN THE FIELD? IS THERE SUCH A PERSON?

WELL, THESE, THE FIVE WITNESSES PRESENTED BY THE STATE, ESSENTIALLY DEFINED THEMSELVES AS BEING THE LEADING AUTHORITIES IN THE FIELD OF KNIFE MARKS, OF APPLYING THE PRINCIPLE OF TOOL MARKS TO STAB WOUNDS IN HUMAN CARTILAGE.

THE KNIFE MARKS, DO THEY REPRESENT THAT THEY ARE KNIFE MARK EXPERTS OR TOOL MARK EXPERTS?

BOTH, YOUR HONOR. I CAN THAT IS THE GIST OF THEIR TESTIMONY. THEIR PRIMARY TRAINING IS, TOOL MARK EXAMINERS. THIS IS A SUBSET OF TOOL MARKS, BUT IT IS ONE THAT HAS NOT BEEN TESTED, AND FRYE, ITSELF, DOES REQUIRE THAT IT IS NOT JUST BASIC PRINCIPLE, THE TOOL MARK PRINCIPLE, BUT THAT SPECIFIC APPLICATION OF IT THAT NEEDS TO BE FRYE TESTED, AND THAT IS WHAT THIS COURT SET OUT TO BE DONE IN RAMIREZ ONE, AND IN RAMIREZ ONE, THIS COURT MADE IT EXTREMELY CLEAR THAT IT WASN'T ENOUGH TO JUST HAVE AN EXPERT COME IN AND SAY THIS IS RELIABLE, AND THIS COURT HAS SAID, REPEATEDLY, THAT THE QUALITY OF THE EVIDENCE IS OFFERED TO ESTABLISH RELIABILITY, IS RELEVANT, AND THAT IS THE ISSUE HERE.

WHAT WOULD BE REQUIRED MORE THAN THE EXPERTS PUT ON THIS INSTANCE, THAT WE LOOKED AT THE MARKS THROUGH A MICROSCOPE AND WE ARE EXPERTS IN THIS FIELD, AND WE FIND THESE MARKS TO BE SIMILAR? WHAT MORE WOULD THEY HAVE TO PUT ON, OTHER THAN THAT?

THEY WOULD HAVE TO HAVE SOME IMPERICAL EVIDENCE TO BACK IT UP. AS IT STANDS, THAT IS EXACTLY --

USING THAT TERM, WHAT?

THE KIND OF VALIDATION TESTS, FOR EXAMPLE, THAT WE DESCRIBED IN THE BRIEF, THE PROVEN IRPS HE -- THE PROFICIENCY TESTS, ASKING THEM AND GIVING THEM KNIFE AND TOOLS, TO SEE WHETHER THEY COULD ACCURATELY MAKE IDENTIFICATION. THAT HAS BEEN DONE IN OTHER

FIELDS THAT HASN'T BEEN DONE HERE.

WERE THEY CROSS-EXAMINED ON THESE, THEIR TESTIMONY?

THEY WERE CROSS-EXAMINED ON SOME OF THESE ISSUES, BUT --

WERE THEY SHOWN OTHER KNIVES AND ASKED, BY DEFENSE COUNSEL, IF THEY COULD MAKE THAT SAME ASSERTION?

NO, THEY WEREN'T, YOUR HONOR. I MEAN, THIS COURT HAS SAID, REPEATEDLY, THAT THE PURPOSE OF FRY IS THAT THE -- OF FRYE IS THAT THE COURTROOM IS NOT THE LABORATORY. FRYE DETERMINES GENERAL LIABILITY, BECAUSE WE ASSUME THAT THIS KIND OF TESTING AND SCRUTINY AND EXPERIMENTATION IS SUPPOSED TO OCCUR OUTSIDE THE COURTROOM, WITHIN THE SCIENTIFIC DISCIPLINE, AND IT IS THAT PROCESS OF RIGOROUS SCRUTINY IN EXAMINATION THAT MAKES GENERAL ACCEPTANCE MEANINGFUL, AS A PROXY FOR RELIABILITY. AND IF --

YOURS IS THE SUFFICIENCY OF THE TEST. IS THAT WHAT YOU ARE ARGUE SOMETHING.

I AM SORRY. I DON'T UNDERSTAND.

ARE YOU ARGUING THE SUFFICIENCY OF THE TEST THAT WAS CARRIED OUT?

NO, YOUR HONOR. I AM SAYING THERE HAS NEVER BEEN ANY TESTING THERE. IS NO IMPERICAL TEST TO SHOW THEIR IN FALLIBILITY.

THEY LOOKED AT IT THROUGH A MICROSCOPE AND SAID THEY ARE SIMILAR, SO --

THEY SAID IT IS SIMILAR, THEY SAID.

THE ARGUMENTS CATEGORIZE THAT AS TESTING.

THEY THAT EXAMINATION, BUT THERE IS NO WAY TO VERIFY THE ACCURACY OF THAT. THAT IS WHY YOU HAVE THE KIND OF TESTING, WHERE YOU USE CONTROLS OR YOU USE SEVERAL DIFFERENT MARKS, AND THE PERSON WHO DESIGNS THE TEST KNOWS WHAT THE RIGHT ANSWER IS, IS THE ONLY WAY YOU CAN DETERMINE ACCURACY. THE FACT THAT THEY LOOKED AT IT UNDER A MICROSCOPE AND SAID WE THINK THAT THIS MARK HAD TO HAVE BEEN MADE BY THIS KNIFE, TO THE SECLUSION OF ALL OTHERS IN THE WORLD, STILL DOESN'T PROVE THAT THAT IS, IN FACT, THE RIGHT --

THAT IS NOT DISSIMILAR FROM TOOL MARKS.

-- CONCLUSION.

THEY LOOK AT THEM AND SAY THEY ARE SIMILAR.

BUT, AGAIN, YOUR HONOR, TOOL MARKS AT LEAST, THERE HAS BEEN PROVE ISSUES TESTING. -- THERE HAS BEEN PROFICIENCY TESTING.

IN SCIENTIFIC TESTING, YOU MEAN THERE HAVEN'T BEEN ANY STUDIES BROUGHT FORWARD THAT HAVE SHOWN, FOR INSTANCE, THAT SOMEBODY TOOK 1,000 KNIVES WHICH WERE USED TO STAB 1,000 OBJECTS, WHICH THEY KNEW WHICH KNIFE STABBED WHICH OBJECT, AND THEY MAY NOT TAPED A RECORD OF THAT AND HAD THE FACTS OF THAT OR WHATEVER, AND THEN THEY EVALUATED THAT BLINDLY. THAT IS BASED ON WHETHER OR NOT YOU COULD, BECAUSE OF THE STRIATIONS OR WHATEVER, AND HOW ACCURATE THAT MAY HAVE COME OUT. YOU KNOW, ONCE YOU STAB THOSE MATERIALS OR WHATEVER, AND WHETHER IT VARIES WITH THE MATERIALS OR THE COMPOSITION OF THE KNIFE BLADE, FOR EXAMPLE. IN OTHER WORDS THAT THIS IS DONE IN

LARGE NUMBERS, IN A CONTROLLED ENVIRONMENT, WHERE YOU COULD ACTUALLY TELL WHETHER THIS WAS AN ACCURATE WAY TO DO IT.

RIGHT. THAT IS EXACTLY --

THOSE THINGS ARE DONE AND THEN REPORTED IN SCHOLARLY JOURNALS OR SOMETHING.

RIGHT. THAT IS EXACTLY RIGHT, YOUR HONOR. AND THAT IS WHAT HAS OCCURRED, WITH OTHER FORENSIC SAMPLES, IS THAT THERE HAS BEEN SUCH TESTING. NOW, UNDERSTAND THAT THIS IS EXACTLY THE KIND OF EVIDENCE THAT THIS COURT EXPLAINED IN FLANAGAN THAT FRYE IS SUPPOSED TO EXCLUDE, WHICH IS THAT IT IS MISLEADING TO A JURY, BECAUSE HERE YOU HAVE THE EXPERTS COMING IN WITH NOT JUST AN AURA OF INFALLIBILITY BUT WITH AN ACTUAL CLAIM OF INFALLIBILITY -- OF INFALLIBILITY, BUT THE RELIABILITY HAS NEVER BEEN PROVEN, ITSELF. NOW, THIS COURT HAS BEEN VIGILANT IN ITS APPLICATION OF FRYE, AND IT HAS REQUIRED MORE THAN NOSE COUNTING. IT HAS REQUIRED MORE THAN "WE KNOW IT WHEN WE SEE IT; WE ARE NEVER WRONG; TRUST US." THIS COURT CLEARLY REQUIRES MORE THAN THAT.

THIS CASE WAS ORIGINALLY IN 1983. IS THAT WHEN THE KNIFE MARK IDENTIFICATION WAS MADE, BACK IN 1983?

I BELIEVE THE TRIAL WAS LATER THAN THAT, BUT, I BELIEVE, YES, IN 1980s.

WHEN WAS THE LAST RETRIAL?

19 -- IT HAS NOW, I THINK, BEEN ABOUT TWO YEARS AGO.

IN '98 OR '97?

I BELIEVE SO.

WHEN THE KNIFE EXPERT TESTIFIED IN THIS CASE, DID HE TESTIFY, BASED ON THE TEST THAT HE DID IN 1983, AND I GUESS MY QUESTION THERE IS HAS THERE BEEN, SINCE WE NOW SORT OF HAVE 16, 15 YEARS FOR THIS FIELD TO HAVE BECOME MORE ESTABLISHED OR FOR THESE CONTROLLED EXPERTS TO BE DONE, HAS THERE BEEN ADVANCEMENTS IN THIS FIELD FOR THE LAST 20 YEARS?

NO.

IT IS THE SAME AS OTHER PUBLICATIONS, NO CONTROLLED EX-PEMPLTS, OTHER WAYS TO DETERMINE -- EXPERIMENTS, OTHER WAYS TO DETERMINE RELIABILITY.

NEW YORK CITY YOUR HONOR.

IN 1987, DID HE TESTIFY -- IN 1997, DID HE TESTIFY WHAT HE DID IN 1983?

HE TESTIFIED, BASED ON HIS ORIGINAL INFORMATION. I THINK THIS STATE'S CASE HAS BEEN UNCHANGED SINCE RAMIREZ TWO, AND I THINK, IN TERMS OF THE SCHOLARLY LITERATURE IN THE FIELD, MOST OF WHICH IS, IN FACT, NOT VERY SIMILARLY AT -- SCHOLARLY AT ALL, THERE HAS BEEN NOT THIS KIND OF TESTING, DURING THAT ENTIRE TIME PERIOD.

BUT, AGAIN, YOU WERE ABLE TO CROSS-EXAMINE THIS EXPERT ABOUT. THAT DID YOU PUT ON YOUR OWN EXPERT AT THIS TRIAL, TO EXPLAIN WHY THERE IS NO WAY THAT THIS COULD BE 100% CERTAIN, AND THAT THERE WERE DIFFERENCES BETWEEN THE STRIATIONS OR WHAT WAS THE TESTIMONY?

ESSENTIALLY THE DEFENSE EXPERT SAID THAT IT DID NOT COMPORT WITH THE SCIENTIFIC

METHOD.

AND THAT IS WHAT WAS OFFERED AT TRIAL, ALSO?

THAT WAS, ALSO, OFFERED. THAT WAS, ALSO, OFFERED AT TRIAL.

BUT WERE THEY ABLE TO, EVEN THOUGH IT DIDN'T COMPORT WITH THE SCIENTIFIC EXPERT, WAS THERE ENOUGH IN WHAT WAS DONE, FOR YOUR EXPERT TO BE ABLE TO EXPLAIN WHY IT WASN'T SUBSTANTIALLY SIMILAR?

HE DID NOT MAKE THAT ARGUMENT. HE HE WAS NOT AN EXPERT IN STRIATED TOOL MARK EXAMINATION.

BEFORE YOUR TIME IS UP, WOULD YOU MOVE TO YOUR SECOND ISSUE? I AM PARTICULARLY INTERESTED IN THE TETTER ISSUE.

YES. I HAD WANT TO EMPHASIZE THE JURY'S RECOMMEND DAYS AGO OF LIFE IN THIS CASE WAS 9-3. THE STATE PRESENTED 14 WITNESSES TO ESTABLISHED SUBSTANTIAL MITIGATING CIRCUMSTANCES THAT THIS COURT HAS REPEATEDLY HELD TO BE SUFFICIENT TO SUSTAIN A LIFE RECOMMENDATION. THE JUDGE DISAGREED WITH THE JURY FINDING, EITHER THAT THESE FACTORS WERE NOT MITIGATING OR ACCORDING THEM LITTLE WEIGHT, BUT IN EACH INSTANCE, AS DISCUSSED IN THE BRIEF, THE JURY COULD HAVE REASONABLY DISAGREED WITH THAT. ES TENSIONALLY AFTER FINDING THAT THE DEATH SENTENCE WOULD BE MORE APPROPRIATE, THE JUDGE ATTRIBUTED HIS RECOMMENDATION TO A SINGLE LINGERING DOUBT, DUE TO DEFENSE COUNSEL'S ARGUMENT, THAT THE JURY WAS IMMEDIATELY INSTRUCTED TO DISREGARD, AND, ALSO, TO HIS SPECULATION THAT THE JURY MAY HAVE FELT SIMPLY ANY FOR -- SYMPATHY FOR THE DEFENDANT'S FAMILY, EVEN THOUGH THEY WERE, ALSO, INSTRUCTED THAT THEY COULD NOT CONSIDER SYMPATHY. AND THERE WAS NEVER ANY SUGGESTION BY THE STATE THAT EITHER THE FAMILY'S MEMBERS' TESTIMONY IN -- THE FAMILY MEMBERS' TESTIMONY IN COURT WAS NOT A SUFFICIENT BASE TO TURN OVER LIFE.

IF YOU WISH TO RESERVE SOME TIME FOR REBUTTAL, YOU MAY.

YES, THANK YOU.

MS. JAGGARD.

MAY IT PLEASE THE COURT. SANDRA JAGGARD, ASSISTANT ATTORNEY GENERAL, ON BEHALF OF THE STATE. THIS KNIFE MARK EVIDENCE PASSES FRYE. WE PRESENTED FIVE EXPERTS, WHO ALL TESTIFIED THAT THIS IS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY THIS. IS MERELY AN APPLICATION OF TOOL MARK IDENTIFICATION, TO A NEW MEDIA.

IS IT SELF-SERVING FOR THE FIVE OF THEM TO SAY THIS IS ACCEPTED IN THE SCIENTIFIC COMMUNITY, WHEN THERE ARE NO SCHOLARLY WRITINGS ON IT?

THERE WERE SCHOLARLY WRITINGS ON IT. THERE WAS A 76 GERMAN ARTICLE ABOUT TOOL MARK COMPARISON IN HUMAN CARTILAGE. IT HAS NEVER BEEN CRITICIZED. THEY PRESENTED AN INDIVIDUAL WHO IS NOT AN EXPERT IN THIS FIELD, WHO SAYS I JUST DON'T THINK THEY SHOULD DO IT THE WAY THEY DO IT. I DON'T LIKE THEIR OPINION.

IS IT YOUR REPRESENTATION THAT THIS SCIENCE IS ACCEPTED, GENERALLY, IN THE SCIENTIFIC COMMUNITY? KNIFE MARKS?

TOOL MARK EXAMINATION. THAT IS WHAT THIS IS. THIS IS TOOL MARK EXAMINATION.

NOT TOOL MARKS. KNIFE MARK EXAMINATION.

A KNIFE --

THAT IS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY?

YES. BECAUSE A KNIFE IS SIMPLY ANOTHER TOOL. IT IS NO DIFFERENT THAN ANY OTHER TOOL MARK IDENTIFICATION, AND THAT IS WHAT ALL THE EXPERTS TESTIFIED TO, THAT THIS IS NO DIFFERENT THAN ANY OTHER TOOL.

WHAT EX-PEMPTS HAVE BEEN DONE? IN OTHER WORDS -- WHAT EXPERTS HAVE BEEN DONE? IN OTHER WORDS ORDINARILY, FOR INSTANCE, I GUESS THE TIME THAT WE MUST SEE SCIENTIFIC EVIDENCE IS IN THE MEDICAL FIELD, AND SO THEY WILL TALK ABOUT CONTROLLED STUDIES BEING DONE ON PATIENTS THAT PRESENT CERTAIN SYMPTOMS AND THEIR DIET OR WHATEVER THAT THEY DID HOWEVER MANY THOUSANDS OF PEOPLE OVER FIVE OR TEN YEARS AND CONTROLLED EVERYTHING EXCEPT ONE THING, YOU KNOW, AND THEN, SO, THEY COME UP WITH STATISTICS, AND A STATISTICAL ANALYSIS. NOW, ARE THOSE THINGS AVAILABLE FOR KNIVES?

A GERMAN SCIENTIST IN THE '70s, TOOK AND STABBED HUMAN CARTILAGE WITH A KNIFE AND DETERMINED --

HOW MANY TIMES?

I DON'T KNOW, YOUR HONOR. HE PUBLISHED IT.

DID THAT MAKE A DIFFERENCE? IN OTHER WORDS IF SOMEBODY GOES OUT AND THEY STAB HUMAN CARTILAGE ONCE, AND THEN THEY LOOK AT THE NAF, AND THEY LOOK AT THE CARTILAGE, AND THEY SAY AH-HA! I THINK THERE IS SOMETHING UNIQUE HERE, THAT THAT KNIFE DID IT. DALBERT, FOR INSTANCE, HAS ACTUALLY WRITTEN OUT AND LISTED SOME THINGS THAT JUDGES SHOULD LOOK AT, IN ORDER TO DETERMINE WHETHER OR NOT SOMETHING IS GENERALLY ACCEPTED IN THE PARTICULAR SCIENTIFIC COMMUNITY, AND THIS IS ONE OF THE THINGS THAT IT POINTS TO, AND THAT IS HAS THERE BEEN THE KIND OF RIGOROUS SCIENTIFIC EXPERIMENTATION. I AM ASKING YOU WHETHER OR NOT THAT HAS BEEN DONE HERE AND WHERE IS THE -- IF THE EVIDENCE IS IN THE RECORD TO SUPPORT THAT.

THERE ARE GERMAN ARTICLES IN THE RECORD THAT SHOW THAT TESTING WAS DONE, BACK IN THE '70s. THAT IT WAS PUBLISHED. THAT IT HAS NEVER BEEN CRITICIZED.

WHAT DOES THAT ARTICLE SAY?

THAT YOU CAN IDENTIFY KNIFE MARKS IN HUMAN CARTILAGE.

THE POSITION. ALL RIGHT. WE KEEP TALKING ABOUT, YOU WOULD AGREE THAT JUST AN EXPERT'S SELF-SERVING STATEMENT WOULD NOT BE SUFFICIENT TO ESTABLISH SCIENTIFIC RELIABILITY, WOULD YOU NOT?

ONE EXPERT'S SELF-SERVING STATEMENT, PROBABLY NOT. WHEN YOU HAVE A SCIENTIFIC COMMUNITY --

IF TWO GET UP AND SAY THE SAME THING, WOULD IT MAKE A DIFFERENCE?

WHEN YOU HAVE A SCIENTIFIC COMMUNITY COME IN, KEEP IN MIND THERE HAS BEEN NO DISPUTE ABOUT WHAT THE SCIENTIFIC COMMUNITY IS. THERE HAS BEEN NO DISPUTE --

KEEP THE FOCUS, THOUGH, ONGOING BEHIND, CERTAINLY THE U.S. SUPREME COURT'S DECISION IN

DALBERT, REALIZING THAT WE HAVE STUCK WITH FRYE, BUT ALSO THAT WE HAVE CONSIDERED FRYE TO BE MORE RIGOROUS, IN TERMS OF THIS, BUT TELL ME ABOUT -- YOU ARE FAMILIAR WITH THE RECORD, MORE THAN I AM. TELL ME ABOUT, IS IT JUST THIS ONE ARTICLE. IS THAT IT?

THERE WERE OTHER ARTICLES ON CONSECUTIVELY-MANUFACTURED KNIFE MARKS. I BELIEVE THERE WERE TWO GERMAN ARTICLES ON KNIFE MARKS IN HUMAN TISSUE.

WHAT WERE THE EXPERTS AND THE -- WHAT WERE THE EXPERTS AND THE STUDIES?

I DON'T RECALL, YOUR HONOR. I KNOW THAT THEY DID --

WOULD YOU AGREE THAT THE STUDIES AND EXPERTS HAVE TO BE DONE -- THAT THE STUDIES AND EXPERIMENTS HAVE TO BE DONE UNDER SCIENTIFIC STANDARDS?

THIS IS NOT NEW THIS. IS TOOL MARKS, THE SAME AS ANY OTHER TOOL MARK, AND THEY HAVE PROVEN THAT YOU CAN IDENTIFY KNIFE MARKS. THEY HAVE PROVEN YOU CAN IDENTIFY TOOL MARKS. AND THEY HAVE SHOWN THAT YOU CAN DO THIS IN THIS MEDIA.

NOW, LET ME ASK YOU THIS. IS THERE A DIFFERENCE BETWEEN BEING ABLE TO MAKE AN IDENTIFICATION AND BE BEING ABLE TO -- AND BEING ABLE TO SAY, AS IN A COURT OF LAW, THAT THIS IDENTIFICATION IS 100% INFALLIBLE, 100% ACCURATE, AND ONLY THIS KNIFE COULD MAKE THIS MARK? DO YOU SEE A DIFFERENCE, AGAIN, BETWEEN THE GENERAL ACCEPTABILITY OF A TECHNIQUE, WHICH IS BASED ON COMPARISONS AND THEREFORE LOOKING, VISUALLY, EITHER MIKE STOPCALLY OR OTHERWISE, AND -- MICROSCOPICALLY OR OTHERWISE, AND A STATEMENT THAT, APHID THAT, BASED ON NOT -- THAT, AFTER I DID THAT, BASED ON I AM NOT GOING TO TELL YOU WHAT, IT IS 100% ACCURATE, AND ALLOW ALLOWING AN EXPERT TO MAKE THAT DEFINITIVE STATEMENT?

FIRST OF ALL THEY DIDN'T SAY THAT IT WAS 100% ACCURATE. THEY SAID THAT IT WAS IMPOSSIBLE TO HAVE A FALSE POSITIVE. THEY SAID IT WAS POSSIBLE TO MISS A MATCH THAT IS PRESENT. SECONDLY --

WHAT WAS THE TESTIMONY THOUGH? WHAT WAS THE BOTTOM LINE THAT THIS EXPERT SAID ABOUT THIS KNIFE?

THAT THIS KNIFE IS THE KNIFE THAT CAUSED THAT STAB WOUND.

WITH WHAT LEVEL OF CERTAINTY?

REASONABLE SCIENTIFIC CERTAINTY.

SO 75 -- THAT IT COULD BE FALLIBLE IN 25%?

THAT --

90% ACCURACY? 80% ACCURACY? WHAT ACCURACY LEVEL?

THEY DID NOT GIVE AN ACCURACY LEVEL. WHAT THEY DID SAY --

I THOUGHT THE PROBLEM WAS THEY SAID 100% ACCURATE.

THEY SAID, TO A REASONABLE SCIENTIFIC CERTAINTY, THAT IS THE KNIFE THAT CAUSED THAT WOUND.

WHAT WOULD THAT BE? 90%? MORE THAN 50%?

A REASONABLE SCIENTIFIC CERTAINTY.

THIS IS IMPORTANT, WHAT WE ARE TALKING ABOUT, BECAUSE THERE ARE THINGS, LIKE, AGAIN, FOOTPRINT SIMILARITIES, OR YOU HAVE GOT BULLET, BALLISTICS EXPERTS. WE ALL KNOW THESE FIELDS, AND AS WE SAID, EVEN WITH DNA, WE DON'T HAVE 100%, BUT THEY ARE ACTUALLY UP TO PRETTY HIGH PERCENTAGES.

YOUR HONOR, WHAT THE EXPERTS TESTIFIED TO IS THIS IS EXACTLY LIKE BALLISTICS, WHERE THEY COME IN AND SAY THIS GUN CAUSED THIS PROJECTED THIS PROJECTILE, HAD THIS CASING IN IT, BASED ON THE STRIATED MARKS. THE LANDS AND GROOVES GIVE YOU THE CLASS CHARACTERISTICS. THE ACTUAL IDENTIFICATION TO THIS GUN, TO THIS CASING, IS EXACTLY HOW THEY SHOW THE TOOL MARK IDENTIFICATION.

AND HOW DID THEY SHOW THE JURY? DID THEY HAVE PHOTOGRAPHS OF BOTH OR THEY JUST SAID IT?

THEY JUST SAID IT, AND THEY DO HAVE CRITERIA THEY USE. THEY SAID WE LOOK AT THE LENGTH. WE LOOK AT THE DEPARTMENT. WE LOOK AT THE SHAPE. WE LOOK AT THE RELATIONSHIP BETWEEN IT AND OTHER MARKS. WHAT THEY SAID IS WE DON'T GIVE YOU -- WE LOOK AT AN OVERALL PATTERN, BASED ON THESE CHARACTERISTICS, AND WE DETERMINE THERE IS A MATCH, AND WE DON'T SHAPE POINTS.

HOW CAN THAT BE CROSS-EXAMINED? THAT IS, REALLY, AGAIN, TALKING ABOUT GIVING SOMETHING TO A JURY THAT GIVES THEM A SENSE THAT THIS IS GOING TO BE--THOUGH IS A CRITICAL PIECE OF EVIDENCE, AND THIS IS WHAT IT IS -- THAT THIS IS GOING TO BE -- THIS IS A CRITICAL PIECE OF EVIDENCE, AND THAT THIS IS HOW IT IS GOING TO BE. HOW DOES SOMEONE LOOK AT SOMETHING AND SAY THIS IS CLOSE TO 100% OR THIS IS THE KNIFE? HOW DO YOU DO THAT?

THE DEFENDANT COULD HAVE AN EXPERT COME IN AND SAY, NO, THIS SHAPE ISN'T THIS SHAPE. THIS LENGTH ISN'T THIS LENGTH. IT IS A DIFFERENT PATTERN. THAT IS NOT HAPPENING HERE. THERE IS NO EXPERT COMING IN ON THE OTHER SIDE WHO SAYS, NO, THIS ISN'T THE KNIFE. THERE IS AN EXPERT THAT SAYS I THINK THEY SHOULD TEST IT MORE BEFORE THEY BRING IT IN.

WHAT KIND OF KNIFE IS IT?

IT IS A KITCHEN KNIFE.

SO HOW MANY KITCHEN KNIVES LIKE IT WERE MADE IN THE WORLD?

NO ONE KNOWS HOW MANY KITCHEN KNIVES LIKE THIS WERE MADE IN THE WORLD MUCH THE PROBLEM IS THAT, WHEN YOU PROCESS A KITCHEN KNIFE, WHEN YOU SHARPEN IT, YOU CAUSE INDIVIDUAL MARKINGS TO OCCUR ON THE BLADE. THIS KNIFE WAS USED. THAT CAUSES EVEN MORE INDIVIDUAL MARKINGS THAT CAUSE THE STRIATIONS, THAT CAUSE THESE IDENTIFICATIONS TO BE MADE, SO IT IS NOT A QUESTION OF HOW MANY KNIVES THERE ARE IN THE WORLD, BECAUSE EACH KNIFE HAS TO BE SHARPENED. IT HAS TO BE PROCESSED, AND THAT CREATES THESE DEFECTS THAT CAUSED THIS PATTERN.

DID THEY SAY HOW MANY POINTS OF SIMILARITY THERE WERE?

NO, AND SOMEONE, IN 1958, PROPOSED THAT THEY DO IT THAT WAY, AND THE SCIENTIFIC COMMUNITY REJECTED IT, SAYING THAT IS NOT HOW THIS SHOULD BE DONE. IT SHOULD BE DONE ON AN OVERALL PATTERN, BASED ON THE LENGTH, THE DEPARTMENT, THE -- THE DEPTH, THE SHAPES, THE RELATIONSHIP TO THE OTHER --

AND THE STANDARDS ARE PUBLISHED WHERE?

THE EXAMINERS ALL TESTIFIED TO THEM. I AM SURE THEY ARE PUB LICKED -- PUBLISHED IN TOOL MARK JOURNALS, BECAUSE ALL THIS IS TOOL MARKS.

CAN WE MOVE, FOR A MOMENT, TO THE JURY OVERRIDE, THE TETTER ISSUE, AND WHEN YOU ADDRESSING THAT, ADDRESS YOUR ISSUE NUMBER SIX, WITNESS ELIMINATION BEING THE DOMINANT.

WHAT HAPPENED IN THIS CASE WAS THIS JURY RECOMMENDATION WAS TAINTED. WE HAD A CLOSING ARGUMENT THAT HAD NOT ONE IMPROPER COMMENT BUT A SERIES OF THEM THAT WAS AN APPEAL TO THE JURY'S SYMPATHY. THE MITIGATING EVIDENCE THAT WAS PRESENTED HERE WAS NEVER TIED TO THE DEFENDANT'S CONDUCT. WE HEARD TESTIMONY THAT, AT SOME POINT, HE WAS SEXUALLY ABUSED, BUT WE NEVER HEARD THAT THAT DID ANYTHING TO HIM. WE HAD NO EXPERTS TELLING US THAT CAUSED THIS BEHAVIOR. WE HAD TESTIMONY AT SOME POINT HIS FATHER HIT HIM WITH AN EXTENSION COURT. WE HAD NO TESTIMONY THAT THAT WAS TIED TO THIS BEHAVIOR.

HASN'T THE U.S. SUPREME COURT SAID THAT YOU CAN NOT ELIMINATE MITIGATING EVIDENCE, JUST TO EVIDENCE THAT DOES, THEN, TIE TO THAT BEHAVIOR? I THOUGHT THE U.S. SUPREME COURT HAD CAUTIONED US THAT YOU CAN NOT JUST LIMIT THE MITIGATING EVIDENCE PRESENTED JUST TO EVIDENCE THAT SHOWS TO BE TIED TO HIS BEHAVIOR IN THE CASE?

WE NEED EVIDENCE OF HIS CHARACTER THAT EXPLAINS HIS MORAL CULPABILITY. AND THIS EVIDENCE DIDN'T EXPLAIN HIS MORAL CULPABILITY.

HAS THE U.S. SUPREME COURT SAID THAT WE CAN'T LIMIT MITIGATING EVIDENCE? JUST THAT THAT IS TIED TO HIS BEHAVIOR IN THE CASE?

THE U.S. SUPREME COURT HAS SAID THAT WE MUST ADMIT EVIDENCE THAT RELATES TO THE DEFENDANT'S CHARACTER AND THE EVENTS IN THE CASE, THAT RELATE TO HIS MORAL CULPABILITY.

SO IT HAS TO RELATE TO THE PARTICULAR EVENT?

IT HAS TO RELATE TO HIS CULPABILITY IN THE CASE, AND HERE YOU HAVE --

IT IS LIMITED TO HIS RELATION TO THE CULPABILITY IN THE CASE?

TO HIS CHARACTER, SUCH AS IT -- THAT IT GOES TO WHY HE DID IT OR HOW HE DID IT. IT IS COMPLETELY UNRELATED TO ANY EVENT, AND YOU HAVE THIS INCREDIBLY ABUSIVE CLOSING ARGUMENT.

SO THIS SHOULD NOT HAVE BEEN ADMITTED?

NO. THE EVIDENCE SHOULD HAVE BEEN ADMITTED.

WHY, IF IT IS NOT RELEVANT?

IT DOES, TO SOME EXTENT, GO TO HIS CHARACTER. IT JUST DOESN'T RISE TO THE LEVEL OF MITIGATING CRIME.

SO THE JURY COULDN'T CONSIDER IT?

THE JURY COULD, BUT WHEN YOU ARE LOOKING AT AN OVERRIDE, YOU NEED TO HAVE EVIDENCE, YOU KNOW, WE STILL HAVE AGGRAVATORS OUTWEIGHING MITIGATORS, AND HERE WE HAVE

MITIGATION THAT HAS NO CONNECTION TO WHAT HAPPENED HERE. AND THAT JUST DOESN'T OVERRIDE THE AGGRAVATION IN THIS CASE. PARTICULARLY BEGIN THE CONTRADICTION TO THIS MITIGATION, YOU KNOW, ALL WE KNOW ABOUT THE DEFENDANT'S SEXUAL ABUSE IS THAT HE TOLD TWO PEOPLE HE WAS SEXUALLY ABUSED, AND THAT ONE AUNT ALLEGEDLY SAW HIM BEING SEXUALLY ABUSED AND THOUGHT SO MUCH OF IT, SHE DID NOTHING ABOUT IT, THROUGH A CRACK IN A DUPLEX WALL.

WITNESS ELIMINATION.

WITNESS ELIMINATION. IN THIS CASE, WE KNOW THAT THE VICTIM AND THE DEFENDANT WORKED TOGETHER. WE KNOW THAT SHE, THE PHONE IN THE ROOM WHERE SHE IS INITIALLY ATTACKED IS OFF THE HOOK AND A NUMBER IS PARTIALLY DIALED. WE KNOW THAT SHE IS -- WE DON'T HAVE ANY EVIDENCE THAT SHE ATTACKED HIM. WE ONLY HAVE EVIDENCE THAT HE ATTACKED HER. WE KNOW THAT SHE IS NOT GOING TOWARDS THE DOOR.

DO WE HAVE ANY EVIDENCE THAT SHE WOULD BE ABLE TO IDENTIFY HIM?

THAT SHE AND HE WORKED TOGETHER. AND WOULD HAVE RUN INTO ONE ANOTHER AT WORK. THEY WORKED THE SAME SHIFT, IN THE SAME PLACE.

SO THEY DID KNOW EACH OTHER.

THEY WOULD HAVE BEEN ABLE -- SHE WOULD HAVE KNOWN HIM FROM THAT. YES.

THERE WERE SEPARATE CONVICTIONS OF ARMED BURGLARY AND ARMED ASSAULT IN THIS CASE?

ARMED BURGLARY AND ARMED ROBBERY, YES.

AND ARMED ROBBERY. NOW, WAS -- DOES THE ISSUE OF THE KNIFE GO TO ALL OF THESE CONVICTIONS?

WELL, TO THE ARMED PORTION OF ALL THESE CONVICTIONS.

HAS IT -- I MEAN, I DON'T REALLY SEEING A CHALLENGE TO THE BURGLARY --

IT WAS CHALLENGED TO ITS ADMISSIBILITY, AND IT HAD NOT BEEN ADMITTED, YOU WOULD LACK EVIDENCE ON THE BURGLARY. THERE IS NO SEPARATE ISSUE HERE, RAISED ON APPEAL, THAT THEY SHOULD BE REDUCED BECAUSE OF THAT, NO.

I WANT TO GO BACK TO THE MIGHT GATTORS THAT THE JURY HEARD, IN DECIDING ON THIS 9-3 RECOMMENDATION. THIS DEFENDANT WAS HOLD, AT THE TIME OF THIS CRIME?

-- WAS HOW OLD, AT THE TIME OF THIS CRIME?

24.

HE HAD BEEN SEXUALLY ABUSED BY THE BABY-SITTER'S TEENAGED SON RRTION FROM THE TIME HE WAS -- SON, FROM THE TIME HE WAS EIGHT YEARS OLD?

WE DON'T REALLY KNOW. WE HAVE DIFFERENT AGES OF THIS ABUSE FROM EVERY --

AGAIN, THE JURY HEARD TESTIMONY THAT WOULD BE CONSISTENT WITH THAT.

THE JURY HEARD FROM ONE WITNESS THAT HE WAS EIGHT AT THE TIME.

AND WHAT WE KNOW IS THAT, STARTING, BASED ON THE PSI'S IN THE FILE, THAT, AS A JUVENILE,

HE WAS ARRESTED FOR INVOLUNTARY SEXUAL BATTERY, WHICH IS CERTAINLY SOMETHING THAT IS -- MAY OCCUR, AFTER SOMEONE HAS BEEN SEXUALLY ABUSED. THAT IS THAT THEY WILL COMMIT CRIMES OF A SEXUAL NATURE, AND DURING THE TIME SUBSEQUENT TO THE SEXUAL ABUSE, HE WAS DEEMED TO BE UNCONTROLLED AS A CHILD, FOUND TO BE A CHILD IN NEED OF SUPERVISION, WHILE STILL A JUVENILE, ARRESTED FOR NUMEROUS ARMED ROBBERIES, AND SO HEARING ALL OF THIS, AND UNDERSTANDING THE FAMILY BACKGROUND, WHY ISN'T IT THAT THE JURY COULD FIND THAT THE SEXUAL ABUSE THAT OCCURRED TO HIM, AS A CHILD, AND THE SUBSEQUENT PHYSICAL ABUSE, THAT HE WAS SUBJECTED TO BY OTHER MEMBERS OF, I GUESS, HIS STEP FAMILY OR WHATEVER, LED TO A -- TO THIS TYPE OF ANTISOCIAL BEHAVIOR AND FIND THAT TO BE, WHETHER WE AGREE OR NOT, FIND THAT TO BE MITIGATING, IN THIS CASE? WHY COULDN'T THEY DO THAT?

WELL, FIRST OF ALL, I DON'T BELIEVE THEY EVER HEARD ABOUT THE INVOLUNTARY SEXUAL BATTERY THAT DID NOT RESULT IN A CONVICTION. THEY DID NOT HEAR ABOUT THE SERIES OF ARMED ROBBERIES. ALL THEY HEARD ABOUT WAS ONE ARMED ROBBERY, BECAUSE THE TRIAL COURT PRECLUDED ALL OF THE REST OF THAT EVIDENCE, SO THEY SIMPLY HAVE A DEFENDANT WHO COMMITS ONE ARMED ROBBERY AT THE AGE OF 16. THEY ARE NOT BEING TOLD ABOUT THIS HISTORY, SO HOW CAN THEY CONSIDER SOMETHING THEY DON'T KNOW ABOUT?

WAS THIS THE CASE, DID HE WITNESS HIS MOTHER BEING KILLED BY HIS FATHER? TWHAUS THIS CASE?

SORRY. NO. HE IS A -- SHE A LIVE, WELL, AND TESTIFIED AT TRIAL, THE LAST I HEARD. NO, THAT IS NOT.

LET ME ASK YOU A QUESTION BACK ON SORT OF THE FRYE ISSUE. IN THE ORIGINAL TRIAL, THIS CASE WAS SENT BACK, BECAUSE WE CONCLUDED THAT THE STATE -- I ASSUME THERE IS NOT SUFFICIENT EVIDENCE, HERE, WITHOUT THIS TESTIMONY CONCERNING THE KNIFE BEING THE KNIFE, AND TO CONVICT THIS DEFENDANT?

WELL, THIS COURT CONCLUDEDED THAT IT WAS HARMFUL.

DOESN'T THE EVIDENCE ISSUE, ABS THE KNIFE EVIDENCE? ANOTHER DEFENDANT'S FINGERPRINT IS FOUND IN BLOOD CONSISTENT WITH THE VICTIM'S OVER TOP OF HER BODY.

LET ME ASK YOU THIS. AT THE SUBSEQUENT TRIAL -- THIS WAS THE THIRD TRIAL OF THIS CASE, CORRECT?

YES.

DO WE HAVE ANY ADDITIONAL EVIDENCE, BEYOND WHAT WE HAD IN THE FIRST TRIAL, THAT POINTS TO MR. RAMIREZ AS THE PERPETRATOR OF THIS CRIME?

NO. BUT YOU DO HAVE AMPLE EVIDENCE THAT POINTS TO MR. RAMIREZ AS THE PERPETRATOR OF THIS CRIME. YOU HAVE MR. RAMIREZ GOING AROUND, THE DAY OF THE CRIME, INQUIRING ABOUT THE AMOUNT OF MONEY THAT WAS THERE A THAT ENDED UP BEING STOLEN.

BUT I WOULD ASSUME, FROM THE FIRST CASE, THAT THAT -- YOU COULD NOT SAY, BEYOND A REASONABLE DOUBT, THAT WITHOUT THIS KNIFE EVIDENCE, THAT THIS OTHER EVIDENCE, A JURY WOULD HAVE FOUND HIM GUILTY, JUST BASED ON THAT OTHER EVIDENCE?

WELL, THAT IS WHAT THIS COURT HELD. THE STATE CERTAINLY DOESN'T AGREE.

SO YOUR ANSWER IS THERE IS NO ADDITIONAL EVIDENCE, BEYOND WHAT WE HAVE HAD BEFORE.

NOT THAT I AM AWARE OF. AND YOU HAVE TO KEEP IN MIND THAT, WITH THIS JURY RECOMMENDATION, YOU HAVE A HORRENDOUS CLOSING ARGUMENT, AND IN FRANCIS, THIS COURT HAS SAID THAT, WHERE YOU HAVE AN IMPROPER DEFENSE CLOSING ARGUMENT AND WEAK MITIGATION, IT CAN TAINT THE JURY RECOMMENDATION, AND YOU CAN OVERRIDE. ON TOP OF THAT, WE HAD A TRIAL COURT WHO ADMITTED EXPERT TESTIMONY REGARDING FUTURE DANGEROUSNESS THAT HE ACKNOWLEDGED AT THE TIME. THE EXPERT SAID THIS IS NOT GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY. THE TRIAL COURT SAYS, WELL, YOU KNOW, I REALLY DON'T THINK I SHOULD ADMIT THIS, BECAUSE IT IS NOT GENERALLY ACCEPTED, BUT I AM AFRAID THE FLORIDA SUPREME COURT WILL REVERSE ME, IF I DON'T, SO HE ADMITS IT, AND HE, THEN, ON THE SENTENCING ORDER REALIZES THAT HE ADMITTED IT AND REFUSES TO CONSIDER IT, SO WE HAVE A JURY WHO IS TAINTED BY AN IMPROPER CLOSING, INADMISSIBLE EVIDENCE, AND THEN THEY REFUSE TO INSTRUCT ON THE PECUNIARY GAIN MEASURE ON THE ARMED ROBBERY CASE, WHICH WAS FOUND, AND THE JURY IS MISS INSTRUCTED, AND ALL THE COURT IS TRYING TO DO IS OVERRIDE THE RECOMMENDATION, AND THE STATE SUBMITS THAT WAS APPROPRIATE, UNDER FRANCIS, AND WE REQUEST THAT YOU AFFIRM.

THANK YOU. REBUTTAL?

I WOULD LIKE TO ADDRESS JUST A FEW --

DO YOU AGREE, COUNSELOR, THAT, AS FAR AS THE WITNESS ELIMINATION, THAT THE VICTIM COULD HAVE IDENTIFIED THE DEFENDANT? THERE WAS TESTIMONY THAT THEY COULD HAVE KNOWN EACH OTHER FROM HAVING OVERLAPPING HOURS, BUT THIS COURT HAS SAID THAT THE FACT THAT THE VICTIM COULD HAVE IDENTIFIED THE DEFENDANT IS NOT NECESSARILY ENOUGH TO FIND THIS AGGRAVATING CIRCUMSTANCES, AND CERTAINLY, AS ARGUED IN THE BRIEF, WE BELIEVE THE EVIDENCE WAS NOT SUFFICIENT OR, AT A MINIMUM, THAT IT WAS MARGINAL ENOUGH, THAT IT WOULD HAVE, ALSO, BEEN A PROPER FACTOR IN THE JURY'S RECOMMENDING LIFE, WOULD BE TO FIND THAT THIS AGGRAVATOR WAS NOT WELL ESTABLISHED. I JUST WANTED TO BRIEFLY ADDRESS JUSTICE ANSTEAD'S QUESTION ABOUT THE GERMAN ARTICLES. THERE WERE THREE OF THEM. THEY ARE DISCUSSED AT SOME LENGTH IN THE INITIAL BRIEF. I THINK, WHICH TRIES TO EXPLAIN WHY THEY DON'T SUPPORT THE CONCLUSION OF THE TRIAL JUDGE CITING THEM FOR. PRIMARILY THE MOST SUBSTANTIAL OF THOSE ARTICLES, BASICALLY, BY DOING STAB WOUNDS IN HUMAN CARTILAGE, ESTABLISHED THAT THE CLASS CHARACTERISTIC OF KNIVES COULD BE DETERMINED FOR -- FROM THOSE MARKS. FOR EXAMPLE THAT YOU COULD DISTINGUISH A SERRATED BREAD KNIFE FROM A SMOOTH-BLADED KITCHEN KNIFE, BUT THE MOST -- THE FARTHEST THOSE AUTHORS GO IS TO SAY THAT IT MIGHT BE POSSIBLE TO IDENTIFY INDIVIDUAL KNIVES, BASED ON MICROSCOPE DIFFERENCES IN THE BLADE. THEY DID NOT UNDER TAKE ANY TESTING, TO SEE WHETHER THAT COULD BE ACCURATELY AND RELIABLY DONE. SO THESE ARTICLES ARE NOT -- DID NOT VALIDATE THE PROCEDURE THAT WAS USED IN THIS CASE AND IN THE WAY THAT WE ARE TALKING ABOUT.

AND THEY WERE NOT BASED ON EXPERIMENTS IN LARGE NUMBERS.

NOT IN LARGE NUMBERS. I MEAN, CERTAINLY THEY ARE MUCH MORE SCHOLARLY THAN ANYTHING THAT AMERICAN SCIENTISTS HAD DONE, BUT, THEN, THEY ARE, ALSO, MUCH MORE MODEST IN THEIR CLAIMS, AS FAR AS A WHAT THEY CLAIM TO HAVE -- AS FAR AS WHAT THEY CLAIM TO HAVE DONE. WITH RESPECT TO THE IN FALLIBILITY, I THINK, AS THE STATE ONE SEED, WITH THEIR STATE EXPERTS -- THE STATE CONCEDED, WITH THEIR STATE EXPERTS, I DON'T THINK IT IS THE TERM REASONABLE EXPERT THAT SAID THIS KNIFE. NO OTHER KNIFE IN THE WORLD, AND THEY TESTIFIED AND THE TRIAL COURT FOUND, IN THE FRYE ORDER, THAT THEIR TESTIMONY WAS THAT IT WAS IMPOSSIBLE TO MAKE A FALSE POSITIVE, WHICH MEANS THAT, WHEN THEY STAND UP AND SAY WE HAVE MADE THIS IDENTIFICATION, WE CAN'T BE WRONG. WHAT THEY SAID WAS THAT ANY ERRORS IN LIGHTING OR IN THEIR COMPARISON TECHNIQUE COULD NEVER RESULT IN A FALSE POSITIVE. IT WOULD ONLY RESULT IN IDENTIFICATION NOT

BEING ABLE TO BE MADE, SO THAT IS A CLAIM OF INFALLIBILITY. IN OTHER WORDS, SO, EITHER THERE IS AN I HAD -- TO LOOK IS AN IDENTIFICATION AND IT IS 100% ACCURATE OR THEY SAY WE CAN'T MAKE THAT IDENTIFICATION?

RIGHT.

THERE IS NO MIDDLE GROUND THAT THEY HAVE?

RIGHT. RIGHT. AND THAT IS SPECIFICALLY WHAT THE TRIAL JUDGE FOUND.

HOW DOES THAT WORK? HOW IS THAT DIFFERENT THAN BALLISTICS? THAT WAS THE ANALOGY GIVEN, THAT THIS IS, REALLY, JUST LIKE BALLISTICS. CAN YOU EXPLAIN WHY IT IS NOT JUST LIKE BALLISTICS?

IN BALLISTICS, I SUPPOSE IT COULD BE DONE IN KNIFE MARK IDENTIFICATION, TOO, IN SOME INSTANCES THAT YOU MIGHT SAY THAT ONLY THE CLASS CHARACTER, I -- CHARACTERISTICS ARE ESTABLISHED, NOT THE INDIVIDUAL CHARACTERISTICS. I WOULD POINT OUT THAT ONE OF THE STATE'S EXPERTS, MR. CONRAD, SPECIFICALLY TESTIFIED THAT BALLISTICS ARE EASIER THAN OTHER KINDS OF TOOL MARKS, SPECIFICALLY BECAUSE A BULLET IS ALWAYS MARKED BY BEING FIRED DOWN THE BARREL OF A GUN, WHEREAS A TOOL MARK CAN BE MADE IN ANY VARIETY OF WAYS, INTO DIFFERENT KINDS OF MEDIUMS, AND A BULLET IS ALWAYS A BULLET, AND IT IS ALWAYS MARKED BY THE SAME, IN THE SAME MANNER. AND THEY, ALSO, HAVE MUCH MORE EXTENSIVE TESTING AND DATABASES, WITH REGARD TO BULLETS.

THANK YOU, MS. SPALDING. THANK YOU, MS. JAGGARD.