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NEXT CASE IS JASON DEMEETRIES STEPHENS VERSUS THE STATE OF FLORIDA.

MR. YOKAN, YOU MAY PROCEED.

MR. CHIEF JUSTICE, MEMBERS OF THE COURT. PLEASE EXCUSE ME, TODAY, IF I HAVE TO REACH FOR A GLASS OF WATER. I AM RECOVERING FROM A COLD. MY VOICE GIVES OUT. ELEVEN ISSUES WERE PRESENTED IN MR. STEPHENS' DIRECT APPEAL. AS THIS COURT KNOWS, THIS IS AN APPEAL OF A CONVICTION FOR MURDER AND A SENTENCE TO DEATH. OUT OF THOSE 11 ISSUES RAISED, I PLAN TO ADDRESS SIX OF THOSE ISSUES, REALLY OF WHICH GROUPED TOGETHER, MORE OR LESS, INTO THREE ISSUES. I WOULD LIKE TO RESERVE TEN MINUTES FOR REBUTTAL, TODAY, IF I DIDN'T MENTION THAT. CENTRAL TO THIS CASE, THIS CASE CONCERNS AN ARMED ROBBERY, A BURGLARY, A KIDNAPPING OF A HOUSE WHICH WAS KNOWN AS A HOUSE BEING INVOLVED WITH DRUGS. FOLLOWING WHICH MY CLIENT, MR. STEPHENS, TOOK THE THREE-YEAR AND FOUR-MONTH-OLD CHILD OF THE TENANT OF THE HOUSE IN A CAR THAT HE, ALSO, TOOK FROM THE SCENE. THE ROBBERY COMMENCED AT APPROXIMATELY 3:00 P.M.. LASTED NO MORE THAN A HALF-HOUR. THE CHILD WAS FOUND DEAD THAT NIGHT IN THAT CAR AT APPROXIMATELY 9:30 P.M. SOMEWHERE BETWEEN A HALF MILE AND NINE-TENTHS OF A MILE FROM THE CHILD'S HOME. THERE IS CONFLICTING EXPERT TESTIMONY IN THE RECORD. THE STATE'S EXPERT, THE FORENSIC EXAMINER TESTIFIED THAT THE CHILD DIED FROM SUFFOCATION. THE CODEFENDANT'S EXPERT, DR. DUNNING, TESTIFIED THAT THE CHILD DIED FROM HYPOTHERMIA, FROM BEING LEFT IN THE CAR WITH THE WINDOWS CLOSED AND THE CAR HEATING UP. CENTRAL TO DETERMINE NATION TO THIS COURT, I THINK, IS THE FINDING OF THE TRIAL COURT IN ITS SENTENCING ORDER, WHICH THE TRIAL COURT STATED, ALTHOUGH THE CIRCUMSTANTIAL EVIDENCE ESTABLISHES THAT IT IS MORE LIKELY THAN NOT THAT YOUNG ROBERT DIED AS A RESULT OF ASPHYXIATION, THE COURT IS UNABLE, BEYOND A REASONABLE DOUBT, TO DETERMINE THE EXACT CAUSE OF DEATH. LIKEWISE THE TRIAL COURT FOUND THAT THE TRIAL COURT CANNOT FIND, BEYOND A REASONABLE DOUBT, FOUND THAT THE DEFENDANT INTENDED TO KILL AND THAT GIVES THE DEFENDANT SIGNIFICANT WEIGHT FOR WHAT IS DONE AND THAT WAS GIVEN THE DEFENDANT SIGNIFICANT WEIGHT FOR NOT INTENDING TO KILL IN THE SENTENCING PHASE. WITH THAT BACKGROUND, I WOULD LIKE FOR THE COURT TO CONSIDER THAT, IT IS OUR POSITION THAT THE TRIAL COURT ERRED BOTH IN NOT GRANTING A JUDGMENT OF ACQUITTAL AND IN NOT GRANT AGO MOTION FOR NEW TRIAL AS TO THE FIRST-DEGREE MURDER CHARGE. THERE CLEARLY WAS NO SUFFICIENT EVIDENCE OF PREMEDICATION -- PREMEDITATION. THE TRIAL COURT GRANTED A JUDGMENT OF ACQUITTAL AS TO THE CODEFENDANT, FOREST KUMMINGS. THAT WAS IN THE RECORD, PAGE 1949. THE CODEFENDANT WAS IN THE HOUSE DURING AT LEAST PART OF THE ROBBERIES AND THE DOE DEFENDANT ENDED UP PICKING MR. STEPHENS AT THE SITE WHERE THE CHILD WAS LEFT IN THE CAR AT THE END OF THE DAY. THE TRIAL COURT'S FINDING, AS I READ TO YOU --

HE WAS CHARGED WITH, BOTH, PREMEDITATED AND FELONY MURDER?

CORRECT.

OKAY. AND THERE IS NO DOUBT, HERE, THAT THIS DEATH WAS INSTANT TO THE -- INCIDENT TO THE KIDNAPPING. CORRECT?

IT IS OUR POSITION, MY POSITION, THAT, I MEAN, ULTIMATELY THE CHILD DIED FOLLOWING THE KIDNAPPING. IT IS DEBATABLE WHETHER IT ACTUALLY OCCURRED AS A LEGAL CONSEQUENCE OF THE KIDNAPPING. IN FACT, ONE OF THE ISSUES I WISH TO PRESENT TO THE COURT IS THAT THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S THEORY OF DEFENSE INSTRUCTIONS, WHICH

ASKED FOR MORE SPECIFIC INSTRUCTIONS ON CAUSATION, FORESEEABILITY OF THE ACTS.

WELL, THIS IS -- HOW MUCH TIME ARE WE TALKING ABOUT HERE, UNDER THIS -- HOW MUCH DISTANCE WAS THERE FROM THE PLACE WHERE THE KIDNAPPING BEGAN AND THE PLACE WHERE THIS CHILD WAS LOCATED IN THE CAR?

BETWEEN A HALF MILE AND NINE-TENTHS OF A MILT.

-- OF A MILE.

AND THE CHILD, WHAT TIME OF DAY WAS THIS?

THAT WOULD HAVE BEEN AT, ROUGHLY, 3:30 P.M., THE CHILD WOULD HAVE BEEN LEFT AT THE CAR OR THE KIDNAPPING WOULD HAVE ENDED AT 3:30 P.M.

AND WHAT TIME DID THEY LEAVE THE HOUSE?

IT WAS WITHIN A FIVE-MINUTE DRIVE FROM THE TIME THAT THEY LEFT THE HOUSE TO THE TIME WHERE THE CAR WAS PARKED.

AND THIS WAS IN JUNE?

THIS WAS IN JUNE. JUNE 2, 1997, I BELIEVE IT WAS A 82-DEGREE DAY.

AND REGARDLESS OF WHETHER THE CHILD WAS STRANGLED OR DIED OF HEAT, THE RECORD ESTABLISHED THAT THE CHILD WAS LEFT IN THE CAR.

THAT IS CORRECT, SIR.

WITH WINDOWS ROLLED UP.

YES, SIR.

AND THAT THE -- THIS DEFENDANT WAS THE PERSON THAT TOOK THE CHILD FROM THE HOUSE.

CORRECT.

OKAY. THANK YOU.

TIME OF DEATH IS UNCERTAIN, AND I THINK THAT IS CRUCIAL TO AN EVALUATION OF THIS CASE.

BUT LET'S ASSUME, INSTEAD OF THE CHILD BEING IN THE VEHICLE, THAT THE DEFENDANT HAD PLACED THE CHILD IN THE TRUNK OF THE VEHICLE. AT THAT TIME, WOULDN'T THE KIDNAPPING STILL BE GOING ON, WITH THE CHILD IN AN ENCLOSE YOUR, AGAINST HIS WILL?

I THINK YOUR HONOR IS CORRECTLY REFERRING TO CASES WHICH REFER TO KIDNAPPING AS CONTINUING, WHEN A VICTIM IS LEFT CONFINED AT THE SCENE OF A CRIME. YES, I WOULD AGREE WITH YOU IN THAT SCENARIO, THE VICTIM WOULD STILL, THE KIDNAPPING WOULD BE ONGOING.

SO IN THIS CASE, WHY WASN'T THE KIDNAPPING STILL ONGOING? BECAUSE EITHER HE WAS STRANGLED, AND THAT IS WHY HE DIDN'T GET OUT, OR HE OBVIOUSLY COULDN'T GET OUT, BECAUSE OF HIS AGE AND THE OTHER CIRCUMSTANCES. SO WHY WOULDN'T THAT KIDNAPPING CONTINUE UP UNTIL THE TIME OF THIS CHILD'S DEATH?

THIS CHILD WAS NOT AN INFANT. WAS NOT A BABY. THIS CHILD WAS THREE YEARS AND FOUR MONTHS OF AGE. WAS DESCRIBED BY THE CHILD'S MOTHER, DURING THE SENTENCING PHASE, AS

AN ADVANCED CHILD. THAT IS VOLUME 4, PAGE 601. IN FACT THE RECORD SHOWS THAT THE DAY BEFORE THIS INCIDENT INCIDENT, THE CHILD'S UNCLE HAD PHYSICALLY DISCIPLINED THE CHILD BY APPARENTLY PHYSICALLY HITTING HIM ON THE WRIST THE FOR HAVING OPENED THAT VERY VEHICLE'S CAR DOOR AND WINDOWS.

DID THE DEFENDANT KNOW THAT?

DID THE DEFENDANT KNOW ABOUT THE PRIOR DISCIPLINE? I WOULD NOT THINK SO.

SO WHY SHOULD HE BENEFIT FROM THE FACT THAT THE CHILD, ON A PREVIOUS OCCASION, MAY HAVE GOTTEN OUT OF THE CAR, ALTHOUGH I AM NOT REAL CLEAR ABOUT THE FACTS OF HOW THE CHILD ACTUALLY GOT OUT OF THE CAR, SO WHY WOULD THE DEFENDANT BENEFIT FROM THAT, IF THE DEFENDANT HAS NO REASON TO BELIEVE THAT THE CHILD WAS ABLE TO GET OUT OF THE CAR?

I THINK THE DEFENDANT WAS ABLE TO OBSERVE THIS CHILD FOR ROUGHLY A HALF-HOUR, AND A THREE-YEAR AND FOUR-MONTH-OLD CHILD, AND WAS ABLE TO OBSERVE THAT CHILD IN A NORMAL --

DO WE HAVE A DESCRIPTION OF THE SIZE OF THE CHILD?

I WOULD ASSUME THAT IS IN EVIDENTIARY EXHIBITS. THE MADCAL EXAMINER'S REPORT, WHICH WOULD BE FILED AS AN EXHIBIT OF THE KOUMPLT I WAS NOT PROVIDED WITH A COPY. -- EXHIBIT OF THE COURT. I WAS NOT PROVIDED WITH A COPY.

I AM TRYING TO UNDERSTAND HOW THE DEFENDANT WOULD HAVE ANY KNOWLEDGE OF WHETHER OR NOT OF THIS CHILD'SABILITY TO GET OUT OF THE CAR. WHY -- THE CHILD'S ABILITY TO GET OUT OF THE CAR. WHY WOULD WE ASSUME OR WHY WOULD THE DEFENDANT ASSUME THAT THE CHILD WAS ABLE TO GET OUT OF THE CAR?

I THINK THE CHILD DID NORMAL THINGS FOR HIS AGE, WHICH IS WALKING, TALKING, THAT SORT OF THING.

AND SO DO WE HAVE INFORMATION IN THE RECORD THAT A NORMAL THREE-YEAR-OLD WAS ABLE TO GET OUT OF A CAR?

I DO NOT THINK WE HAVE ANY EXPERT TESTIMONY OR RECORD TESTIMONY TO THAT EFFECT. I THINK THE COURT CAN TAKE JUDICIAL NOTICE. I WOULD BE HAPPY TO SUPPLEMENT THE RECORD WITH --

I KNOW THERE WAS SOME TESTIMONY THAT THE DRIVER'S DOOR WAS UNLOCKED.

CORRECT.

BUT WERE THE OTHER DOORS UNLOCKED, AND THE CHILD WAS ON THE PASSENGER SIDE, CORRECT?

CORRECT.

AND WAS THE PASSENGER SIDE UNLOCKED?

I DON'T KNOW ABOUT THAT AS WE STAND HERE BEFORE THE COURT TODAY. I KNOW THAT THE CAR WAS LEFT IN A RESIDENTIAL NEIGHBORHOOD. I KNOW THE ESSENTIAL TESTIMONY IS THAT IT WAS PARKED IN A NEIGHBORHOOD, WHERE IT WAS UNOBSTRUCTED FROM THE HOUSE, AT A TIME AND PLACE WHERE THERE WERE PEOPLE WALKING.

DID YOUR CLIENT TESTIFY?

YES.

WHAT WAS HIS TESTIMONY, AS FAR AS THE CONDITION OF THE CHILD AT THE TIME HE LEFT THE CAR?

HE TESTIFIED THAT THE CHILD WAS LEFT UNHARMED AND THAT THE LESS LASS THING HE DID BEFORE HE LEFT THE VEHICLE WAS TO REMOVE THE CD PLAYER FROM THE VEHICLE. HE TESTIFIED THAT THE CHILD ASKED IF HE INTENDED TO HARM HIS MOTHER AND THAT THE CHILD WAS ALIVE AND WELL AND ALERT AT THE TIME HE LEFT HIM IN THE VEHICLE.

DID HIS CODEFENDANT TESTIFY?

THE CODEFENDANT, FOREST CUMMINGS, DID NOT TESTIFY.

MAYBE I AM STILL TRYING TO FIGURE OUT, IN TERMS OF THE KIDNAPPING, BECAUSE WE WERE GETTING BACK TO WHETHER THERE WAS ENOUGH, HERE, FOR FELONY MURDER, AND EITHER WE HAVE A TEMPORAL RELATIONSHIP BECAUSE OF THE AMOUNT OF TIME THAT HAD PASSED WHEN THE CHILD WAS TAKEN FROM THE HOUSE, OR WE HAVE A SITUATION WHERE THE JURY COULD HAVE FOUND, REASONABLY, THAT THE CHILD REMAINED CONFINED UP UNTIL THE TIME OF HIS DEATH. SO WHAT DOES THE FACT THAT THE CHILD GOT OUT, I GUESS, WAS ABLE TO GET OUT THE DAY BEFORE, HAVE TO DO WITH THE ISSUE AS TO WHETHER THE KIDNAPPING WAS STILL ONGOING?

IF YOU COULD JUST -- I AM NOT SURE THAT I UNDERSTAND THAT -- THE SIGNIFICANCE OF THAT FACT, OTHER THAN TO, MAYBE, MAKE IT MORE LIKELY THAT THE CHILD WAS STRANGLED AT THE TIME, AND THAT IS WHY HE DIDN'T, WASN'TABLE TO GET OUT OF THE CAR?

I THINK WHAT THAT CONTRIBUTES TO IS YOU ARE LOOKING FOR A REASON AS TO WHY THIS CHILD DIDN'T GET OUT OF THE CAR ON HIS OWN, IT COULD VERY WELL BE THAT HE FEARED HE HAD BEEN DISCIPLINED THE DAY PRIOR AND DID NOT WANT TO GET OUT OF THE CAR FOR THAT REASON. DR. DUNTON TESTIFIED THAT, WITHIN A SHORT TIME OF HYPOTHERMIA STARTING TO SET IN, THAT DISLOCATION OF THOUGHT PROCESSES OCCURS, AND THAT IS VERY PLAUSIBLE EXPLANATION OF WHY THE CHILD DID NOT GET OUT OF HIS CAR ON HIS OWN. AS FAR AS WHAT CONCLUSIVELY ESTABLISHES THIS CHILD'SABILITY IN THE RECORD, BEYOND -- THIS CHILD'S ABILITY IN THE RECORD, BEYOND THE MOTHER TESTIFYING IN THE PENALTY PHASE THAT SHE BELIEVED HE WAS AN ADVANCED CHILD AND BEYOND TESTIMONY CONCERNING WHERE THIS CHILD WAS OR WHAT THE CHILD WAS DOING IN THE HOUSE DURING THE TIME OF THE INCIDENT, THERE IS NOT TESTIMONY AS TO THIS CHILD CHILD'S ABILITY AND AGE. THERE IS TESTIMONY IN THE RECORD THAT, WHILE MR. STEPHENS WAS IN THE LIVING ROOM, EITHER HORACE CUMMINGS OR ANOTHER I HAD -- OR ANOTHER IDENTIFIED CODEFENDANT WAS IN THE FRONT BEDROOM OF THE HOUSE AND THE CHILD MADE A COMMENT TO ANOTHER CODEFENDANT OF YOU ARE CHOKING ME. THERE IS, ALSO, I BELIEVE, ANOTHER COMMENT IN THE RECORD ABOUT THE CHILD ASKING, AGAIN, ANOTHER CODEFENDANT WHETHER --

THIS IS ON PREMEDITATION THAT YOU ARE SAYING THAT THIS MATTER IS IN?

I WOULD ARGUE -- WE HAVE, REALLY, OVERLAPPED. I WOULD ARGUE THAT THIS GOES TO BOTH THE PREMEDITATION ISSUE AND THE FIRST-DEGREE FELONY MURDER.

THERE IS SOME MEDICAL TESTIMONY AROSE AS TO, OR DID I JUST READ THIS IN THE BRIEF, THAT WHAT A CHILD MIGHT DO UNDER STRESS COULD BE COMPLETELY DIFFERENT FROM WHAT A CHILD WOULD DO ON PLAYING AROUND WITH THE CAR. SO HERE THIS CHILD HAS BEEN TAKEN OUT AND PUT IN THE CAR AND KIDNAPPED, AND SO HOW IS IT RELATIVE, RELEVANT WHAT HE DID

THE DAY BEFORE, WHEN HE IS OUT THERE PLAYING IN THE CAR?

DR. FLORO, THE MEDICAL EXAMINER FOR THE STATE, ONE OF THE REASONS HE RULED OUT HYPOTHERMIA WAS BECAUSE HE HAD BEEN TOLD THAT THE CHILD COULD OPEN CAR DOORS AND WINDOWS. HE WAS TOLD THAT, I THINK, TEN DAYS AFTER THE FACT. THE STATE MAKES A GREAT DEAL OF SAYING THE CHILD WAS TERRORIZED, AND THAT IS WHY THE STATE SPECULATES THE CHILD DIDN'T GET OUT OF THE CAR. I THINK, QUITE FRANKLY, THAT IS A FACT THAT WILL NEVER BE RESOLVED. WE DON'T KNOW IF IT WAS THE PRIOR DISCIPLINE AND THE HEAT THAT SAT IN OR THE CHILD WAS FEEFERL OF GETTING OUT OF THE CAR. FOR WHATEVER REASON, HE DIDN'T.

I UNDERSTAND. I GUESS WE HAVE TAKEN UP ENOUGH OF YOUR TIME ON THAT, PARTICULARLY.

I THINK, WHEN YOU ARE LOOKING AT, I WOULD ASK THE COURT TO LOOK AT THE CASES OF FISHER AND MONGEN, WHICH ARE, BOTH, CITED IN THE INITIAL BRIEFS, WHEN YOU ARE DEALING WITH THE ISSUE OF PREMEDITATION NOT BEING PROVED. EVEN IF THIS CASE WAS A SUFFOCATION, YOU STILL DON'T HAVE EVIDENCE SUFFICIENT TO STAB LIBLISH A -- TO ESTABLISH A CASE OF PREMEDITATION. ALL OF THAT STATEMENT MADE BY MR. STEPHENS CONCERNING THE CHILD'S PRECONDITION ARE CONDITIONAL. IF YOU FOLKS DON'T STAY IN THE HOUSE UNTIL I AM SAFELY AWAY, I WILL KILL THE CHILD. THERE WAS NEVER ANY STATEMENT SAYING I AM GOING TO KILL THE CHILD. THERE WERE SOME ADDITIONAL STATEMENTS REGARDING THAT CHILD. AS TO TELL ANY MURDER, WHEN YOU LOOK AT THE SPECIFIC INSTRUCTIONS REQUESTED BY STEPHENS' COUNSEL, WHICH TRACKED THE TWO PARKER OPINIONS AND THE MILLS' OPINION, BOTH OF WHICH ARE CITED IN THE INITIAL BRIEF, MR. STEPHENS WAS ASKING FOR A BREAKDOWN ON CAUTIONATION, FORESEEABLE, WHICH, I THINK, WERE HIGHLY RELEVANT. THAT WAS HIS THEORY OF DEFENSE, AND THE STATE WAS ARGUING THROUGHOUT THIS CASE AND ARGUING DURING CLOSING IT DIDN'T MATTER WHETHER THE CHILD DIED OF HYPOTHERMIA OR WHETHER THE CHILD WAS SUFFOCATED, AND IF YOU ARE GIVEN THAT KIND OF ARGUMENT, IT SIMPLY WAS NOT ENOUGH FOR THIS CASE TO HAVE GONE TO THE JURY ON A STANDARD INSTRUCTION OF "AS A QONS QENS OF AND WHILE ENGAGED IN A CRIME." MR. STEPHENS TESTIFIED THAT HE DID NOT CAUSE THE CHILD'S DEATH AS A RESULT OF A PREVIOUS FELONY. HE ASKED FOR AN INSTRUCTION ON THAT AND HE WAS DENIED THE INSTRUCTION. ANOTHER POINT ILL LIKE TO -- ANOTHER POINT I WILL LIKE TO BRING UP IS I THINK IT MERITS A REHEARING ON CAUSATION BY THE STATE FOR MR. STEPHENS, THAT MR. STEPHENS HAD ASKED LAW ENFORCEMENT OFFICIALS FOR THEIR HELP IN SEEING THAT HE WAS ELECTROCUTED WITHIN A YEAR IF HE COOPERATED. BEARING IN MIND IF SOMEONE IS MAKING A STATEMENT THAT I WISH TO DIE OR I WISH TO BE LEG CUTED IS -- TO BE ELECTROCUTED IS NOWHERE NEAR AS PROBATIVE AN OFFENSE AS TO BELIEFS. HERE YOU HAVE SOMETHING COMING IN, SOMETHING MORE PREJUDICIAL, AS I WOULD LIKE TO HAVE YOU MAKE ME LEG CUTED. THE COURT SAID IT BORE -- ELECTROCUTED. THE RECORD SHOWS IT BORE ON HIS STATEMENT WHEN HE WAS BROUGHT IN. HE WAS BROUGHT IN THREE MONTHS LATER IN ATLANTA, GEORGIA. THIS CRIME OCCURRED THREE MONTHSERLYER WHY. THAT -- MONTHS EARLIER. THAT STATEMENT WAS NOT ALLOW TO BE HEARD AT BOTH THE GUILT PHASE AND THE PENALTY PHASE, AND I THINK IT DENIED HIM A FAIR TRIAL AND SKEWED THE ENTIRE TRIAL. THE COURT, ALSO, RULED THAT IT WAS ADMISSIBLE, BECAUSE THE DEFENDANT HAD DENIED CRIMINAL INVOLVEMENT. AGAIN, I THINK THE STATEMENT WAS NOT RELEVANT TO THE ISSUES BEFORE THE JURY, AND IT WAS UNDULY PREJUDICIAL UNDER RULE 403. THE LAST TWO ISSUES I WANTED TO TAKE UP WITH THE COURT, TODAY, HAVE TO DO WITH THE DEATH SENTENCE. THIS SHOULD NOT BE A CASE WHICH RESULTED IN A DEATH SENTENCE. WHEN YOU LOOK AT THE TYSON, ENMANN AND JACKSON HOLDINGS, AND YOU LOOK AT THE CASES WHICH I HAVE CITED IN THE INITIAL BRIEF, SUCH AS CARDONA VERSUS STATE, THE CONDUCT IN THIS CASE IS SIMPLY NOT THE LEVEL OF RECKLESS CONDUCT WHICH THIS COURT HAS SANCTIONED BEFORE AS JUSTIFYING THE DEATH SENTENCE. EVEN TYSON EXPRESSLY RECOGNIZES THAT CONDUCT CAUSING ITS NATURAL, THOUGH NOT INEVITABLE, LETHAL RESULT, IN SOME SITUATIONS, WHEN IT IS RECKLESS INDIFFERENCE, CAN JUSTIFY THE DEATH SENTENCE. YOU NEED TO BEAR IN MIND THAT, IN FLORIDA, THE MANSLAUGHTER JURY INSTRUCTION USES

THOSE TERMS, AS FAR AS RECKLESSNESS, INDIFFERENCE, AND WHEN YOU ARE LOOKING AT TYSON AND EDMUND AND JACKSON, YOU ARE TALKING ABOUT A WHOLE DIFFERENT STANDARD OF CULPABILITY THAN YOU ARE IN MANSLAUGHTER. THE FACTS OF THIS CASE MIGHT HAVE JUSTIFIED A LESSER CONVICTION. THEY DIDN'T JUSTIFY A FIRST-DEGREE MURDER CONVICTION, AND CERTAINLY NOT A DEATH SENTENCE.

CAN WE BACK UP TO YOUR SPECIAL INSTRUCTIONS, THE REQUEST FOR SPECIAL INSTRUCTS -- INSTRUCTION ONE AND SPECIAL INSTRUCTION NUMBER TWO, WHAT IS, IN YOUR OPINION, IS THE GIST OF THAT INSTRUCTION? IF YOU FIND THAT, BECAUSE OF THE PASSAGE OF TIME AND THE SEPARATION OF SPACE FROM THE FELONIES OF KIDNAPPING, ROBBERY AND BURGLARY, THAT THESE FELONIES HAD BEEN COMPLETED PRIOR TO THE DEATH OF ROBERT SPARROW, ET CETERA, ET CETERA, ET CETERA, YOU SHOULD FIND THE DEFENDANT NOT GUILTY OF THE FIRST-DEGREE MURDER. THAT IS RATHER CONFUSING INSTRUCTION THAT REQUESTED THAT. IF HE DIED SOME TIME AFTER STEPHENS TOOK HIM OUT, PUT HIM IN THE CAR, AND LEFT HIM THERE, ARE YOU SAYING THIS -- HE DIED AN HOUR LATER OR A DIED TEN MINUTES LATER? IT MAKES A DIFFERENCE? IS THAT WHAT YOU ARE SAYING WITH THAT INSTRUCTION?

IT DOES MAKE A DIFFERENCE. THERE IS NO EVIDENCE THAT THIS CHILD WAS CONFINED. THOSE THREE INSTRUCTIONS, OF WHICH, IN MY VIEW, THE THIRD ONE BEING PREDICTABLE RESULT, I.E. FORESEEABILITY BEING THE MOST IMPORTANT, COME STRAIGHT OUT OF THE TWO PARKER HOLDINGS AND OUT OF MILLS.

WHAT IS THE GIST OF THEM, IN YOUR WORDS? WHAT ARE YOU TELLING THE JURY THERE?

THE GIST OF IT IS THAT, IF THAT CHILD WAS LEFT UNCONFINED AND DIED FROM CIRCUMSTANCES THAT WERE NOT DIRECTLY FLOWING FROM THE KIDNAPPING, FOR WHATEVER REASON, THAT CHILD DIDN'T GET OUT OF THE CAR, IT IS AN INTERVEENING CIRCUMSTANCE. IT IS AN ACTION THAT WAS NOT FORE EEBL -- FORESEEABLE.

BUT THIS DOESN'T TALK ABOUT ANY INTERVENING CIRCUMSTANCE OR A BREAK IN IT AND SO FORTH. THAT IS NOT WHAT THE INSTRUCTIONS ASKED FOR.

THAT IS WHAT THEY WERE ATTEMPTING TO GET AT, WITH THE CHAIN OF CIRCUMSTANCE, BREAK AGE AND TIME AND DISTANCE WOULD BE THE SAME THING. I THINK THE FORESEEABILITY ONE, THE THIRD INSTRUCTION, DOES SPECIFICALLY GO TO THE ISSUES WHICH WERE BEFORE THE JURY, NAMELY WAS IT FORESEEABLE THAT LEAVE AGO CHILD IN A CAR, THAT CHILD WAS -- LEAVING A CHILD IN A CAR, THAT THAT CHILD WAS GOING TO DO?

WHAT WOULD IT BE BY SIMPLY STATING THAT THE STATE HAS FAILED TO PROVE ONE OF ITS ELEMENTS, AND YOU FIND THE DEFENDANT NOT GUILTY? WOULDN'T THAT BE A LESS CONFUSING INSTRUCTION AND COVER EVERYTHING YOU ARE ASKING FOR?

I DO NOT BELIEVE SO, BECAUSE THE DEFENDANT'S EXPRESS THEORY OF DEFENSE WAS THAT THAT CHILD WAS ALIVE AND WELL WHEN MR. STEPHENS DEPARTED FROM THE CHILD, AND THAT HIS ACTIONS DID NOT RESULT IN THAT CHILD'S DEATH, WHILE, AT THE SAME TIME, YOU HAD THE STATE ARGUING IT DOESN'T MATTER WHETHER THE CHILD DIED FROM SUFFOCATION OR HYPOTHERMIA. MR. STEPHENS WAS ENTITLED TO HAVE THE JURY DECIDE THAT ISSUE OF CAUSATION, FOR WHETHER HIS ACTS CAUSED THE CHILD'S DEATH.

DID YOU HAVE A QUESTION, JUSTICE PARIENTE?

I WOULD LIKE TO POINT OUT, IN RESPONSE TO A QUESTION THAT JUSTICE PARIENTE WAS ASKING EARLIER, THAT THERE IS A FOOTNOTE IN THE MILLS OPINION, WHICH IS A THIRD DCA 1981 CASE, FOOTNOTE SIX, WHERE THE COURT DOES SAY THAT, IN THE SITUATION, AND IT IS IN THE SITUATION OF A KIDNAPPING, IF ONE WAS TO ABANDON AN INFANT IN A CAR OR AN INFANT

DURING A KIDNAPPING, AND THE CHILD DIED, THAT THAT WOULD BE FELONY MURDER. IT IS MY POSITION THAT THIS WAS NOT AN INFANT. THAT IS WAS A THREE-YEAR-OLD AND FOUR-MONTH-OLD CHILD THAT WAS CAPABLE OF GETTING OUT OF THAT VEHICLE, AND WE WILL NEVER KNOW WHY THAT CHILD DIDN'T GET OUT. THE LAST POINT THAT I WANTED TO MAKE BRIEFLY, AND I SEE MY TIME IS UP FOR INITIAL ARGUMENT, IS THAT THE DEFENDANT'S POSITION IS THAT THE COURT ERRED IN NOT -- IN ITS WEIGHING OF THE STATUTORY AND NONSTATUTORY AGGRAVATING AND MITIGATING FACTORS, SPECIFICALLY THE COURT FOUND, GAVE MR. STEPHENS NO CREDIT FOR REMORSE, BECAUSE HE WOULDN'T IDENTIFY AN UNIDENTIFIED THIRD PERSON. THERE WAS A TIME IN THIS COUNTRY, BEFORE THE GUIDELINES, WHEN A DEFENDANT WAS CONSIDERED A STAND UP DEFENDANT FOR DOING THAT. NOW THE TRIAL JUDGE SAYS THERE IS NO REMORSE IF YOU ARE NOT GOING TO NAME YOUR CODEFENDANTS. ACCEPTANCE OF RESPONSIBILITY. THE COURT GAVE LITTLE WEIGHT, AND THE CODEFENDANT PROPORTIONALITY, THE COURT GAVE SOME WEIGHT. MR. CUMMINGS, AFTER THE TRIAL, CUT A DEAL WITH THE STATE TO GET A LIFE SENTENCE. HE WAS PRESENT AT THE SCENE. HE PICKED MR. STEPHENS UP FROM THE SCENE WHEN THE CHILD WAS LEFT IN THAT CAR. AS TO ACCEPT ANSWER OF RESPONSIBILITY -- AS TO ACCEPTANCE OF RESPONSIBILITY, MR. STEPHENS PLED TO ONE COUNT OF ARMED KIDNAPPING, THREE COUNTS OF ARMED ROBBERY, TWO COUNTS ATTEMPTED ARMED ROBBERY, ONE COUNT OF BURGLARY AND ONE COUNT OF BATTERY BEFORE TRIAL. ALL OF THOSE PLEAS, EXCEPT ARMED BATTERY AND BURGLARY, RESULTED IN TWO-YEAR SENTENCES AND THE OTHER THREE RESULTED IN CONSECUTIVE 15-YEAR SENTENCES.

HAD YOUR CLIENT HAD HIS TRIAL AT THE TIME THAT CUMMINGS PLEADED WITH THE STATE?

NO, HE DID NOT.

DID HE TESTIFY AT MR. CUMMINGS --

NO, HE DID NOT.

SO HE DIDN'T TESTIFY AT THE PENALTY PHASE.

NO, HE DID NOT.

IN THIS CASE, THE PRIOR FELONY, NOT ONLY HIS CONTEMPORARY OR OTHER FELONIES BUT, LITTLE, A PREVIOUS CONVICTION FOR A VIOLENT FELONY. IS THAT CORRECT?

THAT IS CORRECT.

AND THE PLEAS THAT YOU ARE TALKING ABOUT ARE PLEAS IN EXCHANGE FOR THEM NOT BEING USED IN AGGRAVATION IN THIS MURDER.

NO. THAT IS NOT CORRECT. THOSE ARE PLEAS FOR COUNTS CHARGED IN THE INDICTMENT IN THIS CASE AND, IN FACT, IN THE COURT, IN SENTENCING ORDER, REFERENCES THE PRIOR CRIME OF VIOLENCE TO JUSTICE PARIENTE REFERS TO, AND THEN, ALSO, SAYS, IN ADDITION, THERE WERE THESE OTHER --

DIDN'T YOUR CLIENT PLEAD TO SOME CASES THAT WOULD NOT BE USED IN AGGRAVATION?

HE PLED TO A LIFE SENTENCE IN AN UNRELATED ATTEMPTED MURDER, IN EXCHANGE FOR THAT NOT BEING USED. AND WITH THAT --

WERE THE SENTENCES IMPOSED CONCURRENTLY OR CONSECUTIVELY?

I WILL BE HONEST AND SAY, WITH THE OTHER CRIME THAT HE PLED TO, IT IS MY RECOLLECTION THAT IT IS CON CURRENT, BUT I DO NOT KNOW THAT FOR A FACT. I DO KNOW THAT THE TWO 15-

YEAR SENTENCES, ON THE OFFENSES THAT HE PLED TO, WERE CONSECUTIVE LIFE SENTENCES ON THE OTHER END OF THE CRIME IN THIS CASE. I WOULD LIKE TO RESERVE THE BALANCE OF MY TIME. THANK YOU.

THANK. YOU MAY. MR. WHITE.

STEVE WHITE, ASSISTANT ATTORNEY GENERAL, REPRESENTING THE APPELLEE. AS TO ISSUE ONE, THE SUFFICIENCY I OF THE EVIDENCE CLAIMS IT -- THE SUFFICIENCY OF THE EVIDENCE CLAIMS THAT IT IS THE STATE'S POSITION, AND WE ARGUED IN OUR BRIEF, THAT THE STATE PROVED THERE WAS SUFFICIENT EVIDENCE FOR BOTH PREMEDITATED -- PREMEDITATED MURDER AS WELL AS FELONY MURDER, BECAUSE THE EASIEST, QUOTE, SOLUTION, IS THAT CLEARLY THERE WAS A KIDNAPPING, AND CLEARLY THAT KIDNAPPING, UNDER DEBARY, WHICH THE STATE DISCUSSED IN ITS BRIEF, CONTINUED UNTIL THE VICTIM REACHED A PLACE OF SAFETY. JUST AS CLEAR AS IF SOMEONE HAD BEEN PUT IN THE TRUNK OF A CAR, THIS THREE-YEAR-OLD VICTIM HAD BEEN PUT IN THIS CAR AND THE DOORS CLOSED AND WINDOWS CLOSED AND ABDUCTED AND TAKEN TO A STRANGE AREA THAT IS A WAY FROM THE HOME THAT SHE KNEW -- EXCUSE ME -- THAT HE KNEW, HAVING BEEN TERRORIZED IN THE EVENTS THAT JUST PRECEDED THE ABDUCTION.

SO YOUR POSITION IS THAT THE KIDNAPPING CONTINUED UP UNTIL THE TIME OF THIS CHILD'S DEATH. UNDER THE THEORY OF FELONY MURDER.

YES, YOUR HONOR.

WE HAVE, IN THIS CASE, AGAIN, BOTH A SITUATION WHERE THE TRIAL COURT AND THE APPELLATE COURT MIGHT HAVE BEEN AIDED BY SPECIAL INTERROGATORIES, TO FIND OUT WHETHER THE JURY, ALSO, FOUND PREMEDITATION, BECAUSE YOUR POSITION IS THAT THERE WAS SUFFICIENT EVIDENCE OF STRANGULATION FOR THIS, THE PREMEDITATED MURDER, TO GO TO THE JURY. IS THAT CORRECT?

YES, YOUR HONOR.

SO IF THE JURY HAD FOUND PREMEDITATED MURDER, THE TRIAL COURT, THEN, WOULD NOT REALLY HAVE NEEDED TO DO AN EDMUND TYSON ANALYSIS, BECAUSE THE DEFENDANT WOULD HAVE BEEN THE DIRECT PERPETRATOR 6 OF A PREMEDITATED MURDER -- PERPETRATOR OF A PREMEDITATED MURDER.

ALSO THE EDMUND TYSON DOES NOT APPLY WHEN THE DEFENDANT COMMITTED A LETHAL ACT.

THE REASON I AM ASKING IS BECAUSE, OVER AND OVER AGAIN, IT COMES OUT TO WHY THE STATE DOESN'T SEEM TO WANT THE COURT TO SORT OF IMPOSE A RULE THAT WOULD REQUIRE A JURY TO MAKE THESE FINDINGS. WOULDN'T IT ENHANCE APPELLATE REVIEW OF THESE ISSUES, IF WE HAD THAT TYPE OF REQUIREMENT?

YOUR HONOR, TO BE HONEST WITH YOU, I HAVEN'T THOUGHT ABOUT IT, IN TERMS OF A LONG-TERM POLICY ANALYSIS. OF COURSE I KNOW IN THIS CASE WE HAD A GENERAL VERDICT. IN THIS CASE WE CLEARLY HAVE FELONY MURDER N THIS CASE WE, ALSO, HAVE SUFFICIENT EVIDENCE FOR PREMEDITATED MURDER. OF COURSE WE DON'T HAVE A SPECIAL INTERROGATORY, BUT I, TO BE HONEST WITH YOU, I HAVEN'T THOUGHT THROUGH THE LONG-TERM IMPLICATIONS OF REQUIRING SPECIAL INTERROGATORIES, IN CASES IN THE FUTURE.

BUT IN THIS CASE, THE JUDGE DID NOT FIND, ALTHOUGH THE JUDGE FOUND THERE WAS SUFFICIENT EVIDENCE FOR THE PREMEDITATED MURDER TO GO TO THE JURY, THE JUDGE FOR THE PURPOSES OF THE SENTENCING ORDER, DID NOT FIND THAT IT WAS PROVEN BEYOND -- THAT THE PREMEDITATED MURDER WAS PROVEN BEYOND A REASONABLE DOUBT AND COULD YOU ADDRESS WHAT THE SIGNIFICANCE OF THAT FINDING IS AND HOW WE EVALUATE THIS DEATH

SENTENCE?

YES, URPS. I WOULD BE -- YES, YOUR HONOR, I WOULD BE GLAD TO. AS TO THE PENALTY PHASE, THE TRIAL JUDGE WAS THE FINDER OF FACT. THE TRIAL JUDGE HAD TO MAKE A DECISION DO I PERSONALLY BELIEVE THAT THE STATE PROVED, BEYOND A REASONABLE DOUBT, THAT THE DEFENDANT INTENDED TO KILL THE VICTIM. AS FOR GATEKEEPER, FOR PURPOSES OF THE VERDICT, THE TRIAL JUDGE IS MERELY ASKING HIMSELF WOULD IT BE REASONABLE FOR A JURY TO CONCLUDE THAT THE STATE PROVED PREMEDITATED MURDER? IN OTHER WORDS THERE IS A RANGE OF REASONABLE DECISIONS THAT A JURY CAN MAKE, EVEN THOUGH THE TRIAL JUDGE MIGHT MAKE A DIFFERENT DECISION SOME WEEKS OR MONTHS LATER, AND IN THE PENALTY PHASE. OF COURSE THIS WAS NEVER PRESENTED TO THE TRIAL JUDGE, BY THE WAY, YOUR HONOR, IN TERMS OF THE MOTION FOR NEW TRIAL, THE WEIGHT OF THE EVIDENCE ARGUMENT, WHICH IS I SHOULD TO, THAT THE DEFENDANT NEVER ARGUED TO THE TRIAL JUDGE, JUDGE, YOU HAVE DECIDED AS TRIER OF FACT, THAT THE STATE HAS NOT PROVED INTENT TO KILL, FOR PURPOSES OF MITIGATION. NOW, I WANT YOU TO RECONSIDER WEIGHT OF THE EVIDENCE FOR PURPOSES OF A NEW TRIAL. THAT WAS NOT PRESENTED TO THE TRIAL JUDGE.

BUT, AGAIN, YOU ARE SAYING IT IS ENTIRELY CONSISTENT THAT THE JUDGE CAN PROPERLY ALLOW THAT TO GO TO THE JURY ON PREMEDITATED MURDER, BUT WHEN IT COMES TO THE JUDGE'S ROLE IN THE PENALTY PHASE --

YES, YOUR HONOR.

-- THAT THE JUDGE WAS GIVING SORT OF THE BENEFIT OF THE DOUBT, SO TO SPEAK, TO THE DEFENDANT IN MAKING THAT FINDING.

YES, YOUR HONOR, THAT NOW I HAVE TO DECIDE, AS TRIAL JUDGE, FOR MYSELF, AS TRIER OF FACT, WHETHER THE STATE PROVED THAT. WHEREAS BEFORE I WAS ONLY DECIDING WHETHER I COULD HAVE OR ANOTHER TRIER OF FACT, THE JURY, COULD HAVE REASONABLY DECIDED THAT. A TOTALLY DIFFERENT GATE-KEEPING ANALYSIS IN TERMS OF ANALYSIS OF THE SUFFICIENCY ISSUE VERSUS THE TRIAL JUDGE, AS FINDER OF FACT AT THE PENALTY PHASE. THE STATE WOULD CONTEST, THEN, THAT OPPOSING COUNSEL CHARACTERIZED THE VICTIM AS NOT BEING CONFINED. THE STATE HAS ELABORATED AT SOME LENGTH, IN ITS BRIEF, THROUGH THE BULLET OF FACTS, AROUND PAGE 13 AND FOLLOWING PAGES, ABOUT THE TERROR THAT THIS VICTIM WENT THROUGH IN THE HOME OF AGENT ROBERT. THIS MOTHER SAW HIS MOTHER PISTOL WHIPPED IN FRONT OF HIM. THIS PERSON HEARD THE DEFENDANT MAKE NUMEROUS STATEMENTS TO VICTIMS INCLUDING, IF YOU RUN, I WILL KILL, TELLING ANOTHER PERSON IN THE HOME, AND THIS IS A SMALL HOME, WHERE YOU CAN HEAR STUFF GOING ON IN DIFFERENT ROOMS. THIS DEFENDANT TOLD ANOTHER VICTIM, IF YOU RUN, I WILL KILL YOU. SAW HIS MOTHER PISTOL WHIPPED. SAW THIS DEFENDANT PUT THE GUN AT POINT BLANK RANGE TO TWO OF THE VICTIMS' HEADS, AND, OF COURSE, WE DON'T KNOW EXACTLY WHERE THE VICTIM WAS LOOKING, BUT, AGAIN, ALL THIS OCCURRED IN A VERY CONFINED AREA OF THE SMALL HOME. THE VICTIM, LITTLE ROBERT, THREE-YEAR-OLD ROBERT, STARTS CHIING DURING PART OF THIS. -- STARTS CRYING DURING PART OF THIS, AND LITTLE KAHARI, HIS BROTHER, STARTS CRYING DURING PART OF THIS. THE DEFENDANT, MR. STEPHENS, TELLS LITTLE KARAHI SHUT UP OR I WILL KILL YOU. WHEN THE DEFENDANT TELLS LITTLE ROB TO SHUT UP, HE QI EITHER DOWN. SO BASICALLY THE PICTURE THAT -- HE QI EITHER DOWN, SO -- HE QUIETS DOWN, SO BASICALLY THE PICTURE IS THAT THIS GUY HAS TOTAL CONTROL, AND IF I DON'T DO WHAT HE TELLS ME TO AND IF I DON'T STAY EXACTLY WHERE HE TELLS ME TO STAY, WHERE HE PUTS ME, HE IS GOING TO KILL ME. THAT IS THE COMMUNICATION THROUGHOUT ALL OF THESE EVENTS, FORCING THE FAMILY TO CRAWL ON THE FLOOR, EVEN, DURING PART OF THIS TIME.

CAN YOU DISCUSS THE RELATIVE ROLE BETWEEN THIS DEFENDANT AND STEPHENS. ISN'T THAT THE OTHER --

OF CUMMINGS?

OF CUMMINGS. YES, SIR.

YES, YOUR HONOR. IT IS CLEAR THAT STEPHENS WAS THE MAIN PERPETRATOR. NO DOUBT ABOUT IT. IN FACT IF YOU CUT IT ALL AWAY, STEPHENS, IN ESSENCE, TO USE A METAPHOR, IS THE TRIGGER MAN. STEPHENS IS THE ONE THAT AND DUCTS LITTLE ROB AND PUTS HIM IN THE CAR.

DID HE GRAB HIM?

I THINK KAHARI TESTIFIED THAT HE ACTUALLY PULLED HIM BY THE SHIRT OR SOMETHING LIKE. THAT OF COURSE WE DON'T HAVE A WITNESS TO HIM ACTUALLY CARRYING HIM TO THE CAR, AND WE DON'T KNOW WHETHER HE WAS DRAGGING HIM OR WHAT HAVE YOU, BUT WE KNOW THAT THIS DEFENDANT SAID I AM TAKING THE LITTLE KID AS A HOSTAGE FOR INSURANCE, AND WE KNOW THAT THIS DEFENDANT ASKED FOR THE KEYS FROM RODERICK GARDENER, TO GET THE KEYS TO THE KIA, WHERE THE VICTIM IS ULTIMATELY PLACED BY THIS DEFENDANT, AND WHERE THE VICTIM IS FOUND DEAD, SO THIS DEFENDANT IS THE MAIN PERPETRATOR. THIS DEFENDANT IS THE ONE WHO THREATENS TO KILL PEOPLE IF THEY DON'T DO THIS, IF THEY DON'T DO THAT.

WHERE WAS CUMMINGS WHILE THAT WAS GOING ON?

HE IS, DURING MOST OF THIS TIME, I BELIEVE HE IS IN THE LIVING ROOM WHERE THIS IS OCCURING. AT ONE TIME I THINK HE GOES IN A BACK ROOM AND SOME OF THE WITNESSES HEAR DRAWERS OPENING BACK THERE, AND AT ONE TIME LITTLE ROB HIS APPARENTLY BACK THERE AND SAYS SOMETHING ABOUT SOMEBODY CHOKING ME.

HOW ABOUT DURING THE ABDUCTION?

DURING THE ABDUCTION, CUMMINGS IS IN A SEPARATE CAR, YOUR HONOR. IN FACT, THE DEFENDANT, BY HIS TESTIMONY, TESTIFIES I WENT TO APPROACH CUMMINGS' CAR AND CUMMINGS OR SOMEBODY IN THE CAR WAIVED ME OFF, AND SO I -- WAVED ME OFF, AND SO I GOT IN THE KIA. I GOT THE KEYS. THIS IS TESTIMONY WHY DID HE GETS THE KEYS, UNLESS HE INTENDED TO STEAL STEAL THE CAR, BUT HIS TESTIMONY IS THAT THE PEOPLE INCOMINGS' CAR WAVED HIM OFF, AND SO HE GETS IN THE KIA WITH LITTLE ROB AND DRIVES UP AND ENDS UP ABOUT .8 MILES AWAY FROM THE HOME, IN A PLACE, BY THE WAY, WHERE THIS DEFENDANT HAD TOLD ROBERT'S DAD, RIGHT BEFORE HE LEFT, I AM GOING TO LEAVE HIM AT THE CORNER. HE DOESN'T LEAVE HIM AT THE CORNER. HE LIED ABOUT WHERE HE WAS GOING TO LEAVE THE KID, MISLEADING THE FATHER AS TO WHERE TO FIND THE CHILD. THAT WAS THIS DEFENDANT. NOT CUMMINGS.

BUT ON THAT -- I KNOW -- PLEASE FINISH YOUR THOUGHT, BUT I WANTED TO MAKE SURE THAT THE JUDGE FOUND THAT THIS DEFENDANT DIDN'T INTEND TO KILL THE CHILD.

YES, YOUR HONOR. BUT HE WAS CLEARLY, IF WE ARE GETTING TO THE RELATIVE CULPABILITY OF STEPHENS VERSUS CUMMINGS, HE WAS CLEARLY THE FAR MORE CULPABLE AND CLEARLY SHOWED AN EXTREME RECKLESS NECESSARY TO HUMAN LIFE IN EVERYTHING THAT HE DID THAT DAY, BOTH IN THE HOUSE, ABDUCTING LITTLE ROBERT, AFTER HAVING INTIMIDATED AND TERRORIZED HIM AND LEAVING HIM, HE LEFT LITTLE ROBERT AT THE SCENE. HE TOOK THE CD PLAYER. HE CLOSED THE DOOR. HE DIDN'T OPEN A WINDOW. HE DIDN'T LEAVE THE DOOR OPEN AS HE LEFT. HE DIDN'T CALL THE POLICE. OF COURSE CUMMINGS DIDN'T CALL THE POLICE, EITHER, BUT THIS DEFENDANT IS THE ONE WHO CLOSED THE DOOR ON LITTLE ROB'S LIFE, AND THIS DEFENDANT IS THE ONE WHO TERRORIZED LITTLE ROB AT THE HOUSE AND PISTOL WHIPPED HIS MOM IN FRONT OF LITTLE ROB'S EYES. AS TO THE SPECIAL INSTRUCTIONS, IT IS THE STATE'S POSITION, AS WE HAVE ARGUED IN THE BRIEF, THAT THE STANDARD INSTRUCTIONS MORE THAN AMPLY COVER THIS SITUATION, AND, PERHAPS, MOST CRITICALLY, MOST EASILY RESOLVED, IS

THE SPECIAL INSTRUCTIONS THAT WERE REQUESTED, ALL OF THEM OMIT FLIGHT. ALL OF THEM ARE MISLEADING. AND SO THE SPECIAL INSTRUCTION ISSUE, THE STATE WOULD CONTEND, IS A NONSTARTER FOR THAT REASON ALONE. BUT THE STANDARD INSTRUCTIONS CERTAINLY COVER WHILE AND AS A CONSEQUENCE OF ONE OF THESE UNDERLYING FELONIES. AS A QONS QENS OF REQUIRING THE STATE TO -- AS A CONSEQUENCE OF REQUIRING THE STATE TO ESTABLISH THAT CAUSE NEXUS. WHICH IS WHAT THE STATE IS CONTENDING NOW, AS WELL AS WHAT IS BELOW.

THE AGGRAVATORS THAT THE JUDGE FOUND, COULD YOU JUST BE -- ADDRESS THAT ISSUE. HOW MANY AGGRAVATORS DID THE JUDGE FIND?

YES, YOUR HONOR. THERE WERE THREE AGGRAVATORS. ONE WAS AN INCIDENT WHERE THE DEFENDANT PLED GUILTY. I THINK HE PLED GUILTY TO BURGLARY OF A DWELLING. IT WAS, ACTUALLY, ANOTHER HOME INVASION ROBBERY/BURGLARY, BECAUSE THE STATE PUT ON THE VICTIM OF THAT PARTICULAR CRIME, AND SHE TESTIFIED THAT THE DEFENDANT WAS WIELD AGO SAWED-OFF SHOTGUN THROUGH -- ---WAS WIELDING A SAWED-OFF SHOTGUN -- THE DEFENDANT RUNS FOR HER AND CATCHES HER OUTSIDE THE HOME AND THROWS HER UP AGAINST THE CAR AND HOLDS A SAWED-OFF SHOTGUN TO HER HEAD AND SAID LET ME KILL THE "B" OR SOMETHING TO THE EFFECT I WOULD LIKE TO KILL HER.

SO THAT WAS IN 1992, SO THAT IS A PRIOR VIOLENT FELONY.

YES, YOUR HONOR.

COULD YOU, THEN, CLARIFY WHETHER THERE ARE, ALSO, ADDITIONAL VIOLENT FELONIES THAT COULD AND WERE PROPERLY USED IN THIS SENTENCING ORDER?

YES, YOUR HONOR. IT WAS ANOTHER AGGRAVATOR WAS THAT THE KILLING OR THE MURDER WAS DURING THE PERPETRATION OR ATTEMPT OR ESCAPE FROM CERTAIN FELONIES.

THAT WOULD BE, BUT THAT IS THE FELONY MURDER.

YES, YOUR HONOR.

SO IS THAT -- WHY -- I AM GOING BACK TO WHETHER THERE WERE OTHER FELONIES THAT, IN THE SENTENCING ORDER, THAT THE JUDGE SAYS THE DEFENDANT PLEADED GUILTY, WAS FOUND GUILTY OF CRIMES OF ROBBERY, AGGRAVATED BATTERY AND BURGLARY WITH AN ASSAULT.

YES, YOUR HONOR.

WERE THOSE SUPPOSED TO BE TAKEN INTO ACCOUNT OR NOT, ACCORDING TO THE TERMS OF THE PLEA AGREEMENT THAT WAS WORKED OUT?

I DON'T RECALL THEM BEING CONTESTED. I MEAN, FOR THAT REASON, I DIDN'T -- THAT PARTICULAR AGGRAVATOR BELOW ME COULD TESTIFY, BUT -- I DIDN'T LOOK AT IT.

I THOUGHT THAT THE TERMS OF THE AGREEMENT WAS THAT THOSE, WHATEVER HE PLED GUILTY TO, WASN'T SUPPOSED TO BE USED IN CONSIDERATION OF THE SENTENCE OF DEATH. IS THAT CORRECT?

YOU KNOW, I COULD BE WRONG, YOUR HONOR. I DON'T RECALL THAT. I MEAN, I KNOW THE DEFENSE TACTIC WAS, FIRST AND FOREMOST, THAT, HEY, I AM COMING CLEAN AS TO WHAT I DID BEFORE THE JURY, AND WHAT I DIDN'T DO WAS MURDER LITTLE ROB, AND THERE WERE THREE OTHER COUNTS, I BELIEVE, THAT HE DID NOT PLEAD TO, BUT I HONESTLY DON'T SPECIFICALLY RECOLLECT, AT THIS PARTICULAR JUNCTURE, THE RECORD, IN TERMS OF YOUR QUESTION, YOUR HONOR.

I GUESS THE REASON FOR ME IT IS SIGNIFICANT IS THAT, EVEN THOUGH THERE IS ONE AGGRAVATOR OF A PRIOR VIOLENT FELONY, IF WE HAVE, IN THIS CASE, BOTH THE PRIOR FELONY FROM 1992, PLUS CONTEMPORANEOUS FELONIES IN THE HOUSE.

YES, YOUR HONOR.

THAT, EVEN THOUGH THAT IS IN ONE AGGRAVATOR, THAT IS A MORE WEIGHTY AGGRAVATOR THAN IF IT WAS JUST EITHER THE PRIOR VIOLENT FELONY OR THE CONTEMPORANEOUS CONVICTION, SO IT IS IMPORTANT, BECAUSE THAT IS SEPARATE AND APART FROM THE KIDNAPPING, WHICH IS THE -- ANOTHER AGGRAVATOR THAT IS USED, AND THAT IS THE ONE THAT I SAID IS THAT IS, SORT, TO ME, MURDER IS FELONY MURDER, ALTHOUGH I REALIZE THIS COURT HAS HELD DIFFERENTLY.

WE DO HAVE MULTIPLE COUNTS OF ARMED ROBBERY, AND HE DID NOT PLEAD GUILTY TO ALL OF THOSE COUNTS, AND YET HE WAS FOUND GUILTY, AT LEAST ONE OF THE COUNTS, TO WHICH HE DID NOT PLEAD TO. SO IN ANSWER TO YOUR QUESTION, CERTAINLY THERE WAS NO STIPULATION THAT THAT COULD NOT BE USED AGAINST HIM. I MEAN, AGAIN, I DON'T RECOLLECT FROM THE RECORD, BECAUSE I DON'T THINK IT WAS RAISED SPECIFICALLY ON APPEAL, AS TO YOUR QUESTION, YOUR HONOR, BUT CLEARLY THERE WAS AN ARMED ROBBERY, AN ARMED ROBBERY THAT HE WAS FOUND GUILTY OF, AND THERE WAS NO STIBLATION ABOUT IT THAT COULD PROVIDE THE BASIS -- THE STIPULATION ABOUT IT THAT COULD PROVIDE THE BASIS FOR THE SECOND AGGRAVATOR, AND THE THIRD BASIS WAS THE CHILD'S AGE. IN TERMS OF THE DEFENDANT'S STATEMENT ABOUT THE ELECTRIC CHAIR, THE APPELLANT CLAIMS THAT IT WAS PREJUDICIAL. STATE WOULD CERTAINLY AGREE IT WAS PREJUDICIAL. IT WAS PREJUDICIAL BECAUSE IT WAS PROBATIVE, AND THAT IS EXACTLY RELEVANCY, AND THE PROBATIVE VALUE, THAT WENT TO, HEY, I FEEL GUILTY. I HAVE THIS CONSCIOUSNESS OF GUILT ABOUT WHAT HE DID REGARDING THIS CASE. AGAIN THERE, IS THIS DISCUSSION IN OPPOSING COUNSEL'S BRIEF ABOUT, WELL, IT COULD HAVE BEEN REFERRING TO OTHER ROBBERIES, OTHER CRIMES, WHAT HAVE YOU, THAT THIS PARTICULAR DEFENDANT COMMITTED, BUT BY THE TIME THIS STATEMENT WAS ADMITTED, BY THE TIME THE JURY HEARD IT, THERE WAS A PREDICATE LAID THAT THE OFFICERS WERE TALKING ABOUT THIS CASE, THIS SPARROW MURDER CASE. NO AMBIGUITY WHATSOEVER. NONE. AND EVEN IF THERE WERE SOME AMBIGUITY, THE CHILLITO CASE WOULD CONTROL. THE FACT THAT THE DEFENDANT MAY HAVE MADE THE STATEMENT BECAUSE OF OTHER THINGS THAT HE DID IN HIS LIFE, WELL, IN CHILLITO, THERE WERE OTHER ROBBERIES INVOLVED, OTHER FELONIES INVOLVED THAT COULD HAVE EXPLAINED THE DEFENDANT'S FLIGHT IN THAT CASE. BUT THERE IS NO AMBIGUITY IN THIS CASE. NONE. IN THAT TERMS OF THE TYSON ANALYSIS, NUMBER ONE, IS THE DEFENDANT IS THE ONE WHO DID THE ACTUAL LETHAL ACT. THAT, ALONE, DISTINGUISHES THIS CASE FROM TYSON AND ENMANN, BUT BEYOND THAT, HE CERTAINLY DID AS MUCH, IF NOT MORE SO, THAN RICKY TYSON DID IN THE TYSON CASE. RICKY TYSON GOT THE GUNS AND SOME OF THE GUNS, WITH HIS BROTHER, RAYMOND, AND BROUGHT THEM TO THE PRISON FOR THE PRISON BREAK OUT. WELL, THIS DEFENDANT CERTAINLY BROUGHT HIS GUN TO THIS PARTICULAR ROBBERY SCENE. HE BROUGHT LETHAL FORCE AND CERTAINLY DID A LOT MORE THAN THAT, IN TERMS OF THREATENING PEOPLE WITH THIS GUN, INCLUDING TO THE POINT OF EJECTING A ROUND FROM THE GUN.

BUT UNDER THIS TYSON KIND OF ANALYSIS, WE ARE SUPPOSED TO DETERMINE WHAT, WHETHER OR NOT THE DEFENDANT HAD A RECKLESS INDIFFERENCE TO HUMAN LIFE. IS THAT CORRECT?

YES, YOUR HONOR.

OKAY. AND SO WHAT KIND OF FACTORS SHOULD WE CONSIDER, IN TRYING TO COME TO A DETERMINATION AS TO WHETHER OR NOT THIS DEFENDANT HAD SUCH A RECKLESS INDIFFERENCE?

YOUR HONOR, I BELIEVE THAT RICKY TYSON'S SITUATION ILLUSTRATES THE FACT THAT THE LETHAL FORCE NEED NOT OR THE RECKLESS INDIFFERENCE, TO USE THE LANGUAGE, NEED NOT HAVE PERMEATEED ALL OF THE EVENTS.

OKAY. BUT HOW ABOUT IF WE FOCUS, THEN, ON THE KIDNAPPING AND LEAVING THE CHILD THERE, WHAT FACTORS DO WE HAVE TO SHOW IT IS RECKLESS INDIFFERENCE TO THIS YOUNG BOY'S LIFE?

NUMBER ONE IS THE AGE OF THE CHILD, ALONE. NUMBER TWO, THE FACT THAT THE CHILD WAS OBVIOUSLY EMOTIONALLY DISTRAUGHT OVER WHAT WAS HAPPENING. HAD CRIED. GIVEN WHAT THE CHILD SAW, OF COURSE, AS A THREE-YEAR-OLD.

LET ME ASK YOU THIS. BEFORE WE GO TOO MUCH FURTHER IN THIS.

YES, YOUR HONOR.

WE HAVE ASKED A LOT ABOUT THIS CHILD AND BEING ABLE TO OPEN A DOOR OR WINDOWS OR WHATEVER. WHAT DO WE FULLY HAVE IN THE RECORD THAT TALKS ABOUT THIS PRIOR INCIDENT, WHERE THE CHILD ALLEGEDLY GETS OUT OF THE CAR BY HIMSELF OR OPENS THE WINDOW OR WHATEVER?

THE MOST CRITICAL THING WE HAVE, I BELIEVE, WAS INDICATED BY YOUR HONOR'S QUESTION, THAT THERE WAS THIS PRIOR INCIDENT AS TO THIS CAR, WHERE THE CHILD, I THINK IT WAS A DOOR THAT HE OPENED, BUT THE DEFENDANT DIDN'T KNOW ABOUT IT. IN TERMS OF HIS RECKLESSNESS, HE HAD NO INKLING WHATSOEVER THAT THIS CHILD, THIS THREE-YEAR-OLD CHILD WHOM HE HAD BEEN TERRORIZING, COULD OPEN THIS DOOR. NONE.

AND SO WE REALLY DON'T HAVE A LOT OF FACTORS ABOUT WHAT HAPPENED IN THIS PRIOR INCIDENT, DO WE?

NO, YOUR HONOR. OTHER THAN THAT IT OCCURRED, AND I THINK IT WAS THE DAY BEFORE IN THIS CAR, AND THE CHILD WAS CLASSTIZED FOR IT -- CLASSTIZED FOR IT, BUT, AGAIN, STEPHENS DIDN'T KNOW ABOUT IT.

WHO PUT THAT TESTIMONY ON?

THE STATE DID. I THINK THAT WAS RODERICK GARDENER, I BELIEVE. I WOULDN'T SWEAR TO THE WITNESS.

WHAT WAS THE STATE PUTTING IT ON FOR?

WELL, THE STATE WAS TRYING TO ESTABLISH SUFFOCATION. THAT I MEAN, AS THE TRIAL --

THE STATE WAS USING IT TO SHOW THAT THE DEFENDANT, MORE LIKELY THAN NOT, SUFFOCATED HIM, BECAUSE HE COULD HAVE GOTTEN OUT OF THE CAR?

YES, YOUR HONOR. I MEAN, BASICALLY THE WAY THE TRIAL PROGRESSED IS THAT THE STATE WAS FOCUSED UPON PROVING SUFFOCATION, THROUGH DR. FLORO'S TESTIMONY AND THE TESTIMONY OF OFFICER MARKHAM, WHO FOUND THE CHILD WITH THE FACE COMPRESSED INTO THE SEAT AND MOVED THE CHILD AND THEN THERE WAS A SOUND OF AIR, ET CETERA. THE STATE'S MAIN THEORY, INITIALLY, WAS SUFFOCATION. DEFENSE COUNSEL DID AN EXCELLENT JOB OF CROSS-EXAMINATION OF DR. FLORO AND PUNCHED SOME HOLES IN THE STATE'S THEORY AND, OF COURSE, THEY EVENTUALLY PUT ON DR. DUNTON, WHO WAS A CONTRACT MEDICAL EXAMINER OUT OF ATLANTA, WHO TESTIFIED AS TO HYPOTHERMIA, AND THEN WHEN YOU GET TO CLOSING ARGUMENT, THE STATE'S THEORY IS, WELL, WE THINK WE HAVE PROVED SUFFOCATION,

BUT EVEN IF WE DIDN'T, WE CERTAINLY PROVED FELONY MURDER, SO THE STATE ARGUED BOTH AND STILL WITH THE PRIMARY THEORY, I THINK, AND THIS IS AN INTERPRETATION OF THE CLOSING ARGUMENT, THE PRIMARY THEORY BEING SUFFOCATION, BUT THE STATE, ALSO, ARGUED, WELL, WHETHER IT WAS SUFFOCATION OR HYPOTHERMIA, WE CERTAINLY PROVED FELONY MURDER, AND SUBMITTED THAT TO THE JURY ON BOTH OF THOSE THEORIES.

DID YOU HAVE ANYTHING MORE, AS FAR AS JUSTICE QUINCE'S QUESTION ABOUT WHAT ELSE SHOWED RECKLESS INDIFFERENCE? YOU SAID THE AGE OF THE CHILD AND THAT HE HAD PREVIOUSLY TERRORIZED THE CHILD.

TERRORIZED THE CHILES. ABDUCTED THE -- TERRORIZE ZED THE CHILD. ABDUCTED THE CHILD. THIS CHILD HAD NO INKLING WHERE HE WAS. IT WASN'T EXTREMELY FAR WAY, BUT --

DO WE HAVE ANY INFORMATION ABOUT, I KNOW THE DEFENSE COUNSEL HAS SAID THAT THE CAR WAS PARKED IN THE NEIGHBORHOOD, AND YOU KNOW, WAS AT A TIME WHEN PEOPLE MIGHT OR MAY OR MAY NOT COME BY THE CAR. DO WE HAVE ANY INDICATION AS TO WHETHER OR NOT THE CAR WAS PARKED IN A SHADY AREA OR A SUNNY AREA OR ANY OF THOSE KINDS OF OTHER FACTORS?

THERE WAS SOME EVIDENCE THAT IT RAINED SOME THAT DAY. THERE WAS, ALSO, SOME EVIDENCE, I THINK PRIMARILY THROUGH THE DEFENSE CASE, THAT IT WAS VERY SUNNY THAT DAY, BUT IN ANY EVENT, I THINK IT WAS UNDISPUTED THAT THE TEMPERATURE WAS AROUND 82 DEGREES THIS AFTERNOON AND THAT THE TEMPERATURE WOULD RISE WRATHER RAPIDLY IN -- RISE RATHER RAP ILY IN THE CAR -- RAPIDLY IN THE CAR, GIVEN THAT THERE WAS NO TREES OR SHADE FROM THE BUILDINGS, BUT I WOULD, ALSO, POINT OUT, IN TERMS OF THE LEGAL SIGNIFICANCE OF THAT, IS THAT, TO MY KNOWLEDGE, THERE IS NO GOOD SAMARITAN RULE THAT, HEY, I GET OFF IF A GOOD SAMARITAN DOESN'T COME RESCUE YOU. IN FACT, IN THIS PARTICULAR CASE, THE WINDOWS WERE TINTED. THE OFFICER TESTIFIED I HAD TO COME RIGHT UP TO THE WINDOW TO SEE INSIDE. I THINK THERE WAS EVIDENCE THAT THE VIEW WAS BETTER FROM THE WINDSHIELD IN FRONT, BUT I MEAN, JUST FACT IT TOOK HOURS FOR ANYBODY TO CONTACT THE POLICE IS FURTHER CORROBORATION OF THE FACT THAT IT WAS NOT EASY TO SEE THIS CHILD INSIDE, AND THERE WAS AFFIRMATIVE EVIDENCE THAT THE WINDOWS WERE TINTED TO THE DEGREE IT WAS DIFFICULT TO SEE INSIDE. SO I MEAN, HE COULD HAVE LEFT THE CHILD, THE STATE'S THEORY WAS AT, YOU KNOW --

WHAT TIME WAS THE CHILD DISSOLVED?

I HAVE SOME -- DISCOVERED?

I HAVE SOME DISAGREEMENT WITH COUNSEL ABOUT THE EXACT TIME. THERE WERE VARYING TIMES THROWN AROUND, BUT THERE WAS, ALSO, EVIDENCE THAT IT WAS AROUND 9 P.M.

WAS THAT BY THE LAW ENFORCEMENT? DID THEY DISCOVER THE CHILD?

A BICYCLIST CAME UP TO OFFICER MARKHAM AND LED OFFICER, I THINK IT WAS CAROL MARKHAM TO THE CAR.

WAS THERE A SEARCH GOING ON?

THE RECORD IS UNCLEAR ON THAT, YOUR HONOR. I MEAN, I ASSUME THERE WAS. THIS CREATED QUITE A STIR IN JACKSONVILLE. BUT, I MEAN, BASICALLY ONE OF THE DEFENSE THEORIES WAS, I LEFT THE CHILD WHERE A GOOD SAMARITAN SHOULD HAVE DISCOVERED THE CHILD, WHERE THE CHILD COULD HAVE DONE THIS OR COULD HAVE DONE THAT, AND, AGAIN, UNDER THE BARRY THEORY, THE CHILD WAS CONFINED. WAS GROSSLY UNDER AGE. AND UNDER, WITHOUT THE CONSENT OF THE PARENT, OF COURSE. THAT IS OBVIOUS. AND HAVING BEEN TERRORIZED, THAT

THE CONFINEMENT CONTINUED TO THE CHILD'S DEATH, NO MATTER HOW IT OCCURRED. WHETHER IT WAS THROUGH SUFFOCATION OR THROUGH HYPOTHERMIA, TO USE THE DEFENSE THEORY.

AND LET ME ASK YOU ONE MORE QUESTION ABOUT THIS. THERE IS SOME CONTENTION THAT THERE WAS AN AGREEMENT THAT HE WOULD LEAD THE CHILD TO THE CORNER. DID THE -- LEAVE THE CHILD AT THE CORNER. DID THE DEFENDANT ASK THAT OR DID THE FATHER ASK THAT?

I THINK IT WAS ON INQUIRY OF THE FATHER, YOUR HONOR. HE WANTED TO KNOW WHERE CAN I FIND LITTLE ROB, AND THE DEFENDANT'S EXPLANATION WAS I DON'T KNOW WHAT HE WAS TALKING ABOUT. I JUST TOLD HIM ANYTHING, JUST TO GET HIM OFF MY BACK, AND RESPECT OF COURSE, THIS IS INCONSISTENT WITH AM NOT PUTTING UP WITH ANYTHING AT THE ROBBERY SCENE, BOSSING PEOPLE AROUND, PISTOL-WHIPING THE MOTHER, ET CETERA, ET CETERA, AND YET IN THE TRIAL HE TESTIFIES THAT, YOU KNOW, I WAS CONFUSED BY WHAT HE SAID AND I JUST TOLD HIM ANYTHING, JUST TO SHUT HIM OFF. OF COURSE HE SHUT OTHER PEOPLE UP BY POINTING GUNS AT THEM AND THREATENING TO KILL THEM. BUT THE STATE'S EVIDENCE, I BELIEVE, WAS THAT ROBERT JR., ACTUALLY, WAS THE FATHER, ASKED WHERE I CAN FIND LITTLE ROB, AND HE SAID AT THE CORNER. AND, OF COURSE, HE DIDN'T LEAVE HIM THERE. HE LEFT HIM MUCH FARTHER AWAY THAN THAT AND MISLED THE FATHER. THE DEFENSE, APPELLANT ARGUES THAT THE TRIAL JUDGE FOUND NO REMORSE. JUST I WOULD LIKE TO HIGHLIGHT A FEW THINGS IN THE RECORD THAT SUPPORT THAT. HIS TESTIMONY ALONE, AND, OF COURSE, NOW WE ARE AT THE PENALTY PHASE, SO THE TRIAL JUDGE HAS THE BENEFIT OF THE ENTIRE RECORD. STEPHENS LAUGHS AT DERRICK DIXON'S TESTIMONY. THAT CERTAINLY DOESN'T SHOW MUCH REMORSE. I MEAN HERE WE ARE, IN THE MIDDLE OF A TRIAL, WE ARE IN THE MIDDLE OF A TRIAL, WHERE A THREE-YEAR-OLD IS KILLED, AND HE IS LAUGHING AT ONE OF THE STATE'S WITNESSES. DERRICK DIXON TESTIFYING HE DIDN'T ROB ME AND STEPHENS SAID, I SURE DID. I TOOK TWO TENS FROM HIM. NO REMORSE. THE WHOLE ELECTRIC CHAIR STATEMENT SCENARIO, I MEAN, HE HAS TWO EXPLANATIONS, SUPPOSEDLY FOR IT. I MEAN, HE IS CHANGING EXPLANATIONS FOR THIS STATEMENT --

WHAT WAS THE POINT -- WHAT WAS THE PURPOSE AND WHAT PROBATIVE VALUE DID IT HAVE, THIS WHOLE THING, ABOUT, THIS WHOLE STATEMENT ABOUT THE DEFENDANT WANTING THEM TO HELP HIM GET THE ELECTRIC CHAIR?

THAT HE WAS SHOWING A CONSCIOUSNESS OF GUILT, YOUR HONOR, THAT THE ONLY -- AGAIN, THE POLICE --

WELL, YOU KNOW, THAT IS KIND OF INTERESTING, GIVEN THE FACT THAT, WHILE HE AGREED THAT HE HAD COMMITTED ANY NUMBER OF CRIMES, HE WAS PRETTY ADAMANT, WASN'T HE, THAT HE DIDN'T KILL THIS DLTHS BOY? -- THIS LITTLE BOY?

HE WAS ADAMANT THAT HE DIDN'T SUFFOCATE HIM, THAT HE LEFT HIM IN THE CAR. OF COURSE, EVEN UNDER HIS THEORY, YOU TAKE HIS THEORY AT ITS BEST, HE STILL COMMITTED FELONY MURDER. AT THE TRIAL, HE DOESN'T FEEL RESPONSIBLE FOR THE CHILD, BUT UNDER THE LAW THE STATE'S CONTENTION IS THAT HE IS, THAT THE KIDNAPPING CONTINUED UNTIL ROB WAS PLACED AT SAFETY, NOT UNTIL HE REACHED A PLACE OF SAFETY. BUT WHEN HE TALKED TO THE POLICE, I THINK IT WAS -- MAY HAVE BEEN GBI AND FBI, IT -- THEY WERE TALKING ABOUT THIS MURDER CASE, AND HE SAID THAT I WANT TO BE ELECTROCUTED. I WANT TO GET THE ELECTRIC CHAIR. OF COURSE YOU CAN'T GET THE ELECTRIC CHAIR FOR THINGS OTHER THAN MURDER, SO HE HAD TO BE REFERRING TO THE MURDER OR THE DEATH OF LITTLE ROB. THE POLICE, ESPECIALLY, REFERRED TO THIS CASE, AND SO HE WAS, FOR ONCE, IN THIS WHOLE CASE, ASSUMING SOME RESPONSIBILITY. OF COURSE LATER ON HE BACK TRACKS A COUPLE OF TYPES AND CHANGES HIS STORY AS TO WHY HE MADE THAT STATEMENT. AT ONE POINT, AT THE PENALTY PHASE, HE TESTIFIES THAT I JUST WANTED TO MEET GOD. THAT IS ALL I MEANT BY

THAT. WELL, AT THE TRIAL, HE HAD TESTIFIED THAT, NO, I WAS REFERRING TO THE GUILT THAT I FELT FOR EVERYTHING THAT I HAVE DONE IN MY LIFE. HE IS CHANGING HIS STORY. BUT, AGAIN, IT WAS CLEAR, WHEN THE POLICE INTERVIEWED HIM, THAT THEY WERE REFERRING TO THIS MURDER, AND AS THE TRIAL COURT FOUND, THE TRIAL COURT WASN'T CONFUSED ABOUT THIS AT ALL, THE TRIAL COURT DECIDED RULE BASED ON THE CONSCIOUSNESS OF GUILT THAT THIS STATEMENT INDICATED. AND AS OPPOSING COUNSEL POINTS OUT, HE, ALSO, SHOWED A LACK OF REMORSE, BECAUSE HE, TO THE LAST DAY OF THIS CASE, HE WOULDN'T DISCLOSE WHO THE OTHER FOLKS WERE. WEREN'T INVOLVED. THESE PEOPLE WEREN'T INVOLVED. HE WAS TRYING TO GET EVERYBODY ELSE OFF. HE WAS TRYING TO TAKE THE WHOLE BLAME, HIMSELF. HE STILL WOULDN'T DISCLOSE WHO THEY WERE. HE SAID I AM NOT GOING TO TELL YOU WHO PLATZ IS OR THE FOURTH PERSON.

WE HAVE STEPHENS AND CUMMINGS AND THE FOURTH PERSON, WHO ALL WALK INTO THE HOUSE TOGETHER. IS THAT WHAT HAPPENED? AND THE FOURTH ONE IN THE CAR?

PARDON ME. I AM SORRY?

THERE WAS A FOURTH PERSON IN THE CAR. THESE THREE COME IN, AND THERE WAS A FOURTH PERSON IN THE CAR. IS THAT HOW THIS GOES?

CUMMINGS AND PLATZ WERE CLEARLY INSIDE. THE FOURTH ONE, I THOUGHT I SAW OR HEARD SOME TESTIMONY AS TO THERE MAY HAVE BEEN SOME TESTIMONY ON THAT, TOO, BUT I WOULDN'T BANK ON T I MEAN I AM NOT POSITIVE OF THAT, YOUR HONOR.

BUT, ALSO, IS IT CLEAR THAT ONLY STEPHENS HAD A GUN?

NO, YOUR HONOR. THE OTHERS HAD GUNS, TOO. CUMMINGS HAD A GUN, AND I AM PRETTY SURE PLATZ DID, TOO, BUT STEPHENS WAS THE ONE BRANDISHING IT, AND PISTOL-WHIPING THE MOTHER, THREATENING PEOPLE IF YOU DO THIS, YOU DO THAT, I AM GOING TO KILL YOU. FORCING THEM TO CRAWL INTO THE BATHROOM, TRICKING THEM, BASICALLY, BY SAYING, AFTER THEY GET INTO THE BATHROOM AND LETTING A LITTLE TIME GO BY, SAYING, HI, I AM STILL HERE. DON'T YOU COME OUT HERE NOW. HE IS CLEAR THE RINGLEADER. OF COURSE HE IS THE ABDUCTOR, TOO, SO HE IS THE PRIMARY ACTOR. I SEE MY TIME IS UP. THANK YOU.

THANK YOU.

APPRECIATE IT.

AS TO THE ELECTRIC CHAIR STATEMENT, VOOL UNIFORM -- VOLUME 13, PAGE 1658, THE TRIAL JUDGE RULED HE CAN ASK HIM QUESTIONS THAT GO TO HIS STATE OF MIND WHEN HE TURNED HIMSELF IN, REGARDING GUILT, AND I THINK IN LIGHT OF HIS TESTIMONY, HE CAN LEAD HIM. THERE IS NO QUESTION THAT THE TRIAL JUDGE ERRED. MR. STEPHENS NEVER TURNED HIMSELF IN. THE TRIAL JUDGE WAS SIMPLY WRONG. ON THE WEIGHT OF THE EVIDENCE ISSUE, THE TRIAL JUDGE CONCLUDED THERE WAS NOT EVIDENCE OF PREMEDITATION. THE MOTION FOR NEW TRIAL NECESSARILY FILSD, FOLLOWED -- NECESSARILY FOLLOWED THAT FINDING BY THE TRIAL JUDGE IN THE SENTENCING ORDER. IT PLAINLY WAS REVERSEABLE ERROR NOT TO HAVE GRANTED THE MOTION FOR NEW TRIAL. THE COURT --

EXPLAIN WHY.

I WOULD ARGUE THAT GOES AS TO THE PREMEDITATION ISSUE. I, ALSO, STILL MAINTAIN IT WAS ERROR NOT TO GRANT IT AS TO TELL ANY MURDER. IF THE COURT LOOKS AT THE CASES CITED IN THE INITIAL BRIEF, PAGES 66 TO 68, AND THE REPLY BRIEF, PAGES 20 TO 22, WHICH ARE CASES INVOLVING RECKLESSNESS, WHICH RESULT IN OTHER CHILD DEATHS, THE COURT WILL SEE THAT THIS CASE DOES NOT FIT IN THE CONFINES OF OTHER CASES IN WHICH THE COURT HAS UPHELD A

DEATH SENTENCE. AND THE MAJORITY OF --

WE HAVEN'T, REALLY, HAD A DEATH CASE, WHERE, UNDER THESE KINDS OF CIRCUMSTANCES. IN THE MUDD CASE, I BELIEVE IT IS, WE HAVE THE MOTHER WHO LEFT THE CHILD. IS THAT THE ONE THAT THE MOTHER LEFT THE CHILD IN THE CAR WHILE SHE WAS WORK SOMETHING.

I THINK THAT IS CORRECT. YES.

AND NONE OF THOSE CASES SEEMED TO INVOLVE A SITUATION WHERE THE ACTOR WAS ENGAGED IN ANY OTHER CRIMINAL ACTIVITY.

I THINK --

SO, I MEAN, ARE THOSE REALLY ON POINT, WHEN YOU ARE CONSIDERING THIS IN THE CONTEXT OF SOMEONE WHO BURGLARIZES -- COMES INTO A HOUSE AND TERRORIZES EVERYONE, ROBS THEM, THEN KIDNAPS A CHILD AND LEAVES THE CHILD, YOU KNOW, IN A CLOSED VEHICLE, UNDER WHATEVER CIRCUMSTANCES THAT MIGHT HAVE BEEN.

THEY WILL ARE ON POINT, BECAUSE SOME OF THOSE CASES HAVE THE UNDERLYING PREDICATE FELONY, IN A FELONY MURDER CASE, OF AGGRAVATED CHILD ABUSE. AND I BELIEVE --

AGGRAVATED CHILD ABUSE. OKAY. YOU ARE TALKING ABOUT THE ONE WHERE THE SCALD THE CHILD AND --

YES, YOUR HONOR. I BELIEVE THAT WAS JACKIE BOWSQY, 499 SO.2D 277. THAT RESULTED IN THE SECOND DCA REDUCING THE, GRANTING JOA, AS TO SECOND-DEGREE FELONY MURDER AND IMPOSING A THIRD-DEGREE FELONY MURDER SENTENCE. THE COURT WAS ASKING AS TO THE TIME WHEN THE CHILD WAS FOUND, VOLUME 15, PAGE 385, THE TRIAL COURT, IN ITS SENTENCING ORDER, STATED YOUNG ROBERT'S BODY WAS FOUND BETWEEN 9 AND 9:30 P.M. THAT NIGHT IN THE FRONT SEAT OF THE VEHICLE STOLEN BY THE DEFENDANT. THE NEXT PAGE THE COURT FOUND THAT THE CHILD WAS LEFT IN A RESIDENTIAL NEIGHBORHOOD AT A TIME WHEN PEOPLE WERE USUALLY WALKING UP AND DOWN THE STREET. THE HOMES IN THE NEIGHBORHOOD WERE OCCUPIED. IN REGARDS TO, AND I APOLOGIZE FOR SKIPPING AROUND, IN REGARDS TO THE JOA AND THE PREHEADTATION ISSUE, I POINT -- AND THE PREMEDITATION ISSUE, I POINT OUT THAT THAT WAS AS TO THE ISSUE IN THE WHOLE GUILT AND PENALTY PHASE. JUSTICE ANSTEAD, IN HIS DISSENT IN THE MUNGIN CASE, CITED IN THE BRIEF THAT, IN THAT CASE, WHEN IT IS A CLOSE FACTUAL SITUATION, AS TO WHETHER, IF IT IS A CLOSE CASE THAT, IT CAN SKEW THE FAIRNESS OF A TRIAL, AND I BELIEVE THAT IS WHAT OCCURRED IN THIS CASE. I WOULD, ALSO, POINT OUT, IN REGARDS TO THE WHOLE FELONY MURDER ISSUE, THAT PAGE 25 OF ITS ANSWER BRIEF, EVEN THE STATE RECOGNIZES THAT REASONABLE FORESEEABILITY IS THE ELEMENT OF FELONY MURDER. AND WE MAY NOT OBTAIN THAT CAUSATION WAS SIMPLY NOT PROVED AND THE JURY WAS NOT ALLOWED TO DECIDE THAT ISSUE IN THIS CASE. THE STATE REFERRED, DURING ITS ARGUMENT, TO CHILLITO, THAT CASE CAN EASILY BE DISTINGUISHED, BECAUSE IN THAT CASE, WHICH WAS, ALSO, IN JACKSONVILLE, FLORIDA, THE DEFENDANT WAS APPREHENDED, I BELIEVE, THE NEXT DAY, AND THE COURT LOOKED AT TIME WHICH HAD PASSED. IN THIS CASE YOU HAVE THE DEFENDANT ARRESTED IN ANOTHER STATE, IN ATLANTA, GEORGIA, ALMOST TWO MONTHS LATER. THE STATE NEVER PUT ON ANY TESTIMONY OF EITHER THE GBI INVESTIGATE OR OR THE FBI INVESTIGATOR THAT MR. STEPHENS SUPPOSEDLY MADE THE STATEMENT TO, TO SAY, HEY, WE WERE INTERVIEWING HIM ABOUT THIS SPARROW MURDER CASE. THAT COMES FROM A LEADING QUESTION, WHICH THE TRIAL COURT ALLOWED THE STATE TO POSE, MEANING, AND THEY WERE TALKING TO YOU ABOUT THIS CASE, WEREN'T THEY? AND THAT IS HOW THAT GOT INTO THE RECORD IN THIS CASE. WHAT THAT FORCED MR. STEPHENS TO DO IN HIS DEFENSE WAS, THEN, TO REFER TO OTHER ACTS, NAMELY I MADE THAT STATEMENT? CONTEXT OF ALLTHE CRIMES I HAVE DONE IN MY LIFE. THUS HE HAD TO ATTEMPT TO JUSTIFY THAT STATEMENT TO THE JURY. THERE BY REFERRING TO OTHER CRIMES A MAKIT EORE PREJUDICIAL BUT HEAD NO CHOICE AT THAT

POINT. JUST LIKE TO POINT OUT TO THE COURT THAT, OF THE FOUR COUNTS THAT MR. STEPHENS DID NOT PLEAD TO, ONE WAS THE MURDER CHARGE, THE OTHER THREE WERE ARMED ROBBERIES. TWO OF THOSE HE WAS FOUND NOT GUILTY OF BY THE JURY.

SO ON THAT POINT, YOU SAY THAT THE JUDGE SHOULD NOT HAVE, IN A SECOND PART OF THE SENTENCING ORDER, WHERE HE REFERS TO PRIOR VIOLENT FELONIES, THAT THERE IS SOME OF THOSE PRIOR VIOLENT FELONIES HE SHOULD NOT HAVE CONSIDERED?

I THINK IT IS QUITE HONESTLY, I THINK IT IS PROBABLY A WASH, BECAUSE THAT WAS, HE GAVE, QUOTE/UNQUOTE, GREAT WEIGHT TO THAT FACTOR, WHEREAS THE OTHER FACTORS -- FACTORS, AND I BELIEVE HE EITHER GAVE SIGNIFICANT WEIGHT TO OR SOME WEIGHT, AND THAT ONE, HE GAVE IT THE MOST WEIGHT OF ANY FACTOR HE CONSIDERED IN THE WHOLE ANALYSIS.

THANK YOU.

THANK YOU.

THANKS TO BOTH OF YOU. FOR RESISTING -- FOR ASSISTING US. WELL BE IN RECESS. BAILIFF: PLEASE RISE.