James Franklin Rose vs State of Florida

THE MARSHAL: PLEASE BE SEATED.

NEXT CASE ON THE COURT'SCAL EASTBOUND DAFER IS -- COURT'S CALENDAR IS ROSE VERSUS STATE. MR. ROSENBAUM.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. MY NAME IS RICHARD ROSENBAUM, ON BEHALF OF JAMES FRANKLIN ROSE, WHO IS, ONCE AGAIN, BEFORE THIS COURT, SEEKING REVERSE ALF THE DEATH SENTENCE THAT WAS IMPOSED. IN THIS CASE IT WAS I AM OPPOSED AS DEATH BY ELECTROCUTION. WE ARE HERE FOR A COUPLE OF REASONS. FIRST OF ALL, WHEN THE CASE WENT BACK DOWN, IN FRONT OF JUDGE BACKMAN, THE JURY WAS ALLOWED TO RELY ON AN IMPROPER AGGRAVATOR, IN THIS CASE THE EXPOS FACT-CLAUSE. IN THIS CASE -- THE EXPOS FACT FACT-CLAUSE. IN IT -- FACTO CLAUSE. IN THIS CASE, THE STATE KEPT REFERRING TO LISA BERRY, THE POOR 8-YEAR-OLD GIRL. WE DON'T QUARREL WITH THE FACT THAT THAT FACTOR WOULD COME UP. WHAT WE DO QUARREL WITH IS THAT THE JURY WAS ALLOWED TO FOCUS ON THAT FACTOR AND THAT FACTOR, ALONE, COULD BE USED AS AN AGGRAVATING CIRCUMSTANCE TO WARRANT THE DEATH PENALTY. WE DO CONCEDE THAT THERE WERE FOUR OTHER AGGRAVATORS THAT THE COURT FOUND, ALTHOUGH WE DON'T CONCEDE THAT THOSE FOUR OTHER AGGRAVATORS WERE NECESSARY. BASED ON THE FACTS FROM THE MEDICAL EXAMINER, THIS CHILD COULD HAVE DIED INSTANTLY OR WITHIN FOUR MINUTES THERE. IS NO AGGRAVATOR OTHER THAN THAT ULTIMATELY THE DEATH, WHEN THE CHILD'S BODY WAS FOUND IN A CANAL SOMETIME LATER. THE WHOLE BASIS FOR HOO PMA N IS TO CURE THE ILL OF AN IMPROPER AGGRAVATOR, AND IN THIS CASE THE STATE FOCUSED ON THIS IMPROPER AGGRAVATOR. THE RECORD IS REPLETE, AND I CITED IN MY BRIEF, OVER 20 CASES WHERE THE STATE REFERRED TO THIS 8-YEAR-OLD CHILD. IT IS TRUE WE TAKE OUR VICTIMS AS WE FIND THEM. HOWEVER, FOR THE JURY TO BE TOLD THAT THEY COULD FOCUS ON THAT ONE INSTANCE, THAT FACTOR, OF THE CHILD'S AGE, WHETHER IT WAS THE ADVANCED AGE, WHICH YOU FALL FOUND TO BE EXPOSE FACTO, OR THE CHILD UNDER 12 OR ADVANCED AGE, AS IN HOO PMA N -- HOO PMA N.

WELL,

WHAT THE JUDGE DID, WHEN THIS CASE CAME OUT, WAS TO WEIGH THE AGGRAVATOR FACTOR. IF WE TOOK IT AWAY FROM HOOPMAN AND STILL FOUND IT AS AN AGGRAVATOR, IT WOULD BE FAIR, BUT IT IS OUR CONTENTION THROUGHOUT THE BRIEF AND THE ENTIRE PROCEEDINGS, THAT THAT WOULD BE IMPROPER, AND THAT IS BASED ON AN ADVISORY OPINION FROM THE JURY, AND IN THIS CASE WE DIDN'T GET A BONA FIDE ADVISORY OPINION FROM THE JURY, BECAUSE THEY WERE TAINTED BY THE UNLAWFUL AGGRAVATOR. IF WE LOOK AT THE HISTORY IN THIS CASE. MISTRIAL THE FIRST TIME. A 6-6 DEADLOCK, AND WHAT WE ARGUED OR MY PREDECESSOR ARGUED WAS AN UNFINAL DECISION. AND IT THEN COMES BACK 9-3. THIS IS OVERWHELMING IN THE CASE.

WAS IT BROUGHT TO THE TRIAL COURT'S ATTENTION THAT AGE IS BEING USED TOO MANY TIMES?

YES, SIR. IT WAS BROUGHT, BOTH PRIOR TO THE RESENTENCING PROCEEDING. IT WAS BROUGHT, AFTER THE DEATH SENTENCE HAD BEEN REIMPOSED. IT WAS, THEN, BROUGHT ON A MOTION TO VACATE, PURSUANT TO RULE 3.800, THAT YOU CHANGED THE LAW PERSPECTIVE WITH REGARDS TO WHETHER DEATH CASES COULD BE CORRECTED, BASED ON 3.8006789 BACK WHEN MR. ROSE WAS CONVICTED, SOME 23 YEARS AGO, THAT WAS NOT THE CASE, AND AT THAT POINT IN TIME,

HE COULD BRING UP THESE TYPES OF ERRORS, UNDER 3.800. THE TRIAL COUNSEL TRIED TO PURSUE EACH AND EVERY AVAILABLE REMEDY.

DID THE PROSECUTOR PRESS THIS IN THE ARGUMENT, THOUGH, AS AN AGGRAVATOR, OR DID THE PROSECUTOR JUST TALK ABOUT THE FACT THAT IT WAS A CHILD?

BLOT. HE DID -- BOTH. HE DID STRESS THAT IT WAS AN AGGRAVATOR THAT THE COURT COULD RELY UPON.

REPEATEDLY?

YES.

AND IN THE CLOSING ARGUMENT TO THE JURY.

YES, YOUR HONOR. WE CLAIM THERE ARE A NUMBER OF DIFFERENT IMPROPRIETIES HERE WARRANTING THAT A DEATH SENTENCE COULD BE AFFIRMED. THE FIRST WAS THE HOOPMAN AGGRAVATOR AND SECOND THE RULE UNDER 3.800, WHICH WE HAVE DISCUSSED. THEN WE GET ON TO THE AGGRAVATOR FACTOR ANIMATE GAIT -- AND MITIGATORS, AND WHEN THE JUDGE IGNORED THE DEFENSE EXPERT, DR. JETHROW TUMOR. DR. TUMOR HAD SEVERAL THINGS TO SAY, REGARDING MR. ROSE.

BACK TO YOUR POINT, YOU ARE NOT CONTESTING THAT IT COULD NOT BE HARMLESS ERROR? I MEAN, IT COULD BE HARMLESS ERROR.

THERE HAVE BEEN HARMLESS ERROR-TYPE OF ANALYSIS, SUCH AS IN THE DECISION WHERE THE COURT COMES BACK AND REWEIGHS IT.

WELL, LUKHART JUST RECENTLY CAME OUT, WHERE THERE WAS AN AGGRAVATOR THAT WAS FOUND TO BE NOT -- IT SHOULDN'T HAVE BEEN BEFORE THAT JURY BUT IT WAS FOUND TO BE HARMLESS, CORRECT?

YES, SIR.

THAT IS -- I MEAN, THAT IS A SIMILAR SITUATION HERE.

SIMILAR, ALTHOUGH FACTUALLY DIFFERENT, AND THAT WAS THE REASON THAT I HAVE STRESSED THAT THIS FACTOR BECAME A FEATURE OF THE TRIAL, BECAUSE IN ALL OF THE HARMLESS ERROR-TYPE CASES, IT WASN'T A FEATURE OF THE TRIAL. IT WAS ONE AGGRAVATOR, AND THE COURT COULD SAY, WELL, IF WE SET ASIDE THAT AGGRAVATOR, WHAT ARE WE LEFT WITH? THE THE ZACH DECISION IS FAIRLY ANDAL JUST, AND WE -- ANALOGOUS, AND WE BROUGHT THAT UP. THE IMPROPER AGGRAVATOR WAS STRIPPED A WAY, BUT BECAUSE THE AGE WAS A FACTOR THAT WAS STRESSED UPON BY THE PROSECUTOR AND WAS TOLD, BY THE JURY, THAT THEY COULD RELY UPON THAT IN THEIR SENTENCING RECOMMENDATION, AND BECAUSE OF THAT, IT BECAME A FEATURE OF THE TRIAL. WE BELIEVE THAT THIS IS NOT THE TYPE OF CASE, WHERE SOMEONE SHOULD BE PUT TO DEATH, UNDER A HARMLESS ERROR-TYPE OF ANALYSIS.

HAVE YOU SET OUT IN YOUR BRIEF THE NUMBER OF TIMES THAT THE PROSECUTOR REFERRED TO THIS AS AN AGGRAVATOR IN THE CLOSING ARGUMENT?

I SET FORTH, IF IN A FOOTNOTE, THE NUMBER OF TIMES THAT THE PROSECUTOR REFERRED TO HER AS A CHILD AND TO HER AGE. I DIDN'T SET FORTH THE NUMBER OF TIMES THAT IT WAS SET FORTH AS AN AGGRAVATOR OR ARGUED AS AN AGGRAVATOR, BUT I WOULD BE HAPPY TO DO SO, IN A SUPPLEMENTAL MEMORANDUM, IF THE COURT DESIRES.

THERE IS A CONSIDERABLE DIFFERENCE, THOUGH, THAT IT TRULY IS. YOU CAN'T -- YOU CANNOT ESCAPE THE ABSOLUTE FACT, HERE, THAT THIS WAS A CHILD EIGHT YEARS OLD. I MEAN, THAT IS -- AND SO THAT CANNOT BE A PROBLEM, WITH REFERRING TO THAT, AND EMPHASIZING THAT FACT. AS I UNDERSTAND YOUR POINT, IS THAT IT IS THE RELIANCE UPON THAT FACT, IN CONNECTION WITH IT BEING AN AGGRAVATOR, THAT, NOT THAT SIMPLE REFERENCE TO THE CHILD THE FACT THAT THE CHILD IS EIGHT YEARS OLD.

THAT IS TRUE, JUSTICE, AND WE TAKE OUR VICTIM HOWEVER WE FIND THEM, BUT IF YOU FOCUS ON THE INSTRUCTIONS THAT THE ADVISORY JURY WAS GIVEN, THEY WERE TOLD YOU CAN FIND ANY NUMBER OF AGGRAVATORS. THERE IS NO SPECIFIC NUMBERS, AND WE NEED FOR YOU TO RECOMMEND WHAT THE VOTE IS GOING TO BE, WITH REGARD TO LIFE OR DEATH, AND IN THIS CASE WE CAN'T TELL WHETHER THE JURY FOCUSED ON THE PROPER AGGRAVATOR OR THE IMPROPER AGGRAVATOR. WE JUST DON'T KNOW, AND IF WE SEND JIM ROSE TO THE ELECTRIC CHAIR, WE DON'T KNOW WHAT IS GOING ON IN THE JURY'S MIND.

ISN'T THAT THE CASE, ANY TIME THAT WE STRIKE AN AGGRAVATOR? HOW IS THIS DIFFERENT FROM ANY CASE THAT WE STRIKE AN AGGRAVATOR. WE NEVER KNOW WHICH AGGRAVATORS THAT THE JURY ACTUALLY FOCUSED ON.

WELL, JUSTICE QUINCE, TO SOME EXTENT YOU ARE CORRECT. HOWEVER, IN THIS CASE, BECAUSE OF THE FEATURE OF THE TRIAL, AND BECAUSE THIS BECAME SUCH AN IMPORTANT ISSUE, THIS IS NOT A SIMPLE CASE OF STRIPPING AWAY ONE AGGRAVATOR AND SEEING WHAT IS LEFT. EACH OF THE AGGRAVATORS THAT WERE LEFT WERE CONTESTED, ESPECIALLY THE HAC AGGRAVATOR, BUT THIS IS NOT A CASE LIKE LIKE ANY THAT HAVE EVER BEEN IN FRONT OF THIS COURT. FIRST OF ALL --

IF THE PROSECUTOR, ASSUMING THERE IS NO AGGRAVATOR ABOUT THE AGE OF THE CHILD, AND THE PROSECUTOR MADE THIS TYPE OF ARGUMENT ABOUT -- KEEP IN MIND THIS IS AN EIGHT-YEAR-OLD CHILD THAT HE KILLED, WHERE WOULD WE BE THEN? IF HE FEATURED IT, JUST AS YOU ALLEGE HE FEATURED IT IN THIS ARGUMENT OR HIS PRESENTATION, WHERE WOULD WE BE? WOULD YOU HAVE ANY ARGUMENT THAT HE IMPROPERLY FEATURED THAT PART OF THE CASE OVER ANYTHING ELSE?

I DON'T BELIEVE THAT I WOULD PREVAIL, UNDER A 90.403 TYPE OF PREJUDICE, PROBATIVE VALUE TYPE OF ANALYSIS, UNDER THAT SCENARIO. I HAVE MY OTHER ARGUMENTS THAT I HAVE RAISED, THAT ARE CRUCIAL WITH REGARD TO THE HOOPMAN ISSUE. I THINK IT WOULD BE PROPER FOR THE PROSECUTOR TO SAY THAT LISA BERRY WAS AN EIGHT-YEAR-OLD CHILD. I THINK THE JUDGE COULD SAY, IF YOU FIND ON AGE ALONE, THAT COULD BE ENOUGH TO ARGUE THE DEATH PENALTY, AND I DON'T THINK THE JUDGE COULD GO AND LOOK BACK ON THIS AND SEGREGATE WHAT WAS IN THE JURY'S MIND, WHEN THEY WERE TOLD THAT THIS WAS AN IMPROPER AGGRAVATOR. THAT IS WHAT, I THINK, DISTINGUISHS THIS CASE FROM ANY OTHER CASE THAT HAS BEEN IN FRONT OF YOU.

WAS THAT KIND OF STATEMENT MADE, REGARDING ANY OF THE OTHER AGGRAVATORS?

THE JURY WAS TOLD THAT THERE WAS NO SPECIFIC NUMBER OF AGGRAVATORS THAT IT TOOK FOR THE JURY TO MAKE THE RECOMMENDATION. SO THIS WAS JUST LIKE ANY OTHER AGGRAVATOR. IT WAS GIVEN THE SAME WEIGHT AS ANY AGGRAVATOR, SUCH AS HEINOUS, ATROCIOUS OR CRUEL. IT IS OUR CONTENTION THAT THE TRIAL JUDGE OR THE SENTENCING JUDGE, IN THIS CASE, ACTUALLY DISREGARDED EXCELLENT EVIDENCE OF MITIGATION THAT CAME OUT THROUGH DR. JETHROW TUMOR. DR. TUMOR HAS BEEN THROUGH THE COURT SYSTEM AND HAS REPRESENTED A NUMBER OF INDIVIDUALS CHARGED WITH CAPITAL CRIMES MUCH THE PROSECUTOR WAS PERMITTED, OVER DEFENSE OBJECTION WHICH WAS TIMELY, TO START GOING THROUGH WHICH CASES THE DOCTOR HAD BEEN INVOLVED IN, THERE BY TRYING TO PREJUDICE

THE JURY AGAINST THE CAUSES THAT THE DOCTOR WAS THERE, PROVIDING EXPERT OPINION ABOUT.

WHY IS THAT IMPROPER, TO CROSS-EXAMINE A WITNESS ON THE MONETARY ASPECTS OF WHEN THEY HAVE BEEN INVOLVED AS AN EXPERT WITNESS? MAYBE THAT IS JUST WHAT THEY ARE IS AN EXPERT WITNESS. WHAT IS WRONG WITH, IN TESTING WHETHER IT BE FOR THE STATE OR FOR THE DEFENSE?

IF THAT WERE THE ONLY ISSUE THAT WAS CROSS-EXAMINED, YOU WOULD BE CORRECT ON THAT. THERE IS NO PROBLEM WITH ASKING IF SOMEONE WAS PAID TO REPRESENT A CAUSE. HOWEVER, IF I AM BRINGING IN THE PERSON WHO HAS REPRESENTED TED BUNDY, DANNY ROLLING, PEOPLE OF THAT NATURE, AND I AM USING THAT TO TRY TO INFLAME THE JURY AGAINST THE CAUSE THAT THIS DOCTOR IS TESTIFYING ABOUT, THAT IS IMPROPER. THAT CAN'T PASS A 90.403 ANALYSIS, AND THIS WAS TIMELY OBJECTED TO. THIS WAS NOT SOMETHING THAT JUST SKATED BY THE TRIAL COUNSEL. THIS WAS SOMETHING THAT WAS OBJECTED TO. IT WAS BROUGHT TO THE COURT'S ATTENTION. THE COURT THOUGHT ABOUT IT AND ALLOWED THE EVIDENCE. NOW, DR. TUMOR HAD EVIDENCE TO GIVE, CONCERNING THE DEFENDANT'S ALCOHOLISM, CONCERNING THE FACT THAT HE HAD A VERY LOW IQ, CONCERNING OTHER MITIGATORS, ALTHOUGH NOT STATUTORY MITIGATORS. THERE WERE SEVERAL NONSTATUTORY MITIGATORS. MR. ROSE COOPERATED WITH LAW ENFORCEMENT AND HELPED MAKE CASES ON THREE DEFENDANTS. HE PUT OUT A FIRE IN THE PRISON THAT HELPED SAVE NUMEROUS LIVES. THESE ARE THE TYPES OF FACTORS, THAT ALTHOUGH THEY ARE NOT STAT OTHER MITIGATE ON, -- STATUTORY MITIGATORS, THEY ARE NONSTATUTORY MITIGATORS, AND ONCE YOU STRIP AWAY THE HOOPMAN IMPROPER MITIGATOR, YOU CAN, NOW, LOOK AT THESE AGGRAVATORS IN A DIFFERENT LIGHT, AND AT THAT POINT THEY RISE TO A DIFFERENT LEVEL, A LEVEL THAT MIGHT WARRANT A LIFE PENALTY, AS OPPOSED TO THE DEATH PENALTY.

COULD YOU TELL US WHAT EVIDENCE DOES SUPPORT THE FACT THAT THIS YOUNG VICTIM WAS CONSCIOUS AT, PRIOR TO -- DURING THE POINT -- DURING THE ACTUAL MURDER?

WELL, JUSTICE PARIENTE, I DID ADDRESS THIS, AT PAGE 16 OF MY REPLY BRIEF, AND BASICALLY THE EVIDENCE FROM THE MEDICAL EXAMINER WAS THAT THE CHILD COULD HAVE BEEN ALIVE FROM FOUR TO EIGHT MINUTES. THE CHILD COULD HAVE DIED INSTANTANEOUSLY.

ALIVE. WHAT ABOUT CONSCIOUSNESS, BECAUSE BEING ALIVE, IF THE VICTIM WAS -- WHAT WAS SAID ABOUT THE CONSIDERATIONNESS?

THERE WAS NOTHING -- THE CONSCIOUSNESS?

THERE WAS NOTHING CONCRETE. MY MEMORY IS THAT THE CHILD COULD HAVE LOST CONSCIOUSNESS VERY QUICKLY. I BELIEVE THAT THAT MIGHT BE THE FOUR TO EIGHT-MINUTE AREA THAT THE DOCTOR TESTIFIED ABOUT. I DON'T THINK THERE WAS ANY DEFENSE EVIDENCE TO THE CONTRARY. WE ARE LEFT WITH THE MEDICAL EXAMINER'S EVIDENCE AS UNDISPUTED.

BUT WHAT ABOUT THE SIGNIFICANCE OF HER NOT HAVING CLOTHES ON, AT THE TIME THAT SHE WAS MURDERED? IS THAT -- AS FAR AS IN THE HAC, ANALYSIS, AS TO WHAT SHE KNEW WAS HAPPENING TO HER?

WELL, WE DON'T KNOW, NUMBER ONE, WHETHER SHE WAS CLOTHED AT THE TIME OF THE MURDER OR WHETHER SHE WASN'T. NOW --

ISN'T THERE SOME INFERENCES ABOUT THE BLOOD ON HER BODY, VERSUS THE CLOTHES, THAT SUPPORTS AN INFERENCE FRENS THAT -- AN INFERENCE THAT SHE DID NOT HAVE CLOTHES ON?

ALL CIRCUMSTANTIAL EVIDENCE. THE PROSECUTOR, AT THE TRIAL COURT LEVEL, MADE MUCH

ADO ABOUT THE FACT THAT THE CHILD WAS FOUND NAKED IN THE CANAL. THEY TRIED TO INFER THAT THERE HAD BEEN SOME SEXUAL ASSAULT THAT HAD OCCURRED, ALTHOUGH THERE WAS NO EVIDENCE TO SUPPORT THAT. THERE WERE NO MEDICAL FINDINGS. THERE WERE NO FLUIDS FOUND, AS TESTIFIED TO BY THE MEDICAL EXAMINER. THERE WAS NOTHING TO BASE ANY INFERENCE FRENS OF THE SEXUAL -- INFERENCE OF THE SEXUAL ASSAULT, AND WE REGARD THAT AS IMPROPER ERROR, TO MAKE THE INFERENCE THAT A SEXUAL ASSAULT HAD OCCURRED. WE HAVE A NUMBER OF POINTS IN OUR BRIEF. I WILL SAVE MY TIME FOR THOSE AND RESERVE TO REBUTTAL. THANK YOU.

> GOOD MORNING. MAY IT PLEASE THE COURT. LESLIE CAMPBELL, ASSISTANT ATTORNEY GENERAL FOR FLORIDA. FOR THE APPELLEE.

COULD YOU POINT OUT THE EVIDENCE THAT SUPPORTS THE HACK AGGRAVATOR, IN THIS CASE?

YES, YOUR HONOR. THERE ARE SEVERAL FACTORS. FIRST OF ALL, LOOK NOT ONLY AT THE MEAD TIME OF DEATH OR HOW LONG IT TOOK FOR THE CHILD TO DIE, BUT YOU LOOK AT THE EVENTS THAT LED UP TO THAT DEATH. NOW, WE HAVE THIS EIGHT-YEAR-OLD CHILD, TAKEN FROM HER MOTHER, WHO WAS AT A BOWLING ALLY, BY HER MOTHER'S EX-BOYFRIEND. SHE IS TAKEN APPROXIMATELY TEN MILES FROM THE BOWLING ALLY. SHE IS STRIPPED OF HER CLOTHES, AND I WOULD SAY THAT THE INFERENCE THAT HER CLOTHES CONTAINED THE DEFENDANT'S BLOOD BUT DID NOT CONTAIN HER OWN BLOOD --

DO WE HAVE ANY EVIDENCE, BEFORE YOU GET TOO FAR, AND YOU ARE STRESSING SHE WAS TAKEN FROM THIS BOWLING ALLY, BUT DO WE HAVE ANY EVIDENCE TO SUPPORT, EITHER WAY, WHETHER SHE WAS TAKEN BY FORCE OR WHETHER, YOU KNOW, HE MAY HAVE LURED HER INTO GOING AWAY WITH HIM OR WHATEVER?

I THINK IT MATTERS NOT, WHETHER OR NOT SHE WAS TAKEN BY FORCE IN THIS PARTICULAR CASE OR IF SHE WAS LURED AWAY. THE FACT IS SHE WAS TAKEN FROM HER MOTHER, AND AT SOME POINT IN TIME, IT IS OBVIOUS THAT SHE WOULD NOT HAVE ACCEPTED BEING DISROBED AND HIT IN THE HEAD WITH A HAMMER. AT SOME POINT IN TIME, IT DEFINITELY BECAME A KIDNAPPING AND DEFINITELY BECAME SOMETHING VIOLENT, SO THEREFORE, GIVEN THAT THERE WAS A KIDNAPPING AND GIVEN THAT THERE WAS VIOLENCE INVOLVED, YOU CAN LOOK AT THAT TERROR THAT THAT CHILD MUST HAVE FELT, WHILE MR. ROSE WAS --

BUT DON'T WE GET, AT THAT POINT, INTO THE REALM OF SPECULATION. THAT IS WHAT PROOF IS THERE ABOUT ANY OF THAT?

ANY OF THE VIOLENCE?

NO. NOT VIOLENCE. OBVIOUSLY THIS BODY WAS TERRIBLY VIOLENTLY ABUSED AND THE DEATH OF THE CHILD. I AM TALKING ABOUT THE SPECULATION OF ACTUALLY, YOU KNOW, WHAT OCCURRED, AND ISN'T IT, ALL, PRETTY MUCH JUST SPECULATION? AND THAT IS WHY I AM ASKING YOU FOR EVIDENCE, YOU KNOW, THAT WOULD SUPPORT HOWEVER WE DESCRIBE HACK.

YES, YOUR HONOR. HER CLOTHES WERE REMOVED WITH FORCE, AND THAT IS OBVIOUS FROM THE BROKEN ZIPPER OF HER PANTS. THEY WERE NOT TAKEN OFF, AT LEAST HER PANTS WERE NOT TAKEN OFF EASILY. THERE WAS EVIDENCE, IN THE VAN, OF --

HOW DO WE KNOW WHEN THE ZIPPER WAS BROKEN?

THERE IS TESTIMONY FROM HER PARENTS THAT THE ZIPPER WASN'T.

WAS IN GOOD SHAPE.

YES. SHE WAS DRESSED WELL THAT EVENING. SO WHEN THE PANTS ARE FOUND, THE ZIPPER IS BROKEN. THE LOGICAL INFERENCE IS THAT IT WAS BROKEN, WHEN THE PANTS WERE REMOVED.

HOW DO WE KNOW WHEN IT WAS BROKEN? HOW DO WE KNOW, FOR INSTANCE, THAT THE DEFENDANT DIDN'T TAKE IT AND BREAK THE ZIPPER?

AFTER HE REMOVED THE PANTS?

YES. IN OTHER WORDS WE DON'T KNOW THAT, DO WE?

WE DON'T KNOW FOR A FACT, BUT THE LOGICAL INFERENCE IS THAT THE ZIPPER WAS BROKEN AS THE PANTS WERE BEING REMOVED. IT DOESN'T -- IT DOESN'T APPEAR LOGICAL THAT HE WOULD BREAK THE ZIPPER OF THOSE PANTS, JUST FOR THE SAKE OF BREAKING THE ZIPPER. THE LOGICAL INFERENCE IS THAT THE ZIPPER WAS BROKEN, AS THE PANTS WERE BEING REMOVED, AND, OBVIOUSLY, THAT IS -- THAT GOES TO HAC. SHE IS SUFFERING TERROR, AS SHE IS BEING VIOLATED, NOT NECESSARILY IN A SEXUAL SENSE.

HOW DO WE KNOW SHE WASN'T KNOCKED UNCONSCIOUS, WHILE ALL OF THIS WAS GOING ON?

THE MEDICAL EXAMINER'S TESTIMONY WAS THAT THE BLOW TO THE TEMPLE WOULD HAVE BLED, AND HER -- THE VICTIM'S BLOOD, LISA'S BLOOD IS NOT ON HER CLOTHES. LISA'S BLOOD IS THROUGHOUT VAN. LISA'S BLOOD IS ON THE DEFENDANT'S PANTS, BUT IT IS NOT ON HER CLOTHES. SO HER CLOTHES MUST HAVE BEEN REMOVED BEFORE SHE WAS HIT IN THE HEAD, AND THAT MEANS SHE WAS CONSCIOUS WHEN HER CLOTHES WERE REMOVED.

HAVE WE FOUND, LIKE, IF THERE WAS A SITUATION WHERE THERE HAD BEEN A SEXUAL BATTERY, PRECEDING A MURDER, BUT THERE IS -- THAT THERE WERE TWO DISCREET ACTS, HAVE WE FOUND CASES WHERE THE FACT THAT THERE IS A PRECEDING SEXUAL BATTERY IS -- WOULD SUPPORT A FINDING OF HAC OF THE MURDER?

WE -- I HAVEN'T FOUND ANY CASES THAT SAID THAT THERE WAS -- THAT JUST DISROBING SOMEBODY WOULD HAVE BEEN -- WOULD HAVE SHOWN HAC, BUT IT IS NOT JUST DISROBING. IT IS THE TERROR THAT PRECEDES. IT IS EVERYTHING THAT GOES INTO THE CRIME, BEFORE THE ACTUAL MURDER.

OKAY. BUT IF WE KNEW, AND, AGAIN, THIS IS -- THESE DETAILS ARE JUST AWFUL DETAILS, BUT IF WE KNEW THAT WHAT HAD HAPPENED, HERE, WAS THAT THIS LITTLE GIRL HAD BEEN DISROBED, OBVIOUSLY A HORRIBLE, TERRIBLE EXPERIENCE, AND THEN SHOT IN THE HEAD, WOULD THERE BE ENOUGH FOR HAC?

I WOULD ARGUE THAT THERE WOULD BE.

AND WHAT IS THE CLOSEST CASE THAT WOULD SUPPORT THAT?

AS I SAID, I HAVEN'T FOUND ONE WHERE THERE WASN'T SOME SORT OF SEXUAL ABUSE, PRIOR TO THE MURDER, BUT THE CASES THAT COME THE CLOSEST TO THAT WOULD BE SCHWAB, AND RIVERA, WHERE THERE IS TERROR PRECEDING THE DEATH, WHERE THE VICTIM IS TAKEN, SAY, TO A WOODED LOCATION, WHERE THE DEFENDANT IS TAKEN -- EXCUSE ME -- THE VICTIM IS TAKEN TO A SECLUDED LOCATION AND FORCED TO MOVE FROM SAFETY TO THIS EXCLUDED LOCATION AND THEN KILLED.

BUT ISN'T THAT BASED ON THAT THEY ARE AWARE OF THEIR IMPENDING DEATH, AND AREN'T THERE, ALSO, DHAZ, IF THE VICTIM IS REASSURED THAT NOTHING IS GOING TO HAPPEN, THAT THAT, ALSO, THAT WOULD GO THE OTHER WAY, THAT THERE WOULD NOT BE THIS AGGRAVATOR, AND WE DON'T -- I GUESS THE POINT IS WE DON'T KNOW, HERE, BECAUSE THERE IS NO

TESTIMONY, SO HOW DO WE INFER, FROM THE FACT OF REMOVAL OF CLOTHES, THAT THERE WAS KNOWLEDGE AND TERROR OF IMPENDING DEATH?

I THINK THE REASONABLE CONCLUSION IS THAT, IF YOU ARE SECRETED AWAY FROM YOUR PARENTS, EVEN IF IT IS BY A KNOWN PERSON, AND I WOULD DIRECT THE COURT TO SCHWAB, THAT, AT SOME POINT, THERE IS TERROR. THERE IS KIDNAPPING. AND THE ADDITIONAL VIOLATION OF BEING DISROBED BY A 31-YEAR-OLD MAN IS DEFINITELY GOING TO BE SOME SORT OF TERROR, AND THEN, WHEN THE HAMMER COMES OUT AND IT IS PLACED DOWN ON THE CHILD'S HEAD, SHE KNOWS SHE IS FACING, EITHER, IMPENDING DEATH OR GREAT INJURY. SHE --

SO DOES THAT MEAN THAT ANY TIME SOMEONE -- THERE IS TESTIMONY THAT IS ESTABLISHED, THAT THE VICTIM SEES SOMEBODY A TAKE OUT A GUN, THAT, BECAUSE THERE IS OBVIOUSLY GOING TO BE TERROR PRECEDING THE GUN SHOT, GUN AGAIN, WE ARE TALKING ABOUT AN UNIQUE AGGRAVATING CIRCUMSTANCE, THAT THAT IS GOING TO BE ENOUGH FOR THERE TO BE THE ADDITIONAL AGGRAVATOR OF HAC?

JUST SAY SEEING THE GUN, I WOULD SAY NO, BUT IT IS EVERYTHING THAT IS INVOLVED WITH THAT VIEWING OF THE WEAPON. SHE NAKED. SHE IS VULNERABLE. SHE IS A WAY FROM FRIENDS AND FAMILY. SHE IN A REMOTE LOCATION. THAT DEFINITELY IS TERROR -- TERRIFYING TO A CHILD. SHE IS OUT IN A VERY DARK AREA OF BROWARD COUNTY, TEN MILES FROM HER MOTHER. THERE HAS TO BE TERROR.

I MEAN, OBVIOUSLY THAT SHE IS EIGHT YEARS OLD, BUT WOULD ANYBODY THAT IS TAKEN AWAY, AGAINST THEIR WILL, AND SUBJECTED TO A SITUATION WHERE THEY DON'T KNOW WHAT IS GOING TO HAPPEN TO THEM, I MEAN, THERE WOULD BE TERROR IN ANY OF THOSE SITUATIONS?

I AGREE. THERE WOULD BE TERROR.

THAT WOULD SUPPORT HAC, IN ANY OF THOSE CASES.

I WOULDN'T GO SO FAR AS TO SAY JUST TERROR WOULD SUPPORT HAC, BUT, AS I SAY, IT IS EVERYTHING LEADING UP TO THE ACTUALLY, THE ACTUAL MURDER, SO SHE IS TERRIFIED, FROM -- SHE COULD BE TERRIFIED, FROM THE TIME THAT THEY GET IN THE VAN AND LEAVE. SHE COULD BE TERRIFIED, AT THE TIME THAT HER CLOTHES ARE REMOVED. AND SHE IS TERRIFIED AT THE TIME THAT SHE SEES THE MURDER WEAPON.

AT WHAT EVIDENCE IS THERE THAT SHE SAW THE MURDER WEAPON?

SHE IS HIT IN THE SIDE OF THE HEAD. SHE WOULD HAVE PERIPHERAL VISION. SHE WOULD HAVE SEEN THAT. SHE IS, ALSO, HIT --

DID THE MEDICAL EXAMINER TESTIFY TO THAT?

NO. BUT IF LOGIC DICTATE THAT, IF YOU ARE HIT IN THE SIDE OF THE HEAD, THAT YOU ARE GOING TO SEE THE MURDER WEAPON. SHE IS NOT HIT IN THE BACK OF THE HEAD. THE BACK OF THE HEAD CAME LATER.

ARE WE SPECULATING AS TO WHETHER OR NOT THAT SHE SAW THE MURDER WEAPON, THAT SHE SAW HIM DO THAT TO HER?

WE WOULD HAVE EYEWITNESS, YES, BUT I THINK THE LOGICAL INFERENCE THAT CAN BE DRAWN FROM ALL OF THE EVIDENCE, ALL OF THE BLOOD EVIDENCE AND ALL OF THE EVIDENCE WHERE HER CLOTHES WERE FOUND SCATTERED TEN MILES BETWEEN THE BOWLING ALLY AND WHERE SHE WAS KILLED, AND THE FACT THAT SHE WAS FOUND DISROBED, WE COULD MAKE INFERENCE THAT THERE WAS HAC IN THIS CASE. NOW, THE FACT THAT THE STATE COULDN'T PROVE, BEYOND

A REASONABLE DOUBT, THAT THERE WAS A SEXUAL BATTERY, IS THE FACT --

DID THE STATE ATTEMPT TO PROVE SEXUAL BATTERY? I THOUGHT THE TRIAL COURT RULED THAT THE STATE WAS PRECLUDED FROM REFERRING TO THAT IN ANY WAY.

THAT IS CORRECT. THAT IS CORRECT.

SO IN THIS CASE, THERE IS NO, EVEN, A CLAIM, IS THERE? TO SEXUAL BATTERY.

NONE. BUT I JUST WISH TO POINT OUT THAT THE BODY WAS FOUND FOUR DAYS LATER AND A SEXUAL RAPE KIT WAS DONE, AND BECAUSE OF THE AGE OF THE -- THE TIME THAT THE VICTIM WAS IN THE WATER, THERE WAS NO CONCLUSIVE EVIDENCE, ONE WAY OR THE OTHER, BUT WE --

SO WHAT -- WHAT POINT ARE YOU TRYING TO ESTABLISH BY THAT?

ALL I AM TRYING TO SAY IS THAT THE STATE DID NOT USE THAT EVIDENCE AS THE DEFENSE WOULD HAVE YOU BELIEVE. DID NOT USE ANY SEXUAL BATTERY.

ON THE ISSUE THAT THE STATE IMPROPERLY ALLUDED TO --

SEXUAL BATTERY.

OKAY. WHAT WAS THE -- I AM TRYING TO REMEMBER THE CLAIM HERE, AS FAR AS THE TESTIMONY OF ONE OF THE DETECTIVES. WAS IT JUST ABOUT THE BROKEN ZIPPER?

YES. YES, YOUR HONOR.

WAS THAT THE EXTENT OF IT?

THAT WAS THE EXTENT, AS FAR AS THE SEXUAL BATTERY TO THE VICTIM, AS THE DEFENSE WOULD HAVE YOU DRAW THAT INFERENCE.

THAT IS ALL THE JURY HEARD, WAS THAT THE ZIPPER -- ON A BROKEN ZIPPER IS A BROKEN ZIPPER. THEY CAN DRAW WHATEVER INFERENCE THEY WISH.

DO YOU AGREE THAT THE GUZMAN CASE, AS WELL AS OTHERS, THAT WHAT WE ARE TALKING ABOUT, WITH THIS PARTICULAR AGGRAVATOR, IS THAT IT APPLIES ONLY WITHIN TORT YURS MURDERS THAT EXHIBIT EXTREME AND OUTRAGEOUS DEPRAVITY, THAT EXEMPLIFY A HIGH DEGREE OF PAIN OR UTTER INDIFFERENCE TO THE ENJOYMENT OF ANOTHER?

YES.

THAT IS WHAT WE ARE LOOKING AT, HERE, IS NOT THAT THIS IS A TERRIBLE CRIME BUT WHY IT WOULD BE CATAGORIZED AS BEING AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER.

YES, AND I WOULD SUBMIT THAT THIS, THE EVENTS THAT SURROUND THIS MURDER AND KIDNAPPING, CERTAINLY, FALL INTO THAT. IT IS HEINOUS, ATROCIOUS AND CRUEL, TO TAKE THIS CHILD, SECRET HER AWAY, REMOVE HER CLOTHES, BEAT HER, AND THEN --

BUT THE SECRETING AWAY GOES TO THE KIDNAPPING, WHICH IS A SEPARATE AGGRAVATOR, SO WE DON'T WANT TO BE DOUBLING. THE FACT THAT SHE IS TAKEN AWAY TO ANOTHER LOCATION, AFFECTS THE OTHER AGGRAVATOR OF IT BEING A KIDNAPPING. CORRECT.

YES, BUT IT, ALSO, IS THE TERROR THAT IS INVOLVED. AS FAR AS THE HOOPMAN ISSUE IS CONCERNED, THE TRIAL COURT DID A VERY GOOD ANALYSIS OF THAT, WHEN IT STRUCK THAT AGGRAVATOR. IT FOUND THAT THERE WERE FOUR AGGRAVATORS REMAINING, AND THEY WERE

PRETTY STRONG AGGRAVATORS. HAC, PRIOR VIOLENT FELONY, MR. ROSE WAS ON PAROLE, AT THE TIME THAT HE KIDNAPPED AND MURDERED LISA BERRY, AND, ALSO, WE HAVE THE KIDNAPPING, WHICH IS THE FELONY MURDER. AGAINST THESE, THE TRIAL COURT FOUND TEN NONSTATUTORY MITIGATORS. ONE OF WHICH WAS THE MENTAL AND EMOTIONAL DISTRESS OF THE DEFENDANT AT THE TIME.

WHAT ABOUT THE JURY'S ROLE IN THIS, HOWEVER, THAT IS THAT THE JURY WAS GIVEN AN INSTRUCTION ON THIS AGGRAVATOR? IS THAT CORRECT?

YES, THEY WERE.

SO WHAT ABOUT THE EFFECT OF GIVING AN IMPROPER AGGRAVATOR ON THE JURY? AND SPECIFICALLY WHAT -- WOULD YOU ADDRESS THE QUESTIONS THAT WE ASKED YOUR OPPONENT, WITH REFERENCE TO WHETHER THE PROSECUTOR ALLUDED TO THIS AGGRAVATOR, DURING THE COURSE OF HIS ADDRESS TO THE JURY.

YES, THE PROSECUTOR DID MENTION, TO THE JURY, THAT THIS AGGRAVATOR HAD BEEN PROVEN. HOWEVER, HE, ALSO, IS PERMITED TO CHARACTERIZE THE VICTIM AS SHE IS. SHE IS AN EIGHT-YEAR-OLD GIRL. AND THAT WAS NEVER OBJECTED TO.

YOUR OPPONENT SUGGESTS THAT THE PROSECUTOR MADE A MAJOR ISSUE OUT OF THIS AGGRAVATOR, TO THE JURY. IS HE CORRECT, IN THAT ASSESSMENT?

I THINK THAT IS OVERSTATING THE CASE. YES, HE DID ALLUDE -- HE HE DID MENTION THE AGGRAVATOR. HE MAY HAVE MENTIONED MORE THAN ONCE. HOWEVER, IN JUST GENERAL EVIDENCE THAT CAME FORWARD DURING THE PENALTY PHASE, THE JURY WAS MADE AWARE OF THE AGE AND SEX OF THE CHILD. THAT IS JUST A FACT THAT WE -- THAT IS A FACT OF THE CASE. THERE IS NO WAY TO EXCISE THAT FROM THE CASE.

WE KNOW, IN PREVIOUS JURIES, THOUGH, THAT WEREN'T TOLD THAT THIS WAS AN AGGRAVATOR, THAT THE VOTES WERE DIFFERENT.

YES. 7 TO 5 ON THE FIRST JURY BUT 11 TO 1 ON THE SECOND JURY.

6 TO 6 ON THE FIRST JURY. IS THAT CORRECT?

AT ONE POINT, BEFORE THEY CAME UP WITH A RECOMMENDATION, YES, THEY HAD MENTIONED THAT THEY BELIEVED THEY WERE DEADLOCKED. HOWEVER, THIS COURT, ON TWO SEPARATE OCCASIONS, SAID THAT THAT IS OF NO MOMENT. THERE WAS NO RECOMMENDATION, AND THEY HAVE REJECTED THAT CONTENTION TWICE.

RIGHT. BUT THOSE WERE JURIES THAT DIDN'T HAVE AN INSTRUCTION THAT THIS WAS AN AGGRAVATOR THAT THEY COULD CONSIDER.

THAT IS CORRECT. AND YOU, STILL, HAD A DEATH RECOMMENDATION. IN FACT, ONE DEATH RECOMMENDATION WAS 11 TO 1.

DOES THE STATE AGREE THAT THERE COMES A TIME WHEN MENTION OF AGE BECOMES TWO PREJUDICIAL OR -- DO YOU AGREE THAT THAT CAN EVER HAPPEN? OR IS THE STATE'S POSITION THAT THE CHILD IS EIGHT YEARS OLD, AND NO MATTER HOW MANY TIMES THE STATE MENTIONS THE AGE, THERE WOULD BE NO ERROR.

IN ANSWER TO YOUR QUESTION, YOUR HONOR, NEVER IS IT TOO STRONG OF A WORD -- NEVER IS TOO STRONG OF A WORD. I WOULD NOT SAY THAT THIS COULD NEVER, EVER HAPPEN. HOWEVER, THE VICTIM IS WHAT THE VICTIM S YOU COULD HAVE A 97-YEAR-OLD GENTLEMAN THAT HAS

BEEN MURDERED, AND THAT IS NOT PREJUDICIAL. YOU COULD MENTION A GRANDMOTHER WITH A LARGE FAMILY. YOU COULD MENTION THAT SEVERAL TIMES, AND THAT IS NOT PREJUDICIAL. YOU MUST TAKE THE VICTIM AS YOU FIND THEM.

WITHOUT THIS INSTRUCTION, HOWEVER, THE DEFENDANT COULD ARGUE TO THE JURY THAT, IF THEY ARE TO FOLLOW THE INSTRUCTIONS OF THE COURT, THEY MAY NOT CONSIDER THE AGE OF THE VICTIM AS AN AGGRAVATOR OR AN AGGRAVATING CIRCUMSTANCE. WOULDN'T THAT BE CORRECT?

IF THERE WAS NO AGGRAVATOR?

RIGHT. THE COURT TELLS THEM THAT THEY CAN ONLY CONSIDER THE AGGRAVATORS THAT THE COURT GIVES THEM. IS THAT CORRECT?

THAT IS CORRECT.

AND SO A DEFENDANT COULD PROPERLY ARGUE THAT THEY ARE NOT TO CONSIDER THAT AS AN AGGRAVATING CIRCUMSTANCE.

YES.

ABS THIS INSTRUCTION THAT IS GIVEN -- ABSENT THIS INSTRUCTION THAT IS GIVEN HERE.

ABSENT THAT INSTRUCTION. HOWEVER --

BUT THE DEFENDANT COULDN'T DO THAT IN THIS CASE.

NO, HE COULD NOT. HOWEVER, AS IS VERY CLEAR, FROM ALL OF THE TESTIMONY, THE JURY KNEW THE AGE OF THE CHILD, IN THE SECOND RETRIAL, EXCUSE ME, IN THE SECOND PENALTY PHASE, AND THEY CAME UP WITH A 11 TO 1 VOTE FOR DEATH.

ARE YOU SUGGESTING THAT THE JURY IMPROPERLY CONSIDERED THAT, AS AN AGGRAVATOR?

NO, NOT AT ALL, BUT I AM JUST SAYING THAT, EVEN WITHOUT THAT AGGRAVATOR, THEY THOUGHT THAT THE VALID AGGRAVATORS AT THAT TIME WERE SUFFICIENT TO RECOMMEND DEATH. THE COURT, ALSO, THE TRIAL COURT, ALSO, MADE NOTE THAT IT HAD NOT GIVEN DISPARATE WEIGHT TO THIS PARTICULAR AGGRAVATOR THAT WAS, LATER, STRUCK, AND IN REWEIGHING THE REMAINING AGGRAVATORS AND MITIGATORS, IT FELT THAT THERE WAS -- THAT THE DEATH SENTENCE WAS STILL APPROPRIATE.

BUT HOW DO WE KNOW THE JURY WENT THROUGH THAT SAME ANALYSIS?

WELL, OBVIOUSLY THE JURY DIDN'T HAVE THE BENEFIT OF THIS, OF BEING GIVEN THIS INFORMATION, BUT THIS COURT WOULD HAVE DONE THAT SAME ANALYSIS, WHETHER OR NOT THE TRIAL COURT ACTUALLY DID THE ANALYSIS BEFORE. IF AN AGGRAVATOR IS STRUCK, THIS COURT CAN SAY THIS AGGRAVATOR SHOULD BE STRUCK, AND IN REWEIGHING THE REMAINING AGGRAVATORS AND MITIGATORS, WE FIND THAT THE DEATH PENALTY IS PROPORTIONATE. HERE WE HAVE THE ADDITIONAL BENEFIT OF THE TRIAL COURT'S REASONING, AND THE TRIAL COURT WAS THE ONE WHO HEARD ALL OF THE EVIDENCE, WITNESSED THE TESTIMONY FROM THE WITNESS STAND AND SAW THE EVIDENCE.

SO YOU AGREE WE DON'T KNOW WHAT ROLE THIS AGGRAVATOR PLAYED, IN THE ANALYSIS OF THE JURY.

I DON'T THINK YOU KNOW THE ROLE THAT ANY AGGRAVATOR PLAYS IN THE ANALYSIS OF THE

JURY. THE JURY NEVER TELLS US THAT. THAT IS SOMETHING THAT THE JURY DOES NOT HAVE TO DISCLOSE.

SO WE DON'T KNOW, FOR INSTANCE, WHETHER THE JURY, HERE, AGREED, WELL, THAT AGGRAVATOR, BY ITSELF, IS WHAT WE ARE GOING TO BASE OUR RECOMMENDATION ON.

WE DON'T KNOW THAT, IN ANY CASE. AT NO TIME DOES THE JURY DISCLOSE, UNLESS THEY CHOOSE TO TALK TO SOMEONE, THEY DO NOT DISCLOSE WHAT AGGRAVATORS AND MITIGATORS THEY RELIED UPON. THEY MAY HAVE -- THEY MAY HAVE REJECTED EVERY MITIGATOR HERE, AND THEY MAY HAVE RELIED ON ALL FIVE AGGRAVATORS. WE DO NOT KNOW. HOWEVER, FROM THE EVIDENCE, IT IS LIKELY, I MEAN, IT IS REASONABLE TO ASSUME THAT, EXCUSE ME, THIS AGGRAVATOR WAS GIVEN NO ADDITIONAL WEIGHT TO ANY OTHERS, AND THAT THE DEATH PENALTY IS APPROPRIATE. IF I COULD MOVE ON, QUICKLY, TO DR. TUMOR'S CROSS-EXAMINATION. DR. TUMOR WAS CROSS-EXAMINED PROPERLY. HIS CREDIBILITY IS ALWAYS AT ISSUE, AS IS ANY WITNESS. THE REASON THAT THE STATE NEEDED TO GO INTO THE NAMES OF DIFFERENT CASES THAT DR. TUMOR WORKED UPON HIS BECAUSE DR. TUMOR INITIALLY SAID HE ONLY WORKED ON THREE CAPITAL CASES. IT WAS ONLY AT THE FURTHER QUESTIONING OF THE STATE THAT IT TURNED OUT THAT THERE WERE ADDITIONAL -- I THINK IT ENDED UP BEING 14 CASES THAT DR. TUMOR AGREED HE HAD WORKED ON.

LET ME ASK YOU ONE QUESTION ABOUT THAT, BECAUSE I REALIZE YOUR TIME IS GONE. WE DID HAVE A CASE, A YEAR OR SO AGO, WHERE I CAN IT OCCURRED IN MIAMI, AND WHERE THE PROSECUTOR DID NAME NAMES OF -- THAT THEICS PUERTO-THAT THE EXPERT WITNESS HAD, ALSO, TESTIFIED IN THEIR -- THAT THE EXPERT WITNESS HAD, ALSO, TESTIFIED IN THEIR CASES, AND SUBSEQUENTLY SAID THAT THIS IS A DOCTOR WHO REPRESENTS THESE TERRIBLE MASS MURDERERS AND KILLERS, AND YOU SHOULDN'T BE LEAVE HIM AS A RESULT OF THAT. WAS THERE ANYTHING LIKE THAT DONE HERE?

NO. THE PROSECUTOR DID NOT GO FUR THAN NAMING THE NAMES. HE DIDN'T GIVE ANY FACTS.

THERE WAS NO SUGGESTION, HERE, THAT THIS IS A DOCTOR WHO REPRESENTS MURDERERS AND KILLERS AND THEREFORE YOU SHOULDN'T BE LEAVE HIM?

HE GAVE NO ADDITIONAL FACTS TO THOSE CASES. HE DIDN'T THAT THAT INFERENCE. IN FACT, THE TESTIMONY IS THAT DR. TUMOR HAS TESTIFIED FOR THE STATE IN OTHER CASES. IT IS ONLY IN THE CAPITAL CASES THAT HE HAS TESTIFIED FOR THE DEFENDANT.

THERE WAS NO ARGUMENT TO THE JURY TO THAT HE HAVE SNECKT.

NO. I DO NOT REMEMBER SEEING ANY ARGUMENT TO THE JURY TO THAT EFFECT.

THANK YOU, COUNSEL. REBUTTAL.

DURING THE CLOSING ARGUMENT, THE PROSECUTOR SAID THE CHILD WAS EIGHT YEARS OLD, PAGE 54, 97, 98. SHE WAS LESS THAN 12, 99.

IF WE HAVE A GENDER PROSECUTED AND THE PROSECUTOR TALKED ABOUT YOU HAD A FEMALE INVOLVED. SAME AS HERE?

NO. I DON'T KNOW IF YOU COULD ARGUE THAT IT WAS FEMALE, BUT I THINK IF YOU TOLD THE JURY THAT THE SEX WAS A FEMALE, THAT COULD NOT AND AGGRAVATING FACTOR.

IT IS REFERENCED IN THE ARGUMENT THAT THERE WAS A FEMALE INVOLVED. SO THAT WOULD BE REVERSIBLE, UNDER A SIMILAR ARGUMENT THAT YOU ARE MAKING HERE, THAT WE HAVE ABUSED THAT ELEMENT. THAT IS NOT AN AGGRAVATING ELEMENT. IT JUST HAPPENS TO BE WHAT

THE PERSON IS.

I DON'T BELIEVE IT WOULD BE AS STRONG AN ARGUMENT AS WE HAVE HERE. IT WOULD HAVE TO BE PREJUDICIAL VERSUS PROBATIVE.

WHERE IS IT THAT YOU MENTION IN THESE PAGES THAT IT IS, THEN, LINKED TO SAY THAT SHE IS EIGHT YEARS OLD. SHE IS UNDER 12, AND WHAT YOU SAID, BEFORE, THAT IT WAS ACTUALLY LINKED INTO THIS AGGRAVATOR. HOW DID THE PROSECUTOR ARGUE, NOT JUST AGE, WHICH IS JUST A FEATURE OF -- IT IS JUST AN ASPECT OF WHO THIS VICTIM WAS, BUT LINKING IT INTO THE AGGRAVATOR. WHAT WAS SAID, IN CLOSING, ABOUT THAT?

WHEN THE PROSECUTOR WAS DISCUSSING WHAT THE AGGRAVATORS WERE, THE PROSECUTOR STRESSED THE FACT THAT AGE WAS AN APPROPRIATE AGGRAVATOR AND THEN PROCEEDED TO GO, ON SEVERAL OCCASIONS, AT LEAST TWENTY THAT I HAVE NOTED IN MY BRIEF THAT, LISA WEIGHED 29 POUNDS. LISA WAS EIGHT. 1435, 1437, FOR NEARLY 100 PAGES, THE JURORS WERE SLAMMED WITH THAT THIS WAS AN EIGHT-YEAR-OLD CHILD AND THEY COULD USE THAT AND THAT FACTOR, ALONE, TO SENTENCE HIM TO DEATH.

WHERE DOES THE PROSECUTOR SAY. THAT AGAIN, IF THIS WAS PRIOR TO THE TIME THAT THIS AGGRAVATOR HAD BEEN ADOPTED, EVERYTHING THAT, I THINK, YOU WOULD AGREE, THAT THEY COULD HAVE SAID SHE IS 94 POUNDS. SHE WAS -- SHE A YOUNG CHILD. SHE IS EIGHT YEARS OLD, AND THERE COULD NOT BE ANY -- THAT IS WHO SHE IS. THAT IS WHO THE VICTIM S IT IS NOT EVEN VICTIM IMPACT. IT IS A DESCRIPTION OF THE VICTIM. WHERE, THEN, IS THE LINK MADE, TO SAY, AND BECAUSE SHE IS EIGHT, YOU CAN DECIDE TO IMPOSE THE DEATH PENALTY, BASED ON THAT FACT ALONE. THAT IS WHERE -- IS THAT ARGUMENT MADE?

YES. IT IS MADE IN THE CLOSING ARGUMENT, WHEN THE PROSECUTOR IS DISCUSSING WHAT ALL OF THE AGGRAVATORS --

WHAT PAGE IS THAT MADE ON?

I DON'T HAVE THE PAGE HANDY.

ARE YOU PARAPHRASING, OR WAS THAT ACTUAL ARGUMENT MADE?

THAT ARGUMENT WAS MADE, YOUR HONOR.

ON THE BASIS OF THAT FACTOR ALONE?

WELL, HE USED THE TOTALITY OF THE FACTORS, IN ARGUING THAT DEATH WAS APPROPRIATE.

THAT IS A DIFFERENT ISSUE THAN WHAT WE ARE ASKING YOU HERE, AND SO LET ME BE CLEAR. YOU ARE NOT CLAIMING, THEN, THAT THE PROSECUTOR ARGUED, TO THE JURY, THAT ON THE BASIS OF THAT FACTOR ALONE, YOU MAY I AM PROSE THE DEATH -- YOU MAY IMPOSE THE DEATH PENALTY.

MY REMEMBRANCE IS THAT HE DID SAY THAT, ON THAT FACTOR ALONE.

IS THAT CITED IN YOUR BRIEF?

I DON'T HAVE A PAGE CITE HANDY.

IS YOUR OPPONENT, ALSO, CORRECT, THAT THE PROSECUTOR NEVER ARGUED TO THE JURY THAT YOU SHOULDN'T BE LEAVE DR. TUMOR, BECAUSE HE HAS REPRESENTED OTHER KILLERS?

I MUST CONCEDE THAT SHE IS CORRECT, ALTHOUGH THE INFERENCE WAS THAT, ONCE THEY

NAMED ALL OF THE NAMES OF THE TERRIBLE MURDERERS THAT THIS DOCTOR HAD REPRESENTED, THERE WAS THAT INFERENCE, BUT THAT ARGUMENT WAS NOT MADE BY THE PROSECUTOR IN CLOSING ARGUMENT, OUTRIGHT.

IN THE JURISPRUDENCE OF THIS COURT, IS IT ACCEPTABLE FOR US TO CONSIDER THE REASONABLE INFERENCES ARISING FROM SOME OF THOSE FACTS, BECAUSE WE DON'T HAVE EYEWITNESSES, FIRST? IS THAT -- CAN THIS COURT CONSIDER THAT?

YOU CAN CONSIDER INFERENCES, BUT WE DON'T BELIEVE THAT THE INFERENCES, IN THIS CASE, WOULD SUPPORT THE HAC FACTOR.

IS IT A REASONABLE INFERENCE THAT YOU FIND THE CLOTHING OF A CHILD THAT HAS BEEN DISROPED AND, CERTAINLY, NOT UNDER GOOD CIRCUMSTANCES, AND THE CLOTHING IS DAMAGED IN SOME MANNER, THAT THAT IS A CIRCUMSTANCE THAT CAN BE CONSIDERED, WITH A LOGICAL INFERENCE OF SOME TERROR?

WE DON'T BELIEVE THAT THERE WAS ANY INFERENCE OF TERROR. WE DON'T KNOW.

CAN I CALL FROM THAT FACT?

NO. YOU DON'T KNOW HOW THE ZIPPER WAS BROKEN, WHEN IT WAS BROKEN, WHERE IT WAS WHEN IT WAS BROKEN.

THEN YOU HAVE TO HAVE EYEWITNESS TESTIMONY, IS WHAT YOU ARE SAYING, IF YOU HAVE TO HAVE WHEN IT WAS DONE AND HOW IT WAS DONE AND WHERE IT WAS DONE. YOU HAVE TO HAVE SOMEBODY THAT CAN TELL YOU THOSE THINGS.

NO, YOUR HONOR. WE HAVE EXPERT WITNESSES THAT WOULD HAVE OPINED AS TO WHERE IT WOULD HAVE HAPPENED OR HOW IT WOULD HAVE HAPPENED. MEDICAL EXAMINERS ARE VERY QUALIFIED TO GIVE THAT. THAT IS ROUTINE, THROUGHOUT THE STATE OF FLORIDA, AND IF THE MEDICAL EXAMINER COULD HAVE GIVEN THAT EXPERT OPINION, THEN YOU WOULD HAVE SOMETHING TO BASE YOUR DECISION ON, BUT HERE IT SNOT THERE. IT IS SPECULATION.

IT HAS GOT TO BE EXPERT TESTIMONY OR EYEWITNESS, THEN. THAT IS THE STANDARD WE MUST FOLLOWA?

EXPERT TESTIMONY, EYEWITNESS, OR I WOULD SAY THAT, EVEN UNDER THE CASE LAW FROM THIS COURT, CIRCUMSTANTIAL EVIDENCE THAT HAS NO REASONABLE HYPOTHESIS TO THE CONTRARY.

WHAT ABOUT YOUR OPPONENT SAYING THAT THE CLOTHING WAS OBVIOUSLY REMOVED, BEFORE THE CHILD WAS KILLED?

I DON'T KNOW WHERE THEY GET THAT FROM. AND I HAVE READ THE RECORD, THROUGH AND THROUGH, AND THAT IS NOT IN THE RECORD.

BUT THERE IS NO -- BUT IF SHE MADE THAT ASUMPTION UMINGS, I THINK -- ASSUMPTION, I THINK, BASED ON THE FACT THAT THERE WAS NO BLOOD ON THE CHILD'S CLOTHE SOMETHING.

THERE WAS BLOOD ON MR. ROSE, AND WE DON'T KNOW WHEN IT GOT THERE, AND IT COULD HAVE GOTTEN THERE, WHEN THE HAMMER HIT THE CHILD, WITHOUT THE CHILD EVER SEEING IT. THIS IS A CHILD THAT KNEW --

BUT WOULDN'T THAT BE THE ASSUMPTION, THAT IF THE HAMMER HIT THE CHILD, THEN THE CHILD HAD ON NO CLOTHES, THEN THERE WOULD BE NO BLOOD ON THE CLOTHES.

IT COULD BE. IT COULD BE THAT THE CHILD IS HIT, AND THAT THE CLOTHES ARE TAKEN OFF AFTER THE CHILD IS DEAD, AND THAT IS THE CHILD IS RIGHT NEXT TO THE BODY --

WOULD THAT BE A REASONABLE INFERENCE THAT, IF HE HAD BLOOD ON HIM, THAT THERE WOULD BE NO BLOOD ON THE CLOTHES?

I AM NOT SURE THAT ANY OF THOSE ARE REASONABLE INFERENCES. I AM NOT SURE THAT WE SHOULD BE RELYING ON MEDICAL EXAMINERS OR EXPERTS IN THAT FIELD, AND WHAT YOU ARE REFERENCING IS EVIDENCE THAT DOESN'T SUPPORT THOSE TYPES OF FINDINGS.

THANK YOU, COUNSEL.