Robert Rimmer vs State of Florida

MR. CHIEF JUSTICE: GOOD MORNING AND WELCOME TO THE ORAL ARGUMENT CALENDAR FOR THE FLORIDA SUPREME COURT, FOR THIS THURSDAY, MAY 3. I WOULD LIKE TO BEGIN, BY WELCOMING THOSE WHO ARE HERE FROM THE EIGHTH GRADE HONOR STUDENTS AT FOREST LAKE EDUCATION CENTER IN LONGWOOD. IN SEMINOLE COUNTY. AND I UNDERSTAND THAT THEIR TEACHER IS MR. MATT HORNDORF AND MS. HAYT HAAS. I HOPE I HAVE PRONOUNCED THOSE NAMES CORRECTLY. IF NOT, PLEASE FORGIVE ME. THE FIRST CASE ON THE CALENDAR IS ROBERT RIMMER VERSUS STATE.

GOOD MORNING. I AM PATRICK RASTATTER, REPRESENTING ROBERT RIMMER, THE APPELLANT. THIS IS A JURY-RECOMMENDED DEATH BY A VOTE OF 9-TO-3 AND OBVIOUSLY THE TRIAL JUDGE IMPOSED IT. THESE TWO SHOOTINGS HAPPENED DURING THE ROBBING OF AN AUDIO LOGIC STORE, AND JUST BY WAY OF EXPLANATION, AN AUDIO LOGIC STORE IS ONE OF THOSE PLACES WHERE YOU GO IN, AND YOU BUY MOBILE AUDIO EQUIPMENT FOR YOUR CAR. THEY HAVE A SHOWROOM TYPE AREA AND THEY, ALSO, HAVE SOME SERVICE SPACE WHERE THEY DO INSTALLATION. IF YOU EVER SIT AT A TRAFFIC LIGHT AND SOMEONE SITTING NEXT TO YOU HAS BOOM, BOOM, BOOM COMING OUT OF THEIR CAR, THAT IS WHERE THEY GOT IT INSTALLED IS AT ONE OF THE PLACES LIKE WHAT THEY DO. THE TIME FRAME IN THIS IS IMPORTANT, BECAUSE THE SURVIVING WITNESSES INDICATE THAT THE TWO FOLKS WHO WERE DOING THE ROBBING WERE IN AND OUT OF THE SERVICE BAYS, TAKING MERCHANDISE FROM THE SHELVES AND FROM THE STORAGE STORAGE AREAS AND LOADING IT IN THE CAR, WHICH WAS THEIR MEANS OF EXIT. THERE WERE FIVE PEOPLE IN THE AUDIO LOGIC STORE, WHEN THE TWO ROBBERIES CAME IN.

THIS WAS A DAYLIGHT SITUATION?

YES, JUDGE. JUSTICE ANSTEAD. TWO OF WHOM WERE KILLED. THE DECEDENTS ARE BRADLEY KRAUSE AND AARON KNIGHT. THE THREE SURVIVING VICTIMS OF THE ROBBERY, TWO MADE IDENTIFICATIONS AND ONE DID NOT. THE TWO THAT MADE IDENTIFICATIONS ARE KIMBERLY BURKE AND JOSEPH MOORE.

WERE THE TWO THEY WERE KILLED IS THERE ANYTHING IN THE RECORD TO INDICATE THAT THE DEFENDANT HAD HAD SOME PRIOR CONTACT WITH THE TWO PEOPLE WHO WERE KILLED?

THERE IS NOTHING IN THE ENTIRE COLLOQUY, UP UNTIL THE VERY END, WHEN ALL THE MERCHANDISE HAS BEEN LOADED IN THE CAR, AND, IN FACT, THE PERSON THAT IS IDENTIFIED AS ROBERT RIMMER, GETS IN HIS VEHICLE, DRIVING, STARTS DRIVING AWAY FROM THE AUDIO LOGIC STORE. STOPS IN THE PARKING LOT. WALKS BACK AND THEN SAYS, TO EITHER MR. KRAUSE OR MR. KNIGHT, I FORGET WHICH, YOU KNOW ME, DON'T YOU? AND THAT PERSON SAYS "NO". AND THE GUNMAN SAYS YOU KNOW ME, AND THE PERSON, AGAIN, SAYS, NO, I DON'T, AND HE SHOOTS THAT PERSON. SO DURING THE TIME THAT IT IS UNRAVELING, JUSTICE QUINCE, NO, THERE IS NOTHING TO INDICATE THAT ANY OF THE PARTIES KNOW EACH OTHER AT ALL.

BUT ISN'T THERE, ALSO, EVIDENCE THAT THERE WERE SOME BAD DEALINGS, LATER ON, THROUGH OTHER WITNESSES,R AM I MISTAKEN?

A COMPETITOR OF THAT STORE CAME IN. I DON'T WANT TO SAY BAD -- I AM NOT SAYING IT IS BAD DEALINGS, BUT THERE IS TESTIMONY FROM A COMPETITOR, WHO SAID THAT MR. RIMMER BOUGHT AN AUDIO PRODUCT FROM HIM THAT HE WAS COMPLAINING ABOUT, AND, BUT, WHEN

YOU SAY BAD DEALINGS, AT BEST THERE WAS A COMPLAINT. HE ALWAYS SAID THAT RIMMER AT THE TIME, WHEN HE WAS DISCUSSING IT, HE WAS ALWAYS POLITE AND CORDIAL. SO I WOULD LIKE TO DISCUSS FOUR POINTS, IF I COULD. THE FIRST ONE IS THE FAILURE OF THE TRIAL JUDGE TO SUPPRESS ELECTRONIC ITEMS THAT WERE SEIZED. ELECTRONIC ITEMS TAKEN FROM THE AUDIO LOGIC STORE WERE ULTIMATELY SEIZED FROM A WAREHOUSE REPRESENTED BY ROBERT RIMMER. THAT WAREHOUSE WAS SEARCHED, PURSUANT TO A WARRANT. THE PROBABLE CAUSE IN THE AFFIDAVIT FOR THAT WARRANT, CAME FROM THE POLICE EXECUTE AGO PRIOR WARRANT FOR MR. RIMMER'S CAR. WHEN THEY SEARCHED THE DEFENDANT'S CAR, IN A PERSONAL ORGANIZER, IN THE GLOVE BOX, THEY FOUND A RENTAL AGREEMENT, BETWEEN RIMMER AND THE STORAGE FACILITY. COUNSEL BELOW FILED A MOTION, SAYING THAT HIS PERSONAL PAPERS, MEANING MR. RIMMER'S PERSONAL PAPERS, AND SPECIFICALLY THE RENTAL AGREEMENT, WAS NOT AN ITEM LISTED IN THE WARRANT TO BE SEARCHED. NEVERTHELESS, THE POLICE, UPON SEARCHING HIS CAR, IMMEDIATELY TOOK THE ORGANIZER AND ALL ITS CONTENTS, TOOK IT BACK TO THE POLICE STATION, WENTENT THROUGH IT, CAME UP WITH THE -- WENT THROUGH IT, CAME UP WITH THE LEASE AGREEMENT WITHIN THE ORGANIZER, AND THEN USED THAT LEASE AGREEMENT AS THEIR PROBABLE CAUSE, IN AN AFFIDAVIT, TO SEARCH THE WAREHOUSE.

BUT THE SCOPE OF THIS SEARCH, THE OTHER ITEMS THAT WERE SUBJECT TO THE SEARCH WARRANT, WERE NOT LIMITED. IN OTHER WORDS GOING INTO THE GLOVE COMPARTMENT WAS NOT BEYOND THE SCOPE OF THE SEARCH, WAS IT?

JUSTICE PARIENTE, I WOULD SAY THAT THIS IS A VERY GENERALIZEED SEARCH WARRANT. IT IS ABOUT AS GENERALIZED AS YOU MAY MAKE ONE. IT IS COMPARABLE TO THIS COURT'S DECISION IN GREEN, WHERE THE WARRANT IN GREEN SAID GO OUT AND FIND THE PROPERTY THAT GREEN WAS WEARING AT THE TIME OF THE MURDER. GO FIND PROPERTY OR ITEMS OF THE CRIME THAT GREEN TOOK DURING THE ROBBERY, AND THIS COURT SAID THAT WAS TOO GENERALIZED A WARRANT TO BE SUFFICIENT. IN THIS CASE, THERE WERE FOUR WARRANTS ISSUED. THERE WAS A WARRANT ISSUED FOR MR. RIMMER'S HOUSE. THERE WAS A WARRANT ISSUED FOR MR. RIMMER'S OTHER VEHICLE. THERE WAS A WARRANT ISSUED FOR THE CAR THAT THEY ARRESTED HIM IN, AND THEN ULTIMATELY THERE WAS THE WARRANT FOR THE WAREHOUSE. ALL FOUR WARRANTS RECITE THE EXACT SAME THINGS THAT ARE SOUGHT, EVEN THE WARRANT THAT WE ARE TALKING ABOUT HERE, TODAY, FOR HIS CAR, SEEKS ITEMS THAT THE POLICE HAD ALREADY SEIZED. THEY HAD ALREADY, AT THAT POINT, ARRESTED MR. RIMMER, SEIZED THE MURDER WEAPON, SEIZED A WEAPON THAT WAS TAKEN DURING THE ROBBERY, FOUND ONE OF THE WITNESSES' WALLET AND PERSONAL BELONGINGS, YET THEY WERE STILL LISTED IN THE AFFIDAVIT AND AGAIN SET FORTH IN THE WARRANTACITY ELMS TO BE SOUGHT. SO THIS TRULY WAS GENERALIZED ITEM, AND FOR EXAMPLE, ONE OF THE THINGS THAT THE POLICE ASKED TO SEARCH FOR --

THAT DIFFERS, A LOT, FROM GREEN. I MEAN, GREEN WAS GO OUT TO THE MOTEL AND GET WHATEVER YOU FIND THERE THAT WILL HELP YOU WITH THE CASE. THAT IS BASICALLY WHAT GREEN SAID. THIS IS MUCH MORE PARTICULARIZED THAN GREEN.

FOR INSTANCE, IN PARAGRAPH FOUR, "ANY TRACE MIKESCOPIC EVIDENCE OF -- MICROSCOPIC EVIDENCE OF THESE CRIMES" THAT, TO ME, IS A LOT MORE SIMILAR TO WHAT WAS HAPPENING IN GREEN, WHERE THE OFFICER WAS AUTHORIZED TO GO OUT AND SEIZE ANY EVIDENCE OR CLOTHING THAT GREEN WAS WEARING. IN SOME SENSE, GREEN WAS A LITTLE MORE PARTICULARIZED. IN ANY EVENT, IF WE GET BEYOND THAT, JUSTICE WELLS, ONE SECOND, AND WE GET TO THE NOTION THAT THE POLICE HAD A RIGHT TO GO IN THE GLOVE BOX, AND THEY HAD A RIGHT TO GO WITHIN THE ORGANIZER UNDER THE WARRANT, THAT IT WASN'T A GENERAL WARRANT THAT IS BAD ON ITS FACE, ASSUMING THAT MUCH, NOW THEY ARE IN THE ORGANIZER, AND THEY COME UPON THE LEASE AGREEMENT. WELL, THERE IS NOTHING APPARENTLY IN CRIMINAL NATURING -- INCRIMINATING, ON THE LEASE AGREEMENT, ITSELF, THAT NOW INDICATES ITS CONNEDRA BANNED IS SUBJECT TO SEIZURE, AND WE NOW KNOW IN ARIZONA

VERSUS HICKS --

WAS STEREO EQUIPMENT STOLEN, IN THE ROBBERY PART OF THIS CRIME SPREE OR CRIME? STEREO EQUIPMENT WAS STOLEN, RIGHT?

FORT-SOME BOXES.

WHY WOULDN'T IT BE LOGICAL, IF THEY SAW A RECEIPT FOR A WAREHOUSE THAT STORES GOODS, TO THINK THAT THAT MIGHT BE A PLACE WHERE THEY ARE STORING THE STOLEN STEREO EQUIPMENT?

IT MAY BE VERY LOGICAL, JUSTICE ANSTEAD, AND I THINK WHAT YOU DO IS YOU SAY TO YOURSELF I AM A POLICEMAN. I HAVE NEVER RECOVERED ELECTRONICS IN THIS. HERE IS A RENTAL AGREEMENT, BUT THE RENTAL AGREEMENT BACK IN THE ORGANIZER. PUT THE ORGANIZER BACK IN THE GLOVE BOX, AND THEY GO BACK TO THE MAGISTRATE, AND I SEEK MY FIFTH WARRANT IN THE CASE. I SAY, TO THE MAGISTRATE, LOOK, WE STILL HAVEN'T RECOVERED THE ELECTRONIC ITEMS. WE HAVE, NOW, SEARCHED HIS RESIDENCE, BOTH HIS CARS, BUT WE HAVE COME ACROSS, INVERTENTLY IN OUR SEARCH THAT WE WERE ALLOWED TO DO, WE WERE ALLOWED TO BE IN A SPACE THAT WE WERE SUPPOSED TO BE, WE WERE ALLOWED TO BE IN THE GLOVE BOX, WE WERE ALLOWSED TO BE IN THE ORGANIZER. WE STILL HAVEN'T FOUND CERTAIN ITEMS. WE NOW WANT ANOTHER WARRANT AND COME BACK AND SEARCH HIS CAR, AGAIN, AND SEIZE THE RENTAL AGREEMENT THAT WE CAME UPON. NORTON VERSUS CALIFORNIA AND ARIZONA VERSUS HICKS, THEY ALLSTATE THAT, IF THE POLICE COME UPON WHAT IS CONNEDRA BANNED, WHEN EXECUTING A WARRANT AND THEY HAVE A RIGHT TO BE WHERE THEY, THEN THERE HAS TO BE AN APPARENT NATURE TO THE CONTRABAND.

IS YOUR ARGUMENT THAT THERE WAS NOT A SUBSEQUENT WARRANT FOR THE WAREHOUSE OR IS YOUR ARGUMENT THAT THE SUBJECT, ITSELF, IS APPARENTLY NOT A FRUIT OF THE CRIME AND IT SHOULD NOT HAVE BEEN SEIZED. I AM NOT SURE, NOW, WHAT YOU ARE ARGUING.

IT WAS TWOFOLD. TRYING TO GET PAST WHAT JUSTICE WELLS SAID, IF THE WARRANT ALLOWED ENTRY IN THE GLOVE BOX AND THE WARRANT, NOT THAT GENERAL, ALLOWS INSPECTION OF THE ORGANIZER, MY POSITION NOW IS THE WARRANT STILL DIDN'T ALLOW FOR THE SEIZURE OF THE RENTAL AGREEMENT, BECAUSE THERE WAS NOTHING APPARENTLY INCRIMINATING ABOUT THE LEASE AGREEMENT, ON ITS FACE. IT WAS THE OBLIGATION FOR THE POLICE TO GO BACK TO THE MAGISTRATE AND GET A SPECIFIC WARRANT, SPECIFICALLY NAMING THE LEASE AGREEMENT.

BUT THEY DID GET A SEARCH WARRANT FOR THE STORAGE UNIT.

YES. BASED UPON THE -- SOLELY BASED UPON THE FINDING OF THE LEASE AGREEMENT.

WELL, LET'S JUST SAY, I DON'T KNOW, WHAT IS THE DIFFERENCE, REALLY, I GUESS, BETWEEN SAYING, GOING BACK TO THE POLICE AND SAY GOING BACK TO THE MAGISTRATE, ASKING FOR THE SEARCH, TO BE ABLE TO SEIZE THE LEASE AGREEMENT, LEAVE IT THERE, VERSUS, AND THEN GO THROUGH TWO STEPS? IS THAT REALLY WHAT WOULD TURN THIS INTO WHAT WOULD BE A REASONABLE SEARCH FROM AN UNREASONABLE SEARCH?

THE ONLY DIFFERENCE ARE FROM THE LAWS AND THE STATUTES. THE SAME WAY, WHEN THE POLICE DO A CONTROLLED BUY AT A HOUSE AND THEIR INFORMANT GOES IN AND BUYS CONTRABAND AND COMES OUT AND SAYS, HERE, I JUST BOUGHT CONTRABAND IN THIS HOUSE. THE POLICE STILL GO TO THE EXTRA STEP, TAKE THE CONTRABAND AND GO TO THE MAGISTRATE AND GET A WARRANT FOR THAT HOUSE.

HOW MANY DAYS AFTER THE MURDER WAS THE WAREHOUSE LEASED?

I THINK JUST A COUPLE DAYS, JUSTICE SHAW. A MATTER OF TWO OR THREE DAYS. SO BASED UPON THE GENERAL NATURE OF THE WARRANT, BASED UPON THE FACT THAT THE LEASE AGREEMENT WAS NOT, APPARENTLY, IN CRIMINAL NATURING -- INCRIMINATING, WE WOULD SUBMIT THAT THE POLICE HAD NO RIGHT TO SEARCH IT AND THAT THERE FOR THE SUBSEQUENT SEARCH OF THE WAREHOUSE WAS THE FRUIT ON THE POISONOUS TREE. ON POINT TWO, THISS THE IDENTIFICATIONS OF JOSEPH MOORE AND KIMBERLY DAVIS BURKE. THE THIRD SURVIVING, SUBJECT TO THE ROBBERY, COULD MAKE NO IDENTIFICATIONS, EITHER PRETRIAL OR TRIAL. MR. MOORE MADE A SELECTION OF MR MR. RIMMER FROM A PHOTO SPREAD THAT IS NOT HERE UNDER ATTACK. WHAT IS UNDER ATTACK IS, AFTER MR. MOORE MADE THAT IDENTIFICATION OF MR. RIMMER FROM HIS PHOTO SPREAD, THE PHOTO SPREAD WAS, THEN, SHOWN TO KIMBERLY DAVIS BURKE. SHE PICKED AN IMAGE NOT ROBERT RIMMER'S. AFTER SHE DID THAT, THE DETECTIVE SAID YOUR BOYFRIEND, MR. MOORE, PICKED THIS OTHER.

I THOUGHT SHE PICKED TWO BUT HAD NUMBER ONE AND NUMBER TWO.

I KNOW THAT IS WHAT THE GOVERNMENT HAS ARGUED, JUSTICE PARIENTE, BUT THE REASON THAT THAT IS NOT SO IS, IF YOU LOOK AT THE POLICE STATEMENT THAT THEY TOOK FROM MISS DAVIS-BURKE, AFTER THE PHOTO SPREAD SELECTION THEY ASKED HER WHICH IMAGE DID YOU SELECT, AND SHE SAID, WELL, I PICKED AN IMAGE, AND THEN, AFTER YOU TOLD ME TO CONCENTRATE ON A SECOND IMAGE, I THEN PICKED A SECOND ONE. SO THAT WAS HER SWORN POLICE STATEMENT, FOLLOWING --

THAT WAS, BUT SHE DID NOT SAY THIS WAS AFTER YOU TOLD ME THAT MY FRIEND HAD PICKED SOMEONE ELSE.

YES, SHE DID. YES, SHE DID, JUSTICE QUINCE. THAT IS EXACTLY WHAT SHE SAID. SHE SAID I PICKED ONE, AND THEN ULTIMATELY I PICKED A SECOND ONE ONLY AFTER YOU GUYS TOLD ME I SHOULD PAY ATTENTION TO IT, BECAUSE THAT IS WHO MY BOYFRIEND PICKED, AND THEN ULTIMATELY, SHE PICKED, STAYED WITH TWO SELECTIONS FROM THE FIRST PHOTO SPREAD. WE, THEN, MOVE ON TO ALIVE LINE UP, WHICH IS CONDUCTED THEREAFTER. MR. RIMMER IS THE ONLY PERSON IN THE LIVE LINE UP WHOSE IMAGES APPEARED IN THE PHOTO SPREADS.

IS THAT FOR BOTH MOORE ANN LEWIS?

YES.

BUT YOU ARE NOT ATTACKING THE MOORE IDENTIFICATION?

YES, I AM. AT THIS POINT WE ARE, NOW -- IS THAT FOR BOTH MORE ANN LEWIS?

YES. -- FOR BOTH MOORE AND LEWIS?

YES. AT THIS POINT WE ARE, NOW, ATTACKING THE LINE-UP. HE SAID, GUESS WHAT, MR. RIMMER HAS BEEN ARRESTED AND HE HAD YOUR WALLET ON HIM WHEN HE WAS ARRESTED, AND GUESS WHAT? WE RECOVERED THE FIREARMS IN THIS CASE, AND THEN THEY SHOWED THE LIVE LINEUPS, WHICH HAD ONLY RIMMER IN IT, WHOSE PHOTO IS IN THE IMAGE IN THE PHOTO SPREAD.

THAT PRACTICE ACTUALLY, WHERE YOU, SAY, GIVE SOMEONE A PHOTO LINE UP AND THEN YOU ONLY USE THE ONE PERSON WHO IS THE SUSPECT IN THE LIVE LINE UP, THAT THAT IS, IN ITSELF, UNNECESSARILY SUGGESTIVE, BECAUSE THE PERSON, AT THAT POINT, WON'T KNOW WHETHER THEY WERE REMEMBERING THE PHOTO LINE UP OR WHAT THEY SAW AT THE SCENE?

JUSTICE PARIENTE, ONE OF THE EXAMPLES WHICH I WAS ABLE TO FIND, WAS GILMER VERSUS CALIFORNIA. I THINK, IN THAT CASE, THEY HAD A LOT OF NUMEROUS, SEVERAL WITNESSES, ALL, MAKING THE IDENTIFICATIONS AT ONE TIME. BUT THERE IS SOMETHING IN MY BRIEF THAT

ADDRESSES THAT.

ISN'T THIS, ASSUMING THESE ARE ANY PART OF THESE ARE UNNECESSARILY SUGGESTIVE, WHAT IS YOUR POSITION ON THEIR BEING ABLE TO GET THROUGH THE SECOND PRONG, BECAUSE HERE YOU HAVE THIS, ESPECIALLY LEWIS, IS THE ONE THAT HAD THIS OPPORTUNITY TO OBSERVE THE DEFENDANT AND ACTUALLY PUT THE COMPOSITE TOGETHER FOR THE POLICE SKETCH.

REALLY LOOKING TO THE SECOND PRONG WITH THE BIGGER ANALYSIS, AND PROBABLY, TO ME, AS A LAWYER THE MOST IMPORTANT ELEMENT IN BIGGERS, IS FOR THE TRIAL JUDGE TO LOOK AT ANY SIGNIFICANT DISCREPANCIES IN THE ORIGINAL DESCRIPTIONS GIVEN BY THE EYEWITNESSES TO THE POLICE, AND THE ACTUAL DESCRIPTIONS OF THE PERSON SELECTED FROM THE PHOTO SPREAD, THE LIVE LINE UP, IN COURT, AND COINCIDENTALLY THAT, PARTICULAR ELEMENT IS NOT ONE WHICH THE TRIAL JUDGE DISCUSSED, WHEN HE ISSUED HIS ORDER. HE DISCUSSED SEVERAL OF THE OTHER BIGGERS ELEMENTS FOR ANALYSIS, BUT HE DID NOT DISCUSS THE VARIANCE IN THESE TWO FOLKS' DESCRIPTIONS OF THE PEOPLE THAT COMMITTED THE ROBBERY AND MR. RIMMER'S ACTUAL DESCRIPTION. JOSEPH MOORE HAD THE GUNMAN AS A BROWN-SKINNED BLACKMAIL MALE, 5-10, 150 TO 160 POUNDS, BAGGY CLOTHES, BASEBALL CAP, AND NO EYE WEAR. WE WILL GET TO THE EYE WEAR, IF I HAVE A CHANCE. KIMBERLY BURKE DESCRIBED A BLACK MALE, 5-8 TO 5-9, BASEBALL CAP AND ALIKE WEIGHT, I THINK. IN REALITY MR. RIMMER'S PHYSICAL CHARACTERISTICS WERE 6-1 TO 6-2 AND HE WAS ANYWHERE FROM 190 TO 200 POUNDS. THE GUNMAN THAT THESE TWO WITNESSES DESCRIBE, PHYSICALLY, IS NOT ROBERT RIMMER'S PHYSICAL CHARACTERISTICS, BY A LONG SHOT. THEY ARE NOT EVEN CLOSE, IN TERMS OF HEIGHT OR IN TERMS OF WEIGHT.

THE WEIGHT OF 200 POUNDS VERSUS 160, IS THAT IN THE RECORD? BECAUSE --

THE 200, ABSOLUTELY. THE 200 POUNDS, 190, 200 POUNDS, IS ABSOLUTELY PART OF THE RECORD. I BELIEVE THE 160 POUNDS THAT THE STATE ALLUDED TO IN THE BRIEF, CAME OFF A BOOKING SHEET. IT WAS NOT IN EVIDENCE. I WOULD SAY THE TESTIMONY AT THE TRIAL OR AT THE SUPPRESSION HEARING, IS THE 190-TO-200, SO OBVIOUSLY THERE IS A GREAT DISPARITY IN ROBERT RIMMER'S ACTUAL PHYSICAL CHARACTERISTICS AND THOSE THAT MISS MOORE AND -- MR. MOORE AND MISS BURKE RECITED TO THE POLICE. AND, AGAIN, THAT WAS ONE NOT ADDRESSED BY THE TRIAL JUDGE IN HIS REELI -- IN HIS RULING. I WOULD, ALSO, LIKE TO ADDRESS POINT FOUR. THIS SEEMS, ON ITS FACE, IS NOT IMPORTANT, BUT TO ME IS PROBABLY THE MOST IMPORTANT ISSUE THAT ROBERT RIMMER BRINGS TO THIS COURT. THERE IS NO QUESTION THAT THE GUNMAN WAS NOT WEARING EYE WEAR. THERE IS NOT ONE PERSON WHO WAS A WITNESS IN THE CASE WHO SAID THE GUNMAN WAS WEARING EYE WEAR. THE POLICE SKETCH, ALL THE DESCRIPTIONS, NO EYE WEAR, SO MR MR. RIMMER CAME TO THE COURT AND ATTEMPTED TO DEMONSTRATE TO THIS JURY THAT HE HAS TO WEAR EYE WEAR TO SEE, AND I THINK IT IS AN ISSUE THAT, IF HE WAS ABLE TO CONVINCE THE JURY THAT HE HAD TO WEAR EYE WEAR TO FUNCTION IN DAILY LIFE, AND THE JURY BELIEVED THAT, THEY COULD NOT CONVICT HIM OF THESE CRIMES, BECAUSE THERE WAS JUST TOO MUCH GOING ON, DURING THE 15 OR 20 TRIPS IN AND OUT OF THE STORE, LOADING THE AUTOMOBILE, DRIVING THE AUTOMOBILE, ALL THAT WENT INTO IT.

WAS YOUR DEFENSE THAT IT WAS NOT HIM OR THAT HE COULDN'T BE THE SHOOTER OR BOTH?

BOTH.

WELL, BECAUSE THIS WOULD GO TO JUST NOT HIS BEING THE SHOOTER, BUT IF HE WAS PRESENT AT THE SCENE, HE WOULD BE LIABLE AS A PRINCIPLE -- AS A PRINCIPAL PRINCIPAL.

THEY ARE SAYING THAT THE PERSON ON THE SCENE THAT DID THE SHOOTING, THAT IS ROBERT RIMMER.

DID THE PHOTO OR THE LINE-UP, DID MR. RIMMER HAVE GLASSES ON IN THE PHOTO PACK?

NO, MA'AM. NO, MA'AM. SO MR. RIMMER BRINGS IN HIS OPTOMETRIST, WHO DID HIS EYE EXAM, BRINGS IN THE OPTICIAN, WHO DID HIS GLASSES, BROUGHT IN HIS WIFE, WHO SAYS HE ALWAYS WEARS GLASSES AND CAN'T SEE FIVE FEET IN FRONT OF HIM WITHOUT THEM. BROUGHT IN THE ARRESTING OFFICER THAT SAID, WHEN HE WAS BROUGHT IN AND BOOKED, HE WORRY GLASSES. HE BRINGS IN HIS DRIVER'S LICENSE REQUIREMENT THAT HE WEARS GLASSES, SO HE MADE A NICE PRESENTATION AND DEMONSTRATED THAT HE WEARS GLASSES AND THAT HE IS CONSIDERED LEGALLY BLIND, WITHOUT HIS GLASSES, WHICH WAS FINE. NOW, THE STATE WAS, THEN, FREE TO BRING IN REBUTTAL IF THEY WANT TO. BRING IN PEOPLE THAT SAY WE SEE HIM DRIVING WITHOUT HIS GLASSES ALL THE TIME. HE DRIVES FINE OR DOES HIS DAILY LIFE THEORIES CHORES -- LIFE CHORES FINE WITHOUT GLASSES OR BRING IN HIS AN OPTHALMOLOGIST AND SAYS HIS VISION IS NOT SO BAD. INSTEAD THEY BRING IN THE POLICE OFFICER WHO ARRESTED ROBERT RIMMER IN THIS VERY CASE, AND THE TRIAL JUDGE ALLOWS OFFICER KELLY TO TESTIFY, OVER OBJECTION THAT, YOU KNOW, I, ALSO, HAVE AN EYE PROBLEM, AND I WEAR EYE WEAR AND MY EYESIGHT IS NOT QUITE AS BAD AS ROBERT RIMMER'S, BUT IT IS ALMOST AS BAD AS HIS, AND YOU KNOW, I FUNCTION FINE IN DAILY LIFE. I DRIVE A CAR, EVEN THOUGH I HAVE A DRIVER'S LICENSE RESTRICTION AND I AM A LAW ENFORCEMENT OFFICER, I STILL DRIVE MY CAR WITHOUT GLASSES, AND I GO ABOUT MY DAILY AFFAIRS WITHOUT MY GLASSES, AND YOU KNOW I CAN SEE ACROSS THIS COURTROOM RIGHT NOW --

IS THIS SUBJECT TO A HARMLESS ERROR ANALYSIS, IF IT IS ERROR?

AND THAT IS WHY I STARTED OUT JUSTICE SHAW, WHEN HE SAID, IF THE JURY BELIEVES THAT ROBERT RIMMER HAS TO WEAR EYE GLASSES, TO GO FROM PLACE TO PLACE AND DO NORMAL THINGS, AS WAS DONE HERE, IF THEY BELIEVE THAT, THEN THEY COULD NOT BELIEVE THAT HE WAS THE GUNMAN. THIS IS -- ALLOWING OFFICER KEL TOY COME IN AND GIVE HIS PERSONAL OPINIONS ON WHAT HE CAN DO WITHOUT HIS EYE WEAR HAS NOTHING TO DO WITH WHAT ROBERT RIMMER COULD OR COULD NOT DO. ROBERT RIMMER'S PEOPLE DIDN'T COME IN AND SAY EVERYBODY WITH AN EYE PROBLEM, SUCH AS ROBERT RIMMER'S, CAN OR CANNOT DO CERTAIN THINGS. THEY CAME IN. THEY WERE VERY SPECIFIC AS TO WHAT ROBERT RIMMER COULD DO. OFFICER KELLY CAME IN, AND THE STATE SAID WE ARE NOT OFFERING THIS TO REBUT WHAT ROBERT RIMMER CAN AND CANNOT DO. WE ARE JUST OFFERING THIS TO SHOW WHAT PEOPLE, IN GENERAL, CAN DO.

YOU ARE IN YOUR REBUTTAL TIME BUT I AM NOT SURE THAT YOU DIRECTLY ADDRESSED JUSTICE SHAW'S QUESTION.

A YES OR NO ANSWER.

YES. I THINK IT IS HARMFUL ERROR, JUSTICE SHAW, BECAUSE IT --

IS IT SUBJECT TO HARMLESS ERROR REVIEW?

SUBJECT TO AN ANALYSIS.

I AM SORRY. I APOLOGIZE. YES. IT IS SUBJECT TO HARMLESS ERROR ANALYSIS, BUT I DON'T BELIEVE IT IS HARMFUL.

THANK YOU. ARE YOU FINISHED, JUSTICE SHAW?

YES.

MAY IT PLEASE THE COURT. MY NAME IS DEBORAH RESCIGNO, REPRESENTING THE STATE OF FLORIDA. I WOULD LIKE TO, FIRST, START ON POINT ONE, REGARDING THE SEIZURE OF THE LEASE

AGREEMENT. THE STATE SUBMITS THAT THE SEIZURE OF THAT LEASE AGREEMENT WAS PROPER, UNDER THE PLAIN-VIEW DOCTRINE. ONCE DEFENSE COUNSEL CONCEDED, BELOW, THAT THE AUTHORITIES HAD THE OPPORTUNITY TO OPEN THE GLOR COMPARTMENT, AND THEN -- TO OPEN THE GLOVE COMPARTMENT, AND THEN ONCE IN THERE, THEY DISCOVERED AN ORGANIZER, WHICH COULD HAVE CONTAINED SEVERAL OF THE ITEMS THAT HAD BEEN SPECIFICALLY LISTED IN THE SEARCH WARRANT, SO BECAUSE OF THAT, THEY WERE ALLOWED TO OPEN THAT CONTAINER. WHEN THEY DID, THEY CAME ACROSS A LEASE AGREEMENT THAT IT WAS IMMEDIATELY APPARENT TO THEM, BASED ON THE FACT THAT THEY HAD $17,000' WORTH OF ELECTRONICS EQUIPMENT THAT HAD NOT YET BEEN RECOVERED THAT, CONSISTED OF ABOUT 40 BOXES, IT BECAME APPARENT TO THEM THAT THEY HAD A LEAD TO WHERE IT WAS, BECAUSE IT WAS AN AGREEMENT TO LEASE A STORAGE UNIT, AND THE DATE THAT WAS RIGHT ON THE TOP OF IT WAS FOR MAY 7, WHICH WAS FIVE DAYS AFTER THE MURDERS HAD BEEN COMMITTED. AN ADDITIONAL ARGUMENT IS THAT THAT ELECTRONICS EQUIPMENT WOULD HAVE BEEN DISCOVERED, PURSUANT TO INEVITABLE DISCOVERY, BECAUSE EVEN IF THEY DIDN'T SEIZE THAT LEASE AGREEMENT, THEY HAD THE INFORMATION IN IT, THE LOCATION OF WHERE IT WAS, AND THEY COULD HAVE GONE AND OBTAINED A SEARCH WARRANT TO GO AND GET THE ELECTRONICS EQUIPMENT.

THEY HAD IT FROM A SOURCE OTHER THAN THE ACTUAL LEASE AGREEMENT?

NO. THEY WOULD HAVE HAD IT JUST BY THE FACT THAT THEY OPENED THE ORGANIZER, AND IT WAS APPARENT IT WAS RIGHT THERE, ON THE FACE OF IT, THE INFORMATION, SO I AM SAYING EVEN THOUGH THEY HADN'T SEIZED THE LEASE AGREEMENT, AND THEN GONE AND GOTTEN THE SEARCH WARRANT, THEY COULD HAVE STILL OBTAINED A SEARCH WARRANT, BASED ON THE INFORMATION. AND THAT WOULD HAVE BEEN INEVITABLE DISCOVERY. REGARDING POINT TWO AND THE IDENTIFICATION, IT IS CLEAR THAT THE TRIAL COURT PROPERLY SUPPRESSED THE MOTION TO SUPPRESS ON THESE FORM HE, BASED ON ON THE TOTALITY OF THE CIRCUMSTANCES, HE WAS CONVINCED THAT THERE WAS NO CHANCE OF ANY IRREPARABLE MISIDENTIFICATION, APPLYING THE BIGGERS FACTORS.

ARE YOU CONCEDING THAT THERE IS SOME IMPROPRIETY IN THE FIRST STEP? THAT IS THE WAY THAT THE IDENTIFICATIONS WERE MADE?

NO. THE IDENTIFICATION OR THE PHOTO IDENTIFICATION OF JOE MOORE, THERE WAS NOTHING SUGGESTIVE AND THE TRIAL COURT FOUND THAT THERE WAS NOTHING SUGGESTIVE IN THAT.

IN THAT. HOW DO YOU HAVE, HOW CAN THE POLICE USE A PROCESS, BY WHICH YOU TAKE A PHOTO LINE UP, AND THEN YOU HAVE THE ONLY PERSON IN THE PHOTO LINE UP, THEN, BE IN THE LIVE LINE UP? I MEAN, WHATEVER WE KNOW ABOUT PSYCHOLOGY IS HOW DO WE KNOW THAT THE PERSON ISN'T REMEMBERING WHAT HE OR SHE SAW IN THE PHOTO, VERSUS WHAT HE OR SHE SAW, YOU KNOW, AT THE TIME OF THE CRIME?

WELL, REGARDING KIMBERLY DAVIS-BURKE, IT IS VERY INTERESTING, BECAUSE HER IDENTIFICATION OF THE ASSAILANT WAS PROBABLY THE MOST RELIABLE OUT OF ANY OF THE WITNESSES. , TO BEGIN WITH, SHE ENCOUNTERED HIM ON TWO DIFFERENT OCCASIONS, BEFORE SHE WAS LED INTO THE SERVICE BAY AND MADE TO STAY THERE WITH THE OTHER HOSTAGES. SHE SAW HIM WHEN HE FIRST DROVE UP IN A FORD PROBE. SHE, THEN, SAW HIM IN THE INVENTORY ROOM. SHE HAD BEEN SITTING IN THE LOBBY ROOM.

TO DO THAT, NOW YOU GET TO WHETHER, AT LEAST IT IS STILL THE SECOND PRONG OF BIGGERS. I AM ASKING ABOUT WHETHER THIS IS A PRACTICE THAT IS WELL ESTABLISHED AS BEING NOT SUGGESTIVE? THAT IS USING A PHOTO LINE UP, THEN TAKING THE ONE PERSON WHO YOU WANT THE EYEWITNESS TO SELECT, AND USE THAT IN A SUBSEQUENT LIVE LINE UP. ISN'T THAT, ITSELF, UNNECESSARILY SUGGESTIVE?

SHE HAD ALREADY -- SHE WAS THE PERSON RESPONSIBLE FOR COMPARING THE COMPOSITE SKETCH THAT LED TO HIS PREVENTION, AND THAT HAPPENED TWO DAYS BEFORE THE PHOTO I.D..

AS TO WHETHER IT IS RELIABLE TO LET IN, I AM JUST ASKING ON THE QUESTION AS TO WHETHER, IN THE FUTURE, IF YOU WERE ADVISING POLICE, IS THIS SOMETHING YOU DO? DO YOU TAKE PHOTO LINEUPS AND THEN TAKE THE ONE PERSON WHO YOU WANT THE EYEWITNESS TO SELECT, AND PUT THAT INTO ALIVE LINE UP? -- A LIVE LINE UP?

THAT ISSUE, I AM NOT AWARE OF THE CASES THAT COUNSEL ALLEGES THAT WERE CITED TO THAT IN THE BRIEF. AND THAT WASN'T SOMETHING THAT WAS DISCUSSED, BUT WE COULD SUPPLEMENT ON THAT, IF YOUR HONOR WOULD LIKE.

THERE IS SOME INDICATION HERE THAT THE PHYSICAL DESCRIPTION OF THE DEFENDANT THAT YOU ARE REPRESENTING TO US IS FROM OFF-THE-RECORD OR OUT-OF-THE-RECORD EVIDENCE?

NO.

TELL US ABOUT THE PHYSICAL DESCRIPTIONS.

OKAY.

AND THEN WHERE THOSE PHYSICAL DESCRIPTIONS COME FROM.

OKAY. UNDER BIGGERS, AS THE COURT IS WELL AWARE, THERE ARE SEVERAL FACTORS THAT HAVE TO BE EVALUATED. ONE OF THE DEFENDANT'S ARGUMENTS IS THAT THERE WAS A DISCREPANCY BETWEEN THE DESCRIPTIONS THAT WERE GIVEN. THERE REALLY WEREN'T. THERE WERE MINOR DISCREPANCIES BETWEEN THE DESCRIPTIONS THAT WERE GIVEN BY THE EYEWITNESSES, THE SURVIVORS.

WHAT WERE THE PHYSICAL DESCRIPTIONS THAT WERE GIVEN, AND THEN WHAT WAS --

THEY, BOTH, DESCRIBED THE ASSAILANT AS A BLACK MALE. THEY, BOTH, SAID THAT HE WAS WEARING JEANS SHORTS AND A WHITE SHIRT. THEY, BOTH, SAID THAT HE WAS WEARING A WHITE CAP. THERE WERE SOME VARIATIONS IN THE HEIGHT. I THINK ONE SAID 5-8 TO 5-9, AND ONE WOULD HAVE SAID 5-9. THERE WAS A LITTLE BIT OF VARIATION. I DON'T THINK KIMBERLY GAVE AN ESTIMATED WEIGHT, AND MR. MOORE THOUGHT THE WEIGHT WAS BETWEEN 150 AND 160. NOW, WHEN HE WAS ARREST STEAD ON MAY 10, WHICH WAS EIGHT DAYS AFTER HE COMMITTED THESE CRIMES, THERE IS A BOOKING SHEET, AND THAT INFORMATION CAME IN THROUGH AN OFFICER THAT TESTIFIED, AND THAT BOOKING SHEET SHOWS HIM AS 6 FOOT-2, 160 POUNDS.

THAT WAS INTRODUCED IN HIS TESTIMONY?

THAT WAS INTRODUCED IN HIS TESTIMONY. RIGHT.

WHERE DID THE EVIDENCE THAT HE WEIGHED 200 POUNDS OR SOMETHING --

THERE WAS PRIOR BOOKING SHEETS FROM HIS PRIOR ARRESTS THAT WERE INTRODUCED, TESTIMONY INTRODUCED OF THE OFFICERS, OR THE BOOKING ARRESTS, WHERE IT SEEMS LIKE HIS WEIGHT FLUCTUATED AND SOME OF THEM LIST HIM AS THAT.

AND WERE THOSE CLOSE, IN TILE TO THIS?

-- IN TIME, TO THIS?

NO. I THINK ONE WAS IN 1987. THEY WERE PRIOR IN TIME.

SO IS IT THE STATE'S CONTENTION THAT THE EXPLANATION FOR THE VARIANCE IN WEIGHT WAS THAT IT WAS A SUBSTANTIAL PERIOD OF TIME PRIOR TO THIS EVENT?

BETWEEN THE BOOKING SHEETS THAT WOULD SHOW HIM AT 200 AND BETWEEN WHAT HE WEIGHED AT THE TIME OF THIS CRIME, YES.

OKAY.

AND THE STATE'S POSITION IS THAT THE BEST INDICATION OF HIS WEIGHT, AT THE TIME OF THIS MURDER, WAS THE BOOKING SHEET FROM EIGHT DAYS AFTER HE WAS ARRESTED, SHOWING WHAT HE WEIGHED.

WHAT ABOUT THIS ISSUE OF THE WITNESS IDENTIFYING MORE THAN ONE PICTURE IN THE PHOTO PACK, IN THE PHOTO LINEUP? DID SHE IDENTIFY PHI JUST ONE PICTURE OR MORE THAN ONE -- DID SHE IDENTIFY JUST ONE PICTURE OR MORE THAN ONE OR WHAT WERE THE CONVERSATIONS WHEN IT WAS DETECTED?

KIMBERLY PICKED OUT TWO PICTURES. THE FIRST ONE SHE PICKED OUT WAS NUMBER SIX. IT IS NOT THE APPELLANT. THE SECOND PICTURE THAT SHE PICKED OUT WAS THE NUMBER THREE PICTURE THAT WAS THE APPELLANT, BUT SHE WAS ADAMANT, AT THE MOTION TO SUPPRESS HEARING AND THROUGHOUT TRIAL, THAT SHE PICKED OUT BOTH OF THOSE PHOTOS. SHE INITIALED THEM. SHE SIGNED THEM. SHE DID EVERYTHING SHE HAD TO DO BEFORE DETECTIVE LEWIS MADE THE STATEMENT TO HER THAT, YES, THAT IS THE ONE THAT YOUR BOYFRIEND PICKED OUT.

SHE -- IS SHE AND WITNESS MOORE, BOTH, TESTIFIED AT THE SUPPRESSION HEARING?

YES.

LIVE?

YES. AND FOR JOE MOORE, IT IS NOT AN ISSUE, BECAUSE NO STATEMENT WAS MADE TO HIM, UNTIL AFTER THEY WERE BOTH FINISHED WITH MAKING THEIR PHOTO IDENTIFICATIONS, THEN THE DETECTIVE SAID, TO JOE MOORE THAT YOU AND YOUR GIRLFRIEND HAVE PICKED OUT THE SAME PHOTO, BUT NOTHING WAS SAID TO HIM BEFORE THE PHOTOS.

WAS THIS THE PERSON THAT WAS THE ONLY PERSON THAT WAS IN THE PHOTO PACK AND THE LIVE LINEUP?

THE APPELLANT WAS THE ONLY PERSON?

WAS HE IN BOTH?

I AM SORRY.

HE WAS IN THE PHOTO PACK.

YES.

THE ADDITIONAL LINEUP, WAS HE IN THAT?

YES. HE WAS IN THE LIVE LINEUP, TOO.

WERE ANY OTHER DEFENDANTS IN BOTH? WERE ANY OTHER INDIVIDUALS IN BOTH? I GUESS MY POINT IS, IF YOU WANTED TO TIP THE SCALES.

I AM NOT SURE IF THERE IS ANYTHING THE RECORD.

YOU WOULD HAVE THE SAME INDIVIDUAL IN TWO PLACES AND ASK THE WITNESS, AND THE WITNESS WOULD SEE THE PERSON IN THE PHOTO PACK, AND THEN THEY WOULD SEE THE PERSON IN A LIVE LINEUP, AND YOU SORT OF GET THE MESSAGE THAT MAYBE THIS MIGHT BE THE PERSON! WOULDN'T THAT BE AWAY TO TIP T SCALES A LITTLE BIT?

I AM NOT SURE THAT THERE IS ANYTHING IN THE RECORD, SHOWING WHETHER THE SAME PEOPLE OR PERSONS IN THE PHOTO IDENTIFICATION WERE THEN IN THE LIVE LINEUP.

BUT THIS ONE PERSON DID SHOW UP IN BOTH.

WE KNOW THAT THE APPELLANT WAS IN BOTH, BECAUSE HE WAS IDENTIFIED IN BOTH, BUT THERE WASN'T ANYTHING IN THE RECORD, SAYING HOW MANY OF THE PEOPLE THE PHOTO I.D. WERE, THEN, IN THE LIVE LINEUP. THERE IS NOTHING IN THE RECORD ON THAT.

IS THERE ANYTHING IN THE RECORD THAT SHOWS WHO THE OTHER PEOPLE WERE THAT WERE IN THE PHOTO PACK?

NO, YOUR HONOR.

PHOTO LINEUP. WERE THEY PEOPLE THAT THEY SIMPLY HAD ARREST RECORDS OR WERE THEY POLICE OFFICERS OR DO WE KNOW ANYTHING ABOUT WHO THOSE PEOPLE WERE, IN THE PHOTO PACK LINEUP?

NO. THERE IS NOTHING IN THE RECORD, INDICATING THAT.

DO WE KNOW WHO THE PEOPLE WERE, IN THE LIVE LINEUP THAT WAS DONE LATER?

NO. THERE IS JUST NO INFORMATION IN THE RECORD AS TO WHO THEY WERE OR WHAT --

WE DON'T KNOW WHETHER THEY WERE POLICE OFFICERS OR OTHER PEOPLE UNDER ARREST?

NO. THAT WAS NEVER BROUGHT OUT, DURING THE MOTION TO SUPPRESS HEARING NOR AT THE TRIAL.

SO YOU ARE NOT -- SO DID THE DEFENDANT DIDN'T ARGUE THAT -- WHAT I AM HEARING, TODAY, OR WHAT I WAS ASKING YOU ABOUT, WAS THIS IDEA THAT YOU WOULD USE JUST -- JUST DEFENDANT WOULD BE THE ONLY ONE THAT WOULD BE IN THE PHOTO LINEUP AND THE LIVE LINEUP. ARE YOU SAYING THAT THE RECORD DOESN'T TELL US, ONE WAY OR ANOTHER, THAT THE DEFENDANT DIDN'T MAKE THAT ARGUMENT BELOW?

I KNOW THE ALLEGATION HAS BEEN MADE THAT THE DEFENDANT WAS THE ONLY ONE IN THE PHOTO LINEUP AND THE LIVE LINEUP. I AM SAYING THAT THERE IS NOTHING IN THE RECORD SAYING WHO THE OTHER PEOPLE WERE THAT WERE IN THE LIVE LINEUP OR WHO THEY WERE THAT WERE IN THE PHOTO LINEUP.

IN THE TRIAL COURT.

NOT IN THE TRIAL COURT. I THINK HE HAS MADE IT ON APPEAL APPEAL. THE TRIAL COURT BELOW, REGARDING KIMBERLY'S IDENTIFICATION, THESE PHOTO IDENTIFICATIONS, FOUND THAT THE PROCEDURE USED BY DETECTIVE LEWIS, WHEN HE TOLD HER, AFTER SHE HAD PICKED HER TWO PHOTOS, THAT, YES, NUMBER THREE IS WHAT YOUR BOYFRIEND PICKED, HE FOUND THAT THAT WAS AN UNNECESSARILY SUGGESTIVE PROCEDURE, BUT HE SAID, BASED ON THE TOTALITY OF THE CIRCUMSTANCES, AND ESPECIALLY THE FACT THAT SHE HAD HELPED PREPARE THIS

COMPOSITE SKETCH, THAT HE WAS CERTAIN THAT HER IDENTIFICATION OF HIM WAS BASED ON HER PERCEPTION OF HIM AT THE TIME OF THE CRIME, AND NOT ON ANYTHING THAT HAD BEEN SUGGESTED TO HER.

ARE YOU GOING TO TALK, NEXT, ABOUT THE REBUTTAL TESTIMONY?

YEAH. ABOUT THE EYE GLASSES?

YES. THAT TESTIMONY CAME IN, BASICALLY, IT TO REBUT ONE OF THE DEFENDANT'S THEORIES OF DEFENSE, WHICH WAS THAT HE COULDN'T BE THE SHOOTER, BECAUSE HE WEARS EYE GLASSES ALL THE TIME, AND THAT THE SHOOTER WAS NOT WEARING EYE GLASSES. IT IS IMPORTANT TO POINT OUT THAT OFFICER KELLY'S TESTIMONY WAS NOT BEING ADMITTED TO SHOW WHAT THE APPELLANT COULD SEE. IT WAS BEING ADMITTED TO SHOW WHAT A PERSON WITH SIMILAR VISION WOULD BE ABLE TO SEE.

HOW WOULD THE DEFENDANT EVER BE ABLE TO CROSS-EXAMINE THE OFFICER KELLY EFFECTIVELY, ON WHETHER HIS EYESIGHT WAS SIMILAR TO THE DEFENDANT'S? WOULD HE -- WOULD YOU REQUIRE HIM, WOULD HE HAVE TO GO GET OFFICER KELLY'S RECORDS, QUESTION OFFICER KELLY'S EYE DOCTORS? I MEAN HOW IS THAT POSSIBLY RELEVANT TO THE ISSUE THAT, AS TO WHAT THE DEFENDANT CAN SEE? IF IT IS ABOUT WHAT OFFICER KELLY COULD SEE, THEN IT IS NOT RELEVANT.

WE AGREE TO THAT THE TESTIMONY, AT BEST, WAS MARGINALLY RELEVANT. I THINK, IN ANY EVENT, IT WAS HARMLESS, BECAUSE IT WAS CUMULATIVE TO WHAT THE DEFENDANT'S EXPERT TESTIFIED TO. HE BROUGHT IN AN OPTOMETRIST, WHO, ON CROSS-EXAMINATION, THE PROSECUTOR WENT THROUGH A SERIES OF QUESTIONS WITH HIM, ASKING HIM, OKAY, FROM 13 FEET AWAY, COULD THE DEFDANT, COULD THE APPELLANT SEE THIS, COULD HE SEE THIS FROM FIVE FEET AWAY, AND THEN FINALLY HAD HIM ADMIT THAT, FROM A DISTANCE OF FIVE FEET AWAY, HE COULD DISTINGUISH SOMEONE'S HEAD FROM THEIR FEET, IF THEY WERE LYING ON THE FLOOR, SO ALL OF THAT TESTIMONY THAT WAS ASKED OF THE DOCTOR ABOUT THE APPELLANT'S EYESIGHT WAS, THEN, REASKED OF THIS OFFICER KELLY, BASED ON HIS SIGHT. SO THE STATE'S POSITION IS THAT IT WAS CUMULATIVE AND COULDN'T HAVE ATTRIBUTED TO THE JURY'S VERDICT, BECAUSE BASICALLY THEY HEARD THE SAME INFORMATION FROM THE DOCTOR.

BUT BEYOND A REASONABLE DOUBT THEY WOULD HAVE REJECTED THE WHOLE DEFENSE THAT THE DEFENDANT WOULD HAVE PUT ON, ANYWAY. IS THAT WHAT WE WOULD HAVE TO FIND, THAT THIS HAD NO EFFECT ON THE CREDIBILITY OF THE DEFENSE?

IT REALLY COULDN'T HAVE, BECAUSE THE DOCTOR, HIMSELF, HAD TESTIFIED TO EXACTLY WHAT THE APPELLANT COULD HAVE SEEN UNDER THOSE CIRCSTANDS AND ADMITTED THAT HE COULD SEE AND DISTINGUISH A BODY LYING ON THE GROUND, THAT HE COULD TELL WHERE HIS HEAD WAS VERSUS HIS FEET, IN ORDER FOR THE SHOOTING.

IS THERE ANY CONNECTION IN THE EVIDENCE, WITH REGARD TO THE OPERATION OF THE MOTOR VEHICLE, HOWEVER? BECAUSE THERE IS SOME TESTIMONY ONE OF THE VEHICLES PULLED UP IN FRONT OF THE AREA WHERE THE CUSTOMER, THE YOUNG LADY WAS?

YES.

I ASSUME IT WAS THE FORD PROBE, SO THIS WAS THIS DEFENDANT'S MOTOR VEHICLE. IS THERE ANY -- WHAT PART, OTHER THAN THE SHOOTING, I MEAN, A BLIND PERSON CAN GO FEEL AND FIRE A WEAPON? WHAT ABOUT THE OPERATION OF THE MOTOR VEHICLE, TO EXCLUDE THE DEFENDANT? WHAT IS THE EVIDENCE ON THAT?

THE EVIDENCE ON THE MOTOR VEHICLE, IT WAS THAT THE EYEWITNESS, KIMBERLY, SAW HIM

PULL UP. SHE WAS ABLE TO IDENTIFY HIS CAR BECAUSE IT HAD ONE OF ITS HEADLIGHTS STUCK IN THE "UP" POSITION. THE ONLY OTHER TIME SHE SAW HIM DRIVING THAT CAR --

IT WAS THE DEFENDANT OPERATING IT, THOUGH, WHEN SHE --

THE ONE TIME IT IS IN THE RECORD WHERE SHE SAID SHE SAW HIM DRIVING IT WAS WHEN SHE SAW HIM MOVING IT OUT OF THE BAY AREA, TO COME BACK AND MURDER AARON AND BRAD, BECAUSE HE HAD SAID TO HER, SHE HAD BEEN SITTING IN THE FRONT OF A CAR, WITH HER BACK ON THE FRONT GRILL AND SHE WAS ABOUT THREE FEET AWAY FROM AARON, AND AFTER ALL OF THE EQUIPMENT HAD BEEN LOADED IN THE CAR, THE APPELLANT CAME OVER, AND HE SAID TO HER, I WANT YOU TO MOVE OUT OF THE WAY. I DON'T WANT TO GET ANYTHING ON YOU, SO HE HAD HER MOVE DOWN, AND THEN HE GOT IN HIS CAR AND JUST MOVED IT OUT. IT HAD BEEN IN THE BAY, AND HE MOVED IT OUT OF THE BAY, AND THEN CAME BACK, AND THAT IS WHEN HE PUT THE GUN TO AARON'S HEAD AND MURDERED HIM AND MURDERED BRAD.

AND DID SHE DESCRIBE HIM DRIVING, THIS DEFENDANT, DRIVING OFF, OR IS THERE ANY EVIDENCE IN THE RECORD?

THERE IS NO EVIDENCE. SHE SAW HIM GET IN THE CAR WHILE IT WAS IN THE BAY AREA. SHE SAW HIM GET IN IT, TO MOVE IT OUT OF THE BAY AREA.

SO IT IS ONLY AROUND JUST STORE, ITSELF.

RIGHT.

IS THERE ANY TESTIMONY AT ALL OR ANYTHING IN THIS RECORD, ABOUT CONTACT LENSES OR ANYTHING?

NO. ABSOLUTELY NO. NO INFORMATION. AND REGARDING THE I.D.'S, EVEN IF THIS COURT WERE TO FIND THEM INAPPROPRIATE OR ERROR, THEY WOULD STILL BE HARMLESS. THE EVIDENCE IN THIS CASE IS PRETTY OVERWHELMING. WHEN, RIGHT BEFORE THE DEFENDANT WAS APPREHENDED, HE LED THE POLICE ON A 12-MILE OR 12-MINUTE CHASE THROUGHOUT THE CITY OF FT. LAUDERDALE, DURING WHICH HE THREW OUT SEVERAL ITEMS CONNECTING HIM TO THE MURDER.

BUT IS ONE OF THE ISSUES, I GUESS, MAYBE THIS IS A QUESTION OF WHETHER IT IS GUILT OR PENALTY-PHASE, HE WAS TRIED WITH A CO-DEFENDANT?

FOR GUILT.

FOR GUILT. AND THE CO-DEFENDANT, IN THE PENALTY PHASE, ENDED UP GETTING LIFE RECOMMENDATION?

YES.

SO THERE WAS A QUESTION, WOULD BE A QUESTION AS TO WHO WAS THE SHOOTER. CORRECT?

RIGHT. BETWEEN THEM.

SO THE ISSUE OF THE IDENTIFICATION OF THE SHOOTER AND THE ISSUE OF WHETHER THE SHOOTER, WHOEVER WAS THE SHOOTER HAD A -- BE ABLE TO SEE, THAT BECOMES VERY SUBSTANTIAL, AS TO WHETHER THIS DEFENDANT WOULD GET LIFE OR DEATH, WOULDN'T IT?

THERE WERE, ALSO, OTHER IDENTIFICATIONS OF THE APPELLANT APART FROM KIMBERLY AND MR. BROWN.

AS BEING THE SHOOTER?

MR. MOORE.

AS, WELL, AS BEING THERE, BECAUSE --

I AM ASKING ABOUT IT BEING THE SHOOTER.

NO. BUT THE -- MR. MOORE'S PHOTO I.D. IS NOT SUBJECT TO AND IS NOT BEING CHALLENGED, SO THAT WOULD, STILL, BE WITHIN ANY HARMLESS ERROR ANALYSIS. HIS PHOTO IDENTIFICATION. AND PLUS THEIR COMPOSITE SKETCH THAT THEY, BOTH, PREPARED, THAT LED MIKE DIXON, WHO WAS A CO-OWNER OF THE STORE, TO BE ABLE TO IDENTIFY THE APPELLANT AS A PREVIOUS CUSTOMER, WHO THEY HAD ACTUALLY DONE WORK FOR HIM, AND THAT IS HOW AARON AND BRAD, APPARENTLY, KNEW THE APPELLANT. HE HAD GONE THERE, ABOUT FIVE MONTHS EARLIER, AND HAD THEM INSTALL A RADIO/STEREO SYSTEM, ALARM SYSTEM IN HIS CAR, AND WAS OBVIOUSLY UNHAPPY ABOUT IT, HAD GONE TO A COMPETITOR IN FEBRUARY AND COMPLAINED ABOUT THEIR SERVICES, AND ONCE THIS SKETCH WENT OUT, IT WAS THE COMPETITOR WHO CALLED UP MIKE DIXON AND SAID I RECOGNIZE HIM. HE WAS IN HERE COMPLAINING ABOUT YOUR WORK, AND THEN MIKE DIXON LOOKED AT IT CLOSELY, AND THAT IS WHEN HE REMEMBERED MEETING THE APPELLANT ON SEVERAL OCCASIONS AND LOOKED UP THEIR RECORDS AND CONFIRMED THAT HE HAD HAD WORK DONE AT THE OAKLAND PARK STORE, WHERE AARON AND BRAD WERE MURDERED.

WAS THERE ANY EVIDENCE THAT THE OTHER, THAT THE CO-DEFENDANT FIRED THE FATAL SHOT, DID THE KILLING?

NO.

AND YOU SAY THEY WERE TRIED JOINT LOU. WAS ALL THE EVIDENCE THAT WAS -- JOINTLY. WAS ALL OF THE EVIDENCE THAT WAS RECEIVED, RECEIVED AGAINST BOTH OF THEM? IN OTHER WORDS IN THE SAME TRIAL?

UM-HUM.

WE ARE NOT TALKING ABOUT TWO SEPARATE JURIES. WE ARE TALKING ABOUT A SINGLE JURY. ALL THE EVIDENCE THAT CAME IN, CAME IN AT THE SAME TRIAL, BEFORE THAT SINGLE JURY. IS THAT CORRECT?

RIGHT.

WHAT WAS THE DEFENSE OF THE OTHER DEFENDANT DEFENDANT, DURING THE -- OF THE OTHER DEFENDANT, DURING THE COURSE OF THE GUILT PHASE?

THAT HE WASN'T THERE AND THAT HE WASN'T THE SHOOTER.

AND THEN THE SAME JURY HEARD THE PENALTY PHASE SEPARATELY.

IT WAS SEVERED FOR THE PENALTY PHASE.

AND HOW DID THAT, WHICH ONE WAS DONE FIRST?

I BELIEVE MR. RIMMER WAS DONE FIRST, BUT I AM NOT SURE, YOUR HONOR.

THAT IS THE SAME JURY.

I AM NOT SURE THAT IT WAS THE SAME JURY THAT HEARD THEIR PENALTY PHASE. I WOULD HAVE

TO GO BACK AND LOOK AT THAT, YOUR HONOR. I AM NOT SURE ON THAT.

WHAT WAS THE EXTENT OF THE MEDICAL TESTIMONY THAT WAS PUT ON, RELATIVE TO WHAT THE DEFENDANT COULD SEE, WITH HIS EYESIGHT, WITH HIS CONDITION?

HE PUT ON THE TESTIMONY OF HIS OPTOMETRIST, WHO TESTIFIED THAT HE HAD 20/400 VISION.

AND WHAT WAS THE RESULTS OF THAT? WHAT COULD HE SEE AND WHAT COULD HE NOT SEE, WITH THAT TYPE OF VISION?

THEY WENT THROUGH A SERIES OF QUESTIONS WITH HIM. AND HE WAS OF THE OPINION THAT, FROM, SAY, A DISTANCE OF 13 FEET DEPENDING ON THE SIZE OF THE ITEM, HE COULD SEE SOMETHING, BUT, MAYBE, COULDN'T MAKE OUT THE READING ON THE BOX OR THAT A PERSON WOULD BE FUZZY, SO THEY JUST HAD SEVERAL QUESTIONS THAT THEY ASKED HIM, FROM VARYING DISTANCES, AS TO WHAT HE COULD SEE.

RELATIVE TO DRIVING A CAR, WAS THERE ANY TESTIMONY THERE?

WELL, TO DRIVING A CAR, HE SAID THAT HE WOULD NOT BE ABLE TO, WITHOUT GETTING INTO AN ACCIDENT, BUT ON REDIRECT, HE ADMITTED THAT HE DIDN'T HAVE THAT INFORMATION, BASED ON ANY STUDIES THAT HE HAD SEEN OR THAT HAD BEEN CONDUCTED, THAT THAT WAS JUST HIS OPINION.

AND THE PROSECUTION, TO REBUT THAT, PUT ON ALLAY WITNESS -- PUT ON A LAY WITNESS, WHO WAS A POLICE OFFICER, TO SAY THAT MY EYESIGHT IS WORSE THAN THAT AND I CAN DRIVE. IS THAT WHAT HAPPENED?

HIS EYESIGHT WAS A LITTLE BIT BETTER, A AND HE SAID THAT, ON SOME OCCASIONS WHEN HE IS NOT ON DUTY, HE HAS DRIVEN WITH HIS EYE GLASSES NOT ON, NOT WEARING THEM AND HAS NOT GOTTEN INTO AN ACCIDENT.

WELL, I GUESS I AM BACK TO JUSTICE PARIENTE'S QUESTION. HOW DO YOU CHALLENGE THE POLICE OFFICER WHO GETS ON AS A LAY WITNESS, NOT AS AN EXPERT WITNESS, AND JUST SAYS MY EYESIGHT IS WORSE THAN HIS AND I CAN'T SEE. I COULDN'T SEE TO DRIVE A CAR.

AGAIN, THE RELEVANCE OF THE TESTIMONY IS MARGINAL AT BEST, AND, BUT, WE BELIEVE IT IS CLEARLY HARMLESS, CONSIDERING ALL OF THE EVIDENCE IN THIS CASE THAT CAME IN, AND THE FACT THAT IT WAS CUMULATIVE TO THE DOCTOR'S TESTIMONY. HE HAD ALREADY TOLD THE JURY THAT THE APPELLANT WOULD HAVE BEEN ABLE, WITHOUT GLASSES, WOULD HAVE BEEN ABLE TO SEE AARON AND BRAD LYING ON THE FLOOR, AND HE COULD DISTINGUISH BETWEEN THEIR HEADS AND THEIR FEET.

BUT THE POLICE OFFICER'S TESTIMONY WAS THAT, DID HE SAY I HAVE NO PROBLEM TO DRIVING A CAR OR JUST HOW SPECIFIC WAS HIS?

THE DOCTOR'S TESTIMONY?

NO. THE POLICE OFFICER. KELLY.

HE JUST SAID THAT, ON, THAT THERE HAVE BEEN OCCASIONS WHEN HE HAS DRIVEN WITHOUT HIS EYE GLASSES, WHEN HE IS OFF DUTY, AND THAT HE HASN'T GOTTEN INTO AN ACCIDENT. BUT HE REALLY WASN'T, HE DIDN'T, YOU KNOW, GO ON ABOUT HOW CLEARLY HE COULD SEE.

ON THE PREJUDICE POINT, WHAT ABOUT THE DEMONSTRATION THAT WAS DONE? WHAT IS THE RECORDS REFLECT ABOUT WHAT THE PROSECUTOR DID WITH OFFICER KELLY?

OKAY.

DIDN'T THEY -- WASN'T THERE A POINT WHERE THE PROSECUTOR GOT DOWN ON THE FLOOR AND HAD OFFICER KELLY POINT HIS FINGER AT HIM, TO SEE IF HE COULD SEE?

RIGHT. THAT WAS ALL PART OF, YEAH, THAT WAS ALL PART OF --

WHAT WAS THAT ALL ABOUT? WHAT WAS THAT SUPPOSED TO GO TOWARDS?

WELL, THAT WAS GOING TO SHOW WHAT THE APPELLANT COULD SEE FROM FIVE FEET AWAY.

BASED ON WHAT OFFICER KELLY --

NO. NO. HE DID THAT WITH THE OPTOMETRIST FIRST, THE PROSECUTOR. HE DID THAT ON CROSS-EXAMINATION OF THE OPTOMETRIST. HE LIED DOWN ON THE FLOOR, AND HE WAS FIVE FEET AWAY FROM THE DOCTOR, AND HE SAID, OKAY, TELL ME, COULD SOMEBODY WITH THE APPELLANT'S VISION SEE OR AT LEAST DISTINGUISH BETWEEN MY HEAD AND MY FEET?

BUT HE DIDN'T REPEAT THAT WITH THE OFFICER KELLY ON THE STAND?

I AM NOT SURE IF HE LIED DOWN. I AM NOT SURE THAT HE LIED DOWN WITH OFFICER KELLY, WITH THAT, BUT HE DID ASK THAT SAME QUESTION, SO HE MIGHT HAVE BEEN FIVE FEET AWAY, BUT I AM NOT SURE THAT HE LIED DOWN ON THE GROUND WITH THAT.

YOUR OPPONENT SAYS THAT, IN ALL OTHER INSTANCES, WHEN THE DEFENDANT WAS ARRESTED, OTHER BOOKINGS OR WHATEVER, INCLUDING THIS ONE, THAT HE HAD ALWAYS HAD GLASSES ON? IS THAT CORRECT? OR WAS THAT SHOWN BY THE EVIDENCE?

THE TESTIMONY THAT IS IN THE RECORD SHOWS THEY BROUGHT FORTH AN OFFICER WHO HAD BEEN SURVEILING HIM ON THE DAY THAT HE WAS GOING TO BE ARRESTED. THEY HAD A SURVEILLANCE OFFICER OUT THERE FOR AN HOUR OR SO, AND HE TESTIFIED THAT, WHEN THE APPELLANT LEFT HIS HOUSE, HE HAD EYE GLASSES ON. WHEN HE WAS ARRESTED LATER THAT NIGHT, HE DIDN'T HAVE THEM ON. BUT HIS CONTENTION IS HE HAD BEEN TAKEN DOWN BY THE K-9 DOGS AND THAT, YOU KNOW, HE LOST HIS GLASSES THEN. HE TRIED TO INTRODUCE BOOKING SHEETS FROM SEVERAL OTHER CRIMES THAT WERE COMMITTED EARLIER, LIKE IN 1987. ON ONE BOOKING SHEET, IT IS CHECKED OFF THAT HE WEARS EYE GLASSES, BUT WHETHER THEY CALLED IN ON REBUTTAL BY THE STATE, THE OFFICERS WHO HAD ACTUALLY ARRESTED HIM, THEY SAID THEY DIDN'T HAVE ANY RECOLLECTION OF HIM WEARING EYE GLASSES, AND THE BOOKING OFFICER SAID I DON'T HAVE AN INDEPENDENT RECOLLECTION OF THE APPELLANT, SO I DON'T KNOW THAT HE WAS WEARING GLASSES. IT COULD BE THAT I JUST ASKED HIM A QUESTION AND CHECKED THAT OFF. SO I WAS TALKING ABOUT THE HARMLESSNESS UNDER POINT TWO, IN THE EVENT THAT THE COURT FINDS THAT ANY OF THE IDENTIFICATIONS WERE IMPROPER. THE TESTIMONY SHOWING THAT THE DEFENDANT WAS THROWING ITEMS FROM THE CRIME, LINKING HIM TO THE CRIME, THROWING THEM OUT OF HIS CAR DURING THE CAR CHASE, ONE OF THE THING THAT IS HE THREW OUT WAS THE MURDER WEAPON. THAT LINKED HIM TO THE ROBBERY. WE WOULD, ALSO, HAVE THE THREE SURVIVORS AND THEIR TESTIMONY, AS TO THE FACTS OF THE MURDER, AND THE ROBBERY, WHICH THEY COULD TESTIFY TO WHAT HAPPENED, AND MIKE DIXON, OF COURSE, WHO WAS ABLE TO IDENTIFY THE APPELLANT IN A PHOTO I.D., ALIVE LINEUP ID AND IN COURT. AGAIN, IF THERE IS NOTHING FURTHER, THANK YOU.

THE EYE WEAR ISSUE IS REALLY IMPORTANT. IF THESE EYEWITNESSES TO THE CRIME HAD SAID THAT THE MAN THAT CAME IN AND SHOT THESE PEOPLE WALKED FINE AND HAD COMPLETE CONTROL OF HIS EXTREMITIES AND DIDN'T WALK WITH A LIMP AT ALL, AND THEN ROBERT RIMMER BROUGHT IN HIS SURGEON AND HIS PHYSICAL THERAPIST, WHO DEMONSTRATE HE HAD BEEN IN A SERIOUS AUTOMOBILE ACCIDENT, AND AFTER HIS LEG WAS REPAIRED, HE WALKED

WITH A LIMP, A NOBLE LIMP, AND HE HAS WALKED WITH A LIMP EVER SINCE THE ACCIDENT, THAT SURELY WOULD CAST SOME REAL DOUBT ON THOSE EYEWITNESSES' TESTIMONY.

THE OPTOMETRIST THAT CAME IN, WAS THIS THE OPTOMETRIST THAT HAD BEEN DEALING WITH THE DEFENDANT FOR AN EXTENSIVE PERIOD OF TIME?

YES.

AND THE QUESTION WAS ASKED ABOUT THE CONTACTS OR OTHER VISION ENHANCERS. WAS THAT QUESTION ASKED, OR IS THERE JUST NO QUESTION OR IT IS NOT IN THE RECORDS? WHAT IS THE STATUS OF THE RECORD ON THAT ASPECT?

HE SORT OF WENT THROUGH, LIKE A LAUNDRY LIST. HE HAS BEEN MY PATIENT FOR "X" YEARS. THIS IS THE DEGREE OF IMPAIRMENT. HE GETS HIS GLASSES. I SEND HIM TO THIS OPTICAL STORE NEXT DOOR, AND THE OPTICIAN THAT IS HERE, AS WELL, FILLS HIS GLASSES. IT WAS JUST SORT OF MECHANICAL.

BUT WAS THERE ANY TESTIMONY ABOUT THE USE OR NONUSE OF CONTACT LENSES?

NONE AT ALL. HE SAID THAT HE GAVE HIM REGULAR EYE WEAR.

BUT WAS THE QUESTION ASKED? IN OTHER WORDS --

NO ONE ASKED. NO ONE ASKED.

SO THERE WAS NO DISCUSSION ABOUT THAT.

NO ONE ASKED.

WHAT ABOUT IT 4, WAS THEIR TEST MONEY ABOUT THE OTHER DEFENDANT AND HIS PHYSICAL DESCRIPTION -- WHAT ABOUT IT, WAS THEIR TEST MONEY ABOUT THE OTHER DEFENDANT -- WAS THERE TESTIMONY ABOUT THE OTHER DEFENDANT AND HIS PHYSICAL DESCRIPTION?

I DON'T THINK THAT EYE WEAR CAME INTO THE DESCRIPTION.

IN OTHER WORDS THE WAY THE WITNESSES DESCRIBED THE TWO DEFENDANTS WAS THAT NEITHER OF THEM HAD ON EYE GLASSES. IS THAT CORRECT?

I BELIEVE SO, JUSTICE, YES. THE THING BACK WITH THE EYE WEAR THOUGH, IT IS KIND OF SILL FOY OFFICER KEL TOY COME IN AND SAY I -- SILLY FOR OFFICER KELLY TO COME IN AND SAY I AM A SWORN POLICE OFFICER AND I NEED MY EYE WEAR AND THE STATE OF FLORIDA SAYS I NEED MY EYE WEAR BUT I DON'T WEAR IT WHEN I AM DRIVING. I SAY TO HECK WITH THE MOTOR VEHICLE LAWS, AND SOMETIMES I GO OUT ON DUTY AND I WEAR MY EYE WEAR. IT WAS KIND OF SILLY, THE WAY HE PRESENTED IT, BUT IT WAS THE ONLY REBUTTAL TESTIMONY TO ALL OF ROBERT RIMMER'S TESTIMONY ABOUT HIS DEFICIENT EYESIGHT AND THAT HE IS LEGALLY BLIND. HIS WIFE SAYS HE NEVER GOES ANYPLACE WITHOUT HIS EYE WEAR. HE CAN'T SEE DIDDLY WITHOUT HIS EYE WEAR. THEY HAD NOT ONE WITNESS, FROM JAILERS, FROM FRIENDS, FROM TEACHERS NOT ANYBODY, NOT ONE PERSON TO REBUT HIS DEFICIENT EYESIGHT, EXCEPT OFFICER KELLY, WHO COMES IN AND GOES, WELL, I CAN SEE FIVE FEET FROM HERE, SO I GUESS I COULD SHOOT SOMEBODY FIVE FEET FROM HERE.

THAT IS JUST ONE FACET OF THE CASE, AND WHEN YOU SUPER IMPOSE THAT AGAINST ALL OF THE REST OF THE EVIDENCE, WHICH IS RELEVANT, IT IS PRETTY COMPELLING DOES IT FAIL IN THE HARMLESS ERROR?

-- A REFERENCE IT TO AN ALIBI. IF ONE PERSON CAME IN AND SAID HE WAS IN ARIZONA AND YOU BELIEVE THAT ONE PERSON, THERE IS A WEALTH OF OTHER INFORMATION IF YOU BELIEVE THAT PERSON WAS IN ARIZONA, THEN I AM SORRY. THE GOVERNMENT'S CASE FAILS.

BUT YOU SAID EARLIER THAT IT WAS SUBJECT TO HARMLESS ERROR. YOU DIDN'T HAVE A PROBLEM WITH IT.

I GUESS BECAUSE THE EYESIGHT THING IS JUST, JUST TRANSCENDS EVERYTHING. THE WAY THEY DESCRIBE THE ROBBERY WAS A MAN 15-TO-20 TIMES IN AND OUT OF THE STORE, TAKING THINGS OFF OF THE SHELVES AND STACKING THEM AND LOADING THEM IN A CAR. THERE WERE SO MANY THINGS THAT A PERSON WITH ROBERT RIMMER'S EYESIGHT JUST COULD NOT DO, AND THEIR TOTAL REBUTTAL WAS BRINGING IN OFFICER KELLY TO SAY I ARRESTED HIM, AND THE REASON HE DIDN'T HAVE ANY EYE WEAR ON WHEN THEY ARRESTED HIM IS OFFICER KELLY ADMITTED THAT THE DOG CHEWED ROBERT RIMMER UP AND OFFICER KELLY ADMITTED THAT HE BEAT HIM ABOUT THE FACE UNPERCENT SFLI, SO THE FACT THAT -- UNMERCIFULLY, SO THE FACT THAT HE DIDN'T HAVE EYE GLASSES WHEN HE WAS BOOKED INTO JAIL, EVEN HIS MOM TESTIFIED THAT, LOOK, I HAD TO GO AND GET HIM TWO PAIRS OF EYE GLASSES FOR AFTER HE WAS BOOKED INTO THE JAIL. THE LAST COMMENT WAS IN THE CLOSING PENALTY PHASE WHERE, EVEN THOUGH ROBERT RIMMER WAS ON COMMUNITY RELEASE AT THE TIME AND THAT IS A ELEMENT FOR AGGRAVATING CIRCUMSTANCE, THE PROSECUTOR FRAMED HIS ARGUMENTS AS TO THE GOVERNMENT'S PROOF OF THAT ISSUE, BY LEADING THE JURY TO BELIEVE THAT FLORIDA HAS AWAY TO RELEASE PRISONERS. IN OTHER WORDS LIFE DOESN'T MEAN LIFE. JUSTICE ANSTEAD, I KNOW THAT YOU HAVE WRITTEN ABOUT THIS EXTENSIVELY. EVEN LAST NIGHT IN THE NEWS, THEY ARE STILL TALK ABOUT HOW --

I THOUGHT, IN THAT PARTICULAR COMMENT BY THE PROSECUTOR, THAT THE PROSECUTOR WAS TALKING ABOUT THE FACT THAT HE HAD A PREVIOUS CONVICTION AND HAD GOTTEN OUT ON CONTROLLED RELEASE.

THAT IS HOW HE WANTED -- THAT IS HOW HE WANTED THE TRIAL JUDGE TO BELIEVE WHAT HE WAS TALKING ABOUT, THAT HE WAS JUST TALKING ABOUT, LOOK, THE STATE HAS PROVED UP THE AGGRAVATING CIRCUMSTANCE. THE PRIOR VIOLENT FELONY, AND HE WAS ON COMMUNITY RELEASE FOR IT. BUT THERE WAS AWAY TO DO THAT. THAT WAS NEVER CHALLENGED BY THE DEFENSE. THERE WAS NEVER AN ISSUE THAT HE WAS ON COMMUNITY RELEASE. WE HAVE NO MORE PAROLE IN FLORIDA.

IT IS REALLY NOT APPROPRIATE, I DON'T BELIEVE, FOR YOU TO BE MAKING A NEW ARGUMENT ON YOUR REBUTTAL PART THAT, THE STA DOESN'T HAVE AN OPPORTUNITY TO RESPOND TO. YOU DIDN'T ADDRESS THIS, WHEN YOU INITIALLY STOOD UP. I REALIZE YOU ADDRESSED IT EXTENSIVELY IN YOUR BRIEF, AND IT SEEMS TO ME IN FAIRNESS, THAT WE SHOULD TAKE IT ON THE WAY YOU PRESENT IT IN THE BRIEF.

I GUESS I DON'T HAVE ANYMORE. THANK YOU.

THANK YOU, COUNSEL.