>> OKAY, THE NEXT CASE UP WILL
BE--
[INAUDIBLE]
WE'LL JUST WAIT A FEW MINUTES
FOR EVERYONE TO LEAVE.
>> HANG ON FOR A SECOND.
GENTLEMEN?
LADIES AND GENTLEMEN--
[INAUDIBLE]
>> OKAY.
MR. MALONE?
>> CHIEF JUSTICE LABARGA, MAY IT
PLEASE THE COURT, MY NAME'S
STEVE MALONE.
I'M HERE ON BEHALF OF RODNEY
LOWE.
MR. LOWE WAS-- I'M SORRY?
>> [INAUDIBLE]
>> OH, GOSH.
ALL RIGHT.
>> DO YOU HAVE A VOLUME THING
THERE?
THERE YOU GO.
>> HOW'S THIS?
ALL RIGHT.
MR. LOWE WAS CONVICTED OF AN
ATTEMPTED ROBBERY AND
FIRST-DEGREE MURDER IN A JULY
3RD, 1990, SHOOTING AT A
CONVENIENCE STORE.
AT THE TIME OF, AT THE TIME OF
THE CRIME, HE WAS IN HIS FIRST
MONTH OF HIS 20TH YEAR.
HE WAS 20 YEARS OLD.
THIS COURT AFFIRMED THE GRANT OF
PENALTY PHASE RELIEF WHEN IT WAS
DISCOVERED THAT THERE WERE OTHER
PEOPLE WHO HAD SAID THAT THEY
WERE ACTUALLY SHOOTERS.
SO THIS CASE WENT BACK TO A NEW
PENALTY PHASE, AND THERE WAS THE
COMPETING THEORIES WERE
PRESENTED.
THE DEFENSE THEORY BEING THAT
MR. LOWE WAS, AS HE ADMITTED,
WAS THE DRIVER OF THE CAR BUT
WAS NOT ACTUALLY THE SHOOTER.
IF I COULD DIRECT THE COURT'S
ATTENTION TO THE SECOND POINT IN
THE BRIEF, BECAUSE I THINK IT
OVERARCHES A LOT OF WHAT
HAPPENED AT THE TRIAL.
AND THAT IS THAT THERE WAS A
TOTALLY IMPROPER AGGRAVATOR
PRESENTED OF THE FACT THAT

MR. LOWE WAS ON COMMUNITY
CONTROL.
AND, IN FACT, MR. LOWE WAS NOT
ON COMMUNITY CONTROL.
HE HAD BEEN CONVICTED IN 1987,
EXCUSE ME, OF A BURGLARY AND A
ROBBERY WITHOUT A WEAPON, AND AT
THE TIME OF THE OFFENSE HE WAS
GIVEN, HE WAS GIVEN A YOUTHFUL
OFFENDER SENTENCE PURSUANT TO A
NO CONTEST PLEA.
AND THE LAW COULDN'T BE CLEAR
THAT IF IT'S A YOUTHFUL OFFENDER
SENTENCE, YOU ARE NOT ON
COMMUNITY CONTROL, YOU ARE IN A
COMMUNITY CONTROL PROGRAM.
>> WELL, BOTH OF THOSE ARE
DEFINED, ARE THEY NOT, IN THE
SAME--
>> VERY SIMILAR.
>> RIGHT.
>> YEAH.
BUT LET'S LOOK.
[LAUGHTER]
>> I HAVE BEEN LOOKING.
HELP US UNDERSTAND WHY THESE
THINGS SHOULD NOT BE CONSIDERED.
>> WELL, FIRST, WHEN THE
LEGISLATURE CREATES AN
AGGRAVATOR OR IN THIS CASE SORT
OF EXPANDED, IT SAYS WHAT THE
AGGRAVATOR IS.
AND IT SAID THAT IT WAS A
VIOLATION, IT HAD TO BE A
VIOLATION OF COMMUNITY CONTROL.
THIS SAME LEGISLATURE HAS
CREATED A YOUTHFUL OFFENDER ACT
THAT'S PRESUMED TO KNOW WHAT ITS
LAW IS, IT'S PRESUMED TO KNOW
THAT, AND IT'S-- IF IT WANTED
TO SAY THAT A YOUTHFUL OFFENDER
WHO WAS IN A COMMUNITY CONTROL
PROGRAM COULD BE AGGRAVATED FOR
FIRST-DEGREE MURDER, IT WOULD
HAVE, AND IT DIDN'T.
>> DID THE ATTORNEY AGREE TO THE
AGGRAVATORS OTHER THAN THE--
>> [INAUDIBLE]
>>-- AVOID ARREST?
>> YEAH.
I LIKE TO SAY THAT THERE'S AN
UNKNOWING ACQUIESCENCE IN THIS
COURT'S--
>> WELL, COULD YOU GO BACK TO, I
MEAN, I'M NOT IMPRESSED WITH

THAT ARGUMENT.
>> ALL RIGHT.
>> BECAUSE THE JURY'S GOING TO HEAR WHAT, I MEAN, THEY'RE GOING TO HEAR EITHER HE'S IN A COMMUNITY CONTROL PROGRAM, BUT YOU WERE TALKING ABOUT THE ISSUE OF WHO WAS THE SHOOTER.
ARE ANY OF YOUR POINTS ON APPEAL RELATED TO QUESTIONS AS TO WHETHER THAT WAS ADEQUATELY EVALUATED IN THE PENALTY PHASE EITHER IN THE-- OR IN THE INSTRUCTIONS OR IN THE JURY OR THE JUDGE'S CONSIDERATION?
BECAUSE IF THAT'S WHY WE SENT IT BACK, YOU STARTED TO SAY THAT'S WHY WE SENT IT BACK, AND-- SO IS WHAT, BUT THEN YOU WENT ON TO COMMUNITY CONTROL.
SO COULD YOU GET BACK TO THE ISSUE ABOUT WHY WE REVERSED IT AND WHETHER THERE ARE CONCERNS ABOUT WHO THE SHOOTER WAS?
>> YES.
JUSTICE PARIENTE, THERE WAS A, THERE WERE A COUPLE PROBLEMS WITH WHAT HAPPENED AT TRIAL IN TERMS OF WHETHER THE JURY COULD CONSIDER THE FACT THAT MR. LOWE WASN'T THE SHOOTER.
I HAVE RAISED THE ISSUE IN POINT SIX AND POINT SEVEN.
ONE OF THE ISSUES IS THAT THE JURY, THE JURY IS REPEATEDLY INSTRUCTED AS THE HITCHCOCK INSTRUCTION HAS BEEN FORMULATED THAT MR. LOWE HAS BEEN CONVICTED OF FIRST-DEGREE MURDER, AND YOU CANNOT QUESTION THAT FINDING.
THE JURY IS TOLD HE'S ALSO CONVICTED OF THE ATTEMPTED ROBBERY.
THE JURY'S NEVER TOLD THAT IF YOU GO BACK AND LOOK AT THE VERDICT FROM THE ORIGINAL TRIAL, THAT THIS WAS A GENERAL VERDICT, THAT IT WAS BASED ON BOTH FELONY MURDER AND PRINCIPAL'S INSTRUCTIONS, AND THAT THERE WAS A WAY THAT THEY COULD CONSIDER THAT MR. LOWE WAS--
>> WELL, DIDN'T THERE, WASN'T THERE EVIDENCE PRESENTED AT THE RESENTENCING FROM THE WITNESSES

WHO ACTUALLY SAID SOMEBODY ELSE
SAID THEY--
>> THERE WAS.
>> OKAY.
BUT-- ALL RIGHT.
SO IF YOU COULD TAKE IT FROM
THERE--
>> YES.
>> WHAT HAPPENED WHEN THOSE
WITNESSES TESTIFIED?
>> THE WITNESSES WERE PERMITTED
TO TESTIFY, AND THE EVIDENCE WAS
ADMITTED THAT BLACKMAN HAD SAID,
BRAGGED ABOUT KILLING IN THE
CONTEXT OF A CONVENIENCE STORE
KILLING THAT HE KILLED THE
WOMAN.
>> AND HOW DID THE TRIAL JUDGE
DEAL WITH THAT?
>> THE PROBLEM IS-- THE JUDGE
LET THE TESTIMONY IN, BUT THE
PROBLEM IS THERE WAS NO WAY FOR
THE JURY TO REALLY CONSIDER IT.
THERE'S--
>> WELL, THEY HAD THE-- THE
STATE SAYS THAT THEY WERE
INSTRUCTED ON THE MINOR
PARTICIPANT MITIGATOR.
>> YES, THEY WERE.
RIGHT.
BUT HOW-- BUT, AGAIN, WHEN A
JURY IS TOLD THAT YOU ARE NOT,
YOU CANNOT CONSIDER, YOU CANNOT
RECONSIDER THE FACT THAT
MR. LOWE'S BEEN CONVICTED OF
FIRST-DEGREE MURDER, WHAT-- HOW
CAN THEY POSSIBLY CONSIDER--
>> BECAUSE IT'S TWO DIFFERENT
THINGS.
I MEAN, YOU'RE CONVICTED OF
FIRST-DEGREE MURDER EVEN IF
YOU'RE NOT THE SHOOTER.
>> WE KNOW THAT.
>> DID ANYONE ASK FOR AN
INSTRUCTION THAT SPECIFICALLY
SAID IS HE, YOU KNOW, THAT--
FOR THEM TO DETERMINE WHO THE
SHOOTER WAS?
WAS THAT--
>> NO, I DON'T RECALL THAT
INSTRUCTION BEING REQUESTED.
>> OR AN INTERROGATORY?
>> I BELIEVE THAT THEY REQUESTED
THE VERDICT FORMS ON THE
AGGRAVATORS TO BE, TO BE FOUND.

BUT, JUSTICE PARIENTE, WE KNOW
THAT PEOPLE CAN BE CONVICTED OF
FIRST-DEGREE MURDER BASED ON
FELONY MURDER THEORIES.
THE JURORS DON'T KNOW THAT
NORMALLY UNLESS THEY'RE TOLD.
>> BUT YOU'VE ALREADY JUST SAID
THAT THEY DIDN'T ASK FOR AN
INSTRUCTION ABOUT THAT, AND SO
ARE YOU SAYING THAT THE TRIAL
JUDGE SHOULD HAVE TAKEN IT UPON
HIMSELF TO GIVE SUCH AN
INSTRUCTION?
>> I'M SAYING THAT'S FUNDAMENTAL
ERROR NOT TO.
>> OKAY.
>> THAT THIS COURT DIRECTED, IT
AFFIRMED THE LOWER COURT'S GRANT
OF POSTCONVICTION RELIEF AS TO
PENALTY--
>> SAY WHAT?
WE SAID BASICALLY IN LOWE THAT
WE WERE GRANTING IT BECAUSE
THERE WERE THE TWO WITNESSES
THAT THE DEFENSE ATTORNEY SHOULD
HAVE FOUND--
>> RIGHT.
>>-- AND THAT THOSE WOULD BE
PERTINENT TO MINOR
PARTICIPATION, AND I BELIEVE
UNDER THE DOMINATION OF
ANOTHER--
>> YES, DOMINATION.
>> TWO AGGRAVATED-- I MEAN, I'M
SORRY, TWO MITIGATING
CIRCUMSTANCES.
AND SO THAT'S WHAT WE SAID WHEN
WE REMANDED THIS FOR
RESENTENCING.
>> RIGHT.
>> OKAY?
AND SO WE GET TO THE
RESENTENCING, YOU GOT THE PEOPLE
TESTIFIED, YOU HAVE THE ATTORNEY
ARGUING THAT EVIDENCE, CORRECT?
>> CORRECT.
>> AND THEN YOU GET TO THE JURY
INSTRUCTIONS, AND THERE'S NO
REQUEST FOR JURY INSTRUCTION TO
GO WITH THAT.
>> NO.
AND THERE'S A RELATED ISSUE OF
THERE WAS NO--
[INAUDIBLE]
INSTRUCTION GIVEN EITHER.

>> WELL, BUT THE JUDGE RAISED
THAT ISSUE, AND THE DEFENSE
LAWYER SAID I'LL LOOK AT IT AND
SAID HE WAS SATISFIED.
>> RIGHT.
>> WITH THE INSTRUCTION.
>> THAT'S TRUE.
>> SO IT'S AFFIRMATIVELY SAID HE
DIDN'T WANT THAT INSTRUCTION.
>> WELL-- YES, THAT IS TRUE.
BUT THE COURT HAS A MANDATE.
THIS COURT AFFIRMED THE LOWER
COURT'S GRANT OF RELIEF AS TO
PENALTY, AND THE LOWER COURT
INCLUDED IN ITS ORDER-- WHICH
IS, OF COURSE, COURT-AFFIRMED--
THAT THE INSTRUCTION HAD TO BE
GIVEN.
AND THIS COURT REQUIRES IT IN
THESE KINDS OF CASES.
I MEAN, I AGREE THERE WAS-- I'D
LIKE TO CALL, YOU KNOW, IT WAS
ACQUIESCENCE.
THE DEFENSE LAWYER DIDN'T PURSUE
IT, BUT THE MANDATE OF THIS
COURT HAS TO BE CARRIED OUT.
>> SO YOU'RE SAYING THAT WE
SHOULD SAY THAT DESPITE THE FACT
THAT THE TRIAL JUDGE
SPECIFICALLY BROUGHT UP THE
ISSUE OF AN EDMOND TYSON
INSTRUCTION WHICH, AS I
UNDERSTAND THE RECORD THE STATE
SAID, NO, WE DON'T NEED TO, BUT
THEN HE TURNED TO THE DEFENSE
ATTORNEY AND SAID WOULD YOU LIKE
THIS INSTRUCTION, AND THE
DEFENSE ATTORNEY SAYS, WELL, LET
ME THINK ABOUT IT--
>> THINK ABOUT IT OVERNIGHT,
RIGHT.
>>-- AND THEN COMES BACK AND
DOESN'T WANT IT.
>> WELL-- DOESN'T PURSUE IT,
CORRECT.
>> OKAY.
BUT YOU-- I'M, YOUR ARGUMENT
THEN BREAKS DOWN TO SIMPLY THIS,
TO ME, IS THAT DESPITE THE
DEFENSE ATTORNEY SAYING, NO,
THEY DIDN'T NECESSARILY WANT
THAT INSTRUCTION, THE TRIAL
JUDGE SHOULD HAVE GIVEN IT
ANYWAY?
>> I BELIEVE THAT'S WHAT THE LAW

REQUIRES.
>> OKAY.
>> THE LAW REQUIRES THAT THE
JURY MAKE-- ESPECIALLY IN A
CASE LIKE THIS.
THE LAW REQUIRES THE JURY MAKE
AN ENMAN FINDING.
>> AND YOU COULD BE RIGHT.
IT SEEMS TO ME THAT WE DID SAY
IN PEREZ THAT A EDMOND TYSON
INSTRUCTION SHOULD BE GIVEN.
>> YES.
I THINK IT'S REQUIRED.
>> THERE WAS A CASE WHERE THERE
WERE CO-DEFENDANTS--
>> I DON'T RECALL OFF THE TOP OF
MY HEAD.
BUT MOST, I MEAN, MOST LIKELY.
THAT WOULD MAKE SENSE.
>> WELL, BUT THE REALITY IS
THERE ARE ALL SORTS OF THINGS
THAT ARE REQUIRED BY THE LAW
WHICH ARE WAIVEABLE.
>> WHICH ARE WHAT, WAIVEABLE?
>> WAIVEABLE.
SOMETIMES THEY'RE WELL INFORMED
AND SOMETIMES THEY'RE NOT.
BUT THAT HAPPENS ALL THE TIME.
AND THEN MAYBE IF THEY'RE IN THE
CATEGORY OF NOT WELL INFORMED,
THEN YOU'RE OFF INTO
POSTCONVICTION OR-- BUT, OR
IT'S FUNDAMENTAL.
IF THERE'S SOME KIND OF
FUNDAMENTAL ERROR.
>> THAT'S WHAT I'M PURSUING
HERE.
>> SO THAT'S WHAT YOU'RE
REALLY--
>> YEAH.
AND I AGREE THERE ARE SOME--
BUT, YOU KNOW, AGAIN, I THINK
WHEN THE COURT ISSUES A MANDATE
AND SAYS TO DO THIS IN THE TRIAL
AND IT'S NOT DONE, IT'S A WHOLE
DIFFERENT LEVEL.
YOU KNOW?
THAT RISES TO--
>> THAT'S AUTOMATICALLY
FUNDAMENTAL.
>> WELL, IF THE COURT, IF THIS
COURT ORDERS IT AND IT'S NOT
DONE, WHAT WOULD BE MORE
FUNDAMENTAL?
I MEAN--

>> MAYBE VIOLATING THE
CONSTITUTION.
>> YEAH.
>> BUT EVEN A CONSTITUTIONAL
VIOLATION--
>> IT IS NOT, RIGHT?
>> WELL, IT IS-- NO.
NO, NOT DIRECTLY.
BUT IT IS IN THE SENSE THAT
THERE HAS TO BE A DETERMINATION
THIS COURT HAS FILED--
>> WE DID AFTER-- THE SUPREME
COURT SAID IT WASN'T A
CONSTITUTIONAL VIOLATION.
WE DID SAY THAT WE NEEDED ONE TO
BE, THAT THIS ISSUE SHOULD BE
SUBMITTED TO THE JURY.
I THOUGHT WE HAD--
>> I THINK IT SAYS MUST BE
SUBMITTED.
>> WHAT DID THE JUDGE FIND AS
FAR AS THE RELATIVE CULPABILITY?
>> JUDGE REJECTED THE DEFENSE
THEORY AND THE DEFENSE WITNESSES
ON THAT ISSUE.
>> SO THERE WAS A CREDIBILITY
FINDING THE JUDGE MADE.
>> THE JUDGE MADE IT, BUT--
>> THAT YOUR CLIENT WAS THE
SHOOTER.
>> THE JUDGE MADE THAT FINDING,
BUT, YOU KNOW, WE DON'T KNOW
WHAT THE JURY SAID BECAUSE--
>> BECAUSE, WELL AGAIN--
>> [INAUDIBLE]
>>-- IT LOOKS LIKE THE DEFENSE
LAWYER MADE A TACTICAL DECISION
NOT TO HAVE THAT PUT FRONT AND
CENTER TO THE JURY.
>> I DON'T KNOW WHY THE DEFENSE
LAWYER DIDN'T PURSUE IT.
I KNOW THIS COURT REQUIRES IT.
AND THAT IT SHOULD--
>> WE MAY HAVE AN OPPORTUNITY TO
FIND OUT ABOUT THAT.
>> I WOULD RATHER DEAL WITH THE
ISSUE NOW.
[LAUGHTER]
>> I UNDERSTAND.
>> I WOULD LIKE TO ADDRESS
ANOTHER POINT.
THE DEFENSE, MY POINT 11, THE
DEFENSE PRESENTED A PSYCHOLOGIST
WHO TESTIFIED ABOUT A NUMBER OF
THINGS BUT MAINLY WAS GOING TO

TALK ABOUT THE FACT THAT
MR. LOWE WOULD NOT BE VIOLENT IN
THE FUTURE.
THIS IS A CRITICAL ISSUE IN THIS
CASE BECAUSE THE JURY, THE
JURORS KNEW THAT MR. LOWE'S
CRIME HAD BEEN COMMITTED IN 1990
AND-- WELL, THEY KNEW HE'D BEEN
ON DEATH ROW, AND THEY WERE
ASKED AND TOLD BY THE STATE
ATTORNEY AT THE TRIAL THAT, YES,
HE COULD GET CREDIT FOR THE TIME
HE'D SERVED.
SO IT'S REALLY A CRITICAL ISSUE
TO THE JURY.
ABOUT WHETHER HE'D BE VIOLENT IN
THE FUTURE.
>> WELL, I WAS READING THE
ARGUMENT THERE, AND I'M REALLY
KIND OF PUZZLED AS TO WHY IT
WOULD BE SUCH A CRITICAL ISSUE
CONSIDERING THE FACT THAT IN A
DEATH PENALTY CASE, FIRST-DEGREE
MURDER CASE I SHOULD SAY,
THERE'S REALLY ONLY TWO OPTIONS.
ONE IS THAT THE DEATH PENALTY
WOULD BE IMPOSED OR A LIFE
SENTENCE WOULD BE IMPOSED.
AND SO WAS THIS A CASE WHERE HE
WOULD HAVE BEEN ELIGIBLE FOR
PAROLE AFTER 25 YEARS--
>> YES.
>>-- OR 50--
>> 25.
IT WAS, IT USED TO BE--
>> SEEMS TO ME, HE'S GOING TO BE
IN JAIL.
WHAT DID HE GET FOR THE
ATTEMPTED ROBBERY?
>> HE GOT 15 YEARS CONSECUTIVE,
AND THE DEFENSE WASN'T PERMITTED
TO TELL THE JURY THAT.
THAT'S ANOTHER--
>> OKAY.
SO WHAT-- I GUESS MY REAL
QUESTION IS WHAT REAL IMPACT
WOULD THE FACT THAT HE WAS NOT
GOING TO BE DANGEROUS IN THE
FUTURE REALLY MAKE SINCE HE'S
GOING TO BE IN JAIL POSSIBLY--
PROBABLY IN PRISON FOR THE REST
OF HIS LIFE?
>> WELL, FIRST, I DON'T THINK
JURORS THINK THAT.
I THINK JURORS THINK THAT AFTER

THE 25 YEARS THERE'S THIS
LIBERAL PAROLE BOARD UP THERE
THAT'S GOING TO RELEASE THEM.
THAT'S WHAT JURORS THINK.
>> HE HAD A CONSECUTIVE 50-YEAR
SENTENCE.
>> 15.
BUT THE JURORS WERE NOT
PERMITTED TO HEAR THAT.
THE JUDGE ISSUED AN ORDER SAYING
THE DEFENSE COULD NOT TALK ABOUT
THE 15-YEAR CONSECUTIVE, AND
ALSO THE DEFENSE COULD NOT
PRESENT EVIDENCE THAT NO ONE
WHO'S EVER HAD A SENTENCE OF
DEATH REDUCED TO LIFE WITH A
MANDATORY QUARTER HAS EVER BEEN
RELEASED ON PAROLE IN FLORIDA.
THE DEFENSE WASN'T PERMITTED TO
PRESENT THAT.
JURORS REALLY THINK END OF 25
YEARS, THAT'S IT.
HE'S OUT.
AND THAT'S, THAT'S WHY THE
FUTURE DANGEROUSNESS ISSUE IS SO
IMPORTANT.
BECAUSE THEY THINK THAT IF WE
RELEASE, IF WE GIVE LIFE NOW, I
THINK THIS WAS, LIKE, THREE
YEARS AGO, RIGHT?
WE'RE AT THE 25-YEAR MARK NOW.
THEY'RE THINKING THAT HE'S JUST
GOING TO BE OUT IN THREE YEARS.
BUT WHAT HAPPENED WAS THE
DEFENSE WAS PERMITTED TO PRESENT
PART OF THE ISSUE OF WHETHER
MR. LOWE WOULD BE VIOLENT IN THE
FUTURE AND WAS PRECLUDED BECAUSE
OF A DISCOVERY VIOLATION FROM
PRESENTING THINK OF THE
UNDERLYING DATA OR TESTING.
THE--
>> THIS IS THE ISSUE WHERE THE
PERSON WHO'S TESTIFYING, I GUESS
THE EXPERT, HAD-- THE STATE
KNEW ABOUT HIM, HAD DEPOSED HIM?
>> YES.
>> HAD HIS REPORT AND THEN JUST
PRIOR TO HIS TESTIMONY HE ADDS
SOMETHING ELSE THAT HAD NOT BEEN
DISCLOSED.
>> RIGHT.
THAT'S TRUE.
SOMETIME AFTER THE DEPOSITION
THE DOCTOR ACTUALLY GOT THE

VIOLENCE RISK ASSESSMENT
INSTRUMENT OUT AND SCORED IT,
MR. LOWE ON IT, AND HE WAS
ALLOWED TO TESTIFY THAT IN HIS
OPINION THERE WOULD BE A LOW
RISK OF REOFFENDING PRIMARILY
ONE OF THE MAJOR FACTORS BEING
HIS AGE AT THE TIME.
BUT HE WAS NOT PERMITTED TO
TESTIFY BECAUSE THE STATE
OBJECTED SAYING THEY DIDN'T GET
THIS PART OF THE REPORT.
HE WASN'T PERMITTED TO TESTIFY
ABOUT ANY OF THE STATISTICAL
DATA THAT BACKS UP THAT RISK
ASSESSMENT OR THE TESTING DATA
FROM WHAT HE COMPLETED ON THE
FORM.
SO, IN OTHER WORDS, HE COULD
GIVE HIS OPINION, BUT HE
COULDN'T SAY, LOOK, THERE'S
STUDIES TO BACK THIS UP THAT,
YOU KNOW, IF YOU HAD THIS, THIS
AND THIS FACTOR, YOU'RE LESS
LIKELY TO BE VIOLENT IN THE
FUTURE.
THE COURT-- THE STATE SAID THAT
IT HADN'T CALLED ITS, IT
ACTUALLY HAD AN EXPERT RETAINED
ON THAT ISSUE, BUT THE EXPERT
WAS IN GEORGIA AND THEY HADN'T
BROUGHT HIM DOWN BECAUSE IT
DIDN'T KNOW ABOUT, YOU KNOW,
THIS PART OF THE RISK
ASSESSMENT.
THE JUDGE DID NOT EVEN
CONSIDER-- I MEAN, HOW FAR IS
GEORGIA?
YOU KNOW, CONTINUING THE CASE
FOR A TODAY OR SO FOR THE EXPERT
TO GET DOWN THERE?
>> IS THAT WHAT THE DEFENSE
ASKED FOR?
>> NO.
THE DEFENSE ASKED TO BE ABLE TO
PRESENT THE TESTIMONY.
>> NO, NO.
DID HE ASK FOR--
>> I DON'T RECALL--
>>-- A CONTINUANCE SO THAT THE
STATE COULD EXPLORE THIS NEW
EVIDENCE?
>> I DON'T RECALL ANYTHING BEING
DISCUSSED.
>> A REMEDY AS OPPOSED TO

DENYING HIM TESTIFYING ON THAT
SMALL PORTION?
>> I-- WELL-- I DON'T RECALL
THEM ASKING.
>> [INAUDIBLE]
>> I DON'T RECALL THE ISSUE OF A
CONTINUANCE BEING DISCUSSED, BUT
IT'S THE JUDGE'S OBLIGATION.
I MEAN, THE LAW IS WHEN YOU'RE
TRYING, WHEN YOU'RE EXCLUDING
DEFENSE EVIDENCE, THAT IS A
CONSTITUTIONAL ISSUE.
A MAJOR CONSTITUTIONAL ISSUE.
AND THAT EVERY POSSIBLE REMEDY
SHORT OF THAT SHOULD BE
CONSIDERED FIRST.
AND THE JUDGE DIDN'T CONSIDER
ANY OTHER REMEDIES, JUST SAID
IT'S NOT WILLFUL, BUT IT WAS
SUBSTANTIAL.
AND JUST SORT OF, BOOM, YOU
CAN'T TESTIFY TO THAT.
>> YOU'RE DEEP INTO YOUR
REBUTTAL.
LIKE, YOU'VE GOT 30 SECONDS
LEFT.
>> ALL RIGHT.
I'D LIKE TO RESERVE THE REST OF
MY TIME.
>> I'LL GIVE YOU TWO MORE
MINUTES OF REBUTTAL.
>> GOOD MORNING.
MAY IT PLEASE THE COURT, LESLIE
CAMPBELL WITH THE ATTORNEY
GENERAL'S OFFICE ON BEHALF OF
THE STATE.
STARTING WITH DR. REIFSTECK TO
CONTINUE--
>> WHAT?
STARTING WITH WHAT?
>> REIFSTECK, THE GENTLEMAN, THE
EXPERT WE WERE JUST TALKING
ABOUT?
THERE WERE TWO ISSUES.
NOT ONLY THE DISCOVERY
VIOLATION, BUT THE STATE ALSO
SAID THAT IT WAS PRECLUDED FROM
TESTING THIS EVALUATION, ALL THE
STATISTICS UNDER FRY.
SO IT WASN'T JUST THAT THERE
COULD HAVE BEEN A CONTINUANCE OF
SOMETHING ELSE OFFERED WHICH WAS
NOT REQUESTED BY THE DEFENSE.
THERE WERE OTHER MATTERS THAT
WERE CONCERNED.

BUT BOTTOM LINE IS THE EXPERT
WAS ALLOWED TO TESTIFY TO HIS
ULTIMATE CONCLUSION WHICH WAS
THAT MR. LOWE WOULD NOT HAVE
BEEN A FUTURE DANGER IN PRISON.
>> YEAH, BUT, YOU KNOW,
TESTIFYING TO THAT IS-- THAT
STATEMENT IS ONE THING, BUT
BACKING IT UP WITH SOME KIND OF
DATA, I MEAN, REALLY WOULD BE
IMPORTANT, IT SEEMS TO ME, TO
EXPLAIN TO THE JURY WHY THE
EXPERT BELIEVES HE WOULD NOT BE
A FUTURE DANGER.
>> WELL, NOT ONLY DID THE
DEFENSE PUT ON THIS EXPERT, BUT
IT ALSO PUT ON I BELIEVE IT WAS
THREE PEOPLE WHO HAD BEEN WITH
MR. LOWE IN JAIL WHO HAD EITHER
BEEN CORRECTION OFFICERS OR HAD
COUNSELED HIM, AND EVERYTHING
WAS THAT HE HAD EITHER MINOR
VIOLATIONS EARLY IN HIS CAREER
BUT THAT HE, HE WAS A GOOD
PRISONER.
SO IT WASN'T JUST THIS EXPERT
TESTIFYING, OH, I LOOKED AT SOME
STATISTICS AND, THEREFORE, HE
WOULDN'T BE A FUTURE DANGER, BUT
THERE WAS EVIDENCE BACKING IT
UP.
SO ALL TOTALED, THE JURY DID
HAVE A PICTURE OF MR. LOWE AS
FAR AS THAT ISSUE.
AND THE TRIAL COURT DID FIND
THAT MITIGATOR.
SO IF THERE WAS ANY ERROR, WHICH
THE STATE SUBMITS THAT THERE WAS
NOT, IT WAS HARMLESS BEYOND A
REASONABLE DOUBT.
WITH REGARD TO THE EDMOND TYSON,
THIS COURT DID NOT REMAND FOR AN
EDMOND TYSON EVALUATION.
IT REMANDED BECAUSE IT FOUND
INEFFECTIVE-- IT DID NOT FIND
INEFFECTIVE ASSISTANCE OF
COUNSEL IN THE GUILT PHASE
BECAUSE THERE WAS THE GENERAL
VERDICT, AND MR. LOWE WAS
CLEARLY INVOLVED IN THIS
ROBBERY/HOMICIDE.
IT DID REMAND FOR EVALUATION OF
THE PENALTY PHASE GIVING TWO
MITIGATORS, THAT THIS NEW
TESTIMONY COULD GO TO THE TWO

MITIGATORS OF A SUBSTANTIAL
DOMINATION OF ANOTHER AND ALSO
THE MITIGATOR OF MINOR
PARTICIPANT.
AND THAT WAS WELL LITIGATED
DURING THE TRIAL.
THERE WERE SEVERAL WITNESSES
THAT TESTIFIED TO THAT.
THE TWO MAIN WITNESSES WERE LISA
GROENIG MILLER AND ALSO BEN
CARTER.
HOWEVER, BOTH WERE THOROUGHLY
IMPEACHED--
>> [INAUDIBLE]
THEIR TESTIMONY?
>> THAT AT A PARTICULAR EVENT
SOMETIME AFTER, I THINK IT WAS
'92, '93, SOMETIME AFTER THE
MURDER MR. BLACKMAN HAD BOASTED
AND USED IN A THREATENING MANNER
ALMOST TO BULLY OTHERS, TO
THREATEN OTHERS THAT I'VE KILLED
SOME OTHER WOMAN, AND I CAN DO
IT AGAIN.
SO IN OTHER WORDS, BACK OFF, LET
ME--
>> WAS THIS AFTER MR. LOWE'S
TRIAL?
>> YES.
MR. LOWE WAS ALREADY IN PRISON.
HOWEVER, MR. CARTER SAID THAT IT
WAS AS A BULLYING TACTIC.
MR. CARTER ALSO WAS THE PERSON
THAT FIRST CAME FORWARD TO THE
POLICE TO SAY THAT HE OVERHEARD
MR. LOWE TELL MR. BLACKMAN THAT
MR. LOWE HAD COMMITTED THE
ROBBERY, THAT THE THREE INITIAL
COMPADRES-- MR. BLACKMAN,
MR. SAILOR AND MR. LOWE-- HAD
CASED THE NEW PACK BUT THAT
MR. LOWE HAD, WHEN THEY WERE
APART, HAD GONE HIMSELF TO
COMMIT THIS MURDER.
SO WHAT WE HAVE IS WE HAVE THE
JURY HEARING THIS TESTIMONY THAT
MR. LOWE, EXCUSE ME, THAT
MR. BLACKMAN HAD USED NOT
NECESSARILY THE NEW PACK, BUT
THAT HE HAD KILLED A WOMAN IN
THE PAST AND COULD DO IT AGAIN,
AND WE HAVE THAT TESTIMONY BEING
IMPEACHED AS FAR AS THE VALUE OF
IT WITH RESPECT TO THE NEW PACK
MURDER.

>> BUT YOU HAVE THE PROSECUTOR
WHO'S ARGUING THAT MR. LOWE WAS
THE SHOOTER AND THAT HE WAS THE
ONLY PARTICIPANT IN THIS
ROBBERY/MURDER.
YOU HAVE MR. LOWE WHO HAS
PRESENTED THESE WITNESSES WHO
ARE SAYING THAT MR. BLACKMAN WAS
THE SHOOTER.
I DON'T KNOW IF THEY WENT INTO
WHETHER OR NOT MR. LOWE WAS THE
DRIVER OR NOT.
BUT, SO YOU HAVE THESE TWO, YOU
KNOW, SORT OF OPPOSITE ARGUMENTS
BEING MADE HERE, AND SO WHY
WOULDN'T UNDER THE PEREZ CASE,
WHY SHOULDN'T AN INSTRUCTION
HAVE BEEN GIVEN--
>> WELL, WE ALSO HAVE A THIRD
PARTY INVOLVED.
WE HAVE MR. SAILOR.
AND WE HAVE MR. LOWE IN HIS
CONFESSION ALWAYS POINTING TO
MR. SAILOR AS THE ONE WHO PULLED
THE TRIGGER.
SO IT--
>> BUT--
>> MR. LOWE'S NOT EVEN
CONSISTENT.
>> IT DOESN'T CHANGE THE
DYNAMICS OF WHAT WENT ON AT
RESENTENCING.
AT THE RESENTENCING WE HAVE THE
STATE ARGUING HE WAS THE LONE
SHOOTER, WE HAVE THE DEFENDANT
ARGUING THAT SOMEONE ELSE WAS
THE ACTUAL SHOOTER, AND SO--
AND THAT, YOU KNOW, HE WAS IN
THE CAR AS THE GETAWAY DRIVER.
SO WHY SHOULDN'T AN EDMOND TYSON
INSTRUCTION HAVE BEEN GIVEN
UNDER THOSE CIRCUMSTANCES?
>> IT SHOULD NOT HAVE BEEN
GIVEN, IT IS NOT FUNDAMENTAL
ERROR.
WE'RE HERE ON A TRIAL COURT
ERROR, AND THE TRIAL COURT
SPECIFICALLY ASKED US, AS THIS
COURT HAS POINTED OUT, AND THE
DEFENSE SPECIFICALLY REJECTED
AFTER TAKING THE EVENING TO
CONSIDER IT, BUT IT'S NOT
FUNDAMENTAL ERROR BECAUSE THERE
IS ABSOLUTELY NO EVIDENCE,
CREDIBLE EVIDENCE THAT ANYONE

OTHER THAN MR. LOWE COMMITTED
THIS ROBBERY AND HOMICIDE.
MR. LOWE'S FINGERPRINTS ARE IN
THERE, MR.-- ON THE HAMBURGER
WRAPPER THAT WAS IN THE
MICROWAVE.
WE HAVE MR. LUETKE SAYING HE
CAME UPON THE SCENE JUST AS
MR.-- A BLACK MALE IS EXITING.
THAT BLACK MALE'S DESCRIPTION
MATCHES MR. LOWE.
HE ALSO SAYS THERE IS A WHITE
CAR THAT MATCHES THE DESCRIPTION
OF PAT WHITE'S CAR, THAT'S
MR. LOWE'S GIRLFRIEND, THAT
THERE WAS NO ONE IN THAT CAR,
THAT--
>> BUT I THOUGHT YOU SAID THAT
THE DEFENSE DID PRESENT EVIDENCE
OF OTHERS BEING INVOLVED.
YOU'RE GOING THROUGH THE
EVIDENCE FAVORABLE TO THE STATE,
AND I UNDERSTAND THAT, BUT WAS
THERE NOT EVIDENCE TO THE
CONTRARY?
>> THERE WAS EVIDENCE TO THE
CONTRARY THAT--
>> WELL, THAT'S WHAT, AGAIN,
WE'RE NOT HERE NOW TO ACT AS A
JURY.
OUR QUESTION IS, AND I THINK
THAT'S WHAT SHE'S ASKING, IS WHY
WOULD YOU, WHY WOULD ONE NOT
GIVE A JURY INSTRUCTION IF THAT
EVIDENCE HAS BEEN PRESENTED, IF
THAT'S WHY THE CASE WAS SENT
BACK TO BEGIN WITH, AT LEAST
SOME JURY INSTRUCTION TOUCHING
UPON WHAT YOU DO WITH OR WHAT A
JURY SHOULD DO WITH WHATEVER
THEY FIND--
>> AND THEY HAVE--
>>-- WITH THAT EVIDENCE?
>> AND THEY HAD AN
INSTRUCTION--
>> OKAY.
>>-- ON NOT EDMOND TYSON, BUT
ON THE MINOR PARTICIPANT.
THEY WERE GIVEN THAT
INSTRUCTION.
>> OKAY.
>> THE TRIAL COURT MADE FINDINGS
ON THAT INSTRUCTION AND FOUND
THAT MR. LOWE WAS THE ONLY
PERSON.

THE TRIAL COURT ALSO MADE
FINDINGS ON THE TESTIMONY OF
MR., THAT MR. BLACKMAN HAD MADE
THESE THREATS THAT HE HAD KILLED
SOMEONE BEFORE, BUT THAT WASN'T
CREDIBLE TESTIMONY.
SO WHAT WE ARE LEFT HERE WITH IS
THE DEFENSE COME SAYING I DO NOT
WANT THAT INSTRUCTION, AND THE
EVIDENCE SUPPORTING THE FACT
THAT MR. LOWE IS THE ONLY ONE
WHO COMMITTED THE MURDER AND,
THEREFORE, THERE IS NO
FUNDAMENTAL ERROR HERE.
AND THAT WOULD BE THE STANDARD.
BECAUSE, AGAIN, DEFENSE COUNSEL
SAID HE DID NOT WANT THE
INSTRUCTION.
IF THERE ARE NO OTHER QUESTIONS,
THEN THE ONLY ISSUE LEFT IS THE
COMMUNITY CONTROL ISSUE.
AND-- AND--
>> COULD YOU, I MAY HAVE MISSED
IT.
DID YOU ADDRESS THEIR BEING
PRECLUDED FROM CONSIDERING HE
HAD A 15-YEAR CONSECUTIVE
SENTENCE?
>> I DID NOT, BUT THE TRIAL
COURT, THE ISSUE CAME UP IN THE,
IN VOIR DIRE.
THE TRIAL COURT ADDRESSED IT BY
SAYING, LOOK, THIS IS, THIS IS
THE SORT OF SENTENCE THAT HE
COULD GET.
IT'S SPECULATIVE, AND YOU'RE NOT
TO CONSIDER WHAT WOULD HAPPEN
AFTER.
THE TRIAL--
>> BUT THIS, I DON'T UNDERSTAND,
HOW IS IT IF HE HAS A 15-YEAR
CONSECUTIVE SENTENCE-- 50.
>> 15, 1-5.
>> WHY IS THAT?
AT LEAST TO THAT PART, THERE'S
NOTHING SPECULATIVE ABOUT THAT.
>> WELL, IT'S SPECULATIVE AS TO
WHEN THAT KICKS IN.
IS IT CONSECUTIVE TO THE
EXISTING SENTENCE.
IT'S CONSECUTIVE TO THE DEATH
SENTENCE.
IF HE GETS LIFE, IT'S
SPECULATIVE AGAINST WHETHER --
>> FIT THAT A LEGAL DETERMINE

DETERMINATION?
>> I GUESS WHERE THESE CASES
RESENTENCING OVER SOME YEARS AND
STILL BOUND IN 25 YEARS AS
MR. MALONE SAYS, NOBODY GETS
OUT.
THAT YEARS AT ALL, THAT
THE CONVICTED OF FIRST-DEGREE
MURDER, OTHERWISE WOULD BE A
DEATH SENTENCE.
FOR JURY TO HAVE ANY DOUBT THAT
THIS GUY MAY GET IT AFTER
25 YEARS, CERTAINLY MILITATES
WANTING TO GIVE HIM, YOU KNOW,
THE ALTERNATIVE.
THAT IS ALWAYS CONCERNED ME.
WITH THESE, YOU KNOW,
RESENTENCING WITH THE 25 YEARS.
THAT THE JURY DOES THINK WHAT
MR. MALONE SAYS.
>> HOWEVER, THIS COURT HAS
CONSISTENTLY SAID, THAT WE ONLY
INSTRUCT THE JURY THAT IT IS A
LIFE SENTENCE WITH THE
POSSIBILITY OF, AFTER 25 YEARS.
WE DO NOT GO BEYOND AS TO WILL
HE GET OUT, MIGHT HE GET OUT?
IT IS, THE JURY IS INSTRUCTED
PROPERLY WHEN IT IS TOLD WHAT
THE POSSIBLE SENTENCE IS.
THERE IS NO REASON TO GO BEYOND
THAT PAUSE IT IS BEYOND THE
CONTROL OF THE CONTROL OF THE
JURY.
BEYOND CONTROL OF COURT.
>> WERE THEY TOLD HE WOULD GET
CREDIT FOR TIME HE HAD ALREADY
SPENT IN PRISON?
>> YES.
THEY WERE TOLD THAT THAT WAS IN
VOIR DIRE.
>> WAS THAT IS CONCLUSORY,
CREDIT AGAINST WHAT?
THAT WOULD USUALLY SAY, AGAINST
THE 25 YEARS, RIGHT?
>> YES.
>> SO THEY WOULD BE IMMEDIATELY
ELIGIBLE FOR PAROLE.
WHICH RAISES THE SPECTER THIS
GUY WILL BE WALKING THE STREETS
IN ANOTHER YEAR.
>> THE JURY WAS TOLD IT WASN'T
TO CONSIDER THAT.
AND THE JURY IS PRESUMED TO
FOLLOW THE INSTRUCTIONS OF THE

COURT.
THAT THE FACT THAT ANOTHER ENTITY, ANOTHER AGENCY WILL MAKE THAT DETERMINATION DOES NOT ENTER INTO THE FACTOR THAT THE JURY, THAT THE JURY, THE FACTORS THAT THE JURY IS TO CONSIDER, WHICH ARE, MITIGATION, AGGRAVATION, AND THE WAY OF THOSE.
THOSE ARE THE FACTORS THAT YOU CAN BE CONSIDERED.
THAT IS WHAT THE JURY WAS INSTRUCTED ON.
IT IS AGAIN PRESUMED THAT THEY FOLLOW THE INSTRUCTIONS.
AND THEN, THE, THE LAST ISSUE, AGAIN IS, THAT, THE COMMUNITY CONTROL.
THE, THE INTENT OF THAT AGGRAVATOR IS TO, IS AN AGGRAVATION OF THE CASE WHEN SOMEBODY IS UNDER SENTENCE OF IMPRISONMENT AND THAT HAS NOW BEEN DEFINED ON PROBATION.
ACTUALLY IN PRISON, OR ON COMMUNITY CONTROL.
SO WHETHER IT'S IN A COMMUNITY CONTROL PROGRAM, OR IT IS ON COMMUNITY CONTROL, THAT IS A DISTINCTION WITHOUT A DIFFERENCE.
MOREOVER, MR. LOWE WAS CONVICTED AS AN ADULT.
WE'RE NOT TALKING JUVENILE CONVICTION.
WHILE HE WAS GIVEN A YOUTHFUL SENTENCE, YOUTHFUL OFFENDER SENTENCE HE WAS CONVICTED AS AN ADULT.
THAT AGGRAVATOR APPLIES.
THE INSTRUCTION WAS PROPER.
IT IS SUPPORTED BY THE EVIDENCE AND IT WAS PROPERLY FOUND BY THE COURT.
EVEN IF THAT IS STRICKEN, THERE STILL ARE THE PRIOR VIOLENT FELONY AGGRAVATOR.
THE, DURING THE COURSE OF THE FELONY, COMBINED WITH PECUNIARY GAIN AND AVOID ARREST.
>> WHAT WAS, THE PRIOR VIOLENT FELONY WAS WHAT?
>> THE BURGLARY, BURGLARY OF THAT CAR, HE HAD A PRIOR.

>> WHERE DID IT BECOME VIOLENT?
>> BECAUSE HE HELD A SHARP,
PLASTIC, INSTRUMENT PIECE OF
PLASTIC TO THE VICTIM'S NECK.
TOLD HIM TO GET OUT OF THE CAR.
>> HE WAS UNDER YOUTHFUL
OFFENDER SENTENCE THEN?
>> HE WAS 17 AT THE TIME HE
COMMITTED THAT BURGLARY,
ATTEMPTED ROBBERY.
>> HOW OLD WAS HE WHEN HE
COMMITTED THIS CRIME?
>> 20.
UNLESS THERE ARE ANY FURTHER
QUESTIONS I ASK THE COURT TO
AFFIRM THE FINDING OF DEATH AND
DEATH SENTENCE IMPOSED.
THANK YOU.
>> GIVE YOU TWO MINUTES.
>> IN TERMS OF THE EVIDENCE ON
THE COMPETING THEORIES I JUST
WANT TO POINT OUT THE CIVILIAN
WITNESS, MR. LUEDEKE, WAS
UNABLE, DID NOT PICK OUT
MR. LOWE FROM A PHOTO DISPLAY.
ON ISSUE OF--
>> BUT MR. LOWE, THE DESCRIPTION
WAS SOMETHING ABOUT THE FACIAL
HAIR AND, WASN'T IT AND THAT
MR. LOWE, OF THE THREE OF THEM,
OF LOWE, BLACKMON AND SAILOR,
POSSIBLY MET THE
DESCRIPTION AND NOT OTHER TWO,
IS THAT THE RECORD?
>> THE STATE--
>> IS THAT WHAT THE RECORD
DEMONSTRATES.
I DON'T THINK IT DEMONSTRATES
THAT.
I'M NOT SURE--
>> MR. LOWE, THE DESCRIPTION
THAT WAS GIVEN OF THE
PERPETRATOR FIT MR. LOWE AND NOT
THE OTHER TWO?
>> WELL, IN GENERAL, YOU KNOW.
THE GUY WALKING OUT OF THE STORE
WITH A--
>> THAT'S WHAT I'M SAYING.
THAT DESCRIPTION, MR. LOWE, BUT
THE OTHER TWO, IS THAT CORRECT?
>> I, NO.
I DON'T THINK THAT'S TOTALLY
CORRECT.
I THAT THE DESCRIPTION IS SO
VAGUE YOU CAN'T REALLY SAY THAT.

>> WHAT WAS THE DEFENSE'S THEORY
ABOUT THE FINGERPRINT ON--
HAMBURGER WRAPPER?
>> YEAH.
I BELIEVE THAT THERE WAS ALONG
THE LINES OF WHAT THE LAW IS.
IT IS A MOVEABLE OBJECT.
MAYBE HE HAD BEEN IN THERE
BEFORE.
>> LEFT IT IN THE MICROWAVE?
>> WELL, YOU WOULDN'T HAVE HAD
TO TOUCH IT AT THAT MOMENT TO
HAVE YOUR PRINT ON IT.
IT COULD HAVE BEEN TOUCHED AT
SOME OTHER TIME.
LAW IS FAIRLY CLEAR ON A
MOVEABLE OBJECT BUT GOING BACK
TO THE INABILITY OF THE JURY TO,
OR THE JURY'S EXPOSURE TO THE
CREDIT FOR TIME SERVED, AND, AND
DEFENSE'S INABILITY TO PRESENT
EVIDENCE, THAT THERE WOULD BE A
CONSECUTIVE 15-YEAR SENTENCE,
THE STATE'S ARGUING NOW, NOT
SOMETHING FOR THE JURY TO
CONSIDER.
WHEN THEY GOT UP IN FRONT OF THE
JURY AT PENALTY PHASE, IT SAID
MR. LOWE HAS BEEN ON, SOMETHING
TO THE EFFECT ON DEATH ROW SINCE
1990.
NOTHING HAS CHANGED IN THE LAST
20 YEARS.
NOT AS IF THE STATE-- THE STATE
MADE A BIG DEAL OF IT AT PENALTY
PHASE.
THANK YOU FOR YOUR TIME.
I'M GOING TO ASK THE COURT TO
EITHER REDUCE THE SENTENCE TO
LIFE OR REVERSE FOR ARGUMENTS.
>> THANK YOU FOR YOUR ARGUMENTS.
THE COURT IS IN RECESS FOR TEN
MINUTES.