

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY  
CASE NO. 2014CF5586CFAXWS

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STATE OF FLORIDA,	:
	:
Plaintiff,	:
-VS-	:
	:
ADAM MATOS,	:
	:
Defendant.	:

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PROCEEDINGS:	MOTIONS
BEFORE:	HONORABLE MARY M. HANDSEL Circuit Judge
DATE:	September 14, 2017
PLACE TAKEN:	Pasco County Government Center 7530 Little Road New Port Richey, FL 34654
REPORTED BY:	Maria A. Fortner, RPR Notary Public State of Florida at Large

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## A P P E A R A N C E S

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APPEARING ON BEHALF OF  
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1 P-R-O-C-E-E-D-I-N-G-S

2 THE COURT: All right. And then the only  
3 other matter for this afternoon is the Matos  
4 matter.

5 And Mr. Matos is here with his lawyers. The  
6 State is here.

7 And we were going to go ahead and, first and  
8 foremost, I think we were going to talk about  
9 whether we were able to secure the witnesses for  
10 the date that we had picked.

11 MR. SARABIA: Judge, we've heard from a couple  
12 of others thus far. Other than the issues I  
13 mentioned at the last court date, we don't know of  
14 any new issues. However, we are also now trying to  
15 recontact a lot of the people that we contacted  
16 before the hurricane.

17 THE COURT: Right.

18 MR. SARABIA: Because we're not sure if any of  
19 them or all of them have been displaced at this  
20 point.

21 And we have not been able to reach everybody.  
22 We've only had one working day, aside from today,  
23 since the last hearing, but thus far it is looking  
24 good. Even the law enforcement officers that we've  
25 been trying to get in touch with, a lot of them

1 have been working extra shifts and extra hours. So  
2 I don't have a lot of new information for the Court  
3 other than I think that we're going to be okay.

4 THE COURT: Okay.

5 MR. SARABIA: The witnesses that I was most  
6 concerned about I have spoken to and they appear to  
7 be fine. And the other witnesses I'm concerned  
8 about are not an unavailability issue so much as a  
9 cooperation issue, which we should be able to get  
10 them under subpoena between now and then.

11 THE COURT: Okay.

12 MR. SARABIA: In particular, some of them are  
13 subpoenaed to be here on Monday morning. We  
14 haven't told anyone they're released from their  
15 subpoenas, so hopefully they will be here Monday  
16 morning or we will know whether or not they were  
17 planning to show up with that subpoena.

18 THE COURT: All right. Are you intending to  
19 re-serve them at that time?

20 MR. SARABIA: Correct.

21 THE COURT: All right. Well, I'll be here  
22 Monday. So if there's any issues, you can bring  
23 them before the Court.

24 MR. SARABIA: Thank you, Judge.

25 THE COURT: Defense, any indication that that

1 date won't be working for you?

2 MR. MICHAIILOS: No, Your Honor.

3 THE COURT: Okay. And were you able to  
4 contact this expert out of Rhode Island?

5 MR. MICHAIILOS: Yes, Your Honor.

6 THE COURT: I assume he was not able to fly in  
7 on Friday?

8 MR. MICHAIILOS: You were correct, Judge. He  
9 was not able to.

10 THE COURT: That was just a guess. I've been  
11 through so many hurricanes that didn't come here,  
12 that I just had the feeling that this one might  
13 show up. So it's always iffy when we're talking  
14 about hurricanes. But I don't think we would have  
15 had any jurors today, so I think we probably worked  
16 out that.

17 I hate continuing such cases where we have so  
18 many days put aside, but, you know, it had to be  
19 done. And that gives both sides a little bit more  
20 time and Defense gets more time to get the expert  
21 down.

22 Have you been able to reschedule this flight  
23 and his appearance to at least speak to your  
24 client?

25 MR. MICHAIILOS: Yes, Your Honor.

1           THE COURT: All right. And if you are going  
2 to list him, I need you to do that as quickly as  
3 possible so the State can depose him and then do  
4 whatever it is that we need to do from there. So  
5 if you don't choose to list him, then you don't  
6 choose to list him. That's your decision.

7           All right. So other than that, we have the  
8 rest of the pending motions we were going to do  
9 today, correct? State, which ones do you want do  
10 first?

11          MR. SARABIA: Judge, we have State's motion in  
12 limine and Defense's motion in limine. I'm  
13 handling those. We already handled the Clerk not  
14 posting stuff on the website, a motion for us. And  
15 then the Defense has multiple motions that  
16 Mr. LaBruzzo is handling regarding voir dire and  
17 constitutionality of the death penalty.

18          THE COURT: All right. Do you want to do the  
19 motions in limine first?

20          MR. MICHAIILOS: Judge, with regard to the  
21 State's motion in limine, I thought Mr. Vizcarra  
22 would be here, but I found out today that he had  
23 depositions regarding a trafficking case in Dade  
24 City and he couldn't make it here.

25          The State's request in many of these counts in

1       their motion in limine are pretty reasonable. I'm  
2       assuming at the end of the day we're going to agree  
3       to most of them. But there's some that are still  
4       up in the air because we're still completing  
5       discovery with regard to the Michelle Stinson  
6       matter and some of these counts may relate to that.

7               So Mr. Vizcarra was hoping we could put off on  
8       the State's motion in limine, since we have more  
9       time now, for it to be heard at a later time in  
10      early October.

11             THE COURT: State, do you have witnesses here?

12             MR. SARABIA: No. Not for the motion in  
13      limine, Judge.

14             THE COURT: Okay.

15             MR. SARABIA: It's not necessary.

16             THE COURT: Do you have any problem resetting  
17      that one --

18             MR. SARABIA: I have no issue with that.

19             THE COURT: -- so that additional counsel can  
20      be here to respond to that?

21             MR. SARABIA: That's fine. Our arguments will  
22      be the same, then.

23             THE COURT: All right. The State's motion in  
24      limine we'll reset.

25             Let me look at my calendar right now. I know

1       you asked me to do it in October. Can we do it  
2       like October 5th?

3               MR. MICHAILOS: That would be great, Judge.

4               THE COURT: State, is that a date? That's a  
5       Thursday. I can do it morning or afternoon.

6               MR. SARABIA: That's good for me.

7               THE COURT: Do you want to check with the  
8       family?

9               MR. SARABIA: Afternoon is better for them.

10              THE COURT: Okay. So October 5th at 1:30,  
11       we'll reset the State's motion in limine. All  
12       right. So we've taken care of that.

13              So we have the Defense's motion in limine.  
14       Why don't we go ahead and handle that.  
15       Mr. Michailos, it appears to be signed by you, so I  
16       thought you'd be arguing this one.

17              MR. MICHAILOS: Yes, Judge. The motion speaks  
18       for itself. This is a 911 audio that was ruled  
19       admissible by Judge Siracusa. Now, in that motion  
20       we didn't specify additional redactions because of  
21       prejudice, it had to do more with whether or not it  
22       was hearsay and whether or not Crawford applied.

23              But Judge Siracusa on his own in his order  
24       realized some things were pretty obvious to him.  
25       Actually, he mentioned it during oral arguments and



1 included it in the order. And the State did abide  
2 by Judge Siracusa's order and redacted those  
3 portions, and I got a copy of the State's redacted  
4 version.

5 And when I played it, my main concerns, as I  
6 documented in my motion, have to do with these  
7 cries more than anything else that are throughout  
8 the audio. And I understand there's parts that are  
9 intermingled with the actual statements made.

10 For instance, in the end there's just several  
11 seconds of when Megan Brown is on the phone with  
12 dispatch and she's waiting for law enforcement to  
13 come and she's just sobbing there endlessly. I  
14 think it's prejudicial because it's not probative  
15 for any purpose, and it insights undue sympathy.  
16 In addition to all that, it's also clearly  
17 cumulative. So in my motion I jotted to all those.  
18 I specified where in the audio I found all that.

19 In addition, there's gratuitous mention of my  
20 client's ethnicity. When the officer asks  
21 Miss Brown to describe him, she volunteered that  
22 he's Puerto Rican. That's done on two different  
23 areas in the audio. So I requested that the State  
24 consider redacting that. They did not agree to do  
25 that.

1 THE COURT: All right. State?

2 MR. SARABIA: First regarding the tape. It  
3 was ruled admissible. And I know that Your Honor  
4 was not the judge during that hearing, but ruled  
5 admissible based on it being an excited utterance  
6 and being for the nature of trying to get  
7 assistance rather than to preserve any kind of  
8 testimony.

9 But in particular, the reason that the courts  
10 and the law -- the reason they recognized that  
11 excited utterances are an exception to hearsay is  
12 because there's an inherent reliability in the  
13 excited utterances because of the way that they're  
14 made.

15 So it's important for a jury to hear the  
16 moaning and the excited state that Miss Brown is in  
17 while she's making the call as they're evaluating  
18 this piece of evidence for its usefulness or the  
19 credibility of any of her statements and whether or  
20 not she is, in fact, in an excited state to be  
21 trusted.

22 Because I have little doubt that the Defense  
23 is going to argue as the defendant did say to law  
24 enforcement that this event did not happen the way  
25 that Miss Brown described. So in order to start

1 cutting stuff out and picking and choosing, it's  
2 going to largely falsify the statement here in  
3 making her sound calmer than she actually was or  
4 less excited, less traumatized than she actually  
5 was.

6 And it's not cumulative. It's a period of  
7 time that it's taped. The entire timetable of  
8 August 28th of 2014, is very important from the  
9 point where the defendant attacks Miss Brown with a  
10 knife all the way until the end of the day and  
11 including the times when there's a period of time  
12 the gap where Deputy Heidgerken is in the process  
13 of responding and eventually does respond. And  
14 there's certainly nothing prejudicial or  
15 excessively prejudicial about that other than how  
16 it goes to her state of mind when she's  
17 communicating.

18 Moreover, the Puerto Rican comment is in  
19 direct response to what is going on. There's  
20 anything prejudicial about being Puerto Rican. I  
21 don't know why the Defense would find that to be  
22 harmful in some way. I don't know that the  
23 defendant would agree that being Puerto Rican is  
24 something negative.

25 But she's describing the person who did this

1 to her and she indicates a Puerto Rican male, and  
2 the dispatcher specifies, "Did you say Puerto  
3 Rican?" And she says, "Yes." That goes to ID and  
4 it goes to his physical description. She used  
5 other descriptive indicators, I think height and  
6 the fact that he has some tattoos.

7 And so none of that is prejudicial beyond its  
8 probative value. It's all extremely probative  
9 because she's not here, since the defendant killed  
10 her, to point him out as the person who attacked  
11 her with a knife. So I don't think that any of  
12 this warrants exclusion or redaction, and I'm not  
13 aware of any case law that would support the  
14 Defense's argument.

15 THE COURT: Any case law, Mr. Michailos?

16 MR. MICHAILOS: No, Judge. I have no case  
17 law.

18 MR. SARABIA: And I would note that the  
19 moaning is interspersed throughout the call. You  
20 know, the entire call happens and then the last  
21 minute is just her moaning. It's moaning in  
22 between questions, moaning after questions.

23 And I would note that this piece of evidence  
24 is actually already admitted in the hearing, so it  
25 is with the Court. It was actually on the website

1 where it could be played until recently. So that  
2 is something that could be reviewed, but not the  
3 redacted version, which Mr. Michailos has a copy  
4 of.

5 And I would also note that it would be  
6 difficult to redact. The redactions that were made  
7 pursuant to Judge Siracusa's order, which I think  
8 the Defense agrees are pursuant to his order, were  
9 done in such a way that if there were a second  
10 here, a second there, and I don't know that the  
11 jury will even be able to tell that there were  
12 redactions. This type of stuff, it's going to be a  
13 lot harder to do that.

14 Thank you, Judge.

15 THE COURT: Okay. Go ahead.

16 MR. MICHAIILOS: I think it would be best if  
17 the Court were to at least to hear it for yourself,  
18 Your Honor, and make that decision.

19 As far as I'm not concerned if I was a member  
20 of the jury. Unfortunately, there is a distinct  
21 percentage of our population that is prejudicial,  
22 and we know that for a fact. So my client's ethnic  
23 background is of no relevance in this case,  
24 especially in the context of this 911 tape. So I  
25 don't think there's any purpose for it to be in

1       there. It could only be misapplied. It couldn't  
2       help in any way.

3           THE COURT: Okay. What I'm doing right now is  
4       rereading Judge Siracusa's order. I have it on the  
5       computer here, so I was rereading it. And I see  
6       that he had certain parts and went through great  
7       pains. Obviously, he listened to the tape when he  
8       admitted it and found things that he thought would  
9       be inadmissible.

10       I see, "Has he ever done anything like this in  
11       the past?" He took that out. "Does he carry  
12       weapons?" Well, he has seven felonies. He took  
13       that out. Obviously that's not admissible. It  
14       looks like he also had taken out another part where  
15       she indicates that he's assaulted her three years  
16       ago but this is the first time he's actually tried  
17       to kill her. Another bad act that would be  
18       inadmissible.

19       The tape contains the excited utterance.  
20       Anything about that tape would make it excited. So  
21       if she's crying, if she's moaning, anything like  
22       that is admissible. That's what makes it excited.  
23       That's what makes it admissible.

24       You can't sit there and edit out the reaction  
25       or the emotion of the caller, and in this case it's

1 the victim who's not here to testify because she's  
2 the decedent and the victim of one of the counts of  
3 murder. Therefore, the jury has to decide, since  
4 it's not an issue of whether the event of that day  
5 took place, but whether that goes to motive,  
6 opportunity, past behavior and excited utterance.  
7 So anything that would show her state of mind,  
8 which includes her moaning or crying or  
9 excitedness, would be admissible.

10 And Judge Siracusa has already ruled that  
11 admissible. So I'm not going to take that out or  
12 try to chop up a 911 tape. It is 911 tape. That's  
13 why it's admissible, because Judge Siracusa already  
14 ruled that her statements were done in a matter of  
15 an excited manner, and the way she's speaking or  
16 any sobbing or panting or anything like that is  
17 what makes it an excited utterance which makes it  
18 admissible. So I'm not going to take that out.

19 The fact that she's asked to describe your  
20 client, the only part of that you're asking to take  
21 out is that he's a Puerto Rican male? That's the  
22 only part? Because Mr. Sarabia says he describes  
23 his height, weight, and tattoos. Is it all at the  
24 same time?

25 MR. SARABIA: Within the same general time

1 period, yes.

2 THE COURT: Okay.

3 MR. SARABIA: Not the exact same question and  
4 answer.

5 THE COURT: So the 911 operator is saying, Can  
6 you describe him with hair color, and, you know,  
7 how tall is he? What's the question that precedes,  
8 "He's a Puerto Rican male"?

9 MR. MICHAÏLOS: Well, that's the whole thing,  
10 Judge. I think I misspoke. The operator doesn't  
11 even ask for a description. It's just something  
12 that she gratuitously throws in there.

13 MR. SARABIA: The operator asks -- and I would  
14 note, Judge, I believe there's a transcript of this  
15 tape that is in a previous filing. But the  
16 operator says.

17 "And that's the father of your son?"

18 She says, "Yes."

19 The operator says, "It's going to be okay,  
20 ma'am. It's going to be okay."

21 Miss Brown says something to the child not a  
22 part of the phone conversation.

23 The operator says, "Okay. So give me a --"

24 Miss Brown says, "It's okay. I'm not trying  
25 to -- I'm sorry. You need to have someone come --"



1 then she's talking to the operator, "You need to  
2 have someone come out here as soon as possible. He  
3 literally tried to kill me."

4 The operator says, "Okay. He left in a  
5 vehicle or on foot?"

6 Miss Brown says, "On foot. He doesn't have a  
7 license. It's okay. He probably has his --"

8 Operator says, "What --" has an off phone  
9 conversation.

10 Miss Brown says, "He has a bike. He is a  
11 Puerto Rican male. He had no shirt on. He had two  
12 cross tattoos."

13 The operator says -- it goes on for a little  
14 bit.

15 Miss Brown says -- it's not in response to a  
16 question -- "He just did it ten minutes ago."

17 The operator asks, "What is his name?"

18 Miss Brown says, "Adam Matos." And spells it.

19 Operator asks, "How old is he?"

20 Miss Brown says, "He's 28, almost 29."

21 Then the operator says, "You said he's Puerto  
22 Rican?"

23 Miss Brown says, "Yes."

24 Then the operator asks, "What was he wearing?"  
25 And she goes on to describe, "No shirt when he

1 left. I don't remember if he was wearing shorts or  
2 not."

3 THE COURT: So there's two times where the  
4 fact that he's a Puerto Rican male comes in?

5 MR. SARABIA: It's mentioned, yeah. And it  
6 goes on further down a couple of seconds after  
7 that, multiple questions.

8 The operator asks, "Is he thin, medium or  
9 heavy?"

10 And she says, "He's like 6'2", and he's medium  
11 built. And you would think he was skinny, but  
12 he's -- he's a little bit meaty, but compared to  
13 people here in Hudson he's medium."

14 So there's lots of physical description being  
15 given. And there's nothing inherently prejudicial  
16 about ethnic background because he's a Puerto Rican  
17 male.

18 THE COURT: Other than to describe him as if  
19 it's a black male, white male, Hispanic male.

20 MR. SARABIA: Exactly.

21 THE COURT: Puerto Rican male, that kind of  
22 stuff.

23 MR. SARABIA: Exactly. Arabic male.

24 THE COURT: Okay.

25 MR. SARABIA: Albino male.

1           MR. MICHAIILOS: Judge, in this case there's no  
2           dispute and Defense is not going to dispute the  
3           fact that Miss Brown is talking about the  
4           defendant.

5           As far as Puerto Rican being the description,  
6           I think the Puerto Rican group is a diverse of  
7           people. There are blond, blue-eyed Puerto Ricans.  
8           I don't think the fact that Puerto Rican is  
9           necessarily going to describe him. It really has  
10          no purpose here other than to possibly just be  
11          misinterpreted by jurors that might have the wrong  
12          inclination.

13          THE COURT: Well, first of all, there's no  
14          indication that there's an overall sense in Pasco  
15          County of some indication that they dislike Puerto  
16          Ricans.

17          I don't understand why you're concerned about  
18          this. I mean he's Puerto Rican. It is a part of  
19          the United States. It is an island off of Cuba.  
20          It's got no racial connotation whatsoever. So why  
21          is it that the Defense believes that if you  
22          describe someone as from the island of Puerto Rico,  
23          that in itself is going to cause someone to be  
24          prejudice?

25          They can look at him here in the courtroom and

1       make their own decision on what ethnic background.  
2       If they're going to be offended or prejudiced to a  
3       person from Puerto Rico, that means I guess in your  
4       mind that they don't like Hispanic people. Is that  
5       what you're thinking? Because it's not the island  
6       of Puerto Rico that's your problem. It's part of  
7       the United States. He's an American citizen.  
8       Everybody knows that. It's not like, you know,  
9       he's from Venezuela or Chile.

10       MR. MICHAIILOS: So are African-Americans,  
11       Judge, but there's plenty of people that have a  
12       problem with them.

13       THE COURT: Right. But they can see. He's  
14       sitting in the courtroom. What I'm saying is the  
15       words being spoken by someone on the tape is not  
16       going to stop the prejudice from them looking at  
17       him and seeing what he is. You can see from the  
18       way he looks that he is obviously a Hispanic male.  
19       Whether he's from Puerto Rico or whether he's from  
20       another Hispanic type of place, he's Hispanic.  
21       That's what he is.

22       MR. MICHAIILOS: I tend to disagree, Judge. I  
23       think he could be Mediterranean, he could be Greek,  
24       he could Italian, he could be Columbian, he could  
25       be a bunch of different things.

1           THE COURT: Well, but someone who is  
2 predisposed to have an infinity to -- they just  
3 predispose people to be, oh, look at him, he's  
4 Hispanic, I don't like him, whether it's from  
5 Puerto Rico or they'll just make up somewhere else.

6           So what I'm saying is you can't stop someone's  
7 prejudice. They're going to look at him and make a  
8 decision without being told he's Puerto Rican. So  
9 unless you can tell me there's some big group in  
10 Pasco County that dislikes Puerto Ricans, I can't  
11 really understand why that matters.

12           I mean, you know, I understand we have some  
13 neo-Nazis in this county. I've prosecuted them.  
14 I've had them in front of me. Okay. They do not  
15 like African-Americans. But, again, that person  
16 will be sitting at the table with you and you can  
17 kind of see what they are.

18           So I'm trying to get at how taking words out  
19 of this tape is going to stop somebody from being  
20 prejudiced against your client. They're going to  
21 look at him, they're still going to be prejudice.  
22 He obviously looks somewhat on the darker side.  
23 He's either Hispanic. Or, you know, if people are  
24 by nature someone who would be that type of person,  
25 who would have a prejudice, then they're prejudice

1       against everybody who's not white Anglo-Saxon and  
2       from, you know, England.

3             All right. What is it about the island of  
4       Puerto Rico that has you concerned?

5             MR. MICHAIILOS: Judge, I just don't think  
6       that's necessarily true. I understand what you're  
7       saying, but I know there's different ethnicities  
8       that have qualms against each other.

9             I mean to maybe an American who's of a white  
10      Anglo-Saxon background there's no distinction  
11      between let's say a person from Mexico or  
12      Guatemala, but I can tell you there could be a big  
13      hatred between a group of people like just by fine  
14      distinctions of their ethnicity.

15            So in the abundance of caution I don't see how  
16      it's relevant or probative of anything.

17            THE COURT: Okay.

18            MR. MICHAIILOS: So I don't know why the jury  
19      has to hear it on the 911 tape.

20            THE COURT: Well, the entire tape is  
21      prejudicial to your client obviously. I mean she  
22      alleges that he physically assaulted her and tried  
23      to murder her.

24            MR. MICHAIILOS: Right.

25            THE COURT: So the whole thing is prejudicial.

1       It's going to be prejudicial against your client.  
2       The question becomes do we take a tape and doctor  
3       it to the point that the jury becomes suspicious,  
4       suspicious of you, suspicious of the State,  
5       suspicious. I've heard jurors say this. There's  
6       something going on, there's something missing, I  
7       can tell. So then I have to read an instruction  
8       that says we altered this tape.

9               Do you really want that? I mean if that's  
10       what you want, I'll have them take out her  
11       description of him as Puerto Rican. It doesn't  
12       sound like that would be so difficult. It's sounds  
13       like it's one second. So we can take out the  
14       Puerto Rican twice, but that's all I'm taking out.  
15       Because anything other than that, this tape is  
16       going to sound like it's been doctored or altered  
17       in some way, and then I have to read them an  
18       instruction and then that leaves the jury with some  
19       idea that something is being hidden from them.

20              That's never good for either side. I can  
21       never figure out who it's bad for, but I know it's  
22       bad for somebody, because they go back there and  
23       go, uh, they altered the tape. I wonder what they  
24       took out? I wonder what she really said? You  
25       know, and so then you leave the jury I think with a

1 worse situation is the fact they go back there,  
2 even they're told not to, knowing that something is  
3 taken out of the tape.

4 Because once you take things out, if it starts  
5 to sound to me, and I'll listen to it before we  
6 play it, if it sounds to me as if things have been  
7 taken out, I'm reading the instruction, because I  
8 don't want the jury to think that you're hiding  
9 something. I'll just tell them, we took stuff out,  
10 so don't be concerned, it didn't matter to you,  
11 it's not important in this case, and we took it  
12 out.

13 So I'll go ahead and grant the part about  
14 Puerto Rican, in abundance of caution, in case  
15 there's anybody who doesn't like people from the  
16 island of Puerto Rico. We'll take that part out,  
17 but other than that that's all I'll take out.

18 State, do you think you can make those  
19 changes?

20 MR. SARABIA: I believe so.

21 THE COURT: But the rest of it will stay the  
22 same.

23 And it says that it's at 3:03 and 3:38. Those  
24 are the only two spots?

25 MR. MICHAÏLOS: Yes, Your Honor.



1           THE COURT: That's on you Line 5 of your  
2 motion in limine. "It says specifically being  
3 Puerto Rican, which is heard at 3:03 and 3:38."

4           MR. MICHAILOS: Yes, Judge.

5           THE COURT: Okay. So I'll grant the Puerto  
6 Rico at 3:03 and 3:38, remove that. And provide  
7 the redacted copy to the Defense. And if either  
8 side, after those changes are made, based on all  
9 the changes that have been made from the tape, if  
10 you all want me to read the instruction prior to it  
11 being played to the jury about, you know, that  
12 changes have been made to any tape, I will do that.  
13 So that will be up to you guys. Okay?

14          All right. So that takes out that.

15          And, Mr. Michailos, are you going to do an  
16 order on that?

17          MR. MICHAILOS: Yes, Your Honor. If you'd  
18 like me to.

19          THE COURT: Okay.

20          MR. MICHAILOS: If I could provide it perhaps  
21 tomorrow?

22          THE COURT: Yes. Yes. Just take your time.  
23 And all it has to say is granted as to Number 5,  
24 denied as to all others. It doesn't have to be  
25 anything special.

1           MR. MICHAIILOS: Thank you.

2           THE COURT: Just in murder cases I like orders  
3 on everything we do, so if there's a reason for  
4 appeal, we have it.

5           All right. So next is the motions to exclude  
6 Sections 921.145 -- 141(5)(h) and 141(5)(b). The  
7 motion to dismiss for lack of jurisdiction was moot  
8 because the State went ahead and reindicted the  
9 defendant and then refiled all the necessary  
10 paperwork.

11           And the last thing we'll do is the motion for  
12 jury questionnaire. So, Mr. Livermore, do you want  
13 to handle these now?

14           MR. LIVERMORE: Yes, ma'am.

15           THE COURT: Okay.

16           MR. LIVERMORE: The two constitutional  
17 motions, in all a candor, are routinely denied but  
18 routinely raised, because I still believe they're  
19 valid.

20           The first has to do with EHAC. As we know  
21 aggravators are designed to limit a class of people  
22 who are eligible for the death penalty, and as EHAC  
23 has been applied, it no longer limits anything. It  
24 used to be you could only get EHAC let's say on a  
25 strangulation, but now you can get it on a

1 shooting.

2 But part of the motion lists -- and honestly,  
3 I haven't read all of them, but there's like 30  
4 pages of cases, and it goes all over the place.  
5 And the problem with this aggravator is it no  
6 longer limits, and that's why there's the  
7 objection. That's why we object to the aggravator  
8 in itself as being constitutional.

9 And the second one is PVF, Prior Violent  
10 Felony, which has now been basically amended by the  
11 courts to say anything that happens at the same  
12 time, it kind of goes against the definition of the  
13 aggravator. We believe it's too broad, too vague,  
14 and improper.

15 I'm not going to belabor the point because I  
16 know where the law stands on it right now, but if  
17 *Hurst* has taught us anything about objecting to  
18 *Ring* for 16 years --

19 THE COURT: Raise everything and worry about  
20 it later.

21 MR. LIVERMORE: -- I'm going to keep objecting  
22 until something agrees with me.

23 THE COURT: Okay. State, any response?

24 MR. LABRUZZO: Judge, I would just say that as  
25 recently as August the 31st of 2017, in

1        *Covington v. State*, the Supreme Court upheld the  
2        aggravator of EHAC as well as other aggravators,  
3        one being the victim was particularly vulnerable.

4                In cases in the state of Florida the law --  
5        this is statutorily based, and I understand the  
6        Defense's reasoning for raising them, although I  
7        would say it is still a limiting factor to those  
8        individuals that do commit crimes that are  
9        qualifying for EHAC when it comes to the manner in  
10       which they commit their crimes.

11               So I believe, Judge, based on the statute and  
12       the recent case law and the Supreme Court's  
13       continuous finding that they are statutorily  
14       appropriate and constitutional, that the Court  
15       should not vote for the motion to find EHAC  
16       unconstitutional, as well as the prior violent  
17       felony.

18               THE COURT: Okay. After the State reindicted  
19       Mr. Matos the other day, they refiled or did file  
20       under the new statute a notice of intent to seek  
21       the death penalty. And the only reason I raise  
22       that for the record is because the original motion  
23       was filed prior to them refiling the indictment or  
24       reindicting Mr. Matos and filing a notice of intent  
25       to seek the death penalty under the new indictment.

1           So that was done on September 7th of 2017, and  
2           they still have listed, you know, heinous,  
3           atrocious and cruel, as we like to refer it here as  
4           EHAC. And also four felonies involving youth -- or  
5           previous convictions of another capital felony,  
6           which in this particular case would be for the  
7           other individuals who were murdered as to Count I,  
8           and then the same thing, II, III and IV.

9           So at this point they have still listed them  
10          under the notice to seek death under the new  
11          indictment. And the State is correct, the latest  
12          order that came from the Supreme Court on the death  
13          penalty again upheld the constitutionality of these  
14          two reasons for aggravating circumstances for  
15          seeking for the death penalty.

16          Now, whether, when we get there, if we get  
17          there, there's sufficient showing to still have  
18          those as aggravating circumstances for the jury is  
19          another determination. I mean you're just  
20          basically saying they're unconstitutional as  
21          written.

22               MR. LIVERMORE: Right.

23               THE COURT: And that will be denied. So there  
24          will be another question about whether the facts  
25          and circumstances, if we get to that point, would

1       substantiate those being read to a jury on a second  
2       phase.

3               So since we don't even know if we're going to  
4       get there, we'll make that determination later.  
5       But for right now as to constitutionality of  
6       921.141 (5) (b) and 5(h), that will be denied. But  
7       it is on the record and, therefore, can be  
8       appealed. So that will be denied.

9               Can I have just a blank motion on that. I'll  
10      do a blank motion and just say denied. Okay?

11              MR. LIVERMORE: Sometimes they give me one and  
12      I forget it.

13              THE COURT: If you have one, I'll take it. If  
14      not, I'll just use one of ours.

15              MR. LIVERMORE: Not handy.

16              THE COURT: Okay. So that takes care of  
17      those.

18              What do you want to do next, Defense?

19              MR. LIVERMORE: Well, I have I think the only  
20      matters left, there are actually two procedural.

21              THE COURT: Okay.

22              MR. LIVERMORE: And I know we talked about  
23      this in Amy, but it never really got, that I can  
24      recall, totally settled. One is the manner of  
25      conducting voir dire. We asked for individual

1 sequester, and I know the Court is not in favor of  
2 that.

3 But I strongly argue that putting everybody  
4 behind this, 50 or 60 of them, and doing them all  
5 at once is really not a very good way to go. I sat  
6 through Cruz, two days of jury selection in Cruz,  
7 and I can tell you it's painful for everybody.

8 I'm looking at the grand jury. We had  
9 originally suggested that we fill the jury box to  
10 do the voir dire, and then once that panel is done  
11 move on. It's a lot more comfortable for the  
12 jurors and a lot easier to deal with.

13 As far as the number, I mean I can see doing  
14 it with the grand jury added chairs, but I think  
15 it's just a lot less cumbersome and a lot more  
16 efficient to do smaller groups than 50 or 60 at a  
17 time.

18 THE COURT: All right. State?

19 MR. LABRUZZO: Well, Judge, as to the motion  
20 as written, individual sequestering, the State  
21 would object to that. Although, when we're sitting  
22 here today and you look at the number of jurors you  
23 could bring in in a grand jury room, it may be more  
24 efficient. I don't think it necessarily shortens  
25 the entire jury selection because you tend to

1 repeat yourself more often.

2 Judge, we're going to object as to any type of  
3 sequestering other than the entire panel just for  
4 the sake of keeping it consistent and so that we  
5 don't have to repeat ourselves over and over again  
6 with the entire panel.

7 THE COURT: Okay. The motion for individual  
8 sequestered voir dire is denied. However, I will  
9 tell you this is the arrangements that I've made  
10 and this is what I think could and might work  
11 better than what you're suggesting.

12 First of all, I've asked that on the day that  
13 we have set, October 30th, that the first 100  
14 jurors that arrive, they put them in a list, a  
15 sheet of paper, not on the way we normally have  
16 with boxes, but literally the way I do it for grand  
17 jury, which is list them 1 through 100 with their  
18 names, addresses on a sheet of paper, 1 through  
19 100, and then they're going to give us each a copy  
20 of those.

21 They're going to bring that 100 up here. I  
22 don't want them sworn by anybody. I don't want  
23 them spoken by anybody. I don't want them to watch  
24 any videos. I want them literally to be taken 100  
25 people and put them in my courtroom, this



1 courtroom. I don't care if I have to use this and  
2 that, it's going to be the first hundred.

3 MR. LIVERMORE: Because I don't think they'll  
4 fit.

5 THE COURT: Right. They'll fit. They'll fit.  
6 I've had as many as 70 on that side. We'll fit.

7 They're going to bring with them the single  
8 piece of paper that is sent to them by the Clerk  
9 currently either filled out or they'll have a blank  
10 one in their hand. Because right now they send  
11 them by email, if they have an email, they send it  
12 to them and say fill this out and bring it with  
13 you. Okay?

14 So a lot of people show up with a form, the  
15 normal questionnaire form. It used to be they were  
16 downstairs and they had to fill it out. Now  
17 probably more than half show up with the same one  
18 but already filled out. If they have not filled  
19 one out, the Clerk is to give them that form, a  
20 blank one, and bring them up here.

21 So the first thing they're going to do is come  
22 up here. I'm going to swear them. I'm going to  
23 explain that we're here on a first-degree murder.  
24 I'm going to make them all turn off their  
25 cellphones. I'm going to make them all put their

1 cellphones away. A lot of times I don't do that.

2 We're going to introduce ourselves and then  
3 we're going to hand them the questionnaire that  
4 we're going to work on that's an additional  
5 questionnaire than the one they've already had.  
6 And we're going to talk about how long this case is  
7 going to be, when we are going to start, when we're  
8 going to finish, the schedule and all that. And  
9 then I'm going to have them fill out that  
10 questionnaire. When they're done, it's going to be  
11 collected, copied, and all of you all are going to  
12 get it back.

13 We are all going to meet in the jury room with  
14 the defendant and the court reporter. They're  
15 going to stay out here; we're going to go in there.  
16 And if we have any individual jurors that we need  
17 to talk to just from that, we'll bring them one by  
18 one into the jury room. And the bailiffs will be  
19 right there. They're going to sit at the end of  
20 the table. You'll ask all the questions. The  
21 court reporter will be there. The defendant will  
22 be there. We'll do it all in the jury room.

23 Then if we need to excuse them, as soon as  
24 they're excused, they'll be leaving the courtroom,  
25 go back downstairs. And that way we are going to

1 have somewhat of individual voir dire, but that  
2 will be based on the questionnaires themselves, the  
3 amount of time it's going to take, murder cases,  
4 those kind of things.

5 So we'll probably get rid of many jurors  
6 before you guys start asking questions, because I  
7 completely understand it is very difficult to ask a  
8 hundred people questions, but normally we can get  
9 rid of 20, 30, maybe even 40 jurors.

10 MR. LIVERMORE: With the publicity, possibly.

11 THE COURT: Right. So when we're talking  
12 based on the questionnaires, the amount of time,  
13 and that kind of stuff, from sequestered voir dire,  
14 individual voir dire, based on those. Then we'll  
15 begin the questions. I have on Tuesday already set  
16 up for another 500 jurors to be brought in, if we  
17 need them.

18 So if we figure by the end of the day at 5:00,  
19 we don't have enough jurors to go forward to start  
20 picking for not -- you know, for peremptories, then  
21 we need to bring in another panel and start all  
22 over again.

23 What I would do with the first panel is send  
24 them home and tell them to come back at lunch, at  
25 1:00 the next day. You know, because the problem

1       that we have is we need to keep them in order. So  
2       we'll need to know 1 through whatever, and then the  
3       next group will come in, then we'll put them down.

4             I think we'll need, before we can actually  
5       start strikes -- and I'm not talking about, you  
6       know, for good cause, I'm saying, yeah, I don't  
7       like them -- we can't do that until we have at  
8       least -- you get 10, you get 10, and then we need  
9       14 jurors. So we're talking about 40 jurors. We  
10      need 40 clean jurors before we start picking.

11            Does everybody agree with that? True? Not  
12      true?

13           MR. LABRUZZO: We agree.

14           MR. LIVERMORE: Well, I understand.

15           THE COURT: I mean we've pretty much gotten  
16      rid of anybody you're going to say I have a cause  
17      strike, because those are going to be done early.

18           I'm saying these are peremptories, you got 10,  
19      he's got 10, and then I need 14 for a panel, so  
20      that's 34 people. And then sometimes they say  
21      stuff when we're talking. So we need at least 40  
22      before we start picking. Probably we'll have as  
23      many as 50, but I'm saying I can probably start at  
24      40.

25           But I have two days worth of jurors, and I

1 think if we start out by just bringing them up  
2 here. Don't let them go downstairs. Don't let  
3 them get in any -- you know, so they understand  
4 this is very important, this is a significant case.  
5 We have them all here in this courtroom. They can  
6 be monitored. They can be watched. Their cell  
7 phones, all that kind of stuff is going to be in  
8 their pockets. I have bailiffs that are going to  
9 be watching them.

10 And then we do the majority of the questions  
11 of any significance that could, you know, hurt the  
12 whole panel, we'll do it in there. The press, you  
13 know, any prior knowledge of the case, live in the  
14 neighborhood, know any of these individuals, know  
15 anybody that knows anybody of these individuals,  
16 those kind of things, we'll do all those in the  
17 jury room.

18 Does anybody have any problems with that?

19 MR. SARABIA: No, Judge.

20 MR. LIVERMORE: So I understand. Then any  
21 questioning about -- you know, obviously the  
22 questioning about the death penalty will be done in  
23 a group in here?

24 THE COURT: Correct. And the reason that I  
25 want to do it that way is because what happens is

1       you forget -- not you personally.

2               MR. LIVERMORE:   Probably.

3               THE COURT:   But the State, the Defense, they  
4       ask one set of jurors some questions and they don't  
5       ask the other jurors the other questions, and then  
6       they say, oh, oh, I forgot to ask.  You know what I  
7       mean?  I forgot to ask that second set of jurors,  
8       can I ask again?

9               So as long as all the jurors are in here at  
10       once, they all hear the same questions, they can  
11       raise their hands, they can comment.  And  
12       personally I think you get more feedback from  
13       jurors when you get somebody who raise their hand,  
14       then somehow 50 people raise their hand.  Whereas  
15       if you just bring them in a room, they're, like,  
16       no, yes, no, yes, you know, I'm not answering any  
17       more questions.  People tend to be more open if  
18       they hear other people talk about the same subject.

19              And I just don't want it to be appealable  
20       because the -- not even appealable.  But I don't  
21       want to get in a situation where one group or the  
22       other realizes that they forgot to ask certain  
23       questions to one group of panel, and then another  
24       panel comes in and then you're, oh, you remember  
25       that question, now you want to bring that other

1 panel back in to ask that question that you forgot  
2 to ask. Right? I mean we all know it's going to  
3 happen.

4 MR. LIVERMORE: Well, we've got four people to  
5 remind us what we missed.

6 THE COURT: I think you have six now, but  
7 that's okay.

8 MR. LIVERMORE: Well, that could be.

9 THE COURT: That makes it even worse because  
10 then you have six people who want to ask questions.  
11 So if they're all in here together, they all hear  
12 the same questions, they all answer. And, you  
13 know, jury selection by its very nature can be  
14 tedious for both myself, you, the State, and the  
15 jurors and anybody else who watches it. It's not  
16 the part they show on TV is shocking. Okay?

17 So it's the boring part of the trial that's  
18 probably the most important part for both sides and  
19 it takes a long time and there's really no way to  
20 make it any quicker. You know, the part I worry  
21 about is somehow we ask a question that strikes the  
22 whole panel. That's the only one I'm worried  
23 about. And if we ask the questions that could  
24 prejudice an entire jury panel inside the jury  
25 room, we don't have that problem. And if we strike

1       them right then, right there, they'll leave here  
2       and they won't have any other contact with the  
3       panel as a whole because they'll go back down.

4               Because we have five other judges picking  
5       juries that day that day, that week, Monday. So I  
6       have a lot of jurors coming in. So we may even be  
7       able to bring in another set of panels that day on  
8       Monday, but I have a backup for more jurors coming  
9       in on Tuesday. Because I know you Mr. Livermore  
10      and I think Mr. LaBruzzo were in a trial with me  
11      where it was like a whole three-fourths of the  
12      panel was gone before we even got to question  
13      number one.

14             I don't remember what trial it was, but I just  
15      remember thinking how are we ever going to get a  
16      jury panel, I just lost three-quarters of my jury  
17      panel with like five minutes into the jury  
18      selection because everybody is, like -- and this  
19      may be one of those juries. I mean this is a case  
20      that had a lot of press when it happened and it  
21      hasn't had a lot of press since.

22             So as anecdotal, when I talk to people about  
23      this case, oh, I had to continue my trial, it's a  
24      three-week murder trial, I tell them as little as I  
25      know about this case, oh, almost -- to the person,



1 oh, I remember reading about that case or I  
2 remember about hearing about that case. Now, what  
3 they remember or anything like that, I don't know.  
4 But these are people that I associated with that  
5 don't live in Pasco County. They live in Pinellas.  
6 So I can only imagine in Pasco that number of  
7 people will be pretty high.

8 MR. LIVERMORE: It's a risk.

9 THE COURT: Right. So, yeah, I think that's  
10 going to be one of the issues. And just because  
11 you've heard or read about it doesn't mean that  
12 you're not available to sit as a juror, but it's  
13 most certainly something that you're going to ask a  
14 considerable amount of questions about, and being  
15 individual you can be a little bit sterner or  
16 stricter or more direct than you can trying to look  
17 good in front of the whole panel.

18 That's the way I intend to get it to work. I  
19 do need to work on this specialized jury  
20 questionnaire. I have one that I've used, but it  
21 would be easier if the two sides could maybe look  
22 at what's already asked and see if you have some  
23 ideas of additional questions that you would like.

24 MR. LIVERMORE: That's fine. We can do that.

25 THE COURT: I mean it doesn't have to be one

1 page. It can be two. I mean I'm not limiting it  
2 any, but whatever you think is important in a way  
3 that can be answered that doesn't take 17  
4 paragraphs would be helpful.

5 MR. LIVERMORE: Right.

6 THE COURT: I have another trial with Regional  
7 Counsel and their questions could lead to pages and  
8 pages and pages of answers. I'm not exactly sure  
9 that's helpful. But, you know, have you sat on a  
10 murder case? Do you know anybody that's ever been  
11 involved in a murder case? Do you know about this  
12 murder case? Whatever you think is important.

13 You guys think you can get together and maybe  
14 have an idea?

15 MR. LIVERMORE: Sure.

16 MR. LABRUZZO: Judge, I've already started  
17 working on one. I haven't spoken to Mr. Livermore  
18 about some of the things that we think, but we've  
19 reviewed it. I think we'll be able to find at  
20 least some middle ground or at least narrow the  
21 issues for the Court.

22 THE COURT: Right. And I'm not limiting  
23 either side to whatever they feel their issues are.  
24 I mean everybody has their issues. They've gone to  
25 chair classes of Life over Death and, you know,

1 Death Penalty, and, you know, just as a lawyer  
2 sometimes you have questions that, you know, what's  
3 your favorite color? I don't know why that makes  
4 any difference, but if you want to ask that, if  
5 that's something important to you, put it on the  
6 list. I'm good. You can ask it. Bumper stickers,  
7 you know, newspapers, any of those.

8 But sometimes they come up with things like,  
9 you know, what's your favorite flower? And I'm,  
10 like, okay, ask away. What state you're from. I  
11 don't know if that has anything to do with it.  
12 But, you know, they have a lot of psychologists and  
13 psychiatrists working on the idea of what is the  
14 best death penalty juror, and I don't know the  
15 latest, you know, psychosomatics of that. So if  
16 you guys can work on that.

17 And, again, whatever question you want, I have  
18 no problem having that in there. I just ask that  
19 if the question can be answered in one or two lines  
20 and not, you know, how do you feel? You know. You  
21 might get a lot of the feelings might go on and  
22 upon. But, you know, that's up to you.

23 So I will deny the individual sequestered voir  
24 dire, but I will indicate for the record that we  
25 will do a somewhat sequestered voir dire based on

1 the individual questionnaires and the extra  
2 questionnaires that we're going to give. Anybody  
3 want to talk to anybody in private in the jury room  
4 before we begin general questioning, I have no  
5 problem with that. No matter what reason, if you  
6 want to talk to any one juror, all you have to do  
7 is just tell me it's because of question number 6  
8 or question 9, or whatever. Okay?

9 MR. LIVERMORE: Okay.

10 THE COURT: Let's see. We decided to do the  
11 State's motion on October 5th. Do you think we can  
12 use that date also to review an additional jury  
13 questionnaire?

14 MR. SARABIA: That's fine, Judge.

15 THE COURT: You guys think you can get  
16 together on that?

17 MR. LIVERMORE: I think so.

18 THE COURT: Okay. So for October 5th at 1:30,  
19 we'll reset the State's motion in limine and also  
20 review for the additional jury questionnaire.

21 And, again, you'll get the jury list not in  
22 boxes. We won't put them in boxes, you know, at  
23 all. You will have an actual list, you know,  
24 stapled together of 1 through 100, so you can  
25 strike through them.

1           And I believe it gives you the name and then  
2           it also gives you the street address where they  
3           were sent their summons. And that's one of the  
4           other things I wanted, because I know that the  
5           Defense specifically, I would think the State also,  
6           knows the area better than I do, and that will give  
7           you a more accurate indication if they've ever  
8           lived or do currently live in the area where this  
9           occurred.

10           Because I just have to, you know, think that  
11           if you've lived in the area, you'll know way more  
12           about this case than just reading it in the  
13           newspaper maybe once or something like that. I  
14           mean if you live in that subdivision, if you live  
15           close to that area, if you live close to where  
16           Mr. Matos was arrested -- I don't even know where  
17           that happened. I'm just saying if you've lived  
18           close to that area, and you all know the map of  
19           Pasco better than I do, that would be something  
20           that was very important to you for questioning.  
21           Defense, I think that would be important to you?  
22           Yes?

23           And, now, they may have lived closer before  
24           back in '14, but this will at least give you the  
25           address where they were summonsed for that day.

1       Okay? And then it will be just a list, and it's  
2       like double spaced, so it's easier for you. Plus,  
3       if you have somebody that's running names for you,  
4       it's much easier to run the names in this format.  
5       And that will be given to you as soon as they come  
6       up. So while they're filling out the forms, you'll  
7       know whoever is your person can take the piece of  
8       paper that has the names on them and go run them if  
9       they want.

10       MR. LIVERMORE: Okay.

11       THE COURT: Or multiple people running names.  
12       So I can give you the entire list of who was  
13       summonsed for that day if you want it ahead of  
14       time.

15       MR. LIVERMORE: We do.

16       THE COURT: I can get it for you.

17       MR. LIVERMORE: Yes, ma'am.

18       THE COURT: Do you want that?

19       MR. LIVERMORE: Yes.

20       THE COURT: Okay. But that's not going to  
21       tell you the first hundred that I get.

22       MR. LIVERMORE: Right.

23       THE COURT: State, do you want a copy?

24       MR. LABRUZZO: Yes, Judge.

25       MR. SARABIA: Yes, Judge.

1           THE COURT: All right. I don't know if she's  
2 actually sent out the summons yet. Do you know?  
3 October 30th.

4           THE CLERK: Maybe. But I don't think so.

5           THE COURT: I think she was going to do it  
6 today.

7           THE CLERK: Yes.

8           THE COURT: Okay. So I believe that she was  
9 going to go ahead and do that list today. I think  
10 we had that conversation with her this morning.  
11 And so as soon as that list of the entire names of  
12 everyone that's summonsed for that day is made, I  
13 will give you both a copy. I didn't know I could  
14 that, but someone asked for it in another trial and  
15 I found out I can get it real easy.

16           Is there anything else that either side wants?

17           MR. SARABIA: No, Judge.

18           THE COURT: What are we going to do about the  
19 competency motion?

20           MR. LABRUZZO: Judge, it's our understanding  
21 of the law that the Court would have to determine  
22 competency of Mr. Brown, and at this time the State  
23 has not offered him. And if at such time we do, we  
24 would expect the Court to determine competency at  
25 that time.

1           I think this motion as filed is not ripe yet.  
2       We understand there is a legal process for  
3       determining competency. It does require that it be  
4       done outside the presence of the jury. It does not  
5       require that it be done pre-trial.

6           Judge, and competency in this fashion, we're  
7       not talking about competency to proceed at trial.  
8       Just competency to testify can be a fluid concept,  
9       and I think that he could be -- it's mainly done  
10      right before he testifies.

11          MR. MICHAIILOS: Except that we have a right to  
12      discovery, Judge. And we can tell you that in  
13      August of 2015, when we deposed this child -- and I  
14      can at least speak for the State. Last time they  
15      were in court they didn't have the ability to  
16      review that video because it was in our possession.  
17      Since then Mr. Sarabia asked for it and I gave him  
18      a copy of that videotape and he had a chance to  
19      review it.

20          And if I'm not mistaken, I think the State  
21      will concede that at least on August of 2015,  
22      [REDACTED] was not competent to testify. And at  
23      that deposition we were not able to net any  
24      information that would give us any clue as to how  
25      this child would testify in order to prepare for



1 trial.

2 So I understand it could be a fluid process.  
3 If the State is of the position that [REDACTED]  
4 is competent today, we would do a motion to the  
5 Court to redepose him, fly to New Jersey, take that  
6 deposition, and ask him questions to figure out  
7 exactly what he actually witnessed in this case in  
8 order to be prepared for trial.

9 But I don't think the State is going to expect  
10 us, you know, during the trial, before the child  
11 takes the stand, if at that point in time their  
12 position is that he's competent, that we continue  
13 the trial or put it on pause until we depose him.

14 So I have the video. I brought it here. I  
15 know the State's had a chance to review it.  
16 Obviously, I suggest that if the Court wanted to  
17 see it, we'd love to play it for you. But I can  
18 tell you, Your Honor, that during this deposition  
19 the child is incapable of communicating in any way  
20 effectively, and we were able to net no information  
21 from this child during that deposition.

22 MR. LABRUZZO: I would respectfully disagree  
23 with that assessment. He was deposed. They've  
24 complied with the rules of discovery. Both the  
25 State and the Defense went up north, took a

1 deposition, he did make statements that are  
2 damaging for the defendant. He does say, "I saw  
3 daddy kill mommy." So this idea that he is  
4 incapable of testifying to anything relevant in  
5 this case is not necessarily true.

6 The rules provide very clearly that to  
7 determine competency the Court has an opportunity  
8 to determine whether or not the witness has an  
9 understanding as to the moral imperative of  
10 testifying truthfully in a case and that he has the  
11 ability to recall the things upon which he is being  
12 asked to testify. Basically, does he have an  
13 accurate memory.

14 He's been a listed witness. They've gone up  
15 and deposed him. If the State elects to call him  
16 as a witness, there is no shock, there is no  
17 surprise as to these facts. There would be a  
18 hearing in accordance with the rules outside the  
19 presence of the jury to determine whether or not  
20 he's competent to testify to those things.

21 So, you know, it's not these attorneys that  
22 were present for that last deposition, we weren't  
23 either, but the level of questioning was not  
24 extremely in depth and the witness was four years  
25 old or five years old at the time. So that being

1       said, it's not like we really prevented them from  
2       conducting their discovery as to that matter.

3               MR. MICHAILOS: Real quick, Judge?

4               THE COURT: Okay.

5               MR. MICHAILOS: I think Mr. LaBruzzo made the  
6       statement the child said he saw his father kill his  
7       mom. That is nowhere in the deposition. What he  
8       said was in response to Mr. -- it was Mr. Halkitis  
9       asked him a question. He said, "Daddy killed  
10      mommy." And then later on, when Mr. Hendry --  
11      there was a question where he asked him whether  
12      somebody told him that, he said, "Yes".

13              So there's no evidence that the child has any  
14      personal knowledge of this case or actually  
15      witnessed anything. And the first criteria of  
16      90.603 is that the child is capable of expressing  
17      himself concerning a matter. It's clear on that  
18      video that he was incapable of expressing himself  
19      and making it clear what he saw, what he knows  
20      regarding this case.

21              So that previous depo was clearly ineffective  
22      in the sense that we were able -- it was a useless  
23      piece of discovery at that point in time. If the  
24      child has changed now, it's almost as if -- to use  
25      the analogy, if the child was deaf and mute and

1       communicated completely nothing during the  
2       deposition, I would assume that the State would  
3       agree that we would have the right and good cause  
4       to redepose that witness.

5               We're in the same type of situation here. The  
6       child was not a mute, was able to talk, but most of  
7       what he said was inaudible, it did not make sense  
8       and did not answer the questions posed to him. So  
9       I can't see any way around this but to allow us to  
10      redepose this child if in fact this child has  
11      become competent to testify in the interim, which I  
12      have yet to see any evidence of, Your Honor.

13             MR. LABRUZZO: And, Judge, I just feel like  
14      there are two issues being argued here: One is  
15      whether or not he's a competent witnesses. And the  
16      rules kind of lay out a very distinct procedure for  
17      a court to determine if a witness is competent and  
18      can be done at trial, and it is not ripe at this  
19      stage.

20             I'm also hearing a motion to redepose a  
21      witness that they've already deposed and have not  
22      pled or filed any motion laying out the good cause  
23      for that in this case. The Defense chose to take  
24      those depositions at the time upon which they  
25      chose. Again, we were not the attorneys, both for

1 the State and the Defense, and we were not present  
2 for that. I don't know why those dates were  
3 chosen. They were selected and a deposition was  
4 done.

5 And so for the motion that is before the Court  
6 as to determine competency, the State's position is  
7 that it is not ripe at this point. There is a  
8 clear procedure that is laid out and through case  
9 law and the rules for which determining competency,  
10 and we're not at that stage today.

11 THE COURT: I'm reading his depo, if you want  
12 to know what I'm doing.

13 MR. LABRUZZO: In all fairness, Judge, just  
14 for the record, I think that the transcript of the  
15 deposition -- the State would at least argue that  
16 the video that was provided in this case is a  
17 little bit more informative as to what he says and  
18 how he says it. So I would just put that on the  
19 record. I don't think the transcript is fully  
20 telling us what the State believes he says.

21 THE COURT: Mr. LaBruzzo, I know that you've  
22 watched the video. I presume you've read the  
23 transcript, correct?

24 MR. LABRUZZO: Yes, Judge.

25 THE COURT: Is there any indication that this

1 child has progressed in his intellectual ability  
2 since his deposition was taken?

3 MR. LABRUZZO: Yes, Judge.

4 THE COURT: All right. So at this point I  
5 believe the State is correct, that the Court cannot  
6 make a determination of competency or disqualify a  
7 witness unless and until we're ready for trial.

8 The State is telling me that this child has  
9 matured and has more ability than when he was first  
10 deposed, but how much that is or what that is is  
11 not something that I personally can know.

12 But I can read the deposition and tell you  
13 that notwithstanding that he has some intellectual  
14 disabilities alleged by the Defense in their  
15 motion -- I don't know if that's true, I haven't  
16 heard from a psychologist and all that kind of  
17 stuff -- that this is a typical deposition of a  
18 young child.

19 A car, swimming, pool -- they don't really  
20 want to tell you much. They don't really know how  
21 to tell you much. It doesn't make them  
22 incompetent, it just makes them difficult to depose  
23 because they only have a world that's this big, a  
24 box, that's what they live in. It's hard for them  
25 to articulate those things sometimes when you have

1 a bunch of adults who don't speak child language  
2 talking to them.

3 So I do not have a motion currently pending  
4 before me to ask for additional time or to redepose  
5 the witness. If you file that, I most certainly  
6 would review that.

7 But I can tell you that the State is now  
8 telling me that notwithstanding the video and the  
9 deposition that was taken from the video -- they're  
10 at the same time. I just know that the video, like  
11 anything else, gives you more nuances, so to speak,  
12 of a deposition.

13 But I'm reading it and I can tell you right  
14 now, and I've down a lot of depositions of  
15 children, I've had a lot of children testify, this  
16 is not unusual for a child spinning around in their  
17 chair and saying, you know, "I like peanut butter  
18 and jelly," because that's what they like, so  
19 that's all they want to talk about.

20 So at this point, Defense, the State is saying  
21 they're still listing him, he's matured, he may be  
22 able to be more forthcoming in questioning. And if  
23 you file a request to have additional depositions  
24 and list why, then I would, of course, hear that.  
25 And if I grant it, then we can reset the deposition

1 and fly back up to New Jersey?

2 MR. LABRUZZO: New Jersey.

3 THE COURT: New Jersey.

4 Is the State willing to go ahead and waive  
5 them filing a motion and just agree?

6 MR. LABRUZZO: No, Judge. I'd like to see a  
7 written motion on that.

8 THE COURT: Okay.

9 MR. MICHAIILOS: And, Judge, the reason why I  
10 didn't file that motion is because I didn't  
11 understand until recently, after talking to  
12 Mr. Sarabia about the deposition, is that the child  
13 evolved and has become competent in the interim.

14 THE COURT: Correct.

15 MR. MICHAIILOS: Otherwise, I would have filed  
16 that in writing.

17 THE COURT: And I think this hearing here is  
18 something that you can put in there, that I asked  
19 the State if he's evolved and if he's matured and  
20 if they feel he's more able to communicate, then  
21 you can cite the original deposition and his age  
22 and his -- I hate to say behavior because he wasn't  
23 misbehaving, it's just he wasn't really answering  
24 exactly the questions that were asked.

25 He seems to answer the questions that he



1 thinks he's going to be asked, which again is not  
2 unusual for any child, any young child during an  
3 interview, especially in the type of situations  
4 that children find themselves in video depos, which  
5 is at a big table with a bunch of adults sitting  
6 around and a camera in their face.

7 So we don't really do well with depositions of  
8 children. And we do the best we can because that's  
9 the court system we're in, but we all know that  
10 little children many times are scared, overwhelmed.

11 MR. LABRUZZO: Traumatized.

12 THE COURT: Traumatized.

13 MR. MICHAIILOS: I understand, Judge.

14 THE COURT: And I'm not saying that's your  
15 fault or anyone.

16 MR. MICHAIILOS: Right.

17 THE COURT: It's just that we put them in a  
18 room with a table and a bunch of adults and we're  
19 asking them a bunch of questions rapid fire. The  
20 older they are the better they are able to deal  
21 with that and the more specifically your deposition  
22 is accurate.

23 MR. MICHAIILOS: Right. And just for the  
24 record, Judge, as far as his diagnosis, that didn't  
25 come from us. That came from the State's

1 witnesses, the people from CPT, the people that  
2 evaluated the child had diagnosed the child as  
3 being autistic.

4 So there is definitely a disability there,  
5 unless the State is disputing the people that came  
6 up with that diagnosis.

7 THE COURT: Well, as you well know, in this  
8 time period, 2014 to 2017, the diagnosis of autism  
9 falls on a spectrum that can go from almost, as you  
10 indicated, deaf-mute to ADHD.

11 MR. MICHAIILOS: Right. Right. Right.

12 THE COURT: So there's a lot of room for very  
13 competent children or adults with autism to testify  
14 in a court of law.

15 MR. MICHAIILOS: Exactly.

16 THE COURT: So I'm not disputing that he may  
17 have some autism in some situation somewhere on the  
18 spectrum. That by itself, that diagnosis means  
19 nothing to me.

20 MR. MICHAIILOS: Right.

21 THE COURT: Half the people in this room  
22 probably has children that had autistic diagnosis  
23 on a spectrum if we had it back when we were  
24 growing up.

25 MR. LIVERMORE: I'll go ahead and file the

1 motion, Judge.

2 But the other issue is him being  
3 truth-qualified. Up to this point he hasn't been,  
4 but I'm hoping -- I mean we'll see if he's able to  
5 be truth-qualified. But I'll file that motion and  
6 we'll see what happens.

7 I mean we don't look forward to traveling out  
8 of state to redepose him, but if that's what needs  
9 to be done, that's what we'll do.

10 THE COURT: I understand. You have your job  
11 to do and they have their job to do.

12 It doesn't appear from deposition -- there's  
13 21 pages. I'm on Page 19. It doesn't appear  
14 anybody tried to truth-qualify him. It appears  
15 that they got frustrated with the questions and the  
16 answers and just stopped.

17 MR. MICHAÏLOS: Right. Right. Because you  
18 know exactly by reading, you can figure out what's  
19 going on.

20 THE COURT: And, you know, based on the fact  
21 that Mr. Halkitis has, or did have when he was the  
22 prosecutor, the ability to communicate effectively  
23 with a child, it's questionable.

24 He gets frustrated about Page 2. So he was  
25 done, he wasn't going to ask any more questions,

1 and I don't believe Mr. Hendry tried to  
2 truth-qualify the witness.

3 MR. MICHAIILOS: Well, after the child keeps  
4 responding by giving his name over and over again  
5 regardless of the question.

6 THE COURT: I know. Just for the record, he  
7 says, "My name is [REDACTED]" for every answer  
8 for the first four pages. But he starts to open up  
9 and talks about swimming and school and blue school  
10 buses and all that stuff.

11 MR. MICHAIILOS: And squirrels.

12 THE COURT: Squirrels. So, again, it may take  
13 a little bit of patience to finish the deposition.  
14 Hopefully the people, if I do grant the motion and  
15 they go back up and redepose him, we'll have people  
16 with a little more patience in the room when they  
17 ask the questions.

18 But, you know, that's what we get. So it's a  
19 child. I wish that we didn't have to call  
20 children, but if they're witnesses or they need to  
21 testify, they have to testify. There's nothing we  
22 can do about that. So you have a right to depose  
23 him. File your motion. As soon as your motion is  
24 filed, we'll get that set.

25 We can hear that motion, if filed, on the 5th.

1       Okay.  So if you file the motion -- I am going to  
2       deny the motion -- or I'll take it this way.  I'll  
3       pass the motion to determine competency and strike  
4       or disqualify the witness until trial.

5             If you're filing an additional motion to ask  
6       for redeposition time with the witness, I'll hear  
7       that on the 5th.  So I'm not denying it, I'm just  
8       tabling it until the more appropriate time of  
9       trial.

10       MR. MICHAIILOS:  Yes.

11       THE COURT:  All right.  Anything else?

12       MR. SARABIA:  No, Judge.

13       THE COURT:  All right.  I hate to have you all  
14       go when it's pouring rain outside, as we can all  
15       tell from my courtroom.  But everything else or  
16       anything else that I need to review we'll do on  
17       October 5th at 1:30.  Okay?

18             All right.  Thank you all.

19       MR. MICHAIILOS:  Thank you.

20       (HEARING CONCLUDED.)

21  
22  
23  
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25

1 CERTIFICATE OF REPORTER

2  
3 STATE OF FLORIDA )

4 COUNTY OF PASCO )

5  
6  
7 I, MARIA FORTNER, Registered Professional  
8 Reporter for the Sixth Judicial Circuit, do certify that  
9 I was authorized to and did stenographically report the  
10 foregoing proceedings and that the transcript is a true  
11 record.

12 DATED this 6th day of June, 2018.

13  
14 /S MARIA A. FORTNER  
15 MARIA A. FORTNER  
16 Registered Professional Reporter  
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