# Daniel Ely Perez v. State of Florida

PLEASE RISE. HERE YE, THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE, DRAW NEAR. GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

GOOD MORNING, LADIES AND GENTLEMEN, AND WELCOME TO THE FLORIDA SUPREME COURT. THE FIRST CASE ON TODAY'S DOCKET IS PEREZ VERSUS THE STATE OF FLORIDA. MR.^CALDWELL, IT LOOKS LIKE YOU ARE READY.

YES, MA'AM.

YOU MAY PROCEED.

MAY IT PLEASE THE COURT, I AM GARY CALDWELL ON BEHALF OF DANIEL PEREZ, HIS APPEAL FROM HIS CONVICTION FOR FIRST DEGREE MURDER AND OTHER OFFENSES AND SENTENCED TO DEATH. I WOULD LIKE TO SPEAK FIRST TODAY ABOUT THE FIRST ISSUE IN THE BRIEF, WHICH PERTAINS TO A JUROR DISQUALIFICATION DURING THE TRIAL. SECONDLY I WOULD LIKE TO DISCUSS THE ISSUES CONCERNING A CONSTITUTIONAL PROPORTIONALITY WHICH IS IN TYSON AND THIRDLY IF I HAVE TIME I WOULD LIKE TO DISCUSS THE ISSUE CONCERNING THE CONFESSION WHICH IS THE SECOND ISSUE AND THE BRIEF. SO SAYING THAT, LET ME TURN TO THE FIRST ISSUE. I DON'T THINK THERE IS ANY DISPUTE IN THE BRIEF ABOUT THE OVERALL RULE OF LAW GOVERNING THIS ISSUE, WHICH IS THAT WHEN A JUROR FAILS TO DISCLOSE WHETHER PURPOSELY OR INADVERTENTLY A FACT WHICH IS MATERIAL TO A PARTY -- TO THAT JUROR'S SERVICE WHICH IS DEFINED AS BEING MATERIAL TO A PARTY'S DECISION, WHETHER TO EXCUSE THE JUROR FOR CAUSE OR AS ANOTHER MATTER.

COULD YOU EXPLORE FOR US, PLEASE, THE PARAMETERS OF MATERIALITY? HERE WE'RE DEALING WITH, AS I UNDERSTAND THE FACTS, SOMEONE WHO HAD MADE A BID TO DO SOME WORK FOR SOMEONE ELSE AND HAD BEEN IN THEIR PRESENCE MAYBE FOUR TIMES, SO IT IS SOMEWHAT DIFFERENT THAN CASES WHERE SOMEONE HAS A BACKGROUND OF A LITIGIOUS NATURE. SO {SCHROR} WITH US WHERE THE LAW SHOULD BE WITH REGARD TO THIS MATERIALITY PROBLEM.

YES, SIR, JUSTICE LEWIS. THE MATERIALITY, AS I SAY, THE CASE LAW INDICATES THAT MATERIALITY IS MATERIAL INSOFAR AS IT WOULD AFFECT A PARTY'S DECISION TO -- WOULD REASONABLY AFFECT A PARTY'S DECISION TO EXERCISE THE CHALLENGE TO THAT JUROR. BECAUSE THE RIGHT OF BEING EFFECTIVE, IT IS THE PARTY'S RIGHT TO ENGAGE IN AN INTELLIGENT JURY PROCESS SO THAT'S HOW THE MATERIALITY PLAYS IN AND AS THE DEFENSE ATTORNEY SAID HERE AND THE JUDGE DOESN'T DISPUTE IN THIS CASE, IT WOULD DEFINITELY HAVE AFFECTED THE DEFENSE DECISION WHETHER TO LEAVE THIS JUROR -- THIS WOMAN ON THE JURY.

HOW ABOUT TAKING ME THROUGH, I KNOW YOU SAID THAT THE CASE LAW HAS COME DOWN TO THE FACT THAT IT WOULD BE -- WHETHER IT WAS INTENTIONAL OR INADVERTENT, BUT IN MY EXPERIENCE AS A TRIAL LAWYER I KNOW THAT YOU STAND UP AND YOU ASK, YOU READ A LIST OF WITNESSES TO THE JURY AND YOU ASK THEM WHETHER THEY KNOW ANY OF THESE PEOPLE. NOW, IF THERE IS, AND THAT'S KIND OF WHAT HAPPENED HERE, RIGHT?

YES, JUSTICE WELLS, THAT'S CORRECT.

AND SO THERE WASN'T, IN THIS INSTANCE, AS I UNDERSTAND THE FACTS, A SITUATION IN WHICH THERE WAS A SPECIFIC QUESTION ABOUT ANY OF THESE PEOPLE AS TO WHETHER THERE WAS OR WAS NOT A BUSINESS RELATIONSHIP. IS THAT RIGHT?

WELL, THAT IS CORRECT, YES, SIR.

SO NOW WE GET DOWN THROUGH THE TRIAL, AND THIS MATTER COMES UP.

UH-HUH.

AND THE JUROR SAYS I DIDN'T CATCH THIS PERSON'S NAME OR DIDN'T REMEMBER THIS PERSON FROM THAT READING. ISN'T THAT WHAT HAPPENED?

I BELIEVE SO.

DOESN'T THE TRIAL JUDGE HAVE THE ABILITY TO RELY UPON THAT STATEMENT BY THE JUROR IN MAKING A DECISION AS TO HOW TO HANDLE THIS PARTICULAR SITUATION WHEN IT ARISES OR SHOULDN'T THERE BE SOME DISCRETION ON THE PART OF THE TRIAL JUDGE?

I DON'T BELIEVE SO, JUSTICE WELLS, AND LET ME SAY WHY. AS I SAY, AS YOU SAID, AND THIS IS VERY CLEAR FROM THE CASE LAW FROM DELAROSA AND THE CASES CITED THEREIN THAT THIS IS NOT AN INQUIRY INTO THE JUROR'S MORAL CULPABILITY FOR PURPOSELY CONCEALING SOMETHING. IT DID HAPPEN -- LET ME MENTION SOMETHING ELSE THAT YOU RAISED. WHICH WAS THAT THERE WAS NO QUESTION ABOUT BUSINESS DEALING WITH THE JURORS. CERTAINLY AS SHE HAD SAID I KNOW THAT WITNESS, THEN THERE WOULD HAVE BEEN INQUIRY, WHICH WOULD HAVE REVEALED THAT DURING THE VOIR^DIRE. IT WAS INADVERTENT CONCEALMENT WHICH WAS THE RESULT OF THAT QUESTION NOT BEING ASKED WHICH IS PART OF THE PREJUDICE WHICH IS THE DEFENSE'S ABILITY TO EXERCISE A CHALLENGE TO THAT JUROR.

BUT DON'T WE HAVE A SITUATION HERE IN WHICH THIS JUROR IS REALLY SAYING I DIDN'T KNOW THAT? IT'S NOT WHETHER IT IS REALLY A CONCEALMENT OR NOT. IT IS A TOTAL LACK OF KNOWLEDGE AT THE POINT IN TIME THAT THE LIST IS BEING RAISED, I MEAN THAT'S WHAT THE JUROR IS SAYING. NOW, IT IS UP TO THE TRIAL JUDGE WHETHER THE TRIAL JUDGE BELIEVES THAT OR NOT.

WELL, AGAIN, I UNDERSTAND WHAT YOU ARE SAYING, AND I'M NOT SAYING IN ANY WAY THAT THE RECORD SHOWS THAT THERE WAS SOME PURPOSEFUL THING ON THE PART OF THIS JUROR. I WOULDN'T MAKE ANY SENSE THAT SHE WOULD HAVE CONCEALED IT AND THEN SENT OUT THE MESSAGE LATER ON SAYING O. BY THE WAY, I KNOW THE JUROR.

BUT DOESN'T THIS TIE INTO THE MATERIALITY ASPECT BECAUSE WE DON'T HAVE A JUROR WHO REALLY HAS A CLOSE CONNECTION? THIS IS, AS I CAN READ THIS, SOMEBODY MADE A BID ON A PAINTING JOB.

SHE KNOWS THE JUROR THROUGH FRIENDS OF HERS. I DON'T REMEMBER IF THERE WAS REALLY ANY DISCUSSION AT ALL ABOUT WHETHER SHE KNOWS ANYTHING ABOUT THE REPUTATION OF THE WITNESS OR ANYTHING LIKE THAT.

I MEAN IT SEEMS TO ME THAT IT IS A FAIR STATEMENT THAT THEY MAY HAVE BEEN IN THEIR PRESENCE MAYBE FOUR TIMES IN 20 MONTHS.

UH-HUH.

AND IT WAS A BIDDING ON A JOB. SO I JUST WONDERED, ISN'T THIS ALL PART OF IF THIS IS WHAT JUSTICE WELLS IS SUGGESTING THAT THAT'S PART OF READING A LIST AND THERE IS REALLY NOT THAT NEXUS THAT MAY BE THERE IN OTHER CASES OF PRIOR HISTORY. I DON'T WANT TO TAKE UP ALL OF YOUR TIME.

I'M SORRY, GO AHEAD.

AGAIN, THE MATERIALITY ISSUE IS WHETHER THE DEFENSE WAS ABLE TO MAKE AN INTELLIGENT DECISION WHETHER TO LEAVE THIS JUROR ON THE JURY.

AND WHAT INVOLVEMENT --

THAT'S WHAT IS INVOLVED.

IS THIS ONE OF THESE CASES WHERE THERE ARE 60 WITNESSES AND EITHER THE PROSECUTOR OR THE DEFENSE ATTORNEY JUST SAT THERE AND WENT THROUGH A WHOLE LAUNDRY LIST OF WITNESSES WITHOUT MENTIONING WHERE THEY LIVE, WHERE THEY WORK, SOMETHING THAT MAY CONNECT A PARTICULAR WITNESS TO THE JUROR? SO UNLESS THE JUROR ACTUALLY REMEMBERED THEIR NAME, JUST READING THROUGH A LAUNDRY LIST OF A WHOLE BUNCH OF WITNESSES DOESN'T PROVIDE THE AVERAGE PERSON WITH A LOT OF INFORMATION, UNLESS THEY KNOW THE PERSON VERY WELL. IS THAT CORRECT?

WELL, I DON'T REMEMBER HOW MANY WITNESSES THERE WERE, BUT IT WAS A COMPLICATED CASE SO IT WAS A FAIR NUMBER AND I DON'T REMEMBER IF IT WAS AS MANY AS 60. I DON'T REMEMBER IF THEY SAID DEPUTY BEFORE HER NAME OR NOT. SHE WAS A DEPUTY SHERIFF.

AND HELP ME OUT WITH HER AND -- IMPORTANCE AS A WITNESS IN THIS CASE.

SHE WAS PRETTY IMPORTANT BECAUSE SHE WAS THE PERSON WHO TRACED DOWN THE JEWELRY THAT WAS TAKEN IN THE ROBBERY, WHICH WAS VERY IMPORTANT PHYSICAL EVIDENCE TYING THE DEFENDANT TO THE ROBBERY. THE OTHER -- THERE WAS NO DNA EVIDENCE. THERE WASN'T ANY OTHER, THAT KIND OF EVIDENCE.

SHE WAS JUST TESTIFYING THAT THERE WAS JEWELRY GIVEN TO A PARTICULAR PAWN SHOP?

SHE WAS A GOOD FRIEND OF THE VICTIM. SHE, RIGHT, SHE TESTIFIED SHE WAS VERY FAMILIAR WITH THE VICTIM. TESTIFIED A LITTLE BIT ABOUT THE PERSONALITY OF THE VICTIM. SHE WORKED WITH THE VICTIM, AND SHE, RIGHT, AND SHE TRACKED DOWN THIS JEWELRY AT THE PAWN SHOP.

NOW, SECONDLY, TOWARDS THE END OF THE TRIAL PRIOR TO THE JURY BEING, I THINK, PRIOR TO IT BEING CHARGED OR WAS IT PRIOR TO CLOSING ARGUMENTS? THE ISSUE CAME UP ABOUT THIS JUROR AND WHETHER OR NOT TO MAKE SURE AN ALTERNATE?

WELL, THAT WAS SOMETHING THAT THEY DISCUSSED AT DIFFERENT STAGES, AND I BELIEVE IT WAS THE DAY BEFORE THE FINAL ARGUMENTS, THE STATE HAD THIS PROPOSITION AND THE DISCUSSION OF THIS WAS VERY UNCLEAR, BUT THE STATE SEEMED TO HAVE THE IDEA TO LEAVE HER ON THE JURY UNTIL THE END OF THE FINAL ARGUMENT AND THEN MAKE HER AN ALTERNATE SO SHE COULD COME BACK TO THE PENALTY AND THE DEFENSE UNDERSTANDABLEY WAS OPPOSED TO THAT BECAUSE THAT WOULD JUST CREATE THE PROBLEM ALL OVER AGAIN AND THAT WOULD IN EFFECT WAIVE THE ISSUE AS SOMETHING THAT HAPPENED TO ONE OF THE OTHER JURORS BETWEEN THE GUILT AND THE PENALTY ISSUE. THE {DWENTS} WAS SAYING IF SHE IS DISQUALIFIED SHE IS DISQUALIFIED.

BUT IF THE JURY IS INSTRUCTED NOT TO DELIBERATE UNTIL THEY ACTUALLY HAVE THE CASE

AFTER THEY'VE HEARD ALL OF THE EVIDENCE, THE ARGUMENTS AND THE INSTRUCTION ON THE LAW, AND PRIOR TO THIS TIME THE DEFENDANT IS GIVEN THE OPTION TO MAKE THIS PERSON AN ALTERNATE AND, AGAIN, THE JURY IS INSTRUCTED NOT TO BE DELIBERATING, WHY IS THIS NOT WAIVED?

WELL, NO, THE JUDGE SAID I DON'T THINK I CAN DO THAT, ANYWAY. SO THAT'S NUMBER ONE. NUMBER TWO IS THAT IT STILL COULD HAVE HAPPENED THAT THE JUROR WOULD HAVE COME BACK FOR THE PENALTY PHASE. THE DEFENSE IS SAYING, LOOK, SHE'S DISQUALIFIED. YOU CAN'T MAKE HER AN ALTERNATE AND HAVE THE POSSIBILITY SHE COMES BACK.

WHY NOT? ISN'T THAT ONE OF THE REASONS FOR HAVING ALTERNATES? THAT IS IF YOU'VE GOT 14 PEOPLE, OKAY, THAT IS 12 JURORS AND TWO ALTERNATES, HOW MANY DID YOU HAVE HERE BY THE WAY?

I BELIEVE AT THE END OF THE EVIDENCE THERE WERE 13, YOU KNOW, 12 AND 1 ALTERNATE.

SO ISN'T THAT ONE OF THE BENEFITS OF HAVING AN ALTERNATE? THAT IS THAT IF ONE OF THE REGULAR JURORS BECOMES ILL THEN THINGS JUST GO ON IN STRIDE? THERE IS NO PROBLEM, SO WHY ISN'T THIS SIMILAR TO ONE OF THE JURORS BECOMING ILL AND THE ALTERNATE JUST BECOMES -- THE JURORS TOLD WHETHER OR NOT THEY WERE ALTERNATES OR NOT OR WERE THEY JUST ALL QUALIFIED AND THEN NOBODY KNEW WHETHER THEY WERE GOING TO BE AN ALTERNATE OR NOT?

IT WAS CLEARLY PART OF THE DISCUSSION THAT THE 12 KNEW THAT THEY WERE THE 12 AND THE THE NATIONAL KNEW THAT HE WAS THE THE NATIONAL.

NEVERTHELESS WHY WOULD THAT NOT HAVE SOLVED ANY PROBLEM IF THAT IS INDEED THE WHOLE PURPOSE OF HAVING AN ALTERNATE THERE IS THAT IF A JUROR BECOMES ILL AS I SAID OR WHATEVER, AND HERE WE CAN ANALOGIZE THIS TO A JUROR BECOMING ILL.

THAT WOULD BE FINE IF YOU SAY SHE IS DISQUALIFIED, WE'LL PUT THE ALTERNATE ON THE PANEL BUT WHAT THEY WERE SAYING IS WE'LL TAKE THIS JUROR, MAKE SURE AN ALTERNATE SO SHE CAN COME BACK AND BE ON THE JURY IF SOMETHING HAPPENS TO THE ALTERNATE AND THAT DIDN'T MAKE ANY SENSE. THAT WAS --

WE DON'T KNOW WHETHER THAT'S EVER GOING TO COME TO PASS IF YOU'VE GOT 12 WITHOUT A PROBLEM.

RIGHT.

LET ME ASK YOU AS A FOLLOW-UP TO JUSTICE LEWIS' QUESTION ABOUT THE MATERIALITY EXAMINATION HERE. AND SEE IF YOU CAN HELP ME WITH LET'S DO IT IN SORT OF A SPECTRUM WAY. THAT WE'VE GOT A LIST OF WITNESSES, AND NOW IT TURNS OUT THAT ONE OF THE JURORS DID KNOW AN IMPORTANT WITNESS, AND CLEARLY THE RELATIONSHIP WOULD HAVE CREATED SOME BIAS OR SOMETHING. THAT'S ONE END OF THE SPECTRUM, VERY CLEAR-CUT CASE. BUT AT THE OTHER END WE HAVE A JUROR, THEY DIDN'T RECOGNIZE THE NAME BUT LATER THEY ARE VERY CONSCIENTIOUS, AND THEY REMEMBER AT A FUND-RAISING GATHERING THEY MET THIS PERSON AND ACTUALLY SHOOK HANDS WITH THEM AND COMPLIMENTED THEM FOR CONTRIBUTING MONEY TO SOMETHING. I'M PUTTING THAT AT THE OTHER END OF THE SPECTRUM IN TERMS OF THE RELATIONSHIP. NOW, TAKING THAT AS THE SPECTRUM, WHERE WOULD YOU PLACE THIS WITNESS' RELATIONSHIP WITH THE JUROR ON THAT SPECTRUM THAT I'VE JUST GIVEN YOU? WOULD IT BE DOWN NEAR THE MEETING SOMEBODY AT THE COCKTAIL PARTY OR WOULD IT BE DOWN AT THE OTHER END OF BOY THEY'VE GOT A CLEARLY CLOSE AND BIAS RELATIONSHIP?

THE RANGE RECOGNIZED BY THE CASE LAW IS WOULD IT HAVE BEEN REASONABLE FOR A PARTY TO HAVE EXERCISED A CHALLENGE TO THAT JUROR, AND THIS JUROR CLEARLY FITS WITHIN THAT RANGE. OBVIOUSLY CLOSER TO THE LESS MATERIAL RANGE, BUT NEVERTHELESS I DON'T THINK THERE CAN BE REALLY ANY DISPUTE ABOUT THE FACT THAT A PARTY WOULD NOT WANT TO HAVE OR WOULD CONSIDER THAT THE QUESTION IS WHETHER IT IS SOMETHING THAT A PARTY WOULD CONSIDER IN EXERCISING A CHALLENGE TO THE JUROR. THE PARTY IS DEPRIVED OF THE RIGHT OF FINDING OUT THIS INFORMATION.

YOU MENTIONED THAT YOU WERE GOING TO JUST HIT ISSUE TWO AT THE END IF YOU HAD TIME. THE STATE HAS RAISED WITH REFERENCE TO ISSUE TWO, THAT IS THE DENIAL OF THE MOTION TO SUPPRESS, THAT THERE IS A PRESERVATION ISSUE THAT ONE OF THE GROUNDS THAT YOU'VE RAISED ON APPEAL WITH REFERENCE TO SUPPRESSION IS THAT THERE WASN'T A COMPLETE MIRANDA WARNING GIVEN HERE, BUT THAT THAT WAS NOT ARGUED TO THE TRIAL COURT JUDGE BELOW. I APOLOGIZE FOR TAKING YOUR TIME, BUT WOULD YOU ADDRESS WHETHER OR NOT THERE IS A PRESERVATION ISSUE IN THIS CASE?

WELL, OKAY, THE MOTION TO SUPPRESS, THE DEFENSE MOTION TO SUPPRESS STATED THAT THE STATEMENT WAS MADE WITHOUT A PROPER WAIVER OF RIGHTS AND WITHOUT BENEFIT OF COUNSEL. AND OBVIOUSLY THERE WAS NO LAWYER PRESENT. THE STATEMENT WAS MADE WITHOUT BENEFIT OF COUNSEL. AT THAT POINT THE QUESTION BECOMES, OKAY, DID THE STATE GET AROUND THAT BY SHOWING THAT THERE WAS A WAIVER OF THE RIGHT OF COUNSEL, AND HAS THE -- AS THE MOTION SAYS THERE WAS NOT AN ADEQUATE KNOWING, A VOLUNTARY WAIVER OF THE RIGHTS BECAUSE THE DEFENDANT WASN'T ADVISED OF HIS RIGHT TO HAVE AN ATTORNEY PRESENT.

IS THAT WHAT THE MOTION ACTUALLY SAYS?

YES.

THAT'S ONE OF THE REAL PROBLEMS I SEE IN YOUR MOTION TO SUPPRESS IS WHAT DOES THE MOTION ACTUALLY SAY AND WHAT WAS ARGUED BEFORE THE TRIAL JUDGE? WAS THE TRIAL JUDGE GIVEN THE SPECIFIC OPPORTUNITY TO RULE ON WHETHER OR NOT THE MIRANDA WARNINGS HAVE BEEN ADEQUATE, WHETHER OR NOT WHAT WAS TOLD TO HIM FULLY COVERED HIS MIRANDA RIGHTS?

OKAY. THE MOTION ITSELF, AS YOU SAY, SPECIFICALLY SAID THE STATEMENT WAS MADE WITHOUT A KNOWING AND VOLUNTARY WAIVER OF HIS RIGHTS AND WITHOUT BENEFIT OF COUNSEL.

AND THAT'S A PRETTY BROAD STATEMENT, SO BUT THERE IS NO DELINEATION OF WHAT WAS MEANT WITHOUT THE BENEFIT OF COUNSEL.

WELL, LET ME SAY, AS A PRELIMINARY MATTER, I DON'T BELIEVE THAT THE -- THERE IS ANY CASE LAW SAYING THAT A MOTION TO SUPPRESS HAS TO SAY MORE THAN THIS.

THAT MAY BE TRUE SO WHAT WAS ARGUED AS A PART OF THAT PARTICULAR STATEMENT?

WELL, AFTER THE EVIDENCE AND WHICH THE FOCUS IN THE EVIDENCED TO DO WITH THIS ODD PROCEDURE THAT THE OFFICER HAD OF HAVING THE DEFENDANT BELIEVE HE WAS NOT UNDER ARREST, AND THEN THE DEFENDANT ASKING ABOUT WHETHER HE WAS UNDER ARREST AND THEN THE OFFICER READING THE MIRANDA AND THEN LATER ON TELLING HIM HE WAS UNDER ARREST SO THE FOCUS OF THE ARGUMENT, YES, WAS ON THAT FACTUAL PROCEDURE, AND IT DID NOT GO OFF ON THIS DISCRETE ISSUE ABOUT THE STATEMENT BEING MADE WITHOUT BENEFIT OF COUNSEL. ALTHOUGH DEFENSE COUNSEL DID SPECIFICALLY ARGUE TO THE JUDGE, THEY DID NOT HAVE A WRITTEN WAIVER OF HIS MIRANDA RIGHTS.

BUT I GUESS MY PROBLEM IS: WITHOUT ACTUALLY SAYING TO -- ARGUING TO THE TRIAL COURT THAT, LOOK, HE SHOULD HAVE BEEN SPECIFICALLY TOLD THAT HE HAD THE RIGHT TO COUNSEL, HE HAD THE RIGHT TO COUNSEL TO BE PRESENT DURING THE QUESTIONING, AND IF YOU CAN'T AFFORD AN ATTORNEY ONE COULD BE GIVEN TO YOU. WITHOUT ACTUALLY ARGUING THAT TO THE TRIAL JUDGE, WHEN DID THE TRIAL JUDGE EVER HAVE THE OPPORTUNITY TO ACTUALLY SAY THAT THESE WARNINGS WERE INADEQUATE?

WELL, THE JUDGE DID SAY THAT THE WARNINGS WERE ADEQUATE. I MEAN, HE LISTENED TO THE TAPE, AND HE WROTE IN THERE THAT ALTHOUGH THERE WAS NO COUNSEL THERE, THERE WAS AN ADEQUATE MIRANDA WAIVER, AND OUR CONTENTION IS THAT THE MOTION ITSELF WAS SUFFICIENT TO APPRISE THE STATE AND THE JUDGE OF THAT ISSUE.

SO THIS GOES BACK TO WHETHER IT'S PRESERVATION OR THE SIGNIFICANCE OF THIS AS OPPOSED TO THE FOURTH DISTRICT CASES. NOBODY EVEN PICKED UP ON THE FACT THAT IT WASN'T PRECISELY THE WAY THE MIRANDA WARNINGS SHOULD BE GIVEN. WHAT DO YOU SAY TO THAT? IN OTHER WORDS, HE'S TOLD THAT HE'S GOT THE RIGHT TO COUNSEL. THEY DON'T SAY A RIGHT TO COUNSEL DURING QUESTIONING OR FOR QUESTIONING A RIGHT TO COUNSEL. SO WHY IS IT THAT, YOU KNOW, WITH THE TRIAL LAWYER NOT PICKING UP THE JUDGE THAT NOBODY, THAT THIS SHOULD BE SOMETHING THAT SHOULD BE CAUSE FOR REVERSAL IF NOT SPECIFICALLY RAISED AND ARGUED BELOW?

WELL, LET ME POINT OUT FIRST THIS IS SOMETHING THAT COULD NOT HAVE BEEN CORRECTED AT THAT STAGE OF THE TRIAL PROCEEDINGS IN THE SENSE THAT THE STATE COULD HAVE GONE BACK IN TIME AND CHANGED WHAT THE OFFICER SAID TO THE PERSON.

YOU'RE SAYING IT IS AN ISSUE OF LAW AND NOT OF FACT, CREDIBILITY DETERMINATION?

RIGHT, RIGHT. SECONDLY, THE DEFENDANT SUBSEQUENTLY WHEN THE OFFICER SAID YOU ARE UNDER ARREST AFTER CONSIDERABLE AMOUNT OF WHAT I WOULD TERM BROWBEATING BUT THE STATE DISAGREES WITH THAT, TELLS THEM HE IS UNDER ARREST AND THE DEFENDANT BRINGS UP THE COUNSEL ISSUE WHICH AGAIN HAD NOT BEEN CLARIFIED TO THE DEFENDANT. THE DEFENDANT HAD NOT WAIVED BECAUSE THE OFFICER HAD ONLY SAID TO HIM, DO YOU WANT ME TO KEEP TALKING AND NOT ASKED HIM IF HE AGREED TO WAIVE HIS RIGHTS.

THAT'S A DIFFERENT ARGUMENT, WHETHER IT WAS A VALID WAIVER.

WELL, IT IS PART OF WHAT THE JUDGE'S RULING WAS THAT THERE WAS -- IT WAS PROPER ADVISEMENT AND THAT THERE WAS A WAIVER AND THAT THAT ERRADICATED ALL OF THE OTHER PROBLEMS.

AREN'T WE DANCING AROUND OBVIOUSLY NOW AFTER THIS SERIES OF RULINGS FROM THE 4TH DISTRICT THAT THERE IS A MOTION TO SUPPRESS FILED IN BROWARD COUNTY FOR EXAMPLE, AND THEY ARE ARGUING ABOUT THIS. THEY ARE GOING TO SAY POINTEDLY TO THE JUDGE, JUDGE, THE PROBLEM IS THAT THIS WARNING WAS NOT COMPLETE UNDER MIRANDA AND THAT'S WHAT THE FOURTH DISTRICT HAS HELD AND ISN'T THAT REALLY WHAT'S SUPPOSED TO GO ON, EITHER IN THE MOTIONS OR AT THE HEARINGS HERE? THE JUDGE IS SITTING THERE SAYING WHAT'S THE PROBLEM IN THIS CASE, YOU KNOW, THAT ENTITLES YOU TO SUPPRESS THIS CONFESSION, AND YOU SAY, WELL, NUMBER ONE AND NUMBER ONE OR NUMBER TWO OR NUMBER THREE OUGHT TO BE, WELL, THE PARTICULAR MIRANDA WARNINGS GIVEN, YOU KNOW, BY THE POLICE OFFICERS IN THIS CASE WERE NOT COMPLETE AS CONTEMPLATED BY THE MIRANDA DECISION AND AS THE COURTS HAD HELD SINCE THAT TIME. THAT KIND OF ARGUMENT WAS NOT MADE TO THE TRIAL COURT JUDGE HERE. IS THAT CORRECT? I REALIZE THAT THAT KIND OF ARGUMENT WAS NOT MADE. IS THAT RIGHT?

MY CASE WOULD CERTAINLY BE CLEARER IF DEFENSE ATTORNEY HAD SAID THAT, YES, JUSTICE ANSTEAD, BUT I KNOW THAT I WASN'T ANSWERING JUSTICE PARIENTE'S QUESTION VERY WELL BUT THE POINT I WAS TRYING TO GET TO IS THAT THE DEFENDANT LATER SAID, RAISED THIS COUNSEL ISSUE. THAT WAS THE ONLY TIME IT WAS RAISED WAS THE DEFENDANT AFTER THIS CONFUSING SERIES OF EVENTS, WHICH COUNSEL DID FOCUS ON, HOW CONFUSING THIS WAS FOR THE DEFENDANT, THE DEFENDANT SAID, WELL, SHOULD I CONTACT A LAWYER AND THE OFFICER SAID IF YOU DO THAT THEN THE INTERROGATION ENDS WHICH IS THE OPPOSITE OF TELLING HIM HE HAS A RIGHT TO HAVE AN ATTORNEY PRESENT DURING THE INTERROGATION. THAT COMPLETELY NEGATED THAT RIGHT.

BUT ISN'T THAT CORRECT IF HE WANTS TO HAVE AN ATTORNEY THEY HAVE TO SEES QUESTIONING HIM -- CEASE QUESTIONING HIM, ISN'T THAT CORRECT?

LET'S GET BACK TO REALITY. ISN'T IT TRUE IF THE ATTORNEY ARRIVES THE REALITY IS THE ATTORNEY IS GOING TO SAY MY CLIENT IS GOING TO EXERCISE HIS RIGHTS NOT TO SAY ANYTHING?

THAT'S USUALLY WHAT HAPPENS BUT NOT ALWAYS. SOMETIMES THE LAWYER, THE LAWYER TALKS TO THE DEFENDANT AND SAYS, OKAY, WE HAVE THIS TO PRESENT BECAUSE WE HAVE EVIDENCE PARTIALLY OR COMPLETELY EXCULPATING OUR CLIENT. LET'S SEE WHAT WE CAN WORK OUT.

YOU'RE IN YOUR REBUTTAL AND I KNOW YOU WANTED TO RAISE THE INMAN TYSON ISSUE. DO YOU WANT TO TOUCH ON THAT OR RELY ON YOUR BRIEF?

LET ME JUST VERY BRIEFLY SAY THAT -- DRAW THE COURT'S ATTENTION TO THE ARIZONA CASE WHICH IS VERY SIMILAR TO THIS CASE. THE INMAN TYSON ISSUE IS AN ISSUE OF CONSTITUTIONAL PROPORTIONALITY SO THAT CASES FROM OTHER STATES ARE VERY IMPORTANT FOR CONSIDERATION OF THIS ISSUE, AND I REALLY COULDN'T FIND ANY OUT OF STATE CASES CERTAINLY IN THE PAST FIVE OR TEN YEARS WHICH WERE AS MUCH LIKE THIS CASE AS THAT CASE AND THAT CASE THE COURT FELT THAT UNDER INMAN TYSON THAT IS LIFE SENTENCE WAS REQUIRED. BUT, AGAIN, I DON'T HAVE ENOUGH TIME TO REALLY GO ON TO THAT VERY MUCH.

AND THE LIFE SENTENCE, YOU ARE ARGUING THAT THE LIFE SENTENCE IS REQUIRED BECAUSE IT WAS NOT --

THE STATE WAS UNABLE TO -- IT WASN'T ESTABLISHED.

HE DID NOT ACTUALLY DO THE ACT THAT ENDED UP IN THE DEATH OF THE PERSON?

RIGHT, YES, MA'AM.

AND ARE YOU ALSO ARGUING THAT THERE IS NO EVIDENCE THAT HE KNEW THAT THAT WAS GOING TO TAKE PLACE?

YES, SIR, JUSTICE QUINCE. THIS IS BASICALLY THE DEFENDANT ONLY FOUND HIM GUILTY OF FELONY MURDER. THIS IS SORT OF A BASIC FELONY MURDER CASE WHERE YOU HAVE TWO PEOPLE. THE EVIDENCE IS INCONCLUSIVE AS TO WHO ACTUALLY COMMITS TO KILLING AND UNDER THE CASE LAW THE FACT THAT THIS CASE DOESN'T SHOW THE LEVEL OF CULPABILITY.

WAS HE ACTUALLY THERE ON THE SCENE WHEN THE MURDER WAS TAKING PLACE?

HE'S THE MOST CULPABLE VERSION OF THE EVIDENCE IS THAT HE IS COMING IN WHILE THE OTHER PERSON IS COMMITTING THE STABBING, AND THEN THE LACI CASE THE GUY IS GOING IN AND OUT WHILE THE SHOOTINGS ARE GOING ON AND IS IN THE BUILDING WHILE ONE OF THE

PERSONS IS BEING SHOT, AND I BELIEVE IS COMING IN OR IS COMING BACK IN WHEN THE OTHER PERSON IS SHOT.

BUT IN THIS CASE THE PHONE LINE WAS CUT, THE WINDOWS AND THE LADIES, KNEW SOMEBODY WAS COMING INTO THE HOME AND APPARENTLY WHOEVER WAS COMING IN KNEW SHE WAS IN THE HOME AT THE TIME OF THE BURGLARY?

THAT'S THE STATE'S ARGUMENT, AND WHAT SHE SAYS SHE IS TALKING ON HER CELL PHONE SHE'S GOT SOME PROBLEM WITH THE LAND LINE. SHE DOESN'T KNOW THE PHONE HAS BEEN CUT, AND SHE SAYS, I HAVE TO GO, SOMETHING LIKE THAT, AND THEN APPARENTLY SHE IS ASSAULTED IMMEDIATELY AFTER.

DID THE JUDGE MAKE THE FINDING REQUIRED BY INMAN TYSON?

THE JUDGE MADE A FINDING IN HIS FINDINGS ABOUT THE FELONY MURDER CIRCUMSTANCE. THE DEFENDANT WAS A MAJOR PARTICIPANT AND ACTED WITH RECKLESS, I THINK THAT'S THE TERMINOLOGY, RECKLESS DISREGARD FOR HUMAN LIFE.

AND YOU ARE NOT ARGUING THAT THE JURY HAS TO MAKE THAT DETERMINATION?

I AM ARGUING THAT.

SO YOUR ARGUMENT IS A VARIATION OF RING?

RIGHT. I HAD TWO ISSUES ON THAT.

WHAT WAS THE DISPOSITION OF GREEN?

MR. GREEN? IT IS NOT IN THE RECORD, BUT I CAN TELL YOU, APPARENTLY AFTER THIS CASE, MR.^PEREZ' SENTENCING HEARING MR. GREEN APPARENTLY PLED TO A MANSLAUGHTER CHARGE. APPARENTLY WITHOUT THE DEFENDANT'S STATEMENT, THE STATE REALLY HAD NO EVIDENCE.

SPEAKING, AND I KNOW YOU ARE VERY MUCH IN YOUR REBUTTAL BUT THERE IS SOMETHING THAT CONCERNS ME AND I'M NOT SURE EXACTLY HOW THIS WAS -- YOU SAID YOU DON'T KNOW WHO WAS THE STABBER, BUT IN OPENING STATEMENT ALSO IN THE CROSS EXAMINATION OF HEATH THERE WAS A STATEMENT ABOUT THE DEFENDANT ALWAYS CARRYING A KNIFE, AND YOU'VE OBJECTED TO THAT AND THERE WAS A MISTRIAL BASED ON THAT IT WAS A MISSTATEMENT OF HIS CONFESSION ABOUT HIM ALWAYS CARRYING A KNIFE. FIRST OF ALL WAS THE KNIFE THAT HE WAS SUPPOSEDLY ALWAYS CARRYING CONNECTED BY THE STATE TO THE KNIFE THAT WAS USED TO STAB THE VICTIM?

WELL, THE KNIFE ITSELF WAS NEVER FOUND. THE STATE'S ARGUMENT WAS THAT IT WAS THE SAME KNIFE, BUT IT WAS -- THE MEDICAL EXAMINER SAID THAT THESE STAB WOUNDS WERE ABOUT AN INCH DEEP. THE KNIFE THAT THE DEFENDANT HAD HAD I BELIEVE LESS THAN THREE-INCH LONG BLADE BUT THERE WAS NO DIRECT, I MEAN THE EVIDENCE CONNECTING HIS WORK KNIFE TO THE STABBING, THAT'S ALL THAT THERE WAS.

WELL, WAS THERE AN ATTEMPT TO KEEP THAT OUT? I GUESS MY CONCERN IS THAT WHY WAS THERE ANY OBJECTION TO THAT BEING INPROPER HABIT EVIDENCE? EVEN IF HE SOMETIMES CARRIED THE KNIFE, IT WOULD SEEM TO ME THAT THE JURY WITHOUT ANY OBJECTION COULD USE THAT AND THE JUDGE COULD USE THAT TO SAY IF IT'S A SIMILAR KNIFE THAT HE WOULD BE MOST LIKELY TO HAVE BEEN THE PERSON WHO STABBED THE VICTIM.

WELL, AS THE JUDGE NOTED WHEN THEY WERE DISCUSSING THE INMAN TYSON ISSUE, THE JUDGE SAID, WELL, THE STATE'S EVIDENCE AT MOST SHOWED FROM THE STATEMENT THAT HE CARRIED

A KNIFE AROUND IN HIS POCKET AND IT DIDN'T SHOW THAT HE DID -- THAT THIS KNIFE WAS USED FOR THE STABBING. IT WAS JUST SOMETHING IN HIS POCKET, SO IT REALLY WASN'T TIED TO THE HOMICIDE AT ALL.

SINCE THE CODEFENDANT HAS NOW BEEN FOUND GUILTY OF MANSLAUGHTER, UNDER YOUR CASE LAW IS THAT GOING TO ALLOW SOME KIND OF A NEW REEVALUATION OF SENTENCING OR HAS SUCH A MOTION BEEN MADE?

I DON'T KNOW THAT AT THIS STAGE THAT THAT WOULD BE DONE. I KNOW THAT THERE HAVE BEEN POST CONVICTION CASES WHERE THAT SORT OF THING HAS ARISEN, BUT THAT'S A SEPARATE ISSUE. THAT'S CODEFENDANT DISPARITY PROPORTIONALITY AS OPPOSED TO THE CONSTITUTIONAL PROPORTIONALITY OF INMAN TYSON AND OUR POSITION IS AND I SUBMIT THAT THE CASE LAW STRONGLY SUPPORTS WHEN YOU HAVE SORT OF STANDARD FELONY MURDER CASE, THE DEFENDANT IS CONVICTED ONLY OF FELONY MURDER. IT IS NOT DETERMINED BEYOND A REASONABLE DOUBT WHO DID THE ACTUAL KILLING THAT THIS COURT WOULD BE WAY OUT ON ITS OWN IF IT AFFIRMED THE DEATH SENTENCE IN THIS CASE, WHICH IS THE U.S. SUPREME COURT TEACHES UNDER CONSTITUTIONALITY -- CONSTITUTIONAL PROPORTIONALITY, YOU JUST CAN'T HAVE THESE OUTLIER KIND OF CASES SO WITH THAT, I HAVE REMAINING 6/10THS OF A MINUTE FOR REBUTTAL.

I'M SURE YOU WILL USE IT WISELY.

MR.^EGBER?

MAY IT PLEASE THE COURT, MITCHELL EGBER ON BEHALF OF THE STATE OF FLORIDA. I'D LIKE TO FIRST ADDRESS ISSUE 1, REGARDING THE JUROR, AND WOULD LIKE TO FIRST STRESS THE ISSUE OF MATERIALITY THAT WAS RAISED BY OPPOSING COUNSEL. I THINK IT'S IMPORTANT TO NOTE THAT THE TESTIMONY OF THE WITNESS IN THE CASE WAS CUMULATIVE AT BEST. SHE IDENTIFIED THE JEWELRY BELONGING TO THE VICTIM SUSAN MARTIN, AND HER IDENTIFICATION OF THAT JEWELRY WAS ALSO MADE BY THE PAWN SHOP OWNER WHO TESTIFIED IN THE CASE.

IS THAT AN ELEMENT THAT WE ARE SUPPOSED TO LOOK AT UNDER THE CASE THAT GIVES YOU THE PRONGS THAT WE ARE SUPPOSED TO BE LOOKING AT?

YOUR HONOR, IT IS OUR CONTENTION THAT DELAROSA WOULD NOT COMPLY IN THIS CASE AND WE WOULD SPECIFICALLY REQUEST THAT THIS COURT NOT APPLY DELAROSA. ALL OF THE CASES CITED IN THE INITIAL BRIEF AND IN THE REPLY BRIEF BY THE APPELLANT INVOLVING DELAROSA, CASES THAT SUPPORT IT AND CAME AFTER DELAROSA ALL INVOLVE SITUATIONS WHICH OCCURRED POST TRIAL. NONE OF THEM INVOLVED WHERE A JURY WAS DEADLOCKED, WHICH THE {LE} BROKEN CASE WAS. NONE OF THOSE CASES INVOLVING DELAROSA WERE A FACTUAL SCENARIO SUCH AS THIS. I THINK IT IS CLEAR THAT AT THE TIME THAT THE JUROR INDICATED THAT SHE RECOGNIZED THE WITNESS THAT SHE WAS COMPLETELY FORTHRIGHT. I WOULD NOTE THAT IN HER NOTE SHE INDICATED THAT SHE WAS MILDLY ACQUAINTED WITH HER. COULD NOT PLACE THE FACE WITH THE NAME. THAT SHE HAD PUT IN FOR A PAINT BID AT HER HOUSE AND THAT AS SOON AS THE WITNESS TESTIFIED AT HER FIRST AVAILABLE OPPORTUNITY SHE IMMEDIATELY LET THE COURT KNOW OF THE SITUATION.

WELL, WHEN YOU SAY DELAROSA WOULD NOT APPLY, LET'S ASSUME THIS WAS POST TRIAL. THERE WOULD BE AN INQUIRY ABOUT WHETHER IT WAS RELEVANT AND MATERIAL TO JURY SERVICE. THAT'S THE FIRST PRONG AND THEN THE SECOND, THE JUROR CONCEALED THE INFORMATION DURING QUESTIONING. NOW, THE ISSUE AS TO WHETHER THERE WAS A CONCEALMENT, COULD YOU ADDRESS THAT AND REALLY FOLLOW UP ON WHAT JUSTICE WELLS SAID? LET'S JUST ASSUME WE THINK THAT THE THREE PRONGS STILL WORK WELL WHEN THIS INFORMATION COMING OUT DURING TRIAL. IF THE INQUIRY HAD BEEN MADE AFTER TRIAL AND THE JUROR SAID, YOU KNOW, IT DIDN'T OCCUR TO ME UNTIL AFTER TRIAL I REALIZED WHEN I

SAW THAT PERSON AND I GO OH, MY GOODNESS, THAT WAS THE PERSON I KNEW BUT HERE IT HAPPENS DURING TRIAL AND SO WHAT ABOUT DOES IT HAVE TO BE A KNOWING -- DOES IT HAVE TO BE KNOWING OR IS IT JUST THAT THERE WAS INFORMATION THAT WOULD HAVE BEEN HELPFUL TO THE DEFENDANT AND THE APPROPRIATE QUESTIONS WERE ASKED AND THE JUROR FOR WHATEVER REASON FORGOT WERE JUST WASN'T THINKING OR PAYING ATTENTION DURING JURY SELECTION, WHAT IS YOUR RESPONSE ABOUT THE CONCEALMENT PRONG SO TO SPEAK?

WELL, BEFORE WE APPLY THE CONCEALMENT PRONG IN THIS CASE, IT IS OUR CONTENTION THAT THERE WAS NO CONCEALMENT, EITHER ADD {VERT} {ENT} OR INADD {VER} -- ADD {VERT} {ENT}. NOT IN THIS SITUATION, THIS JUROR WAS VERY FORTHRIGHT AT THE FIRST AVAILABLE OPPORTUNITY SHE HAD, INDICATED SHE COULD NOT EVEN PLACE THE NAME WITH THE FACE. THIS IS NOT A SITUATION SUCH AS IN DELAROASA WHICH INVOLVED A MEDICAL MALPRACTICE CASE AND IT WAS THE JUROR FOREMAN NOT RESPONDING TO A QUESTION REGARDING PRIOR LAWSUITS WAS FOUND OUT AFTERWARDS HE WAS INVOLVED IN SIX PERSONAL INJURY SUITS.

I GUESS WE GO THROUGH AND MAYBE IT IS A MEANINGLESS EXERCISE. MANY OF US WERE TRIAL LAWYERS, TRIAL JUDGES THAT YOU REALLY WANT TO KNOW IF THE JURORS KNOW THE WITNESSES, YOU KNOW? IT'S, AND ESPECIALLY IF IT IS THE DEPUTY SHERIFF SO YOU GO THROUGH THE LIST AND DON'T YOU HAVE A RIGHT TO RELY ON THEM SAYING THEY DON'T KNOW THEM OR DO WE NOW NEED TO TELL DEFENSE LAWYERS OR PROSECUTORS THAT THEY NEED TO GIVE PICTURES WITH THE NAMES SO THEY WILL BE ABLE TO DO SOMETHING? YOU KNOW, WHERE DO YOU DRAW THE LINE ABOUT, YOU KNOW, USUALLY IF SOMEBODY WOULD SAY THEY KNEW A WITNESS YOU AS A LAWYER WOULD BE VERY CONCERNED ABOUT THAT, AND YOU WOULD WANT TO ASK FURTHER QUESTIONS, SO IT IS CERTAINLY MATERIAL TO THE VOIR DIRE INQUIRY OR ELSE WE HAVE BEEN WASTING ALL OF OUR TIME ALL OF THESE YEARS ASKING JURORS WHETHER THEY KNOW THE WITNESSES. POLICY WISE HOW DO YOU RESPOND TO THAT? SOMEONE COULD SAY, I DIDN'T RECOGNIZE THE NAME. NOW I SEE THE FACE, AND, SORRY.

WELL, I THINK IN TERMS OF A REMEDY IN THIS CASE I DON'T THINK IT IS NECESSARY FOR THE FACTUAL SCENARIOS SUCH AS THIS THAT ALL OF THE WITNESSES NEED TO BE PARADED INTO COURT AND PRESENTED TO THE JURY TO MAKE SURE PEOPLE CAN PLACE THE FACE WITH A NAME OR A VIDEO TYPE OR -- VIDEOTAPE OR PHOTOGRAPH NEEDS TO BE SHOWN TO THE JURORS. IMMEDIATELY AFTER SHE SAW THIS WITNESS TESTIFY SHE SAID SHE KNEW HER. THAT WAS NOTHING SHE WAS REQUIRED TO DO AS A JUROR. SHE FOLLOWED THROUGH ON HER OBLIGATION AND CHARGE TO DO THAT. THE JUDGE AT THAT POINT BROUGHT THAT TO THE ATTENTION OF TRIAL COUNSEL. HE ASKED THE STATE AND THE DEFENSE TO MAKE INQUIRY, AS SHE PROBABLY DOES. HE CONDUCTED AN INQUIRY OF THE JUROR. I BELIEVE HE ASKED FOR INPUT FROM THE DEFENSE.

AND THE JUROR SAID THIS WOULD NOT AFFECT HER -- WHAT WAS SPECIFICALLY HER RESPONSES?

SHE CLEARLY INDICATED THAT LETTER ACQUAINTANCESHIP, MILD ACQUAINTANCESHIP WITH THIS WITNESS WOULD IN NO WAY AFFECT HER PARTIALITY IN THE CASE. AS A MATTER OF FACT, WHEN SHE WAS ASKED ABOUT THE PAINT BID, WHICH WAS A TENUOUS FINANCIAL RELATIONSHIP AT BEST, BASED ON WHAT SHE STATED AND THERE IS NOTHING IN THE RECORD. AS A MATTER OF FACT, DEFENSE COUNSEL CLEARLY INDICATED THAT HE DIDN'T HAVE A PROBLEM WITH HER INTEGRITY WHEN SHE INDICATED THAT REGARDING THE PAINT BID THE JUDGE SPECIFICALLY ASKED HER, WILL THAT AFFECT YOUR DECISION IN THIS CASE ON BEING AN IMPARTIAL JUROR, SHE STATED TO THE COURT, NO, IT WOULD NOT. I HAVE PLENTY OF WORK. SO SHE WENT BEYOND WHAT WAS ACTUALLY THERE. IN TERMS OF THE QUESTION.

WHAT ABOUT THE SOCIAL FRIENDS? WHAT WAS THAT THAT SHE SAID SHE WAS ALSO -- WASN'T THERE SOME SOCIAL FRIENDSHIP?

YES, SHE HAD MET HER -- WHAT HAPPENED WAS SHE HAD FRIENDS THAT PLAYED IN A BAND, AND THIS WITNESS WAS -- PLAYED IN THE BAND WITH A BUNCH OF PEOPLE THAT SHE KNEW IN THE BAND. IN THE 20 MONTHS PRIOR TO THE TRIAL, IT IS ACTUALLY UNCLEAR WHETHER SHE SAW HER FOUR TIMES OR ACTUALLY TWICE, BUT THE BOTTOM LINE IS THAT THE TWO TIMES THAT SHE SAW HER WERE THE TWO TIMES SHE SPOKE TO HER ABOUT THE PAINT BID. SHE NEVER HAD ANY PHONE CONVERSATIONS WITH HER. SHE NEVER HAD ANY OTHER RELATIONSHIP WITH HER OUTSIDE OF THAT ACQUAINTANCESHIP WITH HER FRIENDS IN THIS BAND THAT SHE KNEW.

AND THIS PERSON ACTUALLY DIDN'T GET THE CONTRACT, RIGHT? DID THE PERSON GET THE PAINTING CONTRACT?

THE JUROR INDICATED THAT WHEN ASKED ABOUT THE STATUS OF THE PAINTING CONTRACT, THE JUROR INDICATED TO THE COURT THAT SHE -- THEY HADN'T GOTTEN BACK TO HER. IT WASN'T -- AND WHEN PRESSED FURTHER SHE INDICATED THAT WHEN SHE GET THE MONEY SHE IS PROBABLY GOING TO DO THE JOB. SO DEFENSE COUNSEL SEEMED TO INDICATE THAT THEY FELT THAT THE FINANCIAL RELATIONSHIP HERE WAS ALREADY COMPLETE BUT AS I INDICATED IN TERMS OF HER ANSWERS TO THE QUESTIONS IT WAS TENUOUS AT BEST.

IF THIS HAD COME OUT DURING VOIR DIRE THERE WOULD HAVE BEEN TWO QUESTIONS. THEY WOULD HAVE MOVED TO EXCUSE FOR CAUSE, BUT THEY CERTAINLY WOULD HAVE HAD A RIGHT TO EXERCISE A PEREMPTORY CHALLENGE AND THAT WOULD BE A NEUTRAL REASON TO EXERCISE A PEREMPTORY CHALLENGE. IN TERMS OF THE ISSUES OF WHETHER IT WAS RELEVANT AND MATERIAL TO JURY SERVICE, IT IS NOT THE ISSUE OR IS IT THAT IF IT WAS DISCLOSED DURING THE PROPER TIME IT WOULD HAVE RESULTED IN A CHALLENGE FOR CAUSE OR IS IT AS MR.^CALDWELL HAS STATED THAT THE OMISSION PREVENTED THE COUNSEL FROM MAKING AN INFORMED JUDGMENT DURING JURY SELECTION?

FIRST IN TERMS OF A CHALLENGE FOR CAUSE, BECAUSE SHE WAS AN UNBIASED, IF IT HAD BEEN DONE DURING THE VOIR DIRE SHE WOULD SEEM TO BE CLEARLY NOT A BIASED JUROR, UNDER FLORIDA STATUTE 913.03, SHE WOULD NOT BE SUBJECT TO A CHALLENGE FOR CAUSE. WHEN THE TRIAL BEGINS AND EVIDENCE IS TAKEN, UNDER THE FLORIDA RULES, THE JUDGE CANNOT STRIKE HER FOR CAUSE. AT THAT POINT THE COURT, ON ITS OWN, COULD DETERMINE WHETHER SHE IS A FIT OR UNQUALIFIED JUROR. FOR INSTANCE IF SHE HAD COME INTO THE COURTROOM AND HE FOUND OUT SHE HAD READ A NEWSPAPER ABOUT THE CASE OR A SLEEPING JUROR OR COME INTO THE COURT INTOXICATED, SOMETHING THE JUDGE KNEW ABOUT. AT THAT POINT HE CAN DETERMINE THAT. WHAT'S IMPORTANT HERE IN TERMS OF THE TWO OTHER ISSUES THAT WE RAISED REGARDING PRESERVATION AND WAIVER IS THAT COUNSEL AT TRIAL ONLY ASKED THAT SHE BE DISCHARGED FOR CAUSE. THERE WAS NEVER ANY MENTION OF A DUE PROCESS VIOLATION IN TERMS OF THE INITIAL VOIR DIRE, BUT MORE IMPORTANT IT'S OUR CONTENTION THAT WHEN DEFENSE COUNSEL HAD THE OPPORTUNITY AT THE END OF THE -- JUST BEFORE DELIBERATIONS WHEN THEY SAID I WANT TO REVISIT THIS AGAIN AND WE ARE GOING TO SEE HER DEMEANOR GOING TO TRIAL AND THE DEFENSE COUNSEL INDICATED NOTHING HAD OCCURRED DURING THE TRIAL TO SHOW THAT ANYTHING HAD CHANGED EARLIER REGARDING THE FACT THAT SHE SAID SHE WOULD BE AN IMPARTIAL JUROR, THE DEFENSE COUNSEL AFTER THE STATE INDICATED THEY WERE READY AT THAT POINT SINCE THEY HAD ALL OF THE JURORS THERE, 13, AND THEY COULD REPLACE HER NOW WITH AN ALTERNATIVE DURING THE DELIBERATIONS, THE STATE INDICATED THAT THIS IS ON THE RECORD 1740 OR 41, IF THE DEFENSE IS STILL ASKING THAT SHE BE DISQUALIFIED IF WE HAVE 13 JURORS WE WOULD RATHER GO THAT ROUTE AND DISQUALIFY HER AND GO WITH THE ALTERNATE. THE DEFENSE STATED IMMEDIATELY THEREAFTER IF THE COURT HAS MADE A FINDING THAT THE STATE IS AGREEING WITH THAT FINDING THAT IF THERE IS NO CAUSE CHALLENGE THEN NOTHING SHOULD CHANGE. THEY HAD THEIR OPPORTUNITY AT THAT POINT TO AGREE WITH THE STATE TO REMOVE THIS JUROR FROM A JURY.

SO IT WASN'T GOING TO BE A SWITCH. IT WAS JUST GOING TO BE DISCHARGING HER?

DISCHARGE. THEY HAD ASKED FOR THAT EARLY ON, AT THE VERY BEGINNING WHEN THIS NOTE WAS DISCOVERED, AND IT IS OUR CONTENTION AT THAT POINT SHE WAS ASKED --

AND I'M SORRY, AND THE RESPONSE OF THE DEFENDANT WAS WHAT?

THE DEFENSE LAWYER?

THE RESPONSE OF THE DEFENDANT WAS I MADE MENTION OF THE PART THAT WAS SIGNIFICANT. WHAT THEY SAID WAS AFTER THE STATE INDICATED IF A DEFENSE IS STILL ASKING THAT SHE BE DISQUALIFIED THE DEFENSE STATED, WELL, JUDGE, I THINK THAT IS BASICALLY DOING WHAT THE COURT DETERMINED IT COULD NOT DO IN ITS DISCRETION AND IF THE COURT HAS MADE A FINDING THAT THE STATE IS AGREE BEING THAT FINDING THAT IF THERE IS NO CAUSE CHALLENGE THEN NOTHING SHOULD CHANGE. IN OTHER WORDS, WE NEED TO LEAVE HER ON THE JURY. NOW, WHY THEY AT THAT POINT WANTED HER THEN TO STAY ON IS SUBJECT TO SPECULATION. I HAVE FOOTNOTED --

WHAT ARE YOU CONTENDING THEY SHOULD HAVE SAID AT THAT POINT? THAT WE SHOULD EXERCISE A PEREMPTORY CHALLENGE? I'M NOT SURE WHAT YOU ARE GETTING AT WITH THAT.

THEY HAD ASKED IN THE VERY BEGINNING THAT SHE BE DISCHARGED FOR CAUSE. THE JUDGE AT THAT POINT IN THE TRIAL INDICATED THAT THIS JUROR, HE WOULD NOT STRIKE HER FOR CAUSE AT THAT POINT BECAUSE HE FOUND AFTER AN INQUIRY THAT SHE WOULD BE IMPARTIAL. HE SAID I WILL REVISIT THIS ISSUE AGAIN IF EITHER PARTY WANTS ME TO REVISIT BEFORE DELIBERATIONS. IT GAVE DEFENSE COUNSEL THAT OPPORTUNITY. DEFENSE COUNSEL NEVER SAID ANYTHING, NEVER BROUGHT TO THE COURTNEY CASE LAW WHERE ANY OTHER INFORMATION WHEN THE COURT HAD REQUESTED IT EARLY ON ABOUT WHAT THE COURT SHOULD DO. ALL HE EVER SAID WAS WE WOULD LIKE HER DISCHARGED FOR CAUSE. WHEN THEY GOT JUST BEFORE DELIBERATIONS WHEN THE COURT INDICATED THAT THEY WERE GOING TO -- THAT IT WAS GOING TO REVISIT THE ISSUE, THE STATE REVISITED THE ISSUE. DEFENSE HAD THE OPPORTUNITY AT THAT POINT TO ASK THE COURT, REQUEST OF THE COURT TO DISCHARGE THE JUROR BECAUSE THE ISSUE HAD BEEN REVISITED. THEY DID NOT DO THAT. TO THE CONTRARY, THEY DIDN'T SAY, WELL, WE STILL BELIEVE THAT THIS IS A CAUSE CHALLENGE, AND THAT SHE SHOULD BE STRUCK, BUT IF YOU WANT TO KEEP HER ON THE JURY THAT'S UP TO YOU. THEY ACTUALLY INDICATED THAT NOTHING SHOULD CHANGE. THAT THE JUROR SHOULD REMAIN AND I WOULD ALSO NOTE --

WAS THERE EVER A DISCUSSION BY DEFENSE COUNSEL SAYING, JUDGE, I HAVE A PEREMPTORY CHALLENGE LEFT. I HAD ONE AND SO NOW THIS INFORMATION HAS COME OUT, I'D LIKE TO EXERCISE MY REMAINING PEREMPTORY CHALLENGE, WAS THAT EVER SAID?

NO, YOUR HONOR.

WAS THERE EVER A DISCUSSION AT THAT POINT OR AFTER THIS MATTER CAME UP OF THE EXERCISE OF A PEREMPTORY CHALLENGE?

NO, YOUR HONOR. THE ONLY REQUEST MADE BY DEFENSE COUNSEL IS THAT SHE BE DISCHARGED FOR CAUSE.

WHAT YOU ARE SAYING AT THE END IS IF THE JUDGE, IF THE STATE WAS WILLING TO SAY SHE CAN BE DISCHARGED, THE DEFENDANT WOULD HAVE GOTTEN THE REMEDY THAT THE DEFENDANT HAD INITIALLY SOUGHT WHICH WAS TO HAVE THE JUROR REMOVED, NOT JUST SWITCHED TO BEING AN ALTERNATE?

YES.

YOU THINK THAT'S CLEAR FROM THAT INTERCHANGE?

YES, YOUR HONOR, BECAUSE THAT'S WHAT THE STATE WAS ASKING. THEY WERE ASKING THAT SHE BE MADE AN ALTERNATE AND I WOULD ALSO NOTE THAT THE NEXT DAY THE COURT SAID, WELL, I'M STILL GOING TO THINK ABOUT THIS. HE SAID I HAVE THE JURORS IN THIS CASE HAVE TO MAKE THE {ULT} NATIONAL -- ULTIMATE DECISION ABOUT WHETHER I THINK SHE IS FIT SO THE COURT THAT EVENING THOUGHT ABOUT IT, CAME BACK THE NEXT DAY AND ONCE AGAIN INDICATED THAT HE WAS GOING TO KEEP THE JUROR ON THE JURY PANEL BECAUSE HE FOUND HER IMPARTIAL. AT THAT POINT THE DEFENSE ONCE AGAIN SAID NOTHING. NOW, AS I INDICATED, A FOOTNOTE IN THE BRIEF AND ALL OF THIS IS A MATTER OF SPECULATION, BUT THIS JUROR, I WOULD ALSO POINT OUT, UNDER HER JUROR QUESTIONNAIRE WAS A MODEL JUROR FOR THE DEFENSE IN TERMS OF THE PENALTY PHASE. SHE INDICATED THAT SHE WOULD ONLY CONSIDER THE DEATH PENALTY IN TERMS OF THE UPBRINGING OF THE DEFENDANT AND IN RELATION TO THAT SHE FELT IT WAS APPROPRIATE IN SOME CASES AND INAPPROPRIATE IN SOME OTHERS. SHE WAS RIGHT DOWN THE MIDDLE ON THAT. NOW, I DON'T KNOW WHETHER THAT PLAYED INTO THEIR DECISION TO KEEP HER ON THE JURY, WE DON'T KNOW.

I GUESS WE'LL FIND OUT SOMETIME IN THE FUTURE POST CONVICTION.

WOULD YOU ADDRESS, I THINK WE'VE GONE THROUGH THIS PRETTY WELL BUT I'M TROUBLED BY NOT SO MUCH THE CULPABILITY BUT THAT TYPE OF ANALYSIS WITH REGARD TO THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING FACTOR. IT SEEMS HERE, AND CLEARLY THE TRIAL JUDGE FOUND THAT AS AN AGGRAVATING FACT {OOR}, CORRECT?

YES, SIR.

AND CLEARLY THE ONLY EVIDENCE REALLY OF THE FACTS OF THE CRIME CAME FROM THE INTERVIEW OR THE CONFESSION SO TO SPEAK, CORRECT?

VIS-A-VIS DANIEL PEREZ?

YES, HIS INVOLVEMENT.

WELL, THAT IS CORRECT IN TERMS OF HIS STATEMENT BUT THERE WAS MUCH COOPERATION OF HIS STATEMENT.

BUT THERE IS NO EVIDENCE THAT HE ACTUALLY INFLICTED THE DEATH BLOWS, CORRECT? HE DIDN'T ADMIT TO THAT AND THERE IS NOT REALLY DIRECT EVIDENCE OF THAT, CORRECT?

THERE IS NO DIRECT EVIDENCE OF SOMEONE SAYING THAT HE INFLICTED THE BLOWS.

SO HE DESCRIBED THIS AS THIS OTHER PERSON DOING THE -- INFLICTING THE MORE TALL WOUNDS, CORRECT, THAT'S HIS STORY?

THAT IS HIS STORY.

NOW, IT MAY BE SUFFICIENT FOR EDMOND TYSON ANALYSIS THAT HIS CULPABILITY RELATIONSHIPS AND PLANNING AND ALL OF THOSE, BUT THE HAC AGGRAVATING FACTOR WITH REGARD TO THE LAW OF THIS COURT IN WILLIAMS AND IT BASICALLY TALKS ABOUT THAT AGGRAVATING FACTORS CANNOT BE APPLIED VICARIOUSLY ABSENT A SHOWING BY THE STATE THAT THE DEFENDANT DIRECTED OR KNEW HOW THE VICTIM WOULD BE KILLED. WOULD YOU ADDRESS THAT ASPECT OF THIS CASE, WHETHER HAC IS A PROPER AGGRAVATING FACTOR AND IF NOT WHAT IS THE ALTERNATIVE? IS IT A REMAND FOR RESENTENCING? BECAUSE THIS IS REALLY THE ONLY AGGRAVATING AGGRAVATOR. WE'VE GOT {PE} COON {YAR}Y -- PECUNIARY GAIN AND OTHERS, BUT WE DON'T HAVE THE HORRENDOUS AND HORRIBLE AGGRAVATORS ALTHOUGH SOME

MAY CHARACTERIZE ALL OF THEM IN THAT CATEGORY BUT IT REMOVES HAC WHICH GENERALLY PUTS A DIFFERENT LIGHT ON CASES.

FIRST IN TERMS OF THE AGGRAVATORS THERE WAS A PRIOR VIOLENT FELONY AND COMMISSION OF A CAPITAL OFFENSE DURING A ROBBERY. I DON'T THINK THERE IS ANY QUESTION IN THIS CASE THAT DANIEL PEREZ, ONE, WAS A MAJOR PARTICIPANT WHO ACTED WITH RECKLESS DISREGARD FOR HUMAN LIFE.

I AGREE WITH THAT. I'M ASKING ABOUT THE HAC.

I DON'T THINK THERE IS ANY EVIDENCE IN THIS CASE THAT HE DIRECTED WHAT OCCURRED HERE, BASED ON HIS STATEMENT AND OTHER EVIDENCE IN THE CASE AND KNEW EXACTLY WHAT WAS GOING TO HAPPEN.

WHAT WAS EVIDENCE THAT HE DIRECTED HIS CODEFENDANT TO STAB THE VICTIM?

WELL, YOUR HONOR, THE COURT DID NOT BELIEVE THAT THE STATE HAD PROVED BEYOND A REASONABLE DOUBT THAT DANIEL PEREZ WAS THE ACTUAL STABBER. THE COURT STATED THAT IN ALL LIKELIHOOD HE WAS THE ACTUAL STABBER AND MAYBE -- AND CERTAINLY I THINK THE EVIDENCE SHOWS THAT. IT DOESN'T SHOW --

THE JURY VERDICT STEAM SEEMS TO INDICATE THAT HE WAS NOT, YOU KNOW, BECAUSE HE WAS ONLY CONVICTED OF FELONY MURDER.

THAT IS CORRECT HE WAS CONVICTED OF FELONY MURDER BUT THE JURY, I THINK ONE NEEDS TO LOOK AT DANIEL PEREZ' DEFENSE IN THIS CASE. THE WHOLE CASE AT THE TRIAL LEVEL AND BEFORE THIS COURT ON THE APPEAL IS BASED ON DANIEL PEREZ' STATEMENT. I DON'T WANT TO GET TOO DEEPLY INTO THE CODEFENDANT BECAUSE HE IS THE OTHER ONE.

HE IS NOT HERE. THAT EVIDENCE IS NOT HERE WITH REGARD TO PRECISELY WHAT HE SAID OR DIDN'T SAY.

BUT DANIEL PEREZ INDICATED THAT.

RIGHT, RIGHT.

AND LET ME GO BACK TO WHAT I INDICATED EARLIER, WHY I BELIEVE THAT DANIEL PEREZ DIRECTED WHAT HAPPENED HERE. I THINK WE HAVE TO LOOK AT ALL OF THE FACTS. FIRST, DANIEL PEREZ WAS THE ONLY INDIVIDUAL IN THIS CASE WHO KNEW THE VICTIM. HE HAD A FAMILIAL RELATIONSHIP WITH THE VICTIM.

WAS IT BROUGHT OUT -- WASN'T HE A SUSPECT IN THE PRIOR BURGLARY AND ROBBERY OF THE SAME LADY?

YES, YOUR HONOR.

AND WAS THAT A PART OF THE STATE'S CASE IN CHIEF OR NOT?

IT WASN'T --

WAS THIS EVIDENCE BEFORE THE JURY?

YES, IT WAS. DETECTIVE AND DANIEL PEREZ KNEW THAT HE WAS A SUSPECT IN THAT BURGLARY BECAUSE THE VICTIM HAD ACCUSED HIM OF IT.

BUT ISN'T THE PROBLEM THAT YOU HAVE THAT YOU HAVE PHONE LINES CUT, YOU'VE GOT A

STABBING OF 90 PLUS TIMES, YET THE JURY DOES NOT FIND THAT THIS WAS PREMED INDICATE -- PREMEDITATED MURDER AND SO IN TERMS OF AND WE DON'T HAVE A DETERMINATION OF WHO WAS THE STABBER. SO HOW DO WE GET TO AS ANSWERING JUSTICE LEWIS' QUESTION TO HOW SOMEBODY WOULD THEREFORE AND HE STATED THE WORDS, WOULD KNOW THIS WAS GOING TO HAPPEN SO THAT THAT AGGRAVATOR COULD BE IMPUTED TO WHERE THERE IS NO ACTUAL FINDING OF WHO THE STABBER IS AND NO FINDING THAT THE MURDER WAS PREMEDITATED.

WELL, THE AGO {VA} -- AGGRAVATOR OF HAC HAS BEEN IMPUTED TO OTHER CASES WHERE THEY WERE NOT THE ACTUAL STABBER OR SHOOTER.

WE WOULD HAVE TO LOOK AT EACH ONE.

RIGHT.

BUT I'M ASKING YOU WITH THESE FACTS, I'M NOT ARGUING THAT THERE MIGHT BE -- MIGHT NOT BE A CASE WHERE THERE IS IMPUTATION BUT ON THESE FACTS WHAT BASIS IN WHICH EITHER THE JURY OR THE JUDGE FOUND WOULD YOU SAY THAT WE COULD POINT TO?

WELL, LET ME POINT OUT ONE FINDING IN THEIR VERDICT THAT I THINK IS AWFULLY IMPORTANT IN THIS CASE. FIRST OFF THEY FOUND THAT HE WAS GUILTY OF BATTERY. THEY ALSO FOUND THAT HE HAD GONE TO THE HOME AND ENGAGED IN ROBBERY WITH A DEADLY WEAPON WITH A KNIFE. I THINK THE KNIFE CANNOT BE DISCOUNTED IN THIS CASE. AS I INDICATED PREVIOUSLY HE KNEW THE VICTIM. HE IS THE ONE THAT DROVE CALVIN GRAIN OUT TO THE HOUSE AND DROVE HIMSELF OUT TO THE HOUSE. HE SAID HE WAS GOING WITH THE GUYS TO STEAL AN AUTOMOBILE BUT WHEN CONFRONTED WITH DIFFERENT EVIDENCE IN THE CASE BY THE POLICE HE ACKNOWLEDGED THAT HE WAS IN THE HOUSE. HE ACKNOWLEDGED THAT HE BASED ON WHAT HE SAID THAT HE SAW CALVIN GREEN DOING THE STABBING BUT HE SAYS HE WAS DOING THE STABBING WITH A SIX-INCH SWITCH BLADE KNIFE, THAT KNIFE DOES NOT COMPORT, THE USE OF THAT KNIFE OF WHAT HE SAID WAS BEING USED WITH THE MEDICAL EXAMINER'S TESTIMONY.

WE CAN'T TELL THAT THE BATTERY WAS COMMITTED. IT MAY HAVE BEEN AN ASSAULT, RIGHT, THE WAY THE VERDICT FORM WAS WORDED BECAUSE IT SAID IN THE COURSE OF COMMITTING THE BURGLARY OR TRESPASS, DID THE DEFENDANT MAKE AN ASSAULT OR BATTERY UPON ANY PERSON. HE DID ADMIT BEING UP IN THE HOME, CORRECT, AS THIS WAS HAPPENING, BUT NOT INFLICTING THE BLOWS?

HE ADMITTED BEING IN THE HOME AS ONLY A BENIGN SPECTATOR. THAT WAS ALL HE ADMITTED TO. I THINK IT'S IMPORTANT THAT ONE MUST LOOK AT HIS DEFENSE IN THIS CASE. HIS DEFENSE TO THE POLICE AND DURING TRIAL AND IN CLOSING ARGUMENT BY DEFENSE COUNSEL NEVER WAIVERED TO THE EXTENT THAT ALL HE DID WAS GO TO THE HOUSE BELIEVING THAT CALVIN GREEN WAS GOING TO STEAL MISS MARTIN'S TAHOE FROM HER DRIVEWAY AND THAT THEY WERE GOING TO LEAVE AND HE WAS GOING TO BE CUT IN FOR THE PROCEEDS. THAT NEVER CHANGED WHATSOEVER, EVEN DURING CLOSING ARGUMENTS BY DEFENSE COUNSEL. THAT WAS ALWAYS THE DEFENSE. THE {SFAKT}S CLEARLY -- FACTS CLEARLY INDICATE OTHERWISE IN THIS CASE. THE FACT THAT HE HAD A SMALL THREE-INCH KNIFE WHICH ADMITTEDLY THE MEDICAL EXAMINER DID NOT HAVE A KNIFE AND HE COULD NOT SAY WHETHER THAT KNIFE ACTUALLY CAUSED THE WOUNDS TO THE VICTIM. HOWEVER, THAT KNIFE THAT HE HAD WOULD COMPORT WITH THE WOUNDS THAT WERE DONE TO THE VICTIM, ALL PERPETRATED BY THE SAME WEAPON AND I THINK THAT'S IMPORTANT.

IF THE STATE'S THEORY IS CORRECT ON THAT, THEN THE JURY WOULD HAVE FOUND PREMEDITATED MURDER SO THE FACT THAT THE JURY DID NOT FIND PREMEDITATED MURDER, DOESN'T THAT INDICATE THAT THE JURY DISAGREED WITH YOUR THEORY?

THE JURY FOUND FELONY MURDER, BUT THEY MAY HAVE STILL FOUND HIM -- THEY STILL MAY

HAVE FOUND HIM TO BE THE ACTUAL STABBER. YOU KNOW, UNDER A FELONY MURDER THEORY BUT NOT UNDER A PREMED {TATION} THEORY. NOW, I THINK ONCE AGAIN IT IS IMPORTANT TO NOTE THERE IS NO EVIDENCE AT ALL IN THIS CASE, NO TANGIBLE, PHYSICAL EVIDENCE LINKING CALVIN GREEN AS BEING THE STABBER. IT ALL COMES FROM THE STATEMENT MOST OF WHICH IS VERY SELF-SERVING WHEN IT GETS TO THIS AREA OF DANIEL PEREZ. THAT IS WHAT WAS RAISED BELOW.

THE PHYSICAL EVIDENCE LINKING -- THERE IS NO PHYSICAL EVIDENCE LINKING THE DEFENDANT, EITHER?

TO THE SCENE?

YES.

YES, THERE IS, YOUR HONOR.

TO THE MURDER.

WELL, I'D LIKE TO ADDRESS THAT BECAUSE I THINK IT'S IMPORTANT IS WHAT WAS AT THE SCENE AT THE HOUSE. THERE WAS A PIECE OF EVIDENCE, A VERY IMPORTANT PIECE WHICH WAS THAT THE BLOODY SHOE PRINT IN THE BLOOD OF THE VICTIM WAS THE SHOE PRINT OF DANIEL PEREZ AND THAT SHOE PRINT WAS NOT ONLY JUST AROUND WHERE THE VICTIM WAS, BUT IT WAS A SHOE PRINT THROUGH THE HOUSE.

CAN WE REALLY SAY IT WAS THE SHOE PRINT OF MR.^PEREZ, BECAUSE AS I UNDERSTAND THE EVIDENCE IT REALLY IS THAT IT IS A KIND OF PRINT OF A SHOE THAT MR.^PEREZ MAY HAVE WORN, ALSO, BUT THERE ARE ANY NUMBER OF THOSE KINDS OF SHOES OUT THERE. WE DON'T KNOW IF MR. GREEN HIMSELF HAD ON THOSE SAME KINDS OF SHOES, SO I'M NOT SURE THAT WE CAN REALLY SAY THAT THIS WAS MR.^PEREZ' FRIEND.

WELL, YOUR HONOR, IN TERMS OF CALVIN GREEN'S SHOES, AND DANIEL PEREZ' SHOES THEY WERE NOT THE SAME. CALVIN GREEN'S SHOES WERE TAKEN FROM HIM FROM THE MARTIN COUNTY JAIL WHEN HE WAS TRANSPORTED TO PORT ST. LUCIE AND THE DETECTIVE TOOK HIS SHOES AND IN NO WAY WERE THEY THE SAME SIZE AS DANIEL PEREZ' OR THE SAME SHOE OR CONFIGURATION OF THE IMPRINT. TWO, HE ADMITTED TO THE POLICE THAT THE EVENING OF THE MURDER HE DISPOSED OF HIS BLOODY SHOES.

OTHER THAN THE TESTIMONY OF MR.^PEREZ, WAS THERE ANY EVIDENCE LINKING CALVIN GREEN TO THE SCENE?

THE ONLY EVIDENCE LINKING CALVIN GREEN AS A CODEFENDANT WAS THAT THERE WAS A STATEMENT THAT CAME OUT BY DEFENSE COUNSEL TO {DIKT} {IF} BEET WHERE HE INDICATED HE -- DETECTIVE BEATH SAID HE SAW THE ATTACK BEGIN TO TAKE PLACE, RAN FROM THE HOUSE AND BACK TO HIS HOME A FEW BLOCKS AWAY. ON THE OTHER HAND THAT --

DEFENSE COUNSEL, GREEN'S COUNSEL?

THAT STATEMENT CAME OUT DURING TRIAL ON QUESTIONING ELICITED FROM -- DEFENSE COUNSEL WAS ELICITING QUESTIONS TO DETECTIVE BEATH WHO WAS ASKED WHAT STATEMENTS CALVIN GREEN HAD STATED. DETECTIVE BEATH VOLUNTEERED THAT CALVIN GREEN STATED, THIS CAME OUT IN FRONT OF THE JURY THAT CALVIN GREEN STATED HE HAD GONE TO THE HOUSE WITH DANIEL PEREZ, THEY HAD GONE TO THE GARAGE, HE HAD GONE INTO THE LAUNDRY ROOM AND THAT UPON ENTERING THE LAUNDRY ROOM PEREZ WENT INTO THE HOUSE. THE ATTACK BEGAN ON SUSAN MARTIN AND CALVIN GREEN RAN FROM THE HOUSE AND WENT BACK HOME.

OKAY. I TAKE IT THAT THE ROBBERY WAS CHARGED AS THE DEFENDANT PEREZ FORCEFULLY TOOK PROPERTY FROM THE VICTIM FOR THE USE OF A DEADLY WEAPON. IS THAT THE WAY IT WAS CHARGED?

YES, YOUR HONOR, I BELIEVE , SO AND I WOULD POINT OUT THAT THE VICTIM IN THIS CASE HAD AN AM {THIS} PENDANT -- AMETHYST NECKLACE PENDANT. FIRST SHE HAD SCRATCHES AROUND HER NECK THAT THE MEDICAL EXAMINER TESTIFIED TO. HE INDICATED THAT THAT WOULD HAVE COME FROM SOMETHING SUCH AS A NECKLACE BEING RIPPED FROM HER NECK. SO I DON'T THINK THERE IS ANY QUESTION ABOUT THAT AND WHAT'S IMPORTANT HERE IS THAT DURING HIS STATEMENT DANIEL PEREZ INDICATED TO DETECTIVE KELSO WHEN SHE SAID TO THEM THE FAMILY DESERVES THAT AMETHYST PENDANT BACK, IT IS SOMETHING THAT THEY NEED, DO YOU KNOW WHERE IT IS, DANIEL PEREZ' NEXT LINE WAS, I HAVE IT. NOW, IT WAS NEVER BROUGHT TO THE POLICE STATION, OF COURSE, IT WAS NEVER FOUND, BUT WHAT'S IMPORTANT IS AND THIS GOES BACK TO QUESTIONS EARLIER REGARDING HIS CULPABILITY IN THIS CASE, WHICH I THINK IS OVERWHELMING AND QUITE CLEAR, THAT HE APPROPRIATED PROPERTY IN THE CASE, NOT JUST A COLLECTIBLE COINS, BUT THE APPROPRIATED PROPERTY RIPPED FROM HER PERSON SUCH AS THE PENDANT, BUT WHEN HE ADMITTED THAT HE HAD THAT, TO ME IT SHOWS THAT HE WAS, AND YOU CAN CONCLUDE THAT WITH THE BLOODY SHOE PRINTS, THERE IS NO QUESTION THAT HE WAS THERE WHEN THE CRIME OCCURRED, KNEW IT WAS HAPPENING, AND IT IS OUR CONTENTION HE HAD BROUGHT THE KNIFE, A DEADLY WEAPON WHERE LETHAL FORCE WOULD BE USED AT 1:00 IN THE MORNING AGAINST THIS FAMILY MEMBER.

WAS THE DEADLY WEAPON CHARGE, HAS THE JURY FOUND, THE JURY FOUND THAT HE WAS ARMED. WAS THE WEAPON CHARGED ONLY THE KNIFE OR WAS IT ONLY THE CANE OR WAS IT BOTH IN THE INDICTMENT?

IT WAS THE KNIFE.

SO THE CANE WAS NOT CHARGED AS THE ARMED WEAPON IN THE BURGLARY?

NO, IT WAS NOT. IT WAS THE KNIFE. IF THERE ARE NO FURTHER QUESTIONS --

WITH YOUR HELP, YOU HAVE USED UP OUR TIME. THANK YOU VERY MUCH.

I WOULD ASK THE COURT TO AFFIRM.

THANK YOU. MR.^CALDWELL?

YES, VERY BRIEFLY, JUSTICE WELLS, YOU HAD ASKED WHETHER THERE WAS A DISCUSSION OF AN EXERCISE OF A PEREMPTORY CHALLENGE DURING THIS DISCUSSION ABOUT THE JUROR. AT PAGES 1498 AND 1499 THERE WAS A DISCUSSION ABOUT THAT, AND THE PROSECUTORS APPLIED -- SUPPLIED THE COURT WITH AUTHORITY INDICATING THAT THEY, THE DEFENSE, DON'T HAVE THE AUTHORITY TO ASK FOR A CAUSE CHALLENGE OR PEREMPTORY, THE AUTHORITY OF THE COURT TO EXCUSE A JUROR WOULD BE TO DECLARE HER DISQUALIFIED AND THAT'S WHAT THEY ASKED FOR, WAS FOR HER TO BE DISQUALIFIED. THERE WAS A DISCUSSION ABOUT THIS VERY CONFUSED DISCUSSION AT PAGES 1740 AND 41 ABOUT THE JUROR, ABOUT MAKING HER AN ALTERNATE AND SHE COULD COME BACK FOR THE PENALTY. HOWEVER, THE JUDGE DID NOT UNDERSTAND THAT AS BEING IN ANY WAY A WAIVER BY THE DEFENSE BECAUSE THE NEXT DAY THE JUDGE SPECIFICALLY RULED AT THE END OF THE FINAL ARGUMENTS SHE IS GOING TO REMAIN AS ONE OF THE PRIMARY JURORS AND TO THE EXTENT THAT THE DEFENSE HAS PREVIOUSLY ASKED TO EXCUSE HER, AGAIN MY RULING REMAINS THE SAME AND THE REQUEST IS DENIED. SO THE JUDGE DID SPECIFICALLY RULE ON THE ISSUE. IT WAS NOT WAIVED. SO I'VE USED ALL OF MY TIME. ASK THE COURT TO REVERSE IN THIS CASE. THANK YOU VERY MUCH.

THANK YOU. THANKS TO BOTH THE COUNSELS FOR A VERY INFORMATIVE ORAL ARGUMENT AND FOR BEING RESPONSIVE TO OUR QUESTIONS. WE ALWAYS APPRECIATE THE PROFESSIONALISM THAT IS EXHIBITED. BECAUSE WE ONLY HAVE TWO OTHER CASES WE ARE GOING TO TAKE OUR MORNING RECESS OF 15 MINUTES AND THEN WE WILL RESUME TO HEAR THE LAST TWO CASES. THANK YOU VERY MUCH.

PLEASE RISE.