

>> SUPREME COURT OF FLORIDA
IS NOW IN SESSION.
PLEASE BE SEATED.

>> OKAY.
THE NEXT CASE ON THE DOCKET IS,
CORRECT ME IF I'M WRONG,
PASHA V. STATE?

>> YES, I'M KAREN KICKNY ON
BEHALF OF KHALID PASHA.
AND GIVEN THE LIMITED TIME I
HAVE HERE TODAY--

>> I'M HAVING TROUBLE HEARING
YOU.

I'M NOT SURE IF THAT'S NOT
TURNED ON OR YOU'RE NOT SPEAKING
INTO IT, OR IT'S BECAUSE I'M
SLIGHTLY DEAF.

>> MAYBE I'LL LEAN FORWARD.
IS THAT BETTER?

>> THAT'S BETTER.

>> GIVEN MY LIMITED TIME, I'D
LIKE TO FOCUS ON THE FIRST THREE
ISSUES THAT CONCERN THE PRETRIAL
PROCEEDINGS IN THIS CASE.
AND ESPECIALLY THE SPEEDY TRIAL
ISSUE, BECAUSE THAT IS A
THRESHOLD ISSUE, AND IT IS
DISPOSITIVE.

AND IF YOU AGREE WITH MY
POSITION, YOU WILL NOT HAVE TO
REACH ANY OF THE OTHER ISSUES IN
THE CASE.

MY POSITION IS THAT AT THE
NOVEMBER 19TH HEARING THERE WAS
A TRIAL AT THAT TIME SET FOR THE
FOLLOWING MONDAY WHICH WAS
NOVEMBER 26.

AND THAT HEARING WAS SET FOR THE
STATE'S MOTION FOR RETURN OF
PROPERTY TO GET THE PROPERTY OUT
OF THE EVIDENCE AND BROUGHT--
GIVEN TO THE STATE TO USE AT THE
NEW TRIAL.

THAT WAS AN UNCONTESTED MOTION.
BUT THE JUDGE TOOK OVER THAT
HEARING BY OFFERING MR. PASHA A
CHANCE TO RELITIGATE HIS PRIOR
MOTIONS, AND THAT INCLUDED HIS
MOTIONS TO SUPPRESS.

AND WHEN SHE DID THAT, SHE

VIOLATED HIS RIGHT TO DUE
PROCESS BECAUSE SHE CONDITIONED
HER OFFER ON HIS GIVING UP HIS
RIGHT TO SELF-REPRESENTATION.

>> I'M, REALLY THAT ARGUMENT
JUST FLIES RIGHT OVER ME, YOU
KNOW?

I'M HAVING A HARD TIME
UNDERSTANDING HOW A JUDICIAL
OFFICER WHO'S TRYING TO HELP A
PRO SE LITIGANT AND EVEN TO THE
POINT OF SAYING I'LL RECONSIDER,
I'LL RECONSIDER ALL OF THE STUFF
THAT YOU'VE PUT BEFORE ME PRO SE
AND ALLOW A LAWYER TO PRESENT
IT, HOW THAT VIOLATES DUE
PROCESS RIGHTS.

I JUST, THAT DOES NOTHING--

>> THE JACKSON CASE OUT OF THE
UNITED STATES SUPREME COURT.
THAT IS A CASE WHERE THERE WAS A
STATUTE THAT GAVE A BENEFIT TO A
PERSON WHO ELECTED TO PLEAD
GUILTY OR HAVE A NONJURY TRIAL
OVER A PERSON WHO ELECTED TO GO
TO A TRIAL.

AND THE SUPREME COURT SAID IN
THAT CASE THAT ANY PROCEDURE
THAT GIVES A BENEFIT TO A
DEFENDANT TO FORGO THE EXERCISE
OF A CONSTITUTIONAL RIGHT
VIOLATES DUE PROCESS.

AND THAT--

>> ISN'T THAT MORE LIKE--
WHAT'S OPERATIVE THERE IS THAT
IT'S REALLY A PENALTY ON
EXERCISING THE CONSTITUTIONAL
RIGHT WHEREAS HERE I JUST DON'T
SEE HOW YOU LOOK AT THIS AS A
PENALTY ON EXERCISING HIS RIGHT.

>> WELL, ACTUALLY, THE CASE LAW
SAYS IF YOU IMPOSE A PENALTY OR
IF YOU GIVE A BENEFIT TO FORGO.
SO YOU CAN IMPOSE A PENALTY FOR
DOING THE, FOR EXERCISING YOUR
RIGHT TO GO PRO SE, AND THE
PENALTY IS I WILL NOT REHEAR
YOUR MOTION TO SUPPRESS.

NOW UNDERSTAND, IN THIS
SITUATION JUDGE FERNANDEZ CAME

ON THIS CASE IN MAY OF 2012 OR '11, I'M NOT SURE.
BUT SHE WAS THE SUCCESSOR JUDGE TO A JUDGE, FUENTE, WHO HAD BEEN RECUSED.
AND THE RULES ALLOW MR. PASHA TO MOVE THE NEW JUDGE TO REHEAR THE MOTIONS THAT HAD BEEN DECIDED AGAINST HIM.
AND HE DID THAT WITHIN THE TIME LIMIT.
AND JUDGE FERNANDEZ JUST, YOU KNOW, SHE DENIED THAT.
AND SO SHE KNEW IT WAS VERY IMPORTANT TO HIM OF TO HAVE THE MOTION TO SUPPRESS REHEARD.
>> BUT SHE, BUT YOU ACKNOWLEDGE THOUGH THAT HE HAD, IN FACT, ALREADY FILED A MOTION TO RECONSIDER THOSE MOTIONS THAT WERE HEARD BY JUDGE FUENTE, AND SHE HAD ALREADY DENIED THEM BEFORE WE GET TO THE POINT OF THE SPEEDY TRIAL AND THE OFFER OF COUNSEL AND OFFERED TO REHEAR THEM YET AGAIN FILED BY COUNSEL.
>> SHE NEVER REHEARD HIS MOTIONS.
>> WELL, HE-- WELL, SHE DENIED THE MOTION TO RECONSIDER THEM, RIGHT?
>> CORRECT.
>> OKAY.
>> SO IN JUNE SHE HAD DENIED HIS MOTIONS FOR REHEARING, AND SHE ENTERED AN ORDER SAYING THAT JUDGE FUENTE HAD ADEQUATELY ADDRESSED THESE MOTIONS, I WILL NOT REHEAR THEM.
NOW, WE GET TO A WEEK BEFORE THE TRIAL, AND SHE TELLS HIM I WILL REHEAR YOUR MOTIONS, BUT THAT WILL BE CONDITIONED ON YOU GIVING UP YOUR RIGHT TO SELF-REPRESENTATION, AND THAT WILL BE CONDITIONED ON YOU WITHDRAWING YOUR DEMAND FOR SPEEDY TRIAL.
SO HE DID NOT WANT TO DO THAT BECAUSE HE HAD MR. HERNANDEZ

THERE WHO HE HAD BEEN INSISTING
HAD A CONFLICT.
HE DIDN'T EVEN WANT HIM AS
STANDBY COUNSEL,
AND, YOU KNOW, THAT'S A WHOLE
OTHER ISSUE.
BUT HE HAD TO MAKE A CHOICE ON
THE SPOT, AND THAT WAS BASICALLY
THE PRESSURE AND THE ON-THE-SPOT
DECISION AND THE COERCION
RENDERED HER OFFER WAS ILLEGAL
AS A VIOLATION OF DUE PROCESS.
AND I ALSO CITED A CASE OUT OF
THE CALIFORNIA SUPREME COURT
THAT DISCUSSES THE FEDERAL LAW
ON THE DUE PROCESS VIOLATION.
IT'S, I MEAN, CALIFORNIA SUPREME
COURT.
IT'S COLLINS, I THINK.
YEAH.
IT'S-- THAT IS REFRAINING FROM
THE EXERCISE OF THE
CONSTITUTIONAL RIGHT.
AND THE OFFER ITSELF WAS A
FARETTA VIOLATION.
AND THE IRONY IS THAT THIS CASE
WENT BACK ON A FARETTA
VIOLATION.
AND NOW WE HAVE THE JUDGE
COERCING HIM TO GIVE UP HIS
RIGHT TO SELF-REPRESENTATION IN
EXCHANGE FOR A PROCEDURAL
BENEFIT.
>> AND SO HE, HE ULTIMATELY
DECIDED NOT-- I MEAN, HE
INITIALLY SAID, OKAY, I'LL DO
THAT, AND THEN HE DECIDES NOT
TO.
HE SAYS, NO, I WANT TO CONTINUE
TO REPRESENT MYSELF, RIGHT?
>> RIGHT.
SO AT THE HEARING WHERE THE
OFFER WAS MADE, HE TWICE SAID
NO, AND THEN THE THIRD TIME SHE
SAID WE'RE GOING TO TAKE A
RECESS, I WANT YOU TO THINK
ABOUT THIS SOME MORE.
THEY CAME BACK.
HE AGREED.
NOW, HE WAS-- WENT BACK TO JAIL

AND THOUGHT ABOUT THIS SOME MORE, AND THEN HE WROTE HIS MOTIONS, A MOTION TO GO PRO SE AND A MOTION TO BE HEARD. AND IN THAT HE STATES THE PROBLEM WITH THE OFFER. HE SAYS---

>> AND SO WHAT HAPPENS THEN?

THAT'S ABOUT 17 HOURS.

AND THEN WHAT HAPPENS?

>> SO WE GET TO THE HEARING THAT IS HELD, LIKE, MAYBE TWO WEEKS LATER THAT WAS THE HEARING OF DECEMBER 7TH, I BELIEVE.

AND SHE SAYS, OKAY, WE'RE GOING TO HEAR YOUR MOTIONS, AND I WILL ALLOW YOU TO BE PRO SE AGAIN.

AND HE SAYS I WANT TO BE RESTORED AND HAVE IN THIS ERROR CORRECTED-- HAVE THIS ERROR CORRECTED BY YOU HOLDING MY TRIAL WITHIN THE SPEEDY TRIAL WINDOW OF RECAPTURE.

OKAY?

SO THEN HE-- THE JUDGE SAYS, NO, YOU CANNOT HAVE THAT RESTORED.

BUT I'M GOING TO SAY THAT YOUR MOTION WILL BE A NEW DEMAND FOR SPEEDY TRIAL.

AND THERE WAS-- IT WAS NOT A NEW DEMAND FOR SPEEDY TRIAL. HE CORRECTED HER.

>> SO YOU'RE SAYING, ARE YOU SAYING THAT THIS SHOULD BE DISCHARGED FOR NOT HAVING BEEN BROUGHT IN THE RECAPTURE PERIOD?

>> ABSOLUTELY.

THIS NEEDS TO BE A DISCHARGE BECAUSE THE OFFER WAS ILLEGAL. IT VIOLATED DUE PROCESS, IT VIOLATED FARETTA, AND IT WAS A NULLITY.

IT WAS VOID.

THE ACCEPTANCE OF IT.

HE RESCINDED HIS AGREEMENT TO THE OFFER, AND THEN HE FILED A NOTICE OF EXPIRATION OF SPEEDY TRIAL TIME ON DECEMBER 17TH.

NOTHING HAPPENED.

THERE WAS NO HEARING, AND AFTER THE 15 DAYS GO BY, HE FILED A-- WELL, HE ALSO FILED A MOTION TO DISQUALIFY JUDGE FERNANDEZ AT, WHEN HE FILED THE MOTION FOR EXPIRATION OF SPEEDY TRIAL TIME. SHE ENTERED A LONG ORDER DENYING WHAT HAPPENED ON NOVEMBER 17TH WHICH IS-- OR 19TH, WHICH IS ACTUALLY IN THE RECORD.

AND THEN NEVER HELD A HEARING ON THE MOTION FOR EXPIRATION, THE NOTICE OF EXPIRATION.

HE THEN FILES THE DEMAND FOR DISCHARGE, AND ONE DAY LATER SHE FILES AN ORDER STRIKING THE NOTICE OF EXPIRATION AND DENYING THE DISCHARGE.

AND I DON'T BELIEVE SHE HAD JURISDICTION TO DO THAT BECAUSE THERE IS A PROCEDURE--

>> ALL RIGHT.

SO THEN WHAT HAPPENS?

THEN HE RE-ASKS FOR SPEEDY TRIAL?

HE STARTS THE-- HE SAYS I WANT TO GET TO TRIAL?

I THOUGHT YOU SAID THEN HE FILED A NEW NOTICE.

>> HE NEVER FILED A NEW NOTICE. THERE'S ONLY ONE DEMAND FOR SPEEDY TRIAL IN THIS RECORD. THAT'S ON OCTOBER 24TH, 2011, I GUESS.

OR, NO, '12.

>> BUT HE HAD THE OPPORTUNITY ONCE HE WAS REPRESENTED, EVERYTHING ELSE STARTED AGAIN. IN OTHER WORDS, HE COULD HAVE ASKED FOR THIS, HIS TRIAL TO BE SPEEDILY CONDUCTED, RIGHT?

>> HE-- THIS ISSUE CONCERNS HIS DEMAND FOR SPEEDY TRIAL ON OCTOBER 24TH.

>> I GOTCHA.

SO THERE'S NOTHING AFTER THAT THAT YOU COULD RELY ON?

>> NO, BECAUSE-- WELL, WHEN HE WENT TO THE HEARING WHERE THE JUDGE SAID, WHERE HE SAID I'M

NOT AGREEING TO THAT DEAL, I WANT MY SPEEDY TRIAL, SHE SAID, WELL, I'M GIVING-- OKAY, SO YOU'RE MAKING A NEW DEMAND TODAY.

AND SO WE'RE GOING TO HAVE IT, WE'RE GOING TO HAVE SPEEDY TRIAL WITHIN THAT NEW DEMAND PERIOD. SO THEY SAY LET'S SET THE TRIAL FOR JANUARY 14TH.

AND THAT'S WHEN THE TRIAL STARTED.

AND SHE WAS DOING THAT BY HER OWN RULING THAT HE HAD FILED A NEW DEMAND, BUT THAT NEVER HAPPENED.

SO ALL HE EVER SAID WAS I WANT THE SPEEDY TRIAL THAT I DEMANDED ON OCTOBER 24TH.

YOU HOOD WINKED ME.

THAT WAS-- HE WAS CORRECT.

AND I, I THINK YOU SHOULD LOOK AT THE LANDRY CASE, BECAUSE IN THAT CASE THAT WAS 20 YEARS AGO, 1995.

THIS COURT RULED THAT A TRIAL JUDGE'S ORDER THAT DISMISSED A, OR DENIED A DEMAND FOR SPEEDY TRIAL WAS NOT AUTHORIZED UNDER THE RULE.

AND IT WAS, IN FACT, A NULLITY. SO WHEN-- SIMILAR TO THIS CASE BECAUSE THE JUDGE AND THE STATE PROCEEDED UNDER THE UNDERSTANDING THAT HE COULDN'T GET A SPEEDY TRIAL BECAUSE THE JUDGE HAD DENIED HIS DEMAND.

WELL, THIS COURT--

>> WELL, WAIT A MINUTE.

WAS THERE REALLY A DENIAL OF A DEMAND?

IT SEEMS TO ME THAT WHAT HAPPENED WAS THAT THE TRIAL JUDGE SAID WHEN HE DECIDED HE WASN'T GOING TO DO THE DEAL, THAT-- AND THEN HE SAYS HE WANTS HIS SPEEDY TRIAL THAT SHE INTERPRETED THAT, OR AT LEAST IT SAID THAT, WAS A NEW DEMAND AND GAVE HIM A TRIAL DATE WITHIN

THAT NEW DEMAND TIME, CORRECT?

>> YOU TALKING ABOUT IN THIS CASE?

>> YES.

>> OKAY.

IN THIS CASE, RIGHT.

WHEN HE FILED THE MOTION TO BE HEARD THAT SPECIFICALLY SAYS I WAS HOODWINKED, I AM WITHDRAWING WHAT I ASSENTED TO ON THE NOVEMBER 19TH HEARING.

SO I WANT YOU TO GIVE ME MY SPEEDY TRIAL.

YOU WILL HAVE-- THEY HAD TIME BECAUSE IT HADN'T EXPIRED.

THE 50 DAYS HADN'T EXPIRED, AND THEY WOULD STILL HAVE THE WINDOW OF RECAPTURE.

THEY GO IN FRONT OF HER ON NOVEMBER 7TH, AND SHE SAYS YOU DON'T GET TO DO THAT BECAUSE YOU ASKED FOR AN ATTORNEY.

AND HE SAID, ACTUALLY, NO, I DIDN'T.

YOU PUSHED HIM OFF ON ME.

SO SHE SAID, WELL, THE RECORD WILL REFLECT WHAT HAPPENED ON NOVEMBER 19TH.

AND I THINK THAT THE RECORD DOES REFLECT THAT HIS, HIS VERSION IS CORRECT, AND THAT WAS A DUE PROCESS VIOLATION, .

WHAT THE JUDGE DID THERE WAS A NULLITY.

AND SO THE SPEEDY TRIAL DEMAND PERIOD CONTINUES TO RUN.

SO WHEN HE FILES HIS NOTICE OF EXPIRATION, HE HAS A RIGHT TO BE DISCHARGED WHEN THEY DON'T EVEN HOLD A HEARING ON IT, AND 15 DAYS LATER, THE SPEEDY TRIAL WINDOW OF RECAPTURE HAS CLOSED AND NOBODY DID ANYTHING.

SO THE TRIAL JUDGE ENTERED AN ORDER STRIKING HIS NOTICE OF EXPIRATION WHICH SHE HAD NO RIGHT TO DO BECAUSE I'VE SEEN CASES THAT SAY THEY LOSE JURISDICTION WHEN NOTHING HAPPENS, AND THE WINDOW OF

RECAPTURE CLOSES.

SO I--

>> WHAT ABOUT THE CONTINUANCE ON NOVEMBER 19TH?

>> WELL, THAT'S THE STATE'S POSITION, THAT NOVEMBER 19TH WAS A CONTINUE WANT, AND-- CONTINUANCE, AND--

>> WHY'S THAT WRONG?

>> THAT'S WRONG BECAUSE IF YOU LOOK AT WHAT HAPPENED ON NOVEMBER 19TH, HE DIDN'T ASK FOR A CONTINUANCE.

HE WANTED HIS TRIAL TO START THE FOLLOWING MONDAY.

THE JUDGE GIVES HIM AN ILLEGAL OFFER.

SHE SAYS I WILL--

>> OKAY, THIS GOES BACK TO WHAT YOU WERE ARGUING AT THE BEGINNING.

>> RIGHT.

AND THIS IS WHAT THE STATE IS SAYING AND THE TRIAL JUDGE TOOK THE POSITION THAT YOU TOOK A CONTINUANCE ON NOVEMBER 19TH.

AND I'M SAYING THAT'S WRONG, BECAUSE HE WAS GIVEN AN ILLEGAL OFFER THAT VIOLATED FARETTA, VIOLATED DUE PROCESS.

>> BUT IF WE REJECT THAT, THEN THIS ARGUMENT ABOUT SPEEDY TRIAL GOES AWAY.

>> RIGHT.

>> OKAY.

>> IF YOU THINK THAT THIS WAS A, YOU KNOW, A VALID CONTINUANCE, THEN I LOSE.

BUT I'M SAYING--

>> ON THAT POINT ANYWAY.

[LAUGHTER]

>> LET ME ASK YOU THIS QUESTION. YOUR TIME IS RUNNING SHORT, AND I REALLY WOULD LIKE TO HEAR YOU ARGUE OR DISCUSS THE WHOLE ISSUE OF ALIBI.

ARE YOU PREPARED TO GO INTO THAT?

>> OKAY, THAT'S FINE.

>> CAN YOU EXPLAIN THIS?

>> THE-- MR. PASHA TESTIFIED THAT HE WAS NOT PRESENT AT THE SCENE OF THE MURDERS BECAUSE HE WAS UP THE ROAD. AND THEN AFTER HE TESTIFIED, HE REQUESTED THE STANDARD ALIBI INSTRUCTION. THE STATE OBJECTED TO IT, AND THE STATE SAID HE DID NOT FILE A NOTICE OF ALIBI, AND THE FACTS WILL NOT SUPPORT AN ALIBI.

>> ON THE FACTS, COULD YOU TELL ME HOW FAR UP THE ROAD HE SAID HE WAS?

>> HE SAYS THAT HIS WIFE DROPPED HIM OFF ON THE WEST END OF SEEDLING CIRCLE, AND HE WALKED DOWN LATER WHEN SHE DIDN'T COME BACK. BE SO THE RECORD REALLY DOESN'T REFLECT THE ACTUAL DISTANCE.

>> IS THERE SOMETHING ABOUT BEING LEFT THERE TO RECEIVE A SIGNAL FROM WHERE HIS WIFE WAS GOING TO GO?

>> YEAH-- WELL, SHE WAS GOING TO SIGNAL HIM, SHE WAS GOING TO COME BACK AND PICK HIM UP, BUT SHE WAS GOING TO SIGNAL HIM IF SHE HAD TROUBLE. SO HE WAS THERE--

>> SO HE WOULD BE WITHIN SIGHT. THAT-- IF I'M UNDERSTANDING YOU CORRECTLY, CORRECT ME IF I'M WRONG, SO HE WOULD BE WITHIN SIGHT OF WHERE SHE WAS SO SHE COULD SIGNAL HIM.

>> WELL, I DON'T REALLY KNOW THAT, BECAUSE I DON'T KNOW IF SHE WAS GOING TO BLOW HER HORN OR USE THE CAR LIGHTS OR WHAT EXACTLY WAS THE SIGNAL. THAT'S NOT REALLY PART OF--

>> OKAY.

>>-- THE RECORD. BUT, SO--

>> BUT WITHIN SIGHT OR SOUND.

>> IT DOESN'T SEEM LIKE HE WAS WITHIN SIGHT. I MEAN, ACCORDING TO HIS

TESTIMONY WHICH IS WHAT THE ALIBI IS BASED ON.

SO--

>> WAS THERE A, YOU MENTIONED EARLIER, WAS THERE A NOTICE OF ALIBI FILED IN THIS CASE?

>> NO, THERE WASN'T A NOTICE OF ALIBI, AND THERE DIDN'T HAVE TO BE A NOTICE OF ALIBI, BECAUSE HE WAS NOT GOING TO PUT ON ALIBI WITNESSES.

HE DIDN'T PUT ON ALIBI WITNESSES.

[INAUDIBLE]

>> RIGHT.

AND YOU DON'T HAVE TO FILE A NOTICE OF ALIBI IF YOU'RE THE ONLY PERSON WHO'S GOING TO TESTIFY.

>> OKAY.

DID HE ACTUALLY REQUEST THE ALIBI INSTRUCTION?

>> YES, HE DID, VERY PLAINLY. AND IT WAS THE STATE OBJECTED TO IT, AND THE JUDGE DENIED IT. AND THAT IS REVERSIBLE ERROR--

[INAUDIBLE]

>> LET ME ASK YOU ABOUT HOW THIS FITS IN WITH JUST KIND OF THE GENERAL CONCEPT OF ANNAL BILE, AND LET ME GIVE A HYPOTHETICAL. SAY THAT THERE'S A MURDER IN THE KITCHEN OF A HOUSE.

WIFE, TWO CHILDREN ARE MURDERED IN THE KITCHEN OF THE HOUSE, FOUND DEAD THERE.

THE HUSBAND COMES INTO THE SIGHTS OF THE AUTHORITIES.

HIS ALIBI, HOWEVER, THAT HE WAS IN THE ADJACENT B LIVING ROOM ASLEEP ON THE COUCH.

HE, AGAIN, IS THE SOLE WITNESS TO THAT.

DOES THAT REALLY FIT WITHIN WHAT WE WOULD ORDINARILY CONCEIVE OF AS AN ALIBI?

NOW, HE HAS A FACTUAL DEFENSE BASED ON HIS TESTIMONY.

I UNDERSTAND THAT.

THE JURY-- AND THE JURY'S GOT

TO EVALUATE ALL THAT X HE GETS
THE PRESUMPTION OF INNOCENCE AND
SO ON.

BUT DOES THAT REALLY FIT WHAT WE
THINK ABOUT WHEN WE THINK ABOUT
AN ALIBI DEFENSE?

OR ISN'T THAT REALLY PUSHING THE
LIMITS OF WHAT WE WOULD CONSIDER
TO BE AN ALIBI?

>> RIGHT.

>> AND I WOULD DISTINGUISH THAT
FROM A CLAIM THAT HE'S IN THE
HOUSE NEXT DOOR--

>> OKAY.

>>-- WHERE THERE ARE, WHERE
THERE ARE PEOPLE THAT SAY HE WAS
IN THE HOUSE NEXT DOOR.

>> WELL, I CITED A CASE IN MY
BRIEF THAT IS--

>> I READ IT.

>>-- TWO, IS THE ALIBI IS BEING
MADE BY A DEFENDANT WHO WAS IN
THE SAME HOUSE.

HE WAS UPSTAIRS.

AND IT, HE WAS ENTITLED TO THE
ALIBI INSTRUCTION.

BECAUSE THE PROXIMITY, HOW FAR
AWAY DOESN'T MATTER.

THE QUESTION IS, WAS HE THERE
PRESENT AT THE COMMISSION OF THE
CRIME.

AND IT'S REALLY A QUESTION ABOUT
THE BURDEN OF PROOF.

>> BUT AGAIN, THIS QUESTION
ABOUT THE SCOPE OF "THERE" IS
SUBJECT TO SOME DISAGREEMENT, IT
SEEMS.

NOW, I REALIZE THE CASE YOU'VE
CITED, BUT I THINK WE COULD FIND
OTHER AUTHORITY ELSEWHERE THAT
WOULD REACH A DIFFERENT
CONCLUSION IF THE DEFENDANT'S
CLAIM IS THAT HE WAS IN THE
HOUSE ASLEEP AS OPPOSED TO
SOMEWHERE AWAY FROM THE SITE OF
THE CRIME.

SO I UNDERSTAND YOUR ARGUMENT,
AND I KNOW THAT YOU'VE GOT
AUTHORITY THAT TENDS TO BE
SUPPORTIVE OF IT.

>> WELL, THE ALIBI CASE LAW IS A ABOUT THE JURY BEING CORRECTLY INSTRUCTED ON THE BURDEN OF PROOF.

>> WELL, LET ME--

>> SO DOES THE DEFENDANT HAVE THE BURDEN TO PROVE THAT HE WASN'T THERE, OR DOES-- HE'S ABLE TO GIVE AN ALIBI DEFENSE, AND HE DOESN'T HAVE TO TO PROVE THAT HE WASN'T THERE. IT'S THE STATE THAT HAS TO PROVE THAT HE WAS THERE.

>> I UNDERSTAND THAT.

>> AND SO WHEN YOU SWITCH WIT AROUND AND GIVE-- SWITCH IT AROUND AND DON'T GIVE THE INSTRUCTION AND THEN THE STATE GIVES A CLOSING ARGUMENT, THAT MAKES IT SOUND LIKE HE HAD A REASON, HE HAD TO PROVE BEYOND A REASONABLE DOUBT THAT HE WASN'T THERE.

>> DID THE STATE ACTUALLY SAY THAT IN THE CLOSING ARGUMENT, OR IS THAT YOUR EXTRAPOLATION FROM EXTRAPOLATION OF SOME COMMENT, THE STATEMENT--

>> THE STATE WAS TALKING ABOUT REASONABLE DOUBT, AND HE SAID THE DEFENDANT, YOU KNOW, RAISED SOMETHING THAT MAY CAUSE SOME DOUBT.

BUT THEN HE START-- HE'S TALKING ABOUT THIS ALL IN THE CONTEXT OF REASONABLE DOUBT. SO I WOULD THINK THAT THE JURY WOULD TAKE THAT TO MEAN THAT HE DIDN'T PROVE BEYOND A REASONABLE DOUBT THAT WHAT HE SAID WAS TRUE.

>> WELL, OF COURSE, THAT'S GOING TO BE THE STATE'S POSITION THAT-- THE STATE'S POSITION IS THAT THEY HAVE PROVED THEIR CASE BEYOND A REASONABLE DOUBT. SO THERE'S NOTHING REMARKABLE ABOUT THE STATE ARGUING ALONG THOSE LINES, I DON'T THINK. THE QUESTION, THOUGH, IS WASN'T

THE JURY INSTRUCTED ON
REASONABLE DOUBT, GIVEN AN
EXTENSIVE INSTRUCTION ON THAT?
AND ISN'T IT-- AND TWO-PART
QUESTION.

ISN'T IT ALSO TRUE THAT THIS
ALIBI DEFENSE IS NOT AN
AFFIRMATIVE DEFENSE.

IT'S ALMOST, IT'S ALMOST AN
INSTRUCTION ON A LAW OF NATURE
AS OPPOSED TO A MATTER OF LAW,
ISN'T THAT CORRECT?

>> THE LAW OF NATURE--

>> WELL, THE NOTION--

>> I THINK IT'S A STANDARD
INSTRUCTION.

>> BUT THE NOTION, THE NOTION IS
THAT SOMETHING THAT IS GOING TO
BE INTUITIVE TO MOST PEOPLE IS
YOU CANNOT COMMIT AN ACT OF
VIOLENCE IF YOU'RE NOT AT THE
LOCATION AT THE TIME WHEN THE
ACT OF VIOLENCE WAS COMMITTED.
THAT'S JUST-- ANYONE THAT
UNDERSTANDS ANYTHING ABOUT
REALITY WOULD UNDERSTAND THAT
FACT.

>> BUT THE QUESTION IS WHO HAS
TO PROVE, WHO HAS THE BURDEN OF
PROOF ON THAT QUESTION.

>> WELL, BUT THE STATE HAS THE
BURDEN OF PROOF IN THE CASE, AND
THE INSTRUCTIONS GO OVER THAT
AT-- AND THEY TALK ABOUT THE
PRESUMPTION OF, IT SAYS YOU MUST
PRESUME OR BELIEF THAT THE
DEFENDANT IS INNOCENT OF BOTH
COUNTS.

THE PRINCIPLES STAYS WITH THE
DEFENDANT AS TO EACH MATERIAL--
UNTIL OR UNLESS IT IS OVERCOME
BY THE EVIDENCE TO THE EXCLUSION
OF BEYOND A REASONABLE DOUBT.
AND IT GOES ON FROM THERE.

I MEAN, AGAIN, ALL THE STANDARD
INSTRUCTIONS ON REASONABLE DOUBT
WERE GIVEN HERE, AND THERE'S
NOTHING IN THE INSTRUCTIONS, IS
THERE, THAT SUGGESTS THAT
SOMEHOW THERE'S SOMETHING

DIFFERENT ABOUT MR. PASHA'S TESTIMONY, THAT SOMEHOW THAT'S JUDGED BY A DIFFERENT STANDARD.

>> WELL, I THINK THAT WHAT YOU'RE SAYING IS THAT THERE SHOULDN'T BE AN ALIBI INSTRUCTION.

AND I THINK THAT THAT'S NOT CORRECT BECAUSE THIS IS ONE OF THE OLDEST INSTRUCTIONS. I MEAN, THIS IS MANAGER THAT THE CASE LAW-- THIS IS SOMETHING THAT THE CASE LAW GOES BACK TO THE BEGINNING, GIVING THAT INSTRUCTION IS A RIGHT.

>> LET ME ASK YOU THIS, IS IT YOUR POSITION THAT THE FAILURE TO GIVE THE ALIBI INSTRUCTION-- ASSUMING IT'S AN ERROR-- THAT IT IS NOT SUBJECT TO HARMLESS ERROR ANALYSIS?

>> I THINK IT'S A-- NOW, I DON'T KNOW HOW IT COULD BE SUBJECT TO HARMLESS ERROR. I MEAN, IT MAY BE SUBJECT TO HARMLESS ERROR ANALYSIS, BUT IT'S NOT GOING TO BE IN THIS CASE.

I HAVEN'T REALLY THOUGHT ABOUT WHETHER IN OTHER CIRCUMSTANCES THAT COULD ARISE WHERE YOU COULD SAY, WELL, THAT WAS HARMLESS. I MEAN, I GUESS IN ALMOST ANYTHING YOU COULD DO THAT.

BUT HERE YOU HAVE A SITUATION-->> SO YOU'RE NOT SAYING THERE'S A PER SE REVERSAL.

>> I THINK THERE IS A PER SE REVERSAL BASED ON THE CASE LAW I'VE SEEN, BUT I'M REALLY NOT REALLY ABLE TO SAY RIGHT AT THIS POINT THAT THERE WOULDN'T BE SOME QUESTION.

I MEAN, THE CASE LAW I'VE SEEN SAYS THAT IF YOU DON'T GET THAT INSTRUCTION WHEN YOU REQUEST IT, YOU GET A REVERSAL AND A NEW TRIAL.

SO I THINK THAT THAT'S--

>> MS. KINNEY, I KNOW YOU'RE INTO YOUR REBUTTAL TIME, BUT THIS IS OBVIOUSLY AN IMPORTANT AREA.

JUST TELL US WHAT EXACTLY WAS THE ALIBI?

WHERE DOES HE CLAIM HE WAS WHEN THIS HOMICIDE TOOK PLACE?

>> HE CLAIMS THAT HE WAS DOWN THE STREET.

HE WAS, HE WAS WITH HIS WIFE, AND SHE DROPPED HIM OFF AT THE TOP OF THE ROAD.

AND SHE SAID I'M GOING TO GO DOWN AND MEET SOMEBODY, AND IF THERE'S ANY PROBLEM, I'LL SIGNAL YOU, OR, YOU KNOW, YOU JUST BE HERE IN CASE THERE'S A PROBLEM.

AND SO HE DOESN'T SAY THAT HE WAS WITHIN EARSHOT OR--

>> WHAT KIND OF PROBLEM WE TALKING ABOUT?

>> WELL, THE TESTIMONY WAS THAT--

>> A SAFETY PROBLEM?

>>-- HIS WIFE WAS ENGAGED IN SOMETHING ILLEGAL X IT'S NOT REALLY-- AND IT'S NOT REALLY SPELLED OUT, BUT THAT'S THE TESTIMONY.

AND HE DIDN'T SAY EXACTLY WHAT IT WAS, BUT HE SAID THAT SHE WANTED HIM THERE TO BE, BE THERE IN THE AREA IN CASE SHE NEEDED SOME ASSISTANCE.

SO IS THAT WAS WHAT HISS TESTIMONY WAS. -- HIS TESTIMONY WAS.

I WILL JUST SAVE THE REMAINDER FOR REBUTTAL.

>> DID THE STATE ARGUE WHEN IT WAS ASKED WHEN IT WAS REQUESTED, DID THE STATE ARGUE HE WASN'T ENTITLED TO IT BECAUSE-- WHAT WAS THIS, I MEAN, WHAT WAS THEIR ARGUMENT ABOUT WHY SINCE IT'S PRETTY CLEAR HE WAS ENTITLED TO IT--

>> YES.

>>-- THAT HE WASN'T ENTITLED TO

IT?

>> THE STATE'S ARGUMENT IS
BASICALLY WRONG--

>> WELL, WHAT DID THEY ARGUE?

>> THEY SAID A TWO-- SAID TWO
THINGS.

THE STATE SAID HE DIDN'T FILE AN
ALIBI NOTICE.

AND THEY SAID THAT, AND HE
DIDN'T GIVE AN ALIBI.

THEY SAID HIS TESTIMONY WOULDN'T
SUPPORT AN ALIBI.

>> OKAY.

AND THE JUDGE, DID THE JUDGE
DENY IT BASED ON THAT THERE WAS
NO NOTICE GIVEN, OR DID THE
JUDGE EXPLAIN WHY--

>> AS I RECALL, THE JUDGE DIDN'T
SAY ANYTHING, JUST SAID IT WAS
DENIED.

SO I WOULD ALSO, I DID WANT TO
TALK ABOUT--

>> YOU MIGHT, AGAIN, WE ARE
QUICKLY INTO YOUR ALMOST ENDING
YOUR REBUTTAL.

>> I WANTED TO-- THE MOTION TO
SUPPRESS IS MERITORIOUS, AND IT
SHOULD BE LOOKED AT BECAUSE THE
UNITED STATES SUPREME COURT CASE
OF J.L. WILL SUPPORT THE MOTION
TO SUPPRESS BECAUSE THE POLICE
DID NOT, WHO STOPPED HIM, DID
NOT HAVE A REASONABLE SUSPICION
OF CRIMINAL ACTIVITY WHEN THEY
DID THAT.

>> THANK YOU.
COUNSEL?

>> MAY IT PLEASE THE COURT,
BLAIR DICKERT, ASSISTANT
ATTORNEY GENERAL ON BEHALF OF
THE STATE.

IN REGARDS TO ISSUE ONE WITH
THIS SPEEDY DEMAND, DEFENDANT
FILED THE DEMAND ON OCTOBER
22ND.

WE HAVE A HEARING ON THE DEMAND.
THE TRIAL COURT IN NO WAY PUT
PRESSURE ON THE DEFENDANT,
DIDN'T COERCE THE DEFENDANT.
SHE WAS EXPLAINING THE

DISADVANTAGES AND ADVANTAGES OF
GOING FORWARD WITH TRIAL WHILE
HE HAD OUTSTANDING MOTIONS.
HERE, AS MY OPPOSING COUNSEL
CONCEDES, WE DO
NOT HAVE A PROBLEM BECAUSE
THERE'S NO, THERE'S NO ISSUE.
HE FILED THE DEMAND, SHE HEARD
THE DEMAND, SHE ALLOWS HIM TO
PROCEED WITH SPEEDY.
HE THEN, JUST AS YOU POINTED
OUT, JUSTICE PARIENTE, SAYS, OH,
I CHANGED MY MIND NOW.
THIS WAS A WEEK BEFORE TRIAL WAS
SUPPOSED TO START.
HE FILES THE MOTION TO BE HEARD,
AND ALTHOUGH IT IS ENTITLED
MOTION TO BE HEARD IN HIS FIRST
LINE WHERE HE'S ASKING FOR
RELIEF, I WANT TO POINT OUT THAT
HE DOES SAY I'M LOOKING FOR, I
AM DEMANDING FOR SPEEDY TRIAL.
SO UNLIKE--
>> [INAUDIBLE]
REALLY IS THAT THE TRIAL
JUDGING'S OFFER TO HIM, YOU
KNOW, WE WANT YOU TO TAKE-- YOU
NEED THE TAKE AN ATTORNEY.
AND IF YOU TAKE AN ATTORNEY, IF
YOU AGREE NOT TO REPRESENT
YOURSELF BUT HAVE AN ATTORNEY
REPRESENT YOU, I WILL RECONSIDER
ALL OF THESE MOTIONS THAT YOU
FILED.
AND SO IS THE DEFENDANT'S LAWYER
CORRECT THAT THERE IS CASE LAW
THAT SAYS YOU CAN'T MAKE THAT
KIND OF OFFER TO A DEFENDANT?
>> NO.
SHE IS NOT CORRECT.
WHAT HAPPENED HERE IS THAT
DEFENDANT FILES THIS MOTION,
THIS DEMAND, EXCUSE ME, FOR A
SPEEDY TRIAL.
THEY GO-- JUDGE FERNANDEZ GOES
THROUGH THE COURSE OF AN ENTIRE
HEARING EXPLAINING TO HIM WHAT
THAT MEANS.
AND THAT MEANS THAT HE IS READY
TO PROCEED WITH TRIAL.

HE ARGUES WITH HER OVER SEVERAL PAGES OF THAT ARGUMENT, THAT WAS THE ORIGINAL--

>> YEAH, I MEAN, BASICALLY HE WAS ARGUING THAT HE COULD STILL, DURING THAT TIME PERIOD, PROCEED WITH WHATEVER DISCOVERY AND OTHER THINGS THAT, MOTIONS THAT HE HAD PENDING AND ALL OF THAT. YEAH.

BUT THEN WE GET TO THE NEXT HEARING, AND THEN WHAT HAPPENS?
?

>> AT THE NOVEMBER 7TH HEARING? OR THE-- THERE'S A NOVEMBER 7TH--

>> WELL, THE HEARING WHERE THE JUDGE STARTS OFFERING HIM OR--

>> WELL, THERE WAS--

>>-- ABOUT TAKING AN ATTORNEY.

>> OKAY.

THAT, AT THAT HEARING-- I JUST WANTED TO PUT IT IN CONTEXT, BECAUSE THIS IS, YOU KNOW--

>> THIS IS A NOVEMBER 7TH HEARING, AS I UNDERSTAND--

>> THE--

>> THE NOVEMBER 7TH HEARING. HE WAS SCHEDULED FOR TRIAL ON NOVEMBER THE 26TH.

SO ON NOVEMBER THE 7TH, THEY HAVE THIS HEARING WHERE SHE MAKES THE FIRST OFFER TO HIM OF AN ATTORNEY, RIGHT?

>> SHE MAKES AN OFFER.

HE SAYS I DON'T WANT THE OFFER. JUDGE FERNANDEZ SAYS ARE YOU READY TO PROCEED, HE SAYS, YES. JUDGE HERNANDEZ AT THAT POINT IS READY TO GO TO TRIAL.

SHE SENDS OUT 200 SUMMONS TO HAVE JURORS THERE AND READY FOR VOIR DIRE.

>> SO WHAT HAPPENS ON NOVEMBER 19TH?

>> ON NOVEMBER 19TH THEY COME IN.

HE'S STILL FILING--

>> AND THEY CAME IN PURSUANT TO WHAT?

I MEAN, WHAT--

>> THE STATE DID FILE THEIR MOTION TO GET THEIR PROPERTY FROM THE FIRST TRIAL WITH THE IMPRESSION THAT THEY WERE PROCEEDING TO TRIAL ON NOVEMBER 26TH.

THE TRIAL JUDGE HERE, WHICH IS JUDGE FERNANDEZ, AND THE STATE CLEARLY WERE READY AND WERE UNDER THE IMPRESSION WE WERE GOING TO TRIAL.

ON NOVEMBER 19TH WHEN THE JUDGE MAKES A COMMENT I JUST WANT TO INSURE THAT YOU HAVE THE BEST DEFENSE THAT YOU CAN, THIS IS A CAPITAL CASE.

AS WE KNOW, HE'S TAKEN INCONSISTENT POSITIONS IN FRONT OF BOTH THE TRIAL COURT AND THIS COURT AS WELL, AND SHE WANTS TO MAKE SURE THAT HE UNDERSTANDS THE DIFFERENCES.

SHE'S NOT MAKING HIM ANY DEAL. IT IS CLEAR ON THAT RECORD AS WELL CONTRARY TO THE POSITION THAT HIS STANDBY COUNSEL MAKES IT VERY CLEAR THAT HE WILL NOT BE ABLE TO PROCEED WITH THE TRIAL THAT IS SET FOR NOVEMBER 26TH IF DEFENDANT ELECTS TO TAKE COUNSEL.

IT IS VERY CLEAR HE SAYS I DON'T EVEN THINK I HAVE TIME UNTIL NEXT SUMMER.

THE DEFENDANT-- IT'S NOT THAT THE TRIAL COURT SAID YOU NEED TO MAKE A DECISION RASHLY.

SHE SAYS, YOU KNOW, I REALLY WANT YOU TO THINK ABOUT THIS. THEY TAKE TWO TIMES OFF THE RECORD.

HE CONFERS WITH HERNANDEZ TWICE AND COMES BACK AND SAYS I AM GOING TO PROCEED WITH COUNSEL. THAT'S NOT A--

>> AND SO HER OFFER TO REHEAR ALL THESE MOTIONS HE HAD FILED, YOU KNOW, MOTIONS ABOUT MANY THINGS, BUT SHE HAD OFFERED TO

REHEAR THESE MOTIONS X THAT DOESN'T COME-- AND THAT DOESN'T COME INTO PLAY AT ALL?

>> NO, BECAUSE THAT'S WHY THE CONTINUANCE IS ON HIM.

HE WANTED THEM, THE MOTIONS TO BE REHEARD, BUT HE HAD NO, HE WASN'T OFFERING A FACTUAL OR LEGAL BASIS TO HAVE THOSE MOTIONS REHEARD.

HE'S JUST FILING MOTIONS THAT HIS PRIOR ATTORNEY AND THEN HE JUST IS ARGUING THE SAME LEGAL PRINCIPLES.

SO THERE'S NOTHING REALLY FOR JUDGE FERNANDEZ, EXCUSE ME, TO REHEAR FROM JUDGE FUENTE, BECAUSE HE'S MISTAKING THE EXACT SAME ARGUMENT. -- HE'S MAKING THE EXACT SAME ARGUMENT.

THE DEFENSE CHARGES SO HE CAN BE ALLOWED IN CASE HE WANTS TO LITIGATE ANY OF THOSE MOTIONS IF HE FINDS THERE IS A LEGAL OR FACTUAL JUSTIFICATION FOR DOING SO.

AND THAT IS EXACTLY WHAT DEFENDANT DID HERE.

HE IS TRYING TO HAVE THIS COURT ENTER AN ORDER THAT'S GOING TO HAVE A RUN, AN END GAME AROUND THE SPEEDY TRIAL PRINCIPLE.

IN FACT, HE JUST CHANGES HIS MIND A WEEK LATER AND FILES THIS DEMAND, A DEMAND TO PROCEED PRO SE.

SHE HEARS IT.

THERE'S NO BIAS.

SHE SAYS, OKAY, NOW WE'RE GOING TO GO TO TRIAL.

AGAIN, IT WAS A WEEK BETWEEN NOVEMBER 19TH AND THEN HE FILES IN THIS.

SO THEY GO TO TRIAL WITHIN THREE MONTHS OF HIM FILING THE INITIAL DEMAND.

IT'S A WEEK LATER AFTER THIS HEARING THAT HE FILES THE MOTION TO BE HEARD COUPLED WITH THE MOTION TO PROCEED PRO SE.

>> REMIND ME, HOW MUCH TIME DO YOU HAVE ONCE YOU FILE THAT DEMAND?

HOW MUCH TIME BEFORE YOU TAKE THEM TO TRIAL?

HAVE TO TAKE THEM TO TRIAL?

>> 50 DAYS.

>> HOW MANY?

>> 50.

>> 50 DAYS.

OKAY.

SO THAT DEMAND WAS OCTOBER 24TH OR SOMEWHERE IN THAT NEIGHBORHOOD?

>> YEAH.

>> AND HE WAS, HIS TRIAL STARTED ON JANUARY 14TH?

>> WELL, HIS INITIAL TRIAL WAS GOING TO BE ON NOVEMBER 26TH--

>> YEAH.

BUT THE ACTUAL TRIAL WAS--

>> ON--

>> ON JANUARY 14TH WHICH WAS WELL BEYOND 50 DAYS.

>> WELL, WHAT MY OPPONENT-- RIGHT.

AND I THINK WHAT YOU'RE TRYING TO GET AT IS SAYING WE'RE NOT IN THE DEMAND PERIOD.

BUT IF YOU EVEN TAKE AWAY THE CONTINUANCE WHEN HE DID THAT, WE WOULD STILL BE IN THE DEMAND PERIOD.

WE HAVE A 25-DAY DEMAND PERIOD WHICH WOULD, WOULD NOT END UNTIL DECEMBER 24TH.

SO IF HE-- SO THAT'S WHEN THE 50-DAY PERIOD WOULD HAVE ENDED. AND WHEN HE FILED THE NOTICE OF EXPIRATION ON DECEMBER 17TH, THAT IS EXACTLY WHY IT WAS PREMATURE, AND THERE ARE CASE LAW-- BROWN SAYS THAT WHEN YOU FILE A NOTICE OF EXPIRATION THAT'S PREMATURE, IT IS PROPERLY STRICKEN--

>> LET ME ASK THIS QUESTION. WHEN A DEMAND FOR SPEEDY TRIAL IS FILED, DOESN'T THE RULE REQUIRE THAT A HEARING BE

CONDUCTED WITHIN, WHAT, TEN DAYS, SEVEN DAYS TO SCHEDULE MATTERS AND SO ON?

>> NOT IN THIS, NOT IN A SITUATION LIKE THIS WHERE THE DEMAND FOR SPEEDY WAS HEARD WITHIN THE FIVE DAYS AND THE TRIAL WAS SET FOR JANUARY 14TH.

>> OKAY.

>> AND THAT WAS IT.

I MEAN, SHE SAID I'M SETTING THE TRIAL.

I WILL-- AND SHE DIDN'T NEED TO SET THE HEARING FOR THE EXPIRATION BECAUSE SHE-- IT WAS IN THE 50 DAYS.

>> WELL, WAIT, THAT'S-- BUT FROM OCTOBER 24TH.

>> FROM OCTOBER 24TH THEN-- RIGHT.

SEE, I THINK CHRONOLOGICALLY EVERYTHING'S GETTING CONFUSED. ON OCTOBER 24TH HE FILES HIS ORIGINAL DEMAND.

THE TRIAL COURT HEARS IT ON OCTOBER 30TH, SETS IT FOR TRIAL ON NOVEMBER 26TH.

ON NOVEMBER 7TH THEY COME IN, DEFENDANT'S STILL READY FOR THE TRIAL.

ON NOVEMBER 14TH, EXCUSE ME, ON THE 19TH THEY HAD THIS HEARING WHERE THE DEFENDANT VOLUNTARILY ELECTS TO WITHDRAW HIS DEMAND FOR SPEEDY AND TAKE THE CONTINUANCE SO THAT AN ATTORNEY CAN LITIGATE IT.

IT IS VERY CLEAR.

HE-- THEY ASK HIM--

>> I DON'T UNDERSTAND THAT PART. BECAUSE THE ATTORNEY SAID I'M NOT GOING TO BE READY UNTIL THE SUMMER, AND THEN ULTIMATELY THIS ATTORNEY WHO HE CLAIMED HE HAD A CONFLICT WITH WAS APPOINTED STANDBY.

SO WAS IT THAT HE SAID I'LL TAKE MR. HERNANDEZ AND--

>> HE--

>> AND SO HOW DID IT--

>> HE WAS, MR. HERNANDEZ WAS
STANDBY AT THAT TIME.
>> HE WAS ASKING FOR FULL
REPRESENTATION OR STANDBY?
>> AT WHICH HEARING?
>> SINCE IT'S, THIS SEEMS
CHRONOLOGICALLY CONFUSING, I'M
SURE WE HAVE THE RECORD.
I GUESS THE QUESTION IS, IS
THEIR BIGGEST POINT IS THAT HE
WAS COERCED TO WITHDRAW HIS
OCTOBER 24TH DEMAND.
AND YOU'RE SAYING, NO, HE
VOLUNTARILY, ABANDONED THAT BY
FILING A MOTION FOR CONTINUANCE.
IS THAT YOUR ARGUMENT?
>> HE VOLUNTARILY CHANGED HIS
MIND, LIKE MY OPPOSING COUNSEL
SAYS.
I MEAN, THERE'S NO DIFFERENCE IN
OUR ARGUMENT.
WHAT I'M, WE'RE SAYING, THE
STATE'S POSITION IS THAT THE
TRIAL COURT WAS ACTING
APPROPRIATE TALLY AS A
CONSERVATIVE JUDGE WOULD.
SHE IS MAKING, INSURING THE WEEK
BEFORE TRIAL WAS TO START THAT
DEFENDANT WAS READY TO PROCEED.
HE'S ALL OF A SUDDEN TALKING
ABOUT MITIGATION SPECIALISTS AND
HOW HIRING MITIGATION
SPECIALISTS AT THAT HEARING.
AND SHE'S SAYING TO HIM,
DEFENDANT, YOU KNOW, I WANT TO
MAKE SURE YOU HAVE THE BEST
DEFENSE POSSIBLE.
HE KNOWS THAT, MR. HERNANDEZ--
ACTUALLY, DEFENDANT ASKS THAT
QUESTION SPECIFICALLY.
>> WHAT ABOUT THE PART THOUGH
WHERE SHE SAYS I'LL REHEAR THE
MOTIONS IF YOU GET COUNSEL?
>> SHE, SHE'S TELLING HIM WHAT
THE LAW IS.
SHE'S-- THAT'S WHAT
MR. HERNANDEZ WOULD BE ABLE TO
DO AS HIS ATTORNEY.
IT WAS CLEAR THAT DEFENDANT WAS
TAKING ADVANTAGE OF THE FACT AND

GOING BACK AND FORTH.
HE WAS SAYING HE DOESN'T
UNDERSTAND WHAT A SPEEDY MEANT.
SHE--

>> WHO FILED THE NOTICE OF
EXPIRATION, MR. HERNANDEZ OR--

>> NO, THE DEFENDANT.

PRO SE.

THE DEFENDANT PRO SE.

>> HE UNDERSTANDS HOW TO GAME
THE SYSTEM.

>> YES.

>> THAT COULD BE ONE WAY TO LOOK
AT IT.

I'M NOT SAYING NECESSARILY
THAT'S GOOD OR BAD, BUT DOES
SEEM HE CERTAINLY TOOK
ADVANTAGE.

COULD YOU THEN GO TO THE POINT
THAT SEEMS TO BE OF CONCERN.
THE DEFENDANT SPECIFICALLY ASKED
FOR AN ALIBI INSTRUCTION.
CLEARLY, HIS DEFENSE IS HE'S NOT
PRESENT AT THE SCENE.

HE HAS, HE PUTS ON A DEFENSE
THAT HE'S SOMEWHERE ELSE WHEN
THE MURDER OCCURS.

THE ALIBI INSTRUCTION CLEARLY
STATES THAT IF THE JURY HAS A
REASONABLE DOUBT THAT THE
DEFENDANT WAS NOT PRESENT AT THE
SCENE, THEN YOU WILL FIND THE
DEFENDANT NOT GUILTY.

SO WHETHER IT'S A REQUIRED WE'VE
NEVER, I THINK THE CASE LAW HAS
BEEN PRETTY WELL SET THAT IF
IT'S REQUESTED, IT SHOULD BE
GIVEN NOW.

I'D LIKE YOU JUST TO ADDRESS
WHETHER YOU CAN, IN A CASE LIKE
THIS OR ANY CASE, YOU CAN DO--
WHY WAS IT NOT ERROR?

WHY SHOULD THE TRIAL COURT'S
RULING ON THE GIVING THE
INSTRUCTION BE AFFIRMED, BUT
MORE IMPORTANTLY IF IT WAS
ERROR, DOES THE STATE MAKE AN
ARGUMENT THAT IT WAS HARMLESS
ERROR BEYOND A REASONABLE DOUBT?

>> WELL, OUR POSITION IS IS THAT

THIS COURT REVIEWS THE TRIAL COURT'S DECISION REGARDING GIVING THE INSTRUCTION FOR AN ABUSE OF DISCRETION.

HERE THERE WAS NO ABUSE OF DISCRETION BECAUSE THERE'S ABSOLUTELY NO BE NEXUS TYING IN BETWEEN THE EVIDENCE AND AN ALIBI DEFENSE.

>> WHAT DO YOU MEAN BY THAT?

>> ISN'T THAT A FACTUAL QUESTION FOR THE JURY?

>> WELL, HIS WHOLE CASE IS THAT HE WAS THERE AT THE COMPLEX. DEFENDANT GETS ON THE WITNESS STAND AND TESTIFIES THAT MRS. CANADY CALLED HIM, HAD HIM COME DOWN TO THE COMPLEX TO WATCH OUT.

AS IT WAS POINTED OUT, THEY WERE ALWAYS IN, AT-- DURING HIS DIRECT PERSONAL STATEMENT, HE SAYS THEY WERE IN VISUAL CONTACT WITH EACH OTHER.

HE NEVER SAYS HE'S AT A DIFFERENT PLACE.

HE ALWAYS MAINTAINS THAT HE WAS AT THE COMPLEX ON THE NIGHT OF THE MURDERS.

>> WELL, THE COMPLEX IS NOT AT THE SCENE-- I MEAN, AND THIS IS THE QUESTION.

ALIBI IS I WASN'T PRESENT WHEN THE MURDER OCCURRED.

I KNOW THERE'S A CASE OUT OF THE-- I DON'T KNOW IF IT'S THE FOURTH DISTRICT, WHATEVER-- THAT IF THEY'RE IN A NEXT DOOR APARTMENT OR-- THEY'RE NOT PRESENT.

I DON'T KNOW THAT YOU HAVE TO BE, LIKE, IS THERE A 20-MILE RULE OR A 1-MILE RULE OR--

>> WELL, HERE--

>> 300-YARD RULE?

>> IN THIS CASE YOU, THIS COURT HAS NOT RULED ON A DEFINITIVE SPACE AND MEASUREMENT.

BUT CERTAINLY WHEN THE DEFENDANT IS IN THE VICTIM'S CAR, WE THEN

HAVE AN EYEWITNESS--

>> NO YOU'RE, OKAY, NOW WE'RE GOING TO WHETHER IT'S HARMLESS BECAUSE IT IS IT IS, YOU'VE GOT THIS, THIS IS A RETRIAL OF A CASE.

>> RIGHT.

>> YOU'VE GOT A DEFENDANT THAT ASKED FOR AN INSTRUCTION THAT CAN'T POSSIBLY HARM THE STATE AND THE JUDGE GIVING IT, YET THE STATE ARGUES AGAINST IT.

NOW, LET'S ASSUME THAT IT SHOULD HAVE BEEN GIVEN.

IS THERE AN ARGUMENT, ARE THERE CASES THAT SAY THAT IT'S HARMLESS, IT CAN BE HARMLESS ERROR BEYOND A REASONABLE DOUBT, THAT IT'S CERTAINLY NOT PER SE REVERSIBLE, SO LET'S JUST GO TO, LET'S ASSUME IT SHOULD HAVE BEEN GIVEN.

HOW CAN--

>> WELL, IN THESE CIRCUMSTANCES I DON'T THINK THAT IT SHOULD HAVE BEEN GIVEN.

>> I GUESS, OKAY.

LET'S JUST GO AND JUST INDULGE ME.

LET'S SAY IT SHOULD HAVE BEEN GIVEN.

WHAT'S-- DOES THE STATE HAVE A FALLBACK POSITION AS TO THAT IT WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT?

>> WELL, WE HAVE--

>> YOU KNOW SUFFICIENT EVIDENCE.

>> WE HAVE OVERWHELMING EVIDENCE--

>> BUT THAT'S NOT REALLY WHAT IT TALKS ABOUT AS FAR AS HARMLESS ERROR.

>> WITH THE ALIBI DEFENSE?

>> ANY ERROR, IT'S NOT THAT THERE'S EVIDENCE THAT HIS ALIBI MIGHT, WILL PROBABLY BE REJECTED BY THE JURY.

THAT'S NOT, THAT'S NOT THE TEST. OR YOU WOULD NEVER HAVE-- ANYWAY, SO YOU'RE SAYING THERE'S

A LOT OF EVIDENCE, SO IT
COULDN'T BE HARMLESS BECAUSE
THERE COULDN'T BE A JURY AROUND
THAT WOULD EVER BUY THIS
PREPOSTEROUS DEFENSE?
IS THAT YOUR ARGUMENT?

>> WELL, MY ARGUMENT WOULD BE,
OBVIOUSLY, IF THERE WAS ERROR,
IT WOULD BE HARMLESS.

BUT HERE HIS WHOLE ENTIRE
VERSION, HIS THEORY OF DEFENSE
WAS THAT HE WAS AT THE SCENE.
THE PENALTY PHASE CHARGE
CONFERENCE CAME AFTER HIS
TESTIMONY AND AFTER HE GAVE HIS
CLOSING WHERE HE'S SAID THAT HE
WAS AT THE COMPLEX.

AT THE PENALTY PHASE CHARGE
CONFERENCE, HE WHEN ASKED BY THE
TRIAL COURT WHAT IS YOUR BASIS
FOR GIVING THIS INSTRUCTION, HE
SAYS JUST BECAUSE I WAS AT IN
THIS SCENE AND HAD BLOOD ON ME
DOESN'T MEAN THAT I DIDN'T DO
IT.

WHICH IS NOT WHAT--

[INAUDIBLE]

BY DEFENSE IS.

>> I'M JUST, I'M CONCERNED
BECAUSE I SEE THE ARGUMENT THE
PROSECUTION MADE ABOUT THIS
NEXUS ARGUMENT THAT YOU'RE
TALKING ABOUT.

IF I'M HYPOTHETICALLY SPEAKING,
IF I'M IN THE HOUSE AND I STEP
OUT THE FRONT YARD TO SMOKE A
CIGARETTE-- AND I DON'T SMOKE,
BUT JUST A HYPOTHETICAL--

[LAUGHTER]

SMOKE A CIGARETTE AND I'M
TALKING THERE TO SOMEONE OR
WHATEVER AND THEN WHILE I'M
SMOKING A CIGARETTE SOMEBODY
COMES IN AND KILLS WHOEVER IN MY
HOUSE, THAT NEXUS THING, I MEAN,
WOULD THAT FOLLOW WITHIN THE
SAME NEXUS AND THAT WOULDN'T
QUALIFY AS AN ALIBI?

WHEN IS THERE A BREAK IN THIS
NEXUS?

>> WELL, IN THAT SITUATION
THERE'S A DIFFERENCE.
YOU'RE OUTSIDE OF THE HOUSE, AND
THERE'S A STRUCTURE JUST LIKE
THE CASES THAT MY OPPONENT
CITES.

THEY ARE IN AN ENCLOSED
STRUCTURE LIKE THE APARTMENT--

>> WHAT ABOUT JUSTICE CANADY'S
EXAMPLE BE OF THE MURDER
OCCURRING, SAY, IN THE BEDROOM
AND THE DEFENDANT CLAIMS HE WAS
IN THE FAMILY ROOM WATCHING THE
SUPER BOWL?

WOULD THAT QUALIFY?

IS THAT A SUFFICIENT NEXUS?
IS THERE A NEXUS THERE OR NOT?

>> IN THAT, IN THAT CASE, I
MEAN, IF SOMEONE'S IN TWO
SEPARATE ROOMS CAN AND THEY
HAVE-- ROOMS AND THEY HAVE
OFFERED AND PROVIDED SUFFICIENT
EVIDENCE, YOU HAVE TO HAVE AT
LEAST SOME EVIDENCE OF THE
INSTRUCTION OR OF THE ALIBI.
HE NEVER DID THAT.

>> OKAY.

>> I DON'T UNDERSTAND THAT,
BECAUSE IT JUST SAYS THE
DEFENDANT WAS PRESENT WHEN THE
CRIME WAS COMMITTED.

HE, HIS WHOLE DEFENSE WAS I
WASN'T PRESENT WHEN THE CRIME
WAS COMMITTED.

>> I DON'T READ HIS DEFENSE AS
THAT.

HE GOT ON THE WITNESS STAND, HE
TESTIFIES THAT SHE HAD HIM COME
DOWN TO THE COMPLEX.

HE CAME TO THE COMPLEX, WE HAVE
AN EYEWITNESS SEEING HIM GET
INTO THE CAR.

>> I THINK YOU'RE TALKING PAST
ONE ANOTHER.

THE JUSTICES ARE ASKING WHERE
WAS THIS DEFENDANT SPECIFICALLY?
YOU KEEP USING THE WORD COMPLEX.
WELL, THAT COULD BE FOUR MILES
LONG.

SO WHERE SPECIFICALLY DID THE

DEFENDANT SAY HE WAS SO YOU CAN
COMMUNICATE TO GIVE US WHERE THE
DEFENDANT SAYS HE WAS?

>> WELL, I APOLOGIZE FOR THAT.
HE DOES CHANGE HIS STORY AND
ADMIT THAT HE WAS IN THE BACK
SEAT OF HER CAR JUST PRIOR TO
THE TIMES OF THE MURDER.
WE HAVE AN EYE WITNESS TO THAT
AS WELL.

>> WELL, INDULGE THEM, THOUGH,
AND ADDRESS, WHEN YOU SAY CAME
TO THE COMPLEX, WHERE?
AND THEN YOU SAID TO JUSTICE
CANADY, I THINK VISUAL CONTACT.
IT'S A VERY SIMPLE, DIRECT
QUESTION.

IT'S HANGING OUT THERE.

>> HE CAME TO THE COMPLEX.
HE PARKED HIS CAR.

>> WHAT'S A COMPLEX MEAN?

>> HE CAME TO THE WOODLAND --
THE CRIME SCENE.

>> IS IT AN APARTMENT HOUSE?

>> IT'S A BUSINESS COMPLEX
CENTER OUTSIDE.

IT'S WITH BUSINESS -- BUILDINGS.

>> A COMMERCIAL PARK.

>> COMMERCIAL PARK WOULD BE
CORRECT.

>> THERE'S A DIFFERENCE IN BEING
ON ONE SIDE, ON THE BACK SIDE.
THAT'S WHAT I'M SAYING.

YOU REALLY ARE HARMING YOUR
ARGUMENT BY NOT RESPONDING
SPECIFICALLY AS TO WHERE THIS
DEFENDANT WAS.

I MEAN, DON'T YOU SEE WHAT'S
HAPPENING?

>> WELL, ABSOLUTELY, AND THAT'S
WHY I WAS TRYING TO GET BACK ON
TARGET.

>> PLEASE DO.

PLEASE DO.

>> OKAY.

SO WE WERE IN THIS BIG
COMMERCIAL PARK.

HE TESTIFIES THAT HE WENT THERE.
HE WAS WITH HER AT ALL TIMES,
WITH THE VICTIM.

>> BUT HIS TESTIMONY IS I WAS IN THE BACK -- HIS CONSISTENT TESTIMONY WHEN HE ASKED FOR THE ALIBI WAS I WAS IN THE BACK SEAT OF MY WIFE'S CAR, AND I SAW THIS OTHER PERSON MURDER HER BECAUSE I WAS RIGHT THERE.

I WAS AN EYE WITNESS.

THAT'S HIS TESTIMONY?

>> NO.

>> I DON'T KNOW WHEN HE SAYS HE GOT IN THE CAR OR OUT OF THE CAR.

HIS TESTIMONY WAS SHE TOLD ME TO GO SOMEPLACE ELSE TO FIND SOMETHING.

I DID THAT.

I WAS SOMEPLACE ELSE AND WHEN I CAME BACK SHE WAS MURDERED AND THAT'S HOW I GOT BLOOD ON ME.

THAT WAS HIS DEFENSE.

>> BUT HE TESTIFIED AND SAID, AS MY OPPONENT CONCEDES, THAT HE WAS ALWAYS IN EYESIGHT VIEW.

SO HE WASN'T -- IT WASN'T LIKE HE WAS IN THIS --

>> OKAY.

SO THE EYESIGHT, THE FACT THAT HE COULD SEE HER AT ALL TIMES, SO DID HE SEE WHO MURDERED HER?

>> THAT WAS HIS FIRST STORY.

>> BUT THE FACT THAT HE GIVES DIFFERENT STORIES -- THE ISSUE IS WHY WASN'T HE ENTITLED TO THE INSTRUCTION?

>> BECAUSE AT NO TIME DOES HE SAY I WAS SOMEWHERE ELSE AND NOT THERE.

HIS DEFENSE IS IT WASN'T ME.

>> BUT ISN'T IT TRUE HE DID SAY HE WAS DOWN THE ROAD.

OKAY.

I UNDERSTAND IT'S YOUR POSITION THAT THAT'S NOT SOMEWHERE ELSE. BUT THERE'S A PERSPECTIVE THAT SAYS IF HE'S DOWN THE ROAD AND THE CRIME GOES ON IN THE CAR, THAT DOWN THE ROAD IS SOMEWHERE ELSE.

RIGHT?

>> ABSOLUTELY.
BUT THEN WE ALSO HAVE
CONFLICTING TESTIMONY THAT SAYS
HE'S IN THE CAR.
>> WE HAVE CONFLICTING
TESTIMONY.
BUT HERE'S [INAUDIBLE].
HE SAYS -- AND I'M TRYING TO
QUOTE HERE.
I STOOD THERE FOR 15, 20
MINUTES, I DON'T KNOW HOW MUCH
TIME IT WAS.
I WASN'T PAYING ATTENTION TO
EXACTLY WHAT TIME IT WAS.
I SAW HER WALKING BACK DOWN TO
IT, BUT I WASN'T WALKING DOWN
THE STREET TOWARD HER.
I WALKED DOWN THE BACK PART
THROUGH THE GRASSY AREA.
WHEN I CAME AROUND THE BACK WAY,
WHEN I CAME CLOSE AND CLOSE TO
THE CUL-DE-SAC, I WALKED UP AND
SAW MY WIFE LAYING ON THE
GROUND.
AND I RAN TO HER.
I LOOKED AT HER DAUGHTER LAYING.
IT SOUNDS LIKE HE WAS WALKING
DOWN THE CUL-DE-SAC.
HE WASN'T THERE.
COUNSEL WOULD HAVE EXTRACTED
BETTER TESTIMONY IF HE WAS
DIRECTING THE TESTIMONY.
>> THAT WAS HIS FIRST STATEMENT.
AND ON CROSS TO THAT STATEMENT
HE ADMITS THAT THIS CLAIM WAS
FALSE.
AND HE TESTIFIED THAT HE WAS IN
THE CAR WITH THEM.
SO THERE WAS NO -- SO THERE WAS
NO EVIDENCE AT ALL ESTABLISHING
THAT HE'S IN A DIFFERENT
LOCATION, SOMEWHERE ELSE, WHEN
THE CRIMES WERE COMMITTED.
>> SOUNDS HERE LIKE IT WAS.
HE CAME AWE CROSS THE
CUL-DE-SAC, CAME ACROSS THE
AREA, SAW THEM LAYING ON THE
CROSS.
THAT MAY ALL BE IN ONE SPOT, BUT
IT'S HARD FOR US TO VISUALIZE

THAT.

SOUNDS LIKE HE WAS IN A DIFFERENT PLACE AND HE WAS AT LEAST AT ONE POINT IN TIME IN A PLACE WHERE HE COULDN'T SEE THEM.

WHEN HE CAME AROUND HE SAW THE ONE LAYING DOWN AND THE OTHER ONE ACROSS THE STREET.

>> WELL, THAT'S IF YOU BELIEVE HIS DIRECT TESTIMONY.

ON CROSS, HE CHANGES THE STORY.

>> THAT'S FOR THE JURY TO DECIDE.

YOU DON'T JUST NOT GIVE AN INSTRUCTION JUST BECAUSE HE GIVES CONFLICTING STORIES.

I DON'T KNOW.

MAYBE I'M WRONG.

>> I'M NOT SAYING YOU DON'T GIVE THE INSTRUCTION IF THERE'S CONFLICTING STORIES.

I'M SAYING THE TRIAL COURT DID NOT ABUSE ITS DISCRETION HERE IN NOT GIVING AN ALIBI INSTRUCTION BECAUSE THERE WAS NOT ENOUGH EVIDENCE TYING HIM TO BEING SOMEWHERE ELSE.

THERE WAS NO EVIDENCE.

THAT WAS NOT HIS THEORY OF DEFENSE.

HE CAME UP WITH IT AT THE END.

HE OFFERED HIS OWN INSTRUCTIONS ON BURDEN OF PROOF AND THE TRIAL COURT ACCEPTED THAT PRIOR.

HE JUST CAME UP WITH IT.

>> LET ME ASK YOU THIS, JUST SO I'M CLEAR.

YOU MENTIONED EARLIER, WHEN WAS THIS REQUEST FOR THIS ALIBI INSTRUCTION MADE?

YOU SAID DURING THE PENALTY PHASE?

>> NO.

THIS WAS DURING THE CHARGE CONFERENCE, BUT THIS CAME AFTER

--

>> ON THE GUILT PHASE.

>> ON THE GUILT PHASE, AFTER HE TESTIFIED, AFTER HE WAS

CROSS-EXAMINED AND AFTER BOTH THE STATE AND HIM GAVE THEIR CLOSING.

>> OKAY.

SO THE JUDGE HAD ALREADY CONDUCTED THE CHARGE CONFERENCE AND CLOSING?

BECAUSE IN MY EXPERIENCE THE CHARGE CONFERENCE IS ALWAYS DONE BEFORE CLOSING ARGUMENT.

>> RIGHT.

>> SO YOU KNOW WHAT TO ARGUE TO THE JURY AS FAR AS THE LAW.

>> WELL, THAT'S WHY THE STATE SAID --

>> SO WHEN DID HE REQUEST THIS? AFTER THE CLOSING ARGUMENT? SO THE CHARGE CONFERENCE MUST HAVE BEEN CONDUCTED BEFORE AND HE ADDED THIS AT THE END? I DON'T KNOW.

>> CORRECT.

THERE WAS A CHARGE CONFERENCE CONDUCTED AFTER ALL OF THE EVIDENCE WAS PRESENTED AND THE CLOSINGS WERE CONDUCTED AND HE THEN REQUESTED IT.

>> SO YOU'RE NOT SAYING HE DIDN'T REQUEST IT TIMELY.

>> NO.

THAT'S NOT MY ARGUMENT.

THE WAY IT WAS PRESENTED WASN'T IN THE CORRECT ORDER.

>> DID THE DEFENSE COUNSEL IN CLOSING ARGUE THAT HE WASN'T THERE?

>> NO.

HE DOESN'T SAY THAT.

>> IT WASN'T DEFENSE LAWYER.

>> NO.

>> WHAT DID HE ARGUE IN CLOSING?

>> THAT HE WAS THERE AND THAT HE WAS BLOODY AND HE SAW THE BODIES AND HE CAME TO THE COMPLEX.

HE MET UP WITH HIS -- THE DECEASED.

THEY PULLED IN.

THEY HAD THIS CONVERSATION ABOUT THE RING.

HE CLAIMED THAT WAS A

FABRICATION AND THAT SHE WENT TO PICK UP HER DAUGHTER, HIS STEPDAUGHTER, FROM A TRAINING CLASS AND THAT HE WAS SUPPOSED TO COME DOWN WHEN SHE GAVE THIS SIGNAL.

>> SO HERE IS THE THING. AGAIN, YOU'RE SAYING IT AS IF YOU ARE ALMOST MOCKING HIS ARGUMENT.

BUT HIS ARGUMENT IS STILL I WASN'T THERE WHEN SHE WAS KILLED.

I MEAN, HE COULD HAVE EITHER ARGUED I SAW SOMEONE ELSE DO IT. I WAS THERE, BUT SOMEONE ELSE CAME AND STABBED HER AND I HAD TO DEFEND HER.

OR THAT I WAS INSANE AT THE TIME AND I CAN'T BE RESPONSIBLE. BUT HE ARGUED I WASN'T THERE. I CAN'T TELL YOU HOW SHE GOT KILLED.

DID HE SAY HE KNEW HOW SHE GOT KILLED?

>> HE PICKS UP THE MURDER WEAPON.

HE SAYS THAT HE SAW HOLES IN THEIR BODIES.

HE DISPUTES THAT HE KILLED THEM, BUT HE'S NOT SAYING HE WAS SOMEWHERE ELSE.

THAT IS NOT WHAT HE'S SAYING. HE WAS ALWAYS IN -- AT THE VERY MOST, HE WAS IN VISUAL EYE CONTACT.

>> BUT DOESN'T HE SAY THAT HE COMES AND FINDS THE BODIES. I MEAN, HE SAYS THAT, DOESN'T HE?

>> HE SAYS THAT ON DIRECT, IN HIS PERSONAL STATEMENT, THAT HE FINDS --

>> JUSTICE POLSTON ASKED YOU WHAT HE SAID IN CLOSING. DID HE SAY IN CLOSING I WAS IN THE CAR WITH HER WHEN SHE GOT KILLED, BUT I CLOSED MY EYES, I DIDN'T SEE WHO IT WAS?

>> HE DOESN'T ADDRESS THAT, NO.

NO.

IN HIS CLOSING.

HE DOES NOT ADDRESS THAT.

HE SAYS HE DOESN'T TELL THE
POLICE.

THAT'S HIS -- HE HAS A GAP.

HE DOESN'T ADDRESS THAT PART.

SO I CAN'T SPECULATE ON WHAT HE

-- WHAT THE DEFENDANT WAS

THINKING.

THE DEFENDANT DID, THOUGH, ADMIT

THAT HE WAS IN THE CAR PRIOR --

JUST PRIOR TO THE MURDERS.

WE CANNOT ON CROSS GET HIM TO
ADMIT THAT HE KILLED THE VICTIM,
BUT WE CAN GET HIM TO AT LEAST
THE POINT WHERE IMMEDIATELY
PRECEDING THE MURDER, HE'S IN
THEIR CAR.

WE HAVE AN EYE WITNESS TO THAT.

WE HAVE TWO EYE WITNESSES WHO
SAW HIM RUNNING AROUND THE PARK,
COVERED IN BLOOD, WITH A SHINY
OBJECT, CHANGING CLOTHING,
ACTING ERRATICALLY, TRYING TO
FLEE THE SCENE.

THERE WAS NO EVIDENCE OTHERWISE
THAT HE WAS NOT IN THE AREA OF
THE CRIME SCENE WHEN THEY WERE
KILLED.

SO THERE'S NO NEXUS.

>> YOUR TIME IS UP.

>> OKAY.

THANK YOU.

THE STATE WOULD ASK TO AFFIRM.

>> I JUST WOULD ASK THIS COURT
TO READ THE RECORD BECAUSE I
DISAGREE WITH SO MANY FACTUAL
STATEMENTS THAT HAVE BEEN MADE
HERE, AND I WOULD NOT HAVE TIME
TO GO THROUGH THE RECORD, BUT
THE RECORD IS VERY CLEAR THAT
HIS STORY WAS WHAT HE TESTIFIED
TO AND THERE WAS NEVER DIFFERENT
VERSIONS, SO I'M NOT SURE WHAT
SHE'S TALKING ABOUT.

>> WELL, DID THE JUDGE DENY IT
BECAUSE THE JUDGE THOUGHT IF
YOU'RE WITHIN EYESIGHT YOU'RE
PRESENT?

I'M STILL TRYING TO FIGURE OUT
WHAT WAS THE BASIS FOR DENYING
THE INSTRUCTION?

>> OKAY.

I DON'T BELIEVE THAT THE BASIS
FOR DENYING THE INSTRUCTION IS
IN THE RECORD.

I BELIEVE THAT THIS IS A TRIAL
THAT THE STATE GOT EVERYTHING
THEY WANTED.

AND SO EVEN WHEN THE STATE MADE
NONSENSICAL -- GAVE NONSENSICAL
REASONS OR ILLEGAL REASONS, THEY
STILL GOT WHAT THEY WANTED AND
THEY SAID, HERE, WE DON'T WANT
TO HAVE THE ALIBI INSTRUCTION
BECAUSE THERE'S NO FACTUAL
SUPPORT FOR IT OR --

>> WELL, ISN'T THERE ARGUMENT
THEN THAT HIS DEFENSE IS SO
PREPOSTEROUS THAT NO JURY COULD
BELIEVE IT SO FAILURE TO GIVE AN
ALIBI INSTRUCTION HAS TO BE
HARMLESS BECAUSE THE JURY WOULD
NEVER ACCEPT WHAT THIS DEFENDANT
SAID.

>> WELL, THAT MAY BE WHAT
THEY'RE ARGUING NOW, BUT THAT
WOULD BE AGAINST ALL THE CASE
LAW THAT SAYS THESE ALIBI
INSTRUCTIONS SHOULD NOT BE
HOARDED.

IT'S FOR THE JURY TO DECIDE
WHETHER OR NOT THEY BELIEVE THAT
THE PERSON WASN'T THERE.

SO --

>> ONE OF THE THINGS THAT SHE
SAYS THAT STRUCK ME -- AND I
WANT YOU TO TELL ME IF IT'S
CORRECT OR NOT.

SHE INDICATES THAT, YES, HE
TESTIFIED TO WHAT JUSTICE
LABARGA READ ON DIRECT
EXAMINATION, BUT THAT THE
CROSS-EXAMINATION HE SAID
SOMETHING DIFFERENT.

>> OKAY.

I DO NOT KNOW WHAT SHE'S TALKING
ABOUT.

SO ALL I CAN DO IS -- THE

CROSS-EXAMINATION WAS THE PROSECUTOR INSISTING THAT HE WASN'T TELLING THE TRUTH AND THAT WE KNOW THAT YOU DID THIS, SO WHY DON'T YOU TELL US WHY. SO I DON'T KNOW OF ANY DIFFERENT VERSION.

>> THAT'S ALL RIGHT.

WE CAN READ THE CROSS FOR OURSELVES.

>> THIS IS A PRETTY DIRECT STATEMENT THAT'S MADE BY ONE SIDE, AND THE OTHER SIDE IS REALLY CHALLENGING IT, SO I THINK YOU OWE THE COURT AT LEAST A RESPONSE AS TO WHETHER THIS DEFENDANT ON CROSS-EXAMINATION TESTIFIED THAT JUST BEFORE THE MURDER HE WAS IN THE CAR.

>> YES.

HE TESTIFIED THAT -- THE TESTIMONY HE GAVE IS THAT HE WENT TO THE COMPLEX AND GOT IN THE CAR WHEN THEY WERE IN A PARKING LOT AFTER THE DAUGHTER GOT PICKED UP.

HE SAID MY WIFE DROVE TO A DIFFERENT LOCATION IN THE COMPLEX AND DROPPED ME OFF AT THE WEST END OF SEEDLING CIRCLE. AND THEN SHE AND THE DAUGHTER DROVE AWAY.

AND HE SAID SHE TOLD ME TO WAIT HER AND I WILL BLOW THE HORN OR FLASH THE LIGHTS IF I NEED YOU. SO SHE'S TALKING ABOUT HE SAID HE WAS IN THE CAR.

BUT HE SAID HE GOT OUT OF THE CAR.

I'M SORRY.

>> EXCUSE ME.

YOU SAID BEFORE THAT THERE'S NO TESTIMONY.

SO THERE IS TESTIMONY WITH REGARD TO HIS LOCATION FROM BOTH DIRECT AND CROSS, CORRECT?

IT MAY FAVOR YOU.

THAT'S NOT NECESSARILY AN ADVERSE QUESTION.

>> I THINK THAT I'M CONFUSED

BECAUSE I UNDERSTAND OPPOSING
COUNSEL TO BE SAYING THAT HE
CHANGED HIS VERSION OF EVENTS ON
CROSS, AND I DON'T THINK THAT
WAS TRUE.

SO I DON'T KNOW -- YOU KNOW, THE
THING ABOUT BEING IN THE CAR.

I DON'T UNDERSTAND WHAT SHE'S
TALKING ABOUT.

LET ME JUST SAY ONE THING ABOUT
THE VOLUNTARINESS BECAUSE ON THE
ISSUE OF --

>> I'M SORRY.

BUT YOU'RE THREE MINUTES --

>> I'M SORRY.

OKAY.

>> I DO APPRECIATE IT.

THANK YOU.

>> THANK YOU.

>> THANK YOU FOR YOUR ARGUMENTS.