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Luis Caballero v. State of Florida

MARSHAL: PLEASE RISE. PLEASE BE SEATED.

CHIEF JUSTICE: BEFORE I HEAR THIS CASE BE, -- THIS CASE, AND I APPRECIATE YOU BEING READY WHEN WE COME OUT ON TO THE BENCH. WELCOME TO THE KIDS PARTICIPATING IN THE BROWARD COUNTY COMMUNITY COLLEGE CREATIVE EDUCATION COURSE. WELCOME TO THE FLORIDA SUPREME COURT. THIS IS A LEADERSHIP DEVELOPMENT PROGRAM. THE STUDENTS ARE OBSERVING THE STATE CAPITOL AND GOVERNMENTAL INSTITUTIONS AND LIKE THE FLORIDA SUPREME COURT, AND I UNDERSTAND THE GROUP IS ESCORTED BY MR. NEAL COHEN. WELCOME. AND YOU ARE THE DIRECTOR OF STUDENT DEVELOPMENT? ALL RIGHT. WE COMPLEMENT YOU FOR -- WE COMPLIMENT YOU FOR BRINGING YOUR STUDENTS TO THE FLORIDA SUPREME COURT. WE HAVE FINE ATTORNEYS ARGUING THE NEXT CASE. SO WITHOUT ANY FURTHER ADO, THEN, CAB LETTER-VERSUS STATE. -- CABELLERO VERSUS STATE: YOU MAY PROCEED.

IF THE COURT PLEASE AND GOOD MORNING. UNLESS THE COURT HAS QUESTIONS, I WOULD LIKE TO SKIP OVER SEVERAL OF THE POINTS THAT I HAVE RAISED, SPECIFICALLY THE -RAISED, AND I WOULD LIKE TO FOCUS MY ARGUMENT ON TWO VERY IMPORTANT ISSUES IN THE CASE, FOCUSING ON TWO AREAS, THE APPELLANT OF DUE PROCESS AT THE PENALTY PHASE. SPECIFICALLY UNDER THE CONTROLLING LAW IN URBAN, I WILL CONCEDE THAT THIS, THE FACTS OF THIS CASE ARE VERY BAD. FROM THE DEFENSE PERSPECTIVE, ON THE OTHER HAND, THIS DEFENDANT HIMSELF, THE APPELLANT, IS FAR FROM ONE OF THE LEAST MITIGATED APPELLANTS THAT WOULD APPEAR ON A REVIEW AFTER CAPITAL SENTENCING IN THIS COURT. -- ON A REVIEW OF A CAPITAL SENTENCING IN THIS COURT.

WHAT ARE THE TWO THAT YOU WANT TO ADDRESS THIS MORNING?

ONE WOULD BE THE INABILITY OF THE STATE'S POSITION IN THE TRIAL COURT'S RULING ON THE APPELLANT'S ATTEMPT TO INTRODUCE A CERTIFIED COPY OF THE CODEFENDANT ISAAC BROWN'S CONVICTION OF MURDER IN THE SECOND DEGREE.

SO IT IS PROPORTIONALITY AND FAILURE TO INTRODUCE THE CONVICTION --

EXACTLY.

AND I ASSUME THE SENTENCE THAT WAS RECEIVED WITH THAT.

PRECISELY YOUR HONOR.

ALL RIGHT.

THERE WERE SEVERAL AGGRAVATING FACTORS, BUT WE FEEL THAT THERE WOULD HAVE BEEN, AMONG THE ADDITIONAL MITIGATING FACTORS THAT SHOULD HAVE BEEN CONSIDERED WAS ONE BY THE JURY, THEMSELVES, THE SENTENCING JURY, THE FACT OF THE CERTIFIED CONVICTION, AND ALSO THAT THE COURT MADE FINDING AS WELL, ALTHOUGH THE COURT WAS REQUESTED TO MAKE THAT FINDING, BOTH AT THE, AT PAGE 15-THROUGH--- 1513-THROUGH-1517 OF THE RECORD. THERE WAS THE COLLOQUY WHERE IN THE STATE ASSERTS HERE THAT WE HAVE NOT RESERVED THE ISSUE ABOUT THE SO-CALLED "OPENING THE DOOR" ISSUE, REGARDING THE SECOND-DEGREE MURDER FELONY CONVICTION OF THE CODEFENDANT BROWN.

WHAT ARE YOU ACTUALLY ASKING TO HAVE INTRODUCED, CONCERNING THE CODEFENDANT'S PARTICIPATION?

THANK YOU, JUSTICE QUINCE, FOR SEEKING TO CLARIFY THAT WITH ME. THERE IS A THIRD CODEFENDANT. HIS NAME IS ROBERT MESSER. HE IS REFERRED TO AS, I BELIEVE, ROB, AND BRIEFLY IN THE APPELLANT --

HELPED HIM DISPOSE OF THE BODY?

IT APPEARS ON THIS RECORD, ALL WE KNOW IS THAT HE MAY HAVE BEEN AT A RESTAURANT, THAT HIS FINGERPRINTS WERE SOMEPLACE AND THAT APPELLANT CABALLERO MENTIONED HIM IN HIS STATEMENT. ISAAC BROWN, THOUGH, WAS A CENTRAL FIGURE, ACCORDING TO THE ERROR WHICH FURNISHES MOST OF -- THE RECORD WHICH FURNISHES MOST OF THE AGGRAVATING CIRCUMSTANCES AGAINST APPELLANT IN THAT AGGRAVATING CIRCUMSTANCE. CABALLERO SHIFTED THE WEIGHT TO BROWN, TO INDICATE THAT BROWN CAME UP WITH THE ORIGINAL PLAN TO ROB THE UNFORTUNATE VICTIM, ALTHOUGH IT WAS SUPPOSED TO BE ON HER APARTMENT, WHICH WAS SUPPOSED TO BE ON THE SAME FLOOR AS THE APPELLANT'S, AND THAT HE, THEN, BROWN, ALL OF A SUDDEN, ON THE AFTERNOON OF THE INCIDENT, GRABBED THE VICTIM, DRAGGED HER INTO APPELLANT'S APARTMENT AND BOUND HER UP, AND THEN EVENTUALLY WAS THE MOVING PARTY. HE, BROWN, BEING THE MOVING PARTY.

SO THIS IS WHAT YOU WANTED TO INTRODUCE AT THE PENALTY PHASE.

HIS NOT MESSER'S, BECAUSE AT A SEPARATE JURY BEFORE THIS CASE, THE CODEFENDANT BROWN HAD BEEN CONVICTED OF MURDER, TOO. MESSER, AS IT TURNS OUT, WAS CONVICTED OF EVEN A LESSER CHARGE. IT WAS A SECOND-DEGREE FELONY OF EITHER MANSLAUGHTER OR A THIRD-DEGREE FELONY.

TELL US WHAT HAPPENED PROCEDURALLY.

PROCEDURALLY.

TELL US HOW THE LAWYER BELOW ADVANCED TO THE COURT WHAT IT WAS AND WHEN THIS QURD, THAT WHAT HE WANTED -- THIS OCCURRED, THAT, WHAT HE WANTED TO HAVE ADMITTED, AND THAT THERE WAS A RULING. IN OTHER WORDS, GIVE US THE PROCEDURAL OUTLINE, HERE, OF THE ATTEMPT TO HAVE THIS ADMITTED.

YES, SIR. PAGE 15123-THROUGH-1517 ON THE RECORD, ON THE PENALTY PHASE -- PAGE 1513-THROUGH-1517 ON THE PENALTY PHASE, THE CERTIFIED COPY OF BROWN'S CONVICTION WAS OFFERED IN, AND WHEN HE SAID HE WANTED TO OFFER IT IN, THE STATE SAID, IF YOU DO THAT, JUDGE, TALKING TO THE TRIAL COURT, THAT WOULD OPEN THE DOOR TO EITHER HAVING THE DEFECTIVE -- THE DETECTIVE TESTIFY AS TO WHAT BROWN TOLD HIM ABOUT DETAILS OF BROWN'S VERSION OF HIS CONFESSION, OR TO PLAY THE TAPE RECORDING OF BROWN'S CONFESSION. AND CLEARLY DEFENSE COUNSEL ARGUED, PENALTY PHASE COUNSEL ARGUED THAT THIS WOULD NOT OPEN THE DOOR, INTRODUCING THE CERTIFIED CONVICTION, BUT THE COURT, AT PAGE 1517, CLEARLY SAID, I, AND AGREED WITH, PARTIALLY AGREED WITH PENALTY PHASE COUNSEL AND SAID THAT THIS GOES TO A PROPORTIONALITY AGREEMENT OF PROPORTIONALITY, PARDON ME, ARGUMENT. HOWEVER, I CAUTION YOU --

TRYING TO SHOW THAT EQUALLY CULPABLE CODEFENDANT GOT LESS THAN DEATH.

THAT IS EXACTLY RIGHT.

AND SO, AND THE PORTION OF HIM BEING EQUALLY CULPABLE WOULD BE TAKEN FROM

CABALLERO'S OWN CONFESSION.

IT WOULD HAVE TO BE, YES, BECAUSE THE PRINCIPLE EVIDENCE IN THIS CASE, BEED SIDES THE PHYSICAL -- BESIDES THE PHYSICAL EVIDENCE IS BASICALLY CORROBORATING CABALLERO'S STATEMENT. SO THAT IS ALL YOU HAVE!

WHAT COULD THE STATE DO, THEN, TO ATTEMPT TO DEMONSTRATE THIS WAS NOT AN EQUALLY CULPABLE CODEFENDANT?

UNDER RODRIGUEZ, DONLEDZ SON, I THINK HE WILL AND OTHER CONTROLLING -- DONELSON, INGLES AND OTHER CONTROLLING CASES, THEY COULD HAVE CALLED BROWN AS A WITNESS, I WASN'T AROUND, AND ASKED THEM WHO WAS THE MOVING PARTY IN THIS CASE THAT DELIBERATELY CHOSE NOT TO DO THAT. HE WASN'T GOING TO DO THAT.

FIRST, I AM TRYING TO GET A PICTURE OF WHETHER OR NOT THIS HAS BEEN PRESERVED.

I BELIEVE IT HAD BEEN.

WHAT HAPPENED AFTER THIS DISCUSSION BACK AND FORTH, ABOUT WHETHER THE STATE, THEN, WOULD OFFER THE STATEMENT OF THE POLICE OFFICER ABOUT THE CODEFENDANT STATEMENT? DID YOU SAY, WELL, I DON'T, IN OTHER WORDS, NOT YOU BUT DID THE LAWYER SAY, WELL, I DON'T CARE, YOU KNOW, WHAT ELSE MIGHT END UPCOMING IN. I AM OFFERING THIS IN COURT. YOU HAVE TO RULE ON THIS, AND WAS THERE A RULING THAT IT WAS ADMISSIBLE OR NOT OR WHAT HAPPENED?

THE RULING WAS, AGAIN, I KNOW THE SPECIFIC PAGE. IT WAS AT 1517, AND THE COURT SAID, SAID YOU CAN INTRODUCE THIS IN SUPPORT THE PROPORTIONALITY ARGUMENT. I CAUTION YOU NOT TO DO SO. AND BECAUSE SHE AGREED WITH THE STATE THAT IT WOULD OPEN THE DOOR.

SO DID THE DEFENSE LAWYER, THEN, WITHDRAW IT?

HE DIDN'T WITHDRAW IT. HE OBJECTED, AND THAT, HE JUST OBJECTED AT THAT TIME, AND AT A LATER TIME, IN, I BELIEVE IT WOULD BE IN THE CONTEXT OF THE SPENCER HEARING, I THINK IT IS PAGE, I HAVE THE PAGE HERE. I THINK IT IS 18. 22. YES. IT IS 1822. IN ARGUMENT TO THE COURT SUBSEQUENTLY, PENALTY PHASE COUNSEL, I WOULD QUOTE, "I WOULD ARGUE THAT THE PROPORTIONALITY OF THIS IS NOT FAIR IN REGARDS TO THE DEFENDANT RECEIVING THE DEATH PENALTY, AND IT WOULD BE DISPROPORTIONATE TO SENTENCE THIS MAN TO DIE AND NOT TO SENTENCE HIM TO LIFE IMPRISONMENT." BECAUSE HE TALKED ABOUT THE, I BELIEVE THAT THAT IS WHERE HE, ALSO, ON THE SAME PAGE, MADE REFERENCE TO THE OTHER CODEFENDANT, WHO IS BROWN, WHO WAS ALSO CHARGED WITH FIRST-DEGREE MURDER WHO ALMOST, ON THE SAME EVIDENCE, IF YOU WILL, WAS FOUND GUILTY OF SECOND-DEGREE MURDER.

BROWN WENT TO A JURY DETERMINATION, CORRECT?

YES, HE DID.

AND HE WAS DETERMINED TO HAVE BEEN GUILTY OF SECOND-DEGREE MURDER.

THAT'S CORRECT.

AND THIS VERY SIMILAR SITUATION OF WHAT HAPPENED IN SHEAR, CORRECT?

I RESPECTFULLY AND STRONG DISAGREE, THE CENTERPIECE, ONCE YOU GET PAST PRESERVATION, AND IN THAT REGARD, JUSTICE WELLS, IF I MIGHT, WHEN THE LAWYER IS TOLD BY THE TRIAL COURT, "I CAUTION YOU NOT TO DO SO. I AM GOING TO LET THEM PLAY THE TAPE

OF BROWN'S STATEMENT." IT SEEMS TO ME TO ME THAT THE PRESERVATION ISSUE IS SUFFICIENT. THE COURTS TOLD, MADE, IN OUR VIEW, CLEARLY AN ERRONEOUS RULING, AS I AM ABOUT TO RESPECTFULLY TRY TO EXPLAIN TO JUSTICE WELLS, BUT THE COURT HAS SAID, HUH HUH, I AM GOING WITH THE STATE. I AM GOING TO PLAY THAT TAPE. THEY ARE GOING TO PLAY THAT TAPE.

AND DID HE THEN HAVE TO GO AND INTRODUCE THE EVIDENCE THAT CABELLER-WANTED TO INTRODUCE, AND THEN -- CABALLERO WANTED TO INTRODUCE, AND THEN ONCE IN THE STATE'S CASE, WANTED TO INTRODUCE OTHER EVIDENCE, AND THEN ARGUED THAT THAT IS HEARSAY AND IT IS BEYOND THE SCOPE AND YOU CAN'T INTRODUCE IT, AND THEN IF THE COURT SAID, NEW YORK CITY I SAID BEFORE I WAS GOING TO LET THEM INTRODUCE IT, YOU OPENED THE DOOR, AT THAT POINT YOU WOULD HAVE AN APPEAL ISSUE, BUT YOU NEVER EVEN INTRODUCED THE EVIDENCE YOU SOUGHT TO INTRODUCE THAT WOULD HAVE OPENED THE DOOR.

WELL, MY ANSWER TO THAT IS THAT, AGAIN, I TRIED TO ANSWER IT AS BEST I CAN. I THINK IT IS PRESERVED. IF YOU DON'T DEAL WITH IT ON THE MERITS NOW, WITH ALL DUE RESPECT, IT IS JUST INVITING IT OPPOSE THE CONVICTION RELIEF, AND I THINK IT IS A MERITORIOUS ISSUE, AND OUR ISSUE IS THAT IT SHOULD HAVE BEEN PRESENTED TO THE TRIAL JURY, AND THE TRIAL COURT'S RULING WAS ERRONEOUS. IF I MIGHT, THE REASONS, IN ANSWER TO JUSTICE WELLS'S QUESTION, ABOUT WHY SHEAR, THE DECISION OF THIS COURT LAST SEPTEMBER IS NOT ON POINT FOR THE STATE IS SHEAR VERSUS MOORE IS POSTCONVICTION-RELIEF CASE. I WOULD SPECIFICALLY REFER EVERYONE'S ATTENTION TO ALL OF THE MEMBERS OF THE COURT'S ATTENTION TO CHIEF JUSTICE ANSTEAD'S PARTIAL CONCURRENCE AND PARTIAL DISSENT IN THAT CASE, JOINED IN BY JUSTICE PARIENTE. IT TALKS ABOUT THE SUBSTANTIAL HISTORY HERE, OF THE IMPORTANCE OF CODEFENDANTS NOT BEING SENTENCED TO THE, TO GETTING A LESSER SENTENCE THAN THE APPELLANT IN QUESTION.

BUT DON'T ALL OF THOSE CASES CONCERN CIRCUMSTANCES WHERE THE CODEFENDANT RECEIVED THE CONVICTION OF FIRST-DEGREE MURDER AND THEREFORE WAS ELIGIBLE FOR THE DEATH PENALTY, HOW CAN YOU ARGUE THAT A SENTENCE OF DEATH IS DISPROPORTIONATE TO ANOTHER SENTENCE WHICH, LEGALLY THAT COULD NOT HAVE BEEN IMPOSED?

JUSTICE CANTERO, I WOULD REFER YOU TO, MY INTERPRETATION OF THAT SAME PARTIAL CONCURRENCE AND SAME PARTIAL DISSENT BY CHIEF JUSTICE ANSTEAD, IN SHERER. IT IS NOT THE NATURE OF THE CONVICTION. IT IS THE FACTUAL SETTING OF EACH CASE THAT DETERMINES. IF YOU LOOK AT THE CASES CITED IN OUR BRIEF, APPELLANT'S BRIEF AND IN SHERER, THOSE CASES SAYING THAT YOU CAN'T LOOK AT THE CODEFENDANT SENTENCES DEALS WITH SITUATIONS WHERE THE STATE HAS PLED THE PERSON OUT TO MURDER IN THE SECOND-DEGREE AND TURNED STATE'S EVIDENCE AGAINST THE DEFENDANT. SHERER PRIMARILY RELIES ON ANOTHER POST-CONVICTION RELIEF CASE. STEINHORST VERSUS SINGLETARY, AND IF I JUST MIGHT CONSULT MY NOTES, BECAUSE THIS IS THE CRUCIAL ANSWER TO YOUR IMPORTANT QUESTION.

SPEAK TO WHAT THIS COURT SAID IN SHERER, WHAT THE MAJORITY SAID THAT HAD TO DO WITH A LARGER AREA, AND WE SAID THAT THE STATE FOUND THAT THE ACQUITTAL IN THE DEATH WAS IRRELEVANT TO THIS PROPORTIONALITY REVIEW, BECAUSE AS A MATTER OF LAW HE WAS EXONERATED, AND THEN WE CONTINUED TO SAY THAT IS THE SAME SITUATION, WHERE IT IS FOUND TO BE GUILTY OF SECOND-DEGREE MURDER.

TO WHATEVER EXTENT THAT YOU WOULD INTERPRET SHERER AS SAYING THERE IS A BLANKET PROHIBITION AS DISREGARDING THE CODEFENDANT'S SECOND-DEGREE MURDER CONVICTION IN FRONT OF ANOTHER JURY, AS EVER BEING SOMETHING THAT COULD BE USED BY THE DEATH SENTENCE DEFENDANT IN SUPPORT OF A PROPORTIONALITY ARGUMENT, I AM TELLING YOU THAT IF YOU LOOK CAREFULLY AT THE STEINHORST VERSUS SINGLETARY, IN STEINHORST YOU HAVE A TRIAL COURT WHICH ABUNDANTLY SHOWS, THAT WAS A TRIPLE HOMICIDE THAT HE WAS

CONVICTED OF, FOUR COUNTS OF MURDER, THREE DEATH SENTENCES, AND THE RECORD IS ABUNDANTLY CLEAR, LONG BEFORE IT CAME TO THIS COURT OPPOSE THE CONVICTION RELIEF, THAT HE, STEINHORS. IT WAS MOST CULPABLE. THAT WAS FACTUALLY DISTINGUISHABLE FROM THIS CASE. SHERER RELIES SOLELY ON STEINHORST VERSUS SINGLETARY. THERE MAY BE, I WOULD SUGGEST TO YOU THAT PERHAPS THERE SHOULD BE A CLARIFICATION OF SHERER VERSUS MOORE, BUT IT DOES NOT STAND FOR THAT BLANKET STATEMENT, IN OUR RESPECTFUL VIEW, JUSTICE WELLS, AND HERE IN THIS CASE, THE STATE GETS THE BENEFIT OF SHOWING THIS CASE WAS CLEARLY QUALIFIED FOR HAC I COULDN'T FORM AN ARGUMENT THAT IT WASN'T FOR THE FACTS DIDN'T FIT, TO AVOID LAWFUL ARREST. THE OTHER AGGRAVATORS I ASSERTED WERE NOT AGGRAVATORS IN CCP AND THAT IS WHY I WANT TO RELY ON THE BRIEF THERE, BUT HERE, IN THIS SITUATION, THE STATE GETS THE BENEFIT OF ARGUING, HERE IS THE MAN THAT GAVE YOU THE DETAILS. WE ONLY KNOW SHE WAS STRANGLED. THERE WAS NO LIGATURE MARKS ON HER NECK. THE ME COULD ONLY SAY IT WAS AS -- THE M.E. COULD ONLY SAY IT WAS ASPHYXIA.

LET'S GET TO THE SUBSTANCE OF WHAT YOU SEEM TO BE ASSERTING HERE WOULD SEEM TO BE THAT, EVEN IF WE WERE TO ONLY ASSUME THAT THE SECOND-DEGREE WOULD COME IN, ACCEPTING YOUR THEORY, WHY WOULD THE STATE BE PRECLUDED FROM ENTERING EVIDENCE WITH REGARD TO THE MANNER IN WHICH THAT SECOND-DEGREE CONVICTION WAS OBTAINED? ARE YOU SAYING THAT THE STATE COULD INTRODUCE NOTHING FROM THAT OTHER PROCEEDING, TO DEMONSTRATE WHY IT WAS A SECOND-DEGREE RATHER THAN THE PREMEDITATED FIRST-DEGREE CAPITAL MURDER?

TWOFOLD ANSWER. THE FIRST ANSWER IS THAT THEY CAN'T PLAY BROWN'S STATEMENT, BECAUSE IT IS A DENIAL OF CONFRONTATION, SIXTH AMENDMENT RIGHT OF CONFRONTATION PROVIDES THAT ALL PHASES OF THE CAPITAL TRIAL, INCLUDING PENALTY PHASE, AND THERE ARE CASES HERE THAT CLEARLY SHOW THAT THE STATE CANNOT RELY ON SOME HEARSAY EVIDENCE OF THE PENALTY PHASE BUT NOT THE STATEMENT OF THE NONTESTIFYING CODEFENDANT. THE SECOND REASON IS THAT THE STATE'S THEORY ON THE MERITS IS THAT SOMEHOW THE DEFENDANT OPENED THE DOOR. THE APPELLANT CABALLERO OPENED THE DOOR. NOW, THAT THEORY IS COMPLETELY AND TOTALLY UNSUPPORTED BY THE CASES THEY RELY ON. THEY RELY ON RAMIREZ AND THEY RELY ON McCRAIG.

REGARDLESS ON THE CASES THAT THEY RELY ON, YOU ARE NOT SUGGESTING, ARE YOU, THAT THE DEFENDANT CAN PRESENT A ONE-SIDED VIEW OF WHAT THE UNDERLYING FACTS WERE, WHEN THE STATE HAS TURNED THESE PROCEEDINGS ON THEIR HEAD. THAT IS, IS IT NOT, IF THE STATE COULD PROVE THE MURDER CONVICTION, AND THE PROBLEM WITH SHERER THAT -- WITH SHERER THAT YOU DISCUSSED HERE, BUT IF THE DEFENDANT WANTS TO PUT ON FACTS THAT THE CODEFENDANT WAS REALLY THE BAD GUY, SURELY THE STATE IS ENTITLED TO PUT ON EVIDENCE THAT THE CODEFENDANT WAS NOT THE BAD GUY, THAT THE DEFENDANT WAS THE BAD GUY. ARE YOU SAYING THAT, WHEN THE ATTEMPTS TO MITIGATE HIS PARTICIPATION BY SHOWING A CODEFENDANT WAS THE WORST OR WHATEVER WE WANT TO SAY THERE, THAT THE STATE IS PRECLUDE FROM PRESENTING EVIDENCE THAT THAT IS NOT TRUE? AND THAT THE DEFENDANT WAS THE WORST?

BY NO MEANS.

WELL, DIDN'T YOU JUST --

BUT YOU HAVE TO DO IT IN SUCH AWAY THAT THE DEFENDANT AT THE PENALTY PHASE, CAN CONFRONT THE EVIDENCE AGAINST HIM. EYE UNDERSTOOD YOUR FIRST THING ABOUT THE STATEMENT. YOU KNOW, THAT BEING ONE ISSUE, BUT AFTER THAT, YOU SAID, NO, IN TERMS OF OPENING THE DOOR OR WHATEVER, THAT THE STATE WOULD BE PRECLUDED FROM OFFERING EVIDENCE ABOUT THE CULPABILITY OF THE DEFENDANT, IN TERMS OF WHAT, FOR INSTANCE, THAT OTHER JURY MAY HAVE BEEN TOLD.

THEY WOULD, BUT THEIR WAY OF DOING THAT WOULD BE TO CALL BROWN AS A WITNESS, AND HE HAS ALREADY GIVEN UP THE FIFTH AMENDMENT RIGHT.

YOU CAN SEE THAT THE STATE WOULD BE ENTITLED TO SHOW PROOF TO THE CONTRARY.

OF COURSE BUT THEY WOULD HAVE TO CALL BROWN AS A WITNESS, SO HE COULD BE CROSS-EXAMINED. I AM SORRY IF I DIDN'T MAKE THAT CLEAR. 1,000 APOLOGIES. THAT IS EXACTLY WHAT THEY NEED TO GET OUT, TO HAVE THE OPPORTUNITY TO DO IT.

BUT IN OPENING THE DOOR WITH RELYRANS TO THAT ISSUE -- RELEVANCE TO THAT ISSUE, YOU WOULD AGREE THAT THE STATE WOULD BE ENTITLED TO REBUT THE DEFENDANT'S CLAIM THAT THE CODEFENDANT WAS THE MOST CULPABLE.

ABSOLUTELY.

BUT GETTING BACK TO JUSTICE LEWIS'S QUESTION, WHICH WAS ARE YOU SAYING THAT THE STATE COULD NOT INTRODUCE ANY EVIDENCE FROM BROWN'S TRIAL IN REBUTTING THAT ALLEGATION? YOUR ANSWER IS NO, THEY COULDN'T.

ON THE CONTRARY, THEY HAVE THE SAME PHYSICAL EVIDENCE. THEY HAVE THE EVIDENCE ABOUT THE MANNER OF THE BODIES RECOVERED AND PHYSICAL EVIDENCE IN THE APARTMENT BUILDING, FROM THE VICTIM'S CAR AND THEY ALL HAVE THE SAME PHYSICAL EVIDENCE. ALL I AM SAYING IS THAT THEY DON'T HAVE, IF THEY WANT TO GET OUT BROWN'S VERSION OF IT, UNLESS THE DOOR IS OPENED BY THE DEFENDANT, TO ALLOW THAT OTHERWISE INADMISSIBLE TESTIMONY TO BE ELICITED, THEN THEY HAVE TO CALL BROWN AS A WITNESS, IF THEY WANT TO GET OUT HIS SELF-SERVING VERSION OF IT. IT IS OUR POSITION HERE THAT THE STATE GETS THE BENEFIT OF ALL OF THE NEGATIVE THING THAT IS CABALLERO SAYS IN HIS STATE. AND THEN, AT THE PENALTY PHASE -- IN HIS STATEMENT, AND THEN, AT THE PENALTY PHASE, CABALLERO WANTS TO SAY, LOOK, THAT SAME STATEMENT SAYS THAT THE OTHER FELLOW IS THE MOVING PARTY HERE. HE IS AT LEAST, IF NOT MORE, AT LEAST AS CULPABLE OF ME AND HE GOT CONVICTED OF MURDER IN THE SECOND DEGREE!

IF CERTIFIED MURDER WERE ADMITTED, WOOT STATE BE ABLE TO ARGUE, IN THE PENALTY PHASE, IF FOUND GUILTY, THAT THE STATE WOULD ARGUE THAT THE CODEFENDANT WAS FOUND GUILTY OF SECOND-DEGREE MURDER, IN ORDER TO ARGUE THAT YOUR CLIENT WAS THE MORE CULPABLE?

YES, THEY SHOULD HAVE BEEN ABLE TO ARGUE BUT EVEN MORE INFERENCE FROM THE STATE TO DO. THAT THE PROBLEM WAS THAT THE STATE WAS DENIED THE OPPORTUNITY TO PRESENT THE FACT THAT THE CONVICTION OF MURDER TWO IN THE CASE --

WHY ISN'T IT THE PROBLEM, THOUGH, THAT WHAT HAS HAPPENED, IS THAT THERE HAS BEEN A LEGAL ADJUDICATION THAT HE WAS NOT EQUALLY CULPABLE?

THE DIFFERENCE THERE IS THAT ALL BROWN'S JURY HEARS, THEY DON'T HEAR CABALLERO'S STATEMENT. OBVIOUSLY WE KNOW, ON OUR RECORD HERE, WE KNOW THAT BROWN SHIFTED THE WEIGHT TO CABALLERO, BECAUSE FAR FROM DEFENSE COUNSEL TRYING TO MISLEAD THE JURY, WHICH IS A THEORY OF THE OPENING THE DOOR CASES HERE, PENALTY PHASE, GUILT PHASE COUNSEL, ON CROSS-EXAMINATION OF THE MAIN DETECTIVE, HIS NAME IS BACATA, ASKED HIM IF, DURING THE COURSE OF THERE WAS A NIGHT-LONG SERIES OF INTERROGATIONS OF THESE PEOPLE, AND THE QUESTION WAS ASKED BY DEFENSE COUNSEL ON CROSS, DID YOU CONFRONT BROWN WITH THE FACT THAT CABALLERO INCULPATEED HIM, AND THE DETECTIVE'S ANSWER WAS, YES, AND WHAT HAPPENED THEN, AND HE SAID HIS ANSWER WAS HE SHIFTED, HE BLAMED CABALLERO. DEFENSE COUNSEL WAS NOT CONCEALING ANYTHING.

I WANTED, THERE ARE THREE DIFFERENT ISSUES TO ME. ONE IS PROPORTIONALITY, WHICH THIS COURT DOES. THE SECOND IS WHETHER THE TRIAL COURT CONSIDERS RELATIVE CULPABILITY OF A CODEFENDANT, WHEN THE CODEFENDANT HAS BEEN ALREADY CONVICTED, ADJUDICATED GUILTY JUST OF SECOND-DEGREE NOT FIRST-DEGREE, AND THE FIRST IS WHETHER THE JURY IS ENTITLED TO HEAR ANYTHING ABOUT RELATIVE CULPABILITY. AS TO THIS COURT'S OBLIGATION, AND THIS IS POSITION THAT HAS, COMES UP IN OTHER CASES, DO WE HAVE THE FULL TRANSCRIPT OF THE BROWN TRIAL BEFORE US IN THIS CASE? IN OTHER WORDS HAS THAT BEEN FILED AS PART OF THE RECORD IN THIS CASE?

NO.

SO REALLY, IN TERMS OF ASKING THIS COURT IN TERMS OF PROPORTIONALITY, TO REALLY PERFORM THE IMPOSSIBLE, BECAUSE WE DON'T KNOW TO THIS DAY WHAT WENT INTO THE DETERMINATION AS TO WHETHER OR NOT THE CODEFENDANT WAS LESS CULPABLE, RESULTING IN A SECOND-DEGREE FINDING. WE DON'T HAVE A BASIS EVEN TO MAKE THAT DETERMINATION.

I WOULD RESPECTFULLY DISAGREE THERE, BECAUSE YOU ALREADY HAVE A 8-4 DECISION HERE ON THIS YOUNG MAN, WITHOUT PRIOR CONVICTIONS, WHO, IN HIS TESTIMONY, INDICATED, HIS TESTIMONY, AGAIN, WHICH, FIRST, THE AGGRAVATING FACTORS INDICATE THE CODEFENDANT IS PRIMARILY RESPONSIBLE. THE JURY WAS NOT PERMITTED TO HEAR THAT, BY VIRTUE OF THE COURT'S ERRONEOUS RULING ABOUT THE OPENING OF THE DOOR, AND SO I THINK YOU HAVE AN ISSUE THERE, AND EVEN THOUGH THE COURT KNEW ABOUT THE CONVICTION, THE COURT REFUSED, THERE IS NOTHING IN THE COURT'S SENTENCING ORDER ADDRESSING THE CONCERN RAISED IN THE TRIAL COURT, ABOUT THE RELATIVE CULPABILITY OF BROWN.

WE DO HAVE A JURY DETERMINATION, BASED ON YOUR CLIENT'S CONFESSION, EVEN, THAT THIS MAN REALLY WAS RESPONSIBLE FOR THE MURDER OF THIS PERSON. I MEAN, EVEN IN THE CONFESSION, HE TALKS ABOUT THE FACT THAT HE PUT HIS KNEE IN THIS PERSON'S BACK AND WAS HELPING WITH THE, HOLD THIS PERSON DOWN AS THE CODEFENDANT WAS STRANGLING HER. I JUST HIM HAVING A HARD TIME BUYING YOUR ARGUMENT THAT THIS RELATIVE CULPABILITY ARGUMENT THAT YOU ARE MAKING, BECAUSE THIS JURY HEARD ALL OF THE FAVORABLE EVIDENCE THAT YOUR CLIENT TRIED TO GIVE PUTTING THE BLAME ON SOMEONE ELSE, YET CONVICTED HIM OF FIRST-DEGREE MURDER. WHAT, WHAT ARE WE SUPPOSED TO DO?

THE EVIDENCE IS CLEARLY LEGALLY SUFFICIENT, BUT THE ANSWER WHETHER THIS MAN INCULPATED HIMSELF IS SEPARATE AND APART FROM WHETHER, ON THIS RECORD, THERE WAS NOTHING TO REBUT HIS STATEMENT THAT THE OTHER FELLOW WAS AT LEAST EQUALLY CULPABLE. THAT IS THE EVIDENCE IN THE CASE. THE SAME EVIDENCE THAT WE ARE USING TO CONVICT HIM, IN EFFECT, WE ARE BEING TOLD YOU CAN'T USE THAT TO ARGUE TO THE JURY OR TO THE TRIAL JUDGE THAT THAT IS A --

SO DO THE FACTS SAY YOU COULD, IN FACT, BRING IN THE EVIDENCE THAT YOU WANTED TO BRING IN, BUT HE CAUTIONED YOU THAT IT MIGHT LEAD TO OTHER THINGS. LEAD TO NOT TO DO IT.

THAT IS TRIAL COUNSEL, RIGHT MR. CHIEF JUSTICE

I HAVE TO CAUTION YOU NOW, THAT YOU ARE INTO YOUR REBUTTAL TIME, AND AT LEAST YOU DON'T HAVE TO PAUSE NOW, BUT I WANT TO GIVE YOU TAKE THAT OPPORTUNITY.

NO. I WILL PAWS NOW. DID I ANSWER YOUR QUESTION -- I WILL PAUSE NOW. DID I ANSWER YOUR QUESTION, JUSTICE QUINCE? OKAY. THANK YOU.

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING. MELANIEDALE ON BEHALF THE STATE -- MELANIE DALE ON BEHALF OF 9 STATE.

BEFORE YOU GET -- ON BEHALF OF THE STATE.

BEFORE YOU GET INTO THE STATUS OF THE BROWN RECORD, DID THE STATE SEEK THE DEATH PENALTY FOR THE CODEFENDANT?

YES.

WAS THE CODEFENDANT CONVICTED NOT ONLY OF SECOND-DEGREE MURDER BUT WAS HE CONVICTED OF THE UNDERLYING KIDNAPING OR ROBBERY OR ANY OF THOSE CRIMES?

I AM NOT 100 PERCENT POSITIVE. I WENT LOOKING THROUGH THE COURT FILES, TO TRY AND FIND THOSE FILES OR NOT IN MY OFFICE, HOWEVER I DO KNOW THAT CASE WAS RECENTLY PCAED BY THE FOURTH DCA AS A MURDER CASE.

FOR WHATEVER REASON, IF WE WANTED THE RECORD SUPPLEMENTED WITH THE BROWN TRANSCRIPT THAT, COULD BE DONE, BECAUSE THE APPEAL WAS COMPLETED.

HE TOOK AN APPEAL THAT WAS COMPLETED. HOWEVER, THAT RECORD WAS NEVER INCORPORATED INTO THIS CASE BELOW. PRIMARILY, I WOULD POINT OUT THAT THIS CLAIM IS NOT PRESERVED ON APPEAL. SPECIFICALLY BELOW, APPELLANT RAISED THE ISSUE PRIOR TO THE BEGINNING OF THE PENALTY PHASE, AND THE TRIAL COURT MADE THE FINDING THAT THE DISPROPORTIONALITY ARGUMENT THAT THE DEFENDANT WANTED TO MAKE IN THIS CASE WOULD OPEN THE DOOR TO REFUTE THE CLAIM BY USING BROWN'S STATEMENT. THERE WAS NO EXPLANATION OF HOW IT WOULD BE DONE, BUT THE STATE WOULD BE ABLE TO REFUTE IT. AT PAGE 15 --

DO YOU AGREE THAT THE USE OF HIS TAPED STATEMENT WOULD HAVE BEEN I AM PROPER?

I THINK IT WOULD BE, IT WOULD DEPEND ON THE CIRCUMSTANCES OF HOW THE SECOND-DEGREE MURDER CONVICTION IS PUT IN. I THINK EVERYTHING WOULD HAVE DEPENDED ON HOW THE SECOND-DEGREE MURDER CONVICTION WAS PUT IN. WHAT WAS ARGUED? THE STATE WOULDN'T HAVE KNOWN HOW TO REFUTE IT RIGHT OFF THE BAT, WITHOUT KNOWING HOW TO INTRODUCE IT IN PENALTY PHASE.

THE STATE INTRODUCED THE JUDGMENT OF SENTENCE.

YES, BUT WE DON'T KNOW WHO THROUGH AND HOW AND WHEN. BECAUSE WHAT HAPPENED IS, SPECIFICALLY RIGHT AFTER THE TRIAL COURT FOUND THAT IT WOULD OPEN THE DOOR, DEFENSE COUNSEL AGREED AND STATED THAT HE WOULD WAIT AND SEE WHAT HAPPENED WITH THE ISSUE. THAT IS AT PAGE 1517 EVERY TIME TRANSCRIPT, AND THE ISSUE NEVER CAME UP AGAIN. DEFENSE COUNSEL NEVER ASKED THE CERTIFIED SENTENCE BE PUT INTO THE RECORD, SO THE STATE CLAIMS THIS WASN'T PROPERLY RESERVED FOR THIS COURT TO REVIEW IT.

DID THE TRIAL COURT ERR IN RULING THAT THE EVIDENCE THAT THE DEFENDANT WANTED TO PUT IN WAS ADMISSIBLE IN THE FIRST PLACE, BECAUSE I DON'T UNDERSTAND WHY A SECOND-DEGREE MURDER CONVICTION WOULD BE RELEVANT TO PROPORTIONALITY IN A FIRST-DEGREE MURDER CASE.

THAT IS MY NEXT ARGUMENT. EXACTLY. AS A MATTER OF LAW, THE SECOND-DEGREE CONVICTION IS NOT CONSIDERED THE MITIGATING CIRCUMSTANCE. I WOULD POINT RIGHT AT KITE V STATE, WHICH IS A 2001 CASE, WHERE THIS COURT STATED THAT, WHERE DEFENDANT ARE NOT CONVICTED OF THE SAME OFFENSE, THEIR SENTENCING -- THEIR SENTENCES CANNOT BE DISPARATE. THEN, AS IN THIS CASE, THE DEFENDANT WAS CONVICTED OF SECOND-DEGREE

MURDER, THEN AS A MATTER OF LAW, A RELEVANT CULPABLE CONVICTION COULD NOT BE CONSIDERED AS MITIGATING.

IF THE STATE HAD OFFERED, IF BROWN HAD TESTIFIED IN THIS CASE, THE STATE HAD PUT HIM ON, CERTAINLY THE DEFENDANT WOULD, THE ISSUE AS TO WHAT HIS PUNISHMENT WAS WOULD COME OUT IN CROSS-EXAMINATION.

WHAT BROWN'S PUNISHMENT WAS.

RIGHT.

YES.

AND WHAT IF, IF THERE HAD BEEN NO CONVICTION OF BROWN, I KNOW THAT, AGAIN, COULD YOU HELP ME AS TO WHETHER, UNDER WHAT CIRCUMSTANCES, THE STATE'S POSITION IS THAT THE JURY SHOULD BE ABLE TO ASSESS RELATIVE CULPABILITY OF TWO CODEFENDANTS? UNDER WHAT CIRCUMSTANCE WOULD THE TRIAL COURT SHOULD, AND THEN WHETHER, WHEN WE WOULD LOOK AT EQUAL CULPABILITY DETERMINATION?

OKAY. I THINK IT IS VERY CLEAR FROM THIS COURT'S PRIOR DECISION, THAT A SECOND-DEGREE MURDER CONVICTION IS NOT A RELATIVE CULPABILITY ARGUMENT THAT CAN BE MADE AT THE PENALTY PHASE IN THIS TYPE OF A CASE, BASED ON KITE.

BUT IT DOESN'T PRECLUDE MR. CABALLERO'S ATTORNEY FROM ARGUING THAT MR. BROWN WAS MORE CULPABLE. WASN'T THAT ONE OF HIS, IN OTHER WORDS, AND MAYBE IT GOES BACK TO WHAT JUSTICE CANTERO IS SAYING, THE FACT OF THE SECOND-DEGREE MURDER CONVICTION IS NOT THE ISSUE. THE ISSUE IS HE WASN'T PRECLUDE FROM ARGUING TO THE JURY, WAS HE, THAT MR. BROWN WAS ACTUALLY THE MORE CULPABLE PERSON?

NO. HE WASN'T PRECLUDED FROM MAKING THAT ARGUMENT. HOWEVER, AS A MATTER OF LAW, THE TRIAL JUDGE REALLY DIDN'T EVEN NEED TO ALLOW THAT EVIDENCE BEFORE THE JURY, BASED ON KITE. THE SECOND-DEGREE MURDER CONVICTION WOULD NOT EVEN MAKE IT A RELATIVE CULPABILITY ANALYSIS THAT COULD BE ARGUED TO THE JURY, BECAUSE AS A MATTER OF LAW, A DEFENDANT CONVICTED OF SECOND-DEGREE MURDER CANNOT BE CONSIDEREDIALLY CULPABLE TO A CODEFENDANT CONVICTED OF FIRST-DEGREE MURDER.

CAN YOU TELL US WHETHER OR NOT DEFENSE COUNSEL ARGUED RELATIVE CULPABILITY TO THE JURY?

IT WAS NOT ARGUED IN THIS CASE TO THE JURY.

MS. DALE, CAN YOU ADDRESS TO ME THE ARGUMENT THAT THE CCP RAISES? SPECIFICALLY I HAVE TWO CONCERNS. NUMBER ONE, WHAT IS THE EVIDENCE THAT MR. CABALLERO AND BROWN HAD A LONG VERSUS A SHORT CONVERSATION ABOUT HOW TO KILL THE VICTIM, AND SECONDLY, WHAT IS THE EVIDENCE SEPARATE AND APART FROM EVIDENCE THAT WOULD SUPPORT THE HAC AND AVOIDING ARREST AGGRAVATORS THAT PERTAINED SOLELY TO CCP?

I THINK SPECIFICALLY, IF WE LOOK AT THE FACTS OF THIS CASE, IT IS CLEAR THAT THE KILLING WAS A PRODUCT OF COOL AND CALM REFLECT AND NOT AN ACT PROMPTED BY EMOTIONAL FRENZY, AND THERE WAS A CAREFUL PLAN TO DO WHAT THESE DEFENDANTS DID. THE RECORD REFLECTS THAT CABALLERO CONFESSED THAT THE NIGHT BEFORE THE CRIME, HE AND BROWN TALKED ABOUT ROBBING THIS VICTIM.

DON'T WE NEED TO SEPARATE CALM AND COOL REFLECTION ABOUT ROBBING SOMEBODY FROM CALM AND COOL REFLECTION TO COMMIT MURDER?

THAT IS WHAT HAPPENED THIS DAY, BECAUSE BEFORE AND DURING THE ABDUCTION AND ROBBERY, THE DEFENDANTS TALKED ABOUT HOW THEY WOULD KILL DENISE AND HOW THEY WERE GOING TO DISPOSE OF HER BODY, IN THE HOURS BEFORE SHE WAS MURDERED. WE KNOW THAT DENISE BEGGED FOR HER LIFE AND CABALLERO CONFESSED THAT HE KNEW SHE HAD TO BE KILLED, SO IN THIS CASE IT IS CLEAR THAT THERE WAS CALM AND COOL REFLECTION AS TO HOW AND WHEN DENISE WAS GOING TO BE MURDERED, AND THAT EXHIBITED THE HEIGHTENED PREMEDITATION.

WHAT IS THE EVIDENCE OF THE TIME PERIOD BETWEEN WHEN THEY BEGAN TALKING ABOUT HAVING TO KILL HER AND HOW MUCH TIME ELAPSED AND HOW OFTEN THEY TALKED ABOUT THAT, BETWEEN THAT AND THE TIME THAT SHE WAS ACTUALLY MURDERED?

I THINK WHAT NEEDS TO BE LOOKED AT IS BOTH THE CONFESSIONS THAT CABALLERO GAVE IN THIS CASE. IT IS DISCUSSED THAT HE KNEW DURING THE DAY, WHILE, IT WAS A NUMBER OF HOURS THAT DENISE WAS BOUND AND TIED UP IN HIS APARTMENT, SO I THINK IT WAS DISCUSSED THROUGHOUT THE HOURS. I DON'T THINK THERE IS A SPECIFIC TIME REFERENCE. I KNOW THERE IS SOME REFERENCE TO A FEW MINUTES BEFORE. HOWEVER, WE KNOW THAT MR. CABALLERO WAS IN THE APARTMENT, LEFT THE APARTMENT AND CAME BACK, SO I THINK THAT IT REALLY IS JUST A COMPLETE REVIEW OF THE CONFESSION SHOWS THAT MR. CABALLERO KNEW, DURING THE DAY, BEFORE DENISE WAS MURDERED, THAT, HOW IT WAS GOING TO HAPPEN AND WHEN IT WAS GOING TO HAPPEN AND THEY DISCUSSED HOW IT WAS GOING TO HAPPEN.

WHAT IS THE EVIDENCE THAT THEY SPOKE ABOUT, OTHER THAN THE FEW MINUTES BEFORE THAT THEY SPECIFICALLY SPOKE ABOUT HAVING TO KILL HER?

I THINK IT IS IN THE SECOND CONFESSION AT THE BEGINNING OF THE CONFESSION. CABALLERO SAYS THAT HE AND MR. BROWN DISCUSSED THE CRIME AND HOW IT WOULD BE DONE. IT IS NOT SPECIFIC AS TO THE MURDER, ITSELF. HOWEVER, I THINK IN LOOKING AT THE CONFESSION AS A WHOLE, IT IS CLEAR THAT THE DEFENDANT IN THIS CASE AND THE CODEFENDANT DISCUSSED THE CRIME THROUGHOUT THE DAY. I MEAN, IT WAS A NUMBER OF HOURS, AND TO SAY THAT WE BOUND HER, KEPT HER IN THE APARTMENT, AND STOLE ALL OF HER, ROBBED HER WITH HER ATM CARDS AND CREDIT CARDS AND THEN CAME BACK, I THINK THAT THE DEAF SAID A FEW MINUTES, BUT I THINK -- THAT THE DEFENDANT SAID A FEW MINUTES, BUT I THINK THAT THE CRIME ITSELF PROVES HOW LONG IT TOOK FROM THE TIME THAT THEY ABDUCTED HER TO THE TIME THAT THE CRIME TOOK TO COMMIT.

HOW LONG DID IT TAKE?

ABSOLUTELY DISCUSSING THE AVOID ARREST AND THE DEFENDANT SPOKE OF THE MOTIVATION, THE DEFENDANT LIVED ACROSS THE HALL FROM HER. SHE HAD SEEN THE DEFENDANT ON A NUMBER OF OCCASIONS. IT WAS FOCUSED ON THE FACT THAT CABALLERO KNEW HER AND IT WAS OBVIOUS FROM THE CRIME THAT SHE KNEW THE DEFENDANTS, SO I THINK THAT IS CLEARLY DIFFERENT, AND WITH RESPECT TO THE HEINOUS, ATROCIOUS AND CRUEL, A REVIEW OF THE SENTENCING ORDER IS CLEAR THAT THE TRIAL JUDGE FOCUSED ON THE FEAR ANDTER AND THETER OTHER -- AND THE TERROR THAT DENISE MUST HAVE SUFFERED AND THE NATURE OF THE CRIME WHICH WAS COMMITTED. AND SPECIFICALLY, JUDGE, GOING BACK TO THE RELATIVE CULPABILITY, I WOULD STRESS THAT THIS COURT HAS MADE FINDINGS THAT, IN CASES WHERE A CODEFENDANT IS CONVICTED OF SECOND-DEGREE MURDER, THE RELATIVE CULPABILITY IS NOT AN ISSUE THAT CAN BE RAISED AND ADDRESSED. THE JURY HAS MADE A FINDING IN ISAAC BROWN'S CASE THAT HE IS GUILTY OF SECOND-DEGREE MURDER. THEREFORE HIS LIFE SENTENCE OR THE SENTENCE THAT HE WAS GIVEN IS NOT, CANNOT BE ANALYZED AS PROPORTIONAL OR DESPERATE FROM MR. CABALLERO -- OR DISPARATE FROM MR. CABALLERO'S SENTENCE.

IN TERMS OF WE ARE LOOKING AT, EVEN THE CONFESSION OF MR. CABALLERO AS TO WHAT HE

DID VERSUS MR. BROWN, IT WOULD LOOK LIKE IT IS HIS APARTMENT. HE KNEW THE VICTIM, HE IS THE ONE THAT WENT OUT AND USED THE ATM CARD, ACTUALLY WENT OUT WITH THE VEHICLE AND CALLED. HE ADMITS TO HAVING, I GUESS, SEXUAL BATTERY WASN'T, BUT IT WAS HIS DNA IN THE VICTIM.

YES.

AND WERE THERE ANY OTHER, IN OTHER WORDS, AS FAR AS, I MEAN IT WOULD APPEAR TO ME JUST ON HIS OWN CONFESSION, THAT HE IS THE MORE CULPABLE DEFENDANT, EVEN IF MR. BROWN HAD GOTTEN A FIRST-DEGREE MURDER CONVICTION, WHICH WAS FOUND, LIKE, ON THIS EVIDENCE -- WHICH IT WOULD SOUND LIKE, ON THIS EVIDENCE HE SHOULD HAVE GOTTEN.

THAT MAY BE THE CASE BUT WE DON'T KNOW WHAT THE EVIDENCE IN MR. BROWN'S CASE WAS.

BUT JUST IN THIS CASE DIDN'T IT SHOW THAT MR. CABALLERO IS MORE CULPABLE DEFENDANT?

I THINK THAT IS VERY CLEAR, BASED ON ALL OF THE EVIDENCE IN THIS CASE. WE KNOW THAT THE VICTIM WAS MR. CABALLERO'S NEIGHBOR. WE KNOW HE KNEW HER. WE KNOW HE IS THE ONE THAT TOOK THE ATM AND CREDIT CARDS. IS HE THE DEFENDANT THAT WENT INTO DENISE'S APARTMENT. HE IS THE DEFENDANT THAT USED DENISE'S CAR, AND HE IS THE DEFENDANT WHO CAME BACK WITH ALL OF THE PROCEEDS FROM THE ROBBERY PORTION. SO I THINK IT IS VERY CLEAR FROM THIS RECORD THAT, MR. CABALLERO IS THE MORE CULPABLE DEFENDANT, FROM HIS OWN CONFESSION.

MAY I ASK A QUESTION. BY LAW, WE HAD TWO SEPARATE JURIES, BUT WASN'T THE SAME JUDGE OR SEPARATE JUDGES? -- WAS IT THE SAME JUDGE OR SEPARATE JUDGES?

I AM NOT 1 ON 0 PERCENT SURE. -- I AM NOT 100 PERCENT SURE. I BELOW JUDGE LEBOW HEARD BOTH CASES.

YOU CAN'T TELL FROM THE RECORD.

I BELIEVE THAT IS HOW IT IS DONE IN BROWARD, BUT I TRIED TO CHECK THE RECORD LAST NIGHT AND DIDN'T HAVE ACCESS TO ISAAC BROWN'S TRIAL TRANSCRIPT.

BUT WHAT HAPPENED, DO I UNDERSTAND IT CORRECTLY THAT THE CODEFENDANT WAS PROSECUTED FOR FIRST-DEGREE AND THE STATE SOUGHT THE DEATH PENALTY IN THAT CASE, TOO?

YES.

WHAT WOULD HAPPEN IN A CASE LIKE THIS IF, AFTER BEING CONVICTED OF SECOND-DEGREE MURDER, THE CODEFENDANT, NOW, WANTED TO TESTIFY IN THE DEFENDANT'S TRIAL THAT INDEED THE DEFENDANT WAS RIGHT, THAT IT WAS THE CODEFENDANT THAT WAS THE PRIMARY AND THE MORE CULPABLE PERSON, AND HE WANTED TO TESTIFY ON BEHALF OF THE, WOULD HIS TESTIMONY NOW BE PRECLUDED BECAUSE OF THE CONVICTION OF SECOND-DEGREE?

I THINK IT WOULD. I THINK, BASED ON THE CASE LAW THAT THIS COURT HAS COME OUT WITH, THAT THE SECOND-DEGREE MURDER CONVICTION TAKES THAT KIND OF TESTIMONY OUT OF THE RELATIVE CULPABILITY RANGE. I THINK THIS COURT DOES ITS PROPORTIONALITY REVIEW, BUT WITH RESPECT TO RELATIVE CULPABILITY AS A MATTER OF LAW, A DEFENDANT WHO IS CONVICTED OF SECOND-DEGREE MURDER BY A JURY CANNOT BE CONSIDERED EQUALLY CULPABILITY TO A -- CULPABLE TO A DEFENDANT CONVICTED OF FIRST-DEGREE MURDER.

CHIEF JUSTICE: THANK YOU.

IF THERE ARE NO FURTHER QUESTIONS, I WOULD REST ON MY BRIEF AND ASK THAT THIS COURT AFFIRM THE CONVICTION AND SENTENCE. THANK YOU.

CHIEF JUSTICE: HOW MUCH DOES HE HAVE? FOUR MINUTES. COUNSEL.

I DON'T BELIEVE THAT, IN THAT SITUATION THAT YOU POSITED TO JUSTICE ANSTEAD, THAT THE CODEFENDANT WOULD BE SO PRECLUDE. THAT WOULD BE A JURY ISSUE AS TO WHO TO BELIEVE.

DOESN'T OUR RULING IN SHERER, THOUGH, AND THE HEITT CASE THAT, IT PRECLUES THAT, ONCE, AS A MATTER OF LAW, ONCE THE CODEFENDANT HAS BEEN FOUND TO BE GUILTY OF A LESSER OFFENSE, LIKE SECOND-DEGREE, THAT IT MAKES HIS INVOLVEMENT IN THE CRIME IRRELEVANT AS A MARTYR OF LAW?

THE ONLY WAY I CAN ANSWER THAT IS THAT, IF THAT IS THE INTERPRETATION THAT THIS COURT WOULD BE DRAWING FROM SHERER, THEN I THINK SHERER SHOULD BE CLARIFIED. ALL POST-CONVICTION RELIEF CASES, HEIT. IT IS POSTCONVICTION-RELIEF CASE AND THE OTHER CASE ABOUT THE QUADRUPLE HOMICIDE, THEY ARE ALL POST-CONVICTION RELIEF CASES. WE ARE TALKING ABOUT A JURY RELIEF ISSUE.

WHAT DIFFERENCE DOES THAT MAKE, THAT THEY ARE POST-CONVICTION RELIEF CASES? THEY PRETTY MUCH LAY OUT A RULE OF LAW HERE. WHY SHOULD IT MAKE A DIFFERENCE, IF IT IS IN POSTCONVICTION RATHER THAN DIRECT APPEAL?

BECAUSE IN OUR CASE HERE, AND, AGAIN, I WOULD RESPOND TO A QUESTION THAT JUSTICE PARIENTE ASKED BEFORE. I THINK THE EVIDENCE IS THAT BROWN, ON THIS CASE, YOU HAVE GOT TO GO WITH THE DEFENDANT'S CONFESSION. THAT IS WHAT THE STATE USED FOR THE AGGRAVATING FACTOR. HE SAID THAT BROWN WAS THE MORE CULPABLE ONE THAT PLANNED THE WHOLE THING THAT STARTED THE MURDER AND GRABBED HER OUT IN THE HALL, WHEN IT SHOULD HAVE BEEN A ROBBERY IN HER APARTMENT.

I AM STILL NOT SURE WHY IT MAKES A DIFFERENCE, EVEN IN POSTCONVICTION. STILL, IN POSTCONVICTION, AS IN THIS CASE, WE DON'T HAVE ACCESS TO MR. BROWN'S RECORD, AND EVEN IN POSTCONVICTION WE MAY NOT HAVE ACCESS TO BROWN'S RECORD, SO WHAT DIFFERENCE DOES IT MAKE IF A RULING IS MADE IN A POSTCONVICTION CONTEST VERSUS A DIRECT APPEAL? BECAUSE IN EVERY ONE OF THOSE --

BECAUSE IN EVERY ONE OF THOSE POSTCONVICTION CASES, YOU HAVE CONVICTION AND APPEAL THAT THE APPELLANT WAS THE CULPABLE PERSON, AND WE DON'T HAVE THAT HERE. NOWHERE IN THE TRIAL RECORD DID THE COURT MAKE ANY SUCH FINDING THAT CABALLERO WAS MORE CUP ABLE THAN BROWN. -- WAS MORE CULPABLE THAN BROWN. IT WAS NOT FOUND IN ANY PLACE. NOT TOUCHED UPON AT ALL. I THINK THAT DEFINITELY HE WAS AT LEAST AS CULPABLE AS BROWN, AND I WOULD SAY IN ANSWER TO A SITUATION THAT JUSTICE CANTERO RAISED ON THE CCP ARGUMENT, AS A MATTER OF FACT, THE ONLY SEPARATE EVIDENCE THAT DID NOT, ON THE CCP FINDING THAT DID NOT DUPLICATE THE HAC AND THE AVOIDANCE OF ARREST AGGRAVATORS, ONLY SUCH EVIDENCE WAS THE UNFOUNDED ASSERTION IN THE SENTENCING ORDER THAT, ABOUT THE LENGTHY DISCUSSION. THE ANSWER TO YOUR HONOR'S QUESTION ABOUT HOW LONG THE DISCUSSION WAS, THERE IS ZERO EVIDENCE OF A LENGTHY DISCUSSION. THAT IS ABSOLUTELY NOT THERE. IT IS NOT SUPPORTED. THE WOMAN WAS CLEARLY BOUND FOR A WHILE. BROWN IS THE ONE WHO GRABBED HER, ACCORDING TO CABALLERO, DRAGGED HER INTO CABALLERO'S APARTMENT AND BOUND HER UP AND STAYED WITH HER AND REBOUND HER WHILE, THAT IS WHAT CABALLERO SAYS HE DISCOVERED WHEN HE CAME BACK FROM GOING TO THE ATM MACHINE.

WASN'T THERE SOME TESTIMONY THAT THEY WERE AT ONE POINT IN THE BEDROOM AND THEN

LEFT THERE AND WENT INTO THE KITCHEN, TO DISCUSS HOW THIS MURDER WAS GOING TO TAKE PLACE?

THERE WAS THAT EVIDENCE BUT THERE WAS NO, ZERO EVIDENCE THAT IT WAS A LENGTHY DISCUSSION. AS TO THE SPECIFIC CONTEXT --

HOW LONG DOES IT HAVE TO BE?

THE POINT IS THAT THIS CCP FINDING WAS BASED UPON A LENGTHY DISCUSSION OVER THE COURSE OF THE EVENING, AND THERE IS NO SUCH EVIDENCE. THE CONVERSATION, AS I UNDERSTAND IT FROM CABALLERO'S STATEMENT, WAS BROWN SAYS YOU KILL HIM. CABALLERO SAYS, NEW YORK CITY YOU KILL HIM, AND THEN BROWN SAYS, WELL, I WILL TAKE MORE OF THE MONEY, SO IF I GET MORE OF THE MONEY, I WILL KILL HER. THAT IS ALL THAT IS IN THE RECORD THERE. IS NOTHING ABOUT ANY TIME IN THERE. IT IS UNSEEMLY TESTIMONY, NOTHING THAT GLORIFIES THE IMAGE SPIRIT, BUT IT IS BRIEF. THERE IS NO EVIDENCE OF LENGTHY CONVERSATION, AND THAT WAS SPECIFICALLY RELIED UPON BY THE TRIAL COURT, WHO WAS THE JUDGE IN THE PRIOR CASE AS WELL, BROWN'S CASE, AND MESSER'S AS WELL, THE OTHER CODEFENDANT. THERE IS NO SUCH EVIDENCE, NO SUCH FINDING. IT IS NOT SUPPORTED ON THIS RECORD, AND ON THIS RECORD, THOUGH, OUR POSITION IS, THOUGH, THAT BROWN WAS AT LEAST AS CULPABLE, AND I RESPECTFULLY SUBMIT THAT A RECORD REVIEW WILL SHOW THAT.

CHIEF JUSTICE: THANK YOU BOTH VERY MUCH. THE COURT WILL STAND IN RECESS UNTIL WEDNESDAY MORNING AT NINE O'CLOCK.

MARSHAL: PLEASE RISE.