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## **Bobby Raleigh v. State of Florida**

CHIEF JUSTICE: BEFORE WE BEGIN, I THINK YOU ARE ALL AWARE THAT THE SUBSTITUTE AUTHORITY ISN'T TO BE SUBSTITUTED FOR A BRIEF, SO THE COURT WILL GRANT THE MOTION TO STRIKE THE SUPPLEMENTAL AUTHORITY.

I RECEIVED THAT BY FAX ON MY WAY TO THE AIRPORT.

CHIEF JUSTICE: LET'S DO IT THIS WAY, LET'S NOT ADDRESS ANY CASES THAT ARE LISTED IN SUPPLEMENTAL AUTHORITY.

I WILL NOT BE {REFERK} TO IT, THAT ISSUE OR ON THAT. I WOULD LIKE TO PREREMIND THE COURT THAT BRIEFING HAS BEEN PLEADED FOR ALMOST A YEAR AND-A-HALF AND SINCE THEN THERE HAS BEEN A LOT OF MAJOR DECISIONS, PARTICULARLY OUT OF THE U.S. SUPREME COURT.

CHIEF JUSTICE: WE WOULD HOPE THAT THAT WOULD HAVE BEEN A SUPPLEMENTAL REQUEST FOR A SUPPLEMENTAL BRIEFING OR CERTAINLY TO FILE A SUPPLEMENTAL BRIEF, AND CERTAINLY MR. NUNNELLEY WAS CONCERNED WITH THOSE CASES FILED AFTER YOUR BRIEF WAS FILED, BUT HE POINTED OUT WHAT MANY OF THEM WERE, PRIOR TO THAT TIME, AND, OF COURSE, WE ARE FAMILIAR WITH THE CASES IN THE BRIEF. IF ANY CASES OCCURRED AFTER THE DATE OF YOUR BRIEF, YOU CAN CERTAINLY REFER TO THEM.

THANK YOU. AS YOU KNOW, IT IS A 3.850 APPEAL AND SIMULTANEOUS HABEAS PROCEEDING AND I WANT TO START OUT WITH MY MOST IMPORTANT TODAY, REFERRING TO ARGUMENT 3 OF THE INITIAL BRIEF, RELATING TO THE ISSUE OF PROSECUTORIAL MISCONDUCT AND THE STATE'S PRESENTATION OF FALSE EVIDENCE. NOW, THERE IS SOMETHING THAT THE ATTORNEYS AND THE TRIAL COURT, ITSELF, MISSED IN THIS CASE, THAT BEING, WHAT I AM REFERRING TO EXACTLY IS THAT THE STATE ARGUED IN THE CODEFENDANT'S TRIAL THAT THE CODEFENDANT KILLED ONE OF THE VICTIMS. NOW, IN OUR CASE, THE STATE ARGUED THAT THE DEFENDANT KILLED BOTH OF THE VICTIMS. NOW, THE TRIAL COURT RULED THAT THIS WAS OKAY, BECAUSE THIS WAS INCONSISTENT ARGUMENT, AS OPPOSED TO BEING INCONSISTENT PRECEDENCE, WHICH IS NOT OKAY. NOW --

IS THAT A GIGLIO CLAIM OR IS IT SOMETHING ELSE? BECAUSE IT IS NOT FALSE EVIDENCE. IT, REALLY, THE STATE TAKING INCONSISTENT POSITIONS, MORE THAN A GIGLIO CLAIM.

IT IS FALSE EVIDENCE IN THE SENSE THAT BRADY --

I DON'T THINK IT SEEMS TO BE BRADY, EITHER. IT IS JUST WHETHER THE STATE CAN TAKE INCONSISTENT POSITIONS ON WHO ACTUALLY COMMITTED THE MURDER.

CORRECT.

AND THAT SEEMS TO BE AN ISSUE THAT YOU RESOLVE ON DIRECT APPEAL.

WELL, ACTUALLY ABOUT TO GET INTO THAT, BUT THEY WOULD -- THEY WITHHELD THAT EVIDENCE.

WHAT EVIDENCE ARE YOU TALKING ABOUT THEY WITHHELD?

IN THE CODEFENDANT'S TRIAL, THE CODEFENDANT MADE A STATEMENT TO HIS UNCLE JOSE, THAT THE CODEFENDANT MAY HAVE KILLED ONE OF THE VICTIMS. IN OUR CASE, THEY DID NOT INTRODUCE THAT STATEMENT INTO EVIDENCE.

WHEN WAS THAT STATEMENT ACTUALLY RECEIVED BY THE STATE? DO WE HAVE ANYTHING IN THE RECORD THAT INDICATES WHEN THAT INFORMATION WAS AVAILABLE? MR. RALEIGH'S TRIAL WAS BEFORE THE CODEFENDANT'S TRIAL, CORRECT?

I GUESS.

CHIEF JUSTICE: THAT IS PRETTY IMPORTANT, THE TIMING.

I KNOW THAT IT WASN'T DISCOVERED BY US UNTIL THE PENALTY PHASE WAS OVER.

CHIEF JUSTICE: WHAT?

UNTIL THE PENALTY PHASE WAS OVER.

IT WAS EVER PRODUCED?

CORRECT.

THE PENALTY PHASE IN MR. REILLY'S CASE?

YES. THAT IS ACCURATE.

CHIEF JUSTICE: THE ARGUMENT WOULD BE, IS THAT STATEMENT AT ODDS WITH WHAT WAS INTRODUCED IN THE PENALTY PHASE?

YES. EXACTLY.

HOW DID DISCOVERY, AND IT STILL DOESN'T TELL US WHEN THE STATEMENT CAME INTO THE POSSESSION OF THE STATE.

I AM NOT QUITE SURE IF IT IS A BRADY CLAIM. I AM NOT SURE IF WE HAD THAT EVIDENCE OR NOT.

HAVE YOU EVEN MADE A BRADY CLAIM AS TO THIS ISSUE?

I BELIEVE IT IS PHRASED IN THE BRIEFS AS A BRADY AND GIGLIO CLAIM.

HOW WAS IT PRESENTED IN THE TRIAL COURT, IN THE POSTCONVICTION PROCEEDINGS? IN OTHER WORDS, I THINK YOU NEED TO HELP US, BECAUSE WE ASSUME THAT YOU ARE MUCH MORE FAMILIAR WITH THE RECORD IN THIS CASE, AS THE DEFENDANT'S LAWYER ASSERTING THIS CAME, THAN WE ARE, SO HELP US WITH, IF I UNDERSTAND WHAT YOU ARE CLAIMING IS THAT THE STATE HAD KNOWLEDGE OF THE STATEMENT THAT THE CODEFENDANT HAD GIVEN AN UNCLE, OKAY, WHICH STATES THAT THE CODEFENDANT HAD A MUCH LARGER ROLE IN AT LEAST ONE OF THE TWO KILLINGS THAT ARE INVOLVED HERE, AND THAT NOTWITHSTANDING THAT THE STATE HAD KNOWLEDGE OF THAT STATEMENT MADE TO THE UNCLE THAT WOULD BE HELPFUL TO YOUR CLIENT, THAT THE STATE WITHHELD THAT STATEMENT AND DID NOT DISCLOSE IT TO YOUR CLIENT, IS THAT, IS HA WHAT YOUR CLAIM IS?

WELL, OUR CLAIM, IT LOOKS LIKE THE PRIMARY BASIS IS A GIGLIO CLAIM, SO I AM NOT EXACTLY SURE HOW THAT CAME B I THOUGHT BRADY WAS, ALSO, MENTIONED IN THE INITIAL --

I AM HAVING DIFFICULTY WITH YOUR TELLING ME THE WAY, YOU ARE REPRESENTING THE

DEFENDANT HERE.

CORRECT.

SO YOU ARE THE DEFENDANT, AS FAR AS WE ARE CONCERNED. OKAY. SO TELL US WHAT YOUR CLAIM IS!

THAT THEY ARGUED INCONSISTENT EVIDENCE. THEY ARGUED TWO SIDES OF THE SAME COIN. IN THE CODEFENDANT'S CASE, THEY WANTED TO GET HIM, SO THEY ARGUED THAT HE KILLED ONE OF THE PEOPLE. IN OUR CASE, THEY ARGUED THAT THE DEFENDANT KILLED -- CHIEF JUSTICE

WE HAVE HAD SEVERAL CASES INVOLVING THESE KINDS OF ISSUES. THERE WERE THE MURDERS THAT WERE DOWN IN MARTIN COUNTY, WHERE THERE WERE THREE OR FOUR DEFENDANTS, AND THERE WERE QUESTIONS AS TO WHETHER THEY WERE KEPT ON, TRYING TO PUT THE CULPABILITY ON EACH OF THE DEFENDANTS. I DON'T THINK WE HAVE EVER, AGAIN, AS LONG AS THERE ARE THEY ARE MAKING ARGUMENTS THAT SAY THIS GUY MAY BE TO BE BLAME AS WELL AS THIS PERSON, BUT AS LONG AS THEY HAVEN'T WITHHELD EVIDENCE, THEN DO YOU HAVE ANY CASE AUTHORITY THAT WOULD SAY THAT RELIEF WOULD BE GRANTED? CERTAINLY IT WOULDN'T BE UNDER GIGLIO, BECAUSE GIGLIO ONLY APPLIES TO THE EVIDENCE, KNOWING TESTIMONY NOT ARGUMENT.

OKAY. I DO. AND THIS IS THE MAIN POINT I WANTED TO BRING UP, THAT EVERYONE HAS MISSED. NOW, THE TRIAL COURT CITED THIS COURT'S DECISION IN STATE V PARKER, A 1988 DECISION, WHICH SAID THAT, WHICH THE TRIAL COURT PURPORTED, BELIEVED THAT THE CASE SAID THAT INCONSISTENT ARGUMENT WAS OKAY BUT INCONSISTENT EVIDENCE WAS NOT. THAT IS WHAT THE TRIAL COURT CITED PARKER FOR. PARKER IS T DOES NOT STAND FOR THAT PROPOSITION. IT DOES NOT HOLD. THAT PARKER, A CAREFUL READING OF PARKER REVEALED THAT THIS COURT WAS JUST RELYING THE PROCEDURAL HISTORY OF -- RELAYING THE PROCEDURAL HISTORY OF THE CASE. THIS COURT WAS SIMPLY REGURGITATING THE ELEVENTH CIRCUIT'S HOLDING IN THE UNDERLYING CASE.

LET'S SAY WE DON'T HAVE PARKER. FORGET PARKER FOR A SECOND. WHAT CASE HOLDS THE CONVERSE THAT THE STATE IS ARGUING INCONSISTENT POSITIONS, CONSTITUTE A GIGLIO CLAIM?

STATE V GATES OUT OF THE SECOND DCA, 2002. SO BASICALLY, THE TRIAL COURT IMPROPERLY FILED AN APPEAL, BASED ON GATES. GATES IS DIRECTLY ON POINT.

BEFORE WE GET TO THAT, BECAUSE THE TRIAL JUDGE IN THE TRIAL JUDGE'S ORDER, DEALT WITH GATES, AND WHAT IT HELD WAS THE SUBSEQUENT PARKER ANALYSIS, BUT, WE, SO FOR PURPOSES OF WHAT WE ARE TALKING ABOUT, YOU DID NOT QUARREL WITH THE COURT'S STATEMENT IN ITS ORDER, THAT WHAT WE ARE DEALING WITH IS NOT INCONSISTENT EVIDENCE. WHAT WE ARE DEALING WITH IS ONLY INCONSISTENT ARGUMENT. IS THAT RIGHT?

I DO QUARREL. AND --

WELL, THEN, GO BACK, WHERE IS THE TRIAL JUDGE WRONG, WHEN THE TRIAL JUDGE STATES THAT DEFENDANT ONLY CITES TO NUMEROUS STATEMENTS WITHIN THE CLOSING ARGUMENT OF THE ATTORNEY. HOWEVER, SUCH STATEMENTS DO NOT AMOUNT TO FALSE EVIDENCE. NOW, SPECIFICALLY, WHERE IN THE RECORD, WAS IT ARGUED TO THIS TRIAL JUDGE, THAT THERE WAS FALSE EVIDENCE AS OPPOSED TO FALSE STATEMENTS? SPECIFICALLY.

IT IS ARGUED IN OUR TRIAL THAT THE STATE MAY HAVE NOT INTRODUCED THE CODEFENDANT'S UNCLE STATEMENT THAT THE CODEFENDANT KILLED ONE OF THE VICTIMS. INSTEAD, THE STATE ARGUED THAT THE DEFENDANT KILLED BOTH.

CHIEF JUSTICE: THAT MAY BE TRUE IF YOU WERE ARGUING A FALSE CLAIM OR BRADY CLAIM, WITH REGARD TO THE STATEMENT. THAT IS THAT WE GET BACK TO THIS ISSUE THAT THE STRONGER CASE, AND, IS, WOULD BE, YOU KNOW, WE ONLY HAD THE CODEFENDANT'S STATEMENT, AND WE HAD TO RELY ON THAT IN THE PENALTY PHASE. IF WE HAD, PUTTING THAT OUT TO THE JURY, THAT WOULD BE THE FIRST INSULT, AND THEN TO ADD INSULT TO INJURY, THEY ACTUALLY HELD THE UNCLE'S STATEMENT FROM US AND NOW THAT PUTS CULPABILITY UPON CULPABILITY, AND THAT WOULD AND SUBSTANTIAL POSSIBILITY OF AT LEAST MAKING A CLAIM, BUT THAT DOESN'T SEEM TO BE THE RECORD HERE. REALIZING YOU ARE AT A DISADVANTAGE, SINCE YOU CAME IN ONLY AFTER A THE BRIEFS WERE FILED. SO THAT IS WHERE, IF THEY DON'T DO ANYTHING WRONG, WE HAVE GOT TO ASSUME THEY DIDN'T DO ANYTHING WRONG WITH REGARDS TO THE UNCLE'S STATEMENT, OR THAT CLAIM WOULD HAVE BEEN MADE.

WELL, LET'S JUST ASSUME THAT EVERYTHING WAS IN FULL VIEW OF EVERYONE, WHICH I AM NOT TOTALLY SURE IF THAT IS THE CASE. THEY, STILL, CANNOT TAKE CONTRADICTORY POSITIONS ON THE SAME EVIDENCE. IT IS STILL UNPERMISSIBLE.

BUT IT REALLY ISN'T THE SAME EVIDENCE. THAT IS THE PROBLEM, FROM, REALLY, HERE, IS THAT WE HAVE ONE STATEMENT THAT THE CODEFENDANT MADE, THAT WAS USED IN MR. REILLY'S TRIAL. THEN WE HAVE TWO STATEMENTS OR A DIFFERENT STATEMENT, THAT THE CODEFENDANT MADE, THAT WAS USED IN HIS TRIAL. SO, REALLY, WE DON'T HAVE THE SAME EVIDENCE THAT WAS PRESENTED, AND SO THE ARGUMENT BY THE STATE WAS DIFFERENT, BASED ON THE ACTUAL EVIDENCE THAT WAS PRESENTED IN EACH TRIAL.

BECAUSE THEY CHOSE WHICH EVIDENCE TO PRESENT, TO MAKE THEIR ARGUMENT BETTER.

BUT YOU HAVE TO DEMONSTRATE IT TO US THAT THEY CHOSE WHICH EVIDENCE TO PRESENT, BECAUSE YOU HAVEN'T TOLD US WHEN THE STATE GOT THIS OTHER INFORMATION, WAS IT AVAILABLE FOR MR. REILLY'S TRIAL, THEY DIDN'T USE IT IN MR. REILLY'S TRIAL ON PURPOSE, AND THEN USED IT IN THIS, IN THE CODEFENDANT'S TRIAL, TO DEMONSTRATE A DIFFERENT POSITION.

I, JUDGE, I JUST DON'T REMEMBER THAT, AS I STAND HERE. I KNOW THAT INFORMATION IS IN THE BRIEF. CHIEF JUSTICE

BUT THAT IS SO IMPORTANT FOR THIS ARGUMENT. I MEAN, THIS HAS BEEN A YEAR AND-A-HALF THAT WE WAITED TO SET THIS CASE FOR ORAL ARGUMENT, AT YOUR REQUEST, AND NOW YOU ARE TELLING YOU SAY YOU DON'T KNOW WHAT IS IN THE BRIEF?

WELL, NO, MY IMPRESSION IS, NO, I DO KNOW WHAT IS IN THE BRIEF. I KNOW THAT, THE INFORMATION DID NOT BECOME AVAILABLE TO US, UNTIL AFTER THE PENALTY PHASE WAS OVER. THAT IS WHAT THE BRIEFS SAY.

DO YOU KNOW HOW YOU YOU GOT THAT INFORMATION? HOW, AT THAT POINT, DID YOU GET IT? DID THE STATE GIVE IT TO YOU? DID THE CODEFENDANT SAY HE HAD MADE ANOTHER STATEMENT? HOW DID YOU GET IT?

AS I STAND HERE, I DO NOT RECALL THAT INFORMATION.

YOU CAN SEE THAT, JUSTICE PARIENTE JUST SAID, THE PROBLEM IS WE DON'T KNOW WHEN THIS STATEMENT CAME UP. WAS IT MADE AFTER MR. REILLY'S TRIAL BUT BEFORE THE PENALTY PHASE, WHEN DID THE STATE GET THIS INFORMATION? SO WE CAN'T BASE THIS ARGUMENT ON SPECULATION. WE CAN'T MAKE A RULING ON IT.

WELL, I AM ARGUING THAT IT DOESN'T MATTER. BECAUSE --

IT DOESN'T MATTER BECAUSE?

BECAUSE THEY CAN'T TAKE, WHETHER OR NOT SOMEONE KNEW OR DIDN'T KNOW AT A CERTAIN TIME, THEY CAN'T MAKE INCONSISTENT ARGUMENT.

BUT YOU SEE, THE PROBLEM, AGAIN, WOULD BE THAT, IF YOU ARE, THE ATTORNEY, AND THIS WOULD BE AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, IF YOU HAD THIS STATEMENT FROM THE UNCLE, AND DIDN'T DIDN'T ARGUE RELATIVE CULPABILITY, OF COURSE IT WAS PRETTY HARD WITH HIM PLEADING GUILTY TO BOTH, YOU KNOW, WE ARE TALKING ABOUT SOMETHING WHERE HE DID NOT DENY HIS CULPABILITY, SO WE HAVE GOT AN ADDITIONAL ISSUE THERE AS TO, MAYBE YOU OUGHT TO, I MEAN, THE QUESTION IS LET'S GET TO THE SECOND PART. WHAT DIFFERENCE WOULD IT HAVE MADE, IF YOU HAD THE STATEMENT IN, AT THE TIME OF YOUR CLIENT'S TRIAL? HOW WOULD YOU HAVE ARGUED THIS CASE DIFFERENTLY?

WELL, WE WOULD HAVE ARGUED THAT THE CODEFENDANT MAY HAVE BEEN RESPONSIBLE FOR ONE OF THE MURDERS, WHICH WOULD SIGNIFICANTLY REDUCE THE CHANCES OF A DEATH PENALTY.

WOULDN'T HE STILL BE, IF THEY WERE IN THIS AS A JOINT ENTERPRISE, WOULD MR. REILLY, STILL, BE LIABLE FOR THE MURDER OF THE SECOND PERSON?

HE WOULD BE LIABLE, BUT HE WOULD NOT NECESSARILY BE SUBJECT TO THE DEATH PENALTY. I AM VERY SURE OF THAT.

DIDN'T WE HAVE A TAPED CONFESSION BY RALEIGH, WHERE HE ADMITTED TO SHOOTING THE SECOND VICTIM AND BEATING HIM IN THE HEAD BECAUSE HE WAS SCREAM SOMETHING.

YES. I BELIEVE THAT IS CORRECT.

CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL, IF YOU WANT TO SAVE SOME TIME.

OKAY. I WILL CEDE MY TIME.

MAY IT PLEASE THE COURT. I AM KEN NUNNELLEY. I REPRESENT THE STATE OF FLORIDA IN THIS PROCEEDING.

CHIEF JUSTICE: I HOPE YOU CAN STRAIGHTEN OUT AND GIVE US, SINCE YOU HAVE BEEN IN THIS CASE, WHAT IS, WHAT WAS THE STATUS OF THIS STATEMENT TO THE UNCLE? WHEN WAS IT PRODUCED AND YOU KNOW, CAN YOU GIVE WAS TIME LINE ON THAT?

YOUR HONOR, I AM AFRAID I CANNOT HELP THE COURT BECAUSE I HAVE NEVER HEARD THIS CLAIM BEFORE. THIS CLAIM HAS NEVER, EVER, BEEN ARGUED, BRIEFED, OR EVEN MENTIONED IN THE CONTEXT OF SUPPRESSION OF ANY STATEMENT OF THE CODEFENDANT BY THE STATE, AND I AM ABSOLUTELY OFFENDED TO STAND UP HERE BEFORE THIS COURT AND HAVE TO TELL YOU ALL THAT I DON'T KNOW WHAT IS GOING ON, BECAUSE I AM HERE IN AN ARGUMENT THAT I HAVE NEVER SEEN BEFORE, I HAVE NEVER HEARD IT BEFORE, AND I HAVE ABSOLUTELY NO IDEA WHAT MY OPPONENT IS TALK ABOUT!

WHY DON'T YOU TALK ABOUT, IN TERMS OF ISSUE NUMBER THREE IN THE BRIEFS.

THE CLAIM AS BRIEFED, WHICH IS ABOUT ALL I CAN ARGUE, JUSTICE CANTERO, AND I APOLOGIZE, LET ME QUOTE FROM PAGE 37 OF THE DEFENDANT'S BRIEF, WHICH I SUPPOSE FRAMES THE ISSUE. LET ME BACK UP. LET ME QUOTE FROM WHAT THE TRIAL COURT SAID FIRST, IN THE ORDER DENYING RELIEF. THE TRIAL COURT SAID AND I QUOTAS PAGE 5 OF THE ORDER, CODEFENDANT DOMINGO FEDERO'S STATEMENT WAS INTRODUCED DURING HIS TRIAL, AS STATE ATTORNEY

ALEXANDER ARGUED THAT THE STATEMENT WAS UNTRUTHFUL ON A NUMBER OF POINTS. THIS IS A SIGNIFICANT PART OF ORDER RIGHT HERE. YES, THE SAME STATEMENT WAS ADMITTED IN DEFENDANT'S CASE, AND AT THAT TIME THE STATE ARGUED CONSISTENTLY WITH MR. FIGUEROA'S STATEMENT. NOW, WE ROLLOVER INTO THE BRIEF THAT WAS FILED IN THIS CASE, AND WE HAVE THIS FOLLOWING STATEMENT. CODEFENDANT DOMINGO FIGUEROA'S STATEMENT WAS INTRODUCED DURING HIS, PAREN, MR. FIGUEROA'S TRIAL, AND STATE ATTORNEY ALEXANDER ARGUED THAT THE STATEMENT WAS UNTRUTHFUL ON A NUMBER OF POINTS YET THE SAME STATEMENT WAS ADMITTED IN THE DEFENDANT'S CASE AND THE DEFENDANT ARGUED IN CONSISTENTLY WITH THE DEFENDANT'S STATEMENT. I ATTRIBUTE THIS TO THE ORDER BUT THE POSITION OF THE BRIEF IS WHAT WE ARE HERE ON!

SO YOU ARE REALLY JUST TALKING ABOUT THE ONE STATEMENT. ARE YOU SAYING THERE IS NO SECOND STATEMENT WHERE HE SAYS HE KILLED ONE AND I KILLED ONE?

THERE IS A STATEMENT WHERE FIGUEROA SAYS I KILLED ONE AND BOBBIE KILLED ONE, BUT WHAT WE HAVE, AND I DON'T KNOW WHEN THAT STATEMENT WAS MADE. I AM NOT SURE ABOUT THE CONTEXT OF THAT STATEMENT, BUT BECAUSE IT HAS NEVER BEEN AT ISSUE BEFORE THIS MORNING. CHIEF JUSTICE

IS IT CORRECT THAT, IN THE RALEIGH'S TRIAL, THE ONLY STATEMENT THAT WAS INTRODUCED, WAS HIS TAPED STATEMENT?

I BELIEVE THAT IS CORRECT, YOUR HONOR, BUT I AM NOT PREPARED TO STAND UP HERE AND TELL THE COURT THAT THERE IS, IN FACT, A SECOND STATEMENT, NOR AM I PREPARED TO STAND UP HERE AND DISCUSS THE ISSUE OF WHEN THAT SECOND STATEMENT, IF THERE IS ONE, WAS PRODUCED BECAUSE I SIMPLY DON'T KNOW, BECAUSE IT HAS NEVER BEEN ISSUE BEFORE!

WAS IT A SUBJECT AT THE POSTCONVICTION EVIDENTIARY HEARING?

NO.

IN OTHER WORDS, THERE WAS NO TESTIMONY PRESENTED AT THE POSTCONVICTION HEARING THAT, AT THE CODEFENDANT'S TRIAL, THE STATE INTRODUCED A SEPARATE STATEMENT THAT THE CODEFENDANT MADE TO HIS UNCLE, IN WHICH HE IMPLICATED HIMSELF EVEN MORE IN THE CRIME OF THE DEATH OF ONE OF THE VICTIMS, THAN HE DID IN HIS OWN STATEMENT THAT HE GAVE TO THE POLICE AUTHORITIES?

YOUR HONOR, I APOLOGIZE FOR SOUNDING LIKE I DON'T KNOW MY RECORDS LIKE I DON'T KNOW THE CASE, BUT I AM COMPLETELY CONFUSED ABOUT WHAT THE ISSUE THAT WE ARE HEARING HERE IS. I JUST SHRIMP DON'T KNOW!

CHIEF JUSTICE: WELL, THE REPLY TALKS ABOUT THE ADMISSION OF DOM I THINK-FIGUEROA TELLING HIS UNCLE THAT DOMINGO KILLED ONE AND RALEIGH KILLED ONE. THAT IS RIGHT IN THE REPLY BRIEF. THERE IS NO QUESTION THAT THE STATEMENT TO THE UNCLE, FOR WHATEVER REASON, WHETHER IT WASN'T AVAILABLE, WHETHER IT WAS SUPPRESSED, OR IT WAS A STRATEGIC DECISION, WAS NOT PART OF THE RECORD IN THE RALEIGH CASE. DO WE, CAN WE AGREE WITH THAT? YOU KNOW YOUR RECORD IN THIS CASE.

YES, MA'AM.

CHIEF JUSTICE: SO NO STATEMENTS TO THE UNCLE, SO THE ISSUE, REALLY, LET'S ASSUME SO WE WILL GO BACK AND UNDERSTAND, THAT THE STATE PUT THE STATEMENT OF THE UNCLE IN, IN THE CODEFENDANT'S TRIAL BUT IT WASN'T IN RALEIGH'S TRIAL. CAN THE STATE TAKE A POSITION, IN TWO CASES, TO SAY THAT TWO PEOPLE ARE THE KILLER? CAN THEY TAKE THOSE INCONSISTENT POSITIONS, BASED ON OUR CASE LAW?

I AM NOT TRYING TO EVADE YOUR QUESTION, JUSTICE PARIENTE, BUT I HAVE TO BACK UP AND ANSWER THE QUESTION AS A BACKDROP TO THIS CASE, WHICH IS A GUILTY PLEA TO TWO COUNTS OF MURDER.

CHIEF JUSTICE: GIVE ME HYPOTHETICALLY, CAN YOU TAKE, WHEN TWO CODEFENDANTS ARE NOT BEING TRIED TOGETHER, TAKE AND SAY THAT IN ONE CASE DEFENDANT X WAS THE SHOOTER AND THE PRIMARY CULPABLE DEFENDANT, AND IN ANOTHER CASE, SAY IT WAS DEFENDANT Y? CAN THEY DO THAT UNDER OUR CASE LAW?

YES, MA'AM, UNDER FARKAS.

AND WOULD FOTOPOULOS, ALSO, BE A CASE --

YES, MA'AM, IT WOULD.

CHIEF JUSTICE: SO THIS IS PATTERN THAT APPARENTLY WE HAVE ALLOWED THAT THEY CAN TAKE INCONSISTENT POSITIONS.

YES, MA'AM, AND THE RATIONALE BEHIND THAT IS TO UNDERSTAND THE CULPABILITY OF THE STATEMENTS THAT ARE MADE. BUT WHAT IS IMPORTANT, MAYBE I AM TAKING A BOTTOM-LINE APPROACH TO ALL OF THIS, BUT WHAT WE HAVE HERE IS THERE IS NO QUESTION THAT THE SECOND, THAT THE VICTIM WE ARE TALKING ABOUT IN THE STATEMENT, BY FIGARO, A IS TIMOTHY EBERLIN. THERE IS NO QUESTION WHATSOEVER. THERE IS NO DISPUTE, NEVER BEEN A DISPUTE THAT BOBBIE RALEIGH KILLED DOUGLAS COX BY SHOOTING HIM THREE TIMES IN THE HEAD THERE. IS ABSOLUTELY NO QUESTION ABOUT THAT. THERE IS, ALSO, ABSOLUTELY NO DOUBT THAT TIMOTHY EBERLIN WAS BEATEN TO DEATH. HE DID NOT DIE OF A GUNSHOT WOUND. AND, IN FACT, IN POSTCONVICTION HEARING, THE DEFENSE EXPERT, DR. BORDINI TESTIFIED, THAT, BECAUSE TIMOTHY EBERLIN WAS SCREAMING WHILE BOBBIE RALEIGH WAS BEATING HIM IN THE HEAD WITH A PISTOL THAT, THAT CONTRIBUTED TO ONE OF THE MENTAL MITIGATORS, SO, AGAIN, WE DON'T HAVE, REALLY, MUCH, WE DON'T HAVE ANY QUESTION EXISTING ABOUT WHAT HAPPENED. VIS-A-VIS MR. RALEIGH. IF MR. FIGUEROA MAY HAVE AN ISSUE, I DON'T KNOW. THAT IS NOT SOMETHING THAT WE ARE HERE ON, BUT THE BOTTOM LINE IS FIGUEROA'S STATEMENT THAT I KILLED ONE AND BOBBIE KILLED ONE, IS ABSOLUTELY REBUTTED BY THE RECORD, BY THE EVIDENCE IN THE RECORD! AND WHEN YOU GET RIGHT DOWN TO IT -- CHIEF JUSTICE

DID THE STATE, EVEN THOUGH IT WAS REBUTTED BY THE RECORD, DID THEY USE THAT IN DOMINGO FIGUEROA'S TRIAL, TO PUT MORE CULPABILITY ON HIM?

THEY INTRODUCED THE STATEMENT, AND THEY ARGUED IT IN CLOSING, BUT THE CLOSING ARGUMENTS ARE NOT EVIDENCE. MR. FIGUEROA, OF COURSE, WAS ENTITLED TO TRY HIS CASE AS HIS ATTORNEY SAW FIT, AND TO DEAL WITH THE EVIDENCE BEFORE THAT JURY AS HE SAW FIT.

CHIEF JUSTICE: I GUESS IT WOULD SEEM, AND MAYBE IN THIS CASE IT IS ACADEMIC BECAUSE OF WHAT YOU SAY ABOUT THE RECORD AND THE GUILTY PLEA, THAT IT DOES CONCERN ME THAT THE STATE, KNOWING SOMETHING DOESN'T SHOW WHAT IT SAYS, TAKES IT AND, YOU KNOW, JUST USES THE LEEWAY, I CAN REALLY ARGUE IT. IT IS ONLY ARGUMENT. IT IS NOT EVIDENCE. THAT DOES CONCERN ME. DOES IT CONCERN YOU?

WELL, YES, IT DOES, AND, YOU KNOW, AND I MEAN --

I MEAN, YOU ARE NOT THE ONE ARGUING THESE, YOU ARE NOT THE PROSECUTOR. YOU COME IN AFTER THE FACT, AND I THINK THAT WE JUST NEED TO GET STRAIGHTENED OUT WHETHER THIS IS A PRACTICE THIS COURT THINKS IS A GOOD PRACTICE OR NOT AND SHOULD BE DISCOURAGED, OR JUST IT DOESN'T MATTER BECAUSE IT JUST ARGUMENT.

WELL, I WOULD CERTAINLY, YOU KNOW, PERSONALLY RATHER THEY DIDN'T DO IT SO I DIDN'T HAVE TO DISCUSS THIS WITH YOU GUYS.

BUT THIS GOES BEYOND JUST WHAT YOU WOULD LIKE AS A PRACTICE. DOESN'T IT TOUCH ON DUE PROCESS.

I THINK IN THE RIGHT CASE, IT COULD, JUSTICE LEWIS, BUT I THINK IN THE, I THINK JUSTICE PARIENTE, PROBABLY, YOU KNOW, WHEN SHE REFERRED TO IT, WHEN YOU CALLED IT ACADEMIC, IN THIS CASE I THINK THAT IS WHAT IT IS IN THIS CASE. AND I DON'T THINK THAT THIS CASE IS THE PROPER VEHICLE FOR THIS COURT TO DECIDE A GENERAL PRACTICE. WE HAVE TWO CASES THAT THIS COURT HAS NEVER SEEN, ONE, MR. FIGUEROA'S CASE. THE CASE DID NOT COME UP HERE BECAUSE HE DID NOT GET A DEATH SENTENCE, AND I WOULD SUGGEST THAT, THIS ISN'T REALLY THE CASE WE ARE UP HERE ON.

LET ME ASK YOU, IS THERE ANY DISPUTE OR ANY QUESTION IN FACT? DID MR. FIGUEROA EVER ADMIT TO BEATING EBERLIN IN THE HEAD? IS THERE A QUESTION ON WHO WAS SHOOTING?

IT IS MERELY A QUESTION OF WHO WAS SHOOTING. MR. FIGUEROA SAID HE SHOT ONE TIME AND, YOU KNOW, I CAN'T REMEMBER ALL OF THE --

WASN'T RALEIGH'S TESTIMONY THAT FIGUEROA WAS SHOOTING AND HIS GUN GOT JAMMED, AND THEN HE WENT IN THERE AND SHOT AND THEN HE WAS SCREAMING AND THEN RALEIGH BEAT HIM ON THE HEAD?

YES. THERE IS NO QUESTION ABOUT ANY OF THAT.

IS MY RECOLLECTION CORRECT? WE DEALT WITH THIS ISSUE AS A RATHER FACT-SPECIFIC TYPE ISSUE IN FOTOPOULOS.

YES, JUDGE, THAT IS CORRECT. AND IN FOTOPOULOS IT CAME UP IN THE ASPECT OF COUNSEL, AND THAT IS A DISCUSSION, AN ISSUE, NOT WHAT WE HAVE HERE, BUT WHAT WE HAVE HERE IS A VERY PECULIAR SET OF CIRC{STAPZ}, IN THAT WE DO HAVE THE GUILTY CIRCUMSTANCES, IN THAT WE DO HAVE THE GUILTY PLEA. WE DO HAVE THE UNDON'T VATED FACT THAT MR. EBERLIN WAS BEATEN TO DEATH WITH WITH A PISTOL AFTER IT JAMMED, AND THAT IT WAS FIRED BY BOBBIE RALEIGH, AND THAT MR. EBERLIN WAS, IN FACT, BEATEN BY BOBBIE RALEIGH, AND OUT HERE YOU HAVE FIGUEROA'S STATEMENT, I SHOT ONE. BOBBIE SHOT ONE. FIGUEROA SAID HE FIRED ONE TIME, AND, OF COURSE, ALL OF THE EVIDENCE THAT IS BEFORE THE FIGUEROA JURY, IS WHAT IS BEFORE, WHAT THEY HAVE BEFORE THEM, AND THE FIGUEROA TRIAL IS PART OF THE RECORD IN THIS PROCEEDING, BUT NONETHELESS, IT HAS NEVER BEEN DISPUTED. NOBODY HAS EVER ARGUED OR SUGGESTED THAT MR. FIGUEROA HAD ANYTHING TO DO WITH BEATING MR. EBERLIN. AGAIN, IT IS ALL UNDISPUTED, AND THAT IS WHY I COME BACK TO JUSTICE PARIENTE'S COMMENT THAT IT, PERHAPS, ACADEMIC IN THIS CASE, AND I SUGGEST THAT IT IS, AND I SUGGEST THAT THIS DOES NOT PRESENT, WHAT IS THE WORDY WANT TO USE, AN ESPECIALLY CLEAN CASE FOR THIS COURT TO ADDRESS THE ISSUE OR DECIDE THE ISSUE OF WHETHER THE STATE CAN TAKE INCONSISTENT POSITIONS, BASED UPON THE SAME EVIDENCE, AND CERTAINLY THE STATE CAN ARGUE THE INFERENCES FROM THE EVIDENCE, AND CERTAINLY IN MR. FIGUEROA'S CASE --

IT IS NOT JUST MERELY INFERENCES. IT IS DIFFERENT EVIDENCE, BECAUSE IT IS A DIFFERENT STATEMENT THAT IS USED IN ONE CASE AND NOT IN THE OTHER, SO, REALLY, IT IS PRESENTING DIFFERENT EVIDENCE IN TWO CASES, AND THAT, IT MAY BE ACADEMIC, BUT IT IS NOT THE SAME EVIDENCE, IS IT?

JUSTICE LEWIS, I AM CONCERNED ABOUT THIS BEING, ABOUT THE ATTEMPTS MY OPPONENT IS MAKING TO TURN THIS INTO A BRADY CLAIM, AND THE BRADY GIGLIO COMPONENT OF THIS WAS

NOT LITIGATED.

CHIEF JUSTICE: BUT WE ARE STILL TALKING ABOUT THAT THE RECORD IS CLEAR THAT THE STATEMENT TO THE UNCLE IS NOT IN THE RALEIGH CASE, AND IT WAS IN THE CODEFENDANT'S CASE, SO THAT, HOW, HOW IT GOT TO BE IN ONE VERSUS THE OTHER, THE STATE CHOSE WHICH EVIDENCE TO USE IN EACH CASE.

OF COURSE.

ALL RIGHT. SO IT IS NOT, IT, SO PERHAPS, IN TERMS OF THE EVIDENCE, IF THE STATEMENT OF, TO THE UNCLE IS, WAS, SAYS I SHOT ONE OF THEM, THAT IS INCONSISTENT WITH THE EVIDENCE THAT CAME IN AT RALEIGH'S TRIAL.

NOT ENTIRELY INCONSISTENT WITH THE, IT IS NOT INCONSISTENT, BECAUSE THERE HAS NEVER BEEN ANY DISPUTE THAT FIGUEROA DID, IN FACT, FIRE A SHOT.

HOW IS IT INCONSISTENT WITH THE STATEMENT THAT YOU MADE OUT THERE REPEATEDLY, THAT THIS IS ALL, REALLY, ACADEMIC, BECAUSE RALEIGH ADMITS BEING -- ADMITS BEATING THE VICTIM, AND THAT IS THE RECORD THAT SHOWS THE VICTIM DIED OF A BEATING DEATH, AND IF THAT IS THE STATE'S POSITION, DON'T WE HAVE A LITTLE BIT OF A PROBLEM, IF THE STATE AT FIGUEROA'S TRIAL, IS ATTEMPTING TO SHOW THAT, NO, THAT VICTIM DIED FROM FIGUEROA SHOOTING HIM, BUT, THOUGH, I AM HAVING, AS COMMITTEE WE KEEP UNRAVELING THE ONION, IT SEEMS LIKE, YOU KNOW, WE ARE JUST DISCOVERING FURTHER ISSUES. LET'S GO BACK TO JUSTICE LEWIS'S QUESTION, TO BE SURE WE ARE ALL ON THE SAME PAGE. HE SAID WE ARE NOT TALKING ABOUT THE SAME EVIDENCE. AND YOU AGREE WITH THAT, DO YOU NOT?

GLOBALLY, YES, BUT LET ME ASK YOU A QUESTION.

LET'S STOP RIGHT THERE FOR A MINUTE, THEN YOU CAN ASK ME A QUESTION. ALL RIGHT. THE THE SEPARATE, DIFFERENT EVIDENCE IS THE STATEMENT TO THE UNCLE, THAT THE STATE PRESENTED AT THE FIGUEROA TRIAL, WHEREAS THE STATE DID NOT PRESENT THAT AT THE RALEIGH TRIAL. IS THAT CORRECT?

I BELIEVE THAT'S CORRECT, YOUR HONOR.

WELL, YOU BELIEVE. ISN'T THAT CORRECT?

I DON'T BELIEVE THE STATEMENT TO THE UNCLE CAME IN AT BOBBIE RALEIGH'S TRIAL.

THAT IS PRETTY STRAIGHTFORWARD AND SIMPLE, ISN'T IT? THAT IS NOT VERY COMPLICATED. BUT LET'S STOP, LET'S TAKE IT JUST A LITTLE BIT FURTHER.

JUSTICE ANSTEAD.

SO WHAT IS THE CASE LAW OUT THERE, WITH REFERENCE TO WHETHER OR NOT THE STATE CAN MAKE DIFFERENT ARGUMENTS, BASED ON THE SAME EVIDENCE, OR WHETHER THE STATE CAN PRESENT ENTIRELY DIFFERENT EVIDENCE, AND SOME OF WHICH MAY CONTRADICT THE EVIDENCE THAT THEY PRESENTED AT A CODEFENDANT'S TRIAL. WHAT IS THE STATE OF THE LAW?

THE STATE OF THE LAW IS PARKER. LET ME BACK UP, LET ME WORK BACKWARDS FROM THAT. FIGUEROA'S STATEMENT TO HIS UNCLE IS NOT OFFERED TO PROVE OR NOT OFFERED INTO THE FIGUEROA TRIAL TO PROVE THE CAUSE OF DEATH. THE CAUSE OF DEATH IS UNDISPUTED. FIGUEROA'S STATEMENT GOES TO FIGUEROA'S STATE OF MIND AND THAT IS ALL. IT DOESN'T GO BEYOND THAT.

THOUGH THE STATE, AT FIGUEROA'S TRIAL, CONCEDED THAT THE VICTIM IN THAT INSTANCE, THAT FIGUEROA SHOT, DIDN'T DIE FROM A, WAS THERE A GUNSHOT WOUND TO THAT BODY?

YEAH. YES, SIR. I MEAN, EBERLIN WAS SHOT, BUT THERE WAS NO --

THE STATE CONCEDED THERE, THAT FIGUEROA DID NOT BEAT THAT VICTIM AND THAT THAT VICTIM'S DEATH WAS CAUSED BY THE BEATING BY RALEIGH.

CORRECT.

OKAY.

AND, YOU KNOW, MAYBE THAT IS WHY I AM HAVING SUCH A PROBLEM WITH THE NOTION OF IT BEING INCONSISTENT EVIDENCE OR INCONSISTENT POSITIONS OR WHATEVER. IT IS TWO SEPARATE TRIALS WITH TWO SEPARATE DEFENDANTS, WITH TWO SEPARATE SETS OF ISSUES THAT THE STATE HAS GOT TO PROVE! AND WHETHER, FACTUALLY I HAVE SOME QUESTIONS IN MY OWN MIND AS TO WHETHER THE STATEMENT OF THE UNCLE WOULD HAVE EVEN BEEN PROPERLY ADMISSABLE ON RELEVANCY GROUNDS AND, HAD BOBBIE RALEIGH GONE TO TRIAL ON THE ISSUE OF GUILT, BUT IT IS A SEPARATE, IT IS A SEPARATE ISSUE, WHEN WE ARE TRYING TO PUT A SQUARE PEG IN A ROUND HOLE, WHEN YOU GET RIGHT DOWN TO IT.

IN ESSENCE, WAS THE STATEMENT TO THE UNCLE, A STATEMENT THAT I SHOT THIS PERSON? OR WAS, AND WASN'T THAT THE ESSENCE OF THE TAPED STATEMENT, ALSO, IS THAT HE SHOT THE PERSON --

YES, MA'AM.

-- AND THAT MR. RALEIGH ACTUALLY BEAT HIM WITH THE GUN.

YES, MA'AM.

I THOUGHT THE STATEMENT WAS THAT "I KILLED ONE OF THEM AND RALEIGH KILLED THE OTHER."

BUT THE EVIDENCE DOESN'T PROVE THAT. I SHOT --

HOW DOES THE STATE, IN RALEIGH'S CASE, GIVEN THAT THAT IS WHAT HE TOLD HIS UNCLE, THAT HE THOUGHT HE KILLED ONE AND RALEIGH KILLED ONE, DID THE STATE ARGUE THAT FIGUEROA KILLED EBERLIN IN RALEIGH'S TRIAL?

NO! WE ARGUED IN RALEIGH'S TRIAL THAT, WELL, IN RALEIGH'S TRIAL, OF COURSE, RALEIGH PLEADED GUILTY TO KILLING BOTH OF THEM. CHIEF JUSTICE

I AM SORRY. IN FIGUEROA'S TRIAL, DID THEY ARGUE, WITH THAT STATEMENT THAT FIGUEROA KILLED EBERLIN?

JUSTICE PARIENTE, I AM HAVING TO ADMIT TO BEING SO TURNED AROUND ON THIS ISSUE THAT I DON'T REMEMBER.

CHIEF JUSTICE: BUT THAT IS THE ESSENCE OF WHAT HE IS TALKING ABOUT. YOU DON'T KNOW WHAT THE STATE ARGUED, AS FAR AS WHO WAS THE KILLER IN THE FIGUEROA CASE?

I CANNOT REMEMBER AT THIS POINT, YOUR HONOR. I AM SORRY. I CAN'T REMEMBER.

YOU SAID TO ME A MINUTE AGO THAT THE STATE, IN THE FIGUEROA TRIAL, AGREED THAT THE VICTIM WAS KILLED BY A BEATING AND WAS NOT KILLED BY THE GUN SHOT WOUND INFLICTED

BY FIGUEROA.

THAT IS CORRECT.

WE HAVE GOT ONE CIRCUMSTANCE, SORT OF, OBVIOUSLY WHEN YOU TRY TWO DIFFERENT DEFENDANTS SEPARATELY OR WHATEVER, THE STATE IS GOING TO BE FOCUSING ON THE CULPABILITY OF THE DEFENDANT ON TRIAL, AND THAT, YOU KNOW, WE ACCEPT THAT, AND THAT THAT IS THE WAY THAT IT IS GOING TO GO, BUT IF ON THE OTHER HAND, TAKING THE EXTREME EXAMPLE THE OTHER WAY, IF THE STATE, NOW, AT RALEIGH'S TRIAL, INTRODUCED THE PROOF OF THE BEATING, AND IT IS RALEIGH AND IT IS HIS STATEMENT, AND IT IS, AND WHEN WE SAY INTRODUCED AT TRIAL, WE ARE TALKING, HERE, OF COURSE, ALSO, ABOUT A PENALTY PHASE.

THAT'S TRUE.

WITH RALEIGH, TO DETERMINE WHETHER HE WILL LIVE OR DIE, AND SO IF THE STATE DID THAT, AND IN TERMS OF SAYING IT WAS ABSOLUTELY RALEIGH, YOU KNOW, THE OTHER GUY WAS THERE, AND HE PROBABLY IS GUILTY OF MURDER, TOO, BECAUSE HE WAS THERE DURING THESE HEINOUS OFFENSES BEING COMMITTED, AND HE HAD A GUN AND HE FIRED A SHOT, SO WE KNOW WHAT HIS INTENT WAS, BUT IT IS A DIFFERENT STORY, IF THE STATE, NOW, AT THIS CODEFENDANT'S TRIAL, SAYS, WELL, IF WE HAVE A STATEMENT IN WHICH THIS DEFENDANT ADMITTED KILLING ONE OF THE VICTIMS, SO WE HAVE AN IRONCLAD CASE AGAINST HIM --

I DON'T THINK THEY EVER ARGUED THE STATEMENT AS -- JUSTICE PARIENTE, I APOLOGIZE FOR BEING CONFUSED ON THIS, I REALLY DO, BUT I DON'T THINK THE STATE ARGUED SOMETHING OTHER THAN WHAT THE FORENSIC EVIDENCE SHOWED.

CHIEF JUSTICE: I GUESS THE BEST EVIDENCE OF THE RECORD WOULD BE WHAT THE RECORD PROVES. WITH OUR HELP, JUSTICE ANSTEAD, YOU DIDN'T GET TO ASK YOUR QUESTION, BUT YOU ARE RETIRED.

I SLIPPED THE ANSWER IN THERE. THANK YOU.

I WANT TO START BY SAYING HE DOESN'T KNOW ANYTHING ABOUT THIS. IT IS ON PAGE 38 OF THE INITIAL BRIEF AND JUSTICE PARIENTE, AS YOU POINTED OUT IT IS ON PAGE 12 OF THE REPLY BRIEF.

LET'S NOT WASTE A LOT OF TIME ON THAT. HOW ABOUT YOU ENLIGHTENING US THAT THE STATE, WASN'T IT YOUR PLAN HERE, AT FIGUEROA'S TRIAL, INDEED, COMPLETELY SHIFTED AND INSTEAD OF SAYING THAT THE BEATING WAS THE CAUSE OF THE DEATH, NOW ARGUED THAT, BASED ON THE STATEMENT MADE TO THE UNCLE, THAT FIGUEROA KILLED THAT SECOND VICTIM?

YES.

IS THAT --

WELL, YES.

WAS THAT WHAT YOUR POSITION IS?

YES.

AND WHERE IS THE PROOF OF THAT?

WELL, THE ANSWER TO JUSTICE PARIENTE'S QUESTION --

LET'S NOT ANSWER JUSTICE PARIENTE'S QUESTION UNTIL YOU ANSWER MY QUESTION. WHERE IS

THE PROOF THAT THE STATE DID THESE INCONSISTENT THINGS?

IN FIGUEROA'S TRIAL, THEY ARGUED THAT HE KILLED EBERLIN, AND --

WHERE, THERE IS A RECORD IN THIS POSTCONVICTION PROCEEDING. OKAY.

YES.

AND WHAT DOES THE RECORD IN THIS POSTCONVICTION PROCEEDING TELL US ABOUT THAT?

THE AMENDED POST-CONVICTION RELIEF MOTION CITES TO TRANSCRIPTS IN THE FIGUEROA CASE.

DID THE MEDICAL EXAMINER TESTIFY IN THE FIGUEROA CASE? DID THE MEDICAL EXAMINER, WHO EXAMINED THE TWO VICTIMS' BODIES, DID HE TESTIFY IN THE FIGUEROA CASE?

I DO NOT KNOW. I CAN'T CONFIRM THAT.

SO WE DON'T KNOW WHAT THE MEDICAL EXAMINER SAID WAS THE CAUSE OF DEATH OF MR. EBERLIN.

I DO NOT THINK THAT IS IN THE RECORD.

LET ME SEE IF I CAN SUMMARIZE, REALLY, WHERE YOU ARE GOING HERE. YOU ARE SAYING THAT THE STATE HAD EVIDENCE, A STATEMENT, THAT INDIVIDUAL "X" COMMITTED A MURDER, THAT IN INDIVIDUAL "X"'S TRIAL THEY ARGUED THAT "X COMMITTED THAT MURDER, NO ONE ELSE, BUT IN YOUR CLIENT'S TRIAL, DURING THE PENALTY PHASE, THEY HAD ALL OF THAT EVIDENCE, AND THEY USED DIFFERENT STATEMENTS, DIFFERENT EVIDENCE, TO SHOW THAT YOUR CLIENT COMMITTED THAT.

EXACTLY.

AND THE IMPORTANCE IS BECAUSE THAT GOES TO AN AGGRAVATOR, PRIOR VIOLENT FELONY, STATUTORY AGGRAVATOR, AND YOU ARE SAYING THAT THEY ARE PRECLUDED FROM DOING THAT.

YEAH. IT MAKES THE DEATH PENALTY --

NOW, LET ME ASK YOU THIS QUESTION, DID YOU HAVE AN OPPORTUNITY TO PROVE ALL OF THAT DURING AN EVIDENTIARY HEARING? BELOW. IN YOUR POSTCONVICTION, IN THIS PROCEEDING, DID YOU HAVE AN OPPORTUNITY TO PROVE THAT, TO PRESENT THAT EVIDENCE TO THE TRIAL JUDGE?

YES.

AND DID YOU PRESENT ALL THAT TO THIS TRIAL JUDGE?

YES.

AND WHERE DID THE TRIAL JUDGE GO WRONG?

THE TRIAL JUDGE RULED THAT IT WAS MERE INCONSISTENT ARGUMENT AND CITED THIS COURT'S DECISION IN STATE V PARKER. STATE V PARKER DOES NOT HOLD THAT. TAKE A CAREFUL LOOK AT IT.

DID YOU MAKE A BRADY CLAIM BELOW?

WE ARE PUTTING THAT STUFF ON THE PROCEDURAL ASPECT OF HOW THIS INFORMATION CAME TO LIGHT. I THOUGHT IT WAS FRAMED AS BRADY IN THE BRIEF. I KNOW IT WAS DEFINITELY FRAMED AS GIGLIO IN THE --

WELL, I THINK YOU HAVE DISCOVERED AT LEAST AT ORAL ARGUMENT, THAT THERE WAS NO BRADY CLAIM MADE IN THE BRIEFS, RIGHT?

I BELIEVE THAT'S CORRECT.

GIGLIO CLAIM IS IN THE BRIEFS. THERE IS A GIGLIO CLAIM IN THE BRIEFS, RIGHT?

I BELIEVE SO.

CHIEF JUSTICE: BUT I GUESS WHAT YOUR POSITION WOULD BE IS THAT, WHETHER OR NOT THE DEFENDANT KNOWS ABOUT SOMETHING, THAT THE STATE CAN'T PICK AND CHOOSE THE EVIDENCE IT IS GOING TO INTRODUCE ON CULPABILITY, BUT I GUESS THE PROBLEM WITH THAT IS WHEN IT IS NOT, IF IT IS PRESENTED THE BRADY CLAIM, THEN WE CAN KIND OF GO AND UNDERSTAND THAT, WELL, WAIT A SECOND, YOU WOULD HAVE, IF YOU THIS UNCLE'S STATEMENT, YOU WOULD HAVE USED IT IN RALEIGH'S CASE, TO SHOW THAT HE WASN'T AS CULPABLE.

I BELIEVE IT IS ALLEGED IN OUR AMENDED 3.850 THAT IT WASN'T DISCOVERED BY OUR ATTORNEYS UNTIL AFTER THE PENALTY PHASE WAS OVER.

CHIEF JUSTICE: BUT DON'T WE ALSO HAVE TO LOOK AT THIS. LET'S JUST ASSUME THAT, ON THE FIRST ISSUE THAT YOU GET TO BE ABLE TO SAY, YES, THAT IS THE CLAIM. THAT IS THE CLAIM IS THAT THEY CAN'T PRESENT INCONSISTENT EVIDENCE. YOU STILL HAVE TO GET TO THE SECOND PRONG OF SOMETHING, WHICH IS HOW IT HAD MADE A DIFFERENCE, AND YOU HAVE GOT A PRETTY BIG HURDLE TO OVERCOME, WITH YOUR CLIENT HAVING PLED GUILTY TO BOTH OF THESE CRIMES AND THE MEDICAL EXAMINER'S EVIDENCE SHOWING THAT THE VICTIM, THE VICTIM EBERLIN WAS BEATEN TO DEATH AFTER HE WAS SHOT.

IT DOESN'T GO TO GUILT OR INNOCENCE, SO WE ARGUE THAT IS NOT RELEVANT. IT IS WHETHER THE DEATH PENALTY AND THE DEATH, SUFFICIENT AGGRAVATION FOR DEATH TO WARRANT IT.

CHIEF JUSTICE: SO WE WILL HAVE TO TAKE THAT UNDER ADVISEMENT. WELL CALL THE NEXT CASE. WE ARE GOING TO DO ONE MORE CASE. THEN WE WILL TAKE A BREAK AFTER THIS ONE.