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Angel Diaz v. State of Florida

SC06-2259

PLEASE RISE.

HERE YE, HERE YE.

SUPREME COURT OF FLORIDA IS
NOW IN SESSION.

ALL WHO HAVE CAUSE TO PLEA,
DRAW NEAR, GIVE ATTENTION,
AND YOU SHALL BE HEARD.

GOD SAVE FLORIDA, THESE
UNITED STATES, AND THE GREAT
STATE OF FLORIDA.

>> GOOD MORNING.

>> GOOD MORNING.

LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING AND WELCOME
TO THE ORAL ARGUMENT
CALENDAR FOR DECEMBER 7th,
2006.

THE FIRST CASE ON OUR
CALENDAR THIS MORNING IS
DIAZ v. STATE OF FLORIDA.

AND I WOULD, WOULD ASK THAT
PLEASE USE YOUR TIME WISELY
BE WE GENERALLY HAVE A LOT
OF QUESTIONS AND YOU WANT TO
BE SURE YOU WALK AWAY YOU
FEEL AS THOUGH YOU HAVE BEEN
ABLE TO PRESENT THE ARGUMENT
THAT YOU WANTED TO PRESENT.

>> GOOD MORNING.

MAY IT PLEASE THE COURT,
SUSAN CERF ON BEHALF OF THE
APPELLANT DIAZ.

THIS IS THE CIRCUIT OF
DENIAL OF POST CONVICTION
RELIEF AND DENIAL OF ACCESS
TO PUBLIC RECORDS.

I WOULD FIRST LIKE TO
ADDRESS THE APPELLANT'S
CLAIM OF NEWLY DISCOVERED
EVIDENCE.

THE JAILHOUSE SNITCH WAS THE ONLY WITNESS IDENTIFYING MR. DIAZ AS SHOOTER. HE ONLY INDICATED THAT HE HAD ACTED OUT THE SHOOTER FROM HIM AND INFERED THE SHOOTER WAS THE SHOOTER BASED ON THOSE ACTION SAID. WHAT HE TESTIFIED TO AT TRIAL IS THAT MR. DIAZ SHOT THE MAN AND HE INDICATED THAT HE HAD TO SHOOT OR THE -- OR THE OTHER GUY WOULD SHOOT HIM.

>> THE TRIAL COURT ENTERED A COMPREHENSIVE ORDER ON THIS, AND COULD YOU USE THAT AS THE FRAMEWORK?

WHERE DID THE TRIAL COURT GO WRONG IN ITS ANALYSIS OF THIS ISSUE IN THE ORDER THAT WAS ENTERED BECAUSE IT SEEMED LIKE THAT ORDER PRETTY COMPREHENSIVELY TREATED THE ISSUE.

SO WITHOUT COMMENTING ON THE MERITS OF THE OUTCOME, WHAT -- WHERE IS THE FLAW IN THE ANALYSIS OF THE TRIAL COURT?

>> WELL, FIRST, I THINK IT'S IMPORTANT TO NOTE THAT THE TRIAL COURT DID IN FACT SAY THAT THE RECANTATION OF MR. GAUGE'S INFERENCE IS NEW.

SO SHE DID FIND THAT THIS WAS NEWLY DISCOVERED EVIDENCE.

I THINK THAT WHERE THE TRIAL COURT WENT WRONG IS IN ITS ANALYSIS OF WHETHER THIS WOULD PROBABLY PRODUCE AN ACQUITICAL OR A LIFE SENTENCE.

IT'S A LITTLE UNCLEAR IF THE TRIAL -- WHETHER THE TRIAL COURT HAD THE STANDARD CORRECT, BUT IN ESSENCE, SHE DID FIND THAT THIS WOULD NOT HAVE MADE A DIFFERENCE. CERTAINLY WITH REGARDS TO A LIFE SENTENCE.

>> YOU SAY THE TRIAL JUDGE FOUND THAT THIS WAS NEWLY

DISCOVERED EVIDENCE.

WELL, WOULD -- LET'S EXPLORE THAT A LITTLE BIT.

THIS WAS AN INDICATION THAT MR. GAUGES, IS THAT HIS NAME.

>> GAUGES.

>> DID NOT ACTUALLY GET INFORMATION FROM THE DEFENDANT THAT HE WAS THE SHOOTER, CORRECT?

>> I KNOW THERE ARE DIFFERENT PARTS OF HIS AFFIDAVIT BUT THAT'S ONE OF THE MAIN PARTS OF HIS AFFIDAVIT.

AND IN THAT TRIAL MR. GAUGES ALSO SAID THAT MR. DIAZ NEVER TOLD HIM THAT HE WAS THE ACTUAL SHOOTER AND THAT HE JUST INFERRED THAT FROM MOTIONS OF, OF MR. DIAZ, CORRECT?

>> THAT'S CORRECT.

>> SO ON THAT ISSUE, IT SEEMS TO ME, AT LEAST THAT PORTION OF HIS AFFIDAVIT, SEEMS TO BE PRETTY CONSISTENT WITH WHAT HE SAID AT TRIAL.

SO WHAT IS THE REAL DIFFERENCE IN WHAT THE AFFIDAVIT SAYS AND WHAT HE SAID AT TRIAL ON THAT PARTICULAR ISSUE?

>> THE DISTINCTION NOW IS THAT HE SAYS HIS TESTIMONY THAT HE INFERRED THAT MR. DIAZ WAS THE SHOOTER IS IN FACT A LIE ALSO.

NOT ONLY DID MR. DIAZ NOT ADMIT TO BEING THE SHOOTER SO HE DID NOT SPECIFICALLY TELL HIM IN HIS OWN WORDS BUT IN FACT, WHEN MR. GAUGES TESTIFIED THAT HE WAS INFERRING THIS INFORMATION FROM HIS ACTIONS, THAT WAS A LIE.

HE IN FACT SAYS THAT AT THE TIME HE TESTIFIED, HE HAD NO BASIS FOR STATING THAT MR. DIAZ WAS THE SHOOTER, ANY BASIS TO MAKE THAT INFERENCE.

HE DIDN'T KNOW WHAT THE SHOOTER WAS BASED ON WHAT MR. DIAZ'S ACTIONS WERE.
>> AND HOW ALSO DOES THIS RELATE TO THE 19893.851 MOTION THAT WAS FILED AND THERE WAS INDICATION IN THAT MOTION THAT PREVIOUS CCRC COUNSEL HAD MADE A STATEMENT SIMILAR TO THAT MR. GAUGES HAD MADE A STATEMENT SIMILAR TO THE ONE HE'S MAKING NOW. AND SO IT SEEMS TO ME THAT AT SOME POINT EVEN THAT PART OF WHAT MR. GAUGICIZE SAYING WAS TALKED ABOUT IN THE 1989 PROCEEDING.

>> WHAT YOU'RE REFERING TO IS A VERY CONCHRUSRY SENTENCE CONTAINED WITHIN A BRADY CLAIM IN THE 19893850. WHAT THAT STATEMENT WAS MR. GAUGES TOLD CURRENT COUNSEL HE NEVER -- THIS STATEMENT IS NOTHING MORE THAN WHAT HE SAID AT TRIAL. HE SAID AT TRIAL THAT HE DIDN'T ADMIT T. WHAT HE SAID AT TRIAL IS THAT HE ONLY INFERRED IT AND AS I STATED WHAT IS DIFFERENT NOW IS THAT EVEN THAT INFERENCE IS BASED ON A LIMT THERE WAS NO INFORMATION FOR HIM TO INFER THAT.

>> ARE YOU ASKING FOR A NEW PENALTY PHASE OR ARE YOU ASKING FOR A RETURN FOR EVIDENTIARY HEARING BECAUSE WE ARE HERE AGAIN THOUGH THE TRIAL COURT DID ORDER A COMPREHENSIVE ORDER. DID SHE HEAR FROM GAUGES?

>> IT IS MY POSITION THAT IN HER ORDER SHE DID STATE NOTHING NEW IS ALLEGED. SHE GOES THROUGH EACH PORTION OF THE AFFIDAVIT THAT NOTHING NEW IS ALLEGED EXCEPT FOR THE RECANTATION OF MR. GAUJS SHE IS STATING THE RECANTATION IS NEW EVIDENCE SO ESSENTIALLY WHAT I HAVE STATED IN THE BRIEF

THAT TO THE EXTENT THE STATE IS STILL ARGUING THAT COUNSEL WAS NOT DILIGENT AND THIS IS NOT NEWLY DISCOVERED SKPEFDS THEY'RE CALL NOTHING TO QUESTION THE -- EVIDENCE, AND THEY'RE CALL NOTHING TO QUESTION THE STATEMENT OF THE 19893850.

>> TO DECIDE WHETHER AN EVIDENTIARY HEARING TO DETERMINE WHETHER IT'S NEWLY DISCOVERED?

I MEAN WOULD THE EVIDENTIARY HEARING BE A THRESHOLD DECISION AS TO WHETHER CCRC WAS DILATORY IN TRYING TO OBTAIN THIS INFORMATION.

>> WELL THE STATE'S POSITION IS THAT IT'S NOT NEWLY DISCOVERED EVIDENCE.

>> IN OTHER WORDS, HOW IS THAT REVIEWED ON APPEAL? IS THAT A DECISION OF LAW? IS THERE FACTS, PEOPLE NEED TO TESTIFY AS TO WHAT WAS DONE BETWEEN 1989 AND 2006? WHEN YOU KNOW THAT GAUGES IS THE PERSON THAT IS THE ONLY ONE THAT PUTS DIAZ AS BEING THE SHOOTER?

YOU JUST 89 TO 2006 DO NOTHING TO PURSUE THAT? I MEAN, IN OTHER WORDS, WHAT IS, WHERE IS THAT DETERMINATION TO BE MADE?

>> WELL, I THINK AT AN EVIDENTIARY HEARING. OF COURSE, WE HAVE SET THAT OUT IN OUR 3850 BELOW AS WELL AS IN THE BRIEF, HOWEVER, ALL THAT THE TRIAL COURT SAYS IS THAT NOTHING NEW IS ALEMGED HERE BUT THE RECANTATION.

SHE DOESN'T DISCUSS CCRC'S DILIGENCE BEYOND THAT SO I THINK THE ACKNOWLEDGMENT THAT THIS IS NEW EVIDENCE IS ESSENTIALLY --

>> WHAT IF WE ASSUME IT'S NEW EVIDENCE.

WHAT ABOUT THE STATEMENTS IN OUR OPINIONS, WHICH

ESSENTIALLY ALREADY
ACKNOWLEDGE THAT THERE'S NO
CONCLUSIVE EVIDENCE AS TO
WHO THE SHOOTER IS BUT THAT
EITHER WAY, DIAZ WAS A MAJOR
PARTICIPATE.
HOW DOES THIS --
PARTICIPANT.
HOW DOES THIS EVIDENCE OF
WHAT NOW GAUGES SAYS CHANGE
THAT CONCLUSION THAT THIS
COURT MADE THAT HE WAS A
MAJOR PARTICIPANT AND WE
WERE NOT MAKE A DECISION AS
TO WHO THE SHOOTER WAS?
>> WELL, I THINK THAT WHAT
YOUR HAHNSER REFERING TO IS
THE ANALYSIS ON DIRECT
APPEAL AND WHAT THAT DOES IS
THAT ONLY GETS OVER THE
HURDLE THAT THE STATE CAN
EXACT THE DEATH PENALTY ONCE
THERE'S BEEN A WEIGHING OF
AGGRAVATION AND MITIGATION.
HERE YOU WOULD HAVE TO LOOK
AT HOW THE GAUGES
INFORMATION THAT WE NOW HAVE,
HIS ADMISSION THAT HIS
INFERENCE WAS IN FACT A LIE
WOULD HAVE AFFECTED THE JURY
IN THIS PROCEEDING,
PARTICULARLY WHILE I STILL
MAINTAIN THAT THIS WOULD'VE
AFFECTED THE ACTUAL
CONVICTION, THERE IS NO
DOUBT THAT IT WOULD AFFECT
THE SENTENCE HERE.
THE JURY DURING THEIR GUILT
PHASE DELIBERATIONS ASKED
FOR THE TESTIMONY OF CANDICE
BRAWN AND RALPH GAUGES.
THOSE WERE THE TWO WITNESSES
WHOSE TESTIMONY CONFLICTED.
ONE SAID MR. TORO WAS THE
SHOOTER AND MR. GAUGES SAID
MR. DIAZ WAS THE SHOOTER.
THEY WERE OBVIOUSLY
CONCERNED ABOUT THE
TESTIMONY.
THEY ASKED FOR IT.
THE JUDGE YPIN FACT ASKED
THEM TO GIVE IT AND THE
JUDGE INSTRUCTED THEM TO
RELY ON THEIR MEMORY.

WHAT ALSO MUST BE
CONSIDERED THAT THIS WAS
A AN 8-4 JURY
RECOMMENDATION.

THERE WAS NO INFORMATION --

>> IT APPEARS TO ME FROM
READING THE TRIAL COURT'S
ORDER AND YOU'RE DEALING
WITH THE ORDER THAT THE
TRIAL COURT ENTERED ON
DECEMBER 1st, RIGHT?

>> CORRECT.

>> AND THE, THE TRIAL COURT
SAID DIAZ ALLEGATIONS DO NOT
MEET THE STANDARD FOR NEWLY
DISCOVERED EVIDENCE OR
RECONTATION.

THE ALLEGED RECONTATION IS
NOTHING MORE THAN SEMANTICS.
AND ITS -- IT CERTAINLY
APPEARS TO ME FROM MY
READING OF IT THAT THAT'S
CORRECT.

WHY IS THAT NOT CORRECT?
YOU LOOK AT THE LAST TWO
PARAGRAPHS OF THE AFFIDAVIT,
AND IT REALLY ADDS TO
NOTHING MORE THAN SPECK --
SOME SORT OF DIFFERENT
SPECULATION THAT MR. GAUGES
IS, IS NOW SAYING THAT HE'S
MAKING.

NOW NEW FACTS, ARE THERE?

>> WELL, I THINK THERE'S NEW
FACTS IN THAT HE'S SAYING
THAT WHEN HE TESTIFIED THAT
MR. DIAZ WAS THE SHOOTER HE
REALLY DIDN'T KNOW WHO THE
SHOOTER WAS.

HE HAD NO INFORMATION --

>> HE NEVER SAID HE KNEW WHO
THE SHOOTER WAS.

HIS TESTIMONY IS CHROET QOETED
BY THIS COURT IN 1987.

92 THAT'S CORRECT.

WAS CORRECT,.

>> WHAT HE TESTIFYICIDE
BASED ON WHAT MR. DIAZ WAS
ACTING OUT TO HIM HE
INFERRED THAT MR. DIAZ WAS
THE SHOOTER.

THIS EVIDENCE WAS BEFORE THE
JURY.

THIS COURT AND THE TRIAL

COURT IN ITS SENTENCING ORDER RELIED ON THAT IN POINTING TO THE FACT THAT THERE IS EVIDENCE THAT MR. DIAZ IS THE SHOOTER WITHOUT THE INFERENCE -- GO AHEAD.

>> IN THE ORDER OF DECEMBER 1 ON PAGE 5, THE COURT ALSO SAYS THE SENTENCING ORDER SPECIFICALLY FOUND THAT WHETHER DIAZ WAS ACTUALLY THE SHOOTER OR NOT DID NOT IMPACT THE FINAL RESULT. THE OVERWHELMING EVIDENCE AT TRIAL CONCLUSIVELY SHOWED THAT DIAZ'S INVOLVEMENT SUPPORTED THE JUDGMENT AT SENTENCE.

SO THE SENTENCING ORDER WAS NOT BASED ON WHETHER HE WAS A SHOOTER.

IT WAS HIS INVOLVEMENT IN THE CRIME, IN THE ROBBERY, HIS PRESENCE DURING THE SHOOTING.

SO WHY IS ANY -- EVEN IF WE TAKE GAUGES' AFFIDAVIT AS YOU SAY, WHY WOULD THAT CHANGE THE RESULT?

>> WELL, I THINK THAT YOU HAVE TO FOCUS ON WHAT INFORMATION WAS BEFORE THE SQLURY HERE.

IN ORDER TO -- JURY HERE. IN ORDER TO DETERMINE WHETHER IT WOULD HAVE MADE A DIFFERENCE TO THE SENTENCE IN PARTICULAR IS WHAT INFORMATION THE JURY HAD. I DON'T THINK THE PROPER FOCUS IS WHAT THE TRIAL COURT DID.

WE -- AS I WAS SAYING, WE HAD AN 8-4 RECOMMENDATION HERE, AND HAD THE JURY KNOWN THAT MR. GAUGES WAS NOT CREDIBLE, HAD THE JURY KNOWN THAT WHAT WE NOW KNOWN NOW THAT WE COULDN'T EVEN HAVE DRAWN THESE INFERENCES.

>> SO THE FIND GDS IN A SENTENCE ORDING ARE IRRELEVANT.

>> I'M NOT SAYING THEY'RE
IRRELEVANT BUT WE HAVE TO
FOCUS ON WHAT THE EVIDENCE
THE JURY HAD BEFORE HIM.

>> BUT THE ZWLURY HAD NO
EVIDENCE THAT HE WAS THE
SHOOTER.

>> THEY DID --

>> THEY HAD SOMEONE WHO
INFERRED IT.

HOW IS THAT EVIDENCE HE WAS
THE SHOOTER SAYING I ASSUME
THERE'S NOTHING HE DID THAT
MADE ME ASSUME AND I JUST
ASSUMED IT.

SO NOW HE'S SAYING HE WAS
WRONG IN HIS ASSUMPTION.

>> WELL I DON'T KNOW THAT IT
WAS -- SAYING THAT HE
ASSUMED IS, IS EVEN MORE
VAGUE THAN AN INFERENCE.

HE SPECIFICALLY TESTIFIED
THAT MR. DIAZ INDICATED THAT
HE SHOT THE MAN.

HE TESTIFIED THAT THE
INFERENCE WAS BASED ON
MR. DIAZ ACTING OUT THE
SHOOTING. WASN'T JUST WE WERE
HAVING CONVERSATIONS AND I
ASSUMED HE WAS THE SHOOTING.

HE -- HIS INFERENCE S HE
SAID AT TRIAL, WERE BASED ON
THE ACTIONS OF MR. DIAZ.

THE FACT OF THE MATTER IS
NOW THAT WE EVEN TAKE THAT
INFERENCE AWAY, HE HAD NO
INFORMATION ON WHICH TO COME
TO THE COURT AND TESTIFY
THAT MR. DIAZ --

>> DID THE STATE ARGUE THAT
DIAZ WAS THE SHOOTR?

>> NO.

IN FACT THE STATE IT WAS A
FELONY MURDER CASE AND THE
STATE DID SAY WE ARE NOT
GOING TO PRESENT ANY
EVIDENCE THAT HE WAS THE
DIRECT EVIDENCE THAT HE WAS
THE SHOOTER.

>> IN THIS COURT.

>> DID THNT COURT MAKE THE
DETERMINATION IN 1987 THAT
EVEN WITHOUT GAUGES'S
TESTIMONY THAT THERE WAS A

SUFFICIENT BASIS FOR AN
ENDMAN TYSON ANALYSIS THAT
WOULD SUPPORT THE DEATH
PENALTY?

THAT'S WHAT THIS COURT HELD,
RIGHT.

>> THAT'S CORRECT BUT AS I
WAS STATING TO JUSTICE
PAIRIENT AI I THINK THAT
ONLY GETS YOU OVER THE
HEARDTHALITY STATE CAN EXACT
THE DEATH PENALTY.

IT DOESN'T TAKE AWAY THE
FACT THAT THERE HAS TO BE A
WEIGHING OF AGGRAVATION AND
MITIGATION AND THE FACT THAT
MR. DIAZ WAS NOT THE
SHOOTING HERE CERTAINLY
WOULD HAVE BEEN NONSTATUTORY
MITIGATION THAT THE JURY WAS
ENTITLED TO HEAR.

>> WELL THIS COURT DEALT
WITH THAT, DIDN'T IT?

>> I'M SORRY?

>> THIS COURT DEALT WITH THE
FACT THAT MR. TORO RECEIVED
A SENTENCE THAT WAS NOT
DEATH.

THIS COURT DEALT WITH IT.

>> BUT THAT WAS ALSO BASED
ON THE ASSUMPTION THAT
MR. DIAZ COULD'VE BEEN THE
SHOOTER.

IN FACT JUSTICE BARNETT SAYS
IN HER CONCURRING OPINION IF
THERE IS EVIDENCE MR. DIAZ
IS NOT THE SHOOTER.

>> WHERE IS EVIDENCE THAT HE
WAS NOT THE SHOOTER.

>> WELL, THE FACT OF THE
MATTER IS THAT THERE IS NO
EVIDENCE THAT HE WAS.

THE ONLY EVIDENCE --

>> BUT IS EVIDENCE THAT
THERE WERE THREE PEOPLE IN
THE BARROOM, RIGHT?

>> CORRECT.

>> AND EVERYBODY ELSE WAS
LOCKED UP, THE BAR ROOM,
MCHINGER, WHATEVER CAME OUT.

>> NOT EVERYBODY WAS LOCKED
UP.

THERE WERE SOME WITNESSES AT
THE BAR.

>> BUT NOBODY WITNESSED THE SHOOTING?

>> THAT'S NOT EXACTLY TRUE.

THERE WERE TWO WITNESSES IN A BAR THAT TESTIFIED AT TRIAL.

THEY BOTH -- IT WAS VERY CONFUSING BECAUSE NOBODY COULD MAKE A POSITIVE IDENTIFICATION OF THE ROBBERS.

HOWEVER THE WAY THAT THE STATE WAS REFERING TO EACH ROBBER AS ROBBER NUMBER 1, ROBBER NUMBER 2, AND ROBBER NUMBER 3, THEY MADE IT CLEAR THAT THE PERSON THAT THEY IDENTIFIED AS DIAZ WAS NOT THE PERSON WHO HAD THE BAR MANAGER BACK BY THE BAR MANAGER'S OFFICE.

>> FOR THE JURY --

>> THAT WAS ARGUED BEFORE THE JURY?

>> YES, THE JURY HEARD THE EVIDENCE --

>> SO THERE'S NO NEW EVIDENCE IN REGARD OF THAT. IN ALL THREE OF THE ROBBERS HAD GUNS AND SHOT?

>> CORRECT.

>> CORRECT.

>> SO YOU STILL DON'T HAVE ANYTHING THAT'S POINTING TO SOMEBODY ELSE BEING THE ACTUAL SHOOTER.

>> THERE WAS TESTIMONY AT THE TRIAL THAT --

>> NEW, THERE'S NOTHING NEW.

>> THERE'S NOTHING NEW THAT DEFINITELY SAYS THAT THE CO-DEFENDANT WAS THE SHOOTER HOWEVER I DON'T THINK WE CAN GET AROUND THE FACT THAT THE ONLY PERSON AT THE TRIAL THAT INDICATED HE WAS NOW SAYS THAT'S NOT TRUE.

THIS WAS A CONCERN OF THE JURIES.

THEY DID IN FACT ASK FOR THE TESTIMONY OF MR. GAUGES AND ASK FOR THE TESTIMONY OF THE WITNESSING INDICATING THAT CO-DEFENDANT WAS THE

SHOOTER.

>> MR. ANISTON.

>> YOU HAVE NOT TOUCHED ON ANY OF THE OTHER POINTS SO PLEASE BE RESPONSE TO YOUR RESPOND TO MR. ANSTEAD.

>> BECAUSE YOU ARE IN YOUR REBUTTAL IF YOU HAD ANOTHER POINT YOU WANTED TO MAKE I'LL WAIVE MY QUESTION. DO YOU HAVE SOMETHING THAT IS ABSOLUTELY.

>> I JUST WOULD LIKE TO EMPHASIZE TO THE COURT THE TREATMENT OF PUBLIC RECORDS IN THE TRIAL COURT BELOW THAT I DO THINK IT WAS A COMPLETE ABUSE OF DISCRETION THAT THEY CUT -- THAT THE TRIAL COURT CUT OFF OUR TIME FOR REQUESTING RECORDS UNDER A RULE WHICH IS SPECIFICALLY DESIGNATED FOR A WARRANT SITUATION.

>> IN ADDITION TO CITING EXTENSIVELY FROM THE SENTENCING ORDER THAT DISCOUNTED RECEIPT REALLY THAT YOU ARE CLIENT WAS THE SHOOTER BUT WENT AHEAD WITH HIS MAJOR PARTICIPATION IN THIS ARMED ROBBERY AND THE DEATH OF THE, OF THE VICTIM, THE CLOSING PARAGRAPH OF THE TRIAL COURT IS JUST A COUPLE OF SENTENCES LONG.

AND IT SAYS, GIVEN THAT THREE WITNESSES TESTIFIED THAT DIAZ WAS NOT THE SHOOTER IT CANNOT BE SAID THAT GAUGE'S TESTIMONY THAT HE INFERRED THAT DIAZ WAS THE SHOOTER QUASI-OF ANY CONSEQUENCE.

THE JURY WAS APT TO BELIEVE THE THREE WITNESSES WHO TESTIFIED CONSISTENTLY RATHER THAN GAUGES WHO INFERRED HE WAS THE SHOOTER. DESPITE THE TESTIMONY OF THE THREE WITNESSES THE MAJORITY OF THE JURY RECOMMEND ADSENTENCE OF DEATH. WHAT IS YOUR COMMENT ON THE

JUDGE'S CLOSING PARAGRAPH.

>> WELL I THINK TO SAY THAT GAUJ'S TESTIMONY WAS INCONSEQUENTIAL IGNORES THE FACT THAT THE STATE DID FEEL COMPELLED TO PRESENT HIS TESTIMONY.

IT ALSO IT IGNORES THE FACT THAT THE JURY DID IN FACT REQUEST TO SEE HIS TESTIMONY.

THEY WERE CONCERNED ABOUT HIS TESTIMONY.

AND SO I DON'T THINK THAT YOU CAN SAY THAT THE ONE PERSON INDICATING HE WAS THE SHOOTER --

>> BUT YOU AGREE THAT THE STATE HAD NOT ARGUED THAT YOURT CLIENT WAS THE SHOOTR?

>> I AGREE THAT THEY HAD, I BELIEVE IN THEIR OPENING AND THEIR CLOSING THEY SAY WE HAVEN'T PRESENTED DEFINITIVE EVIDENCE THAT HE WAS THE SHOOTER BUT THEY DID PRESENT RALPH GAUGES.

>> MAY IT PLEASE THE COURT SANDRA DAGGERT ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE.

AS THIS COURT HAS RECOGNIZED, THE INFORMATION ABOUT MR. GAUGES WAS SIMPLY AN INFERENCE.

MR. GAUGES STILL SAYS THAT HE ACTED IT OUT.

HE'S JUST SAYING RECANTING THE INFERENCE.

THE CLAIM --

>> CAN I JUST ON THAT -- AND IT MAY END UP BEING NOTHING. BUT ON DIRECT APPEAL, THE TESTIMONY WHICH WAS REPEATED WAS WHERE DID HE INDICATE -- DIAZ INDICATE HE SHOT THE MAN.

WHERE DID HE INDICATE HE SHOT THE MAN?
IN THE CHEST.

DID HE EVER COME OUT TO YOU AND SAY IN THE WORDS THAT HE SHOT THE MAN IN THE CHEST?
NO HE DIDN'T.

YOU WERE INFERRING THAT FROM HIS INDICATIONS MEANING HIS ACTIONS.

>> YEAH.

>> SO THE STATE PRESENTED THAT WITNESS.

>> YES.

>> FOR WHAT PURPOSE?

>> TO HAVE ADDITIONAL EVIDENCE, WE HAD VICTIMS WHO COULD NOT IDENTIFY THE SHOOTERS.

THEY ONLY ONE OF THEM COULD EVEN GIVE A TENTIVE IDEA OF WHO WAS IN THE BAR.

WE HAD A FINGERPRINT OF MR. DIAZ AND SEVERAL FINGERPRINTS OF MR. TORO.

WE HAD THE VICTIMS AT THE ASIDE OF TIME FOR PLACE ASIDE FROM HIDING UNDER THE BAR OR LOCKED IN THE BATHROOM AND DON'T SEE ANYTHING.

>> SO THE WAY I SEE THAT IT'S NOT INCONSEQUENTIAL TESTIMONY.

WOULD YOU AT LEAST -- AGREE WITH THAT THE JURY HEARING THAT CERTAINLY COULD HAVE DETERMINED BASED ON WHAT GAUGES SAID WHETHER WE THINK IT MADE A DIFFERENCE FOR THE!!!!!! THENTMAN-TYSON ANALYSIS THAT DIAZ WAS THE SHOOTER.

>> WELL YOU HAVE TO REMEMBER THAT MR. GAUGES DID NOT JUST TESTIFY ABOUT THIS INFERENCE.

HE TESTIFIES ABOUT HOW THE DEFENDANT TOLD HIM HE WAS GOING TO GET OFF BECAUSE HE THREATAND WINS NAMED KANTEDY.

THERE WAS A WITNESS NAMED KANTEDY, CANDICE BRAWN WHO WAS THREATENED.

SO THAT BOLTERS -- BOLSTERS HER TESTIMONY.

SHE AGREED TO TESTIFY.

RECANTED AND RECANTED BACK SO BOLSTERING HER TESTIMONY WAS IMPORTANT.

MR. GAUGES TOLD HIM THEY WERE IN THE BAR COMMITTING

THIS ROBBERY AND THE SHOOTING OCCURRED. THAT AGAIN SHOWS THAT THE DEFENDANT'S GUILTY AND WHEN YOU DON'T HAVE WITNESSES WHO CAN IDENTIFY PEOPLE, YOU HAVE MS. BROWN WHO'S GOING BACK AND FORTH. PRESENTING SOMEONE TO BOLSTER THE TESTIMONY IS IMPORTANT.

>> SO DO YOU SEE HIS AFFIDAVIT AS BEING ON THIS POINT A VARIANT OF HIS TRIAL TESTIMONY OR IN FACT IT IS AT LEAST INCONSISTANT WITH HIS TRIAL TESTIMONY. NOW THERE MAY BE SOME INFORMATION ABOUT WHETHER GAUGES HIMSELF IS CREDIBLE OR NOT BUT WE CAN'T -->> I UNDERSTAND. IT CERTAINLY'S INCONSISTENT ON WHETHER HE'S DRAWING THE INFERENCE OR NOT HOWEVER YOU THEN YOU GET TO THE 1989 FOR POST CONVICTION RELIEF WHERE MR. GAUGES NEVER ADMITTED DUMPLICITY.

WHETHER THREATENING CANDY IS COMPLICITY ADMITTING YOU ARE IN THE BAR AND THE SHOOTING TOOK PLACE.

>> -- A TRIAL HE DIDN'T COME OUT AND SAY I SHOT THE MAN IN THE CHEST.

HE INFERRED IT FROM HIS INDICATIONS.

HE IS NOW SAYING IN HIS AFFIDAVIT.

>> I DIDN'T INFER IT.

I DIDN'T SAY IT.

I LIED WHEN I SAID I INFERRED IT.

>> SO HE DOESN'T RECAN'T THE PART WHERE HE SAYS DIAZ SAYS

--

>> NO, HE SAID MR. DIAZ DID ACT OUT THE SHOOTING TO HIM.

I'M LYING WHEN I SAID I INFERRED T. THAT'S ALL HE SAYS.

>> YOU KNOW PROBABLY BETTER THAN, THAN WE BECAUSE IF

YOU'RE FAMILIARITY WITH THE RECORD.

HOW MUCH OF AN ISSUE THE IDENTITY OF THE SHOOTER OR WHO THE SHOOTER WAS AT TRIAL.

CAN YOU HELP US WITH THAT IN TERMS OF THE STATE'S ASSERTIONS, THE STATE'S --

>> THE STATE'S --

>> RELIANCE ON THIS AND THEN THE DEFENSE SAYING MY CLIENT UNDER ANY SCENARIO WAS NOT THE SHOOTER, THEREFORE, YOU SHOULD RECOMMEND LIFE.

WHAT -- TELL US WHAT, WHAT WENT ON WITH REFERENCE TO THE RELEVANCE OR IRRELEVANCE OF WHO THE SHOOTER WAS?

>> THE STATE'S POSITION WAS BASICALLY WE CAN'T TELL YOU WHO THE SHOOTER WAS.

THERE IS THIS EVIDENCE FROM CANDEN BRAWN WAS TORO IS THE SHOOTER THERE IS EVIDENCE FROM RALPH GAJDS IS THE SHOOTER.

WE DON'T KNOW.

IT DOESN'T MATTER.

HE WAS A MAJOR PARTICIPANT IN THIS CRIME.

>> SO IT WAS THE ARGUMENT OF THE STATE THAT IT DIDN'T MATTER HE WAS A MAJOR PARTICIPANT IN THIS CRIME THAT HE WAS A MAJOR --

>> IN YOUR PROPORTIONALITY ANALYSIS ON DIRECT APPEAL YOU SAY ASSUMING THERE'S INSUFFICIENT EFRDS THAT HE'S THE SHOOTER IT DOESN'T MATTER.

>> WHAT WAS THE ARGUMENT OF THE DEFENDANT IN PLEADING TO THE JURY FOR LIFE?

>> THE DEFENDANT'S ARGUMENT WAS THAT TORO WAS THE SHOOTER AND TORO HAD GOTTEN LIFE BUT HE DIDN'T WANT TO GET INTO THE PLEA BECAUSE THE REASON THE STATE HAD GIVE THP PLEA, THE STATE SAID IF HE GO THERE, WE WANT TO PRESENT OUR REASONS FOR

OFFERING THAT PLEA AND THE REASONS FOR OFFERING THAT PLEA IS HE'S THREATENED THESE WITNESSES AND HE HAD APEDY TRIAL CLAIMPENEDDING AND THEREFORE WE HAD TO GIVE HIM SOMETHING OR WE WOULD'VE HAD TO DISMISS OUR CASE.

AND THE DEFENSE DID WANT WANT US BRINGING OUT ALL THE THREATS TO THE WITNESSES AND SO THEY DROPPED THE, DROPPED IT AT THAT POINT WHICH IS WHY WHEN WE GET TO SENTENCING, THE DEFENSE ENDS UP AGREEING TO US FILING A WRITTEN PROPER.

>> BUT THE RECORD IS CLEAR THAT THE STATE DID NOT RELY -- RELY ON HIM BEING THE SHOOTER FOR ITS CLAIM THAT HE SHOULD RECEIVE THIS --

>> NOT THAT I RECALL.

>> I GUESS THE QUESTION JUST ON THIS.

HOW COULD THEN -- IF HE'S NOT THE SHOOTER AND TORO IS, HOW IS HE, AND IT MAY OR MAY NOT MATTER, THE MORE CULPABLE OF THE TWO PERPETRATORS?

>> WELL, THIS COURT SAID THAT WHEN THE STATE PLEASE SOMEONE OUT TDOESN'T MATTER. ON WHEN YOU ANALYZE THIS, WHEN YOU HAD IT ON DIRECT APPEAL.

AND YOU SAID DIRECTLY, EVEN ASSUMING WE'VE ALREADY DECIDED THE ENDMAN-TYSON ISSUE AND IT DOESN'T MATTER TO US THAT TORO MAY BE THE SHOOTER.

EVEN ASSUMING THAT DIAZ WASN'T THE SHOOTER, TORO'S PLEA DOESN'T MATTER TO US. YOU DIRECTLY SAID IT WHEN YOU ANALYZED THIS ISSUE ON DIRECT APPEAL.

>> SO TORO HAVING RECEIVED THE PLEA TO SECOND DEGREE, IT DOESN'T MATTER IF TORO WAS THE SHOOTER FOR THE COURT'S ANALYSIS.

NOW, I GUESS IT GOES BACK TO THEN THE PROBABILITY OF A LIFE SENTENCE IF THE COURT'S PROPORTIONALITY ANALYSIS WOULDN'T BE ANY DIFFERENT.

NOW WE JUST GO BACK TO -- DOES IT GO TO ANIYINGIVATOR OR MITIGATOR IN THE --

>> WELL, AGAIN, THERE WAS A TRAITOFF THERE AT THE TIME OF TRIAL.

THE DEFENSE MADE THAT THEY WEREN'T GOING TO GET INTO THE FACT OF TORO'S PLEA BECAUSE THEY DIDN'T WANT US TO GO INTO THE REASONS FOR TORO'S PLEA BECAUSE THE DEFENDANT WAS IMPLICATED IN THESE THREATS.

HE TOLD GAUGES HE WAS IMPLICATING IN THESE THREATS THEN YOU HAVE EVIDENCE PRESENTED TO THE JURY THAT HE'S BUSY THREATENING WITNESSES.

>> I THOUGHT YOU SAID GAUGES TESTIFIED AT TRIAL TO THE THREATS.

>> GAUGES TESTIFIED THAT THEY TOLD HIM ABOUT THREATS. THEY THREATENED MORE THAN ONE WITNESS AND THE EXTENT OF THE THREATS, MS. -- THE DEFENDANT BROUGHT OUT SOME OF THE THREATS WITH MS. BRAUN WHEN HE WAS CROSS-EXAMINING HER BUT THE EXTENT OF THE THREATS DIDN'T COME OUT AND THEY DIDN'T WANT US GETTING UP AND EXPLAINING WHAT HAPPENED AND WHY IT IS THAT TORO HAS A LIFE SENTENCE F. WE HADN'T HAD A PROBLEM WITH THE WITNESSES TORO WAS -- WE WOULD'VE SOUGHT DEATH ON TORO TOO.

>> FROM THE STATE'S PERSPECTIVE 27 YEARS LAETEDER DO WE HAVE ANY BETTER IDEA WHO THE SHOOTER WAS?

>> NO.

THE WITNESSES WERE STILL LOCKED IN THE BATHROOM OR

HIDING UNDER THE BAR.
THEY DIDN'T SEE THE SHOOTER.
YOU HAVE CANDICE BRAWN
SAYING THE DEFENDANT TOLD ME
TORO WAS THE SHOOTER AND I
OVERHEARD THIS ARGUMENT FROM
WHICH I INFERRED THAT TORO
WAS THE SHOOTER.
BECAUSE EVERYBODY SEEMED TO
BE YELLING AT HIM.
AND WE HAVE GAUGES SAYING
THE DEFENDANT TOLD ME IT WAS
HEART OF HIS -- PART OF THIS
CRIME AND I INFERRED HE WAS
WHICH GAUGES AND -- GAUGES
HAS BEEN RECONTING THAT
SINCE 89 SO TO CALL IT NEWLY
DISCOVERED EVIDENCE AT THIS
POINT.
>> BUT IN 89, WE REALLY
DIDN'T HAVE ANY EVIDENCE
THAT WAS REALLY PRESENTED.
AS I RECALL, THE ATTORNEY --
MADE AN ALLEGATION THAN A
PRIOR ATTORNEY HAD -- HE HAD
-- THERE WAS NEVER REALLY
ANY EVIDENCE PRODUCED OF
THAT, WAS IT.
>> WELL, BECAUSE WE ACCEPT
THAT THAT IS TRUE AND
SUMMARILY DENIED IT FOR THE
VERY REASON THE STATE URGES
YOU TO AFFIRM THE SUMMARY OF
DENIAL TODAY YOU HAVE --
AFFIRMED THE SUMMARY DENILE
WHEN IT WAS A BRADY CLAIM
WHEN YOU HAD TO ACCEPT THAT
ALLEGATION THAT GAUGES HAD
SAID DEFENDANT NEVER
ADMITTED ANYTHING COMPLICITY
TO HIM AND YOU'VE, YOU NOW
HAVE A LESSER RECONTATION
THAN THAT BOLD STATEMENT
BECAUSE THAT WOULD TAKE OUT
THE CANDICE BRAWN, THAT
WOULD TAKE THE ADMISSION TO
BEING IN THE BAR WHEN HE
SAID NO COMPLICITY.
COMPLICITY WOULD MEAN I HAVE
NOTHING TO DO THIS CRIME AND
THAT WAS THE ALLEGATION THEY
SAID WE HAVE TO SAY IS TRUE.
SO IF IT DIDN'T MEET THE
BRADY STANDARD OF A

REASONABLE PRAEBLT OF A
DIFFERENT OUTCOME IT DOESN'T
MEET THE NEW STANDARD OF A
PROBABILITY OF DIFFERENT
OUTCOME WITH THIS COURT JUST
DESCRIBED LAST WEEK AS A
STRINGENT STANDARD.

THE COURT HAS NO FURTHER --

>> WELL, WOULD YOU -- I
THINK SHE HAS ADDRESSED THE
ISSUE OF THE RECORDS AND WE
ARE SEEING THIS ON A
REPETITIVE BASIS WITH REGARD
TO SOME CHANGES THAT, THAT
ARE ALLEGEDLY OCCURRING WITH
RECALL TO PROTOCOLS AND
THOSE KIND OF THINGS AND
THERE SEEMS TO BE A RUNNING
DISCUSSION GOING ON SO COULD
YOU ADDRESS THAT AS WELL?

>> WELL, MY OPPONENT IN HER
BRIEF TALKS ABOUT HOW THESE
RECORDS PREVENTED HER FROM
CENTRING THE EXPERT DOING
THE ANALYSIS THE STATE'S
POSITION IS MOTION SHOULD BE
-- YOU CAN FILE AN I REQUEST
AT ANY TIME ALL YOU HAVE TO
DO IS SHOW THAET IT'S
CALCULATED TO LEAD TO THE
DISCOVERY OF A CLAIM.

THEREFORE, THE CLAIM, THE
MOTION, THE REQUEST SHOULD
HAVE BEEN MADE BEFORE YOU
SHOW UP AT THE HUFF HEARING
ON YOUR MOTION.

SECONDLY, MY OPPONENT AT THE
NOVEMBER 17th HEARING
ADMITTED THAT SHE HAS THE
AUTOPSY REPORTS FROM 2000 TO
2005.

SHE COULD'VE PRESENTED THOSE
TO HER EXPERT AND HAD HIM
EVILY!!IUATE THOSE.

SHE'S TALKING ABOUT ONLY THE
THREE MOST RECENT AUTOPSY
REQUESTS BUT BY THE WAY SHE
THEN TURNED AROUND AND ASKED
DOC AND THE ATTORNEY
GENERAL'S OFFICE FOR THE
AUTOPSY REQUESTS.

THESE REQUESTS WENT ON FOR
PAGES.

THEY WERE VASTLY OVERBROAD.

THEY WERE UNTIMELY.
AND THE STATE'S POSITION IS
THE TRIAL COURT DIDN'T ABUSE
ITS DISCRETION PARTICULARLY
CONSIDERING THAT THIS COURT
HAS REJECTED THESE PUBLIC
RECORD CLAIMS IN ROTHERFORD,
HILL, AND RAULEN.

>> I THINK WHAT THE QUESTION
I HAVE ABOUT THE PROTOCOL IS
AT THE END OF RUTHERFORD OR
HALL IS THAT THERE HAS BEEN
WHAT APPEARED TO BE AN
INCREASE IN THE AMOUNT OF
ONE OF THE DRUGS.

WHAT IS THE STATE OF THE
RECORD ON THAT?

>> WELL THE STATE OF THE
RECORD ON THAT IS IN YOUR
SIMS OPINION WHAT YOU SAID
THE TESTIMONY WAS.

AND WHAT THE TESTIMONY WAS
THAT THE SODIUM PENTHOL
WOULD BE IN SYRINGES.

THE NEW PROTOCOL OR
ALLEGEDLY NEW PROTOCOL
DIRECTLY SAYS IT'S TWO
SYRINGES.

THERE'S NO CHANGE JUST
CLARIFICATION OF THE
LANGUAGE.

>> MORE SPECIFIC AS TO --

>> WE NEVER SAID THERE WERE
TWO.

WE SAID TWO SYRINGES
CONTAINING NO LESS THAN TWO.
THEY INTERPRETED THAT AS
TWO.

TWO SYRINGES CONTAINING 2.5
ARE NOT TWO SYRINGES
CONTAINING LESS THAN TWO.

>> IF IN FACT IT'S A LITTLE
BIT MORE.

>> WELL, THEY'RE THE SAME
STATEMENT.

ONE IS CLEARER THAN THE
OTHER BUT THEY'RE BOTH THE
SAME STATEMENT.

TWO SYRINGES NO LESS THAN
TWO, THEY INTERPRET THAT AS
TWO.

NO LESS THAN TWO IS WHAT WE
SAID.

FIVE ISN'T LESS THAN FIVE.

>> HOW DOES IF AT SOME POINT
WLL WE'RE AT THE CONTROVERSY
CONTINUES THAT THERE COULD
BOW A RISK OF CONSTANT PAIN,
WHAT MECHANISM DOES THE
COURT HAVE TO MONITOR THAT?
I MEAN WE DON'T WANT TO BE
INTERFERING WITH EACH AND
EVERY EXECUTION.

I RECALL AT THE END OF THE,
WHEN THE ELECTRIC CHAIR WE
WERE HAVE THE STATE FILE
UPDATES ON HOW, YOU KNOW,
WHAT WAS BEING DONE TO
REVIEW IT.

CAN YOU UAS AN OFFICER OF
THE COURT TELL US IF YOU
HAVE ANY INFORMATION AS TO
WHETHER THIS IS AN ONGOING
CONCERN OF THE DOC AND THE
STATE OR IF YOU HAVE ANY
EVIDENCE ABOUT THAT AT ALL?

>> THE STATE'S POSITION IS,
THE STATE OF THINGS HASN'T
CHANGED SINCE SIMS.

IF THEY COME UP WITH SOME
ACTUALLY NEWLY DISCOVERED
EVIDENCE THAT THERE WAS A
PROBLEM PERHAPS IT WOULD BE
TIME TO LOOK AT IT AGAIN.

THEY HAVE NOT DONE THAT.
ALL THEY HAVE COME OUT WITH
SPECULATION OUT AFFA LANSET
ARTICLE PUBLISHED MORE THAN
A YEAR BEFORE THEY FILED
THEIR ARTICLE.

SPECULATION FROM WHY THE
SPECULATION MIGHT BE TRUE
FROM A LETTER THAT WAS
PRESENTED A LETTER TO THE
EDITOR AFTER THE LANSET
ARTICLE.

THEY ADMIT THEY HAVE THE
AUTOPSY REPORTS FROM 2000 TO
2005.

THEY COULD GIVE THEM TO AN
EXPERT AND HAVE THE EXPERT
TELL THEM WHETHER OR NOT
THERE'S A PROBLEM AND THEN
TIMELY PRESENT THAT CLAIM.
IF THEY HAVE ANY EVIDENCE OF
A PROBLEM.

AND THE STATE'S POSITION IS
THAT, THAT, YOU KNOW, THE

REASON YOU HAD THE, THE
HEARINGS ON THE ELECTRIC
CHAIR IS THERE WAS EVIDENCE
THERE WAS A PROBLEM.
THERE HAD BEEN FLAMES THEN
YOU HAD CHART READINGS AND
THE CHART MEETINGS DIDN'T
MATCH WHAT THEY WERE GOING
TO MATCH.

THERE'S NOTHING HERE BUT
SPECULATION ABOUT WHAT MIGHT
HAPPEN SO UNTIL AND UNLESS
THEY COME UP WITH SOME
ACTUALLY NEWLY DISCOVERED
EVIDENCE THAT THEY PRESENT
DILIGENTLY FROM WITHIN A
YEAR OF WHEN THEY COULD'VE
DISCOVERED IT, THERE'S
NOTHING TO CONSIDER.

92 THE -- APPEERS THAT THE
ARGUMENT, AND IT IS BECOMING
REPETITIVE IN MULTIUAL CASES
IS THAT THEY DON'T HAVE THE
INFORMATION AND YOU'RE TODAY
SAYING THIS RECORD
DEMONSTRATES THAT THAT
INFORMATION IS AVAILABLE.
IT'S THERE.

AND THAT'S NOT A MERITORIOUS
ARGUMENT.
CERTAINLY WE WOULD KNOW IT
WOULD HAVE TO HAVE
DOCUMENTATION BEFORE YOU CAN
WHETHER WHAT'S HAPPENING IS
THE SAME OR NOT.

SO THE RECORD HERE DOES
DEMONSTRATE THAT ALL OF THE
DOCUMENTS NECESSARY HAVE,
HAVE BEEN MADE AVAILABLE IN.

>> CERTAINLY NOT ALL OF THE
DOCUMENTS THEY WANT.

>> WELL, SUFFICIENT
DOCUMENTATION IS AVAILABLE?

>> BUT,
[INAUDIBLE]

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WHEN THEY'RE COMPLAINING
ABOUT ME REPRESENTING THE
AGENCIES THEY SAY THE
MEDICAL EXAMINER OF THE
EIGHTH DISTRICT SENT THUS
AUTOPSY REPORTS BEFORE THE
LAST THREE.

SO THEY HAVE THOSE AUTOPSY

REPORTS.

UNLESS THE KOURLT HAS ANY OTHER QUESTIONS THE STATE RESPECTFULLY REQUESTS YOU DENY ALL OF THESE.

>> THANK YOU.

REBUTTAL?

>> I'M GOING TO START WITH THE LETHAL INJECTION SINCE I DIDN'T HAVE MUCH COMMENT ON THAT EARLIER.

SPECIFICALLY WITH REGARDS TO THE PUBLIC RECORDS, THIS IS DISTINGUISHABLE FROM HILL, RURTHFORD, AND ROWELING THOSE WERE DENIED ON PROCEDURAL GROUNDS.

THEY WERE REQUEST UNDER H 3 WHICH REQUIRES THE RECORDS HAD BEEN PREVIOUSLY REQUESTED TO THE AGENCY PRIOR TO A WARRANT BEING SIGNED.

THAT'S NOT THE SITUATION LEER.

OUR RECORDS WERE REQUIRED UNDER 3.25 I AND THAT'S DIFFERENT THAN H 3.

WE FILED THESE BEFORE THE WARRANT WAS SIGNED.

WE HAD IT UNDER I IT'S REQUIRED THEY ARE RELEVANT TO THE SUBJECT MATTER OF A PENDING POST CONVICTION PROCEEDING.

>> DID THE TRIAL COURT FIND THAT THE QUEST WAS OVERBROAD?

>> THEY DID FIND IT WAS OVERBROAD BUT I WOULD SAY THAT OUR REQUESTS WERE VERY SPECIFIC.

ASKING FOR ONLY THOSE DOCUMENTS THAT WE WERE ABLE IN LOOKING AT THE NEW PROTOCOL WE WERE ABLE TO, TO FIGURE OUT THAT IN FACT THE STATE MAY HAVE -- THEY HAVE THESE DOCUMENTS.

THEY SAY THEY'RE KEEPING CHECKLISTS OF THE EXECUTION SO WHERE ARE THE CHECK LISTS IN HILL, RURTHFORD, AND ROWELING.

I WOULD ARGUE MR. DIAZ IS ENTITLED TO THOSE DOCUMENTS AND WE DON'T HAVE THEM.
>> THEY SAID PROTOCOL SO THE PROTOCOL IS NOT SOME KIND OF SECRET UNKNOWN THING. YOU DO HAVE THAT?
>> OBVIOUSLY, THE STATE PROVIDED IN RUTHERFORD. THE PROBLEM IS THE NEW PROTOCOL GENERATES SO MANY ADDITIONAL QUESTIONS THAT TALKS ABOUT THE THAT THE WARDEN HAS DISCRETION TO SELECT EXECUTIONERS AND MAKE SURE THEY'RE PROPERLY TRAINED BUT WHAT KIND OF TRAINING DO THEY RECEIVE? DO THEY HAVE MEDICAL TRAINING?
>> THE STATE SEEMS TO SUGGEST THAT THERE REALLY ISN'T A NEW PROTOCOL. THAT ORIGINAL PROTOCOL SAID NO LESS THAN TWO AND THAT THIS WHAT YOU SEE NOW SAYS 2.5.
BUT IS NOT INCONSISTENT WITH THE ORIGINAL PROTOCOL THAT WAS, WAS ACTUALLY DISCUSSED IN SIMS.
>> IN SIMS, THE UNDERSTANDING WAS THAT IT WAS TWO GRAMS. THAT WAS THE UNDERSTANDING IN SIMS. THAT'S NOT AN UNDERSTANDING THAT THE DEFENDANT IS CREATING.
THE FACT OF THE MATTER THAT IT'S NOW FIVE GRAMS STILL DOESN'T REMEDY THE PROBLEM OF THE ADMINISTRATION OF THE SODIUM PENTHOL AND IT DOES ELIMINATE THE PROBLEM THAT THE ANESTHESIA MAY WEAR OFF. I HAVE CITED IN TESTIMONY BELOW AND IN MY BRIEF MY TESTIMONY OUT OF CALIFORNIA. THERE IS SWORN TESTIMONY FROM DOCTORS, EXPERTS, EYEWITNESSES IN CALIFORNIA, INDICATING THAT EVEN FIVE GRAMS IS INSUFFICIENT AND

THAT IT IS LIKELY THAT IT WEARS OFF IN THESE CIRCUMSTANCES. THE MAJOR DIFFERENCE HERE, YOU KNOW, THE NEW PROTOCOL, ITS IT POINTS TO MANY ADDITIONAL THINGS THAT GENERATE MORE QUESTIONS. BUT THE FACT OF THE MATTER IS HERE, SINCE SIMS THERE HAS BEEN 19 EXECUTIONS. IN SIMS THERE WAS NO EYEWITNESS TESTIMONY TO THE EXECUTIONS. THE DIFFERENCE IS IN CALIFORNIA, WE NOW HAVE THAT EYEWITNESS TESTIMONY. AND THAT IS THE STATE THAT -- WHOSE PROCEDURES ARE SIMILAR TO FLORIDA. >> WITH OUR ASSISTANCE YOU HAVE UTILIZED ALL OF YOUR TIME. THANK YOU VERY MUCH. FOR THE WELL DONE ARGUMENTS AND WE WILL TAKE THE CASE UNDER ADVISEMENT. THANK YOU.