

>> PLEASE RISE.

>> LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.

PLEASE, BE SEATED.

>> ALL RIGHT.

NEXT CASE ON THIS COURT'S
CALENDAR IS GALANTE ROMAR
PHILLIPS V. THE STATE OF
FLORIDA.

PARTIES READY?

>> YES, YOUR HONOR.

>> YOU MAY PROCEED.

>> MR. PHILLIPS WAS CONVICTED OF
MURDER DURING THE COURSE OF A
ROBBERY THAT OCCURRED IN THE
PARKING LOT OF A BUILDING SUPPLY
COMPANY.

HE SHOT MR. CHRISTOPHER ALIGADA
AS HE CAME TO THE AID OF HIS
CO-WORKER, MR. SWEET, WHO WAS
THE ROBBERY VICTIM.

I'D LIKE TO ADDRESS TWO ISSUES
TODAY.

ISSUE ONE DEALING WITH THE
PROPRIETY OF AVOIDING ARREST AND
ISSUE TWO, DEALING WITH
PROPORTIONALITY.

THE TRIAL COURT IMPROPERLY FOUND
THAT THE HOMICIDE WAS COMMITTED
TO AVOID ARREST.

THE FACTS OF THIS CASE SHOW THAT
MR. PHILLIPS REACTIVELY SHOT AS
MR. ALIGADA WAS RUSHING HIM.
AS HE SAID, "HE WAS RUSHING ME,
I THOUGHT HE WAS GOING TO GRAB
THE FIREARM OR GRAB THE WEAPON

OR OTHERWISE PREVENT ME FROM COMPLETION OF THE ROBBERY OR LEAVING THE IMMEDIATE SCENE OF THE ROBBERY."

THE TRIAL COURT'S ACTUAL FINDINGS IN THE ORDER WE'RE NOT TAKING SIGNIFICANT ISSUE WITH, BUT THE LEGAL CONCLUSION ISN'T THERE.

THE FACTS THE COURT HAS FOUND SIMPLY DO NOT SUPPORT THE LEGAL CONCLUSION THAT THE HOMICIDE WAS TO AVOID ARREST --

>> WOULD YOU GO THE NEXT STEP? WHERE DOES THAT LEAVE US IN THIS CASE?

DOES THAT LEAVE US WITH REDUCING THE CASE?

DOES THAT LEAVE US WITH, IF WE ACCEPT YOUR ARGUMENT, REVERSING FOR NEW PENALTY?

WHERE DO YOU THINK THAT LEAVES US IN THIS CASE?

IF WE ACCEPT YOUR POSITION?

>> REVERSING THE AVOIDING ARREST AGGRAVATING CIRCUMSTANCE, I THINK, LEADS US TO A REVERSAL OF THE DEATH SENTENCE ON PROPORTIONALITY BASED UPON --

>> AND?

NEXT STEP?

REDUCTION TO LIFE?

>> REDUCTION TO LIFE BASED ON PROPORTIONALITY --

>> RATHER THAN A NEW PENALTY PHASE?

>> YES, YOUR HONOR.

>> AND WHY IS THAT?

>> WELL, IF THE AVOIDING ARREST
AGGRAVATING CIRCUMSTANCE ISN'T
THERE, I'VE HAD -- IN A
PROPORTIONALITY ARGUMENT I HAVE
THREE COMPARABLE CASES.

SIMILAR AGGRAVATE, MITIGATING,
AND IN FACT SOME OF THOSE CASES
ARE MORE AGGRAVATED AND LESS
MITIGATED THAN THIS CASE.

>> WHICH WERE THOSE CASES?

>> THE TERRY, JOHNSON AND HESS.

>> AND, WELL, WE'RE PROBABLY
JUMPING AHEAD OF OURSELVES AS
FAR AS ON THE PROPORTIONALITY,
BUT YOUR ARGUMENT IS IF WE DON'T
ACCEPT THAT IT WOULD RESULT IN
AN AUTOMATIC REDUCTION TO LIFE,
THEN YOU WOULD, YOU WOULD THEN
SAY THAT IT'S NOT HARMLESS ERROR
BEYOND A REASONABLE DOUBT AND
THAT'S WHY IT WOULD HAVE TO BE
REVERSED FOR A NEW PENALTY
PHASE?

>> IT WOULD HAVE TO BE REVERSED
FOR A NEW PENALTY PHASE.

>> BUT WHAT ABOUT THE JUDGE'S
FINDING THAT ANY ONE OF THE
AGGRAVATORS WOULD BE SUFFICIENT
FOR HIM TO HAVE IMPOSED THE
DEATH PENALTY?

>> WELL, YOU KNOW, THAT KIND OF
LANGUAGE APPEARS IN ORDERS FROM
TIME TO TIME, BUT IN THIS CASE
IT'S APPARENT THAT IF THE ONLY

AGGRAVATOR HAD BEEN DURING THE COMMISSION OF A ROBBERY OR FELONY MURDER AGGRAVATOR, THIS COURSE ALMOST UNIFORMLY REVERSES DEATH SENTENCES, AND THERE WAS MITIGATION PRESENT.

SO I DON'T KNOW HOW MUCH CREDENCE WE CAN GIVE TO THAT KIND OF LANGUAGE IN A TRIAL COURT'S ORDER WHEN IT'S APPARENT THAT IF THERE WAS ONLY ONE AGGRAVATOR IN THE CASE, THAT IT WOULDN'T BE.

>> WELL, IT'S NOT EXACTLY JUST THE ROBBERY HERE.

THERE ARE PRIOR VIOLENT FELONIES, THAT AT 17 YEARS OLD HE SHOT HIS AUNT, HE SERVED FIVE YEARS IN PRISON, AND THEN AFTER THIS MURDER HE COMMITTED ANOTHER ARMED ROBBERY.

HE WAS UNSUCCESSFUL IN KILLING ANYONE, THANK GOODNESS, BUT HE SHOT AT THEM 13 TIMES.

SO THIS IS NOT EXACTLY A SITUATION THAT IS ONLY WHERE THE AGGRAVATION ONLY ARISES OUT OF THE CRIME ITSELF.

>> THAT'S CORRECT.

THAT IS CORRECT.

>> [INAUDIBLE]

>> WELL, THE COMPARABLE CASES I'VE PROVIDED TO THE COURT, IN FACT, THERE IS AGGRAVATION THAT DOESN'T ARISE OUT OF THE CRIME ITSELF THAT INCLUDED PRIOR

VIOLENT FELONIES.

IN PARTICULAR, THE JOHNSON CASE.
THERE WAS ACTUALLY TWO MURDERS
INVOLVED EVEN THOUGH IT AROSE
OUT OF THE CRIME, IT WAS
ACTUALLY TWO CONVICTIONS FOR
MURDER.

AND IN THAT PARTICULAR CASE THE
NATURE OF THE CRIME WAS EVEN
MORE AGGRAVATED.

IN JOHNSON THE DEFENDANT AND HIS
BROTHER WENT TO COMMIT A ROBBERY
AND A BURGLARY.

THEY WENT -- THE DEFENDANT WENT
INTO THE HOUSE WITH ONE OF THE
VICTIMS, SHOT HIM IN THE HOUSE,
BROUGHT HIM BACK OUT ON THE
PORCH AND SHOT HIM FOUR MORE
TIMES.

THE JURY VOTE WAS 9-3 IN THAT
CASE, AND WE'VE GOT A 7-5 --

>> WHY DON'T WE, YOU'RE REALLY
DEALING WITH PROPORTIONALITY,
AND I THINK THE QUESTION'S AROSE
LEGITIMATELY TO WHAT JUSTICE
LEWIS ASKED, BUT LET'S GO BACK
TO WHERE IT GETS US IF IT
DOESN'T GET US TO REDUCED TO
LIFE WHICH IS, I THINK, WHERE
WE'RE GOING.

>> I THINK THE PROPORTIONALITY
ARGUMENTS AND THE FACTUAL
ARGUMENTS DEALING WITH THAT
ISSUE ALSO IS A FOUNDATION THAT
IT SHOULD BE REDUCED FOR A
PENALTY PHASE AT THE VERY LEAST.

>> WHAT ABOUT OTHER AGGRAVATORS
HERE OR ARGUABLY THAT COULD HAVE
BEEN FOUND IF IT GOES BACK FOR
PENALTY PHASE?
HOW DO WE ADDRESS THOSE AND WHAT
ARE THOSE FROM A LEGITIMATE
POSTURE WE'RE LOOKING AT?
ARE THERE OTHERS TO DISCUSS?
WHAT'S THE POSTURE THERE AS YOU
SEE IT?

>> I'M NOT SURE I FOLLOW THE
QUESTION.

>> IN THIS CASE IF IT GOES BACK
FOR A PENALTY PHASE OR A REASON
THAT IT SHOULD GO BACK FOR A
PENALTY PHASE IS THAT THERE MAY
BE OTHER FACTORS WITH REGARD TO
OTHER ARGUABLE AGGRAVATORS,
OTHER FACTORS THAT OUGHT TO BE
REWEIGHED BY A JURY.

I MEAN, THAT'S THE FLIP SIDE OF
YOUR SUGGESTING THAT IT'S
REDUCTION TO LIFE, AND THAT'S
WHAT I'M ASKING ABOUT, ABOUT
THOSE KIND OF FACTORS THAT ARE,
IF THEY ARE OR IF THEY ARE NOT
PRESENT HERE.

ARGUABLY.

I UNDERSTAND YOU'RE NOT GOING TO
ACCEPT THAT THEY ARE, BUT, I
MEAN, I THINK THAT'S WHAT WE
HAVE TO LOOK AT, DON'T WE?
WE REALLY NEED TO LOOK AT THIS
FROM THE TOTALITY OF THE CASE.

>> OKAY.

THE TOTALITY OF THE CASE HERE IS

WE HAVE A BAD AGGRAVATOR, NUMBER ONE.

>> OKAY.

>> THAT LEFT WITH TWO AGGRAVATORS, AS I SAID, IN PROPORTIONALITY ARGUMENT. IT'S STILL, WE SHOULD GET THERE. THERE'S A COUPLE OTHER VARIABLES HERE, TOO, AND THAT IS WE'RE DEALING WITH A 7-5 DEATH REC, AND EVEN THOUGH I DIDN'T MENTION I WAS GOING TO ADDRESS THAT THIS MORNING, ISSUE TWO ALSO DEALS WITH WHETHER THE TRIAL COURT USED THE CORRECT OVERRIDE STANDARD AS TO WHETHER SHE COULD OVERRIDE A DEATH RECOMMENDATION.

I THINK SHE USED --

[INAUDIBLE]

RATHER THAN JUST THE INDEPENDENT REWEIGHING.

SO THERE'S A NUMBER OF VARIABLES HERE IN THIS CASE.

I MEAN, WE'VE GOT THE TWO AGGRAVATORS THAT REMAINED.

I GUESS I'M A LITTLE UNCLEAR WHERE YOUR QUESTION --

>> WELL, NO, I'M TRYING TO GET TO THE POINT OF WHAT ARE THE FACTORS YOU THINK WE NEED TO LOOK TO THAT WE OUGHT TO REDUCE TO LIFE?

WHAT ARE THE FACTORS THAT SHOULD LEAD US WHEREVER WE NEED TO GO? TAKE US WHERE YOU THINK THIS CASE NEEDS TO BE IF WE DON'T

REDUCE TO LIFE.

WHAT DO WE LOOK TO, WHAT'S OUR GUIDE?

>> IF YOU DON'T REDUCE TO LIFE, NUMBER ONE, THE JURY SHOULD HAVE NEVER BEEN INSTRUCTED ON THE AGGRAVATOR OF AVOID ARREST. NUMBER TWO, THE TRIAL COURT SHOULD NEVER HAVE CONSIDERED IT IN THE SENTENCING EQUATION.

WE STILL HAVE PROBLEMS WITH THE TRIAL JUDGE'S STANDARD.

WE'RE ALSO DEALING WITH A 7-5 DEATH REC IN THIS CASE.

I THINK THOSE ARE ALL THE KINDS OF VARIABLES THAT WOULD POINT TO, AT A MINIMUM, A REVERSAL FOR A NEW PENALTY PHASE.

>> WHY IS IT NEAR HARMLESS ERROR?

>> WELL, IT'S NOT HARMLESS ERROR WHEN WE HAVE THE JUDGE ACKNOWLEDGING WE HAVE A BAD AGGRAVATOR, AN AGGRAVATOR THAT SHOULDN'T HAVE EVEN GONE TO THE JURY, AND AN AGGRAVATOR WHICH THE TRIAL COURT ERRONEOUSLY FOUND AND APPLIED OR WEIGHED IN THE SENTENCING EQUATION.

AND AGAIN, WE'VE GOT A TRIAL JUDGE WHO MAY HAVE USED THE WRONG STANDARD IN DECIDING WHETHER TO OVERRIDE A 7-5 DEATH REC OR NOT.

THOSE ARE ALL VARIABLES.

>> LET'S GO BACK.

I HAVE BEEN LOOKING AT THE CASE
LAW ABOUT THIS QUESTION, THAT
IS, ASSUMING THAT THE JUDGE
SHOULDN'T HAVE FOUND THE AVOID
ARREST AGGRAVATOR WHETHER IT WAS
ERRONEOUS TO ACTUALLY SUBMIT IT
TO THE JURY IN THE FIRST PLACE.

AND WHAT DO YOU UNDERSTAND OUR
LAW TO BE ON WHETHER, YOU KNOW,
AGAIN, A JUDGE MAY NOT HAVE
FOUND THE AVOID ARREST
AGGRAVATOR, BUT IT STILL GOES TO
THE JURY?

WE DON'T HAVE SPECIAL VERDICT.
WHAT IS IT THAT WE HAVE SAID
ABOUT WHETHER THE JURY BEING
INSTRUCTED ON AN AGGRAVATOR THAT
IS ULTIMATELY NOT FOUND, WHAT'S
THE, WHAT IS THE STANDARD FOR
SUBMITTING IT TO THE JURY AND
THEN HOW WE WOULD EVALUATE WHAT
EFFECT IT MIGHT HAVE ON THE
JURY'S DELIBERATIONS?

YOU UNDERSTAND THAT --

>> I DO, AND WHEN THE FACTS,
WHEN THERE IS A LEGAL CONCLUSION
THAT THE FACTS DON'T SUPPORT AN
AGGRAVATOR, THEN THE
INSTRUCTIONS SHOULD HAVE NEVER
GONE TO THE JURY.

IT'S ALMOST LIKE A JOA STANDARD.

>> WELL, NOW, LET ME ASK YOU
ABOUT THAT EVIDENCE.

I CERTAINLY SEE THE POINT ABOUT
THAT THERE IS EVIDENCE IN THIS
RECORD THAT SUPPORTS THAT THIS

WAS A SPONTANEOUS SHOOTING, THAT
IT WAS, YOU KNOW, THAT
MR. ALIGADA HAD COME ONTO THE
SCENE.

HOWEVER, THE STATE POINTS IN ITS
BRIEF TO STATEMENTS THAT
PHILLIPS TOLD TO HIS GIRLFRIEND.
AND ONE OF THEM THAT
PARTICULARLY CONCERNS ME AS FAR
AS WHETHER THERE'S FACT BOTH
WAYS IS, "IF I DON'T SHOOT HIM,
THE POSSIBILITY THAT ME AND THE
OTHER DUDES GOT SHOT UP ARE
GUARANTEED TO GO TO PRISON THE
REST OF OUR LIFE."

ISN'T THAT, THAT STATEMENT THAT
HE MAKES AFTER THE FACT TO HIS
GIRLFRIEND, SUPPORT NOW AT LEAST
GOING TO THE JURY ON WHETHER
THERE'S CONFLICTING EVIDENCE AS
TO WHETHER, AS TO THE REASON
THAT HE SHOT MR. ALIGADA?

>> I WOULD SAY, NO, BECAUSE IN
THE CONTEXT IN WHICH HE WAS
MAKING THAT STATEMENT YOU READ
THE CONTEXT OF HIS DISCUSSION OR
THE COMMENTS WITH HIS
EX-GIRLFRIEND AND LATER WITH HIS
WIFE, THE CONSISTENT THREAD
THROUGHOUT ALL HIS STATEMENTS
WAS, I HAD, I COULDN'T LET HIM
STOP ME.

I WAS ON FOOT.

HE WAS TRYING TO FLEE THE
IMMEDIATE SCENE OF THE ROBBERY.
THAT WAS HIS OVERRIDING CONCERN,

WAS NOT BEING CAUGHT ON THE
SCENE.

HE WASN'T TALKING ABOUT
ELIMINATING SOMEONE AS A FUTURE
WITNESS.

IF HE HAD CHOSEN TO DO THAT, HE
COULD HAVE PURSUED MR. ALIGADA.

>> REALLY THE AVOIDING IS NOT --
IT'S AN INTERESTING THING
BECAUSE IF WE LOOK BACK TO WHAT
AVOID ARREST IS, YOU THINK THAT
IT HAS TO REALLY DO -- AGAIN
BECAUSE IT COMES FROM LAW
ENFORCEMENT -- TO ACTUALLY THE
ACTUAL ARREST OF THE PERSON?

BUT, I MEAN, WHAT IF MR. ALIGADA
WAS TRYING TO STOP HIM?
ISN'T THAT A FORM OF -- AND HE
WANTS HIM NOT TO STOP HIM, AND
I'M STRUGGLING WITH THAT.

>> THESE CASES HAVE REALLY DRAWN
A DISTINCTION THERE.

IF WE HAVE A SITUATION SUCH AS
IN THIS CASE WHERE THERE IS A
CONFRONTATION DURING THE COURSE
OF A ROBBERY OR AN INTERVENTION
AND DURING THE COURSE OF A
ROBBERY AND IN THIS CASE THE
DEFENDANT'S SAYING, I COULDN'T
LET HIM STOP ME, I WAS ON FOOT,
I HAD TO GET AWAY.

>> WELL, THERE WAS MORE TO IT
THAN THAT HERE.

MR. ALIGADA HAD INTERVIEWED YOUR
CLIENT A FEW DAYS BEFORE FOR A
JOB.

YOUR CLIENT, ACCORDING TO THE RECORD, TARGETED MR. SWEET, AND PERHAPS HE ONLY INTENDED TO JUST PULL THE GUN, GET THE MONEY AND GET AWAY.

PERHAPS THAT MAY HAVE BEEN THE INTENT.

BUT ONCE ALIGADA STARTED COMING INTO THE PICTURE AND HE SAW ALIGADA AND FEARED ALIGADA MAY RECOGNIZE HIM, WHY IS NOT SHOOTING ALIGADA AVOIDING ARREST?

I MEAN, YOU CAN DEVELOP THAT INTENT SPONTANEOUSLY AS WELL, CAN'T YOU?

>> THERE -- THE FACT THAT MR. ALIGADA MAY HAVE RECOGNIZED -- AND I POINT YOU TO THE TRIAL COURT'S ORDER IN THIS --

>> FORGET WHAT ALIGADA MAY HAVE RECOGNIZED, I'M TALKING ABOUT YOUR CLIENT'S STATE OF MIND.

>> RIGHT.

>> AT THAT POINT IN TIME HE SEES ALIGADA COMING, HE RECOGNIZES ALIGADA, AND HE FEARS AT THAT POINT IN TIME THIS GUY CAN RECOGNIZE ME.

HE INTERVIEWED ME FOR A JOB TWO DAYS EARLIER.

I'M GOING TO SHOOT HIM.

HOW IS THAT NOT AVOIDING ARREST?

>> IT'S NOT AVOIDING ARREST BECAUSE, NUMBER ONE, JUST

KNOWLEDGE OF THE DEFENDANT AND THE VICTIM KNOWING EACH OTHER HAS BEEN CONCLUDED NOT TO BE -- STANDING ALONE IS NOT A FACTOR THAT WOULD ESTABLISH ELIMINATION OF A WITNESS FOR PURPOSE OF THESE CIRCUMSTANCES.

THERE'S NUMEROUS CASES HOLDING THAT, SO THERE HAS TO BE SOMETHING IN ADDITION TO THE FACT THAT THE DEFENDANT AND THE VICTIM KNEW EACH OTHER, AND THERE IS NO ADDITIONAL EVIDENCE HERE --

>> WHAT ABOUT, WHAT ABOUT THE AFTER-THE-FACT STATEMENT OF THE DEFENDANT THAT HE WASN'T GOING BACK TO PRISON?

HE COULDN'T LET HIM PUT HIM IN A POSITION WHERE HE WAS GOING TO GO BACK TO PRISON?

THAT'S AN ADDITIONAL -- I MEAN, HOW CAN WE BE IN THE POSITION OF SAYING, WHICH I THINK WE NEED TO SAY, IS THAT NO REASONABLE PRIOR FACT COULD HAVE CONCLUDED BASED ON ALL OF THESE CIRCUMSTANCES AND REASONABLE INFERENCES FROM THESE CIRCUMSTANCES THAT THE AVOID ARREST AGGRAVATOR WAS ESTABLISHED?

>> BASED UPON THE CASE LAW, I DON'T THINK THIS INSTRUCTION SHOULD HAVE EVER BEEN SUBMITTED TO THE JURY BECAUSE IN THE CONTEXT THOSE STATEMENTS WERE

MADE, EVEN THE TRIAL JUDGE'S ORDER -- I'LL JUMP AROUND A LITTLE BIT HERE.

EVEN THE TRIAL JUDGE'S ORDER SAID THERE MAY HAVE BEEN A SUGGESTION THAT THEY MAY HAVE RECOGNIZED EACH OTHER, BUT THE COURT SAID WHETHER OR NOT THEY RECOGNIZED EACH OTHER AT THE TIME OF THE SHOOTING OR NOT, SHE DISMISSED THAT AND STILL FOUND THAT THE AGGRAVATOR WAS PRESENT.

SO THE TRIAL JUDGE'S ORDER ACTUALLY ELIMINATED THAT AS AN ISSUE AS TO WHETHER OR NOT THEY KNEW EACH OTHER BECAUSE IT'S AMBIGUOUS WHETHER THEY RECOGNIZED EACH OTHER AT THE TIME.

HE REALIZED WHO HE WAS AFTER THE FACT --

>> SHE MENTIONED THAT THE SHOOTING TOOK PLACE 2-3 FEET AWAY, SO IT IS REASONABLE TO BELIEVE THAT, IT'S NOT UNREASONABLE TO BELIEVE THAT HE MAY HAVE RECOGNIZED HIM.

>> THAT'S CORRECT.

>> ARE THERE ROBBERY-GONE-BAD CASES THAT DISCUSS THIS AGGRAVATOR?

IT'S NOT UNCOMMON, 7/11 KIND OF YOU GO INTO ROB IT, SOMEBODY REACTS, EITHER THE CUSTOMER OR CLERK SEE THEM EYEBALL TO EYEBALL, AND THEN A DEATH

RESULTS.

HAVE WE DISCUSSED THE AVOID
AGGRAVATOR IN THAT CONTEXT OF A
ROBBERY GONE BAD?

>> YES, YOUR HONOR.

>> [INAUDIBLE]

IDENTIFY THE PERPETRATOR?

>> YES, YOUR HONOR.

>> AND WHERE DO THOSE TAKE US?

>> THERE MUST BE EVIDENCE THAT
THAT WAS THE SOLE OR DOMINANT
REASON FOR THE HOMICIDE.

NOT JUST A REASON, BUT IT HAS TO
BE THE --

>> WELL, AS I UNDERSTAND IT,
THIS STARTED OFF ON ELIMINATION
OF LAW ENFORCEMENT OFFICERS.

>> CORRECT.

>> AND WHERE DID WE START
BRANCHING OFF FROM THAT, AND HOW
DID WE ACCOMPLISH THAT?
BECAUSE IT'S CERTAINLY NOT
LIMITED TO THAT CIRCUMSTANCE
TODAY.

>> THIS COURT CONCLUDED THAT IT
COULD BE APPLIED TO A NON-LAW
ENFORCEMENT OFFICER.

>> RIGHT.

>> BUT IT HAD TO HAVE A STRICT
PROOF THAT IT WAS THE WITNESS
ELIMINATION.

NOT, I SHOT SOMEBODY TO GET AWAY
FROM THE SCENE, BUT WITNESS
ELIMINATION WAS THE SOLE OR
DOMINANT MOTIVE FOR THE
HOMICIDE.

>> WELL, YOU KNOW, THAT KIND OF LANGUAGE CAN REASONABLY IN THE ENGLISH VOCABULARY BE INTERPRETED IN VIRTUALLY EVERY, EVERY CAPITAL CASE THAT WE SEE BECAUSE PEOPLE DON'T WANT TO BE CAUGHT.

I MEAN, THAT'S IN THE VERNACULAR.

YOU DON'T WANT TO BE CAUGHT WHEN YOU DO SOMETHING LIKE THIS, AND SO, I MEAN, THAT COULD BE ARGUED IN HERE.

>> THAT'S WHY THIS COURT'S CASE LAW HAS PUT THAT STRICTER --

>> THAT'S WHAT I'M ASKING.

WHERE DID WE START, WHAT WAS THE BEGINNING POINT OF THAT DIVERSION AWAY FROM JUST STRICTLY LAW ENFORCEMENT?

>> OH.

>> AND WHAT'S THE RATIONALE?

>> I THINK IT WAS THE REILLY CASE BACK IN THE '70s.

>> IT'S BEEN A LONG TIME.

>> YEAH.

>> I'M TRYING TO SEE BECAUSE WE ARE IN AN ERA WHERE THAT SEEMS TO BE MORE AND MORE PART OF WHAT'S ALLEGED AND WHAT'S FOUND AS AN AGGRAVATING FACTOR IN THESE CASES THAT WE ARE REVIEWING.

SOMETIMES THINGS START HAVING A TREND TO THEM --

>> RIGHT.

>> -- AND THAT SEEMS TO ME WE'RE SEEING A LOT -- WE'RE SEEING MORE OF THESE.

WE SEEM TO BE SEEING MORE OF THESE WHERE THAT'S A FACTOR. AND IN DISCUSSING IT IN COMMON PARLANCE AND WITH, IN LAYPERSON TERMS, WELL, SURE, THEY DIDN'T WANT TO GET CAUGHT, SO THEY KILLED THE PERSON.

>> AND, AND BECAUSE THAT IS A COMMON FACTOR, SOMEBODY DOESN'T WANT TO GET CAUGHT, THAT'S WHY THIS COURT HAS MADE THE DELINEATION FROM.

IT'S GOT TO BE SOMETHING MORE THAN, I SHOT BECAUSE I DIDN'T WANT TO GET CAUGHT AT THE SCENE TO, GEE, HE RECOGNIZED ME, I CAN'T LEAVE A WITNESS.

AND IF HE REALLY THOUGHT MR. ALIGADA WAS GOING TO BE A FUTURE WITNESS, HE SHOT ONE TIME.

MR. ALIGADA RAN 20 YARDS, AND MR. PHILLIPS FLED IN THE OPPOSITE DIRECTION.

HE DIDN'T KNOW WHETHER HE'D KILLED HIM, DIDN'T KNOW WHETHER HE'D HIT HIM OR HOW BAD HE WAS HIT.

IF HE REALLY WANTED TO BE SURE HE WAS DEAD AND COULDN'T BE A WITNESS, HE PROBABLY WOULD HAVE CHASED AFTER HIM AND SHOT HIM.

>> IS THAT A DETERMINING FACTOR

THAT WE SHOULD APPLY?

I MEAN, LOGICAL INTERPRETATIONS OF WHAT COULD BE PART OF THE ANALYSIS HERE.

>> WELL, AGAIN, THIS COURT HAS ALSO HELD THAT LOGICAL INFERENCES AREN'T NECESSARILY ENOUGH IN THIS SETTING.

THERE'S CASE LAW TO SUGGEST THAT THERE'S GOT TO BE STRICT PROOF BECAUSE OTHERWISE YOU'RE GOING TO GET INTO A SITUATION WHERE EVERY MURDER WAS POTENTIALLY AVOIDING ARREST.

>> BUT THEN YOU HAVE THE STATEMENTS.

>> THE STATEMENTS IN THE CONTEXT THAT THESE WERE MADE IN THIS CASE, HE CLEARLY SAID, I COULDN'T LET HIM STOP ME AT THE SCENE.

I WAS, YOU KNOW, HE WAS TRYING TO GRAB ME, I REACTIVELY SHOT, AND, YOU KNOW, BESIDES THAT I WAS ON FOOT.

I NEEDED TO GET AWAY.

I COULDN'T LET HIM GRAB ME.

IN THAT CONTEXT WAS THE DISCUSSION, AND THAT WAS -- IF YOU READ THE WHOLE STATEMENT, THAT'S THE RECURRING THEME FROM THE DEFENDANT'S COMMENTS WAS, I COULDN'T LET HIM STOP ME.

I HIGHLIGHTED A QUOTE FROM THE -- WHICH I THINK CAPITALIZED IT -- WAS HE PUT ME IN A

SITUATION WHERE I WAS ON FOOT, I COULDN'T LET HIM STOP ME, AND THAT'S WHY I SHOT.

AND WE HAVE THE TESTIMONY FROM MR. SWEET, WHO WAS THE ROBBERY VICTIM, SAYING THAT MR. ALIGADA HAD APPROACHED FROM AN ANGLE OR TO THE SIDE, OR APPARENTLY MR. PHILLIPS CAUGHT HIM IN HIS PERIPHERAL VISION, AND HE TURNED, AND HE QUICKLY FIRED. HE SAID THOSE SHOTS HAPPENED VERY, VERY QUICKLY.

THERE WAS -- MR. ALIGADA WAS STRUCK ONE GUNSHOT WOUND. IT WENT THROUGH HIS UPPER LEFT ARM AND THEN INTO THE CHEST. HE MANAGED -- MR. ALIGADA RAN, TURNED AND RAN BACK TOWARD THE BUILDING FOR 20 YARDS BEFORE HE FELL.

IMMEDIATELY AFTER THE SHOOTING, MR. PHILLIPS IS RUNNING IN THE OTHER DIRECTION TO GET AWAY. HE TAKES MR. SWEET'S TRUCK TO DO SO, OR SUV TO DO SO.

SO HE WASN'T, LIKE, THERE'S A WITNESS THAT I CAN'T LEAVE ALIVE.

>> I MEAN, BUT THAT SAME ARGUMENT COULD BE MADE IF HE HAD SHOT TOWARD A POLICE OFFICER AND YOU HIT HIM AND TAKE OFF, AND THAT'S NOT GOING TO PROVIDE RELIEF IN THOSE CIRCUMSTANCES, IS IT?

>> WELL, WE'RE DEALING WITH A POLICE OFFICER IN THE CONTEXT OF A POLICE OFFICER --

>> IS THERE A CASE THAT SAYS YOU HAVE TO FOLLOW THEM AND SHOOT THEM MULTIPLE TIMES?

>> I WAS JUST SUGGESTING THAT WAS FURTHER EVIDENCE THAT HE, THAT WASN'T THE CIRCUMSTANCE --

>> THAT HE DIDN'T REALLY SEE THE GUY, WHO HE WAS.

HE SAW SOMEBODY COMING, DIDN'T REALLY KNOW WHO IT WAS AND FIRED INSTINCTIVELY RATHER THAN -- IS THAT WHAT YOU SAY THE EVIDENCE SUSTAINS IN THIS CASE?

>> I THINK THE EVIDENCE SUSTAINS THAT.

NOW, WHETHER HE RECOGNIZED MR. ALIGADA AT THE MOMENT THAT HE SAW HIM OR NOT --

>> DON'T KNOW.

>> WE DON'T KNOW.

HE COULD HAVE.

>> I THINK THE THING THAT IS PRETTY CLEAR IN THE CASES WHERE WE FIND AVOID ARREST IS THAT, YOU KNOW, THEY'VE ALREADY TIED UP THE PERSON OR SOMETHING OF THAT, AND THEN THEY'RE SHOOTING --

>> THERE'S ADDITIONAL EVIDENCE.

>> BUT HERE THE THING THAT PUTS THIS NOT QUITE IN THE TERRY ROBBERY-GONE-BAD IS THAT THIS ISN'T A STRUGGLE, AND IT'S AT A,

I THINK THERE WAS TESTIMONY THAT HE MIGHT HAVE BEEN AS MUCH AS 3 FEET AWAY.

SO WE'RE REALLY GETTING BACK TO WHETHER THIS IS ENOUGH -- AND I THINK THIS IS WHERE I WAS -- WHETHER IT'S ENOUGH TO GO TO THE JURY EVEN IF WE FIND THE JUDGE ULTIMATELY SHOULDN'T HAVE FOUND IT.

AND IF IT WAS ENOUGH TO GO TO THE JURY, THEN WE GO BACK TO THE QUESTION OF WHETHER, HOW WE EVALUATE ASSUMING IT'S ERROR TO HAVE FOUND IT, IS IT HARMLESS ERROR BEYOND A REASONABLE DOUBT TO HAVE SUBMITTED IT TO THE JURY?

AND IS IT HARMLESS ERROR BEYOND A REASONABLE DOUBT, TOO, FOR THE JUDGE?

SO MAYBE IF YOU CAN GET US BACK TO THAT, LET'S ASSUME FOR THE SAKE OF ARGUMENT THAT WE AGREE THAT THERE, THAT THE JUDGE SHOULDN'T HAVE FOUND IT, BUT THAT THERE IS, THIS EVIDENCE IS CONFLICTING ENOUGH THAT IT WAS ACCEPTABLE TO GO TO THE JURY. WHERE DOES THAT LEAVE US UNDER OUR CASE LAW ABOUT WHAT STANDARD WE APPLY?

>> I THINK THE STANDARD -- IN THE PAST YOU'VE APPLIED A HARMLESS ERROR TEST WHEN THERE'S BEEN A BAD AGGRAVATOR TO

DETERMINE WHETHER OR NOT IT NEED
TO GO BACK TO THE JURY.
THAT IS A HARMLESS ERROR ON
ANALYSIS.

THE QUESTION WOULD BE, YOU KNOW,
AGAIN, YOU'VE GOT -- OKAY, I'M
GETTING BACK TO YOUR ASSUMPTION
HERE.

IT'S OKAY TO GO TO THE JURY WITH
THE AGGRAVATOR.

BUT THAT BEING THE CASE, I WOULD
STILL SAY YOU WOULD NEED TO
JUST, GIVEN THE FACT THAT IT
WAS -- WELL, WE'VE GOT A DOUBLE
THING GOING ON HERE, TOO, AS TO
WHETHER THE JURY WAS REALLY
ADEQUATELY INSTRUCTED ON THAT
QUESTION.

BUT GIVEN THE CONTEXT OF THE
CASE.

BUT IT WOULD BE A HARMLESS ERROR
ANALYSIS THAT THIS COURT WOULD
CONDUCT.

>> I WAS JUST TRYING TO -- I
HAVE A CASE OF DIAZ V. STATE,
AND THAT HAD TO DO WITH OUR
FINDING HARMLESS, AND I WAS
TRYING TO SEE IF THERE'S SOME
LANGUAGE IN IT OF OUR POSTRING
CASES SPECIFICALLY ADDRESSING
THIS.

>> I'M NOT AWARE OR I CAN'T
POINT TO THE COURT TO THE CASES
THAT MIGHT BE THERE.

HARMLESS ERROR ANALYSIS
POSTRING.

I KNOW --

>> WELL, LET'S GO TO THIS ONE
BECAUSE IT'S THE NEXT CASE WE
HAVE ONE OF THE ISSUES.

LET'S ASSUME THE JUDGE HADN'T
FOUND IT, STILL HAD IMPOSED THE
DEATH PENALTY WHICH HE SAID HE
WAS GOING TO DO, THEN HOW DO YOU
GO BACK ON -- WHAT WOULD YOUR
ARGUMENT THEN BE?

IF THE JUDGE HAD NOT FOUND THE
AGGRAVATOR STILL OPPOSED THE
DEATH SENTENCE --

>> AND WE HAD A JURY WHO WAS
INSTRUCTED ON THAT?

>> CORRECT.

>> THAT WOULD CREATE -- AND
THAT'S MY ARGUMENT IS THAT THE
JURY SHOULD NEVER HAVE BEEN
INSTRUCTED ON IT TO BEGIN WITH
BECAUSE IT WAS INSUFFICIENT
EVIDENCE TO SUPPORT THE
AGGRAVATOR AND INSUFFICIENT
EVIDENCE TO INSTRUCT THE JURY.
THAT WOULD REQUIRE A NEW PENALTY
PHASE WITH THE JURY BECAUSE OF
THE ERRONEOUSLY GIVEN
INSTRUCTION ON ON AGGRAVATOR
THAT WAS POTENTIALLY A FACTOR,
AND POTENTIALLY IN THIS CASE WE
WERE DEALING WITH A 7-5 DEATH
REC FROM THE JURY.

WE WERE ONE VOTE AWAY FROM A
LIFE RECOMMENDATION IN THIS CASE
ALREADY, SO ANY ERROR VIS-A-VIS
INSTRUCTING ON AN AGGRAVATING

CIRCUMSTANCE, PARTICULARLY IN THIS CASE WITH A 7-5 RECOMMENDATION, WOULD REQUIRE A NEW PENALTY PHASE.

>> DO YOU WANT TO SAVE THE REST OF YOUR TIME FOR REBUTTAL?

>> I WILL.

I THINK I'VE ALREADY ADDRESSED THE PROPORTIONALITY ISSUE.

THANK YOU.

>> PLEASE THE COURT, STEVE WHITE REPRESENTING APPELLEE.

IT'S THE STATE'S POSITION THAT WE HAVE TO LOOK AT THE TOTALITY OF THE FACTS HERE.

WE CAN'T ANALYZE IT JUST BY LOOKING AT ONE STATEMENT SUCH AS THE GIRLFRIEND, ALTHOUGH IMPORTANT.

WE CAN'T ANALYZE IT JUST BY LOOKING AT THE FACT THAT THEY KNEW EACH OTHER, THAT IS MR. PHILLIPS KNEW MR. ALIGADA AND KNEW MR. ALIGADA KNEW HIM. IMPORTANT, BUT NOT THE ONLY FACT.

WE CAN'T LOOK AT IT JUST BY THE FACT THAT THE DEFENDANT FIRED TWO SHOTS AT MR. ALIGADA AND THEN FIRED THREE SHOTS AT MR. SWEET AFTER MR. PHILLIPS ALREADY HAD MR. ALIGADA -- EXCUSE ME, HAD MR. SWEET'S MONEY.

>> WELL, LET ME ASK YOU, AND I UNDERSTAND EXACTLY WHERE YOU'RE

GOING.

IF MR. SWEET, WHO WAS THE ROBBERY VICTIM, YOU KNOW, IF MR. ALIGADA HAD NOT INTERVENED, IS THERE ANY EVIDENCE THAT MR. PHILLIPS INTENDED TO SHOOT AND KILL THE VICTIM?

>> BEFORE HE WENT INTO THE, BEFORE HE STARTED STALKING --

>> BEFORE, AS THE ROBBERY ENSUED.

THAT HE WOULD HAVE SHOT MR. SWEET.

>> WE DON'T HAVE ANY INDICATION THAT WHEN HE WAS LYING IN WAIT THAT HE PLANNED TO SHOOT AND KILL MR. SWEET, BUT WE DO KNOW THAT HE TRIED TO SHOOT MR. SWEET AS MR. SWEET --

>> WELL, THAT'S WHAT I WAS GOING TO ASK YOU.

IF WHAT HAD HAPPENED HERE INSTEAD WAS THAT THERE HAD BEEN THIS ROBBERY AND AFTER THE ROBBERY WAS COMPLETE AND HE WAS, HE SAID, STAY WHERE YOU ARE OR SOMETHING, YOU KNOW, SO I CAN GET AWAY, AND INSTEAD MR. SWEET HAD RUN, AND AT THAT POINT THE DEFENDANT HAD SHOT MR. SWEET, WOULD THAT HAVE BEEN AN AVOID ARREST, OR WOULD THAT JUST -- I MEAN, WHAT WOULD THAT BE? THAT'S WHAT I'M TRYING TO FIGURE OUT, YOU KNOW, AND THIS IS SORT OF FOLLOWING ON WHAT JUSTICE

LEWIS IS ASKING.

AT WHAT POINT DOES SOMETHING GO FROM IT'S PART OF THE CRIME, YOU KNOW, YOU'VE COMMITTED, BUT HOW YOU DETERMINE THE INTENT BEING WITNESS ELIMINATION AS OPPOSED TO JUST COMING UP BECAUSE OF THE WITNESS RESISTING OR SOMETHING HAPPENING DURING THE ROBBERY THAT, AGAIN, MAKES IT ONE OF THESE, QUOTE, ROBBERIES-GONE-BAD CASES WHERE WE DON'T SEEM TO BE FINDING AVOID ARREST?

>> YOUR HONOR, I WOULD THINK THE ONLY REASONABLE INFERENCE IN THAT SITUATION WOULD BE AVOID ARREST OR WITNESS ELIMINATION. WHY SHOOT AT HIM WHEN THAT PERSON IS NO LONGER ANY THREAT WHATSOEVER?

AS IN THIS CASE WHERE MR. PHILLIPS ALREADY HAD MR. SWEET'S MONEY AND HE'S SHOOTING AT MR. SWEET AS MR. SWEET'S TRYING TO, LITERALLY, TRYING TO DODGE THE BULLETS?

>> MY CONCERN IN THE AVOID ARREST, AND I'M CONCERNED ABOUT THE SLIPPERY SLOPE WE BEGIN TO APPLY ANYTIME ANYONE GETS KILLED.

>> YES, SIR.

>> BUT MY CONCERN IS THE SITUATION WHERE SOMEONE MAY BE PLANNING A ROBBERY WITH NO

INTENT TO KILL.

BOUGHT A FAKE GUN, PULLED THE GUN ON A PERSON, GET THE MONEY, GET IN THE CAR AND DRIVE AWAY.

THAT'S THE INTENT.

AND THEN SOMEONE HAPPENS TO COME ON THE SCENE IS, RECOGNIZES THEM AND AT THAT POINT IN TIME THE PERSON MAKES A DECISION, WELL, I BETTER KILL 'EM BECAUSE NOW I CAN BE RECOGNIZED.

AND THAT'S MY CONCERN HERE WHEREAS THE DEFENDANT IN THIS CASE MAY HAVE INTENDED ONLY TO ROB MR. SWEET.

OBVIOUSLY, HE KNEW HE HAD A LOT OF MONEY ON HIM, ABOUT \$3100, SOMETHING LIKE THAT?

>> CORRECT.

>> TAKE THE MONEY, AND I THINK THERE WAS A GETAWAY DRIVER WHO PULLED AWAY WHEN THE SHOOTING BEGAN, AND THAT WOULD HAVE BEEN THE END OF IT.

BUT THEN ALIGADA HAPPENS ON THE SCENE, AND HE SAYS, WELL, I JUST TALKED TO THIS GUY A FEW NIGHTS AGO.

HE RECOGNIZES ME, I BETTER SHOOT HIM.

AND THE QUESTION, I MEAN, I GUESS THE LEGAL QUESTION IF YOU'RE GOING TO PUT IT UNDER A MICROSCOPE IS, CAN THE INTENT TO KILL SOMEONE TO AVOID ARREST BE DEVELOPED SPONTANEOUSLY IN THAT

FASHION?

>> ABSOLUTELY, YOUR HONOR.

YOU DON'T NEED PREMEDITATION FOR
AVOID ARREST ALTHOUGH AVOID
ARREST CAN HELP PROVIDE EVIDENCE
OF PREMEDITATION.

IN OTHER WORDS, THE DEFENDANT
MAY PLAN A KILLING AHEAD OF TIME
TO AVOID ARREST, THAT COULD BE
CCP.

BUT YOU CAN DEVELOP THE INTENT
TO KILL TO AVOID ARREST.

THE CONSALVO CASE WAS A BURGLARY
GONE BAD.

MR. CONSALVO THOUGHT THAT THE
VICTIM WOULD BE PASSED OUT AT
THE TIME, AND HE WENT INSIDE,
AND SHE WOKE UP.

AND HE KILLED HER ON THE SPOT
BECAUSE HE WAS WORRIED THAT SHE
WAS GOING TO CALL THE POLICE.

BUT THERE'S NO EVIDENCE THAT
MR. CONSALVO INTENDED TO KILL
THE VICTIM WHEN HE WENT INSIDE
HER HOUSE.

>> LATER ON IN HURST V. STATE,
THE MERE FACT THAT THE VICTIM
KNEW AND COULD IDENTIFY THE
DEFENDANT WITHOUT MORE IS
INSUFFICIENT TO PROVING
AGGRAVATOR.

>> ABSOLUTELY, YOUR HONOR, BUT
WE HAVE THREE CONSTELLATIONS OF
FACTS TO SUPPORT ARREST, AND
THAT'S WHY IT'S THE STATE'S
POSITION WE DON'T NEED TO WORRY

ABOUT THE SLIPPERY SLOPE BECAUSE
OF THE FACTS OF THIS CASE.

WE HAVE NOT ONLY THAT
MR. PHILLIPS KNEW THAT ALIGADA
KNEW HIM --

>> JUST LET ME STOP YOU ON THAT.
WE KNOW AFTERWARDS THAT PHILLIPS
SAID SOMETHING ABOUT WHETHER
THAT HE HAD TRIED TO GET A JOB
THERE, BUT IS THERE ANY EVIDENCE
THAT IN THIS REACTIVE -- HE'S,
YOU KNOW, HE'S JUST FINISHED THE
ROBBERY, SOMEONE'S RUSHING HIM,
TURNS AROUND AND SHOOTS, THAT AT
THAT POINT HE KNEW THAT IT WAS
THE PERSON WHO HAD THE DAY
BEFORE HAD HE HAD AN INTERVIEW
WITH?

>> WELL, THAT'S WHAT HE TOLD THE
POLICE AND WHAT HE TOLD HIS
GIRLFRIEND.

>> THAT HE TOLD 'EM, I DON'T
THINK THAT THAT WAS, THAT WAS
WHAT HE SAID.
YOU KNOW, YOU MIGHT BE RIGHT
THAT IT'S AN INFERENCE, SO GOOD.
BUT THERE'S NOTHING THAT HE
ACTUALLY SAYS THE WAY I'VE
REVIEWED THESE STATEMENTS OR
ANYTHING FROM WHAT MR. SWEET
SAYS THAT HE, THAT HE, PHILLIPS,
RECOGNIZED WHO THIS PERSON WAS
AS OPPOSED TO JUST SOMEONE WAS
GOING TO BE COMING.

HE SAID, I SHOT THE PERSON WHO
TRIED TO STOP THE ROBBERY.

THAT WAS REALLY HIS STATEMENT.
HE DIDN'T SAY, I SHOT THIS GUY
WHO I KNEW -- HE SHOT THE PERSON
WHO TRIED TO STOP THE ROBBERY.
IN OTHER WORDS, THIS GUY WAS
RUSHING HIM LIKE A GOOD
SAMARITAN WHICH WE HAVE IN
ANOTHER CASE.

>> RIGHT.

>> -- TO TRY TO STOP THE
ROBBERY, AND HE TURNS AROUND AND
SHOOTS AT HIM.

SO WHAT IS THERE THAT SHOWS THAT
AT THAT POINT HE RECOGNIZED, OH,
THIS IS THE GUY FROM THE DAY
BEFORE, AND I'D BETTER ELIMINATE
HIM BECAUSE HE'LL KNOW ME, AND I
WON'T BE ABLE TO GET AWAY WITH
THE ROBBERY?

>> WELL, HE MADE A NUMBER OF
STATEMENTS NOT ONLY TO THE
GIRLFRIEND, BUT ALSO TO
DETECTIVE DINGEE.

AND ONE OF THE STATEMENTS HE
MADE TO DETECTIVE DINGEE, IT'S A
LONG INTERVIEW, AND I THINK THE
COURT HAS THE VIDEO OF THE
INTERVIEW ---

HE TALKS ABOUT SOME FOLKS IN
THE PARKING LOT SEEING ME BUT I
WAS IN THE SHADOWS.

THEY DIDN'T KNOW WHO I WAS
BECAUSE I WAS IN THE SHADOWS.
AND THEN THE NEXT PARAGRAPH,
THE VERY NEXT PARAGRAPH, THE
DEFENDANT SAYS, THIS ONE GUY IN

THIS F-ING TRUCK, TALKING ABOUT MR.^ALIGADA, HE WAS DRIVING AN SUV, KNOW WHO I AM.

HE SEEN ME.

MR.^PHILLIPS IS COMPARING MR.^ALIGADA TO THE OTHER FOLKS WHO HAD SEEN MR.^PHILLIPS IN THE SHADOWS.

AND THOSE OTHER FOLKS COULDN'T RECOGNIZE HIM.

THESE ARE MR.^PHILLIPS OWN WORDS TO DETECTIVE DINGEE.

WE HAVE THE STATEMENT FROM THE GIRLFRIEND, WE HAVE THE STATEMENT WHERE THE DEFENDANT EXPLAINS THE DIFFERENCE BETWEEN ALIGADA AND OTHER FOLKS.

THE OTHER FOLKS CAN NOT IDENTIFY ME BECAUSE I'M IN THE SHADOWS.

IN FACT THERE WAS TESTIMONY FROM ONE OR TWO OF THE OTHER WORKERS COMING OUT ABOUT SEEING MR.^PHILLIPS IN THE SHADOWS.

BUT, THERE'S ANOTHER STATEMENT TO DETECTIVE DINGEE.

I WOULDN'T COME OUT ON TOP IF HE PREVENT ME FROM GETTING AWAY.

THAT WASN'T TO PREVENT THE, PREVENT MR.^ALIGADA FROM PREVENTING THE ROBBERY, FROM STOPPING THE ROBBERY.

PREVENT ME FROM GETTING AWAY.

THERE WERE MULTIPLE, I WOULD DISAGREE WITH OPPOSING COUNSEL.

THE THREAD IN THE STATEMENTS
ARE, THE THREADS, THE THREAD
IS, IS THAT, MY GOD, WHERE DID
ALIGADA COME FROM?

FOR ALL THE TIMES FOR HIM TO
COME OUT AND PARK IN THE BACK
AND PLAYED HERO.

BUT THAT LED TO THE INTENT TO
KILL MR.^ALIGADA, BECAUSE
MR.^ALIGADA KNEW MR.^PHILLIPS
AND MR.^PHILLIPS KNEW THAT HE
KNEW.

THERE ARE MULTIPLE STATEMENTS
BY MR.^PHILLIPS, NOT ONLY TO
THE GIRLFRIEND BUT TO THE
POLICE, THAT ESTABLISHED THAT
THREAD.

>> I THINK, SO IDENTITY, YOU
SAY THERE'S STRONG EVIDENCE
THAT THERE WAS, HE KNEW WHO IT
WAS.

I THINK YOU WERE SAYING THERE
WERE OTHER FACTORS HERE THAT
DISTINGUISH THAT?

>> YES, YOUR HONOR.

THE FIRST ONE, AND IT IS NOT
ALONE BUT IT IS WE'RE LOOKING
AT THE TOTALITY HERE AND TRYING
TO AVOID THE SLIPPERY SLOPE,
FIRST OF ALL, MR.^PHILLIPS KNEW
THAT ALIGADA KNEW HIM.

MR.^PHILLIPS DID NOT WEAR MASK
OR GLOVES SO MR.^PHILLIPS KNOWS
THAT HIS FACE IS EXPOSED.

SECONDLY, MR.^PHILLIPS SHOOTS
MR.^ALIGADA AFTER HE ALREADY

HAS THE MONEY FROM MR.^SWEET.
AND THEN MR.^SWEET TAKES OFF
RUNNING, AND RATHER THAN, HE IS
JUST SHOT TWICE AND, HE KNOWS
THAT HE HIT MR.^ALIGADA,
BECAUSE MR.^ALIGADA FALLS TO
THE GROUND, INSTEAD OF JUST
ABANDONING THE SITUATION,
MR.^PHILLIPS TRIES TO SHOOT
MR.^SWEET BY FIRING TWO OR
THREE TIMES.

AND IN FACT, ONE OF THE, ONE OF
THE PROJECTILES RECOVERED FROM
A CAR THAT MR.^SWEET DUCKED
BEHIND, MATCHED THE PROJECTILE
THAT WAS OBTAINED FROM THE
VICTIM, MR.^ALIGADA'S BODY.
FIRED FROM THE SAME GUN.

SO, FIRED TWO TIMES AT
MR.^ALIGADA.

MR.^ALIGADA FALLS TO THE
GROUND.

HE ALREADY HAS THE MONEY.

MR.^PHILLIPS DOES.

MR.^SWEET TAKES OFF RUNNING AND
THERE IS NO REASON TO SHOOT AT
MR.^SWEET NOW EXCEPT FOR TO TRY
TO ELIMINATE MR.^SWEET.

>> LET ME ASK YOU TO GO BACK
AND DESCRIBE WHAT THE RECORD
SHOWS ABOUT WHAT MR.^ALIGADA,
THE MURDER VICTIM, WAS DOING A
THE TIME THE SHOTS WERE FIRED.
NOW THE TRIAL COURT'S ORDER
SAYS THAT HE WAS SHOT AT A
RANGE OF THREE TO SIX FEET.

WHAT DOES THE RECORD SHOW ABOUT, WHAT WAS HAPPENING AT THE MOMENT THE SHOTS WERE FIRED AND JUST BEFORE THE SHOTS WERE FIRED?

>> MR.^SWEET DIDN'T KNOW MR.^ALIGADA WAS APPROACHING AT ALL.

THAT, THE RECORD IS MIXED.

MR.^SWEET DIDN'T HEAR HIM COMING.

ALL HE DOES SEES MR.^PHILLIPS TURN, AND AIM AND FIRE ONCE. AND HE DIDN'T KNOW UNTIL AFTER THE SHOTS WERE FIRED, HE LATER SEES IT WAS HIS FRIEND, MR.^ALIGADA, COWORKER, MR.^ALIGADA WHO WAS GUNNED DOWN.

ON THE OTHER HAND, MR.^WALTON TESTIFIED, I THINK IT WAS MARK WALTON, TESTIFIED THAT HE WAS IN THE PARKING LOT AT THE TIME, AND HE SAW MR.^ALIGADA, I THINK HE USED THE TERM, RUNNING TOWARDS AND YELLING AT, AT MR.^PHILLIPS AND HAS AS HE APPROACHED THEN TWO SHOTS RANG OUT.

>> SO HE WAS ACTUALLY RUNNING TOWARDS THE DEFENDANT AND THE ROBBERY VICTIM?

>> AND HE IS GUNNED DOWN BEFORE HE GETS THERE, YES, MA'AM.

>> BUT HE'S ON THE WAY TO TRY TO STOP THIS ROBBERY.

YOU KNOW, I'M NOT, THIS IS A
DIFFICULT CASE.

I THINK THE FACT OF YOU SAYING,
WELL, THAT, HE CERTAINLY,
YOU'RE NOT TRYING TO SAY THERE
IS CCP HERE OR ANY OF THE OTHER
AGGRAVATORS BUT I THINK WHAT
CONCERNS ME IS JUST THE VERY
FACT THAT HE, PHILIPS, PICKS
THE PARKING LOT AFTER WORK AND
THERE ARE OTHER PEOPLE AROUND.
SO IT'S NOT AS IF HE IS
THINKING THAT HE IS GOING TO
SHOOT WHATEVER WITNESSES ARE
THERE AND GET AWAY WITH IT THAT
WAY.

HIS INTENT, I WOULD ASSUME,
AGAIN TO GET THE MONEY AND RUN.
THERE WAS APPARENTLY A GETAWAY
DRIVER AND, THERE OBVIOUSLY HAD
TO BE AN INSIDE PERSON BECAUSE
HOW ELSE WOULD HE HAVE KNOWN
THAT SWEET HAD \$3100?

WE JUST DON'T KNOW WHO THOSE
OTHER TWO PEOPLE ARE.

WOULD YOU AGREE THIS LITTLE.

>> RIGHT.

>> THIS LITTLE COINCIDENTAL HE
PICKS ON SOMEBODY HE DOESN'T
KNOW JUST HAPPENS TO HAVE --

>> TELLING THE DETECTIVE HE
KNEW SWEET HAD THE MONEY AND
CLAIMS SWEET WAS A DRUG DEALER
WHICH THE DETECTIVE
INVESTIGATED.

FOUND NO EVIDENCE OF.

>> HE DOESN'T GIVE UP HIS
WHOEVER ACCOMPLICES THAT.
>> HE TOLD THE POLICE THAT.
I'M NOT TELLING YOU WHO OTHER
PEOPLE ARE INVOLVED.
>> THIS IDEA TO ME THAT WAS THE
PART THAT MOST WEIGHED IN FAVOR
OF THERE BEING NO OF ARREST AT
THE POINT THE VICTIM IS RUNNING
TOWARDS MR.^SWEET.
AND THAT'S UNCONTROVERTED,
CORRECT?
>> WELL, THAT'S WHAT MR.^WALTON
SAYS.
NOW MR.^SWEET SAYS, I DIDN'T
HEAR HIM, DIDN'T SEE HIM EVEN
THOUGH MR.^WALTON SAYS THAT
MR.^ALIGADA WAS YELLING
SOMETHING, AH, AH.
>> IS THERE ANYTHING IN THE
RECORD THAT SUPPORTS THE
STATEMENT THAT MR.^ALIGADA HAD
HIS HANDS UP WHEN HE WAS SHOT?
>> MR.^WALTON, YES, YOUR HONOR.
THERE WAS ONE BULLET HOLE, WELL
THERE ARE TWO BULLET HOLES IN
MR.^ALIGADA, ONE IN THE ARM AND
ONE IN THE TORSO.
THE ONE IN THE TORSO OF COURSE
IS THE LETHAL WOUND.
THE MEDICAL EXAMINER SAYS THOSE
TWO BULLET HOLES CONSISTENT
WITH ONE BULLET PASSING INTO
THE ARM AND INTO THE TORSO.
HE COULD NOT HAVE HAD HIS HANDS
UP LIKE THIS AND THE BULLET

COULD NOT HAVE GONE THROUGH IN BOTH PLACES.

UNDOUBTEDLY WOULD HAVE TO BE SOMETHING LIKE THIS.

>> WHAT SUPPORTS THE ASSERTION THAT HE HAD HIS HANDS UP AT ALL?

>> THAT'S MR.^WALTON, I BELIEVE, YOUR HONOR.

>> SAYING WHAT?

THAT HE WAS RUSHING TO TRY TO STOP THIS?

I MEAN HE WAS IN FULL FORWARD MOTION, CORRECT?

>> HE WAS IN, HE WAS IN FORWARD MOTION TOWARDS MR.^SWEET AND MR.^PHILLIPS.

>> I THINK THERE IS QUESTION, QUESTIONS FROM --

>> HE ALREADY HAD THE MONEY.

>> JUSTICE PERRY AND JUSTICE POLSTON I THINK.

>> ALONG THESE LINES, JUSTICE PERRY WOULD LIKE TO KNOW THE THREE PEOPLE INVOLVED.

WHAT WERE PHYSICAL POSITIONS RIGHT BEFORE THE SHOOTING AND AS THE SHOOTING TOOK PLACE?

>> MR.^SWEET AND MR.^PHILLIPS ARE RIGHT NEXT TO MR.^SWEET'S VEHICLE.

MR.^SWEET HAD BEEN TRYING TO START THE VEHICLE.

IN FACT STARTED I THINK, QUIT, AND APPARENTLY HAD TO USE A SCREWDRIVER OR SOMETHING.

AND THEN, MR.^ALIGADA HAD
GOTTEN IN HIS VEHICLE, AND
APPARENTLY HAD A LITTLE WAYS --

>> I THINK HE WAS WANTS TO KNOW
AS THE SHOOTING TOOK PLACE,
RIGHT AS THE SHOOTING OCCURRED?

>> WE HAVE VARIOUS TESTIMONY.
THE JUDGE'S ORDER SAYS THREE TO
SIX FEET.

MR.^WALTON SAYS 10 FEET.

HE ESTIMATES IN THE COURTROOM,
TALKING TO COUNSEL FROM ME TO
YOU AND ON THE RECORD AS ABOUT
10 FEET.

>> WERE THEY ALL FACING EACH
OTHER?

WERE THEY TO THE SIDE, WHERE
WERE THEY?

>> I DON'T KNOW THE EXACT
ANGLE, YOUR HONOR.

I'M, I KNOW WE KNOW MR.^ALIGADA
WAS APPROACHING MR.^PHILLIPS
AND MR.^SWEET.

BUT, EXACTLY WHAT THE ANGLE IS,
I DON'T KNOW.

THERE WAS A DIAGRAM THAT WAS
INTRODUCED, ACTUALLY I CAME
OVER TO THE COURT TO LOOK AT
THE EXHIBITS LAST THURSDAY AND
THE DIAGRAM APPARENTLY HASN'T
BEEN TRANSMITTED.

>> WHAT HAPPENED, SO YOU KNOW,
IF IT IS IMPORTANT YOU NEED TO
GET A COPY OF IT AND
SUPPLEMENT.

>> YES, MA'AM.

>> WE DON'T ACCEPT ORIGINAL EXHIBITS.

SO IF THERE IS AN EXHIBIT THAT IS CRITICAL, BOTH SIDES NEED TO KNOW IN THESE DEATH CASES THAT THEY HAVE GOT TO DO SOMETHING TO --

>> I UNDERSTAND THE COURT'S PROCEDURE CHANGED SOMEWHAT RECENTLY IN THAT REGARD.

>> IT HAS BEEN MORE --

>> IN ANY EVENT -- YOU WERE YOUR HONOR --

>> IF YOU WANTED TO SUPPLEMENT WITH AN EXHIBIT, WITH THE AGREEMENT, SO THAT WE HAVE A COPY OF THAT, IF THAT BECOMES CRITICAL.

>> YES, MA'AM.

>> MR.^SWEET DID NOT SEE MR. ALIGADA, RIGHT, AS IT --

>> CORRECT.

>> HE DID NOT SEE HIM.

DIDN'T HEAR HIM.

THE FIRST THING THAT HE KNOWS SOMETHING IS GOING ON OTHER THAN THE ROBBERY HIMSELF SEES MR.^PHILLIPS TURN AND AIM A GUN AND FIRE AT MR.^ALIGADA.

THEN HE RUNS, MR.^SWEET RUNS.

>> LET ME TAKE YOU DOWN THE ROAD WITH THE ASSUMPTIONS THAT JUSTICE PARIENTE DID WITH YOUR OPPOSING COUNSEL.

LET'S ASSUME FOR THE MOMENT THAT THE JURY WAS PROPERLY

INSTRUCTED ON ARREST AGGRAVATOR
BUT THE JUDGE IMPROPERLY FOUND
IT.

WE GO TO HARMLESS ERROR
ANALYSIS, RIGHT?

>> YES, YOUR HONOR.

>> OKAY. TELL ME ABOUT THAT.
WHY SHOULD THERE BE HARMLESS
ERROR IF THAT'S THE CASE?

>> ROGERS IS A NOTE WHERE THE
EXAMPLE OF ROGERS IS 1987
ROGERS.

IN THAT CASE, THE AVOID ARREST
AGGRAVATOR WAS STRUCK BY THIS
COURT.

IN THAT CASE THE ONLY EVIDENCE
OF THE AVOID ARREST WAS THE
DEFENSE CHARACTERIZATION OF THE
VICTIM AS A HERO.

WE HAVE WAY MORE THAN THAT
HERE.

I'M NOT CONCEDED ANY ERROR AT
ALL.

AND IN THAT CASE THE REMAINING
AGGRAVATORS WERE PRIOR FELONY
AND DURING AN ATTEMPTED
ROBBERY.

AND THIS COURT HELD IT WAS
HARMLESS ERROR.

HERE WE HAVE PRIOR FELONY
BIG-TIME.

WE HAVE PRIOR FELONY TIMES TWO.

AND THE ONE OF THOSE PRIOR
FELONIES IS THE DEFENDANT
LAYING IN WAIT, STALKING,
OUTSIDE OF A BUSINESS, WAITING

FOR A VICTIM TO COME OUT.

HE HAS REASON TO BELIEVE HAS
MONEY.

IN THAT CASE WE HAVE ANOTHER
GOOD SAMARITAN AND DEFENDANT
FIRING AS YOUR HONOR POINTED
OUT, 13 SHOTS TRYING TO SHOOT
THAT VICTIM AS HE IS RUNNING
AWAY.

>> I THINK THE PART, WITH ALL
OF THIS, THE JURY'S
RECOMMENDATION IS 7-5 IS,
SOMEWHAT TROUBLING TO ME AT
LEAST.

BECAUSE YOU WOULD THINK, WITH
THOSE PRIOR VIOLENT FELONIES,
AND AGAIN, I KNOW WE DON'T TRY
TO SECOND-GUESS WHAT THE JURY
IS DOING, BUT IT STRIKES ME
THAT, THAT IS A FACT THAT THE
COURT LOOKS AT WHEN WE'RE DOING
A HARMLESS ERROR ANALYSIS.

BECAUSE IF THIS WAS REVERSED,
IT WOULD GO BACK TO A NEW
PENALTY PHASE, AND YOU WOULD
AGREE ANY NEW PENALTY PHASE, IF
WE FOUND ERROR IN THE AVOID
ARREST, THE JURY WOULD NOT BE
INSTRUCTED ON AVOID ARREST,
CORRECT?

>> OF COURSE IF THE COURT, IF
THIS COURT DIRECTS IT WILL NOT
BE STRUCKED IT WILL NOT BE
INSTRUCTED.

>> WHEN WE FIND THERE IS
INSUFFICIENT EVIDENCE AND

REMAND FOR NEW PENALTY PHASE
WE'RE NOT GOING TO HAVE THE
SAME INSTRUCTION.

>> WE HAVE A DISTINCTION, I
UNDERSTAND THE COURT WILL
ADDRESS THIS IN EXTRA ORAL
ARGUMENT THERE IS DISTINCTION
BETWEEN THE JUDGE AS GATEKEEPER
THERE IS ENOUGH EVIDENCE FOR
YOU FOLKS TO CONSIDER.

AFTER YOU CONSIDER IT AND YOU
MAKE YOUR RECOMMENDATION, I, AS
FINDER OF FACT, I SAW THE
EVIDENCE, I WILL NOW MAKE MY
OWN DETERMINATION.

SO THERE ARE TWO DIFFERENT
FUNCTIONS THERE OF THE TRIAL
JUDGE IN MY VIEW, YOUR HONOR.

>> HERE WE KNOW THAT THE JURY,
SINCE THERE'S, CONVICTIONS I
HAVE MY RING ISSUE WHICH IS THE
JURY HAD TO FOUND AT LEAST ONE
AGGRAVATOR BECAUSE THERE --

>> CORRECT.

>> THE ROBBERY --

>> HERE AGAIN, PRIOR VALID, I
SUPPLEMENTED WITH THE BLAKE
CASE LATE LAST WEEK AND BLAKE
WAS 2003.

AND THAT WAS A, ANOTHER PRIOR
FELONY TWO WEEKS PRIOR TO THE,
PRIOR TO THE MURDER.

HERE WE HAVE THE DEFENDANT,
KNOWING THAT HE GUNNED DOWN
MR. ^ALIGADA, LESS THAN THREE
MONTHS LATER, DOING THE SAME

THING AND IN A GUNFIGHT AS A RESULT.

IN ADDITION TO THE SHOTGUN INCIDENT WITH HIS WIFE IN 1996 FOR WHICH HE WAS CONVICTED OF AGGRAVATED BATTERY, AS YOUR HONOR, INDICATED RECEIVED PRISON TIME.

>> IS THERE ANY WEIGHT GIVEN TO THE FACT THAT HE SHOOTS AT THE ROBBERY VICTIM IN THIS CASE? NOT JUST A ROBBERY, BUT IT IS A ROBBERY AND THEN HE, I MEAN, WAS THERE AN ATTEMPTED MURDER ON, FOR MR.^SWEET BECAUSE OF WHAT HAPPENED TO MR.^SWEET?

>> I DON'T THINK THEY CHARGED THAT, YOUR HONOR.

THEY CHARGED THE ARMED ROBBERY AND THEY CHARGED FIRST-DEGREE MURDER AND JURY CAME BACK GUILTY AS CHARGED UNDER BOTH.

>> UNDER YOUR THEORY HE WAS ATTEMPTING MURDER.

BUT THEY DIDN'T CHARGE IT?

>> YES, MA'AM.

>> THEY DID NOT CHARGE ATTEMPTED MURDER OF MR.^SWEET?

>> I CAN'T SAY IT WAS NEVER CHARGED BUT, BY THE TIME IT REACHED THE JURY TRIAL, I DON'T, I DON'T THINK IT WAS, PENDING AT THAT TIME.

>> THAT WOULD MAKE IT A VERY DIFFERENT CASE IF THAT, I MEAN IN TERMS OF IF THERE WAS AN

ATTEMPTED MURDER OF MR.^SWEET.

>> I CAN'T EMPHASIZE, ENOUGH,
YOUR HONOR, BEFORE WE GO TO
HARMLESS.

>> I WOULD SAY VERY DIFFERENT
CASE. WOULD BE ONE MORE FACTOR.

>> RIGHT.

BUT AGAIN IT IS THE TOTALITY.
IT IS NOT JUST THEY KNEW EACH
OTHER.

IT IS NOT JUST -- NOT JUST THAT
HE SHOT AT MR.^ALIGADA AS HE
APPROACHED AND KNEW ALIGADA
KNEW HIM, IT IS ALSO THAT HE
SHOT AT MR.^SWEET AND TRIED TO
SHOOT HIM AFTER HE ALREADY HAD
THE MONEY. AND --

>> SEEMS TO ME THAT'S REALLY
WHERE YOU ARE REALLY FOCUSING
IN ON, THAT THIS OCCURRED AFTER
THE UNDERLYING CRIME WAS
COMPLETED, AND THEN SECONDLY,
BECAUSE HE FIRED THE WEAPON,
AT, AN ADDITIONAL PERSON.
AND THAT TEAMS SEEMS TO BE
REALLY WHERE YOU'RE GOING
BECAUSE ALL THE OTHERS HAVE
THOSE KINDS OF ELEMENTS IN
THEM.

>> THERE IS NO REASON I CAN
THINK OF REASONABLE OR
OTHERWISE TO SHOOT AT MR.^SWEET
OTHER THAN TO TRY TO ELIMINATE
MR.^SWEET.

MR.^ALIGADA IS ALREADY --

>> THE VICTIM HERE, THE MURDER

VICTIM IS MR.^ALIGADA.

>> CORRECT. SHOWS THE
DEFENSE MINDSET.

>> I GUESS ON THAT, WHY, SINCE
WE REQUIRE THIS STRONG
EVIDENCE, ON AVOID ARREST.
AND I GOT TO GO BACK TO WHY WE
REQUIRE STRONG EVIDENCE IF
THERE IS INFERENCES BOTH WAYS.

BUT AS MR.^McLAIN
ARGUED, HE, MR.^ALIGADA
CONTINUES TO, THERE'S A SHOT
FIRE BUT HE CONTINUES TO RUN.
MR.^PHILLIPS DOESN'T RUN AFTER
HIM.

HE RUNS, HE HAS RUN AWAY.

>> WELL, THERE'S CONFLICTING
EVIDENCE IN TERMS OF WHAT
EXACTLY HAPPENED TO MR.^ALIGADA
WHEN HE GETS SHOT.

MR.^WALTON SAYS HE FELL TO THE
GROUND.

>> OKAY.

>> IN FACT THE MEDICAL
EXAMINER, CORROBORATES THAT
WITH THE INJURIES TO THE
VICTIM'S KNEES.

MR.^SWEET, WHO ADMITS THAT HE
REALLY DIDN'T SEE WHAT WAS
GOING ON, HE TALKS ABOUT
MR.^ALIGADA CONTINUING TO TROT,
I BELIEVE WAS THE TERM THAT HE
USED.

BUT, DURING THAT TIME,
MR.^SWEET'S RUNNING AWAY AND
DODGING BULLETS, LITERALLY

DODGING BULLETS.

SO THE EVIDENCE IS CONFLICTING
IN TERMS OF EXACTLY WHAT
HAPPENED TO MR. ^ALIGADA AT THE
SECOND HE WAS SHOT.

BUT AGAIN, IT'S THE TOTALITY, I
WAS LEADING UP TO NOT ONLY THE
KNOWLEDGE OF HIM, NO MASK, NOT
ONLY OF SHOOTING MR. ^ALIGADA
AFTER HE GOT THE MONEY AND ALSO
TRYING TO SHOOT MR. ^SWEET AFTER
HE HAD THE MONEY BUT ALSO THE
THREE STATEMENTS WE'VE TALKED
ABOUT.

SO IT IS THE TOTALITY OF ALL
THESE THINGS THAT DISTINGUISH
THIS CASE AND IS, AND WHERE WE
DO NOT HAVE TO WORRY ABOUT THE
SLIPPERY SLOPE BECAUSE THE
DEFENDANT IN SOME WORDS SAID, I
HAD TO SHOOT HIM BECAUSE HE
KNEW ME, VERSUS THE OTHER
PEOPLE WHO SAW ME IN THE
SHADOWS AND COULDN'T RECOGNIZE
ME.

SO, THE STATE WOULD SUBMIT THAT
ALSO AS TO ISSUE TWO, THAT THE
TRIAL JUDGE, NUMBER ONE, IS,
VERSUS MOHAMMED, IF THE
EVIDENCE WAS CONTESTED OR THAT
THE PENALTY PHASE WAS CONTESTED
AND NUMBER TWO THE JUDGE, AND I
BOLDED AND UNDERLINED THIS IN
MY BRIEF, VERY CLEARLY
INDEPENDENTLY WEIGHED THE
AGGRAVATORS AND MITIGATORS.

SHE DID NOT JUST DEFER TO THE JURY BUT SO THE STATE WOULD RESPECTFULLY REQUEST THE COURT AFFIRM THE JUDGMENT SENTENCE.

>> THANK YOU. REBUTTAL?

>> I MAKE A FEW POINTS.

FIRST OF ALL, MR.^ALIGADA WAS, ACCORDING TO MR.^SWEET, HE WAS ABOUT 20 YARDS AWAY WHEN HE WAS ON THE GROUND.

MR.^SWEET WENT TO HIM ON THE GROUND AND HE WAS ALREADY, HE SAID, 20 YARDS AWAY ON HIS WAY BACK TO THE BUILDINGS AND THE BUSINESS.

SO HE DID TURN AND RUN FOR A PERIOD, OR FOR A SPACE OR PERIOD OF TIME BEFORE HE FELL TO THE GROUND.

AS A WAY OF OVERVIEW --

>> AT THAT TIME, WHEN HE GOES TO HIM ON ALIGADA ON THE GROUND, WHERE IS --

>> MR.^PHILLIPS IS GONE.

>> SO MR.^PHILLIPS, SO WHAT IS THIS NOTION THAT HE KEPT ON TRYING TO ELIMINATE MR.^SWEET AS A WITNESS?

WHERE DO WE GET THAT FROM?

>> WHAT WE HAVE, MR.^SWEET SAID WHEN HE TURNED AND FIRED AT MR.^ALIGADA, HE TOOK THAT OPPORTUNITY TO RUN HIMSELF IN A DIFFERENT DIRECTION AND HE RAN OVER TO THE AREA WHERE THE PARKED CARS WERE AND WAS

DODGING THROUGH THE PARKED CARS.

AND HE SAID THAT MR.^PHILLIPS DID FIRE SHOTS AT HIM.

SO HE FIRED SHOTS IN HIS DIRECTION.

THERE WAS GUN STRIKES OR BULLET STRIKES TO PARKED CARS.

SO THERE WAS TWO TO THREE SHOTS.

NOW, TO SAY THERE WAS NO OTHER REASON TO SHOOT AT MR.^SWEET OTHER THAN TRY TO KILL HIM BECAUSE HE WAS A POTENTIAL WITNESS, AGAIN, IT GOES RIGHT BACK TO THE CONSISTENT STATEMENT THAT IS THE DEFENDANTS MADE.

I WAS TRYING TO GET AWAY FROM THE SCENE.

IT WAS JUST AS REASONABLE TO ASSUME HE FIRED IN THE DIRECTION OF MR.^SWEET TO BE SURE THAT MR.^SWEET DIDN'T START CHASING HIM, NOT NECESSARILY TO KILL HIM.

AND --

>> THE STATE SEEMS TO BE SAYING, IS THAT THE SHOTS AS TO MR.^ALIGADA WERE FIRED AFTER THE UNDERLYING CRIME HAD BEEN COMPLETED AND SEEMS TO BE SAYING, THAT BECAUSE SHOTS WERE FIRED THEN AT VICTIM OF THE UNDERLYING CRIME, NUMBER TWO, AND, THIRDLY, HAD ANOTHER THIRD

FACTOR OF THOSE STATEMENTS.
THE STATEMENTS THAT WERE MADE.
>> RIGHT.
>> WHERE IS THE STATE
INCORRECT?
WHAT CASE WOULD I LOOK TO, IF I
WERE TO SAY, OKAY, I WANT TO
SEE WHAT THE LAW IS IN THIS
AREA.
THE DEFENSE TELLS ME THIS CASE,
OR THESE CASES, REFUTE THOSE
FACTORS APPEARING TOGETHER,
TOGETHER?
BECAUSE HE IS ARGUING THAT IS
HOW WE MUST LOOK AT THIS CASE,
WITH THE TOTALITY.
IS THERE A CASE AND WHERE WOULD
I LOOK.
WHERE WOULD YOU SUGGEST I, THE
CASE THAT WOULD DO IT, TWO
CASES.
>> I DON'T KNOW IF I CAN POINT
YOU TO CASE.
>> OKAY.
>> BECAUSE THESE ARE ALL
FACT-BOUND SITUATIONS BUT ONE
THING I WOULD LIKE TO POINT
OUT --
>> WE MUST HAVE CASES WHETHER
IT IS BEFORE OR AFTER THE
ACTUAL UNDERLYING CRIME.
>> YES.
>> WE MUST HAVE CASES WHERE IT
ADDRESSES SHOOTING AT OTHER
PEOPLE.
WE MUST HAVE CASES THAT ADDRESS

STATEMENTS.

I KNOW WE HAVE THOSE FOR SURE.

THE QUESTION IS WHETHER THESE STATEMENTS ARE SUFFICIENT?

>> THAT'S CORRECT.

WHETHER THEY'RE SUFFICIENT.

>> YEAH.

>> THE CASE, THIS COURT HAS DRAWN A DISTINCTION WHERE THE MOTIVE FOR THE SHOOTING WAS TO FLEE THE SCENE VERSUS WHETHER THERE IS ADDITIONAL EVIDENCE TO CHANGE THAT FROM MERELY APPREHENSION AT THE SCENE, GETTING AWAY FROM THE SCENE OF THE CRIME VERSUS, SOME ADDITIONAL EVIDENCE TO SHOW IT WAS ELIMINATION OF A WITNESS AS A MOTIVE.

>> WHAT IS THE CASE THAT DRAWS US THERE?

>> WELL THE CASES I CITED IN THE BRIEF WHICH SPECIFICALLY --

>> ALL RIGHT.

>> HAD TO DEAL WITH, EXCUSE ME JUST A MOMENT.

>> DON'T TAKE UP ALL YOUR TIME LOOKING FOR CASES.

>> IT WAS TERRY AND SOME OF THOSE CASES BUT --

>> IN THIS, ARE YOU TAKING, THE STATE SAID THAT THE ROBBERY WAS COMPLETE WHEREAS IT SOUNDS LIKE MR. WALTON REALLY WAS SAYING THAT THIS, THE WITNESS, THIS ALIGADA, THE VICTIM, WAS

ACTUALLY RUSHING AT, AS THE ROBBERY MUST HAVE STILL BEEN GOING ON.

>> THE ROBBERY WAS STILL GOING ON. JUST THE FACT THAT HE ALREADY HAD THE MONEY FROM MR.^SWEET WASN'T THE END OF THE ROBBERY, IF YOU WILL.

IT ALL HAPPENED VERY QUICKLY.

>> THE GUN WAS STILL --

>> HE STILL HAD MR.^SWEET AT GUNPOINT.

HE HAD TAKEN THE MONEY.

MR.^ALIGADA COMES FORWARD.

HE TURNS AND FIRES, MR.^SWEET RUNS. THE FACT THAT HE HAD THE MONEY FROM THE MR.^SWEET DIDN'T END THE ROBBERY.

IT IS AN ONGOING EVENT.

HE WAS STILL AT THE SCENE AND ALL OF THIS WAS STILL GOING ON.

SO, TO SAY THAT IT WAS A DISTINCT EVENT, THE ROBBERY WAS OVER, I DON'T THINK YOU CAN CONCLUDE THAT, FROM THE EVIDENCE.

ANOTHER POINT I WOULD LIKE TO MAKE, I DON'T THINK I AT LEAST MENTIONED IT.

ALL OF THIS EVIDENCE HAS TO BE LOOKED THROUGH THE PRISM OF THE CIRCUMSTANTIAL EVIDENCE RULE. THIS COURT CONSISTENTLY APPLIED THE CIRCUMSTANTIAL EVIDENCE RULE IN THESE KINDS OF MATTERS DEALING WITH, IF THERE IS TWO

POSSIBLE INFERENCES FROM A
FACT, ONE INDICATE AVOID
ARREST, ONE NOT, THE COURT IS
REQUIRED TO TAKE THE ONE THAT
DOESN'T ESTABLISH THE FACT.
IN JARRELLS CASE IS ONE OF
THOSE PARTICULAR CASE.
ALL THIS HAS TO BE VIEWED
THROUGH THE CIRCUMSTANTIAL
EVIDENCE RULE PRISM.
THESE INFERENCES JUST BECAUSE
THERE MAY BE A POSSIBLE
INFERENCE OF AVOIDING ARREST
FROM A FACT, THERE IS ALSO
INFERENCE THAT COUNTERS AVOID
ARREST OR FOR SOME OTHER
REASON, THEN I THINK THIS COURT
IS REQUIRED UNDER THE
CIRCUMSTANCES TO FOLLOW THAT.
>> IS THERE DIRECT EVIDENCE
HERE IN THE FORM OF THE
STATEMENTS THAT WERE MADE BY
THE DEFENDANT CONCERNING HIS
INTENTION?
>> NO. IN FACT THERE IS A SPECIFIC
STATEMENT IN HERE, HE SAYS I
DIDN'T INTEND TO KILL ANYBODY.
THAT WASN'T MY INTENTION.
HE TOLD THAT TO THE POLICE
OFFICER.
SO IF YOU WANT TO LOOK AT
DIRECT STATEMENTS FROM THE
DEFENDANT HE SAYS I DIDN'T
INTEND TO KILL ANYBODY.
>> WHAT ABOUT OTHER DIRECT
STATEMENTS THAT THE OFFICER AND

TO THE GIRLFRIEND, THAT THE
STATE HAS RECOUNTED HERE,
ISN'T THAT DIRECT EVIDENCE?

>> IT IS DIRECT EVIDENCE BUT IF
YOU LOOK AT IT IN CONTEXT I WAS
TRYING TO STOP, HE WAS TRYING
TO STOP ME.

I HAD TO PREVENT HIM FROM
APPREHENDING ME AT THE SCENE.

>> I UNDERSTAND, YOUR
UNDERSTANDING OF THAT IS
DIFFERENT AND I UNDERSTAND THAT
THAT MAY MAYBE THAT'S A
REASONABLE TAKE ON IT, BUT
ISN'T THAT DIRECT EVIDENCE?

>> DIRECT EVIDENCE OF HIS
REASONS FOR, YEAH, HIS
TESTIMONY CAN BE CONSIDERED
DIRECT EVIDENCE BUT IT IS ALSO
CIRCUMSTANTIAL EVIDENCE OF HIS
STATE OF MIND.

>> I THINK WITH THAT, YOU HAVE
USED UP YOUR TIME.

>> I'M SORRY.

>> IF YOU WANT TO --

>> THANK YOU.

>> THANK YOU.

I THANK BOTH ATTORNEYS FOR THE
PARTIES FOR THEIR PROFESSIONAL
ARGUMENTS TODAY, AND, WE WILL
TAKE THE MATTER UNDER
ADVISEMENT.