

>> ALL RISE.  
SUPREME COURT OF FLORIDA IS NOW  
IN SESSION.  
PLEASE BE SEATED.  
>> OUR LAST CASE FOR THE DAY IS  
CARR V. STATE OF FLORIDA.  
YOU MAY PROCEED.  
>> MAY IT PLEASE THE COURT, GOOD  
MORNING.

I'M CHRIS QUARLES, I REPRESENT  
EMILIA CARR IN HER DIRECT APPEAL  
OF HER SENTENCE FOR KIDNAPPING  
AND FIRST-DEGREE MURDER AND  
RESULTING DEATH SENTENCE.  
THIS MORNING I'D LIKE TO FOCUS  
ON JUST THE SENTENCING ISSUES,  
SPECIFICALLY THE RELATIVE  
CULPABILITY WHICH THIS COURT,  
BASED ON THE UNUSUAL POSTURE OF  
THIS CASE, REQUESTED  
SUPPLEMENTAL BRIEFS.

MS. CARR WENT TO TRIAL FIRST FOR  
THE MURDER OF JOSH FULGHAM'S  
WIFE, HEATHER STRONG, AND BY A  
BARE MAJORITY, 7-5, SHE WAS  
SENTENCED TO DEATH.

MR. FULGHAM WENT TO TRIAL MUCH  
LATER, AND AT THE TIME I WAS  
ABOUT TO FILE MY REPLY BRIEF,  
THE JURY HAD COME BACK WITH A  
LIFE RECOMMENDATION FOR --

>> WAS IT BEFORE THE SAME JUDGE?

>> NO, YOUR HONOR.  
THEY HAD DIFFERENT JUDGES, THEY  
HAD DIFFERENT JURIES AND  
DIFFERENT LEGAL TEAMS.

SAME PROSECUTOR, WHICH AT THIS  
POINT I'D LIKE TO POINT OUT  
PURSUED DIFFERENT THEORIES IN  
DIFFERENT TRIALS.

IN MS. CARR'S TRIAL, MR. KING --  
THE STATE ATTORNEY -- MADE  
MS. CARR THE MASTERMIND OF THE  
MURDER, AND SHE WAS THE  
MANIPULATOR OF MR. FULGHAM.  
AND IN MR. FULGHAM'S TRIAL THERE  
WAS A BIG, BIG ROW AMONG THE  
LAWYERS ABOUT THE INCONSISTENT  
STANCE THE PROSECUTOR WAS TAKING  
AND HIS TRIAL POINTING HIM OUT

AS THE MASTERMIND WHEREAS  
PREVIOUSLY IN MS. CARR'S TRIAL  
THEY HAD MADE HER THE  
MANIPULATOR --

>> ON THIS ISSUE OF RELATIVE  
CULPABILITY, DOES THAT GO TO  
PROPORTIONALITY OR TO A FACTOR  
IN WHETHER THE DEATH PENALTY,  
YOU KNOW, A TRIAL JUDGE  
CONSIDERATION?

>> BOTH, I BELIEVE.

>> ALL RIGHT.

NOW, ALSO A QUESTION AND THEN  
YOU CAN, PLEASE, ELABORATE.  
THE ISSUE OF WHAT'S -- BECAUSE  
WE DON'T HAVE THE TRANSCRIPT, OF  
COURSE, OF THE CO-DEFENDANT --

>> WE DO.

>> IT'S IN THIS RECORD?

>> YES.

>> OKAY.

BUT THE JUDGE, OBVIOUSLY, THE  
JUDGE DIDN'T HAVE IT.

>> CORRECT.

>> IF THERE'S, QUOTE, MORE  
MITIGATION IN THE CO-DEFENDANT,  
DOES THAT AFFECT THE ANALYSIS OF  
RELATIVE CULPABILITY FOR THE  
CRIME?

>> UNDER THE CASE LAW OF THIS  
COURT, I DON'T, I DO NOT BELIEVE  
IT DOES.

THIS COURT HAS STATED THAT  
RELATIVELY CULPABLE  
CO-DEFENDANTS WHO ARE CULPABLE  
OR -- ONE LESS CULPABLE SHOULD  
NOT GET THE DEATH SENTENCE IF  
THE MORE CULPABLE -- I'M SORRY,  
I'M MIXING THEM UP.

THE LESS CULPABLE SHOULD NOT GET  
THE DEATH SENTENCE IF THE MORE  
CULPABLE GETS LIFE.

AND --

>> WELL, WHAT IF THEY'RE EQUALLY  
CULPABLE?

>> WELL, THEN IF ONE GETS LIFE,  
THE OTHER SHOULD GET LIFE.

>> BUT, I MEAN, THAT -- MY  
UNDERSTANDING, AND CORRECT ME IF  
I'M WRONG, BUT IF THERE IS A

PLEA DEAL --  
>> THAT'S DIFFERENT.  
>> WELL, OKAY.  
OKAY, SO IT'S NOT A UNIFORM  
RULE.  
IF IT'S A PLEA DEAL, IF IT'S A  
CONVICTION FOR A DIFFERENT  
DEGREE?  
ISN'T THAT A DIFFERENCE --  
>> OH, ABSOLUTELY.  
ABSOLUTELY.  
>> SO IT'S NOT JUST ABSOLUTE --  
>> NO.  
>> -- THAT IF TWO PEOPLE ARE  
PARTICIPATING, THEN NECESSARILY  
THAT HAPPENS?  
>> WELL, THERE IS SOME OLDER  
CASE LAW FROM THIS COURT WHERE  
THEY DID CONSIDER RELATIVE  
CULPABILITY WHERE THERE WAS A  
PLEA DEAL --  
>> BUT THAT'S NO LONGER THE LAW.  
CLEARLY --  
>> CORRECT.  
>> OKAY.  
>> THIS COURT HAS SAID IN ORDER  
TO BE RELATIVELY CULPABLE FOR AN  
ISSUE, BOTH CO-DEFENDANTS HAVE  
TO BE TRIED AND CONVICTED OF THE  
SAME CRIMES, AND THEN THAT'S  
WHEN RELATIVE CULPABILITY CAN BE  
EQUALLY WEIGHED.  
>> BUT THEN WHY, WHY WOULDN'T  
DIFFERENT MITIGATION MAKE A  
DIFFERENCE?  
FOR EXAMPLE, ONE DEFENDANT A IS,  
HAS JUST A TREMENDOUS AMOUNT OF  
MENTAL HEALTH MITIGATION,  
BORDERLINE RETARDATION, JUST THE  
MOST SYMPATHETIC CHARACTER THAT  
ONE COULD EVER FIND.  
NOT INSANE, BUT STILL ELIGIBLE  
FOR THE DEATH PENALTY.  
AND THEN DEFENDANT B -- BOTH  
PARTICIPATING IN IT -- THE  
DEFENDANT B BEING ONE WHO IS A  
COLLEGE-EDUCATED PROFESSOR AND  
NO MENTAL HEALTH BUT STILL HAS  
PARTICIPATED IN, HAS THE INTENT  
TO COMMIT THE SAME CRIME?

>> WELL, THERE I THINK --  
>> DON'T YOU LOOK AT MITIGATION?  
I MEAN, IT'S -- WHY WOULD YOU  
NOT?

>> TO SOME EXTENT YOU DO, BUT I  
THINK IT HAS TO DO IN  
SITUATIONS, THAT'S BECAUSE MORE  
IMPORTANT WHERE YOU HAVE  
SUBSTANTIAL DOMINATION OF ONE  
CO-DEFENDANT OVER THE OTHER.

>> NO, I'M NOT SAYING  
DOMINATION, I'M SAYING --  
BECAUSE YOU MADE A CATEGORICAL  
STATEMENT THAT YOU DO NOT LOOK  
TO MITIGATION, IT MAKES NO  
DIFFERENCE.

I'M TRYING TO MAKE SURE THAT I,  
THAT I UNDERSTAND IT AND AGREE  
OR DISAGREE WITH IT.

I'M TRYING TO --

>> I THINK THIS CASE, THE CASE  
LAW BY THIS COURT HAS INDICATED  
THAT REALLY IT DOESN'T MATTER,  
THE MITIGATION.

WE HAVE MITIGATION.

WE HAVE JUST AS MUCH MITIGATION  
IN EMILIA'S CASE AS WE DO IN  
JOSH'S.

>> BUT HOW CAN THAT BE IF THE  
JOB OF A JURY AND THE JUDGE IS  
TO EVALUATE AGGRAVATION AND  
MITIGATION?

CERTAINLY THAT THERE IS SOMEONE  
WHO DID THE SAME ACT BUT DID NOT  
RECEIVE THE DEATH PENALTY MAY BE  
A MITIGATION.

MAYBE, I DON'T KNOW.

BUT IT DOESN'T SEEM TO ME TO BE  
AS A PRINCIPLE OF LAW THAT THEY  
CANNOT HAVE A DIFFERENT, A  
DIFFERENT SENTENCE.

>> WELL --

>> HELP ME UNDERSTAND THAT.

>> I'M NOT SURE I CAN IN THE  
SHORT AMOUNT OF TIME I HAVE.

>> OKAY.

I DON'T WANT TO, I DON'T WANT TO  
DOMINATE.

GO AHEAD.

GO AHEAD AND MAKE YOUR --

>> BUT REGARDLESS, WE THINK THE EVIDENCE SHOWS THAT JOSH FULGHAM WAS MORE CULPABLE THAN EMILIA CARR.

>> BUT ISN'T A STRIKING CIRCUMSTANCE HERE IS THAT THE DEFENDANT IN THIS CASE HAS AN IQ OF 125?

>> THAT'S CORRECT.

>> AND MR. FULGHAM IS INTELLECTUALLY CHALLENGED. I MEAN, PRETTY SEVERELY INTELLECTUALLY CHALLENGED.

>> FAIRLY INTELLECTUALLY CHALLENGED.

>> THE DYNAMIC HERE, ISN'T IT ALSO -- CAN THE CONCLUSION BE SUPPORTED FROM THE RECORD, VERY STRONGLY SUPPORTED FROM THE RECORD THAT THE DEFENDANT IN THIS CASE IS A LEADER AND NOT A FOLLOWER?

>> DEPENDS ON WHICH TRIAL YOU READ.

>> WELL, HOW ABOUT THIS TRIAL.

>> IN THIS TRIAL THE STATE MADE HER THE LEADER.

IN THE --

>> BUT ISN'T THAT WHAT THE EXPERT WITNESSES TESTIFIED TO?

>> SOME OF THEM DID, YES.

BUT ALSO, MORE IMPORTANTLY, IT WAS JOSH'S WIFE.

THE WHOLE MOTIVE OF KILLING HEATHER STRONG WAS BECAUSE THEY HAD A TUMULTUOUS RELATIONSHIP. THEY'D BEEN TOGETHER, THEY KNEW EACH OTHER WAY LONGER THAN EMILIA HAD EVEN BEEN IN THE PICTURE.

JOSH USED TO BEAT HIS WIFE ON A REGULAR BASIS.

HE THREW HER -- SHE THREW HIM IN JAIL ON A REGULAR BASIS.

HE WAS IN JAIL 30 DAYS, I'M SORRY, 45 DAYS BEFORE THE MURDER.

HE TALKED TO EMILIA ABOUT "I SHOULD HAVE KILLED HER, I SHOULD HAVE KILLED HER," AND THEN HE

ALSO TALKS TO HEATHER AND SAID,  
"I KNOW I BEAT YOU UP, I BEAT  
YOU UP AND, PLEASE, DROP THESE  
CHARGES."

HE WAS IN JAIL BECAUSE OF HER  
HAVING HIM ARRESTED BECAUSE HE  
POINTED A GUN AT HER.

SHE KEPT SAYING, "I'M TIRED OF  
IT, JOSH."

"I THINK THIS TIME WHEN YOU GET  
OUT, YOU'RE GOING TO KILL ME.  
I'M AFRAID YOU'RE GOING TO KILL  
ME THIS TIME."

AND SURE ENOUGH, HE DID.

TWO WEEKS LATER SHE WAS DEAD.  
HE WAS THE ONE THAT TALKED TO  
EMILIA ON THE PHONE, ALL THESE  
RECORDED JAIL CONVERSATIONS CAME  
IN DURING THE TRIAL, AND HE  
ASKED HER, "WHAT ABOUT THAT  
TRAILER BEHIND YOUR HOUSE?  
CAN THE NEIGHBORS SEE THAT?  
ARE THE WOODS, DO THE WOODS  
BLOCK THAT?"

AND SHE WENT, "YEAH, NO, THEY  
CAN'T SEE THAT, WHY ARE YOU  
ASKING THAT?"

HE WAS ALREADY HATCHING THE PLAN  
TO KILL HEATHER, LURE HER TO THE  
TRAILER WHERE SHE WAS KILLED,  
AND THAT'S WHAT HAPPENED.

EMILIA WAS CLEARLY GUILTY OF  
PRINCIPLED FIRST-DEGREE MURDER,  
NO DOUBT ABOUT IT.

BUT IT WAS JOSH'S MOTIVE, AND  
THE REASON HE WAS GOING TO KILL  
HER WAS SHE'D FINALLY HAD  
ENOUGH.

SHE WAS GOING TO TAKE THEIR TWO  
CHILDREN THAT THEY HAD TOGETHER  
BACK TO MISSISSIPPI WHERE THEY  
CAME FROM, AND JOSH COULD NOT  
HAVE THAT, SO THAT'S WHY SHE HAD  
TO DIE.

IN FACT, HE HAD HIS MOTHER TYPE  
UP A CUSTODIAL PARENTAL CHANGE  
GIVING HIM CUSTODY OF THE  
CHILDREN THAT THEY MADE HER SIGN  
IN THE TRAILER BEFORE THEY  
KILLED HER.

NOW --

>> IS THERE ANY EVIDENCE HERE THAT THIS DEFENDANT HAD A MOTIVE?

WASN'T THERE SOME EVIDENCE ABOUT SOME PRIOR THREATS THAT SHE MADE?

AND WASN'T SHE PREGNANT WITH THIS CO-DEFENDANT'S CHILD?

I MEAN, TELL US -- YOU KNOW, THERE IS SOME EVIDENCE IN HERE THAT SHE HAD SOME MOTIVE FOR KILLING THE VICTIM ALSO.

>> SHE HAD A MOTIVE FOR GETTING RID OF HEATHER, BUT NOT KILLING HER.

IN FACT, SHE KEPT SAYING, "I CAN'T BELIEVE THAT JOSH FINALLY WENT THROUGH WITH IT."

AND WHAT REALLY SET HIM OFF AT THE SCENE OF THE CRIME WAS SHE ADMITTED TO HIM THAT SHE HAD BEEN UNFAITHFUL TO HIM WHILE HE WAS IN JAIL WHEN SHE HAD HIM LOCKED UP IN JANUARY.

>> HOW DID THAT HAPPEN?

HOW WAS THAT ADMISSION ELICITED?

WASN'T THAT A RESPONSE TO A QUESTION THAT MS. CARR ASKED?

>> IT WAS HER -- WHAT HAPPENED WAS SHE -- JOSH'S SISTER WAS WIRED, AND EMILIA HAD BEEN QUESTIONED BY THE POLICE AND KEPT, THEY KEPT LETTING HER GO HOME.

AND THE CONFESSION SHE GAVE TO JOSH'S SISTER WHILE SHE DIDN'T KNOW SHE WAS BEING RECORDED WAS, BASICALLY, THE SAME CONFESSION SHE GAVE TO THE POLICE ULTIMATELY, COMING CLEAN.

AND THAT WAS WHAT SHE TOLD MICHELLE, JOSH'S SISTER, THAT HE -- THIS RAGE CAME OVER HIM, AND SHE SAID, "I DON'T THINK HE WOULD HAVE KILLED HER IF SHE HAD NOT ADMITTED THAT SHE'D BEEN UNFAITHFUL WHILE HE WAS IN JAIL."

>> DID I MISREAD SOMETHING?

DID SHE NOT SOLICIT SOMEONE TO  
KILL THIS WOMAN?

>> THAT WAS --

[INAUDIBLE]

THIS WAS A STRANGE --

>> AND DIDN'T SHE SAY THAT SHE  
WOULD KILL THEM HERSELF, EXCEPT  
SHE'S PREGNANT, SHE COULDN'T  
MOVE THE BODY?

>> THAT WAS ADMITTED ALSO.

>> OKAY.

>> THIS WAS MONTHS BEFORE.

THIS WAS A STRANGE, STRANGE  
RELATIONSHIP, AND IT DID NOT  
COME OUT HOW STRANGE IT WAS IN  
MS. CARR'S TRIAL, BUT IN  
MR. FULGHAM'S TRIAL, IT CAME OUT  
THAT JOSH, EMILIA AND HEATHER  
STRONG, THE VICTIM, WOULD HAVE  
SEXUAL THREESOMES WITH EACH  
OTHER, THAT SOMETIMES HEATHER  
AND EMILIA WOULD GET TOGETHER  
SEXUALLY WITHOUT JOSH, THAT JOSH  
WAS GOING BACK AND FORTH BETWEEN  
BOTH WOMEN.

IT WAS JUST A TRIANGLE THAT A  
STRANGE PART OF MARION COUNTY,  
THAT A LOT OF STRANGE THINGS  
WENT ON.

AND EVEN THOUGH THE EMPTY, THE  
THREATS ABOUT, OH, I WISH I HAD  
500, I'LL GIVE YOU 500 TO KILL,  
EVEN THE PEOPLE SHE SAID THAT TO  
SAID IT WAS AN EMPTY THREAT.

"WE DIDN'T TAKE HER SERIOUSLY."  
PEOPLE THREATEN TO KILL PEOPLE,  
I'D LOVE TO KILL THAT GUY, JUST  
BECAUSE YOU'RE MAD AT THEM.

>> CAN WE GO BACK TO THE ISSUE  
WHETHER MITIGATION PLAYS A ROLE?  
YOU CITE IN YOUR BRIEF THE  
SENTENCE OF DEATH, THE RECORD  
SHOWS THAT SCOTT AND THE  
CO-DEFENDANT HAD SIMILAR  
CRIMINAL RECORDS, WERE ABOUT THE  
SAME AGE, HAD COMPARABLE LOW  
IQs AND WERE EQUALLY CULPABLE  
PARTICIPANTS.

NOW, I REALIZE EVERYTHING IS,  
YOU CAN'T JUST TRANSLATE ONE



CASE TO ANOTHER, BUT DON'T -- IT IS STARTLING, A DIFFERENCE IN THESE TWO DEFENDANTS' IQs.

SO IT SEEMS TO ME THAT MAYBE THE MITIGATION IN THE TRADITIONAL SENSE DOESN'T PLAY A PART, BUT AS FAR AS WHETHER YOU'RE CONSIDERING CULPABILITY, WHETHER THIS DEFENDANT WHO YOU SAID HAD THE MOTIVE WOULD HAVE COMMITTED THIS MURDER IF NOT FOR HIS VERY PREGNANT GIRLFRIEND.

SO HOW DO YOU -- SO DO WE JUST DISREGARD THE IQs, OR WHERE DOES THAT FIT IN?

>> I THINK YOU CAN.

THAT'S THE ONLY CASE I COULD FIND WHERE THE MITIGATION FOR EQUALLY CULPABLE CO-DEFENDANTS WAS EVEN MENTIONED, AND I THINK IT WAS AN ASIDE.

JUSTICE AMSTEAD IN HIS PARTIAL CONCURRENCE -- WHICH I BRING UP IN SCHERR V. MOORE -- TALKS ABOUT THE NUMEROUS CASES WHERE THIS COURT HAS ACKNOWLEDGED THE PRINCIPLE THAT THE RELATIVE CULPABILITY AND PUNISHMENT OF A CO-DEFENDANT IS AN IMPORTANT FACTOR TO BE CONSIDERED IN CONSIDERING CAPITAL DEFENDANTS AND THAT EQUALLY CULPABLE CO-DEFENDANTS SHOULD RECEIVE THE SAME SENTENCE.

I THINK MITIGATION HAS NOTHING TO DO WITH THAT.

I MEAN, TO SOME EXTENT IF IT --

>> BUT THE NOTION THAT MITIGATION HAS NOTHING TO DO WITH OUR ANALYSIS OF CULPABILITY STRIKES ME AS QUITE BIZARRE.

BECAUSE WHEN WE'RE DOING PROPORTIONALITY ANALYSIS TO DETERMINE WHETHER THE CULPABILITY IS SUCH THAT A DEATH SENTENCE CAN BE SUSTAINED, THE ANALYSIS OF THE MITIGATION IN COMPARISON WITH THE AGGRAVATION IS CENTRAL TO WHAT'S GOING ON. I JUST DON'T UNDERSTAND -- HELP

ME UNDERSTAND THE POINT HOW IT  
COULD POSSIBLY BE THE CASE THAT  
WHEN WE'RE LOOKING AT RELATIVE  
CULPABILITY WE WOULD NOT TAKE  
INTO ACCOUNT MITIGATION.

>> WELL, ACTUALLY, I MENTIONED  
THIS IN MY REPLY BRIEF.

I THINK WHEN THIS COURT FIRST  
SET FORTH THE WHOLE  
PROPORTIONALITY ANALYSIS,  
EVERYBODY ENVISIONED IN ALL  
CAPITAL CASES WHETHER THE  
SENTENCE BE LIFE OR DEATH  
DEPENDING ON WHAT THE JURY  
RECOMMENDED AND WHAT THE JUDGE  
IMPOSED, THERE WOULD BE A  
SENTENCING ORDER IN EVERY CASE.  
AND YOU WOULD BE ABLE TO COMPARE  
CASES THROUGHOUT THE YEARS WHERE  
YOU HAD SIMILAR MITIGATION,  
SIMILAR AGGRAVATION BECAUSE THE  
DEATH PENALTY IN THIS CASE IN  
THIS STATE IS RESERVED FOR THE  
MOST AGGRAVATED, LEAST  
MITIGATED.

THERE ARE PLENTY OF CASES THAT  
THIS COURT NEVER SEES WHERE  
THERE'S WAY MORE AGGRAVATION  
THAN WE HAVE IN THIS CASE AND  
WAY LESS MITIGATION.

SHE WAS SEXUALLY ABUSED.  
THE ONLY DIFFERENCE IS THE IQ,  
THAT'S IT.

THERE'S SOME EVIDENCE, AND YOU  
CAN TELL FROM THE TELEPHONE  
CONVERSATIONS EVEN THOUGH SHE'S  
SMARTER THAN JOSH, HE'S  
MANIPULATING BOTH WOMEN; HEATHER  
TO GET HIM OUT, TO GET THE  
CHARGES DROPPED, AND EMILIA HE'S  
MANIPULATING BECAUSE SHE'S GOT  
MONEY FROM HER TAX REFUND TO  
HIRE A LAWYER TO DEFEND HIM.

>> DO WE KNOW WHAT THE VOTE WAS  
IN THE FULGHAM --

>> NO, WE DON'T.

>> THAT'S NOT --

>> THAT'S NOT PART OF THE  
RECORD.

>> THEY JUST RETURNED A

RECOMMENDATION OF LIFE.

>> JUST SAYS LIFE.

AND WE HAVE A BARE 7-5 MAJORITY  
IN MS. CARR'S CASE.

>> DIDN'T THE DEFENDANT IN THIS  
CASE TRY TO BREAK HER NECK?

>> THEY, THAT WAS PART OF THE --  
IT DEPENDS ON WHO YOU BELIEVE.

BOTH, BOTH CONFESSIONS, THE MOST  
INCUHPATORY CONFESSIONS TO THE  
POLICE ARE FAIRLY CONSISTENT.

IT DEPENDS ON WHICH CONFESSION  
YOU READ WHETHER ONE IS PUTTING  
THE BAG OVER HER HELD, ONE IS  
TRYING TO SNAP HER NECK, ONE IS  
TAPING THE GARBAGE BAG AROUND  
HER NECK, ONE IS STRAPPING HER  
ARMS TO THE CHAIR TO RESTRAIN  
HER SO THEY COULD DO THAT.

IN FACT, THE POLICE CONFRONT --  
THE ONLY PHYSICAL EVIDENCE THEY  
CONFRONT JOSH WITH, THE ONLY  
PHYSICAL EVIDENCE AT THE SCENE  
OF THE CRIME IS HIS FINGERPRINTS  
ON THE DUCT TAPE.

AND THAT'S WHEN HE SAID, "WELL,  
I TIED HER UP, BUT SHE DID  
THIS."

SO THEY'RE BOTH PRINCIPALS TO  
FIRST-DEGREE MURDER.

>> WELL, THE TRIAL COURT FOUND  
THAT THE DEFENDANT ATTEMPTED TO  
BREAK HER NECK, RIGHT?

>> THAT'S CORRECT.

>> WAS THERE COMPETENT,  
SUBSTANTIAL EVIDENCE TO SUPPORT  
THAT?

>> SHE SAID, I THINK HER  
STATEMENT WAS TO THE POLICE, "HE  
TOLD ME TO TRY TO BREAK HER NECK  
AND JUST SNAP IT LIKE, YOU KNOW,  
YOU SEE IN THE MOVIES," AND  
THAT'S NOT SO EASY, OF COURSE.  
SO SHE SAID SHE HALF-HEARTEDLY  
TRIED TO.

SHE'S EIGHT MONTHS PREGNANT AT  
THE TIME, SHE'S NOT GOING TO BE  
ABLE TO SNAP ANYBODY'S NECK --

>> [INAUDIBLE]

>> I DON'T BELIEVE SO.

MAYBE YOU'RE RIGHT.  
ALL THIS HAPPENED IN, YOU KNOW,  
A MATTER OF 15, 20 MINUTES.  
BUT WHAT REALLY THE EXPLOSION  
WAS WHEN SHE CONFESSED HER  
INFIDELITY TO JOSH, AND HE HIT  
HER WITH A FLASHLIGHT, ACCORDING  
TO EMILIA'S STATEMENT.  
ACCORDING TO JOSH'S STATEMENT,  
WHEN HE LURED -- HE BROUGHT HER  
TO THE SCENE, JOSH BROUGHT  
HEATHER STRONG, THE VICTIM, TO  
THE SCENE OF THE CRIME, AND  
EMILIA THEN CAME OUT AND ENTERED  
THE TRAILER.  
AND WHEN HEATHER SAW EMILIA, SHE  
FIGURED WHAT WAS UP OR THAT THEY  
WERE GOING TO DO SOMETHING TO  
HER, SO SHE TRIED TO RUN.  
AND ACCORDING TO JOSH, EMILIA  
HIT HER WITH A FLASHLIGHT AND  
SAID SHE WAS TRYING TO RUN OUT.  
AND THEN THEY BOTH GOT --  
THEY'RE BOTH PRINCIPALS OF  
FIRST-DEGREE MURDER.  
THEY'RE BOTH EQUALLY CULPABLE --  
>> WHAT ARE THEIR AGES?  
>> COMPARABLE.  
SHE WAS 24 AT THE TIME, AND I  
THINK HE WAS 26, 27?  
>> AND WHAT WAS BOTH OF THEIR  
CRIMINAL HISTORIES BEFORE --  
>> SHE HAD NO SIGNIFICANT PRIOR  
CRIMINAL HISTORY.  
SHE HAD HAD A GRAND THEFT WHERE  
ADJUDICATION HAD BEEN HELD.  
HE WAS CONSTANTLY BEING LOCKED  
UP FOR BEATING UP HEATHER.  
HE -- THAT WAS NOT FOUND IN  
HIS -- I MEAN, THEY DIDN'T EVEN  
ARGUE THAT IN HIS TRIAL.  
HE HAD CRIMINAL HISTORY.  
>> PURPOSE OF THE BAG OVER THE  
HEAD --  
>> TO SUFFOCATE HER.  
>> TO SUFFOCATE HER.  
DID THEY ACTUALLY TIE IT WITH  
DUCT TAPE?  
>> THEY DUCT TAPED IT AROUND HER  
NECK.

>> AND IT DIDN'T WORK?

>> NO, IT DID WORK.

AND THAT'S ANOTHER DIFFERENCE,  
KEY DIFFERENCE IN THEIR  
CONFESSIONS.

EMILIA IN HER CONFESSION TO THE  
POLICE SAID I HELPED HER TAPE  
HER DOWN, HE TOLD ME TO TRY TO  
SNAP HER NECK, I TRIED, IT  
DIDN'T WORK.

AND THEN SOMEBODY -- SHE SAID HE  
PUT THE BAG OVER HER HEAD AND  
THEN DUCT TAPED IT AROUND.

AND THEN HE PUT HER, HIS HAND  
OVER THE GARBAGE BAG WHICH  
FINALLY ENDED HER LIFE.

SHE THOUGHT ONCE SHE TOLD THE  
POLICE THAT, OKAY, I'M A  
WITNESS -- SHE DIDN'T UNDERSTAND  
BEING PRINCIPAL TO FIRST-DEGREE  
MURDER.

JOSH TESTIFIED THAT EMILIA PUT  
HER HAND OVER THE GARBAGE BAG  
AND, ULTIMATELY, SUFFOCATED HER.  
SHE WOULD HAVE SUFFOCATED  
ANYWAY --

>> I MEAN, IT SEEMS TO ME  
THERE'S NO QUESTION THEY'RE  
EQUALLY CULPABLE IN THE MURDER.  
BUT WHAT YOU'RE SAYING IS YOU'VE  
GOT THE MOTIVATION FOR THIS --

>> CORRECT.

>> -- WAS THE, WAS FULGHAM'S.

>> AND THE PLANNING, THE IDEA IN  
THE FIRST PLACE.

>> AND HE CALLS HER, HE CALLS  
EMILIA OUT, AND WHAT DOES SHE  
SAY?

SHE SAID AT FIRST SHE THOUGHT IT  
WAS A JOKE.

>> SHE THOUGHT HE WAS GOING TO  
THREATEN HER AND GET HER TO SIGN  
THE PAPER TO GET HIS KIDS AND  
THAT HE WOULD NOT KILL HER.  
THAT -- AND IT'S CLEAR FROM,  
IT'S ABSOLUTELY CLEAR THAT IT  
WAS HIS IDEA.

I MEAN, THEY HAD TALKED ABOUT  
IT, AS I SAID, THEY WENT BACK  
AND FORTH THROUGH THIS THREESOME

THING, AND HE GOT MAD AT HER ONE TIME AND SAID TO EMILIA, SHE'S OUT THERE AT THE BAR WITH SO AND SO.

WE SHOULD KILL HER AND THEN BLAME IT ON HIM.

AND THEN A YEAR LATER WHEN HE SAID FROM JAIL HE SAID, "REMEMBER WHAT WE TALKED ABOUT? ARE YOU DOWN FOR THAT?"

SHE SAID, "SURE."

BUT SHE KEPT SAYING I NEVER THOUGHT HE WAS GOING TO GO THROUGH WITH THE WHOLE, WITH ACTUALLY KILLING HER.

AND THAT WAS CREDIBLE.

THE OTHER STATE WITNESSES BELIEVED THAT, NO, SHE DIDN'T THINK HE WOULD GO THROUGH WITH IT.

BUT, SO WE HAVE, LIKE I SAID, THE ONLY PHYSICAL EVIDENCE WAS HIS FINGERPRINTS FOUND AT THE SCENE.

OH, ONE OF THE MANY MENTAL HEALTH PROFESSIONALS, JOSH FULGHAM HAD WAY BETTER LAWYERS, DID A MUCH THOROUGH JOB, AND THAT'S PART OF MY GUILT PHASE ISSUES ABOUT A CONTINUANCE.

BUT HE HAD A BUNCH OF EXPERTS. HE GOT THE JUDGE TO GIVE \$100,000, HAD A BUNCH OF EXPERTS TESTIFY.

ONE OF THE HEALTH EXPERTS, MENTAL HEALTH EXPERTS TESTIFIED THAT HE, IT TOOK FULL RESPONSIBILITY FOR THE CRIME. HE ADMITTED THE MOTIVE WAS TO PREVENT HER FROM RETURNING TO MISSISSIPPI WITH THE CHILDREN.

>> LET ME GO BACK TO THE POSTURE.

WE CERTAINLY HAVE ADDRESSED RELATIVE CULPABILITY ON DIRECT APPEAL.

BUT FROM YOUR POINT OF VIEW, IF YOU HAD A JUDGE WHO COULD LISTEN, YOU KNOW, EITHER THE JUDGE THAT HEARD THE EVIDENCE IN

THIS CASE AND ACTUALLY EVALUATE THE THINGS THAT ARE -- YOU'RE ARGUING ON A COLD RECORD PLUS YOU'VE GOT ISSUES, YOU'RE SAYING THERE WAS MUCH MORE MITIGATION IN EMILIA'S CASE THAT WASN'T PRESENTED.

SO RATHER THAN RISK THAT MAYBE ON WE SAY IT'S AN AFFIRMANCE, BUT WE DON'T KNOW, ISN'T IT BETTER THAT WE LET THIS GO INTO POSTCONVICTION?

>> WELL, NO, BECAUSE THEN THE, WHOEVER -- THE JUDGE IMPOSED CONVICTION WOULD NOT HAVE THE ENTIRE RECORD OF FULGHAM'S TRIAL UNLESS IT HAD BEEN --

>> WELL, YOU HAVE BOTH RECORDS, PLUS YOU HAVE THE RESPONSIBILITY IF THE PROSECUTOR TOOK INCONSISTENT POSITIONS, YOU HAVE GOT THAT ARGUMENT ALSO, SOMETHING THAT REALLY IS IMPOSSIBLE FOR US TO WEIGH AT THIS STAGE.

>> I DON'T THINK SO. YOU'VE GOT BOTH RECORDS ON APPEAL, YOU'VE GOT -- I THINK THIS COURT IS THE MOST LOGICAL AND MOST JUDICIALLY ECONOMICAL --

>> BUT WHAT YOU'RE SAYING, YOU SAID SOMETHING ABOUT MITIGATION. IF WE SAY, LISTEN, THERE'S MUCH MORE MITIGATION IN JOSH'S CASE, AND YOU'RE ARGUING, WELL, THAT'S BECAUSE THE LAWYERS DIDN'T DO A GOOD JOB.

WELL, WE CAN'T TELL THAT ON THIS RECORD.

>> WELL, I THINK YOU CAN, NUMBER ONE.

NUMBER TWO, IT'S -- THERE WAS EVIDENCE PRESENTED THAT EMILIA CARR WAS SEXUALLY ABUSED BY BOTH HER FATHER AND HER GRANDFATHER.

>> BUT, AGAIN, AND I APPRECIATE THAT.

BUT HOW DOES THAT -- SHE, 24 YEARS OF AGE, SHE'S PREGNANT.

THERE'S NOTHING ABOUT THIS CRIME THAT TAKES THE SEXUAL ABUSE AND MAKES IT A SIGNIFICANT MITIGATING FACTOR TO THIS CRIME. SO, I MEAN, WHERE'S THE CONNECTION?

>> THERE DOESN'T HAVE TO BE A CONNECTION.

THIS COURT HAS REPEATEDLY SAID THERE NEED NOT BE A NEXUS --

>> I UNDERSTAND, BUT NOW YOU'RE SAYING BUT FOR JOSH FULGHAM WOULD WE SAY IT STILL SHOULD BE REDUCED TO LIFE BECAUSE SHE WAS SEXUALLY ABUSED?

>> TRUE.

ABSOLUTELY.

THIS IS MITIGATED.

THE JUDGE FOUND CCP, THAT'S COMPLETELY UNSUPPORTED BY THE RECORD.

HE FOUND SIGNIFICANT, NO PRIOR SIGNIFICANT CRIMINAL HISTORY AS THE ONLY STATUTORY MITIGATION. HE FOUND A LOT OF NONSTATUTORY MITIGATION BUT GAVE IT NO WEIGHT, WHICH IS A CONTINUING PROBLEM AMONG TRIAL JUDGES WHICH YOU MENTIONED IN THE FIRST ARGUMENT, HOW DO THEY WEIGH IT. AND DURING THE COMMISSION OF KIDNAPPING WHICH WAS, THAT WAS IT.

THREE AGGRAVATORS.

ONE'S NOT VALID, ONE'S THE PRIOR VIOLENT FELONY THAT COMES WITH ALMOST EVERY CAPITAL CASE THIS COURT SEES, AND SHE HAD NO SIGNIFICANT PRIOR HISTORY AND A LOT OF MITIGATION.

IT WASN'T PRESENTED IN THE BEST WAY AS FAR AS JOSH HAD THE 5-YEAR-OLD NIECE WHO IS NOW GROWN UP WHERE THEY WERE SEXUALLY ABUSED TOGETHER BY HIS OLDER SISTER TESTIFIED AT HIS PENALTY PHASE, AND SHE CRIED.

IT WAS POWERFUL, POWERFUL.

ALL WE HAVE TO PROVE THE SEXUAL ABUSE IN EMILIA'S CASE IS, WELL,



HER FATHER GOT ARRESTED, AND SHE WAS PROTECTING HER YOUNGER SISTER, ANOTHER MITIGATION BECAUSE SHE WAS THE NEXT ONE TO BE SEXUALLY MOLESTED BY HER STEPFATHER.

AND HER OLDER SISTER ALREADY HAD.

HE GOT, HE ENDED UP IN JAIL. HE SOLICITED A HIT MAN TO KILL THE MOTHER AND EMILIA SO THEY WOULDN'T TESTIFY AGAINST HIM. THEN HE SUBSEQUENTLY DIED IN PRISON BECAUSE HE WENT TO PRISON FOR THE SOLICITATION.

I MEAN, THERE'S A LOT OF MITIGATION IN THIS CASE, AND THIS IS NOT THE MOST AGGRAVATED, LEAST MITIGATED CASE BY FAR. YOU COULD DECIDE IT JUST ON THAT IF YOU WANTED TO, IF YOU WANTED TO AVOID THE RELATIVE CULPABILITY.

BUT I THINK IT'S VERY, VERY CLEAR THAT JOSH FULGHAM IS MORE CULPABLE AND THAT IT WAS HIS -- HE HAD THE MOTIVE, HE HATCHED THE PLAN, HE BROUGHT THE VICTIM TO THE SCENE OF THE CRIME, AND IT'S VERY UNFAIR UNDER THE JURISPRUDENCE OF COURT FOR HIM TO BE SERVING A LIFE SENTENCE WHERE SHE IS NOW --

>> WOULD YOU HELP ME WITH THE TIMELINE --

>> YES.

>> -- ON THE TRIALS?

DID I UNDERSTAND YOU TO SAY THAT THE MAN HAD NOT GONE TO TRIAL AT THE TIME THIS DEFENDANT WENT TO TRIAL?

>> CORRECT.

>> SO NONE OF THE EVIDENCE PRESENTED AT TRIAL WAS BEFORE THIS TRIAL COURT IN ANY WAY?

>> THAT'S CORRECT.

>> AND THE PENALTY PHASE WAS COMPLETED BEFORE THE MAN WAS CONVICTED AS WELL?

>> THIS PENALTY -- YES.

>> ALL RIGHT, ALL RIGHT.  
OKAY.  
ALL RIGHT.  
NO, I'M JUST TRYING TO MAKE SURE  
I UNDERSTAND.  
>> YES.  
>> SO WE HAVE A PROCEEDING THAT  
WAS COMPLETED IN ITSELF WITH THE  
SENTENCING ORDER ENTERED BASED  
UPON THIS RECORD, CORRECT?  
BEFORE THE OTHER PERSON WAS  
EVEN, EVEN TRIED.  
>> CORRECT.  
>> SO HOW DOES, HOW DOES THIS  
COURT FIND THAT THERE WAS SOME  
ERROR ON THE PART OF THE TRIAL  
JUDGE OR WHAT OCCURRED IN THIS  
RECORD WHEN NONE OF THIS HAD  
EVEN BEEN CONSIDERED BECAUSE IT  
HADN'T EXISTED AT THE TIME OF  
THE JUDGMENT THAT WE ARE  
REVIEWING?  
I'M JUST A LITTLE --  
>> WELL, I DON'T THINK YOU CAN  
FAULT THE TRIAL JUDGE BECAUSE HE  
DID --  
>> THE ERROR, WHERE'S THE ERROR?  
I MEAN, AT THE TIME THE SENTENCE  
WAS ENTERED, THE SENTENCING  
ORDER THAT WE ARE TO REVIEW AS  
AN APPELLATE COURT, IT DIDN'T  
EXIST.  
HOW DOES, HOW DOES THIS COURT  
THEN ALL OF A SUDDEN IN AN  
APPEAL FROM THAT JUDGMENT  
REVERSE WHAT'S HAPPENED IN THIS  
CASE?  
>> BECAUSE THIS COURT HAS THE  
ENTIRE RECORD OF JOSH FULGHAM'S  
TRIAL THAT HAS THE NEW FACT, SO  
IT'S SORT OF NEWLY-DISCOVERED  
EVIDENCE --  
>> WELL, THAT, IT SEEMS TO ME  
THAT ALWAYS COMES IN IN A  
COLLATERAL FASHION, THAT  
SOMEBODY DIDN'T DO SOMETHING.  
IF WE'RE GOING TO DO THIS, THEN  
WE'RE GOING TO SET ASIDE FINAL  
JUDGMENTS IN THE STATE BASED ON  
THINGS THAT HAVE NOT YET

OCCURRED.

>> THIS IS VERY UNUSUAL  
PROCEDURAL POSTURE.

>> WELL, THAT, I MEAN, WE HAVE  
TO DEAL WITH WHAT WE HAVE.  
AND THAT'S LIKE OPENING THE  
FINAL JUDGMENT BECAUSE SOMETHING  
ELSE HAS HAPPENED SOMEWHERE  
ELSE.

AND I'M TRYING TO UNDERSTAND IF  
WE HAVE JURISPRUDENCE THAT SAYS  
THAT WE DO THIS IN THIS FASHION.

>> I'M, I BELIEVE, I BELIEVE I  
DID CITE A CASE OR TWO IN THE  
BRIEF, IN THE SUPPLEMENTAL  
BRIEFS WHERE THIS COURT DID  
SOMETHING SIMILAR.

IT MIGHT HAVE BEEN -- I'LL HAVE  
TO LOOK FOR THAT --

>> OKAY, WELL, I'LL GO INTO IT  
AGAIN.

BUT THAT'S WHAT I MEAN.  
IT SEEMS YOU'RE ARGUING  
SOMETHING THAT OCCURRED AFTER  
THIS JUDGMENT WAS ALREADY  
ENTERED, AND THE APPEAL FILED IN  
THIS CASE, AND THAT'S WHERE --  
HOW DOES THE COURT -- WE CAN'T  
HAVE, I MEAN, AN APPELLATE COURT  
HAS CERTAIN STANDARDS AND  
CERTAIN, CERTAIN PROCEDURES THAT  
IT MUST FOLLOW.

WE CAN'T JUST REACH AND PICK ALL  
OVER THE PLACE WITH REGARD TO  
WHAT THE RECORD IS OR HOW THE  
CASE IS DECIDED.

>> I THOUGHT BASED ON THE  
UNUSUAL PROCEDURAL POSTURE OF  
THIS CASE THAT'S WHY THIS COURT  
ORDERED SUPPLEMENTAL BRIEFS ON  
THE ISSUE OF RELATIVE  
CULPABILITY, BECAUSE YOU HAVE IT  
ALL BEFORE YOU.

THE AG SAID, NO, AND IF YOU'RE  
GOING TO DO THAT, YOU NEED HIS  
ENTIRE RECORD ON THE APPEAL, SO  
WE SUPPLEMENTED WITH THE ENTIRE  
RECORD ON APPEAL.

SO YOU HAVE IT ALL BEFORE YOU.  
I THINK THIS COURT IS IN THE

BEST POSITION TO DISCERN THAT ISSUE AND DECIDE THAT ISSUE AS TO RELATIVE CULPABILITY IF YOU DON'T REVERSE ON PROPORTIONALITY WHICH YOU CLEARLY COULD IN THIS CASE.

I'M GOING TO RESERVE MY TIME FOR REBUTTAL, THANK YOU.

>> MAY IT PLEASE THE COURT, COUNSEL, MY NAME IS SARA MACKS, AND I REPRESENT THE STATE OF FLORIDA.

>> LET ME ASK YOU --

[INAUDIBLE]

AS A TRIAL JUDGE -- WOULDN'T IT HAVE BEEN THE MORE PRUDENT THING TO DO TO HAVE ONCE THE JURY CAME BACK WITH A DEATH RECOMMENDATION FOR MS. CARR TO HAVE AWAITED FOR CONCLUSION OF THE TRIAL OF THE CO-DEFENDANT AND WAIT FOR THE JURY'S RECOMMENDATION IN THAT CASE BEFORE SENTENCING ANYONE IN THIS CASE?

DO YOU THINK THE SENTENCES WOULD HAVE BEEN THE SAME IF HE'D DONE THAT?

>> I THINK THE SENTENCES STILL WOULD HAVE BEEN THE SAME, AND I DON'T BELIEVE THAT WAS ACTUALLY THE MOST PRUDENT THING BASED ON THE FACTS OF THIS CASE.

WHAT HAPPENED WAS THAT HE HAD NEW COUNSEL, THESE NEW ATTORNEYS THAT HAD COME FROM MIAMI TO TAKE OVER THIS CASE.

SO THIS, SO MR. FULGHAM'S TRIAL ENDED UP GETTING PUSHED OFF FOR QUITE A WHILE.

SO IF THEY WERE GOING TO ACTUALLY CONVICT HER AND THEN WAIT, THAT WOULD HAVE ENDED UP BEING ABOUT, I THINK IT WAS A YEAR AND A HALF.

THAT'S A LONG PERIOD OF TIME.

>> WHAT IS THE DOWNSIDE OF WAITING?

SHE WASN'T GOING ANYWHERE.

>> WELL, I THINK YOU WANT THE SAME JURY.

JUST MAKE THAT JURY WAIT A YEAR  
AND A HALF?

>> NO, NO, NO.

YOU HAVE A JURY RECOMMENDATION  
AND JUST DON'T SENTENCE --

>> OH, NOT SENTENCE -- I'M  
SORRY, I THOUGHT YOU MEANT DO  
THE --

>> DON'T SENTENCE IT, WAIT FOR  
THE SECOND CO-DEFENDANT TO BE  
TRIED, WAIT FOR THAT JURY  
RECOMMENDATION AND THEN YOU  
SENTENCE BOTH DEFENDANTS.

THAT WOULD SEEM TO ME TO BE THE  
LOGICAL THING, AND THE JUDGE  
WOULD HAVE COMPLETE KNOWLEDGE OF  
BOTH JURIES AND SO ON AND ON.

>> I DO UNDERSTAND, YOUR HONOR.  
I THINK, AGAIN, BUT THEN THE  
TIMELINE ALSO PRESENTS A  
PROBLEM.

THE JUDGE WANTS TO DO ITS  
SENTENCING ORDER AS SOON AS IT  
CAN, HAS EVERYTHING FRESH.  
DC READ THE TRANSCRIPT, BUT IT'S  
STILL NOT THE SAME.

HE'S OBSERVING WITNESSES, HE'S  
DOING ALL OF THOSE THINGS.  
AND SO IT'S PRUDENT FOR THAT  
JUDGE TO FILE THAT SENTENCING  
ORDER AS SOON AS POSSIBLE AFTER  
BOTH THE PENALTY PHASE AND THE  
SPENCER HEARING.

SO TO GO THROUGH ALL OF THAT --  
>> WELL, HE COULD HAVE WITHHELD  
THE SPENCER HEARING.

IS THERE A PROCEDURAL RULE THAT  
REQUIRES THAT SPENCER HEARING TO  
BE CONDUCTED AT ANY PARTICULAR  
POINT?

I'M NOT --

>> NO, YOUR HONOR, THERE'S NOT.

>> SO WHAT JUSTICE LABARGA IS  
ASKING, I MEAN, IT CERTAINLY IS  
NOT CONTRARY OR WOULD NOT  
VIOLATE EXISTING RULES OF  
PROCEDURE.

>> IT DOES NOT.

IT DOES NOT VIOLATE ANY LAW.  
THERE'S NO REASON THAT COULDN'T

HAVE HAPPENED.

I CAN SAY BY GOING OVER ALL THE CASE LAW WITH CO-DEFENDANTS AND THINGS LIKE THAT, I DON'T KNOW THAT THAT VERY OFTEN DOES HAPPEN.

YOU GET A FEW CASES ONCE IN A WHILE, BUT USUALLY ONCE THESE JUDGES GET THESE CASES, THEY RESOLVE THEM AS QUICK AS POSSIBLE.

>> WELL, I MEAN, PRESSURE FROM THIS COURT AS ALL TO RESOLVE FAR THE --

>> RIGHT.

BUT IN TERMS OF ANY RULE OR LAW, NO, THERE'S NO RULE OR LAW.

>> BUT WE DO HAVE, AGAIN, WHERE EQUAL CULPABILITY COMES IN, FIRST OF ALL, I REMEMBER JUDGE SCHAFER WHO USED TO DO A LOT OF DEATH PENALTY CASES SAID THE SUREST WAY TO GET A LIFE SENTENCE IS IF THE CO-DEFENDANT GOT LIFE, YOU KNOW?

THE JURIES SEE THAT.

SO, OBVIOUSLY, THAT COULDN'T HAPPEN IN THIS CASE BECAUSE OF THE TIMING.

THE JUDGE DIDN'T HAVE THAT BENEFIT, AND THE JUDGE DIDN'T TRY THE OTHER CASE.

WE PERFORM THIS CULPABILITY, RELATIVE CULPABILITY ON THE IDEA THAT EQUALLY CULPABLE CO-DEFENDANTS SHOULD BE TREATED ALIKE.

NOW, YOU'VE ARGUED THAT IT IS THE BETTER COURSE TO PUT THIS INTO POSTCONVICTION?

>> CORRECT, YOUR HONOR.

>> AND TELL ME THE REASON.

IF WE HAVE THE FULL RECORD HERE AND IT'S, IT GOES TO PROPORTIONALITY, NOT TO AN ERROR THE JUDGE MADE -- BECAUSE THIS JUDGE COULDN'T HAVE COMMITTED AN ERROR IF HE DIDN'T HAVE THIS INFORMATION -- WHY ISN'T IT, DO WE HAVE CASE LAW PRECEDENT THAT

SAYS THAT WE WOULD PERFORM THIS ON DIRECT APPEAL?

>> YOUR HONOR, I -- THERE'S ONLY ONE CASE THAT I WAS ABLE TO FIND, AND THAT'S THE WITT CASE FROM THE '70s --

>> WHAT ABOUT --

[INAUDIBLE]

WHAT DOES THAT SAY?

MORE RECENT CASE OF WRIGHT V. STATE?

>> WHERE THE, THEY TRIED THE DEFENDANT -- WHAT?

I'M SORRY.

I DON'T REMEMBER THAT.

>> YOU DON'T HAVE -- OKAY.

I'M NOT --

[LAUGHTER]

I JUST SOMEHOW I THOUGHT THAT MAYBE IN THAT CASE THERE WAS A CONCERN.

>> THE SAME TYPE OF TIMELINE?

>> MAYBE IT WASN'T --

>> OKAY, I'M SORRY, YOUR HONOR.

>> YOU THINK, TELL ME WHY YOU THINK IT'S BETTER POLICY FOR US TO DO THIS ON POSTCONVICTION.

>> WELL, AND I THINK THERE'S A FEW REASONS.

THE FIRST IS THAT, YOU KNOW, YOU HAD TALKED ABOUT PREVIOUSLY, YOUR HONOR, THAT WHEN THIS ACTUALLY GOES BEFORE THE JUDGE EITHER AT THE, YOU KNOW, IDEALLY AT THE SENTENCING PHASE AND THEN HE GETS TO WEIGH THE MITIGATION AND AGGRAVATION, AND IF HE FINDS THAT THIS IS ACTUALLY WEIGHTY MITIGATION, HE CAN TAKE THAT INTO ACCOUNT IN DETERMINING WHETHER OR NOT THE DEATH SENTENCE WAS APPROPRIATE.

>> SO WHY WOULDN'T IT BE BETTER THEN TO RELINQUISH JURISDICTION, LET THE JUDGE WHO TRIED THIS CASE HAVE THE FULL RECORD AND ANY FURTHER TESTIMONY THAT EITHER DEFENSE OR STATE WANTS TO OFFER ABOUT WHO WAS MORE CULPABLE, YOU KNOW?

WERE THEY EQUALLY WHERE THE PLAN WAS ALL THE THINGS WE'RE ARGUING AND LET HIM EVALUATE THAT? RATHER THAN PUT INTO POSTCONVICTION?

WHY WOULDN'T THAT BE A BETTER WAY TO HANDLE THIS CASE?

>> I THINK THAT, YOU KNOW, RELINQUISHING JURISDICTION IS AN OPTION, NOT THE IDEAL OPTION. BECAUSE WHAT WE'RE DEALING WITH IS EVERYTHING HAPPENED AFTER TRIAL.

>> THE REASON IT'S A GOOD OPTION IS BECAUSE WE STILL HAVE THE TRIAL JUDGE PRESUMABLY WHO HEARD THIS CASE.

YOU KNOW?

IF FIVE YEARS FROM NOW THAT TRIAL JUDGE MIGHT NOT BE AVAILABLE, AND IT SEEMS THAT THE JUDGE THAT TRIED THIS CASE WOULD BE IN THE BEST POSITION TO HELP US EVALUATE THE ARGUMENTS THAT ARE BEING MADE ON THIS COLD RECORD.

>> AND I DO AGREE WITH THAT. I THINK IT IS ABSOLUTELY MORE APPROPRIATE FOR THE TRIAL JUDGE TO BE LOOKING AT THIS AND GIVING YOU A RULING THAT YOU CAN EVALUATE.

IT'S ABOUT WHAT'S THE BEST WAY OF GETTING IT BACK.

THE STATE, OF COURSE, ARGUES THAT -- OR URGES THAT THIS ACTUAL, THIS DIRECT APPEAL ITSELF SHOULD BE RESOLVED BEFORE THAT HAPPENS.

AND I THINK THE BIGGEST REASON FOR -- WELL, YOU KNOW, ONE, IT'S ALREADY GONE BACK ONCE TO HAVE THIS RECORD SUPPLEMENTED IN, AND, TWO --

>> SHE'S NOT GOING, AS I SAID, SHE'S NOT GOING ANYWHERE. SHE WAS A EIGHT-MONTH-PREGNANT WOMAN WHO HAD NO PRIOR CRIMINAL HISTORY, AND THE CO-DEFENDANT WHO HAD THE MOTIVE AND WHOSE



WIFE IT WAS IS NOW GOING TO SPEND THE REST OF HIS LIFE IN PRISON WHILE SHE IS GOING TO BE HAVING THIS DEATH PENALTY HANGING OVER HER HEAD WITH A RECORD THAT NEEDS TO BE RESOLVED.

AND SO EXPEDITIOUSLY IF THE JUDGE FINDS THAT THIS DEFENDANT SHOULD GET LIFE, IT'S SORT OF, I MEAN, THE STATE COULD APPEAL IT, BUT, YOU KNOW, I THINK YOU HAVE, THERE'S BETTER -- YOU KNOW, THERE ARE A LOT OF DEFENDANTS ON DEATH ROW.

SO IT SEEMS TO ME THAT THAT'S AN EXPEDITIOUS WAY FOR THE ADMINISTRATION OF JUSTICE TO RESOLVE THIS.

AND I DON'T -- I'M JUST SAYING MYSELF, YOU KNOW --

>> RIGHT.

>> I DON'T SPEAK FOR ANYBODY HERE.

>> YOUR HONOR, WE WOULD WANT THIS RESOLVED AS FAST AS POSSIBLE.

IF THAT WAS THE FASTEST WAY TO RESOLVE IT, THAT WOULD BE EXCELLENT.

I DON'T KNOW THAT THAT WOULD ACTUALLY HAPPEN.

I MEAN, IT MAY, YOU KNOW? YOU SEND IT BACK, THEY HAVE TO HAVE THE HEARING.

IT MAY END UP TAKING, YOU KNOW, LONGER FOR THAT TO HAVE A WHOLE OTHER HEARING RATHER THAN TO HAVE IT AS PART OF THE POSTCONVICTION HEARING.

>> BUT IN POSTCONVICTION THERE'S A WHOLE ISSUE OF INEFFECTIVE ASSISTANCE.

HE'S SAYING THESE DEFENSE LAWYERS WEREN'T READY, THEY DIDN'T PUT ON THE KIND OF MITIGATION THEY NEEDED, YOU KNOW?

THAT'S GOING TO TAKE -- WE KNOW THAT DOESN'T GET DONE VERY

QUICKLY.

>> AND I THINK THAT -- WELL, AND BECAUSE OF THAT, THOUGH, THE, YOU KNOW, DEFENDANT COULD ALSO BRING UP OTHER ISSUES CONNECTED TO THE, YOU KNOW, WHAT MITIGATION WAS BROUGHT, HOW THAT AFFECTED THE JURY VERDICT, WHAT WOULD HAVE HAPPENED IF YOU NOW ADD IN THE LIFE SENTENCE OF THE CO-DEFENDANT ISSUE.

AND ALL OF THOSE ISSUES CAN BE TRIED TOGETHER THEN IN THE POSTCONVICTION HEARING.

SO IT PROVIDES A FORUM FOR THE DEFENDANT TO PUT ALL OF THOSE ISSUES ON THE SAME TABLE, PRESENT IT TO TRIAL JUDGE AND SAY, LOOK, THIS IS WHY MY DEATH SENTENCE ISN'T APPROPRIATE.

WHEREAS IF WE JUST GO BACK FOR JUST KIND OF PRESENTING THAT NEW MITIGATION AND SEEING HOW IT AFFECTS THE JUDGE'S VERDICT, KIND OF A SPENCER HEARING PART TWO, WHAT WOULD -- YOU KNOW, NOT ALL OF THAT INEFFECTIVENESS OR ANYTHING LIKE THAT WOULD COME IN.

SO THERE'S AN ADVANTAGE TO ALSO DOING IT ON POSTCONVICTION IN THAT WAY.

ONE OF THE THINGS I SPECIFICALLY WANTED TO TALK TO YOU ABOUT WAS THE TIMELINE RIGHT BEFORE THE MURDER.

BECAUSE RIGHT ABOUT A MONTH BEFORE THE MURDER IS WHEN MR. FULGHAM GOT ARRESTED ON THE DOMESTIC VIOLENCE BETWEEN HIM AND MS. STRONG.

AND IT WAS DURING THAT TIME PERIOD WHERE MS. CARR SOLICITED TWO SEPARATE PEOPLE TO TRY TO MURDER MS. STRONG AND THREATENED MS. STRONG AND HELD A KNIFE TO HER NECK.

SO THIS WAS IN A TIME PERIOD RIGHT BEFORE THE MURDER ITSELF. AND THEN ONCE, AND THEN ONCE HE

GOT OUT OF JAIL, THAT'S WHEN THE TWO OF THEM SAID, OKAY, WE ARE NOW GOING TO DO THIS.

IT'S TIME TO MURDER HER.

THEY HAD DISCUSSIONS ABOUT IT.

SO WE KNOW ALL OF THOSE FACTS.

AND THEN WHAT HAPPENED ON THE ACTUAL DAY OF THE MURDER WAS THAT MR. FULGHAM GOT THE VICTIM, MS. STRONG, TO MS. CARR'S HOME. SO THIS IS ACTUALLY OCCURRING IN THE BACKYARD OF MS. CARR'S HOME IN THE STORAGE TRAILER.

SO HE GETS HER OVER THERE

UNDER -- THEY BOTH ADMIT THAT IT WAS BECAUSE SHE WANTED, HE WAS GOING TO GIVE HER MONEY THAT WAS STORED BACK THERE.

THERE'S SOME PHONE CALLS BETWEEN THE CO-DEFENDANT AND MS. STRONG ABOUT HIM PAYING HER LOT ON HER TRAILER.

SO HE, THAT'S HOW HE GETS HER OVER THERE.

AND THEN ONCE SHE'S OVER THERE, THAT'S WHEN SHE GETS TIED UP BY BOTH OF THEM.

THEY BOTH CONFESS THAT HE HELD HER DOWN AND THAT MS. CARR DUCT TAPED HER ARMS AND LEGS TO THE CHAIR.

AND NOW ONCE THEY -- RIGHT BEFORE THEY DUCT TAPED HER, SHE TRIED TO ESCAPE, AND THAT'S WHEN HE HIT HER OVER THE HEAD WITH THE FLASHLIGHT.

AND THEN THEY HAD TO LIGHT A CANDLE BECAUSE IT WAS DARK IN THE TRAILER.

SO NOW SHE'S DUCT TAPED TO THE CHAIR, SHE'S PLEADING FOR HER LIFE, AND THAT'S WHEN

MS. CARR -- YOU WERE CORRECT -- TWICE TRIED TO BREAK HER NECK. SHE ADMITS TO TWICE TRYING TO BREAK HER NECK IN HER LAST, FINAL STATEMENT TO LAW ENFORCEMENT.

THEN WHEN THAT DOESN'T WORK, SHE ADMITS THAT SHE'S THE ONE THAT

HOLDS THE BAG, HE DUCT TAPES HER MOUTH FIRST AND THEN DUCT TAPES HER AROUND HER NECK.

AND THEN WHEN THAT DOESN'T WORK, MS. CARR CLAIMS THAT HE WAS THE ONE THAT PUT THE HAND OVER THE MOUTH.

AND THEN MR. FULGHAM DISPOSED OF THE BODY IN THE SUITCASE AND BURIED IT IN THE BACKYARD.

SO IN THE ACTUAL COMMISSION OF THE CRIME, MS. CARR WAS HEAVILY INVOLVED IN WHAT WAS GOING ON. WHAT IS ESPECIALLY CONCERNING AND WHY THE STATE BELIEVES SHE'S ACTUALLY THE MORE CULPABLE DEFENDANT IN THIS CASE IS BECAUSE MS. CARR ACTUALLY IS THE ONE THAT WOULD LEAD MR. FULGHAM. THERE WAS TESTIMONY BOTH AT HIS TRIAL AND AT HER TRIAL THAT SHE WAS THE DOMINEERING ONE IN THE RELATIONSHIP, SHE WAS THE MANIPULATIVE ONE WHO MANIPULATED IN ALL OF HER RELATIONSHIPS WITH MEN.

SHE'S PREGNANT WITH HIS CHILD, AND HE GOES OUT AND GETS MARRIED TO THIS OTHER WOMAN.

AND THIS OTHER WOMAN, MS. STRONG, IS RUINING HER LIFE THAT SHE WANTS TO HAVE PLANNED WITH THIS MAN.

SHE WANTS TO RAISE HIS CHILDREN, SHE WANTS TO HAVE THEM TOGETHER AND THEM ACTUALLY -- AND

MS. CARR AND MR. FULGHAM GET MARRIED, AND MS. STRONG IS RUINING IT.

SHE'S SENDING HIM TO JAIL BY COMPLAINING TO LAW ENFORCEMENT ABOUT HIM, SHE'S TAKING CHILD SUPPORT THAT'S MONEY THAT THEY SHOULD HAVE TO RAISE THEIR CHILDREN.

THERE'S COMPLAINT AFTER COMPLAINT THAT MS. CARR HAS IN ALL OF HER MOTIVES AND HER REASONS WHY SHE PLANS THIS OUT. SO THERE IS AMPLE EVIDENCE NOT

ONLY OF THE CCP AND THE HAC,  
THERE IS ALSO QUITE A BIT OF  
EVIDENCE TO SHOW THAT SHE WAS  
THE DOMINANT.

AND I DIDN'T EVEN TALK ABOUT THE  
IQs.

THAT IS, IN A LOT OF THE IQ  
INFORMATION COMES OUT IN MR.  
FULGHAM'S TRIAL -- WELL, HIS IQ.  
WE DON'T KNOW WHAT HIS IQ IS YET  
UNTIL THAT TRIAL.

AND IN THAT TRIAL THEY REALLY  
SAY THAT HE'S EASILY LED, THAT  
HE WOULD -- I THINK IT WAS  
DR. MAYER SPECIFICALLY TESTIFIED  
THAT SHE WAS THE ONE THAT WOULD  
TELL HIM WHAT TO DO, THAT WOULD  
MAKE SURE THAT HE, YOU KNOW,  
KEPT ON TRACK IN THE  
RELATIONSHIP.

AND IT APPEARED TO DR. MAYER  
THAT SHE WAS THE ONE THAT WAS  
REALLY PUSHING GETTING RID OF  
HEATHER, GETTING RID OF  
MS. STRONG.

AND SO BECAUSE OF THAT NOT ONLY,  
YOU KNOW, IF THIS COURT DECIDES  
THEY DO WANT TO LOOK AT THE  
RELATIVE CULPABILITY ISSUE WHEN  
IT COMES TO PROPORTIONALITY,  
MS. CARR IS ACTUALLY THE MORE  
CULPABLE DEFENDANT IN THIS CASE.  
THE OTHER ISSUE I WANTED TO  
BRIEFLY TOUCH ON WAS THE --  
WHICH I KIND OF SPOKE ABOUT  
BEFORE -- AND THAT'S THE CCP  
AGGRAVATOR.

AND BECAUSE SHE HAD MADE PRIOR  
THREATS, BECAUSE SHE HAD TWICE  
TRIED TO HIRE SOMEBODY TO KILL  
MS. STRONG AND BECAUSE SHE ALSO  
WAS PARTICIPATING IN THE  
PLANNING, SHE KNEW THAT, YOU  
KNOW, SHE DECIDED THAT THEY  
WOULD, YOU KNOW, THEY DECIDED TO  
USE THE BACK TRAILER IN HER OWN  
HOME.

AND IT'S NOT LIKE THEY DREW HER,  
GOT HER BACK THERE AND KILLED  
HER.

NO, THEY TORTURED HER.  
THEY TRIED TO KILL -- SHE TRIED  
TO KILL HER IN MULTIPLE WAYS.  
THERE WAS LOTS OF EVIDENCE THAT  
THIS WASN'T JUST A HEAT OF  
PASSION TYPE OF MURDER.  
THIS WAS WELL PLANNED.  
THIS WAS COLD, THIS WAS  
CALCULATED, AND THIS WAS  
DEFINITELY PREMEDITATED.  
AND IF THIS COURT HAS NO FURTHER  
QUESTIONS, THE STATE WOULD ASK  
THAT YOU AFFIRM THE DEATH  
SENTENCE IN THIS CASE.

>> THANK YOU.

REBUTTAL?

>> THE FASTEST WAY FOR THIS  
COURT TO RESOLVE THIS ISSUE AND  
THE MOST JUDICIALLY ECONOMIC WAY  
IS FOR THIS COURT TO DECIDE THE  
RELATIVE CULPABILITY.

IF NOT THAT, I REALLY THINK THIS  
COURT SHOULD REDUCE THE SENTENCE  
BASED ON THE PROPORTIONALITY  
ARGUMENT.

SHE -- VERY FEW AGGRAVATORS,  
VERY, ONLY TWO VALID ONES, AND  
STATUTORY MITIGATORS AND  
NONSTATUTORY GALORE.

THE INCIDENT WITH THE KNIFE, SHE  
WAS THREATENING HEATHER TRYING  
TO GET HEATHER TO DROP THE  
CHARGES AGAINST JOSH WHILE HE  
WAS IN JAIL.

THEY SUBSEQUENTLY MADE UP AND,  
YOU KNOW, SHE BABYSAT THE  
CHILDREN.

THAT WAS NOT, SHOULD NOT BE  
IMPUTED TO LEAD TO THE MURDER.

THE SOLICITATION TO KILL  
HEATHER, THE PEOPLE WHO SHE  
SOLICITED SAID, "WE DIDN'T TAKE  
HER SERIOUSLY."

I MEAN, SHE OFFERED \$500.

WE -- WE KNEW SHE WAS MAD AT  
HER, MAD AT HEATHER, BUT WE  
NEVER --

>> BUT, I MEAN, AS WE'RE  
EVALUATING THIS, WE JUST IGNORE  
THAT?

>> BASED ON --  
>> BECAUSE, JUST BECAUSE  
SOMEBODY SAYS, OH, I DIDN'T TAKE  
HER SERIOUSLY.

>> WELL, YES.

>> THAT'S WHAT YOU DO?

>> CORRECT.

IT WAS JUST SOMETHING SAID IN  
ANGER BECAUSE SHE HAD JOSH  
LOCKED UP, THAT'S ALL.  
IT WAS NOT A SERIOUS THREAT.  
IT WAS FAR FROM COLD, CALCULATED  
AND --

>> THE FACTS SEEM TO INDICATE  
DIFFERENTLY.

>> WELL, I DIS-- I RESPECTFULLY  
DISAGREE.

HE WAS IN JAIL WHEN HE WAS THE  
ONE THAT HATCHED THE PLAN AND  
STARTED TALKING ABOUT THE  
TRAILER AND WHERE IT COULD BE  
SEEN, WHETHER THE TRAILER COULD  
BE SEEN.

AND IT DEPENDS ON WHICH TRIAL  
YOU READ WHO WAS THE MANIPULATOR  
AND WHO WAS THE DOMINANT ONE.

HE HAD THE MOTIVE.

IT WAS HIS WIFE.

HE'D BEEN, THEY'D BEEN FIGHTING  
FOR OVER SEVEN, EIGHT YEARS THAT  
THEY'D BEEN TOGETHER, AND HE WAS  
MORE CULPABLE, CLEARLY, AND AT  
THE VERY LEAST THEY WERE EQUALLY  
CULPABLE.

>> WHAT DOES THE RECORD SHOW  
ABOUT WHO, WHOSE HAND WAS PLACED  
OVER HER MOUTH AND THE VICTIM'S  
MOUTH AND NOSE?

>> HER VERSION WAS THAT HE DID  
IT.

HIS VERSION WAS THAT SHE DID  
THAT.

AND, BUT THEY WERE CLEARLY BOTH  
PRINCIPALS TO FIRST-DEGREE  
MURDER.

IN ONE OF HER MOST INCULPATORY  
STATEMENTS WHERE SHE WAS WIRED,  
JOSH'S SISTER WAS WIRED, SHE  
KEPT SAYING, "I REALLY DIDN'T  
THINK HE WAS GOING TO KILL HER."

HE WAS GOING TO THREATEN HER,  
YES, BUT THAT GOES FAR AGAINST  
CCP IN THIS CASE.

THANK YOU.

>> THANK YOU FOR YOUR ARGUMENTS.  
COURT IS ADJOURNED.

>> ALL RISE.