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Alex Pagan v. State of Florida

THE FINAL CASE ON THE COURT'S ORAL ARGUMENT CALENDAR THIS MORNING IS PAYING AND VERSUS STATE. MR. ROSENBAUM.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. MY NAME IS RICHARD ROSENBAUM. I WAS APPOINTED BY THE TRIAL COURT TO RENTAL EXPAYING AND, A 23-YEAR-OLD -- ALEX PAGAN, A 23-YEAR-OLD AT THE TIME OF HIS ARREST. HE IS SENTENCED TO TWO COUNTS OF DEATH ON COUNTS ONE AND TWO, AS WELL AS CONSECUTIVE LIFE SENTENCES OF LIFE, AND COUNT THREE, THE BURGLARY OF A JEEP CHEROKEE, FOR WILLIE GRAHAM, WITH MY CLIENT. HE WAS CONFIRMED IN DISTRICT COURT AND THAT WAS AFFIRMED. WE HAVE RAISED SEVERAL ISSUES IN OUR BRIEF, AND WE WON'T GO INTO EVERYONE OF THEM. HOWEVER, I WOULD LIKE TO ADDRESS A TOO ISSUES TODAY, WHAT OCCURRED DURING THE PRETRIAL, IN TERMS OF WILLIAMS EVIDENCE, AND WHAT OCCURRED DURING THE TRIAL, IN TERMS OF WHAT COULD HAVE COME IN AND EVIDENCE THAT WAS AND SHOULDN'T HAVE BEEN EXCLUDED, AND FINALLY, THE PENALTY THAT MY CLIENT HAS RECEIVED, AS FAR AS RELATED TO HIS CODEFENDANTS AND THE OTHER DEFENDANTS WHO COMMITTED THESE CRIMES. FIRST OF ALL, MR. PAGAN STILL PRO CLAIMS HIS INNOCENCE. HE ENTERED A WRITTEN PLAEFING IN. HE NEVER TESTIFIED AT PRETRIAL, AT TRIAL, AND YOU HAVE SEEN NOTHING SENSE. YOU HAVE NEVER SEEN HIS NAME IN THE PAPERS, WITH REGARDS TO STATEMENTS ATTRIBUTABLE TO HIM. THIS WHOLE CASE EVOLVED ON FEBRUARY 23, BUT THE STATE WOULD HAVE YOU BELIEVE THAT IT ACTUALLY STARTED IN JANUARY, WHEN MR. JONES'S HOME WAS ROBBED. THERE WAS NO DIRECT EVIDENCE, AND WE ARE GOING TO GET INTO WHETHER A CONFESSION IS DIRECT EVIDENCE, BECAUSE THE STATE ONE TENDS THAT TWO OF MY CLIENTS' FRIENDS, FORMER FRIENDS, SAID THAT MY CLIENT CONFESSED, AFTER THE JANUARY AREA ROBBERY -- JANUARY ROBBERY OF THE JONES EVIDENCE. THERE WAS NO DNA. THERE WERE NO FIBERS. THERE WAS NOTHING TO LINK MY CLIENT TO THESE EVENTS, OTHER THAN THE STATEMENTS OF TWO OTHER INDIVIDUALS.

IF THIS IS A CIRCUMSTANTIAL EVIDENCE CASE, THEN EVIDENCE HAS TO NEGATE A REASONABLE HYPOTHESIS OF INNOCENCE.

EXACTLY, YOUR HONOR O.

WHAT WOULD BE THAT REASONABLE HYPOTHESIS?

THE REASONABLE HYPOTHESIS WOULD BE THAT MR. PAGAN WAS NOT THE CULPRIT HERE. IT WAS OTHER INDIVIDUALS.

THAT IS IT?

THAT IS IT. THAT IS TWO PEOPLE, SPECIFICALLY ANTONIO QUOSADO AND MR. KEITH JACKSON MADE UP A STORY TO FIT WHAT THE STATE WAS SAYING, TO TRY TO PIN MR. PAGAN WITH THE OFFENSE. FLRP OTHER SUSPECTS. OTHER SUSPECTS INCLUDED WILLIE GRAHAM, WHO WAS CONVICTED, WILLIE'S BROTHER ANTHONY GRAHAM, KEITH JACKSON, WHO WAS LET GO.

AND UNDER THAT STANDARD, DO YOU JUST HAVE TO SAY ? THAT -- TO SAY THAT THAT IS A REASONABLE HYPOTHESIS AND THAT IS ENOUGH, OR DO YOU HAVE TO HAVE SOME EVIDENCE THAT THAT IS A REASONABLE HYPOTHESIS?

WE BELIEVE YOU HAVE TO HAVE SOME EVIDENCE, BUT THE EVIDENCE DOESN'T NEED TO BE DIRECT EVIDENCE T CAN BE CROSS-EXAMINATION EVIDENCE. IT CAN, ALSO, BE THE REASONABLE INFERENCES THAT STEM FROM THAT EVIDENCE. IN THIS CASE --.

I AM HAVING TROUBLE WITH UNDERSTANDING ONE OF YOUR FIRST STATEMENTS, WHICH IS THAT, WHETHER YOU CALL THEM CONFESSIONS OR ADMISSIONS, THAT THE TESTIMONY OF THE OTHERS AS TO WHAT YOUR CLIENT SAID WOULDN'T SUPPLY DIRECT EVIDENCE OF INVOLVEMENT IN THE CRIME. COULD YOU HELP ME OUT ON THAT?

IT IS OUR ASSERTION THAT, IN THIS CASE, THE TWO INCREDIBLE INDIVIDUALS, WHO SAID THAT MY CLIENT CONFESSED, SHOULDN'T HAVE BEEN BELIEVED. THAT IS A CREDIBILITY --

THAT IS CLASSICALLY A JURY --

THAT IS A CREDIBILITY --

SO YOU ARE NOT ARGUING THAT WE SHOULD GRANT JUDGMENT OF ACQUITTAL, ARE YOU?

WE ARGUE THAT THE JUDGE FAILED TO GRANT JUDGMENT OF ACQUITTAL.

IS THAT NOT A JURY QUESTION AS TO WHETHER THE JURY BELIEVES THE TESTIMONY OF THE CODEFENDANTS, AS TO WHAT YOUR CLIENT SAID?

THAT, COUPLED WITH THE PROBLEM IN THE CASE IS THE JANUARY EVIDENCE, AND IF YOU PULL THE JANUARY EVIDENCE OUT, EVERYTHING ELSE FALLS APART, BECAUSE WHAT THE STATE ATTEMPTED TO SHOW, BY FILING THE WILLIAMS RULE NOTICE, WAS THAT MY CLIENT WAS INVOLVED IN A RIP OFF OF PLL JONES. MR. JONES, IT APPEARS FROM THE TRANSCRIPT, WAS A DRUG DEALER. HE HAD $109,000 AND SOME COCAINE AND MARIJUANA, ALL, IN HIS HOUSE, ON THE DATE OF THE HOME INVASION ROBBERY IN FEBRUARY. APPARENTLY THERE WAS A SCHEME THAT WAS CONCOCTED BY AN INDIVIDUAL BY THE NAME OF ERIC MILLER, TO GO IN IN JANUARY. EVERYONE SUPPOSEDLY KNEW THAT THIS WAS A DRUG DEALER. THEY WERE GOING TO GO IN THE HOUSE AND STEAL THE MONEY, STEAL THE DRUGS, SO THREE INDIVIDUALS WENT IN IN JANUARY, AND THEY WEREN'T REAL SUCCESSFUL. APPARENTLY THEY TOOK ABOUT $16,000 WORTH OF CASH AND JEWELRY, $6,000 IN CASH AND $10,000 WORTH OF JEWELRY. THE EVIDENCE IS FAIRLY UNREFUTED THAT MR. GRAHAM WAS SEEN WITH SOME OF THE JEWELRY AND, ACCORDING TO WHAT MR. PAGAN STATED, AT THE TIME OF HIS ARREST, BECAUSE HE WAS FOUND IN POSSESSION OF SOME OF THE JEWELRY, ALSO, HE RECEIVED THE JEWELRY FROM MR. GRAHAM. NOW, MR. PAGAN, HIS ACTIONS, REALLY, SPEAK LOUDER THAN WHAT HE WOULD HAVE EVER TESTIFIED TO, BECAUSE THE WAY THAT HE WAS ARRESTED WAS THAT THERE WAS AN ARREST WARRANT AND A SEARCH WARRANT, WHICH WE HAVE, ALSO, ATTACKED, AND THE OFFICERS CAME TO THE DOOR. IT IS OUR CONTENTION THAT THEY ENTERED WITHOUT KNOCKING. A CLEAR VIOLATION OF UNITED STATES VERSUS RAM RIS. WE HAVE RAISE -- OF RAMIREZ. WE HAVE RAISED THAT, ALSO, IN OUR BRIEF, AND THE FIRST THING THAT MR. PAGAN SAID WAS YOU HAVE GOT THE WRONG INDIVIDUAL. THE ARREST WARRANT WAS, FIRST, FOR ALEJANDRO RAMIREZ. NOW, MR. PAGAN'S MOTHER IS CLOSE BUT CLOSE ISN'T ENOUGH.

YOU ARE OUTLINING CIRCUMSTANCES, HERE, BUT YOU NEED TO BRING US BACK INTO FOCUS ABOUT WHAT ISSUE IT IS THAT YOU ARE ADDRESSING, AND SO WHAT ISSUE IN YOUR BRIEF ARE YOU GOING TO ARGUE TO US NOW?

THE WILLIAMS RULE ISSUE, WHICH IS THE SECOND ISSUE IN THE BRIEF, WE BELIEVE, THE STRONGESTISH EWAN WARRANTS -- STRONGEST ISSUE AND WARRANTS AN OUTRIGHT REVERSAL, WE, ALSO, ARGUE THAT A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

YOU NEED TO ARGUE THOSE SERIALLY OR HOWEVER YOU ARE GOING TO DO IT, BUT WE NEED TO

KNOW THE FOCUS OF WHAT YOU ARE LAYING OUT FOR US, NOW, AS FAR AS THE RELEVANCE TO WHICH ISSUE. ARE YOU GOING TO ARGUE THE WILLIAMS RULE ISSUE? ZOO YES, SIR, AND THAT HAS DO WITH THE JANUARY ROBBERY THAT OCCURRED, AND WE CONTEND IS TEMPORALLY SEPARATE FROM THIS OFFENSE.

IF WE TAKE THE STATEMENTS THAT WERE GIVEN AGAINST YOUR CLIENT, HERE, ISN'T THERE A CLEAR CONNECTION BETWEEN THE JANUARY EVENT AND THEN THE LATER EVENT, IN WHICH THE PEOPLE WERE MURDERED, AND OTHERSALITYENTED TO BE MURDERED? SO -- AND OTHERS ATTEMPTED TO BE MURDERED? SO ISN'T THERE A CLEAR RELEVANCE, THEN, IN THE SCHEME OF THINGS, IF WE ACCEPT THE STATEMENTS, AS I SAY, THAT WERE ADMIT INTERESTED EVIDENCE, HERE, BETWEEN THESE TWO EVENTS? DOESN'T THAT SHOW THE CONTEXT OF WHY THEY WERE BACK THERE THE SECOND TIME, DURING WHICH TIME THE MURDERS OCCURRED?

WELL, WE ASSERT THAT THERE RN TWO SEPARATE INCIDENTS, AND THAT THE SPILL OVER EFFECT FROM THE JANUARY INCIDENT POIMPBD THE JURY.

BUT THE STATEMENTS WERE CONTRARY TO THAT, WERE THEY NOT? WHAT DID THE STATEMENTS SAY, WITH REFERENCE TO THE CONNECTION OF THE TWO EVENTS?

THERE WAS ONE STATEMENT DURING THE FEBRUARY DOUBLE HOMICIDE, WHERE SOMEONE SAID WE DIDN'T DO IT RIGHT LAST TIME OR WE ARE BACK TO DO IT RIGHT THIS TIME. SOMETHING OF THAT NATURE.

AND THE REFERENCE TO LAST TIME OR WHAT TIME WAS CONNECTED TO THE JANUARY INCIDENT.

THAT IS AN INFERENCE THAT THE VICTIM'S WIFE MADE BUT NOT ONE THAT WE BELIEVE THE JURY SHOULD HAVE BEEN PERMITTED TO MAKE. IT IS A PROPENSITY TYPE OF CASE AT THAT POINT, NOW THAT THEY HAVE BESMIRCHED MY CLIENT'S NAME, THE JURY IS LED TO BELIEVE THAT HE DID THE JANUARY ROBBERY AND THEREFORE IT IS REASONABLE TO BELIEVE THAT HE DID THE FEBRUARY ROBBERY.

DID THE OTHER WITNESSES, TO WHOM YOUR CLIENT ALLEGEDLY CONFESSED, ALSO, CONNECT THE JANUARY HE HAVEENT? ZOO CONNECTED THE JURY THAT WAS SEEN -- THE JEWELRY THAT WAS SEEN AFTER THE JANUARY ROBBERY, TO MAKE IT SIMPLE, MY CLIENT WAS SEEN WITH SOME OF THE JEWELRY FROM THE JANUARY ROBBERY, BY THESE INDIVIDUALS.

THEY DID NOT CONNECT, THROUGH THEIR TESTIMONY THAT, YOUR CLIENT WAS THERE. IT WAS ONLY BECAUSE HE HAD THE JEWELRY? MY READING INDICATED A LITTLE BIT MORE THAN. THAT.

YOUR READING IS CORRECT. IT IS A LITTLE BIT MORE THAN THAT, BUT IT IS NOT EXACTLY -- MY CLIENT DIDN'T COME OUT AND SAY I DID THE JANUARY ROBBERY.

I UNDERSTAND, BUT DID THE OTHER WITNESSES SAY THAT HE WAS INVOLVED IN THE JANUARY HE HAVEENT?

THEY DID.

SO WE HAVE BOTH OF THOSE THEN.

BUT I NEED TO BREAK THAT DOWN, BECAUSE MR. POSADO WAS, FIRST, MR. PAGAN'S STAR WITNESS. MR. POSADA SAID MR. PAGAN WAS WITH ME THE WHOLE NIGHT IN FEBRUARY. HE DIDN'T DO IT. I AM HIS ALIBI WITNESS. HE GOES TO COURT AND TO MR. PAGAN'S BOND HEARING AND HE AGAIN SWEARS TO TELL THE TRUTH AND HE SAYS HE DIDN'T DO IT AND LATER ON CONTRADICTED BY THE POLICE OFFICERS, UNCONTRADICTED IN THE RECORD, AND HE ADMITTED THAT HE LIED, AND NOW WE CONTEND THE STORY THAT THE STATE WANTED HIM TO SAY, HE IS

NOT CHARGED, AND THE STATE IS BREEZE ENTO SAY THAT YOU WILL NOT BE CHARGED, EITHER, AND NOW HE SUGGESTS THAT MY CLIENT WAS INTIMATELY INVOLVED.

AND THAT IS A CREDIBILITY ISSUE, IS IT NOT?

THERE HAS TO BE SHOWING THAT THIS PERSON WAS CREDIBLE TO BEGIN W ARE WE GOING TO LOOK AT HIS FIRST STATEMENT OR SECOND STATEMENT?

THAT IS EXACTLY WHAT THE TRIER OF FACT IS SUPPOSED TO DO, AND THEY ARE GOING TO SAY THAT WE ARE GOING TO DISREGARD WHAT HAS BEEN SAID ON THE STAND, HERE, BECAUSE IT IS A DEMONSTRATED FACT THAT HE HAS LIED SO MANY TIMES BEFORE, OR HE GAVE THOSE STATEMENTS BEFORE AND WE CAN SEE WHAT THOSE CIRCUMSTANCES WERE, AND HE TRIED TO MANEUVER AROUND OR GET AWAY WITH SOMETHING, AND NOW WE THINK HE IS TELLING THE TRUTH, BUT THEY ARE THE ONES THAT HAD THAT OPTION TO ACCEPT THAT OR NOT ACCEPT T.

CORRECT, BUT THE TRIAL JUDGE HAS THE RESPONSIBILITY TO PERFORM A 903 BALANCING TEST, TO DETERMINE WHETHER THE JANUARY INCIDENT IS ADDITIONAL OR PROBATIVE. IN THIS CASE, THE JANUARY INCIDENT IS EXACTLY WHAT HAPPENED AT TRIAL. THE JURY COULDN'T FOCUS ON WHAT HAPPENED AT FEBRUARY, BECAUSE THEY WERE TAINTED BECAUSE OF JANUARY. IF WE LOOK AT WHO ALL TESTIFIED, WITH REGARDS TO THIS WILLIAMS RULE EVIDENCE, THERE IS MANY, MANY PEOPLE. LOUISIANA TASHA JONES TESTIFIED. -- LATASHA JONES TESTIFIED. THE LIEUTENANT TESTIFIED AS TO A BURGLARY.

IS THAT WHAT YOU ARE SAYING, UNDER THE WILLIAMS RULE, THAT IT BECAME A FEATURE OF THE TRIAL, AS OPPOSEED TO --

THAT IS PROBABLY ONE OF MY STRONGEST CLAIMS, YES, SIR.

TELL US ABOUT THAT. WHAT IS THE LAW ABOUT THE FEATURE ISSUE AND THEN WHAT ARE THE CIRCUMSTANCES HERE?

THE LAW IS THAT THE INCIDENT, THE WILLIAMS RULE INCIDENT CANNOT BECOME THE FEATURE OF THE TRIAL. IF IT DOES, IT NEGATES THE CONVICTION. IN THIS CASE, THE STATE FOUND THE WILLIAMS RULE EVIDENCE AND THEN BACKED OUT OF IT AND SAID IT IS ACCEPTABLE CRIME EVIDENCE, SO HERE I AM ARGUING IT IS IMPROPER WILLIAMS RULE EVIDENCE. IT IS IMPROPER EVIDENCE, AND IT SHOULDN'T HAVE COME IN.

HASN'T THE CASE LAW TREATED THOSE THINGS DISCREETLY, TOO, THAT IS THE CASE LAW HAS DISTINGUISHED BETWEEN, WELL, IF YOU HAD THE SAME MO OR SOMETHING, AND THEN THAT BECOME AS FEATURE OF A PREVIOUS ONE, OR THE ONES WHERE IT IS RELEVANT, BECAUSE IT IS INEXTRICABLY LINKED TO THE PARTICULAR ONE THAT SHOWS WHAT THE MOTIVE WAS OR SOMETHING LIKE THAT. AREN'T THOSE CASES TREATED DIFFERENTLY?

YES, THEY ARE. IN FACT, THIS COURT HAS UPHELD A PRIOR ROBBERY OR BURGLARY TWO DAYS BEFORE THE MURDER. HERE WE ARE TALKING EVEN MORE TEMPORALLY SPACED OUT. WE ARE TALKING ABOUT 30 DAYS, A DIFFERENT POINT OF ENTRY. WE DON'T KNOW THAT THERE WERE ANY FIREARMS USED IN THE JANUARY INCIDENT. THERE WERE MORE INDIVIDUALS IN THE JANUARY INCIDENT. WE BELIEVE THAT THE JANUARY INCIDENT SHOULD NOT HAVE BEEN BROUGHT UP IN THE FEBRUARY HOMICIDE TRIAL.

THAT IS A DIFFERENT ISSUE THAN WHETHER IT BECAME A FEATURE. GOING BACK TO WHETHER IT SHOULD HAVE COME IN AT ALL, IF IT IS NOT WILLIAMS -- IF IT IS NOT WILLIAMS RULE EVIDENCE, MEANING THAT IT WAS NOT OFFERED AS SIMILAR CRIME EVIDENCE, BUT OFFERED TO SHOW THE MOTIVE FOR THIS CRIME, THAT IS THEY WENT IN BEFORE. THEY WERE UNSUCCESSFUL IN GETTING WHAT THEY WANTED. THE EXACT SAME RESIDENCE, AND THEREFORE THEY WERE COMING BACK

AGAIN. UNDER THAT CIRCUMSTANCE, DON'T WE LOOK AT THE RELEVANCE AND WHETHER THE PREJUDICIAL VALUE OUTWEIGHS THE RELEVANCE. IT IS NOT WHETHER IT BECOME AS FEATURE OF THE TRIAL. WE JUST -- IT IS A WEIGHING ANALYSIS, AND THAT IS SOMETHING THAT THE TRIAL COURT DOES, NOT, WHEN I SAID WE THAT, IS A TRIAL COURT DETERMINATION OF RELEVANCY.

CORRECT.

ALL RIGHT. SO YOU ARE ARGUING NOT THAT IT -- NOT THAT IT IS NOT RELEVANT BUT THAT THE PREJUDICIAL VALUE OR THE PROBATIVE VALUE IS --

IS FAR OUT WEIGHED BY THE PREJUDICIAL EFFECT.

AND, NOW, WHAT CASE LAW DO YOU HAVE THAT WOULD SAY, UNDER THESE FACTS, EVEN THOUGH IT IS 30 DAYS AWAY, IT IS THE SAME RESIDENCE, THE TESTIMONY IS THIS IS BASICALLY THIS IS WHY THE SECOND INVASION OCCURS, TO DO -- FINISH UP WHAT THEY DIDN'T DO THE FIRST TIME. WHY ISN'T THAT EXACTLY SUPPLYING THE MOTIVE FOR WHAT HAPPENED? I MEAN, IN THIS CASE.

WELL, IN TERMS OF AN EXACT CASE ON POINT, I DIDN'T FIND ONE THAT FIT THESE EXACT FACTS. I READ THROUGH 90.401, AGAIN, AND 402 AND 403, AND JUST TRIED TO APPLY WAS THIS, REALLY, FAIR THAT THIS TRIAL WAS TAINTED BECAUSE OF THE JANUARY EVIDENCE, AND THE FEBRUARY INCIDENTS ARE, REALLY, WHAT WE ARE SUPPOSED TO BE ON TRIAL FOR. THE CASE LAW THAT THIS PANEL HAS USED IS WE ARE SUPPOSED TO LOOK AT THE INCIDENT, AND THE INCIDENT THAT HE WAS ON TRIAL FOR WAS THE DOUBLE HOMICIDES IN FEBRUARY.

OKAY. SO, THEN, YOU WOULD SAY IT WAS OKAY FOR THE TRIAL COURT TO LET IT IN, BUT THE TRIAL COURT SHOULD HAVE, SOMEHOW, LIMITED HOW MUCH OF THE ARGUMENT WAS ON THE FIRST CASE? IS THAT WHAT THE ARGUMENT --

WE DON'T BELIEVE IT WAS ADMISSIBLE, TO BEGIN WITH.

BUT THE SECOND FALL BACK POSITION IS THAT IT WASN'T LIMITED ENOUGH. IS THAT YOUR ARGUMENT?

I DON'T THINK THAT THERE IS A FALL BACK POSITION. WE JUST BELIEVE THAT IT WASN'T ADMISSIBLE AND SHOULDN'T HAVE COME IN, TO TAINT THIS TRIAL.

I THINK THE PROBLEM THAT I AM HAVING, IN UNDERSTANDING YOUR POSITION, IS, ARE YOU ARGUING THAT IT SHOULDN'T HAVE COME IN, BECAUSE IT WAS IMPROPER WILLIAMS RULE EVIDENCE, BECAUSE IT WAS IRRELEVANT, OR BECAUSE OF A 403 ANALYSIS?

CAN I PICK ALL OF THE ABOVE?

WELL, BUT, I DON'T UNDERSTAND THAT THAT IS WHAT YOU ARE DOING. IS IT WHAT YOU ARE DOING?

YES, IT IS.

SO, AND I THINK, THEN, THE FOLLOW-UP TO JUSTICE PARIENTE'S QUESTION IS THAT, UNDER A 403 ANALYSIS, WHERE THE PREJUDICE OUTWEIGHS RELEVANCE, YOU ASSUME, THAT, UNDER THAT ANALYSIS, THAT IT IS EVIDENCE THAT IS RELEVANT, BECAUSE IT TENDS TO PROVE UNDER LYING FACT, WHICH, HERE, WOULD BE MOTIVE, WHICH WOULD, ALSO, QUALIFY IT UNDER WILLIAMS. NOW, BUT, HASN'T THIS COURT SAID THAT, THEN IT BECOME AS MATTER OF, UNDER 403, OF DISCRETION OF THE TRIAL COURT, TAKING INTO CONSIDERATION ALL OF THE OTHER EVIDENCE THAT IS FROM?

YES, SIR. THAT WOULD BE THE APPROPRIATE STANDARD.

AND THAT IS EXACTLY WHAT THIS COURT SAID IN WILLIAMS.

CORRECT.

AND ALLOWED THAT TYPE OF -- THIS TYPE OF EVIDENCE IN? APPROVED A TRIAL JUDGE, IN THAT CASE.

SAYING THAT THE TRIAL JUDGE HAS NOT ABUSED HIS OR HER DISCRETION. WE ARE ARGUING DISCRETION AND JUDGE LEBOW ABUSED HER DISCRETION IN ALLOWING IT TO BECOME WILLIAMS AND ALLOWING IT TO BECOME THE FEATURE OF THE TRIAL. WHETHER I CALL IT JANUARY EVIDENCE OR WILLIAMS RULE EVIDENCE, WE BELIEVE THAT IF IS NOT INEXTRICABLY INTERTWINED. WE BELIEVE THAT THE TEMPORAL BREAK ESTABLISHES THAT IT WAS A DIFFERENT EVENT. WE BELIEVE THE FEBRUARY SIGNATURE WAS NOT A SIGNATURE OF THE JANUARY EVENT. MOST OF THE TIME THAT I HIM UP HERE, I HAVE TO ARGUE THAT THIS IS FUNDAMENTAL ERROR, AND IN THIS CASE I HAVE THE LUXURY OF BEING ABLE TO TELL YOU THAT, AT LEAST 20 TIMES DURING THE TRIAL THIS WAS OBJECTED TO, SO IT WAS NO SURPRISE THAT THIS WAS EVIDENCE THAT WAS GOING TO BE HOTLY CONTESTED AND EVIDENCE THAT THE DEFENSE THOUGHT WAS CRUCIAL TO WINNING OR LOSING THE CASE OR, POSSIBLY, GETTING A LESSER-INCLUDED OFFENSE.

DID YOU -- I NOED THAT WE HAVE CONSUMED -- I NOTE THAT WE HAVE CONSUMED A LOT OF YOUR TIME ON QUESTIONS, BUT TALK TO US ABOUT THIS LIFE SENTENCE FOR THE CO-DEFENDANT. WHAT WERE THE CIRCUMSTANCES UNDER WHICH THAT SENTENCE WAS IMPOSED?

WELL, TO BEGIN --

WAS THAT PURSUANT TO A JURY RECOMMENDATION?

NO, IT WASN'T. IT WAS JUST THAT THE JUDGE DETERMINED THAT LIFE WAS THE APPROPRIATE SENTENCE IN THAT CASE. THERE WAS A PROBLEM THAT CAUSED A SEVERANCE. MR. GRAHAM'S CASE WENT TO TRIAL A LONG TIME BEFORE MR. PAGAN'S. IN FACT, I BELIEVE THAT HIS CASE HAD ALREADY BEEN PCAED ON APPEAL, OR AT LEAST BY THE TIME THE SPENCER HEARING WAS CONDUCTED AND WAS CONCLUDED.

DID THE STATE SEEK THE DEATH PENALTY IN THAT CASE?

THEY DID, AS TO BOTH OF THESE INDIVIDUALS. NOW, WHEN WE LOOK AT THIS, WE CAN'T JUST LOOK AT MR. PAGAN AND MR. GRAHAM, WHO GOT LIFE. I THINK WE, ALSO, NEED TO LOOK AT ERIC MILLER, WHO PLANNED THIS, WHO SCOPED OUT THE JOINT, WHOSE IDEA IT WAS TO DO THIS DRUG RIP OFF, WHO NEVER GOT CHARGED. WE HAVE TO LOOK AT MR. QUASADO, THE DRIVER, WHO IS THE INDIVIDUAL THAT CHANGED HIS STORY.

ONE QUESTION. THE JURY RECOMMENDED DEATH AND THE JUDGE IMPOSED A LIFE SENTENCE? ' I BELIEVE THAT IT WAS JUST A STRAIGHT LIFE FINDING BY THE JUDGE. I DON'T THINK THAT, AT THAT POINT, EITHER THE STATE BACKED OFF THEIR REQUEST FOR DEATH OR THE JURY JUST CAME BACK ON THE STRAIGHT FIRST.

AREN'T THEY EQUALLY CULPABLE? IS MR. PAGAN THE SHOOTER IN THIS CASE?

IT APPEARS THAT BOTH INDIVIDUALS WHO ENTERED COULD HAVE BEEN THE SHOOTERS. THE STATE HAS TRIED TO CHARACTERIZE IT THAT MR. PAGAN WAS THE SHOOTER. THE STATE HAS, ALSO, TRIED TO CHARACTERIZE THAT MR. PAGAN WAS FAR MORE CULPABLE THAN MR. GRAHAM. WE DON'T BELIEVE THAT THE FACTS SHOW THAT.

DID THE JUDGE ADDRESS THAT IN THE SENTENCING ORDER?

IT IS NOT CONTAINED IN THE SENTENCING ORDER, THAT I RECALL.

WAS IT ARGUED AS A MITIGATING FACTOR? ANOTHER DEFENSE ATTORNEY DID, IN FACT, ARGUE T MR. GRAHAM, IF YOU BELIEVE THAT MR. -- ARGUE IT. MR. GRAHAM, IF YOU BELIEVE THAT MR. PAGAN AND MR. GRAHAM WERE THE ONES THAT CAME IN, MR. PAGAN TAKES MRS. JONES AND PUTS A GUN TO HER HEAD AND MAKES HER GO AROUND THE HOUSE, LOOKING FOR MONEY, AND AT SOME POINT EVERYONE IS TIED UP, AND THEN THE VERY QUIET PERSON, WHO THE STATE ASSERTS IS MR. PAGAN, FIRED THE SHOTS AND THERE WERE EIGHT OR NINE PROJECT HE CAN TILES.

DOES THE JURY KNOW THAT THE -- PR O.J. ECTILES.

DOES THE JURY KNOW THAT THE CO-DEFENDANT GOT LIFE?

I DON'T BELIEVE SO.

HOW ABOUT THE JUDGE?

THE JUDGE WAS THE JUDGE ON EITHER OF THE CASES.

WAS THE CONVICTION AND THE SENTENCE BEFORE THE JURY TRIAL HERE?

I DON'T BELIEVE IT WAS BEFORE THE JURY TRIAL. I BELIEVE IT WAS BEFORE THE ULTIMATE SPENCER HEARING AND THE DEATH PENALTY BEING GIVEN.

HOW ABOUT THE EVIDENCE? AS I LOOK AT THE RECORD THAT WE ARE TAKING A LOOK AT, IT SEEMS AS THOUGH THERE APPEARS TO HAVE BEEN AT LEAST EVIDENCE, UPON WHICH ONE COULD, A FACT FINDER COULD CONCLUDE THAT ONE OF THE TWO ENGAGED IN THE SHOOTING, THAT WHETHER YOU DESCRIBE THAT, AND WE KNOW THE SCHEME ASKED. WE KNOW THE LIFTING UP AND ALL OF THAT, BUT IT JUST SEEMS, AS WE ARE GOING THROUGH IT, THAT ONE OF THE TWO IS THE ONE THAT SHOT CHILDREN.

CORRECT.

AND SO IF A FACT FINDER WOULD FIND THAT YOUR CLIENT WAS THAT PERSON, WHERE DOES THAT LEAVE US, WITH REGARD TO THE PROPORTIONALITY? DOES THAT CHANGE A LITTLE BIT, IF THAT IS A FACTUAL ISSUE?

IT COULD CHANGE IT, WITH REGARDS TO PAGAN AS OPPOSED TO GRAHAM. I DON'T THINK IT CHANGES 2, WITH REGARD TO -- CHANGES IT, WITH REGARD TO MR. PAGAN AS OPPOSED TO THE OTHER INDIVIDUALS. YOU HAVE GOT THE PERSON WHO DRIVES THEM AND OTHER THINGS. THAT, IN A FELONY MURDER, THAT INDIVIDUAL SHOULD HAVE BEEN LOOKING DEATH PENALTY, ALSO. YOU DIDN'T. YOU HAVE KEITH JACKSON, WHO, ALSO, LIED.

HAVE OTHER CASES MADE THE DISTINCTION ON THAT BASIS ON OR HAVE THEY MADE THE DISTINCTION PRIMARILY ON THE BASIS THAT TWO PEOPLE CHARGED, FOUND GUILTY OF THE SAME OFFENSE, EQUALLY CULPABLE? ONE GUESS A LIFE AND THE OTHER GETS -- ONE GETS LIFE AND THE OTHER GETS THE DEATH PENALTY?

I HAVE THIS COURT DISTINGUISH BETWEEN THE INDIVIDUALS ACTUALLY INSIDE THE HOUSE AND THE DRIVERS OF THE VEHICLES.

WELL, EVEN, DID WE DISTINGUISH THE ONES THAT WERE CHARGED AGAINST THE ONES THAT

WEREN'T?

YOU HAVE TALKED ABOUT THAT IN SEVERAL CASES, YES, BUT IT IS STILL A FACTOR THAT CAN BE LOOKED AT, IN TERMS OF PROPORTIONALITY. YOU HAVE GOT, SUPPOSEDLY, THREE PEOPLE GO TO DO THE JANUARY RIP OFF, AND ONE OF THOSE IS KEITH JACKSON. KEITH JACKSON WOULD HAVE BEEN THE THIRD PERPETRATOR IN FEBRUARY BUT APPARENTLY HE WAS RUNNING LATE, AND THERE WAS A STATEMENT ATTRIBUTABLE TO PAGAN, SAYING FORGET HIM. HE IS TOO LATE. WELL, THIS IS SOMEONE WHO WAS A KEY IN THE PLANNING OF THIS, WHO IT LOOKS LIKE, PARTICIPATED IN JANER. HE -- JANUARY. HE DOESN'T GET CHARGED, EITHER. WE HAVE SUSPECTS WHO DIDN'T GET CHARGED, AND THEN WE HAVE THE CO-CONSPIRATOR WHO GETS LIFE AND MY CLIENT GETS DEATH.

I AM HAVING TROUBLE UNDERSTANDING. DID THE DEFENSE LAWYER ARGUE TO THE JUDGE THAT THE ISSUE OF -- THAT BECAUSE THE CODEFENDANTS GOT LIFE OR LESS, THAT IT WAS INAPPROPRIATE? IT WOULD BE PLOT PORTIONAL, TO IMPOSE THE DEATH SONTS MR. PAGAN?

DEFENSE -- DEATH SENTENCE ON MR. PAGAN?

DEFENSE COUNSEL ARGUED PROPORTIONALITY. WHETHER IT IS ARGUED IN YOUR QUESTION, I DON'T KNOW.

IT IS NOT ADDRESSED, AT ALL, IN THE SENTENCING ORDER.

CORRECT.

I KNOW YOU HAVE RAISED PROPORTIONALITY, IN GENERAL, BUT HAVE YOU RAISED IT AS A POINT ON APPEAL, THAT THE TRIAL COURT SHOULD HAVE SPECIFICALLY EVALUATED THE LESSER SENTENCING GIVEN TO THE CO-DEFENDANT?

I RAISE IT ON P AN EEL, BUT DO I RAISE IT AS AN ISSUE THAT THE TRIAL COURTERRED IN REJECTING THAT -- COURT ERRED IN REJECTING THAT ARGUMENT AT THE TRIAL COURT LEVEL? NO.

BUT WE CAN'T DO PROPORTIONALITY, THE ISSUE, UNLESS WE UNDERSTAND WHO WAS FOUND TO BE THE SHOOTER AND WHETHER THEY WERE EQUALLY CULPABLE OR NOT.

WELL, JUDGE LEEB-FOUND THAT -- LEBOW FOUND THAT MR. PAGAN WAS THE SHOOTER SPECIFICALLY. I CAN'T ANSWER THAT NOW.

BUT IS HE MORE MISSOURI CULPABLE?

MORE -- MORE CULPABLE? ALL MORE CULPABLE THAN MR. GRAHAM, CORRECT, AND I GUESS YOU COULD SAY MORE COUPLE THAN THE INDIVIDUALS WHO PLANNED IT, WHO WERE THERE IN JANUARY AND WHO --

I GUESS YOU COULD SAY IT WAS CASE LAW AT THE TIME.

YES.

THANK YOU. YOU ARE IN YOUR REBUTTAL TIME.

THANK YOU.

MR. BROWNE.

GOOD MORNING. SCOTT BROWNE FOR THE STATE OF FLORIDA. YOUR HONORS, THIS IS CLEARLY

NOT A CIRCUMSTANTIAL EVIDENCE CASE. THIS COURT MADE IT VERY CLEAR, IN HARDWICK V STATE, THAT CONFESSIONS AND ADMISSIONS CONSTITUTE DIRECT, NOT CIRCUMSTANTIAL EVIDENCE OF A CRIME. THAT BEING THE CASE, THE STATE IS ENTITLED TO AN EXTREMELY FAVORABLE STANDARD OF REVIEW ON APPEAL, AND THE EVIDENCE IN THIS CASE WAS MORE THAN SUFFICIENT TO OVERCOME THE BARE BONES MOTION FOR A JUDGMENT OF ACQUITTAL SUBMITTED BY THE DEFENSE BELOW. THIS ENTIRE OFFENSE, YOUR HONORS, BEGAN NOT IN FEBRUARY BUT IN JANUARY OF 1993, AND IN JAN -- IN JANUARY, THAT WAS THE TIME PERIOD WHEN THE DEFENDANTS PLANNED TO ROB THE JONES'S RESIDENCE, AND THEY SUSPECTED, BECAUSE THEY THOUGHT HE WAS A DRUG DEALER, WHO FIND A VERY LARGE AMOUNT OF CASH. THERE WAS IN SOME TESTIMONY RANGING FROM BETWEEN $15,000 TO OVER $100,000, AND THAT IS WHAT THEY WANTED, SO THEY BROKE INTO THE HOUSE, IN JANUARY OF 1993, AND THEY WERE SUCCESSFUL TO A SMALL EXTENT. THEY DID GET A NUMBER OF EXPENSIVE ITEMS OF JEWELRY. THEY DID GET SOME CASH.

DO WE KNOW IF ANYONE WAS IN THE HOUSE, AT THE TIME OF THE JANUARY -- DO WE GET THAT KIND OF --

YES, YOUR HONOR. THERE WAS NO ONE IN THE HOUSE AT THAT TIME, BUT THEY DID -- THEY CAME AWAY WITH A LOT OF EXPENSIVE JEWELRY AND SOME CASH, BUT IMMEDIATELY AFTERWARD, QUASADO AND JACKSON TESTIFIED THAT THEY WERE UNHAPPY WITH THEIR HAUL, BECAUSE THEY WANTED A LARGE AMOUNT OF CASH AND THEY DIDN'T GET IT, SO IMMEDIATELY AFTER THE SUCCESSFUL BURGLARY OF THE HOUSE, THEY STATED THEIR INTENT TO GO BACK AND DO IT RIGHT, AND DON IT RIGHT MEANT GETTING THE -- AND DO IT RIGHT, AND DOING IT RIGHT MEANT GETTING THE LARGE AMOUNT OF CASH.

DID IT MEAN GOING IN AND GETTING A LARGE AMOUNT OF CASH, WHEN THE DWELLING WAS OCCUPIED AND KILLING WHOEVER WAS INSIDE?

PURNS, PRELIMINARY DISCUSSIONS IMMEDIATELY AFTERWARD DIDN'T INCLUDE GOING BACK AND KILLING EVERYONE. THE DISCUSSIONS THAT CAME IN, THROUGH QUASADO AND JACKSON WERE THAT THEY WERE GOING TO GO BACK AND DO IT RIGHT. I DIDN'T RECALL ANY CONVERSATION, IN JANUARY, AS TO WHETHER OR NOT THE PEOPLE WOULD BE HOME, BUT IT IS LEER, IN FEBRUARY, THEY -- IT IS CLEAR, IN FEBRUARY THEY PICKED A TIME WHEN THEY KNEW THE PEOPLE WERE GOING TO BE IN THE HOUSE. IN FACT, THE APPELLANT INDICATED THAT HE WAS GOING TO KILL, ON THE WAY OVER TO THE HOUSE, EVERY ON ONE IN THE HOUSE.

AS FAR AS YOU, NOW, SPEAKING ABOUT THE JANUARY INCIDENT, EXPLAIN WHETHER THE INCIDENT, AS PART OF THE STATE, COMES IN, MEANING IT IS WILLIAMS RULE, THAT IT IS A SIMILAR MO, OR COMES IN BECAUSE IT IS IN SEPARABLE CRIME EVIDENCE OR COMES IN TO ESTABLISH MOTIVE OR ALL OF THE ABOVE, OR HOW, SO THAT WE CAN ANALYZE THE, IN AN APPROPRIATE WAY. ARE YOU -- DID THE STATE JUST TRY TO GET IT IN ON ALL OF THOSE BASIS, OR DID THEY MAKE AN ARGUMENT THAT IT, REALLY, WENT TO THE MOTIVE FOR THE SECOND CRIME KROOIM?

YOUR HONOR, THE THROUGHS -- CRIME?

YOUR HONOR, THE THRUST OF THE STATE'S CASE BELOW IS THAT WAS INEXTRICABLE EVIDENCE, BUT IT WAS CLEARLY ARGUABLE UNDER 94.02 OR 94.04, WILLIAMS RULE EVIDENCE, BECAUSE IT WAS RELEVANT TO IDENTIFY FIX, MOTIVE, OPPORTUNITY, AND WHAT YOU SEE -- I HAD IF I CAN INDICATION -- IDENTIFICATION, MOTIVE. THEY INDICATED THAT THEY DIDN'T DO THE RIGHT THE FIRST TIME. THAT IDENTIFIES THE PERPETRATORS OF THE PRIOR BURGLARY AS THE PERPETRATORS OF THE HOME INVASION, AND THE STATE CITED A CASE, PRICE V STATE THAT, IS PRETTY MUCH DIRECTLY ON POINT OUT OF THE THIRD DISTRICT. WHEN THERE IS A STATEMENT THAT IS MADE, DURING A ROBBERY THAT, IDENTIFIES THEM AS HAVING COMMITTED A PRIOR

ROBBERY, IF YOU CAN LINK THE TWO, THEN THAT IS STRONG EVIDENCE IDENTIFYING THE PERPETRATORS OF THE INSTANT OFFENSE.

IF I UNDERSTAND THE STATE'S ARGUMENT, THE JANUARY AND FEBRUARY ROBBERIES, ONE IS SORT OF REST JESS TIE. -- OF RES JESTI, IS THAT REALLY WHAT YOU ARE SAYING? BUT WHEN YOU HAVE A LAPSE OF A MONTH, CAN YOU, REALLY, PUT IT INTO THAT CATEGORY?

GENTLEMEN, YOUR HONOR, BECAUSE YOU HAVE A -- YES, YOUR HONOR, THAT IS AN OBVIOUS LINK, BECAUSE WHEN YOU HAVE THE JANUARY STORY, YOU CAN'T TELL THE HOME INVASION STORY OF FEBRUARY, WITHOUT TELLING THE JANUARY STORY. YOU CAN'T DO IT IN A COHESIVE MANNER. THERE ARE MANY STATEMENTS THAT WERE MADE PRIOR TO THE SECOND OFFENSE THAT REFERENCE THE PRIOR BURGLARY OF THE HOUSE. FOR INSTANCE, QUASADO, WHEN HE IS DRIVING GRAHAM AND JACKSON AROUND, SAYS THIS WOULD BE A GOOD NIGHT TO GO BACK TO THE HOUSE. QUASADO IMMEDIATELY KNEW THAT TO MEAN THE HOUSE THAT THEY HAD BROKEN INTO IN JANUARY.

HOW ABOUT IF SIX MONTHS HAD LAPSED SINCE THAT TIME? WOULD THE STATE STILL TAKE THE TAPINGS THAT IS PART OF RES JESTI?

GIVEN THE FACT THAT THIS WOULD BE RELEVANT, WHETHER YOU CALL IT RES JESTAI OR NOT, IT IS, STILL, A MOTIVE.

YOU WOULD HAVE TO COME IT IN UNDER WILLIAMS RULE. YES, YOUR HONOR, IT WOULD, ALSO, BE UNDER WILLIAMS RULE. IN THE FEBRUARY HOME INVASION, THERE WERE WATCHES AND A SMALL AMOUNT OF CASH IN THE HOUSE AND CREDIT CARDS. WHY DIDN'T THEY TAKE THOSE ITEMS? THE REASON IS THEY WERE ONLY INTERESTED IN GETTING THE CASH THAT THEY DIDN'T GET DURING THE JANUARY BURGLARY, SO THAT EXPLAINS WHY MINORITY ELMS OF VALUE, WRIST WATCHES WERE LEFT BEHIND. CREDIT CARDS. THEY DIDN'T TAKE A WALLET. THEY WANTED CASH AND ONLY THE CASH. CLEARLY THE JANUARY BURGLARY WAS RELEVANT AND ADMISSIBLE, AND THERE HAS BEEN NO ABUSE OF DISCRETION SHOWN. THE SUPPRESSION ISSUE, I DON'T BELIEVE, MY OPPONENT, REALLY, ADDRESSED THAT TO ANY EXTENT. HOWEVER, HE DID MENTION THAT THE POLICE FAILED TO KNOCK PRIOR TO ENTERING MR. PAGAN'S RESIDENCE. THAT IS NOT TRUE. THE STATE CITED IN THE RECORDS THE OFFICERS DID, IN FACT, KNOCK. THEY DIDN'T WAIT. THEY SAID POLICE AND THEY ENTERED IMMEDIATELY, BUT THERE WAS NO KNOCK AND ANNOUNCE VIOLATION ALLEGED BELOW. THAT ISSUE HAS NOT BEEN PRESERVED FOR APPEAL. PROPORTIONALITY ISSUE, I WOULD NOTE THAT MY OPPOSING COUNSEL DID NOT CLAIM, IN HIS BRIEF THAT, MR. GRAHAM WAS AN EQUALLY CULPABLE CO-DEFENDANT. THAT WAS NOT ISSUE RAISED PROPERLY BEFORE THIS COURT, IN THE STATE'S OPINION. HOWEVER, THE EVIDENCE IS ABUNDANTLY CLEAR THAT MR. PAGAN WAS, IN FACT, THE SHOOTER IN THIS CASE. THEY WERE NOT EQUALLY CULPABLE CODEFENDANTS.

HE WAS THE SHOOTER OF ALL FOUR VICTIMS THAT DIED IN AND THE TWO THAT --

YES, YOUR HONOR, AND THE ENTIRE FAMILY. IF YOU RECALL --

WHAT IS THAT CONCLUSION BASED ON?

BASED ON HIS ADMISSIONS TO BOTH QUASADO AND JACKSON AND MRS. JONES'S TESTIMONY THAT THE QUIET ONE WAS THE SHOOTER. WE KNOW THAT PAGAN WAS THE QUIET ONE AND GRAHAM WAS DESCRIBED AS THE HYPERONE, DURING THE HOME INVASION, SO IT IS ABUNDANTLY CLEAR, BASED UPON THIS RECORD, THAT MR. PAGAN WAS THE SHOOTER. WHEN THE FAMILY --

DOES THE RECORD INDICATE THAT THE SAME GUN WAS USED IN ALL FOUR SHOOTINGS?

YES, YOUR HONOR. IT WAS A NINE MILL METER -- A 9 MM, AND, AGAIN, PAGAN WAS THE ONE, BLESS YOU, YOUR HONOR, MR. PAGAN WAS THE ONE DESCRIBED AS HAVING THE 9 MM, DURING THE HOME INVASION, AND HE WAS, ALSO, OBSERVED BY POSADA AND JACKSON, AND HE WAS KNOWN TO HAVE A .38 CALIBER AND A 9 MM.

WHAT IS YOUR KNOWLEDGE OF THE RECORD, WITH REGARD TO SENTENCING AND CONVICTION, ABOUT GRAHAM'S CONVICTION AND SENTENCE? DO YOU KNOW?

I CAN'T GIVE YOU A FIRM ANSWER. I DON'T BELIEVE THAT IT WAS, EVER, ARGUED BELOW THAT THERE WAS AN EQUALLY CULPABLE CO-DEFENDANT. THAT COULD NOT HAVE BEEN REBUTTED. THE JURY GAVE GRAHAM A SENTENCE OF LIFE.

DID THE JUDGE KNOW THAT?

SHE, CERTAINLY, KNEW THAT IS, YOUR HONOR.

WAS SHE THE JUDGE IN THE GRAHAM CASE?

I DO NOT KNOW THE ANSWER TO THAT QUESTION, YOUR HONOR. BUT THE APPELLANT'S SENTENCE IS, CLEARLY, PROPORTIONAL. WHAT YOU HAVE HERE AND WHAT THE JUDGE FOUND WAS THIS WAS A PRE-PLANNED ATTEMPT TO SLAUGHTER AN ENTIRE FAMILY.

> LET ME ASK YOU THIS. THIS WAS A 7-TO-5 JURY RECOMMENDATION OF DEATH. GIVEN THE CIRCUMSTANCES OF THIS CRIME, TWO DEATHS, TWO PEOPLE WHO WERE SHOT, WHO DID NOT DIE, THE AGGRAVATING CIRCUMSTANCES THAT WERE PRESENTED HERE, AND WE LOOK AT THAT IN THE CONTEXT OF THE MITIGATING CIRCUMSTANCES THAT WAS PRESENTED. WHY DO YOU THINK WE HAVE A 7-TO-5 --

I HAVE ASKED MYSELF THE SAME QUESTION, YOUR HONOR. I THINK THIS IS ONE OF THE MOST HORRENDOUS CRIMES THAT I HAVE HAD THE OPPORTUNITY OF REPRESENTING THE STATE ON. HE SHOT A SIX-YEAR-OLD CHILD. I CAN'T UNDERSTAND IT, MYSELF. I CAN ONLY STATE THAT THE DEFENSE ATTORNEY DID A VERY GOOD JOB, I BELIEVE, IN HUMANIZING MR. PAGAN, BRINGING IN A LOT OF FAMILY MEMBERS, AND THE STATE, I I DON'T BELIEVE -- I DON'T BELIEVE, PUT ON MUCH OF A CASE DURING THE SENTENCING PHASE.

DO WE TALK ABOUT MR. JONES, IS THAT HIS NAME, DRUG DEAL SOMETHING.

YES, AND PERHAPS THAT HAD SOMETHING TO DO WITH IT, ALTHOUGH I WOULD HOPE IT WOULDN'T, BECAUSE A SIX-YEAR-OLD CHILD WAS, ALSO, MURDERED, BUT THE JURY DID REACH A 7-TO-5 RECOMMENDATION. THIS COURT COULD COMPARE THE SENTENCE TO OTHERS OUT THERE. THE STATE HAS CITED A NUMBER OF CASES ON WHICH THIS COURT HAS AFFIRMED THE DEATH PENALTY WITH EVEN FEWER AGGRAVATORS AND/OR MORE MITIGATION.

JUST TO MAKE SURE ABOUT THIS, BECAUSE, OF COURSE, TO AFFIRM A CONVICTION LIKE THIS, AND THEN THERE IS A QUESTION OF HOW MUCH IS BASED ON THE TESTIMONY OF CODEFENDANTS, WHAT OTHER EVIDENCE DO WE HAVE THAT MR. PAGAN WAS THE SHOOTER IN THIS CASE. GRAHAM AND PAGAN COME IN. DO THEY, BOTH, HAVE GUNS?

YES, THEY DO, YOUR HONOR.

WHEN SOMEONE WAS DESCRIBED AS THE HYPERONE? MR. GRAHAM DESCRIBES HIMSELF AS THE HYPERONE SOMEBODY.

YES, YOUR HONOR.

SO THAT THE SURVIVING VICTIM IDENTIFIES THE -- WHAT WAS THE OTHER DESCRIPTION, THE QUIET ONE AS THE SHOOTER?

THE QUIET ONE. ALSO RECALL THAT LATASHA JONES, THE LIGHT CAME ON FOR A MOMENT, AND SHE NOTICED A LIGHT-SKIBD INDIVIDUAL. WE KNOW THAT -- LIGHT-SKINNED INDIVIDUAL. WE KNOW THAT WILLIE GRAHAM WAS NOT LIGHT-SKINNED AND MR. PAGAN IS, AND WE KNOW THAT THE MASK WAS PARTIALLY UP, AND CERTAINLY THE TWO, THAT, ALSO --

WAS THAT THE EXTENT TO WHICH LATASHA WAS, ALSO, ABLE TO IDENTIFY MR. PAGAN?

YES. YOU HAVE A TENTATIVE VOICE IDENTIFICATION, AS WELL, BUT THEY CLEARLY PLANNED THIS TO GET AWAY WITH IT. THEY WORRY MASKS AND THEY HAD GLOVES, AND THEY PLANNED ON MURDERING THE ENTIRE FAMILY, BUT YOU HAVE MR. POSADA'S'S TESTIMONY WAS VERY PRESENTABLE, BECAUSE HE WAS MR. PAGAN'S CLOSEST FRIEND. HE INITIALLY AGREED TO PROVIDE A FALSE ALIBI FOR HIM. HE MADE A PRIOR CONSISTENT SFAMENT WHEN HE WAS TAPED. MR. JACKSON TAPED HIM, AND IN THAT EXISTING STATEMENT, MR. POSADA CONFIRMS THAT HE DID DRIVE MR. GRAHAM AND MR. PAGAN TO THE HOME, THE NIGHT OF THE MURDERS, SO YOU DO HAVE AMPLE EVIDENCE WITH SUPPORTING THE STATE'S RECORD AND CREDIBILITY. AND, AGAIN, THAT IS A MATTER FOR THE COURT TO RECOGNIZE, AND THAT IS CREDIBILITY.

IT WASN'T THAT HE WAS NOT THERE AT ALL. IT WAS THAT HE WAS THERE, BUT HE HAD SOMEBODY ELSE --

HE HAD NO ALIBI EVIDENCE. HE TRIED TO POKE HOLES IN THE STATE'S CASE BUT HE DIDN'T HAVE ANAL BI. THE STATE HAS NOTHING FURTHER AT THIS -- OF AND ALIBI. THE STATE HAS NOTHING FURTHER AT THIS TIME.

THANK YOU. MR. BROWNE.

THANK YOU. THE VERDICT WAS RENDERED ON JANUARY 6, 1995. JUDGE LEB OWE W WAS THE -- LEBOW WAS ON THE CASE AND IT STARTED A YEAR AND THREE-QUARTERS LATER, ON NOVEMBER 4, 1996. THE STATE BRINGS UP SOME THINGS THAT I DIDN'T GET A CHANCE TO MENTION, IN MY INITIAL OPENING PORTION. THAT WAS THE VOICE IDENTIFICATION, THE VOICE IDENTIFICATION IS A BIT OF THE EVIDENCE THAT WE CONTEND, IN THE BRIEF, SHOULD NOT HAVE BEEN PERMITTED. LATASHA WENT DOWN TO THE POLICE STATION. SHE WAS UNABLE TO IDENTIFY THE VOICE OF THE PERSON THAT SHE SAID WAS THE CALM ONE, THE SHOOTER, BUT, THEN AFTER THE DEFENSE LAWYER LEFT, SHE SAID I THINK MAYBE IT WAS NUMBER TWO. THE JURY WAS ALLOWED TO HEAR. THAT NUMBER TWO IS MR. PAGAN.

WHO BROUGHT UP THE VOICE IDENTIFICATION?

WELL, THE DEFENSE BROUGHT IT UP, AFTER NIRNLLY -- AFTER INITIALLY TRYING TO KEEP IT UP, FILING A RESPONSE, OBJECTING TO THE VOICE IDENTIFICATION, AND THEN GOING AND WATCHING IT, SO IT IS, REALLY, NOT INVITED ERROR, AS THE STATE MAKES IT SOUND IN THEIR ANSWER BRIEF. IT IS A CASE WHERE THE JURY, AGAIN, GETS INFECTED WITH OTHER EVIDENCE THAT THEY SHOULD NOT HAVE HEARD, JUST LIKE THE TAPE THAT YOU JUST HEARD ABOUT. SURE ENOUGH THERE IS A TAPE. AT THE SENT OUT MR. JACKSON TO TALK TO MR. POSADA. THERE IS A SURREPTITIOUSLY RECORDED TAPE, IN THE CAR, ON THE WAY TO THE FLEA MARKET. THE STATE GOT THAT, SAYING IT WAS A PRIOR CONSISTENT STATEMENT. MY REVIEW OF THE FLORIDA EVIDENCE CODE SHOWS THAT, TO BE A STATEMENT, IT MUST AND SWORN STATEMENT. ADDITIONALLY, THERE MUST BE A CHANCE FOR RECENT FABRICATION. THIS WAS THREE YEARS AFTER MR. POSADA HAD INITIALLY COME FORWARD AS THE ALIBI WITNESS.

WHY WOULD THAT NOT BE ADMISSIBLE, THOUGH, AFTER THE ATTEMPTS TO DEMONSTRATE THAT THERE HAD BEEN A CHANGE IN TESTIMONY, AND THIS WOULD COLORADO IN TO SHOW THAT,

REALLY, THERE WAS NO CHANGE. WOULD THAT NOT BE AN EXCEPTION TO WHAT YOU ARE ARGUING?

WE DON'T BELIEVE SO. FIRST OF ALL --

IT HAS TO BE A SWORN STATEMENT?

YES, SIR. WITH REGARDS TO THE PROPORTIONALITY, IT IS OUR ASSERTION THAT THIS IS THE TYPE OF CASE, ALTHOUGH IT LOOSE HEINOUS, AND, YES, THERE IS A DEAD CHILD INVOLVED HERE. IT IS A CASE THAT, STILL, MR. PAGAN PRO CLAIMS HIS INNOCENCE, AND EVEN IF YOU FIND THAT HE WAS ONE OF THE SHOOTERS, THIS IS NOT AN APPROPRIATE CASE TO SENTENCE HIM TO DEATH. THIS IS AN INDIVIDUAL WHO WAS SUFFERING FROM ADD. THERE IS EXTENSIVE PSYCHIATRIC MEDICAL TESTIMONY IN HERE. THERE WERE A NUMBER OF NONSTATUTORY MITIGATORS. THERE WERE A COUPLE, ON ONE STATUTORY MITIGATOR.

THIS -- IN ADDITION TO THIS BEING A DOUBLE MURDER, THERE WAS AN ATTEMPTED MURDER OF A 18-MONTH-OLD CHILD, AND THE WIFE, CORRECT?

CORRECT.

AND HE, ALSO, HAD OTHER PRIOR VIOLENT FELONIES?

HE HAD TWO PRIOR AGO BATTERIES AND A -- PRIOR AG BATTERIES AND A PRIOR INDECENT ASSAULT.

AS FAR AS LOOKING AT THE KIND OF CASE THAT THE DEATH PENALTY IS INAPPROPRIATE FOR, AS FAR AS AGGRAVATING CIRCUMSTANCES, CAN YOU -- HOW CAN YOU SAY THIS ISN'T THE MOST AGGRAVATED?

ON A 7-TO-5 DECISION, FIRST OF ALL, I WILL SAY THAT, BECAUSE OF ALL OF THE ERRORS, THIS SHOULD NOT BE A DEATH CASE, BUT IF WE ASSUME THAT NONE OF THOSE ERRORS WERE HARMFUL ERRORS OR THEY WEREN'T PRESERVED, WE BELIEVE THAT, BECAUSE OF THE MITIGATORS, WHETHER STATUTORY OR NONSTATUTORY, THAT WERE BROUGHT UP, THIS IS THE TYPE OF CASE THAT THE COURT SHOULD NOT HAVE FOLLOWED THE JURY'S WEAK 7-TO-5 RECOMMENDATION.

BUT ON THE OTHER HAND, I MEAN, YOU TALK ABOUT HE HAD AN ATTENTION DEFICIT DISORDER, WHICH THE TRIAL JUDGE, I BELIEVE, GAVE LITTLE WEIGHT TO.

LITTLE WEIGHT TO O YES.

ESPECIALLY IN VIEW OF -- LITTLE WEIGHT TO, YES.

ESPECIALLY IN VIEW OF THE FACT THAT THIS MAN HAD AN IQ OF 107, WHICH IS IN THE TOP 90 PERCENTILE OF IQ'S. THIS IS NOT THE KIND OF CASE THAT WE NORMALLY SEE WITH PEOPLE WITH 65 IQ'S AND, YOU KNOW, HAD ALL THESE PROBLEMS ALL THEIR LIVES.

CORRECT, BUT WE, ALSO, HAVE SOMEONE WHO WAS AN ABUSED CHILD, WHO HAD A BORDERLINE PERSONALITY DISORDER, WHO HAD EMOTIONAL PROBLEMS, HAD ATTEMPTED SUICIDE, BROUGHT IN ALL OF THE EVIDENCE THAT HE IS A LOVING ON BROTHER AND A LOVING GRANDSON AND A LOVING GREAT GRANDSON.

I WOULD THINK THERE IS SOMETHING, YOU KNOW, WHEN WE SEE THESE MITIGATING CIRCUMSTANCES, I MEAN, YOU SAY IT IS MITIGATING, BECAUSE HE IS A LOVING PERSON, AND IT IS MITIGATING, BECAUSE HIS FAMILY LOVES HIM, AND IT JUST -- IT IS HARD TO UNDERSTAND

HOW ALL OF THIS CAN BE MITIGATING, WHEN THAT IS WHAT WE EXPECT. THAT IS THE NORMAL THING THAT GOES ON, IN SOCIETY, IS THAT PEOPLE HAVE PARENTS WHO LOVE THEM AND SIBLINGS WHO LOVE THEM, AND THEY, IN TURN, LOVE THEIR SIBLINGS. YOU KNOW, YOU WANT THE ABUSE TO BE MITIGATING AND YOU WANT THE GOOD THINGS THAT GO IN THEIR LIVES TO BE MITIGATING, ALSO, AND I GUESS I HAVE A HARD TIME TRYING TO FIGURE OUT WHICH IS MITIGATING, AND HOW DO YOU FIGURE OUT WHICH, TRULY IS MITIGATING, BECAUSE THERE WAS SOME OF THESE THINGS THAT THE TRIAL JUDGE SAID THAT HE DIDN'T FIND WAS ESTABLISHED BY THE EVIDENCE.

CORRECT. IT IS MY CONTENTION THAT, IN THIS CASE, THE NUMBER OF MITIGATORS SHOWED THAT THIS IS NOT THE TYPE OF PERSON THAT WE SHOULD TAKE HIS LIFE.

BUT HAVEN'T WE, ALWAYS, SAID --

STICK HIM IN JAIL FOR THE REST OF HIS LIFE.

-- THAT IS A NUMBERS GAME?

IT IS NOT A NUMBERS GAME, AND THAT IS WHY WE HAVE TO LOOK AT MR. PAGAN AS A PERSON AND DR. JAKE ONE AND -- JACOB AND WHAT SHE SAID, AFTER HER INTENSIVE EVALUATIONS OF HIM. CONTRARY TO WHAT YOU JUST SAID, AS DEFENSE LAWYER, I STAND UP NEXT TO THE DEFENDANT AND I AM THE ONLY PERSON IN THE ROOM, AND I AM ONLY THERE BECAUSE I AM GETTING PAID, BUT THAT ISN'T THE CASE. THIS IS A CASE WHERE YOU HAVE A LOVING FAMILY. YOU SUPPORT THIS INDIVIDUAL. YES, IF HE WAS THE SHOOTER, HE DID SOMETHING TERRIBLE, AND WE HAVE LIFE IN PRISON FOR PEOPLE LIKE. THAT.

BUT ISN'T THERE, ALSO, THE EVIDENCE THAT THE ONE INDIVIDUAL, REALLY, IS JUST A SOCIO-PATH AND HE HAS NO PSYCH OLOTIC KINDS OF -- PSYCHOTIC PROBLEMS, JUST WON'T FOLLOW OAT RULES AND CONTINUES TO NOT, AND, AGAIN, YOU HAVE -- FOLLOW THE RULES AND YOU HAVE THESE MULTIPLE MURDERS. ISN'T THAT THE RATIONALE WAY TO LOOK AT IT?

I THINK THAT THIS IS A DRUG RIP OFF AND DRUGS ARE A DIRTY BUSINESS AND MR. JONES HAD DRUGS AND HE HAD OVER $100,000 IN CASH, BUNDLED UP IN HEAT-PROTECTED PACKETS, AND, YES, THERE WAS A KILLING THERE.

OF A CHILD.

DOESN'T THAT MEAN THE PROPORTIONALITY OF A SIX-YEAR-OLD CHILD MUST DIE AND THAT IS OKAY?

I DON'T THINK IT MATTERED WHAT THE AGE OF THE INDIVIDUALS WERE. WHOEVER WAS THERE, WAS DECEMBER FIND TO BE THE TARGET OF GUNFIRE. BASICALLY IT IS EVERYONE DOWN ON YOUR FACES AND THEN THE GUNFIRE. ONCE THERE IS NO MONEY FOUND. SURE. IT IS A TERRIBLE, TERRIBLE CASE. THERE IS NOTHING I CAN SAY TO GET OVER THAT, OTHER THAN THAT IT IS A SLAM FOR US TO TAKE A EXPAGAN'S LIFE, BECAUSE HE DOES HAVE SOME REDEEMING SOCIAL VALUES AND HE CAN BE A PRODUCTIVE PERSON. HE HAS NEVER BEEN A PROBLEM PERSON IN JAIL. WHILE THE COURT HAD THE OPPORTUNITY TO THE GIVE HIS CONDUCT SOME WEIGHT, YOU HAVE THE OPPORTUNITY TO GIVE IT FULL WEIGHT.

THANK YOU, COUNSEL. THANK YOU, MR. BROWNE. THE COURT WILL BE IN RESAYS. MARROW-IN RECESS. THE MARSHAL: PLEASE RISE.