Jason Brice Looney \Guerry Wayne Hertz v. State of Florida

MR. CHIEF JUSTICE: MR. SELIGER, IT IS MY UNDERSTANDING THAT, BY AGREEMENT, THAT THE, BOTH HERTZ AND LOONEY WILL PRESENT THEIR ARGUMENT, AND THEN THE STATE AND THEN THERE WILL BE REBUTTAL BY HERTZ AND LOONEY. CORRECT?

YES, SIR. WE THOUGHT THAT, SINCE THEY WERE TRIED BELOW, THE CODEFENDANTS, THERE ARE MANY COMMON ISSUES IN THE CASE. MR. CHIEF JUSTICE: THAT IS CERTAINLY AGREEABLE, AND SO THE CASES THAT ARE NOW PRESENTED FOR ARGUMENT ARE HERTZ VERSUS STATE AND LOONEY VERSUS STATE.

MAY IT PLEASE THE COURT. MY NAME IS STEPHEN SELIGER. I AM THE COURT-APPOINTED ATTORNEY FOR MR. HERTZ. JUST CHIEF JUSTICE INDICATED, WE ARE GOING TO ARGUE THESE CASES TOGETHER. SITTING AT THE COUNSEL TABLE IS BARBARA SANDERS, THE ATTORNEY FOR MR. LOONEY. MR. CHIEF JUSTICE: PLEASE KEEP TRACK OF YOUR TIME, SO THAT YOU ARE EACH SHARE THE TIME.

AS I UNDERSTAND IT, WE HAVE AN HOUR BETWEEN US. MR. CHIEF JUSTICE: RIGHT.

AND WE HAVE DIVIDED IT UP AND RESERVED SOME OF IT FOR REBUTTAL REBUTTAL. MR. CHIEF JUSTICE: RIGHT.

OKAY. THANK YOU. I WOULD LIKE TO START OUT OUR ARGUMENT BY TALKING ABOUT, I THINK, THE IMPORTANT SENTENCING ISSUE IN THIS CASE, WHICH IS PROPORTIONALITY, AND IN THAT RESPECT I WANT TO MAKE SURE THAT YOU UNDERSTAND THAT THE PROPORTIONALITY HIM TALKING ABOUT IS THE RELATIVE CULPABILITY BETWEEN THE PARTIES IN THIS CASE WHO WERE CHARGED. THAT WOULD INCLUDE BOTH MR. LOONEY, MR. HERTZ, AND THE THIRD CODEFENDANT, MR. DEMPSY.

ON THIS ISSUE, ARE YOU SAYING, THEN, THAT THE EXACT SAME QUESTION AS FOR MR. LOONEY AND MR. HERTZ?

YES, MA'AM. THE -- THE WAY IT GOT DIVIDED OUT AT TRIAL WAS THEY WERE ALL INDICTED TOGETHER. MR. DEMPSY ULTIMATELY ENTERED A PLEA TO THE FIRST-DEGREE MURDER CHARGE, IN EXCHANGE FOR HIS TESTIMONY AT THE JOINT TRIAL AGAINST MR. LOONEY AND MR. HERTZ HERTZ. DOES THAT ANSWER YOUR QUESTION?

WELL, IF, FOR EXAMPLE, MR. LOONEY WASN'T, AS FAR AS THE EVIDENCE AS TO WHO WAS THE SHOOTER.

RIGHT.

THERE COULD BE DIFFERENCES IN THE RELATIVE CULPABILITY.

THAT'S CORRECT. AND WHAT I WANT TO TALK ABOUT IS THE PRINCIPLE, TO BEGIN WITH, THAT IT IS THE SAME, I THINK. NOW, I THINK THE FACTS ARE SUCH THAT IT WOULD EQUALLY APPLY TO MR. LOONEY AND MR. HERTZ. WHAT YOU HAVE HERE IS YOU HAVE THREE PEOPLE WHO ARE OUT LATE AT NIGHT IN MCCULLOUGH COUNTY AND DECIDE, AT SOME POINT, THAT WE NEED A CAR. WE HAVE BEEN WALKING AROUND FOR A LONG TIME AND WE DON'T WANT TO A WALK ANYMORE. WE NEED A CAR. AND SO PRIOR TO EMBARKING ON THIS TASK, ULTIMATELY ALL

THREE OF THEM HAVE GUNS. SO I MEAN, I THINK WE HAVE AN AGREEMENT THAT THEY ARE ALL GOING TO BE PART OF STEAL AGO CAR, AND THEY ARE ALL ARMED WHEN THEY GO OUT TO ENGAGE IN THIS TASK. I THINK THE EVIDENCE SHOWED THAT MR. DEMPSY HAD HIS OWN GUN AT THE TIME. MR. LOONEY HAD HIS OWN GUN, AND MR. HERTZ WAS SUPPLIED A GUN BY MR. LOONEY, BUT AT LEAST BEFORE THEY GO OUT ON THIS LONG WALKING TREK THAT THEY TAKE, IT ULTIMATELY RESULTS IN THE MURDERS.

AND DO WE KNOW WHO DECIDED THAT WE NEEDED TO HAVE A CAR?

ING IT WAS ONE OF THOSE THINGS WHERE THEY WERE SITTING AROUND TALKING AND THEY HAVE ALL BEEN TOGETHER AND THEY ARE WALKING AROUND AND THEY JUST NEED A CAR.

WE ARE GENERALLY FAMILIAR WITH THE FACTS, BUT I DON'T WANT TO PREVENT YOU, OF COURSE, BUT WHY WOULDN'T, REALLY, THE OPENING DESCRIPTION THAT YOU GAVE, ALL BY ITSELF, BE A JUSTIFICATION, WHEN WE HAVE THREE DEFENDANTS, LIKE THIS, FOR THE STATE, IN ORDER TO HAVE AN INSIDE WITNESS, TO, WHEN ONE OF THEM IS GREG TO PLEAD GUILTY, NOMINALLY TO SAVE HIS LIFE, I ASSUME, IN ORDER TO HAVE THAT KIND OF INSIDE WITNESS, WHICH ONLY ONE OF IT IS THESE DEFENDANTS -- ONE OF THE THREE DEFENDANTS, REALLY, CAN PROVIDE IN A CASE LIKE THAT, WHY WOULDN'T THAT FACTOR ALONE BE SUFFICIENT FACTOR TO JUSTIFY THE DIFFERENT TREATMENT OF THESE THREE DEFENDANTS, TWO OF THEM, OF COURSE, HAVE BEEN SUBJECTED NOT ONLY TO THE RISK OF HAVING THE ULTIMATE PENALTY IMPOSED BUT OF COURSE, RECEIVED IT, BUT WHY WOULDN'T THAT JUSTIFICATION, ALONE, BE ENOUGH TO, UNDER THE LAW, JUSTIFY WHAT THE DISPARITY TREATMENT OF THESE -- THE DISPARATE TREATMENT OF THESE THREE?

I THINK WHAT YOU ARE TALKING ABOUT IS MAKING A DISTINCTION BETWEEN AN EXECUTIVE DEPARTMENT ACT BY THE STATE ATTORNEYS OFFICE, THAT MAY TAKE THE PROPORTIONALITY ARGUMENT OUT OF THE JUDICIAL DETERMINATION OF WHETHER PEOPLE ARE EQUALLY CULPABLE FOR A CRIME SO THEY SHOULD BE PUNISHED THE SAME. I THINK THIS COURT HAS DECIDED IT BOTH WAYS. I THINK, FOR INSTANCE, THERE ARE CASES THAT SAY, IF THE STATE ALLOWS A PERSON TO PLEA, FOR INSTANCE, TO SECOND-DEGREE MURDER, SO THAT THERE IS SOME DETERMINATION THAT THE CULPABILITY AS TO GUILT IS DIFFERENT THAN SOMEONE WHO IS CHARGED AND CONVICTED OF FIRST-DEGREE MURDER, THEN YOU CANNOT COMPARE SENTENCES. BUT THAT IS NOT THE CASE, JUSTICE ANSTEAD. THIS IS A CASE WHERE THE PERSON PLED TO FIRST-DEGREE MURDER, SO THEY WERE EQUALLY CULPABLE AS TO GUILT.

SO IF --

YOU ARE TALKING ABOUT NOT HAVING, YOU KNOW, THAT IT BE -- FIRST OF ALL, THAT IT CAN BE ARBITRARY OR THAT IT IS NOT SUBJECT TO EXAMINATION, BUT HAVING CONSIDERED THOSE TWO THINGS, THAT IT NOT BE ARBITRARY AND THEN THAT WE SUBJECT IT TO EXAMINATION, WHY ISN'T THE PERCEIVED NEED FELT, ON BEHALF OF THE STATE, HERE, TO HAVE A WITNESS THAT THERE IS NOBODY ELSE ELSE THAT CAN FIT INSCRIPTION OF THAT WITNESS, WHO REALLY KNEW WHAT WAS GOING ON HERE, AND WHY WOULDN'T THAT RATIONALE, THEN, BE A REASONABLE AND VALID RATIONALE, UNDER THE LAW, AGAIN, NOT ALLOWING IT TO BE ARBITRARY AND NOT SUBJECTING IT TO, IN OTHER WORDS, HAVING IT SUBJECTED TO JUDICIAL SCRUTINY, BUT SCRUTINIZING IT, WHY WOULDN'T THAT BE A SUFFICIENT FACTOR TO JUSTIFY WHAT OCCURRED HERE AND THE DIFFERENT TREATMENT? OBVIOUSLY THAT ONE OF THE THREE DEFENDANTS RECEIVED.

I THINK THIS COURT HAS TAKEN UPON ITSELF THE CONSTITUTIONAL OBLIGATION TO SAY PEOPLE WHO COMMIT A CRIME AND ARE EQUALLY CULPABLE SHOULD BE TREATED THE SAME. I THINK THAT IS WHAT YOUR CASES SAY, WHEN THE ULTIMATE PENALTY IS DEATH. SO THAT IT IS NOT REASONABLE TO SIMPLY SELECT ONE PERSON OUT OF A GROUP OF THREE AND I DON'T KNOW

THIS, BUT, THEY COULD HAVE SELECTED MR. HERTZ OR THEY COULD HAVE SELECTED MR. LOONEY AS OPPOSED TO MR. DEMPSY, AND IT STILL WOULD HAVE BEEN THE SAME RESULT.

BUT IF THE STATE WOULD HAVE ALLOWED MR. DEMPSY TO PLEAD TO SECOND-DEGREE, ARE YOU SAYING THAT IT WOULD BE DIFFERENT?

I THINK THERE ARE CASES WHERE THIS COURT TALKS ABOUT AN EXECUTIVE BRANCH DECISION THAT TAKES THE CULPABILITY DETERMINATION OUT OF THE FIRST-DEGREE RANGE, HAS A DIFFERENT REVIEW.

IS IT DIFFERENT THAN IF MR. DEMPSY IS FOUND TO BE OR IS EVALUATED, AS THE JUDGE DID, TO BE LESS CULPABLE, THEN YOUR ARGUMENT FAILS, ANYWAY, CORRECT?

IF THIS COURT UPHOLDS THAT FINDING OF FACT, THAT MR. DEMPSY IS LESS CULPABLE, THEN THAT IS A REASONABLE DETERMINATION THAT DISTINGUISHES BETWEEN DEFENDANTS.

SO ARE YOU SAYING, THEN THAT, THE ONLY WAY THAT THE STATE, IN DECIDING WHO THEY ARE GOING TO GIVE A DEAL TO AMONG DEFENDANTS, CAN GIVE A LIFE DEAL TO BUT SEEK THE DEATH PENALTY FOR THE OTHER DEFENDANTS, AS IF THEY CHOOSE THE DEFENDANT WHO IS LEAST CULPABLE.

WELL, I THINK THAT'S RIGHT. I THINK THEY HAVE TO MAKE A DETERMINATION UP FRONT, THAT IF WE OFFER A BARGAIN TO SOMEONE, AND THAT BARGAIN RESULTS IN A LIFE SENTENCE, AND IT TURNS OUT THAT THE OTHER DEFENDANTS ARE EQUALLY OR LESS CULPABLE THAN THE DEFENDANT THEY OFFERED THE BARGAIN TO, THEN THIS COURT SAYS THOSE OTHER DEFENDANTS ARE ENTITLED TO A LIFE SENTENCE. I THINK THAT IS A RISK THE STATE TAKES, BECAUSE THIS COURT HAS AND UNDER TAKES THE CONSTITUTIONAL OBLIGATION TO COMPARE CULPABILITY OF BEHAVIOR, WHEN THE DEATH SENTENCE IS IMPOSED.

BUT WE DON'T DO THAT, IF HE HAS GOT, IF HE -- SO, IT SEEMS TO ME THAT WHAT YOU ARE REALLY SAYING, HERE, IS THAT THE STATE SHOULD GIVE WHICHEVER ONE THEY CHOOSE, THEY CHOOSE TO MAKE THE BARGAIN WITH, A SECOND-DEGREE MURDER, LET HIM PLEAD, HIM OR HER PLEA TO SECOND-DEGREE, AND THEN WE DON'T HAVE THIS PROBLEM.

WELL, I WOULD ARGUE YOU PROBABLY SHOULD HAVE THE PROBLEM BUT WHAT I AM TELLING YOU IS I THINK THE CASES SAY THAT THEY WOULD NOT HAVE THIS PROVEN. I MEAN -- THIS PROBLEM. I DON'T THINK YOU SHOULD BE ABLE TO TAKE TOUT BECAUSE OF THE EXECUTIVE ACTION BY -- TO TAKE IT OUT, BECAUSE OF THE EXECUTIVE ACTION BY A STATE ATTORNEYS OFFICE TO DO THAT, BUT I THINK THERE ARE CASES THAT SAY THAT. I HAVE TO SAY THAT, BECAUSE THERE ARE CASES OUT THERE, JUSTICE QUINCE THAT, SAY THAT.

WHY DO WE TAKE OUT OF THE EQUATION THE NEED TO HAVE AN INSIDE WITNESS AND THE GOOD FAITH OR REASONABLENESS OF THE PROSECUTOR'S DECISION TO DO THIS IN A PARTICULAR CASE, AND HAVE THAT OR THOSE AS ADDITIONAL FACTORS IN ADDITION TO THIS CULPABILITY ANALYSIS? WHY AREN'T THOSE RELEVANT FACTOR TO BE CONSIDERED IN THIS ANALYSIS?

WELL, I AM NOT SAYING MAYBE THEY COULDN'T BE, BUT THAT DOESN'T GO TO WHETHER OR NOT YOU ARE AS CULPABLE AS SOMEBODY ELSE. I MEAN, YOUR CULPABILITY IS DETERMINED ON WHAT YOU DID THAT CAUSED THE KILLINGS. NOT WHETHER, YOU KNOW, TWO YEARS LATER YOU DECIDE TO COOPERATE WITH THE STTE. I MEAN, THAT, I DON'T SEE HOW THAT LESSENS YOUR CULPABILITY FOR THE CRIME.

BUT YOU ARE TAKING OUT OF THAT THE NEED FOR THE STATE TO HAVE CREDIBLE AND SUBSTANTIAL EVIDENCE TO PROVE THE GUILT OF THE PERSONS THAT THEY CHARGED WITH THIS OFFENSE.

AND WE ARE NOT ARGUING ABOUT THE GUILT, JUSTICE ANDTED. -- ANSTEAD. THEY CAN USE THAT TO PROVE THEIR GUILT AND THAT IS FINE. THESE PERSONS COULD HAVE BEEN CONVICTED OF SECOND-DEGREE MURDER AND GOTTEN LIFE SENTENCES JUST LIKE MR. DEMPSY.

WHAT ABOUT THE SITUATION IF, INDEED, THE KILLINGS APPEAR TO BE HEINOUS AND ACTUALLY IN ANY SUPERFICIAL EXAMINATION OF THE KILLINGS THAT OCCURRED HERE, THEY CERTAINLY HAVE THE INITIAL SUPERFICIAL APPEARANCE TO BE HEINOUS, WOULD YOU NOT AGREE?

YES, SIR.

AND THE STATE SAYS, WELL, BUT THE ONLY WAY THAT WE ARE GOING TO BE ABLE TO PROVE THE HEINOUS HEINOUSNESS, IF THAT IS WHAT OCCURRED, IS TO HAVE ONE OF THE, IN THIS CASE, THE THREE, TELL US JUST EXACTLY WHAT WENT ON, SO THAT WE WILL BE ABLE TO PROVE THAT AND SEEK THE ULTIMATE PENALTY AGAINST AS MANY OF THEM AS WE POSSIBLY CAN. WHY ISN'T THAT REASONABLE, EVEN UNDER THE PENALTY ANALYSIS OF THE CASE?

BECAUSE IT ELIMINATES LOOK AT WHAT THE COURT IS OBLIGATED TO DO, WHICH IS TO JUDGE THE CULPABILITY OF THE ACTOR AS TO THEIR PARTICIPATION IN THE CRIME. I AM NOT AWARE OF ANY CASE THAT TALKS ABOUT YOU LESSEN CULPABILITY FOR COOPERATION, IN THE PROPORTIONALITY REVIEW. IT IS JUST NOT, IT IS JUST NOT A FACTOR, BECAUSE YOU LOOK AT WHAT PEOPLE DID AT THE TIME THE CRIME IS COMMITTED.

ISN'T THE STATE SADDLED WITH THE SAME RISK THAT IS INVOLVED HERE, FOR NSTANCE, IF THE STATE PICKS OUT MISTAKENLY, OR DEPENDING ON WHAT THE CIRCUMSTANCES ARE, PERHAPS, SOMEBODY THAT IS CLEARLY MORE CULPABLE IN THE CASE, AND THEY REALLY DIDN'T NEED, IN ORDER TO PROVE THEIR CASE, A PLEA BARGAIN CLEARLY MORE CULPABLE, AND THEN A LESS CULPABLE CODEFENDANT RECEIVES THE DEATH SENTENCE, WOULDN'T THAT BE A DIFFERENT SCENARIO OR DIFFERENT CASE, AND ONE IN WHICH, IF THE STATE TOOK THAT RISK OR GAMBLE, THAT THEY MIGHT NOT PREVAIL ON THAT, BUT THAT, AND THAT IS NOT, THOSE AREN'T THE CIRCUMSTANCES THAT WE HAVE HERE, ARE THEY? WHAT YOU ARE ARGUING, IF I UNDERSTAND IT, IS THAT, AT MOST, THE CODEFENDANT THAT RECEIVED WHAT, TWO BACK-TO-BACK LIFE SENTENCES?

YES, SIR.

IS SIMPLY THAT YOU CAN'T REALLY DISTINGUISH BETWEEN THE THREE. IS THAT --

THAT'S CORRECT. THAT IS EXACTLY RIGHT.

BUT, SO, WE ARE NOT TALKING ABOUT THE STATE HAVING MADE THIS ARRANGEMENT WITH SOMEBODY THAT IS CLEARLY MORE CULPABLE. IS THAT A CORRECT STATEMENT?

YES, BUT I AM NOT SURE HOW THAT FACTORS INTO THE EQUATION, JUSTICE ANSTEAD, BECAUSE IF THEY ARE EQUALLY CULPABLE, THE LAW SAYS TREAT THEM THE SAME!

WELL, YOU HAVE ALREADY SAID THAT, IF THE STATE, WHICH SOUNDS WHOLLY ARBITRARY, THE STATE MADE THIS SAME ARRANGEMENT, AND TWO CONSECUTIVE LIFE SENTENCES, BUT IT HAPPENED TO SAY SECOND-DEGREE INSTEAD OF FIRST-DEGREE, THAT YOU WOULDN'T BE MAKING THIS ARGUMENT.

I DIDN'T SAY THAT, JUDGE. THIS COURT SAID THAT. OKAY. SO, BUT, FOR INSTANCE, YOU --

I HAVE DIFFICULTY WITH THE INTERPRETATION OF THAT DECISION.

OKAY. THIS COURT HAS DEALT WITH CASES WHERE THE STATE HAS BARGAINED WITH

CODEFENDANTS, WHERE A LIFE SENTENCE WAS A RESULT OF THAT BARGAIN, WHERE OTHER CODEFENDANTS WENT TO TRIAL, GOT THE DEATH SENTENCE, AND THEN COMPARED THEIR BEHAVIOR ABOUT WHAT ACTUALLY HAPPENED, WHAT WAS THEIR PARTICIPATION IN THE MURDER. AND FOUND THAT THEY WERE EQUALLY CULPABLE.

OKAY. WELL, HOW ABOUT MOVING ON TO THE ISSUE OF WHETHER THE JUDGE, HERE MADE SOME FINDINGS AND FACT IN WHICH HE ASSERTS THAT THE DEFENDANT THAT RECEIVED THE LIFE SENTENCES WAS NOT AS CULPABLE, IS THAT CORRECT?

THAT'S RIGHT. JUDGE SAULS SAYS THAT.

OKAY. WOULD YOU DEAL WITH THAT.

SURE. JUDGE SAULS SAYS THAT MR. TEMPIES IS CULPABLE. THAT IS INCONSISTENT WITH THE FINDINGS OF THE LIST OF AGGRAVATORS, WHICH, IF YOU LOOK AT THE LIST OF AGGRAVATORS, WHEN HE WRITES HIS SENTENCING ORDER AND HE LOOKS AT WHAT HAPPENED ABOUT THE MURDER, HE TALKS ABOUT IT IN TERMS OF THE DEFENDANT, IN CASE MR. HERTZ AND THE CODEFENDANTS, AND HE SAYS CODEFENDANTS, AND HE IS TALKING ABOUT MR. LOONEY AND MR. DEMPSIES. IN EACH INSTANCE THEIR BEHAVIOR IS THE SAME.

EXCEPT DOESN'T HE, ALSO, INDICATE THAT, AT SOME POINT MR. DEMPSY LEFT THE ROOM, AND IT SEEMS THAT THERE WAS SOME AGREEMENT MADE BETWEEN MR. HERTZ AND MR. LOONEY, THAT THESE PEOPLE WERE GOING TO HAVE TO BE KILLED, AND THEY TELL MR. DEMPSY THAT, WHEN HE COMES BACK INTO THE ROOM. DOES THAT MAKE ANY DIFFERENCE?

WELL, IT WOULD, IF MR. DEMPSY SAID, OKAY, WELL, I AM NOT GOING TO BE INVOLVED. I AM NOT GOING TO PARTICIPATE ANY FURTHER. I AM NOT GOING TO HOLD THE GUN TO SOMEBODY'S HEAD. THE GUN THAT I HAVE, I AM NOT GOING TO USE. I AM NOT GOING TO PARTICIPATE IN THIS CRIME ANYMORE. BUT THE FACT THAT THEY JUST TALK ABOUT IT AND THEN MR. DEMPSY'S RESPONSE ISN'T TO WALK AWAY, AND THE, HIS RECORD IS REPLETE WITH INSTANCES WHERE MR. DEMPSY, IF HE WAS LESS CULPABLE, COULD HAVE WALKED AWAY, MANY TIMES, BUT HE DID NOT.

DIDN'T HE TESTIFY THAT HE WAS THREATENED?

HIS TESTIMONY WAS THAT MR. HERTZ TOLD HIM, ON ONE OCCASION, YOU CAN LEAVE, IF YOU WANT. IF YOU DON'T WANT TO DO THIS, YOU CAN LEAVE. MR. DEMPSY DOESN'T LEAVE. THEN MR. DEMPSEY SAYS, WELL, I HIM GOING TO QUALIFY THAT. YOU CAN LEAVE, BUT THERE IS A BULLET IN IT FOR YOU. BUT READ THE RECORD. THE RECOVERED SAYS, WHEN MR. -- THE RECORD SAYS, WHEN MR. HERTZ IS TELLING HIM THIS, HE IS LAUGHING, AND MR. DEMPSY SAYS I HAVE KNOWN THIS GUY FOR SEVEN YEARS. HE IS PLAYING AROUND. HE DID NOT TAKE THIS THREAT SERIOUSLY, THIS STATEMENT SERIOUSLY.

WELL, WHAT ABOUT, IN TERMS OF CULPABILITY, YOU ARE FOCUSING ON THE ACTUAL CRIME, ITSELF, BUT THEN THE JUDGE, ALSO, MAKES FINDINGS THAT, WITHIN 24 HOURS THAT, THIS DEFENDANT, THIS PARTICULAR DEFENDANT THAT RECEIVED THE PLEA BARGAIN, HAD EXPRESSED REMORSE, HAD GIVEN A FULL CONFESSION, THAT THE PEOPLE AT THE WAL-MART HAD SAID THAT JUST HIS DEMEANOR WAS DIFFERENT. HE DIDN'T HAVE ONE OF THE VEHICLES. THE OTHER TWO DOES. DOES THAT -- THE OTHER TWO DID. DOES THAT, IS IT SIMPLY THAT WE GO TO HOW THE MURDER OCCURRED, OR DO WE, IS THE JUDGE, JUST AS IF THIS PARTICULAR DEFENDANT HAD BEEN TRIED, ENTITLED, IN TERMS OF LOOKING AT WHETHER HE SHOULD GET LIFE AND THE OTHERS GET DEATH, LOOK AT THOSE OTHER FACTORS THAT ARE, WOULD BE MITIGATING CIRCUMSTANCES?

RIGHT. THEY MAY BE MITIGATING CIRCUMSTANCES AS TO A SENTENCE, IF MR. DEMPSY WAS FACING THE PENALTY OF DEATH, BUT THEY DON'T GO TO HIS RELATIVE CULPABILITY AS TO THE

CRIME, BECAUSE THE CRIME IS, I MEAN, YOU LOOK AT THE FACTS OF WHAT HAPPENED, AND WHAT PEOPLE DID, IN COMMITTING THE CRIME.

BUT WE, ALL THE TIME, SAY THAT, IF THERE ARE GREATER -- THERE COULD BE CULPABILITY, BUT IT THERE IS GREATER MITIGATORS FOR ONE DEFENDANT THAN THE OTHER THEN THAT, ALSO, FIGURES INTO A PROP ORTIONALITY ANALYSIS, DOES IT NOT?

WELL, YES, MA'AM. IT WOULD BE, BUT NOT IN PROPORTIONALITY, IN TERMS OF DECIDING THE RELATIVE CULPABILITY OF THE ACTOR OF THE CRIME. I THINK THAT IS THE DIFFERENT PROPORTIONALITY QUESTION, IS --

WHAT IF THE JURY HAD RECOMMENDED, FOR INSTANCE, THEY HAD ALL THREE BEEN TRIED AND THEN THE JURY RECOMMENDED LIFE FOR THIS PARTICULAR DEFENDANT, AFTER HEARING THAT HE HAD REMORSE AND WHATEVER, OKAY.

WELL, THEN, THAT, THIS COURT AFFORDS THAT RECOMMENDATION VERY SPECIAL TREATMENT. UNDER ITS CASES. I MEAN, AND, BUT, THIS COURT STILL WOULD NOT ABROGATE ITS CONSTITUTIONAL OBLIGATION TO COMPARE THE CONDUCT, EVEN IF THE JUDGE, BECAUSE THERE ARE CASES WHERE THE JUDGE HAS IMPOSED, WHERE A JURY HAS RECOMMENDED LIFE AND THE JUDGE IMPOSES LIFE, AND A JURY RECOMMENDS DEATH IN. THE CASE, AND THE JUDGE IMPOSES DEATH. THIS COURT STILL COMPARES THE BEHAVIOR.

WELL, IN COMPARING, THOUGH, AND THEN PRESUMABLY THAT DEFENDANT, IN PERHAPS GIVING A CONFESSION, IN COOPERATING WITH THE POLICE, SUBMITS THAT AS A MITIGATING FACTOR, IN ARGUING TO THE JURY FOR A LIFE RECOMMENDATION, WOULD WE CONSIDER THAT, TOO?

YES, SIR. THAT WOULD CERTAINLY BE ANY OTHER FACT THAT THE JURY COULD CONSIDER.

WELL, THEN, WHAT IS THE DIFFERENCE BETWEEN WHAT IS GOING ON HERE AND BETWEEN WHAT WOULD BE GOING ON IN A SITUATION LIKE THAT?

I STILL DON'T UNDERSTAND HOW THAT WOULD AFFECT YOUR CULPABILITY FOR THE CRIME. IS THAT AFTER THE CRIME, AND ACTUALLY THIS IS NOT COMPLETELY FACTUALLY ACCURATE. THE FIRST STATEMENT THAT MR. DEMPSY GIVES TO LAW ENFORCEMENT, MR. DEMPSY AGREES HE LIED.

BUT YOU WOULD BE SAYING THAT, IN THAT SCENARIO THAT, IF THE JURY RECOMMENDED LIFE FOR ONE, THAT THAT AUTOMATICALLY WOULD BE LIFE FOR ALL THREE.

IF THEY WERE EQUALLY CULPABLE CULPABLE. JUSTICE ANSTEAD.

DESPITE THESE DIFFERENCES ABOUT GIVING A CONFESSION OR COOPERATING OR HAVING REMORSE OR ANY OF THAT.

WELL, I MEAN, I THINK THEY ALL EXPRESS REMORSE IN THIS RECORD, JUSTICE ANSTEAD. I THINK, IN THIS RECORD, THEY ALL GAVE STATEMENTS THAT THEY PARTICIPATED IN THIS CRIME. I DON'T SEE THOSE AS MEANINGFUL DISTINCTIONS IN THIS RECORD.

MR. SELLINGER, BE REMINDED OF YOUR TIME.

YES. THANK YOU.

MAY IT PLEASE THE COURT. I AM BARBARA SANDERS, AND I REPRESENT MR. JASON LOONEY. JUST BECAUSE IT WAS WHAT WE WERE SPEAKING OF JUST A MOMENT AGO, JUST REALLY BRIEFLY, I THINK JUSTICE PARIENTE, YOU COULD SAY THAT THERE IS EVEN DISTINCTIONS FACTUALLY,

BETWEEN MR. LOONEY AND MR. HERTZ. I, SINCE WE ARE JOINTLY ARGUING I DON'T WANT TO LET THAT BY, AND THESE ARE THINGS ABOUT WHO WENT AND GOT THE GASOLINE, WHO HELD WHO DOWN, WHO STARTED FIRING, ET CETERA, SO THE COURT IS GOING TO HAVE THE OBLIGATION TO REVIEW THE RECORD CAREFULLY, TO MAKE THAT PROPORTIONALITY DECISION.

WELL, ARE YOU ARGUING THAT YOUR CLIENT IS, BECAUSE LESS CULPABILITY IS, THEN, A DIFFERENT SITUATION. ARE YOU ARGUING THAT MR. LOONEY IS LESS CULPABLE, BASED ON THE FACTS, THAN MR. HERTZ? I REALIZE YOU ARE IN A DIFFICULT SITUATION, BECAUSE THE CASE WAS TRIED TOGETHER, AND YOU ARE ON APPEAL HERE.

I THINK, AS TO EACH INDIVIDUAL ACT THAT, SOME WERE MORE CULPABLE THAN OTHERS, AND THAT WHEN YOU LOOK AT IT AS A WHOLE, THEY ARE EQUALLY CULPABLE BECAUSE IT WAS JOINT ENDEAVOUR, BUT WHEN YOU LOOK AT EACH SPECIFIC HEINOUS ACT, WHO DID WHAT, YOU ARE GOING TO FIND SOME UP HERE, SOME DOWN HERE, AND YOU HAVE TO LOOK AT IT AS AN OVERALL PICTURE.

YOU SAID THE OVERALL PICTURE, THOUGH, COMES OUT TO EQUAL.

EQUAL. YES. YES.

RESPONSIBILITY.

YES.

AND YOU WOULD AGREE WITH CO-COUNSEL'S, REALLY, INDICATION THAT THE STATE SORT OF PROCEEDS AT ITS PERIL, IF IT TAKES ONE OF THE CODEFENDANTS, IN ORDER TO BUILD A BETTER CASE, AND ALLOWS THAT CODEFENDANT TO PLEA AND GIVE THEM LESS THAN THE DEATH SENTENCE.

I THINK THAT IS ABSOLUTELY THE WAY TO SAY IT. THEY PROCEED AT THEIR PERIL.

THEY ARE STUCK WITH WHAT IS LEFT. EVERYONE HAS TO GET A LIFE SENTENCE.

AND THAT IS BECAUSE IT HAS TO COME TO THIS COURT, AND YOU ALL HAVE TO DECIDE ARE THEY DIFFERENT OR ARE THEY EQUAL, AND YOU WILL FIND, IN THIS RECORD, FOR EXAMPLE, EXPRESSIONS OF REMORSE. THERE WERE CONFESSIONS. THEY WEREN'T USED IN THE TRIAL, BUT YOU WILL FIND IN THE PAPER RECORD OF THE, YOU KNOW, THE CLERK, THAT THERE WAS MOTIONS TO SUPPRESS STATEMENTS, ET CETERA, AND THERE WERE STIPULATIONS THAT PREVENTED THAT FROM COMING INTO EVIDENCE, BUT WHEN YOU LOOK IN TERMS OF HOW THESE PEOPLE ACTED AFTER THAT CRIME, THEY ALL CONFESSED, AND THEY ALL EXPRESSED REMORSE.

DID THE JUDGE MAKE A FINDING AS A MITIGATE OR, FOR EITHER YOUR CLIENT OR MR. HERTZ, OF REMORSE AS A MITIGATOR?

YES. AS TO MR. LOONEY, I KNOW FOR SURE THERE WAS THAT FINDING. AND I WANT TO SAY YES TO MR. HERTZ. MR. LOONEY, FOR EXAMPLE, WAS CRYING, FOR EXAMPLE, DURING THE VICTIM IMPACT PRESENTATION.

I THOUGHT THE JUDGE SAYS AS TO ONE HE THOUGHT THE CRIME WAS MORE FOR THEIR PERSONAL SITUATION THAN FOR REMORSE FOR WHAT THEY DID. NOW THAT I REMEMBER THAT.

I THINK THE JUDGE, I THINK THE JUDGE DOES SAY THAT AND DOESN'T WEIGH IT AS SOMETHING THAT WOULD DETRACT FROM THE IMPOSITION OF THE DEATH PENALTY. I WANTED TO ADDRESS, BASICALLY, THE ADMISSION OF THREE DIFFERENT CATEGORIES OF EVIDENCE IN THE CASE. AND THAT, WITH THE ULTIMATE CONCLUSION THAT THAT IS CUMULATIVE ERROR THAT WOULD

REQUIRE REVERSAL IN THIS CASE. THE FIRST IS THE PICTURES OF THE CRIME SCENE AND THE AUTOPSY. THE SECOND IS THE INTRODUCTION OF THE NONTESTIFYING CODEFENDANTS EYE JAILHOUSE STATEMENT -- CODEFENDANT'S JAILHOUSE STATEMENT, AND THE THIRD IS THE EVIDENCE OF THE COLLATERAL CRIMES.

THERE ARE CERTAIN EXHIBITS THAT WERE APPARENTLY NOT SUPPOSED TO GO INTO EVIDENCE THAT WENT INTO EVIDENCE.

YES, YOUR HONOR.

WE DON'T HAVE THOSE IN THIS RECORD. DO YOU KNOW WHAT THE STATUS IS OF THOSE?

I KNOW OUTSIDE THE RECORD, WHAT I HAVE BEEN TOLD, BUT I, FROM YOUR --.

HOW DO WE EVALUATE WHAT WENT BEFORE THE JURY, TO HAVE IT --

EXACTLY. EXACTLY. FIRST OF ALL, JUST IF YOU LOOK AT THE RECORD, IT IS AROUND PAGE 1584, WHERE THIS STARTS. AND THE STATE PRESENTS FIVE PHOTOGRAPHS OF THE AUTOPSY, TWO OF WHICH ARE MR. SPEARS AND THREE OF WHICH ARE MS. KING. AND HE PRESENTS IT AT SIDE BAR, SO IT IS NOT IN THE PRESENCE OF THE JURAT THAT POINT. THE -- OF THE JURY, AT THAT POINT. THE DEFENSE OBJECTS, THAT THEY ARE NOT RELEVANT, BECAUSE THE MIGHT NOT IS NOT GOING TO NEED THEM, AND THEY ASK FOR VOIR DIRE DIRE. THE TRIAL JUDGE DENIES THE DEFENSE, FIRST OF ALL, THE RIGHT TO VOIR DIRE, IMMEDIATELY, TO SEE IF HE IS GOING TO -- THE ME, TO SEE IF HE IS GOING TO NEED THESE PICTURES, SO THEN THE STATE SHOWS 39-D AND 39-E. THEY ARE USING WHAT IS DESCRIBED AS THE DOA RMPLT SYSTEM, FROM THE -- THE DOAR SYSTEM. FROM THE RECORD IT APPEARS THAT THE JURY IS SEEING THESE THINGS, SO THEY ARE PUBLISHED. THEN, WHEN THE M.E. DOESN'T, IN FACT, USE THE PICTURES TO TALK ABOUT WHAT HE DESCRIBES THE PICTURES IN GREAT DETAIL, BUT HE DOESN'T USE THEM TO SHOW WHAT HIS TESTIMONY, TO ILLUSTRATE HIS TESTIMONY, THE DEFENSE RENEWS ITS OBJECTION TO THE PHOTOGRAPHS. AND, AGAIN, THE STATE, THEN, PUBLISHES 39-E. THE STATE, THEN, GOES ON AND SHOWS 39-A, B AND C, WHICH IS SPEARS. THE M.E. DESCRIBES THOSE, AND THEN THE STATE MOVES IN ALL FIVE OF THE PHOTOGRAPHS. THEY PUBLIC 39-A, WITH A GREAT DESCRIPTION BY THE M.E. OF THE DETAILS, AND 39-B, AGAIN, WITH THE DESCRIPTION OF THE DETAILS OF THE PICTURES. ON THE NEXT DAY, WHICH IS DAY TWO OF THE TRIAL BEFORE THE TRIAL AGAINST, THE PROSECUTOR COMES IN AND SAYS I WOULD LIKE TO WITHDRAW THREE OF THE EXHIBITS, 39-B, WHICH HAD BEEN PUBLISHED, 39-C, AND 39-E, WHICH HAD BEEN PUBLISHED, FROM THE EVIDENCE. WHEN I READ THAT TO BE HONEST WITH YOU, I THOUGHT IT MEANT DON'T SEND IT TO THE JURY. IT NEVER OCCURRED TO ME THAT IT MEANT DON'T LEAVE IT IN THE RECORD. BECAUSE IT HAD ALREADY BEEN PUBLISHED. THE COURT GRANTS THAT WITH THE CONCURRENCE OF THE DEFENSE, AND IF YOU PLACE YOUR SELF IN THE POSITION OF THE DEFENSE ATTORNEYS, THEY ARE SAYING, SURE DON'T SEND IT BACK. THAT IS FINE WITH US. THEY DO SEND PHOTO 39-A AND 39-D THE SMALLER VERSIONS BACK TO THE JURY, SO OF THOSE FIVE-C, WHICH WOULD BE MISS KING, WAS NOT EVER SHOWN, NOT EVER SENT BACK, AND HAS DISAPPEARED FROM THE RECORD, SO WHAT YOU DON'T HAVE IS B, C AND E. AND IF YOU WOULD LIKE TO KNOW JUST EXTRA RECORD, MY UNDERSTANDING IS THAT THOSE ARE IN THE POSSESSION OF THE STATE ATTORNEY, BUT I DON'T KNOW HOW TO DO THAT, HOW THAT COMES IN BEFORE THE COURT AND EVALUATION. SO MY POSITION IS THAT I HAVE MET MY BURDEN OF SHOWING THAT THE PICTURES WERE NOT RELEVANT, AND THAT THEY WERE GRUESOME, JUST FROM THE DESCRIPTION OF THE M.E. IN THE RECORD, AND THAT IT WOULD BE INCUMBENT UPON THE STATE --

THE MEDICAL EXAMINER DID, IN FACT, DURING HIS TESTIMONY, DESCRIBE WHAT WAS IN ALL FIVE OF THESE PICTURES?

ALL EXCEPT C.

ALL.

ALL EXCEPT C.

> AND C IS ONE OF THOSE THAT IS NOT --

IT IS DISAPPEAR AND DID NOT GO TO THE JURY. IT DIDN'T GO TO THE JURY AND IS NOT NOW IN THE RECORD BEFORE THIS COURT AND APPARENTLY IS NOT IN THE POSSESSION OF THE CLERK OF COURT OF THE COUNTY, EITHER.

IS IT UNDISPUTED IN THIS CASE THAT THE VICTIMS DIED FROM BULLET WOUNDS, WITHIN A MINUTE OR TWO OF THE INFLICTION OF THE BULLET WOUNDS?

YES, SIR.

THAT THE BURNING OCCURRED WELL AFTER THAT?

THE MEDICAL, THE STATE'S EVIDENCE FROM THE MEDICAL EXAMINER IS CLEAR THAT, BECAUSE THERE IS NO SOOT IN THE LUNGS, THAT THE VICTIMS DID NOT LIVE AFTER THE FIRE WAS STARTED.

AND THERE WAS NO CONTRARY EVIDENCE OF THAT.

NO CONTRARY EVIDENCE. ABSOLUTELY NONE.

AND THEN WHAT WAS THE POSITION ADVANCED BY THE STATE, FOR THE USE OF PHOTOGRAPHS THAT SHOWED THE EFFECTS OF THE BURNING?

I DO WANT TO MAKE SURE WE UNDERSTAND THERE IS A CRIME SCENE PHOTO, WHICH IS 1-C, AND THEN WE HAVE THESE AUTOPSY AND THE AUTOPSY PHOTOS THAT ARE SEPARATELY. THE POSITION OF MS. SNURKOWSKI ON APPEAL OR AT THE TRIAL?

BOTH.

OKAY. WAS THAT THEY WERE RELEVANT TO SHOW THE EXTENT OF THE DAMAGE TO THE BODIES. NOW, THEY SAID THAT, IN TERMS OF EXTENT OF INJURIES. OUR POSITION IS THAT, IF THEY WERE ALREADY DEAD BY THE TIME THE FIRE STARTED, THAT IS IRRELEVANT. WHAT THE EXTENT OF THE DAMAGE TO THE BODIES IS, IS NOT RELEVANT TO WHAT THE JURY HAD TO DECIDE. YOU KNOW. WHAT WAS THE CAUSE OF DEATH. WHAT WAS THE DEATH. WHO DID THE CRIME. WHO COMMITTED THE CRIME. AND I DON'T WANT TO, I HATE TO STATE MS. SNURKOWSKI'S ARGUMENT, BUT BASICALLY THAT WAS RELEVANT TO ILLUSTRATE THE TESTIMONY OF THE M.E.. AND OUR POSITION IS IT IS NOT RELEVANT TO ILLUSTRATE, THE M.E. M.E.'S TESTIMONY WENT ON AT LENGTH OF WHAT WAS IN THE PICTURES, BUT WHAT HE NEEDED TO TESTIFY TO WAS CAUSE OF DEATH, AND THEY WEREN'T RELEVANT AT ALL TO THAT.

AND WAS THERE OBJECTION TO THE ACTUAL TESTIMONY FROM THE MEDICAL EXAMINER, CONCERNING THESE PICTURES?

THERE WAS THE, AGAIN, THE INITIAL OBJECTION AND REQUEST FOR VOIR DIRE, WHICH WAS DENIED, ONCE THE M.E. TESTIFIED, THERE WAS THE SECOND OBJECTION AS TO THE PICTURES COMING IN, BECAUSE HE DIDN'T USE THEM IN HIS TESTIMONY AS THE CAUSE OF DEATH, BUT NOT AS TO THE ACTUAL TESTIMONY. THERE WAS NO REQUEST THAT HIS TESTIMONY BE STRICKEN ABOUT THE DESCRIPTION OF THE PICTURES.

WELL, WAS THERE SOME EVIDENCE THAT WAS DISCUSSED, WITH REGARD TO TRAJECTORY OF

BULLETS?

NONE.

WAS THERE ANYTHING WITH REGARD TO THE FINDING OF BULLET FRAGMENTS OR ANYTHING, WHAT WAS NECESSARY TO TRACE IT TO THE GUNS OR ANYTHING LIKE THIS?

NONE. NONE.

NOTHING LIKE THAT AT ALL.

AND SEE, WHAT HAPPENED, THE REASON FOR THAT, AND THIS IS WHAT THE STATE WOULD ARGUE, I THINK, IS THAT THE ARSON DETERIORATED THE CRIME SCENE TO SUCH AN EXTENT THAT, WHAT THE CRIME SCENE TECHNICIANS HAD TO DO WAS GET UNDER THE BED AND SIFT, FIND DEBRIS, TO FIND BLOBS OF METAL, SO YOU DIDN'T HAVE A GOOD, CLEAN CRIME SCENE, WHERE YOU ARE GOING TO SEE WHERE A BULLET GOES AND SEE WHERE IT LANDS IN A DOOR OR WHATEVER. YOU DON'T HAVE ANY OF THAT KIND OF EVIDENCE. IT IS ALL BECAUSE OF THE DETERIORATION OF THE CRIME SCENE BY THE ARSON.

WAS IT NECESSARY TO DISCUSS THAT, TO SHOW WHAT HAD HAPPENED TO THE I HAVE HAD EVIDENCE AND WHAT -- TO THE EVIDENCE AND WHAT HAD HAPPENED TO THESE PIECES OF METAL? IS THAT A VIABLE BASIS OR IS THAT NOT AN APPROACH?

THERE, YOU CAN TELL BY READING THE RECORD, THAT WHAT THE STATE IS STRUGGLING WITH, IS THEY ARE ANTICIPATING A DEFENSE ARGUMENT THAT THERE IS LACK OF EVIDENCE ABOUT JUST THAT, WHICH GUNSHOT WHO, AND WHAT WAS THE TRAJECTORY, ET CETERA. BUT THEY DON'T THERE IS A YET, UNTIL THEY HAVE DEMPSY ON THE STAND, SO AT THE TIME THEY ARE ADMITTED, THEY ARE IRRELEVANT, AND THERE IS NO QUESTION THAT THERE IS IRRELEVANCE, AND I THINK THE STATE ADMITS THEY ARE IRRELEVANT, WHEN THEY COME IN A THE NEXT DAY AND SAY WE WANT THEM BACK. WE AT LEAST WANT THREE OF THEM BACK. I THINK THAT IS AN ADMISSION BY THE STATE THAT THEY DIDN'T, SHOULDN'T HAVE GONE TO THE JURY, BECAUSE THEY WEREN'T RELEVANT, BUT, YES, TO SOME EXTENT, I THINK THE STATE IS TRYING TO ANTICIPATE A DEFENSE ARGUMENT, MAYBE, IN CLOSING, EVEN, THAT THERE WOULD BE A LACK OF EVIDENCE. AGAIN, THOUGH, AT THAT POINT THEY DID THEM, THEY ARE NOT RELEVANT. SO WE THINK THAT THE STATE ADMITTED IT, ADMITTED THE ERROR, AND NOW THE BURDEN IS ON THE STATE TO SHOW WHY IT IS NOT HARMFUL ERROR, AND THEY HAVEN'T DONE THAT, I DON'T THINK, IN THE BRIEF. THEY JUST MAKE THE ASSERTION.

WELL, ON THAT PARTICULAR POINT, WHY IS IT HARMFUL, IF, IN FACT, THE STATE WITHDREW THE PICTURES, THEY DID NOT GO BACK INTO THE ROOM WITH THE JURORS, THE MEDICAL EXAMINER DISCUSSED AND DESCRIBED THESE PICTURES, AND THERE WAS NO OBJECTION TO HIS ACTUAL TESTIMONY CONCERNING THE PICTURES, SO WHY ISN'T IT HARMLESS THEN?

THE PICTURES WERE EXHIBITED TO THE JURY, ON THE 36-INCH SCREEN, THE DOIR SCREEN, SO WHETHER THEY WENT BACK OR NOT, THREE OF THEM, THEY WERE, TWO OF THOSE THREE WERE SHOWN TO THE JURY. IN TERMS --

I HIM SORRY. HOW IS THIS PRESERVED? -- I AM SORRY. HOW IS THIS PRESERVED? SINCE WE DON'T HAVE THE PHOTOGRAPH, DOES THE DEFENDANT AGREE ALLOW THE STATE TO WITHDRAW THEM OUT OF THE EVIDENCE.

FROM THE EVIDENCE.

OUT OF, HOW CAN WE TELL WHETHER, HOW BAD THE PHOTOGRAPH IS VERSUS THE TESTIMONY THAT THE MEDICAL EXAMINER GAVE?

I DON'T THINK YOU CAN. BUT I THINK THAT THAT MEANS THAT --

IS THAT BURDEN?

NO. THAT IS THE STATE'S BURDEN. I THINK THAT THE DEFENSE HAS PRESERVED THE ERROR OF THE IRRELEVANCY, AND THE ERROR OF THE GRUESOMENESS, STRICTLY FROM THE WORDING OF THE WAY THE M.E. DESCRIBES IT. AND THAT, IF THE STATE, THEN, WANTED TO COME FORWARD AND SAY, COURT, YOU SHOULD LOOK AT THE PICTURES, YOURSELF, AND MAKE A DETERMINATION FOR YOURSELF, WHETHER OR NOT THEY ARE GRUESOME THEN THE STATE IS FAILING IN PRESERVING THE RECORD FOR THIS COURT TO REVIEW. ALL YOU KNOW, FROM THIS RECORD, IS THAT THE PICTURES WERE DESCRIBED IN DETAIL, GRUESOME DETAIL, SHOWN TO THE JURY, SO THE STATE HAS PREVENTED, BY ALLOWING, BY REMOVING THE PICTURES NOT ONLY FROM THE EVIDENCE BUT, ALSO, FROM THE RECORD, HAS PREVENTED THIS COURT FROM MAKING A DETERMINATION THAT THEY WEREN'T GRUESOME, THAT IT WASN'T HARMLESS ERROR, THAT IT IS HARMLESS ERROR.

DO WE HAVE ANY PLEADINGS DIRECTED TO ANY CONSTRUCTING THE RECORD OR COMPELLING SOMEONE TO PUT PHOTOGRAPHS IN THE RECORD? HAS THERE BEEN A FIGHT OVER THERE -- OVER THIS?

A SHORT FIGHT. I FILED A NOTION SUPPLEMENT THE RECORD. ACTUALLY THIS COURT ORDERED THE CLERK TO SUPPLEMENT INITIALLY, AND THEY SENT UP 39-D. ORIGINALLY HE HAD 39-A. YOU SENT THE ORDER. THEY SENT 39-D. I TEN FILED A MOTION TO SUPPLEMENT WITH B, C AND E, AND THE COURT GRANTED MY MOTION, ORDERED THE CLERK TO DO SO, AND I HAVE NOT SEEN IT WITH MY OWN EYES, BUT I UNDERSTAND THERE IS A PLEADING BACK OR A LETTER BACK FROM THE CIRCUIT COURT CLERK THAT SAYS WE DON'T HAVE THEM.

I MEAN, IT REALLY WASN'T TESTED AS TO WHETHER IT IS OR ANYTHING LIKE THAT, AS YOU WOULD NORMALLY FIND. YOU WOULD HAVE A HEARING AND SOMEONE WOULD SAY WE DON'T HAVE THEM, SO YOU DIDN'T HAVE THAT IN THIS CASE.

NO, SIR. NO.

OKAY.

IT WASN'T.

WELL, WE HAVE A STATE OF THE RECORD THAT SEEMS TO INDICATE PRETTY CLEARLY THAT THESE DEFENDANTS COMMITTED THESE CRIMES, AND I MEAN, THIS IS NOT A PURELY CIRCUMSTANTIAL EVIDENCE CASE OR ANY OF THAT, AND SO I -- WHY ARE THESE PICTURES HARMFUL? WHY DO YOU BELIEVE WE SHOULD HAVE A REVERSAL OF THIS CONVICTION, BASED ON ADMISSION OF THESE PICTURES?

I THINK FIRST, THAT IT IS THE STATE'S BURDEN TO PROVE THAT IT IS HARMLESS.

WELL, I WANT YOU TO TELL ME, EVEN IF IT IS THE STATE'S BURDEN WHAT IS IT ABOUT THIS RECORD THAT THESE PICTURES ARE SO IMPORTANT?

OKAY. THAT GOES TO MY CUMULATIVE EVIDENCE ARGUMENT, WHERE I AM SAYING THE PICTURES, THE HEARSAY WHICH CORROBORATES THE GOVERNMENT'S WITNESS, THE STATE'S WITNESS, WAS MY NEXT POINT.

WHAT IS THE HEARSAY?

THAT IS WHERE MR. HATHCOCK, A PERSON IN JAIL, GETS ON THE STAND THERE. IS A STIPULATION

THAT HE IS NOT GOING TO USE ANYTHING THAT MR. HERTZ SAID THAT WOULD IMPLICATE LOONEY. HE VIOLATES THE STIPULATION, BY SAYING HERTZ SAID TO ME THAT HE AND HIS TWO CODEFENDANTS WERE INVOLVED IN A MURDER. SO BOOM, RIGHT THERE, YOU GET THE CORROBORATION OF MR. DEMPSY, UNTIL THEN IT IS, AS YOU SAID, JUSTICE ANSTEAD, THERE IS ONLY THE ONE INSIDE GUY, WHO IS GIVING TESTIMONY. NOW HERE IS MR. LOONEY. CAN'T CROSS-EXAMINATION MR. HERTZ, AND THERE ARE TWO INSIDE GUYS, ALL OF A SUDDEN, BECAUSE WE HAVE GOT THIS NONTESTIFYING CODEFENDANT STATEMENT, SAYING NOT ONLY DOES DEMPSY SAY THAT BUT HERTZ SAYS THAT. THAT THERE ARE TWO PEOPLE. SO THAT IS THAT ARGUMENT. THAT IS THAT ERROR. STATED -- THE STATE ADMITS THAT IT IS ERROR. ONCE AGAIN THEY SAY THAT IT IS INADVERTENT AND THAT IT SHOULD BE HARMLESS. THEY ADMIT IT IS ERROR. THE TRIAL JUDGE TRIES CURE, THERE IS A MOTION FOR MISTRIAL. THE TRIAL JUDGE TRIES TO CURE THE ERROR, BY INSTRUCTING THE JURY TO DISREGARD MR. HATHCOCK'S TESTIMONY IN TOTO, SO NOTHING HE SAYS COMES IN, OF COURSE. IF YOU LOOK BACK BEYOND THAT, THERE IS REALLY NO REASON TO HAVE HAD MR. HATHCOCK ON THE STAND, ANYWAY. ANYTHING ELSE HE SAYS IS NOT RELEVANT. THAT IS ERROR NUMBER TWO. ERROR NUMBER THREE, THEN, IS THE FOCUS OF THE COLLATERAL CRIMES IN VOLUSIA COUNTY, SO 24 HOURS LATER, HERE IS MR. LOONEY, MR. HERTZ, AND MR. DEMPSY, BASICALLY ATTEMPTING TO MURDER POLICEMEN, TO GET AWAY, IN STOLEN VEHICLES VEHICLESS.

BUT THE EVIDENCE OF FLIGHT, YOU AGREE, CERTAINLY CAN BE PART OF THE EVIDENCE TO COME IN.

BUT.

AND CERTAINLY EVIDENCE OF RESISTANCE AND CERTAINLY THAT CAN COME IN.

I THINK IT HAS TO BE FLIGHT FROM THAT CRIME. IF THEY HAD STOPPED THEM, FOR EXAMPLE, COMING OUT OF WAKULLA COUNTY AND GOING INTO LEON COUNTIES THAT WOULD BE FLIGHT FROM THAT CRIME. WHAT ARE THEY FLEEING FROM IN VOLUSIA COUNTY YOU? THEY ARE THEY ARE FLEEING FROM A LAW OFFICER TRYING TO MAKE A TRAFFIC STOP.

WAS THE STOP BASED ON THE FACT THAT THE VEHICLE WAS THE STOLEN VEHICLE?

YES. UM-HUM.

WHICH WAS A PART OF THE CRIME.

YES. BUT WE ARE TALKING ABOUT USING IT AS EVIDENCE OF GUILT OF THE MURDER. THEY AREN'T CHARGED WITH STEALING CARS. NONE OF THE SIX COUNTS --

HOW DO YOU SEPARATE ALL OF THIS? I MEAN, GO ON.

WELL, NOT EASILY. NOT EASILY. BUT WHAT THEY DID WAS MAKE THAT A FOCUS, IN A THREE-DAY TRIAL, THAT, THREE-DAY TRIAL, FIRST, FORENSIC, SECOND DAY IS VOLUSIA, THIRD DAY IS MR. DEMPSY. SO ONE-THIRD OF THE TRIAL ARE THESE COLLATERAL CRIMES, AND BY COLLATERAL CRIMES, I DON'T MEAN CHARGED CRIMES. AGGRAVATED FLEEING AND ALLUDEING. I HAVE MADE A LIST OF THEM. RECKLESS DRIVING. FELONS IN POSSESSION. ALL OF THE BAD THINGS THAT THEY DID, SO YOU HAVE GOT A JURY, NOW LOOKING AT BAD, TERRIBLE CRIMINAL BEHAVIOR IN VOLUSIA COUNTY. YOU HAVE GOT CORROBORATION OUTSIDE OF A STIPULATION, OF THE TESTIFYING CODEFENDANT, BY THE NONTESTIFYING CODEFENDANT, AND YOU HAVE THESE TERRIBLE, TERRIBLE PHOTOGRAPHS.

WHAT WAS YOUR CLIENT'S, WHAT WAS MR. LOONEY'S DEFENSE? DESAY HE WASN'T THERE?

NO. THE DEFENSE DID NOT PUT ON A DEFENSE, SO --

I ASSUMED THERE WAS -- WHAT WAS THE ARGUMENT THEN?

OKAY. WELL, I AM RECONSTRUCTING, I MEAN, SITTING IN THEIR CHAIRS. I THINK THEIR ARGUMENT WAS, ALL ALONG, WE ARE NO MORE CULPABLE THAN DEMPSY. I THINK THEY TRIED THE GUILT PHASE FOR THE PENALTY PHASE. I THINK THERE WAS THE EFFORT TO ATTACK THE CREDIBILITY OF MR. DEMPSY, IN THE GUILT PHASE, WITH THE VIEW THAT WE ARE GOING TO DEFEAT THE DEATH PENALTY IN FRONT OF THE JURY, BECAUSE DEMPSY IS JUST AS BAD. MR. CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL TIME.

THANK, SIR.

MISS SHNEUR NOW SKI.

MAY IT PLEASE THE COURT. I THINK, AND SO I WON'T FORGET, I WOULD LIKE IT TO GET TO THE ISSUES WITH REGARD TO THE PHOTOGRAPHS AND OTHERS THAT MISS SAUNDERS OR SANDERS, EXCUSE ME, TALKED ABOUT FIRST. FIRST OF ALL, I THINK THE RECORD IS ABSOLUTELY CLEAR, WITH REGARD TO WHAT HAPPENED TO THE PHOTOGRAPHS, AND I AM GOING TO GIVE YOU THE RECORD IN THESE TWO CASES. ROCKED ALONG WITH THE SAME PAGINATION FOR A WHILE, AND THEN INTERRUPTED WAS MR. HERTZ'S MOTION FOR COMPETENCY TO STAND TRIAL, SO AFTER THAT PART OF THE RECORD, THE RECORD SPLITS OFF, AS FAR AS PAGINATION, SO THE RECORD CITES THAT I GIVE YOU ARE PROBABLY GOING TO BE FROM THE HERTZ RECORD, AS OPPOSED TO THE LOONEY RECORD, BECAUSE I DID NOT BRING WITH ME MY PAD WITH REGARD TO THE LOONEY RECORD. BUT THE RECORD REFLECTS, ON PAGE I WANT TO SAY IT IS 1712, AND I MARKED IT. SPECIFICALLY THAT STATE ATTORNEY AT THE END OF THE MEDICAL EXAMINER'S TESTIMONY, WITH REGARD TO THE PHOTOGRAPHS, GOT UP AND SAID WE WOULD LIKE TO REMOVE -- IT WAS THE NEXT DAY. WE WOULD LIKE TO REMOVE THREE OF THE FIVE PHOTOGRAPHS INTRODUCED BUT NOT SHOWN TO THE JURY, DURING THE MEDICAL EXAMINER'S TESTIMONY. THE RECORD BEARS OUT THAT THERE WAS A DOAR SYSTEM USED, AND I HAD TO EDUCATE MYSELF A LITTLE BIT WITH REGARD TO WHAT KIND OF A SYSTEM THAT WAS, BUT IT IS APPARENTLY TO BROADCAST, IN DIFFERENT AREAS OF THE COURT, PHOTOGRAPHS BY A TELEVISION CAMERA, AND IN FACT ONLY TWO PHOTOGRAPHS --

IT ENLARGES THE PICTURE.

THROUGH A TELEVISION CAMERA. IN FACT, I, YESTERDAY, WENT TO LOOK AT THE PICTURES THAT THE COURT HAS IN THE COURT FILE, AND PICTURES 39-A AND 39-D, WHICH ARE THE TWO THAT WERE INTRODUCED ARE IN THE COURT FILE. THEY ARE ACTUALLY PROOFS. THEY ARE ABOUT THIS BIG, AND SO THEY WERE USED TO BE ENLARGED THROUGH THIS DOAR SYSTEM THAT APPARENTLY IS AN ABILTY TO MAKE THEM LARGER, WITH REGARD TO --

ARE THOSE THE ONLY TWO PHOTOGRAPHS THAT WERE ENLARGED AND SEEN BY THE JURY?

NO. THE OTHER PHOTOGRAPHS WOULD HAVE BEEN 1-C, WHICH IS A BONE OF CONTENTION, WITH REGARD TO THE FIRE DAMAGE THAT WAS DONE. WHETHER THAT PICTURE REVERSES OTHER PICTURES COULD BE USED WITH REGARD TO THE CRIME SCENE, BUT IF YOU ARE ASKING OF THE AUTOPSY PHOTOGRAPHS, THOSE ARE THE ONLY TWO THAT WERE INTRODUCED TO THE JURY TO BE SHOWN TO THE JURY.

WHAT ABOUT, AGAIN, MAYBE THIS RECORD, I EVER 1594 AND 1600 AS SHOWING THAT EXHIBITS 39-B AND 39-E WERE SHOWN TO THE JURY DURING THE MEDICAL EXAMINER'S TESTIMONY. IS THAT INACCURATE, THE RECORD REFLECTION THEN?

I BELIEVE THAT IT IS, YOUR HONOR. I BELIEVE THAT THE CORRECT REFLECTION COMES FROM THE LIPS OF THE STATE ATTORNEY WHO, WHEN HE GOT UP AND INDICATED TO THE COURT THAT HE

WOULD LIKE TO WITHDRAW THREE OF THE FIVE PHOTOGRAPHS, SAID THAT THEY WERE NOT PUB LIRCKD TO THE JURY, AND THERE WAS NO OBJECTION AT THAT POINT BY EITHER OF THE DEFENSE COUNSEL, WITH REGARD TO THIS.

SO YOU DISPUTE THAT THOSE EXHIBITS THAT WERE 39-B, C AND E WERE SHOWN TO THE JURY.

YES, YOUR HONOR. I THINK THE RECORD BEARS THAT OUT, AND I THINK THE RECORD --

SO WE CAN'T TELL ANYTHING, REALLY, UNLESS WE RELINQUISH TO LET THE TRIAL JUDGE FIGURE THIS OUT.

WELL, I DON'T BELIEVE THAT THAT IS NECESSARY, BECAUSE I THINK THE RECORD DOES BEAR OUT AND IT IS NOT CONFUSING. THERE IS A STATEMENT THAT THE JURY DID NOT SEE THESE PHOTOGRAPHS, AND THAT WAS THE REASON WHY, AND IT WAS OPEN STATEMENT MADE BY THE STATE ATTORNEY TO THE TRIAL JUDGE, IN FRONT OF THE DEFENDANTS, AND THEIR COUNSEL, AND THEY HAD NO OBJECTION TO ALLOWING THE STATE TO DO. THAT -- TO DO THAT.

AND PART OF THAT REQUEST WAS AN EXPLICIT STATEMENT THAT THOSE PHOTOGRAPHS WERE NOT VIEWED BY THE JURY?

THESE ARE MY NOTES, AND NOT THE RECORD PROPER, BUT THESE ARE MY NOTES FROM THE RECORD THAT I REVIEWED, AND I AM SUGGESTING TO YOU THAT, ON PAGE 1712 OF THE HERTZ RECORD, IT REFLECTS THAT. NOW, IT MAY SAY IT A LITTLE DIFFERENTLY THAN HOW MY WORDS ARE HANDWRITTEN FROM READING THE RECORD, BUT I BELIEVE I WOULD NOT HAVE PUT IN THERE, I DON'T THINK, THAT IT WAS NOT SHOWN TO THE JURY, DURING THE M.E.'S TESTIMONY, UNLESS THERE WAS SOME RECORDATION OF THAT, BUT I WILL LET THE RECORD STAND ON THAT.

SO, AGAIN, 1594 AND 1600 SO SHOW THAT THE EXHIBITS THAT WERE -- SHOW THAT THE EXHIBITS MARKED AS 39-B AND E WERE SHOWN, THEN THAT JUST IS AN ERROR IN WHAT THE COURT REPORTER PUT DOWN, IS THAT --

I THINK THERE WAS SOME CONFUSION WITH REGARD TO WHAT EXHIBITS WERE SHOWN, BECAUSE I THINK WE WERE TALKING A LOT ABOUT B, AND IN FACT WHAT CAME IN AND WHAT WAS SHOWN WAS APPARENTLY A DID NOT D, SO -- WAS APPARENTLY "A" AND "".

SO IT WOULD AND SCRIVENER'S ---.

I CAN'T SAY. WHAT I HAVE TO SHOW IS THAT THE RECORDS INTRODUCED INTO THIS RECORD ARE "A" AND "D", AND I MIGHT ADD THAT THE MEDICAL EXAMINER DID, IN MINUTE DETAIL DESCRIBE THE CONDITIONS OF THE BODIES THROUGH THE AUTOPSY PHOTOGRAPHS, BUT HE USED THOSE PHOTOGRAPHS AND IT WAS IN HIS DISCUSSIONS OF WHAT TRANSPIRED T WASN'T THAT HE HAD THE PICTURES THERE AND HE WAS POINTING TO THEM. HE WAS TALKING ABOUT THEM FROM HIS DIALOGUE AS OPPOSED TO THE PICTURES. HE WAS USING THE PICTURES, BUT THEY WERE NOT PUBLISH AT THE TIME.

IN CLOSING ARGUMENT, THERE IS NO QUESTION THAT THESE PHOTOGRAPHS WERE NOT, WERE THEY RESHOWN, PHOTOGRAPHS OF THE BODIES SHOWN TO THE JURY?

NO. NO. NO NO. AND IN FACT, THERE WAS A STATEMENT WITH THE REFLECTION UPON WHAT THE MEDICAL EXAMINER WAS USING, WHY WAS IT REALLY ACTUALLY NECESSARY FOR HIM TO REALLY USE THESE PHOTOGRAPHS, AND IN FACT AT 1594 OF THE HERTZ RECORD, IT REFLECTS THAT THE MEDICAL EXAMINER IS TESTIFYING THAT HE COULDN'T FOLLW THE BULLET PATH IN MS. KING'S CIRCUMSTANCE, BECAUSE OF THE DAMAGES IN THE HARM THAT WAS DONE TO HER BODY AND HER SKULL, SO THERE WAS, HE WAS TALKING ABOUT WHAT USE HE WAS MAKING OF THESE PICTURES AND WHY THERE WAS PROBLEMS WITH REGARD TO THE NATURE OF THE

PHOTOGRAPH AND WHAT WAS, WHAT TRANSPIRED WITH REGARD TO HIS AUTOPSY OF THE BODIES AND HOW HE WAS THERE TO TRY TO EXPLAIN THE CAUSE OF DEATH AND WHY THERE WAS DIFFICULTY WITH REGARD TO DOING THAT.

IT WAS UNCONTESTED IN THIS CASE, THAT THE VICTIMS DIED FROM THE BULLET WOUNDS.

ABSOLUTELY. YES.

THERE WAS THE MEDICAL EXAMINER SAID THAT THERE WERE THREE GUNSHOT WOUNDS, TWO TO THE HEAD OF MS. KING AND ONE TO THE HEAD OF MR. SPEARS.

BURNING WAS NOT RELATED TO THE DEATH OF THE VICTIMS.

FORTUNATELY NOT. THERE WAS NOT ANY EVIDENCE THAT WE KNOW THERE WAS TESTIMONY THAT REFLECTED FROM THE MEDICAL EXAMINER THAT THESE INDIVIDUALS WOULD HAVE EXPIRED WITHIN A MINUTE OR TWO OF BEING SHOT, AND THERE WAS NO SOOT IN THE TRACHEA REFLECTING THAT THEY WOULD HAVE BREATHEED IN FUMES AT SOME POINT IN TIME, BUT IN FACT THERE WAS A CHARGE OF ARSON AND, IN FACT, A CONVICTION AS TO ARSONS, AND THE STATE HAS MAINTAINED THAT IT WAS VERY IMPORTANT TO DEMONSTRATE THE PURPOSE AND HOW THESE CRIMES WERE COMMITTED AND THE MOTIVE OF THE DEFENDANTS IN TRYING TO COVER-UP THE NATURE OF THE CRIMES THAT THEY COMMITTED, AND THAT WAS WHAT THE IMPORTANT PART OF MUCH OF THE PHOTOGRAPHS WERE, WITH REGARD TO THE WHOLE SET OF IC THROUGH IU OR T. I THINK I WENT THROUGH MY BRIEF VERY CAREFULLY, TRYING TO EXPLAIN WHAT EACH PHOTOGRAPH REFLECTED, AND THERE WAS AN ARGUMENT MADE, TODAY, THAT 1-C SHOULD NOT HAVE BEEN INTRODUCED BECAUSE IT WAS MORE GRAPHIC THAN. THE ONE, I-U OR I-T, WITH REGARD TO THE BURNING CONDITIONS THAT OCCURRED, AND IN FACT THE STATE AS ARGUED IN ITS BRIEF WHY THAT WAS ABSOLUTELY IMPORTANT FOR THE FIRE MARSHALLS TO BE ABLE TO EXPLAIN THE USE OF ACCELERANTS AND THEN THE ABSOLUTE ATTEMPT TO DESTROY THE HANDIWORK THAT WAS DONE THIS DAY.

ASSUMING WE FIND SOME PROBLEM WITH THE OVERUSE OF THE PHOTOGRAPHS, WHAT IS THE STATE'S POSITION WITH REFERENCE TO THE EVIDENCE THAT WAS INTRODUCED AND HOW HARMFUL THE USE OF THE PHOTOGRAPHS WOULD HAVE BEEN?

WELL, FIRST OF ALL, I THINK THERE IS ABSOLUTELY NO HARM, WITH REGARD TO THE INTRODUCTION OF THE PHOTOGRAPHS, BECAUSE THERE IS NO ERROR. THE STATE IS REQUIRED AND HAS THE RESPONSIBILITY OF PUTTING FORTH EVIDENCE TO THE JURY, SO THEY HAVE A FAIR AND CLEAR UNDERSTANDING OF WHAT HAS TRANSPIRED, AND SOMETIMES YOU HAVE TO DO THAT THROUGH DEPICTION VERSUS WORDS, AND IN THIS INSTANCE, THAT WAS PROPERLY DONE. THERE WAS NOT AN OVER ABUNDANCE OF PICTURES INTRODUCED, AND IN FACT, EVERY PICTURE THAT WAS INTRODUCED, WAS PROVIDED FOR, FOR A PURPOSE, AND THAT WAS, THAT IS REFLECTED ON THIS RECORD SO I DON'T THINK THERE IS ANY HARM TO THAT. TO THE EXTENT THAT THE COURT IS, AS AN EXERCISE IN DISCUSSION, WITH REGARD TO WHETHER, IN FACT, THERE COULD BE HARMFUL ERROR WITH REGARD TO THE CONVICTIONS, I THINK THAT THAT IS BEYOND THE PALE THAT THE ADMISSION OF THESE PHOTOGRAPHS COULD IS NOT NOT HAVE MADE A DIFFERENCE. THE CONDITIONS OF THE BODY, THE DESCRIPTION BY MR. DEMPSY OF TRANSPIRED, THE CONDITIONS AND FACTS AND CIRCUMSTANCES OF THIS CASE WERE NOT PRESENTED TO THE JURY BY THESE PICTURES AND NOT PORTRAYED TO THE JURY BY THESE PICTURES. THEY ONLY EXPLAINED WHAT THE JURY SHOULD HAVE KNOWN OR ALREADY KNEW WITH REGARD TO THE CONDITIONS THAT OCCURRED. AGAIN, YOU HAD AN ARSON CASE, TOO, AND YOU HAD A VERY VIVID KRIPINGSS OF FIRE MARCH -- DESCRIPTIONS OF FIRE MARSHALLS DESCRIBING THE DAMAGE THAT WAS DONE TO THE TRAILER, AND WHY IT WAS DONE, AND THE FACT THAT HOW BURNING PATTERNS OCCUR AND WHAT WAS HAPPENING AND HOW THERE WAS A TOTAL DESTRUCTION OF SOME EVIDENCE, BECAUSE, IN FACT, I ASSUME THE STATE WAS, BELOW,

WAS GOING TO, WAS CONCERNED ABOUT THE FACT THAT, FOR EXAMPLE, THERE WERE TEN CARTRIDGES BUT 12 BULLETS OR FRAGMENTS, AND HOW DO YOU EXPLAIN THE VARIANCE, AND THERE WERE SOME PROBLEMS THAT WE KNEW THERE WAS A NUMBER OF WEAPONS, BUT YOU COULDN'T REALLY TELL WHICH PARTICULAR WEAPON WAS FIRED THAT ACTUALLY PRODUCED THE THREE GUNSHOT WOUNDS TO THE HEADS OF THE TWO VICTIMS, SO I MEAN, THOSE WERE ALL PROBLEMS, AND THAT IS WHY YOU HAVE TO GO THROUGH AND GO THROUGH IN MINUTE DETAIL WHAT THE EVIDENCE WOULD REFLECT IN THIS CASE.

WHAT ABOUT THE SANDERS ARGUMENT THAT IT IS NOT JUST PHOTOGRAPHS WE HAVE. THE COLLATERAL CRIMES EVIDENCE AND THE BRUTON PROBLEM HERE, AND THEN WHEN YOU PUT THOSE TOGETHER.

AS TO THE BRUTON PROBLEM, I THINK THAT ONLY GOES TO, POSSIBLY, MR. LOONEY. IT DOES NOT GO TO MR. HERTZ, BECAUSE MR. HERTZ IS THE SPEAKER HERE, AND I THINK THAT THAT WAS DONE, THAT ISSUE RAISED BY MR. HERTZ IN HIS BRIEF ON APPEAL. NOW, THE NOTION THAT THERE WAS SOME SORT OF PROBLEM AND HAD, IN FACT, THE STATE ADMITTED IT, THAT THERE WAS A PRETRIAL AGREEMENT. NOTHING WAS TO BE SAID WITH REGARD TO THIS, TO SHOW COMPLICIT, SO THAT THEY COULD GO FORWARD DURING TRIAL.

WHAT WAS THE PURPOSE OF MR., I CAN'T REMEMBER THE MH NAME.

HATHCOCK.

WHAT WAS THE MILES PER HOUR OF HIM BEING CALLED AS A WITNESS?

BECAUSE HE HAD BEEN IN JAIL WITH MR. HERTZ. THERE WAS TESTIMONY WITH REGARD TO MR. HERTZ THAT WAS TO COME OUT. WITH REGARD TO WHAT HE KNEW, WHAT HE HAD HEARD. BUT HAD IT HAD NOTHING -- THERE WAS NOT SUPPOSED TO BE A NEXUS BETWEEN THE TWO, AND THAT IS WHY IN FACT, THE, ANY HARM THAT WAS RECOGNIZED BY THE PROSECUTOR WOULD HAVE BEEN IN THE LOONEY CASE AND NOT THE HERTZ CASE. BECAUSE HE WAS, IT WAS HERTZ WHO SAID TO MR. HATHCOCK THAT WE GOT OURSELVES IN TROUBLE, AND WE KILLED TWO PEOPLE IN CRAWFORDVILLE.

SO HERTZ MADE ADMISSIONS, CORRECT?

RIGHT.

WHAT ABOUT WITH REFERENCE TO LOONEY? WHAT HAPPENED AS A RESULT --

THE RECORD REFLECTS, AND LET'S GET THE STATEMENT ACCURATE INSTEAD OF ME TELLING YOU, BECAUSE I DID TRANSCRIBE, THIS HOPEFULLY CORRECTLY. AT PAGE, AND THIS WOULD BE, PROBABLY, THE, HOPEFULLY, LET ME SEE WHAT BRIEF I AM IN. THIS IS IN THE LOONEY RECORD, SO IT MAY BE IN THE LOONEY RECORD AT PAGE 1849 THROUGH 1850. THE STATEMENT THAT WAS MADE, SPECIFICALLY WAS HE STARTED OFF BY TELLING ME, THIS IS MR. HATHCOCK, HE STARTED OFF BY TELLING ME THAT HE HAD GOTTEN INTO A CONFRONTATION WITH SOME POLICE OFFICERS DOWN IN DAYTONA, A BECAUSE I ASKED HIM ABOUT A SCAR ON HIS HEAD, AND THAT LED TO -- THE CONVERSATION GOT BACK TO HE TOLD ME THAT HE AND TWO OF HIS CODEFENDANTS HAD BEEN INVOLVED IN TWO MURDERS IN CRAWFORD VILLAIN THAT THEY HAD KILLED. IT -- CRAWFORDVILLE, THAN THEY KILLED. IT ENDED THERE. THERE WAS A MOTION FOR MISTRIAL. ARGUMENTS WERE MADE. THEY RECESSED FOR THE NIGHT, BECAUSE THERE WAS A DISCUSSION AS TO WHETHER, AT THIS POINT, THEY SHOULD SEVER THE TRIALS, AND I THINK THAT THE PARTIES DISCUSSED THE POSSIBLE RAM NICKSS AS TO THESE TWO DEFENDANTS OF A SEVERANCE OF THAT POINT AND WHAT IT WOULD LOOK LIKE, ONE VERSUS THE OTHER, AND SO EACH OF THEM HAD A DIFFERENT VIEW, WITH REGARD TO THAT. THE NEXT DAY, THE COURT CAME BACK, AND HE GAVE THE FOLLOWING INSTRUCTION TO THE JURY. LET THE RECORD REFLECT, AND THIS

IS AT PAGE 1892, LET THE RECORD REFLECT THAT THE JURY HAS RETURNED, AGAIN. GOOD MORNING, MEMBERS OF -- MEMBERS OF THE JURY OF. I MUST INQUIRE HAVE ANY OF YOU OBTAINED ANY TYPE OF INFORMATION FROM ANY SOURCE OR FASHION CONCERNING THE SUBJECT MATTER? ALL RIGHT. THAT BEING THE CASE, THEN AT THIS TIME THEN THE STATE WOULD BE PREPARED TO CALL ITS NEXT WITNESS, AND AT THIS TIME, MEMBERS OF THE JURY, OF COURSE, AS I INDICATED TO YOU IN YOUR PRELIMINARY INSTRUCTIONS THERE ARE CERTAIN MATTERS OF LAW TO WHICH ONLY THE COURT IS CONCERNED AND THE MATTERS OF FACT ARE YOUR PROVINCE AS A JURY AND FROM TIME TO TIME YOU HAVE TO CONDUCT OUR RESPECTIVE PROVINCES TO THE EXCLUSION OF EACH OTHER. AT THIS TIME THE COURT WILL INSTRUCT YOU, A A MATTER OF LAW, TO DISREGARD THE TESTIMONY OF ROBERT HATHCOCK IN ITS ENTIRETY, AND THE COURT HAS STRICKEN MR. HATHCOCK AS A WITNESS IN THESE CASES. THAT WAS IT. THERE WAS NO FURTHER OBJECTION OR ANYTHING RAISED AT THAT POINT POINT. WITH REGARD TO THOSE REMARKS. THE STATE WOULD ARGUE THAT, BASED ON THE FACTS AND CIRCUMSTANCES OF THE CASE, WITH REGARD TO, AGAIN, THE CASE AGAINST MR. LOONEY, THAT THERE WAS HARMLESS ERROR WITH REGARD TO THE INVERTENS MADE BY BY MR. HATHCOCK OF STATEMENTS.

WAS THERE A RULING ON THE MOTION FOR MISTRIAL THAT HAD BEEN MADE?

NO. THAT WAS THE SUM TOTAL OF WHAT TRANSPIRED. THERE WAS DISCUSSIONS AFTER MOTION HAD BEEN DISCUSSED.

MR. LOONEY WASN'T REALLY ARGUING HE WASN'T THERE. I MEAN AS A DEFENSE.

NO. NO. HE MADE, THE RECORD REFLECTS THAT THE DEFENDANTS RESTED AT THE CLOSE OF THE STATE'S CASE. THEY PRESENTED NO TESTIMONY AT ALL.

DO YOU AGREE THE ISSUE WAS THE BASIC ISSUE IN THIS CASE WAS THE QUESTION OF THE RELATIVE CULPABILITY. OF THE THREE DEFENDANTS?

WELL, I THINK THE ISSUE WITH REGARD TO GUILT WAS WHETHER THE STATE COULD PROVE THAT HE COMMITTED THE CRIME AND WHETHER A JURY WAS CONVINCED, BASED ON THE FACTS AND THE CIRCUMSTANCES PRESENTED TO THEM, THAT THESE INDIVIDUALS COMMITTED THESE CRIMES. NOW, ULTIMATELY, OBVIOUSLY, IT IS WHO DID WHAT, AND THAT, BUT THAT WAS THE PENALTY PHASE, AND THERE WAS EVIDENCE THAT WAS PRESENTED IN THE PENALTY PHASE AS TO THE THIRD ISSUE, I AM TRYING, AND I WANT TO GET BACK TO THAT, BECAUSE IT REALLY GOES TO THE SECOND, WHAT MR. STEVE, I KNOW, WHO WAS IT? SO LONG AGO. TALKED ABOUT. AS TO PROPORTIONALITY OR RELATIVE CULPABILITY, WHICH I SNK A MUCH WISER WORD TO USE, AS OPPOSED TO PROPORTIONALITY, BECAUSE I THINK WE ALL GET ONE FUSED ABOUT THAT, BUT AS TO THE THIRD POINT, THE FEATURE OF THE VOLUSIA COUNTY CRIMES. TODAY WE ARE HEARING THAT THIS WHOLE EPISODE WAS SO HORRIBLE THAT IT, IN FACT, BECAME A FEATURE OF A CRIME. WELL, IN FACT, IF YOU LOOK AT THE RECORD, IT DEMONSTRATES THAT THERE ARE APPROXIMATELY TEN PAGES THAT REALLY TALK ABOUT SIMILAR FACT EVIDENCE OF CRIMES. I MEAN, YEAH, THERE WAS A CHASE, AND THEY FOLLOWED THEM AND THEY WERE SPEEDING AND ALL THAT, BUT WHAT WAS REALLY THE CRIME WAS THAT THESE TWO INDIVIDUALS, IN THEIR WHITE FORD TRUCK AND THEIR BLACK MUST OBTAIN, TRIED TO RUN OVER TWO POLICE OFFICERS, AND THE TWO POLICE OFFICERS, MR. ROONEY, DETECTIVE ROONEY AND DETECTIVE HOWARD, TESTIFIED THEY WEREN'T HURT, SO WE HAD A LOT OF THUNDER, AND THE END PRODUCT WAS THEY WEREN'T HURT. NOW, MY OPPONENT WOULD SAY, YES, BUT THERE WAS THE POINT THAT THEY TRIED. OF COURSE THERE WAS THE POINT THAT THEY TRIED, AND THAT IS WHY THEY WERE CHARGED AND CONVICTED AND THEY DO NOT ASSAIL THE FACT THAT THERE WAS AN AGGRAVATED BATTERY IN VOLUSIA COUNTY, FOR WHICH THAT WAS ONE OF THE AGGRAVATING FACTORS IN THIS CASE BUT THE SUM TOTAL OF THE CRIMES THAT THEY ACTUALLY GOT CONVICTED FOR WAS TEN PAGES OF THIS WHOLE RECORD. TEN PAGES WE

TALKED ABOUT BACKING UP, THE MIKE GOING UP IN THE AIR, FALLING DOWN, GETTING UP. EVERYTHING IS OKAY, AND I MIGHT ADD THAT THE OTHER PART OF THAT IS THAT THE CARS ARE RIDDLED WITH BULLETS BY THESE TWO INDIVIDUALS. NOT THE DEFENDANTS. THE POLICE! AND IN FACT, THAT IS HOW MR. HERTZ IS INJURED, AND IN FACT, SUSTAINS GUNSHOT WOUNDS IN THIS, IN THE VOLUSIA COUNTY ATTEMPT TO SECURE HIM. APART FROM THAT, IF WE LOOK AT THE WHOLE BIG PICTURE, THIS IS A CONTINUATION OF THE CRIME. WE DID NOT GO INTO THE FACTS VERY QUICKLY, BUT AS THIS COURT WILL RECALL, THESE INDIVIDUALS LEFT THE CRIME SCENE. THEY WENT TO GET GAS TO TALLAHASSEE. THAT WAS THEIR PURPOSE TO COME TO TALLAHASSEE. THEY WENT TO THE WAL-MART ON THOMASVILLE ROAD THAT IS OPEN 24 HOURS A DAY. WITHIN AN HOUR AND-A-HALF OF THIS MURDER. AND THEY ARE JOKING AROUND. HERTZ AND LOONEY ARE JOKING AROUND ABOUT HOW THIS IS THEIR LAST NIGHT OUT BECAUSE ONE OF THEM IS GOING TO GET MARRIED, A AND THEY TELL FIVE PEOPLE WHO ARE THE ONLY FIVE PEOPLE WHO ARE RUNNING THE STORE AT WAL-MART, THAT THAT IS OUR CAR OUT THERE, AND THEY MADE TWO OF THE WOMEN GO OUT THERE AND LOOK AT THEIR NEW CARS, AND SO THEY ARE POSITIVELY IDENTIFIED IN NEXUS TO THE CAR. THEY MOVE ON. THEY GO TO A GAS STATION, AND THEY MEET UP WITH SOME PEOPLE WHO ARE APPARENTLY GOING ON THEIR WAY TO DAYTONA, BECAUSE THERE IS SOME DISCUSSION AS TO WHERE THEY SHOULD GO. THEY GO TO DAYTONA, BECAUSE THERE IS GOING TO BE A PARTY OVER IN DAYTONA, A AND WHEN THEY GET THERE, THEY ARE SEEN BY THE POLICE. THE POLICE FIND A HIT ON THE CARS. AND A CHASE ENSUES, AND THEY ARE ULTIMATELY CAPTURED, ONE LOONEY AND DEMPSY ARE CAUGHT, WHEN THEIR CARS CRASHED, AND THEY GET OUT AND THEY ARE UNHARMED, AND THEN HERTZ, WHEN HE CRASHES OR HIS CAR IS DISABLED OR THE TRUCK IS DISABLED, AND THEN HE TAKES A CAB RIDE TO HIS AUNT'S HOUSE AND HIS AUNT TURNS HIM IN. THIS IS ALL A CONTINUATION OF THE CRIME. IT EXPLAINS WHAT HAPPENED. IT EXPLAINS HOW THESE DEFENDANTS ARE CAUGHT AND IT, ALSO, EXPLAINS SOME OF THE STATEMENTS THAT WERE MADE WITH REGARD TO THEM RETURNING TO TALLAHASSEE AND HOW, FOR EXAMPLE, ONE OF THEM, IN PARTICULAR MR. HERTZ, IS TELLING HE IS MAKING A STATEMENT IN A BUGED CAR VAN OR WHATEVER THEY TRANSPORT THEM BACK IN, ABOUT HOW HE IS GOING TO BANK HIS HEAD AND MAKE A RUCKUS ON SO THIS EVENING HE IS CRAZY.

WHEN YOU SAY IT IS A CONTINUATION OF THE CRIME, I MEAN, IT IS REALLY THE ESCAPING, OR TRYING TO ELUDE THE POLICE OFFICERS GOES TO CONSCIOUSNESS OF GUILT.

ABSOLUTELY.

IF, FOR EXAMPLE, THEY HAD IN VOLUSIA COUNTY, STARTED TO, WENT TO SOMEONE'S HOUSE AND COMMITTED A SEXUAL BATTERY, I MEAN, THERE WOULD BE SOME POINT.

THAT'S DIFFERENT. SURE.

IT IS A DIFFERENT. IT IS NOT JUST THAT IT IS A SEQUENCE OF EVENTS TO EXPLAIN ANYTHING. IT IS WHAT THIS WAS.

AND LET'S NOT FORGET THAT THESE INDIVIDUALS, ALL THREE OF THEM, WERE ON SOME SORT OF CUSTODIAL PROBATION OR SOME POST SENTENCE SERVICE.

WAS IT, THAT WAS A QUESTION I JUST HAD HAD, AND BEFORE I FORGET IT, WAS DEMPSY WANTED FOR A VIOLATION OF PROBATION?

HE WAS BEING SOUGHT. THE TESTIMONY IS THAT HE WAS STAYING, HE WAS STAYING WITH HERTZ BECAUSE OF SOME PROBATION VIOLATION. THERE WAS SOME PROBLEM WITH THAT AND HE HAD MADE STATEMENTS, HE MADE, IT WAS NOT, THERE WAS NO RATIFICATION, OTHER THAN HIS STATEMENTS, BUT HE WAS, HE MADE SOME STATEMENTS ABOUT HOW HE WAS HOLDING UP AT HERTZ'S HOUSE AND HOW HE WOULD HAVE SHOT OUT, IF THERE HAD BEEN A NEED TO HAVE A SHOOTOUT THERE. HE HAD A WEAPON. HE CLEARLY HAD A WEAPON.

BUT HE WAS THE ONLY ONE WANTED FOR A VIOLATION. THE OTHER ONES WERE ON SOME TYPE OF --

-- SUPERVISION WHEN THEY COMMITTED THESE CRIMES. THEY WERE OF THE SIMMIC, ONCE THEY HAD -- THE SAMEIC, ONCE THEY HAD THE -- THE SAME I CAN, ONCE THEY HAD -- THE SAME ILK, ONCE THEY HAD THE GUNS IN THEIR HANDS AND THE SAME CULPABILITY AS TO THE CRIMES THAT WERE MIGHT COMMITTED. CULPABILITY. I HOPE THAT IS A TERM OF ART THAT WE CAN, PERHAPS, IN GRAIN IN OUR LAW WITH REGARD TO THESE KINDS OF CRIMES, WHERE YOU HAVE MULTIPLE DEFENDANTS, AND YOU HAVE AN INDIVIDUAL WHO MAY BE THE LESS CULPABLE AND THE STATE TALKS TO, AND IN FACT, I MEAN, THIS RECORD REFLECTS THAT HE, MR MR. DEMPSY CONFESSED WITHIN 24 HOURS OF BEING CAPTURED, SO HE WAS READILY WILLING AND ABLE TO SPILL HIS GUTS. NOW, THE FACT THAT THERE MAY HAVE BEEN SOME DEVIATION WITH REGARD TO TELLING THE TRUTH AND LIES, AND THE WHOLE SCHEME OF THINGS, I DON'T THINK IT IS A SURPRISE TO ANY OF US THE FACT THAT AN INDIVIDUAL WHO IS TRYING TO MAKE HIMSELF OUT AS NOT BEING PART OF A CRIME THEN LATER DOES CONFESS TO HIS COMPLICIT IN A CRIME, IS NOT UNUSUAL. BUT THE BOTTOM LINE IS HE DID CONFESS RELATIVELY QUICKLY AFTERWARDS.

WHAT ARE YOU SAYING? WHAT IS THE LAW THAT YOU SAY THAT THE LAW IS OR SHOULD BE WITH PROVISIONALITY? THE EVIDENCE IS THAT MR. TEMPI WAS WANTED FOR VIOLATION OF PROBATION -- THAT MR. DEMPSY WAS WANTED FOR VIOLATION OF PROBATION, THAT HE WAS MORE CULPABLE. HE HAD A GUN. BECAUSE HE KNEW ONE OF THE VICTIMS. WOULD THE FACT THAT THE STATE NEEDED TO MAKE A DEAL WITH ONE AND GIVE, AND HE GOT A LIFE SENTENCE BECAUSE OF THAT, DOES THAT, HOW DOES THAT FACTOR INTO OUR EVALUATION?

IN DETERMINING RELATIVE CULPABILITY, IT SEEMS TO ME THAT THOUGH THAT INDIVIDUAL WHO DOES GET A DEAL FROM THE STATE, AND I AGREE WITH JUSTICE QUINCE IN WONDERING WHAT THE DIFFERENCE WOULD BE FOR SECOND-DEGREE MURDER AS OPPOSED TO THE STATE TRYING TO GET THE MOST EGREGIOUS PENALTY BUT NOT GOING FOR FIRST-DEGREE MURDER, YOU GET PENALIZED, THE STATE GETS PENALIZED FOR DOING THAT, BECAUSE NOW SUDDENLY, THEY ARE ALL, EVERYBODY ELSE GETS LIFE SENTENCE, BECAUSE THEY DO THAT. THAT DOESN'T MAKE ANY SENSE TO ME, AND I WOULD HOPE THAT WE WOULD TRY TO CLARIFY THAT, THAT WE ARE NOT REALLY TALKING ABOUT YOU HAVE TO REDUCE IT TO A SECOND-DEGREE MURDER, IF YOU GIVE SOMEBODY A LIFE SENTENCE FOR SPILLING THE BEANS, THAT THAT --

ALSO, AND I AM NOT SURE, DO WE HAVE LOTS OF CASE LAW OUT THERE THAT HAS TO BE --

SURE.

IT WOULD NOT MAKE ANY SENSE, WOULD IT?

NO.

IT WOULDN'T MAKE ANY SENSE, FOR IF YOU HAD THE MOST CULPABLE FOR THE STATE TO MAKE A DEAL FOR SECOND-DEGREE.

RIGHT.

AND IMMUNIZE A CONSIDERATION OF THAT FACTOR, IN LOOKING AT THE RELATIVE CULPABILITY. DO YOU NOT AGREE?

ABSOLUTELY. ABSOLUTELY. ABSOLUTELY. AND YOU KNOW, IT WOULD BE PRESUMED THAT, IF YOU ARE WILLING TO MAKE AN AGREEMENT ON SECOND-DEGREE MURDER, THAT IS BECAUSE THE FACTS AND CIRCUMSTANCES REFLECT THAT, AS OPPOSED TO THAT IS CONVENIENCE TO DO SOMETHING ELSE.

THAT WOULD SIMPLY BE A FACTOR TO BE CONSIDERED.

ABSOLUTELY.

BUT IT WOULD NOT BE IMMUNE FROM EXAMINATION, AS A FACT.

I DON'T THINK IT WOULD BE IMMUNE FROM EXAMINATION, BUT I WOULD SUGGEST THE COURT, PERHAPS AN OUTLANDISH NOTION, THAT ONCE YOU EXAMINE IT FOR THAT, THAT THAT IS END OF IT, BECAUSE WE HAVE NO WAY OF KNOWING, AND AS JUSTICE PARIENTE WAS ASKING, I WAS SITTING THERE, THINKING, WELL, WAIT A MINUTE, HERE, YOU KNOW, YEAH, CULPABILITY, WELL, THEY ALL DID THE ACT, BUT THEN THEY ALL CAME TO THE ACT WITH LIVES THAT THIS COURT HAS SAID IS IMPORTANT WITH REGARD TO WHETHER THEY SHOULD GET THE DEATH PENALTY OR LIFE SENTENCE OR WHETHER THEY SHOULD BE RELATIVELY COMPARED. YOU ALL COMPARE ALL THE TIME. DEFENDANTS WHO GET A LIFE SENTENCE, YOU SAY, WELL HE IS NOT AS CULPABLE BECAUSE, WELL, A ONE IS 26. ONE IS 18. WELL, YEAH, THEY CAME TO THE CRIME THAT WAY, BUT THAT IS AN IMPORTANT FACTOR, SO WE DON'T, IT IS NOT JUST A VACUUM OF WHAT, EXACTLY, THEY DID AT THE TIME THE CRIME WAS COMMITTED. IT WAS WHAT BAGGAGE THEY BRING WITH THEM, SO IF WE ARE LOOKING AT THAT, THEN WE ARE TALKING ABOUT WHAT MITIGATION THEY MAY HAVE THAT WOULD MITIGATE THE AGGRAVATION AND THE APPROPRIATENESS OF THE DEATH PENALTY IN THAT PARTICULAR CASE. FOR EXAMPLE, IF YOU ARE A JUVENILE, WE KNOW THAT YOU ARE NOT EVEN ELIGIBLE, AND I WOULD SUSPECT THAT, IF WE EXAMINE THIS WITH REGARD TO THE RELIABILITY OF WHAT THE STATE DID, IN USING THIS INDIVIDUAL, WHETHER, I MEAN I DON'T THINK WE CAN SECOND-GUESS, WE SHOULDN'T BE SECOND-GUESSING A PROSECUTOR, WITH REGARD TO WHETHER, IN FACT, THEY DETERMINENATED A DETERMINATION OF WHO IS THE MORE OR LESS CULPABLE. I THINK WE OUGHT TO LOOK AT IT AND SEE IF THERE IS A REASONED BASIS FOR THAT.

BUT DOES THE STATE ATTORNEY, REALLY, EVEN MAKE SUCH AN EVALUATION? I MEAN, YOU SAID, YOURSELF, THAT MR. DEMPSY IS THE ONE WHO FIRST STARTED TO SPILL HIS GUTS.

SURE.

SO BASED ON THAT, I MEAN, I WOULD IMAGINE THE STATE ATTORNEY DECIDES, OKAY, WE WILL USE MR. DEMPSY.

I DON'T THINK SO.

DO THEY EVEN GO THROUGH A PROCESS OF SAYING, WELL, YOU KNOW, DEMPSY DID THIS. LOONEY DID THIS. HERTZ DID THIS: LET'S GO WITH DEMPSY, BECAUSE HE IS LESS CULPABLE.

INNINGS. I THINK YOU HAVE TO LOOK AT THE KIND OF STATEMENTS THAT ARE BEING MADE. I SUSPECT THAT AT SOME POINT IN TIME THEY ALL COME UP WITH SOME SORT OF STATEMENT ABOUT WHAT THEY DID. THIS INDIVIDUAL SAID THIS IS WHAT THEY DID, AND I MADE MY EVALUATION ON THAT. THE POINT IS, NOT TO GET OFF. WE OUGHT NOT TO BE TRYING TO JUDGE THE CULPABILITY OF SOMEBODY WHO GOT A SECOND-DEGREE MURDER OR LIFE SENTENCE, THE RELATIVE CULPABILITY, BECAUSE THEY ARE OUT OF IT. THEY ARE OUT OF IT, JUST LIKE THE INDIVIDUAL WHO IS LEGALLY INCAPABLE OF BEING PART, GIVEN THE DEATH PENALTY.

HOW DOES THAT, THOUGH, IF YOU TAKE, THAT IT TURNS OUT THAT THE STATE MAKES THE DEAL AND ALLOWS THE MOST CULPABLE TO PLEAD GUILT TO SECOND-DEGREE MURDER, AND IT TURNS OUT THAT THE MOST CULPABLE WAS A RINGLEADER THAT HAD TWO USEFUL PEOPLE THAT DIDN'T HAVE MUCH MENTAL BAGGAGE TO GO ALONG OR WHATEVER, AND THEN GOT THEM, REALLY, TO DO A DEED, THAT IT WAS THE MOST CULPABLE THAT WANTED DONE. IN OTHER WORDS, IT IS A CLEAR CASE OF, REALLY, TWO LESSER PEOPLE, BECAUSE OF THEIR MENTAL

CAPABILITIES OF JUST GO ALGERS OR WHATEVER. ARE YOU SAYING THAT -- A LONGERS OR WHATEVER, ARE YOU SAYING THAT BECAUSE A STATE MAKES A DECISION LIKE THAT, THAT IT I AMNIZES THE STATE'S DECISION?

NO. IT DOESN'T IMMUNIZE THE STATE'S DECISION, BUT IT OUGHT TO HAVE SOME CREDIBILITY AS TO WHY THAT INDIVIDUAL IS NOT, NOT THIS COMPARATIVENESS. WE ARE, WHAT WE SHOULD BE COMPARING IS HERTZ AND LOONEY'S PARTICIPATION IN THIS CRIME. WHAT IS DEMPSY HAVING TO DO WITH IT? CAN YOU TELL ME, AND I SAY THIS RHETORICALLY, EXCUSE ME, BUT WHAT DO WE KNOW ABOUT MR. DEMPSY? WE KNOW THAT THE COURT MADE SOME PHRASE, SAID SOME STATEMENT BECAUSE OF SELF-SERVING REMARKS THAT WERE MADE, THAT HE HAS GOT A 3.5 AVERAGE. IS HE A SMART GUY. THAT MEANS HE IS NOT MENTALLY RETARREDED. WE KNOW THAT HE HAS HAD DRUGS.

WOULD YOU NOT AGREE THAT, IF WE DID KNOW SOMETHING ABOUT MR. DEMPSY, ASSUMING, AND WE KNEW WHAT EXISTED IN THE HYPOTHETICAL THAT I GAVE YOU, THAT IS THAT MR MR. DEMPSY WAS 40 YEARS OLD. HE WANTED HIS WIFE KILLED OR SOMETHING, AND HE FOUND TWO MENTAL-EDGED PEOPLE, YOU KNOW, WHO DO IT AND PICKED ON THEM, AND THAT THEY WERE JUST WILLING, THEY WERE TWO DRUGGIST OR WHATEVER, AND SO WE HAD THE -- DRUGYS OR WHATEVER, AND SO WE HAD THE CLEAR HYPOTHETICAL THAT I DESCRIBED TO YOU BEFORE, AND IF THAT WAS THE SITUATION HERE, THAT THAT MIGHT BE A DIFFERENT STORY. WOULD YOU NOT AGREE?

BUT YOU KNOW, WHAT I HEAR FROM YOUR EXAMPLE IS MORE THAT YOU ARE PORTRAY AGO INDIVIDUAL WHO HAS A LOT OF MITIGATION THAT IS NOT GOING TO GET THE DEATH PENALTY, ANYWAY, BECAUSE IS HE BORDERLINE THIS. I AM JUST SAYING I THINK THAT IS WHY THESE, THIS IDEA --

I SUPPOSE WHAT I AM TRYING TO SAY, THOUGH, IN THIS, IS MY EARLIER QUESTIONS TO YOUR COLLEAGUE, THAT THESE --

MR. SELL I BETTER. I KNOW HIS -- MR. SELL I GETTING OF -- SELL I GETTER. I KNOW HIS -- SELL GETTER. I KNOW HIS -- SELIGER. I KNOW HIS NAME.

THESE ARE ALL DECISIONS THAT ARE NOT ON THE TABLE, AND THESE REALLY ALL HAVE TO BE APPLIED, AND WHAT I WOULD LIKE TO REALLY HEAR FROM YOU NOW, IS WHY THESE TWO DEFENDANTS, IN RECEIVING THE DEATH SENTENCES, ARE NOT DISPROPORTIONATE BECAUSE THE STATE MADE A DEAL WITH THE DEVIL AND THIS IS A MORE CULPABLE CODEFENDANT THAT THEY PICKED OUT TO MAKE THIS DEAL WITH.

I THINK MR. DEMPSY IS THE JR. DEVIL. HE IS NOT QUITE THE DEVIL IN THIS INSTANCE. THERE IS TANGIBLE EVIDENCE IN THIS RECORD.

THE TRIAL JUDGE, HERE, SEEMED TO MAKE FACTUAL FINDINGS. ' MADE DETERMINATIONS ABOUT THE FACT THAT HE HAD EXHIBITED REMORSE, AND I FORGOT, SOMEBODY ASKED ME A QUESTION ABOUT THE REMORSEFULNESS. IT WAS MR. HERTZ WHO THE TRIAL COURT WAS NOT AS INTERESTED IN FINDING REMORSE FOR, BECAUSE, IN FACT, HE WAS CRYING, BUT HIS STATEMENTS WERE SOMETHING TO THE EFFECT THAT I WOULD NOT BE ABLE TO PROVIDE GRANDCHILDREN TO MY MOTHER. THAT WAS ONE OF THOSE STATES. BUT ANYWAY IT HAD TO DO WITH REMORSE. THE FACT THAT HE CAME FORE FORWARD, AND HIS TESTIMONY -- CAME FORWARD, AND HIS TESTIMONY, AND IN FACT EXCEPT FOR THE TESTIMONY PLAINTIFF HARRIS, WHO TESTIFIED IN THE LOONEY CASE, WITH REGARD TO ONLY MR. MR. TEMPI -- DEMPSY'S STATEMENTS AS TO WHAT TOOK PLACE WERE UNASSAILED. AND IN FACT THE CELLMATE OF MR. DEMPSY, AND MR. DEMPSY HAD INDICATED TO HIM AND THERE WAS EVIDENCE EXPLORED AND BROUGHT OUT AND THERE WAS NO REASON TO SAY THIS, BUT APPARENTLY MR. DEMPSY INDICATED THAT LOONEY WAS A LOOKOUT, THAT HE WAS THE ONE THAT, WHEN THEY WERE RIDING OVER TO DAYTONA, THAT HE

WANTED TO GET OUT OF THE CAR. HE WASN'T DRIVING. AND THAT THERE WAS SOME OTHER LITTLE THING BUT HAD TO DO, IT SEEMED LIKE IT FOLLOWED, IT TRACKED A LOT OF THE LANGUAGE WITH REGARD TO WHAT, IN FACT, DEMPSY HAD TOLD THE POLICE, WITH REGARD TO WHAT HIS ROLE WAS.

I JUST WANT TO MAKE SURE ABOUT WHEN WE, BEFORE WE JUST GET OFF OF THE RELATIVE CULPABILITY. IF I WAS HEARING WHAT YOU WERE FIRST SAYING, IT WAS THAT, IF A PLEA BARGAIN HAS BEEN MADE WITH ONE OF MULTIPLE DEFENDANTS, THAT IN TERMS OF THIS COURT'S RESPONSIBILITY, TO MAKE SURE THAT THE DEATH PENALTY IS ADMINISTERED IN A FAIR AND NONARBITRARY WAY.

RIGHT.

WE OUGHT TO EXCLUDE THAT DEFENDANT, THAT DEFENDANT FROM THE EVALUATION. IS THAT --

NOW, UPON MAKING THE DETERMINATION THAT YOU HAVE RELIABILITY.

IS THAT YOUR ARGUMENT?

YES. YOU HAVE --

IS THAT BASED ON CASE LAW, THAT THIS COURT --

ABSOLUTELY NOT. I AM SUGGESTING TO YOU THAT YOU ARE GOING TO SEE THESE CASES AGAIN AND AGAIN AND AGAIN, AND WHAT KIND OF RULE OF LAW OR WHAT KIND OF PRINCIPLE OF REVIEW SHOULD WE BE UNDERTAKING HERE? AND I AM SUGGESTING TO YOU THAT THESE INDIVIDUALS ARE EQUALLY IN THE SAME POSTURE AS AN INDIVIDUAL WHO, BECAUSE OF HIS AGE, HE COMES WITH THE AGE OF 16 OR BECAUSE OF. THE REASON, BECAUSE HE, ONE -- BECAUSE OF ANOTHER REASON, BECAUSE ONE PERSON IS NOT MENTALLY COMPETENT.

BUT I THOUGHT YOU AGREED, IF WE HAVE THE SITUATION IN MY HYPOTHETICAL, THAT WE WOULD HAVE TO EXAMINE THAT IN DETERMINING THE PROPORTIONALITY, NOT THE PROPORTIONALITY, RELATIVE CULPABILITY.

THAT IS WHAT I WAS TRYING TO GET AT. I WAS THROWING OUT THE NOTION THAT THERE IS A WAY OF DOING THIS, BY SAYING, OKAY. WE TRUST AND WE RELY UPON THIS RECORD TO REFLECT THAT THE LEAST CULPABLE INDIVIDUAL, WE ARE COMFORTABLE WITH THAT. ONCE YOU MAY THAT DETERMINATION -- ONCE YOU MAKE THAT DETERMINATION, WHY IS THAT NOW SUDDENLY THE ARGUMENT THAT NOW WE ARE GOING TO MAKE AN ARGUMENT ABOUT THE CULPABILITY OF THESE INDIVIDUALS. WE ASSUME AND ARE COMFORTABLE WITH THE NOTION THAT THE STATE HAS, IN FACT, GIVEN THE LEAST CULPABLE IN A CRIME SCENE, A BETTER DEAL, FOR LACK OF A BETTER TERM, BECAUSE THEY GOT LIFE AS OPPOSED TO THE DEATH PENALTY.

BUT ISN'T THAT THE SAME THING AS EXAMINING?

YES. I MEAN, I AM NOT, I AM JUST TRYING TO SUGGEST TO YOU --

I THINK THE CONCERN IS THAT THE DECISION BY THE PROSECUTOR WOULD BE IMMUNIZED FROM EXAMINATION, ONCE THE DECISION WAS MADE, AND YOU ARE NOT TAKING THAT POSITION, ARE YOU?

NO. WELL, TO THE EXTENT THAT I HIM SAYING WHY ARE WE CONTINUALLY, TODAY WE ARE GOING TO HAVE A DISCUSSION. WE HAVE HAD A DISCUSSION. I WAS IN THE MIDDLE OF TRYING TO TELL YOU WHY I THOUGHT DEMPSY'S EVIDENCE WAS THIS, THIS AND THAT AND WHY THE TRIAL COURT WOULD SUPPORT IT, AND I THINK HIS RECORD IS VERY CLEAR, THE TRIAL COURT'S

FINDINGS ARE VERY CLEAR AS TO WHY HE FOUND AM NOT AS CULPABLE AS THE OTHER TWO, BUT WE ENGAGE IN THIS, WE KEEP ENGAGING IN WHO IS THE CULPABILITY, AND WE ARE ALWAYS GOING BECOME BACH TO THE INDIVIDUAL WITH WHOM WE HAVE THE LEAST AMOUNT OF KNOWLEDGE ABOUT, YET WE ARE TRYING TO MAKE A COMPARISON WITH THE OTHER TWO PEOPLE WHO HAVE HAD A FULL-BLOWN PENALTY PHASE HEARING. WHO HAVE PRESENTED THEIR MITIGATION. THEY HAVE HAD THE AGGRAVATION PRESENTED TO BOTH A JURY AND IS A SENTENCING JUDGE, BUT THE COMPARISON IS BEING MADE BY AN INDIVIDUAL WHO WE KNOW VERY LITTLE ABOUT. YES, MAYBE IN FACT WE KNOW THAT HE HAS GOT AN AGE. WE HAVE PHYSICAL THINGS THAT WE KNOW ABOUT HIM. BUT APART FROM THAT, WE DON'T KNOW MUCH MORE, AND YET WE ARE TRYING TO HAVE TO REASON THROUGH ALL OF THIS.

WELL, THAT IS IN THIS CASE. BUT IN TERMS OF WHAT THE RULE OF LAW IS GOING TO BE, WITH REFERENCE TO THIS RELATIVE CULPABILITY, IF THE NEXT CASE IS ONE WHERE THE CODEFENDANTS PUT ON A SHOWING THAT THE FELLOW THAT GOT THE DEAL WAS THE REAL --

BUT THE RECORD DOESN'T BEAR THAT OUT AND YOU HAVE SOMETHING TO COMPARE WITH.

YOU ARE SAYING THAT IS NOT THIS CASE.

YOU HAVE SOMETHING TO COMPARE WITH.

YOU SAID YOU WERE GOING TO CONTINUE WITH THE TRIAL JUDGE'S --. THE TRIAL JUDGE TRACKS AND BELIEVES THE TESTIMONY OF MR. DEMPSY, WITH REGARD TO HIS ACTIVITIES IN THIS CRIME. IT STARTED OUT AS!CN IMPORTANT TRADE, THEY WANTED, THEY WERE TIRED OF BEING AFTER. THE AND THEY WANTED A -- AFO TO. T. THEY -- AFOOT. THEY WANTED A CAR AND THEY WENT TO ONE PLACE AND THE WOMAN WASN'T THERE AND THEY WENT TO KING'S AND SPEARS' HOUSEHOLD. THIS WAS SOMETHING LIKE TWO O'CLOCK IN THE MORNING. THEY GET THERE. MR. DEMPSY HAS THE WHEREWITHAL TO HOT WIRE A CAR. IT IS MR. HERTZ WHO GOES TO THE FIRST HOUSE, THE VENTRI HOUSE AND TRIES TO DIVERT BECAUSE THERE IS A DOG BARKING. THEY ARE TRYING TO STEAL A JEEP CHEROKEE OR SOMETHING THERE. THEY ARE AT THE SOAKED HOME. IT IS NOW MR. DEMPSY WHO GOES TO THE DOOR AND ASKS TO TALK, TO BORROW THE PHONE. MELANIE KING COMES TO THE DOOR. SHE HANDS HIM A PHONE OUTSIDE THE DOOR. HERTZ, THEN, GOES IN WITH THE GUN, PUTS THE GUN TO HER. WE HAVE LOONEY, THEN, FOLLOWING AND PUTS A GUN TO MR. SPEARS. AT THAT TIME, WE, THEN, HAVE A CHANGE IN SHIFT OF POSITION, BECAUSE IN FACT, DEMPSY IS IN THE HOUSE AND HE NOTICES THAT THERE IS A HOLSTER ON THE BED. HE COMES BACK AND SAYS HE HAS A GUN, MEANING MR. SPEARS OR THEY HAVE A GUN. AT THAT POINT, HE SAYS TO SPEARS TO PUT, THAT TELLS LOONEY TO SHOOT HIM. THEY ARE ASKING WHERE IS THE GUN GUN. THEY, THE GUN IS UNDERNEATH. IT IS A 9 MILL METER -- MILLIMETER FOUND UNDERNEATH THE BODIES. THE REST OF MR. DEMPSY'S PARTICIPATION IN THE CRIME UP YOU BELIEVE THE ACTUAL MURDERS IS THAT HE -- UNTIL THE ACTUAL MURDERS IS THAT HE IS A LOOKOUT. HE TIES THEM UP AND WATCHESES THEM IN THE BEDROOM. HE COMES FROM THE BEDROOM AT SOME PARTICULAR TIME AND OVER HEARS LOONEY AND HERTZ SAYING THAT THEY ARE GOING TO HAVE TO DO IT THERE, AND I THINK WHAT IS ASKED IS MR. LOONEY, IN THIS RECORD, ASKS DO YOU THINK WE NEED TO TELL HIM, THERE AND IS NO IDENTIFIABLE STATEMENT, BUT IN FACT WHAT NEXT HAPPENS IS THAT A STATEMENT IS MADE TO MR. DEMPSY, AND I SAID IN MY BRIEF THAT IT MR. HERTZ THAT SAYS IT. BASICALLY THAT WE ARE GOING HAVE TO DO THEM IN HERE. WE ARE GOING TO HAVE TO TAKE CARE OF THIS. THERE IS SOME DISCUSSION BY MR. DEMPSY ABOUT BEING CONCERNED ABOUT THIS, AND THE RECORD REFLECTS, I KNOW THAT THERE WAS. THE STATEMENT WITH REGARD TO WHAT HAS TRANSPIRED WITH REGARD TO WHAT HAPPENED AND WHETHER, IN FACT, MR. DEMPSY THOUGHT MR. HERTZ WAS JOKING WITH HIM, AND THE RECORD, AND THIS IS GOING TO BE IN THE HERTZ RECORD AT RECORD CITE 1918 THROUGH 1919, THAT THEY WENT OUT. THERE WAS A THREAT THAT WAS MADE, WELL, YEAH, YOU CAN LEAVE WITH A BULLET. THEY GO OUTSIDE. HE GOES OUTSIDE TO, HE WAS GOING OUTSIDE TO THE SHED. THE NEXT THING THAT HE KNOWS THERE, IS A CITE, A -- A SIGHT, A

LASER SIGHT BEING INFRA RED LASER BEAM SIGHT ON HIS HEAD, AND THAT IS HERTZ DOING, IT AND HE STAYS.

I GUESS ONE OF THE THING THAT IS BOTHERS ME ABOUT THIS WHOLE, I GUESS, RELATIVE CULPABILITY, IS THAT EVEN MR. DEMPSY SAYS THAT HE SHOT ONE OF THESE PEOPLE.

RIGHT. RIGHT.

AND THAT, AND HE SAYS HE THOUGHT HE SHOT HIM TWICE IN THE HEAD.

YES, WHICH IS AN IMPOSSIBILITY, BECAUSE, IN FACT, THERE WAS ONLY ONE BULLET HOLE, ONE INJURY, ONE BULLET INJURY TO THE HEAD OF THE VICTIM.

SO, AND THERE ARE TWO VICTIMS BOTH OF WHOM WERE SHOT, SO IT SEEMS TO ME THAT MAYBE ONE OF THEM, OTHER THAN MR. DEMPSY, DIDN'T ACTUALLY SHOOT ANYONE. ARE WE --

WELL, WE ARE MAKING AN ASSUMPTION THAT HE ACTUALLY HIT THE BODY OR HE ACTUALLY WAS ABLE TO, AND, AGAIN, THERE ARE OTHER PARTS OF THIS THAT THERE WERE OTHER INJURIES TO THE BODY. THAT WAS THE WHOLE POINT OF THE MEDICAL EXAMINER'S TESTIMONY, WITH REGARD TO HOW MANY INJURIES. THEY DID IDENTIFY THAT THERE WERE THREE INJURIES, THREE BULLET HOLES TO THE HEAD. THAT DOES NOT MEAN THAT THERE WERE NOT OTHER BULLET INJURIES TO THE INDIVIDUALS.

WAS THERE ANY TESTIMONY AS TO WHEN THE IDEA THAT THERE WOULD BE A BREAK IN AND THEN -- A BREAK-IN AND THEN A TERRORIZING OF INDIVIDUALS WOULD OCCUR? WHEN THEY LEFT THE RESIDENCE, THE RESIDENCE --

DID THEY SAY THAT BEFOREHAND?

THEY WERE GOING TO -- THEY WANTED A CAR.

THEY WERE GOING TO HOT WIRE A CAR. SURE.

AND LOONEY HAS GOT A GUN AND DEMPSY HAS GOT A GUN. DEMPSY HAS GOT A BACKPACK WITH DUCT TAPE IN IT.

RIGHT.

DOES DEMPSY SAY WHEN, THE POINT WHEN THEY GET TO THIS PERSON'S TRAILER, THAT --

HE EXPRESSED SURPRISE. HE EXPRESSES SURPRISE, WHEN HERTZ, WITH GUN IN HAND, PUTS IT GETS INTO THE HOUSE, ENTERS THE HOUSE. HE WAS NOT EXPECTING THAT.

BUT AS SOON AS HE GETS IN, HE IS THE ONE THAT TIES UP THE VICTIM SPEARS.

YES. WELL, YES, CONTAINS HIM, YES. HE GETS IN THERE, BECAUSE THERE IS TWO GUNS, AND I MEAN, AGAIN, I DON'T KNOW ALL THE DYNAMICS OF WHAT IS BEING SAID. I CAN JUST TELL YOU WHAT MR. DEMPSY REFLECTS TRANSPIRED. AND HIS TELLING OF THE STORY, AS HE RECALLS IT, AND THERE IS NO, NOTHING TO COUNTERIT, IS THAT THEY GO IN. HERTZ GOES IN, GUNPOINTED TO MISS KING, SPEARS, LOONEY COMES IN RIGHT BEHIND, MANAGES TO DISABLE MR. SPEARS. THEY LOOK AROUND THE TRAILER. THEY DISCERN THAT THERE IS A WEAPON.

AND DEMPSY TELLS THEM THAT, AFTER HE GETS IN THERE, HE THINKS THAT HE KNOWS KING FROM HIGH SCHOOL.

THERE IS A STATEMENT, YES, THAT THERE WAS A STATEMENT THAT HE MAKES THAT HE AND

HERTZ HAD GONE TO HIGH SCHOOL TOGETHER. NOW, I THINK IT IS IMPORTANT, I MEAN, THERE IS A LOT TO BE MADE ABOUT THAT, BUT IN FACT, THE RECORD REFLECTS THAT, AT THE SPENCER HEARING, MRS. KING TESTIFIED, THE MOTHER OF THE VICTIM TESTIFIED, AND SHE SAID THAT THE HERTZES LIVED ACROSS THE STREET FROM THEM AND HAD FOR MANY YEARS, AND IN FACT THAT WAS WHAT THE TRIAL COURT FOUND, SO THERE WAS COMPETENT AND SUBSTANTIAL EVIDENCE WHERE THE TRIAL COURT COULD ASCERTAIN THAT IN FACT THESE INDIVIDUALS KNEW AND THAT WAS ONE OF THE CONTINUATIONS, ONE OF MANY FACTORS THAT SUPPORTED THE AVOID ARREST AGGRAVATING FACTOR. I SEE I HAVE USED 39 MINUTES OF MY TIME. THAT IS MORE TIME THAN I USUALLY GET TO SPEAK. THANK YOU VERY MUCH.

THANK YOU. MR. SELIGER.

I AM GOING TO TRY TO ANSWER YOUR QUESTION, JUSTICE PARIENTE. I DON'T THINK THERE IS ANY EVIDENCE IN THIS RECORD ABOUT HOW THE NOTION THAT WE ARE GOING TO TAKE A CAR, TRANSFORMED INTO BREAKING INTO THE TRAILER, AND THEN BURGLARIZING IT, ROBBING THE INDIVIDUALS AND KILLING THEM. I DON'T THINK THERE IS ANY INFORMATION THAT TEST US HOW WE GOT FROM THE NOTION THAT WE ARE GOING TO HOT WIRE A CAR, WHICH MR. DEMPSY SAID HE HAD THE CAPACITY TO DO, AND HE BRINGSTERS THAT HE CAN BREAK THE WINDOW INTO A CAR, BECAUSE HE HAS THE DUCT TAPE AND STUFF IN HIS BACKPACK TO DO THAT, TO WHAT HAPPENED. I DON'T THINK DEMPSY GIVES ANY EXPLANATION ABOUT THAT.

AND AS FAR AS THEIR PRIOR HISTORY, ALL THREE OF THEM, THEY HAVE ALL HAD PRIOR, THEY ARE ON SOME TYPE OF PROBATION? DO THEY HAVE ANY HISTORY OF VIOLENT BEHAVIOR?

I KNOW MR. HERTZ WAS ON PROBATION. THERE IS NO, THE AGGRAVATOR THAT IS USED AGAINST MR. HERTZ IS THE SUBSEQUENT CONVICTIONS IN VOLUSIA COUNTY FOR THE PRIOR VIOLENT FELONY. THERE IS NO EVIDENCE OF ANY PRIOR VIOLENT CONDUCT. WE KNOW THAT MR. DEMPSY IS ON PROBATION, AND WE KNOW MR. DEMPSY IS, KNOWS THAT HE HAS VIOLATED HIS PROBATION, BECAUSE HE HAS CHANGED HIS RESIDENCE, AND HE IS HIDING OUT AT MR. HERTZ'S WITH A FIREARM. WHEN THE NOTION ABOUT WE ARE GOING TO GO TAKE THE CAR BEGINS.

DID THE TRIAL COURT FIND, AS MITIGATION, IN THESE TWO CASES THAT, THERE WAS NO SUBSTANTIAL CRIMINAL RECORD ON THE PART OF EITHER OF THESE?

NO, SIR.

DID HE CONSIDER THAT?

I DON'T KNOW THAT IT WAS OFFERED BY THE DEFENDANT AS A MITIGATOR.

THERE IS NOTHING THIS RECORD, AS I UNDERSTAND IT, TO SHOW AT LEAST ANY VIOLENT CRIMES, IN THE PAST, OF EITHER OF THE TWO DEFENDANTS HERE.

THAT'S CORRECT. BECAUSE THE PRIOR VIOLENT FELONY AGGRAVATOR DEALT WITH THE SUBSEQUENT CRIMES IN VOLUSIA COUNTY. WHICH PREDATED THE SENTENCING IN THIS CASE.

IS THERE A CASE FROM THIS COURT THAT YOU WOULD PICK OUT THAT YOU FEEL HAS THE BEST DISCUSSION OF THIS ISSUE, WITH REFERENCE TO RELATIVE CULPABILITY?

-- UNDER CIRCUMSTANCES THAT CAN DRAW A PARALLEL TO THIS.

> I PROBABLY WOULD TALK ABOUT TWO. HAZE ENVERSUS STATE, CHO-HAZEN VERSUS STATE, WHICH IS CITED -- HAZEN VERSUS STATE, WHICH IS CITED IN MY INITIAL REPLY BRIEF, AND RACE OR VERSUS STATE.

THERE WAS DEFINITELY A DETERMINATION THERE THAT HAZEN WAS A FOLLOWER, CORRECT? AND THAT WAS, ALSO, A DEAL, A SITUATION, IN WHICH EN.

THAT'S CORRECT. NO. TLAFS PLEA BY THE CODEFENDANT. HE GOT LIFE.

AND THE DETERMINATION WAS THAT HAZEN WAS NOT AS CULPABLE.

WHICH I THINK THAT IS A CIRCUMSTANCE. BUT I MEAN, IT IS JUST NOT AT CUP YOU BELIEVE, BUT IF -- CULPABLE, BUT IF YOU YOU ARE EQUALLY CULPABLE, I THINK YOU ARE IN THE SAME BOAT. I THINK IF YOU ARE THE SAME, YOU HAVE TO BE TREATED THE SAME. IF YOU DID THE SAME STUFF, THEN YOU OUGHT TO BE TREATED THE SAME AND I THINK THAT IS WHAT THIS COURT HAS SAID, AND I THINK THAT IS WHAT HAZEN SAYS. THAT IS MY READING OF IT.

WHAT ARE THE CASES THAT DISCUSS THE ROLE OF THE PLEA BARGAINING AND PROSECUTORIAL DISCRETION?

I DON'T --

MARTIN, WHICH SAYS IT, BUT IN THAT CASE La BREW HAD A LESSER ROLE, BUT THERE IS A CASE FROM THE '80s. GARCIA V STATE. ARE YOU FAMILIAR WITH THAT?

I HAVE READ A BUNCH OF CASES, BUT I CAN'T TELL YOU OFF THE TOP OF MY HEAD WHAT THEY ARE, JUSTICE PARIENTE. HERE IS WHAT CONCERNS ME AND WHAT YOU ASKED, JUSTICE QUINCE, IS THAT THERE MAY BE SOME KIND OF REASONED THINK BUYING PROSECUTOR, IN A MULTIPLE DEFENDANT CASE, TO MAKE A DECISION, BASED ON ALL OF THE CIRCUMSTANCES, WHICH WOULD INCLUDE THEIR PRIOR RECORD, THEIR ROLE IN THE OFFENSE, WHETHER THEY COOPERATED EARLY ON AND TOLD THE TRUTH, TO MAKE THAT PERSON GET A SENTENCE LESS THAN THE PEOPLE, THE OTHER PEOPLE, THE OTHER CODEFENDANTS, BUT THERE IS CERTAINLY NOTHING THIS RECORD THAT SAYS THE STATE ATTORNEY WENT THROUGH THAT PROCESS.

BUT THAT IS, OKAY, SO YOU ARE NOT SAYING, BECAUSE, AGAIN, YOU HAVE THREE DEFENDANTS HERE, THAT THE STATE HAS TO GO FOR ALL OR NOTHING, TRY TO GET THE DEATH PENALTY FOR ALL THREE, SO IF WE LOOK AT WHAT JUDGE, AT THE TRIAL COURT'S DETERMINATION THAT THERE WAS A REASON BASIS FOR AFFORDING A LIFE SENTENCE TO MR. DEMPSY, THEN THAT IS A BASIS FOR FINDING THESE SENTENCES TO BE PROPORTIONATE.

THAT IS THE END OF THE DISCUSSION, JUSTICE PARIENTE, HAS NOT THAT IS WHAT THIS COURT HAS SAID. YOU CAN TREAT PEOPLE WHO ACT DIFFERENTLY, DIFFERENT.

BUT THEY COULD BE EQUALLY RESPONSIBLE FOR THE CRIME, BUT IF ONE IS WILLING TO COOPERATE AND GIVES FULL KROOPINGS, IS WILLING TO TESTIFY -- FULL COOPERATION, IS WILLING TO TESTIFY, THAT IS A FACTOR THAT CAN GO INTO LOOK O'CLOCK AT WHETHER IT WAS, THE OTHER TWO -- LOOKING AT WHETHER THE OTHER TWO SENTENCES WERE PROPORTIONATE, BUT THE OTHER SENTENCES ARE THREE EQUALLY IN IT TOGETHER, BUT THE STATE WANTS TO MAKE SURE SINCE IT IS A HEINOUS AND TERRIBLE CRIME, THAT THE DEATH PENALTY IS IMPOSEED. YOU ARE SAYING THAT, IN CASES WHERE THERE IS NO DISTINCTION IN TERMS OF THEIR INVOLVEMENT, THAT THE STATE WOULD BE PRECLUDED FROM TRYING TO GET, GIVE A PLEA TO ONE OF THEM.

IF THE STATE COULD COME UP WITH A REASON ABOUT WHY YOU WILL TREAT SOMETHING, SOMEBODY DIFFERENTLY, THEN THAT IS OKAY, BUT IF THE STATE CANNOT, I MEAN, WHY, HOW DID WE KNOW WHY THE STATE CHOSE DEMPSY?

I GUESS IS THAT ENOUGH?

IT IS NOT ENOUGH. RIGHT.

IS THE FACT THAT THE STATE NEEDS THIS TESTIMONY, SO THAT WHEN THEY GO TO TRIAL, ALL THE HEINOUSNESS, ALL THE, WHATEVER ELSE ABOUT THE CRIME CAN COME OUT, BUT YOU CAN ONLY DO THAT, IF ONE OF THE DEFENDANTS IS WILLING TO TALK ABOUT IT, IS THAT ENOUGH TO SAY, YES, THESE ALL THREE OF THEM DID IT, BUT THAT FACTOR IS SUFFICIENT.

MY ANSWER IS NO, THAT IS NOT ENOUGH.

HOW COULD THAT BE CONSISTENT, THOUGH, WITH A DEFENDANT THAT THROWS HIMSELF ON THE MERCY OF THE COURT AND JURY, AND SAYS, YOU KNOW, MY STRATEGY, IF YOU WILL, IS TO SAY, YES, I DID IT. I AM TERRIBLY SORRY. THIS IS THE MOST HORRIBLE THING, AND THE JURY SHOWS HIM MERCY, AND YET TWO OR THREE OR FOUR OTHER DEFENDANTS THAT DO NOT DO THAT AND HAVE SEPARATE INJURIES AND -- JURIES AND JUDGES, THAT YOU WOULD SAY THE JURY THAT GRANTED MERCY IN THE FIRST CASE WOULD BIND THE DECISION FOR THE OTHER DEFENDANTS IN THE OTHER CASES, WOULDN'T YOU? ISN'T THAT THE SAME ANALOGY?

IF THEY ALL DID THE SAME THING, THAT'S RIGHT.

SO, OKAY.

I MEAN, I -- I THINK IF YOU START EXPANDING IT --

ISN'T THAT JUST AS ARBITRARY AS IT WOULD BE, IF THE PROSECUTION TOOK THE POSITION THAT, ONCE WE MADE THE DECISION, TO HAVE THE PLEA BARGAIN, EVEN IF IT WAS WITH THE WORST OF THE GROUP, THAT THAT IS IMMUNIZED, AND CAN'T EVEN BE LOOKED AT. I MEAN, AREN'T THOSE, REALLY, TWO EXTREMES IN THE SITUATION THERE?

I WOULD SAY NO. I MEAN, I THINK YOUR OBLIGATION, UNDER THE CONSTITUTION, IS TO COMPARE DEATH SENTENCES, IN CASES WHERE THE STATE ARRESTS AND INDICTS PEOPLE FOR THE MURDER, AND THAT IS, I MEAN, WE ARE TALKING ABOUT THE DEATH SENTENCE HERE. I MEAN, THERE ARE LOTS OF OTHER CRIMES HERE, BUT WE ARE TALKING ABOUT WHY DID THESE TWO PEOPLE GET DEATH AND MR. DEMPSEY GET LIFE?

WELL, IF, IN THE JURY, SINCE MR. DEMPSY DOWN PLAYED HIS ROLE, WHETHER IT IS TRUTHFUL OR NOT, IT IS THE TESTIMONY IN HERE, AND IF YOU BELIEVE WHAT HE SAYS, THEN ALTHOUGH HE WENT IN THERE, WAS, TO DO SOMETHING, THAT THE IDEA TO MURDER THE VICTIMS, THE IDEA TO COMMIT THE ARSON, THE IDEA, ALL THIS THAT THEY WERE NOT HIS IDEAS AND THAT HE WAS THREATENED TO DO IT, NOW, YOU MAY NOT BELIEVE THAT, BUT ISN'T THAT WHAT, IN ESSENCE, THE JUDGE MADE A FINDING IN THIS CASE THAT MR. DEMPSY WAS LESS CULPABLE.

RIGHT. I STARTED OUT BY SAYING, JUSTICE PARIENTE THAT, IS A FINDING OF FACT THAT THE TRIAL JUDGE MADE, AND IF YOU FIND THAT THAT FINDING IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE, THEN THAT IS OKAY FOR YOU TO SAY NOW, THAT IS A REASON WHY MR. DEMPSY WAS TREATED DIFFERENTLY THAN MR. HERTZ AND MR. LOONEY. THE QUESTION IS, DOES JUDGE SAULS FINDINGS OF HOW MR. DEMPSY'S BEHAVIOR WAS DIFFERENT THAN MR. HERTZ AND MR. LOONEY, ARE SUPPORTED BY THE RECORD, AND WE ARGUE THEY ARE NOT.

SO WE HAVE TO MAKE A DETERMINATION THAT THE STATE GAVE THE DEAL TO THE DEFENDANT WHO IS THE, QUOTE, LEAST CULPABLE, BUT AS FAR AS ISSUE OF HOW YOU DETERMINE CULPABILITY, THAT IS REALLY SORT OF, IT IS A VAGUE NOTION, ISN'T IT?

I THINK IT IS A FACTUAL REVIEW OF THE RECORD. YOU LOOK AT WHAT PEOPLE, DID AND YOU YOU EVER A SENTENCING ORDER FROM A -- AND YOU HAVE A SENTENCING ORDER FROM A JUDGE. MY TIME IS UP. MR. CHIEF JUSTICE: CHEEVER THANK YOU, MR. SELIGER. THANK YOU.

THANK YOU, JUDGE.

AGAIN --

I AM CONCERNED ABOUT THIS WHOLE NOTION, BECAUSE IT SEEMS TO ME IF YOU TAKE IT TO ITS EXTREME, AND WHAT YOU END UP WITH IS THAT ANY TIME A CODEFENDANT, WHETHER TRIED TOGETHER OR NOT, ENDS UP WITH A LESSER SENTENCE, THEN EVERYBODY WHO IS INVOLVED IN THIS CRIME HAS TO HAVE THAT SENTENCE. I MEAN, IS THAT WHERE ALL OF THIS IS GOING?

JUSTICE QUINCE, I AM NOT A SCHOLAR OF DEATH PENALTY, BUT MY UNDERSTANDING OF WHAT THIS COURT HAS TO DO, IN ORDER FOR THE DEATH PENALTY TO BE CONSTITUTIONAL, IS TO DECIDE ON EVERY CASE, WHETHER IT WAS APPROPRIATELY GIVEN TO A PERSON, AND YOU REVIEW, TO SEE IF EVERY PERSON WHO GETS THE DEATH PENALTY IS THE PERSON WHO OUGHT TO GET THE DEATH PENALTY. SO WHAT I WOULD SAY, IN ANSWER TO YOUR QUESTION, IS THAT THEY DON'T ALL HAVE TO GET THE SAME SENTENCE, BUT SOME OF THEM CAN'T GET DEATH AND OTHERS NOT. AND THAT IS THE DISTINCTION, WHEN YOU ARE LOOKING AT THE RELATIVE CULPABILITY, THE STATE ATTORNEY HAS MADE A DECISION ABOUT WHO HE WANTS TO USE TO ADDRESS --

HOW DOES THAT DIFFER --

-- THE PROOF PROBLEM.

YOU SAID SOME KID.

ONLY IN THAT IT IS THE DEATH PENALTY PART OF IT. IT IS THE IMPOSITION OF THAT MOST ULTIMATE PENALTY ON LOONEY AND HESTS, WHEN WHAT THEY DID -- AND HERTZ, WHEN WE THEY DID WAS NO WORSE THAN WHAT DEMPSY DID, AND THAT IS WHAT THE COURT HAS TO REVIEW, AND IN EVERY DEATH CASE.

WHAT OF THE SITUATION BETWEEN LOONEY AND HERTZ THAT, MR. HERTZ THERE WAS A DIFFERENT QUALITY OF THE MITIGATING EVIDENCE. MR. HERTZ WAS BORN WITH A CLUBBED FOOT. MR., THIS HAPPENED TO MR. HERTZ, SOMETHING ELSE HAPPENED TO MR. LOONEY, AND BASED ON THAT, BECAUSE OF, SAY, THE, SOME MITIGATION THAT ISN'T IN THIS RECORD BUT COULD BE IN A RECORD BETWEEN TWO DEFENDANTS, THE JUDGE DETERMINED DETERMINES THAT THE -- DETERMINES THAT THE QUALITY OF THE MITIGATION IS SUCH THAT IT OUTWEIGHS AGGRAVATED, BUT YET THE AGGRAVATION IS THE SAME. IS THE JUDGE REQUIRED, THEN, BECAUSE HE FINDS THAT ONE DEFENDANT HAS MORE MITIGATION, TO GIVE THE, TO GIVE LIFE TO BOTH?

I THINK, UNDER THE CASES OUT OF THIS COURT, NO. I MEAN, IF THE MITIGATORS OUTWEIGH THE AGGRAVATORS FOR ONE OF THE DEFENDANTS AND IT DOESN'T FOR THE OTHER, THEN THAT WOULD JUSTIFY DIFFERENTIAL IMPOSITION OF THE PENALTY.

BUT WHY WOULDN'T THE FACT THAT A DEFENDANT, A CODEFENDANT WHO HAS SHOWN REMORSE AND IS WILLING TO FULLY COOPERATE, BE A SUBSTANTIAL MITIGATOR THAT, EVEN IF THEY WERE LOOKING AT ALL OF THIS, THAT GIVING MR. DEMPSY MIGHT HAVE BEEN A LIFE SENTENCE COULD HAVE BEEN AN APPROPRIATE AND PROPORTIONATE PUNISHMENT FOR HIM AND NOT REQUIRE THE OTHER TWO TO, ALSO, BE GIVEN A LIFE SENTENCE?

I THINK WHAT MR. SELIGER WAS SAYING IS, IF THE COURT CAN REVIEW EACH AND EVERY FACT IN THIS RECORD AND MAKE THAT DECISION, THEN IT CONCEIVABLY WOULD BE A REASON, BUT WE DON'T THINK THAT THAT IS IN THIS RECORD. SO FACTUALLY, THAT DOESN'T EXIST EXIST. I THINK WHAT JUSTICE ANSTEAD WAS TALKING ABOUT IS, YOU KNOW, WHATEVER THIS COURT SAYS IS

GOING TO ESTABLISH A RULE THAT TRIAL LAWYERS ARE GOING TO START TAYLORING HOW THEY TRY CASES -- TAILORING HOW THEY TRY CASES, SO NOW DO WE NEED TO HAVE, IN A COOPERATING CODEFENDANT CASE, A SEPARATE PROCEEDING, WHERE WE HAVE TO PRODUCE THE EVIDENCE THAT THE PERSON IS, DOESN'T HAVE THESE TRUE MITIGATIONS. DO WE HAVE TO CROSS-EXAMINE AND DECIDE WAS IT REALLY REMORSE OR WAS IT CROCODILE TEARS OR, YOU KNOW, DO WE HAVE TO HAVE THAT IN EVERY CASE. BUT I THINK THERE IS ENOUGH IN THIS RECORD THAT YOU CAN SAY THAT THERE ISN'T ENOUGH MITIGATING ON MR. DEMPSY'S PART TO GET HIM OUT OF THE DEATH PENALTY. THERE IS EQUALITY, AS FAR AS THE MITIGATORS, AS FAR AS THE AGGRAVATING OR THE CULPABILITY, AND THAT IT IS NOT JUSTIFIED IN THIS PARTICULAR CASE, TO MAKE A DIFFERENCE BETWEEN THE PEPTS OF THESE MEN. -- THE PENALTIES OF THESE MEN.

WELL, THERE IS CERTAINLY AN AMOUNT OF PROSECUTORIAL DISCRETION INVOLVED, FROM THE CHARGINGS, STRAIGHT THROUGH, ALMOST, WOULD YOU HAVE US DO SOMETHING OR THE, THIS COURT INTERVENE, IF THE PROSECUTOR IN CHARGING, SAY, THERE ARE THREE OR FOUR PEOPLE INVOLVED, IF THE PROSECUTOR CHOSE TO CHARGE THE MOST CULPABLE WITH SECOND-DEGREE MURDER AND THE OTHERS WITH FIRST-DEGREE MURDER? WOULD YOU ASK THAT WE INTERVENE IN THAT OR COULD WE INTERVENE IN THAT?

I WOULD ASK THAT YOU WOULD INTERVENE.

I BEG YOUR PARDON?

I WOULD ASK THAT YOU WOULD INTERVENE. I DON'T KNOW THAT YOU CAN --

WHAT WOULD BE OUR AUTHORITY FOR INTERVENE SOMETHING WOULDN'T THAT BE A SEPARATION OF POWERS PROBLEM?

I THINK THAT YOUR AUTHORITY WOULD BE THE EQUAL PRO TEXAS -- PROTECTION CLAUSE OF THE CONSTITUTION. I MEAN, I THINK THAT IS WHAT JUSTICE ANSTEAD WAS TALKING ABOUT. DO WE LOOK AT THE GOOD FAITH DECISION OF THE PROSECUTOR? SO, FOR EXAMPLE, IF WE ALLOW THE PROSECUTOR TO HAVE THE DECISION OF WHO TO CHOOSE OUT OF THE THREE, AND I AM, I HAVE BEEN DYING TO MAKE THIS ARGUMENT, ALTHOUGH MR. SELIGER AND I HAVEN'T FLESHED IT OUT, BUT SUPPOSE IF YOU ARE A TRIAL LAWYER, WHO ARE YOU GOING TO CHOOSE? YOU ARE GOING TO CHOOSE YOUR MOST ARTICULATE PERSON, YOUR SMARTEST PERSON, YOUR BEST-LOOKING PERSON, TO BE YOUR WITNESS, AND THEN --

THE SPRAYS OF POWERS, HE HAS THE POW -- THE SEPARATION OF POWERS, HE HAS THE POWER TO DECIDE HOW AND HOW TO -- WHO AND HOW TO CHARGE.

TRUE.

WHAT IS OUR AUTHORITY FOR SBAERVENING IN THAT? I GUESS THAT IS MY -- INTERVENING IN THAT? I GUESS THAT IS MY QUESTION.

ONLY IN THE FACT THAT YOU HAVE THE CONSTITUTIONAL DUTY TO LOOK AT THE DEATH PENALTY CASES AND DETERMINE WHETHER OR NOT IT IS PROPORTIONAL. I UNDERSTAND THE DISTINCTION BETWEEN WHAT YOU ARE SAYING THAT YOU CAN'T, THE COURT DOESN'T HAVE THE AUTHORITY TO ORDER THE PROSECUTOR TO CHARGE ALL CASES EQUALLY. THEY MAKE CHARGING DECISIONS CONSTANTLY, WHETHER IT IS DEATH PENALTY OR NOT, AND THERE IS GOING TO BE, IN THE SYSTEM, SOME DISPARITY, NO MATTER WHAT, AND THE COURT CAN'T REALLY DO ANYTHING ABOUT THAT, BUT WHEN IT IS HERE, FOR YOU TO REVIEW, WHETHER OR NOT IT WAS FAIR, WHETHER OR NOT IT WAS PROPORTIONAL, WHETHER OR NOT IT WAS RIGHT TO GIVE TWO THE DEATH PENALTY.

ISN'T THERE A DISTINCTION OF THAT, THOUGH, WHEN WE GET TO THE PROSECUTOR, NOW, TAKING A PLEA FROM ONE AND CHOOSING TO LET, GET, LET THAT PERSON PLEAD TO A LESSER CHARGE THAN SOMEONE ELSE? ISN'T THAT AN EXTENSION OF THE PROSECUTOR'S DISCRETION?

IT DOES, TO SOME EXTENT, BUT IT IS, ALSO, THE COURT'S AUTHORITY, OR THE COURT'S DUTY TO, AND A DUTY THAT THE COURT CANNOT ABROGATE, IN A DEATH PENALTY REVIEW CASE, TO SEE THAT IT IS BEING FAIRLY ADMINISTERED THROUGHOUT THE STATE, ON ALL OF THE CASES THAT COME BEFORE THE COURT. I MEAN, THAT IS WHAT MAKES THE DEATH PENALTY CONSTITUTIONAL, AND IF YOU WERE NOT TO DO THAT, I THINK YOU ARE GOING TO FURTHER DOWN THE ROAD, GET INTO MORE DIFFICULTIES, AS TO THE DUTY THAT HAS BEEN, THAT YOU HAVE, AS THE SUPREME COURT, TO LOOK AT EACH OF THOSE CASES. I JUST WANTED TO BRIEFLY, ALSO, JUSTICE PARIENTE, AS TO THE FACTUAL CIRCUMSTANCES IN MY REPLY BRIEF, I GO OVER EACH OF THE ONES THAT I THINK ARE FACTUAL MISSTATEMENTS FROM THE RECORD, BY MISS SNURKOWSKI, AND FOR EXAMPLE THE POINTING OF THE GUN AT THE HEAD, THAT WAS MR. DEMPSY. IT IS IN HIS TESTIMONY. IT IS NOT MR. LOONEY. MR. LOONEY DID GO IN WITH A RIFLE AND TOOK A STANCE AND COVERED SPEARS. THOSE ARE THE KINDS OF HARROW SPLITTING, IF YOU WILL, BUT THEY MAKE A DIFFERENCE, WHEN YOU LOOK BACK AND SAY SHOULD THIS PERSON HAVE THE DEATH PENALTY AND THIS PERSON SHOULD NOT? THAT IS WHAT THE JOB OF THIS COURT IS, IS TO LOOK AT EACH AND EVERY ONE OF THOSE LITTLE BITTY DETAILS, IF YOU WILL, TO MAKE THAT DECISION.

BUT DOESN'T THAT ACTUALLY LEND CREDIBILITY TO WHAT DEMPSY SAYS? BECAUSE, SEE, HE COULD HAVE DOWN PLAYED HIMSELF COMPLETELY, IF HE WANTED TO SORT OF PAINT HIMSELF --

TRUE ENOUGH. MAKES HIM SOUND --

IT GIVES CREDIBILITY TO THE PORTIONS WHERE HE SAID HE REALLY DIDN'T WANT TO GO ALONG WITH THIS.

YES. I THINK THAT, WHENEVER DEMPSY STARTS SAYING I DID SOME BAD STUFF, TOO, THAT MAKES HIM LOOK MORE CREDIBLE THAN IF HE WENT IN AND SAID I WAS A BOY SCOUT AND THEY FORCED ME TO DO EVERYTHING. I THINK HIS LACK OF CREDIBILITY COMES, WHEN HIS TESTIMONY IS NOT CORROBORATED BY THE FORENSIC TESTIMONY AT ALL. HE TALKS ABOUT ONLY ONE BURNING. THEY SAY THERE ARE THREE PLACES THE FIRE STARTED. HE TALKS ABOUT SHOOTING SPEARS TWICE. IT TURNS OUT MISS KING IS THE ONE WHO GOT SHOT AND NOT MR. SPEARS. ALMOST AS IF HE THOUGHT, WELL, IT WOULD BE WORSE IF I ADMITTED THAT I SHOT THE WOMEN INSTEAD OF THE MEN. THAT KIND OF PSYCHOLOGY BEHIND WHAT MR. DEMPSY IS SAYING, WHERE IT DOESN'T MATCH UP WITH THE FORENSICS, IS WHERE I THINK HE LOSES HIS ULTIMATE CREDIBILITY.

IS IT THE GUN HE HAD THAT IS THE BULLET, AT LEAST ONE OF THE BULLETS THAT WAS IN MR. SPEARS? IS THE GUN THAT --

RIGHT. NONE OF THE BULLETS REMAIN IN THE BODIES OF EITHER OF THE VICTIMS, AND THE BULLETS MATCH THE LORSING, WHICH THEY STOLE FROM MR. SPEARS. IT WAS ACTUALLY HIS GUN. THAT ONE WAS FIRED AND THEY FOUND THAT BULLET AND KNEW IT CAME FROM THAT GUN.

WHO HAD THAT GUN?

MR. HERTZ. AND MR., THEY ALSO FOUND A RIFLE BULLET THAT THEY COULD MATCH TO A RIFLE, A 30.0 CARBINE, BUT MR. LOONEY HAD THAT, AND OTHER THAN THAT THERE IS NO MATCHING UP OF THE GUNS IN ANY WAY TO THE BULLETS OR TO THE VICTIMS OR TO THE PERPETRATORS.

MS. SANDERS.

YES, SIR.

COUNSEL. APPRECIATE YOUR ASSISTANCE IN THIS CASE. THE COURT WILL BE IN RECESS.

THANK YOU.