>> ALL RISE.
>> THE SUPREME COURT OF FLORIDA IS NOW IN SESSION.
PLEASE BE SEATED.
>> WE NOW COME TO THE THIRD CASE ON THE DOCKET TODAY, NEWBERRY V. THE STATE OF FLORIDA.
>> THANK YOU, CHIEF JUSTICE CANADY.
MAY IT PLEASE THE COURT, ON BEHALF OF MR. NEWBERRY, I HOPE TO FOCUS ON ONE MULTI-PART CLAIM FOR RELIEF.
THAT CLAIM DRAWS IN FULL ON ISSUES TWO AND FOUR IN THE INITIAL BRIEF, ON PART OF ISSUE THREE OF THE INITIAL BRIEF AND ON PART OF POINT FOUR IN THE REPLY BRIEF WHICH DEALS WITH HARMLESS ERROR.
IN SHORT, THIS COURT SHOULD REVERSE FOR, AT A MINIMUM, REEVALUATION OF THE MITIGATING CIRCUMSTANCES IN SENTENCE BECAUSE; ONE, THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE IMPAIRED CAPACITY MITIGATING CIRCUMSTANCE WAS NOT PROVEN; TWO, WHEN FIVE OTHER MITIGATING CIRCUMSTANCES WERE ESTABLISHED BUT, QUOTE, NOT MITIGATED, END QUOTE; AND THREE, AT LEAST CONSIDERED CUMULATIVELY, THOSE SIX ERRORS WERE NOT HARMLESS.
WITH THAT IN MIND, THIS CASE IS ABOUT INSURING THAT IN SENTENCING A MAN TO DIE, THE COURT PROPERLY ACCOUNTS FOR ALL CIRCUMSTANCES THAT REASONABLY CAN SERVE AS A BASIS FOR IMPOSING A SENTENCE LESS THAN DEATH AND CREATE THAT IT WILL SO IN A MANNER THAT ALLOWS FOR MEANINGFUL REVIEW.
>> ON THE INCAPACITY FACTOR, DOESN'T DR. GOLD'S TESTIMONY GIVE COMPETENT, SUBSTANTIAL EVIDENCE IN WHICH THE TRIAL COURT COULD HAVE CONCLUDED THAT MITIGATING FACTOR DID NOT APPLY

OR SHOULD NOT HAVE BEEN APPLIED
HERE?
>> NO, SIR.
>> WHY?
>> WELL, FIRST OF ALL, I THINK I
NEED TO FOCUS ON THE COMPETENT,
SUBSTANTIAL EVIDENCE STANDARD
FOR A MOMENT AND SAY THAT
STANDARD IS NOT ANY EVIDENCE.
IT'S COMPETENT, SUBSTANTIAL
EVIDENCE.
>> ITS EXPERT TESTIMONY, I THINK
IT WAS THE DEFENDANT'S OWN
EXPERT, WASN'T HE?
DR. GOLD'S?
>> YES, SIR.
>> HOW IS THAT NOT COMPETENT,
SUBSTANTIAL EVIDENCE THAT THE
DEFENDANT BELIEVES THAT HE'S
PRESENTING CREDIBLE EVIDENCE?
>> YES, SIR.
WELL, WELL, BECAUSE THIS COURT
HAS SAID COMPETENT, SUBSTANTIAL
EVIDENCE IS SUFFICIENTLY EVIDENT
AND MATERIAL FOR A MIND TO
SUPPORT THE CONCLUSION REACHED.
AND I WOULD ALSO POINT OUT THAT
HERE THE FINDING THAT THE
IMPAIRED CAPACITY CIRCUMSTANCE
WAS NOT PROVEN, THAT INVOLVES
THE APPLICATION OF SOME STANDARD
TO SOME FACTUAL FINDINGS.
AND THE COMPETENT, SUBSTANTIAL
EVIDENCE STANDARD WOULD APPLY TO
THE FACTUAL FINDINGS.
HERE LET'S ASSUME IMPLICITLY--
AND I THINK WE CAN IMPLICITLY--
THE TRIAL COURT FOUND THAT
DR. GOLD'S TESTIMONY, THAT
DR. GOLD'S TESTIMONY ESSENTIALLY
WAS THAT MR. NEWBERRY'S CAPACITY
WAS NOT SUBSTANTIALLY IMPAIRED,
AND THIS IS CRITICAL, BY HIS LOW
INTELLECTUAL FUNCTIONING AND
INTENDED EFFECTS.
THE REASON I SAY THAT IS BECAUSE
DR. BLOOMFIELD CLEARLY TESTIFIED
IT WAS IMPAIRED BY THAT.
>> STATE: IN TERMS OF THE
DEFENDANT AT THE TIME OF THE

MURDER, CAN YOU SAY WHETHER HE
WAS ABLE TO APPRECIATE THE
CRIMINALITY OF HIS CONDUCT,
WHICH IS THE MITIGATING FACTOR
HERE?
DR. GOLD'S: I HAVE NO REASON TO
BELIEVE THAT HE WASN'T.
A LOT OF DOUBLE NEGATIVES, BUT
THAT'S A NO.
AND THEN THE STATE ASKED WHETHER
THAT WAS SUBSTANTIALLY IMPAIRED.
YOU'RE NOT SAYING HE WAS
SUBSTANTIALLY IMPAIRED, ARE YOU?
DR. GOLD'S SAYS NO.
AND I KNOW THE NEXT QUESTION IS
RELATED TO TRAUMATIZATION.
HIS ANSWER IS PRETTY UNEQUIVOCAL
THAT HE'S NOT SAYING AND HE'S
NOT TESTIFYING, NO INDICATION
THAT HE WAS SUBSTANTIALLY
IMPAIRED, THAT HE WAS
SUBSTANTIALLY IMPAIRED, CORRECT?
>> WELL, THOSE ARE HIS FIRST TWO
ANSWERS, JUSTICE LUCK--
>> RIGHT.
>> AND I THINK THAT COULD BE
SOME EVIDENCE TO SUPPORT THE
FINDING HERE.
BUT I THINK IN ORDER TO
DETERMINE WHETHER EVIDENCE IS
COMPETENT AND SUBSTANTIAL, THOSE
ANSWERS HAVE TO BE PUT IN
CONTEXT.
THE VERY NEXT QUESTION AND
ANSWER HAS TO BE CONSIDERED.
AND THE VERY NEXT QUESTION IS,
DO YOU UNDERSTAND THAT
DR. BLOOMFIELD'S OPINION HE IS
SUBSTANTIALLY IMPAIRED?
DO YOU SHARE THAT OPINION?
AND THEN MINUTES LATER,
DR. GOLD'S: THE STATE HAS ASKED
YOU A LOT OF BROAD QUESTIONS.
WHAT WAS THE SPECIFIC PURPOSE OF
YOUR INVESTIGATION?
AND DR. GOLD SAYS I WAS ASKED TO
EVALUATE MR. NEWBERRY WHETHER
HE'S EXPERIENCED TRAUMA AND
WHETHER THAT HAD A PSYCHOLOGICAL
IMPACT ON HIM.

SO HERE I THINK IT'S CLEAR.
I DON'T THINK DR. GOLD'S
WOULD BE QUALIFIED TO RENDER A
CATEGORICAL OPINION THAT
MR. NEWBERRY'S CAPACITY WAS NOT
SUBSTANTIALLY IMPAIRED.
>> AS I UNDERSTAND IT, OUR CASE
LAW HAS SAID WHERE THERE'S BEEN
SUBSTANTIAL PLANS AND
PREPARATIONS BOTH BEFORE, DURING
AND AFTER A MURDER, THAT THAT
ITSELF CAN NEGATE EXPERT
TESTIMONY OF SUBSTANTIAL
IMPAIRMENT.
WE HAVE SAID THAT, HAVE WE NOT?
>> SOMETHING ALONG THAT LINE.
>> OKAY.
I KNOW I'M NOT QUOTING, BUT
SOMETHING LIKE THAT.
>> YES, SIR.
>> OKAY.
TELL ME IF I HAVE THAT WRONG.
>> WELL, I WOULD WANT TO GET
DOWN INTO THE DETAILS AND SAY
THIS COURT HAS ESSENTIALLY SAID
COMPETENT, SUBSTANTIAL EVIDENCE
EXISTS TO FIND THE IMPAIRED
CAPACITY CIRCUMSTANCE IS NOT
ESTABLISHED, NOT PROVEN WHEN
THERE'S EVIDENCE THAT THE
DEFENDANT CAN SIGNAL HIS
INVOLVEMENT FOR OTHERS.
THIS COURT ALSO SAID, TOOK
ACTIONS THAT ARE INDICATIVE OF
SOMEONE-- SAID HIS CONDUCT IS
CRIMINAL AND COULD CONFORM IF
THEY SO DESIRED.
>> WELL, WHAT WE SAID IS THAT
PURPOSEFUL ACTIONS DONE DURING
THE COURSE OF THE MURDER COULD
BE INDICATIVE OF SOMEONE WHO
KNEW THE ACTUAL WRONG AND COULD
CONFORM, RIGHT?
>> PURPOSEFUL ACTIONS.
>> RIGHT.
>> I THINK-- SO, FOR EXAMPLE IN
HOSKINS WE SAID THAT THE
PURPOSEFUL ACTION OF BINDING AND
GAGGING THE VICTIM, DRIVING TO
HER PARENTS' HOUSE SIX HOURS

AWAY, BORROWING A SHOVEL,
DRIVING TO A REMOTE AREA AND
TELLING HIS BROTHER HE HIT A
POSSUM--
>> YES, THOSE ACTIONS ARE.
>> ISN'T THERE A LITANY THAT THE
TRIAL COURT WENT THROUGH IN ITS
ORDER TO SHOW THAT THE DEFENDANT
HERE HAD THOSE SORTS OF
PURPOSEFUL ACTIONS WHICH
INDICATED HE UNDERSTOOD THE
CRIMINALITY OF HIS ACTIONS?
>> WELL, THE TRIAL COURT DID GO
THROUGH A LITANY, JUSTICE LUCK.
I WOULD SAY THAT THAT EVIDENCE
THAT THE TRIAL COURT FOCUSED ON,
WHICH THE STATE CHARACTERIZED AS
MR. NEWBERRY TAKING PURPOSEFUL
ACTIONS OR LOGICAL STEPS AT THE
TIME OF THE CRIME, AND I THINK
WE COULD SAY THAT WAS EVIDENT
THAT HE ARRANGED TO CARRY OUT
THE CRIME--
>> WHAT ABOUT HIS STATEMENTS TO
THE GIRLFRIEND THAT HE WAS GOING
TO STEAL A CAR, THAT HE WANTED
TO STEAL A CAR?
ISN'T THAT INDICATIONS OF A
PLAN?
>> MR. NEWBERRY'S STATEMENT TO
HIS GIRLFRIEND THAT HE WAS GOING
TO STEAL A CAR?
>> RIGHT.
>> I'M SORRY, JUSTICE LUCK--
>> I APOLOGIZE IF I'M GETTING
THAT WRONG.
IN ANY EVENT, WHY ARE THOSE
ACTIONS AT THE TIME OF THE EVENT
AND AFTER NOT INDICATIVE OF
PURPOSEFUL ACTIONS?
>> WELL, BECAUSE I THINK WE NEED
TO LOOK AT THE LANGUAGE OF THE
STATUTE 924.141, IF THE
DEFENDANT'S CAPACITY TO
APPRECIATE THE CRIMINALITY OF
HIS CONDUCT WERE SUBSTANTIALLY
IMPAIRED.
AND I THINK THAT IF A DEFENDANT
TAKES LOGICAL STEPS OR
PURPOSEFUL ACTIONS TO ARRANGE

AND CARRY OUT A CRIME, THAT'S
NOT NECESSARILY INCONSISTENT
WITH HIM APPRECIATING THE
CRIMINALITY OR BEING ABLE TO
CONFORM HIS ACTIONS TO
REQUIREMENTS.
NOW, ON THE OTHER HAND, TAKING
ACTIONS TO CONCEAL THEIR
INVOLVEMENT, THAT IS
INCONSISTENT WITH THOSE TWO
PRONGS.
AND LOGICALLY, I THINK THAT
MAKES SENSE BECAUSE THE FIRST
SITUATION-- ARRANGEMENT
CARRYING OUT THE CRIME-- YOU
KNOW, THAT ONLY REQUIRES WHAT I
WOULD CONSIDER FIRST ORDER,
FIRST LEVEL, BEING AWARE OF THE
CONSEQUENCES AND GETTING IT
DONE.
THE SECOND SITUATION INVOLVES
THIRD, SECOND-- THIRD-LEVEL
THINKING IN THIS SENSE: NOT ONLY
IS THAT INDIVIDUAL CAPABLE OF
ACCOMPLISHING AN IMMEDIATE GOAL,
HE OR SHE CAN THINK, WELL, THE
CONSEQUENCES OF THAT WOULD BE
CRIMINAL--
>> WHAT ABOUT WHEN HE SHOT THE
TWO POLICE OFFICERS HE THOUGHT
WERE ARRESTING HIM FOR THE
UNDERLYING ACTION HERE?
ISN'T THAT AN ATTEMPT TO GET
AWAY WITH IT?
>> I THINK-- LET'S ASSUME THAT
IS COMPETENT, SUBSTANTIAL
EVIDENCE THAT HE COULD
APPRECIATE THE CRIMINALITY OF
HIS CONDUCT.
THE STATUTE IS-- I DO NOT THINK
THAT'S COMPETENT, SUBSTANTIAL
EVIDENCE THAT HE HAD THE
CAPACITY-- OR I'M SORRY, HIS
CAPACITY TO PERFORM THE
REQUIREMENTS TO-- THE STATUTE
DOESN'T REQUIRE THAT THAT
CAPACITY BE ENTIRELY LACKING.
IT ONLY REQUIRES THAT IT BE
SUBSTANTIALLY IMPAIRED.
>> SO LET'S GO TO THE SECOND

PART OF THE ISSUE THAT YOU WANT US TO TALK ABOUT, WHICH IS THE FIVE MITIGATING CIRCUMSTANCES OR NOT.
>> YES, SIR.
>> HASN'T OUR CASE LAW SAID THAT A TRIAL COURT CAN, WEIGHING THE EVIDENCE, FIND THAT IT'S OF NO VALUE EVEN THOUGH THEY FOUND THAT THE MITIGATOR HAD BEEN PROVED?
>> WELL, GENERALLY.
>> YES, IN GENERAL.
>> I WOULD SAY THIS COURT HAS FOUND THAT-- THIS COURT HAS BASICALLY STATED THAT IF A MITIGATING CIRCUMSTANCE IS GENERALLY-- I MEAN, IF A CIRCUMSTANCE IS GENERALLY CONSIDERED MITIGATING, THEN IT'S TECHNICALLY RELEVANT AND HAS TO BE CONSIDERED BY THE SENTENCER. HOWEVER, THEY COULD DECIDE THAT IT'S ENTITLED TO NO WEIGHT--
>> GIVEN THAT THE TRIAL COURT HERE, FIRST OF ALL, AS I UNDERSTAND IT, THE JURY FOUND NONE OF THEM WERE FOUND, AND ONE OF THEM HAD ANY WEIGHT.
>> YES, SIR.
>> THE TRIAL COURT THEN SAID I KNOW THE JURY FOUND THAT, BUT I'M GOING TO GO THROUGH EACH ONE INDIVIDUALLY.
GOES THROUGH EACH INDIVIDUALLY, FINDS THAT SOME ARE PROVEN AND SOME ARE, IN FACT, ENTITLED TO WEIGHT, AND THEN IT SPECIFICALLY ASSIGNS WEIGHT OR NO WEIGHT DEPENDING UPON EACH PARTICULAR FACTOR.
GIVEN THAT, CAN'T YOU FIND THAT THE TRIAL COURT DID EXACTLY WHAT TERRESE ALLOWED THE TRIAL COURT TO DO?
>> NO, SIR.
>> WHY?
>> THE TRIAL COURT HAS A DUTY TO INDEPENDENTLY WEIGH THESE CIRCUMSTANCES.

THE FACT THAT THE JURY MAY NOT
HAVE FOUND THEM, THAT'S NOT
DISPOSITIVE.
>> AGREED.
BUT DIDN'T THE TRIAL COURT GO
THROUGH EACH ONE--
>> YES.
WELL--
>>-- AND ASSIGN WEIGHT TO SOME
A, WERE NOT PROVEN AND, B, THEY
SHOULDN'T BE WAIVED IN ANY
PARTICULAR FASHION?
>> WELL, THE FIVE PARTICULAR
CIRCUMSTANCES I'M FOCUSED ON--
AND THOSE ARE THE FIVE
CIRCUMSTANCES IN ISSUE FOUR.
>> RIGHT.
>> AND WHERE THOSE CIRCUMSTANCES
ARE CONCERNED, THE TRIAL COURT
FOUND THAT THEY'RE ESTABLISHED
BUT THEY WERE, QUOTE, NOT
MITIGATING.
END QUOTE.
THAT WAS IT.
MY ARGUMENT IS THAT THE MOST
LOGICAL NOT MITIGATING IN NATURE
RATHER THAN MITIGATING IN NATURE
BUT ENTITLED TO WEIGHT--
>> WE DON'T HAVE TO READ IT LIKE
THAT.
CAN'T WE JUST READ IT AS I
ASSIGN NO WEIGHT TO IT?
>> WELL, I WOULD SAY A COUPLE
THINGS.
FIRST OF ALL, EVEN IF YOU READ
IT THAT WAY, THEN ISSUE THREE
KICKS IN WHICH IS THE TRIAL
COURT ABUSES DISCRETION BY NOT
THOUGHTFULLY, COMPREHENSIVELY
ANALYZING THE MITIGATORS.
BUT TO A BROADER POINT, IF I
COULD--
>> DIDN'T WE DEAL WITH THAT IN
ROGERS?
IT WAS SIMPLY ENOUGH TO GO
THROUGH EACH ONE AND ASSIGN
WHETHER IT'S PROVEN AND THE
WEIGHT GIVEN TO IT?
>> WELL, I THINK THAT REALLY
WHAT ROGERS SAID IS THIS COURT

WAS CEDED FROM LOYOLA ARE TO THE EXTENT THAT A TRIAL COUNT HAD TO ARTICULATE WHY A PARTICULAR CIRCUMSTANCE WAS ASSIGNED A PARTICULAR WEIGHT.
>> RIGHT.
>> WHICH IS NOT REALLY THE ARGUMENT I'M MAKING HERE.
I'M ARGUING THAT THE TRIAL COURT FAILED TO FIND THESE CIRCUMSTANCES MITIGATING IN NATURE.
BUT THE BROADER POINT-- WELL, SO THAT WOULD BE ONE RESPONSE TO ROGERS.
I WOULD THEN STEP BACK FURTHER, AND THIS IS A BROADER POINT I WANT TO MAKE.
BUT I DO THINK ROGERS NEEDS TO BE PLACED IN CONTEXT.
AND AS ODD AS THIS MAY SOUND, I'D LIKE TO USE THE ANALOGY OF A TREE.
AND IF WE THINK LOYOLA, THAT'S OUT AT THE BRANCHES.
CAMPBELL MAY BE THE TRUNK OR CLOSE TO THE TRUNK, BUT CAMPBELL'S NOT THE ROOT.
CAMPBELL'S NOT THE ROOT TO THIS LINE OF PRECEDENT.
THE ROOT IS PROFITT V. FLORIDA, STATE V. DIXON.
AND I MAKE THAT POINT BECAUSE ROGERS ONLY RECEDED FROM LOYOLA WHICH WOULD BE PROVING THE EDGES OF THE BRANCHES, BUT THERE'S STILL CAMPBELL.
THERE'S MANY BRANCHES IN BETWEEN, BUT--
>> AND I DON'T KNOW THAT I DISAGREE WITH ANYTHING YOU'VE JUST SAID, BUT WHAT CAMPBELL SEEMED TO SUGGEST WAS IT'S ENOUGH FOR THE TRIAL COURT TO GO THROUGH THEM EVENTUALLY, ASSESS WHETHER THEY'VE BEEN PROVEN OR NOT AND ASSESS A WEIGHT TO THEM.
IN OTHER WORDS, WHAT WE DON'T WANT IS TRIAL COURTS SAYING THEY'VE ALLEGED ALL THESE, AND I

FIND THIS TO BE MORE AGGRAVATING
THAN THAT.
AND WHAT WE'VE SAID IS, NO,
YOU'VE GOT TO GO THROUGH THEM
INDIVIDUALLY.
FINE, AS I UNDERSTAND IT, GOING
THROUGH ALL THE INDIVIDUAL--
THE 30 SOMETHING OR 20 PLAINTIFF
SOMETHING CATCH-ALL MITIGATING
FACTORS, AND DID EXACTLY THAT,
WENT THROUGH AND ASSIGNED WEIGHT
TO THEM.
HOW IS THAT NOT CONSISTENT WITH
CAMPBELL?
>> CAMPBELL.
WELL, JUSTICE LUCK, AS A PURE
MANNER OF FORM, ARGUABLY IT IS
CONSISTENT WITH CAMPBELL.
BUT I WOULD POINT OUT THAT
SUBSEQUENT TO CAMPBELL IN
JACKSON AND WALKER, THIS COURT
SAID THAT A TRIAL COURT, THAT
THIS COURT IS NOT ABLE TO
PROVIDE MEANINGFUL APPELLATE
REVIEW UNLESS THE TRIAL COURT
THOUGHTFULLY AND COMPREHENSIVELY
ANALYZES THE PROPOSED
CIRCUMSTANCES.
AND THEN I WOULD REFER BACK TO
WHAT CAMPBELL IS BUILT ON, THOSE
TYPES OF CASES THAT THE COURT
SAID THINGS LIKE IT'S IMPORTANT
THAT THE CAPITAL SENTENCER
SPECIFY THE FACTORS ON WHICH IT
RELIED, ARTICULATE REASONS.
DIXON AND THAT'S IMPORTANT
BECAUSE AS WE ALL KNOW, CAPITAL
SENTENCERS, THEIR DISCRETION HAS
TO GO THROUGH SOME TYPE OF
CHANNELING PROCESS, I WOULD SAY.
AND A CRUCIAL COMPONENT OF THAT
CHANNELING PROCESS AS THIS COURT
RECOGNIZED AS RECENTLY AS
ROBERTSON, AS THE UNITED STATES
SUPREME COURT IS SAID IN
PROFITT, A CRUCIAL PART IS
MEANINGFUL APPELLATE REVIEW.
AND I APPRECIATE THIS IS A
MATTER OF LINE DRAWING, SO IT
DOESN'T LEND ITSELF TO A--

WHICH I KNOW CAN POSE SOME
CHALLENGES.
BUT IF THE COURT DOESN'T ANALYZE
THE CIRCUMSTANCES, THIS COURT
ESSENTIALLY HAS TO SUBSTITUTE
ITSELF FOR THE TRIAL COURT AND
SAY, WELL, IT'S NOT MITIGATING,
HERE'S WHY.
>> IT SEEMS TOUGH TO ME TO READ
THIS ORDER WHICH SEEMS PRETTY
DETAILED TO LEAD TO THE TRIAL
COURT'S NOT THOUGHTFULLY GOING
THROUGH THE MITIGATING FACTORS.
THE JURY FOUND NONE OF THEM ARE
PROVEN, AND YET STILL
INDIVIDUALLY WENT THROUGH EACH
ONE, INDIVIDUALLY FOUND SOME
PROVEN AND THEN INDIVIDUALLY
ASSIGNED WEIGHTS TO SOME NOT
CATEGORICALLY SAYING ONE OF THEM
HAD ANY WEIGHTS.
IT'S HARD FOR ME TO SAY UNDER
THE FACTS I'VE LAID OUT, AND
TELL ME IF I HAVE THOSE WRONG,
THAT THAT'S NOT THE THOUGHTFUL
REVIEW THAT WE'RE TALKING ABOUT.
>> YES, SIR.
WELL, TWO THINGS, JUSTICE LUCK,
AGAIN, I WOULD JUST RETURN TO
THE FACT THAT UNDER FLORIDA'S--
921.141 REQUIRES THE TRIAL COURT
TO, QUOTE, ADDRESS THE
MITIGATING CIRCUMSTANCES.
AND AT ONE POINT IT SAYS IT
SHALL CONSIDER THE AGGRAVATING
FACTORS BUT ALL MITIGATORS.
SO AGAIN, I DON'T THINK THE FACT
THAT THE JURY DIDN'T FIND THESE
REALLY HAS MUCH BEARING HERE ON
THIS ISSUE.
THE SECOND THING WOULD BE
REALLY-- AND THE CLAIM I'M
HOPING TO FOCUS ON TODAY, I'LL
REALLY BE ZEROING IN ON--
>> WHAT WERE THE MITIGATORS
THAT, THE MITIGATING
CIRCUMSTANCES THAT THE TRIAL
COURT DID GIVE WEIGHT TO?
>> MR. NEWBERRY'S INTELLECTUAL
IMPAIRMENT, HIS LOW IQ, I

BELIEVE, AND-- SORRY, CHIEF
JUSTICE CANADY, THERE WAS ONE
MORE ALONG THOSE LINES.
THERE WERE THREE.
HE GAVE MODERATE WEIGHT TO ONE
AND SLIGHT WEIGHT TO TWO.
I HAVE TO APOLOGIZE, I CAN'T
RECALL THAT THIRD.
>> I HAVE ONE FOLLOW-UP QUESTION
ON THE IMPAIRED CAPACITY
NEGATER--
>> YES, SIR.
>>-- AND YOUR ISSUE.
AS JUSTICE LUCK ALLUDED TO AND I
THINK YOU DID TOO, THIS WAS
TRIED USING INTERIM JURY
INSTRUCTIONS THAT HAD THE JURORS
RECORD THEIR VOTE AS TO WHETHER
THEY FOUND INDIVIDUALLY THE
EXISTENCE OF MITIGATING FACTORS
ARGUED TO THE JURY, AND THE JURY
UNANIMOUSLY REJECTED THAT
PARTICULAR FACTOR.
DOES THAT HAVE ANY RELEVANCE TO
OUR CONSIDERATION OF THE LEGAL
ISSUE THAT YOU RAISE REGARDING
THE TRIAL COURT'S DECISION?
>> NO, SIR, I DON'T THINK SO.
>> AND WHY NOT?
>> WELL, BECAUSE AGAIN, THE
STATUTE REQUIRES THE TRIAL COURT
TO INDEPENDENTLY MAKE THESE
FINDINGS.
SO I THINK IF THE TRIAL COURT
WAS TO BASICALLY SAY, WELL, THE
JURY DIDN'T FIND IT, THEREFORE,
I DIDN'T FIND IT, IT'S AN ABUSE
OF DISCRETION--
>> BUT HE DIDN'T DO THAT.
>> RIGHT.
WELL, I GUESS THE MAIN POINT I
WANT TO MAKE IS THAT THE FACT
THAT THE JURORS DID NOT FIND
THAT SHOULD NOT PREVENT THE
TRIAL COURT FROM FINDING IT.
I THINK THE TRIAL COURT HAS TO
INDEPENDENTLY DETERMINE THAT.
I'M NOT NECESSARILY SAYING THAT
FACTOR COULD NOT SOMEHOW WEIGH
IN THAT, BUT I DON'T THINK THAT

FACT WOULD BASICALLY SAY, WELL,
THE JUDGE THEN WHAT HE HAD TO DO
BECAUSE THE JURY DIDN'T FIND IT,
I DON'T THINK THAT WOULD BE THE
APPROPRIATE--
>> SO WHAT YOU'RE SAYING, AND TO
FOLLOW UP ON THAT, YOU'RE MAKING
A STATUTORY CLAIM, NOT A
CONSTITUTIONAL CLAIM.
BECAUSE CONSTITUTIONALLY, THE
JURY-- THE DEFENDANT HERE GOT
THE RIGHTS THAT HE WAS ENTITLED
TO UNDER THE SIXTH AND EIGHTH
AMENDMENTS BY HAVING A UNANIMOUS
JURY FINDINGS WITH REGARD TO
THESE THINGS, CORRECT?
>> WELL, OF COURSE, ISSUE ONE IN
THE BRIEF I TAKE, YOU KNOW, I
TAKE AN ISSUE WITH THAT.
>> I UNDERSTAND.
>> JUSTICE LUCK--
>> THAT'S BEEN DECIDED AGAINST
YOU.
>> YES, SIR.
>> GREAT.
>> YES, SIR.
BUT HERE IN THIS PARTICULAR
CLAIM I'M MAKING WOULD BE MORE
OF A STATUTORY--
>> OKAY.
>> YES, SIR.
IF I COULD BRIEFLY ADDRESS HARM,
THE HARMLESS ISSUE.
AGAIN, THESE SIX ERRORS AT LEAST
CONSIDERED CUMULATIVELY WERE NOT
HARMLESS, AND I WOULD POINT OUT
THAT IN THESE TYPES OF
CIRCUMSTANCES WHERE A TRIAL
COURT HAS ERRED IN WHAT I WOULD
CALL IMPROPERLY CONSIDERING
MITIGATING CIRCUMSTANCES-- AND
I'M THINKING ABOUT CASES LIKE
COVINGTON OR TANZI V. STATE--
THIS COURT HAS ESSENTIALLY
APPLIED A THREE-FACTOR TYPE OF
TEST.
FACTOR ONE WHERE SETTING ASIDE
THOSE IMPROPER MITIGATING
CIRCUMSTANCES, DID THE COURT
WEIGH OTHER MITIGATION.

SECOND OF ALL, WAS THERE
SIGNIFICANT AGGRAVATION.
AND THEN FINALLY, AS FAR AS THE
CIRCUMSTANCES THAT WERE
IMPROPERLY CONSIDERED, WERE THEY
MINOR AND TANGENTIAL.
AND HERE I WOULD ARGUE THAT ALL
THREE OF THOSE FACTORS WEIGH IN
MR. NEWBERRY'S FAVOR.
HERE THE TRIAL COURT ONLY FOUND
AND WEIGHED THREE, WHEREAS HE
IMPROPERLY CONSIDERED SIX.
AND SECOND OF ALL, AT LEAST
RELATIVE TO OTHER CASES IN WHICH
THIS COURT HASP FOUND THIS TYPE
OF ERROR HARMLESS, I WOULD SAY
THAT THE AGGRAVATION HERE WAS
NOT SIGNIFICANT.
IN PARTICULAR, HEINOUS,
ATROCIOUS AND CRUEL WERE NOT
INVOLVED.
THE FINAL POINT, THESE
CIRCUMSTANCES WERE NOT MINOR AND
TANGENTIAL.
FIRST OF ALL, THE IMPAIRED
CAPACITY CIRCUMSTANCE WAS THE
ONLY, QUOTE-UNQUOTE, STATUTORY
MITIGATING CIRCUMSTANCE IMPOSED.
THAT AS WELL AS MR. NEWBERRY'S
CONTROL WERE DIRECTLY RELATED TO
HIS CULPABILITY WHICH I
ACKNOWLEDGE DOES NOT HAVE TO BE
PRESENT TO BE A MITIGATOR, BUT
IT WOULD BE REASON TO GIVE IT
MORE WEIGHT.
I WOULD ALSO POINT OUT THE
EVIDENCE OF HIS RELATIONSHIP
WITH HIS FAMILY.
THIS IS NOT A SITUATION WHERE A
CAPITAL DEFENDANT CALLED FAMILY
MEMBERS IN WHO SAID THAT'S MY
BROTHER.
I HAVEN'T SEEN HIM IN YEARS, BUT
THAT'S MY FAMILY.
HERE THERE WAS PERSUASIVE
TESTIMONY THAT MR. NEWBERRY
MAINTAINED AN ONGOING
RELATIONSHIP EVEN WHILE HE WAS
IN PRISON WITH HIS CHILDREN AND
GRANDCHILD.

AND FINALLY I'LL SAY COMPARED TO CASES SUCH AS CROOK, THIS CASE WOULD BE MORE ANALOGOUS TO THAT TYPE OF SITUATION ON THE ISSUE OF HARM.
ON THE OTHER HAND, PLACES LIKE TANZI ON THE ISSUE OF HARM.
IF THERE ARE NO FURTHER QUESTIONS, I'LL RESERVE THE BALANCE OF MY TIME FOR REBUTTAL.
THANK YOU.
>> MAY IT PLEASE THE COURT, MICHAEL KEPNETT FOR THE STATE OF FLORIDA.
THE APPELLANT FOCUSED ON ISSUES TWO, THREE AND FOUR.
I'D LIKE TO BRIEFLY TOUCH ON ISSUE FIVE AS WELL REGARDING PROPORTIONALITY.
ISSUE TWO, THE APPELLANT CHALLENGES THE FINDING THAT COMPETENT, SUBSTANTIAL EVIDENCE DID NOT SUPPORT THE MITIGATOR-- I'M SORRY, THE, YEAH.
THE STATUTORY MITIGATOR FOUND IN 941.121F THAT THE CAPACITY OF THE APPELLANT TO UNDERSTAND THE CONDUCT AND TO COMPORT HIS CONDUCT WITH THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED.
AS APPELLANT POINTED OUT AS A TWO-PRONGED MITIGATOR, THE CAPACITY TO UNDERSTAND AND THE ABILITY TO CONFORM, THERE WAS NO DISPUTE AT ALL ABOUT THE FIRST PRONG.
THE DEFENSE'S OWN EXPERTS TESTIFIED THAT THE APPELLANT COULD UNDERSTAND THE DIFFERENCE BETWEEN RIGHT AND WRONG WITH.
SO THE ONLY ISSUE WITH REGARD TO THAT MITIGATOR WAS WHETHER OR NOT THERE WAS EVIDENCE TO SHOW THAT THE APPELLANT COULDN'T CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW.
AND THERE'S ONE PIECE OF EVIDENCE ON THIS ARMED BURGLARY-- OR ARMED ROBBERY

THAT SHOWS THAT HE SHOULD.
THE APPELLANT SECURED A VEHICLE FROM ONE OF HIS CO-DEPENDENT'S MOTHERS, ANDERSON.
BUT TESTIMONY CAME OUT THAT BECAUSE THE APPELLANT DID NOT HAVE A DRIVER'S LICENSE, ANDERSON DROVE.
EVEN THOUGH THE APPELLANT IS THE ONE WHO ASKED FOR USE OF THE VEHICLE.
THAT SHOWS HE IS ABLE TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW ONLY IF, FOR NO OTHER REASON, THAN TO NOT GET CAUGHT SO THAT YOU CAN GET THE BIGGER SCORE.
HE CAN CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WHEN HE WANTS TO.
AND THE EVIDENCE SHOWS THAT.
BUT THERE ARE SOME FUNDAMENTAL FLAWS WITH DR. BLOOMFIELD'S TESTIMONY.
IT'S SOMEWHAT BACKWARDS.
HE USES A DIAGNOSIS OF LOW INTELLECTUAL FUNCTIONING TO OPINE ABOUT THE APPELLANT'S BEHAVIOR.
THAT'S BACKWARDS.
HE DOESN'T USE AN OBSERVATION OF THE APPELLANT'S BEHAVIOR IN ORDER TO MAKE A DIAGNOSIS.
WELL, WHY IS THAT IMPORTANT?
THE WOMAN WHO SHARES FOUR CHILDREN WITH THE APPELLANT HAD A 40-YEAR OBSERVATION PERIOD OF THE APPELLANT'S BEHAVIOR, AND WHAT DOES SHE SAY WHEN SHE WAS ASKED ABOUT THAT?
SHE WAS ASKED IF THE APPELLANT IS SMART.
SHE SAID, I SUPPOSE SO.
IS HE EASILY LED?
NO, HE IS NOT.
AGAIN, SHE HAD A 40-YEAR OBSERVATION PERIOD.
WHAT DR. BLOOMFIELD SAID WAS ANYBODY WHO HAS LOW INTELLECTUAL FUNCTIONING NECESSARILY WANTS TO

FEEL INCLUDED AND WILL LOOK TO A
CRIMINAL ELEMENT TO SEEK THAT
APPROVAL.
>> BUT DR. BLOOMFIELD'S
TESTIMONY ALONE, ASSUMING THERE
WOULD BE NOTHING ELSE TO THE
CONTRARY, WOULD HAVE REQUIRED
THE TRIAL COURT TO HAVE FOUND
THIS MITIGATING FACTOR, YOU
WOULD AGREE?
THAT ALONE WOULD HAVE BEEN
COMPETENT, SUBSTANTIAL EVIDENCE
THAT, IF NOT REBUTTED IN ANY
WAY, WOULD HAVE SUPPORTED THE
MITIGATING FACTOR, CORRECT?
>> WELL, LET ME-- I'LL TAKE A
SLIGHT ISSUE WITH THAT.
>> AM I CORRECT OR NOT CORRECT,
AND TELL ME WHY I'M NOT.
>> WELL, JUST BECAUSE THE
STATE--
>> AM I CORRECT OR NOT CORRECT,
AND IF I'M NOT--
>> IF YOU COULD REPEAT THE
QUESTION.
>> YES.
THE ONLY TESTIMONY AT THE
SENTENCING HEARING HAD BEEN
DR. BLOOMFIELD'S TESTIMONY, AND
HE TESTIFIED AS HE DID, WOULD
THAT NOT BE COMPETENT,
SUBSTANTIAL EVIDENCE THAT'S
UNREBUTTED FROM WHICH THE TRIAL
COURT WOULD HAVE TO FIND THAT
MITIGATOR?
>> I WILL SAY, NO, BECAUSE THIS
WAS A RESENTENCING FOLLOWING
HURST.
IN THAT THERE WAS STILL EVIDENCE
FROM THIS COURT'S DECISION ON--
WHERE IT UPHELD--
>> I KNOW.
BUT YOU'RE FIGHTING MY
HYPOTHETICAL.
ANSWER MY HYPOTHETICAL.
>> YES.
>> SO I THINK THE BETTER COURSE
WOULD BE WHAT EVIDENCE
CONTRADICTS THAT.
THAT'S WHAT I'D LIKE FOR YOU TO

FOCUS ON.
>> AND THAT'S WHAT --
>> I DON'T WANT TO HEAR ABOUT THE FLAWS IN DR. BLOOMFIELD'S TESTIMONY.
I'M SURE THEY'RE THERE.
WHAT CONTRARY TESTIMONY WAS THERE THAT WOULD ALLOW THE TRIAL COURT TO FIND, DESPITE THAT EVIDENCE, THAT THE MITIGATORS SHOULD NOT APPLY HERE.
>> SURE.
THE FACT THAT ALTHOUGH HE SECURED THE VEHICLE FROM ANDERSON'S MOTHER, HE HAD ANDERSON DRIVE BECAUSE HE DIDN'T HAVE A DRIVER'S LICENSE.
HE PLANNED THIS WHOLE EPISODE OUT, THE RINGLEADER, TESTIMONY IS VERY CLEAR ABOUT THAT.
HIS MOTHER, THE MOTHER OF HIS FOUR CHILDREN SAID HE'S SMART, AND HE'S NOT OBVIOUSLY LED BY OTHERS.
THAT'S EVIDENCE THAT REBUTS THAT TESTIMONY FROM DR. BLOOMFIELD.
NOW, THERE IS TESTIMONY FROM DR. GOLD'S, BUT HE DID LIMIT HIS TESTIMONY AS TO THE IMPACTS OF PTSD ONLY.
HE BASICALLY SAID HE WAS LOOKING AT PTSD IMPACTS, NOT THE ENTIRE PSYCHOLOGICAL MAKEUP OF THE APPELLANT WHICH IS WHAT DR. BLOOMFIELD WAS DOING.
ALL THE EVIDENCE OF PLANNING, THE INCIDENT REGARDING THE LAW ENFORCEMENT OFFICERS WHO WANTED TO DETAIN HIM NOT ARREST HIM.
HE DROPPED AN ARTICLE, FLED, HE WAS TACKLED BY THE OFFICERS, AND THEN HE SAYS I GIVE UP, I GIVE UP.
AT THAT POINT THE OFFICERS WENT BACK TO LOOK FOR THE DISCARDED ARTICLE, THE APPELLANT SAW HIS OPPORTUNITY AND ENDED UP WITH A GUNFIGHT WITH TWO OFFICERS.
HE SHOT ONE OFFICER IN THE FOOT, THE OTHER OFFICER IN THE HAND.

UNBEKNOWNST TO THE OFFICERS, THE APPELLANT WAS SHOT THROUGH AND THROUGH.
HE RUNS BACK TO HIS MOM'S HOUSE, HE GETS ARRESTED.
AFTER THE ARREST HE CONCEALS FROM THE AUTHORITIES THAT HE HAD BEEN SHOT, AND HE WAS LOOKING AT THE CHAIR TO MAKE SURE THERE WAS NO EVIDENCE OF BLOOD.
HE'S JUST, HE'S NOT THE, NOT THE FOOL THAT DR. BLOOMFIELD PORTRAYS HIM TO BE JUST BECAUSE HE HAS LOW INTELLECTUAL FUNCTIONING.
HE DID HAVE A RECENT IQ TEST OF 65, 66, BUT THAT'S NOT DISPOSITIVE IN THIS CASE BECAUSE WHEN HE WAS 8 YEARS OLD, HE HAD AN 81 SCORE.
SO, AGAIN, THAT EVIDENCE IS NOT EXPERT TESTIMONY.
BUT UNDER THIS COURT'S CASE LAW THAT EVIDENCE DOES NOT SQUARE WITH THE OPINION TESTIMONY FROM DR. BLOOMFIELD.
THEREFORE, THE TRIAL COURT CAN REJECT IT.
NOW, THAT BEING SAID, EVEN IF IT WAS AN ERROR FOR THE TRIAL COURT NOT TO FIND THAT STATUTORY MITIGATOR AS WAS ALLUDED TO EARLIER, THAT UNDERLYING CIRCUMSTANCE WAS CONSIDERED PART OF THE INTELLECTUAL IMPAIRMENT MITIGATOR.
AND JUST AS AGGRAVATORS SHOULD BE MERGED, THIS COURT HAS SAID THAT MITIGATORS SHOULD BE AGGRAVATED.
THAT'S FOOTNOTE THREE IN CAMPBELL.
CAMPBELL'S OFTEN CITED FOR FOOTNOTE FOUR WHICH HAS A LIST OF THAT CATCH-ALL NONSTATUTORY MITIGATOR REGARDING THE WIFE OF THE DEFENDANT.
SO, AGAIN, THE UNDERLYING CIRCUMSTANCE WAS CONSIDERED THE TRIAL COURT FOUND INTELLECTUAL

IMPAIRMENT AND AFFORDED THAT MITIGATING CIRCUMSTANCE MODERATE WEIGHT.
AND IF YOU LOOK, IT'S THE SAME TESTIMONY USED TO SUPPORT ONE MITIGATOR THAT'S USED TO SUPPORT THE OTHER.
SO THERE REALLY IS NO ERROR HERE EVEN IF EVIDENCE FROM DR. BLOOMFIELD WAS NOT REBUTTED.
ON TO ISSUE THREE, THAT ISSUE IS CONTROL BY THIS COURT'S RECENT DECISION IN ROGERS.
BUT WHAT THE APPELLANT IS BASICALLY DOING IS RAISING A PROCESS CHALLENGE TO THOSE 25.
ISSUE THREE ISN'T REALLY CHALLENGING THE DECISION AS TO THOSE 25, JUST THE PROCESS THAT THE TRIAL COURT USED TO GET THERE.
BUT AS THIS COURT ESSENTIALLY SAID IN ROGERS, UNDER THE ABUSE OF DISCRETION STANDARD, THE TRIAL COURT DOESN'T NEED TO BE THAT DETAILED IN ITS SENTENCING ORDER.
IT HAS TO CONSIDER THE MITIGATORS AND SHOW, INDICATE THAT IT DID, BUT DOES NOT REQUIRE THE LEVEL OF DETAIL SUGGESTED WHICH IS WHY THIS COURT RECEDED FROM LOYOLA IN ROGERS.
AND THAT BRINGS US TO ISSUE FOUR, WHICH IS THE FIVE MITIGATING CIRCUMSTANCES THAT TRIAL COURT SAID WEREN'T MITIGATING.
THERE IS SOME CONFUSION IN THE RECORD AS TO WHETHER OR NOT THE TRIAL COURT SAID, YES, THESE ARE MITIGATING IN NATURE, BUT THERE'S NO WAY APPROPRIATE IN THIS CASE OR IF THE TRIAL COURT SAID THEY'RE NOT MITIGATING IN NATURE.
IN THE END, IT DOESN'T MATTER BECAUSE THERE'S NO REVERSIBLE ERROR.

IT DOESN'T MATTER IF IT'S THE
ABUSE OF DISCRETION STANDARD
THAT APPLIES OR DE NOVO BECAUSE
THE EVIDENCE WAS NOT PERSUASIVE.
THERE'S NO HARM AND THERE'S NO
ABUSE OF DISCRETION IF IT HAD
BEEN AFFORDED SLIGHT WEIGHT.
AND I'LL READ TO YOU WHAT THE
COURT SAID.
ALTHOUGH THE JURY UNANIMOUSLY
FOUND THE GREATER WEIGHT OF THE
EVIDENCE DID NOT ESTABLISH THIS
CIRCUMSTANCE-- AGAIN,
ACKNOWLEDGING THE FACT THAT FOR
EVERY SINGLE MITIGATOR THE JURY
SAID NO-- THE COURT WENT ON TO
WRITE, THIS EVIDENCE DOES NOT
ESTABLISH THIS CIRCUMSTANCE.
THIS COURT NOW DETERMINES THIS
CIRCUMSTANCE IS NOT MITIGATING.
SO TO EXTENT THERE'S ANY
QUESTION ABOUT WHETHER THE TRIAL
COURT SAID IT'S NOT MITIGATING
IN NATURE OR MITIGATING IN THIS
CASE, IT DOESN'T MATTER BECAUSE
THE EVIDENCE WAS SUBSUMED BY THE
INTELLECTUAL ERROR OR IT WAS NOT
PERSUASIVE.
SO IF IT'S DE NOVO, THEN IT'S
HARMLESS ERROR.
>> HOW CAN THEY SAY THEY WERE
SUBSUMED WHEN THE FIVE THAT
WE'RE TALKING ABOUT ARE HE
STRUGGLES WITH DEPRESSION, WHICH
WAS NOT ANY OF THE THREE THAT
WERE THERE; THAT HE'S INELIGIBLE
FOR PAROLE, WHICH I DON'T SEE
HOW THE THREE THAT WERE FOUND
COULD POSSIBLY SUBSUME THAT;
THAT HE WAS PLACED IN SPECIAL
EDUCATION AS A CHILD WHICH, AS
YOU'VE STATED, IT'S VERY
DIFFERENT FROM THE LOW IQ THAT
WAS FOUND AS AN ADULT; THAT HE
WAS IN A LOVING RELATIONSHIP
WITH HIS FAMILY WHICH WOULD SEEM
TO BE COUNTERINDICATIVE OF SOME
OF THE THREE THAT WERE FOUND;
AND HE HAS POOR IMPULSE CONTROL.
THAT WOULD MAYBE BE CLOSE TO

SUBSUMED.
IT'S HARD FOR ME TO SAY THEY'RE HARMLESS WHEN THEY SEEM VERY DIFFERENT THAN THE THREE THAT WERE FOUND.
>> WELL, I SAID, JUSTICE LUCK, THEY WERE EITHER SUBSUMED BY THE--
>> RIGHT.
THAT'S WHAT I'M ASKING THE QUESTION ABOUT.
>> OR--
>> I'M NOT ASKING ABOUT OR.
HOW COULD THEY POSSIBLY BE SUBSUMED?
>> WELL, THE TESTIMONY FROM DR. BLOOMFIELD, HE SAYS THE INTELLECTUAL IMPAIRMENT RELATED TO THE IMPULSE CONTROL PROBLEMS THAT THE APPELLANT HAD.
>> I AGREE, POSSIBLY COULD BE, BUT I DON'T SEE HOW THE OTHER FOUR COULD BE.
>> I'M NOT ARGUING THAT THEY ARE.
>> OKAY.
SO GIVEN THAT THEY'RE NOT, HOW COULD WE SAY THAT THEY'RE HARMLESS IF THE TRIAL COURT ERRED IN FINDING THAT THEY WERE NOT MITIGATING IN THIS CASE?
>> BECAUSE OF THE NATURE OF THE AGGRAVATION IN THIS CASE.
WE HAVE FOUR PRIOR VIOLENT FELONY CONVICTIONS, ALL OF THEM INVOLVING GUN VIOLENCE.
THREE OF THEM INVOLVING SHOOTING VICTIMS, ONE SHOT SIX TIMES BY THE APPELLANT.
>> HOW CAN WE SAY THOUGH THAT WITHOUT KNOWING WHAT THE WEIGHT SHOULD HAVE BEEN FOR EACH OF THESE, HOW CAN, HOW THAT WE WOULD WEIGH IT THE SAME WAY--
IN OTHER WORDS, LET'S SAY THE TRIAL COURT ERRED AND SHOULD HAVE GIVEN EACH ONE OF THESE GREAT WEIGHT.
HOW COULD WE HAVE WEIGHED THOSE FOUR OR FIVE WITH GREAT WEIGHT

AGAINST THE GREAT WEIGHT THAT
WAS GIVEN TO OTHERS AND HAVE
REACHED THAT SAME CONCLUSION?
>> WELL, IF YOU LOOK AT THIS
CASE, THERE'S NO WAY THESE WOULD
BE ENTITLED GREAT WEIGHT.
>> HOW DO WE KNOW THAT?
>> BECAUSE YOU CAN LOOK TO THE
RECORD.
THE TESTIMONY SAYS THE DEFENDANT
WAS DEPRESSED IN THE PAST
BECAUSE HIS FATHER DIED.
THERE'S NO NEXUS TO DEPRESSION
FROM THE APPELLANT'S DAD'S DEATH
PREVIOUSLY IN TIME TO THIS
PARTICULAR CRIME.
THERE'S JUST NO NEXUS THERE,
JUSTICE LUCK.
SO IT'S NOT PERSUASIVE.
>> INELIGIBILITY FOR PAROLE'S A
PRETTY BIG ONE.
>> YES.
BUT, AGAIN, JUST BECAUSE SOMEONE
HAS A LIFE SENTENCE WITHOUT THE
POSSIBILITY FOR PAROLE DOES NOT
MEAN SOCIETY IS EVER PROTECTED
FROM THAT INDIVIDUAL.
>> AGREED.
BUT YOU'RE ASKING US TO REWEIGH
SOMETHING WHERE THE TRIAL COURT,
AGAIN ASSUMING ERROR THAT THE
TRIAL COURT ERRED HERE AND
WITHOUT KNOWING WHAT WEIGHT THE
TRIAL COURT WOULD HAVE GIVEN US
ON A COLD RECORD TRYING TO FIND
OUT WHAT WE WOULD HAVE GIVEN IT,
THAT'S A HARD TASK FOR US TO DO.
>> I WOULD DISAGREE ABOUT YOUR
DEFINITION OF HARMLESS ERROR.
HARMLESS ERROR ANALYSIS IS THERE
A REASONABLE PROBABILITY--
>> THAT WOULD HAVE AFFECTED THE
RESULT.
I UNDERSTAND.
WITHOUT KNOWING THE WEIGHT
THOUGH, HOW COULD I MAKE THAT
DETERMINATION, I GUESS IS WHAT
I'M ASKING.
>> BECAUSE IT'S NOT PERSUASIVE,
AND IT WOULDN'T HAVE BEEN GIVEN

THAT MUCH WEIGHT ANYWAY.
AGAIN, FOUR PRIOR VIOLENT FELONY CONVICTIONS ALL INVOLVING GUN VIOLENCE WITH THREE GUNSHOT VICTIMS.
THEY'RE NOT CONTEMPORANEOUS.
IT WASN'T LIKE TWO BEFORE, TWO WERE AFTER.
THIS IS NOT A SITUATION WHERE THE APPELLANT, HE VOLUNTEERED--
IT'S NOT A ROBBERY GONE BAD.
IT MAY HAVE BEEN FOR HIS CO-DEFENDANTS, BUT THIS IS NOT THE FIRST TIME THAT THE APPELLANT USED GUN VIOLENCE TO GET WHAT HE WANTED.
>> HAVE WE EVER ADDRESSED WHETHER INELIGIBILITY FOR PAROLE IS PROPERLY CONSIDERED AND WEIGHED AS A MITIGATOR, TO YOUR KNOWLEDGE?
>> THIS COURT HAS SUGGESTED THAT IT IS A MITIGATOR, BUT THE STATE TAKES SOME ISSUE WITH THAT BECAUSE THERE SEEMS TO BE A PRESUMPTION THERE THAT BECAUSE THE--
>> YOU'RE DECIDING WHETHER THE DEFENDANT IS, SHOULD GET THE DEATH PENALTY OR LIFE WITHOUT PAROLE.
IT SEEMS ODD THAT YOU WOULD SEPARATELY CONSIDER INELIGIBILITY FOR PAROLE A MITIGATOR WHEN--
>> RIGHT.
>>-- THAT'S THE OVERARCHING--
>> THERE SEEMS TO BE SOME PRESUMPTION THAT UNDERLIES THAT, THAT SOMEHOW SOCIETY IS SAFE JUST BECAUSE THE DEFENDANT IS GOING TO SPEND HIS LIFETIME IN PRISON.
BUT THERE ARE MANY-- PRISONERS ARE STILL PART OF OUR SOCIETY.
CORRECTIONAL OFFICERS ARE STILL PART OF OUR SOCIETY.
AND THERE'S BEEN, THERE ARE NUMEROUS CASES WHERE INMATES ARE KILLING OTHER INMATES.

AND IF THOSE INMATES HAVE FAMILIES, THEY HAVE LOVED ONES, THAT'S SOMEONE'S BROTHER, FATHER, SISTER, MOTHER.
THEY'RE PART OF OUR SOCIETY TOO.
SO THIS PRESUMPTION THAT JUST BECAUSE A PERSON SPENDS THE REST OF HIS LIFE IN PRISON MEANS THAT WE'RE SAFE IS A FALSE PRESUMPTION.
AND THEN I UNDERSTAND THAT THE STATE FILED AN AUTHORITY SOMEWHAT LATE IN THIS CASE, PARTICULARLY REGARDING THE PROPORTIONALITY REVIEW.
THE APPELLANT RAISED REVIEW AS AN ISSUE IN THIS CASE, AND THE STATE FIRST ARGUES THAT FOR ALL THE REASONS ARTICULATED BY CHIEF JUSTICE CANADY THAT PROPORTIONALITY REVIEW UNCONSTITUTIONAL GIVEN THE CONFORMITY CLAUSE IN THE STATE CONSTITUTION.
IN DISSENT THERE'S A QUOTE FROM THE BALLOT, TALKS ABOUT THE MINIMUM LEVEL OF PROTECTIONS.
SO WHAT THE CONFORMITY CLAUSE BASICALLY SAYS IS WE ARE BOUND IN FLORIDA TO PROVIDE THE BARE MINIMUM AND THE BARE MINIMUM ONLY.
WE CANNOT AFFORD ADDITIONAL SAFEGUARDS BECAUSE THE PEOPLE OF THE STATE HAVE SAID NO TO THAT.
NOW, AS TO THE MAJORITY DECISION IN YACOB, IT IS TIME TO REVISIT THAT CASE PARTICULARLY BECAUSE OF FOOTNOTE TWO.
IT'S BASICALLY A HOUSE OF CARDS ARGUMENT, THAT IF YOU TAKE OUT THE PROPORTIONALITY REVIEW CARD, THE ENTIRE HOUSE OF CARDS FALLS.
AND JUST BECAUSE THE U.S. SUPREME COURT HAS SAID THIS STATE'S CAPITAL SENTENCING SCHEME IS CONSTITUTIONAL DOESN'T MEAN THAT FLORIDA'S WILL BE IF YOU TAKE OUT PROPORTIONALITY REVIEW.

BUT THE CAPITAL SENTENCING SCHEME AT ISSUE IN 2014 WHEN YACOB WAS DECIDED IS NOT THE CAPITAL SENTENCING SCHEME WE HAVE TODAY.
TODAY IN THE POST-HURST WORLD, THE SYSTEM THAT WE HAVE IS INDISTINGUISHABLE FROM THE CALIFORNIA SYSTEM THAT WAS UPHELD BY THE U.S. SUPREME COURT IN PULLEY.
SO NOW IF THERE WAS ANY DEBATE ABOUT WHETHER OR NOT PROPORTIONALITY REVIEW WAS PART OF THE BARE MINIMUM OR WAS AN ADDITIONAL SAFEGUARD, IT IS CLEAR UNEQUIVOCALLY THAT IT IS NOW AN ADDITIONAL SAFEGUARD.
BECAUSE IT IS AN ADDITIONAL SAFEGUARD AND NOT THE BARE MINIMUM, THIS COURT CANNOT DO IT BECAUSE THE PEOPLE OF FLORIDA HAVE SAID SO THROUGH THE PASSAGE OF THE CONFORMITY CLAUSE.
>> DUD YOU ARGUE THIS IN YOUR BRIEF?
>> NO, AND I APOLOGIZE FOR THAT, JUSTICE POLSTON.
AND I APPRECIATE THAT OPPOSING COUNSEL DID NOT HAVE A LARGE AMOUNT OF TIME TO RESPOND TO THAT ARGUMENT.
I WOULD NOTE THAT AFTER I FILED THE NOTICE OF SUPPLEMENTAL AUTHORITY, I DID CONTACT OPPOSING COUNSEL BY PHONE AND TOLD HIM THE EXACT ARGUMENT I INTENDED TO MAKE.
I KNOW IT'S NOT AN IDEAL SITUATION, I WAS JUST TRYING TO GIVE THE OPPOSING COUNSEL AS MUCH OPPORTUNITY AS POSSIBLE.
BUT I UNDERSTAND THE CONCERN, JUSTICE POLSTON.
AND THEN LASTLY IN CLOSING, WITH REGARD TO ISSUE SIX, THE APPELLANT IS SEEKING AN EXTENSION OF THE CATEGORICAL BAR FROM INTELLECTUAL DISABILITY TO INTELLECTUAL IMPAIRMENT RELYING

ON THE STANDARDS OF DECENCY.
THE CONFORMITY CLAUSE PRECLUDES
THAT AS WELL.
BUT I WOULD CLOSE WITH AS
NUMEROUS DEFENDANTS HAVE SAID,
THE EVOLVING TEST IS AN UP
CONSTITUTIONAL USURPATION OF
LEGISLATIVE POWER BY THE
JUDICIARY, BY THE U.S. SUPREME
COURT.
ON THAT, THE STATE ASKS THAT
THE, THIS COURT AFFIRM THE
SENTENCE RENDERED BELOW.
>> GOOD.
I'D LIKE TO TRY AND MAKE THREE
BRIEF POINTS ON HARM AND THEN
THREE BRIEF POINTS ON THE
IMPAIRED CAPACITY--
>> I'M GOING TO GIVE YOU TWO
ADDITIONAL MINUTES SO, BUT--
>> OKAY.
THANK YOU, JUSTICE CANADY.
YES, SIR.
ON HARM, JUSTICE LUCK, I THINK
YOUR QUESTIONS OF THE STATE IN
TERMS OF HOW THIS COURT CAN FIND
THIS HARMLESS OR CONDUCT A
HARMLESS ERROR REVIEW WITHOUT
REWEIGHING.
THAT GOES TO THE FACT THAT THESE
TYPES OF ERRORS HINDER THIS
COURT FROM CONDUCTING MEANINGFUL
APPELLATE REVIEW.
AGAIN, THAT'S THE CRITICAL
REASON FOR THE TRIAL COURT TO
THOUGHTFULLY AND COMPREHENSIVELY
ANALYZE THESE CIRCUMSTANCES AND
ASSIGN AWAY AND EXPLAIN WHY IT'S
NOT MITIGATING.
THE OTHER POINT I WOULD MAKE IS
THIS COURT HAS STATED IN KNOWLES
V. STATE THAT WHERE HARMLESS
ERROR IS CONCERNED, THE QUESTION
IS WHETHER THERE'S A REASONABLE
POSSIBILITY THAT THE ERROR
AFFECTED THE VERDICTS NOT
WHETHER IT'S SUBSTANTIALLY
INFLUENCED THE VERDICT.
HERE THERE'S A REASONABLE
POSSIBILITY THAT THESE ERRORS

CONTRIBUTE TO THE DEATH
SENTENCE.
I WOULD ALSO POINT OUT THAT
EVEN, EVEN IF THE COURT
CONSIDERED MR. NEWBERRY'S
INTELLECTUAL IMPAIRMENT AND
ASSIGN WEIGHT OF MITIGATING
CIRCUMSTANCES, THAT FACT DOES
NOT-- EVEN SO, EVEN DETECTING
THAT TO BE THE CASE, I WOULD
STILL ARGUE THAT IF THE COURT
HAD PROPERLY CONSIDERED THE
PASSING CIRCUMSTANCES TO BE
CONCLUDE PROVEN, IT WOULD NEED
TO ASSIGN THAT MORE THAN
MODERATE WEIGHT.
HERE'S WHY I SAY THAT.
THAT WOULD HAVE DIRECTLY LED
TO HIS CULPABILITY.
IN ADDITION, IT WAS TESTIFIED
THAT IT AFFECTED HIS FUNCTIONING
AT ALL TIMES.
AND I WOULD POINT OUT THAT IN
THIS CASE NOT ONLY DID THE
EVIDENCE NOT ONLY FAIL TO
INDICATE THAT MR. NEWBERRY
CONCEALED HIS ACTION, IT
ACTUALLY SHOWED THE REVERSE.
HE ENGAGED IN THIS CRIME WITH
THREE MEN HE KNEW FROM THE
NEIGHBORHOOD, PEOPLE SAW THE
WEAPONS IN PLAIN VIEW.
IF THE TRIAL COURT WOULD HAVE
PROPERLY CONSIDERED THE IMPAIRED
CAPACITY CIRCUMSTANCE, I THINK
THAT WOULD HAVE BEEN MEANINGFUL
HERE.
I WOULD ALSO POINT OUT THAT TO
EXTENT THE COURT FOUND THAT
MR. NEWBERRY UNDERSTOOD RIGHT
FROM WRONG, THIS COURT HAS MADE
CLEAR THAT JUST BECAUSE A PERSON
IS SANE OR KNOWS THE
CONSEQUENCES INCLUDING RIGHT
FROM WRONG, THAT DOESN'T
NECESSARILY MEAN THAT HIS
CAPACITY IS NOT SUBSTANTIALLY
IMPAIRED.
I'D ALSO NOTE THAT
MR. ANDREWS-- NOT COMPETENT

SUBSTANTIAL EVIDENCE.
AND I WOULD JUST END BY SAYING
THIS--
>> WELL, WHY ISN'T IT?
[LAUGHTER]
I MEAN, BECAUSE IF SOMEONE
DECIDES HE'S NOT GOING TO DRIVE
A CAR BECAUSE HE LACKS A
DRIVER'S LICENSE, THAT SHOWS
KIND OF A KEEN AWARENESS OF THE
REQUIREMENTS OF THE LAW AND A
CAREFULNESS TO ABIDE BY CERTAIN
REQUIREMENTS OF THE LAW.
WHY WOULDN'T THAT BE COMPETENT
EVIDENCE?
>> WELL, CHIEF JUSTICE CANADY,
IN THAT CIRCUMSTANCE IT COULD
BE.
BUT THAT'S NOT WHAT HAPPENED
HERE.
FROM THE RECORD, I'M NOT AWARE
OF THERE BEING EVIDENCE THAT
THERE WAS SOME DISCUSSION AND
MR. NEWBERRY SAID I'M NOT
DRIVING, I DON'T HAVE A LICENSE.
THE EVIDENCE CAME FAR LATER IN
THE PROCEEDINGS AS I RECALL.
MY UNDERSTANDING IS THAT
CO-DEFENDANT PHILLIPS DROVE.
BUT I'M NOT AWARE OF THERE--
>> SO YOU'RE SAYING THERE'S NO
EVIDENCE TO SHOW THAT THERE'S
ANY LINK BETWEEN--
>> YES, SIR.
>>-- BETWEEN HIS DECISION NOT
TO DRIVE AND HIS LACKING A
DRIVER'S LICENSE.
>> YES, SIR.
TO MY, TO MY UNDERSTANDING.
AND IF I COULD JUST CONCLUDE BY
SAYING, AGAIN, THESE ERRORS
HINDERED THIS COURT'S ABILITY TO
MEANINGFULLY REVIEW THIS
SENTENCING ORDER, AND AS A
RESULT, I WOULD ASK THIS COURT
TO REVERSE FOR REEVALUATION OF
MITIGATING CIRCUMSTANCES IN THE
SENTENCE.
THANK YOU.
>> ALL RIGHT.

WE THANK YOU BOTH FOR YOUR ARGUMENTS, AND THE COURT WILL NOW BE RECESSED.