

NOW WE MOVE TO THE FINAL CASE ON
THE DOCKET TODAY WHICH IS
LAWRENCE V. STATE OF FLORIDA.

[BACKGROUND SOUNDS]

>> GOOD MORNING, CHIEF JUSTICE
CANADY, JUSTICES.

I'M BARBARA BUSHARIS

REPRESENTING MR. LAWRENCE.

I'D ASK TO RESERVE FIVE MINUTES
OF MY TIME FOR REBUTTAL.

UNLESS THE COURT PREFERS
OTHERWISE, I'D LIKE TO FOCUS ON
PROPORTIONALITY THIS MORNING AND
TALK ABOUT WHY MR. LAWRENCE'S
SENTENCE IS NOT PROPORTIONAL AND
ALSO TRY TO ADDRESS THE ARGUMENT
THAT THE STATE RAISED IN THE
ANSWER BRIEF ABOUT WHETHER
PROPORTIONALITY REVIEW SHOULD BE
UNDERTAKEN AT ALL IN THIS, IN
THIS CASE AND AS A GENERAL
MATTER OF LAW IN THE STATE OF
FLORIDA.

THE PROPORTIONALITY ARGUMENT
RELATING TO MR. LAWRENCE'S
SENTENCE WAS, AS THE COURT IS
AWARE, REJECTED THE FIRST TIME
THAT HE WAS SENTENCED.
AND ON HIS FIRST DIRECT APPEAL.
HOWEVER, AT HIS RESENTENCING
THERE WAS COMPELLING AND AN
EXTENSIVE EVIDENCE PROVIDED BY
AN EXPERT, DR. WU, OF BRAIN
DAMAGE SUFFERED BY MR. LAWRENCE
AS A CHILD, OF STRUCTURAL
CHANGES IN THE BRAIN THAT WERE
DIRECTLY ATTRIBUTABLE, IN THE
EXPERT OPINION, TO THAT EARLY
BRAIN DAMAGE AS WELL AS TO
SUBSEQUENT EVENTS THAT HAPPENED
TO HIM.

AND THAT THESE BRAIN INJURIES
AND CHANGES IN HIS BRAIN
DIRECTLY AFFECTED HIS ABILITY TO
REGULATE HIS BEHAVIOR, MADE HIM
MORE OF A FOLLOWER OF OTHERS AND
PLAYED A ROLE IN THE UNDENIABLY
AWFUL EVENTS THAT HAPPENED BACK
IN, I THINK, 1998 WHEN HIS
ORIGINAL CRIME TOOK PLACE.

THE RECORD OF THE SENTENCING,
WHICH AS YOU'VE SEEN WAS NOT--
WAS A SENTENCING AT WHICH HE
WAIVED MITIGATION, SO IT WAS
SIMPLY A PRESENTATION OF
MITIGATION RATHER THAN ARGUING
MITIGATION-- ALSO INCLUDED
TESTIMONY FROM THE,
MR. LAWRENCE'S SISTER.
ACTUALLY, TWO OF HIS SISTERS BUT
ONE IN PARTICULAR TESTIFIED
ABOUT HIS LIMITATIONS AND
TESTIFIED THAT HE COULD NOT EVEN
REMAIN EMPLOYED IN THE FAMILY
BUSINESS BECAUSE HE WAS UNABLE
TO REMEMBER SIMPLE THINGS LIKE
TAKING HOSES OFF A TRUCK.
HIS SHORT-TERM MEMORY WAS SO
DAMAGED.
AND SO I KNOW THROUGHOUT THIS
CASE THE PREMEDITATION HAS BEEN
A HUGE ISSUE, AND THERE IS
UNDENIABLE EVIDENCE OF PLANNING
IN THIS CASE.
AS WE, AS WE CONCEDED IN THE
INITIAL BRIEF.
BUT THAT HAS TO BE SEEN IN
CONTEXT, IN THE CONTEXT OF
SOMEBODY WHO COULD NOT REMEMBER
SIMPLE TASKS WITHOUT WRITING
ANYTHING DOWN.
IT'S NOT NECESSARILY EVIDENCE OF
EXTENSIVE PREMEDITATION IN THE
SENSE OF SOMEBODY WHO ACTUALLY
CONCEIVED OF A CRIME ON HIS OWN
AND CAME UP WITH THE WAYS TO
CARRY IT OUT.
THE CASES THAT WE RELIED ON IN
THE INITIAL BRIEF FOR
PROPORTIONALITY INCLUDED JOHNSON
WHERE, LIKE MR. LAWRENCE, THE
DEFENDANT WAS A PRINCIPAL IN THE
PRIOR FELONIES THAT SUPPORTED
THE FINDING OF AN AGGRAVATOR
BASED ON PRIOR FELONIES.
HERE MR. LAWRENCE WAS A
PRINCIPAL IN THE OTHER EVENTS
THAT TOOK PLACE WITH HIS
CO-DEFENDANT.
YOU KNOW, THERE WERE TWO PRIOR

OFFENSES THAT HE PLED TO.
ONE INVOLVED SHOOTING AT
SOMEBODY WHICH, FORTUNATELY, DID
NOT RESULT IN A DEATH.

AND IN THAT INSTANCE, THE
CO-DEFENDANT ACTUALLY FIRED THE
SHOT, AND THE OTHER INVOLVED THE
STABBING DEATH OF MR. LAWRENCE'S
COUSIN.

AND THERE TOO HE WAS NOT THE
INITIAL AGGRESSOR, BUT
PARTICIPATED IN THE CRIME AFTER
HIS CO-DEFENDANT HAD STRUCK THE
SEVERAL BLOWS.

SO WE OFFERED JOHNSON AS AN
EXAMPLE OF A CASE WHERE THE
PRIOR FELONIES WERE NOT ONES
WHERE THE DEFENDANT WAS THE
LEADER IN ANY SENSE AND, THUS,
THAT A SENTENCE OF DEATH WAS
DISPROPORTIONATE.

BUT MOVING, MOVING ON TO THE
LARGER ISSUE OF WHETHER
PROPORTIONALITY REVIEW SHOULD BE
CONDUCTED AT ALL,
PROPORTIONALITY REVIEW UNDER
FLORIDA LAW AT ITS FOUNDATION IS
BASED IN DUE PROCESS.

THERE ARE NUMEROUS CASES, AND I
BELIEVE JUSTICE CANADY LISTED
THEM IN YOUR DECISION IN THE
YAKOV DECISION, NUMEROUS CASES
REGARDING THE FLORIDA
CONSTITUTION'S PROHIBITION OF
CRUEL AND UNUSUAL PUNISHMENT AS
THE SOURCE OF PROPORTIONALITY
REVIEW.

AND THE SAME LANGUAGE REAPPEARS
OVER AND OVER AGAIN BECAUSE
CASES CITE EACH OTHER OVER AND
OVER AGAIN.

BUT GOING BACK IN THE LINE OF
FLORIDA DEATH PENALTY CASES
TALKING ABOUT PROPORTIONALITY,
WHAT IT'S REALLY BASED IN IS DUE
PROCESS AND THE PROCESS THAT IS
REQUIRED WHEN YOU ARE GOING TO
EXTRACT THE MOST SEVERE, THE
MOST IRREVOCABLE PUNISHMENT FOR
A PARTICULAR CRIME.

ONE OF THE EARLY CASES THAT'S USUALLY CITED, STATE V. DIXON, IS THE CASE THAT SAID DEATH IS A UNIQUE PUNISHMENT IN ITS FINALITY AND ITS TOTAL EJECTION OF THE POSSIBILITY OF REHABILITATION.

IT IS PROPER, THEREFORE, THAT THE LEGISLATURE HAS CHOSEN TO RESERVE ITS APPLICATION TO ONLY THE MOST AGGRAVATED AND UNMITIGATED OF MOST SERIOUS CRIMES.

PROPORTIONALITY REVIEW IS THE WAY THIS COURT HAS ALWAYS AFFECTED THAT GOAL OF MAKING SURE THAT THE DEATH SENTENCE IS RESERVED FOR THE MOST AGGRAVATED AND THE LEAST MITIGATED OF CRIMES.

>> COULD YOU ARTICULATE THOUGH, I MEAN, WHAT WOULD THE-- SO PROPORTIONALITY REVIEW UNDER THAT SENSE WOULD BE SORT OF A MEANS TO AN END OF INSURING THAT A PARTICULAR DUE PROCESS TEST WAS MET.

BUT WHEN I'VE-- IT SEEMS LIKE IN THE CASE LAW EVEN WHEN THERE'S A DISCUSSION OF WHAT THE DUE PROCESS REQUIREMENTS MIGHT BE, IT WOULD BE AN INDIVIDUALIZED CONSIDERATION, SOMETHING THAT MAKES SURE THAT THERE ISN'T A FREAKISH OR WANTON IMPOSITION OF THE DEATH PENALTY. AND WHY, WHY ISN'T-- WHY AREN'T ALL THE SAFEGUARDS AND ALL THE PROCESSES THAT ARE BUILT IN THAT MAKE SURE THAT, YOU KNOW, IN THE DEFENDANT'S OWN CASE THAT, YOU, THE NATURE OF THE CRIME AND THE DEFENDANT AND ALL THE MITIGATION IS CONSIDERED, WHY WOULDN'T THAT SATISFY ANY DUE PROCESS REQUIREMENT IN TERMS OF THE WAY THAT THAT'S ARTICULATED IN THE CASE LAW?

AND IF REALLY THE ISSUE IS THAT IT'S A SUBSTANTIVE PROHIBITION

ON, YOU KNOW, THE UNUSUALNESS OF THE PUNISHMENT FOR SOMEONE IN THOSE, IN THOSE CIRCUMSTANCES, THEN YOU'RE REALLY RIGHT BACK AT THE, YOU KNOW, EIGHTH AMENDMENT ISSUE--

>> CORRECT.

>> AND IT'S NOT INDEPENDENTLY DUE PROCESS.

>> I AGREE, YOUR HONOR.

AND IF THAT'S THE FOUNDATION THAT YOU'RE AVOIDING THE UNUSUAL PUNISHMENT, THEN THAT WOULD HAVE TO FAIL IN LIGHT OF THE CONFORMITY CLAUSE.

BUT WHAT THE DUE PROCESS CONCERN IS, IS THAT THE PUNISHMENT IS SO SEVERE AND SO FINAL THAT IT HAS TO BE SUBJECT TO HEIGHTENED SCRUTINY.

AND THAT'S WHY TILLMAN, FOR EXAMPLE, A DECISION OF THIS COURT, REFERRED NOT JUST TO THE PROHIBITION AGAINST CRUEL OR UNUSUAL PUNISHMENT, BUT ALSO TO THE DUE PROCESS CLAUSE AND TO EXCLUSIVE GRANT OF JURISDICTION TO THIS COURT TO REVIEW DEATH PENALTIES.

ONE OF THE GOALS OF THAT BEING SOME MEASURE OF UNIFORMITY IN--

>> WELL, I STRUGGLE TO SEE HOW A GRANT OF JURISDICTION TO US BECOMES THE BASIS FOR A SUBSTANTIVE REQUIREMENT THAT WE IMPOSE.

I JUST, IT JUST SEEMS TO ME TO BE A LOGICAL LEAP.

I'M NOT SAYING THAT THAT'S NOT SUGGESTED IN THE EARLIER CASES, BUT AT LEAST THE ONE YOU MENTIONED, BUT I JUST FIND THAT VERY UNCONVINCING AND UNREASONED.

TELL ME WHY I'M MISSING SOMETHING THERE.

>> YOUR HONOR, I THINK IT GOES, IT REALLY GOES BACK TO THE DUE PROCESS THAT'S REQUIRED WHEN YOU'RE GOING TO EXTRACT THE

FINAL PUNISHMENT AND THE MOST
IRREVOCABLE PUNISHMENT.
IT ALSO RELATES TO THE
CONFIDENCE IN THE SYSTEM THAT
IMPOSES THAT PUNISHMENT THAT YOU
DON'T HAVE PEOPLE WHO ARE
PUNISHED DIFFERENTLY WHEN THEY
ARE SIMILARLY SITUATED.
THAT'S WHAT PROPORTIONALITY
REVIEW GETS AT.

IT-- AND THIS MAY RESPOND
SOMEWHAT TO YOUR QUESTION TOO,
JUSTICE MUNIZ.

IT GETS TO THE SITUATION THAT
YOU WITH POINTED OUT IN YAKOV
WHERE YOU AGREED THAT THE DEATH
PENALTY WAS DISPROPORTIONATE FOR
THAT PARTICULAR DEFENDANT.

WHICH MEANS THAT COMPARED TO--
>> WELL, I AGREE THAT UNDER OUR
CASE LAW--

>> UNDER THE CASE LAW--

>>-- THAT WOULD BE THE
CONCLUSION--

>> DECADES OF CASE LAW.

>> BASED ON THE CASE LAW.

OF WHICH I DISAGREE.

>> I UNDERSTAND, JUSTICE CANADY.
DECADES OF CASE LAW LOOKING AT
SITUATIONS WHERE PEOPLE ARE
BEING SENTENCED TO DEATH,
LOOKING AT THEIR BACKGROUNDS,
LOOKING AT THEIR PRIOR CRIMES,
LOOKING AT ALL THE OTHER
AGGRAVATORS HAVE PRODUCED A BODY
OF LAW WHERE IT WAS POSSIBLE TO
POINT TO SOMEONE AND SAY THIS
PERSON IS BEING SENTENCED TOO
SEVERELY.

WITHOUT PROPORTIONALITY REVIEW,
THAT FINAL SAFEGUARD WOULD NOT
TAKE PLACE--

>> I THINK THE ISSUE THOUGH IS,
SORRY TO INTERRUPT YOU, IS THAT
THAT'S A SUBSTANTIVE ISSUE THAT
POINTS YOU IN THE DIRECTION OF
THE EIGHTH AMENDMENT AND THAT,
TO THE EXTENT YOU'RE TALKING
ABOUT PROCESS, THAT CLEARLY OUR
DEATH PENALTY STATUTE AND ALL

THE PROCEDURES THAT ARE BUILT IN
WOULD BE SUFFICIENT TO MEET
WHATEVER THE TEST OF DUE
PROCESS, LOOKING AT THAT
INDEPENDENTLY WHATEVER, HOWEVER
YOU WOULD ARTICULATE THAT,
HOWEVER THE VARIOUS WAYS I'VE
SEEN IT ARTICULATED.

IT SEEMS LIKE WE GO, YOU KNOW,
WE EASILY CROSS WHATEVER THAT
THRESHOLD WOULD BE WITHOUT
PROPORTIONALITY REVIEW.

>> THAT MAY VERY WELL BE, YOUR
HONOR.

BUT THAT DOESN'T PRECLUDE
PROPORTIONALITY REVIEW AS A
MATTER OF STATE LAW.

THE SUPREME COURT HAS UPHELD
STATUTES THAT INCLUDED OR
SYSTEMS THAT--

>> IT'S NOT, IT'S NOT REQUIRED
AS PART OF STATE STATUTORY LAW.
CLEARLY NOT PROPORTIONALITY
REVIEW, CORRECT?

>> PROPORTIONALITY REVIEW IS NOT
REQUIRED UNDER STATE STATUTE,
BUT IT IS UNDER COURT RULE
THAT'S BEEN IN PLACE SINCE 2005
AND THEN INCORPORATED BY
REFERENCE IN STATE STATUTORY LAW
WHICH SAYS THAT SENTENCES SHALL
BE IMPOSED IN ACCORD WITH-- AND
I'M PARAPHRASING-- BUT IN
ACCORD WITH RULES OF THIS COURT.
SO THE RULES OF THIS COURT SINCE
2005 HAVE EXPLICITLY INCLUDED
PROPORTIONALITY REVIEW.

>> BUT THAT RULE SIMPLY IS A
REFLECTION OF WHAT OUR CASE LAW
REQUIRED.

>> THE RULE WAS PUT IN PLACE TO
REFLECT--

>> I MEAN, WE DON'T, WE DON'T
MAKE SUBSTANTIVE LAW IN OUR
RULES OF PROCEDURE.

>> UH-HUH.

>> AND THE LEGISLATURE--

>> THAT'S RIGHT.

>>-- COULDN'T TELL US THAT WE
HAVE THAT AUTHORITY.

RIGHT?

>> NO, THE--

>>-- TO ADOPT SUBSTANTIVE LAW
IN OUR RULES.

>> BUT THE LEGISLATURE, BEING
AWARE THAT THAT IS THE COURT'S
PRACTICE, HAS ALLOWED THAT TO
STAND SINCE 2005.

THAT RULE'S BEEN IN PLACE SINCE
THEN.

THE DEATH PENALTY STATUTE, THE
SENTENCING PROVISIONS HAVE BEEN
AMENDED NUMEROUS TIMES SINCE
THAT, STARTING IN 2005, SEVERAL
TIMES IN BETWEEN IN AMENDMENTS
IN 2016 IN RESPONSE TO HURST BUT
THEN AGAIN IN 2016 AND '17.

DURING ALL OF THAT TIME, THERE
WAS A RULE IN PLACE REQUIRING
PROPORTIONALITY REVIEW WHICH WAS
INCORPORATED BY REFERENCE IN
FLORIDA STATUTES.

AND THAT WAS NEVER ELIMINATED OR
ALTERED.

>> WELL, IF WE WERE TO CHANGE
THE RULE AND THEN ELIMINATE
PROPORTIONALITY, THE LEGISLATURE
WOULD BE FREE TO ENACT A STATUTE
THAT REQUIRED IT, RIGHT?

>> I BELIEVE SO, JUSTICE WILSON.
I BELIEVE, AGAIN, AS A MATTER OF
STATE LAW THE LEGISLATURE COULD
REQUIRE PROPORTIONALITY REVIEW
BECAUSE THE SUPREME COURT HAS
REPEATEDLY SAID WE DON'T REQUIRE
IT, BUT WE DON'T PROHIBIT IT.

IT'S SIMPLY NOT, IT'S NOT
REQUIRED, AS YOU WERE SAYING
EARLIER, JUSTICE MUNIZ, IT'S NOT
REQUIRED CONSTITUTIONALLY AS
PART OF THAT MINIMUM SET OF
GUARANTEES TO MAKE SURE THAT
THERE IS INDIVIDUALIZED
SENTENCING DETERMINATION.

BUT IT IS REQUIRED THROUGH MANY
DECADES OF PRECEDENT IN FLORIDA
WHICH WAS THEN INCORPORATED INTO
A COURT RULE AND HAS BEEN
ALLOWED TO STAND SINCE 2005
WHICH MAKES PROPORTIONALITY

REVIEW PART OF THE DUE PROCESS THAT A CAPITAL DEFENDANT GETS BEFORE THE STATE SENTENCES HIM OR HER TO DEATH.

MAKES IT PART OF THE REVIEW THAT INSURES THAT SIMILARLY-SITUATED DEFENDANTS WILL NOT BE SENTENCED DIFFERENTLY ARE BECAUSE THEY WERE TRIED IN FRONT OF A DIFFERENT JUDGE.

AND I THINK IT'S ALSO WORTH NOTING THAT IN THE PROPORTIONALITY REVIEW IT'S VERY CLEAR THAT THIS COURT DOESN'T SECOND GUESS THE TRIAL JUDGE.

IT'S NOT AN APPEAL OF WHAT THE TRIAL JUDGE THOUGHT WERE SIGNIFICANT MITIGATORS OR AGGRAVATING CIRCUMSTANCES. THIS COURT ACCEPTS THOSE FINDINGS AS THEY ARE.

BUT GIVEN THAT DEFERENCE TO THE TRIAL COURT'S FINDINGS, THE PROPORTIONALITY REVIEW PROVIDES ONE FINAL SAFEGUARD TO MAKE SURE THAT DEFENDANTS ARE SENTENCED WITH SOME CONSISTENCY ACROSS THE STATE OF FLORIDA.

WHICH I WOULD ARGUE IS ESSENTIAL WHEN YOU'RE IMPOSING THIS PUNISHMENT.

IT'S ESSENTIAL FOR THE DUE PROCESS THAT'S DUE TO THAT DEFENDANT AND ALSO ESSENTIAL FOR CONFIDENCE IN THE JUDICIAL SYSTEM THAT THAT PUNISHMENT IS NOT EXTRACTED DIFFERENTLY DEPENDING ON WHICH TRIAL COURT HEARD A PARTICULAR DEFENDANT'S TRIAL.

IF THERE ARE NO FURTHER QUESTIONS, I'LL RESERVE THE REMAINDER OF BY TIME.

THANK YOU, YOUR HONORS.

>> CHIEF JUSTICE CANADY, MAY IT PLEASE THE COURT, CHARMAINE MILLSAPS REPRESENTING THE STATE. I'D LIKE TO TALK ABOUT SOME OF THE SUPPLEMENTAL AUTHORITY I PROVIDED TO THE COURT.

ON THE FIRST ISSUE, I KNOW-- I JUST WOULD LIKE, I'M NOT GOING TO TELL THIS COURT WHAT THIS COURT JUST WROTE IN POOLE, BUT YOU DID FIND THAT SUFFICIENCY OF AGGRAVATORS AND WEIGHINGS WERE NOT FACTS.

BUT THERE'S A RECENT CASE FROM THE UNITED STATES SUPREME COURT WHICH I PROVIDED AS SUPPLEMENTAL AUTHORITY WHICH IS MCKINNEY V. ARIZONA.

AND IN THAT CASE THE DEFENDANT, MCKINNEY, WAS ARGUING THAT IN THE WAKE OF RING AND HURST V. FLORIDA THAT AN APPELLATE COURT COULD NO LONGER DO REWEIGHING UNDER CLEMENT.

TRADITIONALLY, APPELLATE COURTS HAVE BEEN ALLOWED TO WHEN THERE'S ERROR REGARDING EITHER THE AGGRAVATORS OR MITIGATORS COULD REWEIGH ITSELF.

AND MCKINNEY ARGUED, NO, THAT IN THE WAKE OF HURST AND RING, THAT APPELLATE COURTS COULD NO LONGER REWEIGH, THAT THAT HAD TO BE PERFORMED BY THE JURY.

AND THE UNITED STATES SUPREME COURT, MIRRORING A LOT OF THE LANGUAGE THAT THIS COURT ALSO HAD IN RING, QUOTING THE SAME SORT OF THING, REJECTED THAT ARGUMENT AND SAID REWEIGHING CAN BE STILL DONE BY AN APPELLATE COURT, THAT THE ONLY REQUIREMENT THAT WE, THAT RING AND HURST REQUIRE IS THE FINDING OF ONE AGGRAVATOR.

AND ANY FINDINGS BEYOND THAT SUFFICIENT AS SUFFICIENCY IN WEIGHING MAY BE DONE BY THE JUDGE OR, IN MCKINNEY'S CASE, BY AN APPELLATE PANEL.

THE FINDINGS REQUIRED BY THE SIXTH AMENDMENT, MCKINNEY WAS OBVIOUSLY A SIXTH AMENDMENT CASE, THEY SAID OUR SIXTH AMENDMENT JURISPRUDENCE REQUIRES THE FINDING OF ONE AGGRAVATOR,

AND ANY ADDITIONAL FINDINGS MAY BE MADE BY THE JUDGE.

AND THEY QUOTED, THEY QUOTED, THEY QUOTED THE EXACT SAME LANGUAGE THIS COURT HAD QUOTED IN POOLE.

SO I THINK THAT ESTABLISHES, MCKINNEY ESTABLISHES THAT THIS COURT IN POOLE IS READING THE SIXTH AMENDMENT REQUIREMENT CORRECTLY.

MOVING ON TO PROPORTIONALITY, FIRST I'D LIKE TO ESTABLISH THE DEATH SENTENCE IN THIS CASE IS ACTUALLY PROPORTIONATE.

I PROVIDED SUPPLEMENTAL AUTHORITY OF DODY, AND RECENTLY THIS COURT SAID IN A HURST RECENT INCIDENCE CASE WHERE THE SAME AGGRAVATION WAS FOUND AT THE SECOND PENALTY PHASE AS IN THE FIRST PENALTY PHASE, YOU SAID THERE'S NO REASON TO CHANGE YOUR ANALYSIS THE FIRST TIME YOU HAD FOUND THE SENTENCE PROPORTIONAL IN THAT CASE.

SO YOU SAID WE'RE GOING TO, WHEN THE SAME AGGRAVATORS AND MITIGATORS ARE INVOLVED, WE'RE GOING TO FIND IT PROPORTIONATE AGAIN, AND WE SEE NO REASON TO CHANGE OUR ANALYSIS.

THAT'S EXACTLY WHAT WE'VE GOT HERE, YOUR HONOR.

WE'VE GOT A HURST RESENTENCING WHERE THE AGGRAVATION WAS THE SAME.

THE SAME TWO AGGRAVATORS WERE FOUND-- PRIOR VIOLENT FELONY AND CCP-- AND THEY WERE GIVEN GREAT WEIGHT BOTH THE FIRST TIME AND THE SECOND TIME.

THE MITIGATION IS A LITTLE DIFFERENT, BUT IT'S LESS.

AND I THINK YOUR CASE IN DODY APPLIES EVEN MORE WHEN IT'S THE SAME MITIGATION BUT LESS OR DIFFERENT MITIGATION.

SO THIS COURT SHOULD FOLLOW ITS PRECEDENT IN THIS CASE AND FIND

THAT THIS DEATH SENTENCE IS PROPORTIONAL.

NOW, I'D ALSO LIKE TO TALK ABOUT-- I TAKE THEIR ATTACK ON PROPORTIONALITY TO BE THIS: THAT LAWRENCE IS MORE OF A FOLLOWER THAN A LEADER, AND THE CO-DEFENDANT WAS MORE THE LEADER.

BUT, YOUR HONOR, THAT'S JUST NOT AN ACCURATE DESCRIPTION OF THIS CRIME AND THE TWO PRIOR FELONIES.

LAWRENCE AND HIS CO-DEFENDANT, ROGERS, ARE BOTH SERIAL KILLERS. THE FIRST TIME AROUND IT WAS LAWRENCE WHO GOT A FRIEND OF HIS FROM HIGH SCHOOL.

HE HAD-- HE GOT A FRIEND OF HIS TO PURCHASE THE GUN THAT BOTH SHOT THE FIRST VICTIM IN THE BACK AND SHOT-- AND ROGERS SHOT THIS VICTIM IN THIS CASE IN THE HEAD WITH.

SO THE GUN THAT IS INVOLVED, THE MURDER WEAPON IN THIS CASE AND THE WEAPON USED TO SHOOT THE FIRST VICTIM, THERE WERE THREE INCIDENTS THAT OCCURRED ABOUT THREE WEEKS APART ENDING IN THE MURDER OF THIS TEENAGE GIRL, JENNIFER ROBINSON.

SO, BUT THE FIRST ONE, BOTH OF THOSE IT IS LAWRENCE WHO PURCHASED THE GUN.

HE GOT A FRIEND OF HIS TO BUY THE GUN BECAUSE HE HAD PRIORS. IT WOULD BE ILLEGAL FOR HIM TO OBTAIN THE GUN, SO HE GOT HIS FRIEND TO DO IT.

AND SO HE'S THE ONE PURCHASING THE GUN.

LAWRENCE WAS THE ONE DRIVING AROUND THAT NIGHT WITH THE FIRST VICTIM.

YES, IT WAS ROGERS WHO GOT OUT AND SHOT THE VICTIM, BUT THEN HE-- THEY BOTH DROVE AWAY.

SO LAWRENCE KNOWS.

THESE ARE PLANS, THESE ARE PLANS

TO KILL.

THIS IS A CONSPIRACY BETWEEN TWO PEOPLE TO ENGAGE IN SERIAL KILLING.

SO THERE'S JUST, YOU-- THE IDEA THAT HE'S JUST SOME SORT OF FOLLOWER, CO-CONSPIRATORS ARE CO-CONSPIRATORS.

THEY'RE NOT FOLLOWERS.

AND IN THE SECOND, THE MURDER OF HIS COUSIN, IN THE SECOND ONE THEY BOTH HAD KNIVES, BUT IT WAS LAWRENCE WHO, WHEN HIS COUSIN WAS ON THE GROUND, STABBED HIM FOUR TIMES IN THE BACK.

IT'S LAWRENCE WHO ACTUALLY KILLED HIS COUSIN.

THE FATAL WOUNDS WERE INFLICTED BY LAWRENCE.

AND HERE THEY WERE BOTH INVOLVED, THEY TOOK THE VICTIM'S CALF, AND IT WAS FOUND IN LAWRENCE'S REFRIGERATOR.

UNDERSTAND THIS IS STRAIGHT OFF THE SCALE IN TERMS OF HEIGHTENED PREMEDITATION.

THERE WERE BOTH TO-DO LISTS AND SUPPLY LISTS.

AND LAWRENCE IS WRITING THOSE LISTS.

THEY'RE IN HIS HANDWRITING, AND HE'S THE ONE GETTING THE THINGS THAT THEY ARE USING TO KILL WITH INCLUDING THE GUN, THE ALCOHOL TO INTOXICATE HER, THE FILM FOR THE POLAROID, ALL THAT ARE THINGS THAT LAWRENCE IS DOING. HE'S GETTING THE IMPLEMENTS TO COMMIT THESE MURDERS.

>> I'M SORRY TO INTERRUPT YOU. CAN I ASK YOU A QUESTION ABOUT THE BROADER LEGAL ISSUE?

IT LOOKS LIKE READING THE BRIEF ON PAGE 45 YOU SEEM TO TAKE THE POSITION THAT THE LEGISLATURE WOULDN'T HAVE THE IS AUTHORITY TO REQUIRE PROPORTIONALITY REVIEW.

IS THAT REALLY YOUR POSITION?

>> YOUR HONOR, AS I UNDERSTAND

CONFORMITY CLAUSE, A LOT OF TIMES-- DEPENDING ON THE WAY THEY'RE WORDED-- THEY COMBINE NOT JUST COURTS, BUT THE LEGISLATURE AS WELL.

BECAUSE IT CAN BE THE WILL OF THE PEOPLE OF THE STATE OF FLORIDA THAT THIS WILL NOT BE ENGAGED IN.

YOU HAVE TO LOOK AT THE EXACT LANGUAGE OF THE CONFORMITY CLAUSE TO SEE WHETHER A STATUTE COULD BE ENACTED.

BUT, YOUR HONOR, CONFORMITY CLAUSES COMBINE LEGISLATURES AS WELL.

NOW, OUR STATUTE DOES NOT DO THAT, YOUR HONOR.

>> NO, I MEAN, I AGREE WITH YOU ON THAT, I WAS JUST KIND OF SURPRISED TO SEE THAT ARGUMENT IN THERE.

THE LEGISLATURE COULD OBVIOUSLY REQUIRE IT AND NOT BE PURPORTING TO BE ENFORCING, YOU KNOW, THE EIGHTH AMENDMENT.

THE LEGISLATURE CAN GO BEYOND-- I THINK THE PROBLEM IS THAT IF THE CONFORMITY CLAUSE WORKS THE WAY CHIEF JUSTICE CANADY'S DEFENSE SUGGESTED IT DID IS THAT WE WOULD ESSENTIALLY BE INTERPRETING THE CONSTITUTION TO REQUIRE A SUBSTANTIVE RULE THAT GOES BEYOND THE EIGHTH AMENDMENT AND, YOU KNOW, WE'RE PROHIBITED FROM DOING THAT.

BUT I DON'T SEE HOW YOU COULD-- IT DOESN'T SEEM PLAUSIBLE TO SUGGEST THAT THE LEGISLATURE, IF IT CHOSE TO EXPLICITLY REQUIRE THAT WHICH IT HASN'T--

>> YOUR HONOR, I THINK OURS DOES MORE TOWARD THE COUNTS, IT'S LIMITED MORE.

IT TALKS ABOUT INTERPRETATION. SO I THINK IT DEPENDS ON-- BUT REMEMBER, A CONSTITUTIONAL AMENDMENT COULD BE WORDED THAT THE PEOPLE OF THE STATE DON'T

WANT EITHER THE LEGISLATURE OR
THE COURTS TO DO SOMETHING.
BUT USUALLY IT SAYS
INTERPRETATION.

USUALLY CONFORMING CLAUSES ARE
DESIGNED TO LIMIT COURTS, NOT
LEGISLATURES.

OKAY?

SO, BUT I CONCUR--

>> WHAT'S YOUR POSITION, SO
DOES, DO YOU THINK THAT
PROPORTIONALITY REVIEW-- I KNOW
THE BRIEF SUGGESTED THAT IT WAS
HARD TO ACTUALLY APPLY IN
PRACTICE, BUT DO YOU-- IS IT,
WHAT'S THE STATE'S POSITION ON
SORT OF THE VALUE OF
PROPORTIONALITY REVIEW?

WHAT, DOES IT, IS IT WORTH IT?
DOES IT SERVE A USEFUL PURPOSE?
DOES IT, DOES IT, YOU KNOW, MAKE
THE DEATH PENALTY MORE
APPROPRIATELY ENFORCED?

I MEAN, WHAT'S YOUR POSITION ON
THAT?

>> WELL, I THINK WE HAVE BETTER
SAFEGUARDS THAN THAT.
YOUR HONOR, I USE THE EXAMPLE OF
NEW JERSEY.

NEW JERSEY DID A VERY DETAILED
WHERE THEY WERE TRYING TO
LITERALLY MATHEMATICALLY DO
PROPORTIONALITY REVIEW.

AND, QUITE FRANKLY, IT DIDN'T
WORK.

SO, NO, I-- ONE OF THE
ESPECIALLY REASONS I DON'T THINK
IT'S A VERY GOOD SAFEGUARD IS
BECAUSE I DON'T THINK IT WORKS
VERY WELL.

HERE'S WHAT I THINK A BETTER
SAFEGUARD IS THAT OUR STATUTE
DOES HAVE.

WE DON'T HAVE JURY SENTENCING,
WE HAVE, WE HAVE JURY-- WE HAVE
A JURY RECOMMENDATION, BUT THEN
WE HAVE A JUDGE DOING AN
INDEPENDENT-- YOU DON'T, IT'S
NOT-- A DEATH SENTENCE IN
FLORIDA REQUIRES TWO SEPARATE

ACTORS.

AND THAT'S A MUCH MORE-- ONE,
THE JURY, BUT THE JUDGE HAS TO
AGREE.

AND HE HAS INDEPENDENT POWER
THAT'S NOT EVEN REVIEWABLE, YOUR
HONOR.

SO THAT'S A MUCH BETTER
SAFEGUARD.

WE ARE, WE ARE SAFEGUARDING MORE
THAN STATES WITH PLAIN JURY
SENTENCING IN CAPITAL CASES.

SO I DON'T THINK IT IS A VERY
GOOD SAFEGUARD BECAUSE I-- AS I
UNDERSTAND NEW JERSEY, THEY DID
IT.

THEY HIRED A MATHEMATICIAN, THEY
HIRED A SPECIAL MAGISTRATE TO
REVIEW.

THEY WERE DOING NOTHING BUT
PROPORTIONALITY TO TRY TO MAKE
IT TRULY EVEN, AND IT DIDN'T
WORK, YOUR HONOR.

AND NOBODY EVEN PRETENDS THAT IT
WORKED.

SO I DON'T THINK IT IS A VERY--
I THINK YOU'RE ASKING ME ITS
PRACTICALITY, AND I DON'T THINK
IT IS VERY PRACTICAL.

I THINK WHAT YOU END UP DOING IS
DOING A LOT WHAT THE COURT DOES,
CATEGORICAL, NO, WE'RE NOT GOING
TO DO THOSE.

AND SO YOU'RE NOT, FOR THE
MAJORITY OF THEM, IT'S NOT
PRACTICAL.

SO I DON'T THINK IT IS A GOOD
SAFEGUARD.

BUT I TAKE HER ARGUMENT TO BE
MORE DUE PROCESS THAT WE DON'T
HAVE A CONFORMING CLAUSE
REGARDING DUE PROCESS, SO
THEY'RE TRYING-- SHE'S TRYING
TO PUT THIS-- FIRST OF ALL,
IT'S DUE PROCESS.

PROCESS, DUE PROCESS IS ABOUT
PROCESS.

IT'S ABOUT THE PROCEDURES USED
TO GET SOMEWHERE.

AND WHAT SHE'S REALLY TRYING TO

CREATE A IS A SUBSTANTIVE DUE PROCESS.

AND, YOUR HONOR, WHEN WE HAVE A SPECIFIC PROVISION, A SPECIFIC CONTROLS OVER GENERAL-- BUT THAT'S TRUE FOR CONFORMITY CLAUSES TOO.

SO THERE IS NO, I'M NOT AWARE OF ANY SUBSTANTIVE DUE PROCESS RIGHT.

YOUR HONOR, THE CONSTITUTIONAL PROVISION THAT GOVERNS HERE IS THE EIGHTH AMENDMENT, AND THE EIGHTH AMENDMENT-- AND WE HAVE A CONFORMITY CLAUSE REQUIRING THIS COURT'S CASE LAW TO MATCH THE, MATCH THE UNITED STATES SUPREME COURT CASE LAW REGARDING THE EIGHTH AMENDMENT.

BUT GOING BACK, I DO-- UNDER DODY, FOLLOWING THE SAME LOGIC AS DODY BECAUSE THE AGGRAVATION WAS EXACTLY THE SAME INCLUDING THE WEIGHT GIVEN BY BOTH THE FIRST TIME AND THE SECOND TIME AND THE MITIGATION FOUND WAS A LITTLE LESS BUT REALLY MORE ACCURATELY DESCRIBED AS DIFFERENT, THIS COURT SHOULD FIND THIS SENTENCE PROPORTIONAL IF YOU ARE GOING TO ENGAGE IN PROPORTIONALITY REVIEW.

BUT I DON'T THINK IT'S VERY DEBATABLE.

>> SO WE, IF WE HAVE A 50-YEAR HISTORY OF DOING PROPORTIONALITY REVIEW AND IF IT TURNS OUT THAT THE GREATER WEIGHT OF THE LEGAL ARGUMENTS ARE THAT WE ACTUALLY NOW IN LIGHT OF THE CONFORMITY CLAUSE LACK THE AUTHORITY TO DO THAT, WHAT FROM THE STATE'S PERSPECTIVE, WHAT IS THE VALUE OF RECEDING FROM THAT IN A CASE WHERE LET'S JUST ASSUME FOR ARGUMENT THAT CLEARLY THIS DEATH SENTENCE WOULD BE PROPORTIONAL? I MEAN, WHAT IS THE-- I'M CURIOUS TO HEAR WHAT YOUR-- WHAT'S THE ARGUMENT AS TO WHY

THIS SHOULD BE THE CASE IN WHICH
THE COURT RECEDES FROM THAT IF
THE COURT THINKS THAT'S THE
RIGHT LEGAL ANSWER?

>> OKAY.

YOUR HONOR, I TAKE YOUR QUESTION
TO BE DO WE REALLY HAVE TO REACH
THIS ISSUE IN THIS CASE GIVEN IF
WE'RE GOING TO DECIDE TO HOLD
THE DEATH SENTENCE TO BE
PROPORTIONAL, AND THE ANSWER IS,
NO, YOU DON'T HAVE TO REACH THE
PROPORTIONALITY.

THE ONLY CASE YOU WOULD HAVE TO
REACH THE PROPORTIONALITY REVIEW
BY THE COURT VIOLATES THE
CONFORMITY CLAUSE WOULD BE ONE
IN WHICH YOU WERE GOING TO HOLD
THAT THE DEATH SENTENCE WAS NOT
PROPORTIONATE.

THIS IS NOT THAT CASE BECAUSE
THIS IS CLEARLY THAT
PROPORTIONATE.

NOW, I DON'T THINK IT'S-- I DO
HAVE A LITTLE DISPUTE ABOUT
SAYING 50 YEARS.

REMEMBER SOMETHING, YOUR HONOR,
THE CONFORMITY CLAUSE CAME IN--

>> NO, I UNDERSTAND.

I MEAN, BUT ALL I'M SAYING IS
THAT EVER SINCE WE HAD THE
REENACTMENT OF THE DEATH PENALTY
STATUTE, THE COURT-- AGAIN, NOT
TYING IT TO THE STATUTE, BUT I
THINK IN DIXON THE COURT KIND OF
PREDICTED THAT PROPORTIONALITY
REVIEW WAS GOING TO BE A PART OF
IT.

WE'VE CONTINUED TO DO THAT.

I UNDERSTAND THE ARGUMENT THAT
THE ENACTMENT OF THE CONFORMITY
CLAUSE CHANGED THE LEGAL
LANDSCAPE AND TOOK AWAY OUR
AUTHORITY TO DO IT.

MY POINT IS AS A MATTER OF
PRUDENCE FOR THE COURT, WHY IS
THIS THE RIGHT CASE IF THE
ANSWER IS TO RECEDE, WHY IS THIS
THE RIGHT CASE TO DO THAT.

THE LEGISLATURE MAY HAVE BEEN

OPERATING UNDER THE ASSUMPTION THAT THIS WAS ALL OKAY. YOU KNOW, WE-- THIS COURT INSTITUTIONALLY HASN'T, YOU KNOW, MAJORITY HASN'T SIGNALLED PROBLEMS WITH IT. WE DON'T KNOW IF THE LEGISLATURE WOULD WANT US TO BE DOING PROPORTIONALITY REVIEW. SO I'M JUST CURIOUS WHAT YOUR, YOU KNOW, HOW YOU ADDRESS THAT. >> YOUR HONOR, REALLY THE ONLY CASE YOU WOULD HAVE TO ADDRESS IT WOULD BE IN A CASE IN WHICH YOU WERE GOING TO FIND THE DEATH SENTENCE DISPROPORTIONATE. IF YOU'RE GOING TO FIND THIS SENTENCE, IF YOU'RE GOING TO FOLLOW A FINDING THAT THE DEATH SENTENCE IN THIS CASE IS PROPORTIONATE, WHICH YOU CERTAINLY SHOULD DO BASED NOT ONLY ON LAWRENCE'S, NOT ONLY ON THIS COURT'S PRIOR DECISION IN LAWRENCE, BUT IN THE CO-DEFENDANT'S CASE, ROGERS. YOU ALSO FOUND THE DEATH SENTENCE PROPORTIONATE. IF YOU'RE GOING TO FIND A SENTENCE PROPORTIONATE, I DON'T WANT-- YOU ARE NOT, AS A MATTER OF PRUDENCE, REQUIRED TO ADDRESS THIS ISSUE. UNTIL YOU HAVE A CASE IN WHICH YOU'RE GOING TO FIND A DEATH SENTENCE DISPROPORTIONATE. I HOPE THAT ANSWERS YOUR QUESTION. OKAY. THANK YOU VERY MUCH FOR YOUR TIME, AND THIS SENTENCE IS PROPORTIONATE, AND WE ASK YOU TO AFFIRM BOTH THE CONVICTIONS AND THE-- WHICH WAS NOT EVEN ON THE TABLE-- AND THE DEATH SENTENCE AND FIND IT PROPORTIONATE. THANK YOU. >> YOUR HONORS, WE AGREE THAT THE EIGHTH AMENDMENT CONTROLS, AND THE WAY THAT THE CONFORMITY

CLAUSE WOULD BAR PROPORTIONALITY REVIEW IS IF THAT WAS THE ONLY BASIS FOR PROPORTIONALITY REVIEW IN FLORIDA.

THEN I WOULD HAVE TO AGREE THAT THE CONFORMITY CLAUSE STRIPS AWAY THE BASIS FOR THAT JURISDICTION.

IT'S NOT, FOR THAT EXERCISE OF JURISDICTION.

IT'S NOT THE ONLY BASIS FOR PROPORTIONALITY REVIEW.

IF YOU WANT TO INTERPRET FLORIDA LAW, CONTINUE INTERPRETING IT IN CONFORMANCE WITH SUPREME COURT JURISPRUDENCE, PROPORTIONALITY REVIEW HAS NEVER BEEN PROHIBITED BY THE SUPREME COURT, AND THE STATUTES HAVE REPEATEDLY BEEN UPHELD THAT INCLUDE IT.

>> I THINK THE QUESTION WOULD BE WHETHER THERE'S ANOTHER VALID BASIS.

>> YES.

>> I MEAN, THERE'S CERTAINLY BEEN OTHER ARTICULATED BASIS, BUT AS WE'VE TALKED ABOUT IN PRIOR QUESTIONING, IF THOSE ARE NOT CONVINCING AND WE CONCLUDE THAT THERE'S NOT ANOTHER VALID BASIS, THEN THAT WOULD REQUIRE US TO RECEDE FROM THAT PRECEDENT IN THE RIGHT CASE, CORRECT?

>> IT MIGHT, YOUR HONOR.

WE WOULD, WE WOULD THINK THAT THIS IS NEITHER THE RIGHT CASE, NOR THE RIGHT RESULT BECAUSE OF THE RECOGNITION UNDER FLORIDA LAW THAT DEATH IS DIFFERENT. DEATH SENTENCES DESERVE THAT ADDITIONAL LEVEL OF SCRUTINY THAT INSURES THAT PEOPLE ARE SIMILARLY TREATED WHEN THE STATE IS GOING TO EXTRACT THAT FINAL PUNISHMENT FOR A CRIME.

IF THERE ARE NO OTHER QUESTIONS, THANK YOU, YOUR HONORS.

>> ALL RIGHT.

WELL, WE THANK YOU BOTH FOR YOUR ARGUMENTS, AND COURT IS NOW

ADJOURNED.