>> ORDER IN THE COURT.
SUPREME COURT OF FLORIDA IS NOW IN SESSION.
THE HONORABLE CHIEF JUSTICE CHARLES T. CANADY PRESIDING.
>> GOOD MORNING AND WELCOME TO THIS SESSION OF THE FLORIDA SUPREME COURT.
ON OUR DOCKET TODAY, WE HAVE THE CASE OF CRUZ V. THE STATE OF FLORIDA.
COUNSEL?
>> GOOD MORNING.
MAY IT PLEASE THE COURT AND COUNSEL, MY NAME IS RAFAEL RODRIGUEZ, I REPRESENT MR. CRUZ ON THIS DIRECT APPEAL IN THE CAPITAL MURDER CONVICTION AND SENTENCE OF DEATH.
WE HAVE RAISED SEVERAL ISSUES IN OUR BRIEF, BUT I WOULD LIKE TO ADDRESS A FEW OF THEM, TIME PERMITTING.
THE FIRST ONE I WOULD LIKE TO ADDRESS IS THE ISSUES RAISED IN ISSUE 12 OF OUR INITIAL BRIEF DEALING WITH ERRORS IN THE TRIAL COURT'S SENTENCING ORDER.
IN PARTICULAR, INSOFAR AS THE DISPARITY OF SENTENCE BETWEEN MR. CRUZ AND MR. CHARLES WHO'S THE CO-DEFENDANT.
AS A WAY OF FACTUAL BACKGROUND, MR. CRUZ WENT TO TRIAL FIRST.
HE WAS CONVICTED, HE WENT TO A PENALTY PHASE, THE JURY RECOMMENDED OR VOTED FOR DEATH, AND THEN THE COURT HANDLED A SPENCER HEARING, POSTPONED THE FINAL SENTENCING HEARING PER THE TEST-- THE TRIAL OF MR. CHARLES, THE CO-DEFENDANT.
AT THAT TRIAL THE JURY FOUND MR. CHARLES GUILTY ON, ACCORDING TO THE COURT, ESSENTIALLY THE SAME FACTS ON AN IDENTICAL VERDICT.
AND THE JURY, HOWEVER, VOTED FOR LIFE IMPRISONMENT.
>> LET ME ASK YOU, CAN I INTERRUPT YOU FOR A SECOND?
ON MR. CHARLES' CASE, WERE THE CHARGES AGAINST HIM IDENTICAL TO

THE CHARGES AGAINST MR. CRUZ?
>> THE CHARGES WERE IDENTICAL, AND THE COURT MADE THAT CLEAR ALSO AS FAR AS THE VERDICT AT 3828 OF THE RECORD THAT THE VERDICTS WERE IDENTICAL WITH THE SOLE EXCEPTION--
>> WELL, I'M TALKING ABOUT THE INDICTMENT.
WAS MR. CHARLES ALSO CHARGED WITH FIRST-DEGREE PREMEDITATED MURDER AS WELL AS FELONY MURDER?
>> THAT'S CORRECT.
>> OKAY.
>> THE SOLE EXCEPTION BETWEEN THE TWO DEFENDANTS AS THE COURT, THE TRIAL COURT ITSELF NOTED, WAS THAT THE JURY IN MR. CRUZ'S TRIAL MADE A SPECIAL FINDING THAT MR. CRUZ HAD POSSESSION OR ACTUALLY DISCHARGED A FIREARM CAUSING THE VICTIM'S DEATH.
PRIOR MR. CHARLES' TRIAL, THE STATE STIPULATED THAT MR. CHARLES WAS NOT THE SHOOTER AND, THEREFORE, THE JURY IN MR. CHARLES' CASE NEVER HAD THE OPPORTUNITY TO MAKE THAT FINDING.
AS A RESULT--
>> I'M SORRY TO INTERRUPT YOU FOR ONE QUICK SECOND.
AM I READING THE RECORD RIGHT THAT THE GIRLFRIEND OF CHARLES WHO TESTIFIED ABOUT THE TWO DIFFERENT GUNS, DID SHE ONLY TESTIFY IN CHARLES' CASE, OR DID SHE TESTIFY IN CRUZ'S CASE ALSO?
>> SHE ONLY TESTIFIED IN MR. CHARLES' CASE.
WHICH DOVETAILS WITH THE OTHER PART OF MY ARGUMENT, THE NON-RECORD EVIDENCE WAS UTILIZED BY THE TRIAL JUDGE IN HIS SENTENCING ORDER WHICH THIS COURT HAS LONG CONDEMNED BASED ON GARDINER V. FLORIDA.
BUT AS FAR AS THE FIREARM ARGUMENT, WE POINT OUT TO THE FACT THAT THE RECORD IN THIS CASE, THERE'S NO COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE SPECIAL FINDING BY THE JURY THAT MR. CRUZ WAS, IN FACT, THE

SHOOTER.
WE RAISED THAT IN ISSUE 5 OF OUR BRIEF.
IN PARTICULAR, THE LEAD DETECTIVE WAS ASKED ON DIRECT EXAMINATION BY THE PROSECUTOR DO YOU HAVE ANY INFORMATION AS YOU SIT HERE RIGHT NOW TO KNOW WHICH OF THE TWO INDIVIDUALS ALLEGED ACTUALLY FIRED ANY SHOTS IN THIS CASE, AND HIS ANSWER WAS, NO, SIR, I DO NOT.
THAT IS THE EVIDENCE BELOW.
AND PRIOR TO THE GUILT VERDICT RENDERED BY THE JURY.
AND SO OUR POSITION IS THAT IF AN ENTIRE CONVICTION CAN BE VACATED AS A RESULT OF LACK OF COMPETENT SUBSTANTIAL EVIDENCE, CERTAINLY A SPECIAL JURY VERDICT CAN, FINDING CAN.
AND IN THIS CASE, THAT'S EXACTLY WHAT WE'RE ASKING THIS COURT TO DO.
IF THAT--
>> WHAT ABOUT THE ARGUMENT THAT YOUR CLIENT WAS CHARGED IN THE INDICTMENT WITH PREMEDITATED FIRST-DEGREE MURDER AND THAT THE JURY FOUND HIM GUILTY OF THAT? ISN'T THAT FACTUAL FINDING BY A JURY SUFFICIENT?
>> SUFFICIENT FOR?
>> FIREARM.
>> WELL, NO, BECAUSE THEY WERE THEN SPECIFICALLY ASKED WHETHER HE WAS IN POSSESSION OR DISCHARGE OF FIREARM.
MR. CHARLES WAS CONVICTED OF THE SAME THING, AND YET HE WAS SENTENCED TO LIFE.
SO MY POINT BEING THAT IF THAT'S THE CASE, THE TRIAL COURT ITSELF IN ITS SENTENCING ORDER FOUND THAT THE DEFENDANTS WERE EQUALLY CULPABLE.
THAT WAS A FINDING OF THE TRIAL COURT ON PAGE 3822 OF THE SENTENCING ORDER.
AND SO WHEN YOU HAVE DEFENDANTS WHO ARE EQUALLY CULPABLE, THIS COURT HAS TIME AND TIME AGAIN RULED THAT THEY CANNOT BE SENTENCED DISPARATELY.

AND THAT'S EXACTLY--
>> IT SEEMS LIKE YOUR BETTER ARGUMENT WOULD BE THAT THE TRIAL COURT, THE ENTIRE ORDER IS SORT OF PERMEATED WITH THE DISTINCTION OF YOUR CLIENT HAVING BEEN THE SHOOTER AND WHETHER THERE WAS EVIDENCE TO SUPPORT THAT.
I MEAN, THE JUDGE DIDN'T THINK THAT THEY WERE EQUALLY CULPABLE. HE OBVIOUSLY THOUGHT THAT YOUR CLIENT WAS SHOOTER THAT THAT THAT WAS, YOU KNOW, A MEANINGFUL ENOUGH DIFFERENCE TO JUSTIFY OF THE DEATH SENTENCE.
THAT'S THE WAY I READ THE ORDER.
>> YES, JUDGE, THAT'S EXACTLY WHAT THE JUDGE-- HE DIDN'T HAVE ANY ANALYSIS OF THE FACTS WHICH ARE NOW BEING PUT FORWARD BY THE STATE AS TO THE RELATIVE CULPABILITY OF THE TWO DEFENDANTS.
ALL HE SAID WAS THE JURY MADE THIS FINDING, THAT'S GOOD ENOUGH FOR ME, BASICALLY, IN ORDER TO IMPOSE THE DEATH PENALTY.
BUT HE ACTUALLY REFERRED TO THE TESTIMONY OF THE GIRLFRIEND, WHICH IS PART OF THAT ISSUE 12, INDICATING THAT MR. CRUZ HAD POSSESSION OF A .22 CALIBER FIREARM AND THAT THEY HAD FORMULATED A PLAN TO ROB MR. WALTERS.
WELL, THAT WASN'T PART OF MR. CRUZ'S TRIAL AT ALL.
THAT WAS EXCLUSIVELY IN MR. CHARLES' TRIAL.
AND YET THE TRIAL JUDGE INCORPORATED THOSE FINDINGS IN HIS SENTENCING ORDER.
AND THIS COURT HAS ALWAYS SAID THAT YOU NEED TO REVIEW THE ENTIRE SENTENCING ORDER IN THE ITS ENTIRETY TO MAKE THAT DETERMINATION AND NOT SEGREGATE SECTIONS.
WELL, HE MADE THAT FINDING IN THE FACTUAL PORTION, HE MADE THAT FINDING AS FAR AS THE AVOID ARREST AGGRAVATOR INDICATING THAT THAT AGGRAVATOR WAS LENT

VALIDITY BY THE FACT THAT
MR. CRUZ BRANDISHED A FIREARM
ACCORDING TO THE GIRLFRIEND'S
TESTIMONY.
SO WE BELIEVE THAT THIS ORDER IS
UNSUPPORTABLE BY COMPETENT
SUBSTANTIAL EVIDENCE IN
PARTICULAR AS TO DISPARITY OF TO
SENTENCE.
I WOULD POINT OUT FURTHER THAT
THE PROSECUTOR BELOW NEVER, EVER
INFORMED THE JURY THAT THEY
BELIEVED THAT MR. CRUZ WAS THE
SHOOTER.
THEY ALWAYS COUCHED THEIR
ARGUMENT AS THEY COMMITTED THIS
OFFENSE, THEY BOUND AND GAGGED
THE VICTIM, THEY COMMITTED THIS
BURGLARY, THEY DROVE HIM TO A
SECLUDED LOCATION, THEY SHOT
HIM.
IN FACT, THE PROSECUTOR
INDICATED VERY AMORPHOUSLY ONE
OF THEM STOOD OVER THE VICTIM
AND SHOT HIM.
SOMEONE STOOD OTHER THE VICTIM
AND SHOT HIM.
SOMEBODY STOOD OVER HIM AND SHOT
HIM.
THOSE ARE ALL IN THE CLOSING
ARGUMENTS THAT THE STATE
PRESENTED TO THE JURY.
>> YOUR BASIC ARGUMENT THEN IS
THAT BECAUSE WE DON'T KNOW WHAT
THE SHOOTER WAS AS FAR AS THE
EVIDENCE IS CONCERNED, THEN BOTH
DEFENDANTS SHOULD RECEIVE THE
SAME SENTENCE.
>> THAT'S CORRECT.
ONCE MR. CHARLES RECEIVED A LIFE
SENTENCE, IF THEY'RE EQUALLY
CULPABLE ACCORDING TO THE JUDGE
BUT FOR THAT SPECIAL FINDING,
THEN THEY SHOULD BE TREATED
ALIKE.
>> I'M JUST WONDERING WHAT IF
THE JURY HAD FOUND, HAD
RECOMMENDED DEATH FOR
MR. CHARLES AND HE HAD BEEN
SENTENCED TO DEATH?
WHAT WOULD YOUR ARGUMENT BE HERE
TODAY?
>> THE ARGUMENT WOULD STILL--
>> [INAUDIBLE]

THE SHOOTER?
>> WELL, NO.
THE ARGUMENT WOULD BE THAT THERE WAS NOT COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY FINDING IN MR. CRUZ'S TRIAL IRRESPECTIVE OF WHAT OCCURRED IN MR. CHARLES' TRIAL.
BECAUSE ONCE MR. CHARLES WAS SENTENCED, THEN THIS ISSUE BECAME RIPE, THEN THIS ISSUE BECAME SOMETHING THAT I COULD RAISE AS A DISPARITY OF SENTENCE.
PRIOR TO THAT THE MATTER WASN'T RIPE.
IT COULDN'T BE RAISED BECAUSE WE DON'T KNOW WHAT WOULD HAVE HAPPENED IN MR. CHARLES' CASE.
BUT ONCE MR. CHARLES RECEIVED THE LIFE SENTENCE, THEN THE ISSUE OF DISPARITY BECAME RIPE FOR THIS COURT'S DETERMINATION.
AND AN ISSUE OF COMPARATIVE CULPABILITY--
>> I MEAN, IT'S A LITTLE COMPLICATED HERE BECAUSE IF YOU'RE LOOKING AT IT FROM--
LOOKING BACK ON IT TO EVALUATE THAT THE ISSUE FROM THE PERSPECTIVE OF WHAT HAPPENED IN THE CHARLES CASE, YOU KNOW, THAT SHOWS, THERE'S EVIDENCE THERE THAT WOULD SUPPORT THE CONCLUSION.
THERE'S STIPULATION BY THE STATE ALSO THAT WOULD SUPPORT THE CONCLUSION THAT MR. CHARLES WAS NOT THE SHOOTER.
SO THAT'S ONE ASPECT OF THIS.
BUT IT SEEMS TO ME, I KIND OF ECHO WHAT JUSTICE MUNIZ SAYS, YOUR FOCUS ON THE FACT THAT THE TRIAL COURT HERE IN ITS DECISION TO IMPOSE THE DEATH PENALTY RELIES ON THIS JURY FINDING THAT MR. CRUZ WAS THE SHOOTER OR THAT HE DID SHOOT, OKAY?
I DON'T GUESS IT'S EXCLUSIVELY HIM, BUT IT SAYS THAT THERE'S THAT FINDING THAT HE, HE DISCHARGED A FIREARM AND RESULTING IN THE DEATH OF THE VICTIM.

THAT THAT-- BUT THERE'S NO
EVIDENCE IN MR. CRUZ'S CASE THAT
ACTUALLY SUPPORTS THAT.
>> THAT'S MY ARGUMENT.
>> THE TRIAL COURT HAS RELIED ON
A FACTUAL FINDING BY THE JURY,
AND IT SEEMS TO BE KIND OF, IT
SEEMS TO BE CENTRAL TO THE
ANALYSIS OF THE TRIAL COURT, THE
RELIANCE ON THAT FINDING WHICH,
YOU KNOW, WE CAN SEARCH THE
RECORD HERE, AND THERE'S NO
SUPPORT FOR IT.
THAT'S KIND OF THE-- I MEAN,
YOU'VE GOT A VARIETY OF
ARGUMENTS, BUT ISN'T THAT KIND
OF THE HEART OF YOUR ARGUMENT?
>> THAT IS THE HEART OF THE
ARGUMENT, YOUR HONOR.
I'M GLAD YOU PUT IT IN SUCH
TERMS.
THAT IS EXACTLY, IN FACT, WHAT
WE'RE SUGGESTING TO THE COURT.
IF THE COURT REVIEWS THIS RECORD
FROM BACK TO FRONT, IT WILL NOT
FIND COMPETENT SUBSTANTIAL
EVIDENCE TO INDICATE THAT
MR. CRUZ WAS THE SHOOTER.
NONE OF THE ARGUMENTS ADVANCED
BY THE STATE ON APPEAL NOW WERE
ADVANCED BY THE STATE BELOW, NOR
CITED BY THE COURT IN ITS ORDER.
THE COURT SIMPLY AND EXCLUSIVELY
RELIED ON THE FACT THAT THE JURY
FOUND THAT HE HAD BEEN THE
SHOOTER.
>> WELL, YOU ALSO SEEM TO HAVE
RELIED ON THE GIRLFRIEND'S
TESTIMONY FROM THE OTHER CASE.
>> THAT IS CORRECT.
AND THAT IS IMPROPER BECAUSE
THIS COURT HAS SAID THAT OVER
AND OVER AGAIN.
THAT EVIDENCE WAS NEVER, THE
DEFENSE LAWYER WAS NEVER GIVEN
NOTICE THAT THE COURT WAS GOING
TO RELY ON THAT INFORMATION.
THAT INFORMATION WAS NEVER
INDEPENDENTLY DEVELOPED AT THE
DEFENDANT'S TRIAL.
SO ALL THE EXCEPTIONS THAT THIS
COURT HAS NOTED OVER THE YEARS
THAT PERHAPS WE CAN OVERLOOK THE
FACT THAT A COURT HAS RELIED ON

NON-RECORD EVIDENCE DO NOT APPLY
IN THIS CASE.
THE COURT SPECIFICALLY REFERRED
TO THIS INFORMATION FROM THE
GIRLFRIEND, DAMAGING INFORMATION
FROM THE GIRLFRIEND'S TESTIMONY
THAT MR. CRUZ POSSESSED AND
BRANDISHED A .22 CALIBER PISTOL
WHICH WAS NOT BROUGHT OUT IN
MR. CRUZ'S TRIAL.
SO WE BELIEVE--
>> THE OTHER ASPECT OF THAT WAS
THAT MR. CHARLES HAD A WEAPON OF
ANOTHER CALIBER, ISN'T THAT
CORRECT?
>> THAT'S CORRECT.
.9 MM.
>> AND SO THERE IS EVIDENCE IN
THIS CASE THAT SUPPORTS THE
CONCLUSION THAT THE VICTIM WAS
KILLED BY, NOT BY A .9 MM,
BUT--
>> THAT IS CORRECT.
IN FACT, A .22 CALIBER SPENT
CARTRIDGE WAS FOUND AT THE SCENE
WHERE THE VICTIM WAS SHOT.
SO THAT EVEN MADE IT WORSE
BECAUSE NOW THE JUDGE IS RELYING
ON INFORMATION HE RECEIVED IN A
SEPARATE TRIAL FOR WHICH
MR. CRUZ'S LAWYER WAS NOT
PRESENT IN ORDER TO SUBSTANTIATE
HIS FEELING THAT THE JURY HAD
MADE AN ADEQUATE RULING.
THERE WAS A MOTION FOR JUDGMENT
OF ACQUITTAL ON THIS POINT FILED
BY THE DEFENSE, AND IT WAS
DENIED BY THE TRIAL COURT.
SO THE ISSUE IS RIPE FOR THIS
COURT'S DETERMINATION.
THIS IS NOT SOMETHING THAT WE'RE
BRINGING FORWARD TO THE SUPREME
COURT NOW THAT HAD NOT BEEN
BROUGHT BEFORE THE TRIAL JUDGE
HIMSELF AT THAT TIME.
AND ONE LAST POINT ON THE
RELIANCE OF NON-RECORD EVIDENCE.
THE TRIAL COURT SEEMED TO HAVE
RECOGNIZED THAT IT WAS IMPROPER
FOR HIM TO DO THAT BECAUSE HE
ACTUALLY REFERRED TO JAILHOUSE
TESTIMONY IN MR. CHARLES' TRIAL
AND SAID, WELL, I'M REJECTING
BECAUSE I DON'T FIND HE WAS

CREDIBLE AND BECAUSE DEFENSE
LAWYER DID NOT HAVE NOTICE, WAS
NOT PRESENT WHEN THAT TESTIMONY
WAS PRESENTED.
IT WASN'T AS IF THE TRIAL JUDGE
WAS IGNORANT OF THIS COURT'S
PROSCRIPTION THAT HE COULD NOT
USE NON-RECORD EVIDENCE.
HE WAS AWARE OF IT AND YET HE
STILL RELIED ON IT.
SO BASED ON THOSE TWO ASPECTS OF
THAT PARTICULAR ORDER, WE'RE
ASKING THIS COURT TO VACATE THE
SENTENCE OF DEATH AND REMAND FOR
A POSITION OF A LIFE SENTENCE.
I WOULD LIKE THE COURT TO--
>> LET ME ASK YOU THIS, WHY IS
THAT THE CORRECT REMEDY?
>> BECAUSE--
[INAUDIBLE CONVERSATIONS]
>> WELL, WILL LET ME, LET ME
EXPAND ON MY QUESTION AND THEN
GIVE YOU A CHANCE TO ANSWER.
WHY WOULDN'T THE CORRECT REMEDY
BE TO REMAND IT TO THE TRAIL
COURT FOR A REEVALUATION BASED
ON THE RECORD EVIDENCE BEFORE
HIM AND, YOU KNOW, WITHOUT
CONSIDERATION OF NON-RECORD
EVIDENCE?
>> WELL, I MEAN, THAT'S ALWAYS
AN OPTION FOR THIS COURT TO DO,
BUT I THINK THE RECORD IS
ABUNDANTLY CLEAR.
IT'S NOT GOING TO CHANGE.
I MEAN, THE GOVERNMENT IS NOT
ARGUING, WELL, THE JURY COULD
HAVE FOUND A DIFFERENCE IN YOUR
ROLES IRRESPECTIVE OF THE
FIREARM.
BUT ONCE AGAIN, THOSE ARE NOT
FACTS RELIED ON BY THE STATE
BELOW NOR WERE CITED BY THE
COURT IN ITS ORDER.
>> WELL, AGAIN, MR. -- IT'S JUST,
THE WAY THESE CASES ARE
PRESENTED, I MEAN, IF YOU'RE
LOOKING BACK ON IT IN TERMS OF
THE RELATIVE CULPABILITY, THE
WAY THE CASES ARE PRESENTED AND
THE WAY THE STATE TRIES THEM
DOES MAKE A DIFFERENCE.
SO IF THE STATE STIPULATES THAT
MR. CHARLES WAS NOT THE SHOOTER,

THEN THAT JUST PUTS THAT CASE IN A LITTLE DIFFERENT CATEGORY, DOESN'T IT?
>> WELL, IT VIRTUALLY GUARANTEED A DISPARATE SENTENCE.
VIRTUALLY GUARANTEED IT BECAUSE AT THAT POINT--
>> WELL, BUT AGAIN, THERE WAS AN EVIDENTIARY BASIS AT THAT POINT.
THE STATE HAD A VERY GOOD EVIDENTIARY BASIS FOR THAT, FOR THAT STIPULATION AND FOR THAT DISTINCTION.
DIDN'T THEY?
>> THEY MAY VERY WELL HAVE.
BUT IN MR. CRUZ'S TRIAL, THE COURT DIDN'T MAKE ANY ANALYSIS, IT SIMPLY RELIED--
>> I'M KIND OF BEYOND THAT.
I'M THINKING THIS, THINKING ABOUT WHAT IF WE SHOULD DECIDE TO REVERSE THIS, WHAT WOULD REMEDY WOULD BE AND HOW THAT WOULD POTENTIALLY-- WHAT THE FACTORS WOULD BE IN DETERMINING THAT.
BUT I APPRECIATE--
>> THANK YOU VERY MUCH, YOUR HONOR.
>> MR. RODRIGUEZ, I ALSO HAVE A QUESTION OR A SERIES.
TO ME, THIS CASE SEEMED ANALOGOUS TO THE CASE WHERE YOU HAVE CO-DEFENDANTS, ONE OF WHOM IS A JUVENILE SO THAT THE DEATH PENALTY IS SIMPLY NOT AVAILABLE.
HERE YOU HAVE A CO-DEFENDANT, I MEAN, WE DON'T HAVE JURY SENTENCING IN FLORIDA, WE HAVE THE JUDGE IS THE SENTENCER.
BUT ONCE A SEPARATE JURY LOOKS AT A CASE, INCLUDING DIFFERENT MITIGATORS, IT'S NOT JUST THE FACTS THAT MIGHT BE AGGRAVATED WOULD BE DIFFERENT IN ONE TRIAL OR THE OTHER, BUT THE MITIGATION'S GOING TO BE DIFFERENT, AND YOU HAVE A DIFFERENT JURY.
AND SOME INDIVIDUALS MAY JUST VIEW THINGS DIFFERENTLY.
BUT THE BOTTOM LINE IS THAT THE DEATH PENALTY WAS NOT AVAILABLE FOR MR. CHARLES.

SO IN THAT CONTEXT, WHY WOULD WE
EVEN DO ANY COMPARISON?
WHY SHOULD HE BE TREATED AS IF
MR. CHARLES WAS A JUVENILE?
ANY REASON WHY THE DEATH
SENTENCE WAS NOT AVAILABLE TO
THE SENTENCER FOR ONE
CO-DEFENDANT AND NOT THE OTHER?
DOES THAT MAKE SENSE?
>> I UNDERSTAND, I THINK I
UNDERSTAND WHAT YOUR HONOR IS
SAYING, BUT I THINK THAT THE
ARGUMENT STILL BOILS DOWN TO
WHETHER OR NOT IRRESPECTIVE OF
MR. CHARLES' TRIAL, WHETHER
THERE WAS COMPETENT SUBSTANTIAL
THE EVIDENCE TO SUPPORT THE
JURY'S FINDING.
IF THERE WASN'T, THEN HE'S IN
THE SAME BOAT AS MR. CHARLES
BECAUSE HE WAS CONVICTED OF THE
SAME OFFENSES, AND THE JURY
FOUND THE SAME AGGRAVATORS.
>> BUT I MEAN, I GET THE FIRST
PART OF YOUR ARGUMENT, BUT WHEN
YOU TIE IT TO ANYTHING RELATED
TO MR. CHARLES, THAT'S WHERE YOU
LOSE ME BECAUSE THERE WERE A LOT
OF DIFFERENCES IN THE TRIALS.
I MEAN, THAT WAS--
>> WELL, TRUE.
AND IF WE LOOK AT MR. CRUZ'S
TRIAL, WHICH LET'S FOCUS ON
THAT, IF ANYTHING, MR. CHARLES
WAS MORE CULPABLE.
IT WAS HE THE ONE WHO BROUGHT UP
THE ISSUE OF MR. WALTERS'
APARTMENT.
IT WAS HIS FOOTPRINT THAT
KNOCKED THE DOOR OPEN INTO THE
APARTMENT.
IT WAS HIS BLOOD THAT WAS ON THE
HALLWAY AND IN THE ENTRANCEWAY
INTO THE APARTMENT.
IT WAS HE WHO DROVE THE VICTIM
TO THE SECLUDED LOCATION, AND HE
WAS, IT WAS HIS SHOE PRINT ON
THE VICTIM'S SHIRT INDICATING
THAT HE MAY HAVE STOMPED ON THE
VICTIM.
>> I GUESS WHAT I'M SUGGESTING
AND ASKING YOU TO TELL ME WHY
THIS IS NOT DIRECT, IF THE DEATH
PENALTY IS NOT AVAILABLE TO ONE

OF THE CO-DEFENDANTS, WHY WOULD
WE LOOK AT RELATIVE CULPABILITY?
>> OKAY.
AND I WOULD--
>> AND THE OTHER CONTEXT IN
WHICH WE DON'T LOOK AT RELATIVE
CULPABILITY OR WHEN ONE OF THE
CO-DEFENDANTS IS A JUVENILE SO
THE DEATH PENALTY IS NOT
AVAILABLE OR WHEN ONE OF THE
CO-DEFENDANTS PLEADS TO A LESSER
OFFENSE, I MEAN, THAT'S MY
RECOLLECTION OF THE LAW.
>> THAT'S CORRECT.
>> SO WHY--
>> BUT IN THE CASE OF A
16-YEAR-OLD, THERE'S A
CONSTITUTIONAL PROHIBITION.
IN THIS CASE IT'S A SIMPLE
FACTUAL COMPARISON BETWEEN THE
TWO CASES.
I MEAN, SIMPLY BECAUSE THE STATE
MAY ENTER THE STIPULATION, IT
DEPRIVED THE JURY THE ABILITY TO
ENTER A SPECIAL FINDING.
THEY COULD HAVE FOUND A SPECIAL
FINDING GIVEN THE OPPORTUNITY IN
MR. CHARLES' CASE, BUT THEY
DIDN'T DO THAT.
>> SO LET'S, LET ME ASK THIS.
IT IS THE CASE THAT SOMEONE CAN
BE GUILTY OF PREMEDITATED
FIRST-DEGREE MURDER AND GET A
DEATH SENTENCE EVEN IF THEY'RE
NOT SHOOTING.
>> THAT'S CORRECT.
I MEAN, THERE ARE CASES THAT SAY
THAT.
BUT IN THIS PARTICULAR CASE,
WE'RE DEALING WITH A SITUATION
WHERE THE JUDGE BASED IT
EXCLUSIVELY ON THAT POINT BASE
ON HIS ORDER.
I CAN'T GO BEYOND THE FOUR
CORNERS OF HIS ORDER.
>> I MEAN, THE BOTTOM LINE IS
THE CULPABILITY, THE RELATIVE
CULPABILITY IN HARRISON IS
REALLY A RED HERRING FROM, I
WOULD THINK FROM YOUR
PERSPECTIVE, WHICH IS THE ORDER
IS BASED ON EITHER A JURY
FINDING THAT WASN'T SUPPORTED BY
EVIDENCE IN THE RECORD OR BY

THE, YOU KNOW, THE GIRLFRIEND'S
TESTIMONY WHICH WAS FROM ANOTHER
CASE.
I MEAN, FORGET ABOUT THE OTHER,
FORGET ABOUT THE RELATIVE STUFF.
I MEAN, THE POINT IS THIS
PARTICULAR DEATH SENTENCE
APPEARS TO HAVE BEEN JUSTIFIED
BY THE SENTENCER, I.E., THE
JUDGE BASED ON FACTS THAT MIGHT
NOT HAVE BEEN SUPPORTED BY THE
RECORD THAT HE WAS PROPERLY ABLE
TO CONSIDER.
I MEAN, ISN'T THAT THE BOTTOM
LINE?
>> THAT'S THE BOTTOM LINE, YOUR
HONOR.
BUT I WANTED TO BRING OUT THE
ISSUE OF THE CO-DEFENDANT'S
SENTENCE ONLY TO BRING TO THE
FORE THE REASON WHY WE FEEL THAT
MR. CRUZ IN PARTICULAR, THE
SENTENCE SHOULD BE VACATED
BECAUSE OF THE LACK OF EVIDENCE
TO SUPPORT A JURY FINDING IN
THIS CASE THAT HE WAS THE
SHOOTER.
SO IF HE'S EQUALLY CULPABLE AS
THE JUDGE HIMSELF FOUND IN THE
SENTENCING ORDER, THEN HE'S
EQUALLY CULPABLE.
AT THAT POINT IT BECOMES
RELEVANT AS TO WHAT HE DID WITH
MR. CHARLES BECAUSE HE SAID THEY
WERE EQUALLY CULPABLE.
IF YOU KNOCK OUT THE FIREARM
FINDING BECAUSE THERE WAS NO
COMPETENT SUBSTANTIAL EVIDENCE,
THEY STAND ON THE SAME LEVEL.
THEY STAND ON THE SAME LEVEL,
AND THIS COURT HAS PARTICULARLY
SAID THAT PEOPLE WHO ARE IN THE
SAME SITUATION SHOULD BE TREATED
THE SAME.
AND THAT'S WHY IT WAS BROUGHT UP
TO THE COURT'S ATTENTION.
NOW, I WOULD LIKE TO ADDRESS
BEFORE MY TIME EXPIRES THE ONLY
OTHER ISSUE I THINK I HAVE TIME
FOR IS THE NUMEROUS IMPROPER
CLOSING ARGUMENTS MADE DURING
THE PENALTY PHASE.
I RECOGNIZE UP FRONT THAT TRIAL
COUNSEL FAILED TO OBJECT TO ANY

OF THESE.
BUT THEY WERE MADE IN THE COURSE
OF 23 PAGES IN A VERY TRUNCATED
FASHION AND COVER A LOT OF
TERRITORY THAT WAS IMPROPER.
THIS PROSECUTOR, MR. WILL, MADE
STATEMENTS THAT WERE OUTRAGEOUS
TO BEGIN WITH, AND THERE WAS NO
ATTEMPT TO OBJECT TO THEM, AND
THE COURT DID NOT INTERVENE
SAYING, HEY, STOP.
IN THIS CASE MR. WILL WENT ON TO
SAY-- COMPARED HIM TO HIS
SISTER LIVING IN THE SAME HOUSE.
THIS IS NOT A GENERAL COMPARISON
TO THE GENERAL POPULATION, THIS
IS DENIGRATING AS MITIGATION.
AND THEN HE SAID MR. CRUZ
TORCHED HIS MOTHER IN PUBLIC.
UNFORTUNATELY, THE TRIAL JUDGE
PICKED UP ON THIS WHEN HE SAID
THAT THE MOTHER WAS VILIFIED,
OKAY?
SO THESE ARE NON-STATUTORY
AGGRAVATORS WHEN MR. CRUZ IS
SIMPLY TRYING TO SAY WHY HE GREW
UP THE WAY HE GREW UP.
THE PROSECUTOR ALSO ARGUED TO
THE JURY THAT THEY SHOULD
DISREGARD THE FACT THAT HE HAD
COMMITTED SUICIDE, THAT THEY
SHOULD DISREGARD HIS ADHD AND
BIPOLAR DISORDERS WHICH WERE
ESTABLISHED ON THE RECORD
WITHOUT DISPUTE.
AND HE ACTUALLY TOLD THE JURY
THAT HE KNEW THE DIFFERENCE
BETWEEN RIGHT AND WRONG.
THIS COURT HAS SAID THAT THAT'S
NOT THE STANDARD WHEN YOU'RE
ASSESSING THE TWO STATUTORY
MITIGATORS OF EXTREME EMOTIONAL
DISTURBANCE AND APPRECIATION OF
CRIMINALITY.
THOSE ARE CASES CITED IN OUR
PRIOR BRIEF INDICATING THAT IT'S
NOT THE STANDARD.
BUT THE WORST ARGUMENT THAT THIS
PROSECUTOR WENT ON TO SAY WAS
IT'S THE KIND OF CRIME THAT
FRIGHTENS YOU TO YOUR CORE, IT'S
THE REASON THAT CHILDREN FEAR
THE DARKNESS.
IT'S WHY PEOPLE HAVE LOCKS ON

THEIR DOORS AND KEEP GUNS FOR PROTECTION.
IF THIS IS NOT AN IMPROPER COMMENT, I AM VERY STRETCHED TO FIND OUT WHAT IS.
INTRODUCING THE CONCEPT OF SOCIAL CRIME AND CRIME IN THE STREETS INTO THE, INJECTING IT INTO THIS PROCEEDING?
HE THEN CREATED A SCRIPT THAT WAS MADE OUT OF WHOLE CLOTH AS TO WHAT THE VICTIM WAS HEARING ABOUT A SUPPOSED CONVERSATION WHEN WE DON'T EVEN KNOW HE WAS CONSCIOUS WHEN HE WAS IN THE TRUNK, INDICATING THAT HE TALKED ABOUT IT AND MR. JEMERY HEARD HIM--
>> COUNSEL, YOU CAN KEEP GOING, BUT I JUST WANT YOU TO BE AWARE THAT YOU ARE NOW INTO YOUR REBUTTAL TIME, AND YOU'VE USED ABOUT A MINUTE OF IT.
>> OKAY.
WELL, IN THAT CASE I WOULD ASK THAT THE COURT REVERSE AND REMAND THIS CASE.
THANK YOU.
>> THANK YOU.
COUNSEL FOR THE STATE.
>> GOOD MORNING AND MAY IT PLEASE THE COURT, MY NAME IS PATRICK BOBEK, AND I REPRESENT THE STATE IN THIS CASE.
I'D LIKE TO START BY ADDRESSING THIS SPECIAL JURY FINDING THAT MR. CRUZ WAS THE SHOOTER.
I THINK IT'S ONLY RELEVANT TO ONE ISSUE, AND THE ISSUE'S RELATIVE CULPABILITY.
AND I'D LIKE TO POINT OUT TO THE COURT THAT RECENTLY IN LAWRENCE V. STATE, YOU RECEDED FROM--
[INAUDIBLE]
PROPORTIONALITY AND SAID IT WAS IN COMPORT WITH THE FLORIDA CONSTITUTION'S CONFORMITY CLAUSE WITH SEVERAL EIGHT AMENDMENT JURISPRUDENCE.
>> WE DON'T-- DO WE REALLY NEED TO GO THERE?
I MEAN, I THINK WHAT THE ARGUMENT HAS BEEN IS THAT THERE WAS NO COMPETENT SUBSTANTIAL

EVIDENCE TO SHOW THAT MR. CRUZ
WAS THE SHOOTER IN THIS CASE.
AND THE ONLY THING YOU HAVE TO
SHOW FOR IT, BASICALLY, IS THAT
THE STATE STIPULATED THAT
CHARLES WAS NOT THE SHOOTER.
SOMEBODY SHOT THIS GUY,
THEREFORE, IT MUST BE CRUZ.
THAT SEEMS TO BE IT.
>> RIGHT.
BY ASSUMING RELATIVE CULPABILITY
AND ITS RELIANCE HERE SHOULD BE
ADDRESSED, WHEN THE COURT
RECEDED FROM COMPARATIVE
PROPORTIONALITY IN LAWRENCE, IT
RECEDED ALSO FROM THE RELATIVE
CULPABILITY ANALYSIS.
>> WE'RE NOT GOING THERE.
WE'RE JUST SAYING YOU HAVEN'T
PROVED IT.
>> OKAY.
SO I THINK EVEN IF THIS COURT
WERE TO THROW OUT THE JURY
FINDING, YOU STILL DON'T HAVE
EQUALLY CULPABLE DEFENDANTS.
BECAUSE THAT WOULD LEAVE CRUZ
WITH WE DON'T KNOW IF HE WAS THE
SHOOTER, AND IT WOULD LEAVE
CHARLES WITH HE WAS DEFINITELY
NOT THE SHOOTER.
THAT STILL LEAVES CHARLES MORE
CULPABLE.
SO IF THE COURT WANTED TO MAKE
IT, BUT I DON'T THINK THE COURT
ANY LONGER NEEDS TO DO A
RELATIVE CULPABILITY ANALYSIS.
>> CRUZ WOULD BE MORE
CULPABLE--
>> YES.
I'M SORRY, I MISSPOKE.
>> LET'S JUST FOCUS ON THE
RECORD.
IS THE CALIBER OF THE FIREARM
RECOVERED FROM CRUZ IN THE
RECORD AT CRUZ'S TRIAL?
>> NO.
>> IF THAT'S NOT IN THE RECORD,
DIRECT US TO WHAT RECORD
EVIDENCE THERE IS TO SUPPORT THE
JURY'S FINDING.
AND IF THERE IS NO RECORD
EVIDENCE, TELL US SO.
>> SO I THINK THERE IS RECORD
EVIDENCE THE JURY COULD HAVE

RELIED ON TO FIND THAT HE WAS
THE SHOOTER.
THE TWO MOST COMPELLING PIECES
OF EVIDENCE I FOUND WERE THAT
THERE WAS A CONCENTRATION OF
PISTOL WHIP MARKINGS ON
MR. JEMERY'S FACE, ON THE RIGHT
SIDE OF HIS FACE.
MR. CRUZ IS LEFT-HANDED, SO THAT
SHOWS HE WAS WIELDING A GUN THAT
NIGHT.
AND HE WAS THE PASSENGER IN THE
CAR, AND MR. CHARLES WAS THE
DRIVER OF THE CAR THE ENTIRE
TIME, AND WE HAVE MR. CRUZ ON
CAMERA AT AN ATM GETTING OUT OF
THE CAR WHILE MR. CHARLES WAITS.
SO I THINK THAT THOSE KIND OF
THINGS ARE WHAT THE JURY
MIGHT HAVE LOOKED AT.
>> FIRST, ABOUT WHERE THE PISTOL
WHIPPING WAS ADMINISTERED, HOW
COULD YOU, HOW COULD YOU INFER
ANYTHING FROM THAT?
YOU DON'T KNOW WHETHER HE'S
STANDING LOOKING DOWN OVER HIM
OR HE'S ABOVE HIS HEAD LOOKING,
LOOKING-- YOU JUST DON'T KNOW
WHAT DIRECTION HE'S APPROACHING
HIM FROM AS HE'S PISTOL WHIPPING
HIM, DO YOU?
IS THERE ANY EVIDENCE ABOUT
THAT?
>> THERE'S NOT, JUDGE.
>> THAT JUST SEEMS ENTIRELY
SPECULATIVE.
>> I'LL BE THE FIRST TO ADMIT
THAT THE STATE DIDN'T PUT ON
NEARLY AS MUCH EVIDENCE AS THEY
COULD HAVE FOR THIS FINDING, AND
SO IF THIS COURT IS GOING TO
REJECT THE FINDING, I STILL
THINK THAT IT DOESN'T HAVE ANY
BEARING ON THE OUTCOME OF THIS
CASE.
>> BUT, COUNSEL, COULD YOU
ELABORATE ON THAT?
BECAUSE THAT'S THE-- DO YOU
AGREE OR DISAGREE FROM THE, IF
YOU READ THE ORDER AND YOU TRY
TO UNDERSTAND THE COURT'S OWN
KIND OF JUSTIFICATION FOR WHY IT
WAS IMPOSING THE DEATH SENTENCE,
THE WAY I READ THE ORDER IS THAT

THE WHO IS THE SHOOTER WAS A VERY SIGNIFICANT, IF NOT SORT OF THE DETERMINING FACTOR AS TO IMPOSING THE DEATH SENTENCE.
OBVIOUSLY, THE COURT WAS, YOU KNOW, VERY HIGHLY INFLUENCED BY THE VIDEOTAPE OF, YOU KNOW, THE OTHER INCIDENT AND EVERYTHING.
BUT IT SEEMED TO ME THAT IF YOU TAKE OUT THE WHO'S THE SHOOTER PART OF IT, YOU REALLY COULDN'T HAVE ANY CONFIDENCE THAT THE SENTENCE WOULD HAVE BEEN THE SAME.
BUT COULD YOU RESPOND TO THAT?
>> SURE.
AND THE WAY I READ HOW HE FINALLY CONCLUDED HIS ORDER AS TO THAT, HE SAID THE ONLY REASON HE THINKS CHARLES ESCAPES THE DEATH PENALTY IS BECAUSE IT WAS STIPULATED THAT HE'S NOT THE SHOOTER.
AND I THINK THAT'S VERY CONVINCING MITIGATION THAT HE WOULD HAVE BEEN ABLE TO RELY ON AT HIS TRIAL THAT LED TO THIS DIFFERENT RESULT.
I DIDN'T READ IT AS I'M SENTENCING CRUZ TO DEATH BECAUSE HE'S THE SHOOTER, I'M JUST RECOGNIZING THAT CHARLES ESCAPED THE DEATH PENALTY BECAUSE THE STATE STIPULATED HE WAS NOT THE SHOOTER.
AND SO THE MITIGATION AGGRAVATION WAS DIFFERENT FOR THE TWO CASES BECAUSE OF THAT.
>> AND YOU AGREE AND RECOGNIZE THAT THE TRIAL COURT DID SAY THAT THEY WERE EQUALLY CULPABLE, CHARLES AND CRUZ, CORRECT?
>> WELL, I THINK-- YES, HE DID.
HE SAID THROUGHOUT THAT THEY ACTED IN CONCERT.
>>OKAY.
EQUALLY CULPABLE.
DOESN'T THAT LOGICALLY LEAD TO THE CONCLUSION THAT HE WOULD HAVE IMPOSED THE SAME PENALTY ON CHARLES IF, I MEAN, MITIGATION'S DIFFERENT, BUT IN TERMS OF WHETHER HE WAS THE SHOOTER OR NOT, IF THEY WERE EQUALLY

CULPABLE, I'M JUST-- IT SEEMS
LIKE THAT CUTS IN YOUR FAVOR,
BUT I'M NOT SURE EXACTLY.
>> WELL, AGAIN, I DON'T THINK
THE CONCLUSION IS THAT THEY ARE
EQUALLY CULPABLE BECAUSE CHARLES
HAD THE BENEFIT OF I AM
DEFINITELY NOT THE SHOOTER TO
RELY ON.
>> YOU KNOW, THE TRIAL COURT'S
STATEMENT ABOUT EQUAL
CULPABILITY IS A LITTLE ODD.
IT SAYS BOTH WERE EQUALLY-- AND
I'M QUOTING IT-- BOTH WERE
EQUALLY CULPABLE FOR THE ACTIONS
OF EACH OTHER.
NOW, THAT'S NOT EXACTLY LIKE
SAYING THAT THEY WERE EQUALLY
CULPABLE FOR THE CRIME.
IT'S JUST, I'VE JUST NEVER SEEN
ANYTHING QUITE LIKE THAT.
DO YOU HAVE ANY COMMENT ON THAT?
>> I DON'T, JUDGE.
>> I DON'T KNOW WHETHER THAT
HELPS OR HURTS YOU--
[LAUGHTER]
BUT I POINT OUT THAT IS WHAT THE
TRIAL COURT SAID.
>> AND, COUNSEL, WHAT'S YOUR
POSITION ON WHETHER IT WAS OKAY
FOR THE COURT TO HAVE CONSIDERED
THE GIRLFRIEND'S TESTIMONY FROM
THE OTHER CASE AS FAR AS WHO HAD
WHICH GUN?
>> SO THIS COURT'S PRECEDENT IS
PRETTY CLEAR THAT THE TRIAL
COURT IS NOT SUPPOSED TO RELY ON
NON-RECORD EVIDENCE, AND I DON'T
THINK HE DID HERE.
HE DID MENTION IT IN HIS
RECITATION OF THE FACTS, BUT HE
DID NOT RELY ON HER TESTIMONY IN
FINDING ANY OF THE AGGRAVATING
FACTORS.
>> WELL, I MEAN, WASN'T THAT--
I MEAN, REALLY WOULDN'T IF THAT
SAME EVIDENCE HAD BEEN IN THIS
TRIAL, WE WOULDN'T BE SITTING
HERE SPECULATING ABOUT WHETHER
THERE WAS EVIDENCE TO SUPPORT
WHO THE SHOOTER WAS.
IT SEEMS LIKE THAT'S THE MOST
DIRECT WAY TO GET TO THE
INFERENCE, WHO HAD THE .22 AND,

THEREFORE, WHO SHOT THE, YOU KNOW, WHO WAS THE SHOOTER OF THE FATAL SHOT.
>> RIGHT.
BUT I DON'T THINK HE RELIED ON HER TESTIMONY IN FINDING ANY AGGRAVATED FACTORS.
AGAIN, WHO IS THE SHOOTER IS NOT AN AGGRAVATING FACTOR.
>> RIGHT.
NO, BUT THAT'S-- THE AGGRAVATOR IS ONLY, THAT GETS YOU, OBVIOUSLY, YOU KNOW, THE ELIGIBILITY QUESTION.
BUT AS FAR AS THE SELECTION AND WEIGHING AND UNDERSTANDING OF, YOU KNOW, ALL THE FACTS AND CIRCUMSTANCES OF THE EVENTS AND EVERYTHING, ALL THE OTHER VARIABLES THAT GO INTO THE ACTUAL SENTENCE, IT SEEMS LIKE THAT WAS A SIGNIFICANT PART OF IT.
>> AND, AGAIN, I WOULD JUST POINT OUT THAT IN ANALYZING WHO THE SHOOTER IS, I THINK THE JUDGE WAS POINTING OUT THAT THE BENEFIT CHARLES GOT, THE MITIGATION HE WOULD HAVE BEEN ABLE TO PRESENT THAT I DEFINITELY DID NOT SHOOT HIM, THE OTHER GUY DID, WAS A SIGNIFICANT FACTOR IN HIS CASE.
AND I THINK THAT PUTS IT IN A DIFFERENT LIGHT THAN I'M RELYING ON THE FACT HE'S THE SHOOTER AND SENTENCING HIM TO DEATH.
THAT'S HOW I READ THAT PART OF HIS ORDER.
>> WELL, COUNSEL, I JUST, I UNDERSTAND WHAT YOU'RE SAYING, BUT, YOU KNOW, THIS IDEA OF MR. CRUZ BEING THE SHOOTER AND THAT HAVING BEEN ESTABLISHED BY THE JURY SEEMS TO JUST KIND OF PERVADE THIS ORDER.
AND OBVIOUSLY, THAT IS, THAT'S SIGNIFICANT.
THAT IS NOT AN INSIGNIFICANT FACTOR IN WEIGHING EVERYTHING AND DETERMINING WHAT THE APPROPRIATE PUNISHMENT IS.
SO I'M JUST STRUGGLING TO SEE HOW WE COULD WITH SAY THAT THAT

ERROR WAS HARMLESS BEYOND A
REASONABLE DOUBT.
HELP ME, HELP ME-- IF YOU'VE
GOT ANYTHING ELSE TO SAY ON
THAT, BUT I THINK THAT MIGHT BE
THE QUESTION.
BECAUSE ADMITTEDLY, IT'S AN
ERROR TO RELY ON IT, IT SEEMS TO
ME, SINCE IT'S UNSUPPORTED BY--
I MEAN, MADE AN ATTEMPT TO COME
UP WITH SOME SUPPORT FOR IT, BUT
IT'S PRETTY FEEBLE.
>> RIGHT.
AND, AGAIN, I WOULD SAY THAT THE
FACTS OF WHETHER CRUZ IS THE
SHOOTER IS ONLY RELEVANT TO A
RELATIVE CULPABILITY ANALYSIS,
AND THAT IS NO LONGER IN
COMPORTING WITH THE FLORIDA
CONSTITUTION.
I THINK THAT'S ITS ONLY
RELEVANCE IN THIS CASE.
>> I'M NOT SURE I AGREE WITH
THAT.
I'M NOT SURE I AGREE WITH THAT
STATEMENT OF LAW.
WE'VE BEEN THROUGH THIS BEFORE,
I DON'T KNOW THAT YOU NEED TO GO
THERE.
BUT IF YOU READ THE LAWRENCE
OPINION WITH RELATIVE
CULPABILITY AS OPPOSED TO HOW
THE DEATH PENALTY'S
ADMINISTERED?
>> SO McCLOUD V. STATE IN
2016, JUSTICE CANADY POINTED OUT
THAT RELATIVE CULPABILITY IS AN
ASPECT OF COMPARATIVE
PROPORTIONALITY REVIEW.
SO IF YOU GET RID OF COMPARATIVE
PROPORTIONALITY, YOU HAVE DE
FACTO GOTTEN RID OF RELATIVE
CULPABLE.
>> I'M NOT SURE I FOLLOW GETTING
RID OF SOMETHING MEANS GETTING
RID OF AN ASPECT OF IT.
>> WELL, IF IT'S PART OF THE
ANALYSIS AND THAT ANALYSIS IS
NOW GONE--
>> IT IS TRUE THAT IT'S PART OF
THAT ANALYSIS, BUT IT ALSO, FOR
EXAMPLE, IS A PART OF, YOU KNOW,
GENERAL SENTENCING PRINCIPLES TO
CONSIDER RELATIVE CULPABILITY.

IT'S PART OF CONSPIRACY LAW.
IT'S AN ASPECT OF ALL THOSE
OTHER THING, AND YOU WOULDN'T
SAY THAT THOSE THINGS HAVE BEEN
ELIMINATED BY OUR DECISION ON
PROPORTIONALITY, WOULD YOU?
>> NO.
I WOULD SAY SPECIFICALLY IN THE
DEATH PENALTY CONTEXT THE FLOOR
IS EDMUND TYSON.
IT'S SOMEBODY THAT IS LESS
CULPABLE CANNOT BE GIVEN GREATER
SENTENCE.
EQUALLY CULPABLE DEFENDANTS
FEDERALLY CAN BE GIVEN DIFFERENT
SENTENCES.
AND SO IN THE CONTEXT OF THE
DEATH PENALTY CASE LAW, IT
WOULDN'T APPLY.
>> I MEAN, I THINK THE ARGUMENT
HERE ISN'T THAT IT'S
UNCONSTITUTIONAL IN TERMS OF A
RELATIVE COMPARISON WHICH IS
WHAT THE LAWRENCE GETS TO.
IT'S THAT IF AN ORDER, IF A
JUDGE'S DISCRETIONARY DECISION
IS MOTIVATED BY, SIGNIFICANTLY
BY A FACT THAT IS NOT PROVEN OR
THAT WAS PROVEN WITH EVIDENCE
THAT WASN'T ALLOWED TO BE
CONSIDERED, THEN DOESN'T THAT
SORT OF UNDERCUT THE VALIDITY OF
THE ENTIRE ORDER, OF THE
DECISION?
THAT'S THE QUESTION.
>> RIGHT.
AND I'LL JUST RELY ON MY
PREVIOUS ARGUMENT THAT I DON'T
THINK HE WAS TALKING ABOUT IT IN
A DECIDING FACTOR OF CRUZ'S
CASE, BUT THAT CHARLES GOT THE
BENEFIT OF MITIGATION IN HIS
CASE.
THAT'S HOW I READ HIS ORDER.
SO I DON'T THINK IT WAS THE
DECIDING FACTOR.
I THINK THE FIVE AGGRAVATING
FACTOR THAT HE GAVE GREAT WEIGHT
TO WERE THE DECIDING FACTORS IN
THIS CASE.
SO THEN I'D LIKE TO MOVE ON TO
THE PROSECUTOR'S CLOSING
ARGUMENTS IN THE GUILT-- THE
PENALTY PHASE.

THE FIRST THING I'D POINT OUT TO THE COURT IS ONE OF THESE WERE OBJECTED TO, SO THEY'D HAVE TO RISE TO FUNDAMENTAL ERROR, MEANING THE RECOMMENDATION OF DEATH COULD NOT HAVE BEEN REACHED BUT FOR THESE COMMENTS.
AND THIS WAS A GREATLY AGGRAVATED CASE.
LIKE I SAID, THERE WERE FIVE AGGRAVATING FACTORS; HAC, CCP, AVOID ARREST, IN THE COURSE OF A FELONY-- WHICH WAS THREE FELONIES-- AND A PRIOR VIOLENT FELONY WHICH WAS A ROBBERY HE COMMITTED ONLY ONE WEEK AFTER THIS OCCURRED.
IN RELATION TO THAT, HE HAD 37 MITIGATING FACTORS THAT WERE FOUND, AND TWO-THIRDS OF THEM WERE ONLY GIVEN SLIGHT WEIGHT.
SO THIS WAS A GREATLY AGGRAVATED CASE WITH MITIGATION THAT JUST DIDN'T STACK UP.
IN THAT CONTEXT, THOSE COMMENTS THE COURT MIGHT FIND OBJECTIONABLE DID NOT RISE TO THE LEVEL OF FUNDAMENTAL ERROR AND THE-- AND SPECIFICALLY SOME OF THEM I DON'T THINK ARE OBJECTIONABLE AT ALL.
FOR EXAMPLE, WHEN HE REFERS TO THE DEFENDANT'S SISTER AND HOW SHE TURNED OUT ALL RIGHT, I THINK THAT'S A FAIR COMMENT ON WHAT WEIGHT A JURY SHOULD GIVE MITIGATION.
WE HAVE SOMEONE HERE WHO LIVED THROUGH THE SAME THINGS HE DID, AND, IN FACT, SHE TESTIFIED SHE HAD IT HARDER BECAUSE SHE HAD TO BE SUPPORTIVE AND STRONG FOR HIM WHEN HE WAS UPSET, AND SHE COULDN'T FEEL THE EMOTIONS SHE WANTED TO FEEL BECAUSE SHE WAS THE OLDER SIBLING.
SO BEING ABLE TO POINT TO A COUNTEREXAMPLE IS A GOOD WAY TO SAY THIS MITIGATION IS NOT AS WEIGHTY.
I'D MOSTLY RELY ON MY FUNDAMENTAL ERROR ARGUMENT THERE.
IF THERE ARE NO FURTHER

QUESTIONS, I WOULD ASK THAT THE COURT MAINTAIN THIS CONVICTION AND DEATH SENTENCE.
[INAUDIBLE CONVERSATIONS]
>> I'M SORRY.
>> AND THAT IS WHAT WOULD BE THE CORRECT REMEDY, DO YOU THINK, IF WE DETERMINED THAT THE TRIAL JUDGE RELIED ON MATTERS THAT SHOULD NOT HAVE BEEN RELIED UPON IN THE SENTENCING ORDER AND WE CAN'T TELL WHETHER THAT RELIANCE MADE A DIFFERENCE IN THE ULTIMATE SENTENCE?
>> IF YOU CAN'T TELL WHETHER IT MADE A DIFFERENCE?
I THINK THAT WOULD SHOW THAT THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT BECAUSE IT DIDN'T RISE TO--
>> NO.
I MEAN, WHAT I MEAN IS, I MEAN, IF THE TRIAL JUDGE THAT NOT RELIED ON THE GIRLFRIEND'S TESTIMONY, HAD NOT RELIED ON THE FINDING THAT WASN'T SUPPORTING ASSUMING WE DETERMINE THAT'S TRUE, WE CAN'T TELL WHETHER THAT WOULD HAVE INFLUENCED THE ULTIMATE SENTENCE OR NOT.
IF YOU REMOVE THOSE THINGS, WOULD THE SENTENCE HAVE BEEN DIFFERENT?
SO IF WE CAN'T TELL ONE OR THE OTHER, IT MIGHT HAVE BEEN DIFFERENT, THEN WHAT WOULD BE THE REMEDY?
>> WELL, AGAIN, IT WOULD HAVE TO-- I THINK IT WOULD HAVE TO RISE TO FUNDAMENTAL ERROR THAT IT COULD NOT, THE SENTENCE COULD NOT HAVE BEEN REACHED BUT FOR THE ERRORS.
>> NO, I THINK THE QUESTION THAT JUSTICE LAWSON'S GETTING AT IS DOES THE COURT GET AN OPPORTUNITY TO, ESSENTIALLY, REMAKE THE DECISION WITHOUT THOSE, WITHOUT THOSE EVIDENTIARY ISSUES, OR IS THE REMEDY TO ESSENTIALLY SAY, YOU KNOW, SEND IT BACK FOR A LIFE SENTENCE?
>> YEAH.
SO IF THIS COURT WERE TO

REVERSE, I THINK THE PROPER
RULING WOULD BE REMAND FOR A NEW
SENTENCING HEARING.
THAT'S WHAT THE COURT HAS DONE
IN THE PAST WHEN IT'S THROWN OUT
SOME AGGRAVATORS OR FOUND
MITIGATORS TO BE MORE WEIGHTY,
TO HAVE THE TRIAL COURT DO THAT
WEIGHING PROCESS.
I THINK YOU WOULD REMAND IT TO
THE TRIAL COURT TO REWEIGH
EVERYTHING WOULD WANT THOSE
FINDINGS.
>> NOT A NEW HEARING IN THE
SENTENCE THAT THERE'D BE THE
STATE GETS ANOTHER BITE AT THE
APPLE PRESENTING EVIDENCE AT
WHO'S THE SHOOTER, BUT
ESSENTIALLY, YOU KNOW, FREEZE
THE EVIDENCE THAT'S PROPERLY
CONSIDERED AND THEN HAVE THE
COURT SORT OF REDO ITS CALCULUS
AND THEN IMPOSE WHATEVER
SENTENCE IT THINKS IS
APPROPRIATE.
>> YES.
IF THERE ARE NO FURTHER
QUESTIONS?
THANK YOU FOR YOUR TIME.
>> THANK YOU, COUNSEL.
WE WILL NOW HEAR REBUTTAL.
>> VERY QUICKLY, I DISAGREE WITH
THE STATE'S INTERPRETATION OF
THE ORDER.
I THINK JUSTICE CANADY STATED
CORRECTLY THAT IT SORT OF
PERVADES THE ORDER; THAT IS, THE
FINDING THAT HE WAS THE SHOOTER.
IT MADE THE ORDER FROM ONE POINT
TO THE OTHER.
ON THAT POINT, IN FACT, ON THE
EDMUND TYSON SECTION OF THE
RECORD, THE COURT BASICALLY SAID
THE JURY MADE THAT
DETERMINATION, NO FURTHER
ANALYSIS IS NEEDED.
AND THAT'S ON PAGE 3800 OF THE
RECORD.
AND FURTHER, HE DID USE THE
NON-RECORD EVIDENCE IN THE AVOID
ARRESTING AGGRAVATOR
SPECIFICALLY REFERRING TO THE
GIRLFRIEND'S TESTIMONY.
SO FOR THE STATE TO SUGGEST THAT

THAT DID NOT ACTUALLY OCCUR IN
THE ORDER IS INCORRECT.
HE DID MAKE REFERENCE TO IT.
I ALSO TAKE THE OBJECTION TO THE
STATE'S INTERPRETATION OF
LAWRENCE AS SAYING THAT IT WIPED
AWAY THE DISPARITY JURISPRUDENCE
OF THE SUPREME COURT.
IT DID NO SUCH THING.
IT DEALT EXCLUSIVELY WITH
PROPORTIONALITY.
AND THERE WAS NO LANGUAGE IN
LAWRENCE ADDRESSING THAT POINT,
AND THE STATE DIDN'T BRIEF THAT
POINT BEFORE THIS COURT BEFORE
ANNOUNCING THAT THAT WAS THE
POSITION THAT THE STATE WAS
TAKING.
SO WE WOULD ASK THE COURT TO
REJECT THAT ARGUMENT OUTRIGHT.
AND WE WOULD ALSO POINT OUT THAT
INSOFAR AS THE SISTER'S
TESTIMONY IN THE CLOSING
ARGUMENT, THE PROSECUTOR SAID
SHE TURNED OUT FINE.
WELL, ACTUALLY, THE SISTER
TESTIFIED AT THE PENALTY PHASE,
AND SHE SAID THAT SHE WAS UNDER
EVALUATION AND MEDICATION
BECAUSE OF THE WAY THEY WERE
RAISED.
SO IT WAS MISLEADING THE JURY IN
TELLING THEM THAT SHE TURNED OUT
FINE WHEN THERE WAS RECORD
EVIDENCE TO THE CONTRARY.
SO WE WOULD ASK THIS COURT TO
TAKE THAT INTO CONSIDERATION,
AND THEN WE WOULD ASK THAT THE
COURT REVERSE THE PENALTY PHASE
AND REMAND TO THE TRIAL COURT.
WITHOUT GIVING UP OUR ARGUMENTS
ON THE GUILT PHASE, BUT THAT'S
ANOTHER ISSUE.
>> ALL RIGHT.
WE THANK YOU BOTH FOR YOUR
ARGUMENTS IN THIS CASE TODAY.
AND THAT CONCLUDES TODAY'S