

>> SUPREME COURT OF FLORIDA IS NOW IN SESSION PLEASE BE SEATED.

>> WE'LL NOW TAKE UP CRUZ V. THE STATE OF FLORIDA.

>> GOOD MORNING, MAY IT PLEASE THE COURT, COUNSEL, MY NAME IS RAFAEL RODRIGUEZ, I REPRESENT MR. CRUZ ON THIS DIRECT APPEAL. THIS IS MR. CRUZ'S SECOND VISIT TO THIS COURT.

LAST YEAR THIS COURT VACATED HIS DEATH SENTENCE BASED ON THE FACT THAT THE CIRCUIT COURT OR INCLUDED INFORMATION IN HIS SENTENCING ORDER THAT PERTAINED TO TESTIMONY IN THE CO-DEFENDANT'S TRIAL.

THIS COURT FOLLOWED PRECEDENT BY SAYING THAT WAS IMPROPER AND -- [INAUDIBLE]

THE DEATH SENTENCE.

ON REMAND, THE CIRCUIT COURT RECONSIDERED THE IMPOSITION OF THE DEATH PENALTY --

>> BUT, AND WE DID JUST REMAND FOR A RESENTENCING BEFORE THE TRIAL COURT, NOT A NEW SENTENCING PHASE, CORRECT?

>> THAT IS CORRECT.

THE COURT REEVALUATED THE CASE. IN LIGHT OF THIS COURT'S DECISION WHICH ALSO FOUND THAT THERE WAS NO COMPETENT OR SUBSTANTIAL EVIDENCE TO SUPPORT THE JURY'S SPECIFIC FINDING THAT MR. CRUZ WAS THE TRIGGERMAN. BASED ON THAT, THE CIRCUIT COURT ACTUALLY MADE A FINDING THAT CRUZ WAS NOT THE SHOOTER. AND THAT'S REFLECTED IN HIS RESENTENCING ORDER.

HE HAD PREVIOUSLY STATED THAT BOTH DEFENDANTS WERE EQUALLY CULPABLE AND HAD STATED IN HIS ORIGINAL ORDER THAT THE ONLY THING THAT DISTINGUISHED THE TWO DEFENDANTS WAS THE FACT THAT MR. CRUZ WAS THE SHOOTER PURSUANT TO THE COURT'S SPECIAL FINDING.

ON REMAND, THE CIRCUIT COURT DOUBLED DOWN ON ITS FINDINGS THAT MR. CRUZ AND MR. CHARLES,

THE CO-DEFENDANT, WERE, IN FACT,
EQUALLY CULPABLE.

HE SAID THAT THEY ACTED IN
CONCERT.

THEY HAD EQUAL FOOTING.

THEY PARTICIPATED EQUALLY.

CULPABILITY LIE EQUALLY IN THEIR
HANDS.

BOTH DEFENDANTS ARE EQUALLY
CULPABLE.

THESE ARE FINDINGS OF THE
CIRCUIT COURT THAT COME TO THIS
COURT AND SHOULD NOT BE
DISTURBED BECAUSE THERE IS
COMPETENT, SUBSTANTIAL EVIDENCE
TO SUPPORT THOSE FINDINGS.

AND, IN FACT, THE STATE DOES NOT
MAKE THE ARGUMENT THAT THEY'RE
NOT EQUALLY CULPABLE, AND IT'S
IN THEIR BRIEF.

THE ONLY DIFFERENCE BETWEEN THE
TWO CASES WAS NOW THE FACT THAT
A MR. CRUZ WAS NO LONGER
CONSIDERED THE TRIGGERMAN.
AND THAT IS THE ONLY DIFFERENCE
IN THE REEVALUATION.

THE COUNT FAILED TO GIVE AN
EXPLANATION IN ITS RESENTENCING
ORDER AS TO WHY IT WAS GIVING
DISPARATE TREATMENT TO BOTH
DEFENDANTS EVEN THOUGH IT FOUND
BOTH OF HEM TO BE EQUALLY
CULPABLE.

>> ALTHOUGH FROM THE JUDGE'S
PERSPECTIVE, THE VARIABLE THAT
MATTERED WAS SENTENCING CHARLES
TO DEATH WAS NOT AN OPTION --

>> THAT IS CORRECT.

>> HE COULD HAVE THOUGHT CHARLES
WAS EQUALLY DESERVING AND JUST
DIDN'T HAVE THE LEGAL AUTHORITY
TO DO THAT.

>> WELL, THE STATE NEVER PURSUED
THAT ISSUE WITH THE JURY BECAUSE
THEY NEVER HAD --

>> ON THE SHOOTER.

BUT DID THEY NOT -- THEY SOUGHT
THE DEATH PENALTY --

>> THEY SOUGHT THE DEATH
PENALTY, THAT'S CORRECT.

>> RIGHT.

>> BUT ONCE THE JURY HAD MADE A
FINDING OF MR. CRUZ'S CASE
ORIGINALLY, THERE WAS A JURY

FINDING.

>> OBVIOUSLY, A REASONABLE PERSON LOOKING AT THE FACTS OF THIS HORRIBLE CRIME COULD CONCLUDE THAT IT DOESN'T MATTER WHO THE SHOOTER WAS AND THAT THEY'RE BOTH -- THEY BOTH SHOULD, THEY BOTH DESERVE THE DEATH PENALTY.

AND IN THE CASE, YOU KNOW, THE TRIAL JUDGE DIDN'T HAVE THE AUTHORITY TO IMPOSE THE DEATH PENALTY.

SO THE BOTTOM LINE IS UNLESS -- YOUR WHOLE CASE, I MEAN, IT SEEMS LIKE IT ALL RESTS ON WHETHER THERE'S SORT OF, WHETHER THIS RELATIVE CULPABILITY RULE, WHETHER THAT STILL STANDS. BECAUSE THE COURT SAYING THAT THEY'RE EQUALLY CULPABLE DOESN'T, DOESN'T REALLY GET YOU ALL THE WAY THAT YOU NEED TO GO. BECAUSE THE IMPLICATION OF THAT COULD BE THAT THEY BOTH SHOULD HAVE GOTTEN THE DEATH PENALTY, NOT THAT NEITHER SHOULD HAVE.

>> WELL, NO.

THE POINT THAT I WAS TRYING TO MAKE IS THAT THAT IS A SUBTLE FACT IN THIS CASE.

NOW, WHETHER OR NOT THIS COUNT APPLIES THE RELATIVE CULPABILITY ANALYSIS IS WHAT THE STATE IS ASKING THIS COURT NO LONGER TO DO IN VIEW OF THE LAWRENCE DECISION.

SO WE'RE ASKING -- WE'RE TAKING IT ONE STEP FURTHER AND SAYING THAT IS THE REALITY BEFORE THIS COURT.

THESE ARE EQUALLY CULPABLE DEFENDANTS BECAUSE THERE'S NOTHING DISTINGUISHING BETWEEN THEM.

AND WHAT THE --

>> WELL, TO THE EXTENT THAT IT RELATES TO THE PARTICULAR CIRCUMSTANCES OF THIS CRIME, I THINK THAT'S WHAT THAT IS ABOUT, CORRECT?

>> RIGHT.

>> THAT DOESN'T TAKE INTO ACCOUNT OTHER AGGRAVATION.

AND, ACTUALLY, WOULDN'T TAKE INTO ACCOUNT OTHER MITIGATION EITHER, RIGHT?

YOU'VE GOT THAT -- AS PART OF THE ANALYSIS HERE, YOU'VE GOT WHAT HAPPENED IN THE CRIME, AND THEN YOU HAVE CIRCUMSTANCES RELATED TO AGGRAVATION AND MITIGATION WHICH BEAR ON THE ULTIMATE PENALTY THAT IS TO BE IMPOSED, ISN'T THAT CORRECT?

>> WELL, AND SO FAR AS AGGRAVATION, BOTH OF THEM WERE FOUND TO HAVE THE SAME AGGRAVATORS.

>> WELL, BUT THERE IS THIS FACTOR AND, AGAIN, I DON'T KNOW THAT THIS IS LEGALLY DISPOSITIVE, BUT IT MIGHT HAVE BEEN WHAT IS PART -- IT IS PART OF WHAT IS GOING ON IN THIS CASE ABOUT THE SUBSEQUENT HUNGRY HOWIE'S ROBBERY AND THE FINDINGS OF THE COURT ABOUT KIND OF THE VICIOUSNESS OF THE PISTOL WHIPPING THAT THE DEFENDANT HERE ADMINISTERED TO ONE OF THE VICTIMS IN THAT CASE. THAT IS SOMETHING THAT THE COURT DOES DWELL ON, ISN'T THAT CORRECT?

>> CORRECT.

HE MAKES THAT POINT, BUT REMEMBER, THAT'S AN EVENT IN WHICH BOTH DEFENDANTS PARTICIPATE --

>> WELL, THE ONE PERSON WAS DOING THE PISTOL WHIPPING, RIGHT?

>> THAT'S CORRECT, YOUR HONOR.

>> THAT WAS THE DEFENDANT IN CASE.

>> THAT IS CORRECT.

BUT THAT WAS ONE AGGRAVATORS THAT HE WAS TALKING ABOUT, WHICH IS THE PRIOR CONVICTION WHICH IS APPLIED TO BOTH DEFENDANTS. AND THE CIRCUIT JUDGE COULD EASILY -- AND THIS COURT HAS OVER THE YEARS REVIEWED CIRCUIT COURT OPINIONS -- COULD HAVE EASILY LAID OUT AS AN ISSUE AS TO WHY, FOR EXAMPLE, THE MITIGATION IN MR. CHARLES' CASE

MAY HAVE VERIFIED OR MAY HAVE SUPPORTED A LIFE SENTENCE. BUT, NO, HE DIDN'T DO SO. THIS COUNT IS DEPRIVED OF THAT CIRCUIT COURT'S REASONED JUDGMENT AS TO WHY HE'S TREATING THESE TWO DEFENDANTS SEPARATELY --

>> SO CAN I ASK YOU, I'M SORRY, LET'S ASSUME THAT RELATIVE CULPABILITY WENT OUT THE WINDOW WITH LAWRENCE.

IS WILL ANY OTHER LEGAL PRINCIPLE THAT WOULD WARRANT VACATING THIS SENTENCE JUST BASED ON THE FACT THAT THE JURY THAT RECOMMENDED DEATH, A REASONABLE PERSON COULD THINK THAT IT WAS -- THAT THAT RECOMMENDATION INFLUENCED HEAVILY BY THE SHOOTER FINDING WHICH WE SAID WAS LACKING IN ANY EVIDENTIARY SHARE SUPPORT?

>> IF I UNDERSTAND THE COURT'S QUESTION, IT IS WHETHER OR NOT THERE'S ANY BASIS IF YOU WITH ACCEPT THE FACT THAT LAWRENCE DID AWAY WITH RELATIVE CULPABILITY?

>> YES.

TAKE THAT OFF THE TABLE --

>> YES, AND WE RAISED THAT IN OUR BRIEF.

EQUAL PROTECTION, WHICH WAS NOT ADDRESSED IN LAWRENCE --

>> WHICH HAS NOTHING TO DO WITH THE SHOOTER.

FORGET ABOUT THE OTHER DEFENDANT AND FOCUS ON THE FACT THAT THE JURY MADE A FINDING THAT HAD NO EVIDENTIARY SUPPORT ACCORDING TO OUR COURT AND THAT LIKELY OR PLAUSIBLY INFLUENCED THEIR DEATH RECOMMENDATION WHICH WAS, OBVIOUSLY, NECESSARY IN ORDER FOR THIS PERSON TO GET THE DEATH PENALTY.

>> RIGHT.

THERE IS SUPPORT FOR THAT, AND THAT IS THAT A CIRCUIT JUDGE -- A JURY'S RECOMMENDATION IS NOT THE END AND BE-ALL OF A JUDGE'S RESPONSIBILITY WHEN HE'S CONSIDERING THE DEATH PENALTY.

COURT HAS REPEATEDLY SAID THAT THE PROPRIETY OF THE DEATH PENALTY IS SUBJECT TO THE CIRCUIT COURT'S REASONED JUDGMENT.

AND IN THIS PARTICULAR CASE, WHAT WE HAVE IS AN INDICATION BY THE CIRCUIT JUDGE THAT THE AGGRAVATORS HAVE SUPPORTED THE JURY'S VERDICT, AND THAT WAS THE END OF THE DISCUSSION.

HE SAID I'M NOT GOING TO DISTURB THE JURY'S VERDICT.

BUT THAT IS NOT THE DUTY OF THE CIRCUIT JUDGE AT THIS POINT.

THE CIRCUIT JUDGE, ESPECIALLY WHEN HE'S VIEWING EQUALLY CULPABLE DEFENDANTS IS TO DEMONSTRATE IN HIS ORDER WHY HE'S GIVING DISPARATE TREATMENT TO THESE DEFENDANTS.

WE'VE RAISED THE ISSUE SHOE OF EQUAL PROTECTION BECAUSE THIS COURT AS FAR BACK AS SLATER, NEARLY 50 YEARS AGO, SAID EQUAL PROTECTION OF THE LAW'S APPLIED IN THIS TYPE OF ANALYSIS.

AND IT HAS DONE SO IN OTHER CASES WHICH WE SET OUT IN OUR BRIEF.

SO IN ADDITION TO THAT, WE'VE ALSO RAISED THE DUE PROCESS CLAUSE AND THE STATE CONSTITUTION WHICH THIS COURT CAN OBVIOUSLY INTERPRET MORE BROADLY THAN ANY FEDERAL PROVISION.

BECAUSE THOSE ARE FLORIDA STATE CONSTITUTIONAL PROVISIONS THAT COULD BE APPLIED.

WE, OF COURSE, CHALLENGE THE FACT THAT LAWRENCE IS DETERMINATIVE OF THIS CASE BECAUSE LAWRENCE DID NOT DEAL WITH RELATIVE CULPABILITY. IT DEALT EXCLUSIVELY WITH PROPORTIONALITY.

AND IT RELIED --

>> BUT HAVEN'T WE OVERWHELMINGLY IN OUR CASE LAW CONSIDERED THE ISSUE YOU'RE HERE ON, AND IT'S KIND OF A SUBSET OF THE PROPORTIONALITY ISSUE?

>> THIS COURT HAS, ON OCCASION,

REVIEWED --

>> WELL, BUT I UNDERSTAND YOU
HAVE SOME CASES THAT YOU COULD
ARGUE WE'VE --

>> YEAH.

>> I UNDERSTAND THAT.

BUT IF YOU LOOK AT IT AS A
WHOLE, THE BODY OF CASE LAW
WHERE THAT HAS COME UP, ISN'T IT
A TRUE STATEMENT THAT WE HAVE
OVERWHELMINGLY TREATED IT AS A
SUBSET OF OUR PROPORTIONALITY
REVIEW?

>> YOU HAVE.

THIS COURT HAS ALSO 40 YEARS AGO
SAID THEY WERE SEPARATE MATTERS
IN THE WAINWRIGHT DECISION.

AND IN THAT CASE, THE DEFENDANT
WAS TRYING TO RAISE THAT ISSUE,
AND THE COURT SAYS, NO, NO, NO.
THESE ARE SEPARATE AND
COMPLETELY DIFFERENT ISSUES THAT
YOU'RE DEALING WITH.

SO THIS COURT'S OPINION, YES,
HAVE USED IT, BUT THERE ARE
OTHER CASES THAT HAVE USED THEM
IN DIFFERENT CATEGORIES.

AND THE POINT THAT I'M TRYING TO
MAKE IS THAT IN THE CONFORMITY
CLAUSE JURISPRUDENCE OF THIS
COURT, IT HAS BEEN MADE VERY
CLEAR THAT IN ORDER FOR A
SUPREME COURT CASE OPINION TO
APPLY UNDER THE CONFORMITY
CLAUSE, IT MUST MAKE CLEAR AND
SPECIFICALLY HOLD A PARTICULAR
ISSUE UNDER THAT CLAUSE.

UNDER THE, FOR EXAMPLE, CRUEL
AND UNUSUAL OR THE SEARCH AND
SEIZURE PROCEDURES UNDER ARTICLE
I, SECTION 12.

THAT IS NOT WHAT HAPPENED IN
THIS CASE BECAUSE IT WAS SIMPLY
INVOLVING COMPARATIVE
PROPORTIONALITY.

LAWRENCE RELIED EXCLUSIVELY ON
PULLEY.

THE STATE HAS SAID, WELL,
THERE'S NO DECISION THAT ALLOWS
IT TO OCCUR FROM THE UNITED
STATES SUPREME COURT, BUT THAT
TURNS THE ARGUMENT UPSIDE DOWN
BECAUSE THE SECTION OF THE
CONSTITUTION SECTION 17

SPECIFICALLY REFERS TO DECISION.
TO SAY, TO SAY TO THIS COURT
THAT THE U.S. SUPREME COURT HAS
NEVER SANCTIONED IT, WOULD BE TO
BASICALLY HANDICAP THIS COURT IN
ITS ANALYSIS OF BOTH SEARCH AND
SEIZURE AND CRUEL AND UNUSUAL
PUNISHMENT, BECAUSE WE HAVE TO
WAIT UNTIL THE U.S. SUPREME
COURT SPECIFICALLY MAKES A
DECISION ON AN ISSUE --
>> WHAT DID YOU SAY PALMS WAS
DECIDED?
>> PALMS V. WAINWRIGHT.
>> WHEN?
>> THAT WAS 1984.
>> I THOUGHT YOU SAID FOUR YEARS
AGO.
[LAUGHTER]
>> 40 YEARS AGO, I MEANT.
>> 40.
[LAUGHTER]
>> TIME FLIES.
[LAUGHTER]
>> AND I WOULD ALSO POINT OUT
THAT THE STATE'S ARGUMENT THAT
YOU SHOULD APPLY LAWRENCE ALSO
DISREGARDS THIS LONG LINE OF
CASES FROM THIS COURT THAT THIS
COURT DOES NOT INTENTIONALLY
INTEND TO OVERRULE A DECISION
SILENCIO, AND THAT IS ALSO A
LINE OF CASES THAT IS BEFORE
THIS COURT BECAUSE THAT IS A
DOCTRINE OF THIS COURT AS
APPLIED.
IF WE WERE TO APPLY THAT
DOCTRINE, THEN LAWRENCE COULD
NOT POSSIBLY HAVE OVERRULED
RELATIVE CULPABILITY, BECAUSE IT
WAS SILENT ON THE ISSUE.
THERE WAS NO REFERENCE IN
LAWRENCE TO RELATIVE
CULPABILITY, ZERO.
AND, IN FACT, IT RELIED ON THE
JACOB DISSENT.
AND THE JACOB DISSENT -- WHICH
WAS A SINGLE-DEFENDANT CASE --
DIDN'T MENTION RELATIVE
CULPABILITY.
AND IT SAID VERY CLEARLY THAT
THE SUPREME COURT DECISION MAKES
CLEAR, PARTICULARLY HOLDS,
SPECIFICALLY HOLDS THAT

PROPORTIONAL COMPARATIVE
PROPORTIONALITY IS NOT FOUND, IS
NOT MANDATORY UNDER THE FEDERAL
CONSTITUTION.

BUT IT SAID NOTHING ABOUT
RELATIVE CULPABILITY.

AND THIS COURT HAS USED THAT
OVER AND OVER AGAIN FOR THE LAST
50 YEARS.

IT EVEN USES IT IN GUIDELINES
CASES WHEN THERE'S DIFFERENCES
BETWEEN DEFENDANTS.

SO IT'S NOT ALIEN TO THE LAW OF
THE STATE OF FLORIDA.

AND IT MAKES SENSE THAT LAWRENCE
WOULD NOT HAVE MENTIONED, THAT
LAWRENCE WOULD NOT HAVE
MENTIONED THE McCLOUD FOOTNOTE
THAT WAS RAISED BY THE STATE IN
ITS BRIEF BECAUSE IT DEALT WITH
A COMPLETELY DIFFERENT MATTER.

>> WOULDN'T YOU AGREE THOUGH
THAT AS A MATTER OF PRINCIPLE,
THE SAME THINGS THAT MAKE
PROPORTIONALITY REVIEW KIND OF
INCOHERENT APPLY EQUALLY TO
RELATIVE CULPABILITY IN THE
SENSE OF NOT BEING ABLE TO
COMPARE MITIGATION AND
AGGRAVATION, YOU KNOW, THAT SORT
OF THING?

THAT THERE'S JUST TOO MUCH
VARIABLES TO REALLY HAVE A
PRINCIPLED WAY OF, OF EVEN
APPLYING PROPORTIONALITY OR
RELATIVE CULPABILITY?

I MEAN, THEY BASICALLY SUFFER
FROM THE SAME PROBLEMS, DON'T
THEY?

>> WELL, THERE'S TWO ISSUES ON
THAT.

ONE IS COMPARATIVE
PROPORTIONALITY, THIS COURT
NEVER HAD --

[INAUDIBLE]

TO DO IN THAT.

ABSOLUTELY NONE.

FOR YEARS AND YEARS --

>> I THINK THAT'S PROBABLY IN
THE EYE OF THE BEHOLDER.

BUT --

>> OKAY.

>> -- TELL ME WHY RELATIVE
CULPABILITY IN APPLICATION IS

DIFFERENT FROM PROPORTIONALITY
IN TERMS OF THESE ISSUES THAT
I --

>> THE MAIN ISSUE IS YOU'RE
LOOKING AT THE SAME CASE.
YOU'RE NOT LOOKING AT UNRELATED
CASES IN THE UNIVERSE OF CASES.
YOU'RE LOOKING AT THE ACTORS
BEFORE THE COURT, THE ACTUAL
INDIVIDUALS BEFORE THE COURT.
YOU'RE NOT LOOKING AT WHAT
HAPPENED IN STATE V. JOHNSON, IN
STATE V. PEREZ.

YOU'RE NOT LOOKING AT THAT.
YOU'RE LOOKING AT THE CASE IN
FRONT OF YOU WEAN THE TWO
DEFENDANTS, THE TWO ACTORS IN
THIS CASE.

AND, IN FACT, EDMOND V. TYSON,
WHICH THE STATE ALSO RELIES ON
AS THE ONLY FEASIBLE THEORY BY
WHICH THIS COURT CAN ASSESS
CO-DEFENDANTS IN A
MULTI-DEFENDANT CASE, SANCTIONS
THE LOOKING OF THE RELATIVE
ROLES OF THE DEFENDANTS.

THE UNITED STATES SUPREME COURT
IN SOLEMN V. HELM, CITED IN OUR
BRIEF, SPECIFICALLY TALKED ABOUT
HOW ED HAND TALKS ABOUT THE
DIFFERENT CULPABILITY OF THE
DEFENDANTS.

SO IT'S NOT COMPLETELY ALIEN TO
THE LAW, AND IT IS COMPLETELY
APPROPRIATE TO DEAL WITH THE
ACTORS IN FRONT OF YOU.

AND IN THIS CASE THIS COURT IS
ACTUALLY FACED WITH A SITUATION
WHERE THE COURT HAS MADE A
FACTUAL FINDING THAT THEY ARE
EQUALLY CULPABLE.

HE COULD HAVE, HE COULD HAVE --
NOTHING PREVENTS HIM FROM
REFERRING TO MITIGATION AS A
DIFFERENCE, A DISTINCTION
BETWEEN THE DEFENDANTS, BUT HE
DIDN'T DO SO.

HE DID NOT DO SO.

AND THIS COURT --

>> WELL, BUT HE DOES SEEM TO
FOCUS ON PARTICULAR AGGRAVATION
IN THIS CASE.

AND EVEN WHEN HE'S COMING DOWN
THERE TO THE BOTTOM LINE

CONCLUSION NOT JUST GOING THROUGH THE INDIVIDUAL AGGRAVATORS, BUT THE CONCLUSION ABOUT THE IMPOSITION OF THE DEATH SENTENCE, HIS FOCUS IS TO A SIGNIFICANT EXTENT ON THE VIDEO FROM THE HUNGRY HOWIE'S ROBBERY.

WHICH HE SAYS THE JURY SAW THE SAME AND RETURNED A VERDICT OF DEATH AGAINST MR. CRUZ.

SO THERE SEEMS TO BE A LOT OF FOCUS ON THAT, ISN'T THAT CORRECT?

>> THAT IS CORRECT, THAT'S WHAT HE WROTE.

BUT, AGAIN, THAT REFERS TO THE ONE AGGRAVATOR WHEN WHICH APPLIED TO BOTH DEFENDANTS. BOTH DEFENDANTS WERE FOUND TO HAVE COMMITTED -- HAVE THE SAME AGGRAVATOR.

SO IF THAT'S THE ONLY ASPECT --

>> BUT WE DO KNOW THAT THE AGGRAVATORS, THAT IT'S NOT INAPPROPRIATE FOR A COURT TO CONSIDER A QUALITATIVE FACTORS WITH RESPECT TO AN AGGRAVATOR. I MEAN, NOT EVERY AGGRAVATOR OF THIS PARTICULAR TIME WOULD BE EQUIVALENT.

I MEAN, BECAUSE THE CIRCUMSTANCES ARE DIFFERENT. IT COULD BE, SO AN AGGRAVATOR CAN BE MORE AGGRAVATED BECAUSE OF THE PARTICULAR CONDUCT OF THE DEFENDANT ASSOCIATED WITH THE AGGRAVATOR, ISN'T THAT CORRECT?

>> THAT MAY BE TRUE --

>> WELL, IT MAY BE TRUE OR IS IT OBVIOUSLY TRUE?

>> THE ONLY REASON I SAY THAT IS BECAUSE THE CIRCUIT JUDGE SAID IT DIDN'T MATTER IN THIS CASE WHO WAS THE SHOOTER OR WHO WAS THE ONE THAT INFLICTED THE INJURIES.

SO WHO INFLICTED THIS INJURY AT HUNGRY HOWIE'S SHOULDN'T APPLY EITHER, SHOULDN'T MATTER TO THEM, BUT HE SAID IT DID.

>> WELL, I THINK HE SAID THE POINT ABOUT WHO WAS THE SHOOTER WAS WE DON'T KNOW WHO THE

SHOOTER WAS, OKAY?

AND SO, AND THE IDEA THAT THERE CAN NEVER BE A DEATH PENALTY IN A PLACE WHERE THE SHOOTER IS, THAT'S NOT CORRECT, IS IT?

>> WE ONLY DO THAT, ONLY KNOW THAT WHEN A COURT MAKES A SPECIFIC FINDING AND AN ORDER THAT THIS COURT CAN REVIEW. WE CAN ONLY KNOW THAT. WE CANNOT START SPECULATING ON WHAT THE CIRCUIT JUDGE HAD IN HIS MIND.

HE HAD THE ABILITY, NO ONE WAS --

>> BUT I'M TALKING ABOUT THE LEGAL POINT THAT YOU NEED NOT ESTABLISH IN A CASE WHERE YOU'VE GOT TWO PERPETRATORS, YOU NEED NOT ESTABLISH WHO THE SHOOTER WAS OR THE DEATH SENTENCE TO BE IMPOSED, ISN'T THAT CORRECT?

>> THAT IS CORRECT.

BUT IN THIS CASE THIS COURT SHOULD NOT DISREGARD THE FACT THAT THIS SAME JUDGE IN AN EARLIER ORDER FOUND THAT TO BE THE ONLY SALIENT DIFFERENCE BETWEEN THESE TWO DEFENDANTS. THEN HE DID AN ABOUT FACE AND SAID, WELL, IT DOESN'T MATTER, AFTER ALL, WHETHER OR NOT HE WAS THE SHOOT OR WHO INFLICTED THE INJURIES.

WE'RE FACED WITH AN INTERNAL INCONSISTENCY WITH THE SAME SET OF ORDERS BY --

>> ALL RIGHT, COUNSEL, YOUR DOWN TO ONE MINUTE.

YOU'RE ONLY GOING TO HAVE A MINUTE LEFT FOR REBUTTAL.

>> OKAY.

I WILL REFER THE ONE MINUTE.

>> THANKS.

>> GOOD MORNING, MAY IT PLEASE THE COURT, MY NAME IS PATRICK, AND I REPRESENT THE STATE IN THIS CASE.

TWO YEARS AGO IN LAWRENCE V. STATE, THIS COURT RECOGNIZED THE IMPORTANCE OF PULLEY V. HARRIS WHICH FOUND THAT COMPARATIVE PROPORTIONALITY REVIEW IN CAPITAL SENTENCING CASES IS

CONSTITUTIONALLY PERMITTED BUT NOT REQUIRED.

BECAUSE OF THE STATE'S CONFORMITY CLAUSE IN THE CONSTITUTION REQUIRING THIS COURT TO REVIEW UNUSUAL CASES -- SORRY --

[LAUGHTER]

WITH U.S. SUPREME COURT PRECEDENT, IT FOUND THAT ITS COMPARATIVE PROPORTIONALITY REVIEW VIOLATED THAT CLAUSE.

RELATIVE CULPABILITY IS, OF COURSE, PROPORTIONALITY REVIEW.

I'D ARGUE IT'S THE QUINTESSENTIAL FORM OF PROPORTIONALITY REVIEW, BECAUSE YOU'RE ATTEMPTING TO FIND SIMILAR CASES.

YOU CAN'T GET A MORE SIMILAR CASE HAND TWO CO-DEFENDANTS WHO COMMIT THE SAME CRIMES.

>> WAIT A MINUTE.

PROPORTIONALITY --

>> YES --

>> IT DEALS WITH WHETHER THE DEATH PENALTY HAS BEEN APPLIED IN SIMILAR TYPE CASES.

>> RIGHT.

>> OKAY?

RELATIVE CULPABILITY MEANS THAT IT COULD BE WITH, WHETHER LET'S TAKE HYPOTHETICALLY THIS CASE WHERE ONE DEFENDANT WENT IN AND DID THE KILLING WHILE THE OTHER ONE WAS ON THE LOOKOUT.

>> RIGHT.

>> THAT'S WHY -- THEY'RE TWO DIFFERENT THINGS.

>> SO I WOULDN'T -- THEY'RE NOT TWO DIFFERENT THINGS --

>> WE CAN GO BACK AND FORTH, AND IF CAN SAY THEY'RE TWO DIFFERENT THINGS.

[LAUGHTER]

>> I WOULD ARGUE THAT YOUR CURRENT PRECEDENT DOESN'T ALLOW THAT.

RELATIVE CULPABILITY IN AN ASPECT OF RELATIVE PROPORTIONALITY, AND THIS COURT SAID IN A MAJORITY OPINION IN THE -- THE ONE OF THE FACTORS THAT CAN BE CONSIDERED IS THE

DISPARATE TREATMENT OF
CO-DEFENDANTS.

SO THAT'S THIS COURT SAYING IT'S
A FACTOR OF PROPORTIONALITY
REVIEW.

AND THEN WHEN YOU LOOK AT THE
SPORTS CASES WHEN IT'S APPLIED
RELATIVE CULPABILITY, IT'S
ALWAYS IN -- USING IT AS
PROPORTIONALITY.

WHEN YOU REDUCE A SENTENCE FROM
DEATH TO LIFE, COURT ALWAYS SAYS
SO BECAUSE IT'S DISPROPORTIONATE
TO THE CO-DEFENDANTS.

>> CAN YOU EXPLAIN WHY UNDER
YOUR LOGIC EVEN AGGRAVATORS AND
MITIGATORS AREN'T SUSPECT?
BY THEIR NATURE, THEY'RE
COMPARATORS, RIGHT?

>> YES.

>> YOU'RE COMPARING A
HYPOTHETICAL BASELINE CASE AND
SAYING THERE'S AN AGGRAVATOR OR
MITIGATING FACTOR.

IF WE ACCEPT YOUR RULE THAT
COMPARISONS AMONG DEFENDANTS ARE
SUSPECT BECAUSE OF LAWRENCE,
WHAT SAVES AGGRAVATORS AND
MITIGATORS?

>> WELL, I'D ARGUE BECAUSE THE
WEIGHING PROCESS IS INHERENTLY
SUGGESTIVE.

THAT'S WHY WE HAVE THE JURY DO
IT.

THAT'S WHY WE HAVE A JUDGE
REVIEW THEIR FINDINGS AND LAY
OUT THE WEIGHT HE GIVES TO EACH
OF THEM.

THEY'RE NOT SUSPECT, IT'S AN
INHERENTLY -- PROCESS THAT THE
JUDGE AND THE JURIES GO THROUGH
WHEN THEY WEIGH HOSE.

AND THE SUPREME COURT HAS
ACTUALLY GIVEN US GUIDANCE ON
WHAT TO DO WITH CO-DEFENDANT
CASES.

AND THE FOCUS IS ALWAYS ON THE
INDIVIDUAL WHICH IS IN LINE WITH
SUPREME COURT PRECEDENT SAYING
YOU SHOULD HAVE INDIVIDUALIZED
SENTENCING IN DEATH PENALTY
CASES.

YOU SHOULD LOOK AT NOT JUST THE
CONDUCT OF THE DEFENDANTS, BUT

THEIR BACKGROUND, THEIR UNIQUE CHARACTERISTICS AND EVERYTHING ABOUT THEM.

THE NAME OF THE -- SAYS THE PERSON MUST BE A MAJOR PARTICIPANT OF THE CRIME AND ACT WITH AT LEAST RECKLESS INDIFFERENCE TO HUMAN LIFE. AND THIS COURT HAS ALREADY FOUND THAT -- SINCE THAT'S THE ONLY THING THIS COURT NEEDS TO APPLY IN CO-DEFENDANT CASES, PARTIES HAVE FOUND TO BE AGAINST CRUZ'S TO -- SHOULD STAND.

>> COULD YOU TALK TO US ABOUT THIS PARTICULAR CASE IN THIS PARTICULAR ORDER OR IN THE SENSE THAT IT DOESN'T INSPIRE A LOT OF CONFIDENCE?

I MEAN, YOU KNOW, YOU'VE GOT A JURY THAT MAKES A FINDING THAT'S A CRITICAL FINDING --

>> YEAH.

>> -- THAT WE, THAT THIS COURT DECIDES WAS LACKING IN EVIDENTIARY SUPPORT.

YOU HAVE YOUR INITIAL ORDER THAT YOUR COLLEAGUE FOCUSED ON, THE SENTENCING ORDER, AND WE HAVE THE DO-OVER SENTENCING ORDER THAT DOESN'T SEEM LIKE IT REALLY ATTEMPTED TO KIND OF REJUSTIFY THE IMPOSITION OR REEXPLAIN THE IMPOSITION OF THE DEATH PENALTY IN LIGHT OF THE SHOOTER THING NOT BEING ON THE TABLE ANYMORE.

>> RIGHT.

>> YOU HAD A JUDGE WHO REPEATEDLY CONCLUDED THAT MITIGATORS WEREN'T PROVEN BUT THEN STILL ASSIGN THEM WEIGHT. I DON'T KNOW LEGALLY WHAT THIS COURT SHOULD OR CAN DO ABOUT THAT, BUT I'M CURIOUS TO HEAR YOUR PERSPECTIVE ON SORT OF THIS PARTICULAR ORDER AND, YOU KNOW, HOW IT'S SORT OF LEGALLY JUSTIFIED.

>> OF COURSE.

I THINK IT'S IMPORTANT TO NOTE THAT FIRST SENTENCING ORDER CAME OUT IN 2019 WHEN THIS COURT STILL DID A COMPARATIVE PROPORTIONALITY REVIEW.

AND SO THAT'S WHY THERE WAS A FOCUS ON THE JURY FINDING THAT CRUZ WAS THE SHOOTER, BECAUSE THE JUDGE HAD TO JUSTIFY WITH RELATIVE CULPABILITY IN PROPORTIONALITY REVIEW WHY CRUZ WAS MORE CULPABLE.

POST-LAWRENCE HE DOESN'T HAVE TO DO PROPORTIONALITY REVIEW, SO HE JUST HAS TO LOOK AT THE AGGRAVATION AND DECIDE DOES HE AGREE WITH THE JURY THAT IT OUTWEIGHS THE MITIGATION. HE EXHAUSTIVELY WENT THROUGH EACH AGGRAVATOR, EACH MITIGATOR, WEIGHED THEM AGAINST EACH OTHER AND AGREED WITH THE JURY THAT AGGRAVATION OUTWEIGHED MITIGATION.

SO THE TIMING I THINK IS IMPORTANT AND EXPLAINS WHAT LOOKS LIKE A CONTRADICTION BETWEEN THE FIRST AND THE SECOND --

>> DO YOU THINK THOUGH, DOES IT RAISE ANY RED FLAGS FOR YOU WHEN YOU READ AN ORDER THAT SEEMS TO BE SO INTERESTED IN SORT OF TRYING TO JUSTIFY A JURY DECISION OR BE APPROPRIATELY DEFERENTIAL TO THAT WHEN WE NOW KNOW HAT JURY'S RECOMMENDATION COULD VERY WELL HAVE BEEN INFECTED BY, YOU KNOW, A MAJOR ERROR?

>> I THINK, IF ANYTHING, HE WAS MORE DEFERENTIAL TO THE DEFENDANT.

LIKE YOU SAID, HE WOULD EXPLAIN HOW HE SAID A MITIGATOR DIDN'T MESSILY APPLY, BUT FIND IT WAS PROVEN.

FOR EXAMPLE, THAT CRUZ WAS A MINOR PARTICIPANT IN A CRIME COMMITTED WITH SOMEONE ELSE. HE GAVE THAT MODERATE WEIGHT, BUT FOUND UNDER NO CIRCUMSTANCES THAT CRUZ WAS A MINOR PARTICIPANT.

AND I THINK HE GAVE IT MODERATE WEIGHT BECAUSE IT IS FOCUSING ON THE FACT THAT THE ANOTHER PARTICIPANT WAS IN THE CRIME, WHICH IS PART OF THE MITIGATOR.

I THINK THAT'S WHY YOU FOUND IT AS FOUND AND GAVE IT MODERATE WEIGHT.

I DON'T THINK HE WAS DEFERENTIAL TO THE JURY'S FINDING, I THINK HE JUST AGREED.

I MEAN, THIS IS A HIGHLY AGGRAVATED CASE.

FIVE AGGRAVATORS, SOME MITIGATION BUT NOT NEARLY ENOUGH TO OVERCOME SOME OF THE WEIGHTIEST AGGRAVATORS IN THIS COURT'S PRECEDENTS.

SO THE DEATH SENTENCE WAS JUSTIFIED IN THIS CASE.

IF THERE ARE NO OTHER QUESTIONS?

ALL RIGHT, I WOULD ASK THAT THIS COURT UPHOLD THE CONVICTION AND SENTENCE TO DEATH.

THANK YOU.

>> VERY BRIEFLY, THE SECOND ORDER DO DID TALK ABOUT PROPORTIONALITY EVEN AFTER LAWRENCE, SO THERE'S NO TIMING ISSUE HERE.

>> I THINK HE WAS USING THAT AS A SYNONYM FOR THE WEIGHING PROCESS, THE WEIGHING OF THE AGGRAVATORS AS OPPOSED TO THE MITIGATORS.

IF YOU LOOK AT IT IN CONTEXT, WOULDN'T YOU THINK THAT'S WHAT -- HE WASN'T REALLY TALKING ABOUT THE OTHER CASES, HE'S TALKING ABOUT, HE'S WEIGHING THE AGGRAVATORS AND MITIGATORS.

>> I THINK HE CITED ONE CASE IN THAT PORTION OF THE ORDER. BUT IN ANY EVENT, AGAIN, WE WOULD ARGUE THAT EDMUND TYSON ONLY OPPOSED TO THOSE THRESHOLD OF CASES.

IT DOESN'T TALK ABOUT RELATIVE CULPABILITY, AND IT DOESN'T BIND THIS COURT NOT TO APPLY RELATIVE CULPABILITY.

WE CONCLUDE BY ASKING THIS COURT TO CONSIDER THE FOLLOWING: THE STATE'S ARGUMENT IS ASKING THIS COURT TO STROLL INTO A LEGAL MINEFIELD, TO DISREGARD THIS LINE OF CASES OF SILENCIO, TO DISREGARD THE INTERPRETATION OF THE CONFORMITY CLAUSE AND TO

THROW OUT RELATIVE CULPABILITY
THAT HAS BEEN APPLIED IN THIS
COURT FOR OVER -- NEARLY 50
YEARS.

IT ASKS FOR A RADICAL REORDERING
OF THIS COURT'S PRECEDENT.

WE'D ASK THAT IN THE COURT
VACATE THE DEATH PENALTY AND
REQUEST THAT THE CIRCUIT COURT
ENTER AN ORDER OF LIFE.

THANK YOU.

>> THANK YOU.

THE COURT'S ADJOURNED.