>> THE NEXT CASE UP WILL BE

McCLOUD V. STATE.

[BACKGROUND SOUNDS]

[BACKGROUND SOUNDS]

[BACKGROUND SOUNDS]

>> GOOD MORNING.

>> MORNING.

MAY IT PLEASE THE COURT, ANDREW

CRAWFORD, I'M HERE WITH THE

OFFICE OF REGIONAL COUNSEL.

SEATED TO MY LEFT IS OUR

HOMICIDE CHIEF AS WELL AS ETHAN

MODEN FOR THE SECOND DISTRICT

FOR THE STATE OF FLORIDA.

THEY HAVE BOTH BEEN INSTRUMENTAL

IN HELPING ALONG WITH THIS

APPEAL.

THIS IS A FINAL-- THIS IS A

FIRST APPEAL FROM A SENTENCE

IMPOSING DEATH OUT OF THE POLK

COUNTY, FLORIDA.

THERE ARE 12 ISSUES IN THIS

APPEAL.

THERE'S TWO I WOULD REALLY LIKE
TO FOCUS ON.
IN THE GUILT PHASE, THE TRIAL
JUDGE EXCLUDED DR.WILLIAM
CONSUMERRER WHO HAVE HAVE
TESTIFIED DURING THE GUILT PHASE
THAT THE APPELLANT'S STATEMENT
TO LAW ENFORCEMENT WERE, IN
FACT, COERCED BASED ON, NUMBER
ONE, HIS MENTAL HEALTH ABILITIES
AND, NUMBER TWO, BASED ON THE
VARIOUS FACTORS IN TERMS OF THE
LENGTH OF THE INTERROGATIONS AND
THE THINGS THAT WERE SAID DURING
THE INTERROGATION.
NOW, THE FIRST DISTRICT COURT OF
APPEAL HAS SPECIFICALLY RULED
AND FOUND SUCH TESTIMONY
ADMISSIBLE IN BOYIER V. STATE.
SO IF THIS COURT COULD EITHER
ADOPT OR DISAPPROVE THAT
RATIONALE.
THE ONLY OTHER CASE WHERE THIS

HAS BEEN MENTIONED, THERE IS ONE
CASE IN THIS REPORT, BLAINE ROSS
V. STATE, WHERE THE COURT
UTILIZED A FALSE CONFESSION
EXPERT'S TESTIMONY IN PART IN
REVERSING A CONVICTION FINDING
THE CONFESSION INVOLUNTARY IN
ITSELF.
SPECIFICALLY, THE FALSE
CONFESSION EXPERT TESTIMONY IN
THIS CASE WENT TO THE HARTE OF
THE DEFENSE-- HEART OF THE
DEFENSE.
THE CONFESSION IN THIS CASE WAS
THE CENTER PARIS OF THE STATE'S
CASE.
IT WAS MENTIONED DURING THEIR
OPENING STATEMENT, IT WAS
MENTIONED THROUGH VARIOUS
DETECTIVES DURING THEIR CASE IN
CHIEF, IT WAS MENTIONED DURING
THEIR CLOSING ARGUMENT AND ALSO
THE REBUTTAL ARGUMENT AND, IN

FACT, THE JURY IN THIS CASE

ASKED TO SEE THE STATEMENT.

>> IN THAT STATEMENT, AND MAYBE

THIS IS MORE TO THE MERITS, HE

HAS ALWAYS DENIED THAT HE WAS

THE SHOOTER.

>> CORRECT.

>> AND SO THE FALSE PART OF THE

CONFESSION IS SUPPOSEDLY THAT HE

WASN'T INVOLVED IN THIS INCIDENT

AT ALL?

>> ABSOLUTELY, YOUR HONOR.

>> AND YOU-- IN TERMS OF THE,

HOW IT WAS INVOLUNTARY, WHAT IS

THE-- WAS THIS DEFENDANT CAN

INVOLVED WITH THE CRIMINAL

JUSTICE SYSTEM BEFORE THIS

CRIME?

>> I BELIEVE HE HAD, HE DID HAVE

A PRIOR RECORD, YES.

>> OKAY, HOW MANY-- WAS HE, HE

SAID HE WAS THREATENED--

>> CORRECT.

HE WAS THREATEN WITH THE THE

DEATH PENALTY.

>> BUT THE POLICE, THE

DETECTIVES SAID HE WAS NOT

THREATENED.

>> CORRECT.

IN ADDITION TO BEING--

>> BUT THEY HEARD THAT, THE JURY

HEARD THAT HE SAID THAT HE WAS

THREATENED, AND HE DIDN'T INTEND

FOR THIS TO BE.

SO WHAT WOULD THE CONFESSION

EXPERT OR FALSE CONFESSION

EXPERT-- BECAUSE, OBVIOUSLY,

THAT'S TO BE CONCERNED WITH

SOMEBODY FALSELY CONFESSING TO A

CRIME--

>> CORRECT.

>> WHAT WAS IT THAT HE WOULD

HAVE ELABORATED ON?

>> DR. CRIMPER WOULD HAVE

ELABORATED ON TWO DIFFERENT

THINGS.

THE FIRST WOULD HAVE BEEN THE
APPELLANT'S MENTAL HEALTH WHICH
I THINK IS VERY IMPORTANT
BECAUSE THE TRIAL COURT
SPECIFICALLY INSTRUCTED THE JURY
THAT THEY COULD CONSIDER THE
APPELLANT'S MENTAL HEALTH IN
DECIDING WHETHER THE CONFESSION
WAS VOLUNTARY.
SO HE WOULD HAVE TESTIFIED THAT
MR.McCLOUD HAD BORDERLINE
FUNCTIONING AND HE WAS
PARTICULARLY SUGGESTIBLE TO--
SUSCEPTIBLE TO SUGGESTION.
HE GAVE A SERIES OF TESTS
INCLUDING WEXLER AND SOME OTHER
TESTS AND IN ONE INSTANCE HE
WOULD READ A STORY TO
MR. McCLOUD.
MR. McCLOUD WOULD THEN READ
THE STORY BACK, AND IN ADDITION
TO READING THE STORY BACK, HE
WOULD ADD A BUNCH OF ADDITIONAL

DETAILS.

BASED ON ALL THESE TESTS, IT WAS

DR. CRIMPER'S CONCLUSION THAT IN

ADDITION TO HIS BORDERLINE

FUNCTIONING THAT HE WOULD INVENT

DETAILS THAT WEREN'T EVEN

PRESENT IN THE STORY.

>> WAS THERE SOMETHING ABOUT

THIS CONFESSION WHICH ACTUALLY

DID NOT CONFORM WITH THE

EVIDENCE?

I MEAN, WHAT WAS IT, WHAT DID

HE-- WHAT WAS THE CONFESSION?

>> THE CONFESSION, WELL, IT

STARTED-- HE WAS ARRESTED IN

ORLANDO PROBABLY ABOUT 2 OR 3:00

ON THE 21ST OF OCTOBER.

HE WAS QUESTIONED FROM

APPROXIMATELY 7:30 UNTIL 3 IN

THE MORNING, VERY LONG SERIES.

HE DENIED IT ALMOST THE ENTIRE

TIME.

>> WAS ANY OF THAT VIDEOTAPED?

>> NO, NOT AT ALL.

ONLY 52 MINUTES OF THE

SEVEN-AND-A-HALF HOUR

INTERROGATION WAS VIDEOTAPED.

THE DEFENSE ACTUALLY PRESENTED A

WITNESS, A COMPAL FROM THE

ORLANDO COUNTY SHERIFF'S OFFICE,

WHO SAID THEY ALWAYS RECORD

THEIR INTERVIEWS, BUT THEY DID

NOT IN THIS CASE.

THE PRIME MINISTER SHERIFF'S

OFFICE-- POLK COUNTY SHERIFF'S

OFFICE ELECTED NOT TO AND ONLY

RECORDED 52 MINUTES OF IT.

WHAT WAS RECORDED, BESIDES THE

DENIALS, WAS THAT HE DID

PARTICIPATE IN THE ROBBERY, HE

DID NOT SHOOT ANYBODY, AND THERE

WAS NO INTENT FOR ANYONE TO BE

HARMED.

HE ALSO MENTIONED THAT HIS

CO-DEFENDANT, SEVERAL OF HIS

CO-DEFENDANTS, WERE MORE

INVOLVED AND THAT HE-- NO ONE

WAS SUPPOSED TO BE THERE, AND

ADDITIONALLY, THAT NO ONE WAS

SUPPOSED TO BE HURT, AND HE

DIDN'T HURT ANYBODY.

>> AND MAYBE I'M JUMPING

AHEAD--

>> SURE.

>> TO WHETHER YOU'RE SAYING

THIS SHOULD HAVE BEEN, YOU'RE

SAYING THIS CONFESSION SHOULD

HAVE BEEN SUPPRESSED OR THAT THE

JURY SHOULD HAVE HEARD THAT IT

WAS A, THAT THE CONFESSION, THAT

THEY SHOULD HAVE HEARD THIS

FALSE CONFESSION EXPERT?

>> WELL, JUDGE, OF COURSE, WE

MOVE TO SUPPRESS THE

CONFESSION--

>> BUT YOU'RE SAYING THE JUDGE

HAD CONSIDERED THAT, AND IF THE

JUDGE HAD CONSIDERED IT, HE

WOULD HAVE SUPPRESSED THE

CONFESSION, AND IT WOULDN'T HAVE

COME IN AT ALL?

>> I WOULD ARGUE THAT, BUT--

>> YOU THINK THAT'S A WEAKER--

IT'S LIKE YOU'RE HESITATING.

>> I THINK THE MORE CRUCIAL

EXPERT IS THE FALSE CONFESSION

EXPERT TESTIFYING.

IF YOU LOOK ON THE INNOCENCE

PROJECT WEB SITE, APPROXIMATELY

268 PEOPLE HAVE BEEN RELEASED,

30 PERCENT OF THOSE INVOLVED

FALSE CONFESSIONS.

>> I UNDERSTAND THAT, AND THERE

MAY BE-- BUT I REALLY, HE WAS

FOUND NOT WITH THE MURDER

WEAPON--

>> CORRECT.

>> HE WAS FOUND WITH A .38.

>> CORRECT.

WHICH WAS PROVEN NOT TO BE THE

MURDER WEAPON.

>> BUT IT WAS ONE OF THE, WAS IT

PROVEN TO BE ONE OF THE WEAPONS

AT THE, THAT WAS USE INSIDE THE

CRIME AT ALL?

>> NO.

IT WAS TAKEN FROM THE VICTIM IN

THE CASE--

>> IT WAS TAKEN BY THE VICTIM.

>> CORRECT.

>> OKAY.

SO HE'S WITH THE MURDER WEAPON

OF-- AND DID HE RECEIVE ANY OF

THE PROCEEDS OF THE ROBBERY?

>> THERE WAS TESTIMONY FROM SOME

OF THE CO-DEFENDANTS THAT HE

DID, BUT HE TESTIFIED OR HE--

DURING HIS CONFESSION HE

MENTIONED THAT HE PURCHASED IT

FROM NATE WHO WAS ONE OF THE

CENTRAL FIGURES IN THE CASE.

NOT THAT HE STOLE IT FROM THE

VICTIM, BUT THAT HE PURCHASED IT

AFTER THE ROBBERY.

HE PRESENTED AN ALIBI DEFENSE,

AND THERE WAS NUMEROUS--

>> SAID HE PURCHASED THE WEAPON,

DID HE NOT?

>> HE DID.

>> BUT HE DID RECEIVE SOME OF

THE CONTRABAND?

>> WELL, THAT'S WHAT THE OTHER

CO-DEFENDANTS TESTIFIED TO.

>> GOING BACK TO THE

CONFESSION--

>> CORRECT.

>> [INAUDIBLE]

YOU MENTIONED THE, I BELIEVE

THE--

>> BOYER.

>> BOYER DECISION.

>> ARE YES, SIR.

>> OTHER THAN THE BOYER

DECISION, HAVE THERE BEEN ANY

OTHER DECISIONS IN THE STATE

ALLOWING SUCH AN EXPERT TO

TESTIFY?

>> IN FACT, THERE HAS, YOUR

HONOR.

THE OTHER ONE IS FROM THE FOURTH DISTRICT WHICH IS TERRY V. STATE WHICH IS THIS 1985.

THAT WAS A SITUATION WHERE IT WAS A MANSLAUGHTER CASE, THERE WAS AN ALLEGATION OF BATTERED SPOUSE SYNDROME.

AND IN THE END OF THE OPINION, THE FORTY DISTRICT SAY-- FOURTH DISTRICT SAYS THAT THIS EXPERT SHOULD HAVE BEEN ADMITTED TO TESTIFY.

THE ONLY OTHER TIME YOU SEE THESE KIND OF FALSE CONFESSION EXPERT CASES SPECIFICALLY ARE, FOR EXAMPLE, WHEN SOMEONE RAISED IN A 3.851 SAYING DEFENSE COME WAS INEFFECTIVE FOR FAILING TO HIRE A FALSE CONFESSION EXPERT.

AND THIS COURT HAS ADDRESSED SEVERAL OF THOSE CASES AND ONE DECIDED BY THE STATE, DEREK V.

STATE.

BUT THOSE CASES ARE

FUNDAMENTALLY DIFFERENT

BECAUSE THE HOLDINGS

BASICALLY SAY THERE WASN'T

SUFFICIENT FACTS ALLEGED IN

ORDER TO GET A FALSE CONFESSION

EXPERT.

AND THERE'S SOME LANGUAGE IN THE

FOOTNOTES THAT THEY CITE TO IN

THE DEREK CASE, THIS COURT CITED

TO A FOURTH DISTRICT COURT OF

APPEAL CASE CALLED BELTRAN V.

STATE.

BELTRAN V. STATE WAS ANOTHER

SIMILAR ISSUE WHERE A DEFENDANT

HAD REQUESTED APPOINTMENT OF

FALSE CONFESSION EXPERT, AND THE

FOURTH DISTRICT SAID, NO, AND WE

QUESTION WHETHER THIS IS EVEN

ADMISSIBLE.

THE PROBLEM WITH THAT CASE IS

YOU CANNOT COMPARE IT TO THIS

CASE BECAUSE IT'S SO

FUNDAMENTALLY DIFFERENT

FACTUALLY.

THAT CASE WAS A VERY, VERY NASTY

SEXUAL ABUSE CASE INVOLVING AN

INFANT, AND THE EXPERT IN THAT

CASE HAD ONLY DONE SOME INTERNET

SEARCHES AND HAD READ A CASE

STUDY ON COLLEGE STUDENTS TYPING

THE WRONG KEY LATE AT NIGHT.

SOMEHOW THAT WAS SUPPOSED TO

RELATE TO A FALSE CONFESSION.

>> WHAT WAS THE JUDGE'S

RATIONALE FOR EXCLUDING IT?

WAS IT A BLANKET RULE TO SAY,

LIKE WE'VE HAD WITH SOME OTHER

AREAS THAT HE OR SHE WASN'T

GOING TO ALLOW IT IN BECAUSE YOU

SHOULDN'T ALLOW THAT IN AT ALL,

OR DID HE RELATE IT-- OR SHE--

TO THE ACTUAL FACTS OF THE CASE?

>> IT WAS AN ABSOLUTE BLANKET

RULE EXCLUDING HIS TESTIMONY.

>> SO WHAT YOU'RE SAYING IS THEN
THAT THE JUDGE DID NOT EVEN
EXERCISE DISCRETION, BUT JUST
SIMPLY EXCLUDED IT.
>> WELL, HE SIMPLY EXCLUDED IT.
I DON'T THINK HE EXERCISED
PROPER DISCRETION.
>> WELL, IF YOU THINK THERE'S A
BLANKET RULE, I GUESS THEN YOU
THINK THERE'S NO ABILITY TO LET
IT IN, RIGHT?
>> WELL, THE JUDGE WOULD NOT LET
ANY OF THE TESTIMONY IN.
>> DID THE JUDGE INDICATE THAT
HE THOUGHT HE HAD NO DISCRETION
TO ALLOW IT IN?
>> NO.
THE JUDGE INDICATED THAT HE
THOUGHT IT WOULD NOT AID THE
JURY.
>> WELL, BUT THAT'S DIFFERENT.
SEE, THEN THAT'S NOT A BLANKET
RULE.

IF HE THOUGHT IN THIS CASE HE

HEARD-- AND THERE WAS A

PROFFER, RIGHT, OF THE

TESTIMONY?

>> HE DECIDED THAT PRIOR TO THE

PROFFER.

PRIOR TO EVEN HEARING WHAT

DR. CRIMPER SAID, HE EXCLUDED IT

AND SAID HE WOULD ALLOW A

PROFFER.

THE STATE CITED A SERIES OF

CASES.

SO THE JUDGE EXCLUDED IT PRIOR

TO EVEN HEARING THE PROFFER.

>> LET ME CAN ASK YOU ABOUT--

LET ME ASK YOU ABOUT SOME

DETAILS OF THE CONFESSION--

>> SURE.

>> THAT PRESENT A PROBLEM OR

A CHALLENGE TO THE CONFESSION.

NOW, DIDN'T THE DEFENDANT IN HIS

CONFESSION RELATE THAT HE GAVE A

PARTICULAR ITEM TO THE FEMALE

DEFENDANT?

>> CORRECT.

>> WHICH WAS CONSISTENT WITH THE ESTABLISHED FACTS, APPARENTLY, AND DOESN'T THAT JUST-- THAT SORT OF PARTICULAR DETAIL JUST TOTALLY UNDERMINE ANY CLAIM THAT THIS DEFENDANT WASN'T THERE AND KNEW THE CIRCUMSTANCES AND WAS PRESENT WHEN THIS CRIME WAS COMMITTED.

>> NO.

>> TELL ME WHY.

>> I'LL TELL YOU WHY, BECAUSE HE SPECIFICALLY-- HE TESTIFIED OR DURING HIS CONFESSION HE SAID THAT HE WAS TOLD THAT FACT BY ANOTHER ONE OF THE ROBBERS. ADDITIONALLY, THAT IS AN ARGUMENT FOR THE JURY.

>> WHY WOULD--

>> THAT HAS NOTHING TO DO WITH THE ADMISSIBILITY OF THE EXPERT

HIMSELF.

>> WHY WOULD HE, WHY WOULD HE POSSIBLY, WHY WOULD HE RELATE SUCH A FACT JUST BECAUSE SOMEONE ELSE HAD TOLD HIM I'M JUST TRYING TO GET INTO THE THOUGHT PROCESS.

>> I UNDERSTAND YOUR HONOR'S POINT, BUT THAT GOES TO THE WEIGHT OF DETERMINING WHETHER OR NOT THE CONFESSION ITSELF IS VOLUNTARY, NOT WHETHER OR NOT A FALSE CONFESSION EXPERT IS AVAILABLE TO TESTIFY IN THE CASE.

THAT'S A TOTALLY DIFFERENT FACT, AND THAT WAS ARGUED TO THE JURY, AND THAT WAS ESPECIALLY--

>> BUT WOULDN'T THAT WEIGH INTO THE EVALUATING WHETHER THE JUDGE IN THIS PARTICULAR CASE ABUSED HIS DISCRETION; THAT IS, THAT HE MADE A DECISION THAT NO JUDGE

ACTING PROPERLY COULD HAVE MADE?

>> I THINK IT MIGHT BE A

CONSIDERATION.

HOWEVER, AGAIN, IN TERMS OF

EXERCISING DISCRETION, IT IS

ABUSE OF DISCRETION STANDARD.

THERE'S STILL THE SIXTH

AMENDMENT, AND THERE'S STILL

ENTITLEMENT TO PRESENT WITNESSES

ON YOUR BEHALF SO LONG AS THEY

MEET THE EVIDENTIARY CODE WHICH

IS EXACTLY WHAT HAPPENED HERE.

THE FACT THAT MR. McCLOUD

MIGHT HAVE MENTIONED SOMETHING

DURING HIS CONFESSION THAT WAS

SOMETHING THAT WAS HIGHLIGHTED

DURING THE PROSECUTOR'S CLOSING

ARGUMENT, PRESUMABLY A FACT THAT

ONLY SOMEONE WHO WAS THERE WOULD

KNOW, DOES NOT CHANGE THE FACT

THAT THE JUDGE BASICALLY SAID

THIS IS NOT GOING TO BE USEFUL

TO THE JURY AND SPECIFICALLY

INSTRUCTED THE JURY YOU'RE TO
CONSIDER MR. McCLOUD'S MENTAL
STATE WHILE AT THE SAME TIME
EXCLUDING ALL EVIDENCE REGARDING
HIS MENTAL STATE.
>> COULD YOU-- I KNOW YOU SAID
YOU HAD ANOTHER POINT.
>> CORRECT.
>> I'M VERY INTERESTED IN THIS
ISSUE OF THE FOUR
CO-DEFENDANTS--
>> YES, MA'AM.
>> OR AT LEAST SEVERAL WHO
GOT LIFE AND ONE WHO CAN'T BE
ELIGIBLE BECAUSE HE'S MENTALLY
RETARTEDDED.
>> CORRECT.
>> THE ONE WHO WAS FOUND TO BE
MENTALLY RETARDED, IS HE THE ONE
WHO ACTUALLY PARTICIPATED IN THE
PRIOR ROBBERY?
>> YES, HE WAS.
>> IS HE THE ONE WHO SORT OF

SAID I'M GOING TO GET THIS GUY?

>> HE DID.

>> SO THATST AN IRONIC SERIES OF

EVENTS, IF THAT'S TRUE.

WHAT IS, YOU KNOW, THERE'S

CASE-- I HAVE LOOKED AT EVERY

CASE CITED BY BOTH OF YOU.

I LOOKED BEYOND.

IT LOOKS LIKE WE'VE GOT SORT OF

THE BEST CASE FOR YOU IS THE

HAZEN CASE--

>> CORRECT.

>> FROM 1997.

THAT HASN'T BEEN OVERRULED.

>> CORRECT.

>> BUT IT SEEMS TO ME THAT THE

JUDGE THOUGHT WE HAD A BLANKET

RULE THAT IF THE, THERE WAS A

PLEA TO SECOND DEGREE, THAT

THERE WOULD NOT-- EVEN IF THE

PERSON WAS NOT, WAS ACTUALLY

LESS CULPABLE, THAT IT WOULD

STILL BE A PROPORTIONATE

SENTENCE.

SO DO YOU WANT TO ADDRESS THAT?

>> I WOULD VERY MUCH LIKE TO,

YOUR HONOR.

IN THIS CASE THE JURY

SPECIFICALLY FOUND THAT BY

SPECIAL INTERROGATORY DESPITE

THE INDICTMENT THAT

MR. McCLOUD WAS NOT ONE OF THE

SHOOTERS OF EITHER OF THESE

VICTIMS.

THE JUDGE ALSO FOUND IN THE

SENTENCING ORDER THAT

MR. McCLOUD WAS NOT ONE OF THE

MAIN INSTIGATORS OF THIS OFFENSE

AND, IN FACT, THAT THERE WAS NO

INTENT THAT ANYONE WOULD HAVE

BEEN KILLED.

>> BUT JUST TO MAKE SURE, I

MEAN, YOUR--

[INAUDIBLE]

IS NOT A STRONG ARGUMENT.

>> OKAY.

>> IN MY VIEW--

>> RIGHT.

>>-- PAUSE ALTHOUGH HE WASN'T

THE INCITY GATER AND IT WASN'T

HIS IDEA TO TO ROB, IT APPEARS

FROM ENOUGH OF THE EVIDENCE THAT

HE WAS NOT A MINOR PARTICIPANT.

IT WASN'T LIKE HE WAS WITH THE

GETAWAY CAR.

>> CORRECT.

>> HE WAS IN THERE THE ENTIRE

TIME.

AND THE JURY FOUND HE POSSESSED

A FIREARM.

>> CORRECT.

>> OKAY.

>> IN TERMS OF THE DIFFERENT

SENTENCES, YOU HAD FOUR SEPARATE

CO-DEFENDANTS.

ONE WAS NATE.

HE WAS DETERMINED TO BE

INELIGIBLE FOR THE DEATH

PENALTY.

HE WAS, BASICALLY, HAD ROBBED

THE VICTIM BEFORE.

HE HAD, HE TORTURED THE VICTIM

WHILE HE WAS THERE, POURED

BOILING WATER OVER HIS BACK.

>> THE PROBLEM WITH YOU

COMPARING, THAT'S WHERE LIKE YOU

GOT A 17-YEAR-OLD THAT'S NOT

ELIGIBLE.

>> CORRECT.

I UNDERSTAND.

>> YOU'VE REALLY GOT TO COMPARE

HIM TO THE OTHER THREE, IN MY

VIEW SURE.

THE OTHER ONE, THE MASTERMIND

WAS MR. BRYSON.

MR. BRYSON WAS IDENTIFIED BY THE

VICTIM PREVIOUSLY SAYING, WE'LL

BE BACK.

THEN HE IDENTIFIED BRYSON WHO

TESTIFIED DURING THE STATE'S

CASE HE DIDN'T EVEN GO IN THE

HOUSE DESPITE A FINGERPRINT

FOUND IN THE VICTIM'S VEHICLE

THAT HE WAS SHOT BY THE VICTIM.

AND THE STATE WITH THIS

CO-DEFENDANT GAVE HIM TEN YEARS.

>> NOW, LET ME GO ON THAT, THE

SURVIVING VICTIM WHICH IS

INCREDIBLE THAT HE SURVIVED, WAS

HE ABLE TO IDENTIFY ANYBODY THAT

PARTICIPATED IN HIS TORTURE?

>> NO.

>> SO WHEN YOU SAY I THOUGHT--

BRYSON S THAT THE--

>> CORRECT.

>> OKAY.

I THOUGHT YOU SAID, I THOUGHT

YOU SAID SOMETHING ABOUT HIM

IDENTIFYING BRYSON.

>> HE DID.

>> AS WHAT?

WHAT DID HE IDENTIFY?

>> DURING THE ROBBERY FOR WHICH

THE DEFENDANT, THE APPELLANT IN

THIS CASE WAS CONVICTED, HE

IDENTIFIED BRYSON AS ENTERING
THE HOUSE AND SHOOTING HIM IN
THE LEG.
THAT TESTIMONY CAME BEFORE THE
JURY.
AND THE STATE ELECTED TO GIVE
HIM TEN YEARS DESPITE THE FACT
THAT HE PARTICIPATED IN THIS
GRIEVOUS ROBBERY, WAIVED THE
10-20-LIFE, 25 IN THIS CASE, AND
ALLOWED HIM TO PLEAD TO TEN
YEARS IN PRISON MINUS THE TIME
HE'D ALREADY SERVED.
>> WHO-- THERE IS TESTIMONY
WHERE THE JUDGE FOUND THAT THIS
DEFENDANT PARTICIPATED IN THE
TORTURE.
>> CORRECT.
>> DID THAT TESTIMONY COME FROM
AND HOW DO WE EVALUATE THAT
TESTIMONY?
>> THAT TESTIMONY CAME FROM ONE
OF THE CO-DEFENDANTS, A

GENTLEMAN BY NAME OF DRE.

DRE HAD BEEN--

>> JUST SO WE KNOW, DRE

WASN'T-- THESE ARE ALL--

>> CO-DEFENDANTS.

>> NAMES, BUT THAT'S NOT HIS

REAL NAME.

>> CORRECT.

THAT'S HOW HE WAS REFERRED TO IN

THE TRIAL.

HIS NAME WAS ANDRE BROWN.

ANDRE BROWN TESTIFIED FOR THE

STATE.

HE IMPLICATED MAJOR

GRIFFIN, AND THE APPELLANT IN

THIS CASE AS TORTURING THE

VICTIM.

HOWEVER, THAT'S THE ONLY

TESTIMONY WE HAVE.

THE JURY, BRYSON ACTUALLY

TESTIFIED THAT DRE ADMITTED TO

SHOOTING ONE OF THE VICTIMS AS

WELL AS TO MEETING WITH HIM IN

THE JAIL TO TRY AND PLAN OUT HIS
TESTIMONY IN ORDER TO GET A
BETTER DEAL.
BUT THAT IS THE ONLY TESTIMONY
WE HAVE OF WHO ACTUALLY
TORTURED.
AND THE JURY SPECIFICALLY
REJECTED THAT TESTIMONY IN A
SPECIAL INTERROGATORY FINDING.
>> I HAVE A QUESTION, ACTUALLY,
AND IT'S ON AN AGGRAVATOR, AND
IT'S CCP.
>> SURE, CORRECT.
>> THE JURY FOUND HE WAS NOT THE
SHOOTER, BUT WE HAVE TWO
DEFENDANTS, TWO VICTIMS THAT
WERE SHOT EXECUTION STYLE.
DO WE HAVE ANY CASE LAW AS TO
WHETHER CCP CAN BE IMPUTED?
CERTAINLY FELONY MURDER GETS YOU
THE MURDER, THAT CCP HAS BEEN
IMPUTED TO SOMEONE WHO IS NOT
THE SHOOTER?

>> I DID NOT FIND ANY, YOUR

HONOR.

>> UNLESS THEY'RE THE ONES THAT

ARE ORDERING THE EXECUTION.

>> WELL N THAT SITUATION USUALLY

IT'D BE--

>> YOU DIDN'T RAISE THAT.

YOU DIDN'T RAISE THAT AS AN

ISSUE.

>> I BELIEVE I DID, JUDGE.

>> OH, YOU DID?

>> I BELIEVE I DID.

AND QUESTIONED THE APPLICATION

OF CCP TO THIS CASE AND SAID

THAT IT WAS INSUFFICIENT BECAUSE

THERE WAS NO EVIDENCE THAT HE

INTENDED TO KILL ANYBODY OR THAT

THERE WAS HEIGHTENED

PREMEDITATION.

I DON'T RECALL ANY CASE LAW

SPECIFICALLY FINDING IN TERMS OF

VICARIOUSLY APPLYING CCP UNLESS

IT WAS, FOR EXAMPLE, HEIGHTENED

LEVEL OF PREMEDITATION, FOR

EXAMPLE, MOB BOSS ORDERS HIS HIT

MAN TO GO DO SOMETHING.

BUT I DID NOT-- THAT WAS NOT

PRESENT IN THIS CASE, AND I

COULDN'T FIND ANY CASE LAW

SPECIFICALLY ADDRESSING THAT.

BUT--

>> JUST A QUICK QUESTION--

>> SURE.

>> ON THE FACTS.

TWO OF THE FOLKS WERE SHOT AND

KILLED EXECUTION STYLE.

>> CORRECT.

>> THERE WAS ALSO A 3-YEAR-OLD

CHILD IN THE ROOM.

>> CORRECT.

>> WHAT HAPPENED WITH THE CHILD?

>> THE CHILD WAS THE DAUGHTER OF

THE SURVIVING VICTIM.

SHE WAS FINE.

SHE WASN'T INJURED IN ANY WAY.

SHE WASN'T HURT.

OBVIOUSLY, SHE WITNESSED SOME
PRETTY TERRIBLE THINGS, BUT SHE
WAS NOT HURT.
SO SHE WAS FINE.
BUT BACK TO THE PROPORTIONAL HI
FINISH.
>> WELL, FINE MIGHT BE--
>> WELL.
>> NOT EXACTLY THE RIGHT WAY
TO DESCRIBE IT.
>> PHYSICALLY FINE.
LET ME REPHRASE THAT, PHYSICALLY
FINE.
IN TERMS OF THE PROPORTIONALITY,
THE STATE'S ARGUMENT AND THE
JUDGE'S ARGUMENT WAS BECAUSE
THEY WERE CONVICTED OF
SECOND-DEGREE MURDER, CAN'T
CONSIDER IT.
>> AGAIN, THEY WERE-- THROUGH A
PLEA.
>> THROUGH A PLEA.
>> THERE WAS A CASE IN CHEER V.

MOORE--

>> CORRECT.

>> WHERE THE JURY FOUND THE

CO-DEFENDANT LESS CULPABLE BY

SECOND-DEGREE MURDER.

>> CORRECT.

>> THE ISSUE OF, AND THIS IS

NORMALLY, AND THIS IS THE FIRST

TIME I'VE SEEN ONE WHERE, YOU

KNOW, THE STATE OBVIOUSLY HAS

ITS REASONS FOR WANTING TO MAKE

DEALS WITH THE DEVIL, SO TO

SPEAK, BECAUSE THEY'VE GOT TO

GET A CONVICTION.

BUT IN THE TERMS OF DECIDING

THAT HE EITHER WAS EQUALLY OR

MORE CULPABLE, IS THERE

ANYTHING-- I MEAN, IT JUST--

I'M NOT UNDERSTANDING IT, AND

THAT'S GOING TO BE A QUESTION TO

THE STATE, HOW THIS DEFENDANT

CAN WHO DIDN'T KNOW THEM, DIDN'T

ROB THEM BEFORE, WASN'T THE

PLANNER, WAS THE MUSCLE AND

DIDN'T POSSESS THE MURDER WEAPON

IS-- AND, AGAIN, WAS THE ONE

THAT WAS EQUALLY OR MORE

CULPABLE.

BUT WE DON'T-- CAN YOU GIVE US

SINCE THE STATE WILL WHAT THEIR,

HOW THEY WOULD HAVE SEEN YOUR

CLIENT AS BEING EQUALLY OR, I

MEAN, MORE CULPABLE?

>> I DON'T SEE HOW HE COULD BE

CONSIDERED MORE CULPABLE BASED

ON THE FACTS OF THE CASE AND THE

JUDGE'S FINDING, YOU KNOW, THE

JUDGES' SENTENCE-- JUDGE'S

SENTENCING ORDER.

THE STATE'S BRIEF WHEN THEY'RE

TALKING ABOUT PROPORTIONALITY,

THEY JUST SAY, BASICALLY, HEY,

HE WAS FOUND GUILTY OF

SECOND-DEGREE MURDER, YOU CAN'T

EVEN CONSIDER IT.

THEY APPLY A BLANKET RULE.

IN TERMS OF HIM BEING LESS
CULPABLE, YOU SUMMED-- I MEAN,
JUSTICE PARIENTE, HE SUMMED IT
UP.
HE DIDN'T INTEND FOR ANYBODY TO
KILL, HE DID NOT PARTICIPATE IN
THE ROBBERY PREVIOUSLY, HE DID
NOT HAVE THE MURDER WEAPON.
THE ONLY TESTIMONY THAT HE
ACTUALLY, IN FACT, WAS A SHOOTER
WAS REJECTED BY THE JURY--
>> YOU WOULD AGREE THAT IF ONE
OF THESE OTHER DEFENDANTS HAD
GOTTEN THE DEATH PENALTY,
THIS-- HE'S THERE THE ENTIRE
TIME, PEOPLE ARE, INNOCENT
VICTIMS ARE BOUND AND THEN SHOT
BY SOMEBODY EXECUTION STYLE,
THIS WOULD BE A PROPORTIONATE
PENALTY, WOULD YOU, DO YOU-- I
MEAN, YOU'RE BEING FAIRLY, AND
THIS IS THE FIRST TIME I'VE SEEN
YOU, AND I COMMEND YOU ON YOUR

ADVOCACY.

BUT DO YOU THINK THAT IN THAT

SITUATION THAT IT WOULD BE A

PROPORTIONATE PENALTY EVEN

THOUGH HE'S NOT THE SHOOTER?

HE'S THERE THE WHOLE TIME, HE'S

SOMEBODY, HE'S THE MUSCLE, SO TO

SPEAK.

>> I DON'T THINK I'M

UNDERSTANDING YOUR QUESTION.

>> I'M ASKING YOU THAT IF ONE

OTHER CO-DEFENDANT HAD GOTTEN

DEATH--

>> OKAY.

>> WOULD THERE BE A PROBLEM

IN HIM, THERE WOULDN'T BE A

PROPORTIONALITY PROBLEM.

IT'S ONLY BECAUSE OF THE ISSUE

THAT YOU'RE SAYING HE'S LESS

CULPABLE THAN AT LEAST ONE OR

MORE OF THE CO-DEFENDANTS WHO

HAD TO BE THE SHOOTER BECAUSE HE

WASN'T, THAT IT'S, IT'S NOT A

PROPORTIONATE--

>> WELL, I THINK IT WOULD DEPEND

ON WHICH CO-DEFENDANT AND THEIR

LEVEL OF INVOLVEMENT.

WE'RE DEALING WITH MULTIPLE--

>> WELL, WE REALLY DON'T KNOW

WHO THE SHOOTER IS.

WE JUST KNOW FROM THE JURY IT'S

NOT THIS DEFENDANT.

>> CORRECT.

>> YOU'RE INTO YOUR REBUTTAL.

>> THANK YOU.

IF I CAN RESERVE THE BALANCE.

>> MAY IT PLEASE THE COURT,

COUNSEL, MY NAME IS SARA MACKS,

AND I REPRESENT THE STATE OF

FLORIDA.

THE ISSUE THAT I THINK OR THE

STATE BELIEVES IS THE MOST

IMPORTANT IS THE PROPORTIONALITY

ISSUE, SO I WAS GOING TO JUMP

RIGHT INTO THAT ISSUE.

SO WE HAVE OUR THREE

CO-DEFENDANTS WHO ALL PLED, AND,
JUSTICE PARIENTE, YOU HAD ASKED
ABOUT WHY, WHY WAS THIS PLEA
DEAL ENTERED INTO.
AND I THINK TO THE TAKE IT FROM
THE PROSECUTOR'S PERSPECTIVE,
BEFORE HE TRIED THIS CASE BASED
ON ALL THE FACTS AND EVIDENCE HE
HAD PRESENTED TO HIM, WE HAVE
ANDRE BROWN'S CONFESSION,
WE HAVE ALL OF THE
EVIDENCE AT THAT CRIME SCENE, WE
HAVE THE EVIDENCE THAT IT
WAS A .38.
AND BASED ON THE CONFESSIONS AND
THE EVIDENCE, THAT .38 WAS
McCLOUD'S HANDS.
>> YOU HAVE--
>> [INAUDIBLE]
>> A 38.
NO.
NOT THAT-- I'M SORRY, YOUR
HONOR.

NOT THAT .38.

THEY BELIEVED, THE PROSECUTOR

KNEW FROM THE OTHER, FROM THE

CONFESSION OF ANDRE BROWN THAT

A, THAT HE BROUGHT A .38 TO THE

CRIME SCENE.

NOT THE .38 HE WAS EVENTUALLY

FOUND WITH, BUT ON THEIR WAY TO

THE CRIME SCENE, HE ARMED

HIMSELF WITH A .38.

>> WHO IS HE?

>> THE DEFENDANT IN THIS CASE,

ROBERT MCCLOUD.

>> SO THE STATE IS RELYING ON

ONE OF THE PERPETRATORS TO SAY

ANDRE BROWN MUST BE TRUTHFUL

BECAUSE HE IS PENDING IT ON THIS

CODEFENDANT?

>> THIS IS THE EVIDENCE THEY

HAVE TO BRING FORTH.

>> I'M NOT CRITICIZING THE STATE

FOR MAKING DECISIONS THAT THEY

MADE IN THIS CASE ABOUT THE

CODEFENDANTS.

THEY HAVE DISCRETION.

WHAT I'M LOOKING AT THE WITHOUT

AN EIGHTH AMENDMENT, HOW IS THIS

DEFENDANT EQUALLY OR MORE

CULPABLE THAN THE OTHER

CODEFENDANTS?

>> AND THAT'S WHEN YOU HAVE THE

PROSECUTORS DISCRETION PLEA TO

THE SECOND DEGREE.

>> THERE IS THE EIGHTH

AMENDMENT, THE PROSECUTOR MAKES

A DECISION -- I GUESS WHAT I'M

ASKING IS HOW DO YOU GET AROUND

HAZEN?

>> WHAT THE HAZEN COURT DECIDES

IS THAT YOU HAVE EQUAL

CULPABILITY.

WHAT THE OTHER CASES AFTER THAT

DETERMINE IS THAT ONCE YOU HAVE

THAT LOWER CHARGE OF SECOND

DEGREE, THAT CHANGES THE

CULPABILITY OF THE DEFENDANTS.

>> SO YOU SAY HAZEN WAS

OVERRULED BUT WE NEVER OVERRULED

IT?

THAT IS WHAT YOU HAVE TO SAY.

>> IN HAZEN THEY SAY EQUAL

CULPABILITY.

WHAT THE CASES SAY LATER IS ONCE

YOU HAVE A LOWER CHARGE NO

LONGER FIRST DEGREE, A

SECOND-DEGREE, IT LOWERS THE

CULPABILITY.

>> HAZEN HE PLAYED GUILTY TO

SECOND-DEGREE MURDER.

WE'VE NEVER OVERRULED HAZEN.

>> ISN'T IT THE CASE--

>> CAN SHE ANSWER?

>> YES, YOUR HONOR.

>> HAS HAZEN AND OVERTURNED?

>> IT HAS NOT, YOUR HONOR.

>> OKAY, NOW PROCEED.

HERE'S MY QUESTION FOR YOU,

NOTWITHSTANDING WHAT HAZEN SAYS,

ISN'T IT THE CASE THAT WE HAVE

REPEATEDLY SINCE HAZEN SAID

WHERE THE CODEFENDANT LESSER

SENTENCE AS A RESULT OF A PLEA

AGREEMENT FOR PROSECUTORIAL

DISCRETION, THE COURT HAS

REJECTED CLAIMS OF DESPERATE

SENTENCING?

>> CORRECT.

>> I DON'T KNOW THE EXACT NUMBER

OF CASES WE'VE SAID IT, BUT WE

SAID IT REPEATEDLY.

ISN'T THE TENSION BETWEEN WHAT

IT SAID THERE AND HAZEN?

>> THERE IS, YOUR HONOR.

>> MAYBE INCONSISTENCY.

>> CORRECT.

I THINK PART OF THE RATIONALE IS

ONES THAT PROSECUTOR AND HIS

INTO A PLEA AGREEMENT AND THE

CHARGE GOES DOWN TO SECOND

DEGREE, THAT IS A REDUCED

CULPABILITY.

YOU KNOW LONGER HAVE THAT SAME

CULPABILITY AS THE FIRST DEGREE
MURDER.
SO IT CHANGES THE LANDSCAPE.
SO YOU ARE NO LONGER FIVE
DEFENDANTS FACING FIRST-DEGREE
MURDER, YOU ARE NOW TWO
DEFENDANTS FACING FIRST-DEGREE
MURDER, THREE DEFENDANTS THAT
HAVE BEEN CONVICTED OF
SECOND-DEGREE MURDER SO THOSE
THREE DEFENDANTS HAVE A REDUCED
CULPABILITY JUST UNDER THE LAW.
SO NOW YOU HAVE HEIGHTENED
CULPABILITY FOR YOUR TWO
FIRST-DEGREE MURDER DEFENDANTS,
REDUCED CULPABILITY ON THE THREE
SECOND-DEGREE MURDER DEFENDANTS
AND COMPARE THOSE SECOND-DEGREE
MURDER DEFENDANTS.
THAT IS WHERE THE SPORT HAS
ANALYZED ALL THOSE CASES FOR
RECENTLY.
THE COLE CASE FOR EXAMPLE,

TIFFANY COLE WAS NOT THE
SHOOTER, SHE GOT DEATH BUT HER
CODEFENDANT WHO PLED GOT A
REDUCED SENTENCE OF I THINK,
CAN'T REMEMBER WHAT IT GOT, 45
YEARS.
>> THAT WAS COLE, WADE, THE
SERIES OF CASES WHERE THERE WAS
NO QUESTION IN THOSE OTHER CASES
THOSE PEOPLE LIKE TIFFANY COLE
AND WADE WERE ALL INVOLVED IN AN
EQUAL WAY.
SO I THINK WHAT WE HAVE TO DO,
AND I APPRECIATE THAT WE HAVE
SAID A LOT OF THINGS IN A LOT OF
CASES IS TO LOOK AT, I DON'T
KNOW THAT WE HAVE A CASE LIKE
THIS, THOUGH, THAT THE JUDGE AND
I GUESS EVERYBODY AGREED THERE
WAS GOING TO BE A SPECIAL
INTERROGATORY AS TO WHETHER HE
WAS THE SHOOTER.
AND THE JURY COMES BACK AND SAYS

HE'S NOT THE SHOOTER.

WE'VE GOT TWO VICTIMS WHO WERE

SHOT.

IT IS NOT ONE OF THE OTHER

CODEFENDANTS WHO STAYED INSIDE,

THEY CAN'T GET OUT OF THEIR

BARGAIN, HAD TO BE THE SHOOTER

IF WE'RE GOING TO ACCEPT A JURY.

YOU CAN SAY WE DON'T REALLY, WE

STILL THINK HE WAS THE SHOOTER,

AS THAT IS WHAT YOU SHOULD

CONSIDER, BUT THAT IS MY CONCERN

IS UNDER THE EIGHTH AMENDMENT OF

MAKING SURE THE DEFENDANTS ARE

TREATED EQUALLY UNDER SIMILAR

CIRCUMSTANCES, THERE IS THIS

CASE STANDS OUT TO ME AS ONE

THAT DOESN'T FIT INTO BECAUSE I

LOOK AT ALL THE FACTS OF THE

OTHER CASES, NOT JUST THE

PRONOUNCEMENTS, THAT FIT INTO

ANY OTHER CASE.

IF HAZEN IS NO LONGER GOOD LAW

AS YOU ARE SAYING, WHAT CASE OUT THERE IS MOST SIMILAR TO THIS CASE WHERE THE FACTS ARE SIMILAR?

THAT IS THERE IS LESS CULPABILITY BECAUSE HE IS NOT THE SHOOTER?

>> IN THE PHAREENA CASE, THAT SHOOTER WAS NOT THE KILLER AS WELL.

>> AND I THINK THERE, I WOULD AGREE WITH YOU WHERE THE CODEFENDANT IS NOT ELIGIBLE BECAUSE IT IS 17 OR LESS, OR HERE IF THEY IT TURNED OUT THE OTHER DEFENDANTS, THE ONLY OTHER CODEFENDANT WAS MENTALLY RETARDED AND WASN'T ELIGIBLE, I THINK WE MIGHT HAVE -- I THINK, SO I AGREE YOU DON'T HAVE INABILITY TO IMPOSE THE DEATH PENALTY.

>> AND WE DO HAVE THAT SITUATION

BECAUSE WE HAVE A CODEFENDANT

HERE WHO CANNOT GET DEATH.

>> ONE OF THE CODEFENDANTS, BUT

WE HAD THREE OTHERS, RIGHT?

THREE OTHERS?

>> CORRECT.

>> AND THOSE ALL PLED TO

SECOND-DEGREE?

>> CORRECT.

>> YOU SAID PHAREENA IS SIMILAR,

I SAID I DON'T THINK THE BECAUSE

HE IS 17.

GIVE ME ANOTHER CASE IT IS MORE

SIMILAR TO THIS CASE THEN HAZEN.

>> WE HAVE LAZALEER, THAT CASE

WAS THE CASE ALTHOUGH LAZALEER

WAS A DOMINATING FORCE, WAS NOT

THE TRIGGER MAN.

AND THE CODEFENDANTS WERE NOT

PROSECUTED AT ALL IN THAT

PARTICULAR CASE.

THAT'S AN OLDER CASE.

CAN'T REMEMBER WHAT YEAR THAT

WAS FOUND.

IN THE '90S, I BELIEVE.

>> ACCEPTING THE PREMISE JUST

BECAUSE ONE IS THE SHOOTER AND

THAT PERSON IS NOT SENTENCED TO

DEATH, AND SOMEBODY ELSE WAS NOT

THE SHOOTER SENTENCED TO DEATH,

AUTOMATICALLY CAUSE A PROBLEM.

SOMETIMES THE SHOOTER MAY BE

ORDERED BY SOMEONE PRESENT TO DO

THE SHOOTING.

IT MAY BE AN INITIATION.

AND IF YOU ARE SHE DOESN'T DO

IT, SOMETHING HAPPENS TO THE

PERSON.

THERE ARE ALL KINDS OF

VARIABLES.

I DON'T WANT TO GO DOWN THE

TRACK WHERE JUST BECAUSE THE

SHOOTER DIDN'T GET SENTENCED TO

DEATH, IT DOESN'T MEAN ANYBODY

ELSE CAN'T.

IN THIS PARTICULAR INSTANCE,

HOWEVER, WE DO HAVE A FACTUAL
FINDING BY THE JURY THAT THE
DEFENDANT IN THIS CASE IS NOT
THE SHOOTER, AND WE DON'T EVEN
KNOW WHO THE SHOOTER WAS, WE
DON'T KNOW WHO THE MOST CULPABLE
PERSON WAS.
THERE ARE NO FACTS ANY PERSON
WAS MORE CULPABLE THAN THE
OTHER.
HOW DID THE JUDGE DECIDE TO GIVE
THIS ONE PERSON A DEATH SENTENCE
AND ACCEPT PLEAS TO SOMETHING
LESS THAN THE OTHER ONES?
>> I THINK IN THIS CASE PART OF
WHAT THE JUDGE WAS ABLE TO DO IS
THE JURY'S FINDING, TO LOOK AT
THE JURY FORM, THE JURY'S
FINDING IN THIS CASE IS A BIT
UNUSUAL BECAUSE WHAT THEY WERE
GIVEN WERE TWO LINES.
AND IT WASN'T -- IT WAS MORE OF
A NON-FINDING.

WHAT THEY DID WAS IN THE FIRST

SIGN WAS POSSESSION.

CHECK AS MANY BOXES TYPE OF A

THING, NOT CHECK THIS IF YOU

BELIEVE IT NOT TO BE TRUE.

SO IN THE FIRST LINE IT SAID

POSSESSION OF A FIREARM.

IN THE LINE ABOVE IT IT SAID

DISCHARGE OF A FIREARM.

SO THEY CHECKED ALL THE LINES

THAT SAID POSSESSION AND A BLANK

THE ONE THAT SAID DISCHARGE.

FULLY ONLY CONCLUSION WE COME TO

IF THEY COULD NOT FIND BEYOND A

REASONABLE DOUBT HE DISCHARGED

THE FIREARM.

NOT NECESSARILY THAT THE REVERSE

IS TRUE, JUST THAT WE KNOW THEY

COULDN'T FIND THE ON A

REASONABLE DOUBT THAT HE

DISCHARGED THE FIREARM BECAUSE

THEY LEFT THAT POSITION BLANK.

OR THAT CHECKMARK BLANK.

SO ALL WE KNOW IS THAT BEYOND A

REASONABLE DOUBT THEY COULD NOT

DETERMINE THAT MCCLOUD

DISCHARGED THE FIREARM.

>> WOULD YOU SAY THEY WEREN'T

PROVEN.

AT THIS IS APPARENTLY THAT HE

WAS INNOCENT.

>> NOT THAT HE IS INNOCENT --

BECAUSE THERE WAS CONFLICTING

TESTIMONY ON THIS POINT.

AND BECAUSE ALL THESE

CODEFENDANTS LIKE MOST

CODEFENDANTS WANT TO POINT THE

FINGER AT EACH OTHER, AND SO THE

STATE PRESENTED ITS CASE THAT

MCCLOUD WAS THE SHOOTER.

AND THAT MAJOR GRIFFIN WAS THE

ONE THAT ATTEMPTED TO KILL THE

HOMEOWNER AND THAT MCLOUD SHOT

THESE TWO INNOCENT VICTIMS IN

THE HOME.

>> WERE THERE TO SHOOTERS OR

JUST ONE?

>> THE STATE PRESENTED A CASE

THERE WERE TWO.

ANOTHER CASE CAN BE PRESENTED

THAT MAJOR GRIFFIN DID ALL THE

KILLING.

BUT THE STATE'S CASE WAS WERE

TWO.

>> WITH SHOOTING AT THE

HOMEOWNER, AND THEN THE OTHER

VICTIM--

>> RIGHT, DUSTIN FREEMAN IS IN

THAT ROOM AS WELL.

>> IN THE LIVING ROOM ON THE

COUCH, I RECOMMEND THE SHOTS

WERE FIRED ABOUT THE SAME TIME.

THEY WERE.

AND OF COURSE NONE OF THE

CODEFENDANTS WANT TO BE IN THAT

HOUSE.

>> SO NATE IS IN THE HOUSE.

>> YES, HE IS ABSOLUTELY IN THE

HOUSE.

>> BUT HE COULDN'T HAVE SHOT OLD

PEOPLE, KILLED BOTH PEOPLE.

>> IT IS A FACTUAL SITUATION

WHERE HE COULD HAVE SHOT BOTH.

>> THERE IS?

>> THAT IS, YES, IF POSSIBLE

SITUATION.

>> THAT HE COULD HAVE WITH TWO

DIFFERENT WEAPONS?

>> YES.

>> SO HE COULD HAVE SHOT BANG,

BANG.

LET'S ASSUME IT'S NOT THAT

PLAUSIBLE.

THERE WOULD HAVE TO BE AT LEAST

TWO SHOOTERS.

COULD BE ONE.

AND ONE OF THE OTHER FOUR WAS

HIM.

THE EVIDENCE SHOWS THIS JURY

FINDS THAT MCCLOUD WAS NOT ONE

OF THE SHOOTERS, CORRECT?

>> IF THE STATE CAN PROVE IT

BEYOND A REASONABLE DOUBT.

>> SO ONE OF THE OTHER THREE

HAVE TO BE THE SHOOTER.

SO THEREFORE YOU ARE NOT

COMPARING HIM WITH ME, YOU ARE

COMPARING HIM WITH THE PLEA OF

SECOND DEGREE MURDER.

SO THAT WOULD TAKE IT OUT OF THE

SCENARIO WHERE NO ABILITY TO

SENTENCE US TO DEATH.

>> WE DISAGREE, YOUR HONOR,

BECAUSE IT IS NOT A COMPARISON

IN THAT WAY.

BECAUSE THEIR SENTENCES HAVE

BEEN ALREADY REDUCED BASED ON A

PLEA AGREEMENT AND PROSECUTORIAL

DISCRETION.

>> THE STATE HAS THE RIGHT TO DO

THAT.

WE ARE TALKING BUT MCCLOUD,

WHO IS SENTENCED TO DEATH, HE IS

LESS CULPABLE BECAUSE HE WAS NOT

WILLING TO SHOOT.

>> WELL, DOESN'T MATTER IF HE IS
MORE OR LESS CULPABLE, IT IS
WHETHER OR NOT HE IS ELIGIBLE
FOR DEATH.
THAT IS ULTIMATELY THE
DETERMINATION, AND THAT GOES,
ONCE HE IS ELIGIBLE FOR DEATH,
YOU ANALYZE HIS CASE.
>> WE'RE TALKING ABOUT
DISPARAGING SENTENCES, THAT IS
THE EIGHTH AMENDMENT ARGUMENT.
EQUAL PROTECTION.
>> I UNDERSTAND THAT, YOUR
HONOR.
BUT ONCE THEY ARE TRIED FOR
SECOND DEGREE MURDER, THEY ARE
NO LONGER FIRST-DEGREE MURDER
CASES.
SO THEY ARE NOT PART OF THAT
PICTURE.
OUR ARGUMENT IS THERE NOT PART
OF THAT PICTURE ANYMORE, THEY
ARE SECOND-DEGREE CASES.

EVEN IF THEY FIRED THAT FATAL

SHOT--

>> AND THE JURY SAID HE WAS NOT

THERE.

>> THEY COULD NOT FIND BEYOND A

REASONABLE DOUBT.

>> IF THEY FIND REASON HE WOULD

BE THE SHOOTER AND SUCH, WE

BASICALLY FOLLOWED THE JURY'S

RECOMMENDATIONS.

>> THE STATES DOESN'T LEAVE, WE

CAN'T SAY THAT HE WAS NOT.

>> I KNOW WHAT THE STATE

BELIEVES, BUT IT IS WHAT THE

JURY BELIEVED.

WHAT COUNTS AT THE END OF

THE DAY.

THE STATE DELIVERS THEIR ACCOUNT

TO THE JURY.

IN THIS CASE THEY DIDN'T, SO THE

JURY IS THE ULTIMATE FINDING OF

FACT, ARE THEY NOT?

>> ABSOLUTELY ARE, YOUR HONOR.

>> I WANT TO FOLLOW UP ON WHAT
THE JUSTICE SAID, THERE ARE
CASES WHERE SOMEBODY IS ORDERED
AND EXECUTION AND JUST BECAUSE
THEY ARE NOT THE SHOOTER THEY
ARE INELIGIBLE FOR THE
DEATH PENALTY.
SO HERE IT IS NOT JUST THE JURY
DIDN'T FIND BEYOND--
I UNDERSTAND WHAT YOU ARE SAYING
THEY ARE FINDING, IT IS THE
JUDGE DID FIND FROM THE EVIDENCE
IT WAS MADE AND JOSH, I WILL
HAVE TO CHART THIS ALL OUT, THEY
KNEW ABOUT FANG'S DRUG DEALINGS,
THEY MAY BE THE INITIAL
INSTIGATORS OF THE PLAN HOME
INVASION ROBBERY.
THE INITIAL PLAN WAS A BURGLARY.
SO, IT LOOKS LIKE THE FACT THAT
HE WASN'T THE INSTIGATOR, SO
IT'S NOT JUST THAT HE WASN'T THE
SHOOTER AS FOUND BY THE JURY OR

THE STATE DIDN'T PROVE IT, BUT
THAT HE WASN'T THE MOVING FORCE
BEHIND THE CRIME, HE WASN'T
INVOLVED IN THE PRIOR ROBBERIES,
ALL OTHER SERIES OF THINGS WHERE
IT DOES APPEAR AGAIN ALTHOUGH HE
WAS A MAJOR PARTICIPANT THAT ALL
THE OTHER ELEMENTS, HE WASN'T
THE PLANNER OF IT, THAT IS
SOMETIMES WHEN IT IS THE PLANNER
WHO ORDERS OTHER PEOPLE TO
SHOOT, IT DOESN'T MATTER, YOU
AREN'T THE SHOOTER.
SO CAN YOU SORT OF ELABORATE ON
THAT SITUATION THAT IS NOT JUST
THAT HE'S NOT THE SHOOTER, OR IF
IT GOES BACK TO THIS, AND I
THINK WE WILL PROBABLY GO AROUND
IN A CIRCLE, ONCE THEY PLAYED
EVERYBODY ELSE OUT, THE ISSUE OF
TRYING TO COMPARE INVOLVEMENT OF
THE CODEFENDANTS IS NOT AN
EIGHTH AMENDMENT ISSUE.

THAT WOULD BE YOUR ARGUMENT.

>> IN THE STATE DOES MAINTAIN

THAT, BUT I WILL GO OVER SOME OF

THE FACTS OF THE CASE.

THE FACTS OF WHY HIS INVOLVEMENT

IS SIGNIFICANT, AND I THINK THIS

GOES TO SHOW WHY THAT HIS

INVOLVEMENT PARTICULARLY WAS

ENOUGH THAT SHOWED THAT THIS

PARTICULAR DEFENDANT, THIS GOES

I THINK A PROPORTIONALITY

ANALYSIS IN GENERAL.

HE IS THE ONE WHO BROKE DOWN THE

DOOR, TESTIMONY WAS HE WAS THE

ONE -- HE IN HIS CONFESSION SAID

I WAS THE MUSCLE.

I KNEW I WAS BROUGHT ALONG

BECAUSE I AM THE BIGGEST, I AM

THE BADDEST, AND I KNEW THAT --

HE CURSED AND SAID I KNEW I WAS

THERE TO F UP.

HE KNEW THAT IS WHY HE WAS

BROUGHT ALONG.

SURE ENOUGH HE IS THE FIRST ONE
IN THE HOME, HE IS FIRST ONE HE
BREAKS DOWN THE DOOR, THERE IS
EVIDENCE THE DOOR WAS BROKEN
INTO.
YOU KNOW, TESTIMONY FROM THE
CODEFENDANTS IS THAT HE'S THE
ONE WHO HELPS PARTICIPATE IN THE
TORTURING OF THIS CODEFENDANTS.
>> THIS ISSUE OF WHAT THE JUDGE
FOUND ABOUT THIS, WAS IT THE
CODEFENDANTS AND AFTER
TESTIFYING FOR TWO HOURS
EVERYTHING HE SAID WAS A LIKELY
TO MARK --
>> NO, YOUR HONOR.
WAS TORTURED, IS NOT ABLE TO
IDENTIFY THIS DEFENDANT HAS BEEN
INVOLVED IN HIS TORTURE.
>> NO COMMENT HE IS NOT ABLE TO
IDENTIFY ANYBODY WHO WAS
INVOLVED IN THE TORTURING.
>> BUT HE IS ABLE TO IDENTIFY

ANOTHER CODEFENDANT HAS BEEN THE

ONE WHO SHOT HIM IN THE LEG.

>> RIGHT.

AND HIS ABLE TO IDENTIFY THE

PERSON WHO SHOOTS INTO THE

CLOSET BECAUSE HE IS ABLE TO

IDENTIFY MAJOR GRIFFIN AS WELL.

>> SO TWO OTHER PEOPLE HE'S

IDENTIFIED AS BEING INVOLVED

AGAINST HIM.

SO GOING BACK TO WHAT ELSE?

I, AGAIN, GOES TO HE IS INVOLVED

MAYBE WITH THE TORTURE BECAUSE

OF THE TESTIMONY OF THE

CODEFENDANT SAYS THAT, AND WHAT

ELSE.

>> AND THEN THERE IS ALSO THE

TESTIMONY OF HIS MAJOR

PARTICIPATION IN THE ROBBERY

ITSELF.

AND SO HE'S, YOU KNOW, GOING

AROUND THE HOME AND DOING ALL

THAT.

HIS PARTICIPATION IN -- YOU KNOW

-- THEY GET AWAY AND -- SO IF

HE'S NOT THE SHOOTER, THEN HE'S

-- HE DOESN'T -- KIND OF LIKE IN

THE TYSON CASE LIKE WHEN I WAS

HUNG OVER THAT CASE, WHILE HE IS

GOING AWAY FROM THE CRIME SCENE,

HE ESCAPES WITH ALL THE

DEFENDANTS IN THAT SAME WAY.

HE HELPS WITH THAT ESCAPE, HE

GOES BACK TO THE HOMES WITH THE

PROCEEDS, HIDES OUT WITH

EVERYBODY, HE GOES OFF TO SOME

UNKNOWN HOUSE FOR THE WHOLE TIME

HE DISAPPEARS, HE HIDES OUT.

>> THEY ALL ESCAPED.

>> RIGHT.

>> THE QUESTION IS WHO DID THE

KILLING.

FOR TWO DIFFERENT PEOPLE.

HE WAS NOT THE SHOOTER, WOULDN'T

THAT ESCAPE WHAT YOU ARE SAYING?

THESE ARE BAD GUYS, NO DOUBT

ABOUT IT, BUT THE QUESTION IS

WHETHER OR NOT THEY ARE

DESERVING OF THE DEATH PENALTY

BASED ON THESE FACTS.

THE MURDER.

NOT THE TORTURE, BUT FOR MURDER.

>> RIGHT, AND THAT GOES TO THE

ACTION, THAT GOES TO THE

AGGREGATORS FIRST, WERE THOSE

AGGREGATORS OUT WAY TO

MITIGATERS.

>> ON THE SENTENCING ORDER ON

THE QUESTION OF DEATH, HE SAID,

AND I'M QUOTING HERE, "THERE'S

NO DESPERATE TREATMENT OF

MR. MCCLOUD AS THE JURY

CONVICTED HIM OF TWO COUNTS OF

FIRST-DEGREE MURDER IN THE OTHER

THREE CODEFENDANTS HAVE PLENTY

LESSER INCLUDED OFFENSE OF

SECOND DEGREE MURDER IN THE CAP

SENTENCES 10 THROUGH 20 YEARS,

SOMETHING LIKE THAT."

SO HE'S BASICALLY SAYING THE
SAME THING YOU'RE SAYING, IT'S
UP TO THE STATES TO DECIDE WHO
GETS CHARGED WITH WHAT, WHO
PLEAS TO WHAT IT ONCE A DECISION
IS MADE, THERE CAN NEVER BE ANY
ARGUMENT FOR THIS.
I'M CONCERNED THE STATE HAS TO
MAKE THAT CHOICE.
WHY DO WE HAVE JURIES DECIDING
THIS CASE?
>> THAT GOES TO THE
PROSECUTORIAL DISCRETION UNDER
THE FIRST JUDICIAL, THAT IS THE
EXECUTIVE FUNCTION OF THE
PROSECUTOR AND THE PROSECUTOR'S
ROLE.
THE JUDICIAL ROLE IS ONCE THEY
BRING THAT CASE TO THE
JUDICIARY, THEN THE JURY GETS TO
MAKE THAT DECISION.
>> THE ONLY BASIS FOR THIS
DIFFERENT TREATMENTS IN THIS

CASE IS THE DECISION TO THE

PROSECUTOR.

SEE WHAT I'M SAYING?

THEY DECIDED THESE TWO, FOR

WHATEVER REASON, I DON'T KNOW,

THEY'LL GET 10 YEARS IN PRISON.

WHILE WE'RE GOING TO GO AFTER

THIS GUY AND MAKE SURE HE'S

SENTENCED TO DEATH.

IF THAT'S THE ONLY BASIS FOR

ALLOWING THIS DESPERATE

TREATMENT, I'M CONCERNED

ABOUT THAT.

I UNDERSTAND THE EXECUTIVE POWER

IN THAT KIND OF THING.

IT SEEMS THEY'RE TAKING THAT

CHOICE AWAY FROM THE JUDICIARY

AND THE JURY TO DECIDE WHOSE

WEIGHT OF FACTORS DECIDE WHO

SHOULD BE SENTENCED TO DEATH

AND NOT.

>> ONE, THE JURY IN THIS CASE

HEARD ALL THIS INFORMATION.

THEY KNEW EXACTLY WHAT SENTENCES
ALL THESE GUYS GOT, THEY KNEW
THAT THEY ALL GOT THE 15 AND
10 YEARS.
THAT INFORMATION WAS ALL
PRESENTED TO THE JURY.
SO THEY KNEW WHAT ALL THE
CODEFENDANTS GOT, AND IT WAS
PRESENTED AS A MITIGATE OR FOR
THEM TOO IN THE LIST OF
MEDICATIONS.
LOOK, WE CAN LOOK AT THESE OTHER
PEOPLE'S SENTENCES AND DETERMINE
THAT AS POSSIBLE MITIGATION FOR
MR. MCCLOUD SENTENCE.
IN ADDITION TO THAT, THAT IS THE
RULING.
THE PROSECUTOR'S OFFICE, THAT IS
THE ROLE OF THAT IS TO MAKE
THOSE TYPES OF DECISIONS.
>> BUT IN THIS SITUATION, AND
I'M LOOKING BACK AT ENGLAND AND
WADE AND ALL THOSE CASES.

THE TRIAL JUDGE IN THIS CASE
DIDN'T EVEN MAKE A FINDING AS TO
WHETHER HE WAS EQUALLY CULPABLE
WITH THE OTHER CODEFENDANTS
BECAUSE HE FELT BASE AND WHAT HE
SAW AS THE CASE LAW, THAT WAS
OFF THE TABLE.
AND I'M WONDERING IF THAT
SITUATION -- WHETHER SOMETHING
HAS TO GO BACK TO THE TRIAL
JUDGE TO SAY YOU LOOK AT BECAUSE
YOU HEARD THIS CASE AND THE
CODEFENDANTS, IT APPEARS THIS
DEFENDANT IS LESS CULPABLE, NOT
EQUAL -- LESS, CERTAINLY NOT
MORE -- THAN THE OTHER
DEFENDANTS WERE WHEN WE LOOK AT
THIS RECORD AND MAKE THAT
BECAUSE NONE OF THE CASES WHERE
WE SAID IT WAS ALLRIGHT TO HAVE
THE DEATH PENALTY WAS THERE A
SITUATION WHERE THE DEFENDANT
WAS LESS CULPABLE.

NOW I'M SAYING SHOOTER AND NOT
THE INSTIGATOR, THAN THE
CODEFENDANTS.
SO SHOULD THE JUDGE BE MAKING
THE FINDING?
OR AGAIN, ARE YOU SAYING SECOND
DEGREE, EVEN A JUDGE CANNOT LOOK
AT EVERYTHING HE HEARD OR SHE
HEARD AND STILL EVALUATE
RELATIVE CULPABILITY?
>> OKAY, WE KIND OF HAVE TWO
QUESTIONS, SHOULD IT GO BACK TO
THE TRIAL JUDGE.
I THINK THE TRIAL JUDGE IN HIS
OPINION KIND OF WRESTLED WITH
THAT ISSUE, IS THIS A TRIAL
JUDGE ISSUE OR A SUPREME COURT
ISSUE.
IN ITS ORDER THEY THOUGHT THE
TRIAL JUDGE THOUGHT IT WAS KIND
OF SOME FACTUAL FINDINGS IT
NEEDED TO MAKE AND THAT ALSO
RECOGNIZED THIS COURT ALSO LOOKS

AT PERSONALITY AND RELATIVE
CULPABILITY AND MAKES HIS OWN
ANALYSIS.
SO I THINK THE TRIAL JUDGE DID
WHAT IT THINKS IT SHOULD DO
ALREADY IN ANALYZING THESE
THINGS AND THEN THIS COURT
AUTOMATICALLY REVIEWS ALL DEATH
CASES.
SO I THINK THE TRIAL JUDGE DID
WHAT IT THOUGHT IT COULD WITH
THIS CASE ALREADY.
>> AGAIN, GOING BACK TO WHAT I
WAS SAYING, THE PROSECUTOR COULD
HAVE CHOSEN TO DISCHARGE ALL
FOUR OR FIVE, WHICH IS SECOND
DEGREE MURDER, AND WE WOULDN'T
BE TALKING ABOUT A DEATH PENALTY
HERE TODAY.
WHAT IT SEEMS TO ME THE ONCE THE
PROSECUTOR MAKES A CHOICE TO GO
AFTER SOME FOR SECOND AND SOME
FOR FIRST, THAT I THINK THIS

WHOLE ISSUE FOR PROPORTIONALITY

COMES INTO PLAY.

THAT'S CONTRARY OF WHAT YOU ARE

SAYING.

>> THAT IS CORRECT AS

FIRST-DEGREE CASES.

BUT THE SECOND DEGREE CASES

CHANGE THE LANDSCAPE FOR THOSE

CASES BECAUSE THAT IS A LEGALLY

DIFFERENT LEVEL OF CULPABILITY.

IT JUST CHANGES -- THEIR LEGAL

CULPABILITY IS IN THE SAME

ANYMORE.

I THINK THAT IS FOR A FEW

DIFFERENT REASONS.

ACTUALLY WE DON'T ALWAYS KNOW

THE FACTS AND SITUATIONS

SURROUNDING EVERYTHING.

SOMETIMES THE PLEA MAY BE

ENTERED INTO NOT BECAUSE OF A

RICHARDSON VIOLATION, MAYBE

THERE IS SOME EVIDENCE IN A

PARTICULAR DEFENDANTS CASE THAT

HAD TO BE EXCLUDED BECAUSE OF
SOMETHING LIKE THAT WE DON'T
KNOW BECAUSE WE DON'T HAVE THOSE
RECORDS BEFORE US.
IT MAY COME OUT IN SOMETHING
LIKE THAT, BUT NOT NECESSARILY
IN A DIRECT APPEAL.
SO WE DON'T ALWAYS KNOW ALL THE
REASONS WHY A PLEA MIGHT HAVE
OCCURRED IN EVERY SINGLE
CODEFENDANTS' CASE.
WHAT WE KNOW IS THE PLEAS HAVE
HAPPENED AND THE PROSECUTOR
BELIEVES THAT IS THE BEST COURSE
OF ACTION IN ONE PARTICULAR
CASE.
IN THIS CASE WHAT WE HAVE IS
THAT HE ENTERED INTO THESE
PLEAS, WE ACTUALLY HAVE MORE OF
A RECORD THAN WE OFTEN TIMES
HAVE.
WE HAVE PLEAS, WE HAVE THE
TESTIMONY FROM THE CODEFENDANTS,

AND WE HAVE ALL THAT INFORMATION
THAT WAS ACTUALLY PRESENTED TO
THE JURY AND THE JURY ACTUALLY
COULD ANALYZE IT IN THIS CASE,
WHICH I THINK PRESENTS A
POSITIVE FOR US BECAUSE THE JURY
HAD ALL THAT INFORMATION AND
STILL DECIDED TO GIVE THIS
PARTICULAR DEFENDANT DEATH EVEN
THOUGH IT KNEW ALL THAT SAYING
WE STILL BELIEVE THAT YOUR
CULPABILITY IN THIS ROSE TO THE
LEVEL OF DESERVING THE DEATH
PENALTY.
THAT YOUR ROLE WAS AT THAT
LEVEL.
>> WHAT IS THE U.S. SUPREME
COURT SAID OF THE STATEMENTS FOR
SENTENCING CLAIMS LIKE THIS?
>> THE UNITEDSTATES SUPREME
COURT HAS SAID THAT IS STILL IN
THE LINE OF THAT YOU ANALYZE THE
CASES ON A CASE-BY-CASE BASIS

AND THAT IT'S BASED ON THE
PROPORTIONALITY OF THE
SENTENCES.
I DIDN'T EXPLAIN THAT VERY WELL,
JUST KIND OF REPEATING MYSELF.
THAT IS KIND OF ALONG THE LINE
OF ARIZONA VERSUS TYSON AND THAT
WHAT YOU LOOK AT IS THE
PROPORTIONALITY LIKE THE DEATH
PENALTY CASES TO EACH OTHER
VERSUS -- THEY DON'T EVEN GIVE
OUT THAT SPECIFIC -- IT IS MORE
LIKE THE STATES REVIEW THE
PROPORTIONALITY OF CASES BEFORE
THEM AND THAT DESPERATE
SENTENCING HAS TO DO WITH THE
DEFENDANTS THAT ARE BEFORE THEM
AND THEY DON'T REALLY GET--
I DON'T KNOW THAT I REALLY
ANSWER YOUR QUESTION VERY WELL.
>> THE TIME IS UP.
>> THANK YOU, YOUR HONOR.
>> COUNCIL, YOU HAVE SIX MINUTES

AND 59 SECONDS.

>> BACK AND SOME RICE WITH THE

STATE IS ARGUING IS THE

PROSECUTION ENTERED A DEAL WITH

A CODEFENDANT, YOU AS A SUPREME

COURT CONSIDER, THAT IS WHAT

THEY ARE SAYING.

NOW THAT IS TOTALLY NOT IN LINE

WERE YOU CONSIDER THE TOTALITY

OF EACH INDIVIDUAL CASE.

>> WE HAVE LOOKED AT THESE CASES

BEFORE.

>> YOU HAVE?

>> TO MAKE THAT BLANKET

STATEMENT IS SOMEWHAT MISLEADING

BECAUSE WE HAVE DISCUSSED ON THE

DYNAMICS OF A PLEA AND ENTER

INTO A PLEA WITH SOMEONE WHO IS

TOTALLY RESPONSIBLE FOR WHAT IS

GOING ON AND YOU HAVE TO MAKE

THESE CHOICE -- I THOUGHT HE

OUTLINED THAT AND DISCUSSED IT,

SO IT IS NOT A BLANKET THAT YOU

JUST DON'T LOOK AT THAT IF THERE
IS A PLEA DEAL.
AND SECONDLY IF IT IS DIFFERENT
CHARGES.
>> THE STATE'S ARGUMENT IN THEIR
BREEZE AND WHAT THEY SAID IN
THEIR ORAL ARGUMENTS IS OF A
CODEFENDANT IN A FIRST-DEGREE
MURDER CASE ENTERS A PLEA AS A
RESULT OF A PROSECUTORIAL
PROSECUTION, THEY CANNOT ENTER
INTO THE SENTENCE.
>> THAT IS NOT THE QUESTION I
JUST ASKED YOU.
YOU ARE SAYING THAT'S JUST THE
OPPOSITE, IT IS ABSOLUTELY THAT
IT MAKES NO DIFFERENCE WHETHER
IT IS A PLEA OR A DIFFERENT
CHARGE, THAT IS WHAT YOU ARE
ARGUING.
>> I'M ARE GOING THAT IS WHAT
THE STATE IS ARGUING YOU CAN'T
CONSIDER IT.

>> YOU ARE ARGUING THE REVERSE

ABSOLUTE RULE THAT IT MAKES NO

DIFFERENCE.

WHETHER IT IS A PLEA OR WHETHER

IT IS A DIFFERENT CHARGE.

YOU ARE SAYING IT MAKES

ABSOLUTELY NO DIFFERENCE IN THE

ANALYSIS.

>> THAT IS NOT WHAT I'M SAYING.

>> OKAY, WHAT ARE YOU SAYING?

>> WHAT I'M SAYING IS IMPORTANT

EVERY DEATH PENALTY CASE EVEN IF

THERE IS A PLEA OF PROSECUTORIAL

DISCRETION, LOOK AT THE TOTALITY

VERY OF THE STANDS, AND CONSIDER

THE CULPABILITY OF THE

DEFENDANT.

>> AND IF THERE IS A PLEA, THIS

LOOK AT MORE FAVORABLY TO THE

STATESIDE.

AND IF IT IS A DIFFERENT CHARGE

THE SAME THING.

BUT YOU SAY THIS NOT CONCLUSIVE.

>> IT IS NOT CONCLUSIVE.

>> EITHER WAY.

>> CORRECT.

THAT IS WHAT I AM SAYING.

IF THERE'S ANY CONFUSION, I'M

SORRY, THAT IS NOT WHAT I MEANT.

THE HALF IN CASES WHERE THE

COURT HAS SAID THAT, BUT IF YOU

LOOK AT THE INDIVIDUAL FACTS OF

THOSE CASES, THEY WERE MUCH

DIFFERENT THAN WHAT WE HAVE

HERE.

NOT ONE OF THOSE CASES DO YOU

HAVE SPECIFIC FINDINGS WITH THE

PERSON WAS NOT THE ACTUAL

SHOOTER.

>> AGAIN ON THIS FINDING, THE

REALITY IS WE MAY NEVER KNOW WHO

THE ACTUAL SHOOTER WAS AND THERE

MAY BE NO WAY IN CERTAIN

CIRCUMSTANCES TO DETERMINE THAT,

ISN'T IT THE CASE THE JURY

FINDING IS NOT A FINDING THE

DEFENDANT HERE WAS NOT THE
SHOOTER BUT IS A FINDING THE
JURY CANNOT DETERMINE BEYOND A
REASONABLE DOUBT THEN IT WAS THE
SHOOTER.
>> THEY DETERMINED THAT THE
STATE PROVED BEYOND A REASONABLE
DOUBT, WHICH IS THEIR WORD, NOT
DEFENDANTS', THAT HE DID NOT
DISCHARGE A FIREARM, THEREFORE.
NOT THE SHOOTER.
UNLESS THEY FAILED TO PROVE
BEYOND A REASONABLE DOUBT.
THEY FAILED TO PROVE THAT.
AND AGAIN IF WE ADOPT THE
ARGUMENT OF -- I UNDERSTAND THE
STATE HAS TO ENTER A PLEA, BUT
IT IS CRUCIAL FOR THIS COURT TO
JUDGE EACH OTHER TOTALITY VERY
OF THE CASES.
>> SO WE DON'T END UP WITH THESE
BLANKET RULES, THAT'S THE ISSUE
OF THE SHOOTER MENTIONING

LAZALEER SOMEHOW I THINK THAT
WAS THE PERSON THAT ORDERED THE
SHOOTING, BUT I MAY BE WRONG ON
THAT CASE.
IF THIS DEFENDANT WAS THE HEAD
OF THE GANG SO TO SPEAK, HE WAS
A PERSON WHO KNEW FANG OR NEW
THE DRUGS WERE THERE, WHO HAD
THE IDEA TO ROB, IT REALLY
DOESN'T MATTER THAT HE DIDN'T
SHOOT THOSE WERE THE FACTS FROM
A PROPORTIONALITY ARGUMENT.
WHAT THE OUTLINE THAT SHOWS THAT
HE IS EQUALLY OR LESS
CULPABLE--
>> LESS CULPABLE.
>> EXPLAY WHY HE IS LESS
CULPABLE.
>> IN TERMS OF LESS CULPABILITY,
THE OTHER CODEFENDANTS, BRYSON
PREVIOUSLY ROB THIS PERSON.
THERE WAS TEST MY FROM BOTH OF
THE OTHER CODEFENDANTS HE WAS

THE ONE IN THE CAR GIVING THEM
SPECIFIC DIRECTIONS OF WHERE TO
LOOK FOR THE MONEY AND DRUGS.
THE STATE PRESENTED A VOLUME OF
EVIDENCE SHOWING CELLPHONE
CALLS FROM BRYSON'S PHONE NUMBER
OF THE OTHER CODEFENDANTS PHONE.
IT WAS UNDISPUTED PITCHER
MCCLOUD DID NOT HAVE A
CELLPHONE AT THE TIME.
ADDITIONALLY THE JUDGE FOUND HE
WAS NOT THE MAIN INSTIGATOR OF
THE ROBBERY IN THE SENTENCING
AND THAT THERE WAS NO INTENT FOR
ANYONE TO BE KILLED.
>> WOULD YOU AGREE BY HIS
KITCHEN IN THE DOOR AND
PARTICIPATING IN THE TYING UP OF
THESE VICTIMS, THAT HE WAS A
MAJOR PARTICIPANT?
>> COMPARATIVELY SPEAKING TO THE
OTHER DEFENDANTS, NOPE HE HAD
THERE WAS NO TESTIMONY OF MY

RECOLLECTION OR IN THE RECORD

THAT HE TIED UP ANY ONE OF THESE

VICTIMS.

>> BUT AGAIN, THE ISSUE -- YOU

DON'T WIN ON THE ENTICING, HE IS

A MAJOR PARTICIPANT.

UNLESS HE IS NOT THERE, UNLESS

SOMEHOW THE ALIBI HE IS WITH HIS

WIFE--

>> DO YOU THINK UNDER TYSON THAT

HE HAD A STATE OF MIND THAT

AMOUNTED TO A RECKLESS

INDIFFERENCE TO HUMAN LIFE?

>> I ARGUED MY BRIEF AND I WILL

REASSURE YOU DURING THE ORAL

ARGUMENT.

>> DIDN'T YOU KNOW THAT MATE WAS

LIKELY TO KILL FANG BEFORE HE

EVER WENT THERE?

>> DURING HIS TESTIMONY HE KNEW

MATE WAS UPSET WITH FANG.

>> IT WAS THE LIKELY TO ME THE

MOMENT HE KICKED THE DOOR DOWN

AND THAT EVERYBODY INTO THE

HOUSE KNOWING PEOPLE WERE THERE,

HE KNEW SOMEBODY WAS GOING TO

DIE.

>> I WOULD RESPECTFULLY DISAGREE

WITH THAT.

>> WHY AREN'T I RIGHT?

>> BECAUSE THE JUDGE

SPECIFICALLY FOUND THERE WAS NO

INTENT FOR ANYBODY TO BE KILLED.

THAT HE TESTIFIED THERE WAS NO

INTENT FOR ANYBODY TO BE KILLED.

THE OTHER CODEFENDANTS WAS

NOBODY WAS EVEN SUPPOSED TO BE

HOME DURING THE TIME.

>> BUT THEY KNEW THEY WERE

THERE.

THEY WAITED FOR THE TWO HOURS.

>> THEY DID, THEY DID.

I CAN I WOULD ARGUE HE DIDN'T GO

THERE FOR THE SPECIFIC INTENT

THAT SOMEBODY WAS ONE TO DIE.

>> BUT HE KNEW.

>> HE KNEW MATE WAS UPSET WITH

FANG.

>> SO WHY ISN'T THAT RECKLESS

INDIFFERENCE?

>> I UNDERSTAND YOUR POINT,

AGAIN I WOULD ARGUE HE DIDN'T GO

THERE WITH THE SPECIFIC INTENT

OF SOMEBODY BEING KILLED.

I THINK MY RECOLLECTION OF THE

TESTIMONY WAS HE WASN'T GOING TO

KILL FANG, HE IS GOING TO DO

SOMETHING TO HIM, BEAT HIM UP,

TIE HIM UP, DON'T THINK THERE

WAS ANY TESTIMONY THAT HE WAS

GOING THERE TO SHOOT HIM.

>> THANK YOU FOR YOUR ARGUMENT.

>> THANK YOU.

>> THE COURT WILL BE IN RECESS

FOR ABOUT 10 MINUTES.

>> ALL RISE.