>> WE CALL THE NEXT CASE WHICH
IS LIONEL MICHAEL MILLER VERSUS
THE STATE OF FLORIDA.
ALL RIGHT.
MR.^HENDERSON, ARE YOU READY?
>> YES. GOOD MORNING, MAY IT PLEASE THE
COURT --
I'M LARRY HENDERSON, PRIVATE
ATTORNEY OUT OF DAYTONA BEACH,
FLORIDA.
>> MAKE SURE YOU SPEAK INTO THE
MIKE.
>> WITH ME IS CHRISTOPHER
QUARLES, WHO IS CHIEF OF THE CAPITAL
APPELLATE DIVISION OF THE 7th
CIRCUIT PUBLIC DEFENDERS
OFFICE.
WE REPRESENT LIONEL
MILLER.
MR. MILLER WAS CONVICTED
FIRST-DEGREE MURDER, ATTEMPTED
FIRST-DEGREE MURDER, ARMED
BURLARY, ASSAULT WITH
A FIREARM OR DEADLY WEAPON
FOLLOWING A JURY TRIAL
IN ORANGE COUNTY WITH
HONORABLE BELVIN PERRY PRECIDING.
THIS IS THE DIRECT APPEAL OF
THOSE JUDGEMENTS AND A DEATH
SENTENCE THAT WAS IMPOSED WITH
REFERENCE TO THE FIRST-DEGREE
MURDER CONVICTION.
THIS COURT HAS MANDATORY
APPELLATE JURISDICTION.
I LIKE TO DO THIS MORNING,
DISCUSS SOLELY POINT TWO, THE

APPRENDI VERSUS NEW JERSEY
ISSUE.
WE SUBMIT THAT THE DEATH
PENALTY IN FLORIDA BEING
UNLAWFULLY IMPOSED IN VIOLATION
OF THE CONSTITUTION OF THE
GREAT STATE OF FLORIDA AND
CONSTITUTION OF THE UNITED
STATES OF AMERICA BASED
PRIMARILY ON THE APPRENDI LINE
OF DECISIONS.
THE STANDARD OF REVIEW THIS
MORNING IS DE NOVO.
>> I THINK THE REASON WE WE
MIGHT BE SPEECHLESS, IS THAT,
WE HAVE HAD THIS ISSUE COME UP
MANY TIMES SINCE APPRENDI AND
RING AND, THE COURT HAS,
ESPECIALLY WHERE, AND YOU KNOW
I'VE BEEN AT SOME POINT
DISAGREEING BUT WHERE'S, ISN'T
THERE A PRIOR VIOLENT FELONY,
CONTEMPORANEOUS FELONY?
WHAT IS YOUR SPECIFIC ARGUMENT
ABOUT WHY, GIVEN THE FACT OF
THIS CASE, THE STATUTE IS
UNCONSTITUTIONAL?
WE WANT TO BE, SINCE YOU KNOW
WE'VE BEEN OVER THE GENERAL
ARGUMENTS, TIME AND AGAIN OVER
THE LAST SEVEN OR EIGHT YEARS.
>> THAT'S CORRECT.
SINCE APPRENDI CAME OUT IN 2000
THIS COURT HAS ISSUED MANY
DECISIONS THAT DEAL BOTH WITH
APPRENDI AND RING VERSUS

ARIZONA.
I SUBMIT THOSE DECISIONS HAVE
NOT ADDRESSED THE SPECIFIC
ISSUES THAT WERE TIMELY
PRESENTED BELOW TO JUDGE PERRY
AND ADEQUATELY PRESERVED.
>> WHY DON'T YOU, AND WHAT
SPECIFIC DEFICITS ARE YOU
RAISING ABOUT THE SCHEME AS IT
APPLIES TO MR.^MILLER?
>> THIS COURT HAS APPLIED
APPRENDI, NON-CAPITAL CONTEXT.
THIS, THE STATE RELIES
PRIMARILY, IF NOT EXCLUSIVELY
ON THE LANGUAGE OF THIS COURT
IN MILLS VERSUS MOORE.
TO ASSERT THAT THIS COURT HAS
ALREADY DECIDED THE ISSUE.
THAT APPRENDI DOES NOT APPLY,
THAT RING VERSUS ARIZONA DOES
NOT APPLY ALSO.
BUT I SUBMIT IF WE START WITH
THE MILLS DECISION AND WORK OUR
WAY THROUGH THAT, I BELIEVE THE
COURT WILL SEE WHERE I'M GOING
WITH THIS.
IN MILLS, THIS COURT SAID, THAT
APPRENDI ON ITS FACE DOES NOT
APPLY TO CAPITAL CASES.
THAT'S CORRECT STATEMENT OF
LAW.
UNFORTUNATELY, SIX MONTHS AFTER
MILLS, THE UNITED STATES
SUPREME COURT APPLIED THE
APPRENDI RULING TO CAPITAL
CASES.

BUT THE MILLS DECISION IS
IMPORTANT BECAUSE THE FOCUS AT
THAT TIME WAS ON THE APPRENDI
CASE.
>> I THINK WHAT YOU NEED TO DO
FOR US, IS RATHER THAN JUST
TALK GENERALLY, SPECIFICALLY
WHAT ARE YOU SAYING SHOULD HAVE
HAPPENED HERE THAT DIDN'T
HAPPEN AS APPLIES TO
MR.^MILLER?
>> WHAT HAPPENED HERE IS
MR.^MILLER TIMELY ASKED, FIRST
HE OBJECTED TO THE INDICTMENT
BECAUSE THE INDICTMENT FAILED
TO CONTAIN THE LANGUAGE THAT IS
REQUIRED AS A FINDING OF FACT
IN FLORIDA TO IMPOSE THE DEATH
PENALTY.
THE FIRST DEGREE MURDER STATUTE
IN FLORIDA IS, STATES THAT
FIRST-DEGREE MURDER IS A
CAPITAL FELONY.
HOWEVER, THE DEATH PENALTY IS
NOT AUTHORIZED TO BE IMPOSED
UNLESS YOU GO TO A CROSS
REFERENCED STATUTE.
THOSE STATES ARE 775 --
>> YOU'RE SAYING THE INDICTMENT
NEEDED TO STATE THE AGGRAVATING
TO FACTORS.
>> NO, YOUR HONOR, THAT
ARGUMENT HAS BEEN REJECTED THAT
IS NOT OUR ARGUMENT.
>> WHAT IS DEFECTIVE ABOUT THE
INDICTMENT.

>> THE INDICTMENT ALLEGED
MERELY FIRST-DEGREE MURDER.
THE INDICTMENT DID NOT CONTAIN
THE LANGUAGE UNDER 921.141 (3).
WHICH IS THE FINDING IN OF FACT
IN FLORIDA THAT MUST BE MADE
THAT RENDERS THE A DEFENDANT
ELIGIBLE FOR THE DEATH PENALTY.
IT IS NOT EXISTENCE OF AN
AGGRAVATING CIRCUMSTANCE.
IT IS NOT THE EXISTENCE OF ONE
OR MORE AGGRAVATING
CIRCUMSTANCES.
IT IS THE EXISTENCE OF
SUFFICIENT AGGRAVATING
CIRCUMSTANCES.
THAT'S WHAT OUR STATUTE SAYS.
THAT'S WHAT THIS COURT HAS
FOUND TO APPLY.
THAT IS THE FINDING OF FACT
THAT ATTACHES.
SO THE INDICTMENT HAD TO SAY --
>> SO THE INDICTMENT HAD TO SAY
WHAT THE AGGRAVATORS WOULD HAVE
BEEN?
>> NO, YOUR HONOR.
THE INDICTMENT HAD TO SPECIFY,
MR.^MILLER FROM PREMEDITATED
DESIGN KILLED MISS SMITH AND
THERE ARE SUFFICIENT
AGGRAVATING CIRCUMSTANCES TO
TESTIFY TO FOR IMPOSITION OF
DEATH PENALTY.
>> UNDERSTAND.
>> YOU HAVE TO SAY INSUFFICIENT
MITIGATING FACTORS OUTWEIGH

WHATEVER THE STATUTORY
LANGUAGE.
REQUIRES BOTH IN WHAT YOU'RE
ARGUMENT IS?
>> THAT IS WHAT THE ARGUMENT.
I POINT OUT THAT THE ARIZONA
STATUTE CONTAINS SIMILAR
LANGUAGE IN THEIR STATUTE AS
FAR AS THE FINDING OF
MITIGATION.
AND THE UNITED STATES SUPREME
COURT DID NOT GO THERE.
THEY DID NOT REQUIRE --
>> BUT THE ARIZONA STATUTE IS
THE FLORIDA STATUTE.
YOU WOULD AGREE WITH THAT.
>> ABSOLUTELY, YOUR HONOR.
>> SO WE'VE GOT DIFFERENT
STATUTES.
>> DIFFERENT STATUTES.
>> IT SEEMS TO ME, THIS HAS
BEEN THE, THE REAL PROBLEM,
PROBLEMATICAL THING WE'VE DEALT
WITH SINCE RING, AND THAT IS
THE ISSUES.
IT SEEMS AS THOUGH EITHER RING
HAS NO APPLICATION AT ALL TO
FLORIDA LAW, BECAUSE, DEATH IS
THE MAXIMUM PENALTY UPON THE
CONVICTION WITHOUT REGARD TO
THE MITIGATING FACTORS.
THAT IS JUST THE MAXIMUM
PENALTY.
>> YES, SIR.
>> YOU ONLY REACH THAT IF YOU
GO INTO THE AGGRAVATION AND

MITIGATION, OR, AND THEN IF YOU
ACCEPT THAT, OR OUR STATUTE IS
JUST SO UNCONSTITUTIONAL THAT I
MEAN, FROM DAY ONE, I MEAN ON
ITS FACE IT SEEMS AS THOUGH IT
IS UNCONSTITUTIONAL IF YOU
ACCEPT THE OTHER ARGUMENT HERE.
>> YOUR HONOR, I DON'T BELIEVE
THE STATUTE ITSELF IS
NECESSARILY UNCONSTITUTIONAL.
I BELIEVE THE WAY IT IS BEING
APPLIED BY THE COURTS.
THE STATUTE DOES SAY THAT THE
JUDGE MUST MAKE THOSE FINDINGS.
THE ARIZONA STATUTE SAID, ONLY
THE JUDGE.
FLORIDA STATUTE DOESN'T SPECIFY
THAT IT IS ONLY THE JUDGE THAT
MUST MAKES THOSE FINDINGS.
>> IN ARIZONA STATUTE THE DEATH
IS NOT MAXIMUM PENALTY UNDER
THE STATUTE AS WRITTEN WHERE IT
IS IN FLORIDA.
>> IN ARIZONA THEY CALLED IT A
CAPITAL FELONY.
THE DEATH PENALTY COULD BE
IMPOSED FOR THAT.
THE DICTIONARY DEFINITION OF
CAPITAL WILL NOT WORK AND THIS
COURT REALIZE THAT WITHIN THE
SEXUAL BATTERY CONTEXT.
LEGISLATURE CAN'T SAY SEXUAL
BATTERY IS A CAPITAL CRIME
PUNISHABLE BY THE DEATH PENALTY
AND DO SO LAWFULLY.
THEY STILL CALL IT A CAPITAL

CRIME.
IF THIS COURT'S LANGUAGE IN
MILLS IS TO BE TAKEN AT FACE
VALUE, THEN ALL THE PEOPLE WHO
HAVE BEEN CONVICTED OF CAPITAL
SEXUAL BATTERY SHOULD BE BACK
IN FRONT OF THIS COURT SAYING
WAIT WE WEREN'T INDICTED WE
DIDN'T GET A 12-PERSON JURY.
IT IS SAME THING.
NOT THE DICTIONARY DEFINITION
THAT CONTROLS.
IT HAS TO BE LAWFUL PUNISHMENT
BASED PRIMARILY WHAT THE
LEGISLATURE SAYS BUT IT HAS TO
BE FILTERED THROUGH THE
CONSTITUTION.
>> YOU SAID THAT THE INDICTMENT
IS INSUFFICIENT BECAUSE IT
DOESN'T HAVE LANGUAGE, NOT,
BECAUSE WE'VE ALREADY REJECTED
THAT IT DOESN'T NEED TO LIST
THE AGGRAVATORS.
YOU'RE SAYING IT NEEDS TO
CONTAIN LANGUAGE THAT SAYS,
THERE ARE SUFFICIENT
AGGRAVATING FACTORS AND
INSUFFICIENT MITIGATING?
>> YES.
THE FINDING UNDER SECTION
921.141, 3.
>> ARGUMENT UNDER INDICTMENT.
>> THAT'S CORRECT.
>> WHAT IS YOUR NEXT LEGAL
ARGUMENT?
>> THE NEXT LEGAL ARGUEMENT

THAT HAS TO BE PRESENTED TO THE JURY AND HAS TO BE UNANIMOUS FINDING BEYOND A REASONABLE DOUBT BY THE JURY IN ORDER TO FIND THE DEFENDANT ELIGIBLE FOR THE DEATH PENALTY THIS.
HAS NOTHING TO DO WITH THE RECOMMENDATION.
THE RECOMMENDATION IS A STATUTORY CREATURE.
THAT'S NOT FOUNDED IN THE CONSTITUTION.
>> BUT THIS COURT HAS FOUND OR HELD, NOT IN BOTTOSON NECESSARILY BECAUSE THAT WAS PLURALITY OPINION, AS LONG AS, THE ELIGIBILITY FOR THE DEATH PENALTY COMES UPON A FINDING OF ONE OR MORE AGGRAVATING CIRCUMSTANCES.
>> AND I DISAGREE WITH THAT, YOUR HONOR BECAUSE THAT'S NOT WHAT THE STATUTE SAYS.
THE STATUTE DOES NOT SAY ONE OR MORE.
FOR MORE THAN 30 YEARS THIS COURT HAS SAID THAT THE DETERMINATION AS FAR AS IMPOSITION OF THE DEATH PENALTY FOR THE JUDGE, IS WHETHER THERE ARE SUFFICIENT AGGRAVATING CIRCUMSTANCES.
IT IS NOT ONE OR MORE.
IT IS NOT A QUANTITATIVE ANALYSIS.
IT IS A QUALITATIVE ANALYSIS.

SO YOU MIGHT HAVE A PRIOR
VIOLENT FELONY A PURE FELONY
MURDER 30 YEARS OLD WHERE
DEFENDANT WAS ACCOMPLICE.
THAT IN OF ITSELF IS NOT GOING
TO BE SUFFICIENT.
THE DICTIONARY DEFINITION
SHOULD BE APPLIED TO THE WORD
SUFFICIENT AS OPPOSED TO
CAPITAL BECAUSE THE GENERAL
UNDERSTANDING OF SUFFICIENCY IS
ENOUGH.
NOT ONE OR MORE.
>> IN TERMS OF THE
CONSTITUTIONALITY, HOWEVER,
THOUGH YOU ARE MOUNTING A
FACIAL CHALLENGE, THE, THIS
U.S. SUPREME COURT IN RING
NEVER RECEDED FROM ITS CASES
THAT SAY, AS LONG AS THERE IS A
PRIOR VIOLENT FELONY, THAT
THERE DOES NOT NEED TO BE A
JURY FINDING OF A PRIOR VIOLENT
FELONY.
THAT IS NUMBER ONE, AND TWO,
HAS SAID THAT EVEN WHEN THERE
WERE VIOLATIONS OF RING, THAT
THE COURT CAN APPLY HARMLESS
ERROR ANALYSIS.
MY, WE HAVEN'T HAD THIS COME UP
RECENTLY WHERE WE'VE LOOKED
INTO THE DETAILS BUT, AM I
INCORRECT ABOUT THOSE TWO
ASSUMPTIONS COMING OUT OF THE
UNITED STATES SUPREME COURT?
>> THE, YOU'RE NOT INCORRECT,

YOUR HONOR.
THE THING ABOUT RING IS IT
DEALT WITH ARIZONA STATUTE
WHICH REQUIRED ONE OR MORE
AGGRAVATING CIRCUMSTANCES.
SO IF THERE WAS A PRIOR VIOLENT
FELONY UNDER THE ARIZONA
STATUTE, THE DEFENDANT WAS
ELIGIBLE FOR THE DEATH PENALTY
THAT MET THE APPRENDI EXCEPTION
OR THE RESIDIVIST STATUTE.
THERE WAS A PRIOR CONVICT, AND
OBTAINED WITH FULL
CONFORMITYTO DUE PROCESS.
AS FAR AS ANALYSIS TO BE
PERFORMED THAT SATISFIED THE
RING, ARIZONA STATUTE IN RING.
FLORIDA REQUIRES SUFFICIENT
AGGRAVATING CIRCUMSTANCES.
SO ONE OR TWO OR THREE OR FOUR
AGGRAVATING CIRCUMSTANCES AS
FAR AS COUNTING IS NOT THE
QUESTION.
>> I APPRECIATE WHAT YOU'RE
SAYING BUT WE HAVE, AS YOU
UNDERSTOOD, WE HAVE PREVIOUSLY
UPHELD THE DEATH PENALTY AND WE
GAVE THE UNITED STATES SUPREME
COURT MANY OPPORTUNITIES FROM
BOTTOSON ON, TO RELOOK AT
WHETHER THE PRIOR
PRONOUNCEMENTS THAT THE STATUTE
WAS CONSTITUTIONAL NEEDED TO BE
REVISITED AND THEY HAVE
DECLINED ON NUMEROUS OCCASIONS
INCLUDING IN THE CASE BUTLER

WHICH IS A CASE WHERE THERE WAS
A SINGLE AGGRAVATOR, HAC, AND
IT WAS NOT EVEN FOUND
UNANIMOUSLY.
SO I GUESS MY CONCERN HERE IS
THAT YOU RECOGNIZE THERE IS
PRECEDENT FROM THIS COURT TO
THE CONTRARY AND YOU ARE URGING
THIS COURT TO RECEDE FROM ITS
OWN PRECEDENT BASED ON WHAT YOU
ASSUME THE UNITED STATES
SUPREME COURT MIGHT DUE NOT
FUTURE?
>> ONLY IN THE BROADEST SENSE
DO I RECOGNIZE THERE IS
CONTRARY AUTHORITY FROM THIS
COURT.
THIS COURT HAS IN PARAPHRASING
THE ARGUMENTS MADE BY OTHER
DEFENDANTS SAID THE DEFENDANT
CONTENDS THAT THE DEATH PENALTY
UNCONSTITUTIONAL BECAUSE THE
JURY DID NOT FIND FACTS
NECESSARY TO IMPOSE HIS
SENTENCE --, NOW GENERALLY
STATED THAT IS THE ARGUMENT WE
MAKE.
BUT THEN THOSE DEFENDANTS WENT
ON TO SAY, SPECIFICALLY, THAT
THE DEFENDANT ALLEGES THAT THE
AGGRAVATING CIRCUMSTANCES HAVE
TO BE CONTAINED IN THE
INDICTMENT.
THE AGGRAVATING CIRCUMSTANCES
HAVE TO BE FOUND UNANIMOUSLY BY
THE JURY.

THAT'S NOT OUR ARGUMENT.
THE ARGUMENT IS THE
SUFFICIENCY.
IF THE COURT WOULD CONSIDER,
PREMEDITATED MURDER,
FIRST-DEGREE MURDER, THE
ALLEGATION IS FIRST DEGREE
MURDER.
THE INDICTMENT DOES NOT NEED TO
BE SPECIFY WHETHER PREMEDITATED
OR FELONY.
IT SAYS FIRST DEGREE MURDER.
SAME WITH SUFFICIENCY.
THEY ALLEGE SUFFICIENCY AND THE
AGGRAVATING CIRCUMSTANCES DO
NOT HAVE TO BE UNANIMOUSLY
FOUND INDIVIDUALLY.
THE CRUCIAL DETERMINATION IS,
IS THAT THE JURY UNANIMOUSLY
FINDS, BEYOND A REASONABLE
DOUBT, THAT THERE ARE
SUFFICIENT AGGRAVATING
CIRCUMSTANCES.
THAT IS THE ELIGIBILITY
REQUIREMENT.
THE STATE HAS NOT POINTED THIS
COURT TO A SINGLE CASE, THAT
SATISFIES, THAT ARGUMENT.
>> IT USES THE LANGUAGE THAT
YOU'RE ASSERTING THAT NEEDS TO
BE APPLIED.
YOU'RE SAYING THAT IS THE TEST
AND THIS COURT HAS APPLIED
DIFFERENT, DIFFERENT WORDS TO
DESCRIBE THE STATUTE.
>> IN PARAPHRASING THE

ARGUMENTS PRESENTED BY THE
APPELLANT.
>> RIGHT.
>> GENERALLY RECOGNIZE THAT'S
THE ARGUMENT BUT THE SPECIFIC
ARGUMENT MADE IS NOT THE
ARGUMENT MR.^MILLER MADE BELOW.
I'M WELL AWARE THE COURT
DEMANDS THE ARGUMENT PRESENTED
BELOW, RULED ON AND PRESENTED
TO THIS COURT.
EVERYONE PRECEDED THAT DID NOT
MADE THIS ARGUMENT WILL NOT GET
THE BENEFIT OF THIS ARGUEMENT.
AS FAR AS THIS ARGUMENT WHETHER
THE COURT IS STONEWALLED BY THE
FEDERAL COURT, LET ME'S THAT,
PLEASE.
>> I'M NOT SAYING STONEWALLED,
IT IS JUST THAT I KNOW WE
LOOKED AT THIS OVER A PERIOD OF
TIME, THAT OUR PRECEDENT HAD
UPHELD THE DEATH PENALTY
AGAINST CONSTITUTIONAL ATTACKS
AND THERE WAS A FEELING AMONG,
YOU CAN SEE IF YOU READ THE
BOTTOSON OPINION AMONG MEMBERS
OF THIS COURT, IF THE DEATH
PENALTY WAS GOING TO BE
DECLARED UNCONSTITUTIONAL IT
WOULD BE THE U.S. SUPREME COURT
THAT WOULD DO IT, NOT THIS
COURT.
SO IT IS NOT STONEWALLED.
IT IS JUST, IT IS SAYING, WE'RE
NOT CONVINCED ANYTHING THE

UNITED STATES SUPREME COURT HAS SAID, NOW MAKES OUR STATUTE INFIRM AND IT OUGHT TO BE SOMETHING DECIDED BY THE UNITED STATES SUPREME COURT.
>> I UNDERSTAND THE COURT'S HESITANCY TO OVERRULE THE UNITED STATES SUPREME COURT.
AND BY THE SAME TOKEN --
>> HESITANCY? I WOULDN'T --.
>> TRIAL JUDGES BELOW DO NOT WANT TO OVERRULE THIS COURT EITHER.
THAT'S WHY MILLS VERSUS MOORE NEEDS TO BE RECEDED FROM, THAT LANGUAGE IS INCORRECT.
BUT THE THING IS, IF THIS COURT HAS APPLIED APPRENDI SINCE 2000, AND, GALINDEZ, INSKO, STATE VERSUS SIEGLER, THIS KATE ACKNOWLEDGED IN THE NON-CAPITAL CONTEXT, DUE PROCESS RIGHTS HAVE CHANGED.
SIXTH AMENDMENT REQUIRES IF THERE IS SENTENCE TO BE IMPRESSED IMPOSED, IT HAS TO BE IMPOSED BY FINDINGS OF FACT BY THE JURY CONTAINED IN THE VERDICT THAT IS THE IN NON-CAPITAL CONTEXT.
I SUBMIT TO YOU UNDER THE FLORIDA CONSTITUTION, DUE PROCESS, RECOGNITION OF THAT, REQUIRES THAT THIS COURT UNDER THE FLAT CONSTITUTION GIVE THOSE SAME RIGHTS TO CAPITAL

DEFENDANTS.
THAT WAS WHAT LED THE UNITED STATES SUPREME COURT TWO YEARS AFTER APPRENDI TO SAY IN RING WE CAN NO LONGER ADHERE TO THE FACT THAT PEOPLE CHARGED WITH MISDEMEANORS HAVE MORE PROCEDURAL DUE PROCESS THAN PEOPLE CHARGED WITH CAPITAL FELONIES.
THAT IS IRRATIONAL.
WE CAN NOT DO THAT.
AS A MATTER OF FEDERAL CONSTITUTIONAL LAW WE APPLY THAT MINIMAL DUE PROCESS TO CAPITAL CASES.
>> SEEMS WHERE OUR DISCUSSION OR YOUR ARGUMENT RUNS HEAD LONG INTO WHAT THE COURT, I GUESS WE HAVE A MAJORITY OF PLURALITY, WHATEVER WE HAVE EXISTING OUT THERE, WAS THAT YOU DO HAVE A, THE NECESSITY FOR UNANIMOUS FINDING OF THE OF THE FIRST DEGREE MURDER PROVISION AND, THERE IS NO ADDITIONAL FINDING THAT'S NEEDED TO SUBJECT THAT DEFENDANT TO A DEATH PENALTY BECAUSE, DEATH IS THE MAXIMUM PENALTY.
ONCE THAT'S DONE, SO YOU DON'T GET INTO THIS DISCUSSION ABOUT INCREASE, ABOUT INCREASING PENALTY.
THAT SEEMS TO BE WHERE, THAT'S THE POINT WHERE WE GO TWO

DIFFERENT WAYS.
>> THAT'S WHAT WAS SAID IN MILLS AND THAT'S WHY IT IS SO IMPORTANT FOR THIS COURT TO RECOGNIZE THAT THE PRECEDENT THAT HAS COME FROM THE UNITED STATES SUPREME COURT, THE RELEVANT STATUTORY MAXIMUM IS THE PUNISHMENT THAT CAN BE IMPOSED BASED ON THE FINDINGS BY THE JURY.
>> BY THE JURY.
>> NOT WHAT THE LEGISLATURE DOES.
>> AND THIS COURT HAS INTERPRETED THAT DEATH CAN BE IMPOSED UPON THAT FINDING.
THAT'S THE MAXIMUM PENALTY.
IT IS NOT ENHANCEMENT OF A PENALTY AS WE TALKED ABOUT IN APPRENDI OR IN RING.
THAT SEEMS TO BE, THAT'S WHERE I'M TRYING TO GET BEYOND, TO MAKE SURE WE'RE TALKING THE SAME, SAME LANGUAGE HERE.
SO, --
>> RESPECTFULLY THAT APPROACH SIMPLY CAN'T NOT WORK BECAUSE IN IT DOES, IF IT IS THE DICTIONARY DEFINITION OF CAPITAL, IF THE JURY FINDS THE DEFENDANT GUILTY OF A CAPITAL OFFENSE, THAN CAPITAL SEXUAL BATTERY PEOPLE --
>> I THOUGHT IT SAID IF YOU FIND THEM GUILTY OF

FIRST-DEGREE MURDER STATUTE
EITHER PREMEDITATED OR FELONY
MURDER SITUATION, THAT ONCE
THAT FINDING, MUST BE
UNANIMOUS, MUST BE BY THE JURY,
BUT ONCE THAT FINDING IS MADE,
THE MAXIMUM PENALTY, THE
MAXIMUM PENALTY UNDER OUR
STATUTORY SCHEME AT THAT POINT,
IS THE DEATH PENALTY.
>> I DISAGREE.
>> WELL I'M, YOU MAY DISAGREE
BUT THAT'S WHAT THIS COURT HAS
SAID BECAUSE YOU DON'T NEED ANY
OTHER FINDING FOR WHAT THE
MAXIMUM PENALTY IS.
IT IS ALREADY RECOGNIZED THAT
THE JURY CAN'T TAKE IT BEYOND.
SO THAT'S WHERE WE ARE
SPLITTING.
THAT'S WHAT I'M TRYING TO GET
YOU ADDRESS HERE MAKE SURE WE
ARE RIGHT AT THE RIGHT SPOT TO
DEAL WITH THIS.
>> IF YOU TRAVEL WITH ME TO A
TRIAL, THE JURY IS JUST COMING
BACK AND FOUND THE DEFENDANT
GUILTY OF FIRST-DEGREE MURDER.
UNANIMOUS VERDICT.
>> RIGHT.
>> THE JUDGE CAN NOT, CAN NOT
THEN STAND UP AND SAY,
MR.^SMITH YOU'RE GUILTY OF
FIRST-DEGREE MURDER.
IMPOSE THE DECK PENALTY ON
YOU.

>> THAT'S NOT WHAT WE'RE
SAYING.
THAT IS NOT WHAT THE COURT
SAID.
THE COURT SAID AT THAT POINT
DEATH IS THE MAXIMUM PENALTY
AUTHORIZED BY LAW APPLYING THE
LANGUAGE FROM THE PRIOR
LANGUAGE.
THERE MAY HAVE TO BE ADDITIONAL
THINGS GOING ON BUT THAT, --
DEATH PENALTY.
BUT THAT DEATH IS THE MAXIMUM
PENALTY.
IT IS NOT INCREASED BY ANYTHING
ELSE.
>> THAT'S THE LEGAL
REQUIREMENT, YOUR HONOR, IS
THAT THERE IS AN ADDITIONAL
FINDING OF FACT THAT MUST BE
MADE BY THE JUDGE.
THERE IS AN ADDITIONAL FINDING
OF FACT THAT.
IS IMMUTABLE FACT.
>> IF WE GO THERE, THIS NOW
COMES BACK DURING THE TIME WE
WERE LOOKING AT THIS, I
RESPECTFULLY DISAGREE WITH ONE
OR MORE OF MY COLLEAGUES THAT
YOU CAN JUST SAY DEATH IS THE
MAXIMUM PENALTY BECAUSE THAT
WOULD MAKE EVERYONE
SUBJECT, THAT WOULD YOU HAVE AN
8th AMENDMENT PROBLEM, NOT JUST
SIXTH AMENDMENT.
BUT HERE I'VE YOU'VE GOT

UNANIMOUS FINDINGS OF HIM
PREVIOUSLY CONVICTED OF A
FELONY AND UNDER SENTENCE OF
IMPRISONMENT.
HE WAS PREVIOUSLY CONVICTED OF
A FELONY INVOLVING THE USE OF
VIOLENCE AND YOU HAVE, THE THAT
THIS CAPITAL FELONY WAS
COMMITTED WHILE THE DEFENDANT
WAS COMMITTING OR ENGAGED IN
THE COMMISSION OF EITHER
ROBBERY OR BURGLARY.
>> THAT'S CORRECT.
>> THE ROBBERY OR BURGLARY WAS
FOUND UNANIMOUSLY, WASN'T IT?
>> IT WAS.
>> SO IN THIS CASE EVEN IF I
MIGHT AGREE WITH YOU, IN
ANOTHER CASE, WHERE YOU JUST
HAVE HAC OR SOMETHING THAT
ISN'T FOUND UNANIMOUSLY BY THE
JURY YOU DON'T HAVE THAT HERE.
YOU'VE GOT THAT, ONE OR MORE
AGGRAVATING CIRCUMSTANCES
WHICH, THEN, RENDERS THE
DEFENDANT'S ELIGIBLE TO BE
CONSIDERED FOR THE DEATH
PENALTY.
>> YOUR HONOR --
>> THAT IS FOUND UNANIMOUSLY BY
THE JURY.
I THINK THIS CASE YOU HAVE.
SIX, AGGRAVATING FACTORS NOT A
GREAT CASE TO BE ARGUING
CONSTITUTIONALITY OF THE
STATUTE.

>> YOUR HONOR, IT IS A GREAT CASE.
A PURE MATTER OF LAW, ONE OR MORE AGGRAVATING CIRCUMSTANCES DOES NOT SATISFY OUR STATUTE AS WRITTEN BY THE LEGISLATURE.
THE COURT RESPECTFULLY, IS VIOLATING THE SEPARATION OF POWERS --
>> NOW, THAT IS DIFFERENT, NOW YOU'RE MAKING AN ARGUMENT NOT UNDER THE FEDERAL CONSTITUTION OR FLORIDA CONSTITUTION.
FOR ALL THESE YEARS, FOR 30 YEARS, THAT FLORIDA COURTS HAVE NOT BEEN FOLLOWING THE WILL OF THE LEGISLATURE AND THAT THERE IS SEPARATION OF POWERS, IS THAT WHAT YOU'RE SAYING?
>> I'M SAYING AND THAT'S WHAT WAS SAID TO JUDGE PERRY BELOW AND, IF THE COURT WILL ALLOW ME TO EXPOUND ON THAT, THE STATUTE SAYS SUFFICIENT AGGRAVATING CIRCUMSTANCES.
IT DOES NOT SAY ONE OR MORE.
HAD THE LEGISLATURE INTENDED THAT THEY COULD HAVE WRITTEN ONE OR MORE. THEY DID NOT.
SECTION 921.41 (3), THE FINDING MUST BE MADE BY THE JUDGE WHEN THE SENTENCE IS IMPOSED THAT SUFFICIENT AGGRAVATING CIRCUMSTANCES EXIST.
THAT'S IN THE PLURAL.
>> AND --

>> AND THAT SUFFICIENT
MITIGATING CIRCUMSTANCES EXIST
THAT'S TRUE.
THOSE ARE TWO FINDINGS HAVE TO
BE FIND.
IN MR.^MILLER'S CASE THOSE
FINDINGS WERE NOT MADE BY
UNANIMOUS JURY BEYOND A
REASONABLE DOUBT.
OVER OBJECTION THE JURY WAS NOT
INSTRUCTED THAT THE JURY HAD TO
FIND BEYOND A REASONABLE DOUBT
UNANIMOUSLY THERE ARE
SUFFICIENT AGGRAVATING
CIRCUMSTANCES.
THAT'S WHAT MAKES THE DEFENDANT
IN FLORIDA PER THE STATUTE --
>> DOES THE JURY, DOES THE
STATUTE SAY IT HAS TO BE
UNANIMOUS?
>> EXCUSE ME, YOUR HONOR?
>> DOES THE STATUTE SAY THAT
THE FINDING BY THE JURY HAS TO
BE UNANIMOUS?
>> DUE PROCESS SAYS --
>> I'M ASKING YOU, YOU --
>> NO, YOUR HONOR.
>> YOU WANDER AROUND.
YOU SAID YOU WANTED TO MAKE A
SEPARATION OF POWERS ARGUMENT
AND I'M SAYING THE JURY IS
INSTRUCTED THEY HAVE GOT TO
FIND SUFFICIENT AGGRAVATING AND
INSUFFICIENT MITIGATING.
THE QUESTION IS, DOES THAT HAVE
TO BE FOUND, UNANIMOUSLY BY THE

JURY?
>> IT DOES UNDER DUE PROCESS,
NOT UNDER THE STATUTE.
THAT'S THE APPRENDI ANALYSIS.
YOU LOOK AT THE STATUTE.
YOU LOOK AT FINDING THAT IS
REQUIRED.
>> NOW APPRENDI, YOU DO AGREE,
IS, ENHANCING, THE SENTENCE TO
SOMETHING HIGHER THAN IT, THAN
THE THAT WOULD OTHERWISE BE THE
MAXIMUM?
>> I AGREE WITH THAT.
>> THAT'S EXACTLY WHAT THAT
CASE IS ABOUT, CORRECT?
>> I AGREE WITH THAT.
>> AS RING CAME IN, RING WAS
THEN SUPER IMPOSED UPON
APPRENDI, A DISCUSSION OF
APPRENDI IN THE CAPITAL CONTEXT
AND AGAIN, DID IT NOT OR HAS
THIS COURT NOT DISCUSSED THAT
THE, WHAT THE JURY DOES, DOES
NOT, DOES NOT OR WHAT THE JUDGE
DOES, DOES NOT INCREASE THE
MAXIMUM PENALTIES?
THAT IS WHERE THIS COMES BACK
TO, THIS IS WHERE WE'RE
SPLITTING IT.
AND THAT'S WHAT I'M TRYING TO
GET YOU TO ADDRESS RATHER THAN
TO NEBULOUS CONCEPT BECAUSE, I
THINK WE HAVE TO GET PAST THAT,
FOR THIS COURT TO GO ANYWHERE
ELSE.
>> THAT'S WHAT THIS COURT SAID,

MILLS VERSUS MOORE.
I SUBMIT THAT'S WHAT NEEDS TO
BE RECEDED.
>> THAT IS THE POINT, THAT IT
IS NOT, DEATH IS NOT THE
MAXIMUM PENALTY, UPON A
CONVICTION OF FIRST-DEGREE
MURDER IS WHAT YOU'RE SAYING?
>> OUR STATUTE REQUIRES AN
ADDITIONAL FINDING OF FACT.
AND APPLYING THE REASONING OF
THE UNITED STATES SUPREME COURT
FROM, BLAKELY VERSUS
WASHINGTON, CUNNINGHAM VERSUS
CALIFORNIA, THERE THE SENTENCE
THAT WAS BEING AFFECTED WAS
ALSO WITHIN THE QUOTE, UNQUOTE
STATUTORY MAXIMUM WHERE YOU HAD
TO DETERMINE SENTENCING.
BUT CLEARLY THE COURT SAID,
THAT THERE IS A DUE PROCESS
ENTITLEMENT FOR THE JURY TO
MAKE FINDING A FACT UPON WHICH
THE IMPOSITION OF THE SENTENCE
DEPENDS.
SO THE TRIAL JUDGE IN FLORIDA
CAN NOT IMPOSE THE DEATH
PENALTY UNLESS THE TRIAL JUDGE
MAKE AS FINDING THAT SUFFICIENT
AGGRAVATING CIRCUMSTANCES
EXIST.
THAT IS UNDER OUR STATUTE.
SO APPRENDI SAYS YOU LOOK AT
THE STATUTE.
WHAT IS THE FINDING OF FACT
THAT CONTROLS THE IMPOSITION OF

THE PUNISHMENT?
IT IS CONVICTION AND THIS
CONSIDERATION ABOUT SUFFICIENCY
OF THE AGGRAVATING
CIRCUMSTANCES.
AND I SUGGEST THAT THE COURT IT
CAN BE CURED BY REQUIRING THE
INDICTMENT TO SHOW THAT THE
GRAND JURY CONSIDERED WHERE
THERE WERE SUFFICIENT
AGGRAVATING CIRCUMSTANCES AND
IN SUFFICIENT MITIGATING
CIRCUMSTANCE, PRESENT THAT TO
THE JURY, HAVE A UNANIMOUS
FINDING BY 12-PERSON JURY THERE
ARE SUFFICIENT AGGRAVATING
CIRCUMSTANCES ON A SEPARATE
VERDICT FORM, AND THEN HAVE
THEM MAKE THEIR RECOMMENDATION
BY WHATEVER MAJORITY THEY WANT
TO MAKE THE RECOMMENDATION.
THE RECOMMENDATION IS A
STATUTORY RIGHT.
THAT IS NOT THE DUE PROCESS
RIGHT UNDER OUR CONSTITUTIONS.
LIKE TO RESERVE THE REMAINDER
OF MY TIME FOR REBUTTAL.
>> MAY IT PLEASE THE COURT.
LISA-MARIE LERNER WITH THE
ATTORNEY GENERAL'S OFFICE FROM
THE STATE.
ADDRESSING ISSUE TWO, I'M GOING
TO TRY TO DO IT VERY BRIEFLY.
I HAVE THREE COMMENTS.
FIRST OF ALL AS JUSTICE
PARIENTE INDICATED, MR.^MILLER

HAS THREE AGGRAVATING FACTORS
TIED TO EITHER CONTEMPORANEOUS
FELONY CONVICTIONS FOR
BURGLARY, ATTEMPTED ROBBERY AND
LEST WE FORGET, ATTEMPTED
MURDER OF MR.^HAYDEN.
THE JURY WAS UNANIMOUS ON EACH
OF THOSE THREE CONTEMPORANEOUS
FELONY CONVICTIONS.
THAT MEANS WHEN THE JURY
RECOMMENDED DEATH, BY 11-1,
AFTER FINDING A UNANIMOUS
VERDICT ON THOSE THREE SEPARATE
CHARGES, THEY FOUND THAT THAT
AGGRAVATOR EXISTED.
UNANIMOUSLY.
ADDITIONALLY, MR.^MILLER HAS
TWO PRIOR VIOLENT FELONY
CONVICTIONS IN THE STATE OF
OREGON.
HE HAD ROBBERY WITH THE USE OF
A GUN WHERE HE SHOT AT SOMEONE.
AND HE HAD A MANSLAUGHTER WITH
A GUN WHERE HE KILLED SOMEONE.
>> THE ARGUMENT, I MEAN, YOU'RE
GOING DOWN THE PATH WHERE THE
COURT HAS BEEN BEFORE?
>> YES.
>> NO QUESTION.
HE'S MAKING THE ARGUMENT, AS I
UNDERSTAND HIM, IS THAT, SO
WHAT?
THAT'S NOT WHAT THE FINDING
MUST BE.
YOU CAN HAVE 400 AGGRAVATING
FACTORS.

THAT'S NOT THE STATUTORY TEST,
AND THE STATUTORY TEST THAT YOU
HAVE TO APPLY IS A JURY MUST
HAVE THE FINDING OF SUFFICIENT
AGGRAVATING FACTORS, EVEN
THOUGH THERE IS 400, THAT, THAT
IS NOT THE SAME FINDING, AND,
INSUFFICIENT MITIGATING
FACTORS.
>> I UNDERSTAND.
>> THAT'S WHERE HE'S GOING WITH
THIS.
SO YOUR ARGUMENT IS REALLY
SAYING THAT'S WHERE OUR LAW IS.
SO, I WOULD LIKE AT SOME POINT
TO ADDRESS THIS SLICE WHERE HE
IS SLICING THIS.
>> YES, I WILL BUT THIS COURT
IS STILL BOUND BY STARE DECISIS
AND UNDER THIS COURT'S CURRENT
LAW, THIS CASE IS TAKEN OUT OF
THE RING, APPRENDI ISSUE.
GOING ONTO THAT ISSUE, --
>> HE SEEMS TO CONCEDE THAT HE
IS JUST SAYING WE'VE BEEN
WRONG.
>> I UNDERSTAND.
>> OKAY.
THAT'S WHERE WE'RE GOING.
>> MILLER IS SAYING, TO, THAT
ONE OR MORE AGGRAVATING
CIRCUMSTANCES, NOT THE CORRECT
TEST. IT IS SUFFICIENCY.
HOWEVER THIS COURT IN DIXON,
BACK IN THE '70s SAID THAT
SUFFICIENT AGGRAVATING

CIRCUMSTANCES IS THE EXACT SAME
LANGUAGE MEANT ONE OR MORE.
THE STATE LEGISLATURE SINCE THE
'70s, HAS REISSUED OR
REPROPOSED THE STATUTE NUMEROUS
TIMES, AND UNDER THE STATUTORY
CONSTRUCTION I CITED THE CASE
IN MY BRIEF WHEN THE STATE
LEGISLATURE DOES THAT, THEY
INCORPORATE THE STATE SUPREME
COURT LAW INTERPRETING THAT
STATUTE.
THEREFORE, SUFFICIENT
AGGRAVATING CIRCUMSTANCES IN
THIS CASE DOES MEAN ONE OR
MORE.
ADDITIONALLY, THIS COURT'S
OTHER DECISIONS SAYING THAT
DEATH IS THE MAXIMUM PENALTY,
YOU DON'T HAVE TO HAVE THIS
EXPRESS LANGUAGE IN THE
INDICTMENT, THOSE SUPREME COURT
DECISIONS ARE ALSO OUT THERE
WHEN, WHEN STATE LEGISLATURE
REENACTED THE STATUTE, --
>> HAVE WE BY A MAJORITY, FOUR
OR MORE, SAID THAT WE, RING
DOESN'T APPLY BECAUSE DEATH IS
THE MAXIMUM PENALTY?
I KNOW IT WAS SAID IN BOTTOSON,
MUST HAVE BEEN SAID IN MILLS.
WAS THAT A MAJORITY OPINION OF
THIS COURT?
>> I BELIEVE SO.
>> WE'VE SAID, SO WE HAVE TO
RECEDE FROM --

>> NUMEROUS CASES, YES.
I SUBMIT UNDER MILLER'S CONSTRUCTION OF THIS STATUTE, ESSENTIALLY WHAT YOU WOULD HAVE, YOU WOULD BE COMPLETELY THROWING OUT THE ENTIRE FLORIDA STATUTE.
YOU WOULD BE HAVING ONE TRIAL, NOT TWO, BECAUSE THE JURY WOULD BE HAVING TO BE, LISTEN TO THE EVIDENCE OF AGGRAVATORS AND MITIGATORS IN THE GUILT PHASE AND ESSENTIALLY DOING IT ALL IN ONE TRIAL.
AND THEN PERHAPS FOR WHATEVER REASON, GOING TO THE PENALTY PHASE.
THAT IS NOT WHAT THE FLORIDA LEGISLATURE ENVISIONED WHEN IT CREATED THE STATUTE.
>> IT WOULDN'T BE A VERY DIFFICULT THING, IF THE LEGISLATURE INTENDED IT FOR THERE TO BE, YOU KNOW, TO GO TO PENALTY PHASE AND HAVE THEN, YOU KNOW, WE THE JURY FIND THERE ARE SUFFICIENT AGGRAVATING CIRCUMSTANCES AND INSUFFICIENT MITIGATING CIRCUMSTANCE.
>> BUT WHAT I UNDERSTOOD, I --
>> I THOUGHT THAT WHAT IS HE WAS SAYING.
>> WHAT I, I COULD BE WRONG, IN THE INDICTMENT AND GUILT PHASE THE JURY WOULD HAVE TO IN ORDER

TO MAKE HIM EVEN ELIGIBLE FOR
THE DEATH PENALTY, IN THE GUILT
PHASE THE JURY WOULD HAVE TO
MAKE A FINDING, AS I SAID ON A
SEPARATE VERDICT FORM APART
FROM THE GUILTY VERDICTS FOR
THE CHARGES THEMSELVES THAT
THERE ARE SUFFICIENT
AGGRAVATING CIRCUMSTANCES AND
INSUFFICIENT MITIGATING
CIRCUMSTANCES.
>> I'M SURE THAT WOULD VIOLATE
THE FLORIDA STATUTE.
>> ABSOLUTELY BUT THAT IS WHAT
HE IS SAYING.
IN THE GUILT PHASE BEFORE EVEN
BECOMES ELIGIBLE.
THAT I BELIEVE IT HIS ARGUMENT.
I COULD BE WRONG.
AFTER THEY MAKE THE SEPARATE
VERDICT FORM HE WOULD BECOME
ELIGIBLE AND THEN YOU WOULD GO
INTO, YOU KNOW, THE PENALTY
PHASE.
THAT IS NOT THE WEIGHING
PROCESS THAT FLORIDA
LEGISLATURE ENVISIONED WHEN IT
PUT FORTH THIS DEATH PENALTY
STATUTE AND REENACTED IT
NUMEROUS TIMES CHANGING THE
LANGUAGE OR WHAT NOT BUT EACH
TIME THEY DID IT THEY
INCORPORATED YOUR CASE LAW
INTERPRETING THAT STATUTE.
SO, I FIND HIS ARGUMENT BOTH
UNREASONABLE AND A VIOLATION OF

ALL THE FLORIDA SUPREME COURT
PRIOR DECISIONS ON THIS.
MOVING ONTO THE MIRANDA ISSUE,
JUST BRIEFLY, MILLER IS ASKING
THIS COURT TO EXTEND PAL.
AS THIS COURT KNOWS PAL, THE
DEFENDANT MUST BE TOLD HE HAS
RIGHT TO ATTORNEY BOTH BEFORE
AND DURING QUESTIONING.
MILLER IS TRYING TO PUSH THAT
FURTHER BY SAYING NOT ONLY DOES
HE HAVE TO BE TOLD THAT HE HAS
A RIGHT TO AN ATTORNEY BOTH
BEFORE AND DURING QUESTIONING
BUT HE HAS TO BE EXPLICITLY
TOLD YOU HAVE TOLD YOU HAVE A
ATTORNEY FREE OF CHARGE BEFORE
QUESTIONING AND ATTORNEY FREE
OF CHARGE DURING QUESTIONING.
AND THE STATE SUBMIT THAT IS
NOT A REASONABLE INTERPRETATION
OF EITHER THE REQUIREMENTS OF
PAL AND U.S. SUPREME COURT
MIRANDA CASES, NOR IS IT A
REASONABLE INTERPRETATION OF
THE RIGHTS WHICH WERE ACTUALLY
GIVEN TO MILLER.
HE WAS TOLD SPECIFICALLY AND IT
IS LISTED IN THE BRIEF THAT HE
HAS A RIGHT TO AN ATTORNEY BOTH
BEFORE AND DURING QUESTIONING.
IF YOU CAN'T AFFORD AN
ATTORNEY, ONE WILL BE APPOINTED
TO HIM BEFORE QUESTIONING, FREE
OF CHARGE.
THOSE SENTENCES ARE TAKEN

TOGETHER, REASONABLE
INTERPRETATION WOULD BE, THAT
HE HAS A RIGHT TO A FREE
ATTORNEY AT ANY POINT WHEN HE
REQUESTS IT, EITHER BEFORE OR
DURING QUESTIONING.
AND THE STATE ASKS THIS COURT
NOT TO EXTEND PAL AND TO FIND
THAT THESE WAIVERS WERE
ADEQUATE AND HIS WAIVER WAS
KNOWING AND VOLUNTARY.
GOING TO THE AVOID ARREST,
SINCE THIS COURT WAS INTERESTED
IN IT ON THE LAST CASE, IN THIS
CASE, THE STANDARD FOR GIVING
THE INSTRUCTION BASED ON THE
EVIDENCE IS WHETHER THERE WAS
COMPETENT SUBSTANTIAL EVIDENCE
OR CREDIBLE AND COMPETENT
EVIDENCE TO SUPPORT GIVING THE
INSTRUCTION.
THE INSTRUCTION THAT THE COURT
GAVE WAS CORRECT.
THE DEFENSE ATTORNEY IN MILLER
DOWN IN THE TRIAL COURT NEVER
OBJECTED TO THE INSTRUCTION
BEING GIVEN, AND DID NOT OBJECT
TO THE STATE ARGUING THE AVOID
ARREST.
>> I THINK IN THIS CASE, WILL,
WE'LL LOOK AT THAT LAW YOU BY I
THIS YOU COULD SAFELY ARGUE
THAT, IT WOULD BE HARMLESS
ERROR BEYOND A REASONABLE DOUBT
TO HAVE INSTRUCTED JURY.
DID YOU MAKE THAT ARGUMENT?

>> YES, I DID.
I ALSO DID NOT PUT IT IN MY
BRIEF BUT IT IS UNPRESERVED.
BUT GIVEN THE FACT THERE WAS
EVIDENCE BASED ON MILLER'S
STATEMENTS ABOUT WANTING TO
AVOID GOING BACK TO PRISON AND
WHAT NOT, THERE WAS ENOUGH
EVIDENCE TO INSTRUCT AND THE
COURT, DID NOT ABUSE ITS
DISCRETION IN ANALYZING THE
FACTS WITH THIS COURT'S CASE
LAW IN FINDING IT WAS NOT FOUND
BEYOND A REASONABLE DOUBT.
AND, THIS COURT DOES HAVE TO
DETERMINE PROPORTIONALTY GIVEN
THE FACT THAT THERE ARE FIVE
AGGRAVATING CIRCUMSTANCES AND
SIX NON-STATUTORY CIRCUMSTANCES
GIVEN LITTLE WEIGHT.
I DON'T BELIEVE THAT THE THERE
IS DISPROPORTIONALTY HERE.
AND UNLESS THE COURT HAS ANY
QUESTIONS, I WOULD ASK THE
COURT TO AFFIRM BOTH THE GUILT
VERDICT AND THE DEATH PENALTY.
THANK YOU.
>> REBUTTAL?
>> I AGREE THE STARE DECISIS IS
IMPORTANT, I SUBMIT HOWEVER
THIS COURT IS PERFORMING DE
NOVO REVIEW AND YOU STEP BACK
AND LOOK AT CASES OUT THERE AND
REASONING THAT IS OUT THERE BY
THE UNITED STATES SUPREME COURT
AND, THE REASONING THAT, THIS

COURT HAS STATED IN REFERENCE
TO APPLYING APPRENDI IN
NON-CAPITAL CASES.
AND IT LEADS TO THE SAME
DECISION THAT THE UNITED STATES
SUPREME COURT REACHED IN RING,
DUE PROCESS REQUIRES THAT
NON-CAPITAL DEFENDANTS CAN NOT
ENJOY MORE PROTECTION THAN DO
CAPITAL DEFENDANTS.
AS FAR AS THE INDICTMENT AND
THE LANGUAGE THAT HAS TO BE IN
THE INDICTMENT HERE, THE STATE
NEVER ALLEGED THIS WAS A
CAPITAL CRIME.
THE WORDS CAPITAL DO NOT OCCUR
ANYWHERE IN THAT INDICTMENT.
TIMELY OBJECTION WAS MADE TO
THAT.
THE STATE NO LONGER HAS TO
PROSECUTE CAPITAL SEXUAL
BATTERIES BY INDICTMENT.
THEY CAN DO THAT BY
INFORMATION.
I RESPECTFULLY SUBMIT THAT THE
STATE OF FLORIDA CAN PROSECUTE
A 15 OR 16 OR 17-YEAR-OLD
DEFENDANT IN FLORIDA FOR
FIRST-DEGREE MURDER WITH AN
INFORMATION AND TRY THAT WITH A
SIX-PERSON JURY WITHOUT DOING
HARM TO THE HEARING DECISION
AND THAT LINE OF CASES BECAUSE
THE CAPITAL PENALTY IS NOT
AVAILABLE TO 15, 16,
17-YEAR-OLD DEFENDANTS.

BY THE SAME TOKEN, YOU'VE GOT A CONSTITUTIONAL BAR THAT PRECLUDES IMPOSITION OF THE DEATH PENALTY ON SOMEONE WHO IS JUST CHARGED TO HAVE COMMITTED A FIRST-DEGREE MURDER WITHOUT THE ALLEGATION OF THE OTHER FACTS THAT ARE NECESSARY.
UNDER FLORIDA LAW YOU HAVE TO HAVE A DEFINITE WRITTEN STATEMENT OF THE ELEMENTS OF THE CRIME.
THEY LEFT OUT THE FACT THAT THERE ARE SUFFICIENT AGGRAVATING CIRCUMSTANCES AND INSUFFICIENT MITIGATING CIRCUMSTANCES.
>> ARE YOU, ASSERTING THAT THE, THAT THE JURY WOULD HAVE TO MAKE THAT FINDING IN THE GUILT PHASE?
>> NO, YOUR HONOR, NOT AT ALL.
I THINK UNDER THE CURRENT STRUCTURE, THE JURY COULD FIND THE DEFENDANT GUILTY OF FIRST-DEGREE MURDER OR SECOND-DEGREE MURDER OR WHATEVER.
THEN THE STATUTE SAYS IF THE DEFENDANT IS FOUND GUILTY OF FIRST-DEGREE MURDER, NOT A CAPITAL OFFENSE BUT A FIRST-DEGREE MURDER, THEN YOU HAVE A SEPARATE PROCEEDING AFTER THE DEFENDANT IS FOUND GUILTY OF FIRST-DEGREE MURDER

AND --
>> DO YOU ALSO AGREE THAT
SUFFICIENT HAS BEEN INTERPRETED
AS ONE OR MORE?
>> IT HAS IN STATE VERSUS DIXON
THE COURT INTERPRETED THAT BUT
I SUBMIT THE COURT SHOULD
CONSIDER THE CONTEXT THAT
STATEMENT WAS MADE.
AND THAT WAS THE COURT HAD
JUST, BEEN PRESENTED WITH A NEW
STATUTE AFTER FURMAN.
THE WHOLE FOCUS WAS ON THE
AGENT AMENDMENT.
UNDER 8th AMENDMENT LAW THERE
HAS TO EXIST ONE AGGRAVATING
CIRCUMSTANCE TO LIMIT THE CLASS
OF PEOPLE ELIGIBLE FOR THE
DEATH PENALTY.
TO SAY GENERIC WHETHER
I REQUIRES ONE OR MORE THAT IS
DISCUSSION WHAT IS REQUIRED
UNDER THE 8th AMENDMENT.
WE'RE HERE TALKING ABOUT WHAT
IS REQUIRED UNDERED 5th, 6th
AND 14th AMENDMENTS AND FLORIDA
COUNTERPARTS.
WHERE THE STATUTE SAYS
SUFFICIENT AGGRAVATING
CIRCUMSTANCES THAT IS THE
FINDING THAT THE JUDGE HAS TO
MAKE, NOT ONE OR MORE.
FOR THIS COURT TO SAY ONE OR
MORE RESPECTFULLY VIOLATES THE
SEPARATION OF POWERS.
THE FACT THAT THE LEGISLATURE

LET'S THE COURT DO THAT DOES
NOT CONFER AUTHORITY FOR THIS
COURT TO DO THAT.
SO RESPECTFULLY, WE ASK THE
COURT TO REVERSE MILLER'S DEATH
PENALTY AND REMAND FOR
IMPOSITION OF A LIFE SENTENCE
BECAUSE IT WAS IMPROPERLY
CHARGED AND THE JURY NEVER MADE
FINDING OF FACT HERE THERE WERE
SUFFICIENT AGGRAVATING
CIRCUMSTANCES.
THAT CAN NOT BE HARMLESS ERROR.
IT WAS OVER TIMELY OBJECTION.
WE ASK THE COURT TO VISIT THE
LANGUAGE IN MILLS VERSUS
MARYLAND AND TO SAY, THAT IN
FLORIDA, THE STATUTORY,
RELEVANT STATUTORY MAXIMUM FOR
FIRST-DEGREE MURDER IS LIFE
WITHOUT POSSIBILITY OF PAROLE,
UNLESS, THERE ARE SUFFICIENT
AGGRAVATING CIRCUMSTANCES.
AND INSUFFICIENT MITIGATING
CIRCUMSTANCES.
BECAUSE THAT IS THE FINDING
THAT HAS TO BE MADE, THAT IS
THE FINDING THAT THE DUE
PROCESS ATTACHES TO.
THE ERROR IN THIS CASE CAN NOT
BE HARMLESS ERROR.
I SUBMIT EVEN THOUGH YOU'VE GOT
A HEFTY JURY RECOMMENDATION
HERE THE JURY WAS NOT
APPROPRIATELY INSTRUCTED THAT
THEY MUST FIND BEYOND A

REASONABLE DOUBT SUFFICIENT
AGGRAVATING CIRCUMSTANCES
EXIST.
THEY WERE TOLD YOU HAVE TO FIND
BEYOND A REASONABLE DOUBT THAT
ONE AGGRAVATING CIRCUMSTANCE
EXISTS BUT THAT IS NOT THE TEST
IN FLORIDA.
THAT'S NOT WHAT THE FINDING, IS
THAT HAS TO BE MADE BY THE
SENTENCER.
NOW THE JUDGE IS THE SENTENCER.
THE JUDGE IMPOSES THE SENTENCE.
WE'RE NOT QUARRELING WITH THAT.
WE'RE SIMPLY SAYING THAT TO
BECOME ELIGIBLE, THE DEFENDANT
HAS TO FIND THE DEFENDANT
GUILTY OF FIRST-DEGREE MURDER
AND, WHAT IS REQUIRED BY THE
STATUTE THAT THE JUDGE HAS TO
FIND.
INTERESTINGLY, IF THIS COURT
LOOKS AT THE STATUTORY
REQUIREMENT OF THE JURY
RECOMMENDATION, THE STATUTE
SAYS THE JURY MUST DETERMINE
WHETHER THERE ARE SUFFICIENT
AGGRAVATING CIRCUMSTANCES.
AND WHETHER THERE ARE
INSUFFICIENT MITIGATING
CIRCUMSTANCES TO OUTWEIGH THE
AGGRAVATING CIRCUMSTANCES.
SO THE LEGISLATURE HAS RECENTED
JURY HAS --
>> BUT IT HASN'T SAID IT HAS TO
BE FOUND UNANIMOUSLY, THE

LEGISLATURE HAS NOT.
>> THAT'S CORRECT.
AND IT WOULD NOT HAVE TO BE FOR
THE RECOMMENDATION, THAT THE
RECOMMENDATION BY THE JURY WHAT
SENTENCE TO IMPOSE DOES NOT
HAVE TO BE UNANIMOUS.
THE JURY, THE, IT CAN BE A 7-5.
IT CAN BE, WHATEVER THE
LEGISLATURE SAYS IT HAS TO BE,
THAT'S WHAT IT HAS TO BE
BECAUSE THAT'S THE STATUTORY
RIGHT.
WHEN WE START TALKING ABOUT
ELIGIBILITY FOR THE PUNISHMENT,
THAT'S A DUE PROCESS RIGHT
FOUNDED IN THE CONSTITUTION.
THAT'S WHERE YOU CAN'T AFFORD
LESS PROTECTION TO THE FINDING
OF --
>> THAT'S WHY DOESN'T THIS COME
WITHIN THE EXCEPTION THAT, AT
LEAST, A MAJORITY OF THIS COURT
HAS RECOGNIZED, EVEN IF YOU
ASSUME ALL THESE THINGS, THAT
IN THIS CASE, YOU HAVE,
UNANIMOUS RECOMMENDATIONS FOR
ELIGIBILITY BASED UPON THE
CONTEMPORANEOUS CONVICTIONS OF
THE OTHER FELONIES?
>> IF THERE IS UNANIMOUS
RECOMMENDATION IMPLICITLY THE
JURY FOUND UNANIMOUSLY THERE
ARE SUFFICIENT AGGRAVATING
CIRCUMSTANCES.
THE PROBLEM IS THEY WERE NEVER

INSTRUCTED THAT HAD TO BE
PROVED BEYOND A REASONABLE
DOUBT.
HERE WE DO NOT HAVE IT AND
RESPECTFULLY --,
WE ASK THE COURT TO REMAND
FOR THE IMPOSITION OF A
LIFE SENTENCE.
>> WE'LL TAKE UNDER ADVISEMENT
FOR ALL THE ISSUES THAT HAVE
BEEN RAISED IN BRIEF.
WITH THAT THE COURT WILL BE IN
RYE SES UNTIL WEDNESDAY
MORNING.
>> PLEASE RISE.
SUPREME COURT IS NOW ADJOURNED.