

>> ALL RISE.

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

NEXT CASE ON THE DOCKET IS VICTOR GUZMAN V. STATE OF FLORIDA.

>> MAY IT PLEASE THE COURT, MY NAME IS ANDREW STANTON AND I'M HERE ON BEHALF OF THE APPELLATE VICTOR GUZMAN.

I WOULD LIKE TO FOCUS ON PENALTY PHASE ISSUES.

THIS IS THE CASE WHERE THE RECOMMENDATION CAME DOWN TO A SINGLE VOTE BETWEEN LIFE AND DEATH.

IN THIS CASE THE STATE WAS ABLE TO PREVENT THE JURY FROM HEARING FROM IMPORTANT MITIGATION REGARDING REMORSE, IT WAS ALLOWED TO DENIGRATE MITIGATION ABOUT MENTAL HEALTH WAS WITH REGARD TO REMORSE THE IMPORTANCE OF THIS, THIS IS A CASE WHERE THE DEFENDANT WHEN HE WAS BEING INTERROGATED, REPEATEDLY APOLOGIZING.

THE DEFENSE DURING THE PENALTY PHASE BROUGHT OUT REMORSE AND THE STATE ATTACKED THAT SAYING HE DIDN'T EXPRESS REMORSE TO MITIGATION WITNESSES.

THE JURORS WERE LEFT TO WONDER IF HE WAS SHOWING SO MUCH REMORSE, WHY DON'T WE SIT HERE FOR THREE WEEKS HAVING HIM TELL US HE DIDN'T DO ANYTHING WRONG, THAT IS A COMMON PROBLEM FOR CAPITAL LAWYERS.

THE THING IS THE JURY ISN'T ALLOWED TO KNOW THAT HE WAS WILLING TO FORGO THAT TRIAL.

>> IS THE STATE ALLOWED TO CROSS EXAMINE AND QUESTION ANY KIND OF EVIDENCE THE DEFENDANT MIGHT PRESENT?

>> IF THE DEFENDANT WAS PERMITTED TO PUT ON EVIDENCE OF THIS IT WAS UNDISPUTED BY ANYONE.

>> IS THIS OUT OF THE BLUE?  
ARE YOU SAYING THE STATE DID THIS OUT OF THE BLUE?

>> THIS WAS DURING THE HEARING  
PRIOR TO THE PENALTY PHASE AND  
IT WAS ARGUABLY A STANDARD  
MOTION AND ONE OF THE THINGS ON  
IT WAS TO EXCLUDE PLEA  
NEGOTIATIONS WHICH IS NOT  
CONTROVERSIAL.

NORMALLY A NONCONTROVERSIAL  
ISSUE.

AS THE COURT BEGAN TO SAY NO  
PLEA NEGOTIATIONS THE DEFENSE  
WAITED.

IN THIS CASE HE HIMSELF, THE  
DEFENDANT TOLD THE COURT HE WAS  
WILLING TO PLEAD GUILTY IN  
RETURN FOR A LIFE SENTENCE.

THE COURT SAID LOOK AT THESE  
CASES THE STATE HAS HERE, IT  
SAYS YOU CAN'T ADMIT PLEA  
NEGOTIATIONS.

THE THING IS THE CASES THE STATE  
RELIED ON WERE ABOUT ATTEMPTS TO  
INTRODUCE THE FACT THAT THE  
STATE WAS WILLING TO OFFER A  
LIFE SENTENCE AS PART OF THE  
PLEA NEGOTIATION.

>> I AM STRUGGLING WITH EXACTLY  
HOW A CONDITIONAL DESIRE TO  
ENTER A GUILTY PLEA TO A VOID A  
DEATH SENTENCE IS DEMONSTRATIVE  
OF REMORSE.

THE STATE CAN MAKE THE ARGUMENT  
AS TO WAIT.

NO QUESTION BUT I THINK IT DOES  
SHOW THE THINGS THAT KEPT YOU  
FROM OWNING THIS WAS FEAR OF  
DEATH.

AND TO TELL THE JURY WHEN YOU DO  
THIS IT IS AWFUL HARD TO LOOK AT  
THE PEOPLE YOU HAVE BEEN TELLING  
FOR 3 WEEKS YOUR CLIENT IS NOT  
GUILTY AND THEN TELL THEM  
GUILTY, BUT THERE IS REMORSE.

YOU LOST MOST OF YOUR  
CREDIBILITY WITH THE JURY AT  
THAT POINT AND IF THE JURY CAN'T  
KNOW THE POSITION THE DEFENDANT  
MADE ACCORDING TO WHAT IS  
RECOUNTED BY THE COURT AND THE  
LAWYERS IT WASN'T A QUESTION OF  
THERE BEING AN ACTUAL  
NEGOTIATION, I WANT TO PLEAD  
GUILTY IF I CAN GET LIFE.

AS TO THIS, THE STATE SAYS IT

WASN'T OBJECTED TO, BUT DEFENSE COUNSEL STOPPED THE COURT WHEN GRANTING A MOTION AND SAID I DON'T THINK IT IS A PLEA NEGOTIATION, THE JUDGE, THE DEFENSE SAID IT TAKES TWO TO TANGO AND THIS WASN'T A PLEA NEGOTIATION BECAUSE IT WASN'T NEGOTIATING WITH ANYONE. THE JUDGE SAID HE REMEMBERED THE EVENT AND KNEW WHAT THEY WERE TALKING ABOUT.

STATE CASES DEAL WITH A DIFFERENT SITUATION AND IN FACT COURTS HAVE CONSISTENTLY RECOGNIZED AND OFFERED A PLEA OF GUILTY IS ADMISSIBLE MITIGATION. I DON'T KNOW A CASE WHERE IT WAS A DISPUTED ISSUE.

I HAVE LISTENED TO MY BRIEF CASE AFTER CASE WHERE AMONG THE MEDIATOR'S WAS OFFERED TO PLEAD GUILTY.

COUPLED WITH THIS, WE HAVE A COUPLE ISSUES OF PROSECUTORIAL MISCONDUCT IN THE PENALTY PHASE. MOST CRUCIALLY THE STATE WAS ABLE TO MOCK THE DEFENSE MITIGATION, EXPERT MITIGATION. THERE ARE SOME THINGS THE STATE COULD HAVE SAID AND SOMETHING THAT COULDN'T BUT HERE THE STATE SAID THIS MEDICAL INFORMATION HASN'T GOT A ROLE IN THIS CASE BECAUSE IT DOESN'T EXPLAIN -- IT HAS A ROLE IN THIS CASE WHETHER IT EXPLAINS A MURDER, MOST MITIGATION DOESN'T EXPLAIN A MURDER.

WORSE, THOSE EXPERTS DON'T ADD TO YOUR UNDERSTANDING OF ANY MITIGATION, IT WAS ONLY ABOUT MITIGATION BUT THEN THE PROSECUTOR GOES ON TO SAY THIS IS WHAT CRUEL LOOKS LIKE IN REAL LIFE NOT IN THE MIND OF SOMEONE WHO HAS THEIR HEAD BURIED IN A BOOK AND TELLS YOU SOME STUFF THEY READ AND TRYING TO ACCOUNT FOR WHAT HAPPENED, THIS IS REAL AND HEINOUS AND ATROCIOUS AND COOL.

THIS IS WORSE THAN CALLING IT FLIMSY OR AND EXCUSE, IT IS SOME

STUFF, EXPERTS SHOULDN'T BE HEARD BECAUSE ALL THEY TALK ABOUT IS SOME STUFF IRRELEVANT TO THE HACK.

THEY ARE THE KIND OF PEOPLE WITH THEIR HEAD STUCK IN SOME BOOKS. THE STATE ALSO MADE IN THE COURSE OF THIS MADE ITS ARGUMENT ABOUT WHY THERE WASN'T ANY SHOWING OF REMORSE.

THE STATE ALSO MADE AN ARGUMENT MISSTATING THE NATURE OF THE PRIOR CONVICTION, I DID A POOR JOB IN MY BRIEF EXPLAINING WHY THIS WAS IMPORTANT.

THE THING WAS IN THIS CASE THE PRIOR CONVICTION AGGREGATE WAS APPROVED BY SUBMITTING A COPY OF THE JUDGMENT.

THEY DID NOT CALL WITNESSES TO TESTIFY TO WHAT HAPPENED AND THE PROSECUTOR THEN TOLD THE JURY THE DEFENDANT ATTEMPTED TO KILL THE VICTIM SAYING THAT HE MADE INTENTIONAL ACTS TO KILL HIM. AS WE DISCUSSED EARLIER THIS MORNING THE CHARGE WAS UNDER 782051 WHICH EXCLUDES INTENT TO KILL.

SO THE JURY WAS COMING TO THIS WITH WHAT THE PROSECUTOR SAID AS EXPLANATION OF PRIOR CONVICTIONS, NOT GOING FROM A FACTUAL BACKGROUND.

I WOULD ADD TO THIS THAT THE FACT THE PRIOR CONVICTION AGGRAVATE HER IS INVALID ON ITS FACE AND HIS IMPENDING, THE COURT HAS DENIED MY MOTION TO SUPPLEMENT THE RECORD WITH THE ORIGINAL INFORMATION IN THAT CASE WHICH WOULD ON ITS FACE BEFORE THE COURT DEMONSTRATE VIOLATION OF THE STATUTE OF LIMITATIONS.

I WOULD POINT OUT THE COURT SHOULD NEVERTHELESS CONSIDER THIS BECAUSE TWO CASES WERE CARRIED TOGETHER THROUGHOUT THE ENTIRETY OF LITIGATION ARISING FROM THE SAME ARREST AND INTERROGATION.

EVERY DAY ONE CASE WAS ON, BOTH WERE ON.

AT ONE POINT DURING DISPENSER  
HEARING THEY ADDRESSED THE  
ACTUAL ORIGINAL INFORMATION THE  
DEFENSES WAS SEXUAL BATTERY ON  
MINOR CHARGE INCLUDING THE  
ORIGINAL --

>> IS THIS CASE PENDING ON  
APPEAL OR HAS IT BEEN RESOLVED?

>> IT IS STILL PENDING UNLESS  
THE THIRD DISTRICT ISSUED ITS  
OPINION AT 10:30.

>> SO IT REALLY HAS NOT -- A  
CONVICTION IS A CONVICTION.

>> I AM SUBMITTING THAT THERE IS  
A DIFFERENCE.

MY MOTION HAS BEEN DENIED BUT I  
URGE THE COURT THERE IS A  
DIFFERENCE BETWEEN CASES WHERE  
THERE IS A COMPLAINT YOU SHOULD  
NOT BE ABLE TO USE UNTIL THE  
APPEAL IS COMPLETE OR APPEALABLE  
ON ISSUES THAT REALLY AREN'T  
REVIEWABLE BEFORE THIS COURT BUT  
WHAT WE HAVE IN THE CASE WHERE  
YOU CAN TELL BY LOOKING AT THE  
INFORMATION WITHOUT A DOUBT THAT  
THERE WAS A VIOLATION OF THE  
STATUTE OF LIMITATIONS AND THE  
COURT IS IN A POSITION WHERE WE  
ARE GOING TO ENGAGE IN CHURNING  
WHERE IF THE COURT DOESN'T  
CONSIDER WHAT WE KNOW TODAY, IT  
WILL WAIT FOR THE THIRD DISTRICT  
AND THEY WILL BE ABLE TO GET.

>> ASSUMING IT IS REVERSED ON  
APPEAL, WHAT ARE THE AGGRAVATOR  
THAT WE HAVE?

>> AGGRAVATOR, PRIOR  
CONVICTION AGGRAVATE HER IS  
INVALID AND WHICH THE TRIAL  
COURT GREAT WEIGHT ON, WE HAVE  
ELDERLY ABUSE AGGRAVATE HER AND  
FELONY MURDER AGGRAVATE HER  
WHICH WAS BASED ON THE BASIS OF  
THE SAME OFFENSE.

>> IF IT IS REVERSED BECAUSE  
CURSED BY INTERPRETATION ALL OF  
THIS MAY BE PUT BACK IN THE MIX.  
THERE IS SOMETHING, MAYBE IT  
DOESN'T MATTER FOR ANYTHING BUT  
THIS MURDER OCCURRED IN 2000.  
WHEN WITH THE ARRESTED FOR THIS  
MURDER?  
IN 2004?

>> HE WAS INTERVIEWED WHEN HE WAS ALREADY IN CUSTODY AWAITING DEPORTATION.

>> DID HE SPEND TEN YEARS IN JAIL BEFORE THIS CASE WHEN TO TRIAL?

>> YES.

>> ANY EXPLANATION FOR A 10 YEAR DELAY?

>> I DON'T KNOW IN THIS CASE WHICH I DID NOT GLEAN IT FROM MY REVIEW OF THE DAILY RE-SETTINGS AND THIS WAS NOT A CASE I WAS INVOLVED IN AT TRIAL. THEY HAD HIM IN HAND IN MARCH OF 2004, AND FILED THIS INFORMATION IN APRIL OF 2004 JUST AFTER THE DEADLINE FOR STATUTE OF LIMITATIONS.

>> THE OTHER CASE WHICH TOOK AS LONG TO GET THROUGH THE PROCESS --

>> IT WAS TRIED JUST BEFORE SO THE STATE WOULD HAVE THE AGGRAVATE HER IN HAND.

>> WE DON'T KNOW IF THE DELAY IS STATE'S FAULT, DEFENDANT'S FAULT?

>> I'M NOT PREPARED TO BLAME ANYBODY FOR THAT DELAY.

>> THERE IS NO SPEEDY TRIAL ISSUE?

>> NO, NOT RAISING ONE.

>> SO, WHEN, RING WAS THERE, IN THE COURT BELOW, WAS THERE A RING MOTION MADE?

>> YES, THERE WAS A RING MOTION, VERY LENGTHY RING MOTION. IT WAS ARGUED AND IT WAS DENIED AS WAS THE COURSE OF LITIGATION OVER THE PAST DECADE AND MORE IN THE COURTS ALWAYS A RING MOTION AND WAS ALWAYS DENIED FOR OBVIOUS REASONS.

NOW WE'RE IN A DIFFERENT SITUATION AND WE'RE FACED WITH A CASE WHERE THE RING MOTION SHOULD HAVE BEEN GRANTED AND I DON'T KNOW TO WHAT EXTENT THE COURT WANTS ME TO GO INTO HURST. COURT HAS BEEN HEARING ABOUT THIS FOR A WHILE AND AT THAT POINT I THINK THE COURT MAY KNOW SOMETHING I DON'T ABOUT HOW IT

SHOULD BE INTERPRETED.  
HOWEVER, IF I COULD JUST HIT A  
COUPLE OF ELEMENTS.  
>> HOW WE'RE GOING TO INTERPRET  
IT YOU MEAN?  
>> WHAT?  
>> HOW WE'RE GOING TO TERMS IT?  
>> YOU KNOW HOW YOU THINK IT  
SHOULD BE INTERPRETED.  
>> YES.  
I DON'T KNOW HOW FAR IN THE  
DECISION PROCESS YOU ARE.  
THAT I WILL.  
BUT, JUST TO, HIT A COUPLE  
HIGHLIGHTS, BECAUSE I KNOW THAT  
THE STATE HAS COUNSEL HERE TO  
ARGUE HURST AND HAS SUBMITTED  
SUPPLEMENT AUTHORITY ON THAT  
POINT.  
AS HURST IN ITS LANGUAGE AND THE  
COURT KNOWS THE ARGUMENT ON THE  
LANGUAGE SAYS THESE ARE FACTUAL  
FINDINGS AND CITES 924.1 SUB 3.  
AND REFERS TO ACTUALLY FINDINGS  
BY THE COURT AS TO SUFFICIENCY  
IN MITIGATION AND THE STATUTE  
ITSELF SAID THAT THESE WERE  
FACTUAL FINDINGS.  
THE COURT IS AWARE OF ALL THIS.  
THE STATE HAS SUBMITTED IN ITS  
SUPPLEMENTAL AUTHORITY IN THE  
FORM OF BETTERMAN VERSUS MONTANA  
AND STATE VERSUS BELTON.  
BETTERMAN IS FOOTNOTE IN A CASE  
WHERE THE QUESTION WAS SPEEDY  
TRIAL.  
SIXTH AMENDMENT SPEEDY TRIAL  
RIGHT APPLIED TO SENTENCING  
FACTORS REALLY SENTENCING  
FACTORS.  
WE RESERVE THE QUESTION WHETHER  
THE SPEEDY TRIAL APPLIES TO  
BIFURCATED PROCEEDINGS WHICH AT  
THE SENTENCING STAGE FACTS THAT  
COULD EXCEED THE PRESCRIBED  
SENTENCING RANGE ARE DETERMINED  
SUCH AS CAPITAL CASES WHICH  
ELIGIBILITY FOR THE DEATH  
PENALTY HINGES ON AGGRAVATING  
FACTOR FINDINGS.  
THAT IS NO HOLDING ABOUT  
ANYTHING.  
THE FACT THAT THEY MENTIONED  
THAT SOME SENTENCES DO HINGE THE

DEATH PENALTY ON SPECIFICALLY  
THE AGGRAVATING FACTOR FINDINGS  
DOESN'T CHANGE WHAT THE STATUTE  
HERE WAS AND WHAT THE STATUTE  
INTERPRETED BY HURST WAS.  
SOME STATUTES MAY NOT PUT  
FACT-FINDING IN THE HANDS OF THE  
JUDGE.

THE SECOND CASE, BETTERMAN  
VERSUS MONTANA INVOLVED A  
DEFENDANT WHO WAIVED JURY AND  
THEREBY I BELIEVED WAIVED A  
DETERMINATION OF ELIGIBILITY FOR  
THE DEATH PENALTY.

BUT IF HE HAD SOUGHT A JURY  
TRIAL UNDER OHIO LAW HE WAS  
ENTITLED TO A UNANIMOUS JURY  
VERDICT ON THE DEATH PENALTY.  
SO I'M NOT SURE WHERE THERE'S  
HEADED.

AND THE STATE HAS--

>> WAIT A MINUTE.

YOU SAY HE WAIVED A  
DETERMINATION BY THE JURY?

>> YES.

>> WHAT POINT ARE YOU TRYING TO  
MAKE WITH THAT?

>> I'M TRYING TO MAKE THE POINT  
THAT THE STATE, I DON'T THINK IS  
MOVING ANYWHERE BY CITING THIS  
CASE TO THE COURT.

THIS IS THE SUPPLEMENTAL  
AUTHORITY THAT WAS PROVIDED  
YESTERDAY BY THE STATE.

I'M NOT ARGUING THAT IT SUPPORTS  
ME.

I'M ARGUING THAT IT DOESN'T  
SUPPORT ANYTHING.

I WOULD LIKE TO TOUCH ON KANSAS  
VERSUS CARR BECAUSE THIS COMES  
UP A LOT IN THESE CASES.

I'M NOT SURE THAT ALL OF THE  
OHIO LIGHTS HAVE BEEN HIT--  
HIGHLIGHTS HAVE BEEN HIT IN ALL  
THE CASES BUT THE STATE WANTS TO  
SAY IN KANSAS VERSUS CARR THE  
SUPREME COURT RESOLVED ANY DOUBT  
AS TO WHAT HURST SAID, SAYING  
NO, THESE ARE REALLY ELEMENTS,  
THEY ARE JUDGMENT CALLS.

THE COURT IS AWARE KANSAS VERSUS  
CARR WAS AN EIGHTH AMENDMENT  
CASE.

THE QUESTION BEFORE THE COURT IN

KANSAS VERSUS CARR WAS WHETHER  
IN FACT THAT THE EIGHTH  
AMENDMENT REQUIRE JURORS IN ALL  
CASES ARE INSTRUCTED THAT  
MITIGATORS NEED NOT BE PROVEN  
BEYOND A REASONABLE DOUBT AND  
THAT WAS THE ISSUE DECIDED IN  
KANSAS VERSUS CARR.

THE CASE THE STATE RELIES ON IS  
PREFACED BY THE COURT SAYING  
THAT THIS APPROACHING THE  
QUESTION IN THE ABSTRACT WITHOUT  
REFERENCE TO OUR CAPITAL  
SENTENCING LAW WAS HOW IT WAS,  
HOW IT PREFACED ITS DISCUSSION  
OF THE STATE--

>> DICTA?

>> IT IS SUPER DICTA.

>> I'M NOT SURE WHAT THE  
DIFFERENCE IS BETWEEN SUPER  
DICTA AND DICTA, BUT EVEN DICTA  
CAN SOMETIMES BE INTERESTING AND  
INFORMATIVE IF IT COMES FROM,  
PARTICULARLY IF IT COMES FROM  
OUR HIGHEST COURT.

PARTICULARLY IN A CASE THAT IS,  
I THINK THAT WAS A 8-1 DECISION  
WHERE EIGHT MEMBERS OF THE COURT  
JOINED A DECISION THAT WAS  
ISSUED RIGHT AFTER HURST HAD  
BEEN ISSUED.

ISN'T THAT RIGHT?

>> IT IS BUT, THE REASON I CALL  
IT SUPER DICTA THEY MADE IT  
CLEAR NOT ONLY WAS IT NOT  
NECESSARY TO THE HOLDING OF THE  
CASE BUT IT ALSO WASN'T  
NECESSARILY RELATED TO THE BODY  
OF CAPITAL SENTENCING LAW.  
SO THE, MORE THAN JUST DICTA,  
BUT MORE IMPORTANTLY I THINK IS  
THAT THE COURT SHOULD NOT LOOK  
TO THE EIGHTH AMENDMENT, THE  
DICTA IN THE EIGHTH AMENDMENT  
CASE REGARDING INSTRUCTIONS ON  
MITIGATION BUT SHOULD RELY ON  
THE PLAIN LANGUAGE OF HURST AND  
THE PLAIN LANGUAGE OF FLORIDA  
STATUTE WHICH SAID THAT  
FACT-FINDING ON THESE ISSUES WAS  
MADE BY THE COURT.

>> WHAT DOES HURST SAY ABOUT  
HILDWIN?

I'M SORRY, WHAT DOES HURST SAY

ABOUT SPAZIANO IN SECULAR?  
>> IT SAYS SPAZIANO IS OVERRULED TO THE EXTENT IT ALLOWS, PARDON ME, IT ALLOWS A DEATH SENTENCE BASED UPON FINDING OF AN AGGRAVATOR BY A JURY.  
>> SO THE FOCUS THERE IS ON THE ABSENCE OF A JURY FINDING OF AN AGGRAVATOR?  
>> YES.  
THAT IS WHAT HAPPENED IN SPAZIANO.  
THAT WAS THE ISSUE PRESENTED IN SPAZIANO.  
>> THAT ECHOES THAT FOCUS ELSEWHERE IN THE OPINION, DOES IT NOT?  
>> NOT, I DON'T THINK SO.  
>> THE COURT NEVER REFERS TO THE ABSENCE OF FINDING OF AN AGGRAVATOR?  
>> OF COURSE IT DOES.  
I'M NOT SURE I UNDERSTOOD WHAT THE COURT MEANT IT ECHOES-- LANGUAGE CERTAINLY IS IN THE OPINION BUT SO IS THE LANGUAGE SAYING THAT THE PROBLEM, THE HARM, THE ERROR IN HURST WAS THAT THE DEATH SENTENCE WAS BEING MADE PURSUANT TO FACT-FINDING BY A JUDGE, NOT A JURY, AND IT SPECIFICALLY POINTED TO FACT-FINDING THAT INCLUDED THE FACT-FINDING AS TO SUFFICIENCY IN MITIGATION.  
>> BUT DOESN'T THE COURT THROUGHOUT THE JURISPRUDENCE FROM APPRENDI FORWARD ACQUIT THE FACT-FINDING IT IS TALKING ABOUT WITH THE FINDING OF AN ELEMENT OF AN OFFENSE?  
>> THAT IS ONLY TRUE IF THAT'S THE-- IF, THE FACT-FINDING IS MADE AN ELEMENT OF THE OFFENSE BY THE FACT IT IS NECESSARY TO IMPOSE THE PUNISHMENT THOUGH THE QUESTION IS WHETHER IT'S NECESSARY FACT-FINDING.  
I'M SORRY, JUSTICE.  
>> GO AHEAD.  
>> THE QUESTION THEN IS, WHETHER THAT FACT-FINDING IS NECESSARY TO INCREASE THE PUNISHMENT AND, WHAT I READ HURST AS SAYING THAT

THE FACT FINDING REQUIRED,  
SOMEONE NOT ELIGIBLE UNDER THE  
FLORIDA STATUTE AS IT STOOD FOR  
DEATH UNTIL ALL OF THAT FACT  
FINDING IS COMPLETE.

IT IS NOT A STATUTE THAT SAID,  
OKAY, FIND AN AGGRAVATOR AND DO  
WHAT YOU WANT.

>> IF THAT IS THE CASE, WHY  
WOULD, WHY WOULD SPAZIAN ONLY BE  
OVERRULED TO THE LIMITED EXTENT  
IT WAS OVERRULED?

WHAT IS THE HOLDING OF SPAZIANO.

>> IN SO MANY WORDS I COULDN'T  
TELL YOU EXCEPT--

>> GO AHEAD.

>> EXCEPT TO THE EXTENT THE  
QUESTION WAS WHETHER OR NOT  
COULD HAVE A JUDGE SENTENCING A  
DEFENDANT WHERE IN THE ABSENCE  
OF JURY FINDING OF AN  
AGGRAVATOR.

>> I DON'T THINK IT WAS JUST  
ABOUT AN AGGRAVATOR.

I THINK IN SPAZIANO IN  
PARTICULAR THE HOLDING WAS THAT  
THE SIXTH AMENDMENT AND THE  
EIGHTH AMENDMENT DID NOT  
PRECLUDE A JUDICIAL SENTENCING  
AS OPPOSED TO JURY SENTENCING.  
ISN'T THAT CORRECT?

>> YES.

>> WELL WHY WOULD, IF THE COURT  
MEANT TO ESSENTIALLY TOTALLY  
OVERRULE SPAZIANO WHICH I THINK  
IS WHAT YOUR ARGUMENT WOULD  
ENTAIL, WHY WOULD THE COURT  
SPECIFY IT WAS ONLY OVERRULING  
IT TO THE EXTENT THAT IT DID NOT  
REQUIRE THE JURY TO FIND AN  
AGGRAVATOR?

>> WELL, AS THE COURT POINTS  
OUT, IT REFERS TO THE ABSENCE OF  
AN AGGRAVATOR SEVERAL TIMES.  
AND IT DOES IN THAT PHRASE BUT  
I--

>> TELLING ME SOMETHING I  
ALREADY KNOW.

I'M ASKING YOU WHY THEY WOULD DO  
THAT IF THEY INTENDED TO  
EFFECTIVELY OVERRULE SPAZIANO  
ENTIRELY?

AND YOUR ARGUMENT ESSENTIALLY  
WOULD ENTAIL PUTTING SPAZIANO,

SPAZIANO WOULD HAVE NO EFFECT,  
RIGHT, UNDER YOUR ARGUMENT?  
>> YES, AND I THINK--  
>> WHY WOULD THEY, I DON'T SEE  
HOW YOUR ARGUMENT CAN BE  
CONSISTENT WITH THE NARROW  
OVERRULING OF SPAZIANO THAT IS  
SPECIFICALLY ARTICULATED IN  
HURST?  
WHO I'M NOT TRYING TO MAKE  
SOMETHING UP HERE.  
>> OF COURSE NOT.  
>> I'M TRYING TO FOLLOW WHAT THE  
COURT ACTUALLY SAID IN HURST.  
>> IT SAID THAT IT ALSO SAID  
WHAT THE FACT-FINDING WAS UNDER  
THE FLORIDA STATUTE AND I THINK,  
WITHOUT HAVING READ SPAZIANO  
VERY RECENTLY--  
>> YOU HAVEN'T READ SPAZIANO?  
>> RECENTLY, THIS WEEK, I THINK  
THAT THE IMPLICATION IN THAT  
CASE, THAT THERE'S NOTHING LEFT  
OF SPAZIANO ONCE YOU GET RID OF  
THE ABILITY TO FIND SOMEBODY,  
SENTENCE SOMEBODY TO DEATH BASED  
ON THE EXISTENCE OF A SINGLE  
AGGRAVATOR.  
I WOULD BE HAPPY TO BRIEF THAT  
FURTHER IN A WEEK THAT I HAVE  
REVIEWED SPAZIANO, I'M VERY  
SORRY.  
>> BUT--  
>> WELL INTO MY REBUTTAL I  
THINK.  
THE JUDICIAL FACT-FINDING IN  
THIS CASE, MOREOVER, WAS MORE  
THAN POOR.  
THE SENTENCING ORDER IN THIS  
CASE WAS CURSORY AT BEST IN MANY  
PLACES.  
AS I EXPLAIN IT ALL, MISSTATES  
FACTS.  
BUT, THE COURT, WELL, LET ME HIT  
THIS QUICKLY THEN BECAUSE I  
THINK IT IS IMPORTANT THAT, THE  
COURT CAN READ THE SENTENCING OR  
THE COURT KNOWS THAT AELLO  
REQUIRES THAT THE JUDGE DRESSILY  
ARTICULATE THE EVIDENCE AND WHY  
IT GAVE THE WEIGHT THAT IT DID  
TO THE PROPOSED MITIGATION AND  
THIS, THE JUDGE DIDN'T EVEN TRY.  
SOMETIMES THE JUDGE WOULD JUST

STATE THE PROPOSED MITIGATOR AND SAY WHAT WEIGHT IT GAVE. IT WOULDN'T EVEN DISCUSS THE EVIDENCE OR WHY IT GAVE THE WEIGHT.

MANY OTHER TIMES IT WOULD MENTION THAT THERE WAS EVIDENCE IN SUPPORT OF MITIGATOR BUT THEN JUST STATE THE WEIGHT AND MANY TIMES THEY JUST LEFT OUT IMPORTANT FACTS LIKE THE DEFENDANT WAS DISCIPLINED BY HIS FATHER BECAUSE, MADE TO LIE DOWN, DISROBE AND BE BEATEN WITH A LEATHER WHIP.

THE QUESTION IS, I'M CONFIDENT THIS COURT'S IS GOING TO SAY THIS SENTENCING ORDER IS INADEQUATE AND I THINK IT'S IMPORTANT WE CONSIDER WHAT THE ACTUAL REMEDY WILL BE AND, BECAUSE NORMALLY THE COURT SENDS THE CASE BACK FOR THE JUDGE TO RECONSIDER IT PROPERLY, WRITE A PROPER SENTENCING ORDER AND PART OF A PROPER SENTENCING ORDER IS OF COURSE TO GIVE WEIGHT TO THE JURY'S RECOMMENDATION.

WHEN THIS CASE GOES BACK THERE'S GOING TO BE A PROBLEM BECAUSE WHAT JURY RECOMMENDATION SHOULD THE COURT RELY ON?

THE ONLY JURY RECOMMENDATION IS A 7-5 RECOMMENDATION UNDER AN UNCONSTITUTIONAL STATUTE AND AT THAT POINT THERE IS REALLY NO CONSTITUTIONAL SENTENCING ORDER THE JUDGE CAN WRITE.

I WILL SAVE MY THREE MINUTES, IF I MAY.

>> MAY IT PLEASE THE COURT.

CARINE MITZ, ASSISTANT ATTORNEY GENERAL FOR THE STATE OF FLORIDA AND CO-COUNSEL CHARLENE MILL LAPS.

I WILL BE HANDLING THE HURST MATTERS.

I WOULD FILL IN ON THE FACTS CONCERNING MR. GUZMAN'S OFFER TO PLEA TO THE TRIAL COURT.

WHAT YOU DID NOT HEAR TODAY IS THAT IT WASN'T JUST A ONE-SIDED, ONE-TIME OFFER IN COURT TO THE JUDGE THAT HE WANTED TO PLEA.

THERE IS ACTUAL NEGOTIATIONS  
THAT HAPPENED BETWEEN THE  
PARTIES.

IN FACT DURING NUMEROUS PRETRIAL  
HEARINGS THEY DISCUSSED THE  
POSSIBILITY OF MR. GUZMAN'S  
ENTERING A PLEA.

THE CASE WAS CONTINUED TIME  
AFTER TIME FOR PLEA NEGOTIATIONS  
TO CONTINUE.

THE STATE ASKED MR. GUZMAN'S  
COUNSEL TO PROVIDE A MITIGATION  
PACKET SO THAT THEY COULD, YOU  
KNOW, REALLY CONSIDER THIS.  
AFTER THAT THEY HAD ASKED FOR  
INFORMATION REGARDING HIS  
BEHAVIOR IN JAIL PRETRIAL.  
THAT THE STATE WAS PROVIDED WITH  
THAT IT WASN'T UNTIL MONTHS  
LATER IN COURT THAT TRIAL  
COUNSEL MENTIONED, WE GAVE THE  
STATE A VERY LONG AND DETAILED  
DEATH PENALTY MEMO AND WHILE  
THIS PARTICULAR PROSECUTOR  
WANTED TO WAIVE IT, THE DEATH  
PENALTY COMMITTEE DID NOT.  
SO THIS IN FACT IS A CASE  
INVOLVING PLEA NEGOTIATIONS.  
THERE IS NO DOUBT ABOUT THAT THE  
RECORD SUPPORTS IT.

AND AS WE KNOW, AS HAS BEEN  
CITED IN THE BRIEFS, THE TRIAL  
JUDGE DID NOT ABUSE HIS  
DISCRETION IN GRANTING THE  
MOTION IN LIMINE TO PREVENT THIS  
INFORMATION.

HE HAD A STATUTE.  
HE HAD A RULE, AND HE HAD CASE  
LAUL, ALL EXISTING AT THAT TIME  
THAT SAID THIS WAS NOT PERMITTED  
AS MITIGATION.

AS WE ALL KNOW, MITIGATION IS  
EVIDENCE PRESENTED TO THE JURY  
CONCERNING THE DEFENDANT'S  
CHARACTER, HIS RECORD, OR THE  
CIRCUMSTANCES OF THE CRIME.  
THE FACT THAT HE WANTED TO ENTER  
A PLEA, TO LIFE IN THE FACE OF  
DNA EVIDENCE, AND I THINK THE  
STATISTICS WERE 1 IN  
153 TRILLION IS COMPLETELY  
SELF-SERVING.

THERE IS NO MITIGATION  
WHATSOEVER TO THAT.

SO THE JUDGE WAS PROPER IN GRANTING THAT MOTION IN LIMINE AND EXCLUDING THAT INFORMATION AND HE DID NOT ABUSE HIS DISCRETION.

IN TERMS OF THE COMMENTS THAT WERE ADDRESSED TODAY DURING PENALTY PHASE CLOSING, THE FIRST COMMENT THAT WAS ADDRESSED WAS STATED BY THE PROSECUTOR WHILE HE WAS DISCUSSING HOW HE PROVED THE AGGRAVATOR OF HAC AND HE DID STATE THAT HE HAD NOT OFFERED PSYCHOLOGICAL EVIDENCE IN THIS CASE AND THAT'S WHAT HE WAS DOING.

HE WAS EXPLAINING TO THE JURY THAT IN LIGHT OF THE WEIGHTY AGGRAVATORS HERE HE DID NOT FEEL THE NEED TO PRESENT HIS OWN MENTAL HEALTH EXPERT.

AND IN FACT, HE WAS CORRECT WHEN HE SAID IT DOESN'T EXPLAIN WHY HE MURDERED LOLA.

A MITIGATOR IS NOT LIKE A DEFENSE THAT YOU PRESENT AT THE GUILT PHASE.

IT DOESN'T CHANGE THE FACTS OF THE CRIME.

IT'S AGAIN JUST PRESENTED TO HAVE THE JURY CONSIDER RECOMMENDING LIFE VERSUS DEATH. SO, IT IS THE STATE'S POSITION THERE WAS NO ERROR IN THIS COMMENT.

IT WAS NOT IMPROPER AND EVEN IF THE COURT WERE TO DISAGREE WITH THAT TO FIND IT WAS ERROR IT DOES NOT CONSTITUTE FUNDAMENTAL ERROR AND THAT'S WHAT THE DEFENDANT IS FACING HERE TODAY. HE DID NOT OBJECT AT THE TIME AND SO HE HAS TO PROVE FUNDAMENTAL ERROR.

ERROR THAT GOES DOWN TO THE VALIDITY OF THE TRIAL.

THAT MATERIALLY CONTRIBUTED TO THE CONVICTION, OR PENALTY PHASE, I'M SORRY THE SENTENCE. THE REASON THE JURY VOTED DEATH IN THIS CASE IS BECAUSE THEY WERE PRESENTED WITH EVIDENCE THAT IN DECEMBER OF 2000 HE BRUTALLY MURDERED AN ELDERLY

80-YEAR-OLD WOMAN AND ATTEMPTED TO SEXUALLY BATTER HER. ONLY FOUR MONTHS LATER HE RAPED AND ATTEMPTED TO MURDER A 12-YEAR-OLD. THIS IS WHY THEY RECOMMENDED DEATH.

>> DO WE KNOW WHY THEY VOTED 7-5, FIVE JURORS THOUGHT THAT THIS WAS NOT A DEATH CASE? WE DON'T KNOW WHY?

>> UNFORTUNATELY WE DON'T. THERE WERE NO INTERROGATORIES IN THIS CASE.

>> IN THIS BRIEF BY MR. STANTON SOME SERIOUS PSYCHOLOGICAL AND OTHER MITIGATION. NOT TO EXCUSE THE CRIME BUT TO, HOW OLD WAS THE DEFENDANT AT THE TIME?

>> 27.

>> 27, AS YOU SAY, TO BRUTALLY RAPE AND MURDER AN 80-YEAR-OLD WOMAN. WAS THERE, WAS THERE A ROBBERY?

>> NO.

>> SO IT'S A, IT'S A SENSELESS, HORRIBLE, ACT, PERHAPS ONLY EXPLAINED BY THE DEFENDANT'S MENTAL STATUS, BUT AND THAT'S WHAT THE JURY HEARD. SO, AGAIN, WHEN YOU SAY, YOU KNOW MANY CASES WHERE THERE ARE UNANIMOUS VERDICTS, THIS WAS NOT THAT. THIS IS THE SLIMMEST MARGIN, RIGHT?

ONE MORE JUROR, WHAT WOULD HAVE HAPPENED, 6-6, WHAT WOULD HAVE HAPPENED?

WOULD HE GOTTEN A LIFE SENTENCE?

>> 6-6, YES.

>> WHAT IF THE JUDGE TRIED TO SAY NO, IT IS STILL A DEATH CASE WHAT WOULD HAPPEN UNDER OUR LAW?

>> THAT WOULD NOT STAND. HE WOULD HAVE TO FOLLOW--

>> SO ONE JUROR MORE HE WOULD HAVE BEEN A LIFE SENTENCE.

>> WE DON'T KNOW--

>> CORRECT?

>> CORRECT.

I AGREE, I'M SORRY.

WE DON'T KNOW WHETHER THEY VOTED

7-5 BECAUSE OF THE MITIGATION OR  
SIMPLY BECAUSE OF MERCY.  
WE DON'T KNOW.

UNFORTUNATELY THAT'S THE PROBLEM  
WE HAVE IN THIS CASES THAT WE  
DON'T KNOW.

BUT I URGE THE COURT TO CONSIDER  
THE AGGRAVATORS IN THIS CASE.  
THEY WERE EXTREMELY WEIGHTY.  
IN TERMS OF THE ARGUMENT I WAS  
MAKING WHICH IS FUNDAMENTAL  
ERROR, HE CAN'T PROVE THAT.  
THAT IS WHERE THEY ARE AT  
BECAUSE THEY DIDN'T OBJECT AT  
THE TRIAL LEVEL.

>> SO THE AGGRAVATORS IN THIS  
CASE THAT HE KILLED AN ELDERLY  
PERSON AND THIS WAS HAC?

>> YES IT WAS.

>> AND HE HAD A PRIOR VIOLENT  
FELONY?

>> THREE.

>> NOT, OTHER THAN THE FELONY  
THAT IS ON APPEAL CORRECT?

>> RIGHT.

>> HE HAD A PRIOR VIOLENT  
FELONY.

AND WHAT WAS THAT.

>> HE RECEIVED WITHHOLD ON  
AGGRAVATED BATTERY.

>> EXCUSE ME?

>> A WITHHOLD ADJUDICATION ON  
AGGRAVATED BATTERY.

>> WERE THERE ANY SEXUAL ASPECTS  
OF THAT.

>> I DIDN'T SEE ANY INFORMATION  
IN THE RECORD ABOUT THE FACTS OF  
THAT CASE.

>> WE HAVE THREE SUBSTANTIAL  
AGGRAVATING FACTORS IN THIS  
CASE?

>> WE HAVE FOUR INCLUDING THE  
PRIOR VIOLENT FELONY.

>> CORRECT.

>> IT WAS ALSO DURING THE COURSE  
OF AN ATTEMPTED SEXUAL BATTERY  
AND THE EVIDENCE COMPLETELY  
SUPPORTS THAT.

THE FACT THAT THE VICTIM WAS  
VULNERABLE DUE TO HER AGE AND  
HER HEALTH.

>> SO NOT WITHSTANDING THE CASE  
THAT IS ON APPEAL.

>> CORRECT, .

>> WE STILL HAVE FOUR  
AGGRAVATING FACTORS.  
>> THREE LEFT, YES.  
>> THREE AGGRAVATING TO FACTORS.  
>> THE STATE WOULD SUBMIT  
THEY'RE ALL VERY STRONG.  
>> I DIDN'T HEAR MR. STANTON  
ARGUING A PROPORTIONALITY.  
>> IN TERMS OF PROPORTIONALITY  
THE STATE RELIES ON GORDADO  
VERSUS STATE.  
THIS IS CASE THIS COURT HEARD  
THIS 2007.  
THE DEFENDANT BEAT AND STABBED  
AN ELDERLY WOMAN.  
THE COURT FOUND FIVE AGGRAVATORS  
SOME FOUND IN THIS CASE, PRIOR  
VIOLENT FELONY.  
ENGAGEMENT OF A COMMISSION OF A  
ROBBERY WITH A WIN, HAC.  
THEY FOUND NO STATUTORY  
MITIGATORS IN OUR CASE.  
19 NON-STATUTORY MITIGATORS.  
THE DEFENDANT HAD A LENGTHY ARE  
HISTORY OF DRUG ABUSE.  
THE JUDGE HERD AND GAVE WEIGHT  
TO HIS ALCOHOLISM.  
THE COURT FOUND THE DEATH  
SENTENCE WAS PROPORTIONATE SO  
I'M RELYING ON THAT CASE.  
ONE OTHER POINT I WANTED TO  
MAKE.  
REGARDING THE SENTENCING ORDER  
IT'S THE STATE'S POSITION THERE  
IS NO ERROR.  
THAT THE SENTENCING ORDER  
CONFORMED WITH LAW.  
CAMPBELL, THAT IT ADDRESSED THE  
FACTS.  
I WAS JUST TRYING TO FLIP  
THROUGH IT WHILE OPPOSING  
COUNSEL WAS MAKING THE ARGUMENT.  
I DID NOT SEE ANY MITIGATOR  
WHERE IT WAS JUST ASSIGNED  
WEIGHT.  
HE HAD A COUPLE SENTENCES UNDER  
EACH MITIGATOR BUT IT IS THE  
STATE'S POSITION THE SENTENCING  
ORDER IS FINE.  
IF THE COURT AGREES, IT IS  
REMAND FOR NEW ORDER.  
HE DOESN'T GET A NEW PENALTY.  
IT IS JUST A REWRITING OF THE  
ORDER.

AND IF THE COURT HAS NO FURTHER  
QUESTIONS OF ME CONCERNING THE  
MERITS I WILL TURN THIS OVER TO  
MISS MILLSAPS.

THANK YOU.

>> GOOD MORNING, MAY IT PLEASE  
THE COURT OF THE ASSISTANT  
ATTORNEY GENERAL CHARMAINE  
MILLSAPS.

I DID PROVIDE SUPPLEMENTAL  
AUTHORITY WITH BETTERMAN AND  
THEY'RE NOT, THEIR POSITION IS  
NOT JUST THAT SPAZIANO WAS  
OVERRULED ENTIRELY WHEN IN FACT  
IT WAS ONLY OVERRULED TO THE  
EXTENT REGARDING, AND I QUOTE,  
THAT THEY ALLOWED A SENTENCING  
JUDGE TO FIND AN AGGRAVATING  
CIRCUMSTANCE INDEPENDENT OF THE  
JURY'S FACT-FINDING.

SO NOT ONLY ARE THEY ADVOCATING  
THAT SPAZIANO WAS TOTALLY  
OVERRULED AND NOW JURY  
SENTENCING IS REQUIRED, WHICH OF  
COURSE THE HURST COURTS DIDN'T  
SAY BUT THEY'RE ALSO WANTING TO  
SAY THAT O'BRIEN HAS BEEN  
OVERRULED.

AND O'BRIEN IS THE UNITED STATES  
SUPREME COURT CASE WHICH THEY  
CITE AGAIN AND REAFFIRM AGAIN IN  
BETTERMAN, IS THAT IT'S NOT JUST  
A DISTINCTION BETWEEN FACTS.  
ALL FACTS DO NOT HAVE TO BE  
DECIDED BY A JURY.

IT IS ONLY FACTS THAT INCREASE  
OR AGGRAVATE.

FACTS THAT DECREASE THE PENALTY  
SUCH AS MITIGATION, MITIGATORS  
DO, DO NOT HAVE TO BE DECIDED BY  
A JURY.

THE DISTINCTION BETWEEN ELEMENTS  
AND SENTENCING FACTORS IS VERY  
IMPORTANT.

HAS BEEN REAFFIRMED AND AGAIN  
AND AGAIN AND AGAIN IN BETTERMAN  
REAFFIRMED AGAIN IN THE WAKE OF  
HURST.

YOUR HONOR, JUST BECAUSE--

>> DID THE SUPREME COURT IN  
HURST, COUNSEL HAS MADE THE  
ARGUMENT IT SPECIFICALLY  
REFERRED TO A PARTICULAR  
STATUTORY PROVISION THAT

VIOLATED THE PRINCIPLE THAT THE COURT WAS TALKING ABOUT, AND THAT THAT DID INCLUDE BOTH AGGRAVATORS AND MITIGATORS. IS THAT AN INCORRECT ARGUMENT? >> NO, YOUR HONOR. THE HURST COURT DID, DID CITE TO THE SUBSECTION THAT REQUIRES FACT-FINDING BUT-- >> ASKED TO BOTH AGGRAVATORS AND MITIGATORS? >> YES, THEY DID DO THAT. THEN THEY WENT ON TO EXPLAIN BECAUSE THE JUDGE DOES IT INDEPENDENTLY. THAT WAS NOT PART OF THE HOLDING, YOUR HONOR. WHAT THEY'RE SAYING THERE IS THE JUDGE IS DOING THESE INDEPENDENTLY. THEY WANT AGGRAVATORS FOUND AND THOSE FINDINGS TO BE BINDING ON THE TRIAL JUDGE. BUT, YOUR HONOR, THIS LANGUAGE ABOUT FACTS NECESSARY TO IMPOSE IT IS ALMOST LIKE A SHORTHAND. THEY ARE NOT OVERRULING SPAZIANO COMPLETELY AND THEY ARE NOT OVERRULING O'BRIEN. IN THE WAKE OF HURST, THEY ARE STILL SAYING THERE ARE SENTENCING, THERE ARE SENTENCING FACTORS THAT EXIST. FACTS THAT DECREASE THE PENALTY OR, I'M SORRY, WEIGHING ISN'T EVEN A FACT BUT MITIGATORS. IF THEY, AND THEY DID SAY IN CARR THAT LOOK, THEY, MITIGATORS ARE JUDGMENT CALLS. BUT THEY ADMITTED THAT SOME MITIGATORS, THEY GO ON IN THE PARAGRAPH, IN THAT PARAGRAPH AND SAY LOOK, SOME MITIGATORS HAVE A FACTUAL ASPECT TO THEM. WE'RE NOT DENYING THAT BUT IT IS FACTUAL PLUS A JUDGMENT CALL AND THAT IS WHY THEY DID NOT REQUIRE STANDARD OF PROOF. YOUR HONOR, FACTS HAVE TO INCREASE OR AGGRAVATE THE PENALTY BEFORE THEY BECOME ELEMENTS THAT THE JURY MUST DECIDE. IF THEY DECREASE THE PENALTY,

WHICH IS WHAT MITIGATORS DO,  
THEY DO NOT HAVE TO BE DECIDED.  
THERE IS NO SIXTH AMENDMENT  
RIGHT TO JURY FINDINGS ON  
ANYTHING BUT THINGS THAT ARE  
ELEMENTS.

AND IT'S AGGRAVATORS, AND  
AGGRAVATORS ONLY THAT ARE  
ELEMENTS.

THEY HAVE NOT ABOLISHED OWEN.  
IF YOU SAY THE SIXTH AMENDMENT  
REQUIRES ALL FACTS TO BE FOUND  
BY A JURY, UNDER THE SIXTH  
AMENDMENT, THAT IS GOING TO  
APPLY TO NON-CAPITAL CASES AS  
WELL.

SO YOU HAVE JUST ABOLISHED THE  
CRIMINAL PUNISHMENT CODE AS WELL  
BECAUSE YOU SAID JURORS, JUDGES  
UNDER OUR CRIMINAL PUNISHMENT  
CODE IN NON-CAPITAL CASES MAKE  
FACTUAL FINDINGS, ALL KINDS OF  
FACTUAL FINDINGS WITHIN, WITHIN,  
WITHIN THE RANGE AND THOSE  
FINDINGS ARE MADE BY JUDGES.  
WE DON'T HAVE JURY SENTENCING IN  
NON-CAPITAL CASES.

>> SO WHAT DOES APPRENDI MEAN IN  
THE CONTEXT OF THE NON-CAPITAL  
CASES?

I THOUGHT THAT UNDER THAT LINE  
OF CASES THAT THOSE THINGS, JUST  
AS IN THE CAPITAL CONTEXT, THE  
JURY HAS TO FIND, FOR EXAMPLE,  
THAT HE CARRIED ON A FIREARM  
BEFORE YOU COULD USE THAT TO  
INCREASE THE PUNISHMENT?

>> TO INCREASE.

FACTS THAT INCREASE OR  
AGGRAVATE.

>> I'M SAYING ISN'T THAT WHAT  
APPRENDI SAYS ALSO?

>> ABSOLUTELY, YOUR HONOR.  
APPRENDI, RING, AND NOW, AND  
BETTERMAN.

THEY ALL SAID FACTS THAT  
INCREASE.

MITIGATORS DO NOT INCREASE THE  
PENALTY.

THEY INCREASE THE PENALTY.  
THEY'RE MORE TO AFFIRMATIVE  
DEFENSES.

THE STATE DOESN'T APPROVE  
MITIGATORS.

THE DEFENSE PROVES THEM AT A LOWER STANDARD OF PROOF.  
>> WHAT DO YOU DO WITH THE FACT THAT IN ORDER TO, STILL, IN OR THE-- IN ORDER TO IMPOSE A DEATH SENTENCE THERE HAS TO BE A FINDING?  
WHO DO YOU SAY MAKE THIS IS FINDING THAT THE AGGRAVATORS OUTWEIGH THE MITIGATORS?  
>> I BELIEVE THAT THE UNITED STATES SUPREME COURT IN CARR SAYS THAT'S NOT A FACT. AND IT'S NOT. THAT IS BALANCING.  
>> WHATEVER YOU WANT TO CALL IT, WHO MAKES THAT DECISION?  
>> A JUDGE ALONE MAY MAKE THAT DECISION.  
A JUDGE MAY DETERMINE MITIGATION.  
A JUDGE MAY DO WEIGHING.  
IT IS AN AGGRAVATOR AND AN AGGRAVATOR ONLY, IT IS AGGRAVATORS THAT INCREASE THE PENALTY TO DEATH.  
THEY'RE THE ONLY THING THAT LOOK LIKE THE ELEMENT.  
NOW, YOUR HONOR, WE ALL KNOW WHAT ELEMENTS ARE.  
THEY ARE THINGS THAT THE STATE PROVES BEYOND A REASONABLE DOUBT THAT ARE FACTS.  
WHAT DID THE KANSAS VERSUS CARR COURT SAY?  
STARTED OUT WITH AGGRAVATORS ARE PURELY FACTUAL DETERMINATIONS.  
>> SO HOW DOES-- SO YOU BELIEVE THAT THE JURY STILL MAKES, OR DO YOU BELIEVE THAT THE JURY STILL MAKES A RECOMMENDATION TO THE COURT?  
>> YES.  
>> OKAY.  
AND SO WHAT IS THAT RECOMMENDATION BASED ON?  
>> IT'S BASED ON THE STATUTE. CONSTITUTION DOES NOT REQUIRE--  
>> WANT SOMETHING MORE SPECIFIC THAN IT IS BASED ON THE STATUTE. THE RECOMMENDATION FROM A JURY TO THE COURT IS BASED ON WHAT? AGGRAVATORS AND MITIGATORS, CORRECT?

>> YES.  
AND THERE IS A BALANCING.  
SO YOU FIND, THE JURY FINDS  
AGGRAVATORS.  
THEN THEY FINDS MITIGATION AND  
DECIDES WHICH WEIGHT TO DO THAT,  
AND THEN IT BALANCES THE TWO.  
BUT I'M SAYING THE ONLY ONE OF  
THOSE THINGS THAT EVEN LOOKS  
REMOTELY LIKE AN ELEMENT IS AN  
AGGRAVATOR.  
IT IS A FACT THAT INCREASES,  
THAT THE STATE PROVES BEYOND A  
REASONABLE DOUBT.  
MITIGATORS DECREASE THE PENALTY.  
>> SUFFICIENT AGGRAVATOR DOES  
NOT DECREASE, DOES IT?  
>> WHAT?  
>> WHETHER THERE IS A SUFFICIENT  
AGGRAVATOR DOES NOT DIMINISH,  
DOES IT?  
>> NO.  
I'M TALKING ABOUT--  
>> SO THAT'S PART OF THE FINDING  
AS WELL.  
SUFFICIENCY NOT JUST IN  
AGGRAVATOR BUT A SUFFICIENT  
AGGRAVATOR?  
>> UNDER THE STATUTE BUT WE'RE  
TALKING ABOUT--  
>> I'M ASKING WHO DOES THAT NOW?  
>> THE JURY DECIDES, UNDER OUR  
NEW PENALTY STATUTE, THE JURY  
DECIDES ALL AGGRAVATORS.  
IT IS FINDING-- BINDING ON  
THEM.  
>> DO YOU UNDERSTAND?  
I'M TALKING ABOUT THE WORDS  
SUFFICIENCY OF AGGRAVATOR.  
THEY MAY DECIDE AN AGGRAVATOR  
BUT THERE IS IT STILL THE  
CONCEPT OF A SUFFICIENT  
AGGRAVATOR.  
>> BUT, YOUR HONOR, SUFFICIENT  
ISN'T A FACT.  
THINK ABOUT THAT.  
THAT IS AN ADJECTIVE.  
THAT IS GOING TO BE PART OF THE  
WEIGHING PROCESS.  
>> WELL, IT MAY DETERMINE THAT  
AN AGGRAVATOR THAT I HAVE A  
PREEXISTING CRIME BACK WHEN I  
WAS 10 YEARS OLD, THAT MAY BE AN  
AGGRAVATOR UNDER THE STATUTE BUT

NOT A SUFFICIENT ONE TO IMPOSE DEATH.  
>> BUT SUFFICIENT IS GOING TO GO INTO WEIGHING AND WE'RE SAYING THAT IS NOT EVEN A FACT.  
>> WELL, IT IS ATTACHED TO THE WORD AGGRAVATOR.  
DOESN'T DO ANYTHING OTHER THAN ADDRESS AGGRAVATORS.  
THAT IS WHY I HAVE DIFFICULTY WITH YOUR POSITION IS THAT IT SEEMS TO ME THAT THE JURY NEEDS TO DETERMINE, YOU CAN'T JUST-- IT'S AN ELEMENT OF THE CRIME IS IT BE A SUFFICIENT AGGRAVATOR, NOT JUST AN AGGRAVATOR UNDER THE STATUTE, RIGHT?  
>> UNDER THE STATUTE IT USES A WORD SUFFICIENT.  
>> RIGHT.  
>> THAT IS NOT FACTUAL FINDING.  
>> SIXTH AMENDMENT OF--  
>> THAT IS WHERE WE HAVE FUNDAMENTAL DISAGREEMENT.  
YOU WANT TO SEPARATE THE WORDS AND IT IS NOT JUST AN AGGRAVATOR, IT IS A SUFFICIENT AGGRAVATOR.  
>> NOT ACCORDING TO THE HURST COURT.  
THE HURST COURT USES THE WORD, AN AGGRAVATING CIRCUMSTANCE.  
SO IF WE'RE TALKING ABOUT HURST--  
>> I UNDERSTAND IT USES SUFFICIENT AGGRAVATOR, DOES IT NOT.  
>> WE'RE TALKING ABOUT WHAT THE FEDERAL CONSTITUTION TALKS ABOUT WHEN THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL A JURY DECIDE VERSUS WHAT A JUDGE MAY DECIDE. I'M SAYING THE CONCEPT, THEY NOT ONLY WANT YOU TO SAY JURY SENTENCING IS REQUIRED BUT THEY WANT YOU TO ABOLISH THE ENTIRE CONCEPT OF SENTENCING FACTORS. THERE ARE STILL FACTS THAT A JUDGE MAY DECIDE IN THE WAKE OF A APPRENDI AND RING AND ALLENDE AND REAFFIRMED THAT IN BETTER MAN.  
FACTS THAT ARE STILL EXIST IN THE WAKE OF HURST.

TOUGH READ HURST JUST, THE  
CONVERSE OF WHAT IT'S SAYING.  
>> SO YOU'RE SAYING UNDER BUTTER  
MAN, BETTERMAN, THE A JUDGE IN  
THE WAKE OF, SO, A JUDGE IN THE  
WAKE OF A JURY SAYING THERE IS  
NO SUFFICIENT AGGRAVATION TO  
OUTWEIGH MITIGATION CAN DO WHAT?  
>> YOUR HONOR, IF A-- A JUDGE  
IS BOUND BY THE FACTUAL FINDINGS  
OF THE AGGRAVATOR.  
SO IF THEY FIND NO AGGRAVATOR OR  
REJECT A PARTICULAR AGGRAVATOR,  
THE JUDGE IS BOUND BY THAT.  
HE MAY NOT FIND CONTRARY TO WHAT  
THEY FOUND REGARDING  
AGGRAVATORS.  
>> IF THEY FOUND MITIGATION, AND  
THEY SAY THAT THAT MITIGATION  
OUTWEIGHS AGGRAVATION, THAT, IS  
THAT THE END OF IT?  
>> AND THEY RECOMMEND DEATH BY A  
VOTE, ARE YOU GOING UNDER OUR  
STATUTE?  
>> YEAH.  
>> WHAT'S, WHAT WOULD BE THE  
VOTE?  
IF IT IS 9-3 THAT WOULDN'T COUNT  
UNDER OUR NEW STATUTE.  
IT WOULD BE LIFE AND THE JUDGE  
WOULD, UNDER OUR STATUTE BE  
BOUND BY THAT.  
>> WHAT IF IT'S UNANIMOUS?  
>> WHAT IF IT IS WHAT?  
>> IF IT IS UNANIMOUS WHAT CAN  
THE JUDGE DO?  
>> IF IT IS UNANIMOUS THAT  
RECOMMENDING DEATH, 12-0, THEY  
RECOMMEND DEATH.  
>> SO THAT'S DEATH?  
>> CAN A JUDGE STILL IMPOSE  
LIFE?  
COULD HE OVERRIDE THAT, IS THAT  
WHAT YOU'RE ASKING ME?  
>> THAT IS ONE OF THE QUESTIONS,  
YES.  
>> YES, UNDER OUR STATUTE, UNDER  
OUR STATUTE HE COULD OVERRIDE.  
>> THE JUDGE WOULD DO THAT BASED  
ON WHAT?  
>> BECAUSE HE HAS THE POWER TO  
DISAGREE.  
HE'S BOUND BY THE FACTS THAT  
INCREASE.

FINDINGS THAT, THAT'S THE  
EQUIVALENT OF AN ELEMENT AND ALL  
JUDGES ARE BOUND WHAT THE JURY  
SAYS ABOUT ELEMENTS.

THEY ARE NOT BOUND WHAT THE JURY  
SAYS ABOUT MITIGATION OR  
CONSTITUTIONALLY.

NOW, YOU ALSO HAVE TO FOLLOW OUR  
STATUTE.

SO THEY ARE NOT-- A JUDGE CAN  
SAY, THE JURY DIDN'T FIND THIS  
TO BE MITIGATING.

I DO.

HE CAN DISAGREE WITH THEM.

THAT'S A SENTENCING FACTOR.

MITIGATION IS EQUIVALENT TO A  
SENTENCING FACTOR.

AND HE CAN--

>> CAN A JUDGE-- [INAUDIBLE].

>> RIGHT.

HE CAN NOT INCREASE BY HIMSELF.

HE MUST, NOT ONLY NOT BY  
HIMSELF.

HE IS BOUND.

THAT'S PART OF HURST.

THEY WANT HIM BOUND BY THE JURY  
FINDINGS.

REGARDING THE AGGRAVATORS.

SO I BOUND-- THE JURY MUST GO  
UP BUT THE JUDGE CAN GO DOWN AND  
IT REALLY IS THE DIFFERENCE  
BETWEEN AN ELEMENT AND A  
SENTENCING FACTOR.

THERE ARE STILL FACTS THAT  
JURORS, THAT JUDGES MAY DECIDE  
INCLUDING MITIGATION BY  
THEMSELVES.

THE SIXTH AMENDMENT ONLY RIGHT  
TO JURY TRIAL PROVISION ONLY  
COVERS FACTS THAT INCREASE OR  
AGGRAVATE MINIMUM MANDATORY.

>> YOU HAVE GONE WELL OVER YOUR  
TIME.

THANK YOU FOR YOUR ARGUMENTS.

>> THANK YOU VERY MUCH.

>> COUNSEL?

>> JUST TO HIT A FEW THINGS  
QUICKLY THEN.

AS TO THE OFFER TO PLEAD GUILTY,  
YES OF COURSE THERE WERE PLEA  
NEGOTIATIONS AS THERE ALWAYS  
WERE.

AND PACKETS ARE PREPARED AND  
MEETINGS ARE HAD AND THERE AN

ATTEMPT TO GET A WAIVER RATHER THAN TO HAVE TO ENTER A PLEA OF THE POINT HERE IS THAT THE DEFENDANT PERSONALLY OFFERED OUTSIDE OF THAT PROCESS TO PLEAD GUILTY AND THE JURY NEED NEEDED TO KNOW THAT ABOUT HIM FOR THE REASONS I STATED.

AS TO THE 7-5 RECOMMENDATION, MAY HAVE COME FROM THE STATE REPEATEDLY CHARACTERIZES THE MITIGATION AS WEAK IN THIS CASE. THERE IS A REASON THERE WAS A 7-5.

THERE WAS THE MENTAL HEALTH MITIGATION AND JUST OVERWHELMING BACKGROUND MITIGATION ABOUT HIS GROWING UP IN PERU AND THE FACTORS THAT LED TO HIS PSYCHOLOGICAL PROBLEM. THIS IS A VERY RICH MITIGATION RECORD.

THE PRIOR CONVICTION, THERE WAS THE ONLY CASE THAT WAS ADMITTED BECAUSE THE STATE SAID THAT THEY WOULD NOT AND COULD NOT ADMIT THE OTHER CASE.

THE SENTENCING ORDER, THE STATE HASN'T SEEN ANY-- [INAUDIBLE]. THE DEFENDANT HAS A MOTHER, WANTS TO MAINTAIN HER RELATIONSHIP WITH HIM OF THE COURT GIVES THIS LITTLE WEIGHT. THE DEFENDANT HAS A EMOTIONAL SCARS.

THE COURT GIVES THIS SLIGHT WEIGHT.

THAT IS AN EVALUATION.

THAT'S A ONE-WORD DESCRIPTION. AND THE QUESTION REALLY IS, THAT, SAPS LEAVES OFF, THERE IS QUESTION WHETHER THERE IS AN ELEMENT

THE FEDERAL LAW IS CONSEQUENCE OVER WHAT THE STATE DECIDES. THE STATE, OBJECT TO WHAT OTHER LIMITATIONS THERE MAY BE THE STATE DECIDES WHAT FACT-FINDING THERE MUST BE IN ORDER TO IMPOSE A GIVEN SENTENCE.

THE STATE DECIDED IN FLORIDA, THAT FACT-FINDING, SO-CALLED IN SO MANY WORDS, WAS NECESSARY BEFORE SOMEBODY WAS IN FACT

ELIGIBLE FOR THE DEATH PENALTY  
AND THOSE STATE DECISIONS HAVE  
FEDERAL CONSEQUENCES.  
IT BINDS THE STATE BY THE  
FEDERAL CONSTITUTION.  
THANK YOU.  
>> THANK YOU FOR YOUR ARGUMENTS.