>> ALL RISE.
>> SUPREME COURT OF FLORIDA IS NOW IN SESSION.
PLEASE BE SEATED.
>> THE NEXT CASE ON THE DOCKET IS BRADLEY V STATE.
>> GOOD MORNING.
MAY IT PLEASE THE COURT, I'M NANCY RYAN REPRESENTING THE APPELLANT, BRANDON BRADLEY.
THIS IS A DIRECT APPEAL FROM A DEATH SENTENCE AND THUS IT'S IN THE PIPELINE FOR APPLICATION OF HURST V FLORIDA.
I DO NOT INTEND TO WAIVE ANY OF THE ARGUMENTS MADE IN THE BRIEF.
THIS COURT HAS HEARD THEM MANY TIMES AND WILL HEAR MORE LATER THIS WEEK ON THOSE ISSUES.
AGAIN, I DO NOT INTEND TO WAIVE ANYTHING, BUT WISH TO CONCENTRATE ON THE ISSUES PARTICULAR TO THIS CASE AS TO RING VERSUS ARIZONA.
I DO NOT INTEND TO WAIVE THE ARGUMENT THAT SOMEDAY UNANIMITY WILL BE REQUIRED IN PENALTY PHASES.
AS TO CALDWELL VERSUS MISSISSIPPI, WHAT DOES SEEM CLEAR IS THAT THE PRE-HURST STANDARD JURY INSTRUCTIONS THAT WERE READ IN THIS CASE UNDER THE OLD STATUTE DO IN FACT RUN AFOUL OF CALDWELL IN THAT ON OVER TWO DOZEN OCCASIONS THEY REMIND THE JURY THAT ITS ROLE IS MERELY ADVISORY.
>> AND OF COURSE IF HE'S ENTITLED TO RELIEF UNDER HURST, THAT ARGUMENT [INAUDIBLE].
>> NOT NECESSARILY, YOUR HONOR.
NO, YOUR HONOR.
AGAIN, I'M NOT WAIVING THE ARGUMENT THAT SECTION 775.082 OF THE STATUTES DOES REQUIRE VACATION OF THE SENTENCE AND IMPOSITION OF A LIFE SENTENCE.
I DO MAINTAIN THAT POSITION, YOUR HONOR.

BUT IF THIS COURT DOES -- AND IT DOES END UP REACHING THE CALDWELL ISSUE, THE QUESTION ARISES WHETHER ANY ERROR IN READING THE OLD STANDARD INSTRUCTIONS CAN BE DEEMED HARMLESS.
MY POSITION IS THAT THEY CANNOT BECAUSE THEY AMOUNT TO STRUCTURAL ERROR IN THAT THE JURY WAS NOT FORCED TO GRAPPLE WITH ITS DECISION.
IF THIS COURT DISAGREES AND REACHES THAT QUESTION, THE ISSUE BECOMES WHETHER THE STATE CAN SHOW BEYOND A REASONABLE DOUBT THAT THE ERROR IN READING THE STANDARD INSTRUCTIONS WAS HARMLESS.
AND MY POSITION IS THAT THEY CAN'T DO THAT ON THIS RECORD, PRIMARILY BECAUSE OF THE PROSECUTORIAL MISCONDUCT THAT TOOK PLACE AT THE VERY END OF THE PENALTY PHASE.
WHEN TYING UP HIS ARGUMENT, COUNSEL FOR THE STATE ARGUED I SUBMIT TO YOU THAT AFTER WEIGHING THE EVIDENCE, YOU WILL COME TO THE SAME CONCLUSION JUSTICE CALLS FOR, THE PILL FAMILY CALLS FOR, THE BREVARD COUNTY SHERIFF'S DEPARTMENT CALLS FOR AND THE LAW ENFORCEMENT CALLS FOR.
>> [INAUDIBLE] NO SPECIFIC FINDINGS IN THE PENALTY PHASE HERE.
WAS IT REQUESTED?
>> YOUR HONOR, I DON'T RECALL.
I DON'T BELIEVE SO.
I KNOW THE FIFTH CIRCUIT PUBLIC DEFENDER'S ALSO REQUEST THAT.
I DON'T BELIEVE THE 18TH CIRCUIT PDs REQUEST THAT, YOUR HONOR.
THE JURY AFTER HEARING THAT ARGUMENT HAD BEEN CLEARLY OVER-INFORMED ABOUT FACTS WHICH WERE NOT IN EVIDENCE AND COULD NOT HAVE COME INTO EVIDENCE.

PAYNE V. TENNESSEE HOLDS THAT
SURVIVORS OF THE VICTIM CANNOT
COME INTO COURT AND ANNOUNCE TO
THE JURY WHAT OUTCOME THEY WOULD
LIKE TO SEE RESULT.
IT'S OF COURSE EQUALLY
IMPERMISSIBLE FOR COWORKERS OF
THE VICTIM TO COME IN AND
ANNOUNCE THEIR VIEWS.
A CURATIVE INSTRUCTION WAS
GIVEN.
I SUBMIT TO YOU IT'S OF A KIND
THIS COURT CALLS LEGENDARY
INEFFECTIVENESS.
WHEN THE JURY IS TOLD TO
DISREGARD IT, THIS COURT SAYS
THEY CAN'T.
THEY'RE HUMAN.
THEY CAN'T DO A MEMORY ERASE,
WIPE KIND OF THING.
HERE IT'S THE SAME THING.
WE HAVE A JURY THAT WAS TOLD
DON'T WORRY SO MUCH ABOUT YOUR
VERDICT, IT'S MERELY ADVISORY,
BUT EVERY AUTHORITY FIGURE IN
THE COURTROOM ABSENT THE JUDGE,
PLUS ALL THE AUTHORITY FIGURES
WHO WILL KEEP YOU SAFE IN YOUR
COMMUNITY WANT A DEATH PENALTY.
THAT IS NOT THE IMPARTIAL JURY
THAT MR. BRADLEY WAS ENTITLED
TO.
THE HEIGHTENED RELIABILITY IN
SENTENCING PROCEEDINGS WHICH
HE'S ENTITLED TO WAS VIOLATED.
AND THAT DUE PROCESS WAS
VIOLATED.
THE STATE ARGUES THE DOOR WAS
OPENED BY THE DEFENSE'S GUILT
PHASE ARGUMENT.
IN THE GUILT PHASE, THE DEFENSE
HAD ALSO TO WORK WITH.
IT WAS, AS THE COURT KNOWS, A
VERY AGGRAVATED CASE WHERE THE
KILLING ITSELF DID APPEAR ON A
VIDEOTAPE.
AND THE DEFENSE ARGUED THAT THE
BREVARD COUNTY SHERIFF'S OFFICE
WANTED VENGEANCE AND HAD BEEN
SLOW TO GATHER EVIDENCE AND HAD

POSSIBLY BEEN GUIDED IN THAT
REGARD IN GIVING TESTIMONY.
THE STATE TAKES THE POSITION NOW
THAT -- OR THE STATE TOOK THE
POSITION IN THE TRIAL COURT AND
ARGUES NOW THAT THE DOOR WAS
THEREFORE OPENED TO THE ARGUMENT
I OBJECT TO IN THE PENALTY
PHASE.
I SUBMIT TO YOU THE DOOR WASN'T
OPENED THAT FAR.
DEFENSE COUNSEL'S COMMENTS WERE
LIMITED TO THE BREVARD COUNTY
SHERIFF'S OFFICE.
THERE WAS NEVER ANY MENTION BY
COUNSEL OR ANY EVIDENCE OF WHAT
THE VICTIM'S FAMILY WANTED.
SO I SUBMIT TO YOU THAT THE
CALDWELL ERROR CANNOT BE
HARMLESS FOR THIS REASON AND
THAT THE ARGUMENT IN ITSELF
VIOLATED THE RIGHT TO AN
IMPARTIAL JURY.
THE JURY WAS ALSO OVER-INFORMED
IN THE EVIDENTIARY PORTION OF
THE GUILT PHASE, WHEN WITNESS
AMANDA OZBURN WAS CALLED,
PRIMARILY FOR THE STATE, TO
IMPEACH HER WITH HER
OUT-OF-COURT STATEMENT THAT THE
DEFENDANT HAD TOLD HER IF HE
WERE EVER PULLED OVER BY POLICE,
THEY'D HAVE TO HOLD COURT IN THE
STREETS BECAUSE HE'S GOING OUT
LIKE A SOLDIER.
I SUBMIT THAT WAS HIGHLY
PREJUDICIAL IN BOTH PHASES.
THE STATE IN ITS -- SORRY.
>> THE LAW IS, OF COURSE, THAT
YOU CANNOT CALL A WITNESS JUST
SO YOU CAN IMPEACH THEM WITH A
PRIOR INCONSISTENT STATEMENT.
BUT WAS THIS WITNESS -- DID THIS
WITNESS OFFER ANY OTHER
SUBSTANTIVE EVIDENCE ON ANY OF
THE DISPUTED ISSUES THAT WERE
PRESENTED DURING THIS TRIAL?
>> NONE THAT WERE DISPUTED, YOUR
HONOR.
THE DEFENDANT --

>> SHE TESTIFIES ABOUT HIS
POSSESSION OF THE GUN, RIGHT?
>> YES, YOUR HONOR.
>> OKAY.
AND THAT LINKED HIM TO THE
MURDER WEAPON, CORRECT?
>> NO.
THERE'S NO QUESTION OF IDENTITY
IN THE CASE, YOUR HONOR.
THE DEFENDANT IN HIS STATEMENT,
WHICH WAS PLAYED FOR THE JURY,
ADMITTED THAT HE CARRIED A GUN
AND ADMITTED THAT HE WAS AWARE
HE HAD WARRANTS OUT FOR HIS
ARREST.
THOSE WERE PRIMARILY THE OTHER
FACTS THAT WITNESS OZBURN WAS
CALLED TO SET OUT FOR THE JURY'S
BENEFIT.
ALSO, THE CODEFENDANT, ANDRIA
KIRCHNER HAD TESTIFIED, HE
CARRIES A GUN, HE'S NERVOUS
ABOUT THE COPS, HE DOESN'T WANT
TO GET PULLED OVER.
>> LET ME ASK YOU A QUESTION ON
WHAT THE STATE KNEW BEFORE SHE
CAME TO THE STAND.
IF SHE HAD RECALLED WHAT SHE
SUPPOSEDLY SAID TO THE POLICE,
SHE COULD HAVE BEEN CALLED TO
PROVIDE THAT STATEMENT AS AN
ADMISSION.
>> YES, YOUR HONOR.
>> THE STATE -- IS THERE
EVIDENCE IN THE RECORD THE STATE
ALREADY KNEW BEFORE THEY CALLED
HER THAT SHE DID NOT ADMIT OR
REMEMBER MAKING THAT STATEMENT?
>> YES, YOUR HONOR.
>> SO, I MEAN, AGAIN, THIS IS A
FRIENDLY QUESTION.
AND THE PROFFER, IT'S PRETTY
CLEAR THAT'S THE STATEMENT THAT
THE STATE WANTED TO ELICIT.
>> IT WAS ABUNDANTLY CLEAR, YOUR
HONOR, AND IT'S MY POSITION THAT
--
>> BUT THEN THE JURY -- AND WHAT
WAS IT IMPEACHING OF?
I MEAN, IF SHE DOESN'T REMEMBER

IT, IT'S NOT INCONSISTENT WITH
WHAT SHE'S SAYING AS TO THE GUN
OR WHATEVER.
HOW DID THAT EVEN COME OUT AS
IMPEACHMENT?
>> MY POSITION IS THAT YOU ARE
CORRECT IN THAT THERE WAS
ACTUALLY NO BASIS FOR IT TO COME
IN AT ALL.
>> BUT WOULDN'T THAT BE AN
ALTERNATIVE GROUND, WHICH IS
THAT IT SHOULDN'T -- IT WASN'T
IMPEACHING HER TESTIMONY.
>> WELL, SHE DENIED EVER -- SHE
SAID SHE DID NOT -- SHE SAID SHE
DIDN'T RECALL EVER MAKING SUCH A
STATEMENT TO POLICE.
>> BUT THEY KNEW THAT BEFORE
THEY PUT HER ON.
>> THEY DID.
THEY DID.
>> IT WOULD BE DIFFERENT -- AND
THIS IS FOR THE STATE -- IF THE
STATE HAD EXPECTED TO CALL HER
BECAUSE SHE HAD ALREADY SAID THE
STATEMENT, WHICH IS SHE HAD TOLD
THE STATE ON NUMEROUS OCCASIONS
HE TOLD ME HE WOULD GO OUT LIKE
A SOLDIER.
AND THEN WHEN THEY ASKED HER
THAT QUESTION, AND SHE GOES, I
DON'T RECALL SAYING IT, THEY
THEN COULD IMPEACH HER WITH
THAT.
>> YOU'RE RIGHT, BUT THAT'S NOT
WHAT HAPPENED HERE.
>> SHE DID IN FACT -- LET ME
MAKE SURE I'M CLEAR HERE.
SHE DID IN FACT ON THE STAND SAY
SOMETHING TO THE EFFECT OF IF HE
WAS CONFRONTED BY THE POLICE, HE
WOULD RUN, WHICH IS A DIFFERENT
STATEMENT FROM IF I'M CONFRONTED
BY THE POLICE, I'M GOING TO GO
OUT LIKE A SOLDIER.
IS THAT CORRECT?
>> THAT'S TRUE, YOUR HONOR.
AND THAT MAY HAVE BEEN THE
JUDGE'S REASONING.
>> THAT IN HER TESTIMONY AT

TRIAL, THAT IF HE WAS CONFRONTED
BY THE POLICE, HE WOULD RUN.
>> YOUR HONOR, YES, SHE DID SAY
THAT.
THAT WAS -- IT WAS UNDISPUTED
THAT HE WOULD RUN.
AND THAT MAY HAVE BEEN THE
JUDGE'S REASONING, IS THAT SHE
HAS CHANGED HER STATEMENT.
ANOTHER PIECE OF EVIDENCE THAT
CAME IN THAT SHOOT NOT HAVE WAS
THAT THE PROBATION OFFICER WAS A
HIGH-RISK SPECIALIST.
THE CODEFENDANT CAME IN AND
TESTIFIED THAT HE TOLD ME JUST
BEFORE HE FIRED, I GOT TO TAKE
THIS CRACKER OUT, SHE SAW MY
FACE.
IT WAS HOTLY DISPUTED WHETHER HE
EVER SAID ANY SUCH THING.
IT CANNOT BE HEARD ON THE
VIDEOTAPE.
AND MISS OZBURN'S STATEMENT MADE
IT --
>> SHE WAS ON THE PHONE AT THE
TIME THAT SHE WAS -- PART OF THE
TIME THAT SHE WAS TALKING TO THE
DEFENDANT, CORRECT?
>> YES, WITH ONE DIEGUEZ.
>> AND THE PERSON SHE WAS
TALKING TO ON THE PHONE
TESTIFIED AT THE TRIAL, CORRECT?
>> HE DID.
>> AND SO DID THAT PERSON HEAR
THAT STATEMENT?
>> HE SAID DIFFERENT THINGS AT
DIFFERENT TIMES.
HE KEPT ADDING WHAT HE HAD
HEARD.
HE DID TESTIFY AT TRIAL THAT HE
HEARD THAT STATEMENT OVER THE
PHONE.
HE WAS VERY HEAVILY IMPEACHED.
IT WAS VERY MUCH AT ISSUE AT
TRIAL WHETHER HE HAD SAID ANY
SUCH THING, WHETHER
PREMEDITATION COULD IN FACT BE
FOUND IN THE CASE, BECAUSE WE
DISPUTED THE FACT --
MISS KIRCHNER'S TESTIMONY THAT

HE EVER SAYS SUCH A THING.
THE SHOTS WERE FIRED IN SUCH A RAPID SUCCESSION, THE JURY MAY HAVE FIND THERE WAS NO PREMEDITATION.
THIS WAS A HOTLY-CONTESTED ISSUE.
>> HE WAS BEING CONFRONTED BY A LAW ENFORCEMENT WHO HAD NO WEAPON DRAWN AND WAS ASKING HIM TO EXIT THE VEHICLE, WAS ATTEMPTING TO TURN OFF THE IGNITION BECAUSE HE WAS STILL MOVING THE CAR FORWARD.
AND HE CHOSE -- INSTEAD OF GETTING OUT OF THE CAR, INSTEAD OF TURNING THE CAR OFF, HE CHOSE TO GET THE WEAPON AND SHOOT HER.
YOU DON'T THINK THAT DEMONSTRATES PREMEDITATION?
>> THE JURY COULD HAVE COME TO EITHER CONCLUSION.
THE FELONY MURDER THEORY WAS DISPUTED AS WELL IN THAT THE ROBBERY CONSISTED OF A THEFT FOLLOWED BY A BRUSH WITH THE SUV.
>> DID HE SHOOT SEVEN TIMES?
>> PARDON, YOUR HONOR?
>> DID HE SHOOT HER SEVEN TIMES?
>> FIVE SHOTS HIT THE TARGET.
>> THAT'S NOT PREMEDITATION?
>> THE SHOTS ARE FIRED IN EXTREMELY RAPID SUCCESSION.
THE POSITION AT TRIAL --
>> YOU GOT TO PULL THE TRIGGER EACH TIME, DON'T YOU?
>> I'M NOT FAMILIAR WITH AUTOMATIC OR SEMIAUTOMATIC FIREARMS, YOUR HONOR.
THE TESTIMONY WAS THAT THE WEAPON HAD AVERAGE PULL.
THE JURY COULD HAVE GONE EITHER WAY.
>> IT WAS AN AUTOMATIC.
NOT AN AUTOMATIC FIREARM.
>> I BELIEVE IT WAS SEMIAUTOMATIC.
LIKE I SAID, THE JURY COULD HAVE GONE EITHER WAY WITH IT, BUT IT

WAS DISPUTED AT TRIAL.
I'VE MADE TWO DIFFERENT
ARGUMENTS AS TO THE PENALTY
PHASE.
THE STATE ATTEMPTS TO DISMISS
THE ARGUMENT AS TO MISS OZBURN'S
STATEMENT AS TO SIMPLY BASED ON
THE UNRELIABILITY OF THE
STATEMENT.
>> AS I UNDERSTAND IT, YOU'RE
SAYING THAT MISS OZBURN'S
STATEMENT NOT ONLY ABOUT-- WHAT
WAS IT?-- THAT I'M GOING TO GO
OUT LIKE A SOLDIER, WAS USED AS
A PART OF THE CCP?
>> IT WAS, YOUR HONOR.
IT WAS HARMFUL IN BOTH PHASES
FOR THAT REASON.
AND IT WAS FURTHER AN ABUSE OF
DISCRETION TO ADMIT IT BECAUSE
IT WAS TOO UNRELIABLE TO BE
HEARD AT THE SENTENCING PHASE.
I'VE MADE A DISTINCT ARGUMENT TO
THAT EFFECT IN THE BRIEF.
>> LET ME ASK YOU, IN THE
SENTENCING PENALTY PHASE, DID
THE POLICE OFFICER THAT SHE
ALLEGEDLY TOLD THE STATEMENT TO
TESTIFY THAT SHE MADE THAT
STATEMENT?
IS
>> NO.
>> SO HOW DOES -- WHO RELIED ON
THAT STATEMENT IN FINDING CCP?
WHERE IS THERE AN INDICATION?
DID THE -- BECAUSE IT WAS ONLY
IN FOR IMPEACHMENT, NOT FOR
SUBSTANTIVE EVIDENCE.
HOW WAS IT ARGUED BY THE STATE
OR USED BY THE JUDGE IN FINDING
CCP?
>> THE STATE ATTORNEY DID RELY
ON IT.
IT WAS FIRST TO ARGUE IT AS
RELEVANT TO MISS OZBURN'S
CREDIBILITY.
AS I'VE ARGUED IN THE BRIEF, I
BELIEVE THE STATE WENT TOO FAR
IN ARGUING.
WHAT COUNSEL FOR THE STATE SAID

WAS THAT MISS OZBURN'S TOLD YOU
HE WOULD RUN AT A MINIMUM IF HE
WERE CAUGHT, THEREBY NUDGING AND
WINKING THE JURY TO RECALL THE
STATEMENT THAT SHOULD NOT HAVE
COME IN.
>> IT HAS TO BE SUBTLE.
I MEAN, THAT'S PRETTY -- TO ME.
>> AND THAT WAS ARGUMENT THAT
WAS MADE AT THE GUILT PHASE?
>> PENALTY PHASE.
BUT IN THE PENALTY PHASE I'VE
ALSO ARGUED THAT --
>> BUT THE STATE DIDN'T ATTEMPT
AND THE JUDGE DIDN'T USE THAT
STATEMENT IN FINDING CCP.
>> NOT EXPRESSLY, AS I RECALL.
BUT I'VE ALSO TAKEN THE POSITION
AS TO MISS OZBURN'S STATEMENT
THAT IT'S INADMISSIBLE ON
SEPARATE GROUNDS BECAUSE IT
UNDERMINES THE HEIGHTENED
RELIABILITY THAT'S REQUIRED IN
PENALTY PHASE PROCEEDINGS.
I'VE PROVIDED THE COURT IN THE
BRIEFS WITH A PAGE OF FEDERAL
CITES TO THAT EFFECT.
I WAS NOT ABLE TO FIND A FLORIDA
CASE WHICH HELD HEARSAY SHOULD
NOT HAVE COME IN IN THE PENALTY
PHASE BECAUSE IT WAS NOT SHOWN
TO BE RELIABLE.
HERE THE WITNESS SAID NOT ONLY
THAT SHE DIDN'T REMEMBER EVER
TELLING THE POLICE ANY SUCH
THING, BUT THAT SHE DIDN'T
REMEMBER HEARING ANY SUCH THING.
>> BUT I THOUGHT YOU JUST SAID
-- WE HAVE HELD HEARSAY COME IN
IF IT'S RELIABLE.
I THOUGHT YOU SAID IT WASN'T A
SEPARATE ATTEMPT TO GET IN THAT
STATEMENT AS HEARSAY BY THE
POLICE OFFICER TESTIFYING IN THE
PENALTY PHASE.
>> NO.
IT DIDN'T COME IN IN THE PENALTY
PHASE.
IT DID NOT COME IN IN THE
PENALTY PHASE.

BUT IT ESTABLISHED THE STATE'S
THEME THROUGHOUT.
>> SO IT NEVER CAME IN AS
HEARSAY.
IT CAME IN AS IMPEACHMENT.
>> CORRECT.
BUT MY POSITION IS IT WAS USED
BY THE STATE AS SUBSTANTIVE
EVIDENCE AND THAT IT WAS SO
STRONG IN ITSELF THAT THE JURY
COULD NOT HAVE PUT IT IN A
LITTLE BOX.
>> SO WHEN DID THE STATE USE IT
AS SUBSTANTIVE EVIDENCE?
>> JUST WHEN I'VE JUST REFERRED
TO, YOUR HONOR, IN THE GUILT
PHASE.
>> AT A MINIMUM.
>> AT A MINIMUM.
THAT'S WHAT I'M RELYING ON.
YES, YOUR HONOR.
THE VERY COMPOSITION OF THE JURY
AND ANOTHER ISSUE MAY HAVE BEEN
AFFECTED BY THE LIMITS THE COURT
PUT ON QUESTIONING OF A WITNESS,
WHETHER THEY WOULD STILL
CONSIDER MITIGATION IF THEY KNEW
THE DEFENDANT WAS ON RUN FROM A
ROBBERY AND ON PROBATION FOR AN
EARLIER ROBBERY WHEN HE SHOT
DEPUTY PILL.
MOST OF THOSE FACTS WERE COMING
INTO EVIDENCE AND EVERYBODY KNEW
IT.
MY POSITION IS THAT WHEN -- THE
JUDGE DID NOT ALLOW THAT.
SHE SAID YOU CAN'T TELL THEM
HE'S ON PROBATION FOR ROBBERY.
THAT'S NOT FAIR TO HIM.
DEFENSE COUNSEL OFFERED TO WAIVE
ANY ISSUE IN THAT REGARD ON
APPEAL.
>> IT JUST TEAMS TO ME THAT THE
QUESTION IS ASKING THE JURY TO
COMMIT TO SOMETHING BEFORE THEY
HEAR THE EVIDENCE.
>> THAT'S WHAT THE STATE ARGUED
IN THE --
>> THAT'S WHAT IT SEEMS TO ME.
I MEAN, THAT'S SOMETHING WE DO

NOW, ASK JURORS TO COMMIT TO
SOMETHING?
>> CERTAINLY NOT.
BUT THE GEORGIA AND OHIO SUPREME
COURT CASES DRAW A DISTINCTION
BETWEEN ASKING THE QUESTION
DEFENSE COUNSEL WANTED TO ASK,
COULD YOU STILL BE FAIR IF YOU
HEARD THIS STEAMING PILE OF
PROOF, AND ASKING THEM A
DIFFERENT QUESTION, SUCH AS
WHAT'S YOUR TAKE ON THIS KIND OF
PROOF.
HOW DOES THAT MAKE YOU FEEL?
WOULD YOU FIND GUILT?
HE'S JUST ASKING THEM IF YOU
HEAR ALL THIS, CAN YOU BE FAIR,
WHICH IS WHAT WAS ASKED IN THE
U.S. SUPREME COURT I'VE RELIED
ON ON THIS POINT, WHERE THERE
WAS RACIAL DISPARITY BETWEEN THE
DEFENDANT AND THE VICTIM.
>> ISN'T THE ISSUE OF RACIAL
BIAS ENTIRELY DIFFERENT FROM THE
KIND OF ISSUE THAT YOU WERE
WANTING TO GET INTO OR THE
DEFENSE WAS WANTING TO GET INTO
HERE?
>> IT IS AN EASIER CASE, YOUR
HONOR.
THE GEORGIA AND OHIO CASES ARE
EASIER AS WELL IN THAT THEY
INVOLVE A SMALL CHILD AS A
VICTIM.
BUT I SUBMIT THAT THEY OPEN THE
DOOR TO THE POINT OF ASKING TO
THE PRINCIPLE THAT DEFENSE
COUNSEL IN A CAPITAL CASE MAY
ASK COULD YOU STILL CONSIDER
LIFE IF THUS HAPPENED.
THEY WOULD HAVE -- WERE GOING TO
COME IN IN THE GUILT PHASE
ANYWAY.
>> WHEN DID THAT INFORMATION
COME IN?
>> DURING THE GUILT PHASE.
THE FIRST WITNESS CALLED WAS THE
PROBATION OFFICER.
HE TESTIFIED WAS A HIGH-RISK
SPECIALIST.

IN FAIRNESS TO THE STATE, THAT WAS BLURTED OUT.
SO THE JURY SHOULDN'T HAVE HEARD THE DEFENDANT WAS ON PROBATION FOR A SERIOUS CRIME, BUT MY POSITION IS THAT IN EFFECT THEY DID.
THE STATE EMPHASIZED EACH OF THE ISSUES WE WANTED TO ASK THE JURY ABOUT THEIR FEELINGS ABOUT -- IN GUILT PHASE OPENING AND CLOSING AND IN THE PENALTY PHASE.
THE STATE ARGUES THAT WE CAN'T IDENTIFY A BIASED JUROR THAT WAS IN FACT SEATED.
I AGREE, BECAUSE -- BUT MY POSITION IS THERE'S NO WAY WE COULD BECAUSE THE QUESTIONING WAS NOT ALLOWED AND DEFENSE COUNSEL COMPLIED WHEN THE JUDGE TOLD HIM NOT TO GO THERE.
THIS IS THE KIND OF ERROR THAT THIS COURT FINDS PER SE REVERSIBLE BECAUSE SPECULATION IS REQUIRED.
SO MY POSITION AS TO THIS ISSUE IS THAT THE JUDGE ABUSED HER DISCRETION AND THE RIGHT TO AN IMPARTIAL JURY WAS ADVERSELY AFFECTED.
>> LET ME GO JUST ON THE HURST ISSUE, AND AS YOU'VE OBSERVED, WE'RE STILL DECIDING WHAT HURST MEANS.
IN THIS CASE WHAT WAS THE JURY RECOMMENDATION?
>> 10-2.
>> 10 TO 2.
THERE WERE CERTAIN AGGRAVATORS THAT WERE PREDICATED ON CRIMES FOUND BY THE JURY, CORRECT?
>> CORRECT.
>> WHAT WERE THOSE?
>> THERE WAS CONTEMPORANEOUS ROBBERY.
THERE WAS A -- WELL, I DON'T KNOW IF THE JURY KNEW ABOUT IT BUT THE PRIOR VIOLENT FELONY WAS ONE OF THE AGES
>> IF THIS COURT WERE TO SO

HOLD, OUR POSITION IS THAT
HOLDING THAT A SINGLE AGGRAVATOR
IS ENOUGH TO DEATH QUALIFY --
THE FACT THAT THE DEFENDANT WAS
ON THE RUN FROM A ROBBERY OF
SORTS WAS OBVIOUSLY GOING TO
COME IN SINCE THE CASE WAS
TRYING CASE ON FELONY MURDER
THEORY OR PREMEDITATION THEORY.
CAME IN HE WAS ON PROBATION AND
CAME IN AS HE WAS ON PROBATION
AS HIGH-RISK.
I SUBMIT NOTHING DEFENSE COUNSEL
WANTED TO ASK THE ABOUT WOULD
HAVE IN FACT SURPRISED JURORS.
>> WHEN DID THAT INFORMATION
COME IN.
>> DURING THE GUILT PHASE, FIRST
WITNESS CALLED WAS THE PROBATION
OFFICER.
HE TESTIFIED RIGHT AWAY THAT HE
WAS HIGH-RISK SPECIALIST.
IN FAIRNESS TO THE STATE THAT
WAS BLURTED OUT.
THE JURY SHOULDN'T HAVE HEARD
THE DEFENDANT WAS ON PROBATION
FOR SERIOUS CRIME BUT MY
POSITION IS IN EFFECT THEY DID.
THE STATE EMPHASIZED EACH OF THE
ISSUES WE WANTED TO ASK THE JURY
ABOUT THEIR, GO INTO THE PENALTY
PHASE.
WE CAN'T IDENTIFY A BIAS JURY.
THAT WAS SEATED.
MY POSITION THERE IS NO WAY WE
COULD BECAUSE THE QUESTIONING
WAS NOT ALLOWED AND DEFENSE
COUNCIL COMPLIED.
IN THIS CASE IT WAS JURY
RECOMMEND DECISION.
RECOMMENDATION?
>> 10-2.
>> CERTAIN AGGRAVATORS.
REMAINING AGGRAVATOR WAS CCP.
>> YOU MAKE AN ARGUMENT.
THIS COULD AFFECT HURST ISSUES
THAT THE JURY INSTRUCTION ON THE
MERGER WAS COMPLETE BECAUSE IT
DIDN'T GIVE AN EXAMPLE OF HOW IT
WOULD BE MERGED.

SO WE REALLY DON'T KNOW, IF THE
JURY MERGED THE TWO AGGRAVATORS.
WE DON'T KNOW.
WE DON'T,.
>> WE DON'T KNOW, YOUR HONOR.
FEDERAL NINTH CIRCUIT HELD THAT
SET OF FACTS UNREASONABLY EXCUSE
THE JURY RECOMMENDATION.
>> SO THE QUESTION THOUGH, IS,
IS, IT HURT IF HURTS ONLY
REQUIRES ONE AGGRAVATOR FOR JURY
TO FIND, YOU WOULD NOT BE
ENTITLED TO HURST RELIEF?
>> THERE WAS EVIDENCE FROM
MENTAL HEALTH EXPERTS HE WAS
UNDER EXTREME EMOTIONAL DISTRESS
WHEN HE COMMITTED A CRIME?
>> THERE WAS EVIDENCE, YOUR
HONOR.
THE JUDGE REJECTED IT, IN PART
BECAUSE SHE DECLINED TO CONSIDER
ANY BRAIN DAMAGE BECAUSE THE
STATE'S THEORY.
THE STATE THREW OUT IN CLOSING,
THAT WE DON'T KNOW THAT THE
BRAIN DAMAGE DOCTOR, DR. WU SAW
ON THE TEST, THAT DR. WU
TESTIFIED IT WAS QUITE
SIGNIFICANT AND HE TESTIFIED
SOMETHING MUST HAVE HAPPENED TO
THIS INDIVIDUAL, SOMETIME
BETWEEN FOURTH GRADE AND THE HIS
ADULT LIFE, BECAUSE HE SCORED
RIGHT IN THE MIDDLE OF THE PACK
ON TESTS IN FOURTH GRADE BUT
COULD BARELY ACHIEVE ON A
8th PERCENTILE SCORE.
AFTER THE INCIDENT OUR
NEUROPSYCHOLOGIST DR. OLANDER
TESTIFIED SHE SAW NO EVIDENCE OF
MALINGERING, AND DR. WU AGREED,
HE SAW NO EVIDENCE OF
MALINGERING.
>> THERE WAS 70 I.Q. BUT THERE
WAS NOT TESTIMONY HE WAS
INTELLECTUALLY DISABLED?
>> CORRECT.
IT WAS THROWN OUT AS PART OF THE
TESTING.
>> THERE ARE CLEARLY ERRORS IN

THE SENTENCING ORDER OF THE
JUDGE NOT FINDING CERTAIN
MITIGATORS.
>> I AGREE, JUDGE, NOT GIVING,
IN DECLINING TO CONSIDER THE
BRAIN DAMAGE BECAUSE IT COULD
HAVE TAKEN PLACE AFTER THE
INCIDENT, WHEN THE SUV WENT INTO
THE CULVERT, BUT WE'VE, I SUBMIT
THAT IS NOT COMPETENT
SUBSTANTIAL EVIDENCE TO SUPPORT
THE THEORY THAT THE BRAIN DAMAGE
TOOK PLACE AFTERWARD.
DR. WU SAID HE WAS LOOKING AT
SHEERING OF, AWAY FROM ONE SIDE
OF THE BRAIN.
HE SAID HE IS LOOKING AT
EVIDENCE OF A TRAUMATIC INJURY.
YOU CAN SEE, ON, STATE EXHIBIT
61 OR 62, I'VE FORGOT OWN WHICH,
CRASH IN QUESTION IS NOT EVEN A
CRASH.
IT'S, SUV GOING DOWN INTO A
DITCH, ONE WITNESS DESCRIBED IT
AS CULVERT.
THERE IS NOT.
THERE IS NO COMPETENT
SUBSTANTIAL EVIDENCE TO SUGGEST,
AS I READ THE RECORD, THAT THE
BRAIN DAMAGE COULD HAVE
POSTDATED THE SHOOTING.
>> YOU SAID THE CODEFENDANT, WAS
THE CODEFENDANT TRIED WITH THIS
DEFENDANT?
>> NO, SHE ENTERED A PLEA TO A
12-YEAR SENTENCE PRIOR TO HIS
TRIAL.
>> YOU'RE INTO REBUTTAL BUT YOU
CAN CONTINUE?
>> NO, SIR.
I WILL RESERVE MY TIME.
>> MAY IT PLEASE THE COURT.
I'M STACY KIRCHER, FROM THE
OFFICE OF THE ATTORNEY GENERAL
ON BEHALF OF THE STATE IN THIS
CASE.
I WOULD LIKE TO BEGIN BY JUST A
COUPLE OF THE POINTS MY OPPOSING
COUNSEL RAISED.
THERE WERE SPECIAL JURY

INTERROGATORIES TO SOME EXTENT
IN THIS CASE.
SPECIFICALLY THAT THE DEFENDANT
USE AD FIREARM, SHOT A FIREARM,
SHOOTING THAT FIREARM CAUSED THE
DEATH OF DEPUTY PILL WAS A LAW
ENFORCEMENT OFFICER.
SO THERE IS A SPECIFIC JURY
FINDING ON THAT.
>> GUILT PHASE, THESE ARE
FINDINGS ON THE VERDICT FOR THE
GUILT PHASE?
>> YES, YOUR HONOR.
>> OKAY.
AND--
>> BECAUSE HE WAS CHARGED, ONE
OF THE COUNTS WAS, HAD TO DO
WITH HER BEING A LAW ENFORCEMENT
OFFICER.
>> CORRECT.
>> HE WAS CONVICTED OF THE
CONTEMPORANEOUS CRIMES OF
ROBBERY, FLEEING AND ALLUDING,
RESISTING AN OFFICER WITH
VIOLENCE AND THE ROBBERY IN
ADDITION TO FIRST-DEGREE MURDER
OF DEPUTY PILL.
SO IN RESPONSE TO THE HURST
ARGUMENT, THE ONLY AGGRAVATOR
THAT WE HAVE IN THIS CASE OF THE
FIVE THAT IS NOT SPECIFICALLY
FOUND BY THE JURY IS THE CCP
AGGRAVATOR.
ALL THE OTHERS WERE.
BUT IN THIS CASE, TALKING ABOUT
KIND OF GOING IN ORDER TO WHAT
MY OPPOSING COUNSEL ARGUED,
CLAIM ONE, THE COURT DENYING A
MISTRIAL AFTER THE STATE'S
PENALTY PHASE, CLOSING ARGUMENT.
THAT THEY'RE CHARACTERIZING AS
SEND A MESSAGE ARGUMENT.
THE QUESTION WE HAVE TO LOOK AT
IMPACT THIS PARTICULAR STATEMENT
HAD ON THE JURY AND WHETHER OR
NOT IT VITIATED THE DEFENDANT'S
FAIR TRIAL.
IT IS REVIEWED UNDER ABUSE OF
DISCRETION.
AND, IT, WAS NOT SUCH A SERIOUS

STATEMENT AS TO WARRANT A
MISTRIAL.
IT DIDN'T VITIATE THE ENTIRE
TRIAL.
WHAT WAS ACTUALLY SAID, VERY
BAIT IMIS, WHEN YOU GO BACK TO
THE JURY ROOM, I URGE YOU TO
TALK TO YOUR FELLOW JUROR,
EXPRESS YOUR OPINION, DISCUSS
WEIGHING FACTORS OF AGGRAVATING
VERSUS MITIGATING.
I SUBMIT TO YOU, IF YOU DO YOU
COME TO THE SAME CONCLUSION THAT
JUSTICE CALLS FOR, THAT THE PILL
FAMILY CALLS FOR, THAT BREVARD
COUNT SHERIFF'S OFFICE CALLS FOR
AND LAW ENFORCEMENT FAMILY CALLS
FOR.
THEY HAD OBJECTION.
THEY HAD A SIDEBAR.
OBJECTION WAS SUSTAINED.
THE DEFENSE COUNSEL ASKED FOR
MISTRIAL.
THE MISTRIAL WAS DENIED.
THERE WAS VERY LENGTHY
CONVERSATION AT SIDEBAR HOW TO
CRAFT A CURATIVE INSTRUCTION
THAT DEFENSE COUNSEL WAS
COMFORTABLE WITH.
HE ASKED THE JUDGE TO RECRAFT IT
A COUPLE TIMES.
AT WHICH TIME HE ASKED CURATIVE
INSTRUCTION BE GIVEN.
THAT INSTRUCTION WAS GIVEN
SPECIFICALLY AFTER, OR DIRECTLY
AFTER FROM THE JUDGE WAS OKAY,
LADIES AND GENTLEMEN OF THE
JURY, YOU ARE TO DISREGARD ANY
COMMENTS MADE BY THE STATE AS IT
RELATES TO WHAT THE LAW
ENFORCEMENT COMMUNITY WANTS AND
WISHES OF FAMILY WITH REGARD TO
A SENTENCE.
IT IS NOT TO BE CONSIDERED BY
YOU IN YOUR DELIBERATION.
OKAY, MR. McMASTER YOU MAY
PROCEED.
THAT IS VOLUME FIVE, RECORD
CITE, 2749.
DIRECTLY AFTER THIS COMMENT WAS

MADE AND OBJECTION WAS MADE THE
JUDGE AMELIORATED ANY
IMPERMISSIBLE DELIBERATIONS BY
THE JURY BY DOING THIS CURATIVE
INSTRUCTION WHICH WAS A THROUGH
ROY AND COMPREHENSIVE CURATIVE
INSTRUCTION TAILORED TO THE
OBJECTION THAT WAS MADE.
OKAY.
AGAIN IT WAS--
>> THE TESTIMONY OF AMANDA OZ
BURN, SEEMS-- OZBURN, SHE GAVE
TESTIMONY, IT WAS TESTIMONY
ALREADY GIVEN BY OTHER WITNESSES
AND THAT, YOU COULD DRAW THE
CONCLUSION THAT THE STATE CALLED
HER SIMPLY TO GET IN THE
STATEMENT THAT HE HAD SAID, I'M
GOING TO GO OUT LIKE A SOLDIER.
>> AND JUSTICE QUINCE, THE
REASON THAT WE KNOW THAT'S NOT
WHY THE PROSECUTOR CALLED HER IS
BECAUSE SHE TESTIFIED TO THREE
TO FOUR OTHER FACTS THAT WERE
SPECIFICALLY HELPFUL TO THE
STATE'S CASE.
AND THE LAW ON CALLING YOUR OWN
WITNESS FOR IMPEACHMENT, AT
LEAST, FOR THE STATE, CALLING
THE, THE PROSECUTOR CALLING A
WITNESS TO IMPEACH IS IF THERE
IS REASONABLE EXPECTATION THAT
WITNESS IS GOING TO TESTIFY TO
OTHER FACTS HELPFUL TO THE
STATE'S CASE THEY'RE NOT CALLING
THEM PURELY FOR THE SAKE OF
IMPEACHING THEM.
THERE WAS A MOTION IN HIM ME
WHICH DID NOT INCLUDE THIS
PARTICULAR ARGUMENT BUT THERE
WAS PROFFER AND DISCUSSION OFF
THE RECORD AND AT SIDEBAR
BETWEEN THE PROSECUTOR, THE
DEFENSE ATTORNEY AND THE JUDGE
ABOUT WHETHER OR NOT THIS
WITNESS WAS BEING CALLED PURELY
FOR IMPEACHMENT PURPOSES AND
PROSECUTOR STATED, NO, THE
REASON I'M CALLING HER IS
BECAUSE SHE TESTIFIES THAT SHE

SPENT A LOT OF TIME WITH THE
DEFENDANT, SHE KNEW HIM TO CARRY
A FIREARM IN HIS WAISTBAND THAT
MATCHED THE MURDER WEAPON.
IT WAS A .47 SMITH & WESSON
GLOCK SEMIAUTOMATIC.
SHE IDENTIFIED THAT WAS THE
WEAPON HE CARRIED AROUND IN HIS
WAISTBAND.
SHE KNEW SINCE 2011 HE HAD
OUTSTANDING WARRANTS.
HE WOULD NOT BE TAKEN BACK INTO
CUSTODY.
THAT HE WOULD RUN.
>> SO WHAT TESTIMONY OF THE
WITNESS WAS THE STATE SEEKING TO
IMPEACH?
>> IT WAS THIS PARTICULAR
STATEMENT-- SHE HAD GIVEN A, A
STATEMENT TO LAW ENFORCEMENT
OFFICERS JUST A COUPLE DAYS
AFTER THE MURDER IN WHICH--
>> NO, NO, NO.
WE'RE JUMPING TO WHAT, WE'RE
JUMPING THE HE QUESTION.
MY QUESTION IS, SO WHAT DID SHE
TESTIFY THAT THE STATE SOUGHT TO
IMPEACH?
>> WELL, IT WAS THIS, THAT SHE,
THAT SHE MADE A STATEMENT SAYING
THAT HE SAID HE WOULD RUN AS
OPPOSED TO GOING OUT LIKE A
SOLDIER.
IT WAS THE DIFFERENCE IN THE
DEPOSITION TESTIMONY VERSUS THE
ORIGINAL STATEMENT THAT SHE GAVE
TO--
>> I THOUGHT YOU WERE JUST
RELYING ON THAT NOW FOR
SOMETHING THEY WANTED TO GET IN
THAT HE WOULD RUN?
I MEAN, THE IDEA THAT SHE
COULDN'T HAVE SAID BOTH THOSE
THINGS SEEMS TO ME TO BE
SOMEWHAT FARFETCHED.
>> IT MAY BE A STRETCH SO FAR AS
IMPEACHMENT GOES BUT FOR THE
PARTICULAR ISSUE THAT IS
PRESERVED FOR APPEAL AND THAT
WE'RE ARGUING HERE TODAY, IS

THAT SHE WAS CALLED PURELY FOR
IMPEACHING HER TESTIMONY AND--
>> WE CAN-- THE PROBLEM IS, I
THINK AGAIN THE STATE, CLEARLY,
FOR ME, BECAUSE I DIDN'T REALIZE
FIRST IT WAS IMPEACHMENT, WHEN
YOU HEAR WILL GO OUT LIKE A
SOLDIER, THERE IS SOMETHING
ABOUT THAT YOU CAN NOT GET OUT
OF YOUR MIND.
NOW I DON'T SEE FRANKLY HOW IT
COULD POSSIBLY AFFECTED THE
GUILT PHASE.
IF PENALTY PHASE, DEPENDING ON
WHAT HURST REQUIRES OR WHAT WE
DECIDE, SO, IT'S, IT'S SORT OF
CAME IN BECAUSE IT WAS THERE BUT
THE STATE NEVER TRIED TO BRING
IN THE OFFICER THAT SHE
SUPPOSEDLY SENT IT TO.
SHE-- SAID IT TO.
SHE DENIED FROM THE TIME
APPARENTLY IN THE DEPOSITION,
THEY KNEW THAT WAS NOT SOMETHING
THEY THOUGHT SHE HAD SAID,
RIGHT?
>> THE ARGUMENT APPARENT FROM
THE PROFFER AND SIDEBAR ARE
OUTSIDE OF THE PRESENCE OF THE
JURY CONVERSATION.
THE STATE IS NOT SURE IF SHE
WILL ADMIT IT ON STAND OR NOT.
>> BUT SHE ALREADY, THEY SAY
THAT, BUT, DEPOSITION, SHE WAS
CLEAR.
>> CORRECT.
>> THAT THAT-- WHAT DID SHE SAY
WHEN SHE WAS ASKED IN DEPOSITION
HE DENIED HE WOULD RUN.
>> EXCUSE ME.
SHE SAID IN THE DEPOSITION THAT
HE WOULD RUN.
AND SHE DID NOT REMEMBER GIVING
THE STATEMENT HOLD COURT IN THE
STREETS, GO OUT LIKE A SOLDIER.
BUT IN REFERENCE TO YOUR
ORIGINAL QUESTION, JUSTICE
PARIENTE--
>> WITH AN UNVERIFIED, WRITTEN
ACCOUNT OF WHAT SHE SUPPOSEDLY

SAID WITHOUT CALLING OFFICER SHE
HAD SAID IT TO?
>> I BELIEVE HE WAS RELYING ON
HER DEPOSITION TESTIMONY AT THAT
POINT TO SAY YOU GAVE A
DEPOSITION.
YOU SAID IT AT THAT POINT.
YOU ARE NOT SAYING IT TODAY.
>> WAIT.
I THOUGHT IN HER DEPOSITION SHE
DENIED EVER MAKING THE STATEMENT
ABOUT THE SOLDIER?
>> CORRECT.
>> SO I DON'T GET-- AND THE
STATEMENT THAT SHE-- THIS HAS
BEEN A WHILE AS FAR AS EVIDENCE
IS CONCERNED BUT THE STATEMENT
THEY WERE SEEKING TO IMPEACH WAS
A, WAS IT A RECORDED STATEMENT
SHE GAVE TO THE POLICE?
>> YES.
>> AND SHE, BUT NO-- WHO
VERIFIED SHE HAD GIVEN THAT
STATEMENT.
>> THAT IS AN INTERESTING POINT.
THEY DIDN'T BRING THE OFFICER
WHICH I THINK GOES TO THE FACT
THAT THIS STATEMENT WAS NOT
HEAVILY RELIED ON BY THE STATE
OF THE ONLY TIME IT CAME OUT IS
THE TIME THAT WE'RE TALKING
ABOUT RIGHT NOW.
THERE WAS NO MENTION IN THE
CLOSING ARGUMENT.
NO MENTION IN THE COURT
SENTENCING ORDER, IN CCP.
THERE IS NO MENTION ANYWHERE
ELSE OF THIS GOING OUT LIKE A
SOLDIER STATEMENT.
THE PROSECUTOR DIDN'T CALL THE
OFFICER TO, YOU KNOW, TALK
FURTHER ABOUT THE STATEMENT.
THAT ONE MENTION IN THE RECORD
IS THE ONLY TIME WE HEAR THIS
GOING OUT LIKE A SOLDIER
STATEMENT.
AND IN FACT IT IS IMPORTANT TO
NOTE AS WELL THERE WAS ANOTHER
LIMITING INSTRUCTION GIVEN BY
THE JUDGE DIRECTLY AFTER THIS,

AT THE REQUEST OF DEFENSE
ATTORNEY AND THAT VERBATIM READ,
BASED ON THE COURT'S PRIOR
RULING THIS STATEMENT JUST GIVEN
BY THIS WITNESS ATTRIBUTING
COMMENTS TO THE DEFENDANT SHOULD
NOT BE CONSIDERED AS PROVEN FACT
BUT FOR THE PURPOSE OF
DETERMINING THE BELIEVABILITY OR
CREDIBILITY OF THE WITNESS.
>> THAT'S WHERE, I CAN'T
UNDERSTAND, IT IS NOT IMPEACHING
HERE THOUGH.
THAT IS THE OTHER PROBLEM.
>> AND THAT IS THE, THAT IS THE
CURATIVE INSTRUCTION THAT WAS
DISCUSSED AND REQUESTED BY THE
DEFENSE ATTORNEY.
>> WHAT WE KNOW, AGAIN, THEY'RE
SAYING IT WAS INCONSISTENT, HE
SAID HE WOULD RUN BUT JUSTICE
CANADY IS SAYING THOSE ARE TWO
DIFFERENT THINGS.
ONE DOESN'T IMPEACH THE OTHER.
SHE MIGHT HAVE SAID BOTH THINGS.
>> MIGHT HAVE NOT BEEN THE
MOST ARTFUL IMPEACHMENT, JUSTICE
PARIENTE IS CORRECT.
BUT THE--
>> I DON'T UNDERSTAND HOW THE
IMPEACHMENT WAS ACCOMPLISHED.
I HAVE NEVER SEEN IMPEACHMENT
ALLOWED WHERE IT IS THE
QUESTION OF A LAWYER TO THE A
WITNESS THAT IS THE BASIS IS
SUBSTANCE OF WHATEVER THAT
STATEMENT IS.
>> I AGREE JUSTICE LEWIS.
>> THAT IS WHAT HAPPENED HERE,
ISN'T IT IS IT?
>> WHAT HAPPENED IS THE
PROSECUTOR SAID DO YOU REMEMBER
GIVING A STATE ON THIS DAY?
SHE SAYS I DIDN'T REMEMBER UNTIL
THIS MORNING.
HE SAYS, DO YOU REMEMBER IT NOW
HAVING SEEN IT THIS MORNING
ESSENTIALLY?
AND SHE SAYS, I DON'T REMEMBER
GIVING THAT STATEMENT.

>> AND IT WAS A WRITTEN
STATEMENT?
>> NO, IT WAS A RECORDED
STATEMENT.
>> OKAY.
BUT AGAIN, IT ONLY CAME FROM
THE, FROM THE MOUTH OF THE
LAWYER.
>> YOU'RE CORRECT, JUSTICE
LEWIS.
>> YOU CAN'T IMPEACH THAT WAY.
>> AND SO LOOKING AT THE BIGGER
ISSUE HERE, WE'RE LOOKING AT,
YOU KNOW, IF IT WAS ERROR FOR
THIS TO COME IN WHETHER THAT
AFFECTED THE VERDICT IN THIS
CASE.
>> I'M JUST THAT THE STATE IS
ARGUING THAT IS HOW WE IMPEACH
IN THE STATE OF FLORIDA NOW.
>> AND I'M NOT ARGUING THAT IS
PROPER IMPEACHMENT, JUSTICE
LEWIS OKAY.
>> I AM SAYING THAT WAS THE
ARGUMENT THE DEFENSE ATTORNEY
HAD AT TRIAL LEVEL.
THAT IS THE WAY IT WAS PRESENTED
IN APPELLANT'S BRIEF SO.
OKAY, AND--
>> WOULD YOU TOUCH UPON AT SOME
POINT WHY A DEFENDANT, IF THE
DEFENDANT CHOOSES TO RAISE
DURING VOIR DIRE THE SUBJECT OF
HIS CLIENT'S BACKGROUND, WHY
JUST GENERAL QUESTIONS IN THAT
AREA, NOT TO PREDISPOSE THEM TO
COMMIT HOW THEY WILL VOTE BUT
TAKE THE STING OUT OF THE
EVIDENCE TO ASK THEM WHETHER
THEY CAN CONSIDER SUCH AND SUCH
IF THE EVIDENCE SHOWS THAT THE
DEFENDANT HAS ENGAGED IN BAD
STUFF?
CRIMINAL CONDUCT OR WHATEVER.
I CAN SEE WHY THE STATE MAYBE
SHOULD NOT DO THAT.
BUT IF A DEFENDANT WANTS TO DO
THAT, WHY IS THAT NOT PROPER
VOIR DIRE?
>> THAT IS INTERESTING ISSUE,

JUSTICE LEWIS AND THAT IS WHAT
WE'RE DEALING WITH APPELLANT'S
ISSUE NUMBER TWO.
ALLOWING SPECIFIC QUESTIONING AS
TO THE FACT THAT THE DEFENDANT
HAD BEEN PREVIOUSLY CONVICTED OF
FOUR PRIOR VIOLENT FELONIES,
THAT HE WAS ESCAPING FROM A
FELONY TO AVOID THE EXECUTION OF
THESE PROBATION WARRANTS AT THE
TIME HE KILLED OFFICER PILL.
>> ALL RIGHT.
>> AND THERE'S SPECIFIC
QUESTIONS--
>> THAT IS GOING TO COME OUT
ANYWAY IN THE PENALTY PHASE IF
THERE IS CONVICTION.
>> IN THE PENALTY PHASE, YES,
YOUR HONOR.
>> SO, BUT THE SAME JURY WILL
HEAR BOTH GUILT AND PENALTY SO.
>> CORRECT.
>> I'M TRYING TO UNDERSTAND WHY,
YOU KNOW, MAYBE YOU'RE TRYING TO
PROTECT THE DEFENDANT FROM
INCOMPETENT COUNSEL IN SOME WAY
BECAUSE YOU DON'T WANT TO HEAR
THAT BUT, IF I'M DEFENDING
SOMEBODY, I WOULD WANT TO KNOW
WHAT IMPACT IT IS GOING TO HAVE
ON THIS JURY AS TO MY CLIENTS'S
BEING A BAD GUY?
>> CORRECT.
AND A DEFENSE ATTORNEY IS
ALLOWED TO QUESTION AS TO THINGS
THAT THEY MAY UNCOVER POTENTIAL
BIAS, BUT IN THIS CASE IT IS
VERY DIFFERENT BECAUSE HE WAS
SPECIFICALLY TRYING TO ELICIT A
PROMISE FROM THE JURY.
IF I TELL YOU THAT ALL OF THESE
NEGATIVE THINGS IN DEFENDANT'S
PAST OCCURRED, CAN YOU STILL
THEN, AND ALL OF THE SIX
AGGRAVATORS, AS WELL, HE WANTED
TO DISCUSS EACH OF THE SIX
AGGRAVATORS, THAT THE STATE WAS
SEEKING BEFORE WE EVEN HAVE THE
GUILT PHASE.
AND IN THE GUILT PHASE, THE ONLY

THING THAT THEY HEARD--
>> SO THE OBJECTION HERE IS THAT IT WAS AN ATTEMPT TO COMMIT TO JURORS BEFORE THEY HEAR THE EVIDENCE RATHER THAN A GENERAL DISCUSSION TO DETERMINE ANY BIAS OR PREJUDICE THAT MAY EXIST AND WHETHER THEY COULD CONSIDER THE EVIDENCE GENERALLY?
THAT'S THE ARGUMENT YOU'RE MAKING HERE?
>> CORRECT.
>> OKAY.
>> THAT'S THE ARGUMENT.
AND ALSO GETTING INTO FACTS THAT SPECIFICALLY IS NOT ALLOWABLE ON VOIR DIRE BECAUSE YOU'RE PRETRYING THE CASE.
SO NOT ONLY IS DEFENSE ATTORNEY, DEFENSE COUNSEL AT THAT POINT ATTEMPTING TO GET A PROMISE FROM THE JUROR THAT I TOLD YOU HE WAS A BAD GUY AND THAT I TOLD YOU THESE SIX AGGRAVATORS WOULD COME OUT AND I STILL ASKED YOU TO PROMISE YOU COULD DEAL WITH THIS MITIGATION, THAT YOU COULD CONSIDER THIS MENTAL MITIGATION.
GETTING INTO THE FACTS THAT SPECIFICALLY IS ATTEMPTING TO PRETRY THE CASE AND WHAT QUESTIONS ARE ALLOWED I ABOUT THE TRIAL JUDGE IS WITHIN THE BODIES CORRECTION OF THE TRIAL COURT ON WHAT THEY CAN QUESTION THE VENIRE PANEL ABOUT.
IN THIS CASE THE JUDGE GAVE WIDE LATITUDE TO THE DEFENSE ATTORNEY TO DISCUSS, TO SKIRT AROUND THE ISSUE BUT AT THE POINT THAT HE ASKED TO GET INTO THE SPECIFICS OF THE SIX AGGRAVATORS THAT THE STATE WAS SEEKING AND THE FACT THAT HE HAD A PRIOR VIOLENT FELONY, SEVERAL PRIOR VIOLENT FELONY CONVICTIONS AND WAS ESCAPING A ROBBERY, THE JUDGE SAID NO, WE CAN'T DO THAT.
GOING BACK TO JUSTICE LEWIS'S POINT, EVEN IF THE DEFENSE

ATTORNEY IS WAVING THE CLAIM
ON-- WAIVING THE CLAIM ON
APPEAL WHICH PERHAPS I DIDN'T
WORD CORRECTLY IN MY ANSWER
BRIEF AS OPPOSING COUNSEL IS
POINTING OUT, WHAT I MEAN TO SAY
HE CAN'T WAIVE HIS
INEFFECTIVENESS.
WE'LL BE BACK ON 3851.
THIS IS CAPITAL CASE.
WE'LL HAVE POST-CONVICTION
PROCEEDINGS.
AT SOME POINT YOU PREDISPOSED
JURY IN THE GUILT PHASE WHEN
THAT ISSUE WASN'T GOING TO COME
OUT UNTIL THE PENALTY PHASE, IF
THERE WAS A PENALTY PHASE, YOU
HAVE A JURY THAT NOW KNOWS
ABOUT--
>> WHAT WAS TESTIMONY OF
PROBATION CALLED FOR?
>> THE PROBATION OFFICER WAS
CALLED TO ESTABLISH THE MOTIVE
THAT HE WAS GOING TO RUN.
WHEN OFFICER COLOGNE
TESTIFIED--
>> THERE WAS NO EVIDENCE WHY HE
WAS GOING TO RUN OR IN HIS
BACKGROUND?
>> HE DID NOT TESTIFY TO THE ANY
OF THESE OF THE UNDERLYING
PROBATION.
HE TESTIFIED MERELY TO THE FACT
THAT HE WAS ON PROBATION.
HE WAS SUPERVISING HIM OF AS OF
2010 AND, THEY--
>> HOW ABOUT THE COMMENT, WHAT
WAS THE REASON THEY HAD TO SAY
HE WAS A HIGH-RISK PROBATION
OFFICER?
>> THEY DIDN'T.
>> THEY DIDN'T WHAT.
>> THEY DIDN'T HAVE THE SAY
THAT.
THE WAY THAT CAME OUT THE VERY
FIRST QUESTION THE PROSECUTOR
ASKED, WHAT IS YOUR NAME.
SPELL YOUR NAME.
WHAT'S YOUR JOB.
HE SAID I'M A HIGH-RISK

SPECIALIST WITH THE DEPARTMENT
OF CORRECTIONS.
BUT THE PROSECUTOR AFTER THAT,
RECOGNIZING OKAY, HE SHOULDN'T
HAVE SAID THAT, IMMEDIATELY
AMELIORATED, ASKING ESSENTIALLY
YOU'RE A PROBATION OFFICER?
WHICH HE REPLIED YES.
TO THAT POINT WE NEVER TALK
ABOUT HIGH-RISK SPECIALISTS.
WE NEVER TALK ABOUT WHY HE IS
BEING SUPERVISED AND WHAT
CONSTITUTES A HIGH-RISK
SPECIALIST PROBATION OFFICER.
SO THE JURY DOESN'T KNOW THAT
EVERY PROBATION OFFICER WHO
WORKS FOR DOC IS HIGH-RISK
SPECIALIST.
>> THEY ALREADY KNEW HE HAD
OUTSTANDING WARRANTS.
>> CORRECT.
BUT THE DIFFERENCE IS THAT, I
WOULD DISAGREE WITH MY OPPOSING
COUNSEL THAT INFORMATION DIDN'T
COME OUT AS TO THE SPECIFIC
CHARGES HE WAS ON PROBATION FOR
UNTIL THE PENALTY PHASE AND MY
PRIMARY ARGUMENT WITH THAT THAT
HIGH-RISK SPECIALIST IS NOT
PRESERVED.
THAT ACTUALLY OCCURRED 14
QUESTIONS AFTER AND FIVE RECORD
PAGES AFTER THAT ARGUMENT.
AND IT WAS IN THE CONTEXT OF A
SIDEBAR ABOUT THE FACT THAT THE
STATE WANTED TO INTRODUCE THE
REDACTED PROBATION WARRANTS, NOT
SAYING WHAT THEY WERE FOR BUT
SHOWING THE ACTUAL WARRANT.
THEY SAID HE DOESN'T NEED TO
TALK ABOUT THE CASE NUMBERS.
HE DOESN'T NEED TO ADMIT THE,
THE REDACTED PROBATION WARRANTS.
HE GOES, OH, YEAH, BY THE WAY
WHAT IS THIS BUSINESS ABOUT HIM
CALLING HIMSELF A HIGH-RISK
SPECIALIST, I OBJECT TO THAT
TOO.
SO PRIMARILY I WOULD ARGUE IT
WASN'T PRESERVED FOR APPEAL BUT

IF IT WAS IT WAS IMMEDIATELY AMELIORATED AND THERE IS NO REASONABLE PROBABILITY THAT THE JURY CONVICTED HIM BASED ON HIS TITLE AS A HIGH-RISK SPECIALIST.
>> YOUR OPPONENT TALKS A GOOD ABOUT IT ABOUT THE INSTRUCTION THAT WAS GIVEN, THE CALDWELL INSTRUCTION THAT WAS GIVEN ABOUT THE JURY'S ROLE IN THE SENTENCING.
AND I BELIEVE SHE ALSO SORT OF WEAVED IT IN WITH HER ARGUMENT ABOUT THE PROSECUTOR'S ARGUMENT.
SO, WOULD YOU ADDRESS THAT ISSUE?
>> ABSOLUTELY, JUSTICE QUINCE.
AS TO THE CALDWELL ISSUE, WE HAVE A CALDWELL ISSUE-- WELL, CLEARLY LET ME STATE THAT I'M AWARE THAT WITH THE STATUTE CHANGING, THE JURY INSTRUCTIONS ARE OF COURSE GOING TO CHANGE BUT WE HAVE A CALDWELL ISSUE WHERE THE JURY INSTRUCTIONS ARE SIGNIFICANTLY DIMINISHING THE JURY'S ROLE.
IN THIS CASE I WOULD ARGUE EVEN THOUGH WE'RE READING FROM THE STANDARD JURY INSTRUCTIONS AND WE'RE STATING ADVISORY BECAUSE ADVISORY THE WORD DOES APPEAR IN THE STANDARD JURY INSTRUCTION SEVERAL TIMES THAT'S NOT SIGNIFICANTLY DIMINISHING THE JURY'S ROLE, ESPECIALLY IN THIS CASE WHEN WE HAVE AT RECORD CITE 2794 THAT THE JUDGE SPECIFICALLY INSTRUCTS, YOUR RECOMMENDATION MUST BE GIVEN GREAT WEIGHT AND DEFERENCE BY THE COURT IN DETERMINING WHICH PUNISHMENT TO IMPOSE.
SO THE TRIAL COURT SPECIFICALLY STATES THAT THEIR RECOMMENDATION IS GOING TO BE GIVEN GREAT WEIGHT.
I WOULD ARGUE THAT THE FACT THAT ADVISORY APPEARS IN THE JURY INSTRUCTIONS IN THE STANDARD

JURY INSTRUCTIONS AS DELIVERED,
IT IS NOT A SIGNIFICANT
DIMINISHING OF THE JURY'S
RESPONSIBILITY IN DETERMINING A
SENTENCE FOR THE DEFENDANT.
SO THE COURT PROPERLY DENIED THE
MOTION TO REMOVE ALL APPEARANCES
OF THE WORD ADVISORY.
THEY WERE RELYING ON THE
STANDARD STRUCKS UNDER CODE
REENTERING BUT CLEARLY THOSE
INSTRUCTIONS AT THIS POINT IN
LIEU OF HURST AND THE NEW
STATUTE WILL CHANGE.
>> LET ME ASK YOU THIS ABOUT THE
NEW STATUTE.
IF WE WERE TO REVERSE BASED ON
HURST, THE NEW STATUTE
APPARENTLY ONLY, REQUIRES
UNANIMITY AS TO EACH AGGRAVATOR.
>> I WOULD DISAGREE WITH THAT.
>> THE NEW STATUTE DOESN'T SAY
THAT?
>> I'M SORRY, I THOUGHT YOU WERE
TALKING ABOUT HURST.
SORRY.
>> IT REQUIRES UNANIMITY FOR
EACH AGGRAVATOR.
YOU'RE SAYING THERE IS UNANIMITY
OF FIVE OF THE SIX?
>> WELL, THERE WERE SIX THAT
WERE REQUESTED.
FIVE ACTUALLY WERE GIVEN WEIGHT
BECAUSE TWO WERE MERGED AND
THERE IS DISCREPANCY--
>> CCP IS THE ONE--
>> CCP IS THE ONLY ONE.
>> OKAY.
AND THEN THEY, THE JURY IS
REQUIRED TO FIND THAT DEATH IS
THE APPROPRIATE PUNISHMENT BY
10-2?
>> CORRECT.
>> WHICH HAPPENED HERE.
>> WE HAVE A 10-2 DECISION HERE.
>> IF THIS CASE, IF, IF, IF,
MAYBE THERE ARE TOO MANY
HYPOTHETICALS, THIS WOULD, THIS
WOULD SATISFY THE NEW STATUTE?
>> OUR ARGUMENT THAT WOULD BE

THAT THIS IS IN COMPLIANCE WITH
THE NEW STATUTE AND IN
COMPLIANCE WITH HURST.
>> JURY IS NOT TOLD WHAT IT IS
ROLE IS, YOU'RE SAYING IT
DOESN'T MATTER BUT--
>> IT DOES NOT SAY THAT THE JURY
IS NOT INFORMED OF COURSE THAT
SIT BINDING.
>> I UNDERSTAND.
>> AT THE POINT THE JURY
INSTRUCTIONS WERE DELIVERED
THEIR ROLE WAS NOT BINDING AND
THEIR DETERMINATION AS TO
AGGRAVATORS WOULD BE GIVEN GREAT
WEIGHT WHICH IS WHAT WAS ARGUED
OR WHAT WAS DELIVERED HERE IN
THE JURY INSTRUCTION.
SO MY ARGUMENT AS TO THE
CALDWELL CLAIM THAT THE JURY WAS
NOT LED TO BELIEVE THE
RESPONSIBILITY FOR DETERMINING
THE APPROPRIATENESS OF THE
DEFENDANT'S DEATH PENALTY WAS
ELSEWHERE BECAUSE THE JUDGE
SPECIFICALLY SAID I'M GOING TO
GIVE DEFERENCE, I'M GOING TO
GIVE GREAT WEIGHT.
THE LAST POINT I THINK MY
OPPOSING COUNSEL--
>> THAT IS A STANDARD
INSTRUCTION, ISN'T IT.
>> THE STANDARD INSTRUCTIONS
WERE GIVEN HERE.
>> WITH THAT REASONING WE JUST
SAID HURST IS HARMLESS IN ALL OF
FLORIDA CASES, WHICH THAT
INSTRUCTION HAS BEEN--
>> WELL, AND MY OPPOSING COUNSEL
MAKES THE ARGUMENT, APPELLANT
MAKE ARGUMENT--
>> IS THAT A YES?
>> YES, JUDGE.
>> HURST MEANS NOTHING IN
FLORIDA NOW?
>> NO, YOUR HONOR.
>> AS FAR AS PRIOR CASES.
>> THAT IS FOR ARGUMENT TOMORROW
WHETHER OR NOT, WHAT HURST
APPLICABILITY IS GOING TO BE AND

WHETHER OR NOT HARMLESS ERROR
APPLIES IN CERTAIN CASE.
>> WAS ASKED ABOUT THE
INSTRUCTION BECAUSE JURIES ARE
ALWAYS GIVEN THAT INSTRUCTION,
SO THEY ARE, YOUR VIEW IS THE
STATE IS SAYING IS THAT FLORIDA
CASES, DEFENDANTS, ARE ALWAYS
RECEIVE A TRIAL IN WHICH A JUDGE
TELLS THE JURY THAT THEIR
DECISION IS GOING TO BE GIVEN
GREAT WEIGHT, WHICH THEY ALL ARE
GIVEN AND THAT RENDERS ANY HURST
ERROR HARMLESS.
>> WELL SPECIFICALLY IN THIS
CASE THAT WOULD BE THE CASE.
IT WOULD DEPEND ON I BELIEVE IF
THE JUDGE IN THE CASE IS
FOLLOWING THE STANDARD JURY
INSTRUCTIONS AND GIVING THE
SPECIFIC INSTRUCTION THAT THEIR
DETERMINATION IS GOING TO BE
GIVEN GREAT WEIGHT AND
DEFERENCE.
>> I DON'T THINK I'VE SEEN ONE
THAT DOESN'T CONTAIN THAT.
>> I CERTAINLY DON'T AGREE WITH
MY APPELLANT, OPPOSING COUNSEL'S
POSITION ANY CASE IN FLORIDA
WHICH THE STANDARD JURY
INSTRUCTION WAS GIVEN WHICH
MENTIONS ADVISORY IS A PER SE
ERROR AND NEEDS TO BE REVERSED
UNDER HURST.
>> THERE ARE TWO EXTREMES.
LIKE WE HEARD, YOU'RE SAYING,
ARE YOU SAYING THAT THERE WILL
NEVER BE A HURST ERROR BECAUSE
THE JURY INSTRUCTIONS SAY THAT
THEIR RECOMMENDATIONS IS GIVEN
GREAT WEIGHT?
>> I CAN NEVER SAY THERE WOULD
NEVER BE AN ERROR BUT THAT WOULD
BE MY POSITION BUT MY POSITION
WHERE THE JURY IS INSTRUCTED
THEIR ADVISORY OPINION IS GIVEN
GREAT WEIGHT, THAT WOULD NOT BE
CALDWELL ERROR.
>> BUT THAT IS WHAT IS IN THE
STANDARD INSTRUCTIONS.

>> CORRECT.
AND WE'RE LOOKING AT A COUPLE DIFFERENT ISSUES FOR HARMLESS ERROR UNDER HURST.
SO FAR AS THE CALDWELL ISSUES GOES, MY MORE TAILORED ARGUMENT WOULD BE THAT IN THIS CASE THE JURY'S RESPONSIBILITY WAS NOT DIMINISHED.
IT WASN'T A SIGNIFICANT DIMINISHMENT OF THEIR RESPONSIBILITY IN THIS CASE.
I'D LIKE TO GO QUICKLY TOO TO ADDRESS THE ARGUMENT RAISED BY MY OPPOSING COUNSEL AS TO THE WEIGHING OF THE AGGRAVATORS AND MITIGATORS IN THIS CASE.
I BELIEVE JUSTICE PARIENTE, YOU HAD SAID THAT, YOU KNOW, CLEARLY SOMEONE WITH THE PET SCAN AND INFORMATION THAT DR. WU WAS TESTIFYING TO, THERE MIGHT BE ERROR IN THE WEIGHING.
I WOULD JUST LIKE TO POINT OUT THAT--
>> I THOUGHT THE JUDGE, THIS IS WHAT WAS STARTLING TO ME ABOUT THE JUDGE'S ORDER, IS THAT THERE WERE SEVERAL OF THESE MITIGATORS, MAYBE THIS WAS THE JUDGE'S FIRST CASE, DEATH CASE, THAT WERE CLEARLY THERE AND THE JUDGE FOUND, GAVE THEM, NO WEIGHT?
>> AND I WOULD DISAGREE WITH THE CHARACTERIZATION THAT THE ONE THAT WAS GIVEN NO WEIGHT WAS CLEARLY THERE.
THAT WAS THE MITIGATOR THAT WAS PROPOSED BY THE DEFENSE ATTORNEY THAT HE HAD A 70 I.Q.
THE REASON THAT WAS GIVEN NO WEIGHT BECAUSE THAT WAS NEVER PROVEN.
THE I.Q. TESTING THAT HE HAS IN 2013 WAS THAT HE HAD A 96 IN DEPARTMENT OF CORRECTIONS.
POLK COUNTY, WHEN HE WAS TRANSFERRED FROM BREVARD COUNTY TO POLK COUNTY DID A FULL MENTAL

WORKUP.
FOUND NOTHING REMARKABLE.
HE ALWAYS DENIED ANY MENTAL HEALTH PROBLEMS.
HE HAD NEVER ANY HISTORY OF PSYCHOTROPIC MEDICATIONS OR MENTAL HEALTH ILLNESSES.
NOT UNTIL DR. OLANDER, AND HER TESTIMONY AND DISCUSSIONS WITH HIM, THAT HE TESTIFIED HE HAD VISIONS STARTING WITH 12 EVEN THOUGH THOSE WERE NEVER REPORTED.
AGAIN ALL INDICATIONS WERE THAT HE HAD AVERAGE I.Q.
THE TESTING AGAIN IN THE 2013 WAS THAT HIS I.Q. WAS 96.
>> [INAUDIBLE]
>> I'M SORRY?
>> WHEN WAS THE 70 I.Q.?
>> THAT WAS THROUGH THE TESTIMONY OF DR. OLANDER BUT I DON'T SEE THAT THERE WAS EVER--
>> DID SHE DO TESTING?
>> SHE DID DO TESTING BUT SHE NEVER TESTIFIED THAT HE HAD A 70 I.Q.
THAT WAS PROPOSED MITIGATION.
SHE TALKED ABOUT THE FACT THAT HE HAD SEVERELY DIMINISHED CAPACITY.
AND I BELIEVE THAT THAT WAS, THAT WAS HER, THAT WAS HER ESTIMATION WHAT IT WOULD BE.
>> IS THERE ANY DOCUMENT, ANY RECORDS ANYWHERE THAT SHOWS THAT HE WAS TESTED AND THAT TEST HAD A 70 I.Q.?
>> NOT THAT I AM AWARE OF.
THE I.Q. TESTING THAT WAS PROVIDED WAS A 96, WHICH WAS AN AVERAGE INTELLIGENCE.
>> WHAT DID THE DEFENSE SAY ABOUT THAT?
DID THEY PUT ON ANY EVIDENCE WITH RESPECT TO THE 96 I.Q. AND WHY IT WASN'T RELIABLE?
>> WELL, IT WAS NON-VERBAL TESTING SO THE QUESTIONING WAS, WELL, MAYBE HE IS BETTER ON

NON-VERBAL VERSUS VERBAL TESTING
BUT NO, THERE WAS REALLY NO
ATTACK OF THAT 9.
SO ALL, SO STATE'S POSITION
EVERYTHING IN HIS HISTORY AND
ALL THE TESTING THAT WE HAVE
SHOWS THAT HE IS OF AVERAGE
INTELLIGENCE.
SO THAT'S WHY THE JUDGE
ATTRIBUTED THAT NO WEIGHT.
>> I GUESS, THIS WAS THE
OTHER-- J, THE DEFENDANT
SUFFERS FROM BRAIN DAMAGE AND
BRAIN FUNCTIONAL DEFICIT.
SHE FOUND ALTERNATIVELY, SHE
SAID THEY DOESN'T PROVE THAT THE
BRAIN INJURY EXISTED AT THE TIME
OF PILL'S MURDER BUT THEN FOUND
THAT BRAIN DAMAGE EXISTED, IT
DIDN'T AFFECT HIS ACTIONS BUT
YOU WOULD AGREE THAT FOR
NON-STATUTORY MITIGATION, IT
DOESN'T HAVE TO BE, DOESN'T HAVE
TO BE A CAUSAL CONNECTION
DEMONSTRATED?
>> CORRECT.
IT WOULD JUST GO TO THE WEIGHT
OF THAT MITIGATION AND--
>> WE HAVE TO SEE COMPETENT
SUBSTANTIAL EVIDENCE WOULD
SUPPORT THAT THIS BRAIN DAMAGE
COULD HAVE OCCURRED FROM THIS,
FROM, WAS HE IN THE HOSPITAL
AFTERWARDS, AFTER THE ACCIDENT?
>> NO.
THE COMPETENT SUBSTANTIAL
EVIDENCE THAT SUPPORTS UNDER
KIERS NO WEIGHT FOR THAT
MITIGATION OR THAT MITIGATION
WAS NOT PROVEN COMES FROM THE
TESTIMONY ON CROSS-EXAMINATION
WHERE DR. WU WAS ASKED, WELL,
OKAY, YOU CAN'T SPECIFICALLY
ATTRIBUTE THIS TO ANYTHING.
HE SAYS IT MIGHT BE PTSD.
IT MIGHT HAVE BEEN A HEAD INJURY
AT SOME POINT, TO WHICH THE
PROSECUTOR CROSS-EXAMINED AND
SAID, WELL, CAN YOU DETERMINE
THAT THAT HAPPENED PRIOR TO THIS

ACCIDENT?
AND HE SAID NO, HE COULD NOT.
BUT IT WAS HIS UNDERSTANDING, OR
HIS BELIEF THAT IT HAD OCCURRED
IN CHILDHOOD, EVEN THOUGH THE
DEFENDANT DENIED EVER HAVING ANY
SIGNIFICANT HEAD TRAUMA
INITIALLY.
HE THEN GOES BACK TO SAY THAT
WHEN HE WAS 12, HE WAS IN A, I
BELIEVE AT A YOUNG AGE, HE FALLS
OFF THE MONKEY BARS WHERE HE
RECEIVED A HEAD TRAUMA.
>> JUST BECAUSE I KNOW YOU'RE
ALMOST OUT OF TIME, WHAT THE
JUDGE SAID ABOUT THE 70 I.Q.,
SAID IT WAS ESTABLISHED BUT IT
WAS NOT PROVEN TO BE MITIGATING
UNDER THE FACTS IN THE CASE AND
THEREFORE ASSIGNS IT NO WEIGHT.
LOOKS TO ME LIKE THE JUDGE WAS
SAYING, IT WAS PROVEN BUT
BECAUSE IT WASN'T, DIDN'T CAUSE
THE CRIME, HIS ACTIONS AT THE
TIME OF CRIME THEY'RE ASSIGNING
IT NO WEIGHT?
>> AND THINK DO, THE COURT--
DISCUSSES AGGRAVATORS AND
MITIGATORS.
19 MITIGATORS PRESENTED BY THE
DEFENSE.
16 OF THOSE WERE GIVEN WEIGHT
AND ONE OF THOSE WAS FOUND NOT
TO BE PROVEN.
SO I APOLOGIZE.
IT WAS THE OTHER THAT WAS FOUND
NOT TO BE PROVEN.
>> THE STATE IN THESE CASES WITH
DR. WU NORMALLY PUT ON EXPERTS
TO UNDERMINE THE PET SCAN
THEORIES THAT DR. WU USES?
WAS THAT DONE IN THIS CASE?
IF SO WHO WAS IT?
>> THE STATE HAD EXPERTS THAT
TESTIFIED IN REBUTTAL AND ALSO
AGAIN THIS, IN THE GUILT PHASE
IT WENT TO DR. OLANDER,
DR. DANZIGER.
EXPERTS TESTIFIED THAT HE DID
NOT HAVE THE COMPETENCE TO WAVE

MIRANDA TO GIVE HIS CONFESSION.
CLEARLY WHEN HE WAS FOUND
GUILTY, THAT MORPHED IN THE
PENALTY PHASE AND BECAME TOWARD
MITIGATION.
SO SOME OF THE SAME EXPERTS
TESTIFIED BUT THE STATE DID
OFFER TESTIMONY IN REBUTTAL IN
BOTH THE GUILT PHASE AND PENALTY
PHASE.
>> AS TO THE PET SCAN?
>> CORRECT.
WELL, AS TO THE MENTAL
MITIGATION AS WHOLE.
>> I'M ASKING, DR. WU RELIES ON
PET SCAN AND I'M TRYING TO
UNDERSTAND IN THIS CASE WE'RE
NOT, I'M NOT SEEMING TO GET A
PICTURE THAT THE STATE MAY HAVE
DONE THAT HERE.
>> OKAY.
WHAT WE HAVE, DR. SCOLY DANZIGER
TESTIFIED TO THE DEFENSE AS TO
INTOXICATION AND COGNITIVE
FUNCTIONING.
DR. OLANDER TESTIFIED IN THE
GUILT PHASE.
DR. GOLDBERG WHO WAS FORENSIC
PSYCHOLOGIST AND DR. ZAFF A
MENTAL HEALTH EXPERT TESTIFIED
THAT HE CLEARLY UNDERSTOOD AND
MADE A KNOWING, INTELLIGENT,
VOLUNTARY WAIVER OF MIRANDA.
I DON'T KNOW IF WE HAVE SPECIFIC
TESTIMONY IN REGARDS TO THE PET
SCAN.
BUT IT, HIS MENTAL HEALTH AS A
WHOLE WITH TESTING AND
EVALUATIONS THAT WERE DONE.
THEN IN THE PENALTY PHASE
DR. OLANDER TESTIFIED AGAIN AND
THEN DR. WU AND THEN SOME LAY
WITNESSES TESTIFIED.
SO WE DIDN'T HAVE MENTAL HEALTH
EXPERT THAT TESTIFIED AFTER
DR. WU IN THE PENALTY PHASE.
SO.
>> [INAUDIBLE].
>> THANK YOU.
IF THERE ARE NO FURTHER

QUESTIONS I WOULD DISCUSS ASK
THIS COURT AFFIRM BRANDON
BRADLEY'S CONVICTIONS BELOW AND
SENTENCE OF DEATH.
>> AS 96 I.Q., DR. OLANDER, OUR
NEUROPSYCHOLOGIST TESTIFIED THAT
WAS RESULT OF A SCREENING TEST
DONE BY DOC WHICH WAS NOT A TEST
SHE HAD ANY RESPECT FOR.
SHE HERSELF GAVE THE FULL-ON
I.Q. TEST AND GOT AN I.Q.
THAT IS ALL POST-OFFENSE.
EXCUSE ME.
AND, YOUR HONOR, JUSTICE
PARIENTE NO ONE GOT MEDICAL
TREATMENT AFTER THAT.
>> BEFORE YOU MOVE AWAY FROM
THAT, WHERE DID THE 70 I.Q. COME
FROM?
>> DR. OLANDER DID FULL-ON
ELABORATE TESTING AND MPI AND SO
FORTH.
>> THAT IS WHAT HE GOTTI POINT,
AT THIS STAGE?
>> YES, YOUR HONOR.
>> LET ME ASK YOU-- WAS THERE
ANY OTHER I.Q. TEST IN THE
RECORD?
>> THE ONLY RECORDS TO I.Q. TEST
WAS THE 70 THAT DR. OLANDER
OBTAINED AND 96 DOC OBTAINED
WHEN THEY FIRST SCREENED
-- ON HIS ARRIVAL.
THAT IS ONLY TWO SCORES WE AWARE
OF AT THIS TIME.
>> THAT IS WHY THEY COULDN'T
PROVE MENTAL INTELLECTUAL
DISABILITY BECAUSE THERE WASN'T
ANYTHING BEFORE 18?
NO INDICATION HE HAD BEEN
TESTED.
>> CORRECT, YOUR HONOR.
CORRECT, YOUR HONOR.
THE TRIAL COURT FOUND THERE WAS
NO EVIDENCE OF, THAT THAT THERE
WAS AFFIRMATIVE EVIDENCE OF
ADAPTIVE FUNCTIONING BUT FEDERAL
11th CIRCUIT EXPRESSLY
HEALTH IN THE BURGESS CASE CITED
IN THE BRIEFS IT IS NOT

REASONABLE FOR THE COURT TO GO
THERE WHEN THE DEFENSE OFFERS
LOW I.Q. IN MITIGATION RATHER
THAN BAR OF SENTENCING WHEN
THERE IS NOT FULL-ON ATKINS
HEARING WHERE EVERYBODY GOES
INTO ADAPTIVE FUNCTIONING.
HERE THE JUDGE CHERRY-PICKED
ADAPTIVE FUNCTIONING.
>> REALLY, IF THE 70 I.Q. IS
THERE AS NUMBER, LIKE, NOT QUITE
LIKE THIS, I'VE GOT A MEDICAL
CONDITION, EVEN THOUGH IT
DOESN'T HAVE TO BE RELATED TO
WHAT HAPPENED IN THE CRIME, FOR
IT TO BE CONSIDERED MITIGATING,
THERE HAS TO BE, JUST, THE
NUMBER DOESN'T EXIST IN THE AIR.
IT HAS TO BE RELATED TO
SOMETHING IN THIS DEFENDANT'S
LIFE THAT MADE HIM LESS CAPABLE
OF DEALING WITH SOMETHING, I
MEAN, TO, TO RELATE TO SOME
ASPECT OF HIS CHARACTER OR,
DOESN'T IT?
>> WELL IT'S, IT WAS FLESHED OUT
BY DR. WU AND DOCTOR OLANDER'S
TESTIMONY.
YOUR HONOR, YOU'RE CORRECT THERE
WAS NO REBUTTAL OF THAT
TESTIMONY.
>> SO YOU'RE REALLY-- IT SORT
OF GOES TOGETHER WITH THE BRAIN
DAMAGE?
>> YES, YOUR HONOR.
YES, YOUR HONOR.
DR. WU'S CONCLUSION WAS
SOMETHING HAPPENED TO THIS
INDIVIDUAL BETWEEN FOURTH GRADE
AND TIME OF THIS POST-OFFENSE
TESTING.
>> WHAT DID HE COME UP WITH
FOURTH GRADE?
WHAT WAS IT OCCURRED?
>> IN FOURTH GRADE THERE WERE
AVERAGE ACHIEVEMENT TEST SCORES
IN SCHOOL.
>> FROM THERE ON?
>> FROM THERE ON THERE IS
NOTHING OF RECORD UNTIL THE DATE

OF THE OFFENSE.
>> I MEAN, DID HE-- YOU MAY HAVE SAID IT BUT HE GRADUATED HIGH SCHOOL?
>> HE DID.
HE GRADUATED HIGH SCHOOL.
>> NO SPECIAL EDUCATION CLASSES?
>> THAT WAS NOT CLEAR.
EDUCATIONAL RECORDS FOR SOME REASON WERE NOT BROUGHT IN.
>> WE DON'T KNOW WHY?
>> WE DON'T KNOW WHY.
WE DON'T KNOW WHY.
AS TO CALDWELL, I WOULD SUBMIT THAT THERE IS A REAL AND SERIOUS PROBLEM WITH THE FORMER JURY INSTRUCTIONS IN THAT I COUNTED OVER TWO DOZEN REFERENCESES IN THOSE INSTRUCTIONS TO THE JURY'S ROLE BEING EITHER ADVISORY OR TO MAKE A RECOMMENDATION.
I SUBMIT TO THE FEDERAL COURTS, PARTICULARLY THE HURST COURT WILL TAKE THE CALDWELL ERRORS IN THESE FORMER CASES VERY, VERY SERIOUSLY INDEED OF THE AS TO PRESERVATION OF THE HIGH-RISK PROBATION OFFICER ISSUE, THERE WAS A MOTION FOR MISTRIAL MADE AND RENEWED LATER ON.
I SUBMIT THAT'S PRESERVED.
IT WAS DOCTORS GOLDBERGER AND ZAP WHO TESTIFIED AS TO MENTAL HEALTH FOR THE STATE.
TESTIFIED IN THE GUILT PHASE THAT THE DEFENDANT WAS CAPABLE OF WAIVING HIS RIGHTS.
THE STANDARD OF REVIEW ON THE PROSECUTORIAL MISCONDUCT, THE STATE HAS ARGUED THAT THE CRIME WAS, THAT THE TRIAL WAS NOT VITIATED.
THIS COURT'S HOLDING IN SALAZAR WAS THAT THE STANDARD OF REVIEW IS WHETHER ARGUMENT IS SO INFLAMMATORY THAT IT MIGHT HAVE INFLUENCED JURY TO REACH A MORE SEVERE VERDICT.
I'M OUT OF TIME.
I SUBMIT THAT IS WHAT HAPPENED

HERE AND I ASK THE COURT.