>> THE SUPREME COURT OF FLORIDA
IS NOW IN SESSION.
PLEASE BE SEATED.
>> OKAY.
THE LAST CASE ON THE DOCKET,
IT'S SIMMONS V. STATE.
WHENEVER YOU'RE READY.
>> GOOD MORNING, MAY IT PLEASE
THE COURT.
I'M NANCY RYAN REPRESENTING ERIC
SIMMONS, AND I UNDERSTAND THAT
THE COURT IS ANXIOUS TO ADDRESS
HARMLESS ERROR AND HEARST.
THIS COURT HAS EVER SINCE THE
FALLOUT FROM FURMAN HELD THAT
DEATH PENALTY CASES MUST BE NOT
ONLY AMONG THE MOST AGGRAVATED,
BUT AMONG THE LEAST MITIGATED.
RESPONSIBLE MINDS COULD DIFFER,
BUT THIS IS GIVEN THE HISTORY OF
THIS COURT'S PROPORTIONALITY
RULINGS, THIS IS NOT ONE OF THE
LEAST MITIGATED CASES TO COME
BEFORE THIS COURT.
MY BEST CASES ARE CITED IN THE
BRIEF, HAWK AND CROOK IN 1998,
THIS COURT HELD IN HAWK WHERE
THERE WAS AN 8-4 DEATH
RECOMMENDATION AND THE
AGGRAVATORS INCLUDING PECUNIARY
GAIN AND PRIOR VIOLENT FELONY,
THIS COURT UNANIMOUSLY HELD THAT
A BLUDGEONING MURDER WAS
SUFFICIENTLY MITIGATED TO
WARRANT IMPOSING A LIFE SENTENCE
IN LIGHT OF THE WELL-DOCUMENTED
BRAIN DAMAGE THAT CAME FROM A
CHILDHOOD ILLNESS, AND THE
WELL-DOCUMENTED LOSS OF CONTROL
THAT MR. HAWK HAD IN CHILDHOOD.
CROOK IS QUITE SIMILAR.
THERE WAS A 7-5 DEATH REC
AND A 6-1 COURT IN A CASE WHERE
THE AGGRAVATORS WERE PECUNIARY
GAIN, HAY US IN, ATROCIOUS AND
CRUEL AND CONTEMPORARY SEX
BATTERY--
>> LET ME ASK YOU A QUESTION.
IT'S SORT OF A REVERSE ISSUE ON
PROPORTIONALITY.

IN THIS CASE WE'VE GOT THE
SPECIAL JURY VERDICT, AND WE'VE
GOT THE JURORS THAT FOUND
AGGRAVATORS BY, MOST OF THEM OR
ALL OF THEM--
>> ALL THREE UNANIMOUSLY.
YES, YOUR HONOR.
>> OKAY.
BUT THEY ONLY FOUND 6-6 ON
MITIGATORS.
DON'T WE THEN, IN LOOK NOW IF WE
WERE TO DO A PROPORTIONALITY
REVIEW, DON'T WE LOOK AT THE
JURY'S FINDINGS THAT THEY DIDN'T
FIND EITHER OF THE STATUTORY
MITIGATORS WHICH I BELIEVE AT
LEAST IN CROOK WAS A HUGE ISSUE
ABOUT IT WAS A RAGE KILLING?
SO HOW DO YOU, IF WE ARE GOING
TO BE GOING TO LOOKING AT THE
ROLE OF THE SPECIAL VERDICT IN
THIS CASE WHICH IS, YOU KNOW, I
WOULD ASSUME THE STATE WILL
ARGUE, HOW DO YOU LOOK AT IT FOR
PROPORTIONALITY?
>> I THINK THERE ARE TWO
PROBLEMS WITH THE VERDICT IN
THAT REGARD.
ONE WAS THAT THEY DID NOT HEAR
THE EVIDENCE THAT WAS PRECLUDED
BEFORE FLORIDA V. HALL WAS
DECIDED.
THE STATE ARGUED THAT WE CAN'T
HAVE THE JURY HEARING ANYTHING
ABOUT THE FACT THAT A DEFENDANT
COULD HAVE BEEN DIAGNOSED AS
INTELLECTUALLY DISABLED IN
CHILDHOOD BECAUSE THAT WOULD
HAVE A HUGE EFFECT ON THE JURY.
THE JUDGE AGREED, OH, WE CAN'T
GO THERE, THAT OPENS A WHOLE NEW
ARENA IN THE JURY'S MINE.
THAT'S ONE-- MINDS.
THAT'S ONE PROBLEM.
THE STANDARD JURY INSTRUCTIONS
IN THAT THE JURY WAS TOLD OVER
TWO DOZEN TIMES THAT ITS DUTIES
WERE MERELY ADVISORY OR A
RECOMMENDATION.
AND IT WAS ALSO TOLD, YES, WE

KNOW YOU CAN ONLY TAKE ONE STRAW
VOTE ON THIS.
SO I SUBMIT THAT BOTH AS TO
AGGRAVATION AND AS TO
MITIGATION, BOTH OF THOSE
SITUATIONS DIMINISH THE VALUE OF
THE FINDINGS IN THIS CASE.
AND NOT TO BELABOR THE POINT,
YOUR HONORS, BUT HERE AGAIN THE
KILLING WAS BRUTAL.
HERE AGAIN WE HAVE VERY WELL
DOCUMENTED HISTORY OF BRAIN
DAMAGE WHERE WE HAVE AN ACTUAL
EYEWITNESS TO THE INCIDENT THAT
CAUSED THIS VERY UNFORTUNATE
BRAIN DAMAGE ON MR. SIMMONS'
PART WHEN HE WAS 18 MONTHS OLD
AND AGAIN IN THE SECOND
SENTENCING HEARING AFTER THIS
COURT SENT IT BACK FOR A SECOND
SENTENCING HEARING IN LIGHT OF
THE MITIGATION THAT WASN'T
BROUGHT FORTH AT FIRST.
MR. SIMMONS' WAS INITIALLY
SENTENCED TO DEATH 12-0, AFTER A
12-0 DEATH RECOMMENDATION X THIS
COURT SENT IT BACK ON
INEFFECTIVENESS GROUNDS SINCE
VERY SUBSTANTIAL MITIGATION
CONSISTING OF THE SCHOOL RECORDS
SHOWING INABILITY TO CONTROL
HIMSELF AND THE BRAIN INJURY HAD
NOT BEEN INTRODUCED.
SO I WOULD ASK THIS COURT TO
VIEW THIS CASE, FIRST AND
FOREMOST, THROUGH THE LENS OF
PROPORTIONALITY REVIEW RATHER
THAN BEING DISTRACTED BY THE
STARTLING EVENTS OF 2016.
BUT THAT DOES BRING US TO
HEARST.
AND I WOULD, I DID-- I WOULD
AND DO ASK THE COURT TO NOT ONLY
VACATE THE DEATH SENTENCE, BUT
TO REMAND FOR ENTRY OF A LIFE
SENTENCE ON PROPORTIONALITY
GROUNDS.
BUT IN THE EVENT THE COURT DOES
REACH THE HEARST QUESTIONS, MY
POSITION IS THAT HARMLESS ERROR

ANALYSIS IS POSSIBLE IN THESE
MATTERS BUT ONLY THEORETICALLY.
I DON'T BELIEVE THE CONDITIONS
NECESSARY FOR IT CAN BE MET BY
PROBABLY ANY OF THE CASES IN THE
PIPELINE.
I THINK THE CONDITIONS THAT ARE
NECESSARY FOR THIS COURT TO
FIND, TO RULE THAT THERE WAS
HARMLESS ERROR IS THAT YOU'D
HAVE TO HAVE NOT ONLY WHAT
YOU'VE GOT HERE WHICH IS THE
UNANIMOUS FINDINGS ON THREE
AGGRAVATORS, BUT YOU'D ALSO HAVE
TO HAVE A MAN NOW MIND--
UNANIMOUS FINDING THAT THEY WERE
ENOUGH TO WARRANT THE DEATH
PENALTY AND THEY WERE NOT
OUTWEIGHED BY THE MITIGATION.
I THINK YOU'D HAVE TO HAVE NO
CALDWELL V. MISSISSIPPI PROBLEM
IN THE JURY INSTRUCTIONS.
I SUBMIT TO YOU THAT THE SIXTH
AMENDMENT HOLDING IN HEARST IS A
COMMENT THAT BLEW BY HERE ABOUT
THREE WEEKS AGO AND THAT THE
TAIL OF THE COME MEANT HASN'T
COMING INTO VIEW YET, BUT IT'S
GOING TO BE EIGHTH AMENDMENT
PROBLEMS WITH THE JURY
INSTRUCTIONS THAT I'VE JUST
DESCRIBED.
AND I FURTHER SUBMIT THAT EVEN
IF YOU HAD ALL THOSE CONDITIONS
PRESENT, YOU WOULD STILL NEED TO
REMAND AS MY FELLOW DEFENSE
LAWYERS HAVE BEEN ARGUING THIS
WEEK.
I THINK YOU WOULD STILL NEED TO
REMAND TO SEE WHAT TRIAL COUNSEL
WOULD HAVE DONE IN SUCH A
DIFFERENT SITUATION WITH A JURY
MAKING A-- KNOWING THAT A JURY
WOULD BE MAKING FINAL DECISIONS.
>> WELL, I ASSUME YOU BELIEVE
THAT THE JURY NEEDS TO MAKE
FINDINGS ON AGGRAVATORS AND
MITIGATORS?
>> YES, YOUR HONOR.
I BELIEVE IT'S--

>> AND SO MY QUESTION THEN IS
WHEN I LOOK AT THIS, EXCUSE ME,
VERDICT FORM--
>> YES.
>>-- I SEE THAT IN THAT 6-6
VERDICT YOU HAVE, THERE'S A
PANOPLY OF MITIGATORS THERE.
DON'T YOU THINK IT WOULD BE A
BETTER-- OR WOULD YOU THINK
THAT IT'S A BETTER IDEA THAT
THERE BE A SPECIFIC JURY FINDING
AS SIEGE MITIGATOR?
>> YES, I DO.
I BELIEVE-- I HAVE TWO CASES IN
THIS EXACT SAME POSTURE.
I BELIEVE IT WAS IN BOTH CASES
THE DEFENSE DID SEEK THAT BUT
WAS DENIED THAT.
I'M NOT POSITIVE THAT THE RECORD
WILL SUPPORT ME ON THAT IN THIS
CASE.
THE OTHER CASE IS DONALD
WILLIAMS V. THE STATE.
I KNOW IN THIESS ONE OF THEM THE
DEFENSE DID SEEK SPECIFIC
FINDINGS ON MITIGATORS.
AGAIN, WITH REGARD TO THE
EXTREME DIFFICULTY OF HARMLESS
ERROR ANALYSIS, I WOULD PROVIDE
A LITTLE BIT OF ANSWER TO THE
QUESTIONS YESTERDAY ABOUT WHAT
ARIZONA HAS DONE.
THIS IS ABOUT 24 HOURS' WORTH OF
RESEARCH--
>> IT SOUNDS LIKE, IT SOUNDS
LIKE, RESPECTFULLY, WHAT YOU'RE
SAYING IS THAT IF THE COURT HAS
NOT, THE TRIAL COURT HAS NOT
ALREADY COMPLIED WITH WHAT
HEARST SAYS, YOU CANNOT HAVE
HARMLESS ERROR.
THAT'S NO DOCTRINE OF HARMLESS
ERROR AT ALL.
>> OH, IT'S-- I'M SORRY, YOUR
HONOR, I DID ALLUDE THROUGH
THAT.
>> YEAH.
>> I BELIEVE IT'S POSSIBLE IF
YOU HAD A COMBINATION OF WAIVER
OF ENTIRE MITIGATION CASE AND A

VERY DETAILED CONFESSION, THAT'S
ONE OF THE THINGS ARIZONA LOOKS
AT, STIPULATIONS AND CONCESSIONS
BY COUNSEL WHEN THEY'RE DOING
THEIR HARMLESS ERROR ANALYSIS.
I THINK YOU COULD THEORETICALLY
IF THERE IS A CASE IN YOUR
PIPELINE WHERE THERE WAS NOT A
CALDWELL V. MISSISSIPPI PROBLEM,
I THINK YOU COULD HAVE A
COMBINATION OF CONCESSIONS AND
WAIVER.
>> ALL RIGHT.
>> THAT WOULD ALLOW A HARMLESS
ERROR FINDING.
>> HOW WOULD YOU DO THAT IF
YOU'RE SAYING THAT BEYOND
FINDING THE AGGRAVATORS, DO YOU
HAVE TO FIND EACH OF THE
MITIGATORS UNANIMOUSLY OR
JUST-- AND THEN YOU'RE SAYING
IN ANY EVENT THAT UNDER THE
SIXTH AMENDMENT THERE HAS TO BE
A UNANIMOUS FINDING OF THE DEATH
PENALTY?
>> THERE'D HAVE TO BE-- UNDER
RING, I BELIEVE SO, YES.
I DON'T THINK HEARST DEALT WITH
ALL THE PROBLEMS.
THE QUESTION OF WHETHER YOU'VE
GOT TO HAVE UNANIMITY IN YOUR
ULTIMATE FINDING IS STILL OUT
THERE, AND I WOULD POINT OUT
ARIZONA DOES, WHEN IT'S DOING
ITS HARMLESS ERROR ANALYSIS, IT
DOES LOOK AT THE EQUIVALENT OF A
WEIGHING QUESTION, THE ARIZONA
QUESTION IS WHETHER BEYOND A
REASONABLE DOUBT NO REASONABLE
TRIER OF FACT COULD WEIGH
LENIENCY IN THE SAME MANNER AS
THE TRIAL JUDGE.
SO THAT'S THEIR GLOBAL
QUESTION--
>> DIDN'T, ISN'T IT-- YOU SEE,
THE PROBLEM WITH ARIZONA IS, AS
WAS POINTED OUT BY MS. DITTMAR
IN A PRIVATE ARGUMENT, THEY
DIDN'T HAVE THE BENEFIT OF JURY
FINDINGS.

WE HAVE, IN THIS CASE, THE
BENEFIT OF JURY FINDINGS ON THE
AGGRAVATORS AND MORE THAN ONE
AGGRAVATOR.
SO WE'VE GOT A-- AND I THINK
YOU'VE ALREADY SOMEWHAT AGREED
THAT THE, AT LEAST AS TO THE
SUFFICIENCY OF THE AGGRAVATORS
THAT YOU'VE GOT, YOU DEFINITELY
HAVE SUFFICIENT AGGRAVATORS.
YOU DON'T JUST HAVE ONE
AGGRAVATOR, YOU HAVE SEVERAL--
>> OH, NO, YOUR HONOR.
I DID NOT MEAN TO CONCEDE.
I MISSPOKE--
>> I REALIZE YOU WOULDN'T WANT
TO CONCEALED.
I THOUGHT YOU-- I TRIED TO USE
MORE GENTLE ARGUMENT HERE.
BUT IF WE'RE, I THINK, GOING
BACK TO THE QUESTION OF WHAT
YOU'RE SAYING IS THAT IF THE
JURY ISN'T TOLD THAT THEIR
VERDICT HAS TO BE UNANIMOUS,
WHICH THEY WOULD NEVER HAVE TOLD
BACK THEN.
THEY'RE TOLD IT'S GIVEN GREAT
WEIGHT, THAT THEIR VERDICT IS
GIVEN GREAT WEIGHT.
THEN YOU CAN'T HAVE HARMLESS
ERROR.
>> IT'S UNLIKELY THAT THE
CONDITIONS WILL BE MEANT IN ANY
PIPELINE CASE AT THE MOMENT.
BUT I'M NOT-- I DID, I DO NOT
INTEND TO CONCEDE THAT THE JURY
MADE A FINDING THERE ARE
SUFFICIENT AGGRAVATORS IN THIS
CASE IN A MANNER THAT THE SIXTH
AMENDMENT RECOGNIZES SINCE
HEARST TELLS US THAT A 7-5 DEATH
REC IS NOT GOOD ENOUGH.
I CAN'T IMAGINE A SITUATION
WHERE AN 8-4 DEATH REC WOULD BE
GOOD ENOUGH TO SUFFICE AS A
FINDING--
>> BUT IN HEARST THERE WAS NO
JURY FINDINGS OF ANY OF THE
AGGRAVATORS.
HERE WE'VE GOT JURY FINDINGS ON

ALL THE AGGRAVATORS.
>> I'M SAYING THAT DOESN'T GO
FAR ENOUGH PARTICULARLY IN LIGHT
OF THIS RECORD.
HERE I'D REFER YOU AS COUNSEL
DID YESTERDAY FOR MR. MORRIS TO
MR. JUSTICE AN THEY WOULD'S
DISSENTING OPINION IN THE 2003
OPINION IN DURST V. STATE.
THAT IS-- I'M SORRY.
I'M SORRY.
I'M SORRY, YOUR HONOR.
THE QUESTION?
>> I DIDN'T HAVE A QUESTION.
>> OH.
>> YOU WERE TALKING.
YOU WERE TALKING ABOUT JUSTICE
ANSTEAD'S DISSENT.
>> I'D FORGOTTEN WHY I BROUGHT
THAT UP.
IN ARIZONA-- OH, THE RECORD IN
THIS CASE.
THE RECORD IN THIS CASE IS THE
PROBLEM.
BECAUSE YOU'VE GOT THE STATE
ARGUING THAT, TO THE JURY THAT
THIS PRIOR VIOLENT FELONY
AGGRAVATOR DOESN'T COUNT FOR
MUCH.
YOU'VE GOT THE TRIAL JUDGE
FINDING THAT IT DOESN'T COUNT
FOR MORE THAN MODERATE
AGGRAVATION BECAUSE IT WAS A
CASE OF AN AGGRAVATED ASSAULT ON
A POLICE OFFICER CONSISTING OF A
SWERVE.
IT WAS A TRAFFIC CHASE, AND THE
DEFENDANT-- ACCORDING TO ONE OF
THE OFFICERS-- SWERVED TOWARD
THAT OFFICER'S CAR, CAUSING THAT
OFFICER TO HAVE TO TAKE EVASIVE
ACTION.
NO ONE WAS HURT, AND THE STATE
ACCEPTED A PLEA TO THE
AGGRAVATED FELONY.
BUT I BELIEVE IT WAS A TWO-YEAR
SENTENCE.
SO THIS IS NOT-- AND, AGAIN,
THE STATE, I BELIEVE THE FIRST
THING IN ITS OPENING THE STATE

SAID YOU'RE GOING TO HEAR ABOUT
A PRIOR VIOLENT FELONY, BUT IT
DOESN'T WEIGH MUCH.
AND GIVEN THAT, I THINK YOU
DON'T HAVE A RECORD THAT SAYS
THESE AGGRAVATORS WERE
SUFFICIENT TO WARRANT THE DEATH
PENALTY AFTER HEARST.
>> SO UNDER YOUR ANALYSIS,
WHAT'S LEFT FOR THE TRIAL JUDGE
TO DO?
BECAUSE IT SOUNDS TO ME LIKE
YOU'RE SAYING THAT THE JURY HAS
TO MAKE EVERY FINDING; THE
AGGRAVATORS, THE MITIGATORS,
WHETHER THEY, WHETHER THE
MITIGATORS OUTWEIGH THE
AGGRAVATORS AND WHAT THE
ULTIMATE SENTENCE SHOULD BE.
SO THEN WHAT DOES THE JUDGE DO?
>> SIMPLY IMPOSE SENTENCE.
SIGN THE SENTENCING ORDER.
I THINK THAT'S WHAT THE SUPREME
COURT SAYS IN HEARST.
>> SO THE JUDGE SIMPLY IMPOSES
SENTENCE PURSUANT TO WHAT THE
JURY JUST DID.
>> YES.
UNDER--
>> AND THERE'S NO ROOM FOR
ANYTHING.
>> I DON'T BELIEVE, I BELIEVE
THAT WHAT HEARST SAYS IS THAT
THE TRIAL JUDGE CANNOT
SUBSTITUTE HIS JUDGMENT FOR THAT
OF THE JURY--
>> YOU SUGGESTING THEN THAT A
JUDGE, AFTER HEARING EVERYTHING
AND SITTING THROUGH IT, WOULD
COME TO THE CONCLUSION THAT THIS
IS NOT A DEATH CASE, AND A JURY
COMES BACK WITH A DEATH, DEATH
FINDINGS, THAT A JUDGE COULD NOT
OVERRIDE THAT DECISION?
>> OH, AN OVERRIDE FOR LIFE?
>> UH-HUH.
>> I THINK THAT WOULD ALWAYS BE
POSSIBLE.
I THINK THAT WOULD ALWAYS BE
POSSIBLE.

>> BUT NOT THE REVERSE.
>> BUT NOT THE REVERSE.
>> OKAY.
>> I THINK OVERRIDES ARE OUT
UNDER HEARST, OVERRIDES FOR
DEATH UNDER HEARST.
I HAVE RECALLED MY POINT ABOUT
MR. JUSTICE ANTHEY WOULD WHICH
IS THAT IF, IN HIS OPINION HE'S
POINTING OUT THE DIFFICULTIES OF
DOING HARMLESS ERROR ANALYSIS IN
THESE CASES, AND HE SAYS YOU'D
HAVE TO PUT COMPLETELY OUT OF
YOUR MIND EVERYTHING THE TRIAL
JUDGE SAID WHICH WOULD PUT YOU
AT A GREAT DISADVANTAGE.
THAT'S AFTER BEST EVIDENCE OF
WHAT HAPPENED IN THE TRIAL
COURT.
AND I BELIEVE, I BELIEVE THAT IS
A PROBLEM.
I BELIEVE THERE'S A PROBLEM WITH
HARMLESS ERROR ANALYSIS, YOU
HAVE A PROBLEM WITH SUBSTITUTING
YOUR OWN JUDGMENT FOR THAT OF
THE JURY IN A CASE SUCH AS THIS
WHERE YOU'VE ONLY GOT BARE, BARE
FINDINGS ON THE AGGRAVATORS AND
NO FINDING ON THE--
>>-- ANALYSIS ALWAYS INVOLVES
THE COURT, THE COURT APPLYING
THE HARMLESS ERROR ANALYSIS TO
BASICALLY PUT ITSELF IN THE
POSITION OF THE JURY.
I MEAN, THAT'S, THAT IS INTEGRAL
TO HARMLESS ERROR ANALYSIS.
I DON'T KNOW HOW THAT'S ANY
DIFFERENT IN THIS CONTEXT THAN
ANY OTHER CONTEXT.
THAT'S JUST PART OF WHAT
HARMLESS ERROR ANALYSIS IS.
WE KNOW THAT THE SUPREME COURT
HAS SAID THAT APPRENDI ERRORS
ARE SUBJECT TO HARMLESS ERROR
ANALYSIS.
THEY SPECIFICALLY HELD THAT AND
OVERRULED THE STATE SUPREME
COURT THAT HELD TO THE CONTRARY.
WE ALSO KNOW THAT IN HEARST THEY
SPECIFICALLY REMANDED WITH AN

ACKNOWLEDGMENT THAT THE STATE
COURTS WOULD PERFORM HARMLESS
ERROR ANALYSIS.
MAYBE THAT'S NOT A HOLDING, I
DON'T KNOW, BUT THEY CERTAINLY
CONTEMPLATED THAT HARMLESS ERROR
ANALYSIS IS GOING TO BE APPLIED.
SO TO THE EXTENT-- I DON'T
UNDERSTAND THIS, YOUR POINT
ABOUT HOW JUDGES CAN'T PUT
THEMSELVES IN THE POSITION OF
THE JURY, BECAUSE THAT'S ALWAYS
INVOLVED.
IF THAT'S WHAT YOU WERE SAYING.
THAT'S WHAT I UNDERSTOOD YOU TO
BE SAYING.
PAUSE THAT'S ALWAYS INVOLVED IN
HARMLESS ERROR ANALYSIS.
>> IT IS, YOUR HONOR.
AND THAT BRINGS US TO STRUCTURAL
ERROR.
I BELIEVE ONCE THE DUST SETTLES,
IT'S GOING TO BE PERCEIVED AS
THE CALDWELL V. MISSISSIPPI
PROBLEM.
WE ARE GOING TO SEE THIS ONE DAY
AS A CASE OF STRUCTURAL ERROR.
IF YOU READ RING THREE FROM THE
ARIZONA SUPREME COURT IN 2003,
THE JUSTICES SPLIT 3-2 ON
WHETHER HARMLESS ERROR ANALYSIS
IS APPROPRIATE.
TWO, THE DISSENTERS, SAID, NO,
THIS IS LIKE SULLIVAN V.
LOUISIANA.
THERE'S NOTHING IN THE CENTER OF
THE VERDICT THERE.
THERE'S NO THERE THERE.
YOU CAN'T PERFORM HARMLESS ERROR
ANALYSIS ON IT.
OBVIOUSLY, THE THREE MAJORITY
JUSTICES PREVAILED IN SAYING
THAT THIS IS JUST LIKE THE METER
CASE RATHER THAN THE SULLIVAN
CASE, BUT THIS COURT IN THE
GALLINDIS CASE AND I BELIEVE
IT'S JOHNSON CITED BY THE
SUPPLEMENTAL BRIEFS HAS APPLIED
HARMLESS ERROR ANALYSIS SITING
NEATER IN CASES WHERE THERE'S A

SINGLE FACT THAT GOES INTO A
GUIDELINES CALCULATION OR--
I'VE FORGOTTEN THE EXACT CONTEXT
OF JOHNSON, HARMLESS ERROR CASES
THAT ARE OBVIOUSLY OUTSIDE THE
CAPITAL WHEELHOUSE.
BUT WHEN THERE'S A SINGLE
QUESTION THAT MIGHT HAVE GONE
ONE WAY OR THE OTHER, THIS COURT
AND ANY COURT, ANY APPELLATE
PANEL CAN LOOK AT WHETHER THE
ERROR, THE PROBLEM, THE LAPSE IN
SIXTH AMENDMENT RIGHTS OR
WHATEVER LAPSE WAS HARMLESS
BECAUSE THERE'S NO WAY THE JURY
COULD HAVE FOUND THAT, COULD
HAVE FOUND DIFFERENTLY AS TO
THAT SINGLE FACT.
AND IT COULDN'T, IT JUST
COULDN'T HAVE POSSIBLY MADE A
DIFFERENCE TO THE VERDICT AS A
GLOBAL WHOLE.
AND MY POSITION IS THAT SINCE
THE JURY IN FLORIDA AS DISTINCT
FROM ARIZONA MUST, I BELIEVE,
MAKE A FINDING THAT THERE IS,
ARE SUFFICIENT AGGRAVATORS TO
WARRANT THE DEATH PENALTY.
I BELIEVE THAT'S A UNANIMOUS,
EXPRESS FINDING THEY MUST MAKE
UNDER HEARST.
IN THAT CASE, IF THAT IS ABSENT,
THEN YOU RUN INTO A STRUCTURAL
ERROR PROBLEM WHERE THERE'S
NOTHING TO PERFORM HARMLESS
ERROR ANALYSIS ON.
I BELIEVE I'VE-- OH, MY LIGHT'S
NOT ON YET.
>> YOU'RE INTO YOUR REBUTTAL.
>> I AM INTO MY REBUTTAL TIME?
IF I MAY, YOUR HONOR, I WILL
RESERVE MY REMAINING TIME.
>> MAY IT PLEASE THE COURT,
STEPHEN AKE ON BEHALF OF THE
STATE OF FLORIDA IN THIS CASE.
I'D LIKE TO, I GUESS, BRIEFLY
ADDRESS THE PROPORTIONALITY
ARGUMENT BEFORE WE GET TO
HEARST.
>> COULD YOU, BEFORE YOU GET TO

PROPORTIONALITY, COULD YOU
ADDRESS THE HALL ISSUE?
>> SURE.
>> I'M TRYING TO UNDERSTAND, DID
THEY WANT TO PRESENT EVIDENCE OF
MENTAL RETARDATION AND
INTELLECTUAL DISABILITY TO THE,
TO THE JURY?
>> I THINK IT'S SOMEWHAT
CONFUSING FROM THE RECORD.
COUNSEL, DEFENSE COUNSEL
SPECIFICALLY SAID I'M NOT GOING
TO ARGUE THAT HE'S MENTALLY
RETARDED CURRENTLY, BUT HE
WANTED TO PRESENT THAT HE WAS,
EXCUSE ME, INTELLECTUALLY
DISABLED AS A CHILD.
HE WANTED TO PRESENT THAT
EVIDENCE THROUGH DR. CUNNINGHAM.
THE PROBLEM WAS DR. COUPLE HAM
HAD COME ON TO THE JURY AND SAID
YOU CAN'T SENTENCE SOMEBODY TO
DEATH WHEN THEY'VE BEEN FOUND TO
BE INTELLECTUALLY DISABLED AND
THEN WENT ON TO PROCEED TO THEM
THEM MR. SIMMONS' WAS.
THE ONLY THING THIS COURT
ALLOWED WAS DR. CUNNINGHAM'S
TESTIMONY AS TO THE NORMS AND
STANDARD AREAS OF
MEASUREMENTS--
>> THEY WERE ONLY DEALING WITH
THE CHILDHOOD ISSUE OF--
>> THAT'S WHAT THEY SAID.
>> I MEAN, BECAUSE-- OKAY.
I WAS TRYING TO THE SEE IF THIS
WAS TRULY A HALL ISSUE.
BECAUSE YOU AGREE POST-HALL THE
STANDARD ERROR MEASUREMENT IS
RELEVANT--
>> RIGHT.
>>-- AND PRESUMABLY IF IT'S
BEING PRESENTED TO THE JURY AS A
STATUTORY OR NONSTATUTORY
MITIGATOR, THEY SHOULD BE ABLE
TO HEAR THAT EVIDENCE.
>> WELL, I THINK YOU HAVE THE
PROBLEM OF THEM NOT COMPLYING
WITH THE RULE IN THAT SCENARIO,
AND THAT'S WHAT THE STATE WAS

HAVING THE PROBLEM WITH IN THIS
THIS CASE.
THEY NEVER FILED A MOTION AS A
BAR ON MENTAL RETARDATION.
THE STATE WAS TAKEN BY SURPRISE
WHEN DR. CUNNINGHAM STARTS TO
PINING--
>> SEE, WHAT'S WHAT I DON'T
QUITE UNDERSTAND.
ONE WOULD BE IT'S A BARRED
EXECUTION.
>> RIGHT.
>> THE OTHER WOULD BE WE'RE
OFFERING THIS AS EVIDENCE OF
MITIGATION.
>> RIGHT.
>> AND I DON'T THINK-- DOES THE
STATE HAVE TO HAVE-- THAT'S
NOT, THE RULE DOESN'T APPLY
AT--.
AT THAT POINT TO YOU DO YOUR
DISCOVERY, AND YOU FIND OUT.
I'M NOT SURE I GET THE IDEA THAT
THEY DIDN'T PRESENT A HALL CASE
TO THE JUDGE, AND THEY DIDN'T
FILE A RULE, YOU KNOW, UNDER THE
RULES.
BUT HOW DOES THAT, HOW DOES THAT
AFFECT HOW YOU PRESENT YOUR
MITIGATION TO THE JURY?
>> WELL, I THINK WHAT HE WAS,
WHAT THE COURT WAS DISALLOWING
IN THIS CASE WAS EVIDENCE AS TO
ONE ASPECT OF THE IQ TEST.
AND THAT'S, I THINK WE HAVE TO
KIND OF FOCUS ON WHAT WAS
ALLOWED AND WHAT BUDGET.
THEY WERE ALLOWED TO PRESENT ALL
KINDS OF EVIDENCE AS TO HIS LOW
IQ NUMBERS, HIS TEST SCORES, HIS
FUNCTIONALITY IN THE COMMUNITY,
ALL THAT.
>> HE WASN'T ALLOWED TO SAY BUT
THERE'S A STANDARD ERROR OF FIVE
POINTS?
I GUESS-- I DON'T GET WHY YOU
WOULD LIMIT IT.
IT MAY BE HARMLESS-- DOCTOR.
>> RIGHT.
>>-- OKAY?

BUT I WAS SORT OF CONFOUNDED
ABOUT-- AND I DON'T HEAR THAT
MS. RYAN'S ARGUING INTELLECTUAL
DISABILITY.
>> NO, I THINK THE PROBLEM WAS
THIS WAS PRE-HALL, THE PENALTY
PHASE, AND THE STATE WAS
OBJECTING SAYING THE STANDARD
ERROR OF MEASUREMENT DOESN'T
COME IN.
THEY HAVE THE BRIGHT LINE, SO WE
DON'T GET INTO THAT.
>> SO REALLY IT SHOULD BE MORE
OF A HARMLESS ERROR ANALYSIS AS
OPPOSED TO THAT THE JUDGE WAS
RIGHT.
>> RIGHT.
WELL, AND AS I POINTED OUT, THEY
PRESENTED THAT EVIDENCE THROUGH
ANOTHER EXPERT, THE SAME EXACT
THING THAT SHE'S COMPLAINING WAS
NOT PRESENTED TO THE JURY
ACTUALLY CAME OUT AS TO THE
STANDARD MEASUREMENT AND ALL
THAT.
IN FACT, WHEN YOU LOOK AT IT IN
ITS TOTALITY, REALLY NOTHING WAS
EXCLUDED FROM THE JURY AS TO
DR. CUNNINGHAM'S--
>> OKAY.
THANK YOU FOR THAT
CLARIFICATION.
>> AS TO PROTO PORTIONALTY, I
THINK THE CASE IS A CLEARLY
DISTINGUISHABLE, HAWK AND CROOK.
BOTH OF THOSE INVOLVED MENTAL
ILLNESSES.
THE TWO STATUTORY MENTAL
MITIGATORS, SUBSTANTIAL
MITIGATION IS NOT PRESENT IN
THIS CASE.
IN THIS CASE WE DON'T HAVE
EITHER OF THE TWO STATUTORY
MENTAL MITIGATORS THAT ARE
PRESENT.
BOTH THE JURY AND THE JUDGE
UNANIMOUSLY REJECTED THOSE.
ALL WE HAVE IN THIS CASE IS THAT
THE DEFENDANT DID, INDEED, HAVE
A INCIDENT AS AN 18-MONTH-OLD

CHILD WHERE HE GOT A BLANKET
AROUND HIM AND WAS TAKEN TO THE
HOSPITAL FOR AN HOUR.
APPARENTLY, THAT LED TO SOME
BRAIN DAMAGE FROM THE TESTIMONY
OF THE DEFENSE EXPERTS.
THE STATE PRESENTED REBUTTAL
EVIDENCE TO THAT.
BUT THAT WAS IT, AND IT WAS LOW
IQ AND BRAIN DAMAGE, AND THAT'S
REALLY PRETTY MUCH THE GIST OF
THE MITIGATION THAT HE WAS USED
A LOT OF ALCOHOL WAS THE OTHER
ONE.
THAT'S THE GIST OF SITUATION IN
THIS CASE, AND IT'S CERTAINLY
NOT, YOU KNOW, WHEN YOU LOOK AT
THIS CASE WITH AGGRAVATION AND
THE VERY BRUTAL RAPE AND
KIDNAPPING AND MURDER OF THIS
VICTIM, YOU KNOW, IN THE PRIOR
AND DURING THE COURSE OF THE
KIDNAPPING, SEXUAL BATTERY, I
THINK YOU'LL SEE THAT HIS
SENTENCE IS PROPORTIONATE.
AS TO THE HEARST ISSUE, I
BELIEVE-- I KNOW THIS COURT HAS
BEEN HEARING ARGUMENT ALL WEEK
ON THIS.
>> EXPUNGING AS TO WHAT --
WAS SAYING.
THE STATE'S POSITION, OBVIOUSLY,
THAT IT'S A MERE FINDING OF A
FACT THAT ENHANCES THE MAXIMUM
SENTENCE THAT THE JURY HAS TO DO
X. IN THIS CASE, THAT IS ONE OR
MORE AGGRAVATING CIRCUMSTANCES.
AND THAT WAS, OBVIOUSLY, DONE IN
THIS CASE.
WE HAVE A VERDICT FORM THAT
REPRESENTS THE JURY'S, THE JURY
FOUND EACH OF THE THREE PROPOSED
AGGRAVATING CIRCUMSTANCES
UNANIMOUSLY.
ONE WAS A PRIOR VIOLENT FELONY
ON A LAW ENFORCEMENT OFFICER
WHERE SIMMONS HAD PLED GUILTY TO
THAT.
THE OTHER ONE WAS THE VERDICT
FROM THE ORIGINAL GUILT PHASE

BACK IN 2003 IN THIS CASE WHERE
HE WAS CONVICTED OF A KIDNAPPING
AND SEXUAL BATTERY OF THE
VICTIM, SO IT WAS DURING THE
COURSE OF THOSE.
AND THE THIRD ONE WAS THE HAC
AGGRAVATORS.
SO ALL THREE OF THOSE WERE FOUND
IN THIS CASE UNANIMOUSLY BY THE
JURY, SO I DON'T THINK YOU HAVE
ANY KIND OF HEARST ISSUE IN THIS
CASE.
>> I GUESS IT DEPENDS ON WHAT
HEARST SAYS.
BECAUSE IF HEARST REQUIRES THE
JURY TO MAKE A RECOMMENDATION,
WHICH THEY DID, BUT IF IT'S
INTERPRETED UNDER THE SIXTH
AMENDMENT TO BE UNANIMOUS, IT
WAS AN 8-4 RECOMMENDATION.
>> RIGHT.
AND I DON'T THINK, OBVIOUSLY,
THE COURT'S DISAGREEING WITH US
ON HOW TO READ HEARST, BUT I
BELIEVE JUSTICE BUY WRITER IS--
WRYER IS THE ONLY ONE--
>> WE DON'T KNOW.
THE COURT HASN'T DECIDED THIS.
>>NO, I KNOW, AND JUST BASED ON
THE QUESTIONS THAT HAVE BEEN
COMING OUT.
WE SEEM TO, HEARST SEEMS TO
IMPLY THAT WE HAVE TO HAVE JURY
SENTENCING.
I DON'T SEE THAT IN HERST
DECISION.
>> WELL, I MEAN, THE PROBLEM
WE'VE HAD THIS WEEK, QUITE
HONESTLY, IS WE'VE HAD PEOPLE
TAKING EXTREME POSITIONS THAT IN
MANY INSTANCES NEITHER ONE HELPS
THE COURT REACH WHAT REALLY
HEARST IS SAYING.
I MEAN, WE KNOW THAT HEARST
DOESN'T SAY JURY SENTENCING--
>> RIGHT.
>> AND WE ALSO KNOW THAT HEARST
DOESN'T SAY YOU NEED FINDINGS OF
FACT FOR ENHANCEMENT.
THAT'S YOU'RE GOING BACK TO

APPRENDI AND RING.
AND WE DO KNOW THESE BUILT ON
THOSE TWO CASES--
>> RIGHT.
>> BUT THERE ARE A COUPLE OF
CASES WHERE THERE'S SOME
INCONSISTENT LANGUAGE.
TO ME, IT'S UNMISTAKABLE THAT
THE U.S. SUPREME COURT IN THE
MAJORITY OPINION SAYS THAT A
JURY MUST DECIDE THE FACTS UPON
WHICH DEATH IS IMPOSED.
>> I UNDERSTAND THE COURT'S
READING OF THE CASE.
I INTERPRET IT TO BE THAT THE
JURY MUST FIND THE FACT THAT
ENHANCES THE SENTENCE WHICH IS
AN AGGRAVATING CIRCUMSTANCE.
[LAUGHTER]
WE OBVIOUSLY HAVE A DISAGREEMENT
AS TO--
>> WELL, NO, IT'S NOT A
DISAGREEMENT.
I'M JUST WONDERING WHY
INTELLIGENT PEOPLE CAN'T AT
LEAST AGREE ON WHAT THE ENGLISH
LANGUAGE IS SAYING--
[LAUGHTER]
AND IF WE NEED TO INTERPRET IT,
OKAY.
SEEMS TO ME THAT, YOU KNOW,
INTELLECTUAL LAWYERING OUGHT TO
BE THAT WE CAN AGREE ON WHAT THE
WORDS ARE.
NOW, IF THERE'S SOME MEANINGS
THAT WE NEED TO DO, IT'S ONE
THICK.
BUT WE HAVEN'T EVEN HAD
AGREEMENT THIS WEEK ON WHAT THE
WORDS ARE IN THE OPINION.
>> RIGHT.
I AGREE THERE IS SOME LOOSE
LANGUAGE IN VARIOUS SECTIONS OF
THE OPINION, YOUR HONOR.
I CERTAINLY SEE THAT AND SEE WHY
IT'S DIFFICULT TO DECIPHER
EXACTLY WHAT IT IS SAYING.
>> WELL, BUT THE ISSUE IT'S NOT
JUST LOOSE LANGUAGE, THERE'S
LOOSE LANGUAGE IN SOME PLACES,

BUT THERE'S TIGHT LANGUAGE IN
OTHER PLACES.
>> RIGHT, RIGHT.
>> YOU'RE RELYING ON THE TIGHT
LANGUAGE.
>> I THINK YOU CAN LOOK AT IT
THAT WAY, YES, YOUR HONOR.
>> BUT IF THE WHOLE THING WAS
FRAMED IN TERMS OF THE LOOSE
LANGUAGE, THEN YOU WOULDN'T HAVE
ANYTHING TO WORK WITH, WOULD
YOU?
[LAUGHTER]
>> NO.
>> WELL, THE TIGHT LANGUAGE
DOESN'T SAY ENHANCED, ENHANCE
THE PENALTY.
>> NO--
>> THOSE WORDS DON'T APPEAR IN
THIS OPINION, DO THEY?
>> NO.
YOU'RE CORRECT, YOUR HONOR.
>> AGAIN, GOING BACK TO WHAT WE
HAVE HERE--
>> RIGHT.
>>-- AND EVEN THOUGH YOU'VE GOT
CALDWELL INSTRUCTIONS, THE JURY
STILL FOUND ALL THE-- I MEAN,
THIS IS SORT OF A HELPFUL
QUESTION--
>> RIGHT.
>> IF WE'RE SAYING THAT HEARST
AT LEAST MEANS THAT ALL THE
AGGRAVATORS HAVE TO BE FOUND BY
THE JURY WHATEVER THEY'RE GOING
TO FIND TO BE CONSIDERED, THEY
SHOULD, YOU KNOW, UNANIMOUSLY.
NOT THAT THEY HAVE TO FIND
EACH-- BUT IF YOU'RE GOING TO
CONSIDER IT.
HERE THERE ARE THREE
AGGRAVATORS.
THEY FOUND IT UNANIMOUSLY.
>> RIGHT.
>> THEY DID NOT FIND ANY
STATUTORY MITIGATORS.
THAT WAS UNANIMOUS, THAT THEY
DIDN'T FIND STATUTORY MITIGATORS
WHICH, AS YOU SAY IN HAWK AND
CROOK, WERE STATUTORY

MITIGATION.
SO THAT'S HELPFUL--
>> OH, YES.
>> THAT'S VERY HELPFUL TO YOU.
YOU MAY NOT LIKE-- I REALIZE
THE AG HAS TO LOOK AT ALL THE
CASE, BUT WE'RE TRYING-- AND
THERE ISN'T, YOU KNOW, WHAT
WE'RE CONSIDERING THIS WEEK
DOESN'T MEAN ANYONE'S MADE UP
THEIR MIND.
WE'RE LOOKING FOR LIGHT,
CLARITY.
>> RIGHT.
>> AND SO GOING BACK TO THIS
CASE, I THINK YOUR ARGUMENT
WOULD BE THAT THERE DOESN'T NEED
TO BE A RECOMMENDATION OF DEATH
UNDER THE SIXTH AMENDMENT THAT
IS UNANIMOUS BECAUSE THE
RECOMMENDATION IS NOT WHAT IS
NEEDED TO IMPOSE--
>> CORRECT, YOUR HONOR.
>> BUT THE QUESTION WOULD HAVE
BEEN, I GUESS, WERE THERE
SUFFICIENT AGGRAVATORS TO
OUTWEIGH THE MITIGATORS.
THAT VOTE WAS ONLY--
>> 8-4.
>>-- 8-4.
IT WAS NOT BEEN BUT THEY WEREN'T
TOLD IT HAD TO BE UNANIMOUS,
THAT'S THE OTHER PROBLEM.
>> RIGHT.
AND YOU LOOK AT THE REJECTION OF
THE TWO STATUTORY MITIGATORS,
AND THE CATCH-ALL ONE
WAS A 6-6 VOTE, AND THEY LISTED
THE JURY COULD CONSIDER SUCH
THINGS AS 29--
>> BUT FOUR JURORS THOUGHT THAT
EVEN THOUGH THIS IS, LOOKS, YOU
KNOW, AS FAR AS FROM OUR POINT
OF VIEW MAY BE PROPORTIONATE,
FOUR JURORS THOUGHT THAT THE
AGGRAVATORS DID NOT, HOWEVER WE
SAY IT, DID NOT OUTWEIGH THE
MITIGATORS, CORRECT?
>> I THINK YOU GET INTO A CASE
OF--

>> I MEAN, THAT'S CORRECT,
RIGHT?
>> KANSAS V--
>> YOU JUST ANSWER--
>> I DON'T THINK YOU COULD
SPECULATE AS TO WHAT THE JURORS
FOUND.
I THINK THAT COULD BE A MERCY
VOTE OF FOUR PEOPLE FINDING THE
AGGRAVATORS CLEARLY OUTWEIGHED
THE MITIGATORS, BUT FOUR PEOPLE
JUST DIDN'T WANT TO IMPOSE A
DEATH SENTENCE.
AS THE U.S. SUPREME COURT JUST
STATED IN KANSAS CASE, THAT IS A
JUDGMENT CALL ON THE JURORS, AND
THEY MAY DO THEIR MERCY ON DOING
THAT KIND OF VOTE.
SO, I MEAN--
>> IF THAT'S THE CASE--
>> OBVIOUSLY, THOUGH, WE HAVE
SIX RECOMMENDING NONSTATUTORY OR
FINDING NONSTATUTORY.
I'M SORRY, JUSTICE QUINCE.
>> SO IF THAT IS THE CASE THAT
THE FOUR OR EVEN IN A THREE OR
TEN, WHATEVER, IF YOU HAVE
JURORS THAT POSSIBLY ARE DOING
THIS BASED ON MERCY, I'M STILL
STRUGGLING WITH DOES-- WHAT
DOES THE TRIAL JUDGE HAVE TO DO
IN A SENTENCING ORDER NOW?
>> WELL, UNDER HEARST HE CAN'T
FIND ANY FACTS THAT THE JURY
DIDN'T FIND.
>> OKAY.
>> SO IN THIS CASE--
>> CAN'T FIND ANY AGGRAVATION?
>> RIGHT.
>> OR WHAT?
>> AGGRAVATION.
WELL, I MEAN, THE WAY OUR
SYSTEM'S SET UP NOW IN THIS
CASE, FOR EXAMPLE, THEY
PRESENTED ADDITIONAL EVIDENCE AT
THE SPENCER HEARING IN
MITIGATION THAT THE JURY NEVER
HEARD, AND THE JUDGE FACTORED
THAT INTO HIS SENTENCING ORDER.
SO, BUT THE JUDGE FOUND--

>> THEY COULDN'T DO THAT UNDER
THE, UNDER HEARST NOW?
>> NO.
I DON'T THINK THE MITIGATION
COMES INTO PLAY UNDER HEARST.
I THINK YOU'RE DEALING WITH WHAT
ENHANCES THE SENTENCE, AND
MITIGATION DOES NOT ENHANCE THE
SENTENCE, SO I DON'T THINK THAT
COMES IN.
I DON'T THINK YOU NEED A SPECIAL
VERDICT FORM ON MITIGATION.
BUT THE WAY OUR SYSTEM'S SET UP
WITH THE SPENCER HEARING NOW
WHERE THE JUDGE HEARD ADDITIONAL
MITIGATION AND HE FACTORED THAT
INTO HIS SENTENCING ORDER,
THAT'S TO THE BENEFIT OF THE
DEFENDANT.
>> ARE YOU SAYING THAT
MITIGATION IS NOT A FACT
NECESSARY TO IMPOSE DEATH?
>> YES.
>> YOU'RE SAYING WHETHER
SOMEBODY'S INTELLECTUALLY
DISABLED IS NOT A FACT, WHETHER
THEY ARE, HAVE BEEN SEXUALLY
ABUSED AS A CHILD IS NOT A FACT,
IT'S A JUDGMENT CALL?
>> WELL, THERE'S FACTS.
AS-- AND I THINK IT WAS KANSAS
V. CARR THAT SAYS THAT.
THERE ARE FACTS THAT SUPPORT
THAT THAT CAN BE FOUND BY THE
JURY, BUT WHETHER IT'S
MITIGATING OR NOT IS A DIFFERENT
QUESTION.
>> WELL, THEY WERE REALLY
ADDRESSING, KANSAS V. CARR,
WHETHER YOU NEEDED A JURY
INSTRUCTION TO SAY THAT
MITIGATION NEED NOT BE FOUND
BEYOND A REASONABLE DOUBT.
>> RIGHT.
>> THERE'S OTHER COMMENTS IN
THERE, AND I DON'T KNOW WHAT
KANSAS' STATUTE LOOKED LIKE AT
THE TIME, BUT IT'S-- AGAIN,
THEY CAN SAY SOMETHING.
THE QUESTION IS, HOW DOES IT

APPLY TO FLORIDA.
AND I'M TRYING TO UNDERSTAND HOW
SOMEONE AS A SCHIZOPHRENIC, THEY
WERE-- THEY'VE GOT
POST-TRAUMATIC STRESS DISORDER
TO.
TO ME, THOSE ARE FACTS.
>> RIGHT.
>> NOW, THE WEIGHT TO BE GIVEN
MAY BE JUDGMENT CALLS--
>> RIGHT.
>>-- BUT NOT THE FACT OF THE
MITIGATION.
>> AND I AGREE WITH YOU ON THAT
ASPECT.
BUT LIKE THE EXAMPLE OF, AND I
THINK IT WAS IN THIS CASE, THAT
HE LOVES ANIMALS.
IT'S A FACT, BUT IS IT
MITIGATING?
YOU KNOW?
I THINK YOU'RE RIGHT IN THE
SENSE THAT CERTAIN FACTS, LIKE
HE HAS A, YOU KNOW,
HYPOTHETICALLY SOMEBODY HAS A
DEFINED MENTAL ILLNESS THAT'S
BEEN PRESENTED EVIDENCE ON,
THAT'S A FACT THAT THE JURY MAY
FIND.
>> DID THE JURY, DID THE DEFENSE
ASK FOR SPECIAL FINDINGS FOR
EACH OF THE MITIGATORS?
>> THEY HAD A LONG DISCUSSION
ABOUT THAT AND REALLY THE
DEFENSE WAS OPEN TO-- THEY WERE
ALL KIND OF BASICALLY TRYING TO
HASH IT OUT AS TO HOW TO DO THE
NONSTATUTORY LIST THAT THE
DEFENSE HAD PROPOSED WHICH WAS,
ORIGINALLY IT WAS 34, AND THE
DEFENSE WAS VERY OPEN SAYING,
HEY, HOWEVER YOU GUYS WANT TO DO
THIS THAT LOOKS THE BEST AND
FLOWS THE BEST, WE'LL DO IT.
AND THEY ENDED UP REACHING AN
AGREEMENT THAT THEY WOULD LIST
THE CATCH-ALL AND HAVE THE BLANK
SPACES NEXT TO THE CATCH-ALL AND
THEN SAY UNDER THAT IT MAY
INCLUDE, AND THEN IT HAD THE

LIST OF THE--
>> DID THE JURY THINK THAT THEY
HAD TO FIND THAT THERE WAS
MITIGATION AS TO ALL THAT?
>> NO.
THEY JUST SAID THAT THE
BACKGROUND, THE THINGS IN THE
DEFENDANT'S BACKGROUND,
CHARACTER AND SO FORTH MAY
INCLUDE SUCH ITEMS AS, AND THEN
THEY LISTED ALL THOSE--
>> LET ME JUST ASK YOU THIS.
I MEAN, I THINK I UNDERSTOOD YOU
CORRECTLY TO SAY THAT THE JURY
IS NOT REALLY INVOLVED IN THE
MITIGATION PART OF IT.
SO I THINK WHAT YOU'RE SAYING IS
THAT THE ONLY TASK THE JURY HAS
IS TO MAKE A DETERMINATION AS TO
WHETHER THE FACTS FOR AN
AGGRAVATOR EXIST.
>> RIGHT.
I THINK I MISSED THE FIRST PART
OF YOUR QUESTION, BUT I THINK
YOU HAD IT RIGHT.
>> IF THAT'S ALL THE JURY HAS TO
DO, MAKE A FACTUAL DETERMINATION
AS TO WHETHER OR NOT IT'S HAC OR
PRIOR VIOLENT FELONY, THOSE KIND
OF THINGS, IF THAT'S ALL THEY
HAVE TO DO, THEN WHY DO WE NEED
TO PRESENT ANY MITIGATION DURING
THE PENALTY PHASE?
>> WELL--
>> IT SEEMS LIKE SOMETHING THAT
THEY WOULD PRESENT AFTERWARDS.
OKAY, JUDGE, I FOUND ALL THESE
THINGS, BUT NOW WE HAVE ALL
THESE THINGS THAT YOU NEED TO
CONSIDER AS FAR AS MITIGATION.
WHY WOULD WE EVEN PRESENT IT,
AND WHY WOULD WE ALLOW
PRESENTATION OF MITIGATION
DURING THE PENALTY PHASE?
>> WELL, I CERTAINLY THINK A
SYSTEM COULD BE SET UP WHERE YOU
DO THAT QUALIFYING HERE'S THE
AGGRAVATION, AND IF YOU FIND IT,
THEN WE GO TO THE NEXT STEP AND
PRESENT THE MITIGATION.

BUT CURRENTLY THAT'S NOT HOW
IT'S SET UP.
I THINK NOW THE DEFENSE WANTS TO
PRESENT THEIR MITIGATION, BUT
THEY MAY HAVE STRATEGIC REASONS
NOT TO PRESENT ALL OF IT TO THE
JURY.
THEY MAY WANT TO HOLD SOME OF IT
BACK.
SO I MEAN, WE GET INTO ALL THOSE
RAMIFICATIONS OF IT.
THE POINT I WAS TRYING TO MAKE
WAS THE MITIGATION ITSELF DOES
NOT NEED TO BE INDIVIDUALLY
VOTED ON IN A JURY VERDICT FORM
EVEN THOUGH IT WAS IN THIS CASE.
>> I THOUGHT YOU WERE SAYING--
>> WELL, BUT YOUR POINT IS THE
FEDERAL CONSTITUTION ONLY
REQUIRES, UNDER YOUR
UNDERSTANDING OF HEARST, THAT
THE FEDERAL CONSTITUTION ONLY
REQUIRES JURY FINDINGS OF FACT
WITH RESPECT TO THE AGGRAVATION.
>> EXACTLY.
>> BUT WE DO, YOU NEVER
SUGGESTING, BECAUSE IF YOU TAKE
LOCKHART AND EVERY CASE ABOUT
MITIGATION, THERE IS-- I DON'T
THINK THE STATE HAS EVER TAKEN A
POSITION, AND WE'VE HAD TO
REVERSE MANY DEATH SENTENCES
BECAUSE WE WERE TELLING THEM
DON'T CONSIDER NONSTATUTORY
MITIGATION.
THE JURY HAS TO HAVE MITIGATION
BEFORE IT.
>> YES, CORRECT.
YEAH.
BUT THEY DON'T HAVE TO FIND--
>> IT SEEMS TO ME YOU'RE SAYING
THEN THAT THE JURY ONLY FINDS
THE AGGRAVATION-- THE
MITIGATION IS PRESENTED TO THE
JURY SO THAT THEY CAN COME TO
THAT FINAL, ULTIMATE VOTE--
>> THE SELECTION PART, YES.
>>-- WHETHER TO IMPOSE THE
DEATH SENTENCE.
>> CORRECT.

>> AND SO THEN THE JUDGE THEN,
GETTING WHAT THE JURY VERDICT
IS, SEES WHAT THEY FIND IN
MITIGATION, AND THE JUDGE THEN
FINDS THE AGGRAVATION AND
DETERMINES WHETHER THAT, I MEAN,
JUDGE THEN FINDS THE MITIGATION
AND DETERMINES WHETHER THAT
MITIGATION WOULD OUTWEIGH THE
AGGRAVATION THAT THE JURY FOUND?
>> RIGHT.
>> THE WHOLE MITIGATION PART OF
IT WILL BE IN THE SPENCER
HEARING AFTER--
>> NO, NO.
>> I MEAN, SO WHY-- WHAT'S THE
NEED FOR IT?
>> NO, THE JURY STILL HEARS IT
BECAUSE THEY'RE MAKING A
RECOMMENDATION TO THE JUDGE
UNDER OUR SYSTEM, BUT THEY ONLY
HAVE TO FIND, AS JUSTICE CANADY
WAS SUMMARIZING, THEY ONLY HAVE
TO FIND THE AGGRAVATION
CONSTITUTIONALLY UNDER THE SIXTH
AMENDMENT, IS OUR ARGUMENT.
>> BUT, AGAIN, IN OUR STATUTE TO
IMPOSE DEATH THEY'VE GOT TO FIND
THAT THE AGGRAVATORS OUTWEIGH
THE MITIGATORS.
SO IS THEY-- IT'S NOT, AND
THAT'S WHAT THE QUESTION IS,
GOES BACKING TO, IS THAT A FACT.
AND YOU WERE ARGUING, WHICH I
APPRECIATE IT, KANSAS VERY CARR,
MITIGATION ISN'T A FACT.
IT'S A JUDGMENT CALL.
>> RIGHT.
>> SO THAT'S WHERE WE GO AROUND.
>> I THINK I UNDERSTAND WHERE
WE'RE AT.
BUT, YES, I THINK THAT
SUMMARIZES OUR POSITION ON THIS.
BUT IF THERE ARE NO FURTHER
QUESTIONS, THE STATE WOULD ASK
THAT THIS COURT AFFIRM.
THANKS.
>> YOUR HONOR, AS TO THE HALL
QUESTION, THE QUESTION UNDER
SKIPPER V. SOUTH CAROLINA IS

WHETHER IT'S REASONABLY LIKELY
THAT EXCLUDING THE TESTIMONY
THAT WAS EXCLUDED MAY HAVE
AFFECTED THE VERDICT.
I SUBMIT THAT'S A LOW BAR.
I DON'T MEAN TO WAIVE THE HALL
ISSUE.
WE HAD A LIMITED TIME FOR
ARGUING SEVERAL TOPICS THIS
MORNING.
I DO ASK THE COURT TO CONSIDER
WHETHER HALL, THAT THE HALL
PROBLEM IN ITSELF DOES NOT, IN
FACT, WARRANT REVERSAL BOTH IN
COMBINATION WITH THE OTHER
PROBLEMS AND ON ITS OWN.
>> WELL, I THOUGHT THE EVIDENCE
HERE WAS VERY CLEAR THAT ALL THE
PRONGS NECESSARY WITH
INTELLECTUAL DISABILITY WERE NOT
SATISFIED.
THE ADAPTIVE BEHAVIOR PRONG, WAS
THAT SATISFIED IN--
>> NO, YOUR HONOR.
WE DIDN'T ATTEMPT TO.
WE WEREN'T TRYING TO SHOW
INTELLECTUAL DISABILITY IN BAR
OF SENTENCE.
THAT'S A WHOLE SEPARATE
PROCEEDING WITHOUT A JURY WHERE
WE'VE GOT THE BURDEN, AND WE'VE
GOT TO SHOW--
>> OKAY.
MY HEAD IS SPINNING WITH THIS
ARGUMENT.
YOU WERE TRYING TO SHOW THAT
THIS DEFENDANT HAD AN
INTELLECTUAL DEFICIT.
>> AS A CHILD.
>> OKAY.
AND DIDN'T THAT EVIDENCE GO
BEFORE THE JURY?
>> SOME OF IT DID.
WE SUBMIT IT WAS INEFFICIENT IN
THAT BOTH THE STATE AND THE
COURT AGREED THAT IT WOULD BE A
BIG DEAL IF THEY HEARD IN
ADDITION-- IF THEY HERALD IN
ADDITION TO WHAT THEY HAD
ALREADY HEARD THAT THE DEFENDANT

COULD HAVE AND PROBABLY WOULD
HAVE BEEN CLASSIFIED AS MENTALLY
RETARDED BACK IN THE 1970s.
THAT'S OUR POSITION ON THAT
POINT.
>> AND--
[INAUDIBLE]
FALLEN, THAT WOULD HAVE
FATHER-IN-LAW UNDER THE
NONSTATUTORY MITIGATION.
>> YES, YOUR HONOR.
>> WHICH THE JURY ALREADY WERE
SPLIT ON WHETHER OR NOT ALL THAT
LIST OF THINGS HAD BEEN FOUND.
>> YES, YOUR HONOR.
AND, AGAIN, THAT'S ANOTHER
SIMILARITY WITH THE HAWK CASE
THAT I'VE ARGUED AS TO
PROPORTIONALITY.
IN THAT CASE THE JURY CAME BACK
8-4 EVEN THOUGH THEY HAD NOT
HEARD ALL OF THE NONSTATUTORY
MENTAL HEALTH-RELATED
MITIGATION, AND THIS COURT DID
FIND PROPORTIONALITY PROBLEM
WITH THE DEATH SENTENCE IN THAT
CASE.
>> SO UNDER WHATEVER NEW--
WELL, AFTER HER IS THERE
STILL-- HEARST, IS THERE STILL
ROOM FOR A DEFENSE ATTORNEY TO
WANT TO PRESENT MITIGATING
EVIDENCE ONLY TO A JUDGE?
>> NO.
I THINK THE SPENCER OR HEARING
HAS, IS NO LONGER SOMETHING THAT
CAN HAPPEN.
UNLESS-- WELL, WE'RE TALKING
MITIGATION.
IT IS POSSIBLE, AS I THINK WE
AGREED EARLIER, THAT AN OVERRIDE
TO LIFE IS STILL POSSIBLE.
YES, I THINK IT WOULD STILL BE
POSSIBLE AS A STRATEGY MATTER
FOR THE DEFENSE TO BRING
SOMETHING IN IN THE SPENCER
HEARING IN MITIGATION TO MAKE
THAT KIND OF HAIL MARY ARGUMENT
AT THE END FOR AN OVERRIDE IN
THE EVENT OF A BAD

RECOMMENDATION.
>> I COULD IMAGINE
POSTCONVICTION CLAIMS LATER ON
THAT SHOULD HAVE BEEN BROUGHT UP
TO THE JURY INSTEAD OF WAITING
UNTIL AFTER THE SPENCER--
>> I FORESEE A LOT OF
LITIGATION.
[LAUGHTER]
>> WE ACTUALLY HAVE THAT CASE.
>> COTTAGE INDUSTRY.
OKAY.
>> THERE IS A CASE INVOLVING
THAT EXACT ISSUE.
ABOUT PUTTING IT IN--
>> WE LOOK FORWARD TO YOUR
OPINION, AND I ASK YOU TO VACATE
AND REMAND FOR A LIFE SENTENCE
ON PROPORTIONALITY GROUNDS.
>> THANK YOU FOR YOUR ARGUMENTS.
THE COURT'S IN RECESS.