>> ALL RISE.
HEAR YE, HEAR YE, HEAR YE.
THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
ALL TO HAVE CAUSE TO PLEAD, DRAW
NEAR, GIVE ATTENTION, YOU SHALL
BE HEARD.
GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA, THIS
HONORABLE COURT.
>> LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> GOOD MORNING, WELCOME TO THE
FLORIDA SUPREME COURT.
THE CASE ON THE DOCKET TODAY IS
ASSAY VERSUS STATE.
MCCLAIN?
>> FOR THE RECORD, MY NAME IS
JOHN MCCLAIN.
>> I'M HAVING TROUBLE HEARING
YOU.
>> I FORGET TO RISE THAT.
>> PROBABLY RAISE IT SOME MORE.
THERE.
RIGHT THERE.
>> HOW IS THAT.
>> WE WILL SEE.
NOW YOU BROKE IT.
>> [INAUDIBLE]
>> I'M PREPARED FOR ALL THE
ARGUMENTS AND BRIEFS ANNOUNCING
DIRECTION FROM THE COURT, I WILL
START WITH THE BRADY CLAIM ON
HALL AND THE NEWLY DISCOVERED
EVIDENCE CLAIM IN CONNECTION
WITH WILLIAM TOBIN.
IN THIS CASE, SORT OF IN ORDER
TO UNDERSTAND THIS CASE, THE
SIGNIFICANCE OF SELL WIN HALL
AND WILLIAM TOBIN'S AFFIDAVITS,
THE LINK IN THE BOOKER CASE,
THERE WAS THE BOOKER CASE, AND
THE McCASE AND THEY'RE
INVESTIGATED SEPARATELY.
McDOWELL CASE.
12 DAYS INTO THE INVESTIGATION,
11 DAYS INTO THE INVESTIGATION.
WHEN AGENT WARNEMENT SAYS FOUR
BULLETS FROM McDOWELL WERE

FIRED FROM THE SAME GUN AS ONE
BULLET FROM BOOKER.
UP TO THAT POINT IN TIME THERE
WAS NO LINK BETWEEN THEM.
THEY HAD DIFFERENT SUSPECTS.
THE MAIN SUSPECT IN THE BOOKER
CASE WAS ROLAND PUGH.
THAT WAS BASED ON THE STATEMENTS
SELWIN GAVE, PUGH TOLD HIM LATE
THAT FRIDAY NIGHT HE SHOT A
BLACK MAN.
IT'S A SWORN STATEMENT.
IT IS ULTIMATELY SORT OF
DISREGARDED IN LIGHT OF WARNIMIN
100% CERTAINTY THE BULLETS FIRED
BY THE SAME GUN.
AND THAT BECOMES KEY TO THE
INVESTIGATION, THEY STOP
INVESTIGATING PUGH WHO THEY HAVE
ARRESTED.
AND, IN THE COURSE OF THE
ARREST, HE WAS SHOT,
HOSPITALIZED.
HE WAS STILL IN THE HOSPITAL AT
THE TIME WARNIMENT'S 100% CAME
ALONG.
THEY HAD NOT TALKED TO PUGH.
THEY HAD NOT GOTTEN STATEMENTS
FROM PUGH AT THAT POINT IN TIME.
>> KNOW THAT NOW, A PERSON WHO
DOES THIS BULLET KIND OF
ANALYSIS, WOULD NOT BE ABLE TO
SAY THAT THIS WAS A 100% MATCH,
RIGHT?
>> CORRECT.
WE ALSO KNOW THAT IT IS JUST
SCIENTIFICALLY UNRELIABLE
EVIDENCE.
IT IS JUST SUBJECTIVE OPINION.
THERE ARE NO STANDARDS.
THERE IS NO BASIS FOR REACHING A
CONCLUSION.
>> LET ME ASK YOU THIS, THEN.
WHY DON'T YOU TELL US, AT
SPECIFICALLY WHY THERE IS
PREJUDICE FROM THIS?
>> ABSOLUTELY.
BECAUSE, WELL, IF YOU LOOK AT
THE CLOSING ARGUMENT THE
PROSECUTOR GAVE YOU WILL SEEN

SEE THE DEFENSE WAS TRYING TO
SUGGEST THAT ASSAY DID NOT SHOOT
BOOKER.
THE PROSECUTION IS ARGUING THE
CHINAR, WE KNOW THIS--
CLINCHER, WE KNOW THIS BECAUSE
OF THE BALLISTICS MATCH.
THE WITNESSES BUBBA, AND ROBBIE,
WHO WERE ASAY, THEY NEVER
IDENTIFIED BOOKER AS PERSON WHO
WAS ARGUING WITH ROBBIE.
ROBBIE WAS NEGOTIATING WITH
THEM.
>> WASN'T THERE SOME
IDENTIFICATION OF HIM BY OTHER
PEOPLE WHO SAW HIM RUNNING FROM
THE SCENE, YELLING OR SAYING, HE
HAD BEEN SHOT AND, SO, DON'T WE
HAVE SOME OTHER TIES, OTHER THAN
THIS BULLET EVIDENCE THAT LEAD
US TO CONCLUDE THAT MR. ASAY
SHOT MR. BOOKER?
>> THERE WERE FOUR WITNESSES,
TWO OF WHOM TESTIFIED, SEEING
BOOKER, WELL, ONE OF THEM,
IDENTIFIED BOOKER AS THE PERSON.
THE OTHER INDIVIDUALS JUST SAID
THAT THEY SAW THIS BLACK MAN
COME DOWN LAURA STREET FROM
SIXTH, RUNNING BY, SAYING
SOMEBODY HAD SHOT HIM.
THE TIME FRAMES, THOMAS, WHO
DOES NOT TESTIFY SAYS, IT IS
BETWEEN 11 AND 12.
KNIGHT, WHO DOES NOT TESTIFY
SAYS IT IS BETWEEN 12 AND 2:00.
AND PACE AND PATTERSON WHO BOTH
TESTIFIED SAY IT IS AFTER 2:00.
AND THE TIMEFRAME BECOMES
IMPORTANT BECAUSE INITIALLY THE
POLICE SAW NO REASON FROM WHAT
THOSE FOUR WITNESSES SAW, THAT
IT WAS NOT PUGH.
PUGH WAS NOT ELIMINATED ON THE
BASIS OF THOSE FOUR WITNESSES.
THOSE FOUR WITNESSES DID NOT SEE
THE SHOOTING.
ALTHOUGH SAID THEY SAW WAS A
BLACK MAN WHO, ONE OF THEM
IDENTIFIED AS BOOKER, RUNNING

DOWN THE STREET, SAYING HE HAD
BEEN SHOT AND RUNNING UNDERNEATH
THE HOUSE A COUPLE DOORS DOWN.
>> WELL ON THIS CLAIM THE JUDGE
DIDN'T GIVE EVIDENTIARY HEARING
AND FOUND, JUDGE FOUND IT WAS
PROCEDURALLY BARRED?
>> THERE WAS NO EVIDENTIARY
HEARING.
>> COULD YOU ADDRESS WHY THIS IS
NOT PROCEDURALLY BARRED?
OTHER THAN THAT HE DIDN'T HAVE
YOU AS HIS LAWYER, FOR THIS
PERIOD OF TIME, THE ISSUE OF THE
UNRELIABILITY OF, THIS IS NOT
CBLA EVIDENCE.
IT IS THE, LOOKING AT TWO
BULLETS AND COMPARING THE MARKS
ON THEM?
>> CORRECT.
>> OKAY.
THAT'S NOT, I MEAN THAT'S BEEN
AS FAR AS WHETHER IT'S ACTUALLY
RELIABLE OR NOT HAS BEEN UNDER
CONSIDERATION FOR YEARS AND WHAT
YOU HAVE NOW IS YOU SAY, WELL I
FOUND AN EXPERT THAT WILL SAY
THAT IT'S NOT RELIABLE.
I'M TRYING TO UNDERSTAND HOW
IT'S NOT PROCEDURALLY BARRED?
>> FROM 2005 UNTIL 2016 MR. ASAY
DID NOT HAVE COUNSEL.
>> HE HAD COUNSEL IN HIS FEDERAL
APPEAL.
>> EVEN RIGHT NOW AS WE SPEAK
THE STATE IS TRYING TO STOP
CHEW, FEDERALLY APPOINTED IN THE
CASE, FROM REPRESENTING HIM IN
STATE COURT.
THE FEDERAL COUNSEL CAN NOT COME
INTO STATE COURT.
>> THEY COULD HAVE RAISED CLAIM,
WHY COULDN'T THEY RACED THE
CLAIM IN FEDERAL COURT?
>> IT IS NOT A CLAIM IN FEDERAL
COURT.
IT IS NOT CONSTITUTIONAL CLAIM.
IT HAS NOT BEEN PRESENTED TO THE
STATE COURT.
>> IT IS MY UNDERSTANDING THAT A

FEDERAL ATTORNEY COULD IN FACT
COME INTO STATE COURT AND ASK TO
BE APPOINTED TO REPRESENT THE
DEFENDANT.
THAT'S NOT TRUE?
>> THE FEDERAL ATTORNEY, AND I
HAVE BEEN APPOINTED FEDERALLY,
AND I HAVE COME INTO STATE
COURT--
>> I UNDERSTAND THAT.
>> AND ASKED TO BE THE
APPOINTED.
THE FEDERAL ATTORNEYS APPOINTED
TO MR. ASAY'S CASE DID NOT DO
THAT.
AND THERE ARE BIG ISSUES
REGARDING MARY CATHERINE BONNER
WHO THE FEDERAL JUDGE FOUND,
SHOULD BE DISBARRED IN ESSENCE
WHEN RULING ON HER DECISION NOT
TO FILE THE FEDERAL HABEAS ON
TIME, WITHOUT TELLING HER
CLIENT.
>> WELL, I CAN UNDERSTAND THAT
MIGHT BE A PROBLEM IN ANOTHER
CASE BUT IN THIS CASE THE
ATTORNEYS COULD HAVE, AT LEAST
ATTEMPTED TO DO THAT.
WHETHER THEY, WHY THEY DID OR
DID NOT, THAT IS REALLY NOT--
>> I'M NOT SURE NECESSARILY ALL
ATTORNEYS HELD TO MY STANDARD
BUT THE FACT I HAVE DONE IN SOME
CASES I DON'T KNOW THAT IS
NECESSARILY THE STANDARD TO
JUDGE MARY CATHERINE BONNER AND
THOMAS FALAS, WERE APPOINTED IN
FEDERAL COURT.
FIRST OF ALL, MARY CATHERINE
BONNER KEPT FILES AND RECORDS IN
PLACE WHERE THEY WERE ULTIMATELY
UNUSABLE.
FALACE DESTROYED FEW BOXES HE
GOT.
IN ORDER TO INVESTIGATE THE
ISSUE WHICH DEVELOPED IN 2008,
2009, REPORTS CAME ALONG
INDICATING THERE IS PROBLEM WITH
THIS.
I WANT TO MAKE THE POINT

QUICKLY.
THERE WAS NO GUN, SO THE BALLISTICS MATCH IS JUST BETWEEN TWO BULLETS.
IT IS SPECIFICALLY THAT TYPE OF EVIDENCE THAT THESE REPORTS IN 2008, 2009, CAME OUT AND INDICATED WAS UNRELIABLE.
>> DO YOU KNOW THE REPORTS THEMSELVES, WOULD NOT BE NEWLY DISCOVERED EVIDENCE.
>> CORRECT, CORRECT.
>> SO YOU WOULD CLAIM, BASED ON SEEING THOSE REPORTS YOU WOULD HAVE GOTTEN EXPERT.
SO IN OTHER WORDS WHERE IS, WHAT IS NEWLY DISCOVERED I HAVE HAD THAT YOU'RE CLAIMING AND WOULD BE PROBABLE ACQUITTAL?
>> NEWLY IS DID COVERED EVIDENCE IS ONCE COUNSEL WAS IN PLACE.
MR. ASAY IS ON DEATH ROW.
HE DOESN'T KNOW ABOUT THE REPORTS OR HAVE COUNSEL INVESTIGATE THEM.
THE CLOCK SHOULD NOT BE RUNNING UNTIL THE COUNSEL IS APPOINTED.
THE OTHER IMPORTANT ASPECT THE BRADY CLAIM ITSELF CAUSE AS NEED TO INVESTIGATE THE AGENT TESTIMONY.
BRADY CLAIM WAS NOT DISCLOSED UNTIL JANUARY 27th OF 2016.
THERE HAD BEEN PUBLIC RECORDS DISCLOSED PREVIOUSLY BUT HANDWRITTEN NOTES WERE NOT TURNED OVER.
I DON'T UNDERSTAND WHY THE FILE ON ROLAND PUGH, WHICH CONTAINS HANDWRITTEN NOTES, INCLUDES SELWIN'S HALLS STATEMENT HANDWRITTEN NOTES ABOUT THE PUGH ARREST ON JULY 23rd, 1987.
I DON'T KNOW WHY THOSE WERE NOT TURNED OVER.
THEY WERE CLEARLY NOT TURNED OVER.
HANDWRITTEN NOTES GIVEN TO THE JUDGE FOR IN CAMERA INSPECTION ARE UNDER SEAL.

I DON'T HAVE ACCESS.
>> ONE OTHER QUESTION, WHY IS THE IMPORTANT FOR TWO MURDERS TO BE LINKED?
HE RECEIVED TWO DEATH SENTENCES. WOULD YOU AGREE THERE MIGHT BE.
>> UNDOUBTEDLY STRONGER EVIDENCE IS McDOWELL.
>> WHAT WOULD BE WRONG WITH THAT ANALYSIS?
>> THE STATE USED THE TESTIMONY OF THOMAS GROVES WHO HAD RECANTED BEFORE AND THIS COURT SAID YOU HAVE TO ACCEPT RECANTATION AS TRUE, THAT, HE IS CLAIMED THAT ASAY CONFESSED TO BOTH SHOOTINGS, USING RACIAL EPITHETS AND IT WAS DUE TO RACIAL ANIMUS.
THE PROSECUTORS SPECIFICALLY ARGUED THE FACT BOOKER SHOT FIRST CREATED PREMEDITATION THAT HE WAS GOING AROUND LOOKING FOR PEOPLE TO SHOOT TO ARGUE THE SECOND ONE WAS PREMEDITATED.
ONE OF THE WITNESSES, CHARLIE MOORE, WHO TESTIFIED THAT ASAY HAD, THIS IS THE PERSON THAT LINKED ASAY TO THE McDOWELL HOMICIDE IN THE FIRST PLACE, INDICATED THAT ASAY HAD SAID HE SHOT McDOWELL BECAUSE HE KISSED HIM AND REALIZED IT WAS NOT A WOMAN, IT WAS A MAN.
SO, AND IN ADDITION THERE WAS A LOT OF ALCOHOL USE.
SO THERE WAS A WAY TO ARGUE SECOND-DEGREE MURDER AS TO McDOWELL.
IT GOES TO, AS TO McDOWELL, THEY USED BOOKER AS AN AGGRAVATING CIRCUMSTANCE.
SO, TWO CASES BECOME LINKED IN THAT FASHION.
USING BOOKER TO PUSH FOR PREMEDITATION AS TO McDOWELL.
ALSO CCP AS TO McDOWELL, DESPITE MOORE'S TESTIMONY THAT THE STATE PRESENTED THAT IT WAS IN REACTION TO KISSING THIS

PERSON AND REALIZING IT WAS NOT
A WOMAN, IT WAS A MAN.
>> YOU ARE GETTING CLOSE TO
REBUTTAL TIME, ANYTHING NEW YOU
WOULD LIKE TO ADD?
YOU HAVE BEEN BEFORE ARGUING THE
RING HURST LINE OF CASES.
DO YOU HAVE ANYTHING NEW YOU
WOULD LIKE TO ADD ON THAT ISSUE?
>> WELL, WHAT I WOULD SAY IS,
FIRST, PRETTY MUCH IT IS THE
SAME ARGUMENT AS TO
RETROACTIVITY.
I DON'T KNOW THAT I HAVE
ANYTHING NEW TO ADD TO THAT.
BUT IN THIS INSTANCE, I WOULD
ALSO BE ARGUING LIFE SENTENCE IS
A SOLUTION IF THE ERROR IS
FOUND.
ALTERNATIVELY TO EXTENT COURT
MAY REJECT THAT, INARGUENDO, YOU
DO HARMLESS ERROR, I DON'T THINK
YOU CAN DO HARMLESS ERROR
ANALYSIS ON THIS CASE BECAUSE
THE EVIDENTIARY AND THE BRADY
AND NEWLY DISCOVERED EVIDENCE
BECAUSE THE TWO CASES
AGGRAVATING CIRCUMSTANCE, THERE
ARE ONLY TWO AGGRAVATING
CIRCUMSTANCES AS TO BOOKER.
>> BUT IT WAS BOTH OF THOSE
AGGRAVATING CIRCUMSTANCES AS TO
BOOKER ARE THINGS THAT HAVE BEEN
FOUND BY THE JURY, WHO HAVE
PRIOR VIOLENT FELONY WHICH WAS A
CONTEMPORANEOUS FELONY.
YOU HAVE, HE WAS UNDER SENTENCES
OF IMPRISONMENT BASED ON--
>> ON PAROLE.
>> GRAND THEFT AUTO I BELIEVE,
IT WAS IN ANOTHER STATE.
>> GRAND THEFT AUTO IN TEXAS, HE
WAS ON PAROLE.
BEING ON PAROLE AS AGGRAVATING
CIRCUMSTANCE MY ARGUMENT SAYS
SUFFICIENT AGGRAVATING
CIRCUMSTANCE, NOT JUST AN
AGGRAVATING CIRCUMSTANCE.
SECOND, THE REASON FOR THE
LANGUAGE, SUFFICIENT AGGRAVATING

CIRCUMSTANCES WAS TO COMPLY WITH
FUHRMAN AND INSURE PROPER
NARROWING IS OCCURRING.
JUST SIMPLY BEING ON PAROLE BY
ITSELF WOULD NOT SATISFY
FUHRMAN.
>> YEAH, BUT YOU HAVE, ON PAROLE
AND CONTEMPORANEOUSLY,
CORRECT?
>> CORRECT.
THERE IS ALSO THE
CONTEMPORANEOUS FELONY.
THAT IS ACCORDING TO THE
STATUTE, NOT AUTOMATIC, BECAUSE,
THAT'S, THERE HAS TO BE A
FINDING BY THE JURY IT'S
SUFFICIENT.
AND IN THIS INSTANCE YOU ALSO--
>> SO YOU'RE NOT, YOU'RE NOT
ARGUING THAT THE FACT THAT THE
JURY FOUND BOTH OF THOSE
AGGRAVATORS, YOU'RE SAYING
YOU'VE GOT TO TAKE IT A STEP
FURTHER AND THE JURY ALSO HAS TO
SAY THAT THERE'S NO MITIGATION
THAT OUTWEIGHS THESE TWO
AGGRAVATORS?
>> WELL LET ME JUST BACK UP.
>> SUFFICIENT MITIGATORS.
>> SUFFICIENT AGGRAVATORS.
THE STEPS ARE FIRST OF ALL THE
JURY NEVER FOUND AN AGGRAVATOR
IN THE CASE.
THE JURY IS JUST UNINSTRUCTED
AND RETURN A 9-3 DEATH
RECOMMENDATION.
THERE IS NO FINDING OF AN
AGGRAVATOR BY A JURY OF THE
STATE HAS ARGUED--
>> SO IF THE JURY, LET'S LOOK AT
THIS.
IF A JURY IS PRESENTED WITH A,
EVEN IN THIS CASE, FOR EXAMPLE,
A PRIOR VIOLENT FELONY AND SAY
THERE IS ONE, IS NOT ONE, WHEN
IN FACT HE HAD JUST BEEN
CONVICTED OF ANOTHER VIOLENT
FELONY, HOW DO WE HANDLE THAT?
>> I SUBMIT UNDER THE STATUTE,
THE STATUTE WAY IT'S WRITTEN.

IT SAYS WHAT HAS TO BE FOUND,
THERE ARE TWO FACTUAL FINDINGS
HAVE TO BE FOUND BY THE JUDGE TO
IMPOSE DEATH.
ONE, SUFFICIENT AGGRAVATING
CIRCUMSTANCES EXIST.
SO THERE IS NO AUTOMATIC ONE AG
AND YOU'RE QUALIFIED.
THERE IS REQUIREMENT IN THE
STATUTE THERE BE SUFFICIENT
AGGRAVATING CIRCUMSTANCES AND IT
HAS TO BE FOUND AS A MATTER OF
FACT.
THAT DID NOT HAPPEN.
>> YOU'RE, I MEAN YOU'RE MAKING
THE LEAP THAT SUFFICIENCY, THIS
IS WHERE, IS, THE FACTUAL
FINDING.
I MEAN, I AM WITH YOU ON
AGGRAVATING CIRCUMSTANCES ARE
FACTS.
UNLESS THEY HAVE BEEN FOUND AS
JUSTICE QUINCE SAID.
I THINK WHERE WE'RE GOING TO GET
IN A DISCUSSION OF WHAT HURST
MEANS IS THE WEIGHING PROCESS
WHICH IS WHAT SUFFICIENCY HAS TO
GO TO, IS THAT A FACT OR A
BLENDED JUDGMENT CALL AS TO THE
WEIGHING PROCESS?
>> WELL--
>> IT'S NOT, TO SAY SUFFICIENCY
AS A FACT.
>> I SUBMIT IT'S A FACT WHEN IT
COMES TO THE STATUTE-- FIRST OF
ALL THE STATUTE NEVER SAYS ONE
AGGRAVATOR AND YOU'RE ELIGIBLE.
THE LEGISLATURE IS INSERT THAT
LANGUAGE.
THAT INDICATES IT WASN'T THERE
BEFORE.
THAT IS NOT THE LAW IN THIS
CASE.
IT WASN'T THERE, ONE AG AND YOUR
ELIGIBLE IS NOT THE LAW IN
FLORIDA.
THE STATUTE SAYS THERE HAS TO BE
A FINDING OF SUFFICIENCY.
AND IT DESCRIBES IT AS A FACTUAL
FINDING.

AS A MATTER OF FACT THE JUDGE
HAS TO FIND THE AGGRAVATORS ARE
SUFFICIENT.
NO REFERENCE TO MITIGATION AT
THAT POINT.
>> YOU UNDERSTAND, YOU CAN'T,
SUFFICIENCY HAS TO BE LOOKED AT
WITH MITIGATION?
>> NO, IT DOES NOT.
UNDER FUHRMAN, SUFFICIENCY IS
WHETHER OR NOT HE IS AMONG THE
WORST OF THE WORTH.
WHETHER OR NOT YOU HAVE PROPERLY
NARROWED WHO'S ELIGIBLE FOR
DEATH.
IT HAS NOTHING TO DO WITH
MITIGATION.
UNDER FUHRMAN YOU HAVE GOT
AGGRAVATION WHICH MAKES YOU
ELIGIBLE OR AUTHORIZES A DEATH
SENTENCE.
IT IS NARROWING.
AND MITIGATION IS REASON WHY TO
COME BACK FROM THAT.
SO, SUFFICIENT AGGRAVATING
CIRCUMSTANCE LANGUAGE IS AN
EFFORT TO SATISFY FUHRMAN.
THAT IS WHAT IT'S ADOPTED.
IT IS ADOPTED AT END OF '72.
GOES INTO EFFECT AT END OF '73.
IT IS TO COMPLY WITH FUHRMAN.
IN PROPHET v. INTO, SUPREME
COURT QUOTES THAT LANGUAGE--
FLORIDA.
IN YEARS SINCE 1973 WE'VE GONE
FROM EIGHT AGGRAVATORS TO 15.
AND IN DOING SO, ONE AGGRAVATOR,
SOME OF THESE AGGRAVATORS JUST
DON'T NARROW.
THE NARROWING THAT IS REQUIRED
BY FUHRMAN IS DEPENDENT UPON
THAT WORD, SUFFICIENT
AGGRAVATING TO CIRCUMSTANCES.
THAT IS WHAT MAKES FLORIDA
DIFFERENT FROM ARIZONA.
AND OTHER STATES.
BECAUSE WE HAVE THE WORD
SUFFICIENT, AND IT'S DESCRIBED
IN THE STATUTE, AS A FACTUAL
FINDING THAT THE JUDGE HAS TO

MAKE.
>> WAY DOWN INTO YOUR REBUTTAL
BUT GIVE YOU EXTRA TIME ON
REBUTTAL, GIVEN THE ISSUES.
>> THANK YOU.
>> MAY IT PLEASE THE COURT.
ASSISTANT ATTORNEY GENERAL
CHARMAINE MILLSAPS REPRESENT THE
STATE.
>> YOU CAN KEEP YOUR VOICE UP
ALSO.
>> YES.
I ACTUALLY DO BETTER IF I JUST
YELL.
OKAY.
I'M GOING TO TALK ABOUT BRADY
AND THEN I'M GOING TO TALK ABOUT
HURST.
OKAY, FIRST OF ALL UNDER BRADY I
WANT TO GET FACTS STRAIGHT.
GROSS NEVER RECANT RECANTED IN
THIS CASE AS THE COURT
ACKNOWLEDGED IN THE
POST-CONVICTION APPEAL, ASAY
VERSUS STATE AT PAGE 982.
HE WAS GOING TO BE PRESENTED AT
THE EVIDENTIARY HEARING BUT HE
WAS NEVER CALLED.
SO THERE IS NO RECANTATION FROM
GROSS BEFORE THIS COURT.
THEY HAD HIM OUTSIDE, BUT
REFUSED TO PRESENT HIM AND
REFUSED TO THE SHOW THE
AFFIDAVIT.
IT IS NOT ACCURATE TO SAY
GROSS-- EVERYTHING HAVING TO DO
WITH GROSS RECANTATION JUST
FORGET.
THERE IS NO RECANTATION BEFORE
THIS COURT.
SECONDLY, BALLISTICS EVIDENCE IS
STILL SCIENTIFICALLY RELIABLE
AND IS STILL ADMISSIBLE.
SO ON THE, ON THE NEWLY
DISCOVERED EVIDENCE CLAIM, THAT
TESTIMONY, NOT AT 100%, BUT THAT
TESTIMONY, THAT TESTIMONY, FDLE
FIREARMS BALLISTICS EXPERT WOULD
TESTIFY IN MY OPINION, THE
BULLET FROM THE FIRST VICTIM

BOOKER MATCHED THE, WITHIN
REASONABLE DEGREE OF CERTAINTY
MATCHED FOUR BULLETS FROM THE
SECOND VICTIM McDOWELL.
YOU WOULD STILL EVEN HAVE THAT
TESTIMONY, JUST NOT AT THAT SAME
LEVEL, OKAY?
AND ONCE MORE, WHAT THIS CLAIM
REALLY BOILS DOWN TO IS THAT WE
DIDN'T PROVE THE FIRST VICTIM
WAS BOOKER.
I WANT YOU TO UNDERSTAND,
EVERYTHING THAT HAPPENED TO THE
FIRST VICTIM HAPPENED ON THE
SAME STREET, JUST A FEW BLOCKS
AWAY.
FIRST, ASAY'S BROTHER AND A
FRIEND OF HIS BROTHER, BUBBA,
TESTIFIED THAT HE SHOT A BLACK
MAN.
NO, THEY COULD NOT IDENTIFY
BOOKER.
A COUPLE OF BLOCKS AWAY,
MR. PATTERSON, WHO WAS IN HIS
CAR, WAS IN AN ACCIDENT.
HE WASN'T ACTUALLY IN THE CAR.
AND SO HE WAS JUST FORTUITOUSLY
ON THE STREET BECAUSE HE HAD A
FENDER-BENDER.
MR. PACE HAD HIT HIM.
HE TESTIFIES REPEATEDLY IT WAS
JUST A LITTLE THING.
AND SO THEY'RE NOT REALLY UPSET.
AND, BOOKER, THE VICTIM, RUNS BY
HIM.
WHO HE KNOWS.
>> WHAT IS THE, DO WE KNOW THE
TIME FRAME THE TIME
BETWEEN THE TIME THAT THE
MR. BOOKER WAS SHOT AND HE WAS
SEEN AND HOW FAR APART?
>> IT'S A FEW BLOCKS ON LAUREL
STREET.
THEY'RE NOT EXACTLY, IT IS
BETWEEN TWO AND 2:30 IN THE
MORNING.
THAT IS WHAT EVERYBODY SAYS.
WE DO NOT FIND THE VICTIM'S BODY
UNTIL SEVEN HOURS LATER A BLOCK
OR TWO AWAY, BUT STILL ON LAUREL

STREET.
ALL THIS HAPPENS AT 2:00 IN THE MORNING DOWNTOWN IN JACKSONVILLE.
HE IS SHOT.
HE RUNS PAST PATTERN SON WHO KNOWS HIM.
-- PATTERSON WHO KNOWS HIM, WE FIND HIM A BLOCK AWAY SEVEN HOURS LATER, HIS BODY WITH EXACTLY, AND HE IS RUNNING HOLDING HIS SIDE, THE VICTIM'S RUNNING HOLDING HIS SIDE AND THE MEDICAL EXAMINER TESTIFIES THAT THAT THE BULLET WOUND IS IN FACT THROUGH HIS ABDOMEN.
SO WE FIND A BODY WITH EXACTLY THE KIND OF BULLET THAT THEY SAY.
AND, WHEN SOMEBODY YOU KNOW RUNS PAST YOU, IT IS NOT LIKE A NORMAL ENCOUNTER.
HE IS LITERALLY RUNNING PAST HIM SAYING I'VE BEEN SHOT.
THAT'S A DRAMATIC THING.
HE IS GOING TO RECOGNIZE.
WE HAVE ACQUAINTANCE TESTIMONY THAT THE VICTIM WAS IN FACT BOOKER.
SO THERE'S NO POSSIBILITY OF ACQUITTAL ON RETRIAL WHICH IS THE STANDARD FOR EVIDENCE.
AND, I ALSO, COUNSEL IS ENTERTAINING LINK BRADY IN DISCOVERY AND TWO DIFFERENT CLAIMS.
THE BRADY, HAS TO DO, WITH THE
IT IS CLEAR DEFENSE COUNSEL HAD THIS STUFF, PROPERLY RAISED AS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.
TRIAL COUNSEL HAD THE.
>> TRIAL COUNSEL HAD THE QUESTION WHETHER THIS TYPE OF BULLET ANALYSIS WAS DEFICIENT?
>> NO.
THE BULLET GOES TO THE NEWLY DISCOVERED, THE BRADY IS ABOUT SETON HALL AND WHETHER.
ONE HAS TO DO WHETHER ROLAND

PUGH, THE BRADY CLAIM WAS EARLY SUSPECT AND WHETHER DEFENSE COUNSEL KNEW THAT THAT IS THE BRADY CLAIM.
OVER HERE IS THE BALLISTICS. THAT IS THE NEWLY-DISCOVERED EVIDENCE CLAIM.
WE HAVE NO BUSINESS, SHOULD NOT HAVE BEEN RACED AS ONE CLAIM.
>> THAT ONE ON THE BRADY ISSUE, MR. MCCLAIN ARGUES IN HIS BRIEF, THE HEARING WHERE THIS WAS ALL DISCUSSED WAS SET WITHIN AN HOUR AND HE HAD NO CHANCE TO BE AT THE HEARING WHERE WHATEVER THE JUDGE RECEIVED, EMAILS, THAT EXPLAINED, THAT THIS HAD BEEN PRODUCED, WAS, WAS DISCUSSED.
I GUESS MY QUESTION ON THIS IS WHY ISN'T IT BETTER THAT THERE BE A EVIDENTIARY HEARING SO THAT WE HAVE OUT IN THE OPEN, THAT THE COUNSEL HAD THIS INFORMATION AS TO THE BRADY CLAIM, AND THAT ON THE COMPARATIVE BULLET, I'M SORRY THE, THE BULLET MARK EVIDENCE THAT, THE QUESTION OF THAT HE DID NOT HAVE A STATE LAWYER, FOR THE TIN YEARS, IS ACTUALLY-- 10 YEARS IS ACTUALLY FLESHED OUT.
THIS SEEMS LIKE AN UNUSUAL SET OF CIRCUMSTANCES WITH A LAWYER NOT HAVING, NO STATE LAWYER FOR 10 YEARS.
WHY ISN'T IT BETTER TO GO BACK FOR EVIDENTIARY HEARING?
>> OKAY, AND I WILL ANSWER THAT, BUT I WANT TO THE HEARING THAT THE JUDGE HELD, WAS ON MY MOTION TO PROHIBIT THE PROFFER.
IT WAS NOT ANY OF THIS.
MR. MCCLAIN NEVER FILED A MOTION DOWN BELOW TELLING THE TRIAL COURT, HE DIDN'T THINK HE, THAT SHE SHOULD BE RELYING ON THIS EVIDENCE.
SO MY, THAT HEARING WAS ON MY MOTION TO PRECLUDE A PROFFER.
INCIDENTALLY THE ONLY THING THAT

CAME OUT AT THE END OF THAT
HEARING WAS THAT THE RECORDS
WERE SEALED.
SO THERE'S NO HARM TO HIS NOT
BEING THERE AND I DON'T THINK
IT'S FAIR TO CALL IN A HEARING
EX-PARTEE BECAUSE YOU REFUSED TO
ATTEND.
I DON'T THINK YOU CAN DO THAT.
>> THE TIMING OF THIS REFUSAL--
WE'RE TALKING ABOUT AN HOUR.
I REALIZE WE'RE UNDER THESE
TIGHT TIME FRAMES BUT, AND I'M
NOT FAULTING ANYBODY ON THIS.
I KNOW THAT WE ARE, YOU KNOW, WE
PUT THESE STRICT TIME FRAMES IN
BUT IT ISN'T, IT DIDN'T APPEAR,
AT LEAST, AS I LOOKED AT THE
RECORD, THAT THIS WAS A REFUSAL
TO ATTEND.
IT WAS, HE GOT NOTICE AS THE
HEARING WAS OCCURRING SO.
>> I THINK YOU SHOULD ATTEND THE
HEARING RATHER THAN GO TO THE
BANK, YOUR HONOR.
YOU CAN GET YOUR CO-COUNSEL TO
SIT IN FOR YOU.
THERE ARE TWO CO-COUNSEL IN THIS
CASE.
IT'S DESIGNED TO STOP THE JUDGE
FROM REALLY HEARING MY MOTION.
I'M JUST TRYING TO GET STRAIGHT
WITH YOU, YOUR HONOR, THAT
HEARING WAS NOT ABOUT THE BRADY.
NOBODY EVER SAID TO THE BUDGE IT
WAS IMPROPER TO RELY ON PUBLIC
RECORDS DISCLOSURES.
THAT WAS NEVER SAID TO THIS
JUDGE.
THAT IS BEING MADE FOR THE FIRST
TIME UP ON APPEAL.
OKAY?
SO THE JUDGE NEVER HAD THAT.
BUT, REGARDING, I DON'T THINK
EVIDENTIARY HEARING IS NECESSARY
ON, IT IS NOT JUST TO FLESH OUT
STUFF.
IF THE RECORD CONCLUSIVELY
REBUTS STUFF WE DO NOT HOLD
EVIDENTIARY HEARINGS.

I THINK, AS A MATTER OF LAW YOU
CAN DENY THE NEWLY-DISCOVERED
EVIDENCE CLAIM.
IT IS VERY CLEAR THAT IS NOT
GOING TO-- HAVING THE EXPERT
MOVE THE DEGREE OF HIS TESTIMONY
DOWN IS NOT GOING TO PRODUCE AN
ACQUITTAL ON RETRIAL, ESPECIALLY
IN LIGHT OF PATTERSON AND THE
FACT THAT THIS ALL OCCURS ON THE
SAME STREET.
AND REGARDING THE BRADY CLAIM
ALL WE'RE GOING TO DO AT ANY
EVIDENTIARY HEARING I'M GOING TO
STAND UP TO INTRODUCE THESE TWO
DOCUMENTS AND THEN WE'RE DONE.
WELL THE DOCUMENTS ARE ALREADY
PART OF THE RECORD.
IN OTHER WORDS THE REASON WE
DON'T NEED AN EVIDENTIARY
HEARING IS THERE IS NO REAL
POINT TO AN EVIDENTIARY HEARING,
OKAY?
BOTH THE DOCUMENTS HE IS TALKING
ABOUT, THE DEPO AND THE
STATEMENT FROM HALL, WHAT THEY
GOT WAS NOT THE HANDWRITTEN
NOTES BUT THEY GOT THE
CONTINUATINO REPORT, THE
HOMICIDE REPORT.
AND THAT, IT IS REPORT, WE DO
THAT ALL THE TIME.
THE HANDWRITTEN NOTES ARE TURNED
INTO A TYPED REPORT AND WE
DISCLOSED THE TYPED REPORT,
OKAY?
UNDERSTAND THE SUBSTANCE OF
WHAT'S IN THE HANDWRITTEN NOTES
WAS TYPED, AND GIVEN TO DEFENSE
COUNSEL.
THE ONLY WAY THIS CAN PROPERLY
BE RAISED IS CLAIM OF
INEFFECTIVE--
>> IS THERE ANY DIFFERENCES
BETWEEN WHAT WAS THE IN THE
HANDWRITTEN NOTES AND THE TYPED
INFORMATION YOU SAY WAS IN FACT
GIVEN TO DEFENSE COUNSEL?
>> SOME MINOR DETAILS.
LET ME GIVE I AN EXAMPLE.

IN THE TYPED NOTES, HALL, THE
ACCOUNT IS THAT PUGH SHOOTS
SOMEBODY IN HIS YARD.
IN THE HANDWRITTEN NOTES THE
EXACT ADDRESS IS GIVEN.
IT'S THAT KIND OF STUFF.
NO, THAT PUGH SHOT SOMEBODY, A
BLACK MALE THAT NIGHT ON,
OUTSIDE OF HIS HOUSE IS THE
SAME.
IT'S MINOR LITTLE-- I WOULD SAY
THE HANDWRITTEN NOTES HAVE
SOME--
>> AND WHERE DOES PUGH LIVE, DO
WE KNOW IN RELATIONSHIP TO WHERE
THESE CRIMES TOOK PLACE?
>> THE 1400 BLOCK OF NORTH
MARKET STREET BUT THIS OCCURS
MORE ON LAUREL STREET.
YES, MARKET STREET'S DOWNTOWN
JACKSONVILLE TOO.
SO, SO, BUT IT IS NOT THE EXACT
SAME STREET.
AND, THE VICTIM, THE FIRST
VICTIM, BOOKER, WAS SHOT AT
LAUREL AND FIFTH OR LAUREL AND
SIXTH AND THEN PATTERSON SEES
HIM A COUPLE OF BLOCKS.
AND THEN ONE BLOCK LATER IS
WHERE WE FIND HIS BODY.
THAT IS SEVEN HOURS LATER AFTER
THAT.
BUT THE FIRST TWO INCIDENTS, THE
SHOOTING, AND MR. PATTERSON
SEEING HAPPENED AT 2:00, 2:30
AND SEVEN HOUR LATER IN THE
MORNING A PATROL OFFICER FINDS
THE BODY UNDERNEATH THE HOUSE.
BUT, ROLAND PUGH, REMEMBER THIS
IS A BRADY CLAIM.
IT DOESN'T MATTER WHAT IS IN IT.
IT MATTERS THAT WE DISCLOSED
THIS.
THE DEFENSE COUNSEL KNEW THAT
ROLAND PUGH WAS SUSPECT BASED ON
THE SHOOTING.
I GOT THAT INFORMATION.
BASED ON ROLAND PUGH'S OWN
STATEMENTS TO OTHER PEOPLE, BOTH
YANKEE AND HALL, THAT HE HAD

SHOT SOMEBODY AT MARKET STREET
INSTEAD OF LAUREL, THAT SAME, IT
SOUND LIKE IT WAS EVEN LATER,
LIKE 4:00 OR SOMETHING.
BUT THAT SAME NIGHT HE, THAT
FRIDAY NIGHT I THINK IT WAS,
THAT HE HAD SHOT SOMEBODY AS
WELL.
DEFENSE COUNSEL KNEW THIS.
SO YES, THIS IS ONLY PROPERLY
RAISED AS A NEW, AS A CLAIM OF
INEFFECTIVENESS OF TRIAL COUNSEL
FOR NOT PRESENTING PUGH AS
ALTERNATIVE SUSPECT IS CLEAR
THAT HE KNEW ABOUT IT.
HE MADE THAT CHOICE AND SO, YES,
THAT'S PROCEDURALLY BARRED.
THERE IS NO REASON WE SHOULD BE
DOING THAT.
THAT SHOULD HAVE BEEN EXPLORED
AT THE FIRST EVIDENTIARY
HEARING.
THERE WAS AN EVIDENTIARY HEARING
IN THE FIRST POST-CONVICTION.
THERE IS NO REASON FOR THEM TO
BE JUST, BECAUSE HE GETS A NEW
LAWYER, WHO THINKS THAT SHOULD
HAVE BEEN THE CLAIM, CLAIM OF
INEFFECTIVE ASSISTANCE OF TRIAL
COUNSEL FOR NOT PRESENTING PUGH,
JUST BECAUSE YOU A GET A NEW
LAWYER YOU DO NOT GET A SECOND
EVIDENTIARY HEARING.
REGARDING HURST, THE STATE, IN
ITS BRIEF MAKES FOUR MAIN
ARGUMENTS.
NON-RETROACTIVE.
THERE IS PRIOR VIOLENT FELONY.
THAT THERE IS CONTEMPORANEOUS
FELONY AND THAT IT IS HARMLESS.
I WOULD LIKE TO BEFORE WE GET TO
RETROACTIVITY IS THE BIG
ARGUMENT BUT BEFORE WE GET THERE
I WOULD LIKE TO TALK ABOUT WHAT
I THINK HURST ACTUALLY SAID.
HERE IS WHAT COUNSEL IS SAYING.
ANY FACT IN A STATUTE MUST BE
FOUND BY A JURY.
THAT IS NOT APPRENDI, THAT IS
NOT HURST, THAT IS NOT RING.

THE FACT MUST INCREASE IN
APPRENDI'S WORDS OR AGGRAVATE IN
APPRENDI'S WORDS BEFORE A JURY
HAS TO FIND IT.
THAT IS WHEN A FACT BECOMES A
ELEMENT THE STATE MUST PROVE
BEYOND A REASONABLE DOUBT.
WHEN THAT FACT INCREASES
PENALTY.
TAKE OUR CRIMINAL PUNISHMENT
CODE.
THERE ARE WHOLE BUNCH OF FACTS
IN OUR CRIMINAL PUNISHMENT CODE.
THEY'RE ALL FOUND BY THE JUDGE.
WHY?
BECAUSE NONE OF THEM INCREASED
THE PENALTY.
YOU HAVE A STATUTORY, AND NONE
OF THEM CREATE A MINIMUM
MANDATORY LIKE A LEND DAY.
IF A FACT IS JUST A FACT DOES
NOT INCREASE PENALTY OR
AGGRAVATE IT, THEN THE JUDGE,
THAT WE STILL HAVE SENTENCING
FACTORS IN THE WAKE OF APPRENDI.
IT MUST GO UP.
AND MITIGATORS GO DOWN.
SO MITIGATORS ARE NEVER FOUND.
>> I OBVIOUSLY I AGREED FOR MANY
YEARS BECAUSE I KEPT ON SAYING
IT WAS JUST A PRIOR VIOLENT
FELONY AS THAT HAD TO BE FOUND
BUT HERE'S THE DIFFERENCE.
WHEN YOU LOOK AT APPRENDI OR ANY
OF THESE CASES SAY YOU HAVE A
GUN, THEN IT GOES FROM, YOU KNOW
THE PUNISHMENT INCREASES, DEATH
PENALTY, THE DEATH SENTENCE IS
NOT LIKE THAT.
IT'S, IF YOU DON'T HAVING A
STRAIGHTING CIRCUMSTANCES, IT IS
A LIFE SENTENCE.
IN AGGRAVATING CIRCUMSTANCES IT
IS A LIFE SENTENCE.
NOT IF YOU HAVE AGGRAVATING
CIRCUMSTANCES YOU HAVE A DEATH
SENTENCE.
>> YES IT IS LIKE THAT
CONSTITUTIONALLY.
LET'S NOT CONFUSE WHAT THE SIXTH

AMENDMENT REQUIRES.
WE'RE HERE WHAT SIXTH AMENDMENT REQUIRES A FACT TURNED INTO ELEMENT.
WHEN A FACT INCREASES PENALTY IT BECOMES ELEMENT.
CONSTITUTIONALLY ALL YOU HAVE TO HAVE IS ONE AGGRAVATOR.
THEN DO WE HAVE TO FOLLOW THE STATUTE ONCE WE MEET THE CONSTITUTIONAL REQUIREMENTS?
OF COURSE.
SO I'M NOT SAYING THAT.
YOU KNOW WE'RE GOING TO HAVE TO FOLLOW OUR STATUTE.
WE'RE HEAR WHAT THE SIX AMENDMENT REQUIRES.
ONE AGGRAVATOR--
>> AS MR. MCCLAIN SAID, WE'RE NOT DEALING WITH THE ARIZONA STATUTE.
WE'RE DEALING WITH THE FLORIDA STATUTE WHICH WAS PASSED RIGHT AFFIRM AFTER FUHRMAN.
IT DOESN'T SAY ONE AGGRAVATING CIRCUMSTANCE HAS TO BE FOUND.
IT SAYS SUFFICIENT AGGRAVATING CIRCUMSTANCES.
IN A WORLD THAT DOESN'T HAVE A STATUTE LIKE FLORIDA HAD, MAYBE THAT'S THE CASE BUT--
>> THAT IS NOT WHAT THE UNITED STATES SUPREME COURT SAID, I'M QUOTING FROM TUPELO VERSUS CALIFORNIA.
TO RENDER A DEFENDANT ELIGIBLE FOR THE DEATH PENALTY THE TRIER OF FACT MUST CONVICT THE DEFENDANT OF MURDER AND FIND ONE AGGRAVATING CIRCUMSTANCE OR ITS EQUIVALENT AT EITHER THE GUILT OR PENALTY PHASE.
>> SORRY, WHAT CASE IS THAT FROM.
>> TUPELO VERSUS CALIFORNIA.
I WILL SPELL IT BECAUSE MY PRONUNCIATION IS SO BAD.
TIPILAA.
THAT IS FROM 191994.
UNDERSTAND, UNDERSTAND, LET'S

NOT TANGLE TWO THINGS.
FIRST IT IS WHAT THE SIXTH AMENDMENT REQUIRES.
OF COURSE WE FOLLOW OUR STATUTE, OKAY?
BUT THE SIXTH AMENDMENT REQUIRES ONLY FACTS AND THEY OVERRULED SPAZIANO, THE FIRST COURT OVERRULED SPAZIANO AND HILWIN BECAUSE OF APPRENDI.
ONLY FACTS THAT INCREASE THE PENALTY ARE FOUND BY THE JURY.
THE UNITED STATES SUPREME COURT MADE IT VERY CLEAR IN SEVERAL CASES, THEY CITE CASES IN THAT CASE I CITED TO YOU, IT IS THAT ONE AGGRAVATOR THAT INCREASES THE PENALTY TO DEATH.
>> BUT KNOW, WHEN.
>> IT SEEMS TO ME WHEN WE LOOK AT HURST, I DON'T INTERPRET HURST SAYING THAT.
THAT ONCE YOU FOUND ONE AGGRAVATOR, YOU KNOW, IT'S OVER.
IT SEEMS TO ME HURST TALKS IN TERMS OF SUFFICIENT ALSO.
SO HOW DO WE GET TO, I MEAN I DON'T KNOW WHAT CALIFORNIA STATUTE PROVIDES FOR OR MANY OF THESE OTHER STATES BUT I DO KNOW THAT OUR STATUTE DOES NOT HAVE ANYTHING THAT SAYS, ONCE, ONE AGGRAVATOR IS FOUND, YOU ARE NOW ELIGIBLE FOR THE DEATH SENTENCE.
SO HOW DO WE MAKE THAT LEAP TO GET TO THAT UNDER FLORIDA LAW?
>> HURST AT BOTH TWO PLACES TOWARD THE END SAYS, I'M BOEING-- THE DECISIONS ARE OVERRULED.
SPAZIANO AND HILDWIN.
TO THE EXTENT THEY ALLOW SENTENCING JUDGE TO FIND AN AGGRAVATING CIRCUMSTANCE.
IN THE END FLORIDA'S SENTENCING SCHEME WHICH REQUIRES THE JUDGE ALONE TO FIND EXISTENCE OF AN AGGRAVATING CIRCUMSTANCES ARE THERE FOR UNCONSTITUTIONAL.
YOUR HONOR WHAT I'M SAYING THIS.

THERE IS WHAT THE CONSTITUTION
REQUIRES.
THIN THERE IS WHAT THE STATUTE
REQUIRES.
WE'RE NOT UP HERE SAYING YOU
SHOULD IGNORE THE STATUTE.
FOR EXAMPLE, THE ONE OF THE NEW
DEATH PENALTY STATUTES, AT LEAST
ONES I HAVE SEEN WILL SAY ALL
AGGRAVATORS HAVE TO BE FOUND BY
THE JURY.
WE'RE UP HERE DECIDING WHAT
HURST AND THE SIXTH AMENDMENT
REQUIRE.
WHAT DOES THE CONSTITUTION
REQUIRE?
SO FIRST YOU DETERMINE WHAT THE
CONSTITUTION REQUIRES.
THEN OF COURSE YOU FOLLOW THE
STATUTE.
BUT THE CONSTITUTION ONLY
REQUIRES THAT ONE AGGRAVATOR.
AND SECONDLY, YOUR HONOR--
>> SO WHAT PART OF THE STATUTE
ARE YOU TALKING ABOUT?
IN HURST, YOU KNOW, AT LEAST A
PART OF THE STATUTE WAS DECLARED
UNCONSTITUTIONAL SO WHAT ARE WE
FOLLOWING NOW?
>> WELL, I'M FOLLOWING HURST AND
INCIDENTALLY SUFFICIENT IS AN
ADJECTIVE.
>> NO, YOU SAID ONCE YOU HAVE
THE AGGRAVATOR, OF COURSE WE NOW
FOLLOW THE STATUTE.
WHAT PART OF THE STATUTE ARE YOU
REFERRING TO THAT WE ARE NOW
FOLLOWING?
BECAUSE IT SEEMS TO ME THAT THE,
THAT PART OF IT HAS BEEN
DECLARED UNCONSTITUTIONAL,
CORRECT?
IN HURST.
SO WHAT PART ARE WE NOW
FOLLOWING?
>> WHAT HURST REQUIRES IS THE
FINDING BY A JURY, A SPECIFIC
FINDING, THAT WAS PART OF THEIR
PROBLEM, THAT IT WASN'T
SPECIFIC.

A SPECIFIC FINDING FROM THE JURY
OF AN AGGRAVATOR, AND THEN,
OKAY, THAT THAT'S WHAT HURST
REQUIRES, OKAY?
AND THEN ALL THE OTHER THINGS,
THE JUDGE CAN DECIDE.
SO YOU FOLLOW THE STATUTE AND
JUST, A MATTER WHO GETS TO DO
THE REST OF IT.
THE WEIGHING, FINDING OF
MITIGATION, THE JUDGE CAN DO.
>> SO YOU'RE SAYING THAT ONCE WE
ARE IN THE PENALTY PHASE, ONCE
THE JURY FIND ANY ONE
AGGRAVATING CIRCUMSTANCE, THE
TRIAL JUDGE IS THEN FREE TO FIND
ANY OTHER AGGRAVATING
CIRCUMSTANCES?
>> YES AND MORE IMPORTANTLY--
YES.
THAT IS EXACTLY WHAT I'M SAYING.
CONSTITUTIONALLY.
NOW, WE'RE GOING TO HAVE A NEW
STATUTE AND IT'S GOING TO
REQUIRE THAT THE JURY MAKE THOSE
FINDINGS.
IN THAT SITUATION--
>> ALL AGGRAVATING CIRCUMSTANCE?
>> WHAT?
>> A FINDING ON ALL OF THE
AGGRAVATING CIRCUMSTANCES?
>> NOW THAT IS HOW I UNDERSTAND
IT.
NOW IT HASN'T BEEN PASSED YET.
FIRST YOU MEET THE CONSTITUTION
AND THEN YOU DO WHAT THE STATUTE
SAYS, BUT, YOUR HONOR, UNDER OUR
CURRENT STATUTE, HURST, WE NEED
A SPECIFIC FINDING THAT IS JURY
BINDING.
THAT IS THE HURST COURT'S TWO
PROBLEMS.
THAT IT WASN'T SPECIFIC ENOUGH
AND IT WASN'T BINDING.
THAT FINDING, FOR EXAMPLE OF
NON-AGGRAVATION NEEDS TO BE
BINDING.
IN OTHER WORDS, NO OVERRIDES.
THAT'S, HURST IS SAYING TWO
THINGS.

WE WANT IT SPECIFIC, NOT
IMPLIED.
WE WANT TO KNOW WHICH AGGRAVATOR
THE JURY FOUND.
THEN WE WANT THAT FINDING, FOR
EXAMPLE, OF NON-AGGRAVATION TO
BE BINDING.
THEY DIDN'T LIKE-- THAT IS THE
TWO PARTS OF THE CONSTITUTION OF
OUR STATUTE.
THE OVERRIDE PROVISION, AND THE
NOT SPECIFIC THAT THE HURST
COURT SAID NO, WE'RE NOT DOING
THAT, OKAY?
THAT'S THE PART THAT IS
UNCONSTITUTIONAL.
>> WHO WEIGHS THE AGGRAVATORS IN
YOUR SCENARIO?
>> CONSTITUTIONALLY THE JURY
MUST FIND ONE AGGRAVATOR.
THAT ONE AGGRAVATOR--
>> WHO WEIGHS MITIGATORS?
>> MITIGATORS MAY BE-- BECAUSE
THEY DECREASE.
IT IS SO IMPORTANT, ALLENDI AND
APPRENDI TALK ABOUT INCREASES IT
AGGRAVATION.
IF YOU GO DOWN, WHICH IS WHAT
MITIGATORS DO, THEY DECREASE THE
PENALTY.
THEY, THEY ARE NOT ELEMENT.
THEY CAN NOT BE ELEMENTS.
THE STATE DOESN'T PROVE
MITIGATORS.
THE DEFENSE PROVES THEM.
AND NOT AT BRD.
LOOK, WHAT YOU READ A STATUTE,
THERE ARE WHOLE BUNCHES OF FACT
IN A STATUTE.
WHEN YOU READ A STATUTE YOU'RE
TRYING TO PULL OUT THE FACTS
THAT INCREASE THE PENALTY
BECAUSE THOSE ARE THE FACTS THE
CAN JURY MUST FIND.
EVERY OTHER FACT FOR EXAMPLE IN
OUR CRIMINAL PUNISHMENT CODE CAN
BE FOUND BY THE JUDGE ALONE.
SO IT IS ONLY FACTS THAT
INCREASE THE PENALTY.
AND APPRENDI IS ALL THROUGH THIS

AS IS, ALL THROUGH THE HURST
OPINION IS ALLENDE.
>> THANK YOU.
YOUR TIME IS UP.
>> THANK YOU FOR YOUR TIME.
WE ASK THAT THE TRIAL COURT'S
SUMMARY DENIAL BE AFFIRMED.
>> THANK YOU.
>> GIVE YOU ADDITIONAL TIME THAT
SHE RECEIVED.
ANOTHER TWO MINUTES, AT THAT
SECONDS.
-- 25 SECOND.
>> THANK YOU.
ASSUME THE STATE IS JUST
MISREADING HURST, APPRENDI ALL
SAY YOU LOOK TO THE STATUTE.
THE SIXTH AMENDMENT RIGHT
ATTACHES TO THE FACTS REQUIRED I
ABOUT THE STATUTE.
>> SO WHAT'S LEFT OF THE STATUTE
NOW?
>> NOTHING.
I MEAN THE STATUTE PROVIDES THAT
THERE HAS TO BE A FINDING OF
SUFFICIENT AGGRAVATING
CIRCUMSTANCE, THAT'S THE FACT.
THEN IS SAYS THAT THE THERE ARE
INSUFFICIENT MITIGATING
CIRCUMSTANCES TO OUTWEIGH THE
AGGRAVATING--
>> TELL ME SPECIFICALLY.
IS YOUR ARGUMENT THAT A JURY
MUST FIND EACH AND EVERY
AGGRAVATOR, THE JURY MUST FIND
EACH AND EVERY MITIGATOR AND
THEN THE JURY MUST WEIGH THOSE
AND MAKE A DETERMINATION OF
LIFE OR DEATH?
IS THAT YOUR ARGUMENT.
>> MY ARGUMENT IS HURST SAYS,
EACH FACT NECESSARY FOR THE
IMPOSITION OF DEATH MUST BE
FOUND BY THE JURY.
RIGHT AT THE BEGINNING OF THE
OPINION.
THAT'S WHAT IT SAYS.
YOU LOOKED AT STATUTE, WHAT THE
FACTS ARE, THE STATUTE DOES HAVE
THE LIST OF THE AGGRAVATORS.

IT HAS STATUTORY MITIGATORS,
NON-STATUTORY MITIGATORS BUT IT
SAYS THERE HAS TO BE A FINDING
OF SUFFICIENT AGGRAVATING
CIRCUMSTANCES.
I PRESUME IN ORDER TO GET TO
SUFFICIENT AGGRAVATING
CIRCUMSTANCE YOU HAVE TO FIRST
IDENTIFY THE AGGRAVATING
CIRCUMSTANCE.
>> YOU HAVE TO FIND THEM ALL?
>> YOU HAVE TO FIND WHATEVER
YOU'RE GOING TO FIND.
WHICHEVER AGGRAVATORS YOU'RE
GOING TO FIND HAVE TO BE FOUND
AND THERE HAS TO BE A FACTUAL
DETERMINATION THAT THEY ARE
SUFFICIENT, AS THE JURY
INSTRUCTION SAYS, SUFFICIENT TO
JUSTIFY THE IMPOSITION OF A
DEATH SENTENCE.
THAT IS THE FACT.
>> OKAY.
SO I JUST WANT TO MAKE SURE I
UNDERSTAND YOUR ARGUMENT.
SO YOU'RE SAYING THAT
SUFFICIENCY IS ALSO A FACT?
>> YES.
THAT'S WHAT HURST SAYS.
>> LET'S GO BACK TO--
>> ARE YOU FINISHING THE
QUESTION THOUGH?
HOW ABOUT THE MITIGATORS.
YOU STOPPED WITH THE
AGGRAVATORS.
>> IT'S IN THE STATUTE THERE HAS
TO BE INSUFFICIENT MITIGATORS TO
OUTWEIGH THE AGGRAVATION.
>> SO THE JURY HAS TO FIND THAT
AS WELL?
>> I SUBMIT THAT READING OF
HURST THAT EVERY FACT NECESSARY
TO IMPOSITION OF DEATH HAS TO BE
FOUND--
>> SO THE ANSWER TO MY QUESTION
WAS YES?
>> YES, YOUR HONOR.
>> AND THEN, IS THE ANSWER TO
JUSTICE QUINCE'S QUESTION, NOT
MY QUESTION, BUT THAT BEFORE

DEATH CAN BE IMPOSED, THERE HAS
TO BE A THIRD FINDING AND THAT
IS THE MITIGATION DOES NOT
OUTWEIGH THE AGGRAVATION?
THAT'S THE THIRD THING SHE
ASKED?
>> WELL, THERE IS CONFUSION
ABOUT WHETHER THE MITIGATION
OUTWEIGHS THE AGGRAVATION OR
AGGRAVATION OUTWEIGHS THE
MITIGATION.
THE STATUTORY LANGUAGE IS
INSUFFICIENT, INSUFFICIENT
MITIGATORS TO OUTWEIGH THE
AGGRAVATION.
>> FINE.
WHATEVER THAT THIRD--
>> SO THAT IS A FACT IN THE
STATUTE AND SINCE HURST SAYS
THOSE FACTS HAVE TO BE FOUND BY
THE JURY.
>> YOUR ANSWER RESPONSE IS YES
TO EACH OF THOSE?
>> YES.
>> THAT'S FINE.
>> THE JURY WOULD HAVE TO
CONSIDER ALL MITIGATORS, WOULD
HAVE TO BE PRESENTED TO THE
JURY?
>> THE JURY WOULD HAVE TO RETURN
A FINDING, THAT THE MITIGATION
DOES NOT OUTWEIGH THE
AGGRAVATION, IN ORDER TO GET
THEY HAVE TO CONSIDER--
>> TIME TO CONTRACT MITIGATORS
IS IN PRESENCE OF THE JURY.
>> YES.
>> YOU WILL HAVE SITUATION WHERE
DEFENSE COUNSEL ON A STRATEGY
DECIDE I HOLD BACK ON MITIGATOR
BECAUSE IT LOOKS GOOD FOR THE
JURY AND PRESENT LATER ON TO THE
JUDGE?
>> ABSOLUTELY CHANGES THE
STRATEGY, ABSOLUTELY CHANGES
STRATEGY BECAUSE JUST AS YOU DO
A GUILT PHASE, MANY DEFENSE
ATTORNEYS DO GUILT PHASE ON
NOTION GETTING ONE JUROR AS A
HOLDOUT.

IF YOU'RE NOT FACING A 7-5
SITUATION, A MAJORITY VOTE BUT
UNANIMOUS VERDICT, IT CHANGES
HOW YOU WOULD APPROACH IT.
AND ABSOLUTELY I THINK A CHANGE
IN THE STRATEGY IS WHAT YOU'RE
TALKING ABOUT, YOU WOULDN'T HOLD
BACK ARE TO THE JUDGE.
YOU WANT TO GO FOR ONE JUROR WHO
WOULD FIND IN YOUR FAVOR.
INSTEAD OF BANKING ON GOING TO
THE ONE JUDGE, AND HOPING HE
WOULD FIND IN YOUR FAVOR.
SO IT CHANGES THE STRATEGY
COMPLETELY WHICH IS ONE OF THE
REASONS WHY I ALSO ALTERNATIVELY
ARGUED THERE SHOULD BE
EVIDENTIARY HEARING LIKE AFTER
HITCHCOCK AND DUGGAR, HOW THIS
CHANGE AFFECTS STRATEGY.
HOW YOU WOULD APPROACH THE TRIAL
DIFFERENT.
YOU WOULD DO VOIR DIRE
DIFFERENT, PEREMPTORY CHALLENGES
DIFFERENTLY.
ADVISORY, NOT BINDING.
EVERYTHING WOULD BE DIFFERENT.
>> LET ME ASK ONE FINAL QUESTION
ON THE RETROACTIVITY OF HURST.
YOU WOULD AGREE THAT MR. ASAY'S
CONVICTION WAS FINAL PRIOR TO
RING?
>> YES.
>> IT WAS ALSO FINAL PRIOR TO
APPRENDI?
>> YES.
>> AND SO WHAT IS YOUR, SO, WHY
WOULD, AND YOU WOULD ALSO AGREE
THAT THE UNITED STATES SUPREME
COURT HAS SAID THAT RING DOES
NOT APPLY RETROACTIVELY?
>> THEY SAID THAT AS TO RING.
I SUBMIT THIS IS BROADER THAN
RING.
AND WE ALSO NOW HAVE
MONTGOMERY v. LOUISIANA WHICH
IS CHANGED T, AND WE DON'T
REALLY KNOW HOW THAT WILL PLAY
OUT IN THE FUTURE WITH THE U.S.
SUPREME COURT.

WE DON'T, STATE OF FLORIDA,
DOESN'T FOLLOW TEEING.
IT FOLLOWS WITT.
ONE OF THE IMPORTANT FACTORS
UNDER WITT, LOOKING AT FACT PAUL
BEASLEY JOHNSON HIS CONVICTION
WAS FINAL BEFORE MR. ASAY BACK
IN THE EARLY '80s.
HE IS GETTING THE BENEFIT OF
HURST.
RICKY ROBERTS, FINAL BEFORE
MR. ASAY, HE IS GETTING BENEFIT
OF HURST.
PAUL HILDWIN GETS BENEFIT OF
HURST.
ARBITRARINESS JUST THE
ASSOCIATED TURNS ON WHEN THE
U.S. SUPREME COURT HANDED DOWN A
DECISION, SOME PEOPLE ARE
GETTING IT FROM WAY BACK WHEN
AND OTHER PEOPLE ARE NOT, UNDER
WITT, THAT CALLS FOR UNIFORMITY
AND FAIRNESS AND IT CALLS FOR
RETROACTIVE APPLICATION TO
EVERYBODY JUST LIKE HITCHCOCK.
>> THANK YOU.
>> THANK YOU.
>> THANK YOU FOR YOUR ARGUMENTS.
THE COURT'S IN RECESS.