>> ALL RISE.
>> SUPREME COURT OF FLORIDA IS NOW IN SESSION.
PLEASE BE SEATED.
>> WE TURN NOW TO THE THIRD CASE ON TODAY'S DOCKET, ROGERS V. THE STATE OF FLORIDA.
>> MAY IT PLEASE THE COURT.
BRACEY ON BEHALF OF MR. ROGERS.
I'D LIKE TO FOCUS ON ISSUE FIVE REGARDING THE COURT'S HANDLING OF THE MITIGATION.
THIS CASE IS ABOUT INSURING THAT THE PROCESS OF SENTENCING A MAN TO DIE IS FAIR.
THAT IT INCREASES CONFIDENCE IN THE CRIMINAL LAW AND THAT IT'S DELIBERATE AND CONSIDERATE.
MORE SPECIFICALLY, THIS CASE REVOLVES AROUND TWO ISSUES.
ONE, WHETHER A JURY MUST REACH A SUBJECTIVE STATE OF CERTITUDE AS TO THE DETERMINATIONS THAT INCREASE A PENALTY FROM LIFE WITHOUT PAROLE TO DEATH AND,
TWO, WHETHER A TRIAL JUDGE CAN SUMMARILY ADDRESS AND DISPOSE OF PROPOSED MITIGATION WHEN SELECTING A SENTENCE OF DEATH OVER A SENTENCE OF LIFE WITHOUT PAROLE.
REGARDING ISSUE ONE, I'D LIKE TO MAKE ONE POINT, AND IF POSSIBLE, FOUR CONTINGENTS IN SUPPORT OF THAT MAIN POINT.
THE MAIN POINT IS THAT, AS THIS COURT RECOGNIZED IN PERRY V. STATE, DETERMINATIONS AS TO WHETHER THE AGGRAVATION IS SUFFICIENT TO JUSTIFY IMPOSING THE DEATH PENALTY AND WHETHER THE AGGRAVATION OUTWEIGHS THE MITIGATION MUST BE MADE BEYOND A REASONABLE DOUBT.
AND IN SUPPORT OF THAT GENERAL POINT, I'D LIKE TO FIRST NOTE THAT ELEMENTS AS WELL AS THE FUNCTIONAL EQUIVALENT OF ELEMENTS MUST BE DETERMINED BEYOND A REASONABLE DOUBT.

THAT'S A KEY TAKEAWAY FROM THE
APPRENDI LINE OF CASES.
NUMBER TWO, THESE DETERMINATIONS
AT ISSUE HERE TODAY ARE THE
FUNCTIONAL EQUIVALENT OF
ELEMENTS.
>> DIDN'T WE SAY THE OPPOSITE IN
FOSTER?
>> TAKEN AT FACE VALUE, JUSTICE
LUCK, YES, FOSTER DID SAY
DIFFERENTLY.
MY POSITION IS THAT IN ORDER TO
BE RECONCILED WITH RING, FOSTER
MUST BE READ NARROWLY.
AND IF IT IS, THEN IT WOULD HAVE
NO APPLICATION IN ROGERS' CASE.
>> WHY?
>> WELL, IF I COULD START BY--
WELL, LET ME SAY THIS.
I BELIEVE THAT FOSTER SHOULD BE
READ, AND SHOULD BE READ TO
ESTABLISH THAT DETERMINATIONS AS
TO WHETHER AT LEAST ONE
AGGRAVATING FACTOR EXISTS AS TO
WHETHER THE AGGRAVATION IS
SUFFICIENT AND AS TO WHETHER IT
OUTWEIGHS THE MITIGATION.
FOSTER CAN BE READ TO ESTABLISH
THOSE DETERMINATIONS WERE NOT
THE FUNCTIONAL EQUIVALENT OF
ELEMENTS IN 1998 AT THE TIME
THAT FOSTER WAS TRIED.
IF IT'S READ THAT WAY, AND
HERE'S WHY I SUGGEST IT CAN AND
SHOULD BE READ THAT WAY,
MR. FOSTER ESSENTIALLY ARGUED
THAT HURST V. STATE CLARIFIED
WHAT HAD BEEN LONG EXISTING LAW
IN FLORIDA.
QUOTE, HURST WAS A CHANGE IN THE
DECISION OF LAW, AND IT LATER
SAID THAT THE 2016 AND 2017
AMENDMENTS TO 921.141 CODIFIED
THOSE CHANGES.
AND THAT IS SIGNIFICANT
BECAUSE--
>> DIDN'T IT ALSO SAY THAT UNDER
THE STATUTE AND THE RULE THAT WE
DO NOT FIND THOSE TO BE
RESPECTS?

>> IT DID SAY THAT, YES, SIR.
>> AND THE STATUTE WAS TALKING ABOUT THAT STATUTE.
>> YES.
TAKEN AT FACE VALUE, YES, IT DID, JUSTICE LUCK.
>> OKAY.
>> SO TO TURN TO THAT POINT, I WOULD SAY THAT IF FOSTER IS TAKEN AT FACE VALUE, ESSENTIALLY WHAT FOSTER APPEARS TO REASON IS THAT IN FLORIDA THE MAXIMUM PENALTY FOR FIRST-DEGREE MURDER BASED ON A CONVICTION FOR FIRST-DEGREE MURDER ALONE IS DEATH.
AND THE REASONING SEEMS TO BE THAT 782.04, WHICH DEFINES FIRST-DEGREE MURDER, CHARACTERIZES IT AS A, QUOTE CAPITAL FELONY.
UNQUOTE.
PUNISHABLE BY DEATH.
BUT THAT IS THE EXACT SAME ARGUMENT, ESSENTIALLY, THAT THE UNITED STATES SUPREME COURT REJECTS IN RING V. ARIZONA.
AND IF I COULD ELABORATE ON THAT QUICKLY.
IN RING ARIZONA BASICALLY ARGUED THE MAXIMUM PENALTY FOR FIRST-DEGREE MURDER IS DEATH BECAUSE THEIR FIRST-DEGREE MURDER STATUTE, WHICH I-- WELL, THEIR FIRST-DEGREE MURDER STATUTE SAID IT IS PUNISHABLE BY LIFE IMPRISONMENT OF DEATH.
AND THE UNITED STATES SUPREME COURT SAID IT AUTHORIZES DEATH ONLY IN A FORMAL SENSE AND NOTED THAT THAT FIRST-DEGREE MURDER STATUTE-- I DO NOTE THIS IS AT PAGES 603-604 OF THE RING OPINION, BUT THEIR FIRST-DEGREE MURDER STATUTE EXPLICITLY CROSS-REFERENCED ANOTHER STATUTE-- SIMILARLY 782.04 IN FLORIDA CROSS-REFERENCES 775.082 WHICH IN TURN CROSS-REFERENCES 921.141 AND CLEARLY MORE THAN

JUST A CONVICTION FOR
FIRST-DEGREE MURDER IS REQUIRED
IN ORDER FOR THE MAXIMUM PENALTY
TO BE INCREASED FROM LIFE
WITHOUT PAROLE TO DEATH.
THAT'S WHY I SUGGEST THAT IF
FOSTER IS READ AT FACE VALUE,
IT'S JUST SIMPLY IRRECONCILABLE
WITH THE APPRENDI LINE OF CASES,
PARTICULARLY RING VERY ARIZONA.
IN TERMS OF THE DETERMINATIONS
AT ISSUE TODAY INCREASING THE
MAXIMUM PENALTY FOR MURDER,
AGAIN, I WOULD POINT OUT THAT
782.04 CITES TO 775.082 WHICH
ESSENTIALLY SAYS THE MAXIMUM
PENALTY FOR A CAPITAL FELONY IS
LIFE WITHOUT PAROLE UNLESS THE
PROCEDURES OUTLINED IN 921.141
RESULT IN A DETERMINATION THAT A
SENTENCE OF DEATH SHOULD BE
IMPOSED.
AND SO THEN WE'RE AT 921.141.
AND TO OVERSIMPLIFY, IT
ESSENTIALLY SAYS YOU'VE GOT TO
DETERMINE WHETHER AT LEAST ONE
AGGRAVATING FACTOR EXISTS.
IT THEN LAYS OUT ADDITIONAL
DETERMINATIONS THAT HAVE TO BE
MADE.
AND IT'S IMPORTANT FOR ME TO
STEP BACK A MOMENT AND POINT OUT
THAT THE APPROPRIATE ANALYSIS
WHEN DETERMINING WHETHER A
FINDING INCREASES THE PENALTY
CONCERNS THE OPERATION AND
EFFECT OF THE LAW AS APPLIED AND
ENFORCED BY THE STATE.
THAT'S A CLEAR PRINCIPLE LAID
DOWN BY THE UNITED STATES
SUPREME COURT ACTUALLY IN MELANI
V. WILBUR.
SO A DIFFERENT WAY TO STATE THAT
IS THAT THE RELEVANT INQUIRY IS
NOT ONE OF FORM, BUT OF EFFECT.
DOES THE REQUIRED FINDING EXPOSE
THE DEFENDANT TO INCREASED
PUNISHMENT.
AND I WOULD SUGGEST THAT WE, OF
COURSE, START WITH THE TEXT,

921.141, BUT WE HAVE TO LOOK AND SEE HOW IS THAT APPLIED AND ENFORCED.
AND IT'S VERY HELPFUL, OBVIOUSLY, TO LOOK AT THE STANDARD INSTRUCTIONS.
IN PARTICULAR I WOULD SUGGEST TO LOOK AT THE STANDARD VERDICT FORM.
AND WHAT BECOMES APPARENT IS THAT EACH OF THOSE DETERMINATIONS-- NOT ONLY THE DETERMINATION TO WHETHER AT LEAST ONE AGGRAVATING FACTOR EXISTS, BUT ALSO WHETHER THAT IS SUFFICIENT AND WHETHER THAT AGGRAVATION OUTWEIGHS THE MITIGATION-- EACH OF THOSE IS A NECESSARY DETERMINATION BEFORE WE EVEN GET TO THE POINT WHERE WE CAN CONSIDER LIFE WITHOUT PAROLE OR DEATH.
AND I WOULD, AGAIN, IF YOU LOOK AT SECTION, THE FOURTH SECTION, I BELIEVE IT'S SECTION D OF THE STANDARD VERDICT FORM, IT IS ACTUALLY TITLED ELIGIBILITY FOR THE DEATH PENALTY.
AND THAT DETERMINATION, SECTION D, PERTAINS TO WHETHER THE AGGRAVATION OUTWEIGHS THE MITIGATION.
>> THOSE SAME STANDARD JURY INSTRUCTIONS AND VERDICT FORMS EXPLICITLY EXCLUDED, DESPITE ARGUMENT FROM LOTS OF DIFFERENT FOLKS, THE REASONABLE DOUBT STANDARD, CORRECT?
>> YES.
THE CURRENT VERSION OF--
>> LOOK TO THAT AS AN EXAMPLE, DOESN'T THAT INDICATE TO US THERE WAS NO ERROR IN FAILING TO INSTRUCT ON THE STANDARD OF PROOF FOR THE OUTWEIGHING ELEMENT AND FOR THE ACTUAL ELEMENT OF WHAT SENTENCE-- THE SUFFICIENCY ELEMENT?
>> WELL, JUSTICE LUCK, AS WE ALL KNOW, WHEN THIS COURT AUTHORIZED

THOSE STANDARD INSTRUCTIONS FOR PUBLICATION, THEY EXPLICITLY SAID, YOU KNOW, WE EXPRESS NO CORRECTNESS TO THE OPINION OF THESE INSTRUCTIONS.
IS SO I DO TAKE IT TO MEAN THAT THIS COURT EXAMINED THE POSITIONS OF THE PARTIES--
>> THAT'S CERTAINLY TRUE--
>> YES, SIR.
>> AND I THINK THAT'S TRUE IN THE NORMAL CASE, BUT THESE WERE NOT THE AVERAGE INSTRUCTIONS WE GET.
THE AVERAGE INSTRUCTIONS ARE THEY'RE IMPOSED BY ONE OF THE STANDARD INSTRUCTION COMMITTEES, THEY COME UP TO US, WE LOOK OVER THEM, ISSUE AN OPINION AND PUT THAT DISCLAIMER THERE.
WE ASKED FOR COMMENT WITHIN 60 DAYS, WE GOT EXTENSIVE COMMENTS AND THANKED A LOT OF DIFFERENT PARTIES INCLUDING THOSE THAT RAISED THE EXACT SAME ISSUES YOU'VE RAISED HERE, AND THE COURT UNANIMOUSLY-- EVEN THOUGH THERE'S A SEPARATE CONCURRING OPINION BUT NOT ON THIS ISSUE-- UNANIMOUSLY REAFFIRMED THE FACT THAT THE BEYOND A REASONABLE DOUBT STANDARD WAS NOT INCLUDED HERE.
I SHOULDN'T SAY ELEMENTS, THOSE INDICATIONS ON THE STATUTE THAT YOU ARE CONTESTING HERE.
>> JUSTICE LUCK, I MEAN, CERTAINLY THE COURT DID NOT INCLUDE THOSE IN THE STANDARD INSTRUCTIONS.
I WOULD TAKE THE POSITION THAT AS THOROUGH AS A POSITIVE PROCESS THAT WAS, IT WAS NOT LITIGATION, YOU KNOW?
IT WAS NOT TESTED BY THIS PROCESS.
>> LET'S STEP BACK--
>> YES, SIR.
>> WHAT I-- I UNDERSTAND THAT YOU HAVE A STANDARD OF PROOF

THAT APPLIES TO A FINDING WITH
RESPECT TO THE EXISTENCE OF AN
AGGRAVATOR.
>> YES, SIR.
>> THAT MAKES PERFECT SENSE TO
ME.
THAT'S A FACTUAL QUESTION, IT
EXISTS OR NOT.
BUT WHEN IT COMES TO THE
QUESTION OF THE SUFFICIENCY OF
THE AGGRAVATOR OR THE WALKING OF
THE AGGRAVATION AND MITIGATION,
I'M HAVING TROUBLE UNDERSTANDING
HOW THAT IS REALLY A MATTER OF
PROOF.
I MEAN, THOSE AREN'T REALLY
FACTUAL QUESTIONS.
THAT'S A QUESTION ABOUT THE
JUDGMENT OF THE JURY.
SO IT JUST SEEMS LIKE, TO ME, TO
BE A CONCEPTUAL PROBLEM TO
ATTEMPT TO APPLY A STANDARD OF
PROOF TO THOSE DETERMINATIONS.
WHAT AM I MISSING THERE.
>> WELL, JUSTICE CANADY, IN
SHORT, WHAT I WOULD SAY IS THAT
EVEN THOUGH THESE DETERMINATIONS
ARE NOT PURELY FACTUAL AND
INVOLVE WHAT I WOULD CALL THE
EXERCISE OF NORMATIVE JUDGMENT,
THEY'RE STILL SUBJECT TO THE
CONSTITUTIONAL REQUIREMENT OF
PROOF BEYOND A REASONABLE DOUBT.
AND I WOULD TRY THE MAKE THREE
POINTS IN SUPPORT OF THAT.
THE FIRST POINT WOULD BE THAT
THESE DETERMINATIONS ARE
ULTIMATE OR ELEMENTAL FACTS.
AND THE UNITED STATES SUPREME
COURT HAS DISTINGUISHED BETWEEN
ULTIMATE OR ELEMENTAL FACTS AND
BASIC OR EVIDENTIARY FACTS.
IN THE APPRENDI LINE OF CASES, I
BELIEVE IT IS REFERRING TO
ELEMENTAL FACTS.
THE SECOND POINT WOULD BE THAT
THESE DETERMINATIONS, THEY'RE
DETERMINATIONS THAT JURIES HAVE
TO MAKE BEYOND A REASONABLE--
>> WELL, IN THE APPRENDI LINE OF

CASES, THAT TALKS ABOUT THE EXISTENCE OF AN AGGRAVATOR. THAT'S WHAT THEY'RE TALKING ABOUT.
>> YES, SIR.
>> WHY OUR COURT MAYBE HAS HAD A DIFFERENT UNDERSTANDING ABOUT THAT, BUT THAT'S CLEAR IN THAT LINE OF CASES.
>> WELL, I AGREE, JUSTICE CANADY, BUT I WOULD SAY THAT THE SPECIFIC REFERENCE TO AN AGGRAVATING CIRCUMSTANCE ARISES IN LARGE PART FROM THE RING DECISION.
AND THE DEATH PENALTY STATUTE AT ISSUE IN RING, THE ARIZONA STATUTE BACK IN 2001, I BELIEVE, DIFFERS IN A CRITICAL RESPECT FROM FLORIDA'S DEATH PENALTY STATUTE.
AND WHAT I WOULD SAY IS THIS: THE RUNG STATUTE-- AGAIN, THE FIRST-DEGREE MURDER REFERRED TO WHAT I WILL CALL THE RING DEATH PENALTY STATUTE.
THAT DEATH PENALTY STATUTE AND RELEVANT PART ESSENTIALLY SAID THE COURT, BECAUSE AT THAT POINT, YOU KNOW, THE ARIZONA REQUIRED THE COURT TO MAKE THESE DECISIONS.
BUT I DON'T THINK THAT MATTERS FOR TO OUR PURPOSES HERE.
THE COURT SHALL ESSENTIALLY DETERMINE WHETHER AT LEAST ONE AGGRAVATING FACTOR EXISTS.
IF SO, IT MUST MAKE A DETERMINATION AS TO WHETHER--
AND I BELIEVE THIS IS MORE OR LESS A QUOTE-- MITIGATING CIRCUMSTANCE SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY, END QUOTE, EXIST.
IN CONTRAST TO THAT DETERMINATION UNDER THE FLORIDA STATUTE AFTER AT LEAST ONE AGGRAVATING FACTOR IS FOUND--
>> I'M HAVING THE SAME ANALYTICAL PROBLEM THAT JUSTICE

CANADY JUST ARTICULATED, AND I
WANT TO DELVE FURTHER INTO THAT.
ISN'T IT CORRECT THAT THE
INSTRUCTIONS IN TERMS OF
MITIGATORS AND EVERYTHING THAT
COMES AFTER THE ACTUAL FACTUAL
FINDINGS TELLS THE JURY THAT
THIS IS AN INDIVIDUAL
DETERMINATION, EACH OF YOU HAVE
TO DETERMINE WHETHER SOMETHING
IS MITIGATING?
BECAUSE IT'S AN EXERCISE OF
JUDGMENT, SOMEBODY ELSE MAY NOT
THINK IT'S MITIGATING?
YOU DON'T HAVE TO AGREE
UNANIMOUSLY ON WHAT'S
MITIGATING, CORRECT?
>> I DO AGREE, YES, AS TO THE
MITIGATING CIRCUMSTANCES.
>> RIGHT.
SO I JUST CAN'T RECONCILE THE
ARGUMENT THAT YOU SHOULD TREAT
IT AS A FACT AND ATTACH A
STANDARD OF PROOF TO MANAGER
THAT IN THE SAME INSTRUCTIONS WE
TELL THE JURY IS NOT A FACT AND,
IN FACT, REALLY ISN'T A FACT.
I MEAN, IT'S A INDIVIDUAL
JUDGMENT CALL BASED ON WHAT THAT
JURY-- AND WE TELL THE JURORS
THAT.
I DON'T SEE HOW YOU CAN DO BOTH
WITHOUT BEING IRRECONCILABLY
CONFUSING.
>> YES, SIR.
WELL, JUSTICE LAWSON, I DO THE
BELIEVE THAT THE INSTRUCTIONS
MAKE IT CLEAR THAT THE
INDIVIDUALIZED DETERMINATION IS
TO THE EXISTENCE OF THE
MITIGATING CIRCUMSTANCES.
OF COURSE, THEN IT HAS TO BE
UNANIMOUS AS TO WHETHER THE
AGGRAVATION OUTWEIGHS THE
MITIGATION.
>> RIGHT.
>> AND SO I WOULD, WHAT I WOULD
SAY, I WOULD TRY TO MAKE TWO
MORE POINTS IN TERMS OF WHY
THESE DETERMINATIONS ARE SUBJECT

TO THE CONSTITUTIONAL
REQUIREMENT OF PROOF BEYOND A
REASONABLE DOUBT.
ONE IS THAT MANY
DETERMINATIONS--
>> WOULDN'T IT BE LIKE TELLING,
IN FLORIDA, TRIAL JUDGES
GENERALLY HAVE VERSION TO
SENTENCE UP TO THE MAXIMUM
PENALTY AUTHORIZED BY LAW.
GENERALLY.
IT WOULD ALMOST BE LIKE SAYING
TO THE TRIAL JUDGE I KNOW THIS
IS A DISCRETIONARY DECISION,
DIFFERENT TRIAL JUDGES ARE GOING
TO VIEW IT NECESSARILY--
DIFFERENTLY NECESSARILY.
BUT YOU NEED TO ANNOUNCE ON THE
RECORD THAT YOU BELIEVE BEYOND A
REASONABLE DOUBT THAT YOUR
SENTENCE IS THE CORRECT-- I
MEAN, IT JUST, IT JUST DOESN'T
EVEN FIT, TO ME.
I'M STRUGGLING WITH THAT.
>> YES, SIR.
WELL, I DO THINK THIS IS
DIFFERENT, JUSTICE LAWSON.
THESE DETERMINATIONS DON'T GO TO
SELECTING A SENTENCE.
THEY GO TO INCREASING THE
PENALTY FROM LIFE WITHOUT PAROLE
TO DEATH IN THE FIRST PLACE.
AND I THINK THAT'S CRITICAL
BECAUSE, YOU KNOW, RESULTING IN
THE OUTCOME THAT MR. ROGERS IS
SUGGESTING HERE WOULD NOT HAVE
AN IMPACT ON SENTENCING WITHIN A
RANGE.
THIS IS ABOUT THESE FINDINGS,
THESE DETERMINATIONS INCREASING
THE PENALTY.
BUT IF I CAN CIRCLE BACK TO THE
QUESTION ABOUT THE FACTUAL OR
NON-FACTUAL IN NATURE, I BELIEVE
THAT MANY DETERMINATIONS THAT
JURIES MAKE BEYOND A REASONABLE
DOUBT HAVE BOTH A FACTUAL
COMPONENT AND AN APPLICATION OF
A STANDARD TO THE FACTS
COMPONENT.

AND ONE EXAMPLE OF THAT WOULD BE IN THE UNITED STATES SUPREME COURT CASE OF U.S. VERY GOLDEN, THERE THE ISSUE DEALT WITH THE MATERIALITY ELEMENT.
AND IN ESSENCE, THE GOVERNMENT ARGUED THAT ONLY THE FACTUAL COMPONENTS OF THAT ELEMENT, YOU KNOW, WHAT STATEMENT WAS MADE, WHAT DECISION WAS THE STATE-- THE PERSON TO WHICH THE STATEMENT MADE, WHAT WAS THAT DECISION.
THOSE FACTUAL COMPONENTS HAVE TO BE DECIDED BY THE JURY BEYOND A REASONABLE DOUBT, BUT THE JUDGE COULD DECIDE WHAT EFFECT THAT HAD ON THE DECISION MAKER.
AND THE UNITED STATES SUPREME COURT REJECTED THAT AND SAID JURORS HAVE TO DETERMINE ALL THOSE THINGS.
IT SAID THAT JURORS NOT ONLY DETERMINE FACTS, BUT THEY CAN DRAW INFERENCES FROM THE FACTS, CONDUCT DELICATE ASSESSMENTS OF THE FACTS AND DETERMINE THE SIGNIFICANCE OF THOSE INFERENCES.
FURTHERMORE, OTHER DETERMINATIONS HAVE BOTH A FACTUAL COMPONENT AND AN APPLICATION OF WHAT I WOULD CALL A NORMATIVE STANDARD TO FACTUAL COMPONENT.
FOR INSTANCE, ONE EXAMPLE WOULD BE OBSCENITY, WHETHER THE MATERIAL DEPICTS SEXUAL CONDUCT IN A PATENTLY OFFENSIVE WAY.
ANOTHER EXAMPLE COULD BE THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR WHICH ESSENTIALLY ASKS A JURY TO DETERMINE BEYOND A REASONABLE DOUBT WHETHER THE MURDER WAS EXTREMELY WICKED OR VILE, PITILESS.
AND YOU COULD LOOK TO THE DECISION IN BROWN V. STATE.
ESSENTIALLY, THE COURT SAID A

DETERMINATION AS TO WHETHER A
NONIF STATE PRISON SENTENCE
COULD PRESENT A DANGER TO THE
PUBLIC WAS THE FUNCTIONAL OF AN
EQUIVALENT ELEMENT.
YOU HAVE TO DETERMINE THE
UNDERLYING FACTS AND THEN APPLY
A STANDARD.
AND I WOULD SUGGEST A STANDARD
THAT IS NORMATIVE.
SO I THINK IT'S IMPORTANT TO
RECOGNIZE THE VARIOUS COMPONENTS
THAT THESE DETERMINATIONS
INVOLVE.
THE THIRD AND FINAL POINT I
WOULD LIKE TO MAKE IN TERMS OF
THE FACTUAL NATURE OF THESE
DETERMINATIONS IS THAT EVEN IF
THESE DETERMINATIONS ARE NOT
SUSCEPTIBLE TO A QUANTUM OF
PROOF, THEY'RE SUSCEPTIBLE TO A
SUBJECTIVE STATE OF CERTITUDE.
AND I SAY THAT IN THIS SENSE:
PERHAPS IT WOULD BE DIFFICULT
FOR JURIES TO SAY, WELL, THE
AGGRAVATION OUTWEIGHS THE
MITIGATION BY X QUANTITY OF
PROOF.
BUT I THINK EVEN IF THAT IS THE
CASE, THEY WOULD STILL BE ABLE
TO ASK THEMSELVES DO I HAVE AN
ABIDING CONVICTION THAT BY SOME
DEGREE, BY SOME DEGREE THE
AGGRAVATION OUTWEIGHS THE
MITIGATION.
AND ON THAT POINT, I WOULD NOTE
THAT MULTIPLE STATES REQUIRE
THESE DETERMINATIONS TO BE MADE
BEYOND A REASONABLE DOUBT.
SO I THINK THAT, IN SHORT, EVEN
THOUGH THESE DETERMINATIONS ARE
NOT PURELY FACTUAL AND INVOLVE
THE EXERCISE OF NORMATIVE
JUDGMENT, THAT ALONE DOES NOT
MEAN THEIR NOT SUBJECTED TO THE
CONSTITUTIONAL REQUIREMENT OF
PROOF BEYOND A REASONABLE DOUBT.
NOW, IF I COULD CIRCLE BACK TO
THESE DETERMINATIONS INCREASING
THE PENALTY FOR THE CRIME, I

JUST WANT TO MAKE SURE AND POINT OUT THAT 921.141-- AND THIS SORT OF CIRCLES BACK TO COMPARING FLORIDA STATUTE TO THE ARIZONA STATUTE-- THE ARIZONA STATUTE, AS I SAID, REQUIRED AN AGGRAVATOR AND THEN ALSO MITIGATING CIRCUMSTANCES NOT SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY.
WHEREAS HERE WE'RE TALKING ABOUT WHETHER THE AGGRAVATION IS SUFFICIENT AND WHETHER THE AGGRAVATION OUTWEIGHS THE MITIGATION.
AND I WOULD SUGGEST THAT THOSE DETERMINATIONS DIFFER IN KIND FROM THE SECOND DETERMINATION IN ARIZONA.
THE SECOND DETERMINATION IN ARIZONA WAS ESSENTIALLY ABOUT DO WE COME DOWN FROM A MAXIMUM PENALTY WHEREAS THESE WHERE THE AGGRAVATION IS SUFFICIENT TO JUSTIFY IMPOSING DEATH AND WHETHER THE AGGRAVATION OUTWEIGHS THE MITIGATION, THOSE WERE ABOUT SAYING IF WE GET TO THE MAXIMUM IN THE FIRST PLACE.
AND I THINK THAT'S A CRITICAL POINT.
AND SO, JUSTICE CANADY, THAT KIND OF BRINGS ME BACK TO THE UNITED STATES SUPREME COURT REFERRING TO AGGRAVATING CIRCUMSTANCES.
I DO THINK THAT IS ARISING FROM THE RING DECISION AND THE RING STATUTE.
AND I WOULD SUGGEST THAT FLORIDA STATUTE DIFFERS.
I WOULD ALSO-- YES, SIR.
>> TO BE HONEST, I THINK I UNDERSTAND YOUR ARGUMENT, BUT THE WHOLE CONCEPT OF AGGRAVATION SUGGESTS GOING UP.
>> YES.
BUT I THINK THAT WHETHER THE AGGRAVATION IS SUFFICIENT TO JUSTIFY THE DEATH PENALTY, I

THINK THAT'S ABOUT GOING UP.
I THINK THAT IS ABOUT GOING UP.
AND I THINK THAT'S IN CONTRAST
TO WHETHER THE MITIGATION IS
SUFFICIENTLY SUBSTANTIAL TO CALL
FOR LENIENCY.
I DO THINK THAT'S ABOUT COMING
DOWN.
AND I THINK THAT THAT IS-- AND
I WILL ADMIT IT'S A SUBTLE, IT'S
A SUBTLE POINT, BUT I THINK THAT
THESE DETERMINATIONS ARE
DIFFERENT FROM TELLING A JUDGE,
OKAY, THE--
>> JUST--
>> YES, SIR.
>> IT SEEMED, IT SEEMS YOUR
ARGUMENT SEEMS COMPLETELY
INCONSISTENT WITH WHAT WE, HOW
WE TREAT THE ENTIRE CASE.
IN OTHER WORDS, IF YOU'RE
SUGGESTING THAT THE LAW IS THAT
WE HAVE 12 JURORS WHO ARE GOING
TO MAKE A PERSONALIZED,
NORMATIVE DETERMINATION ABOUT
WHETHER THE DEATH PENALTY SHOULD
BE IMPOSED TO A STANDARD THAT'S
AN EVIDENTIARY STANDARD, THEN
WHY WOULD WE GO THROUGH THE
PROCESS AND EXCLUDE PEOPLE WHO
JUST DON'T BELIEVE IN THE DEATH
PENALTY?
>> WELL--
>> BECAUSE THAT'S A SOCIETAL
NORM THAT A LOT OF PEOPLE SHARE.
SO IF IT'S NOT TO BE A FACTUAL
DETERMINATION THAT CAN BE MADE
TO A STANDARD BASED ON THE
EVIDENCE, A LEGAL STANDARD AND
THE EVIDENCE WHICH IS WHAT
IMPARTIAL JURORS ARE SUPPOSED
TO BE DOING, IF IT'S JUST A NORM
OF WHETHER 12 PEOPLE THINK THE
DEATH PENALTY SHOULD BE IMPOSED,
THEN WHY WOULD-- I MEAN, DO YOU
UNDERSTAND THE QUESTION?
>> I DO, JUSTICE LAWSON.
BUT I THINK THAT WHAT YOU'RE
REFERRING TO WHEN YOU TALK ABOUT
IT BEING A PERSONALIZED SORT OF

INDIVIDUALIZED DISCUSSION,
THAT'S REALLY ABOUT THE FINAL
STEP WHICH IS WHETHER DEATH IS
APPROPRIATE.
>> RIGHT.
YOU'RE SAYING THAT SHOULD BE
SUBJECT I, THEY SHOULD BE
INSTRUCTED TO FIND THAT BEYOND A
REASONABLE TOUT?
>> NO, SIR, I'M NOT.
THE FINAL DETERMINATION AS TO
WHETHER DEATH IS APPROPRIATE,
WHICH THIS COURT HAS LABELED AT
LEAST INVOLVING THE MERCY REPS,
I'M NOT SUGGESTING THAT THAT
SHOULD BE BEYOND A REASONABLE
DOUBT.
BECAUSE I DO THINK AS THE UNITED
STATES SUPREME COURT INDICATED
IN KANSAS V. CARR, MERCY IS NOT
STRENGTH.
AND I DO THINK THAT IT'S
DIFFICULT TO SAY DOES A PERSON
DESERVE MERCY BEYOND A
REASONABLE DOUBT.
BUT AGAIN, THAT INDIVIDUALIZED
POINT REALLY COMES IN IN THE
FINAL DETERMINATION AS TO
WHETHER DEATH OR LIFE IS
APPROPRIATE.
I'M TALKING ABOUT THE
DETERMINATIONS AS TO WHETHER THE
AGGRAVATION IS SUFFICIENT AND
WHETHER IT OUTWEIGHS THE
MITIGATION.
>> BUT THE SUPREME COURT SAID
THAT IN CARR IN THE CONTEXT OF
THE EKH BY POSE STATUTE,
CORRECT?
>> YES.
>> HOW IS THAT ANY DIFFERENT
THAN OUR WEIGHT, ONE MORE THAN
THE OTHER?
>> YES, SIR.
>> HOW CAN WE TREAT THAT ANY
DIFFERENTLY?
OR WHY SHOULD WE?
>> YES, SIR.
I WOULD SAY, JUSTICE LUCK, THAT
THAT PORTION OF THE CARR OPINION

IS DICTA.
I MEAN, IT BEGINS BY SAYING IN THE ABSTRACT AND CONSIDERED WITHOUT RESPECT TO OUR CAPITAL SENTENCING CASE LAW.
>> THERE'S ONE JUDGE THAT I'VE READ WHO SAYS THERE'S DICTA, AND THEN THERE'S SUPREME COURT DICTA--
[LAUGHTER]
AND THEY DON'T OFTEN OPINE ON ISSUES OF LAW, AND WHEN THEY DO, IT'S SOMETHING WE SHOULD ALL PAY ATTENTION TO.
I THINK EVEN YOU WOULD AGREE WITH THAT.
>> YES, SIR.
I'M NOT SAYING THAT MEANS IT SHOULDN'T BE PERSUASIVE.
BUT WHY IT SHOULD NOT BE PERSUASIVE IS THAT PORTION OF THE CARR OPINION REALLY, IT CONFUSES A DETERMINATION AS TO WHETHER A DEATH-ELIGIBLE DEFENDANT DESERVES MERCY WITH A DETERMINATION AS TO WHETHER THE AGGRAVATION OUTWEIGHS THE MITIGATION.
AND IT CERTAINLY IN THE CONTEXT TO HAVE SELECTION PHASE AS OPPOSED TO THE ELIGIBILITY PHASE.
AND I'M SUGGESTING THAT UNDER FLORIDA STATUTE THESE DETERMINATIONS ARE ELIGIBILITY DETERMINATIONS, NOT SELECTION FACTORS.
BUT THE BOTTOM LINE IS THAT, AS I SAID A MOMENT AGO, I DO THINK IT'S HARD TO ASSERT THE POSITION THAT A DEFENDANT DESERVES MERCY BEYOND A REASONABLE DOUBT.
BUT I THEY'S DIFFERENT FROM WHETHER THE AGGRAVATION OUTWEIGHS THE MITIGATION.
I THINK THE JUROR CAN ASK DO I HAVE AN ABIDING CONVICTION THAT AT LEAST BY SOME AMOUNT, THE AGGRAVATION OUTWEIGHS THE MITIGATION.

THAT'S THE PRIMARY REASON WHY I
BELIEVE THE CARR MUSINGS SHOULD
NOT BE PERSUASIVE AND
CONTROLLING HERE.
>> LET ME TAKE YOU BACK TO THIS
DISTINCTION YOU'RE TRYING TO
MAKE BETWEEN OUR STATUTE AND THE
ARIZONA STATUTE.
>> YES, SIR.
>> ISN'T IT TRUE THAT IN THE
HURST CASE AT THE U.S. SUPREME
COURT, THEY TREATED THE QUESTION
BEFORE THEM REALLY AS SIMPLY
INVOLVING A STRAIGHTFORWARD
APPLICATION OF RING TO THE
FLORIDA STATUTE.
I MEAN, NOTHING ABOUT THIS KIND
OF DISTINCTION.
I MEAN, THAT'S JUST-- THAT
DISTINCTION YOU'RE MAKING REALLY
WOULD BE SOMETHING THAT WOULD BE
FOREIGN OR CERTAINLY NOT WITHIN
ANYTHING IN THE ANALYSIS FROM
THE U.S. SUPREME COURT.
ISN'T THAT CORRECT?
>> IN HURST V. FLORIDA?
>> YES.
>> YES, SIR.
ALTHOUGH I WOULD SAY THIS,
JUSTICE CANADY--
>> OR ANYWHERE ELSE.
>> RIGHT, THAT IS CORRECT.
ALTHOUGH I DON'T KNOW IF THIS
ARGUMENT HAS BEEN ADVANCED IN
THE COURT.
BUT I WOULD NOTE THAT IN HURST
V. FLORIDA, THERE IS A PORTION
OF THE OPINION THAT REFERS TO
THE DEFENDANT NOT BE ELIGIBLE
FOR DEATH UNTIL THERE ARE
FINDINGS.
AND IT DOES SAY ELIGIBLE UNTIL
FINDINGS AS TO WHETHER THE
AGGRAVATION IS SUFFICIENT AND
WHETHER IT OUTWEIGHS THE
MITIGATION.
SO THERE IS TENSION BETWEEN THE
FOUR CORNERS OF THE HURST V.
FLORIDA OPINION.
BUT THAT PORTION, I DO BELIEVE,

SUPPORTS THE ARGUMENT THAT I'M TRYING TO MAKE IN THE SENSE THAT THESE ARE ELIGIBILITY DETERMINATIONS.
ONE LAST POINT I'D LIKE TO MAKE AS I KNOW I'M GETTING CLOSE TO MY REBUTTAL TIME IS THAT INSTRUCTING THE JURY TO MAKE THESE DETERMINATIONS BEYOND A REASONABLE DOUBT, IT WOULD FURTHER INTEREST UNDERLYING THE CONSTITUTIONAL INTEREST.
IN PARTICULAR, IT WOULD PROMOTE FAIRNESS AND CONFIDENCE IN THE CRIMINAL LAW, AND THAT IS BECAUSE THE BEYOND A REASONABLE DOUBT STANDARD REDUCES THE MARGIN OF ERROR AS TO THE CAPITAL DEFENDANT.
AND THE CAPITAL DEFENDANT HAS AT STAKE INTERESTS OF EXTRAORDINARY-- I'M SORRY, STAKE, HAS THAT STAKE INTEREST THAT ARE EXTRAORDINARY NOT ONLY LIBERTY, BUT LIFE.
AND UNLESS THERE ARE ADDITIONAL QUESTIONS RIGHT NOW, I WILL RESERVE THE BALANCE OF MY TIME FOR--
>> I JUST WANT TO CLARIFY --
>> YES, SIR.
>>-- YOU AGREE, I GUESS, THAT YOUR ISSUE FOUR DOES NOT HAVE MERIT WHATSOEVER?
>> ISSUE FOUR?
>> ISSUE FOUR, THAT REVERSIBLE ERROR OCCURRED WHEN FINDING THE PRIOR VIOLENT FELONY CONVICTION BECAUSE HE HAD NOT BEEN CONVICTED OF A CRIME AS A RESULT OF USE OF VIOLENCE?
CLEARLY, THE JUDGE IN THE FINAL ORDER LISTED THE THREE CRIMES HE WAS RELYING UPON.
THAT SEEMS TO BE BASED ON A MISAPPREHENSION OF THE RECORD.
YOU DIDN'T REPLY IN THE REPLY BRIEF ON THAT.
>> WELL, JUSTICE LAWSON, I WOULD JUST SAY IT TURNS ON WHAT THE

JUDGE MEANT BY WHEN HE REFERRED
TO OTHER PEOPLE AGAINST WHOM
MR. ROGERS HAD USED VIOLENCE.
AND IF WHO HE WAS REFERRING TO
WAS ONLY THE VICTIMS IN THE
PRIOR FELONIES, THEN, YES, I
AGREE.
I WOULD SUGGEST THOUGH THAT THE
BETTER READING OF THE ORDER IS
THAT THE REFERENCE TO OTHER
PEOPLE WAS REFERRING NOT ONLY--
>> YOU ARGUE THIS AS IF THERE
WERE-- I MEAN, YOU SAY HE HAD
NOT BEEN CONVICTED OF OTHER
CRIMES AS A RESULT OF THE USE OF
VIOLENCE, AND HE CLEARLY HAD,
AND IT'S CLEARLY IN THE ORDER.
AND IT'S CLEARLY SET FORWARD AS
THE BASIS FOR THAT FINDING.
>> YES, SIR.
FRANKLY, JUSTICE LAWSON, WHEN I
READ THE ORDER, I THOUGHT THAT
THE REFERENCE TO OTHER PEOPLE
WAS IN A SEPARATE PARAGRAPH
REFERRING TO SOME UNIDENTIFIED
PEOPLE.
>> OKAY.
>> WHEN THE STATE SUBMITTED
THAT, I DID RECOGNIZE THAT THERE
WAS A DIFFERENT READING.
YES, SIR.
THANK YOU.
>> CHIEF JUSTICE CANADY,
JUSTICES OF THE COURT, MAY IT
PLEASE THE COURT, MY NAME IS
JENNIFER DONAHUE.
I'M AN ASSISTANT ATTORNEY
GENERAL, AND I REPRESENT THE
STATE IN THIS MATTER.
TURNING TO ISSUE ONE, THE
SUFFICIENCY IN WEIGHING.
THE STATUTE, 921.1412B2 IS VERY
CLEAR.
THAT A DEFENDANT BECOMES
ELIGIBLE FOR THE DEATH PENALTY
UPON THE FINDING OF GUILT FOR
FIRST-DEGREE MURDER AND AT LEAST
ONE AGGRAVATING FACTOR.
THE REMAINDER OF THE
DETERMINATION IN SENTENCING IS

BASED ON A JUDGMENT CALL, AS
THIS COURT HAS CLEARLY
UNDERSTANDS IT THE SAME WAY THAT
THE STATE DOES.
THE SUFFICIENCY IN WEIGHING ARE
JUDGMENT CALLS FOR THE JURY TO
MAKE, AS JUSTICE SCALIA STATED
IN CARR, WHETHER MITIGATING
CIRCUMSTANCES OUTWEIGH
AGGRAVATING CIRCUMSTANCES IS
MOSTLY A QUESTION OF MERCY.
TO ASSIGN A BURDEN OF PROOF,
ESPECIALLY SUCH AS BEYOND A
REASONABLE DOUBT, TO THAT
QUESTION OF MERCY DOES NOT MAKE
SENSE.
MY OPPOSING COUNSEL MENTIONED
THAT PERHAPS THIS ISSUE HAS NOT
BEEN PRESENTED TO THE UNITED
STATES SUPREME COURT.
I WOULD CONTEND THAT IT HAS.
IN THIS COURT'S CASES IN DENYING
RELIEF BASED ON HITCHCOCK, THE
MAJORITY OF THE CERT PETITIONS
REFERENCE THE ISSUE OF THE
BURDEN OF PROOF BEING ASSIGNED
TO SUFFICIENCY IN WEIGHING AND
THAT IT SHOULD BE BEYOND A
REASONABLE DOUBT.
THE PURPOSE BEYOND THAT IS TO,
ESSENTIALLY, MAKE THIS COURT
DETERMINE THAT HURST ITSELF
SHOULD BE FULLY RETROACTIVE,
THUS OBLITERATING THE HITCHCOCK
LINE OF CASE LAW FROM THIS
COURT.
ADDITIONALLY, THE ARGUMENT IS
THAT IT SHOULD ALSO BE NOT
SUBJECT TO A IT'S FOR
HARMFULNESS OR HARMLESSNESS.
SO THAT IS THE END GOAL IN
TRYING TO MAKE THIS COURT
DETERMINE THAT THE FINDINGS FOR
SUFFICIENCY IN WEIGHING SHOULD
BE TERMED BEYOND A REASONABLE
DOUBT AND THAT IT WAS ERROR IN
THE FIRST PLACE TO NOT DO THAT.
OBVIOUSLY, SINCE THERE ARE
JUDGMENT CALLS, THEY'RE NOT
ELEMENTS, THEY'RE FACTUAL

FINDINGS THAT THE JURY MUST
MAKE, AND THERE IS NO BURDEN OF
PROOF THAT IS ASSIGNED TO THOSE
FACTUAL FINDINGS.
I BELIEVE THAT MY OPPOSING
COUNSEL MENTIONED THAT HE WOULD
LIKE TO TALK ABOUT THE
MITIGATION ISSUE NUMBER FIVE.
HE DID NOT GET TO THAT.
BUT I JUST WANT TO BRIEFLY TOUCH
ON THAT.
THIS COURT'S CASE LAW IN
CAMPBELL AND TRICE, THE JUDGE IS
REQUIRED TO DETERMINE WHETHER
THE MITIGATION HAS BEEN
ESTABLISHED, TO WEIGH THAT
MITIGATION AGAINST AGGRAVATION
AND TO EXPRESSLY CONSIDER EACH
MITIGATING FACTOR.
HERE THE COURT HAS DONE EXACTLY
THAT.
THERE'S A 15-PAGE ORDER.
I BELIEVE IT'S 15.
IN WHICH THE JUDGE LISTS OUT
EACH INDIVIDUAL MITIGATING
FACTOR AND EXPLAINS WHETHER THE
JURY FOUND THAT MITIGATING
FACTOR, WHETHER HE HIMSELF FOUND
THAT MITIGATING FACTOR TO EXIST.
AND I WILL MENTION THAT THE
JUDGE FOUND SOME MITIGATING
FACTORS EXISTED THAT THE JURY
DID THE NOT THEMSELVES FIND.
SO THAT WAS A BENEFIT TO THE
DEFENDANT.
>> THAT INDICATES THAT THERE WAS
AN INDIVIDUAL CONSIDERATION OF
EACH OF THE FACTORS.
>> ABSOLUTELY.
>> IN OTHER WORDS, IF THE JUDGE
WAS JUST GOING ALONG WITH
WHATEVER THE JURY DID, THE JUDGE
WOULD HAVE SAID THE JURY FOUND
THIS, AND THERE'S NO--
>> ABSOLUTELY.
>>-- THAT FACTOR HASN'T BEEN
FOUND.
>> AND THAT'S THE WHOLE PURPOSE
BICAMERAL, WE DON'T WANT TO
SUMMARILY-- THE JUDGE TO

SUMMARILY DISMISS MITIGATING
FACTORS AND NOT CONSIDER THEM.
AND THAT'S ABSOLUTELY EVIDENCE
THAT THE JUDGE CONSIDERED EACH
MITIGATING FACTOR INDIVIDUALLY,
AND HE ASSIGNED DIFFERENT WEIGHT
TO EACH OF THOSE MITIGATING
FACTORS INDIVIDUALLY.
PENDING THIS COURT'S QUESTIONS,
THE STATE REQUESTS THAT THIS
COURT AFFIRM THE JUDGMENT AND
SENTENCE IN THIS CASE.
>> IF I COULD BRIEFLY ADDRESS
ISSUE FIVE.
THE FACT THAT THE COURT FOUND
SOME MITIGATING CIRCUMSTANCES
THAT THE JURY DID NOT-- MAY
HAVE INDICATED THAT THERE WAS
INDIVIDUALIZED CONSIDERATION.
BUT THE SENTENCING ORDER DOES
NOT REFLECT REASONED JUDGMENT.
AND BECAUSE DEATH IS
IRREVOCABLE, THIS COURT HAS
INDICATED THAT THE TRIAL COURT
MUST DELIBERATELY CONSIDER THE
MITIGATING CIRCUMSTANCES.
AND I BELIEVE THAT MEANS
THOUGHTFULLY AND COMPREHENSIVELY
ANALYZING, GIVING SOME REASONING
AND ANALYSIS IN SUPPORT OF
WHETHER A MITIGATING
CIRCUMSTANCE IS NOT PROVEN OR
EVEN IF IT IS PROVEN, SOME
REASONING OR ANALYSIS AND
SUPPORT, WHY IT'S GIVEN THE
WEIGHT THAT THE TRIAL COURT
GIVES IT.
>> DIDN'T THE TRIAL COURT
EXPLAIN AS TO CERTAIN OF THEM
THAT THE JURY HEARD THE EVIDENCE
AND FOUND THAT MITIGATING
FACTORS TO NOT EXIST?
>> YES.
>> ISN'T THAT A REASON?
>> TO FIND IT NOT PROVEN?
>> RIGHT.
>> WELL, I STILL THINK THE TRIAL
JUDGE HAS AN INDEPENDENT DUTY--
>> AND, IN FACT, HE EXERCISED
THAT BECAUSE THEN THERE WERE, I

THINK, AT LEAST SIX OR SEVEN OF THEM WHERE THE TRIAL JUDGE SAID THE JURY FOUND IT, NOT FOUND. HOWEVER, THERE WAS EVIDENCE TO SUPPORT THIS, AND I AM GIVING IT X WEIGHT.
>> RIGHT.
BUT HE GAVE NO REASONING OR ANALYSIS IN SUPPORT OF THAT X WEIGHT.
AND I WOULD SAY, JUSTICE LUCK, CONTRAST THE TRIAL COURT'S TREATMENT OF THE AGGRAVATING FACTORS WITH THE TREATMENT OF THE MITIGATING CIRCUMSTANCES.
AS TO THE TREATMENT OF THE AGGRAVATING FACTORS, HE AT LEAST LAID OUT SOME STANDARDS, SUMMARIZED SOME OF THE FACTS, APPLIED THOSE STANDARDS TO THE FACTS.
WHEN YOU LOOK AT THE MITIGATION, IT'S JUST THE SAME BASIC STATEMENTS AFTER THE OTHER.
IT MAY HAVE BEEN 15 PAGES BECAUSE THERE WERE 68 PROPOSED CIRCUMSTANCES, BUT IT WAS STILL SUMMARILY ADDRESSING AND DISPOSING OF THE MITIGATION.
AND I BELIEVE THAT IN ORDER FOR THIS COURT TO MEANINGFULLY REVIEW THE SENTENCING ORDER, THE TRIAL COURT HAS TO EXPLAIN ITSELF, HAS TO GIVE SOME REASON.
AGAIN, IF YOU LOOK AT LOYOLA AND JACKSON, I THINK THE COURT MADE IT CLEAR THAT THOSE, IN THOSE INSTANCES THE TRIAL JUDGE DID NOT THOUGHTFULLY AND COMPREHENSIVELY ANALYZE IT, THE MITIGATION, AND I THINK THE SAME IS TRUE HERE.
>> LOYOLA IS BASED ON CAMPBELL, CORRECT?
>> YES, SIR.
>> AND CAMPBELL DOES NOT HAVE THAT REQUIREMENT, CORRECT?
>> TO THOUGHTFULLY AND COMPREHENSIVELY ANALYZE--
>> CAMPBELL SAYS THAT WHEN

ADDRESSING MITIGATING
CIRCUMSTANCES, THE SENTENCING
COURT MUST EXPRESSLY EVALUATING
EACH MITIGATING CIRCUMSTANCE TO
DETERMINE WHETHER IT'S SUPPORTED
BY EVIDENCE AND WHETHER IN THE
CASE OF NONSTATUTORY FACTORS
IT'S TRULY MITIGATING.
>> WELL, JUSTICE--
>> THAT'S WHAT CAMPBELL SAYS.
>> YES.
BUT I BELIEVE SUBSEQUENT CASES
SUCH AS WALKER, JACKSON, LOYOLA,
THEY ELABORATE ON WHAT EXPRESSLY
EVALUATE MEANS, AND I THINK AT A
MINIMUM, IT REQUIRES REASONED
JUDGMENT, REQUIRES A THOUGHTFUL
AND COMPREHENSIVE ANALYSIS.
I BELIEVE IT'S THE WALKER
DECISION THAT SAYS, YOU KNOW, IN
ORDER TO SATISFY THE CAMPBELL
REQUIREMENT, THE TRIAL COURT
CAN'T TREAT ITS ANALYSIS OF THE
MITIGATION LIKE AN A ACADEMIC
EXERCISE IN WHICH IT SUMMARILY
ADDRESSES AND DISPOSES OF THE
PROPOSED MITIGATION.
NO, CAMPBELL DOES NOT ELABORATE
ON IT, BUT SUBSEQUENT CASES
BUILD ON EVALUATING THE
MITIGATION.
>> WHAT DO WE DO WITH THE TWO
WHERE THE HEADINGS ARE DIFFERENT
THAN THE SUBSTANCE OF THE
PARAGRAPH--
>> YES, SIR.
>> WHERE THERE'S A MISMATCH
THERE?
ASSUMING I AGREE THAT'S SOME
SORT OF ERROR, IS THAT A
HARMLESS ERROR GIVEN THAT THERE
ARE TWO MITIGATING FACTORS THAT
WERE GIVEN VERY LITTLE WEIGHT
COMPARED TO THE AGGRAVATING
FACTORS IN THIS CASE?
>> JUSTICE LUCK, I WOULD SUGGEST
THAT THE TREATMENT OF THOSE TWO
INSTANCES REFLECTS MORE BROADLY
THAT IT WAS, AGAIN, A SUMMARILY
ADDRESSING AND DISPOSAL OF THE

MITIGATION.
IT WAS, AT LEAST IN SOME
INSTANCES-- I WOULD ARGUE
ACROSS THE BOARD, NOT THOUGHTFUL
AND COMPREHENSIVE.
>> WAS IT 25 MITIGATORS THAT THE
TRIAL JUDGE FOUND THAT THE JURY
DID NOT FIND?
IS THAT THE RIGHT NUMBER?
>> I'M SORRY, JUSTICE LAWSON, I
DON'T KNOW THE EXACT NUMBER.
BUT, AGAIN, I WOULD SAY THAT
EVEN IF THE TRIAL JUDGE IS
FINDING SOME FACTORS THAT THE--
>> [INAUDIBLE]
>> SIR?
>> A NUMBER OF FACTORS THAT THE
JURY DIDN'T.
>> YES, SIR.
BUT IT SHOULD STILL EXPLAIN WHY
IT GAVE THOSE RELATIVELY LIMITED
WEIGHT.
THAT'S IMPORTANT.
THAT'S WHAT MATTERS FOR, SAY, A
PROPORTIONALITY REVIEW.
>> WHAT WOULD THAT LOOK LIKE?
>> WHAT WOULD AN APPROPRIATE
ANALYSIS LOOK LIKE?
WELL, I CAN GIVE YOU COUPLE OF
EXAMPLES, JUSTICE CANADY.
THE FIRST PROPOSED MITIGATOR WAS
WHETHER THE KILLING TOOK PLACE
WHILE THE DEFENDANT WAS UNDER
EXTREME-- MULTIPLE DEFENDANTS
TESTIFIED HE STRUGGLED WITH
IMPULSE CONTROL, THERE WAS BRAIN
DAMAGE, REGULATING HIS EMOTIONS.
ORDER, ONE STATE EXPERT
ESSENTIALLY SAID I CAN'T SAY HE
DOESN'T HAVE BRAIN DAMAGE
BECAUSE HE COULDN'T READ THE PET
SCANS, BUT I THINK IT'S FROM A
PERSONALITY DISORDER.
THE COURT COULD HAVE AT LEAST
SUMMARIZED THAT TESTIMONY.
PRESUMABLY, IT SAID IT WASN'T--
I THINK IT SHOULD HAVE AT LEAST
DONE THAT.
ANOTHER EXAMPLE WOULD BE THAT
MR. ROGERS--

>> HOW DOES THAT, I MEAN, AT THE END OF THE DAY HOW DOES THAT REALLY HELP US IN OUR REVIEW?
>> WELL--
>> BECAUSE WE, YOU KNOW, WHEN WE LOOK AT WHAT'S THERE, WE CAN-- AND WE LOOK AT THE EVIDENCE, WE CAN TELL WHAT THE TRIAL COURT'S DONE.
I MEAN, SO I'M STRUGGLING TO UNDERSTAND HOW THAT ELABORATION REALLY HELPS US PERFORM OUR APPELLATE FUNCTION.
>> YES.
>> I MEAN, I UNDERSTAND YOUR ARGUMENT, AND I KNOW WE'VE SAID SOME THINGS IN SOME DIFFERENT CASES, BUT I'M REALLY STRUGGLING TO UNDERSTAND HOW THAT HELPS US PERFORM THE APPELLATE FUNCTION AND WHY IT'S NECESSARY.
>> YES, SIR.
WELL, I THINK IT'S ESSENTIALLY BECAUSE THIS COURT CAN'T PROPERLY STEP IN AND REWEIGH THE MITIGATION.
YOU KNOW, THE TRIAL JUDGE WAS THERE.
AND I WOULD SUGGEST THAT THE TRIAL JUDGE--
>> WELL, WE'VE DONE THESE CONCLUSIONS.
>> WELL, YOU DON'T KNOW THE REASONS OR THE ANALYSIS IN SUPPORT OF IT.
ONE WAY TO LOOK AT IT IS IT'S HARD FOR ME TO ARGUE THE TRIAL JUDGE EXCUSED IT WHEN I DON'T KNOW HIS REASONS, I CAN ONLY SPECULATE.
AGAIN, THAT ONE EXAMPLE MAY BE THAT HE FOUND THE STATE EXPERT MORE-- I DON'T KNOW WHY.
I WOULD SUGGEST, IN ESSENCE, THIS TYPE OF ERROR IS SORT OF STRUCTURAL IN THE CONTEXT, THE UNIQUE CONTEXT OF A PENALTY PHASE PROCEEDING IN FLORIDA.
>> ALL RIGHT.
>> YES, SIR.

>> EXHAUSTED YOUR TIME.
>> THANK YOU.
>> OKAY.
WE THANK YOU BOTH FOR YOUR
ARGUMENTS.