WE NOW MOVE TO THE SECOND CASE
ON THE DOCKET.
SMILEY VERSUS THE STATE OF
FLORIDA.
>> IS THAT OKAY?
THANK YOU.
MAY IT PLEASE THE COURT.
MY NAME IS ANDREA NORGARD AND I
REPRESENT BENJAMIN TRAVIS
SMILEY.
THIS IS A DIRECT APPEAL FROM A
CAPITAL CONVICTION.
BENJAMIN TRAVIS SMILEY WAS
CONVICTED OF FIRST OF A FELONY
MURDER AND THREE OTHER PRIOR OR
CONTEMPORANEOUS FELONIES AND IN
ADDITION TO THAT THERE WAS A
SECOND HOMICIDE HE WAS CONVICTED
OF THAT THE STATE DID NOT SEEK
THE DEATH PENALTY BUT DID USE
AGGRAVATION IN THIS CASE.
THE INITIAL BRIEF RAISED FOUR
ISSUES RELATED TO THE GUILT
PHASE IN FIVE RELATED TO THE
PENALTY PHASE.
THIS CASE TOOK A VERY UNUSUAL
POSTURE IN THE TRIAL COURT IN
THAT THE GUILT PHASE IN PENALTY
PHASE WERE BIFURCATED AND DURING
THE COURSE OF THAT BIFURCATION
FIRST ISSUED AND CAUSED A HOST
OF ADDITIONAL LITIGATION BEFORE
THE PENALTY PHASE BEGAN.
MY INTENT WOULD BE TO FOCUS ON
THE GUILTY PHASE.
IN DOING SO NOT TRYING TO
RELIEVE THE IMPRESSION THE GUILT
PHASE ISSUES DO NOT DESERVE
SERIOUS CONSIDERATION BUT THEY
DO NOT PRESENT SOME OF THE VERY
FACTUALLY COMPLICATED AND
UNUSUAL PROBLEMS THE PENALTY
PHASE DOES PRESENT.
WITH COURT'S PERMISSION I WOULD
LIKE TO BEGIN BY ADDRESSING THE
PENALTY PHASE ISSUES.
THE FIRST ISSUE AND THE ISSUE I
WOULD LIKE TO BEGIN WITH WAS
ISSUE 6 IN THIS CASE ADDRESSING
WHAT EVIDENCE THE STATE SHOULD

HAVE BEEN ABLE TO PRESENT DURING
THE PENALTY PHASE GIVEN THE
JURY'S VERDICT IN GUILT PHASE.
I WOULD LIKE TO OPEN THAT
ARGUMENT BY READING TO THIS
COURT A PARAGRAPH FROM THE
COURT'S DECISION IN LEBRON
VERSUS DAY LOCATED AT 894-899.
PRIOR TO COMMENCING ANALYSIS IN
LEBRON, WE ACKNOWLEDGE THE
UNIQUE FACTUAL POSTURE OF THE
CASE BEFORE US WHICH GENERATES
UNUSUAL PROBLEMS.
THE GUILT PHASE, GUILTY OF
FELONY MURDER, HE POSSESSED A
GUN BUT DID NOT POSE THIS THE
GUN AT THE TIME OF THE MURDER
AND SHOT BY SOMEONE OTHER THAN
LEBRON.
SUCH EVIDENCE PRESENTED HERE,
SELDOM TO THIS COURT REVIEW
CAPITAL CASES IN WHICH THE GUILT
PHASE PRODUCES SPECIFIC AND
SEEMINGLY INCONSISTENT VERDICTS.
THAT SAID, NEITHER THIS COURT
NOT THE TRIAL COURT CAN ALTER
THE JURY'S FINDINGS WITH REGARD
TO GUILT ISSUES.
TO THE CONTRARY THE JUDICIARY'S
CONSTITUTIONALLY MANDATED ROLE
IN THIS CONTEXT IS TO ENSURE
LEBRON'S SENTENCE IS NOT
PREMISED ON FACTS AND FINDINGS
THAT WOULD CONTRAVENE THE
ORIGINAL DETERMINATION.
>> WHAT ABOUT THE VERDICT WAS
INCONSISTENT HERE?
I UNDERSTAND THE ARGUMENT THERE
WERE BLANKS WITH REGARD TO THE
775087 ENHANCEMENT MADE, BUT NO
INDICATION IN THE VERDICT FORM
THAT HE DID NOT POSSESS THE
FIREARM.
>> I WOULD RESPECTFULLY DISAGREE
WITH THAT ASSESSMENT AND POINT
OUT THAT IN LEBRON THE COURT DID
NOT FIND THE JURY VERDICTS WERE
INCONSISTENT.
THAT WAS NEVER ARGUED.
THEY WERE SEEMINGLY --

>> I AM LOOKING AT THE VERDICT.
COUNT 2 AND THERE IS A CHECK
MARK WHICH SAYS THE DEFENDANT IS
GUILTY OF ROBBERY WITH A
FIREARM.
THERE IS.
I DON'T UNDERSTAND HOW IT IS
INCONSISTENT.
IT MAY NOT HAVE DUPLICATED WHAT
WAS SAID THERE, BUT GUILTY OF
ROBBERY WITH A FIREARM IS GUILTY
OF ROBBERY WITH A FIREARM.
>> THE INCONSISTENT VERDICT
ARGUMENT CAME IN IN THIS CASE OF
THE TRIAL COURT WAS NOT BETWEEN
WHAT WAS STATED UNDER EACH COUNT
BUT RATHER THE ACCOUNTS 2, 4, 5
WERE INCONSISTENT WITH THE
VERDICT IN COUNT ONE.
THAT WAS THE ARGUMENT
PROMULGATED BY THE TRIAL
ATTORNEYS.
>> JUST TO BE CLEAR, COUNT ONE
WAS THE FELONY MURDER COUNT IN
THE JURY WAS INSTRUCTED IN ORDER
TO FIND THE DEFENDANT GUILTY, HE
WAS THE ONE WHO ACTUALLY KILLED
THE VICTIM, CORRECT?
>> THAT WAS THE INSTRUCTION.
>> THEY WERE GIVEN THE
INTERLOCKING VERDICT COUNTS,
FIRST DIRECTED TO REACH A
DETERMINATION AND IF THEY FOUND
BENJAMIN TRAVIS SMILEY GUILTY OF
COUNT 2 OR 5 THAT WOULD
ESTABLISH UNDERLYING FELONY THAT
WOULD SUPPORT A FELONY MURDER
CONVICTION, IT WAS NEVER
SUBMITTED TO THE JURY IN THIS
CASE.
>> THE JURY FOUND BENJAMIN
TRAVIS SMILEY KILLED THE VICTIM.
LET ME ASK YOU THIS WAS WITH THE
JURY INSTRUCTED, IF THE FACT
HAPPENED.
>> I BELIEVE --
>> CAN YOU ANSWER -- I WILL GET
YOUR ARGUMENT.
CAN YOU ANSWER MY QUESTION?
>> THAT WAS PART OF THE

INSTRUCTIONS.
>> DID IT HAVE TO BE FOUND BY THE JURY FOR IT TO HAVE REACHED THE VERDICT THAT IT DID?
>> THAT IS ONE INTERPRETATION OF THESE CONFUSING VERDICT FORMS SO I WOULD SAY YES.
>> AS TO EACH OF THE OTHER COUNTS, EACH OF THEM ACTUALLY SAID AGGRAVATED ASSAULT WITH A FIREARM AND ROBBERY WITH A FIREARM, CORRECT?
>> THAT IS CORRECT.
>> THE JURY FOUND IN COUNT ONE, IF HE ACTUALLY KILLED AND COUNTS 2, 4 AND 5 ALL INDICATED THEY WERE DONE WITH A FIREARM, CORRECT?
>> THAT WAS INDICATED IN THE FIRST PORTION OF THE VERDICT FORM.
>> I'M HAVING TROUBLE UNDERSTANDING HOW THIS IS LIKE LEBRON WHERE THERE IS ANY INCONSISTENCY EVEN IF IT WASN'T A MODEL OF CLARITY.
>> IN LEBRON IT WAS ESSENTIALLY THE SAME THING.
WHEN THE JURY WAS ASKED TO MAKE SPECIFIC FINDINGS REGARDING FIREARMS IT WAS SIMILAR TO THIS CASE.
>> THE JURY DID FIND THERE WAS NO FIREARM AT LEAST TO SOME COUNTS, CORRECT?
HERE THERE WAS NO INDICATION OF NO FIREARM.
>> MY ARGUMENT TO THIS COURT IS THERE WAS BUT THE JURY DID NOT MAKE --
>> HOW CAN YOU SAY THERE WAS WHEN THERE'S TWO BOXES, ONE BOX IS. BETTER FOR FIREARM AND THE OTHER IS DID NOT POSSESS A FIREARM, THE JURY IS TOLD TO ANSWER THAT AND THEY DON'T ANSWER ANYTHING?
>> BECAUSE OF THE SECOND PART OF WHAT THE JURY WAS INSTRUCTED. IF NOT APPLY.

LEAVE BLANK.
I DON'T THINK IN AN ANALYSIS OF THIS NATURE, THAT IT IS APPROPRIATE TO DISREGARD PART OF THE JURY VERDICT FORM.
>> LET ME ASK YOU THIS.
IN ADDITION TO SAYING WITH A FIREARM, THE SUBSTANTIVE COUNTS, EACH OF THEM SAYS AS CHARGED IN THE INDICTMENT, CORRECT?
>> THAT IS CORRECT.
>> THE INDICTMENT CHARGED HE POSSESSED A FIREARM, DID IT NOT?
>> THE INDICTMENT CHARGED THAT WE DON'T KNOW IF THE JURY REFERRED BACK TO THE INDICTMENT, WHETHER THAT IS WHAT THEY RELIED UPON OR WHETHER THEY WERE MAKING --
>> THEY MADE A FINE DID COME ARE REPEATED FINDINGS HE WAS GUILTY OF THESE VARIOUS OFFENSES, ROBBERY WITH A FIREARM, AGGRAVATED ASSAULT WITH A FIREARM, BATTERY WITH A FIREARM, ALL AS CHARGED IN THE INDICTMENT.
THOSE ARE THE PRIMARY FINDINGS.
>> I WOULD SAY THAT IS THE WORDING OF THE FIRST STATEMENT TO EACH VERDICT.
COULD THAT BE IN ONE SENSE CONSTRUED AS A FINDING?
YES.
HOWEVER, THAT FINDING WAS QUALIFIED IN THE JURY VERDICT FORM BY WHAT THE JURY WAS SUBSEQUENTLY ASKED TO DO.
>> SORRY FOR INTERRUPTING.
ISN'T THE ONLY ISSUE YOU POSSIBLY HAVE HERE, ON COUNTS 2 AND 4, THE JURY WAS TOLD THOSE HAD TO DO WITH MARK WILKERSON AND THE EVIDENCE WAS THERE WAS NO DISCHARGE OF A FIREARM WITH REGARD TO HIM.
IT MADE SENSE FOR THE JURY NOT TO CHECK THOSE BOXES GIVEN YOUR UNDERSTANDING OF THE REFERENCE TO WILKERSON.

COUNT 5 SEEMS LIKE THAT IS THE ONLY ONE WHERE THERE IS POSSIBLE AMBIGUITY.
>> I WOULD ARGUE COUNTS 2 AND 4 BECAUSE THE JURY WAS ASKED TO DO THIS AND FAILED TO DO THIS, UNDER ONE POSSIBLE SCENARIO, THEY FOLLOWED THE INSTRUCTION EXACTLY AND DETERMINED IF NONE APPLY, LEAVE BLANK, IN ANY OF THOSE INSTANCES WE DON'T HAVE A FINDING FROM THE JURY SPECIFICALLY ASKED --
>> YOU ARE NOT DISPUTING -- THAT THEY REFERRED -- THE JURY WAS TOLD THAT WAS ABOUT WILKERSON.
>> I DO NOT DISPUTE THAT.
>> DISCHARGING A FIREARM AND AS A RESULT OF SUCH DISCHARGE CREATE BODILY HARM AND DEATH INFLICTED, WHEN WE KNOW FROM THE FACTS OF THIS CASE THAT THE WILKERSON PART OF THIS DIDN'T INVOLVE THE DISCHARGE OF A FIREARM AND THERE IS A SEPARATE CRIME COMMITTED AGAINST HIM THEY DIDN'T HAVE TO DO WITH --
>> THE JURY WAS INSTRUCTED IN GIVING THE INTERLOCKING VERDICT FORM AND TOLD CONSIDER, 2, 4, 5 OR SPECIFICALLY 2 AND 5 BEFORE THEY COULD REACH ONE, THAT WE CAN'T EXERCISE OUT THIS PORTION OF THIS VERDICT OR THAT VERDICT. WE HAVE TO LOOK AT WHAT THE JURY WAS ASKED TO DO AS A WHOLE.
WE ALSO, IT IS IMPORTANT TO REMEMBER THAT ONE OF THE THINGS THAT IS ESPECIALLY PROBLEMATIC IN THIS CASE IS THE FACT THAT WE ARE TRYING TO STAND HERE TODAY AND ARGUE AND DISCERN AND TRY TO FIGURE OUT WHAT THE JURY DID AND WHAT THE JURY DIDN'T DO.
ONE OF THE BENCHMARKS OF JURISPRUDENCE WHEN IT RELATES TO JURY VERDICT IS THEY ARE SUPPOSED TO BE CLEAR AND CONCISE AND THERE'S NOT SUPPOSED TO BE ROOM FOR AMBIGUITY.

THAT IS COMPLETELY LACKING IN
THIS INSTANCE AND THAT IS WHEN
YOU END UP WITH SIMILAR TO WHAT
YOU END UP WITHIN THE BRAUN
WHERE YOU HAVE WHAT ARE
SEEMINGLY INCONSISTENT FINDINGS
BY THE JURY.
THE PARTIES ARGUE BELOW AND
EVERYONE AGREED THE STATE, THE
DEFENSE ATTORNEYS AND THE COURT,
THAT HOW DO WE TAKE THIS
FORWARD?
WE CAN'T SQUARE WITH WHAT THEY
DID ON COUNTS 2, 4 AND 5 WITH
COUNT ONE.
I WANT TO MAKE THE DISTINCTION
UNDER THE JURISPRUDENCE OF THIS
COURT, THAT IS NOT WHAT IS
CONSIDERED A TRULY INCONSISTENT
VERDICT WHERE YOU CAN'T HAVE
CONVICTION OF ONE COUNT AND THE
CONVICTION OF ANOTHER COUNT.
I'M NOT ARGUING THAT THESE MET
THE TRULY INCONSISTENT STANDARD,
NOR DID THIS COURT FIND IT IN
LEBRON.
WHAT ARE SEEMINGLY INCONSISTENT
IS THE JURY WOULD MAKE THE
FINDING OF GUILT AS TO COUNT ONE
BUT EITHER NOT MAKE SPECIFIC
FINDINGS RELATED TO WHO
POSSESSED AND WHO DISCHARGED THE
FIREARM AS TO COUNTS 2 AND 5 AND
AS WELL AS 4.
THE OTHER THING IT IS IMPORTANT
TO NOTE IS THE DEGREE THIS
AMBIGUITY CARRIED FORWARD, WHEN
WE HAVE TO LOOK AT WHAT THE
TRIAL COURT FELT IT COULD DO AND
NOT DO IN THE SENTENCING IN THIS
CASE.
CLEARLY WHEN THE TRIAL COURT
REACHED THE SENTENCING ISSUE, WE
HAVE PAPER IN THE RECORD THAT
WE'VE HAD TWO INTERPRETATIONS
FOR BOTH THE STATE AND MYSELF.
READING IT IT APPEARS THE TRIAL
COURT EITHER SENTENCED TO A 10
YEAR MANDATORY WHICH WAS NOT
REFLECTED ANYWHERE ELSE, AND IS

ON THE WEBSITE WHEN YOU LOOK AT
WHAT THE OFFENDER SENTENCES, IF
YOU TAKE THE SECOND
INTERPRETATION WHICH SAID THE
TRIAL COURT WAS NOT PROPOSING
MINIMUM MANDATORY'S BECAUSE
THERE WERE INSUFFICIENT FINDINGS
OF THOSE FACTS REGARDING FIREARM
POSSESSION AND THE TRIAL COURT'S
DETERMINATION HE COULD NOT
SENTENCE TO THOSE MINIMUM
MANDATORY'S BASED ON THE JURY'S
FINDING IS ILLUSTRATIVE OF WHAT
THE TRIAL COURT BELIEVED THE
JURY HAD DONE IN THIS CASE SO
THEN TO GO FORWARD ON THE
PENALTY PHASE EVIDENCE THAT
CONTRAVENED THE JURY FINDINGS
WHICH THE JURY WAS TOLD THREE
TIMES YOU DETERMINE GUILT BUT
YOU HAVE TO MAKE SPECIAL
FINDINGS REGARDING THE FIREARM.
EVEN IN OTHER CASES WHERE THE
JURY IS DEBATING OR FINDING
GUILT OR INNOCENCE, WE STILL
REQUIRE THOSE SPECIAL FINDINGS
REGARDING FIREARM POSSESSION AND
DISCHARGE.
WHEN THE JURY IS TOLD IN A
SPECIAL FINDING IF THIS DOESN'T
APPLY, LEAVE IT BLANK.
ARE WE TO PRESUME THE JURY FELT
THEY FOUND IT ALREADY OR ARE WE
TO PRESUME THAT THE JURY FOUND
THAT NONE APPLY?
MY POSITION IS IT IS NOT PROPER
FOR US TO SAY WHICH ONE
OCCURRED.
THAT WOULD VIOLATE THE WHOLE
PRINCIPLE OF UNAMBIGUOUS
VERDICTS AND IF THE DECISION HAS
TO BE MADE WHICH WAY THE JURY
WENT AND WE HAVE TO TRY TO
MAGICALLY GO BACK AND DETERMINE
DID YOU DO THIS BECAUSE YOU
THOUGHT YOU HAD ALREADY DONE IT?
OR DIDN'T APPLY?
WHAT WERE YOU THINKING?
THAT ERROR IN FAVOR OF THE
DEFENSE ESPECIALLY WHEN TALKING

PRIOR PRECEDENT FROM THIS COURT
WHICH IS VERY SPECIFIC, YOU
CAN'T SAY FOR CERTAIN WHAT THE
JURY FOUND AND EVIDENCE THAT IS
CONTRARY.
>> WHAT AM I MISSING, WHY WOULD
WE BE SPECULATING WHETHER THE
JURY THOUGHT THEY FOUND USE OF A
FIREARM WHEN THEY VERY CLEARLY
DID FIND THE FIREARM, WE KNOW
THEY FOUND THESE FIREARMS, I
GUESS THEY WOULD THINK THAT.
THEY DID FIND IT.
>> I WOULD SUBMIT THAT BASED ON
THE WAY THIS VERDICT WAS DRAWN,
IT IS POSSIBLE AND PROBABLE TO
SPECULATE THE JURY SAID HE IS
GUILTY OF THIS BUT NONE APPLY AS
FAR AS THE FIREARM AND MOVED ON
AND SO OUR POSITION WOULD BE
WHEN YOU BEGIN TO ENGAGE THAT
LEVEL OF SPECULATION ABOUT WHAT
A JURY DID OR DIDN'T DO IN THERE
ARE TWO POSSIBLE ALTERNATIVES,
YOU DO NOT THEN ALLOW EVIDENCE
UNDER LEBRON COME IN THAT MIGHT
CONTRAVENED THE JURY
DETERMINATION.
I THINK THEN IT BECOMES
ESPECIALLY IMPORTANT WHEN YOU
CONSIDER HOW THAT EVIDENCE WAS
USED IN CLOSING ARGUMENTS IN
THIS CASE AND I CAN HONESTLY SAY
IN 30 YEARS OF PRACTICING IN
DEATH PENALTY CASES I HAVE
PROBABLY NEVER ENCOUNTERED A
CLOSING ARGUMENT SO FRAUGHT WITH
PROBLEMS PROMULGATED BY THE
PROSECUTOR AT THE TRIAL COURT
LEVEL IN THE DEFENSE ATTORNEY IN
THIS CASE.
IT IS ALMOST A LAUNDRY LIST OR
PRIMER ON WHAT NOT TO DO.
THE TRIAL COURT SAW FIT TO
ADMONISH THE STATE DURING THE
ARGUMENT THAT WHAT SHE WAS DOING
WAS IMPROPER AND SHE NEEDED TO
STEER CLEAR OF THAT AND ONE
FAIRLY GLARING INSTANCE, THE
STATE MADE AN ARGUMENT AT THE

OPENING OF HER CLOSING ARGUMENT
WHICH WAS OBJECTED TO AND THE
TRIAL COURT SUSTAINED THE
OBJECTION AND SHE REPEATED
ALMOST VERBATIM I'M GOING TO
REFER TO MY PRIOR ARGUMENT AT
THE END OF HER SUMMATION AND
REPEATED THE ARGUMENT, THE
OBJECTION SUSTAINED FOR
SUSTAINED IMPROPER.
I BELIEVE THAT IF YOU GO THROUGH
MANY OF THOSE INSTANCES IT IS
NOT POSSIBLE TO FIND OR
DETERMINE THAT THEY ARE HARMLESS
ERROR UNDER THIS COURT'S PRIOR
PRECEDENT.
IN PARTICULAR I WOULD LIKE TO
HIGHLIGHT THE ISSUES ARGUING
WITH THIS JURY THE DEATH
SENTENCE WOULD BE A DETERRENT.
THIS COURT HAS NEVER PERMITTED
THAT ARGUMENT TO BE MADE.
I ALSO BELIEVE THE FOCUS ON THE
NUMERICAL VALUATION OF
AGGRAVATING CIRCUMSTANCES IN
THIS CASE IS PARTICULARLY
PROBLEMATIC AS IT WAS USED IN
SUBMISSION TO PENALTY PHASE, THE
CLOSING ARGUMENTS OF THE PARTIES
AND HOW THE JUDGE EVALUATED THE
AGGRAVATED AND SENTENCING ORDER.
I WAS UNABLE TO FIND A SINGLE
CASE DATING FROM THIS COURT'S
APPLICATION OF THE DEATH PENALTY
GOING FORWARD THAT HAS EVER
CONDONED OR AUTHORIZED THE PRIOR
VIOLENT FELONY AGGRAVATED TO BE
FOUND INDEPENDENTLY AND
SEPARATELY FOR EACH PRIOR
CONVICTION.
THE EFFECT OF THAT IN THIS CASE
WAS TO TELL THIS JURY THAT THIS
WAS A EIGHT AGGRAVATE HER CASE
WHEN UNDER THE LAW THIS WAS NOT
A EIGHT AGGRAVATEOUR CASE, IT
WAS A 2 AGGRAVATEOUR CASE.
THE TRIAL COURT MADE THE SAME
ERROR IN THE SENTENCING ORDER
FINDING THIS TO BE A 5
AGGRAVATEOUR CASEWORK 4

DEPENDING ON WHETHER -- ON HOW
YOU INTERPRET THE CONTRADICTORY
HANDLING OF THE GAIN
AGGRAVATEARE.
THE JUDGE AT ONE POINT VERBALLY
STATED HE WAS GIVING THAT
SUBSTANTIAL RATE BUT IN THE
SENTENCING ORDER APPEARED TO
MERGE IT.
THERE IS AMBIGUITY WHETHER THE
TRIAL COURT FOUND IT TO BE A 4
AGGRAVATEOUR AURA 5 AGGRAVATEOUR
CASE BUT I WAS UNABLE TO LOCATE
A SINGLE CASE THAT WOULD
AUTHORIZE THE METHOD USED IN
THIS CASE.
>> THIS WAS THE WAY IT WAS
AGREED TO BY THE PARTIES,
CORRECT?
>> YES AND NO.
ON THE VERDICT FORM, THE
ORIGINAL VERDICT FORM THE
PARTIES AGREED ON AND EVERYONE
THOUGHT THEY WERE GOING TO MOVE
FORWARD ON WAS ALTERED BY THE
TRIAL COURT.
HE DID NOT MAKE -- THE ACTUAL OR
ORIGINAL VERDICT FORMS PROPOSED
WERE NOT IN THE RECORD, JUST THE
FINAL VERDICT FORM THAT WAS USED
BUT I DON'T THINK THERE WAS
SUBSTANTIAL ALTERATION TO THE --
THE PARTIES DID ALL DO THIS.
AS WAS ARGUED --
>> THE WAY IT WAS DONE DID NOT
MEAN THE JURY HEARD ANY
ADDITIONAL EVIDENCE THAT WOULD
NOT BENEFIT OR PRESENTED AS A
SINGLE AGGRAVATEARE.
THE STATE WOULD ESTABLISH ALL
THE OTHER FELONIES.
>> I DON'T BELIEVE THE JURY
HEARD ADDITIONAL EVIDENCE
SUBJECT TO MY PRIOR ARGUMENTS
WHAT IS IT AS EVIDENCE.
HOWEVER, I DO THINK THAT WHEN
YOU HAVE A STATE ATTORNEY WHO
DURING THE PENALTY PHASE INFORMS
THE JURY THAT OUT OF 60 PENDING
FIRST-DEGREE MURDER CASES IN

THEIR OFFICE ONLY NINE MIGHT
WARRANT THE DEATH PENALTY AND
THIS IS ONE OF THEM THE
PROSECUTOR GOES ON TO HIGHLIGHT
THIS IS CERTAINLY A CASE WITH
EIGHT AGGRAVATERS.
THE DEFENSE ATTORNEY REPEATS
THAT INCORRECT AND IMPROPER
ARGUMENT UNDER THE LAW OF THIS
COURT AND THE COURT INSTRUCTS
THE JURY UNDERWENT IT IS NOT THE
LAW FROM THIS COURT REGARDING
THE AGGRAVATER IS TO BE
PRESENTED THAN I THINK THAT IS
REVERSIBLE ERROR EVEN IF
ADDITIONAL EVIDENCE MIGHT NOT
HAVE COME IN.
>> SINCE THERE WAS NO OBJECTION
WITH RESPECT TO THIS PARTICULAR
ISSUE IT IS A FUNDAMENTAL ERROR
STANDARD AND I AM STRUGGLING
CONCEPTUALLY TO SEE HOW IT
WEIGHS OUT DIFFERENTLY SO IF I
PRESENT EIGHT, 1 POUND WEIGHT
CAN SAY, WEIGH THEM AGAINST THE
LITIGATION OR WEIGHED AGAINST
THE MITIGATION, IT SEEMS THE
WEIGHING IS GOING TO BE THE SAME
CONCEPTUALLY AND I AM STRUGGLING
TO SEE HOW THAT IS HARMFUL AND
HOW YOU COULD BE -- MEET A
FUNDAMENTAL ERROR STANDARD.
>> IT BECOMES PARTICULARLY
HARMFUL BECAUSE THE STATE
EMPHASIZED EACH ONE
INDIVIDUALLY.
FOR MOST OF US AS HUMANS, WE
TEND TO LOOK AT SOMETHING AND
SAY MORE MUST MEAN WORSE.
SO WHEN YOU HAVE A JURY THAT HAS
BEEN TOLD WE ALREADY DECIDED AS
THE PROSECUTING AUTHORITY THAT
THIS MERITS THE DEATH PENALTY
AND IT IS ONE OF 9 OUT OF 60 AND
THEN THE JURY IS TOLD OVER AND
OVER, THERE'S 12345678 AS
OPPOSED TO YOU CAN CONSIDER THE
FACT THAT THE DEFENDANT HAS
PRIOR CONVICTIONS.
>> BACK TO THE POINT EARLIER

THERE IS NO SUGGESTION OF
EVIDENCE OF ALL THOSE PRIOR
OFFENSES, IS THERE?
>> THE STATE WAS ALLOWED IN THE
PENALTY PHASE --
>> I AM STRUGGLING TO UNDERSTAND
WHY IT IS NOT APPROPRIATE FOR
THE JURY TO CONSIDER THAT
HISTORY OF VIOLENCE THAT HAS
BEEN PERPETRATED BY THE
DEFENDANT IN ASSESSING THE
AGGRAVATION AND WEIGHING
EVERYTHING.
THAT IS THE REALITY HE CREATED.
WHY WOULD THEY HAVE TO BE
SOMEHOW SHIELDED FROM
CONFRONTING THAT?
>> I DON'T BELIEVE UNDER THIS
COURT'S PRIOR JURISPRUDENCE THAT
INSTRUCTING THE JURY THEY CAN'T
CONSIDER THE FACT THE DEFENDANT
HAS A PRIOR RECORD AND THEY CAN
CONSIDER THAT PRIOR RECORD
DIMINISHED THAT.
I DON'T BELIEVE THERE IS A
LEGITIMATE REASON FOR THIS COURT
TO ABANDON WHAT HAS ALWAYS BEEN,
THE WAY TO STATUTE REQUIRES THIS
TO BE PRESENTED IN FAVOR NOW OF
A PROCESS WHICH WOULD ALLOW
SEPARATE, INDEPENDENT, AND
DISTINCT AGGRAVATING
CIRCUMSTANCE FOR EACH OF THE
DEFENDANT'S PRIOR CONVICTIONS.
IF YOU LOOK AT THE PENALTY CASES
AS A WHOLE, THE NUMBER OF CASES
FOR WHICH THERE ARE EIGHT
AGGRAVATERS ARE FEW AND FAR
BETWEEN.
THERE ARE NOT EVEN EIGHT
STATUTORY AGGRAVATERS TOTAL.
YOU ARE IS IN ESSENCE ALLOWING
THE STATE TO GROSSLY INFLATE, IN
FRONT OF A JURY, I DISAGREE
RESPECTFULLY, NUMBERS ARE
IMPORTANT.
NUMBERS ARE IMPORTANT.
IF I ONLY HAVE TWO AGGRAVATERS
VERSUS EIGHT COMING IN THE EYES
OF THE PENALTY PHASE JURY --

>> ARE YOU SUGGESTING -- ARE YOU SUGGESTING THAT WITH MITIGATION WE SHOULD COME UP WITH CATEGORIES ENFORCE A DEFENSE TO PREVENT THEM, THAT THIS IS ALL OF HIS HISTORY?
THE DEFENSE DOES WHAT YOU ARE SAYING.
>> THE DIFFERENCE IS STATUTORY AGGRAVATERS ARE LIMITED AND PERMITTED TO USE WHERE IS IN LITIGATION NOT ONLY DO YOU HAVE THE STATUTORY MITIGATED BUT IN ORDER TO PRESERVE THE CONSTITUTIONALITY OF THE DEATH PENALTY SENTENCING SCHEME, WE HAVE TO HAVE THE CATCH ALL MITIGATE.
>> IT SEEMS ODD, GIVEN THAT OUR LAW ASSIGNED GREATER WEIGHT TO CERTAIN FACTORS THAT IF WE ACCEPT THE ARGUMENT THAT NUMBERS MATTER, WE SAID CERTAIN AGGRAVATERS ARE GIVEN GREATER WEIGHT AND CAN OUTWEIGH SIGNIFICANT MITIGATION COMPARED TO OTHERS, WE SAID NUMBERS DON'T MATTER, QUALITY MATTERS, NOT QUANTITY.
>> IN THIS CASE WE MADE NUMBERS THE ENTIRE FOCUS.
WE MADE NUMBERS THE FOCUS IN THIS CASE, ONE OUT OF NINE CASES THE QUALIFY FOR THE DEATH PENALTY.
WE MADE THIS CASE APPEAR TO BE MORE AGGRAVATED UNDER THE LAW WE HAVE BEEN USING THE LAST 30 YEARS THAT IT WAS BY CLAIMING IT IS A EIGHT AGGRAVATER CASES POSTED TWO.
>> THE NUMBER DOESN'T AFFECT THE WEIGHT.
>> WE DON'T KNOW THAT.
WE DON'T KNOW THAT THE JURY COULDN'T HAVE LOOKED AT THIS AND SAID WOW, 8.
THIS IS EIGHT.
THE STATE ALREADY TOLD US THIS IS A CASE THEY THINK QUALIFIES

FOR THE DEATH PENALTY.
A NATURAL ASSUMPTION WOULD BE
THE OTHERS MUST BE LESS.
THIS COURT HAS ALSO SAID
AGGRAVATERS IN NUMBER ARE NOT
DETERMINED IT IN THE APPELLATE
REVIEW OF A DEATH SENTENCE.
WE ARE DEALING AS WAS TALKED
ABOUT IN THE PREVIOUS ARGUMENTS,
WE HAVE JURORS WHO DON'T KNOW
THE LAW.
>> YOU ARE NOT CONCERNED ABOUT
HAVE OF YOUR REBUTTAL.
>> I WILL FINISH AND SAVE THE
REMAINING TWO MINUTES, THANK
YOU.
>> MAY IT PLEASE THE COURT, MY
NAME IS LISA MARTIN AND I
REPRESENT THE STATE OF FLORIDA
IN THIS MATTER.
THE FIRST THING I WANT TO
ADDRESS IS THE PECUNIARY GAIN
AGGRAVATER.
WHILE REVIEWING THE RECORD IN
PREPARATION FOR THIS ARGUMENT, I
REREAD THE SENTENCING HEARING
AND THE TRIAL COURT, THE TRIAL
COURT DID NOT GIVE WEIGHT TO THE
GAIN AGGRAVATER BUT HE GAVE IT
SUBSTANTIALLY.
WE WOULD LIKE TO ASK YOU TO
STRIKE THE PORTION OF HIS
WRITTEN SENTENCING ORDER THAT
GIVES WEIGHT TO THAT
AGGRAVATOR.
SO JUST GOING THROUGH THE --
ISSUES THAT OPPOSING COUNSEL
DISCUSSED, ISSUE NUMBER 6 HAD TO
DO WITH THE VERDICT FORM.
ANY ALLEGED AMBIGUITY IN THIS
VERDICT FORM WAS NOT RAISED TO
THE COURT BEFORE THE JURY WAS
DISCHARGED.
THESE PROBLEMS ARE REQUIRED TO
BE RAISED OR THEY ARE WAIVED.
THERE IS NO WAY TO DISCUSS WITH
THE JURY TO FIND OUT IF THERE
WAS ANYTHING WRONG, IF THE JURY
QUESTION INDICATED THEY WERE
CONFUSED, IF THAT LED TO THEM

NOT FILLING OUT THE SPECIAL
VERDICT QUESTIONS.
WE WOULD ARGUE THAT IS A WAIVED
ISSUE.
AS FAR AS THE CLOSING ARGUMENTS,
THE STANDARD IS THE COLLECTIVE
PREJUDICE IN THE STATEMENTS MUST
BE SO PREJUDICIAL TO VITIATE THE
PROCEEDING.
IT IS NOT A HARMLESS ERROR
STANDARD.
THE COMMENT ABOUT THE DEATH
SENTENCE BEING A DETERRENT,
OPPOSING COUNSEL SAID IT HAS
BEEN FOUND TO NOT BE A
FUNDAMENTAL ERROR WHICH IS WHAT
THIS COURT WOULD REVIEW OF THE
STATEMENTS WERE.
THAT WAS IN GIBSON.
IT WAS ALSO FOUND TO BE PROPER
IN KENNEDY WHERE THE PROSECUTOR
WAS MAKING A COMMENT WHERE
DEFENDANTS PRIOR MURDER DIDN'T
DETER HIM FROM MURDERING AGAIN
AND THAT WAS PROPER AS IT SPOKE
TO AGGRAVATION.
CONCERNING THE COMMENTS THAT
THERE WERE PERHAPS 60 CASES, 60
HOMICIDE CASES IN THE CIRCUIT,
ONLY NINE WERE ELIGIBLE FOR THE
DEATH PENALTY.
TAKEN IN CONTEXT, THAT IS NOT
IMPROPER.
THE PROSECUTOR WAS SPEAKING WITH
YOURS WHO SAID THEY WERE ARDENT
SUPPORTERS OF THE DEATH PENALTY
IN THE PROSECUTOR WAS EXPLAINING
NOT EVERY CASE, NOT EVERY MURDER
IS DEATH ELIGIBLE.
THERE ARE LEGAL REQUIREMENTS.
AND THIS COURT SAID THAT IS AN
APPROPRIATE COMMENT ON THE LEGAL
FRAMEWORK OF THE IMPOSITION OF
THE DEATH PENALTY IS IMPOSED.
CONCERNING ANY LISTING OF
AGGRAVATORS I KNOW THIS COURT
ALREADY POINTED THIS OUT BUT
THERE IS NO FUNDAMENTAL ERROR IN
LISTING AGGRAVATORS SEPARATELY
ALTHOUGH THESE SAME FACTORS GO

TO THE JURY.
THEY HAVE TO MAKE A DECISION ON EACH AND EVERY FACTOR AND THEY HAVE TO DO A QUALITATIVE ANALYSIS AND THEY ARE INSTRUCTED THE ANALYSIS IS NOT QUANTITATIVE OR QUALITATIVE AND JURORS ARE PRESUMED TO FOLLOW INSTRUCTIONS.
>> A COUPLE QUESTIONS REGARDING THAT.
IN A POST HURST WORLD DOES IT MAKE SENSE TO SEND THEM OUT INDIVIDUALLY SO THAT WE KNOW WHETHER IT IS UNANIMOUS OR NOT AND WHAT THE JURY BREAKDOWN IS CUTE YOU COUNSEL IS IN FAVOR OF IT.
>> I WOULD BELIEVE THAT IT IS MORE HELPFUL TO HAVE THEM DELINEATED IN THAT MANNER.
>> EVEN WHEN COMBINED AS THE TRIAL COURT DID, WOULDN'T IT BE RELEVANT TO THE TRIAL COURT WHETHER THE JURY DID NOT FIND THOSE INDIVIDUALLY AS OPPOSED TO FINDING SOME INDIVIDUALLY?
THE JURY DIDN'T FIND PECUNIARY GAINS BUT DID FIND COMMISSION OF A PRIOR FELONY, COMMISSION DURING THE COURSE OF THE CUNY AREA GAIN, WOULDN'T THAT BE RELEVANT TO THE TRIAL COURT?
>> I BELIEVE IT WOULD, WHICH ALSO GOES TO THE SECOND PART OF THAT ISSUE CONCERNING THE MITIGATION AND I BELIEVE IT IS HELPFUL.
>> I WANT TO BACK UP.
AS A MATTER OF STRATEGY WITH THE DEFENSE WANT THAT SO THEY CAN ARGUE THEY ARE NOT THERE SUCH THAT THEY COULD ARGUE AT THE DISPENSARY HEARING AND BEFORE THE JURY IN THAT SOME OF THESE ARE THERE AND THE MITIGATION SHOULD OUTWEIGH THE AGGRAVATION
>> I BELIEVE IN A CASE WHERE CERTAIN AGGRAVATORS WERE NOT FOUND THE DEFENSE MIGHT NOT MAKE THIS ARGUMENT.

>> THE DEFENSE DIDN'T OBJECT TO THIS, THEY WANT TO THE INDIVIDUAL AGGRAVATORS TO BE SEPARATED.
IN OTHER WORDS THERE SEEM TO BE GOOD REASONS THEY WOULD WANT THAT VERY THING.
>> SURE.
IN THIS CASE ESPECIALLY, THERE IS NO WAY IT AFFECTED THE JURY RECOMMENDATION BECAUSE THE JURY WAS PRESENTED WITH SEVERAL DIFFERENT MITIGATED IS, WITH FOUR STATUTORY MITIGATED US AND THREE UNDER THE CATCH ALL AND THE JURY ONLY FOUND TWO OF THOSE MITIGATED IS AND THEY FOUND IN ONE OF THEM THERE WAS NO SIGNIFICANT PRIOR CRIMINAL HISTORY THEY ASKED A QUESTION BECAUSE IT HAPPENED THREE WEEKS BEFORE THIS MURDER AND THE QUESTION WAS WHETHER THEY WERE SUPPOSED TO DISREGARD THAT MURDER IN ASSESSING THE FIRST CIRCUMSTANCE.
>> I WANT TO UNDERSTAND YOUR ARGUMENT.
THIS IS ATTRIBUTABLE TO THE TIMING WITH HURST AND EVERYTHING BUT SOUNDS LIKE NO ONE HAS BEEN ABLE TO FIND EXAMPLES OF THIS HAVING BEEN DONE EXACTLY LIKE THIS.
I'M CURIOUS WHAT YOUR POSITION IS GOING FORWARD.
IS THAT YOUR POSITION THAT THERE IS NOTHING ABOUT THE WAY THIS FORM WAS PUT TOGETHER AND INSTRUCTIONS THAT WAS IN ANYWHERE FUNDAMENTAL ERROR?
THAT YOUR POSITION WE SHOULD WRITE SOMETHING SAYING HERE IS THE WAY IT WAS DONE HERE AND THIS IS PERFECTLY APPROPRIATE FOR FUTURE CASES?
>> I DO THINK IT IS APPROPRIATE.
I DON'T THINK IT IS ERROR.
THE WEIGHING PROCESS IS QUALITATIVE AND THESE FACTORS

ARE CONSIDERED, OR WHETHER THERE
IS ONE SUBSECTION ABCDE TO
SUBSECTION AB 3, IN THIS CASE
THERE WAS NO SUBSECTION.
I DON'T THINK IT MATTERS EITHER
WAY.
IT IS PERMISSIBLE TO DO IT THIS
WAY.
GOING FORWARD I THINK EITHER
OPTION WOULD BE FIND.
>> EVEN IF THE VERDICT FORM IS
OKAY TO DO IT THAT WAY IS IT
OKAY FOR THE STATE TO IMPLY
AGGRAVATION OUTWEIGHS MITIGATION
BECAUSE OF THE NUMBER.
>> NOT BECAUSE OF THE NUMBER.
>> WOULD BE OKAY FOR THE STATE
TO MAKE THAT ARGUMENT EVEN
THOUGH YOU KNEW THE STATE WOULD
KNOW SOME OF THEM WOULD BE
COMBINED WHEN IT COMES TO THE
TRIAL COURT ISSUE A SENTENCING
ORDER?
>> KNOW.
THIS JERRY WAS INSTRUCTED AS TO
DOUBLING ON FOUR OF THESE
FACTORS.
THEY WERE INSTRUCTED THE
WEIGHING CERTAIN AGGRAVATORS ARE
GOING TO BE MERGED AND THE TRIAL
COURT DOES IT.
>> AS LONG AS TRIAL COURT DOES
IT, THE JURY IS INSTRUCTED, THEN
THE JURY PROBABLY UNDERSTANDS
THE LITIGATION.
>> IT IS OKAY IN THE CASE WHERE
THERE IS SIX PRIOR
CONTEMPORANEOUS FELONIES, OKAY
TO REFER TO THAT IS SIX
AGGRAVATORS, AGGRAVATING
FACTORS.
>> I BELIEVE SO.
>> IF THERE ARE NO FURTHER
QUESTIONS, THE STATE WOULD ASK
YOU TO AFFIRM THE JUDGMENT IN
THE SENTENCE.
>> IN REBUTTAL I WOULD ARGUE
NOW, THAT IS NOT PROPER JUSTICE
FOR THAT TO BE DONE.
OF THE COURT IS GOING TO

MAINTAIN THIS IS QUALITATIVE AND
NOT QUANTITATIVE ANALYSIS THERE
WOULD BE NO BASIS TO ALLOW
PROCESS WHICH WOULD ENHANCE THE
QUANTITATIVE.
>> WHAT ABOUT THE JURY WAS
INSTRUCTED HOW, THE ROLE OF EACH
OF THESE AGGRAVATING FACTORS?
>> THE JURY MAY HAVE BEEN
INSTRUCTED.
WE DON'T KNOW IF THE JURY DID OR
DIDN'T DO THAT.
>> THE JURY FOLLOWS
INSTRUCTIONS.
>> WE HAVE TO PRESUME THEY
FOLLOW THEM IN THE GUILT PHASE.
IN THIS INSTANCE ONE OF THE
THINGS I THINK IT IS IMPORTANT
TO KNOW, WHEN THIS WAS BEING
DONE, THIS COURT HAD PROMULGATED
STANDARD JURY INSTRUCTIONS 3
WEEKS BEFORE THE TRIAL,
PRESUMABLY THIS COURT DID THAT
IN LIGHT OF HURST, NEW ADOPTION
OF JURY INSTRUCTIONS, THIS COURT
3 WEEKS BEFORE THE TRIAL DID NOT
SEE FIT THAT UNDER HURST THE
JURY MUST MAKE SPECIFIC FINDING
OF AGGRAVATION AS TO EACH PRIOR
CONVICTION.
>> AS A STRATEGIC SENSE FOR
DEFENSE COUNSEL TO ASK FOR THAT
IN THE SAME WAY THEY ASK EACH OF
THE MITIGATED IS TO BE LAID OUT?
>> A YEAR LATER IN THE STANDARD
JURY INSTRUCTIONS SPECIFICALLY
DID NOT REQUIRE THE JURY TO
IDENTIFY EACH MITIGATING
CIRCUMSTANCE OR PROVIDE A
NUMERICAL VOTE WHATSOEVER ON
MITIGATION.
SOMETIME BETWEEN APRIL 2017 AND
THE FOLLOWING YEAR WE DECIDED
THE COURT DECIDED JURORS ARE NOT
GOING TO BE REQUIRED TO IDENTIFY
EACH PARTICULAR MITIGATING
FACTOR.
THAT SOMETHING WE RELY ON THE
TRIAL JUDGE IS TO DO IN THEIR
SENTENCING ORDERS UNDER

CALDWELL.
WE NEVER REQUIRED THE JURY TO MAKE THAT.
EVEN PRIOR TO HURST THIS COURT REJECTED IN PARTICULAR THE REQUEST THE JURY'S BE REQUIRED TO MAKE SOME TYPE OF SPECIFIC FINDINGS REGARDING MITIGATIONS SO TO HAVE THE JURY DO THIS ON THE VERDICT FORMS ESPECIALLY WHEN THIS COURT NEVER ASKED FOR THAT BEFORE AND IF WE ARE GOING TO FOCUS ON THE QUANTITATIVE AND NOT THE QUALITATIVE AS OPPOSED TO QUANTITATIVE, WHAT DO YOU DO WITH AN INDIVIDUAL WHO HAS 25 PRIOR CONVICTIONS AND HALF ARE FOR PETTY THEFT.
ARE WE GOING TO REQUIRE JURIES TO HAVE VERDICT FORMS AND PENALTY PHASES THAT REQUIRE THE FINDING OF EACH PRIOR CONVICTION NO MATTER HOW MANY AND TRY TO SAY NUMBERS DON'T COUNT TO DO THE NUMBERS DON'T COUNT THERE IS NO REASON TO DEVIATE FROM WHAT HAS BEEN THE ACCEPTED PRACTICE AND LAW OF THIS COURT FOR 30 YEARS.
>> THANK YOU FOR YOUR ARGUMENTS.
THE COURT WILL BE IN RECESS.