HEAR YE, HEAR YE, HEAR YE, THE SUPREME COURT OF FLORIDA IS NOW IN SESSION, ALL WHO HAVE CAUSE TO PLEAD, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD.
.
>> LADIES AND GENTLEMEN, THE SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> GOOD MORNING, WELCOME TO THIS SESSION OF THE FLORIDA SUPREME COURT.
JUSTICE PAULSON IS UNABLE TO BE HERE TODAY BUT HE WILL BE PARTICIPATING IN THIS CASE.
FIRST CASE TODAY IS NUMBER 211047, STATE VERSUS HERBERT LEON MANAGO.
>> THANK YOU, MR.
CHIEF JUSTICE, CHRISTOPHER BAUM FOR THE STATE.
UNDER WILLIAMS VERSUS STATE, FOR FAILING TO CONSIDER WHETHER SENTENCING RESPONDENT UNDER SECTION 775.082, WITHOUT THE REQUIRED JURY FINDING CONSTITUTED DIPLOMAS THIS COURT SHOULD QUASH THE DECISION AND REMAND FOR THE FIFTH DISTRICT TO CONSIDER THAT QUESTION IN THE FIRST INSTANCE AND MAKE CLEAR IF YOU FIT THIS DISTRICT CONCLUDES THIS ERRORS HARMFUL THAN THE REMEDY FOR THAT ERROR SHOULD BE REMAND FOR RESENTENCING UNDER SECTION 1B 2 OR TO ALLOW THE STATE TO HANDLE THE JURY TO MAKE THE REQUIRED JURY VERDICT.
TURNING TO THE FIRST QUESTION APPELLATE COURT'S REVIEW JUDGMENT, NOT THE REASONING OF TRIAL COURTS AND WHETHER OR NOT THEY MADE A HARMLESS ERROR FINDING IN ITS OPINION THE UNDERLYING ERROR IN JUDGMENT IS THE SAME, THE ABSENCE OF A REQUIRED JURY FINDING.
THIS COURT MADE CLEAR IN WILLIAMS VERSUS STATE THE APPELLATE COURT, HAS 12 CONSIDER UNDER THE HARMLESS ERROR STATUTE, BECAUSE THIS COURT IS A

COURT OF REVIEW, NOT FIRST
REVIEW THE COURT SHOULD REMAND
FOR THE FIFTH DISTRICT TO
CONSIDER IN THE FIRST INSTANCE
WHETHER IT CONSTITUTED HARMLESS
ERROR.
THE COURT SHOULD CLARIFY THE
REMEDY FOR A HARMFUL ERROR IN
THIS CONTEXT, EITHER TO REMAND
FOR SENTENCING 1B 2, OR ALLOW
THE STATE TO IMPANEL A JURY.
>> WE AGREE AS TO THE FIRST
ISSUE, YOU REACH THE SECOND
ISSUE.
>> THE SECOND ISSUE IS IMPORTANT
AND RECURRING, IT HAS COME UP
SEVERAL TIMES, THIS CASE
PRESENTS AN OPPORTUNITY FOR THE
COURT TO ADDRESS IT AND PROVIDE
HELPFUL GUIDANCE TO THE FIFTH
DISTRICT ON REMAND, AND TO
CLARIFY TO RESOLVE THE CONFLICT
IN THE DISTRICT.
>> CAN I ASK YOU, MAYBE I MISSED
IT.
>> WHAT IS YOUR POSITION ON
TRIAL COURTS PERFORMING THE
HARMLESS ERROR ANALYSIS?
>> THIS PROVIDES CLEAR GUIDANCE
IF CONFRONTED WITH THE SAME
SITUATION AGAIN, TRIAL COURTS
SHOULD EITHER SENTENCE THE
DEFENDANTS UNDER SECTION 1B 2
WHICH DOES NOT REQUIRE THE JURY
FINDING OR ALLOW THE STATE TO
MAKE THE REQUIRED JURY FUNDING.
>> HAVING CONCERN WITH THE TRIAL
COURT IN THIS PARTICULAR CASE
ALONG WITH THEIR ANALYSIS AND
MAKE DECISIONS FROM THAT.
>> YES, YOUR HONOR, WE ARE IN
AGREEMENT THE HARMLESS ERROR
ANNOUNCES WHAT THE DISTRICT WAS
TO PERFORM UNDER THE STATUTE.
THEY WERE REQUIRED TO FORM FOR
FORM THAT ANALYSIS AND HAD NO
POWER TO REVERSE TRIAL COURT
SENTENCE UNDER THE HARMLESS
ERROR STATUTE WITHOUT CONCLUDING
THAT IT WAS HARMFUL.
>> I CAN SEE IF IT WAS AN
OPINION, AND MAKING HARMS ERROR
ANALYSIS IN THIS CASE WITH OTHER
FACTORS AND OTHER THINGS, I

COULD SEE A SITUATION WHERE AT
THE END OF THE TRIAL, THE
PROSECUTOR GIVES UP AND SAYS
SOMETHING.
I WOULD HOPE IT NEVER HAPPENED
BUT SAY SOMETHING LIKE THE
DEFENDANT IS NOT GUILTY, WHY DID
HE TAKE THE STAND AND TESTIFY
AND TELL YOU HE IS NOT GUILTY
AND TELL YOU WHY?
TODAY THAT WOULD BE REVERSAL OF
ERROR AND PROBABLY STRONG
OPINION AT LEAST FOR ME AND
SOMETHING LIKE THAT BUT I CAN
SEE A SITUATION WHERE A TRIAL
JUDGE WOULD SAY THIS IS A
CLOSING ARGUMENT, WE HAVE
VIDEOTAPE OF SURVEILLANCE VIDEO
OF THE DEFENDANT, DNA, LEFT HIS
BLOOD BEHIND, FINGERPRINTS,
PEOPLE IDENTIFIED HIM SO I WILL
MAKE A HARMLESS ERROR ANALYSIS
AND IT IS WRONG TO DO THAT.
A REASONABLE JURY, RATIONAL,
REASONABLE JURY WOULD CONVICT
THIS PERSON AND WOULD NOT ACQUIT
JUST BECAUSE THAT MISTAKE WAS
MADE BY A PROSECUTOR.
I SEEM THAT HARMLESS ERROR
ANALYSIS BEING CONDUCTED AND
THAT IS THE CONCERN I HAVE.
>> AND THAT INSTANCE, ON APPEAL
DISTRICT COURT WOULD REVERSE THE
INSTANCE OF HARMLESS ERROR
ANALYSIS.
WHETHER OR NOT THE TRIAL COURT
PERFORMS THAT HARMLESS ERROR
ANALYSIS IF THE ERROR OCCURS IT
IS GOING TO BE SUBJECT TO
REVERSAL IF IT CONSTITUTES
HARMFUL ERROR.
>> TRYING TO AVOID A CASE
GETTING TO US.
>> SURE, YOUR HONOR, BUT
CERTAINLY DISTRICT COURTS WOULD
CLEAN IT UP.
>> IF I UNDERSTAND YOUR POSITION
YOU AGREE THAT IT WAS ERROR FOR
THE TRIAL COURT TO CONDUCT
HARMLESS ERROR ANALYSIS.
>> IN THIS INSTANCE YOU COULD
CALL IT ERROR BUT IT IS NOT
REVERSIBLE ERROR.
>> A LOT OF ERRORS NOT

REVERSIBLE ERROR.
UNDER EILEEN THE TRIAL COURT SHOULD HAVE DONE ONE OF THE TWO THINGS YOU SUGGESTED IMPOSING SENTENCE UNDER THE STATUTE OR HANDLE THE JURY.
>> IT IS AND ALSO OUR POSITION THAT DISTRICT AIRED IN TRYING TO CONSIDER THE TRIAL COURT'S ERROR.
>> THIS WOULD BE LIKE ANY OTHER ERROR UNDER THE STATUTE, TO CONDUCT HARMLESS AIR OR, THE DUTY OF THE APPELLATE COURT TO CONDUCT A HARMLESS ERROR REVIEW TO DETERMINE THAT IT WAS HARMLESS.
>> THAT IS CORRECT.
HE DIDN'T IS THE POINT IS MAYBE THAT SORT OF SEEMS UNFAIR, THE ERROR THAT THE TRIAL COURT HAD WAS TO CONDUCT HARMLESS ERROR ANALYSIS.
IF TRIAL COURT WAS RIGHT NOTHING HAPPENS, NO RELIEF FOR THAT ERROR.
>> IN APPEAL, IF THE COURT OF APPEAL THINKS THERE IS NO HARMFUL ERROR IT DOESN'T HAVE POWER TO REVERSE, AND KNOWINGLY COMMIT AN ERROR BUT NOT NECESSARILY TO WRITE THAT IN THE OPINION OR CONDUCT HARMLESS ERROR AND SAY I WILL COMMIT THIS ERROR BECAUSE IT IS HARMLESS.
EITHER WAY THE UNDERLYING ERROR IS THE SAME, THE SENTENCE THAT IS UNSUPPORTED BY THE REQUIRED JURY FINDING AND THAT IS THE ERROR THE FIFTH THE DISTRICT WAS REQUIRED TO REVIEW FOR HARMLESS ERROR AND FAILED TO DO SO.
>> WE HAVE BEEN ASSUMING THERE IS HARMLESS ERROR ANALYSIS.
THAT MEANS ONE ANALYSIS BUT IT DOESN'T.
THE CONTENT OF THE HARMLESS ERROR ANALYSIS SHOULD BE APPLIED ON REMAND OR REMAND WITH INSTRUCTION.
IS IT 9:24:23, WILLIAMS, WHAT IS THE STATE'S POSITION ON THAT?
>> IT IS WILLIAMS, WHETHER A RATIONAL JURY WOULD CONCLUDE

BEYOND A REASONABLE DOUBT THE RESPONDENT ACTUALLY KILLED, ATTEMPTED TO KILL OR INTENDED TO KILL.
>> ANY RATIONAL JURY, SEEMS TO BE THE CASE PRESENTS IF IT PRESENTS ANYTHING, AN OPPORTUNITY TO REFINE THE CONTENT OF THE HARMLESS ERROR ANALYSIS, WHETHER THOSE TWO STRUCTURES I JUST OUTLINED, ARE DIFFERENT FROM THE STATE'S PROSPECTIVE.
>> IT IS A GREAT OPPORTUNITY TO RESOLVE THAT QUESTION.
THE PARTY HAVE NOT BRIEFED THE STANDARD, ANY RATIONAL JURY, THE TEST THAT IT SET FORTH IN THAT CASE.
WHEREAS RESPONDENT'S POSITION IS IT WAS NOT REQUIRED TO DO SO.
IT IS INTEGRATE VEHICLE TO ADDRESS THAT QUESTION.
>> ARE YOU FAMILIAR WITH FEDERAL CASES IN THE THIRD CIRCUIT THAT ANALYTICALLY THE FIRST TO ASK WHETHER IT IS TRIAL AND ERROR OR SENTENCING ERROR.
WHEN THEY DECIDED IT WAS A SENTENCING ERROR THEY DON'T LOOK AT THE TRIAL RECORD BUT THEY ASK WHETHER IN THE ABSENCE OF THE ERROR THE SAME SENTENCE WOULD HAVE BEEN IMPOSED, IF YOU DEEM THIS A SENTENCING ERROR, WITHOUT THE COURT -- COULD THEY HAVE IMPOSED THE SENTENCE?
IT SEEMS AS TO THE REVIEW PERIOD, THE SAME SENTENCE CAN BE IMPOSED.
IS IT POSSIBLE THAT THAT IS THE RIGHT WAY TO LOOK AT WHAT THE ERROR WAS AND APPLY HARMLESS ERROR THAT GETS AT THIS ISSUE?
IT IS WEIRD TO SAY THAT THE CIRCUIT COURT DIDN'T HAVE THE OPTION OF LOOKING AT THE RECORD.
TO DO HARMLESS ERROR OPPOSED TO MAY BE LOOKING AT IT ANALYTICALLY AS JUST A SENTENCING ERROR AND DOING HARMLESS ERROR ANALYSIS.
>> NOT FAMILIAR WITH THIRD CIRCUIT CASES BUT THE WILLIAMS

APPROACH MAKES SENSE, IF YOU
HAVE AN UNDERLYING ERROR AND THE
REQUIRED JURY FINDING IS MISSING
AND ANALYSIS IS MUCH THE SAME AS
IN ANY OTHER CONTEXT WHERE THE
COURT SIMPLY ASKS LOOKING AT
WHAT THE JURY COULD HAVE DONE,
THIS DEFENDANT WAS THE SHOOTER
OR INTENDED SHOOTER OR ATTEMPTED
TO SHOOT THE VICTIM.
IF YOU ANALYZE WHETHER THE TRIAL
COURT COULD HAVE IMPOSED
SENTENCE WITHOUT THE REQUIRED
JURY FINDING, AS YOUR HONOR
MENTIONED WITHOUT THE REQUIRED
JURY FINDING YOU CAN'T SENTENCE
THE DEFENDANT, HAS TO BE UNDER
ONE B 2.
THE COURT SHOULD MAKE CLEAR
TRIAL COURTS HAVE THE OPTION TO
EITHER SENTENCE THE DEFENDANT
WITHOUT REQUIRED JURY FINDING
UNDER ONE B 2 OR ALLOW THE STATE
TO HANDLE THE JERRY TO MAKE THE
REQUIRED JURY FINDING AND THAT
WOULD BE CONSISTENT WITH HOW
THIS COURT TREATED RESENTENCING
UNDER SUBSECTION 10 OF 775.082.
>> THE FIRST THING, YOU HAVE A
STATUTORY FRAMEWORK THAT ASSUMES
THERE IS A BIFURCATED GUILT
PHASE, SENTENCING PHASE WITH
FACT-FINDING.
IT IS NO ONE'S FAULT, BECAUSE
YOU HAVE THIS CONFLUENCE OF
THREE LINES OF COMMON LAW AND IN
THE STATUTE EVERYBODY IS TRYING
TO MAKE THE BEST OF IT.
ON THE FRONT END GOING FORWARD,
IS IT FAIR TO SAY THE RIGHT WAY
TO DO THIS IN A NEW CASE, THE
2014 STATUTE, THAT THE
QUESTION NEEDS TO BE POSED TO
THE JURY AND IF THAT DOESN'T
HAPPEN, COULD YOU HAVE, COULD
YOU RECONVENE A JURY AND HAVE
THE SAME JURY IN THE SENTENCING
PHASE 2 FACT-FINDING IN THAT
SITUATION?
>> THAT WOULD BE A DIFFERENT
QUESTION.
AS YOU EXPLAINED, THERE'S THE
STATUTORY FRAMEWORK, BUT IN
SUBSECTION 10 THERE WAS NO

STATUTORY FRAMEWORK TO ADDRESS THIS ISSUE BUT THE COURT HAS INHERENT AUTHORITY TO DO SO WHEN THE LEGISLATURE HAS NOT ADDRESSED THE PROBLEM.
IF WE ARE TALKING ABOUT A DEFENDANT WELL AFTER THE EVENTS PASSED THE PROCEDURAL BLUSTER OF THIS CASE, THEY WERE -- THE JURY WAS NOT PROPERLY INSTRUCTED EVEN THOUGH EVERYONE AGREES THEY SHOULD HAVE BEEN INSTRUCTED TO MAKE THIS FINDING THAT IS A DIFFERENT QUESTION THAN WE HAVE HERE WHERE WE ARE TRYING TO FIX THE PROBLEM THAT ROSE GIVEN THE LINES OF CASES WE ARE TALKING ABOUT.
>> I WILL ASK ABOUT OUR INHERENT AUTHORITY TO FIX.
HOW FAR DOES THAT GO?
WHERE IS THE LINE IN WHICH WE CAN FIX A STATUTE WITH CONSTITUTIONAL ISSUES?
THE COURT SAID WE FEEL WE CAN DO THAT IN THIS CASE BUT THERE'S NOTHING IN THE LEGISLATIVE SCHEME THAT CONTEMPLATED AM PANELING A JURY YEARS LATER, LEGISLATORS THINKING ABOUT JUDICIAL RESOURCES, THERE IS DEBATE, POLICY CONSIDERATIONS IN THE LEGISLATIVE SCHEME NONE OF WHICH WE ARE MEANT TO ADDRESS.
WHERE' S THE LINE IN INHERENT AUTHORITY THAT YOU SPEAK OF THAT WOULD ALLOW US TO FIX THE STATUTE OR NOT?
>> I DON'T THINK YOU WOULD BE CROSSING OVER THE LINE IN ANY EVENT IF YOU SAID THE REMEDY IS THE SAME AS IT IS IN SUBSECTION 10, TALKING ABOUT THE SAME STATUTE, THE SAME REMEDY OF THE SAME JURY FINDING THAT CONSISTENT WITH HOW THE COURT TREATS THESE AREAS IN THE FIRST CONTEXT, THE BIFURCATED PROCEEDINGS, AND THE PENALTY PHASE AND GUILT PHASE, IT ALLOWS THE USE OF THEM PANELING A JURY AND REMAND FOR RESENTENCING BECAUSE IT IS CONSISTENT WITH GAME ON, CONSISTENT WITH HEARST,

AND TREAT ERRORS ACROSS THE
BOARD CONSISTENTLY WITH THE
ABSENCE OF THIS FINDING.
TRIAL COURT SHOULD HAVE THE
OPTION TO HANDLE THE JURY IF THE
STATE SO CHOOSES.
>> IN THIS PARTICULAR CASE, THE
STATE NEVER HINTED AT ASKING THE
COURT TO HAVE A JURY COME IN AND
SHOULD THAT AFFECT PEOPLE
SYSTEMICALLY, MIGHT BE GOOD TO
LET THE COURT THINK ABOUT THE
AVAILABLE REMEDIES.
IT SEEMS ODD IN THIS CASE TO
HAVE THAT BE THE REMEDY.
>> I DON'T THINK THERE'S A
QUESTION OF PRESENTATION BECAUSE
IT WOULD BE FUTILE TO HAVE IT
REQUESTED IN THE TRIAL COURT OR
DISTRICT COURT TO ALLOW THE
STATE -- UNDER WILLIAMS,
WILLIAMS'S REMEDY WOULDN'T BE AN
OPTION AND THE STATE IS NOT
REQUIRED TO MAKE FUTILE ATTEMPT
TO PRESERVE REQUESTS.
I DON'T THINK IT WOULD BE.
>> YOU ARE ASKING US TO REMAND
THE CASE BACK AND MAKE THIS
POSITION.
>> TO CLARIFY, THE STATE IS
REQUESTING THE DISTRICT DECISION
BELOW AND REMAND THE FIFTH
DISTRICT TO CONSIDER WHETHER THE
ERROR IN THIS CASE WAS HARMLESS
IN THIS INSTANCE.
WHEN IT CONCLUDES ON REMAND THAT
THE ERROR WAS HARMFUL, WE ARE
ASKING THE COURT CLARIFY THAT IN
THAT CIRCUMSTANCE THE FIFTH
DISTRICT CAN REMAND TO THE TRIAL
COURT, UNDER ONE B 2, TO ALLOW
THE STATE TO CHOOSE WHETHER TO
IMPANEL THE JURY FUND.
>> MATT MACLEAN -- HERBERT LEON
MANAGO ON BEHALF OF THE
DEFENDANT.
I WOULD LIKE TO ADDRESS THE
ERROR THAT WAS COMMITTED IN THIS
CASE BY THE TRIAL COURT.
AT THE TIME OF THE RESENTENCING
THE TRIAL COURT WAS ARMED WITH
THE DECISION IN WILLIAMS, THE
JURY FINDING AS TO WHETHER THE
DEFENDANT KILLED, OR ATTEMPTED

TO KILL THE VICTIM IN THE CASE.
KNOWING THAT, PROCEEDED TO
COMMIT AN ERROR BECAUSE IT DEEMS
THE ERROR TO BE HARMLESS.
THOSE WHO FAITHFULLY APPLY THE
LAW, NOT COMMIT ERROR KNOWINGLY,
IT IS HARMLESS.
>> THE VERDICT PROVIDED TO THE
JURY DID NOT PROVIDE, DID IT,
FOR THE JURY TO MAKE A
DETERMINATION THE DEFENDANT --
>> FELONY, FIRST DEGREE MURDER,
CARJACKING, NO SPECIAL VERDICT
FINDINGS WERE REQUESTED.
>> WHY IS THAT?
>> IT WAS THE STATE'S POSITION
THEY DON'T NEED TO PROVE IT TO
GET THE CONVICTION TO GET FELONY
FIRST FREE MURDER, AND A
PRINCIPAL IN THE SITUATION.
JUST FIND HIM GUILTY OF FELONY
MURDER AND --
>> UNDER THAT YEAR YOU NEED
THREE CHARGED WITH BEING THE
ISSUE.
>> IF YOU LOOK AT THE INDICTMENT
IN THE CASE, THE STATE CHARGES
HIM AS IF HE WAS THE KILLER IN
THE CASE BUT ALTERNATIVELY
CHARGES HIM AS IF HE WAS
PARTICIPATING IN HELPING, MIGHT
HAVE BEEN RESPONSIBLE FOR THE
KILLING IN THE CASE.
THE STATE PROCEEDED UNDER DUAL
THEORIES BELOW.
THE STATE HAS TAKEN A SESSION
THAT IT WAS NOT CONDUCTED BY THE
FIFTH DISTRICT COURT AND THEY
DID CONDUCT HARMLESS ERROR
ANALYSIS, NOT THE ONE IN
WILLIAMS BUT ANALYSIS OF A
PRACTICAL APPROACH.
WHAT WOULD HAVE HAPPENED UNDER
THE SITUATION OF THE COURT WOULD
HAVE FOUND THERE IS NO JURY
VERDICT, SUPPORT THE ENHANCED
SENTENCING THEY WOULD HAVE
SENTENCED HERBERT LEON MANAGO
PURSUANT TO ONE B 2.
>> ARE YOU ASKING US TO OVERRULE
WILLIAMS?
>> I'M NOT ASKING YOU TO
OVERRULE WILLIAMS.
>> WHAT IS THE JUSTIFICATION FOR

THE DEPARTURE OF WILLIAMS?
>> THE ERROR THAT IS COMMITTED, THAT CASE DECIDED PRIOR TO WILLIAMS, DID NOT KNOW THEY WERE KNOWN THEY WERE COMMITTING ERROR.
ONLY AFTER WILLIAMS CAME OUT WHICH THE COURT BECOMES AWARE OF THE LAW AND RECOGNIZE THE LAW AND COMMIT ERROR KNOWINGLY JUST BECAUSE THEY CONDUCT HARMLESS ERROR ANALYSIS, THAT'S THE PROBLEM THEY ARE TRYING TO AVOID SO NO REASON TO OVERRULE WILLIAMS.
THE PRACTICAL APPROACH GOING FORWARD, WHEN THERE IS NO VERDICT TO SUPPORT INCREASED SENTENCE THEY SHOULD GO AHEAD AND IMPOSE THE SENTENCE.
THAT COMPLIES WITH THE VERDICT FORM.
UNDER SUBSECTION 2, THAT IS WHAT SHOULD HAVE HAPPENED POST WILLIAMS.
>> IN TERMS OF APPELLATE STANDARDS, WHAT YOU ARE ARGUING FOR IS A RULE UNDER THESE CIRCUMSTANCES.
>> UNDER THIS SITUATION --
>> THE ERROR WAS COMMITTED BECAUSE THE TRIAL GEORGE -- JUDGE PROVIDES THE ANALYSIS THEY ARE NOT SUPPOSED TO PERFORM.
IT IS APPROPRIATE IN THOSE INSTANCES.
>> RECOGNIZING IN THE LAW, FIRST THING, ENCOURAGING COURTS TO COMMIT AN ERROR WITH THE HOPE THAT LATER ON, THE ERROR WAS HARMLESS.
>> THE STATUTORY DIRECTIVE THAT APPELLATE COURTS FOR HARMFUL ERROR, WITH HARMFUL ERROR, ERROR THAT -- I HEARD YOUR EARLIER ARGUMENT.
>> STICK WITH MY POSITION THAT THE HARM, WHAT THE RESULTS WOULD HAVE BEEN, DIFFERENT SENTENCE COMPARED TO ONE B 2, WHERE THE ERROR IS HARMFUL IN THIS SITUATION BUT WHEN YOU APPLY THE WILLIAMS HARMLESS ERROR ANALYSIS THERE IS NO REASON THIS COURT

CAN'T DECIDE WHETHER IT WAS HARMFUL.
IN WILLIAMS, IN ANNOUNCING THE RULE THIS COURT CONDUCTED A HARMLESS ERROR ANALYSIS AND FOUND IT WAS HARMFUL SO THERE IS NO REASON TO HAVE THE COURT GO BACK TO INITIAL COURT OF APPEAL WHEN IT IS ABLE AND DONE SO IN THE PAST CONNECTING AT HOME -- HARMLESS ERROR ANALYSIS.
THE ERRORS HARMFUL IN THIS CASE, FALLS IN LINE WITH CASES WHERE THERE'S MULTIPLE DEFENDANTS CHARGED WITH A CRIME, MULTIPLE THEORIES PRESENTED AS TO WHO THE KILLER WAS AND NO CLEAR VERDICT TO WHAT THE JURY DECIDED.
>> THE STATUTE SORT OF, WHOEVER WROTE THIS STATUTE THOUGHT THERE WOULD BE A JUDICIAL FINDING, WHO AFFIRMATIVELY LED THE PERSON TO THESE CRITERIA.
IT WAS IN THE ABSENCE OF A FINDING FOR THE SHOOTER.
THE PERSON WHO DIDN'T KILL, INTEND TO KILL OR ATTEMPT TO KILL, WE DIDN'T HAVE ANY JURY FINDING.
WHERE DOES -- DOES THAT FACTOR INTO -- SHOULD WE -- GIVEN THE REQUIREMENT IN THE STATUTE, DOESN'T THAT REALLY TO SAY THAT THE ONLY RIGHT THING TO DO IN EVERY ONE OF THESE CASES TO RETROACTIVELY APPLY THE STATUTE, WE NEED TO HAVE A JURY COME IN AND DECIDE WHICH BOX THEY FIT INTO, WHICH BLOCKS THE DEFENDANT FIT INTO.
>> TALKING ABOUT THE REMEDY?
>> HOW TO COMPLY BECAUSE THERE'S AN ASSUMPTION YOU COMPLY WITH THE STATUTE BY ASSUMING THE PERSON WASN'T THE SHOOTER BECAUSE OF THE ABSENCE OF A FINDING.
IT IS NOT WRITTEN THAT WAY.
THE LOGIC OF THE STATUTE IS AT THE TIME OF SENTENCING YOU WILL KNOW WHICH BOX TO PUT THE PERSON IN AND THE ABSENCE OF THE FINDING DOESN'T ALLOW YOU TO PUT THEM IN THE ME TOO BOX BUT CAN'T

NECESSARILY PUT THEM IN THE BE
ONE BOX.
>> I AGREE.
THE STATUTE IS WRITTEN SO WHEN
YOU COME TO SENTENCING YOU KNOW
IF THE DEFENDANT FALLS UNDER
THAT SO IT IS UNLIKE SUBSECTION
10 IN THE STATUTE WHICH IS MORE
OF A SENTENCING CONSIDERATION.
THAT IS THE REASON THE COURT
CRAFTED THE REMEDY IT DID.
IT INTENDED POST VERDICT FOR A
JUDGE TO DECIDE WHETHER A
NON-STATE PRISON WOULD BE
DANGEROUS TO THE PUBLIC AND THE
SITUATION OF ONE B1,
CONTEMPLATED AND GOING FORWARD
THAT THE JURY IS INSTRUCTED AS A
MATTER OF FIRST IMPRESSION
REACHING A VERDICT WHETHER THIS
PERSON KILLED OR ATTEMPTED TO
KILL THE VICTIM.
SAME GOES WITH THE DEATH PENALTY
CONTEMPLATED BY STATUTE THAT
THERE'S A GUILT PHASE AND THE
PENALTY PHASE AND THE PENALTY
PHASE SENTENCING FACTORS WILL BE
CONSIDERED POST GUILT VERDICT.
COMING BACK TO WHAT THE REMEDY
WILL BE, WE UNDERSTAND IT IS A
UNIQUE SET OF CIRCUMSTANCES.
A LOBBYING APPLIED RETROACTIVELY
AND PARTIES WERE NOT IN A
POSITION KNOWING THAT AT THE
TIME.
AND THAT DOESN'T THROW OUT THE
OTHER LAW, WHAT HAPPENS IN THE
CASE.
>> YOU DON'T HAVE ANY STANDING
FOR THE IDEA, REVIEWING COURT
APPLIES DIFFERENTLY DEPENDING
WHETHER THE JUDGE, THE CLARITY
OF THE LAW THAT THE JUDGE WAS
DEPARTING FROM BELOW BECAUSE THE
LOGIC OF YOUR POSITION, AND
WOULD HAVE DONE THAT FINDING
BECAUSE IN A NEW HEARING AND IT
WOULD BE HARMLESS ERROR
ANALYSIS.
THE LOGIC OF YOUR POSITION SEEMS
TO BE A JUDGE TODAY HELD THE
HEARING, THE WHAT THE REVIEWING
COURT COULDN'T TO BECAUSE IT
WOULD HAVE BEEN A CLEAR ERROR

THAT IT WAS INTENTIONAL.
IS THAT WHAT YOU ARE SAYING?
YOU DON'T HAVE ANY CASE LAWS
BEING APPLIED DIFFERENTLY.
WHETHER THE JUDGE KNEW WHAT THE
JUDGE WAS GOING TO DO.
>> IF THAT WERE TO BE THE
APPROACH TAKEN, THERE WOULD BE
NO MEANING TO IT.
THE APPELLATE COURT OR TRIAL
COURT WOULD SAY I WOULD IMPOSE
THE INCREASED SENTENCE BECAUSE
I'M ABLE TO EVEN THOUGH I KNOW I
AM COMMITTING ERROR BECAUSE IT
WILL BE HARMLESS.
IF YOU DON'T FIND THAT TO BE
ERROR IT WILL BE ENCOURAGING
COURTS DO NOT FOLLOW THE LAW
FAITHFULLY.
UNIQUE SET OF CIRCUMSTANCES AND
BY GOING FORWARD EVERYONE WOULD
AGREE --
>> YOU COULD MAKE THE SAME POINT
ABOUT HARMLESS ERROR ANALYSIS.
THE FACT THAT, THE FACT THAT
THAT IS THERE IS AN INCENTIVE
FOR ERRORS, IF A JUDGE THINKS IT
MAKES A DIFFERENCE AT THE END OF
THE DAY.
I DON'T UNDERSTAND THE LIMITING
PRINCIPLE YOU CAN RELY ON, I
AGREE THE JUDGE SHOULD NOT OF
DONE THIS BUT I'M STRUGGLING TO
FIND A LIMITING PRINCIPLE THAT
WILL NOT UNDERMINE THE HARMLESS
ERROR AND SOME PEOPLE THINK WE
SHOULDN'T HAVE HARMLESS ERROR
ANALYSIS BUT WE DO.
WHAT AM I MISSING?
>> THE KEY PART THAT IS MISSING
IS THE KNOWING PART, KNOWINGLY,
FORTUNATE ENOUGH TO KNOW HE IS
COMMITTING ERROR AND CONDUCTING
HARMLESS ERROR.
>> IT IS VERY CLEAR.
IT THAT THERE IS LAW THAT --
EVERY TIME A JUDGE MAKES AN
ERROR IS ESTABLISHED.
THAT THAT IS INTENTIONAL?
>> THE HEARSAY OBJECTION, IT IS
CLEAR IT IS HEARSAY.
AT THE END OF THE DAY IT DOESN'T
MATTER THAT IT IS HARMLESS.
>> IS IT MORE YOUR THEORY IS

LIKE LOOSE LIPS SINK SHIPS?
THE JUDGE MIGHT THINK THAT IS
ACT ACCORDINGLY BUT IF HE
ARTICULATES THAT WE ARE IN
DIFFERENT TERRITORY.
>> OF THE ARTICULATE HARMLESS
ERROR ANALYSIS THE JUDGE SHOULD
BE REVERSED IN THAT SITUATION.
GOING TO THE REMEDY IN THIS
CASE, TO IMPANEL A JURY, START
WITH PRESERVATION, SILENT AS TO
REQUESTING TO IMPANEL THE JURY.
BRIEFING AT THE FIFTH DISTRICT
COURT OF APPEAL TO REQUEST THE
ABILITY TO IMPANEL A JURY.
>> THIS IS GOING ON AFTER
WILLIAMS.
WOULDN'T THAT BE FUTILE?
>> DON'T THINK, IF YOU WANT TO
OVERTURN SOMETHING, KNOWING YOU
CITE CASE LAW, HOWEVER WE THINK
IT IS WRONG WE DECIDED FOR THESE
REASONS.
>> WE REQUIRE THAT?
>> WE PRESENT THE ARGUMENT.
>> DO WE HAVE CASES THAT REQUIRE
THAT.
>> AT THE APPELLATE COURT LEVEL,
WITH ORAL ARGUMENT WHEN
CONFRONTED WITH IT.
WHAT IS THE REMEDY ARE ASKING
FOR?
IN LIGHT OF THE GREEN DECISIONS.
>> I WE HAVING A CASE THEY ARE
REQUIRED, A BINDING PRECEDENT,
THE DISTRICT COURT THAT WE
REQUIRE AN ARGUMENT BE MADE FOR
RETURNING OF THE PRECEDENT.
>> I -- ON HAND I DO NOT HAVE A
CASE ASSESSED THAT.
I WOULD LIKE TO POINT OUT WHEN
CONFRONTED BY THE FIFTH DISTRICT
COURT OF APPEAL, TO IMPANEL IT
FOR 15 YEARS AFTER THE FACT,
GIVEN AN OPPORTUNITY TO POST
GREEN, WILLIAMS AND GREEN, TO
SEEK THAT REMEDY, SOMETHING THAT
WE WOULD DO.
>> WHAT ELSE HAVE YOU GOT?
>> STARE DECISIS, THIS COURT
DECIDED FOUR YEARS AGO
CONFRONTED THE SAME ISSUE, IT IS
PRESENTED BY THE REVENUE TO
IMPANEL A JURY AND ASKING THE

COURT TO OVERRULE PRECEDENT.
THE DECISION HAS BEEN PROVEN
WORKABLE.
WITH OTHER DEFENDANTS SITUATED
AND THERE'S BEEN NO FACTUAL
CIRCUMSTANCES THAT WOULD JUSTIFY
DEPARTURE FROM THIS PRECEDENT.
>> THE JURY MAKING OF A FINDING.
AND REMANDED AND INSTRUCT THE
TRIAL COURT TO SENTENCE
SUBSECTION 2.
>> THERE IS NO REASON TO DO SO
BUT IN THE BRIEFING, IT APPROVED
THE PRACTICE UNDER THESE
CIRCUMSTANCES.
THE ONLY CASE LAW OUT THERE AT
THIS TIME IS SAYING YOU
SHOULDN'T DO IT.
THIS COURT CITES OPINIONS FOR
THE FIRST CIRCUIT COURT OF
APPEAL.
THE PENNSYLVANIA SUPREME COURT,
LIKE THE STATE HAS SENTENCING
PROCEEDINGS, BIFURCATED
SENTENCING PROCEEDINGS IN THE
SUPREME COURT IN THE SAME
SITUATION, IF WE ARE NOT GOING
TO LEGISLATE FROM THE BENCH, AND
COME UP WITH THE MECHANISM, THEY
WILL DO THAT, SO EVERY
JURISDICTION I AM AWARE OF WHEN
PRESENTED WITH SIMILAR SITUATION
HAS NOT GONE THE DIRECTION THE
STATE WANTS THIS COURT TO GO AND
WHEN YOU LOOK AT THE UNITED
STATES SUPREME COURT IN A LIEN,
SEND IT BACK CONSISTENT WITH THE
VERDICT IN THE CASE.
THAT IS WHAT WE ARE ASKING FOR
THIS COURT TO DO.
>> I WANT TO READ FROM A
STATEMENT, REVERSIBLE ERRORS ARE
LIMITED TO WHAT IS SO BASIC TO
THE TRIAL THEY DONOR SHARON
FRACTION CAN NEVER BE TREATED AS
HARMLESS AND FROM CHAPMAN VERSUS
CALIFORNIA, INVOLVING
CONSTITUTIONAL VIOLATIONS SUCH
ERRORS ARE ALWAYS HARMFUL.
IDEAS LIKE IF A DEFENDANT IS
COMPLETELY PRIVATE THAT IS A
CONSTITUTIONAL VIOLATION,
STRUCTURAL VIOLATION.
AS I UNDERSTAND YOUR ARGUMENT,

THIS IS A CONSTITUTIONAL
VIOLATION, IT IS STRUCTURAL,
THAT NEEDS TO BE TREATED AS A
REVERSIBLE IN ORDER TO GET THE
RELIEF THE CONSTITUTION
WARRANTS.
AND IF WE ACCEPT YOUR ARGUMENT,
HOW COULD WE MAINTAIN THE
HARMLESS ERROR DIRECTLY FOR
TRIAL COURTS TO DO ANY
CIRCUMSTANCES?
>> GOING BACK TO WHETHER ERROR
WAS COMMITTED?
>> WILLIAMS, THE APPELLATE
COURT, TO DISCUSS THE ERROR
ANALYSIS IN THIS CIRCUMSTANCE.
>> THE ERROR OCCURRED ONE STEP
BEFORE REACHING WILLIAMS, IT IS
RECOGNIZED BY THE FIFTH
DISTRICT.
IT IS NOT A WILLIAMS ERROR PER
SE, IT HAPPENED BEFORE IT GOT
THERE.
THAT IS THE BEST ARGUMENT I HAVE
FOR THAT BUT EVEN GOING BACK TO
IF THE COURT SAYS HE HAD TO
CONDUCT HARMLESS ERROR ANALYSIS,
NO REASON TO FIND IT WOULD BE
HARMLESS IN THIS SITUATION.
THE CIRCUMSTANCES OF THE TRIAL
IN THIS CASE BUT IF THERE IS
SUCH AN IMPORTANT FINDING,
FINDING A MANDATORY 40 YEAR
SENTENCE, A 25 YEAR REVIEW.
AND EVEN BE ABLE TO PRESENT
EVIDENCE AND ARGUMENT TO A JURY
TO MAKE THAT FINDING TO GO AHEAD
AND SAY THINGS WOULD HAVE BEEN
THE SAME UNLESS CONDUCTING
HARMLESS ERROR ANALYSIS BASED ON
WHAT WAS PUT FORWARD TO THAT
TRIAL.
NOW THE RULES OF THE GAME HAVE
CHANGED.
THAT WOULD BE A DO PROCESS
VIOLATION IN OUR PERSPECTIVE.
I AM RUNNING OUT OF TIME.
I WOULD LIKE TO ASK THIS COURT
TO AFFIRM THE REMEDY IN
WILLIAMS.
TO AFFIRM THE FIFTH DISTRICT
COURT'S FINDING OF ERROR IN THE
CASE AND REMAND FOR HERBERT LEON
MANAGO TO BE RESENTENCED

PURSUANT TO ONE BE 2.
>> CAN I ASK A QUESTION?
IT SEEMS THE FACT THAT THE STATE HERE DIDN'T ASK FOR LOTS OF TIME HAS GONE BY, IN A LOT OF CASES THERE ARE SERIOUS PRACTICAL PROBLEMS EVEN IF IT IS A LEGALLY AVAILABLE OPTION AND IT SEEMS UNDER THE LIEN IT IS NOT A CONSTITUTIONAL OPTION FOR THE JUDGE HIM OR HERSELF TO HAVE A FACT-FINDING WHERE THE JUDGE MAKES THE DETERMINATION.
IS IT THE STATE'S POSITION, THINKING ABOUT WHAT THE RULES SHOULD BE IN THESE CASES, IS THAT THE STATE'S POSITION IT'S NOT A CONSTITUTIONAL OPTION TO TELL TRIAL COURTS THEY ARE BOUND BY WHATEVER HAPPENED AT TRIAL, BUT THEY CAN LOOK AT THE RECORD AND DECIDE WHAT IS PRESENTED WITH THIS INFORMATION BEYOND A REASONABLE DOUBT, WHETHER THEY MET WHAT THE CRITERIA ARE.
IS THAT OFF THE TABLE?
>> THAT IS OFF THE TABLE BECAUSE IT IS THE SAME AS THE JUDGE MAKING THE FINDINGS.
>> IT'S NOT REALLY THE SAME.
IT IS NOT THE JUDGE AFFIRMATIVELY FINDING A FACT.
YOU ARE LIMITED, IT GETS BACK TO THE QUESTION IF WE WERE TO REINVENT THINGS, WAS THE ERROR, THE FAILURE TO NOT HAVE IT DURING THE TRIAL, WE KNOW THE REASON IT WASN'T DONE, IF YOU RECONSTRUCT THE ERROR AS FAILURE TO ADD IT THERE IS A REAL DIFFERENCE BETWEEN CONFINING YOURSELF SO THE STATE DOESN'T DO ANYTHING NEW, THE JUDGES EXERCISING THEIR OWN SENSE OF WHAT THE FACT IS BUT YOUR POSITION IS THAT IS NOT CONSTITUTIONALLY AN OPTION.
>> ON APPEAL, THE DISTRICT COURT OF APPEAL IS REVIEWING THE JUDGMENT, NOT THE REASONING OF THE TRIAL.
WHETHER THE TRIAL COURT SAID SENTENCED UNDER ONE BE ONE BECAUSE I'M MAKING A FINDING OR

BECAUSE I THINK DOING SO WOULD
BE HARMLESS ERROR, THE ERROR IS
THE SAME.
THE QUESTION FOR DISTRICT COURT
IS NEVERTHELESS HARMLESS UNDER
WILLIAMS.
THE REASON THE JURY REFORM DID
NOT REQUIRE THE FINDING WAS
BECAUSE THIS WAS NOT A REASON
FOR IT IN THE JURY FORM.
>> IT WASN'T A PURPOSEFUL CHOICE
TO PROCEED IN THE ALTERNATIVE
THE WAY YOUR OPPONENT SUGGESTS.
>> AS FOR THE JURY FINDING.
>> IT IS PRE-2014, THE STATUTE.
>> THAT IS RIGHT.
THE REVERSIBLE HARMLESS ERROR,
LOOSE LIPS SINK SHIPS.
OF THE TRIAL COURT IS
CONSIDERING AN OBJECTION TO THE
TESTIMONY THAT NOBODY IS GOING
TO CARE ABOUT THIS AFTER THE
TRIAL AND THE TRIAL COURT THINKS
I THINK IT WOULD BE UPHELD AS
HARMLESS ERROR, AND IN HARMLESS
ERROR ON APPEAL.
IF THAT DOESN'T SAY IT WILL BE
HARMLESS ERROR AND OVERRULES, I
DON'T THINK THERE'S ANYTHING IN
THE COURT'S CASE LAW THAT
SUPPORTS THAT THEORY.
>> A QUESTION ABOUT THE
PRESERVATION ISSUE.
YOU ARGUE THAT IT UNDERCUT
EVERYTHING WILLIAMS STOOD FOR AS
FAR AS THE DEGREE.
IS THAT A FAIR READING OF WHAT
YOU ARE ARGUING?
>> YES.
>> THAT YOU ARGUE THAT THE FED?
>> NO BUT THE CASE LAW PROVIDES
WE DON'T MAKE SUCH ARGUMENTS IS
CITED IN OUR REPAIR BRIEF.
>> IS NOT A FUTILE ARGUMENT IF
YOU ARE ARGUING THERE IS NO
PRECEDENT, THE THEY HAVE ALREADY
CHANGED THEIR MINDS AND YOU CAN
FOLLOW THE GAME RIGHT NOW.
>> TO CLARIFY MY PREVIOUS ANSWER
THE DISTRICT COURTS COULD NOT
HAVE EXTENDED INTO THE WILLIAMS
CONTEXT BECAUSE WILLIAMS REMAINS
GOOD LAW UNTIL THIS COURT
RECEIVES.

I SEE MY TIME IS UP.
>> YOU WANT US TO INCLUDE LOOSE LIPS SINK SHIPS IN OUR OPINIONS?
>> ABOUT ALL POSSIBLE, YOUR HONOR.
>> THANK YOU.
>> THE LIGHTS ARE IT OUT, RIGHT?
>> WE ARE GOING TO TAKE A 5 MINUTE BREAK TO TRY TO GET OUR SYSTEM FIXED.
THE COURT WILL BE IN RECESS FOR FIVE MINUTES.
>> ALL RISE.