>> THE TESTIMONY OF ALL THE EYEWITNESSES SO THAT WE KNOW THE DELIBERATIONS WERE FOCUSED ON PREMEDITATION OR SELF-DEFENSE.
BEFORE DELIBERATIONS THE JURY SENT A NOTE TO THE JUDGE ASKING OF THE DSM POD WOULD BE EVIDENCE, THAT'S THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS WHICH EXPERT WITNESSES RELIED ON IN THEIR TESTIMONY.
WE KNOW ONE WAS AFFIRMATIVELY INTERESTED IN THE INSANITY DEFENSE.
THE JURY WAS OUT FOR FIVE HOURS.
THERE WERE NO EASY DECISIONS IN THIS CASE.
THAT'S WHY THE CLOSING ARGUMENT IN BOTH PHASES AND JURY INSTRUCTION PROBLEMS IN BOTH PHASES MATTER.
THEY CARRIED FORTH INTO THE APPEAL, PRESERVED ALL 3 COMMENTS AND TWO OBJECTIONS WERE OVERRULED, THE THIRD WAS SUSTAINED, BUT CURATIVE INSTRUCTION WAS DENIED.
THOSE RULINGS OVERRULING OUR OBJECTIONS, IF THEY ARE, THE STATE IN THIS APPEAL SHOWS BEYOND REASONABLE DOUBT THE VERDICT AND PENALTY PHASE WAS UNAFFECTED BY THE ARGUMENT.
THE FIRST ARGUMENT WE OBJECTED TO IN CLOSING WAS TRY YOUR BEST TO REACH AN ANIMUS -- UNANIMOUS VERDICT, WE DISAGREED ON EXACTLY WHAT WAS SAID.
IT WAS A LONG SENTENCE.
AT THE BEGINNING OF THE SENTENCE THE STATE ATTORNEY SAYS YOU HAVE OBLIGATION TO GIVE MEANINGFUL CONSIDERATION TO EVERYTHING.
NOT ONLY THAT BUT TRY YOUR BEST TO REACH A UNANIMOUS VERDICT.
THEY MAY WELL HAVE HEARD YOU HAVE AN OBLIGATION TO REACH A UNANIMOUS VERDICT, THEY HEARD IT IS THE PROSECUTOR'S PERSONAL PREFERENCE THAT THEY TRIED TO REACH A UNANIMOUS VERDICT.
>> CONTEMPORANEOUS OBJECTION.
>> INCORRECT STATEMENT OF LAW.

THAT WAS NOT ONLY OVERRULED, BUT
IN CLOSING, DEFENSE COUNSEL
TRIED TO READDRESS THE MATTER,
HE SAID JURORS, YOUR
INSTRUCTIONS ARE CONTRARY TO
WHAT YOU HEARD.
THERE'S NO OBLIGATION TO ACT AS
ONE.
OBJECTION BY THE STATE
SUSTAINED, SO THE JURY CAME AWAY
WITH THE IMPRESSION THIS WAS
PROPER ARGUMENT AND THE ONLY
CASE THE STATE ATTORNEY COULD
HAVE BEEN THINKING OF IS ALAN
WEST FROM 1896, IT WAS SOFTENED
OVER THE YEARS, IN ANY EVENT THE
CHARGE CANNOT BE GIVEN ACCORDING
TO THE SCHOOL IN THE PENALTY
PHASE.
THE UNDERLYING CONCEIVABLE --
UNDERLYING THE ARGUMENT, ALAN
VERSUS US WHICH DOESN'T APPLY.
>> GAVE THE JURY IN SUSTAINING
AND OVERRULING THE OBJECTIONS.
IS YOUR POSITION THEY GAVE THE
JURY A CHARGE IN CLOSING
ARGUMENTS?
>> THAT THERE IS NO LAW
SUPPORTING GIVING THIS ARGUMENT,
GREAT DEAL OF LAW THAT CLOSES
IT.
EVERYTHING FROM LOCK VERSUS OHIO
ON DOWN.
THEY CANNOT OR LIKEWISE THE
COURT CANNOT INTERFERE.
>> THE COURT TO OVERRULE THE
OBJECTION, TO GIVE NO CURATIVE
STATEMENT FOR HARMFUL ERROR AND
SO WHAT?
>> THE ARGUMENT IS IN OKLAHOMA,
WHAT IS LEFT OF COLORADO VERSUS
MISSISSIPPI.
AND ROMANO THE SUPREME COURT
HELD THE JURY CAN'T BE MISLED AS
TO ITS RESPONSIBILITIES IN THE
PENALTY PHASE IN THE K'S.
OUR POSITION.
>> FUND MENTAL ERROR?
>> IT IS NOT OBJECTED TO IN THIS
CASE.
COULD HAVE BEEN.
>> WHAT I'M TRYING TO FIGURE OUT
IS WE HAVE TO DECIDE, THE AREA
YOU ARE COMPLAINING ON WAS

HARMFUL, THAT'S THE FIRST
QUESTION.
OF IS NOT HARMFUL ERROR IT
DOESN'T GET US ANYWHERE.
THE ERROR YOU ARE FOCUSED ON
RIGHT NOW, WHY DOES IT
CONSTITUTE ERROR?
>> THE JURY CAN'T BE MISLED
ABOUT ITS ROLE IN THE PROCESS.
>> WHAT WAS THE IMPACT ON THE
EVIDENCE CONSIDERED BY THE JURY?
HOW DID IT MAKE THE CONVICTION
NOT SUPPORTED?
>> AGE MAY HAVE BEEN INTIMIDATED
INTO BELIEVING SINCE THE JUDGE
HAD SUSTAINED AN OBJECTION OR
OVERRULED AN OBJECTION TO THIS
ARGUMENT THAT IT WAS PERFECTLY
OKAY THAT IT MAY, THEY MAY HAVE
FELT THEIR INSTRUCTIONS DID NOT
GIVE THE WHOLE STORY AND THEY DO
HAVE AN OBLIGATION TO ACT WHICH
THEY DO NOT.
EACH JUROR IN CAPITAL PENALTY
PHASE MUST INDIVIDUALLY WAIVE
THE MEDICATION.
'S AND NOTHING COULD COME
BETWEEN THE JURY AND THE
MITIGATION.
THE SECOND ARGUMENT WE OBJECTED
TO IN THE PENALTY PHASE CAME IN
THE CONTEXT.
IN THE CONTEXT OF DISCUSSION
WITH STATUTORY META-GATORS HAD
BEEN FOUND AND THAT WAS THE
STATUTORY MITIGATE OR WHETHER
THERE WAS SUBSTANTIAL IMPAIRMENT
TO DEFEND THE CAPACITY TO
APPRECIATE CRIMINALITY OF ITS
CONDUCT OR CONFORM ITS CONDUCT
TO LAW.
THE STATE HAD ADMITTED THE
DEFENSE WAS ENTITLED TO
INSTRUCTION ON THAT STATUTORY
MITIGATE OR BUT THE ARGUMENT WAS
YOU'VE ALREADY MADE THIS
DETERMINATION BY REJECTING THE
INSANITY DEFENSE AND DETERMINE
THAT YOU KNEW RIGHT FROM WRONG.
IN THE BRIEF I SIGNED A CASE,
THE JUDGE IN THE SENTENCING
ORDER CANNOT SAY, NOT GOING TO
CONSIDER THE STATUTORY
META-GATORS BUT REJECTED THE

STATUTORY, THE INSANITY DEFENSE,
THE STATE SEEKS TO DISTINGUISH
THOSE CASES.
DON'T SEE WHY IT'S BETTER FOR
THE JURY TO BE ENCOURAGED TO
BELIEVE IT DOESN'T HAVE TO
ADDRESS A STATUTORY MITIGATE
HER.
THE STATE ARGUES ANY ERROR IS
HARMLESS BECAUSE THE JUDGE FOUND
THE STATUTORY MITIGATE ARE
ABSENT, MENTAL HEALTH RELATED
EVIDENCE, IS NO INDICATION HOW
IT LANDED IN THE JURY.
I DON'T BELIEVE THE STATE WILL
SHOW THIS WAS HARMLESS BECAUSE
OF BECK VERSUS ALABAMA, THE
SUPREME COURT WHERE THEY HELD
THAT PENALTY PHASE VERDICT DOES
NOT EXIST UNLESS THE REVIEWING
COURT CAN BE CONFIDENT THE JURY
GAVE INDEPENDENT WEIGHT TO THE
MITIGATION.
LATER IN CLOSING TO THE END,
DIFFERENT KETTLE OF FISH,
SUSTAINED OBJECTION WHERE WE ASK
FOR THE CURATIVE.
THE DEFENDANT SERVING LIFE
SENTENCES, ANOTHER SENTENCE OF
LIFE WOULD BE ANOTHER PIECE OF
PAPER, THE QUESTION, THE ORDER
OF LIEUTENANT CLAYTON THE SAME
OR SO MUCH MORE?
THE STATE TAKES THE POSITION WHY
THE AGGRAVATION WAS WEIGHTY,
OPPOSITION ON THIS RECORD WAS
ARGUING ON NONSTATUTORY
AGGRAVATED.
I ACKNOWLEDGE THE GLOBE CASE AND
THE REPLY BRIEF.
THAT WAS THE CASE.
IN THAT CASE, GLOBE KILLED HIS
CELLMATE AND THE JUDGE FOUND IN
HIS ORDER THAT THE FACT HE WAS
SERVING A LIFE SENTENCE MADE THE
STATUTORY AGGRAVATE HER OF
CRIMES COMMITTED UNDER SENTENCE
OF IMPRISONMENT VERY WEIGHTY,
THIS COURT HELD HE REFERRED TO
AN EXISTING LIFE SENTENCE WHICH
IS NOT STATUTORY BUT WAS JUST AN
ASPECT OF HIS ANALYSIS OF THAT
THE STATUTORY AGGRAVATE HER IS
WEIGHTY.

THE CONNECTION HERE IS NOT AS
CLEAR THAT A PRIOR FELONY CAN
TAKE PLACE WITHOUT LIFE
SENTENCES.
>> LET ME ASK THIS.
DID THE JURY -- THE LIFE
SENTENCES EXIST, THAT HE WAS
UNDER LIFE SENTENCE?
>> YES.
>> THEY DO THAT?
>> YES.
THE STATEMENT IS TRUE.
IT'S NOT THE END OF THE INQUIRY.
THEY CAN'T SAY THEY REVIEW THESE
CASES CAREFULLY.
>> IF THEY DO IT ALREADY THE
IMPACT IS LIKE TELLING THEM
SOMETHING THEY ALREADY KNOW.
>> WE ASK FOR A CURATIVE WHICH
CONSISTED OF DISREGARD AND WE
THINK WE WERE ENTITLED TO THAT,
DISREGARD ANY EFFORT TO
DENIGRATE A LIFE SENTENCE.
>> STARTED TO SEE THE HARM IF IT
IS SOMETHING THEY ALREADY KNEW.
TELL ME WHY I AM WRONG.
>> AS TO THE --
>> GOT TO PRESERVE THEM --
PRESUME THEY CAN ADD 2 PLUS 2.
THE ACKNOWLEDGMENT OF SOMETHING
THAT IS OBVIOUS.
>> THERE'S GOT TO BE IN
AGGRAVATION FOR THE STATE TO BE
ARGUING.
NONSTATUTORY AGGRAVATE HER'S OR
MITIGATION OR THE STATUTORY
AGGRAVATION, PRETTY MUCH LIMITED
TO THAT.
THEY CAME IN AND SAID IS IT
NOTHING?
>> I'M TALKING ABOUT THE HARM,
HOW YOU CAN THINK THIS IS GOING
TO HAVE ANY IMPACT ON THE WAY
THE JURY IS PROCESSING THIS.
>> THE POINT OF THE FREE
ARGUMENTS TAKEN AS A WHOLE
CREATED SIGNIFICANT HARM.
IT ESTABLISHED THE STATE'S
BURDEN TO ESTABLISH HARM.
>> I UNDERSTAND THE STATE HAS
THAT BURDEN.
>> THERE WAS A GUILT PHASE
ARGUMENT IN THE BRIEFS.
THE GUILT PHASE CLOSING, WHAT IS

THE FUNDAMENTAL ARGUMENT WE HAD
TO REACH FOR, THE MULTITUDE OF
OBJECTIONS.
THE ARGUMENT WAS AMUSING BY THE
STATE ATTORNEY TO THE EFFECT
THAT PREMEDITATION ON THE FLOOR
-- FLORIDA LIES ABROAD CONCEPT,
INSTEAD APPROACHING IT AWAY.
THE INTENT IS PRESENT DURING THE
ACT.
THAT IS WHAT HE SAID.
THE MOSQUITO SQUAD ANALOGY --
>> DOES THE COMMENT TO MAKE IT
SOUND AT LEAST POTENTIALLY THE
ONE OF THE ASPECTS OF THE
COMMENT MADE IT SOUND LIKE THE
INTENT WAS FORMED DURING THE
ACT.
>> THAT IS WHAT HE SAID.
THE STATUTE IS PREMEDITATION.
THE CASE LAW, PREMEDITATION IS
OR IS NOT.
>> ISN'T THE LAW, THE INTENTION
HAS TO BE PRIOR TO THE ACT.
BUT THEN IT HAS TO BE PRESENT
DURING THE ACT.
>> THIS IS CHERRY PICKING.
IN THE STANDARD JURY INSTRUCTION
OFFER, 5 SENTENCES ESTIMATE
PREMEDITATION BEFORE THE ACT AND
THE SECOND OF FIVE SENTENCES
SAYS IT IS DEPENDENT DURING THE
ACT.
TAKEN IN ISOLATION, IT IS
MISLEADING.
FUNDAMENTAL ERROR THIS COURT
HOLDS RECENTLY AFFIRMED IN THE
MICHIGAN SMITH CASE, FUNDAMENTAL
ERROR CAN BE COUNTED TO
CIRCUMSTANCES AT FIRST WHERE THE
VERDICT WOULDN'T BE REACHED WITH
THE ERROR AND WHEN JUSTICE WOULD
BE SERVED BY CORRECTING THE
ERROR.
I HAVE TO CONCEDE WE CAN'T BE
THE FORMER.
IN A CASE OF IMPROPER ARGUMENT
IS GOING TO BE VIRTUALLY
IMPOSSIBLE TO MEET THAT
STANDARD, THE STANDARD
ORIGINATED IN JURY INSTRUCTION
CASES MANAGER IS DIRECTED FROM
THE POSSIBLE OUTCOME IT IS EASY
TO REACH A DECISION OR IT IS

POSSIBLE TO REACH A DECISION ON
THE VERDICT COULDN'T HAVE BEEN
REACHED WITHOUT THE AID OF
ERROR.
WITH CLOSING ARGUMENTS WE JUST
CAN'T REPEAT THE STANDARD.
WE CAN'T CRACK THE JURORS HEADS
OPEN.
ISA BUT THE INTEREST OF JUSTICE
WOULD BE SERVED BECAUSE WE KNOW
COMMUNICATION WAS DISPUTED.
>> DON'T WE ALSO KNOW THAT
DISRUPTIONS TO THE JURY CONTAIN
MULTIPLE INSTANCES OF THE LEGAL
INSTRUCTIONS ON PREMEDITATION
BECAUSE OF THE NUMBER OF
DIFFERENT CRIMES HERE.
THE JURY WAS GETTING IT MULTIPLE
TIMES, CORRECTLY STATED, WE KNOW
THAT.
>> AND THEY WERE LOOKING AT.
>> HOW MANY TIMES MAYBE FOUR?
>> I CAN'T REMEMBER MAYBE THREE.
BUT THERE WAS NOT AN ASPECT IN
THIS CASE, THERE IS NO FALLBACK.
I SUBMIT THERE'S A RISK THAT IS
VERY MEMORABLE, A SNAPPY
ARGUMENT MADE ITS WAY TO THE
JURY ROOM AND THEY SHOULD HAVE
SAID THE VERDICT IS UNDERMINED
AND THE INTEREST OF JUSTICE
WOULD BE SERVED BY CORRECTING
THAT ERROR.
>> THAT COMMENT WAS WITH RESPECT
TO THE INSTRUCTIONS OR CRIME.
>> IT WAS MADE DURING A
DISCUSSION OF THE CRIME.
>> YOUR POSITION THAT IT AFFECTS
EVERYTHING ELSE.
>> THE COMMENT WASN'T LIMITED.
IT IS NOT ON THE CLOSING, THE
JURY INSTRUCTIONS CREATED A RISK
OF UNWARRANTED VERDICT IN BOTH
PHASES.
IN EACH PHASE THE DEFENSE ARGUED
FOR A CHANGE TO THE STANDARD
JURY INSTRUCTIONS.
WE ARGUED IN THE APPEAL THAT
OBJECTED TO INSTRUCTIONS WERE
CONFUSING AND THE GUILT PHASE
AND INACCURATE AND THE PENALTY
PHASE AND IT IS OUR POSITION THE
REVIEW OF THESE ORDERS SHOULD BE
FUN NO VOTE BECAUSE ARGUMENT

RAISE QUESTIONS IN THE LAW.
IN THE PENALTY PHASE WE OBJECTED SPECIFICALLY TO THE STATEMENT IN THE CLOSING INSTRUCTIONS SINCE 2018 WHICH IS IT IS THE DEFENDANT'S BURDEN OF PROOF THAT ONE OR MORE MITIGATING CIRCUMSTANCES EXIST.
THE STATE ADDRESSES A DIFFERENT ARGUMENT FOR MANY YEARS, THE STANDARD INSTRUCTIONS TALK IN TERMS OF WHETHER MITIGATION NOT WAIVED AGGRAVATION IN 2017 THAT WAS SWAPPED TO WHERE WE ARE NOT SAYING ANY MORE THAT THAT'S THE EFFECT.
OUR ARGUMENT IS THAT THE FLORIDA LEGISLATURE HAS NEVER CREATED A SITUATION WHERE THERE IS A BURDEN ON THE DEFENSE IN PENALTY PHASE CLOSING.
WE KNOW IN ARIZONA THAT THEY MAY DO SO BUT HAVE NOT DONE SO.
IF YOU LOOK AT EVERY VERSION OF 921.14 AND ITS PREDECESSOR TO 1972.
>> WHAT'S THE LANGUAGE OF THE STATUTE?
>> THERE SHALL BE AWAY IN FOR AGGRAVATION.
THERE SHALL BE A WAY IN.
DOES THAT ANSWER YOUR QUESTION?
>> IS THAT ALL IT SAID?
>> I'M DRAWING A BLANK.
THE SPECIFIC LANGUAGE, 2018, THE STANDARD INSTRUCTIONS DEFINED MITIGATION ESTABLISHED IF THEY WERE REASONABLY CONVINCED THAT IT EXISTED.
CAMPBELL VERSUS STATE IN 1990, THIS COURT NOTED MITIGATION MUST BE ESTABLISHED BY EVIDENCE.
I ARGUED IN THE BRIEF --
>> THAT'S WHAT I WAS LOOKING FOR, REASONABLY ESTABLISHED.
>> THANK YOU.
>> HOW WOULD YOU REASONABLY --
IT CAN BE REASONABLY ESTABLISHED BY SOMETHING THAT TOOK PLACE IN AGGRAVATION.
>> BUT ISN'T THAT CONSISTENT WITH THE PREPONDERANCE OF THE EVIDENCE?
>> I'M SORRY?

>> SO THAT'S, SO THAT'S -- SO
WHAT WOULD THAT BE, WHAT
STANDARD OF PROOF WOULD THAT BE
CONSISTENT OF?
>> I DON'T BELIEVE THERE IS A
STANDARD OF PROOF.
I BELIEVE IN THE ABSENCE OF ANY
LANGUAGE PLACING ONE ON THE
DEFENSE, IS --
>> -- COMPLICIT IN THAT?
>> NOT NECESSARILY IN THIS
CONTEXT.
VERY MUCH SO IN THE TRIAL
CONTEXT, BUT NOT SO MUCH IN
PENALTY PHASE BECAUSE THE STATE
SHOWS THE CIRCUMSTANCES OF THE
DEFENSE, WE SHOW THE DEFENDANT'S
BACKGROUND AND DIAGNOSES.
A LOT OF MITIGATION IS GOING TO
COME UP DURING THE DEFENSE CASE,
BUT THE WEAKNESS IN THE
AGGRAVATION IS ITSELF
MITIGATING.
MITIGATING, ACCORDING TO THE
U.S. SUPREME COURT, IS A SUPER
BROAD CONSENT WHICH CONSISTS OF
ANYTHING.
>> IT'S GOT TO BE THE
ESTABLISHED.
>> IT'S GOT TO BE THE
ESTABLISHED.
>> IT CAN'T JUST BE ASSERTED.
>> CORRECT.
>> SO ONCE YOU CONCEDE THAT IT'S
GOT TO BE ESTABLISHED, WHICH YOU
OBVIOUSLY HAVE TO CONCEDE, YOU
KNOW, YOU'VE GOT TO HAVE SOME
STANDARD FOR DETERMINING WHETHER
IT'S ESTABLISHED, IT SEEMS TO ME
ME.
UNLESS IT'S JUST TOTALLY
ARBITRARY.
>> THE STATUTORY LANGUAGE, I
THINK, IS BOUND TO EXIST.
SO ISN'T PREPONDERANCE THE
LOWEST STANDARD OF PROOF THAT
THE LAW --
>> YES, IT IS.
BUT IT'S OUR OPINION THAT MUCH
MITIGATION RISES FROM THE
INCONSISTENCIES AND WEAKNESSES
IN THE PURPORTED AGGRAVATION.
AND THAT -- WE ESPECIALLY OBJECT
TO LANGUAGE IN THE CURRENT CASES

BECAUSE THE LANGUAGE HAS MORPHED
FROM IF YOU FIND THEY'VE BEEN
REASONABLY ESTABLISHED TO IT'S
THE DEFENDANT'S BURDEN.
I AM VERY WORRIED THIS LANGUAGE
IS GOING TO LEAD JURORS TO
THINK, WELL, WE DIDN'T BELIEVE
ANYTHING OUT OF THEIR MOUTH, WE
HATE THEM BY NOW.
THEY DIDN'T PROVE ANYTHING
BELIEVABLE, IT COULD HAPPEN.
AND IF THEY'RE CONFRONTED WITH
LANGUAGE SAYING IT IS THE
DEFENDANT'S BURDEN TO PROVE THAT
ONE OR MORE MITIGATING
CIRCUMSTANCES EXIST, THEY MAY
SAY, WELL, THE BURDEN WASN'T
MET.
SO I'M VERY MUCH AFRAID THAT'S
THE CASE.
WE ASK THE COURT TO RETURN TO
ITS FORMER LANGUAGE OF REGARDING
REASONABLY ESTABLISHED.
YOU CAN SAY BY EITHER PARTY.
IT'S ALSO OUR ARGUMENT THAT
STRUCTURAL ANALYSIS, STRUCTURAL
ERROR ANALYSIS SHOULD APPLY
HERE.
I'M RELYING ON SULLIVAN V.
LOUISIANA.
MR. SULLIVAN WAS CONVICTED IN
LOUISIANA BEFORE THE U.S.
SUPREME COURT INVALIDATED THAT
STATE'S REASONABLE DOUBT
INSTRUCTION.
THE QUESTION WHEN HIS CASE GOT
TO THE SUPREME COURT WAS, CAN
THAT ERROR BE HARMLESS.
AND MR. JUSTICE SCALIA WRITING
FOR THE COURT SAID, NO, BECAUSE
THERE'S NO EFFECT ON THE JURY,
AND THEY LACK AN ACCURATE
EXPLANATION HOW TO APPLY THE LAW
TO THE FACTS.
IT'S A NECESSARY ASPECT OF JURY
INSTRUCTIONS.
THIS COURT SIMILARLY HELD THAT
THE BURDEN OF PROOF IS A
NECESSARY ASPECT OF THE PROOF IN
A CRIMINAL CASE.
AND JAN WAS A PRE-1999 CASE
WHERE INSANITY WAS RAISED AS A
DEFENSE.
THAT'S BACK WHEN THE STATE AND

DEFENSE SPLIT THE BURDEN OF
PROOF ON WHAT IS INSANITY.
AND THAT WAS NOT MADE CLEAR IN
THE STANDARD INSTRUCTION, AND
THIS COURT REVERSED.
IF HARMLESS ERROR ANALYSIS
APPLIES, THEN BECK V. ALABAMA
APPLIES.
IF A JURY INSTRUCTION ENHANCES
THE RISK OF AN UNWARRANTED
VERDICT, IT PRESENTS A PROBLEM.
AND FINALLY, AS TO THE GUILT
PHASE, OUR OBJECTION TO THE
STANDARD WAS TO THE DEFINITION
OF CLEAR AND CONVINCING AS IT
APPLIED TO THE INSANITY DEFENSE.
THE STATUTE SAYS INSANITY MUST
BE PROVED BY THE DEFENSE THESE
DAYS BY CLEAR AND CONVINCING
EVIDENCE.
WE HAVE NO OBJECTION TO THE
DEFINITION OF CLEAR IN THE
STATUTE, IN THE JURY
INSTRUCTIONS.
THAT DEFINITION IS PRECISE,
EXPLICIT AND LACKING IN
CONFUSION.
OUR OBJECTION IS TO THE
DEFINITION OF CONVINCING,
BECAUSE THE INSANITY JURY
INSTRUCTION WHICH DATES, I
BELIEVE, TO 2006 RECITES ONLY
ONE OF THE TRADITIONAL HALLMARKS
THAT THIS COURT, THE FLORIDA
COURTS HAVE GIVEN TO CONVINCING.
WHAT THE JURY INSTRUCTION SAYS
IS EVIDENCE IS CONVINCING IF IT
IS OF SUCH WEIGHT THAT IT
PRODUCES A FIRM BELIEF WITHOUT
HESITATION.
WHAT SOME OTHER JURY
INSTRUCTIONS SAY IS THAT
CONVINCING EVIDENCE IS THAT
WHICH MAKES IT HIGHLY PROBABLE
THAT THE ISSUE HAS BEEN PROVED.
AND ANOTHER THING THAT THE
COURTS SAY IN THE CIVIL
INSTRUCTION IN THIS PARTICULAR
IS THAT THE STANDARD IS AN
INTERMEDIATE ONE THAT FALLS
BETWEEN A PREPONDERANCE AND
BEYOND A REASONABLE DOUBT.
THIS COURT FREQUENTLY, WHEN IT
AFFIRMS OR OVERRULES THE ACTION

OF JQC WILL RECITE THAT IT LOOKS
AT A CLEAR AND CONVINCING
EVIDENCE STANDARD AND WILL
RECITE EVERY TIME THAT THAT'S IN
BETWEEN PREPONDERANCE AND BEYOND
A REASONABLE DOUBT.
AND THAT'S DONE, I ASSUME,
BECAUSE IT'S IMPORTANT FOR THE
PUBLIC TO UNDERSTAND WHY
LOCALLY-ELECTED JUDGES ARE BEING
TREATED IN THIS FASHION.
EITHER HIGHLY PROBABLE OR THE
STANDARD IS AN INTERMEDIATE ONE,
I THINK INTUITIVELY IMMEDIATELY
EXPLAINS WHAT CONVINCING
MEANS --
>> COUNSEL, I STRUGGLE WITH
UNDERSTANDING HOW TELLING A JURY
THAT IT'S AN INTERMEDIATE
STANDARD IS REALLY HELPFUL TO
THE JURY.
>> I THINK IT'S EXTREMELY
HELPFUL.
BUT BECAUSE THE PROBLEM WITH
THE --
>> BECAUSE THEN, BECAUSE THEN
YOU'VE GOT TO EXPLAIN THE OTHER
STANDARDS.
AND SO YOU'RE TALKING ABOUT,
YOU'RE TALKING ABOUT THREE
DIFFERENT STANDARDS.
AND THEN, LIKE, IT JUST KIND OF
GROWS, IT SEEMS LIKE TO ME.
BECAUSE JUST SAYING IT'S
INTERMEDIATE WITHOUT EXPLAINING
WHAT THE OTHER POLES ARE DOESN'T
REALLY TELL YOU ANYTHING.
>> YOU WOULD HAVE TO EXPLAIN THE
OTHER POLES.
AND SO THE CIVIL INSTRUCTION
COMMITTEE HAS DECIDED IN THE
CIVIL THEFT STATUTE WHEN THEY
SAY, YES, IF MORE THAN ONE
STANDARD OF PROOF PREVAILS, YES,
EXPLAIN THEM BOTH.
MAKE SURE THE JURY UNDERSTANDS.
IN A CAPITAL CASE IT'S CERTAINLY
IMPORTANT, I THINK, THAT THE
JURY UNDERSTAND WHERE IT'S
GOING.
WE'RE ARGUING STRUCTURAL
ANALYSIS.
>> I UNDERSTAND YOU HAVE TO TELL
THEM WHAT THE BURDEN OF PROOF IS

AND EXPLAIN IT TO THEM, BUT THE
IDEA OF TELLING THEM IT'S
INTERMEDIATE IS WHAT I QUESTION.
>> OKAY.
LET ME TRY THIS --
[LAUGHTER]
WHAT IT SAYS IS OF SUCH WEIGHT
THAT IT PRODUCES A FIRM BELIEF
WITHOUT HESITATION, THAT'S WHAT
THE STANDARD JURY INSTRUCTION ON
INSANITY SAYS.
BUT OUR POSITION IS AND WAS THAT
THAT'S TOO CLOSE TO THE
REASONABLE DOUBT LANGUAGE WHICH
IS THAT YOUR DOUBTS ARE
REASONABLE IF YOUR CONVICTION
THAT THE DEFENDANT IS GUILTY IS
NOT STABLE, BUT ONE WHICH WAVERS
AND VACILLATES.
BOTH OF THOSE CHUNKS OF LANGUAGE
GET THE JURY TO THINK, WELL, IF
I THOUGHT IT RIGHT AWAY, IT MUST
BE TRUE.
I SUBMIT IT'S NOT PARTICULARLY
GOOD ADVICE.
IF HARMLESS ERROR ANALYSIS
APPLIES, AGAIN, BECK V. ALABAMA
APPLIES, AND RECALL THAT A JURY
DID ASK ABOUT THE DSL.
THE STATE TAKES THE POSITION
SUBSTITUTED JUDGMENT FOR THAT OF
THE JURY BECAUSE THEY TAKE THE
POSITION THAT, WELL, THIS IS A
VERY WEAK CASE FOR INSANITY.
BUT AGAIN, I'LL RELY ON SULLIVAN
V. LOUISIANA WHERE THE COURT
WROTE THAT THE WRONG ENTITY
WOULD IN THAT SITUATION BE
DECIDING THE ISSUE.
AND GIVEN THE HIGH RISK FACTORS
I'VE IDENTIFIED AS TO BOTH
PHASES, I ASK THIS COURT TO HOLD
THE STATE'S FEET TO THE FIRE.
THANK YOU.
>> GOOD MORNING, MAY IT PLEASE
THE COURT, THIS IS A VERY
INTERESTING CASE.
THERE ARE A LOT OF ISSUES WITH
THE PROSECUTOR'S COMMENTS THAT
I'D LIKE TO START WITH.
SHE WENT INTO THE COMMENTS, THE
BURDEN SHIFTING.
YOU HAVE AN OBLIGATION TO TRY
YOUR BEST TO REACH A UNANIMOUS

VERDICT.
DEFENSE COUNSEL SAYS THIS WAS A MISSTATEMENT OF THE LAW MINIMIZING BOTH --
[INAUDIBLE]
THE STATE'S RESPONSE WAS THE PROSECUTOR NEVER USED THE WORD OBLIGATION BUT, RATHER, THAT THEY TRIED THEIR BEST.
AND AGAIN, WHAT THE PROSECUTOR WAS OBLIGATING THE JURY TO DO WAS TO MEET MEANINGFUL CONSIDERATION TO EVERYTHING, TO FOLLOW THE LAW, TO FOLLOW THE DIRECTION, TO COME TO THEIR VERDICT.
IN THIS CASE, IT WAS TAKEN OUT OF CONTEXT, AND WHAT THE PROSECUTOR ACTUALLY SAID IS, YOU ALL SAT AND LISTENED TO THE MULTIPLE STATUTES YOU HAVE TO TAKE IN ORDER TO REACH A LAWFUL VERDICT.
YOU HAVE DUTY TO DELIBERATE IN THIS CASE.
AND THERE'S BEEN DISCUSSION DURING JURY SELECTION AND AT MULTIPLE TIMES DURING THE TRIAL ABOUT WHAT IT MEANS TO DELIBERATE.
AND WHILE IT IS TRUE AS YOU'VE BEEN TOLD SEVERAL TIMES THAT YOUR DECISION AS TO WHETHER OR NOT A SENTENCE IS APPROPRIATE IS AN INDIVIDUALIZED DECISION, WHICH YOU LET THEM KNOW.
THAT'S NOTHING NEW TO YOU.
AND THAT IS SOMETHING YOU HAVE ALREADY DONE BECAUSE WHAT THE INSTRUCTIONS AND THE LAW TELLS YOU IS THAT EACH OF YOU MUST REACH AN INDIVIDUALIZED DECISION.
THE PROSECUTOR WAS VERY CLEAR ON THAT WHEN HE WAS SPEAKING TO THE JURY.
I WOULD SUGGEST TO YOU THAT YOU HAVE AN OBLIGATION TO GIVE MEANINGFUL CONSIDERATION TO EVERYTHING, AND NOT ONLY THAT, BUT THAT YOU TRY YOUR BEST TO REACH A UNANIMOUS VERDICT.
AND THIS IS WHEN THE OBJECTION TOOK PLACE, AND IT WAS

OVERRULED.
I SAY THAT KNOWING THAT YOU ALL MAY UNANIMOUSLY DECIDE THAT MR. LOYD DESERVES LIFE IN PRISON WITHOUT PAROLE.
IT'S AN IMPORTANT DECISION THAT YOU WILL MAKE, UNDERSTANDING THAT IT IS AN INDIVIDUALIZED DECISION.
THERE WAS NOTHING WRONG IN THE STATEMENT THAT THE PROSECUTOR MADE TO THE JURY.
IT WAS MADE IN THE SENSE OF FOLLOWING THE JURY INSTRUCTIONS, THEIR OBLIGATION TO FOLLOW THE JURY INSTRUCTIONS AND TO TRY TO REACH A VERDICT.
IF YOU DO FIND THAT IT WAS ERROR, IT WAS HARMLESS.
IT WAS A SINGLE, ISOLATED COMMENT THAT ON THE WHOLE ASKED THE JURY TO REACH A DEATH RECOMMENDATION BASED ON THE EVIDENCE.
THE JURY WAS PROPERLY INSTRUCTED BY THE COURT, INCLUDING THE FACT THAT A UNANIMOUS VERDICT WAS NOT REQUIRED.
THAT WAS REQUIRED, SORRY.
AND SO THE DEFENSE COUNSEL IN THEIR CLOSING ARGUMENTS AGAIN STRESSED TO THE JURY, YOU COULD ACTUALLY WITHOUT QUESTION FIND THAT THE AGGRAVATING FACTOR OUTWEIGH THE MITIGATING FACTORS, AND WE, THE JURY, UNANIMOUSLY FIND THE DEFENDANT SHOULD BE SENTENCED TO DEATH.
IF ONE JUROR, EVEN IF THEY BELIEVE THE AGGRAVATORS OUTWEIGH THE MITIGATORS, THEY DON'T HAVE TO GO TO DEATH.
FOR A DEATH SENTENCE TO OCCUR, IT HAS TO BE ALL 12 UNANIMOUSLY.
AND WHEN YOU GO BACK THERE, YOU MAKE THE DECISION.
IT IS YOUR DECISION.
ONE JUROR IS A LIFE VERDICT, END OF STORY.
THE JURY WAS WELL VERSED ON WHAT THE INSTRUCTIONS, WHAT THE RESPONSIBILITY WAS.
DEFENSE ALSO ACCUSES THE PROSECUTOR THAT THERE WAS NO

NEED TO ADDRESS THE STATUTORY CIRCUMSTANCE REGARDING THE DEFENDANT'S CAPACITY TO APPRECIATE THE CRIMINALITY OF MISCONDUCT.
NOW, THE COMMENT WAS NOT IMPROPER BECAUSE HE WAS ATTEMPTING TO REBUT THE MITIGATING CIRCUMSTANCE ARGUED BY THE DEFENSE.
AND AGAIN, HIS STATEMENT WAS TAKEN OUT OF CONTEXT.
WHAT HE ACTUALLY SAID WAS, SO THE NEXT MITIGATING CIRCUMSTANCE I WANT TO TALK ABOUT IS THE ALLEGATION THAT MR. LOYD'S CAPACITY TO APPRECIATE THE CRIMINALITY OF THE CONDUCT OR CONFORM TO THE REQUIREMENTS OF LAW WERE SUBSTANTIALLY IMPAIRED.
MY RECOLLECTION IS THAT THE ONLY TESTIMONY CAME FROM DR. KALINO, AND IT CAME AT THE END, AND HE WAS ASKED A SPECIFIC QUESTION, AND HE CLARIFIED THAT IN HIS VIEW MR. LOYD UNDERSTOOD AND APPRECIATED THE CRIMINALITY OF HIS CONDUCT.
SO IN THAT FULL SENTENCE, HE WAS ASKING THE JURY TO REMEMBER THE TESTIMONY FROM MR. KALINO AND THAT EVEN HE COULD NOT FIND THAT HE DID NOT UNDERSTAND WHAT HE DID.
NOW, THE STATEMENT THAT THEY'RE TALKING ABOUT COMES AFTER THAT.
AND IF HERE AGAIN YOU HAVE ALREADY MADE A DETERMINATION BY REJECTING HIS INSANITY DEFENSE, YOU DETERMINE THAT HE KNEW THE DIFFERENCE BETWEEN RIGHT OR WRONG.
THE STATE IS FREE TO ARGUE AGAINST THE MITIGATION IN THE CASE.
THEN WENT ON TO ARGUE WHY THERE WAS NO EVIDENCE.
AND IT'S A WHOLE SPEECH ABOUT WHY THE MITIGATION WAS NOT MET.
IT WAS NOT IN ANY WAY, SHAPE OR FORM TELLING THE JURY TO DENY THE MITIGATION THAT THE DEFENSE WAS TRYING TO PRESENT.
IN FACT, HE URGED THE MEMBERS TO

USE THE RECOLLECTION OF THE
EVIDENCE INTRODUCED AT TRIAL IN
ORDER TO SEE WHETHER OR NOT THE
MITIGATOR WAS PROVEN.
AND EVEN IF THE COMMENT WAS
IMPROPER, ANY ERROR IS HARMLESS.
THERE WAS NO REASONABLE
PROBABILITY THAT THAT
CONTRIBUTED TO THE DEATH
SENTENCE.
THE FACTS SUPPORT THE JURY'S
REJECTION OF THIS MITIGATOR,
THAT THE DEFENDANT KNEW WHAT HE
WAS DOING THAT DAY.
THAT AFTER KILLING HIS
GIRLFRIEND AND HER UNBORN CHILD,
HE HID IN THE WOODS, THAT HE
WENT TO THE WALMART AND WHEN HE
SAW THE POLICE OFFICER AND SHE
TOLD HIM TO STOP, HE KNEW WHY HE
WAS BEING TOLD TO STOP.
IN FACT, HE WAS WEARING A
BULLETPROOF VEST, SO HE KNEW
WHAT THE CONSEQUENCES WOULD BE
IF HE WAS CAUGHT.
AND ULTIMATELY, THIS LIEUTENANT
PAID THE PRICE FOR THAT.
WHEN HE FLED THE SCENE AND WAS
ENCOUNTERED BY THE NEXT OFFICER,
HE KNEW AGAIN WHAT HE WAS DOING,
AND HE KNEW THAT HE WAS NOT
GOING TO GO BACK TO JAIL, AND HE
ATTEMPTED TO MURDER THAT
OFFICER.
AND HE CONTINUED TO FLEE.
SO ACTIONS DEMONSTRATED BY
MR. LOYD BEFORE, DURING, AFTER
THIS SHOW THAT HE UNDERSTOOD THE
CONSEQUENCES OF HIS ACTIONS, AND
HE KNEW WHAT HE WAS DOING.
AS FAR AS THE COMMENT REGARDING
THE TWO LIFE SENTENCES, AS
DEFENSE STATED, THE JURY WAS
WELL VERSED ON THIS.
THEY KNEW THAT HE WAS ALREADY
SENTENCED TO LIFE.
AND THE COMMENT WAS A VERY BRIEF
PORTION OF THE STATE'S ENTIRE
CLOSING ARGUMENT.
AND I KNOW THEY COMPARE IT TO
THE PACE AND SPIVY, AND MUCH
LIKE THE SLAP ON THE WRIST
COMMENT, THERE'S NOT A
REASONABLE PROBABILITY THAT THE

FIGURATIVE LANGUAGE USED HERE
CHANGED ANY OF THE OUTCOME OF
THE CASE.
AND, AGAIN, ANY ERROR WOULD BE
HARMLESS, BECAUSE IT IS VERY,
VERY UNLIKELY THAT A DIFFERENT
SENTENCE WOULD HAVE BEEN IMPOSED
HAD THAT COMMENT NOT BEEN SAID.
AS FAR AS CLAIM THREE, THE
PREMEDITATION SHOWN TO EXIST
DURING THE ACT, DEFENSE COUNSEL
STATES -- OR CITES TO REID V.
STATE.
THIS WAS NOT AN INCORRECT JURY
INSTRUCTION, BUT A CLOSING
ARGUMENT.
AND AGAIN, VIEWING THE COMMENT
NOT IN ISOLATION BUT IN THE
ENTIRE CONTEXT, WHAT HE SAID WAS
NOT IMPROPER.
THE JURY INSTRUCTION, FIRST OF
ALL, WAS ON A SCREEN BEHIND HIM
THAT THE JURY COULD READ AS HE
WAS MAKING HIS CLOSING
ARGUMENTS.
AND WHAT THE JURY INSTRUCTION
SAYS IS THAT VISION MUST BE
PRESENT AT THE TIME OF THE
KILLING.
WHAT HE SAID IS YOU LOOKED AT A
MOSQUITO.
YOU SEE IT, WHAT DO YOU DO?
THERE'S A CONSCIOUS CHOICE IN
YOUR MIND TO DO ONE OR THE
OTHER.
AND IT MAY TAKE A MATTER OF
SECONDS TO MAKE THAT DECISION,
BUT IF YOU SMACK IT, THAT'S AN
INTENT TO KILL THAT WAS FORMED
IN YOUR MIND AT THE TIME AND
DURING THE ACTUAL ACT.
>> ISN'T THAT A LITTLE
MISLEADING?
BECAUSE IF YOU -- DOESN'T IT
SUGGEST THAT THE INTENT IS
FORMED DURING THE ACT?
>> WHEN HE SAYS IT THERE, THE
WAY HE SAYS IT IS THE MOSQUITO'S
THERE AND YOU'RE LOOK AT IT, AND
BEFORE YOU SMACK IT, YOU'RE
MAKING THAT CONSCIOUS CHOICE OF
WHAT AM I GOING TO DO?
AM I GOING TO LET IT FLY AWAY,
OR AM I GOING TO SMACK IT?

AND HE FOLLOWS IT UP WITH YOU MAKE THAT CHOICE, AND YOU SMACK IT.
AS THE JURY INSTRUCTION SAYS, IT'S ALSO PRESENT AT THE TIME OF THE KILLING.
SO WHEN HE SAYS AT THE TIME OF THE ACT, IT WAS FORMED IN YOUR MIND PRIOR TO, YOU THOUGHT ABOUT IT, YOU DECIDED TO KILL THE MOSQUITO AND IT'S STILL PRESENT DURING THE ACT WHICH IS WHAT THE JURY INSTRUCTION SAYS.
AND EVEN IF YOU WERE TO FIND THAT WAS AN INCORRECT STATEMENT, HE FOLLOWED THAT UP WITH ACTUAL FACTS FROM THE CASE.
HE TELLS THEM -- HE DOESN'T JUST GIVE THIS EXAMPLE AND LEAVE IT OUT THERE, HE SAYS, AND AGAIN, THE STATE SAID THIS WAS REALLY ONLY TO COUNT TWO, WHICH WAS THE OFFICER WHERE HE ATTEMPTS TO KILL HIM.
HE FOLLOWS THIS EXAMPLE WITH FACTS OF THE CASE.
THEN HE TELLS THE JURY, DO YOU REMEMBER WHEN THE TESTIMONY WAS THE OFFICER PULLED IN, LOYD WAS ALREADY THERE OUTSIDE OF HIS CAR WAITING, STANDING THERE.
AND OFFICER CLAYTON PULLED IN, PARKED HIS CAR, STARTED TO STEP OUT OF HIS VEHICLE, AND LOYD TOOK THE GUN AND POINTS IT AT HIM.
HE HAD A CONSCIOUS CHOICE TO MAKE; TO FLEE, TO GET BACK IN THE CAR.
BUT HE WAS THERE LAYING IN WAIT FOR THAT OFFICER TO COME OUT, AND HE SHOT HIM.
AND THE CIRCUMSTANCES AGAIN FROM WHAT JUST HAPPENED AT THE WALMART, HE WAS NOT GOING TO GO DOWN.
HE WAS GOING TO KILL BEFORE HE WAS CAUGHT.
SO HE FOLLOWED UP WITH THE ACTUAL FACTS OF THE CASE TO SHOW THE PREMEDITATION THAT IS CLEAR FROM THE FACTS THAT THAT WAS A PREMEDITATED ACT ON LOYD'S BEHALF.

I BELIEVE THAT THERE WAS ALSO AN ISSUE WITH THE INSANITY INSTRUCTION.
JURY INSTRUCTIONS ARE PRESUMED TO BE CORRECT, AND THE CLEAR AND CONVINCING EVIDENCE STANDARD HAS BEEN AROUND FOR AT LEAST A DECADE.
THE DEFENSE WASN'T ASKING FOR A SPECIAL JURY INSTRUCTION TO FIT IN WITH ANY UNUSUAL CIRCUMSTANCES OF THE CASE OR BECAUSE A STATUTE HAD BEEN CHANGED OR FOR ANY OTHER REASON THAN TO CHANGE DEFINITION OF CLEAR AND CONVINCING EVIDENCE TO MAKE IT A LITTLE BIT EASIER.
THEY DID NOT HAVE AN ISSUE WITH PRECISE, EXPLICIT, LACKING IN CONFUSION WHICH DURING THE CLOSING ARGUMENT THE PROSECUTOR STATED: SO I WOULD ASK YOU AS THE ARGUMENT IS MADE TO YOU THAT YOU LISTEN CAREFULLY TO DEFENSE COUNSEL'S ARGUMENT BUT ASK, IS THERE EVIDENCE THAT IS CLEAR AND CONVINCING THAT MR. LOYD WAS INSANE.
IS IT, TO USE THE LANGUAGE OF THE INSTRUCTION, PRECISE, EXPLICIT AND LACKING IN CONFUSION.
THE PROSECUTOR DIDN'T EVEN MENTION THE PART THAT THEY'RE HAVING AN ISSUE WITH.
NOW, IN ORDER TO GET A SPECIAL INSTRUCTION YOU HAVE TO MAKE SURE THAT IT'S A CORRECT STATEMENT OF THE LAW AND NOT MISLEADING OR CONFUSING.
NOW, THEY WANTED TO SAY THAT THE DEFENDANT'S CLAIM IS HIGHLY PROBABLE.
WELL, WHAT DOES HIGHLY PROBABLE MEAN BUT VERY LIKELY?
AND A PREPONDERANCE OF THE EVIDENCE IS ENOUGH EVIDENCE TO PERSUADE YOU THAT THE DEFENDANT'S CLAIM IS MORE LIKELY THAN TRUE.
SO THE STATE'S POSITION IS THAT CHANGING THAT DEFINITION TO HIGHLY PROBABLE WOULD BE MORE CONFUSING TO THE JURY THAN THE

CLEAR AND CONVINCING STANDARD
THAT WAS ACTUALLY INSTRUCTED TO
THE JURY AND HAS BEEN UPHELD TO
BE A CORRECT INSTRUCTION AND HAS
NEVER BEEN HELD TO A HIGHER
BURDEN BEYOND A REASONABLE
DOUBT.
AND AGAIN, YES, THE OPINIONS OF
THE MENTAL HEALTH SPECIALISTS
WHO TESTIFIED ALL HAD
INCONSISTENT, CONTRADICTORY
OPINIONS.
SO IT'S VERY UNLIKELY THAT THAT
CHANGE IN THE INSTRUCTION WOULD
HAVE CHANGED THE VERDICT IN THIS
CASE REGARDING THE INSANITY
DEFENSE.
THE FACTS CLEARLY ESTABLISH THAT
MARKEITH LOYD COMMITTED
COLD-BLOODED MURDER.
HE SHOT OFFICER KLAIN BECAUSE HE
WANTED TO GET AWAY, NOT BECAUSE
HE WAS INSANE.
AND I BELIEVE THE LAST ISSUE
THAT WAS DISCUSSED WAS THE
BURDEN SHIFTING.
AS JUSTICE CANADY SAID, IT HAS
TO BE ESTABLISHED BY SOME
FLORIDA STANDARD, AND IT
REASONABLY ESTABLISHED BY THE
GREATER WEIGHT OF THE EVIDENCE
AS THE LOWEST STANDARD THERE IS.
AND THE DEFENDANT IS IN THE BEST
POSITION TO PROVE THAT
MITIGATING, THE MITIGATORS IN
THE CASE.
AND AGAIN, THIS COURT HAS
REPEATEDLY REFUTED ANY ISSUES
REGARDING THE BURDEN SHIFTING
NOT OCCURRING, AND THERE HAS TO
BE SOME SORT OF STANDARD IN
ORDER TO PROVE IT, YOU JUST
DON'T ACCEPT IT AS IS.
IF THERE ARE NO QUESTIONS --
>> I ACTUALLY HAVE A QUESTION,
AND THIS IS ON SOMETHING THAT
WAS NOT MENTIONED IN THE
ARGUMENT, BUT THE BRIEF.
IT HAS TO DO WITH A VIDEO OF THE
VICTIM IMPACT EVIDENCE.
>> CORRECT.
>> IN PARTICULAR, THE MUSIC.
>> YES.
>> I STRUGGLE TO UNDERSTAND WHAT

PROBATIVE VALUE MUSIC ON THE
VIDEO COULD HAVE.
>> THE MUSIC VIDEO, OR THE VIDEO
MONTAGE WAS ABOUT TWO MINUTES
LONG, AND THERE WAS MUSIC ON
THERE.
>> THAT'S WHY I ASKED THE
QUESTION.
>> RIGHT.
THE REASONING FOR IT, THERE WAS
NO SPECIFIC REASON OTHER THAN
THE VICTIMS WANTED THAT TO BE AN
ACCOMPANIMENT TO IT.
THE JUDGE DID LOOK AT THE VIDEO
AND LISTENED TO THE MUSIC PRIOR
TO IT AND DETERMINED THAT IT
WOULD BE ADMISSIBLE.
I DO UNDERSTAND THAT THERE ARE
CIRCUMSTANCES IN THE CASES THAT
WERE CITED WHERE MUSIC WAS NOT
THE BEST CHOICE TO MAKE.
AND IN THOSE CASES, THE MUSIC
WENT ON, THE VIDEOS WENT ON FOR
15 MINUTES, 20 MINUTES.
THE MUSIC WAS ACTUALLY "MY HEART
WILL GO ON" OR SONGS THAT WERE
MEANT TO INVOKE MORE SYMPATHY
AND MORE PASSION.
AND IN THOSE CASES, THE COURT
RULED THAT IT WAS HIGHLY
PREJUDICIAL.
IN THIS CASE IT WASN'T, IT WAS
JUST MUSIC BACKGROUND TO THE
PICTURES THAT DIDN'T DO ANY MORE
THAN WAS ALREADY PRESENT.
THE FACT THAT THERE WAS MUSIC
PLAYING DID NOT EVOKE ANY MORE
EMOTION THAN WHAT THE FACTS OF
THE CASE --
>> BUT IT SOUNDS, IT SOUNDS LIKE
YOU ARE CONCEDING THAT THE MUSIC
ITSELF HAD NO PROBATIVE VALUE,
RIGHT?
IT WASN'T EVIDENCE IN THE CASE.
>> IT WAS NOT EVIDENCE --
>> ALL RIGHT.
SO THE QUESTION BECOMES IF IT
HAD NO EVIDENTIARY VALUE, WAS
IT, WAS THE ZERO OF THAT VALUE
SUBSTANTIALLY OUTWEIGHED BY THE
POTENTIAL TO INFLUENCE
INAPPROPRIATELY THE JURY?
AND IT SOUNDS LIKE IT TAKES VERY
LITTLE TO OVERWHELM ZERO.

SO IF IT HAS ZERO PROBATIVE
VALUE AND IT HAS ANY KIND OF,
YOU KNOW, EFFECT ON THE JURY, IT
DOESN'T HAVE TO BE "MY HEART
WILL GO ON," IT'S CLEARLY THERE,
YOU KNOW, TO INFLUENCE THE JURY.
LEAVING ASIDE HARMLESS ERROR
ANALYSIS FOR JUST ONE MOMENT --
>> SURE.
>> -- DOES THE STATE CONCEDE
THAT IT'S ERROR THEN TO HAVE
INCLUDED THE MUSIC WITH THE
VIDEO?
>> I DON'T CONCEDE THAT.
I FEEL LIKE IN THIS DAY AND AGE
WE'VE GONE FROM JUST VICTIM
IMPACT STATEMENTS THAT ARE JUST
VOCAL TO READING SOMETHING,
PICTURES AND NOW TO THE MUSIC.
AND EVEN DEFENSE CONCEDED THAT
IT WASN'T SO MUCH THE MUSIC, BUT
THAT IT SHOULD ONLY BE
APPLICABLE TO MUSICIANS OR
SOMEONE WHO HAD AN AFFINITY FOR
MUSIC.
SO WHERE DO WE DRAW THE LINE --
>> WELL, BECAUSE THIS WASN'T
MUSIC THAT WAS PARTICULARLY
IDENTIFIED WITH THE VICTIM.
>> YEAH, IT WAS NOT.
>> IT WAS NOT LIKE THE VICTIM'S
FAVORITE SONG.
THAT MIGHT BE A DIFFERENT
CATEGORY --
>> RIGHT, BACKGROUND MUSIC.
>> -- THIS IS BACKGROUND MUSIC.
AND WHAT I STRUGGLE -- LEAVE
ASIDE THE QUESTION ABOUT WHETHER
IT'S THE VICTIM'S FAVORITE SONG,
BECAUSE THAT'S NOT BEFORE US.
BUT IF IT'S JUST BACKGROUND
MUSIC, I STRUGGLE TO, I'M JUST
STRUGGLING TO SEE WHAT THE, AS I
SAID, THE PROBATIVE VALUE OF IT.
I MEAN, I UNDERSTAND WHY PEOPLE
MIGHT WANT IT --
>> RIGHT.
>> -- BUT I DON'T, BUT AGAIN,
THIS IS NOT A SHOW, THIS IS
ABOUT PRESENTING EVIDENCE,
VICTIM IMPACT EVIDENCE --
>> CORRECT.
>> AND I DON'T SEE HOW THIS
PARTICULAR BACKGROUND MUSIC

CONTRIBUTES TO THAT.
I DON'T -- IF YOU GET TO THE HARMLESS ERROR QUESTION, THAT'S A WHOLE DIFFERENT ISSUE.
>> RIGHT.
>> I UNDERSTAND THAT.
>> RIGHT.
AS FAR AS THE PURPOSE OF IT, IT WAS NOT A SONG THAT WAS ASSOCIATED WITH HER OR ANY KIND OF RELEVANCE TO THEM.
>> I'VE BEEN ON BOTH SIDES OF THIS, PROSECUTING AND DEFENDING, INVOLVING VICTIMS' FAMILY ON THE STATE SIDE, INVOLVING THE OTHER SIDE ON THE DEFENSE SIDE.
AND I'VE NEVER HEARD OF MUSIC IN THE IMPACT STATEMENT PART OF SENTENCING.
IT KIND OF REMINDS ME WHEN WE ATTEND FUNERALS AND THEY HAVE A MONTAGE OF PHOTOGRAPHS AND VIDEO CLIPS OF THE VICTIM, IT'S IN THE FAMILY AND THAT TYPE OF THING, AND THEY ALWAYS HAVE THIS BACKGROUND MUSIC.
AND IT'S VERY EFFECTIVE AS FAR AS, YOU KNOW, PLAYING TO EMOTIONS.
>> CORRECT.
>> WHAT -- EVEN AN INSTRUMENTAL, I BELIEVE IN THIS CASE IT WAS JUST AN INSTRUMENTAL --
>> RIGHT, JUST BACKGROUND.
>> WHAT POSSIBLE REASON OTHER THAN TO DRAW THAT TYPE OF EMOTION WOULD IT HAVE?
I JUST NEVER, I NEVER -- IS THIS SOMETHING NEW THAT JUST STARTED RECENTLY?
>> THERE AREN'T VERY MANY CASES THAT HAVE DONE MUSIC.
AND AS I SAID, THE ONES THAT HAVE USED MUSIC IN THE BACKGROUND TOOK IT TO A WHOLE NEW EXTREME.
>> RIGHT.
>> BUT AS I SAID, YES, IT'S -- I GUESS AS TIME GOES ON AND THINGS EVOLVE, IT GOES FROM JUST PAPER TO MUSIC TO VIDEOS TO PICTURES.
THE FACT OF THE MATTER IS THAT WHETHER THE BACKGROUND MUSIC BROUGHT OUT ANY MORE EMOTION

THAN THE FACTS OF THE OFFICER
KILLED AND SEEING THOSE PICTURES
OF THE OFFICER, YOU CAN SAY THEY
DISREGARDED THE MUSIC AND WERE
INTENT ON THE PICTURES.
I MEAN, NOT EVERYONE -- THAT'S
TAKING THE STANCE THAT EVERYONE
IS AFFECTED BY MUSIC.
SOME PEOPLE, MUSIC HAS NO EFFECT
ON THEM AT ALL.
IT'S JUST BACKGROUND NOISE, AND
WHAT THEY WERE CONCENTRATING ON
WAS THE PHOTOS.
SHOULD THEY HAVE USED THE MUSIC?
YES, NO, IT WASN'T REALLY
NECESSARY FOR IT.
BUT DID IT CHANGE THE OUTCOME OF
THE TRIAL?
WAS IT HARMLESS OR NOT?
AND THE FACT OF THE MATTER IS
THAT WHETHER OR NOT THE MUSIC
WAS PLAYED, THE FACTS OF THE
CASE ARE VERY HORRENDOUS.
THAT'S WHAT THE JURY CAME BACK
WITH A DEATH SENTENCE ON.
NOT BECAUSE THERE WAS MUSIC
PLAYED OR NOT EVEN IF THERE WERE
PICTURES PLAYED.
FACT OF THE MATTER IS THAT
OFFICER CLAYTON WAS GUNNED DOWN
AT THE WALMART WHILE SHE WAS
SHOPPING, TRYING TO STOP
MARKEITH LOYD.
AND IT WAS ALL CAPTURED ON
VIDEO.
AND HE HAD A CHANCE TO LET HER
LIVE BECAUSE, AS THE MEDICAL
EXAMINER SAID, THE FINAL SHOT --
OR THE SHOT THAT KILLED HER WAS
THE NECK.
HE HAD SHOT HER AND SHE WAS
DOWN, AND HE COULD HAVE FLED THE
SCENE AND SHE'D BE ALIVE TODAY.
>> AM I CORRECT IN UNDERSTANDING
THAT HE ACTUALLY STOOD OVER
HER --
>> YES.
>> -- AND ADMINISTERED THE FINAL
SHOT?
>> RIGHT.
>> SHE WAS DOWN.
HE HAD AN OPPORTUNITY TO FLEE --
>> -- DO WE KNOW WHETHER THE
NECK SHOT WAS THE FINAL SHOT?

>> THAT WAS THE FATAL SHOT.
>> RIGHT, OKAY.
>> BUT FROM WITNESSES THAT SAW THE INCIDENT AND CAPTURED ON FILM, HE WENT, PHYSICALLY WALKED OVER TO HER AND SHOT HER.
>> RIGHT.
>> ON THIS MUSIC THING THOUGH, I MEAN, WHAT -- AND IT DOESN'T SEEM REASONABLE TO THINK THAT IT AFFECTED THE OUTCOME HERE IN THIS CASE.
BUT WHAT WOULD BE WRONG WITH A CATEGORICAL RULE THAT JUST SAYS UNLESS THERE'S SOME EVIDENTIARY PURPOSE FOR PLAYING THE MUSIC, THEN DON'T PLAY THE MUSIC?
IT'S NOT PERMITTED.
>> BECAUSE WE ALREADY HAVE THE PAYNE GUIDELINES TO SEE WHETHER OR NOT IT WOULD BE PREJUDICIAL.
I THINK WE GET INTO A WHOLE NEW --
>> BUT THAT'S ABOUT EVIDENCE.
>> WHETHER OR NOT --
>> SO IF IT'S NOT EVEN BEING USED TO PROVE SOMETHING, THEN WHAT, I MEAN, IT JUST SEEMS LIKE SYSTEMICALLY IT WOULD BE BETTER TO KIND OF STOP THE PRACTICE.
I'M NOT SAYING THAT, I'M NOT SAYING THAT IT AFFECTED THE OUTCOME HERE, BUT, I MEAN, PART OF WHAT WE DO IN THESE OPINIONS IS WE SAY, WELL, X OR Y OR Z SHOULDN'T HAVE HAPPENED, IT WAS AN ERROR, AND IT JUST SEEMS LIKE IF IT'S NOT, IF THERE CAN'T EVEN -- IF THE PROSECUTION CAN'T EVEN ARTICULATE AN EVIDENCE-BASED REASON FOR DOING IT, THEN IT SHOULDN'T BE PERMITTED, PERIOD.
WHAT'S WRONG WITH THAT?
>> AS FAR AS NO MUSIC AT ALL OR IT HAS TO BE RELEVANT --
>> IT HAS TO BE, IT HAS TO BE, YOU KNOW, SOME FORM OF EVIDENCE, SOME FORM OF AN ATTEMPT TO, YOU KNOW, WHERE THE MUSIC IS BEING USED TO PROVE SOMETHING.
>> OKAY.
OR -- SO YOU'RE SAYING, I GUESS IF THE DEFENSE SAID IT HAD TO DO

IF THEY WERE A MUSICIAN AND YOU WANTED TO PLAY THAT AS A BACKGROUND --
>> THAT'S AT LEAST, THEN YOU GET INTO ALL THE ARGUMENTS ABOUT, YOU KNOW, IS IT PREJUDICIAL OR WHATEVER.
>> RIGHT.
THAT WOULD BE A CASE-BY-CASE BASIS.
AS FAR AS THE MUSIC BEING PLAYED, DID IT HAVE TO BE PLAYED?
NO.
IT REALLY WASN'T TIED INTO ANYTHING, BUT IT ALSO DIDN'T CAUSE ANY ISSUES ON THE OTHER SIDE.
BUT I THINK MUSIC, AS THEY STATED, BE USED.
I DON'T THINK THERE SHOULD BE A BRIGHT LINE, COMPLETE CUTOFF THAT THERE SHOULD NOT BE ANY MUSIC.
THAT'S WHY YOU HAVE THE EVIDENCE BEFORE THE JUDGE, AND HE SEES IT --
>> WELL, I DON'T, I THINK THAT WHAT'S NOT -- I DON'T THINK ANYBODY'S SUGGESTING BRIGHT LINE NO MUSIC.
I THINK WHAT WE MIGHT BE SUGGESTED IS A RULE THAT THERE'S NO MUSIC UNLESS IT HAS PROBATIVE VALUE OF SOME SORT.
AND I THINK YOU CONCEDED THIS HAS NO PROBATIVE VALUE.
IT'S JUST BACKGROUND MUSIC.
INDEED, IT MIGHT BE A DISTRACTION.
>> RIGHT.
RIGHT.
I MEAN --
>> FROM THE IMAGES THAT ARE SHOWN, WHICH IN THE CONTEXT OF WHAT THE JURY HAVE HEARD, I'M SURE, ARE VERY POWERFUL AND HAVE AN IMPACT.
BUT, I MEAN, VICTIM IMPACT EVIDENCE IS NOT MEANT TO HAVE NO IMPACT, SO, BUT THERE'S THIS ELEMENT IN IT THAT HAS NO, IT'S THE NOT REALLY PROVING ANYTHING, IT'S NOT SHOWING ANYTHING.

I JUST, I STRUGGLE WITH IT.
>> YEAH, I AGREE.
BUT --
[LAUGHTER]
IN THIS CASE WHETHER OR NOT IT WAS RELEVANT OR NOT, I DON'T BELIEVE THAT IT IMPACTED THE VERDICT IN ANY WAY.
IF THERE ARE NO FURTHER QUESTIONS, THE STATE WOULD RESPECTFULLY ASK THAT YOU AFFIRM MR. LOYD'S SENTENCE AND CONVICTION.
>> THANK YOU, YOUR HONOR, FOR BRINGING UP THE VICTIM IMPACT POINT.
I'M IN AGREEMENT WITH WHAT I'M HEARING, WHICH IS THAT VICTIM IMPACT IS MEANT TO EMPHASIZE THE UNIQUENESS OF THE VICTIM.
IF THE VICTIM HAD BEEN A CONCERT PIANIST, FOR EXAMPLE, YOU'D EXPECT MUSIC REASONABLY.
I ASK THE COURT TO JOIN WITH THE COURTS OF TEXAS, CALIFORNIA, ALASKA AND NEW JERSEY THAT WERE CITED IN THE BRIEFS.
THE STATE DID MAKE THE ARGUMENT THAT, WELL, THE FACTS WERE UPSETTING.
THAT'S JUST WHY THE JURY EMOTIONS SHOULDN'T BE TWEAKED IN THIS FASHION.
THE VERDICT SHOULD REST ON ARGUMENT BY THE COURT AND THE FACTS BY THE PARTIES RATHER THAN EMOTION.
AS JUSTICE LABARGA SAID, AFTER WEIGHING THE TEXAS APPELLATE COURT, IT'S NOT A FUNERAL SERVICE, IT'S A SENTENCING.
AND AS THE COURT HELD IN WHEELER AND AS THE SUPREME COURT HELD IN PAYNE, IF VICTIM IMPACT BECOMES AN UNDUE FOCUS, THEN THERE'S A DUE PROCESS PROBLEM.
I ASK THE COURT TO REVERSE ON THE GROUNDS RAISED TODAY IN BOTH GUILT PHASE AND PENALTY PHASE.
>> THANK YOU VERY MUCH.