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Gregory Mills v. Michael W. Moore

MR. CHIEF JUSTICE: THE FINAL CASE ON THE COURT'S CALENDAR THIS MORNING IS MILLS VERSUS MOORE.

GOOD AFTERNOON. MAY IT PLEASE THE COURT. TODD SHERER ON BEHALF PETITIONER IN THIS CASE, GREGORY MILLS. AS THE COURT IS A WEAR, MR. MILLS IS CURRENTLY UNDER AN ACTIVE DEATH WARRANT. HIS EXECUTION IS SET FOR MAY 2. THE PETITION THAT IS BEFORE THE COURT, ACTUALLY, HAD BEEN FILED IN ADVANCE OF THE DEATH WARRANT, AND ALONG WITH THE PETITION, I HAVE, ALSO, ASKED AND ASKED, AGAIN, TODAY, THAT MR. MILLS' EXECUTION BE STAYED, PENDING THE COURT'S CONSIDERATION OF THE PETITION FORM THE PETITION RAISES ESSENTIALLY TWO ARGUMENTS, AND I AM GOING TO ADDRESS THEM IN REVERSE ORDER, AS THEY ARE PRESENTED IN THE PETITION. THE FIRST ARGUMENT, I WOULD LIKE TO TALK ABOUT, TODAY, IS MR. MILLS' OVERRIDE. IN NOVEMBER OF LAST YEAR, THIS COURT ISSUED A DECISION IN KEEN VERSUS STATE, IN WHICH IT FOUND THAT A LOWER COURT HAD APPLIED THE WRONG STANDARD TO ANALYZING MR. KEEN'S OVERRIDE. AND WE CONTEND THAT, UNDER THE KEEN ANALYSIS, MR. MILLS'S OVERRIDE WAS INCORRECTLY DECIDED ON DIRECT APPEAL. THERE ARE A FEW MATTERS ABOUT MR. MILLS'S CASE THAT I DO WANT TO POINT OUT, BECAUSE I THINK THEY ALL NEED TO BE CONSIDERED IN THE CONTEXT OF MY ARGUMENT.

BEFORE YOU GET TO THAT, UNDER THAT ISSUE OF WHETHER WE ARE BOUND BY THE LAW OF THE CASE, COULD YOU ADDRESS JOHNSON V DUGGER AND EVEN IF WE WOULD, KNOW, HAVE -- WE WOULD, NOW, HAVE ALLOWED THE JURY OVERRIDE TO STAND, THAT, BECAUSE THE LAW AT THE TIME WAS APPROPRIATELY APPLIED, THAT WE ARE NOT -- WE ARE BOUND TO HONOR THAT LAW OF THE CASE.

WELL, I THINK YOUR POINT RAISES TWO ISSUES. NUMBER ONE IS YOU ARE NOT BOUND BY LAW OF THE CASE. LAW OF THE CASE IS NOT AN IN EX-ORABLE COMMAND. LAW OF THE CASE, AS THE COURT DISCUSSED, AS IN THE DUANE OWEN CASE, RECENTLY, ALLOWS THE CASE TO METAPHOR FIST. THE SUPREME COURT, ALSO -- METAMORPHOSE. THE SUPREME COURT, ALSO, SAID THAT, AND THE LAW OF THE CASE IS NOT SOMETHING THAT CAN AARP TEMPORARILY -- ARBITRARILY EITHER BE APPLIED OR NOT APPLIED. IN THE OWEN CASE, IT LIFTED THE LAW OF PRESTON, WHICH WAS PROVIDED IN THE PAPERS, AND IN JANUARY OF THIS YEAR, IF I OR' VERSUS WHITE -- IN FIORE VERSUS WHITE, IT STANDS FOR THE PROPOSITION THAT A LEGAL STANDARD -- WHAT IS GOING ON IN THE FIORE CASE, AS IN MR. MOORE'S CASE, IS THE CASE THAT APPLIES TO OVERRIDES IS NOT AS KEEN AS BRAND NEW LAW. WHAT FIORE SAYS IS THAT A STATUTE THAT IS PROPERLY INTERPRETED, A STATE COURT CANNOT ARBITRARILY REFUSE TO APPLY THAT RETROACTIVELY, AND THAT IS WHAT WE ARE SAYING OVER COST LAW OF THE CASE IN MR. MILLS'S CASE, BECAUSE, AGAIN, WHEN YOU COMPARE MR. MILLS'S CASE TO THE KEEN DECISION, IT COULD NOT BE CLEARER THAT THIS COURT'S 1995 DIRECT APPEAL DECISION MISS APPLIED FIORE AND TETHER.

ISN'T THAT THE FIRST -- AND TETFER AND TETTER.

WAS A THAT NOT THE FIRST TIME THAT THAT WAS APPLIED IN STATUTE?

IN MR. MILLS'S CASE, THE COURT'S DECISION IN KEEN COMES UP WITH A NEW STANDARD OF ANALYZING TETTER.

JUST A FEW MINUTES AGO, YOU SAID THAT KEEN WASN'T THE NEW STANDARD IN TETTER. LET'S START WITH FIORE. FIORE INVOLVED THE STATE HIGH COURT'S FIRST-TIME INTERPRETATION OF THE INVOLVEMENT OF CRIMINAL STATUTES. IS THAT NOT CORRECT?

THAT'S CORRECT.

AND THE HOLDING IN THAT CASE WAS, HAVING INTERPRETED THAT STATUTE FOR THE FIRST TIME, THAT THE COURT COULDN'T REFUSE TO APPLY IT TO A PRIOR CONVICTION. ISN'T THAT --

TO SOMEBODY ELSE, WHERE THEY HAD REFUSED TO INTERPRET IT THAT WAY. SO, REALLY, IT WAS THE PENNSYLVANIA HIGH COURT'S FIRST OPPORTUNITY, IT WASN'T THEIR FIRST OPPORTUNITY TO INTERPRET IT. THEY HAD PASSED UP THE OPPORTUNITY FOR FIORE'S CO-DEFENDANT, AND SO WHAT THE SUPREME COURT BASICALLY SAID WAS YOU CAN'T DO. THAT YOU CAN'T PICK AND CHOOSE WHAT A STATUTE MEANS. WHAT A STATUTE MEANS, YOU HAVE GOT TO APPLY IT EQUALLY TO BOTH.

BUT IN THE PREVIOUS CASE OR THE OPPORTUNITY -- THERE HAD NOT BEEN A PREVIOUS CASE WHERE THEY HAD INTERPRETED IT SOME OTHER WAY.

I BELIEVE THAT'S CORRECT. I BELIEVE THAT'S CORRECT. BUT IN TERMS OF LAW OF THE CASE, ONCE AGAIN, IT IS THAT IT IS NOT -- I MEAN THE LAW OF THE CASE, THE BOTTOM LINE IS THAT THIS COURT HAS AN OBLIGATION TO ENSURE THAT ITS STANDARDS ARE CONSISTENTLY APPLIED.

MY CONCERN, HERE, IS THAT THIS COURT, A LONG TIME AGO, ANNOUNCED THAT ITS LATER DECISIONS OR MORE RECENT DECISIONS, INTERPRETING TETTER, WERE DIFFERENT THAN THEY WERE DURING A PERIOD OF TIME BEFORE, AND I AM CONCERNED WITH THE TIMING OF WHEN YOU ARE BRINGING THIS ISSUE TO THE COURT, NOW AS IF THE DECISION LAST YEAR OR WHENEVER, IS NEW LAW, BECAUSE AS YOU SAID, IN FACT, A MINUTE AGO, IT IS NOT REALLY NEW LAW. THAT INTERPRETATION OF TETTER IS SOMETHING THAT WE HAVE BEEN APPLYING REGULARLY, NOW, FOR A NUMBER OF YEARS. IS IT NOT?

YES. IT WENT TO THE COURT IN 1988, IN COCHRAN, THE SUPREME COURT INDICATED THAT IT HAD NOT BEEN APPLYING TETTER CONSISTENTLY, MR. MILLS THEN CAME BEFORE THE COURT AND THE COURT SAID LAUST CASE. I SUBMIT THAT THE KEEN INTERPRETATION IS YET ANOTHER EVOLUTION OF THE WAY THAT THE COURT HAS APPLIED TETTER, AND FUNDAMENTAL FAIRNESS DEMANDS THAT THIS COURT'S 1985 DECISION BE REVISITED.

BUT THAT WAS PRECISELY WHAT WAS ASKED OF THE COURT, IN 1992, AND THERE WAS A FOCUS THERE, BUT AS WE KNOW FROM JUSTICE KOGAN'S ACCIDENT ON TETHER -- DISSENT IN TETHER, AFTER COCHRAN, AND IN FACT THAT WAS EXACTLY WHAT WAS ARGUED AND DEALT WITH BY THE ELEVENTH CIRCUIT AND REJECTED IN 1998.

ON THE COCHRAN ISSUE, WHAT I WOULD NOTE IS THAT THE STATE NEVER TOOK THAT POSITION THAT YOU ARE -- THAT JUSTICE ANSTEAD TOOK, THAT COCHRAN SOMEHOW CHANGED THE FORMULATION OF TETTER. IN FACT, THE STATE IS TAKING THE POSITION, TODAY, THAT THE ANALYSIS DONE IN KEEN IS WHAT TETTER HAS ALWAYS MEANT, AND THAT IS WHAT TETTER MEANT IN 1985, WHEN THIS COURT RECOGNIZED THE ISSUE ON APPEAL, AND I SUBMIT THAT, IF THAT IS THE CASE, THEN MR. MILLS HAS BEEN ON DEATH ROW IMPROPERLY SINCE 1985, BECAUSE THERE CAN BE NO QUESTION THAT THE ANALYSIS DONE IN 1985 IS THE ANALYSIS DONE IN KEEN, THEY CAN SIMPLY NOT BE RECONCILED. IN FACT, MR. MILLS'S CASE IS EVEN WORSE. MR. MILLS'S CASE, HIS TRIAL JUDGE'S SENTENCING ORDER, NEVER MENTIONS THE WORD TETTER, NEVER MENTIONING THE FACT THAT THE -- NEVER MENTIONS THE FACT THAT THE TO THE JURY THAT IT WAS ENTITLED TO GREAT WEIGHT, AND I AM PUNISHING THE BURGLARY AND THREE OR FOUR OTHER ROBBERIES AND BURGLARIES THAT WERE COMMITTED BY HIM, AND JUST FOR THIS COURT'S AWARENESS, THE CONTRACT OF IMMUNITY ENTERED BY THE STATE ON MR. ASHLEY, IS

ON PAGE 359 OF THE OFFICIAL RECORD ON APPEAL, AND ALL THE JUDGE DID, IN MR. MILLS'S CASE, WAS SAY THESE ARE THE AGGRAVATORS. THESE ARE THE MITIGATORS. THE AGGRAVATORS OUTWEIGH THE MITIGATORS. YOU GET DEATH.

SO THE JURY KNEW ABOUT THE CO-DEFENDANT'S I AM UNITE.

ABSOLUTE -- IMMUNITY.

ABSOLUTELY.

ADDRESS THE ISSUE OF WHAT AGGRAVATION THE JUDGE HEARD THAT WAS NOT PRESENTED TO THE JURY AND HOW YOU SEE THAT AS AN APRENDI VIOLATION. ANOTHER JUDGE, IN THIS CASE, WHAT HAPPENED WAS THE STATE SET FORTH A NUMBER OF AGGRAVATING CIRCUMSTANCES, IN WHICH THEY LISTED FOUR THAT THEY WERE GOING TO RELY ON, PRIOR VIOLENT FELONY, DURING THE COURSE OF A BURGLARY, UNDER SENTENCE OF IMPRISONMENT AND HEINOUS, AT ATROCIOUS AND CRUEL. THOSE WERE THE AGGRAVATORS THAT WERE ARGUED BY THE STATE, AND THOSE WERE THE AGGRAVATORS THAT WERE ADDRESSED BY DEFENSE COUNSEL FOR THE JURAT SENTENCING. AT THE ALLOCATION BEFORE THE JUDGE ONLY, WHICH WAS -- AT THE ALLOCUTION WHICH WAS PRESENTED EIGHT MONTHS LATER, THE COURT ADDRESSED OTHER CRIMINAL ACTIVITY ON BEHALF OF MR. MILLS.

NOW, THAT IS UNDER COCHRAN AND OTHER CASES, PROPER FOR THE TRIAL COURT TO TAKE INTO CONSIDERATION, OTHER AGGRAVATING INFORMATION THAT IS -- THAT THE JURY DOESN'T CONSIDER.

THAT NOT MY UNDERSTANDING. MY UNDERSTANDING IS THAT, AS THE COURT MADE VERY CLEAR IN KEEN, THAT THE SINGULAR FOCUS, WHEN YOU HAVE A JURY OVERRIDE OR A JURY RECOMMENDATION OF LIFE, IS THERE ANYTHING THAT THE JURY COULD HAVE REASONABLY RELIED ON, TO SUPPORT ITS LIFE RECOMMENDATION. I WOULD, ALSO, NOTE THAT IN FINDING, IN THE SENTENCING ORDER, THE JUDGE FOUND GREAT RISK OF DEATH TO MANY PERSONS, WHICH WAS NOT EVEN AN AGGRAVATOR THAT HAD BEEN ADVANCED BY THE STATE. THIS GETS INTO MY ARGUMENT, IN TERMS OF AND PREPARED I. -- OF APRENDI. IT HOLDS THAT ANY OTHER FACT BESIDES THE CONVICTION, THAT IS USED TO ENHANCE SENTENCE, NEEDS TO BE SUBMITTED TO A JURY AND PROVED BEYOND A REASONABLE DOUBT. I SUBMIT THAT APRENDI HAS SERIOUS IMPLICATIONS FOR THE FLORIDA STATUTE OTHER SCHEME, WHICH, UNDER SECTION 775.082, AS I INDICATED IN THE PETITION, INDICATES THAT LIFE IS THE PUNISHMENT FOR CAPITAL MURDER, UNLESS AND UNTIL ADDITIONAL PROCEEDINGS ARE CONDUCTED BY THE JUDGE AND THE JURY. THAT IS A TREMENDOUS PROBLEM, UNDER APRENDI.

BUT DON'T YOU HAVE TO READ 775.082 AND 941.121 TOGETHER, BECAUSE APRENDI TALKS ABOUT THE MAXIMUM SENTENCE, AND SO WHEN WE READ THOSE TWO STATUTORY PROVISIONS TOGETHER, WHY ISN'T DEATH A MAXIMUM SENTENCE FOR A CAPITAL FELONY?

BECAUSE, JUST LIKE THE WEIGHT OF THE STATUTES WERE WRITTEN IN THE NEW JERSEY SCHEME, YOU DON'T LOOK SIMPLY TO THE LABEL OF WHAT SEX SOMETHING FALLS UNDER, IN ORDER TO DETERMINE WHETHER IT IS A SENTENCING ENHANCEMENT OR WHETHER IT IS AN ACTUAL ELEMENT. I SUBMIT YOU DO NEED TO LOOK AT ALL OF THE SECTIONS TOGETHER, AND IT IS CLEAR THAT, YOU KNOW, UPON A CONVICTION OF FIRST-DEGREE MURDER, UNDER THE 1980 STATUTE, WHICH WAS SUBSEQUENTLY CHANGED, THAT LIFE IS THE MAXIMUM SENTENCE, UNLESS AND UNTIL ADDITIONAL PROCEEDINGS ARE HELD, AND THOSE ARE THE ADDITIONAL PROCEEDINGS THAT WE SUBMIT, UNDER APRENDI, NEED TO BE FOUND AND CHARGED TO AND BY A JURY --

BUT HERE IT DOESN'T SAY THAT THEY HAVE TO BE CHARGED. HERE THEY TALK ABOUT NOT READING THAT PARTICULAR ISSUE, DON'T THEY?

IT HAS TO BE NOTICED. IN TERMS OF A VIOLATION OF THE SIXTH AMENDMENT, IT HAS TO BE SOMETHING FOUND BY A JURY AND FOUND BEYOND A REASONABLE DOUBT.

WHAT IN THIS CASE WAS NOT PRESENTED TO THE JURY THAT RELATED TO THE SENTENCING PROCESS HERE?

WELL, HERE, I MEAN, THE INTERESTING WEIGHT OF THIS CASE, BECAUSE IT IS AN OVERRIDE, IS BY MR. MILLS. YOU KNOW, THE STATE PRESENTED ITS AGGRAVATORS. THE DEFENSE PRESENTED ITS CASE. THE JURY CAME UP WITH A LIFE RECOMMENDATION. I SUBMIT, UNDER APRENDI, THAT IS THE END OF THE PROCESS, BUT WHAT HAPPENED IN THIS CASE, AS I WAS ADDRESSING JUSTICE PARIENTE'S QUESTION, IS THAT THE STATE SUBMITTED ADDITIONAL EVIDENCE TO THE SENTENCING JUDGE, AND THE SENTENCING JUDGE, IN ADDITION TO CONSIDERING THAT, AND FINDING THOSE ADDITIONAL CRIMINAL ACTIVITIES, FOUND YET ANOTHER AGGRAVATOR THAT HAD NEVER EVEN BEEN ARGUED OR ADVANCED BY THE STATE IN ITS NOTICE TO DEFENSE. THAT WASN'T EVEN IN PLACE, AND THAT WAS THE GREAT RISK OF DEATH.

WHICH WAS STICKBEIN THIS COURT ON APPEAL.

CORRECT.

SO HOW DOES THE FACT THAT IT WAS STRICKEN BY THIS COURT ON APPEAL PLACE INTO YOUR ARGUMENT?

IT DOESN'T REALLY, BECAUSE THE ISSUE UNDER APRENDI IS THE RIGHT IT A JURY TRIAL. IT IS THE RIGHT TO HAVE THE JURY FIND, BEYOND A REASONABLE DOUBT, THESE ADDITIONAL ELEMENTS THAT RAISED THE PUNISHMENT UP FROM LIFE TO DEATH, AND IN THIS CASE, THE JURY CAME BACK WITH LIFE RECOMMENDATION. OF COURSE WE DON'T KNOW WHAT THEY FOUND, BUT WE CAN CERTAINLY PRESUME THAT MAYBE THEY DIDN'T FIND ANY OF THE AGGRAVATORS.

SO YOUR ARGUMENT, THEN, HINGES ON WHETHER OR NOT WE DETERMINE THAT THE MAXIMUM SENTENCE FOR A CAPITAL FELONY IS LIFE, AS OPPOSED TO DEATH?

THAT IS PART OF IT, SURE, AND PART OF IT IS, I MEAN, YOU KNOW, THIS IS SOMETHING THAT IS REALLY NEW. CERTAINLY THIS COURT HAS NEVER ADDRESSED IT. COURTS ALL OVER THE COUNTRY ARE GRAPPLING WITH APRENDI AND ITS EFFECTS. THE STATE POSITION IS, BASICALLY, THAT THE MAJORITY IN APPRENDI SAID WALTON VERSUS ARIZONA HAD NEVER BEEN OVERRULED, AND SO APRENDI HAS NO IMPACT ON SUPPRESSION SCHEMES. I SUGGEST THAT YOU READ APRENDI VERY CAREFULLY. IT WAS, THE OPINION OF THE COURT WAS WRITTEN BY FOUR MEMBERS OF THE COURT. JUSTICE THOMPSON CONCURRED, BUT HE WOULD HAVE ADOPTED A BROADER VIEW OF WHAT THE MAJORITY DID, AND SPECIFICALLY STATED IN HIS CONCURRENCE, THAT HE WAS LEAVE GOT ISSUE OF WHETHER WALTON WAS OVERRULED FOR ANOTHER DAY. OF COURSE THE FOUR INDICATED THAT YOU WOULD NOT HAVE BEEN OVERRULED BY THE COURT, AND SO CERTAINLY WALTON, SPAZIANO VERSUS FLORIDA, HILTON VERSUS FLORIDA, ALL OF THESE CASES SAY THE SAME THING AND SAME TO DETERMINE THAT, WHETHER THE SENTENCING PART OF THE CASE, WHETHER THE SIXTH AMENDMENT RIGHTS HAVE TO APPLY IN THAT CASE, AND I AM SUBMIGHTING IT WAS.

WHAT -- SUBMITTING IT WAS.

WHAT WOULD BE YOUR DEFINITION OF A CAPITAL CASE?

MY DEAF MISSION OF A CAPITAL -- MY DEFINITION OF A CAPITAL CASE IS ONE CHARGED UNDER THE SENTENCING STATUTE. IT IS A DIFFERENCE BETWEEN A CAPITAL CASE AND WHAT APRENDI ANNOUNCED AS TO WHAT THE POSSIBLE SENTENCES COULD BE. JUST BECAUSE YOU ARE

CONVICTED, UNDER 775, OF FIRST-DEGREE MURDER, DOES NOT AUTOMATICALLY MEAN THAT YOU ARE ELIGIBLE FOR THE DEATH PENALTY. THE ELEVENTH CIRCUIT, FOR YEARS, HAS CONSISTENTLY REJECTED THE FACT THAT A FELONY MURDER AGGRAVATOR IS AN AUTOMATIC AGGRAVATOR, WHEN SOMEONE IS CONVICTED OF FELONY MURDER. IRONICALLY MR. MILLS WAS SPECIFICALLY CONVICTED OF FELONY MURDER.

IF YOU HAD TO DEFINE AND GIVE A DEFINITION AFTER CAPITAL CASE, WHAT WOULD BE YOUR DEFINITION?

I AM NOT QUITE -- A CAPITAL CASE, THERE ARE SO MANY DIFFERENT -- IN TYPES OF MURDER AND ALL OF THOSE THINGS, MY DEFINITION OF CAPITAL MURDER, THE STATUTE SAYS WHAT THE STATUTE SAYS. I AM NOT SURE.

WOULD MANSLAUGHTER BE A CAPITAL CASE?

NO. NO.

ISN'T IT SOMETHING BECAUSE OF THE DEATH PENALTY? WOULDN'T YOU AGREE TO THAT?

IT IS SOMETHING IN WHICH IT IS POSSIBLE, SURE, BUT UNDER THE STATUTE AS IT IS WRITTEN HERE --.

ISN'T THAT WHAT DISTINGUISHES THAT, IN FACT, IT DOES CARE THE DEATH PENALTY?

NO. BECAUSE, NO, NO, NO, NO. BECAUSE WHETHER IT CARRIES IT OR NOT, I MEAN, WE ARE TALKING ABOUT WHAT THE APRENDI MAJORITY TALKED ABOUT, IN TERMS OF JUST BECAUSE YOU CALL, PUT SOMETHING UNDER THE SUBSECTION OF "PENALTY", THAT DOESN'T AUTOMATICALLY MEAN IT IS NECESSARILY A PENALTY. YOU HAVE TO LOOK AT THE WHOLE THING TOGETHER, AND I SUBMIT THAT, UNDER THE STATUTE AS IT IS WRITTEN, LIFE IS THE MANDATORY PENALTY, UNLESS ADDITIONAL PROCEEDINGS TAKE PLACE.

YOU ARE --

I HIM IN MY REBUTTAL. THANK YOU -- I AM IN MY REBUTTAL. THANK YOU.

MR. NUNNELLEY.

MAY IT PLEASE THE COURT. I AM KEN NUNNELLEY. I REPRESENT THE STATE OF FLORIDA IN THIS PROCEEDING. I MIGHT SPEAK BRIEFLY, AND I BELIEVE IT WAS JUSTICE PARIENTE, IN THE CONTEXT OF THE TETTER ARGUMENT, ASKED MR. SHERER TO IDENTIFY THE NEW AGGRAVATION, I BELIEVE WAS THE WAY IT WAS IN THE CONTEXT, AND I WOULD SUGGEST THAT THAT QUESTION IS ANSWERED AT PAGES 931, 932 OF THE RECORD, WHERE THE STATE IDENTIFIED OTHER CASES THAT THE JURY WAS NOT AWARE, AND THAT MR. MILLS BEEN INVOLVED, IN AND THE COURT'S RESPONSE, INTERESTINGLY, WAS, OF COURSE, THE COURT, REALLY, CAN'T TAKE THAT INTO CONSIDERATION, AS TO THE AGGRAVATION. I CAN TAKE THAT INTO CONSIDERATION, I BELIEVE, UNDER THE MITIGATION, WHETHER THE DEFENDANT HAD NO SIGNIFICANT PRIOR CRIMINAL ACTIVITY. I WOULD SUGGEST THAT THAT ANSWERS THE QUESTION OF WHETHER THERE WAS UNPRESENTED AGGRAVATION. WITH RESPECT TO THE TETTERISH YURTION AND I DON'T BELIEVE IT DESERVES MUCH DISCUSSION, TETTER HAS BEEN AROUND TO FO A VERY, VERY LONG TIME. THE TETTER STANDARD IS VERY WELL KNOWN TO EVERYBODY IN THIS COURTROOM, AND THAT IS THAT, IN ORDER TO SUSTAIN A JURY'S OVERRIDE OF A RECOMMENDATION OF A LIFE SENTENCE, THE FACTS SUGGESTING DEATH MUST BE SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER. THAT IS THE ANALYSIS THIS COURT CONDUCTED ON DIRECT APPEAL. THAT HAS ALWAYS BEEN THE ANALYSIS, AND WHAT WE HAVE HERE --.

WHAT WAS ARGUED ON DIRECT APPEAL, AS BEING THE BASIS FOR THE JURY'S RECOMMENDATION OF LIFE?

I BELIEVE, JUSTICE QUINCE, AND I AM NOT 100 PERCENT CERTAIN, BUT I BELIEVE THE ARGUMENT WAS ADVANCED ABOUT THE CODEFENDANTS' FAVORABLE TREATMENT AND THAT SORT OF THING, I BELIEVE IS WHAT IT WAS. I DON'T REALLY REMEMBER.

IS THAT A PROPER BASIS TO, AS -- TO MITIGATE A SENTENCE? THE CO-DEFENDANT'S UNEQUAL -- GRANT OF IMMUNITY OR UNEQUAL TREATMENT?

IN THE RIGHT CONTEXT, I SUPPOSE IT COULD BE, BUT THE BOTTOM LINE, THOUGH, IS THAT THIS COURT HAS REVIEWED THE ISSUE. IT HAS BEEN BROUGHT BEFORE THIS COURT.

IN THIS CASE, DID THE JUDGE, IN ITS SENTENCING ORDER, REFER, IN HIS SENTENCING ORDER, REFER TO THE UNEQUAL TREATMENT OF THE CO-DEFENDANT?

I DON'T KNOW IF HE DID OR NOT. I DON'T BELIEVE HE DID. I DON'T REMEMBER. BUT THE BOTTOM LINE, JUSTICE PARIENTE, THAT IS NOT THE ISSUE BEFORE THIS COURT. THE TETTER ISSUE IS PROCEDURALLY BARRED. IT HAS BEEN HERE THREE TIMES. IT HAS BEEN TO THE ELEVENTH CIRCUIT ONE TIME. THE ELEVENTH CIRCUIT PANEL, WHICH INCLUDED JUDGE HATCHET, FOUND THAT THIS COURT DID NOT VIOLATE THE STANDARDS OF TETTER ANNOUNCED IN THIS CASE AND ITS PROGENY. THAT IS THE END OF THE INQUIRY.

WHAT HAPPENS IF WE DO CHANGE THE DEFINITION OF TETTER? IN OTHER WORDS WHAT WOULD BE THE STATE'S POSITION? FOR INSTANCE, IF WE ANALYZE THIS CASE UNDER THE KEEN ANALYSIS, ARE YOU SAYING THAT THIS OVERRIDE WOULD STILL STAND UP, DESPITE ANALYSIS IN KEEN?

I BELIEVE THIS OVERRIDE DOES STILL STAND, JUSTICE ANSTEAD. BECAUSE --

BUT THE ANALYSIS IN KEEN, WHICH FOCUSES ON WHETHER OR NOT THERE IS ANY REASONABLE BASIS TO SUSTAIN THE JURY'S RECOMMENDATION OF LIFE, AND HERE WE HAVE JUSTICE MacDONALD'S OUTLINE OF REASONS IN HIS DEFENSE, IN THE ORIGINAL APPEAL, THEN WE HAVE A POSTCONVICTION PROCEEDING, IN WHICH MITIGATION, ADDITIONAL MITIGATION, YOU KNOW, WAS BROUGHT OUT. NOW, TAKING THE KEEN ANALYSIS, HOW COULD THIS JURY RECOMMENDATION POSSIBLY BE OVERRIDDEN?

JUSTICE ANSTEAD, THE FACTS OF THIS CASE CRY OUT FOR A DEATH SENTENCE. WHY THE JURY DID WHAT IT DID, I DON'T KNOW. THEY WERE NOT FULLY INFORMED ABOUT MR. MILLS'S CRIMINAL ACTIVITY. WE KNOW. THAT WE, ALSO, KNOW THAT THAT IS NOT A DEFICIENCY. IT IS POSSIBLE FOR THE TRIAL COURT, FOR THE SENTENCING JUDGE TO CONSIDER ADDITIONAL MATTERS THAT WERE NOT BROUGHT BEFORE THE JURY. THAT WAS THE SITUATION IN SPASIAN OWE.

BUT I THOUGHT -- IN SPAZIANO.

BUT I THOUGHT, IF WE ARE LOOKING AT A JURY LIFE RECOMMENDATION, TO OVERRIDE IT, THE STANDARD ISN'T DOES THE JUDGE FIND ADDITIONAL AGGRAVATING EVIDENCE. THE STANDARD IS TO LOOK AT AND FOR THE JUDGE TO DECIDE IF THERE IS ANY REASONABLE BASIS FOR THE JURY TO HAVE RECOMMENDED LIFE.

WELL, THIS COURT, ON DIRECT APPEAL, FOUND THAT THERE WAS NOT. IF THERE WAS AN ERROR THAT IS BEING ADVANCED AT THIS DATE, AS TO THE SENTENCING ORDER ITSELF, THAT ISSUE IS PROCEDURALLY BARRED, AS WELL.

HASN'T THIS COURT OPENLY ACKNOWLEDGED THAT IT HAS IN ESSENCE APPLIED TWO DIFFERENT STANDARDS IN INTERPRETING TETTER? THAT IS IN ONE PERIOD OF TIME OR YEARS, THAT WE WERE APPLYING ONE DEFINITION OF TETTER, AND IN LATER YEARS, WE WERE APPLYING A DIFFERENT INTERPRETATION. HASN'T THIS COURT OPENLY, IN WRITTEN, PUBLISHED OPINIONS, ACKNOWLEDGED THAT THAT HAS HAPPENED?

I BELIEVE THAT IS CURT KRECKT, JUDGE. HOWEVER -- -- THAT IS CORRECT, JUDGE. HOWEVER --

WHAT ARE WE TO DO, THEN, IF WE ARE TO OPENLY ACKNOWLEDGE THAT THAT HAS HAPPENED, AND WE FIT THIS CASE UNDER THE EARLIER CASES, IN TERMS OF THE DEFINITION AND APPLICATION OF TETTER, ARE WE JUST TO BLINDLY APPLY THE LAW OF THE CASE AND SAY, WELL, THAT IS TOUGH, THAT THAT CASE HAS ALREADY BEEN DECIDED? OR ARE WE TO OPENLY ACKNOWLEDGE THAT WE DID THAT AND APPLY THE STANDARD THAT WE ARE CURRENTLY APPLYING.

WELL, I THINK YOU LOOK AT THE ELEVENTH CIRCUIT COURT OF APPEALS' OPINION THAT IT COURT PROPERLY APPLIED TETTER, AS IT WAS BEING FOLLOWED.

WELL, IT IS UP TO THIS COURT, NOT UP TO THE LEFBI -- ELEVENTH CIRCUIT COURT OF APPEALS TO DECIDE THE CASE, RIGHT?

YES, BUT TEMPT JUDGE HATCHET WAS INT-- BUT, AT THE SAME TIME JUDGE HATCHET WAS ON THE ELEVENTH CIRCUIT COURT OF APPEALS, AND JUDGE HATCHET WAS INTIMATELY FAMILIAR WITH TETTER.

THAT IS NOT GOING TO HELP US NOW. FOR INSTANCE, THIS COURT EARLIER ACKNOWLEDGED THAT IT HAD BEEN APPLYING A STANDARD WITH REGARDS TO PROPORTIONALITY ANALYSIS, THAT IT WOULD HAVE AFFIRMED THE DEATH PENALTY, BUT THAT IT ACKNOWLEDGED THAT IT HAD CHANGED AND THAT THE LAW HAD CHANGED, AND THAT EVEN THOUGH PROPHET HAD BEEN AROUND FOR YEARS, THAT IT NOW IMPOSED A LIFE SENTENCE INSTEAD OF A DEATH SENTENCE, IN A FACTUAL CIRCUMSTANCE, BY THE WAY, VERY SIMILAR TO THE FACTUAL CIRCUMSTANCES HERE. SHOULD THE COURT DO WHAT IT DID IN PROPHET, IN THIS CASE?

NO, YOUR HONOR. THIS COURT --

WHY NOT?

THIS COURT SHOULD DO WHAT IT DID IN 1992 AND FOLLOW FLORIDA LAW AND HOLD THIS CLAIM PROCEDURALLY BARRED. THAT IS WHAT THIS COURT SHOULD DO. THIS CLAIM HAS BEEN HERE ENOUGH TIMES. TURNING TO THE APRENDI ISSUE, APRENDI, BY ITS TERMS, FROM THE UNITED STATES COURT OF APPEAL, FROM THE UNITED STATES SUPREME COURT, DOES NOT APPLY TO CAPITAL SENTENCING. I HAVE PLEADED, IN THE STATE'S RESPONSE, A NUMBER OF PROCEDURAL DEFENSES. I AM NOT WAIVING ANY PROCEDURAL DEFENSE THAT EXISTS AS TO THIS CLAIM AND HAS HERETOFORE BEEN RAISED. HOWEVER, I AM GOING TO GO STRAIGHT TO THE MERITS AND DEAL WITH SOME OF THE QUESTIONS AND SOME OF THE ARGUMENTS THAT MY OPPONENT HAS BROUGHT. FIRST OF -- ARGUMENTS THAT MY OPPONENT HAS BROUGHT. FIRST OF ALL, IT IS VERY SIGNIFICANT THAT MR. MILLS WAS CONVICTED ON A FELONY MURDER THEORY. THIS IS NOT A CASE WHERE THERE IS A GENERAL VERDICT. THIS IS A CASE WHERE IT WENT TO THE JURY ON FELONY MURDER, AND THEY CONVICTED ON A FELONY MURDER THEORY. AT THAT POINT, THERE IS ABSOLUTELY NO QUESTION THAT AN AGGRAVATING CIRCUMSTANCE HAD BEEN PROVEN BEYOND A REASONABLE DOUBT. MOREOVER, THE KEY LANGUAGE IN APRENDI IS THAT ANY MATTER, OTHER THAN A PRIOR CONVICTION, MUST BE PROVEN BEYOND A REASONABLE DOUBT. THE SECOND AGGRAVATING CIRCUMSTANCE THAT WAS UPHOLD BY THIS COURT ON DIRECT APPEAL, WAS A PRIOR CONVICTION AFTER VIOLENT FELONY. THAT FALLS OUT OF THE APRENDI ANALYSIS RIGHT THERE, AND THE APRENDI COMPONENT OF THIS CASE IS OVER WITH. APRENDI

DOES NOT APPLY TO THIS CASE, BY ITS EXPRESS TERMS. WE HAVE ARGUED THE REASONS FOR ITS IN APPLICABILITY IN THE STATE'S BRIEF. BUT THE BOTTOM LINE IS THERE IS NO AGGRAVATING CIRCUMSTANCE THAT WAS UPHELD ON APPEAL BY THIS COURT, THAT IS FACTUALLY DISPUTED.

WAS THERE A MAJORITY OPINION IN APRENDI, AS TO ITS APPLICABILITY TO DEATH PENALTY CASES?

I THINK THE LAST FEW PARAGRAPHS OF APRENDI'S SAY.

DID FIVE JUSTICES JOIN IN THE VOTE ON THE LAST PARAGRAPH OF APRENDI?

I BELIEVE THEY DID.

WHICH FIVE?

THE MAJORITY PLUS THOMAS, I BELIEVE, SIR.

I THOUGHT JUSTICE THOMAS SAID THAT HE WOULD RESERVE, WITH REFERENCE TO --

JUSTICE THOMAS, ALSO, POINTED OUT THE PROBLEMS, AND THE SEVERELY PROBLEMATIC NATURE OF TRYING TO DRAFT APRENDI, WHICH DEALS WITH A NARROW ISSUE OF A SENTENCE ENHANCEMENT STATUTE, ON TO CAPITAL SENTENCING. CAPITAL SENTENCING JURISPRUDENCE HAS BEEN DEVELOPED BY THE UNITED STATES SUPREME COURT, AS WE ALL KNOW, KIND OF ON AN OUTSIDE TRACK, SEPARATELY AND WITH HYPER VIGILANCE, FROM SOME OF THE OTHER CASES. THIS IS NOT A CIRCUMSTANCE, WHERE THIS CASE APPLIES. THE REASON IT DOESN'T APPLY IS BECAUSE YOU CAN'T MAKE THE COMPARISON. AND LET ME SAY THIS, JUSTICE ANSTEAD. IN GOING BACK TO JUSTICE SCALIA, IN ONE OF THE EARLIER CASES, AND I CAN'T REMEMBER THE NAME OF IT, HE MADE THE COMMENT THAT, IF THE DEFENDANT WAS TO ARGUE FOR REVERSAL BECAUSE TWO JURORS WERE WEARING GREEN SHIRTS, THE MOST YOU COULD SAY AGAINST IT IS THERE IS NOTHING TO SAY FOR IT. THE SAME THING APPLIES HERE. YOU CAN'T APPLY APRENDI. APRENDI DOESN'T FIT. IT IS AN ATTEMPT TO FORCE A SQUARE PEG INTO A ROUND HOLE, BECAUSE APRENDI DEALS DOES NOT DEAL WITH IN RE DEATH SENTENCING.

WHY WOULD YOU NOT APPLY THAT, WHEN YOU HAVE A SERIOUS FACTUAL FACTOR THAT HAS TO BE ESTABLISHED, IN ORDER TO ENHANCE THE PENALTY IN A REGULAR FELONY SITUATION, AND NOT APPLY THAT KIND OF PRINCIPLE TO DEATH PENALTY JURISPRUDENCE, IF THE DEATH PENALTY JURISPRUDENCE HOLDS THAT YOU HAVE TO PROVE CERTAIN AGGRAVATORS OR ADDITIONAL FACTS, TO IMPOSE A DEATH SENTENCE. WHY WOULDN'T APRENDI APPLY TO THAT?

FIRST OF ALL, CAPITAL SENTENCING JURISPRUDENCE DEMANDS A DEGREE OF SENTENCETIVITY TO THE DEFENDANT AND HIS INDIVIDUALIALITY, THAT IS NOT PART AND PARCEL WITH SENTENCING. SECONDLY, I DO NOT CONCEDE THAT APRENDI APPLIES TO THIS CASE OR ANY OTHER FLORIDA DEATH PENALTY CASE, BUT EVEN IF YOU WANT TO GO DOWN THAT ROAD, AND I WOULD SUBMIT THAT IS JUST AS WRONG AS IT CAN BE, IT DOESN'T HELP MR. MILLS, AND THAT IS BECAUSE THE FIRST AGGRAVATING CIRCUMSTANCE THAT WAS FOUND BEYOND A REASONABLE DOUBT WAS FELONY MURDER, AND THE SECOND AND THIRD AGGRAVATING CIRCUMSTANCES AREN'T WITHIN REASONABLE REACH APRENDI, SO EVEN IF THIS COURT SHOULD CONCLUDE THAT APRENDI SHOULD SOMEHOW BE APPLIED TO THIS CASE, MR. MILLS LOSES, BECAUSE THE INTENT AS TO TELL ANY MURDER HAS BEEN -- THE INTENT AS TO TELL ANY MURDER HAS BEEN MADE, AND THE INTENT DOESN'T HAVE TO APPLY TO APRENDI, AND THAT IS WHAT I SAID AND KEEP GOING BACK TO. THIS IS NOT THE SORT OF CASE THAT IS EASY TO TALK ABOUT, WHY APRENDI DOESN'T APPLY, AND THAT IS BECAUSE APRENDI IS SO FAR OUTSIDE THE PALE OF CAPITAL SENTENCING, THAT COMPARISON ANALYSIS IS VERY DIFFICULT. IT SIMPLY DOESN'T FIT! IT IS APPLES AND ORANGES. AND I WOULD, ALSO, POINT OUT THAT THE CLAIM OF ERROR, BASED UPON AN AUTOMATIC AGGRAVATING CIRCUMSTANCE, IS ABSOLUTELY INCONSISTENT WITH THE

APRENDI CLAIM THAT WE HAVE HERE TODAY. IF WE HAVE AN AGGRAVATING CIRCUMSTANCE THAT IS FOUND BY THE JURY'S VERDICT OF GUILT OF FELONY MURDER, WE DON'T HAVE AN APRENDI ISSUE. IT DOESN'T EXIST. IT CAN'T EXIST, AS A MATTER OF LAW. IT SIMPLY CAN'T BE. BEYOND THAT, IF THERE ARE NO QUESTIONS, I REALLY HAVE NO FURTHER COMMENTS TO MAKE, WITH RESPECT TO EITHER OF THE ISSUES CONTAINED IN THE HABEAS PETITION. I WOULD POINT OUT, THOUGH, THAT THE THREE AGGRAVATING CIRCUMSTANCES THAT WERE STRUCK ON DIRECT APPEAL BY THIS COURT, DON'T PLAY IN THIS. THOSE AGGRAVATING CIRCUMSTANCES ARE NOT AT ISSUE HERE. THE AGGRAVATING CIRCUMSTANCES THAT ARE AT ISSUE ARE FELONY MURDER, THE PRIOR VIOLENT FELONY CONVICTION AND THE OTHER SENTENCE OF IMPRISONMENT AGGRAVATING CIRCUMSTANCE. THAT IS ALL THAT IS AT ISSUE, AND THOSE DO NOT IMPLICATE APRENDI. IN CONCLUSION, ONCE AGAIN, THE STATE DOES NOT CONCEDE THAT IN ANY WAY APRENDI IS AVAILABLE TO THIS DEFENDANT. THE STATE DOES NOT CONCEDE THAT APRENDI IS EVEN APPLICABLE IN THE STATE OF FLORIDA AS TO CAPITAL SENTENCING. THERE BEING NO FURTHER QUESTIONS, THE STATE RESPECTFULLY REQUESTS THIS COURT TO DENY ALL RELIEF. YES, MA'AM.

I DO HAVE ONE FURTHER QUESTION.

YES, MA'AM.

IN THE KEEN DECISION, THERE IS LANGUAGE IN IT THAT TALKS ABOUT IF THERE IS ANY BASIS IN THE RECORD TO SUPPORT THE JURY'S OVERRIDE. ISN'T THE INFORMATION THAT, CONCERNING THE CO-DEFENDANT, SUFFICIENT? THAT IS A PART OF THE RECORD, ISN'T IT?

IT IS A PART OF THE RECORD, BUT I BELIEVE THIS COURT FOUND THAT IT WAS NOT A REASONABLE -- THEY DID NOT SUPPORT A REASONABLE BASIS FOR THE LIFE RECOMMENDATION. I BELIEVE THAT IS THE FINDING OF THIS COURT ON DIRECT APPEAL. THERE BEING NO FURTHER QUESTIONS, THE STATE RESPECTFULLY REQUESTS THAT ALL RELIEF, INCLUDING ANY STAY OF EXCUSE -- OF EXECUTION BE DENIED.

MR. SHERER.

ON THAT LAST POINT, IF YOU READ THE COURT'S DIRECT APPEAL OPINION, IT IS VERY CLEAR THAT, WHAT THE MAJORITY DID WAS SAY THE LOWER COURT FOUND NO MITIGATION. THE LOWER COURT FOUND THAT THE AGGRAVATION OUT WEIGHED THE MITIGATION, AND THAT IS THE END OF THE ANALYSIS. THIS COURT CONDUCTED NO INDEPENDENT ANALYSIS OF THE TETTER ISSUE AND OF THE IMMUNITY ISSUE, BECAUSE THE LOWER COURT HADN'T. IT WAS SQUARELY PRESENTED IN THE BRIEFS, BUT FOR THE STATE TO POINT TO THIS COURT'S DIRECT APPEAL OPINION AND SAY THAT THIS COURT INDEPENDENTLY DETERMINED THAT THAT WAS NOT A REASONABLE BASIS, AS A MATTER OF LAW, THEY MUST HAVE A DIFFERENT COPY OF THE OPINION THAN I DO, BECAUSE IT IS NOT THERE.

IN KEEN, DID WE ADHERE TO THE LANGUAGE THAT YOU WOULD SUSTAIN A JURY OVERRIDE, IF THE FACTS SUGGESTING A SENTENCE OF DEATH IS SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER?

THAT IS THE TET AT ANY TIMER. DIRECT LANGUAGE FROM TETTER.

AND IT IS STILL A PART OF OUR STANDARD, EVEN UNDER THE KEEN ANALYSIS THAT YOU ARE SAYING WE NEED TO SUPPORT HERE.

CORRECT. BECAUSE WHAT THIS COURT DID AND WHAT THE TRIAL COURT DID IS, JUST LIKE WHAT JUDGE BACHMAN DID IN KEEN. HE TREATED THE CASE AS IF IT WERE A DEATH RECOMMENDATION. YOU WOULD NOT KNOW, FROM LOOKING AT THE SENTENCING ORDER IN THIS CASE, THAT THERE WAS A LIFE RECOMMENDATION IN THIS CASE.

BUT WHEN THIS COURT LOOKED AT IT ON DIRECT APPEAL, THIS COURT USED THAT SAME LANGUAGE THAT, FROM TETTER, THAT HAS BEEN REAFFIRMED IN KEEN.

USED THE ONE, THE "VIRTUALLY NO REASONABLE PERSON LANGUAGE", BUT IT DID NOT DO AN ANALYSIS OF SKOU ERRING OF -- OF SCOURING OF THE RECORD, BECAUSE THE LOWER COURT DIDN'T DO. THAT THE LOWER COURT SAID THAT --

THE ARGUMENT ON APPEAL WAS THAT THAT WASN'T A REASONABLE BASIS. THAT THE COURT OVERLOOKED IT.

CORRECT. CORRECT. THAT IS WHAT JUSTICE McDONALD WAS -- MacDAMAGED DONALD -- MacDONALD WAS POINTING OUT, IN HIS DISSENT.

YOU FILED AN APPLICATION FOR A STAY THAT, THE ONLY REASONS THAT YOU CITED FOR STAY WERE THIS COURT'S CONSIDERATION OF THIS PRESENT PETITION. IS THAT CORRECT?

CORRECT AT THIS TIME, CORRECT.

AND WE ARE TALKING ABOUT AN EXECUTION DATE THAT IS, WHAT, A MONTH AWAY?

CORRECT.

BUT THOSE ARE THE ONLY GROUNDS THAT YOU HAVE CITED, IS THE OPPORTUNITY FOR THIS COURT TO DELIBERATELY RULE ON YOUR PETITION. IS THAT CORRECT?

CORRECT. BECAUSE I THINK THAT PARTICULARLY THE APRENDI ISSUE IS SOMETHING --

I UNDERSTAND. BUT THERE ISN'T SOMETHING ELSE THAT YOU HAVE CITED AS A MATTER FOR STAY.

CORRECT, BECAUSE I THINK CERTAINLY UNDER THE RULES OF THIS ARGUMENT, THAT IF THE COURT WISH TOES HAVE ADDITIONAL BRIEFING ON MATTERS, I HAD FILED THIS PETITION WELL IN ADVANCE OF A WARRANT. I DON'T THINK THE COURT OR A PARTY SHOULD HAVE TO BE IN A POSITION TO REALLY ANALYZE THE POSITIONS, IN ADVANCE AFTER DEATH WARMTH, EVEN THOUGH WE STILL HAVE FOUR WEEKS TO GO. JUST BRIEFLY ON APRENDI, THE STATE OF FLORIDA ANNOUNCED THAT, GEE, MR. MILLS CLAIMED, ALL ALONG, THAT THIS AUTOMATIC AGGRAVATOR, AS AN AUTOMATIC AGGRAVATOR ACTUALLY HAS MERIT. THEY WILL SAY BOTH THINGS OUT OF BOTH SIDES OF THEIR MOUTH. THE FACT OF THE MATTER IS THAT THE FELONY MURDER AGGRAVATOR DOES NOT AUTOMATICALLY MAKE YOU DEATH ELIGIBLE, UNDER THIS COURT'S EXTENSIVE CASE LAW, AND THE ELEVENTH CIRCUIT'S EXTENSIVE CASE LAW, AND THE STATE IS ENAMORED OF ELEVENTH CIRCUIT OPINIONS, SO IT POINTS TO BERTOLLOTTI VERSUS DUGGAR, WHERE THEY CLEARLY FIND THAT FLORIDA'S FELONY MURDER AGGRAVATOR DOES NOT AUTOMATICALLY RENDER ONE ELIGIBLE FOR THE DEATH PENALTY. PART OF WHAT HAS TO BE DETERMINED IN A FELONY MURDER CASE IS ELIGIBILITY UNDER EDMUND AND TYSON. THOSE ARE NOT MATTERS THAT ARE ADDRESSED AT THE GUILT PHASE. THOSE ARE SOLELY MATTERS THAT ARE ADDRESSED AT THE PENALTY PHASE, AND I SUBMIT ARE ELEMENTS THAT NEED TO BE SUBMITTED TO A JURY. THANK.

THANK YOU, MR. SHERER. THE COURT WILL BE IN RECESS. THE MARSHAL: PLEASE RISE.