LINROY BOTTOSON -vs- MICHAEL W. MOORE

WE ARE BACK BEFORE THIS COURT BECAUSE SOMETHING TRULY EXTRAORDINARY HAS HAPPENED. THE SUPREME COURT OF THE UNITED STATES HAS REVERSED ITSELF, CHANGED ITS MIND, NOT JUST ON ONE BUT ON TWO OF ITS MAJOR CAPITAL PUNISHMENT PRECEDENTS. ONE OF THOSE PRECEDENTS INVOLVES A SIXTH AMENDMENT PRINCIPLE THAT LIES AT THE HEART OF THE FLORIDA STATUTE. THAT REVERSAL WAS SURPRISING, BECAUSE THIS COURT AND MANY OTHER COURTS, HAD NOTED THAT THE PRECEDENTS THAT IT FOLLOWED HAD INDICATED THE APRENDI VERSUS NEW JERSEY CASE, HAS INDICATED IT DOES NOT APPLY THAT PRINCIPLE TO CAPITAL PUNISHMENT SITUATIONS, LARGELY BECAUSE OF THE COURT'S HISTORY OF DEALING WITH THAT ISSUE OUT OF FLORIDA AND OUT OF ARIZONA. THAT EXPECTATION, MOST RECENTLY RECOGNIZED BY THIS COURT IN THE MILLS CASE LAST YEAR, TURNED OUT TO CLEARLY BE INCORRECT, THAT APRENDI DOES APPLY IN CAPITAL PUNISHMENT SITUATIONS.

WHY DOESN'T THE ROLE OF THE JURY, AS SET OUT IN THE SCHEME HERE, THE JURY MAKES A RECOMMENDATION TO THE TRIAL JUDGE OR THE SENTENCE OR, WHY DOESN'T THAT APPLY TO THE FACT FINDING?

BECAUSE AS I UNDERSTAND IT, THE JURY IS NOT ALLOWED TO MAKE ANY FACT FINDING OR IN ANY OTHER WAY IDENTIFY WHAT THE JURY CANNOT VIEW. A JURY IS NOT GIVEN A SPECIFIC USE OF CONVICT-TYPE INSTRUCTIONS BUT IN THIS CASE WAS GIVEN A FULL PANOPLY OF JURY-AGGRAVATED INSTRUCTIONS, BUT THE JURY IS TOLD THAT IT IS GIVING A COURT RECOMMENDED VERDICT. THIS COURT, IN THE GROUNDS OF THE EIGHTH AMENDMENT SENTENCING, THAT THAT ADVISORY ALONE COULD NOT CONSTITUTIONALLY SUPPORT A DEATH SENTENCE, AND THIS COURT HAS HELD, IN THE HUFFMAN CASE AND MANY OTHER CASES, THAT THE FINDING OF AN AGGRAVATED CIRCUMSTANCE, SPECIFIC AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT IS A NECESSARY PREREQUISITE TO THE IMPOSITION OF THE DEATH PENALTY IN FLORIDA.

ISN'T THE JURY, THOUGH, UNDER THIS SCHEME, INSTRUCTED TO THAT EFFECT? THAT IS, ISN'T THE JURY INSTRUCTED THAT THEY MUST FIND AT LEAST ONE AGGRAVATING CIRCUMSTANCE, BEFORE THEY CAN MAKE A RECOMMENDATION OF DEATH, AND, ALSO, AREN'T THEY INSTRUCTED THAT THEY MUST FIND THAT CIRCUMSTANCE BEYOND A REASONABLE DOUBT? ARE THEY GIVEN SUCH INSTRUCTIONS INSTRUCTIONS?

THEY WERE IN THIS CASE, YOUR HONOR, AND I BELIEVE THAT IS THE CASE IN MOST FLORIDA CASES.

AGAIN, WHY DOESN'T THAT SATISFY THE RING REQUIREMENT OF A FACTUAL FINDING BY A JURY?

BECAUSE I THINK IT DOES NOT, FOR EXAMPLE IN THIS CASE, OF COURSE, WE HAVE THE NONUNION A NIMITY PROBLEM THAT -- THE NONUNANIMITY PROBLEM THAT THE JURY FOUND IN THIS SITUATION, THAT WE DON'T KNOW IF TWO OR THREE OR FOUR OF THESE JURORS FOUND ONE ANY ONE AGGRAVATING CIRCUMSTANCE. WE KNOW, WITH REGARD TO THE AGGRAVATING CIRCUMSTANCE THE COURT IS RELYING MOST HEAVILY ON HERE, REGARDING THE PRIOR CONVICTION, THAT THAT EVIDENCE OF PRIOR CONVICTION WAS NOT PROPERLY OFFERED BEFORE THE JURY BECAUSE IT WAS NOT PROPERLY OFFERED BY THE STATE. WE DON'T KNOW WHAT THE JURY FOUND, WITH REGARD TO ANY OF THOSE AGGRAVATING FACTORS, AND IN ANY FLORIDA CASE, I THINK THAT IS THE CASE. I DON'T THINK THE JURY IS TOLD THAT ALL TWELVE OF THEM

OR EVEN SIX OF THEM HAVE TO AGREE ON ANY ONE AGGRAVATING CIRCUMSTANCE.

COUNSEL.

I AM SORRY.

WE DON'T KNOW THIS. WE DON'T KNOW THAT, BUT WE DO KNOW THAT THE SUPREME COURT OF THE UNITED STATES HAS, TIME 56 TIME, SAID THAT OUR -- TIME AFTER TIME, SAID THAT OUR SYSTEM MEETS MUSTER, ISN'T THAT CORRECT?

WITH REGARD TO THIS ISSUE, THAT'S CORRECT.

AND SPECIFICALLY WITH REGARD TO THE ADVISORY OPINION?

THAT'S CORRECT. WITH REGARD TO THE ADVISORY OPINION, AS AN EIGHTH AMENDMENT MATTER.

AND THE COURT HAS NEVER SAID THAT WE, THAT THIS SYSTEM IS WRONG, EVEN IN LIGHT OF RING. IT HAS NEVER MADE THAT STATEMENT.

IT DID NOT EXPRESSLY SINGLE OUT THE FLORIDA CASE THAT WAS, OF COURSE, NOT BEFORE IT IN THE RING CASE, BUT IT MADE IT ABSOLUTELY CLEAR, BY COMPLETE IRREFUTABLE LOGIC, THAT FLORIDA'S STATUTE FALSE WITH ARIZONA'S, JUST AS ARIZONA'S STATUTE ROSE WITH FLORIDA, IN 1990.

ISN'T THERE PRECEDENT FROM THE U.S. SUPREME COURT, THAT WHEN THEY SAY SOMETHING, THAT THEY DON'T EXPECT LOWER COURTS TO UNO SAY IT?

-- TO UN-SAY IT?

I THINK THAT IS ONE OF THE FRONTS THAT THIS COURT HAS TO DECIDE. THE SUPREME COURT HAS ADMIT ADD ERROR. THIS IS NOT A SITUATION WHERE THEY SAID THE LAW HAD EVOLVED OR THE FACTS HAD CHANGED. THEY ACKNOWLEDGED AND ADMITTED THAT THEIR PREVIOUS DECISION ON THIS ISSUE WAS WRONG, AND THAT IN DOING THAT, THE QUESTION, THEN, BECOMES DO THEY HAVE TO AND SHOULD THEY, AS AN INSTITUTION, THEMSELVES, SAY, AND WE WERE WRONG ON THIS OCCASION AND WE WERE WRONG ON THAT OCCASION, OR DO THEY LEAVE THAT TO THE LOWER COURTS, WHO CAN READ THEIR OPINION AND UNDERSTAND THE LOGIC OF IT AND CAN SEE, AS HAS BEEN ARGUED BY EVERYONE FROM THE BEGINNING, SINCE 1990, INCLUDING THE STATE OF FLORIDA, THAT THERE IS NO DISTINCTION BETWEEN THE ARIZONA STATUTE AND THE FLORIDA STATUTE. INDEED, THIS CASE SAID, THIS COURT SAID A YEAR AGO, IN MILLS, BECAUSE AND APPREHEND WILL HI -- APRENDI DID NOT OVERRULE WALTON, THE BASIC SCHEME OF FLORIDA IS NOT OVERRULED, EITHER.

WOULD YOU SHARE WITH US WHAT PART OF RING OR OTHER AUTHORITIES THAT YOU BASE YOUR ARGUMENT ON, WITH REGARD TO THE NECESSITY FOR FINDINGS IN THE NECESSITY ON A SPECIAL VERDICT, ON EACH OF THESE ELEMENTS THAT YOU ARE ARGUING THIS MORNING, TO HELP US DIRECT OUR ATTENTION TO THAT PART OF RING THAT YOU THINK REQUIRES THAT.

I THINK THE ESSENCE OF RING, THE ACTUAL LANGUAGE, THERE IS MANY QUOTATIONS, THE BASIC QUOTE THAT WE HAVE PUT IN THE BRIEF THAT I THINK EXPRESSES IT AS WELL AS ANY, IS THAT, WHENEVER A FACT EXPOSES A DEFENDANT TO A PENALTY EXCEEDING THE MACK MAXIMUM THEY WOULD RECEIVE -- THE MAXIMUM THEY WOULD RECEIVE, IF PUNISHED ACCORDING TO THE FACTS REFLECTED IN THE JURY VERDICT ALONE, THAT FACT MUST BE SUBMITTED TO AND FOUND BY A JURY BEYOND A REASONABLE DOUBT.

I UNDERSTAND THAT, BUT THE ASPECT THAT IT MUST BE SPECIFICALLY SET FORTH AND THE NATURE OF A SPECIAL VERDICT FINDING, AS OPPOSED TO A GENERAL VERDICT FINDING. THAT IS THE ISSUE THAT I AM TRYING TO UNDERSTAND, IN YOUR POSITION ON THAT.

OF COURSE, IN ARIZONA, THERE WASN'T ANYTHING LIKE THE FLORIDA SPECIAL VERDICT RECOMMENDATION, THAT THEY COULD ATTACH TO, BUT THE QUESTION, I GUESS, COMES DOWN TO WHETHER THE JURY TRIAL THAT THE AND RENT HI CASE AND THE -- THAT THE APRENDI CASE AND THE RING CASE, WHERE WE HAVE TWO OR THREE JURORS AGREEING TO A DIFFERENT FACT AND TWO OR THREE JURORS AGREEING TO A DIFFERENT FACT AS TO CONVICTION, NOT A PRIOR VIOLENT FELONY ACT, BUT A DIFFERENT PRISON SENTENCE, YOU ARE TALKING ABOUT COMPLETELY DIFFERENT TYPES OF FACTUAL ISSUES, AND UNDER THE THAT STATUTE, THERE IS NO WAY TO KNOW -- AND UNDER THE FLORIDA STATUTE THERE, IS NO WAY TO KNOW WHETHER ANY TWELVE JURORS, ANY THREE JURORS, ANY SIX JURORS, WITH REFERENCE TO ON APPEAL, AND THIS COURT, RELYING ON THOSE CIRCUMSTANCES PROPERLY SUBMITTED AND WHETHER THEY WERE IMPROPERLY SUBMITTED UNDER INSTRUCTIONS OR LACK OF EVIDENCE, YOU DON'T KNOW WHETHER A HALF OR A THIRD OF THE JURORS OR ALL OF THE JURORS BASED THEIR VERDICT. I THINK WHAT RING SAYS IS YOU NEED TO STRIP AWAY THE CLOUD THAT WAS CREATED BY THIS ARGUMENT THAT SENTENCING FACTORS ARE DIFFERENT THAN ELEMENTS, AND ONCE YOU DO, YOU HAVE TO TREAT THEM LIKE ELEMENTS. I AM SORRY.

DO WE HAVE A DIFFERENT ARGUMENT, THEN, IF, IN FACT, IT IS A CASE WHERE THERE ARE MULTIPLE CONVICTIONS, SAY, THAT HE IS CONVICTED OF KIDNAPING OR A ROBBERY AT THE SAME TIME AS THE FIRST-DEGREE MURDER? THEN HOW DOES YOUR ARGUMENT SQUARE, UNDER THOSE CIRCUMSTANCES, BECAUSE THEN YOU WOULD HAVE A JURY FINDING OF AN AGGRAVATING CIRCUMSTANCE, BEYOND A REASONABLE DOUBT, WOULDN'T YOU YOU?

IN THE MILLS CASE, THAT WAS ARGUED BY THE STATE HERE, IN THIS COURT, THAT WAS THIS CASE IN WHICH THERE WAS A GUILT-PHASE VERDICT OF FELONY MURDER, AND SO IT WAS TWELVE JURORS. IT WAS SPECIFIED. IT WAS UNDER INSTRUCTIONS. IT WAS BEYOND A REASONABLE DOUBT. THAT WOULD BE ONE CIRCUMSTANCE IN WHICH YOU COULD LOOK AT THE POTENTIAL FOR SOME KIND OF A HARMLESS ERROR OR DE FACTO COMPLIANCE WITH AND RENT HI, EXCEPT -- WITH AND RENT HI, EXCEPT -- WITH APRENDI, EXCEPT FOR THE FACT THAT THE FACTS MUST BE FOUND AS OPPOSED WITH A DEATH SENTENCE, THE STATUTE SAYS, IN 143 AND 2, ALSO, THAT THERE MUST BE SUFFICIENT AGGRAVATING CIRCUMSTANCES, AND THIS COURT HAS HELD THAT ONE AGGRAVATING CIRCUMSTANCE IS NOT ALWAYS SUFFICIENT, AND THAT IS ONE OF THE REASONS WHY HARMLESS-ERROR ANALYSIS HERE DOES NOT WORK, BECAUSE YOU DON'T --

BUT THAT DOES, IN FACT, MAKE YOU ELIGIBLE FOR THE DEATH PENALTY.

WELL, THE STATUTE SAYS WHAT MAKES YOU ELIGIBLE FOR THE DEATH PENALTY IS A FINDING OF SUFFICIENT AGGRAVATING CIRCUMSTANCES. THIS COURT HELD THAT THAT LOGICALLY MUST MEAN AT LEAST ONE BUT IT IS NOT THE SAME. IT IS A PECULIAR WAY OF SAYING AT LEAST ONE, AND THIS COURT HAS SAID AND THE ELEVENTH CIRCUIT HAS SAID, ONE IS NOT ALWAYS SUFFICIENT. IN FACT, I THINK THERE IS CASES, WE FOUND A CASE YESTERDAY, WHERE THIS SAME TRIAL JUDGE FOUND AN AGGRAVATING CIRCUMSTANCE AND SAID JUST BECAUSE THAT IS AN AGGRAVATING CIRCUMSTANCE, AND THERE IS ONE HERE, DOESN'T MEAN THAT DEATH IS ALWAYS APPROPRIATE APPROPRIATE.

AREN'T WE, THOUGH, CONFRONTED HERE, WITH SPECIFICALLY, THE SITUATION THAT THE U.S. SUPREME COURT IN HILLMAN, UPHELD THE FLORIDA STATUTE AGAINST AN ATTACK ON THE BASIS THAT IT VIOLATED SIX THE AMENDMENT, AND IN PROPHET, IT UPHELD AN ATTACK ON THE EIGHTH AMENDMENT AND IN SPAZIANO, IT UPHELD AN ATTACK ON THE SIXTH AND EIGHTH AMENDMENT, AND RING, THE U.S. SUPREME COURT SPECIFICALLY REFERRED TO HILL WIN BUT

DID NOT SECEDE TO HILLWIN, AND HELD IT TO BE CONSTITUTIONAL, AS AGAINST UNITED STATES CONSTITUTIONAL ATTACK. ISN'T THAT WHAT WE ARE CONFRONTING?

THIS COURT, AS WELL AS THE RESPONSIBILITY OF THE U.S. SUPREME COURT, HAS GIVEN, REVERSED ITSELF IN A WAY THAT MAKES IT ABSOLUTELY CLEAR THAT THAT REVERSAL DOES NOT APPLY JUST TO ONE STATUTE IN ARIZONA. IDAHO IS ALREADY ACKNOWLEDGING THAT, ALTHOUGH THEIR STATUTE IS QUITE DIFFERENT THAN ARIZONA'S, THAT IT IS INVALIDATED BY RING. THE QUESTION IS WHETHER THEY HAVE TO DO IT IN EACH AND EVERY CASE AND REVERSE EACH AND EVERY CASE THAT LOGICALLY FALSE FROM THAT, OR WHETHER, AS JUSTICE HARDING SAID IN HIS CONCURRENCE IN THE MILLS CASE, ON THE LOWER COURTS, ONCE THE LAW HAS BEEN DECLARED, TO APPLY IT UNIFORMLY AND FAITHFULLY, AND THE LOGIC OF RING ABSOLUTELY, IRREFUTEBLY, APPLIES TO HILDWIN, AND THE U.S. SUPREME COURT STATED SO MANY TIMES.

DO YOU ATTACH ANY SIGNIFICANCE TO THE FACT THAT THE UNITED STATES SUPREME COURT DENIED CERT IN THIS CASE, AS OPPOSED TO REMANDING THIS CASE FOR RECONSIDERING CONSIDERATION -- FOR RECONSIDERATION, IN LIGHT OF RING?

WE ARE ABSOLUTELY FORBIDDEN TO ATTACH IN LIGHT OF THAT, BECAUSE THE U.S. SUPREME COURT DID HOLD IN MANY DECISIONS, BUT I WOULD SUGGESTION TO -- BUT I WOULD SUGGEST TO YOU THAT, HAD THE COURT SAID WE WERE WRONG IN A MATTER OF LIFE AND DEATH, WE WERE WRONG IN A WAY THAT MANY STATES HAVE RELIED ON, WE WERE WRONG IN A WAY THAT HAS CAUSED PEOPLE TO BE PUT TO DEATH WRONGFULLY, IN THE STATE OF ARIZONA, IF THEY HAVE TO DO THAT AGAIN AND AGAIN AND AGAIN IN EVERY STATE AND USE UP THEIR POLITICAL AND CREDIBILITY IN THAT WAY, OR WHETHER THAT DUTY IS THE LOWER COURT'S DUTYTY TO SAY IT IS CLEAR, HERE, WHAT THE MESSAGE IS. WE HAVE TO FOLLOW THAT, AND THEY DO NOT HAVE TO INSTRUCT US IN SO MANY WORDS, IN EACH AND EVERY CASE.

AND WE ARE TO INTERPRET THIS, FROM THE SUPREME COURT'S DECISION THAT, IN WALTON, THEY MADE A MISTAKE, BUT DIDN'T THEY, THEY ACTUALLY SAY THAT THEY RECEIVED, FROM WALTON, TO THE EXTENT THAT WALTON SAYS YOU DON'T HAVE TO HAVE A JURY FINDING, CORRECT? ISN'T THAT, THEY DID NOT RECEDE FROM THE ENTIRETY OF WALTON, DID THEY?

THERE WERE MANY OTHER COMPLETELY UNRELATED ISSUES IN WALTON. I THINK THAT IS MAYBE ONE OF THE ISSUES WHY IT GOT --

WHEN WE LOOK AT WHAT THEY SAID IN REGARDS TO WALTON, WE HAVE A SITUATION, AIRS OWN, A WITH NO JURY INVOLVEMENT WHATSOEVER. THEN WE LOOK AT FLORIDA, WHERE WE, IN FACT, DO HAVE A JURY INVOLVEMENT, IN THE PENALTY PHASE OF THE PROCEEDINGS, SO WHY ISN'T THAT JUST AS GOOD AN EXPLANATION AS TO WHY THE SUPREME COURT DID WHAT IT DID IN THE BOTTOSON CASE?

BECAUSE IT DOES NOT FIT THE LOGIC OF THE RING DECISION OR THE APRENDI DECISION, AND AS THIS COURT ACKNOWLEDGED IN MILLS I THINK. IN MILLS, THIS COURT'S ANSWER WAS TO SAY THAT APRENDI DOES NOT APPLY TO CAPITAL SENTENCING, AS MANY OTHER STATES SAID, AND THAT IS THE ONLY ARGUMENT THAT MADE ANY SENSE, BECAUSE I ARGUED WALTON, AND THE REASON WE COULDN'T WIN WALTON WAS BECAUSE OF HLDWIN, BECAUSE THE TWO STATUTES WERE --

YOU ARE IN YOUR REBUTTAL TIME IF YOU WOULD LIKE TO SAVE THAT TIME.

I AM SORRY. I MISUNDERSTOOD.

COUNSEL.

MAY IT PLEASE THE COURT. I AM KEN NUNNELLEY. I REPRESENT THE STATE OF FLORIDA IN THIS PROCEEDING. SEATED WITH ME ARE CAROL DITTMAR CAROL SNURKOWSKI AND CANDY CABELA. AT THE OUT SET, IF I COULD VEER FROM MY OPPONENT'S INITIAL ARGUMENT FOR THE MOMENT, THE ISSUE B BEFORE THIS COURT IS THE INITIAL SHAPE YAS PROCEDURE AND SHOULD NOT BE ARGUED ON THE PROCEDURAL BAR GROUNDS. I DO NOT WISH TO BELABOR THE ISSUE. IT IS IN THE STATE'S BRIEF AND I DON'T WISH TO POUND ON THAT THIS MORNING. HOWEVER, THIS IS A SUCCESSOR PETITION. THIS COURT HAS ALREADY DECIDED THE APRENDI ISSUE, AND THIS IS NOT A RING CASE THIS. IS AN APRENDI CASE. RING IS NOTHING MORE THAN THE APPLICATION OF APRENDI, TO THE PLAYERS AND NUANCES OF ARIZONA'S DEATH PENALTY STATUTE. HOWEVER WALTON CAME TO BE DECIDED, WITH RESPECT TO THE TECHNICAL FUNCTION OF THE ARIZONA STATUTE, IS NOT REALLY THE ISSUE BEFORE THIS COURT. THE ISSUE THAT IS BEFORE THIS COURT IS THE FUNCTION OF THE FLORIDA STATUTE, AND THIS COURT, IN MILLS, EXPLICITLY SAID HOW FLORIDA'S DEATH PENALTY STATUTE FUNCTIONS, AND IT SAID THAT FLORIDA'S DEATH PENALTY ACT MAKES THE DEATH ELIGIBILITY DETERMINATION AT THE GUILT STAGE OF A CAPITAL TRIAL IN THIS STATE. THAT IS EXACTLY NOT HOW ARIZONA'S STATUTE WORKS AND THAT IS EXACTLY WHAT THE ARIZONA SUPREME COURT HELD IN ITS RING DECISION. WALTON, FOR WHATEVER REASON, PERHAPS INARTFUL BRIEFING AND ARGUMENT, I DON'T KNOW. I WASN'T THERE. BUT THE ARIZONA STATUTE WAS MISINTERPRETED BY THE UNITED STATES SUPREME COURT, AND THE FACT OF THEIR MISINTERPRETATION OF ARIZONA'S DEATH PENALTY ACT, DOESN'T HAVE ANYTHING TO DO WITH FLORIDA, BECAUSE WE, NOW, KNOW, BASED UPON WHAT THE ARIZONA SUPREME COURT SAID, THAT FLORIDA IS NOT JUST LIKE ARIZONA. BUT THAT FACT DOES NOT PULL DOWN FLORIDA'S DEATH PENALTY ACT, ALONG WITH ARIZONA'S.

MOVING ON TO RING, ONE ASPECT OF THE U.S. SUPREME COURT'S DECISION, THEY HAVE INDICATED THAT, WHEN FACT FINDING IS NECESSARY FOR AGGRAVATORS, WHICH MUST BE FOUND, IN ORDER TO IMPOSE THE DEATH PENALTY IN A CAPITAL CASE THAT, THIS CANNOT BE DONE BY A TRIAL COURT SITTING ALONE, THAT IT MUST BE DONE BY A JURY, AS PART OF THE RIGHT TO A JURY TRIAL. WOULD YOU HELP ME WITH THE PROPOSITION THAT THIS COURT, IN ITS REVIEW OF DEATH PENALTY CASES, OVER THE YEARS, CERTAINLY OVER THE YEARS SINCE I HAVE BEEN HERE, IN 1994, HAS CONSISTENTLY REVIEWED THE FINDINGS OF FACT MADE BY THE TRIAL JUDGE AND RELIED ON THOSE FINDINGS OF FACT IN ITS REVIEW OF THE APPROPRIATENESS AND LEGALITY OF THE IMPOSITION OF THE DEATH PENALTY. COULD YOU HELP ME AS TO WHETHER OR NOT WE CAN CONTINUE TO RELY ON THAT KIND OF AN ANALYSIS BY THE TRIAL COURT JUDGE, AFTER RING?

THE SHORT ANSWER, JUSTICE ANSTEAD, IS, YES, WE CAN. WE DO NOT HAVE TO CHANGE ANYTHING, BASED UPON RING, AND LET ME STEP BACK HALF A STEP FROM YOUR QUESTION AND MENTION THE OTHER REASON THAT IT IS DISINGENIOUS FOR LINROY BOTTOSON UNDER THE FACTS OF HIS CASE, TO EVEN BE HERE MAKING A CLAIM THAT HE IS ENTITLED TO RELIEF BASED UPON APRENDI. APRENDI, ITSELF, CLEARLY STATED THAT A FACT SUCH AS A PRIOR CONVICTION DOES NOT HAVE TO BE REPROVEN. NOW, THE STATE'S POSITION IS THAT, AND THIS IS THE FOOTNOTE, I SUPPOSE, JUSTICE ANSTEAD, THAT THE AGGRAVATING CIRCUMSTANCES SET OUT IN 921.141 ARE NOT ELEMENTS, BUT IN APRENDI, THEY WERE TALKING ABOUT ELEMENTS OF THE OFFENSE. YOU DON'T HAVE TO HAVE A JURY FINDING OF A PRIOR VIOLENT FELONY CONVICTION, AGAIN. WE DON'T REPROVE THAT. WE CAN'T PUT THAT IN THE INDICTMENT AND READ THE INDICTMENT TO THE JURY, YEAH, HE IS CHARGED WITH FIRST-DEGREE MURDER AND BY THE WAY, HE HAS GOT 12 PRIOR VIOLENT FELONIES. WE CAN'T DO THAT. BUT THE FACT OF THE MATTER IS THAT IS AN AGGRAVATING FACTOR THAT IS OUTSIDE ANY POSSIBLE INTERPRETATION OF APRENDI AND RING. SECONDLY --

ISN'T THAT AN UNIQUE FACTOR OF PRIOR VIOLENT FELONIES? DOES ANY OTHER AGGRAVATOR FALL IN THAT CATEGORY?

YES, YOUR HONOR, IT DOES, AND THAT ONE IS ALSO PRESENT HERE, WHICH IS THE MURDER

DURING THE COURTS OF AN ENUMERATE -- DURING THE COURSE OF AN ENUMERATED FELONY, WHICH MR. BOTTOSON'S COUNSEL CONCEDED WAS PRESENT, SO WHAT WE HAVE HERE -- ANOTHER BROAD KA CATEGORY OF VILEORS -- THE BROAD CATEGORY OF VIOLATEORS THAT FALL IN THE FASHION THAT YOU ARE QUOTING, ARE REALLY WITH REGARD TO A PARTICULAR CASE, IS IT NOT, AND SUSCEPTIBLE PROOF, AND IN DISPUTE OVER THAT, AND HAVE TO BE FOUND BY A FACTOR, ISN'T THAT RIGHT? HEINOUS, ATROCIOUS AND CRUEL, CCP, THE BROAD OTHER CATEGORY OF OTHER AGGRAVATORS, THEY ALL HAVE TO BE INDIVIDUALLY FOUND BY SOME OTHER FACT FINDER, DO THEY NOT?

AND THEY ARE UNDER 941.142.

BUT THEY HAVE TO BE COME TO IN THAT WAY. MY POINT IS, IF THE SUPREME COURT HAS SAID THIS FACT FINDING IN ORDER TO IMPOSE THE DEATH PENALTY, CANNOT BE DONE BY A TRIAL JUDGE, HOW CAN THIS COURT CONTINUE TO RELY ON FACT FINDING, THEN, DONE BY A TRIAL JUDGE, IN ITS DETERMINATION OF THE APPROPRIATENESS OF A DEATH SENTENCE? HOW CAN WE CONTINUE TO RELY ON A FINDING MADE BY A TRIAL COURT JUDGE, IF THE U.S. SUPREME COURT HAS SAID THAT TRIAL COURT JUDGES CAN'T DO THAT?

BECAUSE, JUSTICE ANSTEAD, AND I AM NOT DEFLECTING YOUR QUESTION. I AM REALLY NOT. THE DETERMINATION OF DEATH ELIGIBILITY IS THE DETERMINATION THAT RING SAID MUST BE MADE BY A JURY, AND THE DEATH ELIGIBILITY DETERMINATION IS THE ONE THAT IS MADE AT THE GUILT STAGE OF A CAPITAL TRIAL. RING DOES NOT STAND FOR THE PROPOSITION THAT JUDGE, ALONE, SENTENCING, IS UNCONSTITUTIONAL. IT DOES NOT SAY THAT. IT WOULD HAVE RECEDED FROM HILDWIN, SPAZIANO, PROPHET, BARKLEY, IF IT MEANT TO DO THAT, AND IT DIDN'T.

THERE ARE A NUMBER OF CASES OUT OF THIS COURT, AND IN A PLACE WHERE ONE CATEGORY IS FOUND IN A SEPARATE CATEGORY OF OTHER -- WHERE ONE AGGRAVATOR IS FOUND IN A SEPARATE CATEGORY OF OTHER CASES, AND WHERE THERE IS ONE AGGRAVATOR FOUND AND DEMONSTRATING THAT DEATH IS APPROPRIATE, IF WE HAVE, NOW, THIS CONCEPT THAT THE, THAT SEVERAL AGGRAVATORS ARE SUBMITTED TO THE JURY, THE JURY ENDS UP MAKING A RECOMMENDATION, BUT WE DON'T KNOW WHETHER THEY FOUND ONE OR MORE AGGRAVATORS, WHAT HAPPENS TO THAT PROPOSITION OF LAW THAT WE HAVE ESTABLISHED IN OUR CASE LAW, AND HOW WILL WE BE ABLE TO APPLY A CONCEPT LIKE THAT IN THE FUTURE?

BECAUSE THE CONCEPT THAT YOU ARE TALKING ABOUT, JUSTICE ANSTEAD, IS AN EIGHTH AMENDMENT ANALYSIS, AS OPPOSED TO A SIXTH AMENDMENT ANALYSIS. WE KNOW, UNDER FLORIDA STATUTE, THE WAY 921.141-2 FUNCTIONS, THE JURY HAS TO FIND SUFFICIENT AGGRAVATING CIRCUMSTANCES, WEIGH THEM AGAINST THE MITIGATION, AND THEN COME UP WITH A RECOMMENDATION AS TO LIFE OR DEATH. WE KNOW, UNDER THESE FACTS, AND UNDER THE WAY OUR STATUTE OPERATES, THAT, IF THE JURY RECOMMENDS DEATH, THEY FOUND AN AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT. THIS DOESN'T IMPLICATE THE PROPORTIONALITY REVIEW OF SINGLE AGGRAVATOR CASES. THAT IS AN ISSUE THAT IS OFF TO THE SIDE, AND QUITE HONESTLY, JUSTICE ANSTEAD, I WOULD SUGGEST THAT, IN A SINGLE-AGGRAVATOR CASE, WE KNOW WHAT THE JURY FOUND. WE KNOW WHAT THE AGGRAVATOR WAS!

WHAT DO WE KNOW ABOUT WHAT THE JURY FOUND, IF THE JURY RECOMMENDS LIFE? AND DON'T WE HAVE A PROBLEM HERE BECAUSE IN A SITUATION WHERE THE JURY RECOMMENDED LIFE, THE JURY COULD HAVE FOUND THAT THERE ARE NO AGGRAVATING CIRCUMSTANCES OR THERE IS NO AGGRAVATING CIRCUMSTANCE, AND THEN WHAT DO WE DO IN THOSE SITUATIONS?

THOSE SITUATIONS, JUSTICE QUINCE, AND I MEAN NO DISRESPECT ARE NOT TRULY, ARE NOT REALLY BEFORE THIS COURT IN THIS CASE, BECAUSE THIS IS A DEATH RECOMMENDATION. HOWEVER, I WOULD SUGGEST, YOUR HONOR, THAT IN AN OVERRIDE DEATH SENTENCE, WHAT THE COURT SHOULD LOOK AT, AND, AGAIN, THAT IS NOT THE CASE WE HAVE HERE, AND I DON'T WANT

TO, YOU KNOW, SPEND MUCH TIME ON THE OVERRIDE COMPONENT, BUT IF, AGAIN, WE HAVE A CONVICTION, A GUILTY CONVICTION OF FIRST-DEGREE MURDER, COUPLED WITH EITHER A MURDER DURING THE COURSE OF AN ENUMERATED FELONY, IN OTHER WORDS A CONVICTION OF ROBBERY IN ADDITION TO A FIRST-DEGREE MURDER, OR A PRIOR VIOLENT FELONY IN EXISTENCE, THEN WE HAVE THE ELIGIBILITY DETERMINATION MADE. THE DEFENDANT, AND WE CAN'T CONFUSE THE ISSUE OF ELIGIBILITY FOR DEATH WITH SELECTION FOR DEATH. THE GUILT PHASE IS WHERE FLORIDA FLORIDA'S STATUTE DETERMINES WHETHER OR NOT THE DEFENDANT IS GOING TO BE CONSIDERED TO RECEIVE A DEATH SENTENCE.

ARE YOU SAYING IN CASES WHERE THERE IS ANOTHER FELONY, SUCH AS KIDNAPING, SO THAT THERE FOR THERE IS AN AGGRAVATOR IN THERE? IS THAT WHAT YOU ARE SAYING? ARE YOU ACTUALLY SAYING THAT, BECAUSE THE JURY FINDS THE DEFENDANT GUILTY OF FIRST-DEGREE MURDER, THAT, UNDER FLORIDA'S DEATH PENALTY SCHEME, THAT THAT DEFENDANT IS AUTOMATICALLY ELIGIBLE FOR THE DEATH PENALTY? I AM JUST HAVING TROUBLE, I THINK YOU HAVE, YOU KNOW, YOU ARE SAYING ARIZONA STATUTE DOESN'T HAVE THAT, AND THAT IS THE DISTINCTION. I PUT THE DISTINCTION WITH THE ARIZONA STATUTE, AS IN ARIZONA THE JURY HAS NO ROLE IN THE DETERMINATION OF WHETHER THE DEATH PENALTY WOULD BE IMPOSED, BUT I AM HEARING YOU SAY SOMETHING MORE BASIC, WHICH IS THAT SOMEHOW IN FLORIDA THE ELIGIBILITY IS OCCURRING AT THE GUILT PHASE, WHEREAS IN ARIZONA IT WAS OCCURRING AT THE PENALTY PHASE. IS THAT BECAUSE ARE TELLING THIS COURT?

YES, MA'AM. THAT IS EXACTLY WHAT I AM TELLING THIS COURT.

SO YOU ARE SAYING THAT WE WOULD INTERPRET OUR FLORIDA SCHEME THAT, IN FLORIDA, ALL THAT IS NECESSARY FOR A DEFENDANT TO BE ELIGIBLE FOR THE DEATH PENALTY, IS A CONVICTION FOR FIRST-DEGREE MURDER?

YOUR HONOR, IN A CASE, IN A CAPITAL MURDER CASE IN FLORIDA, THE WAY OUR STATUTE, OUR STATUTE IS A FRONT-END-LOADING STATUTE. FLORIDA, LIKE La, LIKE TEXAS, LIKE ALABAMA, MAKES THE ELIGIBILITY DETERMINATION AT THE GUILT STAGE OF THE TRIAL.

ARE THEY TOLD THAT? IS THAT SOMETHING IN FLORIDA THAT THEY ARE TOLD, THAT A DETERMINATION IN THIS CASE, OF FIRST-DEGREE MURDER, WILL RENDER THE DEFENDANT ELIGIBILITY, OR -- ELIGIBLE, OR AREN'T THEY TOLD THAT THERE IS A SEPARATE PENALTY PHASE IN WHICH THAT DETERMINATION IS GOING TO BE MADE?

THEY ARE TOLD THERE IS A SEPARATE PENALTY PHASE IN WHICH TO DETERMINE PUNISHMENT.

THEY ARE TOLD THEY ARE ELIGIBLE TO RECEIVE THE DEATH PENALTY.

EXCUSE ME, YOUR HONOR?

SO, BUT, THE STATUTE SAYS, UNDER PENALTIES, A PERSON WHO HAS BEEN CONVICTED AFTER CAPITAL PENALTY, SHALL BE PUNISHED WITH DEATH, IF THE PROCEEDING HELD TO DETERMINE THE SENTENCE IS IN ACCORDANCE WITH 921.141, SO ISN'T THAT WHAT WE HAVE GOT TO LOOK AT, AND, AGAIN ALL ASIDE FROM YOUR ARGUMENTS ABOUT PROCEDURAL BAR, I AM JUST HAVING REAL TROUBLE WITH YOUR TELLING US THAT ARIZONA STATUTE IS DIFFERENT FROM FLORIDA'S, AS TO WHEN ELIGIBILITY IS DETERMINED.

THE ARIZONA STATUTE FUNCTIONS WE NOW KNOW, TO PLACE THE DETERMINATION OF WHETHER OR NOT THE DEFENDANT IS ELIGIBLE TO RECEIVE A DEATH SENTENCE, SOLELY IN THE HANDS OF THE JUDGE. FLORIDA, AND LET ME, IF I COULD STEP BACK, AGAIN, JUST A MOMENT, WHAT WE ARE SEEING WHEN WE ARE COMPARING ARIZONA AND FLORIDA STATUTES, IS THE DIFFICULTY IN TRYING TO READ CONSTITUTIONAL TEA LEAVES, IF YOU WILL, BECAUSE THE STATUTES ARE DIFFERENT. THERE ARE 38 DEATH PENALTY STATUTES IN THIS COUNTRY, AND EVERY ONE OF

THOSE STATUTES IS DIFFERENT IN NUANCE, BASED UPON DECISIONAL AUTHORITY, STATUTORY DRAFTING, AND JUDICIAL AND LEGISLATIVE RULE-MAKING. THE STATUTES ARE DIFFERENT. OUR STATUTE, AS THIS COURT SAID IN MILLS, MAKES A DEFENDANT ELIGIBLE FOR DEATH, WHEN HE IS CONVICTED OF A CAPITAL OFFENSE, AND THIS COURT EVEN WENT SO FAR AS TO DEFINE AND DISCUSS THAT A CAPITAL OFFENSE IS DEFINITION DEFINITIONALLY ONE THAT IS DEATH DEATH-ELIGIBLE. THE EXCEPTION WOULD BE CAPITAL SEXUAL BATTERY.

DO YOU AGREE, DO YOU NOT, THAT APRENDI DID CHANGE THE RULES? THE SUPREME COURT, WHEN IT CAME OUT WITH APRENDI, IT SAID WE HAVE BEEN WRONG IN THE PAST AND NOW WE ARE CHANGING IT. YOU HAVE TO AGREE WITH THAT, DON'T YOU?

DID APRENDI CHANGE THE RULES OR DID RING CHANGE THE RULES?

APRENDI.

APRENDI SEEMS TO BE BASED UPON WHAT THE COURT PERCEIVED AS REMOVING SENTENCE ENHANCEMENT DECISIONS FROM THE JURY. WE ARE NOT TALKING ABOUT A SENTENCE --

DO YOU AGREE THAT THAT WAS A CHANGE?

NOT REALLY. I DON'T KNOW THAT THAT IS A SERIOUS OR A MAJOR CAT CLISS MICK CHANGE IN THE LAW. -- CATACLYSMIC CHANGE IN THE LAW BUT THE BOTTOM LINE, AGAIN, IS --

WHAT DO YOU THINK APRENDI SAID? WHAT IS YOUR INTERPRETATION OF APRENDI?

APRENDI SEEMS, TO ME, TO DRAW THE DISTINCTION BETWEEN ELEMENTS OF AN OFFENSE, WHICH AGGRAVATING CIRCUMSTANCES IN FLORIDA MOST CERTAINLY ARE NOT, AND SENTENCE ENHANCEMENT CONSIDERATIONS, WHICH IN THE CASE OF THE NEW JERSEY HATE CRIME --

AGGRAVATING CIRCUMSTANCES THAT WOULD PUT THE PERSON IN A DEATH CATEGORY MUST BE DECIDED BY WHO?

THE AGGRAVATING CIRCUMSTANCES -- THE AGGRAVATING CIRCUMSTANCES DO NOT PUT THE DEFENDANT IN THE DEATH CATEGORY. THE AGGRAVATING CIRCUMSTANCES ARE THE EIGHTH AMENDMENT SELECTION FACTORS THAT DETERMINE WHETHER OR NOT THE DEFENDANT WILL RECEIVE THE MAXIMUM SENTENCE THAT HE IS ALREADY ELIGIBLE TO RECEIVE.

YOU DON'T BELIEVE THAT RING SAYS, THEN, THAT AGGRAVATING CIRCUMSTANCES MUST BE FOUND BY JURY?

THE DISTINCTION THAT WE HAVE TO, THAT HAS TO BE MADE, AND THAT THIS COURT MUST RECOGNIZE, IS THAT WE SEE THE GROOIS AGGRAVATING CIRCUMSTANCES", "ELIGIBILITY FACTORS" AND SELECTION FACTORS" USED SOMEWHAT INTERCHANGEABLY IN THE DECISIONS BUT WHEN YOU STRIP ALL OF THAT DOWN TO ITS MOST BASIC FUNDAMENTAL LEVEL, AN ELIGIBILITY FACTOR IS THE FACTOR THAT DETERMINES THE MAXIMUM SENTENCING EXPOSURE OF THAT DEFENDANT, AND UNDER MILLS, THE CASES, BOTH BEFORE AND SINCE MILLS, THE MAXIMUM SENTENCE TO WHICH A DEFENDANT CONVICTED OF CAPITAL MURDER IS EXPOSED IS DEATH. THE AGGRAVATING FACTORS DEFINED IN THE FLORIDA STATUTES ARE SELECTION FACTORS. THOSE FACTORS ARE EIGHTH AMENDMENT CREATURES.

WHAT IS THE SIGNIFICANCE OF APRENDI, IN YOUR OPINION?

APRENDI --

OR IS IT A SIGNIFICANT OPINION?

APRENDI IS A SIGNIFICANT OPINION. HOWEVER, THE SIGNIFICANCE OF APRENDI IN FLORIDA DOES NOT EXTEND TO DEATH PENALTY CASES.

ISN'T THAT EXPLICITLY WHAT RING HAS HELD, IS THAT IN MILLS, WE ACTUALLY, BASED ON WHAT THE SUPREME COURT HAD SAID BEFORE, BELIEVED AND CONCLUDED, THAT APRENDI DID NOT APPLY TO DEATH PENALTY CASES AND THE FINDING OF AGGRAVATORS, THAT RING, RATHER EXPLICITLY SAYS, NO, ANYTHING THAT WE HAVE SAID TO INDICATE THAT IN THE PAST, THAT WE ADMIT THAT WE WERE WRONG, AND THAT THE APRENDI HOLDING DOES APPLY TO THE FINDING OF AGGRAVATORS IN DEATH PENALTY CASES. ISN'T THAT WHAT THE HOLDING OF RING WAS?

YES. THAT IS WHAT RING SAID. RING APPLIED APRENDI IN THE DEATH SELECTION FACTORS AND THE WAY IT FUNCTION INS DEATH PENALTY AGGRAVATION FACTORS. I ARGUED THE CASE THAT THIS COURT DECIDED, THAT HELD THAT THE SUPREME COURT MEANT WHAT IT SAID, WHEN IT SAID APRENDI DID NOT APPLY, WITH REGARD TO CAPITAL CASES, BUT THIS COURT WENT ON AND SAID BEYOND THAT, OKAY, BE THAT AS IT MAY, THE MAXIMUM SENTENCE AVAILABLE ON THE CONVICTION OF A CAPITAL CASE IN FLORIDA, IS DEATH.

WHAT ABOUT IN ARIZONA? IN AIRS OWN, A WASN'T THAT THE -- IN ARIZONA, WASN'T THAT THE WHOLE IDEA THAT THEY WERE TRYING TO CONFLICT WITH APPREHEND HI -- WITH APRENDI, THAT THEY WERE TRYING TO SAY THAT THE MAXIMUM SENTENCE OF DEATH IN ARIZONA, IN RING THEY SAID THIS REALLY OVERLOOKED THE FACT THAT THE RELEVANT INQUIRY IS ONE OF EFFECT NOT OF REFORM, AND THE REQUIRED FINDING OF AN AGGRAVATING CIRCUMSTANCE EXPOSED RING TO A GREATER PUNISHMENT THAN THAT AUTHORIZED BY THE GUILTY VERDICT. IN FLORIDA, UNLESS A JURY OR THE JUDGE FINDS AN AGGRAVATING CIRCUMSTANCE, THEY ARE NOT GOING TO BE ABLE TO BE SENTENCED TO DEATH, AND SO IN THAT WAY IT IS IDENTICAL, AND I GUESS, YOU KNOW I THINK YOUR OTHER ARGUMENTS HAVE, CERTAINLY, GREAT WEIGHT HERE, WHICH IS THAT I AM NOT SURE HOW WE CAN GO AHEAD AND OVERRULE U.S. SUPREME COURT PRECEDENT, BUT AS FAR AS THAT IDENTITY, I AM JUST STILL HAVING GREAT DIFFICULTY IN THAT ARGUMENT.

UNFORTUNATELY, WITH THAT STATEMENT, YOUR TIME HAS EXPIRED. THANK YOU VERY MUCH FOR YOUR RESPONSES TO OUR QUESTIONS. COUNSEL.

MR. CHIEF JUSTICE.

COUNSEL, COULD I ASK ONE QUESTION FOR CLARIFICATION. ASSUME JUST FOR THE MOMENT, AND WALK THROUGH THIS WITH ME, IF YOU WILL. ASSUME THAT WE AGREE WITH THE SUBSTANTIVE ARGUMENTS THAT MR. NUNNELLEY HAS MADE, WITH REGARD TO THE APPLICATION OF THESE OTHER FACTORS, BUT WE DISAGREE WITH THE ARGUMENT THAT, WITH REGARD TO THAT A JURY MUST FIND THE AGGRAVATING FACTORS THAT YOU HAVE HEARD DISCUSSED. ASSUMING THAT KIND OF PREDICATE, I HAVE SOME CONCERNS, AND HOW WOULD YOU ADDRESS THE CONCERNS, WITH REGARD TO THE STATEMENTS MADE BY THE JUDGE TO THE JURY, THAT, JURY, YOUR ONLY FUNCTION IS TO MAKE RECOMMENDATIONS. IT IS REALLY NOT, OR CONVEY THAT CONCEPT, NOT IN THOSE WORDS BUT TO CONVEY THE CONCEPT THAT YOU ARE NOT, WHATEVER YOU DO IS REALLY NOT THE CRITICAL FACTORS. IS THAT SUBJECT TO A HARMLESS-ERROR ANALYSIS? IS IT NOT? WHAT IS THE AUTHORITY FOR THAT? WHAT IS THE EFFECT OF THAT ASPECT OF THE TRIAL, IF WE MAKE THOSE OTHER ASSUMPTIONS?

THAT WOULD BE A CALDWELL VERSUS MISSISSIPPI KIND OF A PROBLEM, WHERE THE JURY IS NOT GIVEN THE ADMONITION REGARDING THE SERIOUSNESS AND THE NATURE OF ITS ROLE. THAT IS ONE OF THE MANY PROBLEMS WITH THE INSTRUCTIONS JURORS ARE BEGIN, IF THEY WERE TO BE USED FOR THIS PURPOSE. THE UNANIMITY AND REQUIREMENT OR LACK THEREOF IS ANOTHER ONE. THE LACK OF ANY KIND OF A SPEAKS FIX IS ANOTHER ONE, AND AS JUSTICE QUINCE POINTS OUT, THE FACT THAT JURY RECOMMENDATIONS OF LIFE OCCUR IN MANY CASES. IN THIS CASE IT

IS NOT AN UNANIMOUS RECOMMENDATION. THERE ARE TWO JURORS WHO ARE RECOMMENDING LIFE. THAT IS WHAT TAKES AWAY THE POSSIBILITY OF USING THAT VERDICT, AND IN FACT THE CASE THAT WENT TO THE SUPREME COURT, FLORIDA ARGUED THAT IT IS NOT A PROBLEM TO TELL THE JURORS THAT THEIR VERDICT IS NOT BINDING AND IT DOES NOT CREATE A WHAT WOULD WELL PROBLEM, BECAUSE THEY ARE NOT THE SENTENCE OR. IN FACT, THE -- THE SENTENCOR IS THE TRIAL JUDGE. AS I UNDERSTAND FLORIDA TRIAL LAW, THE ADVISORY OF A JURY IS ENTITLED TO MORE LEGAL WEIGHT THAN THAT BUT IS NO MORE MINDING DUE TO THOSE RECOMMENDATIONS.

SHOULD APRENDI BE APPLIED RETROACTIVELY AND IF SO, WHY?

SEVERAL REASONS, YOUR HONOR. ONE IS THE WIDTH CASE. ONE IS THAT YOU -- IS THE WHITT CASE. YOU HAVE A FINITE NUMBER OF RESENTENCINGS THAT WOULD HAVE TO OCCUR. IN THE TERRACE CASE, YOU HAVE RESENTENCING. YOU DON'T HAVE A SITUATION IN A CASE LIKE DUNCAN VERSUS LOUISIANA, WHERE YOU WOULD TURN PEOPLE FREE AND THERE ARE TENS OF THOUSANDS OF OTHER CASES.

BUT IN FLORIDA, WOULDN'T WHITT BE THE PRIMARY CASE USED TO DETERMINE RETRO ACTIVITY, AND ONE OF THE CONSIDERATION BEING HOW IT IMPACTS UPON THE ADMINISTRATION OF JUSTICE?

I THINK BOTH PARTIES --

IE AFFECTING SOME 300 PEOPLE IN PRISON.

I THINK BOTH PARTIES AGREE THAT THAT IS REALLY WHAT IT BOILS DOWN TO, UNDER THE WHITT TEST. THAT IS WHAT I WAS TRYING TO EXPRESS, BUT I THINK ON THE OTHER HAND, THE COURT HAS TO CONSIDER WHAT IS GOING TO HAPPEN WITH REGARD TO RETRO ACTIVITY, IF THIS COURT HOLDS AND RECOGNIZES OR THE SUPREME COURT, IF IT NEEDS TO EXPLICITLY SAY SO OVERRULES HILDWIN AND SAYS THESE ARE UNCONSTITUTIONALLY-IMPOSEED SENTENCES, AND THE JURORS' RIGHTS, UNDER THE SIXTH -- AND THE DEFENDANTS' RIGHTS, UNDER THE SIXTH AMENDMENT, WERE VIOLATED, AND NONETHELESS PEOPLE WOULD BE GOING TO THEIR DEATHS IN A SITUATION WHERE MORE CULPABLE PEOPLE WOULD BE HAVING RETRIALS AND HAVING JURY-BOUND VERDICTS, AND TO COMPLY, JUST BECAUSE OF THE TIMING OF A MISTAKE MADE BY THE U.S. SUPREME COURT OF THE UNITED STATES. THIS WAS A LAW IN 1991. THEY JUST DIDN'T GET IT RIGHT. THEY HAVE ACKNOWLEDGED THAT.

YOU BROUGHT UP IDAHO A COUPLE OF TIMES, AND IDAHO IS SPECIFICALLY ONE OF THE FOUR STATES IDENTIFY IN FOOTNOTE SIX OF RING, AS BEING IN THE ARIZONA CATEGORY, CORRECT?

YES, YOUR HONOR.

BUT IN THAT SAME FOOTNOTE, THE U.S. SUPREME COURT RECOGNIZED THAT FLORIDA WAS NOT IN THAT CATEGORY, CORRECT?

I THINK IT PUT FLORIDA IN A DIFFERENT CATEGORY, WITH DELAWARE AND INDIANA, WHERE ACTUALLY THE INDIANA SUPREME COURT YESTERDAY JUST APPLIED APRENDI AND OVERTURNED A LIFE WITHOUT PAROLE SENTENCE, BASED ON AGGRAVATING CIRCUMSTANCE FOUNDING AT SENTENCING. THE ARGUMENT THAT THE STATE IS MAKING HERE, AS POINTED OUT, JUSTICE PARIENTE, THAT EXPLICITLY IN RING, WHAT THE ARIZONA ATTORNEY GENERAL ARGUED, AND IT WAS THE APPARENT ARGUMENT AS THIS COURT RECOGNIZED IN PAGE ONE AND TWO OF OUR REPLY BRIEF, WE QUOTE THE SPECIFIC REJECTION OF THAT. I THINK IT IS BINDING ON THIS COURT. THANK YOU, YOUR HONOR.

CHIEF JUSTICE: THANK YOU, COUNSEL. THANK YOU ALL. THE COURT WILL TAKE A FIVE-MINUTE

RECESS BEFORE WE HEAR THE LAST CASE, SO IF YOU ALL WILL JUST STAY IN PLACE, THE COURT WILL BE IN RECESS FOR FIVE MINUTES.