AMOS LEE KING -vs- MICHAEL W. MOORE

CHIEF JUSTICE: NEXT CASE IS KING VERSUS MORE AND JUSTICE QUINCE IS RECUSED ON THAT CASE. COUNSEL IS READY TO PROCEED. YOU MADE PROCEED.

THANK, YOUR HONOR. GOOD MORNING. I AM ERIC PINKARD OF CCRC MIDDLE AND WE REPRESENT MR. AMOS KING. I WOULD LIKE TO GO BACK TO THE PREVIOUS ARGUMENT AND TALK ABOUT THE PROPOSEITE OF THIS COURT -- ABOUT THE PROPRIETY OF THIS COURT APPLYING RING AND THE ARGUMENTS PUT FORTH, FROM WHAT I HEARD FROM THE STATE, REGARDING THAT. THIS COURT RECENTLY RULED ON THE KING CASE, ON THE MERITS, AS THEY DID IN SEVERAL OTHER CASES ON THE APRENDI CLAIM, ALONG WITH MILLS AND OTHER CASES, AND WHAT HAS HAPPENED IS, IN THOSE CASES, WHAT THIS COURT HAS PREVIOUSLY HELD IS THAT APRENDI DID NOT APPLY TO CAPITAL SENTENCING SCHEMES, THAT THEY ALSO CITED WALTON, FOR THE PROPOSITION OF DENYING THE CLAIM, AND THEN LASTLY, BECAUSE FLORIDA'S SCHEME DIFFERED FROM ARIZONA'S SCHEME, AS TO THE STATUTORY MAXIMUM PUNISHMENT FOR FIRST-DEGREE MURDER, THAT WAS THE LAST CRITERIA THE COURT USED. RING CHANGES ALL OF THE REASONS THAT THIS COURT PREVIOUSLY DENIED MR. KING'S CLAIM ON THE MERITS. EVERY SINGLE ONE OF THOSE HAS BEEN DISPUTED AND CHANGED BY THE RING OPINION, ITSELF.

ARE YOU, YOU ARE ASKING THIS COURT TO DECLARE FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL BASED ON THE SIXTH AMENDMENT. I MEAN, BASICALLY HAD, THAT IS THE ARGUMENT. THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION, CORRECT?

CORRECT.

THE UNITED, THE UNITED STATES SUPREME COURT PRECEDENT HAS UPHELD, AS JUSTICE WELLS SAID IN THE LAST ORAL ARGUMENT, HAS UPHELD THAT'S DEATH PENALTY SCHEME, PRIMARILY ON THE EIGHTH AMENDMENT, BUT THE SIXTH AMENDMENT IS MENTIONED. I DON'T THINK BACK 20 YEARS AGO, ANYONE GAVE THE SIXTH AMENDMENT MUCH WEIGHT, AS FAR AS AN ARGUMENT OR THOUGHT THAT THAT WOULD EVER BE SOMETHING THAT THIS UNITED STATES SUPREME COURT WOULD BUY INTO, BUT GIVEN THE FACT THAT WE, OURSELVES, FROWN ON LOWER COURTS IMPLICITLY SAYING THAT A HIGHER COURT IMPLICITLY OVERRULED ITS OWN PRECEDENT, HOW DO WE DECLARE OUR STATUTE UNCONSTITUTIONAL, WHEN THE UNITED STATES SUPREME COURT HAS NOT EXPLICITLY RECEDED FROM ALL THIS PRECEDENCE? WOULDN'T THAT JUST VIOLATE EVERY PRINCIPLE THAT BOTH THE UNITED STATES SUPREME COURT TEACHES AND THIS COURT TEACHES, WHEN WE ARE INSTRUCTING OUR LOWER COURTS ABOUT THE WAY THAT DECISIONS ARE MADE IN THE HIGHER SYSTEM?

WHAT WE HAVE HERE IS A DECISION FROM THE HIGHEST COURT IN THE LAND, THAT CHANGES EVERYTHING THAT THIS COURT PREVIOUSLY RELIED ON, AND WHAT THE U.S. SUPREME COURT IS DOING WOULD BE WHETHER THIS COURT WOULD DECIDE, UNDER THE LAWS OF THE STATE OF FLORIDA, WHETHER FLORIDA COMPLIES WITH RING. THAT IS WHAT THIS COURT'S FUNCTION WOULD BE IN THE CIRCUMSTANCES.

ESSENTIALLY WHAT WE CAN DO IS DO WHAT THE ARIZONA SUPREME COURT DID IN RING, WHICH IS EXPLAIN THAT, NOW, THIS IS HOW FLORIDA'S DEATH PENALTY STATUTE WORKS. THE JURY IS ONLY ADVICE. THERE ARE NO EXPLICIT FINDINGS. IT IS NOT UNANIMOUS. THE JURY INSTRUCTION IS ONE THAT SAYS IT, THEY ARE GIVING AN ADVISORY SENTENCE. THEY ARE NOT MAKING FACT

FINDING AND EXPLAIN THAT AND SAY THAT, IF SOME OF US THINK, IN OUR OPINION THAT IT LOGICALLY FOLLOWS FROM RING THAT FLORIDA STATUTE HAS INFIRMITIES, SET THAT FORT, BUT WE HAVE NO AUTHORITY, THEN, TO SAY -- TO SET THAT FORTH, BUT WE HAVE NO AUTHORITY, THEN, TO SAY ON OUR OWN, UNDER THE FLORIDA CONSTITUTION AND YOU HAVEN'T MADE THAT UNDER THE FLORIDA CONSTITUTION.

WHAT HAS TO HAPPEN IS THIS COURT HAS TO APPLY RING TO THE FLORIDA SCHEME. RING IS A CASE FROM THE U.S. SUPREME COURT ON THIS ISSUE, AND THE COURT HAS TO DECIDE T.

YOU ARE ASKING US TO DECLARE OUR STATUTE UNCONSTITUTIONAL, OR MAYBE, ISN'T THAT THE RELIEF THAT YOU ARE SEEKING?

BASICALLY WHAT I AM SAYING IS --

NO ONE SAID IT THIS MORNING, BUT THAT IS WHAT IS BEING ASKED FOR.

I AM SAYING IN THIS CASE OF MR. RING, RING WAS NOT COMPLIED WITH.

MR. KING HAD A 12-0 FINDING FOR DEATH.

IN MR. KING'S CASE, HE IS ENTITLED TO RELIEF IN THIS CASE, BECAUSE NO JURY EVER RENDERED A VERDICT CONVICTING HIM OF THE OFFENSE OF CAPITAL HURD, BECAUSE THE -- OF CAPITAL MURDER, BECAUSE THE JURY WAS NEVER ASKED TO DO THAT IN THIS CASE.

WE KNOW THAT, AS A CONSTITUTIONAL REQUIREMENT, THE JURY FOUND THAT THERE WERE SUFFICIENT AGGRAVATORS TO OUTWEIGH ANY MITIGATORS AND THEREBY RECOMMENDED DEATH, AND I THINK THAT MR. KING IS IN PROBABLY A WEAKER SITUATION, FOR BEING ABLE TO CLAIM ANY BENEFIT OF RING, AS ANY DEFENDANT.

WAIT A MINUTE, JUSTICE PARIENTE. WHAT WE HAVE IS A SITUATION WHERE THE FACTS UPON WHICH THE STATE CONTENDS, CONTINGENT UPON THE IMPOSITION OF THE DEATH PENALTY, HAD TO BE FOUND BY THE JURY, AND THEY ARE CONSIDERED ELEMENTS OF THE OFFENSE, AND IN NO WAY IN THE PENALTY PHASE PROCEEDING IN MR. KING'S CASE, WERE THOSE TREATED AS ELEMENTS OF THE OFFENSE, SUBMITTED TO THE JURY, FOUND UNANIMOUSLY. WE CAN'T TELL WHAT FINDING THE JURY MADE, BY LOOKING AT THEIR ADVISORY RECOMMENDED, RECOMMENDATION TO THE JUDGE, BECAUSE THAT IS ALL IT IS, IS ADVICE TO THE JUDGE. IT IS NOT A SPECIFIC FINDING OF FACT, AND IT IS CERTAINLY NOT VARIED I CAN'T OF A GREATER OFFENSE OF CAPITAL MURDER, BECAUSE IN WHAT OTHER CIRCUMSTANCES WOULD YOU TAKE A CRIMINAL CASE AND SAY, OKAY, SOME OF THE ELEMENTS WE ARE GOING TO SUBMIT TO THE JURY, AND WE ARE GOING TO SAY, OKAY, YOU HAVE TO FIND THOSE AFTER PROPER INSTRUCTION, AND AS TO SOME ELEMENTS WE ARE GOING TO SEPARATE AND TOLERATE IN THE CAPITAL CONTEXT OF WHETHER OR NOT SOMEONE LIVES OR DIES, WE ARE GOING TO SAY, OKAY, WE ARE GOING TO FIND THESE OTHER ELEMENTS, BASED SOLELY ON THE ADVICE OF THE JURY. THAT IS NOT PROPER, WHEN YOU CONSIDER WHAT RING HOLDS. THEY ARE ELEMENTS AFTER GREATER OFFENSE. THEY HAVE TO BE, THERE WAS NO VERDICT IN MR. KING'S CASE, IN THE RECORD OF THIS CASE, THERE IS NO VERDICT.

YOU AGREE THAT, UNDER RING, THE ONLY THING THAT AT LEAST THE MAJORITY OF THE UNITED STATES SUPREME COURT WAS REQUIRING THE JURY FIND WERE THE AGGRAVATORS. THEY WEREN'T ANTICIPATING THAT THE JURY HAD TO ACT AS A TENTHS OR, CORRECT?

-- AS A SENTENCOR, CORRECT?

THAT'S CORRECT AS REGARDS THE SENTENCOR IN THE CASE.

IN FACT, THE DEFENDANT IS GOING TO HAVE LESS OF A RIGHT, BECAUSE AT LEAST IN THE FLORIDA, WE HAVE GOT INJURIES THAT ARE ABLE TO DECIDE THAT THE MITIGATORS OUTWEIGH THE AGGRAVATORS, AND RECOMMEND A LIFE SENTENCE, WHICH IS ENTITLED TO GREAT WEIGHT. THAT WOULD BE REQUIRED, WOULDN'T BE REQUIRED ANYMORE, IF THIS STATUTE WAS THROWN OUT AND ALL THE JURY WAS TO DO WAS TO RESPOND TO THE AGGRAVATORS.

I CAN'T SPECULATE AS TO WHETHER THE MITIGATION ASPECT THAT YOU ARE TALKING ABOUT WOULD BE THROWN OUT OR NOT, BUT I CAN SAY THAT, UNDER MR. KING'S CASE, THAT IF YOU READ WHAT HAPPENED, WHAT ACTUALLY HAPPENED IN MR. KING'S CASE IN LIGHT OF RING, IT JUST DOESN'T COMPLY WITH THE RING DECISION, BECAUSE AS I SAY, WE ARE TALKING ABOUT ELEMENTS OF A GREATER OFFENSE, AND THEY WERE NOT SUBMITTED TO THE JURY IN THAT WAY AND THEY WERE NOT FOUND. THERE IS NO WAY YOU CAN LOOK AT THAT JURY ADVICE, WHICH IS WHAT IT WAS, AND SAY THERE WAS ANY FACT FINDING WHATSOEVER IN MR. KING'S CASE, AND AT THE TIME THAT HE WAS CONVICTED AT THE GUILT PHASE, IF YOU LOOK AT FLORIDA STATUTE 775, HE COULD NOT GET ANYTHING BUT A LIFE SENTENCE, SO THERE HAS TO BE ADDITIONAL FACTS PROVEN, AND THERE WERE NO FACTS PROVEN AT THE RESENTENCING ON MR. KING'S CASE, BECAUSE NO JURY WAS ASKED TO FIND A FACT. NO JURY WAS ASKED TO RENDER A VERDICT.

WHAT WERE THE AGGRAVATORS THAT THE JUDGE FOUND IN MR. KING'S CASE? WHAT ARE THE APPLICABLE AGGRAVATORS?

AFINGT LIST OF THEM HERE -- I HAVE GOT A LIST OF THEM HERE, JUDGE. I KNOW THERE WAS -- HAC WAS ONE OF THEM. ANOTHER ONE WAS PRIOR VIOLENT FELONY.

COULD YOU ADDRESS, UNDER THE PRIOR VIOLENT FELONY, IN THE APRENDI AND OTHER CASES THAT, THAT WOULD BE SOMETHING THAT THE JURY WOULDN'T HAVE TO FIND ANYWAY? ISN'T THAT ACCORDING TO THE UNITED STATES SUPREME COURT PRECEDENT, THAT PRIOR VIOLENT FELONY WOULD NOT HAVE TO BE FOUND BY THE JURY BUT COULD BE FOUND BY THE JUDGE AS THE PREDICATE?

WE DON'T FEEL THAT THE ELEMENT OF THE TORRES CASE STILL APPLIES, IN LIGHT OF WHAT JUSTICE THOMAS SAYS IN THE APRENDI DECISION. THE MAN TOTALLY CHANGES HIS OPINION AS TO WHETHER PRIORS HAVE TO BE FOUND BY THE JURY. HE SPECIFICALLY STATED, BASICALLY ALMOST APOLOGIZED IN THE OPINION, AND SAID THAT THEY ABSOLUTELY SHOULD BE FOUND BY THE JURY, SO WE DON'T FEEL THAT THAT CASE HAS ANY VALIDITY, IN LIGHT OF RING, AND WHAT JUSTICE THOMAS SAID ABOUT THAT, IN ANY CASE THAT IS DEALING WITH RECIDIVISM. WHAT WE ARE TALKING ABOUT IS THE ACTUAL FACTUAL BASIS BETWEEN WHETHER SOMEBODY LIVES OR DIES, SO IT IS A TOTALLY DIFFERENT MATTER ALL TOGETHER, AND I DON'T THINK THAT EXCEPTION APPLIES IN THIS CASE, AND I DON'T THINK THAT SUPREME COURT CASE, I THINK THAT IS THE ONE THAT YOU ARE REFERRING TO, ANY LONGER HAS ANY VALIDITY.

SO WE WOULD HAVE TO SAY THAT THAT DECISION HAS BEEN IMPLICITLY OVERRULED AS WELL. IS THAT WHAT YOU WOULD BE ASKING US TO DO?

WELL, I DON'T KNOW THAT I WOULD SAY IT IS IMPLICITLY OVERRULED, BUT I THINK, I DON'T THINK IT HAS EVER BEEN APPLIED TO A CAPITAL CONTEXT, ANYWAY, AND IN THIS CASE, THE WHOLE CRUX OF THE MATTER HERE IS, I THINK, FROM THIS COURT'S PERSPECTIVE AND GETTING BACK TO WHAT YOU SHOULD DO FROM WHAT THE U.S. SUPREME COURT DID, I THINK YOU SHOULD TAKE A LOOK AT RING AND WHY THE SUPREME COURT CHANGES THEIR POSITION ON THIS, AND THE REASON THEY DID IT WAS WHAT IMPORTANCE THEY PUT ON THE SIXTH AMENDMENT RIGHT TO JURY TRIAL IN THE CAPITAL CONTEXT. THAT IS ONE OF THE WHOLE BASES, BECAUSE RING DECIDEDED THAT JURY SENTENCING WAS SUPERIOR TO JUDGE SENTENCING, AND WHAT THEY DID WAS LOOK AT THE CONSTITUTIONAL RIGHTS, AND THEY FELT IT WAS SO IMPORTANT THAT THEY TO GO BACK AND CHANGE THEIR MIND AND CHANGE THEIR

PREVIOUS PRECEDENT.

CHIEF JUSTICE: YOU ARE INTO YOUR REBUTTAL TIME.

WHAT THIS COURT HAS TO DO AND THE DECISION YOU HAVE IS TO DECIDE HOW IMPORTANT THE SIXTH AMENDMENT IS TO THIS COURT AND APPLY THE RING CASE TO THE FLORIDA STATUTE OTHER SCHEME, AND WHEN YOU DO THAT, THERE IS NO LOGICAL WAY TO HARMONIZE THE TWO.

LET ME MAKE SURE I UNDERSTAND YOUR POSITION IS TO UPHOLD THE FLORIDA STATUTE OTHER SCHEME, IT WOULD NEED TO HAVE A SPECIAL INTERROGATORY VERDICT FORM SUBMITTED TO THE JURY FOR EACH AGGRAVATING FACTOR THAT IS ASSERTED AND EVIDENCE PRESENTED, AS WELL AS EACH MITIGATING FACTOR AND EVIDENCE PRESENTED. THAT IS THE BOTTOM LINE OF YOUR ARGUMENT.

I DON'T KNOW THAT I WOULD GO ALONG WITH THE MITIGATING PART. THAT EACH MITIGATING FACTOR WOULD HAVE TO BE FOUND BY THE JURY, BUT I THINK THE AGGRAVATORS ARE WHAT, IN THE STATE OF FLORIDA, SUFFICIENT AGGRAVATORS ARE WHAT DETERMINE THE DEATH PENALTY.

HOW WOULD YOU DETERMINE THE JURY HAS WEIGHED THE AGGRAVATION AND MITIGATION, IF YOU DON'T HAVE A PROPER JURY FORM FOR THE VERDICT AS WELL.

THAT WOULD BE ONE REQUIREMENT OF RING.

TO DO BOTH.

HOWEVER, I DON'T THINK YOU NEED THAT TO DECIDE THIS CASE. BECAUSE WHAT I AM TALKING ABOUT, THERE WAS NO FACT PROVEN, NO VERDICT RENDERED IN MR. KING'S CASE WHATSOEVER,. THERE IS NO VERDICT ON THE RECORD. WHERE IS THE VERDICT? THERE IS NONE!

DO YOU SAY THIS -- DO YOU SEE THIS CASE AS DIFFERENT FROM THE BOTTOSON CASE WHERE THERE WAS A 10-2 VERDICT AS TO THIS CASE WITH A 12-0 VERDSIGNIFICANT.

I DON'T THINK THERE IS ANY DISTINCTION WHATSOEVER. BECAUSE WHETHER IT IS A 12-0 OR 10-2, YOU STILL CAN'T FACT FIND AS TO WHAT THE JURY DID.

CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL. COUNSEL.

I AM SORRY.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM CAROL DITTMAR FROM THE ATTORNEY GENERAL'S OFFICE, REPRESENTING THE RESPONDENT MORE. MR. KING'S CASE DOES NOT PRESENT ANY BETTER VEHICLE THAN THE BOTTOSON. HE ALSO HAS THE PRIOR CONVICTION WHICH TAKES HIM OUTSIDE THE APRENDI UMBRELLA. THE OTHER AGGRAVATING FACTORS IN THIS CASE WERE DURING THE COURSE OF A FELONY FOR THE BURGLARY, AND ALSO THE SEXUAL BATTERY. HE WAS SEPARATELY CONVICTED OF BURGLARY AND SEXUAL BATTERY BY THE JURY. ANOTHER AGGRAVATING FACTOR WAS THAT MR. KING WAS UNDER A SENTENCE OF IMPRISONMENT AT THE TIME. HIS JURY, ALSO, CONTEMPORANEOUSLY CONVICTED HIM OF AN ESCAPE CHARGE, WHICH INCLUDED A NECESSARY ELEMENT THAT HE WAS UNDER A SENTENCE OF IMPRISONMENT, SO ALL OF THESE AGGRAVATING FACTORS, WE KNOW THAT THERE WAS A JURY FINDING TO SUPPORT THEM. HOWEVER, I THINK JUSTICE PARIENTE IS CORRECT, IN THAT THIS COURT HAS NO AUTHORITY TO REVERSE THE UNITED STATES SUPREME COURT ON THE ISSUE. THE MOST, I THINK, THAT KING CAN HOPE FOR IN THIS CASE IS THAT THIS COURT CAN OVERRULE ITSELF IN MILLS, BUT HE HAS NOT GIVEN THIS COURT ANY BASIS TO DO SO. IN MILLS YOU SAID THAT THE STATUTORY MAXIMUM FOR FIRST-DEGREE MURDER IS DEATH.

WE REALLY, IN MILLS, STARTED WITH THE PROPOSITION, IN READING APRENDI, THAT THEY SPECIFICALLY DECLINED TO COMMENT ON WALTON VERSUS ARIZONA, AND THEY SPECIFICALLY DECLINED TO OVERRULE IT, SO THAT WE WERE STARTING WITH THE PROPOSITION THAT APRENDI DID NOT APPLY TO CAPITAL SENTENCING SCHEMES.

THAT WAS A CONSIDERATION, AND ACTUALLY RING DOES NOT APPLY TO THE SENTENCING PART OF THE ARIZONA STATUTE. IT APPLIES TO CONVICTING THE DEFENDANT OF A QUALIFYING OFFENSE, SO IT STILL IS NOT APPLYING APRENDI TO A SENTENCING PROCEDURE. IT IS, AGAIN, THE CONVICTION OF THE QUALIFYING OFFENSE THAT INVOLVES, THAT REQUIRES THE JURY FACT FINDING, AND IN MILLS, WITH THIS COURT SAYING THAT, OF COURSE THIS COURT HAD THE LANGUAGE FROM APRENDI, SAYING IT IS NOT A MATTER OF FORM OVER SUBSTANCE. YOU KNEW WHAT APRENDI WAS TALKING ABOUT, WHEN YOU DETERMINED THAT OUR MAXIMUM SENTENCE FOR THE FIRST-DEGREE MURDER WAS DEATH. AND WHEN THE APRENDI ARGUMENT WAS CONSIDERED PREVIOUSLY IN MR. KING'S CASE, YOU KNEW THAT THE ARIZONA SUPREME COURT HAD INTERPRETED THEIR STATUTE DIFFERENTLY, BECAUSE KNEW THAT RING HAD BEEN ACCEPTED FOR REVIEW. AND STILL WERE NOT PERSUADED BY THAT, AND NOTHING HAS REALLY CHANGED, OTHER THAN THE UNITED STATES SUPREME COURT ACCEPTING WHAT THE ARIZONA SUPREME COURT SAID IN RING, ABOUT THE ARIZONA STATUTE, AND WHEN THEIR DETERMINATION OF DEATH ELIGIBILITY IS MADE. NOW, I, ALSO, WANT TO ADDRESS THE FACT THAT, IF YOU COULD READ ANY POSSIBLE CHANGE INTO FLORIDA CAPITAL SENTENCING LAW FROM APRENDI OR RING, IT WOULD ONLY APPLY PERSPECT I FEEL AND COULD NOT BE -- PERSPECTIVELY AND COULD NOT BE APPLIED TO ANY CAPITAL CONVICTION WHOSE SENTENCES ARE FINAL, AND THE REASON FOR THAT, NO MATTER WHICH PRINCIPLES YOU WANT TO ADOPT, WHETHER YOU WANT TO, UNDER THE SUPREMACY CLAUSE LOOK AT THE REFERRALS OR IF YOU WANT TO FOLLOW WHAT THIS COURT SAID IN WHITT, AS TO WHAT THE RULES ALLOW, RETRO ACTIVITY IS NOT GOING TO BE PERMITTED UNDER EITHER THEORY. UNDER WHITT, I ADMIT THAT IT COMES FROM THE UNITED STATES SUPREME COURT AND MEETS THE DEFINITION, AS THIS COURT DISCUSSED, OF BEING CONSTITUTIONAL INNATE, BUT THERE IS NO FUNDAMENTAL CHANGE AS NECESSARY IN WHITT, FOR RETROACTIVE APPLICATION, AND I WOULD SUGGEST TO MEET THAT KIND OF STANDARD, IT WOULD HAVE TO BE SUCH A MAJOR CHANGE IN THE LAW AND GO TO THE IDENTIFICATION OF AN INSTRUCT YURLING ERROR -- OF A STRUCTURAL ERROR. THE CLASSIC EXAMPLE IS GIDEON, BUT IF YOU LOOK AT THE CASES WHERE THE UNITED STATES SUPREME COURT SAID INSTRUCTIONAL ERROR COULD NEVER BE HARMLESS. THOSE ARE THE KINDS OF CASES WHERE, IF IT COMES UP LATER, YOU KNOW THERE IS NO WAY TO ASSESS IF THERE WAS AN ERROR, ANY HARMFUL VALUE. THOSE ARE THE CASES THAT IT WILL BE APPLIED BACK TO RETROACTIVELY RETROACTIVELY.

DO YOU KNOW IF ARIZONA HAS MADE A DECISION IF IT IS GOING TO APPLY THE RING DECISION RECEIPT-ACTIVELY OR WHETHER -- -- RETROACTIVELY, OR WHETHER IT IS GOING TO --

THE LAST I HEARD IS ARIZONA IS GOING TO ON THE CASES PENDING THE PIPELINE CASES. THEY ARE NOT, TO MY KNOWLEDGE, INDICATED THAT THEY ARE GOING TO GO BACK AND LOOK AT THEIR PRIOR CASES. I KNOW THAT THEY ARE CONSIDERING ALL OF THE PIPELINE CASES, BUT THE CASE WHERE THEY DISTRICT DIRECTED TO HAVE THAT ISSUE -- WHERE THEY DIRECTED TO HAVE THAT ISSUE CONSIDERED, BECAUSE LIMITED CASES WHICH ARE STILL IN THE PIPELINE.

MISS DITTMAR, WE DID NOT HAVE AN OPPORTUNITY DUE TO TIME LINES TO GET THE STATE'S VIEW WITH REGARD TO WHAT A JURY IS TOLD DURING THESE PROCEEDS. LET ME INQUIRE AS TO WHETHER THE SAME TYPE OF INSTRUCTION WAS GIVEN TO THE JURY IN THE KING CASE AS IN THE BOTTOSON CASE, THAT INDICATE TO THE JURY THAT WHAT YOU ARE DOING IS NOT THE REAL DEAL. IT IS A RECOMMENDATION AND SOMETHING THAT IS NOT CONTROLLING. SOMETHING TO THAT EFFECT OF IT IS ONLY A RECOMMENDATION. WAS THAT THE INSTRUCTION GIVEN IN THE STANDARD IN THIS CASE?

YES. THE JURY WAS TOLD THAT THEIR RECOMMENDATION WAS ADVISORY, WHICH DID NOT MISLEAD THE JURY.

LET'S TAKE A COUPLE OF STEPS THEN. IF WE ACCEPT, AS I PROPOSED EARLIER, IN THE EARLIER CASE THAT THE STATE'S POSITION IS CORRECT ON ALL OF THE SUBCONSTANT IFERBS, BUT THAT ONE WOULD DISAGREE WITH THE STATE'S POSITION TO THE EXTENT THAT RING DOES HAVE IMPACT ON REQUIRING THAT A JURY FIND THE AGGRAVATING FACTORS, HOW DO YOU DEAL WITH THE INSTRUCTION THAT WAS GIVEN TO THE JURY THAT WOULD LEAD THEM TO BELIEVE THAT, REALLY, THEY ARE NOT MAKING THAT DECISION. DO WE VIEW IT UNDER A HARMLESSNESS? WHAT IS THE AUTHORITY YOU WOULD RELY UPON? WHAT IS THE POSITION OF THE STATE, WITH REGARD TO THAT ISOLATED ASPECT THAT I AM ADDRESSING? AM I COMMUNICATING THE QUESTION EFFECTIVELY?

I THINK SO. THE JURY INSTRUCTIONS WERE ONLY IMPROPER, IF YOU WERE MISLEADING THE JURY AS TO THE IMPACT OR THE CONSEQUENCES OF THEIR DELIBERATIONS, AND IF YOU LOOK AT WHEN YOU ARE TELLING THEM WHAT THEIR RECOMMENDATION IS WORTH, THEIR RECOMMENDATION IS, AGAIN, THE SELECTION PART OF THE SENTENCING PROCESS. AND NOT THE ELIGIBILITY PART. THEIR RECOMMENDATION IS NOT BINDING ON THE JUDGE, AND THE JUDGE IS CERTAINLY, GIVES THE APPROPRIATE WEIGHT, AND THAT IS WHAT THE JURY IS TOLD, SO THERE IS NO MISLEADING THE JURY.

BUT IF ONE IS TO ASSUME THAT ELIGIBILITY IS REALLY THE AGGRAVATORS NOT IN THE FINDING, THAT, REALLY, THE FINDING OF THE GUILT ON FIRST-DEGREE PREMEDITATED OR CAPITAL MURDER IS, YOU ARE SUBJECT TO THE MAXIMUM PENALTY, BUT THE ELIGIBILITY IS REALLY IN THE FIND FINEDING OF THE AGGRAVATING FACTORS. HOW WOULD THAT IMPACT WHAT YOU ARE SAYING?

IT IS STILL THE WEIGHING PROCESS THAT THE JURY HAS TO MAKE, THAT IS GOING TO BE THE SELECTION. EVEN IF THE, EVEN IF THE AGGRAVATING FACTORS ARE NARROWING THE OFFENSE FURTHER, THE JURY IS STILL MAKING THAT DETERMINATION, SO AND MAYBE I AM NOT SOUNDSING -- I AM NOT UNDERSTANDING YOUR QUESTION.

I AM TRYING TO DETERMINE IF THE INSTRUCTION IN TELLING THE JURY THAT IT IS REALLY GIVING ADVICE, THAT THE AGGRAVATORS IN THE POINT OF THE TRIAL IS WHAT DETERMINES THE ELIGIBILITY FOR THE IMPOSITION OF THE DEATH PENALTY. THAT IS WHAT I AM TRYING TO DETERMINE.

IF YOU WERE TO DETERMINE THAT IT WAS NECESSARY FOR FLORIDA, IN THE DEATH PENALTY, TO FIND ALL OF THE SUFFICIENT AGGRAVATORS AND THAT THEY OUTWEIGH THE MITIGATING, IN ORDER TO MAKE THAT ELIGIBILITY DETERMINATION INITIALLY, THEN YOU WOULD HAVE TO LOOK AT WHAT THE JURY IS BEING TOLD AND IF THEY ARE BEING TOLD THAT THAT IS THE CONSEQUENCES OF THEIR DECISION. BUT I THINK THEY ARE TOLD THAT, BECAUSE THEY KNOW THAT, FROM THE BEGINNING STEPS OF JURY SELECTION, THEY UNDERSTAND THAT THEIR DECISION AT GUILT PHASE IS GOING TO HAVE AN IMPACT, THAT THIS CASE MAY GO TO A PENALTY PHASE, SO THEY KNOW THAT FROM THE BEGINNING. THEY ARE TOLD THAT THAT IS PART OF THEIR CONVICTION.

WHAT ARE THEY TOLD ABOUT WHAT THEIR FINDING OF GUILT MEANS? BECAUSE, AGAIN, THE WHOLE IDEA OF WHY THE DEATH PENALTY WAS THROWN OUT ORIGINALLY WAS THE IDEA THAT YOU HAD TO NARROW THE CLASSIFICATION OF CASES IN WHICH DEFENDANTS WERE ELIGIBLE FOR THE DEATH PENALTY. IT WASN'T GOING TO BE EVERYBODY THAT WAS CONVICTED OF MURDER.

I DON'T KNOW THAT THERE IS A STANDARD INSTRUCTION FOR WHAT THEY ARE TOLD INITIALLY, BUT I KNOW THEY ARE CERTAINLY TOLD, BECAUSE I HAVE NEVER SEEN A CAPITAL CASE WHERE

THE JURY HASN'T BEEN DEATH-QUALIFIED, SO THEY ARE TOLD THERE IS THE POSSIBILITY THAT, IF THIS JURY CONVICTS THIS DEFENDANT AS CHARGED, THIS CASE WILL GO TO A PENALTY PHASE PROCEEDING, AND THEY ARE ASKED ABOUT THEIR ABILITY TO IMPOSE THE DEATH PENALTY, AND ALL OF THAT IS FULLY EXPLORED IN JURY SELECTION SO THEY ARE FULLY AWARE THAT THEIR CONVICTION CARRIES WITH IT THE POSSIBILITY OF THE DEATH SENTENCE, AND THAT IS THE DEATH ELIGIBILITY, AND, AGAIN, GETTING TO THAT ELIGIBILITY VERSUS SELECTION, YOU ARE RIGHT. THAT IS SOMETHING THAT THE EIGHTH AMENDMENT HAS SAID, AND IF YOU LOOK AT THE REASONS THAT THE EIGHTH AMENDMENT HAS SAID YOU NEED TO HAVE NOT ONLY THE SELECTION FOR CAPITAL SENTENCING BUT YOU NEED TO HAVE THE ELIGIBILITY, THERE ARE TWO FUNDAMENTAL PRINCIPLES AT WORK, AND UNDER THE EIGHTH AMENDMENT, THEY ARE SAYING CAPITAL SENTENCE HAS TO BE PROPORTIONATE, NOT ONLY TO THE CRIMINAL BUT ALSO TO THE CRIME. IT HAS TO BE A PROPORTIONATE PUNISHMENT, AND PROPORTIONATE TO THE CRIME IS THE ELIGIBILITY QUESTION. PROPORTIONATE TO THIS PARTICULAR INDIVIDUAL DEFENDANT IS THE SELECTION QUESTION, AND I THINK WHEN YOU LOOK AT WHERE WE MAKE THAT THRESHOLD DETERMINATION OF ELIGIBILITY AT THE GUILT PHASE, IT IS HELPFUL TO COMPARE OUR STATUTE WITH THE LOUISIANA STATUTE, BECAUSE LOUISIANA, THE UNITED STATES SUPREME COURT HAS RECOGNIZED IN LOANFELD VERSUS -- IN LOWENFELD VERSUS PHELPS, IT DETERMINES FIRST-DEGREE MURDER AND THEY DISCUSS THE HOMICIDE STATUTE IN La AND, A THAT HOMICIDE IS DIVIDED INTO DIFFERENT DEGREES THAT, IT IS NOT JUST A GENERAL MURDER STATUTE WHERE ALL INTENTIONAL KILLINGS ARE MURDER, BUT IT IS A VERY SPECIFIC STATUTE AS IS FLORIDA'S FIRST-DEGREE, THAT IT IS LIMITED TO TWO NARROW THINGS, PREMEDITATION AND FELONY MURDER, AND THE POINT THAT YOU HAVE TO HAVE AT SOME POINT A STATUTORY AGGRAVATOR, TO GET INTO THE SELECTION PHASE, AND THE FACT THAT THE AGGRAVATING FACTORS CAN BE USED TO FURTHER NARROW THE CASE AT THE SELECTION PHASE, DOES NOT MEAN THAT THE ELIGIBILITY DETERMINATION IS MADE, IS NOT MADE AT THE CONVICTION. IF YOU LOOK AT LOUISIANA LAW, THERE IS THE SAME REQUIREMENT IN LOUISIANA LAW, AND THIS IS ARTICLE IX 05.3, A SENTENCE -- ARTICLE 905.3, A SENTENCE SHALL NOT BE IMPOSED, UNLESS BEYOND A REASONABLE DOUBT IT IS FOUND THAT AT LEAST ONE STATUTORY AGGRAVATING FACTOR EXISTS AND AFTER MITIGATING CIRCUMSTANCES, DETERMINES THE DEATH SENTENCE SHOULD BE IMPOSED. THAT SOUNDS FAMILIAR. IT IS JUST LIKE FLORIDA, AND YET THIS IS A STATUTE WHICH THE UNITED STATES SUPREME COURT HAD SAID IN LOWENFELD, THAT THE DEFINITION IS FIRST-DEGREE MURDER. THE FACT THAT IT CONTINUES TO BE MADE FURTHER JUST ADDS GREATER EIGHTH AMENDMENT PROTECTIONS DURING THE SENTENCING PROCESS.

DO YOU REALLY THINK THAT, IF WE READ BACK RING THAT, WE WOULD THINK WHAT THE UNITED STATES SUPREME COURT IS SAYING IS THAT, AS LONG AS THE LEGISLATURE MAKES CLEAR THAT THE MAXIMUM PENALTY IS DEATH, WHEN A PERSON IS CONVICTED OF FIRST-DEGREE MURDER THAT ALL THIS OTHER STUFF ABOUT FINDINGS OF AGGRAVATORS IS JUST LIKE THAT IS REALLY, THEY DON'T HAVE TO WORRY ABOUT THAT REALLY. JUST REWRITE YOUR STATUTES OR THE STATUTE SHOULD HAVE BEEN WRITTEN BACK IN THE '70s, SO THAT ALL WE WOULD, THEY WOULD BE CLEAR TO SAY THAT THE MAXIMUM PENALTY IS DEATH, AND THAT IS GOING TO GET AROUND THE RING PROBLEM?

WELL, THERE IS NO REWRITING THE STATUTE. THAT IS WHAT THE STATUTE ALREADY SAYS, AND THAT IS WHAT THIS COURT HELD IN MILLS, THAT IT IS THAT DETERMINATION, AND IF YOU LOOK AT THE PURPOSES AGAIN, THE EIGHTH AMENDMENT PURPOSES FOR HAVING ELIGIBILITY, AT THE TIME THAT PROPHET WAS DECIDED AND GREG V GEORGIA WAS DECIDED, THE DEATH PENALTY APPLIED TO A NUMBER OF DIFFERENT CRIMES NOT JUST MURDER. IN THE 1970s, YOU COULD GET IT FOR PERJURY IN GEORGIA.

IF WE LOOK AT THE ARIZONA STATUTE, WE WILL SEE THAT THAT STATUTE DOES NOT SAY THAT, UPON CONVICTION OF FIRST-DEGREE THAT, THE MAXIMUM PENALTY IS DEATH, THAT WE ARE NOT GOING TO SEE THAT SAME TYPE OF LANGUAGE IN THE ARIZONA STATUTE?

TO UNDERSTAND THE ARIZONA STATUTE, YOU HAVE TO LOOK AT THE WAY THE ARIZONA SUPREME COURT SAID THEIR STATUTE OPERATES.

I AM ASKING YOU, IF WE READ THE STATUTE, ITSELF, WE ARE NOT GOING TO FIND THE SAME LANGUAGE, SUBSTANTIALLY THE SAME LANGUAGE AS FLORIDA'S, AS FAR AS THE GUILT PHASE AND THE FIRST-DEGREE --

IT IS NOT, THEY DON'T DARKIZE IT AS A CAPITAL FELONY, AS A CAPITAL OFFENSE. THEY CHARACTERIZE IT AS A CLASS ONE FELONY. THERE ARE DIFFERENCES.

THERE IS NOTHING LIKE THAT, THAT SAYS --

THERE IS LANGUAGE THAT CROSS REFERENCES THE SENTENCING PROCEDURES. BUT, AGAIN, YOU HAVE TO LOOK AT, BECAUSE, AND MR. NUNNELLEY TALKED ABOUT HOW EVERY JURISDICTION HAS A DIFFERENT STATUTE. LOUISIANA DOES THE SAME THING, SO YOU HAVE TO, YOU KNOW, LOOK AT WHAT ARIZONA STATE COURT IS SAYING ABOUT HOW THEIR STATUTE OPERATES, AND IF IT IS AN IDENTICAL STATUTE, THAT DOESN'T NECESSARILY MEAN YOU ARE GOING TO HAVE THE IDENTICAL RESULT, BECAUSE THEY ARE ALL SIMILAR IN SOME WAYS, AND THEY ARE ALL DIFFERENT IN SOME WAYS.

LET'S ASSUME, THOUGH, THAT WE DO FIND RING HAS A BEARING ON THE FINDING OF AGGRAVATORS UNDER OUR SCHEME AND MUST BE APPLIED, BUT THAT WE AGREE WITH THE STATE THAT THE JURY'S ADVISORY FINDING ESPECIALLY WHEN IT IS AN UNANIMOUS FINDING, SATISFIES THAT REQUIREMENT. WHAT ROLE, IN YOUR VIEW, REMAINS, THEN, AS FAR AS FACT FINDING IS CONCERNED, OR A FLORIDA TRIAL COURT JUDGE IN THIS SCHEME, AFTER THE RENDITION OF SAID ADVISORY VERDICT?

THE SAME ROLE THAT THEY ALREADY FULFILL, THE SAME TWO --

HOW? THEY HAVE THAT SAME ROLE, THEN, AREN'T YOU SAYING THE TRIAL COURT, THEN, HAS THE AUTHORITY TO FIND AGGRAVATORS THAT THE JURY DIDN'T FIND OR TO FIND, THAT THERE WERE, WEREN'T AGGRAVATORS THAT WERE THERE? IN OTHER WORDS THAT NOW, AND THEN BASE THAT SENTENCING DECISION ON FACTUAL FINDINGS THAT RING SUGGESTS CAN ONLY BE MADE BY A JURY? I AM HAVING DIFFICULTY OF HOW THE TRIAL JUDGE, THEN, CAN, IN EFFECT, OVERRULE A JURY'S FINDING OF FACTS AND STILL BE CONSTITUTIONAL UNDER RING.

WELL, WE KNOW FROM HILDWIN, THAT YOU CAN RELY ON A JURY'S RECOMMENDATION OF DEATH, AS HAVING MADE THE NECESSARY FACT FINDINGS FOR DEATH ELIGIBILITY.

THAT IS ASSUMING THAT HILDWIN ISN'T IMPACTED BY RING.

CORRECT, BUT SINCE RING DIDN'T DISCUSS THE SENTENCING ASPECT AND ONLY DISCUSSED CONVICTING MR. RING OF A QUALIFYING OFFENSE, IT DOES NOT AFFECT HILDWIN, WHICH WAS A SENTENCING CASE. IF YOU CONSIDER THE FACT THAT, WHEN YOU REVIEW WHAT A JURY HAS DONE ON ANY STANDARD CONVICTION, WHEN THEY HAVE CONVICTED SOMEBODY, FOUND SOMEBODY GUILTY AFTER OFFENSE, WE DON'T HAVE THE JURY GO THROUGH EACH ELEMENT OF THE OFFENSE AND CHECK OFF, YES, WE FIND THIS ELEMENT UNANIMOUSLY YES, WE -- THEY RETURN A GENERAL VERDICT, GUILTY AS CHARGED, THAN COURT CAN REVIEW EVIDENCE AND FIND IF THERE IS SUFFICIENT EVIDENCE TO SUPPORT THAT JURY VERDICT. YOU DON'T NEED TO HAVE THE EXPRESS JURY FINDINGS TO KNOW THAT THEY HAVE DONE THEIR JOB. THEY ARE TOLD THEY HAVE TO MAKE FINDINGS, AND YOU HAVE TO ASSUME THEY ARE FOLLOWING THE JUDGE'S INSTRUCTIONS. THERE IS NO REASON TO BELIEVE THEY ARE NOT.

ONCE A JURY DOES THAT, THOUGH HOW CAN YOU SAY THAT THE TRIAL COURT RETAINS THE AUTHORITY TO MAKE A WHOLE FRESH SET OF FINDINGS OF FACT, WITH REFERENCE TO THE

AGGRAVATORS IN THE CASE?

BECAUSE THE TRIAL JUDGE ADDS AN EXTRA LAYER OF PROTECTION UNDER THE EIGHTH AMENDMENT. THE TRIAL, NOTHING THAT THE TRIAL JUDGE DOES TAKES AWAY FROM WHAT THE JURY HAS ALREADY DONE.

WELL, I TAKE IT WHAT YOU ARE SAYING IS, BASED UPON WHAT THE U.S. SUPREME COURT SAID IN PROPHET, THAT THAT WAS A SAFEGUARD, UNDER THE FLORIDA STATUTE, WHICH IT APPROVED IN PROPHET, THE ROLE OF THE COURT IN REVIEWING, AFTER THE, BASED UPON THE JURY'S RECOMMENDATION. ISN'T THAT WHAT PROPHET SAID?

THAT'S CORRECT, AND THEN, OF COURSE, THIS COURT SERVES THE FUNCTION OF REVIEWING THE TRIAL COURT'S FINDINGS.

SO YOU ARE SAYING, LET'S SAY THAT IT WAS A SPECIAL VERDICT, AND THE TRIAL COURT FOUND KRCHL CP AND HAC -- THE TRIAL COURT FOUND CCP AND HAC, THAT, UNDER RING, THE TRIAL COURT WOULD THEN HAVE THE AUTHORITY TO OVERRULE THOSE FINDINGS OF FACT MADE BY THE JURY AND FIND THAT THOSE FACTORS DID NOT EXIST, IF THAT WAS THE DETERMINATION THE TRIAL COURT MAKES, IS THAT CORRECT?

THAT THE TRIAL COURT HAS THE DETERMINATION TO FIND THAT A JURY REASONSLY FOUND AN AGGRAVATING -- ERRONEOUSLY FOUND AN AGGRAVATING FACTOR TO EXIST?

AFTER THE JURY HAS FOUND A SPECIALIZED VERDICT. THEY CHECK OFF THESE, AND LET'S SAY THEY FOUND THEM UNANIMOUSLY --

I THINK THIS COURT CAN SAY THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A TRIAL COURT'S FINDING OF PECUNIARY GAIN. THE TRIAL COURT HAS THE AUTHORITY, HAS THE LEGAL TRAINING TO BE ABLE TO LOOK AT IT IN KIND OF A REVIEW AND SAY IF THEY PRESUMABLY HAVE THE SPECIAL VERDICT FROM THE JURY, TO SAY, WELL, THIS JURY FINDING ISN'T SUPPORTED BY THE EVIDENCE, BUT OF COURSE --

HOW IS, THEN, A JUDGE GOING TO GO ON WITH THAT FUNCTION, IF THERE IS NO SPECIALIZED VERDICT, AND THE JUDGE IS LEFT TO SPECULATE?

BECAUSE THAT FUNCTION ISN'T NECESSARY. THERE IS NO REQUIREMENT THAT --

SO THE JUDGE DOESN'T DO IT ANYMORE THEN?

NO. THE JUDGE IS ENTITLED TO DO IT, BUT IT IS NOT NECESSARY, UNDER THE CONSTITUTION. IT IS REQUIRED UNDER FLORIDA STATUTES, WHICH PROVIDES GREATER CONSTITUTIONAL PROTECTION UNDER THE EIGHTH AMENDMENT, BY ALLOW ALLOWING THIS EXTRA STEP. BUT THE JUDGE DOESN'T DETRACT FROM ANYTHING THE JURY HAS DONE. THE JURY MAKES THE DETERMINATION AND IN KING'S CASE, NOT ONLY MADE THE DETERMINATION OF DEATH ELIGIBILITY, BUT CERTAINLY MADE THE DETERMINATION, THE SELECTION DECISION THAT SUFFICIENT AGGRAVATING FACTORS EXISTED TO OUTWEIGH THE MITIGATION PRESENTED. THE ULTIMATE SENTENCING DETERMINATION, WHICH, YOU KNOW, WHEN KING SAYS THAT IS SOMETHING THAT IS THE ELEMENT, AND THAT IS SOMETHING THAT IS REQUIRED FOR THE OFFENSE OF CAPITAL PUNISHMENT, HE IS GOING OFF ON A TANGENT THAT DOESN'T EXIST.

WELL, DOESN'T JUSTICE SCALIA, IN HIS SPECIAL CONCURRENCE, SUGGEST THAT VERY THING IS REQUIRED?

WELL, WHAT JUSTICE SCALIA SAYS IS WE DON'T CARE WHAT HAPPENS AT SENTENCING. YOU CAN HAVE A JUDGE DO THE ENTIRE SENTENCING, ONCE THE JURY HAS CONVICTED THEM OF AN

OFFENSE WHICH QUALIFIES FOR THE DEATH PENALTY.

JUSTICE SCALIA SUGGESTS THAT, INDEED THE AGGRAVATOR SHOULD BE SPECIFICALLY ALLEGED IN THE INDICTMENT AND THEN PROVEN DURING THE GUILT PHASE OF THE TRIAL, DOES HE NOT?

WHAT JUSTICE SCALIA IS SAYING IS THAT, IF THE AGGRAVATING FACTORS IN ARIZONA ARE THE QUALIFIERS, THE THINGS THAT BRING ON THE DEATH ELIGIBILITY DETERMINATION, THEN THEY SERVE AS THE FUNCTIONAL EQUIVALENT. ONE AGGRAVATING FACTOR. YOU DON'T HAVE TO HAVE MULTIPLE AGGRAVATING FACTORS, BECAUSE THAT GETS TO THE SENTENCING AND THE SELECTION, AND I SEE I AM OUT OF TIME, BUT I WOULD ASK THIS COURT TO DENY THE PETITION.

CHIEF JUSTICE: THANK YOU VERY MUCH. COUNSEL, HOW MUCH TIME IS LEFT FOR THE PETITIONER? HOW MUCH? EIGHT MINUTES. OKAY. COUNSEL FORM -- COUNSEL.

MAY IT PLEASE THE COURT. MY NAME IS MARK RIPPER. AS I UNDERSTAND IT, HOW THE COURT IS DETERMINING IS THEY ARE NOT DEALING WITH IT RETROACTIVELY.

I AM NOT SURE. DID YOU SAY THE ARIZONA SUPREME COURT HAS HELD THAT RING WILL BE APPLIED RETROACTIVELY?

I CAN'T GO THAT FAR. WHAT I UNDERSTAND IS THAT WHAT WAS REPRESENTED EARLIER, THAT ONLY PIPELINE CASES ARE BEING CONSIDERED, IS NOT THE CASE, THAT THERE ARE PREVIOUS CASES OPPOSE THE CONVICTION THAT ARE BEING CONSIDERED.

THE ISSUE HASN'T BEEN REVOLVED YET, IN AIRS OWN, A HAS IT?

I-KNOW ARIZONA, HAS IT?

-- IN AIRS OWN, A THAT IS?

I BELIEVE THAT IS TRUE. THE RIGHT TO TRIAL BY JURY, WHICH WAS OPERATED IN TRAILER V STATE, AS REGARDS THE FLORIDA CONSTITUTION, THIS COURT DOES HAVE THE RESPONSIBILITY TO DEAL WITH THE MATTER UNDER FLORIDA LAW. WITH REGARD TO RETRO ACTIVITY, THE REASON FOR DOING IT IS THE IMMINENT PROSPECT OF PUTTING A MAN TO DEATH, WHO HAS BEEN, AS WE KNOW NOW, DENIED HIS RIGHT TO TRIAL BY JURY, IN THIS RESPECT RING IS --

WHERE IT IS GOING TO DEAL WITH MR. KING'S CASE SPECIFICALLY, UNANIMOUS VERDICT AND NOT ONLY PRIOR VIOLENT FELONY, WHICH, UNDER FOOTNOTE FOUR OF RING SPECIFICALLY WAS NEVER CHALLENGED, THE TORRES, ALMADERES, CASE, AND THAT IS STILL GOOD LAW, AND AT LEAST TWO OTHER FELONIES THAT WERE CON TEMP YAN REIGNIOUS. -- CONTEMPORANEOUS. SEXUAL BATTERY AND BURGLARY. HOW DO YOU GET AROUND THIS, AND THIS JURY FOUND NOT ONLY THOSE FELONIES BUT FOUND UNANIMOUSLY THAT THE DEATH PENALTY SHOULD BE IMPOSEED. SO HOW IS THE SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY UNDERMINED, AS APPLIED TO MR. KING?

WELL, LET'S KEEP IN MIND THAT THERE WERE SIX AGGRAVATING CIRCUMSTANCES SUBMITTED TO THE JURY. TWO OF THOSE WERE INVALID, WERE LATER STRUCK AS A MATTER OF LAW, SO ALTHOUGH THERE WAS A 12-0 RECOMMENDATION, AS A MATTER OF COMMON MATHEMATICS, TRYING TO RECONSTRUCT WHAT THE FINDINGS OF FACT WERE IN THIS CASE, WERE VIRTUALLY IMPOSSIBLE, BUT CERTAINLY INCLUDING A NUMBER OF THEM WOULD VERY WELL HAVE INVALIDATED THE CIRCUMSTANCES. WITH REGARD TO THE PRIOR CONTEMPORANEOUS FELONY SITUATION I HAVE THE SAME ARGUMENT THAT IS GOING TO BE RAISED IN OTHER CASES, WHICH IS SIMPLY THAT RESENTENCING JURY HERE, WHEN COURT CONVENED THAT MORNING, MR. KING WAS FACING A LIFE SENTENCE, UNDER 775.082. IT WAS ONLY BY CONDUCTING OTHER ADDITIONAL PROCEEDINGS THROUGH 941.121 THAT A DEATH SENTENCE WAS ARRIVED AT, AND THE QUESTION

IS THEN DID THOSE PROCEEDINGS COMPLY WITH RING, AND OUR POSITION IS, NO, THEY SIMPLY DID NOT, ALTHOUGH THERE WERE CONTEMPORANEOUS FELONY FINDINGS, AS IN OTHER CASES WHERE THERE MAY BE PRIOR FELONY FINDINGS, OUR POSITION IS THAT THOSE ARE AGGRAVATING CIRCUMSTANCES THAT MUST BE SUBMITED TO THE SENTENCING JURY, THE JURY THAT WILL BE ADVISED IF THESE DO COUNT TOWARDS THE DEATH SENTENCE AS OPPOSED TO, IN THIS CASE, THE GUILT/INNOCENCE JURY, THAT WAS TOLD, I BELIEVE IT IS IN THE RECORD, THAT THEIR CONSIDERATION OF GUILT OR INNOCENCE IS NOT GOING TO HAVE A DIRECT IMPACT ON THE SENTENCE WHICH WILL BE IMPOSEED, WHICH IS ALSO, AGAIN, ROUTE CONTINUALLY THE CASE, UNDER STANDARD JURY INSTRUCTIONS THAT JURIES ARE TOLD -- ROUTINELY THE CASE, UNDER THE STANDARD JURY INSTRUCTIONS, THAT JURIES ARE TOLD THAT THEIR DECISION IS NOT WHY GO GOING TO APPLY TO THE CASE. WITH REGARD TO RECONSTRUCTING A JURY AT SOME TIME IN THE PAST, I BELIEVE A QUESTION WAS BROUGHT UP EARLIER ABOUT SPECIFIC FINDINGS OF FACT BY A JURY, AND THERE IS SOME SUGGESTION ABOUT A PERHAPS A SPECIAL JURY VERDICT FORM OR SOMETHING OF THAT SORT. THE OVERFELL CASES COME TO FIND MIND. -- COME TO MIND. MY UNDERSTANDING NOW, THAT WHENEVER THERE IS A CAPITAL FELONY, WHENEVER THERE IS A SPECIFIC FACT THAT ENHANDS THE DEGREE OF THE -- ENHANCES THE DEGREE OF THE CRIME, THAT WILL BE THE SUBJECT OF THE JURY FORM, THAT WILL BE ONE OF THE ELEMENTS THAT THE JURY IS SPECIFICALLY INSTRUCTED UPON, WITH REGARD TO THE FINDINGS LIKE THE USE OF A FIREARM, FOR IMPOSITION OF A MINIMUM MANDATORY SENTENCE OR THINGS OF THAT NATURE. THERE IS ALSO A REQUIREMENT THAT ON THE VERDICT FORM HAD, THERE BE A FINDING OF SPECIFIC FACT. AS I SAID, IT WOULD BE IMPOSSIBLE TO GO BACK AND RECONSTRUCT ANY FINDINGS OF FACT THAT MAY HAVE BEEN MADE BY THIS JURY IN THIS CASE. TO GO TO THE RETRO ACTIVITY, WITH APRENDI, DECIDED RECENTLY, YOU HAVE ALREADY FOUND A SITUATION WHERE INDIVIDUAL IS FOUND GUILTY AND GIVEN A PRISON SENTENCE, AND THE ONLY QUESTION LEFT IS WHETHER SOMEBODY IS GOING TO DO ADDITIONAL TIME. WE ARE LOOKING IN THIS CASE ABOUT SOMEBODY BEING SENTENCED TO DEATH, AND THAT WAS DISCUSSED BY THE COURT IN RING AND ALSO BY THE CONCURRENCE. THEIR LANGUAGE WAS, IN THE ONE CASE, SENSELESSLY DIMINISHED RIGHT TO A TRIAL BY JURY, AND IN THE CURRENT CASE THE REPEATED SPECTACLE OF A MAN GOING TO HIS DEATH BECAUSE A JUDGE FOUND THAT AGGRAVATING CIRCUMSTANCE EXISTED AND IN BOTH CASES THEY ARE TALKING TO THE COURT ISSUE OF WHITT, WHICH WAS THE PURPOSE OF THE CHANGE. FINALITY IS AN IMPORTANT ISSUE, BUT THE RIGHT TO A JURY TRIAL IS SOMETHING THAT IS VERY, VERY IMPORTANT IN THE PUBLIC'S MIND, AND WE NOW HAVE AN UNDERSTANDING ABOUT WHAT THE SIXTH AMENDMENT REQUIRES, AS I SAID, THAT LEADS AUTOMATICALLY TO AN UNDERSTANDING OF WHAT THE FLORIDA CONSTITUTION REQUIRES, BY WAY AFTER RIGHT TO A TRIAL BY A JURY, AND OUR POSITION IS THAT THAT WAS NOT GRANTED IN THIS CASE.

CHIEF JUSTICE: THANK VERY MUCH. THANK ALL OF YOU VERY MUCH. THE COURT WILL STAND IN RECESS UNTIL NEXT MONDAY MORNING.