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State of Florida v. Alfredie Steele

THE LAST CASE ON THIS MORNING'S DOCKET IS STATE OF FLORIDA VERSUS STEELE. IF THE PARTIES ARE READY.

MAY IT PLEASE THE COURT, I'M CANNED AS SABELLA WITH THE ATTORNEY GENERAL'S OFFICE REPRESENTING THE STATE ON THIS APPEAL. THIS IS TWO CERTIFIED QUESTIONS FROM THE SECOND DISTRICT THAT I INTEND TO TALK ABOUT THE SECOND QUESTION, THE BULK OF MY TIME UNLESS THERE ARE ANY QUESTIONS ABOUT THE FIRST ONE. FIRST I WOULD LIKE TO START WITH TWO PREMISES THAT HOPEFULLY WE CAN ALL AGREE WITH. ONE, STATUTE 921.141 HAS NOT BEEN HELD BY A MAJORITY OF THIS COURT TO BE UNCONSTITUTIONAL. TWO, THAT THIS COURT DOES NOT REWRITE STATUTES, DOES NOT MAKE SUBSTANTIVE CHANGES TO STATUTES AND DOES NOT SET POLICY. THAT'S THE LEGISLATURE.

AM I CORRECT THAT IN WHAT HAPPENED BELOW WAS THAT THE TRIAL JUDGE MAY ENTER AN ORDER SAYING THAT THERE WAS GOING TO BE THIS NOTICE THAT THE DEFENDANT SHALL SCHEDULE AND NOTIFY THE STATE AND THAT ADDITIONALLY, UPON SUBMISSION TO THE JURY, THE QUESTION OF THEIR RECOMMENDED SENTENCE, THE JURY SHALL BE REQUIRED TO COMPLETE AN INTERROGATORY VERDICT, BUT THE INTERROGATORY VERDICT FORM WAS NOT EVER DEVELOPED?

NOT AT THAT TIME. IT HAS SINCE BEEN SUPPLEMENTED TO THE RECORD, YOUR HONOR.

WHAT DO YOU MEAN? I MEAN, AT THE TIME THAT THE COURT

AT THE END OF 2004, JUDGE TEPER HAD APPARENTLY CONCLUDED, PREPARED THE ORDER. IT WAS ORDERED BY THIS COURT TO BE SUPPLEMENTED TO THE RECORD AND IT IS NOW BEFORE THIS COURT.

AND SO THERE IS THE INTERROGATORY FORM?

THE INTERROGATORY FORM, BUT IN ALL HONESTY, IN FAIRNESS, THE INTERROGATORY FORM INCLUDES ALL OF THE AGGRAVATING FACTORS SET OUT, AND SHE DID SAY ON THE RECORD THAT AT THE TIME WHEN THEY GOT TO THAT POINT, THEY WOULD DEVELOP THE JURY INSTRUCTIONS TO GO ALONG WITH IT, AND THAT THEY COULD FURTHER EXPLORE IT, BUT, YES.

ARE WE MAKING IS THIS DECISION HERE, WOULD IT BE ON THE BASIS OF THIS SPECIFIC FORM, OR JUST SORT OF THE THEORY OF THERE BEING AN INTERROGATORY?

I THINK ONE OF THE REASONS WHY WE WERE ANXIOUS TO BRING THIS BEFORE THE COURT IS THAT WE HAVE HAD THIS PROBLEM CONSISTENTLY AROUND THE STATE THAT ISOLATED JUDGES HAVE IN THE WAKE OF RING DETERMINED THAT MAYBE THIS COURT MADE A MISTAKE AND THAT MAYBE THE STATUTE IS UNCONSTITUTIONAL AND IF IT IS UNCONSTITUTIONAL HAVING THESE INTERROGATORIES IS GOING TO SOMEHOW CURE IT.

HAS THERE BEEN A GUILT PHASE OF THIS TRIAL?

WE HAVEN'T EVEN HAD THE TRIAL YET, YOUR HONOR.

SO WE DON'T KNOW WHETHER IN THIS PARTICULAR CASE THERE WOULD EVEN, THIS FELLOW MAY BE ACQUITTED?

THAT'S CORRECT.

WE HAVE HAD CASES AS YOU SAID JUDGE PERRY IN ORLANDO HAD A TRIAL WITH A PENALTY PHASE AND HAD AN INTERROGATORY VERDICT AND I DON'T RECALL THE STATE CROSS APPEALING ON THAT ISSUE.

NO, WE DID NOT, YOUR HONOR. AND IT HAS BEEN BEFORE THIS COURT IN SEVERAL CASES. RECENTLY 24 COURT THIS COURT CAME OUT WITH AN OPINION IN HUGGINS AND THEN RING CAME OUT AND BEFORE THIS COURT HAD HAD TIME TO RULE ON IT, THE JUDGE PUT TOGETHER THE INTERROGATORIES, THE STATE AGREED, THE DEFENDANT OBJECTED. HE RAISED IT ON APPEAL AND THIS COURT SAID IT WAS

CAN THIS COURT, YOU SEEM TO BE GOING ON THE NOTION THAT AND HERE WE ARE ON A CERT PETITION, WHETHER THIS IS A RESULT IN A MISCARRIAGE OF JUSTICE. ARE YOU, IS THE STATE'S POSITION THAT IF A JURY IS ASKED TO GIVE SPECIAL FINDINGS ON AGGRAVATED, NOT REQUIRED TO BUT, WELL, IS REQUIRED TO BASED ON THE JUDGE STATING THAT THEY WANT TO HAVE THAT JUST LIKE THEY MIGHT ASK FOR, YOU KNOW, FELONY MURDER VERSUS FIRST DEGREE, THAT THAT IS IN VIOLATION OF OUR STATUTE?

YES, YOUR HONOR.

SO IN THOSE AREA CASES THEY ACTED AND HOW IS THAT? IN OTHER WORDS, I GUESS YOU DO AGREE THAT UNDER OUR STATUTE THE JURY HAS TO MAKE A DETERMINATION THAT THERE IS AT LEAST ONE AGGRAVATOR THAT APPLIES.

ACTUALLY WHERE A STATUTE SPECIFICALLY SAYS, WE USE THAT STATUTE OF ONE AGGRAVATOR BUT THE STATUTE SPECIFICALLY SAYS AFTER HEAR THE EVIDENCE THE JURY SHALL DELIBERATE AND RENDER AN ADVISORY SENTENCE TO THE COURT BASED UPON THE FOLLOWING MATTERS: WHETHER SUFFICIENT AGO {VA} AGGRAVATING CIRCUMSTANCES EXIST.

SO LET'S JUST STOP ON THAT ONE. DOES THAT NOT DIRECTLY REQUIRE A JURY TO HAVE TO HAVE FOUND AGGRAVATING CIRCUMSTANCES BEFORE THEY CAN CONSIDER THE MITIGATION AND THE DEATH PENALTY?

IT REQUIRES THE JURY TO HAVE FOUND AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES.

SO WHAT'S IN VIOLATION OF THE STATUTE FOR THEM HAVING TO LIST WHAT AGGRAVATING CIRCUMSTANCES THEY FOUND?

I CAN GIVE YOU A FINE EXAMPLE. FOR EXAMPLE, IN HILDWIN, THE COURT SAID UNDER OUR STATUTE THE JURY IS NOT REQUIRED TO MAKE SPECIFIC FINDINGS. FOR YOU TO COME IN NOW AND SAY THE JURY IS REQUIRED TO MAKE SPECIFIC FINDINGS UNDER OUR STATUTE IS GOING TO END UP IN DEFENDANTS, AS THEY DID IN HUGGINS, MAKING IT A 8TH AMENDMENT ARGUMENT THAT WE ARE BEING ARBITRARY AND CAPRICIOUS.

YOU ARE GOING SO MUCH FARTHER HERE. YOU'RE GIVING ME A PARADE OF HORRIBLES.

AND THAT IS MY POINT. THERE IS A PARADE OF HORRIBLES.

I ASKED YOU WHETHER THIS IS THIS WOULD BE IN VIOLATION OF OUR STATUTE AND YOU SAID YES.

YES. BECAUSE OUR STATUTE DOES NOT REQUIRE JURIES TO MAKE SPECIFIC FINDINGS WITH REGARD TO EACH FACTOR.

AND THE COURT'S RULEMAKING POWER, LIKE FOR EXAMPLE AS YOU KNOW IN ARIZONA, WE HAD A SIMILAR STATUTE EXCEPT IT WAS SUBSEQUENTLY, THEY, AND FROM WHAT I COULD TELL I THINK ABOUT EVERY STATE IN THE UNION NOW EXCEPT THIS STATE REQUIRES ADVANCED NOTICE OF AGO {VA} AGGRAVATORS, NOT NECESSARILY IN THE INDICTMENT AND EVEN IN ALABAMA, THE LAST OF THE TWO STATES, FINDS A UNANIMOUS FINDINGS OF AGGRAVATING CIRCUMSTANCES.

BUT, YOUR HONOR, THAT PROVES MY POINT.

IS THAT CORRECT?

YES.

WAS ALABAMA STATUTES ESSENTIALLY THE SAME AS OUR STATUTE?

IT WAS SLIGHTLY DIFFERENT BUT THAT PROVES MY POINT BECAUSE IN EACH OF THESE STATES THOSE CHANGES WERE MADE BY THE LEGISLATURE.

IN ALABAMA IT WAS NOT MADE BY THE LEGISLATURE. IN TWO OR THREE CASES THEY DETERMINED THAT THE AGGRAVATING CIRCUMSTANCES HAD TO BE FOUND UNANIMOUSLY, EITHER IF IT WAS A PRIOR, YOU KNOW, INHERENT IN THE VERDICT, SUCH AS IF YOU HAD A CONTEMPORANEOUS ROBBERY OR IF IT WAS NOT THAT THE JURY HAD TO FIND THAT UNANIMOUSLY.

YOUR HONOR, UNIVERSELY ACROSS THE UNITED STATES WHEN THESE CHANGES HAVE BEEN MADE THEY HAVE BEEN CHANGED BY THE LEGISLATURE.

YOU WOULD AGREE WE ARE THE SOLE STATE NOW THAT ALLOWS BOTH A JURY; IS THAT CORRECT?

I DON'T KNOW THAT, YOUR HONOR. I DON'T KNOW.

GO TO YOUR PREMISE WITH REGARD TO SOMETHING NOT BEING REQUIRED BY A STATUTE AND THAT BY ASKING A JURY TO DO SOMETHING YOU ARE VIOLATING THE LAW IN SOME WAY. IS THE ASPECT WITH REGARD TO THE USE OF A FIREARM FOR ENHANCE {MEBT}S ENHANCE {MEBT}S ENHANCEMENTS AND THOSE KINDS OF THINGS, IT WAS MY UNDERSTANDING THAT BY COURT DECISION WE REQUIRED THAT THERE BE SOME FINDING BY THE JURY THAT A FIREARM WAS ACTUALLY USED. USING THAT AS AN EXAMPLE, IS THERE ARE THERE OTHER INSTANCES SIMILAR TO THAT?

I AM SURE THERE ARE OTHER INSTANCES WHERE THE JURY IS REQUIRED TO MAKE SPECIFIC FINDINGS WITH REGARD TO ELEMENTS. WHETHER THIS COURT HAS ADDED THAT, I DO NOT KNOW, BUT IN GENERAL THE STATUTE WILL SET THAT OUT. AND THIS IS A GOOD POINT AND JUSTICE QUINCE AND IN BOTTOSON NOTES WITH REGARD TO THE RECOMMENDATION THAT THE JURY IS NOT REQUIRED TO SET THEM OUT ANY MORE THAN A JURY IS IN THE GUILT PHASE REQUIRED TO SET OUT THEIR FINDINGS WITH REGARD TO EACH ELEMENT. WHEN THERE ARE SPECIFIC ELEMENTS THAT MAY BE REQUIRED BY THE STATUTES NECESSARILY FOUND BY THE JURY, YES, BUT OUR STATUTE DOES NOT REQUIRE THAT AND FOR THIS COURT TO EXPAND THAT OR FOR FIRST CIRCUIT COURT JUDGES TO DO SO.

IT HAS BEEN DISCUSSED OFF AND ON WITH REGARD TOP AND YOU CHARGE BOTH PREMEDITATED MURDER AND THE FELONY MURDER THAT YOU NEED NOT HAVE A SPECIAL VERDICT FORM. THE

STATUTE {TERNL}LY DOESN'T REQUIRE IT. WOULD THAT ALSO BE IN VIOLATION OF OUR STATUTES IF A TRIAL JUDGE WOULD HAVE A JURY MAKE THAT DETERMINATION AND SEPARATE THOSE THINGS OUT? DOES THAT THEORY HOLD?

IT IS VERY POSSIBLE BUT THERE IS A REAL DISTINCTION HERE I WOULD LIKE TO POINT OUT. WHEN YOU HAVE A FINDING OF GUILT AS OPPOSED TO THE DEATH PENALTY SENTENCING SCHEME AND THAT'S WHERE OUR PROBLEM LIES HERE. WE HAVE A DEATH PENALTY SENTENCING SCHEME WHICH IN FURMAN HAD BEEN STRUCK DOWN BECAUSE IT WAS ARBITRARY AND CAPRICIOUS. IN PROFITT THEY AFFIRMED IT BASED ON THE WAY THE LEGISLATURE HAD IT SET OUT AND THE DUTIES THAT WERE ASSIGNED TO EACH INDIVIDUAL PART OF IT. THERE ARE DUTIES ASSIGNED TO THE JURY, DUTIES ASSIGNED TO THE TRIAL JUDGE AND DUTIES THAT ARE ASSIGNED TO THIS COURT. HAVING THE JURY MAKE THESE FINDINGS WHEN THAT IS A DUTY THAT IS REQUIRED BY THE TRIAL JUDGE AND ONLY HAVING THE JURY MAKE THESE FINDINGS IN CERTAIN CASES HERE AND CERTAIN CASES THERE IS GOING TO RESULT IN A 8TH AMENDMENT VIOLATION AND YOU HAVE ALREADY SEEN THOSE ARGUMENTS BEFORE YOU. BECAUSE WE HAD A SENTENCING SCHEME. IF WE GO OUTSIDE THAT SENTENCING SCHEME, WE ARE NOW OPENING UP MY PARADE OF HORRIBLES OR THE PANDORA'S BOX BECAUSE YOU DON'T KNOW WHAT OTHER EFFECTS THAT IS GOING TO TRIGGER.

SO THE RANDOMNESS OF THIS IS WHAT YOUR PROBLEM IS WITH IT? IF IT WERE REQUIRED IN EVERY CASE WOULD YOU STILL HAVE THAT SAME KIND OF PROBLEM OR DOES THAT ELIMINATE THOSE PROBLEMS?

I WOULDN'T HAVE THAT PROBLEM IF THAT CHANGE IN THE STATUTE WAS DONE BY THE LEGISLATURE BUT MY POSITION IS FOR THIS COURT TO REQUIRE THOSE FINDINGS IS EXPANDING THE JUROR'S DUTIES AS IT IS SET OUT IN OUR STATUTE AND THAT THAT IS IMPROPER. IF THIS COURT DETERMINES OTHERWISE AND THEN DECIDES TO MAKE A UNIVERSAL RULE THEN WE WILL DEAL WITH THAT, BUT AT THIS POINT OUR POSITION IS THAT THAT IS A CHANGE IN THEIR DUTIES AND THAT'S A SUBSTANTIVE CHANGE TO STATUTE.

IS THE STATE'S REAL CONCERN HERE REALLY THAT IF YOU HAVE THESE KIND OF INTERROGATORIES JURY FINDINGS THAT YOU MAY END UP WITH, YOU KNOW, EIGHT JURORS THINK THAT YOU HAVE THIS AGGRAVATING FACTOR AND FOUR OF THEM THINK YOU HAVE THIS AND FIVE OF THEM THINK YOU HAVE SOMETHING ELSE. IS THAT WHAT THE STATE'S REAL INTEREST IS IN THIS? THAT YOU ARE AFRAID YOU ARE GOING TO GET INTO THESE FRAGMENTED DETERMINATIONS OF WHAT AGGRAVATING FACTORS ARE APPLICABLE?

NO, NO, MY CONCERN IS NOT THAT. MY CONCERN IS THAT THAT'S GOING TO HAPPEN AND A JURY OR A JUDGE IS GOING TO LOOK AT IT AND NOT KNOW WHAT TO DO WITH IT BECAUSE OUR STATUTE DOESN'T TELL THEM WHAT TO DO WITH IT AND OUR INSTRUCTIONS DON'T TELL THEM WHAT TO DO WITH IT, BECAUSE UNDER SHAD AND UNDER HILDWIN THE JURY DOES NOT HAVE TO MAKE SPECIFIC FINDINGS AND THEY DO NOT HAVE TO AGREE TO WHICH ONES THEY FOUND.

SO WOULD YOU AGREE TO A JURY INSTRUCTION THAT INSTRUCTS THE JURY TO DETERMINE WHETHER AT LEAST ONE AGGRAVATOR EXISTS? WOULD THAT COMPLY WITH THE STATUTE?

AND THAT IS WHAT OUR JURY INSTRUCTION CURRENTLY DOES, ABSOLUTELY.

LET ME ASK YOU THIS: YOU SAID EARLIER THAT WE HAVE NOT DECIDED THAT OUR SCHEME IS UNCONSTITUTIONAL.

RIGHT.

CAN WE AGREE THAT WE HAVE NOT DECIDED WHETHER RING APPLIES IN FOR THE RECORD AND FLORIDA AND UNDER WHAT CIRCUMSTANCES?

I WILL AGREE THAT THAT CERTAIN OF YOUR CASES HAVE SAID THAT. HOWEVER, THIS COURT HAS NOT GRANTED RELIEF TO ANYONE ON RING AND IS CONSISTENTLY DENIED THOSE CLAIMS.

I UNDERSTAND THAT BUT MY FOLLOW-UP QUESTION IS IF WE HAD NOT DETERMINED ONE WAY OR THE OTHER WHETHER RING APPLIES, A MAJORITY HAS NOT SAID IT APPLIES, A MAJORITY HAS NOT SAID IT DOESN'T APPLY, SO THERE IS A CONFUSION IN THE LAW IN FLORIDA RIGHT NOW, THAT JUDGES HAVE TO DEAL WITH, WHY IS IT A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW FOR A JUDGE TO THEN INTERPRET RING ON HIS OWN AND SAY, WELL, THE FLORIDA SUPREME COURT DOESN'T HAVE A MAJORITY TO DETERMINE WHETHER IT APPLIES OR NOT? I'M GOING TO DETERMINE THAT IT DOES APPLY AND REQUIRE JURY INSTRUCTIONS. WHY IS THAT A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW?

I THINK BECAUSE IT IS VERY FLIPPED BECAUSE THE FACT OF THE MATTER IS WE HAVE TWO PEOPLE, BOTTOSON AND KING WHO HAVE BEEN EXECUTED AFTER THIS COURT WAS PRESENTED A RING CLAIM AND THIS COURT SAYS THAT RING DID NOT APPLY, DID NOT RENDER IT UNCONSTITUTIONAL AND DID NOT PRECLUDE THEIR EXECUTION.

RING WAS BOTTOSON WAS POST CONVICTION?

BOTTOSON AND KING WERE BOTH POST CONVICTION. WE HAVE HAD DIRECT APPEAL CASES WHERE THIS WAS COURT WAS DENIED.

HAVEN'T ALL OF THOSE CASES BEEN WHERE THERE IS A PRIOR VIOLENT FELONY?

NO, THERE WAS ADAM DAVIS AND ALSO HARRY BUTLER.

THOSE CASES RELIED ON BOTTOSON?

THOSE CASES RELIED ON RING.

WELL, THEY WERE INTERPRETING RING AND THEY RELIED ON BOTTOSON TO HOLD THAT WE HAVE HELD THAT RING DOES NOT APPLY IN FLORIDA.

I DON'T UNDERSTAND THE QUESTION, YOUR HONOR.

IN BUTLER AND DAVIS, WHAT CASES DID WE RELY ON OR DID WE ACTUALLY ANALYZE THE ISSUE FOR OURSELVES TO DETERMINE THAT RING DID NOT APPLY?

IN BOTTOSON.

BOTTOSON DIDN'T COME TO A MAJORITY CONCLUSION?

THAT'S CORRECT, YOUR HONOR.

SO THE STATE'S HARM IS NOT NECESSARILY IN THE SENSE IN THIS INDIVIDUAL CASE. YOU ARE SAYING THAT AS A GENERAL RULE THIS COULD CAUSE HARM TO THE SYSTEM IF IT WAS IF ONE JUDGE DID IT, THE OTHER JUDGE DIDN'T, THIS KIND OF ERRATIC BEHAVIOR?

I CAN TELL YOU WHERE THE STATE CAN BE HARMED IN THIS INSTANCE IS BECAUSE THE DEFENDANT DID NOT REQUEST THIS JURY INTERROGATORY. THE DEFENDANT HAS NOT REQUESTED THIS CHANGE TO THE JURY INSTRUCTIONS. THE DEFENDANT MADE A MOTION UNDER RING, AND JUST AS IN HUGGINS THEY MADE A MOTION UNDER RING BUT ULTIMATELY THEY OBJECTED TO THE JURY INTERROGATORIES AND THEN THE STATE IS LEFT OUT THERE HANGING OUT TO DRY TO DEFEND SOMETHING THAT'S GONE ON.

SO IT IS THE IDEA THAT THIS WOULD GIVE THE DEFENDANT DOESN'T AGREE WITH THIS, EITHER, OR I GUESS WE WILL HEAR IN A FEW MINUTES WHETHER THIS WOULD SATISFY THE RING OBJECTION. I THOUGHT THAT THE COLLOQUY HAD INDICATED THAT IF THERE WAS ADVANCE NOTICE THAT THIS WOULD SOLVE THE PROBLEM. THEY DID SAY THAT ON THE RECORD.

THAT'S TRUE. BUT BEYOND THIS PARTICULAR CASE, I MEAN, THERE IS THE UNIVERSAL PROBLEM THAT YOU HAVE INDEPENDENT JUDGES AROUND THE STATE MAKING {UN} LATERAL DECISIONS ON THEIR OWN, MAKING THEIR OWN JURY INSTRUCTIONS AND ADVANCING THEIR DIFFERENT ASPECTS OF THE LAW AND WHEN YOU COMPARE EACH OF THESE, THEY ARE DIFFERENT.

I REALLY WANT A PRONOUNCEMENT FROM THIS COURT THAT THE MAJORITY OF THIS COURT SAYS SOMETHING ABOUT RING THAT NOTHING SHOULD VARY, AND FROM THE WAY IT WAS BEFORE RING?

CORRECT.

SO THE UNDERLYING PROBLEM, THOUGH, IS NOT WHETHER THESE JUDGES ARE ON THEIR OWN ISSUING THESE JURY INSTRUCTIONS. THE UNDERLYING PROBLEM IS WE HAVE NOT DECIDED AS A MAJORITY OF THE COURT WHETHER OR NOT RING APPLIES. ONCE WE DECIDE THAT EVERYTHING ELSE FALLS INTO PLACE, DOESN'T IT? IF WE HAD A MAJORITY OF THE COURT THAT SAYS RING DOES NOT APPLY IN FLORIDA, PERIOD, I DON'T THINK JUDGE TEPER WOULD HAVE ISSUED THIS JURY INSTRUCTION?

EXCEPT THAT HE DENIED THE RING MOTION AND THEN WENT AHEAD
BECAUSE OF THE UNCERTAINTY FROM THE COURT.

BUT IN ANY CASE IF THIS COURT DECIDES THAT RING DOES OR DOES NOT APPLY, TO MAKE A SUBSTANTIVE CHANGE IN THE STATUTE IS NOT WITHIN THIS COURT'S PURVIEW.

UNLESS IT IS UNCONSTITUTIONAL.

BUT THEN YOU DON'T REWRITE THE STATUTE. THE LEGISLATURE DOES.

CAN YOU MAKE THE SAME ARGUMENT WITH ADVANCE NOTICE OF THE AGGRAVATING FACTORS?
YOUR HONOR, THE ADVANCE NOTICE OF THE AGGRAVATING FACTORS, THIS COURT HAS CLEARLY REJECTED THAT IT IS REQUIRED.

I DIDN'T SAY REQUIRED. HERE WE SAID IT IS LIKE A JUDGE SAYING, OKAY, WE'VE GOT PARTIES IN LITIGATION. WE'RE GOING TO DISCLOSE WHAT WE ARE GOING TO DO IN THIS TRIAL AND STATE IF YOU ARE GOING AFTER THESE AGGRAVATORS I AM GOING TO REQUIRE THAT YOU SET THOSE FORWARD. ARE YOU SAYING THAT'S IN THE SAME CATEGORY AS WHAT YOU ARE REQUIRING WITH THE VERDICT?

AS FAR AS WHETHER IT IS A SUBSTANTIVE CHANGE IN THE STATUTE AND THE STATUTE SIMPLY DOES NOT REQUIRE IT. I SUGGEST IT COULD BE.

THE STATUTE DOES NOT REQUIRE A LOT OF THINGS, A LOT OF DISCOVERY AND THINGS BUT THAT'S PART OF HOW WE TRY THESE CASES. THAT'S WHAT I AM HAVING DIFFICULTY UNDERSTANDING IF IT IS IN THE SAME CATEGORY AS THE JURY VERDICT.

BUT YOU ARE ADDING SOMETHING TO THE STATUTE THAT IS NOT THERE. WITH AN INTERROGATORIES BECAUSE YOU ARE GIVING THE JURY DUTIES THAT THEY DO NOT HAVE, AND THEY ARE APPLYING THE SENTENCE.

JUSTICE LEWIS IS ASKING YOU ABOUT THE FIRST ONE, NOT THE SECOND ONE.

I UNDERSTAND BUT THE POINT IS WITH THE NOTICE CLEARLY THE STATUTE DOESN'T REQUIRE IT. HAVING THE JUDGE REQUIRE SOMETHING THAT THIS COURT NOR THE STATUTE REQUIRES, IS AN ESSENTIAL DEPARTURE FROM THE PROVINCE OF THE LAW. WHETHER IT IS A SUBSTANTIVE CHANGE TO THE STATUTE, I DO NOT KNOW. BUT IN THIS CASE THIS COURT HAS SAID TO REQUIRE THE STATE TO DO SOMETHING THAT WE CANNOT REQUIRE THE DEFENDANT TO DO IS PREJUDICIAL TO THE STATE AND IT IS IMPROPER, AND FOR THIS COURT AND FOR THAT CIRCUIT COURT TO DO THAT IS JUST FURTHER EVIDENCE OF JUST TOTALLY IGNORING WHAT THE LAW IS AND GOING FORTH, AND I WANT TO MAKE ONE MORE POINT BEFORE I GO INTO MY REBUTTAL TIME. WE HAVE BEEN GIVEN COPIES OF THE STEERING COMMITTEE FOR THIS COURT PROPOSED JURY INSTRUCTIONS WITH REGARD TO THIS ISSUE AND I JUST WANT TO POINT OUT ONE THING THAT IN THOSE PROPOSED INSTRUCTIONS THEY NOTE WITH REGARD TO THE INTERROGATORIES THESE ANSWERS WILL ASSIST THE TRIAL JUDGE, AND THIS IS CLEARLY A VIOLATION OF THE STATUTE BECAUSE THE STATUTE SPECIFICALLY REQUIRES THE TRIAL JUDGE TO MAKE AN INDEPENDENT DETERMINATION OF THESE AGGRAVATING FACTORS.

BUT BEFORE YOU SIT DOWN, AGAIN, WHAT IS THE STATE'S INTEREST IN THE NOTICE PORTION OF GIVING NOTICE OF THE AGGRAVATING CIRCUMSTANCES? WHERE IS THE STATE'S INTEREST IN THAT? WHY NOT AT SOME POINT? MAYBE NOT AT THE VERY BEGINNING OF THE TRIAL PROCEEDINGS BUT AT SOME POINT WHAT WOULD BE WRONG WITH THE STATE GIVING NOTICE OF ACTUAL AGGRAVATORS THAT THEY ARE GOING TO SEE?

BECAUSE IT IS GOING TO REQUIRE THE STATE TO GIVE NOTICE TO THE AGGRAVATORS BUT YOU CANNOT REQUIRE THE DEFENDANT TO GIVE NOTICE OF THE MITIGATORS THAT HE IS GOING TO GO FOR AND CONSEQUENTLY YOU PUT US ON AN UNEVEN PLAYING FIELD WHICH IS CLEARLY IMPROPER.

GOOD MORNING. PLEASE THE COURT, I'M BOB DILLINGER, I'M THE PUBLIC DEFENDER IN THE 6TH CIRCUIT. MISS GOODYEAR WISHED TO BE HERE. SHE'S NOT ALLOWED TO TRAVEL BY A DOCTOR'S ORDER. WE'RE IN THE UNUSUAL POSITION WHERE WE'RE SAYING THE DCA IS HALF RIGHT. WE'RE HERE ON WHETHER OR NOT THERE IS A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF THE LAW OR SOMETHING THAT RESULT {NS} A MISCARRIAGE OF JUSTICE.

YOU DIDN'T ASK FOR THESE INSTRUCTIONS. DO YOU OBJECT TO THEM?

NO, SIR. AND AS WAS SAID AT THE TRIAL LEVEL AND TO GO BACK TO THE TRIAL LEVEL, JUDGE TEPER WAS TRYING TO FIX WHAT THEY BELIEVED TO BE A POTENTIAL PROBLEM. NOT THAT IT NECESSARILY WAS, BUT AT THAT POINT IT HAD JUST BEEN BOTTOSON AND KING AND THERE WERE SOME ISSUES AND SHE SPECIFICALLY ASKED THE ASSISTANT PUBLIC DEFENDER IF WE DO THIS, IF WE GIVE YOU THE AGO {VA} AGGRAVATORS IN ADVANCE AND WE GET AN INTERROGATORY VERDICT FORM DO YOU THINK THIS WILL HELP CURE THIS PROBLEM? AND THE DEFENSE SAID YES. SO I DON'T THINK WE'VE BEEN UNCLEAR ON THAT.

DOESN'T THE NOTICE PART GO CONTRA TO WHAT THIS COURT HELD IN ITS OPINION IN 1997?

THIS COURT HAS NEVER HELD THAT THE AGGRAVATORS ARE REQUIRED TO BE GIVEN IN ADVANCE.

THIS COURT CONSIDERED THAT RECOMMENDATION BY JUDGE EATON'S COMMITTEE BACK THAT WAS SUBMITTED IN 1997 AND REJECTED IT.

YES, SIR. BUT THE PUBLIC DEFENDERS ALSO OBJECTED TO THAT INSTRUCTION AT THAT POINT, BECAUSE IT WAS TO GIVE AGGRAVATORS AND MITIGATORS AND BOTH THE PROSECUTION AND THE DEFENSE OBJECTED AND YOU DIDN'T ORDER THAT.

WHAT WOULD BE THE REMEDY HERE? I ASSUME THAT I'M REALLY TALKING BOTH ABOUT THE NOTICE, THAT THIS COURT, THAT THE STATE DOESN'T GIVE THEY GIVE YOU NOTICE OF FOUR AGGRAVATORS AND THEN AT TRIAL THEY SAY WE WANT A FIFTH. WHAT WOULD BE THE REMEDY FOR A TRIAL JUDGE?

WE'RE REALLY IN ESSENCE TALKING ABOUT A STATEMENT OF PARTICULARS. JUDGE TEPER ORDERED A STATEMENT OF PARTICULARS ON WHAT ARE THE AGGRAVATORS. I WOULD THINK IT WOULD BE UNUSUAL IF FOR SOME REASON IN THIS ONE-PAGE DOCUMENT THAT THE STATE FILED SAYING UNDER 921.141, 5 WE ARE RELYING ON A, E AND F, THEY LEFT OUT ONE. EITHER THERE WOULD BE A CONTINUANCE OR IT WOULD BE HARMLESS AND THE EXAMPLE BEING WHAT IF IT IS AN AGGRAVATED CHILD ABUSE FELONY MURDER TYPE CASE, THE CHILD IS FOUR YEARS OLD. THEY HAPPEN TO HAVE LEFT OFF AGE, THE CHILD IS UNDER THE AGE OF 12 WHICH IS AN AGGRAVATOR. A CONTINUANCE ISN'T GOING TO DO YOU ANY GOOD. YOU CAN'T CHANGE THE AGE OF THE CHILD. THEY JUST LEFT SOMETHING OFF.

HOW DOES THIS WORK, THOUGH, SINCE JUSTICE WELLS IS MENTIONING A RULE, THIS IS A QUESTION OF WHETHER THIS ALL SHOULD WAIT UNTIL WE CONSIDER THE PROPOSALS OF THE CRIMINAL COURT STEERING COMMITTEE. RULES HAVE PROVISIONS FOR THE STATE TO GIVE NOTICE OF INTENT TO SEEK THE DEATH PENALTY 45 DAYS FROM THE DATE OF ARRAIGNMENT, SOMETHING I ASSUME IS NOT IN OUR STATUTE, BUT WE HAVE ADOPTED BUT RULE, BUT IT SAYS FAILURE TO GIVE TIMELY WRITTEN NOTICE DOES NOT PRECLUDE THE STATE FROM SEEKING THE DEATH PENALTY. SO HOW DOES THIS WORK IN CONJUNCTION WITH THAT RULE?

I THINK THAT THAT PROVES THAT THIS SHOULD BE WHAT IS DONE IN TERMS OF GIVING ADVANCE NOTICE. THE 45-DAY RULE IMPACTS VARIOUS DISCOVERY PROVISIONS, BUT THE FAILURE TO GIVE THAT 45-DAY RULE IN NO WAY PREVENTS THE STATE FROM SEEKING DEATH. THAT'S A PUBLIC POLICY ISSUE. THAT 45 DAYS WAS A RULE, BUT IN THIS INSTANCE ALL WE'RE ASKING FOR IS THAT THERE ARE 14 AGGRAVATING CIRCUMSTANCES OUT THERE. TELL US WHICH ONES YOU IN GOOD FAITH THINK YOU CAN GO FORWARD ON.

DOES THE STATE NOT REGULARLY, DOES THAT HAPPEN INFORMALLY? I MEAN, AS FAR AS A, YOU KNOW, YOU'RE DOING DISCOVERY. FOR EXAMPLE, THEY ARE GOING TO PUT ON HAC. YOU KNOW IN ADVANCE THAT THERE IS A MEDICAL EXAMINER. THEY ARE GOING TO, THAT'S WHO IS GOING TO ISN'T THAT PART OF WHAT GOES ON IN DISCOVERY, ANYWAY? THAT'S WHY I AM STILL TRYING I'M SURPRISED. I UNDERSTAND THE STATE'S BIGGER ISSUE BUT JUST ABOUT THE FACT THAT IT WOULD SEEM IN BOTH MOSTS THE AGGRAVATORS ARE GOING TO BE SOUGHT ARE GOING TO BE FAIRLY APPARENT JUST FROM THE FACTS OF THE CASE AND THE WITNESSES THAT ARE LISTED?

I WOULD THINK SO. I VIEW IT, AND AGAIN I VIEW IT FROM MORE OF AN ADMINISTRATIVE POINT OF VIEW AND A FEAR OF INEFFECTIVE ASSISTANCE OF COUNSEL. WHEN I STARTED OUT THERE WERE EIGHT AGGRAVATING CIRCUMSTANCES AND AS I INDICATED THERE IS NOW 14. MY FEAR IS THAT, YOU KNOW, THE LEGISLATURE CHANGES AN AGGRAVATING CIRCUMSTANCE, YOU KNOW, MARCH, APRIL SESSION. IT GOES INTO EFFECT IN MAY. A HOMICIDE HAPPENS IN JUNE AND SOMEBODY IS COURT APPOINTED IN JULY AND THEY DON'T KNOW IT. THAT WOULD BE MY FEAR AND I WOULD THINK THE STATE WOULD HAVE A REAL INTEREST IN MAKING SURE THAT THIS LAWYER ISN'T THERE TELLING HIS CLIENT, THEY HAVE ONE AGGRAVATOR, WE HAVE THREE MITIGATORS, WE ARE IN OKAY SHAPE IF YOU WANT TO GO TO TRIAL AND IN REALITY THERE ARE TWO AGGRAVATORS OUT THERE.

LET'S SWITCH TO THE INTERROGATORY FORM FIRST. IT DIDN'T APPEAR TO ME THAT THERE WAS REALLY AN ARGUMENT ABOUT A PARTICULAR FORM OF INTERROGATORY, EVEN BEFORE JUDGE TEPER. THERE HAS BEEN SUBMITTED HERE AN INTERROGATORY. DON'T WE HAVE ONE, IF WE WENT TO INTERROGATORY FORMS IN THIS CAPITAL CASES, WOULDN'T IT BE NECESSARY TO GO

TO INTERROGATORY FORMS AS FAR AS MITIGATION AS WELL AS AGGRAVATION?

WELL, YOU HAVE TO FIND AN AGGRAVATOR BEFORE MITIGATION EVEN COMES INTO PLAY.

BUT IF WHAT WE ARE TRYING TO DO IS TO HAVE THE TRIAL JUDGE INFORMED ON WHAT THE JURY WAS MAKING DETERMINATIONS ABOUT, I MEAN, THE SAME THING WOULD HOLD TRUE, IT SEEMS TO ME, WITH MITIGATION AND THEN WE'D HAVE WE'D REALLY HAVE A VERY COMPLICATED VERDICT. THAT IS ONE CONCERN I HAVE. THE SECOND CONCERN I WISH THAT YOU WOULD SPEAK TO IS THE STATED INDICATED THEY ARE NOT THAT CONCERNED ABOUT IT BUT I AM. WHAT DO WE DO IN THE SITUATIONS IN WHICH ALL OF THE SUDDEN WE GET THESE VERDICTS BACK AND THEY HAVE SIX THAT FIND THAT THERE IS CCP, AND SIX THAT FIND THERE IS HAC. THERE IS A RECOMMENDATION OF DEATH. WHAT'S THE STATUS OF THAT CASE?

WELL, I THINK WE NEED TO GO FORWARD WITH THE IDEA OF WE NEED TO END THE MYSTERY, AND THE MYSTERY IS WHAT WERE THE FACTS THAT THE JURY FOUND, AND THAT THE GOVERNMENT SEEMS TO FIGURE THAT IF WE ARE DOING THIS INTERROGATORY VERDICT WE ARE INTRUDING INTO THEIR PROCESS AND I DON'T VIEW THAT AS ALL. WE WANT TO KNOW WHAT THEY FOUND, NOT WHY. SO THAT IF, IN FACT, YOU HAVE AN INTERROGATORY VERDICT FORM AND YOU HAVE WHAT THE JUDGE HAS CALLED OUT TO BE THE APPROPRIATE AGGRAVATING CIRCUMSTANCES, AND LET'S SAY IT IS HEINOUS, ATROCIOUS AND CRUEL OR CCP AND THE JURY SAYS 12-0 ON BOTH OF THOSE I THINK THAT MAKES IT EASIER TO REVIEW. IF, IN FACT, THREE FOUND 1, TWO FOUND ANOTHER, 7 FOUND SOMETHING ELSE, I THINK YOU THEN HAVE A REVIEWING PROCESS. DOES THAT THROW SOME CONFUSION IN IT? IT MIGHT. DOES IT ACTUALLY SAY THAT MAYBE THAT MEANS THAT WE SHOULD MAKE IT UNANIMOUS?

BUT IT THROWS IT INTO SOMETHING IT SEEMS TO ME IS CONTRARY TO THE STATUTORY SCHEME, YOU KNOW, AND IN LAYING ASIDE THE PROBLEMS OF THE STATUTORY SCHEME MAY OR MAY NOT HAVE UNDER RING, STILL THE STATUTORY SCHEME IS THAT THE JURY IS COLLECTIVELY IS TO MAKE A RECOMMENDATION, ADVISORY TO THE TRIAL JUDGE AS TO WHETHER THE AGGRAVATION THAT THEY FIND OUTWEIGHS THE MITIGATION. NOT AS TO WHETHER ANY INDIVIDUAL AGGRAVATOR OUTWEIGHS ANY INDIVIDUAL MITIGATOR, BUT AS TO WHETHER THEY COLLECTIVELY DO. AND THERE ARE SCHEMES.

I THINK BECAUSE WE DON'T KNOW EXACTLY WHAT JURORS DO THAT IT MAKES IT MORE CONFUSING. ARE WE IN A SITUATION WHERE 12 JURORS EACH FOUND EACH OF THEM SAID ONE AGGRAVATOR APPLIES AND THEY HAD 12 DIFFERENT AGGRAVATORS THAT THEY THINK IS APPROPRIATE SO THEY SAID AGGRAVATION OUTWEIGHS MITIGATION? WE DON'T KNOW BECAUSE ALL WE GET IS THE RECOMMENDATION.

SO DO YOU CARRY IT OUT, THE LOGICAL CONCLUSION OF WHERE YOU ARE HEADING IS I THINK WHAT JUSTICE WELLS SAYS IS THAT YOU ARE GOING TO DEMAND NOT ONLY FINDING OF ONE AGGRAVATOR, BUT ALL OF THE AGGRAVATORS YOU FIND AND THEN ALL OF THE MITIGATORS TO MAKE SURE THERE IS A PROPER WAY AND JUST LIKE WE DO WITH TRIAL JUDGES AND GO THROUGH THE SAME PROCESS AND THAT'S MORE OF A COMMENT. REALLY LET ME ASK YOU A QUESTION. I THINK WE'RE ALL CONCERNED ABOUT THE IMPACT OF RING AND WHAT THE U.S. SUPREME COURT MAY DO ON THIS SENTENCING STRUCTURE, BUT WHAT WE HAVE RIGHT NOW IS THE U.S. SUPREME COURT HAS HAD THE OPPORTUNITY TO REVIEW AND FIND RING APPLICABLE TO OUR PROCESS AND HAS ELECTED NOT TO DO SO, SO FAR. THE LEGISLATURE HAS CHOSEN NOT TO REACT AND MODIFY THE STRUCTURE AT ALL, UNLIKE ALL OF THE OTHER STATES. THIS COURT HAS MADE SOME DECISIONS AND NOT OTHERS. ISN'T THERE A RISK, AS THE STATE SAYS, IF WE HAVE INDIVIDUAL TRIAL JUDGES MAKING A DIFFERENT DETERMINATION, ONE SAYING YES, I'M GOING TO REQUIRE ALL EVER THE AGGRAVATORS TO BE LISTED AND LIST THE NUMBER OF JURORS AS OPPOSED TO THE OTHER ONE WHO MAY SAY, WELL, YOU CAN ONLY LIST ONE BUT IT HAS TO BE UNANIMOUS OR LIST ONE AND FIND ONE BUT IT DOESN'T HAVE TO BE UNANIMOUS.

DON'T WE GET A HODGEPODGE OF RESULTS COMING TO US AND REALLY CREATING MORE CONFUSION AND IT IS KIND OF FLIPPING THE PROCESS ON ITS HEAD THAT THE PROCESS SHOULD BE THAT THE LEGISLATURE NEEDS TO ADDRESS IT IF THIS COURT DOESN'T ADDRESS IT? THIS COURT?

NO, SIR. I DON'T KNOW THAT THE LEGISLATURE ADDRESSES THE FORM OF VERDICTS. WHAT I THINK WHAT NEEDS TO BE ADDRESSED IS THAT THE TRIAL JUDGE ALLOWS THOSE AGGRAVATORS THAT ARE APPROPRIATE TO THAT CASE TO GO TO THAT JURY.

THEN IS IT UNANIMOUS OR NOT UNANIMOUS?

THAT'S A SEPARATE ARGUMENT. SOME OF THE JUSTICES BELIEVE IT SHOULD BE UNANIMOUS.

SOME TRIAL JUDGES BELIEVE THAT AT LEAST ONE SHOULD BE UNANIMOUS?

BUT OBVIOUSLY THERE IS A BUNCH OF BALLOONS OF RING UP IN THE AIR. WHETHER THEY STAY UP THERE OR WHETHER THEY SINK OR WHETHER THEY BURST, WE DON'T KNOW, BUT IF, IN FACT, YOU HAVE A VERDICT FORM THAT SAYS WHAT THAT JURY SAID, THIS IS 8-4, THIS IS 6-6, THIS IS 12-0 AND IT COMES BACK, IT HAS TO BE UNANIMOUS, YOU KNOW EXACTLY WHAT YOU HAVE. THE FACTS ARE THERE. WHAT THE JURY RENDERED THEIR DECISION ON IS THERE AND THE WAY TO RESOLVE THAT IS TO MAKE SURE THEY DO THAT IN EVERY CASE.

MR. ^DILLINGER, THE QUESTION THAT I HAVE, BECAUSE I HAVE BEEN A {PRONT} FOR SOME PROPER OPPONENT FOR SOME TIME OF BEING A SPECIALIZED VERDICT THAT WOULD GIVE FELONY MURDER AND FIRST DEGREE SO WE WOULD KNOW WHAT THE JURY DID. AS I RECALL, BOTH THE STATE AND THE DEFENSE REPRESENTATIVES HAD OPPOSED THAT EACH TIME IT HAS COME UP. MY QUESTION FOR THIS SITUATION IS: ARE WE HERE LOOKING AT THIS ISSUE BECAUSE IT IS GOING TO PROVIDE FOR A MORE INTELLIGENT REVIEW PROCESS WHICH WOULD THEN, OF COURSE, REQUIRE LET'S LOOK AT ALL OF THE AGGRAVATORS OR ARE WE DOING IT IN ORDER TO ATTEMPT TO COMPLY WITH THE CONSTITUTIONAL ISSUE THAT THE SIXTH AMENDMENT ISSUE RAISED IN RING, WHICH IS THAT ANY FACT THAT WOULD ELEVATE SOMETHING FROM FIRST DEGREE MURDER TO THE DEATH PENALTY MUST BE FOUND BY A JURY. SO BECAUSE THAT'S TWO DIFFERENT TO ME, THAT'S TWO DIFFERENT REASONS THEN FOR LOOKING AT WHAT WE DO IN GENERAL, AND SO HOW WOULD YOU, YOU KNOW, IN OTHER WORDS ONE SITUATION A JUDGE CAN MAYBE CAN MODIFY A VERDICT FORM BECAUSE THAT'S WITHIN THEIR PREROGATIVE, BUT IF IT IS SO WHAT'S YOUR POSITION ON THAT?

I BELIEVE WE NEED AN ORDERLY REVIEW PROCESS.

AND SO YOU WOULD HAVE LIKED THAT BEFORE RING?

I HAVE, YOU KNOW, ALWAYS THOUGHT THAT WE SHOULD KNOW IF THEY FOUND PREMEDITATED MURDER, FELONY MURDER OR BOTH.

BUT THAT'S NOT A SO NOW ON THIS ONE BUT HERE TODAY ARE WE LOOKING AT IT BECAUSE WE ARE NOT HERE ON A RULEMAKING PROCEDURE? ARE WE HERE IN LOOKING AT THIS BECAUSE IT IS SOMETHING THAT THE JUDGE IS FEELING COMPELLED TO DO BECAUSE OF RING OR BECAUSE SHE FEELS LIKE YOU MIGHT THAT THIS IS JUST A GOOD IDEA TO HAVE THIS INFORMATION. IT WILL HELP HER BETTER MAKE AN INFORMED JUDGMENT ON HER OWN INDEPENDENT REVIEW ON WHETHER THE DEATH PENALTY SHOULD BE IMPOSED?

I THINK JUDGE TEPER IS TAKING THE POSITION NO HARM, NO FOUL. THIS INFORMATION IN NO WAY PREJUDICES THE STATE.

WELL, IF YOU HAVE A VERDICT FORM, HOWEVER, THAT YOU HAVE TO LAY OUT, HOW MANY

JURORS FOUND WHICH OF THESE THINGS, AREN'T YOU REALLY BUILDING IN SOMETHING ELSE THAT'S GOING TO HAVE TO BE DEALT WITH EITHER ON APPEAL OR AT SOME POINT AND THAT MAY, IN FACT, BE PREJUDICIAL TO THE STATE?

WELL, I THINK RIGHT NOW, ALL WE KNOW IS THE JURY SIGNS A FORM THAT SAYS BY A VOTE OF SO AND SO WE FIND THE AGGRAVATORS OUTWEIGH THE MITIGATORS. WE DON'T KNOW WHAT THEY D WE DON'T KNOW IF THEY FOUND AGGRAVATEORS THAT COULDN'T POSSIBLY EXIST.

WOULD IT HELP IF THAT SAME FORM SAID WE, THE JURORS, BY A VOTE OF 8-4, FIND THAT THE AGGRAVATOR, PER VIOLENCE, BUT IT REALLY NOT A GOOD ONE, BUT SOME OTHER AGGRAVATOR IS FOUND BY 8-4. DOES THAT HELP OR IS THAT GOING TO CREATE JUST ANOTHER APPELLATE ISSUE?

THAT IS GOING TO HELP WHEN AND IF IT IS DECIDED DOES AN AGGRAVATOR HAVE TO BE PROVED BEYOND A REASONABLE DOUBT AND IF YOU HAVE THE FACTS OF WHAT THAT JURY DID, NOT WHY THEY DID IT, BUT WHAT THEY DID, THEN IF IT REQUIRES A UNANIMOUS VOTE WE KNOW WHAT THEIR VOTE WAS. THERE IS NO MYSTERY TO IT.

BECAUSE IN ORDER TO COMPLY WITH RING, I THINK YOU WOULD AGREE THEY ONLY HAVE TO FIND ONE AGGRAVATOR?

CORRECT, SIR.

SO ARE YOU SATISFIED WITH AN INTERROGATORY THAT SAYS YOU HAVE TO FIND AT LEAST ONE AND THEY ONLY HAVE TO DESIGNATE ONE AND THAT HAS TO BE BY A MAJORITY?

I THINK THE CURRENT STAGE OF THE LAW, I CANNOT SAY A UNANIMOUS AGGRAVATOR IS REQUIRED. I HAVE A PREFERENCE IN THAT RESPECT, BUT I THINK WE NEED TO KNOW WHAT FACTS THE JURY FOUND.

I GUESS MY QUESTION IS: ARE YOU ASKING THAT THE JURY LIST EVERY AGGRAVATOR THEY FIND AND BY ONE VOTE OR THAT THEY ONLY FIND ONE AGGRAVATOR OF FOUR FOR THE STATE? PART OF MY CONCERN IS IF YOU ASK FOR MORE THAN ONE AND THE JURY VARIES IN THEIR CALCULATION, DOES THAT BIND THE TRIAL JUDGE?

AND THAT'S WHAT I WAS GOING TO RESPOND TO. I THINK THE TRIAL JUDGE NEEDS TO IN ESSENCE DETERMINE WHAT AGGRAVATORS ARE APPROPRIATE IN THIS CASE. I MEAN, IF 6 OF THE 14 ARE APPROPRIATE.

I MEAN THE TRIAL JUDGE IN SENTENCING AFTER RECEIVING THE VERDICT FORM THAT ITEMIZES THE JURY FINDING FOR AGGRAVATORS DOES THAT BIND THE JUDGE MORE SO IN THE JUDGE'S FINDINGS?

I THINK YOU'VE ALREADY HAD THAT ISSUE BEFORE YOU WHEN IF YOU FIND PRIOR VIOLENT FELONY OR FIND ONE, DOES THAT OPEN THE TRIAL JUDGE TO FIND ANOTHER FIVE THAT THE JURY NEVER ADDRESSED AND THAT IS A PROBLEM. THAT'S WHY I THINK THE JURY, WHAT THE JURY'S FACT FINDING MISSION WOULD BE WOULD BE THOSE AGGRAVATORS THAT THAT JURY FOUND.

ALL OF THEM?

YES, SIR.

RIGHT NOW WE HAVEN'T DETERMINED THAT RING APPLIES BUT ASSUMING RING APPLIES, WHY ISN'T IT A REASONABLE INTERPRETATION OF RING IS THAT WHAT IT REQUIRES TO RENDER THE DEFENDANT ELIGIBLE FOR DEATH, THAT THE JURY FIND THAT AN AGGRAVATOR EXISTS? NOT

THAT THE JURY AGREE ON THE SPECIFIC AGGRAVATOR THAT EXISTS BUT THAT A JURY FIND THAT AT LEAST ONE AGGRAVATOR EXISTS WHETHER IT IS A MAJORITY OR A UNANIMOUS JURY ALL RING REQUIRES IS THAT THEY AGREE THAT AN AGGRAVATOR EXISTS AND THAT THE MITIGATORS ARE INSUFFICIENT TO OUTWEIGH THE AGGRAVATORS THAT EXIST, BUT I DON'T SEE ANYTHING IN RING THAT SAYS THEY HAVE TO AGREE THAT IT WAS HAC OR CCP BY A MAJORITY OR UNANIMOUS VERDICT THAT IT WAS A SPECIFIC AGGRAVATOR THAT EXISTED.

THAT COULD BE. I'M NOT SAYING

AND RIGHT NOW MAYBE SHE IS WRONG OR MAYBE MISSTATED THE QUESTION, BUT RIGHT NOW, THE VERDICT DOES SAY DO YOU FIND THAT AN AGGRAVATOR EXISTS. IS THAT IN THERE NOW IN THE JURY INSTRUCTIONS?

THE AGGRAVATING FACTOR OR FACTORS EXCEED THE MITIGATION.

WHICH IS NOT A SPECIFIC JURY INSTRUCTION THAT SAYS DO YOU FIND THAT AT LEAST ONE AGGRAVATOR EXISTS?.

BEYOND A REASONABLE DOUBT?

RIGHT. AND WOULDN'T THAT COMPLY WITH RING?

IT'S POSSIBLE. IT JUST SEEMS THAT IF WE REALLY WANT TO KNOW WHAT THE FACT FINDING WAS

BUT IT SEEMS TO ME THAT JUDGE TEPER WAS TRYING TO COMPLY WITH RING, NOT TRYING TO DETERMINE WHETHER THIS IS A BETTER WAY TO REVIEW AS JUSTICE PARIENTE SAID. SHE WAS JUST TRYING TO STRUGGLE WITH THE FACT THAT IN THE YEAR AND A HALF SINCE RING HAS BEEN DECIDED WE HAVEN'T HELD WHETHER IT APPLIES OR NOT APPLIES BUT EVEN IF THAT'S THE CASE, YOU DON'T NECESSARILY HAVE TO INCLUDE, AGREE ON THE PARTICULAR AGGRAVATOR BUT ONLY THAT OF AN AGGRAVATOR DOES EXIST. AND THAT'S ALL SHE HAD TO DO TO COMPLY WITH RING.

THERE HAS TO BE A FINDING THAT ONE AGGRAVATING CIRCUMSTANCE EXISTS.

BUT THERE IS NOTHING ON RING THAT SAYS THEY HAVE TO AGREE ON WHICH AGGRAVATOR?

NO, WHETHER THAT SHOULD BE OR SHOULDN'T BE, BUT THERE IS NOTHING THAT SAYS THAT, YOU ARE CORRECT, SIR.

ARE THERE ANY OTHER QUESTIONS? I'M NOT EXACTLY SURE WHERE I AM IN THESE POINTS.

SINCE YOU ARE NOT SURE WHERE YOU ARE, LET ME DIRECT YOU. AS FAR AS THE NOTICE OF AGGRAVATING FACTORS, IN FLORIDA CRIMINAL DISCOVERY IS RECIPROCAL, SO WHY SHOULD THERE BE A RULE, EITHER JUDGE MADE OR IN THE CRIMINAL RULES THAT SAY, STATE, YOU HAVE TO PROVIDE ALL OF THE AGO {VA} AGGRAVATORS BUT, STATE, YOU DON'T HAVE TO PROVIDE ANY OF THE MITIGATORS. ISN'T THAT CONTRARY TO THE PROVISIONS?

YOU CAN MAKE THAT SAME ARGUMENT FOR BRADY. THEY HAVE TO GIVE ME BRADY INFORMATION. IT MAY KILL THEIR CASE. I DON'T HAVE TO GIVE THEM ANYTHING THAT I DISCOVER THAT KILLS MY CASE. THERE IS JUST SOME THINGS THAT ARE THAT WAY. WHEN I ASK FOR A {STRAMENT} OF STATEMENT OF PARTICULARS ON DAY, TIME AND PLACE I DON'T HAVE TO TELL THEM WHAT I WANT TO SHOW CONTRARY TO DATE, TIME AND PLACE.

BUT BRADY IS IMPOSED BY THE U.S. SUPREME COURT. IT IS NOT IMPOSED BY A RULE. AND THIS KIND OF RULE, THE DISCOVERY OF REQUIRING THE STATE TO GIVE NOTICE OF THE

AGGRAVATORS, THAT'S NOT IN RING, EITHER, SO THIS WOULD BE JUST A RULE THAT WE MAKE UP, NOT SOMETHING THAT WAS IMPOSED BY THE UNITED STATES SUPREME COURT. WHY SHOULDN'T IT BE CONSISTENT WITH RECIPROCAL DISCOVERY?

WELL, BECAUSE WE HAVE ANY OF THE OTHER ABOVE SITUATIONS, YOU KNOW, FINAL ONE FOR MITIGATION THAT COULD BE QUITE BROAD AND MAY NOT BE KNOWN UNTIL TRIAL. THE CLIENT DIDN'T ACT UP DURING TRIAL.

ARE YOU SAYING THAT RING REQUIRES THE STATE TO PROVIDE NOTICE OR IT IS JUST A GOOD IDEA?

I DON'T THINK RING REQUIRES NOTICE. IT IS AN ESSENCE OF THE STATE OF PARTICULARS AND THE COURT SAID LET'S NARROW THE ISSUES AND HERE THEY ARE.

RING DIDN'T ADDRESS THAT ISSUE?

NO, YOUR HONOR, NOT AT ALL.

WELL, WITH JUSTICE CANTERO'S HELP WE USED UP THE REST OF YOUR TIME.

YOU DON'T HAVE TO WORRY ABOUT WHERE YOU WERE.

PLEASE THE COURT, I JUST HAVE A COUPLE OF POINTS TO MAKE. AS FAR AS THE STANDARD JURY INSTRUCTIONS WITH REGARD TO GIVING BEFORE A NEW PENALTY PHASE JURY IT SAYS IF ONE OR MORE AGGRAVATING CIRCUMSTANCES ARE ESTABLISHED, YOU SHOULD CONSIDER ALL OF THE EVIDENCE TENDING TO ESTABLISH ONE OR MORE MITIGATING CIRCUMSTANCES AND GIVE THAT EVIDENCE SUCH WEIGHT AS YOU FEEL IT SHOULD RECEIVE. TO REACH THE OPPOSITE CONCLUSION OF THIS, YOU HAVE TO ASSUME THE JURY DOES NOT FOLLOW INSTRUCTIONS AND THIS COURT HAS REPEATEDLY SAID THAT WE HAVE PRESUMED THAT JURIES FOLLOW INSTRUCTIONS AND THE OTHER POINT IS I CERTAINLY DIDN'T MEAN TO SUGGEST THAT WE WEREN'T CONCERNED THAT THAT WAS GOING TO HAPPEN. BUT MY CONCERN IS NOT THAT THAT'S A CONSTITUTIONAL VIOLATION. MY CONCERN IS THAT THE ERRORS, THE ISSUES THAT IT IS GOING TO RAISE FOR THE DEFENDANTS AND FOR THE JURY, BECAUSE THERE IS NO INSTRUCTION TELLING THEM WHAT TO DO WITH IT, BECAUSE AS THIS COURT HAS ALREADY NOTED THE CONSTITUTION DOESN'T REQUIRE THAT THERE IS A MAJORITY ON ANY PARTICULAR AGGRAVATING FACTOR OR MITIGATING FACTOR AND JUST AS IN SHAB, THEY SAID THAT THE DECISION THAT THE JURY IS CALLED UPON TO MAKE IS WHETHER THE DEFENDANT IS GUILTY. WE DO NOT REQUIRE THEM WHEN THEY ARE ALTERNATE THEORIES TO TELL US WHAT THOSE THEORIES THEY FOUND WERE. THANK YOU.

ALL RIGHT. THE COURT WILL BE IN RECESS UNTIL 9:00 TOMORROW MORNING.

PLEASE RISE.