

>> ALL RISE.  
>> SUPREME COURT OF FLORIDA IS  
NOW IN SESSION.  
PLEASE BE SEATED.  
>> OKAY, NEXT CASE ON THE DOCKET  
IS JACKSON VERSUS STATE.  
WHenever YOU'RE READY, COUNSEL.  
WHY DON'T YOU WAIT A COUPLE  
SECONDS.  
WE'VE GOT A GROUP COMING IN.  
OKAY.  
WE'RE ALL SET.  
>> MAY IT PLEASE THE COURT.  
I'M JULIUS AULISIO.  
I REPRESENT KENNETH JACKSON.  
I WOULD LIKE TO START OFF WITH  
ISSUE FOUR FROM THE BRIEF WHICH  
IS THE TRIAL COURT ERRED IN  
DENYING MOTION FOR MISTRIAL WHEN  
THE WITNESS, LINDA O'NEILL,  
STATED, MR. JACKSON HAD BEEN  
RELEASED.  
DURING THE STATE'S OPENING THEY  
HAD MENTIONED THAT MR. JACKSON  
HAD JUST MOVED BACK TO TOWN  
SEVERAL WEEKS BEFORE THE MURDER  
INCIDENT TOOK PLACE.  
DURING THE PROSECUTOR'S DIRECT  
TESTIMONY OF LINDA O'NEILL,  
WHICH IS WHERE MR. JACKSON WAS  
LIVING, HE ASKED HOW LONG PRIOR  
TO SEPTEMBER 13th, 2007, WAS  
MR. JACKSON LIVING WITH YOU?  
AND MISS O'NEILL, SHE SAID, I  
BELIEVE HE WAS RELEASED.  
AT THAT POINT DEFENSE COUNSEL  
OBJECTED AND MOVED FOR A  
MISTRIAL.  
THE, HE DIDN'T WANT A CURATIVE  
INSTRUCTION BECAUSE IT WOULD  
JUST HIGHLIGHT THE ERROR.  
SO THEY WENT BACK A FEW MORE  
QUESTIONS.  
MISS O'NEILL WAS UNRESPONSIVE.  
THE JUDGE HAD THE JURY REMOVED,  
TOOK THE JURY OUT OF THE  
COURTROOM AND ADMONISHED MISS  
O'NEILL, SAID, IF YOU'RE GOING A  
QUARTER OF AN INCH FURTHER THIS  
WOULD HAVE BEEN A MISTRIAL.

IF YOU HAD SAID, I BELIEVE HE HAD BEEN RELEASED, HE WOULD HAVE GRANT AD MISTRIAL AND STARTED TRIAL AGAIN FOR THIRD TIME.

>> DID SHE SAY RELEASED FROM WHAT?

>> SHE DID NOT SAY RELEASED FROM WHAT.

>> COULD BE THE HOSPITAL, THE MILITARY?

>> WELL, OUR ARGUMENT OF COURSE THIS DID OUR ARGUMENT IS THE CONTEXT OF A FIRST-DEGREE MURDER TRIAL.

THE MOST COMMON HOSPITAL OR MILITARY WOULD BE DISCHARGED.

>> WAS SHE TRYING TO DETERMINE IN CONTEXT WHEN HE MOVED IN WITH HER?

>> RIGHT.

>> SHE WASN'T TALKING ABOUT THE MURDER.

THE QUESTION HAD TO DO WHEN DID HE MOVE IN WITH YOU.

SHE WAS TRYING TO RECALL.

WHEN HE WAS RELEASED.

THERE WAS AN OBJECTION.

THAT WAS IT.

>> BUT THAT'S NOT IT IN THE FACT WHAT ELSE IS THE JURY GOING TO ASSUME THEY WILL FILL IN WITH?

>> HOSPITAL, MILITARY?

>> AS I SAID THE MORE COMMON TERMINOLOGY FOR THAT WOULD BE DISCHARGE AND THERE WAS NO INDICATION THAT MR. JACKSON HAD BEEN ILL.

THERE WAS NO INDICATION THAT HE HAD EVER BEEN IN THE MILITARY.

AND DEFENSE COUNSEL IS OBJECTING.

OBVIOUSLY SOMETHING THAT DEFENSE COUNSEL DOES NOT WANT THE JURY TO HEAR, I MEAN, HE WOULDN'T BE OBJECTING IF HE WAS COMING HOME FROM THE MILITARY.

>> WELL, IN CONTEXT, THIS WAS NOT A DISCUSSION ABOUT HIS BACKGROUND HISTORY.

IT WAS WITH REGARD TO WHERE HE

WAS LIVING AND WHEN AND THIS WAS THE ONLY REFERENCE.

SO JUST ONE STRAY REFERENCE DURING THE ENTIRE TRIAL, IS THAT CORRECT?

>> THAT'S CORRECT.

>> OKAY.

>> BUT WE'RE SAYING THAT THAT ONE STRAY REFERENCE, IT IS PRESUMPTIVELY HARMFUL WHEN, YOU KNOW, A PERSON'S PRIOR RECORD COMES IN BECAUSE THERE IS THE GREAT RISK THAT THE JURY IS GOING TO RELY ON PRIOR RECORD OR PROPENSITY IN ORDER TO--

>> JUST HERE'S THE PROBLEM.

THE JUDGE RECOGNIZED, AS DID THE DEFENSE LAWYER IMMEDIATELY THAT THE, THIS WITNESS, WHO APPARENTLY WAS A PROBLEM FOR THE STATE ALSO.

I MEAN AS FAR AS WHAT SHE WAS DOING.

IT IS NOT A QUESTION WHERE THE STATE TRIED TO ELICIT IT.

THE, THERE WAS A MOTION FOR A MISTRIAL.

THE JUDGE BY SAYING, YOU COULD SCREW THIS WHOLE THING UP DIDN'T SPECIFICALLY SUSTAIN THE OBJECTION BUT THERE WAS NO FURTHER COMMENTS BY THIS WITNESS ON THIS PARTICULAR ISSUE, CORRECT?

THAT WAS IT?

>> WELL THE--

>> ALL RIGHT.

SO I GUESS THE QUESTION IS, DON'T WE HAVE TO-- IF THE JUDGE HAD, THE JUDGE WASN'T OVERRULING THE OBJECTION.

NOR WAS THE JUDGE ASKED TO GIVE A CURATIVE INSTRUCTION ON THIS.

>> THE JUDGE SUSTAINED THE OBJECTION AND THE JUDGE OFFERED A CURATIVE INSTRUCTION AND DEFENSE COUNSEL SAID, NO, IT WOULD JUST HIGHLIGHT THE ERROR.

>> SO YOU REALLY GOT TO GET TO THIS MISTRIAL STANDARD THEN,

VITIATE THE ENTIRE FAIRNESS OF THE TRIAL.

A VERY HIGH STANDARD.

BUT ANYWAY, YOU AGREE IT IS A HIGH STANDARD.

YOU THINK YOU CAN GET THERE BY WHAT IN THIS CASE?

HOW DID THAT ONE PASSING REFERENCE WHICH AS JUSTICE PERRY SAID COULD BE MISS-- COULD BE CONSIDERED TO BE MAYBE SOMETHING ELSE WASN'T MENTIONED AGAIN, THAT HE WAS RELEASED FROM PRISON?

>> WELL, IN THE TURNER CASE WHERE THERE WAS A, DURING VOIR DIRE POTENTIAL JURORS SAID THAT SHE KNEW THE DEFENDANT BECAUSE SHE WAS A CORRECTIONAL OFFICER AT MARION COUNTY JAIL. SHE NEVER SPECIFICALLY SAID THAT THE DEFENDANT WAS AN INMATE THERE.

THE DEFENDANT COULD HAVE BEEN A CORRECTIONAL OFFICER. COULD HAVE WORKED AT THE JAIL. SO IT WASN'T SPECIFICALLY SAID. SO WE'RE SAYING THAT THIS INFERENCE, IT'S SUCH A GLARING INFERENCE, IT WOULD BE LIKE, WHEN THE JURY'S INSTRUCTED NOT TO SPECULATE ON WHAT THE ANSWER WOULD BE, BE LIKE TRYING TO TELL THEM TO IGNORE THE 10,000-POUND ELEPHANT IN THE ROOM. IT IS JUST SOMETHING THAT CAN'T BE DONE.

AND IT'S SO PREJUDICIAL THAT--

>> THIS WAS ONE STRAY-- ONE REMARK THAT.

THERE WAS NO FOLLOW-UP.

IT WAS NEVER ANY FURTHER DISCUSSION OF IT.

I'M JUST, HOW IN THE WORLD CAN YOU SAY THIS ONE REMARK, VITIATES THIS ENTIRE TRIAL?

>> WELL, IF THE JURY IN FACT, YEAH, WHICH WE SAY THEY WOULD HAVE FILLED IT IN WAS SAYING RELEASED FROM PRISON, THEN YOU

HAVE, YOU KNOW, IN THE CASE LAW IS CLEAR THAT IT'S SO PREJUDICIAL, IT'S PRESUMED TO BE HARMFUL WHERE A PERSON'S PRIOR RECORD COMES INTO PLAY.

I KNOW THE STATE CITES FLETCHER WHERE THEY TRIED TO ARGUE, WELL, IT IS NOT HARMLESS.

WELL IN THAT CASE FLETCHER WAS ON TRIAL FOR AN ESCAPE AND THERE WAS A STIPULATION HE WAS IN LAWFUL CUSTODY.

THE JURY ALREADY KNEW HE HAD A PRIOR RECORD.

HERE MR. JACKSON, HE DIDN'T HAVE ANY ESCAPE.

THERE WAS NO INDICATION OF ANY PRIOR RECORD THAT WOULD HAVE BEEN PRESENTED TO THE JURY BUT FOR THIS COMMENT BY MISS O'NEILL.

I'D LIKE TO MOVE ON TO ISSUE FIVE, WHICH WAS THE TRIAL COURT ERRED BY ADMITTING GROTESQUE PHOTOS OR GRUESOME PHOTOS OF THE BURNT CORPSE AND WEREN'T RELATIVE TO ANY ISSUE IN DISPUTE.

>> DID THE TRIAL COURT BELIEVE, THE ME, THE MEDICAL EXAMINER MADE REFERENCE TO THE PHOTOS WITH REGARD TO DEFENSIVE WOUNDS, WITH REGARD TO THE CUTTING OF THE THROAT, THOSE KINDS OF THINGS?

>> THE, YES.

>> DEMONSTRATIVE EVIDENCE?

>> AND, THAT WAS PART OF THE BASIS BUT THAT WOULD HAVE, OKAY, YOU KNOW, THAT COULD HAVE BEEN DONE, IT COULD HAVE BEEN ADMITTED WITH ONE OR TWO PHOTOS THAT SHOWED THE DEFENSIVE WOUNDS WHICH WERE ALL ON THE NECK.

>> I MEAN EVEN THOSE, RESPECTFULLY.

>> I'M SORRY?

>> I SAID RESPECTFULLY EVEN THOSE, ONE WOULD IN A PURE, CLEAN WORLD SAY THAT THOSE ARE

GROTESQUE AS WELL.  
THIS IS A BURNING OF A BODY  
AFTER THE FACT AND IT WAS, IT IS  
INCONCEIVABLE YOU COULD HIDE THE  
BURNS.

I'VE BEEN THROUGH EVERYONE OF  
THEM.

I CAN UNDERSTAND YOUR ARGUMENT.  
MAYBE SOME OF THEM COULD HAVE  
BEEN SANITIZED BY NOT PUTTING  
THEM ALL IN BUT JUST THE NATURE  
OF THIS CRIME IS SUCH THAT IT'S  
IMPOSSIBLE TO SHOW THE INJURIES  
TO THE THROAT AND THE AREA AND  
THE HANDS WITHOUT, WITHOUT THE  
JURY BEING AWARE OF THE  
EXTENSIVENESS OF THE BURNS.  
SEEMS TO ME.

I JUST--

>> WELL, I THINK THAT HAD THEY  
JUST SHOWN THE-- THERE WAS  
PHOTOS THAT SHOWED JUST THE NECK  
AREA, THAT SHOWED THE WOUNDS,  
OKAY?

>> WELL, BUT THOSE WERE PART OF,  
SHOWED THE JAW.

I WENT THROUGH THEM.

THEY DID SHOW THE JAW AND THE  
TORSO.

>> RIGHT.

BUT THE CLOSE-UP ONES OF JUST  
THE WOUNDS THAT DEMONSTRATED  
THE, THAT SHOWED THAT, IT DIDN'T  
SHOW THE FACE WHERE THE NOSE WAS  
BURNED OFF.

>> I UNDERSTAND.

IT DID SHOW THE CHIN BECAUSE  
THAT WAS PART OF THE NECK AREA.  
SO THAT WAS ALL CHARRED.

>> BUT THAT WAS A WHOLE LOT  
DIFFERENT THAN THE PHOTOS OF THE  
ENTIRE BODY WHICH--

>> HOW MANY PHOTOS WERE  
INTRODUCED?

>> OF THESE GRUESOME PHOTOS AS  
WE RECALL, THERE WERE 13.

>> AGAIN THE GREW SOME, PHOTOS  
OF THE VICTIM OF THE CRIME  
AFTER.

NOW HOW MANY HAD THE STATE TRIED

TO INTRODUCE MORE?  
DID THE JUDGE EXERCISE THE  
JUDGE'S DISCRETION IN LIMITING  
THE NUMBER OF THE GRUESOME  
PHOTOS?  
FRANKLY ALL YOU NEED TO SEE IS  
ONE AND IT IS CERTAINLY GOING TO  
BE, IT'S GRUESOME.  
IT IS AS GRUESOME AS THEY COME.  
SO WHAT IS, WHAT DID THE JUDGE  
DO?  
HOW MANY DID THE STATE WANT TO  
PUT IN?  
>> THE JUDGE DIDN'T LIMIT ANY OF  
THE GREW SOME PHOTOS THAT  
WERE--  
>> THE STATE ONLY WANTED TO PUT  
IN 13 AND THAT'S WHAT THE JUDGE  
LET IN IS THAT WHAT YOU'RE  
SAYING?  
>> AS FAR AS I RECALL.  
>> HOW MANY PHOTOS WERE THERE  
TOTAL?  
>> TOTAL THERE WERE 144 PHOTOS.  
>> THE STATE IN THIS CASE ON ITS  
OWN EXERCISED--  
>> NO, I'M SORRY.  
THERE WERE 144 PHOTOS ADMITTED  
TOTALLY IN THE CASE.  
I'M NOT SURE EXACTLY HOW MANY OF  
THE, WHAT WE CALL THE GRUESOME  
PHOTOS THERE WERE.  
>> YOU SAID THERE WERE 13 I  
THOUGHT.  
>> THAT WERE ADMITTED IN THE  
CASE.  
>> YOU WOULD AGREE WE'RE DEALING  
WITH AN ISSUE WHETHER THE JUDGE  
ABUSED ITS DISCRETION?  
IN EVERY MURDER CASE PHOTOS OF  
THE VICTIM ARE EMOTIONALLY  
APPALLING AND THEY'RE, THEY'RE  
EMOTIONALLY DRAINING, CORRECT?  
>> CORRECT.  
>> THE ISSUE SHE IS BURNED TO  
DEATH, NOT BURNED TO DEATH, BUT  
APPARENTLY BURNED AFTERWARDS.  
YOUR ARGUMENT IS JUST AS MANY  
PHOTOS NEEDED TO SHOW WHAT THE  
PREMORTEM INJURIES WERE IS ALL

THAT SHOULD HAVE BEEN ADMITTED,  
IS THAT CORRECT?

>> CORRECT.

>> AND THAT WOULD HAVE BEEN HOW  
MANY OF THEM?

ARE YOU SAYING NO PICTURES OF  
THE WHOLE BODY, THAT ANY PICTURE  
OF THE WHOLE BODY WOULD HAVE  
BEEN ABUSE OF DISCRETION IF HAD  
BEEN ADMITTED IN?

>> YES.

OF THE WHOLE BODY, YES, THE  
INJURIES THE WHOLE BODY PHOTOS  
SHOWED, THAT OCCURRED AFTER SHE  
WAS DEAD.

IT DIDN'T--

>> WAS THE PRECISE OBJECTION  
THAT WAS RAISED AT TRIAL, BY  
TRIAL COUNSEL?

>> WELL, THERE WAS, THERE WAS  
PRETRIAL MOTIONS BEFORE THIS.  
AND IT WAS THAT THE, THAT THEY  
GRUESOME PHOTOS.

>> WAS IT JUST KIND OF A BROAD  
COMPLAINT ABOUT ALL GRUESOME  
PHOTOS?

>> WELL, AND THAT THEY WERE  
IRRELEVANT TO ANY ISSUE IN  
DISPUTE.

>> BUT IT WASN'T FOCUSED ON, OF  
THESE PHOTOGRAPHS THAT WE HAVE  
BEFORE US, IT WAS, IT WAS NOT  
FOCUSED ON PICK TAR OF THOSE--  
PARTICULAR OF THOSE, IT WAS A  
CATEGORICAL OBJECTION TO ALL OF  
THEM?

I'M ASKING.

>> YES, I BELIEVE SO.

>> BUT YOU DIDN'T SAY THIS ONE  
IS, WOULD BE DUPLICATIVE OR  
CUMULATIVE?

YOU JUST SAID ALL OF THESE  
PHOTOS THAT SHOWED THIS, THE  
BURNED VICTIM ARE, SHOULD BE  
EXCLUDED?

>> WELL, THERE WAS ALSO SPECIFIC  
OBJECTIONS TO SPECIFIC ONES AT  
TRIAL.

YOU KNOW, AND DUPLICATIVE WAS  
ONE OF THE ARGUMENTS.

AND THE 90.403 THAT THE  
PREJUDICIAL IMPACT FAR  
OUTWEIGHED ANY PROBATIVE VALUE.

>> NOW, THE MEDICAL EXAMINER  
DISCUSSED DEFENSIVE WOUNDS?  
YES?

>> THERE WAS ONE POSSIBLE  
DEFENSIVE WOUND.

>> I MEAN THAT WAS DISCUSSED,  
WASN'T IT, BY THE MEDICAL  
EXAMINER, INTERROGATED AND A  
PHOTO WAS USED IN CONNECTION  
WITH THAT TESTIMONY?

>> CORRECT.

>> FINISHED OKAY.

I KNOW YOU WILL HAVE A BUT TO IT  
BUT, AND THAT SHOWED, I MEAN, I  
UNDERSTAND BECAUSE IT WAS,  
SHOWED THE BURNS ON THE ARM AN  
HAND OF THE VICTIM.

THE JURY IS GOING TO SEE THAT.

>> RIGHT.

THAT WAS JUST ONE PHOTO OF THE  
HAND.

IT WAS NOWHERE NEARLY AS  
GRUESOME AS THOSE PHOTOS OF THE  
WHOLE BODY THAT SHOWED THE LEGS  
BURNT OFF AND--

>> THIS IS THE ARGUMENT, SOME OF  
US ON THE BENCH HAVE DIFFERENT  
VIEWS OF THIS, BUT YOU KNOW,  
WHEN THE, A DEFENDANT DOES  
SOMETHING LIKE THIS TO COVER IT  
UP, IT SEEMS STRANGE TO ME THAT  
WE ALLOW ANY KIND OF BROAD  
OBJECTIONS WHEN A DEFENDANT IS  
VIEWING HIS HANDIWORK.

JUST SEEMS A LITTLE STRANGE  
BECAUSE THIS WAS A FACT.

IT WAS NOT PLAYED TO THE  
EMOTION.

IT WAS DISCUSSED, WAS IT NOT,  
SCIENTIFICALLY?

>> WELL, YEAH, THEY WERE  
DISCUSSED BUT, THAT'S-- I MEAN  
THAT POSITION THAT IT'S THE  
DEFENDANT'S HANDIWORK DOESN'T  
TRUMP ALAMEDA WHICH SAYS THEY  
HAVE TO BE RELEVANT TO AN ISSUE  
IN DISPUTE.

>> I MEAN THEY TIED THEM IN.  
THE QUESTION IS, I MEAN YOU'RE  
GOING BACK TO THE RELEVANCE IS  
OUTWEIGHED BY THE, BY THE  
PREJUDICE.  
ALL EVIDENCE IS GOING TO BE  
PREJUDICED OR THE STATE WOULDN'T  
WANT TO PUT IT IN.  
>> RIGHT.  
>> BUT THE JUST THE VERY NATURE  
OF THE CRIME IS, IS OVERWHELMING  
HERE.  
>> YES.  
YOUR HONOR.  
THAT, THE WORK PRODUCT ARGUMENT,  
THAT FLIES IN THE FACE OF THE  
PRESUMPTION OF INNOCENCE.  
THAT IS ASSUMING THAT THE  
DEFENDANT IS A PERSON WHO DID  
IT.  
BASICALLY ASSUMING GUILT.  
SO THAT, IT'S ASSUMING AT THAT  
THE DEFENDANT IS THE ONE WHO  
BURNED, CAUSED THESE BURNS TO  
HAPPEN.  
>> ISN'T THAT THE EVIDENCE?  
HAD DNA CONNECTING HIM TO IT.  
THEY HAD THE SURVEILLANCE  
CAMERAS, SHOWED HIM IN THE AREA.  
NO DNA EVIDENCE?  
>> THEY HAD DNA EVIDENCE--  
>> HE WAS CONVICTED OF A SEXUAL  
CRIME.  
>> FROM SPERM FROM THE VAGINAL  
SWABS WHICH THE DNA EXPERT SAID  
COULD HAVE BEEN DEPOSITED  
ANYTIME UP TO FIVE DAYS PRIOR TO  
TIME IT WAS FOUND.  
>> THIS IS SOMEBODY HE DOESN'T  
KNOW.  
NOT LIKE THIS IS HER HUSBAND OR  
SOMETHING.  
THIS IS A STRANGER.  
>> NO.  
SHE WASN'T A STRANGER.  
SHE LIVED IN THE SAME MOBILE  
HOME PARK.  
GRAND VIEW MOBILE HOME PARK.  
>> ALL RIGHT.  
>> SHE HAD NO INTIMATE RELATIONS

OR NO EVIDENCE OF THAT BETWEEN THIS VICTIM AND THIS DEFENDANT?

>> THERE WAS NO EVIDENCE OF THAT, CORRECT.

IN PHOTOGRAPHS, FOR INSTANCE, IF SOME OF THE PHOTOGRAPHS INDICATED DEFENSIVE WOUNDS IN THE HANDS, WOULD PHOTOGRAPHS OF THE HANDS THEN BE RELEVANT?

>> WELL OUR ARGUMENT THERE WOULD BE THAT IT WOULD BE RELEVANT AND IN A PENALTY PHASE, NOT IN GUILT PHASE.

BECAUSE IT WOULD GO TO HAC. THAT WOULD BE ONLY RELEVANT PURPOSE.

>> WHAT ABOUT PHOTOGRAPHS OF THE POSITION THAT THE VICTIM WAS FOUND IN WHEN DISCOVERED? WOULDN'T THAT BE RELEVANT TO THE ISSUES IN THE CASE?

>> NO.

>> THERE ARE MANY REASONS WHY PHOTOGRAPHS COULD BE RELEVANT IN A TRIAL.

>> IF THE, IF THE VICTIM WAS FOUND AT THE MURDER SCENE, AND THE POSITION OF THE VICTIM WAS RELEVANT TO AN ISSUE IN DISPUTE, AND TO HOW THE DEATH WAS CAUSED, YES THEY WOULD BE RELEVANT.

>> RIGHT.

>> IN THIS CASE THE VICTIM WAS NOT FOUND AT THE MURDER SCENE AND--

>> SEEMS TO ME WHAT YOU'RE ARGUING IS SORT OF A RULE THAT IN HOMICIDE CASES THERE SHOULDN'T-- IF THEY ADMIT-- THIS IS THE VICTIM, AND THERE'S NOT-- NOTHING SHOULD BE ADMITTED OF THE VICTIM'S BODY AS FOUND BY THE POLICE AND I DON'T THINK YOU'RE HEARING FROM ANY OF THIS IS GOING TO BE A WINNING ARGUMENT FOR YOU.

MY SUGGESTION IS GO ON TO AN ARGUMENT THAT-- YOU MAY THINK THESE TWO WERE YOUR STRONGEST ARGUMENTS.

DO YOU WANT TO DISCUSS HURST?  
>> FIRST I WOULD LIKE TO MOVE ON TO ISSUE 2, THAT THE TRIAL COURT ERRED BY FAILING TO GRANT CAUSE CHALLENGES.  
>> SO, YOU'RE LIMITED TIME THIS IS DIRECT APPEAL.  
>> RIGHT.  
>> YOU RAISED A HURST ISSUE.  
>> YES.  
>> DO YOU WANT IN JUST A FEW MINUTES, IS THIS, SHOULD THIS BE REVERSED FOR A NEW PENALTY PHASE BASED ON HURST?  
WAS IT RAISED?  
WAS THE HURST ISSUE RAISED BEFORE THE JUDGE, RIPPING?  
>> YES.  
>> YOU'RE RAISING IT NOW ON APPEAL?  
>> YES.  
>> WHAT WAS THE JURY VERDICT?  
>> JURY VERDICT WAS 11-1.  
>> AND DO YOU, WOULD YOU, IF WE DECIDE THAT HURST REQUIRES ALL THE AGGRAVATORS BE FOUND UNANIMOUSLY, BUT THERE CAN BE HARMLESS ERROR, DO YOU, WHY WOULDN'T THIS BE A HARMLESS ERROR ANALYSIS?  
WHY WOULDN'T IT BE HARMLESS IN THIS CASE?  
>> IT WOULDN'T BE HARMLESS BECAUSE THERE WAS NO VERDICT UPON WHICH TO APPLY HARMLESS ERROR.  
AS THE SULLIVAN VERSUS LOUISIANA APPLIES IN THIS CASE.  
>> BUT IF WE DON'T-- THAT IS THE STRUCTURAL ERROR YOU'VE GOT TO JUST REVERSE AND REDUCE TO LIFE, IS THAT WHAT YOUR ARGUMENT IS?  
>> YES.  
>> IF WE REJECT THAT ARGUMENT, IS THIS HARMLESS BEYOND A REASONABLE DOUBT?  
IN THIS CASE?  
>> NO, IT IS NOT HARMLESS BEYOND A REASONABLE DOUBT BECAUSE THERE

WERE ONLY TWO AGGRAVATORS FOUND.  
ONE WAS DURING THE COURSE OF A  
SEXUAL BATTERY AND ONE WAS  
HEINOUS, ATROCIOUS AND CRUEL.

>> THE SEXUAL BATTERY, WAS THAT  
FOUND BY THE JURY SEPARATELY,  
SEXUAL BATTERY?

>> YES.

>> BUT HAC WAS NOT SUBMITTED TO  
THE JURY?

>> IT WAS SUBMITTED TO THE JURY.

>> I MEAN I'M SORRY, THEY DID  
NOT MAKE A FINDING?

>> THERE WAS NO SPECIFIC  
FINDING.

>> WE DON'T KNOW-- WHAT WEIGHT  
DID THE JUDGE GIVE TO HAC?

>> GREAT WEIGHT AS FAR AS I  
REMEMBER.

>> WAS THE CCP INFORMATION  
SUBMITTED TO THE JURY?

>> YES.

CCP WAS.

>> BUT THE TRIAL JUDGE DIDN'T  
FOUND IT, FIND IT WHY?

THAT WASN'T FOUND.

>> THERE WAS NO EVIDENCE THAT IT  
WAS COLD, CALCULATED,  
PREMEDITATED.

THE ONLY EVIDENCE THAT WAS IN  
RESPONSE TO THE WOMAN.

>> THE FACTS IN THIS CASE ARE  
THAT HE FOUND, HE ACCOSTED HER  
WHEN SHE WAS OUT JOGGING ONE  
MORNING?

>> YES.

>> SO WHAT ARE THE FACTS OF THIS  
CASE?

>> WELL, BASICALLY THE, ALL OF  
THE CCP WOULD HAVE, WOULD HAVE  
GONE TO, THERE MIGHT HAVE BEEN  
PREMEDITATION AS TO THE SEXUAL  
BATTERY BUT THERE WAS NO  
EVIDENCE OF PREMEDITATION GOING  
TOWARDS THE MURDER ITSELF.

>> SO, WHAT WAS THE-- I MEAN  
WAS THIS A PREMEDITATED MURDER  
OR FELONY MURDER?

>> BOTH.

>> OR BOTH?

>> JURY FOUND BOTH.  
PREMEDITATION AND FELONY MURDER.  
>> WHAT WAS THE HAC BASED ON?  
>> THE ONE DEFENSIVE WOUND I  
GUESS.  
I THINK IT WAS IMPROPERLY FOUND,  
THE HAC AND--  
>> SO YOUR ARGUMENT WHY IT IS  
NOT HARMLESS AGGRAVATOR NOT  
FOUND BY THE JURY, BY THE JUDGE  
WAS SUBMITTED TO THE JURY AND  
YOU DON'T KNOW HAC, THERE WAS AN  
ARGUMENT THAT HAC WAS NOT  
APPLICABLE AND THE JURY SHOULD  
HAVE BEEN THE ONE TO FIND  
WHETHER IT WAS OR WAS NOT AN  
AGGRAVATING CIRCUMSTANCE, IS  
THAT CORRECT?  
>> YES.  
>> SO TELL US WHY HAC-- SEEMS  
TO ME THAT YOU HAVE A GOOD  
ARGUMENT IF HAC REALLY WAS  
IMPROPERLY FOUND.  
SO WHY WAS IT IMPROPERLY FOUND?  
>> ONLY EVIDENCE FOR HAC, ONE  
POSSIBLE DEFENSIVE WOUND ON THE  
HAND AND, THAT SHE WOULD HAVE  
LOST CONSCIOUSNESS--  
>> WAS THIS A STABBING CASE?  
AND SLASHING OF THE THROAT?  
OKAY?  
>> YES.  
>> THERE WERE MULTIPLE STAB  
WOUNDS AND MULTIPLE SLASHINGS?  
>> THERE WAS FOUR STAB WOUNDS  
AND TWO INCISED WOUNDS IN THE  
NECK.  
>> DO WE HAVE ANY IDEA OF  
SEQUENCE OF THESE EVENTS?  
WAS SHE ALIVE FOR A PERIOD OF  
TIME?  
>> THE MEDICAL EXAMINE THOUGHT  
SHE WOULD HAVE DIED WITHIN  
MINUTES.  
SHE WOULD HAVE LOST  
CONSCIOUSNESS, WITHIN SECONDS TO  
MINUTES.  
>> IT WOULD BE DIFFERENT, IF THE  
JUDGE COULD HAVE FOUND HAC AND  
SUPPORTED BY COMPETENT,

SUBSTANTIAL EVIDENCE BUT IF THE JURY WAS ALSO REQUIRED TO BE SUBMITTED AS A FACT, THEN THE QUESTION IS, WAS THEIR FAILURE TO FIND IT HARMLESS BEYOND A REASONABLE DOUBT.

IF THEY DIDN'T FIND IT, AND IT WASN'T CCP, THIS WOULD BE A ONE AGGRAVATOR CASE OF SEXUAL BATTERY, CORRECT?

>> CORRECT.

>> SO THAT'S WHERE, I'M SORT OF TRYING TO GET THIS FIGURED OUT WHERE YOUR ARGUMENT WOULD BE IT IS NOT HARMLESS BEYOND A REASONABLE DOUBT?

>> CORRECT.

AND ALSO WE WOULD SUGGEST THAT 775.082 WOULD APPLY IN HURST IN THAT HE WOULD BE ENTITLED TO A LIFE SENTENCE BECAUSE THE, THE STATUTE SAYS IF THE DEATH PENALTY IS FOUND

UNCONSTITUTIONAL, THAT THE, ANY CAPITAL DEFENDANT WOULD BE SENTENCED TO LIFE.

IN THAT 772 ARGUMENT IS SIMPLY THAT THE LEGISLATURE WAS PUT ON NOTICE IN DONALDSON v. SACK, THIS COURT HAD SAID THAT FUHRMAN CAME DOWN THAT THE STATUTE THAT WAS WRITTEN IN ANTICIPATION OF FUHRMAN ACTUALLY CAME--

>> OUR STATUTE, THIS IS, WE HAD THIS ARGUMENT.

THE STATUTE WAS NOT DECLARED IN ITS WHOLE UNCONSTITUTIONAL.

THE AGGRAVATORS WEREN'T THEN UNCONSTITUTIONAL.

THE MITIGATORS WEREN'T.

THE PROCEDURE BY WHICH A JUDGE RATHER THAN A JURY DETERMINED THE FACTS IS WHAT THE, WHAT THOSE FACTS ARE WE'RE GOING TO FIGURE OUT, BUT THAT IS WHAT WAS FOUND UNCONSTITUTIONAL.

SO I DON'T SEE HOW-- BUT, THAT'S WHY I THINK THIS IS, THE ARGUMENT THAT THE DEFENDANTS HAVE BEEN MAKING IS FALLACIOUS,

THAT IT WOULD HAVE, THEY WOULD ALL HAVE TO BE REDUCED TO LIFE. BELIEVE ME, WE ARE, OUR WORKLOAD WOULD BE CONSIDERABLY DECREASED IF WE COULD DO THAT.

>> I WOULD ASK THE COURT TO LOOK AT MY RESPONSE AND TO LOOK AT THE AMICUS BRIEF FILED IN, I THINK IT WAS ASAY ON THAT, THE AMICUS BRIEF ON HURST, THERE IS A GOOD EXPLANATION WHY 775 IS APPLICABLE.

>> YOU'RE INTO YOUR REBUTTAL TIME.

YOU CAN CONTINUE.

I JUST WANT TO WARN YOU.

>> THANK YOU.

I DO BRIEFLY WANT TO ADDRESS THE CAUSE CHALLENGES.

IT WAS, ONE OF THE POTENTIAL JURIES, SUAREZ, THAT SHE INITIALLY SAID THERE WAS NO DOUBT SHE COULD BE FAIR.

THEN ON HER OWN SHE CAME, APPROACHED THE JUDGE, SAID, THAT SHE COULDN'T, THAT SHE BELIEVES THAT SHE COULD BUT IT'S GOING TO BE HARD.

SHE SAID-- AT ONE POINT SHE SAID I'M PRETTY SURE, YEAH, BUT IT'S GOING TO BE HARD.

>> DON'T YOU THINK YOUR BEST ARGUMENT IS ON THE PERSON WHOSE AUNT WAS MURDERED?

>> THIS IS HER.

>> THAT'S HER.

IT IS NOT REALLY WHETHER SHE WAS SAYING I COULD OR COULDN'T, IT IS THE UNDERLYING FACT.

WHAT WAS HER AUNT MURDERED?

>> I'M NOT SURE.

>> THAT DOESN'T COME OUT IN THE RECORD AS WHEN IT WAS IN RELATIONSHIP TO THIS, THIS CRIME?

>> I'M NOT SURE ON THAT.

>> SAID YEAR BEFORE.

I'M NOT SURE.

>> YEAH.

AND THEN, SHE ALSO AT ONE POINT

SAYS THAT, I EXPECT THAT THEY HAVE SOLID EVIDENCE, NOT LIGHT EVIDENCE TO CONVICT THE PERSON. I MEAN, IT IS SHOWING THAT SHE CAN'T FOLLOW THE PRESUMPTION OF INNOCENCE HERE.

BASICALLY JUST ABOUT THE OPPOSITE OF THE PRESUMPTION OF INNOCENCE.

SHE SAID, WHEN ASKED TO EXPLAIN THAT, SHE SAID THEY, THEY HAVE EVIDENCE TO CONVINCING US OF HIS GUILT.

BASICALLY SHE'S, SHE'S NEGATED THE PRESUMPTION OF INNOCENCE. AND WHERE A, WHERE A JUROR CAN'T BE, CAN'T FOLLOW THE PRESUMPTION OF INNOCENCE BEYOND A REASONABLE DOUBT--

>> IT IS NOT THAT BECAUSE THESE QUESTIONS CAN SOMETIMES END UP WHERE JURORS ARE SAYING ONE THING OR ANOTHER.

BEST ARGUMENT IS, UNDERLYING FACTS THAT THE AUNT WAS MURDERED, THAT COULD GIVE RISE TO HER NOT BEING ABLE TO BE FAIR AND IMPARTIAL TO YOUR CLIENT.

>> YES.

>> THAT WAS THE ARGUMENT MADE TO THE JUDGE OR WAS IT, THIS OTHER, THAT SHE WAIVERED OR WAFFLED IN HER ANSWER?

>> WELL, IT WAS ALL TIED IN BECAUSE THAT'S WHY SHE CAME UP. SHE SAID, YOU KNOW, BECAUSE OF WHAT I'M DEALING WITH MY AUNT, I'VE BEEN DEALING WITH THIS FOR TWO DAYS AND I WOULD LIKE TO BE FAIR AND I BELIEVE I CAN BUT YOU KNOW, SHE DIDN'T EVER-- SHE NEVER CAME BACK AND SAID, YES I CAN BE FAIR AND IMPARTIAL.

>> SHE ALSO MENTIONED THE FACT THAT THE DEFENDANT IN THAT CASE WAS REPRESENTED BY THE PUBLIC DEFENDER'S OFFICE, DID SHE NOT, THE AUNT?

>> THAT WAS ACTUALLY ANOTHER

JUROR.  
THAT WAS ANOTHER JUROR WHO KNEW  
A PERSON WHO WAS--  
>> NO.  
>> JURY?  
>> JUROR 36, THAT IS SUAREZ,  
CORRECT?  
>> YES.  
>> SHE SAID THAT HER AUNT HAD  
BEEN VICTIM OF A MURDER AND  
ATTEMPTED SEXUAL BATTERY AND  
THAT THE DEFENDANT WAS  
REPRESENTED BY THE PUBLIC  
DEFENDERS OFFICE.  
AM I INCORRECT?  
>> I WOULD HAVE TO CHECK ON THAT  
BECAUSE I THOUGHT IT WAS  
ANOTHER.  
>> OKAY.  
>> SAVE REMAINDER OF MY TIME.  
>> WAIT A MINUTE.  
THIS JURY WAS STRICKEN THOUGH,  
RIGHT?  
>> AND IT WAS PRESERVED BECAUSE  
THE DEFENSE POINTED OUT FOUR  
JURORS THAT SERVED THAT THEY  
WOULD HAVE USED PEREMPTORY  
CHALLENGES ON AND NO ADDITIONAL  
PEREMPTORY CHALLENGES WERE  
GRANTED.  
EVEN IF ONE JUROR SAT AND IT  
WOULD HAVE REQUIRED A NEW TRIAL.  
THANK YOU.  
>> THANK YOU.  
I'LL GIVE YOU A COUPLE MORE  
MINUTES WHEN YOU GET BACK UP.  
>> MAY IT PLEASE THE COURT.  
GOOD MORNING.  
I'M SUZANNE BECHARD, I'M  
REPRESENTING THE STATE OF  
FLORIDA FROM THE ATTORNEY  
GENERAL'S OFFICE.  
I WILL ADDRESS THE ISSUES THAT  
MR. AULISIO IN ORDER HE  
ADDRESSED THEM.  
>> I WOULD RATHER, GET MY HURST  
ANGST OUT OF THE WAY HERE.  
>> WE'LL DO HURST FIRST THEN.  
>> PRESERVED, WAS IT PRESERVED?  
>> YES.

IT WAS.  
THERE WAS NO CONTENTION IT WAS  
NOT.  
>> THIS IS DIRECT APPEAL.  
WERE THERE TWO AGGRAVATORS FOUND  
BY THE JUDGE, SEXUAL BATTERY AND  
HAC?  
>> THAT'S CORRECT.  
>> CCP WAS ACTUALLY SUBMITTED TO  
THE JURY?  
>> RIGHT.  
>> BUT THE JUDGE DIDN'T FIND IT.  
SO WHAT, IF WE AGREE WITH THE  
STATE THAT HURST, LET'S SAY WE  
DON'T AGREE WITH THE STATE THAT  
JUST ONE AGGRAVATOR'S ENOUGH.  
THAT WE DECIDE THAT IT REQUIRES  
THE JURY TO FIND ALL AGGRAVATORS  
AND THEN, AT LEAST THAT.  
IN THIS CASE THERE'S, THEY FIND  
SEXUAL BATTERY.  
THEY GET, BUT HAC, WHICH IS  
GIVEN GREAT WEIGHT, THERE IS A  
QUESTION.  
YOU KNOW.  
IT IS YES, WE'VE, WE'VE APPLIED  
THESE TO STABBING DEATHS BUT NOT  
REALLY-- HAC, THE JURY COULD  
HAVE NOT FOUND HAC.  
IF THEY DIDN'T FIND HAC, OKAY,  
IT IS A ONE AGGRAVATOR CASE, DO  
YOU AGREE WITH THAT?  
>> I WOULD AGREE WITH THAT BUT I  
WOULD ALSO STATE THAT IN THIS  
SITUATION, FIRST OF ALL, YES, WE  
DO HAVE THE SEXUAL BATTERY AND  
OBVIOUSLY THAT TAKES IT, YOU  
KNOW, IT IS OUR CONTENTION THAT  
TAKES IT OUT OF THE REALM--  
>> IT IS NOT OBVIOUS.  
IT IS OBVIOUS TO THE STATE?  
>> IT IS OBVIOUS TO THE STATE,  
YES, YOUR HONOR.  
WITH REGARD TO THE HAC THIS  
WOULD BE A HARMLESS ERROR  
ANALYSIS THAT THE STATE WOULD  
HAVE TO ESTABLISH BEYOND A  
REASONABLE DOUBT THAT IT DIDN'T  
AFFECT THE OUT COME HERE.  
I LIKE THE LANGUAGE IN THE

NADER CASE.

OUR CONTENTION THE NADER CASE IS WHAT THE COURT NEEDS TO LOOK AT IN DETERMINING HARMLESS ERROR. THE U.S. SUPREME COURT SAID IN DECIDING HARMLESS ERROR, A COURT IN TYPICAL APPELLATE COURT FASHION ASKS WHETHER THE RECORD CONTAINS EVIDENCE THAT COULD RATIONALLY LEAD TO A CONTRARY FINDING WITH RESPECT TO THE OMITTED ELEMENT.

>> IT IS NOT, WE ARE A STATE THAT ADOPTED.

GIGLIO.

THE HARMLESS ERROR THAT THE STATE HAS TO PROVE BEYOND A REASONABLE DOUBT THAT NO REASONABLE JUROR WOULD EVER SAY THERE WASN'T HAC.

ISN'T THAT THE STANDARD?

THAT IS NOT WHAT YOU JUST CITED IN NADER.

>> I AGREE THAT IS THE STANDARD.

>> OKAY.

>> NO REASONABLE JUROR WOULD HAVE REJECTED HAC IN THIS CASE. WHEN YOU LOOK AT WHAT HEINOUS, ATROCIOUS AND CRUEL IS, AND YOU LOOK AT THE FACTS OF THIS CASE, IF YOU WERE, IF YOU ARE TO SEND THIS BACK THE JURY WOULD FIND THIS ALL OVER AGAIN.

WE HAD A SITUATION WITH A WOMAN IN HER 50s, JOGGING IN HER NEIGHBORHOOD BEFORE DAYBREAK. SHE IS TAKEN FROM THE SIDE OF THE ROAD AT KNIFEPOINT.

XI IS TAKEN TO A CHURCH PARKING LOT WHERE SHE IS EITHER UNDRESSED OR FORCED TO UNDESS HERSELF.

HER PANTS, EXCUSE ME, SOCKS AND SHOES, ARE FOUND AT THAT SITE. SHE HAS A DEFENSIVE WOUND ON HER HAND.

-- WOUND ON HER HAND.

TWO INCISED WOUNDS ON HER NECK.

ONE IS CLOSE TO HER FACE.

ONE IS FARTHER DOWN.

THE MEDICAL EXAMINER TESTIFIED AT LEAST ONE OF THE STAB WOUNDS, I BELIEVE THERE WERE FOUR OF THEM, AT LEAST ONE OF THOSE OCCURRED AFTER THE INCISED WOUND.

>> SEEMS TO ME A LOT OF YOU TALKED ABOUT HAS TO REALLY DO WITH THE SEXUAL BATTERY BUT LET ME ASK YOU THIS.

HE SPENT A LOT OF TIME TALKING ABOUT THESE PHOTOGRAPHS AND, SEEMS TO ME THAT THOSE PHOTOGRAPHS CERTAINLY COULD AND, IN THE JURY'S MIND THINK THAT THIS IS A HEINOUS, ATROCIOUS AND CRUEL MURDER BECAUSE THE BODY WAS SO BADLY DECOMPOSED, ETCETERA.

BUT, WE KNOW THAT THIS ACTUAL BURNING OF THE BODY TOOK PLACE AFTER THE MURDER, CORRECT?

>> WELL THAT'S CORRECT.

THERE IS NO DISPUTE ABOUT THAT.

>> JUST SEEMS TO ME YOU'VE GOT A MUCH HARDER ARGUMENT HERE BECAUSE THERE WAS SO MANY PICTURES OF THIS BURNED BODY THAT WAS-- EXCUSE ME.

>> I'M SORRY.

>> THERE WERE SO MANY PICTURES OF THIS BURNED BODY INTRODUCED INTO EVIDENCE IN THIS CASE AND IT SEEMS TO ME, MAKE AS MUCH HARDER-- MAKES A MUCH HARDER ARGUMENT THAT THE ONE DEFENSIVE WOUND, POSSIBLE DEFENSIVE WOUND THAT WE'RE TALKING ABOUT ACTUALLY SUPPORTS HAC BEYOND THESE PICTURES.

>> WELL, THE OTHER PART OF HAC THAT WE HAVE WHEN WE TALK ABOUT ALL OF THESE STAB WOUNDS AND THE INCISED WOUNDS, THIS COURT HASSLED HAC IS APPROPRIATE WHEN WE HAVE MULTIPLE STAB WOUNDS. HERE WE HAVE MULTIPLE STAB WOUNDS.

IN FACT--

>> DIDN'T THE MEDICAL EXAMINER

SAY, HOWEVER, SHE WOULD HAVE LOST CONSCIOUSNESS IN A MATTER OF SECONDS?

>> SHE SAID SECONDS TO MINUTES. AND REMEMBER THAT ALSO ANOTHER FACTOR THAT PLAYS INTO HAC AND FEAR AND STRESS AND TERROR OF THE VICTIM.

YOU HAVE A VICTIM WHO WHOSE THROAT WAS SLICED BEFORE THE FATAL STAB WOUNDS WERE MADE.

SO--

>> IS THAT WHAT THE MEDICAL EXAMINER SAID, THAT THE SLICING TOOK PLACE BEFORE THE STAB WOUNDS?

>> AT LEAST ONE OF THE SLICING WOUNDS OCCURRED BEFORE ONE OF THE FATAL STAB WOUNDS.

SO YOU HAVE THAT.

AND YES, THE MEDICAL EXAMINER SAID SHE COULD HAVE LOST CONSCIOUSNESS WITHIN SECONDS TO MINUTES.

SO SHE COULD HAVE BEEN, YOU KNOW, ALIVE FOR MINUTES.

AS FAR AS THESE PHOTOGRAPHS ARE CONCERNED, I KNOW THAT THE ISSUE WAS RAISED ABOUT THAT.

THERE WAS A PROFFER AND THE MEDICAL EXAMINER LOOKED AT EACH AND EVERYONE OF THESE PHOTOGRAPHS AND DISCUSSED THAT EACH PHOTOGRAPH WOULD ASSIST HER IN HER TESTIMONY IN DESCRIBING, YOU KNOW, THE CAUSE AND MANNER OF DEATH HERE.

AND AS FAR AS, YOU KNOW, THESE WERE RELEVANT BECAUSE EVEN THOUGH THE DEFENSE HAD STIPULATED TO THE IDENTITY OF THE VICTIM, THE DEFENSE HAD NOT STIPULATED TO ANYTHING ELSE IN THIS CASE AND THE STATE HAD THE OBLIGATION OF PROVING EVERYTHING ELSE, ASIDE FROM THE IDENTITY OF THE VICTIM.

SO THE STATE DID NEED TO PROVE CAUSE AND MANNER OF DEATH AND, YOU KNOW, THE OTHER THING ABOUT

THIS, THESE PHOTOGRAPHS, THE DEFENSE HAS CITED TO THE HURST CASE.

AND IN HERTZ, NOT HURST, THE PROSECUTION INTRODUCED THESE PHOTOGRAPHS OF BURNED BODIES. THEY HAD BEEN SHOT.

THAT WAS THE CAUSE AND MANNER OF DEATH BUT THEY INTRODUCED THEM NOT TO SHOW WOUNDS OR NOT TO ASSIST THE MEDICAL EXAMINER BUT ONLY TO SHOW THE BURNS.

ONLY TO SHOW THAT THIS IS WHAT THIS DEFENDANT DID AFTER HE KILLED THESE PEOPLE.

SO IN HURTS, THERE WAS NO RELEVANCE WHATSOEVER.

IN THIS CASE, YOU HAD A PARTIALLY-BURNED BODY AND YOU HAD THE MEDICAL EXAMINER IN A PROFFER GOING THROUGH EACH AND EVERY PHOTOGRAPH SAYING, YES, THIS ONE SHOWS THIS WOUND, THIS ONE SHOWS THAT WOUND, AND THAT THEY WERE ALL RELEVANT AND THE COURT ALSO MADE A FINDING THAT THE PREJUDICIAL, YOU KNOW, THEY WEREN'T UNDULY PREJUDICED.

>> ON THAT COULD YOU-- HOW MANY PHOTOS DID THE STATE TRY TO PUT IN AND THEN DID THE JUDGE EXERCISE ANY DISCRETION IN EXCLUDING SOME?

>> I BELIEVE IN RECALLING THE RECORD, THAT THERE WAS DISCUSSION BETWEEN THE PROSECUTION AND THE DEFENSE ABOUT SHOULD AND SHOULDN'T COME IN AND THAT THE STATE HAD MADE SOME COMMENT, I'M VAGUELY RECALLING, ABOUT HOW THEY HAD NARROWED IT DOWN TO THESE.

>> THAT'S WHAT I'M ASKING.

>> ABSOLUTELY.

>> WE'LL LEAVE THIS UP TO THE JUDGE, THE DISCRETION, WHETHER IT WAS REASONABLY EXERCISED.

>> RIGHT.

>> IT IS HELPFUL TO KNOW CASES WHERE-- THE JUDGE ALLOWED EVERY

PHOTO IN OR CASES WHERE THE JUDGE WERE, SAID NO, I'M NOT GOING TO LET THIS IN BUT I AM GOING TO LET THAT IN BECAUSE THAT IS USUALLY, IN EVERY DEATH CASE THERE IS GORY PHOTOS, GRUESOME PHOTOS.

SO THAT IS WHY I WAS ASKING BUT MAYBE IN THIS CASE THE STATE ITSELF RECOGNIZED HOW TERRIBLY GRUESOME THEY WERE AND EXERCISED ITS OWN RESTRAINT.

>> FROM MY RECOLLECTION OF THE RECORD, THAT IS WHAT HAPPENED HERE AND THAT THEY, THEY WANTED TO INTRODUCE THESE SPECIFIC PHOTOS BECAUSE EACH OF THESE PHOTOS SHOWED A WOUND AND THAT THEY WERE INTRODUCING THEM THROUGH THE MEDICAL EXAMINER. AND, YOU KNOW, THERE WAS NOT A EMPHASIS ON THE PHOTOS, AND, YOU KNOW, THAT THE STATE WOULD SUBMIT THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION.

>> LET'S JUST PUT IT THIS WAY. YOU SEE ONE OF THOSE PHOTOS AS A HUMAN BEING THAT HAS A HEART AND YOU KNOW, THEY'RE AMONG-- WHEN A BODY IS BURNED, IT IS ONE OF THE MOST GRUESOME THINGS THAT YOU CAN IMAGINE.

I MEAN I'VE SEEN A LOT OF THESE PHOTOS, JUST WHEN YOU SEE IT IS PRETTY SHOCKING.

SO, WE DO HAVE TO RECOGNIZE THAT, AND I, WHAT JUSTICE LEWIS SAID IS THERE IS SOME ENTITLEMENT TO SAY THIS IS WHAT HAPPENED IN THIS CRIME AND AS LONG AS IT'S NOT, YOU'RE NOT PUTTING TOO MANY IN, IT'S USUALLY SOMETHING THAT WE ALLOW WITH, AS RELEVANT AND--

>> NOT UNDULY PREJUDICIAL.

>> ALWAYS, THERE ARE ALWAYS GOING TO BE PREJUDICIAL BUT IT IS RELEVANT, IT IS PROBATIVE.

>> RIGHT.

THE STATE WOULD SUBMIT THEY WERE

EACH RELEVANT AND THE COURT MADE A FINDING--

>> JUSTICE QUINCE WAS ASKING YOU WITH ABOUT HAC IS THERE A DANGER FOR THE PENALTY PHASE THAT THE JURY COULD HAVE LOOKED AT THESE PHOTOS AND FELT THAT THAT, YOU KNOW, WITHOUT PROPER INSTRUCTION, WHATEVER, THOSE WERE EVIDENCE OF HAC WHEN THE BURNING OCCURRED AFTER SHE WAS KILLED?

>> I WOULD SUBMIT, NO, YOUR HONOR, BECAUSE THESE WERE INTRODUCED SPECIFICALLY FOR PURPOSES OF ILLUSTRATING THE WOUNDS.

THERE WAS NO REAL, YOU KNOW, THE EMPHASIS WHEN THESE PHOTOGRAPHS WERE INTRODUCED WAS, THIS SHOWS THAT WOUND.

THIS SHOWS THIS WOUND.

THE EMPHASIS WAS NOT ON THE BURNING.

SO I DON'T BELIEVE THERE WAS ANY SORT OF DANGER AND THAT KIND OF GOES BACK TO THE UNDULY PREJUDICIAL ARGUMENT AND--

>> THERE WAS NO REQUEST FOR ANY TYPE OF LIMITING INSTRUCTION OR ANYTHING WITH REGARD TO THAT?

>> NOT THAT I RECALL, YOUR HONOR.

AND FOR THIS TO BE UNDULY PREJUDICIAL I WOULD THINK THAT WITH REGARD TO ANY SORT OF DANGER FOR FINDING HAC, YEAH, IT, YOU KNOW, THE WOUNDS THEMSELVES WERE WHAT WERE EMPHASIZED.

IN THE TESTIMONY.

AND IF ANYTHING, THAT'S WHAT WOULD LEAD TO THE FINDING OF HAC.

BECAUSE YOU HAVE MULTIPLE STAB WOUNDS.

YOU HAVE INCISED STAB WOUNDS.

>> YOU MUST AGREE THAT JUSTICE QUINCE'S QUESTION AND THOUGHT IS COMMON SENSE.

PEOPLE THAT DO NOT UNDERSTAND  
THE POSSIBILITY.

THAT COULD OCCUR IN ANY CASE  
WHICH YOU HAVE GRUESOME  
PHOTOGRAPHS.

COMMON SENSE WILL TELL YOU IT  
HAS SOME IMPACT?

>> IT MAY VERY WELL HAVE SOME  
IMPACT.

THE STANDARD IS HAS TO, THE  
PREJUDICIAL VALUE HAS--  
PROBATIVE VALUE HAS TO BE  
SUBSTANTIAL.

>> IT WASN'T EXPLOITED BY THE  
STATE IN THAT REGARD?

>> IT WAS NOT.

IT WAS NOT.

THERE WAS NO EMPHASIS ON THE  
BURNED PART.

IT WAS A FACT THE BODY GOT  
BURNED BECAUSE HE TRIED TO BURN  
IT AND RELIANCE ON THE HURTS  
CASE, EVEN IF THAT CASE THE  
COURT FOUND IT WAS HARMLESS  
ERROR WHEN THE STATE INTRODUCED  
PHOTOS ONLY FOR THE PURPOSE OF  
SHOWING-- YOU KNOW, THAT  
CERTAINLY WASN'T WHAT HAPPENED.  
WITH REGARD TO HURST, THE STATE  
WOULD SUBMIT THAT YOU KNOW, THAT  
WE'VE GOT THE ONE AGGRAVATOR I  
DON'T THINK THERE IS ANY DISPUTE  
ABOUT, THE SEXUAL BATTERY.

WITH REGARD TO HAC, I DON'T  
THINK ANY REASONABLE JURY WOULD  
FAIL TO FIND THIS.

SO, IN THAT RESPECT THE COURT,  
THE STATE WOULD ASK THAT THE  
COURT TO FIND THAT ANY HURST  
ERROR WAS HARMLESS.

>> ARE YOU SAYING ANYTIME THERE  
IS A STABBING DEATH, NO  
REASONABLE JUROR COULD DO  
ANYTHING OTHER THAN FIND  
HAC?

>> NO.

NO, YOUR HONOR, I'M NOT  
SUGGESTING THAT AT ALL.

>> WHAT EVIDENCE, WHAT EVIDENCE  
DID THE STATE HAVE IN THIS CASE

AS TO WHEN THE SEXUAL BATTERY OCCURRED?

I MEAN THIS ISN'T, IN REFERENCE TO THE KILLING.

WERE THEY CONTEMPORANEOUS?

OR WAS SHE RAPED ONE PLACE AND KILLED IN ANOTHER PLACE?

>> THERE WAS EVIDENCE TO SUGGEST THAT THEY OCCURRED ALMOST SIMULTANEOUSLY.

>> SO THE ISSUE, A JURY COULD ARGUE, BE CONSIDERED AS AWFUL AS THIS IS, THAT IT WASN'T ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL BECAUSE THE FEAR, WHICH YOU SAY THE FEAR THAT SHE WAS GOING TO DIE, WELL, MAYBE, IF I GIVE IN TO THE SEXUAL BATTERY MAYBE HE WILL LET ME GO. WE DON'T REALLY KNOW THAT HERE. THAT'S WHY I'M NOT SURE THAT I COULD AGREE WITH YOU THAT IT IS HARMLESS BEYOND A REASONABLE DOUBT.

>> WHAT WE DO KNOW BASED ON HIS COMMENTS TO HIS FELLOW INMATES, WE KNOW THAT HE TOOK HER FROM THE SIDE OF THE ROAD. SHE KNOW SHE WAS BEGGING HIM NOT TO HURT HER.

WE KNOW THAT HE SAID HE RAPED HER AND HE WANTED TO QUIET HER. SHE KEPT SCREAMING.

HE SAID IF YOU DON'T STOP SCREAMING--

>> WAS THERE ANY CROSS-EXAMINATION OF THE JAILHOUSE SNITCH BY THE DEFENDANT?

>> THERE WERE TWO JAILHOUSE SNITCHES.

>> BOTH OF THEM, WERE THERE ANY-- WE HAVEN'T HAD THEM IN A WHILE WHERE THEY EMBELLISHED ON THIS INFORMATION?

I GUESS THE QUESTION I WOULD HAVE IS, THE JURY, THERE IS A QUESTION MAYBE THAT THE JURY MIGHT BE TOLD THESE ARE PEOPLE THAT HAVE SOMETHING TO GAIN AND

YOU SHOULDN'T REALLY, ALL, YOU SHOULDN'T CREDIT THEIR TESTIMONY. THAT THOSE ARE QUINTESSENTIALLY JURY FACTUAL ISSUES, AREN'T THEY?

>> WELL, THERE WAS TESTIMONY, THERE WAS CROSS-EXAMINATION ABOUT WHAT EACH MUCH THESE TWO PEOPLE SHOULD EXPECT TO, DID EXPECT TO GAIN HERE. BUT, YOU ALSO HAD AS FAR AS EVIDENCE THAT THIS HAPPENED AROUND ALL AT THE SAME TIME IN ADDITION TO HIS STATEMENTS TO THE SNITCHES. YOU ALSO HAVE THIS IS WHERE, AT THE CHURCH, THAT IS WHERE HER CLOTHES WERE FOUND. AND THAT'S WHERE A LARGE BIT OF BLOOD WAS FOUND. HER HAIR ROLLER. THE DEPRESSED AREA, IN THE GRASS, ABOUT THE SIZE OF THE HEAD.

SO I THINK IT IS REASONABLE TO CONCLUDE THAT IT DID HAPPEN AROUND THE SAME TIME.

>> WELL THEN, MAYBE THAT, THEN I-- THEN THE QUESTION IS, HOW-- WHY COULDN'T A JURY DECIDE?

IT'S A SEXUAL BATTERY, IT IS NOT CCP AND JUDGE DECIDED IT WASN'T CCP AND IT WAS NOT HAC.

IT IS AWFUL, THE BURNING OCCURRED WHICH IS REALLY THEY'RE ALL HORRIBLE CRIMES. THE BURNING OCCURRED AFTER SHE WAS DEAD?

>> THERE IS NO DISPUTE THE BURNING OCCURRED AFTER SHE WAS DEAD.

>> WHY ISN'T THERE A DISPUTE ABOUT HAC IN THIS CASE? THAT'S ALL I'M ASKING YOU.

>> IT IS THE STATE'S POSITION THAT NO REASONABLE JUROR WOULD FAIL TO FIND HAC UNDER THE FACTS BECAUSE YOU HAVE MULTIPLE STAB

WOUNDS.

YOU HAVE, YOU KNOW, SHE WOULDN'T HAVE LOST CONSCIOUSNESS.

>> BUT I MIGHT BELIEVE-- WE HAVE SAID STABBING DEATHS ARE HAC BUT I HAVE LOOKED BACK AT THESE CASES WHETHER WE'VE EXPANDED EVERY TIME THERE IS A STRANGULATION OR A STABBING. IF SOMEBODY IS SHOT, YOU KNOW, THEY MAY LIVE A FEW A FEW SECONDS AND DIE, TYPICALLY WE DON'T SAY THEY ARE HAC. SOMEBODY STABBED, LOSES CONSCIOUSNESS IN TWO SECONDS, THAT IS COMPETENT, SUBSTANTIAL EVIDENCE FOR THE JUDGE TO FIND IT.

I MAYBE AS JUROR WOULD THINK THAT IS NOT WHAT THE HAC AGGRAVATOR WAS MEANT TO APPLY TO.

HAVING TWO SECONDS OF CONSCIOUSNESS BEFORE YOU DIE. THAT THAT IS HAC.

THAT IS THE ARGUMENT NOW, LAWYERS WILL MAKE TO THE JURY FORCEFULLY AND WE'LL KNOW IF THEY FIND IT OR THEY DON'T FIND IT.

>> WELL, AGAIN, YOU HAD-- WHEN WE'RE TALKING ABOUT SECONDS, THE MEDICAL EXAMINER DID SAY SECONDS TO MINUTES.

AND, AGAIN, THERE WAS TESTIMONY. THE MEDICAL EXAMINER WAS CLEAR, HER THROAT WAS SLICED OPEN. THAT WAS NOT A FATAL WOUND. THEN SHE WAS STABBED THROUGH THAT SLICING WOUND-- AND THIS IS ONE OF MANY-- AND SHE WOULD HAVE STARTED, YOU KNOW, BLEEDING OUT.

>> AND THAT'S, THIS IS KIND OF WHAT THE STATE WAS ARGUING IN HEARST, THE JUSTICE WHO DISSENTED SAID IT SHOULDN'T GO BACK BECAUSE HAC, IT'S CLEAR THAT HAC WOULD HAVE BEEN FOUND

BY THE JURY, RIGHT?  
THAT WAS WHAT JUSTICE ALITO WAS  
ARGUING.

>> RIGHT.

>> OKAY.

AND SO WE HAVE-- BUT HEARST, OR  
I'M ASSUMING THAT'S GOING TO BE  
THE SAME ARGUMENT IN HEARST.  
THEY SAY NO REASONABLE JUROR  
COULD NOT HAVE FOUND HAC, RIGHT?

>> NO REASONABLE JUROR WOULD  
HAVE FAILED TO FIND HAC.

BUT I DO WANT TO MAKE ONE MORE  
POINT, AND THAT IS THAT ONE  
AGGRAVATOR IS ENOUGH.

AND THIS COURT HAS HELD THAT ONE  
AGGRAVATOR IS ENOUGH.

AND HEARST DIDN'T CHANGE THAT.  
HEARST DIDN'T OVERRULE THIS  
COURT'S ANALYSIS OF OUR OWN  
STATUTE THAT ONE AGGRAVATOR IS  
ENOUGH.

AND IT'S THE STATE'S POSITIONING  
IN THIS CASE-- POSITION IN THIS  
CASE THAT IF THERE WAS A HEARST  
ERROR, IT'S HARMLESS BEYOND A  
REASONABLE DOUBT.

>> BUT THIS, BUT EVEN IF YOU SAY  
THIS IS A ONE-AGGRAVATOR CASE,  
DIDN'T WE HAVE MITIGATION IN THE  
FORM OF THIS GUY WAS IN SPECIAL  
EDUCATION CLASSES ALL OF HIS  
LIFE, THAT HE HAS AN IQ HOVERING  
SOMEWHERE AROUND 75 AND OTHER  
DYSFUNCTIONAL KINDS OF THINGS  
THAT ARE GOING ON IN THE FAMILY?  
SO, YOU KNOW, IT SEEMS TO ME IT  
MAKES IT A MUCH HARDER CASE TO  
REALLY SAY THAT THERE IS  
HARMLESS ERROR.

>> WELL, FOR MITIGATION WE DID  
HAVE, YOU KNOW, THE DIFFICULT  
CHILDHOOD, THE SCATTERED  
CHILDHOOD, THE ABANDONMENT AND  
ALL THAT.

AND I'M NOT DISAGREEING WITH ALL  
THAT.

THE COURT DID NOT GIVE GREAT  
WEIGHT TO ANY OF THAT.

>> IT'S A PRETTY, IT'S A PRETTY

BAD CHILDHOOD.  
HE'S APPARENTLY, DON'T KNOW WHO  
THE FATHER IS.  
THE MOTHER WAS 14 YEARS OF AGE.  
HE LIVED WITH THE GRANDMOTHER IN  
SOME BIZARRE SITUATION WITH THE  
BOYFRIEND, AND HE-- SO THIS IS,  
I MEAN, YOU MIGHT SAY, YOU KNOW,  
WE GET JADED, I THINK,  
SOMETIMES.  
WE SEE THESE CASES, AND THEY ALL  
START TO BLEND IN.  
HE'S 19 AT THE TIME OF THE CRIME  
OR IS HE OLDER?  
>> NO, HE WAS IN HIS 20s AT  
THE TIME--  
>> OKAY.  
>> AND YOUTH WAS NOT ONE OF  
THE--  
>> RIGHT, RIGHT.  
>>-- MITIGATORS FOUND.  
BUT HEARST ALSO DIDN'T CHANGE  
THE FACT THAT IT'S THE JUDGE  
THAT FINDS MITIGATION.  
NOW, THE WEIGHING PROCESS IN THE  
STATUTE, THE JURY DOES WEIGH.  
BUT THEY-- FIRST, THEY FINDING  
A VEGAS UNDER HEARST. --  
AGGRAVATION UNDER HEARST.  
>> SUFFICIENT AGGRAVATION.  
>> FIRST THEY FINDING A VEGAS.  
>> AGGRAVATION, THAT IT'S  
SUFFICIENT.  
>> WELL, YOUR HONOR, OUR  
CONTENTION IS, FIRST, THEY FIND  
THE AGGRAVATION.  
AN AGGRAVATOR HAS TO EXIST.  
BECAUSE IF YOU DON'T FIND AN  
AGGRAVATOR, IT'S LIFE ANYWAY.  
>> UNANIMOUSLY.  
>> PARDON ME?  
>> UNANIMOUSLY?  
THE AGGRAVATORS.  
>> YES.  
>> OKAY.  
>> AND THEN-- BECAUSE IT'S AN  
ELEMENT.  
AN AGGRAVATOR IS AN ELEMENT.  
ONE AGGRAVATOR GETS US INTO THE  
REALM OF THE DEATH SENTENCE.

IT MAKES THE DEATH SENTENCE  
AVAILABLE.

>> SHOULD WE JUST IGNORE THE  
WORD "SUFFICIENT "IN THE  
STATUTE?

>> NO.

NO, YOUR HONOR, YOU DON'T.  
THAT COMES IN WITH THE WEIGHING  
PROCESS IN DECIDING FOR THE JURY  
TO DECIDE WHAT THEIR  
RECOMMENDATION IS GOING TO BE.  
THEY WEIGH THE SUFFICIENCY OF  
THE AGGRAVATION AGAINST THE  
MITIGATION TO MAKE THEIR  
RECOMMENDATION.

>> WELL, THEN WE KNOW THEY CAN  
NO LONGER RECOMMEND AS WELL,  
RIGHT?

>> PARDON ME?

>> THEY CAN NO LONGER RECOMMEND.  
THAT WAS ALSO PART OF HEARST,  
WAS IT NOT?

>> THEY STILL MAKE A  
RECOMMENDATION.

THE COURT--

>> I THOUGHT, I THOUGHT THE U.S.  
SUPREME COURT SAID A  
RECOMMENDATION IS NOT  
SUFFICIENT, THAT IT MUST BE A  
FINDING BY THE JURY.

THE COURT SPECIFICALLY ADDRESSED  
THAT, DID IT NOT?

>> YOUR HONOR, I WOULD DISAGREE  
WITH THAT.

I THINK WHAT HEARST DID IS  
HEARST FOLLOWS IN A STRAIGHT  
LINE FROM APPENDI TO RING TO  
HEARST.

>> IN HEARST DID THE U.S.  
SUPREME COURT ADDRESS THE  
CONCEPT OF RECOMMENDATION?

>> CONCEPT OF WHAT?

>> RECOMMENDATION, WHAT WE'RE  
TALKING ABOUT.

>> [INAUDIBLE]

>> WHAT HEARST FOUND--

>> JUST, LET'S WALK THROUGH  
THIS.

DID THE SUPREME COURT ADDRESS  
THE CONCEPT OF A JURY MAKING A

RECOMMENDATION?

>> TO THE EXTENT THAT THEY  
ADDRESSED IT, IT WAS THAT THE  
JURY, THE COURT COULD NOT  
OVERRIDE A JURY RECOMMENDATION  
OF LIFE.

>> THAT'S NOT WHAT IT SAID-- IT  
SAID THAT?

I THOUGHT IT SAID THAT THE  
ASPECT OF A JURY MAKING A  
RECOMMENDATION COULD NOT  
OTHERWISE SAVE THE PROCESS.

>> THAT'S TRUE.

THAT'S TRUE.

AND THAT WAS IN THE CONTEXT OF  
SHOOTING DOWN THE STATE'S  
ARGUMENT THERE THAT--

>> THE ARGUMENT YOU'RE MAKING  
NOW.

>> I WOULD DISAGREE WITH THAT,  
YOUR HONOR.

>> OKAY.

>> THE FACT THAT IN HEARST THE  
STATE HAD ARGUED THAT THE MERE  
FACT THAT A RECOMMENDATION FOR  
DEATH WAS MADE MEANT THAT THEY  
NECESSARILY FOUND AGGRAVATORS.  
AND THIS IS NOT THAT.

AND HEARST DIDN'T REQUIRE--

>> YOU'RE RELYING ON THE SEXUAL  
BATTERY CONVICTION.

>> CORRECT.

>> THAT THE JURY MADE.

>> UNANIMOUS--

>> THE FINDING EMBODIES IN  
THAT.

>> YES.

>> WAS THERE A FINDING THIS WAS  
BOTH PREMEDITATED AND A FELONY  
MURDER?

>> YES, YOUR HONOR.

YES, YOUR HONOR.

SO--

>> AND IN HEARST THERE WAS NO  
CONVICTION LIKE THAT.

>> THERE WAS NO CONVICTION LIKE  
THAT.

THERE WERE TWO AGGRAVATORS THAT  
WERE NOT NECESSARILY FOUND BY  
THE JURY.

SO ANY RECOMMENDATION DID NOT EMBODY THE FINDING OF AN AGGRAVATOR.

>> AND IT WAS NOT UNANIMOUS-- IT WAS 7-5.

>> THAT'S CORRECT.  
THAT'S CORRECT.

SO YOU, YOU KNOW, THERE WAS JUST NO, NO REASONABLE WAY THAT THE COURT COULD LOOK AT THAT AND SAY, YOU KNOW, YES, THIS IS INHERENT IN THE RECOMMENDATION. BUT JURY SENTENCING IS NOT REQUIRED, AND I DON'T THINK THE COURT HAS EVER, YOU KNOW, ANALYZED HEARST TO THINK THAT JURY SENTENCING--

>> WELL, WE HAVEN'T BECAUSE WE DIDN'T THINK RING APPLIED IN FLORIDA.

SO WE WERE DOING, WE WERE KIND OF GOING ABOUT IT FOR 14 YEARS ASSUMING OUR STATUTE DID NOT MEET IT.

BUT HERE'S THE PROBLEM, IS THAT HEARST SAYS THAT THIS COURT HAS TO EVALUATE OUR OWN STATUTE THAT EXISTED AT THE TIME.

AND IT IS PRETTY CLEAR TO ME THAT THE, AT LEAST THE WAY THE LEGISLATURE FRAMED IT, IS THAT THE FINDING THAT THERE ARE SUFFICIENT AGGRAVATORS THAT OUTWEIGH THE MITIGATION IS A FACT.

NOW, IN THE STATUTE IT SAYS THAT THE JUDGE FINDS.

BUT NOW FOR THE IN THE FACTS NECESSARY TO INCREASE THE SENTENCE WHICH IS DEATH-- IT'S EITHER DEATH OR LIFE.

SO THE ONLY WAY THE PERSON-- THEY DON'T GET DEATH AND THEY'RE NOT ELIGIBLE UNLESS THERE'S AN AGGRAVATOR.

>> ABSOLUTELY.

>> WE AGREE.

THE ONLY WAY THEY GET DEATH IS THEY FIND THE AGGRAVATION IS SUFFICIENT TO OUTWEIGH THE

MITIGATION, OTHERWISE IT'S A  
LIFE SENTENCE, CORRECT?  
AND IF THE JURY DECIDES THAT  
6-6, THERE'S NO DEATH SENTENCE  
IN FLORIDA.

>> AGAIN, HEARST COMES TO US BY  
WAY OF RING AND APPRENDI.  
AND THOSE CASES SAY THAT EVERY  
ELEMENT THAT INCREASES A  
SENTENCE HAS TO BE FOUND, PROVEN  
TO THE JURY BEYOND A REASONABLE  
DOUBT.

>> AND THAT'S WHAT I'M SAYING  
HERE.

UNLIKE, YOU KNOW, THESE OTHER  
CASES LIKE APPRENDI, IT'S EITHER  
THERE'S DEATH OR THERE'S LIFE.  
AND THE ONLY WAY THERE CAN BE  
DEATH IS IF THERE'S SUFFICIENT  
AGGRAVATORS THAT OUTWEIGH THE  
MITIGATORS.

OTHERWISE IT'S A LIFE  
SENTENCE--

>> THE ONLY WAY--

>> AM I-- I MEAN, THIS IS WHAT  
I'M STRUGGLING WITH.

THAT'S-- THOSE ARE THE FACTS  
THAT THE LEGISLATURE SAYS IS THE  
PREREQUISITE TO SOMEONE GETTING  
THE DEATH PENALTY.

NOW, AFTER THEY FIND THAT, WE  
SAY THEY CAN EXERCISE MERCY.  
AND EVEN IF THEY FINDING A--  
AGGRAVATION OUTWEIGHS  
MITIGATION, THEY CAN SAY WE'RE  
NOT GOING TO IMPOSE THE DEATH  
PENALTY.

BUT WITHOUT THAT, WITHOUT THERE  
BEING SUFFICIENT AGGRAVATION TO  
OUTWEIGH THE MITIGATION, AND I  
MAY BE SAYING IT BACKWARDS,  
THERE IS NO DEATH PENALTY.

>> I-- YOUR HONOR, I WOULD  
DISAGREE WITH THAT.

I READ THIS TO SAY THAT ONCE YOU  
GET THAT THRESHOLD AGGRAVATION,  
THAT'S WHAT HAS TO BE FOUND BY  
THE JURY.

AND THESE OTHER, THE WEIGHING  
PROCESS GOES TOWARD THAT

RECOMMENDATION WHICH IS, YOU KNOW, GIVEN TO THE JUDGE, AND THEN THE JUDGE MAKES THE NECESSARY FINDING.

>> ALL RIGHT.

IN THIS STATE IF A JURY FINDS 8-4 THAT THERE'S NO, THAT AGGRAVATION DOES NOT OUTWEIGH MITIGATION AND FINDS THAT AT LEAST 6-6 OR MORE AND THE JUDGE, CAN THE JUDGE PRE THIS NEW STATUTE IMPOSE THIS PENALTY?

>> UNDER THE NEW STATUTE, NO.

>> UNDER THE OLD STATUTE?

>> UNDER THE OLD STATUTE, IT HAD TO BE A SIMPLE MAJORITY.

UNDER THE OLD STATUTE, IT WAS A SIMPLE MAJORITY, UNDER THE NEW STATUTE--

>> THERE'S NO DEATH PENALTY UNLESS THE JURY MAKES THOSE FINDINGS.

>> WELL, THE RECOMMENDATION, BEGUN, THE JURY MAKES THE RECOMMENDATION.

THE JUDGE CAN'T OVERRIDE UNDER THE NEW STATUTE AND UNDER HEARST CAN'T OVERRIDE A RECOMMENDATION OF LIFE.

BUT IT'S THE STATE'S POSITION THAT, YOU KNOW, THIS WEIGHING PROCESS GOES TOWARD-- NOT TOWARD AGGRAVATION, BUT TOWARD THE RECOMMENDATION.

TO BE MADE.

IF THERE ARE NO FURTHER QUESTIONS, THE STATE WOULD CAN THAT THIS COURT AFFIRM THE RULING.

THANK YOU.

>> THANK YOU.

COUNSEL?

>> AS FAR AS THE MEDICAL EXAMINER TESTIMONY, I WOULD SUBMIT THAT THERE WAS A LOT OF TESTIMONY THAT DID NOT RELATE TO THE CAUSE OF DEATH.

THERE WAS THE INJURIES, THE BURN INJURIES, ABOUT THE LEGS BEING RECEIVED AND THE DISCOLORATION

OF THE BONES.

ALL THAT WAS TOTALLY IRRELEVANT  
TO ANY ISSUE IN DISPUTE.

AND IT WAS EMPHASIZED IN THAT  
THERE WAS AN ARIZONA STATE LAW  
REVIEW TALKS ABOUT MOCK JURIES  
WHERE GRUESOME PHOTOS ARE  
SUBMITTED, AND A JURY IS MUCH  
MORE LIKELY TO CONVICT ON THE  
SAME FACTS.

AND IF IT'S COLOR PHOTOS,  
THEY'RE EACH MORE LIKELY TO--  
EVEN MORE LIKELY TO CONVICT.  
WHAT I SUBMIT HERE IS NOT ONLY  
DO WE HAVE COLOR PHOTOS, BUT WE  
HAVE THESE PHOTOS BEING  
DISPLAYED ON A BIG SCREEN  
TELEVISION WHICH IS JUST  
EXTREMELY PREJUDICIAL.

AND THESE PHOTOS, WHILE THE  
MEDICAL EXAMINER WAS TESTIFYING  
FOR SEVERAL MINUTES, THESE  
PHOTOS WERE NOT REFERRING TO THE  
PHOTOS AT ALL, THEY'RE LEFT UP  
ON A BIG SCREEN TELEVISION WHERE  
DEFENSE--

>> WELL, WAS THAT A SEPARATE  
OBJECTION?

BECAUSE THAT'S A WHOLE DIFFERENT  
ISSUE ABOUT ADMISSIBILITY AND  
THEN THAT THERE WAS-- I DIDN'T,  
I THOUGHT IT WAS THAT THEY  
SHOULDN'T BE ADMITTED.

NOW YOU'RE SAYING THEY SHOULDN'T  
HAVE BEEN DISPLAYED FOR TEN  
MINUTES OR-- SO IS THAT, IS  
THAT ALL PART AND PARCEL OF YOUR  
ARGUMENT, HOW THEY WERE USED  
MADE IT UNDULY PREJUDICE I  
SHALL, AND THE JUDGE SHOULD HAVE  
LIMITED IT?

WAS THERE AN OBJECTION TO SAY,  
NO, DON'T PUT IT UP ON A BIG  
SCREEN, DON'T LEAVE IT UP?

>> THERE WAS A-- DEFENSE  
COUNSEL OBJECTED AT SOME POINT,  
AND THEY TOOK IT DOWN WHEN THE  
MEDICAL EXAMINER WASN'T  
REFERRING TO THEM.  
BUT BASICALLY WHAT I'M SAYING IS

THAT, IS THE PREJUDICIAL IMPACT  
IS THAT THE IMPACT IS MUCH  
GREATER WHEN THE JURY'S VIEWING  
THIS ON A BIG SCREEN--

>> I'M ASKING YOU, DID THE  
DEFENSE LAWYER ASK THAT THEY NOT  
BE PROJECTED ON A BIG SCREEN?

>> NOT, NOT PRIOR TO WHEN THEY  
WERE DONE.

JUST--

>> THAT WAS A SURPRISE?

>> WHILE THEY WERE UP THERE AND  
THEY WEREN'T BEING REFERRED TO,  
HE ASKED THAT.

>> THAT'S NOT EVEN PART OF THIS  
APPEAL, IS IT?

>> NO.

I'M BRINGING UP THE--

>> OKAY.

YOU'RE GOING OUT BEYOND, OKAY.

>> THE BIG SCREEN TO SHOW THE  
PREJUDICE.

>> WELL, NO, I UNDERSTAND.

BUT THAT'S NOT PART OF THE  
ARGUMENT ON THE POINT INVOLVING  
THIS APPEAL THOUGH.

>> RIGHT.

>> OKAY.

>> I SEE MY TIME IS UP, SO I  
WOULD JUST ASK THAT THIS COURT  
REVERSE THE JUDGMENT AND  
SENTENCE AND REMAND THE CASE FOR  
A NEW TRIAL OR, IN THE  
ALTERNATIVE, TO IMPOSE A LIFE  
SENTENCE.

>> THANK YOU FOR YOUR ARGUMENTS.