>> THE NEXT CASE IS JOHNSON VERSUS STATE.
AND JUSTICES QUINCE AND JUSTICE CANADY ARE RECUSED FROM THAT CASE AND THEY WILL BE DEPARTING.
>> MAY IT PLEASE UNIVERSITY CUT.
STEVE BOLOTIN FROM THE PUBLIC DEFENDERS OFFICE IN BARTOW.
I REPRESENT APPELLANT PAUL JOHNSON.
CO-COUNSEL JOHN FISHER AND HOWARD DEAN GARRETT, ONE OF THE TRIAL ATTORNEYS PRESENT AT THE TRIAL TAIL.
IN 2009 THE COUNSEL SAID FOR THE STATE SAID THIS, EVEN IF YOU'RE GOING TO RECEDE FROM BATES DON'T DO IT HERE.
SHE MAY HAVE HAD A POINT UNDER THE CIRCUMSTANCES OF BATES WHERE THE COURT WAS REALLY PRESENTED WITH NO REASONS TO RECEDE-- IN THE CIRCUMSTANCES OF WARMY--
>> WE'RE TALKING ABOUT ISSUE OF WHETHER--
>> CORRECT.
>> AND IN BATES, WAS IT 4-3 DECISION?
>> BATES WAS A 4--3 DECISION.
>> TO SAY YOU COULDN'T WAVE YOUR RIGHTS TO PAROLE.
>> MAJORITY OPINION IN BATES WAS 4-3 TWO JUDGES CONCURRED IN BATES AND JUDGED IT MIGHT BE OKAY IF THE STATE AGREED TO IT, IF DONE AS PART OF AN AGREEMENT.
BUT FOUR JUDGES RULED YOU CAN'T DO IT.
THREE JUDGES INCLUDING YOURSELF, JUSTICE PARIENTE, DISSENTED AND SAID THERE IS NO REASON WHY YOU SHOULDN'T BE ABLE TO DO IT.
IN ORMES WAS UNANIMOUS COURT.
ALL SEVEN MEMBERS OF THE CURRENT COURT.
THE PROBLEM WITH ORME THE COURT WAS NOT PRESENTED WITH NO REASONS WHY BATES WAS WRONGLY DECIDED.
ALL ESSENTIALLY ARGUED IN BATES

WAS FOUR PAGE IS OF FACTS AND
SIX PAGES OF DIRECT QUOTES FROM
MAJORITY OPINION AND DISSENT.
ESSENTIALLY WE LIKE THE DISSENT
BETTER.
I'M NOT WRONG, I LIKE THE
DISSENT BETTER TOO.
I THINK THE DISSENT IS MUCH
BETTER REASONED AS STATE
STATUTORY CONSTRUCTION AND
MATTER OF EIGHTH AMENDMENT
CONSTITUTIONAL LAW BUT IT MAY BE
JUST CITING, JUST QUOTING FROM
THE CASE IS NOT ENOUGH REASON TO
VARY FROM STARE DECISIS.
ELEMENTS BEFORE 2009 WE POINTED
OUT AND SINCE 2009 AS WELL, THAT
DEMONSTRATE WHY BATES IS A WRONG
DECISION AND WHY IT WORKS IN
JUSTICE, AND STARE DECISIS DOES
NOT COMPEL OR EVEN SUGGEST THIS
COURT SHOULD STICK WITH THAT
WRONG DECISION.
IN THIS CASE THE STATE ARGUES IN
THEIR BRIEF THAT THE STANDARD OF
REVIEW IS ABUSE OF DISCRETION.
JUDGE JACOBSEN IN THE TRIAL
COURT, WHEN HE WAS PRESENTED
WITH OUR ARGUMENTS AS TO WHY
THIS WAIVER SHOULD BE ALLOWED,
BASICALLY SAID MISS GARRETT, I
AGREE WITH YOU.
HE WAS PERSUADED BY THE
CONSTITUTIONAL AND LOGICAL
ARGUMENTS BUT HE SAID MY HANDS
ARE TIED.
MY LEVEL OF COURT I HAVE TO
FOLLOW THE PRECEDENT, THAT IS
BATES AND ORME.
THIS MAY BE WRONG.
I MAY GET REVERSED BECAUSE OF
THIS BUT THAT'S WHAT I GOT TO DO
AND HE IS PROBABLY RIGHT ON
THAT.
I MEAN I DO THINK BATES AND ORME
ARE DISTINGUISHABLE ON THE FACTS
OF JOHNSON'S CASE.
BASED ON THE FACT UNLIKE THOSE
CASES JOHNSON, THE JURY WOULD
KNOW JOHNSON ALREADY SERVED 32

YEARS-- AND, THEY COULD HAVE
BEEN EVEN MORE CONCERNED THAT
THE RIGHT TO PAROLE COULD MEAN
THAT HE COULD BE RELEASED AT
ANYTIME, MAYBE EVEN SOON.
>> WAS THERE ANYTHING PRESENTED
OR ATTEMPTED TO BE PRESENTED
THAT PAROLE IN THE STATE OF
FLORIDA FOR SOMEBODY WHO IS
CONVICTED OF HERE THREE MURDERS
IS ESSENTIALLY NOT A OPTION?
I MEAN WAS THERE ANY ATTEMPT TO
PUT TESTIMONY ON THAT?
>> THERE WAS NO ATTEMPT TO PUT
TESTIMONY ON BUT EVERYBODY KIND
OF TREATED THAT AS A GIVEN.
I MEAN IT'S--
>> THE STATE DIDN'T TRY TO--
DID THEY EMPHASIZE THAT PAROLE,
THAT THE ISSUE, THAT YOU
SHOULDN'T GIVE THIS PERSON
PAROLE, ANYTHING ABOUT THEIR
ARGUMENT WOULD TRY TO PLAY ON
THAT?
>> THEY MENTIONED IN THEIR
ARGUMENT THAT IT WOULD BE LIFE
WITHOUT POSSIBILITY OF PAROLE
FOR 25 YEARS.
THEY DIDN'T NECESSARILY HAMMER
ON THAT, BUT I THINK ANOTHER
IMPORTANT POINT, FIRST OF ALL,
THIS I THINK GOES TO THE
QUESTION WHETHER THIS ERROR
COULD HAVE BEEN HARMLESS WHICH
THE STATE DOESN'T EVEN ARGUE IN
THIS CASE.
I UNDERSTAND THAT THE COURT CAN
CONSIDER THAT.
DOESN'T HAVE TO CONSIDER THAT.
BUT, THIS IS, IN THE VOIR DIRE
IN THIS CASE, THE FIRST PANEL,
PANEL OF THE 12 JURORS WHO
ACTUALLY SAT ON THIS CASE ALL
INDICATED THAT, YES THEY WOULD
BE INTERESTED TO KNOW WHETHER
LIFE MEANT LIFE AND THEY WOULD
BE INTERESTED TO HAVE A
INSTRUCTION FROM THE COURT ON
THAT.
ARGUMENT OF COUNSEL IS

UNDERSTOOD TO BE THE ARGUMENT OF
AN ADVOCATE AND THERE'S HUGE
DIFFERENCE BETWEEN ARGUING THIS
GUY IS LIKELY TO BE PAROLED AND
THE JUDGE TELLING THE JURY UNDER
THE LAW THIS GUY CAN'T BE
PAROLED.
ALL THE DIFFERENCE IN THE WORLD.
NOW WHAT I THINK IS IMPORTANT
HERE, I THINK WE NEED TO KNOW
WHAT IS THE NATURE OF THE
STATE'S DOG IN THIS FIGHT.
WHY DO THEY OBJECT TO IT?
AT THE TIME OF BATES, IF YOU
LOOK AT OPINIONS IN BATES,
FOOTNOTES IN MAJORITY OPINION
THE STATE VEHEMENTLY OBJECTED TO
THE WAIVER.
THERE IS FOOTNOTE IN JUSTICE
ANSTEAD'S DISSENTING OPINION
WHERE HE POINTS OUT AT VERY TIME
BATES WAS PENDING THERE WAS TWO
OTHER CASES ALAMEDA CASES
PENDING IN THE COURT, WHERE THE
STATE WAS SAYING, WELL, HE COULD
HAVE WAVED EX POST FACTO BUT HE
DIDN'T AND HE SUGGESTED
PROCEDURE FOR DOING THE VERY
THING WE TRIED TO DO IN THIS
VERY CASE.
THE QUESTION BECOMES, WHAT IS--
THE STATE IS NOT-- WE'RE SAYING
WE WANT TO WAIVE THIS ILLUSORY
RIGHT BECAUSE WE DON'T WANT THE
JURY TO BE THINKING ABOUT THAT
HE MIGHT GET PAROLED.
AND THE STATE'S POSITION IS THEY
DON'T WANT HIM TO WAVE HIS--
NOT LIKE IT WILL PREVENT THE
JURY FROM THINKING ABOUT
SOMETHING THEY SHOULD THINK
ABOUT OR THEY HAVE A RIGHT TO
THINK ABOUT LIKE CCP.
IT'S TO PREVENT THE JURY FROM
THINKING ABOUT SOMETHING THIS
COURT HAS SAID IS AN IMPROPER
FACTOR IN CAPITAL CASE.
NOT AN AGGRAVATING CIRCUMSTANCE.
IT IS IMPROPER REFLEXIVE FEAR
THAT THE DEFENDANT MIGHT GET

PAROLED.
THERE HAVE BEEN STUDIES CITED IN U.S. SUPREME COURT CASES AND OTHER STATE SUPREME COURT CASES THAT SAY THIS IS A FACTOR THAT JURORS, POTENTIAL JURORS SAY WOULD BE A HUGE FACTOR, WOULD VERY LIKELY MAKE A BIG DIFFERENCE TO THEM IN DETERMINING WHETHER TO VOTE FOR LIFE OR DEATH.
>> YOU SAID THINGS CHANGED SINCE BATES AND ORME.
I OBVIOUSLY AGREE WITH YOU, BUT WE ALSO HAVE PRECEDENT.
>> CORRECT.
>> WHAT IS THE, WHAT'S CHANGED?
>> THERE ARE A COUPLE OF MAJOR CHANGES.
FIRST OF ALL, NOBODY CITED TO YOU IN BATES THE FACT THAT THIS IS AN ISSUE THAT HAS COME UP IN MANY OTHER STATE COURTS BOTH BEFORE ORME AND CERTAINLY BEFORE AND AFTER BATES.
AND THEY DID OVERRULE THEM.
THEY SAID, THEY SAID THEY WERE WRONGLY DECIDED.
BUT THERE IS A SPLIT OF AUTHORITY, VERY WELL-REASONED CASES OUT OF MISSISSIPPI, NEW JERSEY, OREGON, KENTUCKY AND OKLAHOMA OF ALL RULED IN YOUR FAVOR ON THIS MOSTLY EMPHASIZING THE EIGHTH AMENDMENT RELIABILITY CONCERNS WHAT THE JURY WILL THINK B THERE ARE FIVE OTHER SUPREME COURT CASES WHICH MOSTLY GO, WITH THE EXCEPTION OF TENNESSEE WHICH DOES TALK ABOUT THE EIGHTH AMENDMENT ISSUE AND REJECT IT, THE OTHER FOUR LIKE BATES MOSTLY FOCUS ON THEIR IDEA OF LEGISLATIVE INTENT.
SO THERE'S THAT.
THERE IS THE FACT THAT THIS IS A FEDERAL CONSTITUTIONAL ISSUE.
THE OREGON SUPREME COURT IN McDONALD BASICALLY SAID, AFTER SAYING NOT ALLOWING WAIVER

VIOLATED OREGON CONSTITUTION.
IT ALSO SAID IT VIOLATED U.S.
CONSTITUTION AND THEY PREDICTED,
IF AND WHEN THIS CASE GOT BEFORE
THE U.S. SUPREME COURT THE U.S.
SUPREME COURT WOULD RULE THAT
THE WAIVER SHOULD BE ALLOWED.
I THINK THEY'RE RIGHT ABOUT THAT
BUT ANOTHER THING, TO CONSIDER
IS THE STATE'S WHOLE ARGUMENT
HERE IS PREMISED ON, WELL YOU
CAN'T LET THEM DO IT BECAUSE IT
WOULD BE A ILLEGAL SENTENCE.
ILLEGAL SENTENCE IS A CONCEPT
THAT ARISES MOSTLY-- NEVER HAS
ANYTHING TO DO WITH JURIES BUT,
SO THIS IS KIND OF A DEATH IS
DIFFERENT KIND OF SITUATION
ANYWAY.
BUT YOU KNOW, TO SAY IT IS AN
ILLEGAL SENTENCE IS KIND OF
CIRCULAR REASONING BECAUSE IT IS
ONLY AN ILLEGAL SENTENCE IF THE
COURT HE CAN'T WAIVE IT.
IF THE COURT SAYS HE CAN WAIVE
IT IS A LEGAL SENTENCE.
JUSTICE PARIENTE, YOU MADE THE
POINT IN ORME ORAL ARGUMENT THE
RIGHT TO PAROLE IS ALSO ILLUSORY
IN THIS CIRCUMSTANCE, THE
SENTENCE IS LIFE IMPRISONMENT,
THE RIGHT TO PAROLE THAT IS
LEGISLATIVE GRACE, NOT ANYTHING
THAT YOU CAN EVEN COUNT ON
HAVING A RIGHT TO.
IN EFFECT AN APPENDAGE TO THE
LIFE SENTENCE AND IT IS ABOUT AS
USEFUL TO A CAPITAL DEFENDANT,
PARTICULARLY PAUL BEASLEY
JOHNSON AS AN ACTUAL APPENDIX.
TO TURN LEGISLATIVE INTENT AS A
WEAPON AGAINST THE DEFENDANT,
THE CONCEPT OF EX POST FACTO AT
ANY OTHER RELATED CONSTITUTIONAL
OR STATUTORY CONSTRUCTION
PRINCIPLES, THAT TALK ABOUT,
THAT, ORDINARILY PENAL STATUTES
ARE TO BE APPLIED PERSPECTIVELY.
THOSE ARE, AND LENS VERSUS MATH
THINK CASE THE ONE OF THE FEW

CASES THE STATE CITES IN THEIR
BRIEF ACTUALLY MAKES THIS POINT.
ALL THE INDIVIDUAL AGAINST THE
GOVERNMENT, NOT TO PROTECT THE
GOVERNMENT AGAINST THE
INDIVIDUAL.
AGAIN WHAT IS THE NATURE OF THE
STATE'S DOG IN THIS FIGHT?
WHEN YOU ASK WHAT HAS CHANGED
BETWEEN BATES AND ORME AND NOW,
IN ADDITION TO THE FACT THAT I'M
PROVIDING YOU WITH THE FACT THAT
THIS IS A SPLIT OF AUTHORITY ON
A MAJOR EIGHTH AMENDMENT ISSUE
THERE IS THE CARLOS BELO CASE.
I THINK CARLOS BELO MAY NOT BE
ONLY ONE.
IT WAS FORTUITOUS WE FOUND OUT
ABOUT CARLOS BELO.
CARLOS BELO WAS AN OLD CASE, IT
WAS A TAMPA CASE, AND IN THAT
CASE THE STATE PROPOSED AND
INSISTED UPON THE VERY SAME
WAIVER WE'RE TALKING ABOUT HERE.
IT BASICALLY SAID TO CARLOS
BELO, WE WILL AGREE NOT TO
PURSUE A DEATH SENTENCE IN YOUR
CASE IF YOU WILL AGREE TO WAIVE
YOUR RIGHT TO EX POST FACTO AND
WAIVE YOUR RIGHT TO PAROLE
ELIGIBILITY AND HE SAID
ESSENTIALLY, SURE.
ONCE THEY WERE ABLE TO DETERMINE
THAT BELO WAS COMPETENT TO MAKE
THAT DECISION.
BUT THE REASONS FOR IT, AS A
MATTER OF PUBLIC POLICY, IT'S A
WIN-WIN, WIN, IN THE BELO
CIRCUMSTANCE.
IN THE STATE, BELO GETS TO AVOID
A DEATH SENTENCE.
IN EXCHANGE HE GIVING UP
SOMETHING WHICH-- GETS THE
ASSURANCE THAT HE CAN NEVER BE
PAROLED.
WE DON'T EVEN HAVE TO WORRY
ABOUT HIM APPLYING.
AND THEN THEY DON'T HAVE TO GO
THROUGH THE PROCEDURE OF HAVING,
YOU KNOW, A TRIAL AND A PENALTY

PHASE IN BELO'S CASE.
THE PUBLIC IS PROTECTED.
IT SAVES MONEY, IT SAVES
RESOURCES.
IT IS WIN, WIN, WIN.
NO REASON TO BELIEVE THE
LEGISLATURE WOULD HAVE A PROBLEM
WITH SOMETHING LIKE HAPPENED IN
BELO.
>> AGAIN, YOU HAVE LIMITED TIME,
ARE YOU GOING TO ADDRESS THE
HURST ISSUE?
>> I, WELL, AGAIN BECAUSE I HAVE
LIMITED TIME I--
>> YOU'VE GOT THREE MURDERS
HERE.
>> RIGHT.
>> WHICH HAVE UNANIMOUS
VERDICTS.
>> NO, WE HAD 11-1 VERDICT.
>> AS FAR AS UNDERLYING
AGGRAVATORS.
>> YES.
>> WHAT WERE THE AGGRAVATORS?
>> THEY WERE DIFFERENT IN
DIFFERENT CASES.
CCP WAS FOUND IN TWO OF THE
MURDERS BUT NOT IN OFFICER
BURNHAM'S MURDER.
THAT ONE I BELIEVE WAS LAW
ENFORCEMENT OFFICER AND, AVOID
LAWFUL ARREST.
THOSE TWO WERE MURDERS AND PRIOR
VIOLENT FELONIES.
>> SO IS IT YOUR ARGUMENT, IF WE
NOW HAVE THE NEW STATUTE?
>> CORRECT.
>> THAT WAS PASSED.
WOULD THIS SENTENCING COMPLY
WITH THE NEW STATUTE?
11-1.
THIS IS 11-1.
NOW THEY'RE REQUIRING 10-2.
AND, UNANIMITY ON AGGRAVATORS
THAT ARE FOUND.
SO WOULD WE HAVE TO UNDER THIS,
IF WE WERE TO APPLY THAT
STATUTE, WOULD WE HAVE TO STRIKE
THE AGGRAVATORS THAT WEREN'T
FOUND BY THE JURY OR HOW--

>> HUGE CAN OF WORMS.
FIRST OF ALL I DON'T THINK YOU
CAN APPLY THAT STATUTE.
FIRST OF ALL, THIS HARKENS BACK
TO SOME DEGREE TO THE OTHER
ISSUE.
THAT STATUTE DOES NOT CONTAIN
ANY LANGUAGE MAKING IT
RETROACTIVE.
>> I'M JUST ASKING YOU, BECAUSE
WE'VE GOT TO APPLY HURST.
>> RIGHT.
>> SO WHATEVER HURST MEANT --
>> YOU CAN'T APPLY THE NEW
STATUTE IN DETERMINING ANY KIND
OF QUESTION WHETHER OR NOT HIS
SENTENCING UNDER THE OLD STATUTE
WAS HARMFUL OR HARMLESS.
THE NEW STATUTE HAS NOTHING TO
DO WITH THAT.
>> WHY ISN'T IT HARMLESS UNDER
THE OLD STATUTE?
>> IT IS NOT HARMLESS FOR A
PANOPLY OF REASONS.
AGAIN I'M RUNNING INTO TIME
PROBLEMS.
>> THIS IS PRETTY IMPORTANT
ISSUE.
>> I MIGHT LOOSE ON--
>> WHETHER BATES GETS OVERRULED,
SEEMS LIKE YOUR HURST ISSUE YOU
MIGHT WANT TO--
>> IT IS EXTRAORDINARILY
IMPORTANT.
AGAIN I WOULD WANT TO-- HURST
ORAL ARGUMENTS.
THERE IS NO SIMPLE ANSWER WHY IS
IS NOT HARMLESS.
IT IS HARMLESS FOR A NUMBER OF
REASONS.
THE AS JUSTICE CANADY
DID A MONTH AGO ARE WE SUPPOSED
TO INFER WHAT A JURY WOULD BE
DONE.
THAT IS NOT WHAT YOU'RE SUPPOSED
TO DO UNDER SULLIVAN VERSUS
LOUISIANA.
YOU CAN'T FIND SOMETHING
HARMLESS BASED ON A VERDICT
NEVER RETURNED.

THERE WAS NO VERDICT OF ANY KIND
IN CASE.
SO YOU CAN'T JUST SAY, IT WOULD
BE TANTAMOUNT TO JUDICIAL
FINDING ON THE APPELLATE LEVEL,
FACT-FINDING ON THE APPELLATE
LEVEL.
IT WOULD BE TANTAMOUNT OF
DIRECTED VERDICT FOR DEATH.
>> YOU SAY THERE CAN'T BE
HARMLESS ERROR ANALYSIS.
>> SULLIVAN VERSUS LOUISIANA,
WHAT TURNS ON DISSENT IS
SULLIVAN CONTROL AND--
>> WE THINK THAT HURST SAID WE
HAVE TO LOOK AT HARMLESS ERROR.
LET'S ASSUME THERE IS ONE THAT
CAN BE APPLIED.
>> HURST SAID, I'M SORRY TO
INTERRUPT, HURST SAYING YOU HAVE
GOT TO LOOK AT HARMLESS ERROR
DOES NOT MEAN THEY'RE FINDING IT
CAN BE HARMLESS.
IT IS SAYING YOU HAVE GOT TO
DECIDE.
>> BUT YOU'RE SAYING UNDER
SULLIVAN THERE CAN'T BE.
SO LET'S ASSUME THERE IS A WAY
IF SOMEBODY IS UNDER THE AGE
OF-- LAW ENFORCEMENT OFFICER
AND IT IS UNCONTROVERTED AND
THEY COMMIT THREE MURDERS AND IT
IS UNCONTROVERTED THAT THE JURY
FOUND THAT UNANIMOUSLY HOW IS
THAT NOT SUFFICIENT AGGRAVATORS
IN CASE LIKE THIS.
>> WHAT YOU'RE TALKING ABOUT,
LIKE I SAY, I BELIEVE SULLIVAN
CONTROLS.
BUT IF SULLIVAN DIDN'T CONTROL,
IF NEITHER CONTROL, THEY TALK
ABOUT THE SITUATION WHERE THERE
IS ESSENTIALLY AN UNCONTEST AND
UNCONTESTABLE ELEMENT OR
UNCOASTED IT OR UNCONTESTABLE
SENTENCING FACTOR.
NOT A SITUATION LIKE HERE.
I DON'T THINK NEDER WOULD APPLY
IF THERE WERE FOUR ELEMENTS THAT
WERE NOT SUBMITTED TO THE JURY

BUT IN ANY EVENT IF YOU GO TO
THE NEXT STEP, ASSUMING FOR THE
SAKE OF ARGUMENT THAT YOU REJECT
SULLIVAN, AND I DON'T THINK YOU
SHOULD BUT ASSUMING THAT YOU
DID, THEN THE NEXT STEP WOULD BE
TO DO WHAT ARIZONA DID.
ARIZONA HAD A SPLIT.
THE DISSENTERS IN ARIZONA SAID
IT IS LIKE SULLIVAN.
IT IS STRUCTURAL.
IT AFFECTS THE ENTIRE FRAMEWORK.
THE MAJORITY IN ARIZONA IN THE
BIG RING CASE WHERE THEY
CONSIDERED 40 CASES WE'LL ALLOW
IT CAN BE HARMLESS BUT THEY
ADOPTED A VERY, VERY STRICT--
STANDARD OF AGGRAVATOR AND IF
THAT AGGRAVATOR WAS CONTESTED OR
CONTESTABLE THEN THEY WOULDN'T
ASSUME THAT A REASONABLE JURY
WOULD HAVE FOUND IT.
IN ADDITION, IT WAS, IN FLORIDA,
YOU HAVE TO LOOK AT THREE
THINGS.
TOUGH LOOK AT, YOU NEED
FACT-FINDING AS TO UNDER THE OLD
STATUTE, THE NEW STATUTE HAS
SUBSTANTIVELY CHANGED THIS AND
THAT OPENS UP A WHOLE ANOTHER
CAN OF WORMS.
UNDER THE OLD STATUTE YOU NEED
FACT-FINDING A, EACH AGGRAVATOR,
B, ARE THE HAVING
INDIVIDUALS SUFFICIENT AND
C, ARE THE AGGRAVATORS
OUTWEIGHED BY MITIGATORS.
ARIZONA CASE TALKS ABOUT THE
MITIGATORS SAYING JURY MAY NOT
HAVE FOUND THE SAME AS WHAT THE
JUDGE FOUND.
I'M REMEMBERING BACK, I WILL
ADMIT I HAVEN'T HAD A CHANCE TO
CHECK THIS, I HAVE LOOKED AT A
LOT OF ARIZONA CASES I BELIEVE
IT WAS IN, PERENETTI IN CASE
ORALLY ARGUED LAST MONTH MADE
THE POINT IN 33 OUT OF 35 CASES
AFTER ARIZONA CAN BE HARMLESS
THEY FOUND IT WASN'T HARMLESS OR

COULDN'T FIND IT WAS HARMLESS.
THAT IS PARTICULARLY TRUE IN A
CASE LIKE THIS WHERE YOU'VE GOT
ONE VOTE, ONE JUROR WHO SAID--
AGGRAVATORS AND JUROR MAY HAVE
NOT HAVE FOUND CCP AS TO
MR. EVANS OR MR. BEASLEY.
THE JUROR MAY HAVE THOUGHT TWO
AGGRAVATORS APPLIED IN BURNHAM'S
CASE, OFFICER BURNHAM'S CASE
WERE NOT SUFFICIENT TO WARRANT A
DEATH SENTENCE OR JUROR MIGHT
HAVE FOUND THE MITIGATION WAS
COMPELLING.
THERE WAS BRAIN DAMAGE
MITIGATION.
THERE WAS CHILDHOOD TRAUMA
MITIGATION.
THERE WAS LOW I.Q. MITIGATION.
THERE WAS SUBSTANTIAL MITIGATION
IN THIS CASE.
JUSTICE KOGEN POINTED OUT AT ONE
POINT JUST BECAUSE THE JUDGE
DOESN'T NECESSARILY FIND THE
MITIGATION PERSUASIVE DOESN'T
MEAN JURORS WOULDN'T HAVE.
THE COURT, THE LEGISLATURE HAS
NOW ADOPTED A NON-UNANIMOUS
VERDICT FOR THE FIRST TIME IN,
AS FAR AS I CAN TELL, IT IS THE
FIRST TIME IN FLORIDA, FLORIDA'S
EVER ALLOWED A NON-UNANIMOUS
VERDICT AS OPPOSED TO A
NON-UNANIMOUS RECOMMENDATION.
IT IS ALSO FIRST TIME THAT I--
I DON'T BELIEVE THE U.S. SUPREME
COURT HAS EVER APPROVED A
NON-UNANIMOUS VERDICT IN A
CAPITAL CASE, BOTH OREGON AND
LOUISIANA IN APPODACA AND
JOHNSON SPECIFICALLY EXEMPTED
CAPITAL CASES FROM THEIR 10-2,
9-340 YEARS LATER THEY ARE THE
EVENLY TWO STATES THAT ALLOW
NON-UNANIMOUS VERDICTS IN
FELONIES.
>> ARGUMENT--
>> I'M RESPONDING TO THE
ARGUMENT WHETHER THIS IS
HARMLESS UNDER THE NEW STATUTE.

FRANKLY IF I DIDN'T KNOW BETTER
I THINK LEGISLATURE ADOPTED NEW
STATUTE TO KEEP US APPELLATE
ATTORNEYS EMPLOYED FOR ANOTHER
15 YEARS AND, I, IN ANY EVENT, I
WILL GO BACK TO SULLIVAN NOW.
READ JUSTICE SCALIA'S OPINION IN
SULLIVAN.
SULLIVAN IS AN EXCEPTION TO
CHAPMAN VERSUS CALIFORNIA WHICH
JUST SIS SCALIA VERY ELOQUENTLY
SAYS IT FLOWS FROM THE REASONING
OF CHAPMAN ITSELF.
GRANTED NEDER UKIWENKO ARE
EXCEPTION TO SULLIVAN.
BUT THEY ARE ASSUMING A KIND OF
VERY CUT AND DRIED SITUATION.
IS IT A GUN?
WAS IT WITHIN A THOUSAND FEET
AFTER SCHOOL?
WAS THE VICTIM OVER 65, YES OR
NO.
CAPITAL SENTENCING IS VERY, VERY
DIFFERENT FROM THAT AND I THINK
NUMBER ONE, I THINK THAT IS ALL
VAN-- THIS AFFECTS THE VERY
FRAMEWORK OF THE WAY THE CASE
WAS CONDUCTED AND I THINK IF YOU
READ JUSTICE SCALIA'S OPINION IN
SULLIVAN YOU WILL SEE THAT
SHOULD CONTROL.
IN ALTERNATIVE EVEN IF IT
DOESN'T, IF YOU FOLLOW ARIZONA'S
METHOD OF DETERMINING--
HARMLESS WHERE IT IS
NON-UNANIMOUS, YOU CAN'T JUST
SAY, YOU CAN'T KNOW BEYOND A
REASONABLE DOUBT THAT TRYING HIM
UNDER A CONSTITUTIONAL STATUTE
MIGHT NOT HAVE MADE A
DIFFERENCE.
I DON'T KNOW IF YOU USED ALL MY
REBUTTAL TIME OR JUST GETTING
CLOSE TO IT.
I WILL SIT DOWN NOW AND I
RESERVE.
>> I WILL GIVE YOU A COUPLE
MINUTES SINCE WE HELPED YOU USE
MOST OF IT.
>> THANK YOU.

>> MAY IT PLEASE THE COURT.
TIMOTHY FREE LAND HERE ON BEHALF
OF THE STATE OF FLORIDA.
DEALING FIRST WITH THE
EX POST FACTO ARGUMENT, IT'S
CLEAR TO ME THAT BATES APPLIES.
THE TRIAL JUDGE WAS BOUND BY THE
REQUIREMENTS OF BATES.
THE JURY WAS CORRECTLY
INSTRUCTED PURSUANT TO BATES.
SO--
>> BUT HAVEN'T WE IN THE RECENT
CASE OF THE JUVENILE SENTENCING,
EVEN THOUGH THE LEGISLATURE SAID
IT WOULD NOT BE RETROACTIVE,
DIDN'T WE APPLY IT TO REQUIRE
RESENTENCING UNDER THAT STATUTE
AS A, WE DID THAT, EVEN AGAINST
THE STATE'S ARGUMENT THAT YOU
COULDN'T DO IT?
FALCON.
>> RIGHT, THAT CONTEXT.
I THINK THE COURT DID THAT
BECAUSE THERE WAS NO, I MEAN THE
PREVIOUS STATUTE HAD BEEN FOUND
UNCONSTITUTIONAL.
SO, WE HAD TO GO BACK.
I'M REMEMBERING THE FACTS OF
THAT CASE.
WE HAD TO GO BACK AND DETERMINE,
YOU KNOW, WHAT STATUTE SHOULD WE
APPLY AND WE'RE GOING TO APPLY
THE NEW ONE HERE.
THAT IS THE NOT CIRCUMSTANCE
THAT WE HAVE HERE.
>> WHAT IS THE STATE'S INTEREST?
I UNDERSTAND, WHAT'S THE STATE'S
INTEREST IN NOT ALLOWING A
DEFENDANT TO STIPULATE THAT --
>> WELL, FIRST OF ALL,
THE STATE-- I MEAN,
THERE IS A SEPARATION OF
POWERS ISSUE HERE, YOU KNOW?
THE STATE, WE GET TO SELECT
WHICH STATUTE-- AND THAT'S
REALLY WHAT THE DECISION WAS
BASED UNDER IN BATES, WAS THE
STATE SELECTS WHICH STATUTE
WE'RE GOING TO PROSECUTE.
WISELY OR NOT, WE PICK THE ONE

WHERE, THAT APPLIED TO HIM IN
THIS CASE.
>> WELL, YOU'RE NOT SAYING YOU
CAN PICK.
I THOUGHT IT'S THAT YOU HAVE NO
CHOICE BUT TO GO UNDER THE
STATUTE--
>> THAT'S--
>> THE LEGISLATURE FORBADE YOU
FROM AGREEING TO A LIFE SENTENCE
WITHOUT PAROLE.
>> AND THAT'S OUR DOG IN THIS
FIGHT.
>> EXCEPT MR. BOLOTIN SAYS
YOU'VE JUST RECENTLY-- NOT YOU,
BUT THE STATE HAS AGREED TO
SENTENCE SOMEBODY.
IF SOMEBODY WANTS TO PLEAD TO
LIFE WITHOUT PAROLE, I CANNOT
IMAGINE THE STATE GOING, NO, WE
WANT YOU TO PLEAD TO LIFE WITH
PAROLE.
WOULD YOU EVER-- WHAT WOULD BE
THE--
>> WELL, HE'S TALKING ABOUT THE
BELLOW CASE.
AND, YOU KNOW, WE HAVE SOME
TRANSCRIPTS HERE IN THE RECORD
DESCRIBING THE PLEA PROCESS AND,
YOU KNOW, SOME OF THE FACTORS
INVOLVING THE BELLOW CASE, BUT
WE DON'T HAVE ALL OF THE
FACTORS.
>> DID THE JUDGE HAVE DISCRETION
HERE?
YOU SAY THAT IT WAS A
DISCRETIONARY CALL, BUT
MR. BOLOTIN SAID JUDGE JACOBSON
WOULD HAVE DONE IT, BUT THAT HE
WAS PRECLUDED BY PRECEDENT.
>> I'LL TELL YOU WHY ABUSE OF
DISCRETION IS THE RIGHT STANDARD
HERE.
HE WAS NOT, THIS IS NOT A DE
NOVO SITUATION WHERE THE JUDGE
WAS DECIDING WHICH LAW APPLIED.
I MEAN, HE DID, AND THIS
COURT-- HE DECIDED THAT THAT
STATUTE APPLIES.
BUT THAT'S NOT THE BASIS OF HIS

ARGUMENT BEFORE THIS COURT.
HE WANTED TO MAKE A PARTICULAR ARGUMENT TO THE JURY, AND ABUSE OF DISCRETION APPLIES IN THE COURT RESTRICTING WHAT KIND OF ARGUMENTS ARE AVAILABLE, WHAT ARE PROPER ARGUMENTS TO BE MADE TO THE JURY.
THAT'S WHY IT'S ABUSE OF DISCRETION.
THIS DEFENDANT WAS NEVER ACTUALLY FACED WITH AN ACTIVE EX POST FACTO VIOLATION.
IT WAS LIKE A SYLLOGISM.
IF THE STATE OFFERS ME THIS, THEN I WILL BE WILLING TO WAIVE MY EX POST FACTO.
BUT, A, NEVER OCCURRED.
THE STATE NEVER ACTUALLY OFFERED IT TO HIM, SO HE COULDN'T.
HE WAS WAIVING MANAGER THAT DIDN'T EXIST. -- SOMETHING THAT DIDN'T KANSAS.
HIS ARGUMENT BEFORE THE COURT, THE TRIAL COURT AND THIS COURT, IS THE HARM THAT HE WOULD HAVE SUFFERED, THE JURY WOULD SAY, ALL RIGHT, THIS CASE HAPPENED IN 1981.
THIS IS CLEARLY MORE THAN 25 YEARS AFTER.
IF WE GIVE HIM A LIFE SENTENCE, LEAST GOING TO GET OUT-- HE'S GOING TO GET OUT ALMOST RIGHT AWAY.
HERE IS MY HARMLESS ERROR ARGUMENT AS TO THAT.
THE JURY WAS TOLD BOTH BY THE STATE AND THE DEFENSE, THERE WAS A NINE-COUNT INDICTMENT.
HE WAS BEING RESENTENCED ONLY AS TO THREE, AND HE'D BEEN GIVEN MULTIPLE LIFE SENTENCES UNDER THAT, YOU KNOW, PREVIOUSLY.
SO THE JURY KNEW THAT HE WAS ALREADY SERVING MULTIPLE LIFE, AND THERE WAS NO POSSIBILITY THAT HE WOULD BE GETTING OUT EVEN IF THEY DID OFFER HIM THE POSSIBILITY OF PAROLE WITHIN 25

YEARS.
I DON'T SEE THAT AS BEING AN ACTUALLY HARMFUL, BEYOND A REASONABLE DOUBT AS HARMLESS, BECAUSE THE JURY COULD NOT HAVE THOUGHT THAT.
THEY ALREADY KNEW.
I ASSUME THE COURT, YOU KNOW, SO LET'S MOVE ON TO THE HEARST ARGUMENT.
I THINK THAT, FIRST OF ALL, IN DETERMINING WHETHER HEARST ACTUALLY APPLIES HERE, WE HAVE THIS, WE DO KNOW THAT WE HAVE THE PRIOR VIOLENT FELONIES, AND UNDER APPRENDI AND RING, THE PRIOR VIOLENT FELONIES ARE AN EXCEPTION.
SO I DON'T THINK THAT WE HAVE WHAT WE WOULD CALL A HEARST ERROR HERE.
>> WELL, HOW ABOUT THE, WHEN YOU START WEIGHING HOW THE AGGRAVATORS AND MITIGATORS RELATE?
HOW ABOUT THAT ASPECT OF IT?
TO ME, THAT ASPECT IS-- THAT'S AN EIGHTH AMENDMENT CONCERN, ALL RIGHT?
AND MY UNDERSTANDING--
>> WELL, IT MAY OR MAY NOT BE. I MEAN, WHY IS THAT NOT PART OF THE SIXTH AMENDMENT CONCERN THAT'S PART OF WHAT A JURY HAS TO DECIDE?
>> BECAUSE THIS IS SOMETHING, I MEAN, IT'S A MATTER OF STATE LAW AS TO HOW, YOU KNOW, HOW WE GO ABOUT TELLING THE JURY WHAT TO DO, WHAT PART IS FOR THE JURY TO DO, WHAT PART IS FOR THE JUDGE TO DO.
>> WELL, I MEAN, I UNDERSTAND THAT, BUT THE U.S. SUPREME COURT HAS KIND OF TOLD US WHAT THE JURY HAS TO DO AND WHAT COURTS CANNOT DO.
>> WELL, I READ HEARST AS SAYING, IT'S-- I MEAN, I AGREE I'VE WATCHED THE PREVIOUS

ARGUMENTS.
HEARST SAYS WHAT IT SAYS.
THE FACT IT'S NECESSARY TO
ADVANCE, TO ENHANCE THE
SENTENCE, THAT FACT MUST BE
DETERMINED BY THE JURY.
AND I UNDERSTAND THAT.
THAT DOES NOT NECESSARILY SAY
THAT THE ACTUAL WEIGHING PROCESS
MUST BE CONDUCTED BY THE JURY.
>> CAN SOMEONE BE PLACED TO
DEATH WITHOUT A FINDING THAT THE
AGGRAVATION OUTWEIGHS OR THAT
THE MITIGATION DOES NOT OUTWEIGH
THE AGGRAVATION?
>> NOT UNDER STATE LAW.
FLORIDA LAW REQUIRES THAT--
>> YOU CAN'T DO THAT, CAN YOU?
>> A WEIGHING--
>> RIGHT.
A WEIGHING IS REQUIRED.
AND YOU CAN'T PUT SOMEBODY TO
DEATH WITHOUT THAT WEIGHING.
>> BUT THE WEIGHING PROCESS, THE
SUPREME COURT SAID UNDER THE
BAKER CASE, THE WEIGHING IS NOT
THE SAME AS FACT FINDING.
THAT'S A MATTER OF DISCRETION.
>> YOU SEE, THE PROBLEM IS THAT
YOU CAN READ AT THE BEGINNING OF
HEARST, THE FIRST HOLDING, AND
THEN THE END.
AND YOU CANNOT MAKE A DECISION,
I DON'T THINK, THAT HEARST MEANS
ONLY WHAT YOU SAY IT MEANS.
YOU CAN PICK THAT OUT, AND YOU
CAN ASSUME BASED ON, YOU KNOW,
THE WEIGHING PROCESS IS NOT A
FACTUAL FINDING, BUT IT WAS HARD
TO SAY THAT MITIGATION, FINDING
A MITIGATION IS NOT A FACT.
YOU MAY-- THE BEST ARGUMENT MAY
BE WHAT WAS MADE IN THE LAST
CASE WHICH IS THAT IT'S THOSE
THAT WILL ENHANCE THE SENTENCE,
SO THE AGGRAVATORS OF THE
ENHANCEMENT--
>> OR THAT INCREASE THE FLOOR.
EITHER ONE WITH OF THOSE.
>> INCREASE THE FLOOR, BUT IT'S

THE DEFENDANT THAT HAS TO COME
UP WITH THE MITIGATION.
SO IF IT'S AN ELEMENT OF THE
CRIME, IT'S GOT TO BE THE STATE
THAT PRESENTS IT.
YOU DON'T PRESENT MITIGATION,
YOU DEFEND AGAINST IT.
>> RIGHT.
>> SO THAT'S THE BEST ARGUMENT,
BUT IT'S HARD TO SAY HEARST SAYS
WHAT YOU'RE SAYING IT SAYS.
>> WELL, OKAY.
HEARST, HEARST DOES NOT TELL US
WHAT FACTS.
IT SAYS IF IT'S A FACT THAT'S
NECESSARY TO THE IMPOSITION OF
DEATH.
>> BUT JUSTICE LEWIS, AND EVERY
STATE HAS TO LOOK AT ITS OWN
STATUTE AND DECIDE IT.
AND IN FLORIDA AS A WEIGHING
STATE, A DEATH SENTENCE CANNOT
BE IMPOSED UNTIL IT IS
DETERMINED THAT THE AGGRAVATION
OUTWEIGHS THE MITIGATION.
IT IS THE SIMPLE FACT OF ONE
AGGRAVATOR-- AND, AGAIN, I MAY,
YOU KNOW, I WENT WITH THAT FOR
MANY YEARS, BUT SOME OF THESE
AGGRAVATORS ARE, YOU KNOW,
THEY'RE LIKE NOTHINGS, SOME OF
THE AGGRAVATORS THAT ARE IN OUR
STATUTE.
>> THERE ARE DIFFERENT WEIGHTS.
>> RIGHT.
SO IT'S NOT JUST THAT THERE'S AN
AGGRAVATOR, IT'S GOT TO BE WHAT
ARE ALL THE AGGRAVATORS, AND
THEN ARE THEY SUFFICIENT TO
OUTWEIGH THE MITIGATORS?
>> HERE'S HOW I WOULD LIKE TO
RESPOND--
>> BUT DO YOU AGREE THAT IT'S A
MULTIFACTOR AND THOSE ARE NOT
JUST JUDGMENT CALLS, THEY'RE
FACTUAL DETERMINATIONS?
>> NOT THE WEIGH, TO BE HONEST.
I DON'T SEE THE WEIGHING AS A
FACTUAL DETERMINATION.
>> HOW DO YOU PARSE THAT OUT?

>> HERE IS HOW I DO IT.
I LOOK AT THE SUPREME COURT'S
DECISION IN--
>> UNDER THE FLORIDA STATUTE.
>> RIGHT.
UNDER THE FLORIDA STATUTE.
AND HERE'S HOW I'M GETTING
THERE.
WE KNOW THAT THE FACTS, IN
ORDER.
EVEN IN THE ROOM WHERE DEATH IS
AN AVAILABLE SENTENCE, WE HAVE
TO ESTABLISH AT A MINIMUM AT
LEAST ONE MITIGATOR.
>> I THINK YOU MEANING
AGGRAVATOR.
>> I'M SORRY, ONE AGGRAVATOR,
THANK YOU.
WHAT THE STATE LAW SAYS.
AND IN ORDER TO-- BUT SO BEFORE
WE GET INTO THE ROOM WHERE WE
CAN TALK ABOUT THE POSSIBILITY
OF DEATH, WE HAVE TO ESTABLISH
THAT MINIMUM, THAT AGGRAVATOR.
THAT'S A PREDICATE DEFENSE.
IF DEATH IS NOW AN OPTION AT
THAT POINT, THEN WE GO THROUGH
THE WEIGHING PROCESS.
AND HERE'S WHERE--
>> THAT IS AN OPTION.
>> WHERE DEATH IS AN OPTION.
WE'RE NOT SAYING DEATH IS, WE'RE
NOT MANDATORY DEATH, IT'S EITHER
DEATH OR LIFE.
IT'S DISCRETIONARY AT THIS
POINT.
AND THAT'S WHERE I BRING IN THE
ELAINE CASE--
>> WITHOUT ONE, YOU CANNOT EVEN,
AS YOU SAY, GET INTO THE DEATH
PENALTY ROOM.
>> RIGHT.
>> BUT WITH ONLY ONE YOU ARE,
THE STATE-- IF THAT'S ALL THE
STATE DID, THE STATE MOST OF THE
TIME--
>> WE'RE NOT GOING TO--
>>-- WOULD NOT BE ABLE TO CARRY
ITS BURDEN.
>> I AGREE.

>> AND THAT'S HOW, AT LEAST THE LEGISLATURE HAS SAID YOU'VE GOT TO FIND ALL THOSE AGGRAVATORS UNANIMOUSLY, AND NOW THE QUESTION IS HAVE THEY GONE OFF THE RESERVATION BY COMING UP WITH THIS 10-2?
AND AS MR. BOLOTIN SAID--
>> THAT'S A DIFFERENCE QUESTION.
>>-- MAKING US ALL BUSY FOR THE NEXT 15 YEARS.
>> WE WILL BE BUSY.
BUT MY POINT REMAINS ONCE WE DETERMINE THAT WE'RE IN THE ROOM, WHERE THAT'S AN AVAILABLE OPTION, THEN WE'RE TALKING ABOUT, OKAY, WE HAVE THAT RANGE.
AND NOW WE'RE TALKING ABOUT SENTENCING DISCRETION WHICH IS WHAT ELAINE TALKS TO.
JUSTICE THOMAS MAKES THAT DISTINCTION.
ONCE WE HAVE DETERMINED WHAT THE POSSIBLE RANGE IS, FACTORS THAT GO TO THE COURT'S DISCRETION IN DECIDING WHAT THE POSSIBLE SENTENCE IS WITHIN THAT RANGE ARE NOT GOVERNED BY APPRENDI AND, HENCE, NOT BY RING AND NOT BY HEARST.
>> BUT AGAIN, SO YOU'RE SAYING THAT A TRIAL JUDGE CAN--
WITHOUT WEIGHING CONSIDERATION, THAT THAT'S ALL DISCRETIONARY--
CAN APPLY THE DEATH SENTENCE.
>> I WOULDN'T SAY WITHOUT THE WEIGHING.
I THINK THAT THE STATUTE REQUIRES THE JUDGE DO THE WEIGHING, AND THE STATUTE REQUIRES THAT THE JURY WEIGH IT AND ALL OF THOSE FACTORS COME INTO PLAY.
BUT THE WEIGHING PROCESS IS DISCRETIONARY WITHIN THE TRIAL COURT.
I MEAN, THAT'S-- WE'RE NOT--
THAT'S THE EIGHTH AMENDMENT CONCERN THAT WE'RE TALKING ABOUT.

YOU KNOW, LIMITED DISCRETION,
REVIEWABLE.
THE JURY WEIGHS IT AND THEN THE
JUDGE WEIGHS IT.
I DON'T THINK HEARST--
>> BUT WHAT DOES THE JURY WEIGH
IT FOR?
>> WELL, WE'RE--
>> IF IT DOESN'T MATTER, WHY ARE
THEY WEIGHING IT IN THE FIRST
PLACE?
>> UNDER THE STATUTE WE'RE
REQUIRING THE JURY TO WEIGH IT
SO IS THAT WE CAN DETERMINE WHAT
THEIR RECOMMENDATION IS.
AND THEN THAT RECOMMENDATION, I
MEAN, MAYBE--
>> THE JURY DOES WEIGH IT.
>> IT DOES WEIGH IT.
>> OKAY.
>> I MEAN, THAT'S--
>> BUT HERE'S THE PROBLEM WITH
THIS IN FLORIDA, AND I'VE
THOUGHT OF, YOU KNOW, I'M SURE
YOU'VE THOUGHT ABOUT IT A LOT,
I'VE THOUGHT ABOUT IT A LOT.
IS THAT IF THE JURY IN WEIGHING
IT DOES NOT UNDER THE OLD
STATUTE AT LEAST COME UP WITH A
7-5--
>> MAJORITY.
THAT'S THE OLD STATUTE.
>>-- THERE IS NO ELIGIBILITY
FOR THE DEATH SENTENCE.
AND SO I DON'T KNOW HOW THAT IS
JUST SOMETHING THAT IS, THEY'RE
JUST GIVING IT LIKE THE
CONSCIENCE OF THE COMMUNITY,
THAT IT'S NOT A FACTUAL FINDING
THAT THEY'RE MAKING, EITHER THAT
THE AGGRAVATION DID NOT OUTWEIGH
THE MITIGATION OR, AS WE SAY,
THAT THEY EXERCISE MERCY.
WE DON'T KNOW THAT BECAUSE THERE
ARE NO SPECIAL VERDICTS.
SO IN A SITUATION WHERE WE DON'T
KNOW IT, DON'T WE HAVE TO
REVERSE IT TO ALLOW A NEW
PENALTY PHASE, WHICH IS WHAT
MR. BOLOTIN'S ARGUMENT IS?

>> NO, BECAUSE MY INTERPRETATION OF THAT IS, AGAIN, WE'RE IN THE ROOM ONCE THE STATE HAS ESTABLISHED THAT INDIVIDUAL AGGRAVATOR UNDER STEEL.
THAT'S THE MINIMUM WE HAVE TO GET TO.
IF THE JURY THEN WEIGHS IT AND IN ITS DISCRETION DETERMINES THAT DEATH IS INAPPROPRIATE BECAUSE THE MITIGATORS OUTWEIGH--
>> YOU DON'T THINK THE JURY HAS TO FIND ALL THE AGGRAVATORS BEYOND A REASONABLE DOUBT UNDER HEARST?
>> NOT ALL OF THEM.
I THINK THE JURY HAS TO FIND--
HEARST DOESN'T SAY WHO HAS TO MAKE THAT--
>> NO.
BECAUSE IT'S, UNDER OUR STATUTE THOUGH THE ONLY WAY SOMEONE CAN DETERMINE IF THEY'RE SUFFICIENT IS IF ALL THE AGGRAVATORS ARE PRESENTED AND FOUND.
I MEAN, OTHERWISE, AGAIN, HOW CAN A PRIOR VIOLENT FELONY THAT WAS TAKING, YOU KNOW, AN ELDERLY PERSON'S PURSE-- I WAS GOING TO SAY OLD WOMAN, ELDERLY PERSON--
AND, YOU KNOW, SHOVING THEM BE A PRIOR VIOLENT FELONY THAT'S GOING TO QUALIFY SOMEONE FOR THE DEATH PENALTY?
I MEAN, THERE'S GOT TO BE SUFFICIENCY OF THE AGGRAVATOR.
SO AT THE VERY MINIMUM, YOU NEED THE JURY TO FIND EACH AND EVERY AGGRAVATOR THAT'S, THAT THE STATE IS PRESENTING BEYOND A REASONABLE DOUBT.
>> WELL, WE'RE COMING BACK TO AN INTERPRETATION OF STATE LAW.
>> WHICH IS US--
>> THAT'S US.
>>-- OUR REQUIREMENT.
>> RIGHT.
HEARST DIDN'T TELL US WE HAVE TO REEVALUATE THE ENTIRETY OF OUR

STATE LAW.
THEY JUST SAID IF THIS COURT DETERMINES THAT A FACT OR A GROUP OF FACTS IS NECESSARY TO THE IMPOSITION OF THE DEATH PENALTY, THAT MUST BE MADE BY THE JURY.
>> BUT WE'RE SAYING UNDER OUR STATUTE AT THE TIME THAT THAT WAS A REQUIREMENT.
IT WAS-- WE'RE A WEIGHING STATE AND, THEREFORE, WHAT JUSTICE LEWIS IS ASKING IS HOW COULD THAT NOT BE MANAGER THE JURY FINDS-- SOMETHING THE JURY FINDS AS A MATTER OF FACTUAL DETERMINATION?
>> BECAUSE I THINK WE HAVE ADDRESSED THAT ASPECT OF IT UNDER STEEL.
IF THIS COURT GOES BACK AND REVISITS--
>> WE WERE WRONG, WE WERE WRONG IN EVERY CASE, APPARENTLY, SINCE 2002 ACCORDING TO THE U.S. SUPREME COURT WHO FOUND RELIGION IN 2016.
I MEAN, THEY COULD HAVE STOPPED THIS ALL, YOU KNOW, IN 2002 BY TAKING ANY ONE OF THOSE CASES.
WE'RE ALL IN THE SITUATION, MR. FREELAND-- NOT WITH OUR OWN DOING, WE'RE TRYING TO MAKE THE BEST OF FIGURING OUT HOW TO--
>> AGREED.
>> CORRECT?
>> AGREED.
>> SO TO SAY STEEL IS RIGHT, IT CAN'T BE RIGHT BASED ON HEARST.
>> WELL, IT CAN BE.
IF WE'RE TALKING ABOUT THE MINIMUM, WHAT IS THE MINIMUM TO GET US INTO THE ROOM WHERE WE DO THE WEIGHING PROCESS, STEEL TELLS US WHAT THAT MINIMUM IS.
WE'RE STILL WEIGHING IT UNDER STATE LAW.
I DON'T AGREE THAT HEARST HAS TOLD US WE'VE BEEN WRONG ALL THIS TIME.

HEARST IS WITH REGARD TO WHAT
THE STATE FINDINGS ARE IN TERMS
OF WEIGHING.
I THINK THAT STATE, THAT HEARST
TELLS US WE HAVE TO DETERMINE
WHAT ARE THE FACTS THAT WE NEED
TO ESTABLISH IN ORDER TO BEGIN
THE WEIGHING PROCESS.
>> NOW, DO YOU WANT TO TALK
ABOUT WHETHER-- LET'S ASSUME
THAT HEARST REQUIRES JUST ONE
AGGRAVATOR.
DO YOU WANT TO EXPLAIN THE
STATE'S THEORY OF WHY IT'S
HARMLESS BEYOND A REASONABLE
DOUBT?
>> SURE.
YEAH, IN THAT CASE WE'RE
TALKING-- I REALIZE MY OPPONENT
WANTS THIS COURT TO ADOPT
SULLIVAN.
NEEDER REALLY IS THE RIGHT TEST
BECAUSE IN SULLIVAN THE COURT,
THE JURY WAS GIVEN THE WRONG
STANDARD BEYOND A REASONABLE
DOUBT.
AND THAT'S, IN NEEDER THE COURT
DETERMINED THAT IF IT WAS SIMPLY
A-- IF ONE ELEMENT WAS OMITTED,
WE CAN DETERMINE BEYOND A
REASONABLE DOUBT THAT IT'S
HARMLESS IF WE CAN FIND THAT
THAT ELEMENT WOULD HAVE BEEN, IS
NOT CONTESTED, FOR EXAMPLE.
AND THAT'S WHAT WE HAVE HERE.
WE HAVE THE PRIOR VIOLENT
FELONIES PROVEN, NOT CONTESTED.
AND WE ALSO HAVE THE OTHER
AGGRAVATORS THAT ARE PRESENT
HERE.
YOU KNOW, WE'RE NOT-- THEY'RE
NOT ARGUING HERE IN COURT THAT
ANY OF THOSE OTHER
AGGRAVATORS--
>> WELL, WHAT ARE THE-- LET'S
TAKE ONE VICTIM WHERE THERE'S
THE MOST AGGRAVATORS.
WHAT ARE THE AGGRAVATORS?
>> ALL RIGHT.
WE HAVE THREE VICTIMS.

WE HAVE THREE-- MR. EVANS, THE
CAB DRIVER.
WITH HIM IT WAS THE PRIOR
VIOLENT FELONY WAS AN
AGGRAVATOR, AND IN ADDITION
BECAUSE HE WAS ROBBED, THE COURT
ALSO USED THE PECUNIARY GAIN AS
AN AGGRAVATOR.
AND ALSO--
>> WAS THE ROBBERY FOUND BY THE
JURY BEYOND A REASONABLE DOUBT?
>> YES, IT WAS.
THERE'S A PRIOR VERDICT AS TO
ROBBERY.
AND IN ADDITION WE HAVE CCP.
>> BUT CCP IS QUINTESSENTIALLY A
JURY DETERMINATION.
I MEAN, YOU CAN'T-- WE LOOK AT
THAT, AND IT'S VERY
FACT-INTENSIVE.
>> I AGREE.
>> SO ARE YOU SAYING, SO THERE
WAS CCP, ROBBERY AND PRIOR
VIOLENT FELONY, SO WITHOUT THE
CCP WE THEN DETERMINE THE JURY
WOULD HAVE DONE WHAT BEYOND A
REASONABLE DOUBT?
>> I THINK THEY STILL WOULD HAVE
FOUND UNDER EXISTING LAW THEY
WOULD HAVE FOUND THAT, YOU
KNOW--
>> SUFFICIENT AGGRAVATORS.
>> SUFFICIENT AGGRAVATORS.
>> WHY DOESN'T FINISH BUT THEY
DIDN'T FIND IT UNANIMOUSLY, DID
THEY?
>> AS TO THE-- WE DON'T KNOW
THAT THEY DID.
AS TO THE CCP, WE DON'T KNOW
THAT THEY DID.
WE HAVE AN 11-1--
>> WE DON'T KNOW WHAT THEY
FOUND.
WE DON'T KNOW WHAT THE ONE
PERSON IS.
>> BUT IS THAT-- WELL, ALL
RIGHT.
IF THE CCP IS EXCLUDED, WE STILL
HAVE THE OTHER TWO
AGGRAVATORS--

>> THAT'S NOT A, IS THAT A
HARMLESS ERROR BEYOND A-- IS
THAT HOW WE DO IT?
YOU TAKE OUT ONE?
IS IT THAT NO REASONABLE JURY
WOULD EVER NOT FIND SUFFICIENT
AGGRAVATORS?
IS THAT THE TEST?
>> ALL RIGHT.
WELL, LET'S LOOK AT--
>> I MEAN, WE'RE TRY TRYING TO
FIGURE THIS-- THIS IS A DIRECT
APPEAL.
WE'RE GOING TO HAVE HEARST
ARGUED AFTER HEARST COMES BACK,
AND WE'VE GOT TO DECIDE HOW TO
APPLY, IF WE DO, A HARMLESS
ERROR ANALYSIS.
>> THEY DIDN'T.
MY BEST ARGUMENT THERE IS
THEY'RE NOT CHALLENGING ANY OF
THE AGGRAVATORS IN THIS CASE.
I MEAN, THEY'RE NOT ASKING THIS
COURT TO REVIEW THE AGGRAVATORS.
IT'S NOT, YOU KNOW, THEY'RE NOT
CHALLENGING IT.
SO HOW CAN THEY SAY THAT-- I
AGREE THAT NORMALLY CCP IS
SOMETHING THAT WOULD BE-- I
HAVE 25 SECONDS-- CCP WOULD
NORMALLY BE SOMETHING THAT IS
DETERMINED BY THE JURY.
BUT WE HAVE AN EXTENSIVE FINDING
OF FACT BY THE JUDGE WHICH I
THINK UNDER THE FACTS OF THIS
CASE WOULD BE SUFFICIENT.
THANK YOU.
>> THANK YOU.
>> OKAY.
I GET WHY MY OPPONENT WAS ABLE
TO ANSWER JUSTICE PARIENTE'S
QUESTION ABOUT HARMLESS ERROR.
I THINK THAT'S JUST IMPROPER
WHEN HE DIDN'T ARGUE HARMLESS
ERROR IN HIS BRIEF.
>> WELL, I DID ASK THE QUESTION.
>> WELL, NO.
BUT HE ACTUALLY MADE THAT
ARGUMENT, LONG BEFORE YOU ASKED
THE QUESTION AS WELL.

IT WAS ONE OF THE FIRST THINGS
THAT WAS ARGUED.
IN ANY EVENT--
>> DO YOU WANT AN OPPORTUNITY TO
HAVE BRIEFING ON HARMLESS ERROR?
>> NO.
NO, AS A MATTER OF FACT, I DID
BRIEF ON HARMLESS ERROR IN THE
REPLY BRIEF.
BUT IN THE EVENT-- CCP IS
ALWAYS CONTESTED.
IT WAS CONTESTED IN THIS CASE.
THERE'S A BIG DIFFERENCE BETWEEN
ARGUING THAT CCP WAS IMPROPERLY
FOUND WHERE WE WOULD HAVE TO,
LIKE, OVERCOME ALL OF THE, YOU
KNOW, WAS-- THAT JUST BECAUSE
WE DIDN'T ARGUE THAT IT WAS
LEGALLY INSUFFICIENT DOESN'T
MEAN THAT IT WASN'T CONTESTED.
IT WAS VERY MUCH CONTESTED.
CCP IS A HUGE AGGRAVATOR.
IT WAS GIVEN VERY GREAT WEIGHT
IN THIS CASE.
IT WAS USED ALSO BY THE TRIAL
JUDGE AS A REASON TO GIVE LITTLE
WEIGHT TO THE EXTREME EMOTIONAL
DISTURBANCE, MENTAL DISTURBANCE
MITIGATOR, AND IT WAS REFERRED
TO AGAIN IN THE WEIGHING SECTION
OF THE SENTENCING ORDER.
ALSO, WE DON'T KNOW THAT-- IT
COULD BE THAT ALL 12 JURORS
FOUND CCP.
IT ALSO COULD BE THAT 8 OR 4 OR
NONE OF THEM FOUND CCP.
WE JUST DON'T KNOW.
AND THAT'S THE WHOLE PROBLEM
WITH, YOU KNOW, WHY WE NEED JURY
FINDINGS UNDER HEARST.
THE STATE'S SINGLE AGGRAVATOR
THEORY IS, IN EFFECT, PREMISED
ON THE WRONG ASSUMPTION THAT
FLORIDA'S A NONWEIGHING STATE.
FLORIDA'S ALWAYS BEEN A WEIGHING
STATE.
UNDER THE NEW STATUTE IT'S STILL
A WEIGHING STATE ALTHOUGH IT'S
MOVED A LITTLE BIT IN THE
DIRECTION OF A NONWEIGHING STATE

BECAUSE THEY'VE ADDED FOR THE FIRST TIME SOMETHING TO THE EFFECT OF, WELL, IF THE JURY FINDS ONE AGGRAVATOR UNANIMOUSLY, THEN THE DEFENDANT IS ELIGIBLE FOR DEATH.
ALTHOUGH THEY STILL REQUIRE JURY FINDINGS UNANIMOUSLY AS TO EACH OF THE AGGRAVATORS, OR THEY CAN'T BE USED.
AND THEY STILL REQUIRE JURY FINDING AS TO THE WEIGHING DECISION, ALTHOUGH THEY DON'T REQUIRE MAKING IT UNANIMOUS.
AS TO THE ARGUMENT THAT WEIGHING ISN'T FACT FINDING, WEIGHING ISN'T FACT FINDING, BUT WEIGHING REQUIRES FACT FINDING.
HOW CAN YOU DO THE WEIGHING OF THE MITIGATING AND THE AGGRAVATING UNLESS YOU FIRST DETERMINE WHAT THE MITIGATING FACTORS ARE, WHETHER THEY'RE PROVEN?
AND IT'S IMPORTANT TO NOTE THAT COLORADO, ARIZONA, MISSOURI HAVE ALL FOUND THAT THE WEIGHING FUNCTION IS PART-- RING REQUIRES THAT THE JURY FINDING IS ON THE WEIGHING FUNCTION.
THE TWO STATES THAT I KNOW OF WHO HAVE GONE THE OTHER WAY ON THAT ARE MARYLAND AND NEVADA.
MARYLAND HAS ABOLISHED THEIR DEATH PENALTY SINCE.
MARYLAND AND NEVADA ARE BOTH BASING IT ON THE WEIGHING ISN'T FACT FINDING, WEIGHING IS JUDGMENTAL.
I'LL GIVE THEM THAT.
THE WEIGHING ITSELF MAY BE JUDGMENTAL, BUT YOU CAN'T DO IT WITHOUT PRIOR CONCURRENT FACT FINDING AS TO WHAT THE MITIGATORS ARE, WHETHER THEY'RE PROVEN.
I WANT TO GET VERY BRIEFLY INTO THE STATE'S DOG IN THIS FIGHT ON THE PAROLE WAIVER ISSUE.
WHEN CONFRONTED WITH WHAT

HAPPENED IN BELLOW-- AND, BY
THE WAY, BELLOW ISN'T
NECESSARILY THE ONLY CASE THIS
HAS EVER HAPPENED IN, BECAUSE
TYPICALLY THEY WOULDN'T BE
APPEALED.
THE ONLY WAY WE EVER FOUND OUT
ABOUT BELLOW WAS IN THE TAMPA
TRIBUNE, AND I HAPPENED TO CATCH
IT.
BUT WHEN CONFRONTED WITH WHAT
HAPPENED IN BELLOW, MR. --
THE STATE ATTORNEY, SAID,
WELL, THAT'S VERY DIFFERENT.
IN TAMPA WE DIDN'T OBJECT TO IT.
IN FACT, THEY NOT ONLY DIDN'T
OBJECT TO IT, THEY PROPOSED IT
AND INSISTED ON IT.
WHEREAS HERE WE DO OBJECT.
WELL, THE KEY QUESTION IS WHY.
AND I HAVE NOT HEARD AN ANSWER
FROM ANYBODY THAT THERE'S ANY
POSSIBLE REASON OTHER THAN,
WELL, WE'LL HAVE A BETTER CHANCE
OF GETTING A DEATH
RECOMMENDATION IF WE DON'T LET
THEM WAIVE IT.
THAT SHOOTS TO SMITHEREENS THE
STATE'S WHOLE ARGUMENT THAT THIS
IS AN ILLEGAL SENTENCE, BECAUSE
AN ILLEGAL SENTENCE EVEN IN THE
NONCAPITAL CONTEXT IS SOMETHING
THAT NO JUDGE COULD IMPOSE UNDER
ANY CIRCUMSTANCES, AND I DON'T
THINK IT WOULD COMPORT WITH THE
LEGISLATIVE INTENT TO PRECLUDE
WHAT HAPPENED IN BELLOW.
HERE WE'RE NOT SAYING TO THE
STATE--
>> I'M GOING TO HAVE TO CUT YOU
OFF OR WE'RE GOING TO GO ON ALL
DAY.
>> SORRY ABOUT THAT.
>> THANK YOU.
THANK YOU FOR YOUR ARGUMENTS.
COURT'S IN RECESS UNTIL
TOMORROW, 9:00.