

>> OKAY THE NEXT CASE, WANT TO
TAKE A BREAK?
GOT WATER, RIGHT?
NEXT CASE ON THE DOCKET IS
MORRIS VERSUS STATE.
TAKE YOUR TIME.
WHENEVER YOU'RE READY, WE'LL BE
HERE.
HANG ON ONE SECOND, PLEASE.
THE ALL SET?
SORRY.
PLEASE PROCEED.
>> GOOD MORNING.
MAY IT PLEASE THE COURT.
MY NAME IS CYNTHIA DODGE AND I'M
REPRESENTING THE APPELLANT,
DONTAE MORRIS.
I LIKE TO ADDRESS THE FIRST
ISSUE BECAUSE THIS CASE IS ON
DIRECT APPEAL AS OPPOSED TO
CASES YESTERDAY ON
POST-CONVICTION.
AND I THINK THAT THIS COURT HAS
TO ADDRESS THE IMPORT OF 775.082
SUBSECTION 2 TO THIS CASE.
BECAUSE IN 1972 THE LEGISLATURE
ADOPTED 7750822 BECAUSE THEY
KNEW IT WAS IMMINENT.
IN OTHER WORDS THEY KNEW
SOMETHING WAS GOING TO HAPPEN
AND THEY WANTED TO HAVE SOME
KIND OF PROVISION FOR DEALING
WITH THESE CASES AND IN
DONALDSON, THIS COURT DECIDED
THAT THE DEATH PENALTY,
FLORIDA'S DEATH PENALTY IN 1971
STATUTE WAS UNCONSTITUTIONAL AND
IT COULDN'T BE SAVED.
SPECIFICALLY AT PAGE 501 IN
DONALDSON IT SAID THAT THIS
COURT SAID THAT THE DEATH
PENALTY MUST FALL WITH THE U.S.
SUPREME COURT'S HOLDING AGAINST
THE DEATH PENALTY AS PROVIDED
UNDER PRESENT LEGISLATION.
SO IN OTHER WORDS, IN FUHRMAN
THE DEATH PENALTY ITSELF WAS NOT
HELD TO BE UNCONSTITUTIONAL
PER SE OR VIOLATIVE OF THE
EIGHTH AMENDMENT.

IT WAS BEING IMPOSED ARBITRARY MANNERS WITHOUT PROCESS, WITHOUT SAFEGUARDS, PROCEDURAL SAFEGUARDS.

LATER IN DIXON IN 1973 THIS COURT LOOKED AT NEW STATUTE AND SAID THAT PROCEDURAL SAFEGUARDS WERE SUFFICIENT IN THE NEW STATUTE AND UPHELD THE NEW STATUTE.

SO BASICALLY THE SAME PROBLEM THAT OCCURRED IN 1972 IS OCCURRING NOW.

THIS STATUTE, 921.141 HAS BEEN DECLARED UNDER CONSTITUTIONAL ON ITS FACE BECAUSE--

>> ALL THE AGGRAVATING CIRCUMSTANCE, WHAT'S MITIGATION, EVERY OTHER, EVERY PART OF THE STATUTE, SENTENCING PROCEDURE, IS STILL INTACT.

>> YES.

>> SO IT'S COMPLETELY DIFFERENT FROM FUHRMAN-- OUR STATUTE BEFORE, DURING FUHRMAN SAID EVERY-- MURDER IS THE DEATH AND ONLY THE JURY COULD DECIDE WHETHER IT WOULD BE MERCY. THAT IS NOT EVEN REMOTELY WHAT HAS HAPPENED SINCE THEN.

>> IT IS IN THAT THIS STATUTE FAILS BECAUSE EVEN WITH THE AGGRAVATING CIRCUMSTANCES, THE MITIGATING CIRCUMSTANCES AND THE FACT-FINDING AND WRITTEN FINDINGS THAT ARE REQUIRED, THERE IS NO PROVISION IN THIS STATUTE FOR JURY VERDICT WITH REGARD TO AGGRAVATING CIRCUMSTANCES.

THERE IS NONE.

SO IN OTHER WORDS, WHEN YOU LOOK AT THIS STATUTE, YOU CAN'T REWRITE THAT STATUTE TO HAVE THAT PROVISION IN IT.

>> BUT ALL-- HOW IS IT NOT-- AGAIN, YOU'RE A DIRECT APPEAL CASE.

>> YES.

>> WE DON'T HAVE TO DISCUSS

RETROACTIVITY.

>> CORRECT.

>> WHY IS IT ASSUMING OTHER REQUISITES ARE MET, WHY ISN'T THE ANSWER TO REMAND FOR A NEW SENTENCING PHASE THAT COMPLIES WITH HURST?

I MEAN, YOU KNOW, NOT, I REALIZE, AGAIN, YESTERDAY WE HAD THESE TWO EXTREMES WHAT THE STATE SAYING IT MEANT ALMOST NOTHING AND DEFENSE WAS SAYING IT WAS EVERY CASE HAD TO BE REDUCED TO LIFE, I'M ASKING YOU, IN THIS CASE, DIRECT APPEAL AND ASSUMING YOU PASS, WHATEVER OTHER MARKS, WHY ISN'T REVERSAL FOR NEW SENTENCING PHASE THE APPROPRIATE, IN COMPLIANCE WITH HURST, THE APPROPRIATE WAY TO APPROACH IT?

>> WELL, FIRST OF ALL AT THIS POINT THERE IS NO STATUTE THAT COMPLIES WITH HURST.

SO THEREFORE IF THE MY CLIENT GOES BACK FOR A NEW SENTENCING PHASE AT THIS POINT, IF THAT'S WHAT YOU ORDERED, THERE IS NOTHING FOR THE COURT TO DO BUT BECAUSE THERE IS NO--

>> YOU'RE IN THE SAME SITUATION THEN AS EVERY OTHER DEFENDANT WHO'S EITHER AWAITING TRIAL OR AWAITING SENTENCING.

>> RIGHT.

BUT THERE IS ANOTHER THING TOO. UNTIL WE KNOW WHAT THE NEW STATUTE IS, WE DON'T EVEN KNOW IF IT WOULD BE AN EX POST FACTO APPLICATION BECAUSE THAT IS TOTALLY DEPENDENT HOW THE LEGISLATURE TREATS THE REMEDIAL ACTION WHAT THEY DO WITH IT.

>> WE LOOK AT THE STATUTE. THE STATUTE HAS VERY CLEAR GUIDELINES, WHY WOULDN'T THE REMEDY BE TO SAY WHATEVER THE JUDGE WAS DEFINED, IT IS, UNDER 3-A OR 2-A, NOW THE JURY HAS DEFINED IT?

>> BECAUSE THE STATUTE DOESN'T PROVIDE THAT AND YOU CAN'T REWRITE THE STATUTE.

>> BUT IT'S PRETTY CLEAR IT IS RIGHT TO THE JURY TRIAL, NOT THAT THE AGGRAVATING CIRCUMSTANCES OR THE WEIGHING ARE IMPERMISSIBLE.

THEY DIDN'T FIND AN 8th VIOLATION, THE U.S. SUPREME COURT.

THEY FOUND A SIXTH AMENDMENT VIOLATION.

>> CORRECT.

BUT AT THIS POINT THERE IS NO PROVISION FOR THAT.

SO--

>> BUT ISN'T IT-- WHEN YOU REALLY THINK ABOUT IT, ISN'T THE PROVISIONS YOU'RE TALKING ABOUT REALLY THE PROCEDURAL PART?

AND COULDN'T THIS COURT, SINCE IT'S PROCEDURAL, SIMPLY SAY THE PROCEDURE IS, IN EXECUTING WHAT'S LEFT OF THIS STATUTE THE PROCEDURE IS THAT THE JURY MAKE THESE FINDINGS AND THAT'S HOW YOU PROCEED IN THESE RESENTENCINGS?

THE PROCEDURE IS--

>> OKAY, I'M SAYING PROCEDURE IN-- PROCEDURE IN TWO CONTEXTS. WHEN YOU'RE TALKING ABOUT A SIXTH AMENDMENT, SIXTH AMENDMENT VIOLATION, ALSO YOU'VE GOT A STATUTE THAT NOW PROVIDES FOR JUDGE, SENTENCING BASED ON JUDGE FINDINGS OF FACT.

SO IN OTHER WORDS YOU WOULD BE REWRITING--

>> -- NOT ANYMORE BECAUSE THE SUPREME COURT SAID THAT THE JUDGE CAN'T DO THAT, OKAY? SO I WILL, OUR PROCEDURE BEFORE WAS THAT THE JUDGE DID THAT. THE SUPREME COURT HAS SAID THAT IS INCORRECT.

>> RIGHT.

AND THAT WOULD BE THE PURVIEW OF THE LEGISLATURE TO DECIDE, NOT

THIS COURT.

THIS COURT CAN'T REWRITE THAT STATUTE AND SAY, WELL, WE'RE JUST GOING TO SAY THAT THESE FINDINGS AND THE AGGRAVATING CIRCUMSTANCES HAVE TO BE FOUND BY A REASONABLE DOUBT, BEYOND A REASONABLE DOUBT BY THE JURY, SO THEREFORE WE'RE GOING TO--

>> THE STATUTE ALREADY PROVIDES THAT YOU SUBMIT EVIDENCE TO THE JURY, THE FIRST PART OF 941.141 SAYS THAT YOU SUBMIT EVIDENCE ABOUT AGGRAVATING AND MITIGATING CIRCUMSTANCES TO THE JURY, CORRECT?

>> CORRECT.

>> OKAY.

SO, THEN, WHAT WE NEED TO DO, IT SEEMS TO ME, LIKE ANY OTHER STATUTES THAT WE DEAL WITH, IS TELL THE JURY, WHAT TO DO WITH THAT NOW IT IS BEING SUBMITTED TO THEM.

>> AND THAT IS THE PURVIEW--

>> WHICH IS PROCEDURAL ASPECT I WOULD SUBMIT.

YOU--

>> BUT I KNOW IS DIFFERENT BUT OTHER CRIMINAL STATUTES THAT OUTLINE BEHAVIOR OR CONDUCT THAT IS PROHIBITED BY SAYING THAT IT SHALL BE A FIRST-DEGREE FELONY FOR SUCH AND SUCH, THOSE STATUTES DON'T PROVIDE EXPRESSLY IN THE STATUTE ITSELF ALL OF THE PROCESSES, ALL OF THE PROCEEDINGS THAT A JURY GOES THROUGH ONCE YOU'RE IN THE COURTROOM, DO THEY?

>> CORRECT.

WELL, WHAT HAPPENED IN THIS STATUTE--

>> WAIT, LET'S WALK THROUGH IT.

>> ALL RIGHT.

>> ISN'T THAT THE WAY OUR CRIMINAL LAW HAS OPERATED OVER THE YEARS?

THAT EVERYTHING'S NOT RIGHT IN THE STATUTE.

I MEAN WE'VE GOT JURY INSTRUCTIONS.
WE'VE GOT VERDICT FORMS.
NONE OF THOSE ARE IN THE CRIMINAL STATUTES.
>> BUT THE LEGISLATURE MORE OR LESS IN RING, THEY'RE TREATING THE AGGRAVATING CIRCUMSTANCES AS MORE OR LESS ELEMENTS OF THE OFFENSE.
SO I DON'T THINK THAT THE COURT COULD JUST TAKE AND SAY, WELL WE'RE JUST GOING TO APPLY THIS AND WE'RE GOING TO TAKE THIS. IT WOULD BE ALMOST LIKE CONVERTING THE JURY RECOMMENDATION PROCESS OR THE JUDGE FINDING PROCESS AND SAY OKAY, NOW THE JURY DOES IT.
>> BUT THAT'S WHAT HAPPENED. I MEAN, BUT THAT'S WHAT'S HAPPENING.
IN OTHER WORDS, POST-RING, THE ISSUE WAS, SHOULD YOU HAVE SPECIAL VERDICT FORMS, RIGHT? THAT WAS ONE OF THE ISSUES IN STEELE.
THE COURT, MAJORITY OF THE COURT SAID NO.
THERE IS, AS JUSTICE LEWIS IS SAYING THERE IS NOTHING, THE ISSUE OF SPECIAL VERDICT FORMS WHICH IS GOING TO COME UP IN ONE OF THE CASE THIS IS WEEK, IS A PROCEDURAL ISSUE.
SO HAVING THE JURY BE, AND THEN THE JURY INSTRUCTION WHICH SAYS IT'S ADVISORY IS OBVIOUSLY NO LONGER AN APPROPRIATE INSTRUCTION.
SO, I REALIZE, AGAIN, WHETHER THIS IS SOMETHING WE CAN DO, WHETHER THE LEGISLATURE WILL STEP IN IN THE NEXT 60 DAYS AND GIVE A STATUTE THAT THEY DEEM TO BE CONSTITUTIONAL IS ANOTHER QUESTION BUT, WHAT DID-- BUT DON'T YOU SEE THAT INTERROGATORIES AND JURY INSTRUCTIONS ARE PART OF THE

PROCEDURE?

>> ALL RIGHT.

BUT YOU'VE GOT JUDGE SENTENCING
IN FLORIDA.

YOU HAVE JUDGE SENTENCING THERE.
IS NO JURY SENTENCING IN FLORIDA
AND THIS COURT--

>> THE U.S. SUPREME COURT DIDN'T
SAY JUDGE SENTENCING IS
UNCONSTITUTIONAL.

>> THAT'S NOT WHAT I'M ARGUING.
WHAT I'M SAYING YOU HAVE JUDGE
SENTENCING.

YOU HAVE ONLY A JURY
RECOMMENDATION.

SO TO JUMP FROM SPECIAL VERDICTS
TO, IS THAT GOING TO MEAN
THAT-- YOU WILL MAKE IT SO
THERE IS JURY SENTENCING OR IS
IT GOING TO BE JUDGE SENTENCING
AGAIN AND HOW IS THAT JUDGE
GOING TO, FIRST OF ALL, YOU'VE
GOT THE AGGRAVATING
CIRCUMSTANCES.

THE AGGRAVATING CIRCUMSTANCES
UNDER FLORIDA HAVE NEVER BEEN
ENOUGH.

ABSOLUTELY HAVE NEVER BEEN
ENOUGH.

IN OTHER WORDS--

>> WHY COULDN'T YOU HAVE JURORS
DECIDE THE AGGRAVATING FACTORS,
DECIDE THE MITIGATING FACTORS,
WEIGH AND DECIDE, DETERMINE
FACTUALLY WHETHER THE
AGGRAVATORS OUTWEIGH THE
MITIGATORS?

HAVE A JURY DO THAT.

WHY COULD YOU NOT DO THAT?

>> YOU COULD DO THAT AND END UP
WITH JURY SENTENCING OR WHAT IS
THE ROLE OF THE JUDGE IN THAT?
I THINK ALL OF THIS REALLY
HAS--

>> ISN'T THAT WHAT HURST HAS
TOLD US WHAT WE HAVE TO DO.

>> PARDON ME?

>> ISN'T THAT WHAT HURST, THAT
WE HAVE TO HAVE A JURY DECIDE
EVEN OF THOSE FACTORS?

>> WHETHER OR NOT, WHETHER OR NOT IT CAN BE DONE, I MEAN IN THIS CASE THIS DEATH SENTENCE HAS TO BE VACATED.
I MEAN THAT'S--
>> LET'S GO OVER THIS CASE BECAUSE, THE U.S. SUPREME COURT SAID IT'S UP TO THE COURT THEN, THIS COURT TO DECIDE WHETHER ANY ERROR IS HARMLESS BEYOND A REASONABLE DOUBT.
>> EXACTLY.
>> YOU HAVE A 12-0 RECOMMENDATION FOR DEATH.
>> RIGHT.
>> WHAT ELSE, WHAT ARE THE AGGRAVATORS IN THIS CASE?
>> THE AGGRAVATORS SUBMITTED TO THE JURY WERE PRIOR VIOLENT, CONTEMPORANEOUS CAPITOL FELONY.
>> WAS THEIR FINDING UNANIMOUSLY, THAT HE, THAT THERE WAS TWO--
>> WHOSE FINDING?
THE JURY, THERE WERE NO SPECIAL VERDICTS.
>> WASN'T IT BASED ON THE JURY VERDICT THEY FOUND HIM GUILTY OF TWO SEPARATE MURDERS.
>> TWO HOMICIDES, YES.
>> THAT WAS FOUND UNANIMOUSLY.
>> THEN THERE WAS THE AVOID ARREST AGGRAVATOR.
THE AVOID ARREST.
THEN THE THIRD ONE WAS THAT THE VICTIMS WERE LAW ENFORCEMENT.
>> OKAY BUT THE AVOID ARREST, WASN'T THAT MERGED INTO LAW ENFORCEMENT?
>> YES IT WAS, BY THE JUDGE.
>> NOW IS THAT-- JUST AGAIN UNDERSTANDING THAT ADVOCACY FOR YOUR CLIENT IS WHAT YOU NEED TO DO BUT ISN'T THE, ISSUE ON HARMLESSNESS IS THERE A QUESTION WHETHER THEY WERE BOTH LAW ENFORCEMENT OFFICERS.
>> I THINK UNDER HURST YOU DON'T HAVE TO-- I'M.
>> HARMLESS BEYOND A REASONABLE

DOUBT?

THIS WENT BACK.

IS THERE ANY WAY THAT A JURY
WOULD NOT FIND THAT THESE TWO
VICTIMS WERE LAW ENFORCEMENT
OFFICERS.

>> THERE IS YOUR PROBLEM HERE.
THE JURY FOUND A JURY
RECOMMENDATION WHICH MEANS
NOTHING UNDER HURST.

>> CAN YOU PLEASE ANSWER MY
QUESTION?

IF IT GOES BACK FOR A NEW
PENALTY PHASE, CAN YOU, IS THERE
ANY GOOD FAITH ARGUMENT THAT THE
TWO VICTIMS IN THIS CASE WERE
NOT LAW ENFORCEMENT OFFICERS?

>> IS THERE ANY GOOD FAITH
ARGUMENT?

PROBABLY NOT BUT JURY HAS TO
FIND IT THE JURY HAS TO MAKE A
FINDING OF HARMLESS.

>> ARE YOU SAYING THERE CAN
NEVER BE POST-HURST, A HARMLESS
ERROR BEYOND A REASONABLE DOUBT
ANALYSIS?

>> WELL THIS IS A DIFFERENT, IF
YOU ALLOW ME, THIS IS A
DIFFERENT CASE.

THIS SHOULD FALL UNDER SULLIVAN
BECAUSE WHAT YOU'RE TRYING TO DO
IS YOU'RE TRYING TO SAY WITH THE
JURY HAVE DONE X, Y AND Z.

>> WOULDN'T YOU STIPULATE THESE
WERE TWO LAW ENFORCEMENT
OFFICERS WOULD YOU STIPULATE,
THEY WERE, WERE THEY NOT?

>> YES.

>> OKAY.

>> BUT WHAT I'M SAYING IS,
YOU'RE TRYING TO SAY, WOULD THE
JURY HAVE DONE THIS AND THE
THING IS, THERE IS NO JURY
VERDICT.

SO IT FALLS UNDER SULLIVAN
VERSUS LOUISIANA.

THIS ENDS UP STRUCTURAL ERROR
AND NOT ONLY THAT--

>> LET'S GO BACK TO STRUCTURAL
ERROR.

IT IS HARD FOR ME, I MIGHT AGREE THAT-- A DEFENDANT NOT HAVING A JURY TRIAL MAY BE UNDER SOME NOTION COULD BE STRUCTURAL BUT WE HAVE THE U.S. SUPREME COURT GUIDANCE IN, AND ALSO WHAT THIS COURT SAID ABOUT SIXTH AMENDMENT.

THEY HAVE, FIRST OF ALL SAID IT'S UP TO US TO DECIDE HARMLESS ERROR.

WELL IF IT'S STRUCTURALS I AGREE THERE CAN NOT BE HARMLESS ERROR. WE'RE BOUND BY THE SUPREME COURT'S ANALYSIS OF RETROACTIVITY, IT IS TRUE IN SHARRO VERSUS SULLIVAN THEY DESCRIBED THE RIGHT TO JURY TRIAL THIS IS MERELY A NEW PROCEDURAL RULE.

THEY DID NOT SAY IT IS A CATAclysmic CHANGE THAT THE WAY CASES WOULD BE HANDLED.

SO I'M HAVING-- AGAIN, UNDERSTANDING WHERE THE DEFENSE WANTS TO BE AND WHERE THE STATE WANTS TO BE I'M HAVING A LITTLE TROUBLE UNDERSTANDING THAT WE COULD SAY THAT NOT HAVING FINDINGS OF THE JURY ON THE AGGRAVATORS AND MITIGATORS IS STRUCTURAL ERROR?

THERE CAN NOT BE, YOU CAN NOT LOOK AT HARMLESS ERROR BEYOND A REASONABLE DOUBT?

>> WELL, FIRST OF ALL THE JURY DIDN'T SENTENCE, THERE IS NO JURY SENTENCE HERE.

SO TO TRY TO SAY THAT THE JURY WOULD HAVE DONE--

>> I HATE TO SAY AGAIN, I THINK THERE SHOULD BE JURY SENTENCING. I DON'T SEE THAT HURST, I MEAN JUSTICE BREYER SAID THERE SHOULD BE JURY SENTENCING THE EIGHTH AMENDMENT.

I DON'T READ THE U.S. SUPREME COURT CASE SAYING IN CAPITAL CASES THERE MUST BE JURY SENTENCING.

WE MAY BE THERE, THAT THE EIGHTH AMENDMENT WILL REQUIRE IT BECAUSE EVERY OTHER STATE BUT FLORIDA HAS IT BUT I DON'T READ HURST AS SAYING THAT.

>> WHAT YOU'RE LOOKING AT HERE, YOU'RE REVIEWING A JUDGE'S DETERMINATION AND YOU KNOW, HE FOUND, NOT ONLY THAT, THERE IS ANOTHER PROBLEM HERE.

THERE WAS A SPENCER HEARING. WHATEVER, WHAT THE JURY HEARD WAS NOT THE SAME AS WHAT THE JUDGE HEARD.

AND THERE IS ANOTHER, ARE YOU SAYING THAT THE JUDGE WOULD HAVE IMPOSED THE SAME, THE SAME THING OR THE JURY WOULD, BECAUSE THE JURY CERTAINLY DIDN'T.

THERE IS NO BINDING JURY VERDICT.

SO SAYING THAT THE JUDGE WOULD HAVE DONE THE SAME THING, WE'VE ALREADY DECIDED YOU KNOW, HURST HAS ALREADY DECIDED THAT THE AGGRAVATORS HAVE TO BE FOUND AND BY THE JURY IN THIS WHOLE THING FAILS.

AND WHETHER OR NOT, I MEAN THE JURY DIDN'T MAKE A DETERMINATION AND THEY DIDN'T WEIGH, AND IF ONE OF THE DETERMINATIONS IS THE WEIGHING PROCESS--

>> I UNDERSTAND WHAT YOU'RE SAYING BUT THE HARMLESS ERROR ANALYSIS, IF IT COMES INTO PLAY HERE, HAS TO BE FOCUSED ON WHAT THE JURY WOULD HAVE DONE BEYOND A REASONABLE DOUBT.

ISN'T THAT CORRECT?

ISN'T THAT WHAT WE HAVE TO LOOK AT?

>> RIGHT.

>> THE FACT THIS WAS ADVISORY, THAT IS KIND OF BESIDE THE POINT.

LOOKING FORWARD UNDER HURST DOING HARMLESS ERROR ANALYSIS WE'VE GOT TO MAKE A JUDGMENT ABOUT WHAT A JURY WOULD HAVE

DONE IF WE CAN, AND FINDING
ERROR HARMLESS ONLY IF WE CAN
BEYOND A REASONABLE DOUBT FIND
WHAT THE JURY WOULD HAVE DONE.
THEY WOULD HAVE REACHED, MADE
THE NECESSARY FINDINGS, ISN'T
THAT CORRECT?

>> NO.

MY POSITION IS THAT THE JURY
DIDN'T DO ANYTHING BECAUSE--

>> I UNDERSTAND, THAT'S A--
OKAY, THAT'S A POSITION ABOUT
HISTORICAL FACT ABOUT WHAT THE
JURY IN THIS CASE DID.

I UNDERSTAND THAT AND I
UNDERSTAND THAT THEY MADE, THEY
DID MAKE SOME FINDINGS THAT ARE
RELEVANT.

THEY MADE THE CONVICTION OF THE
CONTEMPORANEOUS MURDER, OKAY.

>> YES.

>> WE'VE GOT ANOTHER CONVICTION
THAT'S A MATTER OF--

>> BUT THERE IS OWN ONE
AGGRAVATOR FOR THAT.

THERE IS NOT--

>> I UNDERSTAND.

BUT, SO, BEYOND THAT, WHEN WE'RE
LOOKING AT HARMLESS ERROR
ANALYSIS IT IS NOT ABOUT WHAT
THE JURY DID OR, THE PROBLEMS
WITH WHAT THE JURY'S ROLE WAS IN
THIS CASE AS IT WAS TRIED BUT
WHAT WE CAN DECIDE A JURY WOULD
HAVE DONE BEYOND A REASONABLE
DOUBT.

I MEAN, WHAT AM I MISSING ABOUT
HOW THE HARMLESS ERROR ANALYSIS
WOULD BE UNDERTAKEN?

>> I GUESS WE HAVE TO DISAGREE
ABOUT THE FACT THAT, THE JURY
DIDN'T DO ANYTHING.

SO TO TRY TO DECIDE WHAT THE--

>> IT'S YOUR POSITION, IT'S YOUR
POSITION THAT HARMLESS ERROR
ANALYSIS IN A CASE LIKE THIS IS
IMPOSSIBLE?

>> YES.

>> OKAY.

HOW DO YOU SQUARE THAT WITH THE

FACT THAT IN HURST THE SUPREME COURT SPECIFICALLY RECOGNIZED THAT, THAT THE FLORIDA COURTS WOULD UNDERTAKE THE HARMLESS ERROR ANALYSIS IN HURST? SEEMS LIKE, IF IT WAS-- IF THEY BELIEVED IT WAS A STRUCTURAL ERROR, AND I CAN UNDERSTAND, THAT'S A POSITION BUT IF THEY BELIEVE THAT, THEY WOULD NOT SEND IT BACK FOR HARMLESS ERROR ANALYSIS BY THE STATE COURT.

>> RIGHT.

IF YOU LOOK AT MOST OF THEIR, THE U.S. SUPREME COURTS LITIGATION ON THESE ISSUES, THEY TRADITIONALLY SEND IT BACK. SO IT'S, I DON'T THINK THEY'RE MAKING A COMMENT THAT IT COULD BE OR THAT IT IS, AND CERTAINLY IN HURST--

>> WELL, WE KNOW, WE KNOW THAT, HAVEN'T THEY DECIDED THAT, THAT UNDER RING, THAT HARMLESS ERROR APPLIES?

>> HAVEN'T THEY DECIDED?

>> OR AM I WRONG ABOUT THAT?

>> NO, I DON'T-- HAVE THEY DECIDED HARMLESS ERROR APPLIES?

>> UNDER RING.

>> UNDER RING.

I DON'T THINK SO.

I THINK UNDER-- I MEAN THERE'S A LINE OF CASES THAT SAY THAT, YOU KNOW, AN ENHANCEMENT, THAT HARMLESS ERROR CAN APPLY TO ENHANCEMENT.

BUT THIS IS NOT A SIMPLE ENHANCEMENT.

YOU HAVE GOT THE JUDGE FINDING 22 MITIGATING CIRCUMSTANCES, THAT THERE IS NO, THERE IS NO JURY FINDING AS TO ANY OF THOSE. MOST OF THOSE, EXCEPT FOR LIKE THE LAST ONE ARE ALL FACTUAL DETERMINATIONS.

WHETHER OR NOT HE WAS BORN TO UNWED MOTHER, WHETHER OR NOT THEY BONDED.

WHETHER OR NOT-- HIS FATHER WAS

MURDERED, ALL THESE THINGS ARE
FACTUAL DETERMINATIONS.

NOT ONLY THAT, WHEN WE GET TO
THE SPENCER HEARING, THE JURY
WASN'T SITTING THERE DURING THE
SPENCER HEARING.

TO SAY WHAT THE JURY WOULD HAVE
DONE, THEY HAVE TO DECIDE, THE
JURY HAS TO DECIDE WHETHER OR
NOT THE MITIGATION OUTWEIGHS THE
AGGRAVATION.

IF THEY DIDN'T HEAR ALL OF THE
MITIGATION, TO SIT THERE AND
REWEIGH IT, YOU KNOW, IT'S--

>> I HAVE A, AND I REALIZE YOUR
ARGUMENT.

WE'LL JUST EITHER NOT TO
DISAGREE, BUT WE'RE STILL TRYING
TO FIGURE THIS OUT.

UNDERSTAND THESE QUESTIONS ARE
NOT ANYTHING DISPOSITIVE.

WE UNDERSTAND YOU'RE ADVOCATING
FOR YOUR CLIENT.

>> I UNDERSTAND.

>> TWO QUESTIONS.

DO WE KNOW, IN THE RING CASES
FROM ARIZONA, I NEED TO GO BACK
ON THAT, HAVE YOU LOOKED, RING,
HOW THE ARIZONA SUPREME COURT
DEALT WITH THE CONVICTIONS THAT
WERE ALREADY, BECAUSE ON APPEAL,
AS TO WHETHER THEY WERE ABLE TO
APPLY HARMLESS ERROR?

THERE WOULD HAVE BEEN NO JURY
FINDING.

OR WHETHER THEY SENT EVERY CASE
BACK FOR RESENTENCING?

WE KNOW THEY DIDN'T REDUCE EVERY
CASE TO LIFE.

SO DO YOU KNOW WHAT THEY DID?

>> YOU KNOW I LOOKED AT THAT, I
CAN'T RECALL.

>> SOMEONE WILL BE ABLE TO HELP
US WITH THAT THIS WEEK.

OKAY, THE SECOND QUESTION, I
REALIZE NORMALLY YOU CAN'T TELL
ANYTHING FROM THE DENIAL OF CERT
FROM, WHAT THE UNITED STATES
SUPREME COURT DENIES CERT, THEY
DENIED CERT FOR 14 YEARS.

BUT IT SEEMS THAT IT IS, AT
LEAST OF NOTE THAT AFTER THEY
DECIDED HURST THEY DENIED CERT
IN TWO CASES THAT BOTH HAD PRIOR
VIOLENT FELONIES.

WHICH MEANS THOSE CONVICTIONS
ARE NOW FINAL.

IT WOULD USUALLY, WOULD BE SOME
EXPECTATION THAT THERE WOULD BE,
THAT THOSE CASES THAT WERE
WAVING THE OUTCOME OF THE MAIN
CASE THEY WOULD SEND BACK FOR,
TO RULE CONSISTENTLY WITH RING
BUT WHAT IS YOUR, WHAT ARE THE
TWO DEFENDANTS THAT JUST HAD
CERT DENIED, THEIR CONVICTIONS
ARE NOW FINAL, AND THEIR
SENTENCES?

SO ARE WE TO TAKE ANYTHING FROM
THAT, THAT DENIAL?

>> THE GRANT MUCH --
FROM THE SUPREME COURT IS
COMPLETELY DISCRETIONARY.

>> I UNDERSTAND THAT.

A WEEK LATER AFTER THE WATERSHED
DECISION, TWO CASES HAVE BOTH
WHERE WE SAID THERE WAS PRIOR
VIOLENT FELONIES, CERT WAS
DENIED IN BOTH OF THOSE.

>> I DON'T THINK YOU CAN READ
INTO ANY OF IT BECAUSE FIRST OF
ALL THEY DID SOMETHING THAT
BASICALLY RENDERED FLORIDA
STATUTES UNCONSTITUTIONAL.
SO THEY'RE PROBABLY, MY TAKE ON
IT IS, THEY SENT THAT BACK AND
AFTER BOTTISON AND KING.

-- BOTTISON.

HOW MANY TIMES?

WHAT KIND OF ASSUMPTION WAS MADE
BY THIS COURT.

>> I WOULD SAY YOUR ANSWER IS
NO, IT MEANS NOTHING.

I APPRECIATE THAT.

I THINK YOU'RE IN YOUR REBUTTAL.

>> OH, YES I AM.

THANK YOU.

>> MORNING YOUR HONORS, MAY IT
PLEASE THE COURT I'M CAROL
DITTMAR, ATTORNEY GENERAL'S

OFFICE REPRESENTING APPELLEE IN THIS CASE STATE OF FLORIDA. ONE OF THE MAIN DISTINCTIONS OF HURST AND FUHRMAN. HURST WAS NOT REMANDED FOR ERROR ANALYSIS BY ANY COURT. THOSE CASES CLEARLY HAD TO GO BACK TO THE DRAWING BOARD AND BACK TO SQUARE ONE AND HURST WE KNOW, IT'S A SIXTH AMENDMENT ERROR, NOT AN EIGHTH AMENDMENT ERROR.

IT IS VERY NARROW. THE U.S. SUPREME COURT HAVE A WHOLE LINE OF CASES TALK ABOUT THIS PARTICULAR SIXTH AMENDMENT ERROR.

IT IS EASY TO IDENTIFY AND FIX WITH PROCEDURAL RULING FROM THIS COURT.

IT IS EASY TO DETERMINE WHETHER OR NOT SIXTH AMENDMENT ERROR OCCURRED ON THE FACTS OF ANY GIVEN CASE AND THE ONLY REASON YOU WOULD HAVE TO REMAND A CASE IF YOU FOUND THERE WAS HARMFUL SIXTH AMENDMENT ERROR THAT OCCURRED.

>> IF WE GO TO, IF WE DECIDE THAT IT HAS TO BE REMANDED, DO WE WHITE UNTIL THE LEGISLATURE PASSES THE STATUTE, OR CAN WE DO WHAT JUSTICE QUINCE WAS SAYING, CAN WE, AND JUSTICE LEWIS, CAN WE ESSENTIALLY TAKE THE STATUTE AND SAY, THAT WHATEVER WERE JUDGE FINDINGS WOULD NOW BE JURY FINDINGS?

>> I THINK YOU NOT ONLY CAN BUT HAVE OBLIGATION TO DO THAT BECAUSE YOU HAVE AN OBLIGATION TO UPHOLD THE STATUTE TO THE EXTENT YOU HAVE THE ABILITY TO DO SO AND YOU CAN DO THAT WITH-- THERE'S AN EASY PROCEDURAL FIX TO THIS.

>> DIDN'T THEY SAY UNCONSTITUTIONAL AS APPLIED. THAT IS MY PROBLEM. THEY SAID IT WAS

UNCONSTITUTIONAL.

SO I'M A LITTLE, YOU KNOW, I'M A LITTLE, THE CONCERN IS ALWAYS THE COURT BEING, DOING MORE THAN IS WITHIN ITS JURISDICTION.

SO I DON'T-- AND WE DIDN'T EVEN FEEL WE COULD DO SPECIAL VERDICTS BECAUSE WE THOUGHT THAT WOULD BE DIFFERENT FROM THE STATUTE, IN REWRITING THE STATUTE.

SO NOW--

>> BUT IT IS NOT SUBSTANTIVE, IT IS PROCEDURAL CHANGE.

IF YOU GO BACK TO ARIZONA AND THE QUESTION YOU ASKED EARLIER ABOUT WHAT ARIZONA DID WITH THEIR PIPELINE CASES, THEY FOUND THAT THEIR STATUTE HAD NOT BEEN COMPLETELY OVERRIDDEN BECAUSE YOU COULD SEVER OUT THE PART WHERE THE JUDGE IS MAKING THE FINDING.

AND THEY HANDLED CASES THAT WAY. THEY DID NOT DO THIS.

>> BECAUSE THEY HAD NO JURY DETERMINATION.

WHAT DID THEY DO WITH THOSE CASES PENDING ON DIRECT APPEAL?

>> THEY FOUND THE PART THAT REQUIRED THE JUDGE TO MAKE EXTRA FINDINGS WAS, WAS SEVERABLE AND THE STATUTE WAS STILL, COULD STILL BE USED.

>> THEY HAD-- WHAT DID THEY DO? BECAUSE THEY DIDN'T HAVE ANY PROVISION FOR THE JURY TO DO THE WEIGHING UNLIKE FLORIDA?

>> I HAVE TO GO BACK AND LOOK AT THE SPECIFIC CASES TO SEE IF THERE WERE PRIOR CONVICTIONS OR WHAT THE, WHAT THE-- BUT THE ANALYSIS WAS, BASICALLY IN THE CASE THAT WAS CITED, I THINK THE BRIEFS TALK ABOUT THE ARIZONA CASE AND WHAT THEY SAY IS, BECAUSE IT IS SEVERABLE, AND THEY, THAT THEY DID NOT HAVE TO FOLLOW A STATUTE THAT PUT IT INTO LIFE, TO LIFE IMPRISONMENT.

>> IN ARIZONA I THINK THEY HAD ONE AGGRAVATOR FOR DEATH BECAME MANDATORY.

HERE WE HAVE THIS BALANCING BETWEEN AGGRAVATORS AND THE MITIGATORS AND IT HAS TO BE DETERMINED BY THE JURY.

WHAT IF, WHAT IS THIS EASY FIX YOU'RE TALKING ABOUT?

>> FIRST OF ALL I DON'T AGREE THE BALANCING HAS TO BE DONE BY A JURY.

I THINK THE AGGRAVATING-- I READ HURST TO SAY AGGRAVATING FACTOR.

I UNDERSTAND IT'S A LITTLE AMBIGUOUS.

IT MAY BE ALL AGGRAVATING FACTORS IN THIS CASE, THE MORRIS CASE, WE HAVE TWO AGGRAVATING FACTORS AND AS TO THE SECOND ONE I KNOW THERE WAS COMMENTS--

>> WHAT IS THE EASY FIX.

>> EASY FIX TO REQUIRE SPECIAL JURY VERDICTS AS TO ONE AGGRAVATING FACTOR OR ALL THE AGGRAVATING FACTORS AS THIS COURT SEES FIT.

>> I RESPECTFULLY, SEEMS TO ME THE UNITED STATES SUPREME COURT HAS SAID IN HURST VERY CLEARLY THAT THE FACTS THAT ARE NECESSARY FOR IMPOSITION OF A DEATH SENTENCE MUST BE FOUND BY A JURY.

DO YOU AGREE WITH THAT.

>> NO.

>> YOU DO NOT?

>> I THINK, ONLY THING IS REQUIRED IS ELIGIBILITY DECISION.

>> I THINK THAT HAS GOTTEN US INTO TROUBLES IN THE PAST WITH YOU ALL USING THESE PHRASES ELIGIBILITY.

THIS IS NOT ELIGIBILITY.

IT'S A QUESTION OF WHETHER THE DEATH SENTENCE CAN BE IMPOSED.

>> IN THIS CASE WE HAVE THE JURY RECOMMENDATION SAYING THAT THEY

HAVE MADE THAT WEIGHING FACTOR
BUT BEFORE YOU GET TO THAT I
JUST WANT TO POINT OUT BECAUSE I
KNOW THIS COURT WAS TALKING
ABOUT WAS, THERE ANY REAL
DISPUTE ABOUT THE THESE VICTIMS
WERE LAW ENFORCEMENT.

>> I AGREE WITH YOU ON-- THERE
ARE TWO--

>> ONE OTHER SENTENCE ABOUT
THAT.

>> PLEASE, AS JUSTICE POLSTON
GOT THE CLEAR CONCESSION, THERE
IS NO ARGUMENT, NO DISPUTE THE
VICTIMS WERE OFFICERS.

SO WE HAVE THOSE AGGRAVATING
FACTORS AND IT COULD BE HARMLESS
ERROR AS TWO THOSE TWO BUT WHEN
YOU START BALANCING DOES, DOES
THAT AGGRAVATOR OR THESE
AGGRAVATORS OUTWEIGH THE
MITIGATORS, WHATEVER IT WAS, SHE
SAID THERE ARE 22 OF THEM.

NOW WHY--

>> YOU HAVE TO FACTOR INTO THAT
THOUGH SOME OF THE MITIGATORS
AND I THINK YOU HAVE TO
NECESSARILY TAKE IT AS A WAIVER
OF A JURY FINDING WHEN THE
JUDGE, WHEN THE DEFENSE TORN
MAKE AS DECISION TO PRESENT
MITIGATION AT A SPENCER HEARING
BECAUSE THEY WANT THE JUDGE TO
CONSIDER IT, THAT THEY DIDN'T
WANT THE JURY TO CONSIDER--

>> I COULD SEE THAT.

>> I MEAN I THINK THEY WAIVED
THEIR JURY WITH REGARD TO
ANYTHING THAT WENT TO THAT
EXTENT.

AND YOU ALSO HAVE--

>> MAY I ASK A QUESTION PLEASE?
IF THEY PRESENT NO MITIGATION TO
THE JURY AT ALL?

>> NO, THEY PRESENTED SOME
FAMILY HISTORY MITIGATION.

>> OKAY.

THEY PRESENTED SOME AND
PRESENTED ADDITIONAL DURING THE
SPENCER HEARING.

>> ALSO AS TO THE AGGRAVATORS WE HAD A CONVICTION FOR THE ESCAPE WAS ALL I WAS GOING TO MENTION. THERE IS A JURY CONVICTION FOR THAT ONE FOR THE ESCAPE AGGRAVATOR.

>> DOESN'T HURST REALLY SAY THAT THE JURY SHOULD BE THE FINDER OF AGGRAVATORS AND THE MITIGATORS? IT SEEMS TO ME, IN OUR SCHEME OF DEATH PENALTY, THAT EVEN IF YOU HAVE A -- THERE HAS TO BE A FINDING THAT MITIGATORS DON'T OUTWEIGH THE AGGRAVATING, OR WHICHEVER WAY IT IS SUPPOSED TO BE DONE. SO IF THE JURY HAS TO MAKE THE FACTUAL FINDINGS THAT WOULD SUPPORT-- SENTENCE OF DEATH, THEY WOULDN'T NECESSARILY THEN, WOULD THEY, AND EXPLAIN TO ME ABOUT WHY NOT, THEY WOULD NECESSARILY ALSO HAVE TO FIND THE AGGRAVATE-- MITIGATORS, OTHERWISE THAT WEIGHING, THAT HAS TO TAKE PLACE WHETHER THERE IS MITIGATORS OUTWEIGH THE AGGRAVATORS, YOU CAN'T DO IT WITHOUT A FINDING OF THE, OF THE MITIGATORS?

>> WELL, AND THE PROBLEM IS WHEN YOU GET NO THAT POINT YOU'RE NOT TALKING ABOUT THE FINDING OF HISTORICAL FACT ANYMORE. IN THE KANSAS v. CARR CASE THE U.S. SUPREME COURT DECIDED A WEEK AFTER HURST THEY SAID THIS MITIGATION AND WEIGHING THAT TYPE OF STUFF, THOSE ARE JUDGMENTS.

THOSE ARE NOT FINDINGS OF HISTORICAL FACT MADE BY A JURY. SO I DON'T THINK THERE'S ANY, I DON'T READ HURST AT ALL SAYING YOU REQUIRE JURY SENTENCING. THAT SEEMS TO BE WHAT THIS COURT IS SUGGESTING BY SAYING, WILL THE JURY HAS TO MAKE THE ULTIMATE WEIGHING DETERMINATION.
>> NO.

I HAVEN'T GOTTEN TO THAT POINT
YET, ALTHOUGH I MAY THINK THAT.
BUT I'M TALKING ABOUT THE FACTS
OF THE MITIGATION.

THOSE ARE IN FACT FACTS, WHETHER
OR NOT HE HAS BRAIN DAMAGE.

WHETHER OR NOT THE DEFENDANT HAD
A TERRIBLE CHILDHOOD.

THOSE ARE FACTS.

SO WHETHER, ISN'T, SHOULDN'T
THOSE FACTS BE FOUND BY THE
JURY?

>> IF, THAT'S HOW THIS COURT
READS HURST I SUPPOSE THAT IS
THE CONCLUSION IT WOULD REACH
BUT I JUST DON'T SEE HOW
ANYTHING IN HURST SAYS WE'RE
ABANDONING ELIGIBILITY AND GOING
STRAIGHT AND PERMITS, REQUIRING
JURY SENTENCING AT THIS POINT.
I DON'T KNOW WHY BREYER WOULD
HAVE SPECIAL CONCURRENCE SAYING
WE SHOULD GO THIS FAR--

>> JURY SENTENCING SIMPLY
BECAUSE THE JURY FOUND THE
AGGRAVATORS AND THE MITIGATORS.

>> BUT YOU'RE SAYING MAKING
ULTIMATE WEIGHING DETERMINATION
ALSO.

>> NOT MAYBE.

I'M NOT SURE WHAT I AM ON THAT.

>>-- THAT'S WHAT'S REQUIRED.

>> BUT THOSE ARE FACTS.

>> SOME OF THE MITIGATION CAN BE
FACT.

>> RIGHT.

SO SHOULDN'T SHOWS FACTS BE
DETERMINED BY A JURY?

>> I DON'T READ HURST AS
REQUIRING THAT.

YOU KNOW, I BELIEVE HURST, I
KNOW HURST HAS SOME BROAD
LANGUAGE BUT I THINK WHEN YOU
LOOK AT HURST AT THE VERY END
WHERE THEIR LANGUAGE IS TIGHTER
IN CONCLUDING, THEY'RE SAYING A
JURY CAN NOT FIND, I'M SORRY, A
JUDGE CAN NOT FIND AGGRAVATING
FACTOR WITHOUT A JURY.

I THINK IT IS TELLING THAT WHEN

HURST TALKS ABOUT THE FACT
THEY'RE OVERTURNING SPAZZIANO
AND HILDWIN AND NOT
OVERTURNING PROFIT.
ONLY PROBLEM JUDGE MAKING
FINDINGS THEY'RE NOT SUPPORTED
BY JURY VERDICT.
IN THIS CASE WE HAVE TWO
AGGRAVATING FACTORS SNORTED BY
JURY VERDICTS.
>> SPAZIAN, FINDING FACTS JURY
HAD NOT FOUND-- SPAZIANO.
>> SIXTH AMENDMENT CASES.
DOES THE JURY HAVE MORE ROLES.
THE UNITED STATES FOR YEARS SAID
NO, NO.
BUT THEY DIDN'T OVERRULE PROFIT.
THEY DIDN'T VERY JUDGE COME IN
DO WONDERFUL SENTENCING ORDERS
AND DO ALL THE FINDINGS FOR THIS
COURT TO MAKE PROPORTIONALITY
ANALYSIS.
THAT IS SOMETHING VERY IMPORTANT
AND WOULD BE GREAT TO PRESERVE.
>> HERE IS THE PROBLEM WHERE
YOU'RE GOING AND IN LIGHT OF
WHAT THE U.S. SUPREME COURT
SAYS.
YOU'VE BEEN HEAR ARGUING ON THE
DEATH PENALTY AND VERY
PROFESSIONALLY FOR A LONG TIME
AND IS THAT THE, YOU BO BACK TO
WHAT FUHRMAN SAYS AND YOU LOOK
AT DIXON AND THE WHOLE IDEA WAS
THAT DISCRETION AS TO WHO GETS
DEATH AND WHO GETS LIFE HAS TO
BE VERY LIMITED AND THE WAY
THAT, FLORIDA JUMPED IN AND
CLEARLY THEY THOUGHT, I WOULD
GIVE THEM THAT BENEFIT OF THE
DOUBT THEY WERE DOING THE BEST
OF EVERYTHING, WHICH IS TO SAY,
FIRST WE'LL HAVE THE JURY MAKE A
RECOMMENDATION.
>>-- COMMUNITY.
>> AND THEN WE'RE GOING TO HAVE
THE JUDGE WHO ISN'T GOING TO BE
MAYBE SWAYED BY EMOTION, MAKE A
MAKE A DETERMINATION.
WE KNOW OVER THE YEARS WE WANT

MORE AND MORE FACTUAL
DETERMINATIONS SO WE CAN
UNDERSTAND -- FACTUAL.
THIS COURT WHO SEES EVERY DEATH
PENALTY CASE SAYING OKAY, THIS
IS THE WORST OF THE WORST.
MOST MITIGATED, LEAST MITIGATED,
MOST AGGRAVATED.
AT THIS POINT THOUGH IT SEEMS TO
ME, AND WHAT HAS HAPPENED IN
THIS COUNTRY AND WITH THE UNITED
STATES SUPREME COURT THAT WE'RE
GOING TO A SITUATION WHERE THE
JURY HAS TO BE ABLE TO MAKE
THESE CRITICAL FINDINGS SO THAT
WE ARE NARROWING, NOT BROADENING
THE DEATH PENALTY IN FLORIDA,
TELLINGLY OVER ALL THE STATES IN
THE UNITED STATES IS IMPOSING
MORE DEATH SENTENCES THAN OTHER
STATES THAT HAVE LIMITED IT
THROUGH JURY FINDINGS.
AND SO MY CONCERN IS, SO THAT
YOU KNOW, TO PRESERVE THE DEATH
PENALTY UNDER EIGHTH AMENDMENT
WE HAVE TO LIMIT IT.
WITH WHICH MEANS THAT THE JURY
HAS TO MAKE SPECIFIC FINDINGS OF
FACT.
I DON'T THINK THAT TAKES AWAY
THE JUDGE'S ROLE TO MAKE SURE
THAT THE JURY RECOMMENDATION OF
DEATH IS TOTALLY SUPPORTED AND
THROUGH THEIR OWN INDEPENDENT
WEIGHING TO MAKE SURE THE
AGGRAVATORS OUTWEIGH THE
MITIGATORS OR THAT THIS COURT
DOESN'T LOOK AND DO ITS OWN
PROPORTIONALITY REVIEW BECAUSE
WE NEED THREE LAYERS OF
PROTECTION BUT THE JURY WE HAVE
SAID NOW FOR THE LAST 15 YEARS
THAT THE JURY, IF THEY SAY LIFE,
IT'S LIFE.
SO NOW WE HAVE THE JURY WHO MUST
MAKE MORE CRITICAL FINDINGS,
MAKING THAT DECISION AND FLORIDA
STATUTE HAS THEM IN THAT ROLE.
SO I DON'T GET, I GUESS, EVEN
THOUGH I COULD READ HURST THAT

THE IDEA THAT THERE ONLY HAS TO BE ONE AGGRAVATOR FOUND IS WHAT IS IN OUR STATUTE OR WHAT THE U.S. SUPREME COURT SAID IN HURST.

I DON'T SEE HOW YOU GET THERE?

>> I THINK THIS IS A PROBLEM AND I THINK JUSTICE SCALIA TALKED ABOUT CREATED BY THE U.S. SUPREME COURT BECAUSE OF THEIR EIGHTH AMENDMENT JURISPRUDENCE AND YOU BRING IN THE SIXTH AMENDMENT AND THERE IS TENSION AND CONFLICT BECAUSE THERE IS NOTHING ABOUT THE JURY FINDINGS THAT MAKES THE SENTENCE MORE RELIABLE.

THAT NECESSARILY UNDER EIGHTH AMENDMENT MAKES IT A BETTER SENTENCE.

I THINK ALL WE CAN DO--

>> WE OBVIOUSLY THINK THE JURIES MAKE, THEY'RE THE ONES THAT DETERMINE THE GUILT OF EVERY DEFENDANT UNLESS IT'S WAIVED SO THAT RIGHT, HARD TO SAY THAT IS JUST MERE PROCEDURE.

I MEAN, WE REQUIRE INSTRUCTIONS THAT ARE PRECISE FOR JURIES AND WHICH DON'T ALLOW CERTAIN ARGUMENTS.

WE TELL THEM EVEN AFTER THEY WEIGH THE AGGRAVATING AND MITIGATION THEY STILL HAVE THE RIGHT TO EXERCISE MERCY.

SO WE PUT THE JURY FRONT AND CENTER IN THE MOST CRITICAL DECISIONS IN THIS CRIMINAL JUSTICE SYSTEM AND IN THE CIVIL JUSTICE SYSTEM.

SO TO SAY IT IS JUST, A MERE PROCEDURE IS, I THINK FLIES IN THE FACE OF WHAT OUR COUNTRY HAS BEEN ABOUT, YOU KNOW, HONESTLY.

>> I THINK THE ONLY, THE WAY YOU CAN READ HURST TO FIT INTO ALL THE OTHER CASES IS TO SAY IT IS ELIGIBILITY THEY'RE TALKING ABOUT AND NOT, NOT COMING INTO ACTUALLY MAKING FINDINGS ON THE

MITIGATION BECAUSE I DON'T SEE HOW THAT'S SOMETHING THAT IS ENCOMPASSED IN CERTAINLY NOT IN RING OR THE CASES--

>> YOU DON'T THINK OUR DEATH PENALTY STATUTE TALKS ABOUT ELIGIBILITY.

THEY TALK ABOUT THERE IS NO SUCH NOTION IN THERE THAT THERE HAS TO BE ONE AGGRAVATOR AND THEY ARE ELIGIBLE.

THEY DON'T EVEN HAVE ABOUT THE JURY OVERRIDES.

THIS IS ALL OUR JURISPRUDENCE. THE DEATH PENALTY STATUTE TALKS ABOUT A WEIGHING PROCESS, FINDING A GATE-- AGGREGATORS AND MITIGATORS TO FIND ONE OUTWEIGHING THE OTHER.

>> THIS COURT TALKED ABOUT ELIGIBILITY AND DEFINED IT BECAUSE OF RING.

RING PUT IT UP THERE YOU HAD TO MAKE THE DETERMINATION WHEN ELIGIBILITY OCCURRED.

>> I DON'T THINK THIS COURT-- WE DECIDED THAT THE RING DIDN'T APPLY IN FLORIDA.

SO WHATEVER WE SAID FOR 14 YEARS IS JUST, IT'S, WE DIDN'T SAY IT. I DON'T KNOW WHERE YOU'RE GETTING ELIGIBILITY IS, WAS A DECISION THAT THIS COURT MADE AS MAJORITY OF THE COURT.

>> WELL I, I HAD READ THAT, I THOUGHT IT WAS IN STEELE AND SEVERAL OTHER CASES WHERE THIS COURT SAID ELIGIBILITY-- ELIGIBILITY IS A TERM, UNFORTUNATELY SEMANTICS CAN BE USED A LOT OF WAYS.

YOU COULD MAKE THE--

>> THIS CASE THERE IS PRIOR VIOLENT FELONY AGGRAVATOR.

>> THERE IS.

>> WHO WHAT IS YOUR POSITION AND HOW DO WE TREAT THEM?

>> PRIOR VIOLENT FELONY TAKES EVERYTHING OUT OF THE WHOLE RING, HURST SCENARIO BECAUSE ALL

OF THESE CASES HAVE ALWAYS--
TIMOTHY HURST, TIMOTHY RING,
THEY WERE CASES THAT DID NOT
HAVE A PRIOR CONVICTION AND THEY
DID NOT CHALLENGE THAT EXCEPTION
IN APPENDI WHICH IS WHERE THIS
ALL STARTED BUT YOU DON'T HAVE
TO HAVE JURY FINDINGS IF YOU
HAVE A PRIOR CONVICTION THAT
BASICALLY PUTS THAT DEFENDANT IN
A CATEGORY OF OFFENSES WHERE HE
IS SUBJECT TO A DEATH SENTENCE.
SO WE DO HAVE THE PRIOR
CONVICTION IN THIS CASE.

WE HAVE, AS JUSTICE PARIENTE
NOTED, PRIOR CONVICTIONS IN THE
PENDING CASES THAT WHERE CERT
WAS DENIED AFTER HURST AND THAT
HAS ALWAYS BEEN RECOGNIZED AS AN
EXCEPTION AND IT'S NEVER BEEN
REALLY PUT IN DOUBT.

>> THIS POSITION BECAUSE THERE
IS THE PRIOR VIOLENT FELONY THAT
THE JURY DOES NOT NEED TO MAKE
ANY OTHER FINDINGS?

>> THAT'S MY POSITION.

HOWEVER, I ALSO THINK IF YOU
LOOK AT THE FACTS OF THIS CASE
WE HAVE JURY FINDINGS FOR BOTH
AGGRAVATING FACTORS.

SO--

>> OKAY.

NOT THIS, I'M THINKING OF CASES
IN GENERAL.

>> YES.

PRIOR CONVICTION SATISFIES THE
REQUIREMENT.

>> WHAT DO WE DO WITH-- THEN
THE JUDGE IS STUCK WITH THAT
PRIOR AGGRAVATOR?

BECAUSE AS I READ HURST THE
JUDGE CAN'T MAKE AN
AGGRAVATING-- CAN NOT FIND AN
AGGRAVATING FACTOR THAT HAS NOT
BEEN FOUND BY THE JURY.
THAT IS THE PROBLEM I HAVE WITH
THAT.

>> THEN YOU CAN CERTAINLY
REQUIRE SPECIAL JURY VERDICTS ON
AGGRAVATING FACTORS TO KNOW

WHETHER OR NOT THE JURY FOUND THE AGGRAVATING FACTORS IN ORDER FOR THE JUDGE TO RELY ON THEM. BUT IN THIS PARTICULAR CASE WE HAVE JURY VERDICTS FOR BOTH AGGRAVATING FACTORS.

>> HERE IS THE ISSUE, AND AGAIN WE CAN ADDRESS HARMLESS ERROR WHICH IS I THINK WHAT YOU WANT TO PROBABLY TALK ABOUT.

>> YES.

>> AS FAR AS THE ISSUE OF THIS PRIOR VIOLENT FELONY WHICH I CERTAINLY JUMPED ON AFTER RING, I THINK THE PROBLEM IS THAT YOU CAN NOT TAKE APPRENDI OR BLAKELY OR ANY OF THESE CASES WHERE YOU NEED A FIREARM AND THEN INSTEAD OF BEING 10-YEAR SENTENCE IT'S A 25-YEAR SENTENCE.

THAT IS NOT THE WAY THE DEATH PENALTY WORKS.

IT IS NOT AS IF YOU'VE GOT ONE AGGRAVATOR AND NOW YOU HAVE DEATH.

IT'S, IF YOU DON'T HAVE THE ONE AGGRAVATOR YOU HAVE MANDATORY LIFE.

BUT, YOU DO NOT HAVE A DEATH SENTENCE.

AND, WE ALL WOULD AGREE WITH THIS, WITH ONE AGGRAVATOR.

WHATEVER, WHATEVER ARIZONA DID, THEY COULDN'T HAVE A STATUTE THAT SAYS ONE AGGRAVATOR YOU GET DEATH BECAUSE THIS WOULD BE UNCONSTITUTIONAL UNDER I THINK UNDER FUHRMAN, UNDER THE EIGHTH AMENDMENT.

SO HOW DO WE-- I JUST DON'T THINK THAT THE TRANSFER OF THE PRIOR VIOLENT FELONY EXCEPTION WORKS FOR THE A DEATH PENALTY AS AT LEAST SET UP IN FLORIDA TO BE CONSTITUTIONAL UNDER DIXON, WHICH IS, THAT IT'S ONLY CONSTITUTIONAL BECAUSE YOU'VE GOT AGGRAVATORS, AND THEN SUBSEQUENTLY MITIGATORS AND WEIGHING AND OTHERWISE, IT WOULD

BE UNCONSTITUTIONAL.
AND SO, I DON'T SEE THAT
PRIOR VIOLENT FELONY EXCEPTION
THAT WAS WORKING IN APPRENDI,
THE CASE INVOLVING THAT I CAN'T,
INVOLVING DEPORTATION, THAT THEY
SAY MAY HAVE, MAYBE NEEDS TO BE
OVERRULED.

BUT THAT WORKS IN THE DEATH
PENALTY CONTEXT.

>> IF YOU TAKE THE THINKING TO
LOGICAL EXTENSION, WHERE YOU
DON'T, DON'T HAVE A DEATH
SENTENCE IN FLORIDA, UNTIL THE
TRIAL JUDGE FILES A WRITTEN
SENTENCING ORDER CONTEMPORANEOUS
PRONOUNCING A
DEATH SENTENCE.

ARE YOU GOING TO REQUIRE A JURY
MAKE A FINDING THAT A TRIAL
JUDGE HAS FILED A WRITTEN
SENTENCING ORDER?

TAKING IT TO ITS EXTREME IS THAT
SUBJECT TO A JURY FINDING THAT
OCCURS BEFORE SOMEONE IS
ACTUALLY ABLE TO RECEIVE A DEATH
SENTENCE?

>> IS THAT IN OUR STATUTES?

>> YES.

>> IS THAT PROCEDURE?

I MEAN, OR IS THAT SUBSTANCE?
I GUESS THE QUESTION ABOUT ALL
OF THIS IS THAT THE RIGHT TO A
JURY TRIAL, IF IT'S PROCEDURE,
THEN WE HAVE THE ABILITY TO MAKE
THOSE DECISIONS, RIGHT?

IF IT IS SUBSTANTIVE, WE HAVE TO
WAIT FOR THE LEGISLATURE?

>> WELL THE RIGHT TO A JURY
TRIAL ITSELF IS A SUBSTANTIVE
RIGHT BUT THE WAY IT IS, YOU
HAVE TO PROTECT IT THROUGH
PROCEDURAL MECHANISMS.

PROTECT A SIXTH AMENDMENT RIGHT
BY HAVING A SYSTEM IN PLACE TO
ALLOW THE JURY TO MAKE WHATEVER
FINDINGS HURST REQUIRES.

WE CAN SET ASIDE EXACTLY WHAT
HURST REQUIRES.

I READ IT REQUIRING ONE

AGGRAVATOR FOR ELIGIBILITY.
I UNDERSTAND YOUR ARGUMENT.
THIS IS ENHANCEMENT.

THERE ARE A LOT OF OTHER THINGS
GO INTO IT, BUT THEY GO INTO IT
AFTER FINDING OF ELIGIBILITY.

>> WHAT IS YOUR ARGUMENT--
FIRST OF ALL I ASSUME YOU WOULD
SAY THAT HURST ERRORS CAN BE
HARMLESS BEYOND A REASONABLE
DOUBT?

>> ABSOLUTELY.

>> DO YOU AGREE WITH THE WAY
JUSTICE CANADY ENUNCIATED IT.

--

>> CAREFULLY THAT THE FINDING
THAT THE JUDGE MADE.

IF THE JUDGE IS RELYING ON
AGGRAVATING FACTOR NOT FOUND BY
THE JURY WE UNDER NETTER CASE,
NO QUESTION THAT THE JURY WOULD
FIND THIS IT'S HARMLESS.

THEY GIVE US THAT ANALYSIS AND
SAY IT DOESN'T HAVE, BASICALLY
WAS UNCONTESTED FACT.

SO THEY FIND AND THAT WAS A CASE
WHERE THE ELEMENT OF MATERIALITY
HAD NOT BEEN SUBMITTED TO A
JURY.

SO THERE WAS OMISSION IN ELEMENT
OF THE OFFENSE FROM THE JURY
VERDICT WHICH IS EXACTLY THE
SAME SIXTH AMENDMENT SITUATION
WE'RE LOOKING AT.

AND THEY SAY, REALLY WAS NO
CHALLENGE THAT THAT EXISTED, IT
IS HARMLESS ERROR.

I THINK THAT IS THE HARMLESS
ERROR ANALYSIS APPROPRIATE.

I THINK, I DON'T SEE HOW YOU GET
TO HARMLESS ERROR IN THIS CASE
WHEN YOU HAVE SPECIFIC JURY
FINDINGS ON BOTH AGGRAVATING
FACTORS.

SO I DON'T SEE THE NEED FOR
HARMLESS ERROR BUT I THINK
THAT--

>> THAT ASSUMES, THAT THE
WEIGHING IS NOT REQUIRED TO BE
PART OF THAT PROCESS.

>> YES IT IS.
THAT ASSUMES THAT IT JUST GOES
TO THE AGGRAVATING AND NOT TO
THE WEIGHING AND NOT TO
MITIGATION WHICH I THINK ARE
MORE JUDGMENT CALLS.
>> WOULD YOU AGREE WITH THE
DIFFERENCE BETWEEN WEIGHING OF
MITIGATORS AND FINDINGS OF
MITIGATORS?
IN OTHER WORDS, I DON'T SEE--
OKAY.
SO ESPECIALLY THE ONE THAT TALKS
ABOUT THE STATUTORY MITIGATOR
OF, AND I DON'T KNOW IF THAT'S
HERE IN THIS CASE, SUBSTANTIAL,
I NEVER GET THIS RIGHT.
>> SUBSTANTIAL IMPAIRMENT.
THEY PUT ON AN EXPERT AT THE
SPENCER HEARING.
HER TESTIMONY WAS THAT MORRIS
DID NOT SUFFER FROM EITHER ONE
OF THE STATUTORY MITIGATORS.
>> ISSUE HERE IS ALWAYS, WE'VE
GOT SOME AFFIDAVITS HOW THESE
CASES ARE TRIED OR MAY BE TRIED
NOW WILL BE DIFFERENT IF THERE'S
A JURY FINDING.
WHAT I'M SAYING IS, THAT THAT,
THOSE FACTS AS TO WHETHER
SOMEBODY IS, IS NOT A JUDGMENT,
I MEAN, IT'S WEIGHING FACTS AND
MAKING A DECISION BUT NO MORE
THAN WHETHER IT'S CCP OR HAC.
>> HARD ESPECIALLY WITH MENTAL
MITIGATION, IF YOU GET INTO THEY
HAVEN'T MET STATUTORY, IT IS
IT IS PROBABLY -- IT IS LISTED
AND FOUND THE.
WE HAVE A CASE TOMORROW.
>> YOU DO.
>> AS I READ THAT TWO IS NOT
REQUIRED FOR THE JURY TO MAKE
FINDINGS OF AN MITIGATION
REPROCESS.
IT IS A SINGLE AGGRAVATOR.
I CAN SEE THE ARGUMENT.
>> DID YOU LOOK AT THE BRIEF IN
FLORIDA INSURANCE GUARANTY?
IT WAS ARGUED AS FINDINGS IN

OTHER ISSUE IS, RIGHT TO JURY
WAS IN THE EIGHTH AMENDMENT
DISCUSSION.

>> A LOT OF FLORIDA INSURANCE
GUARANTY WENT INTO THE
INTELLECTUAL DISABILITY FINDING
AND THAT DOESN'T COME AT IN THE
OPINION THAT THERE WERE A LOT OF
THINGS IN BRIEF AND THE OPINION
ITSELF IS VERY NARROW AND IS
TAILORED GOING TO WHAT THE
PROBLEM IS.

FOR THESE REASONS I ASK THAT YOU
OF FIRM THAT CONVICTIONS,
JUDGMENT OF SENTENCES AND
CONVICTIONS.

>> OF ALL OF THE AGGRAVATOR CAN
BE COUNTED ISN'T EVEN MANDATORY
THAT IT GOES TO PENALTY PHASE.
A PENALTY PHASE IS NOT
MANDATORY.

CERTAINLY THAT AGGRAVATORS ALONE
TO NOT MAKE A PERSON DEATH
ELIGIBLE.

HURST POINTS OUT WHOLE PROCESS

--

>> WHAT YOU MEANT WHEN YOU SAID
YOU NEED NOT HAVE A PENALTY
PHASE, WE KNOW A DEFENDANT CAN
ALWAYS --

>> THE STATE HAS TO SEEK DEATH.
IN OTHER WORDS IS NOT AUTOMATIC.
THE STATE HAS TO SEEK DEATH.
IN OTHER WORDS IF THEY ARE A
DOUBLE TRIPLE HOMICIDE THE STATE
CAN JUST NOT SEEK DEATH SO IN
OTHER WORDS IT DOESN'T
AUTOMATICALLY PUT YOU DOWN
ELIGIBLE --

>> THE STATE SEEKS DEATH YOU
HAVE THOSE MITIGATINGS.

>> YOU DEFER TO WHAT THE
LEGISLATURE SAYS.

THE LEGISLATURE TO REGARD THE
SENTENCING AND A FACT-FINDING
HAS REQUIRED IS REQUIRED UNDER 3
A SUFFICIENT AGGRAVATED
CIRCUMSTANCES, NOT ONE AND
GREATER AND NOT OR LEAVE THAT
BUT LEGISLATURE IF YOU LOOK AT

THE LAST WORDS OF THE FIRST
PARAGRAPH BEFORE THAT.

>> THERE IS NO ARGUMENT BEING
MADE THAT THERE IS NO WAY YOU
DON'T HAVE TO LOOK AT THE
AGGRAVATORS AND MITIGATINGS TO
SEE MITIGATEDS DON'T OUT WHEN
AGGRAVATORS, SO STILL THAT
PROCESS, CORRECT?

>> CORRECT BUT IT SAYS THE
LEGISLATURE HAS SAID AS TO THE
FACTS, IN OTHER WORDS, THERE ARE
INSUFFICIENT MITIGATING
CIRCUMSTANCES TO OUT WEIGH
AGGRAVATING CIRCUMSTANCES.
OUR LEGISLATURE HAS DECIDED THAT
IS A FACT.

IF YOU LOOK AT HURST HURST PICKS
UP THE LANGUAGE INDEED IS BEFORE
AN ECLIPSE THE SAYS AS TO THE
FACTS AND SETS IT OUT SO IT IS
THE WHOLE PROCESS THAT MAKES THE
PERSON DEBT ELIGIBLE.

ONE THING THE STATE HAS SAID IS
SOMEHOW HE WAVED THE MITIGATION
IN SPENCER BECAUSE HE DID NOT
PRESENT IT TO THE JURY.

HE DID NOT KNOW THAT THE JURY,
THE JURY CAN'T BE THE FACT
FINDER IN THE CASE BECAUSE THEY
DID NOT MAKE THE FINDINGS OF
FACT AND TO TRY TO GUESS WHAT
COUNCIL STRATEGY WOULD HAVE BEEN
WOULD NOT HAVE BEEN HAD HE KNOWN
THE JURY RECOMMENDATION WAS
GOING TO MORE OR LESS
SUBSTITUTES.

>> THAT KIND OF INFORMATION IS
PRESENTED OLD-TIME AND OTHER
DEATH PENALTY CASES, ALL OF THIS
INFORMATION ABOUT WHETHER OR NOT
HE HAS 32 STATUES WERE IN
LITIGATORS, THOSE ARE PRESENTED
OVERTIME AND WE SEE OTHER CASES
WHERE FOR WHATEVER REASON THE
DEFENSE ATTORNEY DECIDES TO
PRESENT IT TO THE JUDGE.

>> EXACTLY.

WHAT I AM SAYING IS JUST SAY
THAT SOMEHOW, IF THIS TRIAL

ATTORNEY HAD KNOWN YOU WERE GOING TO BE LOOKING AT A HARMLESS ERROR ANALYSIS WITH REGARD TO 12-0 RECORD WOULD HE HAVE CHANGED HIS STRATEGY? THE ANSWER IS ABSOLUTELY YES. ALL OF THAT STUFF ABOUT THE MENTAL MITIGATION ABOUT HIS LOW IQ AND EVERYTHING DEFINITELY WOULD HAVE BEEN PRESENTED TO THE JURY AND THAT COMPLICATES --

>> THEY ARE SPECULATING WHAT MIGHT BE IN DEFECT --

>> IT IS NOT EFFECTIVE.

>> IF WE LOOK AT THE CHANCE TO GET LIFE, ARE YOU TELLING ME JURIES DO NOT -- DEFENSE ATTORNEYS IN NOT ACTUALLY LOOK AT TRYING TO GET A JURY RECOMMENDATION OF WHITE AND DO WHATEVER THEY CAN TO GET A JURY RECOMMENDATION?

BECAUSE THE CHANCE THAT THE JUDGE, THE JURY VOTED FOR DEATH WILL IMPOSE LIFE IS PRETTY SLIM. I DON'T KNOW WHAT THE STATISTICS ARE.

>> I AM NOT TALKING ABOUT ANYTHING ABOUT INEFFECTIVE ASSISTANCE COUNCIL. I AM TALKING ABOUT THIS MONEYS THE WATER, BECAUSE HOW CAN YOU SAY THIS WAS ABSOLUTELY HARMLESS AND THE JURY, THE JUDGE WOULD HAVE SENTENCED HIM TO DEATH ANYWAY HAD THESE ERRORS NOT OCCURRED WHEN YOU DON'T KNOW WHAT HIS STRATEGY WOULD HAVE BEEN REGARDING IF YOU ARE SAYING THIS JURY WRECK IS SUBSTITUTING FOR A JURY FINDING.

>> THIS IS A DIRECT APPEAL. I YOU MAKING ANY ARGUMENT WHAT THE JURY DID OR WHAT THE JUDGE DID THAT THIS SENTENCE IS NOT PROPORTIONAL?

>> I HAVEN'T MADE THAT ARGUMENT. ONE THING I WOULD LIKE TO DO IS POINT OUT INJUSTICE'S DESCENT, AND 5533, A VERY GOOD ARGUMENT

ABOUT WHY IT DOESN'T APPLY IN
THIS CASE.

ALSO THERE ARE NUMEROUS GUILT
PHASE ISSUES COVERED COMPLETELY
AND COMPREHENSIVELY IN BOTH THE
INITIAL BRIEF AND MY REPLY BRIEF
AND ALSO RELY ON THOSE.

THANK YOU.

>> THE COURT IS IN RECESS FOR
TEN MINUTES.

>> ALL RISE.