>>> THE NEXT CASE IS
KNIGHT V. STATE.
>> GOOD MORNING.
WHENEVER YOU'RE READY.
>> MORNING, MAY IT PLEASE THE
COURT, COUNSEL TODD SCHER ON
BEHALF OF RICHARD KNIGHT.
THIS CASE IS BEFORE THE COURT ON
THE DENIAL OF A 3851 MOTION
FOLLOWING HEARING, IT'S A STATE
HABEAS PENDING AND ALSO,
OBVIOUSLY, THE COURT ASKED FOR
SUPPLEMENTAL BRIEFING IN LIGHT
OF HEARST WHICH I'M PREPARED TO
ADDRESS THE COURT TODAY AND,
HOPEFULLY, FOLLOW UP ON SOME OF
THE ISSUES AND CONCERNS THAT
WERE RAISED IN MR. LAMBRIX'S
CASE.
AT THE OUTSET JUST PROCEDURALLY
IN TERMS OF MR. KNIGHT'S CASE,
AS I THINK WAS ALLUDED TO IN THE
EARLIER ARGUMENT, WE'RE IN A
DIFFERENT PROCEDURAL POSTURE
THAN THE EARLIER CASE.
I DON'T, MY POSITION IS THAT
THAT DOESN'T NECESSARILY MATTER.
I DO THINK THAT HEARST, FOR THE
REASONS SET FORTH IN THE LAMBRIX
PLEADINGS, IS FULLY RETROACTIVE
IN LIGHT OF THE ARGUMENTS THAT
WERE PRESENTED.
BUT I ALSO WANT TO MAKE IT CLEAR
THAT MR. KNIGHT'S IS IN A
DIFFERENT POSTURE.
HIS CASE WAS TRIED POST-RING.
IN FACT, A SLEW OF RING-BASED
MOTIONS WERE FILED AND LITIGATED
IN THE TRIAL COURT, OF COURSE,
ALL WHICH WERE DENIED.
INCLUDING MOTIONS AND SPECIAL
INSTRUCTIONS REGARDING ADVISING
THE JURY OF ITS PROPER ROLE IN
LIGHT OF CALDWELL.
ALL OF THAT WAS DENIED.
THE JURY HERE IN MR. KNIGHT'S A
CASE WAS, AS IT IS IN EVERY
OTHER CASE, TOLD THAT ITS ROLE
AT PENALTY PHASE IS MERELY
ADVISORY, AND ALL THEY ARE TO

RETURN IS A MERE RECOMMENDATION.
MR. KNIGHT'S FULLY PRESERVED HIS
RING/CALDWELL/APPRENDI, ALL OF
THOSE CASES ON HIS DIRECT
APPEAL, AND SO IT'S MY POSITION
WITHOUT EVEN GETTING INTO THE
JOHNSON STUFF OR THE JOHNSON
ISSUE WHICH I DO THINK NEEDS TO
BE REVISITED IN ANY EVENT, BUT
IN THIS CASE UNDER JAMES I THINK
MR. KNIGHT'S SHOULD RECEIVE THE
BENEFIT OF THE HEARST RULING.
>> WHEN YOU SAY RECEIVE THE
BENEFIT OF THE HEARST RULING AND
THE PRIOR ARGUMENT I BELIEVE
THERE WAS AN INDICATION THAT HE
SHOULD BE, HIS SENTENCE SHOULD
BE REDUCED TO LIFE, IS IT YOUR
ARGUMENT THAT HEARST REQUIRES
THAT THIS SENTENCE BE REDUCED TO
LIFE?
>> MY ARGUMENT IS THE SAME AS IN
MR. LAMBRIX'S CASE, YES.
AND FOR THE REASON-- WE CAN GET
INTO THIS A LITTLE BIT MORE IN
THIS CASE, I THINK, IS AGAIN
GOING BACK TO WHAT HEARST SAYS.
AND A LOT OF WHAT I THINK THE
COURT NEEDS TO DO AND WHAT I
THINK HOPEFULLY THE COURT WILL
STAY THE LAMBRIX CASE AND ISSUE
A DECISION THAT'S A CONSIDERATE
ONE BASED ON THE BODY OF TWO
DECADES WORTH OF LAW.
>> I GUESS MY REAL QUESTION HERE
IS WHY SHOULD IT BE A REDUCTION
TO LIFE INSTEAD OF A NEW
SENTENCING PROCEDURE?
BECAUSE IT SEEMS TO ME THAT WHAT
THEY-- NO MATTER HOW BROAD OR
NARROW YOU INTERPRET THE HEARST
DECISION, THAT WHAT IT SAYS IS
THAT THE JURY SHOULD MAKE A
FINDING, THE FINDINGS THAT ARE
NECESSARY TO IMPOSE A DEATH
SENTENCE, BASICALLY.
AND SO HE WAS SENTENCED TO DEATH
ORIGINALLY, AND SO WHY SHOULD IT
BE A PROBLEM TO HAVE A NEW
SENTENCING PROCEDURE WHERE A

JURY WOULD, IN FACT, MAKE
WHATEVER FINDINGS THAT ARE
NECESSARY?
>> I HAVE SEVERAL ANSWERS TO.
THAT ONE IS IF THIS WERE TO GO
BACK, WHICH I AM NOT ADVOCATING
BUT WERE-- WE'D BE DEALING WITH
AN ENTIRELY NEW STATUTE, I WOULD
ASSUME, SO THERE MAY BE DOUBLE
JEOPARDY AND EX POST FACTO
IMPLICATIONS FROM THAT.
ASIDE FROM THAT, WHAT WE HAVE
HERE AND WHY HEARST IS ALSO
SIGNIFICANT IS IT CLARIFIES, IT
SAYS WHAT FLORIDA STATUTES SAYS
AND WHAT IT SAID SINCE IT WAS
ENACTED WHICH IS AFTER THE
CONVICTION IS ENTERED, THE
PRESUMPTIVE SENTENCE IS LIFE.
THAT'S WHERE MR. KNIGHT'S STANDS
RIGHT NOW.
HE HAS NOT BEEN CONVICTED OF
CAPITAL MURDER, BECAUSE THE JURY
DID NOT MAKE THE REQUISITE
FINDINGS OF THE ELEMENTS OF THE
OFFENSE.
AND, IN FACT, NOT ONLY DID THEY
NOT FIND THEM, THEY WERE TOLD
THAT REALLY THEIR ROLE WAS JUST
TO SORT OF HAVE A STRAW POLL,
AND THAT'S WHAT HAPPENED HERE.
WE HAVE A 48 OR 49-MINUTE
DELIBERATION ON TWO MURDER
CASES, AND WHAT'S SIGNIFICANT
ABOUT THAT AS WELL IS THAT THERE
WAS A TWO OR THREE MONTH LAPSE
BETWEEN THE PRESENTATION OF SOME
OF THE MITIGATION, AND THEN
THERE WAS A RECESS OF SEVERAL
MONTHS TO TAKE CAREFUL SOME
OTHER MATTERS.
AND-- CARE OF SOME OTHER
MATTERS.
AND THEN THE JURY CAME BACK AND
HEARD OTHER EVIDENCE.
AND THEN 48, 49 MINUTES LATER,
THEY COME BACK WITH THESE
RECOMMENDATIONS.
THAT SHOWS, AND I THINK THE
BRIEF SUPPLIES THE COURT WITH A

LOT OF CONTEXTUAL BACKGROUND TO
THAT, IS THIS JURY DID WHAT THEY
WERE TOLD.
JUST MAKE A RECOMMENDATION TO
THE COURT.
>> WELL, IT SEEMS TO ME THAT,
YOU KNOW, I'M NOT REALLY BUYING
THAT ARGUMENT BECAUSE EVEN IF
YOU SEND IT BACK, THE JURY, A
JURY EVEN UNDER THIS STATUTE
WHICH EVERYONE NOW SEEMS TO SAY,
MOST PEOPLE NOW SEEM TO SAYS
THAT THE JURY MUST MAKE THE
FINDINGS THAT ARE NECESSARY TO
IMPOSE A DEATH SENTENCE.
EVEN WITHOUT HAVING TO REWORK
IT, IT SEEMS TO ME THAT THE JURY
CAN, IN FACT, MAKE A FINDING
THAT THIS AGGRAVATING
CIRCUMSTANCE EXISTS, THIS
AGGRAVATING CIRCUMSTANCE EXISTS
AND THAT THEY OUTWEIGH THE
MITIGATING CIRCUMSTANCES.
ISN'T THAT ESSENTIALLY WHAT
YOU'RE ARGUING?
IT'S WHAT HEARST SAYS?
>> I THINK IN THE FUTURE THAT
COULD BE THE PROCEDURE IN CASES
BASED ON WHATEVER THE NEW
STATUTE SAYS.
BUT I THINK WHAT YOU'RE SAYING
IS DON'T WE GO BACK AND HAVE A
DO-OVER.
BUT THE ANSWER IS, NO, BECAUSE
THE STATUTE THAT YOU'RE
OPERATING UNDER HAS BEEN HELD TO
BE UNCONSTITUTIONAL.
AND SORT OF LIKE SULLIVAN AND
LOUISIANA IN TERMS OF, I MEAN,
HARMLESSNESS, THIS IS A KIND OF
STRUCTURAL PROBLEM THAT YOU
CANNOT GO BACK AND FIX.
>> SO IN THE MEANTIME, EVEN
CASES-- WHAT DO YOU SAY ABOUT
CASES WHERE THERE'S BEEN NO
TRIAL YET?
SO THERE'S NOTHING THAT CAN BE,
THERE'S NO DEATH SENTENCE THAT
COULD BE IMPOSED ON A
FIRST-DEGREE MURDER CASE NO

MATTER HOW EGREGIOUS AT THIS
POINT?
>> WELL, RIGHT NOW THERE'S NO
STATUTE.
AND SO JUST, OBVIOUSLY, SPEAKING
OUTSIDE OF THE RECORD, I THINK
SOME OF THIS MAY HAVE BEEN
SUPPLEMENTED TO THE COURT IN
LAMBRIX.
I KNOW THAT THIS IS SORT OF
CREATING A LOT OF CONSTERNATION
AND CHAOS IN THE TRIAL COURTS,
OBVIOUSLY.
AND I THINK THE PUBLIC DEFENDERS
ASSOCIATION, I BELIEVE THEY
FILED AN AMICUS BRIEF AS WELL
OUTLINING SOME OF THOSE ISSUES.
BUT THOSE ARE ALL MATTERS, IN MY
OPINION, TO BE ADDRESSED IN THE
FUTURE.
TO SEND THIS CASE BACK FOR A
RESENTENCING, I THINK, WOULD
RAISE SOME SIGNIFICANT PROBLEMS.
ONE OF THE OTHER ISSUES--
>> WAIT, MR.-- JUST TO GO BACK
TO THE SIGNIFICANT PROBLEMS.
WE'VE HELD OVER AND OVER THAT A
NEW SENTENCING PROCEEDING ALLOWS
THE STATE, YOU START OVER.
SO YOU'VE GOT THE AGGRAVATORS
GET PRESENTED, THE MITIGATORS
OR, AND THERE'S NEVER BEEN AN
ISSUE BECAUSE THEY'VE ALREADY
BEEN SENTENCED TO DEATH, SO THE
CHANCE THAT THEY MAY NOT GET
DEATH IS HARD TO UNDERSTAND HOW
THAT'S A DOUBLE JEOPARDY
PROBLEM.
SO COULD YOU JUST-- THE ISSUE
IS IF WE DON'T ACCEPT THAT THE
REMEDY FOR HEARST IS REDUCING
SENTENCES TO LIFE, COULD YOU GO
BACK TO JUSTICE QUINCE'S
QUESTION ABOUT WHAT WOULD HAPPEN
IN KNIGHT.
>> I MEAN, HONESTLY BECAUSE PART
OF IT, THE QUESTION IS ASKING ME
TO SPECULATE ABOUT WHAT A NEW
STATUTE MIGHT SAY, AND I DON'T
NECESSARILY AGREE THAT A

RESENTENCING WOULD BE A CURE
HERE BECAUSE PART OF THE PROBLEM
IS WE HAVE THIS-- AND IT'S NOT
BEEN FULLY BRIEFED.
THIS IS PART OF THE ISSUE WITH,
YOU KNOW, HEARST WAS A PARADIGM
SHIFT.
AND PART OF ONE OF THE THINGS
THAT WE'VE, THAT I ALLUDED TO
CERTAINLY IN THE BRIEFS IS
THE--
[INAUDIBLE]
V. WHITE PROBLEM.
HERE WE HAVE A STATUTE THAT THE
SUPREME COURT EXPLICITLY SAYS,
YOU KNOW, AFTER YOU'RE
CONVICTED, LIFE IS A
PRESUMPTIONED PENALTY.
THEN WE HAVE, OBVIOUSLY, THE
SECOND PART WHERE THEY DETERMINE
ELIGIBILITY.
NOW THAT THAT STATUTE HAS BEEN
CLARIFIED BY THE SUPREME COURT,
I BELIEVE UNDER FIORI V. WHITE,
IT HAS TO APPLY, AND UNDER THAT
STATUTE HE HAS NOT BEEN FOUND
GUILTY OF CAPITAL MURDER.
>> WELL, I'M NOT SURE-- ON THE
STATUTE, LET ME JUST-- FOR
MR. KNIGHT'S, AND THEY DID TALK
ABOUT A HARMLESS ERROR ANALYSIS.
AND RING HAS NEVER BEEN SEEN AS
A STRUCTURAL PROBLEM.
SO MR. KNIGHT'S HAD TWO MURDERS
INCLUDING A MURDER OF A
4-YEAR-OLD CHILD.
NOW-- WHO'S, OBVIOUSLY, UNDER
THE AGE OF 12.
AND THE JURY RECOMMENDATION WAS
UNANIMOUS.
>> CORRECT.
>> SO GOING BACK TO THE ISSUE OF
WHETHER YOU HAVE A LIFE
SENTENCE, IN FLORIDA YOU GET A
LIFE SENTENCE IF THERE'S NOT AT
LEAST ONE AGGRAVATOR.
THAT'S--
>> THAT'S NOT WHAT HEARST
SAYS--
>> I'M SAYING THE STATUTE-- IS

IT TRUE THAT WITHOUT THE
AGGRAVATOR, YOU CANNOT IMPOSE--
AT LEAST ONE AGGRAVATOR-- YOU
CAN'T EVEN CONSIDER THE DEATH
PENALTY.
>> UNDER HEARST--
>> I'M--
>>-- IT HAS TO BE SUFFICIENCY
OF THE AGGRAVATOR.
>> THAT'S FOR DEATH TO BE
IMPOSED.
I'M SAYING WHAT IS, IF THERE
ISN'T ONE AGGRAVATOR--
>> RIGHT.
>>-- WHAT IS THE SENTENCE?
>> WELL, IF THERE'S NO
AGGRAVATORS AS A MATTER OF, I
MEAN--
>> IT'S LIFE.
YOU DON'T GET, THERE'S NO--
>> BUT IT'S LIFE HERE TOO UNDER
THE STATUTE.
IT SAYS AFTER THE-- I MEAN,
THIS IS WHERE WE GET BACK TO THE
APPRENDI AND TORRES ISSUE
BECAUSE WHEN YOU READ THE
STATUTE AND THE SUPREME COURT
READ AND INTERPRETED THE STATUTE
TO ITS WORDS, IS THAT-- IT ALL
GETS BACK IN THE '70s.
WHEN FLORIDA DRAFTED ITS STATUTE
POST-FURMAN, EVERY STATE HAD ITS
OWN WAY OF DEALING WITH THE
PROBLEMS THAT CAME UP IN FURMAN.
SOME STATES CHOSE TO DETERMINE
ELIGIBILITY AND AGGRAVATING
CIRCUMSTANCE AT THE GUILT PHASE.
TEXAS, SOME OTHER STATES.
I'M NOT INTIMATELY FAMILIAR WITH
ALL THE DIFFERENT STATES.
FLORIDA CHOSE TO PERFORM THAT
FUNCTION AT THE PENALTY PHASE.
THAT'S WHY THE STATUTE CLEARLY
DELINEATES THAT UPON THE
CONVICTION OF FIRST-DEGREE
MURDER, THE SENTENCE IS LIFE
UNLESS AND UNTIL THE ELIGIBILITY
DETERMINATIONS ARE MADE AT THE
PENALTY PHASE BY JUDGE.
I MEAN, THE JUDGES ULTIMATELY

WON.
THAT WAS THE FLAW, ONE OF THE
FLAWS THAT THE SUPREME COURT
FOUND WITH HEARST.
AND SO THIS COURT'S-- THE
FLORIDA STATUTE HAS NEVER, EVER
SAID THAT AS LONG AS YOU HAVE AN
AGGRAVATOR, YOU'RE ELIGIBLE FOR
DEATH.
THAT NOTION CAME UP AFTER, AFTER
APPRENDI IN MILLS, MILLS V.
MOORE WHICH I THINK ALSO THE
COURT IS GOING TO NEED TO RECEDE
FROM.
AND, CERTAINLY, IT REAPPEARED
LATER ON IN BODSON AND KING AND
THAT LINE OF CASES.
AND WHAT THE STATE ARGUED TO THE
COURT AND WHAT THE COURT,
UNFORTUNATELY IN MY VIEW, DID
WAS COBBLE TOGETHER SOME
HOLDINGS FROM APPRENDI AND
TORRES AND THEN LATER RING
WITHOUT LOOKING AT THE SPECIFICS
OF FLORIDA STATUTE AND HOW THOSE
GENERAL HOLDINGS IN THOSE CASES
APPLIED TO FLORIDA STATUTE.
SO IF YOU GO BACK--
>> SO BASICALLY WHAT YOU'RE
SAYING IS YOU CANNOT JUDICIALLY
REWRITE THROUGH INTERPRETATION
THIS SENTENCING PROBLEM.
>> CORRECT.
AND--
>> SO, THEREFORE, WE CAN TALK
ALL DAY, AND WE CAN INTERPRET IN
ANY DIFFERENT WAY, IT STILL IS
INVALID, AND WE CANNOT INTERPRET
THAT WAY TO REWRITE THE STATUTE.
>> THAT'S CORRECT.
AND IF THE ELEMENTS ARE AS YOU
SUGGESTED, JUSTICE PARIENTE,
THEN, I MEAN, THE STATUTE IS
BEING REWRITTEN.
THEY MAY REWRITE IT TO AGREE
WITH THAT, BUT THAT'S NOT HOW
THIS STATUTE THAT MR. KNIGHT'S
WAS CONVICTED UNDER OPERATES
OR EVER OPERATED.
AND THAT'S WHY THE OVERRULING OF

HILDWIN AND SPAZZIANO WAS SO
IMPORTANT BECAUSE THEY DIDN'T
JUST SAY, WELL, IN LIGHT OF
SUBSEQUENT DEVELOPMENTS, YOU
KNOW, WE OVERRULE THEM.
THEY SAID THEY WERE WRONGLY
DECIDED.
THEY WERE WRONGLY DECIDED AT THE
TIME.
>> EXTENDING THAT OUT, YOUR
ARGUMENT THAT IT'S
SUBSTANTIVE--
>> YES.
>>-- SUBSTANTIVE ISSUE.
SO UNDER YOUR ARGUMENT THEN,
UNTIL THE LEGISLATURE HAS A
VALID DEATH PENALTY STATUTE IN
PLACE, THERE CAN BE NO CRIME
COMMITTED THAT WOULD FALL UNDER
THE DEATH PENALTY APPLICATION
UNTIL THE LEGISLATURE HAS A
VALID LAW IN EFFECT.
>> THERE IS NO-- YEAH, THERE'S
NO--
>> RIGHT?
AND SO THERE'S NO CRIME UNTIL
AFTER THEN, THE CRIMES COMMITTED
AFTER THEN, THAT'S WHEN IT WOULD
APPLY.
>> IT WOULD DEPEND, OBVIOUSLY,
ON THE WORDING OF WHEN THEY
WOULD MAKE SOME NEW STATUTE
EFFECTIVE.
AND THAT, THIS IS THE PROBLEM
THAT'S GOING ON CERTAINLY IN THE
TRIAL COURT.
>> ANY CRIME WOULD HAVE TO BE
AFTER THE EFFECTIVE DATE OF A
STATUTE.
THAT'S YOUR ARGUMENT.
>> ANY CRIME, I'M NOT SURE-- I
MEAN, OBVIOUSLY, ANY CRIME
THAT'S COMMITTED--
>> THERE CAN BE NO DEATH PENALTY
CASE UNTIL AFTER THE EFFECTIVE
DATE T OF A NEW STATUTE.
THAT'S YOUR ARGUMENT.
>> WELL, THERE'S NO STATUTE THIS
PLACE.
THAT'S WHY PEOPLE ACROSS THE

STREET ARE BUSY REWRITING
THINGS, BECAUSE THERE'S NO VALID
DEATH PENALTY STATUTE IN PLACE.
>> BUT THE QUESTION IS, CAN
THAT-- ASSUME AGO STATUTE IS
ENACTED, THAT CANNOT BE-- IS IT
YOUR ARGUMENT THAT THAT CANNOT
BE APPLIED TO A MURDER WHICH
OCCURS TODAY.
>> THAT, HONESTLY, I DON'T KNOW.
I HAVEN'T--
>> OKAY.
>>-- THOUGHT OF THAT PART OF
IT.
>>-- FROM YOUR SUBSTANTIVE
ARGUMENT, DOESN'T IT? IF IT'S A
SUBSTANTIVE ISSUE, NOT
PROCEDURAL, DOESN'T THAT HAVE TO
BE THE CASE?
>> LOOK, I CAN CERTAINLY MAKE AN
ARGUMENT, BUT I DON'T KNOW
ENOUGH ABOUT THAT PARTICULAR--
THAT'S NOT BEEN THE FOCUS OF MY
BRIEFING IN THIS PARTICULAR
AREA.
I MEAN, THOSE ARE ALL MATTERS,
CERTAINLY, TO BE, I'M SURE,
BEFORE THIS COURT AT SOME POINT
IN THE FUTURE WITH RESPECT TO
WHEN CRIMES HAVE OCCURRED, WHEN
THE STATUTE WAS, NEW STATUTE WAS
PUT INTO EFFECT, WHAT THE NEW
STATUTE SAYS AND WHAT THE
IMPLICATIONS ARE OF THAT
PARTICULAR NEW STATUTE.
WE'RE ALL SORT OF JUST
SPECULATING IN TERMS OF WHAT
WILL HAPPEN TO FUTURE CASES.
BUT THIS CASE IS ALREADY HERE,
IT'S BEEN CONVICTED UNDER AN
UNCONSTITUTIONAL STATUTE--
>> WELL, IT'S NOT A MATTER OF
SPECULATION AS TO WHEN YOU'RE
ARGUING WHAT'S SUBSTANTIVE AND
WHAT'S PROCEDURAL.
WE'RE HAVING TO DEAL WITH WHAT
THE EFFECT OF THE LEGAL ISSUES
ARE AND HOW TO APPLY THOSE IN
THE CASES BEFORE US.
THAT'S NOT A SPECULATIVE THING.

THAT'S REALITY.
>> WELL, THAT'S TRUE, BUT WE
CERTAINLY CAN'T SPECULATE ABOUT
WHAT SOME OF THESE STATUTES
MIGHT SAY, BECAUSE THAT WOULD
NOT AFFECT THE RESOLUTION OF
THIS CASE, IN MY OPINION.
>> I'D LIKE TO ASK YOU A
QUESTION ABOUT A CASE YOU
REFERRED TO IN YOUR ARGUMENT,
AND THAT'S THE JAMES CASE.
WHAT DO YOU UNDERSTAND TO BE THE
HOLDING OF JAMES?
>> THE HOLDING OF JAMES, JAMES
WAS A CASE THAT AROSE AFTER
ESPINOSA--
>> WELL, I KNOW THE RESULTS.
>> OKAY.
>> I JUST WANT TO MAKE SURE--
WHAT'S THE SPECIFIC HOLDING?
>> MY UNDERSTANDING IS THE
HOLDING OF THAT CASE IS THAT--
AND I HAVE IT HERE-- THE COURT
DETERMINED THAT IN, FOR
DEFENDANTS WHO PROPERLY PRESERVE
AT TRIAL AND APPEAL THE
UNCONSTITUTIONALITY OF HAC JURY
INSTRUCTION WHICH WAS LATER
STRUCK IN ESPINOSA, IF THEY HAD
PROPERLY OBJECTED AND PRESERVED
IT ON APPEAL, IT WOULDN'T BE
FAIR TO DEPRIVE THOSE PEOPLE OF
THE RETROACTIVE BENEFIT OF
ESPINOSA.
>> OKAY.
>> AND THAT WAS ULTIMATELY--
>> AND IN JAMES DID THE MAJORITY
DO ANY WHIT ANALYSIS?
BECAUSE WHIT WAS THE LAW--
>> THERE WAS NO WHIT-- I THINK
THAT WAS PART OF JUSTICE GRIMES'
DISSENT.
>> HE MADE A POINT OF THAT.
>> RIGHT.
>> BUT THE MAJORITY DID NOT SEEM
TO CARE ABOUT THAT.
>> RIGHT.
>> AND WHAT STANDARD DID THEY
APPLY?
AM I CORRECT IN UNDERSTANDING

THAT THEY APPLIED THE HARMLESS
ERROR STANDARD THAT WOULD
ORDINARILY BE APPLIED ON A
DIRECT APPEAL?
WHEN THEY SAY WE CANNOT SAY
BEYOND A REASONABLE DOUBT THAT
THE INVALID INSTRUCTION DID NOT
AFFECT THE JURY'S CONSIDERATION?
>> [INAUDIBLE]
>> YES.
THE COURT DID CONDUCT THAT
ANALYSIS, WHICH IS THE
TRADITIONAL ANALYSIS FOR JURY
INSTRUCTIONS.
THAT WAS THE ANALYSIS, THE
HARMLESS ERROR ANALYSIS THAT WAS
BEFORE, FOR EXAMPLE, THE
HITCHCOCK ERRORS.
>> BUT THAT'S AN ANALYSIS THAT'S
APPLIED ON DIRECT APPEALS.
I UNDERSTAND THEY APPLIED IT
HERE IN A CONTEXT--
>> THEY APPLIED IT HERE--
RIGHT, CORRECT.
AND THAT'S, I THINK, THE
TRADITIONAL ANALYSIS WAS APPLIED
IN HITCHCOCK.
THOSE CASES WERE, THE MAJORITY
OF THOSE CASES WERE ALL EITHER
FIRST OR SECOND 3850 MOTIONS OR
EVEN IN A LOT OF CASES STATE
HABEAS PETITIONS.
AND ONE OTHER SORT OF SALIENT
FACT ABOUT KNIGHT'S CASE THAT I
WANT TO POINT OUT IS ONE OF THE
MOTIONS THAT WAS FILED IN THE
TRIAL COURT, AND THIS GETS TO A
BIT OF A POINT THAT WAS
DISCUSSED IN LAM BRIGGS, IS
TRIAL COURT ACTUALLY FILED A
MOTION TO PERMIT ARGUMENT AND
EVIDENCE AT THE PENALTY PHASE
ABOUT RESIDUAL OR LINGERING
DOUBT.
THOSE WEREN'T REALLY THE TERMS
THAT HE USED, BUT THAT WAS THE
GIST OF IT.
AND WHAT THE MOTION MADE CLEAR
WAS HE WAS AWARE OF THIS COURT'S
CASE LAW THAT THAT WAS NOT A

PROPER MITIGATING CIRCUMSTANCE.
BUT WHAT COUNSEL WAS TRYING TO
DO, WHICH I THINK IS INTEREST
ANYTHING HOW IT PLAYS INTO THIS,
IS HE WAS TRYING TO SHOW THAT
MR. KNIGHT'S DID NOT, MR.
KNIGHT'S WAS CONTESTING
ALL OF THE THREE
AGGRAVATORS IN ONE MURDER AND
THE TWO IN THE OTHER, AND HE
WANTED TO PRESENT EVIDENCE AND
ARGUMENT TO THE JURY NOT AS
LINGERING DOUBT AS A MITIGATOR,
BUT TO UNDERMINE THE SUFFICIENCY
AND WEIGHT OF THOSE AGGRAVATORS.
AND THAT GETS TO WHAT TRIAL
COUNSEL, AT LEAST IN THIS CASE,
TRIED TO DO BUT, OF COURSE, WAS
PREVENTED FROM DOING SO.
THAT'S HOW I THINK LOOKING AT
HEARST, THAT'S WHAT LAWYERS
CERTAINLY PRIOR TO RING--
>> YOU'RE INTO YOUR REBUTTAL.
>> YES.
THAT'S WHAT LAWYERS PRIOR TO
RING, I THINK, YOU KNOW, WHICH
IS WHY I THINK ONE OF THE
ARGUMENTS IS WHY, YOU KNOW,
THESE OLDER CASES NEED TO GO
BACK FOR THAT TYPE OF ANALYSIS.
I WOULD RESPECTFULLY RESERVE THE
REST OF MY TIME FOR REBUTTAL.
THANK YOU.
>> MAY IT PLEASE THE COURT,
LISA-MARIE LERNER FOR THE
ATTORNEY GENERAL'S OFFICE IN THE
STATE OF FLORIDA.
YOUR HONORS, AS YOU ARE AWARE,
THE STATE'S POSITION IS THAT
HEARST IS A PROCEDURAL DECISION.
AND THE ACTUAL HOLDING IN HEARST
ON THE LAST PAGE OF THE DECISION
IS FLORIDA'S TO SENTENCING
SCHEME WHICH REQUIRED THE JUDGE
ALONE TO FIND THE EXISTENCE OF
AN AGGRAVATING CIRCUMSTANCE IS,
THEREFORE, UNCONSTITUTIONAL.
>> BUT WE KNOW THAT'S-- I KNOW
THAT'S THE LAST SENTENCE.
BUT WE KNOW OUR SENTENCING

SCHEME.
AND THAT'S NOT JUST WHAT A JUDGE
HAS TO FIND.
SO LET ME GO BACK TO THE ISSUE
OF, FOR MR. KNIGHT'S ABOUT THE
APPLICATION OF JAMES.
NOW, JAMES WHETHER WE AGREE OR
DISAGREE WITH WHAT JUSTICE
GRIMES SAYS IS ALSO THE LAW AS
MUCH AS JOHNSON V. STATE IS THE
LAW.
AND IT APPLIED A JURY
INSTRUCTION, YOU KNOW?
WE WEREN'T EVEN SAYING THE JURY
WAS HAVING TO FIND FACTS THAT
ARE BINDING ON THE JUDGE TO
APPLY THAT TO CASES WHERE IT HAD
BEEN RAISED ON DIRECT APPEAL,
YOU KNOW?
IN THE TRIAL COURT AND ON DIRECT
APPEAL.
SO I'M STRUGGLING WITH WHY NOW
WE'RE TALKING ABOUT JURIES AT
LEAST BEING THE FINDERS OF FACT
OF THE AGGRAVATING
CIRCUMSTANCES, HOW WE CAN APPLY
OR WHY-- TO POST-RING CASES
WHERE RING WAS RAISED WHICH
MR. KNIGHT'S DID.
HOW DO WE JUSTIFY THAT UNEQUAL
TREATMENT?
>> WELL, MR. KNIGHT'S RING CLAIM
IN THE TRIAL COURT, IF I'M NOT
MISTAKEN-- I TRIED TO LOOK IT
UP LAST NIGHT-- WAS THAT IT
WAS, THE JURY HAD TO UNANIMOUSLY
FIND ALL THE AGGRAVATING
CIRCUMSTANCES AND THE MITIGATING
CIRCUMSTANCES AND DO THE ACTUAL
WEIGHING.
THAT IS NOT THE EXACT ISSUE IN
RING AND/OR HEARST.
>> YOU'RE SAYING THEY DIDN'T
PROPERLY PRESERVE IT BECAUSE
THEY WENT FARTHER THAN HEARST?
I'M NOT BUY-- WHAT'S YOUR NEXT
ARGUMENT?
>> WELL, HEARST AND RING FOCUS
ON THE ELIGIBILITY, NOT THE
ACTUAL SENTENCING.

>> SEE, BUT HERE IS THE THING,
AND WE CAN GO BACK AS TO WHAT
HEARST MEAN, AND WE ALL CAN READ
IT.
IT'S NOT A LONG OPINION, YOU
KNOW?
EXCITED THEY CITE MY NAME, AND
THEN I DON'T KNOW WHAT THEY DID
WIT.
IN OTHER WORDS, THE ACTUAL
OPINION ITSELF, WOULD YOU AGREE,
IS NOT AS CLEAR AS THE STATE AND
THE COURT AND MAYBE THE DEFENSE
WOULD LIKE IT TO BE?
>> WELL, THERE'S A LOT OF
EXPANSIVE LANGUAGE IN HEARST.
>> OKAY.
>> WHICH CAN BE READ IN MANY
DIFFERENT WAYS.
>> OKAY, I APPRECIATE-- AND
YOU'RE ALL, I APPRECIATE YOUR
CANDOR ON THAT, AND THAT'S WHAT
WE'RE STRUGGLING WITH AS TO WHAT
IT MEANS.
BUT, SO GOING-- BUT FOUR CASES
WHERE POST-RING WHERE WE
OBVIOUSLY GOT IT WRONG, WHATEVER
"IT" IS, WE GOT IT WRONG.
THE U.S. SUPREME COURT SAYS THEY
GOT IT WRONG BACK WHEN SPAZZIANO
AND I'D WOMEN WERE DECIDED.
THEY DIDN'T TAKE BUTLER.
THEY DIDN'T TAKE CASES FOR 14
YEARS THAT WERE, SOME OF THEM,
JUST LIKE HEARST.
HOW DO WE NOT APPLY IT TO THE
POST-RING CASES UNDER JAMES AND
THOSE TYPE OF CASES?
>> WELL, BECAUSE I THINK THE
ACTUAL ANALYSIS SHOULD BE UNDER
THE JOHNSON WHICH LOOKED AT THE
WHIT STANDARD.
HEARST IS NO BIGGER A CHANGE IN
LAW FOR FLORIDA THAN RING WAS
FOR ARIZONA--
>> SO JAMES.
JUST ADDRESS JAMES.
WHY ISN'T THE SAME REASONING
THAT WE APPLIED IN JAMES
APPLICABLE HERE?

NOT JOHNSON.
>> I UNDERSTAND.
BECAUSE IT'S, I BELIEVE IT'S
ARGUABLE THAT THE HAC JURY
INSTRUCTIONS WAS MORE OF A
SUBSTANTIVE CHANGE IN THE LAW
THAN HEARST AND RING ARE TO THE
DECISION MAKING.
>> HOW CAN THAT POSSIBLY BE?
I MEAN, YOU'RE TALKING ABOUT ONE
AGGRAVATING CIRCUMSTANCE IN
JAMES, AND YET WE'RE TALKING
ABOUT THE ENTIRETY
OF THE AGGRAVATING AND
MITIGATING CIRCUMSTANCES, IT
SEEMS TO ME, WHEN YOU'RE LOOKING
AT RING AND HEARST.
SO HOW IN THE WORLD CAN IT BE A
GREATER CHANGE THAN THOSE TWO?
>> WELL, AGAIN, IT'S THE STATE'S
POSITION THAT HEARST FOCUSES ON
THE ELIGIBILITY.
AND WHEN THE JURY FINDS ONE--
>> WELL, HOW CAN THAT BE WHEN IT
REALLY, SOME OF THE LANGUAGE IN
HEARST, AND I CAN DEGREE THAT,
YOU KNOW, IT COULD HAVE BEEN A
LITTLE BETTER PUT TOGETHER, BUT
IT SEEMS TO ME THAT THE LANGUAGE
IN HEARST ACTUALLY SAYS-- AND
EVEN WHEN THEY'RE TALKING ABOUT
HILDWIN AND SPAZZIANO AND
OVERRULING IT, THEY SAY TO THE
EXTENT THAT THEY ALLOW A
SENTENCING JUDGE TO FIND ANY
AGGRAVATING CIRCUMSTANCE
INDEPENDENT OF THE JURY'S FACT
FINDING, HOW IN THE WORLD CAN
THAT POSSIBLY BE UNDER OR THOSE
CIRCUMSTANCES? -- UNDER THOSE
CIRCUMSTANCES?
IT SEEMS TO ME THAT THAT
INDICATES THAT THE JURY NEEDS TO
FIND ALL OF IT AND NOT JUST A
FACTOR THAT WOULD MAKE HIM
ELIGIBLE, BUT THE FACTORS THAT
WOULD MAKE IMPOSITION OF THE
SENTENCE VALID.
>> THE STATE RESPECTFULLY
DISAGREES WITH YOUR HONOR'S

INTERPRETATION OF HEARST.
>> I ASSUMED YOU WOULD.
>> EXPLAIN WHY YOU DISAGREE.
BECAUSE, I MEAN, SHE'S READ TO
YOU THE LANGUAGE OUT OF THE
OPINION.
WHY IS THE STATE DISAGREEING
WITH THAT?
>> BECAUSE THERE'S ADDITIONAL
LANGUAGE THAT FOCUSES ON THE
ELIGIBILITY AND MENTIONS AN
INDIVIDUAL THAT THE JUDGE OR THE
JURY HAS TO FIND AN INDIVIDUAL
AGGRAVATING FACTOR IN ORDER TO
MAKE A PERSON ELIGIBLE FOR
THE DEATH PENALTY.
THAT LANGUAGE IS ALSO IN HEARST.
AND AS I POINTED OUT, IT IS THE
ACTUAL RULING THAT THE END OF
THE OPINION ITSELF, IT FOCUSES
ON THE SINGLE AGGRAVATING
FACTOR.
ADDITIONALLY--
>> ISN'T THE PROBLEM THOUGH
THAT, AND MR. McLAIN DID SAY
AND IT SORT OF RESOUNDS, IS THAT
WHEN APPRENDI WAS-- WHEN RING
WAS DECIDING WHAT THE STATUTE IN
ARIZONA SAID, IT SAID SOMETHING
VERY DIFFERENT THAN WHAT OUR
STATUTE SAID.
OUR STATUTE WAS WE RUSHED TO PUT
IT IN PLACE RIGHT AFTER FURMAN,
AND ACTUALLY READING IT BACK
FROM 1984 WHEN MR. LAMBRIX'S WAS
SENTENCED EVEN THOUGH MORE
AGGRAVATORS HAVE BEEN ADDED,
IT'S PRETTY MUCH THE SAME WHICH
HAS ALWAYS BEEN THAT WHAT THE
JURY'S TO DO IS FIND SUFFICIENT
AGGRAVATING CIRCUMSTANCES AND
WHETHER THOSE ARE OUTWEIGHED BY
SUFFICIENT MITIGATING
CIRCUMSTANCE.
SO OUR STATUTE IS ACTUALLY AS
FAR AS-- NOW THE QUESTION IS,
WHAT'S THE FACT.
BUT OUR STATUTE IS DIFFERENT
THAN WHAT THE ARIZONA STATUTE
WAS.

AND MAYBE THAT'S WHAT THE UNITED
STATES SUPREME COURT WAS
STRUGGLING WITH WHEN THEY FIRST
HELD THAT ALL THE FACTS
NECESSARY TO IMPOSE DEATH-- NOT
TO MAKE THEM ELIGIBLE, TO IMPOSE
DEATH-- HAVE TO BE FOUND BY THE
JURY.
>> YES.
BUT IN THE FLORIDA STATUTE, THIS
COURT HAS INTERPRETED THE
STATUTE AS MEANING THAT JUST ONE
AGGRAVATING FACTOR IS
SUFFICIENT.
>> HAVE, SEE, AND I'VE GONE BACK
TO A LOT OF THE THINGS THAT
WE'VE SAID.
WE DON'T ALLOW JURY OVERRIDES
ANYMORE IN FLORIDA BECAUSE WE
THINK THAT MUCH OF THE JURY.
IF THE JURY SAYS 6-6 OR 7-5 FOR
LIFE, WE SAY LIFE.
THE STATUTE DOESN'T SAY THAT.
SO WHERE ARE YOU COMING UP WITH
THIS IDEA THAT TO IMPOSE THE
DEATH PENALTY YOU JUST NEED,
THERE JUST HAS TO BE A FINDING
OF ONE AGGRAVATING FACTOR?
>> I BELIEVE THIS COURT HAS
UPHELD CASES WHERE ONE
AGGRAVATING FACTOR HAS BEEN IN
EXISTENCE.
AGAIN, NOT ALL AGGRAVATING
FACTORS ARE EQUALLY HEAVY.
I MEAN, A CCP IS DIFFERENT THAN
SOME OTHER AGGRAVATING FACTORS
BECAUSE IT'S MUCH HEAVIER, AS
THIS COURT HAS SAID.
>> WE'VE JUST SAID IT.
I MEAN, YOU KNOW, IN OTHER
WORDS, IF YOU LOOK AT EVERYTHING
WE'VE SAID SINCE DIXON, WE'VE
SAID A WHOLE LOT OF THINGS.
BUT NOW YOU GO BACK AND LOOK AT
THE STATUTE, AND THE STATUTE
DIDN'T REQUIRE THE JURY TO--
IT'S AN ADVISORY RECOMMENDATION.
SO WE NOW HAVE TO REALLY LOOK AT
WHETHER, AS I'VE SAID, IS
WHETHER THE WHOLE STATUTORY

SCHEME IS ACTUALLY IN FIRM.
AS TO SENTENCING.
>> I UNDERSTAND.
HOWEVER, EVEN IF HEARST WOULD
APPLY IN MR. KNIGHT'S CASE IT'S
SAFE BECAUSE HE WAS CONVICTED OF
TWO CONTEMPORANEOUS MURDERS, AND
HE GOT TWO DEATH
RECOMMENDATIONS, 12-0 FOR
EACH--
>> DIDN'T THE SUPREME COURT SAY
IT DIDN'T REALLY MATTER?
I THOUGHT THEY SAID OUR
STATUTORY SCHEME WAS
UNCONSTITUTIONAL.
IS THAT WHAT HEARST SAID?
>> THEY SAID THE PORTION OF THE
SCHEME WHERE THE JUDGE MADE THE
FINDING--
>> OKAY.
>>-- INSTEAD OF THE JURY.
>> BUT THIS IS WHAT WE'RE
TALKING ABOUT.
DIDN'T THEY SAY THAT WAS
UNCONSTITUTIONAL?
>> THAT ASPECT, YES.
>> SO IS THAT STILL IN PLACE?
>> YES, YOUR HONOR.
>> IT'S STILL IN PLACE ALTHOUGH
THEY SAY IT'S UNCONSTITUTIONAL?
>> YES, YOUR HONOR.
IT--
>> BUT--
>> IT NEEDS TO BE FIXED.
IT COULD BE FIXED EITHER BY THE
LEGISLATURE OR THIS COURT COULD
ACTUALLY DIRECT JURY VERDICTS
AND FINDINGS--
>> YOU SAID THAT--
>> [INAUDIBLE]
CHANGE WHAT A STATUTE SAYS BY A
JURY INSTRUCTION?
I WAS STRUCK BY THAT ARGUMENT
THAT WE HAVE SUCH POWER THAT WE
CAN REWRITE THIS STATUTE, JUST
HAUL OFF AND REDO IT AND THEN
INSTRUCT THE JURY, AND
EVERYTHING'S OKAY THEN.
THAT'S NOT REALLY HOW WE
OPERATE, IS IT?

>> NO.
AND THAT WOULD NOT BE THE BEST
WAY TO DO IT.
>> RIGHT.
>> BUT, FOR EXAMPLE, THERE HAVE
BEEN CASES WHERE THE TRIAL
COURTS HAVE GIVEN THE JURY
SPECIFIC FINDINGS AND HAD THE
JURY COME BACK MAKING FINDINGS
ON AGGRAVATING FACTORS IN DEATH
CASES IN FLORIDA.
>> WHAT ABOUT THE STATUTE SAID
THE JURY IS TO RECOMMEND.
HAD THEY SAID THE JURY WOULD
FIND THOSE FACTS, THAT WOULD BE
DIFFERENT.
BUT THAT'S NOT WHAT THE STATUTE
SAID.
AND THAT'S NOT WHAT THE JURIES'
ADVISED DURING THE INSTRUCTIONS.
THEY SAY THEY'RE TO MAKE A
RECOMMENDATION.
THAT'S UNCONSTITUTIONAL
ACCORDING TO HEARST, RIGHT?
>> WELL, THE JURY HAS TO MAKE A
FACTUAL FINDING.
THEY CAN STILL RECOMMEND--
>> I'M TALKING ABOUT THE
STATUTE.
>> I UNDERSTAND.
BUT THE JURY HAS TO MAKE A
FACTUAL FINDING THAT AN
AGGRAVATING FACTOR EXISTS UNDER
HEARST.
>> YOU SAID IN ANSWER TO JUSTICE
PARIENTE'S QUESTION THAT THE,
THAT HEARST SAYS THAT THE
STATUTE IS UNCONSTITUTIONAL TO
THE EXTENT THAT THE JURY ONLY
MAKES A RECOMMENDATION, AND THE
COURT IMPOSES THE SENTENCE,
CORRECT?
IS THAT WHAT YOU SAID?
>> NO.
I SAID THAT HEARST FOUND THE
STATUTE UNCONSTITUTIONAL BECAUSE
THE JUDGE MADE A FACTUAL FINDING
THAT AN AGGRAVATING FACTOR
EXISTED, NOT THE JURY.
>> SO IS YOUR ARGUMENT THEN

PARTIALLY THAT SECTION
911.141-- 921.141, SUBSECTION
TWO WHICH HAS AN ADVISORY
SENTENCE BY THE JUDGE AND
SUBSECTION THREE WHICH HAS
FINDINGS IN SUPPORT OF THE DEATH
SENTENCE, THOSE ARE THE TWO
PORTIONS OF THE STATUTE THAT IS
SPECIFICALLY FOUND
UNCONSTITUTIONAL BY THE COURT IN
HEARST?
AND ARE YOU SAYING THE REST OF
THE STATUTE SURVIVES?
>> YES, YOUR HONOR.
>> AND SO IF WE LOOK AT THE REST
OF THE STATUTE WITHOUT LOOKING
AT TWO AND THREE, WHAT WOULD A
TRIAL JUDGE DO?
IF A CASE IS BEFORE THE TRIAL
JUDGE, IT'S A FIRST-DEGREE
MURDER CASE, THE STATE WANTS TO
IMPOSE THE DEATH SENTENCE--
HAVE THE DEATH SENTENCE IMPOSED,
WHAT WOULD A JUDGE DO ABSENT
SUBSECTION TWO AND THREE?
>> WELL, THE--
>> I MEAN, MAYBE YOU HAVEN'T
THOUGHT ABOUT THAT--
>> WELL, I HAVEN'T, BUT UNDER
FLORIDA THE JUDGE IS STILL THE
SENTENCER EVEN AFTER HEARST.
HOWEVER, THE JURY--
>> BUT THE JUDGE COULD-- ARE
YOU SAYING THE JUDGE COULD DO
SOMETHING DIFFERENT FROM WHAT
THE JURY SAYS?
>> UNDER OUR CASE LAW, NO.
THE JUDGE WOULD HAVE TO FOLLOW
THE RECOMMENDATION-- WELL,
SHOULD FOLLOW THE RECOMMENDATION
OF THE JURY.
>> OKAY.
>> BUT THE JUDGE IS THE ULTIMATE
SENTENCER.
THE JURY CAN STILL RECOMMEND
UNDER THE FLORIDA LAW.
THAT WAS NOT DECLARED
UNCONSTITUTIONAL.
IT WAS JUST THAT THE SECURE--
THE JURY HAS TO FIND THE

AGGRAVATING FACTOR WHICH
ELEVATES IT TO A DEATH SENTENCE
AS OPPOSED TO--
>> HOW CAN AGGRAVATING FACTS BE
FOUND--
>>-- IS INSUFFICIENT?
I THOUGHT THAT'S EXACTLY WHAT
HEARST SAID, THAT A
RECOMMENDATION IS NOT
SUFFICIENT, THAT'S NOT A FINDING
OF THE NECESSARY ELEMENT.
AND DIDN'T HEARST SAY THAT?
>> WELL, HEARST SAID THAT THE
JURY HAS TO MAKE THE FACTUAL
FINDINGS OF THE AGGRAVATING--
OF AN AGGRAVATING FACTOR.
>> AND--
[INAUDIBLE]
IS NOT SUFFICIENT.
DOESN'T IT SPECIFICALLY SAY
THAT?
>> WELL, IT SAYS THE STATE CAN'T
RELY ON THE FACT THAT THE JURY
MADE A RECOMMENDATION AS A
FACTUAL FINDING.
THAT'S WHAT IT SAID.
>> OKAY.
>> HOWEVER, AS I SAID
PREVIOUSLY, IN KNIGHT--
>> SO LET ME, LET ME SEE.
WHAT YOU'RE SAYING IS, IT SEEMS
TO ME YOU'RE SAYING IF A JURY
SAYS THAT ONE OF THE-- CCP, FOR
EXAMPLE, IS APPLICABLE TO THE
CASE.
THE JUDGE CAN STILL, IN YOUR
OPINION, FIND OTHER AGGRAVATORS
AND IMPOSE THE DEATH SENTENCE?
>> YOU MEAN--
>> BEYOND CCP.
THE JUDGE COULD STILL SAY, WELL,
THIS CASE IS ALSO HAC, IT'S ALSO
PECUNIARY GAIN, YOU KNOW, GREAT
RISK OF HARM TO MANY PEOPLE,
WHATEVER.
AND BASE A DEATH SENTENCE ON
THOSE FACTORS IN ADDITION TO
WHAT THE TRIAL JURY MAY HAVE
FOUND.
>> YES.

I MEAN, I'M--
>> BUT, YOU KNOW, THE THING THAT
BOTHERS ME, I GUESS LET ME JUST
SAY THIS.
THE THING THAT BOTHERS ME IS
THAT WHEN WE DO AN ANALYSIS OF
THESE CASES, WE DON'T LOOK AT A,
AN AGGRAVATING FACTOR AND SAY,
YOU KNOW, THIS AGGRAVATING
FACTOR IS NOT OUTWEIGHED BY ALL
THIS MITIGATING.
WE LOOK CUMULATIVELY AT ALL THE
AGGRAVATING FACTORS THAT ARE
FOUND IN A CASE AND DECIDE
WHETHER OR NOT THE MITIGATING
FACTORS OUTWEIGH THAT.
AND UNDER THAT ANALYSIS, IT
SEEMS TO ME, WOULD BE FLYING IN
THE FACE OF WHAT THE SUPREME
COURT HAS SAID IN HEARST.
>> WELL, IT MAY VERY WELL BE
THAT THE LEGISLATURE WILL GO AND
MAKE THE JURY THE ULTIMATE
SENTENCER IN FLORIDA.
HOWEVER, HEARST DID NOT MANDATE
THAT.
>> BUT IF WE TAKE--
>> THE JUDGE MAKE A FINDING
WITHOUT THE AGGRAVATORS?
CAN HE SENTENCE THEM TO DEATH IF
THERE ARE NO AGGRAVATORS?
>> NO.
>> IF THE JURY HAS NOT FOUND
THOSE AGGRAVATORS, THEN THERE'S
NO DEATH PENALTY.
>> THAT'S TRUE.
>> SO CAN WE, CAN WE TRY TO
RECONSTRUCT OR RESURRECT THIS
FLAWED STATUTE TO MAKE IT
CONSTITUTIONAL?
>> YES, I BELIEVE WE CAN.
HOWEVER--
>> SHOULD WE?
>> SHOULD YOU IS A DIFFERENT
QUESTION.
[LAUGHTER]
I THINK IT WOULD PROBABLY BE
MOST ADVISABLE TO ALLOW THE
LEGISLATURE TO HANDLE THAT.
>> WOULD THAT BE RETROACTIVE?

>> WOULD THE NEW LEGISLATION--
>> THE NEW STATUTE, RIGHT.
>> I DON'T KNOW.
>> HOW WOULD IT IMPACT THE CASES
ALREADY THAT HAVE BEEN DECIDED?
>> WELL, IT'S OUR POSITION THAT
HEARST IS NOT RETROACTIVE.
>> I'M JUST ASKING
HYPOTHETICALLY.
>> HYPOTHETICALLY.
>> NOT EVEN TO CASES THAT WERE
FROM THE RING POINT OF, FROM THE
BEGINNING OF RING FORWARD?
EVEN THOSE CASES ARE NOT
AFFECTED BY HEARST?
>> NO, YOUR HONOR.
THEY'RE NOT.
JUST AS RING ITSELF WAS NOT
RETROACTIVE IN ARIZONA, THIS
COURT IN JOHNSON AND THE U.S.
SUPREME COURT IN SUMMERLIN BOTH
SAID AS YOU HAVE DISCUSSED
PREVIOUSLY THAT RING WAS
PROCEDURAL AND NOT RETROACTIVE.
AND IT WOULD NOT BE RETROACTIVE
IN THIS INSTANCE AS WELL BECAUSE
HEARST IS MERELY AN EVOLUTIONARY
DEVELOPMENT OF APPRENDI.
>> REALLY, I MEAN, IT'S HARD TO
SAY IT'S REALLY-- AND I KNOW
YOU'RE USING THE MAGIC WORDS,
AND YOU'RE ALMOST OUT OF TIME.
I MEAN, I THINK THE ISSUE FOR
MR. KNIGHT'S IS THAT HE IS
POST-RING, AND HOW DOES JUST THE
CIRCUMSTANCE THAT THE U.S.
SUPREME COURT DECIDES IN 2016 TO
DECLARE OUR STATUTE WHICH HAS
BEEN IN EFFECT SINCE 1970, WHAT,
5, 4?
LONG TIME, UNCONSTITUTIONAL.
THAT WE ARE NOW WE ARE
INEVITABLY GOING TO BE IN SOME
WAY ARBITRARY AS TO WHO GETS THE
BENEFIT OF IT.
I MEAN, YOU WOULD AGREE WITH
THAT, THAT THAT'S AN ARBITRARY
MEANING THE U.S. SUPREME COURT
IN DECIDING IT ON JANUARY 16TH
AS OPPOSED TO WHEN IT DECIDED

RING IS SORT OF DICTATING TO THE
STATE WHO GETS THE BENEFIT OF
IT.
>> WELL, IT'S FINISH-- THE U.S.
SUPREME COURT ALSO DID A NUMBER
OF DECISIONS BY NOT ACCEPTING
CERT IN A NUMBER OF CASES FROM
FLORIDA VALIDATING YOUR--
>> YOU'RE TALKING ABOUT THE
DEATH SENTENCES, THE PROPRIOR
VIOLENT FELONIES THEY DID NOT
TAKE CERT.
>> YES.
BOTH EXIST IN KNIGHT, AND THE
STATE WOULD ASK CAN THE COURT TO
CONFIRM THE DENIAL OF
POSTCONVICTION BELIEF.
>> THANK YOU.
>> I'M NOT GOING TO REPEAT
MYSELF, I DON'T HAVE MUCH TIME.
JUST ON THAT LAST POINT, I THINK
IF ONE OF THE LESSONS WE LEARN
FROM THIS IS THAT WE CANNOT
GLEAN OR SPECULATE OR
HYPOTHESIZE ABOUT WHAT THE
DENIAL OF CERT MEANS IN THE TWO
CASES FROM LAST WEEK OR IN THE
TWO CASES, OR IN BODSON AND
KING.
THAT, I THINK, WE PASSED THAT
POINT.
AND SO I THINK HEARST SAYS WHAT
IT SAYS.
I THINK IT'S CLEAR IT APPLIES TO
MR. KNIGHT'S.
AND JUST ON THE POINT OF THE
UNANIMOUS RECOMMENDATIONS,
HEARST MAKES VERY EXPLICIT AS
JUSTICE PERRY INDICATED THAT YOU
CANNOT RELY ON A RECOMMENDATION
TO SUPPLANT FINDINGS.
AS THE CONTEMPORANEOUS, IT GOES
BACK TO THE SUFFICIENCY OF THE
AGGRAVATORS, THE CONTEMPORANEOUS
INDICATOR HAPPENED, BUT THAT'S
NOT A FACTUAL FINDING UNDER
HEARST AND THE SIXTH AMENDMENT,
AND WE WOULD ASK THAT MR.
KNIGHT'S BE GRANTED RELIEF.
>> THANK YOU FOR YOUR ARGUMENTS.

THE COURT WILL BE IN RECESS,
TEN MINUTES.