>> NEXT CASE ON THE DOCKET IS
KING VERSUS STATE OF FLORIDA.
TAKE YOUR TIME.
WHENEVER YOU'RE READY.
>> GOOD MORNING.
MY NAME IS MARIA PERINETTI AND I
ALONG WITH MY CO-COUNSEL
REPRESENT THE APPELLANT, MICHAEL
KING.
THIS IS AN APPEAL FROM THE
CIRCUIT COURT'S DENIAL OF MR.
KING'S MOTION FOR
POST-CONVICTION RELIEF.
I'D LIKE TO START OFF TODAY'S
ARGUMENT FOCUSING ON ARGUMENT
TWO OF MY BRIEF, MY INITIAL
BRIEF, INEFFECTIVE ASSISTANCE OF
COUNSEL FOR FAILING TO PROPERLY
PRESERVE AN ISSUE REGARDING THE
STATE'S STRIKE OF JUROR 111.
IF TIME PERMITS, I'D LIKE TO
ADDRESS SOME THINGS ABOUT THE
HURST ISSUE.
MR. KING'S ATTORNEY ARGUED THAT
THE TRIAL COURT ERRED IN THE
STRIKING OF THE JURY.
THIS COURT DENIED MR. KING'S
CLAIM BECAUSE THEY FOUND THAT
THE CLAIM WAS WAIVED.
BUT FOR DEFICIENT PERFORMANCE,
MR. KING WOULD HAVE WON ON
DIRECT APPEAL AND HE WOULD HAVE
BEEN GRANTED A NEW TRIAL.
>> IS THAT THE STANDARD -- THAT
THE STANDARD THAT WE HAVE
ADOPTED FOR POST-CONVICTION IS
THE CARATELLI STANDARD.
CAN YOU ESTABLISH THAT A BIASED
JUROR SAT?
>> THE CARATELLI CASE IS
DISTINGUISHABLE FROM THIS CASE
FOR SEVERAL REASONS.
FIRST, RELYING ON THE DAVIS CASE
OUT OF THE 11TH CIRCUIT, WHICH
FINDS A VERY NARROW EXCEPTION
FOR INEFFECTIVE ASSISTANCE OF
COUNSEL CASES WHERE TRIAL
COUNSEL WHILE THEY WERE
EFFECTIVE IN RAISING AN
OBJECTION OR AN ISSUE, THEY WERE

INEFFECTIVE IN FAILING TO
PRESERVE THAT ISSUE FOR APPEAL.
IT'S A VERY NARROW EXCEPTION.
THE CARATELLI CASE OUT OF THIS
COURT HAS TO DO WITH A CAUSE
CHALLENGE -- ACTUALLY, THERE
WERE TWO CASES.
>> I THOUGHT WE HAVE APPLIED IT
BROADLY.
DOESN'T THE SAME PRINCIPLE
APPLY, WHICH IS THAT WE'RE NOT
GOING TO GIVE DEFENDANTS A
POST-CONVICTION A NEW TRIAL
UNLESS THEY CAN SHOW THAT A
BIASED JUROR SAT.
THERE ARE SOME THAT WOULD SAY
THAT SHOULD EVEN BE THE STANDARD
ON DIRECT APPEAL AND WE'VE
REJECTED THAT.
BUT ON POST-CONVICTION WE'VE
IMPOSED A HIGHER BURDEN BECAUSE
AT THIS POINT YOU'RE REALLY
SAYING THAT ALONE WOULD GRANT
THE DEFENDANT A NEW TRIAL.
AND I THINK IN CARATELLI AND
SUBSEQUENT CASES WE HAVE SAID
NO, THAT THAT'S NOT A BASIS FOR
A NEW TRIAL.
>> CARATELLI INVOLVED A CAUSE
CHALLENGE.
>> I UNDERSTAND THAT, BUT ARE
YOU SAYING WE HAVEN'T APPLIED IT
MORE BROADLY?
>> I'M SAYING IT HASN'T BEEN
APPLIED -- I COULD NOT FIND A
CASE THAT WAS DIRECTLY ON POINT
WITH THIS CASE, WHERE IT WAS A
PURE BATSON CHALLENGE.
IT INVOLVED A CAUSE CHALLENGE.
ANOTHER CASE ADDRESSED IN THE
CARATELLI CASE THAT HAD TO DO
WITH THE STATE'S OBJECTION TO
THE DEFENSE'S USE OF A
PEREMPTORY CHALLENGE.
>> WHY IS A BATSON CHALLENGE, IS
WHICH IS A PEREMPTORY, ON A
HIGHER LEVEL THAN A CAUSE
CHALLENGE?
WHAT IS THE CONSTITUTIONAL VALUE
OR THE POLICY REASON THAT IF --

AGAIN, IF A BIASED JUROR DIDN'T SIT, THERE'S NO TAINT IN MR. KNIGHT'S TRIAL AND THE ULTIMATE VERDICT.
>> BECAUSE A DEFENDANT IS ENTITLED TO NONDISCRIMINATORY JURY SELECTION PROCESS.
ALSO INDIVIDUAL JURORS ARE ENTITLED TO THAT SAME PROCESS.
IF WE LOOK AT THE -- JUST BY DEFINITION OF WHAT A BATSON CHALLENGE IS, IT HAS NOTHING TO DO WITH A BIASED JUROR SITTING.
IT HAS TO DO WITH THE CONSTITUTIONAL RIGHT TO THIS NONDISCRIMINATORY JURY SELECTION PROCESS.
IF YOU ASK A DEFENDANT TO PROVE PREJUDICE IN THIS CONTEXT, IT'S IMPOSSIBLE.
IT'S SOMETHING A DEFENDANT IS NEVER GOING TO BE ABLE TO DO.
AS OPPOSED TO A CAUSE CHALLENGE THAT HAS TO DO WITH A BIAS.
THE VERY BASIS OF A CAUSE CHALLENGE IS THAT THIS JUROR THAT IS SITTING IS BIASED.
WHEREAS IS BATSON CHALLENGE DOESN'T HAVE ANYTHING TO DO WITH THAT.
I THINK THAT IT'S INDISPUTABLE THAT A DEFENDANT HAS A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL
--
>> LET ME ASK YOU THIS QUESTION, JUST ONE OTHER QUESTION ON IT.
>> SURE.
>> DIDN'T THE LAWYER SAY THAT HE DIDN'T WANT THIS JUROR?
I MEAN, WASN'T THERE --
>> NO.
>> HE DIDN'T SAY THAT.
>> THERE WAS A FIRST AND SECOND CHAIR.
THE FIRST CHAIR WAS NOT THE ATTORNEY WHO MADE THE BATSON OBJECTION.
THE SECOND CHAIR MADE THE BATSON OBJECTION.
THE FIRST CHAIR DIDN'T REMEMBER

ANYTHING ABOUT THIS JUROR.
MR. SCOTISE WAS THE ONE WHO MADE THE OBJECTION, WAS ATTEMPTING TO PRESERVE THIS OBJECTION.
>> BUT DIDN'T THE JUDGE MAKE A FINDING OF FACT ON THAT?
ASKING THE JUROR TO REWEIGH WHETHER IT WAS REASONABLE STRATEGY.
>> THE ONLY REASON THAT THE STATE -- OR THAT THE JUDGE FOUND AT TRIAL -- AT THE TRIAL LEVEL, THE ONLY REASON THAT THE STATE GAVE -- AND, AGAIN, THE STATE GAVE MANY REASONS FOR STRIKING THIS JUROR.
THE FIRST THING THAT CAME OUT OF HIS MOUTH, HOWEVER, WHEN HE WAS ASKED FOR A REASON WAS THAT SHE WAS AN 18-YEAR-OLD FEMALE.
THAT'S THE FIRST THING HE THINKS OF.
EVIDENCE IS A DISCRIMINATORY INTENT ON THE BASIS OF STRIKING FEMALE JURORS.
THEN HE GOES ON TO GIVE A NUMBER OF OTHER REASONS, HER AGE, HER STATEMENT DURING THE ORIGINAL DEATH QUALIFICATION THAT LIVING A LIFE IN PRISON IS MORE AWFUL THAN A DEATH SENTENCE.
FINALLY HE SAYS HER BROTHER HAS A PENDING CHARGE.
SHE WATCHES CSI.
>> YOU HAVE A JUROR WHOSE BROTHER HAS A PENDING FELONY CHARGE.
ISN'T THAT SUFFICIENT?
>> I CAN ADDRESS THAT, YOUR HONOR.
THAT COULD BE A VALID RACE-NEUTRAL REASON.
HOWEVER, FIRST OF ALL, HER BROTHER DID NOT HAVE A PENDING FELONY DRUG CHARGE.
WHEN YOU GO BACK AND LOOK AT THE JUROR FORMS, IT LOOKS LIKE IT WAS A PREVIOUS CHARGE, NOT A PRIOR CHARGE.
OKAY.

ALSO, IF YOU DO --
>> WHAT'S THE DIFFERENCE BETWEEN A PREVIOUS CHARGE AND A PRIOR CHARGE?
>> I THINK THAT -- HONESTLY, I DON'T THINK THAT THERE'S A HUGE DIFFERENCE BETWEEN A PREVIOUS CHARGE AND A PRIOR CHARGE.
BUT WHEN YOU LOOK AT THE COMPARATIVE JUROR ANALYSIS, WHEN YOU LOOK AT THE RACE OF A SIMILARLY SITUATED JURORS AND OTHER JURORS WHO ACTUALLY SERVED ON THE JURY WHO HAD RELATIVES WHO HAD CHARGES, WHO THEMSELVES HAD BEEN CHARGED WITH CRIMES, AND I IDENTIFIED FOUR JURORS WHO ACTUALLY SERVED ON THE JURY WHO --
>> FIRST OF ALL, I THINK WHAT THE STATE SAID WAS A PENDING CHARGE.
AND THERE WOULD BE A DIFFERENCE BETWEEN A PENDING AND A PRIOR, MAYBE TO CURRY FAVOR WITH --
WELL, AGAIN, I DON'T KNOW.
YOU DON'T KNOW.
BUT WHAT YOU'RE REALLY SAYING IS THAT THE PROSECUTOR GAVE A BEVY OF REASONS AND YOU THINK THAT THEY REALLY WEREN'T GENUINE.
BUT BECAUSE -- AGAIN, THIS GOES BACK TO WHY THE TRIAL COUNSEL DECIDED THAT HE DID NOT WANT THIS JUROR ANYWAY, RIGHT?
I MEAN, THAT'S WHAT THE JUDGE FOUND.
AND SO WE'RE NOW -- THIS IS WHAT THE CRAZINESS IS.
WE'RE NOW GOING TO HAVE A BATSON DISCUSSION HOW MANY YEARS AFTER THE CONVICTION AS TO WHETHER THIS WAS A RACE-NEUTRAL REASON?
I MEAN, I JUST FIND THAT, AGAIN, AS A MATTER OF POLICY, TO BE REALLY NOT WHAT SHOULD HAPPEN IN POST-CONVICTION.
BUT YOU CAN GO -- I MEAN, THAT'S -- SEE, BECAUSE WE'RE HAVING THIS.

YOU'RE SAYING YOU WOULD HAVE HAD
IT ON DIRECT APPEAL IF IT HAD
BEEN PRESERVED.
BUT IT WASN'T PRESERVED.
AND THEN WE FIND OUT, WELL,
MAYBE THERE WAS A REASON THEY
DIDN'T DO IT, NOT BECAUSE THEY
DIDN'T DO THE LAW, BUT THEY HAD
A REASON.
WE'RE REEXAMINING IN A MICROCOSM
THIS FEW SECONDS OF A TRIAL
WHERE NOTHING AFFECTED THE
FAIRNESS OF THE CONVICTION.
SO THAT'S MY PROBLEM.
>> I WOULD JUST REITERATE -- AND
I WILL MOVE ON TO THE HURST
ISSUE, BUT I JUST WANT TO
REITERATE THAT THE COUNSEL WHO
ACTUALLY MADE THIS CHALLENGE AND
WHO WAS ATTEMPTING TO PRESERVE
THIS CHALLENGE TESTIFIED AT THE
EVIDENTIARY HEARING THAT HE WAS
TRYING HIS BEST TO PRESERVE THIS
ISSUE FOR APPEAL.
HE WASN'T FAMILIAR WITH THE CASE
LAW REGARDING THE DISCRIMINATORY
STRIKE OF FEMALE JURORS.
HE WASN'T EVEN FAMILIAR WITH
THAT CASE LAW.
AND HE ALSO SAID THAT, YES, I
TRY TO DO COMPARATIVE JUROR
ANALYSES, BUT I'M JUST NOT GOOD
AT T. YOU CAN SEE ON THE RECORD
WHERE HE WAS STARTING TO DO IT.
THERE'S ONE PERSON WHO IS -- AND
THEN HE GETS CUT OFF.
THE COURT AND A STATE HAVE A
LITTLE BACK AND FORTH ABOUT WHAT
THE RACE-NEUTRAL REASON IS AND
HE DOESN'T GO FORWARD.
HE SAID AS HIS SINGLE GENUINE
RACE-NEUTRAL REASON FOR THIS
STRIKE, SHE INDICATED LIVING A
LIFE IN PRISON IS MORE AWFUL
THAN A DEATH SENTENCE.
THAT WAS THE REASON HE GAVE.
THE COURT WASN'T BUYING THAT OR
THE REASON THAT SHE WATCHES CSI.
THE COURT JUST KIND OF PICKED
ONE.

IF YOU PUT OUT ENOUGH
RACE-NEUTRAL REASONS, MAYBE ONE
WILL STICK.
AGAIN, I THINK YOU HAVE TO LOOK
AT THE TOTALITY --
>> HOW MANY DO YOU NEED?
>> I'M SORRY?
>> HOW MANY RACE-NEUTRAL REASONS
DO YOU NEED?
ONE?
>> WELL, I THINK THE FACT THAT
HE'S GIVING SO MANY RACE-NEUTRAL
REASONS, THAT -- SOME OF THEM
ARE APPLICABLE TO OTHER JURORS
WHO SERVED ON THE JURY, WHEN YOU
LOOK AT THE REASON THAT HE GAVE
THAT SHE SAID THAT LIVING A LIFE
IN PRISON IS MORE AWFUL THAN A
DEATH SENTENCE.
WELL, IF THAT'S HIS SINGLE,
GENUINE, RACE-NEUTRAL REASON,
THEN WHY DID HE KEEP JUROR 114,
WHO SAID THE SAME THING?
>> I THINK WE ARE GETTING TO THE
HURST ISSUES.
>> OKAY.
I WANT TO ADDRESS, FIRST OF ALL,
THERE IS A QUESTION THAT CAME UP
YESTERDAY ABOUT HOW ARIZONA
DEALT WITH HURST ISSUES ON
REMAND.
AND I FOUND THE RING V. STATE,
WHERE IT BUMPED BACK TO THE
ARIZONA SUPREME COURT.
THE ARIZONA SUPREME COURT HELD
THAT IT IS SUBJECT TO HARMLESS
ERROR AND THAT IT WAS NOT
STRUCTURAL ERROR.
NOW, WHAT'S INTERESTING IS --
AND THIS IS AN ARTICLE OUT OF
THE -- I GOT THIS FROM AN
ARTICLE OUT OF THE ARIZONA STATE
--
>> AM I CORRECT THAT THE U.S.
SUPREME COURT HAS SAYS THAT
APPRENDI ERROR IS SUBJECT TO
HARMLESS ERROR REVIEW.
>> I BELIEVE SO.
>> OKAY.
THEN ALL OF THIS RING, HURST

ULTIMATELY FLOWS BACK TO
APPRENDI.
ISN'T THAT CORRECT?
>> YES.
BUT WHAT I THINK IS VERY
IMPORTANT AND MY ARGUMENT STILL
IS THAT IT IS STRUCTURAL ERROR.
BUT WHAT I WANT TO POINT OUT IS
IF EVEN IF THIS COURT FINDS THAT
HURST ERRORS ARE SUBJECT TO
HARMLESS ERROR, IT'S DIFFERENT
THAN THE PROPORTIONALITY
STANDARD OR THE STANDARD IN
STRICKLAND.
THE COURT HAS TO FIND THAT THE
ERROR WAS HARMLESS BEYOND A
REASONABLE DOUBT.
AND WHAT'S INTERESTING IS IN THE
CASE OF THE ARIZONA CASES THAT
WERE REMANDED, THERE WERE 30
CASES ON DIRECT APPEAL AND THEY
WERE REMANDED TO THE ARIZONA
SUPREME COURT FOR HARMLESS ERROR
REVIEW.
IN ONLY TWO OF THOSE CASES WAS
IT FOUND TO BE HARMLESS ERROR.
THE REST OF THOSE CASES WENT
BACK AND WERE REMANDED TO THE
TRIAL COURT.
>> NOW, YOU'RE TALKING ABOUT
ARIZONA?
>> IN ARIZONA, YES.
>> ARIZONA DID NOT APPLY IT
RETROACTIVELY.
THEY APPLIED IT WHEN THEY DID
THE CASE YOU'RE TALKING ABOUT,
THAT GOES THROUGH HARMLESS
ERROR, WERE FOR --
>> DIRECT APPEAL CASES, CORRECT.
>> RIGHT.
SO DON'T YOU FIRST HAVE TO GET
TO -- FOR THIS ONE, DON'T YOU
FIRST HAVE TO ADDRESS
RETROACTIVITY?
>> YES.
YES.
I'M JUST ADDRESSING THIS COURT'S
QUESTION YESTERDAY ABOUT THE
HARMLESS ERROR.
>> BUT YOU GOT AN INITIAL BURDEN

TO OVERCOME, WHICH IS
RETROACTIVITY.
>> RIGHT.
>> NOW, WHEN WAS THIS CONVICTION
FINAL?
>> MR. KING'S CONVICTION?
I BELIEVE 2009?
>> WELL, THEN YOU MIGHT HAVE --
>> IT WAS DEFINITELY POST-RING.
>> WELL, THEN YOU MAY BE IN A
SITUATION IF WE DECIDE TO
DISTINGUISH AND PUT YOU IN THE
JAMES CATEGORY, WHICH WOULD BE
THAT IT APPLIES TO CASES -- WAS
RING RAISED BELOW BY THE TRIAL
ATTORNEY?
>> IT WAS RAISED IN TRIAL COURT.
IT WAS NOT RAISED IN DIRECT
APPEAL OR POST-CONVICTION.
I ALSO WANT TO ADDRESS A COUPLE
OF ISSUES THAT ARE UNIQUE TO MR.
KING'S CASE.
THE STATE ARGUED IN THEIR BRIEF
THAT IN FLORIDA ONLY ONE
AGGRAVATING CIRCUMSTANCE IS
NECESSARY TO SUPPORT THE DEATH
PENALTY AND BECAUSE THE JURY
CONVICTED MR. KING OF SEXUAL
BATTERY AND KIDNAPPING, HE WAS
ELIGIBLE FOR THE DEATH SENTENCE.
I THINK THIS COURT HAS ADDRESSED
OVER AND OVER THIS WEEK THE
DISTINCTION BETWEEN BEING
ELIGIBLE FOR THE DEATH PENALTY
AND HAVING ONE AGGRAVATING
CIRCUMSTANCE VERSUS HAVING
SUFFICIENT AGGRAVATING
CIRCUMSTANCES.
BUT WHAT I WANTED TO POINT OUT
IN MR. KING'S CASE WAS THAT HE
ACTUALLY WAS NOT FOUND TO HAVE
THE PRIOR VIOLENT FELONY
AGGRAVATOR, EVEN THOUGH HE WAS
CONVICTED OF SEXUAL BATTERY AND
KIDNAPPING.
INSTEAD, ARE HE WAS FOUND -- OR
THE COURT FOUND THAT THE MURDER
WAS COMMITTED WHILE HE WAS
ENGAGED IN A KIDNAPPING
AGGRAVATOR WAS MET.

THE COURT ONLY AFFORDED THAT
AGGRAVATOR MODERATE WEIGHT.
SO IF IT'S THE STATE'S POSITION
THAT THAT AGGRAVATOR IS
SUFFICIENT TO GIVE MR. KING THE
DEATH PENALTY, I WOULD ARGUE
IT'S NOT.
EVEN THE COURT ONLY GAVE IT
MODERATE WEIGHT.
THERE WERE THREE OTHER
AGGRAVATORS THAT THE COURT FOUND
AND GAVE GREAT WEIGHT.
BUT THEY'RE RELYING ON THE
DURING THE COMMISSION OF A
SEXUAL BATTERY OR KIDNAPPING
AGGRAVATOR, I WOULD ARGUE THAT
THAT'S NOT SUFFICIENT.
>> IF IT IS AN ELIGIBILITY
REQUIREMENT WHICH THE STATE HAS
ARGUED, THEN THE CONVICTION OF
THE OTHER VIOLENT FELONIES WOULD
IN FACT MAKE HIM ELIGIBLE.
>> BUT THAT'S NOT SOMETHING THAT
-- YEAH.
>> IF THERE'S AN ELIGIBILITY
REQUIREMENT.
>> I WOULD SAY I THINK THE WORD
MAY BE PREREQUISITE IS A GOOD
WORD AS FAR AS --
>> WHAT DO YOU MEAN,
PREREQUISITE?
HE WAS CONVICTED IN THIS CASE.
>> HE WAS CONVICTED AND IT WAS
SOMETHING THAT THEY COULD HAVE
SOUGHT, BUT IT WAS SOMETHING
THAT THE STATE DID NOT SEEK THAT
AGGRAVATOR IN THIS CASE.
INSTEAD, THEY SOUGHT THE
COMMITTED WHILE ENGAGED IN A
SEXUAL BATTERY OR KIDNAPPING.
>> WELL, IT DOESN'T MATTER
BECAUSE IF HE HAD BEEN CONVICTED
OF A FELONY TWO YEARS BEFORE,
PRIOR VIOLENT FELONY, HE WOULD
STILL BE -- IF THERE IS AN
ELIGIBILITY REQUIREMENT, THAT
WOULD SATISFY THAT REQUIREMENT,
WOULDN'T IT?
SO WOULD IT REALLY MATTER?
>> THAT THE DEATH PENALTY WAS A

POSSIBILITY, BUT IT STILL
DOESN'T MEAN THAT THERE WAS
SUFFICIENT AGGRAVATORS TO
SUPPORT A DEATH PENALTY.
>> THIS GOES BACK DOWN TO WHAT
WE'VE BEEN TALKING ABOUT ALL
WEEK, WHICH IS WHAT DOES HURST
MEAN.
DOES IT MEAN THERE JUST HAS TO
BE ONE AGGRAVATOR OR UNDER OUR
STATUTE THAT THERE ARE
SUFFICIENT AGGRAVATORS.
THEN THE QUESTION IS DO THEY
HAVE TO FIND MITIGATORS AND THEN
THE WEIGHING.
SO IF THE STATE IS RIGHT THERE'S
ONLY THE QUALIFICATIONS OF THE
ONE AGGRAVATOR, AGAIN, GOING
BACK TO WHAT JUSTICE QUINCE IS
SAYING, THAT'S MET.
BUT THE ISSUE IS CAN WE -- WERE
THERE SUFFICIENT AGGRAVATORS.
>> AND I ALSO WANTED TO POINT
OUT WITH KING'S JUROR WHEN YOU
LOOK AT THE QUESTION THAT THE
JURY CAME BACK WITH, CAN THE
JURY RECOMMEND A DEATH PENALTY
WITHOUT AGREEING TO ALL FOUR OF
THE AGGRAVATING CIRCUMSTANCES
BEYOND A REASONABLE DOUBT.
THEY ASKED THAT QUESTION CAN.
THE JUDGE BASICALLY TELLS THEM
LOOK AT THE JURY INSTRUCTIONS.
THEY GO BACK AND THEY COME RIGHT
BACK OUT WITH A RECOMMENDATION.
SO THIS IS A JURY THAT WAS
CONFUSED.
THEY WERE CONFUSED ABOUT WHAT
THEIR ROLE IS, ABOUT WHAT THEIR
FINDINGS NEEDED TO BE WITH
REGARD TO THE AGGRAVATORS.
I THINK THAT THERE'S AN
INDICATION THAT THEY DID NOT
AGREE TO ALL OF THE AGGRAVATORS
EVEN THOUGH THIS WAS AN
UNANIMOUS DECISION.
AS HURST SAYS, WE CAN'T NOW LOOK
TO TREAT THE ADVISORY
RECOMMENDATION BY THE JURY AS A
NECESSARY FACTUAL FINDING THAT

HURST REQUIRES.
>> THEY RECOMMENDED DEATH BY 12-0, CORRECT?
>> YES.
BUT WE DON'T KNOW WHAT THEIR FACTUAL FINDINGS WERE.
WE DON'T KNOW WHAT THEIR WEIGHING WAS.
AND IN HURST THE COURT SPECIFICALLY SAID THAT WE CAN'T --
>> WELL, WE KNOW THAT THEY FOLLOWED THE JURY INSTRUCTIONS, WHICH SAYS YOU GOT TO FIND THAT THERE ARE SUFFICIENT AGGRAVATING CIRCUMSTANCES OR -- TO OUTWEIGH THE MITIGATORS.
THERE'S NOTHING ABOUT THOSE JURY INSTRUCTIONS THAT WERE CONFUSING, THAT THAT'S WHAT THEIR DEATH RECOMMENDATION HAS TO BE BASED ON.
>> BUT IT SEEMS THAT THEY WERE CONFUSED BECAUSE IT LOOKS LIKE THEY WERE CONFUSED ABOUT WHETHER THEY HAD TO AGREE TO ALL FOUR OF THE AGGRAVATORS.
>> BUT THERE'S NO REQUIREMENT ON THAT, IS THERE, THAT YOU HAVE TO BE UNANIMOUS ON ALL THE AGGRAVATORS?
>> THERE IS NO REQUIREMENT IN THE STATUTE ON THAT.
I'M INTO MY REBUTTAL TIME.
THANK YOU.
>> I'M CAROL DITTMAR REPRESENTING THE STATE OF FLORIDA.
FIRST WITH REGARD TO THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM THAT'S BEEN ARGUED THIS MORNING, ON DIRECT APPEAL THIS COURT DID NOT FIND THE ISSUE HAD BEEN WAIVED.
THIS COURT FOUND THAT THERE WAS NO ABUSE OF DISCRETION.
WHILE YOU NOTED THAT SOME OF THE ARGUMENTS PRESENTED ON APPEAL HAD NOT BEEN PRESERVED, THE ULTIMATE RULING WAS A RULING ON

THE MERITS AND NOT A RULING THAT
THERE WAS A PROCEDURAL BAR.
ALSO, EVEN IF YOU LOOK AT THE
ISSUE, I THINK CARATELLI SETTLES
THE ISSUE AND SETS IT TO REST,
THAT IT IS THE TRIAL THAT WE ARE
LOOKING AT IN DETERMINING
PREJUDICE AND THERE HAS BEEN NO
ALLEGATION HERE OF ANY IMPACT ON
THE TRIAL ITSELF OF ANY
NECESSARILY BIASED JUROR OR ANY
PROBLEM WITH THE JURY THAT
ACTUALLY THE SAT.
SO WE THINK THAT THE PRIOR
FINDING THAT THERE WAS A VALID
RACE-NEUTRAL REASON STILL
APPLIES EQUALLY.
YOU DO HAVE AN EVIDENTIARY
HEARING WHERE LEAD COUNSEL
TESTIFIED I WAS THE ONE WITH THE
FINAL SAY AND I DID NOT WANT
THIS JUROR ON THE PANEL.
I HAD NO WRITTEN NEXT TO HER.
SO THESE ARE ALL FACTORS THAT
CERTAINLY SUPPORT THE TRIAL
COURT'S REJECTION OF THIS CLAIM
IN POST-CONVICTION AND SHOULD BE
AFFIRMED ON APPEAL.
TURNING TO THE HURST ISSUE,
FIRST, WITH REGARD TO
RETROACTIVITY, THIS COURT HAS
ALREADY HELD IN JOHNSON THAT THE
PRINCIPLE, THE ANALYSIS
REQUIRED, WILL NOT ALLOW FOR
RETROACTIVE APPLICATION.
SO IT'S REALLY THE SAME ISSUE
BECAUSE YOU WERE LOOKING AT
BLAKELY, WHICH IS IN THE STRING
OF APPRENDI AND RING DECISIONS
AND ALREADY CONDUCTED THAT
ANALYSIS.
THE U.S. SUPREME COURT HAS SAID
RING WAS NOT GIVEN RETROACTIVE
APPLICATION.
>> WHAT ABOUT JAMES?
>> JAMES IS AN INTERESTING
OPINION, WHICH BASICALLY SKIRTS
--
>> I MADE AN OBSERVATION ALONG
THOSE LINES EARLIER.

>> WHICH BASICALLY SKIRTS THE WHOLE RETROACTIVITY ISSUE.
IN JAMES, THE COURT DOESN'T EVEN DISCUSS RETROACTIVITY.
THEY JUST SAY YOU KNOW WHAT? BECAUSE JAMES PRESERVED THE ISSUE AT HIS TRIAL, RAISED THE ISSUE ON APPEAL, DID EVERYTHING HE COULD TO PURSUE THE ISSUE AND WE REJECTED IT, THIS COURT SAYS IT WOULD NOT BE FAIR TO DEPRIVE HIM OF THE RULING IN ESPINOSA.
WE HAVE WOOD V. STATE THAT SETS OUT VERY CLEARLY WHAT OUR TEST IS AND WE SHOULD FOLLOW THE LAW.
THE COURT IN JAMES CHOSE NOT TO.
THEY CHOSE TO EXTEND JUDICIAL GRACE AND BASICALLY ACTED I THINK MORE EQUITABLY THAN LEGALLY AND THERE'S NO BASIS TO DO THAT IN CASE, FOR A NUMBER OF REASONS.
FIRST OF ALL, THIS ISN'T A DECISION -- HURST ITSELF ISN'T A DECISION THAT MAKES ANY SENTENCING PROCEEDING MORE RELIABLE.
IT DOESN'T AFFECT THE ACCURACY OR THE FAIRNESS OF THE SENTENCING PROCEEDING.
AS THE U.S. SUPREME COURT RECOGNIZED IN RING, IT'S JUST THE EXTENSION OF THE SIXTH AMENDMENT.
>> THERE MIGHT BE SOME PEOPLE THAT WOULD DISAGREE WITH THAT, WHICH IS THAT WE'VE GOT IN THIS COUNTRY AND THIS STATE A HISTORY THAT RIGHT TO JURY TRIAL IS ONE OF THE FUNDAMENTAL RIGHTS AND THE IDEA THAT THE JURY MAKES THE IMPORTANT DECISIONS.
SO, AGAIN, I UNDERSTAND WHAT YOU'RE SAYING, BUT IT'S REALLY NOT -- I DON'T UNDERSTAND -- YOU KNOW, IF THE STATE -- IF THE COURT -- A SINGLE TRIAL JUDGE, BASED ON HIS OR HER EXPERIENCE, IMPOSES THE DEATH PENALTY, WHY THAT'S MORE RELIABLE THAN A JURY

OF 12 MAKING THE SAME DECISIONS.
I GUESS THAT'S -- BUT WE CAN
ARGUE -- SO THAT'S MY --
>> JURIES CAN BE ARBITRARY OR
WHATEVER.
COULD GO EITHER WAY WITH THAT,
AS TO WHICH SYSTEM MAY BE
BETTER, WHICH SYSTEM MAY NOT.
AND I'VE COMPLETELY LOST MY
TRAIN OF THOUGHT.
I'M SORRY.
I APOLOGIZE.
BUT THE OTHER THING ABOUT
FAIRNESS --
>> YOU WERE SAYING THAT IT
WASN'T AFFECTING RELIABILITY.
THAT'S WHAT YOU WERE SAYING.
>> RIGHT.
AND THE OTHER THING ABOUT
FAIRNESS IS RETROACTIVITY IS NOT
ABOUT FAIRNESS.
IN HIS DISSENT IN JAMES, JUSTICE
GRIMES TALKS ABOUT THE
IMPORTANCE OF FINALITY.
FINALITY IS AN INTEGRAL PART OF
THE CRIMINAL JUSTICE SYSTEM.
: : : [AUDIO BREAK]
>> WITHOUT A FINDING OF
RETROACTIVITY, THERE WOULD BE NO
BASIS FOR THEM TO GO BACK TO THE
TRIAL COURT WITH THIS SUCCESSIVE
POST-CONVICTION MOTION JAMES WAS
BASED ON FAIRNESS, BASED ON THE
HAVING -- LITIGATING THE ISSUE.
>> RIGHT.
IT'S A FAIRNESS THING.
I THINK JUSTICE GRIMES WAS VERY
ELOQUENT IN EXPLAINING WHY
FINALITY HAS TO TRUMP FAIRNESS.
WE NEED TO HAVE THE CONFIDENCE,
CERTAINLY THE CITIZENS OF THIS
STATE AND CERTAINLY THE FAMILIES
OF THESE VICTIMS NEED TO HAVE
CONFIDENCE THAT WHEN A SENTENCE
IS FINAL, IT WILL ONLY BE
DISTURBED IF THERE'S A
TREMENDOUSLY IMPORTANT REASON TO
DO SO.
>> BECAUSE THE REALITY IS IF
PURE FAIRNESS IS THE STANDARD,

THEN THERE WOULD NEVER BE
FINALITY, BECAUSE AS OUR
UNDERSTANDING OF THE LAW CHANGED
THEN THERE WOULD BE NO REASON
FOR THAT NEW UNDERSTANDING NOT
TO REACH BACK AND TO APPLY TO
ANY CASE, NO MATTER HOW REMOTE
IN TIME, AND SO EVERY DECISION
WE MAKE WOULD MEAN THAT IF
SOMEONE HAD BEEN CONVICTED UNDER
A DIFFERENT UNDERSTANDING OF THE
LAW PREVIOUSLY, THAT WOULD BE UP
FOR GRABS ALWAYS.
>> AND I THINK IF FAIRNESS IS
THE BAR, YOU HAVE TO REMOVE ALL
PROCEDURAL BARS.
AT SOME POINT YOU HAVE TO SAY WE
HAVE A SYSTEM IN PLACE.
YOU HAVE TO-- OUT OF RESPECT
FOR THE SYSTEM, SOMETIMES YOU DO
THINGS THAT MAY NOT SEEM FAIR.
AND I THINK JUST IN THE ARGUMENT
THAT WAS ON THE STATUTORY
RETROACTIVITY BEFORE THIS ONE
YOUR HONORS TALKED ABOUT.
SOME THINGS IT'S NOT FAIR.
LIFE ISN'T FAIR.
AND NOT ALL DECISIONS ARE GOING
TO BE FAIR.
BUT THEY SHOULD BE LEGAL.
AND LEGAL SHOULD BE THE BASIS OF
THE DECISION RATHER THAN
EQUITABLE OR GRACE OR GOING BY
FAIRNESS AND LETTING FAIRNESS
CARRY THE DAY.
WHILE IT'S A LAUDABLE GOAL --
>> IT'S IMPORTANT TO UNDERSTAND
ALSO THAT HERE THIS CONCEPT OF
FAIRNESS IS A PARTICULAR NOTION
OF FAIRNESS, OF TREATING LIKE
CASES ALIKE.
>> RIGHT.
>> IT DOESN'T MEAN THAT IT'S
UNFAIR IN THE SENSE THAT AN
UNJUST RESULT WAS REACHED IN A
PARTICULAR CASE.
>> EXACTLY.
EXACTLY.
>> SO WE'RE NOT TALKING ABOUT
UNFAIRNESS AS EQUIVALENT TO AN

UNJUST RESULT.
>> EXACTLY.
>> WE'RE JUST TALKING ABOUT THIS DIFFERENCE IN THE PROCEDURAL PROTECTIONS AND THE PROCEDURAL PROCESS FOLLOWED IN PARTICULAR CASES.
>> THAT'S WHY YOU LOOK AT THE NATURE OF THE CASE WHEN YOU'RE DETERMINING THE RETROACTIVITY. UNDER WITT, IF IT'S SOMETHING THAT IMPACTS FUNDAMENTAL FAIRNESS, THAT CAN BE A REASON.
>> LET'S GO BACK TO HURST AND WHAT THE SUPREME COURT MAY OR MAY NOT HAVE SAID IN HURST. IF WE INTERPRET HURST TO REQUIRE THAT THE TRIAL JURY MAKE ALL THE FINDINGS THAT WOULD BE NECESSARY TO IMPOSE A DEATH SENTENCE AND THAT THOSE FINDINGS INCLUDE FINDINGS ON MITIGATING CIRCUMSTANCES, WOULDN'T IT NECESSARILY HAVE TO GO BACK IN THIS SITUATION?
>> WELL, I THINK WHAT YOU'VE GOT TO LOOK AT WITH HURST -- AND I KNOW THE TERM ELIGIBILITY HAS BEEN THROWN AROUND. I THINK THAT'S MAYBE A DANGEROUS WORD BECAUSE THERE ARE A LOT OF DIFFERENT CONTEXTS AND CONNOTATIONS.
>> IT'S VERY DANGEROUS.
>> I THINK IT'S BETTER TO GO BACK TO APPRENDI, A FINDING NECESSARY TO IMPOSE A SENTENCE. THIS COURT SINCE DIXON HAS SAID IN ORDER TO IMPOSE A HIGHER SENTENCE, YOU NEED ONE OR MORE AGGRAVATING FACTORS. NOW, ONE AGGRAVATING FACTOR YOU CAN HAVE A DEATH SENTENCE.
>> NOW, LET'S JUST STOP RIGHT THERE. IT SEEMS TO ME THAT WHAT OUR STATUTE SAID IS NOT THAT YOU NEED ONE AGGRAVATING FACTOR, BUT WHAT OUR STATUTE SAYS IS THAT YOU NEED TO DO A BALANCING TO

DETERMINE WHETHER OR NOT THAT
ONE OR THAT TWO OR THAT THREE
AGGRAVATING FACTOR OR FACTORS
ARE NOT OUTWEIGHED BY THE
MITIGATING FACTORS.
>> ABSOLUTELY.
THAT'S THE ULTIMATE SENTENCING
DECISION.
>> SO TO ME THAT MEANS THAT
THERE'S SOMETHING MORE THAN JUST
FINDING ONE AGGRAVATING FACTOR
TO MAKE SOMEONE -- TO MAKE THE
IMPOSITION OF THE DEATH SENTENCE
APPROPRIATE.
>> BUT IF YOU HAVE ONE
AGGRAVATING FACTOR AND YOU HAVE
A POTENTIAL DEATH SENTENCE, YOU
HAVE A SECOND AGGRAVATING
FACTOR, YOU DON'T HAVE A MORE
SEVERE SENTENCE.
THAT DOESN'T GIVE YOU A HIGHER
SENTENCE THAN ONE AGGRAVATING
FACTOR GIVES YOU.
YOU DON'T GET A HIGHER SENTENCE
BEYOND THE DEATH SENTENCE.
AND MITIGATION IS THE SAME
SENSE.
MITIGATION ISN'T GOING TO GIVE
YOU A HIGHER SENTENCE --
>> BUT IT CAN CERTAINLY GIVE YOU
A LOWER SENTENCE.
>> BUT THAT'S NOT WHAT APPRENDI
SAYS.
IT SAYS THE FACT FINDING
NECESSARY TO IMPOSE A HIGHER
SENTENCE.
>> SEE, THAT'S WHERE YOU CAN'T
TAKE A -- YOU CAN TAKE THE
APPRENDI HOLDING, BUT YOU CAN'T
TAKE APPRENDI WHERE THERE'S ONE
FACT THAT IS NECESSARY AND APPLY
IT APPROPRIATELY IN THE DEATH
PENALTY CONTEXT.
BUT I HAVE A SECOND QUESTION FOR
YOU THAT IS A LITTLE MORE OF A
FRIENDLY QUESTION, WHICH IS
LET'S ASSUME THAT WE APPLY IT TO
MR. KING.
HARMLESS ERROR, YOU WOULD AGREE
-- I MEAN, I'M SURE YOU WOULD,

WOULD BE SOMETHING THAT COULD BE
LOOKED AT.
>> ABSOLUTELY.
>> OKAY.
SO HERE, WHERE THE JURY
RECOMMENDED ON PROPER
INSTRUCTIONS OTHER THAN TO SAY
IT WAS ADVISORY, 12-0.
>> YES.
>> THEIR DEATH SENTENCE, AND
THERE'S -- WOULD YOU ARGUE THAT
AT LEAST IN A CASE WHERE THERE'S
AN UNANIMOUS RECOMMENDATION AND
FINDINGS AND WE KNOW ON THE
RECORD THERE CERTAINLY IS --
WHAT WERE THE AGGRAVATORS?
>> THE HAC, WHICH OVERWHELMING
EVIDENCE OF HAC.
THE AGGRAVATING FACTORS WERE NOT
EVEN CHALLENGED ON DIRECT
APPEAL.
UNDER THE UNITED STATES VERSUS
NEDER CASE THAT THE AMOUNT OF
EVIDENCE OVERWHELMING EVIDENCE
GOING TO A FACTOR WHERE A JURY
HAS NOT BEEN ABLE TO RENDER A
VERDICT ON THAT PARTICULAR
ELEMENT, IF YOU WANT TO CALL IT
AN ELEMENT, CAN BE HARMLESS.
>> SO YOU GOT HAC.
BUT YOU'RE SAYING IT WASN'T EVEN
CHALLENGED ON APPEAL.
>> RIGHT.
AND CCP IN THIS CASE WAS VERY
WELL-ESTABLISHED.
>> WHAT ARE THE OTHER
AGGRAVATORS?
>> DURING THE COURSE OF THE
KIDNAPPING/SEXUAL BATTERY, AND
THE LAST ONE WAS TO AVOID
ARREST.
>> AND THAT WOULD ACTUALLY
INVOLVE A FACTUAL FINDING,
THOUGH.
>> I THINK THAT'S ARGUABLY THE
WEAKEST.
BUT I THINK WHEN YOU LOOK AT THE
STRENGTH OF THE CCP AND YOU LOOK
AT THE HAC, WHICH IS SO
OVERWHELMING IN THIS CASE, AND

YOU LOOK AT THE FACTOR THAT WAS SUPPORTED WITH THE JURY VERDICT, THAT YOU CAN'T COME TO ANY OTHER CONCLUSION THAN ANY HURST ERROR WOULD BE HARMLESS ON THE FACTS OF THIS CASE.
>> BUT YOU CAN'T -- YOU KNOW, I THINK THAT'S ALL WELL AND GOOD THAT THERE'S OVERWHELMING EVIDENCE THAT THERE'S HAC AND CCP, BUT WE STILL DON'T HAVE A JURY DETERMINATION OF THOSE TWO AGGRAVATING FACTORS.
>> WE HAVE A JURY RECOMMENDATION 12-0 THAT THERE WERE SUFFICIENT AGGRAVATING FACTORS.
WE HAVE TO AGREE THAT THE JURY IS GOING TO ABIDE BY ITS INSTRUCTIONS.
>> YOU KNOW, THEORETICALLY, YOU COULD GET A JURY RECOMMENDATION OF 12-0 AND FOUR AGGRAVATING CIRCUMSTANCES HAVE BEEN PRESENTED AND THEY MAY NOT THINK THAT ONE OF THEM IS THERE, BUT THE OTHER IS SUFFICIENT TO HAVE A JURY RECOMMENDATION OF DEATH. SO I DON'T THINK THAT THAT HELPS IN DETERMINING WHETHER OR NOT THE JURY ACTUALLY FOUND THAT -- OR BELIEVED THAT AGGRAVATING CIRCUMSTANCE EXISTED.
>> WELL, I THINK, FIRST OF ALL, IF HE'S GOING TO GET THE SAME SENTENCE ANYWAY, IT'S HARMLESS. EVEN IF YOU SAY THE JURY WOULDN'T HAVE VOID AVOID ARREST, BUT THEY FOUND THESE OTHER AGGRAVATORS.
YOU HAVE THE OVERWHELMING TEST OF NEDER, WHICH I DON'T SEE HOW YOU GET AROUND IN THIS CASE.
>> THE ARIZONA SUPREME COURT DID APPLY HARMLESS ERROR, BUT IT'S BEEN REPRESENTED THAT THEY DIDN'T FIND IT HARMLESS IN MOST OF THE CASES.
COULD YOU APPLY --
>> THAT'S PROBABLY TRUE BECAUSE IN ARIZONA THERE WAS NO JURY

PARTICIPATION AT ALL IN THE SENTENCING UNDER THE STATUTE WHICH RING INVALIDATED.
NOW, ARIZONA WAS VERY QUICK TO ENACT A NEW STATUTE AND TO GET CASES GOING, BUT THOSE CASES THAT WERE IN THE PIPELINE UNDER THE OLD STATUTE, I THINK IT WOULD BE DIFFICULT WHEN WE DON'T HAVE ANY JURY FACT-FINDING AT ALL.
IN FLORIDA WE HAVE SIGNIFICANT JURY PARTICIPATION.
>> BUT THERE'S A DIFFERENCE.
SEE, HERE'S THE DIFFERENCE.
WE ONLY HAVE JURY FACT-FINDING -- LIKE IN THE NEXT CASE WE'LL HAVE JURY FACT-FINDING.
BULL WE DON'T HAVE JURY FACT-FINDING, WHICH IS WHAT THE TRIAL JUDGES HAVE BEEN SAYING.
WE HAVE NO GUIDANCE AS A TRIAL JUDGE TO WHAT WAS FOUND, WHAT WASN'T FOUND.
DID YOU LOOK AT, THOUGH -- I THOUGHT THE ARIZONA SUPREME COURT REALLY ACTUALLY DID A PRETTY PLENARY ANALYSIS OF WHICH AGGRAVATORS AND FINDINGS WOULD MAKE IT HARMLESS OR NOT.
WE JUST NEED TO GO BACK AND LOOK.
>> I HAVEN'T EXPLORED THAT PART OF THE HARMLESS THAT ARIZONA DID, BUT THAT WAS A BIG PROBLEM WITH THEIR CASES, IS NOT HAVING ANYTHING BEYOND THE CONVICTION FROM THE JURY.
I THINK IN THIS CASE YOU CAN LOOK AT THE FACTS.
IF YOU LOOK AT THE RING CASE ITSELF, RING WAS A FELONY MURDER WHERE THE -- TIMOTHY RING WAS NOT EVEN A MAJOR PARTICIPANT.
SO IT WAS A REALLY WEAK, I THINK, COMPARED TO THE CASES THAT WE SEE, A VERY WEAK DEATH CASE.
I DON'T KNOW IF THE OTHER CASES THAT CAME AFTER THAT IN THE

PIPELINE WERE OF A SIMILAR
SITUATION OR IF THEY'RE LOOKING
AT SUBSTANTIVELY HOW HARMLESS IT
MAY BE FROM CASE TO CASE.
I THINK IT WOULD BE A REALLY --
YOU WOULD HAVE TO GO AND LOOK AT
THE FACTS OF EVERY SINGLE CASE.
I DON'T KNOW YOU CAN JUST SAY
BECAUSE THE SYSTEMS ARE
DIFFERENT, THE ANALYSIS WOULD BE
DIFFERENT.
BUT I KNOW THAT ON THE FACTS OF
MR. KING'S CASE, WE CLEARLY HAVE
SUCH OVERWHELMING EVIDENCE OF
THESE OTHER AGGRAVATORS, THERE'S
NO QUESTION ANY REASONABLE JURY
WOULD FIND THEM TO EXIST.
SO I THINK YOU HAVE TO MAKE A
DETERMINATION IN THAT CASE THAT
ANY POSSIBLE HURST ERROR WOULD
BE COMPLETELY HARMLESS.
>> HERE WE HAD JURY CONVICTIONS
FOR SEXUAL BATTERY AND
KIDNAPPING.
>> YES.
>> WERE THOSE AGGRAVATORS?
>> YES.
THERE WAS THE SINGLE AGGRAVATOR
OF DURING THE COURSE OF A
KIDNAPPING OR SEXUAL BATTERY.
SO THAT WAS AN AGGRAVATOR THAT
WAS APPLIED.
FOR THESE REASONS WE WOULD ASK
THE COURT TO AFFIRM THE ORDER
ENTERED BELOW DENYING
POST-CONVICTION RELIEF.
THANK YOU VERY MUCH.
>> THANK YOU.
REBUTTAL?
>> THANK YOU.
I THINK WE'RE MISSING A CRUCIAL
PART OF THE ANALYSIS IN THE JURY
FINDINGS THAT HURST SAID THAT
THE JURY HAD TO FIND.
THE FOCUS ON WHETHER THERE'S
SUFFICIENT AGGRAVATING
CIRCUMSTANCES EXISTS IS ONLY THE
FIRST PART OF THE ANALYSIS.
THE SECOND PART IS WHETHER THERE
ARE INSUFFICIENT MITIGATING

CIRCUMSTANCES TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.
SO EVEN IF WE'RE TO ACCEPT THAT THESE AGGRAVATORS WERE ESTABLISHED, WHICH I'M NOT CONCEDING, BUT EVEN IF WE WERE TO ACCEPT THAT, THERE'S STRONG MITIGATION IN THIS CASE AND THERE'S STILL A WEIGHING THAT HAS TO GO ON BY THE JURY.
>> BUT HERE'S THE PROBLEM IN YOUR CASE, AND EVERY CASE IS GOING TO MAYBE BE DIFFERENT, BUT WE HAVE TO LOOK AT IT.
AND TRIAL COUNSEL RAISED A RING ISSUE, BUT APPELLATE COUNSEL PRESUMABLY EXERCISING THEIR LOOKING AT THE CASE, DIDN'T CHALLENGE THE AGGRAVATORS, HAC.
THEY DIDN'T RAISE THAT THIS WAS A RING PROBLEM.
THEY DIDN'T TRY TO GET A SPECIAL VERDICT FOR THIS.
AND THE JURY RENDERED A 12-0 RECOMMENDATION AFTER JURY INSTRUCTIONS THAT TOLD THEM WHAT THEY NEEDED TO DO.
I'M NOT -- YOU KNOW, IF WE'RE GOING TO -- IF WE'RE GOING TO HAVE HARMLESS ERROR AT ALL, EXPLAIN AGAIN WHY YOUR ARGUMENT WOULD BE THAT THIS CASE WOULDN'T BE AN EXAMPLE OF WHERE IT WOULD BE HARMLESS ERROR BEYOND A REASONABLE DOUBT.
>> BECAUSE WE DON'T KNOW WHAT THE JURY WAS THINKING.
WE DON'T --
>> WELL, WE DO.
WE KNOW THEY DECIDED 12-0, WHICH IS NOT THAT COMMON, THAT THERE'S A 12-0 JURY RECOMMENDATION.
>> THERE'S ALSO -- AND IT'S BEEN BRIEFED EXTENSIVELY THROUGHOUT THE DIFFERENT BRIEFS THAT WERE SUBMITTED TO THIS COURT THIS WEEK, THAT THE STATUTE THAT'S IN PLACE AFFECTS STRATEGY OF TRIAL COUNSEL AND THAT THE STRATEGY OF TRIAL COUNSEL IS HOW THEY WOULD

HAVE PRESENTED GUILT PHASE AND
PENALTY PHASE.
>> BUT IF YOU SAY THAT, THERE'S
NO SUCH THING AS HARMLESS ERROR
IN THESE CASES.
>> THAT IS OUR POSITION.
IT CAN NEVER BE HARMLESS.
EVEN IF YOU APPLY THE HARMLESS
ERROR ANALYSIS, IF YOU LOOK AT
ARIZONA, THE TWO CASES WHERE
THEY FOUND THAT THE ERROR WAS
HARMLESS, THERE WAS EITHER
DEMINIMUS MITIGATION OR
MITIGATION HAD BEEN WAIVED.
IN ALL OTHER CASES THEY FOUND
THAT THE ERROR WAS HARMLESS.
WE WOULD ASK THAT THIS COURT
REVERSE AND REMAND FOR A NEW
TRIAL.
>> THANK YOU.
THANK YOU FOR YOUR ARGUMENTS.
COURT'S IN RECESS FOR TEN
MINUTES.
>> ALL RISE.