

>> OKAY.

THE NEXT CASE BEFORE THE COURT
IS DUROUSSEAU VERSUS STATE.
I HOPE I PRONOUNCED THAT RIGHT.

>> GOOD MORNING, YOUR HONOR.

MAY IT PLEASE THE COURT,
COUNSEL, RICHARD KURITZ ON
BEHALF OF MR. DUROUSSEAU.

>> USE YOUR MIC, PLEASE.

>> I'M SORRY.

THANK YOU.

>> JUDGE, THIS COURT WAS KIND
ENOUGH TO ALLOW ME TO DO
SUPPLEMENTAL BRIEFING REGARDING
HURST.

I REALIZED HOW COMPLEX THIS IS.
SO THE CASES I WANT TO TALK TO
THIS COURT ABOUT IS OBVIOUSLY
HURST, BUT A GREAT DEAL OF THE
TIME I'VE SPENT RECENTLY IS ON
BODDISON AND STEELE AND JAMES
AND WHERE DO WE GO HERE.

I BELIEVE BODDISON -- I'VE READ
THROUGH THE VARIOUS OPINIONS,
ESPECIALLY THE FACT THAT THAT
CASE AND LAMBRIX, THE UNITED
STATES SUPREME COURT KNEW ABOUT
THOSE CASES BECAUSE THEY HAD
GRANTED A STAY OF EXECUTION.

>> IT WAS BODDISON AND MAYBE
KING, BUT IT WASN'T LAMBRIX.

>> THAT'S RIGHT.

IT WAS RING.

BUT THE U.S. SUPREME COURT KNEW
ABOUT THEM, BUT DIDN'T SAY
ANYTHING, GIVE US MUCH OF A
ROADMAP.

AS I READ THROUGH THE OPINIONS,
I REALIZED THAT THAT IS REALLY
WHERE WE SHOULD BE GOING TODAY
REGARDING HURST OPINION ON THIS
THING.

ESPECIALLY IF YOU APPLY JAMES,
BECAUSE IN MR. DUROUSSEAU'S
CASE, WE PRESERVED THE ISSUE.
IT WAS ARGUED ON APPEAL.

AND PURSUANT TO JAMES, HE SHOULD
BE ENTITLED TO THAT AS WELL.

AND THEREFORE AT A MINIMUM HE
SHOULD BE SENT BACK FOR A NEW

SENTENCING PHASE SO THAT THEY
COULD APPLY THAT PORTION OF
HURST TO THAT, SINCE HE DID
PRESERVE THAT ISSUE PURSUANT TO
JAMES.

WHERE I THINK WE ALSO NEED TO GO
-- AND IT'S NOT A POPULAR
DECISION, BUT I THINK WE'RE
GOING TO ULTIMATELY END AT IS
THE UNANIMITY AT SOME POINT IS
GOING TO ULTIMATELY BE A
REQUIREMENT.

THAT'S SOMETHING THAT WAS
DISCUSSED IN BODDISON AND
JUSTICE LABARGA WAS ASKING OR
POINTED OUT OF ALL THE STATES
THAT WE HAVE, THERE'S THE
FEDERAL SYSTEM.

EVEN IN THE FEDERAL SYSTEM IT
REQUIRES A 12-0 VERDICT FOR THE
DEATH PENALTY.

SO I BELIEVE WE'RE ULTIMATELY
GOING TO GO THERE.

THE WHILE THAT'S NOT MY ISSUE
TODAY, I SAY THAT BECAUSE MINE
IS A 10-2 RECOMMENDATION IN THIS
CASE.

AGAIN, IT'S A RECOMMENDATION.

>> SO IF YOUR CASE IS SENT BACK
FOR A NEW PENALTY PHASE, ARE YOU
GOING TO -- IS THIS ARGUMENT
LEADING TO A NEW STATUTE?

>> THAT'S A GOOD QUESTION.

ACTUALLY, MY ARGUMENT THAT I
WANTED TO MAKE -- MY MAIN ISSUE
WHEN I WROTE THE INITIAL BRIEF
IN THIS CASE, WHEN I TOOK OVER
THIS CASE, WAS ABOUT JURY
SELECTION AND WHETHER THE JURY
SELECTION PROCESS WAS -- THE
LAWYERS WERE INEFFECTIVE.

SO AS I READ HURST, IT TOOK ME
TO THE POINT FROM THE MINUTE THE
JURORS ARE BROUGHT INTO THE
COURTROOM AND THE JUDGE BEGINS
TO DO INSTRUCTIONS, THEY ARE
INSTRUCTING THEM WRONGLY ABOUT
WHAT THEIR ROLE IS GOING TO BE
AN ADVISORY POSITION.

>> LET ME JUST CLARIFY.

IN THIS CASE THERE WAS NO SPECIFIC VERDICT FORM OUTLYING THE AGGRAVATORS AND MITIGATORS, WAS THERE?

>> NO, YOUR HONOR.

AND I LOOKED TO THAT BECAUSE THAT'S SOMETHING I ROUTINELY DO. I ROUTINELY REQUEST THAT BECAUSE I WANT THAT.

IT'S UNFORTUNATELY ALWAYS DENIED, BUT I THINK IT'S SOMETHING THAT WE NEED TO ADDRESS.

AND I BELIEVE THAT BASED ON THE ORAL ARGUMENTS THAT I'VE BEEN LISTENING TO, WE NEED TO GET TO THE POINT WHERE THE AGGRAVATORS ARE FOUND BEYOND A REASONABLE DOUBT, THE DISCUSSION ABOUT THE WEIGHING PROCESS IS FOUND BEYOND A REASONABLE DOUBT AND SO THAT WE CAN MOVE FORWARD WITH IT. BUT REGARDING MY INITIAL BRIEF REGARDING JURY SELECTION ASPECT OF IT, IT'S FROM THE VERY BEGINNING --

>> DID YOU ANSWER HER HURST QUESTION?

I THINK SHE SAID IF WE DECIDE TO SEND THIS BACK FOR A NEW PENALTY PHASE, WHAT STATUTE SHOULD APPLY?

>> IT WOULD NOT BE THE OLD STATUTE BECAUSE I DON'T BELIEVE WE CAN REWRITE THE STATUTE OR TRY TO SEVER THAT OUT OF THERE. SO THE QUESTION THEN BECOMES DO WE APPLY THE NEW STATUTE. AND I'VE BEEN LISTENING TO THE COURT'S ANALYSIS OF EX POST FACTO AND MY COLLEAGUES MAY NOT BE HAPPY WITH IT, BUT I BELIEVE THE NEW STATUTE WOULD BE WHAT WOULD APPLY AT A SENTENCING HEARING IF IT'S SENT BACK. I DON'T BELIEVE THE OLD STATUTE WOULD APPLY.

>> WELL, BASED ON YOUR ARGUMENT, IT SEEMS TO ME THAT WE WOULD -- WE SEND IT BACK, A NEW HEARING.

HE GETS A 10-2 VERDICT AGAIN.
THIS IS 10-2 IN THIS ONE,
CORRECT?

>> YES.

>> AND THEN WE'D BE RIGHT BACK
HERE TALKING ABOUT HOW IT SHOULD
HAVE BEEN A 12-0 VERDICT,
CORRECT?

>> THAT'S THE STATUTE WE'D BE
APPLYING.

I DIDN'T SAY I BELIEVE THAT
STATUTE TO BE CONSTITUTIONAL.
I THINK UNANIMITY IS GOING TO BE
REQUIRED.

I DON'T BELIEVE THE NEW STATUTE
IS CONSTITUTIONAL.

IF THIS COURT SENT IT BACK AND
CONDONES 10-2, WE'RE GOING TO BE
BACK HERE 10 TO 15 YEARS FROM
NOW HAVING THIS EXACT
CONVERSATION WE'RE HAVING NOW.

>> WE WON'T BE HERE.

[LAUGHTER]

>> WELL, AND HOPEFULLY I WON'T,
EITHER.

BUT I APPRECIATE THE LEVITY.

BUT --

>> LET ME ASK YOU A QUESTION.
YOU BROUGHT UP SOMETHING, AT
LEAST IN YOUR BRIEF, THAT I
HADN'T SEEN IN OTHER BRIEFS.
YOU ACTUALLY SHOWED SOME OF THE
QUESTIONING THAT WAS GOING ON
BEFORE THE U.S. SUPREME COURT,
AND I NOTICED THAT JUSTICE
SOTOMAYOR WAS ASSUMING THE
VERDICT OF THE JURY WOULD HAVE
TO BE UNANIMOUS, YET THEY DON'T
TALK ABOUT UNANIMITY IN THE
DECISION.

DID YOU HEAR-- WE DISCUSSED THE
NEW STATUTE.

DO YOU SEE A DISTINCTION AS WE
WERE DISCUSSING BETWEEN AN
UNANIMOUS VERDICT ON THE
AGGRAVATORS OUTWEIGHING THE
MITIGATORS, WHICH WE DON'T KNOW
IF THEY DID THAT BECAUSE THEY
DIDN'T SPECIFY AND THEN WHAT
WE'VE BEEN CALLING THE MERCY

RECOMMENDATION, A VERDICT OF LIFE OR DEATH, WHICH IS CLOSER TO MAYBE A HYBRID OF A SIXTH AND EIGHTH AMENDMENT?

WHAT'S YOUR THOUGHT ABOUT THAT?

>> THAT'S WHY I PUT ALL THOSE QUOTES IN THERE.

THE COURT WAS STRUGGLING WITH THAT CONCEPT.

MY THOUGHT ON THAT IS THAT WE'RE GOING TO COME TO UNANIMITY, THOUGH THEY DIDN'T WRITE THAT IN THEIR OPINION.

BUT I BELIEVE ABSOLUTELY UNANIMITY IS GOING TO BE WHERE WE END UP.

>> BUT EXCEPT THAT YOU GOT KANSAS V. CARR THAT TALKS ABOUT MERCY BEING SEPARATE FROM FACTUAL FINDINGS.

AND SO DO YOU SEE -- AGAIN, I KNOW YOU'VE DONE A LOT OF TRIAL WORK.

DO YOU SEE A DISTINCTION BETWEEN A JURY FINDING THE AGGRAVATORS OUTWEIGH THE MITIGATORS AND WHETHER THEY STILL DECIDE THIS IS NOT THE MOST AGGRAVATED OR MITIGATED CASE OR SOMETHING ABOUT THE DEFENDANT THAT CAUSES THEM TO BELIEVE THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE WILL STILL SERVE SOCIETY'S GOALS?

HOW DO YOU SEE -- OR IS THAT NOT A PRACTICAL DIFFERENCE, THE WAY JURIES DO IT THESE DAYS?

>> MERCY IS ALWAYS GOING TO BE THERE.

I BELIEVE JUST AS OUR CONSTITUTIONAL JURISPRUDENCE IS ALWAYS GOING TO BE THERE.

WE TALKED ABOUT VERDICT AND EVERYTHING THAT GOES WITH THAT. ATTACHED TO MY BRIEF WAS THE ORDER OF THE COURT THAT HE'S ALREADY STRUCK DOWN THE NEW STATUTE.

JUSTICE LABARGA WAS ASKING ABOUT THE CONSTITUTIONAL HISTORY OF

THE VERDICT BEING UNANIMOUS.
AND IT'S VERY WELL WRITTEN OUT.
IT'S VERY SCHOLARLY ON THAT.
SO I BELIEVE THE VERDICT IS
GOING TO BE 12-0.
IF YOU'RE GOING TO CALL IT A
VERDICT, THE ONLY TIME IN ALL OF
FLORIDA JURISPRUDENCE WHERE WE
DON'T HAVE AN UNANIMOUS VERDICT
IS IN DEATH RECOMMENDATIONS.
MAKES NO SENSE.
PETTY THEFT HAS TO BE UNANIMOUS.
EVERYTHING ELSE HAS TO BE
UNANIMOUS.
>> WE HAVE TO DECIDE DOES IT NOT
MAKE CONSTITUTIONAL SENSE, THE
STRUGGLE BETWEEN THE SIXTH
AMENDMENT AND EIGHTH AMENDMENT.
BEING AN OUTLIER WOULD GO TO THE
EIGHTH AMENDMENT ARGUMENT.
>> RIGHT.
THE MINE IS A 10-2.
MY CLIENT HAD A PRIOR VIOLENT
FELONY.
THAT WE ASSUME IS ESTABLISHED.
BUT THEN WE GET TO THE
SUFFICIENCY OF THE AGGRAVATORS
AND WHETHER THEY OUTWEIGH THE
MITIGATORS AND THAT'S WHERE I
HAVE A 10-2.
>> IN YOUR CASE HE NOT ONLY HAD
A PRIOR VIOLENT FELONY, BUT THIS
WAS ALSO COMMITTED DURING THE
COURSE OF A ROBBERY OR A SEXUAL
BATTERY, CORRECT?
>> YES, YOUR HONOR.
>> AND SO WE ACTUALLY END UP --
AND FOR PECUNIARY GAIN.
>> YES, YOUR HONOR.
>> WHICH ARE ALL THINGS THAT
REALLY DON'T NEED ANY ADDITIONAL
ELEMENTS OF PROOF, CORRECT?
>> CORRECT.
>> AND SO IS YOUR CASE ONE OF
THOSE -- YOU KNOW IN HURST THEY
LEFT IT TO THE STATES TO
DETERMINE WHETHER OR NOT THERE'S
A HARMLESS ERROR ANALYSIS TO BE
MADE IN THESE CASES.
AND SO UNDER THOSE

CIRCUMSTANCES, WITH THREE AGGRAVATING CIRCUMSTANCES THAT ARE, YOU KNOW, A PART OF WHAT'S ALREADY BEEN FOUND, IS THAT -- SOME CASE ONE OF THOSE THAT WOULD BE SUBJECT TO HARMLESS ERROR?

>> MY ANSWER WOULD BE NO. AND THE REASON I SAY THAT IS WE'RE TALKING ABOUT SOMETHING OF CONSTITUTIONAL PROPORTIONALITY ASPECT OF IT.

12-0, SURE, THE JURY FOUND THOSE THINGS EXISTED ON THE FELONY MURDER AND THEY CAME, OBVIOUSLY, TO GET WHERE WE ARE.

IT HAD TO BE A 12-0 VOTE AT THE GUILT PHASE.

BUT OBVIOUSLY MERCY CAME IN AT SOME POINT OR ALL OF THE AGGRAVATORS DIDN'T OUTWEIGH THE MITIGATORS.

SO TRYING TO STRUGGLE WITH IT

--

>> AT LEAST IN TWO PEOPLE'S MINDS.

>> AT LEAST TWO PEOPLE DECIDED. DO I WISH I WAS HERE ON A 8-4? ABSOLUTELY.

DO I WISH I HAVE DIFFERENT FACTS?

ABSOLUTELY.

BUT HERE I AM.

I STARTED WITH JURY SELECTION.

I WANT TO TOUCH ON THAT FOR ANOTHER MINUTE.

>> CAN WE GO BACK BECAUSE WE GOT SHORT-CIRCUITED IN YOU RESPONDING TO THE 10-2 AND THE NEW STATUTE.

I WOULD LIKE YOU TO FINISH ON THAT AS TO THE STATUS AS YOU SEE IT AS WE COME INTO IT.

IT APPEARS THAT YOU'RE GOING TO HAVE TO HAVE OR WE'RE GOING TO HAVE TO HAVE UNANIMOUS DECISION WITH REGARD TO AGGRAVATORS.

>> YES, SIR.

>> AND PROBABLY UNANIMOUS DECISION WITH REGARD TO

AGGRAVATORS SUFFICIENT THAT
OUTWEIGH MITIGATORS.
BUT THEN THE NEXT STEP IF IT'S
VIEWED AS A MERCY, IT WOULD
ALLOW THOSE UNANIMOUS DECISIONS
TO BE MADE OF FACTS AND THEN
YOUR OPINION ON WHAT SHOULD
HAPPEN BECAUSE WE'VE NEVER HAD
WHAT'S REALLY KNOWN AS JURY
SENTENCING.

>> CORRECT.

>> THAT IT WOULD GIVE THE JURY
THE OPPORTUNITY TO PASS ALONG,
SAY, I FOUND ALL THESE THINGS TO
EXIST, BUT I DON'T THINK IT'S A
DEATH CASE.

COULD THAT WITHSTAND A
NONUNANIMOUS CIRCUMSTANCE TO BE
CONSTITUTIONAL?

ARE YOU SUGGESTING, NO, THAT
WHATEVER THEY RECOMMEND HAS TO
BE UNANIMOUS AS WELL, EVEN
THOUGH THE OTHER TWO -- I CAN
PROBABLY AGREE WITH YOU, MORE
PROBABLY THAT'S GOING TO HAPPEN.
BUT I'M STILL UP IN THE AIR ON
THE 10-2 AND HOW THAT'S GOING TO
OPERATE.

>> YOUR LEGAL ANALYSIS ALL THE
WAY TO THE VERY END, I 100%
AGREE WITH.

SO TO TRY TO ANSWER THAT
QUESTION FROM A TRIAL ATTORNEY'S
PERSPECTIVE OF IT -- AND THAT'S
WHAT I'VE ASKED FOR OVER THE
YEARS, IS A SPECIFIC VERDICT
FORM LETTING US KNOW.

AND SO NOW WE'RE LEARNING THAT
WE HAVE TO HAVE A SPECIFIC
VERDICT FORM.

EVEN IF -- AND MY RESPONSE WOULD
BE EVEN IF THE JURY FINDS ALL OF
THE AGGRAVATORS EXIST AND THEN
THEY BEGIN A PROCESS OF WEIGHING
IT AND THAT'S WHERE WE'RE GOING
TO GET INTO LET'S SAY THEY ALL
CAME BACK AND THEY ALL SAID THEY
OUTWEIGH IT.

BUT THEN WE STILL COME TO A VOTE
AND IT STILL COMES TO 10-2.

THEN WE GO 9-3/10-2.
THAT'S WHERE WE START TO HAVE A
PROBLEM.
THAT'S WHY I SAY IT HAS TO BE
UNANIMOUS.
JURIES ARE ALWAYS GOING TO BE
ALLOWED TO GIVE MERCY.
SO THAT'S WHERE WE'RE AT WITH
IT.
MY ARGUMENT WOULD BE AT THE
TRIAL COURT LEVEL IS THAT 10-2
IS INSUFFICIENT NO MATTER --
EVEN IF THE AGGRAVATORS OUTWEIGH
THE MITIGATORS.
THAT'S NOT -- THEY COULD ALWAYS
-- THEY'RE NEVER REQUIRED TO
GIVE DEATH.
AND THAT'S ONE OF THE
INSTRUCTIONS THAT I THINK SHOULD
STAY IN THERE.
BUT IF WE HAVE A 10-2, MY ANSWER
AS A TRIAL ATTORNEY I'M GOING TO
BE ARGUING AND RESEARCHING AND
COMING BACK HERE ON IS THAT'S
JUST INSUFFICIENT UNDER THE LAW.
>> I UNDERSTAND THAT.
I'M TRYING TO UNDERSTAND WHY IT
WOULD BE IF THAT'S NOT A FACTUAL
FINDING.
BUT THAT REALLY IS SOMETHING
THAT WOULD BENEFIT A DEFENDANT,
TO ALLOW A JURY TO GO AHEAD AND
FIND ALL THESE THINGS
UNANIMOUSLY THAT ARE NOT IN
FAVOR OF A DEFENDANT.
>> RIGHT.
>> BUT THAT LAST STEP, THEY
COULD FIND, TWO OF THEM COULD
FIND IN FAVOR OF A DEFENDANT,
THAT WE OUGHT NOT IMPOSE DEATH
HERE.
>> CERTAINLY.
BUT THEY'VE CHANGED --
>> I'M TRYING TO UNDERSTAND HOW
THAT'S UNCONSTITUTIONAL.
>> YOU'RE GOING FROM 7 TO 5.
NOW I'M PICKING A JURY.
I'M TRYING TO DECIDE WHO I WANT
ON MY PANEL.
AM I LOOKING FOR ONE PEOPLE, TWO

PEOPLE?

VERSUS I WAS LOOKING FOR SEVEN PEOPLE.

SO MY JURY SELECTION IS GOING TO CHANGE BASED ON WHO'S THERE AND WHAT I'VE GOT TO DO BECAUSE OF THE JURY INSTRUCTION ASPECT OF IT.

SO WHEN I SAY, YES, YOU'RE RIGHT, IT DOES INURE TO THE BENEFIT OF THE DEFENDANT, BUT THE NUMBER CHANGES THE LANDSCAPE BASED ON WHERE WE'VE BEEN.

>> I DON'T THINK YOU'RE ANSWERING, THOUGH.

EVERYTHING IN FLORIDA HAS BEEN UNANIMOUS OTHER THAN THIS, BURDEN OF PROOF THE QUESTION BEFORE US, IF IT'S NOT THE FACTUAL FINDING OF GUILT OR EVEN THE FACTS UPON WHICH DEATH IS BASED, WHERE IS THE MERCY PART? WHICH IS UNDENIABLY PART OF OUR -- I MEAN, PART OF THE PROCESS SINCE THE BEGINNING.

>> SURE.

>> WHERE'S THE CONSTITUTIONAL FLAW IN HAVING 10-2 VERSUS WHAT THE SENATE WANTED TO DO, WHICH WAS 12-0?

IT'S LIKE WE'RE GOING -- AND YOU'RE RIGHT.

WE MAY BE BACK IN 15 YEARS. SO WE'RE TRYING TO SEE IF WE CAN'T SHORT-CIRCUIT THAT.

>> SURE.

>> SO HELP US WITH WHY THAT CONSTITUTIONALLY NEEDS TO BE UNANIMOUS, THE ULTIMATE MERCY RECOMMENDATION.

>> THE MERCY RECOMMENDATION DOES NOT NEED TO BE UNANIMOUS, IF I MISSPOKE.

ONE OR TWO JURORS CAN SAY MERCY AND THAT'S WHAT IT'S BEEN AROUND THE REST OF THE COUNTRY.

I MEAN, THAT'S --

>> NO.

NO.

I'M SORRY.

SO 10-2 COULD RECOMMEND DEATH
AND THAT'S CONSTITUTIONAL.

>> NO.

>> OKAY.

SO WHY DOES THE RECOMMENDATION
FOR DEATH -- THAT'S MAYBE --
NEED TO BE UNANIMOUS, UNDER --
AFTER THEY'VE ALREADY SAID
AGGRAVATORS OUTWEIGH THE
MITIGATORS UNANIMOUSLY?

>> RIGHT.

>> IS IT A SIXTH AMENDMENT RIGHT
BECAUSE VERDICTS HAVE ALWAYS
REQUIRED UNANIMITY?

OR IS IT AN EIGHTH AMENDMENT
RIGHT BECAUSE WE CAN'T HAVE --
DEATH IS DIFFERENT AND BE THE
ULTIMATE SENTENCE AND HAVE LESS
THAN UNANIMOUS CONSENT OF THE
JURORS WHO TRY THE CASE?

HEAR THE CASE?

>> I HADN'T WRAPPED MY MIND
AROUND THAT QUESTION AND I SEE
I'M INTO MY REBUTTAL TIME, SO
I'M GOING TO GIVE THAT A LITTLE
MORE THOUGHT, SEE IF I CAN GIVE
AN INTELLECTUAL RESPONSE TO
THAT.

THANK YOU, YOUR HONOR.

>> THANK YOU.

>> MAY IT PLEASE THE COURT,
COUNSEL, CARINE MITZ ON BEHALF
OF THE ATTORNEY GENERAL'S
OFFICE.

>> WHY DON'T YOU MOVE THE MIC
DOWN A LITTLE BIT.

>> ALL RIGHT.

SO I WANT TO BEGIN BY JUST
MAKING SOME VERY CLEAR AND SHORT
POINTS.

IT'S STILL THE STATE'S POSITION
THAT HURST IS NOT RETROACTIVE ON
CASES THAT ARE FINAL ON DIRECT
REVIEW, WHICH IS THE CASE HERE.
IN THIS PARTICULAR CASE, HURST
WAS SATISFIED DURING THE GUILT
PHASE WITH THE JURY'S EXPLICIT
FINDINGS THAT HE COMMITTED THE
MURDER DURING THE COMMISSION OF
BOTH A SEXUAL BATTERY AND A

ROBBERY.

AND THEN MOREOVER, AS POINTED OUT EARLIER, HE CAME TO THAT TRIAL WITH A PRIOR VIOLENT FELONY CONVICTION FOR AGGRAVATED ASSAULT.

HE STILL DOESN'T QUALIFY BECAUSE OF THOSE FACTS.

>> THAT'S ALWAYS AN INTERESTING ARGUMENT TO ME BECAUSE HURST IS ACTUALLY BASED ON RING, CORRECT?

>> CORRECT.

>> AND RING IS, AT LEAST FOR CAPITAL DEFENDANTS, THE BEGINNING OF THE JURY HAVING TO MAKE THE SPECIFIC FINDINGS ON WHICH DEATH IS BASED, CORRECT?

>> CORRECT.

>> THIS DEFENDANT HAS ARGUED UNDER RING.

THIS COURT DENIED HIM RELIEF UNDER RING.

AND SO WHY WOULDN'T, SINCE HE'S ALREADY RAISED IT, PRESERVED IT, HE WOULDN'T BE ENTITLED TO HURST, WHICH IS JUST AN EXTENSION OF RING?

>> WELL, MY ANSWER GOES BACK TO WHAT I JUST SAID.

ONE, IT'S THE STATE'S POSITION THAT IT'S NOT RETROACTIVE TO CASES FINAL ON DIRECT.

IF HE WAS A PIPELINE CASE, THAT WOULD BE DIFFERENT.

BUT BECAUSE HIS CASE HAS BEEN FINAL AND FINALITY TRUMPS FAIRNESS AND THE JAMES OPINION, WE BELIEVE THE CASE THAT SHOULD BE FOLLOWED IS JOHNSON, WHICH CONDUCTED THAT RETROACTIVITY ANALYSIS.

>> I GUESS THE PROBLEM WITH -- AND WE'RE STRUGGLING.

I MEAN, THIS IS ALL TRYING TO GET IT RIGHT AND DO WHAT'S RIGHT FOR THE PEOPLE OF THE STATE OF FLORIDA AND FOR THE DEFENDANT. BUT YOU'VE GOT A SITUATION WITH WITT, WHICH WE ADHERE TO, REQUIRES THE EXTENT OF THE

RELIANCE ON THE RULES.
AND I GUESS WHAT WE'RE LOOKING
AT IS FROM THE TIME -- WHEN RING
WAS DECIDED, THEY COULD HAVE
TAKEN ANY -- SUPREME COURT COULD
HAVE TAKEN ANY TIME IN THE NEXT
14 YEARS ANOTHER CASE THAT --
FROM FLORIDA.

BUT SO THERE'S AN ARBITRARY DATE
OF 2016 WHERE THEY GO, WE'VE
JUST -- WELL, THEY SAID IT IN
RING.

WE'VE JUST ACQUIRED SOME MORE
NEW WISDOM.

FLORIDA DEATH PENALTY STATUTE
WAS NEVER CONSTITUTIONAL, AND IT
WAS UNCONSTITUTIONAL BASED ON
RING.

SO HOW DO WE -- AND THIS
DEFENDANT RAISED RING.

AND SO AS DID OTHERS IN THAT
POST-RING PERIOD.

SO THAT'S WHAT I'M -- SO THAT'S
THE PROBLEM.

WE WEREN'T REALLY DEALING WITH
THAT IN JOHNSON.

HOW DO YOU -- IT'S NOT JUST IT'S
FINAL AND THAT'S IT.

DOESN'T THERE HAVE TO BE OTHER
LOOKING AT THE EXTENT OF
RELIANCE ON THE OLD RULE AND
SOME MORE CONSIDERATION?

>> SURE.

>> SO WHAT ABOUT THE EXTENT OF
THE RELIANCE?

WASN'T IT VERY DIFFERENT AFTER
RING?

>> NO.

IT WASN'T.

I MEAN, THE STATUTE BEFORE HURST
AND THE STATUTE NOW ARE VERY
SIMILAR.

IT DIDN'T CHANGE THE PUNISHMENT
FOR MURDER.

YOU KNOW, SOMEONE WAS
CONSIDERING MURDER, THEY WERE ON
NOTICE THAT THAT WAS THE
PUNISHMENT.

IT DIDN'T INCREASE THE
PUNISHMENT.

ALL IT DID WAS CHANGE THE
DECISION-MAKING AUTHORITY FROM
JUDGE TO JURY.

DID I ANSWER YOUR QUESTION?

>> AND LET ME ASK YOU THIS.
FROM THE PERSPECTIVE OF THE
STATE DURING THIS WHOLE PERIOD
AFTER RING, AM I CORRECT IN
THINKING THAT CASES WHERE RING
HAD BEEN RAISED AS AN ISSUE IN
THIS COURT WERE TAKEN TO THE
U.S. SUPREME COURT, CERT WAS
SOUGHT AND THE U.S. SUPREME
COURT SAID NO RELIEF.

AND THAT WAS GOING ON YEAR AFTER
YEAR AFTER YEAR.

>> CORRECT.

>> SO THE STATE IS SEEING
THEY'RE GETTING NO RELIEF IN THE
FLORIDA SUPREME COURT, GETTING
NO RELIEF IN THE U.S. SUPREME
COURT.

WE THINK WE'RE GOOD WITH OUR LAW
THE WAY IT IS.

>> SURE.

AND YOU WERE.

YOU WERE RIGHT AT THE TIME.

>> SO, HOWEVER, EVEN ALL OF THAT
CONSIDERATION, IF WE DECIDE THAT
MR. DUROUSSEAU IS ENTITLED TO
RELIEF UNDER HURST, WE SEND IT
BACK TO THE TRIAL COURT FOR NEW
PENALTY PHASE AND A NEW PENALTY
PHASE UNDER WHAT CONDITIONS?

>> WELL, IT WOULD BE UNDER THE
NEW STATUTE, OF COURSE.

SO WE WOULD HAVE TO HAVE NEW
JURY INSTRUCTIONS, OR AT LEAST
CREATE SOME IF THEY HAVEN'T BEEN
RELEASED YET.

BUT I SUBMIT THAT WE GET THE
SAME RESULT.

>> OKAY.

SO UNDER THE NEW STATUTE, HE
WOULD -- A JURY WOULD HAVE TO
FIND EACH AGGRAVATOR BEYOND A
REASONABLE DOUBT.

>> UNANIMOUS.

>> THE JURY WOULD HAVE TO FIND
THE MITIGATORS, NOT BEYOND A

REASONABLE DOUBT, CORRECT?

>> CORRECT.

>> THE JURY WOULD HAVE TO FIND
-- WEIGH THE AGGRAVATORS AND
MITIGATORS AND DETERMINE IF THE
AGGRAVATORS OUTWEIGH THE
MITIGATORS BEYOND A REASONABLE
DOUBT?

>> I DON'T KNOW IF BEYOND A
REASONABLE DOUBT IS IN THAT.

>> I KNOW THE STATUTE DOES NOT
EXPLICITLY SAY THAT, BUT ISN'T
THAT A CONSEQUENCE OF THE HURST
DECISION?

ISN'T THAT WEIGHING PROCESS A
FACTUAL FINDING ALSO?

>> I DON'T THINK SO, NO.
AND I AGAIN RELY ON --

>> WHY ISN'T IT A FACTUAL
FINDING?

>> WELL, TWO REASONS.
KANSAS V CARR THE UNITED STATES
SAID THAT'S NOT A FACTUAL
FINDING.

BUT FURTHERMORE --

>> I'M SORRY.

WHAT CASE DID YOU SAY?

>> KANSAS VERSUS CARR.
BUT WHEN WE'RE TALKING ABOUT A
PENALTY PHASE AND THE ELEMENTS
THAT NEED TO BE PROVEN BY THE
STATE BEYOND A REASONABLE DOUBT,
WE'RE TALKING ABOUT THINGS THAT
ARE GOING TO AGGRAVATE OR
INCREASE THE PENALTY.

>> BUT CAN'T YOU ONLY INCREASE
THE PENALTY IF IN FACT THE
AGGRAVATORS OUTWEIGH THE
MITIGATORS?

>> CORRECT.

>> AND SO THAT'S WHY I DON'T
UNDERSTAND WHY YOU WOULD SAY
THAT IS NOT A FACTUAL FINDING.

>> IT CAN BE A FACTUAL FINDING,
BUT IT'S NOT A FINDING THAT GOES
TO AGGRAVATE THE SENTENCE AND
THEREFORE IS NOT ONE THAT NEEDS
TO BE FOUND BY THE JURY.

>> I MEAN, I'M REALLY -- I'M
MISSING IT BECAUSE IN FLORIDA

THE DEATH PENALTY CANNOT BE
IMPOSED WITHOUT THAT ELEMENT.

>> WITHOUT AN AGGRAVATOR.

>> WITHOUT THE AGGRAVATORS
OUTWEIGHING THE MITIGATORS.

>> RIGHT.

RIGHT.

>> SO IF THAT'S -- THAT'S WHY I
CAN'T SQUARE YOUR LAST STATEMENT
WITH WHAT THE STATUTE REQUIRES.
IT DOES REQUIRE -- WHATEVER YOU
WANT TO CALL IT, A DETERMINATION
THAT THE AGGRAVATION IS
SUFFICIENT TO OUTWEIGH THE
MITIGATION.

>> IT DOES.

>> WELL, IF THAT'S REQUIRED, THE
U.S. SUPREME COURT HAS SAID
THOSE ELEMENTS THAT ARE
NECESSARY TO IMPOSE A DEATH
PENALTY HAVE TO BE FOUND BY A
JURY.

I'M NOT MAKING UP THE RULES.

>> NO, NO.

I KNOW.

>> I'M TRYING TO FOLLOW THEM.

>> RIGHT.

>> ISN'T IT -- I MEAN, DOESN'T
IT SAY THAT?

>> I THINK IT DOES.

>> OKAY.

>> I DON'T THINK THERE'S THE
REQUIREMENT THAT THEY BE PROVEN
BEYOND A REASONABLE DOUBT, BUT
IT DOES SAY THAT, YEAH.

YEAH.

GOING BACK TO I THINK JUSTICE
PARIENTE'S -- OR MAYBE IT WAS
JUSTICE --

>> BEFORE WE FINISH THAT, THEN
YOU HAVE ONE MORE STEP, RIGHT?

>> WHAT'S THAT?

>> YOU HAVE THE STEP WHERE THE
JURY NOW -- WHATEVER YOU WANT TO
CALL IT, RECOMMENDATION OR
VERDICT, HAS TO DECIDE IF THE --
MAKE SOME KIND OF DETERMINATION
OF WHETHER DEATH SHOULD BE
IMPOSED.

>> MM-HMM.

>> AND SO WHAT DO WE CALL THAT?
>> WE REFER TO IT AS A
RECOMMENDATION.

>> OKAY.

>> AS IT'S STATED IN THE
STATUTE.

>> BUT DIDN'T HURST SAY THERE
SHOULDN'T BE A RECOMMENDATION

--

>> I DON'T KNOW THAT HURST SAID
THAT.

THEY SPECIFICALLY SAID IT
COULDN'T BE CALLED A
RECOMMENDATION?

>> THAT'S THE WHOLE REASON THEY
SENT IT BACK, BECAUSE THE JURY
MADE THE RECOMMENDATION.

>> BECAUSE THE JURY DID IT,
RIGHT.

>> SO WHAT IS IT CALLED NOW?

>> IT'S CALLED A RECOMMENDATION.
YEAH.

STILL CALLED A RECOMMENDATION,
NOT A VERDICT, IN THE STATUTE.

>> AND OF COURSE I ASSUME YOUR
POSITION IS THAT 10-2 IS
PERFECTLY ADEQUATE.

>> IT IS, YES.

AND IF I COULD, I JUST WANT TO
TOUCH BACK ON SOMETHING THAT WAS
SAID A FEW MOMENTS AGO, GOING
BACK TO THE FAIRNESS, YOU KNOW,
MAKING THIS RETROACTIVE FOR
FAIRNESS PURPOSES.

I SPENT SOME TIME LAST NIGHT
DOING SOME RESEARCH ON A COUPLE
THINGS THAT I THOUGHT MIGHT HELP
THE COURT, THE FIRST THING BEING
I REVISITED THE FACTS OF THE
WITT CASE.

THAT'S THE PERFECT EXAMPLE.

IN WITT HE CAME TO COURT SEEKING
THE RETROACTIVE APPLICATION OF
SIX CHANGES OF LAW WHICH HAD
OCCURRED IN THE SIX YEARS
BETWEEN HIS DIRECT APPEAL AND
HIS POSTCONVICTION APPEAL.

THIS MEANS THAT THE WITT COURT
INTENDED FINALITY COME BEFORE
FAIRNESS BECAUSE THEY DECIDED

NOT TO ALLOW HIM THAT BENEFIT.
>> AND IN THAT CASE, THE WITT
DEFENDANT HAD NOT RAISED THOSE
POSITIONS BEFORE THE APPEAL WAS
OVER, CORRECT?
>> BECAUSE IT WAS NEW LAW.
>> I UNDERSTAND.
WELL, BUT HERE THIS DEFENDANT
RAISED IT BOTH AT TRIAL.
>> HE DID.
>> AND DURING THE APPEAL.
>> HE DID.
HE DID.
>> I MEAN, THAT SUGGESTS TO ME
THAT WITT HAS NOTHING TO DO WITH
THIS.
>> SO THEN I TAKE US BACK TO
JOHNSON.
AND JOHNSON IS PRETTY MUCH ON
POINT.
IT HAD TO DO WITH RING.
IT HAD TO DO WITH WHO MADE THE
DECISION, WAS IT THE JUDGE OR
THE JURY.
SIXTH AMENDMENT RIGHT.
AND IN JOHNSON THERE ARE SOME
THINGS THAT WERE SET OUT IN THE
OPINION THAT PRETTY MUCH MIRROR
WHERE WE ARE TODAY.
SOME OF THE CONCERNS THAT WERE
ADDRESSED IN JOHNSON WITH FINAL
CASES WAS WHAT DO WE DO.
I THINK TODAY, WHAT DO WE DO
WITH THOSE CASES WHO HAVE BEEN
FINAL FOR 20, 30 YEARS?
HOW DO WE -- IF THEY GET A NEW
PENALTY PHASE, HOW DO WE GO BACK
AND RETRY THOSE CASES?
WE MIGHT NOT HAVE WITNESSES
AVAILABLE.
THEIR EVIDENCE MIGHT NOT BE ANY
GOOD.
EVIDENCE MIGHT HAVE BEEN
DESTROYED OR LOST.
>> THERE ARE CASES WHERE THE
EVIDENCE --
>> I'M SORRY?
>> I SAID IN CAPITAL CASES I
THOUGHT THERE WAS A REQUIREMENT
THAT EVIDENCE BE KEPT UNTIL THE

DEFENDANT IS EXECUTED.
>> THAT MAY BE.
THAT DOESN'T MEAN THAT IT HASN'T
BEEN MISPLACED OR, YOU KNOW,
LOST.
SO RETRYING A CASE 20 OR 30
YEARS LATER WITH THE POSSIBILITY
OF NOT HAVING WITNESSES AND/OR
EVIDENCE OR PEOPLE'S MEMORIES,
FAILINGS, WOULD REDUCE THE
RELIABILITY OF THE TRIAL.
AND THAT WAS THE CONCERN ECHOED
IN THE JOHNSON DECISION.
THAT'S A CONCERN --
>> WELL, WOULDN'T THE DEFAULT
DECISION BE LIFE IN PRISON?
>> SURE, BUT WE WANT TO TRY TO
GET -- IF SOMEONE DESERVED DEATH
THE FIRST GO-AROUND, WE'D WANT
TO SEEK DEATH AGAIN.
>> BUT IF YOU CAN'T SEEK DEATH
AGAIN, THEN --
>> THEN WE ARE STUCK.
IT'S NOT A GOOD PLACE.
THE OTHER THING I WANTED TO
MENTION, THERE WAS A QUESTION
ASKED YESTERDAY I THINK BY
JUSTICE QUINCE.
I DID A QUICK COUNT YESTERDAY.
IT LOOKS LIKE OUT OF ALL THE
CASES, 107 ARE FINAL ON DIRECT
APPEAL AND ABOUT 37 ARE PIPELINE
CASES, WHICH EQUATES TO ABOUT
ONE IN FOUR CASES HAVING BEEN
TRIED BEFORE THE HURST DECISION
AND THOSE WILL BE THE ONES TO
GET THE BENEFIT OF THE
RETROACTIVE --
>> THOSE ARE POST-RING CASES?
>> YES.
YES.
>> OKAY.
AND DO YOU KNOW HOW MANY OF
THOSE ARE 12-0s?
>> OH, I DIDN'T GO THAT FAR, NO.
JUST REAL QUICK YESTERDAY
AFTERNOON.
>> THE TOTAL ON DEATH ROW?
>> I GET 140 SOMETHING.
>> NO.

THOSE ARE ONLY THE ONES ON DEATH
ROW POST-RING.

HOW MANY PRE-RING CASES?

>> I DON'T KNOW THAT.

>> I WOULD SAY 400?

>> PROBABLY.

300, YEAH.

MAYBE FOUR.

>> SO WE'RE TALKING ABOUT A GOOD
THIRD OR MORE -- WELL, MORE THAN
A THIRD OF THE PEOPLE ON DEATH
ROW ARE POST-RING CASES.

>> RIGHT.

>> BUT WE DON'T KNOW HOW MANY
ACTUALLY PRESERVED BOTH AT TRIAL
AND APPEAL THOSE POSITIONS.

>> I DID TAKE THAT INTO ACCOUNT
IN THE NUMBERS I JUST PROVIDED.
THESE ARE PEOPLE WHO ACTUALLY
DID PRESERVE THE RING ISSUE.

YEAH.

YEAH.

SO LOOKING AT THAT, WHEN I SAY
ONE IN FOUR CASES TRIED BEFORE
HURST WOULD GET THE BENEFIT,
THAT IS BECAUSE THEY DID
PRESERVE RING.

SO I GUESS WHAT I'M TRYING TO
GET AT IS THAT THERE IS A HAPPY
MEDIUM HERE.

THOSE WHO WERE IN THE PIPELINE
CAN GET THE BENEFIT, BUT THE
STATE IS URGING THE COURT TO NOT
EXTEND THAT TO THOSE CASES THAT
ARE ALREADY FINAL.

>> AND I APPRECIATE YOUR LOOKING
AT ALL THIS AND HELPING US WITH
THIS, BUT ONE OF THE ISSUES
THAT'S BEEN RAISED -- AND THIS
IS JUST ABOUT THE ARBITRARINESS
OF WHO GETS RELIEF OR WHO GETS A
NEW TRIAL.

WE JUST HAD -- IF WE HAVE A
DIRECT APPEAL AND WE REVERSE
BECAUSE OF HURST, BUT THEN WE
HAVE PEOPLE THAT HAD SENTENCES
IMPOSED IN THE '70s WHO MAY
GET NEW TRIALS AND THEY'RE GOING
TO GET THEIR NEW TRIAL UNDER
RIGHT TO THE UNANIMOUS VERDICT.

SO ISN'T -- I MEAN, THERE IS AN ELEMENT OF ARBITRARINESS HOWEVER WE LOOK AT IT.

>> I THINK THAT BY DRAWING A LINE IN THE SAND AND SAYING ONLY PIPELINE CASES AND NOT DIRECT APPEAL, THAT WOULD HELP YOU. IT'S NO LONGER ARBITRARY. IT'S WHERE YOUR CASE FALLS IN THE SYSTEM.

>> WELL, IT HELPS THE STATE IF WE DON'T OPEN UP ANY OF THEM.

>> WELL, YEAH.

SURE.

THERE GOES MY JOB.

SO, YOU KNOW, AS COUNSEL SAID, THIS IS A PRETTY COMPLEX AREA OF LAW.

I CAN UNDERSTAND AND APPRECIATE THE COURT GRAPPLING WITH ALL OF THESE ISSUES.

>> I KNOW IN JOHNSON WE TALK ABOUT IT'S JUST A PROCEDURAL CHANGE.

BUT IN READING BACK IN THE JURISPRUDENCE AND THE REASONS FOR -- WE HAVE JURIES IN THIS COUNTRY AND IN THIS STATE, THE IDEA IS THAT THIS IS THE WORD OF THE COMMUNITY.

AND WE -- YOU KNOW, WE DECIDED THAT OUR DEATH PENALTY STATUTE WAS CONSTITUTIONAL BACK IN DIXON.

WE'RE TALKING ABOUT LIKE THE THREE LAYERS OF PROTECTION. FIRST YOU HAVE THE JURY, THEN YOU HAVE THE JUDGE, AND THEN YOU HAVE THIS COURT.

BUT IN PRACTICALITY, THE INDIVIDUAL JUDGE HAS SOME PRESSURES THAT THE JURY MAY NOT HAVE, WHICH IS THE PRESSURE OF, YOU KNOW, HAVING TO RUN FOR REELECTION IF SOMEONE OPPOSES THAT JUDGE, AND WE DO SEE DIFFERENCES IN WHAT HAPPENS -- AND I DON'T ALWAYS MEAN TO PICK ON JACKSONVILLE VERSUS MIAMI, BUT THERE'S A DIFFERENCE IN

WHICH DEFENDANTS GET THE DEATH PENALTY.

SO IT'S NOT A PROCEDURAL RIGHT. IT'S A CONSTITUTIONAL RIGHT THAT'S BEEN ENSHRINED IN OUR CONSTITUTION AND IN READING BACK ON WHY WE'VE REQUIRED UNANIMITY IT'S BECAUSE IT MAKES THESE VERDICTS MORE RELIABLE.

THAT'S WHAT HAS BEEN SAID. SO I'M HAVING -- EVEN THOUGH I WENT ALONG ON JOHNSON, I'M HAVING TROUBLE WITH THE IDEA THAT THE JURY TRIAL RIGHT AND A RIGHT TO UNANIMOUS VERDICT FOR THE ULTIMATE SENTENCE IS A PROCEDURAL RIGHT RATHER THAN A SUBSTANTIVE CONSTITUTIONAL RIGHT.

CAN YOU HELP ME ON THAT?

>> I WOULD JUST HAVE TO RELY ON WHAT I'VE ALREADY SUBMITTED IN MY BRIEF AND MANY OTHER BRIEFS BY THE STATE.

WE RELY ON SUMMERLIN AND CASES OF THAT SORT THAT SAY IT IS PROCEDURAL.

IT MAY EMANATE FROM THE CONSTITUTIONAL RIGHT TO A JURY TRIAL.

BUT IN THE SIMPLEST FORM HURST REALLOCATES DECISION-MAKING.

>> THAT'S NOT AN "ALL."

IT'S NOT EVEN LIKE CHANGING WHETHER THE HAC AGGRAVATOR IS, YOU KNOW, -- THE INSTRUCTION IS WRITTEN A CERTAIN WAY.

IT'S CHANGING WHO THE DECISION-MAKER IS.

>> RIGHT.

>> ON THE ULTIMATE SENTENCE.

TO ME, 12 PEOPLE IN THE COMMUNITY MAKING THAT LIFE AND DEATH DECISION AT THE RIGHT INSTANCE.

SO I DON'T SEE THAT AS -- YOU KNOW, -- AGAIN, AS I'VE LOOKED AT IT, AS JUST, OH, WELL, IT'S JUST A CHANGE IN PROCEDURE.

>> WHEN I LOOK AT THE DEFINITION

OF SUBSTANTIVE CHANGES, THEY INVOLVE CHANGING THE BURDEN OF PROOF, THE ELEMENT OF THE CRIME, THE DEFINITION OF THE CRIME, CHANGING THE SENTENCES.

>> YOU MEAN CHANGING WHETHER YOU LIVE OR DIE IS PROCEDURAL.

>> NO.

THAT'S STILL UP THERE.

LIVE OR DIE HAS ALWAYS BEEN IN QUESTION.

>> THAT'S WHAT IT IS, WHO'S MAKING THAT DETERMINATION.

>> DID NOT THE UNITED STATES SUPREME COURT EXPLICITLY HOLD THAT RING IS PROCEDURAL IN NATURE?

>> YES.

AND APPRENDI IS.

>> ASSUMING WE WOULD DECIDE THAT HURST IS RETROACTIVE AND EVEN DEFENDANTS WHO RAISE THE RING ISSUE, THAT THEY WERE ENTITLED TO SOME RELIEF ALSO, WHY WOULDN'T IT GO UP -- EVEN BACK TO THE DATE THAT APPRENDI WAS DECIDED?

BECAUSE RING REALLY IS EXTENSION OF APPRENDI, WHICH STARTED THE WHOLE LINE OF CASES THAT TALK ABOUT THE JURY HAVING TO MAKE FINDINGS THAT GO BEYOND THE STATUTORY SENTENCING.

AND SO WHY THEN WOULDN'T DEFENDANTS WHO RAISE SOME KIND OF ISSUE ON THIS BASIS, EVEN FROM THE TIME OF APPRENDI, BE ENTITLED TO RELIEF?

>> WELL, AGAIN, I GO BACK TO MY ORIGINAL ARGUMENT, WHICH IS THAT IF YOU'RE TALKING ABOUT CASES ON DIRECT APPEAL, IT SHOULDN'T BE RETROACTIVE, PERIOD.

>> BUT ASSUMING -- BUT I'M ASKING YOU TO ASSUME THAT WE'RE SAYING IT IS AND THAT IT -- WHY WOULDN'T IT NOT JUST STOP AT RING -- START AT RING BEING RETROACTIVE, BUT ALL THE WAY BACK TO -- APPRENDI WAS, WHAT,

TWO YEARS BEFORE -- I THINK
2000?

>> YEAH.

>> AND RING WAS 2002?

>> RIGHT.

BECAUSE EVERYBODY WAS FILING
RING CLAIMS AND NOT APPRENDI
CLAIMS, YOU KNOW?

IT'S KIND OF A STRETCH.

>> IT'S OKAY TO ADMIT THINGS.

>> I DON'T REALLY KNOW.

>> AND JUSTICE QUINCE IS
ABSOLUTELY RIGHT ON THE MONEY,
THAT APPRENDI WAS ONE OF THE
FIRST TO ALERT -- I MEAN, YOU
CAN GO BACK AND FIND OTHER
THINGS THAT TALK ABOUT THE RIGHT
TO TRIAL BY JURY AND ALL THOSE.
BUT APPRENDI SAYS THAT JURIES IF
YOU'RE GOING TO ENHANCE A
PENALTY, IT'S A DIFFERENT
SETTING, BUT THAT JURORS NEEDED
TO MAKE THAT FINDING, THAT A
JUDGE COULDN'T DO IT.

>> RIGHT.

>> LIKE USE OF A GUN IN A CRIME,
FOR EXAMPLE, THAT KIND OF THING.

>> ENHANCEMENT.

YEP.

I MADE SOME NOTES HERE.
I WASN'T SURE IF I COVERED
EVERYTHING ELSE.

>> YOUR TIME IS UP.

>> OH, IT IS.

OKAY.

>> TIME FLIES WHEN YOU'RE HAVING
FUN.

>> THANK YOU.

>> COUNSEL?

>> JUDGE, OBVIOUSLY YOU'RE
CORRECT.

THE HURST DECISION SAYS THAT A
MERE RECOMMENDATION IS NOT
ENOUGH.

SO I'M GRAPPLING WITH YOUR
QUESTION, WHERE DO WE GO WITH
IT.

IF I WAS GOING BACK TO TRY A
CASE THIS WEEK, WHAT WOULD I BE
ASKING FOR.

AND OBVIOUSLY IT'S DO THE
AGGRAVATORS EXIST.
THAT IS PRIMARY, BECAUSE WE HAVE
THREE OR FOUR.
PROBLEM IS WHEN YOU HAVE MORE,
TEN JURORS MAY FIND THIS
AGGRAVATOR EXISTS, BUT NOT 12.
EIGHT JURORS MAY FIND THIS
AGGRAVATOR EXISTS, BUT NOT 12.
SO WE NEED A FINDING IF EACH ONE
OF THOSE OR ANY OF THOSE ARE
FIND BY THE GROUP OF 12.
SO THAT WOULD BE THE FIRST STEP.
AND THEN THE SECOND STEP,
BECAUSE WE KNOW MITIGATORS ARE
NOT REQUIRED TO BE PROVEN BEYOND
A REASONABLE DOUBT, THERE WON'T
BE WAS THIS ONE PROVEN BEYOND A
REASONABLE DOUBT.
IT WOULD THEN BE A WEIGHING
PROCESS AND THE VERDICT, BECAUSE
A MERE RECOMMENDATION IS NOT
ENOUGH, WOULD BE AT THAT POINT
IS WHAT I WOULD SUBMIT.
I DIDN'T ASK MARTY TO CLAIM THIS
BECAUSE I DIDN'T THINK THIS
QUESTION WAS COMING.
I BELIEVE AT THAT POINT IS WHEN
WE WOULD BE HAVING THE WEIGHING
PROCESS THAT WOULD RESULT IN THE
VERDICT AS TO WHETHER OR NOT 12
JURORS -- OR 10 JURORS, AS
THEY'RE SUGGESTING NOW, WOULD BE
THAT PHASE.
THAT WOULD BE WHERE MERCY WOULD
COME IN AND THEY WOULD DECIDE DO
THE AGGRAVATORS OUTWEIGH THE
MITIGATORS.
>> WELL, YOU'VE ACTUALLY
CONCEDED MORE THAN YOU NEED TO
BECAUSE WE'VE REALLY BEEN
LOOKING AT THREE PHASES.
>> WELL, YES. YES.
>> SO YOU'VE GOT AGGRAVATORS
FOUND.
ARE THEY SUFFICIENT TO OUTWEIGH
THE MITIGATORS.
>> RIGHT.
>> EVEN THEN THEY'RE NOT
REQUIRED TO.

I THINK WE WERE ASKING ABOUT THE THIRD PART.

>> EXACTLY.

AND THAT'S WHAT I HAD THOUGHT ORIGINALLY, IS DO THEY OUTWEIGH THE MITIGATORS.

SECOND STEP.

AND THEN THE THIRD STEP WOULD BE EVEN KNOWING THE AGGRAVATORS OUTWEIGH THE MITIGATORS, WHAT SAY YOU.

>> BECAUSE AS A TRIAL LAWYER, CAN YOU ARGUE THOSE TWO DIFFERENTLY.

YOU'VE GOT A TERRIBLE CRIME.

YOU'VE GOT MITIGATORS THAT MAY NOT ON THEIR FACE OUTWEIGH IT, BUT THEN YOU CAN TALK ABOUT BUT THIS IS A DEFENDANT WHO HAD A CHILDHOOD WHERE HE DIDN'T HAVE A CHANCE.

WE'RE NOT SAYING HE SHOULD BE ACQUITTED, BUT HE SHOULD BE ABLE TO SPEND THE REST OF HIS LIFE IN PRISON BECAUSE OF THESE REASONS.

>> YES, YOUR HONOR.

>> AND THEY MIGHT NOT BE JUST BECAUSE THE AGGRAVATORS DIDN'T OUTWEIGH THE MITIGATORS.

>> I MEAN, THAT'S WHAT I'M--

>> RIGHT.

THERE WOULD HAVE BEEN THREE PHASES.

AND THEN THE FOURTH PHASE IS GOING TO BE WHAT'S THE JUDGE GOING TO DO WITH IT.

>> WELL, THE JUDGE, IF IT'S A 10-2 UNDER THE NEW STATUTE, THEY'VE GOT TO USE THE AGGRAVATORS.

THEY'RE MUCH MORE CONSTRAINED.

>> RIGHT.

OBVIOUSLY, NOT GOING TO OVERRIDE A LIFE SENTENCE.

WE KNOW THAT.

THE QUESTION CAN BE WHERE DO WE GO FROM HERE.

I DIDN'T PREPARE A NEW STATUTE ON THIS CASE.

BUT TO TRY TO RESPOND TO WHAT

THEY WERE SAYING, I BELIEVE THE ANSWER'S AROUND 390 PEOPLE THAT ARE ON DEATH ROW NOW.

I DISAGREE WITH THE IDEA THAT PIPELINE CASES, YOU KNOW, CAN COME BACK, BUT THE OTHERS DON'T. AND, OBVIOUSLY, THIS HAS BEEN ARGUED THAT WE PRESERVED OUR ARGUMENT ALL THE WAY THROUGH TRIAL AND APPELLATE LEVEL, SO RETROACTIVITY IS NOT APPLICABLE TO ME.

WE WERE ARGUING THESE ISSUES BEFORE THIS COURT AND, OF COURSE, WE'VE ALREADY ADDRESSED THAT.

WE ALREADY ADDRESSED THAT. WE ALREADY TOLD YOU, BUT WE HAD TO KEEP DOING IT.

WE HAD TO PREPARE FOR IT, AND WE'VE BEEN DOING THAT.

AND THAT'S FOR THIS PARTICULAR REASON, RIGHT HERE.

RELY ON THE JAMES OPINION.

REALLY MY THOUGHT ON WHAT WE TALKED ABOUT WITH THE AGGRAVATORS OUTWEIGHING THE MITIGATORS, WHAT I THINK IS REALLY IMPORTANT AND WHY THEY NEED TO BE BEYOND A REASONABLE DOUBT IS BECAUSE, AS I SAID, SOME CAN BE FOUND 8-4, BUT NO 12 JURORS FOUND ANY SINGLE AGGRAVATOR TO EXIST.

>> WELL, NOW WE'LL KNOW IT THOUGH.

>> RIGHT.

NOW WE'LL KNOW.

>> THEY HAVE TO INDICATE--

>> RIGHT.

>> AND SO THEY CAN ONLY WEIGH THOSE AGGRAVATORS THAT HAVE BEEN FOUND UNANIMOUSLY.

>> RIGHT, YES.

SO THAT WOULD BE THAT PORTION OF THE PHASE.

THANK YOU.

THAT'S ALL I HAVE.

IF THERE'S ANY OTHER QUESTIONS?

>> THANK YOU FOR YOUR ARGUMENT.

>> THANK YOU, YOUR HONOR.
>> WE'RE IN RECESS FOR TEN
MINUTES.
>> ALL RISE.