>> THE NEXT CASE ON THE DOCKET WILL BE WHITE VERSUS STATE.
>> OKAY.
I THINK WE GOT IT QUIETED DOWN FOR YOU.
YOU MAY PROCEED.
>> THANK YOU, YOUR HONOR.
MR. CHIEF JUSTICE, JUSTICES, MAY IT PLEASE THE COURT, MY NAME IS JOHN SELDEN, ASSISTANT PUBLIC DEFENDER ON BEHALF OF MR. WHITE, THE APPELLANT.
IN THIS MATTER MR. WHITE WAS TRIED BY A JURY, FOUND GUILTY OF FIRST-DEGREE PREMEDITATED MURDER OF HIS ESTRANGED WIFE OF 20 YEARS.
HE WAS THEREUPON SENTENCED TO DEATH AND THIS IS HIS DIRECT APPEAL.
THAT SENTENCE OF DEATH WAS IMPOSED, AS THE COURT IS AWARE, ON A SPLIT VERDICT OF 8-4 IN THE JURY RECOMMENDATION.
I'VE HAD THE OPPORTUNITY -- AND I APPRECIATE THE OPPORTUNITY -- OF HEARING THE ARGUMENT THAT JUST PRECEDED US IN HURST AND THE COURT'S QUESTIONS, THE REPLIES THERETO.
I WANT TO JUST FIRST INITIALLY ASK TO ADOPT THE WONDERFUL REASONING THAT HAS BEEN SET FORTH IN MANY SOURCES AND IS PARTICULARLY INCLUDING THE AMICUS PROVIDED IN MR. HURST'S CASE BY MANY NOTABLE AND RESPECTED AUTHORITIES.
I WANT TO SEE IF I CAN TALK ABOUT A FEW OTHER THINGS IN RESPONSE TO YOUR SPECIFIC QUESTIONS.
>> WELL, IN YOUR CASE --
>> YES.
>> -- THERE ARE PRIOR VIOLENT FELONIES.
THOSE WERE NOT -- THOSE WERE VERY -- NOT -- THOSE WERE 20-YEAR-OLD PRIOR VIOLENT FELONIES.

THERE'S NO QUESTION THAT THEY
WERE JURY FINDINGS OR PLEAS THAT
WERE UNANIMOUS.
UNTIL READING HURST AND THEN THE
SUBSEQUENT INTERPRETATION, MANY
OF US HAD SAID, WELL, RING MEANS
ONLY THAT YOU'VE GOT TO FIND --
THE JURY HAS TO UNANIMOUSLY FIND
ONE AGGRAVATOR.
SO THE QUESTION WOULD BE, IS IN
THIS CASE, UNLIKE HURST, WHY
ISN'T THAT PRIOR VIOLENT FELONY
AGGRAVATOR ENOUGH TO FIND ANY
HURST ERROR HARMLESS?
AND I KNOW THAT'S THE POSITION
OF THE STATE.
SO I WANT YOU TO HAVE A CHANCE
TO ADDRESS THAT.
>> FIRST AND FOREMOST, I THINK
THAT'S ADDRESSED BY ONE WORD
FROM JUSTICE SOTOMAYOR AND
THAT'S ELEMENT.
IT'S NOT A FACT.
IT'S AN ELEMENT THAT MUST BE
PROVEN TO A JURY BEYOND A
REASONABLE DOUBT.
WE CANNOT RELY ON ONE OR MORE
AGGRAVATORS ALONE, STANDING
ALONE, TO HAVE SUFFICIENT
ELIGIBILITY FOR THE DEATH
PENALTY UNDER THE EIGHTH
AMENDMENT, AS POINTED OUT BY
YOUR QUESTIONS.
SO WHAT THE DIFFERENCE BECOMES
IS WHAT IS THE ELEMENT JUSTICE
SOTOMAYOR INSTRUCTED US TO
CORRECT.
THE ELEMENT HAS BEEN POINTED OUT
IS AGGRAVATION, ARE THERE
SUFFICIENT AGGRAVATING FACTORS,
AND WEIGHING, DO WE WEIGH THOSE
AGGRAVATING FACTORS AGAINST ALL
MITIGATION OFFERED, AND THAT IS
THE ELEMENT.
THE DEATH IS THE ELEMENT.
IT'S NOT JUST A SENTENCE.
IT IS THE ELEMENT THAT MUST BE
PROVEN.
>> SO IF WE GO THERE, WHAT IS
THE DIFFERENCE BETWEEN THE SIXTH

AMENDMENT AS APPLIED IN FLORIDA
AND THE EIGHTH AMENDMENT THAT
WOULD REQUIRE JURY SENTENCING?
DON'T THE TWO JUST COMPLETELY
COME TOGETHER AS TO -- UNLESS
YOU DECIDE, UNLESS YOU SAY, NO,
THE ADDITIONAL FACTOR IS THAT
THE JURY ALWAYS HAS THE
OPPORTUNITY TO EXERCISE MERCY
BECAUSE THEY'RE NOT REQUIRED TO
RECOMMEND DEATH EVEN IF THE
AGGRAVATORS OUTWEIGH THE
MITIGATORS.
BUT THAT'S WHAT I'M STRUGGLING
WITH, IS THAT YOU'VE GOT JUSTICE
BREYER'S CONCURRENCE AND THE
MAJORITY DOESN'T ADDRESS THE
EIGHTH AMENDMENT ARGUMENT.
SO HOW -- IF ALL THE ELEMENTS
YOU'RE SAYING EXIST AND WE'VE
TALKED ABOUT IT, WHICH IS
SUFFICIENT AGGRAVATION, WHICH
COULD BE ONE, RIGHT?
COULD BE ONE IF HAC IS AWFUL OR
CCP OR THE PRIOR VIOLENT FELONY,
BUT SUFFICIENT AGGRAVATION AS A
FACT, THEN OUTWEIGHS THE
MITIGATION.
AGAIN, YOU'RE SAYING THOSE ARE
ELEMENTS OF THE CRIME OF CAPITAL
PUNISHMENT?
I MEAN THE CRIME OF CAPITAL
FELONY, TO IMPOSE THE DEATH
SENTENCE?
YOU SEE, THAT'S THE PROBLEM THAT
I'M SURE YOU'VE BEEN THINKING
ABOUT, I'VE BEEN THINKING ABOUT
THE LAST FEW MONTHS, IS IT SEEMS
THAT IT'S NOT CLEAR BASED ON THE
U.S. SUPREME COURT CASE.
>> WE ARGUE THAT THIS HAS BEEN A
PROGRESSION FROM APPRENDI,
THROUGH RING, THROUGH THE OTHER
INTERVENING CASES AND NOW
FINALLY TO HURST.
AND IN THAT DEVELOPMENTAL
PROGRESSION, HURST CAME ABOUT
VERY QUICKLY BY WAY OF AN
OPINION.
IT IS A RELATIVELY SHORT

OPINION.
THERE WAS A CONSENSUS REACHED THAT THE REMEDY IN MR. HURST'S CASE BY THE SUPREME COURT WAS TO DECLARE OUR STATUTE, OUR SENTENCING STATUTE, OUR SCHEME, AS THEY CALLED IT, THE SENTENCING SCHEME, UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT BECAUSE OF THE DEPRIVATION OF THE RIGHT TO A FAIR TRIAL.
PART OF THAT IS THAT A JURY MUST DETERMINE BEYOND A REASONABLE DOUBT ALL THE ELEMENTS OF AN OFFENSE.
NOW, IT'S A LITTLE DIFFERENT BECAUSE WE NORMALLY CAN LOOK AT JUST A CRIME AND THE CRIME HAS THREE ELEMENTS AND THE JURY MUST RETURN A VERDICT, UNANIMOUS VERDICT, SAY WE FIND ALL THREE ELEMENTS PROVEN BEYOND A REASONABLE DOUBT.
WHEN WE HAVE THESE SPLIT VERDICTS, WHETHER THE OLD STATUTE OR NOW THE NEW STATUTE, THEREIN LIES THE CONSTITUTIONAL INFIRMITY BECAUSE IF AN ELEMENT -- IF IT IS AN ELEMENT OF NOT JUST THE CRIME, BUT OF THE OVERALL FUNCTION AND THE SENTENCING, IF THAT IS AN ELEMENT, THAT ELEMENT MUST BE PROVEN BEYOND A REASONABLE DOUBT.
AND IF A JURY SPLITS, THERE IS NOT A FINDING BEYOND A REASONABLE DOUBT.
>> WELL, WHAT IF -- IF UNDER THIS CASE THERE HAD BEEN JURY FINDINGS, AND THEY FOUND UNANIMOUSLY BOTH PRIOR VIOLENT FELONY AND HAC?
>> YES.
>> OKAY.
AND THERE IS ANOTHER PROBLEM FOR YOU THAT THE STATE CAN ADDRESS, WHICH IS THAT TO AVOID ARREST, THEY WERE INSTRUCTED ON THAT,

BUT THEY DON'T KNOW IF THEY CONSIDERED AVOID ARREST.
THAT IS A PROBLEM I THINK FOR THE STATE.
BUT LET'S JUST ASSUME IT WAS A JURY FINDING OF BOTH OF THOSE, SUFFICIENT AGGRAVATION, AND THEN THEY UNANIMOUSLY FOUND THAT THE AGGRAVATION OUTWEIGHED THE MITIGATION, BUT THEN BY 8-4 THEY SAID WE'RE RECOMMENDING DEATH BY 8-4.
NOW, UNDER THE NEW STATUTE, HE WOULD NOT GET A DEATH SENTENCE, RIGHT?
>> THAT WOULD BE OUR FIRST AND FOREMOST ARGUMENT.
THAT'S CORRECT.
>> THAT COULD HAPPEN.
SO WE DO HAVE -- THERE'S A REAL -- I GUESS WHAT I'M SAYING, THERE'S A BLENDING, IT SEEMS TO ME, IN THESE CASES -- AND IT IS A PROGRESSION.
THERE'S NO QUESTION.
YOU READ APPRENDI AND THEN YOU GO TO RING AND THEN YOU GO TO HURST AND IT LOOKS LIKE THEY'VE GOTTEN BROADER AND BROADER ABOUT WHAT THE JURY NEEDS TO DO UNDER STATE STATUTES.
SO -- BUT HOW DO YOU RECONCILE? WOULD YOU AGREE THAT ALL THE FINDINGS HAVE TO BE FOUND UNANIMOUSLY, BUT NOT THE RECOMMENDATION OF DEATH?
>> NO, JUSTICE.
I DON'T AGREE WITH THAT.
BUT SOME OF THIS, TO ANSWER YOUR QUESTION, GOES BACK TO THE EXAMPLE WHEN YOU'RE WORKING WITH A HARMLESS ERROR ANALYSIS.
AND LET ME PROPOSE A DIFFERENT EXAMPLE IN SUCH AN ANALYSIS IN THESE CASES.
IF HYPOTHETICALLY YOU HAD THE SORT OF GALLANT ROBE TRIAL JUDGE WHO UNDER RING ADOPTED DEFENSE MOTIONS AND SAID, WELL, I'M GOING TO GIVE YOU AN

INTERROGATORY VERDICT, WE'RE
GOING TO KNOW FROM THE JURY WHAT
AGGRAVATORS THEY FIND BEYOND A
REASONABLE DOUBT, WE ARE GOING
TO DIRECT THEM TO WEIGH THE
MITIGATORS, THEY WILL GIVE US A
FINDING THAT THEN IN A 12-0 CASE
IS UNANIMOUS, THAT THEY HAVE
WEIGHED LEGITIMATE, PROVEN
AGGRAVATORS AGAINST MITIGATORS
AND DONE ALL OF THOSE THINGS,
POTENTIALLY HARMLESS ERROR MIGHT
BE APPLIED IN THAT CIRCUMSTANCE
UNDER RING.
SHORT OF THAT, WHERE WE HAVE
THESE DEFECTS AND THIS LEVEL OF
RESPONSE TO THE SUPREME COURT'S
RULING, WE MUST LOOK FORWARD.
NOW, HERE'S -- MR. DAVIS HAD
THIS PROBLEM AS WELL.
WHAT IS THE RELIEF I CAN ASK
FOR?
I'M ASKING TO REVERSE AND VACATE
HIS DEATH SENTENCE AND DO WHAT?
I ALSO ARGUE -- I DON'T WANT TO
ADMIT IT.
I OMIT THE ARGUMENT THAT 775.082
DOES DIRECT THE COURT IN THIS
INDIVIDUAL CIRCUMSTANCE, AS THE
LANGUAGE OF THAT STATUTE IS IN
THE SINGULAR, NOT IN THE PLURAL,
NOT IF DEATH SENTENCES ARE
DEEMED UNCONSTITUTIONAL.
>> IT DOESN'T SAY DEATH
SENTENCE.
IT SAYS THE DEATH PENALTY.
>> DEATH PENALTY.
>> BUT THAT'S A HUGE DIFFERENCE.
IT SAYS IF THE DEATH PENALTY IS
DECLARED UNCONSTITUTIONAL, NOT
IF THE DEATH SENTENCE IS
DECLARED -- DEATH SENTENCES OR
DEATH SENTENCE.
THAT'S -- THE WORDS ARE -- MEAN
A LOT.
>> THAT DOES LEAD TO A VERY,
VERY IMPORTANT POINT AND THAT IS
THAT THE HIGH COURT -- NO HIGH
COURT HAS EVER SAID SOMETHING SO
SIMPLE AS THOU SHALT NOT KILL.

WE HAVE A DEATH PENALTY OR WE
HAVE THE AUTHORIZATION TO ELECT
LEGISLATORS WHO IMPOSE DEATH
PENALTY AS OUR WILL AS THE
HIGHEST FORM OF PUNISHMENT.
IN THIS CONTEXT, THOUGH, DEATH
IS -- I HAVE A NOTE I'D LIKE TO
REFER TO, IF I MAY.
THE STATUTE SAYS THAT IF THE
DEATH PENALTY IS DECLARED
UNCONSTITUTIONAL.
THE ONLY WAY TO GET TO A DEATH
PENALTY IS BY THE PROCESS
CONTAINED IN STATUTE, AND HERE
921.14 1, THE STATUTE NOW
DECLARED UNCONSTITUTIONAL.
THEY DID NOT SAY THAT DEATH IS
UNCONSTITUTIONAL AS A PENALTY.
THEY JUST SAID THAT THE WAY
DEATH WAS IMPOSED IS
UNCONSTITUTIONAL.
AND WHAT WE'RE ARGUING HERE IS
THAT THE APPLICATION OF THAT
STATUTE, JUST LIKE IN FURMAN
VERSUS GEORGIA, IS NOT THAT
DEATH IS UNCONSTITUTIONAL AS A
PENALTY.
IT'S NOT DEATH AS A PENALTY.
IT IS THE DEATH PENALTY
CONTAINED IN OUR LEGISLATION.
AND THAT DEATH PENALTY HAS BEEN
DECLARED UNCONSTITUTIONAL.
SO THE DIFFERENCE REALLY IS
DEATH AS A PENALTY VERSUS THE
DEATH PENALTY, MEANING THE
ENTIRE SCHEME, THE PROCESS BY
WHICH WE COME TO EXECUTE AN
INDIVIDUAL.
SO OUR LARGEST PROBLEM NOW IS
PROSPECTIVE LOOKING FORWARD IF
THIS CASE IS REVERSED, WHAT DO
WE DO.
THE ARGUMENTS ARE ANTICIPATORY.
I WILL TELL YOU WHAT I WITH LIKE
TO HAVE YOU DO AND I WILL TELL
YOU WHAT YOU MAY INSTEAD DO.
WHAT I WOULD LIKE THIS COURT TO
DO IS VACATE THE DEATH SENTENCE,
REMAND FOR THE IMPOSITION OF A
LIFE SENTENCE WITHOUT PAROLE

PURSUANT TO THE STATUTE.
EASILY DONE IN THIS CASE.
HOWEVER, SHOULD THE COURT DECIDE
TO CONFRONT THOSE OTHER ISSUES
AND REMAND FOR RESENTENCING
PROCEDURE NOW UNDER THIS NEW
STATUTE, THEN, OF COURSE, BELOW
WE WILL HAVE TO BEGIN THE
MACHINERY OF ALL OF THE EX POST
FACTO ARGUMENT, ALL OF THE
MOTION PRACTICE, ALL OF THE
ATTACKS TO RAISE AND PRESERVE
UNDER DOBBERT, AS YOU SUGGESTED,
THE EX POST FACTO CHALLENGES IN
WHICH ONE DAY DOBBERT MAY BE
OVERTURNED.
>> WE WOULD BE REMISS IF WE
DIDN'T -- AND WE HAVE A CASE
INVOLVING THIS PRECISE STATUTE
NEXT MONTH.
IF WE DIDN'T ADDRESS THIS
STATUTE AND WHETHER THERE WOULD
BE EX POST FACTO VIOLATION.
SO WHETHER WE DO IT IN YOUR CASE
OR THIS, IT WOULD BE TO NOT GIVE
THE TRIAL JUDGES DIRECTION.
SO ARE YOU SAYING HERE OR HAVE
YOU HAD THE CHANCE TO BRIEF
WHETHER THE REMEDY, WHETHER THAT
NEW STATUTE WOULD BE
UNCONSTITUTIONALLY APPLIED TO
YOUR CLIENT?
>> YES, JUSTICE.
AND BOTH WAYS.
>> AGAIN, THERE'S BEEN SO MANY
BRIEFS.
DID YOU BRIEF THAT, THE REMEDY
ISSUE IN THIS CASE IN
>> I BELIEVE I BRIEFED IT
INDIRECTLY BY ARGUING THE
UNANIMITY ASPECT, BECAUSE THE
DECISION IN HURST CAME OUT
BETWEEN THE ANSWER BRIEF AND THE
REPLY BRIEF IN THIS CASE.
I FILED MY REPLY BRIEF.
THE STATE DID JUST RECENTLY FILE
A SUR REPLY.
THE PROSPECTIVE APPLICATION OF A
MARCH 7 EFFECTIVE DATE OF THE
NEW STATUTE PREDATED THESE OTHER

FILINGS.
SO I CAN'T ANSWER YOUR QUESTION
DIRECTLY.
>> DO YOU WANT A TO WANT TO
ADDRESS THE EX POST FACTO
ARGUMENT?
>> IN SUPPLEMENTAL BRIEFING?
CERTAINLY, IF THE COURT WILL
PERMIT IT.
AND FOR THE FEW MOMENTS I HAVE
REMAINING I'D LIKE TO ADDRESS IT
BY SAYING SIMPLY STATE HAD THE
SHOT AND THEY GOT AN 8-4
VERDICT.
WHY WOULD THE STATE BE ENTITLED
TO A SECOND BITE AT THE APPLE TO
TRY TO GET TWO MORE JURORS TO
RISE TO A 10-2 VERDICT?
>> BUT THAT'S NOT THE ANALYSIS
FOR EX POST FACTO.
>> IT'S NOT.
>> YOU'VE GOT ELEMENTS AND WE'VE
HEARD THEM DISCUSSED.
SO WHY, IF YOU HAVE A
REPLACEMENT STATUTE THAT COVERS
THE SAME CONDUCT THAT IS THE
SAME NOTICE TO INDIVIDUALS AS TO
WHAT'S PROHIBITED, IT'S THE SAME
PENALTY.
THE ONLY THING THAT'S DIFFERENT
IS THE PROCESS BY WHICH A JURY
OPERATES WITHIN THAT SYSTEM.
WOULD YOU ADDRESS THOSE WITH
REGARD TO EX POST FACT O NOT,
YOU KNOW, -- I HEAR YOU, THAT
THE STATE HAD ITS CHANCE, IT
MISSED, SO IT LOSES.
THAT'S NOT REALLY WHERE WE NEED
TO GO.
>> AND EXACTLY THE PRECISE
QUESTION YOU'RE ASKING IS THE
VERY, VERY DIFFICULT ONE.
>> WELL, OF COURSE.
>> I CANNOT ANSWER WITH
SOMETHING MAGICAL THAT'S GOING
TO SAY THIS IS WHY IT'S EX POST
FACTO, BECAUSE IN LIGHT OF THE
DOBBERT ANALYSIS AND THE FACTS
YOU'VE JUST EXPLAINED, THE NEW
STATUTE APPEARS TO -- OR

PURPORTS, ANYWAY, TO CONFORM TO
THOSE BARE REQUIREMENTS.
NOW, THE FINE POINTS OF WHETHER
THERE ARE GREATER OR LESSER
PROTECTIONS WILL BE A KEY.
THAT'S THAT WHOLE LITIGATION I
SUGGESTED IS GOING TO HAVE TO GO
ON.
YOU'RE IN THE FOREFRONT AND
GETTING AHEAD OF IT WAY BEFORE
WE ARE.
AND YOU MAY BE ABLE TO ADDRESS
THIS BEFORE THE UNITED STATES
SUPREME COURT -- AND I WILL CALL
TO THE COURT'S ATTENTION THAT ON
MONDAY OF THIS WEEK, THE UNITED
STATES SUPREME COURT IN A CASE
CALLED JOHNSON VERSUS ALABAMA,
15-7091, REVERSED ITS EARLIER
DENIAL OF CERTIORARI, GRANTED
CERTIORARI AND REMANDED THE CASE
TO THE ALABAMA COURT OF CRIMINAL
APPEALS, THEIR HIGH COURT, ON
THE BASIS OF A 10-2 VERDICT.
THE UNDERLYING CASE WAS A 10-2
DEATH PENALTY.
THE UNITED STATES SUPREME COURT
HAD FIRST REJECTED CERTIORARI.
ON REHEARING, THEY HAVE GRANTED
CERTIORARI AND REMANDED FOR
RECONSIDERATION IN LIGHT OF
HURST.
I WOULD ARGUE THAT'S A STRONG
SUGGESTION THAT THEY ARE
INCLINED TO ENFORCE WHAT I ARGUE
IS JUSTICE SOTOMAYOR'S POSITION,
THAT IT MUST BE PROVEN BEYOND A
REASONABLE DOUBT TO THE
UNANIMOUS SATISFACTION OF A
JURY.
>> WHAT DO YOU DO WITH THE OTHER
OPINION OF THE HIGH COURT THAT
AT LEAST SEEMS TO SUGGEST, IF
NOT DIRECTLY STATE, THAT
MITIGATION AND WEIGHING IS NOT
ONE OF THOSE FACTS THAT A JURY
MUST DECIDE?
>> WHAT IS THE ELEMENT IS THE
ANSWER TO THAT QUESTION.
IS THE ELEMENT ELIGIBILITY, OR

IS THE ELEMENT THE PENALTY?
>> WELL, WE SEEM TO HAVE GONE PAST ELIGIBILITY BACK IN RING. RING STARTED USING THAT WORD AND THEN NOW IT'S CHANGED AND NOW IT'S GONE TO -- IT SEEMS TO ME THAT THERE'S A SENTENCE IN THERE THAT SAYS THAT A JURY MUST DETERMINE EACH FACT UPON WHICH A DEATH PENALTY MAY BE IMPOSED. YET WE SEEM TO SEE ALSO LANGUAGE THAT SAYS MITIGATION AND WEIGHING ARE NOT WITHIN THAT, EVEN THOUGH THAT MUST BE DONE TO REACH A DEATH PENALTY.
>> IF NOTHING ELSE, PERHAPS THAT IS THE GREATEST WATERSHED OF THE HURST OPINION, IN THAT THE ELEMENT IS THE SENTENCE OF DEATH THAT REQUIRES THE WEIGHING, IN ADDITION TO MERE QUALIFICATION OR ELIGIBILITY, BY WAY OF AN AGGRAVATOR.
AND JUSTICE PARIENTE, YOU MENTIONED THESE PROBLEMS.
WE CAN HAVE ALMOST ANY DEATH CASE WITH SOME AGGRAVATOR, A PRIOR FELONY, IT HAPPENS.
CONCURRENT FELONY?
IT HAPPENS.
HAC, CCP.
HOW DOES THAT HELP US ANALYZE THESE CASES?
AND I GO BACK TO THE USE OF THE TERM ELEMENT AS WE'VE ALL UNDERSTOOD IT FROM LAW SCHOOL, THAT AN ELEMENT MUST BE PROVEN BEYOND A REASONABLE DOUBT.
WHAT IS THE ELEMENT?
IT IS NOT JUST AN AGGRAVATOR OR QUALIFICATION.
THE ELEMENT IS THE SENTENCE, THE EXECUTION OF AN INDIVIDUAL.
THE PENALTY RESPONSIBILITY OF THE INDIVIDUALS ASSIGNED TO THE JURY TO KNOW THAT THEY ARE GOING TO MAKE THE DECISION THAT THIS PERSON WILL DIE FOR THE OFFENSE.
>> AT THAT POINT THEN, WHETHER I SAID IT TO YOU, THE MERGER OF

JURY SENTENCING, WHICH IS
REJECTED IN JURY FACT-FINDING,
IS -- THERE WOULD BE NO
DIFFERENCE.
AND THE ONE THING THAT -- WE
DON'T -- WE HAVE TO LOOK AT WHAT
THE FACT-FINDING WAS NECESSARY
UNDER THE OLD STATUTE TO IMPOSE
THE DEATH SENTENCE VERSUS
WHETHER THE FACT-FINDING UNDER
THE NEW STATUTE IS IMPOSING LESS
-- I MEAN REQUIRING LESS TO
IMPOSE A DEATH PENALTY.
WE CAN'T HAVE THE STATUTE GIVE
LESS PROTECTION.
IN OTHER WORDS, EXPOSE MORE
INDIVIDUALS TO THE DEATH PENALTY
THAN EXISTED AT THE TIME OF THE
OLD STATUTE.
WOULD YOU AGREE WITH THAT?
>> YES.
AND I ARGUE THAT THE NEW STATUTE
IS IN CONTRAVENTION OF HURST FOR
THAT REASON BECAUSE THE NEW
STATUTE REQUIRES THE JURORS TO
FIND BEYOND A REASONABLE DOUBT
THE EXISTENCE OF ONE OR MORE
AGGRAVATORS, BUT IT DOESN'T
REQUIRE THEM TO REACH ANY
CONCLUSION ABOUT THE WEIGHING
THAT IS APPARENTLY TO BE
RENDERED OTHER THAN BY THEIR
RECOMMENDATION AGAIN.
IT'S NOT ADVISORY.
IT'S A RECOMMENDATION.
>> I THINK THIS IS WHAT JUSTICE
LEWIS IS ASKING.
KANSAS V. CARR, ONCE YOU GET TO
HEAR ALL THE AGGRAVATORS THAT WE
FOUND UNANIMOUSLY, THEN THE
ISSUE OF WHETHER THEY'RE
SUFFICIENT BECOME JUDGMENT CALLS
AND THAT'S WHAT GOES INTO THEIR
RECOMMENDATION.
AND IF THEY DON'T AT LEAST GIVE
10-2, THEN THERE'S NOT A DEATH
SENTENCE.
SO THAT'S WHAT WOULD EXPLAIN --
I'M ASSUMING IF WE LOOKED AT THE
STAFF ANALYSIS, THAT THEY LOOKED

AT KANSAS V. CARR IN CONJUNCTION
WITH HURST TO SAY THE JURY NEEDS
TO FIND -- AND, AGAIN, BECAUSE I
GUESS THE STATE WILL MAKE THIS
ARGUMENT.
ALL THE AGGRAVATORS.
BUT THEN EVERYTHING ELSE IS NOT
-- ARE NOT FACTS.
I MEAN, THAT'S ONE
INTERPRETATION OF HURST IN
CONJUNCTION WITH KANSAS V. CARR.
>> AND, YES, JUSTICE, THE
DECISION IN KANSAS VERSUS CARR
IS UNDER THE KANSAS STATUTE.
KANSAS STATUTE IS SOMEWHAT
DIFFERENT THAN OURS.
AND I CANNOT RECITE IT VERBATIM.
BUT I WOULD ARGUE THAT WHERE
KANSAS MAY HAVE BEEN LESS OF AN
ELIGIBILITY PLUS WEIGHING STATE,
WE ARE CLEARLY A HYBRID
ELIGIBILITY PLUS WEIGHING STATE.
UNDER THE LAWS OF OUR STATE,
BOTH UNDER OUR CONSTITUTION AND
OUR APPLICATION OF HURST AS IT
HAS BEEN REMANDED TO US, THAT
THE ELEMENT THAT THE JURY MUST
FIND UNANIMOUSLY, I WOULD ARGUE,
IS INSUFFICIENT UNDER THE NEW
STATUTE TO PROTECT AND GIVE THE
PROTECTIONS THAT HURST REQUIRES.
THERE WAS AN INTERESTING -- WITH
A MOMENT LEFT, I WOULD LIKE TO
POINT OUT SOMETHING --
>> LET ME ASK YOU A QUESTION
ABOUT THE AGGRAVATORS HERE.
THERE ARE TWO AGGRAVATORS ON
WHICH THIS DEATH SENTENCE WAS
BASED, CORRECT?
>> YES.
>> THE PRIOR VIOLENT FELONY --
AND THOSE WERE REMOTE IN TIME.
THOSE AREN'T REALLY DISPUTED.
>> CORRECT.
IT'S NOT DISPUTED.
THEY ARE REMOTE IN TIME.
BUT I WOULD LIKE A FOLLOW-UP
WHEN YOU FINISH YOUR QUESTION.
>> OKAY.
SPECIFICALLY WHAT I WANT TO ASK

ABOUT IS HAC.
WHAT IS YOUR BEST ARGUMENT THAT WOULD DEFEAT A CLAIM OF THE STATE THAT ANY RATIONAL JURY WOULD HAVE FOUND -- BEYOND A REASONABLE DOUBT WOULD HAVE FOUND THAT THIS MURDER WAS COMMITTED WITH HAC?
>> INSUFFICIENT EVIDENCE OF THAT DESCRIPTOR AS IT'S USED, ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL BECAUSE THE MEDICAL EXAMINER OFFERED SOME TESTIMONY.
DEATH IS GRUESOME.
THERE'S NO TWO WAYS ABOUT THAT.
BUT IT'S NOT ESPECIALLY OUT OF THE REALM IN THE MANNER OF DEATH VERY COMMONLY UNDERTAKEN, AS THIS COURT HAS SEEN MANY, MANY TIMES.
THIS WAS A THREAT SLASHING.
THERE WAS DISPUTES, SOME SUGGESTION, AS TO HOW LONG IT MIGHT TAKE AN INDIVIDUAL TO DIE AND --
>> WERE THERE DEFENSIVE WOUNDS?
>> YES.
THERE WERE DEFENSIVE WOUNDS IN THE HANDS WHICH WERE INQUIRED AS TO WHETHER THEY COULD BE GRABBING THE KNIFE AS AN AGGRESSOR.
BUT I DON'T ARGUE THAT THEY'RE DEFENSIVE.
IT COULD BE WELL-UNDERSTOOD TO BE DEFENSIVE.
BUT RELY ON THE WRITTEN ARGUMENTS ABOUT THE DESCRIPTIVE NATURE OF HAC AND THE VAGUENESS OF WHAT IS REALLY REQUIRED FOR EIGHTH AMENDMENT PURPOSES TO SAY THIS IS SO ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL IN THE REALM OF MURDERS THAT OTHERWISE ARE LIFE IN PRISON WITHOUT PAROLE.
SO THE ARGUMENT THERE IS THAT THERE WAS NOT AN OVERWHELMING SHOWING OF ANIMUS, HATRED, LONGER DELAY AND TORTURE TO SAY THIS IS SO HEINOUS, ATROCIOUS

AND CRUEL.
BUT THE -- I HAD A POINT I
WANTED TO MAKE JUST BEFORE WE
REACHED THAT STAGE.
I'LL ASK TO COME BACK TO IT IN A
SECOND.
RESERVE SOME TIME AND I'M INTO
MY REBUTTAL.
BUT AS PART OF THE ARGUMENT
ABOUT THIS HARMLESS ERROR
ANALYSIS, THE STATE IN THE LAST
ARGUMENT, IN MR. HURST, CITED
NEDER VERSUS U.S. AND THAT'S
ALSO BEEN CITED IN THE STATE'S
SUR REPLY BRIEF IN THIS CASE.
I WANT TO ASK THE COURT TO
LISTEN TO THE WORDS OF JUSTICE
REHNQUIST IN THAT CASE.
IT WAS A HARMLESS ERROR CASE.
ONE ELEMENT WAS LEFT OUT IN THE
JURY INSTRUCTIONS.
THAT WAS DEEMED HARMLESS.
JUSTICE REHNQUIST, WHEN WE TALK
ABOUT THE DIFFERENCE OF WHETHER
YOU CALL IT STRUCTURAL ERROR,
SYSTEMIC ERROR, PROCEDURAL
ERROR, I'M GOING TO ASK TO READ
THIS WITH THE QUOTES IN PLACE
WITH CITATIONS OMITTED BUT
WITHOUT QUOTES AT THE BEGINNING
AND END.
JUSTICE REHNQUIST SAID, THE
ERROR AT ISSUE HERE, A JURY
INSTRUCTION THAT OMITS AN
ELEMENT OF AN OFFENSE, DIFFERS
MARKEDLY FROM THE CONSTITUTIONAL
VIOLATIONS WE HAVE FOUND TO DEFY
HARMLESS ERROR REVIEW.
THOSE CASES WE HAVE EXPLAINED
CONTAIN A, QUOTE, DEFECT
AFFECTING THE FRAMEWORK WITHIN
WHICH THE TRIAL ITSELF PROCEEDS
RATHER THAN SIMPLY AN ERROR IN
THE TRIAL PROCESS ITSELF."
SUCH ERRORS, QUOTE, INFECT THE
ENTIRE TRIAL PROCESS AND
NECESSARILY RENDER A TRIAL
FUNDAMENTALLY UNFAIR.
PUT ANOTHER WAY, THESE ERRORS
DEPRIVE DEFENDANTS OF BASIC

PROTECTIONS WITHOUT WHICH IS
CRIMINAL TRIAL CANNOT REASONABLY
SERVE ITS FUNCTION AS A VEHICLE
FOR DETERMINATION OF GUILT OR
INNOCENCE AND NO CRIMINAL
PUNISHMENT MAY BE REGARDED AS
FUNDAMENTALLY FAIR.
IF WE TAKE THE WORDS LIFE AND
DEATH AND REPLACE THEM FOR GUILT
OR INNOCENCE, THAT IS
SPECIFICALLY THE PROBLEM THAT
HURST HAS RESOLVED AND ADDRESSED
FOR US.
IT WAS A DEFECT IN THE FRAMEWORK
IN THE STATUTE, 921.
>> I UNDERSTAND WHAT YOU'RE
SAYING THERE, BUT HOW DO YOU
SQUARE THAT WITH WHAT WE KNOW
ABOUT APPRENDI ERROR?
AND THIS IS A TYPE OF APPRENDI
ERROR, IS IT NOT?
>> THIS IS AN EXTENSION OF A
SIMILAR KIND OF ERROR.
>> AND WE -- BUT WE KNOW THAT
APPRENDI ERROR IS SUBJECT TO
HARMLESS ERROR ANALYSIS.
IT IS NOT CONCLUSIVELY HARMFUL.
ISN'T THAT CORRECT?
>> AS I SUGGESTED, JUSTICE
CANADY, THERE COULD BE
HYPOTHETICALS IN WHICH HARMLESS
ERROR WOULD BE APPLIED TO THIS.
AND I ALSO WANTED TO NOTE --
>> AND I UNDERSTAND THAT.
IF YOUR CLAIM IS THAT IT'S
STRUCTURAL, IT SEEMS IF IT'S
STRUCTURAL, IT'S STRUCTURAL.
>> WELL, THAT IS DEFINITELY OUR
FIRST AND FOREMOST ARGUMENT,
THAT THIS IS STRUCTURAL, THAT
THIS SHOWS --
>> WE KNOW THAT THE APPRENDI
ERROR IS NOT STRUCTURAL, RIGHT?
>> WHAT'S DIFFERENT THERE IS
THAT -- FROM APPRENDI, APPRENDI
WAS JUST WHETHER IT WAS A HATE
CRIME OR NOT.
THE IMPORTANT DIFFERENCE HERE IS
FROM THE FIRST DAY A PANEL WALKS
IN TO BE CHOSEN, THEY WERE TOLD

THAT YOUR VERDICT IS ADVISORY.
THE JUDGE MAKES THE DECISION.
YOU DO NOT HAVE THAT ONUS.
THE JUDGE WILL DETERMINE.
YOU HAVE A RESPONSIBILITY TO
MAKE AN ADVISORY-ONLY VERDICT.
NOW, THAT PERMEATES THE ENTIRE
PROCEEDING.
THAT WAS PART OF THE CALDWELL
ISSUE, WHICH I ASKED TO PRESERVE
AS WELL.
IF I'VE ANSWERED YOUR QUESTION,
I'D ASK TO RESERVE THE TWO
MINUTES I HAVE.
THANK YOU.
>> MAY IT PLEASE THE COURT, MY
NAME IS VIVIAN SINGLETON.
I'M WITH THE ATTORNEY GENERAL'S
OFFICE.
THE FIRST ARGUMENT I WOULD LIKE
TO MAKE IS THAT THE ARGUMENTS
THAT ARE IN THE REPLY BRIEF THAT
HAVE TO DO WITH THE JURY
FACT-FINDING FROM THE HURST
OPINION ARE WAIVED BECAUSE THEY
WERE NOT REFERENCED IN THE
INITIAL BRIEF.
>> WAS THE INITIAL BRIEF --
AGAIN, LET'S GO WITH THE
STRONGER ARGUMENTS.
THE INITIAL BRIEF WAS --
REFERENCED RING.
IT WAS BEFORE HURST WAS DECIDED?
>> IT WAS.
HOWEVER --
>> WELL, HOW COULD THE STATE SAY
THERE'S A WAIVER?
>> THE REASON IS BECAUSE IN THE
INITIAL BRIEF THE ONLY ISSUES
THAT WERE BROUGHT UP WAS THE
LACK OF UNANIMOUS VERDICT AND
THE FACT THAT THESE PRIOR
VIOLENT FELONY CONVICTIONS WERE
OLD.
IN ONE OF THE PRETRIAL MOTIONS
THERE WAS REFERENCE TO THE FACT
THAT THERE WAS NO FACT-FINDING.
SO THAT COULD HAVE BEEN BROUGHT
UP IN THE INITIAL BRIEF, BUT IT
WAS NOT.

>> WHAT'S YOUR NEXT ARGUMENT?
>> MY NEXT ARGUMENT IS THAT STATUTE 775.082 DOES NOT REQUIRE THAT THIS DEFENDANT'S SENTENCE BE COMMUTED TO A LIFE SENTENCE. THAT STATUTE DOES NOT APPLY IN THIS CASE BECAUSE IN THE HURST DECISION THE SUPREME COURT DID NOT SAY THAT FLORIDA'S DEATH PENALTY WAS UNCONSTITUTIONAL, ONLY THAT THE SENTENCING SCHEME WAS UNCONSTITUTIONAL.
THE OPPOSING COUNSEL REFERENCED DONALDSON.
THAT CASE HAD ONLY TO DO WITH JURISDICTION.
IT WAS NOT A STATUTORY CONSTRUCTION ISSUE IN THAT CASE AT ALL.
>> HERE'S THE PROBLEM.
NOW, YOU JUST SAID THEY ONLY SAID OUR SENTENCING SCHEME WAS UNCONSTITUTIONAL.
>> YES.
>> THEY DIDN'T SAY ONE AGGRAVATOR.
THE WHOLE SENTENCING SCHEME WAS UNCONSTITUTIONAL.
>> THAT'S CORRECT.
>> THAT'S A PRETTY SWEEPING HOLDING.
IT MEANT THAT THERE WAS NO DEATH PENALTY PROCEDURE IN FLORIDA FROM HURST UNTIL THE LEGISLATURE ENACTED A NEW STATUTE, RIGHT?
>> WELL, IT SAID THAT THE SCHEME WAS UNCONSTITUTIONAL.
IT DID NOT SAY THAT THE STATUTE ITSELF WAS UNCONSTITUTIONAL.
THAT WAS NOT THE HOLDING IN HURST.
>> WELL, TO BE PERFECTLY CLEAR, IT SEEMS TO ME THAT WHAT THEY SAID IS THAT FLORIDA IS ALLOWING THE JUDGE TO MAKE THE FINDINGS IS UNCONSTITUTIONAL.
I MEAN, THAT'S REALLY, SEEMS TO ME, WHAT THEY SAID.
>> THAT IS CORRECT.
>> THE STATUTE IS

UNCONSTITUTIONAL TO THE EXTENT
THAT THE FINDINGS IN SUPPORT OF
A SENTENCE OF DEATH IS MADE BY
THE JUDGE AND NOT BY THE JURY.
ISN'T THAT WHAT HURST SAYS?
>> THAT IS CORRECT.
BUT THAT DOES NOT MAKE THE
ENTIRE DEATH PENALTY STATUTE
UNCONSTITUTIONAL.
>> THIS IS A FRIENDLY QUESTION,
ACTUALLY.
>> RIGHT.
>> IT SEEMS TO ME, BECAUSE THE
WAY YOU PHRASED IT, IT SOUNDS
LIKE THE WHOLE SCHEME IS
UNCONSTITUTIONAL, BUT IT'S ONLY
UNCONSTITUTIONAL TO THE EXTENT
THAT THE JUDGE MAKES THE FINDING
AS OPPOSED TO THE JURY.
THAT'S MY INTERPRETATION OF
HURST.
>> THAT IS CORRECT.
>> SO CAN WE THEN UNDER THAT
SEVER -- WE CAN'T SEVER THE
UNCONSTITUTIONAL PARTS FROM THE
CONSTITUTIONAL PARTS, RIGHT?
WE CAN'T REWRITE THE STATUTE
FOUND UNCONSTITUTIONAL IN HURST?
>> WELL, REALLY IT WAS THE
PROCEDURE, THE MANNER WAS
UNCONSTITUTIONAL, BUT THE
STATUTE ITSELF --
>> WHAT I'M ASKING IS COULD IT
BE -- CAN WE REWRITE THE STATUTE
THAT WAS FOUND UNCONSTITUTIONAL?
OR DO WE HAVE TO GO WITH THE NEW
STATUTE?
>> WELL, I HAVEN'T BRIEFED IN
THIS CASE WHETHER OR NOT THE NEW
STATUTE SHOULD APPLY.
THERE WAS A REFERENCE PREVIOUSLY
TO SUPPLEMENTAL BRIEFING.
I WOULD LIKE THE OPPORTUNITY TO
ADDRESS THAT IN SUPPLEMENTAL
BRIEFING, IF I CAN.
>> OKAY.
>> MAY I ASK A QUESTION?
NOW, THE STATUTE, 775.082(2),
WHY WOULD -- IF THIS -- WE'RE
NOT TALKING ABOUT THE DEATH

PENALTY.
WHY WOULD THE LEGISLATURE IN ITS WISDOM ADD THE LAST SENTENCE, NO SENTENCE OF DEATH SHALL BE REDUCED AS A METHOD OF EXECUTION TO [INAUDIBLE].
SO THEY WEREN'T REALLY TALKING ABOUT THE ENTIRE DEATH PENALTY IF THEY ACCEPTED THE METHOD OF EXECUTION.
>> WELL, WHEN THE STATUTE WAS PASSED, IT WAS IN REFERENCE TO THE ENTIRE DEATH PENALTY OF FLORIDA BEING FOUND TO BE UNCONSTITUTIONAL BY THE U.S. SUPREME COURT OR BY THE FLORIDA SUPREME COURT.
I WOULD STILL ARGUE THAT IT IS THE PROCEDURE, THE MANNER IN WHICH WE CARRY OUT THE DEATH PENALTY IS WHAT WAS FOUND TO BE UNCONSTITUTIONAL IN HURST.
ANOTHER POINT THAT I WANTED TO MAKE IS THERE IS NO ERROR IN THIS CASE BECAUSE --
>> BUT WHAT'S LEFT OF THE STATUTE ONCE YOU TAKE OUT THE UNCONSTITUTIONAL PORTION OF IT?
>> WELL, ONCE YOU TAKE OUT THE PROCEDURE, YOU STILL HAVE THE REQUIREMENTS FOR WHAT MAKES THE DEFENDANT DEATH-ELIGIBLE.
YOU STILL HAVE QUITE A BIT THAT'S STILL IN THE STATUTE.
>> [INAUDIBLE]
>> I'M SORRY.
I DIDN'T UNDERSTAND THE QUESTION.
>> CAN A DEFENDANT BE -- CAN THAT PART BE SEVERED AND IT STILL HAS ALL OF ITS INTEGRITY?
>> YES.
YES.
WHAT I WANTED TO SAY WAS --
>> EXCUSE ME.
IT SEEMS TO ME THAT WHEN YOU LOOK AT TAKING OUT THE PORTION OF THE STATUTE THAT ALLOWS THE JUDGE TO MAKE THE FINDINGS RATHER THAN THE JURY, YOU STILL

HAVE THE PORTION OF THE STATUTE
THAT TALKS ABOUT AGGRAVATING
CIRCUMSTANCES, CORRECT?
>> YES.
>> YOU HAVE MITIGATING
CIRCUMSTANCES.
SO WHAT DO YOU DO?
IF WE DECIDED THAT MR. WHITE WAS
ENTITLED TO A NEW SENTENCING
HEARING AND REMANDED IT TO THE
TRIAL JUDGE, WHAT WOULD A TRIAL
JUDGE DO, ASSUMING WE'RE STILL
UNDER THE OLD STATUTE, BUT WE
HAVE TO TAKE OUT THE PORTION
THAT THE SUPREME COURT HAS SAID
IS UNCONSTITUTIONAL, WHAT WOULD
BE LEFT FOR A TRIAL COURT TO DO?
>> WELL, THE TRIAL JUDGE COULD
STILL DETERMINE THAT HE HAS THE
PRIOR VIOLENT FELONY CONVICTIONS
AND HE COULD ORDER THE JURY TO
DETERMINE WHETHER OR NOT OTHER
AGGRAVATORS ARE PRESENT.
>> SO WE WOULD SEND IT BACK TO A
TRIAL COURT FOR A JURY
DETERMINATION OF ALL THE OTHER
AGGRAVATORS?
I MEAN, WELL, IN THIS CASE,
THERE WERE ONLY TWO AGGRAVATORS
FOUND, AND ASSUMING ON A
RESENTENCING, WHAT WOULD THE
JURY HAVE TO FIND?
WOULD THE JURY HAVE TO FIND BOTH
OF THESE AGGRAVATORS?
>> THEY WOULD HAVE TO FIND HAC.
THEY WOULD NOT HAVE TO FIND THE
PRIOR VIOLENT FELONY CONVICTION
BECAUSE UNDER RING AND APPRENDI
THE COURT CAN FIND THAT.
>> AND WHAT ABOUT -- WHAT WOULD
HAPPEN IN SUCH A SCHEME WITH THE
MITIGATING CIRCUMSTANCES?
WOULD THOSE HAVE TO BE FOUND BY
THE JURY ALSO?
>> IT'S NOT A REQUIREMENT.
THEY WOULD HAVE TO COMPARE THE
AGGRAVATORS WITH THE MITIGATORS.
BUT THERE'S NO REQUIREMENT THAT
MITIGATORS HAVE TO BE FOUND.
THEY HAVE TO CONSIDER THE

ARGUMENTS FOR BOTH AGGRAVATORS
AND MITIGATORS.
>> SO YOU WOULD STILL PRESENT --
I'M SORRY.
YOU WOULD STILL PRESENT THOSE TO
THE JURY AND THEN THE JURY WOULD
DO WHAT?
>> THE JURY WOULD DETERMINE
WHETHER OR NOT THE AGGRAVATORS
OUTWEIGH THE MITIGATORS AND
WHETHER OR NOT ANY AGGRAVATORS
HAVE BEEN FOUND UNANIMOUSLY.
>> SO YOUR POSITION -- SORRY.
I'M OFF HERE.
YOUR POSITION IS THAT THE JURY
WILL BE REQUIRED TO WEIGH THE
AGGRAVATORS AND MITIGATORS.
>> THE JURY CURRENTLY DOES THAT.
THEY CURRENTLY DO THAT.
THEY JUST DON'T DO THE
FACT-FINDING.
THEY HAD NOT DONE THE
FACT-FINDING.
IT'S NOT SPECIFIED.
WE KNOW THAT THEY FOUND
AGGRAVATORS BECAUSE THEY DID
RECOMMEND DEATH.
BUT THERE IS NO SPECIFIC JURY
FACT-FINDING.
THERE IS NO JURY INSTRUCTION
THAT SAYS YOU HAVE TO SAY THESE
ARE THE AGGRAVATORS THAT WE
FOUND.
I WAS --
>> THE NEW STATUTE PROVIDES THAT
ONE OF THE FUNCTIONS OF THE JURY
IS WHETHER THE AGGRAVATING
FACTORS EXIST WHICH OUTWEIGH THE
MITIGATING FACTORS FOUND TO
EXIST.
>> UNDER THE NEW STATUTE, THAT'S
CORRECT.
I WAS REFERRING TO THE PREVIOUS
STATUTE.
>> RIGHT.
>> SO IF WE REMAND THIS CASE FOR
A NEW SENTENCING HEARING, IS IT
YOUR POSITION THAT A JURY WILL
HAVE TO MAKE THAT DETERMINATION,
THAT FACTUAL DETERMINATION?

>> YES.
YES.
>> SO IF THEY DON'T -- AND THEN
-- THE 10-2, WHAT DOES THAT
RELATE TO?
DOES THAT RELATE TO THE ULTIMATE
RECOMMENDATION OF 10-2 RATHER
THAN UNANIMITY?
>> THE 10-2 REFERS TO THE DEATH
SENTENCE, THE RECOMMENDATION FOR
DEATH.
>> OKAY.
SO THEY WOULD -- UNDER THE --
AND, AGAIN, I APPRECIATE THAT
YOU'LL HAVE A CHANCE, BOTH OF
YOU, TO BRIEF THE REMEDY,
BECAUSE -- OR WE'LL BE DECIDING
IT IN ANOTHER CASE, BUT IF THE
NEW STATUTE THEN WOULD REQUIRE
FINDINGS OF ALL AGGRAVATORS
UNANIMOUSLY, FINDINGS THAT THE
AGGRAVATORS OUTWEIGHED THE
MITIGATORS UNANIMOUSLY.
YES OR NO?
>> THERE'S NOTHING IN -- THE NEW
STATUTE REQUIRES THAT THE
AGGRAVATORS ARE FOUND
UNANIMOUSLY.
>> BUT UNDER OUR SIXTH AMENDMENT
BACK FROM THE -- I MEAN OUR
VERSION, WE'VE ALWAYS REQUIRED
UNANIMITY.
SO -- BUT THEN -- WHAT I'M
TRYING TO FIGURE OUT IS THIS
10-2.
DOES THAT RELATE THAT AFTER THEY
FIND THAT THERE ARE ALL THE
FACTS NECESSARY FOR THE
IMPOSITION OF DEATH --
>> YES.
>> WE HAVE ALWAYS SAID THEY'RE
NOT REQUIRED TO IMPOSE DEATH.
SO THAT'S TO ME WHERE THE 10-2
COMES IN, WHICH IS THAT TEN OF
THEM HAVE TO AT LEAST HAVE
DECIDED THAT THE DEATH SENTENCE
-- THAT'S WHERE THE JURY
SENTENCING OR IT'S A
RECOMMENDATION TO THE JUDGE.
THE JUDGE IF IT'S NOT 10-2 HAS

TO -- HAS GOT TO IMPOSE LIFE.
>> CORRECT.
>> NOW, HERE'S MY PROBLEM IN THIS CASE.
THE JURY VOTED 8-4 TO RECOMMEND DEATH.
HOW DO WE, IF WE GO BACK, DOESN'T THAT GIVE THE STATE ANOTHER -- ON THIS ONE, ANOTHER OPPORTUNITY TO REPROVE THAT THEY SHOULD VOTE 10-2?
>> WELL, IT GIVES BOTH SIDES ANOTHER OPPORTUNITY TO ARGUE BEFORE THE COURT.
I MEAN, THE STATE WOULD OBVIOUSLY ARGUE -- MAKE WHATEVER ARGUMENTS WERE NECESSARY TO TRY TO GET A 10-2 VOTE, AND THEN THE DEFENSE WOULD ARGUE THAT THERE IS MORE MITIGATION THAN AGGRAVATORS.
>> BUT UNDER -- IF THIS VERDICT CAME OUT UNDER THE NEW STATUTE, HE WOULD HAVE TO GET A LIFE SENTENCE.
>> IF IT WERE STILL 8-4.
>> SO HE GETS A WHOLE NEW PENALTY PHASE, EVERYTHING GOES BACK TO -- FROM THE GET-GO, RIGHT?
>> IF YOU FOUND ERROR.
MY ARGUMENT STILL IS THERE IS NO ERROR BECAUSE OF THE PRIOR VIOLENT FELONY --
>> LET'S TALK ABOUT THAT ONE, THE PRIOR VIOLENT FELONY.
I HAVE ALWAYS THOUGHT AND I -- EXCUSE ME.
SINCE RING AND I LOOK BACK AT JUSTICE SHAW'S STATEMENT THAT IF THERE WAS A PRIOR VIOLENT FELONY, THAT WAS ENOUGH UNDER RING.
>> YES.
>> BUT LOOKING FORWARD AND LOOKING AT HURST, FINDING ONE AGGRAVATOR MEANS THAT THE DEATH PENALTY CAN BE CONSIDERED, BUT EVERY PART, JUST ABOUT, OF HURST, AND THEN LOOKING BACK AT

RING, THAT ALL FACTS NECESSARY
TO IMPOSE THE DEATH PENALTY, NOT
TO MAKE ELIGIBILITY, IS WHAT THE
JURY HAS TO FIND.
NOW, THIS CASE IS A GREAT
EXAMPLE OF A PRIOR VIOLENT
FELONY.
WE SOMETIMES SEE LIKE SOMEONE
KILLS FOUR PEOPLE AND THERE'S
FOUR CONTEMPORANEOUS MURDERS OR
JUST MURDERED SOMEBODY, SOMEONE
GOT OUT OF PRISON AND MURDERS
AGAIN.
BUT HERE YOU'VE GOT THAT IF THAT
WAS THE ONLY AGGRAVATOR FOUND,
THAT 20 YEARS AGO HE HAD
FELONIES, THE JURY, WITHOUT
MORE, THAT'S NOT -- THAT MAY
MAKE HIM ELIGIBLE FOR SOMEBODY
TO CONSIDER IT, BUT DOESN'T THE
JURY HAVE TO DETERMINE IF THAT
AGGRAVATOR IS SUFFICIENT IF THAT
WAS THE ONLY AGGRAVATOR TO
IMPOSE THE DEATH PENALTY?
>> WELL, THE CASE LAW ALLOWS THE
PRIOR VIOLENT FELONY CONVICTION
TO BE THE ONLY AGGRAVATOR.
AND ANOTHER THING I WANTED TO
SAY --
>> WAIT.
THAT'S WHAT I'M ASKING.
BUT HOW COULD IT BE, IF 20 YEARS
AGO HE HAD ROBBED A -- YOU KNOW,
DID A -- HE WAS -- AND I FORGET.
HE'S OLDER BECAUSE THIS HAS BEEN
WITH THIS PERSON.
BUT WHAT IF 20 YEARS AGO HE WAS
17 AND PUSHED AN ELDERLY PERSON
AND HE GOT -- YOU KNOW.
ROBBERY.
ARE WE REALLY SAYING IN THE
STATE OF FLORIDA THAT THAT --
AND THAT WAS THE ONLY
AGGRAVATOR, THAT THAT WOULD BE
ENOUGH TO IMPOSE THE DEATH
PENALTY?
>> THIS COURT HAS DECIDED IN
OTHER CASES IN WHICH ONE
AGGRAVATOR WAS ENOUGH.
THIS COURT HAS ALSO DECIDED IN

OTHER CASES IN WHICH THERE HAVE
BEEN PRIOR VIOLENT FELONY
CONVICTIONS THAT OCCURRED YEARS
AGO, THAT THAT WAS ENOUGH TO BE
AN AGGRAVATOR.
>> IT'S NOT WHETHER IT'S AN
AGGRAVATOR.
IT'S WHETHER THERE IS
AGGRAVATORS THAT ARE SUFFICIENT
TO IMPOSE THE DEATH PENALTY.
AND THE OTHER ISSUE HERE IS THAT
THE HAC, WE HAVE, SINCE I'VE
BEEN HERE -- WELL, IF IT'S A
STABBING DEATH, IT CAN QUALIFY.
BUT ALL WE'RE DOING IS SAYING
THERE WAS SUFFICIENT EVIDENCE
FOR THE JUDGE TO FIND IT.
WE HAVE -- THIS ISSUE OF WHETHER
A JURY WOULD FIND THAT THIS
PARTICULAR CRIME THAT APPARENTLY
SHE WAS -- BECAME UNCONSCIOUS
WITHIN A MINUTE ESTABLISHES
ESPECIALLY HEINOUS, ATROCIOUS
AND CRUEL.
THAT'S A JURY ISSUE.
WE'RE NOT -- YOU KNOW, WHEN WE
REVIEW IT WE DON'T PER SE THAT
THERE IS HAC AS A MATTER OF LAW
IF IT'S A STABBING DEATH, DO WE?
>> NO, NOT AS A MATTER OF LAW.
HOWEVER, THERE WAS PLENTY OF
EVIDENCE FOR ANY REASONABLE JURY
TO DETERMINE THAT HAC DID EXIST
IN THIS CASE.
THERE WERE SEVEN STAB WOUNDS.
THERE WAS EVIDENCE THAT THE
STRAIGHT-EDGED KNIFE WENT ACROSS
HER NECK FOUR TIMES.
>> HOW MANY -- WHAT DID THE
MEDICAL EXAMINER SAY WAS THE
TIME FROM THE BEGINNING OF THE
STAB WOUNDS TO WHEN SHE LOST
CONSCIOUSNESS?
>> WHAT SHE TESTIFIED TO WAS THE
VICTIM WOULD HAVE LOST
CONSCIOUSNESS ABOUT ONE MINUTE
AFTER THE CAROTID WAS SEVERED.
>> SO IF I'M A JUROR, THEY MAY
THINK, WELL, A MINUTE, THAT'S A
BAD -- IT'S REALLY AWFUL THAT

SHE DIED, BUT WE DON'T THINK
THAT'S ESPECIALLY -- IN THIS
CASE THAT IT'S ESPECIALLY
HEINOUS, THAT HIS INTENT WASN'T
TO TORTURE, THAT HE WASN'T
ACTING INDIFFERENT.
HE WAS IN THIS I GUESS EMOTIONAL
DISTRESS.
THIS WAS HIS WIFE THAT HE -- OR
ESTRANGED WIFE.
SO IT'S NOT THAT WE'RE EXCUSING
WHAT HAPPENED.
EITHER WAY THIS GUY IS GETTING
LIFE WITHOUT THE POSSIBILITY OF
PAROLE.
WE'RE JUST DECIDING WHETHER IT
GOES BACK AND THEN UNDER WHAT
CIRCUMSTANCE.
YOU'RE SAYING IT'S HARMLESS.
AND I JUST DON'T SEE HOW IN THIS
CASE WE COULD SAY IT'S HARMLESS
BEYOND A REASONABLE DOUBT.
>> WELL, THE EVIDENCE SHOWS THAT
THERE WAS A STRUGGLE BETWEEN THE
TWO BEFORE SHE WAS ACTUALLY
KILLED.
THERE WAS EVIDENCE OF A CUT
ACROSS HER HAND, A CUT ACROSS
HER FINGERTIPS.
>> BUT HOW DO WE KNOW WHAT THE
JURY DID, BECAUSE THEY WERE EVEN
INSTRUCTED ON AVOID ARREST,
WHICH THE JUDGE FOUND THERE WAS
NOT SUFFICIENT EVIDENCE.
SO WE DON'T KNOW IF THEY FOUND
HAC.
>> WE KNOW THAT THEY DID FIND AT
LEAST ONE AGGRAVATOR, WHICH IS
WHAT THE STATUTE REQUIRES.
ANOTHER THING I WANTED TO SAY IS
SINCE HURST THE SUPREME COURT
HAS DENIED CERT ON THREE OTHER
CASES, FLETCHER, SMITH AND
HOBART, IN WHICH THE DEFENDANT
HAD A PRIOR FELONY CONVICTION,
SIMILAR TO WHAT THE CASE IS
HERE.
I WOULD ARGUE THAT THIS PRIOR
FELONY CONVICTION MR. WHITE HAS
MEANS THERE IS NO ERROR IN THIS

CASE.
>> LET ME ASK YOU ABOUT THIS THE FACTS.
IT SEEMS TO ME -- YOU SAID THERE WERE FOUR SLASHING WOUNDS ACROSS THE VICTIM'S NECK, CORRECT?
>> YES.
IT WENT ACROSS IT AT LEAST FOUR TIMES.
>> OKAY.
DO WE KNOW AT WHICH POINT THE ARTERY WAS ACTUALLY SEVERED?
WAS THE FIRST OF THOSE WOUNDS OR WAS IT THE LAST OF THOSE WOUNDS?
I MEAN, THAT MIGHT IN FACT MAKE A DIFFERENCE AS TO WHETHER OR NOT SHE LINGERED LONGER THAN A MINUTE, AS HAS BEEN SUGGESTED HERE.
>> WE DON'T HAVE ANY TESTIMONY -- THERE WAS NOTHING --
>> THEY WERE NOT ABLE TO SAY AT WHAT POINT AND WHICH SLASH WOUND ACTUALLY SEVERED THE ARTERY, RIGHT?
>> THAT'S CORRECT.
>> OKAY.
OKAY.
>> THERE WAS NO TESTIMONY ON THAT.
>> HAVE YOU HAD A CHANCE TO REVIEW THE RECENT ORDER BY THE U.S. SUPREME COURT REGARDING THE ALABAMA CASE THAT OPPOSING COUNSEL CITED?
NO.
THAT WAS ANOTHER THING I WAS GOING TO SAY.
THERE WAS NO NOTICE PROVIDED TO THE STATE THAT THAT CASE WAS GOING TO BE REFERENCED TODAY, SO I WILL ASK TO REFERENCE THAT --
>> THAT WAS ANOTHER THING I WAS GOING TO SAY.
THERE WAS NO NOTICE PROVIDED TO THE STATE, SO I WILL ASK TO REFERENCE THAT IN A SUPPLEMENTAL BRIEFING THAT I DO.
THE OTHER THING I WANTED TO SAY, THERE WAS A REFERENCE TO NETTER

IN THIS HEARING.
I WOULD JUST ARGUE THAT IN NETTER THE SUPREME COURT DECIDED THAT EVEN WITH ONE OF THE ELEMENTS, THAT THAT CASE SHOULD NOT BE REVERSED.
AND I WOULD ARGUE THAT IF THERE WAS-- THAT WHEN YOU DO YOUR ERROR ANALYSIS, THAT YOU USE THE HARMLESS ERROR ANALYSIS, NOT ANY STRUCTURAL ERROR ANALYSIS.
IN REGARDS TO THE CALDWELL CASE, I WOULD ARGUE THAT ARGUMENT WAS WAIVED BECAUSE IT WAS NOT ARGUED IN THE INITIAL BRIEF, NOR WAS IT REFERENCED IN ANY OF THE PRETRIAL MOTIONS THAT WERE FILED, AND IT WASN'T REFERENCED IN ANY ARGUMENTS IN COURT.
>> BUT TO THE EXTENT THAT IF WE, IN FACT, SENT THIS CASE BACK OR, IN FACT, FOUND HARMLESS ERROR, IS CALDWELL REALLY-- WHAT WOULD WE DO WITH THE CALDWELL ISSUE?
>> WELL, THERE WAS NO CALDWELL ERROR IN THIS CASE.
CALDWELL HAS TO DO WITH MISLEADING THE JURY, AND THE JURY WAS NOT MISLED IN THIS CASE.
FLORIDA COURTS ROUTINELY TELL THE JURORS THAT THEY GIVE GREAT WEIGHT TO THE JURORS' RECOMMENDATION.
AND IN VOLUME 10, THE TRIAL COURT IN THIS PARTICULAR CASE TOLD THE JURY THE JURY RECOMMENDATION MUST BE GIVEN GREAT WEIGHT IN DETERMINING WHICH PUNISHMENT TO IMPOSE.
SO THIS WAS STATED TO THE JURY DURING THE PENALTY PHASE OF THE TRIAL.
SO THE JURY WAS TOLD SPECIFICALLY THAT THE JUDGE WOULD GIVE GREAT WEIGHT, GREAT DEFERENCE TO THEIR RECOMMENDATION.
SO THERE WAS NO MISLEADING OF THE JURY IN THIS CASE.

>> DOES HURST REQUIRE THE JURY TO SENTENCE, TO DO THE SENTENCING?
I'M STILL STRUGGLING WITH WHAT IS THE EXTENT OF WHAT THE SUPREME COURT IS SAYING IN HURST.
I BELIEVE THEY'RE SAYING YOU HAVE TO DETERMINE, THE JURY HAS TO DETERMINE ALL THE AGGRAVATORS.
BUT BEYOND THAT I'M STILL KIND OF STRUGGLING WITH WHAT IS THE SUPREME COURT IS REQUESTING OR REQUIRING?
ARE THEY REQUIRING THAT THE JURY MAKE THE FINDINGS ON AGGRAVATORS-- MITIGATORS, THE WEIGHTING PROCESS AND THEN THE ULTIMATE SENTENCE?
WHAT IS THE JUDGE'S ROLE NOW AFTER HURST?
>> THE ONLY THING THAT HURST SAYS SPECIFICALLY IS THAT THE JURY SHOULD DO THE FACT FINDING.
IT DOES NOT SAY THAT THE JURY SHOULD BE THE SENTENCER OR GO BEYOND THAT.
>> BUT IT DOES SAY, DOES IT NOT-- AND CORRECT US IF I'M MISSTATING IT-- THAT IT DOES REQUIRE THE JURY TO FIND EACH FACT THAT'S NECESSARY FOR THE IMPOSITION OF A DEATH PENALTY?
>> THAT IS CORRECT.
>> AND WE CAN PLAY SEMANTICS ON WHETHER IT'S JUDGMENT OR WHATEVER, BUT ONE OF THOSE FACTORS IS THAT THE MITIGATION DOES NOT OUTWEIGH THE AGGRAVATOR.
OR, STATED DIFFERENTLY, THAT THE AGGRAVATORS OUTWEIGH ANY MITIGATION.
>> THAT'S CORRECT.
>> SO THAT'S WHERE I'M STRUGGLING, IS THAT YOU CAN CALL IT WHAT YOU WILL, BUT IT'S STILL A FACTOR THAT PLAYS INTO THE ULTIMATE DECISION.

>> IT DOES, IT DOES.
>> YEAH.
>> AND THE LEGISLATURE RECOGNIZE THAT, IN MY VIEW, WHEN IT REQUIRES THAT THE JURY-- UNDER THE NEW STATUTE-- MAKE THOSE FINDINGS OF FACT.
AND THEY'VE ALWAYS CALLED THEM FINDINGS OF FACT.
SO WHATEVER KANSAS V. CARR, IN THE KANSAS STATUTE THEY WERE TALKING ABOUT SOMETHING TOTALLY DIFFERENT, IN MY VIEW.
THE ARGUMENT IN KANSAS V. CARR WAS WHETHER THE JURY SHOULD BE INSTRUCTED THAT MITIGATION ONLY HAS TO BE PROVEN BY THE GREATER WEIGHT, AND WE'VE ALWAYS INSTRUCTED THE JURY THAT WAY.
SO I EQUATE IN KANSAS THE IDEA OF MITIGATION IS MERCY.
AND IN NO WAY UNDER FLORIDA STATUTE THAT HAS BEEN IN EFFECT SINCE THE, YOU KNOW, RIGHT AFTER FURMAN HAS MITIGATION EVER BEEN THOUGHT OF AS MERCY.
IT'S WHAT EITHER QUALIFIES YOU OR NOT QUALIFIES YOU FOR THE, TO GET THE DEATH PENALTY.
SO GOING BACK TO IT, DOESN'T WHAT THE LEGISLATURE DID AS FAR AS REAFFIRMING THAT THE JURY IS MAKING NOW THE DETERMINATION THAT THE AGGRAVATION OUTWEIGHS THE MITIGATION, AND THAT'S WHAT THE JUDGE WAS DOING BEFORE, BUT IT WAS ALWAYS CONSIDERED A FACT, NOT A, LIKE, A MERCY CALL.
>> WELL, ONE THING I DO WANT TO SAY ABOUT THE KANSAS CASE, I WOULD LIKE THE OPPORTUNITY TO REFERENCE THAT IN MY SUPPLEMENTAL BRIEFING EVEN THOUGH THE REPLY BRIEF SAID THAT I ARGUED THAT.
I DIDN'T ARGUE THAT BECAUSE WHEN MY ANSWER BRIEF CAME OUT, THE KANSAS CASE HAD NOT BEEN DECIDED.
SO I WILL MAKE REFERENCE--

>> I MEAN, WE'RE GOING TO PROBABLY LET THIS, BUT I DO WANT TO SAY WHEN THE STATE'S SAYING THE DEFENDANTS DIDN'T DO THIS OR THAT, THE STATE WAITED UNTIL MONDAY EVEN THOUGH HURST HAD BEEN OUT TO REQUEST SUPPLEMENTAL BRIEFING IN THESE CASES.
AND IT MAY BE THAT IT'S JUST-- YOU KNOW, WHEN WE'RE TALKING ABOUT WHO HASN'T DONE WHAT, LET'S ALL BE FAIR THAT THIS HAS BEEN COMING DOWN FAIRLY QUICKLY.
SO GO AHEAD WITH WHAT YOU WERE GOING TO SAY, THAT YOU WANT TO BE ABLE TO--
>> YES.
I DO WANT TO ADDRESS THE KANSAS CASE IN A SUPPLEMENTAL BRIEFING, BECAUSE I HAVEN'T HAD A CHANCE TO DO SO PREVIOUSLY.
I WOULD JUST ARGUE THAT THERE'S BEEN NO ERROR IN THIS CASE BECAUSE OF THE PRIOR VIOLENT FELONY CONVICTIONS THAT MR. WHITE HAS.
I WOULD ASK THAT YOU CONFIRM THE CONVICTION AND THE SENTENCE, IF THERE ARE NOT ANY MORE QUESTIONS.
>> THANK YOU, JUSTICE.
JUSTICE PERRY, TO RESPOND TO YOUR QUESTION ABOUT THE STATUTE, 775.082, AS YOU POINT OUT, THERE WERE AMENDMENTS IN THAT.
AND I DON'T HAVE THE TIME AT THIS MOMENT, BUT I WOULD URGE THE COURT TO TAKE INTO ACCOUNT THE AMICUS CURIAE BRIEF FILED IN HURST ON THAT SUBJECT, BECAUSE IT DELVES EXTENSIVELY INTO THE LEGISLATIVE HISTORY AND LAYS OUT EXACTLY WHAT HELPED SOLVE THE PROBLEM FOR THIS COURT IN THE INTERPRETATION OF THAT STATUTE WITH THE DETERMINATION THAT A DEATH PENALTY HAS BEEN FOUND UNCONSTITUTIONAL.
IN THE TRIAL IN THE FACTUAL ARGUMENTS THAT WE'RE DISCUSSING

RIGHT NOW, THE QUALIFYING
AGGRAVATING CIRCUMSTANCES, LET'S
SAY THE PRIOR VIOLENT FELONY.
NOW, ALL THAT HAD TO BE PROVEN
WAS A CONVICTION.
HERE'S A JUDGMENT AND SENTENCE,
HERE'S A PRIOR VIOLENT FELONY.
BECAUSE THEN A QUALIFIER HAS
BEEN MET.
HOWEVER, WHERE THE JURY MUST
DETERMINE THE WEIGHT AND THE,
WHETHER OR NOT THE AGGRAVATOR
HAS BEEN PROVEN BEYOND A
REASONABLE DOUBT, WE POTENTIALLY
HAVE A MINI TRIAL IN EVERY CASE
IN WHICH A DEFENDANT ENTERED A
PLEA OF CONVENIENCE.
HE WAS CONVICTED, CLAIMED HE
WASN'T GUILTY, HE WAS CONVICTED
ON A PLEA OF CONVENIENCE, NO
JURY TRIAL, NO FORMAL
DETERMINATION.
WILL THE TRIAL JURY NOW HAVE TO
BE PRESENTED WITH THAT ARGUMENT
AND THAT EVIDENCE TO DETERMINE
WHETHER OR NOT HE WAS ACTUALLY
GUILTY OF SOMETHING THAT WAS
FORMERLY A--
>> WELL, I DON'T KNOW, HOW DOES
THAT HELP YOU?
>> IT DOESN'T.
>> OH.
>> IT DOESN'T.
I'M NOT SURE WHAT THE EFFECT IS.
>> YOU JUST SAID THAT YOU ARGUE
WHICH IS WHAT I WOULD ASSUME
THEY ARGUED IN THIS CASE.
YES, HE HAD FIVE PRIOR VIOLENT
FELONIES.
HE TOOK THE STAND, HE ADMITTED
IT, BUT THEY WERE 20 YEARS AGO.
THEY SHOULDN'T BE THE BASIS FOR
THE DEATH PENALTY.
>> I'M JUST ADDING--
>> ISN'T THAT WHAT YOU ARGUE?
>> I'M ADDING IN ADDITION TO THE
REMOTENESS ARGUMENT MADE, I'M
ADDING THE PROSPECTIVE PROBLEM,
THE QUESTIONING, OF HOW THE JURY
WHEN THEY WEIGH AND DETERMINE AN

AGGRAVATOR WITH A VERDICT BEYOND
A REASONABLE DOUBT, HOW THEY DO
THAT.
I WOULD ALSO ON PARTING ALSO ASK
TO CONSIDER AS I BRIEFED-- I
DON'T HAVE TIME TO ARGUE THE
SUFFICIENCY OF THE EVIDENCE
QUESTION.
I KNOW I FILED A SUPPLEMENTAL
AUTHORITY, THE COURT'S RECENT
DECISION IN KNIGHT ON THAT
SUBJECT, AND THAT WAS REALLY
SIMPLY FOR THE PURPOSE OF MADAM
JUSTICE QUINCE'S HYPOTHETICAL
ANALYSIS OF THE EVIDENCE IN A
MURDER CASE.
THAT HAPPENED TO HAVE BEEN A
CIRCUMSTANTIAL EVIDENCE-RELATED
DRUG CASE OR WHATEVER.
BUT IN ANALYZING THAT EVIDENCE,
THE COURT DID, JUSTICE QUINCE
DID COMPARE THAT TO A SITUATION
VERY SIMILAR TO HERE WHERE
PERHAPS OVERWHELMING
CIRCUMSTANCES SUGGEST GUILT.
HOWEVER, THERE'S NO DIRECT
EVIDENCE OF THE ACT OF THE
MURDER BEING COMMITTED BY THE
PERSON CHARGED.
SO AS WE CLOSE THIS MATTER NOW,
I WOULD ASK TO PRESERVE MY
ARGUMENT-- OR RENEW MY ARGUMENT
ON THE SUFFICIENCY OF THE
EVIDENCE FOR THE GUILT PHASE.
THANK YOU VERY MUCH, JUSTICES.
>> THANK YOU FOR YOUR ARGUMENTS.
THE COURT'S IN RECESS FOR TEN
MINUTES.
>> ALL RISE.