>> THE SUPREME COURT OF FLORIDA
IS NOW IN SESSION.
PLEASE BE SEATED.
>> WE NOW PROCEED TO THE THIRD
CASE ON OUR DOCKET TODAY,
TISDALE V. THE STATE OF FLORIDA.
COUNSEL?
>> MY NAME IS JEFFREY GARLAND, I
AM HERE ON ERIESE ALPHONSO
TISDALE.
HE MAINTAINS THAT HIS SENTENCE
OF DEATH SHOULD BE REDUCED TO
LIFE.
CRITICAL TO THIS CASE IS THE
ISSUE OF RETROACTIVITY OF
CHAPTER 2016-13.
THAT CASE, THIS CASE WAS, WENT
TO A JURY BEFORE HEARST V.
FLORIDA WAS DECIDED.
THE SENTENCING WAS POSTPONED.
THE LEGISLATURE PASSED 2016-13,
SENTENCING TOOK PLACE AFTER THAT
POINT.
AN ABUNDANCE OF CASE LAW FROM
THIS COURT HAS HELD THAT THESE
PROCEDURAL STATUTES ARE
RETROACTIVE.
IN FACT, THE DEATH PENALTY
STATUTE ITSELF SAYS ALL
PROCEEDINGS MUST PROCEED UNDER
THE DEATH PENALTY PROCEDURE.
OF.
>> BUT ARE YOU SAYING-- HERE'S
THE PROBLEM I HAVE.
THIS JURY DIDN'T KNOW THAT IF
THEY WERE EITHER 10, LESS THAN
10 OR UNANIMOUS THAT THERE WOULD
NOT BE A DEATH PENALTY.
SO I DON'T, SO IF YOU'RE SO--
IT SEEMS TO ME THAT IT IS REALLY
NO DIFFERENT THAN ANY OF THE
OTHER CASES POST-RING WHERE WE
HELD THAT IN A NON-UNANIMOUS
VERDICT THERE SHOULD BE A NEW
SENTENCING.
I DON'T REALLY GET WHY YOURS,
WHICH WAS UNDER A STATUTE WHICH
WAS THEN DECLARED
UNCONSTITUTIONAL, WOULD APPLY TO
MANDATE PROCEDURAL THAT IT BE

REDUCED TO LIFE.
I MEAN, WHAT'S-- I JUST DON'T SEE THAT.
>> THAT TAKES ME TO POINT THREE, WHICH WE'LL ADDRESS FIRST, WHICH IS--
>> WELL, ISN'T THE ONLY ISSUE HERE-- AGAIN, MAYBE I'M MISSING SOMETHING-- EITHER HE GETS A NEW SENTENCING PHASE, OR HE GETS REDUCED TO LIFE?
>> CORRECT.
>> OKAY.
>> CORRECT.
AND POINT THREE DEALS WITH THE NEW SENTENCING PHASE UNDER THE CONTROLLING PRECEDENT OF THIS COURT.
I DON'T THINK THAT'S AN ISSUE BECAUSE IT WAS A NON-UNANIMOUS JURY.
THERE WERE-- THE JUDGE FOUND THE EXISTENCE OF 40 MITIGATING CIRCUMSTANCES, AND OBVIOUSLY, IT WAS A MISINSTRUCTED JURY UNDER HEARST V. FLORIDA AND UNDER--
>> SO WE'RE ONLY HERE BECAUSE OF THIS FACT THAT SENTENCING TOOK PLACE WHEN THE LEGISLATURE HAD PASSED THE STATUTE, THE 10-2 STATUTE WHICH WAS SUBSEQUENTLY DECLARED UNCONSTITUTIONAL?
>> THERE ARE DIFFERENT ASPECTS OF THAT ARGUMENT, BUT THAT IS CORRECT.
>> OKAY.
BUT IT WAS DECLARED UNCONSTITUTIONAL.
IT REQUIRES A UNANIMOUS VERDICT, BUT THERE'S NEVER BEEN, THERE WAS NEVER A SITUATION WHERE WE SAID THOSE, ALL THOSE CASES THAT WERE DECIDED PRE-- WHERE THE JURY CAME BACK SHOULD GET REDUCED TO LIFE OTHER THAN, YOU KNOW, WHEN JUSTICE PERRY, YOU KNOW, DISSENTED ON WHAT WE DETERMINED SHOULD HAPPEN.
>> WELL, THIS COURT IN PERRY V. STATE DID DETERMINE IT IS

RETROACTIVE, AND IT'S APPLICABLE
TO CASES THAT WERE THEN PENDING
IN THE COURTS.
AND I WOULD SUBMIT THAT THE
TISDALE CASE WAS THEN PENDING IN
THE COURTS.
>> WHAT WAS THE JURY--
>> BUT IT WAS FOR, NOT THAT THE
10-2 WAS APPROPRIATE.
>> WELL, IN PERRY V. STATE IT
WENT UP ON 2016-13, AND THAT WAS
THE 10-2 THAT WAS IN PLACE AT
THAT PARTICULAR TIME.
AFTER THAT THE LEGISLATURE
AMENDED, OBVIOUSLY, THE QUESTION
HERE THAT MR. TISDALE IS
CONCERNED ABOUT IS THAT COURT
HAS DETERMINED THAT IF THERE'S A
UNANIMOUS VERDICT, NO MATTER
WHAT THE DEFECTS IN THE
INSTRUCTIONS, THAT THOSE DEATH
SENTENCES ARE VALID.
AND I SUBMIT THAT IF THE FINDING
OF THE JURY IS SUFFICIENT TO
UPHOLD THE DEATH PENALTY WHEN
IT'S UNANIMOUS, THEN THE SAME
JURY FINDING OF 9-3-- WHICH IS
NOT SUFFICIENT TO UPHOLD THE
DEATH PENALTY UNDER THE CURRENT
STATUTE-- SHOULD BE CONSIDERED
BY THIS COURT AS A FINDING OF
FACT--
>> SO WE WOULD HAVE TO, SO THEN
WE WOULD HAVE TO RECEDE FROM
EVERY SINGLE CASE WHERE WE HAVE
SENT IT BACK FOR RESENTENCING.
>> I'M CONCERNED THAT THE
FINDING OF THIS COURT THAT A
CASE IN THIS UNUSUAL, PERHAPS
WITHDREW ANEMIC POSTURE COULD
CAUSE EXACTLY THAT SORT OF
INCONSISTENCY IN THE RULINGS OF
THIS COURT.
>> WHAT WAS THE JURY TOLD ABOUT
WHAT IT SHOULD FIND OR IT COULD
FIND?
>> THEY WERE GIVEN THE STANDARD
INSTRUCTION.
>> SO THERE WAS NO INSTRUCTION
GIVEN TO THE JURY ABOUT IN ORDER

TO IMPOSE A DEATH SENTENCE, YOU
HAVE TO, AT LEAST 10 OF YOU
WOULD HAVE TO AGREE OR ANY
INSTRUCTION TO THAT EFFECT?
>> NO.
THEY WERE TOLD THAT THEY HAD,
THAT A RECOMMENDATION HAD TO BE
AT LEAST 7 OF THEM.
AND IT WAS THE STANDARD JURY
INSTRUCTION.
THE POINT OF THE FACT HERE IS
THAT THERE WAS THE
RECOMMENDATION.
IT SAYS RECOMMENDATION.
THE CURRENT STATUTE SAYS
RECOMMENDATION.
2016-13 SAYS RECOMMENDATION.
WE HAVE A RECOMMENDATION OF 9
JURORS, 3 OF THEM RECOMMENDED
LIFE.
THAT'S NOT SUFFICIENT.
THAT IS NO LESS SIGNIFICANT THAN
THE 12-0 VERDICTS THAT THAT THIS
COURT IS UPHOLDING DEATH
PENALTIES ON.
>> SO YOUR ARGUMENT REALLY IS
THAT ANY CASE WHERE THE JURY
MADE LESS THAN A UNANIMOUS
DECISION SHOULD BE REDUCED TO
LIFE?
>> NO, MA'AM, I'M NOT GOING THAT
FAR.
THAT'S NOT THE ARGUMENT.
>> WELL, IS IT POST-RING?
ALL THOSE CASES?
>> WELL, LET'S START WITH RING.
RING V. ARIZONA, BECAUSE THIS IS
THE STARTING POINT.
AND WHEN WE, WE LOOK-- FOR
YEARS THIS COURT HAS STRUGGLED
AND THE SUPREME COURT HAS
STRUGGLED WITH THE SIMILARITIES
BETWEEN ARIZONA'S DEATH PENALTY
SENTENCING PROCEDURES AND
FLORIDA'S DEATH PENALTY
SENTENCING PROCEDURES.
BULLINGTON V. MISSOURI TAUGHT
THAT IF THE JURY MAKES IN A
CONTESTED EVIDENTIARY HEARING A
FINDING OF FACT AND RETURNS A

VERDICT, THAT THAT IS A DOUBLE
JEOPARDY BAR TO A SUBSEQUENT
SENTENCE OF DEATH.
THAT'S WHAT BULLINGTON V.
MISSOURI SAYS.
WE SUBSEQUENTLY KNOW THAT
ARIZONA VERY RUMSEY, BULLINGTON
V. MISSOURI WAS APPLIED.
AND SO WE KNOW THAT UNDER THE
ARIZONA SENTENCING PROCEDURES
THAT IT'S AN ADVERSARY
PROCEEDING IF THE JURY
RECOMMENDS LIFE.
THAT CAN'T BE REVERSED.
IT'S A DOUBLE JEOPARDY BAR.
>> SO YOUR ARGUMENT IS THAT THE
9-3 WAS A FACTUAL FINDING BY THE
JURY?
>> THAT IS CORRECT.
THAT IS A VERDICT.
>> AND SO SINCE IT WAS NOT
UNANIMOUS, THEN IT BECOMES A
LIFE SENTENCE.
>> UNDER THE LAW IN EFFECT AT
THE TIME, IT HAD TO BE 10-2.
>> BUT THAT'S, BUT THAT STATUTE
WAS INVALIDATED IN PERRY BECAUSE
WE SAID IT HAD TO BE UNANIMOUS.
AND SO AGAIN, I'M TRYING TO FIND
OUT WHAT, WHAT DISTINGUISHES
YOUR CASE FROM ANY OTHER CASE
THAT WAS TRIED BEFORE THE COURT
AND THEN THE LEGISLATURE
REQUIRED THAT THE FINDINGS BY
THE JURY HAD TO BE UNANIMOUS?
>> BECAUSE THIS CASE WAS
SENTENCED AFTER 2016-13 WENT
INTO EFFECT.
THAT, THAT STATUTE SAYS IT'S
RETROACTIVE TO ALL CASES.
ALL PRECEDENT OF THIS COURT SAYS
THESE AMENDMENTS ARE
RETROACTIVE.
IT'S NOT A CHANGE IN THE DEATH
PENALTY.
IT'S A MANDATORY PROCEDURE THAT
MUST BE FOLLOWED.
IT HAD TO BE FOLLOWED.
IF IT HAS TO BE FOLLOWED,
THEN-- IF IT'S NOT FOLLOWED,

THIS COURT IS--
>> WELL, THEN WHAT YOU WOULD HAVE, YOU WOULD BE SAYING TO ME THE JURY HAD TO BE TOLD IT WAS 10-2.
SO WHAT YOU'RE REALLY ASKING IS IT GOES BACK, AND THEY'D ONLY HAVE TO FIND 10-2 RATHER THAN UNANIMOUS?
>> THE JURY COULDN'T HAVE BEEN TOLD 10-2 BECAUSE IT DIDN'T EXIST AT THAT TIME.
>> YEAH, BUT BECAUSE THE JURY WASN'T TOLD, THEY DIDN'T HAVE ALL THE FACTS UPON WHICH TO MAKE THEIR ALL-IMPORTANT FINDINGS REGARDING THE ULTIMATE SENTENCE TO BE IMPOSED.
>> THAT IS TRUE, BUT IN CASES THAT ARE 12-0 THAT DOESN'T SEEM TO MATTER.
AND IN CASES--
>> WELL, IT SAYS, SAYING IN THOSE CASES IT'S HARMLESS ERROR BEYOND A REASONABLE DOUBT BECAUSE THEY FOUND ALL OF, THEY FOUND ALL OF THOSE REQUIREMENTS THAT THE AGGRAVATORS OUTWEIGHED THE MITIGATORS UNANIMOUSLY.
SO THAT IS WHY THOSE CASES-- IT DIDN'T SAY IT DIDN'T MATTER, IT SAID IT WAS HARMLESS BEYOND A REASONABLE DOUBT.
IT'S NOT A STRUCTURAL ERROR.
>> THAT IS A MATTER OF SOME DEBATE WHETHER THE FINDINGS COULD BE MADE WHEN THERE'S NO INSTRUCTION ON THAT WHICH GETS BACK TO THE QUESTION THAT YOU JUST MADE IS SHOULD THEY HAVE BEEN TOLD IT WAS 10-2.
>> THIS SEEMS TO ME IF YOUR ARGUING-- IF YOU'RE ARGUING THIS IS UNIQUE, YOU NEED TO STAY WITH THAT.
BUT IF YOU'RE ARGUING THAT THE COURT HAS BEEN INCONSISTENT, I THINK SOME OF MY COLLEAGUES WOULD AGREE WITH SOME OF THE INCONSISTENCIES.

WE DID THE BEST WE COULD
POST-RING, POST-HEARST, AND
WE'RE HERE NOW ON VERY FEW CASES
THAT STILL HAVE TO BE DECIDED
BEFORE WE NOW KNOW THAT ALL THE
VERDICTS HAVE TO BE UNANIMOUS.
AND EVERY SINGLE ONE OF THEM, IF
IT'S NOT UNANIMOUS, WE'VE
REVERSED FOR NEW TRIAL.
SO THE ONLY-- I MEAN PENALTY
PHASE.
SO THE ONLY ISSUE FOR YOU IS
THAT IT WAS IN THIS UNIQUE
WINDOW THAT YOU WANT TO GET THE
ADVANTAGE OF THE 10-2
REQUIREMENT.
AND THAT'S YOUR ARGUMENT, RIGHT?
>> IN THE BRIEFS I REFERRED TO
IT AS "UNIQUE."
I CAN'T SIT HERE BEFORE THE
COURT AND SAY THERE IS NO OTHER
CASE LIKE THIS, BUT THERE ARE
PROBABLY NOT MANY.
IT COULD BE THE ONLY ONE.
YES.
>> WHAT I'M STRUGGLING WITH
HERE, AND I HAVE A DIFFERENT
PERSPECTIVE ON THIS THAN THE
MAJORITY, BUT I'M STRUGGLING
WITH THE FACT THAT WE, THE
MAJORITY'S DECLARED THAT STATUTE
UNCONSTITUTIONAL.
RIGHT?
>> YES, SIR.
>> WELL, THAT'S THE LAW, AND I'M
STRUGGLING WITH HOW, YOU KNOW,
HOW THAT DECLARATION THAT THAT
LAW WAS UNCONSTITUTIONAL DOESN'T
COME INTO PLAY IN THIS DIRECT
APPEAL.
BECAUSE YOU'RE RELYING ON THIS
LAW THAT WAS DECLARED
UNCONSTITUTIONAL BY THE COURT.
I DON'T-- HELP ME UNDERSTAND
HOW YOU CAN DO THAT.
>> WELL, PERRY V. STATE
ADDRESSED THAT, AND SO DID EVANS
V. STATE WHICH WAS A FOLLOW ON.
AND THERE WAS A DISCUSSION IN
THE CONCURRING AND DISSENTING

OPINIONS ABOUT SEVERABILITY.
AND THE CONCEPT OF LOOKING AT A STATUTE, TRYING TO REMOVE THE PARTS THAT ARE UNCONSTITUTIONAL IF THE REMAINING PART CAN STAND, THEN IF IT ACCOMPLISHES THE PRIMARY PURPOSE OF THE LEGISLATURE, THEN IT REMAINS VALID.
AND WHAT WAS DECIDED WAS AS FAR AS THE AMENDED STATUTE GOES, ELIMINATE THE 10-2, MAKE IT UNANIMOUS.
THE REMAINING PORTION OF THE STATUTE--
>> BUT YOU'RE RELYING ON THE PART THAT THE COURT DECLARED TO BE INVALID, RIGHT?
YOU'RE SAYING, BECAUSE YOU'RE SAYING THERE WASN'T AT LEAST A 10-2.
THAT WAS AN ACQUITTAL.
AND THAT WHOLE THING IS-- YOUR WHOLE ARGUMENT, SEEMS TO ME, TO BE BASED ON THAT PROVISION OF THE STATUTE THAT WAS DECLARED INVALID BY THIS COURT, AND THAT'S NOT THE LAW.
I MEAN, IN THE DIRECT APPEAL WE APPLY THE LAW AS WE UNDERSTAND IT.
AND THE FACT THAT MAYBE SOMEBODY MISUNDERSTOOD IT BACK THEN WHEN IT WAS ON THE BOOKS, DOESN'T MATTER.
IF WE'VE DECLARED IT INVALID, THEN IT'S INVALID, RIGHT?
>> YES, SIR, I AGREE WITH THAT AS FAR AS DECISIONAL LAW GOES.
BUT THE CHANGE HERE IS NOT DECISIONAL LAW THAT I'M CONTENDING.
IT'S STATUTORY LAW.
AND THE COURT CAN'T INTRUDE SO FAR INTO THE REQUIREMENTS OF THE LEGISLATURE.
THEY PASSED A LAW THAT WAS IN PLACE AT THE TIME THE SENTENCING TOOK PLACE--
>> WE DECLARE A LAW

CONSTITUTIONALLY INVALID, WE
TYPICALLY DECLARE IT INVALID
FROM THE START.
>> OKAY.
IN THIS CASE--
>> I MEAN, INSOFAR AS PIPELINE
CASES ARE CONCERNED.
OBVIOUSLY, POST-CONVICTION'S A
WHOLE DIFFERENT THING.
BUT IF IT'S A PIPELINE CASE AND
WE'VE DECLARED A LAW TO BE
UNCONSTITUTIONAL, THEN IT'S
JUST, IT'S LIKE IT NEVER
EXISTED.
THAT PART THAT WE DECLARED TO BE
UNCONSTITUTIONAL.
ISN'T THAT CORRECT?
ISN'T THAT JUST KIND OF A BASIC
PART OF THE WAY THE APPELLATE
PROCESS WORKS?
>> I THINK THAT THAT IS TRUE
GENERALLY, BUT WHEN WE TAKE INTO
ACCOUNT THE RULE OF LENITY, THE
EIGHTH AMENDMENT AND DUE
PROCESS, I THINK WE REACH A
DIFFERENT RESULT IN THIS
PARTICULAR CASE BECAUSE--
>> YOU WOULD THEN CONCEDE WE'VE
GOT TO PUT ASIDE THAT GENERALLY
PREVAILING PRINCIPLE TO GO DOWN
THE PATH YOU WANT US TO GO DOWN.
>> BECAUSE THIS IS A UNIQUE
CASE.
>> OKAY.
>> THIS CASE--
>> LET ME--
>> I--
>> CAN I-- SO I SORT OF SEE
THIS AS TWO VERY DISTINCT LEGAL
ISSUES.
ONE IS WHEN THE SENTENCE GETS
VACATED, AND THEN THE SECOND--
AND IT'S-- THAT YOU GET TO IF
THE SENTENCE IS VACATED, IS
WHAT'S THE REMEDY.
IS IT A LIFE SENTENCE, OR DOES
THE STATE GET A CHANCE, AN
OPPORTUNITY TO HAVE ANOTHER
TRIAL, RIGHT?
THOSE ARE TWO THE SEPARATE LEGAL

ISSUES, RIGHT?
>> THAT IS CORRECT.
>> AND IN THIS CASE YOU'RE SAYING ON THE FIRST ISSUE THERE'S AN EXTRA REASON TO VACATE THE SENTENCE.
SO THERE IS-- EVEN IF THIS LAW HAD NEVER BEEN, THE 10-2 LAW HAD NEVER BEEN PUT INTO EFFECT, YOU WOULD GET-- YOU WOULD HAVE HEARST RELIEF BECAUSE IT WAS A UNANIMOUS JURY VERDICT SO THAT THE SENTENCE WOULD BE VACATED UNDER THIS COURT'S PRECEDENT, CORRECT?
>> THAT IS CORRECT.
>> AND UNDER THAT REASON, WHICH IS THE ONLY KIND OF CASE WE'VE TALKED ABOUT, IT'S CLEAR THAT DOUBLE JEOPARDY, THE U.S. SUPREME COURT HAS HELD AND WE'VE APPLIED AND WE'VE HELD THAT DOUBLE JEOPARDY DOESN'T PROHIBIT THE STATE FROM GETTING A NEW TRIAL, CORRECT?
>> IN MOST CASES, TRUE.
>> OKAY.
SO HERE WHAT YOU'RE SAYING IS THAT THERE'S ANOTHER REASON TO VACATE THE SENTENCE BECAUSE THE LAW IN EFFECT THAT APPLIED AT THE TIME OF THE SENTENCING HEARING DID NOT ALLOW FOR THE DEATH PENALTY.
AND SO WE VACATE, RIGHT?
>> THAT IS CORRECT.
>> AND THIS IS-- SO WE AGREE VACATE THE SENTENCE.
I THINK WE ALL KNOW THAT'S GOING TO HAPPEN, EITHER RATIONALE.
BUT WHEN YOU GET TO THE SECOND ISSUE, I DON'T UNDERSTAND WHY THE ANALYSIS IS ANY DIFFERENT UNDER THE U.S. SUPREME COURT CASE LAW AND OUR CASE LAW.
IN OTHER WORDS, AT THE TIME OF THE JURY TRIAL AND JURY VERDICT AND RECOMMENDATION, THE LAW WOULD HAVE SUPPORTED A DEATH SENTENCE, AND WE HAVE HELD THAT

UNDER THOSE CIRCUMSTANCES IF THE SENTENCE IS VACATED, DOUBLE JEOPARDY DOES NOT BAR THE STATE FROM RETRYING.
AND SO WHEN YOU GET PAST THE DECISION THAT, YES, WE'RE VACATING, THERE ARE TWO REASONS TO DO IT, YOU HAVEN'T SHOWN ME ANY REASON WHY THE GENERAL LAW RELATING TO DOUBLE JEOPARDY AND SENTENCING IN THIS CONTEXT WOULD NOT APPLY.
>> I THINK THAT BULLINGTON AND ARIZONA V. RUMSEY ANSWER THAT QUESTION.
THEY SAY THAT THE JURY FINDING IS A FACTUAL FINDING HERE.
THERE'S A VERDICT OF 9-3.
>> AND THAT WOULD HAVE SUPPORTED A DEATH SENTENCE AT THE TIME OF THE VERDICT, CORRECT?
>> THAT'S CORRECT.
>> OKAY.
AND DOUBLE JEOPARDY WOULD NOT REBAR, IF THE LAW CHANGES, DOUBLE JEOPARDY DOESN'T GENERALLY REBAR.
>> WELL, THAT'S TRUE, BUT THE LEGISLATURE CHOSE TO PASS A HAW THAT WAS RETROACTIVE THAT GAVE A MORE BENEFICIAL POSITION AND SAID IT HAD TO BE 10-2.
THEY LOWERED THE BAR.
AND AT THAT TIME FLORIDA HAD A BIFURCATED SYSTEM.
THE JURY MADE A RECOMMENDATION.
THE JUDGE DIDN'T IMPOSE SENTENCE UNTIL AFTER THE STATUTE WENT INTO EFFECT.
THE STATUTE WAS THE BINDING LAW AT THAT TIME.
PERRY V. STATE WAS DECIDED BY, I THINK, THE FIFTH DISTRICT.
AND IT WAS STAYED BY THIS COURT.
SO IT WASN'T IN EFFECT.
THIS WAS NO, THERE WAS NOTHING TO SAY THAT THAT LEGISLATIVE ENACTMENT WAS NOT VALID AND BINDING LAW OF THE STATE.
MR. TISDALE WAS ENTITLED TO THAT

LAW AT THE TIME OF HIS
SENTENCING.
AND THE STATE NEVER--
>> WHICH IS THE REASON WHY HE'S
GETTING RELIEF.
HE GETS HIS SENTENCE VACATED.
IT'S THE SECOND REASON.
HEARST GETS IT VACATED, BUT THAT
LAW WOULD GET IT VACATED TOO
BUT--
>> EXACTLY.
>> I STILL DON'T SEE WHY DOUBLE
JEOPARDY WOULD--
>> BUT THE SECONDARY, BECAUSE OF
THE BENEFIT OF THE LEGISLATIVE
ENACTMENT, THEY CAN'T SEEK THE
DEATH PENALTY AGAIN BECAUSE THAT
WAS THE LAW IN EFFECT AT THE
TIME.
IT IS PROHIBITED BY DOUBLE
JEOPARDY, IT'S PROHIBITED--
THERE'S ANOTHER PART OF THIS
BRIEF THAT IF SOMEHOW--
>> IT WASN'T THE LAW IN EFFECT
AT THE TIME OF THE VERDICT.
>> BECAUSE IT'S A BIFURCATED
SYSTEM, THE ULTIMATE SENTENCER
WAS THE JUDGE.
AND THE JUDGE WAS BOUND BY THE
STATUTORY LAW WHICH REQUIRED
10-2.
IF FOR SOME REASON THE STATUTE
DOES NOT APPLY RETROACTIVELY IN
THIS CASE, THAT'S A SPECIAL
CARVEOUT, AND THAT'S ADDRESSED
AS POINT TWO IN THE BRIEF, THAT
THERE'S NOTHING IN THE STATUTE
THAT ALLOWS FOR A CARVEOUT.
IT TALKS ABOUT ALL AND IT
TALKS-- AND IT'S RETROACTIVE.
SO ANY DECISION THAT WOULD MAKE
THIS STATUTE ANYTHING OTHER THAN
COMPLETELY RETROACTIVE TO ALL
CASES IS A CARVEOUT.
AND I SUBMIT THAT UNDER EIGHTH
AMENDMENT PRECEDENT DUE PROCESS,
THE RULE OF LENITY THAT THAT'S
NOT PERMITTED.
THIS IS A UNIQUE CASE, I SUBMIT.
THERE MAY BE ONE OR TWO OTHERS,

BUT IT'S PRETTY LIMITED SCOPE.
I SUBMIT TO YOU THAT THIS CASE SHOULD HAVE BEEN DECIDED ON THE STATUTE AT THAT TIME, AND THE STATUTE PROHIBITED IMPOSITION OF THE DEATH PENALTY BASED UPON THE VERDICT WHICH WAS AT AN ADVERSARY HEARING BY A FULLY INSTRUCTED JURY.
EVEN IF IT WAS A WRONG INSTRUCTION, THE CASE LAW OF THE SUPREME COURT IS THAT THE WRONG RULINGS CAN STILL BIND.
THERE WAS A VERDICT OF 9-3 IN THIS CASE.
AND I SUBMIT TO YOU THAT THAT IS THE LAW THAT SHOULD BE APPLIED IN THIS CASE AND THAT, YES, THE DEATH PENALTY SHOULD BE SET ASIDE BECAUSE OF HEARST V. FLORIDA.
BUT THE STATE SHOULD NOT BE PERMITTED TO SEEK DEATH AGAIN BECAUSE OF THE STATUTORY CHANGE.
THE RULING SHOULD BE BECAUSE OF THE STATUTORY CHANGE REGARDLESS OF DOUBLE JEOPARDY.
BUT WHEN WE LOOK AT DOUBLE JEOPARDY, WHEN WE LOOK AT THE REQUIREMENTS OF DUE PROCESS, WHEN WE LOOK AT HOW THIS CASE WAS STRUCTURED FOR SENTENCING AFTER THE STATUTE WENT INTO EFFECT, THEN I THINK IT COMPELS THE CONCLUSION THAT IN THIS UNIQUE AND UNUSUAL CASE THE PROPER REMEDY IS TO THE VACATE THE DEATH SENTENCE WITH INSTRUCTIONS TO IMPOSE LIFE.
>> AND WHAT WAS THE CASE THAT YOU SAID FROM THE U.S. SUPREME COURT THAT COMPELS THIS RESULT?
>> WELL, WE'VE-- THERE'S A SERIES OR OF U.S. SUPREME COURT CASES--
>> I MEAN--
>> U.S. V. BURKES.
THEY TALK ABOUT--
>> YOU MENTIONED A DIFFERENT ONE.

IS THERE A CASE WHERE A VERDICT,
I GUESS IT WOULD HAVE TO BE,
WELL, THERE'S JURY SENTENCES AND
SENTENCING IN SOME STATES, BUT A
VERDICT WOULD SUPPORT A SENTENCE
AT THE TIME THE VERDICT WAS
ENTERED, BUT THE LAW CHANGED,
AND THE COURT SAID THAT DOUBLE
JEOPARDY WOULD BAR A NEW JURY
TRIAL ON THE ISSUE THAT MATTERED
WHEN IT CAME TO SENTENCING?
IS THERE A CASE LIKE THAT?
>> THERE'S A VARIETY OF CASES
THAT TALK ABOUT RULINGS THAT
WERE DONE IMPROPERLY, THEY
SHOULDN'T HAVE BEEN DONE EITHER
BECAUSE THE JUDGE MISUNDERSTOOD
THE FACTS--
>> BUT NONE LIKE THIS.
I MEAN, THIS FACTUAL SCENARIO IS
UNIQUE NOT ONLY BECAUSE WE
HAVEN'T ADDRESSED A CASE LIKE
IT, BUT I THINK YOU'RE CONCEDING
IT'S UNIQUE IN THAT THE U.S.
SUPREME COURT HASN'T REALLY
ADDRESSED A CASE THAT'S DIRECTLY
ON POINT AND SAYS--
>> I COULDN'T FIND A CASE
DIRECTLY ON POINT.
BUT I HAVE RESERVED SOME TIME
AND THANK YOU.
>> GOOD MORNING.
I'M ASSISTANT ATTORNEY GENERAL
DONNA PERRY.
I WOULD LIKE TO START WITH ISSUE
NUMBER ONE.
THERE ARE REALLY TWO SUBISSUES
IN REGARD TO ISSUE NUMBER ONE.
IS THE FIRST IS THAT 2016-13 DID
NOT APPLY TO THE DEFENDANT'S
CASE.
HERE WE HAVE NOT ONLY THE ENTIRE
TRIAL THAT WAS CONDUCTED PRIOR
TO THAT AMENDMENT AND PRIOR TO
HEARST V. FLORIDA, WE HAVE THE
SENTENCING AS WELL IN THE
PORTION WHERE THE JURY WAS
MAKING THEIR RECOMMENDATION.
THAT ACTUALLY OCCURRED ON
OCTOBER 9TH, 2015, TWO MONTHS

PRIOR TO HEARST V. FLORIDA,
THREE MONTHS PRIOR TO--
>> I MEAN, WASN'T THE TRIAL
JUDGE CORRECT IN DETERMINING
FOUR DAYS BEFORE THE SENTENCING
HEARING WHEN HEARST V. FLORIDA
CAME OUT THAT HE COULD NOT
PROCEED TO SENTENCING BECAUSE
OUR DEATH PENALTY SCHEME, AS THE
U.S. SUPREME COURT PUT IT, HAD
BEEN DECLARED UNCONSTITUTIONAL,
SO THERE WAS NO CONSTITUTIONAL
STATUTE THAT WOULD AUTHORIZE THE
DEATH PENALTY, AND HE HAD TO
WAIT TO SEE WHAT HAPPENED?
>> NO, HE WAS NOT CORRECT IN
THAT.
>> REALLY?
>> HE WAS CORRECT IN THAT AT THE
TIME HEARST V. FLORIDA
INVALIDATED WHAT WE CURRENTLY
HAD, BUT THERE WERE PROCEEDINGS
THAT WERE PUT IN PLACE IN PRIOR
CASES THAT WERE LATER UPHELD
SUCH AS DOING SPECIFIC
INTERROGATORIES.
OF COURSE, WE WERE BEYOND THAT
POINT IN THIS CASE BECAUSE WE
HAD ALREADY HAD THE JURY
REPRESENTATION, AND WE'D ALREADY
HAD THE ENTIRE TRIAL.
BUT THERE WERE AVENUES BY WHICH
HE COULD HAVE PROCEEDED.
AND HERE, IN FACT, HE TOOK A
BREAK SO THAT BOTH PARTIES COULD
MAKE WHATEVER LEGAL ARGUMENTS
THEY WANTED TO IN REGARD TO
HEARST WHICH WAS A GOOD DECISION
TO DO IN CASE THERE WERE
ARGUMENTS THAT WOULD HAVE
APPLIED HERE.
THE FACT OF THE MATTER IS THAT
THERE WEREN'T, AND THE REASON IT
WOULDN'T HAVE APPLIED HERE WAS
BECAUSE THE STATUTORY AMENDMENT
THAT CAME LATER ENDED UP BEING
INVALIDATED BY THIS COURT.
>> SO YOU WOULD AGREE THAT UNDER
OUR PRECEDENT HE GETS A NEW
SENTENCE.

>> I WOULD NOT.
THAT WOULD BE IN REGARD TO
HARMLESS ERROR, WHICH I WILL
ADDRESS SHORTLY.
>> OKAY.
BUT BASED UPON ALL OF OR OTHER
CASES THAT SAY THE NON-UNANIMOUS
VERDICT AND IN THIS ONE EVEN
THAT IT WASN'T EVEN-- IT'S
STILL ON APPEAL, THAT THE
CURRENT STATUTE REQUIRES
UNANIMITY, THAT THIS WOULD BE
SUBJECT TO A UNANIMOUS VERDICT.
>> I WOULD AGREE THAT THUS FAR
THIS COURT HAS NOT FOUND
HARMLESS ERROR IN ANY CASE THAT
WAS NOT UNANIMOUS.
IF YOU'D LIKE, I CAN ADDRESS--
>> BUT EVEN IN THIS CASE, AGAIN
EVEN IF THE SITUATIONS WHETHER
SOMETHING SHOULD BE
RETROACTIVELY APPLIED, WE NOW
HAVE A STATUTE THAT SAYS IT HAS
TO BE UNANIMOUS.
>> YES.
>> YOU'RE GOING TO ARGUE
HARMLESS ERROR EVEN IN LIGHT
OF-- HOW MANY MITIGATING
FACTORS DID THE JUDGE FIND?
>> THERE WERE 40.
HOWEVER, 32 OF THEM WERE GIVEN
LITTLE TO NO--
>> WASN'T THERE A SPENCER
HEARING WHERE THE JUDGE HEARD
EVIDENCE THAT THE JURY DIDN'T
HEAR THAT WAS BENEFICIAL AND NO
SPECIAL VERDICT TO EXPLAIN WHAT
LED TO THE 9-3?
WE DON'T KNOW WHETHER SUFFICIENT
AGGRAVATORS WERE FOUND.
WE DON'T KNOW ANY OF THAT.
>> THAT'S CORRECT THAT THERE WAS
NO SPECIAL VERDICT.
HOWEVER, WE DO KNOW WHICH TWO
AGGRAVATORS WERE FOUND.
THE REASON THAT WE KNOW IS
BECAUSE BOTH OF THEM WERE
INHERENT IN THE VERDICT.
THE JUDGE IN THIS CASE WAS
PARTICULARLY CAREFUL NOT TO

CONSIDER ANY AGGRAVATORS THAT
WERE NOT INHERENT IN THE ACTUAL
VERDICT.
THE TWO AGGRAVATORS THAT WE HAD
HERE WERE THAT THE DEFENDANT
KILLED A LAW ENFORCEMENT OFFICER
WHICH WAS INHERENT IN THE
CONVICTION FOR COUNT ONE,
FIRST-DEGREE MURDER OF A LAW
ENFORCEMENT OFFICER--
>> WHAT AGGRAVATORS WAS THE JURY
INSTRUCTED ON?
>> THE JURY WAS NOT INSTRUCTED
ON SPECIFIC AGGRAVATORS IN THE
MANNER THAT YOU'RE INDICATING AS
IN A SPECIAL VERDICT FORM--
>> NO, NO.
WHAT AGGRAVATORS WERE THEY TOLD
THEY COULD CONSIDER?
>> THEY WERE TOLD THAT THEY
COULD CONSIDER THAT THE VICTIM
WAS A LAW ENFORCEMENT OFFICER,
THAT THERE WERE A PRIOR VIOLENT
FELONY WHICH, AGAIN, IS--
>> I UNDERSTAND.
WHAT ELSE?
>> THE OTHER TWO WERE MERGED
INTO VICTIM WAS A LAW
ENFORCEMENT OFFICER.
>> THERE WERE NO HAC, CCP--
>> THERE WERE NOT.
>> AND THEY WEREN'T INSTRUCTED
ON THAT.
>> THEY WERE NOT.
>> SO ONLY TWO.
>> THAT'S CORRECT.
>> AND THOSE ARE THE TWO THAT
WERE UNANIMOUSLY FOUND AS A
RESULT OF THE GUILT PHASE
VERDICT.
>> THAT'S CORRECT.
SO IN REGARD TO 2016-13, THE
PROVISION THAT THE DEFENSE SEEKS
TO APPLY HERE IS THE EXACT
PROVISION THAT THIS COURT
INVALIDATED IN PERRY V. STATE.
AND AS YOU INDICATED DURING THE
COURSE OF THEIR ARGUMENT, THAT
IS AN UNCONSTITUTIONAL PROVISION
THAT COULDN'T BE APPLIED NOT

ONLY TO THAT CASE, BUT TO ANY
CASE IN THE PAST OR IN THE
FUTURE.
THE SECOND PART OF THEIR
ARGUMENT IN REGARD TO ISSUE
NUMBER ONE IS THAT DOUBLE
JEOPARDY WOULD BAR RESENTENCING.
CLEARLY, THAT'S NOT THE CASE.
IN FACT, THIS COURT JUST IN
MARCH DECIDED TURINO V. STATE
WHERE THE COURT REJECTED THE
ARGUMENT THAT DEFENDANTS WHO ARE
NOT UNANIMOUSLY SENTENCED TO
DEATH CANNOT BE RESENTENCED TO
DEATH BECAUSE REDOING THE
PENALTY PHASE WOULD VIOLATE
DOUBLE JEOPARDY.
QUOTE: THE HEARST DECISIONS DO
NOT ACQUIT OF FOUR DEATH
SENTENCES AND WENT ON TO SAY
THAT DOUBLE JEOPARDY DOES NOT
BAR A DEATH PENALTY CASE.
NOW, THE DEFENSE CITED
BULLINGTON AND RUMSEY, HOWEVER,
THE U.S. SUPREME COURT
DISTINGUISHED BOTH OF THOSE
CASES.
THE REASON THEY DISTINGUISHED
THOSE CASES IS BECAUSE IN
BULLINGTON THE JURY FOUND THAT
THE PROSECUTION HAD NOT PROVEN
ANY AGGRAVATING CIRCUMSTANCES
AND, THUS, THE DEFENDANT WAS
ACTUALLY ACQUITTED OF THE FACT
THAT WOULD HAVE BEEN MADE HIM
ELIGIBLE FOR THE DEATH PENALTY.
IN RUMSEY THE COURT ACTUALLY
FOUND THAT NO AGGRAVATING
CIRCUMSTANCES APPLIED AND FOR
THE SAME REASON, THE U.S.
SUPREME COURT SAID AGAIN THAT
DEFENDANT WAS ACQUITTED OF THE
FACT THAT WOULD HAVE LED TO THE
DEATH PENALTY.
THAT'S CLEARLY NOT WHAT WE HAVE
HERE.
THAT'S NOT WHAT WE HAD IN
SATAZA, AND THAT'S WHY THAT WAS
WHICH YOU BASED TURINO ON--
>> I THINK WE AGREE WITH YOUR

ARGUMENT.
I'M JUST GOING BACK TO WHAT MAKES THIS DIFFERENT ON HARMLESS ERROR THAN ALL THE OTHER CASES THAT WE'VE REVERSED.
>> OKAY.
IF WE-- MOVING ON FROM ISSUE NUMBER ONE THEN IF WE'VE ADDRESSED HARMLESS ERROR, THERE HAS BEEN A SOLID WALL OF PRECEDENT IN THE PAST APPROXIMATELY 15 MONTHS COMING FROM OTHER JURISDICTIONS INCLUDING THE U.S. SUPREME COURT THAT HAS TALKED ABOUT THE FACT FINDING THAT'S REQUIRED UNDER THE SIXTH AMENDMENT AND THAT TALKS ABOUT THE FACT THAT THE WEIGHING AND THE QUESTION OF MERCY ARE NOT FACT-FINDING REQUIREMENTS OF THE SIXTH AMENDMENT AND THUS DOES NOT HAVE TO BE FOUND BY THE JURY.
>> COULD YOU SAY HOW UNDER OUR PRECEDENT THIS WOULD BE HARMLESS ERROR?
>> UNDER THE CURRENT PRECEDENT OF THIS COURT, THERE ISN'T A CASE THAT INDICATES THAT ANYTHING BUT A UNANIMOUS VERDICT WOULD BE HARMLESS.
HOWEVER, OUR PRECEDENTS ALL SAY THAT A HARMLESS ERROR ANALYSIS MUST BE PERFORMED.
AND IF A PROPER HARM HE IS ERROR ANALYSIS IS PERFORMED, ONE HAS TO DISREGARD THE ACTUAL NUMERICAL COUNT BECAUSE--
>> I AGREE WITH YOU ON THAT.
WE DON'T-- BUT THE MITIGATION, WHETHER THE JURY HEARD IT, AND AT LEAST THREE OF THE JURORS-- IT WASN'T EVEN 11-1-- MUST HAVE FOUND, IF YOU SAID THE AGGRAVATORS WERE PROVEN, THAT THE MITIGATION WAS NOT, OUTWEIGHED THE AGGRAVATION.
>> WELL, NOT--
>> WE DON'T KNOW BECAUSE, AGAIN, THERE WAS NO SPECIAL VERDICT.

SO WE ARE LEFT WITH THAT THE STATE, YOU KNOW, CAN'T-- I DON'T KNOW HOW THE STATE ENDS UP PROVING IN THIS CASE THAT RECEDING FROM EVERY OTHER CASE THAT THE COURT'S DECIDED THAT IT'S HARMLESS ERROR BEYOND A REASONABLE DOUBT.
>> I DON'T ACTUALLY THINK YOU WOULD HAVE TO RECEDE FROM THE OTHER CASES.
I THINK WHAT YOU WOULD HAVE TO DO IS TAKE A LOOK AT THE CASES THAT HAVE COME FROM ALL THE JURISDICTIONS INCLUDING THE U.S. SUPREME COURT IN THE PAST 15 MONTHS AND INDICATE THAT UPON RE-EXAMINATION OF THE HARMLESS ERROR STANDARD, WHICH IS WHAT THIS COURT HAS SAID THE ENTIRE TIME NEEDS TO BE APPLIED, THAT HARMLESSNESS CAN BE FOUND EVEN IN THE FACE OF A NON-UNANIMOUS VERDICT.
AND THAT'S BECAUSE, AGAIN, THE ACTUAL NUMERICAL COUNT WOULD HAVE TO BE DISREGARDED.
AND THE REASON IT WOULD HAVE TO BE DISREGARDED WAS ENUNCIATED BY THIS COURT WHEN YOU INITIALLY DECIDED HEARST II.
THIS COURT ACTUALLY STATED THAT, QUOTE, JURY'S NOT REQUIRED TO REACH UNANIMITY TEND TO TAKE LESS TIME DELIBERATING AND CEASE DELIBERATING WHEN THE REQUIRED MAJORITY VOTE IS A ACHIEVED RATHER THAN ATTEMPTING TO OBTAIN CONSENSUS.
THAT'S EXACTLY WHAT WE WOULD ARGUE, IS THAT HERE THIS JURY WAS NOT TOLD THEY HAD TO BE UNANIMOUS.
THEY WERE TOLD AS LONG AS YOU HAVE A MAJORITY, YOU CAN APPLY THE DEATH PENALTY.
SO WHEN THEY GOT TO THAT POINT THAT THEY HAD A MAJORITY, THEY WEREN'T GOING TO KEEP PRESSING EACH OTHER--

>> THAT'S WHAT WE DON'T KNOW WHAT THEY HAVE-- I MEAN, THAT'S WHERE THE STATE CAN'T REALLY GET THE BENEFIT.
JUST LIKE THE DEFENSE LAWYER SAID THEY WANT, YOU KNOW, TO BE SENTENCED UNDER A STATUTE THAT WAS DECLARED INVALID, IT SEEMS THAT THE OPPOSITE IS WE REQUIRED JURIES TO BE INSTRUCTED ON WHAT WOULD HAVE BEEN THE LAW AT THAT TIME.
AND THAT'S REALLY, AGAIN, I AGREE WITH-- THAT MAYBE THEY WILL COME BACK WITH A UNANIMOUS VERDICT IF THEY KNOW THEY HAVE TO BE UNANIMOUS.
BUT THAT WOULD BE SPECULATING.
>> BUT IT WOULDN'T BE SPECULATING.
IT WOULD ACTUALLY BE SPECULATION TO TRY TO DETERMINE WHY THOSE THREE DIDN'T COME BACK.
WHAT WE HAVE TO DO UNDER THE HARMLESS ERROR ANALYSIS IS TO IGNORE THAT 9-3 AND LOOK AT THE EVIDENCE BASED ON AN OBJECTIVE MEASURE OF REASONABLENESS, NOT BASED ON THE SPECULATIVE NATURE OF WHY THOSE THREE JURORS MAY HAVE VOTED THE WAY THEY DID BECAUSE, FRANKLY, THEY MAY HAVE VOTED THE WAY THEY DID BECAUSE THERE WAS A MAJORITY, AND THEY JUST DECIDED TO STOP DELIBERATING AT THAT POINT.
THE U.S. SUPREME COURT IN JENKINS V.--
>> WHO HAS TO PROVE HARMLESS BEYOND A REASONABLE DOUBT?
>> THIS COURT HAS DETERMINED THAT THE STATE DOES.
>> OKAY.
SO YOU'RE SAYING THAT WHAT WE WOULD DO IS EVEN THOUGH THERE ARE OTHER POSSIBILITIES WHICH IS THREE JURORS FOUND THAT THE AGGRAVATION DID NOT OUTWEIGH THE MITIGATION OR THAT THEY VOTED THAT IT WAS STILL NOT THE

APPROPRIATE PENALTY, YOU WOULD ASK US TO SPECULATE THAT THE REASON COULD HAVE BEEN THREE JURORS, NOT ONE JUROR, DID IT WAS BECAUSE THEY DIDN'T HAVE TO DO IT.
I MEAN, THAT'S SPECULATION.
>> NO.
I WOULD ASK YOU NOT TO SPECULATE ON WHY THEY DIDN'T VOTE FOR DEATH, AND INSTEAD DO AN OBJECTIVE DETERMINATION BASED ON THE EVIDENCE IN THIS CASE AND BASED ON THE FACT THAT THE ONLY TWO AGGRAVATORS THAT THIS JURY CONSIDERED AND THE ONLY THING THAT'S REQUIRED BY THE SIXTH AMENDMENT IS THE EXISTENCE OF AN AGGRAVATOR AND THAT BASED ON THE TWO AGGRAVATORS HERE, WHICH WERE BOTH FOUND BY THIS JURY, THAT, IN FACT, THE DEATH PENALTY WAS APPROPRIATE.
IN JENKINS V. HUTTON APPROXIMATELY ONE YEAR AGO, THE U.S. SUPREME COURT DECIDED THAT HUTTON HAD THE EXISTENCE OF TWO AGGRAVATING CIRCUMSTANCES DETERMINED DURING THE GUILT PHASE AND THAT, QUOTE, EACH OF THOSE FINDINGS RENDERED HUTTON ELIGIBLE FOR THE DEATH PENALTY, END QUOTE.
APPLYING THAT REASON THAT THAT JURY DETERMINATION DURING THE GUILT PHASE MADE HIM ELIGIBLE FOR THE DEATH PENALTY, THERE ISN'T ANY HEARST OR RING ERROR HERE.
THE ONLY WAY THERE WOULD BE HEARST OR RING ERROR IS IF WE DIDN'T HAVE AN AGGRAVATOR THAT WAS INHERENT IN THE VERDICT.
SHORTLY AFTER, THE 11TH CIRCUIT CAME OUT WITH WALDROP V. COMMISSIONER OF ALABAMA.
IN THAT CASE THE COURT DETERMINED THAT THE JURY HAD FOUND THE EXISTENCE OF A QUALIFYING AGGRAVATOR BEYOND A

REASONABLE DOUBT WHEN IT
RETURNED ITS GUILTY VERDICT FOR
MURDER DURING A ROBBERY.
EXACTLY LIKE WE HAVE HERE.
WE HAVE A GUILTY VERDICT FOR
MURDER OF A LAW ENFORCEMENT
OFFICER, AND THAT FINDING ALONE
QUALIFIES THE DEFENDANT FOR THE
DEATH PENALTY.
AFTER WALDROP THE STATE OF
OHIO'S SUPREME COURT HAD STATE
V. MASON WHICH CAME OUT.
IN THAT COURT THE OHIO SUPREME
COURT STATED, QUOTE: WEIGHING IS
NOT A FACT-FINDING PROCESS
SUBJECT TO THE SIXTH AMENDMENT,
END QUOTE.
AND THEN WENT ON TO CITE 13
DIFFERENT CASES FROM 13
DIFFERENT JURISDICTIONS ACROSS
THE COUNTRY BOTH FEDERAL AND
STATE ALIKE WHERE THE COURTS
DETERMINED THAT THE WEIGHING
PROCESS OF THE QUESTION OF MERCY
WAS NOT WHAT NEEDED TO BE
DETERMINED BY THE JURY IN ORDER
TO SATISFY THE SIXTH AMENDMENT.
BUT THE ONLY THING THAT NEEDED
TO BE DETERMINED WAS THE
EXISTENCE OF AN AGGRAVATING
FACTOR.
AFTER THAT WE HAD THE 10TH
CIRCUIT THAT CAME OUT WITH
UNDERWOOD V. ROYAL, AND THE 10TH
CIRCUIT HELD THAT THE HEARST
DECISION IN FLORIDA WAS LIMITED
TO AGGRAVATING CIRCUMSTANCES AND
DID NOT EXTEND TO MITIGATION OR
TO WEIGHING.
SO GIVEN THAT WALL OF PRECEDENT
THAT'S COME OUT IN JUST THE PAST
APPROXIMATELY YEAR, 15, 16
MONTHS, THE STATE WOULD ASK THE
COURT TO RE-EXAMINE THE WAY THAT
WE PURSUE, THE WAY THAT WE APPLY
THE HARMLESS ERROR ANALYSIS.
WE'RE NOT ASKING THAT YOU
RETREAT FROM IT, WE'RE NOT
ASKING THAT YOU GO BACK ON ANY
OF THE DECISIONS THAT YOU'VE

MADE THUS FAR.
WE'RE JUST ASKING THAT YOU RE-EXAMINE THE WAY IT'S APPLIED AND APPLY IT PURSUANT TO THE WAY THAT THE U.S. SUPREME COURT AND MORE THAN A DOZEN JURISDICTIONS ACROSS THE COUNTRY HAVE DETERMINED THAT IT NEEDS TO BE APPLIED.
AND IF WE DO THAT IN THIS CASE--
>> WELL, I UNDERSTAND YOUR ARGUMENT.
YOU SAY THAT YOU'RE NOT ASKING US TO RECEDE FROM ANY PRECEDENT, BUT YOUR ARGUMENT BASICALLY, AS I UNDERSTAND IT, IS THAT WALDROP WOULD SAY THAT HEARST V. STATE WAS INCORRECTLY DECIDED BECAUSE IT SAID THAT THE CONSTITUTION REQUIRES JUROR WEIGHING.
>> WALDROP WOULD INDICATE THAT THE ONLY THING NEEDED WOULD BE THE EXISTENCE OF THE AGGRAVATOR, YES.
AND ADDITIONALLY, I WOULD POINT OUT, JUSTICE LAWSON, YOUR OWN DISSENT IN THE ALEX PAGAN CASE WHERE YOU INDICATED, IN FACT, THAT A PROPER HARMLESS ERROR ANALYSIS WAS NOT BEING DONE.
SO I WOULD ASK THAT YOU RE-EXAMINE THE WAY IN WHICH THAT IS DONE.
IF THERE ARE NO QUESTIONS ON ISSUE NUMBER THREE, I WOULD LIKE TO ADDRESS SUFFICIENCY OF THE EVIDENCE SINCE THIS IS A DIRECT APPEAL.
EVEN THOUGH IT WASN'T RAISED IN THE DEFENDANT'S BRIEF, IN CASE THERE'S ANY QUESTION ABOUT WHETHER THERE IS SUFFICIENT.
WE HAVE A DISPATCH RECORDING WHERE YOU ACTUALLY HEAR THE ENTIRE TIME FRAME THAT ENCOMPASSES ALL FOUR OF THE CRIMES THAT WE HAVE HERE.
THE DISPATCH TAPE STARTS WITH APPROXIMATELY 45 SECONDS OF THE

SERGEANT GIVING THE VEHICLE'S
MAKE, MODEL, TAG NUMBER AND
LOCATION.
HE ACTUALLY HAS TO REPEAT IT A
COUPLE TIMES WHICH IS WHY IT
TAKES 45 SECONDS, BECAUSE THE
DISPATCHER DIDN'T UNDERSTAND
WHAT HE WAS SAYING.
THERE'S ONLY APPROXIMATELY 15
SECONDS OF QUIET BEFORE SERGEANT
MORALES THEN SAYS THAT THE
DEFENDANT IS TAKING OFF ON HIM.
WHAT WE KNOW HAPPENS DURING
THOSE 15 SECONDS IS WHAT WAS
TESTIFIED TO BY CASEY FEDNICK.
SHE TESTIFIED THAT SHE SAW THE
DEFENDANT GO BY VERY QUICKLY,
BLOW THROUGH A STOP SIGN.
SHE SAW SERGEANT MORALES COMING
AFTER HIM WITH HIS LIGHTS ON.
SHE SAW SERGEANT MORALES STOP
VERY QUICKLY.
THERE WERE SEVERAL SECONDS THAT
WERE PAUSED, AND ALL OF A SUDDEN
HE TOOK OFF AFTER THE DEFENDANT
AGAIN.
THAT IS WHEN HE WOULD HAVE SAID
ON THE DISPATCH TAPE AT ONE
MINUTE, HE'S TAKING OFF ON ME
GOING NORTH ON NAYLOR.
AFTER THAT WE HAVE APPROXIMATELY
A MINUTE WHERE HE DOESN'T SAY
ANYTHING ON THE DISPATCH TAPE.
HOWEVER, WE KNOW WHAT HAPPENS
DURING THAT TIME FROM THE
TESTIMONY OF ALBERT--
[INAUDIBLE]
AND THE TESTIMONY OF JERRY
POLARSKI AS WELL AS THE
TESTIMONY OF DEPUTY BENNETT.
JERRY POLARSKI TESTIFIED THAT
DURING THOSE APPROXIMATELY ONE
MINUTE, 45 SECONDS HE INDICATES
THAT HE SAW THE DEFENDANT STOP
VERY QUICKLY ON A GRAVELED ROAD.
THIS CAUSED, OF COURSE, SERGEANT
MORALES TO STOP VERY QUICKLY.
UNFORTUNATELY, THE DEFENDANT
KNEW HE WAS GOING TO STOP.
SERGEANT MORALES DIDN'T, SO HIS

REACTION TIME TOOK HIM A LITTLE
LONGER, AND HE ENDS UP SLIDING,
SWERVING TO THE LEFT, SLIDING IN
FRONT OF THE DEFENDANT'S VEHICLE
WHICH GAVE HIM THE OPPORTUNITY,
THE DEFENDANT, TO THEN JUMP OUT
OF THE VEHICLE, RUN BEHIND THE
SERGEANT'S VEHICLE, GO UP TO THE
OPEN DOOR AND SHOOT INTO THE
VEHICLE WHICH WAS SEEN BY BOTH
JERRY POLARSKI AND ALBERT--
[INAUDIBLE]
AT THAT POINT, HE TESTIFIES HE
THEN SEES THE DEFENDANT AFTER
SHOOTING SERGEANT MORALES
MULTIPLE TIMES RUN BACK TO HIS
CAR WITH HIS ARM POINTED BEHIND
HIM PARALLEL TO THE GROUND.
NOW, ALBERT DIDN'T SEE THAT
DEPUTY BENNETT HAD COME UPON THE
SCENE AT THAT POINT BECAUSE HE
INDICATED HE WAS TOO BUSY
RUNNING AWAY AT THAT POINT.
BUT WHAT HE SEES IS THE
DEFENDANT WITH HIS ARM POINTED
STRAIGHT OUT, GUN POINTED AT
SOMETHING DOWN THE ROAD.
THEN WE HAVE THE TESTIMONY OF
DEPUTY BENEFIT WHO INDICATES
THAT AS HE CAME DOWN NAYLOR
ROAD, HE SAW THE DEFENDANT
RUNNING TO THE OPEN DOOR OF
SERGEANT MORALES' VEHICLE AND
SHOOTING INTO THE OPEN DOOR,
SHOOTING SERGEANT MORALES ARE
MULTIPLE TIMES.
THE DEFENDANT STARTS TO RUN BACK
TO HIS VEHICLE, POINTS HIS
WEAPON AT DEPUTY BENNETT WHICH
CAUSES HIM TO STOP VERY QUICKLY,
JUMP OUT OF HIS VEHICLE AND FIRE
MULTIPLE TIMES AT THE DEFENDANT
WHO DEPUTY BENNETT DESCRIBES AS
AT THAT POINT TRYING TO ACQUIRE
HIM IN HIS SIGHTS IN ORDER TO
SHOOT DEPUTY BENNETT, WHICH IS
THE BASIS OF THE AGGRAVATED
ASSAULT WITH A FIREARM CHARGE.
AT THAT POINT DEPUTY BENNETT
TESTIFIES THAT THE DEFENDANT

GETS BACK INTO THE RED TOYOTA
AND TAKES OFF WHICH WAS ALSO, OF
COURSE, SEEN BY THE LAY
WITNESSES THAT WERE ON SCENE.
THE TWO DEPUTIES, LUCKILY, WERE
JUST APPROXIMATELY A BLOCK AWAY,
AND AS SOON AS THE INFORMATION
WAS RADIOED OVER DISPATCH--
AND, IN FACT, THIS IS HOW WE
KNOW ABOUT THE TIMING OF THE
SHOOTING, BECAUSE AT THAT POINT
AS SOON AS THE DEFENDANT LEAVES,
DEPUTY BENNETT GETS BACK ON
DISPATCH AND SAYS "SHOTS FIRED."
HE TESTIFIES THAT HAPPENED AFTER
THE DEFENDANT TOOK OFF BECAUSE,
OF COURSE, HE WOULDN'T HAVE HAD
THE OPPORTUNITY TO RADIO THAT
WHILE HE IS ENGAGING IN THE
GUNFIRE WITH THE DEFENDANT.
SO HE INDICATED THAT THE ACTUAL
SHOOTING OF SERGEANT MORALES
HAPPENED APPROXIMATELY 30
SECONDS PRIOR TO THAT TWO MINUTE
MARK.
WHY THAT'S IMPORTANT IS BECAUSE
THE MURDER OCCURRED BETWEEN THE
ONE MINUTE MARK WHERE SERGEANT
MORALES SAYS HE'S TAKING OFF ON
ME AND THE 1:30 MARK WHERE
DEPUTY BENNETT CAME ON THE
SCENE.
THAT LEFT 30 SECONDS, AND THAT
30 SECONDS IS DOCUMENTED BY
CASEY FEDNICK'S TESTIMONY ABOUT
HOW SERGEANT MORALES STOPPED
BRIEFLY, SEVERAL SECONDS, NEVER
GOT OUT OF THE CAR.
THERE WAS NO ALTERCATION AT THAT
TIME.
SHE, IN FACT, TESTIFIED THERE
WAS NO YELLING EVEN AT THAT
TIME, SO THERE WAS NOTHING THAT
WOULD HAVE OCCURRED THERE THAT
WOULD HAVE LED TO ANY CONCLUSION
ABOUT THE DEFENDANT ACTING IN
ANY WAY A SELF-DEFENSE TYPE OF
MANNER.
AT THAT POINT DEPUTY SARVIS AND
DEPUTY STUBBLEY HAD GOTTEN

BEHIND THE DEFENDANT AND WERE
CHASING THE DEFENDANT WHO
REFUSED TO PULL OVER WHICH IS,
OF COURSE, THE BASIS OF COUNT
FOUR.
THEY ACTUALLY HAD TO DO A PITT
MANEUVER IN ORDER TO GET THE
DEFENDANT'S VEHICLE TO STOP AND
ENDED UP HITTING HIS VEHICLE,
CAUSING HIM TO CRASH INTO
ANOTHER PERSON'S VEHICLE.
THE DNA IN THIS CASE MATCHED BY
1 IN 15 QUINTILLION THE
DEFENDANT'S DNA TO THE DNA ON
THE GUN THAT WAS FOUND IN THE
DEFENDANT'S VEHICLE IMMEDIATELY
AFTER THE DEFENDANT WAS FINALLY
STOPPED.
AND IN ADDITION, THE BALLISTICS
TESTIMONY MATCHED ALL OF THE
BULLETS ON SCENE, ALL OF THE
CASINGS TO EITHER DEPUTY
BENNETT'S GUN OR TO THE
DEFENDANT'S GUN.
THE REASON THAT THAT IS
IMPORTANT IS BECAUSE SERGEANT
MORALES NEVER PULLED HIS WEAPON.
IN FACT, IT WAS STILL IN ITS
HOLSTER WHEN HIS BODY WAS
REMOVED FROM THE VEHICLE.
SO THERE'S NO WAY THAT ANY TYPE
OF INDICATION WHERE HE COULD
HAVE BEEN THREATENING THE
DEFENDANT IN ANY WAY OCCURRED.
HIS WEAPON WAS STILL IN ITS
HOLSTER.
ALL OF THE BULLET CASINGS ON
SCENE MATCHED TO THE DEFENDANT
OR TO DEPUTY BENNETT, NOT TO
SERGEANT MORALES' WEAPON.
GIVEN ALL OF THIS EVIDENCE, THE
EVIDENCE HERE, FRANKLY, IS
OVERWHELMING.
IT'S NOT JUST SUFFICIENT.
IT'S ABSOLUTELY OVERWHELMING.
HOWEVER, I WILL CITE TO TWO
CASES WHERE SUFFICIENCY WAS
FOUND.
THESE ARE ALSO THE TWO CASES
THAT I WOULD CITE FOR

PROPORTIONALITY, AND THEY ARE
BAILEY V. STATE.
IN THAT CASE THE DEFENDANT
KILLED AN OFFICER AFTER BEING
STOPPED FOR A TRAFFIC VIOLATION
BECAUSE THE DEFENDANT WAS ON
PROBATION AND DIDN'T WANT TO GO
BACK TO JAIL.
SEVERAL LAY WITNESSES ACTUALLY
SAW THE SHOOTING, AND THE
DEFENDANT HAD THEN MADE AN
ADMISSION TO A LAY WITNESS
AFTERWARDS AS SOON AS HE HAD
FLED.
VERY SIMILAR TO WHAT WE HAVE
HERE WHERE LAY WITNESSES SAW THE
SHOOTING, AND THE DEFENDANT MADE
ADMISSIONS ONCE BACK AT THE
POLICE STATION.
THERE WERE TWO AGGRAVATORS
FOUND; PRIOR VIOLENT FELONY AND
AVOID ARREST.
VERY SIMILAR TO THE TWO
AGGRAVATING FACTORS WE HAVE
HERE.
THERE TODAY HAD A STATUTORY
MITIGATING FACTOR WHICH WE DO
NOT HAVE, AND THEY HAD EIGHT
THAT WERE GIVEN LITTLE WEIGHT.
AND EVEN WITH THAT THIS COURT
FOUND THAT THE EVIDENCE WAS
SUFFICIENT AND THAT THE DEATH
SENTENCE WAS PROPORTIONAL.
THERE'S ALSO THE CASE OF BURNS
V. STATE.
AN OFFICER PULLED THE PASSENGER
OVER, DISPATCH CONFIRMED HE HAD
ASKED FOR A CHECK ON THE
REGISTRATION AND THE DRIVER'S
LICENSE.
THE OFFICER WENT BACK AND ENDED
UP SEARCHING THE VEHICLE AND
FOUND COCAINE.
THE DEFENDANT THEN STRUGGLED
WITH THE OFFICER AND WAS SEEN BY
SEVERAL LAY WITNESSES GRABBING
THE OFFICER'S GUN AND SHOOTING
THE OFFICER.
THERE WAS ONLY ONE
AGGRAVATOR.

IT WAS GIVEN GREAT WEIGHT, AND
THAT WAS THAT THE VICTIM WAS A
LAW ENFORCEMENT OFFICER, AND
THERE WERE TWO STATUTORY
MITIGATORS.
AGAIN, WE DON'T HAVE THAT HERE,
BOTH AGE AND NO SIGNIFICANT
CRIMINAL HISTORY, AND THERE WERE
THREE NON-STATUTORY MITIGATING
CIRCUMSTANCES.
AND DESPITE ALL THAT, THIS COURT
FOUND BOTH SUFFICIENCY AND
PROPORTIONALITY.
GIVEN THAT, I WOULD ASK THIS
COURT TO FIND NOT ONLY THAT THE
CONVICTION SHOULD BE AFFIRMED
GIVEN THAT THERE WAS MORE THAN
SUFFICIENT EVIDENCE, BUT ALSO
THAT THE DEATH PENALTY BE
AFFIRMED AS IT IS PROPORTIONAL
AND IN THIS CASE ANY ERROR IS
HARMLESS.
IF THERE ARE NO FURTHER
QUESTIONS, I WILL RELINQUISH THE
PODIUM.
THANK YOU VERY MUCH FOR YOUR
TIME.
>> IF IT PLEASE THE COURT,
DURING THE COURSE OF THE PENALTY
PHASE, THE DEFENSE PUT ON
EXTENSIVE MITIGATION IN THE FORM
OF EXPERT WITNESSES, FAMILY
MEMBERS, FRIENDS, EMPLOYERS
WHICH ESTABLISHED AN EXTENSIVE
BASIS FOR THE JURY TO EVALUATE
AND FIND THE EXISTENCE OF
MITIGATING CIRCUMSTANCES WHICH
WOULD SUBSTANTIALLY PROVE AND
SUPPORT THE THREE JURORS WHO
FOUND IN FAVOR OF LIFE.
I WAS ASKED, JUSTICE LAWSON,
ABOUT A CASE WHERE THERE WAS
ERROR, IN AND EVANS V. MICHIGAN
WHICH WAS SUPREME COURT 2013,
IT'S IN THE SUPPLEMENTAL
AUTHORITY.
IN THAT CASE THE STATE OF
MICHIGAN JUDGE IN AN ARSON CASE
ORDERED A JUDGMENT OF ACQUITTAL
BECAUSE OF HIS UNDERSTANDING OF

THE LAW.
CLEARLY HE WAS WRONG, AND THE ISSUE OF DOUBLE JEOPARDY WAS RAISED.
>> IT WAS-- WE'RE NOT TALKING ABOUT SENTENCING, WE'RE TALKING ABOUT GUILT.
>> WE WERE TALKING ABOUT, BUT WHAT WE HAVE THERE--
>> WE HAVE A QUESTION THAT THE JUDGMENT OF ACQUITTAL WOULD--
>> BUT I SUBMIT THAT WHAT IT AMOUNTED TO WAS A VERDICT, AND I WOULD SUBMIT THAT ON THE SENTENCING ASPECTS WHEN THERE'S A VERDICT OR THE SUBSTANTIAL EQUIVALENT OF A VERDICT, THEN THAT IS ENTITLED TO DOUBLE JEOPARDY PROTECTION.
THAT'S WHAT WE LEARNED IN BULLINGTON V. MISSOURI, ARIZONA V. RUMSEY.
AND WHAT WE HAVE, WE WOULD SUBMIT, IS A 9-3 IN THIS CASE.
SO THAT COMING BACK TO--
>> BUT WHAT, BUT IN THIS CASE HAS THE JURY MADE A DETERMINATION THAT WOULD PRECLUDE THE APPLICATION OF THE DEATH PENALTY UNDER THE LAW UNDER WHICH THE JURY WAS INSTRUCTED?
OR A FINDER OF FACT MADE SUCH A DETERMINATION.
AND THIS JUST SEEMS DIFFERENT.
WE'VE TALKED ABOUT THAT, BUT I-- THOSE CASES DON'T REALLY GET YOU TO WHERE THEY'RE DISTINGUISHABLE FROM WHERE YOU ARE HERE, AREN'T THEY?
>> I CAN SEE WHERE THEY COULD BE DISTINGUISHED TO SOME EXTENT, BUT ON THE GENERAL PRINCIPLE THAT THEY REPRESENT A VERDICT AND, YOU KNOW, THERE ARE FACT FINDINGS AND THERE ARE VERDICTS THAT HAVE TO DO WITH SENTENCING ISSUES.
AND I SUBMIT THAT THE VERDICT IS SUBJECT TO A DIFFERENT

CONSIDERATION.
IT'S A 9-3.
IF THAT'S CONSIDERED A VERDICT,
THEN THE CHANGE IN LAW CAPTURES
THAT, CONVERTS IT INTO A LIFE
SENTENCE.
THAT'S WHAT WE SUBMIT.
SO THAT IS A SUBJECT OF EIGHTH
AMENDMENT CONCERN, DUE PROCESS
AS WELL AS DOUBLE JEOPARDY.
THESE THINGS ARE BRIEFED.
>> WOULD YOU AGREE THAT WALDROP
SAYS THAT WEIGHING IS NOT, UNDER
THE SIXTH AMENDMENT, A JURY
FUNCTION?
>> I DIDN'T READ IT THAT WAY.
I DON'T READ THAT-- THE
WEIGHING IS INHERENT IN THE JURY
VERDICT IN THIS SORT OF CASE.
BECAUSE THEY HAVE TO BALANCE THE
AGGRAVATORS AGAINST THE
MITIGATORS.
THAT'S EXACTLY WHAT A JURY DOES,
SO WEIGHING IS A SIXTH AMENDMENT
ISSUE.
I MEAN, I WOULD SUBMIT TO YOU
THAT'S WHAT, THAT'S WHAT A DEATH
SENTENCE IS ALL ABOUT, IS THE
WEIGHING PROCESS GUIDED BY
DISCRETION AND INSTRUCTIONS AND
AGGRAVATING AND MITIGATING
CIRCUMSTANCES AND CONSIDERATION
OF WHAT THE EVIDENCE IS.
I DISAGREE WITH, THAT THAT'S THE
SCOPE.
IF THERE ARE NO OTHER QUESTIONS,
THEN ON BEHALF OF MR. TISDALE,
HE WOULD REQUEST THE COURT TO
VACATE THE SENTENCE OF DEATH,
REMAND WITH INSTRUCTIONS TO
IMPOSE A LIFE SENTENCE.
THANK YOU.
>> WE THANK YOU BOTH FOR YOUR
ARGUMENTS.