

>> SUPREME COURT OF FLORIDA IS  
NOW IN SESSION.  
PLEASE BE SEATED.

>> OKAY.

WELCOME.

NEXT CASE, LAST CASE TODAY IS  
PERRY VERSUS STATE.

WHENEVER YOU'RE READY.

>> THANK YOU.

GOOD MORNING YOUR HONORS.

MY NAME IS J. EDWIN MILLS.

MR. MANKEWICZ IS SEATED IN THE  
MIDDLE HERE AND I REPRESENT  
MR. PERRY AT TRIAL COURT LEVEL  
UP THROUGH THE APPELLATE LEVEL  
ON THIS CASE.

FIFTH DISTRICT COURT OF APPEALS  
AS YOU KNOW CERTIFIED TWO  
QUESTIONS OF GREAT IMPORTANCE TO  
THIS COURT, YOU ACCEPTED  
JURISDICTION AND SOMETIME AFTER  
THE BRIEFS WERE BEING FILED, THE  
COURT DIRECTED THAT WE RESPOND  
TO A THIRD QUESTION THAT THIS  
COURT POSED TO US.

THE FIRST QUESTION THAT THE  
FIFTH DISTRICT COURT OF APPEALS  
CERTIFIED, OF GREAT PUBLIC  
IMPORTANCE WAS THE QUESTION OF  
WHETHER THE HURST DECISION BY  
THE UNITED STATES SUPREME COURT  
EFFECTIVELY OR DID HOLD THE  
FLORIDA DEATH PENALTY STATUTE  
UNCONSTITUTIONAL.

OUR POSITION ON THAT,  
MR. PERRY'S POSITION ON THAT, IT  
IN FACT DID.

>> AGAIN, TELL ME WHAT YOU THINK  
THE QUESTION WAS?

DID HURST HOLD WHAT?

>> THE FLORIDA DEATH PENALTY  
STATUTE UNCONSTITUTIONAL.

>> THE CERTIFIED QUESTION ASKED,  
DID HURST DECLARE THE DEATH  
PENALTY UNCONSTITUTIONAL?

>> YES, MA'AM.

>> ISN'T THAT WHAT THE CERTIFIED  
QUESTION IS?

>> YES, MA'AM.

>> DID HURST DECLARE THE DEATH

PENALTY UNCONSTITUTIONAL?

>> OUR POSITION IS THAT IT DID,  
YES.

>> YOU SEE NO DIFFERENCE-- BUT,  
WHY WOULD YOU NEED TO CERTIFY  
THAT?

IT IS PRETTY CLEAR THEY DECLARED  
THE STATUTE UNCONSTITUTIONAL TO  
THE EXTENT THEY REQUIRED A JURY,  
A JUDGE RATHER THAN JURY TO MAKE  
THE FACT-FINDING?

>> CORRECT.

>> OKAY.

IT'S, BUT THEY DIDN'T DECLARE  
OUR DEATH PENALTY  
UNCONSTITUTIONAL.

>> WELL, THE DEATH PENALTY WE  
ALL AGREE IS FOUND IN 77.02082  
SUBONE.

THAT IS THE PROVISION--

>> YOU THINK THEY WERE ASKING  
WHETHER ALL OF THE CASES HAVE TO  
BE REDUCED TO LIFE BECAUSE OF  
WHAT HAPPENED IN HURST?

YOU THINK THAT'S REALLY WHAT THE  
CERTIFIED QUESTION MEANT TO ASK?

>> I'M SORRY, IS THAT A QUESTION  
FOR ME?

>> YES.

>> YES, MA'AM, I THINK IT IS.  
I, IF THE STATUTE WAS DECLARED  
UNCONSTITUTIONAL, THE DEATH  
PENALTY STATUTE WAS DECLARED  
UNCONSTITUTIONAL, BUT, WE'RE  
NOT, WE'RE NOT ARGUING FOR OTHER  
DEFENDANTS THAT HAVE ALREADY  
BEEN CONVICTED UNDER THE OLD  
PROCEDURE, OR THE OLD STATUTE.

>> BUT YOU'RE SAYING, YOU'RE  
SAYING THAT THE FLORIDA'S DEATH  
PENALTY HAS BEEN DECLARED  
UNCONSTITUTIONAL?

>> YES, SIR.

>> IF THAT IS THE CASE, WHAT  
YOU'RE SAYING THEN THAT ALL  
DEFENDANTS WHO HAVE BEEN  
SENTENCED TO DEATH, MUST BE  
COMMUTED TO LIFE?

>> I BELIEVE YOU'RE CORRECT.

>> SO TELL ME THE LANGUAGE, THE

ACTUAL LANGUAGE, IN THE HURST  
OPINION, THAT DECLARED THE DEATH  
PENALTY UNCONSTITUTIONAL.

>> THE LANGUAGE IN 775.082

SUB1-----

>> I WANT THE LANGUAGE FROM  
HURST.

YOU'RE SAYING HURST DECLARED THE  
DEATH PENALTY UNCONSTITUTIONAL.

>> CORRECT.

>> TELL ME WHAT THE LANGUAGE IS  
IN HURST THAT ACTUALLY SAYS  
THAT.

>> THERE ARE TWO PLACES IN HURST  
WHERE THEY DISCUSSED THE, THE  
CONSTITUTIONALITY.

ONE, ADDRESSES THE 921.141,  
AGGRAVATORS IF YOU WILL, AND THE  
OTHER, THE OTHER CRITICISM OF  
THE STATUTE, AND I'M SORRY, I  
DON'T HAVE THE HURST OPINION IN  
FRONT OF ME.

>> DO YOU SEE, THIS IS WHAT  
JUSTICE PARIENTE WAS ASKING I.  
DO YOU SEE A DIFFERENCE IN  
DECLARING THE DEATH PENALTY IN  
FLORIDA UNCONSTITUTIONAL VERSUS  
THE PROCEDURE FOR IMPOSING THE  
DEATH PENALTY UNCONSTITUTIONAL?  
IS THERE A DIFFERENCE IN THOSE  
TWO POSITIONS?

>> WELL, YES, THERE IS.

>> OKAY.

SO WHAT-- WHICH OF THOSE  
POSITIONS ACTUALLY IS WHAT THE  
HURST COURT SAID, THE UNITED  
STATES SUPREME COURT, HURST  
SAID?

>> WELL I HESITATE TO STAND HERE  
AND SAY THAT IT'S THE PROCESS  
BUT IT'S, I THINK THE EXACT  
LANGUAGE IN THE HURST CASE WAS  
THE FLORIDA SENTENCING SCHEME.  
THEY DIDN'T USE THE TERM  
PROCESS.

THEY DIDN'T USE--

>> IF YOU'RE RIGHT ABOUT THE  
IMPACT OF HURST, WHY WOULD THEY  
HAVE REMANDED FOR CONSIDERATION  
OF HARMLESS ERROR?

IS THIS JUST SOMETHING  
REFLEXIVE, UNTHOUGHTFUL?  
THEY JUST DID THAT WITHOUT  
GIVING ANY THOUGHT IT AND THEY  
WENT ALONG FOR THAT RIDE WITHOUT  
THINKING ABOUT THE IMPLICATIONS  
OF THAT?

>> I DON'T KNOW-- I KNOW.  
I DON'T KNOW THE ISSUES  
SPECIFICALLY THAT WERE BRIEFED  
BY THE PARTIES IN HURST.  
AND THAT ALWAYS GUIDES YOUR  
COURT AS WELL AS THE UNITED  
STATES SUPREME COURT AS TO HOW  
THEY ADDRESS A CASE.  
I SUSPECT.  
I WOULD--

>> ACTUALLY IT WAS FOR HARMLESS  
ERROR ANALYSIS ON THE ISSUE ON  
WHICH THEY REVERSED.  
THAT'S WHAT THE HARMLESS  
ERROR-- THAT'S WHERE THEY FOUND  
THE ERROR.  
THEY SAY, GOES BACK AND YOU  
CONSIDER WHETHER THAT ERROR WAS  
HARMLESS, BUT IF YOUR VIEW--  
I'M STRUGGLING TO SEE, IF YOUR  
VIEW IS CORRECT, THAT THERE  
COULD POSSIBLY BE HARMLESS ERROR  
ANALYSIS, AND WE HAVE TO  
CONSIDER THAT WAS JUST, THE  
SUPREME COURT REALLY DIDN'T MEAN  
THAT BECAUSE THEY HAD HELD IN A  
WAY THAT WOULD ACTUALLY PRECLUDE  
HARMLESS ERROR ANALYSIS?

>> WELL, WHEN I READ THE  
OPINION, FRANKLY I WAS PUZZLED  
WHY IT WAS COMING BACK TO YOUR  
COURT, TO THE FLORIDA SUPREME  
COURT ON A HARMLESS ERROR  
ANALYSIS.

>> LET ME, BECAUSE YOU HAVE  
LIMITED TIME, YOUR CASE, THERE  
ARE CASES WHERE THE DEATH  
PENALTY HAS BEEN IMPOSED, LIKE  
IN HURST WHERE CLEARLY TO ME, A  
HARMLESS ERROR ANALYSIS WILL BE  
CONDUCTED UNLESS WE FINE  
775.80822 REQUIRES THOSE CASES  
REDUCED TO LIFE.

TO ME, THE REASON WE'RE LEAR,  
THERE WAS A NEW LAW PASSED, IN  
YOUR CASE, IN YOUR CLIENT'S CASE  
AND OTHER PERSON MENTIONED THERE  
WAS NO DEATH SENTENCE IMPOSED.

>> CORRECT.

>> THERE WAS A PENDING  
PROSECUTION.

THE ISSUE IS, WHETHER, WHAT IS  
YOUR POSITION AS TO, AS TO  
APPENDING PROSECUTION WHETHER  
THE NEW DEATH PENALTY STATUTE  
APPLIES TO YOUR CLIENT?

DOES IT OR DOESN'T IT, AND IF IT  
DOESN'T, WHAT DO YOU, WHAT IS  
YOUR POSITION?

>> OUR POSITION IS IT DOES NOT  
APPLY.

>> SO WHAT WOULD BE-- SO  
BECAUSE WHY?

>> IT'S NOT RETROACTIVE.

>> BUT IT IS NOT BEING APPLIED  
RETROACTIVELY.

YOU'RE NOT, THERE IS NO  
DIFFERENCE.

THE AGGRAVATORS ARE THE SAME.

THE MITIGATION IS THE SAME.

IN FACT, AS MR. McCLAIN POINTS  
OUT AND I GUESS HE IS GOING TO  
ARGUE TODAY, IT IS, BENEFITS THE  
CHANGES BENEFIT THE DEFENDANT BY  
TAKING THE JURY'S ROLE INTO,  
ELEVATING IT IN COMPLIANCE WITH  
HURST.

SO WHAT IS IT, HOW IS THAT  
STATUTE A, WHICH IS, EVERYBODY  
SEEMS TO SAY, IS MORE PROCEDURAL  
THAN SUBSTANTIVE AS TO THE  
SCHEME, DETRIMENT TO YOUR  
CLIENT?

WHY ISN'T DAUBERT THE ANSWER AS  
TO IT IS NOT?

>> I THINK APPRENDI ADDRESSES  
THAT, ESPECIALLY JUSTICE  
SCALIA'S CONCURRING DECISION IN  
APPRENDI, HE WRITES THE CHARGES  
AND THE CORRESPONDING MAXIMUM  
PENALTY CAN BEING IMPOSED--

>> DID IT CHANGE THE WAY, HOW  
YOU GET TO THE DEATH PENALTY?

IT STILL SAYS, YOU GOT TO FIND AGGRAVATORS, RIGHT? AND NOW IT IS SAYING EXPLICITLY, WHICH IS CORRECT, THEY HAVE TO BE FOUND BEYOND A REASONABLE DOUBT.

>> CORRECT.

>> THEN IT SAYS THEY HAVE TO DECIDE THAT THE AGGRAVATORS OUTWEIGH THE MITIGATORS. THERE IS SOME QUESTION UNDER THE NEW STATUTE AS TO WHETHER THAT HAS TO BE UNANIMOUS, BUT IF YOU READ HURST IT WOULD SEEM, AT LEAST THERE IS A GOOD ARGUMENT THAT DOES.

AND THEN THE RECOMMENDATION FOR DEATH, WHICH COULD BE CONSTRUED TO BE THE MERCY RECOMMENDATION, IF 10 JURORS AGREE TO DEATH, EVEN THE JUDGE HAS THE ABILITY TO SAY LIFE?

>> CORRECT.

>> BUT IF THREE JURORS SAY, WE'RE EXERCISING MERCY, THE JUDGE CAN NOT OVERTURN IT. SO, SEEMS LIKE IT'S A MORE DEFENSE-FRIENDLY, BASED ON HURST, STATUTE.

SO HOW THERE IS EX POST FACTO VIOLATION?

EXPLAIN TO ME HOW IT IS A EX POST FACTO VIOLATION.

>> JUSTICE PARIENTE, IT IS, IT MAKES A DEFENDANT, UNDER THE NEW STATUTE, THE DEFENDANT IS ELIGIBLE FOR A DEATH SENTENCE UPON THE FINDING OF ONLY ONE AGGRAVATOR.

>> THAT WAS ALWAYS-- THE CASES IF YOU DON'T HAVE ONE AGGRAVATOR IT IS LIFE.

>> WELL, THAT'S TRUE.

>> SO INTO THE DEATH PENALTY DOOR THERE HAS TO BE AT LEAST ONE.

THAT DOESN'T, THAT'S NOT FACTS UPON WHICH THE DEATH PENALTY CAN BE IMPOSED, THAT THERE IS JUST ONE AGGRAVATOR.

I MEAN YOU GOT TO DO, THEY HAVE GOT TO BE SUFFICIENT AGGRAVATORS TO OUTWEIGH THE MITIGATORS.

>> WELL, AGAIN--

>> LET ME JUST SAY.

IF WE CONSTRUE THE STATUTE IN CORD DANCE WITH HURST, WOULD YOU AGREE THEN THERE IS TO EX POST FACTO VIOLATION?

>> I BELIEVE SO, YES.

>> THERE WOULD NOT BE?

>> CORRECT.

>> OKAY.

>> I'VE RUN OUT OF TIME.

>> YES, SIR.

>> DID YOU HAVE A QUESTION, SIR?

>> NO.

>> THANK YOU.

>> SO YOU DIDN'T SAVE ANYTIME FOR REBUTTAL.

>> MAY IT PLEASE THE COURT.

I THINK THE ISSUE, SORT OF ARISES FROM THE WHEN THE STATUTE WAS PASSED, A LOT OF PEOPLE READ THE STATUTE, IN A WAY THAT THEY THOUGHT HE WAS SAYING HURST IS SATISFIED WHEN ONE AG IS FOUND.

>> WHEN WIN WHAT?

>> ONE AGGRAVATOR IS FOUND.

>> DOESN'T THE STATUTE GO A LITTLE FURTHER?

>> IT REALLY DOES.

>> IT SAYS ALL AGGRAVATORS, DOESN'T IT?

>> IT DOES.

I'M TRYING TO EXPLAIN HOW THIS CASE AROSE IN SORT OF THE PROCEDURAL POSTURE IT WAS WHERE BOTH THE STATE AND DEFENSE I BELIEVE WERE READING THAT STATUTE IN THAT WAY.

AND I SUBMIT THAT'S NOT THE WAY TO READ THE STATUTE.

I SUBMIT THAT, THE BEST WAY TO UNDERSTAND WHAT HAPPENED IS, THE WRITTEN FINDINGS OF FACT, THAT THE JUDGE HAD TO DO UNDER THE OLD STATUTE HAVE NOW BEEN TRANSFERRED TO THE JURY.

>> SO, YOUR UNDERSTANDING WOULD

BE THAT, NOT ONLY THE  
AGGRAVATORS BUT THE MITIGATORS  
ALSO, AND DO THEY HAVE TO BE  
FOUND UNANIMOUSLY BY THE JURY?

>> WELL, I'M NORTH CAROLINA  
INDICATES YOU CAN NOT REQUIRE  
THE JURY TO BE UNANIMOUS ON  
MITIGATING CIRCUMSTANCE.

>> ON THE?

>> ON A MITIGATING CIRCUMSTANCE.

>> OKAY.

>> BUT WHAT I WOULD SUGGEST THE  
COURT LOOK TO

HANNIBAL v. STATE.

THIS COURT SHOULD INDICATE, THE  
STATUTE SAYS ONE AG, JURY HAS TO  
ADDRESS ALL OF THE AGGRAVATORS,  
FIND THEM UNANIMOUSLY BEFORE  
PROCEEDING TO THE NEXT STEP.

THE NEXT STEP ARE THE A-FS  
SUFFICIENT AND DO THE, I'M  
SORRY, USE AGS INSTEAD OF  
AGGRAVATORS.

STOP ME IF I'M GOING TOO FAST IF  
THE AGGRAVATORS OUTWEIGH THE  
MITIGATORS.

>> SO IF THE JURY HAS TO DECIDE  
ON THE AGGRAVATORS UNANIMOUSLY  
AND THE PROSECUTOR POSITS FIVE  
AGGRAVATING CIRCUMSTANCES--

>> RIGHT.

>>-- AND JURY ONLY FINDS FOUR  
OF THEM UNANIMOUSLY AND OTHER  
ONES SAY 10-2, IS THE JURY THEN  
LIMITED TO, AND THE JUDGE THEN  
LIMITED TO THE FOUR THAT WERE  
FOUND UNANIMOUSLY TO WEIGH  
AGAINST THE MITTING?

>> I SUBMIT THEY WOULD BE.

IT IS LIKE HOW THIS COURT  
TREATED WRITTEN FINDINGS OF FACT  
BY THE JUDGE HISTORICALLY.

THIS COURT ALWAYS TREATED  
AGGRAVATORS FOUND BY THE JUDGE  
IN HIS WRITTEN FINDINGS AS THE  
ONES THAT APPLY AND THEN WOULD  
REVIEW ON APPEAL FOR SUFFICIENT  
EVIDENCE TO SUPPORT THE  
AGGRAVATORS.

>> OKAY.

AND SO--

>> SO I WOULD SUBMIT IN ESSENCE THE SAME THING HERE.

THE JURY HAS TO BE UNANIMOUS ON THE AGGRAVATORS FOR THE AGGRAVATORS TO BE INCLUDED IN THE SENTENCING CALCULUS.

>> SO THE UNANIMOUS AGGRAVATORS, NON-UNANIMOUS, NECESSARILY, MITIGATORS, A UNANIMOUS FINDING THAT THE AGGRAVATORS OUTWEIGH THE MITIGATORS?

>> YES.

>> OKAY.

AND SO AT THAT POINT, LET ME ASK YOU THIS.

IT KIND OF COMES TO MIND IS, AT THAT POINT, IF THE STATUTE DID NOT PROVIDE FOR THE JURY TO DO ANYTHING BEYOND THAT, WOULD THAT BE CONSTITUTIONAL?

>> WELL, I THINK WHAT WE HAVE TO DO IS, THERE IS ONE PROBLEMATIC WORD IN THE STATUTE, WELL THERE IS ACTUALLY A COUPLE BUT ONE I'M GOING TO FOCUS ON IN A MOMENT. ONE PROBLEMATIC WORD IS RECOMMENDATION.

IF YOU LOOK AT LANGUAGE FROM JUSTICE SCALIA IN RING, LEGISLATIVE LABELS DON'T CONTROL.

THE QUESTION IS HOW DOES IT ACTUALLY FUNCTION.

UNDER THE NEW STATUTE A DEATH SENTENCE IS NOT ON THE TABLE, CAN NOT BEING IMPOSED IF THREE JURORS OR MORE VOTE FOR LIFE.

SO, WE CAN CALL IT A VERDICT, WE CAN CALL IT A RECOMMENDATION, IN THE WORDS OF JUSTICE SCALIA, WE CAN CALL IT MARY JANE, DOESN'T MATTER WHAT WE CALL IT, BUT THE BOTTOM LINE DEATH IS NOT ON THE TABLE, CAN NOT BE IMPOSED UNLESS THE JURY RETURNS WHAT IS CALLED A DEATH RECOMMENDATION AND, THAT SEEMS TO ME TO INDICATE IT IS LIKE, IT IS LIKE A GUILT PHASE VERDICT OF GUILTY.

THE JURY HAS TO GET TO THAT POINT, HAS TO MAKE ALL THE FINDINGS TO GET TO THAT POINT, JUST LIKE THEY DO WITH THE GUILT PHASE.

>> LET ME ASK YOU THIS WHAT WOULD YOU CALL THAT PARTICULAR PHASE?

WOULD YOU CALL IT A VERDICT?

>> I THINK IT IS-- FOR ALL PRACTICAL PURPOSES IT IS A VERDICT.

>> ALL RIGHT, NOW, TAKE THAT TO THE NEXT LEVEL FOR A SECOND. LET'S TALK A LITTLE BIT ABOUT THE JURORS FINAL RECOMMENDATION, OR FINAL VERDICT AS YOU SAY. AS YOU KNOW 32 STATES IN OUR COUNTRY HAVE THE DEATH PENALTY, AND THE FEDERAL GOVERNMENT.

>> YES.

>> THERE ARE THREE STATES WHO ARE OUTLIERS IN THE COUNTRY.

>> YES.

>> ALABAMA, DELAWARE, AND FLORIDA, THAT ONLY REQUIRE SOMETHING LESS THAN UNANIMOUS.

>> RIGHT.

>> NOW CAN YOU JUST TAKE US THROUGH, WITH JUST A COUPLE MINUTES HERE, I KNOW THE TIME'S LIMITED, FLORIDA'S HISTORY IN REQUIRING UNANIMITY IN JURY VERDICTS, WHETHER IT IS SIX-PANEL PERSON, JURY ON ROBBERY CASE OR WHETHER IT'S A DEATH PENALTY INVOLVING 12 JURORS, HOW DOES THE HISTORY OF FLORIDA IN REQUIRING A UNANIMOUS VERDICT?

>> I MEAN IT ALWAYS BEEN THAT WAY IN FLORIDA.

SINCE EVEN BEFORE, IT WAS A STATE, FLORIDA REQUIRED UNANIMITY IN CRIMINAL CASES FOR CONVICTION.

AND I SUBMIT, IT SHOULD APPLY HERE.

I WANT TO ADD A CAVEAT, I THINK THE QUESTION, SORT OF, THAT YOUR

HONOR HAS RAISED ALONG WITH JUSTICE QUINCE, THAT NEXT STEP, WHAT ABOUT THE CONSIDERATION OF MERCY WHICH IS A SEPARATE SORT OF QUESTION THAN THE ACTUAL FACTUAL ISSUE?

IN HERE THAT'S WHERE IT IS MURKIER BECAUSE I THINK THE UNANIMITY REQUIREMENT IS FINDINGS OF FACT.

BUT, MY, WHAT I POSE COMES UP IS THERE NOW AN EIGHTH AMENDMENT CONSENSUS?

ARE EVOLVING STANDARDS OF DECENCY KICKING IN THAT NOBODY ELSE IS ALLOWING LESS THAN ANYTHING BUT UNANIMITY.

>> STICK WITH THE SIXTH AMENDMENT FOR A SECOND.

LET'S GO BACK IF WE ARE TO CALL IT A VERDICT, AND I GUESS MY QUESTION IS GEARED TOWARD WHAT HAS BEEN FLORIDA'S REQUIREMENT FOR UNANIMITY OF JURY VERDICTS THROUGHOUT OUR HISTORY.

>> WELL THE ONLY, SORT OF EXCEPTION IS IN THE CAPITAL CASES WHEN IT COMES TO THE MAJORITY VOTE RETURNING A RECOMMENDATION.

>> THAT WAS BEF HURST IT WAS RECOMMENDATION.

YOU SAY NOW IT HAS BEEN A VERDICT AND ONLY SHOULD BE A VERDICT?

>> ONLY EXCEPTION IN THE HISTORY OF THE FLORIDA I'M AWARE OF, RECOMMENDATION DID NOT HAVE TO BE UNANIMOUS, AND I THINK THAT WAS BECAUSE THEY WEREN'T VIEWED AS THE SENTENCER.

THEY WEREN'T VIEWED AS THE ONE DETERMINING THE SENTENCE.

BUT IF, IF THEY'RE THE ONES THAT ARE DETERMINING THE FACT, DETERMINING THAT THE FACTS NECESSARY FOR A CONVICTION ARE PRESENT, NECESSARY FOR DEATH TO BE ON THE TABLE, FLORIDA'S ALWAYS REQUIRED UNANIMITY.

>> SO WHO IS THE SENTENCER?  
IN THE FLORIDA SCHEME, WHO IS  
THE SENTENCER?

>> WELL, IS AN INTERESTING  
QUESTION.

I THINK THAT THE ONLY REAL WAY  
TO CONSTRUE IT IS NOW FOR ALL  
PRACTICAL PURPOSES, THE JURY'S  
THE SENTENCER.

THE JURY, IF THE JURY DETERMINES  
LIFE, IT'S LIFE.

>> BUT REALLY IN THIS STATE,  
AFTER TEDDER, ESSENTIALLY, IF  
SIX JURORS VOTED FOR LIFE, AND  
WE HAVE NOT IN MANY, MANY YEARS  
ALLOWED A JUDGE OVERRIDE.

SO ESSENTIALLY THAT WAS DONE.  
HERE IS THOUGH, I THINK YOU'VE  
BEEN VERY HONEST THOUGH ABOUT  
THIS ISSUE OF SEPARATION.

TO ME IT'S CLEAR AFTER, STATUTE  
IS CLEAR THAT UNANIMITY IS  
REQUIRED FOR THE FINDINGS OF  
AGGRAVATORS.

AS YOU SAID ONLY THE AGGRAVATORS  
THE JURY FINDS UNANIMOUSLY CAN  
BE RELIED ON.

THE SECOND QUESTION, WHICH IS  
THE AGGRAVATORS OUTWEIGHING THE  
MITIGATORS IS ALWAYS BEEN THE  
ESSENTIAL REQUIREMENT OF,  
WHETHER THE DEATH PENALTY SHOULD  
BE, WHERE IT WAS RECOMMENDED,  
BUT UNDER OUR STATUTE, MY VIEW  
IS THEY ARE FINDINGS OF FACT,  
THEREFORE THEY HAVE TO BE FOUND  
UNANIMOUSLY.

BY AS YOU SAY, IN LOOKING BACK  
AT HENYARD AN EVEN ALFRED, EVEN  
IN THIS STATE HISTORICALLY, THAT  
EVEN AFTER THE AGGRAVATORS  
OUTWEIGH THE MITIGATORS, THE  
JURY IS ALLOWED, AS IS THE JUDGE  
WHO EXERCISED WHAT IS CALLED  
MERCY WHICH IS DIFFERENT FROM  
WHETHER THE AGGRAVATORS OUTWEIGH  
THE MITIGATORS.

SO IS THAT, IS THAT THE PART,  
DOES THAT GO UNDER THE SIXTH  
AMENDMENT WHERE IT HAS TO BE

UNANIMOUS OR IS THAT THE EIGHTH AMENDMENT WHERE IT'S, THAT WE'RE SUCH AN OUTLIER NOT ONLY OBVIOUSLY IN THIS COUNTRY, IN THE WORLD, IT IS EVEN MORE OF AN OUTLIER, SO WHAT IS YOUR VIEW BECAUSE WE'VE GOT TO LOOK AT THE STATUTE NOW, WHICH ONE JUDGE HAS DECLARED UNCONSTITUTIONAL COMPLETELY, DECIDE WHETHER THERE IS A CONSTITUTIONAL STATUTE THAT CAN BE APPLIED TO PENDING PROSECUTIONS?

>> ABSOLUTELY.

NOT TO QUIBBLE, JUST TO SORT OF SEMANTICAL THINGS, THERE ARE A COUPLE PEOPLE CURRENTLY ON DEATH ROW IN FLORIDA WITH LIFE RECOMMENDATIONS.

EVEN THE COURT STOPPED AFFIRMING THEM AT A POINT IN TIME PEOPLE ARE STILL ON DEATH ROW WITH LIFE RECOMMENDATION.

AND YOU INDICATED THAT THIS COURT HASN'T INDICATED JURORS COULD VOTE FOR MERCY.

THIS COURT NEVER FOUND THAT TO BE A REASONABLE BASIS FOR LIFE RECOMMENDATION.

>> BECAUSE WE DON'T KNOW, WE DON'T KNOW, WHAT THE THREE PEOPLE, OR THE TWO PEOPLE, WHY THEY WOULD VOTE FOR LIFE, EVEN IN FACE OF THE AGGRAVATORS OUTWEIGHING THE MITIGATORS. SO WE DON'T KNOW IF THAT IS MERCY OR THEY DON'T BELIEVE IN THE DEATH PENALTY OR WHATEVER IT IS.

>> THAT'S TRUE, MY POINT IS, EVEN THOUGH THERE IS CASE LAW INDICATING JURORS COULD NONETHELESS VOTE FOR MERCY, IF THAT RESULTED IN A LIFE RECOMMENDATION, THIS COURT NEVER SAID THAT COULD BE A REASONABLE BASIS, ALWAYS REQUIRED MITIGATION, ACTUAL MITIGATION.

>> I THINK WE BEFORE HURST, WE WERE QUESTIONING, THIS WAS JURY

INSTRUCTION SAYS, EVEN IF YOU FIND THE AGGRAVATORS OUTWEIGH THE MITIGATORS YOU'RE NOT REQUIRED TO RECOMMEND DEATH. SO AS JUSTICE, RIGHT. OKAY.

>> THAT WAS ALWAYS THERE BUT IT WAS NEVER RECOGNIZED.

>> WHAT I'M ASKING YOU, HOW DOES THE STATUTE THEN, LET'S JUST GO TO THIS STATUTE, CAN WE CONSTRUE IT CONSTITUTIONAL, CONSTITUTIONALLY OR IS IT UNCONSTITUTIONAL?

>> ONE OF THE-- WELL, THERE ARE THINGS THAT COME UP AND ONE OF THEM IS THE 10-2 PROVISION AND THE 10-2 PROVISION IN SUBSECTION 3, NOT SUBSECTION 2.

SUBSECTION 2 IS THE SUFFICIENT AGGRAVATING CIRCUMSTANCES AND AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MED IS.

I DON'T THINK IT CAN BE CONSTITUTIONAL 10-2 UNDER HURST TO APPLY WHETHER THE AGGRAVATING FACTORS ARE SUFFICIENT AND WHETHER THE AGGRAVATORS OUTWEIGH THE MITIGATORS.

I DO WANT TO MAKE ONE POINT.

>> BUT THAT'S THAT TO BE, A, B, C, THE RECOMMENDATION SHALL BE BASED ON A WEIGHING, HAS TO BE BASED ON THE AGGRAVATORS OUTWEIGH THE MITIGATORS, THAT HAS TO BE FOUND UNANIMOUSLY.

>> I JUST WANT TO MAKE THE POINT, THERE IS CASE LAW FROM THIS COURT INDICATING THAT THE JUDGE'S WRITTEN FINDINGS, WHEN THE JUDGE FOUND THAT THE MITIGATION DID NOT OUTWEIGH THE AGGRAVATION, THAT WAS SUBJECT TO SORT OF SUFFICIENT IF I OF THE EVIDENCE TEST.

SO THIS COURT HAS HISTORICALLY TREATED THAT AS A FACTUAL ISSUE. THAT IS SOMETHING THAT SHOULD HAVE TO BE FOUND BY THE JURY UNANIMOUSLY.

AND I BELIEVE THE QUESTION YOU'RE ASKING IS, ONCE THEY GET TO THAT PART, ONCE THEY UNANIMOUSLY DETERMINED AGGRAVATING TO FACTORS ARE SUFFICIENT AND AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS COULD THEY STILL NONETHELESS RECOMMEND MERCY AND CAN THE 10-2 PROVISION APPLY TO THAT.

I DON'T THINK THE SIXTH AMENDMENT IS WHAT KICKS IN ON THAT POINT.

I THINK IT IS THE EIGHTH AMENDMENT.

I THINK NATIONAL STANDARD THAT NOBODY ELSE PROVIDES FOR THAT ONE JUROR IS ENOUGH ANYWHERE ELSE, THAT THERE IS A CONSENSUS UNDER THE EIGHTH AMENDMENT THAT AND THAT SHOULD GOVERN THAT PROVISION.

>> BUT YOU HAVE, ALREADY, ASSUMING YOU GET TO THAT POINT, YOU ALREADY HAVE A UNANIMOUS FINDINGS UP TO THAT POINT?

>> YES.

>> SO, WHY IN ALLOWING A JURY, WHO MADE THOSE FINDINGS, TO NOT STOP THERE, BUT, TO IN ESSENCE, SAY, NO DEATH PENALTY IN THIS CASE, EVEN THOUGH WE HAVE FOUND THE AGGRAVATORS AND AGGRAVATORS OUTWEIGH ALL THE MITIGATION? HOW DOES THAT TURN INTO, WHEN IT IS ADDITIONAL WAY OUT INTO A CONSTITUTIONAL VIOLATION? THAT'S WHAT I'M NOT UNDERSTANDING.

>> I THINK THAT THE EIGHTH AMENDMENT IS WHAT SAYS A JUROR SHOULD ALWAYS BE ABLE TO VOTE FOR LIFE.

>> WELL, THAT GIVES THEM THAT OPPORTUNITY.

>> EXCEPT THE QUESTION IS, DOES IT HAVE TO BE UNANIMOUS? CAN ONE JUROR SAY, I EXERCISE MERCY AND IN PRECLUDING

UNANIMOUS DECISION.

>> YOU'RE SAYING THAT HAS TO BE  
10-1 TO OPERATE AS MERCY KIND OF  
THING?

>> THE STATUTE PROVIDES FOR  
10-2.

I SUBMIT UNDER THE EIGHTH  
AMENDMENT THAT TOO SHOULD BE NAN  
NEWS.

I RESERVE THE REST OF MY TIME.

>> YOU HAVE NONE.

>> OH.

>> I WILL GIVE YOU AN ADDITIONAL  
FOUR MINUTES.

>> GOOD MORNING YOUR HONORS, MAY  
IT PLEASE THE COURT.

I'M CAROL DITTMAR, FROM ATTORNEY  
GENERAL'S OFFICE, REPRESENTING  
RESPONDENT IN THIS CASE THE  
STATE OF FLORIDA.

THEY DID NOT GIVE ALL THE  
FUNCTIONS TO GIVE THEM TO THE  
JURY.

WE DO NOT HAVE JURY SENTENCING  
UNDER AMENDED STATUTE.

HURST DOES NOT REQUIRE JURY  
SENTENCING.

THIS WHOLE IDEA I'M NOT REALLY  
SURE WHERE IT IS COMING FROM  
THAT THE JURY HAS TO BE THE ONE  
TO MAKE THE SENTENCE.

I'M SORRY.

>> BECAUSE YOU SAY THEY DON'T  
HAVE JURY SENTENCING.

IF THREE JURORS SAY LIFE, .

>> THAT'S IT.

>> THERE IS NO OVERRIDES?

>> NO.

>> SO I DON'T KNOW WHAT THAT IS,  
IF THAT'S NOT ESSENTIALLY JURY  
SENTENCING?

>> WELL, IT'S THE JURY BEING  
ABLE TO PRECLUDE DEATH BUT IT  
DOESN'T MEAN THAT IF THE JURY  
RECOMMENDS DEATH THAT HE IS  
GOING TO GET DEATH BECAUSE THE  
JUDGE CAN DETERMINE THAT IT'S  
NOT A DEATH CASE.

SO, BECAUSE THEIR RECOMMENDATION  
IS NOT BINDING ON THE JUDGE,

YES, THE LIFE RECOMMENDATION,  
BUT THE DEATH RECOMMENDATION IS  
NOT.

>> BUT IT GIVES-- WE'RE WORRIED  
NOT ABOUT A JURY GIVING LIFE.

>> RIGHT, OBVIOUSLY.

>> IT IS THE DEATH  
RECOMMENDATION.

>> THE JUDGE FROM GIVING DEATH.  
THAT'S WHAT, I MEAN I'M NOT, THE  
DEFENDANT, THAT'S FROM THE  
DEFENDANT'S POINT OF VIEW.

>> WHICH REALLY SHOULDN'T BE A  
CONCERN FOR THE DEFENDANT UNLESS  
THE DEFENDANT WANTS DEATH AND  
HIS JURY COMES BACK WITH LIFE.  
MOST DEFENDANTS ARE HAPPY WITH  
THE IDEA IF THE JURY SAYS LIFE  
THEY GET LIFE.

>> EVEN, ALTHOUGH I DON'T RECALL  
IT HAPPENING IN RECENT YEARS,  
EVEN IF A JURY UNANIMOUSLY SAID,  
AT THAT FINAL RECOMMENDATION,  
12-0, THAT WOULD NOT STILL  
PRECLUDE OR WOULD IT PRECLUDE  
THE JUDGE FROM SENTENCING HIM TO  
LIFE?

>> NO, IT WOULDN'T.

>> HOW DO YOU READ THIS--  
BECAUSE WE'RE HERE REALLY, EVEN  
THOUGH THESE CERTIFIED QUESTIONS  
ARE A LITTLE BIT CONFUSING, WHAT  
WE'RE REALLY HERE, BECAUSE WE  
HAVE GOT PENDING PROSECUTIONS.

>> RIGHT, ABSOLUTELY.

>> THE NEW STATUTE APPLIES BUT  
THE REASON FOR ADDITIONAL  
BRIEFING, CLEARLY AT THIS STAGE  
IN OUR JURISPRUDENCE WE WANT TO  
MAKE SURE THE STATUTE IS  
CONSTRUED IN A CONSTITUTIONAL  
MANNER.

>> ABSOLUTELY.

>> SO THAT WE DON'T HAVE ANOTHER  
15 YEARS OF DEATH PENALTY-- IF  
THE STATE WANTS THE DEATH  
PENALTY, WHICH APPARENTLY IT  
DOES, IN FLUX.

SO WHAT IS THE STATE'S POSITION  
AS TO WHAT IS REQUIRED?

THE STATUTE CLEARLY REQUIRES ALL  
HAVING TATETORES BE FOUND  
UNANIMOUSLY.

>> UNANIMOUSLY, YES.

>> THEN THERE IS THE, WHETHER  
THERE IS SUFFICIENT AGGRAVATORS  
TO OUTWEIGH THE MITIGATORS.

IS THE STATE'S POSITION THAT  
UNDER HURST THAT THAT'S A  
FACTUAL FINDING THAT SHOULD BE  
UNANIMOUSLY FOUND BY THE JURY?

>> THAT IS NOT A FACTUAL FINDING  
AT ALL.

IT IS NOT A MATTER OF FACT.

IT IS A DETERMINATION.

WHEN YOU'RE LOOKING AT-- THINK  
ABOUT WHAT A FACT IS.

>> YOU WOULD AGREE IF WE  
CONCLUDE THAT'S A FACT THAT HAS  
TO BE FOUND UNANIMOUSLY?

I APPRECIATE THE STATE SAYS NO,  
IT'S A--

>> IF YOU FIND THAT IS A FACT  
THAT UNDER HURST MUST BE FOUND  
BY A JURY, THEN I STILL DON'T  
SEE WHERE THE-- STILL DOESN'T  
CHANGE THE NATURE OF THE  
RECOMMENDATION THAT THEY'RE  
GIVING.

SO I STILL DON'T SEE WHERE THE  
UNANIMITY MAY BE--

>> SO WHERE MR. McCLAIN IS  
GOING BECAUSE IF YOU READ  
HENYARD AND BACK TO ALFRED, EVEN  
IF AGGRAVATORS OUTWEIGH THE  
MITIGATORS THE JURY WAS ALWAYS  
ALLOWED TO DECIDE THAT EVEN  
THOUGH THE AGGRAVATORS OUTWEIGH  
THE MITIGATORS THAT THIS  
DEFENDANT WAS NOT DESERVING OF  
THE DEATH PENALTY.

>> SURE, THE JURY CAN CERTAINLY  
DECIDE THAT NOW.

>> BUT THAT'S SEPARATE.

THAT WOULD BE THE 10-2.

THERE ISN'T A STATEMENT IN HERE,  
IN THE STATUTE, AS TO WHAT THAT,  
WHAT--

>> RECOMMENDATION OF MERCY?

>> NO, NO, WHAT THE SUFFICIENT

AGGRAVATORS OUTWEIGHING THE  
MITIGATORS, THE FINDING HAS TO  
BE, WHAT THE VOTE HAS TO BE.

>> WELL, I THINK THAT'S  
ENCOMPASSED IN THE FINAL JURY  
RECOMMENDATION.

THAT'S PART OF THE JURY  
RECOMMENDATION.

>> THAT'S WHAT YOU'RE SAYING.  
WHAT I'M SUGGESTING IS IT IS A  
TWO-PART PROCESS BECAUSE IF  
WE'RE TO CONSTRUE IT  
CONSTITUTIONALLY, IF THEY  
WEREN'T REQUIRING UNANIMITY AND  
THE AGGRAVATORS OUTWEIGHING THE  
MITIGATORS, IT WOULD RUN UNDER  
THE OLD DEATH PENALTY STATUTE AS  
INTERPRETED IN HURST AS A  
VIOLATION OF THE SIXTH  
AMENDMENT.

I MEAN THAT'S THE ARGUMENT  
MR. McCLAIN IS MAKING.

>> THAT'S HIS ARGUMENT.

>> THAT IS A GOOD ARGUMENT.

>> THAT WAS ALL BRIEFED AS PART  
OF HURST AS WELL AND, YOU KNOW,  
UNDER THE EIGHTH AND UNDER THE  
SIXTH AMENDMENT ABOUT UNANIMITY.

>> NO, WHAT THE SUPREME COURT  
SAID IN HURST IS ALL OF THE  
BASIS FOR THE DEATH PENALTY TO  
TO BE IMPOSED IS JURIFY  
FINDINGS.

>> THEY DIDN'T SAY AIL THE BASIS  
OF THE THEY SAID ALL THE FACTS  
MUST BE FOUND BY THE JURY.

>> IF AGGRAVATORS DON'T OUTWEIGH  
THE MITIGATORS CAN THE DEATH  
PENALTY BE IMPOSED IN FLORIDA?

>> NO.

IF THE AGGRAVATORS DON'T  
OUTWEIGH THE MITIGATORS, NO IT  
IS A LIFE SENTENCE.

IF THE JURY FINDS IT, IF THE  
JURY DOESN'T FIND IT BUT THE  
JUDGE FINDS IT IS STILL A LIFE  
SENTENCE.

SO EITHER WAY IT IS A LIFE  
SENTENCE.

SO THERE DOESN'T, I DON'T SEE

WHERE THE AUTHORITY TO  
REQUIRE--

>> I GUESS THE REAL CRUX HERE  
IS, IF WE FIND, IF WE DETERMINE  
THAT THE FACT OF WHETHER THE  
AGGRAVATORS OUTWEIGH THE  
MITIGATORS IS A FACTUAL FINDING,  
THEN UNDER HURST WOULDN'T SUCH A  
FACTUAL FINDING HAVE TO BE MADE  
UNANIMOUSLY BY THE JURY?

>> WELL HURST DOESN'T SAY IT HAS  
TO BE UNANIMOUS.

HURST SAYS IT HAS TO BE A JURY  
FINDING.

THEN YOU LOOK AT OTHER U.S.  
SUPREME COURT CASES AND THEY  
NEVER HELD THE 12-PERSON JURY  
HAS TO BE UNANIMOUS SO-- THAT  
IS CROSSING ISSUES.

>> DEFENDANTS UNDER OUR, WE HAVE  
A SEPARATE CONSTITUTIONAL  
AMENDMENT RIGHT TO JURY TRIAL IN  
FLORIDA.

THE EIGHTH AMENDMENT MUST BE  
CONSTRUED CONSISTENT WITH THE  
UNITED STATES SUPREME COURT.

>> BUT NOT THE SIXTH.

>> AND THIS COURT HAS ALWAYS  
SAID THAT JURY VERDICTS IN  
CRIMINALS--

>> IF LOOKING FINAL BINDING  
VERDICTS BUT TALKING ABOUT THE  
WEIGHING PART, THAT ISN'T THE  
VERDICT.

>> THINK ABOUT IT FROM EVERY  
DEFENDANT AND EVERY PERSON'S  
POINT OF VIEW.

WHETHER, JUSTICE SCALIA, YOU GO  
BACK TO WHAT HE SAYS, WHETHER  
SOMEBODY WILL HAVE A TWO-YEAR  
SENTENCE THAT HAS TO BE FOUND  
UNANIMOUSLY BUT WHETHER THAT  
DEFENDANT WILL BE SENTENCED TO  
DEATH, CAN BE BASED ON FINDINGS  
THAT THE JURY DOESN'T MAKE.

THAT'S WHAT--

>> NO.

BECAUSE THE JUDGE HERE CANNED  
MAKE FINDINGS, CAN'T MAKE  
FACTUAL FINDINGS THE JURY ISN'T

MAKING.

I GUESS WE GET BACK TO THE ISSUE, THIS ISN'T A FACT SO.

>> IF YOU DON'T BUY THE WEIGHING, WHAT ABOUT THERE IS AGGRAVATORS BUT ARE THEY SUFFICIENT?

BECAUSE, YOU KNOW, WE HAVE, LIKE THE STATE HAS TAKEN THE POSITION AND FRANKLY I WAS THERE BEFORE HURST, THAT YOU JUST NEED A PRIOR VIOLENT FELONY.

BUT THEN YOU LOOK AT, WITH HE HAD A CASE LAST MONTH, THE PRIOR VIOLENT FELONY WAS 20 YEARS OLD AND IT WAS VIOLENT BUT IT WAS NOT A SUBSTANTIAL FELONY.

>> YOU DON'T REALLY GET INTO THE ISSUE, IS IT SINGLE AGGRAVATOR, IS IT ALL THE AGGRAVATORS.

>> SUFFICIENT COULD BE HAC COULD BE SUFFICIENT, IF JURY CONSIDERS THAT IT'S DEPENDING ON WHAT IT IS, BUT A PRIOR VIOLENT FELONY OR FELONY PROBATION MAY BE INSUFFICIENT.

SUFFICIENCY OF THE EVIDENCE IS WHAT THE JURY DOES.

THEY HAVE TO FIND IS IT SUFFICIENT BEYOND A REASONABLE DOUBT TO ALLOW THE IMPOSITION OF THE DEATH PENALTY.

>> WELL-- I THINK YOU CHANGED THE STATUTE A LITTLE BIT. WHAT THEY HAVE TO FIND IS THAT THE AGGRAVATORS OUTWEIGH THE MITIGATORS.

>> LET ME ASK YOU THIS QUESTION. YOU SAID WE CHANGED THE STATUTE. THE STATE SAYS, THE REASON IT IS NOT EX POST FACTO BECAUSE IT IS PROCEDURAL, NOT SUBSTANTIVE. THE WAY THAT I UNDERSTAND IT, AS PROCEDURES THAT THAT ENACT THE DEATH PENALTY, THAT THOSE PROCEDURES ARE GENERALLY PROCEDURES THAT THE COURT ENACTS, NOT THE LEGISLATURE OF THE SO HOW DO YOU, HOW DO YOU SQUARE YOUR POSITION THAT THESE

ARE NOT SUBSTANTIVE CHANGES WITH THE VIEW THAT THE COURT HAS NO ROLE IN LOOKING AT THE PROCEDURES BY WHICH DEATH IS IMPOSED IN THIS STATE?

>> WELL THIS COURT HAS REJECTED THE ARGUMENT THAT 921.141 IS PROCEDURAL AND IS A VIOLATION OF SEPARATION OF POWERS AND HAS PREVIOUSLY REJECTED THAT SEVERAL TIMES.

IN THE SEPARATION OF POWERS CASES YOU TALK ABOUT YES, THERE MAY BE PROCEDURAL ASPECTS TO LEGISLATION BUT AS LONG AS THEY'RE JUST INCIDENTAL TO THE SUBSTANTIVE PARTS, AS LONG AS THEY DON'T CONTRADICT PROCEDURES WHICH HAVE BEEN ADOPTED BY THIS COURT, THERE'S NO CONSTITUTIONAL PROBLEM WITH IT.

AND YOU ALSO HAVE UNDER RULE 3780 WHERE THIS COURT SAID PENALTY PHASE PROCEEDINGS ARE BASICALLY GOVERNED BY THE STATUTE.

SO YOU BASICALLY PERMITTED THE LEGISLATURE TO TAKE ON THAT ROLE OF CREATING THE PROCEDURES AND MOST OF THAT STATUTE IS IN FACT SUBSTANTIVE.

IT IS DEFINING THE AGGRAVATING FACTORS, DEFINING MITIGATION AND SETTING OUT-- A LOT OF IT IS CERTAINLY PROCEDURAL BUT IT WITHSTOOD MANY YEARS THE SEPARATION OF POWERS ARGUMENT.

>> WE WOULD WANT TO INTERPRET CONSISTENT WITH THE CONSTITUTION.

>> CERTAINLY.

IT REAL.

>> IT REALLY GOES BACK TO THAT ONE PART OF THE AGGRAVATORS OUTWEIGHING THE MITIGATORS AND YOU AGREED WITHOUT THAT FINDING WHOEVER MAKES IT YOU CAN NOT HAVE A DEATH PENALTY IMPOSED?

>> THAT'S CORRECT.

I JUST DON'T THINK THAT IS A

FACT.

THAT IS SOMETHING PEOPLE CAN  
DISAGREE ABOUT WITHOUT BEING  
WRONG.

I THINK IF YOU HAVE A FACT,  
WHETHER THIS--

>> WHETHER A HAVING VATOR EXISTS  
YOU-- WHETHER SOMEONE IS GUILTY  
OR INNOCENT SOMEONE CAN  
DISAGREE.

>> WHY WE HAVE THE JURIES MAKE  
THE DETERMINATION.

>> WHY WE REQUIRE UNANIMITY.  
IF ONE JUROR LOOKS AT THE  
EVIDENCE AND DOESN'T THINK IT IS  
SUFFICIENT, THERE IS NO BINDING  
VERDICT, CORRECT IN FLORIDA.

>> I'M SORRY, COULD YOU REPEAT  
THAT?

>> IF ONE JUROR DOESN'T THINK  
THE EVIDENCE IS SUFFICIENT,  
THERE IS NO VERDICT?

>> WELL IF, I MEAN I GUESS IT'S  
A MISTRIAL, TALKING ABOUT GUILT  
PHASE, REGULAR TRIAL, YOU CAN  
NOT GET A CONVICTION IF YOU  
DON'T HAVE UNANIMOUS JURY.

IF YOU HAVE ONE JUROR SAYING NO  
I'M NOT CONVINCED BY THIS  
EVIDENCE YOU MAY, THE JUDGE MAY  
ULTIMATELY GRANT A MISTRIAL.  
HE MAY ULTIMATELY CONVINCED THE  
OTHER JURORS THAT THE EVIDENCE  
IS SUFFICIENT AND THEY CAN  
ACQUIT.

THERE IS A DIFFERENCE BETWEEN  
FACTS AND THESE DETERMINATIONS  
ABOUT SUFFICIENCY, AGGRAVATORS  
OVER MITIGATION.

BECAUSE PART OF THE DETERMINING  
SUFFICIENT AGGRAVATORS IS PART  
OF THE WEIGHING ALSO.

YOU'RE DETERMINING WHAT WEIGHT  
TO GIVE THE AGGRAVATORS.

LIKE AS YOU MENTIONED WITH THE  
PRIOR FELONY, IT MAY BE VERY  
OLD.

THE JURY MAY THINK THAT IS NOT  
SUFFICIENT EVEN THOUGH IT'S A  
PRIOR CONVICTION.

BUT THAT'S A JUDGMENT CALL AS TO SUFFICIENCY.

IT IS NOT REALLY A QUESTION OF FACT.

THERE'S NOT A POINT WHERE ONE PERSON CAN THINK IT'S SUFFICIENT AND ANOTHER PERSON CAN THINK IT'S NOT SUFFICIENT AND THEY BOTH CAN BE RIGHT.

BECAUSE IT SUBJECTIVE DETERMINATION WHICH IS WHY IS NOT A FACTUAL FINDING.

JURY CREATED--

>> YOU REALIZE WHAT YOU'RE SAYING?

WHOLE ISSUE WHETHER SOMETHING IS SUFFICIENT, PEOPLE CAN DISAGREE. WE HAVE A WHOLE DEATH PENALTY STATUTE BASED ON WHETHER A JUDGE IN MIAMI THINKS SOMETHING IS SUFFICIENT WHEREAS A JUDGE IN JACKSONVILLE DOESN'T.

AND, THE WHOLE IDEA OF WHAT WE'RE SAYING IS REALLY A SINGLE, UNDER ALL THE STATUTE, A SINGLE JUDGE COULD DECIDE SOMETHING WAS SUFFICIENT OR NOT SUFFICIENT, AND WHETHER THAT PERSON WOULD BE, WOULD GO TO THE, TO BE EXECUTED.

>> WEALTH JUDGE CAN'T FIND IT'S SUFFICIENT WITHOUT KNOWING THAT THE JURY MADE FINDINGS THAT THESE AGGRAVATORS EXIST. SO ONCE THE JURY MAKES THE FINDINGS THAT THESE AGGRAVATORS EXIST, I THINK, ANY JUDGE IS FREE TO FIND THAT ANY ONE OF THEM ARE SUFFICIENT IN DOING THE WEIGHING, WHEN YOU'RE DOING THE ULTIMATE--

>> THAT DOESN'T LEAD TO ARBITRARINESS FOR JUDGE TO DO THAT, RATHER THAN A 12-PERSON JURY?

>> I KNOW WE'RE OUTLIER, EIGHTH AMENDMENT YOU ARE IN CONFORMITY WE'RE KIND OF LIMITED WHAT WE CAN DO, BY BEING AN OUTLIER, WE'RE AN OUTLIER BECAUSE WE GO

ABOVE AND BEYOND.

WE OFFER A LOT MORE PROTECTION TO CAPITAL DEFENDANTS THAN MOST PLACES THAT MIGHT JUST HAND THE DECISION OFF TO THE JURY AND I KNOW, MY EXPERIENCE, THIS COURT TAKES VERY SERIOUSLY THE SENTENCING ORDERS THAT ARE WRITTEN BY A JUDGE.

THERE IS A LOT OF CASE LAW THAT HAS GOTTEN HOW THEY DESCRIBE, THEY HAVE TO DEFINE, SAY WHAT WEIGHT THEY'RE GIVING AGGRAVATORS.

YOU'RE NOT GOING TO HAVE THAT WITH A JURY RECOMMENDATION.

>> DO THEY STILL HAVE TO DO THAT?

>> YES, ABSOLUTELY.

>> THIS COURT STILL LOOKS AT WHETHER IT'S, MOST AGGRAVATED AND LEAST MITIGATED?

>> ABSOLUTELY.

YOU STILL HAVE THAT, AND YOU WILL HAVE THE BENEFIT OF HAVING JUDICIAL FINDINGS TO ASSIST YOU WITH THAT, PLUS, YOU WILL HAVE THE RECORD OF KNOWING WHAT AGGRAVATING FACTORS THE JURY FOUND UNANIMOUSLY.

SO YOU'RE GOING TO HAVE MORE INFORMATION GOING INTO YOUR PROPORTIONALITY REVIEW TO BE ABLE TO CONSIDER.

I THINK WE HAVE STRENGTHENED IT. WE HAVE MADE IT, I THINK BETTER FOR CRIMINAL, CAPITAL DEFENDANTS AND EVEN IF IT'S LITTLE DIFFERENT THAN THE WAY OTHER PEOPLE DO IT THAT IS NOT NECESSARILY AN EIGHTH AMENDMENT PROBLEM.

>> YOU'RE SAYING NONE OF THE OTHER STATES THAT REQUIRE UNANIMITY ALLOWS THE JUDGE TO ACTUALLY IMPOSE A LIFE SENTENCE?

>> I DON'T KNOW THAT.

I DON'T KNOW THAT.

>> YOU SAID WE'RE BETTER THAN THE OTHER STATES.

>> I MEAN YOU'RE TALKING ABOUT THIS BEING ANOTHER DETERMINATION IN, THAT SETTING IT APART BY HAVING THE TRIAL JUDGE FOLLOW UP BUT I CAN'T SPEAK TO WHETHER OTHER STATES ALLOW THE JUDGE TO OVERRIDE LIFE VERDICT, OR UNDER WHAT CIRCUMSTANCES.

>> WE'RE, TALKING ABOUT OVERRIDING A DEATH VERDICT.

>> OVERRIDING A DEATH VERDICT. I MISSPOKE, YES.

>> I LIKE TO ASK A QUESTION WHAT WE OUGHT TO DECIDE IN THIS CASE.

>> OKAY, GOOD.

>> THERE IS SUPPLEMENTAL BRIEFING.

IS IT THE STATE'S POSITION THAT THE QUESTION THAT WAS THE SUBJECT OF THE SUPPLEMENTAL BRIEFING IS A YES THAT WE SHOULD DECIDE IN THIS CASE?

I THINK THAT QUESTION WAS NOT, WAS NOT PART OF THIS CASE, WAS IT?

>> NO, IT IS NOT A CASE CONTROVERSY.

JUST GIVING ADVISORY OPINION TO THAT PART OF THE STATUTE.

>> DO YOU THINK WE SHOULD DO THAT IN THIS CASE?

>> I DON'T THINK THAT IS A GOOD PRACTICE.

I THINK IT WOULD BE BETTER TO WAIT TO SEE WHEN THE ISSUE COMES UP IN A CASE AND HAVE IT--

>> LET ME ASK YOU THIS.

ARE WE, WHO IS GOING TO DECIDE WHAT THE SPECIAL, WHAT THE VERDICT IS GOING TO LOOK LIKE THE SPECIAL VERDICT AND JURY INSTRUCTIONS?

ARE WE GOING TO ALLOW PROSECUTIONS TO GO FORWARD WITHOUT ANY JURY INSTRUCTIONS AND SPECIAL VERDICTS?

>> THERE HAVE BEEN SOME PROSECUTIONS ALREADY.

WE DO ALREADY HAVE, I KNOW OF AT LEAST ONE DEATH SENTENCE HAS

BEEN IMPOSED USING THE NEW  
STATUTE.

>> WITH SPECIAL VERDICTS AND  
JURY INSTRUCTIONS?

>> YES.

I KNOW THAT THERE ARE DRAFT JURY  
INSTRUCTIONS THAT ARE BEING  
DISCUSSED.

I THINK THERE ARE A COUPLE OF  
SETS OUT THERE.

I KNOW THERE IS A SET ON THIS  
COURT'S WEBSITE.

I THINK PEOPLE ARE WORKING VERY  
HARD COMING UP WITH THOSE TYPE  
OF ISSUES AND RESOLVING THAT SO  
THAT WE CAN MOVE FORWARD WITH  
THE TRIALS.

BUT I THINK WHAT'S PRESENTED IN  
THIS CASE IS SIMPLY, ARE WE  
CONSTITUTIONAL IN USING THE  
AMENDED STATUTE?

IS THAT THE LEGISLATIVE INTENT,  
NUMBER ONE, WHICH I THINK IT  
CLEARLY IS NOT ONLY BASED ON THE  
LEGISLATIVE HISTORY BUT ALSO CON  
TICKS, THE PURPOSE OF THIS  
AMENDED STATUTE.

AND NUMBER TWO, IS THERE  
CONSTITUTIONAL PROHIBITION  
BEFORE, BY APPLYING IT TO THESE  
PENDING CASES.

AND THERE IS NOT ONE.

SO, FOR THOSE REASONS THE  
PROSECUTION BELOW SHOULD GO WITH  
THE STATUTE AS AMENDED.

>> HERE'S THE PROBLEM THOUGH.  
BECAUSE WE-- WE HAVE HURST  
PENDING.

IF WE DECIDE THAT THE  
AGGRAVATORS HAVE TO OUTWEIGH THE  
MITIGATORS TO COMPLY WITH THE  
SIXTH AMENDMENT, IT HAS TO BE  
DONE CONSTITUTIONALLY, YOU THEN,  
IT IS REALLY WHY THE QUESTION  
WAS ASKED.

IT IS NOT, MAY NOT BE UNTIL  
HURST IS DECIDED WHAT IS THERE,  
BUT IF WE DECIDE THAT, WE CAN'T  
GIVE LESS PROTECTION TO PENDING  
PROSECUTIONS IF THE STATE IS

TAKING THE POSITION THAT THE AGGRAVATORS OUTWEIGHING THE MITIGATORS DOES NOT HAVE TO BE UNANIMOUS.

YOU UNDERSTAND WHAT I'M SAYING?

>> WELL, IF YOU FEEL LIKE THERE IS A CONSTITUTIONAL FLAW IN THE AMENDED STATUTE, YOU KNOW--

>> NOT A QUESTION.

IT WOULD BE DECIDING HURST, AS TO WHAT HURST REQUIRES, RIGHT?

>> OKAY.

>> WHICH IS WHAT ARE THE FACTUAL FINDINGS.

>> OKAY.

>> THE STATE TOOK THE POSITION, ONE AGGRAVATOR ALL THAT HURST REQUIRES.

SO THAT HAS TO BE DECIDED IN HURST.

>> RIGHT.

>> IF IT IS DECIDED WHERE THE AGGRAVATORS OUTWEIGH THE MITIGATORS HAVE TO BE DECIDED BY THE JURY UNANIMOUSLY, MAYBE THAT ANSWERS THE QUESTION THEN, FOR THIS CASE.

SO MAYBE WE JUST HAVE TO DECIDE HURST FIRST?

>> WELL I THINK YOU CAN LOOK AT WHAT THE QUESTIONS THAT HAVE BEEN CERTIFIED TO THIS COURT, I MEAN, I'M VERY ANXIOUS FOR YOU TO DECIDE HURST ANYWAY.

SO I DON'T WANT TO, WANT TO TELL YOU, NO, YOU DON'T HAVE TO WAIT UNTIL THEN.

I THINK THE COURTS, THE TRIAL COURTS OBVIOUSLY NEED A LOT OF GUIDANCE IN THIS AREA, NOT ONLY, THAT THE OLDER CASES THAT WE HAVE, THE POST-CONVICTION CASES ARE ALL KIND OF IN LIMBO AT THIS POINT.

EVERYTHING IN FEDERAL COURT HAS BEEN STAYED FOR GREAT DEAL OF TIME NOW.

REALLY UNTIL WE GET MOVING FORWARD AGAIN AND GET A DETERMINATION FROM THIS COURT

WHAT HURST ACTUALLY MEANS,  
EVERYTHING IS JUST SORT OF UP IN  
THE AIR WHICH IS NOT A GOOD  
SOLUTION FOR ANYBODY.

SO, WE WOULD URGE YOU TO, TO  
APPROVE THE DECISION OF THE  
FIFTH DISTRICT BELOW AND ALLOW  
THE PROSECUTION TO GO FORWARD  
BELOW WITH THIS AMENDED STATUTE.

>> DO YOU SEE ANY DIFFERENCE  
BETWEEN THE NEW STATUTE APPLYING  
TO PENDING PROSECUTIONS WHICH IS  
ALL THE CERTIFIED QUESTION  
ASKED?

>> YES.

>> SO WE DON'T ANSWER IT AS TO  
CASES THAT WOULD COME ON, WOULD  
BE REVERSED BASED ON HURST?  
WE'RE ONLY ANSWERING IT AS TO  
PENDING PROSECUTIONS?

>> I THINK YOU'RE ANSWERING IT  
AS PENDING PROSECUTION IN THIS  
CASE.

>> COULD IT BE DIFFERENT FOR  
RESENTENCING?

>> I WOULDN'T THINK SO.

I WOULD--

>> YOU'RE NOT ASKING--

>> IT IS NOT REALLY WITHIN THIS  
CASE BECAUSE THAT'S NOT WHAT  
THIS CASES ABOUT BUT I THINK, I  
MEAN I THINK WHETHER IT'S  
SOMEONE AWARDED A NEW SENTENCING  
TOMORROW, I THINK THEY WOULD  
ALSO BE ENTITLED TO THE AMENDED  
STATUTE.

>> THAT IS NOT BEFORE US?

>> THAT IS NOT BEFORE YOU IN  
THIS CASE.

SO THANK YOU, YOUR HONORS.

>> LET ME DO THIS.

LET ME GIVE EACH SIDE TWO  
MINUTES TO REBUT.

YOU CAN GO.

>> [INAUDIBLE]

>> I THINK MR. McCLAIN ASKED  
FOR REBUTTAL.

>> QUICKLY, I THINK, WE INTENDED  
TO POINT OUT THAT MR. PERRY'S  
TRIAL IS SET FOR AUGUST 23 rd

OR THEREABOUTS.

>> WHAT?

AUGUST?

>> YES, SET IN LATE AUGUST AND,  
THAT COULD BE A PROBLEM WITH  
THIS PENDING.

>> HAS SOMEONE MOVED FOR A STAY  
HERE?

>> I DON'T KNOW THAT THEY HAVE.

>> WELL IT IS-- NOT YOUR  
AMICUS.

THAT IS UP TO THEIR LAWYERS.

>> I UNDERSTAND.

I WANTED TO POINT OUT IN THE  
PERRY REPLY BRIEF, BECAUSE I  
THINK THIS IS RIGHT ON POINT, TO  
THE POINT THAT MS. DITTMAR WAS  
MAKING, CAMPBELL v. STATE,  
PAGE 5, FOOTNOTE 4.

THIS QUOTE FROM

CAMPBELL v. STATE TO BE  
SUSTAINED THE TRIAL COURT'S  
FINAL DECISION IN THE WEIGHING  
PROCESS MUST BE SUPPORTED BY  
SUFFICIENT, COMPETENT EVIDENCE  
IN THE RECORD.

THIS COURT HAS ALREADY HELD THAT  
THE WEIGHING PROCESS IS A  
FACTUAL ISSUE.

I THINK THAT COMPLETELY DISTORTS  
THE STATE'S POSITION.

>> YOU READ THAT FROM-- WHAT  
DID YOU JUST READ.

>> CAMPBELL v. STATE.

571 SO.2D AT 420.

THAT IS LIKE A 1992 CASE.

THIS COURT SAID THAT THE  
WEIGHING PROCESS, JUDGE'S  
DECISION IN THE WEIGHING PROCESS  
MUST BE SUPPORTED BY SUFFICIENT,  
COMPETENT EVIDENCE.

THAT MEANS A FACTUAL ISSUE.

>> WEIGHING PROCESS HAS TO BE  
SUPPORTED BY COMPETENT EVIDENCE  
OF THE AGGRAVATING CIRCUMSTANCE  
AND THE MITIGATING CIRCUMSTANCES  
RIGHT?

THAT'S THE WAY I READ WHAT THAT  
SAYS.

>> WELL, I MEAN I THINK THAT,

YEAH, I MEAN, MITIGATING AND ALSO THE CONCLUSION--

>> YOU TAKE THOSE FACTUAL FINDINGS OF MITIGATING CIRCUMSTANCES, THOSE FINDINGS OF AGGRAVATING CIRCUMSTANCES AND WEIGH THEM TO MAKE A DETERMINATION WHETHER THEY, ONE OUTWEIGHS THE OTHER.

>> RIGHT IN TERMS OF WEIGHING OUTCOME ALSO, THIS COURT INDICATED, IT WAS A QUESTION WHETHER OR NOT THERE WAS COMPETENT EVIDENCE TO SUPPORT THE JUDGE'S CONCLUSION AS TO THE RESULT OF THE WEIGHING PROCESS. THAT INDICATES TO ME THAT IT'S A FACTUAL ISSUE.

>> DO YOU KNOW WHAT THE STATUS IS THE CASE OF MIAMI WHERE THEY DECLARED THE DEATH PENALTIES.

>> I KNOW SOMETHING HAS BEEN FILED IN THE THIRD DCA, AND THERE IS A QUESTION, I THINK THERE HAS BEEN A MOTION TO STAY IT PENDING THIS CASE. I DON'T KNOW THAT, WHAT'S HAPPENED SINCE THEN.

>> YOU AGREE WITH MISS DITTMAR, DO YOU, THAT WE ASKED FOR THE SUPPLEMENTAL PREVIOUS THAT THIS CASE DOESN'T INVOLVE THE CONSTITUTIONALITY OF THE NEW STATUTE?

>> I THINK CONSTITUTIONALITY OF THE NEW STATUTE OF COURSE IS AT ISSUE. THIS COURT HAS TO CONSTRUE THE STATUTE IN ORDER TO ANSWER THE CERTIFIED QUESTION.

>> IN ORDER TO DECIDE WHETHER EX POST FACTO VIOLATION?

>> I BELIEVE SO. I THINK THAT'S INCLUDED. I MEAN, YOU HAVE TO DECIDE ALSO WHETHER THE STATUTE'S, YOU HAVE TO CONSTRUE IT IN A CONSTITUTIONAL FASHION. I THINK IT IS ALL SORT OF ONE BALL OF WAX, THAT YOU CAN'T

SEPARATE IT OUT.

I ALSO WANTED TO POINT OUT THE  
U.S. SUPREME COURT JUST  
YESTERDAY GRANTED, VACATED AND  
REMANDED AN ALABAMA CASE ON THE  
BASIS OF HURST.

KIRKLEY VERSUS ALABAMA.

A CASE WHERE THERE WAS UNANIMOUS  
JURY FINDING HAC, NONETHELESS  
VACATED THE DEATH SENTENCE.

I BELIEVE LOGICAL EXPLANATION  
THAT ALABAMA REQUIRES WRITTEN  
FINDINGS OF FACT BY THE JUDGE  
JUST LIKE FLORIDA.

I THINK THAT IS THE BEST  
EXPLANATION.

WE'LL BE HAPPY TO PROVIDE  
SUPPLEMENTAL BRIEFING ON THAT.

>> THANK YOU FOR YOUR ARGUMENTS.

>> DID I HAVE ANOTHER  
OPPORTUNITY?

>> I DON'T THINK SO.

WE'RE IN RECESS UNTIL TOMORROW  
MORNING.