

>> ALL RISE.

HEAR YE, HEAR YE, HEAR YE, THE SUPREME COURT OF FLORIDA IS NOW IN SESSION, ALL WHO HAVE CAUSE TO PLEAD, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD.

GOD SAVE THESE UNITED STATES, GREAT STATE OF FLORIDA AND THIS HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE SUPREME COURT OF FLORIDA. PLEASE BE SEATED.

>> GOOD MORNING AND WELCOME TO THE FLORIDA SUPREME COURT. FIRST CASE ON THE DOCKET IS DEVINEY VERSUS THE STATE OF FLORIDA.

>> RICHARD BRACEY FOR MISTER DEVINEY.

I HOPE TO FOCUS ON ISSUE ONE IS RELATED TO DENIAL A CHALLENGE TO RESPECTIVE JUROR HENDERSON. WITH THAT IN MIND.

>> ON PROSPECTIVE JUROR HENDERSON?

OR -- WEATHER WITH RESPECT TO HENDERSON OR ALSO SETTLEMENT?

>> I HOPE TO FOCUS ON JUROR HENDERSON BUT I WOULD BE HAPPY TO ADDRESS JUROR SUTHERLAND AS WELL.

WITH THAT IN MIND, THIS CASE IS ABOUT GRANTING A REMEDY TO WHICH HE IS -- ON A DEEPER LEVEL THIS CASE IS ABOUT HONORING OUR LEGAL SYSTEM'S COMMITMENT TO STABILITY IN THE LAW AND I HOPE TO MAKE 5 MAIN POINTS.

BRIEFLY NUMBER ONE, CALLS FOR CHALLENGE SHOULD BE GRANTED IF THERE IS REASONABLE DOUBT A JURY'S IMPARTIAL.

BY THE SAME TOKEN BY ESTABLISHING BEYOND A REASONABLE DOUBT A JURORS PARTIAL IS NOT NECESSARY. AND UNQUALIFIED PREDISPOSITION TO OPPOSE DEATH FOR

PREMEDITATED MURDER IS A VIEW THAT PREVENTS OR SUBSTANTIALLY IMPAIRS PROSPECT OF CAPITAL SURE'S PERFORMANCE OF THEIR DUTIES IN ACCORDANCE WITH BOTH AND INSTRUCTIONS.

>> ON THE FIRST POINT THE REASONABLE DOUBT STANDARD YOU ARTICULATED IS THE STANDARD FOR WHICH TRIAL JUDGES ARE TO EVALUATE WHETHER SOMEONE SHOULD BE STRUCK FOR CAUSE OR NOT.

WHAT IS OUR REVIEW?

>> THE STANDARD OF REVIEW IS MANIFEST ERROR WHICH THE COURT THAT IS TANTAMOUNT TO --

>> IF THERE IS CONFIDENT SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT DETERMINATION WE WON'T FIND ABUSIVE DISCRETION.

IS THAT FAIR?

>> I DISAGREE WITH THAT.

I WOULD SUGGEST I AM DRYING ON A PARTICULAR CASE THAT I READ, BURNS VERSUS UNITED STATES THAT THEY CITED BEFORE.

THE GENERAL NOTION IS WHAT A TRIAL COURT HAS MEASURE OF DISCRETION THEY HAVE TO CONSCIENTIOUSLY APPLY APPROPRIATE LEGAL STANDARDS.

>> OF THE TRIAL COURT STATES THEY HEARD THE EVIDENCE AND BELIEVE THE JUROR CAN BE VERY THERE IS COMPETENT SUBSTANTIAL EVIDENCE AND RECORD TO SUPPORT THE FINDING WOULD WE FIND, HAVE WE EVER FOUND IT TO BE ABUSE OF DISCRETION?

>> I WOULD HESITATE TO SAY YES OR NO.

I WOULD BE INTERESTED TO SEE THE CASE.

>> MY ULTIMATE QUESTION.

I DON'T MEAN TO CUT YOU OFF, YOU ARE MAKING YOUR POINTS.

IF WE FIND OR LOOK IN THIS RECORD THAT THERE IS COMPETENT SUBSTANTIAL EVIDENCE, ALTHOUGH

STATEMENTS ONE WAY AND  
STATEMENT THE OTHER WAY, THERE  
ARE STATEMENT INDICATING ONE  
COULD BE FAIR AND CONSIDER  
MITIGATING AGGRAVATING  
CIRCUMSTANCES AND NOT IMPOSE  
DEATH AUTOMATICALLY.

IS THAT SUFFICIENT FOR US TO  
AFFIRM AND FIND OUT THE TRIAL  
COURT DID NOT ABUSE ITS  
DISCRETION EVEN THOUGH WE AS  
TRIAL JUDGES MAY NOT HAVE MADE  
THE SAME CALL?

>> I WOULD SAY NO.  
HERE IS WHY IF I COULD  
ELABORATE.

MY THIRD POINT IS THE TRIAL  
COURT ARBITRARILY AND  
UNREASONABLY DID NOT CAUSE  
CHALLENGE TO JUROR HENDERSON  
AND HERE IS WHY.

FIRST OF ALL THIS COURT HAS  
SAID IN CASES LIKE HAYES VERSUS  
STATE, EVEN THOUGH TRIAL JUDGE  
IS ENTITLED TO A LARGE DISAGREE  
OF DISCRETION, THE STANDARD OF  
REVIEW IS NOT A MECHANISM BY  
WHICH TRIAL COURT IS  
RUBBER STAMPED AND ALONG THOSE  
LINES THE COURT SAID DIFFERENCE  
DOES NOT IMPLY --

>> LET ME ASK THIS WAY.  
I DON'T HAVE ANY SITES BUT  
THERE ARE A NUMBER OF CASES IN  
WHICH APPELLATE COURTS OF  
CORRECTLY SAID THEIR STATEMENTS  
MADE BY JURORS SIMPLY CANNOT BE  
REHABILITATED SO EVEN THOUGH  
THE JUROR MAY HAVE SAID OF  
COURSE I CAN FOLLOW THE LAW AND  
BE FAIR AND IMPARTIAL, WE WOULD  
REVERSE OR DETERMINE THE  
CHALLENGE SHOULD HAVE BEEN  
GRANTED BECAUSE OF OTHER  
STATEMENTS THAT WERE MADE.  
IS THAT CORRECT?

>> THAT IS CORRECT.  
AND THAT CIRCUMSTANCE, THE  
DECISION IN HILL VERSUS STATE,  
BASICALLY SAID IF A JUROR SAYS

I CAN CERTIFIED MY BIAS AND  
RENDER A VERDICT BASED ON THE  
LAW ANNOUNCED, EVEN IN THAT  
CIRCUMSTANCE A CAUSE FOR  
CHALLENGE SHOULD BE GRANTED IF  
IT IS CLEAR THE OPINION WILL  
NOT READILY YIELD TO THE  
EVIDENCE THAT IS A QUOTE,  
READILY YIELD.

I CERTAINLY AGREE THE STANDARD  
OF REVIEW IS CRITICAL AND  
GENERALLY SPEAKING I AGREE WITH  
THE POINT.

>> AND DISCUSSING WHAT JUSTICE  
LAWSON ASKED, WHAT MATTER AND  
SAYS, NOT BEING ABLE, I CAN BE  
FAIR AFTER BEING BROWBEATEN,  
HAVING SAID YOU CAN BE FAIR A  
LOT EARLIER, OH 02 IMMUTABLE  
CHARACTERISTICS, THINGS THAT  
WERE IMMUTABLE TO THE JUROR,  
THAT PERSON WAS A VICTIM OF THE  
SAME CRIME FOR WHICH THE  
DEFENDANT WAS BEING CHARGED.  
THE COURT SAID IT IS IMMUTABLE  
TO THAT JUROR, THEY CAN'T SET  
THAT ASIDE AFTER ARTICULATING  
THEY COULDN'T.

THESE ARE LEGAL ISSUES.  
ONE'S VIEW ON THE APPLICATION  
OF THE DEATH PENALTY IS A LEGAL  
ERROR JURORS DON'T UNDERSTAND  
HOW DEATH PENALTIES APPLY AND  
THAT SUGGESTS THOSE ARE THE  
SAME THINGS THAT CAN BE SUBJECT  
TO DISCUSSION AND EDUCATION BY  
THE COURT.

IS THAT NOT THE CASE?

>> THAT IS TRUE.

I THINK I COULD SAY THIS FOR  
PURPOSES OF OUR DISCUSSION.  
ON THIS POINT, ACCEPTING EVERY  
POINT THE COURT POINT OUT AS  
FAR AS STANDARD OF REVIEW.  
AFTER THE STATE ATTEMPT AT  
REHABILITATION, HENDERSON SAID  
THIS.

PREMEDITATION IS THE BIGGEST  
FACTOR FOR ME.

IF THE THOUGHT WAS PRESENT

PRIOR TO THE ACTUAL ACT I COULD NOT VOTE FOR LIFE. IT WOULD BE DEATH. AND IMMEDIATELY THEREAFTER THE DEFENSE ATTORNEY SAID JUROR HENDERSON, IN A CASE LIKE THIS YOU HAVE TO VOTE FOR LIFE OR DEATH AND YOU ARE SAYING, IF MISTER DEVINEY WAS CONVICTED OF MURDER VOTE WOULD BE FOR DEATH. SO I THINK THE STANDARD IS DIFFERENTIAL, THERE HAS TO BE MEANINGFUL REVIEW AND HERE I THINK THE FACT THAT THAT IS WHERE PROSPECTIVE JUROR HENDERSON ENDED UP AFTER THE ATTEMPT AT REHABILITATION IS SIGNIFICANT AND I WOULD ARGUE THAT HERE, THE TRIAL COURT, THE TRIAL COURT FAILED TO EXPLAIN ITS RULING OF THE TRIAL COURT DOESN'T HAVE TO ASK PLANE ITS RULING BUT THAT CAN HELP THE APPELLATE COURT DETERMINE WHETHER HE OR SHE PROPERLY EXERCISED DISCRETION AND IN CIRCUMSTANCES LIKE THIS WHERE THE TRIAL COURT FAILS TO EXPLAIN ITS RULING THE APPELLATE COURT HAS OFFERED NO INSIGHT INTO THE PROSPECT OF JUROR'S CERTAINTY WITH WHICH THEY PROVIDED ANSWERS OR CANNED OR AND AS A RESULT THE APPELLATE COURT ISN'T TO RELY ON ANSWERS AS THEY APPLY AND WHAT ELSE COULD THE APPELLATE COURT DO? THEY HAVE TO DO THAT. >> WHAT CAN THE TRIAL JUDGE ADD THAT WOULD BE HELPFUL? EXPRESSIONS? >> I THINK THE TRIAL COURT COULD SAY THE PROSPECT OF JUROR APPEARED TO BE CONFUSED BY THIS ANSWER OR THAT ANSWER, OR SEEN CLEARLY TO BE CLEAR ON THIS POINT,. >> I RECALL ONE PARTICULAR TRIAL LAWYER THAT APPEARED DURING JURY SELECTION WHEN THE DEFENSE

ATTORNEY GOT UP TO SPEAK, FIRST QUESTION OUT OF HIS MOUTH WITHOUT SAYING ANYTHING, ARE YOU GOING TO MAKE MY CLIENT TESTIFY? MOST PEOPLE WITHOUT BEING EDUCATED ABOUT THE LAW WOULD SAY I WANT TO HEAR FROM HIM AND APPROACH THE CHALLENGE FOR COSTS AND ONCE YOU EXPLAIN IT TO THE JUROR, SOMEONE ELSE WOULD EXPLAIN TO THE JUROR HOW IT WORKS AND I WILL FOLLOW THE LAW. SEE HOW THAT WORKS? SOMETIMES THE DEATH PENALTY IS EASIER.

YOU CAN NEVER GET THE DEATH PENALTY EVER.

WHAT ABOUT ADOLF HITLER WAS ON TRIAL, COULD YOU GET THE DEATH PENALTY THEN?

THAT KIND OF THING.

THAT IS A CONCERN.

ONCE THE JUROR IS EDUCATED OR SOMEONE CLAIMS TO KNOW WHAT THE LAW IS THEN THE NEXT STEP IS HOW DO WE KNOW HOW DOES THE TRIAL COURT NOW HE REALLY MEANS IT, I CAN REALLY FOLLOW THE LAW OR WHETHER I AM JUST SAYING THAT BECAUSE THAT IS WHAT EVERYONE ELSE IS SAYING AND THAT IS THE PROBLEM AND THAT IS THE RESPONSIBILITY, THE TRIAL JUDGE DETERMINED WHETHER THIS PERSON IS HONEST ABOUT HIS OR HER FEELINGS.

>> THE THING ABOUT THIS CASE, NO DOUBT JUROR HENDERSON UNDERSTOOD HIS DUTIES.

DURING THE TIME, THE STATE TOLD HIM, YOU UNDERSTAND, YOU FOLLOW THE LAW, DEATH IS NEVER REQUIRED.

CAN YOU OPPOSE DEATH IN A PARTICULAR CASE?

YOU UNDERSTAND THAT IS NOT AUTOMATIC?

I DO.

COULD YOU WEIGH THEM INTO GETTING EVIDENCE AND BALANCE IT.

IN A HYPOTHETICAL CASE, WHETHER  
PREMEDITATED MURDER COULD YOU  
VOTE FOR LIFE IN PRISON.  
PREMEDITATION IS THE BIGGEST  
FACTOR.

THAT IS THE JURY SELECTION AFTER  
THE JUDGE STARTED OUT BY  
EXPLAINING THE DUTIES.

>> DID YOU DO ANYTHING TO BACK  
AWAY FROM THAT AS WELL AS A  
SPECIFIC STATEMENTS, HE MADE THE  
GENERAL STATEMENTS.

DID ANYTHING BACK AWAY FROM  
THAT?

>> PREMEDITATION IS THE BIGGEST  
FACT.

THE NEXT AND FINAL EXCHANGE, YES  
IT WOULD AND IT WAS MINUTES  
LATER THE TRIAL COURT DENIED THE  
COST CHALLENGE.

THAT IS A CRITICAL POINT.

>> SORRY TO INTERRUPT.

COULD YOU HELP US UNDERSTAND HOW  
TO APPLY SUBSTANTIAL EVIDENCE  
STANDARD EVEN WHAT YOU AND  
JUSTICE KENNEDY TALKED ABOUT,  
THERE WERE OTHER STATEMENTS  
GIVEN WHAT WE HAVE SAID ABOUT  
NEEDING TO D FOR TO THE TRIAL  
COURT HAVING BEEN THERE AND IN A  
NORMAL CASE IF THERE IS EVIDENCE  
IN BOTH DIRECTIONS WHICH IS FAIR  
TO SAY IS TRUE HERE, IF WE LOOK  
AT THE RECORD AND THERE IS  
EVIDENCE WHAT THE TRIAL COURT  
DID IS THE END OF THE INQUIRY.  
IT SOUNDS LIKE WE WOULD HAVE TO  
BACK AWAY FROM THAT STANDARD OR  
BE APPLYING IT HERE IN A WAY WE  
DON'T APPLIED IN ANY OTHER  
CONTEXT.

>> I WOULD SAY THIS.

THIS COURT STATED, QUOTING SHIP  
FIELD, COMPETENT SUBSTANTIAL  
EVIDENCE IS EVIDENCE  
SUFFICIENTLY RELEVANT AND  
MATERIAL FOR REASONABLE MIND TO  
ACCEPT IS ADEQUATE TO SUPPORT  
THE CONCLUSION REACHED AND THE  
CONCLUSION REACHED WOULD BE

THERE IS NO REASONABLE DOUBT  
MISTER HENDERSON WAS IMPARTIAL  
AND TO STATE THAT MORE  
AFFIRMATIVELY, THERE IS NO  
REASONABLE POSSIBILITY WAS  
PARTIAL, NO REASONABLE  
POSSIBILITY HE POSSESSED DEVIL  
PREMEDITATED MURDER.

>> WE SEEM TO BE FOCUSING JUST  
ON THE LAST STATEMENT AND NOT ON  
THE ENTIRE RECORD.

IF YOU LOOK AT THE ENTIRE  
COLLOQUY ON THIS ISSUE THERE IS  
A LOT THERE.

THE FIRST QUESTION ASKED TO HIM  
IS THE ULTIMATE QUESTION.

THIS IS DIFFERENT FROM OTHER  
CASES WHERE RIGHT OFF THE BAT,  
DEATH, DEATH, DEATH.

WHAT HE ASKED IS YOU BELIEVE THE  
PERSON WHO HAS BEEN FOUND GUILTY  
OF MURDER SHOULD AUTOMATICALLY,  
THE DEATH PENALTY SHOULD BE  
IMPOSED?

I WOULD SAY NO.

THERE ARE GOING TO BE OTHER  
CIRCUMSTANCES I WOULD LIKE TO  
HAVE FULL KNOWLEDGE OF.

UNLIKE THE SITUATION JUSTICE --  
CAN BE REHABILITATED, HE SAYS  
THE RIGHT THING RIGHT UP FRONT  
UNDER THE LAW.

THEN THERE IS CONFLICT ABOUT IF  
IT IS PREMEDITATED, THEN HE IS  
EDUCATED BY THE STATE, MORE  
QUESTIONING, THE STATE GOES  
THERE AND HE HEARS EVERYTHING  
ELSE HE SAYS, CAN YOU FOLLOW THE  
LAW AS YOU UNDERSTAND IT?

YES.

AND YOU UNDERSTAND THE DEATH  
PENALTY IS NOT AUTOMATIC AND THE  
WAY THE AGGRESSIVE EATERS AND  
MITIGATE HIS AND HE CONFIRMED HE  
COULD DO THAT.

I UNDERSTAND THERE ARE OTHER  
STATEMENTS BUT GIVEN THE RECORD  
HOW CAN WE SAY TRIAL JUDGE  
ABUSED ITS DISCRETION AS A  
MATTER OF LAW, NO TRIAL JUDGE ON

THE FACE OF THE EARTH COULD HAVE ACTED IN A DIFFERENT WAY THAN HIS TRIAL JUDGE DID HEARING THAT RECORD?

>> I CERTAINLY ACKNOWLEDGE THE TRIAL COURT IS ENTITLED TO A LARGE DEGREE OF DIFFERENCE AND A MEASURE OF DISCRETION.

I'M SIBLEY SAYING I THINK IF THIS COURT FINDS THE TRIAL COURT DIDN'T ABUSE ITS DISCRETION IT IS RUNNING THE RISK OF ABANDONING OR ADVOCATING ITS DUTY TO CONDUCT APPELLATE REVIEW.

I UNDERSTAND THAT WAS THE FIRST STATEMENT, BUT THE JURY CLARIFIED OTHER CIRCUMSTANCES, STATE OF MIND AT THE TIME OF THE CRIME.

IF IT IS PREMEDITATED --

>> THE FIRST STATEMENT IS NOT INCONSISTENT.

THE STATEMENT THAT IS NOT AUTOMATIC, NOT INCONSISTENT WITH FIXATION.

IS THAT CORRECT?

>> THE FIRST QUESTION WAS IF A DEFENDANT IS CONVICTED OF FIRST-DEGREE MURDER UNDER PREMEDITATED MURDER THEORY OR FELONY MURDER THEORY HE SAYS NO, I WOULDN'T AUTOMATICALLY AND WITHIN A FEW QUESTIONS IT IS CLEAR HE IS CONCERNED ABOUT STATE OF MIND AT THE TIME OF THE CRIME, PREMEDITATION AND IF IT WAS A PREMEDITATED MURDER THEORY HE SAYS, THE DEFENSE ATTORNEY SAYS ANY OF THE STATE OF MINDS YOU WOULD LIKE TO KNOW?

IF IT IS PREMEDITATED IT IS PREMEDITATED.

WOULD YOU OPPOSE DEATH?

I WOULD.

>> AS A JUROR WHO WILL AUTOMATICALLY VOTE FOR THE DEATH PENALTY IF IT IS PREMEDITATED, QUALIFIED SURE? KNOWS THERE.

>> IS INCONSISTENT TO SAY WHAT HENDERSON SAID AT THE BEGINNING WHICH IS IF SOMEONE IS CONVICTED IT IS NOT AUTOMATIC DEATH PENALTY BUT IF IT IS PREMEDITATED IT IS AUTOMATIC, ARE THOSE INCONSISTENT?

>> NOT NECESSARILY INCONSISTENT.

>> IT IS A MORE GENERAL QUESTION, THEY TALKED ABOUT FELONY MURDER AND IF SOMEONE IS JUST CONVICTED, IS THAT AN AUTOMATIC DEATH PENALTY KICK YOU I WOULD NEED FURTHER CIRCUMSTANCES, THE CIRCUMSTANCES AND HE SAYS NOW.

IF IT IS PREMEDITATED THAT IS AUTOMATIC.

I DON'T SEE THOSE INCONSISTENT.

>> I AGREE.

I THINK THE POINT WOULD BE UNDER THE FIRST QUESTION IT WAS PREMEDITATED MURDER UNDER FELONY MURDER OR PREMEDITATED MURDER THEORY.

I DON'T THINK JUSTICE ANDERSON WOULD IMPOSE DEATH UNDER PREMEDITATED MURDER OR FELONY MURDER.

>> THE WAY THIS IS ASKED, THE DEFENSE ATTORNEY SAYS SOMEONE IS FOUND GUILTY AND YOU LIST WHAT THEY HAVE BEEN FOUND GUILTY OF. A SICKLY SOMEONE IS FOUND GUILTY OF FIRST-DEGREE MURDER, PREMEDITATED SPECIFIC INTENT, KILLED SOMEONE DURING THE COMMISSION OF A FELONY OR ATTEMPTED FELONY BURGLARY, HOME INVASION, SEXUAL BATTERY, MET -- ROBBERY, KIDNAPPING OR MURDER OF ANOTHER INDIVIDUAL, NO DEFENSE OF OTHERS, THE PERSON IS NOT INSANE, NOT SELF-DEFENSE, THEY WERE ABLE TO FORM A SPECIFIC INTENT.

DO YOU BELIEVE THAT PERSON WILL BE FOUND GUILTY SHOULD BE AUTOMATIC?

AUTOMATICALLY IMPOSED?

I WOULD SAY NO.

HOW IS THAT NOT INCONSISTENT WITH THE LATEST IT WAS ABOUT PREMEDITATION WHEN THAT IS THE VERY QUESTION?

>> I WOULD SAY I GUESS THE POINT I AM TRYING TO MAKE IS THE NEXT FEW QUESTIONS AND ANSWERS MAKE IT CLEAR --

>> THERE ARE STATEMENTS THAT GO THE OTHER WAY, NO DOUBT ABOUT THAT.

THE QUESTION I HAVE, YOU HAVE SOME EVIDENCE ON THE SIDE AND EVIDENCE ON THE SIDE AND THE TRIAL JUDGE LOOKING, OBSERVING, SAME FACIAL EXPRESSIONS, HEARING INTONATION, MAKE A DECISION ON THIS SIDE.

AS A MATTER OF LAW, THAT IS DISCRETION.

>> IN THESE PROTECTIVE CIRCUMSTANCES, YES.

>> WAS THE FIRST QUESTION A COMPOUND QUESTION, PREMEDITATED OR DURING THE COMMISSION OF A FELONY?

>> YES AND THE POINT I'M TRYING TO MAKE IS AS HE CLARIFIED THAT AND SEPARATED IT, IT WAS PREMEDITATED MURDER, HE WOULD AUTOMATICALLY IMPOSE DEATH. ONE LAST POINT I WOULD MAKE ON THIS POINT IS CIRCUMSTANCES INVOLVING JUROR HENDERSON ARE INDISTINGUISHABLE FROM CIRCUMSTANCES INVOLVING PROSPECT OF JUROR, PAGEANT WAS HIS NAME AND BRYANT VERSUS STATE, IN SOUTHERN CIRCUIT 529.

>> AND DIDN'T EVEN COST ABOUT -- TALK ABOUT SUBSTANTIAL EVIDENCE. THAT READS AS IF THE COURT WAS PUTTING ITSELF IN POSITION FOR THE TRIAL COURT AND MAKING THE SAME DECISION.

>> THE COURT DID NOT TALK ABOUT THAT.

THE COURT WAS APPROPRIATELY

APPLYING THE STANDARD IN THAT CASE.

>> ONE CONCERN READING THIS GOES TO THE SUPERIOR VANTAGE POINT. THERE IS SOMETHING UNFAIR ABOUT ASKING JURORS QUESTIONS WHERE YOU DON'T KNOW WHAT THEY KNOW ABOUT THE LAW AND ASKING THEM QUESTIONS ABOUT WHAT YOU WOULD DO ABOUT THIS OR THAT AND THEY ARE TOLD UNDER FLORIDA LAW YOU HAVE TO CONSIDER THIS AND WEIGH THE AGGREGATOR AND IN RESPONSE TO THAT I COULD FOLLOW THAT LAW, WHY CAN THE TRIAL COURT NOT TAKE THAT INTO ACCOUNT AND SAY IT HAS TO BE BOUND BY WHAT THE PROSPECT OF JUROR SAYS WHEN A REGULAR RENT ABOUT THEIR LEGAL RESPONSIBILITIES?

>> GENERALLY THE COURT CAN AND SHOULD IN THIS PARTICULAR CASE, I LAY THIS HOUSE IN A PORTION OF THE REPLY BRIEFING, HENDERSON WAS AWARE OF WHAT THE LAW REQUIRED PARTICULARLY BY HIS FINAL ANSWER REGARDING PREMEDITATION BEING THE BIGGEST FACTOR IN THAT IS CRUCIAL ABOUT THIS CASE.

THE PARTICULAR FACTS OF THIS CASE THAT GIVE RISE TO ABUSE OF DISCRETION IN THIS PARTICULAR CASE.

>> YOU HAVE EXHAUSTED YOUR TIME BUT I WILL GIVE YOU TWO MINUTES FOR REBUTTAL.

>> CHIEF JUSTICE KENNEDY, MAY IT PLEASE THE COURT.

I AM JENNIFER DONAHUE REPRESENTING THE STATE IN THIS MATTER.

AS FAR AS JUROR HENDERSON, YOU ARE CORRECT.

WE NEED TO LOOK AT THE ENTIRE RECORD.

THIS QUESTIONING STEMMED FROM A HYPOTHETICAL THE DEFENSE COUNSEL STARTED WITH A DIFFERENT JUROR. IN THAT HYPOTHETICAL, NO

MITIGATION WAS GIVEN AS PART OF  
A HYPOTHETICAL.  
YOU HAVE THE FACT OF WHAT  
HAPPENED, HE WAS FOUND GUILTY OF  
FIRST-DEGREE MURDER.  
THAT JUROR RESPONDED THAT IS ALL  
YOU ARE GOING TO GIVE ME?  
THAT'S ALL THE FACTS I GET IN  
ORDER TO ANSWER TO THAT  
HYPOTHETICAL AND THEY SAY YES.  
THE STATE OBJECTS TO THIS LINE  
OF QUESTIONING BECAUSE IT IS  
CONFUSING.  
EVEN THE COURT SAYS IT IS  
CONFUSING.  
THE DEFENSE COUNSEL DURING THOSE  
OBJECTIONS EXPLAINS HERE'S WHERE  
I'M TRYING TO GO WITH OF THIS  
AND THE STATE AND COURT  
ACKNOWLEDGE YOU CAN GO IN THAT  
DIRECTION, YOU CAN ASK THOSE  
QUESTIONS BUT THAT'S NOT HOW YOU  
ARE ASKING IT HERE.  
YOU ARE IMPOSING HYPOTHETICAL  
WITH NO MITIGATING CIRCUMSTANCES  
AND BASICALLY ASKING WHAT SHOULD  
YOU DO IN THIS CIRCUMSTANCE IN  
THIS HYPOTHETICAL THAT YOU HAVE  
GIVEN.  
IT IS QUITE LIKELY MISTER  
HENDERSON WAS GOING BACK TO THAT  
ORIGINAL HYPOTHETICAL WHERE  
THERE WERE NO MITIGATING  
CIRCUMSTANCES AND SAYING YES,  
THE DEATH PENALTY IS APPROPRIATE  
IN THOSE CIRCUMSTANCES.  
CERTAINLY THERE IS GREAT  
DEFERENCE TO THE TRIAL JUDGE  
BECAUSE HE GETS TO SEE THE  
DEMEANOR OF THE JURORS WHEN  
THESE QUESTIONS ARE ASKED.  
IT IS MUCH DIFFERENT IF HE SAYS  
ON THE PREMEDITATION, THE  
BIGGEST FACTOR FOR ME.  
IF I COULD NOT VOTE FOR A LIFE  
SENTENCE, HE MIGHT HAVE SAID, I  
CANNOT VOTE FOR A LIFE SENTENCE.  
WE DON'T KNOW.  
IT IS A COLD RECORD AND THAT IS  
WHY ON APPELLATE REVIEW THERE IS

GREAT DEFERENCE GIVEN TO THE TRIAL JUDGE, BECAUSE HE WAS ABLE TO SEE THE JURORS REACTIONS TO THESE QUESTIONS AND ULTIMATELY WE KNOW THE JUDGE FELT THIS JUROR COULD FOLLOW THE LAW.

>> WE HAD THE HYPOTHETICALS, WHAT IF THIS OR THIS OR THIS AND THERE IS THIS BUT NOT THIS, AND THEN SPECIFIC QUESTIONING WHAT IS IMPORTANT TO YOU AND HE SAYS STATE OF MIND AT THE TIME OF THE CRIME.

THEN THEY EXPLORE FURTHER.

WHAT DO YOU MEAN?

IF HE INTENDED AND THEY ASK FOR FURTHER IN THE FINAL, MISTER HENDERSON SAYS WHAT I WANT TO KNOW IS IF IT IS PREMEDITATED. DEFENSE SAYS IN THAT CASE WITH THE DEATH PENALTY WHEN YOU AUTOMATICALLY IMPOSE THE DEATH PENALTY?

I WOULD.

THAT IS AN UNEQUIVOCAL STATEMENT THAT IF THAT CIRCUMSTANCE IS THERE, I WOULD IMPOSE THE DEATH PENALTY.

IT MIGHT BE POSSIBLE THE STATE COULD HAVE GOTTEN BACK UP AND EXPLORED THAT AND FOUND OUT THERE WAS SOME CONFUSION THAT HE DIDN'T MEAN WHAT HE SAID BUT HOW CAN YOU TAKE THAT CLEAR UNEQUIVOCAL STATEMENT THAT FLOWS FROM A SPECIFIC QUESTIONING WHAT THAT JUROR THOUGHT WAS IMPORTANT IN THE DECISION TO RECOMMEND DEATH AND SAY SOME GENERALIZED STATEMENTS ABOUT THESE HYPOTHETICALS SOMEHOW NEGATE THAT?

>> HIS STATEMENT ALONE IS CONCERNING.

>> YOU WOULD AGREE A JUROR WHO SAYS A JUROR WHO WOULD VOTE TO IMPOSE THE DEATH PENALTY BASED ON FINDING OF PREMEDITATION IS NOT QUALIFIED.

>> IF THEY WON'T CONSIDER THE

MITIGATION.

>> THAT IS EXACTLY WHAT HE SAID,  
YOU AGREE.

IT WOULD BE AUTOMATIC, THOSE ARE  
THE WORDS USED.

>> HE PREVIOUSLY SAID IT IS NOT  
AUTOMATIC.

>> HE SAID IT IS NOT AUTOMATIC,  
THIS IS HERE, THIS IS HERE,  
MAYBE THIS OR THIS BUT HERE WE  
HAVE NARROWED TO WHAT IS  
IMPORTANT, AND HE SPECIFICALLY  
SAID IT IS AUTOMATIC IF  
PREMEDITATED.

WITHOUT MORE EXPLORATION OF  
THAT, HOW CAN WE CONCLUDE THAT  
THAT JUROR, ANY JUDGE WOULD NOT  
FIND THAT JUROR TO BE BIASED ON  
THAT RECORD?

>> I UNDERSTAND YOUR CONCERNS  
BUT THE QUESTION, IN A  
FIRST-DEGREE MURDER CASE A  
PERSON HAS SPECIFIC INTENDS BUT  
THE DEFENSE COUNSEL IS NOT  
ASKING IF YOU WOULD CONSIDER  
MITIGATION.

HE'S NOT GOING THAT STEP FURTHER  
SO SPECIFIC INTENT IS IMPORTANT.  
DOES THAT MEAN IF THE JUDGE  
INSTRUCTED YOU TO CONSIDER  
MITIGATION YOU WOULD NOT  
CONSIDER THAT MITIGATION?

>> WE DON'T KNOW.

ON THIS RECORD ALL WE KNOW IS  
THIS JUROR UNEQUIVOCALLY SAID HE  
WOULD VOTE FOR DEATH IF IT WAS  
PREMEDITATED MURDER.

>> IN SPECIFIC HYPOTHETICAL THE  
DEFENSE -- THE DEFENSE COUNSEL  
GAVE.

>> IT WASN'T HYPOTHETICAL.

HE ASKED HIM, IT WAS  
HYPOTHETICAL EARLIER, BUT IF HE  
WAS ASKING HIM WHAT IS IMPORTANT  
TO YOU.

WHAT DO YOU WANT TO KNOW?

>> AT THIS POINT, THE JUROR  
DOESN'T KNOW WHAT IS IMPORTANT  
BECAUSE HE HASN'T HEARD --

>> LET'S ASSUME THE TRIAL COURT

JUDGE COMMITTED ERROR BY NOT  
EXCUSING MISTER HENDERSON FROM  
THE JURY POOL.

YOU IN YOUR BRIEF ASKED THIS  
COURT TO RECEIVED FROM TROTTER.  
CAN YOU EXPRESS THAT?

IS THERE PREJUDICE TO MISTER  
DEVINEY BY THE TRIAL COURT NOT  
STRIKING FOR CAUSE MISTER  
HENDERSON?

>> THE CASE LAW AS IT STANDS HE  
PROPERLY PRESERVED THIS AND  
THERE'S PREJUDICE BECAUSE HE  
IDENTIFIED OTHER OBJECTIONABLE  
JURORS BUT THAT TERM  
OBJECTIONABLE IS VAGUE AND NOT  
DEFINED.

IT IS --

>> ONE OF THEM DID NOT SIT ON  
THE JURY POOL.

>> THAT IS CORRECT.

HE IDENTIFIED THOSE INDIVIDUALS  
SO UNDER THE CURRENT CASE LAW  
THAT HAS BEEN PRESERVED, THIS  
WOULD BE REVERSED IF YOU FIND  
THE JUDGE ABUSED HIS DISCRETION.  
IT IS CONSIDERED PREJUDICE BUT  
WHEN YOU COMPARE IT TO PREJUDICE  
IN ANY OTHER SENSE FROM THIS  
COURT THERE HAS TO BE A SPECIFIC  
PREJUDICE SUCH AS A BIASED JUROR  
AND THAT IS THE PREJUDICE, IS  
THERE A BIASED JUROR THAT SAT  
HERE AND THERE CERTAINLY IS NOT  
A BIASED JUROR, THE SPECIFIC  
JURY OF THIS CHOICE, HE IS  
ENTITLED TO A FAIR AND IMPARTIAL  
JURY AND IF NO BIASED JUROR SET  
ON THIS STORY HE HAD A FAIR AND  
IMPARTIAL JURY JUST BECAUSE HE  
FELT THREE OTHER JURORS WERE  
OBJECTIONABLE, THAT DOESN'T  
DEMONSTRATE PREJUDICE IN THE  
SENSE THAT WE ON APPELLATE  
REVIEW USUALLY ASSUME PREJUDICE.

>> IMPORTANT FOR A JUROR TO BE A  
BIASED JUROR, THE JUROR WOULD  
HAVE TO SAY, TO BE FAIR IN THIS  
CASE, PREMEDITATED MURDER.

>> THEY DON'T HAVE TO COME OUT

AND SAY IT.

>> GETTING INTO THE GRAY AREA.  
THERE IS DIFFERENT TO THE TRIAL  
COURT TO MAKE THAT DETERMINATION  
BECAUSE YOU CAN SEE MORE THAN  
YOU CAN FROM COLD APPELLATE  
RECORD.

>> PART OF THE QUESTION, TO BE  
PREJUDICED FOR THAT?

>> A BIASED JUROR WOULD HAVE TO  
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>> THE NORMAL WAY WE THINK ABOUT  
THIS, IT DOES UNDERMINE THE  
VALUE OF PERIMETER REASONS, NO  
HARM NO FOUL.

IS THAT WHAT YOU ARE SAYING?

>> HENDERSON DIDN'T SIT ON THIS  
JURY, HE WAS AT HOME.

>> WHERE DOES THAT LEAVE THE  
PERIMETER HE CHALLENGES?

>> PEREMPTORY CHALLENGES ARE  
VALUABLE AND ORIGINALLY THEY  
WERE INTENDED TO TAKE CARE OF  
ISSUES LIKE THIS, IF THE JUDGE  
ABUSES HIS DISCRETION, YOU GET A  
PERIMETER RECHALLENGE SO YOU CAN  
CHALLENGE THAT INDIVIDUAL AND  
THEY ARE NOT ON THE JURY OR YOU  
ARE NOT ABLE TO ARTICULATE IN  
THE RECORD THAT WOULD CONSTITUTE  
A BIASED SUCH AS THE JUROR, I  
DIDN'T GET A GOOD VIBE FROM THE  
JURY BEEN THE CAPITAL CONTEXT  
THEIR TEN CHALLENGES SO HE HAD  
TO USE ONE OF HIS 10 ON THIS ONE  
JUROR THE JUDGE DIDN'T THINK WAS  
BIASED DOESN'T SIT WELL WITH OUR  
TRADITIONAL SENSE OF REVERSIBLE  
PREJUDICE.

IT IS ALMOST A PER SE RULE, YOU  
HAVE TO PRESERVE I DON'T LIKE  
THESE OTHER PEOPLE AND NOW  
YOU'RE GOING TO GET A REVERSAL  
JUST BECAUSE THE BIASED JUROR  
YOU ARE CLAIMING IS BIASED TO  
DIDN'T SIT ON A JURY.

IT IS A STRANGE NOTION AND THAT  
IS WHY THE FEDERAL, YOU HAD TO  
HAVE A BIASED JUROR SIT ON YOUR  
PANEL IN ORDER TO DEMONSTRATE

REVERSIBLE PREJUDICE.

>> A LOT OF IT DEPENDS ON WHERE THE JUROR IS SEATED.

IN THIS CASE IF WE DETERMINE HENDERSON WAS A JUROR, AND IF THE DEFENSE HAD USED ALL TEN PEREMPTORY'S BEFORE WE GET TO HIM AND THEN FORCED TO ACCEPT HIM, AND THE ADDITIONAL PERIMETER HE WASN'T GIVEN AND HE SAT ON THE JURY THERE WOULD BE ENTITLEMENT TO RELIEF OF FEDERAL OR STATE LAW.

>> THAT BIASED JUROR ACTUALLY SAT AND THE DEFENDANT MIGHT HAVE WANTED THE JUROR'S 101-102-103 BUT WE DIDN'T GET TO THOSE JURORS.

YOU DON'T GET THE JURY OF YOUR CHOICE, YOU GET A FAIR AND IMPARTIAL JURY.

IF THERE ARE NO FURTHER QUESTIONS, THE COURT SHOULD CONFIRM THE SENTENCE IN THIS CASE, THANK YOU.

>> IF I COULD I WOULD LIKE TO MAKE TWO BRIEF POINTS REGARDING THE MERITS OF THE ADDRESS RECEDING FROM TROTTER.

PAGES 4 THROUGH 5 OF THE REPLY BRIEF DISCUSSES AT LENGTH THE POINTS IN THE RECORD WHERE MISTER HENDERSON WAS ADVISED AND REMINDED OF HIS DUTIES CAPITAL JURORS HAVE TO PERFORM.

THE OTHER THING I WOULD POINT OUT IS IN MANY CASES, AMBIGUITIES AND UNCERTAINTIES AS TO A JUROR'S AND PERSONALITY SHOULD BE RESOLVED IN FAVOR OF EXPLOSION.

WHETHER THE COURT SHOULD PROCEED FROM TRIAL BY THE MERITS IN MISTER DEVINEY'S FAVOR, EVEN IF TROTTER IS ERRONEOUS THE STRONG PRESUMPTION IN FAVOR OF ABIDING BY DON'T PRESIDENT HAS NOT BEEN OVERCOME.

I WOULD LIKE TO DISCUSS THAT A LITTLE MORE IF I COULD BUT I

ALSO WANT TO CHECK OUT EVEN IF THAT STRONG PRESUMPTION WAS OVERCOME IN THIS COURT RECEDED FROM TROTTER THE BURDEN WOULD BE ON THE STATE AS THE BENEFICIARY TO PROVE BEYOND REASONABLE DOUBT THE ERROR DID NOT CONTRIBUTE TO THE JURY'S DETERMINATION THE DEATH WAS APPROPRIATE.

THE KEY POINT I WANT TO MAKE WITH REGARD TO TROTTER'S TROTTER IS A 30-YEAR-OLD DECISION THAT WAS UNANIMOUS AND RELEVANT, REAFFIRMED OVER THE SAME ARGUMENT ADVANCED HERE IN REAFFIRMED THE SECOND TIME AND AGAIN OVER THE SAME ARGUMENT AND SO AS WE ALL KNOW, JUST BECAUSE A DECISION MAY BE ERRONEOUS MANY OTHER SHOWINGS HAVE TO BE MADE FOR THE COURT TO SAY I WILL RECEDE FROM OUR OWN PRECEDENT. HERE I DON'T THINK THEY HAVE PROVEN UNWORKABLE DUE TO RELIANCE ON JUDICIAL FICTION. IF THIS COURT WERE TO RECEIVED FROM TROTTER WHICH APPLIES NOT ONLY IN, CASES THAT CIVIL CASES IT WOULD LEAD TO A SERIOUS DISRUPTION IN THE LAW AND FINALLY THE FACTUAL PREMISES UNDERLYING TROTTER HAVE NOT CHANGED DRASTICALLY TO LEAVE IT CENTRAL HOLDING WITHOUT JUSTIFICATION.

IF I COULD END BY SAYING ONE REASON IS PRESUMPTION IN FAVOR OF STARTING THIS IS ABIDING BY PRECEDENT CONTRIBUTES NOT ONLY TO THE ACTUAL BUT PERCEIVED LEGITIMACY OF THE JUDICIAL PROCESS AND RISK PROPOSED BY RECEDING FROM PRECEDENT OF NEGATIVELY IMPACTING THE PERCEIVED LEGITIMACY OF JUDICIAL PROCESS.

THAT RISK INCREASES TO THE EXTENT THAT A DECISION IS ESTABLISHED.

HERE IT WAS FIRMLY ESTABLISHED,

THAT HISTORY REINFORCES THE  
PRESUMPTION IN FAVOR OF ABIDING  
BY RECEDING FROM TROTTER AND I  
ASK THIS COURT TO REVERSE THE  
ISSUE.

>> THANK YOU FOR YOUR ARGUMENTS  
TODAY.