

>> WHENEVER YOU ARE READY WE  
HAVE EVERYBODY GOING.

>> MAY IT PLEASE THE COURT, MY  
NAME IS VALERY LINEN AND I  
REPRESENT RODRICK WILLIAMS.

I DON'T HAVE THE BOOMING VOICE  
MISTER LLOYD HAD.

LEAGUE OF WOMEN VOTERS OF  
FLORIDA, ET AL., V. RICK SCOTT,  
GOVERNOR HE SHOULD BEFORE THE  
COURT AND THAT IS WHETHER THE  
TRIAL COURT REVERSIBLY AIRED BY  
MAKING A FACTUAL FINDING WHEN  
RESENTENCING MISTER WILLIAMS,  
THAT HE INTENDED TO KILL THE  
VICTIM, THAT FACTUAL FINDING  
TRIGGERED AND MANDATORY MINIMUM  
SENTENCE.

AND MISTER WILLIAMS WOULD HAVE  
HAD NO MANDATORY MINIMUM  
SENTENCE IN THE REVIEW AFTER 15  
YEARS.

WITH THAT FACTUAL FINDING THE  
MANDATORY MINIMUM SENTENCE IS 40  
YEARS.

THE COURT SURPRISE THE FACTS OF  
THE CASE BUT JUST BRIEFLY,  
MISTER WILLIAMS WAS 16 YEARS OLD  
AT THE TIME OF THE OFFENSE, THEY  
WERE 29, 30.

THE STATE OF FLORIDA PROCEEDED  
AT TRIAL UNDER TWO THEORIES OF  
LIABILITY, ONE BEING FELONY  
REPAIR AND THE OTHER  
PREMEDITATED MURDER.

THEY ARE GETTING CLOSING THE  
JURY WAS IN BOTH, THE VERDICT  
FORM, DID NOT HAVE A SPECIALIZED  
FINDING UNDER THE FIRST-DEGREE  
MURDER COUNTS.

IT IS NOT REQUIRED BUT SOMETIMES  
WE SEE VERDICT FORMS THAT HAVE A  
FELONY MURDER OPTION, SOMETIMES  
VERDICT FORMS HAVE A SPECIALIZED  
FINDING THAT MISTER WILLIAMS  
ACTUALLY DISCHARGED A FIREARM OR  
CAUSED THE DEATH.

>> HE WAS CONVICTED OF ROBBERY.

>> KIDNAPPING.

>> KIDNAPPING WOULD QUALIFY AS A

FELONY FOR FIRST DEGREE FELONY MURDER.

>> UNDER THE NEW STATUTE IT DOESN'T MAKE AN OPTION FOR FELONY MURDER OR PRINCIPLE TO BE SENTENCED.

>> LET ME TAKE YOU, IF I CAN HIT THE NAIL ON THE HEAD SINCE I HIT IT IN THE OTHER CASE MAYBE I WILL GET LUCKY THIS TIME.

>> I CAN TELL YOU WHY YOU ARE RIGHT.

>> THE FIFTH DISTRICT COURT OF APPEAL MAKING THE DECISION HERE RELIED ON OUR DECISION, FALCON, THE STATE, THERE WAS A COMMON MAJORITY OPINION, IF THE TRIAL COURT CONCLUDES FALLON DID NOT ACTUALLY KILL. THE FIFTH SAYS WE LIKE TO GO THE OTHER WAY ON THIS, I THINK THE SUPREME COURT IS TELLING US THAT THAT IS THERE LANGUAGE IN FALCON THAT COULD BE ADDRESSED?

>> NO, YOUR HONOR.

THIS ISSUE WAS NOT BEFORE THE COURT IN FALCON.

>> STILL THE MAJORITY OPINION HAS LANGUAGE, SAYS UP TO THE TRIAL COURT JUDGE TO MAKE THIS DECISION, APPRENDI, AND REST OF THOSE DECISION.

>> DOESN'T NECESSARY SAY UP TO THE TRIAL COURT.

IF THE TRIAL COURT CONCLUDES.

>> LANGUAGE SAYS IF THE TRIAL COURT CONCLUDES THAT FALCON DID NOT ACTUALLY KILL, GOES ON. THAT IS THE LANGUAGE.

I THINK THAT SAYS, FIFTH DCA INTERPRETS THAT TO MEAN, THAT WE CONCLUDE.

>> SO IN ORDER TO INTERPRET FALCON IN A WAY THAT COMPORTS WITH THE SIXTH AMENDMENT, I PRESENTED THE COURT WITH THE SUPREME COURT CASE OF MATTAL MATHIS VERSUS THE UNITED STATES. THE COURTS DEAL WITH SENTENCING IN RETROACTIVE SENTENCING

ROUTINELY UNDER THE ARMED CAREER  
CRIMINAL ACT.

SO THAT WAS THE GIST OF MATHIS.  
IF THE COURT CONCLUDES, BY  
LOOKING AT THE VERDICT FORM, BY  
LOOKING AT THE WHAT WAS CHARGED,  
AND THEY CAN MAKE THAT  
CONCLUSION, WITHOUT A DOUBT,  
THAT MR. WILLIAMS WAS THE ONE  
THAT KILLED THE VICTIM,  
ACTUALLY KILLED, ATTEMPTED TO  
KILL OR INTENDED TO KILL THE  
VICTIM THERE.

THERE WAS NO PROBLEM THERE.  
THERE WILL BE NO TYPES OF CASES  
COME ABOUT, WHERE TYPICALLY THE  
JUVENILE ALLEGED TO ACTED BY  
HIMSELF.

HOW THE FEDERAL COURTS WORK WITH  
THAT, THEY SAY THAT THE UNITED  
STATES SUPREME COURT SAYS IN  
ORDER TO ABIDE BY THE SIXTH  
AMENDMENT THE JUDGE CAN SIMPLY  
LOOK TO THE SHEPHERD DOCUMENTS  
WHICH ARE THE VERDICT FORM, THE  
JUDGMENT, THOSE SUCH THINGS,  
FIGURE OUT WHICH BASIS OF THE  
STATUTE FORMED THE CONVICTION.  
SO HERE WE'RE UNABLE TO LOOK AT  
THOSE SHEPHERD DOCUMENTS TO TELL  
WHAT FORMED BASIS OF CONVICTION.  
BECAUSE IT IS NOT CLEAR, WHETHER  
THE JURY CONVICTED MR. WILLIAMS  
UNDER FELONY MURDER OR  
PREMEDITATED MURDER.

THEY DID COME BACK WITH A  
QUESTION, IN DELIBERATIONS.

THIS WAS THE QUESTION.

IF RODERICK WILLIAMS IS JUDGED  
GUILTY OF KIDNAPPING AS CHARGED,  
DOES THE LAW MAKE HIM A  
PRINCIPLE IN THE HOMICIDE BY  
DEFAULT?

BECAUSE OF THAT QUESTION.

BECAUSE THE VERDICT FORM IS NOT  
CLEAR WHAT THEORY THEY CONVICTED  
HIM, ACCORDING TO THE SUPREME  
COURT, NOW AGAIN THIS IS HOW THE  
FEDERAL COURTS DEAL WITH  
SENTENCING RETROACTIVELY, THEN

YOU HAVE TO LOOK AT THE STATUTE IN ITS MOST GENERIC SENSE AND IT IN THIS CASE THE FIRST-DEGREE MURDER STATUTE CAN BE VIOLATED BY FELONY MURDER, OR NOT ATTEMPTED TO KILL OR INTENDED TO KILL, JUST THAT HE WAS PART OF THE UNDERLYING KIDNAPPING THAT WOULD NOT SATISFY THE FINDING UNDER 775.0821-B-1.

IF HE DID NOT ACTUALLY ATTEMPT TO KILL THE VICTIM HE HAS TO BE SENTENCED UNDER 1-B-2 WHERE THERE IS NO MANDATORY MINIMUM SENTENCE AND A MANDATORY--

>> WAS THERE ANY FINDING BY THE JURY HIS POSSESSION, USE, DISCHARGE OF A FIREARM?

>> I, NO, THERE WAS NOT.

ON THE VERDICT FORM IT ACTUALLY SAID, IT DIDN'T PROVIDE THAT HE POSSESS AD FIREARM.

THE STATE WILL CORRECT ME IF I'M WRONG.

UNDER THE KIDNAPPING HE POSSESSED A FIREARM, THAT HE ACTUALLY POSSESSED A FIREARM, NOT THAT HE DISCHARGED IT.

>> THERE WAS NO INTERROGATORY IN THE VERDICT FORM AS TO WHETHER THE DEFENDANT DISCHARGED A FIREARM OR NOT?

>> ON FIRST-DEGREE MURDER THERE WAS, BUT NOT ON SECOND-DEGREE MURDER.

>> THERE WAS GENERAL VERDICT ON THAT SENSE?

>> CORRECT, YOUR HONOR.

>> MAKING FINDING WITHOUT A SPECIALIZED INTERROGATORY FOR THE JURY, THE JUDGE CAN NOT DO THAT WITHOUT VIOLATING MR. WILLIAMS SIXTH AMENDMENT RIGHT TO HAVE THAT JURY DETERMINE BEYOND A REASONABLE DOUBT THAT HE ACTUALLY KILLED OR INTENDED TO KILL THE VICTIM.

>> WAS THERE ANY DISCUSSION AT THE CONFERENCE STAGE WHEN YOU'RE GOING OVER JURY INSTRUCTIONS,

WAS THERE ANY REQUEST FOR AN INSTRUCTION AT THE JURY FORM TO HAVE THAT KIND OF INTERROGATORY ON IT?

>> I DON'T BELIEVE SO AND THAT WAS PRE-MILLER WHEN THIS TRIAL HAPPENED.

I BELIEVE MILLER WAS PENDING BEFORE THE UNITED STATES SUPREME COURT.

SO I DON'T BELIEVE THEY WOULD HAVE HAD ANY REASON TO ASK FOR IT TO BE QUITE HONEST.

>> GOING TO STATUTE 775.802 THERE IS NOTHING IN THE STATUTE THAT REQUIRES THE JUDGE TO MAKE THESE FINDINGS.

>> CORRECT, YOUR HONOR.

>> THERE IS NOTHING IN THERE THAT SAYS JURY HAS TO MAKE FINDINGS.

SO BASICALLY, IT IS OUR DECISION IN FALCON THAT THE LANGUAGE?

>> IT CAN BE INTERPRETED BASED ON THE JURISPRUDENCE ON THE SIXTH AMENDMENT WHO MAKES THAT THAT FACTUAL FINDING.

BASED ON THE VERDICT FORM THE JUDGE ENTERS JUDGMENT AND SENTENCE BASED ON THAT VERDICT FORM.

IT CAN BE INTERPRETED WITH THE SIXTH AMENDMENT EITHER WAY, BASED ON THE JURY'S FINDING WHAT THE DEFENDANT ACTUALLY DID, THEN THE JUDGE ENTERS THAT INTO THE JUDGMENT AND THE SENTENCING ORDER.

SO IT IS POSSIBLE TO CONSTRUE ALL OF THIS IN ACCORDANCE WITH THE SIXTH AMENDMENT.

>> WHAT IS THE REMEDY THAW PROPOSE?

>> THE REMEDY FOR MR. WILLIAMS TO GO BACK AND BE RESENTENCED. IT IS NOT CLEAR BASED ON THE WORDING OF THE STATUTE, BECAUSE IS SAYS SHALL UNDER 1-B-1, AND MAY, UNDER 1-B-2.

SO JUDGE TREANOR COULD HAVE A

REVIEW HEARING.

THE IMPORTANCE OF REVIEW  
HEARING CAN'T BE UNDERSTATED.  
WIND 15-YEAR REVIEW HEARING  
MR. WILLIAMS WOULD BE 31 YEARS  
OLD.

HE HAS BEEN IN CUSTODY SINCE HE  
WAS 16.

AFTER 25 YEARS, MR. WILLIAMS  
WILL BE 41 YEARS OLD.

HE WILL HAVE LIVED 25 YEARS IN  
PRISON.

ANY MOTION THAT HE WOULD HAVE A  
CHANCE OF LEADING A MEANINGFUL  
LIFE OUTSIDE OF PRISON, OR THAT  
HE WOULD BE EVEN BE REFUSED  
AFTER 25 YEARS IS PRETTY SLIM.

>> GOING BACK TO THE LAW HERE,  
THE REMEDY THAT YOU'RE  
SUGGESTING, SINCE THERE WASN'T A  
JURY FINDING THAT HE ACTUALLY  
SHOT HE CAN NOT BE RESENTENCED  
IF THE CASE IS REMANDED TO  
40-YEAR MANDATORY MINIMUM?

>> CORRECT, YOUR HONOR.

>> WHAT YOU'RE SAYING IT HAS TO  
BE OTHER-- YOU CAN'T  
RECONSTRUCT THE JURY TO DO IT  
AGAIN?

>> I TRIED THAT.

JUDGE TRENOR SAID NO ON THAT.  
GOING BACK, IN COMPLETE CANDOR  
JUDGE TRENOR COULD IMPOSE A  
LIFE SENTENCE AGAIN WITH A  
REVIEW HEARING AT 15 YEARS.

>> BUT IT WAS YOUR POSITION THAT  
YOU COULD IMPANEL A JURY HAVE  
THEM CONSIDER A FINDINGS OR NOT.

>> THAT WAS MY FOLKS.

AFTER THE FOG OF THE STATUTE,  
CAME OUT OR NEW JUVENILE  
SENTENCING STATUTE TRYING TO  
MAKE SENSE WHAT WE DO WITH ALL  
THESE JUVENILES ALREADY IN  
PRISON?

>> UNDER A NEW TRIAL, ASSUMING  
THAT POSITION IS CORRECT.  
THE JURY THAT IS BROUGHT IN TO  
CONSIDER THE CASE WILL BE TOLD,  
THE ONLY ISSUE FOR YOU TO

CONSIDER WHETHER OR NOT HE  
ACTUALLY INTENDED TO KILL THE  
PERSON.

>> IF THAT IS AN OPTION.  
I'M NOT SURE THAT'S AN OPTION,  
BUT IF IT IS, IT WOULD BE  
SIMILAR TO A DEATH PENALTY CASE.

>> WHY WOULDN'T IT BE A OPTION  
IF THE STATE WANTED-- SEEMS  
LIKE IF YOU'RE RIGHT ON THE  
LEGAL POSITION, CONSTITUTIONAL  
QUESTION, THAT THE STATE EITHER  
HAS TO ACCEPT SENTENCING WITHOUT  
THE 40-YEAR OR WOULD BE ABLE TO,  
IF THEY WANTED TO, GO HAVE A  
TRIAL ON THAT LIMITED ISSUE.

IS THERE ANYTHING THAT WOULD  
PROHIBIT THEM FROM DOING THAT?

>> YOU KNOW, YOUR HONOR, I'M NOT  
SURE.

SO IF WE LOOK AT IT SIMILAR TO  
DEATH PENALTY CASE WHERE THE  
HURST CASES GETTING REMANDED ARE  
THE NEW PENALTY PHASES

WHERE THEY'RE EVIDENCE ALL OVER  
AGAIN AND MAKING THAT FINDING,  
THAT PROBABLY WOULD BE, THAT  
PROBABLY WOULD BE AN OPTION.

THE EASIER OPTION WITH RULE OF  
LENITY, AND GO BACK WITH LIFE  
SENTENCE AND 15 REVIEW HEARING.

>> LET ME ASK A QUESTION GOING  
FORWARD AND IN THIS CASE, FOR  
YEARS I THOUGHT THERE SHOULD BE  
SPECIAL VERDICT AS TO WHETHER  
FELONY MURDER OR PREMEDITATED.  
THEN YOU HAVE UNDIFFERENTIATED.  
I KNOW THERE ARE REASONS SOME,  
BOTH PROSECUTORS AND DEFENDANTS  
DON'T WANT IT.

IF WE HAD A DIFFERENTIATED  
VERDICT AND THEY HAD FOUND  
PREMEDITATED THAT WOULD HAVE  
BEEN THE END OF THE STORY?

>> YES, YOUR HONOR.

>> GOING FORWARD, IS THAT  
SOMETHING, I DON'T KNOW WHETHER  
SO MAKE SURE THAT THOSE, IN  
THOSE JUVENILE CASES, I MEAN  
CASES OF A JUVENILE TRIED AS AN

ADULT THERE OUGHT TO BE THE VERY LEAST A SPECIAL VERDICT ON FELONY MURDER OR PREMEDITATED.

>> YES, YOUR HONOR, TO COMPORT WITH THE SIXTH AMENDMENT, WITH ALL THE JURISPRUDENCE WE HAVE IN THE UNITED STATES SUPREME COURT ON THAT, THERE HAS TO BE A SPECIAL VERDICT FORM FOR JUVENILES.

>> I WAS GOING TO ASK YOU, YOU SAID, YOU THINK A NEW PENALTY, A NEW SENTENCING PHASE WOULD BE APPROPRIATE?

I'M, WONDERING HOW IN THE WORLD, THAT WOULD WORK?

>> I'M NOT SURE THAT IT IS. IT WAS JUST, WHEN THE STATUTE CAME OUT, AND I WAS TRYING TO MAKE SENSE OF IT, WHAT ARE MY OPTIONS HERE?

I THINK I HAVE TWO OPTIONS TO HAVE A NEW JURY MAKE THE FINDING SIMILAR TO DEATH PENALTY CASE, OR JUST IMPOSE OF RULE OF LENITY AND SENTENCE UNDER 1-B-2.

I'M NOT SURE THE BECAUSE THE ORIGINAL JURY MADE ALL THE FACTUAL FINDINGS AND WE HAVE THIS QUESTION FOR THEM, I'M JUST NOT SURE THAT WOULD BE ADEQUATE SOLUTION THAT WOULD COMPLY WITH THE SIXTH AMENDMENT.

IF THERE ARE NO FURTHER QUESTIONS FROM THE COURT. THANK YOU.

>> THANK YOU.

>> MAY IT PLEASE THE COURT. MY NAME IS PAMELA KOLLER, I REPRESENT THE STATE OF FLORIDA. OUR POSITION IS THIS IS NOT ELEMENT DECIDED BY THE TRIAL COURT.

BASICALLY--

>> HOW DOES THIS DIFFER FROM APPRENDI?

>> APPRENDI DEALS WITH THE GOING ABOVE THE STATUTORY MAXIMUM. THIS GIVES A RANGE, ESSENTIALLY LIFE TO 40 YEARS.

>> IT BASICALLY DICTATES TO THE JUDGE WHAT SENTENCE TO GIVE SOMEONE BASED ON FACTS THAT, THAT BASICALLY SHOULD HAVE BEEN DETERMINED BY THE JURY.  
I MEAN APPRENDI, WHAT WAS APPRENDI ABOUT, WHETHER A PERSON POSSESS AD GUN OR NOT?  
>> RIGHT.  
>> THE SUPREME COURT SAYS THE JURY SHOULD MAKE THAT DECISION. HERE THE QUESTION IS WHETHER HE INTENDED TO KILL SOMEONE, WHY IS THAT NOT A JURY DECISION?  
>> BECAUSE IT IS GOING TO THE DEFENDANT'S CULPABILITY. THE DEFENDANT'S EXTENDED PARTICIPATION IN THE CRIME, NOT THE CRIME ITSELF.  
THE JURY ALREADY FOUND THE ELEMENTS OF THIS OFFENSE AND FOUND HIM GUILTY BEYOND A REASONABLE DOUBT.  
THIS GOES TO HIS PARTICIPATION.  
>> HOW DO YOU SQUARE THAT WITH ALLEYNE.  
THAT ISSUE THERE.  
>> IT STILL SAYS JUDGES CAN FACT FACTUAL FINDINGS.  
THIS IS TRADITIONAL FACTUAL FINDINGS THIS IS ONE OF THE CRITERIA--  
>> NOT IF IT WILL DETERMINE THE MINIMUM SENTENCE.  
>> IT'S A MINIMUM SENTENCE BUT THIS IS NOT A MANDATORY MINIMUM. THIS IS NOT SOMETHING THAT HAS TO BE IMPOSED IN EVERY CASE WHERE THE JUVENILES ARE BEING SENTENCED.  
>> BUT HE HAS TO MAKE THIS DETERMINATION BEFORE HE CAN REACH THAT SENTENCE.  
>> RIGHT.  
WHICH A JUDGE DOES ALL THE TIME IN MAKING SENTENCING DETERMINATIONS.  
THE JUDGE ALWAYS, IF YOU LOOK AT THE CRITERIA UNDER MILLER, THAT IS WHERE THE LEGISLATURE GOT

THIS LANGUAGE FROM THE MILLER-GRAHAM CASES WHERE THEY SAID CHILDREN OR JUVENILES, NOT ONLY DID NOT ACTUALLY INTEND TO KILL, OR ACTUALLY KILL OR INTEND TO KILL AND ALSO ARE JUVENILES, ARE DOUBLY LESS CULPABLE AND SHOULD NOT GET LIFE WITHOUT PAROLE.

THIS IS MILLER COMES FROM THE SENTENCING CASE DEALING WITH THE EIGHTH AMENDMENT, NOT THE SIXTH AMENDMENT.

I DISAGREE THE STATUTE IS VERY CLEAR THE COURT MAKE A WRITTEN FINDING WHETHER A PER IS ELIGIBLE FOR SENTENCING REVIEW UNDER THE TWO DIFFERENT FACTORS, 25 OR 15.

SUCH A FINDING WILL BE BASED ON A WHETHER A PERSON KILLED OR ATTEMPTED TO KILL AND COURT MAY FIND THAT PERSONS ATTEMPTED KILL OR KILLED.

THE STATUTE IS CLEAR THAT IT REQUIRES THE COURT TO MAKE DETERMINATION.

THEY'RE FOLLOWING MILLER AND FOLLOWING EIGHTH AMENDMENT CASE LAW AND THIS IS A TRADITIONAL SENTENCE CIRCUMSTANCE.

>> AS I UNDERSTAND ALLEYNE, ANY FACT THAT INCREASES THE MANDATORY MINIMUM SENTENCE IS ELEMENT OF THE CRIME WHICH HAS TO BE SUBMITTED TO JURY.

IT SOUNDS LIKE UNDER THIS STATUTE, IF THERE IS AN INTENT TO KILL, THE MANDATORY MINIMUM SENTENCE GOES FROM 15 TO 40.

>> THAT-- THAT HAS IT BEEN THEIR ARGUMENT.

THE THEIR ARGUMENT HAS BEEN 40 YEARS IS THE MANDATORY MINIMUM. THAT IS MORE--

>> IF THERE IS NO INTENT TO KILL WHAT IS THE MINIMUM?

>> THE MINIMUM IS I ASSUME, WHATEVER, WHATEVER THEY SCORE OUT ON THE SCORE SHEET.

>> ISN'T THERE, ISN'T IT A 15 YEAR?  
>> THAT IS CHANCE FOR JUDICIAL REVIEW, THAT HAS NOTHING TO DO WITH ACTUAL MANDATORY MINIMUM.  
>> THERE IS NO MINIMUM IF THERE IS NO INTENT TO KILL BUT THERE IS A 40 YEAR MINIMUM IF THERE IS INTENT TO KILL?  
>> CORRECT.  
>> I COULD BE WRONG--  
>> WHICH IS NOT MANDATORY.  
>> HOW IS IT NOT MANDATORY?  
>> APPRENDI, AND ITS PROGENY ONLY DEALS WITH MANDATORY MINIMUMS AND ANY SENTENCE WOULD BE INCREASED BY THE FACTUAL FINDING--  
>> APPRENDI WAS-- ALLEYNE--  
>> WHETHER IT WAS MANDATORY MINIMUM OR NOT, THE FACT HE WILL GO FROM ONE SENTENCE TO A HIGHER ONE, EVEN THOUGH IT IS NOT A MANDATORY MINIMUM.  
>> WELL, AGAIN--  
>> IT IS ENHANCED.  
>> THIS DETERMINE NATION THAT THE JUDGE IS MAKING HAS TO DEAL WITH THE DEFENDANT'S ACTIONS AND HIS PARTICIPATION.  
>> OKAY, LET ME ASK YOU THIS. IF THE JURY FOUND AN INTENT TO KILL, EITHER BECAUSE IT WAS A SPECIAL INTERROGATORY OR THEY FOUND PREMEDITATED MURDER WOULD THE TRIAL JUDGE HAVE THE DISCRETION NOT TO GIVE A 40-YEAR SENTENCE?  
>> I THINK, WELL, IT IS KIND OF LIKE THE WHEN THE JURY MAKES THE DETERMINATION WHEN A FIREARM IS DISCHARGED, BECAUSE YOU HAVE A MANDATORY MINIMUM.  
>> RIGHT.  
>> IT IS KIND OF HARD TO--  
>> IF THE JUDGE DOESN'T HAVE DISCRETION NOT TO IMPOSE AT LEAST 40 YEARS WHERE THERE IS INTENT TO KILL, HOW IS THAT,

EVEN IF THEY DIDN'T USE THE TERM MANDATORY MINIMUM, IF THE JUDGE DOESN'T HAVE ANY DISCRETION, THAT SOUNDS LIKE IT IS MANDATORY AND CERTAINLY IS A MINIMUM SENTENCE.

>> BUT AGAIN THE DETERMINATION IS NOT AN ELEMENT OF THE OFFENSE.

THE DETERMINATION IS MADE, HAS TO DO WITH JUVENILES, EXTENT OF HIS PARTICIPATION IN THIS CRIME. IF YOU LOOKED AT MILLER, THAT IS WHAT THEY TALK ABOUT, YOU LOOK AT MILLER, THEY TALK ABOUT--

>> THIS WHOLE THING ABOUT ELEMENTS, UNDER APPRENDI AND ALL THAT FOLLOWS, THE KIND OF, DEFINITION OF WHAT IS AN ELEMENT HAS KIND OF GROWN, HASN'T IT?

>> IT HAS.

SO BASICALLY THEN WHAT WE'RE SAYING IS, IF GO ON A SCORE SHEET AND THE RANGE THEN FOR THE JUDGE, IS THE LOWEST PERMISSIBLE SENTENCE, WHATEVER CREATES THAT, HAS TO BE FOUND BY A JURY.

AND IT DOES NOT.

AND IN ALLEYNE, CITING CASE NOW NOT IMPERMISSIBLE FOR THE JUDGE TO EXERCISE DISCRETION AND IMPOSING JUDGMENT WITHIN THE RANGE PRESCRIBED BY STATUTE.

>> THAT IS TALKING ABOUT DISCRETION.

MAYBE YOU ANSWERED THE QUESTION, MAYBE I DIDN'T HEAR A CLEAR ANSWER.

IF THE JURY FINDS THAT THIS DEFENDANT HAD FOUND, THAT THIS DEFENDANT HAD INTENDED TO KILL THE VICTIM, WOULD THE JUDGE BE ABLE TO IMPOSE A 30-YEAR SENTENCE?

>> I WOULD SAY, BECAUSE OCCURRED IS THE ONE WHO MAKES THE DETERMINATION, YES.

>> COULD I TAKE YOU TO, COULD I TAKE YOU TO YOUR HARMLESS ERROR

ARGUMENT?

>> SURE.

>> WHAT IS YOUR BEST ARGUMENT WHY IT IS HARMLESS?

>> WELL, IN THIS CASE, EVEN, THE, AS THE STATE ARGUED DURING ITS CLOSING ARGUMENT, EVEN TAKING THE DEFENDANT'S STATEMENT YOU STILL HAVE PREMEDITATED MURDER.

HE ADMITTED THAT HE KNEW THIS WAS GOING TO HAPPEN.

OBVIOUSLY YOU ALSO HAD THE JAILHOUSE SNITCH WHO SAID THE DEFENDANT TOLD HIM THAT WHEN HE GOT OUT OF THE CAR, HE WAS MAKING NOISE, HE TOOK OUT THE GUN AND SHOT THE VICTIM TWICE, WHICH OBVIOUSLY KILLED THE VICTIM IN THIS CASE.

HE IS INVOLVED IN THE KIDNAPPING.

DRIVING DOWN THERE WITH A MAN IN THE TRUNK, TELLING HIM, I'M NOT GOING TO CATCH THIS MURDER RAP. HE CLEARLY KNEW THIS PERSON WAS GOING TO BE KILLED WHEN HE WAS DRIVING THE BODY OR THE MAN DOWN TO EKTTON, FLORIDA, AS OPPOSED TO KILLING HIM IN JACKSONVILLE, WHEN HE WAS COMMITTING THE KIDNAPPING.

HE TOOK THE GUN.

HE ADMITTED, STATED GUNS POSSESSED BY HIS CODEFENDANTS WERE NOT CALIBER OF WEAPON THAT ACTUALLY KILLED THE VICTIM IN THIS CASE.

THE CODEFENDANTS HAD .45 AND 9MM, A .38 ACTUALLY KILLED THE VICTIM.

WE HAVE THIS EVIDENCE THAT SHOWED, CLEARLY THE JURY-- WE ALSO HAD, ANOTHER THING I WANTED TO MENTION, THE JURY WAS ALSO INSTRUCTED ON INDEPENDENT ACT AND DURESS.

THEY WERE TOLD THAT IF YOU DON'T, IF YOU BELIEVE THAT THE DEFENDANT IN THIS CASE DID NOT

INTEND FOR THIS TO HAPPEN, FOR FELONY MURDER PURPOSES, THAT THIS MURDER WAS COMMITTED OUTSIDE THE PLAN OF ACTION, YOU CAN FIND HIM NOT GUILTY OF FELONY MURDER.

THEY FOUND HIM GUILTY AS CHARGED OF FIRST-DEGREE MURDER.

THEY COULD HAVE ASSUMED, THEY FOUND HIM GUILTY OF FIRST DEGREE PREMEDITATED MURDER.

IF THEY BELIEVE THIS IS INDEPENDENT ACT, HE DID NOT HAVE THE INTENT FOR THIS TO OCCUR, THEY WOULD HAVE FOUND HILL NOT GUILTY.

>> YOU USED THE TERM, IN YOUR TO JUSTICE POSTON'S QUESTION, THAT HE KNEW A MURDER WAS GOING TO OCCUR.

>> CORRECT.

>> KNOWING A MURDER IS GOING TO OCCUR IS REALLY NOT THE SAME AS KILLED, INTENDED TO KILL OR ATTEMPTED TO KILL, CORRECT? THAT'S THE TERMS THAT THE STATUTE ACTUALLY USES.

YOU HAVE TO, YOU HAVE TO FIND THAT THE JUVENILE ACTUALLY KILLED, INTENDED TO KILL, OR ATTEMPTED TO KILL.

CORRECT.

>> RIGHT.

>> SO EVEN IF HE KNEW THAT THE CODEFENDANTS WERE GOING TO KILL HIM, IT WOULD NOT FALL UNDER THAT STATUTE, RIGHT?

>> WELL, PART OF IT WAS THAT, I THINK PART OF IT WAS THEY GOT HIM INTO THE TRUNK.

APPARENTLY THEY WEREN'T ABLE TO GET HIM IN THE TRUNK, JUST THE TWO CODEFENDANTS.

THEY CLEARLY NEEDED SOMEONE BIGGER.

THEY KNOW THEY'RE PUTTING THIS MAN IN THE TRUNK OF THE CAR TO DRIVE HIM SOMEWHERE TO KILL HIM AND THE DEFENDANT IS PARTICIPATING IN THIS.

HE IS INVOLVED IN CARRYING HIM INTO THE TRUNK, DRIVING HILL. HE ACTUALLY DROVE THE CAR WITH THE VICTIM IN THE TRUNK. HE CLAIMS THAT HE KNOWS THEY'RE GOING TO KILL HIM AND HE JUMPS OUT OF THE CAR, I WILL NOT CATCH NO MURDER RAP FOR YOU.

BUT THEN HE CONFESSES TO THE JAILHOUSE SNITCH THAT, NO, YOU KNOW, WE ALL KNEW THIS WAS GOING TO HAPPEN.

I WENT IN THE BACK AND I SHOT HIM TWICE.

AGAIN HE WAS THE ONE WHO POSSESSED GUN THAT KILLED THE VICTIM, NOT THE CODEFENDANT. WHILE WE DON'T HAVE A SPECIFIC JURY FINDING, WE CERTAINLY DO HAVE ENOUGH EVIDENCE THAT WAS PRESENTED TO THE JURY THAT WOULD SUPPORT THAT HE ACTUALLY INTENDED, ACTUALLY KILLED OR INTENDED TO KILL.

>> SO YOUR BASIC ARGUMENT IS THAT THE JUDGE CAN MAKE THAT FINDING OF WHETHER OR NOT THE JUVENILE KILLED, INTENDED TO KILL OR ATTEMPTED TO KILL?

>> CORRECT.

IT IS A SENTENCING FACTOR. IT IS BASICALLY WHETHER OR NOT THIS PART OF THE STATUTE APPLIES AS OPPOSED TO ANOTHER PART. IT IS JUST A SENTENCING FACTOR WHETHER OR NOT YOU IMPOSE--

>> HOW WOULD THAT BE DIFFERENT THAN DISCHARGE OF A FIREARM AS A SENTENCING FACTOR?

>> WELL DISCHARGE OF A FIREARM IS AN ELEMENT OF THE OFFENSE. IT IS CHARGED, IT AGGRAVATES THE FELONY.

IT AGGRAVATES THE CRIME. THIS DOES NOT AGGRAVATE THE CRIME.

>> SOME CRIMES IT DOES, BUT SOME CRIMES, IT IS JUST A SENTENCING FACTOR.

10-20-LIFE, THOSE ARE NOT

ELEMENTS OF THE CRIME.  
IT WAS ONLY AFTER APPRENDI AND  
ITS PROGENY THE SIXTH AMENDMENT  
REQUIRED THOSE KIND OF FINDINGS  
MADE BY A JURY AND MADE IT AN  
ELEMENT OF THE CRIME, RIGHT?  
>> ALLEYNE TALKS ABOUT A  
SITUATION WHERE IT AGGRAVATES  
THE CRIME.  
THEY TALK ABOUT SPECIFICALLY,  
OUR RULING TODAY-- I'M SORRY.  
ESSENTIAL POINT IS THE  
AGGRAVATING FACT PRODUCED A  
HIGHER RANGE WHICH IN TURN  
CONCLUSIVELY ELEMENT OF A  
DISTINCT AGGRAVATE THE CRIME.  
THIS DOES NOT AGGRAVATE THE  
CRIME HE HAS BEEN CHARGED WITH.  
THIS GOES TO THE DEFENDANT'S OWN  
EXTENT OF HIS--  
>> I'M, I'M, IT AGGRAVATES THE  
SENTENCE.  
WELL MAYBE THAT IS NOT THE  
CORRECT TERM BUT THE SENTENCING  
RANGE DOES CHANGE WHETHER OR NOT  
HE INTENDED TO KILL AS OPPOSED  
TO, IF HE DID NOT, DOESN'T IT?  
IT'S CLEAR HE GETS A DIFFERENT,  
HE WOULD HAVE THE LIFE SENTENCE  
BUT HE WON'T HAVE 40 YEARS AS  
THE MINIMUM, CORRECT.  
>> IT'S A MINIMUM BUT IT IS NOT,  
IT IS NOT A MANDATORY MINIMUM.  
MANDATORY MINIMUMS DON'T WORK  
THIS WAY.  
THE JUDGE HAS TO IMPOSE THEM  
REGARDLESS WHAT THE SENTENCE IS.  
>> BUT IT HAS TO, IF HE FINDS,  
IF THERE IS THAT FINDING HE HAS  
TO, DOESN'T HE?  
>> NO, HE STILL HAS A DISCRETION  
HE CAN POSE 40 YEARS, HE CAN  
POSE 60 YEARS.  
HE CAN POST LIFE?  
>> HE CAN'T POST 30 YEARS IF  
THERE WAS A FINDING DEFENDANT  
KILLED OR INTENDED TO KILL?  
>> THE JUVENILE WILL GET REVIEW  
AT 25 YEARS.  
SO HE STILL GETS OUT AT 25

YEARS.

HE DOESN'T SERVE 40 YEARS.  
IT IS NOT EVEN A MANDATORY  
SENTENCE TO THE STUFF, HE STILL  
GETS OUT, HE COULD GET OUT AT 25  
YEARS.

HE HAS TO GET FIVE YEARS  
PROBATION.

WHAT HAPPENS IF HE VIOLATES  
PROBATION, HE GOES BACK IN OR  
DOESN'T VIOLATE PROBATION SO HE  
IS DONE.

SO TECHNICALLY DOESN'T HAVE TO  
SERVE MANDATORY MINIMUM OF 40  
YEARS.

HE GETS REVIEW IN 25 YEARS AND  
GETS OUT.

>> THAT'S ASSUMING A LOT.

THAT'S ASSUMING A LOT.

I'M STILL STRUGGLING TO SEE HOW  
THAT FINDING DOES NOT AGGRAVATE  
THE CRIME WITHIN THE FRAMEWORK  
THAT IS ESTABLISHED IN ALLEYNE?

>> IT GOES TO THE DEFENDANT'S  
EXTENT OF HIS PARTICIPATION.

>> I'M NOT FOLLOWING THAT  
BECAUSE, A LOT OF THINGS WOULD  
DO THAT AND IT'S A FINDING  
ABOUT-- AND STILL AGGRAVATE THE  
CRIME.

ALL THIS IS ABOUT THE  
DEFENDANT'S PARTICIPATION?  
ALL OF IT.

>> UNDER THE STATUTE THAT WE'RE  
TALKING ABOUT, THAT IS ONE OF  
THE CRITERIA THAT THE TRIAL  
JUDGE IS SUPPOSED TO LOOK AT  
DETERMINING WHETHER OR NOT A  
LIFE SENTENCE IS APPROPRIATE  
CONDUCTING INDIVIDUALIZED  
SENTENCING.

ESSENTIALLY YOU'RE SAYING THAT  
AGGRAVATING, THAT FACTOR IN,  
UNDER THE STATUTE, THAT THE  
JUDGE IS SUPPOSED TO CONSIDER  
UNDER RESENTENCING FOR JUVENILES  
OR SENTENCING FOR JUVENILES MUST  
NOW BE DETERMINED BY THE JURY  
BECAUSE IT TALKS ABOUT THE  
EXTENT OF HIS PARTICIPATION IS

ONE OF THE FACTORS.  
SUB-F, TALKS ABOUT THE EXTENT OF  
THE JUVENILE'S PARTICIPATION IN  
THE CRIME AND THAT IS A  
SENTENCING CRITERIA.  
THAT IS WHAT JUDGES DO.  
THEY DETERMINE HOW CULPABLE--  
>> WE KNOW WHEN WE'RE LOOKING AT  
THE MAXIMUM AND A MINIMUM OF  
SOME SORT, THEN THAT'S THE KIND  
OF--  
>> A RANGE, THAT'S A RANGE.  
JUDGES SENTENCE IN RANGES ALL  
THE TIME.  
>> WITHIN THERE OBVIOUSLY  
DISCRETION WILL BE EXERCISED.  
>> CORRECT.  
>> WHEN THERE IS SOMETHING THAT  
TRIGGERS A MINIMUM, AS WELL AS  
SOMETHING THAT TRIGGERS AN  
INCREASE IN THE MAXIMUM, THAT'S  
WHEN THE JURY HAS GOT TO BE ON  
THE SCENE, ISN'T THAT CORRECT?  
>> AGAIN, IT HAS TO DO WITH  
EXTENT OF HIS PARTICIPATION.  
>> I'M NOT SAYING THIS IS MY  
IDEA.  
I'M TRYING TO UNDERSTAND WHAT  
JUSTICE THOMAS HAS SAID HERE FOR  
THE SUPREME COURT.  
I'M STRUGGLING TO SEE THE  
DISTINCTION YOU'RE MAKING.  
>> WELL, AGAIN, WHAT I'M SAYING  
TOO, HE IS NOT, THE JUVENILE,  
GETS A JUDICIAL REVIEW IN 25  
YEARS.  
WE DON'T KNOW WHAT IS GOING TO  
HAPPEN IN 25 YEARS.  
SO IT IS NOT EVEN-- NORMAL  
MINIMUM MANDATORY NUMBER ONE  
IMPOSED REGARDLESS WHAT THE  
SENTENCE IS.  
NUMBER TWO--  
>> I DON'T KNOW THERE IS  
EXCEPTION FOR THAT.  
APPRENDI, ALL THE STUFF FOLLOWED  
FROM APPRENDI WOULD APPLY EVEN  
IN A STATE THAT HAS PAROLE,  
OKAY?  
THERE IS NO EXCEPTION FROM

APPRENDI FOR SENTENCES SUBJECT TO PAROLE.

SEEMS LIKE THAT IS WHAT YOU'RE SUGGESTING ESSENTIALLY.

>> WELL, BECAUSE, I MEAN, EVERY MANDATORY MINIMUM--

>> IS THERE ANY CASE THAT DOES THAT?

>> EVERY MANDATORY MINIMUM THEY HAVE TO SERVE X-AMOUNT OF YEARS REGARDLESS WHAT ELSE IS OUT THERE.

YOU COULDN'T EVEN--

>> IS THERE ANYTHING IN THE CASE LAW ANYWHERE THAT SUGGESTS THERE IS AN EXCEPTION FROM THE REQUIREMENTS OF APPRENDI AND ALL THAT FOLLOWED, INCLUDING ALLEYNE FOR SENTENCING SCHEMES THAT ALLOW FOR THE POSSIBILITY OF PAROLE?

>> NOT UNDER APPRENDI. CERTAINLY UNDER MILLER. BUT NOT UNDER APPRENDI.

>> LET ME ASK YOU A QUESTION ABOUT THE MANDATORY MINIMUM. YOU'RE TALKING ABOUT THE 40-YEAR SENTENCE BUT ISN'T THE JUDICIAL REVIEW AFTER, IF IT IS ONLY AFTER 25 YEARS VERSUS ONLY AFTER 15 YEARS, WHICH IS 10 YEARS, DOESN'T THAT MEAN THERE IS A MANDATORY MINIMUM OF 25 YEARS UNDER THE, IF HE IS INTENDED TO KILL?

I MEAN, SO, WHAT IS, HE WOULD, HAVE TO SERVE 25 YEARS AT THE MINIMUM, IF HE INTENDED TO KILL, AND THE JUDGE, HAS NO DISCRETION TO GIVE A LOWER JUDICIAL REVIEW AFTER 15 YEARS, DOES HE OR SHE?

>> ESSENTIALLY THAT IS JUST, IT IS LIKE PAROLE.

IT IS JUST LIKE PAROLE.

>> IN ONE CASE, BUT IF IT IS SOMETHING, IF YOU HAVE A LIFE SENTENCE WITH PAROLE AFTER 25 YEARS--

>> CORRECT.

>> ARE YOU SAYING THAT IS NOT AT

LEAST A MANDATORY MINIMUM, THAT YOU CAN'T GET, YOU CAN'T GET OUT UNTIL 25 YEARS AT THE MINIMUM.

I MEAN AS A PRACTICAL--

>> I DIDN'T REALIZE, 25 YEARS ESSENTIALLY BECOMES THE MANDATORY MINIMUM.

>> AND BUT FOR JUVENILES, WHO ARE GETTING SENTENCED TO LIFE AND, OR, THESE ARE SIGNIFICANT DIFFERENCES AS WAS POINTED OUT BETWEEN WHETHER YOU HAVE REVIEW AFTER 15 YEARS OR YOU HAVE REVIEW AFTER 25 YEARS.

THAT'S A, THAT 10 YEARS IS SIGNIFICANT.

SO WHAT'S YOUR ANSWER-- DO WE IGNORE THAT PART OF THE, THE EQUATION?

>> THAT HASN'T REALLY BEEN ARGUED.

>> WELL, I'M ASKING YOU THAT QUESTION.

>> WELL, THIS IS NOT, THAT IS NOT A SENTENCE.

IT IS NOT A SENTENCE.

IT IS MORE OF A MITIGATING SITUATION.

YOU GET 25 YEAR REVIEW OR 15-YEAR REVIEW.

IT MITT PACE--

>> ANYBODY WITH A 25 YEAR REVIEW, CAN THEY GET OUT BEFORE 25 YEARS?

>> NOT UNDER THIS STATUTE.

>> OKAY.

>> THIS STATUTE IS ABOUT MILLER AND GRAHAM.

THEY'RE ATTEMPTING TO FOLLOW MILLER AND GRAHAM.

>> THEY'RE ATTEMPTING, MILLER AND GRAHAM HAS A SALUTARY PURPOSE BECAUSE IF A JUVENILE KNOWS WHETHER THEY WILL HAVE REVIEW, VERSUS NEVER, THE IDEA THEY'RE GOING TO TRY TO REHABILITATE THEMSELVES AND SHOW THEY HAVE MADE A CHANGE IS THERE VERSUS NO HOPE IF IT'S A LIFE SENTENCE.

THAT'S A PRETTY SIGNIFICANT  
THING FOR THAT 16, 15-YEAR-OLD,  
ISN'T IT?

>> OF COURSE.

THE EXPERT THEY PRODUCED AT THE  
HEARING IN THIS CASE BASICALLY  
SAID 15 OR 25 YEARS WOULDN'T  
MAKE A DIFFERENCE AS FAR AS HIS  
ABILITY TO COPE OUTSIDE OF  
PRISON AND THAT SORT OF THING  
BUT, AND I JUST WANT TO POINT  
OUT SHE RELIED ON THE JURY  
QUESTION.

IF YOU LOOK WHAT THE ANSWER WAS  
TO THE JURY QUESTION, IT WASN'T  
REALLY FELONY MURDER THEY WERE  
TALKING ABOUT.

THE JUDGE, CLEAR ALL THE  
ATTORNEYS KNEW, THEY SAID, THIS  
WAS THE RESPONSE BY THE COURT.  
PLEASE CONSIDER EACH COUNT AND  
ELEMENTS OF EACH COUNT  
SEPARATELY.

BASICALLY DIRECTED THEM TO THE  
FACT THAT THERE IS SEPARATE  
CRIME DISCHARGED IN EACH COUNT.  
THAT BASICALLY I THINK THE JURY  
THOUGHT, IF WE DECIDE ONE, WE  
DON'T EVEN HAVE TO GO TO THE  
NEXT COUNT.

THE JURY WAS BASICALLY TOLD, NO,  
YOU HAVE TO GO AND DECIDE THE  
ELEMENTS PROVEN FOR THE OTHER  
COUNT TOO.

I WANTED TO MAKE SURE THAT WAS  
CLEAR, SINCE I DIDN'T GET A  
CHANCE TO RESPOND TO THAT.

>> IF WE DISAGREE WITH YOUR  
POSITION ON THE SIXTH AMENDMENT,  
DOES THE STATE GET AN  
OPPORTUNITY TO HAVE A TRIAL ON  
THE SENTENCING FACTOR IF THEY  
ELECT TO DO SO?

>> I KNOW THAT A LOT OF  
ATTORNEYS HAVE BEEN ASKING FOR  
JURIES TO BE IMPANELED TO MAKE  
THIS DETERMINATION AND CANDIDLY  
WE'VE BEEN TELLING OUR  
PROSECUTORS, INCLUDED IN THE  
JURY VERDICT, THAT FROM NOW ON.

THAT WOULD BE ONE WAY OF HANDLING THIS, ONE REMEDY, IT WOULD OBVIOUSLY BE VERY TIMELY AND COSTLY, BUT IT WOULD BE ONE REMEDY FOR DOING SO.

OTHERWISE YOU COULD JUST, I DON'T KNOW IF YOU EXCISE THAT FROM THE STATUTE OR WHAT YOU'RE GOING TO DO BECAUSE THE STATUTE SAYS THE COURT SHALL MAKE THIS FINDING.

THE STATUTE DOESN'T LEAVE ANY ROOM FOR THE JURY TO MAKE THIS FINDING.

>> IF YOU DO THAT, SEEMS TO ME IN ORDER TO DO IT PROPERLY YOU ALMOST HAVE TO RETRY THE CASE.

>> THE SAME LIKE WITH THE JURIES GOING BACK WITH THE PENALTY PHASE OF A DEATH CASE.

I MEAN, THEY DO IT ALL THE TIME.

I MEAN THEY ARE TOLD ALL THE EVIDENCE THAT WAS BEFORE, JURY THAT DETERMINED THE GUILT OR INNOCENCE OF THE DEFENDANT.

THEY DECIDE WHETHER OR NOT, WHAT PENALTY SHOULD BE IMPOSED ESSENTIALLY.

>> BUT IN THOSE, IN THOSE SITUATIONS, THERE WAS ALWAYS TWO SEPARATE PROCEEDINGS?

>> CORRECT.

>> IN THIS CASE, THERE IS NOT TWO SEPARATE PROCEEDINGS.

I DON'T KNOW HOW ANY NEW JURY IS GOING TO COME UP WITH ANY INFORMATION WITHOUT PUTTING ON ALL OF THESE THINGS AGAIN.

SEEMS TO ME, THE DEFENDANT ENDS UP BEING TRIED AGAIN.

>> WE DO DO BIFURCATED CASES IN NON-DEATH CASES.

IF YOU HAVE A FELONY, PETTY THEFT, FELONY DUI, YOU BY-- BIFURCATE THEM ANYWAY.

IT IS NOT UNUSUAL.

JURIES HAVE BEEN USED TO DO THAT SORT OF THING.

ESSENTIALLY IT WOULD BE A BIFURCATED TRIAL.

>> USUALLY THAT HAPPENS RIGHT THERE, BUT NOW--  
>> SURE.  
USUALLY HAPPENS THERE FOR DEATH CASES TOO.  
>> YEAH.  
>> I MEAN YOU DON'T USUALLY IMPANEL A NEW JURY FOR A PENALTY PHASE.  
>> THAT SEEMS AWKWARD AND UNWORKABLE TO ME.  
>> SEEMS VERY TIMELY AND COSTLY BUT--  
>> YOUR MANDATORY MAXIMUM TIME IS OVER.  
>> THANK YOU.  
I WOULD ASK THAT YOU AFFIRM.  
>> MAY IT PLEASE THE COURT.  
JUST, QUICKLY, THE DIFFERENCE BETWEEN DEATH PENALTY TRIALS AND FIRST-DEGREE MURDER TRIALS ESPECIALLY WHEN WE'RE TALKING ABOUT JUVENILES, IN A DEATH PENALTY, DEATH PENALTY CASES RARELY PROCEED UNDER FELONY MURDER THEORIES.  
THEY HAPPEN BUT IT IS VERY RARE. WHATEVER THE--  
>> I DON'T THINK THAT IS THE CASE.  
I THINK THERE IS OFTEN FELONY MURDER AND FIRST-DEGREE MURDER CASES IN THE, IN DEATH PENALTY.  
>> AND AGAIN, JUSTICE QUINCE SAID, THE DEATH PENALTY CASES ALWAYS PROCEED WITH A GUILT PHASE AND PENALTY PHASE, WHERE THIS WAS NOT INTENDED TO PROCEED THAT WAY.  
IT WAS JUST ONE TRIAL.  
JUST QUICKLY--  
>> YOU SUGGESTED IT?  
>> I DID.  
WE WERE JUST TRYING TO MAKE SENSE OF THE STATUTE.  
I KNOW IT WAS MY SUGGESTION BUT THEN I SUGGESTED ANOTHER OPTION TOO.  
THERE'S A DIFFERENCE BETWEEN FACTORS AND ELEMENTS.

SO SENTENCING FACTORS AND  
ELEMENTS OF THE OFFENSE ARE  
DIFFERENT.

THEY'RE NOT THE SAME.

SO AN ELEMENT HAS GOT TO BE  
PROVEN BEYOND A REASONABLE  
DOUBT.

SO THE ELEMENTS HERE IS THAT HE  
ATTEMPTED TO KILL HER, THE  
ELEMENTS WE'RE TALKING ABOUT.  
ATTEMPTED TO KILL, INTENDED TO  
KILL OR ACTUALLY KILLED AND THAT  
THE VICTIM IS DEAD.

THOSE CAN CERTAINLY BE  
CONSIDERED IN SENTENCING.

AND JUDGE TREATOR DID CONSIDER  
THEM AS FACTORS AS THE MILLER  
FACTORS BUT ELEMENTS TRIGGER THE  
MANDATORY MINIMUM AND THE REVIEW  
HEARING.

SO THEY'RE SEPARATE AND  
DISTINCT.

AND IF THERE ARE NO FURTHER  
QUESTIONS FROM THE COURT, I  
WOULD ASK THAT YOU REVERSE.  
THANK YOU.

>> THANK YOU BOTH FOR YOUR  
ARGUMENTS.

WE'RE IN RECESS FOR TEN MINUTES.