>> THE COURT WILL NOW PROCEED TO THE NEXT CASE ON THE DOCKET TODAY, WAYNE DOTY VERSUS THE STATE.
>> GOOD MORNING, YOUR HONOR'S. I'M BARBARA BUSHARIS REPRESENTING WAYNE DOTY.
I RESERVE 5 MINUTES OF MY TIME FOR REBUTTAL.
MISTER DOTY IS ASKING TO REVERSE A SENTENCE OF DEATH AND RE-MANNED HIS CASE FOR A NEW PENALTY PHASE AT WHICH THE JURY CAN BE INSTRUCTED ON CORRECT BURDEN OF PROOF TO BE APPLIED TO CERTAIN FINDINGS THAT HAD TO BE MADE BEFORE DEATH COULD BE IMPOSED.
AS THE COURT IS FAMILIAR THIS IS MISTER DOTY'S SECOND SENTENCE OF DEATH.
HE WAS INITIALLY GIVEN A DEATH SENTENCE BASED ON A NON-UNANIMOUS JURY RECOMMENDATION AND WAS RESENTENCED FOLLOWING HURST VERSUS STATE.
THE MAIN ISSUE HE RAISES ON APPEAL IS THE INSTRUCTION OF THE JURY ON WHAT HAS TO BE FOUND BEYOND REASONABLE DOUBT BEFORE DEATH CAN BE IMPOSED UNDER CURRENT FLORIDA STATUTE.
YOUR HONORS, AS YOU ARE FAMILIAR, IN 2016 THE FLORIDA LEGISLATURE MADE SIGNIFICANT CHANGES TO FLORIDA'S DEATH PENALTY STATUTE IN RESPONSE TO THE SUPREME COURT DECISION OF HURST VERSUS FLORIDA.
THE STATUTE WAS RULED UNCONSTITUTIONAL BECAUSE IT ALLOWED JUDICIAL FACT-FINDING OF CERTAIN KEY ISSUES PARTICULARLY EXISTENCE OF AGGRAVATED CIRCUMSTANCES JUSTIFYING THE DEATH PENALTY.
IN RESPONSE TO THAT DECISION, THE FLORIDA LEGISLATURE MADE SIGNIFICANT CHANGES TO THE

DEATH PENALTY STATUTE AND PUT SEVERAL KEY FINDINGS SQUARELY IN THE HANDS OF THE JURY AND WE NOW HAVE A SYSTEM, BEFORE DEATH COULD BE CONSIDERED.
THE JURY HAS TO GO THROUGH SEVERAL STEPS, MAKE FINDINGS AND RECOMMEND DEATH.
ONLY THEN DOES THE COURT IMPOSED DEATH AND GIVE THE DEFENDANT LIFE IN PRISON WITHOUT RELEASE.
THE STEPS ARE ONE OR MORE AGGRAVATED HAVE IMPROVED, SECOND, AGGRAVATED ARE SUFFICIENT TO JUSTIFY DEATH.
IN HURST VERSUS STATE, UNDER PARRY AND SUPREME COURT CASE LAW.
IN THE HANDS OF THE JURY THEY MUST BE MADE BEYOND REASONABLE DOUBT BY UNANIMOUS JURY.
UNANIMITY REQUIREMENT WAS NOT ADDED TO THE STATUTE UNTIL 2017 FOLLOWING HURST VERSUS STATE BUT WE HAVE FINDINGS THAT MUST BE MADE BY THE JURY, REQUIREMENT OF UNANIMITY AND HAND-IN-HAND WITH THAT GOES THE REQUIREMENT THESE FINDINGS BE MADE BEYOND REASONABLE DOUBT.
>> HURST VERSUS DATA THAT REQUIRE THOSE FINDINGS OTHER THAN WHETHER AN AGGRAVATING FACTOR WAS MAYBE A REASONABLE DOUBT.
>> I DON'T AGREE WITH THAT.
>> WHICH PART MENTIONS BEYOND REASONABLE DOUBT WITH REGARD TO OTHER FACTS THAT NEED TO BE FOUND BY THE JURY?
>> HURST VERSUS STATE DISTINGUISHES BETWEEN FINDINGS THE JURY MAKES AND RECOMMENDATIONS AND ACKNOWLEDGES UNDER THE APPRENTICE LINE OF CASES, THE INCREASE MAXIMUM PENALTY, HAVE TO BE FOUND BEYOND A REASONABLE DOUBT.

>> DIDN'T HURST USE REASONABLE DOUBT LANGUAGE WITH REGARD TO THE FACT THAT IT HAS TO BE FOUND BY THE JURY?
>> YOU ARE CORRECT.
IT MAKES SENSE FROM THE CONTEXT OF THE STATUTE THAT WAS INVALIDATED.
>> HOW CAN ONE ASSIGN A CERTAINTY LEVEL, AND ONE VERSUS ANOTHER.
HOW WERE THOSE SUSCEPTIBLE TO A STANDARD OF ROOF WHETHER IT IS BEYOND A REASONABLE DOUBT, PREPONDERANCE OF EVIDENCE OR WHATEVER?
>> THOSE TWO FACTORS ARE TREATED DIFFERENTLY UNDER THE STATUTE AND CAN CONSTITUTIONALLY BE TREATED, JURY'S ULTIMATE RECOMMENDATION OF DEATH OR LIFE IS THE MERCY DETERMINATION AND THAT IS NOT SUSCEPTIBLE TO SPECIFIC BURDEN OF PROOF BUT THE DECISION SUBJECT TO THAT ON A NUMBER OF JURISDICTIONS AND OTHER DECISIONS.
>> OTHERS SAY IT BUT AS A MATTER OF PRACTICE, WHEN ASKED TO WAIVE ONE VERSUS ANOTHER AND ONE WEIGHS MORE THAN ANOTHER HOW IS THAT SUSCEPTIBLE BEYOND A REASONABLE DOUBT OR PREPONDERANCE?
>> BECAUSE THE WEIGHING ITSELF IS A JUDGMENT CALL, THE STATE OF CERTITUDE THAT IS BROUGHT TO THE ULTIMATE RECOMMENDATION CAN BE --
>> DOES A JURY HAVE TO UNANIMOUSLY FIND A MITIGATE OR BEFORE IT CAN BE CONSIDERED?
>> KNOW.
>> WHY NOT?
>> A MITIGATE OR DOES NOT RAISE THE PENALTY.
>> HOW CAN YOU SAY THAT THE FINDING OF A MITIGATE OR WHETHER SOMEONE INDIVIDUALLY

CONSIDER SOMETHING A MITIGATING
CIRCUMSTANCES INDIVIDUAL
DETERMINATION THAT IS
QUALITATIVE?
ONE PERSON CAN, ONE PERSON
CAN'T BUT SOMEHOW AGGRAVATED
AND MITIGATED HAS TO BE BEYOND
REASONABLE DOUBT.
THAT IS COMPLETELY ILLOGICAL
AND INCONSISTENT.
>> IT IS NOT INCONSISTENT.
IT IS WHO HAS THE BURDEN OF
PROOF FOR WHAT.
WHEN THE STATE HAS TO PROVE
SOMETHING THAT WILL RAISE
PENALTY AGAINST THE DEFENDANT
THE STATE MUST DO SO BEYOND
REASONABLE DOUBT GROUNDED IN
THE RIGHT TO A JURY TRIAL.
OF THE DEFENDANT HAS TO SHOW
SOMETHING THAT MIGHT MITIGATE
THE SENTENCE, THAT GETS THE
FACT FINDER TO STEP BACK FROM
THE ULTIMATE PENALTY, IT IS NOT
ON THE DEFENDANT TO DO THAT
BEYOND REASONABLE DOUBT.
THE BEYOND REASONABLE DOUBT,
AND WHEN YOU BRING IT TO THAT
CONCLUSION, THEY OUTWEIGH THESE
MITIGATE HIS.
>> THE WEIGHING FACTORS, AND
LONELY CASES, ARE PROVED BEYOND
REASONABLE DOUBT?
>> WHEN WE RE-FOSTER THE
MESSAGE IT IS CLEARLY NOT
CONCURRENT IN THE LINEUP CASES.
>> WE SAY BEYOND REASONABLE
DOUBT STANDARD EXTENDS TO ANY
ELEMENT OF A CRIME AND THE
HURST PENALTY FINDINGS ARE NOT
A MOMENT OF CAPITAL
FIRST-DEGREE MURDER AND
PROPERLY CONSIDERED THOSE
ELEMENTS.
>> THEY ARE NOT EVIDENCE OF A
CRIME OF FIRST-DEGREE MURDER
BUT UNDER THAT WHOLE LINE OF
CASES, IT IS NOT LIMITED TO ONE
OF THE ORIGINAL ELEMENTS OF THE
CHARGED CRIME FOR IT TO BE A

FINDING THAT INCREASES MAXIMUM
PENALTY AVAILABLE.
>> DID WE REJECT THE ARGUMENT
IN FOSTER?
FOLLOWING BOTH PARRY AND HURST?
>> IT IS NOT NECESSARY TO READ
FOSTER THAT BROADLY.
YOU MAY UNDERSTAND IT BETTER
THAN I DO.
IF YOU ATTEND FOSTER, IT IS IN
THAT LINE OF CASES WHICH MAKE
ABSOLUTELY CLEAR, A SENTENCING
CONSIDERATION THAT ENHANCES
MAXIMUM PENALTY HAS TO BE FOUND
BEYOND REASONABLE DOUBT EVEN IF
IT IS NOT AN ELEMENT OF THE
ORIGINAL CRIME.
>> HOW DO WE SQUARE THAT WITH
JURY INSTRUCTION WHERE SPECIFIC
ARGUMENT WAS BROUGHT TO OUR
ATTENTION BY SOPHISTICATED
LITIGANTS AND THIS COURT
UNANIMOUSLY REJECTED THAT,
INSTRUCTIONS THAT WERE GIVEN IN
THIS CASE?
>> THE COURT ADOPTED A SET OF
INSTRUCTIONS WITHOUT
SPECIFICALLY RULING ON THIS
ISSUE OR EXPRESS AN OPINION
WENT WAY OR ANOTHER.
>> THE EXACT FACTORS YOU ARE
TALKING ABOUT, WE DID NOT DO
SO.
>> WITHOUT EXPLANATION.
YOUR HONOR'S WOULD AGREE WHEN
THE COURT DOES NOT PROVIDE
RATIONALE FOR SOMETHING IT IS
ARGUABLE LATER ON AND --
>> WE CONSIDERED AND REJECTED
IT?
>> THAT HAS HAPPENED IN THE
CONTEXT OF OTHER JURY
INSTRUCTIONS WHERE THE COURT
HAS EXPLAINED WHY SOME CHANGE
WAS ACCEPTED OR NOT ACCEPTED.
IN THIS CASE WE DO KNOW YOU ARE
CORRECT, THOSE, THAT LANGUAGE
WAS DISCUSSED OR PROPOSED IN
CONNECTION WITH THOSE FACTORS.
I WATCHED THE ORAL ARGUMENT ON

JURY INSTRUCTIONS AND IT SEEMED
WHERE IT WAS STICKING WAS ON
THE ULTIMATE WEIGHING DECISION,
THE MERCY DECISION AND WHETHER
IT WAS ACCEPTABLE FOR PROOF
BEYOND REASONABLE DOUBT WHICH
IS NOT WHAT WE ARE URGING
TODAY.
THE WAY IN DECISION, THE
CERTITUDE THAT THEY OUTWEIGH
THE MITIGATE IS AND THE FINDING
THOSE ACTIVATORS ARE SUFFICIENT
TO JUSTIFY DEATH.
I WOULD SAY THE LANGUAGE IN THE
JURY INSTRUCTION DECISION IN
ALL OF THE COURT'S DECISIONS
ISSUING JURY INSTRUCTIONS THAT
NOTHING IN THAT OPINION
FORECLOSES ADDITIONAL
CHALLENGES TO JURY
INSTRUCTIONS.
I DON'T THINK THE ARGUMENT WE
ARE MAKING IS FORECLOSED IN ANY
WAY BY THE FACT THE COURT
ADOPTED STANDARD INSTRUCTIONS.
>> WHAT WE MAKE OF THE SUPREME
COURT'S STATEMENT IN CAR THAT
THE WEIGHING ELEMENT IS THE
QUESTION WHETHER MITIGATING
CIRCUMSTANCES OUTWEIGH
AGGRAVATING CIRCUMSTANCES,
MOSTLY A QUESTION OF MERCY THE
QUALITY OF WHICH IS NOT
STREAMED, IT WOULD BE NOTHING
TO TELL THE JURY THE DEFENDANT
MUST DESERVE MERCY BEYOND
REASONABLE DOUBT OR MUST MORE
THAN LIKELY OR NOT DESERVE IT.
IS THAT THE CONCERN WE ARE
TALKING ABOUT?
IT IS NOT SUBJECT TO STANDARD
OF PROOF.
>> IT IS A CONCERN RAISED IN
THE CONTEXT OF A DIFFERENT
STATUTORY SCHEME.
WHAT WE HAVE HERE IN THE
FLORIDA STATUTE POST 2016 IS A
SYSTEM WHERE THE FLORIDA
LEGISLATURE GAVE CERTAIN
FINDINGS TO THE JURY BEFORE

THAT MERCY DECISION CAN BE MADE
SO THERE ARE STATUTORY SCHEMES
WHERE ONCE AN AGGREGATOR IS
FOUND EVERYTHING ELSE BECOMES A
QUESTION OF MERCY.
HERE WE HAVE A SYSTEM WHERE
MERELY FINDING THE AGGREGATOR
IS NO LONGER ENOUGH.
THAT IS SHOWN BY THE WAY THE
SECTIONS OF THE STATUTE WORK
TOGETHER.
>> EVEN MERCY DETERMINATION IS
STATUTORY SO WHY WOULD THAT NOT
BE A FACT, THAT IS NOT
REASONABLE DOUBT.
AND THAT IS PART OF THE
STATUTORY SCHEME.
AND SECTOR DETERMINATIONS.
>> IT IS BEFORE DEATH CAN BE
CONSIDERED.
AND YOU ARE IN A DIFFERENT
CATEGORY.
>> DEATH CANNOT BE CONSIDERED
BY THE TRIAL JUDGE CANNOT BE
IMPOSED, BEFORE JERRY
DETERMINES THERE SHOULD NOT BE
MERCY, CORRECT.
>> THE DIFFERENCE IS THE
JUDICIAL DECISION BECOMES
ADDITIONAL LAYER OF MERCY.
WE DON'T HAVE A JUDICIAL
OVERRIDE WHERE A JURY CAN
RECOMMEND LIFE AND A JUDGE CAN
RECOMMEND DEATH OR IMPOSE DEATH
AS THEY STILL HAVE IN ALABAMA.
>> I HAVE TROUBLE UNDERSTANDING
HOW IN KANSAS WHERE THERE NEEDS
TO BE BEFORE DEATH CAN BE
IMPOSED, NOT SUSCEPTIBLE TO A
STANDARD OF PROOF BUT OUR
SCHEME SOMEHOW IS.
>> IT HAS TO DO WITH WHERE YOU
DRAW THE LINE BETWEEN WHEN THE
DEATH PENALTY BECOMES AVAILABLE
UNDER THE PARTICULAR STATE
STATUTE.
IN MANY STATE STATUTES YOU HAVE
AGGRAVATED IS THAT ARE BUILT
INTO THE DEFINITION OF MURDER
FOR EXAMPLE SO THAT THE

CHARGING ITSELF LEADS TO
LIMITING THE CASES TO WHICH THE
DEATH PENALTY CAN BE IMPOSED.
IN FLORIDA WE DO THAT BY HAVING
AGGRAVATING FACTORS THAT HAVE
TO BE PROVED BEYOND REASONABLE
DOUBT AND SINCE 2016 THESE
ADDITIONAL JURY FINDINGS THAT
HURST AND PERRY BOTH SAID HAD
TO BE MADE UNANIMOUSLY AND
PERRY DIRECTLY SAID BEYOND
REASONABLE DOUBT.
>> YOU ARE ARGUING A BRIEF THAT
FOSTER IS INCONSISTENT WITH
HURST VERSUS STATE AND PERRY.
>> THE ENTIRE LINE OF CASES.
>> IT IS INCONSISTENT WITH
HURST VERSUS STATE AND PERRY.
PERRY IS THE LATER
PRONOUNCEMENT IN 2018.
ASSUMING PERRY IS CORRECT, WE
BELIEVE PARRY IS CORRECT, WOULD
IT BE CAREFUL TO DETERMINE
WHICH ONES WERE WRONG?
IT IS OBVIOUSLY CONFUSING IF WE
HAVE INCONSISTENT
PRONOUNCEMENTS AND HAVEN'T SAID
EXPLICITLY ONE IS WRONG?
>> THAT WOULD BE HELPFUL TO ALL
LITIGANTS AND FOSTER HAS TO BE
LIMITED TO BE BROUGHT INTO THE
SCOPE OF THE EXISTING CASE LAW,
WHAT HAS TO BE FOUND BEYOND
REASONABLE DOUBT BY UNANIMOUS
JURY.
THE COURT ISSUED ANOTHER
DECISION, THE BROWN DECISION
WHICH I BELIEVE YOUR HONOR
WROTE THAT OPINION WHICH
INVOLVES THE LINE OF CASES AND
THAT DECISION PROVIDES SOME
ANALOGOUS CIRCUMSTANCES TO THE
SITUATION WE HAVE HERE BECAUSE
YOU HAVE A CRIME THAT WAS
SUBJECT IS A THEORETICAL RANGE
OF SENTENCES OF THIRD-DEGREE
FELONY SO IT COULD GET ANYTHING
UP TO 5 YEARS BUT YOU HAD A
STATUTE REQUIRING LOOKING AT
THE CAPITAL PUNISHMENT CODED

REQUIRING SEPARATE FINDING OF
POTENTIAL DANGERS TO THE PUBLIC
AT A LOWER CBC SENTENCE, YOU
HAD A THEORETICAL RANGE LIKE WE
DO HERE ONCE CHARGED WITH
FIRST-DEGREE MURDERS THE
THEORETICAL RANGE IS UP TO
DEATH, ONCE THE DEATH THERE IS
IN PANELED THAT IS THE
THEORETICAL RANGE BUT THAT IS
SOMETHING THAT HAVE TO BE
PROVEN BEFORE THE SENTENCE CAN
BE CONSIDERED.
AS THE COURT SAID IN BROWN
THOSE THINGS HAVE TO BE FOUND
BY A JURY AND IT IS OUR
POSITION IF IT IS A JURY
FINDING IT CLEARLY REQUIRES
UNANIMITY AND WE BELIEVE IT
REQUIRES PROOF BEYOND
REASONABLE DOUBT BEFORE YOU
MOVE INTO THE MORE
DISCRETIONARY PART OF
SENTENCING.
I WILL RESERVE THE REST OF MY
TIME.
>> CHIEF JUSTICE KENNEDY, MAY
IT PLEASE THE COURT.
MY NAME IS JENNIFER DONOHUE AND
I REPRESENT THE STATE.
THIS COURT TO AFFIRM THE
SENTENCE BECAUSE THERE WAS NO
JURY INSTRUCTION AS BURDEN OF
TRUTH IS NOT REQUIRED FOR
SUFFICIENCY IN WEIGHING AND THE
TRIAL COURT PROBABLY CONSIDERED
AND DIRECTED THE NONBINDING
SENTENCING RECOMMENDATION.
OUR STATUTE IS CLEAR THAT THE
ELIGIBILITY FOR A DEATH
SENTENCE OCCURS ON THE FINDING
OF AT LEAST ONE AGGRAVATING
FACTOR BEYOND A REASONABLE
DOUBT.
THE JURY CONSIDERS WHETHER
MITIGATION OUTWEIGHS THE
AGGRAVATED IS, CONSIDERATIONS
THAT ANY JUDGE WOULD MAKE IN
SENTENCING?
JUDGES CONSIDERATIONS AND

SENTENCING ARE NOT MAY BE A
REASONABLE DOUBT.
WE DON'T IS ON BURDEN OF PROOF
TO THAT.
IT IS ELIGIBLE, THE JURY IS
DECIDING WHICH SENTENCE IS
APPROPRIATE IN THE CASE.
THE SECOND ISSUE WAS WHETHER
THE COURT SHOULD HAVE MADE
NONBINDING SENTENCING
RECOMMENDATION, COULD MAKE THE
RECOMMENDATION BUT DECIDED IT
WAS NOT APPROPRIATE.
>> PERRY IS INCONSISTENT WITH
WHAT YOU ARTICULATED.
>> IT IS IN ARTICULATELY
WRITTEN AND IT WOULD HELP ALL
PARTIES TO MORE CLEARLY AND
EXPLICITLY EXPLAIN THE FINDINGS
OF WAYNE AND SUFFICIENT TO HAVE
BURDEN OF PROOF BUT STATUTE IS
CLEAR ENOUGH.
>> IS THERE A WAY TO EXPLAIN
THE DISTANCE BETWEEN FOSTER
FROM PERRY ARE THEY
IRRECONCILABLE.
>> PERHAPS THEY SEEM
IRRECONCILABLE BUT --
>> IS IT POSSIBLE TO THEM
BECAUSE FOSTER WASN'T ARE
PUTTING A PRE-STATUTORY SINCE
FOSTER?
>> PERHAPS THAT IS ONE WAY IT
COULD BE DISTINGUISHABLE.
PERRY WAS AN ARTICULATE RATHER
THAN FINDINGS AND ESTABLISHING
FEATURE IS THE COURT MEANT TO
SAY THESE ARE JURY FINDINGS.
>> IF THERE ARE ELEMENTS DO YOU
AGREE IF WE FIND THEM TO BE A
LITTLE YOU AGREE THEY HAVE TO
BE BEYOND REASONABLE DOUBT?
>> YES.
>> THE KEY IS ARE THEY RELEVANT
OR NOT?
THAT IS WHERE THIS RISES OR
FALLS.
>> ABSOLUTELY.
BUT THEY DON'T INCREASE THE
PUNISHMENT FOR DOWNWARD

DEPARTURE, THE REASON THEY SHOULD BE CONSIDERED ELEMENTS UNDER THAT LINE OF CASES.
THE ONLY STATE THAT HAS MADE THE DETERMINATION IS DELAWARE AND THEY READ HURST VERSUS FLORIDA BROADLY AS THEY STATED IN THEIR OPINION.
>> WHAT IS THE BEST STATUTORY ARGUMENT FOR THE PROPOSITION YOU LAID OUT THAT ONLY THE AGGRAVATING FACTOR ELEMENT OR DETERMINATION IS AN ELEMENT SUBJECT TO PROOF BEYOND REASONABLE DOUBT?
YOU STATED THAT IS WHAT STATUTE SAYS.
WHERE WOULD WE FIND THAT IS THE GATEWAY FOR WHICH YOU ARE ELIGIBLE FOR THE DEATH PENALTY, THE REST OF THE DETERMINATIONS ARE NOT ELEMENTS FOR WHICH YOU ARE ELIGIBLE FOR THE DEATH PENALTY?
>> AT 9:21:141 IT SPECIFICALLY STATES THE DEFENDANT BECOMES ELIGIBLE UPON UNANIMOUS FINDING BEYOND REASONABLE DOUBT OF AT LEAST ONE AGGRAVATING FACTOR.
THE REQUIREMENT FOR REASONABLE DOUBT HAS APPEARED IN CASE LAW SINCE THE EARLY 80s.
THAT IS WHAT WE HAVE BEEN DOING ALL ALONG.
>> BENDING ANY OTHER QUESTIONS FOR THIS COURT THIS COURT SHOULD AFFIRM THE SENTENCE IN THIS CASE, THANK YOU.
>> YOUR HONORS, REGARDING ELIGIBILITY, IT IS CORRECT THERE'S A SECTION LABELED ELIGIBILITY BUT WE WOULD SAY YOU NEED TO LOOK AT FUNCTION IN ADDITION TO FORM WHEN DECIDING WHAT THE STATUTE DOES AND WHAT IT REQUIRES.
IF YOU LOOK AT THE STANDARD JURY INSTRUCTION AND VERDICT FORM THAT THIS COURT APPROVED AND WAS USED IN THIS CASE, THE

WAY THAT WALKS THE JURY THROUGH
THE FINDINGS IT MAKES CLEAR
THAT DEATH IS NOT CONSIDERED
UNTIL THOSE ADDITIONAL FINDINGS
ARE MADE.
IN THE JURY FORM THE WORD
ELIGIBILITY IS ATTACHED.
>> IS THERE A DISTINCTION, I
APOLOGIZE FOR INTERRUPTING.
AND SOME THERE A DISTINCTION
BETWEEN DETERMINATIONS THE JURY
IS REQUIRED TO MAKE IN THE
COURSE OF DELIBERATIONS VERSUS
STATUTORY ELIGIBILITY FOR DEATH
AS YOU ARTICULATED FROM THE
BROWN CASE?
ONLY WHERE THE MAXIMUM SENTENCE
COULD INCREASE OR DECREASE
BASED ON A FINDING THAT FINDING
IS MADE BEYOND REASONABLE DOUBT
IT IS AN ELEMENT OF THE CASE,
IS THE STATUTE SAYING WHAT
INCREASES FOR MANDATORY LIFE TO
DEATH IS FINDING AN AGGRAVATE
HER AND EVERYTHING ELSE IS
WHETHER WE SHOULD OR SHOULDN'T?
>> I WOULD DISAGREE.
THE NEW STATUTE SINCE 2016,
THOSE ADDITIONAL FINDINGS ARE
PREREQUISITES TO CONSIDERING
DEATH.
>> THE RECOMMENDATION IS A
PREREQUISITE.
>> THE MERCY DECISION.
AND PROOF BEYOND REASONABLE
DOUBT, A JUDGMENT CALL THAT
INCORPORATES HOLISTIC VIEW IT
HAS TO BE INDIVIDUALIZED.
>> IF THAT IS THE CASE AND THAT
IS IN THE SAME STATUTORY SCHEME
AND TREATED THE SAME AS
WEIGHING AND SUFFICIENCY
FACTORS WHY WOULD THAT BE
TREATED DIFFERENTLY AND NOT
SUSCEPTIBLE TO A STANDARD OF
PROOF THAT OTHERS ARE
SUSCEPTIBLE?
>> IT IS THE FINAL STEP IN THE
JURY'S DETERMINATION.
IT IS THE DECISION THE JURY

MAKES.
WHAT SENTENCE SHOULD BE IMPOSED
AS OPPOSED TO WHAT HAS TO BE
TRUE.
>> AS A MATTER OF READING THE
STATUTE THEY ARE NOT TREATED
DIFFERENTLY.
>> I WOULD ARGUE THAT THEY ARE.
IF YOU DON'T GET THE INITIAL
FINDINGS YOU DON'T PROCEED ALL
THE WAY.
>> THAT IS TRUE OF MERCY IF THE
MERCY FINDING IS AND MADE
UNANIMOUSLY.
>> THAT IS CORRECT.
>> I AM HAVING TROUBLE.
OF THAT IS NOT SUSCEPTIBLE TO
STANDARD APPROVE AND I AGREE
WITH YOU IT CAN'T BE.
>> I WOULD SAY IT IS THE
ULTIMATE QUESTION THE
FACTFINDER HAS TO DECIDE AND IT
COULD END THERE AND WE HAVE A
PROCEDURE WHERE THE JUDGE HAS
TO IMPOSE THE SENTENCE AND CAN
IMPOSE A LESSER SENTENCE.
THE ACTUAL SENTENCE THAT HAS
BEEN IMPOSED IS WHAT THE JURY
RECOMMENDS UNLESS THE JUDGE
BACK DOWN FROM IT.
THAT BECOMES --
>> THERE ARE FINDINGS OF FACT
AS OPPOSED TO BEING BASICALLY
MAKING JUDGMENT CALLS WAS THE
FINAL STEP IN THE STEP BEFORE
THAT.
>> THEY ARE NOT FINDINGS OF
FACT IN THE SENSE DID THE
DEFENDANT USE A GUN?
DID THE DEFENDANT FIRED 3
SHOTS, BUT --
>> THE WHOLE LINE FROM THE US
SUPREME COURT ABOUT FINDINGS OF
FACT?
>> A LOT OF TIMES THOSE
FINDINGS HAVE TO DO WITH THINGS
LIKE INTEND TO THAT ARE NOT
OBJECTIVE FACTS BUT HAVE TO BE
INFERRED.
ONCE THE JURY DECIDES THAT

SOMEBODY HAD A SPECIFIC INTENT
THERE WAS A BIAS STATUTE AT
ISSUE.
ONCE THE JURY DECIDED THERE WAS
BIAS, THAT BECAME A FACTOR.
ONCE THE JURY DECIDES AGGRAVATE
IS A WAY TO MITIGATE HIS AND
THE JURY IS CONVINCED OF THAT
TO A HIGH LEVEL OF CERTAINTY
THAT BECOMES A FACT.
AGGRAVATE IS THAT WAY TO
MITIGATE IS AND YOU MOVE ON TO
THE NEXT STEP OF THE
DETERMINATION.
>> WE THANK YOU.
THANK YOU BOTH FOR YOUR
ARGUMENTS.
THE COURT WILL STAND IN RECESS
FOR ABOUT 10 MINUTES.
>> ALL RISE.