

>> Chief Justice Carlos Muniz: OUR LAST CASE THIS WEEK IS MICHAEL JAMES JACKSON V. STATE OF FLORIDA CASE NO. 2023-1298.

>> Attorney: WHILE MR. JACKSON'S CASE RAISES MULTIPLE ISSUES THAT MERIT THIS COURT'S ATTENTION I'D LIKE TO PRIMARILY FOCUS ON TWO WAYS IN WHICH THE TRIAL COURT'S FAILURE TO FOLLOW THE LAW DEPRIVED MR. JACKSON OF A FAIR AND RELIABLE SENTENCING.

THE FIRST IS INCORRECTLY INSTRUCTING THE JURY AS TO THE SOME THINGS SENTENCING ROLE IN THE SECOND IS BY IGNORING THE STATUTE WHICH PRECLUDES APPLICATION OF THE 2023 SENTENCING LAW TO MR. JACKSON'S CASE. FOR THE FIRST ISSUE THIS COURT SHOULD VACATE MR. JACKSON'S SENTENCE BECAUSE INSTRUCTING THE JURY THE COURT VIOLATED CALDWELL IN A SET OF FACTS THAT IS NEVER BEEN BEFORE THIS COURT BEFORE.

THIS IS NOT LIKE THE WHERE THE WORD RECOMMENDATION APPLIED TO A STATUTE THAT HAD NO BINDING LIFE POSSIBLY AT THE END OF IT.

CALDWELL THE COURT IS CONCERNED WITH MISLEADING THE JURY IN SEEKING TO MINIMIZE THE RULE AND RESPONSIBLY AS A SENTENCING AUTHORITY.

HERE THE TRIAL COURT'S CLAIMS WENT TO THE HEART OF CALDWELL BECAUSE IT MISLED BY ESSENTIALLY CREATING LIFE AND DEATH BOTH AS SOMETHING THEY CAN BE ALTERED BY THE COURT OF COURSE THE STATUTE PASSED IN 2023 SAID THAT IF THERE ARE FIVE VOTE OR MORE FOR LIFE THE COURT SHALL PRONOUNCE A LIFE SENTENCE AND SO IT IS BOUND TO DO SO.

THE COURT'S INSTRUCTION ALSO CONTRARY TO THE JURY INSTRUCTIONS THE CAN OUT JUST MONTHS AFTER. THOSE JURY INSTRUCTIONS SAID THAT THE JURY NEEDS TO BE TOLD THAT FIVE OR MORE VOTES FOR LIFE OR A BINDING LIFE BOAT BUT THE COURT SHALL AND VOTE FOR LIFE VOTE IN THOSE CIRCUMSTANCES.

AS I SAID CALDWELL IS CONCERNED WITH JUST THE MISLEADING THE JURY WHEN YOU MISLEAD THE JURY YOU'RE SEEKING TO DIMINISH THEIR SENSE OF AUTHORITY OR RESPONSIBILITY HERE AT THE TRIAL COURT SAID OVER AND OVER AGAIN.

>> Justice: ISN'T THE FOCUS ON DIMINISHING THEIR SENSE OF RESPONSE ABILITY FOR THE POSITION OF A DEATH SENTENCE.

NO ARGUMENT REALLY ABOUT THAT HERE.

>> Attorney: IT IS ABOUT THE DIMINISHMENT OF THEIR SENTENCING RESPONSE ABILITY AS TO WHETHER OR NOT DEATH IS APPROPRIATE. LIFE OR DEATH THE EMPHASIS IS ON THE DECISION TO THE FACT TO MAKE THIS VERY IMPORTANT DECISION AS TO WHETHER OR NOT SOMEBODY SHOULD BE SENTENCED TO LIFE OR DEATH AND THEIR AUTHORITY TO DO THAT AND THEIR EMPOWERMENT DOING SO. THE COURT SAID OVER AND AGAIN I'M QUOTING FROM THE RECORD PAGE 1710 I DO NOT WANT THE JURY THINKING THEY ARE SOLELY RESPONSIBLE FOR THE SENTENCE I DON'T WANT THE JURY TO THINK THEY'RE RESPONSIBLE FOR WHEN THE LAW IS CLEAR THAT I AM.

AND OF COURSE THAT WAS THE PREVIOUS THE PREVIOUS STATE OF THE LAW THE

COURT USED TO BE RESPONSIBLE FOR IT. BUT UNDER THE 2023 AMENDMENT THE LIFE VOTE MEANS THE JURY IS RESPONSIBLE FOR THAT SENTENCE.

>> Justice Charles Canady: LET ME ASK YOU THIS ON THIS.

IN THE TRIAL COURT WAS IT EVER ACTUALLY EXPRESSLY ARGUED THAT THE FAILURE TO INFORM THE JURY THAT A RECOMMENDATION OF LIFE WOULD BE BINDING. WAS PROBLEMATIC OR THERE WAS AN OBJECTION SPECIFICALLY ON THAT BASIS?

>> Attorney: DEFENSE COUNSEL OBJECTED MULTIPLE TIMES ON COURSE USES OF THE TERM RECOMMENDATION WITHOUT CLARIFICATION.

>> Justice Charles Canady: UNDERSTAND ABOUT THE RECOMMENDATION YOUR ARGUMENT REALLY GOES BEYOND THAT YOUR ARGUMENT IF I UNDERSTAND YOUR ARGUMENT ON APPEAL THE ERROR HERE WAS THE FAILURE TO INFORM THE JURY THAT A RECOMMENDATION OF LIFE WOULD BE BINDING.

I DON'T FIND THAT ARGUMENT THAT BEING EXPRESSLY MADE IN THE TRIAL COURT AM I MISSING IT?

>> Attorney: FIRST.

>> Justice Charles Canady: TELL ME IF I MISSING IT TELL ME WHERE IT IS IN THE TRIAL COURT WHERE THAT PARTICULAR ARGUMENT WAS MADE IN THE TRIAL COURT.

>> Attorney: ON PAGE 1711 OF THE TRANSCRIPT DEFENSE COUNSEL SAID THE JURY THE JUDGE SHOULD NOT BE SUGGESTING TO THE JURY THAT THE VERDICT IS ADVISORY AND THESE KIND OF FIRMS WHEN IF IT IS NOT A CERTAIN VOTE IS FOR LIFE IT WILL ENDING FOR LIFE IF FIVE OR MORE PEOPLE VOTE FOR LIFE.

>> Justice: ONE PROBLEM WITH THIS ARGUMENT OF COURSE THE SAME THING IS TRUE WITH ANY NUMERICAL BREAKDOWN INCLUDING UNANIMITY.

EVEN IN THE CASE WHERE UNANIMITY IS REQUIRED THE JUDGES SENTENCING DISCRETION IS CONSTRAINED BY THE JURY'S RECOMMENDATION.

THE QUESTION REMAINS THERE IS AN ELEMENT OF CONSTRAINT TO JUDICIAL DISCRETION.

IN APPLYING THE DEATH SENTENCE. THE STATUTE DID NOT CHANGE THAT THE JUDGE STILL REMAINS THE SENTENCING ENTITY.

WHAT HAS CHANGED IS THE NATURE THE TRIGGERING EVENT, FOR CONSTRAINT INSTEAD OF BEING 12/0 IT IS NOW 8/4.

DO YOU DISAGREE THAT YOUR ARGUMENT WOULD APPLY EQUALLY TO THE PRIOR REGIME OR AM I WRONG?

>> Attorney: UNDER THE PRIOR REGIME THERE WAS I BELIEVE IT WAS 10 AT THAT TIME 10 VOTES NEEDED FOR DEATH SENTENCE AND LESS VOTES REQUIRED FOR A LIFE SENTENCE.

HERE THE ISSUE IS NOT JUST RECOMMENDATION FOR RECOMMENDATION IN CONJUNCTION WITH NOTHING TO SAY THAT ACTUALLY ONE WAY IS A RECOMMENDATION IF IT IS A DEATH PENALTY VOTE THAT IS A RECOMMENDATION THE COURT CAN ALTERNATE THAT CAN GO LIFE OR DEATH IF IT IS A LIFE VOTE IT'S A BINDING DECISION THE JUDGE WILL HAVE NO DISCRETION.

>> Justice: IS IT BINDING IF IT WAS 10, 12 OR 8 IT WOULD'VE APPLIED EQUALLY TO THE PRIOR REGIME.

>> Attorney: I THINK IT IS ABOUT THE MISLEADING OF THE JURY IF HE TOLD THE JURY OVER AND OVER AGAIN IF IT IS AGE SUCH FOR BETTER RECOGNITION FOR DEATH IF IT'S MORE THAN THAT THAT'S A RECOMMENDATION FOR LIFE WHATEVER PRECONCEIVED NOTIONS THEY HAVE OF THE EFFECT OF THEIR VERDICT IS BEING ALTERED BY THE FACT THE JURY IS BEEN TOLD REPEATEDLY THIS WILL LEAD TO A RECOMMENDATION THIS WILL LEAD TO A RECOMMENDATION TO THE COURT WHEREAS BEING AFFIRMATIVELY TOLD THIS WILL BE A RECOMMENDATION BUT NOT BEEN TOLD RECOMMENDATION IS NOT THE RETURN TO BE USED IF IT IS LIFE IT IS NOT A RECOMMENDATION THAT IS THE PROBLEM IT IS AFFIRMATIVELY MISLEADING THE JURY BY USING THE TERM RECOGNITION WITHOUT ANY KIND OF CLARIFICATION IT IS REALLY A RECOGNITION AND ONLY ONE SET OF CIRCUMSTANCES.

>> Justice: YOUR ARGUMENT UNDER THE OLD LAW IF THE JUDGE HAD DONE THE SAME THING IF YOU COME BACK A NON-UNANIMOUS VERDICT BETTER RECOGNITION FOR LIFE THAT THE SAME TYPE OF MISTAKE YOUR CLAIM HERE WOULD BE THE SAME THE FOCUS ON IF THE RECOGNITION FOR LIFE OR DEATH IS STILL UP TO THE JUDGE?

>> Attorney: THAT IS WHAT THE JURY WAS LED TO BELIEVE EVEN THOUGH THAT IS NOT TRUE.

THERE ARE INDICATIONS AGAIN THIS WAS THE GOAL OF THE JUDGE THE JUDGE SAID OVER AND AGAIN THIS IS WHAT I WITH THE JURY TO THINK I DON'T WANT THE JURY TO FEEL RESPONSIBLE . THAT IS WHY THE JURY THAT IS WHAT THE JUDGE INSTRUCTED AS HE DID THERE IS ALSO INDICATIONS IN THE RECORD THAT THIS HAD AN EFFECT . THE JURY CAME BACK WITH THE CLOSEST BOAT THERE COULD BE IN THE DEATH SENTENCE 8/4 AFTER JUST TWO YEARS TWO HOURS OF DELIBERATION AFTER I 15 WITNESS FIVE DAY TRIAL TO COME BACK 824.

THERE ARE INDICATIONS IN THE RECORD AS FAR AS ONE CAN FIND THEM THAT THIS DID HAVE AN EFFECT ON THE JURY RULE AND RESPONSIBLY SERIOUSLY KNOWING THAT IF HE CAN MAKE 7/5 THAT WOULD BE A BINDING LIFE VOTE WOULD NEVER BE THAT IT WOULD BE FIRMLY MISLED INTO THINKING THERE IS NO SUCH THING AS A BINDING RECOMMENDATION.

>> Justice: CAN WE UNPACK THAT INTERESTING ADVERB AFFIRMATIVELY AND MISLED DISAGREE YOU DON'T THINK THE COURT WAS MOSTLY TRYING TO MISREPRESENT THE STATE OF THE LAW TO THE JURY.

YOU THINK THE COURT WAS PURPOSEFULLY IF NOT MOSTLY TRYING TO MISS REP THAT THE STATE OF LAW?

>> FROM THE TRANSCRIPT IT SEEMS THAT THE JUDGE SAID AT ONE POINT THAT THE LAW IS CLEAR IF YOU GO BACK TWO YEARS IT RESTS ON THE JUDGE THAT IS NOT ACCURATE THAT IS NOT WHOLLY ACCURATE IF IT IS A BINDING LIFE THAT VERDICT IT DOES NOT REST ON THE JUDGE I'M NOT SAYING THERE IS MALICIOUS INTENT BIND US IT WAS INCORRECT THE JUDGE WAS INCORRECT IN WHAT HE SAID OUTSIDE OF THE JURY AND BEFORE THE JURY AND TO THE JURY.

>> Justice: I THINK THERE'S QUITE A CHASM BETWEEN WHAT YOU JUST SAID WHICH IS THAT THEY ARGUMENT IT WAS INCORRECT AND AFFIRMATIVELY MISLEADING WHICH KEEPS SAYING.

YOU MEAN MISLEADING BY OMISSION HE TOLD THEM SOMETHING THAT WAS WRONG. [UNCLEAR AUDIO] HE WAS TRYING TO SAY ABOUT THE JURY TO THINK ONE THING EVEN THOUGH THAT'S NOT TRUE.

>> Attorney: WHAT I'M TRYING TO SAY IT WAS NOT JUST SILENCE AND LET THE JURY FIGURED OUT IT WAS A FORMIDABLE MISLEADING THE JURY WAS TOLD SOMETHING THAT WOULD MAKE THEM BELIEVE THAT EITHER WAY IT IS GOING TO BE AN ADVISORY SENTENCE JUST LIKE THE OLD LAW WAS THAT WAS PASSED IN 95 THAT NO LONGER IS OPERABLE.

IF I COULD I WOULD LIKE TO QUICKLY TURN TO ANOTHER ISSUE THAT HAS NOT YET BEEN CONSIDERED BY THIS COURT WHICH IS THAT FLORIDA STATUTE 775.022 SUBSECTION 3A BARS APPLICATION OF THE 2023 AMENDMENT TO MR. JACKSON'S CASE SUCH THAT THIS COURT SHOULD VACATE MR. JACKSON SEND AND REMAND FOR RESENTENCING UNDER THE PRIOR LAW THE 2017 LOT THE UNANIMITY LAW THIS IS A CONTEXTUAL ARGUMENT BASED ON THE TEXT OF 775.022 WHICH MAKES CLEAR THE 2023 AMENDMENT SHOULD APPLY PROSPECTIVELY AND SHOULD NOT AFFECT SOMETHING THE WORDS TAKE PLACE UNDER THE 2017 LAW.

>> Justice Charles Canady: YOU ARE RELYING ON 3A RIGHT.

>> Attorney: RIGHT.

>> Justice Charles Canady: THE PRIOR OPERATION OF THE STATUTE.

>> Attorney: YES YOUR HONOR.

>> Justice Charles Canady: THE STATUTE DOES NOT OPERATE PREVIOUSLY. THERE IS NO PRIOR OPERATION OF THE STATUTE.

WHAT THIS SAVINGS CAUSES ABOUT IT IS ABOUT NOT GOING BACK AND ON DOING THINGS THAT HAVE BEEN DONE.

WE WERE TALKING ABOUT SOMETHING THAT HAS NOT BEEN DONE.

>> Attorney: HE HAD NOT YET RECEIVED DISSENTING WHAT HE RECEIVED WAS IN ORDER BACK IN 2017 TO RECEIVE A NEW RESENTENCING PURSUANT TO UNANIMITY.

>> Justice Charles Canady: THE SENTENCING HAD NOT BEEN DONE THERE WAS NO PRIOR OPERATION OF THE STATUTE.

I'M PUZZLED BY HOW YOU CAN FIND A PRIOR OPERATION OF THE STATUTE IN THE CONTEXT THAT IS HERE.

>> Attorney: IN 2017 WHEN MR. JACKSON WAS GIVEN RESENTENCING AT THAT POINT IT WAS UNDER THE PRIOR OPERATION OF THE STATUTE THAT WAS IN PLACE WHEN THE RESENTENCING WAS ORDERED AND IN FACT WAS THE POINT OF THE RESENTENCING THE POINT OF THE FINAL ORDER.

>> Justice Charles Canady: THE RULE IS ON THESE PROCEDURAL THINGS THE LAW IN EFFECT AT THE TIME THE PROCEDURE IS CARRIED OUT IS THE LAW THAT APPLIES. WE HAVE CASES ARE MET.

>> Attorney: 775 THE LEGISLATURE MADE IT A POINT TO EXCLUSIVELY SAY TWO THINGS ONE THIS MEANS A STATUTE THAT IS SUBSTANTIVE OR PROCEDURAL UNDER 775.022 IT EXPLICITLY SAID THE LAW COULD HAVE EXPLICITLY STATED OTHERWISE THAT IT SHOULD ALSO OPERATE RETROACTIVELY MANY LAWS STATE THAT IT OPERATES RETROACTIVELY PROCURED THE 2023 LAW DID NOT . I THINK THE FACT

THE LEGISLATURE PUT IN THE STATUTE WHETHER PROCEDURAL OR SUBSTANTIVE GOES TO THIS ISSUE THAT THIS IS MEANT TO APPLY TO ALL CRIMINAL STATUTES OF ALL KINDS.

IF I COULD I WOULD VERY BRIEFLY TOUCHED ON TWO INTERRELATED ISSUES THAT ARE REGARDING INFORMATION THE JURY WAS DEPRIVED UP THAT ARE WORKING IN CONJUNCTION WITH THIS CALDWELL ISSUE WHERE THE JURY DOES NOT KNOW ABOUT ITS SENTENCING AUTHORITY. THE JURY WAS ALSO DEPRIVED OF KNOWLEDGE THAT THE CO DEFENDANT WHOSE TESTIMONY WAS READ INTO THE RECORD LATER RECANTED THAT TESTIMONY. SO THE ONLY VERSION OF EVENTS WAS THAT ONE CO DEFENDANTS PERPETUATE TESTIMONY HE DID NOT TESTIFY LIVE. THAT WAS RECANTED BUT THE JURY WAS NEVER MADE AWARE OF THE FACT OF NO DEFENSE COUNSEL FOR THE BE MARRIED AWARE THE JURY WAS NOT TOLD THAT ANOTHER CO DEFENDANT HAD A LIFE SENTENCE HAD BEGIN A LIFE SENTENCE FIGHT DESPITE THE FACT HE HAD HIGH RESPONSIBLY IN THIS CRIME THAT WAS ANOTHER THING THE COUNSEL ASKED FOR BUT WAS DENIED.

WE ARE HAVE A JURY WHO IS BEING MISINFORMED AS TO THEIR AUTHORITY WHO IS NOT BURNING THESE TWO KEY FACTS THIS IS ALL WORKING IN CONJUNCTION A CASE WHERE AS FAR AS PREJUDICE GOES IF PREJUDICE IS GOING TO BE FOUND THIS IS THE CASE IS A CLOSE 8/4 VOTE IT WAS AN 8/4 BOAT WHEN MR. JACKSON WAS ORIGINALLY SENTENCED AT THE TIME HE DID NOT PRESENT ANY MITIGATION HERE IS A CLOSE VOTE AFTER COUPLE OF HOURS BUT THERE WAS A LOT OF MITIGATION THAT WAS PRESENTED INCLUDING MR. JACKSON'S MATERNAL ABANDONMENT BY HIS BIOLOGICAL MOTHER WHO AT ONE POINT TO TRIED TO SELL HIM.

THE EFFECT HER STRUGGLE WITH DRUGS AND NICOLE HAD ON HIS NEUROLOGY THE FACT THAT HE HAD ADMITTED RESPONSIBILITY IN 2011 EVEN WENT BACK TO COURT TO OPEN OR OPENLY COURT EXPRESSED HIS REMORSE CERTAINLY THAT WAS WAY BEFORE HE KNEW THERE WAS EVER A RESENTENCING FOR HIM.

HE DID GAIN THE FORGIVENESS OF SEVERAL OF THE VICTIMS FAMILY MEMBERS AND HAD A LOT OF RELIGIOUS AND PERSONAL DEVELOPMENT SPOKEN TO AT THE TRIAL. IF THERE IS ANY CASE WHERE PREJUDICE IS GOING TO BE FOUND THIS IS THE CASE. ALL OF THESE ERRORS WORK IN CONJUNCTION TO SUPPORT THIS COURT SHOULD VACATE MR. JACKSON SENTENCE AND REMAND PURSUANT TO THE LAW OF UNANIMITY ACCORDING TO THE SENTENCING 5.022 ARGUMENT I WILL SAVE MY TIME FOR REBUTTAL

>> Chief Justice Carlos Muniz: THANK YOU.

>> Michael W. Mervine, Appellee: WITH THAT THE COURT'S INDULGENCE RESPECT WILL HANDLE THE 8/4 ISSUE AND I WILL HINDER THE REMAINDER OF THE ISSUES HERE THERE WAS NO CALDWELL ERROR CALDWELL AND HIS PROGENY HOLD THAT A JURY MUST NOT BE AFFIRMATIVELY MISLED AS TO ITS RULE TO BELIEVE THAT THE APPROPRIATENESS OF THE DEATH SENTENCE LIES ELSEWHERE. HERE AT THE COURT DID OMIT THE LANGUAGE ABOUT THE BINDING EFFECT OF A LIFE RECOMMENDATION HOWEVER THE LAW REMAINS THAT A RECOGNITION OF DEATH IS STILL A RECOMMENDATION THE COURT CAN IMPOSE THAT OR CHOOSE NOT TO.

ALSO, THE COMMENT SHOULD BE READ IN CONTEXT THE JURY WAS ADVISED THAT THEY NEEDED TO USE THEIR BEST JUDGMENT THEY NEED TO REALIZE THAT HUMAN LIFE WITH A STAKE AND THAT THEY UNDERSTOOD THE GRAVITY OF THE PROCEEDINGS. THIS COURT HOLDS THAT WITHOUT EVIDENCE TO THE CONTRARY THE JURY IS PRESUMED TO FOLLOW ITS INSTRUCTION THERE IS NO EVIDENCE HERE THAT THE JURY FAILED TO DO THAT.

IN ADDITION,

>> Justice: I'M SORRY YOU'RE ASKING US TO KIND OF CONSISTENT WITH WHAT JUSTICE CANADY ASKED EARLY IN THE ARGUMENT TO READ CALDWELL NOT FOR STANDING FOR THIS PROPOSITION THAT THE JURY IT IS A CONSTITUTIONAL ISSUE ABOUT MISLEADING OR MISINFORMING MIGHT BE THE BETTER WORD, THE JURY ABOUT THE SPECIFIC CONSEQUENCES OF THE DIFFERENT RECOMMENDATIONS . THAT THE PRINCIPAL IS LIMITED TO DO YOU KNOW THE EFFECT OF YOUR RULE IN IMPOSING A DEATH SENTENCE?

I'M NOT SURE HOW IT SEEMS LIKE THEY ARE SO CLOSELY INTERTWINED IF MY LIFE RECOMMENDATION IS BINDING.

>> Michael W. Mervine, Appellee: I THINK WHEN THE FACTS ARE VIEWED THROUGH THE LENS OF CALDWELL WHEN THAT IS THE CONCLUSION CALDWELL INVOLVED THE CASE WHERE THERE WAS JURY SENTENCING SO THERE WAS NO JUDICIAL DISCRETION IT INVOLVED PROSECUTOR STATEMENTS A DEATH SQUAD OR THE WORK MURDERING THE DEFENDANT AND THEN THE STATE GOT UP AND SAID NO THAT IS NOT TRUE.

YOUR DECISION IS GOING TO BE REVIEWED BY A HIGHER COURT.

EVEN THOUGH THAT WAS SOMEWHAT AIM MISSTATEMENT OF MISSISSIPPI LAW AND THE SENTENCE WAS PRESUMED CORRECT.

THE FOCUS OF THE US SUPREME COURT'S OPINION THAT THIS WAS 8TH AMENDMENT VIOLATION WAS FALSE INFORMATION OF THIS TYPE MAY PRODUCE BIAS IN FAVOR OF DEATH SENTENCES. THE FOCUS THERE AND THE COURT SUBMITS IN THIS CASE IS IT THAT THE CALDWELL ANALYSIS SHOULD FOCUS UPON DEATH RECOMMENDATION AND WHETHER THE JURY WAS AFFIRMATIVELY MISLED REGARDING THAT.

ALSO THE DEFENSE POINTS TO THE LACK OF SHORT AMOUNT OF TIME THE DELIBERATIONS TOOK PLACE AS WELL AS THE BREAKDOWN OF THE VOTE. STATING THAT THAT IS EVIDENCE THAT THIS JURY WAS MISLED. HOWEVER THE CURRENT ARGUMENT IS IN CONTRAST TO WHAT DEFENSE COUNSEL ARGUED IN CLOSING. ON THE PAGE 190 OR 1790 OF THE TRANSCRIPT COUNSEL STATED, IF I CAN READ WE ALSO TALKED ABOUT IN IT JURY SELECTION HOW EACH OF YOU AGREED NOT TO GO AGAINST SOMEONE'S OPINION TO LET THEM MAKE THEIR INDIVIDUAL DECISIONS YOU CERTAINLY CAN DISCUSS THERE IS NOTHING WRONG DISCUSSING YOU KNOW IT IS PROPER TO DISCUSS YOUR OPINIONS AND TALK ABOUT THINGS AND GIVE YOUR OPINIONS ABOUT THE EVIDENCE AND WITNESSES. BUT AT THE END OF THE DAY IT IS YOUR DECISION AND YOUR DECISION ALONE.

THAT SEEMS TO BE IN CONTRAST TO WHAT THE APPELLANT IS ARGUING NOW THAT IF THESE FOUR JURORS HAD KNOWN FOR FOR SURE WOULD'VE MANDATED A LIFE

SENTENCE IF THEY COULD'VE PERSUADED THAT PERSON TO VOTE WITH THEM THAT THAT IS THE ERROR IN THIS CASE.

>> Justice: COUNSEL ON THE OTHER SIDE CITED 1711 THE TRANSCRIPT FOR WITH THE SPECIFIED ARGUMENT WAS RAISED DO YOU HAVE A SPECIFIC COMMENT IN RESPONSE ON THAT?

>> Michael W. Mervine,Appellee: THE COURT WAS RESPONDING TO DEFENSE ASKING FOR A JURY VERDICT.

THEY WANTED THE TERM VERDICT TO BE USED AND THAT OF COURSE IS NOT WHAT IS PROVIDED AND IF THE STATUTE AS IT STILL REMAINS A RECOMMENDATION AS TO A BEST RECOGNITION OF DEATH SENTENCE.

>> Justice: IT IS THE STATES POSITION THE ARGUMENT THEY ARE MAKING HERE REGARDING THE VIOLATION ABOUT THE VIOLATION WAS MADE BELOW?
I DIDN'T SEE YOU DID NOT SAY IT WASN'T.

>> Michael W. Mervine,Appellee: BASED CERTAINLY CITED CALDWELL AND THE ARGUED CALDWELL MANY OF THE QUOTATIONS THE APPELLANT IS EXCITING THE COURT WAS REFERRING ALTHOUGH IT IS NOT ESPECIALLY SAD TO A DEATH RECOMMENDATION THE COURT DID NOT WANT THE JURY TO BELIEVE THAT THAT WAS BINDING AND THIS WAS IN FACT A DEATH VERDICT.

>> Justice Charles Canady: WASN'T THERE SOME ARGUMENT BY THE DEFENSE THAT THE CHANGE IN THE STATUTE HAD IN EFFECT I THINK THE TERM WAS BAKED CALDWELL ERROR INTO THE STATUTE.

THERE IS SOME CALDWELL FLAW THAT IS CREATED BY THE STATUTE.
WAS THAT NOT ARGUED.

>> Michael W. Mervine,Appellee: THAT I DON'T RECALL YOUR HONOR THAT I DON'T RECALL. IN ADDITION, THE CONTEXT OF THIS CASE DEMONSTRATES THAT ANY WAS HARMLESS BEYOND A REASONABLE DOUBT.

>> Justice: I DON'T MEAN TO INTERRUPT YOU WHAT IS THE BOTTOM LINE DO BELIEVE THEY PRESERVE THIS ARGUMENT ON THIS SPECIFIC NOT JUST CALDWELL ISSUE BUT THIS SPECIFIC CLAIM TELLING THAT IT WAS THAT THE COURT WAS PUT ON NOTICE THAT THE COURT WAS COMMITTING ERROR BY NOT DRAWING THIS DISTINCTION FOR THE JURY BETWEEN THE RECOMMENDATION OF DEATH AND THE "RECOMMENDATION OF LIFE".

>> Michael W. Mervine,Appellee: I WOULD CONCEDE THAT THEY SAID IT CALDWELL AND IF THEY ARGUED THAT THE JURY INSTRUCTIONS AS PROPOSED BY THE COURT AND GIVEN TO THE COURT VIOLATED CALDWELL BUT NOT NECESSARILY THAT THE FAILURE TO INSTRUCT THE JURY THAT THE FIVE VOTES MEANT MANDATORY OR WOULD BE A LIFE SENTENCE . NO.

>> Justice Charles Canady: WHEN THEY WERE PRESENTED WITH THE PROPOSED JURY INSTRUCTIONS THEY DO NOT ACTUALLY SAY THESE ARE ERRONEOUS BECAUSE THEY FAILED TO INFORM THE JURY THAT A RECOMMENDATION OF LIFE WOULD BE BINDING.

>> Michael W. Mervine,Appellee: I DON'T BELIEVE SO YOUR HONOR.
ALSO IN LIGHT OF THE GRUESOME CRIME ANY ERROR THE STATE WOULD ARGUE

WAS HARMLESS BEYOND A REASONABLE DOUBT. IT IS PURE SPECULATION THAT ANY OF THESE JURORS WOULD'VE BEEN OPEN TO A LIFE SENTENCE HEARING THE FACT THAT THEY DID. OR THAT THOSE FOUR JURORS FELT STRONGLY ABOUT A LIFE SENTENCE TO THE EXTENT THAT THEY WOULD'VE DELIBERATED MORE AGGRESSIVELY.

>> Justice: YOU THINK THE HARMLESS ERROR ANALYSIS SHOULD BE AFFECTED BY THE 8/4 VOTE VERSUS. WHAT WOULD'VE PREVIOUSLY BEEN UNANIMOUS WORK WE WOULD NOT BE HERE.

>> Justice: WHEN WE LOOK AT THE HARMLESS ERROR WERE SAYING BUT FOR THIS ERROR WITH THE JURORS HAVE CONSIDERED A DIFFERENT VOTE YOU THINK THAT THIS IS 8/4 NOW THEY WERE LOOKING AT SHOULD FACTOR INTO THAT DOES IT MAKE IT MORE LIKELY TO BE HARMFUL.

>> Michael W. Mervine, Appellee: I DON'T BELIEVE SO YOUR HONOR.

AS I QUOTED DEFENSE COUNSEL CLOSING ARGUMENT HE URGED THEM TO BASICALLY NOT AGGRESSIVELY LITIGATE IT IS PURE SPECULATION THAT ANY OF THOSE JURORS EITHER IN LIFE OR FOR DEATH OR ON SUCH AN ORDER DID NOT FOLLOW THE COURT'S INSTRUCTIONS TO USE ITS BEST JUDGMENT WHEN THEY GAVE THEIR RECOMMENDATION.

QUICKLY, COUNSEL ADDRESSED THE RECANTING OF CODEFENDANT NIXON. THIS CONFRONTATION CLAUSE ARGUMENT IS UNPRESERVED THE STATE LAW ABUSE OF DISCRETION ARGUMENT MIGHT BE A CLOSE CALL BUT NEVERTHELESS THIS WAS DEFINITELY HARMLESS BEYOND A REASONABLE DOUBT THIS PERPETUATED TESTIMONY WAS READ TO THE JURY WITHIN THAT PERPETUATED TESTIMONY NIXON WAS HIGHLY IMPEACHED THE JURY LEARN THAT HE HAD PREVIOUSLY LIED TO THE POLICE.

THAT HE TALKED ON THE PHONE WITH SOMEONE ABOUT COMING UP WITH A STORY. TO LESSEN HIS CULPABILITY.

HE ALSO RECEIVED A DEAL THE JURY LEARNED HE WAS IN NOT SENTENCED TO LIFE BUT I BELIEVE 55 YEARS TO LIFE. THEY ALSO LEARN THAT HE WAS UNDER THE INFLUENCE OF METHADONE WHEN HE LED THE POLICE TO THE GRAVE.

IN ADDITION THE JURY HEARD APPELLANT'S OWN STATEMENTS AND THOSE WERE RECORDED STATEMENTS AND WITHIN THOSE TIMES HE ADMITTED THAT THIS MURDER PLAN ORIGINATED WITH HIM HE WAS THE LEADER OF IT IT WAS HIS IDEA TO BURY THE VICTIMS ALIVE. IT WAS HIS IDEA TO TARGET THEM BECAUSE THEY WERE INFIRM. HE ADMITTED THAT HE USED THE VICTIM'S PROPERTY AFTER ROBBING THEM IN THE HOUSE AND PLACING THEM IN AT THEIR TRUNK DRIVING THEM TO THE MAKESHIFT GRAVE.

FINALLY THE ADMISSION OF THE CODEFENDANTS LIFE SENTENCE IN ENDINGS V. OKLAHOMA, THE US SUPREME COURT HAS SET FORTH CONSTITUTIONAL MEDICATION WHICH IS HIGHLY INDIVIDUALIZED IT FOCUSES ON THE DEFENDANT'S CHARACTER HIS RECORD AND THE NATURE OF THE OFFENSE THE SENTENCE OF CODEFENDANT WADE IS NOT PROBATIVE OF ANY OF THOSE ALSO THE PRESENTATION OF SUCH EVIDENCE IS PROBLEMATIC BECAUSE FOR IT TO HAVE ANY

MEANING THE JURY WOULD HAVE TO LEARN OF THE AGGRAVATORS, THE MITIGATORS AND MR. WADE'S INVOLVEMENT IN THE CRIME IT WOULD BE A TRIAL WITHIN A TRIAL.

>> Justice: I'M SORRY TO INTERRUPT CAN YOU TAKE A COUPLE OF SECONDS TO WRAP UP.

>> Michael W. Mervine, Appellee: THIS IS MY FINAL ONE.

THIS COURT DECISION ANY CRUISE V. STATE CERTAINLY SHEDS SOME LIGHT ON THE ISSUE THAT CASE ADDRESSED RELATIVELY CULPABILITY REVIEW AND CONCLUDED THAT JUST BECAUSE THE DEFENDANT IS INVOLVED WITH THE SAME CRIME IT IS IRRELEVANT TO HIS CO DEFENDANT SENTENCE BECAUSE THE AGGRAVATORS, MITIGATORS AND INVOLVEMENT ARE DIFFERENT.

THANK YOU VERY MUCH.

>> Jeffrey DeSousa, Appellee: I WON'T TAX THE COURTS PATIENCE I WILL JUST SAY A FEW WORDS ABOUT THE ALLEGATION HERE ON RETROACTIVELY.

ALL THE SAVINGS CLAUSE STATUTE REQUIRES WHETHER NEW CRIMINAL LAW IS SUBSTANTIVE OR PROCEDURAL IS IT BE APPLIED PROSPECTIVELY I AGREE WITH EVERYTHING JUSTICE CANADY SAID ABOUT THAT ISSUE THIS IS BASICALLY CONTROLLED BY LOVE AND THEIR TACIT CONFESSION TO SAY PROCEDURAL LAW 775.022 3A WOULD PREVENT THE TRIAL JUDGE PEOPLE FROM REOPENING A CLOSED PENALTY PHASE TO RETROACTIVELY APPLY THIS PROCEDURE BUT A VALID PERSPECTIVE APPLICATION IS ONE THAT IS FORWARD-LOOKING TALK PENALTY PHASE THAT HAD NOT YET OCCURRED ANY QUESTIONS I CAN ANSWER FOR THE COURT ABOUT ANY OF THE SP 450 ISSUES. THANK YOU FOR YOUR TIME.

>> Chief Justice Carlos Muniz: THANK YOU.

>> Attorney: THANK YOU JUST BRIEFLY I DO HAVE 1711 THAT I WAS SETTING TO I WOULD POINT TO THE PLACE WITH DEFENSE COUNSEL SAYS I'M CONCERNED WITH THE IDEAS SUGGESTED TO THE JURY THAT THERE VERDICT IS ABOUT RIGHT WHEN IT THE RETURN A VERDICT OF LIFE IS THAT ADVISORY IT IS LIFE THE COURT SHALL IMPOSE IT.

>> Justice Charles Canady: CAN I ASK YOU WHEN DID THAT OCCUR WAS THAT AFTER THE PROPOSED JURY INSTRUCTION REPRESENTED OR BEFORE?

>> Attorney: I BELIEVE IT WAS BEFORE THE CHARGE WAS GIVEN.

>> Justice Charles Canady: WERE THEY LOOKING AT THE PROPOSED JURY INSTRUCTIONS AT THAT POINT?

I UNDERSTAND IF YOU LOOK AT THAT IN CONTEXT I THINK THE JUDGE SAYS YES, I THINK THE QUESTION HERE IS WHEN MAYBE I'M MISSING SOMETHING, I THINK THE QUESTION IS WHEN THE INSTRUCTIONS WERE PRESENTED DID THEY SAY NO THIS IS INCORRECT THIS NEEDS TO BE YOU NEED TO HAVE THIS SPECIFIC STATEMENT THAT A JURY RECOMMENDATION OF LIFE WILL BE BINDING?

>> Attorney: YOU MENTIONED THE INSTRUCTIONS HAD BEEN PRESENTED FOR THOSE ARGUMENT I JUST WANT TO UNDERLINE THE BURDEN IS ON THE STATE TO SHOW UNDER CALDWELL THERE IS NO EFFECT ON SENTENCING DECISION. THIS IS ALSO AN INSTRUCTIONAL ERROR IN THAT IT CONTRASTS WITH THE STATUTE ITSELF.

WHICH SAYS THE WORD RECOMMENDATION BUT ALSO SAYS THAT IF IT IS FIVE OR MORE THE COURT SHALL IMPOSE LIFE SENTENCE AND INTERESTINGLY THE JURY INSTRUCTIONS THE KMART ALSO STATED THAT THE JURY SHOULD BE TOLD THAT WHAT THEY DON'T USE THE WORD COMMISSION AT A LIFE SENTENCE LIKELY TO AVOID THIS KIND OF CONFUSION.

UNDER THE INSTRUCTIONAL ERROR THE STATE WOULD HAVE TO SHOW THAT THIS IS A HARMLESS ERROR AND ALSO IT WOULD BE CIRCULAR TO SHOW THAT AS WELL. HERE THE JURY WAS SIMPLY MISINFORMED. IT WAS DEPRIVED OF THE PARROT THE LEGISLATURE HAS GIVEN JURORS EVER SINCE THEY 2016 ADDITION OF THE STATUTE TO DECIDE LIFE RATHER THAN JUST RECOMMEND SOMETHING TO THE COURT THAT THE COURT CAN THEN CHANGE.

AS TO THE CODEFENDANT SENTENCE SITUATION, THIS COURT HAS IN FLORIDA HAS LOOKED FOR A LONG TIME AT CODEFENDANT SENTENCES ANYTHING INDISPUTABLY SIGNIFICANT HERE WERE THIS COURT THE LONGER DOES COMPARATIVE PROPORTIONALITY REVIEW THAT THE JURY GIVEN THIS INFORMATION SO IT CAN MAKE A DETERMINATION OF COURSE IT IS UP TO THE JURY TO DECIDE HOW MUCH WEIGHT TO GIVE THE FACT OF CO DEFENDANT THAT LIFE HERE THE OTHER CODEFENDANT GOT 45 YEARS THE JURY WAS TOLD THAT BUT WAS NOT TOLD THIS OTHER CODEFENDANT COOLS RULE WAS ALLEGED TO BE MORE SERIOUS THAT HE GOT A LIFE SENTENCE AS WELL.

>> Justice: DO WE HAVE TO EXPAND OUR CONCEPT OF MITIGATION TO PRESERVE THAT MITIGATING IT DOESN'T HAVE ANYTHING TO DO WITH THEIR DEFENDANTS BACK ON CHARACTER ETC. THEN HAVE ANYTHING TO DO WITH THE OFFENSE WHERE WOULD WE UNDERSTAND THERE IS THE STATEMENT IN THE CASES AND SELF IF WE WERE GOING TO BE FOCUSED AND PRECISE IN THIS HOW WOULD WE SAVE IF IT'S WITHIN THE CONCEPT OF MITIGATION.

>> Attorney: WAS A SOMETHING THE JURY WAS TOLD THIS CASE THE JURY WAS TOLD MITIGATION WITH ANYTHING THAT SUPPORTS LIFE LIFE DETERMINATION IS MITIGATION THAT IS WHAT THEY WERE TOLD TO CONSIDER. CERTAINLY THIS WOULD'VE FALLEN INTO THAT HAD THEY BEEN TOLD ABOUT THE CODEFENDANT SENTENCE. WHILE THEY WERE GIVEN THE GENERAL INSTRUCTION THAT THE STATE .2 IN TERMS OF TAKE THIS SERIOUSLY NOT ONLY IS THAT TRUE IN MOST DEATH PENALTY CASES IT WAS EVEN TRUE IN CALDWELL AND THAT THE COURT SAID IN CALDWELL THERE WERE GIVEN THESE GENERAL INSTRUCTIONS TO TAKE THIS SERIOUSLY BUT THAT WAS NOT ENOUGH TO GET TO THE SPECIFIC ERROR BECAUSE THOSE INSTRUCTIONS DID NOT GO TO THE SPECIFIC ERROR OF THE MESSAGES THE JURY RECEIVED.

>> Justice Charles Canady: AGAIN LET ME ASK YOU WHETHER YOU AT THE TRIAL LEVEL IT WAS ACTUALLY AN ARGUMENT PRESENTED TO THE TRIAL COURT THAT THIS LIFE SENTENCE WAS MITIGATION?

THE CODEFENDANT LIFE SENTENCE WAS MITIGATION WAS THAT ARGUMENT MADE TO THE TRIAL COURT.

>> Attorney: I BELIEVE THAT WAS THE ARGUMENT I DON'T KNOW THAT THE DEFENSE

COUNSEL USED THIS IS MITIGATION.

>> Justice Charles Canady: THERE HAVE BEEN SOME PRIOR ORDERS THERE WAS NO DISCUSSION OF MITIGATION UNLESS I'M MISSING THIS THE TRIAL COURT HAD NO WAY TO KNOW THAT YOU WANT TO SUBMIT THIS AS MITIGATION BECAUSE YOU WERE NOT SAYING IT IS MITIGATING.

>> Attorney: THE PRIOR LITIGATION WAS WHETHER OR NOT THERE COULD BE THE INTRODUCTION OF OTHER SENTENCES THAT THE CODEFENDANT BUT OTHER SENTENCES THAT ARE NOT SIMILAR TO THIS ONE WHERE IS THAT THIS DISCUSSION HAPPENED LATER AND WAS A DISTINCT ARGUMENT JUST AS TO THE CODEFENDANT SENTENCE AND PRESUMABLY THE DEFENSE COUNSEL WANTED TO BE PRESENTED TO THE JURY BECAUSE IT IS.

>> Justice Charles Canady: DID HE SAY THAT?

DID HE SAY IT IS MITIGATING AND I'M ENTITLED TO PUT IT IN BECAUSE IT IS MITIGATING >> I CANNOT SAY HE WAS THE EXACT WORD MITIGATING OR NOT THAT IS THE TENOR OF THE ARGUMENT.

>> Justice Charles Canady: THE ARGUMENT IT IS MITIGATION THEY ARE ENTITLED TO GET IT SEEMS TO ME IT IS A INCUMBENT UPON THE LAWYER TO TELL THE TRIAL COURT IS MITIGATING EVIDENCE THAT THEY ARE ENTITLED TO GET IN.

>> Attorney: I DON'T THINK THERE'S ANY OTHER REASON FOR WHICH THE DEFENSE COUNSEL WOULD'VE ASKED FOR THAT TO BE ENTERED AND IF IT WERE NOT TO SERVE.

>> Justice Charles Canady: IT IS ABOUT APPRISING THE TRIAL COURT OF THE SPECIFIC BASIS NOT LIKE WHAT YOU'RE SAYING WE EXPECT THE TRIAL COURT TO KNOW IT WAS IT WAS MITIGATING WHEN THEY WERE NOT INFORMED WHEN THE TRIAL COURT IS NOT INFORMED THAT THEY CONSENTED IT WAS MITIGATING.
MY UNDERSTANDING WHAT YOU'RE SAYING.

>> Attorney: YES YOUR UNDERSTANDING WE WOULD BASED ON THAT AND ON THE PREJUDICE OF THAT CERTAINLY RELATED TO THE RECANTATION THAT WOULD WARRANT REVERSAL IN TERMS OF THE CALDWELL ERROR I DID WANT TO UPLIFT IT IS AN INSTRUCTIONAL ERROR EVEN IF THIS COURT DOES NOT FEEL IT UNDERMINED THE JURY'S SENSE OF RESPONSE ABILITY, WHICH WE ARGUE IT DOES AND THAT THERE IS RECORD EVIDENCE OF THAT IF THE COURT DID NOT HOLD THAT THE CONFLICT WITH THE LAW ITSELF.

WHICH DOES USE RECOMMENDATION FOR SAYS FIVE OR MORE BOATS FOR LIFE IS BINDING THIS COURT SHOULD ALSO VERSE ON THOSE GROUNDS.

IF THERE AREN'T ANY OTHER QUESTIONS I WILL REST.

>> Chief Justice Carlos Muniz: THANK YOU VERY MUCH WE ARE ADJOURNED.