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IN THE SUPREME COURT OF THE UNITED STATES

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TIMOTHY LEE HURST, :

Petitioner : No. 14-7505

v. :

FLORIDA. :

- - - - - x

Washington, D.C.

Tuesday, October 13, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:20 a.m.

APPEARANCES:

SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of Petitioner.

ALLEN WINSOR, ESQ., Solicitor General, Tallahassee, Fla.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:20 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case No. 14-7505, Hurst v. Florida.

5 Mr. Waxman.

6 ORAL ARGUMENT OF SETH P. WAXMAN

7 ON BEHALF OF THE PETITIONER

8 MR. WAXMAN: Mr. Chief Justice, and may it  
9 please the Court:

10 Under Florida law, Timothy Hurst will go to  
11 his death despite the fact that a judge, not a jury,  
12 made the factual finding that rendered -- rendered him  
13 eligible for death. That violates the Sixth Amendment  
14 under Ring. In Florida, and Florida alone, what  
15 authorizes imposition of the death penalty is a finding  
16 of fact by the court of an aggravating factor, a finding  
17 that the trial judge makes independently, and, quote,  
18 "notwithstanding the jury's recommendation as to  
19 sentence."

20 Now, the State here contends that capital  
21 sentencing juries make implicit findings that satisfy  
22 the Sixth Amendment under Ring, which the trial judge  
23 then simply ratifies. That is wrong.

24 Whatever the jury's recommendation might  
25 imply about the specified aggravating factors, the

1 Florida Supreme Court has repeatedly rejected the notion  
2 that the jury's verdict is anything other than advisory.  
3 Florida law entrusts the factual findings of aggravators  
4 to the judge alone, who may do so on the basis of  
5 evidence that the jury never heard, and aggravators that  
6 the jury was never presented with.

7 JUSTICE SCALIA: Is there ever a case in  
8 which the jury found aggravators and recommended the  
9 death sentence, and the judge reversed that finding?

10 MR. WAXMAN: There may well be. This is  
11 principally a case about the finding of death  
12 eligibility, not sentence selection. I --

13 JUSTICE SCALIA: Well, I mean, either --  
14 either way, is -- is there -- is there --

15 MR. WAXMAN: Yes.

16 JUSTICE SCALIA: -- is there ever a case in  
17 which the jury did not find an aggravating circumstance,  
18 but the judge did.

19 MR. WAXMAN: Well, we don't ever know what  
20 the jury found about any of the specified aggravating  
21 circumstances. The only thing that the jury tells the  
22 judge is, we recommend life-slash-death by a vote of X  
23 versus Y.

24 JUSTICE SCALIA: Right. But they can't  
25 recommend death unless they find the aggravator, right?

1 MR. WAXMAN: Well, no. No. As a matter of  
2 State law, that's not correct. They can't recommend  
3 death unless seven of them each believe that some  
4 aggravator is satisfied.

5 JUSTICE SCALIA: All right.

6 MR. WAXMAN: But the Florida Supreme  
7 Court -- and this is a -- this is a -- another Ring  
8 problem here. The Florida Supreme Court has recognized  
9 that where two aggravators are presented, it is  
10 impossible to know, even if a single majority agreed on  
11 a single aggravator.

12 CHIEF JUSTICE ROBERTS: Well, that's a  
13 common feature, though, of jury deliberations. Let's  
14 say an aggravator is whether the murder is -- is  
15 particularly heinous. And it can be for -- for a number  
16 of factors: One, the victim is a -- a -- a juvenile, so  
17 maybe three jurors find that. Or an officer was also  
18 killed, or it was in the commission in the course of  
19 another felony.

20 In a typical case, a finding that the murder  
21 was heinous, you have no idea whether the juror -- jury  
22 as a whole made that determination, or if there were 12  
23 different reasons.

24 MR. WAXMAN: Mr. Chief Justice, Florida --  
25 and, Florida is the only State -- the only death penalty

1 State and therefore the only State that does not require  
2 or permit the jury to be told that it has to agree. And  
3 in all other states it's unanimous, but even has to --  
4 cannot even be told that a majority have to agree as to  
5 the existence of one of the specified aggravating  
6 factors.

7 CHIEF JUSTICE ROBERTS: Well, but isn't that  
8 true -- I mean, taking it even out of the death penalty  
9 context, that's true with every jury determination. You  
10 could have the jury determining that the -- the --  
11 the -- you know, the -- the person didn't commit the  
12 offense because his alibi was good, or because, you  
13 know, somebody else did it, or, you know, any number of  
14 12 different reasons that they think he was not guilty.  
15 It doesn't --

16 MR. WAXMAN: It --

17 CHIEF JUSTICE ROBERTS: -- have to be  
18 agreement by the jury on a -- on the particular basis  
19 for their verdict.

20 MR. WAXMAN: We're talking here, Mr. Chief  
21 Justice, about elements of the crime. And as this Court  
22 explained in *Ring*, the existence of a statutory  
23 aggravating factor is an element of a death-eligible  
24 crime.

25 And can anybody imagine a world, which would

1 be the analogue in Florida, if the jury at the  
2 guilt/innocence phase of any trial, a shoplifting trial,  
3 were told, "Now, look. I'm the one who will decide  
4 whether the defendant is or isn't guilty as a matter of  
5 law, and -- and eligible for punishment. But I'd like  
6 your input on what you -- whether you think each of the  
7 specified elements is or isn't satisfied." I mean,  
8 that -- nobody would stand for an argument like that --

9 JUSTICE SCALIA: I'm not sure. You --  
10 you --

11 MR. WAXMAN: -- a premise like that.

12 JUSTICE SCALIA: Are you sure that -- that  
13 if you have a crime that can be satisfied by various  
14 elements, the jury has to agree upon the specific  
15 element that satisfies it?

16 MR. WAXMAN: The jury -- if they are  
17 distinct elements, and this -- this implies the Schad  
18 point that the State is raising: If the State,  
19 consistent with long historical tradition and a finding  
20 of equal culpability, chooses to permit a particular  
21 element in Schad, it was premeditation, or the mental  
22 state to be satisfied either by premeditation or by  
23 felony murder, that's fine.

24 But that is not the Florida system. Florida  
25 requires as a matter of law -- and the Florida Supreme

1 Court has said this over and over again -- that a  
2 defendant is eligible for death only if the trial judge  
3 finds as fact, beyond a reasonable doubt, that a  
4 particular statutory aggravator exists.

5 And I submit, even if that were not the  
6 case, extending *Schad*, which held that in light of a  
7 hundred-and-fifty-year history of states including in  
8 the mental element for first degree murder, either  
9 felony murder or premeditation, that combining those two  
10 elements didn't satisfy the death penalty. None of that  
11 is here.

12 This is a question of the Sixth Amendment  
13 and the Eighth Amendment. No State ever has said that  
14 the jury can just decide some model of aggravation.  
15 They just -- they don't agree on the specific element,  
16 and that would violate, I think, the Sixth and Eighth  
17 Amendment precedents.

18 JUSTICE SCALIA: I -- I -- I would think  
19 that the -- I would think just the opposite, that --that  
20 the necessity of finding the elements of the crime goes  
21 all the way back into the mists of history.

22 And this necessity of finding an aggravating  
23 factor, we made it up, right? I mean, that's just  
24 recent Supreme Court law.

25 MR. WAXMAN: Just --



1 JUSTICE SCALIA: And so if -- if even one of  
2 them should be satisfiable by simply finding the generic  
3 conclusion rather than agreeing upon the -- the  
4 particular species at issue, I would think it's --  
5 it's -- it's the latter, rather than the former.

6 MR. WAXMAN: Justice Scalia, I'm reminded of  
7 your separate opinion -- I think it was in *Walton v.*  
8 *Arizona* -- where you were choosing between two things  
9 that you didn't particularly like, and one of them was  
10 the fact that the court had made, recently or not, had  
11 made a finding of a -- beyond a reasonable doubt, a  
12 factual finding of a specified aggravating factor an  
13 element of the crime. And whether it's recent, whether  
14 the court should or shouldn't have done it, it has. And  
15 it -- under *Ring*, it is just like any other element of  
16 the crime.

17 And on the *Schad* point, I think the other  
18 thing I would have said is, the Florida Supreme Court --  
19 and I'll refer the case -- the Court to the *Bevel*  
20 case -- the Florida Supreme Court has said that the 16  
21 aggravating factors that it -- that makes one eligible  
22 for death are vastly incommensurate, in terms of  
23 relative levels of --

24 JUSTICE ALITO: Mr. Waxman --

25 MR. WAXMAN: -- ability, opposite of the

1 predicate of Schad.

2 JUSTICE ALITO: Could I ask you this about  
3 Ring? I wasn't on the Court at the time of Ring, so  
4 could you tell me if Ring is entitled to greater weight  
5 as a precedent than, let's say, Gregg v. Georgia and the  
6 other cases upholding the constitutionality of the death  
7 penalty?

8 MR. WAXMAN: Oh, I'm not -- I -- I wouldn't  
9 be prepared to say -- to assign weight to either of  
10 them.

11 I think Ring is certainly predicated on  
12 Gregg, to Justice Scalia's point. If Gregg hadn't  
13 decided that -- that there has to be a determinate,  
14 specific appellate reviewable narrowing of trial -- of a  
15 sentencing jury's discretion, Ring wouldn't come up,  
16 because an aggravating factor wouldn't be an element.

17 JUSTICE SOTOMAYOR: Do you think this  
18 scheme, assuming we agree with Justice Scalia, that you  
19 don't really need unanimity, would this still be good  
20 law under Apodaca -- Apodaca --

21 MR. WAXMAN: Well --

22 JUSTICE SOTOMAYOR: -- the case that said  
23 that we -- we needed a unanimous jury, but, you know,  
24 nine out of twelve is okay? Do you -- do you think  
25 seven out of five is okay?

1 MR. WAXMAN: I hope it was clear from our  
2 brief that we think --

3 JUSTICE SOTOMAYOR: It's not.

4 MR. WAXMAN: -- nine out of five is not  
5 okay. It doesn't require this Court to overrule  
6 Apodaca, which --

7 JUSTICE SOTOMAYOR: We're not required to do  
8 anything. We could just say it's not the functional  
9 equivalent. But is --

10 MR. WAXMAN: Well --

11 JUSTICE SOTOMAYOR: -- but is it still good  
12 law.

13 MR. WAXMAN: Well, six --

14 JUSTICE SOTOMAYOR: Shouldn't we overrule  
15 it?

16 MR. WAXMAN: I -- we think, for the reasons  
17 stated in our brief, you should overrule it. And  
18 particularly in the Eighth Amendment context where the  
19 question is death, the jury should be unanimous.

20 I mean, there is no other State that permits  
21 anyone to be sentenced for death other than a unanimous  
22 determination by the jury. And the State of Florida  
23 requires unanimity for shoplifting, just not for death.  
24 It requires unanimity on all of the other elements of  
25 the crime.

1           Now, even -- Apodaca is a -- is an unusual  
2 decision, as Justice --

3           JUSTICE SCALIA:           Well, wait a minute.  
4 They -- they -- they require unanimity for the -- for a  
5 conviction, right?

6           MR. WAXMAN:           Yes. And conviction --

7           JUSTICE SCALIA:           Just -- just -- just they  
8 don't require unanimity on the sentence. That's quite  
9 different from --

10          MR. WAXMAN:           Justice --

11          JUSTICE SCALIA:           -- from whether the person  
12 committed the crime or not.

13          MR. WAXMAN:           Justice Scalia -- exactly.  
14 And, Justice Scalia, leaving aside our Eighth Amendment  
15 point in our brief that -- that followed on Justice  
16 Breyer's concurrence in Ring, the -- this is all about  
17 the eligibility, not the determination of what sentence  
18 applies. And you have held that the existence of a  
19 specified statutory aggravating factor is a condition.  
20 It is an element of capital murder, and it is, by  
21 statute and Florida Supreme Court decision, an element  
22 of capital murder in Florida.

23           And in Apodaca itself, which, as -- as  
24 Justice Thomas pointed out in McDonald, is an  
25 extraordinarily unusual case, even there, six justices

1 indicated that a simple majority rule would not pass  
2 muster.

3 I mean, we need to -- once a -- at --  
4 when -- when an assignment is made to a jury in a case  
5 to decide beyond a reasonable doubt the existence of an  
6 element, however the State defines the element, we need  
7 substantial reliability that the jury actually performs  
8 those functions.

9 And in this case -- and, again, in this  
10 case, if it were true that the sentencing jury was  
11 actually determining death eligibility, which it is  
12 plainly not, as we point out, the Eighth Amendment would  
13 certainly be violated under Caldwell, because this --  
14 Florida juries are told that they do not determine death  
15 eligibility. And the State simply can't have it both  
16 ways. Either the jury is correctly told that its role  
17 is merely advisory, in which case there is a Ring  
18 violation, or the instruction that it's given violates  
19 the Eighth Amendment under Caldwell, because, as in  
20 Caldwell, it misleadingly, quote, "minimizes the jury's  
21 sentence of responsibility for determining the  
22 appropriateness of death."

23 JUSTICE GINSBURG: Mr. Waxman, do we -- do  
24 we just treat as irrelevant what was involved in this  
25 case, that is, the two aggravators that were alleged,

1 the brutality of the murder and that it occurred during  
2 a robbery? Those were obvious that they existed, is  
3 that not so?

4 MR. WAXMAN: I think it's not so. It's  
5 probably a reason why -- for -- I mean, the heinous,  
6 atrocious, and cruel aggravator can never be obvious.  
7 And the State isn't even arguing harmlessness with  
8 respect to that.

9 And as to robbery, I think it's important  
10 to -- to recognize the following: The State made a  
11 choice. They didn't even indite Timothy Hurst for  
12 robbery. The sentencing jury was not even instructed on  
13 the elements of robbery. This argument of harmlessness  
14 was never raised in these proceedings from the  
15 sentencing proceeding onward, including in the brief in  
16 opposition in this case, until the Red brief, and even  
17 there the Red brief is simply arguing that there was a  
18 fatal concession.

19 But in any event, Justice Ginsburg, there is  
20 evidence in the record from which a jury could certainly  
21 find that Timothy Hurst, although he was found guilty of  
22 first-degree murder, did not, in fact, actually commit  
23 the robbery. The jury was told that to find the  
24 existence of the felon murder aggravator, it had to  
25 find -- and I believe this is on Page 211 of the Joint

1 Appendix -- that it had to find that the murder was  
2 committed while he -- in the course of him committing a  
3 robbery. All of the physical evidence in this case that  
4 relates to the robbery, the -- the -- the bank deposit  
5 slip, the money, the bank deposit envelope, and a piece  
6 of paper in Lee-Lee Smith's handwriting toting up the  
7 proceeds, were all found in Lee-Lee Smith's possession.

8 And so, although it is not this Court's  
9 ordinary function to determine whether something was or  
10 wasn't harmless, as in Ring it was remanded for that  
11 purpose, I think in this case it manifestly was not  
12 harmless, and if there were a remand or any question by  
13 this Court on that count, it ought to be remanded to the  
14 State court, not only to determine constitutional  
15 harmlessness, but whether there was a waiver by the  
16 State in its deliberate choice never to mention this  
17 either to the second sentencing jury or thereafter.

18 JUSTICE SOTOMAYOR: Mr. Waxman, am -- am I  
19 understanding the case properly? The informant, who had  
20 all of the physical evidence, was the main identifier of  
21 the defendant, correct?

22 MR. WAXMAN: Correct.

23 JUSTICE SOTOMAYOR: And --

24 MR. WAXMAN: Because there were -- there  
25 were -- there was an eyewitness from across the street

1 who testified that he saw somebody go into the Popeye's,  
2 and he positively identified the defendant.

3 JUSTICE SOTOMAYOR: Now, did --

4 MR. WAXMAN: Now, I believe there was  
5 another cooperator who backed up Lee-Lee Smith's  
6 testimony.

7 JUSTICE SOTOMAYOR: So the defendant  
8 claimed, however, that this informant was the one who  
9 did the crime.

10 Could the jury, under the evidence that  
11 existed, conclude that they both did it?

12 MR. WAXMAN: Certainly.

13 JUSTICE SOTOMAYOR: And that's why it's  
14 debatable whether it's harmless?

15 MR. WAXMAN: Yes. And, in fact --

16 JUSTICE SOTOMAYOR: Because what makes it an  
17 aggravator is if he's the one who actually did the  
18 killing.

19 MR. WAXMAN: That's correct.

20 JUSTICE SOTOMAYOR: That he wasn't --

21 MR. WAXMAN: Well, that's what the jury was  
22 instructed.

23 JUSTICE SOTOMAYOR: Uh-huh.

24 MR. WAXMAN: The jury was instructed that in  
25 order to find the felony murder aggravator, it had to



1 find that the murder was committed in the course of him  
2 committing the robbery.

3 JUSTICE SOTOMAYOR: Personally?

4 MR. WAXMAN: Yes.

5 JUSTICE SOTOMAYOR: All right. That's --

6 MR. WAXMAN: But the -- the statute, the  
7 actual aggravator, is different. But that is what this  
8 jury was told.

9 JUSTICE KAGAN: Mr. Waxman, can I give you a  
10 hypothetical State system? And this is a two-part  
11 question. You tell me if it is consistent with the  
12 Sixth Amendment. And if it is, what makes this case  
13 different. Okay?

14 So my system is that a jury, whether in the  
15 penalty phase or in the guilt phase, has to make a  
16 determination of an aggravating factor. Okay. But once  
17 that's done, once the jury decides on an aggravating  
18 factor, the judge can do whatever she wants. The judge  
19 can add aggravating factors. The judge can reweigh the  
20 aggravating factors as compared with the mitigating  
21 evidence. The judge can do any of that stuff. But the  
22 judge has to leave alone the aggravating factor that the  
23 jury finds. So, in other words, the judge can't give  
24 death when the jury finds life, and the judge can't  
25 throw out the jury's factor. But as long as that jury

1 makes that aggravating factor, the judge can do anything  
2 that is consistent with the Sixth Amendment.

3 MR. WAXMAN: Okay. You're asking only about  
4 the Sixth Amendment and not the Eighth Amendment --

5 JUSTICE KAGAN: Yes.

6 MR. WAXMAN: -- point. Okay. So the -- so  
7 just to be sure that I'm specifically answering your  
8 question, if the jury is told, you must find -- for the  
9 defendant to be eligible for death, you must find beyond  
10 a reasonable doubt the existence of at least one of the  
11 statutory aggravating factors. And I would also say for  
12 Sixth Amendment purposes, you must either be unanimous  
13 or the vote must be at least ten to two. And then the  
14 jury does so find. And then you have the sort of  
15 belt-and-suspenders legal system that the State is  
16 positing that Florida has here where the judge can say,  
17 I'm the one who does the sentence, so I can weigh the  
18 ags and the mits. I can't -- he is death eligible  
19 because the jury found beyond a reasonable doubt that a  
20 statutory aggravator exists. But the judge can say,  
21 nonetheless, I'm giving life. There's nothing --  
22 there's no violation of the Sixth Amendment in -- when  
23 that happens.

24 The question is, in this case, when the  
25 sentencing jury has concluded its work -- I mean -- and

1 I'm assuming in a case where there's not a conviction  
2 for a prior aggravated felony. When the sentencing jury  
3 has concluded its work, is the defendant eligible for  
4 the death penalty under State law? Yes or no. And in  
5 Florida, the answer is unquestionably no.

6 Even if we knew that 12 of the jurors found  
7 the robbery aggravator here, there would be a Ring  
8 violation, just as if we knew that 12 of the jurors  
9 found that he had killed the defendant in this case, but  
10 they had been told, I just want your input on this  
11 because I, the judge, will decide this.

12 JUSTICE KAGAN: Well, is that -- is that  
13 what makes a difference, then, in the end, that -- that  
14 you're saying that the jury has to be specifically told  
15 that that's what it's doing? That -- and you're  
16 saying --

17 MR. WAXMAN: The jury, no.

18 JUSTICE KAGAN: -- the necessary part of a  
19 constitutional system for the jury to be instructed that  
20 it has the responsibility to find the aggravating factor  
21 that serves as a precondition to death.

22 MR. WAXMAN: At a minimum, if, in fact, the  
23 jury is performing that function, it cannot, at least in  
24 a capital case, be told that it is not performing that  
25 function, that its advice is -- that its verdict is only

1 advisory.

2 JUSTICE ALITO: What if it's told that it  
3 has to decide on life or death. But if you decide on  
4 death, the judge is going to review it, and the judge  
5 has the power to sentence to life.

6 MR. WAXMAN: If the -- I mean, there is no  
7 constitutional violation -- our view, and this again is,  
8 is Justice Breyer's Eighth Amendment point, which we  
9 endorse. Our view is that capital sentencing always has  
10 be -- has been, and as a matter of constitutional law  
11 should be, done by a jury. We're not arguing that other  
12 sentences have to be jury sentencing. And so if a  
13 jury -- if a jury says it's death, and the judge says,  
14 well, I disagree, I'm only going to sentence him to  
15 life, there's no constitutional violation.

16 JUSTICE ALITO: Well, I'm trying to  
17 understand the limits of your argument that what is done  
18 under the Florida statute diminishes the jury's sense of  
19 responsibility. The jury's sense of responsibility will  
20 be diminished to some degree if they know that their  
21 verdict is not necessarily the final word.

22 MR. WAXMAN: Well --

23 JUSTICE ALITO: Would that be the case --  
24 isn't that case whether they -- whether they're told,  
25 you -- you make a recommendation and the judge decides,

1 or you impose a sentence, but the judge can impose a  
2 different sentence, a lesser sentence? There's still --  
3 they still don't have to bear the responsibility of  
4 making the absolutely final decision.

5 MR. WAXMAN: So, Justice Alito, let me  
6 separate out what I'm calling the selection decision,  
7 that is life or death and the weighing of ags and mits  
8 and the eligibility decision, which is all of the  
9 elements of capital murder have been found beyond a  
10 reasonable doubt by the jury with either unanimously or  
11 a sufficient majority, and, therefore, when the  
12 sentencing jury is done, you are eligible for the death  
13 penalty, leaving aside the Eighth Amendment question  
14 whether the Constitution then require -- requires the  
15 jury to make the intensely moral judgment about whether  
16 the penalty should be life without parole or death,  
17 assuming that a judge can do that, so long as the jury  
18 is not told that its input, which is how the Florida  
19 Supreme Court has put it, is -- so long as they are not  
20 told that it's advisory, so long as they are told that  
21 you as the finders of fact have to find beyond a  
22 reasonable doubt that this capital crime was committed  
23 which includes the following elements, including one of  
24 the two specifying aggravators, the Constitution is  
25 satisfied.

1           The -- the Caldwell problem is an Eighth  
2 Amendment problem. Caldwell was an Eighth Amendment  
3 case. And in Caldwell what -- I mean what the jury is  
4 told here -- if the system exists as the State posits  
5 it, what the jury is told here is far more misleading  
6 than what was told in Caldwell.

7           In Caldwell, the jury was simply told at  
8 closing argument that your decision is going to be  
9 reviewable by the Mississippi Supreme Court. And a  
10 majority of this Court held that that unconstitutionally  
11 diminished the jury's responsibility.

12           Here the jury was told over and over and  
13 over again, and consistent with Florida law, that your  
14 judgment is merely advisory; I will be the one to make  
15 this determination. And either -- if that isn't -- that  
16 does appear to be the system, that violates Ring. If it  
17 isn't the system and if somehow it can be argued that  
18 the jury is making implicit findings of aggravation at  
19 large, that renders somebody eligible for death, then  
20 there is a plain Caldwell problem. And that -- that's  
21 our position.

22           May I reserve the balance of my time?

23           CHIEF JUSTICE ROBERTS:           You may.

24           MR. WAXMAN:                    Thank you.

25           CHIEF JUSTICE ROBERTS:           Mr. Winsor.

1 ORAL ARGUMENT OF ALLEN WINSOR

2 ON BEHALF OF THE RESPONDENT

3 MR. WINSOR: Mr. Chief Justice, and may it  
4 please the Court:

5 Florida's capital sentencing system was  
6 constitutional before *Ring v. Arizona*, and it remains  
7 constitutional in light of *Ring v. Arizona*. What *Ring*  
8 required was a jury determination on those facts on  
9 which the State legislature conditions the imposition of  
10 the death penalty.

11 In this instance Mr. Hurst got that. The  
12 legislature has determined that the elements necessary  
13 to make a defendant eligible for the death penalty is  
14 the existence of a murder and one or more aggravating  
15 circumstances.

16 And what the other side calls the advisory  
17 sentence included within it a finding, as this Court  
18 recognized in the *United States v. Jones*, that the jury  
19 had determined there was one or more aggravating  
20 circumstances.

21 And so the jury --

22 JUSTICE SOTOMAYOR: I'm sorry. How -- how  
23 is that, when Florida law says that the judge has to  
24 find an aggravator to make someone eligibility for the  
25 death penalty?

1           MR. WINSOR:           Well, I agree with the other  
2 side that there is a difference between the sentence  
3 selection and the sentence eligibility. And so once the  
4 defendant is eligible because a jury has found all of  
5 the necessary elements, then what happens after that,  
6 Your Honor, does not implicate Ring at all.

7           JUSTICE SOTOMAYOR:        Could you tell me how  
8 this is different than Arizona? I mean, in terms of the  
9 system, just like in the Arizona case, there had been  
10 precedent by this Court that Arizona law had been  
11 constitutional. Unlike Arizona, every Florida -- every  
12 court that has looked -- every judge who's looked at it,  
13 not one of them has said that they believe personally  
14 it's constitutional. Even the courts affirming --  
15 affirm on the basis of the prior precedent, and you have  
16 a little less than half the Court directly saying it  
17 violates Ring. So what's the jury finding when it says  
18 seven to five?

19           MR. WINSOR:           Well, if I could back up --

20           JUSTICE SOTOMAYOR:        Even when it says a  
21 murder has been committed, felony murder wasn't. Felony  
22 murder was charged, but we don't know if they found the  
23 robbery, right?

24           MR. WINSOR:           We -- at the guilt phase they  
25 convicted of first degree murder, which could have



1 either been felony murder with the predicate underlying  
2 felony being robbery or premeditated murder.

3 JUSTICE SOTOMAYOR: So how do we know --

4 MR. WINSOR: I'm sorry?

5 JUSTICE SOTOMAYOR: How do we know which one  
6 they picked? Which makes them eligible for the death  
7 penalty?

8 MR. WINSOR: Well, our position is that he  
9 became eligible at the sentencing phase when the jury  
10 made its advisory opinion, because the jury at that  
11 phase was instructed, if you determine that no  
12 aggravating circumstances are found to exist, you must  
13 recommend life.

14 JUSTICE SOTOMAYOR: But you do agree that  
15 that -- it doesn't require unanimous jury?

16 MR. WINSOR: It does not require a unanimous  
17 jury.

18 JUSTICE SOTOMAYOR: And a simple majority is  
19 all you need?

20 MR. WINSOR: That's right.

21 JUSTICE SOTOMAYOR: So we don't have --

22 MR. WINSOR: That's right, but that's a jury  
23 finding.

24 JUSTICE SOTOMAYOR: -- an unanimous jury,  
25 even a functionally equivalent unanimous jury, finding

1 those aggravators.

2 MR. WINSOR: I'm sorry?

3 JUSTICE SOTOMAYOR: We don't have a  
4 unanimous or functionally unanimous jury finding those  
5 aggravators.

6 MR. WINSOR: Our reliance for the -- the  
7 final eligibility determination is that seven to five.

8 But I would make this point: The seven to  
9 five -- there are two things that go on when the -- when  
10 the jury determines whether someone should be sentenced  
11 to death or not.

12 First, the jury looks and determines whether  
13 the State has proven beyond a reasonable doubt an  
14 aggravating circumstance. That's the eligibility piece  
15 of it.

16 Then they get into the sentence selection  
17 process where they weigh the aggravators that they do  
18 find, assuming they find some, against the mitigating  
19 circumstances. And of course the defendant under this  
20 Court's precedent is allowed to put in any evidence that  
21 he wishes.

22 JUSTICE SOTOMAYOR: I'm sorry. The jury is  
23 not asked to find an aggravator.

24 MR. WINSOR: I'm sorry?

25 JUSTICE SOTOMAYOR: It's not asked to find

1 an aggravator.

2 MR. WINSOR: It is, Your Honor. It is  
3 instructed that it may not return a death recommendation  
4 without --

5 JUSTICE SOTOMAYOR: I know. But that's not  
6 found at the jury verdict.

7 MR. WINSOR: I'm sorry?

8 JUSTICE SOTOMAYOR: It's not found at the  
9 trial --

10 MR. WINSOR: At the sentencing phase.

11 JUSTICE SOTOMAYOR: You're -- only at the  
12 sentencing phase.

13 MR. WINSOR: I'm talking about the  
14 sentencing phase right --

15 JUSTICE BREYER: Suppose that the jury comes  
16 back at the sentencing phase and says, we recommend  
17 life.

18 MR. WINSOR: Yes.

19 JUSTICE BREYER: And the reason, though I  
20 guess no one would know it, is because they -- no --  
21 nobody found an aggravating.

22 Can the judge nonetheless give death?

23 MR. WINSOR: No. Not unless --

24 JUSTICE BREYER: No.

25 MR. WINSOR: With this caveat.

1 JUSTICE BREYER: No, we -- we have -- they  
2 have a page in their opinion, in their brief, you know,  
3 Page 20, where it cites about six Florida cases, which  
4 suggested to me that they thought the answer to that  
5 question as a matter of Florida law was, Yes, the judge  
6 can sentence to death.

7 MR. WINSOR: Yeah. Let me -- let me --

8 JUSTICE BREYER: Is that so or not so?

9 MR. WINSOR: Let me be clear: As a matter  
10 of Florida statutory law, it is permitted. We  
11 acknowledge that under Ring it would not be permitted in  
12 the circumstance where the State is relying on the  
13 recommendation to satisfy the eligibility.

14 Now, you could have a situation --

15 JUSTICE BREYER: That's -- I missed the last  
16 part.

17 MR. WINSOR: Okay.

18 JUSTICE BREYER: The jury comes back. They  
19 say life.

20 MR. WINSOR: Right.

21 JUSTICE BREYER: And we know, through mental  
22 telepathy --

23 MR. WINSOR: Right.

24 JUSTICE BREYER: -- though I guess the judge  
25 doesn't, that the reason that they did that is no one

1 found an aggravator.

2 My simple question is: As a matter of  
3 Florida law, can the judge impose the death sentence?  
4 Yes or no.

5 MR. WINSOR: As a matter of Florida  
6 statutory law, yes. As a matter of Ring, no.

7 JUSTICE BREYER: That isn't -- I mean, it  
8 is. It's Federal law. So -- I mean, Ring is over.  
9 So -- so you say the answer is now no --

10 MR. WINSOR: With this caveat, Justice  
11 Breyer --

12 JUSTICE BREYER: -- because of Ring.  
13 Because you agree that this case is like  
14 Ring, and therefore Ring would apply, and therefore --  
15 not this case, but any case in which they recommend  
16 life.

17 MR. WINSOR: Not any case, Your Honor.

18 JUSTICE SCALIA: God, I'd like to know your  
19 caveat. What is the caveat? I'm -- I'm on pins and  
20 needles here.

21 MR. WINSOR: The caveat is this --

22 JUSTICE BREYER: I am, too.  
23 Sorry.

24 MR. WINSOR: There are multiple ways that a  
25 defendant in Florida can become eligible for death.

1           One is, in this case, where it's determined  
2 at the sentencing phase because of the finding within  
3 the jury's recommendation.

4           In other instances it can be -- a person can  
5 become eligible before the sentencing phase either  
6 because they have a prior violent felony conviction or  
7 because they have a contemporaneous conviction.

8           For example, if someone murdered two people  
9 and were convicted of double murder, that person at the  
10 guilt phase, by virtue of that guilt jury's verdict has  
11 been found to be eligible for the death penalty.

12           And so at that stage, then in your  
13 hypothetical, Justice Breyer, if that sentencing-phase  
14 jury recommended life, the judge could override it  
15 without violating Ring.

16           Now, I will tell you that, as a matter of  
17 Florida State law, the judge in that circumstance would  
18 face an exacting standard; and, as a matter of fact, no  
19 judge has overwritten a jury's life recommendation since  
20 before Ring.

21           So as a matter of function, it is just not  
22 something that happens in Florida.

23           But to answer your question, we do believe  
24 it would be constitutional in the situation that I  
25 described.

1 JUSTICE GINSBURG: Suppose the jury came in  
2 hung.

3 MR. WINSOR: I'm sorry?

4 JUSTICE GINSBURG: On -- on the sentence.

5 MR. WINSOR: If the sentencing phase --

6 JUSTICE GINSBURG: The jury -- jury, instead  
7 of being seven to five, it was hung.

8 MR. WINSOR: If the --

9 JUSTICE GINSBURG: Could the judge then  
10 impose the death penalty?

11 MR. WINSOR: Not in this situation, Your  
12 Honor, because that would result in a life  
13 recommendation. A six-six vote is tantamount to a life  
14 recommendation. And the judge could not override that  
15 if he were relying on the jury sentencing finding to  
16 satisfy Ring.

17 And even if he weren't, he or she weren't,  
18 like I said, it's an exacting Florida State law  
19 standard. The judge would be reversed for overturning  
20 that unless he -- he or she determined -- or unless the  
21 appellate court determined that no reasonable jury in  
22 those circumstances could have imposed or recommended a  
23 life sentence.

24 And as I indicated, it's been since 1999  
25 since any judge actually overrode a life recommendation.

1 JUSTICE KENNEDY: Just so I -- I understand  
2 it: So you're saying that it -- it is possible, but  
3 under Florida law the jury would not find the existence  
4 of an aggravated -- aggravating factor but -- and  
5 would -- and then there are different ways that this  
6 would come out -- the hypothetical was a hung jury --  
7 but the judge could then proceed to find an aggravating  
8 factor and impose the death penalty.

9 Now, you say, now, this hasn't happened.  
10 He'd probably be reversed. But theoretically this could  
11 happen.

12 MR. WINSOR: Only -- that could not happen  
13 consistent with Ring, Your Honor, unless there were some  
14 other jury finding or admission that established death  
15 eligibility.

16 JUSTICE KAGAN: Well, you're saying it  
17 couldn't happen consistent with Ring, meaning that there  
18 are certain applications of the Florida law that would  
19 be unconstitutional even in your view.

20 MR. WINSOR: That hypothetical that we've  
21 explored here. Again, with their -- with the absence of  
22 another aggravating circumstance proven outside.

23 And -- and that actually happens in most  
24 cases, Justice Kagan.

25 JUSTICE SCALIA: But -- but we don't --



1 we -- we don't sit in judgment of -- of theoretical  
2 scheme that Florida has set up, do we?

3 MR. WINSOR: No, your Honor, and --

4 JUSTICE SCALIA: And don't we have to  
5 adjudge that there has been unconstitutionality in this  
6 case?

7 MR. WINSOR: That's correct, Justice Scalia.  
8 And in this case there was a -- a jury recommendation,  
9 actually two jury recommendations --

10 JUSTICE KAGAN: Could I give you another  
11 hypothetical scheme, notwithstanding that we don't sit  
12 in judgment of hypothetical schemes?

13 MR. WINSOR: Sure.

14 JUSTICE KAGAN: Suppose that the -- the jury  
15 finds an aggravating fact, but then, you know, the judge  
16 has this whole separate hearing -- right? -- in which  
17 other things are presented to him. And the judge says,  
18 You know, I don't actually agree with the aggravating  
19 fact that the jury found, but I have my own aggravating  
20 facts, and now I'm -- I'm doing all the weighing and I  
21 come out in favor of death.

22 I -- I assume that you would say that that  
23 also would be an unconstitutional application.

24 MR. WINSOR: No, Your Honor. That would be  
25 consistent with Ring because, again, once death

1 eligibility -- and -- and there is a substantial  
2 difference that this Court has recognized over the years  
3 between the determination of who is eligible for death,  
4 and then, of that universe of people eligible for death,  
5 for whom is it appropriate?

6 JUSTICE KAGAN: Yes. Quite -- quite right.  
7 But I'm -- I'm hypothesizing a case in which the jury  
8 finds that death-eligibility marker.

9 MR. WINSOR: Right.

10 JUSTICE KAGAN: Right? If -- but the judge  
11 throws that one out and substitutes his own. That --  
12 you think that would be constitutional?

13 MR. WINSOR: Well, the judge in that  
14 instance wouldn't be throwing it out.

15 JUSTICE KAGAN: No, he does throw it out.  
16 He just says, I don't agree with that. I'm -- but I'm  
17 substituting my own.

18 Would that be all right?

19 MR. WINSOR: That would be okay because  
20 eligibility would have been determined. Just like if,  
21 in my double murder example, the judge believed that,  
22 you know, if he were sitting on the jury maybe he would  
23 have acquitted that person of the -- of the double  
24 murder.

25 And of course he can't just override the

1 jury's verdict based on a mere disagreement. In that  
2 instance, the death eligibility was determined not  
3 withstanding that he had -- he being the decisionmaker,  
4 maybe would have decided differently. The person is  
5 eligible for death. And then it's up to the sentencer.

6 JUSTICE KAGAN: But I have to say that  
7 answer surprises me because the death sentence there is  
8 not at all a function of the jury's eligibility finding.  
9 The judge has tossed out that eligibility finding and  
10 substituted his own, which then leads to the death  
11 sentence.

12 So how can we say that that's possibly  
13 constitutional under Ring?

14 MR. WINSOR: Because the point in Ring was  
15 to make sure that no person was subject to a greater  
16 penalty than they bargained for when they did the crime  
17 without a jury finding. And in your hypothetical, the  
18 jury finds that there is an aggravator. So there is a  
19 jury finding that that person is entitled to the  
20 punishment based on the crime that he or she committed.

21 JUSTICE KAGAN: The judge has said that that  
22 jury finding is utterly irrelevant to his decision about  
23 whether to impose death. That he's imposing death based  
24 on something that the jury has not found.

25 MR. WINSOR: But at that point the judge's

1 determination is separate from the -- the selection  
2 point. The judge is exercising the discretion to  
3 sentence within -- a person who is determined by a jury  
4 to be eligibility for the death penalty.

5 JUSTICE SCALIA: That didn't happen here,  
6 did it?

7 MR. WINSOR: No, your Honor.

8 JUSTICE KAGAN: But the thing is you can't  
9 really tell whether that happens in a wide variety of  
10 cases. And this is actually -- this goes to this  
11 question of because the jury doesn't actually have to  
12 find specific things, only the judge has to find  
13 specific things, you often are not going to be able to  
14 tell whether the judge's sentence is based on the same  
15 aggravating facts that the jury has found.

16 MR. WINSOR: But it doesn't need to be under  
17 Ring, because once the jury has determined that there is  
18 an aggravating factor or if it's been admitted, then the  
19 person is death eligible and Ring is completely  
20 finished. There's nothing more to do under Ring.

21 And then we move --

22 JUSTICE GINSBURG: Even though the jury is  
23 told, now, whatever you say, it's advisory. It's not  
24 binding. So you have made a finding of an aggravator,  
25 but it's not a binding finder of an aggravator. The

1 jury is told that whatever they say is advisory.

2 Doesn't that make a difference?

3 MR. WINSOR: No. What the jury is told is  
4 that its ultimate recommendation is -- is not binding on  
5 the court.

6 And that's true. And that's one of the  
7 great benefits of Florida's system. I mean, Florida's  
8 system was developed in response to this Court's  
9 decision in *Ferment*, and this Court has said that  
10 Florida's system provides additional benefits to the  
11 defendant.

12 So you have a judicial backstop. The  
13 matter --

14 JUSTICE GINSBURG: That was -- that was  
15 before *Ring*.

16 MR. WINSOR: That was before *Ring*.

17 And we're not contesting that *Ring* would  
18 require a jury finding or an admission of those  
19 elements. But once the jury makes its recommendation,  
20 even if it recommends death the judge can override that  
21 by -- for any reason, just based on disagreement alone,  
22 which makes it unlike, you know, in a usual capital --  
23 or the -- excuse me -- a usual criminal proceeding where  
24 the judge could not overcome --

25 JUSTICE SOTOMAYOR: I'm sorry. I just

1 want -- I'm -- I'm sorry.

2 Justice Scalia.

3 JUSTICE SCALIA: Is it clear to the jury  
4 that they are the last word on whether an aggravator  
5 exists or not?

6 MR. WINSOR: What it -- what the jury is  
7 told is that they cannot return a death recommendation  
8 without finding an aggravating circumstance. That's --

9 JUSTICE SCALIA: Then they're also told that  
10 the judge is ultimately going to decide whether your  
11 recommendation stands or not.

12 MR. WINSOR: The judge is going to  
13 ultimately impose the sentence, and that's true, and  
14 that's both true under Caldwell --

15 JUSTICE SCALIA: But shouldn't it be clear  
16 to the jury that their determination of whether an  
17 aggravator exists or not is final? Shouldn't that be  
18 clear?

19 MR. WINSOR: Well, I -- I don't think so,  
20 Your Honor, because the determination of the aggravator  
21 doesn't yield a death sentence unless the judge in his  
22 or her own opinion believes the death is appropriate.  
23 That's a benefit.

24 JUSTICE SCALIA: I'm talking about what  
25 responsibility the jury feels. If the jury knows that

1 if -- if we don't -- if -- if we don't find it an  
2 aggravator, it can't be found; or if we do find an  
3 aggravator, it must be accepted. That's a lot more  
4 responsibility than just, you know, well, you know, if  
5 you find an aggravator and you -- you weigh it and  
6 provide for the death penalty, the judge is going to  
7 review it anyway.

8 MR. WINSOR: I'm not sure that's an accurate  
9 characterization of what goes on because it's not that  
10 the judge must accept -- the aggravator determination  
11 has no purpose or no point other than determining  
12 eligibility and then the weighing.

13 And if the judge determines that the death  
14 sentence is not appropriate for whatever reason, then  
15 the fact that the jury found an aggravating circumstance  
16 makes no difference.

17 JUSTICE KENNEDY: Suppose in your earlier  
18 hypothetical, the judge -- the jury finds an aggravator  
19 occurred in the course of the robbery, and, therefore,  
20 there is death eligibility. Then it goes to the judge.  
21 And the judge says, there is simply no evidence to  
22 support that aggravating factor, but I find another  
23 aggravating factor. Under your view, the judge could go  
24 right ahead and impose the death penalty?

25 MR. WINSOR: Well, in that instance, that's

1 a little bit different, as I understand it, than Justice  
2 Kagan's hypothetical.

3 First of all, the -- the recommendation  
4 doesn't specify what -- which of the aggravating  
5 factors.

6 JUSTICE KENNEDY: But this is my  
7 hypothetical.

8 MR. WINSOR: Okay. So to make sure I  
9 understand --

10 JUSTICE KENNEDY: I mean, a death case is  
11 not funny.

12 JUSTICE KAGAN: Which honestly sounds the  
13 same.

14 MR. WINSOR: Well, I think -- I think the  
15 difference is, respectfully, is his included the finding  
16 that the judge finds no evidence to support as opposed  
17 to just disagreeing with their -- excuse me.

18 JUSTICE KENNEDY: And what would happen?

19 MR. WINSOR: If you had a situation -- and,  
20 again, this would be limited -- let me make sure I'm  
21 limiting the answer to the situation where the State is  
22 depending on the death recommendation of finding an  
23 aggravator.

24 JUSTICE KENNEDY: Yes.

25 MR. WINSOR: Which is the minority of cases,



1 as we said in the brief. If the jury made a specific  
2 finding as to a specific aggravator -- and, again, they  
3 wouldn't be instructed on that aggravator unless there  
4 was sufficient evidence of it at the threshold stage.  
5 But if the judge concluded that there was insufficient  
6 evidence, again, he never would have submitted it to the  
7 jury, then that probably would not be permissible.

8 JUSTICE BREYER: Go for a second to an  
9 analogy.

10 MR. WINSOR: I'm sorry?

11 JUSTICE BREYER: There are two good other  
12 analogies in other areas of the law. The one that  
13 supports you is robbery, force or threat of force. No  
14 one ever asks or needn't ask whether six members of the  
15 jury thought there was a threat but no actual, or seven  
16 members thought there was actual but no threat. Threat  
17 or threat of force. I don't think we have to say. I  
18 don't think so. So that supports you.

19 On the other hand, imagine a normal  
20 sentencing case. The statute says, you get aggravated  
21 punishment if you had 50 grams of cocaine. The jury  
22 finds he had 50 grams of cocaine -- no. Sorry.

23 The statute says aggravated sentence if 50  
24 grams of cocaine or meth. The jury finds he had 50  
25 grams of cocaine. I don't think under Apprendi, which I

1 didn't agree with -- but I don't think the judge could  
2 say, I'm going to give you the aggravated sentence  
3 because I don't believe there was any cocaine, but I do  
4 believe there was meth.

5 MR. WINSOR: That may well be right. And  
6 that's one of the reasons the jury is not asked to find  
7 specific aggravating factors.

8 JUSTICE BREYER: But we do know that the  
9 judge here -- now still you're having conceded Ring,  
10 where the jury says no aggravating factor. We know that  
11 the jury can if the jury finds aggravating factor X,  
12 have death on a completely different aggravating factor,  
13 but the jury never thought of, namely why.

14 Now, we know that. And now compare that to  
15 the hypothetical of cocaine and meth. And then we have  
16 Apprendi, which I disagree with still, but...

17 MR. WINSOR: Well, I think, Your Honor, in  
18 the cocaine and meth example, I believe that the -- the  
19 Court would look, as they did in Jones, to say, well, is  
20 the legislature setting this up as distinctive offenses,  
21 or are they setting this up as one offense that can be  
22 satisfied by either possession of cocaine or meth. And  
23 if it were the latter, then the jury would just be  
24 instructed to find one or the other without any  
25 specific --

1 JUSTICE SOTOMAYOR: I want to clarify. You  
2 think a seven to five recommendation is finding an  
3 element of the crime that makes you eligible for the  
4 death penalty by a unanimous or functionally equivalent  
5 unanimous jury?

6 MR. WINSOR: We do, Your Honor. And let me  
7 say --

8 JUSTICE SOTOMAYOR: Then what do you do with  
9 the statement in our case law that says a simple  
10 majority is not a unanimous jury?

11 MR. WINSOR: Well, we don't say that it's a  
12 unanimous jury. Let me step back and say that the  
13 seven-to-five vote, by the way, is not necessarily five  
14 votes that there was no aggravating circumstance,  
15 because, again, there's two things that go on in the  
16 jury room. One, they decide whether there were  
17 aggravating circumstances. And, two, they do --

18 JUSTICE SOTOMAYOR: And they don't agree  
19 with which one?

20 MR. WINSOR: Sorry?

21 JUSTICE SOTOMAYOR: So we don't know whether  
22 it was premeditation or robbery. It could be four to  
23 three or two to five. It could be anything.

24 MR. WINSOR: I'm talking about in the  
25 sentencing phase now. So a seven to five could well

1 mean that all 12 jurors found a robbery and all 12  
2 jurors found heinous and cruel --

3 JUSTICE SOTOMAYOR: We don't know. What  
4 does the seven to five tell us the jury found?

5 MR. WINSOR: The seven to five tells us that  
6 at a minimum, a majority of the jury at a minimum, found  
7 beyond a reasonable doubt that the State had proven the  
8 existence of one or more aggravating circumstances. And  
9 getting back to --

10 JUSTICE SOTOMAYOR: Not the same one?

11 MR. WINSOR: Not the same one.

12 And getting back to Justice Breyer's point  
13 about the cocaine and meth, these courts look at what  
14 the legislature's -- its definitions of the element.  
15 And we know, as a matter of Florida State law, that the  
16 element at issue here, to take someone who is not  
17 eligible for the death penalty and to make him or her  
18 eligible for the death penalty is the existence of one  
19 or more aggravating circumstances, not -- not a specific  
20 one.

21 And so it is like *Schad v. Arizona*, where  
22 you can't say whether the jury agreed that there was  
23 premeditation or whether there was felony murder. And,  
24 in fact, that was the case at this defendant's guilt  
25 phase back in 1998. He was convicted of first degree

1 murder. And the guilt phase jury was instructed that  
2 they could return that verdict either by finding  
3 premeditation or by finding felony murder. And there  
4 was no jury finding as to which one -- which one it was.

5 And so as a matter of -- I think to answer  
6 your question about whether they all need to be the same  
7 or not, it would depend on what the -- how the State  
8 legislature --

9 JUSTICE SOTOMAYOR: But you believe that a  
10 single majority is a jury unanimously or functionally  
11 unanimously finding that element beyond a reasonable  
12 doubt?

13 MR. WINSOR: Well, we -- they're certainly  
14 finding it beyond a reasonable doubt. And we're relying  
15 on the Court's decision in Apodaca, but also --

16 JUSTICE GINSBURG: That was ten to two.

17 MR. WINSOR: I'm sorry?

18 JUSTICE GINSBURG: Does ten to two  
19 automatically mean that seven to five is okay?

20 MR. WINSOR: Not automatically, Your Honor.  
21 But I think if you look at Apodaca, what they were  
22 rejecting was the same arguments that the petitioner is  
23 asking this Court to accept, which is that this long  
24 history of the unanimity and the 12-person jury  
25 necessarily means it's brought into our system.

1           But I'll say this too, the seven to five is  
2 not the same kind of jury verdict that you'd have at a  
3 guilt phase because of this judicial backstop, because  
4 of the other protections that Florida has put in place.

5           And so even if it's a seven-to-five vote,  
6 you still have the judge coming behind that jury, who --  
7 unlike at the guilt phase where he must accept the  
8 jury's findings, unless they're not supported by  
9 evidence, he or she can disagree for any reason. He or  
10 she can give mercy for any reason. And that happens a  
11 lot.

12           And so we've cited some cases in our brief  
13 where a man was convicted of murder in a horrible sexual  
14 assault, and by virtue of those two convictions was  
15 necessarily eligible for the death penalty. The jury  
16 heard all of the evidence, made a recommendation that he  
17 receive the death penalty, and the judge said no, I'm  
18 going to sentence him to life.

19           And so this Court -- you know, this gets  
20 back into the jury versus judge sentencing. But there  
21 are some real benefits associated with judicial  
22 sentences. And if you go back to Proffitt, when this  
23 Court first upheld Florida's capital sentencing system,  
24 it recognized the advantages of judicial sentencing  
25 because you're not going to have someone's life or death

1 being determined exclusively on the -- perhaps the  
2 emotions of a jury.

3 JUSTICE KAGAN: Can I go back to the kinds  
4 of hypotheticals that Justice Kennedy and I were -- were  
5 proposing.

6 So let's say that there is a jury, and it's  
7 been presented with evidence that the murder was for  
8 pecuniary gain, which is one of the aggravating factors.  
9 And the -- the jury comes out with a recommendation of  
10 death. So you -- and that was the only thing that was  
11 presented to it. So you know that the jury has made a  
12 death eligibility determination on pecuniary gain. Then  
13 it goes to the judge. The judge says, you know what, I  
14 don't really think that there's enough evidence of  
15 pecuniary gain, but I've had this whole hearing, and I  
16 find that the thing was -- that the crime was heinous  
17 and whatnot, and now I'm going to sentence the person to  
18 death.

19 Now, you say that that's fine; is that  
20 right?

21 MR. WINSOR: Well, let me -- let me -- I  
22 realize it's a hypothetical, but let me tell you why  
23 that couldn't happen in Florida. A judge could not  
24 instruct a jury on an aggravating circumstance for which  
25 there was not sufficient evidence to find that.

1           And so your hypothetical would not happen if  
2           there -- there was 16 --

3           JUSTICE KAGAN:           Well, no -- no -- he's --  
4           he's heard more evidence because, you know, there's a  
5           whole new hearing that he has. And now he's considered  
6           it more thoroughly, and he thinks, no, I don't agree  
7           with that anymore, but I think it was heinous. So that  
8           would be fine.

9           MR. WINSOR:           Again, that's not this case  
10          because there was no additional evidence --

11          JUSTICE KAGAN:           Yes, yes, yes, it's not this  
12          case.

13          MR. WINSOR:           But -- but the -- the -- the --  
14          if the -- if the judge found that the -- that there was  
15          no evidence of any aggravator --

16          JUSTICE KAGAN:           I'm throwing out --

17          MR. WINSOR:           Okay.

18          JUSTICE KAGAN:           -- the jury's aggravating  
19          factor, but I'm substituting my own. I thought that  
20          that was what you told me, that that was constitutional  
21          under Ring.

22          MR. WINSOR:           Well, I think it depends on --  
23          on why you're throwing it out. If there -- if -- if --  
24          as with any jury finding, if a judge finds at the guilt  
25          phase that there is insufficient evidence to find any



1 element, then -- then he would not rely on the -- the  
2 jury's determination there.

3 JUSTICE KAGAN: This wasn't at the guilt  
4 phase; this was just as a matter of sentencing.

5 Let me get on with my questioning --

6 MR. WINSOR: Sure.

7 JUSTICE KAGAN: -- because I think you  
8 answered this one already. Then the appeal that's  
9 taken, right -- the appeal is focusing now only on what  
10 the judge has found, isn't that right, under Florida  
11 law? The appeal -- if the person came in and said that  
12 there was insufficient evidence, the appeal would only  
13 be as to the judge's finding and not at all to the  
14 jury's.

15 MR. WINSOR: Well, the -- if I understand  
16 the hypothetical correctly, someone's convicted, has a  
17 death recommendation, a death sentence, and is appealing  
18 to the Florida Supreme Court.

19 JUSTICE KAGAN: And -- and he says there was  
20 just not enough evidence of all these aggravating  
21 factors, so -- but that was -- would only be as to the  
22 judge's aggravating factors. It couldn't possibly be  
23 that he would challenge the jury's.

24 MR. WINSOR: Well, the judge's aggravating  
25 factors would be detailed in a written order. But if

1 it -- if there were -- if -- if --

2 JUSTICE KAGAN: I mean, I'm just suggesting  
3 that the whole appeal process suggests that the crucial  
4 death eligibility determination is being made by the  
5 judge because that's the only death eligibility  
6 determination that the appeals court is ever going to  
7 review.

8 MR. WINSOR: Well, I think that's -- gets to  
9 another benefit of Florida's system, is that -- that  
10 they -- they do have this to review. You know, there's  
11 been some suggestion of jury sentencing as a --

12 JUSTICE KAGAN: Yes, look, they have  
13 something to review. The problem is it's the judge's  
14 thing to -- that they're reviewing, not the jury's, and  
15 that's a Sixth Amendment problem.

16 MR. WINSOR: I don't think it's a  
17 Sixth Amendment problem any more than -- than here when  
18 you. At the -- at the -- at the guilt phase when he  
19 appealed and there was a -- an examination of the  
20 evidence and they didn't know whether the jury found on  
21 felony murder predicate or on first-degree murder.  
22 They're reviewing the conviction, and they're reviewing  
23 the evidence that sustains it.

24 JUSTICE SOTOMAYOR: What about --

25 MR. WINSOR: Or they may sustain it.

1 JUSTICE SOTOMAYOR: How about if a jury --

2 JUSTICE ALITO: So to what degree is there  
3 a -- a real dispute here about the presence of the two  
4 aggravating factors?

5 MR. WINSOR: There is none, Justice Alito,  
6 in my view. And I know that there was some argument a  
7 moment ago about the -- about the evidence suggesting  
8 that someone else may have committed the crime. We  
9 cited in our brief from their -- initial brief in the  
10 Florida Supreme Court where they said, "Without any  
11 contention, this is a two-aggravator case. Hurst does  
12 not challenge the trial court's findings that the murder  
13 was committed during the course of a robbery, and it was  
14 especially heinous, atrocious, or cruel."

15 He doesn't question the seriousness of those  
16 aggravators either. His focus instead, acknowledging  
17 all that, was on proportionality review, which is not at  
18 issue here, but which, by the way, is another benefit of  
19 the Florida system, that the Florida Supreme Court  
20 reviews everything for -- for proportionality.

21 JUSTICE SOTOMAYOR: Can I ask you two  
22 separate questions on this?

23 MR. WINSOR: Yes.

24 JUSTICE SOTOMAYOR: Number one, whenever  
25 have we said that a jury waiver on an issue is based on

1 the lack of a challenge by a defense attorney? Don't we  
2 require waivers of jury trials to be explicit and by the  
3 defendant him or herself?

4 MR. WINSOR: When someone's waiving the jury  
5 trial altogether, absolutely. And, of course, that  
6 would be structural error even if there were no  
7 objection. But this is -- this is -- goes to more like  
8 the -- the element of offense. And the Court held in  
9 Washington v. Recuenco that the Apprendi error is  
10 subject to harmless error here.

11 JUSTICE SOTOMAYOR: So where have we ever  
12 said that not challenging something is an admission of  
13 that something?

14 MR. WINSOR: Well --

15 JUSTICE SOTOMAYOR: We take plenty of  
16 appeals where people are saying, assuming the state of  
17 facts, I'm entitled to X, and then when they go back  
18 down, they argue that that goes -- that assumption is  
19 wrong. Why isn't this the same?

20 MR. WINSOR: Well, we -- we cited other  
21 portions of the -- where they had -- excuse me --  
22 acknowledged that below back in the sentencing  
23 memorandum of the first go-around.

24 But to follow up on your question,  
25 Justice Alito, about whether there is an existence of

1 a -- of a doubt, the Florida Supreme Court found that  
2 both of these clearly existed at the post-conviction  
3 opinion, which led to the resentencing that's now on  
4 appeal here. They sent it back for resentencing not  
5 because of anything having to do with death eligibility  
6 or the establishment of aggravators. They sent it back  
7 because there was insufficient effort to produce  
8 mitigating --

9 JUSTICE SOTOMAYOR: Has there ever been an  
10 appeal in Florida where an advisory jury was given --  
11 not given a proper instruction and a resentence was --  
12 was ordered for that reason?

13 MR. WINSOR: Has there been a Florida  
14 Supreme Court reversing a death sentence for --

15 JUSTICE SOTOMAYOR: An improper instruction  
16 to the advisory jury.

17 MR. WINSOR: I'd be surprised if there  
18 weren't, Your Honor, but I don't know. I -- I'll --  
19 I'll -- I'll look at that.

20 Getting back to the -- to the admission, the  
21 evidence was clear. There is no question that there was  
22 a robbery here. There is no question that there was --  
23 that this is heinous, atrocious, and cruel. And we  
24 would ask that the Court affirm the Florida Supreme  
25 Court's judgment.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Mr. Waxman, six minutes.

3 REBUTTAL ARGUMENT OF SETH P. WAXMAN  
4 ON BEHALF OF THE PETITIONER

5 MR. WAXMAN: Notwithstanding this flurry of  
6 papers, I'm aspiring not to use the six minutes.

7 Let me first -- let me go right to  
8 Justice Scalia's question, which is not a hypothetical,  
9 although I'm happy to answer hypotheticals. Your  
10 question was: Was the jury told and doesn't a jury have  
11 to be told that as to death eligibility, the element of  
12 the crime of capital murder, that it makes the decision?

13 The answer is: It does have to be told  
14 that. It certainly can't be told the opposite, and it  
15 absolutely was not told that.

16 It was told over and over again, consistent  
17 with the statute, that its decision was purely advisory.  
18 And I want to refer the Court to the Florida Supreme  
19 Court's decision in *State v. Steele*, which is at 921 So.  
20 The Florida Supreme Court in *Steele* said, first of all,  
21 "Nothing in the statute, the standard jury instructions,  
22 or the standard verdict form requires a majority of the  
23 jury to agree on which aggravating circumstances exist.  
24 Under current law, the jury may recommend a sentence of  
25 death where four jurors believe only that one aggravator

1 applies, while three others believe that only another  
2 aggravator applies, because seven jurors believe that at  
3 least one aggravator applies."

4 Florida goes beyond that. It -- it is  
5 unlawful -- and the Supreme Court of Florida has said --  
6 to require -- to ask the jury, the sentencing jury, to  
7 provide a special verdict that in any way indicates what  
8 their, quote, input is on the sentencing factors.

9 Again, Steele, at page 546. "Specific jury  
10 findings on aggravators without guidance about their  
11 effect on the imposition of a sentence could unduly  
12 influence the trial judge's own determination of how to  
13 sentence the defendant. The trial court alone must make  
14 detailed findings about the existence and weight of  
15 aggravating circumstances."

16 JUSTICE KENNEDY: Is that a -- post Ring?  
17 What's the date of that?

18 MR. WAXMAN: Yes, this is post Ring. And  
19 the Court also held that Ring didn't apply.

20 It has no jury findings on which to rely.

21 And, in fact, the Court also explained in --  
22 later in the decision -- in the same decision and also  
23 in its decision in Franklin, that Florida bar -- quote,  
24 "Florida bars a special verdict precisely because  
25 requiring specific jury findings on aggravators without

1 guidance about their effect would harm the jury's  
2 independent" -- "the trial court's independent  
3 determination."

4 Now, counsel -- my -- my colleague on the  
5 other side here says that, well, there -- there would  
6 not be a statutory problem, but there would be a Ring  
7 problem if we knew that the jury found that no  
8 aggravators existed. So how can Ring be satisfied when  
9 we have no earthly idea what the jury found? It could  
10 be, as in this case, as Steele acknowledges, three for  
11 one and four for the other.

12 As to the, I think, hypothetical question  
13 that Justice Kagan was asking, so, you know, in a  
14 circumstance, how much leeway does the judge have to  
15 make his own -- his or her own decisions on the death  
16 penalty, the Florida Supreme Court has specifically  
17 allowed the death penalty to be imposed and a  
18 determination of death eligibility to be made based on  
19 evidence that was never presented to the sentencing jury  
20 and based on an aggravating factor on which the  
21 sentencing jury was not applied.

22 And the notion that there hasn't been a  
23 life-override since Ring is -- is an interesting fact,  
24 but this Court, in this Court's Sposiano decision, in  
25 this Court's Daubert decision, that's exactly what



1 happened: The jury said, we want life. The judge said,  
2 I'm hearing independent evidence and you're getting  
3 death.

4 Now, as to the supposed concessions in this  
5 case, I think I'll rely largely on our brief. But the  
6 notion that somebody -- that the lawyers said this is a  
7 two-aggravator case is certainly true. There were two  
8 aggravators charged. And maybe the jury -- we know that  
9 the trial judge found that two aggravators were  
10 satisfied.

11 This defendant has been making the Ring  
12 argument since before Ring was decided. He raised this  
13 as an Apprendi issue at the very first trial. He asked  
14 for a bill of particulars for the -- the State to  
15 indicate which aggravators it was going to rely on, and  
16 he was denied on the grounds that Apprendi doesn't  
17 apply.

18 Even the -- again, the central Ring problem  
19 in this case, the central Sixth Amendment problem in  
20 this case, leaving aside the indeterminacy of seven to  
21 five -- and maybe it's three for one and four for the  
22 other -- is that, when a Florida sentencing jury  
23 finishes its work, there is simply no question: The  
24 defendant is not eligible for the death penalty. Only  
25 the trial judge can do that.

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Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:20 p.m., the case in the  
above-entitled matter was submitted.)

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