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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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P R O C E E D I N G S

(11:20 a.m.)

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

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

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

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

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

Whatever the jury's recommendation might 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 simple 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

1 penalty State and therefore the only State that does not
2 require or permit the jury to be told that it has to
3 agree. And in all other States it's unanimous, but even
4 has to -- cannot even be told that a majority have to
5 agree as to the existence of one of the specified
6 aggravating 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: -- or a system 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 a long historical tradition and a
20 finding of equal culpability, chooses to permit a
21 particular element in Schad, it was premeditation, or
22 the mental state to be satisfied either by premeditation
23 or by 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
23 aggravator -- aggravating factor, we made it up, right?
24 I mean, that's just 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: -- moral ability, opposite of

1 the 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 --
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 the other elements of the
25 crime.

1 Now, even -- Apodaca's 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 sense 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 felony 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, concluded 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 -- can I
10 give you a -- a hypothetical State system? And this is
11 a two-part question. You tell me if it is consistent
12 with the Sixth Amendment. And if it is, what makes this
13 case 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.

22 But the judge has to leave alone the
23 aggravating factor that the jury finds. So, in other
24 words, the judge can't give death when the jury finds
25 life, and the judge can't throw out the jury's factor.

1 But -- but as long as that jury makes that aggravating
2 factor determination, the judge can do anything. Is
3 that consistent with the Sixth Amendment?

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

7 JUSTICE KAGAN: Yes.

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

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

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

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

19 MR. WAXMAN: The jury, no.

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

24 MR. WAXMAN: At a minimum, if, in fact, the
25 jury is performing that function, it cannot, at least in

1 a capital case, be told that it is not performing that
2 function, that its advice is -- that its verdict is only
3 advisory.

4 JUSTICE KAGAN: But --

5 JUSTICE ALITO: What if it's told that it
6 has to decide on life or death, but the judge is -- if
7 you decide on death, the judge is going to review it,
8 and the judge has the power to sentence to life.

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

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

25 MR. WAXMAN: Well --

1 JUSTICE ALITO: Would that be the case --
2 isn't that case whether they -- whether they're told,
3 you -- you make a recommendation and the judge decides,
4 or you impose a sentence, but the judge can impose a
5 different sentence, a lesser sentence? There's still --
6 they -- they still don't have to bear the responsibility
7 of making the absolutely final decision.

8 MR. WAXMAN: So, Justice -- Justice Alito,
9 let me separate out what I'm calling the selection
10 decision, that is, life or death and the weighing of ags
11 and mits and the eligibility decision, which is all of
12 the elements of capital murder have been found by --
13 beyond a reasonable doubt by the jury with either
14 unanimously or a sufficient majority, and, therefore,
15 when the sentencing jury is done, you are eligible for
16 the death penalty.

17 Leaving aside the Eighth Amendment question
18 whether the Constitution then require -- requires the
19 jury to make the intensely moral judgment about whether
20 the penalty should be life without parole or death,
21 assuming that a judge can do that, so long as the jury
22 is not told that its input, which is how the Florida
23 Supreme Court has put it, is -- so long as they are not
24 told that it's advisory, so long as they are told that
25 you as the finders of fact have to find that beyond a

1 reasonable doubt that this capital crime was committed,
2 which includes the following elements, including one of
3 the two specifying aggravators, the Constitution is
4 satisfied.

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

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

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

1 May I reserve the balance of my time?

2 CHIEF JUSTICE ROBERTS: You may.

3 MR. WAXMAN: Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Winsor.

5 ORAL ARGUMENT OF ALLEN WINSOR

6 ON BEHALF OF THE RESPONDENT

7 MR. WINSOR: Mr. Chief Justice, and may it
8 please the Court:

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

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

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

25 And so the jury --

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

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

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

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

24 JUSTICE SOTOMAYOR: Even when it says a
25 murder has been committed, felony murder wasn't. Felony

1 murder was charged, but we don't know if they found the
2 robbery, right?

3 MR. WINSOR: We -- at the guilt phase they
4 convicted of first degree murder, which could have
5 either been felony murder with the predicate underlying
6 felony being robbery or premeditated murder. But to
7 answer your earlier question about the actual --

8 JUSTICE SOTOMAYOR: So how do we know which
9 one they picked?

10 MR. WINSOR: I'm sorry?

11 JUSTICE SOTOMAYOR: Which -- how do we know
12 which one they picked? Which makes them eligible for
13 the death penalty?

14 MR. WINSOR: Well, our position is that
15 they -- that he became eligible at the -- at the
16 sentencing phase when the jury made its advisory
17 decision, because the jury at that phase was instructed,
18 that if you determine that no aggravating circumstances
19 are found to exist, you must recommend life.

20 JUSTICE SOTOMAYOR: But you do agree that
21 that -- it doesn't require a unanimous jury?

22 MR. WINSOR: It does not require a unanimous
23 jury.

24 JUSTICE SOTOMAYOR: It -- and -- a simple
25 majority is all you need?

1 MR. WINSOR: That's right.

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

3 MR. WINSOR: That's right, but that's --
4 that's a jury finding.

5 JUSTICE SOTOMAYOR: -- a unanimous jury,
6 even a functionally equivalent unanimous jury, finding
7 those aggravators.

8 MR. WINSOR: I'm sorry?

9 JUSTICE SOTOMAYOR: We don't have a
10 unanimous or functionally unanimous jury finding those
11 aggravators.

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

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

18 First, the jury looks and determines whether
19 the State has proven beyond a reasonable doubt an
20 aggravating circumstance. That's the eligibility piece
21 of it.

22 Then they get into the sentence selection
23 process where they weigh the aggravators that they do
24 find, assuming they find some, against the mitigating
25 circumstances. And of course the defendant under this

1 Court's precedent is allowed to put in any evidence that
2 he wishes.

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

5 MR. WINSOR: I'm sorry?

6 JUSTICE SOTOMAYOR: It's not asked to find
7 an aggravator.

8 MR. WINSOR: It is, Your Honor. It is
9 instructed that it may not return a death recommendation
10 without --

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

13 MR. WINSOR: I'm sorry?

14 JUSTICE SOTOMAYOR: It's not found at the
15 trial -- after --

16 MR. WINSOR: At the sentencing phase.

17 JUSTICE SOTOMAYOR: You're -- only at the
18 sentencing phase.

19 MR. WINSOR: I'm talking about the
20 sentencing phase right --

21 JUSTICE BREYER: Suppose that the jury comes
22 back at the sentencing phase and says, we recommend
23 life.

24 MR. WINSOR: Yes.

25 JUSTICE BREYER: And the reason, though I

1 guess no one would know it, is because they -- no --
2 nobody found an aggravating.

3 MR. WINSOR: Uh-huh.

4 JUSTICE BREYER: Can the judge, nonetheless,
5 give death.

6 MR. WINSOR: No. Not unless --

7 JUSTICE BREYER: No.

8 MR. WINSOR: With this caveat.

9 JUSTICE BREYER: No, we -- we have -- they
10 have a page in their opinion, in their brief, you know,
11 Page 20, where it cites about six Florida cases, which
12 suggested to me that they thought the answer to that
13 question as a matter of Florida law was, yes, the judge
14 can sentence to death.

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

16 JUSTICE BREYER: Is that so or not so?

17 MR. WINSOR: Let me be clear: As a matter
18 of Florida statutory law, it is permitted. We
19 acknowledge that under Ring it would not be permitted in
20 the circumstance where the State is relying on the
21 recommendation to satisfy the eligibility.

22 Now, you could have a situation --

23 JUSTICE BREYER: That's -- I missed the last
24 part.

25 MR. WINSOR: Okay.

1 JUSTICE BREYER: The jury comes back.

2 MR. WINSOR: Uh-huh.

3 JUSTICE BREYER: They say life.

4 MR. WINSOR: Right.

5 JUSTICE BREYER: And we know, through mental
6 telepathy --

7 MR. WINSOR: Right.

8 JUSTICE BREYER: -- though I guess the judge
9 doesn't, that the reason that they did that is no one
10 found an aggravator.

11 My simple question is: As a matter of
12 Florida law, can the judge impose the death sentence?
13 Yes or no.

14 MR. WINSOR: As a matter of Florida
15 statutory law, yes. As a matter of Ring, no. With --

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

19 MR. WINSOR: With this caveat, Justice
20 Breyer --

21 JUSTICE BREYER: -- because of Ring.

22 Because you agree that this case is like
23 Ring, and therefore Ring would apply, and therefore --
24 not this case, but any case in which they recommend
25 life.

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

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

5 MR. WINSOR: The caveat is this --

6 JUSTICE BREYER: I am, too, actually.

7 Sorry.

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

10 One is, in this case, where it's determined
11 at the sentencing phase because of the finding within
12 the jury's recommendation.

13 In other instances it can be -- a person can
14 become eligible before the sentencing phase either
15 because they have a prior violent felony conviction or
16 because they have a contemporaneous conviction.

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

21 And so at that stage, then in your
22 hypothetical, Justice Breyer, if that sentencing-phase
23 jury recommended life, the judge could override it
24 without violating Ring.

25 Now, I will tell you that, as a matter of

1 Florida State law, the judge in that circumstance would
2 face an exacting standard; and, as a matter of fact, no
3 judge has overwritten a jury's life recommendation since
4 before Ring.

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

7 But to answer your question, we do believe
8 it would be constitutional in the situation that I
9 described.

10 JUSTICE GINSBURG: Suppose the jury came in
11 hung.

12 MR. WINSOR: I'm sorry?

13 JUSTICE GINSBURG: On -- on the sentence.

14 MR. WINSOR: If the sentencing phase --

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

17 MR. WINSOR: If the --

18 JUSTICE GINSBURG: Could the judge then
19 impose the death penalty?

20 MR. WINSOR: Not in this situation, Your
21 Honor, because that would result in a life
22 recommendation. A six-six vote is tantamount to a life
23 recommendation. And the judge could not override that
24 if he were relying on the jury sentencing finding to
25 satisfy Ring.

1 And even if he weren't, he or she weren't,
2 like I said, it's an exacting Florida State law
3 standard. The judge would be reversed for overturning
4 that unless he -- he or she determined -- or unless the
5 appellate court determined that no reasonable jury in
6 those circumstances could have imposed or recommended a
7 life sentence.

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

10 JUSTICE KENNEDY: Just so I -- I understand
11 it: So you're saying that it -- it is possible, but
12 under Florida law the jury would not find the existence
13 of an aggravated -- aggravating factor but -- and
14 would -- and then there are different ways that this
15 would come out -- the hypothetical was a hung jury --
16 but the judge could then proceed to find an aggravating
17 factor and impose the death penalty.

18 Now, you say, now, this hasn't happened.
19 He'd probably be reversed. But theoretically this could
20 happen.

21 MR. WINSOR: Only -- that could not happen
22 consistent with Ring, Your Honor, unless there were some
23 other jury finding or admission that established death
24 eligibility.

25 JUSTICE KAGAN: Well, you're saying it

1 couldn't happen consistent with Ring, meaning that there
2 are certain applications of the Florida law that would
3 be unconstitutional even in your view.

4 MR. WINSOR: That hypothetical that we've
5 explored here -- again, with their -- with the absence
6 of another aggravating circumstance proven outside.

7 And -- and that actually happens in most
8 cases, Justice Kagan.

9 JUSTICE SCALIA: But -- but we don't --
10 we -- we don't sit in judgment of -- of theoretical
11 scheme that Florida has set up, do we?

12 MR. WINSOR: No, Your Honor, and --

13 JUSTICE SCALIA: And don't we have to
14 adjudge that there has been unconstitutionality in this
15 case?

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

19 JUSTICE KAGAN: Could I give you another
20 hypothetical scheme, notwithstanding that we don't sit
21 in judgment of hypothetical schemes?

22 MR. WINSOR: Sure.

23 JUSTICE KAGAN: Suppose that the -- the --
24 the jury finds an aggravating fact, but then, you know,
25 the judge has this whole separate hearing -- right? --

1 in which other things are presented to him. And the
2 judge says, you know, I don't actually agree with the
3 aggravating fact that the jury found, but I have my own
4 aggravating facts, and now I'm -- I'm doing all the
5 weighing and I come out in favor of death.

6 I -- I assume that you would say that also
7 would be an unconstitutional application.

8 MR. WINSOR: No, Your Honor. That would be
9 consistent with Ring because, again, once death
10 eligibility -- and -- and there is a substantial
11 difference that this Court has recognized over the years
12 between the determination of who is eligible for death,
13 and then, of that universe of people eligible for death,
14 for whom is it appropriate?

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

18 MR. WINSOR: Right.

19 JUSTICE KAGAN: -- right? If -- but the
20 judge throws that one out and substitutes his own.
21 That -- you think that would be constitutional?

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

24 JUSTICE KAGAN: No, he does throw it out.
25 He just says, I don't agree with that. I'm -- but I'm

1 substituting my own.

2 Would that be all right?

3 MR. WINSOR: That would be okay because
4 eligibility would have been determined. Just like if,
5 in my double murder example, the judge believed that,
6 you know, if he were sitting on the jury, maybe he would
7 have acquitted that person of the -- of the double
8 murder.

9 And of course he can't just override the
10 jury's verdict based on a mere disagreement. In that
11 instance, the death eligibility was determined, not
12 withstanding that he had -- he being the decisionmaker,
13 maybe would have decided differently. The person is
14 eligible for death. And then it's up to the sentencer.

15 JUSTICE KAGAN: But I have to say that
16 answer surprises me because the death sentence there is
17 not at all a function of the jury's eligibility finding.
18 The judge has tossed out that eligibility finding and
19 substituted his own, which then leads to the death
20 sentence.

21 So how can we say that that's possibly
22 constitutional under Ring?

23 MR. WINSOR: Because the point in Ring was
24 to make sure that no person was subject to a greater
25 penalty than they bargained for when they did the crime

1 without a jury finding. And in your hypothetical, the
2 jury finds that there is an aggravator. So there is a
3 jury finding that that person is entitled to the
4 punishment based on the crime that he or she committed.

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

9 MR. WINSOR: But at that point the judge's
10 determination is separate from the -- the selection
11 point. The judge is exercising the discretion to
12 sentence within -- a person who is determined by a jury
13 to be eligible for the death penalty.

14 JUSTICE SCALIA: That didn't happen here,
15 did it?

16 MR. WINSOR: No, your Honor.

17 JUSTICE KAGAN: But the thing is you can't
18 really tell whether that happens in a wide variety of
19 cases. And this is actually -- this goes to this
20 question of because the jury doesn't actually have to
21 find specific things, only the judge has to find
22 specific things, you often are not going to be able to
23 tell whether the judge's sentence is based on the same
24 aggravating facts that the jury has found.

25 MR. WINSOR: But it doesn't need to be under

1 Ring, because once the jury has determined that there is
2 an aggravating factor or if it's been admitted, then the
3 person is death eligible and Ring is completely
4 finished. There's nothing more to do under Ring.

5 And then we move --

6 JUSTICE GINSBURG: Even though the jury is
7 told, now, whatever you say, it's advisory. It's not
8 binding. So you have made a finding of an aggravator,
9 but it's not a binding finder of an aggravator. The
10 jury is told that whatever they say is advisory.

11 Doesn't that make a difference?

12 MR. WINSOR: No. What the jury is told is
13 that its ultimate recommendation is -- is not binding on
14 the Court.

15 And that's true. And that's one of the
16 great benefits of Florida's system. I mean, Florida's
17 system was developed in response to this Court's
18 decision in *Ferment*, and this Court has said that the
19 Florida's system provides additional benefits to the
20 defendant.

21 So you have a judicial backstop. The
22 matter --

23 JUSTICE GINSBURG: That was -- that was
24 before Ring.

25 MR. WINSOR: That was before Ring.

1 And we're not contesting that Ring would
2 require a jury finding or an admission of those
3 elements.

4 But once the jury makes its recommendation,
5 even if it recommends death, the judge can override that
6 by -- for any reason, just based on disagreement alone,
7 which makes it unlike, you know, in a usual capital --
8 or the -- excuse me -- a usual criminal proceeding where
9 the judge could not overcome --

10 JUSTICE SOTOMAYOR: I'm sorry. I just
11 want -- I'm -- I'm sorry.

12 Justice Scalia.

13 JUSTICE SCALIA: Is it clear to the jury
14 that they are the last word on whether an aggravator
15 exists or not?

16 MR. WINSOR: What it -- what the jury is
17 told is that they cannot return a death recommendation
18 without finding a -- an aggravating circumstance.
19 That's --

20 JUSTICE SCALIA: But then they're also told
21 that the judge is ultimately going to decide whether
22 your recommendation stands or not.

23 MR. WINSOR: The judge is going to
24 ultimately impose the sentence, and that's true. And
25 that's both true under Caldwell, but it's not --

1 JUSTICE SCALIA: But shouldn't it be clear
2 to the jury that -- that their determination of whether
3 an aggravator exists or not is final? Shouldn't that be
4 clear?

5 MR. WINSOR: Well, I -- I don't think so,
6 Your Honor, because the determination of the aggravator
7 doesn't yield a death sentence unless the judge, in his
8 or her own opinion, believes the death is appropriate.
9 That's a benefit.

10 JUSTICE SCALIA: But I'm -- I'm talking --
11 I'm talking about what responsibility the jury feels.
12 If the jury knows that if -- if -- if we don't -- if --
13 if we don't find it an aggravator, it can't be found; or
14 if we do find an aggravator, it must be accepted.
15 That's a lot more responsibility than just, you know,
16 well, you know, if you find an aggravator and you -- you
17 weigh it and provide for the death penalty, the judge is
18 going to review it anyway.

19 MR. WINSOR: I'm not sure that's an accurate
20 characterization of what goes on because it's not that
21 the judge must accept -- the aggravator determination
22 has no purpose or no point other than determining
23 eligibility and then the weighing.

24 And if the judge determines that the death
25 sentence is not appropriate for whatever reason, then

1 the fact that the jury found an aggravating circumstance
2 makes no difference.

3 JUSTICE KENNEDY: Suppose in your earlier
4 hypothetical, the judge -- the jury finds an aggravator
5 occurred in the course of the robbery, and, therefore,
6 there is death eligibility. Then it goes to the judge.
7 And the judge says, there is simply no evidence to
8 support that aggravating factor, but I find another
9 aggravating factor. Under your view, the judge could go
10 ahead and impose the death penalty?

11 MR. WINSOR: Well, in that instance, that's
12 a little bit different, as I understand it, than Justice
13 Kagan's hypothetical.

14 First of all, the -- the recommendation
15 doesn't specify what -- which of the aggravating
16 factors --

17 JUSTICE KENNEDY: But this is my
18 hypothetical.

19 MR. WINSOR: Okay. So to make sure I
20 understand --

21 JUSTICE KENNEDY: I mean, a death case,
22 which is not funny.

23 JUSTICE KAGAN: Which honestly sounds the
24 same.

25 MR. WINSOR: Well, I think the -- I think

1 the difference is, respectfully, is his included the --
2 the finding that the judge finds no evidence to support
3 as opposed to just disagreeing with their -- excuse me.

4 JUSTICE KENNEDY: And what would happen?

5 MR. WINSOR: If you had a situation -- and,
6 again, this would be limited -- let me make sure I'm
7 limiting the -- the answer to the situation where the
8 State is depending on the death recommendation of
9 finding an aggravator.

10 JUSTICE KENNEDY: Yes.

11 MR. WINSOR: Which is the minority of cases,
12 as we -- as we said in the brief. If the jury made a
13 specific finding as to a specific aggravator -- and,
14 again, they wouldn't be instructed on that aggravator
15 unless there was sufficient evidence of it at the -- at
16 the threshold stage. But if the judge concluded that
17 there was insufficient evidence -- again, he never would
18 have submitted it to the jury -- then that -- that
19 probably would not be permissible.

20 JUSTICE BREYER: Go for a second to an
21 analogy.

22 MR. WINSOR: I'm sorry?

23 JUSTICE BREYER: There's -- there are two
24 good other analogies in other areas of the law. The one
25 that supports you is robbery, force or threat of force.

1 No one ever asks or needn't ask whether six members of
2 the jury thought there was a threat but no actual, or
3 seven members thought there was actual but no threat.
4 Threat or threat of force. I don't think we have to
5 say. I don't think so. So that supports you.

6 On the other hand, imagine a normal
7 sentencing case. The statute says, you -- you get
8 aggravated punishment if you had 50 grams of cocaine.
9 The jury finds he had 50 grams of cocaine -- no. Sorry.

10 The statute says aggravated sentence if
11 50 grams of cocaine or meth. The jury finds he had
12 50 grams of cocaine. I don't think under Apprendi,
13 which I didn't agree with -- but I don't think the judge
14 could say, I'm going to give you the aggravated sentence
15 because I don't believe there was any cocaine, but I do
16 believe there was meth.

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

20 JUSTICE BREYER: But we do know that the
21 judge here -- now still you're having conceded Ring,
22 where the jury says no aggravating factor. We know that
23 the jury can, if the jury finds aggravating factor X,
24 have death on a completely different aggravating factor,
25 but the jury never thought of, namely why.

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

4 MR. WINSOR: Well, I think, Your Honor, in
5 the cocaine and meth example, I believe that the -- the
6 Court would look, as they did in Jones, to say, well, is
7 the legislature setting this up as distinctive offenses,
8 or are they setting this up as one offense that can be
9 satisfied either by possession of cocaine or meth. And
10 if it were the latter, then the jury would just be
11 instructed to find one or the other without any -- any
12 specific -- and we know is that --

13 JUSTICE SOTOMAYOR: I want to clarify. You
14 think a seven-to-five recommendation is finding an
15 element of the crime that makes you eligible for the
16 death penalty by a unanimous or functionally equivalent
17 unanimous jury?

18 MR. WINSOR: We do, Your Honor. And let me
19 say --

20 JUSTICE SOTOMAYOR: Well, then what do you
21 do with the statement in our case law that says a simple
22 majority is not a unanimous jury?

23 MR. WINSOR: Well, we don't say that it's a
24 unanimous jury. Let me step back and say that -- that
25 the -- the seven-to-five vote, by the way, is not

1 necessarily five votes that there was no aggravating
2 circumstance, because, again, it's -- there's two things
3 that go on in the jury room. One, they decide whether
4 there were aggravating circumstances. And, two, they
5 just -- they do --

6 JUSTICE SOTOMAYOR: And they don't agree
7 with which one?

8 MR. WINSOR: Sorry?

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

12 MR. WINSOR: I'm talking about the jury --
13 in the sentencing phase now.

14 JUSTICE SOTOMAYOR: Right.

15 MR. WINSOR: So a seven to five could well
16 mean that all 12 jurors found a robbery and all 12
17 jurors found heinous, atrociousness, and cruel --

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

20 MR. WINSOR: The seven to five tells us that
21 at a minimum, a majority of the jury at a minimum, found
22 beyond a reasonable doubt that the State had proven the
23 existence of one or more aggravating circumstances. And
24 getting back to --

25 JUSTICE SOTOMAYOR: Not the same one?

1 MR. WINSOR: I'm sorry?

2 JUSTICE SOTOMAYOR: Not the same?

3 MR. WINSOR: Not the same one.

4 And again, getting back to Justice Breyer's
5 point about the cocaine and the meth, the courts in
6 these situations look at what the -- what the
7 legislature's -- its definitions of the element. And we
8 know, as a matter of Florida State law, that the element
9 at issue here, to take someone who is not eligible for
10 the death penalty and to make him or her eligible for
11 the death penalty is the existence of one or more
12 aggravating circumstances, not -- not a specific one.

13 And so it is like *Schad v. Arizona*, where
14 you -- you can't say whether the jury agreed that there
15 was premeditation or whether there was felony murder.
16 And, in fact, that was the case at this defendant's
17 guilt phase back in 1998. He was convicted of
18 first-degree murder. And the guilt phase jury was
19 instructed that they could return that verdict either by
20 finding premeditation or by finding felony murder. And
21 there was no jury finding as to which one -- which one
22 it was.

23 And so as a matter of -- I think to answer
24 your question about whether they all need to be the same
25 or not, it would depend on what the -- how the State

1 legislature --

2 JUSTICE SOTOMAYOR: But you believe that a
3 simple majority is a jury unanimously or functionally
4 unanimously finding that element beyond a reasonable
5 doubt?

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

9 JUSTICE GINSBURG: That was ten to two.

10 MR. WINSOR: I'm sorry?

11 JUSTICE GINSBURG: Does ten to two
12 automatically mean that seven to five is okay?

13 MR. WINSOR: Not automatically, Your Honor.
14 But I think if you look at Apodaca, what they were
15 rejecting was the same arguments that the petitioner is
16 asking this Court to accept, which is that this long
17 history of the unanimity and the 12-person jury
18 necessarily means it's -- it's brought in to -- to our
19 system.

20 But I'll say this too, the seven to five is
21 not the same kind of jury verdict that you'd have at
22 a -- at a guilt phase because of this judicial backstop,
23 because of the other protections that Florida has put in
24 in place.

25 And so even if it's a seven-to-five vote,

1 you still have the judge coming behind that jury, who --
2 unlike at the guilt phase where he must accept the
3 jury's findings, unless they're not supported by
4 evidence, he or she can disagree for any reason. He or
5 she can give mercy for any reason. And that happens a
6 lot.

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

14 And so this Court -- you know, this gets
15 back into the jury versus judge sentencing. But there
16 are some real benefits associated with judicial
17 sentences. And if you go back to Proffitt, when this
18 Court first upheld Florida's capital sentencing system,
19 it recognized the advantages of judicial sentencing
20 because you're not going to have someone's life or death
21 being determined exclusively on the -- perhaps the --
22 the emotions of a jury.

23 JUSTICE KAGAN: Can -- can I go back to the
24 kinds of hypotheticals that Justice Kennedy and I
25 were -- were proposing?

1 So let's say that there is a jury, and --
2 and it's been presented with evidence that the murder
3 was for pecuniary gain, which is one of the aggravating
4 factors. And the -- the -- the jury comes out with a
5 recommendation of death. So you -- and that was the
6 only thing that was presented to it. So you know
7 that the -- the jury has made a death eligibility
8 determination on pecuniary gain.

9 Then it goes to the judge. The judge says,
10 you know what, I don't really think that there's enough
11 evidence of pecuniary gain, but I've had this whole
12 hearing, and I find that the thing was -- that the crime
13 was heinous and whatnot. And now I'm going to sentence
14 the person to death.

15 Now, you say that that's fine; is that
16 right?

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

22 And so your hypothetical would not happen if
23 there -- there was 16 --

24 JUSTICE KAGAN: Well, you know -- no --
25 he's -- well -- he's heard more evidence because, you

1 know, there's a whole new hearing that he has. And now
2 he's considered it more thoroughly, and he thinks, no, I
3 don't agree with that anymore, but I think it was
4 heinous. So that would be fine.

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

7 JUSTICE KAGAN: Yes, yes, yes, it's not this
8 case.

9 MR. WINSOR: But -- but the -- the -- the --
10 if the -- if the judge found that the -- that there was
11 no evidence of any aggravator --

12 JUSTICE KAGAN: I'm throwing out --

13 MR. WINSOR: Okay.

14 JUSTICE KAGAN: -- the jury's aggravating
15 factor, but I'm substituting my own. I thought that
16 that was what you told me that that was constitutional
17 under Ring.

18 MR. WINSOR: Well, I think it depends on --
19 on why you're throwing it out. If there -- if -- if --
20 as with any jury finding, if a judge finds at the guilt
21 phase that there is insufficient evidence to find any
22 element, then -- then he would not rely on the -- the
23 jury's determination there.

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

1 Let me get on with my questioning --

2 MR. WINSOR: Yeah. Sure.

3 JUSTICE KAGAN: -- because I think you
4 answered this one already.

5 Then the appeal that's taken, right -- the
6 appeal is focusing now only on what the judge has found,
7 isn't that right, under Florida law? The appeal -- if
8 the person came in and said that there was insufficient
9 evidence, the appeal would only be as to the judge's
10 finding and not at all to the jury's.

11 MR. WINSOR: Well, the -- if I understand
12 the hypothetical correctly, someone's convicted, has a
13 death recommendation, a death sentence, and is appealing
14 to the Florida Supreme Court.

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

20 MR. WINSOR: Well, the judge's aggravating
21 factors would be detailed in a written order. But if
22 it -- if there were -- if -- if --

23 JUSTICE KAGAN: I mean, I'm just suggesting
24 that the whole appeal process suggests that the crucial
25 death eligibility determination is being made by the

1 judge because that's the only death eligibility
2 determination that the appeals court is ever going to
3 review.

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

8 JUSTICE KAGAN: Yes, look, they have
9 something to review. The problem is it's the judge's
10 thing to -- that they're reviewing, not the jury's, and
11 that's a Sixth Amendment problem.

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

20 JUSTICE SOTOMAYOR: What about --

21 MR. WINSOR: Or they may sustain it.

22 JUSTICE ALITO: So to what degree is
23 there --

24 JUSTICE SOTOMAYOR: How about if a jury --

25 JUSTICE ALITO: So to what degree is there

1 a -- a real dispute here about the presence of the two
2 aggravating factors?

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

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

19 JUSTICE SOTOMAYOR: Can I ask you two
20 separate questions on this?

21 MR. WINSOR: Yes.

22 JUSTICE SOTOMAYOR: Number one, whenever
23 have we said that a jury waiver on an issue is based on
24 the lack of a challenge by a defense attorney? Don't we
25 require waivers of jury trials to be explicit and by the

1 defendant him or herself?

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

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

12 MR. WINSOR: Well --

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

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

22 But to follow up on your question,
23 Justice Alito, about whether there is an existence of
24 a -- of a doubt, the Florida Supreme Court found that
25 both of these clearly existed at the post-conviction

1 opinion, which led to the resentencing that's now on
2 appeal here. They sent it back for resentencing not
3 because of anything having to do with death eligibility
4 or the establishment of aggravators. They sent it back
5 because there was insufficient effort to produce
6 mitigating --

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

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

13 JUSTICE SOTOMAYOR: An improper instruction
14 to the advisory jury.

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

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

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Waxman, six minutes.

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

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

Let me first -- let me go right to Justice Scalia's question, which is not a hypothetical, although I'm happy to answer hypotheticals.

Your question was: Was the jury told and doesn't a jury have to be told that as to death eligibility, the element of the crime of capital murder, that it makes the decision?

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

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

1 aggravator applies, because seven jurors believe that at
2 least one aggravator applies."

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

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

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

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

19 It has no jury findings on which to rely.

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

1 independent" -- "the trial court's independent
2 determination."

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

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

21 And the notion that there hasn't been a
22 life-override since Ring is -- is an interesting fact,
23 but this Court, in this Court's Sposiano decision, in
24 this Court's Daubert decision, that's exactly what
25 happened: The jury said, we want life. The judge said,

1 I'm hearing -- I'm hearing independent evidence, and
2 you're getting death.

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

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

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

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

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

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