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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 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 totting 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'd been the decision  
13 maker, maybe would have decided differently. The person  
14 is eligible for death. And then it's up to the  
15 sentencer.

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

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

24 MR. WINSOR: Because the point in Ring was  
25 to make sure that no person was subject to a greater

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

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

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

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

17 MR. WINSOR: No, your Honor.

18 JUSTICE SCALIA: Good, I thought so --

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

1     aggravating facts that the jury has found.

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

7                   And then we move --

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

13                   Doesn't that make a difference?

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

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

23                   So you have a judicial backstop. The  
24    matter --

25                   JUSTICE GINSBURG: That was -- that was

1 before Ring.

2 MR. WINSOR: That was before Ring.

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

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

12 JUSTICE SOTOMAYOR: I'm sorry. I just  
13 want -- I'm -- I'm sorry.

14 Justice Scalia.

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

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

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

25 MR. WINSOR: The judge is going to

1 ultimately impose the sentence, and that's true. And  
2 that's both true under Caldwell, but it's not --

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

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

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

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

1           And if the judge determines that the death  
2   sentence is not appropriate for whatever reason, then  
3   the fact that the jury found an aggravating circumstance  
4   makes no difference.

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

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

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

19          JUSTICE KENNEDY: But this is my  
20  hypothetical.

21          MR. WINSOR: Okay. So to make sure I  
22  understand --

23          JUSTICE KENNEDY: I mean, a death case,  
24  which is not funny.

25          JUSTICE KAGAN: Which honestly sounds the



1 same.

2 MR. WINSOR: Well, I think the -- I think  
3 the difference is, respectfully, is his included the --  
4 the finding that the judge finds no evidence to support  
5 as opposed to just disagreeing with their -- excuse me.

6 JUSTICE KENNEDY: And what would happen?

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

12 JUSTICE KENNEDY: Yes.

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

22 JUSTICE BREYER: Go for a second to an  
23 analogy.

24 MR. WINSOR: I'm sorry?

25 JUSTICE BREYER: There's -- there are two

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

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

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

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

22 JUSTICE BREYER: But we do know that the  
23 judge here -- now still you're having conceded Ring,  
24 where the jury says no aggravating factor. We know that  
25 the jury can, if the jury finds aggravating factor X,

1 have death on a completely different aggravating factor,  
2 but the jury never thought of, namely why.

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

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

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

20 MR. WINSOR: We do, Your Honor. And let me  
21 say --

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

25 MR. WINSOR: Well, we don't say that it's a

1 unanimous jury. Let me step back and say that -- that  
 2 the -- the seven-to-five vote, by the way, is not  
 3 necessarily five votes that there was no aggravating  
 4 circumstance, because, again, it's -- there's two things  
 5 that go on in the jury room. One, they decide whether  
 6 there were aggravating circumstances. And, two, they  
 7 just -- they do --

8 JUSTICE SOTOMAYOR: And they don't agree  
 9 with which one?

10 MR. WINSOR: Sorry?

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

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

16 JUSTICE SOTOMAYOR: Right.

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

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

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

1 getting back to Justice --

2 JUSTICE SOTOMAYOR: Not the same one?

3 MR. WINSOR: I'm sorry?

4 JUSTICE SOTOMAYOR: Not the same?

5 MR. WINSOR: Not the same one.

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

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

25 And so as a matter of -- I think to answer

1 your question about whether they all need to be the same  
2 or not, it would depend on what the -- how the State  
3 legislature --

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

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

11 JUSTICE GINSBURG: That was ten to two.

12 MR. WINSOR: I'm sorry?

13 JUSTICE GINSBURG: Does ten to two  
14 automatically mean that seven to five is okay?

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

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

1 in place.

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

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

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

25 JUSTICE KAGAN: Can -- can I go back to the

1 kinds of hypotheticals that Justice Kennedy and I  
2 were -- were proposing?

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

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

17              Now, you say that that's fine; is that  
18 right?

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

24              And so your hypothetical would not happen if  
25 there -- there was 16 --



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

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

9 JUSTICE KAGAN: Yes, yes, yes, it's not this  
10 case.

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

14 JUSTICE KAGAN: I'm throwing out --

15 MR. WINSOR: Okay.

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

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

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

3 Let me get on with my questioning --

4 MR. WINSOR: Yeah. Sure.

5 JUSTICE KAGAN: -- because I think you  
6 answered this one already.

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

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

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

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

25 JUSTICE KAGAN: I mean, I'm just suggesting

1     that the whole appeal process suggests that the crucial  
2     death eligibility determination is being made by the  
3     judge because that's the only death eligibility  
4     determination that the appeals court is ever going to  
5     review.

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

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

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

22                  JUSTICE SOTOMAYOR: What about --

23                  MR. WINSOR: Or they may sustain it.

24                  JUSTICE ALITO: So to what degree is  
25     there --

1 JUSTICE SOTOMAYOR: How about if that  
2 jury -- I'm sorry --

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

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

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

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

24 MR. WINSOR: Yes.

25 JUSTICE SOTOMAYOR: Number one, whenever

1 have we said that a jury waiver on an issue is based on  
2 the lack of a challenge by a defense attorney? Don't we  
3 require waivers of jury trials to be explicit and by the  
4 defendant him or herself?

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

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

15 MR. WINSOR: Well --

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

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

25 But to follow up on your question,

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

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

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

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

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

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

1 Court's judgment.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Waxman, six minutes.

4 REBUTTAL ARGUMENT OF SETH P. WAXMAN

5 ON BEHALF OF THE PETITIONER

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

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

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

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

18 It was told over and over again, consistent  
19 with the statute, that its decision was purely advisory.  
20 And I want to refer the Court to the Florida Supreme  
21 Court's decision in State v. Steele, which is at 921 So.  
22 The Florida Supreme Court in Steele said, first of all,  
23 "Nothing in the statute, the standard jury instructions,  
24 or the standard verdict form requires a majority of the  
25 jury to agree on which aggravating circumstances exist.

1 Under current law, the jury may recommend a sentence of  
2 death where four jurors believe only that one aggravator  
3 applies, while three others believe that only another  
4 aggravator applies, because seven jurors believe that at  
5 least one aggravator applies."

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

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

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

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

22 It has no jury findings on which to rely.

23 And, in fact, the Court also explained in --  
24 later in the decision -- in the same decision and also  
25 in its decision in Franklin, that Florida bar -- quote,



1 "Florida bars a special verdict precisely because  
2 requiring specific jury findings on aggravators, without  
3 guidance about their effect, would harm the jury's  
4 independent" -- "the trial court's independent  
5 determination."

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

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

24 And the notion that there hasn't been a  
25 life-override since Ring is -- is an interesting fact,

1 but this Court, in this Court's Sposiano decision, in  
2 this Court's Daubert decision, that's exactly what  
3 happened: The jury said, we want life. The judge said,  
4 I'm hearing -- I'm hearing independent evidence, and  
5 you're getting death.

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

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

20 Even the -- again, the central Ring problem  
21 in this case, the central Sixth Amendment problem in  
22 this case, leaving aside the indeterminacy of seven to  
23 five -- and maybe it's three for one and four for the  
24 other -- is that, when a Florida sentencing jury  
25 finishes its work, there is simply no question: The

1     defendant is not eligible for the death penalty. Only  
2     the trial judge can do that.

3             Thank you.

4             CHIEF JUSTICE ROBERTS: Thank you, counsel.

5             The case is submitted.

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

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