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IN THE FLORIDA SUPREME COURT

Florida Supreme Court Case No.
Circuit Court Case No: CRC08-26829CFANO

PATRICK ALBERT EVANS, Petitioner,

vs.

STATE OF FLORIDA, Respondents.

RECEIVED, 10/26/2016 12:33:41 PM, Clerk, Supreme Court

EMERGENCY PETITION FOR WRIT OF PROHIBITION #2

Despite this Court's holding in Perry v. State, --- So. 3d --- (Fla. 2016), 2016 WL 6036982, that the Act does not apply to pending prosecutions, the trial court in this case intends to death qualify a jury on October 31, 2016 under an unconstitutional statute and proceed directly to penalty phase should the defendant be convicted as charged.

COMES NOW, Petitioner, Patrick Albert Evans, by and through undersigned counsel, pursuant to Fla. R. App. P. 9.100(e) and 9.030(a)(3), hereby respectfully petitions this Court for issuance of a Writ of Prohibition restraining Sixth Circuit Judge Joseph Bulone from "death qualifying" the jury on October 31, 2016 (for the purpose of conducting a penalty phase should the defendant be convicted as charged) based on the law as he has interpreted and written it post this Court's decisions in Perry v. State, No. SC16-547 and Hurst v. State, No. SC12-1947. Additionally, Petitioner moves to stay the proceedings in the lower court pending the resolution of this petition. Although the State of Florida is listed as the

respondent in the above caption, Judge Joseph Bulone, Circuit Court Judge for the Sixth Judicial Circuit is also a respondent. Pursuant to Fla. R. App. P. 9.100(e)(1), the name of the judge and lower tribunal is omitted from the caption and is included in the body of this petition as required by Fla. R. App. P. 9.100(e)(2).

Should this Court determine that certiorari is the appropriate remedy, Petitioner also alternatively seeks certiorari review of the trial court's determination that it will, on its own motion, amend F.S. § 921.141 to allow for the death qualification of the jury on October 31, 2016, and the penalty phase at the conclusion of the guilt/innocence phase should Petitioner be convicted as charged. Such alternative review is appropriate under the Florida Constitution which provides that, "no cause shall be dismissed because an improper remedy has been sought." Art. V, Sec. 2(a).

JURISDICTION AND JURISDICTIONAL FACTS

In 2011 Mr. Evans was convicted of two counts of First Degree Murder. In 2012 Mr. Evans was sentenced to death for each count of First Degree Murder. The convictions were reversed and retrial was ordered, after this Court concluded that cumulative error occurred based on the use of inadmissible evidence, inappropriate questioning of Mr. Evans, and improper prosecutorial arguments. Evans v. State, 177 So. 3d 1219, 1238-1239 (Fla. 2015).

This Court has exclusive jurisdiction to review death cases. Fla. Const. Art. V, Sec. 3(b)(1). The order sought to be reviewed raises issues having a great effect on the proper administration of the death penalty in this state and should appropriately be decided by the Florida Supreme Court.[1] "The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law by preventing the disagreement over controlling points of law that may arise when the district courts of appeal are the only appellate courts with mandatory appellate jurisdiction." Tillman v. State, 591 So. 2d 167, 169 (Fla.1991).

While "the order sought to be reviewed is not a final judgment imposing the death penalty and thus does not fall within the exclusive jurisdictional ambit reserved to the Florida Supreme Court... [T]he spirit of Tillman with its emphasis on the supreme court's preeminent role in the domain of death-penalty law, it would be judicially beneficial to refer the issue posed in the trial court's order to that court for immediate resolution so that trial courts in this state will have the benefit of a definitively uniform pronouncement regarding the application..." State v. Hootman, 697 So. 2d 1259, 1261 (Fla. 2d DCA 1997).

While this Court has held its jurisdiction should not be exercised in cases in which the conviction and sentence of death have been vacated and remanded for

[1] See the State of Florida's Motion for Clarification regarding this very issue, Perry v. State, SC16-547 (Fla. Oct. 20, 2016).

new trial for routine interlocutory orders, the trial court's decision to proceed in a capital case with an Act that this Court has determined cannot be constitutionally applied and forge its own law is a compelling reason for this Court to accept jurisdiction. See State v. Fourth District Court of Appeal, 697 So. 2d 70, 71 (Fla. 1997); State v. Preston, 376 So. 2d 3, 4-5 (Fla. 1979).

The risk of a jurisprudential quagmire would be created if this Court permits this case to go forward without appropriate guidance. The risks of inconsistent decisions and of immoderate delay weigh in favor of this Court's decision. Further, this Court has a history of exercising its discretion to resolve properly briefed issues once it has acquired jurisdiction in a matter. Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982); Price v. State, 995 So. 2d 401, 406 (Fla. 2008); and, Capone v. Philip Morris USA, Inc., 116 So. 3d 363, 369 (Fla. 2013).

This Honorable Court has jurisdiction to issue the requested Writ of Prohibition pursuant to Fla. R. App. P. 9.030(a)(3). "Where prohibition was sought against trial judge who refused to disqualify himself from presiding over trial in which sentence of death might ultimately be imposed, Supreme Court had jurisdiction." Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978). "Writ of prohibition was appropriate remedy when trial court attempted to interfere with prosecutorial discretion of State's attorney by determining appropriateness of death penalty prior

to trial in first-degree murder case." State v. Bloom, 497 So. 2d 2 (Fla. 1986). If this Court issues an Order to Show Cause in this matter pursuant to Fla. R. App. P. 9.100(h), said order will stay the proceedings in the lower court while the petition is pending.

This Court's certiorari jurisdiction is invoked pursuant to the Florida Constitution Article V, Sec. 3(b)(7) and Fla. R. App. P. 9.030(a)(3) to review non-final orders of circuit courts. Petitioner will suffer irreparable harm from the circuit court's departure from the essential requirements of the law by its erroneous determination to excise an unconstitutional provision of F.S. § 921.141 and author and add new law to the statute in an effort to conform to how the trial court interprets this Court's decisions in Perry and Hurst.

NEED FOR EMERGENCY RESOLUTION AND/OR STAY

Petitioner is charged with two counts of First Degree Murder. The State is seeking imposition of the death penalty. The trial court has decided, post the decisions in Hurst and Perry, that the Court will amend F.S. § 921.141 as it interprets the Florida Supreme Court's intention in the referenced cases. The trial court has indicated that the jury will be death qualified as to a law essentially authored by Judge Bulone and if the Petitioner is convicted, the case will proceed to penalty phase under the same law. The trial is scheduled to begin October 31,

2016. Petitioner is requesting this Court grant this Petition, but in the interim issue an Order to Show Cause to stay the proceedings in the lower court. The trial court's departure from the law will cause material injury for which there is no adequate remedy by appeal.

FACTS

Petitioner was indicted for two counts of First Degree Murder on January 22, 2009. Upon the petitioner's arrest, the case was designated to be presided over by the Honorable Nancy Moate Ley. Judge Ley entered an order recusing herself on the court's own motion on August 4, 2010. It appears the case was then reassigned from Judge Ley's Division T to the Honorable Joseph Bulone in Division K. On August 26, 2010, the case was then reassigned from Division K to Division M where it was ultimately tried and presided over by the Honorable Richard Luce.

On November 9, 2011, Petitioner was found guilty of two counts of First Degree Murder. On November 10, 2011, the jury recommended a sentence of death by votes of eight to four in favor of death, and nine to three. On July 27, 2012, Petitioner was sentenced to death for each count of First Degree Murder by the Honorable Richard Luce. The convictions were reversed and retrial was ordered, after this Court concluded that cumulative error occurred based on the use

of inadmissible evidence, inappropriate questioning of Mr. Evans, and improper prosecutorial arguments. Evans v. State, 177 So. 3d 1219, 1238-1239 (Fla. 2015).

Petitioner filed an unrelated in subject matter Writ of Prohibition to this Court under Florida Supreme Court Case No. SC16-1745 on September 27, 2016. The petition was denied without prejudice on October 4, 2016.

This Court decided Perry v. State, No. SC16-547 and Hurst v. State, No. SC12-1947 on October 14, 2016. The following Monday, Judge Bulone requested that a status check be set October 20, 2016 to discuss several pending death penalty cases set to be tried before him, all defendants represented by the Office of the Public Defender. The Petitioner's case was one of three cases discussed on October 20, 2016, and some arguments made regarding defendant Joel Cruz, circuit court case number 1307959CFANO apply to the Petitioner also, which was made clear on the record. Defendants Cruz and Evans were both present for the entirety of the argument regarding Mr. Cruz. Mr. Cruz was escorted out of the courtroom to allow the remaining parties to then discuss only Mr. Evans.

At the status check on October 20, 2016, the trial court set out five possible scenarios for how the Petitioner's October 31, 2016, trial would proceed. These options are set out in the transcript from October 20, 2016, attached to the Order signed October 25, 2016 (Appendix A). Option one is to prohibit the State from

seeking the death penalty. Option 2 is if Petitioner is convicted of two counts of First Degree Murder, for the trial court to then immediately sentence Petitioner to life in prison. The trial court indicated that it was not going to do options one or two. Option three is for the court to essentially interpret Hurst and Perry and reconcile any discrepancies in the cases to the best of its ability so that the trial court may amend F.S. § 921.141 to permit for the death qualification of the jury, and should Petitioner be convicted as charged, to proceed directly to penalty phase. Option four is to death qualify the jury, again based on the law as Judge Bulone has written it, and if Petitioner is convicted to continue the penalty phase proceedings until after the Florida Legislature has met and presumably enacted a new lawful death penalty statute. Option five is if Petitioner waives the "right" to be tried by the same jury, the trial court would not death qualify the guilt/innocence phase jury and then if Petitioner is convicted empanel a new jury after the Florida Legislature has met to decide the issue of life or death.

The case was passed until October 25, 2016, to allow for all parties to reflect on the court's proposed five options. The trial court indicated it was not going to do options one or two and considered option four to be impractical, so ultimately the decision was left between options three and five.

Having been forced to choose between options three and five, on October 25, 2016, counsel for Petitioner elected option five. Despite the trial court indicating on October 20, 2016 that "...obviously option five is the safest thing for the State because by then the act will have been modified, you would think. And, as I said before, I don't think there's an ex post facto issue. Mr. Swisher had another argument. And then from your point of view it would give the Defense one bite at the apple instead of a possibility of two. So I don't see where it's prejudicial for the State. I personally think five is the best option, but I don't have a problem going with number three," the trial court elected option three. Order and transcript from October 20, 2016 attached as Appendix A. Transcript from October 25, 2016 attached as Appendix B.

ARGUMENT

The Court in Perry v. State, --- So. 3d --- (Fla. 2016), 2016 WL 6036982 said as follows: The Act, however, is unconstitutional because it requires that only ten jurors recommend death as opposed to the constitutionally required unanimous, twelve-member jury. *Accordingly, it cannot be applied to pending prosecutions.* (Emphasis added).

It is not a court's job to write the law. The Court has recognized since at least the decision in State v. Steele, 921 So. 2d 538 (Fla. 2005) that the Court could

not rewrite the death penalty statutes to make them constitutional. This Court has been suggesting to the Florida Legislature for years that the Florida death penalty statutes need to be changed. The Legislature's unwillingness to act does not grant the courts the authority to write laws.

The United States and Florida Constitutions both embrace the fundamental concept of Separation of Powers. Article II, Sec. 3 of the Florida Constitution reads, "Branches of government.—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." As such, the Legislature makes the laws and the Court interprets the laws. In the instant case, the trial court is "interpreting" the law from a 10-2 death verdict to a 12-0 verdict. That is not an interpretation of the statute; it is a rewrite of the statute.

This Court in Brown v. State, 358 So.2d 16 (Fla. 1978) held,

> This Court has traditionally adhered to the policy that all doubts as to the validity of a statute are to be resolved in favor of constitutionality when reasonably possible. Carter v. Sparkman, 335 So. 2d 802 (Fla.1976); State v. Aiuppa, 298 So. 2d 391 (Fla.1974). However, it has also been wary of transcending its constitutional authority by invading the province of the legislature. State v. Wershow, 343 So. 2d 605 (Fla.1977); State v. Egan, 287 So. 2d 1 (Fla.1973). When the subject statute in no way suggests a saving construction, we will not abandon judicial restraint and effectively rewrite the enactment. The Florida Constitution requires a certain precision defined by the

legislature, not legislation articulated by the judiciary. See Article II, Section 3, Florida Constitution. This constitutional mandate obtains for two reasons. First, if legislative intent is not apparent from the statutory language, judicial reconstruction of vague or overbroad statutes could frustrate the true legislative intent. Second, in some circumstances, doubts about judicial competence to authoritatively construe legislation are warranted. Often a court has neither the legislative fact-finding machinery nor experience with the particular statutory subject matter to enable it to authoritatively construe a state. See Kunz v. New York, 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280 (1951) (Frankfurter, J., concurring). The judicial body might question with justification whether its interpretation is workable or whether it is consistent with legislative policy which is, as yet, undetermined.

Art. V, Sec. 5(b) of the Florida Constitution reads,

JURISDICTION.—The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction. Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by general law.

The Court adopts rules of judicial practice and procedure. Matters of substantive law are within the Legislature's domain. This Court in State v. Raymond, 906 So. 2d 1045 (Fla. 2005) writes,

Matters of "substantive law" which, in contrast to the Supreme Court's exclusive state constitutional authority to adopt procedural law in all courts, are within the Legislature's domain, are that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer; such matters include those

> rules and principles which fix and declare the primary rights of individuals with respect to their persons and property.

Amending F.S. § 921.141 to a require a jury to reach a unanimous 12-0 death determination before a death sentence can be imposed is a substantive change to the law and one that is within the Legislature's purview, not the trial court. If this change were merely procedural in nature, the Florida Supreme Court could have amended the statute in either of the recent opinions on in 2005 when Steele was decided. Rather, this Court has been telling the Legislature for years to make the necessary substantive changes to comport with the law and the Legislature has been ignoring the Court. The Legislature failed to act until the United States Supreme Court required it to in deciding Hurst v. State, 136 S. Ct. 616 (S. Ct. 2016).

The Act referred to by the Court is chapter 2016-13, Laws of Florida (2016). The Act is comprised of amendments to six separate Florida statutes: 775.082, 782.04, 921.141, 921.142, 794.011, and 893.135. The Perry opinion states that "while most of the Act can be construed constitutionally under our holding in Hurst, the Act's 10-2 jury recommendation requirement renders the Act unconstitutional." The State argued in the trial court that the unconstitutional portion of the statute could be severed from the constitutional parts of the statute. This argument, however, ignores the plain language of Perry, which states that the Act is unconstitutional and cannot be applied to pending prosecutions.

The trial court added language to both the Hurst and Perry decisions in an effort to reconcile perceived differences of opinion between the decisions. The trial court essentially guessed at what this Court's intention was in deciding those two cases on the same day, and despite neither opinion stating this was a legal option, the trial court decided it was appropriate to excise the unconstitutional provision of F.S. § 921.141 and write its own amended version of the statute upon which it could then death qualify the jury in this case on October 31, 2016.

"Severability is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions." Ray v. Mortham, 742 So. 2d 1276, 1280 (Fla. 1999). The doctrine of severability is "derived from the respect of the judiciary for the separation of powers, and is 'designed to show great deference to the legislative prerogative to enact laws.'" Id. (quoting Schmitt v. State, 590 So. 2d 404, 415 (Fla. 1991). The courts are to be "mindful of the Legislature's intent in determining whether an unconstitutional provision can be severed from the remainder of a statute. If the legislative intent of the statute cannot be fulfilled absent the unconstitutional provision, the statute as a whole must be declared invalid." Fl. Dept. of State, Div. of Elections v. Martin, 916 So. 2d 763, 773 (Fla. 2005). The unconstitutional part of a challenged statute should be severed, leaving the rest intact and in force, when doing so does not defeat the purpose of the statute

and leaves in place a law that is complete. Seay Outdoor Advertising, Inc. v. City of Mary Esther, Fla., 397 F. 3d 943 (11th Cir. 2005).

Under Florida law, the test for severability is as follows:

> When part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken. Coral Springs Street Systems, Inc. v. City of Sunrise, 371 F. 3d 1320 (11th Cir. 2004).

This Court in Perry very clearly stated that the Act is unconstitutional because it does not require a unanimous jury verdict to impose death. The Court also noted the Court is bound to "resolve all doubts as to the validity of the statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with legislative intent." Citing Heart of Adoptions, Inc. v. J.A., Inc., 963 So. 2d 189, 207 (Fla. 2007). And the Court went on to say, "However, this Court may only do so, if 'to do so does not effectively rewrite the enactment.'" Citing State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994).

What this language from Perry makes clear is that the Court considered the severability doctrine and how far the Court could go in construing the statute so as

to not violate the separation of powers. The Court said it could not rewrite the Act so as to make it constitutional. The unconstitutional provisions could not be severed out. If that was what the Court thought it could do in a constitutional manner, it could have done so. Instead, the Court said the Act as a whole could NOT be applied to pending prosecutions.

There are 67 counties in the state of Florida, 20 judicial circuits and literally hundreds of circuit judges. It simply cannot be this Court's intent for each circuit judge to write his own law according to that judge's interpretation of the Court's decisions in Perry and Hurst. To allow for such chaos is the essence of what the Eighth Amendment to the United States Constitution aims to prevent: the arbitrary and capricious application of the death penalty.

CONCLUSION

The Petitioner fundamentally cannot be afforded the Due Process right to a fair trial when the trial court, on its own motion, is writing law to attempt to "fix" an unconstitutional Act so that the death penalty might be imposed. There cannot be a fair trial when there is a not a constitutional law in place to follow. As such, Petitioner is requesting this Honorable Court enter its Order granting this Petition and restraining Judge Bulone from death qualifying a jury to try Petitioner on October 31, 2016.

CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished by hand delivery to the State Attorney, County Justice Center, Clearwater, Florida; The Honorable Joseph Bulone; and via facsimile delivery (813-281-5500) to the Office of the Attorney General, Criminal Appeals Division, Tampa, FL on October 26, 2016.

I CERTIFY that this petition complies with the font requirements of FLA. R. APP. P. 9.100(l).

_____/S_____

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APPENDIX

A.....Order with Transcript from October 20, 2016

B.....Transcript from October 25, 2016

APPENDIX A

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
0826829CFANO

STATE OF FLORIDA

Vs.

EVANS, PATRICK ALBERT Person ID: 2631157

ORDER

This cause came before the Court for a determination of how the recent Florida Supreme Court decisions in *Perry v. State*, No. SC16-547 and *Hurst v. State*, No. SC12-1947 apply to the pending prosecution of defendant Patrick Evans for two counts of first degree murder. *Perry* and *Hurst* were issued on October 14, 2016. On the same date, the defendant filed a demand for speedy trial. On October 20, 2016, the Court held a status check on the demand for speedy trial and to address the impact of *Perry* and *Hurst* on the instant case. In light of the defendant's demand for speedy trial, the Court proposed five possible alternatives as set forth in the transcript filed herein. The Court has chosen the third option, as set forth below:

> Here is choice number three. If the defendant is, in fact, guilty of first degree murder, we proceed to a penalty phase as directed by the Florida Supreme Court. So what we'll do is we'll have, quote, a new penalty phase proceeding consistent with this opinion, end quote. So we would death qualify the jury. I don't – I don't think it takes a rocket scientist to figure out what we would tell them and what we would instruct them on, which is that there is basically four things they have to find unanimously if they're going to determine that death is a proper sentence. That's what I would say. I would call it either a "verdict" or a "determination." I would not call it a "recommendation."
>
> I would have four questions on the verdict form.
>
> Number one, do you-all unanimously believe that this aggravating factor was proved beyond a reasonable doubt? I think the State is only alleging one aggravating factor for each victim.
>
> And then, number two, do you unanimously find that the aggravating circumstances are enough?
>
> Number three, do you find that the aggravating circumstances outweigh any mitigating circumstances?

> And then in number four, if you answered "yes" to all of those, do you find that death would be your verdict or would be the proper determination?
>
> Of course, we would instruct them that just because they answered "yes, yes, yes" to the first three, it doesn't mean they have to answer "yes" to four because they can find the first three and then under the Mercy Rule say I don't think it's appropriate even though I answered the first three unanimously to "yes." So that is possibility number three.
>
> And as I said, we would death qualify the jury and let them know that that's what the rules would be. And then if the defendant is, in fact, found guilty of first degree murder, then we would proceed accordingly. I don't think it would be all that hard to draft those instructions. I don't think it would be all that hard to come up with a verdict form.

On October 25, 2016, the Court held further proceedings on this matter. The defendant affirmed that he is asserting his right to a speedy trial and maintains that he has a right to demand a speedy penalty phase proceeding, should the defendant be convicted of two counts of first degree murder. Thus, the Court determined that this cause will proceed in accordance with choice three. *See State v. Jones*, --- So. 3d --- , 41 Fla. L. Weekly D1853 (Fla. 2d DCA Aug. 10, 2016).

WHEREFORE, this Court will death qualify a jury for guilt phase proceedings to begin on October 31, 2016, and proceed to a penalty phase consistent with *Perry* and *Hurst* if the defendant is convicted of two counts of first-degree murder.

DONE AND ORDERED at Clearwater, Pinellas County, Florida on this 25th day of October, 2016.

ORIGINAL SIGNED
OCT 25 2016
JOSEPH A. BULONE
CIRCUIT JUDGE

Joseph A. Bulone, Circuit Judge

COPIES TO:
Public Defender
State Attorney

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY
CASE NUMBER CRC08-26829CFANO

STATE OF FLORIDA,

Plaintiff,

vs.

PATRICK ALBERT EVANS,

Defendant.
_____/

PROCEEDINGS: STATUS CHECK HEARING

BEFORE: THE HONORABLE JOSEPH A. BULONE
Circuit Court Judge

DATE: October 20, 2016

PLACE: Courtroom 9
Pinellas County Justice Center
14250 - 49th Street North
Clearwater, Florida 33762

REPORTER: Amanda P. Manos
Registered Professional Reporter

(Pages 1 to 79)

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* * *

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

2 THE BAILIFF: All rise. Circuit Court is back
3 in session. You may be seated.
4 THE COURT: All right. We're here on a couple
5 of cases where the State is seeking the death
6 penalty. One is Joel Adrian Cruz, case number
7 13-07959CFANO. And the other one is Patrick Evans.
8 That's case number CRC08-26829CFANO.
9 And I think what we'll do first is to say that
10 both defendants are here because we may have some
11 issues that we'll be talking about in regard to the
12 *Perry* and *Hurst* cases that came out last Friday
13 afternoon on October the 14th which was six days
14 ago. And the Public Defender's Office represents
15 both of them. I know Mr. Swisher is on both cases.
16 There may be some other lawyers on each case.
17 And Mr. Cruz has an interpreter here. And
18 Madam Interpreter, if you can go ahead and state
19 your name for the record.
20 THE INTERPRETER: Astrid Schaffer, your Honor,
21 state certified court interpreter.
22 THE COURT: All right. Please raise your
23 right hand.
24
25

1 THEREUPON,

2 ASTRID SCHAFFER,

3 the interpreter herein, having been first duly sworn, was

4 examined and testified as follows:

5 THE COURT: All right. Very good. And then

6 if the attorneys could all go ahead and state their

7 name and let us know what case you're here on.

8 First of all, Mr. Swisher is here. You're here on

9 both cases, right?

10 MR. SWISHER: Yes, sir.

11 THE COURT: All right.

12 MS. MCNEILL: Jane McNeill, Public Defender's

13 Office, I'm here on both Cruz and Evans.

14 MS. JUSTINIANO: Soraida Justiniano, I'm here

15 on Cruz.

16 MS. MILLER: Allison Miller on behalf of

17 Mr. Evans.

18 THE COURT: Okay. All right. And for the

19 State?

20 MR. DAVIDSON: Kendall Davidson, I'm here on

21 the Joel Cruz case.

22 MR. KOSKINAS: Tom Koskinas, I'm here on the

23 Patrick Evans matter.

24 MR. LABRUZZO: Chris Labruzzo, I'm here on

25 Patrick Evans.

1 THE COURT: All right. Very good. All right.
2 So these cases obviously have something in common
3 in that the State is seeking the death penalty on
4 both. In regard to Cruz, the procedural history
5 basically is this: That we had a trial on this
6 January 20 to January 22, 2015. We had a penalty
7 phase on January the 27th. There was a death
8 recommendation under the old statute, the old
9 statute being prior to March the 7th, 2016. The
10 vote was 10 to 2.
11 We had a Spencer hearing on August 13, 2015.
12 And before the Court could enter a sentence of life
13 or death, *Hurst* came out which is *Hurst versus*
14 *Florida* by the U.S. Supreme Court. That occurred
15 on January the 12th. The statute was amended on
16 March 7th, 2016. And then, of course, we have
17 *Hurst versus State* and *Perry versus State* which
18 came out on October the 14th.
19 So we're or we were up to the point where the
20 Court had to sentence the defendant, but then we
21 have been postponing it to figure out what's going
22 on with these statutes and the constitutionality of
23 everything.
24 As far as Evans, basically we're in a
25 situation where it's a de facto brand new case even

1 though it allegedly occurred back in 2008. In that
2 there was a trial. The defendant was found guilty.
3 There was a death recommendation of 9 to 3 and 8 to
4 4. There was a Spencer hearing. Judge Luce
5 imposed the death sentence. The Defense appealed,
6 and the guilt phase itself was reversed. So now
7 we're back to square one. So that's like having a
8 brand new case. The case is set for trial
9 October 31. Today is October the 20th.
10 My understanding is that the Defense has filed
11 a demand for speedy trial on that, right?
12 MR. KOSKINAS: Correct.
13 THE COURT: All right. So, Mr. Swisher, in
14 light of *Hurst* and *Perry* which just came out -- let
15 me put those cites on the record because we all
16 know what they are now, but perhaps years from now
17 people may not. *Hurst* is 41 Florida Law Weekly
18 S433A. And I hope I didn't lose the *Perry* case.
19 Oh, here it is, 41 Florida Law Weekly S449A.
20 That's the *Perry* case.
21 All right. So I believe Mr. Swisher would
22 like to speak for the Public Defender's Office or
23 the Defense on both cases.
24 MR. SWISHER: No. Ms. McNeill does.
25 THE COURT: Oh, Ms. McNeill does. Okay.

1 MS. MCNEILL: You speak to Evans.
2 MR. SWISHER: Okay. Well, as to Mr. Evans
3 we're set for trial. We're ready for trial, and
4 that's set for a week from Monday. So we're not
5 addressing anything there.
6 As far as Cruz goes, is that the one you want
7 to address? Okay. And then Ms. McNeill would like
8 to address the Cruz case.
9 THE COURT: Okay. All right. Obviously --
10 MR. KOSKINAS: I'm sorry to interrupt. Before
11 we do that, they don't want to address Mr. Evans,
12 but I think it is -- it does need to be addressed
13 based on the procedural history of what's occurred
14 to date. In other words, because the Defense has
15 now made a demand, as the Court pointed out, they
16 have now in essence taken a position that is
17 entirely inconsistent with the position that they
18 have had up until just a few days ago.
19 THE COURT: Well, we're going to deal with
20 Evans. I'm just going to let them give their
21 presentation first, and then I'll let the State
22 give their presentation, and I'll listen to
23 everything.
24 MR. KOSKINAS: Thank you.
25 THE COURT: And then I'll figure out what

1 we're going to do. So --
2 MR. KOSKINAS: Thank you.
3 THE COURT: That's all they wanted to say
4 about Evans so far.
5 MR. SWISHER: Yes, sir. Correct.
6 THE COURT: Okay. All right. What else?
7 MS. MCNEILL: As to Mr. Cruz, your Honor, we
8 asked the Court on Monday that, given the decisions
9 in *Perry* and *Hurst*, that the Court sentence
10 Mr. Cruz to the only available sentence under the
11 law as it stands today, and that is life in prison.
12 And that is our request today. The *Perry* case is
13 very clear. It states the act referring to Chapter
14 2016-13, Laws of Florida. However, it's
15 unconstitutional because it requires that only 10
16 jurors recommend death as opposed to the
17 constitutionally required unanimous 12-member jury.
18 Accordingly --
19 THE INTERPRETER: Excuse me, your Honor. The
20 interpreter would like to request the party to slow
21 down.
22 MS. MCNEILL: Sorry.
23 THE INTERPRETER: Thank you.
24 MS. MCNEILL: Accordingly, it cannot be
25 applied to pending prosecutions. So there is no

1 death penalty that can be applied to Mr. Cruz's
2 case. The only available sentence is life in
3 prison, and we are asking the Court to impose a
4 sentence of life imprisonment today.
5 THE COURT: All right.
6 What says Mr. Davidson about that?
7 MR. DAVIDSON: Your Honor, the supreme court
8 in *Hurst* specifically found that the death penalty
9 is not unconstitutional. The supreme court in
10 *Perry*, again, reiterates the death penalty is not
11 unconstitutional. What the problem is is with the
12 procedure in recommending it. The substantive
13 aspects of the death penalty statute with the
14 aggravating factors they found constitutional. If
15 I can go to -- the wording of the Court is the
16 fact-finding provisions of the revised section of
17 Florida Statutes constitutionally in conformance
18 with *Hurst* to require --
19 THE COURT REPORTER: You're going to have to
20 slow down, sir.
21 MR. DAVIDSON: -- to require unanimous
22 findings on all statutory elements required to
23 impose death. This Court has the ability to create
24 interrogatory jury instructions to comport with the
25 supreme court's finding that the recommendation

1 must be unanimous. We think that we can proceed to
2 a penalty phase with the Court giving the proper
3 instruction, doing an interrogatory verdict. An
4 interesting thing also *is Hurst* has pointed out
5 again that the harmless error analysis also applies
6 to that death penalty case.
7 So in the event -- I guess the first position
8 is that the problem with the statute is procedural,
9 and the Court can fix it. And, therefore, we can
10 proceed with the statute that we know its portions
11 are constitutional as to the substantive aspects.
12 In the event down the road if the death
13 penalty is imposed and if this is reviewed under a
14 new statutory scheme, it's clear what the new
15 statutory scheme is going to require: Unanimous
16 verdicts or recommendations. If the Court requires
17 that, then any finding would have to be harmless
18 error if there is a unanimous death vote and a
19 death sentence following the procedure as laid out
20 in *Hurst* and *Perry*.
21 And so our position is, again, it's
22 procedural. The Court has the ability -- the
23 Courts have always had the ability to craft
24 appropriate jury instructions when there are none
25 in existence. And that's what we're asking the

1 Court to do and set a full penalty phase in the
2 matter.
3 THE COURT: All right.
4 MS. MCNEILL: I anticipated those arguments
5 and have a response.
6 THE COURT: Very good.
7 MS. MCNEILL: I agree that the *Hurst* and *Perry*
8 decisions did not say that Florida no longer has
9 the death penalty. We all agree with that. It did
10 not say that. It did not abolish the death
11 penalty.
12 What it did do is say that our statute is
13 unconstitutional and it cannot be applied to
14 pending cases. I'll go back to the Constitution.
15 The State's argument is that this is procedural.
16 It is not procedural. It is substantive. Let's
17 start with the Florida Constitution, Article II,
18 Section 3, the separation of powers. "The powers
19 of the state government shall be divided into
20 legislative, executive, and judicial branches. No
21 person belonging to one branch shall exercise any
22 powers appertaining to either of the other branches
23 unless expressly provided herein."
24 We can turn to Article V, Section 2 regarding
25 the judiciary. "The supreme court shall adopt

1 rules for the practice and procedure in all courts"
2 and then it goes on.
3 The roles of the judiciary and the legislature
4 are very clearly defined by our constitution and by
5 the laws assigning their responsibilities. The
6 Court does not get to write law. The legislature
7 makes the law. The Court interprets the law. The
8 Court cannot interpret a 10-2 statute into a 12-0
9 statute. Clearly that is a change in the law that
10 the Court does not have the authority to do.
11 Case law makes very clear these separate
12 responsibilities of the Court and the legislature.
13 I'm going to cite to the Court and I will
14 provide -- may I approach?
15 THE COURT: You may.
16 MS. MCNEILL: I will just bring all these up.
17 I will cite to the Court *State v. Raymond*. This is
18 a Florida Supreme Court case found at 906 So.2d
19 1045 from June of 2005. This case on the printed
20 version that I provided headnote two and three on
21 as printed page 3 talks about what is procedural
22 and what is substantive. And it states, Matters of
23 substantive law are within the legislature's
24 domain. Substantive law has been defined as that
25 part of the law which creates, defines, and

1 regulates rights or that part of the law which
2 courts are established to administer. It includes
3 those rules and principles which fix and declare
4 the primary rights of individuals with respect to
5 their persons and property.
6 What the supreme court said in *Hurst* and *Perry*
7 is that our statute is unconstitutional. How it is
8 possible to turn 10-2 into 12-0 without clearly
9 establishing a new right for Mr. Cruz -- he has a
10 right to a unanimous verdict -- that is a
11 substantive change.
12 The additional cases that I provided talk
13 about when there is a change to the death penalty
14 statute, it is a substantive change. And cases
15 that say that -- well, and I don't think I've
16 provided this one -- but aggravators and mitigators
17 are a substantive change in the law. That comes
18 from *Morgan v. State* at 415 So.2d 6. It's a
19 Supreme Court case from '82.
20 Another case that says that adding an
21 aggravator to the death penalty statute is a
22 substantive change in the law is *Lukehart*,
23 L-u-k-e-h-a-r-t, *v. State*, another Florida Supreme
24 Court case found at 776 So.2d 906 from 2000.
25 Changes to the death penalty law are substantive

1 changes in the law.

2 I provided to Court and Counsel the case of

3 *Abdool*, A-b-d-o-o-l, *v. Bondi*, B-o-n-d-i, found at

4 141 So.3d 529, a Florida Supreme Court case from

5 2014. This is a case that had to do with actions

6 that were brought under the Timely Justice Act of

7 2013. And this case as printed and provided to the

8 Court on page 11 also goes through an analysis of

9 substantive versus procedural.

10 Substantive law is defined as that part of the

11 law which creates, defines, and regulates rights

12 and, again, or that part of the law which courts

13 are established to administer. It includes those

14 rules and principles which fix and declare the

15 primary rights of individuals. It's going to that

16 same language.

17 Mr. Cruz has a right. He has an individual

18 right to be sentenced to life in prison. This is a

19 substantive change that the law is being -- that

20 the Court is calling to make. If the Court -- if

21 this was procedural -- and we know that the Court

22 and the Florida Supreme Court is the body that

23 adopts the rules of procedure. We know that. If

24 the Court could have fixed this, they could have

25 done it. They could have just said we're going to

1 change the rule. We're going to change the
2 statute. We're going say the statute now requires
3 12-0 and that's it and we're done. If that was the
4 case and if the Court could just fix this, then why
5 did the legislature need to ask -- act in January?
6 Why couldn't we have just gone off of what the
7 United States Supreme Court said?
8 Clearly the legislature had to act to change
9 the law. Clearly they're going to have to act
10 again to change the law. And the Florida Supreme
11 Court has been telling the legislature since at
12 least 2005 when *Steele* was decided you need to fix
13 the statute. You need to fix the statute. Florida
14 is an outlier. And in *Hurst* in the opinion from
15 Friday, last Friday, stated, In the past we have
16 expressed our view that unanimity in capital
17 sentencing was necessary in *Steele*. Nevertheless,
18 we urged the Florida legislature to take action to
19 require at least some unanimity by the jury in
20 capital penalty proceedings.
21 If the Court could have fixed the law to make
22 it constitutional -- they have been saying it since
23 2005 -- they could have done it. The Court cannot
24 do it. So the State suggested, Well, we can just
25 proceed, and the Court can just come up with jury

1 instructions to fix this problem. You can't cure
2 an unconstitutional statute with a jury
3 instruction. Jury instructions must be based on
4 the law. That is where it comes from. The jury
5 instructions are not just a figment of our
6 imagination that we come up with while we're in a
7 daydream. They have to be based on the law.
8 And if we take the position that, Well, this
9 Court, just come up with whatever you think is the
10 appropriate law to follow in this case -- there are
11 67 counties in Florida, 20 judicial circuits. I
12 tried to count the number of circuit court judges,
13 but it's in the hundreds. We know that -- is every
14 circuit court judge in the entire state of Florida
15 to come up with their own version of what the law
16 is and what the jury instructions are to be?
17 Where does that leave us? That leaves us with
18 an arbitrary and capricious implementation of the
19 death penalty in violation of the Eighth Amendment,
20 and the Court addressed the Eighth Amendment in the
21 *Hurst* opinion, and they talked about *Furman* and
22 what the problem was and why that was an Eighth
23 Amendment case and why the death penalty was ruled
24 unconstitutional under the Eighth Amendment.
25 There has to be a specific law that narrows

1 the people that can be eligible for the death
2 penalty. It is supposed to be reserved for the
3 worst of the worst and the least mitigated. And if
4 we have 67 different counties and 20 different
5 circuits and hundreds of different judges coming up
6 with what they perceive to be the law, based on the
7 recent rulings by the Florida Supreme Court, how
8 can that ever be in accordance with the Eighth
9 Amendment? So the idea that the Court can do that,
10 in addition to violating the separation of powers,
11 certainly violates the Eighth Amendment.
12 And the idea that, Well, the legislature is
13 just going to come back and fix this law. They're
14 just going to change 10-2 to 12-0 -- and, again, if
15 this is just a procedural change, why would they
16 ever need to do that? But if the idea is we can
17 just keep proceeding because it's a simple fix,
18 they're just going to go do it.
19 Well, I'll go back to the legislature's
20 response. And, again, when the United States
21 Supreme Court ruled in January, the legislature got
22 right to it. They knew that they had to in
23 response to *Hurst* change the law, a substantive
24 change in the law. It didn't go to the rules
25 committee to change what the rules are in order to

1 make it constitutional. It went to the
2 legislature.
3 In response to *Hurst* in January, what the
4 Court -- excuse me -- the legislature did some of
5 what they needed to do to comport with the United
6 States Supreme Court's ruling. They didn't do some
7 things they should have done. They went further in
8 some respects than I think it could be argued that
9 the *Hurst* opinion required. So we have no idea
10 what the legislature is going to do given *Hurst* and
11 *Perry*. We simply -- any -- to suggest that they're
12 just going to come back and change those two words
13 10-2 to 12-0 is pure speculation.
14 What might they do? Maybe they'll finally
15 pass a constitutional statute. I don't know.
16 We've been trying for years, but maybe this time
17 they will. They might pass an unconstitutional
18 statute just like they did in March when there was
19 arguments and arguments and testimony before all
20 those subcommittees and the full legislative bodies
21 that you need to go to unanimous. You need to go
22 to unanimous. We're still going to be an outlier.
23 10-2 is not enough. And to his credit, according
24 to news reports, Brad King, the representative for
25 the Prosecutor's Office, did say, Yeah, I guess we

1 should have gone 12-0. I guess we got it wrong.
2 So what are they going to do? We don't know.
3 Are they going to just say, Okay, unanimous? Are
4 they going to try to roll back some of the extra
5 stuff that they put in the statute in response to
6 the *Hurst* case in January? We don't know. It's
7 pure speculation.
8 If it was an easy fix, call a special session.
9 Get it done in an hour if it's that simple. It
10 took them two months at last session to get the
11 statute to where it needed to be, two months. They
12 thought it was a simple fix in response to *Hurst*.
13 It certainly wasn't. If it was so simple, just
14 call a special session. Get it done. We know,
15 according to reports, Senator Negron has been
16 quoted in newspaper articles and apparently
17 confirmed to somebody again last night they're not
18 calling a special session. He said we're going to
19 wait until March when we convene.
20 So we're not going to know. The Court has
21 said and the Court acknowledged on Monday that the
22 Court can't just put things off indefinitely
23 waiting for the Court to act, waiting for the
24 legislature to act.
25 The State suggested that, Well, *Hurst* says,

1 Well, you know, death penalty analysis is subject
2 to harmless error analysis. I think that's
3 interesting. What they're saying to the Court is
4 to commit error. That's what they're saying,
5 commit error, and then we'll find out down the road
6 how bad it was. Is that really how this Court
7 wants to proceed under invited error? That doesn't
8 seem to make a lot of sense.
9 Mr. Cruz has been convicted by a jury. He
10 stands ready to be sentenced. This Court has no
11 option other than to sentence him to life right
12 now. The statute is unconstitutional. *Perry* makes
13 it very clear, and we are asking the Court to
14 sentence him to life.
15 THE COURT: All right. Thank you.
16 Any response from the State?
17 MR. DAVIDSON: Yes, Judge. First off, the
18 last bit of the argument as well as where she
19 started off with making the statement that life is
20 the only sentence under the law, we know that's not
21 true. *Hurst* said the death penalty is, in fact,
22 constitutional. So the death penalty is a
23 constitutional sentence. It is available to this
24 Court. The substance of the death penalty statute,
25 the substantive parts, have been found to be

1 constitutional. The substantive parts of the death
2 penalty statute allowing for the death penalty, the
3 factors that have to be found to determine the
4 death penalty, those are all constitutional.
5 What has been unconstitutional can be fixed by
6 procedure. This Court can use the Doctrine of
7 Severability to sever off the unconstitutional part
8 of that statute and construe it procedurally to
9 require a unanimous verdict and a unanimous
10 recommendation.
11 The argument that we have no idea what the
12 legislature will do -- I suggest the Court
13 shouldn't be concerned with that because we know
14 exactly what needs to be done to make it
15 constitutional based on what the supreme court has
16 told us in *Hurst* and *Perry*. In *Hurst* they didn't
17 send it back and say sentence *Hurst* to life. They
18 sent it back. They remanded for a new penalty
19 phase consistent with their opinion, their
20 procedural opinion. And then they come up with
21 *Perry*, and they say again the fact-finding
22 provisions of the statute, which would be
23 substantive, are constitutional.
24 So this Court, we believe, can sever the
25 unconstitutional part. We know what's required for

1 a constitutional sentence. That's going to be a
2 unanimous verdict, unanimous recommendations. We
3 can instruct the jury as such. And should they
4 return with that recommendation and should the
5 Court follow it, even in the event these arguments
6 were wrong, it would clearly suffice under any
7 harmless error because it would be most stringent
8 for a death penalty recommendation. You know, it
9 would be stronger than the law has ever been in
10 Florida and certainly would be affirmed as long as
11 the death penalty remains constitutional which is
12 abundantly clear the Florida Supreme Court says
13 that the death penalty is constitutional.
14 MS. MCNEILL: May I respond briefly?
15 THE COURT: You may.
16 MS. MCNEILL: I promise it will be brief
17 because Mr. Davidson just brought up the issue of
18 severability, and so I think it would be important
19 to just briefly discuss that issue and to consider
20 what the test for severability is. It's easy just
21 to throw it out there and just sever it out, but
22 let's -- I think it's important to look at what the
23 actual test is.
24 And what the Court must consider is, number
25 one, if the legislative purpose of the valid

1 provisions of an act can be enforced separately
2 from those that are void;
3 Two, if the valid and invalid features cannot
4 be separated, whether the legislator would have
5 passed the one without the other;
6 And, three, whether the act is complete in
7 itself with invalid provisions stricken. And that
8 is from *Williams v. American Optical Corp.*, 985
9 So.2d 23, Florida, Fourth District Court of Appeal,
10 2008, affirmed by the Florida Supreme Court in
11 2011.
12 When you look at severability, the Court is
13 certainly required to uphold the constitutionality
14 of a statute when it's possible to strike only the
15 unconstitutional provisions. But you have to look
16 at what the intent of the legislature is when
17 passing the statute. They passed an
18 unconstitutional statute. Clearly their intent was
19 to try to kill people on only a 10-2 vote. That
20 was their intent. You cannot sever that out and
21 effectuate the intent of the legislature by just
22 taking that portion out. If we sever out, if we
23 sever out the 10-2 portion, we don't have a statute
24 to follow. We just don't. Weed out the portion
25 that says is there an aggravator. Do the ags

1 outweigh the mits? We have all that, but we don't
2 have anything then as to what their recommendation
3 is supposed to consist of.
4 And the Court can't write the law. That's the
5 job of the legislature. So they're the ones that
6 need to fix it. Thank you.
7 THE COURT: All right. Anything else from the
8 State? I'm giving everyone every opportunity here.
9 MR. DAVIDSON: No, your Honor.
10 THE COURT: All right. All right. Obviously
11 we'll have more extensive discussions involving the
12 Evans case because I think that situation is a
13 whole lot more complicated as far as our options
14 there.
15 In Cruz really the factual scenario is pretty
16 similar to what happened in *Hurst* itself. In
17 *Hurst*, of course, there is a very long history, but
18 the bottom line is that *Hurst* goes to trial. He is
19 convicted. Ultimately there is a penalty phase.
20 There is a death recommendation. And the final
21 penalty phase of 7 to 5 was obviously less than
22 unanimous. The judge imposes the death penalty,
23 and then, of course, it's vacated.
24 With Cruz the only difference is that the
25 Court hasn't gotten to the stage of imposing life

1 or death. We have had a trial. The defendant has
2 been convicted. We have had a penalty phase. We
3 have had a death recommendation of 10 to 2. We
4 have had a Spencer hearing. And that's as far as
5 we've gotten. So Cruz really is in just about the
6 same position as *Hurst*.
7 And, of course, the Defense was asking that
8 the supreme court in *Hurst* impose life, and they
9 argued that it was mandatory under that statute
10 that was passed when *Furman* was pending, and the
11 Florida Supreme Court rejected that last Friday.
12 And then the very last thing that they said was we
13 vacate *Hurst*'s death sentence. So that really puts
14 Cruz and *Hurst* in the exact same position where
15 there's been a death recommendation by the jury and
16 remand for a new penalty phase proceeding
17 consistent with this opinion.
18 So they don't say that the act is
19 unconstitutional, that there is no death penalty
20 scheme that's constitutional currently in effect.
21 So you have to give *Hurst* life. That's not what
22 they say. They say that they're remanding it for a
23 new penalty phase proceeding consistent with this
24 opinion. So if the supreme court doesn't give
25 *Hurst* a life sentence, then it seems inappropriate

1 to me to do the same thing for Cruz.
2 Now, the Defense has indicated that if we have
3 a penalty phase in Cruz or any penalty phase, that
4 they're not going to be ready for a long time, that
5 there is all kinds of witnesses that they want to
6 interview. They want to get a mitigation
7 specialist. They want to go down to Puerto Rico
8 where the defendant is from. So they're not going
9 to be ready for months which makes this
10 logistically and practically perhaps not as
11 difficult a pall as it could have been.
12 Now, I believe it's the governor that actually
13 calls the special session and not the House and the
14 Senate themselves, but incoming Senate President
15 Negron, according to the media, is indicating
16 they're not going to have a special session, that
17 they're just going to deal with it in March. And
18 the Defense isn't going to be ready until then
19 anyway.
20 So in an abundance of caution in order to make
21 sure that the Defense is ready for the new penalty
22 phase and to give the legislature an opportunity to
23 amend the statute that would be consistent with
24 *Hurst* that came out last week, it would seem to be
25 a pretty practical thing to have the penalty phase

1 set when the Defense wants which is April. Why not
2 do that?
3 And obviously there is not a speedy trial
4 issue with the sentencing. So they can't demand
5 speedy trial on a sentencing. So I don't really
6 see a practical problem with that. So I think it
7 will make everyone happy to some extent to have it
8 in April or May. The Defense will be ready for the
9 penalty phase. We'll have an amended statute by
10 then.
11 And no doubt the State will have the
12 obligation of proving the aggravators beyond a
13 reasonable doubt, that the aggravators are enough
14 for a death penalty, that the aggravators outweigh
15 the mitigators, and that the jury determines that
16 with all of that, that death is a proper sentence
17 unanimously. And if they don't, if one person
18 indicates that death is not a proper determination
19 in regard to sentence, then Mr. Cruz will get
20 sentenced to life.
21 So we're going to -- we're going to pick a day
22 next year. That seems to be the most practical
23 thing. So how long is it going to take the Defense
24 to get ready for this thing? I know before you
25 said it's going to take a while, right? Have you

1 thought about it?
2 MR. SWISHER: I can't tell you how long it's
3 going to take. And I would like to address one
4 thing that the Court said on how this case is
5 different than *Hurst*.
6 THE COURT: Okay.
7 MR. SWISHER: *Hurst* went to conclusion in a
8 death in a sentence. This case started in January
9 under one statute. It's never been finished, and
10 what your Honor is now saying is that the
11 legislature can change the law during the pendency
12 of the action, and we're going to follow whatever
13 they change it to.
14 That would be the same as in, let's say, a
15 burglary case where one of the elements might be
16 you have to show lack of consent. So the trial
17 starts. All the elements are lack of -- you know,
18 one of the elements is lack of consent. The
19 legislature meets and says we're going to take away
20 lack of consent. So now when we go to a jury,
21 we're going to finish with one less element.
22 If you read through *Hurst*, it clearly defines
23 the penalty phase as an element. It's repeated
24 throughout the opinion. So what you're doing is
25 you're allowing the legislature to meet during the

1 course of a trial prior to its conclusion and
2 change the rules. That's why it's different than
3 *Hurst*.
4 THE COURT: All right. Well, if you read the
5 Fifth DCA case in *Perry*, they say that it's not an
6 ex post facto violation, and I believe that that is
7 what the supreme court, the Florida Supreme Court,
8 indicated in *Perry* as well, that it's not an ex
9 post facto violation but that it is still
10 unconstitutional in regard to a unanimous
11 recommendation or not.
12 So if the legislature changes the law in that
13 regard to make it a requirement of a unanimous
14 recommendation, then that would not be an ex post
15 facto violation because, number one, according to
16 *Perry* with regard to the Fifth DCA it's procedural;
17 and, number two, it benefits the defendant, and it
18 doesn't make it worse for the defendant. It makes
19 it better for the defendant.
20 Now, the supreme court or Florida Supreme
21 Court didn't really hit on that issue very much,
22 but I believe that they indicated that it was not
23 an ex post violation, but it would be a violation
24 under the Sixth Amendment, the Eighth Amendment,
25 the Florida Constitution under section -- under

1 Article I, Section 22, under general Florida law
2 and the whole thing but not an ex post facto
3 violation.
4 MR. SWISHER: I didn't say ex post facto.
5 THE COURT: Well --
6 MR. SWISHER: It's due process. You should be
7 able to finish the case with the same statute you
8 started with.
9 THE COURT: Even if it benefits you?
10 MR. SWISHER: With the same statute no matter
11 which. I didn't argue ex post facto. You did.
12 What I said was you should not finish a case with a
13 different statute than what you started with. And
14 that's what you're allowing. That's a violation of
15 due process.
16 THE COURT: All right. Well, that's also what
17 the Florida Supreme Court did in *Hurst*. Okay.
18 They're saying here is some things that were
19 indicating that the current statute is
20 unconstitutional and then say we're remanding it
21 for a new penalty phase. So --
22 MR. SWISHER: That's the key word, "new
23 penalty phase." Okay. The thing is that case had
24 been decided and sentenced and went up on appeal.
25 We've never finished.

1 THE COURT: All right. Well, that I think is
2 a distinction without a difference. I don't see
3 how that makes any difference legally whatsoever.
4 MS. MCNEILL: I just wanted to bring to the
5 Court's attention that another court in Florida has
6 already had to address the *Perry* and *Hurst*
7 decisions on Friday. The case of Kevin Coleman in
8 the Fifth Circuit received a guilty verdict in
9 phase one of the trial on Thursday afternoon.
10 *Perry* and *Hurst* came out on Friday. They were set
11 to proceed with penalty phase on Monday, and a
12 mistrial was declared. So another court just for
13 the Court's information has already had to address
14 the issue.
15 THE COURT: All right. And that may or may
16 not be the right thing to do. I guess we'll find
17 out months or years from now once things go up on
18 appeal. All right. So why don't we go ahead and
19 set a penalty phase on Evans.
20 MS. MILLER: Cruz.
21 THE COURT: On Cruz. I'm sorry.
22 MR. SWISHER: How about if we set a pretrial
23 so we can kind of gather the troops and talk to our
24 mitigation person just to kind of get a feel.
25 THE COURT: All right. So we'll set a

1 sentencing status check. How is that?
2 MR. SWISHER: That's fine.
3 THE COURT: All right. It's really not a
4 pretrial at this point.
5 MR. SWISHER: Status check with a bring, I
6 guess.
7 THE COURT: Yes. So when would you like to do
8 that?
9 MR. SWISHER: Six weeks.
10 THE COURT: Okay.
11 MR. SWISHER: How about -- we just set
12 something, didn't we? 12/12?
13 THE COURT: Okay. 12/12. So we'll have one
14 court reporter for both of those things again. All
15 right. So 12/12 at 8:30, a sentencing status check
16 on Cruz.
17 All right. Now, we've got Evans which I do
18 think is more complicated in that we're going to
19 have a trial on this. So we have a demand for
20 speedy trial. So the issue is going to be what do
21 we do.
22 MS. MILLER: Judge, I would like to address
23 one thing on Mr. Evans.
24 THE COURT: Okay.
25 MS. MILLER: We did file a demand for speedy

1 trial. I believe today would serve as the fifth
2 day for the calendar call. To reiterate what
3 Mr. Swisher said, capital punishment is an element
4 as clearly delineated in *Hurst* and the subsequent
5 opinions. So we are demanding both a speedy guilt
6 phase trial and a speedy penalty phase trial.
7 THE COURT: All right. Well, I doubt that you
8 have a right to a speedy trial on a sentencing.
9 But we'll say that today is the fifth day which
10 means that we have to set the trial within 50 days
11 basically from the day that it was filed. So it's
12 already set on October 31. And Mr. Swisher
13 indicates that he's ready to go.
14 MR. SWISHER: Yes.
15 THE COURT: So we're having the trial on
16 October 31. So now the issue is what do we do
17 about the possibility of the death penalty. So
18 what says the Defense about that? Anything more?
19 MR. SWISHER: Judge, I don't think we need to
20 death qualify a jury. We don't have a statute
21 that -- how do you instruct them? What do you say?
22 Well, it might be 12-0. We might not have the
23 death penalty because they could decide not to have
24 a death penalty. That is an option. I know
25 everybody in here wants one. But the legislature

1 could say we're not going to have a death penalty
2 anymore. And we don't know. So to -- how do you
3 instruct a jury that death is a possibility but we
4 have no idea yet what it's going to be? I think
5 it's improper, and he's entitled to a non-death
6 qualified jury for the guilt phase.
7 Taking the State's position, I suppose it
8 would be like if we're going to piggyback on Cruz
9 and *Hurst*, I guess you could death qual a
10 sentencing jury later, not that I agree to that,
11 but I think that's legally the only result.
12 THE COURT: All right. What says the State?
13 MR. KOSKINAS: Well, Judge, as to the demand
14 part of it initially, the rule is very clear,
15 Judge, that the demand for speedy trial is a
16 bonified desire by the defendant or the accused to
17 have a trial prior than one could be afforded him
18 already. We were already set for the 31st. Are
19 they by filing this document indicating that they
20 want a trial faster than the 31st? They have not
21 answered that question. I think we're fine to
22 proceed on the 31st. But that is in effect what
23 they've indicated by this filing.
24 Additionally, the position now Ms. Miller has
25 indicated that they want not only a demand or a

1 speedy trial on both the guilt and the penalty
2 phase, I think, is misguided, Judge. The law is
3 very clear that if the jury is impaneled, then
4 speedy is, therefore, satisfied. There's no
5 requirement that speedy applies to any sentencing
6 whatsoever.
7 Additionally, they have to have a bonified
8 desire to have a trial. Now, as the Court is
9 aware, they have expressly -- they're taking the
10 position now that is completely, completely and
11 utterly inconsistent with what they've been arguing
12 to the Court over and over again that they would
13 never be prepared for trial on the 31st, that they
14 could never be prepared for the guilt phase, never
15 mind the penalty phase. In fact, I think they
16 filed their motion indicating they needed two or
17 three years. Ms. Miller has indicated to the Court
18 that she wanted to do it right and set it for next
19 summer.
20 So now within, I think, two weeks of that
21 statement they filed a demand for speedy trial. So
22 there is questions, legitimate questions, about
23 whether it's bonified, whether it's a true desire.
24 I think -- I think it behooves the Court to inquire
25 of the defendant because they are now taking a

1 contrary position to what they've asserted
2 previously. So what is the desire? What is the
3 true desire of the Defense in this case? And we
4 really just don't know. They have been completely
5 inconsistent.
6 So, Judge, I think, you know, the defendant
7 needs to -- if this is just a strategic decision
8 that they're making based on the ruling that came
9 out Friday, then say that and have the defendant
10 acquiesce to that, that he wants to go forward. I
11 don't want a situation where they've now peppered
12 the record for weeks, if not months, of we can't be
13 prepared. In essence, we're going to be
14 ineffective and then demand a speedy trial when at
15 the end say we only did that -- we only demanded
16 because we were taking a position that there was no
17 death penalty.
18 Now that we've -- if that's not the case and
19 the courts determine that they're wrong, well, I
20 don't want them to have the ability to take the
21 position we told the Court we are going to be
22 ineffective. We only demanded speedy trial because
23 of that issue. So we're still ineffective in
24 agreeing that we're still ineffective. I don't
25 want them to have the ability to make those

1 arguments. So I think for those reasons you need
2 to inquire of the Defense at the least and the
3 defendant at the most.
4 And as to the constitutionality of it, their
5 arguments regarding that, I'll leave that to
6 Mr. LaBruzzo. But I think that issue regarding the
7 demand needs to be addressed prior to getting into
8 any of that.
9 THE COURT: All right. Would you like to
10 respond to that?
11 MS. MILLER: Judge, a couple things, speedy
12 trial isn't a call for Counsel. There are certain
13 things that are always within the purview of a
14 defendant or the accused: To decide whether he
15 wants to go to trial, whether he would like to
16 testify in that trial. Whether or not he would
17 like to go to a speedy trial is a strategic call
18 for Counsel. So it is totally improper for the
19 Court to do any kind of independent colloquy of
20 Mr. Evans. As his lawyer, I will speak on his
21 behalf.
22 Mr. Swisher, Ms. McNeill, and I are ready for
23 trial on October 31st, as we indicated when we
24 filed a good faith demand for speedy trial. I
25 don't think it's a secret that I have been

1 primarily responsible for the guilt phase.
2 Mr. LaBruzzo has been kind enough to contact
3 me every Wednesday and Thursday since we've met to
4 see if there were any ways that he could assist in
5 getting ready for us and getting ready for the
6 guilt phase. I had brought to the Court's
7 attention that the issue I knew of that I could
8 speak to was related to shell casings comparisons
9 in the FDLE file. The State was kind enough to get
10 that to me last Friday. I've since provided it to
11 a Defense expert, and I feel comfortable saying
12 we're ready on the guilt phase.
13 I want to focus on the *Perry* opinion. The
14 *Perry* opinion says pretty much verbatim -- it
15 refers to 921.141 as amended as "the act." It
16 refers to the act as unconstitutional and says the
17 act cannot be applied to pending prosecutions.
18 The State has been doing this wrong in Florida
19 for 40 years. I don't know why we keep listening
20 to the State's proposals about how to enact the
21 death penalty in Florida. There is no legal
22 statute in which the death penalty could be
23 imposed. As *Perry* said, the act as amended after
24 March 7th does not apply to pending prosecutions.
25 The federal and Florida Supreme Courts have

1 routinely said that capital punishment, the death
2 penalty, is an element and needs to be decided
3 unanimously. That's been most recently decided by
4 the Florida Supreme Court. As such, I absolutely
5 think that a defendant has the right to demand both
6 a speedy guilt phase trial and a penalty phase
7 trial. It is an element that needs to be decided
8 unanimously by a jury.
9 We are ready to go forward on the guilt phase,
10 and we are ready to go forward on the penalty phase
11 as it applies to Mr. Evans because the only
12 possible penalty legally at this point is life in
13 prison should he be convicted.
14 MR. KOSKINAS: Judge, I'm sorry. To back up
15 just very quickly, they've indicated now that there
16 was only one remaining issue, but they filed
17 multiple motions in the case. My
18 understanding -- and I just want this on the record
19 that they withdraw any kind of motions that they've
20 now filed and that there are no further motions to
21 be filed by the Defense because there is two
22 pending right now that I have that are not yet set
23 for hearing, but they do, in fact, have filed
24 motions.
25 MS. MILLER: We would withdraw. Mr. Swisher

1 filed a motion for individual voir dire. We would
2 withdraw that on behalf of Mr. Evans. We don't
3 anticipate filing any other motions in advance of
4 trial as it applies to the legality of capital
5 punishment as it applies to Mr. Evans because there
6 is no capital punishment legally in the state of
7 Florida right now.
8 Mr. Swisher also filed a motion, I believe, in
9 limine in objection to the transcript of the 911
10 recording, how it was transcribed and presented to
11 the jury in the first trial. I believe there's
12 been conversation between Mr. LaBruzzo and
13 Mr. Swisher about that and a possible resolution of
14 that issue short of hearing.
15 We potentially could have motions in limine,
16 standard sort of motions in limine, as it pertains
17 to the admissibility of evidence in the guilt phase
18 that I expect the Court would hear at the beginning
19 of the trial. But other than that, we don't have
20 any motions to file related to capital punishment.
21 THE COURT: Okay. All right. Mr. LaBruzzo?
22 MR. LABRUZZO: Judge, I would just say that
23 the opinions in both *Hurst* and *Perry* indicate that
24 there is a death penalty in the state of Florida.
25 It's very clear as to the lay of the procedure. We

1 spent the better part of the last hour discussing
2 that.
3 The portion of the *Perry* opinion for which I
4 believe Ms. Miller is referring to and saying it
5 doesn't apply to pending cases does indicate that
6 while most provisions of the act can be construed
7 constitutional --
8 THE COURT REPORTER: You're going to have to
9 slow down.
10 MR. LABRUZZO: Sorry.
11 -- could be construed constitutional and could
12 otherwise be validly applied to a pending
13 prosecution and then because the act requires only
14 10 jurors rather than all 12 recommend a final
15 sentence of death or death to be imposed, the act
16 is unconstitutional to the extent pursuant to *Hurst*
17 as required as to answer the question.
18 I think that the opinions of both *Hurst* and
19 *Perry* indicate exactly what the Court should tell
20 the jury. I know Mr. Swisher indicates there is
21 complete uncertainty as to what to tell the jury.
22 I think that these opinions very clearly tailor
23 what should be told to the jury as it relates to
24 the imposition of death. These opinions are very
25 narrowly tailored as to what portion of the statute

1 was unconstitutional and why it was
2 unconstitutional. It gives very clear guidance to
3 courts such as this as to what should be instructed
4 to a jury.
5 Now, what language we use is obviously going
6 to take either the State and the Defense and the
7 Court to come to some sort of an agreement as to
8 what those instructions should exactly say. But
9 it's clear what the portion needed to be added and
10 what needs to be removed.
11 Florida does have a death penalty. It is
12 clear in both opinions, and we're asking the Court
13 to follow these opinions in preparing the jury
14 instructions on how to death qualify a jury.
15 MS. MILLER: Judge, if I can, the purpose of
16 jury selection is very fundamental: To find 12
17 people who can follow the law fairly and
18 impartially. I agree with Mr. LaBruzzo that the
19 decisional law that's been decided on Friday didn't
20 say there is no death penalty in Florida. But
21 there is no legal mechanism in which one can be
22 sentenced to death.
23 So the State is proposing death qualifying a
24 jury. What law are we asking these people to
25 follow? The ones the Court just decided is

1 unconstitutional? There is certainly no problem in
2 asking these potential jurors if they have a
3 problem following the law as it applies to first
4 degree murder. There is certainly no problem in
5 asking -- well, I think the Court -- we typically
6 ask the Court to instruct potential jurors that
7 this is not a death penalty case which is what we
8 would be asking in Mr. Evans' case because there is
9 no legal way in which the Court can sentence
10 Mr. Evans to death right now.
11 And that's -- the *Perry* case says 921.141 as
12 amended doesn't apply to pending prosecutions.
13 Mr. Evans' case is a pending prosecution. How
14 would we ask a jury to follow a law as it applies
15 to imposing a death sentence?
16 MR. LABRUZZO: Judge, if I may, these issues
17 have been litigated in this courthouse and over in
18 Hillsborough County. They were sent up to the
19 Second DCA. And I'm referring to the *State v.*
20 *Jones* and other defendants where the Defense
21 attempted to preclude the State from seeking the
22 death penalty because of the uncertainty in the law
23 in that period of time between the *Hurst* opinion
24 and the intervening statute. The Second DCA
25 indicated very clearly in its opinion that we were

1 not precluded. And in this case -- in the Evans
2 case we have the benefit of not only having the
3 ability to seek it as verified by the *Jones* case,
4 but we also have the guidance and the wisdom of
5 both the Florida Supreme Court in both *Perry* and
6 *Hurst* that tells us exactly how we need to do that.
7 So I understand where this concern is coming
8 from, but we have a very exact language we need to
9 be using and exactly what we need to say.
10 MS. MILLER: The *Jones* case, as I understand
11 it, actually was consolidated with several other
12 cases, and the Second DCA said it wasn't ripe
13 because none of those defendants had been
14 convicted.
15 We are prepared to go forward with guilt phase
16 and a penalty phase trial on October 31st. There
17 is no mechanism legally that a Court can death
18 qualify a jury. If there's going to be subsequent
19 litigation -- I think Mr. Swisher kind of alluded
20 to this. If the State is going to say continue off
21 the penalty phase and allow the legislature time to
22 convene and enact a new statute, that's a different
23 position, which we don't agree with, but that's a
24 different argument for a different day.
25 Our position is we are ready for trial on

1 October 31st. As the law stands right now, there
2 is no legal mechanism to impose the death penalty.
3 THE COURT: All right. Anything else from
4 anybody before I pontificate a little bit and then
5 raise some options and concerns?
6 MR. LABRUZZO: Nothing from the State.
7 THE COURT: Okay.
8 MR. SWISHER: Judge, I don't know how long
9 you're going to take. I'm going to ask -- I'm
10 going to have to be excused. I have to be up in
11 Pasco County for a meeting at 12:45 at the Land
12 O'Lakes Jail.
13 THE COURT: It will be a short pontification,
14 which is unusual for me.
15 All right. First of all, I'm glad that
16 everyone sees no ambiguity in everything and
17 everyone thinks that everything is clear. I guess
18 the issue is that what everyone sees clearly is the
19 opposite as far as what the State sees and what the
20 Defense sees. So it's perfectly clear, just the
21 opposite.
22 Now, I may be easily confused. But on Friday
23 I read *Hurst*, and I thought I knew exactly what
24 they were saying, and that was before I read *Perry*.
25 And then I read *Perry*, and I thought I knew exactly

1 what it was they were saying. The problem was it
2 seemed to be the opposite of what they said in
3 *Hurst*. And, again, it's probably just me in my
4 confusion. But obviously both of these opinions
5 were drafted and promulgated by the Florida Supreme
6 Court, and they even came out on the same day. So
7 we're going to have to be able to reconcile both of
8 them somehow.
9 Now, obviously in *Hurst* what the Supreme Court
10 or the Florida Supreme Court was saying was that
11 there was four determinations that the jury has to
12 make in their recommendation or determination
13 before the defendant, in essence, becomes death
14 eligible with the judge.
15 And that is, number one, there has to be a
16 finding beyond a reasonable doubt by the jury, and
17 it has to be unanimous as to each aggravating
18 factor. It used to be called "aggravating
19 circumstances." Now they're aggravating factors.
20 If you read the *Steele* case, it's interesting.
21 In the old days the jury had to find an aggravating
22 circumstance beyond a reasonable doubt, but it
23 didn't have to be the same aggravating
24 circumstance. Now it has to be for each and every
25 aggravating circumstance it has to be proven by the

1 State beyond a reasonable doubt, and it has to be
2 unanimous.
3 Secondly, the jury has to find that the
4 aggravating circumstance or aggravating
5 circumstances is enough for death to be a proper
6 sentence.
7 And, number three, they have to determine that
8 the aggravating circumstances outweigh the
9 mitigating circumstances in order for death to be a
10 proper sentence.
11 And then they have what's called the "Mercy
12 Rule," I guess, where even if they all unanimously
13 believe those three things, then they still have to
14 find if death is, in fact, the determination or the
15 proper sentence or, in effect, the verdict.
16 So there is four things there. Now, obviously
17 the statute indicated that it had to be 10 to 2.
18 Now, going from *Hurst* to *Perry* what *Perry* said
19 was that if there is any ambiguity, any statute has
20 to be interpreted consistent with being
21 constitutional. So they said there is no doubt in
22 regard to the aggravating factors that they have to
23 be proved beyond a reasonable doubt, and it has to
24 be unanimous because that's right in the statute.
25 In regard to whether or not the aggravating

1 circumstances are enough for a sentence of death
2 and whether or not the aggravating factors outweigh
3 the mitigating circumstances in *Perry*, they said
4 it's ambiguous. So we're going to interpret them
5 as needing to be unanimous. And then they said
6 that the 10 to 2 vote in regard to the ultimate
7 recommendation or determination, however it is that
8 you want to call it, cannot be interpreted in any
9 way that's constitutional. And, therefore, the
10 very last thing that they say is the act is
11 unconstitutional because it requires that only 10
12 jurors recommend death as opposed to the
13 constitutionally required unanimous 12-member jury.
14 Accordingly, it cannot be applied to pending
15 prosecutions.
16 So I think if you read that, I don't think
17 there is any doubt that you cannot use this statute
18 at this point for pending prosecutions. But, as I
19 said from the beginning, I may get easily confused.
20 So if you go back to *Hurst*, what is the very
21 last thing they say in *Hurst*? Okay. If you want
22 to talk about the very last things that the Court
23 says, We vacate *Hurst's* death sentence and remand
24 for a new penalty phase proceeding consistent with
25 this opinion. Well, if you just read that, I just

1 find it somewhat inconsistent with *Perry* because
2 how can you have a new penalty phase proceeding if
3 they're saying that the act cannot be applied to
4 pending prosecutions? If you just read *Hurst*, it
5 seems to me that what they're saying is that the
6 first three elements need to be unanimous and that
7 we interpret the statute as having to be unanimous.
8 But the ultimate decision as to whether or not the
9 jury determines that death is a proper
10 determination also has to be unanimous. Now, I may
11 be totally misinterpreting this next statement by
12 them.
13 MR. SWISHER: Can I shed some light on that
14 the way I read that?
15 THE COURT: Well, in the end you can.
16 MR. SWISHER: Okay.
17 THE COURT: This is on page 41 of their
18 opinion. If you look at Florida Law Weekly, it's
19 page 16 at the bottom. Then they initially say
20 that there are other pragmatic reasons why
21 Florida's capital sentencing law must require
22 unanimity in a jury recommendation of death, and
23 then they go on about that. And they sort of go
24 through a little history here.
25 Once the supreme court, that is, the U.S.

1 Supreme Court made clear in *Hurst versus Florida*
2 that these findings are the sole province of the
3 jury and that *Ring* applies to Florida's capital
4 sentencing laws, the Florida legislature was
5 required to immediately attempt to correct a new
6 sentencing law in accord with *Hurst versus Florida*.
7 All right. So they said that when *Hurst versus*
8 *Florida* came out, the legislature had to amend the
9 statute, and they did. All right.
10 Then they say Florida need not face a similar
11 crisis in the future. So are they saying here that
12 now the legislature doesn't have to amend the
13 statute? Florida need not face a similar crisis in
14 the future. Requiring a unanimous jury
15 recommendation before death may be imposed in
16 accord with the precepts of the Eighth Amendment
17 and Florida's right to a trial by jury, it is a
18 critical step toward insuring that Florida will
19 continue to have a constitutional and viable death
20 penalty law which is surely the intent of the
21 legislature. This requirement will dispel most, if
22 not all, doubts about the future validity and
23 long-term viability of the death penalty in
24 Florida.
25 So when I just read this, I think what they're

1 saying is, Hey, you have the three elements. We've
2 interpreted that the legislature indicated they
3 have to be unanimous. Then you have the ultimate
4 determination or recommendation or verdict, and
5 we're saying that that has to be unanimous, too,
6 and that Florida need not face a similar crisis in
7 the future and that Florida doesn't have to pass
8 the act.
9 And then how does that comport with *Perry*? Do
10 they mean in *Perry* that the act is unconstitutional
11 because it requires that only 10 jurors recommend
12 death as opposed to the constitutionally required
13 unanimous 12-member jury? Accordingly, it cannot
14 be applied to pending prosecutions. Maybe they're
15 saying it cannot be applied to pending prosecutions
16 as actually written but as we've modified it in
17 *Hurst*. Maybe they're saying that it can be applied
18 with the modification.
19 And Mr. Davidson is arguing the Severability
20 Doctrine, and maybe that's exactly what they're
21 saying, and it's just confusing. I admit I'm
22 confused that when they say, We vacate Hurst's
23 death sentence and remand for a new penalty phase
24 proceeding consistent with this opinion, it sounds
25 like they're saying consistent with what we said,

1 which is everything has to be unanimous: All four
2 of those things, the three elements, then the
3 ultimate Mercy Law, number four.
4 So I will admit I'm not 100 percent sure
5 exactly what they're saying. So in Evans I see
6 five possibilities. And I'll ask everyone's
7 opinion on which one you think we should do.
8 Possibility number one, before the trial even
9 starts, not allow the State to seek the death
10 penalty. Now, under that *Jones* case, which is
11 found at 41 Florida Law Weekly D1853, the Second
12 DCA says that the Court can't do that. It says
13 that a pretrial determination of the death
14 penalty's applicability creates a statutorily
15 unauthorized trifurcated death sentence procedure
16 which the trial judge has no authority to create.
17 The trial court simply has no authority to
18 determine the applicability of the death penalty to
19 defendants who have not been convicted of capital
20 felonies. So --
21 MS. MCNEILL: Which case is that, your Honor?
22 I'm sorry.
23 THE COURT: That's *Jones*, 41 Florida Law
24 Weekly D1853. Okay. So I can't do it before the
25 trial starts.

1 So possibility number two is if the defendant,
2 in fact, is convicted of first degree murder, then
3 I could say that the defendant is entitled to a
4 life sentence and it ends there, right, because in
5 *Jones* they say that the Court can't make a
6 determination before there is a conviction. So you
7 would by implication indicate that they could do it
8 after there is a conviction. But that's really the
9 same thing that we just discussed in Cruz which is
10 a situation like *Hurst* where there is a jury
11 recommendation of death, and then *Hurst* -- it
12 doesn't say that a defendant should then get life.
13 It says we need a penalty phase consistent with
14 this opinion. So I don't think that we can do
15 number two either. And I've already ruled on that
16 in Cruz, and that's my opinion on that.
17 Here is choice number three. If the defendant
18 is, in fact, guilty of first degree murder, we
19 proceed to a penalty phase as directed by the
20 Florida Supreme Court. So what we'll do is we'll
21 have, quote, a new penalty phase proceeding
22 consistent with this opinion, end quote. So we
23 would death qualify the jury. I don't -- I don't
24 think it takes a rocket scientist to figure out
25 what we would tell them and what we would instruct

1 them on, which is that there is basically four
2 things they have to find unanimously if they're
3 going to determine that death is a proper sentence.
4 That's what I would say. I would call it either a
5 "verdict" or a "determination." I would not call
6 it a "recommendation."
7 I would have four questions on the verdict
8 form.
9 Number one, do you-all unanimously believe
10 that this aggravating factor was proved beyond a
11 reasonable doubt? I think the State is only
12 alleging one aggravating factor for each victim.
13 And then, number two, do you unanimously find
14 that the aggravating circumstances are enough?
15 Number three, do you find that the aggravating
16 circumstances outweigh any mitigating
17 circumstances?
18 And then in number four, if you answered "yes"
19 to all of those, do you find that death would be
20 your verdict or would be the proper determination?
21 Of course, we would instruct them that just
22 because they answered "yes, yes, yes" to the first
23 three, it doesn't mean they have to answer "yes" to
24 four because they can find the first three and then
25 under the Mercy Rule say I don't think it's

1 appropriate even though I answered the first three
2 unanimously to "yes." So that is possibility
3 number three.
4 And as I said, we would death qualify the jury
5 and let them know that that's what the rules would
6 be. And then if the defendant is, in fact, found
7 guilty of first degree murder, then we would
8 proceed accordingly. I don't think it would be all
9 that hard to draft those instructions. I don't
10 think it would be all that hard to come up with a
11 verdict form.
12 And if that procedure was used and if the
13 defendant ultimately received the death sentence on
14 that and if the Florida Supreme Court indicated
15 that it was incorrect to do it that way, then
16 obviously he would get a new penalty phase or they
17 would say that life should have been imposed, and
18 then he would get a life sentence.
19 So you can say that there is not a whole lot
20 of prejudice there because of his right to appeal.
21 Obviously if we go through all of that and if he
22 gets a recommendation of life or even if there is a
23 recommendation of death and a Court finds that life
24 is a proper sentence, then it's over.
25 So, as I was saying before, if, in fact, there

1 is a trial and if, in fact, he's found guilty of
2 first degree murder and if, in fact, there is a
3 determination of 12 to nothing for death and if we
4 have this Spencer hearing and if the Court imposes
5 the death sentence and if all of that is incorrect,
6 then that can easily be reversed by the Florida
7 Supreme Court.
8 But if the jury comes up with a recommendation
9 or a determination or a verdict less than 12-0 or
10 even if they do and I give him life, then it's
11 over. So all of this really benefits the defendant
12 if we go with number three.
13 Number four possibility is this: If the
14 defendant is found guilty of murder in the first
15 degree, then we have the jury come back in April or
16 May. I'm really not sure how practical this is.
17 And then after the statute is amended we have our
18 penalty phase. Again, I'm not sure how practical
19 that is. We would advise them that death is a
20 possible penalty, and we would death qualify them
21 the best we could. That's option number four.
22 Option number five is if the Defense waives
23 the right to have the same jury, we can have a
24 guilt phase or a guilt/innocence phase as the
25 Defense brought up at the last hearing and not

1 death qualify the jury. And if the defendant
2 obviously is not found guilty of murder in the
3 first degree, then we're done. If the defendant is
4 found guilty of murder in the first degree, then in
5 April, May, June, whatever we will have a new jury.
6 We'll have a bifurcated proceeding, and we will
7 death qualify them, and then we will have our
8 penalty phase then.
9 So those are the three options that remain.
10 I'm going to do one of those based upon the *Hurst*
11 case.
12 And I don't know if the Defense wants to think
13 about it or even if they want to respond now, and
14 obviously I'll also hear from the State. I don't
15 know who would like to go first. I don't know if
16 you would like to think about it or if anyone wants
17 to respond at this point.
18 THE BAILIFF: Can I move him over, your Honor?
19 THE COURT: Sure. All right. So what says
20 somebody?
21 MS. MILLER: Judge, obviously we anticipated
22 some of this discussion, and Mr. Swisher and
23 Ms. McNeill and I have had a few conversations
24 about this. I think the thing that Mr. Swisher
25 wanted to point out and I also want to point out as

1 to why we don't see *Hurst* as being inconsistent
2 with *Perry* as decided by the Florida Supreme Court
3 is that I think this Court is interpreting *Hurst*
4 when it says it's remanding Mr. Hurst's case for a
5 new penalty phase to mean that has to be a penalty
6 phase in which the death penalty is an option.
7 There are plenty of people that are charged
8 with first degree murder right now that their cases
9 would have no effect by these recent Florida
10 Supreme Court opinions, right? They're convicted
11 of first degree murder. The death penalty isn't
12 being sought. There's a penalty proceeding, and
13 the Court imposes the only possible sentence which
14 is life in prison.
15 So to me *Hurst* is saying Mr. Hurst's case
16 needs to be remanded for a new penalty phase. As
17 there is no lawful mechanism by which death can be
18 imposed, the penalty phase would presumably result
19 in a sentence of life being imposed. I
20 choose -- and I think the Court and I were right
21 there when the Court said I read *Perry* and it says
22 this act cannot be interpreted constitutionally.
23 It cannot apply to pending prosecutions.
24 So that being said, there is never going to be
25 a scenario where the Defense agrees to death

1 qualify the jury now. Mr. Swisher and I have had a
2 conversation about it. We won't be participating
3 at death qualifying this jury because there is not
4 a constitutional provision in which we can ask a
5 jury if they're going to follow the law and impose
6 a sentence of death because there's no legal way to
7 do that.
8 And so we also, just for the record to be
9 clear, adopt any arguments Ms. McNeill made as to
10 Mr. Cruz's case as they apply to Mr. Evans.
11 THE COURT: Well, let me respond to what you
12 said about the new penalty phase proceeding.
13 Obviously when you have a penalty phase proceeding,
14 that is only for the death penalty. If they wanted
15 to say we remand for a sentencing proceeding
16 consistent with this opinion, then I would have
17 said, Whoa, based upon what they just said and
18 based upon *Perry*, then we're in the same position
19 we were before, which is after January the 12th
20 after *Hurst* is decided by the U.S. Supreme Court
21 and before the new statute is in effect on March
22 the 7th.
23 But that's not what they said. They said
24 remand for a new penalty phase, and the only time
25 you have a penalty phase in the law is when a

1 defendant is convicted of first degree murder, and
2 then the issue is is he going to get life or is he
3 going to get death. I mean, if they wanted to say
4 a new sentencing proceeding because of this
5 opinion, they could have said that. So that's what
6 confuses me a little bit.
7 MS. MILLER: And I don't disagree. And so
8 that's why when I read the two together -- I read
9 *Hurst* first, and then I read *Perry*.
10 THE COURT: Well, what did you think when you
11 read *Hurst* first?
12 MS. MILLER: I agreed with what the Court
13 said. Then reading *Perry* and so to reconcile the
14 two opinions together, *Perry* clearly said -- I
15 mean, the last words of the opinion are, This act
16 cannot be applied constitutionally and, therefore,
17 doesn't apply to pending prosecutions.
18 And as Ms. McNeill said, I think it's totally
19 inappropriate for the Court and the State to engage
20 in legislation in this courtroom. Our job isn't to
21 write law.
22 THE COURT: All right.
23 MS. MILLER: And so our position is going to
24 be that we're never going to -- I don't recall the
25 options in the order the Court gave them. Our

1 option is never -- we're never going to agree to
2 anything other than option one, that at this point
3 we're ready for trial October 31st and that death
4 is not a possible option for Mr. Evans.
5 That being said, I don't think it's
6 appropriate for the Court to make a ruling on that
7 because it seems like it would be an advisory
8 opinion. And as *Jones* says, the issue isn't ripe
9 as to whether or not somebody faces capital
10 punishment until --
11 THE COURT REPORTER: You're going to have to
12 slow down.
13 MS. MILLER: I'm sorry.
14 THE COURT REPORTER: Capital punishment --
15 MS. MILLER: *Jones'* case says the issue isn't
16 ripe as to capital punishment until someone has
17 been convicted. And so I don't think it's
18 appropriate for the Court to make a ruling at this
19 juncture. But our position is never going to be
20 anything other than we're ready for the trial on
21 October 31st and that, as *Perry* reads 921.141, to
22 impose death doesn't apply to Mr. Evans. I see it
23 as option five, while I'm not agreeing to that,
24 would most reconcile probably our position and the
25 State's position. And I'm never going to be in a

1 position to agree to that, but I think that's
2 probably -- I'll just leave it there.
3 THE COURT: All right. So I don't think
4 you're going to waive your speedy trial argument
5 that may apply to the penalty phase, right?
6 MS. MILLER: Right.
7 THE COURT: All right. But there's an issue
8 about having the same jury hearing the guilt phase
9 that hears the penalty phase, if we have one.
10 MS. MILLER: Right.
11 THE COURT: And so I'll probably -- and I'll
12 say probably. I haven't even heard from the State
13 yet. I could possibly do number five, but I would
14 need a waiver of having a different jury handling
15 the penalty phase if, in fact, the defendant is
16 convicted of murder in the first degree and if we
17 have an amended statute that's constitutional. Do
18 you understand what I'm saying?
19 MR. KOSKINAS: Yes. Absolutely.
20 THE COURT: Okay.
21 MR. KOSKINAS: But I guess what's crossing my
22 mind is what is the benefit. What is the benefit
23 of doing number five as opposed to doing number
24 three? You ultimately end up in the same position.
25 The only difference is we've expended two juries,

1 countless additional hours just to not death
2 qualify the first jury. That's what it seems like
3 to me.
4 THE COURT: Well, that's not why I would do it
5 if I did that. I would do it because *Perry* says
6 that the act is unconstitutional. So it doesn't
7 apply to pending proceedings. And I realize that
8 when I first read *Hurst* and even when I go back and
9 read *Hurst*, I think it says just the opposite. It
10 just doesn't say it quite as clearly as it says the
11 opposite in *Perry*.
12 MS. MILLER: Right. But *Perry* is pretty
13 clear. I think the Court would agree there's not a
14 lot of mincing of those words. And to answer
15 Mr. Koskinas' question, I think the benefit is
16 following the law which the Defense has been trying
17 to do for quite some time over the State's
18 objection routinely as to unanimity in capital
19 cases.
20 THE COURT: All right. Well, is the defendant
21 willing to waive having the same jury hear the
22 penalty phase that hears the guilt phase if, in
23 fact, we do end up having a penalty phase, that is,
24 if the defendant is found guilty of first degree
25 murder?

1 MS. MILLER: And the answer is no. We're
2 never going to be in a position to give up his
3 rights, but we're also not going to be in a
4 position to say we can death qualify a jury based
5 on an unconstitutional law.
6 THE COURT: All right. And I think
7 Mr. Davidson has a pretty good point there in that
8 there is a harmless error analysis, and if we do it
9 as directed by the Florida Supreme Court in *Hurst*,
10 then they may determine that it was harmless error
11 once the statute is amended to be consistent with
12 *Hurst*.
13 And you know that's going to happen. I mean,
14 everybody knows that. I know we can't assume it,
15 but we know. We can't assume it, but we know.
16 MR. KOSKINAS: But we're presuming that it's
17 error. It may not be error if you do it in
18 accordance with the position that they relayed to
19 you. You're saying a harmless analysis -- I mean a
20 harmless error analysis. They might determine
21 there was no error at all.
22 MS. MILLER: Wait. Wait. Wait.
23 MR. KOSKINAS: You did it properly. You did
24 it in accordance with *Hurst*.
25 THE COURT: That's true. And I'm just saying

1 that if they think what I think *Hurst* says, they'll
2 say you did the right thing. There was no error
3 whatsoever. Okay.
4 If they're saying what I think they're saying
5 in *Perry*, they may say it was error, but they may
6 say it was harmless error. That's my point on
7 that. Okay.
8 I wish I knew exactly what they were saying.
9 Obviously we all do.
10 MS. MILLER: But that's -- we would -- I think
11 we would agree there is ambiguity as to what *Hurst*
12 is exactly ordering trial courts at this point.
13 There isn't ambiguity in *Perry*. And so I think the
14 courts have routinely said it is not prudent to
15 invite error whether it's harmless or otherwise. I
16 don't know why you would be taking that position.
17 THE COURT: Well, because you sort of put us
18 in that position. That's why. Because you
19 demanded speedy trial and you're not saying, Judge,
20 why don't we just have this trial in April when the
21 act is going to be passed -- and we all know it's
22 going to happen -- you're saying I'm demanding
23 speedy trial. We're going to have it now, and
24 we're going to have it now before there's a new
25 act. So you're putting us in this position, right?

1 MS. MILLER: Well, the defendant has the right
2 to a speedy trial. We have chosen to assert that
3 in part based on -- not in part -- based entirely
4 on the fact that we are ready for trial on
5 October 31st as the law stands right now today.
6 And I think that it's a lot of
7 assumption-making that the State and the Court is
8 doing to say the legislature is definitely going to
9 convene and we're definitely -- and only change the
10 unanimity requirement from 10 to 2 to 12-0. *Ring*
11 said we should have done that. *Steele* said you
12 should do that, and the legislature has routinely
13 ignored that.
14 And so that's like what Mr. Swisher said.
15 There's really three options. There's that option,
16 that they could just amend the statute to a 12-0
17 recommendation or verdict from the jury and be
18 lawful.
19 They could also amend the statute further and
20 mess it up again, which seems pretty likely given
21 the tendency of what do we call it -- the law of
22 the case, the law of the legislature's position on
23 capital punishment in Florida or they could say
24 forget it. This isn't worth it. The stemming tide
25 is against capital punishment. Florida should be a

1 leader, not a follower.
2 And so I don't think it's fair to assume
3 what -- this Court said we can't continue things
4 based on speculation as to what the Florida Supreme
5 Court or the legislature might do in the future.
6 And so that's why we championed what the Court said
7 and said we are ready for trial. As the law stands
8 right now reading *Perry*, this law doesn't apply to
9 Mr. Evans.
10 THE COURT: In spite of the prior history, I
11 think it's almost impossible for the legislature to
12 mess this up.
13 MS. MILLER: You're giving them a whole lot of
14 credit.
15 THE COURT: All right. So the State wants
16 option number three, right?
17 MR. KOSKINAS: Correct. We'll take what's
18 behind door number three.
19 THE COURT: All right. And then the Defense
20 doesn't want option three, four, or five?
21 MS. MILLER: I think our position is we're
22 asking the Court to follow the law in that in the
23 *Perry* decision it says this statute doesn't apply
24 to pending prosecutions. So, as I see it, there is
25 no legal way to death qualify a jury. Where that

1 leads us otherwise, I'm not --
2 THE COURT: Well, isn't that what happens in
3 *Jones*, though?
4 MS. MILLER: But I don't think it's right. I
5 would agree. We can't death qualify this jury
6 based on the *Perry* opinion, and then it's not ripe
7 because Mr. Evans hasn't been convicted of first
8 degree murder for the Court to make any of these
9 other considerations.
10 THE COURT: Well, this is what happened in
11 *Jones*, and there's a whole bunch of cases. Judge
12 Federico, Judge Ward, Judge Andrews, and Judge
13 Fernandez all said you can't death qualify the
14 jury, and I'm finding that there is no death
15 penalty scheme. So there is no death penalty. So
16 then the State files a writ, and the Second DCA
17 says, Yeah, that's right.
18 MS. MILLER: Right. But that was before *Perry*
19 was decided. It specifically said the statute as
20 amended does not apply to pending prosecutions.
21 THE COURT: Yeah. But it came out August the
22 10th which is after the new statute came into
23 effect on March 7th, right?
24 MS. MILLER: But I don't believe that was
25 argued. The writs were -- all of them, all of

1 those cases were taken up on writs before the
2 Second DCA before the new statute was enacted. So
3 none of the briefing involved the new statute. It
4 was all just those judges either on their own
5 motion or on a motion of the Defense and said
6 capital punishment doesn't apply to the defendant.
7 THE COURT: All right. Well, here is the
8 advantage of number five for you. Okay. And that
9 is that you don't get a jury that's death qualified
10 which means probably they're going to be less
11 conservative than a death qualified jury, right?
12 MS. MILLER: Right.
13 THE COURT: Now, what I can say is that you're
14 not going to waive what it is you're arguing, but
15 you'll waive the right to have the same jury hear
16 the penalty phase that hears the guilt phase, and
17 that's the only waiver that you're going to make.
18 You're not going to waive your speedy trial
19 argument on the penalty phase. You're not going to
20 waive the fact that there is no death penalty
21 scheme and, therefore, there is no death penalty.
22 You'll just be waiving that, and Mr. Swisher
23 was arguing that even if there's a new act that
24 makes it constitutional, that it still can't be
25 applied. So you're not going to be waiving any of

1 that. So do you want to go with number five here
2 and just waive that one issue or not?
3 The problem is if we go with number three, you
4 don't want to be doing a 3.850 or a 3.851 where
5 you're not asking any questions about the death
6 penalty and --
7 MS. MILLER: And that's the position we would
8 be in.
9 THE COURT: You're saying that you would not
10 participate in it even though it's possible that
11 under *Hurst* that they could say that that was the
12 proper procedure, that I did the proper procedure
13 or even under *Perry* they could say, Well, it's
14 harmless error. So you're going to do that even
15 though your client could ultimately get the death
16 sentence? Are you sure you want to do that?
17 MS. MILLER: Well, let me say a couple things.
18 One, we may be inclined to agree with option five,
19 but I think we need more time.
20 THE COURT: Okay.
21 MS. MILLER: I would like to discuss it more
22 with Mr. Evans. I would like to discuss it with
23 Mr. Swisher who obviously had to leave to make it
24 to Pasco County, discuss it with Mr. Dillinger and
25 see where we're at. So I don't think we need to

1 get any further than to ask the Court for a
2 continuation of this hearing to contemplate sort of
3 what's all been said and mull it over.
4 THE COURT: All right. And obviously option
5 five is the safest thing for the State because by
6 then the act will have been modified, you would
7 think. And, as I said before, I don't think
8 there's an ex post facto issue. Mr. Swisher had
9 another argument. And then from your point of view
10 it would give the Defense one bite at the apple
11 instead of a possibility of two. So I don't see
12 where it's prejudicial for the State. I personally
13 think five is the best option, but I don't have a
14 problem going with number three.
15 I mean, the worst thing that can happen with
16 number three is they tell me I did it wrong, right?
17 That's the worst thing that can happen. All right.
18 MS. MILLER: There's a sixth option. The
19 State could waive the death penalty.
20 MR. LABRUZZO: And that precipitates option
21 number seven: Mr. Evans could enter a plea. So
22 we've gone round and round --
23 THE COURT: All right. So obviously this
24 case -- obviously this case is eight years old,
25 right?

1 MR. LABRUZZO: Right.
2 THE COURT: Now -- and obviously any offers
3 would have to be accepted by Mr. McCabe --
4 MR. LABRUZZO: Correct.
5 THE COURT: -- who is the elected State
6 Attorney. Do you have any inclination if he would
7 accept an offer of life as charged if that offer
8 was made?
9 MR. LABRUZZO: Judge, we have not had that
10 discussion with Mr. McCabe. Primarily we've heard
11 nothing but factual innocence from this side of the
12 aisle. So we've not engaged in that conversation.
13 MS. MILLER: I think that's fair.
14 THE COURT: Okay. And I assume he doesn't
15 want to make that offer?
16 MS. MILLER: That's fair.
17 THE COURT: Okay. All right. So why don't we
18 think about our options and come back. When would
19 you like to come back?
20 MR. LABRUZZO: Tomorrow.
21 MS. MILLER: I will be out of the office.
22 MR. LABRUZZO: Judge, we have --
23 THE COURT: We don't have much time.
24 MR. LABRUZZO: We have a demand for speedy. I
25 understand that --

1 MS. MILLER: No decision is going to be made
2 between now and tomorrow morning.
3 THE COURT: The trial is going. Okay. The
4 trial is going on the 31st.
5 MR. LABRUZZO: And I understand that.
6 THE COURT: It's just a matter of are we going
7 to death qualify them or not, and then obviously if
8 he's found guilty of murder in the first degree,
9 are we going to have a penalty phase. And if we
10 do, when are we going to have it?
11 MR. LABRUZZO: A decision tomorrow allows
12 uninterrupted work on the weekend. Okay. For
13 those of us -- I mean, I'm sure we're all very
14 busy. And I'm not trying to say --
15 THE COURT: Are you doing work on the penalty
16 phase over the weekend?
17 MR. LABRUZZO: Just working on -- well, for
18 us, the State, this whole aggravator is kind of one
19 and the same. So --
20 THE COURT: Well, when you're going to work on
21 that aggravator in March --
22 MR. LABRUZZO: I understand but there also --
23 THE COURT: That's the only way to prove the
24 case, right?
25 MR. LABRUZZO: I don't want to spend

1 time -- which I think it's the State's
2 responsibility to start preparing jury
3 instructions. I know the Court is going to do that
4 as well. But I think to be prepared that's
5 something that we would do ourselves as well to
6 participate in the discussion.
7 THE COURT: Okay.
8 MR. LABRUZZO: So I want to have some clarity.
9 If we can't do it tomorrow, I understand.
10 THE COURT: Well, let's do it Monday. Is
11 Monday okay?
12 MS. MILLER: That will be fine.
13 THE COURT: All right. And then just so you
14 know, I've already worked preliminarily on the jury
15 instructions for the guilt/innocence phase. Does
16 the Defense think that they would want murder in
17 the third degree or not, the offense being armed
18 trespass? I have already included it just in case
19 you want it.
20 MS. MILLER: Very instinctively, yes, but we
21 have not discussed it with Mr. Evans or really put
22 a lot of thought into that.
23 THE COURT: All right. All right. So put
24 some thought into that obviously before we instruct
25 the jury.

1 MR. KOSKINAS: And, Judge, just so the record
2 is clear and the Court has a proper understanding,
3 we're not agreeing to number five.
4 THE COURT: I understand.
5 MR. KOSKINAS: Okay.
6 THE COURT: I understand. All right. So
7 maybe speak to Mr. McCabe or whoever --
8 MR. KOSKINAS: Yes.
9 THE COURT: -- and see what he thinks about
10 things, and then we'll talk about it on Monday. Do
11 you want to do it in the afternoon or in the
12 morning?
13 MR. KOSKINAS: Afternoon, please.
14 MS. MILLER: I was going to say the morning.
15 THE COURT: Well, don't you have a bunch of
16 pretrials and everything in the morning?
17 MS. MILLER: Yes. I agreed to speak at
18 Stetson Monday afternoon. I can certainly try to
19 find somebody else that can do that.
20 MR. LABRUZZO: Well, I can't be here Monday
21 either.
22 THE COURT: Oh, you can't be here Monday at
23 all.
24 MR. LABRUZZO: But Mr. Koskinas is very
25 competent.

1 MS. MILLER: Right. I'm sure Mr. Swisher and
2 Ms. McNeill -- but we would all be here Monday
3 morning.
4 MR. KOSKINAS: All right. No, we wouldn't
5 because I've got to run the calendar next door. So
6 we all wouldn't be. There would be nobody from the
7 State to be here Monday morning.
8 MS. MILLER: I'm fine with that.
9 MR. KOSKINAS: So I either need it Monday
10 afternoon or Tuesday morning is fine with the
11 State.
12 MS. MILLER: That's fine.
13 THE COURT: Yeah. I'll be starting an L and L
14 trial on Tuesday. And Monday afternoon I have a
15 bunch of motions on that L and L trial that just
16 got filed. So either way. I don't think it's
17 going to be all that long, right?
18 MR. KOSKINAS: Do you want to do it as late as
19 possible? Maybe I can get somebody to finish the
20 end of the calendar, but I'm routinely in there
21 until noon Monday morning.
22 THE COURT: What division are you in?
23 MR. KOSKINAS: I'm sorry?
24 THE COURT: What division are you in?
25 MR. KOSKINAS: K.

1 MS. MILLER: Quesada.
2 MR. KOSKINAS: Judge Quesada.
3 THE COURT: You'll be in there a while.
4 You're not going to be done by noon.
5 MR. KOSKINAS: Probably not. I haven't seen
6 the calendar yet being I've been busy with other
7 things. So I don't know how long it is.
8 THE COURT: All right. Can we just do it at
9 1:30 then? Is that all right?
10 MR. KOSKINAS: That's fine with us.
11 MS. MILLER: I won't be here then.
12 THE COURT: Okay. Well, is that all right? I
13 mean, we could do it Tuesday.
14 MS. MILLER: I'm fine with Tuesday morning.
15 THE COURT: All right. All right. So Tuesday
16 morning, is that good for everybody? Mr. LaBruzzo?
17 MR. LABRUZZO: Yes.
18 MR. KOSKINAS: Except for you that has the
19 trial with the L and L.
20 THE COURT: In the afternoon I have all these
21 motions.
22 MR. KOSKINAS: Okay.
23 THE COURT: I have a brand new hearsay motion
24 and all that other stuff that goes along with an L
25 and L. So either one is bad. So we'll pick the

1 one that's better for you-all. So we'll do it on
2 Tuesday.
3 MR. KOSKINAS: Tuesday at what time, Judge?
4 THE COURT: 8:30.
5 MR. KOSKINAS: Thank you, sir.
6 THE COURT: Okay. All right. So we'll need a
7 court reporter then. Okay. And Mr. Evans is a
8 bring.
9 MS. MILLER: Right. So we don't need the will
10 call procedure. Just bring him over on Tuesday
11 morning.
12 THE COURT: Well, he's a PC. But let's just
13 bring him over.
14 MS. MILLER: Right. Whatever the Court needs
15 to do to effectuate getting him here.
16 THE COURT: All right. And we don't need
17 Mr. Cruz or anything on Tuesday. We're just
18 dealing with them.
19 MR. KOSKINAS: Thank you, Judge.
20 THE COURT: All right. So 8:45 on Tuesday.
21 **(PROCEEDINGS CONCLUDED.)**
22
23
24
25

1 CERTIFICATE OF REPORTER
2
3 STATE OF FLORIDA)
4
5 COUNTY OF PINELLAS)
6
7 I, Amanda P. Manos, Registered Professional
8 Reporter, certify that I was authorized to and did
9 stenographically report the foregoing proceedings
10 and that the transcript is a true record.
11 DATED this 24th day of October, 2016.
12
13 /S Amanda P. Manos
14 Amanda P. Manos
15 Registered Professional Reporter
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APPENDIX B

Filing # 48064546 E-Filed 10/25/2016 02:46:08 PM

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY
CASE NUMBER CRC08-26829CFANO

STATE OF FLORIDA,

Plaintiff,

vs.

PATRICK ALBERT EVANS,

Defendant.

_____/

PROCEEDINGS: STATUS CHECK HEARING

BEFORE: THE HONORABLE JOSEPH A. BULONE
Circuit Court Judge

DATE: October 25, 2016

PLACE: Courtroom 9
Pinellas County Justice Center
14250 - 49th Street North
Clearwater, Florida 33762

REPORTER: Amanda P. Manos
Registered Professional Reporter

(Pages 1 to 36)

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ELECTRONICALLY FILED 10/25/2016 02:46:08 PM: KEN BURKE, CLERK OF THE CIRCUIT COURT, PINELLAS COUNTY

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* * *

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

2 THE COURT: Is Evans up?

3 THE BAILIFF: Yes, Judge. He was the first

4 one.

5 THE COURT: I thought we were going to do this

6 pretty early.

7 MR. LABRUZZO: That's what we were told. It

8 has to be early.

9 THE COURT: All right. So everyone is here

10 except Defense Counsel.

11 THE BAILIFF: No. I believe he is back

12 talking to him, Mr. Swisher.

13 THE COURT: Oh, okay.

14 THE BAILIFF: Yeah, he is back in the back

15 talking to him. At least he went back that way

16 just before you took the bench.

17 THE COURT: All right. Can you tell him that

18 we're ready for him. If he wants more time, that's

19 fine. But I think he may be just back there

20 because he thinks we're not ready yet.

21 THE BAILIFF: Yes, sir.

22 THE COURT: But if you'd just tell him if he's

23 ready, we're ready. If he's not ready, then we'll

24 wait for him.

25 THE BAILIFF: Yes, sir.

1 **(AN OFF-THE-RECORD DISCUSSION TOOK PLACE.)**
2 THE BAILIFF: He said five seconds, Judge.
3 THE COURT: All right.
4 **(AT THIS TIME A CASE UNRELATED TO THIS HEARING WAS**
5 **HEARD.)**
6 THE COURT: All right. Are we ready on Evans
7 or would you like to wait?
8 MR. SWISHER: We're ready.
9 THE COURT: Okay. So let's bring him out.
10 THE BAILIFF: Yes, Judge.
11 MR. SWISHER: Do you want him at the table or
12 podium?
13 THE COURT: However you feel comfortable. I
14 mean, he should probably be at the table there and
15 then Mr. Nelson should probably move over to the
16 jury box, I think.
17 MS. MILLER: I told him he didn't have to go.
18 MR. NELSON: I guess I will take my orders
19 from the Judge.
20 THE COURT: All right. We're here on State
21 versus Patrick Evans. And back on October 14, of
22 course, the Florida Supreme Court came out with the
23 *Hurst* and *Perry* decisions. Then we had a very long
24 discussion on October the 20th about what all this
25 may mean and what our options are. The Court came

1 up with five options, and the first two were quite
2 frankly determined not to be a viable, legal option
3 by the Court.
4 And then that left us with three options.
5 Option three is if the defendant is found guilty of
6 murder in the first degree, proceed to a penalty
7 phase as directed by the Florida Supreme Court in
8 *Hurst* if, in fact, that's what they said in *Hurst*.
9 The fourth option is to death qualify the
10 jury, and then if the defendant is found guilty of
11 murder in the first degree, have him come back
12 after the act is amended. I don't know if anyone
13 really thinks that's all that practical, but it's
14 possible.
15 And then the fifth option is if the defendant
16 is found guilty of murder in the first degree, set
17 a penalty phase in front of a different jury after
18 the act is amended. So in that situation we
19 wouldn't even death qualify the jury next week. We
20 would just all agree that after the act is passed,
21 which we all think is inevitable, then we'll have a
22 different jury do the penalty phase.
23 Now we've all had time to reflect on all of
24 this, including the Court and the Defense and the
25 State. So after time for reflection and deep

1 thought and rereading these cases, what says the
2 State?
3 MR. KOSKINAS: Judge, we've been a proponent
4 of your third option to proceed directly to penalty
5 phase. And the reason for that, Judge, is I
6 honestly don't see the benefit of setting off the
7 penalty phase in your option number five to
8 recall -- essentially what we're doing is we're
9 requiring to do the case twice in essence by doing
10 that because we really only have one aggravator.
11 So without qualifying the jury on the initial jury
12 selection, I just don't see the prejudice or
13 detriment in doing it now. I don't see where the
14 benefit of gain but it's incredible -- it's
15 incredibly inconvenient to the citizens of the
16 county as well as the witnesses in the case, many
17 of which we have to fly down. Forget about the
18 expense, just, you know, the inconvenience to all
19 the parties involved, never mind the Court's time.
20 So I just -- I honestly don't see the scenario
21 being that if we death qualify the jury now and
22 proceed, I think the Court was initially concerned
23 that that may be viewed as error and then subject
24 to a harmless error analysis, and I take the
25 position that the *Hurst* opinion is that it will not

1 be error. So I don't think that it will be an
2 error, but I don't think the Court should presume
3 that it is going to be an error based on that
4 opinion from the supreme court.
5 So, Judge, we're asking for the third option
6 to proceed forward and go from there, and I don't
7 see any prejudice to the defendant in doing that.
8 THE COURT: Okay. Thank you.
9 What says the Defense?
10 MS. MILLER: Judge, I would just like to put a
11 few additional things on the record.
12 Allison Miller, on behalf of Mr. Evans.
13 Options one and two I'm going to lump
14 together. Option one the Court indicated would be
15 for the Court to not allow the State to seek death.
16 And option two was, if convicted, that Mr. Evans
17 would be entitled to be sentenced to life
18 immediately.
19 And our position is there is no lawful way in
20 which a death sentence could be imposed on
21 Mr. Evans currently, and so, if convicted, he would
22 need to be sentenced to life in prison. I
23 understand that the Court has essentially made a
24 ruling as to those two options, but we are not --
25 and I think the Court said this, in electing an

1 option, we are not waiving our position that
2 Mr. Evans is, if convicted, fundamentally should be
3 sentenced to life in prison as the law stands right
4 now. Additionally, I believe the demand applies to
5 both the guilt and penalty phase as the United
6 States Supreme Court has routinely said that
7 capital punishment is an element and should be
8 tried and pled -- pled and tried in front of a jury
9 and proven beyond a reasonable doubt. I don't know
10 why that trial would be any different than a guilt
11 phase trial.
12 I think we all agree that four, option four,
13 seems impractical. And so to me, when we were left
14 with our deep thought between last week and today,
15 it was really options three or five that the Court
16 was forcing us to make a decision between.
17 I don't think judicial economy is ever
18 appropriate, particularly in a death penalty case,
19 for the Court to consider. I also think that
20 argument is without merit when hearsay is
21 admissible in a penalty phase. This is already a
22 retrial. The Court is faced with many
23 circumstances in which just the penalty phase needs
24 to be retried like Mr. Cruz that's before the
25 Court. And so to say that it's an inconvenience,

1 we're here on a retrial because of the State's
2 error in part from the first time. So to save
3 judicial economy, I would argue, is without merit.
4 I want the Court to understand the *Perry* case
5 unequivocally says the act is unconstitutional, not
6 921.141 and not the 10-2 recommendation. The *Perry*
7 case very specifically says the act is
8 unconstitutional. The act is comprised of six
9 statutes. As Ms. McNeill laid out in her argument
10 last week as it relates to Cruz, it is not the
11 Court's job to write law. And so I see the benefit
12 of option five over three as it appears to be the
13 only legal one of the two options we're left with.
14 Option three would require the Court to write
15 law over the defendant's objection, and that's not
16 the Court's job. In *Hurst* -- neither *Hurst* nor
17 *Perry* said just this portion of the statute is
18 unconstitutional. In fact, *Perry* unequivocally
19 says the act is unconstitutional and should not
20 apply to pending prosecution.
21 So if left to choose between options three and
22 five, we are choosing option five. The research
23 that I did -- the Court made reference to the
24 defendant's right to be tried by the same jury. I
25 don't see any authority that there is a right to be

1 tried by the same jury. In fact, I think that
2 would have been a legal option even before the
3 *Perry* and *Hurst* cases were decided on Friday. So
4 and I think the Court even said to the State last
5 week this is certainly the cleanest option. And in
6 speaking to some of our old-timers, sorry, it was
7 something more routinely that the defendant would
8 actually request to be tried by separate juries,
9 guilt phase and penalty phase. And that seemed to
10 be the flavor of the month probably 10, 20 years
11 ago, and then we stopped asking for that for
12 whatever reason.
13 And the law that I found certainly seems to
14 suggest -- I could not find a case where the Court
15 did -- a Florida case where the Court did separate
16 juries, but it seems to be within the Court's
17 discretion to do that. And so I don't find any
18 legal authority that there is a right to be tried
19 by the same jury. And so I think it is a decision
20 that I as Patrick's attorney can make, and we would
21 be electing option five, given that we're only left
22 with those two options.
23 I did want to let the Court know, and the
24 Court may have heard about this. There was a case
25 out of the 18th Circuit where the defendant

1 demanded speedy trial. They were set to start
2 trial on Monday. The State Attorney's Office
3 indicated that if the defendant were to withdraw
4 the demand, the State would waive the death
5 penalty. The defendant indicated no. And the
6 State still decided to waive the death penalty
7 indicating that was the more prudent option given
8 the circumstances.
9 So I just wanted to let the Court know that's
10 sort of our position on the option six that we
11 brought up. So that's, I think, the defendant's
12 position.
13 THE COURT: All right. Well, option six is
14 the State waiving the death penalty. Obviously I
15 have no control over that, and I have a feeling
16 that they are not inclined to do that.
17 MR. KOSKINAS: Should we talk about option
18 seven also or is that unnecessary?
19 THE COURT: I'm not sure there was an option
20 seven unless you can come up with something.
21 MR. KOSKINAS: Oh, I can come up with one.
22 The defendant could plead guilty to the offense,
23 and we could have a penalty phase. That's option
24 seven, I guess.
25 THE COURT: All right. I don't think that's

1 going to happen either.
2 MR. KOSKINAS: Okay. Again, Judge, the
3 Defense in this case is taking entirely
4 inconsistent positions at the exact same time.
5 They're trying to put the Court in a box yet again.
6 They're demanding speedy trial and asserting to the
7 Court that they're entitled to the penalty phase
8 long before any statute could be amended, but we're
9 electing option five so that you can -- we can
10 claim error later on when you've delayed the case,
11 the penalty phase, and not given the defendant in
12 this case a speedy penalty phase.
13 So I think they have to pick one. And I
14 thought that was the understanding of the Court. I
15 thought the Court relayed to them the last time
16 around that they're going to have to agree that
17 that's going to be the case. Maybe I'm mistaken
18 about that, but I think it's inconsistent yet again
19 for them to take diametrically opposed positions,
20 as they've been known to do in this case, over and
21 over and over again.
22 So, Judge, with that said, if they're
23 demanding that the penalty phase take place within
24 the demand period, then I think the Court is left
25 with only one option. And that's option three.

1 But I'll leave it to the Court.
2 THE COURT: All right.
3 MS. MILLER: And what the Court, in fact,
4 said -- and I have a very specific recollection and
5 the transcript, if Mr. Koskinas would like to
6 refresh his recollection before speaking -- the
7 Court indicated that you were not requiring the
8 defendant to waive the right to the position that
9 the demand applies to the penalty phase and not
10 requiring the defendant to waive the right to the
11 position that the only possible penalty, should he
12 be convicted, is life in prison.
13 By electing option five over three, the only
14 issue we were waiving, so to speak, was the
15 defendant's right to be tried by the same jury.
16 And so that's when I did reflection and deep
17 thought, as the Court suggested since then, and I
18 didn't find any legal authority that he actually
19 even had that right, that that is something --
20 THE COURT: All right. Well, I can help you
21 out. The argument is in the statute itself,
22 921.141 (1), where it seems to say that the same
23 jury would hear the penalty phase after that jury
24 finds the defendant guilty of first degree murder.
25 So that's the argument.

1 Now, I'm not sure that there is much case law
2 on that, especially because, when it happens, it's
3 at the request of the Defense. So obviously it's a
4 waiver by the Defense. And I'm not sure that the
5 defendant has the right to a speedy trial on the
6 sentencing. I mean, obviously for a guilt phase
7 the defendant obviously can be found not guilty.
8 So he has a right to a speedy trial in order to be
9 found not guilty hopefully for him so that he can
10 then be free and go to the Bahamas or do whatever
11 it is that he wants. I'm not so sure that he
12 really has one on his sentencing phase. I don't
13 know if he has the right to a speedy decision to
14 get life. I don't know if there is a whole lot of
15 case law on it, probably none. But that's my
16 initial thought process on that.
17 So anything else from the Defense?
18 MS. MILLER: And that's what -- I think, so
19 we're on the same page, 921.141 (1) reads, The
20 proceeding shall be conducted by the trial judge
21 before the trial jury as soon as practicable. If
22 through impossibility or inability, the trial judge
23 is unable -- excuse me -- the trial jury is unable
24 to reconvene for a hearing on the issue of penalty,
25 having determined the guilt of the accused, the

1 trial judge may summon a special juror or jurors as
2 provided in Chapter 913 to determine the issue of
3 the imposition of penalty. That's what the Court
4 is referring to?
5 THE COURT: Yes. And, of course, there would
6 be an issue of impossibility or inability. So that
7 would be an issue on appeal if it's really
8 impossible or unable.
9 MS. MILLER: And so it's, I would agree,
10 difficult to reconcile all of the opinions we're
11 dealing with. The *Jones* case seemed to suggest
12 that it's not an issue for the Court to decide
13 whether or not life is the only possible penalty
14 until the death -- excuse me -- until the defendant
15 has been convicted, right?
16 THE COURT: Uh-huh.
17 MS. MILLER: And so I don't think it's ripe at
18 this point for the Court to make that ruling, but I
19 will say that is ultimately going to be our
20 position, if he is convicted, that the only
21 possible penalty that can be imposed, let's say
22 next Friday, November 4th, if convicted, would be a
23 life sentence.
24 If the Court is inclined to continue the case
25 and reconvene a separate jury after the legislature

1 has met and presumably enacted a new statute, we
2 would object. It would be preserved and subject to
3 appellate review, and that's where I think I
4 understood the Court to say we're not giving up the
5 right to that argument. Even though the Court and
6 the Defense may disagree, we're not giving up the
7 right to that argument or the right to argue that
8 the only possible penalty that applies to Mr. Evans
9 is life, should he be convicted. So we are
10 electing option five if left with options three and
11 five as our only two choices.
12 THE COURT: All right. Well, on October the
13 20th we mostly had a discussion and argument. And
14 the Court discussed five options and really ruled
15 on just one and two. And option number two I ruled
16 the way that I did because in *Hurst* it indicated
17 that the defendant is entitled to a new penalty
18 phase. So I wasn't going to go against the Florida
19 Supreme Court and then say that if the defendant is
20 convicted of murder in the first degree that under
21 *Jones* I could then say that death is not a possible
22 penalty because in *Hurst* itself they indicate that
23 there should be a new penalty phase proceeding
24 consistent with the opinion.
25 So, as we also discussed quite frankly, if you

1 look at the *Perry* opinion, you may come up with one
2 conclusion, and if you look at the *Hurst* opinion,
3 you may come up with a different one. I have
4 obviously read both of these cases over and over
5 and over again trying to figure out what the
6 situation is. Obviously both of these cases came
7 out on the same day by the same court, the Florida
8 Supreme Court. So we can't just say that they're
9 inconsistent and throw up our hands because a court
10 is not going to render two opinions on the same day
11 and have them be inconsistent.
12 So just like courts have to try to construe
13 statutes and be constitutional if we can, then I'm
14 going to have to find how these cases are
15 consistent and can be practically applied to each
16 other. In other words, we have to figure out what
17 the Florida Supreme Court is going to be saying.
18 And I'm happy to say that I'm not the only one
19 that's confused by this.
20 If you look at *Perry*, it says the following in
21 the conclusion: The act, however, is
22 unconstitutional because it requires that only 10
23 jurors recommend death as opposed to the
24 constitutionally required unanimous 12-member jury.
25 Accordingly, it cannot be applied to pending

1 prosecutions.
2 So if you just read that, it seems as if the
3 Court would not be able to proceed with any sort of
4 a penalty phase if the defendant is found guilty of
5 murder in the first degree next week.
6 But then *Hurst* says we vacate *Hurst*'s death
7 sentence and remand for a new penalty phase
8 proceeding consistent with this opinion.
9 So what that seems to be saying is that there
10 is a new penalty phase, and the only time we have a
11 penalty phase is in a death penalty case. So they
12 didn't say "sentencing." They said "a new penalty
13 phase proceeding consistent with this opinion." So
14 "consistent with this opinion" means that it has to
15 be unanimous in order for there to be a death
16 "recommendation" or "determination." And I think
17 we're going to use the word "determination" as
18 opposed to "recommendation."
19 And then as I pointed out before, I may be
20 reading this completely wrong, but on page 41 it
21 talks about dramatic reasons why the Court should
22 rule on this now, and they say that the last time
23 it was found unconstitutional by the U.S. Supreme
24 Court in *Hurst versus Florida*, then the statute had
25 to be amended, and then they say, Florida need not

1 face a similar crisis in the future requiring a
2 unanimous jury recommendation before death may be
3 imposed in accord with the precepts of the Eighth
4 Amendment. And Florida's right to trial by jury is
5 a critical step for ensuring that Florida will
6 continue to have a constitutional and viable death
7 penalty law which is surely the intent of the
8 legislature. And if you have a Florida Law Weekly,
9 it's on page 16. If you have what's printed out
10 from the Florida Supreme Court website, it's on
11 page 41.
12 So they seem to be saying there that you don't
13 have the crisis you had before where the
14 legislature even had to amend it. Now, I certainly
15 hope they do. It would make things a whole lot
16 more clear. But they seem to be saying that it
17 really doesn't have to be amended. It could be I'm
18 reading that wrong.
19 So in order to rectify all of this, we're
20 going to have to interpret these things so that
21 they're consistent because there is no way that the
22 Florida Supreme Court is going to rule in opposite
23 directions on the same day on two different cases.
24 So I guess one interpretation is on *Hurst* what
25 they're really saying is we vacate *Hurst*'s death

1 sentence and remand for a new penalty phase
2 proceeding consistent with this opinion and then
3 add after the legislature amends the act. Maybe
4 that's what they meant. But that doesn't make a
5 whole lot of sense to me quite frankly.
6 Maybe in *Perry* what they're saying is it
7 cannot be applied to pending prosecutions and then
8 add as originally drafted but not as basically
9 amended by the Court in *Hurst*, and that may be one
10 of the reasons why in *Hurst* they said that it was a
11 violation of the Sixth Amendment, the Eighth
12 Amendment, and also Florida law. And they seemed
13 to emphasize that it was Florida law more than
14 anything, that it was a violation of Article I,
15 Section 22, a defendant's right to a jury trial,
16 and that historically under Florida law it always
17 has to be a unanimous verdict. So they seemed to
18 be saying that it has to be unanimous based upon
19 federal law but especially Florida state law, and
20 they even mention that in a footnote in *Perry*, but
21 that's the main reasoning of the Court is Florida
22 law.
23 Now, from a practical point of view in order
24 to preserve everyone's rights, that is, the rights
25 of the Defendant and the rights of the State, I

1 think that option three is the most viable option.
2 If somebody wants to file some sort of a writ, it
3 would offend me not at all. And if we get an
4 answer before October 31, nothing would please the
5 Court more to know exactly what the supreme court
6 is thinking in situations like this.
7 I think that it doesn't prejudice the
8 defendant at all if it's a situation where we do
9 have a penalty phase because he is found guilty of
10 murder in the first degree and it's not unanimous.
11 It's over. Obviously if he is not found guilty of
12 murder in the first degree, we don't have to worry
13 about the death penalty. If it's not unanimous,
14 it's over. And then if, in fact, the Defense is
15 right and it was improper for me to do that, it may
16 be a situation where it's harmless error or it may
17 be a situation where the Florida Supreme Court says
18 that it was improper, and he should get a life
19 sentence or it may be a situation where they say it
20 was improper and he's entitled to a new penalty
21 phase. So he may get a third bite at the apple
22 here.
23 And I know that the current Defense Counsel
24 has been critical of prior Defense Counsel, but if
25 the same thing happens here where it's not

1 unanimous, it is a verdict for life and not for
2 death. So I believe the first time it came back 9
3 to 3 and 8 to 4. So obviously if that happens
4 again, it's a life sentence. If, in fact, he's
5 found guilty of murder in the first degree, then we
6 proceed to a penalty phase.
7 So with all of the pending issues, including
8 the speedy trial issue, I have an opinion on that
9 but it's not a case right on point. And the issue
10 of the Defense possibly having to waive the same
11 jury and all the other issues, I think the safest
12 course of action is to proceed with option three.
13 And obviously I have to rule as to what I think the
14 supreme court is saying in *Hurst* and *Perry*. And I
15 think when they say "remand for a new penalty phase
16 proceeding consistent with the opinion," that
17 that's what they mean. "Consistent with the
18 opinion" means that it has to be unanimous, that in
19 *Perry* they said they were interpreting everything
20 where the three findings: That there was an
21 aggravating circumstance; that the aggravating
22 circumstance is enough for death; and that the
23 aggravating circumstance outweighs the mitigating
24 circumstance is already interpreted to be in the
25 statute to be unanimous. And so the only

1 modification here by the Florida Supreme Court is
2 is that the ultimate decision has to be unanimous,
3 too.
4 And Mr. Davidson's argument as to severability
5 makes some sense. So I think that that's what the
6 Florida Supreme Court was saying in *Hurst*.
7 Eventually we'll find out. If someone wants to
8 file some sort of a writ, maybe we'll find out for
9 October 31. Maybe we'll find out on appeal 18
10 months or two years from now or maybe we'll never
11 find out because maybe he'll be found not guilty of
12 murder in the first degree or maybe the jury will
13 come back with something less than a unanimous
14 verdict. So maybe we'll never find out what the
15 answer is. That's probably what the Defense is
16 hoping for, that we never find out.
17 Yes?
18 MR. KOSKINAS: Judge, with that said, which
19 courtroom are we going to be in?
20 THE COURT: One. At least on Monday we'll be
21 in one, and then we'll probably move after that.
22 We have to move to a courtroom other than this one
23 because obviously we have 12 jurors, and we only
24 have room for seven here. So I'll probably get
25 with either Judge Federico or Judge Andrews or

1 somebody and switch for Tuesday.
2 MR. KOSKINAS: And how many on the potential
3 panel does the Defense want -- is the Court
4 thinking?
5 THE COURT: Well, I ordered a hundred just in
6 case. I don't think we need a hundred, though.
7 MR. KOSKINAS: Okay. I understand.
8 THE COURT: But I really don't want to have to
9 repeat because I think that that is a violation of
10 the Eighth Amendment for all of us and the jury to
11 have to hear the same thing over again.
12 MR. KOSKINAS: I understand. Thank you.
13 THE COURT: So I would rather go through the
14 pain of having a whole lot of jurors than go
15 through the pain of doing it twice.
16 MR. KOSKINAS: Yes.
17 THE COURT: So how many jurors do you think we
18 should have?
19 MR. SWISHER: Judge, before we get to that
20 point, we're going to be taking the position that
21 the State and maybe the Court is inviting error.
22 And we're going to raise double jeopardy if things
23 go south obviously because we think that what the
24 Court is doing is usurping the power of the
25 legislature. Jury selection itself is to determine

1 whether the jurors can follow the law. There is no
2 law. The only law that we're guessing is what the
3 supreme court said, and we've kind of twisted
4 ourselves into a pretzel to get it to come out the
5 way some people want it to come out. You're adding
6 words to --
7 THE COURT: Well, as I said, I wouldn't have
8 to add words either way. So it makes things kind
9 of uncomfortable for me.
10 MR. SWISHER: A pretty plain reading is this.
11 If the act does not apply -- that's *Perry* -- and
12 Mr. Hurst goes back for resentencing, not everybody
13 else because it was not harmless error. So that's
14 how those opinions read if you read just the words
15 without adding additional words.
16 THE COURT: Uh-huh.
17 MR. SWISHER: We are not going to participate
18 in a death qualification jury. We don't believe
19 the law is there. We're not prepared to do a death
20 penalty case because when we filed a demand for
21 speedy, the act had been stricken, had been found
22 unconstitutional. We filed it in good faith
23 because there was no death penalty statute in
24 existence, and the Court has resurrected one which
25 now requires us to death qualify a jury which, as

1 your Honor knows, excludes those that are opposed
2 to the death penalty. So you're excluding the
3 class of jurors that we normally would be entitled
4 to keep which affects the guilt/innocence phase.
5 That's why I'm taking the position we're creating a
6 double jeopardy issue, and we're not going to
7 participate in that.
8 THE COURT: All right. Well, I think that's
9 very problematic. I think that if we have a
10 hearing or a trial, especially when life or death
11 is potentially involved, and you don't participate
12 and you're not zealously defending your client,
13 then you could have a real problem. And I really
14 think you have to think about that because there
15 could be personal sanctions against you, not
16 something that I would do. But you have to give a
17 hundred percent on whatever it is we're dealing
18 with.
19 If it turns out you're right, it's not going
20 to be a problem in the end. And as I said before,
21 last time it came out 8 to 4 and 9 to 3. So even
22 if there is a repeat of last time, you would think
23 that maybe the same thing would happen. Maybe if
24 the jury knows it has to be 12-0, it will be a
25 different situation, but just saying, I'm going to

1 take my ball and go home, and I'm not going to
2 participate is very problematic. I don't think the
3 Florida Supreme Court would appreciate that very
4 much.
5 As I said, I won't be offended at all if you
6 file some sort of writ that will have six days to
7 figure it out, and I don't know if it will be a
8 writ of prohibition or whatever it will be. I'm no
9 expert on writs. I'll tell you that right now.
10 But if, in fact, they say, Judge, don't do it,
11 obviously I'm not going to do it. So you have six
12 days to do it.
13 But if I say we're going to do it and they
14 don't say we're not going to do it, then everyone
15 needs to participate and give a hundred percent or
16 else it's going to be really problematic. For one
17 thing, it could be a situation where the worst
18 happens and the defendant is found guilty of murder
19 in the first degree, and then we have a penalty
20 phase. The Defense doesn't participate. Well, if
21 you don't participate, your chances of winning go
22 way down. Then it could be 12-0, and then the
23 Florida Supreme Court could say that the circuit
24 court was right, that what the circuit court
25 interpreted in *Hurst* was right. So everything is

1 fine or they could say that it was harmless error
2 because of the act was eventually passed and anyone
3 could figure out exactly what was going to happen.
4 So those are all the possibilities. And I
5 would really think very seriously about not doing
6 your job and about just taking your ball and going
7 home and not participating. I think you have to
8 participate. You can put on the record whatever it
9 is you want, but if you don't participate, quite
10 frankly, I think that's pretty outrageous. And
11 that's not going to happen.
12 MR. SWISHER: Judge, you're leaving out a
13 possibility.
14 MR. KOSKINAS: Judge, can we get some
15 clarification because -- and I only bring this
16 up -- I apologize -- because they've indicated to
17 us before that they're not going to participate in
18 the jury qualification -- the death qualification
19 of the jury. Are they indicating now that that's
20 what they choose not to participate in or are they
21 indicating -- and maybe I misheard them -- that
22 they're choosing to not participate in the entirety
23 of the trial because if that's their assertion,
24 Judge, I think you need to remove them from the
25 case. I think they need to be disqualified from

1 the case.
2 THE COURT: All right. All right. So they
3 demanded speedy trial. So I'll get someone else to
4 be on the case here and then be ready by next week?
5 MR. KOSKINAS: Well, that's somebody that's
6 going to at least put some effort in.
7 THE COURT: Uh-huh.
8 MR. KOSKINAS: I mean, you could strike -- I
9 mean potentially strike it as invalid. The other
10 attorney may have a good cause why they would want
11 to withdraw. I mean, we don't know the
12 circumstances of all that. But if we hear that
13 this Defense team is not going to participate in
14 any way in violation of their oath, then, yes, I
15 think the Court has to disqualify them and remove
16 them from the case.
17 THE COURT: So what is your position? Are you
18 just not going to participate in any sort of death
19 penalty proceedings if we get to that point?
20 MR. SWISHER: Well, we'll announce that on
21 Monday.
22 THE COURT: Okay.
23 MR. SWISHER: Now, the Court has left out one
24 option.
25 MR. KOSKINAS: Well, hold on. But Monday,

1 Judge, why are we waiting for the last second for
2 them to decide whether they're going to participate
3 in this case or not? They made a statement to the
4 Court now, and we don't have no clarification.
5 THE COURT: All right.
6 MR. KOSKINAS: Don't we need to know now if
7 they're going to participate or not?
8 THE COURT: Well, probably not because that's
9 not going to affect your preparation either way. I
10 mean, you're going to ask your questions on voir
11 dire.
12 MR. KOSKINAS: I agree.
13 THE COURT: And you're going to --
14 MR. KOSKINAS: It is going to affect the
15 preparation of a potential new attorney, should you
16 be forced to remove these attorneys.
17 THE COURT: I don't think I'm going to remove
18 them. All right. I don't know that's really an
19 option at this point.
20 Yes?
21 MR. SWISHER: The option you left out is the
22 legislature could say no more death penalty. If
23 that's the case -- that's what I'm saying -- you've
24 death qualified a jury, excluded a class of jurors
25 that has been to his detriment. And I think that

1 creates a double jeopardy issue because nobody has
2 considered the fact -- because the legislature
3 hasn't passed a new law yet -- they get a shot at a
4 new act. Nobody has considered the other options.
5 They're just assuming that they're going to do what
6 the supreme court says. Guess what? They haven't
7 done it yet, and they have been given numerous
8 opportunities to do this, and they still blow it
9 year after year after year.
10 So your Honor is saying this is what the
11 legislature should do. Therefore, this is what the
12 legislature will do. That doesn't make any sense.
13 That's the position we're taking. That's why we're
14 saying that the supreme court doesn't write the
15 law. If they wrote the law, we would have had this
16 mess resolved back in *Steele* or before that, and
17 they still don't get it right.
18 THE COURT: All right. Well, there is the
19 Doctrine of Severability, and that is what the
20 State's argument is where the first three factual
21 findings all have to be unanimous, and it's the
22 fourth one which is the ultimate decision. Is that
23 your ultimate decision? So there is a Doctrine of
24 Severability where you can say that's
25 unconstitutional under Florida law, Article I,

1 Section 22, which is general Florida law.
2 Everything has to be unanimous. So we're going
3 that way.
4 So I understand all of the Defense arguments.
5 And I can't say they're indefensible because they
6 are not. And that's why we're in sort of the
7 situation that we're in. And obviously I have to
8 rule. I have to pick an option. I've ruled. I've
9 picked an option because I think it's in everyone's
10 best interest. And I think if you look at *Hurst*,
11 when they say, Let's proceed on a new penalty phase
12 consistent with this opinion, they're saying let's
13 proceed consistent with this opinion and have all
14 four issues be unanimous. So I understand that no
15 matter how I rule, no one is going to be happy.
16 Yes?
17 MS. MILLER: And what the Court, in fact, said
18 last week when we were talking about it was that
19 option five was the cleanest. That's a quote from
20 the Court.
21 THE COURT: Uh-huh.
22 MS. MILLER: And so I think I said to the
23 Court at the time -- and certainly this isn't
24 something that Mr. Swisher and I entered too
25 lightly — that we were not inclined to participate

1 in the death qualification of a jury. We have a
2 fundamental Separation of Powers Doctrine, and this
3 Court cannot write law, which is what it's
4 attempting to undertake.
5 I believe zealously representing my client
6 includes not engaging in what I see as illegal
7 activity. And that was our position last week, and
8 that's when the Court even remarked to the State
9 option five would certainly be the cleanest and
10 satisfy everybody's interest. It allows us to
11 proceed with not a death qualified jury. It
12 satisfies the demand for speedy trial. It lets
13 them still try to participate in legalized homicide
14 and here we are.
15 THE COURT: All right. As I said, if you do
16 that, I think that's outrageous. It would be a
17 situation where if a Court denies a motion to
18 suppress, then you say I'm taking my ball and going
19 home. So I'm not even going to participate in the
20 trial because I think their motion to suppress is
21 wrong.
22 MS. MILLER: And I disagree.
23 THE COURT: All right. You better think about
24 that before you do that or else you personally
25 could be in jeopardy as far as your license is

1 concerned. I'm not going to do anything about it,
2 but the supreme court is going to find out all
3 about this, and they are the body that judges
4 lawyers. So you better really think about that and
5 let us know on Monday. So we've had a whole lot of
6 reflection between October 20th and today, and we
7 need a whole lot more reflection between today and
8 October 31. Okay. So we'll see everyone then, and
9 we'll go ahead and start the trial.
10 MR. KOSKINAS: Judge, I'm sorry. I think
11 there's one more question we need answered. And
12 the Defense has asserted to us that when the jury
13 walks into the room that they are going to indicate
14 that they are not ready. Now, I thought that was
15 satisfied last week when they filed the demand and
16 indicated to this Court that they were ready both
17 for the guilt phase and the penalty phase, but I
18 don't want to avoid that subject and then find out
19 that that's their plan.
20 So I think, Judge, if that's the case, they
21 need to assert that, and the Court can take
22 whatever appropriate action it feels necessary. In
23 other words, don't ask them in front of the jury if
24 they are, in fact, ready and have them stand up and
25 say, No, we're not ready because that's what they

1 indicated to us exactly what they were going to do.
2 THE COURT: All right. So let's see what they
3 have to say on Monday.
4 MR. KOSKINAS: Yes, sir.
5 THE COURT: They're going to be thinking about
6 it. So we're not going to assume that they're
7 going to say one thing or another until they
8 actually do it on Monday. Okay?
9 MR. KOSKINAS: Thank you, Judge.
10 THE COURT: So we'll see you then. Thank you.
11 (PROCEEDINGS CONCLUDED.)
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1 **CERTIFICATE OF REPORTER**

2

3 STATE OF FLORIDA)

4

5 COUNTY OF PINELLAS)

6

7 I, Amanda P. Manos, Registered Professional

8 Reporter, certify that I was authorized to and did

9 stenographically report the foregoing proceedings

10 and that the transcript is a true record.

11 DATED this 25th day of October, 2016.

12

13 ***/S Amanda P. Manos***

14 Amanda P. Manos
Registered Professional Reporter

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