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APPENDIX B

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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 25, 2016

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

REPORTER: Amanda P. Manos
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(Pages 1 to 36)

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APPEARING ON BEHALF OF
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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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