Charles Kenneth Foster v. State of Florida

MR. CHIEF JUSTICE

GOOD MORNING AND WELCOME TO THE ORAL ARGUMENT CALENDAR OF THE FLORIDA SUPREME COURT, AND THE FIRST CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS FOSTER VERSUS STATE. MR. McDERMOTT.

JOE MCDERMOTT, REPRESENTING CHARLES KENNETH FOSTER. THIS MATTER COMES UP ON APPEAL FOR DENIAL OR SUMMARY DENIAL ON A 3.850 MOTION DADE COUNTY, PANAMA CITY, AND ALSO A WRIT OF HABEAS CORPUS. THE PETITIONER WANTS TO ARGUE TWO POINTS ON APPEAL WITHOUT WAIVING TIME ON THE REST. THE FIRST ISSUE THAT THE COURT HEARD, IN DENYING A MOTION WITHOUT HEARING, AS TO AN ISSUE THAT WAS RAISED OFE SELCTION OF THE VENIRE. IN PANAMA CITY, BACK IN 1975, THE COURT HAD A PROCEDURE, APPARENTLY THE TRIAL JUDGE AND THE STATE ATTORNEY, MEETING WITH THE ENTIRE PANEL, AND EXCUSEING WOMEN WHO WERE PREGNANT OR WHO HAD YOUNG CHILDREN. WE SUBMIT THAT THAT IS A CONSTITUTIONAL VIOLATION. THE ISSUE INVOLVED IS THAT THERE WAS NO PARTICIPATION BY THE DEFENDANT IN THE EXCUSES OF THAT PANEL. THIS MATTER WAS JUST LEARNED BY VIRTUE OF A SE OFTEBC ORDOF EATETORS FICE,HEN THE NOTICE FROM THE STATE ATTORNEYS OFFICE -- WHEN THE NOTES FROM THE STATE ATTORNEYS OFFICE WERE UNCOVERED REVEALING THIS DEFECT. NOW, THERE HIS CASE LAW, US SUPREME COURT CASELAW THAT SAYS YOU CAN'T EXCUSE WOMEN ACROSS THE BOARD. THERE IS A FLOA CASE THAT KIND OF INDICATES, ALTHOUGH IT IS NOT REAL CLEAR HOW THE COURT RULED, BECAUSE THEY INDICATE THEY CAN'T ADDRESS THE ISSUE BECAUSE THERE WAS NOT A RECORD BEFORE IT, YET THEY GO ON TO SAY THAT THEY HAVE RULED THAT THE EXCLUSION OF WOMEN WITH CHILDREN YOUNG CHILDREN OR OF PREGNANT WOMEN DID NOT REACH AN EXCLUSION OF A CONSTITUTIONAL CLASS.

WLERE WAS ATATUTE ON THE BOOKS AT THE TIME THAT PDED FOR THIS EXCLUSION; IS THAT CORRECT?

UPON REQUEST OF THE LADY THOUGH. YES.

OKAY.

OF JUST WOMAN. THE WOMAN D THE RIGHT TO EXERCISE, TO BE EXCUSED, IF THAT FACT EXISTED.

I UNDERSTAND. WAS THERE ANY ATTEMPT BY THE DEFENDANT, HERE, TO CHALLENGE THAT STATUTE IN THESE PROCEEDINGS, THROUGH COUNSEL?

NO. NO.

HAD THERE BEEN ANY ALLEGATIONS HERE, AS TO SPECIFIC EXCLUSIONS OF JURORS UNDER THAT STATUTE?

YES.

WHAT ALLEGATIONS HAVE THEIR BEEN? IN OTHER WORDS IDENTIFIED PEOPLE THAT WERE EXCUSED UNDER THAT --

YES. THE NOTES, THE VENIRE NOTES ICATE THAT THOSE WN WERE ARBITRARILY EXCUSED BY

THE COURT NOT UPON REQUEST, WHETHER THE RECORD IS VOID ABOUT WHETHER OR NOT ANY REQUEST WAS MADE, BUT IT DOES NOT APPEAR THAT THAT WAS THE SITUATION.

ANY ALLEGATIONS HERE, THAT SOMEHOW A BIASED JUROR DID SIT DURING THE COURSE OF THE TRIAL, IN CONNECTION WITH THIS CLAIM?

I DON'T THINK THAT WE CAN SAY THAT, JUDGE. WE DON'T KNOW THAT.

BUT THERE IS NO CLAIM.

PARDON ME.

BUT THERE IS NO CLAIM HERE OF ANY ACTUAL BIAS ON THE PART OF A JUROR THAT WAS SELECTED FOR THE TRIAL.

NO. WE CAN'T -- THE RECORD IS WITHOUT SUPPORT, EITHER WHICH WAY ABOUT THAT.

HOW DID WE END UP, INSOFAR AS THERE WERE CHALLENGES, IF I UNDERSTAND IT CORRECTLY, IN COURT, LATER, TO THAT STATUTE. TELL ME WHAT THE NET RESULT OF ALL THOSE CHALLENGES WERE. DID WE END UP IN SORT OF AN ACROSS-THE-BOARD, THAT ANYONE WITH YOUNG CHILDREN WOULD BE ENTITLED TO MAKE, PRESENT SUCH AN EXCUSE, AND BE EXCUSED, OR DID WE VALIDATE THE STATUTE, OR JUST WHAT DID WE END UP DOING IN THE COURTS?

ORIGINALLY THE COURT, THIS COURT DECLARED IT, THE SUPREME COURT, RATHER, DECLARED EXCLUSION OF ALL WOMEN UNCONSTITUTIONAL. THE FLORIDA COURT INDICATED THAT IT WAS PER MIRBL, UNDER CERTAIN CIRCUMSTANCES, TO EXCUSE WOMEN WHO EXERCISED THAT REQUEST. SO TO ME THE LAW IS NOT CLEAR ON IT. IT DEFINITELY IS NOT CLEAR. IF YOU READ IT AT FIRST GLANCE, YOU SAY, WELL, THE LAW IS CONSTITUTIONAL, BECAUSE IT DOESN'T EXCLUDE A CLASS, BUT THE FLORIDA SUPREME COURT DOES INDICATE THAT THE COURT CAN EXERCISE, THE TRIAL COURT CAN EXERCISE DISCRETION IF THE LADY WHO IS PREGNANT OR HAS YOUNG CHILDREN, EXERCISES THAT RIGHT, SO TO ME THAT ISSUE HAS NOT BEEN NSWDT ALL. I THINK IT MAYBE A VALID EXCLUSION, IF IT IS THE PERSON, THE JUROR, THAT SAYS I WANT TO BE EXCUSED, BUT I DON'T THINK THE JUDGE OR THE STATE ATTORNEY PARTICIPATING IN THAT PROCESS CAN ARBITRARILY SAY, WELL, SHE IS PREGNANT. THEREFORE SHE DOESN'T SERVE, OR SHE HAS YOUNG CHILDREN. THEREFORE SHE DOESN'T SERVE. NOW, THE STATUTE WAS ORIGINALLY DECLARED UNCONSTITUTIONAL ON AN EQUAL PROTECTION BASIS, BECAUSE MEN WERE NOT INCLUDED. THAT IS BY LEGISLATION AND SUBSEQUENTLY CHANGED, SO THE PARENTS WITH YOUNG CHILDREN, EITHER WHICH WAY, MALE OR FEMALE CAN EXERCISE THE CHALLENGE OR EXCUSE.

THIS IS, WE ARE HERE ON THIS 3.850, BECAUSE THERE WAS A THIRD RESENTENCING. IS THAT CORRECT? IS THIS AN APPEAL FROM THE RESENTS? I MEAN A 3.850 ATTACKING THE PENALTY PHASE OF THE RESENTENCING, OR IS THIS, THIS CHALLENGE IS GOING WAY BACK TO THE ORIGINAL TRIAL.

THIS GOES TO THE TRIAL, JUDGE.

AND SO THIS IS WHERE YOU ARE HAVING TO SAY THAT YOU ARE NEWLY-DISCOVERING THIS EVIDENCE.

RIGHT.

SO REALLY YOU ARE TALKING ABOUT WHETHER THIS MEETS THE JONES PRONG, WHICH IS THAT IT IS NEWLY-DISCOVERED, AND WHAT IS THE SECOND PRONG. DON'T YOU HAVE TO MEET THAT?

OF PREJUDICE?

THAT THERE IS A PROBABILITY OF A LIKELIHOOD THAT AT RETRIAL THERE WOULD BE A A QUICKAL OR WHAT IS THE STANDARD THAT YOU HAVE TO MEET?

I WOULD THINK THAT WE ARE ENTITLED TO A HEARING, TO TRY TO ESTABLISH THAT.

BUT IF YOU CAN'T EVEN MAKE A PRIMA FACIE CASE THAT, IN PART, THAT THE JURY THAT SAT WAS WAS PARTIAL OR BIASED, I AM NOT SURE HOW THIS CLAIM WOULD BE COMINGNIZEABLE.

WELL, I AM NOT SURE THAT WE, I AM NOT SURE THAT THE PREJUDICE IS REQUIRED. IF YOU, THE SUPREME COURT CASE, ON AT LEAST THE EXCLUSION OF WOMEN ALL TOGETHER, I DON'T THINK THERE WAS A NECESSITY TO SHOW PREJUDICE IN THAT CASE.

BUT THIS IS CLEARLY NOT ON ACROSS THE BOARD EXCLUSION OF WOMEN ALL TOGETHER.

NO, SIR.

DIDN'T YOU SAY THAT THE ATTORNEYS PARTICIPATED ALSO?

NO. THE STATE ATTORNEY DID.

STATE ATTORNEY.

RIGHT.

AND YOU ARE SAYING, CAN YOU DEMSTRAIGHT OR DO YOU WANT TO DEMONSTRATE THAT THESE PEOPLE DID NOT REQUEST THIS EXCLUSION?

IT LOOKS LIKE, FROM THE NOTES THE STATE ATTORNEY TOOK NOTES OF THIS JURY PANEL OF SOME 300 PEOPLE, AND THE NOTES REFLECT THAT THE WOMEN WE ARE TALKING ABOUT WERE EXCLUDED, AND YOU CAN'T TELL WHETHER IT IS BY THE JUDGE OR BY THE STATE, PRESUMABLY BY THE JUDGE, BUT THE STATE HAD INPUT TO IT. WE FEEL LIKE WE OUGHT TO BE ABLE TO HAVE A HEARING, TO GET INTO WHAT THE STATE'S PARTICIPATION ACTUALLY WAS. THE DEFENSE WAS NOT PRESENT. IF I SAID THAT, I WAS MISTAKEN.

HELP US, AGAIN, WITH, I AM HAVING DIFFICULTY WITH YOUR ALLEGATIONS ON THIS CLAIM, INSOFAR AS HOW YOU HAVE DEMONSTRATED BOTH A CONSTITUTIONAL FLAW, AND THEN THE PREJUDICE. IN OTHER WORDS, WHERE, YOU ARE REQUIRED TO ALLEGE A SUFFICIENT CLAIM, BEFORE YOU GET TO THE EVIDENTIARY HEARING, AND I AM HAVING DIFFICULTY SEEING WHERE YOU HAVE ACTUALLY ALLEGED THE PREJUDICE, AS A CONSEQUENCE OF THIS, AND SO HELP ME. WHERE HAVE YOU ALLEGED THAT, IN THE SENSE OF THE CONTEXT OF THIS SPECIFIC CLAIM?

WELL, CONSTITUTIONALLY WE ARE ENTITLED TO A FAIR CROSS-SECTION AND TO ME IF YOU ARE DENIED THAT FAIR CROSS-SECTION, THAT IS PREJUDICIAL TO YOU. WHETHER IT IS AN EXCLUSION OF WOMEN ALL ACROSS THE BOARD OR WOMEN WITH SMALL CHILDREN OR BLACKS OR ANY OTHER SEGMENT OF THE POP DLAINGS THAT MIGHT BE -- POPULATION THAT MIGHT BE EXCLUDED DENNIS YOU CONSTITUTIONALLY, THE FAIR CROSS-SECTION.

IN OTHER WORDS ARE YOU SAYING THAT, BECAUSE YOU MIGHT NOT HAVE HAD SOME WOMEN THAT HAD SMALL CHILDREN, OR THAT WERE PREGNANT, THAT YOU ENDED UP WITH AN UNCONSTITUTIONAL CROSS-SECTION?

YES.

WHAT COURT HAS EVER HELD THAT?

WELL, THE U.S. SUPREME COURT HAS HELD THAT, WITH REFERENCE TO TOTAL EXCLUSION.

BUT CLEARLY WE ARE NOW GOING IN A CIRCLE. OBVIOUSLY THIS IS NOT A TOTAL EXCLUSION OF WOMEN.

THAT'S RIGHT.

WHICH EVERYBODY, I ASSUME, WOULD AGREE, BUT, SO, I AM HAVING DIFFICULTY WITH HOW YOU HAVE BEEN DENIED THAT, ESPECIALLY IN LIEU OF THE CASE LAW, REALLY, THAT SAID, WELL, THE ONLY PROBLEM WITH THE STATUTE MAY BE THAT IT SHOULD, ALSO, RECOGNIZE THE PARENTS WITH YOUNG CHILDREN. THAT CERTAINLY WOULDN'T MEAN THAT THESE WOMEN WOULD COME IN THAT CATEGORY OF PARENTS WITH YOUNG CHILDREN, WOULD THEY NOT?

RIGHT.

SO IF THAT IS A VALID --

BUT THEY HAVE -- THE WOMAN WOULD HAVE THE RIGHT TO EXERCISE THAT. THE JUDGE WOULDN'T HAVE THE, THE TRIAL JUDGE WOULDN'T HAVE THE POWER TO SAY YOU ARE OUT, BECAUSE OF THIS.

BUT HOW DOES THAT, IN OTHER WORDS, HOW DO YOU GET TO THE END RESULT THAT YOU ENDED UP WITH AN UNCONSTITUTIONAL CROSS-SECTION?

I AM NOT SURE.

IN OTHER WORDS I THOUGHT YOU SAID THAT THE PREJUDICE TO YOU WAS THAT --

WE DON'T HAVE A FAIR CROSS-SECTION.

-- THAT YOU DON'T HAVE A FAIR CROSS-SECTION, SO I AM HAVING TROUBLE SEEING HOW YOU GET TO THAT FROM THE POINT OF HAVING WOMEN WITH YOUNG CHILDREN EXCUSED.

WELL, I THINK THAT IS AN INFERENCE, THAT YOU CAN DRAW FROM IT, BECAUSE YOU ARE DENYING IN EFFECT, AN EQUAL PROTECTION OF LAW. E BATSEN CASE, BATSEN V KENTUCKY THAT IS CITED IN THE BRIEF, THE SAME EQUAL PROTECTION PRINCIPLES AS THEY ARE APPLIED, IT TO DETERMINE WHETHER THERE IS DISCRIMINATION IN SELECTION OF THE VENIRE, ALSO ADDRESSES THE USE OF THE STATE'S PREEMPTORY CHALLENGES TO STRIKE INDIVIDUALS.

DO YOU KNOW IF THERE WAS A COLLATERAL ATTACK?

NO. THIS ONE. AS FAR AS I KNOW, THIS IS THE FIRST TIME IT HAS BEEN RAISED. NO. I DON'T KNOW OF ANY OTHER.

YOU SAID YOU HAD TWO POINTS THAT YOU WANTED TO ARGUE?

YES. THE NEXT POINT IS IN THE BRIEF WHERE WE CLAIM A BRADY CLAIM OR A VIOLATION WHERE THE PUBLIC RECORDS SEARCH REVEALED A LETTER FROM A JAIL DOCTOR, INDICATING THE DEFENDANT HAD SEVERE MENTAL PROBLEMS. THAT WAS NOT AVAILABLE TO THE DEFENSE, UNTIL THE PUBLIC RECORDS DISCLOSURE RECENTLY, AND WE FEEL THAT THAT HAS NOT BEEN, THAT HAS BEEN WITHHELD BY THE STATE. NO REASON WAS ADVANCED WHY IT WAS WITHHELD. WE FEEL THAT IT WOULD HAVE BEEN MATERIAL TO THE PRESENTATION OF THE CLAIM, AS FAR AS MITIGATION, IN THE DEATH PHASE, BECAUSE WE HAVE WHAT WE TERM WOULD BE AN INDEPENDENT WITNESS, ONE THAT WOULD SPECIFICALLY IDENTIFY THE MENTAL DEFECT OF THE DEFENDANT.

WASN'T IT CLEAR TO EVERYONE THAT THIS DEFENDANT HAD SEVERE MENTAL PROBLEMS, AND DIDN'T NUMEROUS WITNESSES GO INTO FAR GREATER DETAIL, NOT JUST A GENERALIZED STATEMENT LIKE THAT, BUT FAR GREATER DETAIL, AS TO THE SEVERE MENTAL PROBLEMS AT THE ACTUAL TRIAL PROCEEDINGS IN THE CASE?

NOT SO MUCH DURING THE GUILT PHASE BUT FINALLY IN THE PENALTY YES. I THINK THAT IS TRUE, BUT THEY WERE BASICALLY DEFENSE EXPERTS.

WOULD YOU AGREE THAT THE INFORMATION IN THE LETTER, AND THIS IS, WHAT, ABOUE SENTENCES IN A LETTER?

YES.

THE INFORMATION ABOUT HAVING MENTAL PROBLEMS IS NOT NEW INFORMATION OR INFORMATION UNKNOWN TO THE DEFENDANT.

THAT'S CORRECT. IT IS NOT NEW INFORMATION. BUT WE FEEL THAT THAT, THE QUESTION IS WHY. WHY DIDN'T, WHY DID NOT THE STATE SUPPLY IT TO THE DEFENDANT TO USE AS HE SAW FIT.

AGAIN YOU HAVE A RESPONSIBILITY FOR DEMONSTRATING HOW YOU WOULD BE PREJUDICED BY THE FACT THAT THE DOCTOR SAW THIS DEFENDANT AT THE JAIL AND OBSERVED TO THE SHERIFF THAT HE HAD SEVERE MENTAL PROBLEMS, RIGHT?

RIGHT. THE PREJUDICE IS THE INDEPENDENCE OF THE WITNESS THAT IS NOT ALLOWED TO BE PRESENTED TO THT INHE FASHION THAT HE DEVELOPED THE INFORMATION. HE IS OUTSIDE THE LOOP, AS FAR AS THE DEFENSE IS CONCERNED.

DID THE SENTENCING JUDGE FIND THAT THE DEFENDANT HAD MENTAL PROBLEMS?

YES, BUT NOT, AS A MITIGATOR, NOT A STATUTORY MITIGATE OR BUT A NONSTATUTORY MITIGATOR, ENTITLED IT LITTLE WEIGHT. BUT, AGAIN, THE TRIAL JUDGE DIDN'T HAVE THE BENEFIT OF THAT.

THE PREJUDICE WAS THAT THE DEFENDANT DID NOT HAVE AN OPPORTUNITY TO EXPLORE FURTHER, EXPLORE WHAT? THE EXTENT OF HIS MENTAL PROBLEMS OR THE MAGNITUDE OF THE PROBLEM? JUST WHAT?

WELL, OBVIOUSLY IF THE INFORMATION --

YOU CONCEDED THAT EVERYBODY KNEW THAT HE HAD MENTAL PROBLEMS SO WHAT --

WELL, THE IDEA IS TO PRESENT A WITNESS TO THE JURY THAT CAN EXPLAIN THAT, IN UNBIASED TERMS, THAT HE IS NOT HIRED BY THE DEFENSE. HE WAS THE JAIL PSYCHOLOGIST.

BUT WEREN'T THERE STATE MENTAL EXPERTS THAT CONCEDED THAT HE HAD MENTAL PROBLEMS?

YES. > SO THERE WERE WITNESSES IN THAT CATEGORY.

YES.

OR EVEN A STRONGER CATEGORY, YOU KNOW, THAT DID TESTIFY THAT HE HAD MENTAL PROBLEMS, THAT CONCEDED THAT HE HAD MENTAL PROBLEMS.

YES. YES, THEY DID. THE ISSUE, GOING TO THE PETITION FOR WRIT OF HABEAS CORPUS, INVOLVES WHAT WE FEEL IS A DEFICIENT PERFORMANCE BY APPELLATE COUNSEL, IN FAILING TO RAISE A

LACK OF EVIDENCE ISSUE, IN ANY OF THE APPELLATE PROCESS. WE SUBMIT THAT THERE IS SIMPLY NO EVIDENCE OF A ROBBERY, THAT THERE IS NOT EVIDENCE ON A CONSTITUTIONAL LEVEL, AND THEREFORE THAT CAN BE RAISED.

WHAT ABOUT THE EVIDENCE OF THE INTENTION TO RIP OFF THE VICTIM?

WELL, THAT DOES NOT MEAN ROB NECESSARILY.

WHAT WOULD YOU SAY THE AVERAGE PERSON OUT THERE WOULD FEEL THAT THOSE WORDS WOULD CONVEY?

WELL, YOU COULD SUGGEST THAT IT MEANS STEAL, BUT IT DOESN'T MEAN MURDER, AND THE ARGUMENT IS --

WELL, WE ARE NOT TALKING ABOUT MURDER, ARE WE NOT? HERE YOU ARE TALKING ABOUT ROBBERY. THAT IS OF TAKING, FORCIBLY TAKING SOMETHING FROM SOMEBODY. NOW, WHY WOULDN'T THE STATEMENT THERE WAS AN INTENTION TO RIP OFF THE VICTIM, AT LEAST HAVE THE IMPLICATION OF AN INTENT TO ROB, IF, LATER, PROPERTY IS TAKEN FROM THAT VICTIM, UNDER RATHER FORCEFUL CIRCUMSTANCES.

WELL, THAT IS THE THEORY. THE THEORY OF THE STATE WAS, OF COURSE, THE FELONY MURDER, AND WE FEEL THAT IT WOULD BE INTERTWINED. YOU HAVE TO PROVE THE ROBBERY. YOU HAVE TO PROVE A TAKING BY FORCE, AND THERE IS A NUMBER OF CASES CITED THAT INDICATE IF IT IS AN AFTERTHOUGHT. NOW, THIS STATEMENT, AND I WILL READ YOU A LITTLE BIT MORE, FROM WHAT THE WITNESS SAID IN THE TRANSCRIPT, THAT I ASKED HIM HOW HE WAS GOING TO DO IT. THIS IS RIGHT AFTER SHE SAID RIP OFF, AND HE SAID, WELL, HE WAS GOING TO GO TO BED WITH GAIL, MEANING THE VICTIM, AND WHEN HE DID THAT, HE WAS GOING TO GET THE MONEY, WHICH MIGHT IMPLY A THEFT BUT CERTAINLY NOT A ROBBERY BY FORCE. MR. CHIEF JUSTICE

YOU ARE INTO YOUR REBUTTAL TIME.

OKAY.

HELLO. MAY IT PLEASE THE COURT. MY NAME IS CHARMAINE MILLSAPS REPRESENTING THE STATE. FIRST I WOULD LIKE TO TALK ABOUT THE BRADY CLAIM. THE DEFENSE HAD THIS LETTER, THE LETTER ADD ISSUE, DR. STEWART'S LETTER, AT THE RESENTENCING. -- THE LETTER AT ISSUE, DOCTOR STEWART'S LETTER, AT THE RESENTENCING. IT WAS, DEFENSE COUNSEL, BEFORE, THEY HAD THIS LETTER. DEFENSE COUNSEL, IN OPENING STATEMENT, REFERS TO THIS LETTER LETTER. THEIR EXPERT REFERS TO THIS LETTER IN HIS TESTIMONY THERE. IS NO BRADY HERE, BECAUSE THEY HAD THIS LETTER AT THE RESENTENCING.

DO YOU DETAIL THAT IN YOUR BRIEF, HAVE YOU?

I CAN GIVE YOU THE RECORD CITES. NO. I DON'T HAVE THE RECORD CITES. VOLUME 8 AT PAGE 936 IS WHERE DEFENSE COUNSEL REFERS TO IT IN HIS OPENING, AND DR. MARACONGAS, AT VOLUME 12, PAGE 1382, REFERS TO IT AS WELL.

REPEAT THOSE TWO CITATIONS.

VOLUME 8 PAGE 936, IS WHERE DEFENSE COUNSEL, IN HIS OPENING STATEMENT AT THE RESENTENCING, OKAY, THIS IS AT THE RESENTENCING, AND DR. MARACONGAS WHO IS A DEFENSE EXPERT, ALSO REFERS TO THIS LETTER, NUMEROUS PAGES OF HIS TESTIMONY, VOLUME 12, PAGE 1382, ALL-AROUND THERE. OKAY. AND THIS IS DEFENSE EXHIBIT NO. FOUR, SO THEY DEFINITELY HAVE THIS LETTER AT RESENTENCING AND USED THIS LETTER. IT IS NOT CLEAR WHETHER THEY HAD IT AT THE ORIGINAL TRIAL. OKAY. MOREOVER, THE LETTER IS FROM A JAILHOUSE DOCTOR

WHO PHYSICALLY EXAMS THE DEFENDANT. THEN HE SAYS, YES, OBVIOUSLY MENTAL ILL. IT IS VERY SHORT LETTER, A FEW SENTENCING, SIX SENTENCES, BUT WHAT THEY PRESENT THERE IS EXTENSIVE TESTIMONY, ESPECIALLY AT THE RESENTENCING. THAT IS WHAT WE ARE REALLY HERE ON, THE RESENTENCING. THEY PRESENT TWO MENTAL EXPERTS, AND THEN, THROUGH THOSE MENTAL EXPERTS, PRESENT PRIOR EXPERTS. HE WAS HOSPITALIZED AT CHAT HOOF HE -- CHAT HOOF' AND AT BAY -- AT CHATTAHOOCHEE AND AT BAY MEMORIAL, AND ALL OF THAT COMES OUT IN FRONT OF THIS JURY. ALL OF HIS PRIOR, HIS INVOLUNTARY COMMITMENT AT CHATTAHOOCHEE, HIS NUMEROUS STAYS AT MEMORIAL, THE VARIOUS DIAGNOSIS THAT SEVERAL DIFFERENT DOCTORS, DR. MARACONGAS LAYS ALL OF THIS OUT FOR THE JURY, THEIR EXPERT. THE DIAGNOSIS OF DR. MASON, THE PRIOR DIAGNOSIS OF DR. SPOZIKOFF DOCTOR HEARD, DR. CLATSDEN, HIS WHOLE MENTAL HISTORY IS PRESENTED TO THE JURY AND ALL OF THE DOCUMENTS THAT GO ALONG WITH IT AS ALL. NOW, ONE LINE THAT HAS TO DO WITH A DOCTOR DOING A PHYSICAL EXAM IS NOWHERE NEAR WHAT THIS JURY WAS PRESENTED WITH. THEY WERE PRESENTED WITH THIS DEFENDANT'S FULL MENTAL HEALTH AND MENTAL HISTORY.

DOES THE DOCUMENTATION INCLUDE REPORTS OR RECORDS FROM STATE EMPLOYED OR RETAINED MEDICAL EXPERTS, THAT CONFIRM SERIOUS MENTAL ILLNESS?

YES. DR. MASON, FOR INSTANCE, AND HIS THE MANY, THERE WAS A WHOLE GROUP OF PSYCHIATRISTS, WHO EXAMINED HIM AT CHATTAHOOCHEE, DURING, AND ALL THAT IS REFERRED TO. I AM NOT SURE WHETHER ALL OF THAT IS REFERRED TO AND PUT IN FRONT OF THE JURY, SO THE JURY KNOWS THAT, PRIOR TO THIS CRIME, WHAT YOU WOULD CALL INDEPENDENT EXPERTS ARE EVEN MORE CREDIBLY PEOPLE WHO WORKED FOR THE STATE AT CHATTAHOOCHEE, DID FIND HIM TO BE, THERE ARE SEVERAL DIFFERENT TYPES OF DIAGNOSIS, BUT FOUND HIM TO BE MENTALLY ILL ILL. THE TRIAL COURT FOUND BOTH MENTAL MITIGATE ON, BUT AS NONSTATUTORY. WITHOUT THE EXTREME AND WITHOUT THE SIGNIFICANT, AS NONSTATUTORY MENTAL MITIGATORS IN THIS. OKAY. ON THE FAIR CROSS-SECTION, ISSUE ONE, THIS IS REALLY A CHALLENGE TO A STATUTE, AND WHAT IS MORE IS HE IS CHALLENGING HIS JURY AT THE GUILT PHASE, IN THE 1975 TRIAL. HE SHOULD NOT BE DOING THAT AT THIS STAGE. OKAY. WE, THE ONLY JURY THAT SHOULD BE AT ISSUE HERE IS THE RESENTENCING. THIS STATUTE EXISTED AT THE TIME OF TRIAL, AND IF HE WANTED TO RAISE A FAIR CROSS-SECTIONAL CLAIM TO IT, HE SHOULD HAVE DONE IT IN HIS DIRECT APPEAL. IF HE WANTED TO SAY COUNSEL WAS SOMEHOW INEFFECTIVE, HE SHOULD HAVE DONE IT IN HIS FIRST 3.850.

WHEN DID THESE NOTES FROM THE STATE ATTORNEYS OFFICE COME TO THE DISSENT'S ATTENTION? HE SAYS THE STATE HAD SOME JURY NOTES, AND THAT IS HOW WE GET TO THIS ISSUE. WHEN DID THEY GET THESE NOTES?

WELL, I AM NOT SURE EXACTLY WHEN THEY GOT THE NOTES, BUT, REALLY, HOW WE GET TO THIS ISSUE IS THIS STATUTE. THIS STATUTE EXISTED. THEY ARE DOING AN EQUAL PROTECTION AND A FAIR CROSS-SECTION CHALLENGE TO A STATUTE. THEY COULD HAVE BROUGHT THIS ON DIRECT APPEAL, IN 1976. OKAY. SO, NOW, THERE A LIST OF JURORS, BUT THAT IS NOT -- THEY ARE SAYING THIS STATUTE --

WHAT THEY HAVE IS THAT WE HAD NO IDEA THAT THIS WAS GOING ON. YES. THIS STATUTE EXISTS THAT TS ABOUT WOMEN BEING ABLE TO BE EXCLUDED, IF THEY ARE PREGNANT OR HAVE YOUNG CHILDREN, BUT WE HAD NO IDEA THAT THIS WAS GOING ON IN THIS JURY, IN THIS PARTICULAR JURY, UNTIL WE SAW THE STATE ATTORNEY'S NOTES THAT INDICATED THERE WAS SOME KIND OF SYSTEMATIC EXCLUSION OF THESE PEOPLE.

BUT THE STATUTE PROVIDES FOR SYSTEMATIC EX-CHRAUINGS. I GUESS WHAT I AM SAYING IS, YES YOU DID HAVE NOTICE. YOU HAD STATUTORY NOTICE, BECAUSE YOU KNEW THIS STATUTE EXISTED, AND THIS WAS ALL ACROSS THE STATE. THIS ISN'T SOME LOCAL UNIQUE BAY COUNTY JURY SELECTION STATUTE.

BUT IS THAT AN ISSUE? IN OTHER WORDS IS THERE A CLAIM, HERE, THAT THERE WAS SORT OF A OTE,CRETRACTICE G ON, OF HAVING THE COURT AND JUST PROSECUTOR PREQUALIFY THE JURY AND USE THIS STATUTE, FOR INSTANCE, IN THAT PREQUALIFICATION, AND THE DEFENDANT WAS EXCLUDED FROM THAT SO THAT HE WOULD NOT HAVE EVEN KNOWN THAT THE JURORS THAT HE ENDED UP INTERVIEWING ON VOIR DIRE HAD ALREADY BEEN PREQUALIFIED, AND THOSE JURORS ELIMINATED THAT ARE REFLECTED IN THE PROSECUTOR'S NOTES? HELP US WITH WHAT --

THEY DO SEEM TO SAY SOMETHING LIKE THAT IN THEIR 3.850 MOTION, BUT THEY DO NOT SAY THAT ON APPEAL. YOUR HONOR, THEY HAVE RAISED ANY UNIQUE CHALLENGE TO BAY COUNTY PRACTICE. THEY DID NOT REASSERT THAT ON APPEAL. THIS IS A CHALLENGE, A FACIAL CHALLENGE TO A STATUTE ON THIS APPEAL. WHAT IS MORE, YOUR HONOR, THIS STATUTE IS NOT DISCRETIONARY. THIS STATUTE SAYS "SHALL". OKAY. THESE PEOPLE, THIS IS NOT THE PROCESS,, TO BEGIN WITH, EVERYBODY KNOWS THESE ARE SMALL COUNTIES. IT IS UNLIKELY THAT THEY DID NOT KNOW THATTHIS WAS STANDARD PRACTICE,THE WAY THEY DID IT. OKAY. BUT SECONDLY, THIS STATUTE, THIS IS NOT DISCRETIONARY. THE JUDGE ISN'T DECIDING OH, YES I WILL LET YOU GO BECAUSE YOU ARE THE PARENT OF A YOUNG CHILD F YOU ARE PARENT OF A YOUNG CHILD, YOU LEAVE THE COURTROOM. THIS IS NOT A DISCRETIONARY DECISION. IT'S MANDATORY.

BUT AS I UNDERSTAND THE APPELLANT'S ARGUMENT, IT IS NOT SO MUCH AS TO WHETHER THE STATUTE IS DISCRETIONARY OR NOT. IT IS THAT THESE PEOPLE MAY NOT HAVE EVEN ASKED TO BE EXCLUDED FROM JURY DUTY. DOES THE STATUTE REQUIRE E ACTUAL POTENTIAL JUROR TO REQUEST EXCLUSION UNDER IT?

IT DOES SAY UPON REQUEST. YES. THE STATUTE DOES HAVE --

HIS ARGUMENT IS THAT THESE PEOPLE MAY OR MAY NOT HAVE EVEN ASKED TO BE EXCLUDED, AND IF THE JUDGE JUST DID IT SYSTEMATICAY WITHOUT PEOPLE BEING EXCLUDED, WITHOUT PEOPLE REQUESTING EXCLUSION, IS THERE A PROBLEM?

HOW IN THE WORLD WOULD A JUDGE KNOW THAT YOU ARE THE MOTHER OF A YOUNG CHILD, UNLESS YOU TELL HIM?

THERE IS ALL KINDS OF INFORMATION ON JURY QUESTIONNAIRES, ISN'T THERE?

YES. IF THEY KNOW THAT INFORMATION, THEN THEY LET THEM GO, BUT WHAT IS THAT? A VIOLATION OF THE STATUTE, BECAUSE THEY DID IT WITHOUT REQUEST? AND MORE IMPORTANTLY, YOUR HONOR EVEN IF YOU REACH THROUGH, LET'S REACH THROUGH TO THE WHOLE ISSUE HERE, PARENTS OF YOUNG CHILDREN ARE NOT A CONSTITUTIONALLY CONSTITUTIONALLY-SIGNIFICANT CLASS. YOU CANNOT SUCCEED, I DON'T CARE WHAT HAPPENS, HOW THE MOTHER WENT AWAY, HOW THE PARENTS WENT AWAY. IT IS IRRELEVANT. THAT IS NOT A CONSTITUTIONALLY CONSTITUTIONALLY-SIGNIFICANT CLASS. PARENTS OF YOUNG CHILDREN, IT IS NOT EVEN BEING A PARENT. IT IS A PARENT OF A YOUNG CHILD THAT YOU HAVE CUSTODY OF. OKAY.

SO YOUR POINT IS THERE THAT, EVEN IF THEY WERE EXCLUDED, THAT WOULD NOT RISE TO THE LEVEL OF A CONSTITUTION --

THAT T A CONSTITUTIONALLY-SIGNIFICANT CLASS. YOU MAY NOT BRING AN L PROTECTION OR A FAIR CROSS-SECTION CLAIM, BASED ON THE FACT OF A PREGNANCY. THAT IS AORARY CONDITION, AND YOU MAY NOT BRING IT ON THE FACT OF YOUNG PARENTS. MAYBE IF YOU LOST, FOR INSTANCE, ALL PARENTS, BUT YOU ARE ONLY LOSING PARENTS, PURSUANT TO THE STATUTE, YOU ARE ONLY LOSING PARENTS OF THE CURRENT VERSION SAYS UNDER SIX. THAT IS NOT A CONSTITUTIONALLY CONSTITUTIONALLY-SIGNIFICANT CLASS. THAT IS NOT EVEN A CLASS. THAT

IS PARENTS OF A PARTICULAR AGE OF CHILDREN. YOU ARE GOING TO FALL OUT OF THIS CLASS, WITHIN A PARTICULAR YEAR, IF YOU HAVE A FIVE-YEAR-OLD CHILD, AND THIS COURT HAS REPEATEDLY HELD THAT THIS STATUTE DOES NOT VIOLATE DURD -- DURDEN V MISSOURI. IT NOW INCLUDES PARENTS INSTEAD OF JUST MOTHERS, AND REPEATEDLY HELD THAT. YOU HELD THAT IN 1977, HITCHCOCK HENDERSON, PARKER, JOHNSON V DUGGAR. YOU HAVE REPEATEDLY REJECTED CHALLENGES TO THIS STATUTE, SO IT DOESN'T MATTER WHAT HE PROVED. THIS STATUTE HAS NOT, DOES NOT VIOLATE THE FAIR CROSS-SECTION REQUIREMENT OR THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL, WHICH IS WHERE THAT WOULD COME FROM. ON THE HABEAS CLAIM, WHAT HE SAYS IS APPELLATE COUPS HE WILL IS INEFFECTIVE FOR -- COUNSEL -- APPELLATE COUNSEL IS INEFFECTIVE FOR FAILURE TO RAISE THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. APPELLATE COUNSEL DID RAISE THAT. THAT WAS ISSUE THREE, IN THE INITIAL BRIEF AND THE INITIAL APPEAL. THEY DID RAISE A CHALLENGE TO THE SUFFICIENCY OF THE ROBBERY. ACTUALLY RAISED IT IN TWO DIFFERENT WAYS. E ATTACKED THE USE OF ROBBERY AS AN AGGRAVATOR IN ISSUE ONE, AND THE ATTACKED THE SUFFICIENCY OF THE EVIDENCE TO ESTABLISH ROBBERY, THE CONVICTION IN ISSUE THREE. MOREOVER, WHAT HE REALLY WANTS IS HE SEEMS TO THINK THAT COUNSEL SHOULD HAVE CITED THIS COURT'S AFTER-THOUGHT LINE OF CASES, STARTING WITH MONN. WELL, THE PROBLEM WITH THAT IS MONN WAS DECIDED IN 1998. THE INITIAL BRIEF IN THIS CASE WAS FILED IN MAY OF 1976. APPELLATE COUNSEL CANNOT CITE CASES TO THIS COURT THAT DON'T EXIST AT THE TIME THAT HE, THAT APPELLATE COUNSEL IS WRITING THE APPELLATE BRIEF. MOREOVER ON THE MERITS, THIS CASE DOES NOT FALL IN YOUR AFTER-LINE SERIES OF CASES. THIS COURT HAS RECENTLY, IN SEVERAL CASES, MADE IT CLEAR THAT, WHEN THERE IS NO OTHER MOTIVE FOR THE MURDER, THAT APPEARS FROM THE RECORD, THAT AN AFTERTHOUGHT ARGUMENT WILL FAIL. APPELLATE COUNSEL FAILED ON THE MERITS, IF HE HAD RAISED SUCH A CLAIM, IN TERMS OF THE MONN LINE OF CASES. IF THERE ARE NO FURTHER QUESTIONS, THE STATE WOULD ASK YOU TO AFFIRM THE TRIAL COURT'S SUMMARY DENIAL OF THE 3.850 AND DENY THE HABEAS CORPUS PETITION. THANK YOU. MR. CHIEF JUSTICE

THANK YOU, COUNSEL.

MAY IT PLEASE THE COURT. IN ANSWER TO THE QUESTION ABOUT WHEN THIS JURY LIST WAS DISCOVERED, IT WAS DISCOVERED AFTER CONFLICT-FREE COUNSEL WAS APPOINTED ON THE CASE AND THE INVESTIGATOR OBTAINED FILES FROM THE STATE ATTORNEYS OFFICE. NOW, I AM NOT AWARE --

WHAT DATE IS THAT?

IT IS NOT AN EXACT DATE. IT WOULD BE AFTER 1998. I WAS APPOINTED IN 1998, SO IT WAS AFTER THAT. I THINK JULY OF '98. SO IT WAS A RECENT DISCOVERY THAT THE RECORDS HAD NOT PREVIOUSLY BEEN AVAILABLE. WITH RESPECT TO THE DOCTOR'S LETTER, I AM NOT AWARET IT WAS USED AT A PRIOR PROCEEDING. OBVIOUSLY IF THAT WAS THE CASE, I THINK THAT THAT WOULD,E WOULD WITHDRAW THAT ARGUMENT, OBVIOUSLY. MY POINT ON HABEAS CORPUS IS NOT SO MUCH RAISING THE SUFFICIENCY OF THE EVIDENCE. THE FACT THAT THERE WAS NO EVIDENCE. WE CONTEND THERE WAS NO EVIDENCE OF THE ROBBERY AND THEREFORE IT WOULD BE IMPROPER FOR A JURY TO FIND A CONVICTION FOR ROBBERY AND IMPROPER TO HAVE AN AGGRAVATOR OF FELONY MURDER. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE FORM THE