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**Glen Edward Rogers v. State of Florida
SC05-732 | SC05-1730**

PLEASE RISE.

>> GOOD MORNING.

>> LADIES AND GENTLEMEN, THE COURT OF THE SUPREME COURT.

PLEASE BE SEATED.

>> OK.

WE'RE READY FOR OUR NUMBER FOUR CASE THIS MORNING, ROGERS HE VERSUS STATE OF FLORIDA.

MR. KILEY.

>> MAY IT PLEASE THE COURT, MY NAME IS RICHARD KILEY.

I REPRESENT GLEN ROGERS IN THIS ACTION TODAY.

I WOULD LIKE TO ARGUE FOR IN THE INITIAL BRIEF THE THE LOWER

COURT ERRORED IN DENYING AN EVIDENTIARY HEARING ON

MR. ROGERS' CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO

RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF

COUNSEL AT THE PENALTY PHASE OF HIS TRIAL IN VIOLATION OF THE 5,

6, 8, 14 AMENDMENT RIGHTS UNDER THE CONSTITUTION.

COUNSEL WAS INAPPROPRIATE TO OBJECT DURING THE CLOSING

ARGUMENT PENALTY PHASE OF HIS TRIAL.

ALSO WANT TO ARGUE, ARGUMENT FIVE.

CUMULATIVELY, THE COMBINATION OF PROCEDURAL SUBSTANTIVE ERRORS

DEPRIVED ROGERS OF A

FUNDAMENTALLY FAIR TRIAL

GUARANTEED UNDER THE 5, 6, 14th!!!!!!!

14TH AMENDMENT HAND THE ERRORS

ON DIRECT APPEAL COMBINED WITH THE ERRORS IN THE POST

CONVICTION PROCEEDINGS ARE

DETAILED IN CLAIM THREE OF THE

PETITION FOR WRIT OF HABEAS

CORPUS THAT I'D LIKE TO ARGUE

THEM ALSO PURSUANT TO 926

SOUTHERN 2nd, 1118.

2006.

YOUR HONOR, FIRST OF ALL, POST
CONVICTION COURT AIRED WHEN IT
DENIED THE DESERT STORM ARGUMENT
BY RELYING ON --

[INAUDIBLE]

, THAT WAS DISPLACED.

MEEKS INVOLVED CAPITAL
SENTENCING AND SYSTEMIC
EXCLUSION FROM JURY SERVICE.

TRIAL COUNSEL'S CONTENTION THAT
THE CONDEMNATION OF THE DESERT
STORM ARGUE!!!!!!!!!!!!!! ARGUMENT, THAT HAPPENED TO
THEM BEFORE OR PRIOR TO THE
ROGERS TRIAL, HE WOULD HAVE
OBJECTED.

NOW THAT'S A GLARING EXAMPLE OF
INEFFECTIVENESS PURSUANT TO THE
LINE OF CASES, FAILURE TO OBJECT
CASES CITED IN THE REPLY BRIEF.
THE DESERT STORM ARGUED TV NOT A
FUTURE DEVELOPMENT IN THE LAW
THAT TRIAL COUNCIL COULD NOT
ANTICIPATE, IT WAS A DEVELOPMENT
IN CURRENT EVENT.

THIS WAS AN IMPROPER ARGUMENT,
SOLELY USED TO INFLAME THE
PASSIONS AND EMOTIONS OF THE
PENALTY PHASE JURY.

>> LET'S ASSUME THAT -- FIRST OF
ALL, I AGREE WITH YOU THAT IT'S
NOT -- JUST BECAUSE IT'S A
STUPID CASE DOES NOT MEAN THAT
COUNSEL SHOULDN'T FAIL TO OBJECT99!!!!!!!!!!!!!!
OBJECT.

DON'T YOU HAVE TO SHOW SOMETHING
MORE THAN JUST I SHOULD HAVE
OBJECTED, I DIDN'T, THEREOF
UNDER STRICKLAND --

>> YES, I WOULD MAINTAIN TO THIS
COURT THAT THE MINOR CASE AS IT
CAME OUT SUBSEQUENT TO MEEKS AND
CITED IN OTHER CASES, MAKES
CHEER THAT WHEN A PROSECUTOR
SEEKS TO INJECT EMOTION, FEAR,
PERSONALIZES THE PROSECUTOR,
BOLSTER STATE WITNESSES, APPEAL
FOR SYMPATHY HORIN ANY WAY
DISTRACT THE JURY FROM
CONSIDERING THE EVIDENCE, THAT'S
IMPROPER.

>> ON THE DESERT STORM ARGUMENT,
IT'S NOT -- WE DID -- WE DID
REFERENCE THE ARGUMENT AND SAID

THE SINGLE UNOBJECTED TO ARGUMENT DID NOT CONSTITUTE FUNDAMENTAL ERROR AND ALSO THAT MOST OF THE OTHER ARGUMENT DIDN'T CONSTITUTE ERROR, MUCH LESS FUNDAMENTAL ERROR.

LET'S GO TO THE PREJUDICE PRONG.

GIVEN WHAT THE COURT SAID ON DIRECT APPEAL, AND GIVEN THE EVIDENCE IN THIS CASE, HOW DOES THIS KIND OF ACTION, THAT IS, NOT OBJECTING TO CERTAIN CLOSING ARGUMENT, UNDERMINE CONFIDENCE IN THE OUTCOME, THAT IS, HOW DOES PREJUDICE ESTABLISH --

>> JUDGE, FIRST OF ALL, THE COURT'S OPINION ON DIRECT APPEAL, THE OPERATIVE WORD IN THE OPINION WAS UNOBJECTED TO. THE SINGLE UNOBJECTED TO COMMENT.

NOW, JUDGE, THE CONTENTION OF THE -- OF THE TRIAL COUNSEL FOR EXAMPLE, THAT DEN GRACIOUS OF MITIGATION WAS -- DEN GRACIOUS OF MITIGATION WAS FINE, IT WAS PROPER, CLEARLY SHOWED YOU HAD NOT READ NIBERG.

ALL THIS ARGUMENT ADDRESSED IN RUIZ, WAS THE SAME ARGUMENT USED IN ROGERS AND THE CASE THE COURT CITED IN ROGERS, HAS TO BE EXAMINED IN THE TOTALITY.

OBVIOUSLY, MR. ROGERS WAS PREJUDICED AND I WOULD SAY THIS COURT MUST ALSO EXAMINE THE INTRODUCTION OF THE CALIFORNIA MISS GLEANER AND -- DEMEANOR ALONG WITH THE PROPER PROSECUTOR CONDUCT IN CASE DEPRIVED ROGERS OF A FAIR TRIAL.

>> DID THE DEFENSE ATTORNEY TESTIFY AT THE EVIDENTIARY HEARING AS TO WHY HE DIDN'T OBJECT TO THE COMMENTS?

>> QUESTION!!!!!!!!!!!!!!!!!!!!!! YES.

IN REGARDS TO DESERT STORM, HE THOUGHT IT WAS A NEW DEVELOPMENT IN THE LAW.

WITH REGARD TO THE DEN!!!!!!!!!! DENIGRATATION OF MITIGATION, HE THOUGHT IT WAS NECESSARY AND PROPER.

>> MANY TRIAL LAWYERS SAY THEY TRY TO BE VERY CIRCUMSPECT IN

THE NUMBER OF OBJECTIONS THAT THEY USE, EVEN TO CLOSING ARGUMENTS AND THINGS LIKE THAT, BECAUSE IT CAN BACK FIRE ON YOU IF YOU KEEP INTERRUPTING COUNSEL'S CLOSING ARGUMENT, AN THEY ALSO SAID, WELL SOMETIMES THE OUT!!!!!!! OUTRAGEOUS STATEMENT MADE SPEAKS FOR ITSELF AND YOU DON'T NEED TO OBJECT BECAUSE THEY THINK IT'S GOING TO BACK FIRE ON THE JURY, SO IT'S BETTER NOT TO OBJECT.

SO THERE ARE A LOT OF STHEEJ I CAN REASONS -- STRATEGIC REASONS WHY SOMEONE WOULD NOT OBJECT TO AN OBJECTIONABLE CLOSING ARGUMENT.

>> INDEED THERE ARE, YOUR HONOR. HOWEVER, THIS PARTICULAR TRIAL ATTORNEY, DID NOT SAY ANY OF HIS DECISIONS WERE STRATEGIC.

HE SAID, I DIDN'T KNOW, I THOUGHT IT WAS IMPROPER.

I THOUGHT THAT DESERT STORM ARGUMENT, IF I HAD KNOWN IT WAS IMPROPER, I WOULD HAVE OBJECT.

HE KNEW IT WAS IMPROPER.

IT WAS NOT A NEW DEVELOPMENT IN THE LAW.

IT WAS AN ATTEMPT TO FOCUS SYMPATHY AWAY FROM THE CASE AND THE EVIDENCE, AND PROJECT IT ON TO THE DUTY F.P.L. FATHER.

>> HOW DOES THAT UNDERMINE OUR CONFIDENCE IN THE GUILTY VERDICT?

>> WELL, IF YOU TAKE IT CUMULATIVELY, ALONG WITH THE INTRODUCTION OF THE DEMEANOR AND THERE WERE ONLY TWO AGGRAVATORS, ROGERS DID NOT HAVE A FAIR PENALTY PHASE.

IT WAS HIGHLY PREJUDICIAL. FOR THE STATE TO INTRODUCE THE CALIFORNIA DEMEANOR.

NOW I KNEW THAT TRIAL JUDGE, I WAS HER DIVISIONAL P.D. --

>> WOULD YOU -- COULD YOU ATTEMPT TO RESPOND TO JUSTICE PARIENTE'S QUESTION ABOUT THE PREJUDICE AGAIN WITHOUT CONCLUDING THAT IT'S CLEARLY PREJUDICIAL?

COULD YOU PROVIDE HER SOME SUBSTANCE, SOME MEAT IN RESPONSE TO HER QUESTION, PLEASE, SIR?

>> SHE WAS INQUIRING AS TO WHERE'S THE PREJUDICE AND WITHOUT THE CONCLUSION, COULD YOU HELP HER?

COULD YOU RESPOND MORE FULLY TO THAT?

>> I'LL TRY, YOUR HONOR. THE PREJUDICE IS THAT BECAUSE OF ALL OF THESE COMMENTS, IT WAS FOCUSED AWAY UPON THE MITIGATION -- FROM THE MITIGATION AND ON TO THE STATE'S CASE, AND IN PARTICULAR, ON SOMETHING OTHER THAN THE EVIDENCE.

I'M SAYING THAT ALL OF THIS PURSUANT TO YOUR RULING MUST BE LOOKED AT CUMULATIVELY. FOR EXAMPLE, LASTLY, THE DEFENSE ATTORNEY'S FAILURE TO OBJECT TO THE COURT STRIKING THE MENTAL OR EMOWINGNAL ACE!!!!!!!!!!!!!! -- EMOTIONAL DISTURBANCE MITIGATOR, IT WAS ERROR.

NOW IN THIS CASE, YOU HAD TWO AGGRAVATORS.

AND THEN THIS INTRODUCTION OF A NON-STATUTORY AGGRAVATOR, THE CALIFORNIA MISS GLEANER, COUPLED -- DEMEANOR, COUPLED WITH BIAS SYMPATHY INTERGEEKS, DEPRIVED ROGERS HE WAS PREJUDICE.

>> SO WHAT I THINK I'M HEARING YOU SAY IS THAT IF YOU WERE SIMPLY TO LOOK AT THE FAILURE TO OBJECT TO THE DESERT STORM ARGUMENT, THAT YOU WOULD AGREE THAT THAT SINGLE UNOBJECTED TO COMMENT WOULD NOT CONSTITUTE PREJUDICE UNDER STRICKLAND, IS THAT -- SINCE YOU'RE TALKING ABOUT OTHER -- WE ASKED ABOUT PREJUDICE AND THEN YOU WERE TALKING ABOUT OTHER THINGS, THE DEFENSE COUNSEL DIDN'T DO.

ARE YOU BY THAT SAYING THAT YOU WOULD AGREE THAT IF THE ONLY THING, IF WE LOOK THROUGH THIS WHOLE THING, WE SAY YOU KNOW WHAT, WE THINK THE COUNSEL SHOULD HAVE OBJECTED, HE DIDN'T

HAVE A GOOD STRATEGIC REASON FOR NOT OBJECTING TO DESERT STORM, AND THEREFORE NOW LET'S GO TO PROG DIS, WOULD YOU A --

PREJUDICE, WOULD YOU AGREE THAT JUST ON THE BASIS OF THAT, THAT PREJUDICE COULD NOT BE ESTABLISHED UNDER STRICKLAND?

>> RESPECTFULLY, YOUR HONOR, I WOULD NOT HEY GREE.

>> AND WHY -- AND WHAT IS THE STANDARD UNDER STRICKLAND FOR WHY A SINGLE UNOBJECTED TO COMMENT WOULD CONSTITUTE PREJUDICE UNDER STRICKLAND?

>> WELL THE COURT HELD IN RUIZ THAT IT DID CONSTITUTE PREJUDICE.

IT WAS THE SAME ARGUMENT.

>> IN RUIZ, THERE WAS A -- THERE WAS A WHOLE PANOPLY OF ARGUMENT. THERE WAS KNOTS ONE ARGUMENT THAT WAS SINGLED OUT.

AND -- FOR REVERSAL.

>> AND NEITHER DID WE IN ROGERS.

>> AND WE WERE DISCUSSING FUNDAMENTAL ERROR IN RUIZ AND IN THIS CASE, WE'VE ALREADY REJECTED THE ARGUMENT THAT THAT IN CONNECTION WITH OTHER ARGUMENTS CONSTITUTED REVERSIBLE ERROR OR FUNDAMENTAL IRRECORD OVER -- ERROR.

WE OBVIOUSLY CONSIDERED IT AND REJECTED WHAT WE REVERSED ON IN RUIZ.

>> THAT'S A DESERT STORM ARGUMENT, BUT THE COURT DID NOT CONSIDER THE INEFFECTIVE FAILURE TO OBJECT TO BOLSTER OF STATE WITNESSES, TO ALL THE OTHER PRODUCT!!!!!!!!!!!!!!!!!!PROSECUTE!!IAL MISCONDUCT IN THE GUILT PHASE OF HER ARGUMENT.

>> TELL US ABOUT THE CALIFORNIA DEMEANOR, WHAT CHAM IS THAT OF YOUR --

>> THAT IS STILL -- WELL, THAT'S IN MY HABEAS, THE COURT, THE TRIAL COURT GAVE A SCATHING REBUKE OF MS. COX WHEN SHE ATTEMPTED TO INTRODUCE AND DID IN FACT INTRODUCE THE CALIFORNIA DEMEANOR.

I WOULD CITE AS ADDITIONAL CASE

LAW NOT CITED IN MY BRIEF.

>> DID YOU PROVIDE COUNSEL WITH COPIES OF WHATEVER YOU'RE GOING TO PROVIDE, THAT YOU HAVE NOT PROVIDED?

>> NO, BUT IT'S IN THE OPINION. CASTRO V. STATE, 547, SOUTHERN 2D, 1999, AND LAWRENCE V. STATE, 614 SOUTHERN 2D, 1993.

ON THIS RECORD, WE CANNOT SAY THE STATE HAS SHOWN BEYOND A REASONABLE DOUBT THAT THE SIMILAR FACT EVIDENCE OF OTHER CRIMES DID NOT AFFECT THE PENALTY PHASE, ESPECIALLY SINCE THE COURT -- IN THIS CASE, THE COURT FOUND ONLY TWO AGGRAVATORS.

THIS ERROR COULD NOT BE CURED BY AN INSTRUCTION FROM THE COURT TO ESSENTIALLY UNRING THIS BELL.

-- UNRING THIS BELL.

JUDGE, PURSUANT TO DARDEN, I ALSO CONTEND THAT SEVERAL OTHERS TAKEN TOGETHER CAN VIOLATE A PETITIONER'S RIGHT TO DUE PROCESS.

PAGE 600 SPECIFICALLY ADDRESSES THE CUMULATIVE EFFECT OF ONE PROSECUTIVE IMPROPRIETY AFTER ANOTHER ONE.

>> YOU'RE PROCEEDING INTO YOUR REBUTTAL.

AS YOU WANT TO USE YOUR TIME, YOU CAN DO THAT.

>> LET ME ASK ONE QUESTION BEFORE YOU SIT DOWN FOR YOUR REBUTTAL.

THE REBUKE OF THE PROSECUTOR IN THIS CASE, WAS ON THE RECORD?

>> OUT OF THE PRESENCE OF THE JURY.

>> IT FULLY -- I CITED IT IN MY BRIEF.

>> THAT WAS FULLY ON THE RECORD? AS YOU CITED IT IN YOUR BRIEF?

>> YES.

>> OK.

>> MAY IT PLEASE THE COURT, STEPHEN AKE ON BEHALF OF THE STATE OF FLORIDA.

THE STATE WOULD SUBMIT THAT THE LOWER COURT PROPERLY DENIED

CLAIM FOUR OF MR. ROGERS' POST
CONVICTION MOTION DEALING WITH
INEFFECTIVE ASSISTANCE OF
COUNSEL.

>> ON THE PREJUDICE PRONG, CASES
THAT HOLD THAT FOR CLOSING
ARGUMENTS, PREJUDICE IS EQUATED
WITH FUNDAMENTAL ERROR?

>> CORRECT.

>> CASES THAT SEEM TO SUGGEST A
DIFFERENT STANDARD.

WHAT IS YOUR VIEW THAT IF
SOMETHING IS NOT FUNDAMENTAL
ERROR, CAN IT BE PREJUDICE UNDER
STRICKLAND?

>> WELL I BELIEVE THIS COURT IN
THE CHANDLER CASE IN 2003, WHICH
I CITED IN MY BRIEF, DEALS
DIRECTLY WITH THAT, HAND IT
STATES THAT IF ON DIRECT APPEAL,
THAT THE COMMENTS DO NOT
CONSTITUTE FUNDAMENTAL ERROR,
THAT IT IS I!!!! IMPOSSIBLE TO MEET
THE PREJUDICE PRONG UNDER
STRICKLAND.

>> EVEN THOUGH THE WORDING OF
THE TWO STANDARDS ARE
DIFFERENT --

>> CORRECT.

>> THE SUGGESTION IS THAT IT
GOES FARTHER INTO A THE TRIAL
PROCESS OR POST CONVICTION,
THERE SHOULD BE A HIGHER
STANDARD.

>> CORRECT, YOUR HONOR.

I BELIEVE THE CHANDLER OPINION
IS PRETTY MUCH DIRECTLY ON
POINT, AS FAR AS BEING ANALOGOUS
TO WHAT TOOK PLACE IN BOTH THE
ROGERS AND CHANDLER CASE.

>> HE HAS RAISED THOUGH IN IN
CASE, ADDITIONAL ARGUMENTS THAT
THE COURT HADN'T CONSIDERED IN
THE DIRECT APPEAL.

>> CORRECT.

>> PRESUMABLY THEN EITHER
CONSTITUTING APPELLATE
INEFFECTIVE ASSISTANCE.
COULD YOU ENLIGHTEN US ON THOSE
OTHER COMMENTS?

>> WELL, THE COMMENTS IN THE
PENALTY PHASE CLOSING ARGUMENTS
WERE RAISED ON APPEAL.
AND WERE ADDRESSED BY THIS COURT

ON THAT DIRECT APPEAL AND THIS COURT FOUND THAT THE COMMENTS WERE NOT -- THEY DID NOT CONSTITUTE ERROR, MUCH LESS FUNDAMENTAL ERROR, SO THIS COURT REVIEWED THE COMMENTS --

>> I THOUGHT HE HAD SOME ADDITIONAL ONES.

>> THERE'S ONE ADILTIONNAL COMMENT.

IN BREAKING THEM DOWN, THE ONE COMMENT THAT WAS NOT RAISED FROM THE PENALTY PHASE ON DIRECT APPEAL DEALT WITH WHAT WAS TRANSPIRING IN THE VICTIM'S MIND THAT THERE'S A LONG BLOCK QUOTE ABOUT WHAT WAS GOING ON WITH THE VICTIM AT THE TIME THAT WENT TO THE H.H.C. AGGRAVATOR.

THIS COURT UTILIZED BASICALLY THAT TYPE OF LANGUAGE, IN UPHOLDING THE H.H.C. AGGRAVATOR AND THERE WAS NOTHING IMPROPER WITH THE PROSECUTORS ARGUMENT AS TO WHAT WAS TAKING PLACE, THAT WAS A VALID POINT OF CONSIDERATION FOR THE JURY IN CONSIDERING THE H.H.C. AGGRAVATOR, AND AS TRIAL COUNSEL TESTIFY!!IED HE EVIDENTIARY HEARING, HE SAW ABSOLUTELY NOTHING WRONG WITH THE COMMENTS, BECAUSE HE'S CORRECT, THERE WAS NOTHING WRONG WITH THE COMMENTS, SO HE HAD NO REASON TO OBJECT TO THEM.

THAT WAS THE ONLY COMMENT THAT WAS NOT RAISED ON DIRECT APPEAL, BUT I WOULD SUBMIT THAT THIS COURT I'M SURE WOULD HAVE STILL CONSIDERED THAT, HAD IT BEEN THAT OBJECTIONABLE WHEN THEY REVIEWED THE ENTIRE CLOSING ON DIRECT AIMMEDIATELY, BUT THE OTHER -- DIRECT APPEAL, BUT THE OTHER COMMENTS DEALING WITH THE ALLEGED DENIGRATATION OF THE MITIGATOR, THAT WAS CERTAINLY RAISED ON DIRECT APPEAL.

AND AGAIN, THAT'S NOT AN IMPROPER COMMENT.

BASICALLY WHAT THE PROSECUTOR SAID IN HER CLOSING WAS THAT BRAIN DAMAGE, THAT MR. ROGERS

ALLEGEDLY HAD WAS NOT CONNECTED
IN ANY WAY TO THIS CASE.

IT DIDN'T -- THAT HE'S A
VIOLENT, AGGRESSIVE PERSON AND
IT'S NOT CONNECTED TO THE BRAIN
DAMAGE AND DEFENSE ATTORNEY AT
THE EVIDENTIARY HEARING
TESTIFIED THAT WELL, SHE'S
RIGHT.

I COULDN'T SHOW THAT THE BRAIN
DAMAGE WAS RESPONSIBLE FOR THIS,
SO SHE HAD EVERY RIGHT TO ARGUE
THE OPPOSITE AND THAT'S WHAT SHE
HE DID.

THE OTHER COMMENT WAS THE DESERT
STORM ARGUMENT, WHICH OBVIOUSLY
THIS COURT LOOKED AT ON DIRECT
APPEAL.

AND SAID THAT IT WAS IMPROPER
BUT IT DIDN'T RISE TO THE LEVEL
OF FUNDAMENTAL ERROR AND EVEN
THIS COURT SAID ON DIRECT
AIMMEDIATELY THAT IT WOULDN'T
HAVE WARRANTED A MISTRIAL, SO
EVEN HAD THE TRIAL ATTORNEY
OBJECTED AT THAT TIME THE COURT
WOULD HAVE DENIED ANY MOTION FOR
MISTRIAL HAND THAT WOULD HAVE
BEEN AFFIRMED BY THIS COURT, SO
CLEARLY NOW HE IS NOT ABLE TO
ESTABLISH ANY PREJUDICE UNDER
STRICKLAND, BASED ON THIS
COMMENT, BECAUSE AS HAS BEEN
SHOWN, HAD COUNSEL OBJECTED TO
THAT, IT WOULD NOT HAVE RESULTED
IN ANY RELIEF AT THAT TIME.

COUNSEL ATTEMPT TO LUMP IN
ANOTHER ISSUE THAT WAS RAISED ON
DIRECT APPEAL, THESE CALIFORNIA
DEMEANORS AND THIS COURT HEY
DRESSED THAT OVER TWO OR THREE
PAGES IN ITS DIRECT APPEAL
OPINION, AND I THINK COUNSEL
RAISED IT IN HIS CUMULATIVE
CLAIM IN HIS STATE HABE I CAN'T
SAY, AND I'M NOT QUITE CLEAR HOW
HE WAS HE RAISING THAT IN A
STATE HABE HE AS, WHEN IT WAS
RAISED AS AN ISSUE BY APPELLATE
COUNSEL.

>> HOW ABOUT RAISING IT WHEN
HE'S TALKING ABOUT THE
CONSIDERATION OF CUMULATIVE
ERRORS, IN OTHER WORDS --

>> RIGHT.

>> IN THE CONTEXT, DO WE END UP IN TERM OF THE PROSECUTOR IN THIS CASE BEING OVER THE TOP, AS WE DID IF RUIZ, BY LOOKING AT, FOR INSTANCE, THE TRIAL COURT'S SCATHING DENUNCIATION OF THE PROSECUTOR'S USE OF THE CALIFORNIA DEMEANOR AND THE SAME PROSECUTOR'S USE OF DESERT STORM, DO WE END UP WITH IN EFFECT A RUIZ SWAYING WHEN WE CONSIDER CUMULATIVE ERROR? I THINK THAT'S HOW --

>> CLEARLY, THAT COULD HAVE BEEN DONE ON DIRECT APPEAL, YOUR HONOR.

THAT WAS THE TIME TO DO IT BECAUSE IT WAS ALL MATTERS OF RECORD THEN AND CONSIDERED BY THIS COURT.

>> HOW CAN THAT HAPPEN IF THE ERROR WAS UNOBJECTED TO, AND THEREFORE IT WAS REJECTED ON DIRECT APPEAL BECAUSE IT WASN'T OBJECTED TO, AND SO NOT HAVING BEEN OBJECTED TO OF COURSE, ON POST CONVICTION, GONE BACK AND SAID, WELL, THE LAWYER MADE A SERIOUS ERROR IN NOT OBJECTING TO THE FILING PREJUDICIAL AND INFLAMMATORY ARGUMENT.

NOW IT'S BEEN PRESENTED IN THAT CONTEXT, WHEN YOU LOOK AT THESE OTHER THINGS -- HELP ME WITH WHY THIS DOESN'T END UP BEING LIKE THE RUIZ CASE, THAT IS, THERE WAS ENOUGH MISCONDUCT BY THE PROSECUTOR AS EVIDENCED BY WHAT THE TRIAL COURT SAID ON THE RECORD AND NOW --

>> I THINK IT'S CLEARLY DISTINGUISHABLE FROM RUIZ. IN THAT CASE, THE PROSECUTORS HAD A LITANY OF IMPROPER COMMENTS THAT THIS COURT FOUND, THERE WERE NUMEROUS COMMENTS AND THAT'S CERTAINLY NOT THE CASE IN IN ONE.

IN THIS CASE, WE HAD THE OPERATION DESERT STORM CASE, ARGUMENT WHICH IS THE ONLY THING THAT THIS COURTS A SAID IS IMPROPER.

>> WHAT DID THE TRIAL JUDGE SAID TO THIS PROSECUTOR AFTER THE CALIFORNIA DEMEANOR EPISODE?

>> ON DIRECT APPEAL, THIS COURT ADDRESSED THAT QUITE A BIT, AND DISCUSSED HOW THAT DID NOT CONSTITUTE REVERSIBLE ERROR.

>> WHAT DID THE TRIAL JUDGE SAY TO THE PROSECUTOR IN THIS -- WHAT YOUR OPPONENT HAS CHARACTERIZED AS A SCATHING REBUKE?

>> HONESTLY, YOUR HONOR, I DON'T RECALL WHAT THE PROSECUTOR SAID, OR WHAT THE JUDGE SAID TO THE PROSECUTOR AFTER THESE CALIFORNIA.

>> SET OUT IN YOUR OPPONENT'S BRIEF.

>> I'M NOT SURE WHERE IT'S SET OUT.

I DON'T RECALL SEEING THAT, BUT IT MAY INDEED BE IN THERE.

>> SAID IT HAPPENED?

>> I ASSUME IT MAY HAVE HAPPENED, YOUR HONOR.

I DON'T KNOW.

>> WHETHER IT HAPPENED OR NOT?

>> I RECALL THAT IT HAPPENED.

THEY INTRODUCED THIS CRIME AND THERE WAS SOME DEBATE OVER WHETHER IT WAS A FELONY HORA MISS GLEANER, AND -- OR A DEMEANOR AND IT TURNED OUT TO BE A DEMEANOR AND I DON'T RECALL -- A MISDEMEANOR, BUT KNOWING THE JUDGE, SHE PROBABLY DID DO THAT, BUT AGAIN, THIS COURT SETS OUT IN ITS DIRECT OPINION WHAT WAS DONE TO CURE THE ERROR AND THIS COURT FOUND IT WAS INDEED HARMLESS.

A NUMBER OF THINGS THAT THE JURY WAS TOLD TO DISREGARD THAT EVIDENCE.@U WAS INSTRUCTED, TO DISREGARD IT AND THE STATE DID NOT REFER TO IT IN CLOSE ARGUMENT, AND, THERE WAS OTHER EVIDENCE, TO ESTABLISH, THE AGGRAVATION, SO, THIS COURT FOUND ON DIRECT APPEAL, THAT IT WAS HARMLESS ERROR FOR STATE TO INTRODUCE THIS, NOW, AGAIN, IN THE CONTEXT

OF THIS I MAY BE WRONG BUT I BELIEVE IT IS ONLY RAISED IN HIS STATE HABEAS IN A CUMULATIVE ERROR, ARGUMENT, I DON'T BELIEVE THERE IS MUCH WRITTEN ABOUT IT.

IN HIS HABEAS PETITION BUT OBVIOUSLY APPELLATE COUNSEL RAISED THIS ISSUE DIRECTED -- SO, HE CLEARLY CANNOT SHOW THAT THAT IS CAUSE FOR WARRANT RELIEF IN THIS CASE. NO FURTHER QUESTIONS THE STATE WILL ASK THAT THIS COURT AFFIRM.

THANK YOU.

>> REBUTTAL?

>> YES, YOUR HONOR.,,

>> -- MISPLACED, CHANDLER, SPECIFICALLY REFERRED TO ADJECTIVES IN THE GUILT -- IMPROPER ADJECTIVES THE COURT DETERMINED -- TERMED TO BE ME TO BAD TASTE IN THE ROGERS CASE WE HAVE WHOLE ARGUMENTS, NOW --

>> THE QUESTION ON PREJUDICE, THOUGH FOR CHROERGS ARGUMENT WE SEE THIS A LOT WHERE,, YOU KNOW WE EITHER THINGS OBED TO NOT OBED TO THEN WE SAY FUNDAMENTAL ERROR OR NOT, THE QUESTION ON POST CONVICTION, IS -- IS THE STANDARD FOR PREJUDICE LOWER THRESHOLD THAN FOR FUNDAMENTAL ERROR.

LET'S JUST ASSUME WE HAD WHOLE LOT OF CLOSING ARGUMENTS THAT WERE IMPROPER IN THIS CASE.

WHICH YOU STLAD WERE.

BUT THE COURT FINDS THAT IT IS NOT FUNDAMENTAL ERROR, WOULD YOU SAY THAT, AGAIN, THAT UNDER CHAND LR, DOESN'T THAT FORECLOSE A PREJUDICE FINDING, AS FAR AS ANY ACTIONS TO DEAL WITH THE CLOSING ARGUMENT.

>> JUST -- I'M SAYING THAT HIS -- CHANDLER IS MISPLACED CHANDELIER WAS CONCERNED WITH THE GUL PHASE AND IT

WAS SIMPLE ADJECTIVE --
HARMLESS, AND IMPROPER.
IN THE ROGERS CASE, YOU HAD
WHOLE ARGUMENTS, DENIGRATION
OF MITIGATION, FOR EXAMPLE --
>> AGAIN, LET ME TRY IT ONE
MORE TIME.

IF THE COURT FINDS THAT
SOMETHING IS NOT FUNDAMENTAL
ERROR WHATEVER IT IS WHEN IT
IS GUILT PHASE ARE OPENITY
PHASE, CAN THAT FORM THE
BASIS FOR FINDING PREJUDICE
UNDER STRICKLIN AFTER THE
COURT HAS ALREADY FOUND IT
NOT TO BE FUNDAMENTAL ERROR,
IN THE DIRECT APPEAL.

>> YES.

I WOULD MAINTAIN IT --

>> YOU ARE IN OTHER WORDS IT
WAS HAVING -- SYSTEM THIS HE
WE WOULD PUT IN PLACE
ALTHOUGH WE WOULDN'T REVERSE
FOR THESE ARGUMENTS ON
DIRECT APPEAL, WE COULD GIVE
A NEW TRIAL FOR THE SAME
ARGUMENTS, ON POST
CONVICTION, IF WE FIND THE
PERSON SHOULD HAVE OBJECTED.

>> YES, JUDGE, BECAUSE --
BECAUSE -- THE CRUX OF THE
MATTER IS IT NEVER BROUGHT
TO THE COURT'S ATTENTION
BECAUSE YOU -- WAS
INEFFECTIVE, BECAUSE HE WAS
INEFFECTIVE, THE COURT
COULDN'T EXAMINE THOSE
ARGUMENTS.

ESPECIALLY TAKEN CUTE LATTIVELY
TELL ME ABOUT LOOKS LIKE WE
DID GO OVER THIS MISDEMEANOR,
ARGUMENT, AND, FOUND THAT
THE JUDGE DID SUFFICIENT
CURETIVE STEPS WHAT IN THIS
CASE ARE YOU SAYING EITHER
TRIAL COUNSEL OR PAILLET
COUNSEL DID WRONG WITH
REGARD TO THE MISDEMEANOR --

>> WHAT I'M SAYING, HE
DIDN'T TAKE IT KRUM LATTIVE,
IN REGARDS TO THE OTHER
ARGUMENTS.

>> WHAT ABOUT THE FACT THAT
I WROTE ON IT.

KUM LATTIVELY.

>> I WROTE ON IT IN A PARTIAL DISSENT, ALREADY WHICH MEANS OBVIOUSLY THE MAJORITY OF THE COURT DID NOT AGREE WITH THAT CUMULATIVE ANALYSIS THERE. SO, INDEED HAVEN'T WE IN EFFECT ALREADY CONSIDERED YOUR CUMULATIVE ARGUMENT AND REJECTED IT.

>> NO, I WOULD SUBMIT PURSUANT TO --.

VERY THE UNITED STATES THAT WE HAVE DEVELOPED THE CUMULATIVE ARGUMENT AND IMPROPER PROSECUTORIAL COMMENT ARGUMENT SUFFICIENTLY IN POST CONVICTION TO JUSTIFY THIS COURT GRANTING MR. ROGERS NEW PENALTY FACE.

>> IS YOUR ARGUMENT EVEN THOUGH THERE IS NOTHING THE TRIAL COUNSEL DID WRONG, REGARDING THE MISDEMEANOR -- TESTIMONY -- COUNSEL, AND EVEN THOUGH THERE IS NOTHING THAT APPELLATE COUNSEL DID WRONG THAT IN LOOKING AT THE WHEN OUR OFFICE IN THE OUTCOME IS UNDERMINED, WE SHOULD LOOK AT THAT IMPROPER -- HAVING HEARD THAT IMPROPER TESTIMONY?

IS THAT WHAT -- GOING TO THE PREJUDICE PRONG -- WE LOOK AT THINGS THAT WERE HE ONOUSLY PUT BEFORE THE JURY.

>> I WOULD SUBMIT THE COURT SHOULD DO THAT.

NOW, YES, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION ACCORDING TO THIS COURT, HOWEVER, AS I SAID, IT IS QUOTED IN MY REPLY BRIEF, I CAN'T FIND WHICH ONE OF THEM WHETHER PART OF HABEAS OR INITIAL BRIEF BUT THE DID SAY YOU BETTER COME BACK HERE WITH A CASE THAT JUSFIES ME GIVING THIS AS A MISDEMEANOR YOU BETTER DO THIS, YOU CAN SEE THE

DRIPPING SCORN SHE USE AND THE PROSECUTOR, THE COURT GRANTED RELIEF ON THE SAME ARGUMENTS.

THIS WAS THE SAME ARGUMENTS, THE SAME ETHICALLY CHALLENGED PROSECUTION TEAM THAT ADVANCED THESE ARGUMENTS, THE SAME -- >> RUIZ -- THE -- ATTORNEY FOR THE STATE SAYS IN RUIZ WE HAVE MULTIPLE ARGUMENTS WHERE THAT WERE IMPROPER WHEREAS HERE, THE ARGUMENT IS BEING MADE, THAT THE OTHER ARGUMENTS THAT WERE MADE BY THE PROSECUTOR THE ONE THAT YOU ALLEGE DENIGRATED, THE MITIGATING MENTAL MITIGATING THAT DENIGRATED HIS CHILD -- TRIAL WERE NOT IMPROPER ARGUMENTS WHAT WE HAVE LEFT IS THE DESERT STORM ARGUMENT AS OPPOSED TO A IN RUIZ THERE WERE MULTIPLE ARGUMENTS.

>> -- CONTENDED WHEN HARRY SAID WHEN ARE WE GOING TO STOP BLAME OUR PARENTS IF COUNSEL HAD READED WEIBERG THAT ADDRESS -- NYBERG ADDRESSES SAME ISSUE USED WHEN 14 WAS 34 WHEN HE COMMITTED THE CRIME. THE COURT SAID THIS COURT SAID, THAT IS RIDICULOUS, BECAUSE SOMEONE WHO WAS ABUSED AT AGE 14.

WILL CARE THOSE SCARS OF ABUSE FOR THE REST OF THEIR LIFE EDIDN'T OBJECT TO THAT HE DIDN'T OBJECT TO THE IMPROPER CHARACTERIZATION OF THE COUNSEL AS HAVING A VIVID IMAGINATION HE DIDN'T OBJECT TO THE EMOTION OF THE VICTIM'S FINAL MOMENTS. HE DIDN'T DO IT BECAUSE HE DIDN'T KNOW IT.

HE DIDN'T READ THESE -- ALL -- >> THESE ARGUMENTS OTHER THAN THE STATE'S ARGUMENT IS ON DIRECT APPEAL, THIS COURT

A DEALT WITH ALL OF THE ARGUMENTS EXCEPT THE ARGUMENT CONCERNING THE VICTIM WAS THINKING AND GO TO THROUGH AT THE TIME AT THAT THE MURDER WAS COMMITTED DID THIS COURT NOT -- HAVE THOSE ARGUMENTS BEFORE IT?

>> I DON'T THINK THE COURT DID.

I -- I DON'T THINK THE COURT TOOK CONSIDERATION ANY OTHER ARGUMENT EXCEPT THE DESSTORM ARGUMENT, AND THE CALIFORNIA MISDEMEANOR.

THAT IS WHY I --

>> SAYING THAT THOSE OTHER ARGUMENTS WERE PRESENT OWED.

>> I'M NOT GO TO SWEAR UNDER OATH HERE THAT MY MEMORY IS ENTIRELY PERFECT BUT I REMEMBER WRITEING THE CLAIMS.

>> LET ME MAKE A -- DIFFERENT AS TO WHEN OR NOT ALL OF THOSE ARGUMENTS THAT HAVE ABOUT BEEN CONSIDERED AND FOUND NOT HE AS OPPOSED TO NOW YOU ARE SAYING ALL OF THESE ARGUMENTS ARE IMPROPER AND WHEN YOU LOOK AT THEM TOGETHER YOU MAKE YOUR KRUMTIVE ERROR ARGUMENT.

>> I'M ALSO SAYING, SINGULARLY IN ADVOCATE -- AGGREGATE IF COUNSEL OBJECTED TO ANY OF THESE ARGUMENTS THIS COURT WOULD HAVE -- IT DID NOT.

BECAUSE COUNSEL DID NOT OBJECT TO THIS, THAT IS WHY WE HAVE HEARING WHY DIDN'T YOU OBJECT TO THIS WHY DIDN'T I OBJECT TO THAT, I DIDN'T THINK --

>> KIND OF ANSWER WE GOT FROM HIM.

THERE WAS A CHANGE IN THE LAW, UH I WOULD HAVE OBJECTED TO THAT ONE.

AND IT WASN'T APPEALED TO A MOTION IT WAS SOIM PROPER THAT THIS COURT MENDED THIS

IS WHAT PROCEEDING
INSTITUTED AGAINST -- FOR
THE ARGUMENTS OF RUIZ AND
ARGUMENTS IN ROGERS.
>> YOU HAVE NOW EXHAUSTED
YOUR TIME -- BRING YOUR
ARGUMENT TO A CONCLUSION
PLEASE THANK YOU VERY MUCH --
-- THANK YOU VERY MUCH, YOUR
HONOR.
>> THANK YOU FOR ALL YOUR
ARGUMENTS, WE'LL TAKE THE
CASE UNDER ADVISEMENT, THANK
YOU.
>>