

>> ALL RISE.

HEAR YE, HEAR YE, HEAR YE, THE  
SUPREME COURT OF FLORIDA IS NOW  
IN SESSION.

ALL WHO HAVE CAUSE TO PLEA, DRAW  
NEAR.

GIVE ATTENTION, YOU SHALL BE  
HEARD.

GOD SAVE THESE UNITED STATES,  
THE GREAT STATE OF FLORIDA AND  
THIS HONORABLE COURT.

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

PLEASE BE SEATED.

>> GOOD MORNING.

WELCOME TO THE FLORIDA SUPREME  
COURT.

BEFORE WE BEGIN WITH OUR CASES,  
THERE'S A COUPLE OF GROUPS HERE  
OF STUDENTS THAT I WANT TO  
INTRODUCE.

FIRST OF ALL, WE HAVE THE SENATE  
PAGES HERE TODAY.

WILL YOU PLEASE STAND?

THANK YOU.

THANK YOU.

AND ALSO WITH US TODAY ARE  
STUDENTS FROM FLORIDA ATLANTIC  
UNIVERSITY.

WILL YOU PLEASE STAND.

THANK YOU.

OKAY.

NOW, THE FIRST CASE ON THE  
DOCKET TODAY IS ELLERBEE V. THE  
STATE OF FLORIDA.

WHENEVER YOU'RE READY, COUNSEL.

>> GOOD MORNING.

MAY IT PLEASE THE COURT, MY NAME  
IS NICOLE NOEL, THIS IS MY  
CO-COUNSEL, MARTA, AND WE  
REPRESENT TERRY ELLERBEE.

WE ARE HERE ON APPEAL OF THE  
DENIAL OF MR. ELLERBEE'S INITIAL  
MOTION FOR POST-CONVICTION  
RELIEF AS WELL AS A PETITION FOR  
WRIT OF HABEAS CORPUS.

AND I'D LIKE TO BEGIN BY  
DISCUSSING MR. ELLERBEE'S  
ENTITLEMENT TO RELIEF IN THE  
FORM OF A NEW PENALTY PHASE

BASED ON THE HEARST DECISIONS.  
FIRST, REGARDING RETROACTIVITY  
BRIEFLY, MR. ELLERBEE'S  
CONVICTION WAS FINAL AFTER RING,  
AND UNDER THIS COURT'S HOLDING  
IN MOSELEY, MR. ELLERBEE'S  
CLEARLY FALLS INTO THE CATEGORY  
OF INDIVIDUALS WHO ARE ENTITLED  
TO RETROACTIVE OPINION BASED  
ON WIT.

HIS DEATH SENTENCE IS  
UNCONSTITUTIONAL UNDER THE 6TH,  
THE 8TH AMENDMENTS IS AND ALSO  
THE FLORIDA CONSTITUTION.

THERE IS A DIFFERENCE BETWEEN A  
HEARST V. FLORIDA CLAIM  
REGARDING JURY FACT TIDING AND  
REGARDING JURY UNANIMITY.  
HEARST V. FLORIDA ONLY DEALT  
WITH THE 6TH AMENDMENT, THAT THE  
JURY HAS TO DEAL WITH ALL THE  
FACTUAL FINDINGS.

HEARST VERY FLORIDA DID NOT  
ADDRESS UNANIMITY, NOR AN  
INDIVIDUAL JUROR'S RIGHT TO VOTE  
FOR LIFE AS AN EXPRESSION OF  
MERCY.

THIS COURT HELD THAT THE  
FUNDAMENTAL RIGHT EMBODIED IN  
THE FLORIDA CONSTITUTION  
REQUIRES THE JURY'S FINDINGS TO  
BE UNANIMOUS WITH RESPECT TO THE  
EXISTENCE OF AGGRAVATORS, THE  
SUFFICIENCY OF THE AGGRAVATORS  
AND THE FACTUAL FINDING THAT THE  
AGGRAVATORS OUTWEIGH THE  
MITIGATORS.

>> WELL IN THIS CASE YOU HAD A  
JURY RECOMMENDATION OF 11-1--

>> THAT'S CORRECT, YOUR HONOR.

>> AND YOU HAD AS ONE OF THE  
AGGRAVATING FACTORS THAT THE  
CRIME WAS COMMITTED WHILE HE WAS  
ON FELONY PROBATION, CORRECT?

>> YES.

>> AND SO THAT'S NOT AN ISSUE  
THAT REQUIRED ANY FACTUAL  
FINDINGS BY THE, BY THE JURY,  
CORRECT?

AND SO WHY WOULDN'T THIS CASE

FALL INTO THE HARMLESS ERROR ANALYSIS SINCE THE SUPREME COURT, THE UNITED STATES SUPREME COURT DID SAY THAT THE STATES COULD APPLY HARMLESS ERROR ANALYSIS TO THESE CASES?

>> YES, THAT'S CORRECT, YOUR HONOR.

AND MR. ELLERBEE'S ARGUES THAT THE HEARST ERROR IN THIS CASE WAS NOT HARMLESS--

>> WOULD YOU KEEP YOUR VOICE UP, PLEASE?

>> OH, YES.

SORRY.

THE THIS CASE IS NOT AMONG THE MOST AGGRAVATED AND LEAST MITIGATED CASES.

THE JUDGE ONLY FOUND THREE AGGRAVATORS.

THE JURY WAS PRESENTED WITH AND INSTRUCTED ON FIVE, BUT THE JUDGE ENDED UP ONLY FINDING THREE.

HE HAD COMBINED THE FELONY MURDER AND PECUNIARY GAIN AGGRAVATORS INTO ONE, AND THERE WAS THE FACT HE WAS ON FELONY PROBATION, HE HAD A WITHHOLD FOR GRAND THEFT.

HE DIDN'T HAVE A VERY SIGNIFICANT CRIMINAL HISTORY PRIOR TO THIS.

AND THEN ALSO CCP.

THE JUDGE ALSO FOUND 21 OUT OF 23 PROPOSED NONSTATUTORY MITIGATORS.

AND ONE JUROR VOTED FOR LIFE EVEN WITHOUT THE EXTENSIVE MITIGATION THAT WAS PRESENTED AT THE POST-CONVICTION AT THE EVIDENTIARY HEARING WHICH RESULTED IN A DEFICIENT PERFORMANCE FINDING FROM THE LOWER COURT FOR FAILURE TO INVESTIGATE AND PRESENT SUBSTANTIAL MITIGATION--

>> [INAUDIBLE]

ON THE, WHAT WAS THE FELONY PROBATION?

WHAT WAS HE ON FELONY--

>> I BELIEVE IT WAS GRAND THEFT OF A FIREARM, YOUR HONOR--

>> SO IT WAS A NON-- I MEAN, I DON'T KNOW-- IT WAS NOT A CRIME AGAINST ANOTHER PERSON?

>> CORRECT.

THAT'S CORRECT.

SO THE LOWER COURT DID FIND DEFICIENT PERFORMANCE AND FAILURE TO INVESTIGATE AND PRESENT MITIGATION.

MR. ELLERBEE'S HAD SUFFERED HORRIBLE ABUSE AT THE HANDS OF BOTH OF HIS PARENTS--

>> YEAH, I THOUGHT IT WAS INTERESTING THAT IN LIGHT OF HEARST WHETHER FOCUSING ON WHETHER THIS JUDGE WOULD HAVE STILL IMPOSED DEATH REALLY IS NOT THE WAY TO LOOK AT THE PREJUDICE PRONG, IS IT?

>> THAT'S RIGHT, YOUR HONOR. ALSO MR. ELLERBEE'S HAD ARGUED IN THE INITIAL BRIEFINGS THAT THE JUDGE'S FINDINGS, WELL, THEY'RE ESSENTIALLY MEANINGLESS. AND, CERTAINLY, THERE ARE NO FINDINGS ON WHICH HE COULD BASE A STRICKLAND PREJUDICE ANALYSIS. BECAUSE UNDER HEARST V. FLORIDA, THOSE FACTUAL FINDINGS WOULD HAVE NEEDED TO HAVE BEEN MADE BY THE JURY, AND IN THIS CASE THEY WERE MADE BY THE JUDGE.

SO MR. ELLERBEE'S, THE LOWER COURT FOUND HE HAD EXPERIENCED NINE OUT OF TEN OF THE ADVERSE CHILD EXPERIENCE RISK FACTORS, THE TENTH BEING AT LEAST PROBABLE. ONE EXPERT CHARACTERIZED IT AS THE KIND OF PSYCHOLOGICAL AND PHYSICAL ABUSE THAT WAS, QUOTE, A FRONTAL ASSAULT ON THE VERY PROCESS OF BEING HUMAN. AND THIS WAS THE MITIGATION THAT WAS PRESENTED AT THE EVIDENTIARY HEARING WHICH THIS JURY NEVER HEARD.

AND EVEN WITHOUT HEARING THAT  
SUBSTANTIAL, EXTENSIVE  
MITIGATION, ONE JUROR STILL  
VOTED FOR LIFE.

AND SINCE THIS COURT ISSUED  
HEARST V. STATE LAST OCTOBER,  
THE COURT HAS CONSISTENTLY HELD  
THAT A NON-UNANIMOUS  
RECOMMENDATION CANNOT BE SAID TO  
BE HARMLESS BECAUSE IT WOULD  
RESULT IN THE SORT OF  
SPECULATION THAT THE COURT  
CANNOT ENGAGE IN WHEN DOING  
HARMLESS ERROR ANALYSIS.  
RECENTLY, THIS COURT HAD DECIDED  
THE PAUL BEASLEY JOHNSON CASE,  
AND THAT CASE INVOLVED THREE  
11-1 RECOMMENDATIONS.

HE HAD FOUR AGGRAVATORS  
INCLUDING CCP AND A LAW  
ENFORCEMENT VICTIM BUT ALSO HAD  
EXTENSIVE AND COMPELLING  
MITIGATION, SO THAT CASE IS MOST  
SIMILAR TO THIS WHERE--

>> YOU WANT TO ADDRESS, SINCE IT  
LOOKS LIKE PRECEDENT IS IN YOUR  
FAVOR IN THIS ISSUE, THE ISSUE  
OF THE GUILT THAT YOU'RE SAYING  
THAT HE, THE LAWYER DID NOT  
PURSUE A CONSISTENT THEORY OF  
THE DEFENSE?

BUT HERE YOU'VE GOT, I MEAN, I'M  
SKEPTICAL OF THAT CLAIM BECAUSE  
YOU'VE GOT A CONFESSION, YOU GOT  
HIS DNA.

YOU REALLY, I MEAN, WHAT COULD  
YOU HAVE PURSUED FOR THIS  
DEFENDANT TO HAVE GOTTEN A  
CHANCE OF A NOT GUILTY VERDICT?

>> IT WAS A DIFFICULT SITUATION,  
I'LL GRANT YOU, YOUR HONOR.  
WITH THE TRIAL COUNSEL WE'RE  
FACING IN THIS TRIAL.

BUT THE STATE'S THEORY WAS  
FELONY MURDER, THAT THIS HAD  
OCCURRED DURING A BURGLARY.  
AND TRIAL COUNSEL, THE SECOND  
CHAIR TRIAL COUNSEL WHO DID THE  
OPENING AND CLOSING ARGUMENTS AT  
THE GUILT PHASE WHO WAS VERY

INEXPERIENCED, HE HAD NEVER DONE A JURY TRIAL BEFORE THIS.

AND HE TOLD THE JURY THAT THEY COULD FIND HIM NOT GUILTY IF THEY FOUND THAT IT WAS AN ACCIDENTAL SHOOTING THAT HAD OCCURRED DURING A BURGLARY.

WELL, OBVIOUSLY, THAT'S STILL--  
>> I GUESS MAYBE ANOTHER WAY TO LOOK AT THAT QUESTION IS THAT IF YOU'RE GOING TO ARGUE THAT THE DEFENSE SHOULD HAVE PURSUED A DIFFERENT THEORY OF DEFENSE, WHY DON'T YOU TELL US WHAT THAT THEORY COULD HAVE BEEN, BECAUSE I DIDN'T WANT SEE THAT ANYWHERE IN YOUR BRIEF.

>> WELL, CERTAINLY THERE WERE A LOT OF FACTORS AGAINST MR. ELLERBEE'S DEFENSE AT THE TRIAL.

BUT IT CAN BE A VIABLE AND REASONABLE STRATEGY TO CONCEDE GUILT IN THE GUILT PHASE AND IMMEDIATELY BEGIN TO PURSUE A MITIGATION STRATEGY EVEN AT THE GUILT PHASE--

>> WELL, WAIT, WAIT, WAIT, WAIT. TRYING TO UNDERSTAND.

THAT IS YOUR THEORY FOR THE GUILT, IS THAT THEY SHOULD HAVE ADMITTED GUILT?

>> WELL, ESSENTIALLY, THEY DID.  
[LAUGHTER]

BUT WHAT THEY WERE DOING WAS TELLING THE JURY THAT THE ONLY WAY THEY COULD ACQUIT IS IF THEY IGNORED THE JUDGES' INSTRUCTIONS AND DISREGARDED THE LAW-- THE JUDGE'S INSTRUCTIONS AND DISREGARDED THE LAW.

>> AGAIN, YOU'VE BEEN ASKED TWICE, AND I'M STILL WAITING TO HEAR AN ANSWER BECAUSE I THINK THAT'S A KEY QUESTION.

I AGREE WITH JUSTICE LAWTON, WHAT IS THE DEFENSE?

YOUR POSITION IS, ON PAPER THAT THIS-- ON PAPER, IS THAT THESE LAWYERS, AND I THINK ONE OF

WHICH HAS ALREADY PASSED AWAY?

>> YES.

HE WAS DECEASED BEFORE THE EVIDENTIARY HEARING.

>> THAT THESE LAWYERS DID NOT PURSUE A CONSISTENT, VIABLE THEORY OF DEFENSE.

RIGHT?

>> THAT'S CORRECT.

>> YOU'VE BEEN ASKED TWICE, WHAT IS THAT VIABLE, CONSISTENT THEORY OF DEFENSE.

AND I'D LIKE TO HEAR AN ANSWER ALSO TO THAT BEFORE WE JUST TALK ALL AROUND THAT.

WE'RE WASTING TIME IF WE'RE JUST TALKING THEORETICS ALL AROUND THE ROOM ON THAT ISSUE.

>> WELL, AGAIN, CERTAINLY THEY HAD A DIFFICULT TIME--

>> SEE, THAT'S NOT AN ANSWER, THEY HAD A DIFFICULT TIME.

[LAUGHTER]

DID THEY OR DID THEY NOT HAVE ANY VIABLE THEORY OF DEFENSE THEY COULD HAVE RESTED ON?

>> I GRANT YOU THAT'S PROBABLY NOT--

>> IT'S BETTER TO BE CANDID THAN TO DANCE AROUND THAT QUESTION AND WASTE TIME TALKING ABOUT A NON-ISSUE.

>> RIGHT.

>> THAT'S-- IF THERE'S SOMETHING WE MISSED, THEN WE WANT TO KNOW.

>> RIGHT.

>> THE PROBLEM WITH THIS CASE IS, POST-CONVICTION CASE IS THAT A LOT OF MONDAY MORNING QUARTERBACKING GOES ON.

AND HERE YOU HAVE A CASE WHERE, LIKE JUSTICE PARIENTE SAID, THERE'S DNA, HE MADE A FULL CONFESSION IN DETAIL ABOUT HOW HE COMMITTED THIS MURDER, AND THERE WASN'T REALLY MUCH A LAWYER CAN DO WITH IT.

AND WHEN THEY DO TRY SOMETHING-- AND, OBVIOUSLY, IT

DOESN'T WORK-- THEN WE HAVE A LAWYER ARGUING HERE TO US THAT THEY SHOULD HAVE TRIED SOMETHING DIFFERENT.

AND WHAT WE WANT TO KNOW IS WHAT IS THAT DIFFERENT THING THAT YOU WANT THEM TO DO.

THAT'S THE PROBLEM WE HAVE WITH THESE CASES.

>> RIGHT.

AND I UNDERSTAND THAT, YOUR HONOR--

>> YOU CONCEDING THIS ISSUE?

>> I'M SORRY?

>> YOU CONCEDING THIS ISSUE, THAT YOU CAN'T GET RELIEF ON THIS POINT FOR THE GUILT--

>> I WOULD NOT EXPECT TO GET RELIEF ON THE GUILT PHASE CLAIMS.

AND I BELIEVE I'M INTO MY REBUTTAL--

>> DO YOU WANT TO ADDRESS YOUR CHANGE OF VENUE ARGUMENT?

>> WELL, THERE WAS QUITE A BIT OF PRETRIAL PUBLICITY IN THIS CASE, AND I DON'T KNOW IF ANY OF YOU ARE FAMILIAR WITH OKEECHOBEE, BUT IT'S A VERY--

[LAUGHTER]

SORT OF SMALL, TIGHTLY-KNIT COMMUNITY.

EVERYBODY KNOWS EVERYBODY ELSE, AND THERE WERE COMMENTS MADE, I BELIEVE BY THE PROSECUTOR, DURING JURY SELECTION THAT I WOULDN'T WANT TO HAVE ANYBODY ON MY JURY WHO WAS FRIENDS WITH THIS LEAD DETECTIVE, BECAUSE EVERYBODY KNEW HIM.

>> WELL, IT SEEMS TO ME FROM THE RECORD THAT THERE WERE SOME 30 SOME PEOPLE WHO SAID THEY HAD SOME KIND OF KNOWLEDGE OR REMEMBER HEARING ABOUT THE CASE, AND MOST OF THOSE PEOPLE WERE EXCUSED, CORRECT?

AND SO WHO WAS ON THE JURY THAT YOU CAN TAKE ISSUE WITH?

>> WELL, I BELIEVE THAT MOST OF

THE PEOPLE WHO HAD SAID THAT THEY HAD, THAT THEY HAD SOME KNOWLEDGE OF HIM, BUT I A ALSO BELIEVE I THINK THERE WERE A FEW-- I'M SORRY, I DON'T KNOW EXACTLY THE NUMBER--

>> THEY KNEW SOMEONE.

>> RIGHT.

WHO HAD EXPRESSED SOME KNOWLEDGE OF SOMEONE WHO WAS INVOLVED IN THE TRIAL, AND AS THE--

>> WELL, IN THIS SMALL COMMUNITY, AS YOU JUST MENTIONED, I WOULD THINK THAT IN MOST TRIALS SOMEONE WOULD KNOW SOMEONE WHO WAS IN THE SHERIFF'S DEPARTMENT OR SOMEONE-- BUT THAT DOESN'T NECESSARILY ELIMINATE THEM FROM A JURY IF THEY SAY THAT THEY CAN BE FAIR AND IMPARTIAL.

>> RIGHT.

THAT'S, THAT'S TRUE, YOUR HONOR, YES.

AND ALSO A LOT OF THE COMMUNITY MEMBERS, I BELIEVE, WERE FAMILIAR WITH THE ELLERBEE FAMILY.

THE ELLERBEE FAMILY HAD BEEN IN THE AREA FOR A LONG TIME AND HAD A CERTAIN REPUTATION IN THE COMMUNITY.

I JUST-- IN THOSE CIRCUMSTANCES, THE TRIAL COUNSEL SHOULD AT LEAST HAVE REQUESTED A CHANGE OF VENUE, WHICH THEY DIDN'T DO.

AT LEAST TO MAKE SURE THAT THERE WAS GOING TO BE NO WHEREAS COMING FROM THE COMMUNITY--

>> BUT IS IT THEIR BURDEN TO DEMONSTRATE, NOT JUST THAT THEY SHOULD HAVE MADE THE ARGUMENT THAT MORE LIKELY THAN NOT THE TRIAL JUDGE WOULD HAVE GRANTED IT?

>> YES, YOUR HONOR.

>> AND DO YOU THINK YOU'VE ESTABLISHED THAT IN THIS CASE?

>> I BELIEVE THAT'S DIFFICULT TO ESTABLISH FROM THIS RECORD.

>> THANK YOU.

>> LET ME ASK YOU THIS ABOUT THE JOURNAL, THE DIARY SUPPOSEDLY THAT YOUR CLIENT KEPT.

>> THE NOTES.

>> THE NOTES.

>> YES.

>> I'M CONFUSED ABOUT--

SUPPOSEDLY HE WAS KEEPING NOTES ON HIS RESEARCH OF THE AREA, AND HE WAS PLANNING ON DOING A LOT OF BURGLARIES OF THOSE HOMES AND KIND OF LIVING OFF OF THAT, AND HE'D SAID IN THERE THAT HE WOULD KILL.

AND HE MENTIONED A PARTICULAR NAME THAT WAS NOT THE VICTIM IN THIS CASE.

WHEN-- WHAT I'M CONFUSED ABOUT IS MY UNDERSTANDING IS THE POLICE CAME TO POSSESS THOSE NOTES FROM HIS FAMILY.

>> YES.

>> BUT WERE THE NOTES TURNED OVER TO THE POLICE BEFORE THIS MURDER?

OR AFTER THIS MURDER?

THAT'S WHAT I'M A LITTLE CONFUSED ABOUT.

>> I BELIEVE THE NOTES WERE TURNED OVER BEFORE THIS HAPPENED.

THE ISSUE WITH THE NOTES, WELL, THERE ARE SEVERAL ISSUES WITH THE NOTES.

THE NOTES WERE FOUND IN HIS CAR, I BELIEVE BY HIS FATHER, WHO IT TURNED OUT IS HIS PRIMARY ABUSER WHICH WE PRESENTED IN POST-CONVICTION EVIDENTIARY HEARING.

HIS FATHER-- HIS FATHER'S BROTHER, RATHER, HIS UNCLE, WAS A SHERIFF IN OKEECHOBEE, AND SO HIS DAD GAVE HIS UNCLE THE NOTES, AND THAT WAS HOW THEY CAME TO BE IN THE POSSESSION OF--

>> I GUESS THE DAD READ THE NOTES AND BECAME CONCERNED THAT HE MAY FOLLOW THROUGH ON THE PLAN TO KILL SOMEBODY, AND HE TURNED THE NOTES OVER TO HIS BROTHER, THE SHERIFF.

>> THAT'S CORRECT.

>> BUT THAT WAS BEFORE THIS MURDER.

>> YES.

>> OKAY.

>> BUT THE NOTES WERE NOT DATE CANNED.

I MEAN, THEY HAD NO IDEA WHEN THOSE NOTES WERE WRITTEN.

THEY COULD-- WRITTEN.

THEY COULD HAVE BEEN WRITTEN MONTHS BEFORE, YEARS BEFORE.

THEY DIDN'T SAY SPECIFICALLY THIS AMERICAN, THIS ADDRESS, AND IF YOU READ THE CONTENT OF THE NOTES, IT WAS REALLY MORE KIND OF SURVIVALIST TYPE OF STUFF, YOU KNOW, LISTS OF FOOD AND, YOU KNOW, THINGS THAT YOU WOULD NEED TO SURVIVE OUT ON THE PRAIRIE. THAT SORT OF THING.

AND ALSO MR. ELLERBEE'S HAD ARGUED THAT HIS COUNSEL WERE INEFFECTIVE FOR

NOT ONLY NOT ALLOWING, NOT OBJECTING TO THOSE NOTES BEING INTRODUCED AT THE PENALTY FACE, BUT STIPULATING TO THEIR INTRODUCTION.

I BELIEVE HE'S ENTITLED TO A NEW SENTENCING BASED ON HEARST.

>> YOU DIDN'T RAISE AS A SEPARATE ISSUE, I MEAN, WE ON DIRECT APPEAL AS TO THE NOTES BECAUSE IT WAS CONCEDED DID NOT ADDRESS WHETHER THOSE WERE PROPERLY INTRODUCED, WHETHER THE PREJUDICE OUTWEIGHS THE PROBATIVE VALUE, THAT'S SOMETHING THAT COULD BE ADDRESSED AT A NEW PENALTY FACE?

>> THAT'S RIGHT.

YES, YOUR HONOR.

IF THERE ARE NO FURTHER

QUESTIONS, I'LL RESERVE THE REST OF MY TIME.

>> MAY IT PLEASE THE COURT, LISA MARIE LERNER WITH THE ATTORNEY GENERAL'S OFFICE FOR THE STATE OF FLORIDA.

ADDRESSING THE HEARST ISSUE, THE STATE RESPECTFULLY STILL MAINTAINS THAT IT SHOULD NOT BE RETROACTIVE, AND I WILL RELY ON THE ARGUMENTS IN MY PLEADINGS ON THAT.

IN THIS PARTICULAR CASE, ANY ERROR IN THE JURY COMING BACK WITH AN 11-1 RECOMMENDATION INSTEAD OF THE UNANIMOUS ONE IS HARMLESS.

THERE WERE THREE AGGRAVATOR FACTORS, ONE WAS THE CONTEMPORANEOUS ARMED BURGLARY WHICH THE JURY DID CONVICT HIM OF UNANIMOUSLY.

THERE WAS THE FELONY PROBATION WITH, IT WAS A BURGLARY--

>> LET ME JUST GO BACK ON THAT ONE AS FAR AS AN AGGRAVATOR. THE THEORY OF THE CONVICTION FOR FIRST-DEGREE MURDER WAS FELONY MURDER?

>> IT WAS BOTH FELONY MURDER AND PREMEDITATED--

>> WAS THERE A GENERAL VERDICT?

>> YES.

>> SO IF THE JURY CONVICTED HIM BASED ON FELONY MURDER AND THE UNDERLYING FELONY BEING THE BURGLARY, HOW IS AS AN ADDITIONAL AGGRAVATOR THE BURGLARY A VERY STRONG AGGRAVATOR?

IN OTHER WORDS, IT'S SORT OF LIKE THAT WOULD MAKE IT AN AUTOMATIC DEATH PENALTY CASE IF IT WAS A FELONY MURDER CASE, UNDERLYING FELONY'S THE BURGLARY, AND YOU FIND THE BURGLARY AS AN AGGRAVATOR.

>> YES, BUT THAT'S NOT THE SITUATION IN THIS CASE BECAUSE PART OF MR. ELLERBEE'S

CONFESSION WAS THAT HE SAW THIS HOUSE, AND HE STAKED IT OUT FOR A NUMBER OF DAYS WATCHING THE VICTIMS COMING AND GOING.

SO HE KNEW ON THIS PARTICULAR DAY HE SAW THE VICTIM, SAW THE VICTIM LEAVE AND THEN WENT IN THE HOUSE AND LAID IN WAIT.

AND ALL OF THAT WAS BEFORE THE JURY.

>> WE DON'T KNOW-- ALL I'M SAYING ABOUT IT, AGAIN, BECAUSE YOU WERE GOING THROUGH WHAT THE AGGRAVATORS ARE AS IF THESE ARE SUCH STRONG AGGRAVATORS THAT NO JURY COULD EVER VOTE FOR LIFE. AND I'M JUST COMMENTING, AND YOU DON'T SEEM TO AGREE THAT IF ONE OF THE AGGRAVATORS IS THE SAME AGGRAVATOR AS THE BASICALLY FOR THE FELONY MURDER AND THERE'S AN UNDIFFERENTIATED VERDICT, THAT'S NOT, IN MY VIEW AT LEAST, A PARTICULARLY STRONG AGGRAVATOR IN A CASE LIKE THIS.

>> NO, AND I UNDERSTAND YOUR POINT, YOUR HONOR.

BUT THERE'S ALSO THE SECOND AGGRAVATOR THAT HE WAS ON FELONY PROBATION.

I BELIEVE IT WAS A BURGLARY GRAND THEFT.

BUT AGAIN, IT WAS NOT A CRIME AGAINST A PERSON.

>> RIGHT.

SO, I MEAN, AGAIN, AND THEN YOU HAVE ON THE MITIGATION-- YOU HAVE, FIRST OF ALL, THE JURY WAS INSTRUCTED ON FIVE AGGRAVATORS. THE JUDGE FOUND ONLY THREE OF THE FIVE?

>> YES.

>> OKAY.

SO THE-- WHAT WAS THE THIRD? FELONY PROBATION BASED ON THIS NON, THIS NONVIOLENT, I MEAN, BURGLARY PRIOR, AND THEN WHAT WAS THE THIRD AGGRAVATOR?

>> CCP, BASED ON BOTH MR. ELLERBEE'S CONFESSION, THE

EVIDENCE OF HIS GIRLFRIEND THAT SHE GAVE AND ALSO THE DIARY WHICH CAME IN AT THE PENALTY PHASE.

>> OKAY.

SO, AND SO YOU WOULD AGREE THAT IS, WOULD BE A DECISION FOR THE JURY AS TO WHETHER THIS WAS HEIGHTENED PREMEDITATION.

IT SOUNDS LIKE, YOU KNOW, IT SOUNDS LIKE YOU DO HAVE THAT-- LIKE YOU DO HAVE THAT EVIDENCE, SO YOU'VE GOT THAT ONE AGGRAVATOR THAT WE SAW IS A PRETTY STRONG AGGRAVATOR, BUT THEN YOU'VE GOT THE MITIGATION, AND NOW WE HAVE ON TOP OF IT THE MITIGATION THAT WAS NOT PRESENTED TO THE JURY THAT THE JUDGE FOUND THAT THE LAWYER WAS DEFICIENT IN NOT PRESENTING THAT MITIGATION TO THE JURY.

SO HOW CAN WE SPECULATE?

I MEAN, YOU KNOW, WE'VE KIND OF BYPASSED A REALLY IN-DEPTH HARMLESS ERROR ANALYSIS, BUT IT STRIKES ME THAT THIS CASE YOU REALLY CAN'T SAY THAT ANY ERROR WAS HARMLESS.

>> WELL, THE STATE MAINTAINS THAT--

>> YOU'RE CONCEDED THAT UNDER THIS COURT'S PRECEDENT IN HEARST V. STATE THAT THIS IS A REVERSAL ON THE HEARST ISSUE.

>> THE STATE'S OBJECTION, YES.

>> RIGHT.

YOU'RE JUST ARGUING THAT UNDER HEARST V. FLORIDA EVEN IF IT WAS APPLIED RETROACTIVELY SINCE THE JURY UNANIMOUSLY FOUND ONE AGGRAVATOR NECESSARY TO IMPOSE THE PENALTY, THAT THIS WOULD BE HARMLESS ARGUABLY UNDER HEARST, YOU'RE JUST SAYING YOU DISAGREE WITH THE LATEST CASE, BUT YOU UNDERSTAND THAT IT REQUIRES A REVERSAL, IS THAT RIGHT?

>> YES, BUT WE OBJECT.

>> OKAY, I HAD THOUGHT-- I'M

SORRY, I THOUGHT YOU SAID THAT MOSELEY, YOU WERE CONCEDED MOSELEY, BUT I YOU WERE THEN GOING AND SAYING THIS WOULD BE HARMLESS.

SO I TOOK IT YOU WERE ARGUING THE POSITION OF HARMLESS ERROR.

>> SHE WAS.

>> WELL, I WAS ARGUING HARMLESS ERROR.

BUT, YOU KNOW, THE STATE HAS TO MAINTAIN THAT WE OBJECT TO THIS COURT'S PRECEDENTS.

>> SO WE HAVE, AND I THINK YOU'VE ALREADY HEARD THAT YOUR OPPONENT-- AND THIS IS GOOD-- HAS REALLY SAID ON THE GUILT THAT THERE REALLY ISN'T MUCH THERE, SO TO SPEAK.

SO YOU HEARD THAT TOO.

>> YES.

RESPECTFULLY, THE STATE ASKS THE COURT TO AFFIRM THE CONVICTION AND SENTENCE.

>> OKAY.

WELL, THANK YOU FOR YOUR ARGUMENTS.