

>> ALL RISE.
>> PLEASE BE SEATED.
>> WE NOW TAKE UP THE FINAL CASE
ON THE DOCKET TODAY,
SINCHEZ-TORRES VERSUS THE STATE
OF FLORIDA.
>> GOOD MORNING, YOUR HONOR, MY
NAME IS ROBERT BERRY ALONG WITH
CAITLIN, WE ARE REPRESENTING
H...CTOR SINCHEZ-TORRES AND THIS
WAS SIMULTANEOUSLY FILED HABEAS
CORPUS PETITION AND IN
PARTICULAR WHAT I WRITE UP AT
ISSUE ONE IN MY BRIEF, THE ISSUE
OF WHETHER THE GRAND JURY HAS TO
FIND ELEMENTS OF THE OFFENSE IS
THE ISSUE I WANT TO ARGUE TODAY.
THE U.S. SUPREME COURT IN HURST
FOUND THAT AGGRAVATED --
AGGRAVATED ARE ELEMENTS EVEN
CHIEF JUSTICE KENNEDY SAID
AGGRAVATED ELEMENTS AND WE GET
TO AN ISSUE PRETTY QUICKLY FROM
AN EARLIER ARGUMENT A COUPLE OF
WEEKS AGO, ONE OF THE LITIGANTS
FOSTER CONTROLS AND I HAVE TO
SAY THAT THERE'S SOME CONFUSION
IN MY MIND AND AT LEAST MINE,
MAYBE NOBODY ELSE'S ABOUT FOSTER
IS REALLY DOING.
>> DID WE CLARIFY WHATEVER THAT
IS IN ROGERS BECAUSE I THINK I
ASKED THE QUESTION BEFORE ROGERS
CAME OUT?
>> I THINK THAT'S RIGHT
SEQUENTIALLY, I HOPE YOU DID
BECAUSE IT HELPS MY CASE A LOT.
>> OKAY, TELL ME WHY.
>> AS I READ ROGERS, THE LAST
TIME I WASN'T FINAL, I WILL
ASSUME FOR PURPOSES OF OUR
ARGUMENT TODAY THAT IT IS.
>> IT'S OUR PRECEDENT.
>> IT IS YOUR PRECEDENT RIGHT
NOW.
WHAT I THINK THE COURT IS SAYING
IN KEEPING WITH HURST THE BINARY
QUESTION OF EXISTENCE OF
AGGRAVATOR WHETHER CHILD UNDER
12, YOU KNOW, LAW ENFORCEMENT

OFFICER OR HEINOUS ATROCIOUS AND CRUEL, WHAT I THINK THE COURT HAS DONE IN ROGERS AND RIVERA I THINK IS THE MIDDLE ONE AND ROGERS MOST RECENTLY IS RETREATING -- AND I THINK APPROPRIATELY SO, FROM ITS POSITION OUT OF HURST HOW MUCH WAS ASSIGNED TO AGGRAVATOR AND THAT THE COURT IS RECEDING FROM THE --

>> SO COUNSEL, I THINK YOUR READING IS PROBABLY RIGHT. LET'S STIPULATE THAT, AN ELEMENT IS -- AN ELEMENT THAT MUST BE PROVED IN ORDER TO SENTENCE SOMEONE TO DEATH IS THAT THERE IS AN AGGRAVATOR OUT THERE.

>> YES.

>> THE QUESTION IS, DOES IT HAVE TO BE ALLEGED BY THE GRAND JURY WHICH RETURNS THE INDICTMENT AND HOW -- WHERE WE HAVE CASE LAW WHICH HAS SAID THAT IT IS SUFFICIENT ALONE TO PUT SOMEONE ON NOTICE OF THE CHARGES AGAINST THEM TO ALLEGE THE -- THE STATUTE FOR WHICH THEY ARE CHARGED AND GENERALLY INDICATE THE CRIME IN ORDER BURGLARY IN VIOLATION OF THIS PARTICULAR SECTION OF THE STATUTE, THAT'S SUFFICIENT, WHY WOULD IT NOT BE SUFFICIENT TO STATE SOMEONE SENTENCED TO PREMEDITATED DEATH WHICH IS DEATH ELIGIBLE AND HERE IS THE STATUTE AND THE STATUTE INDICATES THAT THERE ARE 7 AND ONLY 7, THERE MAY BE MORE, I'M GUESSING, 7 OR ONLY 7 AGGRAVATING FACTORS WHICH CAN MAKE ONE ELIGIBLE FOR DEATH, WHY IS THAT NOT ENOUGH?

>> BECAUSE I THINK WHAT THE LAW IN -- AND THE STATE'S THINKING WITH ALL DUE RESPECT IS REFLECTED IN YOUR QUESTION IS NOTICE OF GRAND JURY AND IT'S NOT AND THE HISTORY OF THE GRAND JURY DOES NOT SUGGEST ANYWHERE,

I MEAN, FROM AN ORIGINAL STANDPOINT IT'S EASY STUFF, THE GRAND JURY HAS FOUND OUT WHAT BLACK STONE REFERRED TO AS SIMPLY THE ACCUSATIONS, WHAT JUDGE HEARD DOWN THE HALLWAY SAID HERE ARE INTERESTINGLY ENOUGH AGGRAVATORS WHO HAVE BEEN TO BE PLED, RULE PROCEDURE 3.140 SAYS YOU HAVE TO ALLEGE ESSENTIAL FACTS WHICH ARE, I DON'T KNOW HOW YOU GET AROUND THE IDEA THAT AN AGGRAVATORS IS A FACT AND THEN WE TURN WHAT THE U.S. SUPREME COURT IS CALLING ELEMENTS.

>> IF THERE'S A DEFICIENCY IN THE INDICTMENT OR INFORMATION, DO WE HAVE A RULE OF CRIMINAL PROCEDURE WHICH REQUIRES THAT THAT BE BROUGHT TO THE ATTENTION OF THE PARTIES BEFORE TRIAL START OR DURING THE COURSE OF THE PROCEEDINGS?

>> IN CERTAIN INSTANCES 3.10 DOES.

>> RIGHT.

LET ME ASK YOU THIS, WAS THIS BROUGHT TO THE ATTENTION OF ANYBODY DURING THE COURSE OF THE PROCEDURE?

>> NO, ABSOLUTELY.

>> FUNDAMENTAL ERROR?

LET'S GO THROUGH THEM ONE BY ONE.

>> OKAY.

>> IS IT -- WOULD WE REVIEW IT UNDER FUNDAMENTAL STANDARD?

>> I'M GOING TO FRUSTRATE YOU A LITTLE BIT --

>> YOU'RE NOT FRUSTRATING ME.

>> MY VIEW IS GRAY, THE GRAY CASE IS THE DOOR THAT UNLOCKS MY ABILITY TO LITIGATE THIS ISSUE BECAUSE OF THE FAILURE TO ALLEGE AN ESSENTIAL ELEMENT OF THE OFFENSE IN THE CHARGING DOCUMENT.

>> WELL, WOULD WE REVIEW IT UNDER CASE LAW UNDER FUNDAMENTAL

ERROR, IS MY QUESTION?

>> LET'S ASSUME THAT GRAY IS A
FUNDAMENTAL ERROR CASE.

>> OKAY.

HAVEN'T WE SAID THAT WHETHER WE
ARE RIGHT OR WRONG THAT WHERE
THERE'S A FUNDAMENTAL ERROR THAT
IS NOT IN EFFECTIVE ASSISTANCE
OF APPELLATE COUNSEL TO ALLEGE
-- COUNSEL IS NOT FOR FAILURE TO
ALLEGE THE FUNDAMENTAL ERROR?

>> AGAIN, I NEVER WANT TO
FRUSTRATE ANYBODY.

>> YOU'RE NOT.

>> BUT LET ME TELL YOU THE
POSITION I WAS IN AS THE
INHERITOR OF THE CASE FROM AN
ATTORNEY WHO WASN'T QUALIFIED TO
HANDLE THE CASE AT THE CIRCUIT
COURT LEVEL.

I ASKED FOR A REMAND, THIS COURT
DENIED THE REMAND, I COULDN'T
THEN PLEAD AND INEFFECTIVE
ASSISTANCE OF TRIAL COUNSEL
WHICH MAY HAVE BEEN THE BETTER,
IF I HAD HANDLED IT FROM THE
BEGINNING I PROBABLY WOULD HAVE
HANDLED IT THROUGH THAT VEHICLE.

>> SO I THINK YOU MIGHT STILL
RUN INTO THE FUNDAMENTAL ERROR.

>> I THINK SO.

>> EVEN IF IT WASN'T IN
EFFECTIVE ASSISTANCE OF TRIAL
COUNSEL APPELLATE COUNSEL CLAIM,
LET'S GET BEYOND THAT FOR A
SECOND.

YOU MENTIONED STRUCTURAL ERROR,
HAS THIS COURT OR ANY COURT IN
FLORIDA, UNITED STATES SUPREME
COURT OR ANY U.S. CIRCUIT COURT
OF APPEALS IS A GRAND JURY
INDICTMENT?

>> NO.

>> IT'S NOT STRUCTURAL ERROR, NO
ONE EVER SAY IT IS.

>> I DON'T CONCEDE, YOUR HONOR.
YOU KNOW FROM YOUR WORK AS
FEDERAL PROSECUTOR, I DON'T KNOW
IF YOU'VE HANDLED DEATH CASES AS
FEDERAL PROSECUTOR.

>> I DID NOT.

>> I IMAGINE IN DOJ COMPLIANCE THAT YOU SUBMIT ALL OF THE AGGRAVATORS WITH THE EXCEPTION OF ONE TO THE GRAND JURY IN ANY CASE WHERE THE UNITED STATES GOVERNMENT IS SEEKING TO -- IMMEDIATE AND DIRECT RESULT, THEY IMMEDIATELY ADJUSTED PROCEDURES SO THERE WASN'T ANY FEDERAL BASIS TO MAKE THAT ARGUMENT BECAUSE IT WAS TAKEN CARE OF THROUGH --

>> THE QUESTION ISN'T MATTER OF POLICY OR SHOULD OR SHOULDN'T AS A MATTER OF ERROR, IS IN EFFECTIVE FOR APPELLATE ATTORNEY IN REVIEWING THIS RECORD TO HAVE FAILED TO HAVE BROUGHT THIS UP IN THE DIRECT APPEAL AND -- AND --

>> MY POSITION IS YES, BECAUSE WHEN YOU LOOK AT -- BUT FOR THE FAILURE TO ALLEGE -- LET'S ASSUME JUST FOR FUN THAT I'M RIGHT AND THE GRAND JURIES DO HAVE TO FIND AGGRAVATORS IN A CHARGING DOCUMENT JUST LIKE THEY HAVE TO FIND AGGRAVATORS IN A REASONABLE DOUBT --

>> LET ME ASK YOU BEFORE YOU GET THERE.

IS THE CITATION OF GRAND JURY SUFFICIENT TO ALLEGE THAT ALL 7 AGGRAVATORS ARE PRESENT IN THE CASE?

>> THEY ARE OUTLINED ACTUALLY, I'M RETHINKING MY ANSWER, I THINK THERE'S A THROUGH P, SO WHATEVER THAT IS, 16 AGGRAVATORS ARE LISTED IN THE STATUTE.

>> RIGHT.

SO IS THERE REFERENCE IN THE STATUTE --

>> DOESN'T REFERENCE THE STATUTE, IT REFERENCES --

>> THE GRAND JURY STATUTE?

I WANT TO BE CLEAR, THE GRAND JURY IN THIS CASE DID NOT REFERENCE THE DEATH PENALTY

STATUTE?

>> 775087, 775087 SUB 3, THE MURDER STATUTE, DOESN'T GET INTO THE AGGRAVATOR STATUTE, DOESN'T LIST 921, SO THE ANSWER TO YOUR QUESTION IS, NO, IT DOESN'T LIST THAT.

>> OKAY.

>> LET ME ASK YOU A QUESTION ABOUT THIS ARGUMENT.

I'M GOING TO QUOTE ARGUMENT THAT AGGRAVATING CIRCUMSTANCES MUST BE ALLEGED IN THE INDICTMENT, ALSO FROM 2011 AND GOES ONTO SAY NOTHING IN HURST AND PRIOR TO HURST THAT REQUIRE AGGRAVATING CIRCUMSTANCES BE CHARGED IN AN INDICTMENT, THAT'S QUOTING ROGERS FROM 2007, IS THAT THE ISSUE OF LAW THAT YOU'RE ARGUING, THE ONE THAT'S WELL SETTLED IN FLORIDA?

>> I DON'T KNOW HOW IT'S WELL SET UNTILLED THE AFTERMATH OF HURST WHICH CLARIFIES --

>> WELL, I'M QUOTING FROM HALL WHICH IS -- I'M QUOTING FROM HALL WHICH IS -- I'M QUOTING FROM HALL WHICH IS POST FIRST.

>> IT MAY BE SETTLED BECAUSE OF A LIST OF CASES THAT PRECEDED BUT I DON'T KNOW IF THEY ARGUED IN THE CASE THAT THE HISTORY OF GRAND JURY CLAUSE.

I DON'T KNOW HOW YOU RECONCILE ANY HOLDING TO THE CONTRARY WITH THE HISTORY OF GRAND JURY CAUSE THROUGHOUT OUR HISTORY, JUDGE HEARD MENTIONS AGGRAVATORS SPECIFICALLY 1868 AND IF WE ARE ALL AS JUSTICE KAGEN SAID ORIGINALISTS NOW, THAN ANY ORIGINALISTS ANALYSIS OF THE GRAND JURY CAUSE AS IT APPLIES TO THIS SITUATION CLEARLY DEMANDS THAT AGGRAVATORS BE CHARGED BECAUSE THAT'S WHAT THE COMMON LAW REQUIRED.

SO YOU CAN -- I CITED A BUNCH OF CASES AND I THINK I ADDED ONE

THAT I LEFT OUT, MILLER CASE
WHERE THE COURT HAS HELD THE
OPPOSITE OF WHAT I SAID, MY
POINT IS YOU CAN'T RECONCILE
THAT FROM AN ORIGINALIST
STANDPOINT WITH THE GRAND JURY
HISTORY IN OUR STATE MUCH LESS A
MORE BROAD GRAND JURY HISTORY
WHICH THERE'S NO DAYLIGHT
BETWEEN THE TWO.

>> WELL, BUT I DON'T KNOW FROM
AN ORIGINALIST PERSPECTIVE.
THE WHOLE CONCEPT OF THE
AGGRAVATOR IS SORT OF AN EIGHTH
AMENDMENT CREATION THAT ITSELF
KIND OF REJECTED THE COMMON LAW
BASELINE OF SERVING CRIMES
LEADING AUTOMATICALLY TO DEATH,
ET CETERA, ET CETERA, SO I DON'T
KNOW THAT THE -- I DON'T KNOW
THAT PHRASING AN ORIGINALIST
TERMS HELPS US UNDERSTAND THIS.
I MEAN, I UNDERSTAND THAT SORT
OF BY ANALOGY THE SUPREME COURT
FOUND THEM PROVEN BEYOND A
REASONABLE DOUBT AND I DON'T
KNOW THAT THAT HAS BEEN LOOPED
BACK TO TREATING THEM ON THE
FRONT END AS THE SAME AS WHAT IS
TRADITIONALLY UNDERSTOOD AS THE
ELEMENTS OF THE ACTUAL OFFENSE.

>> WELL, UNDER THE COMMON LAW,
THERE WAS A DEFINITION OF
FIRST-DEGREE MURDER AND FELONY
MURDER AND PROBABLY MIRRORS
PRETTY MUCH THE BASIS OF 787.04
IN OUR CURRENT STATUTE.
BUT IF I UNDERSTAND ORIGINALIST
PRINCIPLES AND I DON'T CLAIM TO
BE AN EXPERT BUT I'VE READ A LOT
ABOUT IT, THE PROCESS IS IF YOU
WENT BACK TO THOSE PEOPLE, THE
FOUNDERS AND SAID, HERE IS WHAT
WE ARE GOING TO DO, WE ARE GOING
TO TAKE THE BASIC DEFINITION OF
COMMON LAW MURDER, BUT IN
SOCIETY SAYING, WE WILL
SEGREGATE OUT WHAT SPECIFIC
ELEMENTS --

>> THEY WOULDN'T HAVE HAD -- THE

FOUNDERS, THE WHOLE -- THE AGGRAVATOR REQUIREMENT IS POST FOUNDING INVENTION.

>> THAT'S WHY -- I'M SORRY, THAT'S WHY I -- HE USES THE WORD AGGRAVATORS AND SAID THE FAILURE TO ALLEGE THEM LEAVES THE STATE WITH ONLY THE ABILITY TO PROVE THE CHARGE THAT REFLECTS THE ELEMENTS THAT ARE INCLUDED IN THE CHARGING DOCUMENT AND THE GOVERNMENT FAILS TO ALLEGE THOSE AT THEIR RISK, AT THEIR PERIL. THE ABILITY TO PROSECUTE FOR SERIOUS OFFENSE.

>> BUT COUNSEL, AT THE FOUNDING WE HAD VERY STRINGENT PLEADING REQUIREMENTS INCLUDING THOSE OF PRESERVATION AND -- NONE OF WHAT YOU SAID AFFECTS THAT WE HAVE THE ESTABLISHED RULES OF PRESERVATION THAT -- THAT REALLY SEEM TO PRECLUDE THE CLAIM, RIGHT?

>> NONE ON GRAY, THE DOOR IS OPEN THROUGH GRAY AND EITHER -- I COULD BE READING IT WRONG, DON'T THINK I AM, BUT Y'ALL TELL ME, BUT WHEN YOU TALK ABOUT -- ANOTHER THING YOU HAVE TO LOOK AT WHEN YOU LOOK AT WHAT DO THE FOUNDERS TALK ABOUT, THIS ISN'T SOMETHING THAT JUST EXISTED AS TO ORIGINAL CONSTITUTION, IT WAS IN THE 1838 CONSTITUTION, 1861, 1865, 1868 AND 1885 AND RECENTLY AS 1968.

SO THIS IS A LINE OF THOUGHT THAT HAS -- THAT DOESN'T JUST TIE TO, YOU KNOW, PEOPLE THAT HAVE BEEN DEAD FOR 200 YEARS, I WATCHED YOUR SENATE SYSTEM, IT TIES TO PEOPLE MUCH MORE RECENT THAN THAT BUT -- BUT DOES REFLECT A HISTORY THAT -- THAT PRECEDES ANY OF THE PEOPLE THAT ARE IN THIS ROOM EVER WALKING THE FACE OF THE EARTH.

I -- JUDGE HEARD --

>> AN ERROR IF THAT COULD BE

CORRECTED, RIGHT?
>> YOU'RE TALKING AS OF THAT
TIME OF PERIOD?
>> AS OF ANY TIME, IN THE
HISTORY OF JURIES PRUDENCE?
>> GRAY SAYS NO, GRAY SAYS THAT
YOU CAN DO BY HABEAS CORPUS,
THAT'S WHAT IT SAYS.
>> THERE'S NO CASE IN BETWEEN
THAT SAID SOMETHING DIFFERENT
THAN THAT?
>> I JEOPARDIZED GRAY, I SAW
FIFTH DISTRICT DECISION WHERE --
BUT IT WAS A DIFFERENT SET OF
FACTS, IT WASN'T OF THIS
PARTICULAR ISSUE, YOUR SMILE
SUGGESTS THAT THERE'S SOMETHING
THAT I'M MISSING, WOULDN'T BE
THE FIRST TIME BUT I -- GRAY IS
SUPREME COURT DECISION, IT HAS
NEVER RECEDED FROM GRAY UNLESS
SHEPHERD IS A REALLY LOUSY
SYSTEM OF LEGAL RESEARCH.
>> COUNSEL --
>> 16 --
>> YOU'RE APPROACHING YOUR
REBUTTAL SO I THINK YOU'RE --
>> NOW I'M IN IT.
>> THANK YOU, JUDGE.
>> CHIEF JUSTICE KENNEDY,
JUSTICES OF THE COURT MAY IT
PLEASE THE COURT, MY NAME IS
JENNIFER DONAHUE, I REPRESENT
THE STATE IN THIS MATTER, THE
COURT SHOULD OPPOSE DENIAL OF
ALL CLAIMS IN THIS CASE AND DENY
THE HABEAS PETITION.
NOW, THIS IS CERTAINLY AN
INTELLECTUAL CONVERSATION
EXERCISE ABOUT WHETHER THE
AGGRAVATOR SHOULD BE INCLUDED IN
THE INDICTMENT BUT HERE THE
AGGRAVATOR OF CONTEMPORANEOUS
FELONY OF ROBBERY WAS INCLUDED
IN THE INDICTMENT, SO THIS ISN'T
EVEN AN ISSUE IN THIS CASE, NOT
TO MENTION THAT IT WASN'T
PRESERVED AT ANY POINT WHICH
GRAY MAY SAY THAT YOU CAN WAIT,
BUT WE HAVE A SYSTEM OF

REQUIRING CONTEMPORANEOUS
OBJECTIONS FOR A REASON, THAT'S
SO THAT THE DEFENDANT DOESN'T
WAIT UNTIL WE GET TO POST
CONVICTION AND THEN RAISES AN
ISSUE THAT NOW WE SHOULD GO ALL
THE WAY BACK TO THE INDICTMENT
IN THIS CASE.

IT'S THE MOST KIND OF INVITED
ERROR ISSUE.

SO CERTAINLY IF THERE WAS AN
ERROR WHICH THERE ISN'T IN THE
CASE BECAUSE IT WAS INCLUDED IN
THE INDICTMENT, IT WOULD BE A
FUNDAMENTAL ERROR STANDARD WHICH
WAS NOT MET HERE, ADDITIONALLY,
THE GRAND JURY REQUIREMENT IS
PREMISED ON NOTICE AND IN THIS
CASE THE DEFENDANT WAS GIVEN
NOTICE OF THE INTENT TO SEEK THE
DEATH PENALTY BASED ON FOUR
AGGRAVATING CIRCUMSTANCES AND HE
WAS GIVEN THE NOTICE ON
8/30/2010 WHICH IS 8 MONTHS
BEFORE HE TOOK A PLEA IN THIS
CASE.

CERTAINLY AS FAR AS FUNDAMENTAL
ERRORS IS CONCERN, WE DON'T FIND
IN EFFECTIVE ASSISTANCE OF
APPELLATE COUNSEL TO RAISE EVERY
CONCEIVABLE ISSUE AND WHEN
FUNDAMENTAL ISSUE IS THE
STANDARD THAT WE ARE LOOKING AT
TO OVERCOME CERTAINLY APPELLATE
-- MR. BERRY SUGGESTS IN HIS
BRIEF THAT ADDING AN AGGRAVATING
CIRCUMSTANCE IN THE INDICTMENT
AND REQUIRING THE GRAND JURY TO
DISCUSS THAT AGGRAVATING
CIRCUMSTANCES WOULD GET OUR
OPINION OF THE CONSCIOUSNESS OF
THE COMMUNITY ON WHETHER THIS
SHOULD BE A DEATH PENALTY CASE
OR NOT, BUT THE GRAND JURY
PROCESS IS NOT ADVERSARIAL, THE
DEFENDANT IS NOT THERE
PRESENTING MITIGATING FACTORS
FOR THE GRAND JURY TO WEIGH, SO
REALLY THE CONSCIOUSNESS OF THE
COMMUNITY IS NOT EVEN AT PLAY,

ALL THE STATE WOULD HAVE TO DO
IN THIS INTELLECTUAL EXERCISE IS
PRESENT ONE AGGRAVATING
CIRCUMSTANCE WHICH IS REQUIRED
IN ORDER TO MAKE IT THE
DEFENDANT ELIGIBLE FOR THE DEATH
PENALTY WHICH WAS DONE IN THIS
CASE WITH THE ROBBERY AND HAVE
THE GRAND JURY DECIDE WHETHER
THERE'S PROBABLE CAUSE TO
BELIEVE THAT THAT ONE
AGGRAVATING CIRCUMSTANCE HAVE
BEEN MET BY EVIDENCE PRESENTED
AT THE GRAND JURY.

SO AS I SAID, THIS IS CERTAINLY
AN INTERESTING INTELLECTUAL
EXERCISE TO DETERMINE HURST
IMPACT ON THE GRAND JURY BUT
HURST CHANGED NOTHING, THE
AGGRAVATING CIRCUMSTANCES ARE
NOT REQUIRED IN THE GRAND JURY
INDICTMENT AND EVEN IF THEY WERE
REQUIRED THEY WERE PROVIDED
HERE.

PENDING ANY QUESTIONS FROM THE
COURT, THIS COURT SHOULD AFFIRM
THE DENIAL OF ALL THE CLAIMS IN
THIS CASE AND DENY THE STATE
HABEAS PETITION.

>> WHAT HAVE WE SAID -- SORRY TO
INTERRUPT, WHAT HAVE WE SAID
ABOUT FUNDAMENTAL ERROR, ERROR
NOT RAISED EVER UNTIL HABEAS
PETITION AND IN EFFECTIVE
ASSISTANCE OF COUNSEL HABEAS
WHICH IS DIFFERENT THAN A
GENERAL HABEAS CLAIM?

>> THAT -- IN ORDER TO MEET THE
STANDARD OF FUNDAMENTAL ERROR,
THE APPELLATE COUNSEL WOULD HAVE
HAD TO OVERCOME BASICALLY
DEMONSTRATED THAT THAT ERROR
ALONE OFFICIATED --

>> HAVE WE SAID COUNSEL FAILURE
TO RAISE?

>> DOES NOT REQUIRE MEETING
STANDARD OF FUNDAMENTAL ERROR
AND PLENTY OF CASES THEY ALSO
TALK ABOUT, COUNSEL IS NOT
REQUIRED TO RAISE EVERY

CONCEIVABLE, POTENTIAL ISSUE THAT MIGHT HAVE SOME MERIT TO AND CERTAINLY IT'S HARDER TO GET TO THAT MERIT LEVEL IF IT'S A FUNDAMENTAL CASE AND HERE ON DIRECT APPEAL THE COUNSEL RAISED THE ISSUES THAT HE THOUGHT WERE THE STRONGEST ISSUES AND THIS COURT REJECTED THOSE ISSUES. PENDING ANY QUESTIONS, THANK YOU.

>> THE ERROR HERE, AGAIN, IF I'M RIGHT DOES INITIATE --

>> DID YOU CITE GRAY IN YOUR BRIEFING?

>> I ABSOLUTELY DID. IT'S IN THE FIRST PAGE OF IT, JUDGE.

>> OKAY.

>> STATE ALLEGED THAT THERE IS A AGGRAVATING FACTOR THAT WAS FOUND BY THE GRAND JURY HERE.

>> YOU AND I JUDGE BOTH KNOW THAT THE GRAND JURY WAS NOT ASKED TO LITIGATE OR DELIBERATE ON AGGRAVATORS, WHAT THEY ARE TRYING TO DO IS CONCOCT SOME OR THE OF AGGRAVATOR OUT OF JURY DELIBERATIONS ON -- REALLY, IN THIS CASE YOU HAVE TO LOOK AT COUNT 1, FOR EXAMPLE, AND SAY THAT THE FELONY MURDER THEORY, THE ALLEGED PREMEDITATED WHICH THEN THE WAY THEY DRAFTED THIS INDICTMENT WOULD NOT INCLUDE AN AGGRAVATOR BUT THE FELONY ORDER THEORY IN COUNT 1 WOULD INCLUDE AGGRAVATOR BUT IT WASN'T, THEY WEREN'T ASKED TO DELIBERATE THAT BECAUSE THE PROCEDURES DON'T CALL FOR IT AND SO THE IDEA THAT THEY -- THAT YOU CAN CONCOCT SOME INDICTMENT --

>> DID JURY COME BACK THAT THERE WAS UNDERLYING CRIME THAT WOULD HAVE BEEN ELIGIBLE AS AGGRAVATOR?

>> NOT AGGRAVATOR, JUDGE, YOU'RE NOT ALLEGING, INCORPORATING IN REFERENCE IN COUNT 1 AS

AGGRAVATOR TO ANALYZE, THEY DID CHARGE A ROBBERY, BUT YOU DON'T

--

>> IN THE SAME INFORMATION ON THE SAME DATE AT THE SAME TIME, RIGHT?

>> NOT AS AN AGGRAVATOR, JUDGE.

>> RIGHT.

>> BUT TO SALVAGE THIS YOU CONCOCT --

>> WELL, I'M NOT DOING ANYTHING, COUNSEL, I'M REALLY ASKING A QUESTION.

WHAT MY QUESTION TO YOU IS DID -- WHAT WAS THE BASIS FOR FINDING DEATH HERE, WHAT WERE THE AGGRAVATORS THAT ULTIMATELY WERE FOUND, WASN'T ROBBERY WAS ONE TO HAVE BASIS?

>> NONALLEGED AGGRAVATOR, THE PRIOR MURDER.

>> RIGHT, ALL WE NEED IS ONE TO MEET THE GRAND JURY REQUIREMENT ALL WE NEED IS ONE?

>> TO RESPOND TO THE PLEADING, THOUGH, MY POSITION IS THAT THEY DON'T ALLEGE THE MURDER, FOR EXAMPLE, IN THIS CASE.

>> TO MEET THE CONSTITUTIONAL REQUIREMENT THAT YOU TALK ABOUT ALL YOU WOULD NEED IS ONE, RIGHT?

>> TO -- NO, YES TO THE EXTENT THAT THE FIGHT IN THE SENTENCING PHASE WOULD BE ABOUT THAT ONE THAT YOU ARE -- YOU ARE ASCRIBING TO THE GRAND JURY AND THE OTHER ONE PRIOR MURDER, YOU DON'T GET TO LET GAIT THAT ONE BECAUSE IT WASN'T PLED.

>> RIGHT, THERE'S ONE THAT WAS PLED THAT THE GRAND JURY DID FIND AND THAT WAS THE BASIS AS AGGRAVATOR THAT THE TRIAL COURT USED TO IMPOSE THE SENTENCE HERE?

>> IN THIS CASE IF I RECALL THE ORDER CORRECTLY, THE JUDGE FOCUSED ON THE NONALLEGED AGGRAVATOR IN HIS DECISION TO

SENTENCE MY CLIENT TO DEATH
BASED ON THE OTHER MURDER WHICH
ISN'T ALLEGED IN THE CHARGING
DOCUMENT.

SO EVEN IN THAT SITUATION YOU'D
HAVE TO REMAND FOR A
RESENTENCING --

>> THERE WERE TWO, THE PRIOR
VIOLENT FELONY AND THAT THE
MURDER WAS DONE IN THE COURSE OF
THE ROBBERY.

>> I'M TALKING ABOUT THE
INDICTMENT, JUDGE, I'M NOT
TALKING ABOUT SENTENCING ORDER.

>> HE WAS SENTENCED FOR
SOMETHING THAT THE GRAND JURY
DID FIND, WAS HE NOT?

>> IN PART AND SOMETHING THAT
THEY DIDN'T FIND.

>> OKAY.

THANK YOU, COUNSEL.

>> THANK YOU.

>> ALL RIGHT, WE THANK YOU BOTH
FOR YOUR ARGUMENT AND THE COURT
WILL NOW BE ADJOURNED.