OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-836

TITLE DANIEL VASQUEZ, WARDEN, Petitioner V. BOOKER T. HILLERY, JR.

PLACE Washington, D. C.

DATE October 15, 1985

PAGES 1 thru 46

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IN THE SUPREME COURT OF THE UNITED STATES

DANIEL VASQUEZ, WARDEN,

Petitioner

V. No. 84-836

BOOKER T. HILLERY, JR.

Washington, D.C.

Tuesday. October 15, 1985

The above-entitled matter came on for oral argument before the supreme Court of the United States at 2:05 p.m.

APPEARANCES:

WILLIAM GEORGE PRHAL, ESQ., Supervising Deputy Attorney General of California, Sacramento, California; on behalf of the Petitioner.

CLIFFORD EARL TEDMON, ESQ., Sacramento, California; on behalf of the Respondent.

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C O N T E N T S

CHIEF JUSTICE BURGER: Mr. Prahl, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM GEORGE PRAHL, ESQ.

ON BEHALF OF THE PETITIONER

MR. PRAHL: Mr. Chief Justice, and may it please the Court:

On June 27, 1962, the Kings County Grand Jury returned a true bill indicting Respondent Booker T. Hillery on a charge of first degree murder. Respondent Hillery was charged with murdering a 15-year old girl on March 21, 1962.

Jury selection for the guilt phase of Respondent's trial began on October 23, 1962. Respondent was found guilty of first degree murder and in another phase of the trial the same jury voted unanimously to impose the death penalty.

The guilt phase of Respondent's initial trial was affirmed while the penalty trial was reversed by the California Supreme Court.

QUESTION: Did I understand you to say this crime occurred in 1962?

MR. PRAHL: Yes, Your Honor.

The crime occurred in March. The indictment was returned in June. Mr. Hillery received two subsequent penalty trials after his first penalty trial was reversed. The third penalty trial was conducted in another county in California

in 1970. In both cases, the juries voted unanimously to again impose a death penalty. In all, 36 jurors have decided that Mr. Hillery deserved nothing less than death for the brutal murder of Marlene Miller.

Twenty-one years after the initial jury verdict, Respondent's conviction was reversed by the United States District Court for the Eastern District of California.

Following an evidentiary hearing, the District Court found that there had been purposeful discrimination against black persons in selecting the grand jury between 1956 and 1962.

QUESTION: Mr. Prahl, did the state plead as a defense to the federal habeas action that it was prejudiced in presenting its defense of the action by the passage of time?

MR. PRAHL: No, Your Honor. In the original return we did not plead delay as a defense. It was raised by way of a motion when it became clear that we were going beyond the original trial court record.

QUESTION: And, the District Court ruled on that defense?

MR. PRAHL: Yes, Your Honor. The District Court denied our motion to dismiss in a published opinion.

QUESTION: And, you have not presented that issue here?

MR. PRAHL: No, Your Honor. We feel that that is

one of the issues that becomes involved in the question of harmless error. In other words, as you -- The issue before this Court is a question of whether purposeful discrimination in the selection of a grand jury can be considered harmless error.

And, one of the factors that we think the Court can look to in making that decision is the passage of time, the changes in circumstances that have occurred.

Here, again, there was 21 years from the time of the initial jury verdict until the time when the District Court finally issued its opinion.

Again, the Ninth Circuit --

QUESTION: How many years does it take to become harmless?

MR. PRAHL: Your Honor, I don't think the passage of time alone is the sole criterion.

QUESTION: You were asked why did you drop the time point and you said you dropped it because of the harmless error. Now, I want to know why does time become a harmless error and my particular question is how many years do you have to have before you get harmless error?

MR. PRAHL: Your Honor, in this particular case, the passage of time has indicated that there is no continuing history of discrimination in the county. In fact, the year after Mr. Hillery was indicted, a black person appeared on

the county grand jury.

QUESTION: Would that have helped him?

MR. PRAHL: Well, Your Honor, we don't think that it is necessarily the case in this type of situation; that the remedy provides specific relief to the Defendant. What these kinds of cases are looking for is an overall deterrence effect on the criminal justice administration system and we believe that where, for example, the record indicates that there is no continuing history of discrimination, and, in fact, in this particular record, Your Honor, I think it is important to note that when the trial judge made his remarks, he indicated that efforts had begun even before this particular challenge had been made to locate black persons who could serve on the county grand jury.

So, the District Court's finding that this particular motion precipitated a change may not be entirely supported by the record. In fact here the trial judge, who was dead at the time of the evidentiary hearing in the federal court, the trial judge, Judge Wingrove, indicated on the record at the time of Mr. Hillery's motion to quash, that he was making efforts to try to find black people that could serve on the county grand jury before the motion was brought.

So, we think --

QUESTION: You say that in the 60's -- What was it, '62?

MR. PRAHL: 1962, that is correct, Your Honor.

QUESTION: They were looking for "black" jurors?

MR. PRAHL: The trial judge indicate, Your Honor, that he was looking for --

QUESTION: Did he use the word "black?"

MR. PRAHL: Pardon me, Your Honor.

QUESTION: Did he use the word "black?"

MR. PRAHL: I don't believe he did, Your Honor.

QUESTION: Because nobody else did back in the 60's.

MR. PRAHL: No, Your Honor.

What the trial judge indicated was that he was looking for a representative cross section of the community to serve on the Kings County Grand Jury.

He was especially concerned about the ability of the jurors to serve in California's grand jury system which plays a watch-dog role over county government. They oversee the operations of the fiscal aspects of county government. In other words, it is not something that would come easily to every citizen in the community.

But, if you look at the record as a whole, especially the transcript of the trial judge's remarks, it becomes very clear that the trial judge considered black people to be qualified and capable of serving.

So, I think those factors, the factor of the continued history or the history of the county is one thing the Court

can look to in determining whether or not this form of constitutional error requires reversal.

Harmless error has been held --

QUESTION: Mr. Attorney General, before you move away from the question of delay, is there any evidence in the record as to whether or not California can retry the Respondent at this time 23 years afterwards?

MR. PRAHL: Your Honor, we tried to argue harmless error to the District Court. The District Court --

QUESTION: I am not talking about harmless error at this point. I am talking about whether justification is given for the automatic reversal rule. Cases previously before this Court have been that the Defendant may be retried.

QUESTION: Within a certain period.

QUESTION: So, the question I ask you is is there any evidence in the record as to whether or not the State of California, after quarter of a century, can retry this particular Respondent? The witnesses are all dead, the trial judge is dead.

MR. PRAHL: We did not introduce any of that evidence, Your Honor. There is no evidence in the record. The reason why is because we -- that would have been one of the factors that we would have desired to present evidence to the District Court on in terms of the harmless error analysis. In other words, harmless error in this particular kind of case --

One of the rationales for deciding that harmless error should not be applied has been this notion that somehow you can retry a defendant. I think the Court has been getting away from that in Morris v. Slappy, in --

QUESTION: Mr. Prahl, let me put Justice Powell's question another way. Suppose this case is affirmed. What will or your prosecutor do?

MR. PRAHL: Well, if the District Court opinion is affirmed, you mean, and the Ninth Circuit opinion is affirmed, Your Honor? Pick up the pieces and do the best we can.

QUESTION: Well, what does that mean?

MR. PRAHL: Pardon me, Your Honor?

QUESTION: What does that mean?

MR. PRAHL: Well, this is going to be a devastating case to try to retry. This is a first degree murder that is 25 years old. The question of rounding up the witnesses, rounding up the evidence are not the only questions presented here. The questions of what law applies to this particular case is truly mind-boggling.

QUESTION: Well, your opposition, I think, repeatedly says that the transcript of the original trial is available to you for use in a retrial, is that correct?

MR. PRAHL: The transcripts are available, that is correct, Your Honor, but that is a hollow right to rely on.

QUESTION: Would you proceed to try to prosecute

again?

MR. PRAHL: Yes, Your Honor. I mean, if we have to, the effort will be made. Mr. Hillery is still confined. No parole date has ever been set. He is regarded as a danger by the State of California. He has never been released.

The record on the bail proceedings indicates that state's views toward Mr. Hillery. We would be forced in that situation to do the best we can.

One of the problems I would like the Court to take into account in terms of the harmless error rule is a passage from the case of Morris v. Slappy where the Court recognized for one of the first instances the right of the victims in these particular matters.

Now, this is a murder case, but the Court should be sensitive to the concerns of the parents here. The parents of this particular young girl have had to endure three separate trials and they have been able to put this horrendous experience behind them. To resurrect this tradegy 25 years later, to take this family through this agony once again, where time has had the opportunity to heal this wound, we feel that that is something the Court should take into account in its harmless error calculation.

The other thing we think the Court should look to in --

QUESTION: How really does that bear on harmless

error?

MR. PRAHL: Well, Your Honor, we think --

QUESTION: It seems to me your are sweeping everything under the rug of harmless error.

MR. PRAHL: No, Your Honor. The Court is the one -- Again, in Morris v. Slappy that brought this -- It is part of the question of a retrial. It is part of the question of the public's confidence in a jury verdict and in the finality of that jury verdict.

QUESTION: That is hardly harmless error. It might be something else.

MR. PRAHL: I think that is part, Your Honor, of the rationale behind the extension of harmless error to even constitutional errors. In other words, the public's confidence in the finality of a jury verdict and the finality in the integrity of the jury process --

QUESTION: With the passage of time, at what point does error become harmless?

MR. PRAHL: I don't think error depends necessarily on time. Time is a factor. It is not the crucial factor.

In this particular case, Your Honor, I think there are other factors that are much more telling on the necessity for imposing the harmless error standard.

First of all, in this case, black people were serving on trial juries on a regular basis. The record is replete

with that. There is an acknowledgement in this case, Your Honor, by Mr. Hillery's trial counsel, the attorney that represented him at trial, the attorney who made the motion to quash, that had this case been brought to a preliminary hearing, there is absolutely no doubt in his mind that Mr. Hillery would have been bound over for trial.

That fact, the fact that there is nothing to remedy -- The purpose of the grand jury as noted in the dissent in Rose and in Justice Jackson's dissent in Cassell, the purpose of the grand jury is to provide probable cause to determine whether a trial is to be conducted.

And, here, even Mr. Hillery's trial attorney has acknowledge that there is overwhelming evidence to support probable cause.

In fact, the California Supreme Court in commenting on the evidence in this particular case, the evidence of guilt, characterized this case as being overwhelming.

The fact that Mr. Hillery received a full and fair trial in front of a jury, the fact that he received three trials -- I grant the Court that the second two trials were penalty trials, but a jury deciding whether to impose the death penalty must first obviously be convinced of the Defendant's guilt before they would consider imposing such a harsh penalty.

You have three separate trials. All of those unanimous findings beyond a reasonable doubt.

Again, the point we made before that jury discrimination was being looked to already by the superior court judge.

There really is no basis for imposing the kind of relief or deterrence that is addressed in many of the cases, because here the mechanism of change was already in place and there is nothing in the record before this Court which suggests that there is a continuing pattern or a continuing history of discrimination.

We think that in these kinds of cases application of the harmless error rule would continue to serve the significant deterrent interest which the Court has espoused on many occasions. In other words, the process would remain the same. Petitioner would be required to make a prima facie case of discrimination. The state would have the opportunity if that case has been made to rebut it, then the trial court would make its finding.

There would still be a finding of whether or not there has been purposeful discrimination. That finding in and of itself is a significant undertaking for the judiciary. In other words, that finding provides the integrity that is needed in these kinds of cases and insures the operation of the criminal justice system.

QUESTION: I have a little trouble following that argument. As I understand, your main point is that the proof of the trial shows that there was plenty of probable cause,

and, therefore, the indictment -- the fact that there might have been discrimination in picking the grand jury is really harmless as to this Defendant.

Why -- If you follow that reasoning, why would one ever want to litigate the issue? Why would the Defendant ever raise the question, just for future people to have a declaration on the record of some kind? I just don't know.

MR. PRAHL: Well, Your Honor, to clarify the point, our position is not that the proof of the trial shows there is probable cause. Our point in this particular case is that Mr. Hillery's original trial attorney, Mr. Goodwin, Hugh Goodwin, testified at the federal evidentiary hearing -- He was asked was there any doubt in your mind if the motion to quash had been successful and Mr. Hillery had been brought before a preliminary hearing whether he would have been bound over for trial and Mr. Goodwin acknowledged that there was no question that the evidence before the grand jury was sufficient to indict.

QUESTION: Wouldn't that always be true if you later have a trial and find them guilty beyond a reasonable doubt?

MR. PRAHL: That is certainly true, Your Honor. Well, it may or may not be true. Witnesses may become unavailable, witnesses that have testified at a -- a crucial witness may become unavailable and the state's case may be less convincing, as it were, than at a preliminary hearing. I grant you that

that is a rare occurrence, but that is possible.

The important point in this case was that not only was the evidence at the indictment sufficient to show probable cause, but also the evidence at three separate trials established Respondent's guilt beyond any question. And, as the California Supreme Court noted -- The California Supreme Court characterized the evidence as overwhelming.

QUESTION: But, all of these cases are cases in which a defendant has been convicted and there has been proof beyond a reasonable doubt. I don't know that the fact they proved it three times instead of once makes much difference.

MR. PRAHL: Well, the question, Your Honor, as to why would a defendant bother to do this? We are not arguing that all cases be judged harmless error, but the Court established an across-the-board rule.

What we are arguing is that harmless error be an option, be something that the trial court has available to it to consider under certain well defined circumstances and, if harmless error is shown to be true, then there would be no basis for quashing the indictment.

However, if the Defendant can point to actual prejudice, for example, if there is a continuing history of discrimination, if you combine discrimination in the selection of a grand jury with the discrimination of trial juries, so that there is a fundamental unfairness in the trial process, it may be that

it would be inappropriate to apply the harmless error rule.

QUESTION: Wouldn't we have to overrule Rose against Mitchell to agree with you?

MR. PRAHL: I don't agree with that, Your Honor.

QUESTION: Well, you certainly seem to claim that it has been eroded.

MR. PRAHL: Well, Rose -- No one is quite sure exactly what Rose -- what the holding of the Rose case is given the line-up, if you will, of the justices in that case. But, if the Court --

QUESTION: What do you mean by that?

MR. PRAHL: Well, with the justices voting for different parts of the opinion, it is not -- At least one circuit judge has analyzed the case as saying that there is no clear majority behind the rule that harmless error does not apply. But, the point we wish to make, Your Honor --

QUESTION: You don't think Rose against Mitchell really leads on the question of whether harmless error applies to discrimination in the grand juries?

MR. PRAHL: I am not sure that there is a majority of the Court that supports. We have briefed that question. But, I don't think that is crucial to the outcome of this case, because I don't think Rose necessarily involves the same facts and if the Court is of the opinion that Rose is precedent in this situation, we are asking the Court to overturn that.

We are asking the Court here to carve out an exception for those situations where -- that would allow the trial court to make a harmless error determination.

Again, in this particular case, we would like to point out that there is no claim of actual prejudice resulting from the grand jury indictment.

The sole claim in this case, and it is a significant one -- I don't mean to diminish the claim -- but the sole claim here is that there was purposeful exclusion of blacks from 1956 to 1962.

Our point here is that absent a showing of some prejudice in a grand jury process where black people regularly served on the trial juries, harmless error would be appropriate.

Harmless error, as I have tried to point out, serves several important functions. It gives effect to the principle that the essential purpose of the criminal law is to decide factual questions regarding the Defendant's guilt and not technical questions regarding the composition of a pre-trial hearing body.

Again, in this particular case, where you have three separate juries voting unanimously regarding the Respondent's guilt, you are seriously eroding the public's respect for the criminal justice process. The public does not and has difficulty understanding why what would amount to close to 23 years now, later we are reversing a criminal conviction

that is supported by overwhelming evidence where the trial was fair, where black people participated in the trial juries, simply because blacks were excluded from the grand jury process.

In the absence of anything that would indicate that Mr. Hillery did not receive a full and fair trial, the law, as we see it, should permit the trial judge to engage in a harmless error analysis.

Finally, again, we would like to point to significant changes in the area of deterrence which we feel are now in place that were not necessarily in place when this Court considered such cases as Cassell v. Texas and Reece and some of the other grand jury cases.

In the current situation, there is a great deal more public attention focused on such types of claims. The media, for example, would surely bring a claim like this in a judicial finding of discrimination to the public's attention.

There are civil and criminal sanctions for discrimination. There are also public and private agencies that are concerned and are ready to perform a deterrent function. All of these suggest that deterrence by the courts by way of reversing a criminal conviction are no longer necessary or essential; that the courts can rely on some of these other deterrent mechanisms that are now in place and are now willing to function in order to prevent a reoccurrence of any form of discrimination.

The second issue that is before the Court is the question of whether or not there was a significant change in the evidentiary basis of Mr. Hillery's claim when it finally reached the federal court.

We have included in the Joint Appendix the elaborate computer model that was set up to process information and spit out a result that told the District Court supposedly the level of discrimination that was occurring and the possibility that this could have occurred by chance.

Here, there was actual testimony offered from citizens of Kings County that was never offered in the trial court. The trial court's remarks contained in the transcript are indicative that the trial court felt that Mr. Goodwin had simply not proven his case. There had been no evidence offered on the size of the county's population of blacks that were eligible to serve on the grand jury. And, this failing lead the trial court to deny the motion.

Twenty years later all of these failings, these shortcomings, were remedied and were placed before the Federal District Court.

The Ninth Circuit, in a split decision, did affirm the District Court's order, but the dissenting judge there did find that there had been a significant change in the character of that particular claim.

I have been touristing here in Washington a little

bit and when I went to the Air and Space Museum I saw what this case represents to me, the Wright flyer on the one hand and the space capsule on the other, and that is what this particular case involved.

What Mr. Goodwin presented to the trial judge was a Wright flyer of discrimination and what was presented to that Federal District Court judge was a space capsule. This thing had computers and it had bells and whistles and it did everything.

What we are suggesting to the Court here is --

QUESTION: Do you want a non-exhaustion ruling so that there would be a chance to go back and exhaust in the state court?

MR. PRAHL: Well, what we are suggesting is that if exhaustion --

QUESTION: How much chance would you have of winning in a state court?

MR. PRAHL: Well, if exhaustion is to have any meaning, what this Court should be telling the district courts is that when something comes in that is wholly different, that has wholly been transformed in the words of Daniels v. Nelson or presenting a case in a significantly different posture than it was presented to the state court, it has to be sent back.

QUESTION: In California is racial discrimination in the grand jury selection subject to harmless error analysis

or not?

MR. PRAHL: No, I don't believe it is. The issue has never been raised in California. But, we do feel the issue, as it was presented to the District Court, should have first been brought to California so California would have had a chance.

California reviewed it under the same meager record that was presented to the trial court and there is nothing at all to indicate that the California court had all this bundle of new evidence --

QUESTION: You had a chance to meet any submission that was made?

MR. PRAHL: Pardon me, Your Honor?

QUESTION: You had a chance to meet any of this new evidence?

MR. PRAHL: Yes, Your Honor, we did.

QUESTION: Right.

MR. PRAHL: We chose to defend the matter based on the state record, because we felt that was what was proper.

QUESTION: Mr. Prahl, if it were sent back as unexhausted to the state court, would the state court entertain a rehearing on that, do you know?

MR. PRAHL: On the new evidence, Your Honor?

QUESTION: Yes, and in California law would that be open?

MR. PRAHL: Yes. Under California's habeas corpus law, Petitioner would be allowed to make a case for presenting. He would have a problem though, Your Honor, as to showing why he had not presented that evidence in the first instance; in other words, whether the computer model is such that it would have been unavailable.

But, the testimony, for example, of the citizens of the county, the black citizens who testified as to their recollection of the grand jury process, if they were available and they simply chose not to present them in the state forum the first time, there would be some doubt as to whether they could present them a second time.

And, that is one of the problems again with the federal judge's notion of the plenary power of a federal evidentiary hearing. You can't hold back evidence out of a motion to quash and then wait until you get into federal court to come in and try to present that evidence.

But, that would have to be argued in the state court, but the power to hear it is there.

Unless the Court has any further questions, I wish to reserve some additional time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Tedmon?

ORAL ARGUMENT OF CLIFFORD EARL TEDMON, ESQ.

ON BEHALF OF THE RESPONDENT

MR. TEDMON: Mr. Chief Justice, and may it please

the Court:

Hillery filed his first petition in Federal Court in 1978, filed in the Northern District of California, the wrong forum. It was a per se petition and it was transferred to the Eastern District of California where Chief Judge Thomas J. MacBride was assigned the case.

Judge MacBride, in reviewing Hillery's petition, decided that Hillery had set forth a prima facie case of discrimination in the selection of the grand jury which had handed down the indictment against him in 1962.

He formed that opinion fundamentally based on Hillery's allegations that in the history of Kings County, California, which was formed in 1893, until 1962, there had never been a black person on a grand jury in that county.

QUESTION: Would you be here if there had been, maybe not in this grand jury, but in a previous one? Would that have solved the problem as far as your client is concerned if at some time in the history of the court there had been a black member of the grand jury?

MR. TEDMON: I think if there had been some evidence that in the history of the county there had been a black or blacks on the grand jury, I think Hillery would not have a position here today. I think that would be part of his problem.

There are many ways you can look at the problem, because if you got down to the individual grand jury that

indicted him and he could show some clear discrimination there, he might have an argument.

But, the argument basically, as Judge MacBridge saw it, was that in the history of the county there had never been a black on a grand jury and that, in his mind, lead him to say -- As far as he was concerned, that was evidence which established a prima facie case of discrimination.

Now, when he took senior status, the case was assigned to Judge Karlton who had just been appointed chief judge of the district. When Judge Karlton took the case he had a problem, because he had the California Supreme Court's decision that Hillery had not established a case of discrimination in the grand jury that indicted him.

He had Chief Judge MacBride's opinion that a prima facie case had been established. Now, Judge Karlton was compelled to apply the presumption of correctness doctrine to the California factfinding, although he didn't have to do it to the legal conclusion, but at the same token, he had Judge MacBride's law of the case before him. He had to decide what to do with these two conflicting opinions.

QUESTION: In what year was the Supreme Court of California decision?

MR. TEDMON: The first decision in the California Supreme Court was handed down in 1963, Your Honor. The second decision was handed down in 1965. Those are the only two

decisions discussed in the problems we are discussing here today.

What Judge Karlton did was examine Judge MacBride's order, because the state had already responded. The state had indicated Hillery had exhausted his state remedy. They argued that the rich had not lied because a full and fair hearing had been held in the state court. But, Judge Karlton believed that perhaps Judge MacBride's opinion was a little premature for the reason that the mere exclusion of blacks from a grand jury did not necessarily mean discrimination. He believed there should be some other data in support of that which would tell him whether or not there had been some discrimination in the grand jury process in Kings County, California.

Furthermore, the state record had not been lodged with the District Court until after the court had issued its order. So, in that regard, he determined to set aside that portion of the order which said it was a prima facie case.

He was concerned that perhaps Hillery had not had a full and fair hearing in state court, because when he examined the Supreme Court's decision, it basically relied on what Judge Wingrove had said in terms of the fact that he did not discriminate. It really did not discuss very much of the evidence that was presented other than to relate it to a prior case the California Supreme Court had decided, People versus Burwell, in 1955 and in that case they held the judge's

testimony would be indicative of the fact that there was no discrimination and they related the Hillery case to the Burwell case.

Judge Karlton wasn't convinced that that was a completely correct analysis. So, what he determined to do was utilize the tools available to him. Those tools came under the rules that applied at 2254 Proceedings. He determined to expand the record.

And, in that determination, what he did is ask both sides to answer some interrogatories. He indicated in his order that he would like to see some probability analysis to indicate to him whether or not this lack of blacks on a grand jury could have resulted by chance as opposed to discriminatory acts.

Hillery responded by providing information to the court. There were twelve interrogatories propounded and four of them really related to whether or not there were eligible blacks in the community, what were the total percentage of blacks throughout the various years, and it was that question that lead Hillery to present to the court census data from 1900 through 1970 with a cut-off data at 1962.

The California court had only had census data from 1910 to 1960.

But, in answering the judge's questions as well as Hillery could, he felt compelled to provide all of the data

available to him at that time and the earliest census data was 1900.

He provided for the court what has been referred to as a sophisticated computerized analysis which we don't really believe is a proper characterization. It was a probability analysis. It is pretty much an arithmetic calculation which has been done for many, many years. The reason the computer was used is because it is faster and it gets you a little bit more complete answers. You would get it, I suppose, if you did logarithms or some other manner, but the computer was just a device, a technique, for analyzing the data and that is exactly how Judge Karlton saw the problem. He didn't see this as any fancy, new mathematical program.

QUESTION: Do we know why the evidence from the additional witnesses and a probability analysis was not presented to the state courts by Mr. Hillery?

MR. TEDMON: Your Honor, in the record of the hearing at the motion to quash -- It is a difficult record. There was a lot of what appeared to me frankly to be hostile dialogue between Judge Wingrove and Hugh Goodwin. And, as a matter of fact, Mr. Cantleman, who was the District Attorney handling that hearing, during the course of that hearing suggested to Judge Wingrove, what has to happened here is we have to do an analysis to find out if, first of all, blacks constitute a significant portion of the population. Second, within

that portion of the population, are there blacks eligible to be on the grand jury and none of that was ever followed up on at the District Court level. That is one of the holes in the record that Judge Karlton --

QUESTION: Well, I suppose the burden there was on the Defendant to prcduce his evidence, is that right or not?

MR. TEDMON: Well, I don't think so, Your Honor. According to -- As I recall the record, according to the record, the responsibility rested with the state to produce the statistical data. They would not do it.

QUESTION: That is your understanding of state law in California in a case of alleged discrimination in grand juror selection, that the burden is on the state to disprove it?

MR. TEDMON: I think what happens is the court directs the state to present the evidence and in that particular case the state did present evidence. They presented the census data from 1910 through 1960. They presented evidence from Alice Hanna, who was the county librarian, on the black --

QUESTION: In California, is there no burden on the part of the Defendant like Mr. Hillery to support the allegation of --

MR. TEDMON: I don't know of any law that imposes a burden on him. I just don't know of any.

QUESTION: Well, he has to allege at least there

has never been a black on the grand jury or that the proportion of blacks is completely out of line.

MR. TEDMON: Yes, he would have to make that allegation.

QUESTION: And, if there is an objection -- If there is a denial of those facts, he has got the burden of proving that.

MR. TEDMON: Yes. Then he would have the burden of moving forward, I believe.

QUESTION: So, presumably he did have the burden of proof in California?

MR. TEDMON: I believe he would have the burden of moving forward, yes, Your Honor.

QUESTION: And, if a defendant then does not present evidence at the state court level that is crucial and substantial, can the defendant then simply wait until going to federal court later and present that evidence in your view? Is there never a proper application of inexcusable neglect, for instance, that would preclude the defendant from later presenting that for a second crack at it at the federal habeas level?

MR. TEDMON: I don't know of any rule of inexcusable neglect, Your Honor.

QUESTION: But, there is a rule of exhaustion certainly.

MR. TEDMON: Yes, that is correct.

QUESTION: And, I think the rule does extend -- Courts have said on occasion that even though the claim is the same, if the evidence adduced in support of it is totally different, then the claim may be unexhausted.

MR. TEDMON: Yes, that is the way the courts rule. In this particular case, the claim remains the same. I don't think anybody argues that point. The claim remains the same.

The only thing that happened in the District Court which was different from the Superior Court was that there was an analysis done of the data that was really before both of the courts. Now, that analysis was not done by the court in Kings County, it wasn't done by the prosecutor in Kings County, it wasn't done by Mr. Goodwin in Kings County.

It just appeared to Judge Karlton that what he should do is apply some sort of analytical tool to the data to give him a little more information in terms of analyzing the data.

QUESTION: So, if he had been a computer expert himself and in the course of deciding the case had gone back to his office and run his own analysis of the facts that were before him in the record, that would really be no different than what happened here?

MR. TEDMON: Yes. As a matter of fact, Judge Karlton did something similar to that. He sat down -- and the record reflects that he did a card analysis with an eight of diamonds missing from the deck and he also sat down -- and palming the

card -- and he also sat down on his own and did a standard deviation analysis and came up with what would have been a weak case for Mr. Hillery, a standard deviation of 3.03. However, relating to the total lack of blacks on the grand jury and the computerized analysis, he determined that those things fit togethers.

QUESTION: Well, Mr. Tedmon, I thought there was also some rather significant additional witness testimony over and above the probability analysis. Isn't that so?

MR. TEDMON: Yes. There were three witnesses who testified at the hearing, Evvie Edwards, Joshua Richardson, and Rev. Folsom. They were elderly black people and they had been in the county long before 1956 and they were still in the county when the hearing was held.

They merely testified to the following: That, yes, there were blacks in the community. They testified that the major influx came after World War II, that there was a small percentage of blacks in the community until after the war and then it gradually increased. They testified that there were blacks eligible, as they understood it, to be on the grand jury. They had college graduates, people who had gone to colleges around the country and were now into the community.

They testified if they had been asked, they would have served. But, other than that, I don't think they contributed anything else.

Now, that testimony was essentially all before the Superior Court, because the Sheriff of Kings County testifying in Superior Court here, and the newspaper man both testified that they had never known a black to on a grand jury in the history of Kings County, which is what the elderly black people testified to. They testified that there were blacks in the community.

Now, with respect to whether there were eligible blacks or not, none of the witnesses testified to that in the Superior Court hearing. But, Judge Wingrove discussed it. He indicated, yes, I had considered Lloyd Welcher. That is Bessie Welcher's husband and Bessie gave a deposition in this case. Yes, I did talk to Lloyd Welcher and I considered him, but then I decided it would interfere with his employment, so I chose not to place him on the grand jury, which must indicate that the court in Kings County was aware that there were eligible blacks, and if there is one eligible black, reason and common sense would suggest there is more than one.

So, I don't think the testimony of the elderly black people really altered anything that was before the California Superior Court.

In any event, Judge Karlton, in analyzing all of the data that was presented, arrived at the conclusion that Hillery had established a prima facie case of discrimination and that that prima facie case was unrefuted by the state.

Now, during the hearing itself the testimony from the actuary was taken and he explained his analysis and an interesting part of the problem that comes out of that hearing is that Judge Karlton asked the computer expert would you please do a probability calculation only for the years 1956 to 1962, the years during which Judge Wingrove was the only sitting judge in Kings County, California. He selected the people who would be candidates for the grand jury. After the review, he hand-picked the grand jurors themselves. So, he was Kings County, California, as far as the grand jury was concerned. He was the policy-making agent.

What he did with his pocket calculator was sat down and said, yes, I can do this calculation. He worked it out and in that calculation he said there would only be a probability of two chances out of a thousand in that seven-year period you could have had all non-black grand juries.

Now, in Judge Karlton's opinion, he restricted his thinking to those seven years and I think that is very critical to the analysis of whether he really went that far out of the state court record.

At any hearing, you are going to hear evidence, you are going to hear testimony. You can't stop a trial judge from taking evidence. I don't know how you would do that.

As I view the state's position, what they are saying is that Judge Karlton would not sit there and listen to the

testimony. What he would do was sit there and say, am I going to hear a word which is going to take this outside of what the state court had. I don't think you can do that through a trial judge. He is bound to hear something that wasn't presented to the state court.

But, the question is what does he do with once he hears it? What he did was restrict his thinking to that seven-year period and I think that is very appropriate and very compelling in terms of how he handled the case.

He further, in analyzing the rules that apply to 2254 motion, made some conclusions which are all in the record to the effect that if summary dismissal was not -- If he couldn't do that at the outset, then the hearing would be mandated, but there was this intermediate stage when he could expand the record, which is what he did.

He then after that determined that even if something began to come out during the hearing which would significantly alter the posture of the case, he should still have the right to continue on, complete the hearing in judicial economy terms, finalize the case, finish the thing out.

So, what he did in any event was make his decision that a prima facie case had been established and it was rebutted in the record. He issued his order that the writ should issue.

This went up on appeal in the Ninth Circuit, upheld Judge Karlton, with the exception of Justice J. Blaine Anderson,

who dissented on the basis of -- There were new facts and new methods. And, Justice Anderson's opinion is a very interesting one, very short. He really just talks about anything that wasn't presented to the state court. He says this was a new method.

He said the census data from 1900 to 1910 were new facts. The testimony of the elderly black people was not before the Superior Court of California.

But, he never addressed himself to what Judge Karlton did in his opinion and I think that is where we would not totally agree with Judge Anderson's assessment of this. It may be some slight different piece of evidence or something, but the question as to what did it do in a judge's decision and he has the duty to make that decision. We feel that Judge Karlton made the proper decision.

Now, the state is asking that this now established case of discrimination in the selection of the grand jury, this systematic exclusion of blacks from that grand jury process, which is now the case, that we should determine there was what he calls overwhelming evidence at the trial and that is so compelling and there is no complaint about the trial, that we should now determine the fact that this man's constitutional rights at the grand jury level were abused should be held to be harmless. Obviously, Hillery can never agree with that.

Frankly, we tend to see these two events as somewhat

unique and separated. While it is true that the charging document ties them together, what applies in one phase may not apply in the other phase.

Hillery is not challenging his jury conviction. He can't do that any more. He is not challenging the make-up of the petit jury that tried him.

QUESTION: When did Hillery first make his objection to the composition of the grand jury?

MR. TEDMON: He made it before he was ever brought to trial. He made it in 1962 in a motion to quash the indictment of his pre-trial hearing on the motion, Your Honor. And, he raised the issue on appeal to the California courts in 1963. They heard it in 1963.

And, I might add that there was really only one guilt phase trial in this case. There were several penalty phase trials, but only one -- It has been suggested there were two, but there really was only one. He raised in '63. He raised it again in '65.

The Supreme Court decision in '65, as well as I can analyze it, is a word-for-word copy of the Supreme Court decision in 1963. It does not appear to me that they really re-evaluated. They probably merely accepted the trial court's determination once again.

That never came up again until Hillery brought his writ or habeas corpus motion in Marin County, California, and

that occurred in 1978. But, between that period of time -- and a long period of time has past, about 16 years -- he is now fighting the penalty phase trial.

Judge Karlton commented on that in one of his opinions and he said probably if Hillery had brought his writ over to the federal court while the contests were going on, the federal court would have issued a summary dismissal anyway on the theory that we don't know whether you are going to have other ones or not, you had better go back, do it all at one time. It is sort of that approach which the district courts like to do, I think, in most cases.

He brought it before the Marin County court. It went through the California courts in 1978, denied, denied, denied. I think the last denial was by the California Supreme Court in April of '78.

QUESTION: When are you going to tell us about why this shouldn't be held harmless error?

MR. TEDMON: Oh, I am sorry. I feel --

QUESTION: That is the issue.

MR. TEDMON: That is the issue. Your Honor, an error of this magnitude, wherein an entire grand jury proceeding is tainted in Respondent's view can never be held to be harmless.

This Court has had a number of holdings which have discussed grand jury former. For example, in Rose versus Mitchell and in the Hobby case they discuss a grand jury foreman in

a different context. But, when they find --

QUESTION: What case or cases in this Court squarely hold that this kind of discrimination can never be harmless error? Do you think Rose against Mitchell stands for that?

MR. TEDMON: I don't think it says that. I think it suggests it very strongly, because Rose versus Mitchell talks about the impact of the discriminatory act on the grand jury. In this case, we have an entire grand jury selected in a discriminatory manner.

I don't see how, if the Rose verus Mitchell -- Had they been able to establish their prima facie case, I believe this Court would have overturned that conviction. That is my view of it. That wasn't done in Rose versus Mitchell, so the case was not overturned. But, the holding of the case certainly seems to suggest it would have been overturned.

QUESTION: Mr. Tedmon?

MR. TEDMON: Yes, Your Honor.

QUESTION: Along the line of questions Justice White has been asking you, what is the reasonable rationale for the per se rule you argue for? In other words, why should there never be harmless error in this type of case which is your second argument?

MR. TEDMON: Yes. Because in our view it is a violation of a fundamental constitutional right, Your Honor, and --

QUESTION: Yes, but you are not suggesting that

constitutional rights can never be found to be harmless error, are you? What you said in your brief was or the reason for your present position is that the integrity of the judicial process requires a per se rule.

MR. TEDMON: That is correct.

QUESTION: Do you think this is the only consitutional question with respect to the integrity of the judicial process?

MR. TEDMON: I am not sure I understand the question, Justice --

QUESTION: Well, your position is there can be harmless error rule because otherwise the integrity of the judicial process would be put at issue.

MR. TEDMON: Yes, in this type of a case, in a grand jury discrimination case.

QUESTION: My question was is the grand jury discrimination the only situation where you would make that same argument? What about --

MR. TEDMON: I don't think so. I have been --

QUESTION: You would make it any constitutional error?

MR. TEDMON: When the Constitution gets violated, it is very -- To me --

QUESTION: So, the integrity of the judicial process is at stake?

MR. TEDMON: The integrity of the whole Constitution is at stake.

QUESTION: Have you read Chapman?

MR. TEDMON: Chapman versus?

QUESTION: Chapman against California.

QUESTION: Decided in 1967.

MR. TEDMON: Oh, yes, I have, Your Honor.

QUESTION: Long after Cassel. What did it hold?

MR. TEDMON: Well, it held that in certain situations there could be harmless error.

QUESTION: Even constitutional error.

MR. TEDMON: Even a constitutional error.

QUESTION: Even constitutional error and the error in that case was a comment by a trial judge on the failure of the defendant to take the stand. Do you think that is less of a constitutional error than -- That went to the integrity of the trial itself, not to the grand jury.

MR. TEDMON: Exactly, Your Honor, and I understand.

QUESTION: Do you disagree with Chapman?

MR. TEDMON: I tend to disagree on a constitutional right has been violated.

QUESTION: When any constitutional right has been violated, it ought to be a per se rule.

MR. TEDMON: Yes, I think so, but the courts don't hold that way necessarily.

QUESTION: The courts don't agree with you.

MR. TEDMON: The problem comes out this way, as I

view it, Your Honor. There are trial phase problems which seemly can be corrected at the trial stage. This violation in Hillery can only be corrected by overturning the conviction. There is no other remedy available to him.

For example, as the Court has done in some of the Fourth Amendment cases -- the courts have taken the position that you shouldn't keep the evidence out because the right has been violated. They are talking about evidence at a trial. They are really not saying that you shouldn't have a remedy for the violation of the --

QUESTION: But, the fairness of the trial in this case was not affected in any way by --

MR. TEDMON: No. There is nothing in the record that indicates what happened to Hillery at the indictment phase had anything to do with his conviction.

QUESTION: Are you familiar with our fairly recent decision in Strickland that involved whether or not counsel had been ineffective?

MR. TEDMON: Yes. That is Strickland versus Washington.

QUESTION: Yes.

MR. TEDMON: Yes, Your Honor.

QUESTION: And, there, as I recall, the Court expressly said that even if counsel had been extremely ineffective in substance of denial with the right to counsel, that still the defendant would have to show prejudice. In other words,

we declined to adopt the per se rule there.

MR. TEDMON: That is correct.

QUESTION: Can you think of any more important constitutional right than the right to counsel?

MR. TEDMON: I would think not.

QUESTION: You would think not.

MR. TEDMON: I would think that is a very fundamental right, Your Honor, yes.

QUESTION: So, the rationale that you rely on is the integrity of the judicial process has never been uniformly applied by this Court.

MR. TEDMON: I missed that again.

QUESTION: Your rationale, integrity of the judicial process, has never been uniformly adopted as a reason for not applying the harmless rule by this Court. It wasn't any case that I suggested to you and there are several others, but I won't take your time.

MR. TEDMON: I think --

QUESTION: I will ask you one other question while you are thinking. Who is concerned with the integrity of the judicial process? Lawyers, of course, are, and judges, of course, are. Do you the think the public is?

MR. TEDMON: I think so.

QUESTION: What do you think the public will think of the courts in this case after 23 years, in view of the

fact this man has been unquestionably found guilty of a brutal murder, and you are here arguing today that because of integrity of the judicial process we should let him off?

MR. TEDMON: I don't know that he would be let off.

QUESTION: That is your argument. But, you would take him back to trial, which, of course, is impossible 23 years later. You are a trial lawyer and I was in court some myself and even if you read the transcript that is no way to try the case, like some of the writs have said if he did.

Anyway, the public, I think, would not be very interested in your rationale.

MR. TEDMON: I think they would, Your Honor. I apologize, I am not disagreeing, but I think the public is interested.

QUESTION: The public, of course, is interested in discrimination against blacks or anybody else in the composition of the grand jury. But, after you have a petit jury in a fair trial find that an individual is convicted, and you are not questioning that.

MR. TEDMON: No.

QUESTION: Why should the harmless error not apply?

MR. TEDMON: Because you would have a right for which there would be no remedy if the harmless error rule applied. It would not be, as I view it -- There wouldn't be much of a constitutional right if no remedy could attach for the

violation of that right.

QUESTION: Do I recall correctly that his own counsel at the time said, in effect, it wouldn't have made any difference because a new grand jury would have returned the same indictment, a grand jury that was properly composed?

MR. TEDMON: Mr. Chief Justice, I think Mr. Goodwin said that if he had been put through a preliminary hearing he would have been bound over. I don't think there is anything in the record where Mr. Goodwin talked about another grand jury proceeding.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Prahl? You have two minutes remaining.

MR. PRAHL: Just briefly, Your Honor.

ORAL ARGUMENT OF WILLIAM GEORGE PRAHL, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. PRAHL: I would like to cite to the Court Coleman versus Alabama at 399 U.S. 1 which is a case involving a denial of counsel at a preliminary hearing. I believe it was the State of Alabama.

In that case, counsel was not afforded at a preliminary hearing and this Court found there that that was a constitutional right subject to the harmless error rule and applied harmless error to the depravation -- a Sixth Amendment depravation at a preliminary hearing. I think that is additional authority.

I would like to address one remark made by Justice

O'Connor and that is on the burden of proof. Burden of proof was clearly on the Petitioner or Mr. Hillery to go forward and it was a deficiency in that burden of proof which lead to the --

QUESTION: Well, that isn't the burden of proof, the burden of going forward. Didn't he have the burden of sustaining a prima facie case?

MR. PRAHL: Yes, Your Honor. He also had a burden of proof on the issues he raised.

The District Attorney -- On Joint Appendix 45, page 45, is a statistical compilation introduced by the District Attorney to show that blacks did not comprise a significant -- That was the primary defense raised here.

QUESTION: Yes.

MR. PRAHL: That blacks did not comprise a significant portion of the population.

QUESTION: And, the Defendant had the burden of carrying -- of proving, didn't he?

MR. PRAHL: Yes, Your Honor. He also had the burden of proving that there was the eligible population. Now, that was what significantly changed the character of this when it got to the federal court.

With that I will conclude. Thank you, Your Honor.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:03 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-836 - DANIEL VASQUEZ, WARDEN, Petitioner V.

BOOKER T. HILLERY, JR.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)