Larry Mann v. Michael W. Moore

ANOTHER NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS LARRY MANN VERSUS MOORE. JUSTICE QUINCE IS RECUSED IN THIS CASE. MS. SCALLEY.

MAY IT PLEASE THE COURT. MY NAME IS LESLIE SCALLEY, AND I REPRESENT LARRY MANN ON CCRC. WE ARE HERE, TODAY, ON LARRY MANN'S PETITION FOR HABEAS CORPUS, AND THE FIRST ISSUE I WOULD LIKE TO ADDRESS IS NUMBER THREE. APPELLATE COUNSEL DID NOT, ON APPEAL, MAKE SEXUAL ASSAULTS, FOR WHICH LARRY MANN RENT OFFERED, THE FEATURE OF LARRY MANN MANN'S CASE, AND DELIVER A JURY VERDICT BASED ON THOSE ASSAULTS. DURINGED RECOMMENDATION, THE JURY ASKED THE FOLLOWING QUESTIONS. WAS THERE ANY PROOF OF NATURAL OR UNNATURAL SEXUAL INTERCOURSE WITH ELISA NELSON? WAS THERE ANY PROOF OF A SEXUAL ENCOUNTER BY THE AUTOPSY OF ELISA NELSON? WAS THE SEVEN-YEAR-OLD GIRL THAT MR. MANN FONDLED EVER EXAMINED BY A MEDICAL DOCTOR FOR BEING RAPED? LARRY MANN WAS NEVER CONVICTED OF A SEXUAL ASSAULT FROM THIS VICTIM.

WERE THERE OBJECTIONS MADE BY TRIAL COUNSEL?

TO THE STATEMENTS WE ARE COMPLAINING OF?

RIGHT.

NO. YOUR HONOR, TRIAL COUNSEL DID NOT OBJECT. SO BECAUSE TRIAL COUNSEL DID NOT OBJECT TO THE STATEMENTS DIRECTLY RELATED TO THIS CLAIM ALONE, THEY WOULD HAVE TO BE CONSIDERED ON DIRECT APPEAL, AS FUNDAMENTAL ERROR. AND FUNDAMENTAL ERROR, THIS COURT HAS DEFINED FUNDAMENTAL ERROR AS THAT WHICH REACHES INTO THE VALIDITY OF THE VERDICT, TO OBTAIN A DEATH RECOMMENDATION THAT COULD NOT HAVE BEEN OBTAINED WITHOUT THE ERROR.

WERE THESE ISSUES PRESENTED IN THE 3.850?

THIS ISSUE WAS NOT PRESENTED IN THE 3.850. THE 3.850 PRESENTED THE ISSUE THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE PROSECUTION'S REPEATED REFERENCES TO LARRY MANN, AS A PERVERT, A CHILD MOLESTER, AND A PEDOPHILE. IN THIS ISSUE, THE PROSECUTION MADE THESE SEXUAL ASSAULTS FOR WHICH LARRY MANN WAS KNOTS CONVICTED, THE FEATURE OF LARRY -- WAS NOT CONVICTED, THE FEATURE OF LARRY MANN'S PENALTY PHASE AND ENCOURAGED THE JURY TO RECOMMEND A VERDICT, BASED ON THE SEXUAL ASSAULTS. THAT WAS NOT RAISED IN THE 3.850. THESE QUESTIONS CLEARLY SUGGESTION THAT, EVEN THOUGH LARRY MANN WAS NOT CONVICTED OF A SEXUAL ASSAULT ON THIS CHILD AND THAT LARRY MANN WAS NEVER CONVICTED OF RAPING THE SEVEN-YEAR-OLD CHILD, THE JURY DID CONSIDER THIS DURING THEIR DELIBERATIONS, AND THIS OCCURRED SOLELY BECAUSE THE PROSECUTION MADE THIS THE FEATURE OF LARRY MANN'S PENALTY-PHASE PROCEEDINGS. LARRY MANN PRESENTED DR. CARBONEL, WHO TESTIFIED THAT BOTH STATUTORY MENTAL HEALTH MITIGATORS APPLIED IN HIS CASE, IN PART BECAUSE HE WAS A PEDOPHILE. AND THE BASIS FOR HER OPINION, DR. CARBONEL CONSIDERED THE FACT THAT LARRY MANN WAS ADJUDICATED GUILTY OR HAD RECEIVED A JUVENILE ADJUDICATION FOR FONDLING THE SEVEN-YEAR-OLD CHILD WHEN HE WAS 16. DURING OVER 33 PAGES OF CROSS-EXAMINATION TESTIMONY, THE PROSECUTION MADE THIS JUVENILE INCIDENT A FEATURE OF LARRY MANN'S PENALTY PHASE AND EVEN ARGUED TO DR. CARBONEL, IN FRONT OF THE JURY, THAT LARRY MANN RAPED THIS

SEVEN-YEAR-OLD GIRL, RATHER THAN JUST FONDLING HER, AND THERE WAS NO EVIDENCE OR JUVENILE ADJUDICATION OF A RAPE IN THAT CASE. THE PROSECUTION THEN PRESENTED ITS OWN EXPERT, DR. WHALIN, WHO AGREED WITH THE FACT THAT LARRY MANN WAS A PEDOPHILE AND WHO AGREED THAT LARRY MANN WAS EMOTIONALLY DISTURBED AT THE TIME OF THE CRIME, IN PART BECAUSE HE WAS A PEDOPHILE. DR. WHALIN DISPUTED DR. CARBONEL CARBONEL'S FINDINGS OF BOTH MENTAL HEALTH STATUTE MITIGATORS SO THE FACT WAS NOT AT ISSUE. BOTH THE STATE AND THE DEFENSE AGREED. HOWEVER, DR. WHALIN TESTIFIED THAT LARRY MANN TAUGHT HIMSELF TO AND PEDOPHILE, BY FANTASIZING ABOUT IT, PRACTICING IT IN HIS MIND, BUT THEY SORT OF GET BORED WITH THE OLD FANTASIES AND THEY GET BORED WITH THE OLD ACTS OF MOLESTING, AND THEY HAVE TO CREATE ONE MORE EXCISING. THIS SUGGESTED TO THE JURY THAT LARRY MANN HAD A HISTORY REPLETE WITH SEXUALLY MOLESTING CHILDREN BUT FOR WHICH HE WAS NOT CONVICTED, AND THE PROSECUTION MADE THIS THE SEAM OF HIS CLOSING ARGUMENT, DURING WHICH HE TOLD THE JURY THAT THEY SHOULD CONSIDER THAT SIMPLY BECAUSE LARRY MANN WAS A PEDOPHILE, HE SEXUALLY MOLESTED THIS VICTIM, BECAUSE CERTAINLY IT HAS NOT BEEN PROVED THAT SHE WASN'T SEXUALLY MOLESTED. THIS IS IMPROPER, ASKING THE JURY TO CONSIDER, AS AN AGGRAVATING CIRCUMSTANCE, A CRIME FOR WHICH LARRY MANN WAS NOT CONVICTED, AND THE PROSECUTION THEN CONTINUED ARGUING HE IS NOT CHARGED WITH SEXUALLY MOLESTING THE GIRL, BECAUSE HE MURDED HER. AGAIN THIS SUGGESTS THAT LARRY MANN HAD SEXUALLY MOLESTTED THE GIRL, AND IT INCLUDED A CHARGE OF ASSAULT. AGAIN, THEY SAID HE WAS STRUGGLING SO HARD WITH HIMSELF, STRUGGLING SO HARD ABOUT WHETHER TO MOLEST THIS CHILD. IF THAT STRUGGLE EXISTED, THERE IS NO DOUBT AS TO WHO THE WINNER WAS, AND THE WINNER WAS THE SEXUAL DESIRE, THE DESIRE, THE LIFELONG DESIRE, AGAIN, SUGGESTING THAT THE STRUGGLE THAT EXISTED IN LARRY MANN RESULTED IN A SEXUAL ASSAULT. THE WINNER WAS THE SEXUAL DESIRES, AND IN FACT THERE WAS NO EVIDENCE OF A SEXUAL ASSAULT IN THIS CASE. IT WAS NOT CHARGED, AND LARRY MARC WAS NOT CONVICTED OF A -- AND LARRY MANN WAS NOT CONVICTED OF A SEXUAL ASSAULT.

WAS THIS OR WAS THIS ISSUE NOT ACTUALLY ADDRESSED ON DIRECT APPEAL AND, AGAIN, MAYBE THERE IS DIFFERENTS EFFECTS ---DIFFERENT ASPECTS TO IT, BUT DIDN'T WE, IN THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, ACTUALLY ADDRESS IT BY SAYING THAT NOT ADDITIONAL, THE BULK OF HIS CLAIM IN THIS ISSUE RELATES TO THE PROSECUTORS'S COMMENTS CONCERNING MANN'S PEDOPHILIA, THE DEFENSE COUNSEL NOT ONLY OBJECTED TO THESE COMMENTS BUT THIS ISSUE WAS DECIDED ADVERSELY TO MANN ON DIRECT APPEAL AND IS NOW IMPROPERLY CAST AS AN INEFFECTIVE ASSISTANCE CLAIM. ISN'T THIS NOW, REALLY, THE THIRD TIME THAT THIS SAME EXACT ISSUE IS BEING BROUGHT BEFORE US? IN OTHER WORDS THIS ISN'T A SITUATION, SOMETIMES WE HAVE CASES WHERE A DEFENSE COUNSEL DOESN'T OBJECT TO ANYTHING AND THEN WE SAY IT IS PROCEDURALLY BARRED, AND THEN THE QUESTION IS WHETHER YOU SHOULD RAISE THIS IN AN INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL OR APPELLATE COUNSEL, DEPENDING ON, YOU KNOW, THE NATURE OF WHAT THE ERROR IS, BUT HERE IT LOOKS LIKE THIS HAS BEEN THE SUBJECT OF BOTH THE DIRECT APPEAL, AS WELL AS THE POSTCONVICTION CASE. SO CAN YOU TELL US WHY WE SHOULD BE ADDRESSING IT NOW, IN THIS CIRCUMSTANCE?

YES, YOUR HONOR. ON DIRECT APPEAL, APPELLATE COUNSEL ARGUED THAT THE FACT THAT THE PROSECUTION TOLD THE JURY THE FACT THAT THIS MAN IS A PERVERT AND A CHILD MOLESTER MAKES HIS ACTIONS SOMEHOW MORE EXCUSEABLE THAN THOSE OF A PERSON WHO IS NOT A PERVERT AND A CHILD MOLING ESTHER. -- MOLESTER. THE ARGUMENT RAISE ODD DIRECT APPEAL IS THE PROSECUTOR'S REPEATED REFERENCES TO LARRY MANN AS A PERVERT AND A CHILD MOLESTER, TURNED LARRY MANN'S PEDOPHILIA INTO A NONSTATUTORY AGGRAVATING CIRCUMSTANCE. THE DIRECT APPEAL NEVER MENTIONED THE FACT THAT THE PROSECUTION TOLD THE JURY THAT THEY SHOULD CONSIDER, AS AGGRAVATION, THAT LARRY MANN SEXUALLY ASSAULTED THE VICTIM, BECAUSE CERTAINLY IT HAS NOT BEEN PROVED THAT SHE WASN'T SEXUALLY MOLEST TOLD -- MOLESTED MOLESTED. APPELLATE COUNSEL DID NOT RAISE

THAT ON DIRECT APPEAL, AND IN THE 3.850, THE CLAIM ALLEGED THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE REPEATED REFERENCES TO LARRY MANN AS A PER -- PERVERT AND A CHILES CHILD MOLESTER AND A -- AND A CHILD MOLESTER AND A PEDOPHILE, AND THIS COURT UPHELD THE TRIAL COURT AND FOUND THAT THAT ISSUE NOT SPECIFICALLY BARRED, BECAUSE IT WAS RAISED ON DIRECT APPEAL, BUT THE FACT, THE ASSERTIONS OF SEXUAL ASSAULTS THAT DID NOT OCCUR, THAT WAS NEVER ADDRESSED ON DIRECT APPEAL OR IN THE 3.850. IT IS A MINOR DISTINCTION BETWEEN REPEATINGLY REFERRING TO SOMEBODY'S MENTAL ILL NANCY ACTUALLY SUGGESTING THAT OTHER CRIMES, FOR WHICH A LARRY MANN WAS NOT CONVICTED, ACTUALLY OCCURRED. THAT IS THE DISTINCTION. AND IT IS CLEAR FROM THE QUESTIONS THE JURY SUBMITTED TO THE COURT, THAT THE JURORS DID CONSIDER THIS, WHEN DELIBERATING AND THAT IT WAS FUNDAMENTAL ERROR. LARRY MANN NEEDED ONLY THREE MORE VOTES FOR A LIFE SENTENCE, AND AFTER THE JURY SUBMITTED THESE QUESTIONS, THE COURT ONLY TOLD THE JURY TO RELY ON THEIR COLLECTIVE MEMORY OF THE TESTIMONY AND EVIDENCE PRESENTED. THE JURY RELIED ON THE STATE. THE PROSECUTION, WHO IS THE MINISTER OF JUSTICE, HOLDING A SEMIJUDICIAL POSITION IN FLORIDA THEY RELIED ON HIS ASSERTIONS THAT A SEXUAL ASSAULT HAPPENED IN THIS CASE AND THAT LARRY MANN RAPED THE SEVEN-YEAR-OLD CHILD. IT IS VERY LIKELY THAT AT LEAST THREE JURORS RECOMMENDED THE DEATH SENTENCE, IN LARGE PART BASED UPON A SEXUAL ASSAULT THAT LARRY MANN DID NOT COMMIT.

SO -- WHAT DO YOU HAVE TO ESTABLISH, ASSUMING WE DON'T FIND THAT THIS HAS ALREADY BEEN RAISED? YOU WOULD HAVE TO ESTABLISH THAT IF THIS HAD BEEN PROPERLY RAISED ON APPEAL, THAT IT WOULD HAVE BEEN, RESULTED IN A REVERSAL OF LARRY MANN'S DEATH SENTENCE?

YES. THAT IS THE BURDEN, AND WE ARE ARGUING THAT SIMILAR OTHER COURTS HAVE ADDRESSED SIMILAR SITUATIONS.

IS IT JUST A PER SE THING? IF IT WOULD HAVE RESULTED IN REVERSAL, THEN IT DOESN'T MATTER WHETHER APPELLATE COUNSEL RAISED TEN VERY STRONG ARGUMENTS, IF THEY DIDN'T RAISE THE 11th ARGUMENT THAT MIGHT HAVE RESULTED IN REVERSAL, THAT WOULD RENDER APPELLATE COUNSEL INEFFECTIVE?

YES, YOUR HONOR.

DOESN'T THAT TURN EVERY INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CASE INTO A SECOND OR THIRD APPEAL?

NO, YOUR HONOR, I DON'T BELIEVE SO, NOT NECESSARILY, BECAUSE APPELLATE COUNSEL HAS THE DUTY TO REVIEW THE RECORD, FOR OBJECTED TO ERROR AND FUNDAMENTAL ERROR.

I UNDERSTAND THAT, BUT HOW, IF THE ONLY STANDARD IS MIGHT THAT HAVE RESULTED IN A REVERSAL YOU ARE RAISING A POINT THAT YOU ARE SAYING THE APPELLATE COUNSEL SHOULD HAVE RAISED ON APPEAL, THEN ALL WE ARE REALLY, GIVING, AREN'T WE JUST GIVING A DEFENDANT ANOTHER APPEAL, IF WE JUST FOLLOW THAT LINE THAT WE JUST LOOK AND SEE WHETHER THIS WAS AN ARGUMENT THAT WOULD HAVE RESULTED IN REVERSAL? I AM JUST ASKING FOR CLARIFICATION ON THAT. IT TROUBLES ME THAT WE WOULD BE IN THAT POSITION. THAT --

IT SEEMS, AS FAR AS I CAN TELL FROM THE CASE LAW, THAT THAT IS THE POSITION, AND IT IS SIMILAR TO THE POSITION BASED IN 3.850 CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL. IF YOU FIND COUNSEL WAS INEFFECTIVE, HE GETS, THE DEFENDANT GETS THE NEW PROCEEDING.

WELL, MOST OF THE TIME IN THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, THEY ARE REALLY STRATEGY QUESTIONS. IT IS RARE AT ALL THAT MERELY THE FAILURE TO OBJECT IS

GOING TO RESULT IN A REVERSAL FOR A NEW TRIAL. WOULDN'T YOU AGREE WITH THAT?

YES, IN MOST CASES. HOWEVER, BASED ON THIS COURT'S CASE LAW REGARDING HABEAS PETITIONS, I DON'T SEE ANY LEAD OR ANY OTHER SITUATION EXCEPT WHAT YOU DETERMINED, WHAT YOU HAVE STATED THAT, IF YOU FIND THAT THIS CLAIM PROBABLY WOULD HAVE RESULTED IN INVALIDATING THE VERDICT OR VACATING THE DEATH SENTENCE, THEN APPELLATE COUNSEL WAS INEFFECTIVE, BECAUSE HE DID NOT PERFORM ADEQUATELY, AS COUNSEL, BY RAISING THE MERITFUL CLAIM THAT WOULD HAVE GOTTEN HIS CLIENT RELEASED. THE SECOND ISSUE I WOULD LIKE TO BRIEFLY ADDRESS IS CLAIM ONE, WHICH IS THE APPREHEND I ISSUE, IN -- IS THE APRENDI ISSUE. IN MILLS THIS CASE UPHELD THAT, BECAUSE THE UNITED STATES SUPREME COURT SPECIFICALLY UPHELD STATUTES UNDERLYING BALDWIN VERSUS ARIZONA, THAT THE UNDERLYING SENTENCING SCHEME WAS NOT OVERRULED. HOWEVER, MR. MANN RESPECTFULLY ARGUES THAT THIS COURT INTERPRETED THAT LANGUAGE IN AND RENT I A LITTLE -- IN APRENDI A LITTLE TOO BROADLY. APRENDI NEVER SPECIFICALLY ADDRESSED THE FLORIDA SENTENCING SCHEME, AND IT IS CLEAR THAT THE STATUTE UNDERLYING WELLS, IN WHICH THE UNITED STATES SUPREME COURT UPHELD, ARE THOSE WHICH CLEARLY MAKE AN AGGRAVATING CIRCUMSTANCE A SENTENCING FACTOR AS THEY, UNDER THE TEST, OUTLINED IN APRENDI. APRENDI HELD THAT, TO DETERMINE WHETHER SOMETHING IS A SENTENCING FACTOR OR AN ELEMENT OF DEFENSE, WHICH RECEIVES SIXTH AND FOURTEENTH AMENDMENT PROTECTIONS, THE COURT MUST ASK DOES THE REQUIRED FINDING EXPOSE THE DEFENDANT TO A GREATER PUNISHMENT THAN THAT AUTHORIZED BY THE JURY'S VERDICT ALONE? IN ARIZONA, IN THE STATUTES UNDERLYING WALTON, THE QUESTION IS NO, BECAUSE THE ARIZONA STATUTES UPON WHICH WALTON WAS BASED, SAYS A PERSON CONVICTED OR A PERSON GUILTY OF FIRST-DEGREE MURDER SHALL SUFFER DEATH. HOWEVER, APPLYING THAT STATUTE TO THE FLORIDA DEATH PENALTY SENTENCING STATUTES, AS THEY EXISTED AT THE TIME OF LARRY MANN'S PENALTY PHASE, IN 1990, THE QUESTION IS YES, BECAUSE STATUTE 77.0082 PROVIDED THAT A PERSON WHO HAS BEEN CON -- 770.082 PROVIDED THAT A PERSON WHO HAS BEEN CONVICTED WILL HAVE SENTENCING APPROPRIATE. IT IS CLEAR THAT LARRY MANN WAS SENTENCED TO LIFE. WITH REVELATION TO .141, THE STATUTE MAKES CLEAR THAT, ONLY AFTER AN ADDITIONAL ELEMENT WAS PROVEN, DID THAT MAXIMUM STATUTE PENALTY INCREASE FROM LIFE TO DEATH. IN MILLS, THIS COURT STATED THAT BECAUSE BOTH SECTIONS REFERENCE A CAPITAL FELONY AND THAT THE GENERAL BLACK'S LAW DEFINITION OF A CAPITAL FELONY IS ONE FOR WHICH DEATH IS A POSSIBLE PENALTY, THAT DEATH IS THE MAXIMUM POSSIBLE PENALTY FOR A CAPITAL FELONY IN FLORIDA. HOWEVER, THIS DOES NOT ADDRESS THE TEST THE APPREHEND HI COURT OUTLINED -- THE APRENDHI COURT OUTLINED, AND IN FLORIDA DEATH IS NOT THE MAXIMUM PENALTY FOR A CAPITAL FELONY. UNDER FLORIDA LAW, BOTH CAPITAL FELONY TO A CHILD UNDER 12 AND CAPITAL MURDER FOR WHICH NO AGGRAVATING CIRCUMSTANCES WERE PROVEN, SAYS THAT DEATH IS AN APPROPRIATE PUNISHMENT. THIS COURT LABELED THESE CRIMES AS CAPITAL FELONIES, AS TO THE LEGISLATURE'S INTENT TO GIVE THESE CRIMES AN INCREASED BURDEN THAT MIGHT A COMPANY THE MAXIMUM LIFE SENTENCE PENALTY. IN LIGHT OF THIS ARGUMENT AND THAT PRESENTED IN HIS INITIAL PETITION, WHICH WAS FILED BEFORE MILLS'S HABEAS PETITION AND THE MILLS' OPINION, LARRY MANN ASKED THIS COURT TO FIND THAT, UNDER THE TEST OUTLINED IN APRENDHI, THE FLORIDA DEATH PENALTY SENTENCING SCHEME WAS UNCONSTITUTIONAL, AS IT WAS APPLIED TO LARRY MANN, AND I SEE MY TIME IS UP. I WOULD LIKE TO, IF THERE ARE NO QUESTIONS, I WOULD LIKE TO SAVE MY REMAINING TIME FOR REBUTTAL.

THANK YOU, COUNSEL.

THANK YOU.

MS. DITTMAR.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM CAROL DITTMAR FROM THE

ATTORNEY GENERAL'S OFFICE, REPRESENTING THE RESPONDENT IN THIS CASE, MICHAEL MOORE. IN MY RESPONSE TO THE HABEAS PETITION FILED IN THIS CASE, I ARGUED THAT THIS CASE SHOULD BE DISMISSED AS UNTIMELY, THAT THE PETITION WAS NOT FILED IN TIME, UNDER THE RULES, AND UNFORTUNATELY, I CITED TO THE WRONG RULE IN MY RESPONSE, FOR WHICH I APOLOGIZE TO THE COURT AND TO COUNSEL. THE CORRECT RULE WAS CITED IN THE REPLY TO THE RESPONSE, AND THAT IS 9.140-B-6-E, WHICH CLEARLY RIRSD THAT THESE HAB -- REQUIRES THAT THESE HABEAS PETITIONS BE FILED WITH THE INITIAL BRIEF IN THE POSTCONVICTION APPEAL. MR. MANN'S BRIEF IN THE POSTCONVICTION APPEAL WAS FILED IN OCTOBER 1999. THIS RULE HAD BEEN IN EFFECT FOR A COUPLE OF YEARS BY THEN. THERE IS NO REASON AND THERE HAS BEEN NO REASON OFFERED WHY THIS PETITION COULD NOT HAVE BEEN FILED WITH THE BRIEF, AND IN FACT, AS HAS ALREADY BEEN NOTED, MANY OF THE CLAIMS OVERLAP THE CLAIMS IN THE POSTCONVICTION APPEAL. THERE IS NO REASON TO ENTERTAIN THIS PETITION AT THIS TIME. AND I FEEL THAT THIS VERY STRONGLY, THIS COURT SHOULD NOT ONLY DISMISS THIS PETITION AS UNTIMELY BUT, WITH ALL DUE RESPECT, I THINK YOU SHOULD DISMISS IT VERY QUICKLY, TO PUT DEFENDANTS ON NOTICE THAT THIS RULE WILL BE ENFORCED. I UNDERSTAND THAT, IN ROBINSON, THIS COURT LOOKED AT THE SAME REQUIREMENT, WHICH WAS IN 3.851-2, B-2, HOWEVER, 3.851 HAS A SPECIFIC SECTION, WHICH SAYS THIS ONLY APPLIES TO CASES WHICH BECAME FINAL AFTER JANUARY 1, 1994. THAT SAME LIMITATION IS NOT IN THE 9.140 RULE, SO I DON'T THINK YOU CAN USE THE REASONING THAT WAS USED IN ROBINSON TO AVOID THE ENFORCEMENT OF THE RULE IN 9.140. ON THE CLAIM OF PROSECUTORIAL MISCONDUCT, AGAIN, THIS IS THE SAME ISSUE THAT WAS REJECTED IN THE INITIAL DIRECT APPEAL. IT WAS EXTENSIVELY LITIGATED IN POSTCONVICTION, UNDER A NUMBER OF DIFFERENT THEORIES, UNDER THE THEORY THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR HAVING PRESENTED THE EVIDENCE, BECAUSE, AGAIN, IT WAS THE DEFENSE THAT INGESTED THE SUGGESTION THAT THERE WAS A SEXUAL MOTIVE FOR THIS MURDER, IN THE PENALTY PHASE.

WOULD YOU HELP ME, THOUGH, WITH HOW WE RECONCILE, IN A SITUATION WHERE SOMETHING IS -- ISN'T OBJECTED TO, AND IT IS THERE FOR NOT ADDRESSED ON DIRECT APPEAL? IT LOOKS LIKE, IN THIS CASE, ACTUALLY, A LOT OF THIS WAS ADDRESSED.

RIGHT.

BUT IS THAT PROPERLY, THEN, AN INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CASE FOR THE FAILURE TO OBJECT, OR IS IT, ALSO, AT THE SAME TIME, AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, TO THE EXTENT THAT THE, WHAT ISN'T RAISED COULD BE CLASSIFIED AS FUNDAMENTAL ERROR? HAVE WE HAVE RESOLVED THAT ISSUE AND WHAT IS --

NO. I DON'T THINK THAT HAS BEEN RESOLVED, AND I THINK THE REASON IS IT IS VERY FACT-SPECIFIC, BECAUSE YOU HAVE TO LOOK AT WHAT WAS NOT OBJECTED TO, AND THE QUESTION OF WHETHER SOMETHING SHOULD HAVE BEEN PRESENTED IN THE DIRECT APPEAL AS FUNDAMENTAL ERROR, HAS NEVER, REALLY, BEEN GIVEN A LOT OF ATTENTION. IT CERTAINLY IS ALWAYS ARGUED THIS SHOULD HAVE BEEN PRESENTED AS FUNDAMENTAL ERROR, JUST AS IT IS ARGUED AS TRIAL COUNSEL ERROR FOR NOT PRESERVING THE ACTUAL OBJECTION, BUT WHAT YOU HAVE TO COME BACK TO IS LOOKING AT THE TEST UNDER STRICKLAND, AND SAY SAYING FIND THE DEFICIENCY, AND DEPENDING ON IF IT IS SOMETHING THAT IS REALLY OBVIOUS THAT WAS NOT OBJECTED TO, LIKE I BELIEVE THIS COURT, SEVERAL YEARS AGO, LOOKED AT JURY INSTRUCTIONS, WHICH THERE WAS NO OBJECTION TO AT THE TIME, AND I AM THINKING PARTICULARLY, LIKE THE EXCUSEABLE, JUSTIFIABLE HOMICIDE INSTRUCTION, AND THERE WERE CASES WHERE DEFENSE ATTORNEYS, ALTHOUGH THEY WERE ON NOTICE, CLEARLY, BY CASE LAW, THAT THERE WAS A PROBLEM WITH THE INSTRUCTION, DIDN'T OBJECT TO THE INSTRUCTION, AND SO THAT IS SOMETHING THAT YOU CAN CLEARLY LOOK AT WHERE THE FAULT IS, AND YOU CAN FIND THE DEFICIENCY UNDER STRICKLAND, AND YOU CAN MOVE ON TO THE PREJUDICE PRONG, BUT I THINK --

WE REALLY HAVE SORT OF A CONCEPTUAL DILEMMA, HERE, IN THAT IF A MATTER, LIKE AN ARGUMENT, IS FUNDAMENTAL ERROR, THEN BY THE FACT THAT IT WAS FUNDAMENTAL ERROR AND NOT OBJECTED TO, YOU -- YOU ARE LED TO THE CONCLUSION THAT TRIAL COUNSEL IS INEFFECTIVE FOR NOT OBJECTING TO IT, AREN'T YOU? I MEAN IT JUST SEEMS TO ME --

YOU MAY BE LED TO THE CONCLUSION THAT THERE IS SOME DEFICIENCY. BUT, AGAIN, I THINK YOU HAVE TO LOOK AT EXACTLY HOW IT ARISES. I THINK THAT, IN MOST CASES, WHERE YOU HAVE SOMETHING WHICH IS ALLEGED AT THIS STAGE IN THE PROCEEDINGS, AS BEING IMPROPER, AND YET IT WAS NOT EGREGIOUS ENOUGH FOR TRIAL COUNSEL TO OBJECT. IT WAS NOT EGREGIOUS ENOUGH FOR APPELLATE COUNSEL TO RAISE IT AS FUNDAMENTAL ERROR, THEN IT DETRACTS FROM THE ARGUMENT THAT THERE WAS ANY IMPROPRIETY, TO BEGIN WITH.

ARE YOU FAMILIAR WITH ANY CASES IN WHICH THIS COURT HAS DEALT WITH THIS PROBLEM OF FUNDAMENTAL ERROR IN A HABEAS PETITION FOR THE REVIEW OF THE CONDUCTOR EFFECTIVENESS OF APPELLATE COUNSEL? RUTHERFORD, WE SORT OF WERE PRETTY CLOSE, BUT --

BUT, AGAIN, WHAT THIS COURT ALWAYS SEEMS TO COME BACK TO IS APPELLATE COUNSEL IS BOUND BY WHAT TRIAL COUNSEL PRESERVED FOR APPEAL, AND I THINK ON HABEAS, THAT IS USUALLY WHAT WE ARE LOOKING AT, IS WHAT DID THE APPELLATE ATTORNEY HAVE AVAILABLE TO THEM, AND OF COURSE THEY HAVE THE RECORD AND THEY ARE STUCK WITH THE RECORD, AND ALTHOUGH THERE ARE CASES WHERE APPELLATE ATTORNEYS CAN GET VERY VERY CREATIVE AND VERY THOUGHTFUL AND BRING CLAIMS OF FUNDAMENTAL ERROR, WHICH HAD NOT BEEN PRESERVED AND WHICH ARE SUCCESSFUL, IT DOESN'T MEAN THAT WHEN THAT DIDN'T HAPPEN, IN A PARTICULAR CASE, THAT THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

SO YOU LOOK AT, I GUESS, AN EXAMPLE MIGHT BE SAY THERE IS THE MOST EGREGIOUS CLOSING ARGUMENT THAT, AFTER THAT VERDICT, WE REVERSED FOUR DIFFERENT TIMES FOR THAT ARGUMENT, AND THEN APPELLATE COUNSEL HAVING THOSE FOUR CASES SIMPLY DOESN'T RAISE IT. THAT IS HIPCALLY SOMETHING THAT, WOULD YOU --

AS FUNDAMENTAL ERROR? I MEAN IN THE FOUR CASES WHERE IT WAS RAISED, IT WAS FUNDAMENTAL ERROR AND HAD NOT BEEN PRESERVED AND THE APPELLATE ATTORNEY DID NOT RAISE IT? I THINK THAT COMES CLOSE TO LOOKING -- I THINK YOU HAVE TO LOOK AT THE LEGAL LANDSCAPE, AT THE TIME OF THE APPEAL, TO BE ABLE TO ASSESS THE PERFORMANCE OF THE APPELLATE COUNSEL, AND CERTAINLY IF THE LEGAL LANDSCAPE IS, AT THAT TIME, THIS IS EGREGIOUS FUNDAMENTAL ERROR, WHICH APPELLATE COUNSEL SHOULD HAVE BEEN ON NOTICE FROM ALL THE CASE LAW AND SHOULD HAVE RAISED, AND THERE IS NO QUESTION THAT, IF THE CLAIM HAD BEEN RAISED IN THAT PARTICULAR CASE, IT WOULD HAVE BEEN SUCCESSFUL, THEN I THINK YOU CERTAINLY HAVE TO CONSIDER THAT IN A HABEAS PETITION.

WE DON'T, BECAUSE THERE ARE NO EVIDENTIARY HEARINGS, SO WE ARE JUST LOOKING AND SAYING WE ARE MAKING THE DECISION WHAT THE LEGAL LANDSCAPE LOOKED.

RIGHT.

ARE WE ESSENTIALLY LOOKING AND SAYING, WELL, GEE, IF THIS HAD HAVE BEEN RAISED, WE WOULD HAVE REVERSED, SO FAIRNESS TELLS US WE HAVE GOT TO REVERSE? AND THE QUESTION ON THAT IS THAT IS, REALLY, LIKE JUST GIVING A DEFENDANT ANOTHER APPEAL? NOW, YOU KNOW, I REALIZE -- AND I HAVE HAD THAT PROBLEM FOR SOME TIME, ABOUT HOW THESE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, REALLY, WORK IN REAL LIFE.

AND IT IS REALLY, I MEAN, IT IS ANOTHER APPEAL. IT IS ANOTHER APPEAL, A FURTHER STEP REMOVED FROM THE PROCESS, SO I THINK IT SHOULD BE MORE LIMITED, BUT IT CERTAINLY IS ASKING FOR APPELLATE REMEDIES, AND IT IS ASKING THIS COURT TO EXERCISE APPELLATE JURISDICTION, EVEN THOUGH IT IS AN EXTRAORDINARY WRIT.

SO IT WOULD HAVE TO, MAYBE, BE SOMETHING LIKE A CLEARLY ESTABLISHED LEGAL RIGHT THAT WOULD HAVE LED TO REVERSAL, BASED ON WHAT THE CASE LAW SAID AT THE TIME. YOU SAID SOME OF THE EXAMPLES WOULD BE A JURY INSTRUCTION, WHERE THAT WAS NOT RAISED, WHERE IT WOULD HAVE BEEN A REVERSAL?

THAT JUST, AND I MAY BE WRONG ABOUT THAT, BUT ON THE TOP OF MY HEAD, I SEEM TO REMEMBER CASES FROM SEVERAL YEARS BACK, WHERE ATTORNEYS, TRIAL ATTORNEYS DID NOT OBJECT TO JURY INSTRUCTION ERRORS THAT CASE LAW CERTAINLY SUPPORTED, AND I BELIEVE THAT IS THE TYPE OF CASE WHERE, MAYBE, THIS COURT HAS LOOKED AT INEFFECTIVE ASSISTANCE COUNSEL IN A DIRECT APPEAL FOR THAT TYPE OF THING, SO, AGAIN, YOU HAVE, YOU KNOW, YOU STILL HAVE THE RECORD, AND WITH THE HABEAS PETITIONS, YOU HAVE THE RECORD, AS THE APPELLATE ATTORNEYS ATTORNEYS HAD IT ON APPEAL, AND YOU -- AS THE APPELLATE ATTORNEYS HAD IT ON APPEAL, AND YOU HAVE THE LEGAL LANDSCAPE AS IT WAS DEVELOPED, AT THE TIME OF APPEAL, AND I THINK THERE IS NO NEED TO GO BACK AND ASSESS, UNDER STRICKLAND, WHETHER THERE WAS DEFICIENCY.

BUT IN YOUR OPINION, IT WAS ADDRESSED.

CORRECT. PARTICULARLY PROSECUTORIAL MISCONDUCT WAS DIRECTLY ADDRESSED. THE ARGUMENT WAS MADE THAT THIS WAS INFLAMMATORY, AND THIS COURT REJECTED THAT AND FOUND NO IMPROPRIETY AT ALL, SO THAT THE ONLY THING THAT THE PROSECUTOR SAID WAS FAIR EVIDENCE THAT HAD BEEN SUBMITTED AT TRIAL, AND IT WAS RAISED IN POSTCONVICTION ON A NUMBER OF DIFFERENT THEORIES, ON THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR HAVING PRESENTED IT, ON THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, FOR FAILURE TO FURTHER OBJECT OR FURTHER PRESERVE A RECORD, AND, ALSO, ON SUBSTANTIVE CLAIMS, THE PROSECUTORIAL MISCONDUCT, AND OF THE TRIAL COURT'S TREATMENT AND ACCEPTANCE OF THIS AS NONSTATUTORY MITIGATION, AND ALL OF THOSE CLAIMS WERE REJECTED IN THE POSTCONVICTION APPEAL, AND THERE ARE NO NEW FACTS OR NEW ALLEGATIONS PRESENTED IN THIS HABEAS PETITION THAT THIS COURT HAS NOT ALREADY REJECTED IN THIS VERY CASE, AND I THINK, AGAIN, THAT COMES BACK TO WHY ARE WE HERE TODAY, AND WHY ARE WE ALLOWING THIS TO CONTINUE. ON THE APRENDHI CLAIM, I DON'T THINK ANYTHING HAS BEEN SUBMITTED TO THIS COURT, WHICH SHOULD REQUIRE YOU TO RECONSIDER THE MILLS DECISION. APRENDHI CLEARLY, AS MILLS NOTES STATES ON ITS FACE THAT IT IT IS NOT APPLICABLE TO CAPITAL SENTENCING PROCEEDINGS, PARTICULARLY IN THE WAY THAT IT IS PRESENT HAD IN THIS PETITION, APRENDHI DID NOT EVEN DISCUSS CHARGING DOCUMENTS OR THE REQUIREMENT THAT A JURY VERDICT BE UNANIMOUS, WHICH IS HOW IT IS BEING ALLEGED IN THIS PETITION AS HAVING AN EFFECT ON MR. MANN'S CASE. I THINK WITHOUT SOMETHING FURTHER FROM THE UNITED STATES SUPREME COURT, SUGGESTING THAT THEY ARE GOING TO EXPAND UPON THIS OR THEY ARE GOING TO USE THIS AS AWAY TO INVALIDATE CAPITAL SENTENCING PROCEDURES THROUGHOUT THE COUNTRY, THERE IS CERTAINLY NO REASON, AND THERE ARE NO OTHER CASES THAT I HIM AWARE OF, WHERE APRENDHI HAS BEEN TAKEN TO THAT LEVEL, AND THIS COURT, OBVIOUSLY, THOROUGHLY EXAMINED THE ISSUE IN MR. MILLS'S CASE, AND THERE IS NO REASON TO DISTURB THAT RULING SO I WOULD ASK, FOR ALL THESE REASONS, FOR THE COURT TO DENY RELIEF TO MR. MANN. THANK YOU.

MS. SCALLEY.

THANK YOU. FIRST, THE STATUTE COUNSEL REFERENCEED, IN INDICATING THAT THIS CLAIM SHOULD BE DISMISSED AS UNTIMELY, APPLIES ONLY TO CAPITAL CASES DECIDED PREVIOUSLY TO JANUARY 1, 1994, AS THIS COURT INDICATED IN ROBINSON VERSUS STATE. THIS COURT HAS CONTINUALLY ACCEPTED THE STATE PETITION FOR HABEAS CORPUS, IN CASES WHICH PREDATE JANUARY 1, 1994, AFTER THE INITIAL 3.850 PROCEEDINGS. THIS COURT HAS DONE SO IN ROBIN SON. -- IN ROBINSON. IT HAS DONE SO, RECENTLY, ALSO IN HALL AND IN SCHWAB. MR. MANN'S

PETITION WAS NOT UNTIMELY, THIS COURT RULED. MOREOVER MR. MANN FILED HIS PETITION FOR HABEAS CORPUS MORE THAN ONE MONTH AFTER THE ADDITIONAL DATE. THEREFORE WE ASK THIS COURT NOT TO DISMISS IT IT. SECONDLY, APPELLATE COUNSEL DID NOT RAISE, ON DIRECT APPEAL, THAT THE PROSECUTION MADE NONSTATUTORY AGGRAVATING CIRCUMSTANCE OUT OF THE PRIOR CONVICTION, OUT OF PRIOR SEXUAL ASSAULTS FOR WHICH LARRY MANN WAS NOT CONVICTED. ON DIRECT APPEAL, APPELLATE COUNSEL BRIEFED A THREE AND-A-HALF PAGE CLAIM THAT BASICALLY ADDRESSED ONE PORTION OF THE PROSECUTOR'S MISCONDUCT OR WHAT HE ALLEGED TO BE PROSECUTOR'S MISCONDUCT, AGAIN, AS THIS COURT PARAPHRASED IT, THE STATEMENT THAT SHE IS ACTUALLY SUGGESTING, TO YOU, THAT IT IS APPALLING, IS OFFERED IN MITIGATION, THAT BECAUSE THIS MAN IS A PERVERT AND A CHILD MOLESTER, HIS ACTIONS WERE SOMEHOW MORE EXCUSEABLE THAN SOMEONE WHOSE ACTIONS WERE NOT A CHILD MOLESTER AND A PERVERT. NONE OF THE INSTANCES OF MISCONDUCT IN CLAIM THREE WERE ADDRESSED IN THAT ISSUE, AND APPELLATE COUNSEL ADDRESSED THAT IT IS DENIGRATING MITIGATION IN INTRODUCING PEDOPHILIA AS A STATUTORY NON-- AS A NONSTATUTORY AGGRAVATING CIRCUMSTANCE AND MAKING THE PENALTY PHASE OF THE PROCEEDINGS SEXUAL ASSAULTS FOR WHICH LARRY MANN WAS NEVER CONVICTED. APRENDHI, AGAIN, BRIEFLY, THE SUPREME COURT DID GIVE COURTS SOME LEAD, WHEN IT ADDRESSED THE TEST, DOES THE REQUIRED FINDING EXPOSE THE DEFENDANT TO A GREATER VERDICT THAN THAT AUTHORIZED BY THE JURY, TO GREATER PUNISHMENT THAN THAT AUTHORIZED BY THE JURY'S VERDICT VERDICT? THAT IS THE CASE, UNDER THE FLORIDA DEATH PENALTY SENTENCING SCHEME, AS IT EXISTED IN 1990, AT THE TIME OF LARRY MANN'S PENALTY PHASE, AND THE LANGUAGE THAT SPECIFICALLY UPHELD THAT, IN WHICH APRENDHI SPECIFICALLY UPHOLD CAPITAL SENTENCING STATUTES CLEARLY APPLY TO CAPITAL SENTENCING STATUTES LIKE THOSE IN AIRS OWN, A WHICH ALREADY MAKE AGGRAVATING CIRCUMSTANCES SENTENCING FACTORS RATHER THAN ELEMENTS OF THE CRIME, UNDER THE TEST APRENDHI OUTLINED. IF THERE ARE NO FURTHER QUESTIONS, LARRY MANN ASKS THIS COURT FOR ALL THE REASONS OUTLINED IN HIS INITIAL PETITION AND REPLY PETITION, FOR WRIT OF HABEAS CORPUS, TO VACATE HIS DEATH SENTENCE AND REMAND HIS CASE FOR A NEW AND FAIR PENALTY PHASE PROCEEDING. THANK YOU.

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