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Pablo San Martin v. State of Florida

SC05-831

NEXT CASE ON OUR CALENDAR
THIS MORNING IS SAN MARTIN

VERSUS STATE OF FLORIDA.

>> PLEASE THE COURT, GUSTAVO
GARCIA MONTEZ, REPRESENTING
MR. SAN MARTIN BEFORE THE COURT.

>> PULL THE MICROPHONE A LITTLE
CLOSURES AND MAY HELP US TO HEAR
BETTER.

>> IS IT BETTER.

>> MUCH BETTER.

>> THANK YOU.

THIS CASE IS ON APPEAL ON THE
BASIS OF A DENIAL OF A
POSTCONVICTION CLAIM FILED IN
THE COURT BELOW, THE CLAIM FILED
AFTER THE DENIAL ON THE DIRECT
APPEAL.

I'D LIKE TO CONCENTRATE ON, IN I
MAY THE DENIAL WITHOUT
EVIDENTIARY HEARING OF THE CLAIM
AND IF I MAY COMBINE SOME OF
THEM FOR BREVITY'S PURPOSES.
THAT BEING THE FAILURE TO
PROPERLY INVESTIGATE THE
DEFENDANT'S BACKGROUND IN CUBA,
WHEN COMBINED OR INATTENDANT TO
THE FAILURE AND -- TO DEVELOP

AND COORDINATE THAT BACKGROUND
WITH THE EXPERTS THAT WERE
PRESENTED AT TRIAL.

>> WHAT -- GO RIGHT TO IT.

WHAT DID THE -- WHAT WERE THE
ALLEGATIONS AND WHAT DO YOU SAY
SHOULD HAVE BEEN TESTED AT THIS
EVIDENTIARY HEARING?

LET'S GO RIGHT TO WHAT YOU THINK
YOU SHOULD HAVE HAD THE HEARING
TO DEVELOP.

>> YES, YOUR HONOR.

WHAT I BELIEVE THE HEARING
SHOULD HAVE BEEN HAD TO DEVELOP
IS WHY THE EXPERTS THAT WERE
PRESENTED DURING THE TRIAL HAVE

NOT ACTUALLY MET WITH THE FAMILY MEMBERS OF MR. SAN MARTIN PRIOR TO THEM DEVELOPING THEIR OPINION ESTIMATES, MR. MARTIN'S MENTAL HEALTH AN CONDITION AND ANY MITIGATING FACTORS, PARTICULARLY IN LIGHT OF THE FACT THAT THAT RESULTED IN THE FAMILY OF MR. SAN MARTIN TESTIFYING IN MITIGATION IN A MATTER THAT

CONTRADICTED THE EXPERT'S DESCRIPTION OF MR. SAN MARTIN'S LIFE AND, THEREFORE --

>> ONE OF -- DIDN'T ONE OF THE EXPERTS TESTIFY THAT THAT ACTUALLY WAS PART OF THEIR TECHNIQUE, THAT IS, THAT THEY FELT LIKE THEY DIDN'T WANT TO BE BIASED BY INFORMATION THAT THEY RECEIVED BEFORE INTERVIEWING MR. SAN MARTIN, THEIR PATIENT, YOU KNOW, THE SUBJECT OF THE -- DID ONE OF THEM TESTIFY THAT THAT WAS A CONSCIOUS POLICY OF THEIRS BECAUSE THEY WANTED TO HAVE DIRECT EXPOSURE TO THE PATIENT AS FAR AS THEIR EVALUATION TO BEGIN WITH? I MEAN, JUST HELP ME WITH THAT.

>> YOUR HONOR IS CORRECT. AND I BELIEVE IT WAS DR. MARINA WHO TESTIFIED THAT SHE DIDN'T WANT TO MEET -- DID NOT MEET WITH THE FAMILY OF -- AS A MATTER OF COURSE. THE -- WHAT EFFECT DOES THAT

HAVE AND, IF SHE DOESN'T WANT TO MEET WITH THE FAMILY, SHOULD THE ATTORNEY HAVE HAD PREPARED A SUMMARY OF WHAT THE FAMILY WOULD HAVE TO SAY, AND ADDITION, THE ATTORNEY THEN NEEDS TO REALLY DIG IN, WITH THE FAMILY AND EXPLORE THE DEFENDANT'S BACKGROUND, BEING THE EXPERT DOESN'T WANT TO MEET WITH THE FAMILY, WELL, HERE'S WHAT THE FAMILY HAS TO SAY.

>> WHAT DID THAT EXPERT SAY IN TERMS OF ANY INVESTIGATION INTO THE BACKGROUND OF THE PATIENT? IN ADDITION TO THE DIRECT

INTERVIEW?

DID THE DOCTOR SAY THAT THEY HAD OTHER MATERIALS OR DID ANYTHING ELSE OTHER THAN INTERVIEW THE PATIENT?

>> JUDGE, THE BEST THING I WAS ABLE TO FIND FROM THE RECORD BELOW WAS THE DOCTOR SAID THAT SHE HAD NOT READ THE REPORTS AND RECORDS OF THE CASE.

SO THAT IT APPEARS THAT THE ONLY THING THAT DR. MARINA WAS WORKING WITH WAS WHATEVER INVESTIGATOR REPORTS MAY HAVE EXISTED FROM THE ATTORNEYS WHICH WE DO NOT KNOW BECAUSE THEY BOTH LOST THEIR FILES OR DESTROYED THEIR FILES AS WELL AS DR. MARINA'S CONVERSATIONS WITH PABLO SAN MARTIN.

>> ONE OF YOUR POINTS IS, I REALIZE, THE CONFLICT BETWEEN THE TWO TO SOME EXTENT.

>> YES.

>> BUT WHAT DID THE OTHER EXPERTS SAY IN TERMS OF INTERVIEWING FAMILY MEMBERS, OR BEING EXPOSED TO MATERIAL FROM THOSE FAMILY MEMBERS OR FRIENDS, TO DEVELOP THE BACKGROUND.

WAS THERE A PARALLEL TESTIMONY FROM THAT EXPERT ABOUT WHAT THEIR POLICY WAS? IN TERMS OF INVESTIGATION BEFORE EVALUATION?

>> YOUR HONOR, THE --

DR. HERRERA'S TESTIMONY WAS MORE COMPLETE AND APPEARED TO BE MR. THOROUGH, HOWEVER -- BUT IT DOES NOT -- DID NOT TAKE AWAY THE CONFLICT WITH DR. MARINA'S TESTIMONY AND THE ACTUAL DEFENSE IMPEACHMENT OF ITSELF IN THE PRESENTATION OF MITIGATION TESTIMONY.

I ACKNOWLEDGE THE FACT THAT DR. HERRERA TESTIMONY AND WORK APPEARS TO HAVE BEEN MORE THOROUGH.

BUT, THERE IS AN ADDITIONAL ISSUE.

AND IT HAS TO DO WITH THE

COORDINATION OF THE DEFENSE
WITNESSES.

AND WHILE I'M IN NO WAY
PROPOUNDING THAT THEY SHOULD
HAVE COACHED PEOPLE TO TESTIFY
IN A PARTICULAR WAY, THERE DOES
NOT APPEAR ON THE RECORD
ANYWHERE THAT ONE DOCTOR'S
REPORT WAS GIVEN TO THE OTHER
DOCTOR'S REPORT PRIOR TO

TESTIMONY.

BECAUSE IN FACT AT -- ON THE
STAND, DR. MARINA WAS CONFRONTED
WITH ANOTHER DOCTOR'S REPORT
THAT SHE SHOULD HAVE REVIEWED
AND CHANGED HER OPINION ON THE
STAND.

>> WHAT WAS COUNSEL'S
EXPLANATION OF BOTH THE CONFLICT
AND THEN THAT ISSUE?

>> I DON'T KNOW.

>> COUNSEL, WAS COUNSEL
QUESTIONED ABOUT BEING AWARE OF
THE CONFLICT?

AND THE OTHER MATTER THAT YOU
ARE JUST POINTING OUT.

>> YOUR HONOR, I DO NOT HAVE
ANYTHING IN THE RECORD BELOW.

>> WAS THIS CLAIM SUMMARILY
DENIED.

>> YES.

>> ALL RIGHT.

I THINK WE HAVE GONE BACK TO THE
FIRST QUESTION WHICH IS THAT YOU
WANT A CHANCE -- AND THAT WAS
WHAT JUSTICE LEWIS WAS ASKING

YOU ABOUT, TO DEVELOP THIS, AS
TO WHY HE DIDN'T PROVIDE MORE
ACCURATE STATEMENTS OF WHAT THE
FAMILY WOULD SAY, WHY, WHY, WHY,
RIGHT SENATE WE DON'T HAVE THE
ANSWERS YET.

>> EXACTLY.

ALL OIL SAYING IS THAT AN
EVIDENTIARY HEARING SHOULD HAVE
BEEN HELD AS TO THAT POINT.

AS TO THE COORDINATION AND
DEVELOPMENT OF BACKGROUND AND
THE COORDINATION OF THE
WITNESSES, PARTICULARLY WHEN
THEY ARE GOING TO BE
CONTRADICTED BY THE FAMILY.

>> WOULD YOU ENLIGHTEN ME ON THIS PART AND I'M -- IT DOESN'T APPEAR IN THE RECORD. AS I DIDN'T IT, ALL OF THE WITNESSES THAT YOU SAY NOW TALK ABOUT THE TERRIBLE CHILDHOOD, DID TESTIFY AT THE TRIAL, OTHER THAN THE FATHER, THE FATHER WAS AVAILABLE. FIRST OF ALL, CORRECT.

>> THAT'S CORRECT.

>> ALL RIGHT.

AND THEY TESTIFIED TO MORE OF A GLOWING CHILDHOOD THAN MR. SAN MARTIN RECALLS AND DR. MARINA AT TRIAL EXPLAINED THAT AS BEING PEOPLE DON'T WANT TO ACKNOWLEDGE BAD THINGS IN THEIR BACKGROUND, CORRECT.

>> CORRECTED, YOUR HONOR.

>> BUT THEN, WHAT YOU ARE SAYING IS THAT KIND OF BLEW THE WHOLE THING OUT OF THE WATER BECAUSE THEY IMPLIED SAN MARTIN WAS MAKING IT UP, SO FORTH, CORRECT.

>> THAT'S CORRECT.

>> BUT IF THE ACTUAL WITNESSES TESTIFIED TO WHAT THEY TESTIFIED AT THE TRIAL, AND THEY ARE NOW CHANGING IT, ISN'T IT -- DON'T WE FROM A POINT OF VIEW OF LOOKING AT THIS, IT IS -- WHAT WOULD THE DEFENSE LAWYER HAVE DONE DIFFERENTLY IF THAT WAS THEIR TESTIMONY AT THE TIME? WHAT WOULD YOU DEVELOP I GUESS

IN THAT REGARD?

THAT IS, THAT WELL, THEY TESTIFIED ONE WAY, ASSUME THAT HE PREPARED THESE WITNESSES OR ARE YOU GOING TO ARGUE AND SAY HE REALLY DIDN'T PREPARE THEM WELL, TO POINT TO THEM WHY THEY REALLY NEEDED TO TALK ABOUT THE BAD CHILDHOOD?

I MEAN, WHAT IS --

>> JUDGE THAT IS PRECISELY PART OF THE PROBLEM, HAS TO DO WITH COORDINATION AND THE DEVELOPMENT.

THEY FAILED TO MEET WITH THE PEOPLE SUFFICIENTLY, YOU CAN'T

GET TO THE DARK SECRETS OF A FAMILY IN A COUPLE OF MEETINGS. ONE OF THE WITNESSES FROM SAN MARTIN'S BROTHER, TESTIFIED, WELL, THEY NEVER TOLD ME TO SAY EVERYTHING. I WAS NEVER TOLD TO SAY EVERYTHING. AND, THAT -- WHAT THAT INDICATES IS A FAILURE TO DEVELOP A

RAPPORT WITH THE FAMILY WHEN YOU WILL BE ASKING THE FAMILY TO OPEN THEMSELVES AND DISCLOSE INCIDENTS SUCH AS DRUNKEN BINGES, A PERSON BEING TIED TO A TABLE, ET CETERA.

>> DID YOU SAY HIS FAMILY WAS BACK IN CUBA?

>> YES.
YES.

>> A LITTLE HARDER TO DEVELOP A RAPPORT.

>> NO, I'M SORRY. THAT HAPPENED IN CUBA BUT THE FAMILY IS HERE IN MIAMI.

>> OKAY.

SO --

>> IT HAPPENED IN CUBA, IN A DIFFERENT COUNTRY AND MAY BE DIFFICULT TO OBTAIN ANY RECORDS BECAUSE OF A DIFFERENT JUDICIAL SYSTEM AND DIFFERENT RECORDKEEPING SYSTEM BUT THE TESTIMONY WAS THERE TO BE HAD.

>> WAS THERE A LANGUAGE BARRIER.

>> NO.

>> WITH THE INITIAL -- TRIAL LAWYER -- INTO NO.

>> BOTH SPOKE SPANISH.

>> LET ME GO BACK TO THE DISCUSSION.

I UNDERSTAND, YOU DID SAY THAT ADDITIONAL INVESTIGATION, DO YOU MEAN OTHER PEOPLE OR IS THIS WHAT YOU ARE TALKING ABOUT, THE FAMILY DISCUSSION.

>> THE FAMILY DISCUSSION YOUR HONOR.

>> THAT IS WHAT YOU MEAN BY FURTHER INVESTIGATION.

>> YES.

>> NOT THAT THEY COULD FIND

OTHER WITNESS OR ADDITIONAL INFORMATION, THEY JUST DIDN'T DEVELOP IT FROM THOSE FAMILY MEMBERS WHO WERE HERE.

>> CORRECT.

>> AND THAT'S WHAT YOU THINK IN THE -- YOU NEED AN EVIDENTIARY HEARING ON IS THAT.

>> CORRECTED AND THE PROBLEM LIES, THEN YOU GO TO THE ONE

THAT YOU CAN'T PROVE BECAUSE SINCE YOU DO NOT HAVE A RAPPORT WITH THE CLIENTS PRIMARY FAMILY, CLOSEST FAMILY MEMBERS, YOU -- AND THE CLIENT ATTEMPTED TO GET RID OF HIS ATTORNEY, BASICALLY, THEY HAVE -- THE DAY OF TRIAL SAYING THERE WAS NO COMMUNICATION THAT HE WAS EVEN -- COPIES AND WHAT HAVE YOU NOT THEN YOU ARE LEFT IN A VACUUM AS TO HAVE THEY REALLY DEVELOPED A RAPPORT WITH THE PEOPLE AND WHAT OTHER STUFF COULD THEY HAVE FOUND AND THAT IS AN IMPOSSIBLE ASPECT --

>> NO, WE ARE STILL TALKING ABOUT NONSTATUTORY MITIGATION, CORRECT.

>> JUDGE, WE ARE... WE ARE TALKING ABOUT NONSTATUTORY MITIGATORS TO THE POINT THAT -- TO THE POINT THAT YOU -- TO THE POINT THAT THE PSYCHOLOGICAL PROFILE MAY NOT HAVE BEEN ADEQUATELY DEVELOPED DUE TO THE

LACK OF CRITICAL INFORMATION FROM THE FAMILY.

THAT IS PART OF THE PROBLEM.

>> WHAT ALLEGATION WAS THERE AS TO THAT POINT?

IS THERE ANY ALLEGATION THAT THERE ARE POTENTIAL STATUTORY MITIGATORS HERE.

>> HE MAY -- THERE IS AN ALLEGATION THAT HE MAY HAVE A BRAIN INJURY.

AND THAT THAT BRAIN INJURY MAY PLAY A ROLE, MAY HAVE PLAYED A ROLE.

THERE IS A CLEAR EVIDENCE THAT HE -- THAT THE INDIVIDUAL IS

IMPULSIVE, CLEAR EVIDENCE THAT THE INDIVIDUAL HAS A VERY LOW IQ, AND THAT HE IS A FOLLOWER, AND SO THAT WE MAY GO INTO SOME OF -- MAY BE ABLE TO REACH SOME OF THE OTHER, SOME OF THE STATUTORY MITIGATORS BUT THE PROBLEM LIES WITH THE FAILURE TO HAVE A MORE THOROUGH -- HAVE A COMPLETE AND THOROUGH

INVESTIGATION OF THE BACKGROUND AND --

>> LET ME ASK YOU, YOU KEEP SAYING THAT.

BUT NOW, THE ATTORNEY DID IN FACT TALK WITH THESE PEOPLE, CORRECT?

>> YES.

>> AND WAS THAT -- ON MORE THAN ONE OCCASION.

>> YOUR HONOR, WE CANNOT KNOW THAT BECAUSE THE --

>> I GUESS I'M TRYING TO GET FROM YOU, THEN, HOW -- HOW FAR ARE WE SUPPOSED -- IS AN ATTORNEY SUPPOSED TO GO? YOU KEEP SAYING DEVELOP A RAPPORT WITH THE FAMILY MEMBERS. I MEAN, WHAT ARE YOU SUGGESTING? THAT YOU HAVE TO MEET OVER AND OVER AND OVER AGAIN WITH THESE PEOPLE?

AND TELL THEM EXACTLY EVERYTHING THAT IT IS?

I MEAN, THEY'RE THE ONES WHO HAVE THE INFORMATION.

CORRECT?

AND SO, WHAT IS -- WHAT IS IT THAT YOU ARE SUGGESTING THIS ATTORNEY SHOULD HAVE DONE?

>> JUDGE, IF I --

>> BEYOND TALKING TO THESE PEOPLE, FINDING OUT WHAT THEIR FAMILY LIFE IS LIKE?

>> JUDGE, THE -- THE PROBLEM LIES, BUT --

>> AN ISSUE OF WHAT.

>> OF STYLE BUT IN THIS CASE I WAS COMPLETELY SURPRISED OF THE FACT THAT AN ATTORNEY WOULD PUT AN EXPERT ON THE STAND THAT IS A PSYCHOLOGIST OR PSYCHIATRIST,

THAT HAS NEVER SPOKEN TO THE FAMILY MEMBERS OF THE PERSON THAT HE IS PROVIDING THAT OPINION ABOUT.

>> OKAY.

I WAS MORE INTERESTED IN YOUR WHOLE NOTION THAT THE ATTORNEY HAS TO DEVELOP SOME KIND OF RAPPORT WITH THE FAMILY MEMBERS BEYOND FINDING OUT, IT SEEMS TO

ME, WHAT IT IS THEY HAVE TO OFFER IN TERMS OF MITIGATION.

>> AND I'M GOING THERE.

THE THING IS THIS:

WHERE YOU HAVE AN AND EXPERT NOT MEETING WITH THE FAMILY MEMBERS YOU HAVE TO MEET EVER SO MUCH MORE.

ATTORNEYS ARE NOT PSYCHIATRISTS. THEREFORE, THE MEETINGS HAVE TO BE HELD IN ORDER TO BE ABLE TO GET -- GAIN THE TRUST AND GAIN THE CONFIDENCE OF THOSE INDIVIDUALS.

GO BACK TO MEET WITH YOUR CLIENT AND IS YOUR CLIENT TELLING YOU THAT HIS FATHER STRUCK HIM, HIS FATHER, THEY LIVED IN ABJECT POVERTY AND HIS FATHER WAS ALCOHOLIC AND THERE WAS DOMESTIC VIOLENCE AND THE FATHER WOULD BEAT THE MOTHER AND THAT HIS FATHER WOULD TIE HIM TO A CHAIR AND BEAT HIM UP WHEN HE WAS A CHILD.

>> I GUESS THE PROBLEM IS THAT

YOU ARE ASSUMING RIGHT NOW THAT THE DEFENDANT WAS CORRECT, WAS TELLING THE TRUTH AND THE FAMILY WAS LYING AND THEREFORE YOU DEVELOP A RAPPORT TO GET THE FAMILY TO COME OUT WITH THE TRUTH.

BUT WHEN THIS LAWYER IS BACK THERE, BEFORE TRIAL, TALKING TO BOTH PEOPLE, HE IS NOT ASSUMING ANYTHING.

HE'S JUST TRYING TO GET PEOPLE TO TESTIFY ON THE DEFENDANT'S HALF, AND IF THEY TELL HIM THE FIRST TIME, NO, WE -- HE WASN'T BEATEN, NO, THE FATHER WASN'T

ALCOHOLIC IT IS HARD TO UNDERSTAND WHAT MORE HE IS SUPPOSED TO DO OTHER THAN JUST BERATE THEM AND SAYING I KNOW ARE LYING AND THE DEFENDANT SAYS OTHERWISE.

NOT SURE WHAT KIND OF RAPPORT THAT WILL ESTABLISH.

>> WELL, AT THAT POINT, AT THE POINT -- AND IT IS A

PARTICULARLY DIFFICULT EXERCISE, I RECOGNIZE THAT, HOWEVER, AT THAT POINT, THE ATTORNEY NEEDS TO GO INTO SOME OF THE THINGS THAT ARE AVAILABLE TO AN ATTORNEY HANDLING A CAPITAL CASE INCLUDING VARIOUS LISTS OF QUESTIONS AND QUESTION ANSWERS THAT YOU CAN DRAW --

>> SCHOOL RECORDS AND THINGS LIKE THAT OR WERE THEY IN CUBA AND HE COULDN'T GET THEM BECAUSE THEY WERE IN CUBA OR YOU DON'T KNOW BECAUSE THE RECORDS ARE DESTROYED.

>> IT IS HALF AND HALF. HE DROPPED OUT OF SCHOOL AND DIDN'T COMPLETE SCHOOL.

AND AS FAR AS --

>> ARE YOU NOT ARGUING THAT THE ATTORNEY FAILED TO INVESTIGATE SCHOOL OR HOSPITAL RECORDS OR SOMETHING LIKE THAT?

>> YOUR HONOR, I'M NOT, BECAUSE WE HAVE NO WAY OF KNOWING IF THEY DID, ADDITION, THE LEAD

COUNSEL IN THIS CASE, A LOT OF HIS QUESTIONS, HIS ANSWERS WERE, I DON'T RECALL THAT, I DON'T REMEMBER THAT.

I DON'T RECALL THAT.

>> ANSWERS TO WHAT.

>> TO QUESTIONS HAVING TO DO WITH HIS REPRESENTATION OF THE CLIENT.

>> OUTSIDE OF AN EVIDENTIARY HEARING CONFERENCE.

>> IN A OF AN EVIDENTIARY HEARING THAT HAD TO DO WITH SOME OF THE CLAIMS AND THE PROBLEM IS THE ATTORNEY DESTROYED HIS FILE IT APPEARS AT OR SHORTLY AFTER

THE MOTION FOR POSTCONVICTION RELIEF, THE FINAL ONE, WAS FILED.

HE WENT AHEAD AND DESTROYED HIS FILE AN KEPT IT AROUND FOR SEVEN YEARS AND WENT AHEAD AND DESTROYED IT.

SO THAT NOTES HAVING TO DO WITH CONVERSATIONS OF THAT ATTORNEY WITH THE FAMILY MEMBERS, DO NOT

EXIST.

>> SO I GUESS WHERE I WAS GOING WITH MY QUESTION IS, YOU DON'T KNOW THAT THE ATTORNEY COULD HAVE OR DID HAVE SCHOOL RECORDS OR HOSPITAL RECORDS WITH WHICH HE COULD HAVE CONFRONTED THE FAMILY TO SAY, LOOK, THESE DOCUMENTS CONTRADICT YOUR STATEMENTS TO ME, THAT HE WAS NOT -- THAT HE WAS NOT ABUSED.

>> WE DON'T HAVE THAT.

>>Y ARE ABOUT OUT OF TIME, IF YOU WANT TO RESERVE YOUR TIME. LESS THAN HALF OF YOUR TIME LEFT.

>> FAIR ENOUGH.

THANK YOU.

>> PLEASE THE COURT, SANDRA JAGGARD, ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE, DR. MARINA TESTIFIED AT PAGE 2922 OF THE RECORD THAT SHE ELECTS NOT TO INTERVIEW FAMILY MEMBERS, AND 3004, THAT SHE DOESN'T CONSIDER IT HELPFUL.

>> THE COURT GRANTED AN EVIDENTIARY HEARING ON SOME CLAIMS.

>> YES.

.

>> NOT ON OTHER, NOT ON --

>> ON THIS CLAIM, THE PROBLEM WAS THEY SAID THEY WOULD SHOW HE GREW UP IN POVERTY, HIS FATHER WAS AN ALCOHOLIC WHO ABUSED HIM AND HE WAS TAKEN FOR MENTAL HEALTH EVALUATION AS A CHILD AND THAT HE WAS A BED WETTER, SLEEP WALKER AND DROPPED OUT OF SCHOOL AND WAS NOT A GOOD STUDENT IN SCHOOL AND COUNSEL PRESENTED THE

SCHOOL RECORDS THROUGH DR. MARINA TO SHOW HE WASN'T A GOOD STUDENT AND DROPPED OUT OF SCHOOL AND DR. HERRERA TESTIFIED HE DROPPED OUT OF SCHOOL AND THE FAMILY MEMBERS TESTIFIED THAT THE FATHER DRANK AND IT WAS AN EVERY DAY THING AND CAUSED A BREAK-UP IN THE MARRIAGE, AND THEY DIDN'T CONSIDER HIM AN

ALCOHOLIC AND IT'S NOT THAT THE TESTIMONY WASN'T PRESENTED.

>> THEY -- DIDN'T THEY TESTIFY THE FATHER PHYSICALLY ABUSED THE DEFENDANT.

>> JUAN TESTIFIED HE DIDN'T CONSIDER IT ABUSE BUT HIS FATHER DID STRIKE THE DEFENDANT WITH A BELT AT 2855 OF THE RECORD. IT'S NOT THAT COUNSEL DIDN'T... INVESTIGATE NIGHT THE DEFENDANT'S CLAIM THAT IT GOES MUCH BEYOND THE FACT THAT HE HIT HIM WITH A BEMENT.

>> THE DEFENDANT -- A BELT.

>> THE DEFENDANT SUGGESTION THE FAMILY MEMBERS DOWN PLAYED IT BUT THE FAMILY MEMBERS WERE CLEARLY ASKED, TESTIFYING ABOUT IT AT TRIAL AND UNDER KAREL IF THE CAM MEMBERS DON'T GIVE THE INFORMATION TO THE ATTORNEY IT IS NOTE ATTORNEY'S FAULT, NOT INEFFECTIVE ASSISTANCE.

>> THE JUDGE FOUND THE OTHER SIBLINGS WERE HARD WORKING AND

LAW ABIDING AND RESPECTFUL YOUNG MEN AND WOMEN AND IS THERE ANYTHING CONTRARY TO THAT NOW.

>> NO, IT WAS ALL ABOUT THE DEFENDANT.

IT WASN'T ABOUT THE FAMILY MEMBERS, THEY ARE NOT --

>> I GUESS WHAT I AM SAYING THE ATTORNEY WHEN HE IS INTERVIEWING THE FAMILY, SOMETIMES YOU HAVE A VERY DYSFUNCTIONAL FAMILY, THAT YOU ARE DEALING WITH, SO YOU MAY CAUSE YOU TO SEARCH DEEPER BUT THIS FAMILY HERE, ANYTHING TO CONTRADICT THE FINDING THAT THESE OTHER SIBLINGS --

>> NOTHING HAS BEEN ALLEGED AND THAT WAS THEIR TRIAL TESTIMONY. THEY ALL ADMITTED THAT THEY ARE ALL FUNCTIONING AND HAVE JOBS AND SO YOU HAVE WHAT BASICALLY IS A CLAIM THAT COUNSEL WAS LIED TO ABOUT THE -- BY THE FAMILY ABOUT THE SEVERITY OF THE PROBLEMS.

BUT HE PRESENTED THE PROBLEMS

AND HE PRESENTED DR. MARINA TO EXPLAIN THAT THE REASON WHY THE FAMILY MEMBERS' VERSION IS FAR WORSE THAN THE DEFENDANT'S VERSION IS THE FAMILY MEMBERS ARE IN DENIAL.

THE JURY... ALSO HEARD ONE OF THE BROTHERS I BELIEVE JAVIER TESTIFY HOW GOOD HE WAS IN SCHOOL AND SAW THE SCHOOL RECORDS THAT BELIED THAT AND KNEW THE FAMILY MEMBERS WEREN'T QUITE CORRECT ABOUT THAT.

>> WE ARE TALK ABOUT HERE, IN RELATIONSHIP TO WHETHER OR NOT THERE WAS ABUSE OR WAS ALCOHOLISM.

WAS THIS AT THE TIME THAT THE FAMILY LIVED IN CUBA OR WAS THIS AT THE TIME -- AND HOW LONG HAVE THEY BEEN HERE.

>> THE FAMILIES CAME OVER WHEN THE DEFENDANT WAS 13, ALL OF THE ALLEGED ABUSE OCCURRED IN CUBA. LIKE I SAID, THE FAMILY ADMITTED THE FATHER DRANK AND THAT CAUSED

A BREAK-UP OF THE FAMILY. THEY DIDN'T CONSIDER HIM TO BE AN ALCOHOLIC.

>> WHEN THEY MOVED TO THE U.S..

>> U.S..

>> THE FATHER WAS NOT IN THE PICTURE ANYMORE.

>> HE WAS STILL IN THE PICTURE, STILL SUPPORTING THE FAMILY, HE JUST WASN'T ALLEGEDLY ABUSING THE DEFENDANT.

AND THE DEFENDANT WAS IN HIS MIDDLE 20s, I BELIEVE.

WHEN THIS HAPPENED AND SO YOU HAVE MORE THAN TEN YEARS WITH NOTHING HAPPENING TO THE

DEFENDANT.

SO YOU HAVE THIS SITUATION WHERE COUNSEL DID INTERVIEW THE FAMILY MEMBERS, COUNSEL PRESENTED THE EVIDENCE, HE PRESENTED THE DEFENDANT'S VERSION OF THE EVIDENCE, PRESENTED IT THROUGH AN EXPERT WHO GAVE HIM --

>> GENERALLY, I MEAN, THESE KINDS OF CLAIMS, WHERE THEY TALK

ABOUT THE FAILURE OF COUNSEL TO, YOU KNOW, INVESTIGATE, MITIGATE AND PRESENT MITIGATING -- THESE KINDS OF CLAIMS THAT HAVE BEEN ARGUED HERE TODAY GENERALLY WE DO HAVE EVIDENTIARY HEARINGS ON IT, AND SO, WAS THE STATE OPPOSED TO AN EVIDENTIARY HEARING ON THE ISSUE OR THE JUDGE JUST DECIDED IT WAS NOT AN ISSUE.

>> NO, THE STATE WAS OPPOSED BECAUSE THE EVIDENCE THAT THEY WERE ALLEGING SHOULD HAVE BEEN PRESENTED.

WAS EITHER PRESENTED, AND IN WHICH CASE WE'RE DEALING WITH CUMULATIVE EVIDENCE, WHICH -- WHICH DOESN'T GET YOU INEFFECTIVE ASSISTANCE OR STUFF THE FAMILY MEMBERS TESTIFIED CONTRARY TO WHICH UNDER KAREL IS

--

>> AS I SEE IT WE HAVE PROPER -- PROFESSOR -- PROFFERS OF WHAT THE FAMILY MEMBERS WOULD SAY.

>> WE HAVE A CLAIM IF THEY HAD INTERVIEWED THEM BETTER THEY WOULD HAVE AGREED MORE WITH DR. MARINE -- MARINA AND WOULD HAVE TESTIFIED ABOUT THE ABUSE AND ALCOHOLISM BUT EITHER DIRECTLY SAID IT AT THE TIME OF TRIAL AND MAY NOT HAVE CHARACTERIZED AS ALCOHOLISM BUT DAD DRANK, DAD DRANK EVERY DAY AND CAUSED MOM TO LEAVE DAD AND PROBLEMS IN THE MARRIAGE BECAUSE OF THE ALCOHOL, THE DEFENDANT WAS HIT. THEY JUST DIDN'T CONSIDER IT ABUSE.

SO, THE PROBLEM WAS, YOU DIDN'T HAVE ANY ALLEGATIONS, THE ONLY THING THAT WASN'T PRESENTED WAS THAT HE WAS A BED WETTER AND A SLEEP WALKER AS A CHILD. AND YOU HAVE A DEFENDANT WHO HAS GOT PRIOR VIOLENT FELONIES, INCLUDING THREE SEPARATE CRIMINAL EPISODES, ONE IN WHICH HE ATTEMPT TO ROB A BANK AND

EMPTIES HIS GONE AT A -- GUN AT A BANK GUARD, THAT'S ON THE FRIDAY AFTER THANKSGIVING. YOU HAVE THIS CRIME IN DECEMBER, BEGINNING OF DECEMBER. AND THEN, IN THE MIDDLE OF JANUARY WELL, HAVE HIM KIDNAPPING CRAIG VANNESS AT GUNPOINT AND TRYING TO ROB HIM AND THE JURY HAS A VIVID PICTURE OF A PERSON OUT THERE COMMITTING CRIMES AND DURING THE COURSE OF A FELONY, THEY WERE BUSY COMMITTING ATTEMPTED ARMED ROBBERY AND EMPTYING GUNS AT PEOPLE WHO RAN A FINANCIAL US. >> AND SHOT THEIR BODYGUARD QUITE INTENTIONALLY. AND THEN YOU HAVE CCP AND BEING A BEDWETTER AND A SLEEP WALKER AS A CHILD IS NOT GOING TO OUT WEIGH WHAT WAS PRESENTED. >> WHAT DID THE EVIDENCE SHOW ABOUT WHETHER MR. SAN MARTIN ACTUALLY SHOT AT THE VICTIM AS OPPOSED TO THE BUSINESS OWNERS.

>> WELL, THEY ARE ALL VICTIMS. HE SHOT AT THE BUSINESS OWNERS. HE WAS -- MR. FRANKIE WAS IN CHARGE OF KILLING THE BODYGUARD AND -- WHICH WAS THEIR PLAN AND MR. SAN MARTIN CAME OUT OF THE VAN WITHOUT SAYING WORD AND EMPTIED HIS GUN UNTIL IT JAMMED AT THE CABANAS'S AND KILL FIRST AND TAKE THE MONEY. >> I WANTED TO BE CLEAR IT WAS THE STATE'S POSITION AT TRIAL AND THE EVIDENCE SHOWED IT WAS FRANKIE WHO ACTUALLY -- >> FRANKIE IS THE ACTUALLY KILLER AND SAN MARTIN WAS

CERTAINLY ACTIVELY INVOLVED WITH RECKLESS DISREGARD FOR HUMAN LIFE.

>> CAN YOU REFRESH MY COLLECTION RECOLLECTION, WAS HE CONVICTED OF PREMEDITATED MURDER, FELONY MURDER OR BOTH.

>> BOTH AND THIS COURT AFFIRMED ON DIRECT APPEAL ON BOTH.

AND AS FAR AS THE

INCONSISTENCIES BETWEEN THE EXPERTS, THE TWO EXPERTS WERE LARGELY CONSISTENT AND BOTH CAME UP WITH PROBLEMS WITH JUDGMENT.

THEY BOTH CAME UP WITH HE'S GOING TO BE A GOOD BOY WHILE HE'S INCARCERATED.

THE ONLY DIFFERENCE IS DR. MARINA ATTRIBUTED SYMPTOMS HE ATTRIBUTED TO A MOOD DISORDER AND DR. HERRERA TESTIFIED HIS ONLY ROLE IN THIS WAS TO EVALUATE FOR BRAIN DAMAGE, TESTIFIED, NO, THOSE SYMPTOMS ARE BRAIN DAMAGE AND DOCTOR MARINA SAID MY TEST DIDN'T SHOW BRAIN DAMAGE BUT HIS DOES, THEN MY CONCLUSION IS A SYMPTOM OF THE BRAIN DAMAGE AND THEY BOTH PRESENTED BANE DAMAGE.

>> THE OTHER INCONSISTENCY IS ONE EXPERT SAID THAT ONE STATUTORY MITIGATOR APPLIED BUT NOT THE AT AND THE OTHER EXPERT DID THE CONVERSE.

>> AND HERRERA TESTIFIED THE

REASON HE DIDN'T FIND EMOTIONAL DISTURBANCE IS BECAUSE HE WASN'T LOOKING FOR IT.

HE WAS ONLY LOOKING FOR CAPACITY TO CONFORM AND MARINA DIDN'T FIND BRAIN DAMAGE AND TEST FOR -- BRAIN DAMAGE AND TEST FOR IT.

>> AND THIS IS ONE OF THE EVIDENTIARY HEARINGS.

>> NO.

NO.

BECAUSE THEY ADMITTED IT WAS A STRATEGIC DECISION TO CALL BOTH OF THEM.

BECAUSE YOU GET THE FAMILY

HISTORY OUT OF --

>> STRATEGIC --

>> IN THE MOTION ADMITTED IT WAS A DEFENSE GAMBIT TO CALL BOTH OF THE EXPERTS THOUGH THERE WAS A MINOR INCONSISTENCY.

>> SEE, AND I COULD SEE THAT IN YOUR BRIEF.

MY PROBLEM WITH IT IS THAT JUST BECAUSE SOMETHING IS DONE

INTENTIONALLY, DOESN'T MEAN THAT THAT IS REASONABLE.

AND IT DEFIES -- YOU KNOW, MY NOTION OF HOW TO PREPARE FOR TRIAL THAT YOU WOULD PUT ON TWO DIFFERENT EXPERTS, WOULDN'T SHOW EITHER OF THEM THE REPORTS, SO THAT AT LEAST WE COULD SEE IF THERE IS SOME CON -- CONSISTENCY.

I JUST THINK, THEREFORE, JUST SAYING THE GAMBIT DOESN'T ITSELF SAY IT WAS A REASONABLE STRATEGIC DECISION AND THEREFORE, PER SE, CAN NEVER BE DEFICIENT PERFORMANCE.

>> BUTTS YOU HAVE COUNSEL WHO DID INVESTIGATE.

HE WENT OUT AND HIRED THREE MENTAL HEALTH EXPERTS AND DECIDED WHO TO CALL AND IS GETTING DIFFERENT THINGS OUT OF BOTH PEOPLE, SO IT IS NOT UNREASONABLE.

>> -- WHAT IS STRANGE TO ME, FIRST OF ALL, THIS IS -- MR. SAN

MARTIN, ANOTHER DEATH CASE.

>> NO, HE GOT LIFE ON THAT CASE.

>> LIFE ON THE OTHER ONE AND I GUESS THAT IS -- BRINGS UP SOMETHING ELSE I WANT TO ASK YOU ABOUT.

WHEN I LOOK AT -- THE SECOND DEATH CASE --

>> IT WAS TRIED AFTERWARDS.

>> TRIED AFTER.

IT LOOKS LIKE THERE WAS PRETTY SIGNIFICANT MITIGATION PRESENTED.

I MEAN, SHOULDN'T THERE BE AN EVIDENTIARY HEARING TO SEE WHY THE SAME KIND OF MITIGATION

WASN'T PRESENTED IN THIS PENALTY PHASE, THAN THE OTHER PENALTY PHASE?

>> WHAT, THE MITIGATION IS LARGELY THE SAME EXCEPT THE FAMILY MEMBERS CHANGED THEIR CHARACTERIZATIONS ABOUT THE EVIDENCE AND YOU PUT ON DR. LOURENCO INSTEAD OF DR. HERRERA --

>> CHANGE, YOU SAID CHANGE AND NOW TO SAY HE WAS ABUSED.

>> IT WAS ABUSE, IT WAS --

>> ISN'T THAT REALLY WHAT NEEDS TO BE EXPLORED AND I AGREE, I WOULD AGREE WITH YOU, THAT YOU CAN'T SAY THAT THE FAILURE TO ESTABLISH RAPPORT WITH THE FAMILY COULD CONSTITUTE INEFFICIENT PERFORMANCE BUT ON THE OTHER HAND IT IS TRUE, AND ESPECIALLY IN A FAMILY THAT IS A CLOSED FAMILY, THINGS LIKE ABUSE AND ALCOHOLISM, SOMETHING SOMEBODY DOES, TELL ME ABOUT YOUR FAMILY AND YOU GO, I'D LIKE TO TELL YOU HOW MY FATHER BEAT ME AND ALCOHOLISM.

SO YOU'VE GOT TO EXPLAIN TO A FAMILY WHY WHAT NORMALLY YOU THINK OF AS BAD STUFF, IS IMPORTANT.

AND WHAT I AM CONCERNED ABOUT, IN THE CASE IS WE DON'T KNOW ENOUGH, BECAUSE THERE WASN'T AN EVIDENTIARY HEARING AND WHY

SHOULDN'T THERE BE AN EVIDENTIARY HEARING, TO EXPLORE THIS, TO FIND OUT WHY IN THE SECOND CASE, THEY TESTIFIED IN A WAY THAT WAS CONSISTENT WITH THE EXPERTS AND IN THIS CASE, IT ALLOWED THE STATE TO GO -- NO ONE ELSE IS SAYING THIS BUT SAN MARTIN, THAT HE MUST BE A LIAR?

>> WELL, IT WASN'T SO MUCH NO ONE ELSE IS SAYING THIS OTHER THAN SAN MARTIN IT WAS THESE PEOPLE WERE KNITTING -- ADMITTING THERE WAS ALCOHOL BUT THEY DIDN'T CALL IT ABUSE AND ADMITTED IT CAUSED THE BREAK-UP

OF THE FAMILY AND YOU DON'T
REALLY HAVE THAT GREAT
DIFFERENCE HERE.
BETWEEN THAT AND YOU HAVE TO
KEEP IN MIND, IN THE CASE WHERE
HE GOT LIFE IT WAS A JURY
OVERRIDE AND IN THAT CASE HE
DIDN'T BEHAVE GUN AND DIDN'T
FIRE A GUN.
HIS JOB WAS TO GO AND PICK UP

THE BANK TRAY.
AND IF YOU WANTED TO START
CONSIDERING WHAT HAPPENED IN
THAT CASE THEN YOU ADD THE
MURDER OF A POLICE OFFICER, AS
AGGRAVATION IN THE CASE.
WHICH ONLY MAKES THE SITUATION
WORSE.

I MEAN, THEY ALLEGED CUMULATIVE
MITIGATION.

THEY ALLEGE MITIGATION --.

>> AGGRAVATORS.

>> NO, TRIED AFTERWARDS AND IT
WAS NOT AVAILABLE AS AN
AGGRAVATOR.

>> THE PRECEDENT, IT WAS
RETRIED, NO PREJUDICE BECAUSE
YOU HAVE -- THE -- THAT IS A
DIFFERENT ISSUE.

YOU WANT -- DO YOU WANT TOP
ADDRESS THAT, WOULD THERE BE NO
PREJUDICE?

BECAUSE I'M REALLY -- I REALLY
FEEL BASED ON OUR CASE LAW THAT
THE DEFICIENT PERFORMANCE JUST
CAN'T BE FIGURED OUT WITHOUT AN

EVIDENTIARY HEARING, WITHOUT
MORE -- MORE AMENABLE TO YOUR
BEST ARGUMENT ABOUT WHY THERE IS
NO --

>> THERE IS NO PREJUDICE BECAUSE
YOU HAVE EVIDENCE THAT MERELY A
VARIATION OF WHAT YOU ALREADY
HAD.

GOT HIM A 9-3 DEATH
RECOMMENDATION AND YOU HAVE THIS
MAN, WHO WENT OUT THE DAY AFTER
THANKSGIVING, AND COMMITS AN
ARMED ROBBERY AT A BANK WHERE
THEY WALK UP AND JUST OPEN FIRE
ON A ELDERLY SECURITY GUARD
TRYING TO GET THE MONEY FROM

HIM.
YOU HAVE THIS CRIME COMMITTED IN
THE FIRST WEEKEND OF DECEMBER
WHERE THEY SHOW UP, FULLY ARMED
TO THE TEETH, FULLY PLANNED
ROBBERY WHICH IS WHY THE
MITIGATION ABOUT THE MENTAL
HEALTH GETS REJECTED BECAUSE
THIS ISN'T SOMEBODY WHO IS
ACTING IMPULSIVE.

THESE PEOPLE HAD BEEN PLANNING
THE ROBBERY SINCE THE SUMMER.
THIS WAS A FIVE-MONTH PLAN.
THEY --

>> FRANKIE WAS THE LEADER.
>> FRANKIE AND SAN MARTIN WERE
ACTIVELY INVOLVED IN THE
PLANNING OF THE CRIME WAS THE
TESTIMONY.

I MEAN, IT'S NOT HE WAS INVOLVED
-- HE WAS INVOLVED.
HE IS OUT THERE FOR FIVE MONTHS
PLANNING THE CRIME AND SO NOW
YOU ARE SAYING, WELL, HE HAS
THESE EMOTIONAL PROBLEMS THAT
CAUSED HIM TO ACTED IMPULSIVELY.
WHERE!

>> IN THE SUBSEQUENT TRIAL, WAS
THERE -- WERE THERE STATUTORY
MITIGATORS FOUND?

>> I DON'T RECALL.
I KNOW IT WAS A JURY OVERRIDE
AND I KNOW THAT THE BIG PROBLEM
WAS HIS ROLE IN THE CRIME, HE
DIDN'T HAVE A GUN.

HE WASN'T ONE OF THE SHOOT, ALL

HE DID WAS RIDE IN ONE OF THE
CARS, JUMP OUT OF THE CAR, WHEN
FRANKIE AND GONZALES STARTED
SHOOTING AT THE OFFICER, RAN UP
AND GRAB THE CASH AND RUN BACK
TO THE CAR AND LEAVE.

SO YOU DON'T HAVE HIM AS AN
ACTIVE PARTICIPANT SITTING THERE
FIRING AWAY WITH THE GUN.

LIKE YOU DO IN THIS CASE.

YOU'VE GOT THIS CASE, WHICH IS
COMMITTED -- THEY OPENED FIRE
AND DIDN'T EVEN GIVE THE PEOPLE
A CHANCE TO HAND OVER THE MONEY
WITHOUT BEING SHOT AT.

THEY FIRED -- THERE WERE 29

DIFFERENT PROJECTILES FOUND AT THE -- PROJECTILES AT THE CRIME SCENE AND THEY AMBUSHED THE PEOPLE TO MASSACRE THEM AND THE FACT IS THAT THOSE PEOPLE ARE ALIVE IS AN ACT OF GOD, ONE OF THE BULLETS WENT THROUGH MR. CABANAS, SR.'S HEAD RITE HIS TRUCK BEFORE HE DIED AND YOU HAVE THAT DURING THE PURCHASE OF

A ROBBERY, YOU'VE GOT CCP, AND THESE PEOPLE WENT OUT THERE FULLY PLANNING TO KILL THE MAN AND SO YOU HAVE BASICALLY A SMALL -- KILL MR. LOPEZ AND YOU HAVE A SMALL VARIATION OF WHAT WAS PRESENTED AND IT IS NOT THAT IT WASN'T PRESENTED AND THERE IS YOUR PROBLEM AND THAT'S WHY IT IS CUMULATIVE.

IT IS CONTRARY TO WHAT THE FAMILY WAS GIVING TO THE EXTENT THERE ARE SLIGHT SHADES IN HERE AND... THERE WAS NOTHING THERE TO HAVE AN EVIDENTIARY HEARING ON.

COURT HAS NO FURTHER QUESTIONS, THE STATE RESPECTFULLY REQUESTS YOU AFFIRM.

>> REBUTTAL?

>> THANK YOU.

YOUR HONOR.

>> WOULD YOU ADDRESS THAT ISSUE OF PREJUDICE?

BECAUSE THAT IS WHAT -- ANOTHER HURDLE THAT YOU HAVE TO JUMP

OVER.

EVEN ASSUMING THAT YOU ARE CORRECT.

HOW IS THIS UNDERMINING OUR CONFIDENCE IN THE OUTCOME, GIVEN THE AGGRAVATORS INCLUDING CCP AND PRIOR VIOLENT FELONY, AND THE FACT THAT ON A RETRIAL, THEY WOULD INTRODUCE THIS OTHER -- OR CAN THEY.

>> YOUR HONOR THE ISSUE LIES, HOWEVER, THAT -- IF THE DEFENDANTS ARE GIVEN' CHANCE TO ADEQUATELY AND PRESENT HIS MENTAL CONDITION, THE -- IN THE OTHER TRIAL THE JURY, THERE WAS

A JURY OVERRIDE.

SO THAT -- IN THAT OTHER TRIAL,
THERE WAS A MORE THOROUGH
PRESENTATION, THEREFORE, I DON'T
BELIEVE --

>> WELL, IN THAT OTHER TRIAL
THERE WAS NO STATUTORY
MITIGATION.

CORRECT?

>> I'M -- I DON'T RECALL RIGHT

NOW, YOUR HONOR, I'M SORRY.

>> WELL, THE OPINION, OUR
OPINION INDICATES THAT.

>> RIGHT.

>> PLUS, IN THAT CASE, SAN
MARTIN WAS THE GETAWAY DRIVER.
CORRECT?

>> CORRECT.

>> HE DIDN'T FIRE A SHOT.

IN FACT HE DIDN'T EVEN COME UP
TO THE BANK.

>> CORRECT.

>> IN THAT CASE, CORRECT?

>> CORRECT.

>> GONZALEZ AND FRANKIE WERE THE
ACTUAL SHOOTERS IN THAT CASE.
THAT WAS KIND OF A WILD WEST
SHOOTOUT, IF I REMEMBER
CORRECTLY.

>> I THINK BOTH OF THESE WERE,
BUT YES.

>> WAS THIS CASE USED AS AN
AGGRAVATOR IN THAT CASE?

>> JUDGE, I'M SORRY, I DO NOT
RECALL THAT ANSWER.

HOWEVER, I WOULD LIKE TO ADDRESS
THE ISSUE DEALING WITH THE
GOVERNMENT'S QUALIFICATION OF
THAT.

THERE WERE SUBTLETIES OR
VARIANCES OR MINOR DIFFERENCES
BETWEEN THE TESTIMONY OF THE
FAMILIES IN ONE AND THEN THE
OTHER.

THE ISSUE HERE HAS TO DO WITH
QUALITY, THE ISSUE HERE HAS TO
DO WITH THE PRESENTATION OF THE
ABUSE THAT MR. SAN MARTIN
SUFFERED WHEN HE WAS A CHILD.

>> WELL, LET'S SAY THAT THE

MOTHER TESTIFIES THAT THE FATHER, YOU KNOW, REALLY ABUSED HIM, BEAT HIM REGULARLY. SHE'S GOING TO BE IMPEACHED WITH HER PRIOR TESTIMONY AND SAY YOU WERE UNDER OATH IN THAT CASE, AND YOU TESTIFIED THAT THE ONLY THING HE DID WAS BEAT HIM WITH A BELT.

ISN'T THAT ALL GOING TO COME OUT, AND ISN'T SHE GOING TO BE ABLE TO BE IMPEACHED ON THAT?

>> YES.

>> SO DOESN'T THAT SIGNIFICANTLY REDUCE THE FORCE OF THE NEW TESTIMONY?

>> YOUR HONOR, BUT SHE WOULD HAVE AN OPPORTUNITY TO EXPLAIN, SHE WOULD HAVE AN OPPORTUNITY TO EXPLAIN.

THE PROBLEM IS, AND SHE ALSO HAS SUBSEQUENT TESTIMONY THAT SHE GAVE THAT WOULD BE CONSISTENT WITH THAT TESTIMONY.

THE ISSUE LIES, AND THE OTHER PROBLEM HAS TO DO WITH THE PRESENTATION OF THE WITNESSES. THE, WHAT IS CALLED A GAMBIT SOUNDS MORE LIKE A GAMBLE OF JUST THROWING TWO WITNESSES, TWO EXTRA WITNESSES THAT HAVE -- IT DOESN'T APPEAR THAT THEY MET, THAT THE REPORT OF ONE WAS GIVEN TO THE OTHER AND SAY, LISTEN, YOU KNOW, HOW DOES THIS AFFECT YOUR OPINION, IF ANY, PRIOR TO --

>> WELL, WHAT THE GAMBIT DID, THOUGH, IS ALLOW THE LAWYER TO PRESENT TWO EXPERTS THAT COULD, IN COMBINATION, TESTIFY TO TWO STATUTORY MENTAL HEALTH MITIGATORS.

>> YES, BUT IT ALSO GAVE THE IMPRESSION, FRANKLY, THAT THEY WERE MAKING IT UP BECAUSE YOU HAVE ONE GUY, YOU HAVE MIRANDA SAYING, WELL, IF THIS GUY FOUND -- THEN I HAVE TO CHANGE MY OPINION 180 DEGREES, AND YOU HAVE THE PROSECUTOR, MR. KASTRENAKES, ACTUALLY GETTING UP IN FRONT OF THE JURY AND TELLING THE JURY, LOOK AT THIS.

YOU KNOW, SHE CHANGED HER MIND
180 DEGREES.
SHE COMPLETELY CHANGED IT RIGHT
THERE, RIGHT IN FRONT OF YOU.
AND THAT'S SOMETHING YOU HAVE TO
BE EXTREMELY CAREFUL IN FRONT OF
A JURY WHEN YOU'RE PRESENTING
PSYCHOLOGISTS BECAUSE A LOT OF
PEOPLE HAVE PROBLEMS RECOGNIZING
THE SCIENCE OF PSYCHOLOGY.
SO WHAT WAS THE REASON, HOW CAN
YOU SAY IT WAS STRATEGY, HOW CAN
YOU ATTRIBUTE IT TO STRATEGY TO
PRESENT TWO EXPERTS THAT WIND UP
CONTRADICTING EACH OTHER THAT
ONE HAS TO CORRECT THE OTHER,
AND THEN THEY WOUND UP
CONTRADICTING THE TESTIMONY, THE
INFORMATION PROVIDED BY THE
DEFENDANT, THEIR CLIENT, THEIR
PATIENT INsofar THE FAMILY.
ALL THESE THINGS NEEDED TO HAVE
BEEN PUT TOGETHER TO AT LEAST IF
THE FAMILY KEEPS SAYING, YOU
KNOW WHAT?
IN THIS TRIAL THE FAMILY KEPT
SAYING IT WASN'T VIOLENCE, IT
WASN'T VIOLENCE, AT LEAST
ADDRESS IT.
DO NOT HAVE IT COME OUT IN WHAT
APPEARS TO BE AN UNCONTROLLED
SURPRISE IN FRONT OF A JURY.
>> WITH OUR QUESTIONING, WE'VE
GONE BEYOND THE ALLOTTED TIME.
THANK YOU VERY MUCH.
WE'LL TAKE THE CASE UNDER
ADVISEMENT.
THE COURT WILL TAKE ITS MORNING
RECESS.
>> ALL RISE.